

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Honorable William H. Seals, Circuit Court Judge

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MAY 30 2018

S.C. SUPREME COURT

KEVIN D. COX,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002507

APPENDIX

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1 STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
2 COUNTY OF Horry) INDICTMENT NO. 07-GS-26-4399
3 INDICTMENT NO. 07-GS-26-4401
4

5 THE STATE OF SOUTH CAROLINA,)
6 PLAINTIFF,)
7 -VS-) TRANSCRIPT OF RECORD
8 KEVIN DAVONNE COX,)
9 DEFENDANT.)
10

11 Tuesday, March 4, 2008
12 and
13 Wednesday, March 5, 2008
14 Conway, S. C.

15 B E F O R E:

16 HONORABLE EDWARD B. COTTINGHAM, JUDGE, AND A JURY

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

18 WILLIAM BERTRAM VON HERRMANN, ESQUIRE
19 AND
20 CANDICE A. LIVELY, ESQUIRE
21 Assistant Solicitors, Fifteenth Judicial Circuit
22 Attorneys for the State

23 ROBERT PAUL TAYLOR, ESQUIRE
24 Attorney for the Defendant
25

LINDA W. MCCALL
OFFICIAL REPORTER

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REMARKS OF THE COURT

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TUESDAY, MARCH 4, 2008

(The Court convenes the trial of this case with counsel for the State and counsel for the defendant present in the courtroom. The defendant is not present in the courtroom.)

REMARKS OF THE COURT

THE COURT: All right.

Good afternoon, ladies and gentlemen.

I understand you've been down in the jury room since around 2:00. I had hoped that I'd be able to have you up here at 3:30 but we had a jury here that reached a verdict about 2:30, and we were busy engaged in accepting those verdicts in these cases, and that's why I had to wait and bring you up after we had concluded that procedure.

I tell you this to let you know that we don't like to waste your time even though I know sometimes you think maybe we out smoking or telling cigarettes - - or smoking or telling jokes but we understand that your time is important, too, and we attempt to inconvenience you as little as possible.

And, thus, when I tell the jury that I want them at 2:30 and I can't start until 3:35, they entitled to know why we wasting their time but in this instance it was just such that, ah, the jury told me they had a verdict, and in fairness to them, they'd been here trying this case for two days, we had to go ahead and take the verdict and deal with the sentences appropriately, and that's why I had to wait a few minutes to get you here.

REMARKS OF THE COURT

8

1 Now, from your number we're going to pick twelve jurors and
2 two alternates in a criminal case. We're running civil and
3 criminal dockets this week, and the fourteen selected will be asked
4 to come back to the jury room at 9:30 in the morning to start this
5 case.

6 Those of you who are not selected, Christina, as I understand
7 it, they are to call in after 6:00 tonight for further
8 instructions?

9 CLERK OF COURT: Yes, sir.

10 THE COURT: Okay.

11 Now, Christina?

12 CLERK OF COURT: Yes, sir.

13 THE COURT: Before the jury leaves tonight, I want you to
14 go and get each one of them's telephone number, too.

15 CLERK OF COURT: Yes, sir.

16 THE COURT: Okay.

17 All right.

18 Call your case, Solicitor.

19 MR. VON HERRMANN: Thank you, Your Honor.

20 May it please the Court.

21 We're here on Docket Number 07-GS-26-4399, The State v Kevin
22 Davonne Cox, an indictment for distribution of cocaine base.

23 Also, Your Honor, 07-GS-26-4401, The State v Kevin Davonne
24 Cox, an indictment for trafficking in cocaine, 28 to 100 grams.

25 THE COURT: The defendant is represented by Paul Taylor?

JURY VOIR DIRE

9

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

2 THE COURT: Are you ready for trial?

3 MR. TAYLOR: I am, Your Honor.

4 THE COURT: I note that the defendant is not here but you
5 have asked that we proceed in his absence in that he's otherwise
6 engaged this afternoon.

7 Is that correct?

8 MR. TAYLOR: That's correct, Your Honor.

9 THE COURT: And, so, with your permission, you've asked us
10 to go forward and select the case?

11 MR. TAYLOR: Yes, sir, Your Honor.

12 THE COURT: All right.

13 And we'll start, as I've indicated to you, at 9:30 in the
14 morning.

15 MR. TAYLOR: Thank you, Your Honor.

16 JURY VOIR DIRE

17 THE COURT: Now, ladies and gentlemen, the State of South
18 Carolina brings this case for the two charges indicated against
19 the defendant, and to these charges he has pled not guilty thereby
20 placing the burden of proof of proving him guilty if they can to
21 these indictments by proof beyond a reasonable doubt.

22 Some of you may have been serving in a civil court this week
23 where you were told they must prove their case by the greater
24 weight or the preponderance of the evidence. In a criminal case
25 where an individual's liberty is at stake, the burden of proof is

JURY VOIR DIRE

10

1 the highest burden known to man and that is they must prove his
2 guilt beyond a reasonable doubt, and at the appropriate time in the
3 stage of this case I will instruct you fully as to that concept.

4 Now, the State of South Carolina who brings this case and the
5 defendant who tries it for the defense desires from your number
6 twelve folks with no friends to reward, no enemies to punish,
7 twelve people who can say and upon their oath, "Judge, I don't know
8 a thing about the case. I don't know a thing about the parties.
9 I have no preconceived idea, no biases or prejudices."

10 Twelve people who can say, "Judge, if I'm selected as one of
11 the twelve, I will base my decision on the law and evidence heard
12 in this courtroom and from no other place."

13 Now, initially, you've heard that the allegations are
14 involvement in drugs, one distribution and one trafficking. The
15 defendant specifically denies it.

16 Based on prior experiences, though, in life we develop certain
17 prejudices for one reason or another, and we carry them with us
18 whether we like it or not such that given the fact that this case
19 involves allegations of drugs and sales and trafficking, do any of
20 you have such biases or prejudices that you feel that you could not
21 be a fair juror for the State or the defendant in a case involving
22 drugs?

23 If you do, let me know and I'll excuse you from this case.

24 All right.

25 First, the defendant in this case is Kevin Davonne Cox. Can

JURY VOIR DIRE

11

1 you tell us where Mr. Cox resides, Mr. Taylor, such so I can let
2 them know?

3 MR. TAYLOR: Georgetown, Your Honor.

4 THE COURT: Georgetown.

5 Any of you know Kevin Cox in any capacity whatsoever?
6 Anybody have any experiences with him, co-worker, church member,
7 anything?

8 Anybody know anything about - - related to his family in
9 anyway or him?

10 Anybody have any connections ever with this defendant?

11 Now, it is alleged only until proven beyond a reasonable doubt
12 that these occurrences happened on the 14th day of August in 2007,
13 it being alleged that on that date there was a distribution of
14 cocaine base; it being alleged that on that date, too, that he
15 possessed a quantity of cocaine sufficient in weight to call it
16 trafficking, again, which is denied.

17 Any of you know anything about that, have any discussion
18 either in the courthouse or anywhere else about any issue in this
19 case?

20 If you were to be selected as a juror do any of you have any
21 reason whatsoever why you feel that you could not be fair to the
22 State of South Carolina and equally fair to this defendant?

23 Does anybody have any reason why they feel that they need to
24 be excused from participation in this case?

25 The State of South Carolina is represented by the Solicitor's

JURY SELECTION

12

1 Office. Any of you currently have any close relatives employed in
2 the Solicitor's Office of this circuit including Horry and
3 Georgetown?

4 Any of you been victims or witnesses on behalf of the State of
5 South Carolina in the last recent six months or so?

6 All right. Please identify yourself, gentlemen, and your
7 colleagues there and let me ask them this.

8 MR. VON HERRMANN: Thank you, Your Honor.

9 My name is Bert Von Herrmann. One of the Assistant
10 Solicitor's here, Candice Lively.

11 THE COURT: Any of you currently clients of these folks or
12 have any close personal relationship with any one of them?

13 Counsel for the defense, please do the same.

14 MR. TAYLOR: Thank you, Your Honor.

15 I'm Paul Taylor. I practice here in Conway.

16 THE COURT: Any of you currently clients of Mr. Taylor or
17 have you been in the immediate past?

18 Any further inquiry for the State?

19 MR. VON HERRMANN: Not for the State, Your Honor.

20 THE COURT: Any further inquiry for the defense?

21 MR. TAYLOR: Nothing, Your Honor.

JURY SELECTION

22 THE COURT: Strikes five and five. Proceed with the
23 selection of the jury.

24 We'll have two alternates.
25

JURY SELECTION

13

1 MR. VON HERRMANN: Yes, sir, Your Honor.

2 CLERK OF COURT: When I call your name, please come

3 forward, bring your personal belongings with you and then turn

4 around and face that way.

5 #397, Alvida Watts.

6 What says the State?

7 MR. VON HERRMANN: Please present the juror.

8 CLERK OF COURT: The defense?

9 MR. TAYLOR: Please present the juror.

10 CLERK OF COURT: Please be seated in the jury box.

11 #219, Mary Lawton.

12 What says the State?

13 MR. VON HERRMANN: Please present the juror.

14 CLERK OF COURT: The defense?

15 MR. TAYLOR: Please present the juror.

16 CLERK OF COURT: Please be seated in the juror box.

17 #177, Andrew Hobson.

18 What says the State?

19 MR. VON HERRMANN: Please present the juror.

20 CLERK OF COURT: The defense?

21 MR. TAYLOR: Please excuse the juror.

22 CLERK OF COURT: Please be seated. You're excused from

23 this particular case.

24 #361, Pamela Stone.

25 What says the State?

JURY SELECTION

14

1 MR. VON HERRMANN: Please present the juror.

2 CLERK OF COURT: The defense?

3 MR. TAYLOR: Please present the juror.

4 CLERK OF COURT: Please be seated in the jury box.

5 #159, Robin Hamm.

6 What says the State?

7 MR. VON HERRMANN: Please present the juror.

8 CLERK OF COURT: The defense?

9 MR. TAYLOR: Please present the juror.

10 CLERK OF COURT: Please be seated in the jury box.

11 #392, Jess Wagner. What says the State?

12 MR. VON HERRMANN: Please present the juror.

13 CLERK OF COURT: The defense?

14 MR. TAYLOR: Please present the juror.

15 CLERK OF COURT: Please be seated in the jury box.

16 #10, Carolyn Ball.

17 What says the State?

18 MR. VON HERRMANN: Please excuse the juror from the

19 trial of this case.

20 CLERK OF COURT: Please be seated. You're excused from

21 this particular case.

22 #143, Dennis Gerald.

23 What says the State?

24 MR. VON HERRMANN: Please present the juror.

25 CLERK OF COURT: The defense?

JURY SELECTION

15

1 MR. TAYLOR: Please present the juror.

2 CLERK OF COURT: Please be seated in the jury box.

3 THE COURT: Mr. Gerald, I'm going to ask that you be the

4 Foreperson for me, if you will.

5 CLERK OF COURT: #256, Linda Meadows.

6 What says the State?

7 MR. VON HERRMANN: Please present the juror.

8 CLERK OF COURT: The defense?

9 MR. TAYLOR: Please excuse the juror.

10 CLERK OF COURT: Please be seated. You're excused from

11 this particular case.

12 #191, Anthony Johnson.

13 What says the State?

14 MR. VON HERRMANN: Please present the juror.

15 CLERK OF COURT: The defense?

16 MR. TAYLOR: Please present the juror.

17 CLERK OF COURT: Please be seated in the jury box.

18 #325, Tammy Scott.

19 What says the State?

20 MR. VON HERRMANN: Please present the juror.

21 CLERK OF COURT: The defense?

22 MR. TAYLOR: Please present the juror.

23 CLERK OF COURT: Please be seated in the jury box.

24 #162, Judith Hardin.

25 What says the State?

JURY SELECTION

16

1 MR. VON HERRMANN: Please present the juror.
2 CLERK OF COURT: The defense?
3 MR. TAYLOR: Please present the juror.
4 CLERK OF COURT: Please be seated in the jury box.
5 #355, Erma Stackhouse.
6 What says the State?
7 MR. VON HERRMANN: Please present the juror.
8 CLERK OF COURT: The defense?
9 MR. TAYLOR: Please excuse the juror.
10 CLERK OF COURT: Please be seated. You're excused from
11 this particular case.
12 #403, Mary Weinshenker.
13 What says the State?
14 MR. VON HERRMANN: Please present the juror.
15 CLERK OF COURT: The defense?
16 MR. TAYLOR: Please present the juror.
17 CLERK OF COURT: Please be seated in the jury box.
18 #235, Evelyn MacIntyre.
19 What says the State?
20 MR. VON HERRMANN: Please present the juror.
21 CLERK OF COURT: The defense?
22 MR. TAYLOR: Please excuse the juror.
23 CLERK OF COURT: Please be seated. You're excused from
24 this particular case.
25 #95, John Danley.

JURY SELECTION

17

1 What says the State?

2 MR. VON HERRMANN: Please present the juror.

3 CLERK OF COURT: The defense?

4 MR. TAYLOR: Please present the juror.

5 CLERK OF COURT: Please be seated in the jury box.

6 #283, Jean Osborne.

7 What says the State?

8 MR. VON HERRMANN: Please present the juror.

9 CLERK OF COURT: The defense?

10 MR. TAYLOR: Please excuse the juror.

11 CLERK OF COURT: Please be seated. You're excused from
12 this particular case.

13 #324, Eugene Scott.

14 What says the State?

15 MR. VON HERRMANN: Please present the juror.

16 CLERK OF COURT: The defense?

17 MR. TAYLOR: Please seat the juror.

18 CLERK OF COURT: Please be seated in the jury box.

19 THE COURT: All right.

20 That will constitute the twelve jurors. We'll have two
21 alternates. Strikes are one and two as to each alternate.

22 Proceed.

23 CLERK OF COURT: #28, Roger Black.

24 What says the State?

25 MR. VON HERRMANN: Please present the juror.

JURY SELECTION

1 CLERK OF COURT: The defense?
2 MR. TAYLOR: Please present the juror.
3 CLERK OF COURT: Please be seated in the jury box.
4 #229, Victoria Loeper.
5 What says the State?
6 MR. VON HERRMANN: Please excuse the juror from the
7 trial of this case.
8 CLERK OF COURT: Please be seated. You're excused from
9 this particular case.
10 #391, Kelli Wadsten.
11 What says the State?
12 MR. VON HERRMANN: Please present the juror.
13 CLERK OF COURT: The defense?
14 MR. VON HERRMANN: Please seat the juror.
15 THE COURT: Please be seated in the jury box.
16 THE COURT: All right.
17 Have the jury go to the jury room just a moment, please.
18 (The jury retires to the jury room at 3:53 p.m.)
19 THE COURT: Any jury issues on behalf of the State?
20 MR. VON HERRMANN: None from the State, Your Honor.
21 THE COURT: On behalf of the defendant?
22 MR. TAYLOR: None, Your Honor.
23 THE COURT: All right.
24 Ladies and gentlemen of the jury venire, the remainder of you,
25 you are excused.

