

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable Letitia H. Verdin, Circuit Court Judge

KEVIN JEROME GILLIARD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000071

APPENDIX

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

LINDSEY MCCALLISTER
Assistant Attorney General
1000 Rembert Dennis Bldg, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

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S.C. SUPREME COURT

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Juror #	Name	Race	Sex	Strikes			Accept
				Ct.	Pl.	Def.	
135	Troy Thompson	W	M				X
79	Charles Jones	B	M		X		
86	James Leftwich	W	M				X
129	Rita Strickland	W	F			X	
149	Gwendolyn Woods (Forelady)	B	F				X
76	Faye Johnson	B	F				X
126	Sommer Steadman	W	F			X	
5	Marion Allen	W	M			X	
112	Gregory Satterfield	W	M				X
150	Larry Young	W	M				X
34	Lisa Cooley	W	F				X
28	Estelle Chapman	W	F			X	
13	Amelia Beauchemin	W	F				X
33	Sabrina Collins	W	F			X	
110	Lucius Riddle	W	M				X
2	Anne Adams	W	F				X
12	Valerie Ball	W	F				X
15	Chelsea Bourgeois	W	F				X
	ALTERNATE						
14	Roger Blume	W	M			X	
138	Luis Urrego	H	M				X

*For the Court column, please indicate who made the motion to strike the juror for cause with a "C" for Court, "P" for Plaintiff, or "D" for Defense.

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5

1

DECEMBER 7, 2009

2

(WHEREUPON, court convened with all parties present,

3

and the following proceedings were had commencing at

4

approximately 11:13 a.m.)

5

THE COURT: All right. You want to call the

6

case?

7

MR. CAMPBELL: Yes, sir. Thank you, Your

8

Honor.

9

Your Honor, the State's ready in indictment number

10

2009-1736, the State versus Kevin Jerome Gilliard. He's

11

been charged with possession of marijuana with intent to

12

distribute. And also indictment number 2009-GS-04-1737,

13

the State versus Kevin Jerome Gilliard, also been charged

14

with trafficking crack cocaine between twenty-eight and a

15

hundred grams and possession of a weapon during the

16

commission of a violent crime.

17

I'm also going to hand up a joint witness list

18

between the parties.

19

THE COURT: All right. Thanks.

20

All right. Ladies and gentlemen, what we're going

21

to do now is select the jury for the trial that's going

22

to begin tomorrow. But I want to tell you something very

23

early on that if you're selected for the jury I'm going

24

to tell you at least ten more times. The reason I do

25

that is it is absolutely imperative that you understand

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1 what I'm getting ready to tell you.

2 The Solicitor has just called the case of the State
3 versus Kevin Jerome Gilliard. He actually read from two
4 sheets of papers which are called indictments.
5 Indictments in our system are literally, literally pieces
6 of paper used to start the process. The Defendant in
7 this case has pled not guilty which means that he is not
8 guilty and will continue to be not guilty throughout this
9 trial until a jury strips him of that constitutional
10 protection. That constitutional protection, to me and
11 every other judge, is absolutely inviolate. And at no
12 point from this point forward should anyone consider the
13 fact that there has been an indictment issued. It means
14 nothing. It is not an indication of guilt. It is
15 literally two pieces of paper that start this process.

16 I sometimes worry that people say, oh, there's an
17 indictment and they don't know what that means. And an
18 indictment is this. So again, you shouldn't consider an
19 indictment at any point from now on as an indication of
20 guilt. It is just a process, beginning process, paper.
21 All right.

22 Ladies and gentlemen, the first thing I'm going to
23 do is ask the lawyers to stand up and introduce any
24 witnesses that might be in the courtroom and your
25 clients. Then I've got a couple questions for you about

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1 those.

2 Yes, sir?

3 MR. CAMPBELL: Thank you, Your Honor.

4 Good morning, ladies and gentlemen. My name is Rame
5 Campbell. I'm an Assistant Solicitor here. I work for
6 Solicitor Chrissy Adams. I'll be the prosecutor trying
7 this case. I also have two of my witnesses here. This
8 is Brandon Surratt, one of the case officers, and Eric
9 Nubern, both of the Anderson County Sheriff's Office.

10 There will be witnesses when we come in tomorrow.

11 THE COURT: Yes, sir?

12 MR. POTTER: Thank you. May it please the
13 Court.

14 I'm Andrew Potter. I'm an attorney here in Anderson
15 County, South Carolina. Mr. Gilliard here is my client.

16 Stand up, Kevin.

17 If anybody knows him, you need to let the judge
18 know. We do have -- that's all I have. Thank you.

19 THE COURT: All right. First, ladies and
20 gentlemen, let me ask you a question about the attorneys.
21 Has any member of the panel been represented in the past
22 or are you represented now by either one of these two
23 lawyers? If so please stand.

24 (No response)

25 THE COURT: Does any member of the panel have

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1 any close business or personal relationship or are you
2 related by blood or marriage to either of these two
3 attorneys? If so please stand.

4 (No response)

5 THE COURT: Does any member of the panel have
6 any close business or personal relationship to the
7 Defendant, Kevin Jerome Gilliard?

8 (No response)

9 THE COURT: I'm going to read a list of
10 additional witnesses. Again, you've got two very good
11 lawyers doing this case. They've prepared a joint list
12 which means basically they've agreed to the witnesses.
13 I'm going to read this list. And when I finish reading
14 the list, I'm going to ask you if anyone on the panel has
15 a close business or personal relationship or are you
16 related by blood or marriage to any of these people in
17 addition to the people that have stood and introduced
18 themselves. Of course, we've got Brandon Surratt, Eric
19 Nubern, Tommy Clamp with the Anderson County Sheriff's
20 Office, Chris Wilson of the Anderson County Sheriff's
21 Office, Jon Wilkerson with the Anderson County Sheriff's
22 Office, Mark Miller with the Anderson County Sheriff's
23 Office, Andrew Lunz with the Anderson County Detention
24 Center, Meredith Lanford with the Anderson-Ocone
25 Regional Forensics Lab, Brenda [sic] Lee with the

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1 Anderson County Sheriff's Office, Chris Scott with the
2 Anderson County Sheriff's Office. Is it Dennis (phonic)
3 Childs?

4 MR. CAMPBELL: That's correct.

5 THE COURT: Denis Childs and Demetrius
6 Robertson. Those are all potential witnesses. I can't
7 swear to you that they'll all testify, but they're the
8 potential witnesses in this case. Does anyone have any
9 close business or personal relationship or are you
10 related by blood or marriage to any of those people or
11 any of the people that have been introduced to you in the
12 courtroom today? If so please stand.

13 Yes, sir. Give us your name and number.

14 THE JUROR: Juror 110, Luke Riddle.

15 THE COURT: All right.

16 THE JUROR: I'm a firefighter with the City of
17 Anderson. I've also had ties with Chris Wilson and some
18 of the other officers.

19 THE COURT: Okay. Are they professional ties
20 or social or ...

21 THE JUROR: Chris Wilson, a little bit of both.

22 THE COURT: Okay. Will the fact that you may
23 know him personally or you may have to interact with him
24 during business, will that prevent you from being fair
25 and impartial in this case?

1 THE JUROR: No, sir.

2 THE COURT: All right. Can you render a
3 verdict based only on what you hear in this courtroom?

4 THE JUROR: Yes, sir.

5 THE COURT: All right. All right. Thank you,
6 sir.

7 THE JUROR: Excuse me.

8 THE COURT: Yes.

9 THE JUROR: I'm sorry.

10 THE COURT: That's okay.

11 THE JUROR: I'm juror 147, Nanette Wood, and I
12 went to school with Tommy Clamp.

13 THE COURT: Okay. Will that fact prevent you
14 from being fair and impartial in this case?

15 THE JUROR: No, sir.

16 THE COURT: Can you render a verdict based only
17 on what you hear in this courtroom?

18 THE JUROR: Yes, sir.

19 THE COURT: All right. Does anyone on the
20 panel know of any reason whatsoever that they could not
21 be a fair and impartial juror in this case? If so please
22 stand.

23 (No response)

24 THE COURT: It is possible from reading this
25 list -- in fact, it's probable that a good number of law

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1 enforcement officers may testify in this case. Does any
2 member of the panel feel like they are more likely than
3 not to believe a person who testifies because they are a
4 law enforcement officer? If you feel that way, you need
5 to stand and explain it now.

6 (No response)

7 THE COURT: Okay. Any other questions you want
8 me to ask?

9 MR. CAMPBELL: Nothing from the State.

10 MR. POTTER: None from the accused, Judge.

11 THE COURT: Okay. Does anyone know of any
12 reason whatsoever that they cannot serve as a juror in
13 the case of the State of South Carolina versus Kevin
14 Jerome Gilliard?

15 (No response)

16 THE COURT: Okay. You're ahead of me, aren't
17 you?

18 MADAM CLERK: We're printing out the list,
19 Judge. One alternate?

20 THE COURT: Yeah. Don't you think? It's just
21 a one-day trial?

22 Yeah. In every other county in the state I would
23 have to take a break right now and tell you that the
24 Clerk of Court's Office is going to compile a list, a
25 random list of each of you, and then in a few minutes we

1 would start back court and you would have to be called up
2 -- you'll actually bring up all your stuff, come up and
3 turn around. And each side in a criminal case like this
4 has a certain number of strikes. They can strike you for
5 any reason whatsoever other than race, gender or some
6 other bias that is prevented by the law. Again, in any
7 other county I'd have to do that, but I'm told that as
8 soon as the printer prints, I'm going to have my list.
9 So if y'all will just sit here for a minute, we'll be
10 ready.

11 MR. POTTER: Judge, can I approach real quick?

12 THE COURT: Pardon?

13 MR. POTTER: May I approach, please?

14 THE COURT: Yeah.

15 (WHEREUPON, a bench conference was held off the
16 record.)

17 THE COURT: Okay. As I said, she's about three
18 steps ahead of me. Here's our list. I'll let her
19 explain how we go from here. Each side gets five
20 strikes, so don't be offended if you're stricken. It
21 could be just because the jurors have gone -- or the
22 lawyers have gone to some seminar that says that people
23 that wear blue are more likely to convict or more likely
24 not to convict. When I was a lawyer I used to listen to
25 that kind of thing, pay a lot of money to hear it and

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1 never use it. So don't be offended.

2 All right. Yes, ma'am?

3 MADAM CLERK: Thank you, Your Honor.

4 Ladies and gentlemen, as I call your name, if you'll
5 please come forward. Stand right up here in this area.
6 We'll ask that you bring any personal belongings that you
7 have with you, bring them as you come up. We'll ask that
8 you face the State's table and the Defendant's table.
9 Then we'll tell you whether to have a seat in the jury
10 box or return to your seat. Thank you very much.

11 Juror number 135, Troy Thompson, 135.

12 What say you for the State?

13 MR. CAMPBELL: Present Mr. Thompson.

14 MADAM CLERK: What say you for the Defendant?

15 MR. POTTER: Please swear Mr. Thompson.

16 MADAM CLERK: If you'll have a seat right up
17 there in the jury box, please, Mr. Thompson.

18 Number 79, Charles Jones. Juror number 79.

19 What say you for the State?

20 MR. CAMPBELL: Please excuse Mr. Jones.

21 MADAM CLERK: You may return to your seat.

22 Thank you, Mr. Jones.

23 Juror number 86, James Leftwich, Number 86.

24 What say you for the State?

25 MR. CAMPBELL: Present Mr. Leftwich.

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1 MADAM CLERK: What say you for the Defendant?

2 MR. POTTER: Please swear Mr. Leftwich.

3 MADAM CLERK: Have a seat in the jury box,

4 please, sir. Thank you.

5 Juror 129, Rita Strickland, 129.

6 What say you for the State?

7 MR. CAMPBELL: Present Ms. Strickland.

8 MADAM CLERK: What say you for the Defendant?

9 MR. POTTER: Please excuse Ms. Strickland.

10 MADAM CLERK: You may return to your seat.

11 Thank you, Ms. Strickland.

12 Juror number 149, Gwendolyn Woods, number 149.

13 What say you for the State?

14 MR. CAMPBELL: Present Ms. Woods.

15 MADAM CLERK: What say you for the Defendant?

16 MR. POTTER: Please swear Ms. Woods.

17 MADAM CLERK: Have a seat, please, Ms. Woods,

18 in the jury box.

19 Number 76, Faye Johnson, number 76.

20 What say you for the State?

21 MR. CAMPBELL: Present Ms. Johnson.

22 MADAM CLERK: What say you for the Defendant?

23 MR. POTTER: Please swear Ms. Johnson.

24 MADAM CLERK: Have a seat, please, Ms. Johnson,

25 in the jury box.

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1 Number 126, Sommer Steadman, number 126.

2 What say you for the State?

3 MR. CAMPBELL: Present Ms. Steadman.

4 MADAM CLERK: What say you for the Defendant?

5 MR. POTTER: Please excuse Ms. Steadman.

6 MADAM CLERK: You may return to your seat.

7 Thank you, Ms. Steadman.

8 Number 5, Marion Allen, number 5.

9 What say you for the State?

10 MR. CAMPBELL: Present Mr. Allen.

11 MADAM CLERK: What say you for the Defendant?

12 MR. POTTER: Please excuse Mr. Allen.

13 MADAM CLERK: You may return to your seat.

14 Thank you, Mr. Allen.

15 Number 112, Gregory Satterfield, number 112.

16 What say you for the State?

17 MR. CAMPBELL: Present Mr. Satterfield.

18 MADAM CLERK: What say you for the Defendant?

19 MR. POTTER: Please swear Mr. Satterfield.

20 MADAM CLERK: Have a seat in the jury box,

21 please, sir.

22 Number 150, Larry Young, 150.

23 What say you for the State?

24 MR. CAMPBELL: Present Mr. Young.

25 MADAM CLERK: What say you for the Defendant?

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1 MR. POTTER: Please swear Mr. Young.

2 MADAM CLERK: Have a seat in the jury box,
3 please, sir.

4 Juror number 34, Lisa Cooley, number 34.

5 What say you for the State?

6 MR. CAMPBELL: Present Ms. Cooley.

7 MADAM CLERK: What say you for the Defendant?

8 MR. POTTER: Please swear Ms. Cooley.

9 MADAM CLERK: Have a seat in the jury box,
10 please, ma'am.

11 Number 28, Estelle Chapman, number 28.

12 What say you for the State?

13 MR. CAMPBELL: Present Ms. Chapman.

14 MADAM CLERK: What say you for the Defendant?

15 MR. POTTER: Please excuse Ms. Chapman.

16 MADAM CLERK: You may return to your seat.

17 Number 13, Amelia Beauchemin, number 13.

18 What say you for the State?

19 MR. CAMPBELL: Present Ms. Beauchemin.

20 MADAM CLERK: What say you for the Defendant?

21 MR. POTTER: Please swear this lady. I can't
22 pronounce your last name. I'm sorry.

23 THE JUROR: Beauchemin.

24 MR. POTTER: Beauchemin. Thank you. Please
25 swear Ms. Beauchemin.

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1 MADAM CLERK: If you'll please have a seat
2 right over here in the jury box. Thank you.
3 Juror number 33, Sabrina Collins, number 33.
4 What say you for the State?
5 MR. CAMPBELL: Present Ms. Collins.
6 MADAM CLERK: What say you for the Defendant?
7 MR. POTTER: Please excuse Ms. Collins.
8 MADAM CLERK: You may return to your seat.
9 Thank you, Ms. Collins.
10 Number 110, Lucius Riddle, number 110.
11 What say you for the State?
12 MR. CAMPBELL: Present Mr. Riddle.
13 MADAM CLERK: What say you for the Defendant?
14 MR. POTTER: Please swear Mr. Riddle.
15 MADAM CLERK: Please have a seat, Mr. Riddle,
16 in the jury box.
17 Juror number 2, Anne Adams, number 2.
18 What say you for the State?
19 MR. CAMPBELL: Present Ms. Adams.
20 MADAM CLERK: What say you for the Defendant?
21 MR. POTTER: Please swear Ms. Adams.
22 MADAM CLERK: Please have a seat in the jury
23 box, Ms. Adams.
24 Number 12, Valerie Ball, number 12.
25 What say you for the State?

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1 MR. CAMPBELL: Present Ms. Ball.

2 MADAM CLERK: What say you for the Defendant?

3 MR. POTTER: Please swear Ms. Ball.

4 MADAM CLERK: Have a seat, please, Ms. Ball, in
5 the jury box.

6 Number 15, Chelsea Bourgeois, number 15.

7 What say you for the State?

8 MR. CAMPBELL: Please present the juror.

9 MADAM CLERK: What say you for the Defendant?

10 MR. POTTER: Please swear Ms. Bourgeois.

11 MADAM CLERK: Have a seat in the jury box,
12 please, ma'am.

13 Proceed with the alternate, Your Honor?

14 THE COURT: Yeah.

15 MADAM CLERK: This is for the alternate. Juror
16 number 14, Roger Blume, number 14.

17 What say you for the State?

18 MR. CAMPBELL: Present Mr. Blume.

19 MADAM CLERK: What say you for the Defendant?

20 MR. POTTER: Please excuse Mr. Blume.

21 MADAM CLERK: Number 138, Luis Urrego, number
22 138.

23 What say you for the State?

24 MR. CAMPBELL: Present Mr. Urrego.

25 MADAM CLERK: What say you for the Defendant?

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1 MR. POTTER: Please swear Mr. Urrego.

2 MADAM CLERK: If you'll have a seat on the
3 second row, Mr. Urrego. You'll be our alternate juror.
4 Thank you.

5 THE COURT: All right. Ladies and gentlemen,
6 I'm going to send you back to the jury room just for a
7 minute. We're not starting this trial till tomorrow. I
8 have to handle a few matters outside your presence. But
9 when you come back, Ms. Wood -- is it Woods, Gwendolyn
10 Woods?

11 THE JUROR: Yes, sir.

12 THE COURT: I'm appointing you forelady of the
13 jury. Don't be shocked. You'll be the only person that
14 has to sit in one spot. It ain't going to be that hard.
15 Don't worry about it.

16 THE JUROR: Do I have to?

17 THE COURT: Yeah. Relax. It will be okay. If
18 anybody gets mad at anybody in here, it's going to be me
19 anyway, so don't worry about it. But you'll always be
20 the person to sit in this first seat. Everyone else can
21 sit wherever you want to sit.

22 Every time you leave this courtroom from this point
23 forward, I'm going to tell you not to talk about this
24 case. Obviously you know nothing about this case now.
25 But you can go back and introduce yourselves. You should

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1 never discuss this case until you've heard all the
2 evidence and I instruct you that now is the time you can
3 begin deliberating and talking. And you just really --
4 I'm going to have some instructions for you, but I can't
5 stress that one enough.

6 We got a wallet?

7 THE BAILIFF: If it was full of money, he would
8 have never got it.

9 (Laughter)

10 THE COURT: All right. Okay. Go back. I'll
11 call you back in just a few minutes.

12 (WHEREUPON, the jury exited the courtroom at
13 approximately 11:40 a.m., and the following
14 proceedings were had outside the jury's presence.)

15 THE COURT: All right. Ladies and gentlemen,
16 we're going to hand out a sheet of paper. What I'm going
17 to ask you to do is call in this jury number on this
18 list. I'm not real sure on Monday morning how long cases
19 are going to be or actually take. I am informed that
20 this case that we'll try is not going to take more than a
21 day to a day and a half. If that happens, we may call
22 you back to pick another jury.

23 In the old days, for any of you who may have served
24 way back in the day when Judge Ballinger sat up here, we
25 basically had people come in and sit like you sat today

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1 all day. And something might happen, something might not
2 happen. But at the end of the day, the Clerk of Court
3 would have to go out and say, well, we're not picking a
4 jury today, come back tomorrow. And I, as a lawyer, a
5 young lawyer, watched jury panels come in five days and
6 then on Friday be told just to go home and nothing had
7 happened. We don't do that anymore.

8 Call this jury number after six. No point in
9 calling it tonight. But tomorrow night after six, it
10 will either tell you to call the jury number again on
11 Wednesday night or to come in on Wednesday or you're
12 through for the week. I just don't know right now. If I
13 could tell you, I would. I have a sneaky suspicion I'm
14 going to have to have you come back here Wednesday. So
15 sorry about that. And these poor guys, if you come back
16 Wednesday, I put them back into the panel. So I have had
17 some times when six of these people who have served as a
18 juror now will be back on the next jury. It shouldn't
19 happen under the law of odds, but it does more than you'd
20 think.

21 But have a good week. If anybody discusses or tries
22 to talk to you about your jury service, please let me
23 know as soon as possible. And I expect I'll see you
24 Wednesday. But if not, have a great Christmas. Okay.
25 That's -- the number is on that piece of paper you get.

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Batson Motion

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1 Do they get paid their money for coming up here
2 today?

3 MADAM CLERK: They do, Your Honor.

4 THE COURT: Hey, y'all get paid eight dollars
5 for being here today, by the way.

6 (Laughter)

7 MADAM CLERK: Twelve.

8 THE COURT: What?

9 MADAM CLERK: Twelve.

10 THE COURT: Twelve dollars, whoa. That's half
11 my salary for the week. Yes, sir? Come on up.

12 (WHEREUPON, Juror Number 79 spoke off the record
13 with the Court.)

14 THE COURT: Okay. What number are you?

15 THE JUROR: 79.

16 THE COURT: I'm going to excuse 79.

17 THE JUROR: Okay. Thank you.

18 MR. CAMPBELL: We have -- we may have a motion
19 for the jury panel.

20 THE COURT: Well, yeah. I'll get to it.

21 Okay. You got a motion in regard to the selection
22 of the jury?

23 MR. POTTER: May it please the Court.

24 THE COURT: Yes, sir.

25 MR. POTTER: I do under Batson. Judge, the

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Batson Motion

23

1 State struck the lone black male that was in this panel.
2 That was their only strike. And there are other males,
3 white males, that have been impaneled. There's at least
4 four other white males that are a little bit older.
5 However, out of the whole jury venire, there's one black
6 male and he got struck by the State. So we're of the
7 position that due process has been violated.

8 THE COURT: All right. Yes, sir? What was the
9 reason?

10 MR. CAMPBELL: Your Honor, the reason why I
11 struck him is he has pending charges from August of '09
12 with the Anderson City Police Department for malicious
13 injury to personal property, a violation of some
14 ordinances, City ordinances, a reckless driving. And
15 since I did not know the disposition of those charges --
16 and he has previously also had some possession of
17 marijuana charges in this -- dealing with him. And based
18 upon the fact that his current recent dealings with law
19 enforcement, I felt he might be more prejudicial to the
20 officers and not listen to what they have to say during
21 the testimony.

22 Furthermore, if you're dealing with race, the two
23 black females were -- who were picked in this, I put both
24 of them on there.

25 THE COURT: Okay. I understand your motion,

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1 but it's denied.

2 MR. POTTER: Thank you, Judge.

3 THE COURT: Okay. Any other motions -- what do
4 you want to schedule-wise do?

5 MR. POTTER: Can we -- we probably need to talk
6 in chambers about something.

7 THE COURT: All right. Come on back.

8 MR. CAMPBELL: Your Honor, do we need them
9 anymore? They worked last night.

10 MR. POTTER: As far as I know, there is no
11 *Jackson v. Denno* hearing that needs to be done. There's
12 no statements.

13 THE COURT: Do we have motions?

14 MR. CAMPBELL: He didn't make a statement.

15 MR. POTTER: I didn't know -- I wasn't provided
16 any written statements, so I'm just confirming that we're
17 not going to have to do any *Jackson v. Denno* or anything
18 of that sort of.

19 MR. CAMPBELL: There is no statement.

20 THE COURT: All right. Y'all come on back, and
21 then we'll let them go.

22 MR. CAMPBELL: The only thing he stated is that
23 when he was arrested, he asked what was in his hand. And
24 he says it was marijuana.

25 MR. POTTER: That was the joint.

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1 MR. CAMPBELL: That was the joint. That was
2 it.

3 THE COURT: Y'all come on back.

4 (WHEREUPON, court stood at recess for a short
5 break.)

6 THE BAILIFF: All rise.

7 THE COURT: Thank you. You can bring them in
8 now. I'm let them go until tomorrow. Have a seat.

9 (WHEREUPON, the jury entered the courtroom at
10 approximately 11:51 a.m.)

11 THE COURT: Have you calmed down, Ms. Woods?

12 THE JUROR: A little bit.

13 THE COURT: Okay. That's one of the great
14 parts of my job. Some judges allow juries to go back and
15 elect a foreman. And I've always thought that was an odd
16 thing to do, to require people who don't have any idea,
17 you know. And what strikes me is that the only person
18 that would be elected as foreman of the jury is somebody
19 that really wanted to be elected foreman of the jury.
20 And that kind of concerns me, that someone would want
21 that. So I pick them and I love watching y'all's faces
22 when I do. It's about the only good thing I do from
23 Monday to Friday.

24 I'm going to let you go today. We're not going to
25 start this until tomorrow. I got motion hearings in

1 other cases this afternoon. This case is not going to be
2 a week-long case. We'll finish in a day, a day and a
3 half depending on how quickly we move and how quickly I
4 can handle everything going on back here and move the
5 case along.

6 Tomorrow morning at ten, I'll need you in the jury
7 box or the jury room. It's going to be one of those
8 weeks. I'll need you in the jury room by ten, and we'll
9 start pretty soon thereafter. There's always some delay
10 on the first day, so I'd just -- you know, get
11 comfortable. I'm sure the Clerk will probably have
12 donuts or something.

13 MADAM CLERK: We'll have something.

14 THE COURT: I mean, if you like eating
15 breakfast they'll be here.

16 I do want to tell you quite seriously that I don't
17 expect anyone to get in touch with you about your jury
18 service. But from this point forward, the only people
19 that you should discuss your jury service with are each
20 other and with me. If anybody contacts you, calls you,
21 sends you a letter or communicates with you in any way
22 about your jury service, please let Buck know the next
23 morning or let me know. If you want to call the
24 Sheriff's department that night, they'll get in touch
25 with me and I'll take care of it. I don't -- this is not

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1 going to be a fearful case. This is not going to be one
2 of those cases where people are going to be trying to
3 influence you. But I want you to know that even walking
4 down the street, you should keep your jury badge on, and
5 people shouldn't talk to you about your case. If you
6 know lawyers who are working in the courthouse, they'll
7 probably not speak to you with that jury badge on because
8 they're instructed not to.

9 The whole point of this process this morning was to
10 pick twelve people and an alternate who could listen to
11 the evidence that will be given from this stand, who can
12 review any documents that are introduced and who can make
13 a decision based only on what they hear in this
14 courtroom. And for that reason -- again, I don't know if
15 there will be any publicity -- you should not read any
16 newspapers articles about this case. You shouldn't
17 listen to anything on the radio or watch anything on
18 television about this case if there is anything.

19 I'll tell you that by the end of this week, you will
20 know more about this case than any reporter in the world.
21 And the only thing you could get from any outside review
22 of papers, radio or TV would be mistakes because you're
23 going to know what you need to know. So I'm asking you
24 -- in fact, I'm ordering you not to read or have any
25 publicity in your presence about his case.

1 The most difficult thing that I'm going to have to
2 ask you and order you to do is not talk to any of your
3 family members about the particulars of this case. I
4 understand how hard that would be. Your family is going
5 to want to know every day what's going on, what happened
6 in that case. I understand it. They would in my family.
7 You have to tell them the judge has ordered you not to
8 talk to them about it. And there's really a good reason.
9 It's not that I want to interfere with what you hear or
10 say to your family members. But again, we've been -- we
11 spent a couple hours picking you because we think that
12 you'll be fair and impartial and only listen to the
13 evidence that's allowable by law.

14 And in my family somebody would have an opinion. No
15 matter what I said after that day, somebody would have an
16 opinion. And it would be wrong because, again, they
17 don't know anything about this case. So I'm not going to
18 follow you home. I'm not going to have you taped. But
19 I'm just -- I'm asking you and ordering you not to talk
20 to family members or anybody else, coworkers, friends,
21 girlfriends, boyfriends, husbands, wives about this case.
22 Again, it's not going to be more than a day and a half
23 anyway.

24 I guess ten o'clock tomorrow will be the next time I
25 see you. But if there is a problem or if you have any

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1 problem, get in touch with me or get in touch with the
2 Sheriff's department.

3 And Madam Forelady, the only thing you're going to
4 have to do is while you're in the jury box -- and I'll
5 explain this again tomorrow. But while you're in the
6 jury room, if you have a problem, you're the person that
7 needs to write the note to me and sign it. If you have a
8 question or a problem at any time, give it to one of the
9 bailiffs, give it to Buck and he'll bring it to me. And
10 then at the end of the case, you'll be the person that
11 will write your name on the verdict form. But just as
12 forelady, so I know you can handle it.

13 All right. Y'all have a great day and I will see
14 you tomorrow at ten o'clock.

15 (WHEREUPON, the jury exited the courtroom at
16 approximately 11:57 a.m.)

17 THE COURT: Okay. I guess -- let me -- we're
18 going to need to deal with that issue, but I need to also
19 deal with this. So why don't we break and I'll hear this
20 case and then we'll go back and discuss it?

21 MR. CAMPBELL: Okay.

22 THE COURT: Okay. Just a second.

23 MR. CAMPBELL: Do you want us to like break for
24 lunch, or how long do you want us to break for?

25 THE COURT: No. No, I wouldn't break for lunch

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1 at this point.

2 (WHEREUPON, court stood at recess for a short
3 break.)

4 THE COURT: All right. I think this is a
5 sticky problem y'all have. I think this is a problem,
6 but what do you want to do about it? You want to think
7 about it and come back after lunch?

8 MR. POTTER: Yeah. Let me make some calls.

9 THE COURT: Yeah, you better. I don't know
10 what you do if you've got a witness that's testifying
11 against you who is represented by your office.

12 MR. POTTER: Well, what happened -- if it
13 pleases the Court.

14 THE COURT: Yeah.

15 MR. POTTER: Apparently this happened with --
16 when Kurt was being fired.

17 THE COURT: Right.

18 MR. POTTER: This guy comes to Kurt with a note
19 saying this, and that was another reason why Kurt moved
20 to withdraw.

21 THE COURT: He got it from this client or from
22 the other guy?

23 MR. POTTER: From the other guy, from Denis
24 Childs. He conflicted -- or our office conflicted Denis
25 Childs out, and the file was closed down.

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1 THE COURT: Okay.

2 MR. POTTER: However, the note got to me this
3 morning.

4 THE COURT: How did the note get to you?

5 MR. POTTER: Someone was told to get a copy of
6 the note and give it to me.

7 THE COURT: Wow.

8 MR. POTTER: That -- it didn't come from me,
9 Judge, but it happened. I knew of the potential
10 testimony of this witness. I had talked with my client
11 about the potential testimony of this witness. We didn't
12 know if he was going to be called as a witness or not by
13 the State. But there is -- and I've spoken with Rame.
14 And Rame is not necessarily, he's not necessarily going
15 to be called in his case-in-chief; however, he could be
16 called in rebuttal.

17 THE COURT: Yes, sir.

18 MR. CAMPBELL: Your Honor, just for the record,
19 Matthew Perkins spoke with me the last term of court
20 about it saying that his client -- he has, I believe, a
21 couple of charges pending with our office. Lauren Hogan
22 is actually the prosecutor on those. I have not reviewed
23 those files. I have not talked to Mr. Childs. I haven't
24 talked to Mr. Perkins about it either. The only thing I
25 did was put him on the witness list when you called it

1 just in case. I'm not planning on calling him in my
2 case-in-chief. I just wanted to see who he was going to
3 put up. And if I needed to, I would look at possibly a
4 rebuttal. But at this point in time, I'm personally
5 relying upon my three officers to ---

6 THE COURT: But if he was put up in rebuttal,
7 the information you have from the other file is that --
8 would be a potential at least defense to your client?

9 MR. POTTER: It would be, yes.

10 THE COURT: So much for that Chinese curtain
11 between y'all and the people that are -- it isn't your
12 fault, but that doesn't need to happen anymore. I mean,
13 that's a real problem. All right. Why don't you make
14 some calls? We'll be back here say two.

15 MR. POTTER: Yes, sir. Judge, if it's all
16 right with you, I do have some brief motions to make if
17 it's decided that I'm going to stay on the bench or if
18 I'm going to play the game. If I'm going to play the
19 game, I do have a couple of brief motions to make. We
20 can do them tomorrow morning.

21 THE COURT: Okay.

22 MR. POTTER: It shouldn't take that long.

23 THE COURT: Okay. Yeah, let's deal with this
24 issue and we'll deal with the motions tomorrow.

25 MR. POTTER: Yes, sir.

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1 THE COURT: Okay. We're taking a break until
2 two.

3 (WHEREUPON, court stood at recess for the lunch
4 break.)

5 THE COURT: Yes, sir?

6 MR. CAMPBELL: May it please the Court.

7 THE COURT: Have y'all worked out your problem?

8 MR. CAMPBELL: Yes, sir. Regarding what we
9 talked about prior to breaking is that the State is not
10 -- after talking to Mr. Potter, does not intend to call
11 Mr. Childs as a witness.

12 THE COURT: All right.

13 MR. CAMPBELL: That solves that problem.

14 THE COURT: That solves your ethical problem?

15 MR. POTTER: That solves the issues.

16 THE COURT: Okay.

17 MR. POTTER: So I actually think we're fine.

18 THE COURT: And then you've got a couple of
19 short motions tomorrow morning?

20 MR. POTTER: Just really one thing unless I can
21 think of some more.

22 THE COURT: Well, you got twenty-four hours or,
23 you know, sixteen hours. I'm sure you will.

24 MR. POTTER: Yes, sir. I'm sure I will.

25 THE COURT: Okie doke. I'll see y'all tomorrow

1 morning.

2 (WHEREUPON, court stood at recess for the day.)

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4 (WHEREUPON, court convened with all parties present,
5 and the following proceedings were had commencing at
6 approximately 11:00 a.m.)

7 THE COURT: All right. Do we need to proffer
8 any testimony before we start?

9 MR. CAMPBELL: Yes, sir, in light of what has
10 come along. Your Honor, the State is going to call
11 Demetrius Robertson.

12 MADAM CLERK: If you'll come around, please,
13 Mr. Robinson, to be sworn.

14 MR. CAMPBELL: Judge, do you want me to just
15 put him up here or put him on the stand?

16 THE COURT: You better put him on the stand
17 just so we can get all the microphones right.

18 If you would place your left hand on the Bible and
19 raise your right?

20 (WHEREUPON, the witness was duly sworn.)

21 MADAM CLERK: All right, sir. If you'll go
22 around and have a seat right there in the witness chair,
23 please, sir. And if you'll state your full name -- go
24 ahead and be seated. State your full name and spell your
25 last name for the record.

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1 THE WITNESS: Demetrius Robertson, R-O-B-E-R-
2 T-S-O-N.

3 MADAM CLERK: Thank you.

4 **DEMETRIUS ROBERTSON,**

5 Being first duly sworn, testified as follows:

6 IN-CAMERA EXAMINATION

7 BY MR. CAMPBELL:

8 Q. Mr. Robertson, you were stopped along with Mr.
9 Gilliard on April 19th, 2009; is that correct?

10 A. Yes, sir.

11 Q. You were stopped by Officer Brandon Surratt who is
12 in the courtroom today?

13 A. Yes, sir.

14 Q. And in your car was found about 2.9 grams of crack
15 cocaine; is that correct?

16 A. Yes, sir.

17 Q. And was that your crack cocaine?

18 A. Yes, sir.

19 Q. Was that Mr. Gilliard's cocaine?

20 A. No, sir.

21 Q. Also in that car was found approximately a half
22 pound of marijuana. Was that your marijuana?

23 A. Yes, sir.

24 Q. Was that Mr. Gilliard's marijuana?

25 A. No, sir.

- 1 Q. Did he know that marijuana was in the car?
- 2 A. No, sir.
- 3 Q. As well as there was a set of scales and also a
- 4 forty-five caliber pistol?
- 5 A. Yes, sir.
- 6 Q. And were both of those yours?
- 7 A. Yes, sir.
- 8 Q. Did he know either one of those were in the car?
- 9 A. No, sir.
- 10 Q. And you're taking responsibilities for those items
- 11 -- those charges or those illegal items?
- 12 A. Yes, sir.
- 13 Q. Now, did you know anything about the crack cocaine
- 14 that was found in his pants?
- 15 A. No, sir.
- 16 Q. Did he tell you that he had crack cocaine on him?
- 17 A. No, sir.
- 18 Q. And you were charged with these -- you were charged
- 19 with the same crime; is that correct?
- 20 A. Sir?
- 21 Q. You were also charged with possession with intent to
- 22 distribute ---
- 23 A. Yes, sir.
- 24 Q. --- marijuana, the pistol charge and also PWID crack
- 25 cocaine?

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1 A. Yes, sir.

2 Q. And you acknowledge you're guilty of those?

3 A. Sir?

4 Q. You acknowledge that you're guilty of those charges?

5 A. Yes, sir.

6 Q. And you are currently represented by attorney

7 Carolyn Galloway; is that right?

8 A. Yes, sir.

9 Q. And you have discussed all of this with her; is that
10 right?

11 A. Yes, sir.

12 Q. And you're satisfied with her services?

13 A. Yes, sir.

14 MR. CAMPBELL: I have no further questions.

15 THE COURT: Any questions?

16 MR. POTTER: No. We just thank him for his
17 testimony.

18 THE COURT: Pardon?

19 MR. POTTER: We thank him for his testimony.

20 THE COURT: Yeah, I do too. Thank you, sir.

21 You can go.

22 (WHEREUPON, the witness exited the courtroom.)

23 THE COURT: Okay. So what we're left with --
24 the marijuana with intent to distribute is out?

25 MR. CAMPBELL: That's correct. What we're

1 going to show is that he had a small marijuana cigarette
2 and 2.2 grams of marijuana which would actually be simple
3 possession of marijuana.

4 THE COURT: So I can do away with that
5 indictment and also the possession of a weapon during the
6 commission of a violent crime?

7 MR. CAMPBELL: That's correct.

8 THE COURT: And neither one of y'all have an
9 objection to me just redacting or somebody redacting the
10 indictment to take out the possession of a weapon during
11 the commission of a violent crime and also on the front
12 and the back?

13 MR. POTTER: I have no objection to that.

14 MR. CAMPBELL: The State does not.

15 THE COURT: We'll figure out how to do it. I
16 mean, it's going to be obvious that something was taken
17 off, but ...

18 MR. CAMPBELL: Well, actually once we just make
19 a copy and ---

20 THE COURT: However you want to do that.

21 MR. CAMPBELL: --- delete it, that would be
22 fine.

23 THE COURT: I'll let y'all do that. But no
24 objection to it, right?

25 MR. POTTER: None.

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1 MR. CAMPBELL: None from the State.

2 THE COURT: All right. I'm going to explain to
3 them that while they may have heard yesterday that there
4 were three charges, that the two charges have been
5 dismissed. I think that's probably the way to do it.
6 They don't -- they're not going to care what I say. But
7 that you are proceeding with the charge of trafficking in
8 crack cocaine?

9 MR. CAMPBELL: Yes, sir.

10 THE COURT: Okay. All right. Are y'all ready?

11 MR. POTTER: If it pleases the Court.

12 THE COURT: Yes, sir.

13 MR. POTTER: I do have one brief motion I need
14 to bring up.

15 THE COURT: All right. Yes, sir.

16 MR. POTTER: Judge, it has come to my attention
17 that the crack cocaine that the State intends to move
18 forward on was allegedly found on my client in the
19 booking process at the detention center. As Your Honor
20 is aware, this is a case I just picked up last month. In
21 the booking area of the detention center, there's
22 surveillance cameras. Everything is under video
23 surveillance. And that video, it is my understanding, is
24 recorded and kept for a period of time.

25 When this incident allegedly occurred, it's my

1 understanding that this was all under videotape. When
2 Mr. Tavernier got the case, got the discovery, the
3 warrants and the incident reports didn't indicate that's
4 where the crack cocaine was found. Actually, the
5 warrants and the incident reports indicate the crack
6 cocaine was found at the traffic stop. We did not know
7 about the video until later. The video had been
8 destroyed. And we are seeking, Your Honor, to -- I guess
9 really two things, to be allowed to argue that to the
10 jury and for a specific instruction, an inference
11 instruction, to the jury that due to the fact that that
12 evidence was destroyed, an inference could be given
13 against the State to the Defendant that there is
14 exculpatory information or exculpatory evidence that
15 would have been found had that video been presented. So
16 we're making that motion. And ...

17 Now, I understand we're kind of getting ahead of
18 ourselves with regards to the jury instruction, but I
19 kind of need to know where the Court is going to be so
20 that I know how to fashion arguments, questions and
21 things of that sort.

22 THE COURT: All right.

23 Yes, sir?

24 MR. CAMPBELL: Your Honor, we found out that
25 there was possibly a videotape. I talked to the officer,

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1 Deputy Brandon Surratt. He on that night actually did
2 request from the shift supervisor to make a copy of what
3 was seen inside the booking area. When he went back to
4 -- when he followed back up on that, he learned at that
5 time that they had already taped over it and that it only
6 lasted a certain amount of time. And the individual that
7 he had spoke to didn't do what he said he was going to do
8 which is awry in this case.

9 We've actually brought the other person, the person
10 who actually booked him in, Officer -- Deputy Andrew
11 Lunz, who is seated in the courtroom today. He was
12 actually the one who was doing the booking process. And
13 so the jury will have both Deputy Surratt and Deputy Lunz
14 who were both in the booking area. And they can describe
15 firsthand what they saw and witnessed. While a videotape
16 is basically just cumulative of what actually happened,
17 the officers are still going to take the stand and
18 explain what they saw and what occurred.

19 There is actually no law that states everything has
20 to be videotaped except for DUI's. And therefore, I
21 don't think in this case -- and the officer is going to
22 testify to what he did and saw and observed. And he
23 actually requested a copy of the tape. But in this case
24 I do not think that a jury should be given a specific
25 instruction regarding that against the State, Your Honor.

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1 And also, Mr. Potter is allowed to argue anything he
2 wants to argue. I mean, that's -- he can argue ---

3 THE COURT: Within certain bounds, yeah.

4 MR. CAMPBELL: Right. So that's our position
5 is that we attempted to get it. We didn't get it. We
6 notified them. We don't have it, but we have the
7 witnesses here that were present, the people that were
8 present.

9 MR. POTTER: May it please the Court. As far
10 as I'm aware, there is one witness to the finding of this
11 cocaine, and that's Deputy Lunz. Surratt wasn't there
12 when this happened or when the crack cocaine was found.
13 There's -- so there's just one person who can testify as
14 to what happened in that booking room during the search.
15 The videotape, we've never had a chance to see it. We
16 don't know what that's going to show. And our position
17 is that we're prejudiced in the fact that there's no
18 other way we can correct the destruction of that evidence
19 or get something like that evidence that would preserve
20 our due process rights.

21 So we're of the position that we haven't had a
22 chance to see the video. We don't know what's on the
23 video. There's only one person who can testify about
24 what happened in booking. And I think -- respectfully, I
25 think we are entitled to the instruction.

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1 THE COURT: All right. Well, what I'm going to
2 do is I'll allow you to question him about that, about
3 the existence of the tape, et cetera, but I'm not going
4 to give a curative instruction regarding destruction of
5 evidence at this point unless I hear something different
6 that -- I mean, it's a mistake that shouldn't have
7 happened. It really shouldn't have happened. But at
8 this point I will allow you to go into it though. I
9 mean, I think you can question him about what -- the
10 existence of videotape, where is it and what happened to
11 it and why is it not here and that kind of thing.

12 MR. POTTER: Yes, sir.

13 THE COURT: Okay. Anything else before they
14 come in?

15 MR. POTTER: Judge, under Rule 615, we're going
16 to ask for sequestering of witnesses.

17 THE COURT: Okay. Any objection to that?

18 MR. CAMPBELL: I don't think we need to. I
19 mean, they've all been sitting here.

20 THE COURT: Okay.

21 MR. CAMPBELL: Most of the people in this case
22 are actually going to be chain.

23 THE COURT: Do you want chain people
24 sequestered too? I mean, I will if you -- I do -- if
25 that's what you want, that's fine.

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1 MR. POTTER: The chain people, no.

2 THE COURT: Okay. Anybody that is not
3 testifying as to the chain, we'll need to have them
4 leave.

5 MR. POTTER: That's all I have.

6 THE COURT: Okay.

7 (WHEREUPON, State's Exhibits Number 1 and 2 were
8 marked for identification only.)

9 MR. POTTER: We're ready to go, Judge, if it
10 pleases the Court.

11 THE COURT: Okay.

12 MR. CAMPBELL: The State's ready, Your Honor.

13 THE COURT: I'm waiting for this computer to
14 beep. It's going to beep at some point, and I want it to
15 do it before I bring them in here. But ...

16 Are you having trouble with your computers this
17 morning, Cathy?

18 MADAM CLERK: Not today, but we have been
19 having trouble. Is it real slow?

20 THE COURT: Yeah.

21 MADAM CLERK: Uh-huh (affirmative).

22 THE COURT: Okay. Well, when it beeps, I'll
23 just explain it to them. I think it's the computer more
24 than it is anything else.

25 Okie doke. Bring them in.

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1 (WHEREUPON, the jury entered the courtroom at
2 approximately 11:18 a.m.)

3 THE COURT: Good morning, ladies and gentlemen.
4 I hope you've enjoyed your hour and a half being cooped
5 up in a small hot room. I apologize for that. We've
6 been out here working, trying our best to get through
7 some things we needed to get through. If you're here
8 tomorrow morning, you will not sit back there for an hour
9 and a half. But I do apologize.

10 What we need to do now is swear you in.

11 Yes, ma'am.

12 MADAM CLERK: Thank you, Your Honor.

13 Madam Forelady and ladies and gentlemen of the jury,
14 if you'll please stand and raise your right hand to take
15 the jury oath.

16 (WHEREUPON, the jury was duly sworn.)

17 THE COURT: All right. Ladies and gentlemen,
18 what I'm going to do now is give you a preliminary charge
19 to tell you a little bit about how this case is going
20 proceed to give you an overview of the law and to give
21 you some other thoughts that I have about a trial and
22 some direction. After I do that, the parties will have
23 the opportunity to give an opening statement. After the
24 opening statement, we'll start the testimony. After the
25 testimony has been completed, the parties' attorney will

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1 have an opportunity to give a closing argument. Then I
2 will charge you on the law. I'll have to read to you
3 probably fifteen pages worth of the law. And then at
4 that point you will begin your deliberations. In fifteen
5 seconds that is what we're going to do over the course of
6 today and maybe tomorrow. Obviously it's going to be
7 more complicated than that, but I want you to have an
8 idea, an outline, of it.

9 I want to start out this morning by telling you the
10 same thing that I told you yesterday. I told the whole
11 group. You heard the Solicitor call the case, and he
12 called the case by reading from the indictments. We had
13 two indictments yesterday. First, I want to tell you
14 that we had three charges against this Defendant
15 yesterday. We're only proceeding today on one. The
16 other two have been dismissed.

17 The case against the Defendant today will be on the
18 indictment for trafficking crack cocaine, twenty-eight
19 grams or more but less than a hundred grams under South
20 Carolina Code §.4453-03-75(C)(2)(c). The possession of a
21 weapon during the commission of a violent crime and the
22 possession of marijuana have been dismissed. So we're
23 only going to have one issue that we're going to be
24 asking you to address during this trial.

25 But what I want to tell you is that this indictment,

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1 as I said, you're going to have back with you. You'll
2 have the one indictment that's left with you in the jury
3 room. And you'll see that it's literally just a piece of
4 paper that sets out the facts that are alleged. There's
5 a signature on the back, there's some legal gibberish,
6 and that's it.

7 It should not be discussed by you at any point
8 during the course of this trial. The fact that he has
9 been indicted should never be brought up in the jury
10 room. It shouldn't be brought mentally, and it should
11 have no influence on whether or not you decide guilt or
12 innocence.

13 There's an old way of saying this. And a lot of
14 judges don't use this explanation anymore, but I sort of
15 love it. This Defendant has pled not guilty. Because of
16 that, the State has the burden of proving each and every
17 element of the case against this Defendant beyond a
18 reasonable doubt.

19 Now, just a quick definition of beyond a reasonable
20 doubt. And I'm going to give you a much longer
21 definition at the end of this trial. A reasonable doubt
22 is the kind of doubt that would cause a reasonable person
23 to hesitate to act. Now, what that means is that since
24 the Defendant has pled not guilty, he carries about his
25 shoulders a robe of righteousness or innocence. He came

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1 into this courtroom this morning with this imaginary, yet
2 important, robe draped around his shoulders. During the
3 course of this trial he will continue to have this robe
4 of innocence or righteousness over his shoulders.

5 Once you begin your deliberations, he will continue
6 to have that robe of righteousness or that robe of
7 innocence around his shoulders. And in fact, he'll only
8 have that robe of righteousness or innocence stripped
9 from him by you if you determine that the State has
10 proven their case, each and every element of their case,
11 beyond a reasonable doubt. At that point only at the end
12 of your deliberations, once you make your decision if you
13 believe that the elements have been proved beyond a
14 reasonable doubt, that robe of righteousness or innocence
15 is stripped.

16 The reason I like that analogy is because the
17 presumption of innocence that is in both the State and
18 Federal Constitution is not just a legal nicety. If you
19 read the papers or if you read magazines, the court
20 system and the Constitution is under assault at all
21 times. If you stay in this courthouse too long, you'll
22 learn that these rights are very important rights. And
23 people up here, including me and maybe most importantly
24 me until you got here, treat these rights as inviolate.
25 They're not legal niceties. They're not just words.

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1 They're very important rights we have that differentiate
2 our system from every system in the world and quite
3 frankly from every system in the history of the world.

4 This Defendant comes into this courtroom not guilty,
5 and he will only be found guilty if you determine that
6 the State has proved each and every element of their case
7 beyond a reasonable doubt. That is a very important
8 thing.

9 Now, I want to tell you a couple other things. I
10 get very concerned about the effect of television on
11 jurors. I can't watch lawyer shows, just like most
12 doctors don't watch medical shows. Mainly because they
13 drive me crazy with their inaccuracy. I can tell you
14 right now, we are not going to make a decision in an hour
15 including twenty minutes for commercials today. This
16 thing is not going to move very excitingly. It is going
17 to be a slow and deliberate process. And it's a slow and
18 deliberate process for a very important reason.

19 But this is a very important day for the State and
20 for this Defendant. And I get a little worried that
21 juries -- and watch them during courses of trials. I've
22 been a judge almost ten years now. I watch them. And
23 you can see impatience creep in when they think things
24 are moving too slow and they feel like, you know, they
25 know the answers to questions. You can just watch them.

1 I'm going to ask you to just listen. Pay attention
2 to everything said from this witness stand. Read every
3 document. Anything that is introduced into evidence, you
4 are going to have with you in the jury room. But pay
5 attention and listen and understand that there's a reason
6 sometimes why things go very slow.

7 I'll tell you that you and I will have very
8 different roles during the course of this trial. You're
9 the judge of the facts. You have to listen to the
10 witnesses testify. You have to review the evidence, and
11 you have to determine what the facts are in this case.
12 You're going to have to determine whether you believe
13 witnesses that testify.

14 Credibility under the law is basically
15 believability. And I'll tell you that at the end of the
16 trial. But basically you've got to determine whether the
17 witnesses are credible. And you have to formulate in
18 your own mind what the facts are, then discuss them and
19 begin deliberating. And you as a group will determine
20 the facts in this case.

21 On the other hand, I have to be the judge of the
22 law. During the course of the trial, I will rule on
23 objections. I have to rule on any documents that might
24 be introduced, and I'll have several different times
25 during the course of the trial that I'll have to make

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1 legal decisions. The biggest thing I'll be doing is
2 during the course of this trial emailing back and forth
3 with my law clerk the jury charge. Because at the end of
4 this case, as I said, I will read to you the law in this
5 case. And then you'll apply the facts as you determine
6 them to be to the law as I give it to you and come up
7 with a verdict.

8 If you think at any point during the course of this
9 trial that I have an opinion about a fact, if you think I
10 believe or disbelieve a witness, if you think I believe
11 or disbelieve a fact, ignore it. Whether or not I
12 believe a witness or whether or not I think something is
13 true or is not true is irrelevant to your decision. You
14 are the only people that can determine the facts in this
15 case.

16 Likewise, when I give you the law, some of you make
17 think that the law is different or you may all wish that
18 it were different. You may hope that it's different.
19 But you have to take the law as I give it to you, apply
20 it to the facts as you determine it to be and come up
21 with a verdict. Our roles never cross during the course
22 of this trial. And that's a very important thing I think
23 you need to understand.

24 You also need to understand that the opening
25 statements made by the lawyers are not evidence and

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1 shouldn't be considered evidence. They're just
2 opportunities for the lawyers to talk to you, give you an
3 outline about the case.

4 The closing statements made by the lawyers or
5 closing arguments are also not evidence. They're chances
6 for the attorneys to argue their position to you and try
7 to sway your position. The only evidence in this case
8 will come from this witness stand and from any and all
9 documents or exhibits that are introduced.

10 You've got two good lawyers who are trying this
11 case. They have been in this courtroom many times and
12 they are very smart. They're going to make objections.
13 One of my jobs, one of the portions of my legal job is
14 that I have to determine what to do when a lawyer makes
15 an objection. Most of the time I'm going to send you out
16 of the room while I make that decision for obvious
17 reasons. Most of the objections are going to be because
18 there's a question of admissibility or whether it would
19 be proper for something to be said from the witness
20 stand. I'm going to send you back, I'll make a decision,
21 I'll bring you back in. I can guarantee that at some
22 point if we go more than a day, there will come a time
23 when I'll have an objection, I'll send you out of the
24 courtroom, you'll sit out for ten minutes while we argue
25 it, you'll come back in sit down and there will be

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1 another objection and I'll send you out. I'd like to
2 think that I'm giving you some exercise. The truth of
3 the matter is that's just the way the system works, and
4 that's the way it has to work.

5 If you sit back there longer than you think you
6 should, don't get mad at the lawyers because they made an
7 objection. That's their jobs. Get mad at me.

8 The third thing that I have to is I have to manage
9 the courtroom and manage the time and what goes on in the
10 courtroom. Sometimes I'm a little overwhelmed with it as
11 in yesterday, but mainly it moves pretty smooth. I can
12 tell you that if I send you out for five minutes, it's
13 going to be eight minutes. If I send you out for
14 fifteen, it's going to be twenty-five. It happens every
15 time. But we'll do our best to get this moving along.
16 We understand that you have lives.

17 Also, as I told you during the jury selection
18 process, about every hour and a half we'll take a break
19 for ten or fifteen minutes so you can go back and
20 stretch. If you need a break for any reason during any
21 portion of this trial, just raise your hand, get my
22 attention, get Buck's attention, and we'll take a break.
23 No questions asked. You got to go to the restroom, you
24 got to cough, you've got to have some water. If, you
25 know, it's driving you crazy to sit still, just raise

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1 your hand. I'll never ask you why unless you do it
2 twice. Okay? So feel free to do that.

3 Also, as I told you yesterday, I don't know if
4 there's -- I didn't look at the paper this morning. I
5 don't think there is any publicity. I suspect that there
6 may be some. I'm ordering you not to read it, not to
7 talk to your families, not to talk to your friends, not
8 -- do not discuss this case at all. From this point
9 forward you're somewhat in a shell and have to be that
10 way. But you will know more about this case literally
11 than any other thirteen people in the world. So you're
12 not going to be able gain any information from any other
13 source.

14 I think it goes without saying. But please don't do
15 any searches on the computer or anything like that to try
16 and find out anything about the case. That has actually
17 happened once in this state which is kind of amazing to
18 me. That juror is probably going to serve jail time for
19 that. So please don't do any searches or try to find out
20 any information. Everything you need to know to reach a
21 verdict will be presented to you in this courtroom.

22 And as I said, every time you leave the court --
23 you'll be tired of me saying it -- I'll say please don't
24 begin your deliberations. The first time you should
25 start talking about this case is when the lawyers have

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1 given you their closing arguments and we have sent back
2 to you the verdict form and all this evidence that's been
3 admitted. You'll actually have them delivered to you,
4 and the bailiff will tell you begin your deliberations.
5 Until that time you can talk about football, cooking,
6 Christmas, whatever you want to do, but not this case.

7 Madam Forelady, as I've said before, if you're in
8 the jury room and any issue comes up -- it's too hot,
9 it's too cold, the crackers aren't fresh enough, whatever
10 it is -- just write it out on a piece paper, sign your
11 name and put the time, knock on the door and they'll get
12 it to me and I'll take care of it.

13 All right. Ladies and gentlemen, thank you.

14 All right. The State ready and the Defense ready?

15 MR. CAMPBELL: The State's ready, Your Honor.

16 MR. POTTER: We're ready, Judge.

17 THE COURT: Okay. You can precede.

18 MR. CAMPBELL: May it please the Court, Your
19 Honor. Mr. Potter.

20 OPENING STATEMENT

21 BY MR. CAMPBELL:

22 Ladies and gentlemen of the jury, in most jobs
23 people normally know what to expect when they get to
24 work. Law enforcement is a little bit different. When a
25 man such as Deputy Brandon Surratt puts on that uniform,

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1 they have no idea what they are going to run into or what
2 they're going to get involved with when they go on their
3 shift. That's kind of what this case is about.

4 On April 19th, 2009, Deputy Surratt was on patrol
5 here in Anderson County. And he happened to witness a
6 car disregard a stop sign, and so he was going to
7 basically initiate to stop the car for a moving traffic
8 violation, running a stop sign.

9 Well, there's two people in that car. When he gets
10 up there, he starts talking to the driver. The driver
11 eventually tells him his name, tells him his date of
12 birth. And he runs it through dispatch. It comes back
13 he's under suspension. He can't -- he's not supposed to
14 be driving. He didn't have a valid driver's license, so
15 he placed him under arrest.

16 And while he's sitting there talking to this other
17 individual, Demetrius Robertson, he smells marijuana.
18 And the passenger in the car is the Defendant, Kevin
19 Gilliard, who's seated over here at the table. And when
20 Deputy Surratt goes up there, he has his hand clinched.
21 And he asked him, you know, release your hand and let me
22 see what's in it. And in it is a partially smoked
23 marijuana cigarette. Deputy Surratt asked him what is
24 it. He owned up to it. It's a marijuana cigarette which
25 you can't have in the State of South Carolina. It's

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1 against our laws. So he's being placed under arrest for
2 that.

3 And after he got him out of the car, he did a little
4 pat down to make sure he didn't have any weapons on him.
5 He's going through and his pocket he had a little more, a
6 small baggy of marijuana on him. Then he puts them in
7 his patrol car and they go back to the detention center.

8 Once there they start the booking process. They
9 take your photograph. They do your fingerprints. They
10 get your identification, your information, your personal
11 information. And while he was also there, the jailer --
12 they start doing a pat down to make sure that the person
13 doesn't have any illegal items or contraband or anything
14 that's not supposed to be entering into the jail. And
15 when he went to frisk, I guess is a good way to say it,
16 Mr. Gilliard, out of his pants falls a package.

17 And what the State intends to prove to you contained
18 in that package was crack cocaine. And he's been charged
19 in indictment 2009-GS-04-1737 with trafficking crack
20 cocaine of twenty-eight grams or more but less than a
21 hundred. What the State has to prove to you -- and if
22 you read the language of it, it says that the Defendant,
23 Kevin Jerome Gilliard, on or about April 19th, 2009, in
24 Anderson County -- and if you go down a little bit and it
25 says, knowingly in actual or constructive possession,

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1 knowingly, or knowingly attempted to become in actual or
2 constructive possession of more than twenty-eight grams
3 but less than a hundred. What I have to prove to you --
4 the State -- as the Judge has told you, it's my burden is
5 that, one, it's crack cocaine between twenty-eight and a
6 hundred grams and he knew it was there. That is what I
7 have to prove in order to prove the elements of the
8 charge. I don't have to prove what he intended to do
9 with that crack cocaine. I don't have to prove that he
10 was out trying to sell it or anything like that.

11 And what is actual possession? It means being
12 actually on you, on your person. You have possession of
13 it. Constructive possession means you basically have
14 control, such as you're in your car and it's right next
15 to you and you have control over it. And that's what
16 constructive possession is.

17 Now, as the judge told you, we have to prove this to
18 you beyond a reasonable doubt. And it's our burden. We
19 freely admit that, and we looked forward to it. It's
20 what our whole criminal system is based on. And like the
21 Judge stated, he's innocent as he sits right there right
22 now until you come back with a verdict because y'all are
23 the judges of the facts in this case. Y'all decide
24 whether or not we meet our burden.

25 And as he told you, the reasonable doubt definition

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1 is it causes a reasonable person to hesitate to act. I
2 kind of even simplify it a little bit more than that. If
3 the State proves to you that he did in fact possess crack
4 cocaine weighing more than twenty-eight grams but less
5 than a hundred, we have met our burden. We will ask you
6 at that point to find him guilty if you think we have
7 done that.

8 And likewise on the flip side of that, if you don't
9 think we have met our burden, you find him not guilty.
10 That's the decision y'all have to make. Because we both
11 -- our sides will have different opinions on the facts.
12 And that's why we have chosen y'all to decide.

13 And to prove our case, you're going to hear from the
14 officers. This is Deputy Brandon Surratt right here. He
15 is the case officer. I don't know if you can see him
16 over this podium right here. But he's going to take the
17 stand, and you're going to hear from him. He's going to
18 tell you what took place that day, what transpired and
19 how it happened.

20 And he's also going to tell you one of the things
21 that he didn't do correctly in this case. And it's going
22 to be brought up by the Defense, so I'm just going to go
23 ahead and tell you about it. Is when he did his report,
24 he didn't exactly put down in words exactly how it
25 happened as he saw it and as it occurred to him. And so

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1 you're going to hear from him. But not only are you
2 going to hear from him, we are also bringing the jailer
3 who was actually doing the search. And he's going to
4 tell you what he saw and witnessed.

5 Other people you're going to hear from is the
6 chemist. You're going to hear from the chain people,
7 what we call the chain people, which means who handled
8 the drugs back and forth so you know they haven't been
9 tampered or altered with. You will get to hear from all
10 of those people, and you will judge their credibility.
11 And you determine whether they're telling the truth or
12 they're not, you like them or you don't. You know,
13 that's all up to what each of y'all have to decide.

14 And at the end of this case, you'll be asked to
15 render a verdict, and a verdict that speaks the truth.
16 And at that point in time, I'm going to have an
17 opportunity to speak to y'all again. After you hear all
18 the evidence and the facts of this case, when it comes
19 time, I'm going to ask you to find him guilty of the
20 crime that he's been charged with.

21 Thank you.

22 THE COURT: Yes, sir.

23 MR. POTTER: May it please the Court.

24 THE COURT: Yeah.

25 OPENING STATEMENT

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1 BY MR. POTTER:

2 Ladies and gentlemen, the Government wants you to
3 convict Kevin of possession of crack cocaine based solely
4 on its word. What is the word of the Government? Let's
5 talk about that.

6 On April 19th, Deputy Surratt filled out a warrant.
7 This is the beginning process where a citizen is taken
8 into custody and locked up. And in this warrant, which
9 is sworn and verified to a magistrate judge, Deputy
10 Surratt wrote that on April 19th, 2009, Defendant Kevin
11 Jerome Gilliard from the County of Anderson did knowingly
12 have in his possession approximately forty-nine grams of
13 off-white -- excuse me rock-like substance which field
14 tested positive for crack cocaine base. This was found
15 during a lawful traffic stop. Sworn statement by the
16 deputy.

17 He's going to sit up there, but he's not going to
18 say that. He's not going to say that. He's going to
19 say, my bad. I made a mistake. This is not a situation
20 where you have no time left and you're trying to spike
21 the ball. This is serious stuff. Well, maybe he just
22 made one mistake. What is the word of the Government?

23 Every deputy has to fill out an incident report.
24 This is the summary of the case. This tells the
25 supervisor, his boss, the Solicitor as well as anybody

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1 else involved in the case the basic facts about it.
2 Deputy Surratt claims that he found the crack cocaine
3 inside Kevin's pants, a clear baggy containing an off-
4 white colored rock-like substance weighing approximately
5 fifty grams that did field test positive for crack
6 cocaine or cocaine base at a traffic stop.

7 That's the word of the Government. He's not going
8 to say that. He does a case summary which is presented
9 to the Grand Jury which makes an ultimate indictment
10 whether to charge Kevin with this offense or not. During
11 the course of a traffic stop, Demetrius Lavone Robertson
12 and Kevin Jerome Gilliard search incident to arrest was
13 found in possession of approximately fifty-four, fifty-
14 four grams of crack cocaine. It went from fifty -- went
15 from forty-nine in the warrant to fifty in the incident
16 report to fifty-four in the case summary that we
17 testified to to the Grand Jury. That's the word of the
18 Government. And they're asking you to convict Kevin on
19 that.

20 He's not going to say that when he gets up there.
21 That's what the evidence is going to show. He's going to
22 give you a different story. You get to decide what's the
23 truth. Is it when he signed the warrant? Is it when he
24 testified there, or is it something in between? Or was
25 there something else that hasn't been told? You get to

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1 make that decision.

2 But what's really interesting on this case is what
3 you won't see. We've got this neat system where we can
4 show videos here. We'll probably get a chance to see
5 some because we do use it. They can play videos up
6 there. I don't have a TV that big at my house. They
7 claimed they found this crack cocaine when they were
8 booking Kevin. I hazard to guess there's not a inch of
9 the Anderson County Detention Center that isn't under
10 video surveillance. Booking is under video surveillance.

11 That screen is going to remain black. Nothing is
12 going to be on that screen because there is no video.
13 It's been destroyed.

14 You need to consider and hear the testimony and the
15 evidence, and you need to consider whether or not that's
16 something that you would want to see. Why it was
17 destroyed. How it got destroyed. What was on that
18 video? That's the word of the Government.

19 A warrant that going to allege different facts than
20 what he testifies to. An incident report that gives
21 different facts than what he testifies to. A case
22 summary that gives different facts than what he testifies
23 to. And a video that will never be replayed that has a
24 clear view of what supposedly happened. That's the word
25 of the Government, and that's what they're wanting you to

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1 convict Kevin on. And that's not here.