REMARKS OF THE COURT

19

1 Let me ask you something. Do they need any more juries
2 downstairs this afternoon, Madame Clerk?

3 CLERK OF COURT: No, sir. They're to call back after 6:00.

4 THE COURT: All right.

5 Does everybody understand the call-in procedure? If you do,
6 please call in after 6:00 tonight for further instructions.

7 Thank you so much.

8 (The remaining jury panel is released to call in after 6:00
9 p.m. tonight.)

10 THE COURT: All right. Bring the jury in, please.

11 As soon as I let the jury go, there are some matters we need
12 to get on the record.

13 MR. TAYLOR: Yes, Your Honor.

14 (The jury returns to the courtroom at 3:58 p.m.)

REMARKS OF THE COURT

16 THE COURT: Ladies and gentlemen, during the course of this
17 trial, the Foreperson will always occupy that chair. The
18 alternates will always occupy your two chairs. The rest of you
19 may sit as you choose.

20 Mr. Foreman, your duties will be to preside during the jury
21 room during deliberations and to be the jury's spokesman in the
22 courtroom, and I'll keep you, of course, fully advised, and I will
23 provide for you and your jury at the appropriate time the
24 appropriate verdict forms for the issues in this case.

25 Now, from this moment on you must not discuss this case with

REMARKS OF THE COURT

20

1 anyone. Let no one discuss it with you. Make no independent
2 inquiry. Until I've given you the case for your deliberation,
3 you must not even discuss it among yourselves this case in the jury
4 room.

5 Now, Mr. Foreman, during the breaks and time to time you can
6 discuss the weather or anything else you want to but there must not
7 be any discussion about any issue in this case.

8 And the reason is you don't want to begin your deliberative
9 process until, first, you've heard all of the evidence from
10 everybody; secondly, you've had the chance to consider the exhibits
11 that may be in the trial, and, thirdly, you'll have to wait until
12 I tell you what the law is and what the issues are.

13 And so these are things that we say it's so important not to
14 discuss the case until I give it to you.

15 Now, we propose to start this case promptly at 9:30 in the
16 morning, and so I'm going to ask you to be back in the jury, not
17 the courtroom, not downstairs but back here at 9:30 ready to go.

18 Everybody have - - anybody got any question about that?

19 Yes, ma'am?

20 JUROR: Do we come - - how do we get to that room?

21 CLERK OF COURT: Tell her.

22 BAILIFF: We'll show you. We'll show you after we leave
23 the courtroom.

24 JUROR: Thank you.

25 THE COURT: They'll take care of you, and if they can't get

BENCH WARRANT ISSUED

21

1 you in, you let me know, and I'll come get you, and I'll be
2 delighted to do that.

3 All right. You are excused. See you in the room at 9:30,
4 and they'll show you how to get there.

5 That's a good question. I have problems getting through these
6 doors myself will all the security.

7 Tell them where to go and how to get in the door.

8 (The jury is released for the day at 4:01 p.m. to return at
9 9:30 a.m. on Wednesday.)

10 BENCH WARRANT ISSUED

11 THE COURT: All right.

12 I want the record to reflect that this schedule - - that this
13 case was scheduled to be tried starting this afternoon. The
14 defendant was informed of it. Understood that he would be tried in
15 his absence if he failed to appear.

16 Discussions with his lawyer indicated he called in several
17 times this morning. Told him to get on over here, and he kept
18 saying he was on his way. This was this morning and again at
19 2:00. It is now 4:00. He's not on his way. I'm going to try
20 him in his absence if he doesn't show.

21 Now, Mr. Taylor, I want to protect yourself. State for the
22 record your efforts to get him here and his replies.

23 MR. TAYLOR: Yes, sir.

24 This case was placed on the docket, trial docket some time
25 back. We had a roster meeting on Friday. Mr. Herrmann told him

BENCH WARRANT ISSUED

22

1 to be present and before him Monday morning. Come Monday morning
2 upon arriving, he was present in court downstairs. I met with him.

3 Mr. Herrmann -- Von Herrmann was out because of a sick child.
4 I told him that I'd had a communication -- a meeting with Mr.
5 Herrmann -- Von Herrmann today.

6 I told him that I had spoken to him on his cell phone. I told
7 him to be by the phone in case I called. I had his cell phone
8 number, and I have spoken with him today.

9 Then I was notified to be here today at 2:00 to be with you.
10 My office -- I was at the jail. I told my office that I was in
11 between pleas. Had them call and speak with him. They did so. I
12 myself have spoken with him this afternoon. He was told to be here
13 at 1:30. I got here at 1:30 and called him. He was having car
14 problems. Had to get an alternate ride.

15 I spoke with him again about 1:45. He said he was on his way
16 from Plantersville, South Carolina which is just south of, ah, of,
17 ah, Conway. It's about fifteen minutes south of here. He told me
18 he was on the way.

19 I've checked the hallway and done everything I can to, ah, ah,
20 notify the defendant. He knew to be here.

21 THE COURT: He understood that in his absence he would be
22 tried in his absence?

23 MR. TAYLOR: Yes, sir.

24 THE COURT: All right. Here's what I'm going to do.
25 Issue a Bench Warrant immediately. Go get him and call the

BENCH WARRANT ISSUED

23

1 bondsman and say his bond is going to be forfeited, now. He hasn't
2 complied with showing up for trial.

3 Now, let the bondsman earn his fee here on this thing.

4 So, I want a Bench Warrant issued, and I want you to call the
5 bondsman as you leave the courtroom and tell him to go get him and
6 that's pursuant to a bond - - a Bench Warrant that I'm getting
7 ready - - a Bench Warrant I'm getting ready to issue just as soon
8 as you get it in my hands.

9 Now, I had prepared to start this case and I want it on the
10 record at 2:30 this afternoon.

11 MR. TAYLOR: Yes, sir.

12 THE COURT: In fairness to you, though, Mr. Taylor, it not
13 being your fault, I want to give you every opportunity to get him
14 here but we are going to try this case tomorrow with or without him
15 present.

16 MR. TAYLOR: Yes, sir.

17 THE COURT: Now, I will explain to the jury if he's not
18 here that that cannot be used against him in anyway. It creates no
19 adverse inferences and that they are to put the State to their
20 burden of proof as and if that individual were here on his own
21 behalf.

22 MR. TAYLOR: Yes, sir.

23 THE COURT: If you have any further instructions on that
24 issue. I'll be glad to consider them.

25 MR. TAYLOR: Okay. Thank you, Your Honor.

BENCH WARRANT ISSUED

24

1 THE COURT: All right.

2 See you at 9:30 in the morning.

3 MR. VON HERRMANN: Your Honor, if I could just before we
4 break if it would be okay with the Court, I'd like to make Court's
5 Exhibits of the Bail Proceeding Form with the bond addressed and
6 his subpoena that we issued out of our office to track the notice
7 of the defendant.

8 THE COURT: Made Court's Exhibits.

9 (The Court Reporter accepts Court Exhibit #1, the Bail
10 Proceeding Form II, and Court's Exhibit #2, Subpoena.)

11 MR. VON HERRMANN: Thank you, Your Honor.

12 THE COURT: Anything else?

13 MR. TAYLOR: None from the defense, Your Honor.

14 THE COURT: All right. Fine.

15 (The Court adjourns the trial of this case for the day to
16 reconvene on Wednesday at 9:30 a.m.)

COURT ADDRESSES ABSENCE OF DEFENDANT

25

WEDNESDAY, MARCH 5, 2008

(The Court convenes the trial of this case with all parties present in the courtroom except the defendant.)

COURT ADDRESSES ABSENCE OF DEFENDANT

THE COURT: Be seated, please.

Good morning.

All right. Mr. Taylor, let's address the first issue that you addressed with me and the Solicitor.

MR. VON HERRMANN: Yes, sir, Your Honor.

It is my understanding and we have tried - - we attempted to call Beach Bonding, the bonding company. This Court issued a Bench Warrant yesterday for the defendant in this case who did, in fact, have actual notice from this Court and I think appropriately.

Your Honor, one of the methods by which we can track or address locating the defendant in this case and hopefully of bringing him to court to defend himself but, also, in the even of a conviction or because the Court has already issued a Bench Warrant is to have a cell phone number we are able to track through the use of the cell phone, the U. S. Marshall has got equipment where they can locate the defendant if he has that cell phone.

It is my understanding through conversations of the Court and Mr. Taylor, I think Mr. Taylor has been forthcoming about it, and certainly not been difficult but he's got some concern, and we have asked Mr. Taylor for that cell phone number so we can locate the defendant if it is indeed the cell phone in his possession. We

COURT ADDRESSES ABSENCE OF DEFENDANT

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1 would just ask the Court that he would give us that cell phone
2 number.

3 THE COURT: All right. First, let the colloquy of
4 yesterday and we - - when we picked the jury to be a part of this
5 record, and that record will reflect that Mr. Taylor agreed as his
6 attorney that he knew to be here, was told to be here, was not here
7 and understood that the trial would proceed in his absence.

8 During that time I asked the Solicitor's Office to make every
9 effort to contact him and to call his bondsman.

10 Now, what - - what - - what did you find from those
11 proceedings?

12 MR. VON HERRMANN: Your Honor, we had sent agents and
13 his bonding service to several locations yesterday, and we were
14 able to ascertain from I believe the mother of the defendant that
15 he had stopped by her house and told her bye, that he would see her
16 later and had obtained money either from her or from a friend
17 which, obviously, leads us to believe that he is trying to flee the
18 jurisdiction.

19 There are other people that we have contacted, sureties on the
20 bond and some other people that my investigator called this morning
21 who are failing to cooperate with locating the defendant and are
22 refusing to speak with our investigators.

23 THE COURT: All right. Mr. Taylor, what is your position?
24 You, of course, we're talking about a fleeing felon here, now.
25 He's charged with two serious charges.

COURT ADDRESSES ABSENCE OF DEFENDANT

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1 This is outside the presence of the jury.

2 Trafficking in cocaine and distribution of cocaine.

3 MR. TAYLOR: You want me to start first, Your Honor, put on
4 the record of what my actions, again, to preserve this record as
5 far as what I did to make sure my client knew to be here.

6 THE COURT: Yes, sir.

7 MR. TAYLOR: Okay. I'll start with that first.

8 Your Honor, upon being noticed by the Solicitor's Office to
9 appear here in chambers yesterday, we called, my office as well as
10 myself, my staff and myself, called to speak with Mr. Cox to tell
11 him to be present at 2:00 concerning this case.

12 He was in court on Friday of last week. Um, I don't have the
13 date right off the top of my head but it was last Friday. Was
14 told that he was again on the trial roster once again. He's
15 been on the trial roster for quite some time.

16 He was told to be in court on Monday morning to pick a jury,
17 to qualify a jury.

18 On Monday morning he was here at the courthouse. We were here
19 to do that but Mr. Von Herrmann was unavailable due to his son's
20 illness. He was out of the office.

21 I spoke to Mr. Von Herrmann that morning on his cell phone.
22 I notified my client to be back at court on Tuesday. Told him that
23 I would call him after speaking to Mr. Von Herrmann as to the time.

24 Upon being notified that it was at 2:00, my staff at first
25 called Mr. Cox to tell him to be there. Then I called myself and

COURT ADDRESSES ABSENCE OF DEFENDANT

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1 spoke with him.

2 I spoke with him actually on several occasions yesterday. At
3 one point he told me he was in Plantersville which just south here
4 of Conway on the way to Georgetown. He was on his way here.

5 After several hours you decided to go ahead and swear the jury
6 and he had never appeared. I tried repeatedly up until about 9:30
7 last night to call his cell phone either from my house or from a
8 completely different number and could not get him on his phone now
9 at this point, and I've tried again this morning. He's not taking
10 his calls. It goes to voice mail. He's not taking calls at this
11 point.

12 And moving to the issue of providing the telephone number over
13 to the Solicitor's Office because this is attorney/client
14 information, confidential between an attorney and his client, I
15 felt an ethical obligation unless I was ordered by the Court I
16 could not provide that over to the State's attorney.

17 If you tell me otherwise, Your Honor, then I'll have to do so
18 but at this point based on that attorney/client confidentiality, I
19 can't just unilaterally without getting his permission I feel
20 without getting into an ethical violation provide that over.

21 THE COURT: Well, I certainly appreciate your position, Mr.
22 Taylor, but as a practical matter, the releasing of his cell phone
23 does not breach any confidential information given in your defense
24 of his case.

25 MR. TAYLOR: Yes, sir.

JACKSON V. DENNO HEARING (IN CAMERA)

29

1 THE COURT: And insofar as the defense of these charges,
2 he's not prejudiced in anyway. Contra to that, it may be helpful
3 to have him here so that he can defend it but we going forward
4 today. He was told to be here or the case would be tried in his
5 absence.

6 Given these circumstances and the fact that I find that he's
7 obviously running knowing that he was scheduled for trial again
8 today, then in a sense of justice, I think we ought to find him.

9 MR. TAYLOR: Yes, sir.

10 THE COURT: And his bondsman is entitled to that, too, who
11 is on his bond.

12 So, I respectfully now direct that you furnish to the
13 Solicitor's Office that defendant's cell phone number.

14 MR. TAYLOR: Yes, sir, Your Honor.

15 THE COURT: Plus, if you have any other information that
16 would avail the Solicitor's Office in getting him here, I
17 respectfully direct that you provide them with that information.

18 MR. TAYLOR: Yes, sir, Your Honor.

19 THE COURT: I do not conclude that would violate an
20 attorney/client.

21 MR. TAYLOR: Thank you, Your Honor.

22 JACKSON V. DENNO HEARING (IN CAMERA)

23 THE COURT: All right.

24 Now, we've got a jury unsworn ready to go. As I understand
25 it now, we've got an issue that needs to be resolved?

JACKSON V. DENNO HEARING (IN CAMERA)

30

1 MR. VON HERRMANN: Yes, sir, Your Honor.

2 It's a very short Jackson v. Denno hearing.

3 If we could just call one witness, Your Honor, I believe it
4 would be very short.

5 THE COURT: All right. Have him come forward.

6 I'm just curious. Why didn't we do this yesterday?

7 MR. VON HERRMANN: Your Honor, to be quite frank with
8 you, it dawned on me this morning that we need to have one. Mr.
9 Taylor and I had discussed and neither one of us thought that there
10 were any hearings outstanding.