2 Thank you.

3 THE COURT: Call your first witness.

4 MR. CAMPBELL: Your Honor, the State calls
5 Brandon Surratt.

6 MADAM CLERK: Place your left hand on the Bible
7 and raise your right.

8 (WHEREUPON, the witness was duly sworn.)

9 MADAM CLERK: If you'll go around and have a
10 seat in the witness chair, please, sir. If you'll state
11 your full name and spell your last name for the record,
12 please.

13 THE WITNESS: Brandon William Surratt, S-U-R-R-
14 A-T-T.

15 **BRANDON WILLIAM SURRATT,**

16 Being first duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. CAMPBELL:

19 Q. Mr. Surratt, you're currently employed with the
20 Anderson County Sheriff's Office?

21 A. Yes, sir, I am.

22 Q. And what position are you employed as?

23 A. Deputy.

24 Q. And how long have you been involved in law
25 enforcement?

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1 A. Approximately three years.

2 Q. And you say deputy, what does your duties consist
3 of?

4 A. Answering calls, responding to 9-1-1 calls,
5 enforcing traffic laws, assisting pedestrians.

6 Q. And were you employed in your current position on
7 April 19th, 2009?

8 A. Yes, sir, I was.

9 Q. On that date did you have an occasion to come into
10 contact with Kevin Gilliard?

11 A. Yes, sir.

12 Q. Is he present in the courtroom today?

13 A. That's correct.

14 Q. Can you identify him, please?

15 A. Yes, sir. He sitting there in the black and white
16 shirt.

17 Q. And I want to talk a little bit about how that came
18 about. Do you recall, first of all, what took place
19 before you came into contact with him?

20 A. Yes, sir. It was a traffic violation. While on
21 patrol, I observed a silver vehicle disregard a stop sign
22 in which the vehicle pulled out in front of another car
23 causing that vehicle to slow down which got my attention.
24 At that time I had to turn around on the vehicle that
25 disregarded the stop sign, which was a Silver Pontiac

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1 Grand Am. Once the vehicle that was in between us that
2 he pulled out in front of pulled off, I was able to
3 initiate the traffic stop.

4 Q. And to begin with, where was the stop sign located?

5 A. It was at Delia Street.

6 Q. Is that in Anderson County?

7 A. Yes, sir.

8 Q. And on that day, were you dressed like you are
9 today?

10 A. Yes, sir, I was.

11 Q. I mean the same type of uniform?

12 A. Yes, sir.

13 Q. And your patrol car, is it a marked unit?

14 A. That's correct.

15 Q. It has Anderson County Sheriff's Office, blue lights
16 on top and everything?

17 A. Yes, sir.

18 Q. And does your car have video capabilities?

19 A. It does not have video.

20 Q. Do many of the cars at the Sheriff's Office do?

21 A. To my knowledge the traffic division is the only
22 division that has videos in their car.

23 Q. How many cars is that?

24 A. Maybe seven or eight.

25 Q. Out of how many cars do you think you have at the

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1 Sheriff's Office?

2 A. A hundred.

3 Q. And as a result of that -- well, let me back up. On
4 that day, how was the weather?

5 A. It was clear, sunny. It was two o'clock in the
6 afternoon.

7 Q. Do you recall what day it was?

8 A. Sunday.

9 Q. And you initiated a traffic stop. He didn't attempt
10 to run or anything? The driver of this car didn't
11 attempt to run; is that right?

12 A. No, sir. When I initiated my blue lights, they
13 immediately pulled over.

14 Q. And did you have an occasion to talk to the driver?

15 A. I conducted a driver's-side approach where I walked
16 up to the driver's side of the vehicle. I asked the
17 driver in the vehicle for his license, registration and
18 proof of insurance. He could not provide any of the
19 three. At that time he gave me his name -- it was
20 Demetrius Robertson -- and his date of birth. As I was
21 speaking to him, after he gave me his name, I checked
22 through County dispatch. They advised that he was under
23 suspension.

24 I smelled a strong odor of marijuana coming from
25 inside the vehicle. I observed Mr. Gilliard, the

1 Defendant, with his right fist clenched. I asked if he
2 would open it for my safety because I was unsure of what
3 was in his hand. He opened it. And as he opened it, it
4 was a partially smoked marijuana cigarette. I even asked
5 him, what is that? And he said, this is the marijuana
6 that I smoked earlier today. I asked him to place it on
7 the dash.

8 At that time, I placed the driver, Mr. Robertson, in
9 custody. I was the only deputy on scene, officer.
10 Placed him in custody. I did a quick pat down for
11 weapons for my safety. I wasn't able to do a thorough
12 search on scene because I was by myself. At that time I
13 walked Mr. Robertson to my vehicle, placed him in the
14 back.

15 Walked back up to Mr. Gilliard. I asked him to step
16 out of the vehicle. He did so. I placed him in
17 handcuffs. I did a quick pat down of weapons for my
18 safety once again. I felt a small bulge in his right
19 watch pocket, which I did remove that item. And it
20 turned out to be marijuana. I placed him in the back of
21 my patrol car.

22 Q. And at this time, he was being placed under arrest
23 for having the marijuana cigarette; is that right?

24 A. Yes, sir.

25 Q. Now, I'm going to show you what's been marked for

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1 identification as State's Exhibit 1. Deputy Surratt, I'm
2 going to hand this up to you. Can you please identify
3 what State's Exhibit 1 is?

4 A. Yes, sir. This here, the cigarette material, was
5 what was in his right hand. The green leafy like
6 substance in the clear bag was what was in his front
7 right watch pocket.

8 Q. And this is what you removed off of him; is that
9 right?

10 A. Yes, sir.

11 Q. And as a result, did you take this into your
12 possession?

13 A. Yes, sir.

14 Q. Now, after that -- let me ask you a question. Did
15 Mr. Gilliard -- did he look like he looks today? Is this
16 how he was dressed and how his hair and everything was
17 that day?

18 A. No, sir. The day of the incident, he had small
19 dread locks or small twisties. He also had facial hair,
20 had baggy clothing.

21 Q. And do you typically come across people in your line
22 of work that like to wear their clothes really baggy or
23 lose?

24 A. Yes, sir, on a regular basis.

25 Q. And in your opinion, does that make it kind of hard

1 to search someone thoroughly?

2 MR. POTTER: Objection, Your Honor.

3 A. It does.

4 THE COURT: Hold on a -- hold on a minute.

5 What's the objection?

6 MR. POTTER: Judge, I don't think he is
7 qualified to make that type of opinion or testimony to
8 this jury.

9 THE COURT: Well, if you can lay some
10 foundation. If he knows, he can answer. Re-ask the
11 question.

12 MR. CAMPBELL: I think he kind of already gave
13 his answer.

14 THE COURT: Yeah, I know. Yeah.

15 MR. CAMPBELL: I'll ask it again.

16 Q. Now, in -- so searching Mr. Gilliard at the scene,
17 you were still by yourself; is that right?

18 A. That's correct.

19 Q. Had any backup units arrived?

20 A. No, sir.

21 Q. And you did a quick pat down -- and your testimony
22 was -- for weapons for your safety; is that right?

23 A. That's correct.

24 Q. As a result of that -- after that, you placed him in
25 handcuffs, or he was already in handcuffs at the time?

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1 A. He was already in handcuffs when I conducted a pat
2 down of weapons, and then I placed him in the back of my
3 patrol car.

4 Q. Did backup eventually arrive?

5 A. Backup arrived after I had both subjects in custody
6 in the back of my patrol car.

7 Q. And at any point after that, did you or any of the
8 other officers on the scene get Mr. Gilliard back out of
9 the car and redo another pat down search upon him?

10 A. No, sir. Some more officers arrived on the scene.
11 They did not remove neither subject out of the vehicle.

12 Q. Now, after that you transported him to the detention
13 center?

14 A. That's correct.

15 Q. Let me step back. How many other officers arrived
16 on the scene?

17 A. Three other officers arrived on the scene.

18 Q. And were they all from the Sheriff's Office?

19 A. No, sir. Two were from Anderson City, and one was
20 from the Sheriff's Office.

21 Q. And did you request or call out for Anderson City
22 officers to come to your scene or stop?

23 A. No, sir.

24 Q. And did you actually make a call out to any of your
25 fellow deputies to come back you up?

1 A. I asked if anyone was available if they would be in
2 route to my location. The deputy, me and Deputy Nubern,
3 we work close together. On a normal traffic stop, we're
4 already in route to each other in case we need each other
5 so that there's not a time frame between the time of the
6 stop till the time another deputy arrives on the scene
7 because the county is so large.

8 Q. And that occurred -- he did eventually show up as a
9 backup?

10 A. Yes, sir.

11 Q. Now, you took him to the detention center. And at
12 that point in time y'all started in the booking process;
13 is that right?

14 A. Yes, sir.

15 Q. And when you do the booking process, were you
16 present during the entire time?

17 A. That's correct. I was.

18 Q. Now, what, if anything, if you could tell the ladies
19 and gentlemen of the jury, happened during this booking
20 in process?

21 A. Mr. Gilliard, I asked him to step out of my patrol
22 car. There's three doors in intake. I took him to the
23 first door. We walked in to the door. There's a window
24 there. There's a deputy behind the window that asks all
25 the medical problems, if there's any kind of medical

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1 problems they need to know about, if they have been
2 hospitalized recently, that sort of thing, for their
3 records. Then there's a deputy that comes around and
4 conducts a thorough search of the person that you're
5 bringing in for weapons, contraband, et cetera, so
6 nothing illegal is brought into the jail.

7 Q. And did y'all start the process as you normally do?

8 A. That's correct.

9 Q. The booking process. Was Mr. Gilliard booked in
10 according to normally the way y'all do it?

11 A. Yes, he was.

12 Q. And were you present when Deputy Lunz was searching
13 him for contraband?

14 A. Yes. I was standing right behind him.

15 Q. And how was his demeanor, or how did he act when
16 this was going on?

17 A. When we bring them into the booking room, what they
18 do is they remove the handcuffs. If they have on baggy
19 clothing, they try to pull them up. If they have on
20 regular clothing, they make sure that they're up around
21 the waist. He asked him to place his hands on the wall.
22 That way he can feel under his arms all the way up and
23 down his arms, all that. He did so. He kept asking him
24 to spread his feet. You spread their feet so that you
25 can conduct a thorough pat down in-between their thighs

1 and legs in case there's nothing that's taped to inside
2 of their legs and so on.

3 He didn't want to move his legs apart. He kept
4 holding them together. He kept holding them together.
5 Deputy Lunz kept pushing them apart with his foot, kept
6 pushing them apart. And eventually a clear baggy
7 containing crack cocaine fell from his pant leg onto the
8 ground in the booking process.

9 Q. And did you see it fall out of his pants?

10 A. That's correct. I did.

11 Q. Now, when you walked into the booking area, did you
12 happen to see the floor before y'all started this
13 process?

14 A. Yes, sir.

15 Q. Did you notice anything on the floor when you walked
16 in?

17 A. There was nothing on the floor.

18 Q. I'm going to show you what's been marked for
19 identification State's Exhibit Number 2. If you would
20 please look at this, sir. And if you'll please identify
21 what this is?

22 A. Yes, sir. That's the crack cocaine that fell from
23 his pant leg.

24 Q. And at this point did you take possession of it?

25 A. That's correct. Once it fell on the ground, Deputy

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1 Lunz told him not to move. He held him in position, and
2 I reached down and recovered the item from the floor.

3 MR. CAMPBELL: Your Honor, can I show this to
4 the jury?

5 THE COURT: Any objection?

6 MR. POTTER: No objection, Judge.

7 THE COURT: All right. Without objection.

8 MR. CAMPBELL: Just let the record reflect I'm
9 just going to walk by in front of the jury box and let
10 the jurors have an opportunity to look at it.

11 Q. This -- number 2 -- and this is the item that you
12 took -- that you picked up off the floor at his feet?

13 A. That's correct.

14 Q. And you didn't locate this at the scene of the
15 traffic stop; is that right?

16 A. That's correct.

17 Q. And when you were doing the search of his person at
18 the traffic stop, did you feel around his crotch area or
19 in the back of his pants?

20 A. Where I felt was normally where weapons would be
21 kept which is in the waistband and down toward your feet.
22 So I conducted a quick pat down of his waist area,
23 reached down and felt both ankles. Since I was the only
24 deputy on the scene, I couldn't spend a whole lot of time
25 conducting a thorough search. If there would have been

1 two more -- or another deputy there, it would have been a
2 lengthier search instead of just a quick pat down for
3 weapons for my safety and placing him in the back of my
4 patrol car.

5 Q. And as a result of finding this, what, if anything,
6 did you do next?

7 A. Once a large amount of dope is recovered on a
8 traffic stop or just on any occasion, it's standard
9 procedure to notify your supervisor, which I did.
10 Normally the supervisor, if he feels it necessary to
11 notify the narcotics division, he does. At that time he
12 did notify the narcotic division, and one of the officers
13 wanted me to bring both subjects over to the Sheriff's
14 Office. That way he could interview each one of them.

15 Q. And after that did you bring him back?

16 A. That's correct.

17 Q. And y'all finished the booking in process?

18 A. Before we took them to the Sheriff's Office, we
19 conducted a thorough pat down or search of each
20 individual person, Mr. Robertson and Mr. Gilliard, which
21 was completely remove their clothing all the way. There
22 was nothing else found. Then at that time, we took them
23 to the Sheriff's Office.

24 Q. You didn't perform that, but the deputies at the
25 jail did; is that correct?

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1 A. I was with the deputies at the jail when they
2 performed it.

3 Q. You were present while they did it?

4 A. They did it. I was present in case any more
5 contraband was located on their person.

6 Q. Now, after that, as Mr. Potter talked about in his
7 opening statement, you wrote a report; is that right?

8 A. That's correct.

9 Q. Can you just read to the ladies and gentlemen of the
10 jury what exactly you wrote in your report regarding what
11 you found?

12 A. In the report?

13 Q. Yeah. It should be on page two.

14 A. Search incident into arrest, I located inside
15 Kevin's pants a clear plastic baggy containing off-white
16 colored rock-like substance weighing approximately fifty
17 grams that did test positive for crack cocaine base.

18 Q. For cocaine ---

19 A. For cocaine base. I'm sorry.

20 Q. And cocaine base is another name for crack cocaine;
21 is that right?

22 A. That's correct.

23 Q. And when you weighed this, did you weigh the bag?
24 Did you weigh this right here? What's identified as for
25 identification State's Exhibit Number 2. Did you weigh

1 this there at the Sheriff's Office?

2 A. I did.

3 Q. Did you weigh it with the bag and everything?

4 A. It was weighed inside a clear black -- clear plastic
5 baggy which did not give the exact weight of the item
6 that was found on his person.

7 Q. And to your knowledge, were those scales certified
8 to the weight?

9 A. To my knowledge they were not certified. They had
10 not been calibrated or anything.

11 Q. And the purpose of your -- of this weighing was for
12 what?

13 A. To get an estimation of the weight that was located.

14 Q. And you weren't expecting it to be exactly accurate
15 when you did this initial weigh; is that fair to say?

16 A. That's correct.

17 Q. Now -- so the way you had written it up in your
18 report is not exactly in words how it actually happened.
19 Would you agree with that?

20 A. That's correct. I did make a mistake.

21 Q. And does it change your testimony what you're
22 stating today?

23 A. No, sir.

24 Q. And as a result of you finding this, you did
25 eventually charge him with trafficking in crack cocaine;

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1 is that right?

2 A. That's correct.

3 MR. CAMPBELL: Court's indulgence, please.

4 Q. A couple other questions I forgot to ask you here is
5 that before April 19th, 2009, had you ever come into
6 contact with Mr. Gilliard?

7 A. No, sir. I've never came in contact with him.
8 Never met him.

9 Q. And did you just like plant this dope on him or
10 anything?

11 A. No, sir. I wouldn't do that.

12 Q. I have no further questions. Please answer any
13 questions, Deputy Surratt, that Mr. Potter may have.

14 CROSS EXAMINATION

15 BY MR. POTTER:

16 Q. Deputy, did I hear you correctly, when you weigh
17 crack cocaine you're using a scale that's not calibrated
18 or correct; is that correct?

19 A. That's correct. They do not issue calibrated scales
20 ---

21 Q. Okay. So you're weighing ---

22 A. --- to deputies.

23 Q. Excuse me. I'm sorry. Go ahead. I didn't mean to
24 cut you off.

25 A. They don't issue calibrated scales to deputies.

1 Q. Okay.

2 A. I mean, I weighed it on several occasions. Each
3 time I weighed it, it went between like forty-nine and
4 fifty-four grams. So that tells you the different
5 variants of the scales, depending on which ones you use.

6 Q. So when you decide to charge somebody based upon the
7 weight amount of any drugs, you're relying on a scale
8 that's not correct, not accurate?

9 A. Well, I believe that's why they give you such a wide
10 range, twenty-eight grams to a hundred grams.

11 Q. Okay.

12 A. I believe it's in between.

13 Q. I understand that. But when you decide to charge
14 somebody, you're using an inaccurate scale, correct?

15 A. It's not calibrated, no, sir.

16 Q. Okay. Now, you made a point -- you made a point
17 when you got to booking to make sure the floor was clear,
18 correct?

19 A. That's correct, I did.

20 Q. And the floor was clear when Kevin was brought into
21 booking, correct?

22 A. That's correct. There was nothing on the floor.

23 Q. Okay. Now, you understand the process of signing
24 the warrant and having the warrant served and what that
25 involves, correct?

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1 A. That's correct.

2 Q. And you were trained through -- in the Police
3 Academy down at SLED?

4 A. They don't teach you how to type warrants.

5 Q. I understand that. But they tell you the importance
6 of that the warrants have to allege facts related to
7 probable cause of a case, and it's a sworn statement that
8 has to be verified by a magistrate, correct?

9 A. Yes, sir, that's correct.

10 Q. And that's in essence the beginning process of your
11 case for the court system, correct?

12 A. Yes, sir.

13 Q. Well, one of the beginning processes. It's a blue
14 ticket, correct?

15 A. That's correct.

16 Q. And you chose to issue a warrant obviously against
17 Kevin, correct?

18 A. That's correct.

19 Q. All right. And you were the one who typed it out
20 and filled it out, correct?

21 A. That's not correct. No, sir. We have a -- the
22 judge has a secretary that types up the warrants.

23 Q. Okay. But you signed the warrant?

24 A. Yes, sir, I did.

25 Q. And you read the warrant before you sign it, right?

1 A. That's correct.

2 Q. Did you read this warrant before you signed it?

3 A. Yes, sir, on top of the other charges also.

4 Q. And you read the warrant and you signed it even
5 though the facts were not correct from what you just
6 testified to today, correct?

7 A. Do you mind letting me see the warrant?

8 Q. Sure.

9 MR. POTTER: I have provided -- Judge, just for
10 clarification, this is a copy of the warrant provided by
11 the Government related to this case.

12 A. Yes, sir. Everything that I testified is true.

13 Q. Okay. But what's in the warrant is not what you
14 testified to today?

15 A. I'm not understanding what you're asking. What are
16 you saying that I've testified to that's not in the
17 warrant?

18 Q. Okay. Can I have the warrant?

19 A. Yes, sir.

20 Q. The drugs were found during a lawful traffic stop;
21 is that correct?

22 A. That's correct. They were found during a lawful
23 traffic stop.

24 Q. Okay. But you testified the drugs were found in
25 booking?

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1 A. It was a lawful traffic stop where the drugs were
2 found.

3 Q. The incident occurred on Brown Street and Market
4 Street. Is that where the detention center is located?

5 A. No, sir. That's where the traffic stop occurred.

6 Q. Okay. I understand. But the drugs weren't found at
7 the corner of Brown Street and Market Street, and they
8 weren't found during a lawful traffic stop; they were
9 found when you were booking him. Is that correct?

10 A. That's correct. I'm not saying in the warrant that
11 they were found on the traffic stop on the side of the
12 road; I'm saying that it occurred during a lawful traffic
13 stop.

14 MR. POTTER: Can we have that marked, please?

15 Judge, this is a copy that was provided by the
16 State. I want to ask that it be marked as Defense
17 Exhibit 1.

18 THE COURT: All right.

19 MR. CAMPBELL: I couldn't hear you.

20 MR. POTTER: It's the warrant that you
21 provided.

22 MR. CAMPBELL: No objection from the State,
23 Your Honor.

24 THE COURT: Without objection.

25 (WHEREUPON, Defendant's Exhibit Number 1 was marked

1 for identification only.)

2 Q. And this is your signature on the warrant?

3 A. Yes, sir.

4 MR. POTTER: Judge, we'd ask that this be moved
5 into evidence.

6 THE COURT: Any objection?

7 MR. CAMPBELL: None from the State.

8 (WHEREUPON, Defendant's Exhibit Number 1 was
9 admitted into evidence.)

10 MR. POTTER: May I publish it to the jury?

11 THE COURT: Sure.

12 (WHEREUPON, Mr. Potter presented document to the
13 jury.)

14 Q. Now, Deputy, as the jury is looking at your warrant
15 that you signed -- a warrant is a sworn statement for
16 probable cause in a case, correct?

17 A. That's correct.

18 Q. All right. The magistrate puts you under oath,
19 correct?

20 A. That's correct.

21 Q. All right. As a matter of fact, the typical form of
22 a warrant will indicate that you've been duly cautioned
23 and sworn, correct?

24 A. That's correct.

25 Q. All right. And that's what happened when this

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1 warrant was signed, correct?

2 A. That's correct.

3 Q. That is your signature on the warrant?

4 A. Yes, that's my signature.

5 Q. Now, the incident report that you completed --

6 again, through your training, incident reports are case

7 summaries to be used by you and the Solicitor's Office;

8 is that correct?

9 A. An incident report?

10 Q. Yes, sir.

11 A. Yes, sir. The Solicitor's Office gets a copy as

12 well as it goes to the State.

13 Q. Right. And typically these items are turned over to

14 defense attorneys as part of their discovery request,

15 correct?

16 A. I'm not sure what the defense attorney ---

17 Q. Okay. Typically they are because I got a copy from

18 the State.

19 A. Okay.

20 Q. When you complete an incident report, in your

21 training you were told to be as concise and as accurate

22 as possible, correct?

23 A. Yes, sir. Be as thorough as you can or as you can

24 remember.

25 Q. I understand. And the incident report -- when you

1 complete an incident report, it is then submitted to a
2 supervisor for ---

3 A. That's correct.

4 Q. --- approval?

5 A. A supervisor has to sign off on it.

6 Q. Okay. And you did that on this case as well; is
7 that correct?

8 A. That's correct. I believe Sergeant Callahan
9 approved the report.

10 Q. Right. Now, you read from the incident report
11 earlier when Mr. Campbell was questioning you. And
12 specifically on the second page -- and you do have it in
13 front of you -- you indicated that search incident to the
14 arrest I located Kevin's pants a clear -- inside Kevin's
15 pants a clear plastic baggy containing an off-white
16 colored rock-like substance weighing approximately fifty
17 grams that did field test positive for cocaine base.

18 Where did you field test this at?

19 A. At the Sheriff's Office.

20 Q. Okay. So you didn't ---

21 A. I'm sorry. I'm sorry. Hold on. Yeah. This one --
22 I apologize. This one was -- field tested positive at
23 the Sheriff's Office.

24 Q. Okay. And this was -- and if you look immediately
25 before where the sentence begins, I went around to the

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1 passenger side -- do you see where I'm reading from? I
2 went around to the passenger side. It looks like the
3 third sentence.

4 A. Yes, sir.

5 Q. This is your words. I went around to the passenger
6 side of the vehicle and asked Kevin to step out of the
7 vehicle. I advised him that he was also under arrest.
8 Before Kevin stepped out of the vehicle, I observed a
9 brown bag. Then you went on further, when Kevin stepped
10 out of the vehicle, and I placed handcuffs, double locked
11 them, and that's when -- the reading of this incident
12 report -- is when you found the cocaine in his pants,
13 correct?

14 A. That's correct. That's where I had made the mistake
15 in my report writing.

16 Q. Okay. So that's not accurate to what you're
17 testifying to today, correct?

18 A. Yes, sir. That's where I made a mistake in the
19 report.

20 Q. Okay. And this is an incident report that you need
21 to -- you have to submit to a supervisor to get approved,
22 correct?

23 A. That's correct.

24 Q. It's important to be accurate, isn't it?

25 MR. CAMPBELL: Objection, Your Honor. We've

1 already been down this road. We've been beating this ---

2 MR. POTTER: Judge, this is my cross
3 examination.

4 MR. CAMPBELL: --- for the last ten minutes.

5 THE COURT: All right.

6 MR. CAMPBELL: It's asked and answered.

7 THE COURT: All right. I'll allow you one more
8 time. You can ask the question. Overruled.

9 Q. Now, Deputy, you also -- there's also what's called
10 a case summary. Are you familiar with that? Can you ---
11 this is what I'm talking about.

12 A. I'm familiar.

13 Q. Is this something that you complete?

14 A. Yes, sir. We have ten days to turn that in to the
15 Solicitor's Office.

16 Q. Okay. And the case summary is a summary -- this is
17 -- I'm reading from the document. Do you need to take a
18 look at it first?

19 A. (No verbal response)

20 Q. It says, summary should be in chronological order
21 stating facts of the case, evidence to prove the guilt of
22 the Defendant, information you would present to the Grand
23 Jury. Did you testify to the Grand Jury on this case?

24 A. No, sir, I did not.

25 Q. So what happens is a representative of the Sheriff's

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1 Office is given this and is told, this is what the case
2 is about, and they testify to the Grand Jury?

3 A. That's correct.

4 Q. And in that case summary you wrote that during the
5 course of a traffic stop Demetrius Robertson and Kevin
6 Jerome Gilliard, search incident to arrest, were found to
7 be in possession of approximately fifty-four grams of
8 crack cocaine; is that correct?

9 A. That's correct.

10 Q. But it wasn't a traffic stop where you found the
11 drugs?

12 A. I don't believe I put that I found it on the ---

13 Q. Excuse me. It wasn't -- the search ---

14 A. --- on the side of the road.

15 Q. --- incident to arrest at the scene is not where you
16 found the drugs?

17 A. I don't believe I put that in there.

18 Q. Okay. The search -- it was in your case report and
19 case summary you said, search incident to arrest,
20 correct?

21 A. That's correct.

22 Q. And it's your testimony today that that search
23 incident to arrest relates to what was found at booking,
24 correct?

25 A. On the crack cocaine charge, because once they're

1 taken into custody, it's still search incident to arrest
2 if anything else is found on their person at the jail or
3 if anything else is found.

4 Q. You also indicated in your incident report that it
5 was search incident to arrest, meaning after you took him
6 out of the car, correct?

7 A. Yes, sir. I believe I've said that three times
8 where I messed up in the report writing.

9 Q. Okay. So you were cautious enough to check the
10 floor when you got to booking, but you weren't cautious
11 enough to make sure the warrants and your incident report
12 were correct on this case; is that correct, Deputy?

13 A. I believe the warrants are correct, but I made a
14 mistake in the report where I didn't put exactly where.

15 Q. Well, the jury is looking at the warrant right now.

16 A. Okay.

17 THE JUROR: Here you go.

18 MR. POTTER: If you're through.

19 Q. Again, the warrant says that you found it on a
20 lawful traffic stop at a incident on Brown Street and
21 Market Street.

22 A. Is there periods in between there from where it was
23 located and ---

24 Q. This was found during a lawful traffic stop period,
25 correct?

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1 A. That's correct.

2 Q. You didn't find the drugs at a lawful traffic stop,
3 correct?

4 A. (No verbal response)

5 Q. This incident did occur on Brown Street and Market
6 Street, come, Anderson, come, South Carolina, period.

7 You didn't find them there; did you?

8 A. I didn't find them on Brown Street; that's correct.
9 I found them at the detention center.

10 Q. Deputy, did a -- did John Wilkerson from the City of
11 Anderson come to the scene?

12 A. That's correct.

13 Q. Okay. And he's with the County of Anderson now as a
14 deputy?

15 A. That's correct, he is.

16 Q. And isn't it true that Kevin -- that Wilkerson did
17 another pat down of Kevin?

18 A. That's not true. I was the only one that did a pat
19 down of Kevin and Demetrius ---

20 Q. Okay.

21 A. --- before I placed them in the back of my patrol
22 car.

23 Q. So at no time when you were taking a pat down of
24 Demetrius, Wilkerson didn't pull Kevin out of the car and
25 do another quick pat down?

1 A. No, sir. Once again, I was the only deputy on the
2 scene, only officer on the scene, during the beginning of
3 the traffic stop. Once I had placed both subjects under
4 arrest, I placed them in the back of my patrol car. At
5 that time, that is when other officers and Deputy Nubern
6 arrived on scene.

7 MR. POTTER: Nothing further, Judge. Thank
8 you.

9 THE COURT: All right. Anything on redirect?

10 MR. CAMPBELL: Yes, sir.

11 REDIRECT EXAMINATION

12 BY MR. CAMPBELL:

13 Q. Now, Deputy Surratt, going into Defense Exhibit
14 Number 1, referring to in this warrant the actual weight
15 of it, you put in forty-nine grams; is that correct?

16 A. That's correct. That's what I put on the warrant,
17 yes, sir.

18 Q. And what is the word exactly -- directly before the
19 forty-nine grams?

20 A. Approximately.

21 Q. And in your report, when you stated how much -- how
22 many grams you thought was there, was it an exact amount
23 or was it approximate?

24 A. Before it, it says, weighing approximately fifty
25 grams.

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Brandon William Surratt - Redirect Examination by Mr. Campbell

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1 Q. Do you rely upon the official weight done by the lab
2 as your actual weight?

3 A. That's correct. To make the charge?

4 Q. No. As the actual end weight ---

5 A. The actual weight is -- once it's sent off to crime
6 analysis, they send you an exact weight of the amount of
7 drugs that you send to be tested.

8 Q. And that was done in this case; is that right?

9 A. That's correct.

10 Q. And everything -- I know we've been talking about
11 when everything occurred, but everything was a result of
12 a lawful traffic stop?

13 A. That's correct.

14 Q. In fact, you and I discussed this case prior to
15 coming to court, did we not?

16 A. Yes, sir, we did.

17 Q. And you knew you were going to be beat up on your
18 report writing; is that right?

19 A. Yes, sir.

20 MR. POTTER: Objection to the phrase beat up,
21 Your Honor.

22 THE COURT: Yeah, sustained.

23 Q. You knew you were going to be questioned thoroughly
24 by Mr. Potter regarding your report writing; is that
25 right?

1 A. Yes, sir, that's correct.

2 Q. And the fact that what you've written in your
3 report, does that change anything in your testimony
4 today?

5 MR. POTTER: Objection, Your Honor.

6 A. It does not.

7 THE COURT: Pardon?

8 MR. POTTER: Objection, Your Honor.

9 THE COURT: What's the objection?

10 MR. POTTER: Judge, I think this is cumulative,
11 it violates 403, and he's bolstering his witness.

12 THE COURT: Try to avoid that on redirect.
13 Overruled on this one.

14 Q. You didn't place crack cocaine in his pants, did
15 you?

16 A. No, sir.

17 Q. Did you see Officer Lunz place the crack cocaine in
18 his pants?

19 MR. POTTER: Objection. That's outside the
20 scope of cross, Your Honor. I didn't make any reference
21 to whether he planted drugs or anything like that. I
22 honestly -- that's a serious allegation, Your Honor. I
23 did not make that, and that goes far outside the scope of
24 cross examination.

25 THE COURT: Sustained.

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1 MR. CAMPBELL: I have no further questions.

2 THE COURT: All right.

3 MR. POTTER: Nothing further, Judge.

4 THE COURT: Thank you, sir. You can step down.

5 THE WITNESS: Thank you.

6 THE COURT: Y'all approach for a minute. Let
7 me ask you something.

8 (WHEREUPON, a bench conference was held off the
9 record.)

10 THE COURT: All right. Ladies and gentlemen,
11 we are going to take a ten-minute break and then we'll be
12 back in. Please don't discuss the case.

13 (WHEREUPON the jury exited the courtroom at
14 approximately 12:24 p.m. after which court stood at
15 recess for a short break.)

16 THE COURT: You can bring them in.

17 (WHEREUPON the jury entered the courtroom at
18 approximately 1:43 p.m.)

19 THE COURT: All right. Ladies and gentlemen,
20 we're going to go for about fifteen, twenty more minutes
21 max, and then we'll give you lunch break for an hour and
22 a half and then we'll start back this afternoon. Thanks
23 for your patience.

24 Yes, sir?

25 MR. CAMPBELL: Your Honor, can we just quickly

1 approach for a second?

2 THE COURT: Uh-huh (affirmative).

3 (WHEREUPON, a bench conference was held off the
4 record.)

5 MR. CAMPBELL: Your Honor, the State's going to
6 call Deputy Andrew Lunz.

7 THE COURT: All right.

8 MADAM CLERK: If you'll come around, please,
9 sir, to be sworn. Place your left hand on the Bible and
10 raise your right.

11 (WHEREUPON, the witness was duly sworn.)

12 MADAM CLERK: If you'll go around and have a
13 seat right there in the witness chair, please, sir. If
14 you'll state your full name and spell your last name for
15 the record?

16 THE WITNESS: Andrew Lunz. Last name is
17 spelled, L-U-N-Z.

18 MADAM CLERK: Thank you.

19 ANDREW LUNZ,

20 Being first duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. CAMPBELL:

23 Q. Mr. Lunz, you're employed with the Anderson County
24 Sheriff's Office?

25 A. Yes, sir.

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Andrew Lunz - Direct Examination by Mr. Campbell

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1 Q. How long have you been in law enforcement?

2 A. It will be two years December 17th.

3 Q. And what are your duties or where do you work at in
4 the Sheriff's Office?

5 A. I'm assigned to the detention center.

6 Q. And you've been there for two years?

7 A. Yes, sir.

8 Q. Now, on -- were you working on April 19th, 2009?

9 A. Yes, sir, I was.

10 Q. On that day did you have an occasion to come into
11 contact with Kevin Gilliard?

12 A. Yes, sir, I did.

13 Q. Is he in the courtroom today?

14 A. Yes, sir, he is.

15 Q. Can you please identify him?

16 A. He's the gentlemen sitting in the middle of that
17 table with the striped shirt.

18 Q. And on that day, were you the jailer at the
19 detention center that booked him in when he was brought
20 in by Deputy Surratt?

21 A. Yes, sir. We had one officer that was inside the
22 window doing the paperwork, and I was out inside the
23 booking area with the individual.

24 Q. And how big is this booking area?

25 A. I'm not sure on measurements. But if I held my arms

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1 out, I could probably touch both walls on each side.

2 Q. Is it long too?

3 A. It's short on both sides.

4 Q. If I walk to you, tell me when to stop.

5 A. Stop.

6 Q. So you're looking at maybe eight feet approximately?

7 A. Yes, and it's even shorter on the lip.

8 Q. And can you briefly just tell the ladies and
9 gentlemen of the jury what do y'all do during the booking
10 process at the jail?

11 A. When they're first brought in, we have to go through
12 the medical questionnaire along with the property form
13 and get all the individual's personal property off of
14 them as well as a pat down to find any contraband that
15 would be against the policies and procedures of the
16 detention center.

17 Q. And prior to this day, did you know Mr. Gilliard?

18 A. No, sir, I didn't.

19 Q. Never seen him before?

20 A. No, sir.

21 Q. And was the normal booking procedure or process
22 performed on Mr. Gilliard?

23 A. Yes, sir, it was.

24 Q. And you stated that someone else took his medical
25 information. What was your duties?

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Andrew Lunz - Direct Examination by Mr. Campbell

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1 A. They went through the medical questionnaire with
2 him. And once that is completed, he has to turn all his
3 property -- you have to get down to one shirt, one pair
4 of pants, remove your belt. Any extra clothing, jewelry,
5 anything like that goes into the property.

6 Q. And were you the only jailer present during the pat
7 down of Mr. Gilliard?

8 A. Yes, sir.

9 Q. And just briefly tell the ladies and gentlemen of
10 the jury what transpired or took place when you attempted
11 to do this pat down?

12 A. All right. I have a procedure that I follow. I ask
13 them to place their hands up high on the wall and spread
14 their feet out. I could tell Mr. Gilliard was acting
15 nervous, and he kept fidgeting around. He wouldn't
16 spread his feet for me. He just kept kind of moving
17 around, kind of turning his whole body facing the
18 opposite direction. He would not stand with his back
19 facing me and spread his feet. I asked him a
20 considerable amount of times to do such.

21 Q. Did he eventually spread his feet?

22 A. I had to -- I was holding on to the back of his
23 pants. He was wearing baggy pants. And I was holding on
24 to the back of his pants. And I had to assist him in
25 spreading his feet by taking my hand and patting the left

1 side of the knee out. And finally he spread his feet.

2 Q. And was Officer -- Deputy Surratt, was he present
3 while this was going on?

4 A. Yes, sir, he was.

5 Q. But you were the only one who was handling him; is
6 that correct?

7 A. Yes, sir.

8 Q. Doing the pat down?

9 A. Yes, sir.

10 Q. And what, if anything, happened during this pat
11 down?

12 A. Well, he was fidgeting around a lot. And when I
13 finally got him to spread his feet, I heard something hit
14 the floor next to his left foot. And as I looked down --
15 Deputy Surratt happened to look down at the same time --
16 and I witnessed a plastic baggy laying in the floor next
17 to his left foot.

18 Q. And prior to conducting this pat down, had you
19 looked at the booking room area to see if there was
20 anything on the floor prior to doing this?

21 A. Yes, sir. Whenever I walk into that area, I always
22 look in the floor. It's such a small area, it's easy to
23 just look in the floor.

24 Q. And as a result, I want to show you what's been
25 marked for identification as State's Exhibit Number 2.

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Andrew Lutz - Direct Examination by Mr. Campbell

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1 Can you please identify what this is, sir?

2 A. Yes. That's what fell out of his left pant leg.

3 Q. Out of his left pants leg; is that what you said?

4 A. Yes, sir.

5 Q. Now, you didn't pick this up off the floor, did you?

6 A. No, sir, I did not.

7 Q. Deputy Surratt handled all of that?

8 A. Yes, sir. We saw it at the same time. And I still
9 had my hands conducting the pat down search, and Deputy
10 Surratt bent over and picked it up out of the floor.

11 Q. As a result of this, did you do a more thorough
12 search?

13 A. Yes, sir, I did.

14 Q. And I'm assuming that's what you call a strip
15 search?

16 A. Yes, sir.

17 Q. And nothing else was found; is that right?

18 A. No, sir.

19 Q. Now, when you find narcotics or something like this
20 comes off of the person being brought into the detention
21 center to be booked, do you report it to your supervisor?

22 A. Yes, sir, we do.

23 Q. And in this case, did you do an incident report?

24 A. No, sir, I did not.

25 Q. And what is the purpose or the reason why?

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Andrew Lunz - Direct Examination by Mr. Campbell

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1 A. The reason I did not do a report on this is because
2 the arresting and charging deputy, Deputy Surratt, was in
3 the area when this fell out of his pants leg. And I knew
4 he was doing a report on the incident, so ...

5 Q. And did you notify your supervisor that this
6 quantity of drugs was found?

7 A. Yes, sir, I did.

8 Q. Now, the other individual that was with him,
9 Demetrius Robertson, did y'all also conduct a search of
10 him?

11 A. Yes, sir. Once this item was found, we brought Mr.
12 Robertson in, and he was also stripped searched.

13 Q. Was anything found on him?

14 A. No, sir.

15 Q. And before this time, you never saw this crack
16 cocaine; is that right?

17 A. No, sir, I did not.

18 Q. You didn't plant it on him, did you?

19 A. No, sir, I did not.

20 MR. POTTER: Objection.

21 THE COURT: What's your objection?

22 MR. POTTER: Again Judge, I think that's trying
23 to bolster his witness, not to mention the fact it's not
24 relevant and it violates 403.

25 THE COURT: Overruled. I think that's a

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1 legitimate question.

2 Go ahead.

3 MR. CAMPBELL: Your Honor, I have no further
4 questions of Deputy Lunz.

5 Please answer any questions Mr. Potter may have.

6 MR. POTTER: May it please the Court. Judge,
7 can I approach?

8 (WHEREUPON, a bench conference was held off the
9 record.)

10 THE COURT: Ladies and gentlemen, we've got --
11 something's come up. We're going to have to take our
12 break now which is not unusual. I will tell you, if you
13 haven't noticed, it's raining like heck out there. So be
14 careful. Because of the rain, we're not going -- I'm
15 going to give you an hour and a half. So be back in your
16 jury room at two thirty. That is an hour and a half.
17 Two thirty. Please don't discuss this case with anybody.
18 Don't discuss it amongst yourselves. Don't eat too much
19 because you're going to have to come in here and sit and
20 listen until about four thirty today. We have to break
21 at four thirty today because today is the Christmas get-
22 together for the Sheriff's department. And as much work
23 and help as they give me, I'm not going to make anybody
24 be late for that. So have a good lunch.

25 (WHEREUPON the jury exited the courtroom at

1 approximately 12:54 p.m.)

2 THE COURT: Okay. I'm sorry. And everybody
3 knows that you've been awake all night. We've been
4 trying to get to you. And I apologize. Mr. Potter is
5 obviously very sorry about it. Something has come up and
6 he's got to do it. The problem with stopping in the
7 middle of your testimony is you can't talk to your
8 lawyers or anybody else about this case or any other
9 witnesses. So apart from being exhausted and ready to go
10 home and go to bed, you're probably going to have to sit
11 by yourself and not talk to anybody.

12 THE WITNESS: I'm not going to lunch with him.

13 THE COURT: I wouldn't go to lunch with anybody
14 who had been awake all night. You know, just -- I mean,
15 you're welcome to come back here and eat some of this
16 food and rest wherever you want to rest. But you can't
17 talk to anybody or your lawyer, okay? I'm going to get
18 you up and out of here.

19 All right. See you at two thirty.

20 (WHEREUPON, court stood at recess for the lunch
21 break.)

22 THE COURT: You can bring them in.

23 (WHEREUPON, the jury entered the courtroom at
24 approximately 2:34 p.m.)

25 CROSS EXAMINATION

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Andrew Lunz - Cross Examination by Mr. Potter

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1 BY MR. POTTER:

2 Q. Deputy, is there a policy and procedure with the
3 Anderson County Detention Center when contraband or drugs
4 are found?

5 A. We usually -- when they're found, even as far as
6 when we're searching and doing the initial pat down -- is
7 that what you're ...

8 Q. Well, when somebody or an inmate is found with
9 contraband, is there a policy and procedure in place of
10 how to handle that?

11 A. Yeah. But usually we would fill out an incident
12 report. And then we would let the supervisor review it,
13 and they would send it up ...

14 Q. Right.

15 A. ... to the lieutenant.

16 Q. And if an inmate is found with contraband, he risks
17 losing privileges at the detention center; is that true?

18 A. Yes, sir, that's correct.

19 Q. And having contraband, illegal narcotics, is
20 considered a major violation; is that correct?

21 A. Yes, sir, that's correct.

22 Q. Okay. Now, you chose not to submit a report or
23 anything of that sort; is that correct?

24 A. Yes, sir, that's correct.

25 Q. All right. You informed your supervisor of what

1 happened?

2 A. Yes, sir, that's correct.

3 Q. All right. Now, the detention center -- you're
4 under video surveillance when you go through the booking
5 process with anybody; is that correct?

6 A. Yes, sir, that's correct.

7 Q. Okay. And there's pretty much video throughout the
8 detention center; is that true?

9 A. Yes, sir, in most places.

10 Q. And there's video in the booking area where you're
11 doing the searches of people who are brought in by
12 deputies and things of that sort, correct?

13 A. Yes, sir, that's correct.

14 Q. All right. And there was video of what you
15 described and testified to the jury; is that correct?

16 A. I haven't actually seen it. But yes, sir, it was in
17 the area that is videotaped.

18 Q. Okay. And that video has been -- it's gone; is that
19 right?

20 A. I guess so. The videos get changed out on a certain
21 time limit and ---

22 Q. And so the video of this incident has been erased,
23 it's been destroyed; is that right?

24 A. Yes, sir, that's correct.

25 Q. Nothing further. Thank you.

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Eric Nubern - Direct Examination by Mr. Campbell

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1 THE COURT: Any redirect?

2 MR. CAMPBELL: No, Your Honor.

3 THE COURT: Thank you, sir.

4 Can he be excused?

5 MR. CAMPBELL: Yes, sir. I have no further
6 questions.

7 THE COURT: Any objection?

8 MR. POTTER: No, Your Honor.

9 THE COURT: All right. Thank you, sir.

10 MR. CAMPBELL: Your Honor, the State calls Eric
11 Nubern.

12 MADAM CLERK: Officer, if you'll come around
13 and place your left hand on the Bible and raise your
14 right.

15 (WHEREUPON, the witness was duly sworn.)

16 MADAM CLERK: Have a seat in the witness chair,
17 please, sir. If you'll state your full name and spell
18 your last name for the record.

19 THE WITNESS: Eric Nubern, N-U-B-E-R-N.

20 ERIC NUBERN,

21 Being first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. CAMPBELL:

24 Q. Deputy, you're employed with the Anderson County
25 Sheriff's Office?

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Eric Nubern - Direct Examination by Mr. Campbell

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- 1 A. Yes, sir, that's correct.
- 2 Q. And you were employed on April 19th, 2009?
- 3 A. Yes, sir.
- 4 Q. How long have you been in law enforcement?
- 5 A. A little over three years.
- 6 Q. You work the same shift as Deputy Surratt; is that
- 7 correct?
- 8 A. Yes, sir.
- 9 Q. On April 19th, 2009, did you happen to go or respond
- 10 to a call for a backup by Deputy Surratt?
- 11 A. Yes, sir. On a traffic stop.
- 12 Q. And was that call placed directly to you, or was it
- 13 just like a general call on the radio?
- 14 A. It was a general call. I heard Deputy Surratt call
- 15 a traffic stop out, and then I -- he called out again and
- 16 asked if there were any available units if he could have
- 17 one started.
- 18 Q. As a result of that, did you go to the location
- 19 where he was at?
- 20 A. Yes, sir.
- 21 Q. And where was that?
- 22 A. It was on Brown Street, just off of Market Street.
- 23 Q. That's in Anderson County?
- 24 A. Yes, sir.
- 25 Q. And was it daylight?

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Eric Nubern - Direct Examination by Mr. Campbell

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1 A. Yes, sir.

2 Q. And when you arrived, were the two individuals
3 regarding the traffic stop -- were they already under
4 arrest at the time?

5 A. When I arrived, yeah. There were two black males in
6 the back of Brandon's patrol car.

7 Q. And was any other officer on the scene at that time
8 besides Deputy Surratt?

9 A. When I pulled up, when I turned onto Brown Street, I
10 could see Deputy Surratt's patrol car with the lights on.
11 In front of it I could see a silver sedan. I believe it
12 was a Grand Am. And as I was pulling up, Anderson City
13 was pulling up as well.

14 Q. And did you get out and talk to Deputy Surratt about
15 what had taken place?

16 A. Yes, sir.

17 Q. And as a result of that, did you learn that he had
18 conducted a pat down search of both individuals?

19 A. Yes, sir.

20 Q. Did you or the officers who responded from the City
21 -- did either one of y'all -- I believe it was two
22 officers from the City. Did any of y'all take any --
23 take either one of the two individuals out of the back of
24 his patrol car and search them again?

25 A. No, sir. We never -- none of us ever made contact

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Belinda Lee - Direct Examination by Mr. Campbell

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1 with the two guys.

2 Q. Did you speak to either Dememtrius Robertson or Mr.
3 Gilliard?

4 A. No, sir. Never cracked the door open or nothing.

5 Q. And did either one of the Anderson City Police
6 officers -- I believe at that time it was Mark Miller and
7 John Wilkerson. Did either one of them speak to either
8 two of the individuals in the back of this patrol car?

9 A. No, sir. I didn't see anybody open the door and
10 speak to the guys that were in the back.

11 Q. Deputy, I have no further questions. Please answer
12 any questions ---

13 MR. POTTER: No questions, Judge.

14 THE COURT: All right. Thank you, sir.

15 MR. CAMPBELL: Your Honor, the State calls
16 Brenda Lee to the stand.

17 MADAM CLERK: Place your left hand on the Bible and
18 raise your right, please, ma'am.

19 (WHEREUPON, the witness was duly sworn.)

20 MADAM CLERK: Go up and have a seat in the
21 witness chair, please. If you'll state your full name
22 and spell your last name for the record.

23 THE WITNESS: Belinda Lee, L-E-E.

24 **BELINDA LEE,**

25 Being first duly sworn, testified as follows:

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Belinda Lee - Direct Examination by Mr. Campbell

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1 DIRECT EXAMINATION

2 BY MR. CAMPBELL:

3 Q. Ms. Lee, where are you employed?

4 A. Anderson County Sheriff's Office.

5 Q. How long have you been employed there?

6 A. Twenty-seven years.

7 Q. And currently where are you -- what department or
8 division are you employed with at the Sheriff's Office?

9 A. Evidence.

10 Q. And what -- as part of your duties, do you handle
11 evidence that is turned in by officers?

12 A. Yes, sir. I log it in and put it's place.

13 Q. And you were employed in your current capacity on
14 April 19th, 2009; is that correct?

15 A. Correct.

16 Q. And shortly after that, did you have an opportunity
17 to take evidence that was placed into the evidence locker
18 by Deputy Surratt -- did you have an opportunity to take
19 it out of the evidence locker?

20 A. Yes, I did.

21 Q. And when you took it out of evidence, was it sealed?

22 A. Yes, it was.

23 Q. And you keep records of this; is that correct?

24 A. Yes, I do.

25 Q. And is a best kit that y'all use? Is this how y'all

1 seal them up?

2 A. Well, the officer ---

3 Q. The officer seals them up?

4 A. --- seals them up.

5 Q. So you don't do any of the closing of these items;
6 is that right?

7 A. No, sir.

8 Q. And if these items had been opened or tapered or
9 altered with, would you have documented or noted that?

10 A. Yes, sir.

11 Q. And in this case and to your knowledge, had anything
12 been done to it?

13 A. No, sir.

14 Q. So it was in this sealed condition when you
15 retrieved it out of the evidence locker; is that right?

16 A. Correct.

17 Q. And on May the 6th, of 2009, did you take what has
18 been marked as State's Exhibit Number 2. Did you take it
19 to the lab for analysis?

20 A. I did.

21 Q. And you weren't present when it was analyzed; is
22 that correct?

23 A. No.

24 Q. And on October 7th, 2009, did you have an opportunity
25 to retrieve this item, this piece of evidence, back from

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Belinda Lee - Direct Examination by Mr. Campbell

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1 the Anderson-Ocone Forensic Lab?

2 A. I did.

3 Q. And when you received it back, had it been altered
4 or changed in any shape, way or form to your knowledge?

5 A. No, sir.

6 Q. Was it in a sealed bag when you got it back?

7 A. Yes, it was.

8 Q. If it had been changed or the bag was opened, would
9 you have documented or noted that?

10 A. I would have.

11 Q. And as your job as an evidence tech, these items
12 that are turned in is under continuous care, custody and
13 control; is that right?

14 A. Correct.

15 Q. And this item has not left the Sheriff's Office
16 other than -- the crack cocaine, other than when you took
17 it to be analyzed; is that right?

18 A. That's right.

19 Q. And this item has been in your possession since
20 April the 9th -- I'm not saying in your possession. The
21 evidence at the Sheriff's Office has been in y'all's
22 possession since April the 19th, 2009?

23 A. Yes, it is.

24 MR. CAMPBELL: Your Honor, I have no further
25 questions.

1 THE COURT: All right. Any questions?

2 MR. POTTER: Just briefly.

3 CROSS EXAMINATION

4 BY MR. POTTER:

5 Q. Ma'am, there is a -- what's called a Form B, Rule 6
6 form. Are you familiar with that form?

7 A. I am.

8 Q. And that is the form that comes from the deputy; is
9 that correct?

10 A. Correct.

11 Q. And you fill out what's called, I guess, the Form C
12 form?

13 A. Right.

14 Q. And do you see the Form B form?

15 A. Yes, I do.

16 Q. Is that in your possession?

17 A. Yes.

18 Q. If I could ---

19 MR. POTTER: May I approach, Your Honor?

20 THE COURT: Yes, sir.

21 Q. I've been given a copy by the Solicitor. Is this
22 the copy of the form B?

23 A. Yes, it is.

24 Q. Okay. And what does it indicate where the drugs
25 were located at?

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Belinda Lee - Redirect Examination by Mr. Campbell

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1 A. Brown Street and Market Street.

2 Q. Okay. Does it say -- is there any language of a
3 traffic stop on that form?

4 A. Yes, it is. It says traffic stop.

5 Q. And this is what you saw then you did the Form C and
6 then you did your job?

7 A. Right.

8 Q. Nothing further. Thank you.

9 MR. CAMPBELL: Just a couple of follow-ups.

10 REDIRECT EXAMINATION

11 BY MR. CAMPBELL:

12 Q. Ms. Lee, you're not out making the cases, so you
13 don't know what transpired when the officers bring the
14 evidence in, do you?

15 A. No, uh-uh (negative). I just see the evidence and
16 that's it.

17 Q. You collect it and that's your role?

18 A. Right.

19 Q. And you don't discuss with the officers what takes
20 place during the case?

21 A. Oh, no. I don't even see them.

22 MR. CAMPBELL: No further questions.

23 RECROSS EXAMINATION

24 BY MR. POTTER:

25 Q. Just to make it clear, you don't fill out the form B

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1 form, the officer does, correct?

2 A. Correct.

3 Q. And that's the form that had, traffic stop, Market
4 Street and Brown Street on it, correct?

5 A. Correct.

6 MR. POTTER: Nothing further.

7 THE COURT: All right. Thank you, ma'am. You
8 can step down.

9 MR. CAMPBELL: Your Honor, can I talk to you
10 for just a second?

11 (WHEREUPON, a bench conference was held off the
12 record.)

13 MR. CAMPBELL: Your Honor, the State calls
14 Tommy Clamp to the stand.

15 MADAM CLERK: Place your left hand on the Bible and
16 raise your right, Mr. Clamp.

17 (WHEREUPON, the witness was duly sworn.)

18 MADAM CLERK: Have a seat in the witness chair,
19 please, sir. If you'll state your full name and spell
20 your last for the record, please, sir.

21 THE WITNESS: My name is John Thomas Clamp, Jr.
22 My last name is spelled C-L-A-M-P.

23 JOHN THOMAS CLAMP, JR.,

24 Being first duly sworn, testified as follows:

25 DIRECT EXAMINATION

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1 BY MR. CAMPBELL:

2 Q. Mr. Clamp, where are you employed?

3 A. I'm employed with the Anderson County Sheriff's
4 Office.

5 Q. And in what department?

6 A. Assigned to the evidence division.

7 Q. And in what capacity are you employed with -- as?

8 A. I'm a sergeant, deputy sheriff sergeant assigned as
9 the supervisor of the evidence division.

10 Q. How long have you been employed -- how long have you
11 dealt with evidence?

12 A. I've been employed with the Sheriff's Office since
13 Christmas Day of 1991. I've been assigned to the
14 evidence division since April of 2003.

15 Q. And as your job as sergeant over the evidence,
16 you're the supervisor who basically runs the evidence at
17 the Sheriff's Office?

18 A. That's correct.

19 Q. And all the evidence that comes in is under your
20 care, custody and control?

21 A. That's correct. Myself, evidence technician Belinda
22 Lee, and we have one other evidence technician.

23 Q. And you're responsible -- you, as the supervisor, is
24 responsible for what comes in and out or actually what
25 comes in, you handle it and take care of it during the

1 processing at your department?

2 A. That's correct. Our job is to make sure that when
3 it's turned in, when it goes out, goes to court, for
4 analysis or whatever, it's integrity has been maintained.
5 It's in the same condition when it goes out as when it
6 came in.

7 Q. And if something had been altered or materially
8 changed in some shape, way or form, would you have
9 documented or noted that?

10 A. Yes, we would. Belinda would have notified me, and
11 then we would have taken the appropriate action as far as
12 contacting the officer.

13 Q. And in this case, dealing with Sheriff's Office case
14 number 2009-020901, you've had some dealings with this
15 case regarding the drugs and evidence that had been
16 placed in?

17 A. That's correct.

18 Q. Has anything to your knowledge been altered,
19 changed, in any shape, way or form?

20 A. No, sir.

21 Q. The only time this item -- specifically speaking
22 with item number 2, State's Exhibit Number 2, is when it
23 was taken over to the lab to be analyzed; is that
24 correct?

25 A. That's correct.

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1 Q. If it hadn't, would you have noted it and contacted
2 the officers in the case?

3 A. Yes, we would have.

4 Q. And as a supervisor working in the forensic and
5 evidence department, y'all don't make the cases; is that
6 right?

7 A. No, sir, we don't.

8 Q. And your sole duties is basically to take care of
9 the evidence that comes in from the officers who make the
10 case?

11 A. Correct. We're a support division basically to
12 house the evidence. Their -- evidence is limited to four
13 persons. It could be Belinda Lee, myself, Jessica and my
14 supervisor. There's only four people at the Sheriff's
15 Office that can access any evidence.

16 Q. In fact, these officers can't even come back even on
17 their own case?

18 A. No, sir, they cannot. Sheriff Skipper couldn't get
19 the evidence if he wanted to.

20 Q. I have no further questions. Please answer any
21 questions Mr. Potter may have.

22 CROSS EXAMINATION

23 BY MR. POTTER:

24 Q. Deputy, you gave me today a copy of this form, the
25 Rule B form; is that correct?

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1 A. Yes, sir.

2 Q. And if I can hand it up to you. That's the form you
3 gave me today related to chain of custody, correct?

4 A. Correct, yes, sir.

5 Q. That's the what's called a Rule -- excuse me. I
6 need to look at it.

7 A. It's a Rule ---

8 Q. I'm sorry.

9 A. Form B, Rule 6.

10 Q. Form B, Rule 6. Yes. I was thinking Rule B.

11 And that's completed by the officer who takes in
12 evidence; is that correct?

13 A. That's correct. It's to be completed by the officer
14 who initially takes custody of the evidence.

15 Q. And if I'm correct, he'll fill out the form, he'll
16 put the evidence into a drawer that's locked?

17 A. Correct. A cabinet, drop box.

18 Q. Okay. And is there any significance in the fact
19 that's it's not notarized?

20 A. No, sir.

21 Q. Okay. Now, that particular form that was completed
22 by Deputy Surratt indicates that this was evidence found
23 at a traffic stop at Brown and Market Street, correct?

24 A. That's correct.

25 MR. POTTER: Judge, we ask that this be moved

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1 in as evidence.

2 THE COURT: Any objection?

3 MR. CAMPBELL: No objection.

4 THE COURT: Without objection.

5 (WHEREUPON, Defendant's Exhibit Number 2 was marked
6 and admitted into evidence.)

7 MR. POTTER: May I publish this?

8 THE COURT: Sure.

9 MR. POTTER: Thank you, Judge. No further
10 questions.

11 (WHEREUPON, a bench conference was held off the
12 record.)

13 MR. CAMPBELL: Your Honor, the State is going
14 to recall Deputy Brandon Surratt to the stand.

15 THE WITNESS: Can I step down?

16 THE COURT: Yeah, you can step down. You can
17 be excused. Thank you.

18 MADAM CLERK: You're still under oath.

19 **BRANDON SARRATT,**

20 Being previously sworn, testified as follows:

21 **RECALL DIRECT EXAMINATION**

22 **BY MR. CAMPBELL:**

23 Q. Deputy Surratt, you're still under oath. You
24 understand you're still under oath ...

25 A. Yes, sir.

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1 Q. ... for a limited purpose for these questions. At
2 the jail, as you heard, Mr. Potter talked about a video.
3 Did you request a copy of the video?

4 A. I did. I spoke with the supervisor on duty at the
5 detention center at the time. I asked him if he would
6 make me a copy of the incident. He advised me that he
7 would.

8 Q. And were you able -- did you go back later to
9 retrieve it?

10 A. I went back later when they advised me of the court
11 date, to check to see if the copy was made. He said that
12 they did not make a copy of it.

13 Q. And to your knowledge, the video had been taped
14 over?

15 A. That's correct. They told me -- once I went back to
16 check and see if they had made a copy of it, he said, we
17 have not made a copy of it. But the time frame till now,
18 there is no way that I can re-track to make a copy of it
19 now.

20 Q. I have no further questions. Please answer any
21 questions Mr. Potter may have.

22 MR. POTTER: No questions, Judge.

23 THE COURT: All right. Thank you, sir.

24 MR. CAMPBELL: Your Honor, the State calls
25 Meredith Lanford to the stand.

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1 MADAM CLERK: Place your left hand on the Bible
2 and raise your right.

3 (WHEREUPON, the witness was duly sworn.)

4 MADAM CLERK: Have a seat in the witness chair.
5 If you'll state your full name and spell your last name
6 for the record?

7 THE WITNESS: Meredith Lee Lanford, L-A-N-F-O-
8 R-D.

9 **MEREDITH LEE LANFORD,**

10 Being first duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. CAMPBELL:

13 Q. Ms. Lanford, where are you employed?

14 A. I'm employed with the Anderson-Oconee Regional
15 Forensics Laboratory.

16 Q. And in what capacity or position are you employed
17 as?

18 A. As a forensic chemist.

19 Q. And how long have you been employed there?

20 A. I've been employed there since February 2006.

21 Q. And exactly what type of duties does your job
22 entail?

23 A. My primary job function is to analyze evidence
24 that's been brought to our laboratory for controlled or
25 prescription substances.

1 Q. And approximately -- let me step back and talk a
2 little bit about your schooling. Where did you go to
3 school, and what qualifications do you have in order to
4 do your job?

5 A. I graduated from Clemson University with a Bachelor
6 of Science degree in Chemistry. I then went on to
7 complete the Forensic Science Certificate Program with
8 Greenville Technical College. I was certified and
9 trained as a forensic chemist with the Charleston Police
10 Laboratory as well as with my current employer. I was
11 trained in the area of marijuana analysis by the South
12 Carolina Law Enforcement Division. I was also trained in
13 the area of forensic drug chemistry with the Drug
14 Enforcement Administration. And I am a member of the
15 American Chemical Society as well as the Clandestine
16 Laboratory Investigative Chemists Society.

17 MR. POTTER: Judge, for the record, we have no
18 objection to the fact that she is a chemist and has
19 testified before.

20 THE COURT: All right.

21 MR. CAMPBELL: We want to qualify her as an
22 expert.

23 MR. POTTER: Yes.

24 THE COURT: You agree to her qualifications as
25 an expert?

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1 MR. POTTER: Yes, sir.

2 THE COURT: All right. She's qualified.

3 Q. Ms. Lanford, I'm going to show you what's been
4 marked for identification as State's Exhibit Number 2.

5 Can you please identify what this is for me?

6 A. This is our -- what we call our best kit that the
7 officers place their any kind of drug evidence into, and
8 this outer envelope is what it actually comes to our
9 laboratory.

10 Q. And your office received this, I believe, in April
11 6th of this year?

12 A. May 6th.

13 Q. May 6th. I'm sorry. And when you received it,
14 what's in that bag -- the inner bag is what you're
15 talking about; is that correct?

16 A. Correct.

17 Q. And when you received this, had it been altered or
18 changed or cut open or damaged in any shape, way or form?

19 A. No. We will not accept any evidence bag that has
20 been -- the seal has been tampered with or anything like
21 that.

22 Q. As a result -- if it had, you would have kicked it
23 back to the submitting agency; is that right?

24 A. Correct.

25 Q. And when you received it for the purpose of -- was

1 it to test it and analyze it to see if it was some sort
2 of narcotic, correct?

3 A. Correct.

4 Q. And in this case, you did that?

5 A. Yes.

6 Q. And what type of test or analysis did you perform?

7 A. Initially when we start the analysis, I remove any
8 kind of packaging that the sample may be in. We take a
9 weight of just the sample. And then I perform two
10 screening tests that allow me to narrow down what
11 controlled substance may be present, and then I perform
12 two confirmatory test on the instruments in our lab to
13 help me identify which controlled substance, if any, is
14 present.

15 Q. And did you do that in this case?

16 A. Yes, I did.

17 Q. And when you get the package -- when you get a
18 package from, and in this case, the Sheriff's Office, do
19 you weigh the items, the material that's in -- the
20 substance that's in the bag?

21 A. Yes.

22 Q. And do you weigh it without the bag that it comes
23 in?

24 A. Correct. We remove all packaging.

25 Q. And are the scales that you have at your lab, are

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1 they certified scales?

2 A. Yes, they are.

3 Q. And you weighed it in this case; is that right?

4 A. Yes.

5 Q. And what weight did you come up with?

6 A. 44.63 grams which is approximately 1.57 ounces.

7 Q. And as a result of that, did -- you also tested it,
8 this test you're talking about, and were you able to form
9 an opinion on what type of substance that was brought
10 over to you in this test kit?

11 A. Yes. I found that the item contained cocaine base
12 which is also called crack cocaine.

13 Q. And that's considered a Schedule II narcotic; is
14 that right?

15 A. Correct.

16 Q. And what exactly does Schedule II mean?

17 A. Schedule II means that there is some accepted
18 medical use, but the schedule goes from Schedule I, being
19 the worst basically to Schedule V. This is a Schedule II
20 drug that the Drug Enforcement Administration has placed.

21 Q. So it's illegal?

22 A. Right.

23 MR. CAMPBELL: Your Honor, at this time I move
24 what's been identified as State's Exhibit 2 into
25 evidence.

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1 MR. POTTER: No objection.

2 THE COURT: Without objection.

3 (WHEREUPON, State's Exhibit Number 2 was admitted
4 into evidence.)

5 MADAM CLERK: Your Honor, I have no further
6 questions of this witness.

7 THE COURT: All right.

8 MR. POTTER: No questions, Judge.

9 THE COURT: Thank you, ma'am. You can step
10 down.

11 MR. CAMPBELL: Your Honor, may we approach?

12 THE COURT: Yes.

13 (WHEREUPON, a bench conference was held off the
14 record.)