11 THE COURT: Is there any issue with regards to this
12 statement?

13 MR. TAYLOR: Yes, sir, Your Honor.

14 THE COURT: Sir?

15 MR. TAYLOR: Yes, sir.

16 THE COURT: All right. Let's have it.

17 MR. VON HERRMANN: Thank you, Your Honor.

18 We would call Agent Damon Vescovi to the stand, please.

19 (The witness takes the witness stand.)

20 (IN CAMERA) OFFICER DAMON VESCOVI, being duly
21 sworn, testifies as follows:

22 CLERK OF COURT: Please state your name for the Court.

23 AGENT VESCOVI: Damon Vescovi. I work with the Horry County
24 Police Department.

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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DIRECT EXAMINATION BY MR. VON HERRMANN:

Q. Agent Vescovi, will you please state your name for the record? I believe we were tied up with the Court Reporter, and spell your last name, please.

A. Officer Damon Vescovi, V-e-s-c-o-v-i.

Q. And, Agent Vescovi, were you employed in August of 2007 with the Drug Enforcement Unit here in Horry County?

A. Yes, sir, I was.

Q. Can you please inform the Court the mission and what you did as part of the Drug Enforcement Unit?

A. Um, I worked in a, ah, undercover drug agent capacity where we investigated drug crimes.

Q. Were you involved in August 14, 2007, with the arrest and subsequent interview of Kevin D. Cox, the defendant in this case?

A. Yes, I was.

Q. And can you tell us about kind of an overview of what he was arrested for?

A. Yes, sir.

He was arrested for distributing crack cocaine to a confidential informant. He later shortly thereafter was arrested for that and found in possession of other narcotics.

Q. And in this particular case did you take him to a police department for the purpose of interviewing him?

A. Yes, sir, I did.

Q. And when you got him there, did, um, where did you take him

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 to?

2 A. Surfside Police Department.

3 Q. And how were the accommodations? Were you in an interview
4 room or what? How - - where were you?

5 A. Yes, sir.

6 We were in an interview room behind the physical jail holding
7 facility.

8 Q. Did you provide him any what are known as Miranda Rights
9 before interviewing him?

10 A. Yes, sir, I did.

11 Q. Let me show you State's - - Court's Exhibit #3. Um, can you
12 please tell me if you recognize that document?

13 A. I do.

14 Q. And can you please explain to the Court what that specific
15 document is?

16 A. It's a Miranda Form which explains the rights of the
17 defendant.

18 Q. Ah, and I'll let the Court read it because we're not before
19 the jury, obviously, but is consistent with your office policy?

20 A. Yes, sir, it is.

21 Q. And who - - did he sign it?

22 A. Yes, sir.

23 Kevin Cox, he signed and waived his rights.

24 Q. And did you witness that particular signature?

25 A. I did, sir.

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 Q. And about time was it?

2 A. Ah, ten after 6:00 p.m.

3 Q. And when you obtained this particular statement that we're
4 going to get into in a second, was the defendant deprived of
5 anything he required such as medical necessity, food, water?

6 A. No, sir, he was not.

7 Q. Was he allowed to use the restroom if he needed to?

8 A. He was.

9 Q. Was he threatened, coerced or promised anything to make the
10 statement?

11 A. No, sir, he wasn't.

12 Q. Did he, ultimately, write out and provide you a statement?

13 A. Yes, he did.

14 Q. Let me show you Court's Exhibit #4. Can you please tell the
15 Court what that particular statement is?

16 A. It's a Voluntary Statement Form and pretty standard after
17 we've Mirandized somebody. It gives them an opportunity to give us
18 a statement in their own testimony.

19 Q. And in this particular case, did the defendant give you a
20 statement?

21 A. Yes, he did.

22 Q. And did he sign that statement?

23 A. He did.

24 Q. And is this the full and complete statement that he wrote out?

25 A. Yes, sir, it was.

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN 34

1 Q. Was there any reason that you knew of or had any reason to
2 believe that it was not voluntary or that it was coerced or he in
3 anyway did not want to give the statement?

4 A. No, sir.

5 Q. Did he at anytime indicate that he wanted to speak with a
6 lawyer, an attorney or anybody else for that matter?

7 A. No, sir.

8 Q. Thank you, Officer. I have no further questions. Please
9 answer any questions Mr. Taylor may have.

10 THE COURT: I have one question.

11 I note that I've got the statement in front of me.

12 Did he write it or did you write it and he signed it?

13 OFFICER VESCOVI: He wrote it, Your Honor.

14 THE COURT: It's his handwriting?

15 OFFICER VESCOVI: All right.

16 THE COURT: Did you ask him the specific language of this
17 statement?

18 MR. VON HERRMANN: No, sir, Your Honor.

19 I figured I would handle that in front of the jury unless the
20 Court - - -

21 THE COURT: Well, for this record do that.

22 MR. VON HERRMANN: Okay.

23 We've got that in evidence as to this matter.

24 Q. But for the purposes of this record, can you please just read
25 everything that is handwritten - -

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

35

1 A. Sure.

2 Q. - - that the defendant wrote?

3 A. It states, ah,

4 "I, Kevin Cox, went to Georgetown to see a guy. Don't know
5 his name. I met him through a friend of mine in Raleigh, North
6 Carolina. His name is Black.

7 I paid \$2,800 for the drugs I had today, two and a half ounces
8 of coke and five bundles of heroin."

9 Q. When you searched the vehicle, approximately how much cocaine
10 was in the car?

11 A. I don't recall the exact amount that I - - that I weighed but
12 it was in the neighborhood of two and a half ounces.

13 Q. And as far as the heroin, how many bundles of heroin was it?

14 A. Five which is normally called a brick.

15 Q. Which is consistent with this statement?

16 A. Yes, sir.

17 Q. Thank you.

18 I have no further questions.

19 (The Court Reporter accepts as Court's Exhibit #3, Miranda
20 Rights Form, and Court's Exhibit #4, Statement of Defendant Cox.)

21 THE COURT: Two and a half - - how much did he say?

22 MR. VON HERRMANN: Two and a half ounces, Your Honor.

23 THE COURT: That's more than, of course, 28 grams.

24 MR. VON HERRMANN: Yes, sir, Your Honor. It's right at

25 - - it's approximately 88 grams of coke.

OFFICER VESCOVI - CROSS EXAMINATION BY MR. TAYLOR

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1 THE COURT: All right. So, he found - - his testimony,
2 he found 88 grams?

3 MR. VON HERRMANN: Roughly, Your Honor.

4 THE COURT: All right, sir.

5 All right.

CROSS EXAMINATION BY MR. TAYLOR:

6
7 Q. Sir, it's safe to say that my client is not legally trained -
8 - as an attorney?

9 A. I'm sorry.

10 Q. My client is not legally trained. He's not an attorney, is
11 he?

12 A. Not to my knowledge.

13 Q. And whenever you had him sign this form, how did you explain
14 to him - - tell me the circumstances about how this form was
15 signed.

16 A. Um, my normal practice is I read each line and ask the, ah,
17 the defendant if he understood that particular line, and then I
18 proceed to the next.

19 Q. Okay.

20 And how long did you take you to go through this form? Prior
21 to him writing this statement, how long is the procedure up to the
22 point where he was advised?

23 A. However long it takes me to read it. I'd guesstimate a minute,
24 two minutes.

25 Q. All right.

RULING OF THE COURT

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1 Now, was my client under the influence of any narcotic, any
2 substance that would have made him not understand what was going on
3 that day?

4 A. He did not appear to be. To the best of my knowledge, no.

5 Q. How was his appearance as far as responding to your questions
6 whenever you asked him concerning these Miranda Rights?

7 A. Normal.

8 Q. And how many questions did he ask you regarding these Miranda
9 Rights?

10 A. I'm sorry?

11 Q. Did he ask you any questions concerning these Miranda Rights?

12 A. No, sir.

13 Q. How long had he been interviewed prior to making or writing
14 out this statement? How long did the process take up this point
15 where he wrote the statement?

16 A. In regards to the - - in regards to what he was being charged
17 with?

18 Q. Uh-huh.

19 A. I don't recall.

20 MR. TAYLOR: Your Honor, I have no further questions.

21 RULING OF THE COURT

22 THE COURT: All right.

23 First, I have reviewed the form to which this investigator has
24 testified and I find that the Miranda Rights were set out, and the
25 defendant in this case has signed knowingly that he, ah, understood

RULING OF THE COURT

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1 these rights.

2 In addition to that, the form presented here that I hold in my
3 hand indicates that he has, ah, waived, ah, these various rights,
4 and, ah, based on this evidentiary hearing in the matter I am
5 convinced beyond a reasonable doubt and so find that the confession
6 statement obtained from the defendant was freely and voluntarily
7 given. The same was given without duress, without coercion and
8 without undue influence and without any threats, inducements or
9 hope of reward.

10 I further find that the defendant in compliance with Miranda
11 vs. Arizona was advised of his various constitutional rights as I
12 have enumerated and chose to waive them not only verbally but by a
13 written statement.

14 I further find that the defendant knowingly understood these
15 rights and intelligently waived such rights under the Fifth and
16 Sixth Amendments to remain silent and to have counsel present with
17 him at the interview and interrogation.

18 I, therefore, find that the decision to make the statement was
19 a product of the defendant's own unfettered will. He had the
20 capacity to comprehend the meaning and effect of waiving his
21 constitutional rights. That document is to be introduced into the
22 trial of this case.

23 MR. VON HERRMANN: Thank you, Your Honor.

24 THE COURT: You may -- anything further from this witness?

25 MR. VON HERRMANN: No, Your Honor.

MOTIONS AND RULING OF THE COURT

39

1 THE COURT: All right.

2 You may come down.

3 (The witness leaves the witness stand.)

4 MOTIONS AND RULING OF THE COURT

5 THE COURT: All right.

6 Having dealt with that, now, are there any other issues?

7 MR. TAYLOR: Yes, sir, Your Honor.

8 I have motions I want to make prior to the case starting?

9 THE COURT: Let's hear them.

10 MR. TAYLOR: Your Honor, the first motion I'd make would be
11 to sequester all witnesses concerning this case. The witness list
12 looks like there are five witnesses that - - -

13 THE COURT: I will sequester the witnesses other than the
14 primary investigating officer. You're entitled to that.

15 MR. TAYLOR: Thank you, Your Honor.

16 My second motion would be to suppress any statement that was
17 written by Ms. Gamble who is the co-defendant in this matter as
18 what I've been provided has - - does not have her name on it, does
19 not have her signature.

20 THE COURT: What you say about that?

21 MR. VON HERRMANN: I'm not going to introduce it, Your
22 Honor.

23 THE COURT: Okay.

24 MR. TAYLOR: That's all the motions I have, Your Honor.

25 THE COURT: All right. Fine.

REMARKS OF THE COURT

1 Bring the jury in.

2 MR. VON HERRMANN: And just for the Court and the
3 defense counsel, I believe I told him there was a CD recording. It
4 was suppose to have taken place and recorded the undercover buy.
5 It was actually in a location where I'm sure Mr. Taylor has
6 listened to it. There is nothing on the tape, and we are not
7 intending on introducing it in evidence.

8 THE COURT: All right. Okay.

9 Mr. Taylor, I will explain that they still have the burden of
10 finding him guilty even though he is not here participating. No
11 adverse influence is to be derived. I'll take care of that.

12 MR. TAYLOR: Thank you, Your Honor.

13 (The jury returns to the courtroom at 10:16 a.m.)

REMARKS OF THE COURT

14 THE COURT: Good morning, ladies and gentlemen.

15 I apologize for getting started here at 10:15 when I asked all
16 of you to be promptly at 9:30.

17 Be assured, though, that we and the judges were also here. We
18 have been dealing with other issues since 9:15 as a matter of fact,
19 other issues not involved in your consideration for the jury but I
20 always like to tell jurors of why we're starting late. So, I want
21 you to know that we understand that your time is valuable too, and
22 I don't want a jury to think that we've been out here smoking
23 cigarettes and telling jokes and leaving you sitting there. So,
24 we were working, too.
25

REMARKS OF THE COURT

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1 All right. Swear the jury, please.

2 (The Clerk of Court swears the jury.)

3 THE COURT: All right, sir.

4 You may call the case.

5 MR. VON HERRMANN: Thank you, Your Honor. Ready for
6 opening statements?

7 THE COURT: Sir?

8 Have you called the case yet in the presence of the jury?

9 MR. VON HERRMANN: Yes, sir, Your Honor.

10 THE COURT: Okay.

11 Mr. Taylor, you ready for trial?

12 MR. TAYLOR: Yes, sir, Your Honor.

13 THE COURT: All right, sir.

14 Now, ladies and gentlemen, the State of South Carolina has
15 called the case of trafficking in cocaine which I will explain to
16 you in detail at the appropriate time against the defendant Kevin
17 Davonne Cox.

18 In addition to that, they've called the case regarding the
19 distribution of cocaine against that same defendant to which
20 charges he has specifically pled not guilty.

21 Now, the defendant is not here but the State of South Carolina
22 is entitled to go forward with the trial, and the defendant, of
23 course, is entitled to all protections that he's afforded as and if
24 he was here. There is no adverse influence to be derived by you
25 from the fact that this defendant is not here. He doesn't have to

OPENING STATEMENT BY MR. VON HERRMANN

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1 prove a thing. He's presumed innocent. The State's got to prove
2 him guilty beyond a reasonable doubt.

3 A defendant doesn't have to testify in the trial of his case,
4 and the fact that the defendant does not testify raised absolutely
5 no adverse inferences against him. You must not even let that fact
6 enter into your consideration of the evidence.

7 You are to base your verdict on the law and the evidence and
8 not the fact the defendant did or did not testify nor the fact that
9 he's not here.

10 The State of South Carolina has the burden of proving him
11 guilty of these charges if they can by evidence beyond a reasonable
12 doubt, and they are entitled to proceed on this basis but they must
13 meet the standards as and if he was sitting in this courtroom.

14 Now, Mr. Foreman, during your deliberations do not discuss the
15 fact that he's not here. Do not discuss the fact that he has not
16 testified. That is not an issue. He doesn't have to testify.

17 All right, sir.

18 One minute.

19 (Bench conference held off the record and in the presence of
20 the jury but outside the hearing of the jury.)