15 THE COURT: Ladies and gentlemen, I've got to
16 give you a break at this time. We have a couple matters
17 that we are going to have to take care of out of your
18 presence. It's probably going to be fifteen minutes or
19 so. Do we have any smokers? Good. If there is anybody
20 thaqt's climbing the wall, we can let you go outside.
21 But please don't begin deliberating, and we'll call you
22 back in in fifteen, twenty minutes max.

23 (WHEREUPON, the jury exited the courtroom at
24 approximately 3:10 p.m.)

25 THE COURT: I'll be back in just a minute.

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1 Take your time.

2 (WHEREUPON, court stood at recess for a short break
3 during which State's Exhibit Number 1 was remarked
4 as Court's Exhibit Number 1.)

5 MR. POTTER: Judge, do you ...

6 THE COURT: Yeah, bring him on up.

7 (WHEREUPON, the Defendant and counsel approached the
8 bar.)

9 THE COURT: All right. Sir, we have now
10 reached a point in the trial where you have to make a
11 decision as to whether or not you're going to testify.
12 And I understand that you've talked to your lawyer, but I
13 need to explain your Fifth Amendment Rights for the
14 record so that you understand them. If you have any
15 questions for me, stop me. I'll be happy to answer them.
16 If you have any questions for your lawyer, stop me. Have
17 you talked to your lawyer about whether or not you should
18 testify?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And have you made a decision?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And have you decided to testify or
23 are you're not going to testify?

24 THE DEFENDANT: No, sir.

25 THE COURT: So you're not going to testify?

1 THE DEFENDANT: No, sir.

2 THE COURT: All right. You understand that you
3 have the right to claim this protection that's given to
4 you by the Fifth Amendment, and you -- in part it says
5 that no person shall be compelled in any criminal case to
6 be a witness against himself. But this decision has to
7 be freely and voluntarily and intelligently made. It's
8 your decision, not your lawyer's. And I need for you to
9 tell me that you've made the decision, after consulting
10 your lawyers and your family members or whatever, that
11 you've decided to exercise your Fifth Amendment rights;
12 is that correct?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Okay. Do you understand that I
15 will tell the jury that they cannot discuss the fact that
16 you haven't testified and, in fact, can't hold against
17 you the fact that you haven't testified in this case?
18 And that will be one of my jury charges. Do you
19 understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And do you understand that if you
22 do testify, you could be cross examined on any evidence
23 of criminal wrongdoing or other evidence that might be
24 admissible under the law? Do you understand that?

25 THE DEFENDANT: Yes, sir.

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1 THE COURT: Do you have any questions for me
2 now?

3 THE DEFENDANT: No, sir.

4 THE COURT: Do you have any questions for your
5 lawyer?

6 THE DEFENDANT: No, sir.

7 THE COURT: Do you understand your Fifth
8 Amendment right?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: All right. So you've decided not
11 to testify in this trial; is that correct?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Okay. All right. Thanks.

14 MR. POTTER: Thank you, Judge.

15 THE COURT: Thank you.

16 Okay. So the State's rested and obviously ---

17 MR. CAMPBELL: I haven't rested on the record,
18 Your Honor.

19 THE COURT: Yeah, but you're going to?

20 MR. CAMPBELL: Yeah, right. That's correct.

21 THE COURT: And then are you -- do you have any
22 witnesses?

23 MR. POTTER: Judge, what I would like to do
24 before the State rests and I rest, let's do that tomorrow
25 morning if Your Honor is inclined to do argument and

1 charge tomorrow morning.

2 THE COURT: Yeah, I am.

3 MR. POTTER: I would rather we just -- out of
4 an abundance of caution, I don't want to rest until
5 tomorrow morning.

6 THE COURT: Well, then I assume that both of
7 you might in case something pops in your head at two in
8 the morning, which usually happened to me practicing law.
9 Okay. I'll let you do that. What I'm going to do is
10 bring them back in, tell them that we have the -- I'm not
11 going to tell them it's the Sheriff's Department's
12 Christmas party, but I'm going to tell them that we've
13 got an issue that would cause us to stop court in a few
14 minutes anyway. That I suspect we'll bring them in
15 tomorrow morning, and unless there are any surprises
16 we'll argue and charge tomorrow morning at ten and get
17 this case to them by eleven. And y'all have got the
18 charge? It's pretty straightforward.

19 MR. POTTER: Yes, sir. I'm sorry. If it
20 pleases the Court.

21 THE COURT: Yeah.

22 MR. POTTER: I will make a quick motion related
23 to the video ---

24 THE COURT: Yeah.

25 MR. POTTER: --- and the inferences and all

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1 that. I just want to make that for the record and do
2 that at the appropriate time.

3 THE COURT: Yeah, we'll do all that tomorrow
4 morning.

5 MR. POTTER: Yes, sir.

6 THE COURT: I'll let y'all have some time.
7 Okay.

8 (WHEREUPON, the jury entered the courtroom at
9 approximately 3:27 p.m.)

10 THE COURT: All right. Ladies and gentlemen,
11 what we're going to do now is we're going to break for
12 the day. Quite frankly, we've got an issue that has
13 nothing to do with this case that would cause us to leave
14 at four o'clock. Rather than get into the next phase of
15 this trial, I'm just going break.

16 I will tell you that unless there's some surprise
17 overnight, tomorrow morning at ten, we'll argue and
18 charge this case. You're going to get this case probably
19 tomorrow morning. And I suspect that by lunch we'll have
20 you deliberating. I'm sorry we've had a couple of delays
21 today. None of them have been anything as a result of
22 anything in this trial. We've just had things going on
23 in the back that I had to deal with. But you will not
24 wait until eleven thirty tomorrow, I can tell you that
25 much. We don't have anything planned.

1 I don't have any hearings at ten?

2 It makes me nervous if she's looking.

3 LAW CLERK: We have a conference call at ten.

4 That's all.

5 THE COURT: Who is it?

6 LAW CLERK: H & D Construction.

7 THE COURT: Be here by ten. I'll make those
8 boys -- it will be quick with them. As I said, don't
9 discuss this case with your family. You've got one more
10 night of doing that and you won't have to worry about it.
11 You can tell them tomorrow night anything you want about
12 this. But we'll see you at ten o'clock tomorrow morning.
13 If anybody bothers you or contacts you, please let me
14 know.

15 I don't know if there will be any articles in the
16 paper or on the radio or TV, but please, again, don't
17 read, listen to or watch any publicity on this case. And
18 I will see you tomorrow morning at ten o'clock.

19 (WHEREUPON, the jury exited the courtroom at
20 approximately 3:29 p.m.)

21 THE COURT: All right. What we'll do tomorrow,
22 you can come in, rest if -- unless something comes up.
23 Mr. Potter, you can rest, and then we'll argue and
24 charge.

25 MR. POTTER: Okay.

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1 THE COURT: All right. See you tomorrow
2 morning.

3 MR. POTTER: Thank you, Judge.

4 (WHEREUPON, court stood at recess for the day.)

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6 (WHEREUPON, court convened with all parties present
7 and the following proceedings were had commencing at
8 approximately 10:34 a.m.)

9 MR. CAMPBELL: Judge, I'm going to -- we
10 cleaned up the indictment.

11 THE COURT: Oh, good. That's what I was
12 getting ready to ask you. Well, good. I can use this as
13 the verdict form. That's a lot easier.

14 Any objection to this?

15 MR. POTTER: No objection.

16 THE COURT: I know y'all looked through the
17 charge, and there was some question about whether I
18 needed to define deliver. You don't have any strong
19 objection to that, do you?

20 MR. CAMPBELL: No, sir. I mean, there was no
21 testimony regarding it. I didn't know -- I know it's
22 part of the definition of trafficking, and that was the
23 only reason I brought it up.

24 THE COURT: Okay. Any objection from the
25 Defense?

1 MR. POTTER: No, Your Honor. If it pleases the
2 Court, we would ask for additional instruction in
3 reference to the fact that the video of the booking area
4 was destroyed. We would ask for an inference that that
5 be in essence that there was evidence that was
6 exculpatory or beneficial to the Defendant and the fact
7 that it was destroyed, the jury can make an inference
8 that it was beneficial to the Defense. Again, this is --
9 I think it's -- I don't think it was destroyed in bad
10 faith.

11 THE COURT: No.

12 MR. POTTER: However, there's no other way --
13 there's no other additional evidence that we can look to
14 or point to or rely upon that is along the same level as
15 that video. And as such, I think we're entitled to the
16 instruction.

17 THE COURT: Okay. I understand why you'd ask
18 it. I'm not going to instruct that. I think that
19 instruction, in my mind, is meant more for evidence that
20 has been purposely destroyed or -- but you know, you're
21 protected on the record. That may be ...

22 MR. POTTER: Yes, sir. The only -- in regards
23 to housekeeping, when the State does close their case, I
24 do want to make a record to move for a directed verdict.
25 I don't know if you want to kind of do that now and then

1 he can rest when the jury's in or however you want to do
2 it.

3 THE COURT: Yeah. As soon as your guys gets
4 here let's do that, and we'll let y'all rest and ...

5 (WHEREUPON, the Defendant entered the courtroom.)

6 THE COURT: Okay. Does the State rest?

7 MR. CAMPBELL: Yes, sir. The State rests.

8 THE COURT: All right. Any motions?

9 MR. POTTER: Judge, we do have a directed
10 verdict motion. And I'm sure Your Honor -- I know Your
11 Honor's familiar with regards to the standard light most
12 favorable to the nonmoving party. Viewing all the
13 evidence, we would respectfully submit that the elements
14 of the crime have not been met, and we would submit that
15 issue to Your Honor.

16 THE COURT: All right. I'm going to deny that
17 motion based upon the evidence that has been introduced.

18 And you're resting?

19 MR. POTTER: Your Honor, yes, we are resting.

20 THE COURT: Okay.

21 MR. POTTER: There were two exhibits for the
22 Defense that were already admitted as evidence. So I
23 just want to make sure that those are admitted as
24 Defendant's evidence.

25 THE COURT: Yeah. You got the packet of

1 cocaine.

2 MR. CAMPBELL: And the marijuana we marked as a
3 Court's Exhibit.

4 THE COURT: Right.

5 MR. CAMPBELL: And the rest are Defense
6 exhibits.

7 THE COURT: And then the -- just for the
8 record, the indictment has been cleaned up so that it
9 only states the charge of trafficking cocaine twenty-
10 eight grams or more. And I'll actually allow them to use
11 this now as the verdict form.

12 Okie doke. Well, I'm going to call them in and tell
13 them that the State has rested, the Defense has rested.
14 I'll initially tell them that you're going to give your
15 closing arguments and then my charge. Of course, I'm
16 going to hit hard quite frankly on the fact that he
17 doesn't have to testify. I think that's important so
18 they don't have any inference there.

19 Okie doke. Everybody ready?

20 MR. CAMPBELL: The State's ready, Your Honor.

21 MR. POTTER: Yes, sir.

22 THE COURT: You can bring them in.

23 (WHEREUPON, the jury entered the courtroom at
24 approximately 10:39 a.m.)

25 THE COURT: Good morning, ladies and gentlemen.

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1 Ladies and gentlemen, the State has rested in this case
2 which means you've heard all the testimony that you're
3 going to hear from the State. The Defense has also
4 rested in this case. So in other words, you have heard
5 all of the testimony that you're going to hear in this
6 case. We've now reached the point in the trial where
7 it's time for the attorneys to give you their closing
8 arguments.

9 I want to tell you now -- and I'll also tell you
10 when I read to you the charge -- the Constitution of this
11 country and -- well, mainly the Federal Constitution --
12 has a Fifth Amendment, contains a Fifth Amendment, which
13 allows a defendant not to testify. That -- just as a
14 presumption of innocence is sort of bantered around the
15 newspaper and on the radio as sort of just some words,
16 this presumption of innocence and this prohibition
17 against requiring someone to testify is a substantial
18 right. I will tell you when I get to that portion of the
19 charge, but I want to tell you early, you should not
20 consider the fact that the Defendant has not testified.
21 That should never come up in your deliberations,
22 shouldn't be talked about and shouldn't influence you in
23 any way. The exercise of a constitutional right is
24 perfectly within the Defendant's rights. He has pled not
25 guilty, and the burden is still on the State to prove

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1 each and every element.

2 Now, as I said earlier yesterday, the closing
3 arguments are not evidence. The attorneys do have a
4 right to argue and try to sway you to their position, but
5 you shouldn't consider it evidence. You'll have -- we've
6 had several documents and one packet introduced into
7 evidence. You'll have that in the jury room with you.
8 And then anything that was said from the witness stand
9 would be evidence. But anything the lawyers say now is
10 not evidence, but it is an opportunity for them to sway
11 you.

12 After they've given you their closing arguments, I
13 have to read to you verbatim this. If at any time during
14 the course of my reading to you, you need a break, let me
15 know. As I tell juries, the last time I read to people
16 other than being as a judge, it was when I was trying to
17 put my children to sleep. I really need you not to go to
18 sleep. So if you start to get sleepy and I start to sort
19 of modulate low, raise your hand and I'll either start
20 yelling at you or give you a break. Okay? All right.
21 Thank you.

22 Yes, sir?

23 MR. CAMPBELL: May it please the Court, Your
24 Honor.

25 CLOSING ARGUMENT

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1 BY MR. CAMPBELL:

2 Ladies and gentlemen of the jury, what this case
3 boils down to is very simple. It's just hard to get
4 around the fact that Mr. Gilliard had forty-four grams of
5 crack cocaine in his pants at the jail. It fell out.
6 That's what this case is about. Trafficking crack
7 cocaine. Did he or did he not have it? That's what this
8 whole -- what it comes down to. Did he or did he not?

9 I liken this to back when you're a child and your
10 mama says, no, you can't have a cookie because you're
11 going to spoil your supper. She tells you no, but then
12 yet you go get -- she comes in and you've got your hand
13 in the cookie jar. You can deny it all you want to, but
14 it's still not going to change the facts. And that's
15 what this is about. He can try to deny it all he wants
16 to, but he had the crack cocaine on him.

17 Now, y'all are judges of the facts in this case.
18 Y'all decide. You decide if he's guilty based on what
19 the State's evidence that's been put up or you decide if
20 he's not. And there's -- and I'm sitting here trying to
21 think about this case. Let's talk about the dope and how
22 it got there. Well, there's several explanations. Some
23 plausible and some implausible. Y'all decide.

24 One is, he put it there himself. He had it on him.
25 The other one is that the cops planted it on him.

1 Another one is that the dope was already there at the
2 jail at the booking area when he walked in. If you think
3 that these officers planted it on him, you find him not
4 guilty. I want y'all to do that. If you believe that,
5 you find him not guilty. If you think these officers got
6 together and conspired together to get him, you find him
7 not guilty.

8 If you think that the dope was already there on the
9 floor when he was being booked in, you find him not
10 guilty. If you think these deputies were lying to you
11 and lying out to get him, you find him not guilty. It's
12 been insinuated and implied and all of this that these
13 documents that you're going to see that's in evidence
14 that are falsified. They were under oath. He was lying
15 when he did this. Then you find him not guilty. If the
16 video would change your mind about what these officers
17 stated on the stand, then you find him not guilty.

18 But it's the State's position this man is guilty,
19 and these are the reason why. First of all, in order to
20 get to the guilt or not guilty, you've got to assume
21 that, one, he's a law abiding citizen just out on a
22 Sunday afternoon for a drive minding his own business,
23 not doing anything wrong. We know that's not true. He's
24 smoking marijuana. It's illegal in this State. He could
25 be arrested.

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1 Two is, does it make really sense that these
2 officers would go out of their way to set him up, frame
3 him, try to get even with him or try to get him arrested
4 when he complied with his request? He asked him when he
5 had a clenched fist, will you please undo your fist?
6 Yeah, he complied with that. He asked him, what's in
7 your hand, and he told him. It's a marijuana cigarette
8 and I just smoked it. He's not doing anything wrong
9 right now. I mean, he's not being argumentative, giving
10 the officer trouble or a hard time.

11 When he gets him out of the car, does he comply with
12 everything that he asks? Yes, he does. How do we know
13 this? Well, one is you don't hear a charge for resisting
14 arrest, you don't see assault on an officer. He did what
15 he was supposed to do on the side of the road. I give
16 him that. And this officer didn't charge him with that.
17 So he's doing, he's complying, he's cooperating. Does it
18 make sense that he would be out to get him? If he was,
19 don't you think it would be easier to do it at his house
20 at night, not on the street in broad daylight on a Sunday
21 afternoon on a public road with cars going up and down?
22 No.

23 The -- you know, even after he was handcuffed, he
24 still had more marijuana in his pocket. And at that
25 point and time, you know, he was placed into handcuffs.

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1 And as Deputy Nubern told you, when he arrived on the
2 scene he was already in the back seat of the car. So the
3 only time if he was going to plant dope on him would have
4 been right then. But he would have had to do it
5 immediately when he stepped out of that car because the
6 whole time after that, he was in handcuffs in a patrol
7 car. The next time that he was touched was when he was
8 going through the booking process. Now, does it make
9 sense that these officers would have got together and
10 conspired to do this when they didn't know him? You
11 heard the testimony of both officers. Don't know him,
12 don't see him. The jailer testified, don't know him,
13 never seen him. So those type arguments where it wasn't
14 really come out and said, but it was implied, it is
15 hinted to, it was inferred, it was insinuated about that.
16 No, none of that.

17 Furthermore, the officer testified, the jailer,
18 Andrew Lunz -- and that's really the person they have a
19 hard time getting around. You heard him on the stand.
20 He got really beat up about his reports. And yes, we
21 acknowledge it. We acknowledged it in opening statements
22 that, hey, his report writing needs a little work. But
23 the deputy, the jailer, he has nothing in this. He
24 wasn't part of the arrest. All he did was do his job was
25 to complete the booking process. And he was there. He

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1 heard it and looked down at his feet, and there it was.
2 He has nothing to gain by this. And yet that is the one
3 person they had nothing really they could attack him on
4 or get around.

5 And let's talk about the search. The first search
6 when he was at the road, that was strictly for weapons
7 and weapons only for his safety. He's the only officer
8 at the scene. At that point in time, his backup hasn't
9 showed up yet. And he's going through and he's doing a
10 quick search. As he stated on the stand, I just do the
11 waist, around his ankles, anywhere there might be a
12 weapon that could harm him. It's not an extensive,
13 thorough search looking for illegal substances. It's
14 just for his safety for weapons. And that's what he did.
15 And as the officer stated, he's wearing baggy loose
16 clothing. Yeah, Deputy Lunz stated that at the jail he
17 had to pull his pants up because they were so baggy when
18 they were doing the booking search looking for
19 contraband. That was where the more thorough search
20 occurred was at the jail.

21 Now, this -- and you'll have the opportunity to look
22 at it. I don't know if any of y'all have ever seen crack
23 cocaine, but that's what it is. You hear about it on the
24 news. You'll get to take it back there. This is State's
25 Exhibit Number 2. You can look at it. This is what was

1 in his pocket. In his pants. I'm sorry. This is what
2 fell out of his pants leg while he was there. The -- one
3 of the things, you know, they made some talk about was
4 about his report writing. That, in and of itself,
5 changes the facts of what happened. And that's where
6 y'all can decide. You can determine the credibility of
7 these witnesses when you hear them.

8 And first of all, we take a look at the warrant.
9 And as the officer stated, Deputy Surratt, that he
10 doesn't fill out this part right here. That's done by
11 the Magistrate's Office. And what is the Defense doing?
12 they're playing on words. You know, word things to break
13 up. It kind of reminds me of -- you've seen credit card
14 applications? You get two pages of fine print that you
15 cannot read done by lawyers. And then everything hinges
16 on where an and or an or is located. And that's what
17 we're dealing with. You can read this, you'll have an
18 opportunity to go through it. It says approximately
19 forty-nine grams. As he testified on the stand, that he
20 weighed it in the bag on scales that weren't calibrated
21 between forty-nine and fifty-four grams the several times
22 that he weighed it. And that's what he put here,
23 approximately. As he told you, we go off of what the
24 official weight is, is what the chemist comes up with
25 because her scales are calibrated and certified.

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1 And there's been a lot to do about was it done
2 pursuant a traffic stop. The dope wasn't found where the
3 cars was at. Here again, we're once again playing on
4 words. The dope was found as the result of a lawful
5 traffic stop. He wouldn't have been at the jail if he
6 wasn't arrested because of the traffic stop to begin
7 with. And he is telling you the truth when he talks
8 about that. It was as a result of it. There's no other
9 reason why would he go to the jail. He wouldn't have
10 been arrested, taken to jail if it wasn't for him doing
11 something illegal as a result of this traffic stop. So
12 it's pursuant to or because of the traffic stop that he
13 was taken the detention center. And there's questions
14 about the search incident to arrest. He was searched
15 because he was arrested. The first search was, like I
16 said, strictly for a pat down for weapons. It was at the
17 jail that the search -- it's still incident to arrest.
18 Because of his arrest, he's going to be searched at the
19 jail further, more thoroughly for contraband. That's
20 what Deputy Lunz stated, and that's what they found.

21 You take a look at this form B. There's been a lot
22 of talk and discussion about it. And you'll get a
23 chance. Just read the whole thing. I seized from
24 Demetrius Robertson and Kevin Gilliard pursuant to -- and
25 under this line it will state, in parentheses state

1 whether subject to a warrant, lawful arrest or otherwise.
2 It was pursuant to a traffic stop. That is why he was
3 being arrested. And it was -- it has as location at or
4 near. And he put Brown Street and Market Street,
5 Anderson, South Carolina, because that is where the
6 traffic stop happened. That's where he was on the side
7 of the road. And he has to keep -- he acknowledged --
8 and Mr. Potter did a good job going over it again and
9 again -- about he didn't write it up correctly. The
10 thing is, it doesn't change the facts of what happened.
11 It is what it is. The only person that put the dope on
12 him was himself. Mr. Gilliard is the one that dressed
13 himself that morning. No one else put that dope in there
14 but him.

15 And while Deputy Surratt -- yeah, the reports he
16 didn't do the best job when he was trying to describe
17 this, but his supervisor missed it when he turned in the
18 report and they reviewed it. The Magistrate when they
19 did the warrant and typed it out, they did the same
20 thing. So unless this a great big conspiracy of the
21 legal system to get Mr. Gilliard, do you think that's the
22 truth? Nobody even knew him.

23 Now, one of the things is, that has been brought out
24 is about a video. Would a video have been nice to have?
25 Yes. I'll be the first to admit it. We love videos.

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1 However, Deputy Surratt, as he told you, I asked for it
2 from the shift supervisor and went back. He didn't
3 intentionally try to destroy it. He didn't try -- he's
4 not intentionally trying to hide anything. Yeah, it
5 would have been nice to have, but we didn't.

6 So what's the next best thing? You know, there's
7 more than one way to get evidence in and show it. You
8 get to see the officers. And the three people that were
9 in that room when he was being booked in, Kevin Gilliard,
10 Deputy Surratt and Deputy Lunz, you heard from the stand.
11 Both of the deputies, they told you when they were doing
12 the booking what happened, how it happened. You can
13 believe it, you can discount it. It's what you decide.
14 Y'all are the judges of the facts.

15 And in this case, what it comes down to is I think
16 Mr. Gilliard's the one who kind of got more than he
17 bargained for. I was just going for a little ride, smoke
18 a little marijuana. But he forgot to get rid of his
19 crack cocaine. The thing is he never had an opportunity
20 to get rid of it. And where was the first time that it
21 happened? It was at the jail. Because immediately after
22 he was placed him in handcuffs, he didn't have an
23 opportunity to get rid of it. His hands were behind his
24 back, he's in a patrol car and he goes to jail. He
25 doesn't have time to get rid of it. And that is why he's

1 been charged with trafficking in crack cocaine.

2 As I told you in opening, we have three things to
3 prove to you. One is crack cocaine. The chemist, Ms.
4 Lanford, came in here and told you, yes, I tested and
5 analyzed it. She was qualified as an expert analyzing
6 this stuff, and she says it is crack cocaine. What is
7 commonly referred to as cocaine base.

8 The next thing she talked about is the weight. We
9 had to prove it was between twenty-eight and a hundred
10 grams. She told you it was 44.63 grams. This was done
11 on certified and calibrated scales.

12 The last thing we have to prove to you is
13 possession, whether it's knowing possession, whether it's
14 actual or constructive. In this case, we're dealing with
15 actual possession. He had it on him. And how do we know
16 he knew he had it on him? Well, it came out of his
17 pants.

18 And when the jailer talked about trying to get him
19 to cooperate, this is the only time he didn't really want
20 to follow what the officers were saying was when he was
21 being booked in. He got kind of squirmy. He didn't want
22 to put his legs apart. The officer had to kind of pull
23 them apart. And when he did, that's when the dope fell
24 out. He knew it was there. And that's why he was acting
25 the way that he was when he was being booked in because

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1 he knew it was there. He was hoping that it wouldn't be
2 found, but it fell out anyway.

3 It's kind of one of those things, actions speak
4 louder than words. And that's what this is. His own
5 actions of how he acted at the booking area says it all.
6 And because of that, he was charged with it. And he
7 should be held accountable and responsible for what he
8 has done.

9 Ladies and gentlemen, you'll have an opportunity to
10 go back there and you'll have an opportunity to
11 deliberate. We just ask that you bring back a verdict
12 that speaks the truth and that justice demands. And in
13 this case, it's a verdict of guilty.

14 Thank you.

15 MR. POTTER: May it please the Court.

16 THE COURT: Yes, sir.

17 CLOSING ARGUMENT

18 BY MR. POTTER:

19 When we talked yesterday morning, I told you the
20 Government wants to convict Kevin based on its word.
21 Based on its word. And the fact of the matter is I don't
22 think the Government knows what the true facts of this
23 case is. We have a deputy who signs a warrant verifying
24 or alleging he found the drugs at one place. We have a
25 deputy who submits the incident report that says he found

1 the drugs at one place. We have a case summary that a
2 supervisor or a representative testified to a Grand Jury
3 saying he found drugs at one place, and he gets up on
4 this stand and say something totally different.
5 Completely different.

6 If we could just determine what the truth is. Is
7 the truth what he said from the stand? Is the truth what
8 he said on the warrant? Or is there something that's not
9 there that hasn't been testified to or hasn't been told,
10 that hasn't been included in the incident report that we
11 know is wrong, that hasn't been included in the warrant
12 that we know is wrong?

13 Ultimately, it's the Government's word that they're
14 asking you to convict Kevin on. And the best way I can
15 think about this is this. When you get a bowl of soup at
16 a restaurant and there's a fly in it, you don't pick that
17 fly out and eat the soup. You send the soup back.
18 That's what we have. A situation where we don't know
19 what's going on. The Government doesn't know. They've
20 got different facts.

21 We had a video that would allegedly show what
22 happened, but it's gone. Why didn't -- why didn't
23 Surratt make sure he had a video copy when he left that
24 detention center? Conveniently it's gone. We don't know
25 what's on that video. So it's the Government's word.

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1 And the Government's word is we found it at a traffic
2 stop. No, no, no. We found it at booking. What is it?
3 Is that something you can convict Kevin on? Is that the
4 type of word you expect from the Government?

5 You will have the warrants to read when you go back
6 there. Read it. They tried and they tried, well, it was
7 a traffic stop. And okay, the traffic stop continues
8 when you're booked in. That's not right. Plain reading
9 of the language. Y'all can do that. You know what a
10 traffic stop is. You know what it means. This is a
11 signed, verified, sworn-to statement.

12 The thing that scares me is this. The case summary
13 that we talked about. A case summary -- and we verified
14 and Deputy Surratt confirmed that a representative uses
15 the case summary to testify to a Grand Jury. Was Kevin
16 indicted on facts that were not presented to y'all today?
17 That's a concern. That's scary. That's the problem with
18 the State's case.

19 The State's word doesn't mean anything because it
20 doesn't know what the facts are. You can't convict on
21 that. You can demand better. This is a fellow citizen
22 who got arrested on a warrant, and not one piece of fact
23 from that warrant was testified to. We have a video
24 that's gone. And we have a detective -- excuse me -- a
25 deputy at the Anderson County Detention Center who

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1 violates policy when drugs are allegedly found at the
2 detention center. Policy and procedure. Fill out an
3 incident report, report it to your supervisor. He chose
4 not to do that.

5 You can take the fly out of the soup, but the soup
6 is still bad. You're not going to eat that soup. Find
7 Kevin not guilty. The Government's word cannot be
8 trusted.

9 Thank you.

10 THE COURT: All right. Ladies and gentlemen,
11 do any of you need a break before I begin?

12 (No response)

13 THE COURT: All right.

14 CHARGE

15 BY THE COURT:

16 You've heard all the testimony that you're going to
17 hear in this case. And as I told you at the beginning of
18 the week and yesterday, it is now my obligation to charge
19 you with the law in this case. I want to remind you that
20 the Defendant in this case has been charged with
21 trafficking in crack cocaine. The fact that he was
22 arrested, that he was charged, that he was indicted in
23 this case is not evidence and cannot be considered by you
24 as evidence of guilt and does not create a presumption of
25 guilt. The document that you'll have with you in the

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1 jury room, the indictment, is merely a sheet of paper
2 which sets forth the claims of the State and should not
3 be used to consider -- be considered by you in any way.
4 And I've told you that and I know you understand it. I'm
5 obligated to tell you that mainly because it's such an
6 important right that we have in this State.

7 Now, ladies and gentlemen, I charge you the
8 Defendant has pled not guilty to this indictment, and
9 that plea puts the burden on the State to prove the
10 Defendant guilty. A person charged with committing a
11 criminal offense in South Carolina is never required to
12 prove himself innocence -- innocent. I charge you that
13 it's an important rule of law that the defendant in a
14 criminal trial, no matter what the seriousness of the
15 charge may be, will always be presumed to be innocent of
16 the crime for which the indictment was issued unless
17 guilt is proven by evidence satisfying you of that guilt
18 beyond a reasonable doubt.

19 The presumption of innocence does not end when you
20 begin your deliberations, but it accompanies the
21 Defendant throughout the trial until you reach a verdict
22 of guilt based upon evidence satisfying you of that guilt
23 beyond a reasonable doubt. I used the example of the
24 robe of righteousness or innocence. That's still across
25 his shoulders when you begin your deliberations. He will

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1 have that across his shoulders, that robe of innocence
2 will be with him, until you strip it from him. So he's
3 still, when you begin your deliberations, innocent of the
4 charges.

5 I want to tell you again that the presumption of
6 innocence is not a mere legal theory. It's not just a
7 legal phrase. It's a substantial right to which every
8 defendant and every citizen is entitled to unless you,
9 the jury, are satisfied from the evidence of the
10 Defendant's guilt beyond a reasonable doubt.

11 I told you earlier during the initial charge a very
12 short definition of reasonable doubt. And I told you
13 that reasonable doubt is the kind of doubt that would
14 cause a person, a reasonable person, to hesitate to act.
15 I'll give you another definition that's substantially
16 longer. In every criminal case, I charge you that the
17 State has the burden of proving the Defendant is guilty
18 beyond a reasonable doubt.

19 Some of you may have served as jurors in civil cases
20 where you were told that it was only necessary to prove
21 that a fact is more likely true than not true. Such is a
22 by a greater weight or preponderance of evidence. In
23 criminal cases the State's proof must be more powerful
24 than that. It must be beyond a reasonable doubt.

25 Proof beyond a reasonable doubt is that proof that

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1 leaves you firmly convinced of the Defendant's guilt.
2 There are very few things in this world that we know
3 without absolute certainty. And in criminal cases, the
4 law does not require proof that overcomes every possible
5 doubt. If, based on your consideration of the evidence,
6 you're firmly convinced the Defendant is guilty of the
7 crime charged, you must find the Defendant guilty. If,
8 on the other hand, if you think there is a real
9 possibility that the Defendant is not guilty, you must
10 give the Defendant the benefit of the doubt and find him
11 not guilty.

12 As I told you also during the -- or at the beginning
13 of this case, you and I have very different roles and
14 have had very different roles. I don't think that I've
15 raised my voice or turned red or anything. But in the
16 event that I have given you the indication that I have
17 believed or disbelieved a witness, disregard it.

18 You have to determine -- based upon what you heard
19 in this courtroom and what you'll review back in the jury
20 room, you have to determine what the facts are. If you
21 make a mistake on the facts, not a lot can be done. If I
22 make a mistake, a legal error, if I've introduced
23 evidence or allowed evidence to be introduced that
24 shouldn't be introduced, if I made a mistake in my charge
25 that I've written, there can be an appeal to the Supreme

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1 Court, and they can change it.

2 If you make a mistake on the facts in that closed
3 room back there, there's very little that can be done.
4 In fact, there's almost nothing that can be done. So you
5 need to understand that you need to deliberate very
6 carefully and understand that your role is to determine
7 what the facts are.

8 Your role also is to take this law as I'm giving it
9 to you and apply it to those facts. And you can't wish
10 that the law were different or hope that the law is
11 different or think that the law is different. You have
12 to apply this law to the facts.

13 I know -- I've been watching you. I know you've
14 been paying attention and I do appreciate it. But you
15 are the sole judge of the facts. I'm the sole judge of
16 the law. And here's the point where we sort of mesh.