21 THE COURT: . . . You may have the opening statement.

22 OPENING STATEMENT BY MR. VON HERRMANN

23 MR. VON HERRMANN: May it please the Court.

24 Folks, all the evidence in this case is going to show, really,
25 two simple things and that is the defendant Kevin Cox was a drug

OPENING STATEMENT BY MR. VON HERRMANN

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1 dealer and a drug trafficker, and he did it here in Horry County.

2 Essentially, what has happened is the Drug Enforcement Unit
3 along with a CI, what we'll refer to as a CI, a confidential and
4 reliable informant who is going to testify today, and, essentially,
5 what she had done is she had been arrested for other drug, minor
6 drug charges, and she had sent - - essentially attempts to work
7 those charges or try to get favoritism towards resolving those
8 charges.

9 And that's not really all that we have here because what we
10 essentially do with these people is she has no deal with her
11 charges. They are still pending charges and she can still be
12 prosecuted for those things, and all she is here and all of her
13 requirement and her deal is that she comes and tells you the truth.

14 On August 14th, what happens here is she is able to contact a
15 girl by the name of Keona Gamble. Keona Gamble is the co-
16 defendant to Kevin Cox. She is driving in a car talking to Kevin
17 Cox. Catherine Cooper can actually overhear the conversation
18 between Keona Gamble and - - and the defendant in this case, Kevin
19 Cox, with regards to distributing a fair amount of drugs, what we
20 call an eightball which is typically an eighth of an ounce, about
21 3.5 grams.

22 Now, in this particular case they agree to meet right down in
23 the Garden City Connector area at a gas station. The Drug
24 Enforcement Unit folks issue her \$180 which is the approximate cost
25 of an eightball of cocaine, and they record the serial numbers on

OPENING STATEMENT BY MR. VON HERRMANN

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1 it.

2 The - - the Drug Enforcement Agent Crystal Garcia drives the
3 CI to the location of the meeting. So, you've got Crystal Garcia
4 driving a vehicle, what is a, essentially, a police vehicle but
5 it's undercover. You have Catherine Cooper in that car as a
6 passenger. They meet with Keona Gamble and Kevin Cox at the gas
7 station.

8 Ms. Cooper had been searched. She has no drugs on her. She
9 has no money on her except for the \$180 that the official funds
10 that were given to her to purchase this - - these drugs.

11 She gets out of the car. She goes over to the vehicle that's
12 being operated by Kevin Cox. She goes to make the purchase of
13 drugs. Kevin Cox takes the drugs, sits them on the seat. Ms.
14 Cooper takes the \$180, sits it on the seat. Takes the drugs.
15 Goes back to the vehicle where the Drug Enforcement Unit Agent is
16 driving. She immediately gives that to Crystal Garcia.

17 Now, this is where it kind of gets interesting. This is where
18 we realize that he's not just a drug dealer. He's a drug
19 trafficker because one of the things that Crystal Garcia is there
20 to do is she's contacting other agents who are right around the
21 corner, and what they're going to do is protect the community and
22 make sure that everything doesn't go on and there's not anybody
23 hurt in that parking lot of that gas station, as soon as Mr. Cox
24 leaves and he is driving off, he is pulled over by the South
25 Carolina Highway Patrol and two members of the Drug Enforcement

OPENING STATEMENT BY MR. VON HERRMANN

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1 Unit; that is, Agent Vescovi and Freddie Curry of the Drug
2 Enforcement Unit.

3 The, ah, Highway Patrolman essentially pulls him over. The
4 entire stop is then handled by the Drug Unit folks.

5 The Drug Unit folks go. They immediately arrest Kevin Cox for
6 the distribution of drugs and they immediately arrest Keona Gamble.

7 Now, I keep mentioning Keona Gamble, and she is a co-defendant
8 but she is not being tried today, and her actions while obviously
9 a part of the conspiracy and part of the drug dealing, her charges
10 will be dealt in another court and another day in another way and
11 in another manner. We're not concerned with her today but we are
12 concerned with Kevin Cox.

13 When, um, they arrest Kevin Cox, they find in his seat when he
14 gets out of the car, the drug - - the money, the \$180 with matching
15 serial numbers, and you're going to see a photograph of that where
16 they actually had just paid him the \$180 for the cocaine.

17 They search the vehicle. There's a pocketbook or container in
18 it that has almost 88 grams of powder cocaine which is trafficking
19 weight. The trafficking charge we've dealt with is between 28 and
20 100 grams, and you'll hear from a drug analyst that weighed it and
21 tested it, and it is, in fact, powder cocaine, and it is within
22 that weight.

23 In order to not only kind of make sure, I mean, we all know
24 that it was Kevin Cox that had the drugs and everything else but
25 there's actually a rental ticket for the car in that bag with the

OPENING STATEMENT BY MR. VON HERRMANN

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1 drugs.

2 And as if that wasn't all and enough, they then do exactly
3 what they did with Ms. Cooper when they arrested her. They take
4 Kevin Cox back to Surfside Police Department. They read him what
5 you've seen on tv a thousand times, his Miranda Rights. He agrees
6 to talk to police and explain to them how he's going about getting
7 his drugs and everything, and he handwrites a statement out, and
8 you're going to get to see a copy of that statement.

9 And what that statement says is, "I went to Georgetown to buy
10 drugs. I bought it from a guy that I don't know his name. I spent
11 about \$2800. I got two and a half ounces of cocaine and some
12 heroin and some other stuff."

13 In his own handwriting his admission that he was trafficking
14 in drugs and that he brought it up there.

15 That is going to be the evidence that you're going to hear.

16 Coincidentally, two and a half ounces is approximately and
17 there's always a little bit of weight difference, especially with
18 drug dealers, um, two and a half ounces is approximately what the
19 weight of the drugs in that bag was. So, it's not like there is a
20 disparity there, too.

21 So, when you've got him saying I went and bought two and a
22 half gram or, excuse me, two and a half ounces, and then you've got
23 almost two and a half ounces found.

24 So, and the confession is reliable in that it matches the
25 evidence.

OPENING STATEMENT BY MR. TAYLOR

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1 This is going to be a short trial, folks. There's only going
2 to be four or five witnesses, and one of them, in particular, is
3 going to be a very short witness. So, probably, there's not going
4 to be a whole lot of questions of them because we have to do what
5 is called establish a chain of custody, everybody that touched the
6 drugs, and there was one person that was in the chain of custody,
7 and I'm only going to ask him about three questions so you know
8 about what we did with the drugs the entire time.

9 But, please, it is imperative that you do not measure the
10 importance of this trial based on the number of witnesses that we
11 put up. This trial is an important case to the State of South
12 Carolina. It is an important case to resolve, and I am confident
13 at the end of this that I will have given you enough evidence to
14 where you will be firmly convinced which is the definition of
15 reasonable doubt that he is guilty of trafficking in - -
16 trafficking in powder cocaine and in distributing crack cocaine.

17 And I just ask for your attention, and we'll get through this
18 thing. It should not take a whole long time but it is very
19 important.

20 Thank you.

21 THE COURT: Mr. Taylor.

OPENING STATEMENT BY MR. TAYLOR

22 MR. TAYLOR: Thank you, Your Honor.

23 May it please the Court?

24 Good morning, ladies and gentlemen. This is a case where
25

OPENING STATEMENT BY MR. TAYLOR

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1 it's not as simple as what Mr. Von Herrmann has stated. This is
2 a case where there's always two sides to the story. It's not cut
3 and dried as stated.

4 It's a situation here where you've got somebody that he says
5 is a reliable witness. This person is not a reliable witness.
6 This person is charged with possession with intent to distribute
7 cocaine which is going to come out during her testimony.

8 There are witnesses that are going to be presented later that
9 were around the corner, and there is a trooper even further around
10 the corner that is going to make a stop of vehicle. I'm going to
11 get to that in a minute.

12 The only witness that you're going to have here that is really
13 credible and really shows what happened that day is somebody that's
14 been charged with a crime and has been working with the Drug
15 Enforcement Unit.

16 Now, why does she do that? She gets charged with a crime.
17 She's looking at going to prison for a very long time. Now, that
18 goes towards her credibility I believe, and I hope that you will
19 see that when she gets up there to testify.

20 She's willing to sell out anybody she can, anybody no matter,
21 and if the facts don't exactly fit right, well, let's make them
22 fit. Let's make them fit because if they fit, then the people who
23 I'm working for are happy, and I don't go to jail. It's that
24 simple.

25 So, let's look at that.

OPENING STATEMENT BY MR. TAYLOR

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1 The officer that pulls up with her and lets her out the car
2 but is not the one that goes into the car, and we're going to get
3 to the car whether or not this vehicle that this confidential
4 informant gets into is even my client's vehicle.

5 My client is stopped way down the road by a highway patrolman
6 because somebody said, "There's a vehicle coming your way and it
7 looks a certain description."

8 And how many of those vehicles like that description actually
9 pass that road in and out?

10 Say, for example, a Grand Cherokee. There's a grey Grand
11 Cherokee coming your way. How many of those vehicles of that
12 description was passed by that highway patrolman who actually made
13 the stop in this case? One, two or ten, twenty, thirty?

14 Is the vehicle that was stopped the vehicle that was at the
15 gas station? That's what you have to determine here.

16 You're going to have to say, "Okay, did they put the cart
17 before the horse or the horse before the cart?"

18 So, these other people that are around the corner, they don't
19 see anything as far as any type of transaction. They just go down
20 later on and where there was stop, and then that's their only
21 involvement. They're not there as stated by the State's attorney.
22 They're around the corner. They don't see.

23 So, the only person here that saw anything is the person that
24 is charged with possession with intent to distribute drugs. This
25 is a very serious charge. Working for the Drug Enforcement Unit

OPENING STATEMENT BY MR.. TAYLOR

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1 and as a condition of working for the Drug Enforcement Unit, her
2 position is to make arrests, come to court, testify up here. Make
3 this - - the puzzle fit, and if the puzzle doesn't fit well, "Hey,
4 they're happy if I make it fit."

5 So, her testimony up here is directly in your hands as to
6 whether it's true or as to whether it's not true, and, again,
7 you're going to have to see whether that happens, whether she's
8 credible or not.

9 Now, again, this is going to be a short trial. My client's
10 not here. You can't hold that against him because he doesn't have
11 to say anything. Okay? If he was here, he wouldn't have to say
12 anything. He wouldn't have to get on the stand. He's presumed to
13 be innocent.

14 The judge is going to give you the law later on that everybody
15 in this country, thank God, is presumed to be innocent. This is
16 not Saudi Arabia or Afghanistan where if you get charged with
17 something, they don't have a trial. They take you out back and
18 shoot you and throw you in a hole. This is America. Everybody is
19 presumed to be innocent.

20 So, you can't hold that against him the fact that he's not
21 here today because he doesn't have to testify to anything.

22 So, I hope that after you see all of this evidence, this
23 person that they say is a gleaming witness who is going to get on
24 the stand is not. She's charged with a drug offense. She's
25 working with a drug enforcement agency, and her position is to make

OPENING STATEMENT BY MR. TAYLOR

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1 arrests. I don't care how many she's got to make because she's got
2 time hanging over her head; and if she helps them, well, they going
3 to help her, and let's just be honest with that.

4 You - - you help us when it's time to get an arrest and we'll
5 help you when it's your turn to be in front of a judge, your turn
6 to be in front of jury. We'll help you.

7 Now, they're going to say there's no deal. There's no deal
8 on the table. Now, that's directly contrary to any common sense,
9 and I know that you will see that. This person who is working for
10 the Drug Enforcement Unit making all of these buys for them, she is
11 in direct harms way because, again, these people that are selling
12 drugs on the street are dangerous people. They carry guns, and
13 people get killed every day over drugs.

14 So, she's putting herself in harms way to get killed, thrown
15 in the woods somewhere and never to be seen again, and she's going
16 to do that for what? Because she's a good citizen? No. She's
17 going to do that so her charges get done away.

18 So, again, somebody that is going to come in and testify in
19 trial regarding their credibility, they're going to say anything.
20 They're going to do anything to make sure that those charges go
21 away and that the State's attorney is happy with them, that the
22 Drug Enforcement Unit is happy with them, and that's the only
23 witness here today that's going to be - - have anything to do as to
24 my client's guilt.

25 I hope you see that, and I hope that you do not just

OPENING STATEMENT BY MR. TAYLOR

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1 automatically make an assumption. Drugs are a terrible thing to
2 our society. They kill people everyday. They are a scourge on our
3 society.

4 I hope that you take whatever personal feelings that you have
5 and put them to the side and that you just listen to the facts of
6 this case. And whether or not you hate drugs or not and that you
7 listen and don't prejudice my client just because of what is going
8 on in the street.

9 This is a trial. You have to listen to the evidence and make
10 the decision from what the State puts up as far as evidence, not
11 from any personal feelings, personal belief, and I hope that after
12 everything is looked at in this matter that you see that the
13 State's not going to be able to prove the case, that my client had
14 nothing to do with this situation and that there could have been
15 fifty vehicles that went by that looked like my client's regarding
16 - - because the only person, again, by the State's attorney saying
17 that the only person there was the confidential informant that got
18 into the vehicle that made a drug sale or made a drug purchase, and
19 I just don't think that there's going to be enough here for you to
20 convict my client.

21 Thank you very much.

22 THE COURT: Thank you, Mr. Taylor.

23 Call your first witness, please, Solicitor.

24 MR. VON HERRMANN: Thank you, Your Honor.

25 The State would call Crystal Garcia.

AGENT GARCIA - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 (The witness takes the witness stand.)

2 AGENT CRYSTAL GARCIA, being duly sworn,
3 testifies as follows:

4 CLERK OF COURT: Please state your name for the Court.

5 AGENT GARCIA: Crystal Garcia.

6 DIRECT EXAMINATION BY MR. VON HERRMANN:

7 Q. Agent Garcia, can you please tell the jury where you're
8 employed?

9 A. I work for the Fifteenth Circuit Drug Enforcement Unit.

10 Q. What particular department?

11 A. Conway Police Department.

12 Q. And as your assignment to the Drug Enforcement Unit, can you
13 tell the jury kind of an overview of what the Drug Enforcement Unit
14 does and who is on the Drug Enforcement Unit?

15 A. We, basically, handle narcotics complaints throughout the
16 county.

17 Q. And how many agencies are involved in this particular unit?

18 A. Every agency in the county, I believe, except for Aynor and
19 Loris.

20 Q. In August 14th of 2007, were you involved in an operation
21 targeting a potential drug dealer?

22 A. Yes, sir, I was.

23 Q. And can you identify to the jury who that drug dealer was?

24 A. Ah, they called him Flattop. I believe his real name is Kevin
25 Cox.

AGENT GARCIA - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 Q. And on that particular day, were y'all able to develop a plan
2 to purchase narcotics from him?

3 A. Yes, sir.

4 Q. Can you tell the jury what the plan was with regards to - -
5 just start with how y'all were going to purchase drugs and what was
6 going to happen after it as he left from the - - -

7 A. Ah, we had received information that Kevin Cox was suppose to
8 be, um, coming from the Georgetown area, and the confidential
9 informant was going to meet with Kevin Cox at a gas station. I
10 believe it's kind of the Garden City area on the 17 By-pass.

11 The last call we got before we actually left to head to that
12 location was that he was there, and he was waiting on us.

13 Q. Was there anybody in the car with him?

14 A. Yes. I believe it was his girlfriend. I can't remember her
15 name.

16 Q. And what was your jobs or responsibility in the operation?

17 A. I drove the confidential informant. Well, first, I searched
18 her and wired her up and, ah, I drove her to the buy location where
19 we met with Mr. Cox and his girlfriend.

20 Q. Okay.

21 You communicated that you searched her. Explain to the jury
22 what the purpose - - were you - - were you in a police vehicle?

23 A. A undercover police vehicle, yes, sir.

24 Q. Did you search that to make sure there were no drugs or
25 anything in there?

AGENT GARCIA - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 A. Yes.

2 Q. And what is the purpose of searching the CI in this particular
3 case?

4 A. Ah, so we can say positively that they did not have those
5 drugs on them when they actually met with the individual, to Mr.
6 Cox.

7 Q. Was there any money, ah, official police funds issued to the
8 CI?

9 A. Yes, sir, there were.

10 Q. Explain to the jury how you go about doing that and what type
11 of identifying marks you record on those?

12 A. Basically, what I do and some agents do it differently. We
13 just lay out the money and take a picture to record the serial
14 numbers, um, so, later on when the person is actually arrested if
15 they have that money on them, then we can say that that was the
16 money, you know, we issued to the confidential informant.

17 Q. While you were driving the vehicle with - - well, let's go
18 ahead and give this. I'm sorry. Who was the confidential
19 informant in this particular case?

20 A. Ah, Catherine Cooper.

21 Q. And while you were driving Ms. Cooper around, ah, was there
22 any communication between you and other agents?

23 A. Yes. I did have my radio on, um, when we first pulled in. I
24 did radio to them when she notified me that she had seen him. He
25 was there.

AGENT GARCIA - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 Q. Ah, what was the plan once he left the location where he --
2 where y'all purchased the drugs.

3 A. Um, I had contacted State Trooper David McGaha to stand by in
4 the area. Agents were going to conduct a traffic stop on him once
5 he left the gas station.

6 Q. And were the other agents in the Drug Enforcement Unit
7 involved in this traffic stop?

8 A. Ah, yes.

9 Q. With regards to the, ah, you indicated that you wired up the
10 confidential informant. Tell the jury what type of equipment that
11 typically is.

12 A. Um, I believe on this particular incident we just used an
13 audio recording device. I'm not sure if any other agents did any
14 videoping but I know for sure we wired her with an audio recording
15 device.

16 Q. Have you had an opportunity to listen to that recording
17 device?

18 A. No, sir, I have not.

19 Q. Ah, once you made it the location and you were driving, how
20 did you pull up beside the vehicle?

21 A. Um, he was actually -- he was there, and he was parked at a
22 gas pump, and let's just say this is the gas pump. He parked here.
23 I pulled up right in front of his vehicle, and Ms. Cooper got out
24 and went and met with him at his vehicle.

25 Q. Did Ms. Cooper have any drugs on her when she left your car?

AGENT GARCIA - DIRECT EXAMINATION BY MR. VON HERRMANN

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- 1 A. No, sir.
- 2 Q. Did she have anything other than the \$180 in her possession?
- 3 A. Um, she had her purse which was searched.
- 4 Q. So, there was no money other than the \$180?
- 5 A. No.
- 6 Q. Where did she go when she left your vehicle?
- 7 A. She left my vehicle and went directly to him.
- 8 He was, I believe, kind of cleaning out his car or something
- 9 kind of buying time until we got there.
- 10 Q. And how long was she gone?
- 11 A. Um, thirty-sixty seconds maybe. It was very quick.
- 12 Q. And when she returned did she have any money on her?
- 13 A. Ah, no, sir.
- 14 Q. Did she have any drugs on her?
- 15 A. Yes.
- 16 Q. Do you know approximately how much?
- 17 A. I cannot remember the weight, no.
- 18 Q. Do you remember how much she was suppose to be purchasing?
- 19 A. She was suppose to be purchasing an eightball which is 3.5
- 20 grams.
- 21 Q. Um, was the individual in the truck identified to you as Kevin
- 22 Cox, the defendant in this case?
- 23 A. Yes, sir.
- 24 Q. And what did you do with the drugs once they were given to you
- 25 in your possession?

AGENT GARCIA - CROSS EXAMINATION BY MR. TAYLOR

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1 A. Once they got completed with the traffic stop, I turned it
2 over to the Agent Freddie Curry.

3 Q. And between the time that you were - - took the drugs from her
4 at the gas station and when you gave them to Agent Curry, did you
5 change those drugs in form, substance or content? Did you do
6 anything that would have altered the state of those drugs in any
7 way?

8 A. No, sir.

9 MR. VON HERRMANN: I have no further questions, Agent
10 Garcia. Please answer anything Mr. Taylor would have for you.

11 CROSS EXAMINATION BY MR. TAYLOR:

12 Q. You actually weren't the one that made the drug purchase in
13 this situation, were you?

14 A. No, sir, it was not.

15 Q. Your testimony is that you pulled in front of his car?

16 A. That's correct.

17 Q. As far as being he the person who sold the drugs to the
18 confidential informant?

19 A. That's correct.

20 Q. Did you ever get out of the vehicle?

21 A. No, sir, I did not.

22 Q. You never had any communication with the person - -

23 A. No, sir, I did not.

24 Q. - - other than your CI?

25 Okay.

AGENT GARCIA - CROSS EXAMINATION BY MR. TAYLOR

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1 Um, how far away were the other agents for the Drug
2 Enforcement Unit?

3 A. I couldn't see them, um, but I did see one cross in front of
4 me and went on the opposite side of the store. He could have been
5 parked on the opposite side of the store but I couldn't see him.

6 Q. How many agents did you have backing you up that day?

7 A. Um, maybe four to six, somewhere in there. I'm not really.

8 Q. And where was the highway patrolman, Trooper McGaha?

9 A. I can't remember.

10 Q. You can't remember?

11 All right.

12 What was his role, his role was actually to make the stop, the
13 traffic stop in this case?

14 A. That's correct.

15 Q. And, basically, then make the arrest at that point?

16 A. That's correct.

17 Q. Okay.

18 So he would have - - he was the one that actually, um, made
19 the stop in this case?

20 A. He actually activated the blue lights and got the vehicle
21 pulled over. I don't know who actually handled arresting him and
22 speaking with him.

23 Q. But he's the one who actually pulled him over?

24 A. That's correct.

25 Q. Okay.

AGENT GARCIA - CROSS EXAMINATION BY MR. TAYLOR

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1 And how far away was this car pulled over from the point of
2 transaction?

3 A. Maybe a half a mile to a mile.

4 Q. Okay.

5 A. In that range.

6 Q. Did you go to the scene at that point or did you go somewhere
7 else?

8 A. No. I had the informant with me. So, I continued on.

9 Q. So, you're not really positive as to how far away the - - - A.
10 I saw - - I saw where they were at.

11 Q. All right.

12 And where did you go after you had the informant?

13 A. We pulled off on the side of the road up ahead.

14 Q. Okay.

15 And you said that the transaction at the gas station happened
16 in thirty to sixty seconds?

17 A. Yes. Correct.

18 Q. He was there. You pulled in.

19 A. Yes. Very fast. I know that.

20 Q. All right. The CI gets out, goes back and gets out of the
21 car, and you're out of there within under a minute?

22 A. I'd say so, yeah.

23 Q. All right.

24 So, given that, you're really not sure about the circumstances
25 around you? I mean, you can't definitively say what - -

AGENT GARCIA - CROSS EXAMINATION BY MR. TAYLOR

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1 everything that was going on around you given the quick time frame
2 that you were in and out, can you?

3 A. What else was going on?

4 Q. Like, you can't say exactly where everybody was positioned?

5 A. I can't say that, no.

6 Q. And you had no communication with the person who sold your
7 confidential informant any - - any drugs?

8 A. No, I did not.

9 Q. You have no audio of the drug purchase, do you?

10 A. I believe there has - - it was recorded, audio was recorded of
11 the transaction.

12 Q. Is there anything that's got my client's voice on it?

13 A. I believe so if it was - - if we activated it, ah, then it
14 should have a recording.

15 Q. Okay.

16 How did the confidential informant come to work for you?

17 A. I was just assisting in this case. I'm not exactly sure as to
18 how this informant was developed.

19 Q. Okay.

20 Have you had any communication with this informant other than
21 this transaction?

22 A. Yes.

23 Q. How long has that communication been ongoing?

24 A. I mean, it's - - I see - - I see this particular person when
25 she's involved in other deals, and I don't know how long ago it

AGENT GARCIA - REDIRECT EXAMINATION BY MR. VON HERRMANN

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1 was?

2 Q. You don't know how long?

3 A. I'm not really sure. I couldn't give you an exact number.

4 Q. So, your information here as far as what you know as far as
5 what you know about the CI is just really focused on this
6 individual?

7 A. It was just an isolated incident, yeah.

8 Q. Have you ever had any - - the person who sold your client or
9 not your client, excuse me, your confidential informant, have you
10 ever had any dealings with him in the past?

11 A. No, sir, I have not.

12 Q. So, you wouldn't be able to pick him out of a lineup?

13 A. No, sir, I would not.

14 Q. Thank you. I have no further questions.

15 MR. VON HERRMANN: I just have a couple, Your Honor.

16 REDIRECT EXAMINATION BY MR. VON HERRMANN:

17 Q. The vehicle that you saw her approach to to buy the drugs with
18 Kevin Cox operating it, you indicated that you saw that vehicle on
19 the side of the road stopped. Is that the same vehicle?

20 A. Yes, sir, it was.

21 Q. And it was only a mile - - a half-mile or a mile away?

22 A. That's correct.

23 MR. VON HERRMANN: No further questions, Your Honor.

24 THE COURT: You may come down.

25 And you may remain in the courtroom if you care to.

MS. COOPER - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 AGENT GARCIA: Thank you.

2 (The witness leaves the witness stand.)

3 MR. VON HERRMANN: Your Honor, the State would call
4 Catherine Cooper to the stand, please.

5 CATHERINE COOPER, being duly sworn,
6 testifies as follows:

7 CLERK OF COURT: Please state your name for the record.

8 MS. COOPER: Catherine Cooper.

9 DIRECT EXAMINATION BY MR. VON HERRMANN:

10 Q. Appreciate your coming.

11 Let's just get to kind of the meat of the matter here.

12 Do you currently have pending charges in our office for drug -
13 - possession with intent to distribute cocaine, possession of
14 cocaine, possession of crack cocaine, possession of Schedule I to
15 IV drugs?

16 A. Yes, sir.

17 Q. And do you understand or do you know the penalty - - the
18 largest penalty you can receive?

19 A. Yes, sir.

20 Q. And what is that penalty if you would tell the jury?

21 A. Up to fifteen years.

22 Q. And do you have any deals with regards to any of these
23 charges?

24 A. No, sir.

25 Q. Um, is it your understanding that I am the assigned prosecutor

MS. COOPER - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 on those cases?

2 A. Yes, sir.

3 Q. And have you and I ever discussed those cases in any form,
4 fashion or shape?

5 A. No, sir.

6 Q. What has your instruction been with regards to telling this
7 jury and other juries in other cases with regards to your
8 involvement as a confidential informant for the Drug Enforcement
9 Unit?

10 A. What do you mean, "What's my involvement"?

11 Q. What do you have to do?

12 A. Tell the truth.

13 Q. And have you in any way felt pressure or anything to do
14 anything other than to tell the truth?

15 A. No, sir.

16 Q. In fact, have you been told what the affect of this jury
17 verdict today or any other jury's verdict on whether you will ever
18 get - - whether you'll ever get help on your charges?

19 A. No, sir.

20 Q. So, if the jury finds him guilty or not guilty, will it affect
21 you at all?

22 A. No, sir.

23 Q. Ms. Cooper, on August 14th, 1990 - - or 2007, do you know a - -
24 the defendant named Kevin Cox?

25 A. Yes, sir.

MS. COOPER - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 Q. Now, how many - - how did you know him?

2 A. Um, through another drug dealer.

3 Q. And were you into drugs at the time?

4 A. Yes, sir.

5 Q. Were you addicted to the drugs?

6 A. I was a user.

7 Q. And how long did you know the defendant, Kevin Cox?

8 A. Approximately six months, seven months, something like that.

9 Q. And were you familiar with his girlfriend, Keona Gamble?

10 A. Yes, sir.

11 Q. On August 14th, did you make a telephone call to Keona Gamble
12 at the request of DEU for the purpose of setting up a drug deal?

13 A. Yes, sir.

14 Q. And while you were on that telephone conversation and talking.
15 - - were you talking to Gamble?

16 A. Yes, sir.

17 Q. Were you able to hear Kevin Cox in the background?

18 A. Yes, sir.

19 Q. And what information was it he was relaying to Ms. Gamble at
20 the time?

21 A. That he had, ah, - - -

22 MR. TAYLOR: I'd object, Your Honor, as to hearsay.

23 THE COURT: I sustain that.

24 MR. VON HERRMANN: And, Your Honor, it would be evidence
25 of further conspiracy. She is an indicted co-defendant.

MS. COOPER - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 THE COURT: I still sustain that.