17 Now, ladies and gentlemen, I charge you there are
18 two types of evidence which are generally presented
19 during a trial. There's direct evidence and
20 circumstantial evidence. Direct evidence is the
21 testimony of a person who claims to have actual knowledge
22 of a fact such as an eyewitness. It is evidence which
23 immediately establishes the main fact to be proved.
24 Circumstantial evidence is proof of a chain of facts and
25 circumstances indicating the existence of a fact. It is

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1 evidence which immediately establishes collateral facts
2 from which the main fact may be inferred. Circumstantial
3 evidence is based on inference and not on personal
4 knowledge or observation.

5 The law makes absolutely no distinction between the
6 weight to be given either direct or circumstantial
7 evidence, nor is a greater degree of certainty required
8 of circumstantial evidence than of direct evidence. You
9 should weigh all the evidence in this case. And after
10 weighing all the evidence, if you are not convinced of
11 the guilt of the Defendant beyond a reasonable doubt,
12 then you must find the Defendant not guilty.

13 Now, necessarily one of the things you have to do is
14 determine the credibility of the witnesses. Credibility
15 is the legal phrase for believability. You have to
16 determine who you believe based upon your observations of
17 that person. You can take the testimony of a witness and
18 believe everything they said. You can believe one
19 sentence of what they say and disregard the rest. You
20 can believe one witness and not another. It's completely
21 up to you as to whether or not you believe a witness is
22 credible. And again, if any -- if there's been any
23 indication from me that I believed or disbelieved a
24 witness, please disregard it.

25 Ladies and gentlemen, I charge you that the rules of

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1 evidence ordinarily do not permit witnesses to testify to
2 opinions or conclusions. An exception to this rule
3 exists where witnesses -- or for witnesses that we call
4 expert witnesses. We had an expert witness testify in
5 this case. A witness who by education and experience has
6 become expert in some art, science, profession or calling
7 may state an opinion as to relevant material matter in
8 which the witness claims to be an expert, and he or she
9 may also state the reasons for that opinion.

10 I charge you that you should consider any expert
11 opinion received in evidence in this case and, like any
12 other evidence, give it the weight that you think that it
13 deserves. If you decide that the opinion of an expert
14 witness is not based on sufficient education or
15 experience or if you conclude that the reasons given in
16 support of the opinion are not sound or that the opinion
17 is outweighed by other evidence, you may disregard the
18 expert witness' opinion in its entirety. An expert
19 witness' testimony is to be given no greater weight than
20 that of other witness simply because the witness is an
21 expert. Further, you're not required to accept an
22 expert's opinion even though it's uncontradicted.

23 Now, ladies and gentlemen, I instruct you and I
24 emphasize that the fact that the Defendant did not
25 testify in this case is not a factor to be considered by

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Charge by the Court

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1 you in any way in your deliberations and in your
2 consideration on the question of guilt or the innocence
3 of the Defendant. It must not be considered by you in
4 any manner whatsoever. A defendant has a constitutional
5 right to remain silent. And the assertion of this right
6 must not be considered by you in your deliberations.

7 I repeat that under your oath you are to draw no
8 conclusion whatsoever from the fact that the Defendant in
9 this case didn't testify. The fact that this Defendant
10 did not testify should not even be discussed in the jury
11 room. The burden of proof, as I stated to you before, is
12 on the State. The Defendant is not required to prove his
13 innocence. The burden of proof remains on the State to
14 prove guilt beyond a reasonable doubt.

15 Now, ladies and gentlemen, I charge you that in
16 order to establish criminal liability, criminal intent is
17 required. For example, the mental state required to be
18 proven by the State for a particular crime might be
19 purpose, intent, knowledge, recklessness or criminal
20 negligence. Criminal intent must be proven by the State
21 beyond a reasonable doubt.

22 Criminal intent is always a matter that must be
23 determined by the jury from the circumstances surrounding
24 the situation. There's no way to prove intent to a
25 mathematical certainty. There's no way you can dissect a

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1 persons psyche or brain and determine what the person had
2 in mind, so the law says that criminal intent may be
3 inferred from circumstances shown to existed at the time
4 of the act. This is how you make a determination of
5 whether or not the element requiring intent was present.
6 It is not necessary to establish intent by direct and
7 positive evidence, but intent may be established by
8 inference in the same way as other facts by taking into
9 consideration the acts of the parties and all of the
10 facts and circumstances of the case.

11 Criminal intent is a mental state, a conscience
12 wrongdoing. It's up to you to determine what the
13 Defendant intended to do based on the circumstances shown
14 to have existed at the time of the act. Criminal intent
15 can arise from an action or a failure to act. It may
16 arise from negligence, recklessness or an indifference to
17 duty or to consequences that is considered by the law to
18 be the equivalent of criminal intent. Excuse me.

19 Ladies and gentlemen, I charge you that the
20 Defendant is charged with trafficking in crack cocaine.
21 The State must prove beyond a reasonable doubt that the
22 Defendant knowingly sold, manufactured, cultivated,
23 delivered, purchased, brought into this State, provided
24 financial assistance or otherwise aided, abetted,
25 attempted or conspired to sell, manufacture, cultivate,

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1 deliver, purchase or bring into this State, was knowingly
2 in actual or constructive possession of, knowingly
3 attempted to become in actual or constructive possession
4 of crack cocaine.

5 Ladies and gentlemen, I charge you that in this
6 State the State must prove beyond a reasonable doubt that
7 the amount of the crack cocaine was twenty-eight grams or
8 more but no -- but less than one hundred grams.

9 I charge you that in order to prove possession, the
10 State must prove beyond a reasonable doubt that the
11 Defendant had both the power and the intent to control
12 the disposition or use of the crack cocaine. Possession
13 may be either actual or constructive.

14 Actual possession means that the crack cocaine was
15 in the actual physical custody of the Defendant.
16 Constructive possession means that the Defendant had
17 dominion and control or the right to exercise dominion
18 and control over either the crack cocaine itself or the
19 property in which the crack cocaine was found.

20 Mere presence at the scene where the drugs were
21 found is not enough to prove possession. Actual
22 knowledge of the presence of the crack cocaine is strong
23 evidence that the Defendant's intent to control its
24 disposition or use. The Defendant's knowledge and
25 possession may be inferred when a substance is found on

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1 the property under the Defendant's control. However, the
2 inference is simply an evidentiary fact to be taken into
3 consideration by you along with every other piece of
4 evidence in this case and to be given the weight you
5 decide it should have.

6 I charge you that the definition of the deliver --
7 of deliver, it means to actually, constructively or
8 attempt to transfer the drug. I charge you that
9 distribute means to deliver either -- other than
10 administering or dispensing a drug. I charge you that
11 manufacturing means to produce, prepare, convert,
12 process, plant, cultivate, grow or harvest a drug
13 naturally or chemically. Manufacturing includes any
14 packaging or repackaging of the drug or labeling or re-
15 labeling of the drug's container.

16 Now, ladies and gentlemen, there are two possible
17 verdicts that you can find in this case. There's guilty
18 and not guilty. The fact that I've used the phrase
19 guilty prior to not guilty means nothing. There are only
20 two ways you can go in this, and I have to start with
21 something. Your verdict must be unanimous. Each of you
22 has to agree on this verdict, and you have to agree
23 unanimously the State has met it's burden in this case.

24 Madam Forelady, what I'm going to do is I'll send
25 back the indictment form. And if you'll see down on the

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1 far left corner, there's the word verdict. Once the
2 jury's reached its verdict of not guilty or guilty, you
3 just need to write that down and sign your name and knock
4 on the door. And then, of course, we'll bring you back
5 in and deliver the verdict.

6 As I said, you'll have the evidence. You will not
7 have the jury charge with you. It's not proper for me to
8 send it with you. If you get back there and start your
9 deliberations and you need a clarification or if you have
10 any question whatsoever, what I need you to do, Madam
11 Forelady, is write down the question, sign your name,
12 knock on the door, and they will bring it to me. What
13 I'll do is bring you back into the courtroom. If I can
14 answer a question, I'll answer it. If legally I can't
15 answer it, I'll just tell you, sorry, I can't answer that
16 question. If you need me to recharge or explain anything
17 in my charge in part or in whole, I'll be happy to do
18 that. You just need to write out the question or the
19 problem you're having and let me know.

20 Now, what I'm going to do now is I'm going to send
21 you back to the jury room, but I'm going to ask you not
22 to begin deliberating yet. I'll give both attorneys an
23 opportunity to ask me to correct my charge, to either add
24 or subtract something or if I've made a mistake in
25 reading it. I'm going to give them that opportunity. If

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1 I'm going to make a change, I'll bring you back in. If
2 I'm not going to make a change, in just a minute Buck
3 will bring you back the evidence. And at that point,
4 once you get this indictment and the evidence, you can
5 begin your deliberations.

6 Again, if you have any problem or any questions,
7 write it out. We'll be waiting for you. Take all the
8 time you need and let me know if there's a problem.

9 Take everybody back except the alternate.

10 (WHEREUPON, the jury exited the courtroom at
11 approximately 11:19 a.m.)

12 THE BAILIFF: You want all of them back in here
13 or ...

14 THE COURT: Just out there. I'll come out
15 there in the hall.

16 Any objections to the charge?

17 MR. CAMPBELL: No, Your Honor.

18 MR. POTTER: If it pleases the Court, and I may
19 have blocked this out. Did you read the credibility of
20 witnesses instruction to the jury?

21 THE COURT: Yeah. Actually, I didn't read it
22 verbatim.

23 MR. POTTER: Okay.

24 THE COURT: I'm -- I went through and told them
25 believability, et cetera, et cetera.

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1 MR. POTTER: Right. The only other thing that
2 we would ask again for that instruction related to
3 destruction of the video and the inference to the benefit
4 of the Defendant?

5 THE COURT: Okay. Yeah. And I understand, and
6 all of your arguments are incorporated from before. I
7 deny it, but you're protected.

8 MR. POTTER: Thank you, Judge.

9 THE COURT: Anything else?

10 MR. CAMPBELL: Nothing from the State.

11 THE COURT: Y'all make sure that's together and
12 here's that indictment. And I'll be out to talk to the
13 alternate in just a second.

14 (WHEREUPON, the exhibits in evidence and verdict
15 form were delivered to the jury to begin their
16 deliberations at approximately 11:22 a.m. after
17 which court stood at recess awaiting the verdict of
18 the jury.)

19 THE COURT: I understand we have a verdict.
20 What I'll do is bring them in and receive their verdict.
21 Then I'll go back and speak to them depending on what the
22 verdict is, and we'll go from there. Any objection to
23 that?

24 MR. CAMPBELL: None from the State.

25 THE COURT: Any objection from the Defense?

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1 MR. POTTER: No, Your Honor.

2 THE COURT: Okay. You can bring them in.

3 (WHEREUPON, the jury entered the courtroom at
4 approximately 12:21 p.m.)

5 THE COURT: All right. Madam Forelady, I
6 understand you have a verdict.

7 THE JUROR: Yes, sir.

8 THE COURT: If you would hand it to the
9 bailiff, please.

10 (WHEREUPON, the verdict form was handed up to the
11 Court.)

12 THE COURT: All right. You can publish it.

13 MADAM CLERK: This is case 2009-GS-04-1737, the
14 State versus Kevin Jerome Gilliard, indictment for
15 trafficking crack cocaine twenty-eight grams or more but
16 less than one hundred grams. The verdict of the jury is
17 guilty.

18 Madam Forelady, ladies and gentlemen of the jury, if
19 this is your verdict, would you please indicate by
20 raising your right hand?

21 (WHEREUPON, all jurors hands were raised.)

22 MADAM CLERK: All hands raised, verdict of the
23 jury, Your Honor.

24 THE COURT: All right. Thank you.

25 Ladies and gentlemen, I have to send you back one

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1 last time. I'll be back to speak to you in just a
2 minute. But please go back to the jury room one last
3 time.

4 (WHEREUPON, the jury exited the courtroom at
5 approximately 12:22 p.m.)

6 THE COURT: All right. Any motions?

7 MR. CAMPBELL: None from the State, Your Honor.

8 MR. POTTER: None at this time, Your Honor.

9 THE COURT: All right. What I'm going to do is
10 go back and talk to them and obviously give them the
11 opportunity to come back out if they want to. You got
12 everything ready?

13 MR. CAMPBELL: Yes, sir.

14 THE COURT: Okay. I'll be back in just a
15 second.

16 (WHEREUPON, court stood at recess for a short break
17 during which State's Exhibits Number 2 and 3 were
18 marked for identification only.)

19 THE BAILIFF: All rise.

20 THE COURT: Thanks. Have a seat.

21 All right. Y'all can come on up.

22 (WHEREUPON, the Defendant and counsel approached the
23 bar.)

24 THE COURT: Yes, sir.

25 MR. CAMPBELL: Your Honor, may it please the

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1 Court. I'm going to hand up the sentence sheet involved
2 in this case, and I also have some documents to go on the
3 record.

4 THE COURT: Okay. All right. You can go ahead
5 and put those on the record.

6 MR. CAMPBELL: Your Honor, I'm introducing --
7 and I'm going to show this to Mr. Potter. Court's
8 Exhibit Number 2 is actually a copy of the Anderson-
9 Ocone Forensic Lab Report regarding the cocaine and the
10 weight. And then the -- this is actually a third
11 conviction, the two certified convictions I have. The
12 first one, indictment number 94-GS-04-1184, he was
13 convicted of -- initially it was possession with intent
14 to distribute, and it looks like they reduced it down to
15 possession of crack. And then in 01-GS-04-2141, he was
16 convicted of distribution of marijuana. In that he was
17 actually given three years jail time.

18 He does have a fairly lengthy record. In '92,
19 prowling, receiving stolen goods, receiving stolen goods.
20 Got eight years suspended and probation. In '93, there's
21 grand larceny, breaking in to motor vehicle, another
22 grand larceny, and another grand larceny charge. Then in
23 '94, the crack cocaine conviction. In '95, a reckless
24 driving, D.U.S., false information, failure to accompany,
25 assault and battery, two counts. '99, another giving

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1 false information. '99, he was convicted of failure to
2 stop for a blue light. '01, simple possession of
3 marijuana. 2000, disorderly conduct, public disorderly
4 conduct. In 2001, the distribution of marijuana, and
5 also he had another possession of marijuana conviction
6 along with that. '90 --'06, failure to accompany and
7 also another possession of marijuana. And then in 2008,
8 a criminal domestic violence conviction. This will be
9 his third offense. And I'll hand up these Court's
10 Exhibits.

11 THE COURT: And just for the record, what's the
12 range, statutory range for sentencing?

13 MR. CAMPBELL: Twenty-five to thirty, Your
14 Honor.

15 THE COURT: Twenty-five to thirty?

16 MR. CAMPBELL: Yes, sir.

17 THE COURT: So twenty-five minimum. Is there a
18 fine?

19 MR. CAMPBELL: The fine is ---

20 THE COURT: Fifty thousand dollars?

21 MR. CAMPBELL: --- fifty thousand.

22 THE COURT: Is that an and a fifty thousand
23 dollar fine? I think it is.

24 MR. CAMPBELL: Let's see. For a third or
25 subsequent offense, mandatory minimum imprisonment not

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1 less than twenty-five ...

2 THE COURT: Okay.

3 MR. CAMPBELL: ... and ...

4 THE COURT: All right. Yes, sir?

5 MR. POTTER: Judge, a couple of things in
6 regards to his prior convictions that are being used to
7 enhance. First off, the '94 conviction doesn't indicate
8 he was represented by counsel on that particular case.
9 There is no attorney listed on the sentencing sheet or
10 anything about that that I can see. I would respectfully
11 submit as a result, that cannot be used for enhancement
12 purposes in sentencing. It appears he did not have the
13 benefit of counsel from a reading of the sentencing sheet
14 and what was signed by Judge Epps.

15 In addition, we would submit obviously that the
16 enhancement process -- I think he's entitled at the very
17 least to a jury trial to make a finding whether or not he
18 is -- these are two prior convictions that are something
19 could be enhanced upon for this conviction.

20 Finally, we would submit, Judge, that the mandatory
21 minimum set forth by the General Assembly is a violation
22 of the separation of powers, Eighth Amendment and due
23 process clauses of the United States and the South
24 Carolina Constitution. I'm going to ask that you
25 sentence him in a reasonable fashion as per your

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1 responsibilities of duty. But the main problem I've got
2 is that '94 conviction doesn't have any indication that
3 he was represented by counsel.

4 THE COURT: What's y'all's position on that?

5 MR. CAMPBELL: Your Honor, it was a general
6 sessions charge back in 1994. If I recall correctly,
7 they don't have -- they didn't have it where the
8 attorneys were signing it. It doesn't indicate either
9 way. It's still a general sessions charge. It's still a
10 conviction under the statutes. We're not even
11 considering the little minor simple possession of
12 marijuana charges. It is a general sessions charge.
13 There's no indication from him that he wasn't
14 represented. And to my knowledge and my opinion, I feel
15 like that should count as an enhancement. Furthermore,
16 even if it was considered as a second offense, the
17 penalty range is seven to thirty.

18 THE COURT: Okay.

19 All right. Mr. Gilliard, anything you want to say?

20 THE DEFENDANT: Yes, sir. I don't feel that I
21 should be like enhancement for my '94. I was young and
22 dumb back then, you know. It's been many years.

23 THE COURT: Well, the problem I got is you're
24 not young and dumb now. I mean, what are you still out
25 there doing this for?

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1 is, of twenty-five years and a fine of fifty thousand
2 dollars. I'm going to give you credit for the two
3 hundred and thirty-four days that you've served.

4 And I think that's about it. There's no other --
5 nothing it needs to run concurrent with, no revocations?

6 MR. CAMPBELL: No, sir. I dismissed the other
7 charges.

8 THE COURT: Everything's been dismissed?

9 MR. CAMPBELL: Yes. I've already handed those
10 up to Ms. Phillips.

11 THE COURT: All right. Good luck to you.

12 MR. CAMPBELL: Thank you, Your Honor.

13 MR. POTTER: Thank you, Judge.

14 (WHEREUPON, the Defendant was escorted from the
15 courtroom.)

16 MR. CAMPBELL: Just one second. Can I look at
17 the sentencing sheet?

18 (Pause)

19 MR. CAMPBELL: Actually, Your Honor, I need to
20 make a correction on the record.

21 THE COURT: Stop him then. We need to get him
22 back in.

23 MR. POTTER: What's that?

24 MR. CAMPBELL: The CDR code on the sentencing
25 sheet is wrong.

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1 THE COURT: What is it?

2 MR. CAMPBELL: Your Honor, on the sentencing
3 sheet, it has a CDR code of 392 as his first offense, and
4 it's not.

5 THE COURT: Okay. Yeah, you got to change
6 that.

7 (WHEREUPON, the Defendant entered the courtroom.)

8 THE COURT: Mr. Gilliard, hold on a minute.
9 They got -- there was just a technical problem here, but
10 I wanted you here for everything.

11 The one that was corrected is down there.

12 MR. CAMPBELL: Yeah, 349. Your Honor, I'm
13 going hand this up to you for correction. Actually, the
14 indictment is right. It says 349, but we went and
15 printed one out with a new sentencing sheet that came
16 back as 392. So the CDR code should be 349. And if
17 you'll just scratch out the first offense.

18 THE COURT: So 349 instead of 392?

19 MR. CAMPBELL: Yes, sir. I'm going to hand the
20 indictment back to you.

21 THE COURT: All right. You understand what
22 I've done here?

23 MR. POTTER: Yes, Judge.

24 THE COURT: I just struck through the CDR code
25 and struck through the first offense.

1 CERTIFICATE OF REPORTER

2 I, the undersigned Renee H. Tollison, Official Court
3 Reporter for the Tenth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all
6 the proceedings had and evidence introduced in the
7 trial/hearing of the captioned case, relative to appeal,
8 in the Circuit Court for Anderson County, South Carolina,
9 on the day 7th through 10th days of December 2009.

10 This transcript may contain quoted material. Such
11 material is reproduced as read by the speaker.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 March 8, 2010

15
16 Renee H. Tollison

17 Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

County of ANDERSON)

IN THE COURT OF COMMON PLEAS

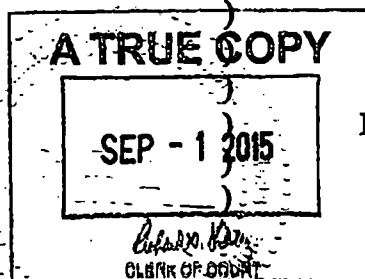
2015-CP-04-02068

KEVIN JEROME GILLIARD, #275357)

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

v.)

State of South Carolina)

APPLICATION FOR
POST-CONVICTION RELIEFFILED-CLERK'S OFFICE
ANDERSON SC

2015 SEP - 1 PM 9:10

INSTRUCTIONS B 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, LEE COUNTY
2. Name and location of Court which imposed sentence ANDERSON COUNTY 10th CIRCUIT
3. Name(s) of co-defendant(s) (if any) DEMETRIUS ROBERTSON
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-GS-04-1737; TRAFFICKING COCAINE

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) DEC. 9th., 2009; TWENTY-FIVE(25)YRS. & FINE OF \$50,000
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. COURT OF APPEALS
- ii. S.C. SUPREME COURT
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. AFFIRMED
- ii. CERT. DISMISSED AS IMPROVIDENTLY GRANTED
- iii. _____
- (c) the date of each such result:
- i. HEARD MARCH 14th., 2012-FILED JUNE 13th., 2012
- ii. HEARD JUNE 16th., 2015-FILED JULY 15th., 2015
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. RULE 220 (b)(1) SCACR; ARIZONA V. YOUNGBLOOD/STATE V. CHEESEBORO
- ii. RULE 268 (D)(2) SCACR
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) N/A

- (b) N/A
- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Applicant reserved the right to amend his application at a later
- (b) date.
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) _____
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NONE
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

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

i. N/A

ii. N/A

iii. N/A

iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

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

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

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

i. N/A

ii. N/A

iii. N/A

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) 1st. P.C.R.
 (b) _____
 (c) _____

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

(a) your arraignment and plea? _____
 (b) your trial, if any? YES
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

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

(a) the name and address of each attorney who represented you:
 i. KURT TAVENIER; ANDERSON COUNTY PUBLIC DEFENDERS OFFICER,
301 CAMSON ROAD, ANDERSON SOUTH CAROLINA 29625
 ii. ANDREW POTTER; ANDERSON COUNTY PUBLIC DEFENDERS OFFICER,
301 CAMSON ROAD, ANDERSON SOUTH CAROLINA 29625
 iii. TRISTAN SHAFFER; SHAFFER LAW FIRM,
120 GRANT STREET, LEXINGTON SOUTH CAROLINA 29072

iii Wanda Carter; S.C. Commission on Indigent Defense, Columbia S.C. 29211-1589

(b) the proceedings at which each such attorney represented you:
 i. PRELIMINARY "STAGES"
 ii. TRIAL
 iii. DIRECT AND RE-HEARING ON DIRECT
 iii. WRIT OF CERTIORARI TO S.C. SUPREME COURT

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

REVERSE AND REMAND FOR NEW TRIAL EXCLUDING UNCHARGED
MARIJUANA FOUND AS A RESULT OF TRAFFIC STOP.

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of ANDERSON)

VERIFICATION

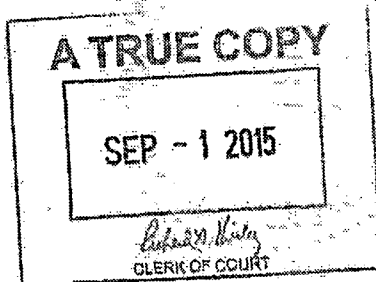
I, KEVIN JEROME GILLIARD #275357, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

s/ Kevin Gilliard

SWORN to and subscribed before me this 25
 day of Aug, 2015.

Debra Suris (L.S.)
 Notary Public

My Commission Expires: 11-4-2015



FILED CLERK'S OFFICE
 ANDERSON SC
 2015 SEP - 1 AM 9:04
 COMMON PLEAS AND
 GENERAL SESSION

2015-CP-04-02068

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

I, KEVIN JEROME GILLIARD #275357, 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.

Kevin Gilliard
Applicant

SWORN or affirmed to and subscribed before me this

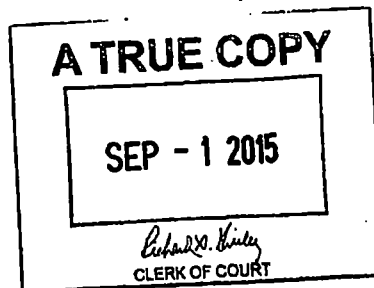
25 day of Aug, 2015.

Debra Sines
Notary Public

My Commission Expires:

11-4-2015

FILED-CLERK'S OFFICE
ANDERSON SC
2015 SEP - 1 PM 9:04
COMMON PLEAS AND
GENERAL SESSIONS



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	TENTH JUDICIAL CIRCUIT
	)	
Kevin Jerome Gilliard,	)	C.A. No. 2015-CP-04-2068
S.C.D.C. No. 275357,	)	
	)	
Applicant,	)	
	)	RETURN AND MOTION TO DISMISS OR,
	)	IN THE ALTERNATIVE, FOR A MORE
	)	DEFINITE STATEMENT
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed September 1, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Applicant was indicted at the July 2009 term of trafficking cocaine, 28-100 grams (2009-GS-04-1737). Applicant was represented by Andrew Potter, Esquire. Applicant proceeded to trial from December 7-9, 2009, after which a jury convicted him as indicted. The Honorable J. Cordell Maddox, Jr., sentenced him to twenty-five (25) year imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Tristan Shaffer, Esquire. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Gilliard, No. 2012-UP-351 (filed June 13, 2012). The Remittitur was issued on March 4, 2014.

Applicant filed a petition for writ of certiorari to the Supreme Court of South Carolina. The Supreme Court granted certiorari. On July 15, 2015, the Supreme Court dismissed certiorari as improvidently granted. State v. Gilliard, No. 2015-MO-041. The Remittitur was issued on July 15, 2015.

Attached herewith and incorporated herein by reference are the records of the Anderson County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial hearing, Applicant's records for the Department of Corrections, and Applicant's appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

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

1. "Applicant reserved the right to amend his application at a later date."

III.

Applicant has failed to raise any allegations for relief. The Uniform Post-Conviction Procedure Act requires the Applicant to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Applicant's pleadings are not compliant with the statute. Accordingly, Respondent requests the current application be dismissed.

In the alternative, Respondent moves for a more definite statement. Respondent submits that it would be unfair to wait until the day of the hearing to raise any specific issues. The Respondent is entitled to adequately prepare for the hearing, and that to withhold the specific grounds and amend only on the day of the hearing prejudices the Respondent. Respondent

therefore submits that it is incumbent on the Applicant to amend the application and provide specific allegations so that adequate preparation is possible. Moreover, Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the Respondent. Rule 15(a), SCRCF.

IV.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCF 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCF Rule 11. Filings by inmates will not be considered at the PCR hearing.

V.

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

[Signature follows]

VI.

WHEREFORE, having made its Return, Respondent requests that the present application be dismissed or, in the alternative, the Applicant be required to amend his application to include a specific set of allegations as to why he is entitled to relief.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

May 23, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	
	)	2015-CP-04-2068
	)	
KEVIN JEROME GILLIARD, # 275357	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent,	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss or, In the Alternative, for a More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Hugh Wingo Welborn, Esquire
PO Box 173
Anderson, SC 29622

DATED this the 23rd day of May, 2016.


 Deonna Rogers, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	Case No(s) : 2015CP0402068
	)	
Kevin Jerome Gilliard	)	
	)	
Applicant,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

October 25, 2016
Anderson, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

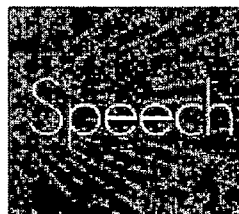
A P P E A R A N C E S:

JOHANNA C. VALENZUELA, Esquire
Attorney for the State

R. MILLS ARIAIL, Esquire
Attorney for the Applicant

Teresa B. Johnson
Certified Verbatim Reporter
P.O. Box 2812
Greenville, S.C. 29602

Records are
taken and
produced via



CAT 7SM

I N D E XDIRECT CROSS REDIRECT RECROSS

Applicant Witnesses:

Kevin Gilliard

by Mr. Ariail 8

by Ms. Valenzuela 26

Andrew Potter

by Ms. Valenzuela 40

by Mr. Ariail 51

Certificate of Reporter 59

EXHIBITS PAGE

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u> <u>EV</u>
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APPLICANT EXHIBITS

A-1	Applicant's Notes	7
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RESPONDENT EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 25th day of October, 2016 at approximately 10:09 a.m.)

THE COURT: Yes, ma'am.

MS. VALENZUELA: May it please the Court.

This is the case of Kevin Gilliard versus the State of South Carolina, 2015-CP-04-2068.

Mr. Gilliard filed his application on September 1st of 2015, approximately a little over a year ago. He's presently confined in at the Department of Corrections and this is because he was indicted by the Anderson Grand Jury in July of 2009 for Trafficking Cocaine.

He was represented by Andrew Potter at trial. That trial proceeded before Judge Maddox on December 7th through 9th of 2009. And after that -- after he was convicted by the jury, Judge Maddox sentenced him to 25 years in prison. A timely notice of appeal was filed on behalf of the applicant. The South Carolina Court of Appeals affirmed his convictions and sentences, and that remittitur was issued on March 4th of 2014.

Now, the State is before you -- the initial matter is that we had filed a return and a

1 motion to dismiss. Additionally, we made a
2 motion -- or in the alternative, a motion for a
3 more definite statement, and that's because, in
4 the application, the allegations were listed as
5 Applicant reserves the right to amend his
6 application at a later date. To this date, we
7 haven't received any allegations from the
8 applicant.

9 **THE COURT:** Okay. All right. Mr. Ariail?

10 **MR. ARIAIL:** Your Honor, I talked with the
11 Attorney General yesterday in regards to it.
12 I've taken this case over from Mr. Welborn.
13 I've reached out and had a conversation and
14 conference call with him in regards to it to
15 try to get some understanding of kind of where
16 we are in regards to this case. He told me last
17 week that he was going to send me a
18 supplemental brief explaining his allegations.
19 Apparently, there was some mix up or some issue
20 with the mail, he just explained to me, with
21 the Department of Corrections.

22 He has provided me, at this point in time,
23 a brief -- actually, it's a summation of his
24 points that he wants to raise. A lot of these,
25 Your Honor -- I'm looking at them -- are pretty

1 much the standard one that we deal with on most
2 cases. They are not really in depth, in
3 particular to his case. I was trying to show
4 this to the Attorney General to see if there's
5 any issue in regards ---

6 **THE COURT:** Okay.

7 **MR. ARIAIL:** --- to proceeding on those
8 points, which I kind of tried to explain to her
9 yesterday some of those things that we are
10 raising.

11 (WHEREUPON, there is a pause.)

12 **THE COURT:** Yes, sir.

13 **MR. ARIAIL:** Yes, Your Honor, we're ready
14 to proceed whenever.

15 **THE COURT:** All right. I'm ready to go. Is
16 there anything -- any update from you all with
17 regard to that note? You've seen this document?

18 **MS. VALENZUELA:** Your Honor, I was handed
19 up a slightly over two-page handwritten list of
20 allegations that talked about those with my
21 witness. We have -- we both reviewed the
22 transcript and we both will be able to address
23 these.

24 **THE COURT:** Okay. Okay. Fantastic. So your
25 motion for a more definite statement is

1 withdrawn? Is that what I'm understanding?

2 **MS. VALENZUELA:** I think it's an answer
3 today.

4 **THE COURT:** Okay. Good.

5 **MR. ARIAIL:** Thank you.

6 **THE COURT:** All right.

7 **MR. ARIAIL:** If I can submit this as an
8 exhibit to his PCR, if there's no problem with
9 that.

10 **THE COURT:** Do you have any objection?

11 **MS. VALENZUELA:** No.

12 **THE COURT:** All right. It will be
13 Applicant's 1.

14 (WHEREUPON, Applicant's Exhibit 1 is marked for
15 identification purposes.)

16 **THE COURT:** Yes, sir.

17 **MR. ARIAIL:** We are ready whenever Your
18 Honor is. I can call my client, Mr. Gilliard,
19 to the stand.

20 **THE COURT:** All right, sir. If you will,
21 come forward and be sworn please.

22 **THE CLERK:** Step right here. Raise your
23 right hand.

24 **KEVIN GILLIARD**

25 having first been duly sworn, testifies as follows:

1 **THE CLERK:** Thank you. You can have a seat
2 right there as witness. If you would, state
3 your full name for the record and spell your
4 last name.

5 **THE WITNESS:** Kevin Jerome Gilliard,
6 G-I-L-L-I-A-R-D.

7 **DIRECT EXAMINATION**

8 **BY MR. ARIAIL:**

9 **Q** All right. Mr. Gilliard, is that how you
10 pronounce it? Is that correct?

11 **A** Yes, sir.

12 **Q** Okay. Good. How you doing today?

13 **A** All right.

14 **Q** Good. We're here on PCR. I just want to go
15 through and kind of get a little bit of the
16 background in regards to your -- I guess what we're
17 here today for. You went to -- I guess you were
18 indicted on July -- some time in July 2009 of
19 Trafficking Cocaine 28 to 100 grams. Is that correct?