2 MR. VON HERRMANN: Okay.

3 Q. What, um, what was your telephone conversation - - what were
4 you there to buy or to purchase?

5 A. An eightball of coke.

6 Q. And who were you going to purchase this from?

7 A. From, ah, Flattop.

8 Q. And who is Flattop?

9 A. Kevin Cox.

10 Q. And tell me. Were you searched by the Drug Enforcement Unit?

11 A. Yes, sir.

12 Q. And did you have any money or drugs on you at the time?

13 A. No, sir.

14 Q. Were you issued any police funds?

15 A. Yes, sir.

16 Q. And how much was that?

17 A. \$180.

18 Q. How much does an - - an eightball roughly cost in your
19 experience as a drug user?

20 A. \$180 - \$200.

21 Q. Um, where were you to meet Kevin Cox to purchase these drugs?

22 A. At the filling station across from the four corners of Suck,
23 Bang and Blow and 17 By-pass.

24 Q. Who was driving you when you went there?

25 A. Officer Crystal - - the lady.

MS. COOPER - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 Q. This lady right here?

2 A. Yes.

3 Q. Tell me, um, what occurred when you drove up to the gas
4 station. Tell the jury exactly how the drug deal went down.

5 A. We pulled up, and I seen his van sitting there. So I knew he
6 was waiting there on me. So, I told her, "That's him."

7 I got out the car. Had the money in my pocket, and I had my
8 purse because that was where I was wired, and I went up to him and
9 he laid it on the seat, and he said, "I hooked you up this time."

10 And I said, "Okay. Cool."

11 And I laid the money there, and I turned around and walked out
12 and act like I was going into the store, and they pulled off, and
13 I jumped back into the truck with the officer lady.

14 Q. What did you do when you went back to the car Agent Garcia was
15 sitting in?

16 A. I handed her the dope.

17 Q. While - - was the dope that was in your possession cocaine?

18 A. Yes, sir.

19 Q. Crack cocaine?

20 A. Yes, sir.

21 Q. And while it was in your possession did you change it in form,
22 substance, content? Did you remove any of it? Add anything to
23 it, any of that?

24 A. No, sir.

25 Q. So, when you gave it to her it was in substantially the same

MS. COOPER - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 condition as when you bought it?

2 A. Yes, sir.

3 Q. And, again, tell me what Flattop - - what Flattop is?

4 A. Kevin Cox.

5 I didn't know him by his real name. I just know by Flattop.

6 Q. But you know he's Kevin Cox?

7 A. Now, I do, yes.

8 Q. Ah, do you know what type of vehicle -
9 - whether he owned or he rented when they were doing the
10 drug deal?

11 I don't know if they were rented or I didn't know if he ever

12 came in different cars.

13 Did your understanding were rental cars?

14
15 Q. Do you currently have a job?

16 Do I?

17 Yes, I am.

18 A. Yes, sir.

19 Q. And I'm not going to ask you where it is.

20 Um, are you - - when was the last time you used drugs of any
21 kind?

22 A. It was before Christmas.

23 Q. When you drove by with Agent Garcia, did you see where they
24 had pulled the van over?

25 A. Yes, sir.

MS. COOPER - CROSS EXAMINATION BY MR. TAYLOR

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- 1 Q. Was the van that was pulled over that Kevin Cox was operating
2 on the side of the road, was that the same vehicle you bought drugs
3 from?
- 4 A. Yes, sir.
- 5 Q. No further questions.
- 6 Please answer any questions Mr. Taylor may have.
- 7 THE COURT: Mr. Taylor.
- 8 MR. TAYLOR: Thank you, Your Honor.
- 9 CROSS EXAMINATION BY MR. TAYLOR:
- 10 Q. Good morning.
- 11 A. Good morning.
- 12 Q. You need some water? I know you had to talk a lot so far.
- 13 A. I'm okay.
- 14 Q. Okay.
- 15 When did you actually start working for the Drug Enforcement
16 Unit?
- 17 A. Ah, that day.
- 18 Q. Which day?
- 19 A. The day that I had to make the buy that day.
- 20 Q. So, in August?
- 21 A. Yes, sir.
- 22 Q. And so you since you've not used drugs since Christmas, and
23 that would be Christmas of 2007?
- 24 A. Yes, sir.
- 25 Q. So you were actually using drugs during the time frame that

MS. COOPER.- CROSS EXAMINATION BY MR. TAYLOR

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1 this incident is alleged to have occurred?

2 A. Yes, sir.

3 Q. Okay.

4 And what drugs were you using?

5 A. Ah, crack cocaine.

6 Q. Okay.

7 How much did you use?

8 A. Ah, I don't know what you call about - -

9 Q. I mean, like - - -

10 A. - - like a dime piece or a twenty piece.

11 Q. Well, let's put it into a different concept.

12 You smoke cigarettes?

13 A. Yes, sir.

14 Q. How many cigarettes do you smoke in a day?

15 A. A pack.

16 Q. A pack? A pack contains twenty?

17 A. Uh-huh.

18 Q. How many times during a day would you smoke crack cocaine?

19 A. Twice maybe.

20 Q. Twice?

21 A. Depending.

22 Q. How much would you smoke each time?

23 A. Well, like one piece, you know, would be like one hit. So,
24 it would be like twice.

25 Q. And how long would the affects of that cocaine use last on

MS. COOPER - CROSS EXAMINATION BY MR. TAYLOR

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1 you?

2 A. I'd say probably within an hour.

3 Q. So you used every day twice a day?

4 A. I didn't say everyday.

5 Q. Oh.

6 A. Whenever I had the extra money to buy something.

7 Q. How long did you use crack cocaine?

8 A. Um, I started, ah, probably about a year ago.

9 Q. Okay.

10 How long have you used powder cocaine?

11 A. About the same.

12 Q. And what was the Schedule IV that you were charged with? What
13 type of narcotic is that?

14 A. The, ah, powder. That was the eightball of cocaine.

15 Q. Okay.

16 So, there were no pills that you were charged with?

17 A. I took one Xanax, a 5 milligram Xanax.

18 Q. Okay.

19 How long have you used Xanax?

20 A. I actually got that from my mother because I was having
21 anxiety attacks.

22 Q. How long have you suffered from anxiety attacks?

23 A. Um, not until that happened when I got arrested.

24 Q. Okay.

25 So, let me get that straight.

MS. COOPER - CROSS EXAMINATION BY MR. TAYLOR

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1 You didn't start taking Xanax until you were actually
2 arrested?

3 A. No, I meant when - - that was afterwards, after I had been
4 arrested is when I had - - I would get a Xanax from my mother every
5 now and again.

6 Q. So, were you actually had multiple arrests then?

7 A. No, no.

8 Q. And on the day in question, there was an audio where you
9 actually called several different drug dealers that morning, didn't
10 you?

11 A. Yes.

12 Q. And you were waiting for call-backs from people regarding
13 that?

14 A. Yes.

15 Q. How many actual drug dealers did you actually call to see
16 whether you could obtain drugs?

17 A. I think it was all together three.

18 Q. Three?

19 A. That included Flattop.

20 Q. All right.

21 And who were the other drug dealers you called?

22 A. Um, I don't know if I'm at liberty to even say their name out
23 right now.

24 Q. Yes, ma'am.

25 A. Okay.

MS. COOPER - CROSS EXAMINATION BY MR. TAYLOR

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1 I go by - - they go by nickname. It would have been an E and
2 a, um, I can't even think of his name. I can't remember the other
3 guy's name.

4 MR. VON HERRMANN: Your Honor, and I'm not sure if there
5 are charges pending in our office. If we can go by nicknames,
6 that's fine but I don't want to reveal the CI information to
7 pending charges in our office.

8 MR. TAYLOR: I'll withdraw that question, Your Honor.

9 THE COURT: Go ahead.

10 Q. You're saying that you were not told that Flattop was Kevin
11 Cox until after the arrest?

12 A. I didn't realize his name was that until afterwards.

13 Q. And when were you told what your charges carry?

14 A. Um, I think it was when I was arrested.

15 Q. Okay.

16 And what was the exact date of your arrest again?

17 A. I really don't know. I'd have to look it up.

18 Q. All right.

19 And tell me how you came - - again, tell me how you came to
20 work for the Drug Enforcement Unit. How did that occur?

21 A. When I was caught with the drugs, that's when they told me I
22 could, you know, give them some information. Go to work for them
23 and try to, ah, work out something.

24 Q. Okay.

25 So, they actually then did offer you to work out something if

MS. COOPER - CROSS EXAMINATION BY MR. TAYLOR

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1 you would work with them?

2 A. Work with them that would help -- he said that would help my
3 case.

4 Q. Okay.

5 So, you do have an incentive, then, to help?

6 A. Either that or go to jail, you know. That's what most people
7 do.

8 Q. Have you ever been in prison?

9 A. I've been in jail three days.

10 Q. But other than the arrest, the time period that you stayed in
11 jail, have you ever been in prison?

12 A. No, sir.

13 Q. Do you have a family?

14 A. Yes.

15 Q. And how many children do you have?

16 A. Two boys.

17 Q. Are you married?

18 A. Divorced.

19 Q. Divorced.

20 So, the children live with you?

21 A. No, sir.

22 Q. Do they have visitation with you?

23 A. They're twenty-eight and twenty-two.

24 Q. All right.

25 Now, how long did the actual transaction take place at the gas

AGENT CURRY - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 station?

2 A. Um, five - ten minutes, that's tops.

3 Q. Okay.

4 And you're not really sure what vehicle this Flattop drove on
5 a regular basis?

6 A. He had different ones.

7 MR. TAYLOR: Your Honor, I have no further questions.
8 Please answer any that opposing counsel may have.

9 MR. VON HERRMANN: I have no follow-up questions, Your
10 Honor.

11 THE COURT: You may come down.

12 Thank you.

13 MS. COOPER: Thank you.

14 (The witness leaves the witness stand.)

15 MR. VON HERRMANN: Your Honor, the State would call
16 Agent Freddie Curry, please.

17 (The witness takes the witness stand.)

18 AGENT FREDDIE CURRY, being duly sworn,
19 testifies as follows:

20 CLERK OF COURT: Please state your name for the record.

21 AGENT CURRY: Freddie Curry.

22 DIRECT EXAMINATION BY MR. VON HERRMANN:

23 Q. Agent Curry, can you please tell the folks in the jury where
24 you're employed?

25 A. Surfside Beach Police Department assigned at this time to the

AGENT CURRY - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 Fifteenth Circuit Drug Enforcement Unit.

2 Q. And on August 14, 2007, were you involved in an operation
3 involved in the arrest of Kevin Cox?

4 A. Yes, sir.

5 Q. Can you please tell the jury what your role was in that
6 operation?

7 A. I brought the CI to the operation, assisted in making phone
8 calls, etc. to get hold of the drug - - well, Mr. Cox. Did
9 surveillance as the buy took place. Assisted as the traffic stop
10 was made, blocking in the car, taking Mr. Cox out of the vehicle
11 and placing him under arrest.

12 Q. Let's go a little bit slower.

13 Were you there when Catherine Cooper purchased the drugs from
14 Kevin Cox?

15 A. Yes, sir.

16 Q. Did you - - were you able to see that while surveilling?

17 A. I could see the vehicle, her going to the vehicle and coming
18 back, yes, sir.

19 Q. Is it your understanding that there was surveillance of a
20 recording device?

21 A. Yes, sir.

22 Q. Can you tell the jury if you've had an opportunity to listen
23 to that particular recording?

24 A. I haven't today. Back then I'd heard it. It was, ah,
25 basically, giving the signal to Agent Garcia, giving the signal

AGENT CURRY - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 that the deal had taken place.

2 Q. Right. Right. Okay.

3 With regards to the arrest, tell me how the arrest took place
4 on the side of the road. Tell me what - - what occurred.

5 A. We had a highway patrol officer make a traffic stop, and I
6 pulled my vehicle in front of the vehicle where it couldn't pull
7 out. We exited the vehicle, approached it. Took Mr. Cox out of
8 the vehicle and placed him under arrest.

9 Q. Who was driving that vehicle?

10 A. Mr. Cox.

11 Q. Was that the vehicle as identified to you as having
12 participated in the drug deal at the, ah, gas station?

13 A. Yes, sir.

14 Q. And when you arrested him, who was with you?

15 A. Agent Vescovi, Agent Hooper, Agent Bishop, Highway Patrol
16 Officer that made the stop with us.

17 Q. And, primarily, when you do that and you're going in in force,
18 how do you operate where just a couple of you become involved in
19 the actual arrest?

20 A. Everyone has their positions of who is going to approach from
21 what, and my position was to go at the front of the vehicle and
22 come back and grab the driver. He was my responsibility.

23 Q. And you arrested Kevin Cox?

24 A. Yes, sir.

25 Q. For the sale of the drugs?

AGENT CURRY - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 A. Yes, sir.

2 Q. And can you tell me what, if anything, you noticed, um, that
3 Mr. Cox had with him?

4 A. Search of his pockets incident to his arrest and handcuffing
5 him, I pulled out the money that we had used to buy the drugs from
6 him.

7 Q. And, ah, were you able to verify the serial numbers of the
8 money?

9 A. Yes, sir. The serial numbers had been photographed prior to
10 being issue to the confidential informant.

11 Q. And do you recall how much money that was?

12 A. It was \$180.

13 Q. And with regards to the, ah, drugs that were purchased, the
14 crack cocaine purchased from Crystal Garcia in that car, did you
15 obtain those drugs from her?

16 A. Yes, sir.

17 Q. Were there any changes to form, substance or content with
18 regards to that?

19 A. No, sir.

20 Q. And what did you do with those drugs?

21 A. I turned them over to Agent Vescovi.

22 Q. And at any point while they were in your position, were there
23 any changes in form, substance or content - -

24 A. No, sir.

25 Q. - - to those drugs?

AGENT CURRY - CROSS EXAMINATION BY MR. TAYLOR

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1 At that point once he was arrested, do you know where they
2 were transported to?

3 A. They were taken to DEU Headquarters or Horry County Police
4 Evidence is where they end up.

5 Q. I'm sorry. Where did they take Kevin Cox?

6 A. Oh, I apologize.

7 We went to Surfside Beach Police Department.

8 MR. VON HERRMANN: I have no further questions of this
9 agent, Your Honor.

10 THE COURT: Mr. Taylor.

11 MR. TAYLOR: Thank you, Your Honor.

12 CROSS EXAMINATION BY MR. TAYLOR:

13 Q. So, there is actual audio that has this transaction on it?

14 A. It's very poor but we had installed it, yes, sir.

15 Q. Detective Curry, how far away were you from the scene of the
16 actual transaction?

17 A. I was posted at the bank across the road.

18 Q. Okay.

19 Across the road at how far distance-wise? A hundred yards?

20 A. Less.

21 Q. Less. How far less?

22 A. We talking the gas station in front of SBB there and the bank
23 is directly across the street from the bank.

24 Q. How many other agents were there on the scene?

25 A. We had a matter of five or six.

AGENT CURRY - CROSS EXAMINATION BY MR. TAYLOR

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1 Q. How many people were called by the CI that morning regarding
2 the purchase of narcotics prior to this situation?

3 A. I wouldn't know, sir, offhand. I wouldn't remember.

4 Q. Had you ever seen Flattop before?

5 A. I'd only heard his name.

6 Q. So, Trooper McGaha is the one that actually was on the scene
7 first as making the stop of this vehicle?

8 A. We were given a highway patrol officer. We gave the agent - -
9 Patrolman McGaha information, and when this vehicle pulls out, we
10 described it to him over the radio to go ahead and make the stop as
11 soon as it pulls out - - as soon as it pulls out on the highway,
12 out on Highway 17 By-pass.

13 Q. How far away was he?

14 A. At this time we had him posted almost down next to the mall
15 letting him go back and forth just out of sight.

16 Q. Distance-wise, he was about an eighth of a mile away from you?

17 A. Right there at the Inlet Square Mall.

18 Q. So, he was the one who made the stop.

19 Why would he make the stop versus yourself?

20 A. It was a good safety issue for everyone involved. If the
21 highway patrol pulled him over, he wouldn't think nothing of it.
22 He was just pulled over for highway patrol. He wouldn't think it
23 was nothing to do with the Drug Unit.

24 Q. All right.

25 After McGaha pulled over, did he go to the car?

AGENT CURRY - REDIRECT EXAMINATION BY MR. VON HERRMANN

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1 A. As he was walking up to the car, I pulled in front of the
2 defendant's vehicle and blocked it in and then exited and
3 approached him.

4 MR. TAYLOR: I have no further questions.

5 Thank you.

6 MR. VON HERRMANN: I just have one or two.

7 REDIRECT EXAMINATION BY MR. VON HERRMANN:

8 Q. What type of vehicles were y'all operating? Were y'all
9 operating unmarked patrol vehicle?

10 A. No, sir.

11 Q. Describe the vehicle that you operated?

12 A. I was in an undercover vehicle, dark color, blacked out.

13 Q. Tell me about what kind of vehicle the highway patrolman was
14 operating.

15 A. Fully marked highway patrol patrol vehicle.

16 Q. You indicated, ah, for officer safety and safety, obviously,
17 not alert him to that. Does that play a part in your decision in
18 the operation planned?

19 A. Absolutely.

20 Trying to pull someone over in an undercover vehicle, we run
21 the risk of this guy automatically knowing he's busted, that he's
22 got caught in the middle of a drug deal. It jeopardizes
23 everybody's safety on the highway if he takes off running. He ends
24 up wrecking and killing somebody.

25 MR. VON HERRMANN: I have nothing more, Your Honor.

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 THE COURT: All right.

2 (The witness leaves the witness stand.)

3 MR. VON HERRMANN: Your Honor, the State would call
4 Agent Damon Vescovi to the stand.

5 (The witness takes the witness stand.)

6 OFFICER DAMON VESCOVI, being duly sworn,
7 testifies as follows:

8 CLERK OF COURT: Please state your name for the record.

9 OFFICER VESCOVI: Damon Vescovi.

10 DIRECT EXAMINATION BY MR. VON HERRMANN:

11 Q. Agent Vescovi, can you please tell the jury who was the case
12 agent on this particular case?

13 A. You want me to identify myself first?

14 Q. For the record if you would. If you would identify yourself
15 and spell your last name.

16 A. I'm Officer Damon Vescovi. It's V-e-s-c-o-v-i. I'm employed
17 by the Horry County Police Department.

18 Q. And are you or were you at the time assigned to the Drug
19 Enforcement Unit?

20 A. I was.

21 Q. And in this particular case were you the case agent
22 responsible for the collection of evidence and taking photographs
23 and things of that nature?

24 A. Yes, sir.

25 Q. And tell the jury specifically, and I know you've been in the

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 courtroom when some of the others were here. Now, tell the jury
2 specifically with the regards to the operation plan y'all developed
3 to target Kevin Cox, what was your job duties and responsibilities
4 on that?

5 A. I was to monitor the, ah, audio transmitting device and to do
6 surveillance. Of course, like, you've already said, the
7 collection of evidence and the case management of the case.

8 Q. Let's talk about this recording device.

9 Have you had an opportunity to listen to the recording device?

10 A. Yes, sir.

11 Q. And can you please describe to the jury the quality or if
12 there is any information whatsoever that can be gleaned from that
13 particular recording?

14 A. It's not good.

15 Q. Can you explain to the jury why the recording device would not
16 pick up in this particular situation?

17 A. Initially, we were going to purchase or attempt to purchase
18 illegal narcotics from another unknown source in which the CI
19 advised us that she would probably be patted down in which led us
20 to secure the audio transmitter in her purse so that the individual
21 that she would be purchasing from would not feel a wire on her
22 person, and because of that, the constant contact of the fabric in
23 the purse and it being stuck into one of the compartments, it
24 developed a lot of background static noise.

25 Q. Prior to coming to work with the Drug Enforcement Unit, have

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 you had any narcotics experience or any experience - - and when I
2 say that as a narcotics agent or anything with using these wires?

3 A. Very little, very little.

4 Q. And would you say you were inexperienced at that particular
5 time?

6 A. Yes, sir.

7 Q. Tell me what happened when the vehicle leaves the area where
8 Catherine Cooper purchased the drugs from Kevin Cox. Tell me what
9 happened - - occurred. What do you do?

10 A. Um, it was communicated to the assisting law enforcement, ah,
11 personnel that he was leaving. It was monitored as it left, when
12 it actually pulled out of the parking lot. It was monitored up
13 until the point - - well, it was constantly monitored, um, to the
14 point in which the trooper initiated the traffic stop.

15 Q. Let's just - - let me just go ahead and get one thing quickly
16 out of the way.

17 Agent Garcia, did she bring you, excuse me, Curry bring you
18 some drugs that were purchased from Kevin Cox at the gas station?

19 A. Yes, sir.

20 Q. Let me show you State's Exhibit #11 marked for identification.

21 Can you identify that?

22 A. Yes, sir. That's the BEST Kit that the evidence was placed
23 in.

24 Q. And is that the evidence from the distribution and sale at the
25 gas station?

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 A. Yes, sir.

2 Q. Explain to the jury the purpose of the BEST Kit and the
3 control numbers and how that goes.

4 A. Ultimately, it's suppose to protect the integrity of the
5 evidence. It's, ah, the control number is, obviously, to identify
6 the Kit in which it is secured in, and the Kit has an adhesive that
7 is tear-proof. If it's tampered with, the seal would be,
8 obviously, tampered with. It's also secured into a bag which
9 bears my signature on the adhesive portion.

10 Q. And in this particular case while it was in your possession
11 prior to putting it in the BEST Kit, did you change it as to form,
12 substance, content, take anything away from it or add anything to
13 it?

14 A. No, sir.

15 MR. VON HERRMANN: Your Honor, at this time, we'd move
16 State's Exhibit #11 into evidence.

17 Your Honor, I'm not going to move this into evidence at this
18 point. I'll do it through the next witness.

19 (The Court Reporter accepts State's Exhibit #11 for
20 identification only at this time.)

21 Tell me about when you get the car started - - stopped. Who
22 is in the vehicle?

23 A. Ah, Mr. Cox and his girlfriend, Ms. Gamble.

24 Q. And did you have an opportunity to search the vehicle?

25 A. I did.

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 Q. And that was search incident to arrest?

2 A. Yes, sir.

3 Q. Was there anything in that particular vehicle that was in
4 plain view or what you in your narcotics experience would allow you
5 or you believed you would have the right to search the vehicle even
6 though it was search incident to arrest as well inventory search?

7 A. Yes, sir.

8 There was a container within the vehicle in which I observed
9 nar - - ah, illegal drugs in plain view.

10 Q. Explain to me what - - did you ultimately retrieve drugs from
11 the vehicle?

12 A. Yes, sir.

13 Q. And, ah, tell me what they were located?

14 A. Where?

15 Q. Yes.

16 A. In the - - in a pocketbook - -

17 Q. Ah - - -

18 A. - - which was between the driver's seat and the, ah, front
19 passenger seat.

20 Q. Let me show you State's Exhibit #4. Do you recognize that?

21 A. Yes, sir. That's the photograph I took.

22 Q. And what is that a photograph of?

23 A. It's a photograph of how I actually observed the drugs which
24 you can see by the picture that the purse is slightly open, and you
25 can see the cellophane bag. It's not very clear on the picture but

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 you can tell it's of a green leafy substance which is consistent
2 with marijuana.

3 Q. Where - - this State's Exhibit #5, can you tell the jury what
4 that is?

5 A. This is two amount of powder cocaine and what they refer to as
6 a brick which is five bundles of heroin in plastic bags within a
7 plastic bag also found in the purse.

8 Q. And y'all did field weight testing just to try to get an idea
9 of how much drugs are involved?

10 A. Yes, sir. It's an approximately weight. It's not an
11 official weight.

12 Q. I show you State's Exhibit #1 and #2. Are those the drugs
13 that you found in the vehicle that day?

14 A. Yes, sir, they are.

15 Q. And located within that pocketbook with the drugs, were you
16 able to retrieve any other information?

17 A. Ah, there was document of the Rental Agreement for the vehicle
18 which we had stopped.

19 Q. Let me show you State's Exhibit #3 and State's Exhibit #6. Do
20 you recognize those?

21 A. Yes, sir. That is the Rental Agreement.

22 Q. And can you tell me the person's name on the Rental Agreement
23 there?

24 A. The defendant's, Kevin Cox, which also has his signature at
25 the bottom portion.

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 Q. Were you able to retrieve any money out of that vehicle.

2 A. There was money retrieved from Mr. Cox.

3 Q. And let me show you State's Exhibit #7. Is that the money?

4 A. Yes, sir.

5 Q. And we indicated or I believe you were present when someone
6 indicated that you took a photograph and take care of serial
7 numbers to make sure all serial numbers. Is that State's Exhibit
8 #8?

9 A. Yes, sir, it is.

10 Q. And do those serial numbers between or these monies that Mr.
11 Cox had on him that he had dropped in the car seat match the ones
12 that you gave Catherine Cooper, the serial numbers of the \$180?

13 A. Yes, sir, and they were also in the same order.

14 MR. VON HERRMANN: Your Honor, at this time we'd move
15 State's Exhibit #1 through #8 into evidence and request that we
16 have opportunity to publish it to the jury.

17 MR. TAYLOR: Your Honor, I have no objection except for
18 State's Exhibit #5.

19 THE COURT: Let's see what - - let's see #5.

20 (Bench conference off record and in the presence of the jury
21 but outside the hearing of the jury.)

22 MR. VON HERRMANN: Your Honor, we'll remove the request
23 for State's Exhibit #5 being moved into evidence. #1 through #8
24 with the exception of #5, Your Honor.

25 THE COURT: They are in evidence.

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 MR. VON HERRMANN: We'd request that we publish this for
2 the jury as well, Your Honor.

3 COURT REPORTER: Your Honor, the exhibits are admitted?

4 THE COURT: Yes, they are.

5 MR. VON HERRMANN: May we publish them to the jury?

6 THE COURT: Yes, you may do so.

7 MR. VON HERRMANN: Thank you, Your Honor.

8 (Court Reporter accepts State's Exhibit #1, #2, #3, #4, #6, #7
9 and #8 into evidence after they are published to the jury.

10 State's Exhibit #5 is withdrawn by the Solicitor.)

11 THE COURT: Mr. Foreman, these matters that I am
12 introducing into evidence, they will be with you in your jury room.
13 So at this time you just may pass them around but you'll have a
14 full opportunity to look at them during your deliberations.

15 You may proceed as they pass that around.

16 MR. VON HERRMANN: Thank you, Your Honor.

17 And I just clear a couple of things up, Your Honor.

18 Q. Let me show you State's Exhibit #13.

19 A. That's the recording of the buy, I believe.

20 Q. And have you had an opportunity to review this?

21 A. It's the audio. Yeah. I've reviewed it.

22 Q. Is this the one that actually has nothing on it but if the
23 jury wants to listen to it, we ought to give them a chance to
24 listen to it.

25 MR. VON HERRMANN: Your Honor, we'd move State's Exhibit

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 #13 into evidence.

2 MR. TAYLOR: No objection, Your Honor.

3 THE COURT: Without objection.

4 (The Court Reporter accepts State's Exhibit #13 into
5 evidence.)

6 Q. Agent Vescovi, the drugs that you were able to retrieve from
7 the car, let me show you State's Exhibit #12, and, again, this
8 being in a BEST Kit. Can you please identify those?

9 A. Yes, sir. This is the illegal drugs that we got out of the
10 vehicle.

11 Q. And there are two packages here. Can you explain to the jury
12 why there are two separate packages?

13 A. That's how they were portrayed in the containers.

14 Q. So, had they been in one big lump, you would have divided them
15 out but you also would combine them?

16 A. I'm sorry?

17 Q. Do you then combine them if they're packaged separately?

18 A. No, no.

19 Q. And are you sure you are the drugs that were retrieved based
20 on the numbers and your signature, have you been able to verify
21 them?

22 A. Yes, sir.

23 Q. While these were in your possession, did you change them in
24 form, substance or content or alter, take away or do anything?

25 A. No, sir.

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 Q. After the arrest, where did you transport Kevin Cox, the
2 defendant in this case - - take him in this case?

3 A. After the initial arrest he was taken to Surfside Beach Police
4 Department and later taken to Horry County Detention Facility.

5 Q. When he was taken to the Surfside Police Department did you
6 have an opportunity to talk to him?

7 A. I did.

8 Q. And prior to any interview, did you take and have the
9 opportunity to read him what is known as Miranda Rights?

10 A. Yes, sir.

11 Q. Let me show you State's Exhibit #9 marked for identification.
12 Can you please identify that form for the jury?

13 A. This is the Miranda Form in which the defendant signed.

14 Q. Is that the Drug Enforcement Unit kind of standard policy
15 procedure to state these warnings all of the time?

16 A. Yes, sir, it is.

17 MR. VON HERRMANN: Your Honor, we would move State's
18 Exhibit #9 into evidence, Your Honor.

19 MR. TAYLOR: No objection, Your Honor.

20 THE COURT: Let me say this.

21 There is being introduced into this record a statement
22 allegedly to have been made by the defendant. Before you may
23 consider this statement as evidence for any purpose, you must
24 determine the four following questions.

25 First, you must determine did the defendant make that

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 statement.