20 **A** Yes.

21 **Q** Okay. You were represented initially by
22 Kurt Tavernier in regards to these charges; is that
23 right?

24 **A** Yes, sir.

25 **Q** And tell me, when you got arrested, were

1 you incarcerated or did you get out on bond? How did
2 that work out?

3 A No, sir. I stayed in jail.

4 Q Stayed in jail. Mr. Tavernier, was he
5 appointed to represent you?

6 A Yes, sir.

7 Q How long after you were arrested did he --
8 I guess, was he appointed as your attorney?

9 A He was found to be a conflict of interest
10 three weeks prior to my trial.

11 Q Okay. That's not my question. After you
12 were arrested, how long after was he appointed to
13 represent you?

14 A No longer than a week.

15 Q Okay. How many conversations did you have
16 with him during his representation of you?

17 A Maybe five, six.

18 Q Okay. Did he give you your discovery in the
19 case?

20 A Yes, yes.

21 Q Did y'all discuss the case?

22 A No, not actually.

23 MS. VALENZUELA: I'm sorry. Can I have a
24 brief moment to speak with counsel?

25 THE COURT: Oh, certainly.

1 **(WHEREUPON, there is a pause.)**

2 **MS. VALENZUELA:** Your Honor, at this point,
3 we would make an objection to going into
4 anything that involves another attorney other
5 than the witness we have here, Andrew Potter. We
6 didn't have notice of that, and we are
7 proceeding forward on the basis that we were
8 prepared today with the witness that we have. So
9 any allegations that go to representation before
10 Andrew Potter, we would object to. We would say
11 that it's untimely and we would rely on our
12 motion for a more definite statement to say that
13 he had the opportunity to give us this. He would
14 be a part of this if he were able to go forward
15 with any allegations that do not reach Andrew
16 Potter, who was his counsel at the trial.

17 **THE COURT:** Mr. Ariail?

18 **MR. ARIAIL:** Well, Your Honor, I'm not
19 aware -- when I talked to him in regard to it,
20 it was my understanding that Mr. Potter was the
21 one that we were focusing in on. I'm just -- I
22 was trying to lay the foundation in regards to
23 who represented him, if he got discovery and all
24 that. But I had not heard any allegations that
25 he has told me that he wants to say Mr.

1 Tavernier was ineffective.

2 **THE COURT:** All right. Mr. Gilliard, you
3 understand that here today, the allegations
4 you've made are with regard to your
5 representation by Mr. Potter. If there's
6 anything that needs to just set the stage with
7 Mr. Tavernier, then I certainly understand. But
8 anything about Mr. Tavernier or an ineffective
9 assistance of counsel that you allege against
10 Mr. Tavernier, I can't consider because it's not
11 part of your application. You know that?

12 **THE WITNESS:** Yes, ma'am.

13 **THE COURT:** Okay.

14 **BY MR. ARIAIL:**

15 **Q** So what I'm trying to do, Mr. Gilliard, is
16 just lay the foundation. So you got your discovery.
17 You had some conversation with Mr. Tavernier. And at
18 some point in time, he was removed as counsel for a
19 conflict of interest. Is that correct?

20 **A** Yes, sir.

21 **Q** After that, Mr. Potter was appointed to
22 represent you; is that right?

23 **A** Yes, sir.

24 **Q** Okay. You indicated it was about three or
25 four weeks before trial?

1 **A** Three weeks exactly before my trial.

2 **Q** Okay. What conversations did you have with
3 Mr. Potter about your case before trial?

4 **A** When I met with Mr. Potter, the first thing
5 I told Mr. Potter was that I was innocent of all
6 charges.

7 **Q** Okay. So you are innocent of all charges.
8 Did you tell him -- did y'all go over the facts of
9 the case?

10 **A** Yes, sir. I went over the facts of the case
11 with him. I told him everything.

12 **Q** What were the things you wanted him to do
13 or concentrate on when he tried the case?

14 **A** I had three defense witnesses ---

15 **Q** Okay.

16 **A** --- at the trial -- at the traffic stop
17 that seen me get searched two times. It was another
18 officer that came out as back up that searched me his
19 self. He was the second officer that searched me.

20 **Q** Wilkerson?

21 **A** Yeah, John Wilkerson.

22 **Q** Okay.

23 **A** And my girlfriend had came out to the
24 traffic stop too. She was sitting on the side of the
25 road. She witnessed him search me the first time he

1 got me out of the car. And when Wilkerson came as
2 backup, Wilkerson searched me again the second time.
3 He told me that my girlfriend was discredibile because
4 she was my girlfriend at the time of the traffic
5 stop.

6 Q Okay. Let me just give a brief summary of
7 what happened here. You were in the passenger seat of
8 a car that apparently was pulled over during a
9 traffic stop and the officer said he witnessed or saw
10 marijuana and smelled marijuana in the car. As a
11 result, he did a search of you. Got you out of the
12 car. Searched you and found marijuana. And then took
13 you to the Anderson County detention center. And at
14 that point in time, the allegation was that some
15 crack cocaine fell out on -- your person, somewhere
16 on you. And that's what you were charged with, 28 to
17 100 grams. Is that correct?

18 A Yes, sir.

19 Q Is that pretty much the synopsis?

20 A Yes, sir.

21 Q What was your theory that you wanted Mr.
22 Potter to advance to the jury or to take at trial?
23 What were you wanting him to do?

24 A I didn't have the drugs on me period.

25 Q Okay. So you're saying the drugs were

1 planted?

2 **A** No. I'm saying that I never had the drugs
3 from the Point A. From the traffic stop to the county
4 jail, I never had the drugs.

5 **Q** Okay. So how -- I'm just trying to
6 understand this. How was he supposed to be able to
7 defend and say, well, the drugs that were found at
8 the detention center, when you were getting booked
9 in, were not yours and didn't fall off your person?
10 What was he supposed to do with that?

11 **A** Bring my three defense witnesses. See, my
12 co-defendant, he came to my trial the first day of my
13 trial. And he told these people that he told them
14 that everything was his at the traffic stop. See, the
15 point that -- he could have cross-examined him. My
16 co-defendant could have said, yes, this officer did
17 search us two times. He didn't get that on -- I
18 wanted him to get that on the record so the record
19 would show that I was searched two times. See, none
20 of my arguments of me showing a defense -- he never
21 showed a defense period.

22 **Q** Okay. Here's what I'm trying to figure out
23 -- I'm trying to understand this, and maybe you had a
24 discussion with him. There was an officer -- I think
25 there was two officers that said -- it was Mr.

1 Surratt and Mr. Lunz --

2 A Andrew Lunz.

3 Q -- Andrew Lunz said that they witnessed the
4 crack cocaine fall out of your pants at the detention
5 center.

6 A Yes, sir.

7 Q So how does -- explain to me. How does what
8 happened at the scene -- you know, how does that help
9 you in regards to what happened at the detention
10 center?

11 A Because that was a false allegation. They
12 ain't never seen no drugs fall out of my pants.

13 Q Okay. So you were saying they were lying?

14 A They was lying.

15 Q Okay. But did you -- I mean, so did you
16 have a discussion with him saying what we need to do
17 to show that they were not telling the truth?

18 A Yes, sir.

19 Q Okay. Now, one key piece of evidence of the
20 case that was brought forward that wasn't there was
21 that there was no videotape, correct?

22 A Yes, sir.

23 Q Are you saying that Mr. Potter did anything
24 wrong in regards to not object -- excuse me --
25 anything he did in regards to trying to keep that

1 out? Are you saying he did anything wrong with that?

2 A He said that the detective was -- the tape
3 was destroyed, but he didn't think the State
4 destroyed it in bad faith. I mean, who -- who
5 attorney are you? Are you with the State or are you
6 with me? Of course it was destroyed in bad faith ---

7 Q Right. But he --

8 A --- because it would have exonerated me.

9 Q Right. But didn't he try to -- he made an
10 objection or, actually, he asked the judge for an
11 instruction that they had destroyed evidence,
12 correct?

13 A Yes, sir.

14 Q And what else did you want him to do with
15 that? Did he -- anything else you're saying he should
16 have done?

17 A I'm not really understanding what you're
18 saying about that.

19 Q I'm just trying to say, was he ineffective
20 in regards to what he did ---

21 A Yes, sir, very ineffective.

22 Q --- with the video?

23 A Yes, sir.

24 Q Okay. So tell me what that -- what you're
25 saying he did.

1 **A** That was one of my prongs that -- it was
2 two prongs that first I couldn't -- they say that I
3 never argued about no exculpatory evidence of the
4 video tape and that -- they used Arizona versus
5 Youngblood and said that they didn't violate my due
6 process rights, specifically because counsel said
7 they didn't destroy it in bad faith.

8 For two -- he killed both of those prongs.
9 He never showed or he never argued no evidence of
10 what the exculpatory evidence would have showed. Then
11 he came back and said that it didn't violate my due
12 process rights. So my -- I probably would have got my
13 case overturned on direct appeal if he hadn't had
14 been effective -- ineffective.

15 **Q** Okay. You're asking him also you wanted him
16 to subpoena Officer Wilkerson, is that for the --

17 **A** That was for purpose of I knew that Surratt
18 -- he already done told one lie. They already lied by
19 admission about one lie. I knew that he was going to
20 sit there and say that he didn't search me. I wanted
21 Wilkerson to be there to contradict his statement.
22 See, the jury was already looking at him like he was
23 -- that right there would have had more -- would have
24 discredited him even more. I needed Wilkerson to be
25 there on my side for my behalf.

1 Q Okay. Did you have a discussion with him in
2 regards to what Wilkerson could say or how he was
3 going to maybe help or hurt your case?

4 A Yes, sir. That's why he was a witness on
5 the potential witness list.

6 Q Did you have a discussion with Mr. Potter?

7 A I had a discussion with him.

8 Q Okay. Did he tell you there might be
9 problems and it might not be helpful?

10 A He never consulted with me about that
11 period. He told me that he was going to have
12 Wilkerson up. And then when Surratt took the stand, I
13 asked him, I said I thought you were going to have
14 Wilkerson. He said, well, I'll subpoena him tomorrow.
15 Tomorrow never came.

16 Q Okay. You say he was going to show what
17 happened at the scene and contradict Officer Surratt?

18 A Yes, sir.

19 Q Okay. Now, you've indicated to me you
20 wanted a motion to suppress to be filed?

21 A Yes, sir.

22 Q Did you discuss that with Mr. Potter?

23 A Yes, sir.

24 Q What did y'all discuss about that?

25 A The first motion was -- okay, my arrest

1 warrant -- when I was in the county jail, I had a
2 Georgetown law journal, and the first case that
3 really caught my eye was Franks versus Delaware.
4 Everything that happened in that case -- the facts of
5 that case are in my case. Surratt went to this
6 magistrate and told the magistrate judge that he
7 found the drugs on me at the traffic stop. So I would
8 ask him could I use -- he told me that since that was
9 a search warrant and your case deal with arrest
10 warrant, the facts are different. But the Supreme
11 Court say a warrant is a warrant. That was against my
12 seizure.

13 Q So you -- y'all did discuss --

14 A And he told me that was irrelevant. I got
15 -- I got a letter right here where he said the facts
16 are irrelevant. I don't intend -- I'm arguing that --
17 I mean, not just -- due to the fact that it was no
18 good faith compliance or nothing to -- he -- he -- he
19 cross-examined him thoroughly about the warrant. He
20 asked everything. He never tried to make a second
21 affidavit or tried to come back and just -- you know,
22 his mistake, he never tried to correct the mistake.
23 But it was a mistake that really didn't happen
24 because it didn't happen that way.

25 Q Okay. You -- I'm trying to review some of

1 your notes that you've given me to today. You said
2 there was some indication that you wanted some
3 testimony in regards to marijuana excluded because
4 you felt that was prejudicial to you.

5 A Yes, sir. Okay --

6 Q Tell me what you mean by that.

7 A Like, when I found out I was indicted, I
8 wrote a letter to the Grand Jury.

9 Q Okay.

10 A And I told the Grand Jurors about the facts
11 of the case. Everything that was in the car, I was
12 charged with. But what I wasn't -- what I did had --
13 I can't dispute it -- I did had a dime bag of
14 marijuana in my pocket, but I never was charged with
15 this, and I do not feel like that was evidence that
16 was presented to the Grand Jury to get me indicted
17 for trafficking. What got me indicted for trafficking
18 was the evidence in the car. See, I asked for a
19 preliminary hearing. I wrote this -- I wrote the
20 Clerk of Court and everybody. But anyway, they sent
21 me a date for a preliminary hearing dated for June
22 the 5th.

23 Q Uh-huh.

24 A And I came back to the courthouse and Big
25 Ben told them when they brought me in, he was like,

1 y'all can take him on back. I was like, why, because
2 I felt like if I would have had this preliminary
3 hearing, the preliminary hearing would have showed
4 the fact that my co-defendant said -- he told him --
5 he told Surratt off the top, when Surratt asked him
6 -- when he came to the car, he said -- the officer
7 said is there anything in the car I need to know
8 about before I search this car. My co-defendant
9 already told him that the marijuana and the gun was
10 in the car. I never should have been charged with
11 that in the first place.

12 Q Okay. So let me try to summarize to make
13 sure I understand this, because I think I finally do.
14 You're saying that your co-defendant acknowledged
15 that the marijuana in the car and the gun were his.

16 A Yes, sir.

17 Q So, I guess, the basis of what the Grand
18 Jury considered to, I guess, get you indicted for the
19 crack cocaine, you're saying they shouldn't have
20 relied on that so you should not have been indicted
21 based on him saying that that was his --

22 A Yes, sir.

23 Q -- his gun and his marijuana?

24 A Yes, sir.

25 Q Okay. That's pretty much your argument?

1 **A** Yes, sir.

2 **Q** Okay. So after the fact that he came to my
3 trial and he told them that everything was his, the
4 judge asked him -- said I'm going to ask you one more
5 thing, have -- was anything -- did he have knowledge
6 of anything in the car? He told him no. After this,
7 the State used this bag of marijuana that was found
8 in my pocket.

9 But I'm saying it's 13 months later, 9
10 months later, I haven't been charged with this. I
11 hadn't been tried, convicted or nothing for this
12 marijuana. How could you use this against me the day
13 of my trial? I didn't even have time to prepare a
14 defense for it or nothing. Me and Mr. Potter, we
15 never discussed it because I wasn't never charged
16 with this. So we never discussed this. He never even
17 told me. He said, well -- yet, still, after the fact,
18 he talked about, oh, you talking about the joint and
19 the bag of marijuana. Well, if you knowed about this,
20 why didn't you tell me about this prior to trial?

21 **Q** I mean, I'm confused. Weren't you aware
22 that the reason that the officer said there was
23 probable cause was because when he pulled you over,
24 first of all, he said your driver was -- you know,
25 ran through a stop sign.

1 **A** Yes, sir.

2 **Q** And then he said when he got up to the car,
3 he saw a marijuana cigarette in your hand ---

4 **A** Right.

5 **Q** --- and he smelled marijuana?

6 **A** Yes, sir.

7 **Q** So you were aware of that when you went --
8 beforehand, correct?

9 **A** Yes, sir. I was aware of that.

10 **Q** Okay. But -- so --

11 **A** What I'm saying, he never told me front the
12 point of the traffic stop or nothing. This is exactly
13 what he told me. That's why I wanted him to get my
14 girlfriend too. My girlfriend got in the car. She
15 came and asked him why is he being arrested. He said
16 he's being charged with the same charges that the
17 driver's being charged with. He never said nothing
18 about --

19 **Q** I'm saying what evidence did you not know
20 going into trial that you said you was --

21 **A** I did not know that they were physically
22 going to use that marijuana against me.

23 **Q** Marijuana cigarette?

24 **A** That marijuana cigarette and the bag of
25 marijuana.

1 **Q** Right. Okay. But you are aware that that
2 was part of the case, correct?

3 **A** See, that's where I -- that's where I'm
4 confused at right now, because I have no charging
5 documents for it. I mean, I wasn't never cited for
6 it. That's what I'm saying. See, if I would have had
7 my preliminary hearing, the preliminary hearing would
8 have gave me grounds for an unlawful arrest, because
9 I wasn't never charged. I might have even got my
10 charges throwed out in the preliminary hearing,
11 because see, after the evidence that was found in the
12 car that my co-defendant claimed ownership of -- due
13 to the fact that I wasn't never charged with the dime
14 bag of marijuana or marijuana paraphernalia or
15 however they want to charge me with it, there was no
16 charge like that in front of the Grand Jury at that
17 time.

18 **Q** Okay.

19 **A** See, the Grand Jury might have not even --
20 I might not had been indicted. My case might have
21 been dismissed then. Even so, if my case hadn't had
22 been dismissed, my bond was 180,000. With -- minus
23 the gun and absent the marijuana, I mean, the big
24 marijuana that they found in the car and all that
25 junk, my bond would have been \$30,000. I would have

1 got out that day.

2 Q I've gone through most of the items that me
3 and you have discussed. I want to make sure, are
4 there other issues that you want to raise in regards
5 to Mr. Potter that we can make part of the record?

6 A Yeah, my -- the charges they used for my
7 sentence enhancement. I've got a cocaine charge from
8 1994 that they used against me.

9 Q Okay.

10 A That's over 10 years old. I sit there and
11 told them then that I don't think they could use that
12 against me. I've got a distribution of marijuana from
13 2001. They used that. That's not for enhancement
14 purpose under the same statute.

15 Q Okay. And you were -- so you're saying the
16 enhancement is what caused you to get the 25 years?

17 A Yes, sir.

18 Q Did you discuss that with him or have a
19 conversation with him in regards to it?

20 A Somewhat to the point.

21 Q So what was his response?

22 A He was telling me that it was lawful and
23 they could use it.

24 Q Okay.

25 A And I feel that, off the top -- if he would

1 have moved to suppress the drugs that were found on
2 my person at the traffic stop, without those drugs, I
3 wouldn't even had went to trial.

4 **MR. ARIAIL:** Okay. Your Honor, I have no
5 further questions.

6 **THE COURT:** All right.

7 Yes, ma'am.

8 **MS. VALENZUELA:** May it please the Court?

9 **THE COURT:** Yes, ma'am.

10 **CROSS-EXAMINATION**

11 **BY MS. VALENZUELA:**

12 **Q** Okay. Mr. Gilliard, let's go through this.
13 Now, to begin with, you explained to your attorney
14 the charges that you were facing. I think we left
15 some out. You were charged with Possession with
16 Intent to Distribute as you went to trial, correct?
17 Possession with Intent to Distribute Marijuana, the
18 marijuana that was found in the car?

19 **A** Uh --

20 **Q** At the start of the trial ---

21 **A** Yeah.

22 **Q** --- the State intended to proceed against
23 you for Possession with Intent to Distribute based on
24 the marijuana that was found in your co-defendant's
25 car?

1 **A** Yeah.

2 **Q** And they were also proceeding forward with
3 Possession of a Weapon during the Commission of a
4 Violent Crime?

5 **A** Yes.

6 **Q** Based on the gun that was found in the car?

7 **A** Yes.

8 **Q** And they were also proceeding forward on
9 Trafficking Cocaine, correct?

10 **A** Yes.

11 **Q** And then, at the beginning of the trial,
12 you and your attorney were able to get your co-
13 defendant to testify before the Court and take
14 responsibility for the marijuana and the gun that was
15 found in the car?

16 **A** Yes.

17 **Q** Correct?

18 **A** Yes.

19 **Q** But your co-defendant was not able to take
20 and did not take responsibility for the marijuana
21 that was found in your hand when the police officer
22 pulled over the car, correct?

23 **A** Well, I mean, he didn't have to because
24 there wasn't no charges for it.

25 **Q** But it was your marijuana in your hand when

1 the police officer pulled over the car?

2 A Yes.

3 Q Okay. And then additionally, your co-
4 defendant wasn't able to take responsibility for the
5 marijuana that was found in your pocket when the
6 officer did a pat down right beside the car, correct?

7 A Yes.

8 Q That was in your pocket, that was your
9 marijuana?

10 A Yes.

11 Q Okay. And then, additionally, your co-
12 defendant would not be able to take responsibility
13 for the crack cocaine that fell out of your pocket
14 when you were patted down in the booking station,
15 correct?

16 A Wasn't no crack cocaine found on me in the
17 booking station.

18 Q The allegations by the State were that
19 crack cocaine fell out of your pocket in the booking
20 station, correct?

21 A Yes.

22 Q And the co-defendant was not there?

23 A Yeah, he was at the book -- he was there
24 too.

25 Q He was not -- he did not take

1 responsibility for the --

2 **A** No, he did not. No.

3 **Q** Okay. And so, to start the trial, you're
4 facing three different charges, but then two of those
5 charges, the State decides not to proceed with based
6 on your co-defendant's testimony that the marijuana
7 in the car and the gun in the car were his?

8 **A** Yes.

9 **Q** And the State decides to proceed forward
10 solely with the charge of the cocaine that was in
11 your pocket?

12 **A** Yes.

13 **Q** Okay. Now, you were talking about three of
14 the witnesses that you would have to come to -- to
15 contradict some of the State's testimony. Officer
16 Wilkerson, is he here to provide testimony on what he
17 would have said if he had testified at your trial?

18 **A** I don't see him.

19 **Q** No. Is your girlfriend here to provide
20 testimony on what she would have said she had seen
21 the night that you were pulled over?

22 **A** No.

23 **Q** And is your co-defendant here to testify to
24 anything that he would -- did not already testify to
25 at the trial?

1 **A** No.

2 **Q** Okay. Now, you also have an argument about
3 the video tape that the State did not have of the
4 booking area, correct?

5 **A** Right.

6 **Q** And in that argument, you said that your
7 attorney didn't do enough for you there, correct? But
8 your attorney was able to argue for the jury and the
9 jury was told repeatedly throughout your trial that
10 the State had the ability to video tape that booking
11 area and did not have that video, right?

12 **A** Yes.

13 **Q** And then he also asked the judge initially
14 before the trial got started for a jury instruction
15 to tell the jury that they should be able to hold
16 this in your favor and against the State because the
17 State didn't have that video, correct?

18 **A** Yes.

19 **Q** The judge denied that request for a
20 curative instruction, correct?

21 **A** Yes.

22 **Q** Additionally, your attorney brought that up
23 again, a second time, to the judge and said, again,
24 Judge, I would ask for a curative -- an instruction
25 to the jury that would make an inference in my

1 client's favor and against the State because they
2 don't have a video, correct?

3 A Yes.

4 Q And even after hearing the testimony, the
5 judge still decided not to give a curative
6 instruction, correct?

7 A (Nods head.)

8 Q You need to say -- speak out loud.

9 A Yes.

10 Q Okay. And then, your attorney filed a
11 notice of appeal for you on that issue of the
12 curative instruction, correct?

13 A Yes.

14 Q And that went up before the Court of
15 Appeals, right?

16 A Yes.

17 Q Now, your argument is that your attorney
18 should have said, whether he believed it or not, that
19 the State had destroyed that video in bad faith?

20 A Yes.

21 Q Okay.

22 A Also -- excuse me. Also, my argument is too
23 that they said I never argued that it wasn't on my
24 person. He never argued that it was on my person. I
25 told him -- I confided with him from Day 1 and told

1 him I never had these drugs. He never presented no
2 evidence whatsoever in my defense to show that I did
3 not have these drugs on me. The only he argued was
4 about the video tape, and he turned around and made
5 that argument frivolous because of his statute.

6 Q His argument about the video tape not being
7 there was a frivolous argument, but you still believe
8 it was in your favor?

9 A No, it -- it was a good argument.

10 Q Okay.

11 A But if -- the reason it wasn't in my favor
12 is because he made that prejudicial comment.

13 Q Okay.

14 A The same -- the same people that he appeal
15 -- that he preserved the right to appeal it to, he
16 killed the prong.

17 Q So talking about what your attorney did for
18 you in the trial, do you remember how he questioned
19 the officers that were in the booking area and
20 specifically asked them if they looked to see if
21 there was anything on the floor before they brought
22 you into the booking area?

23 A Yes.

24 Q And he challenged them on whether there was
25 anything already present on the floor before they

1 started patting you down, correct?

2 A Yes.

3 Q And he challenged both officers, because
4 the State presented two different officers who both
5 observed the crack cocaine falling out of your
6 pocket, correct? At least that was their testimony,
7 right?

8 A Yes.

9 Q And then, additionally, he questioned the
10 officers who were at the scene of the traffic stop,
11 didn't he?

12 A No.

13 Q He questioned them about whether they had
14 patted you down when they first arrested you?

15 A No. That's what I'm saying. John Wilkerson
16 came out -- before the officer that he did question,
17 John Wilkerson was the first officer to arrive on the
18 scene. John Wilkerson could have set the record
19 straight.

20 Q Okay. But there were other officers that
21 the State presented that were at the scene of the
22 arrest?

23 A No, it wasn't. They lied about other
24 officers that was at the scene.

25 Q Okay. Well, understanding --

1 **A** The Newbring -- Nubian or whatever his name
2 was, the guy never -- he never got out of his
3 vehicle. John Wilkerson was the only other officer
4 that got out of his vehicle and physically came to --
5 cause they found the gun afterwards. When they found
6 the gun, they came back to the car to re-pull us out
7 of the car to search us a second time. John
8 Wilkerson, the one perform the second pat down.

9 **MS. VALENZUELA:** Okay. Your Honor, may I
10 have just one moment?

11 **THE COURT:** Certainly.

12 **(WHEREUPON, there is a pause.)**

13 **BY MS. VALENZUELA:**

14 **Q** Okay. Talk to me about Officer Surratt. He
15 was the one who pulled you over?

16 **A** Yes.

17 **Q** And then he's the one who asked you what
18 was clinched in your hands?

19 **A** Yes.

20 **Q** And he's the one who found the roach in
21 your hand?

22 **A** Yes.

23 **Q** Okay. And then he's the one who patted you
24 down and found the small bag of marijuana in your
25 pocket?

1 **A** Yes.

2 **Q** And he testified at trial?

3 **A** Yes.

4 **Q** Okay. Mr. Surratt testified at trial and
5 your attorney cross-examined him about the pat down
6 that he did when he found the marijuana in your hand
7 and your pocket?

8 **A** But he never cross-examined him about why
9 he didn't -- why he didn't follow policies and
10 procedure and charge me with what you did find on
11 him. He asked him -- he asked him -- he said, What is
12 your booking process? What is the first process to
13 your arrest? That's a blue ticket, right? And he
14 killed it right there. Why he didn't ask him why
15 didn't you charge him -- why you write him a blue
16 ticket for possession of marijuana? They said this is
17 what I'm being arrested for -- this is what my
18 detention resulted from.

19 **Q** But you -- you remember that your attorney
20 did actually challenge Officer Surratt about how he
21 wrote his incident report, right? He challenged him
22 on the fact that he got his incident report and he
23 had read a warrant and signed a warrant saying that
24 the crack cocaine had been found at the stop when it
25 had actually been found at the booking -- at the

1 detention center, right?

2 **A** Right.

3 **Q** And he challenged him hard on that. He kept
4 asking him, you read this and you signed this saying
5 that it was at the traffic stop and the officer kept
6 trying to explain it as, well, it was part of the
7 traffic stop, but yes, you're right. I should have
8 said that it was at the detention center. And he did
9 this in front of the jury, didn't he?

10 **A** Yes.

11 **Q** Your attorney did that in one of the -- the
12 jury was able to hear him cross-examine that officer,
13 the officer who patted you down, and get the officer
14 to admit that he had written his report, or at least
15 he had signed a warrant that had stated something
16 different?

17 **A** I mean, well, I -- I feel that he should
18 have made a motion to suppress that evidence due to
19 that false statement.

20 **Q** Okay. So let's go with that.

21 **A** Or due to the constitutionality of the
22 warrant being signed like that.

23 **Q** Let's talk about the arrest then. So your
24 issue is with the arrest being based on the marijuana
25 that was found in the car and the gun in the car. But

1 until the day of trial, when your co-defendant swore
2 under oath that it was his marijuana and his knife,
3 the State believed it was yours and was ready to
4 proceed to trial against you for that, correct?

5 **A** Yes, ma'am.

6 **Q** So the officer believed that you were being
7 arrested for marijuana and a gun at the time that he
8 patted you down and at the time that he arrested you
9 and took you to the detention center?

10 **A** Yes, ma'am.

11 **Q** So all of that was a lawful arrest. It
12 wasn't until the trial when your co-defendant took
13 responsibility that the State realized those were not
14 your drugs or your gun in the car, correct?

15 **A** Okay.

16 **Q** Correct?

17 **A** Yes, ma'am. Yes, ma'am.

18 **Q** Okay. Additionally, even regardless of
19 that, the officer could have arrested you for the
20 roach that was in your hand and for the dime bag of
21 marijuana that was in your pocket that they found at
22 the side of the car?

23 **A** Yes, ma'am.

24 **Q** Okay.

25 **MS. VALENZUELA:** Your Honor, may I have a

1 brief moment?

2 **THE COURT:** Certainly.

3 (WHEREUPON, there is a pause.)

4 **MS. VALENZUELA:** Nothing further, Your
5 Honor.

6 **THE COURT:** All right.

7 Anything else, Mr. Ariail?

8 **MR. ARIAIL:** Nothing, Your Honor.

9 **THE COURT:** Sir, you can step down.

10 **THE WITNESS:** Can I add one more thing?

11 **THE COURT:** Certainly.

12 **THE WITNESS:** I feel that I was denied
13 ineffective assistance of counsel throughout my
14 whole procedure, because my first state-
15 appointed attorney, Kurt Tavernier, that's
16 probably the reason I didn't have my preliminary
17 hearing. He was a conflict of interest at the
18 time of my preliminary hearing.

19 **MS. VALENZUELA:** Your Honor, we'd renew our
20 objection at this point in time.

21 **THE COURT:** And your objection is noted.

22 **MS. VALENZUELA:** Thank you.

23 **THE COURT:** I told you I can't consider
24 anything about Mr. Tavernier now.

25 **THE WITNESS:** Yes, ma'am. I'm just saying

1 about my constitutional rights to ineffective
2 assistance of counsel, period, throughout. That
3 was a critical stage, that preliminary hearing.
4 I needed that right there. I got letters where I
5 wrote Supreme Court, talking about how much I
6 needed to go to a preliminary hearing. I got
7 letters that I wrote to the Solicitor and
8 everybody telling about my -- I begged Mr.
9 Tavernier to take me to my preliminary hearing.

10 **THE COURT:** I understand. All right.

11 **THE WITNESS:** I want to know this, how
12 could -- they never sent me no record or they
13 never attached it to my brief where I had a
14 hearing to find him in conflict, right? They
15 gave me Mr. Potter, and they work in the same
16 office. They use the same -- utilize all the
17 same stuff. Mr. Potter never had no independent
18 investigation. He never relied on no facts of
19 what I told him. He just relied on the State's
20 case, and that was it.

21 **THE COURT:** I gotcha. I see where you're
22 coming from. All right. Sir, you can step down.

23 Anything else from the Applicant?

24 **MR. ARIAIL:** No, Your Honor. That's our
25 case. Thank you.

1 **THE COURT:** All right.

2 **MS. VALENZUELA:** Your Honor, the State
3 would call Mr. Andrew Potter to the stand.

4 **THE COURT:** All right.

5 **ANDREW POTTER**

6 having first been duly sworn, testifies as follows:

7 **THE CLERK:** Thank you. Please have a seat.
8 State your full name for the record and spell
9 your last name please.

10 **THE WITNESS:** My full name is Andrew
11 Potter, P-O-T-T-E-R.

12 **DIRECT EXAMINATION**

13 **BY MS. VALENZUELA:**

14 **Q** Mr. Potter, can you please tell the Court
15 your background in criminal defense work?

16 **A** Yes, ma'am. Graduated from law school in
17 1993. Was a member -- well, am a member of the Ohio
18 bar. Worked as a public defender in Cincinnati, Ohio,
19 for four years there doing juvenile, felony, and
20 misdemeanor work. Came to South Carolina. Became a
21 member of the South Carolina Bar in 1997.

22 I worked for Mr. Laniel Chatman here in
23 Anderson. I was a contract public defender at that
24 time. A year and a half with the Foster and Foster
25 Law Firm in Greenville. That was mostly civil, didn't

1 do much criminal there. Then came back in 2001 as a
2 full-time public defender with the Anderson County
3 Public Defender's Office at time handling juvenile,
4 magistrate, as well as felony, General Sessions work.

5 Member of the National Association of
6 Criminal Defense Lawyers. I'm a board member of the
7 South Carolina Association of Criminal Defense
8 Lawyers. I am a member of the National Association of
9 Public Defenders and a member -- I guess, I mentioned
10 before the Ohio Bar, South Carolina Bar, district
11 courts of South Carolina, district courts of Ohio,
12 Sixth Circuit Court of Appeals, Fourth Circuit Court
13 of Appeals, as well as the United States Supreme
14 Court.

15 Q Okay. Thank you, Mr. Potter. Now, regarding
16 your representation of Mr. Gilliard, were you
17 appointed on that case?

18 A I was -- I was officially appointed by
19 Judge Maddox, I believe, after Mr. Tavernier was
20 relieved by the Court. Apparently, Mr. Gilliard wrote
21 a personal confidential letter to the South Carolina
22 Bar alleging problems with Mr. Tavernier. As a
23 result, Mr. Tavernier had to withdraw.

24 Q Okay. So you were appointed by the judge to
25 represent Mr. Gilliard. Were you prepared to go to

1 trial the day that you took Mr. Gilliard's trial
2 before the jury?

3 A I was.

4 Q Okay. And had you had an opportunity to
5 talk to Mr. Gilliard about his understanding of what
6 -- the night that he was arrested?

7 A I had. I had.

8 Q Did you have discovery in the case when you
9 took over the case?

10 A I did.

11 Q Okay. Did you cover that discovery with Mr.
12 Gilliard?

13 A I believe I did. Yes, ma'am.

14 Q Did Mr. Gilliard give you any information
15 or help in any way in his defense? Tell you anything
16 that he wanted you to do in his defense?

17 A This trial, quite honestly, was back in
18 2009. Memory doesn't serve me much. I've got my notes
19 from a meeting I had with Mr. Gilliard regarding his
20 statement of the facts and things of that sort.
21 Looking at my notes, I don't see anything written
22 about any witnesses he wanted me to call or anything
23 of that sort. However, I know there was testimony of
24 the co-defendant. I've got approximately five pages
25 worth of notes when I met with Mr. Gilliard when we

1 discussed his facts and circumstances related to the
2 case.

3 Q Okay. So you got five pages of notes -- I
4 just want to make sure I've got this -- five pages of
5 notes, but your notes don't have any witnesses that
6 he told you he wanted you to contact?

7 A I'm not seeing anything.

8 Q You still did have the co-defendant -- you
9 managed to get the co-defendant to the trial before
10 it started -- I'm sorry. Can you tell the court about
11 what -- what happened with the co-defendant before
12 the trial started?

13 A Well, I believe the co-defendant got up and
14 testified that the gun and marijuana were his.

15 Q And what did that -- how did that affect
16 what charges you went forward with on -- or that the
17 State went forward with against your client?

18 A As a result, they went forward on the crack
19 charge.

20 Q And did that get rid of the Possession with
21 Intent to Distribute and the Possession of a Weapon
22 during the Commission of a Violent Crime?

23 A I'm sorry. Say that again.

24 Q Sure. Did the co-defendant's testimony
25 result in the State not proceeding forward with the

1 Possession with Intent to Distribute and the
2 Possession of a Weapon during the Commission of a
3 Violent Crime charge?

4 A That's correct.

5 Q Can you tell the Court about whether you
6 looked -- whether you considered making a motion to
7 suppress based on the arrest of your client at the
8 roadside?

9 A We had talked -- and I'm going to say we,
10 myself and Mr. Gilliard, talked about a motion to
11 suppress. He was a passenger in the vehicle. I didn't
12 see any grounds related to the reason for filing a
13 motion to suppress due to the fact that he was a
14 passenger in the vehicle and if the co-defendant, who
15 was the driver, gave consent to allow that vehicle to
16 be searched, then he had no standing to raise that
17 issue. So I'm pretty sure we discussed that fact and
18 that I didn't believe we had a good faith basis to
19 file that under the rules. Ultimately, the real issue
20 of the case wasn't what happened at the car. The real
21 issue of the case was what happened in the detention
22 center.

23 Q So talking about the detention center and
24 good faith, what did you feel after talking to the
25 State, researching the issue and talking to your

1 client about whether the video of the booking area
2 had been destroyed in bad faith?

3 A There was nothing that showed that it was
4 destroyed in bad faith. At best, they were negligent.
5 But in my conversations, there was nothing that made
6 me believe there was any evidence out there that I
7 could present to the Court on a motion or anything of
8 that sort that the video was destroyed in bad faith.
9 So as a result, at best, it was a negligent act.

10 Q Can you -- sorry.

11 A It was a negligent act, I think, at best.

12 Q Can you tell the Court just a brief summary
13 of, you know, how that video issue came about and
14 what the officer said that happened as to why there
15 was no video?

16 A I think what happened was, in my
17 discussions with the detention center people, was
18 that the video is regularly erased after 30 or some-
19 odd days. It was just a procedure that it was erased.
20 There was no hold. No one put down we need to save
21 this. That -- it was just routine procedure that it
22 was erased.

23 Q But you did -- you did try to use the fact
24 that there was no video in your client's favor. Can
25 you talk to the Court a little bit about how you

1 tried to use that missing video in your client's
2 favor?

3 **A** Well, the thing is what I thought would be
4 a good argument to the jury is the fact that the
5 video was missing and, at that time -- at all points
6 in time, the detention center and the sheriff's
7 department had control of that video and that an
8 inference could be made that the reason why it was
9 destroyed was because it was -- it was exculpatory
10 evidence that would vindicate my client on that video
11 or some sort of evidence that would vindicate my
12 client.

13 The argument was, Judge, you need to read
14 an instruction to the jury. I think I made these
15 arguments in opening and closing as well, you know,
16 the reason I don't have it is, you know, we want an
17 instruction saying that there could be an inference
18 that there was beneficial information or evidence
19 related to the defendant on that matter and it could
20 be held against the State in their case-in-chief.
21 That was the approach we kind of took kind of like on
22 civil cases, if something, a piece of evidence gets
23 destroyed, then there could be an inference that it
24 was beneficial to the party who didn't have the
25 evidence. We tried to make that argument to the jury

1 as well as to the Court.

2 Q So along the spoilation, kind of, case law?

3 A Right.

4 Q Okay.

5 A Correct.

6 Q Now, the -- I know that you didn't
7 represent the applicant at the time of his
8 preliminary hearing, but the applicant has raised an
9 argument about his preliminary hearing. What was the
10 status of the indictment at the time that y'all went
11 to trial?

12 A He had already been indicted by the Grand
13 Jury.

14 Q How does the fact that his indictment had
15 already been true billed by the Grand Jury affect his
16 ability to get a preliminary hearing had he raised
17 that issue to you in the weeks that you represented
18 him right before trial?

19 A The point is moot at that point in time.
20 The purpose of the preliminary hearing, as we all
21 know, is to determine whether there's probable cause
22 for the case to be considered by the Grand Jury.
23 What's interesting about preliminary hearings, as we
24 all know, is that the only people who testify are the
25 officers. It's a very low standard to determine

1 whether the case goes to the Grand Jury or not.

2 I don't get a chance to testify. I don't
3 get a chance to put my client up to testify. I don't
4 get a chance to put up witnesses to testify. It's
5 simply the police officer gets up and testify. It's
6 just why did you charge the defendant with what you
7 charged him with. I don't know why Mr. Tavernier
8 either waived the preliminary hearing or why the
9 preliminary hearing wasn't done. However, since he
10 was indicted, the right to a preliminary hearing, at
11 that point in time, was moot.

12 Q And the indictment that went before the
13 jury did reflect only the pending charge of
14 trafficking crack cocaine?

15 A Correct.

16 Q Did you discuss a -- I know we talked
17 earlier about the suppression of the evidence at the
18 traffic stop and why we didn't believe there was a
19 basis there to talk about that with your client. But
20 did you and your client talk about the case that he
21 wanted you to consider in challenging the arrest
22 warrant?

23 A I did. Again, I informed him that the issue
24 was moot at that point in time. I think I explained
25 to him that the warrants are merely notice of what

1 his charges are and that the fact that since he had
2 been indicted, warrants essentially are gone, for all
3 practical purposes. They are a charging document
4 until the indictment happens and the indictment
5 supercedes the warrant as the charging document. Once
6 the indictment was done, there was, again, no legal
7 basis for filing Frank's motion. As an attorney, I
8 can only bring forth motions that I have a good faith
9 belief need to be heard by the Court. I told him I
10 wouldn't do that.

11 Q I want to talk a little bit about his claim
12 that his sentence enhancement was wrong. Do you
13 remember reviewing his criminal history prior to the
14 sentencing?

15 A I did. My client did have -- Mr. Gilliard
16 did have a copy of his rap sheet.

17 Q Was there anything in reviewing the rap
18 sheet or in reviewing the sentences as the State was
19 telling the judge could serve as enhancements that
20 you thought needed to be legally challenged?

21 A The law has changed since the trial of this
22 case and the indictment of this case. At the time
23 when we tried the case, he did have two prior drug
24 convictions. Actually, a third, according to my notes
25 here. So, I think, it looks as if, on his rap sheet,

1 there was 1, 2, 3, 4, I think, 5 priors. That's what
2 I've circled specifically on his rap sheet. I don't
3 know if there was, at that point in time, an issue in
4 regards to priors and whether or not they were
5 properly enhanced or anything of that sort.

6 Q Additionally, the applicant argued that the
7 testimony about the marijuana that he was not charged
8 for that was referenced in the trial was prejudicial
9 to him. What -- what would you had been thinking in
10 terms of whether to object to the reference to the
11 marijuana found on him during the trial?

12 A The only thing I could think of, at that
13 point in time, was probably wanting to focus the jury
14 more in regards to the allegations of the police
15 officers that may try to trap and try to challenge
16 the voracity of Officer Surratt, specifically, and
17 the officers involved in the case. So at that point
18 in time, it was probably a game plan decision. What
19 specific thinking I was making at that point in time,
20 I can't tell you.

21 Q Was it helpful to your client that he was
22 patted down by an officer at the roadside and they
23 managed to find marijuana in his pocket, but that
24 they did not find the crack until they got to the
25 detention center?

1 **A** Yeah.

2 **Q** So would it have played into the strategy
3 of your case to highlight what they did find at the
4 roadside versus what they found at the detention
5 center?

6 **A** Yes.

7 **MS. VALENZUELA:** Your Honor, may I have
8 just a moment?

9 **THE COURT:** Certainly.

10 (WHEREUPON, there is a pause.)

11 **BY MS. VALENZUELA:**

12 **Q** Please answer any questions opposing
13 counsel has for you.

14 **A** Yes, ma'am.

15 **THE COURT:** Mr. Ariail?

16 **MR. ARIAIL:** Thank you, Your Honor. Please
17 the Court?

18 **THE COURT:** Certainly.

19 **CROSS-EXAMINATION**

20 **BY MR. ARIAIL:**

21 **Q** Mr. Potter, I'm just going to go over with
22 you a little bit. When you discussed this case with
23 Mr. Gilliard, did you have a plea offer at some point
24 in this case?

25 **A** There was a 12-year offer that Mr.

1 Tavernier had. That offer was taken off the table
2 when -- I think, in October, according this file, the
3 12-year offer was taken off the table when Mr.
4 Gilliard had filed the PCR letter on Mr. Tavernier.
5 He was placed -- if I'm reading my notes correctly
6 or the notes of the file correctly, he was placed on
7 the trial docket in October. There was a murder trial
8 in front of him. The case was not reached in October.
9 So as a result of -- I think the offer was taken off
10 the table in September of 2009.

11 Q Okay.

12 A And then after the co-defendant testified,
13 my notes indicated I asked my client if he was
14 willing to let me approach the Solicitor about a
15 potential plea on the crack charge, and he said no.

16 Q Okay. So he wanted a trial. He didn't want
17 any type of plea, I guess?

18 A At that point in time.

19 Q Okay. Now, as part of your discussion, you
20 said you have five or six pages of notes with him.

21 A Uh-huh.

22 Q You had discovery, I guess, that had been
23 given to you. You went over it with him, I guess,
24 during that discussion, is that correct?

25 A I believe so, yes.

1 Q And from your recollection, there's nothing
2 in there -- in your notes where he asked you to call
3 any of these witnesses that, I guess, he says he
4 wanted you to call.

5 A He may have told me that. I didn't write it
6 down. I do note that there was a witness list, and
7 Wilkerson was on the witness list that was presented
8 at trial.

9 Q Do you see -- I mean, looking at these
10 witnesses, do you see any benefit to calling him or
11 do you remember any discussions you had with him
12 about calling witnesses and how that impacted the
13 case?

14 A In regards to the witnesses, I don't know
15 exactly what we talked about. My notes don't reflect
16 anything specifically about the witnesses. I know
17 that I spoke -- I had to talk with him about his
18 case, the issues with the case. I talked with him
19 about the risks associated with the co-defendant that
20 he could get up on the stand and say, yeah, it was
21 his drugs and it was his gun. We talked about that.
22 We talked about issues with him taking the stand and
23 prior convictions. So we did talk about problems that
24 I saw on the case. I explained to him defenses at
25 trial, the problems with trials, and things like

1 that. Does that answer your question?

2 **A** Yeah.

3 **Q** Those are the things I was looking for. One
4 of the things I think I laid out in his testimony was
5 that he -- after there was a finding that the gun and
6 the marijuana were the co-defendant's -- I guess it
7 was Mr. Robinson; is that correct? Robertson?

8 **A** Yes.

9 **Q** They were found to be his. Was there any
10 motion to suppress that you saw to keep out the drugs
11 that were found on him while he was being booked?

12 **A** At that point in time, he was a passenger
13 in a vehicle. As I saw it, he had no standing to
14 argue that the stop was illegal, that the searches
15 were illegal, you know, in the sense -- at that point
16 in time, there was no legitimate legal basis based
17 upon the evidence that I was aware of that a motion
18 to suppress should be argued to the Court. The issue
19 was -- had he been the driver of the car, that might
20 have been a different situation. However, there was
21 -- the evidence that was there and the law, I didn't
22 see a viable motion to suppress at that point in time
23 related to the arrest, the seizure of him, and the
24 carrying him to the detention center.

25 **Q** Okay. Now, he wanted me to inquire when he

1 was indicted in front of the Grand Jury, it appears
2 that Mr. or Officer Surratt did not present testimony
3 to the Grand Jury. Are you aware of who presented or
4 do you know how that occurred?

5 **A** I do not know who presented testimony to
6 the Grand Jury. That's an issue that's come up
7 recently in regards to other cases that we have. I do
8 have a note in here asking for transcripts related to
9 the Grand Jury. There are no transcripts of the Grand
10 Jury. I have no idea who testified in regards to the
11 Grand Jury.

12 **Q** Did you -- I guess what I'm asking is there
13 was some question in this trial about whether or not
14 there were mistakes -- they called them mistakes --
15 there was some misinformation that was listed in some
16 of the case reports and case summary. Did you see any
17 -- any ability or any motions that could have been
18 made to try to undo what the Grand Jury had done in
19 their indictments based on this information that had
20 been -- I guess, was wrong information in these case
21 summaries.

22 **A** No, I didn't see any way of filing a motion
23 to quash or anything like that that would have --

24 **Q** Okay.

25 **A** -- would have survived or been successful.

1 **Q** Okay. Bear with me one second. (Pause.)

2 Based on your recollection, did you see
3 anything that Mr. Wilkerson could bring to trial that
4 would have helped you?

5 **A** No.

6 **Q** I mean, I guess he was wanting to -- trying
7 to figure -- to show that what happened at the scene
8 was not -- what Officer Surratt testified to was not
9 correct, which would have helped him show that he was
10 lying about the drugs being at the detention center.
11 Do you see anything that Officer Wilkerson could help
12 with that?

13 **A** I -- again, I don't know if Surratt was the
14 one who discovered the drugs at the detention center.

15 **Q** Okay. And that was -- there was another
16 individual there, Officer Lunz?

17 **A** Lunz, I believe, was the one who testified.
18 I think I was able to elicit testimony. As my notes
19 indicate, I was able to elicit testimony that no one
20 preserved the video and that -- I think Lunz was the
21 one who was involved in finding the drugs.

22 **Q** Okay. Did you see anyway to try to suppress
23 or to keep out any allegations about the marijuana
24 that Officer Surratt saw on or in Mr. Gilliard's
25 possession while he was in the car?

1 **A** No.

2 **Q** Okay.

3 **MR. ARIAIL:** Your Honor, I have no further
4 questions.

5 **THE COURT:** All right. Anything else?

6 **MS. VALENZUELA:** No, Your Honor.

7 **THE COURT:** Sir, you can step down.

8 **THE WITNESS:** May I be excused, Your
9 Honor?

10 **THE COURT:** Certainly. Any objection to
11 that?

12 **MR. ARIAIL:** No objection.

13 **THE COURT:** All right. Thank you for being
14 here.

15 **THE WITNESS:** Thank you, Judge.

16 **THE COURT:** Anything else?

17 **MR. ARIAIL:** No, Your Honor.

18 **MS. VALENZUELA:** Nothing, Your Honor.

19 Unless you want argument, there's nothing
20 further.

21 **THE COURT:** Unless there is anything in
22 particular you need to bring up, I think you
23 both have laid out your sides pretty well. Of
24 course, I told you that I am not in a position
25 to rule on this case today. I will read the

1 transcript of your trial in full. I want to take
2 a look at all the documents, and I want to think
3 about what you've told me today, and I want to
4 look at my notes from today. I'd anticipate
5 ruling on this case within two weeks, and you'll
6 be notified on my decision at that time. All
7 right?

8 MR. GILLIARD: Yes, ma'am.

9 MS. VALENZUELA: Thank you, Your Honor.

10 THE COURT: Thank you.

11 MR. ARIAIL: Thank you.

12 THE COURT: Good luck to you.

13 MR. ARIAIL: Appreciate it.

14 THE COURT: Thank you.

15

16 (WHEREUPON, the proceedings conclude at
17 approximately 11:23 a.m.)

18

19

20

21

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24

25

CERTIFICATE

247
59

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Anderson, South Carolina, on this 12th day of April, 2017.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

Teresa B. Johnson

Official Court Reporter

10-19-16

Applicant was denied his right to effective assistance of counsel prior to during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14 of the South Carolina Constitution.

1. Conflict of Interest:

a. Applicant's state appointed lawyer (Kurt Tavernier) was a conflict of interest at the time of Applicant's prelim. hearing

b. Trial counsel and initial counsel Kurt Tavernier both worked for the public defenders office and utilized the same services

2. Preliminary Hearing

a. The State failed to comply with Applicant's timely request for a prelim

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ANDERSON SC
2016 OCT 25 PM 1:46
COMMON PLEAS AND
GENERAL SESSIONS



STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Oconee County
Edgar W. Dickson, Circuit Court Judge

GREGORY LEE MURPHY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002445

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF
CERTIORARI AND APPENDIX

Counsel for Gregory Lee Murphy respectfully requests an extension of thirty days in which to file the petition for writ of certiorari and appendix in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a second request for an extension. In support of this request, counsel shows:

1. The petition for writ of certiorari and appendix are due to be served and filed with the Court today.
2. Counsel for Gregory Lee Murphy respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.

3. Ineffective Assistance of Counsel:

- a. Failed to adequately investigate
- b. Failed to conduct adequate pre-trial investigation.
- c. Failed to seek suppression of evidence found in Applicants hands and pocket as a result of traffic stop.
- d. Failed to investigate potential defense.
- e. Failed to interview defense witness made known by Applicant.
- f. Failed to ask for a Franks hearing or challenge validity of arrest warrant
- g. Failed to bring issue to tribunal that Applicant made him aware of the fact that he was denied a preliminary hearing and he still wanted one.
- h. For allowing evidence of uncharged offense to be admitted at trial
- i. For failing to protect Applicants right to a fair trial by allowing uncharged evidence to be admitted
- j. For allowing Applicant to be tried and convicted on indictment other than indictment found by grand jury

4. Prosecutorial Misconduct

- a. Solicitor's evidence during pre-trial
- b. Solicitor's prejudicial opening remarks & closing arguments
- c. Unethical tactics in maintain convictions

5. Judicial Misconduct

2. Pointing of attorneys

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) TENTH JUDICIAL CIRCUIT

Kevin Jerome Gilliard,
S.C.D.C. No. 275357,

C.A. No. 2015-CP-04-2068

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

COMMON PLEAS AND
GENERAL SESSIONS

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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 1, 2015. Respondent filed a Return and Motion to Dismiss or, in the Alternative, a Motion for a More Definite Statement on or about May 23, 2016. An evidentiary hearing into the matter was convened on October 24, 2016, at the Anderson County Courthouse. Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Johanna C. Valenzuela.

Applicant and Applicant's trial counsel, Andrew Potter, Esquire, testified at the hearing. This Court also had before it all relevant pleadings and documents, the Clerk of Court records for Anderson County, the South Carolina Department of Corrections' records, the transcript of Applicant's trial, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Applicant was indicted at the July 2009 term of trafficking cocaine, 28-100 grams (2009-GS-04-1737). Applicant was represented by Andrew Potter, Esquire. Applicant proceeded to trial from December 7-9, 2009,

after which a jury convicted him as indicted. The Honorable J. Cordell Maddox, Jr., sentenced him to twenty-five (25) year imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Tristan Shaffer, Esquire. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Gilliard, No. 2012-UP-351 (filed June 13, 2012). The Remittitur was issued on March 4, 2014.

Applicant filed a petition for writ of certiorari to the Supreme Court of South Carolina. The Supreme Court granted certiorari. On July 15, 2015, the Supreme Court dismissed certiorari as improvidently granted. State v. Gilliard, No. 2015-MO-041. The Remittitur was issued on July 15, 2015.

SUMMARY OF TESTIMONY

Prior to Applicant submitting his allegations to the Court the day of the hearing, Respondent moved to dismiss the case due to Applicant's failure to provide any allegations prior to the hearing. At the hearing, Applicant presented a list of allegations for the first time. Respondent's counsel withdrew the objection except as to any allegations that reached Kurt Tavernier, Esquire, as Respondent would be prejudiced due to the lack of notice and Mr. Tavernier not being present as a witness. This Court held the allegations were limited to Mr. Potter and would not consider any allegations as to Mr. Tavernier.

Applicant testified he was innocent of everything and claimed his trial counsel was deficient for failing to object to the lack of a preliminary hearing; failing to object to statements provided to the Grand Jury; and failing to present defense witnesses, such as Officer Wilkerson, Applicant's then-girlfriend, and Applicant's co-defendant. Applicant also claimed trial counsel was deficient for failing to produce the video from the booking area and for failing to make a

Franks¹ motion. Further, Applicant argued the testimony on the marijuana found in Applicant's pocket should have been excluded because it was prejudicial. Finally, Applicant argued the cocaine sentence enhancement charge was in error.

On cross-examination, Applicant agreed that prior to the start of his trial his co-defendant claimed responsibility for all the drugs and the weapon found inside the vehicle at the traffic stop, which resulted in the State dismissing the charges of Possessions with Intent to Distribute and Possession of a Weapon During the Commission of a Crime. Applicant agreed he proceeded to trial solely on the charge related to the crack cocaine the State alleged was found on him in the booking area, following his arrest at the traffic stop. Applicant testified he remembered his trial counsel addressing the missing booking area video at trial.

Applicant also admitted that during the traffic stop he was a passenger, he was observed to have marijuana in his hand, and testimony presented at the hearing was that he was found to have crack cocaine in his possession that was found in the booking area.

Trial counsel testified prior to trial he had discovery and was prepared for the trial. Trial counsel explained he had investigated and discussed with Applicant that there was no standing to object to the traffic stop because Applicant had been the passenger and not the driver of the vehicle when the traffic stop was initiated. Trial counsel also testified there was no evidence the video of the booking area had been destroyed in bad faith. The video had been lost through negligence because it was deleted as part of the regular deletion schedule and not preserved. Trial counsel testified it was beneficial to allow testimony about how the State's witnesses did a good enough pat down of Applicant at the traffic stop to find marijuana in order to highlight how that same officer failed to find the crack cocaine on Applicant until he got to booking. Trial

¹ Franks v. Delaware, 438 U.S. 154, 170, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667 (1978).

counsel also explained the issue related to the preliminary hearing was moot because by the time he took over the case the Grand Jury had true billed Applicant's indictment. Trial counsel did not believe there was any basis for a successful motion to quash the indictment. Trial counsel testified he did discuss a Franks motion with Applicant and explained there was no legal basis to pursue that motion because of the true billed indictment. Finally, trial counsel explained Applicant had five prior convictions, and there was no basis to challenge the conviction as an improper enhancement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. Furthermore, this Court has had the opportunity to observe the witnesses presented at the hearing, and closely pass upon all witnesses' credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S.Ct. at 2064). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to object to preliminary hearing

Applicant argues trial counsel was ineffective for not challenging the failure to give him a preliminary hearing. "South Carolina statutory law specifically provides that an accused may be brought to trial under indictment by a grand jury without a preliminary hearing in some cases." State v. McClure, 277 S.C. 432, 434, 289 S.E.2d 158, 160 (1982) (citing State v. Nesmith, 213 S.C. 60, 48 S.E.2d 595 (1948)). "The indictment itself constitutes a finding of probable cause and thus avoids the need for a preliminary hearing." Id. (citing U. S. v. Werbrouck, 589 F.2d 273 (7th Cir. 1978), cert. den. 440 U.S. 962, 99 S.Ct. 1507, 59 L.Ed.2d 776). However, "[o]nce the accused properly requests a preliminary hearing, the magistrate's court retains jurisdiction and the Court of General Sessions is deprived of jurisdiction until such hearing is held." Id. (citing State v. Porcher, 273 S.C. 507, 257 S.E.2d 505 (1979)).

Trial counsel took over this case after the indictment was true billed by the grand jury. Applicant presented no evidence he requested a preliminary hearing and was denied one or that he was prejudiced by the lack of a preliminary hearing. This Court finds Applicant has failed to carry his burden of proving trial counsel was ineffective for failing to challenge the lack of a preliminary hearing or of proving there was any resulting prejudice. Thus, this allegation is denied.

Failure to call witnesses

Applicant alleges trial counsel failed to call certain witnesses at trial.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Applicant claims trial counsel failed to call witnesses at trial who would have testified on his behalf. However, Applicant failed to present any of these witnesses at the PCR hearing; therefore, no prejudice can be shown pursuant to Underwood. This Court finds Applicant has failed to carry his burden of proving trial counsel was ineffective for failing to call witnesses on Applicant's behalf at trial or any resulting prejudice. Thus, this allegation is denied.

Franks Motion

Applicant claims trial counsel was ineffective for not making a Franks motion. “To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge.” State v. Missouri, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999). Further, “[t]here will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause.” Id.

Applicant has presented no evidence of information recklessly or intentionally omitted from the warrant. At trial, counsel challenged the inaccurate references in the warrant and incident report that suggested the crack was found on Applicant while they were still by the vehicle instead of in the booking area. (Tr. pp. 83-87.) Two of the State’s witnesses testified they observed crack fall out of Applicant’s pant leg onto the floor in the booking area. (Tr. pp. 75, 97-100.) Deputy Surrat testified he mistakenly misidentified where Applicant was when the crack cocaine was found in his possession. (Tr. p. 87.)

Having reviewed the transcript and considered the testimony, this Court finds Applicant has not met his burden of establishing trial counsel was ineffective or that Applicant was prejudiced thereby. There was sufficient information to establish probable cause despite the mistaken identification of Applicant’s location when he was observed in possession of the crack cocaine.

Video from the booking area

Applicant argues his trial counsel was ineffective for failing to produce or challenge the missing booking area video. Trial counsel did challenge the video and did ask that an inference

instruction be given to the jury that the video contained exculpatory information or evidence that could have been found had the State not failed to preserve the video. (Tr. pp. 39-43.) The trial court denied the request for the instruction but allowed counsel to cross-examine State's witnesses on the failure to preserve the video, which counsel did. (Tr. p. 106.) Trial counsel also objected again prior to closing charges. (Tr. p. 136.) At the PCR hearing, trial counsel testified he had no good faith basis to assert the destruction of the video was done in bad faith.

This Court finds Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby and, accordingly, finds this allegation is denied.

Testimony about Marijuana found in Applicant's pocket

Applicant alleges trial counsel was deficient for failing to exclude testimony about the marijuana found in Applicant's pocket at the traffic stop. However, trial counsel testified to a valid trial strategy in addressing and using this testimony to benefit his client.

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d, 529 (1992).

Further, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (citing Strickland v. Washington, 104 S.Ct. 2052, 890 L.E.2d 674 (1984)). Because of the difficulties inherent in making the evaluation, a court

must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id.

Applicant acknowledged that immediately prior to his trial the State dismissed the Possession with Intent to Distribute and Possession of a Weapon charges after his co-defendant confessed all the drugs and the weapon found in the car were his and not Applicant's. The State proceeded to trial solely on the crack cocaine found in Applicant's possession in the booking room. The State presented two witnesses who observed the crack cocaine fall by Applicant's foot in the booking room. (Tr. pp. 74, 96-100.) At the PCR hearing, trial counsel agreed part of his strategy was to highlight the search done of Applicant at the traffic stop and the marijuana officers had found on Applicant during that pat down in order to challenge the later discovery of the crack cocaine on Applicant in the booking room.

This Court finds trial counsel has outlined a valid trial strategy. Therefore, this Court finds Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby and, accordingly, finds this allegation is denied.

Sentence enhancement

Applicant claims his sentence enhancement was in error. He produced no evidence to support this allegation. Trial counsel testified Applicant had sufficient prior convictions, and he was aware of no reason to object to the sentencing enhancement. Therefore, this Court finds Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby and, accordingly, finds this allegation is denied.

No Evidence Presented

At the start of the hearing, Applicant presented a written list of allegations; however, this Court finds Applicant presented no testimony on the following allegations:

- Conflict of interest
- For allowing Applicant to be tried and convicted on indictment other than indictment found by Grand Jury
- Prosecutorial misconduct
 - Solicitor's evidence during pretrial
 - Solicitor's prejudicial opening remarks and closing arguments
 - Unethical tactics in maintaining convictions
- Judicial misconduct

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Respondent.

IT IS SO ORDERED.

LETITIA H. VERDIN
Presiding Judge
Tenth Judicial Circuit

12/28/16 (date)
[Signature] South Carolina

FILED-CLERK'S OFFICE
ANDERSON SC
2017 JAN -3 PM 3:28
COMMON PLEAS AND
GENERAL SESSIONS

WITNESSES

B Surratt, Anderson County Sheriff's Dept.

DOCKET NO. 2009-GS-04-01737

The State of South Carolina

County of Anderson

COURT OF GENERAL SESSIONS

JUL 28 2009

Term

ARREST WARRANT NUMBER

J896841 & J896842

THE STATE

vs.

Kevin Jerome Gilliard

ACTION OF GRAND JURY

TRUE BILL

JUL 28 2009

Foreperson of Grand Jury

Date:

Foreperson

VERDICT

RLC

Indictment forDrugs / Trafficking crack cocaine - 28 g or
more, but less than 100 g

SC Code: 44-53-0375(C)(2)(c)

CDR Code: 0349

Possession of a weapon during the
commission of a violent crime

SC Code: 16-23-0490

CDR Code: 0549

A TRUE COPY

SEP - 1 2015

Richard M. Hines
CLERK OF COURT

Foreperson of Petit Jury

Date:

w/p

STATE OF SOUTH CAROLINA)
COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on JUL 28 2009, the Grand Jurors of Anderson County present upon their oath:

Drugs / Trafficking crack cocaine - 28 g or more, but less than 100 g

That the Defendant, Kevin Jerome Gilliard, on or about April 19, 2009, in Anderson County, South Carolina, did knowingly sell, manufacture, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of more than twenty-eight (28) grams but less than one hundred (100) grams of Crack Cocaine, a schedule II controlled substance, as defined and otherwise limited in Sections 44-53-110, 44-53-210(b)(4), 44-53-210(d)(1), or 44-53-210(d)(2), all in violation of Section 44-53-375, Code of Laws of South Carolina, (1976) as amended.

Possession of a firearm during the commission of a violent crime

That Kevin Jerome Gilliard did in Anderson County, on or about April 19, 2009 possess a firearm during the commission of a violent crime, to wit: Trafficking Crack Cocaine, in violation of Code Section 16-23-0490, Code of Laws of South Carolina, 1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Rame L. Campbell

ASSISTANT SOLICITOR

WITNESSES

B. Surratt, Anderson County Sheriff's Dept.

DOCKET NO. 2009-GS-04-01737

The State of South Carolina

County of Anderson

COURT OF GENERAL SESSIONS

JUL 28 2009

Term

ARREST WARRANT NUMBER

J896841

ACTION OF GRAND JURY

TRUE BILL

JUL 28 2009

Foreperson of Grand Jury

Date:

Foreperson

VERDICT

Foreperson of Petit Jury

Date:

9 Dec 09

THE STATE

vs.

Kevin Jerome Gilliard

RLC

Indictment for

Drugs / Trafficking crack cocaine - 28 g or
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SC Code: 44-53-0375(C)(2)(c)
CDR Code: 0349

A TRUE COPY

SEP - 1 2015

Richard X. Kiley
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on JUL 28 2009, the Grand Jurors of Anderson County present upon their oath:

Drugs / Trafficking crack cocaine - 28 g or more, but less than 100 g

That the Defendant, Kevin Jerome Gilliard, on or about April 19, 2009, in Anderson County, South Carolina, did knowingly sell, manufacture, deliver, purchase, or bring into this State, or did provide ~~financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or~~ bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of more than twenty-eight (28) grams but less than one hundred (100) grams of Crack Cocaine, a schedule II controlled substance, as defined and otherwise limited in Sections 44-53-110, 44-53-210(b)(4), 44-53-210(d)(1), or 44-53-210(d)(2), all in violation of Section 44-53-375, Code of Laws of South Carolina, (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Rame L. Campbell

ASSISTANT SOLICITOR