2 Secondly, was the defendant warned of his constitutional
3 rights?

4 Third, you must find that the defendant knowingly and
5 intelligently waived his constitutional rights.

6 And, lastly, you must find that the statement given was freely
7 and voluntarily made.

8 The fact that this Court has admitted the statement into
9 evidence should not be considered by you as any evidence whatsoever
10 that the defendant made the statement or that the required
11 constitutional safeguards were, in fact, provided and waived by the
12 defendant or that the statement was voluntarily given because these
13 issues are for you, the jury, to determine.

14 The State must prove beyond a reasonable doubt each of the
15 four requirements that I have just stated to you before you may
16 consider the statement as evidence for any purpose whatsoever.

17 You may proceed.

18 MR. VON HERRMANN: Thank you, Your Honor.

19 Q. Agent Vescovi, would you, please, so that the jury has the
20 benefit of the rights that you read to him, first of all, read the
21 rights section of this particular thing so they can understand
22 exactly what you -- the admonitions you gave.

23 A. You have the right to remain silent. Anything you say can and
24 will be used against you in a court of law.

25 You have the right to talk with a lawyer and have him present

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1 with you while you are being questioned. If you cannot afford to
2 hire a lawyer, one will be appointed to represent you before any
3 questioning if you wish one.

4 If you desire to make a statement or answer any questions, you
5 have the right to stop at any time.

6 And above the signature it says, "This is to certify that the
7 above rights have been explained to me, and I understand each of
8 them."

9 And then there is his signature.

10 Q. Thank you.

11 Whose signature is on that?

12 A. The defendant, Kevin Cox.

13 Q. And in this particular case, did he indicate to you that he
14 understands each and every one of these?

15 A. Yes, sir. I read each one of them separately and asked if he
16 understood that particular line and then moved to the next.

17 Q. And could you read the what is described as waiver of rights
18 to the jury, please?

19 A. It says, "I am willing to make a statement at this time. I do
20 not want a lawyer at this time. I understand and know what I am
21 doing. No promises or threats have been made to me, and no
22 pressure or coercion of any kind has been used against me."

23 And it's, again, signed by the defendant, Mr. Cox.

24 Q. And in this particular case was that witnessed by someone?

25 A. By myself, yes, sir.

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 Q. And can you tell the jury what time of day that was taken?

2 A. Ten after six, p.m. on the 14th.

3 Q. While you had him at the Surfside Police Department did you
4 provide him with any necessities? If he wanted a drink of water,
5 did he get one?

6 A. No.

7 Q. Did he use the restroom?

8 A. No, sir.

9 Q. If he wanted Coke, whatever, did you deprive him of anything?

10 A. No, sir.

11 Q. Did he at anytime indicate to you his unwillingness to talk to
12 you while you were taking his statement?

13 A. No, sir.

14 Q. Did you threaten him?

15 A. No, sir.

16 Q. Promise him anything?

17 A. No, sir.

18 Q. Coerce him?

19 A. No, sir.

20 Q. Did you have any reason at all and I mean any reason at all
21 to believe that he was not giving you a statement voluntarily?

22 A. No, sir.

23 Q. Did he voluntarily write out his statement?

24 A. Yes, sir.

25 Q. Let me show you State's Exhibit #10 if you would. Can you

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 identify that particular document for me?

2 A. That's the statement he wrote.

3 Q. Did he write that or did you write that?

4 A. He wrote that.

5 Q. And did he sign that?

6 A. Yes, he did.

7 Q. And was this after you had indicated and read him his rights
8 and he waived his Miranda Rights?

9 A. Yes, sir.

10 MR. VON HERRMANN: Your Honor, we would move State's
11 Exhibit #10 marked for identification into evidence, please.

12 MR. TAYLOR: No objection, Your Honor.

13 THE COURT: Without objection.

14 (The Court Reporter accepts State's Exhibits #9 and #10 into
15 evidence.)

16 Q. Agent Vescovi, if you could please read - - just read the
17 entire thing, date, time and location, everything, and including
18 his statement that was signed by the jury. I think it's important
19 they have all that information.

20 A. Okay.

21 Ah, it's, of course, titled the Defendant's Statement. The
22 date and time is 8/14 of '07 at 6:15. The case file number is DU
23 07 - - actually it wasn't filled out.

24 Um, the incident location, Surfside Beach Police Department.
25 Statement of Kevin Davonne Cox. His date of birth is

OFFICER VESCOVI - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 10/10/75. Height of 6'1". Weight is 185. Black hair, brown
2 eyes.

3 Home address of [REDACTED] [REDACTED] [REDACTED] in Surfside Beach which
4 is Deerfield Plantation. Home phone number of [REDACTED]; Warrant
5 # of 3337213, and then it begins his statement which reads:

6 "I, Kevin Cox, went to Georgetown to see a guy. Don't know
7 his name. I met him through a friend of mine in Raleigh, North
8 Carolina. His name is Black.

9 I paid \$2800 for the drugs I have today, two and a half ounces
10 of coke and five bundles of heroin."

11 You want me to continue with the section.

12 Q. If you could read who signed it.

13 A. Ah, it's signed by the defendant, Kevin Cox.

14 Q. The drugs that you received or retrieved out of the car,
15 State's Exhibit #12, the bundle of cocaine, can you tell this jury
16 approximately how much weight there was in cocaine?

17 A. Approximately two and a half ounces. I think if I remember
18 correctly, approximately 80 something grams total.

19 MR. VON HERRMANN: I have no further questions. Please
20 have any questions Mr. Taylor might have.

21 MR. TAYLOR: I have no questions, Your Honor.

22 THE COURT: Sir?

23 MR. TAYLOR: I have no questions, Your Honor.

24 THE COURT: All right.

25 You may come down.

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1 (The witness leaves the witness stand.)

2 MR. VON HERRMANN: Your Honor, the State would call Lisa
3 Floyd to the stand.

4 MR. TAYLOR: Your Honor, before we get into Ms. Floyd's
5 testimony, I'd like to take a matter up with the Court.

6 THE COURT: You may.

7 I'll let you go to the jury room just a few moments, and I'll
8 be calling you back very shortly.

9 (The jury retires to the jury room at 11:26 a.m.)

10 MOTIONS AND RULING OF THE COURT

11 THE COURT: All right. Yes, Mr. Taylor.

12 MR. TAYLOR: Thank you, Your Honor.

13 In reviewing this, ah, statement made by my client, it's
14 mentioned here five bundles of heroin, and it's now gone to the
15 jury. This was mentioned during examination to the jury, and
16 based on that fact, my client's not being charged here today with
17 heroin, I think it would severely prejudice my client that they've
18 heard the word heroin regarding this situation.

19 THE COURT: No, sir. All he did is testify as to what he
20 saw.

21 MR. TAYLOR: Yes, sir.

22 THE COURT: I will charge the jury -- the jury understands
23 what he's -- do you want me to call it to their -- their
24 attention that -- and I will if you ask me to?

25 MR. TAYLOR: No, sir, Your Honor. No, sir.

MOTIONS AND RULING OF THE COURT

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1 THE COURT: Okay, but he's entitled to testify as to what
2 he saw.

3 MR. TAYLOR: Yes, sir.

4 THE COURT: But I'll be glad to charge them that he's not
5 charged with heroin in this case and no inverse inference - - -

6 MR. TAYLOR: No, sir, Your Honor.

7 THE COURT: Be glad to do it for you..

8 MR. TAYLOR: All right.

9 Moving past that, Your Honor, um, I'd move to suppress the
10 drugs that are about to be presented into evidence here by Ms.
11 Floyd based on the fact that the officer that just got done
12 testifying has not shown the proper chain of custody as far as
13 where the drugs have gone through in order to get to Ms. Floyd
14 who's going to testify that they came in..

15 Secondary to that, Your Honor, as a follow-up to that motion
16 to suppress the drugs, Trooper McGaha was the one that actually
17 made the arrest of my client putting him into custody. Based on
18 that fact, it's kind of like a DUI where the arresting officer
19 makes the arrest of the person on the roadside. Then another
20 officer comes to do the Data Master Test which is the breath test
21 to find out what the alcohol is. Here we don't have that person
22 testifying that he placed my client under arrest thereby and taking
23 the drugs. Therefore, there's not the chain of evidence regarding
24 the drugs to go forward with where we are here today.

25 Based on that, Your Honor, I'd ask that the drugs be - - -

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1 THE COURT: That's an interesting concept. I've never
2 heard it before but - - -

3 MR. VON HERRMANN: Your Honor, Agent Curry - - Freddie
4 Curry of the DEU indicated that he actually made the arrest of
5 Kevin Cox. The only reason the trooper was there was to pull him
6 over and get the vehicle stopped.

7 He didn't participate in the search. He's never been in the
8 chain of anything.

9 He actually was - - another officer was in the chain on the
10 co-defendant on some drugs they found at the jail but the only
11 person that ever searched that vehicle was Damon Vescovi with the
12 exception of the money there should be no chain issue.

13 MR. TAYLOR: Detective Curry's direct testimony, Your Honor,
14 was that Trooper McGaha got out - - made the stop, got out of the
15 car and was in the process of thereby placing my client under
16 arrest by his freedom to move about being detained.

17 This was not a traffic stop. This was a stop for a felony
18 that occurred. Therefore, he was directly involved.

19 And, again, going back to my example regarding a drug - - not
20 a drug but a DUI arrest, you can't come into court and try a DUI
21 case by just putting up the Data Master and not having the
22 arresting officer.

23 THE COURT: Well, the difference is you've got specific
24 steps to take specifically enacted by the Legislature as to a DUI
25 case. That's somewhat differently.

MOTIONS AND RULING OF THE COURT

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1 No, to cut this short, I find - -

2 MR. TAYLOR: Yes, sir, Your Honor.

3 THE COURT: - - in totality the testimony as to the chain
4 is totally adequate.

5 MR. TAYLOR: Thank you, Your Honor.

6 THE COURT: Your motions are respectfully denied.

7 MR. TAYLOR: Thank you, Your Honor.

8 THE COURT: All right.

9 While the jury is out, would you like to take just a short
10 break.

11 MR. VON HERRMANN: If we could, Your Honor.

12 THE COURT: All right.

13 Let's go about ten minutes.

14 MR. TAYLOR: Thank you, Your Honor.

15 (The Court recesses the trial of this case for a short break
16 and thereafter reconvenes the trial of this case.)

17 THE COURT: Be seated, please.

18 How many witnesses you got, counsel?

19 MR. VON HERRMANN: One more, Your Honor.

20 THE COURT: Then, probably, it will be about twelve. Then
21 we'll break at twelve, come back at two and have final. Is that
22 suitable?

23 MR. VON HERRMANN: Yes, sir. That's fine with me.

24 THE COURT: Where is Mr. Taylor?

25 MR. VON HERRMANN: I really don't know, Your Honor.

MS. FLOYD - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 I think I can find him.

2 (Mr. Taylor returns to the courtroom.)

3 THE COURT: All right. You ready to proceed, Mr. Taylor?

4 MR. TAYLOR: Yes, sir, I am, Your Honor.

5 (The jury returns to the courtroom at 11:46 a.m.)

6 THE COURT: The jury is present. Call your next witness,
7 please.

8 MR. VON HERRMANN: Thank you, Your Honor.

9 The State calls Lisa Floyd to the stand.

10 (The witness takes the witness stand.)

11 LISA FLOYD, being duly sworn, testifies as
12 follows:

13 CLERK OF COURT: Please state your name for the Court.

14 MS. FLOYD: Lisa Floyd.

15 DIRECT EXAMINATION BY MR. VON HERRMANN:

16 Q. Ms. Floyd, would you please tell the jury where you are
17 employed?

18 A. With the Horry County Police Department. I run their Regional
19 Drug Analysis Laboratory.

20 Q. Can you give the jury the benefit of your educational
21 background?

22 A. I have a Bachelor of Science Degree in Biochemistry from
23 Clemson University, and I have approximately twenty-four hours
24 toward a Masters in Biochemistry from Clemson also.

25 Q. And are you trained to analyze drugs?

MS. FLOYD - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 A. Yes, I am.

2 Q. And can you tell the jury the qualifications you have and the
3 training you have received to do that?

4 A. Yes. I trained for fourteen weeks with the Spartanburg
5 County Sheriff's Office Forensic Laboratory with a former SLED
6 Agent. He use to work in Drug Analysis at SLED.

7 Q. And do you keep up routinely with to stay abreast of all the
8 new innovations with regard to drug analysis?

9 A. Yes, I do.

10 All of the South Carolina Labs meet bi-annually, and we
11 discuss current trends and new topics in drug analysis.

12 Q. And at your laboratory y'all do the things that are necessary
13 to ensure that it's up to date and that it's accurate and all
14 those things?

15 A. Yes, we do.

16 Q. And, in particular, have you ever been qualified as an expert
17 in the state of South Carolina with regards to being a drug
18 analyst?

19 A. Yes, I have.

20 MR. VON HERRMANN: Your Honor, at this time we would
21 tender the witness as an expert as a drug analyst.

22 THE COURT: I find her qualified. She's testified in this
23 court and many courts in the state on many occasions.

24 Glad to have you.

25 Q. Ms. Floyd, particularly with regards to this case, were you

MS. FLOYD - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 requested by the Drug Enforcement Unit to test, ah, crack cocaine
2 and powder cocaine?

3 A. Um, yes.

4 Q. And let me show you State's Exhibit #11 and #12 that are
5 currently marked for identification. Are those two of the BEST
6 Bags that you were required or requested to test?

7 A. Yes. The lab numbers match for both of these.

8 Q. And can you tell the jury exactly how you go about before
9 you'll test - - the drugs that are in here, how you go about to
10 make sure they're not tampered with?

11 A. Oh, yes.

12 When I receive what's called a BEST Kit, it comes to me in
13 this outer envelope that you see here, and inside of that is the
14 bag inside. This one was blue with the red adhesive at the top,
15 and what I do is make sure that all of that tamper evidence design
16 all the way around it doesn't show any signs of tampering, and as
17 long as everything looks okay and that adhesive seal is still
18 appropriate, then I'll put my initials, the letters O.K. indicating
19 that I did inspect it and that everything was showing that it had
20 not been tampered with and the date, agency's case number and I put
21 the lab number that I assign it on there as well.

22 Q. And was that done specifically with both of these?

23 A. Yes, it was, and they both indicate the letters O.K. meaning
24 that they had not been tampered with.

25 Q. And did you test, ultimately, State's Exhibit #11 and #12?

MS. FLOYD - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 A. Yes, I did.

2 Q. We'll get into your specific findings but were there drugs on
3 both of them?

4 A. Yes, there were.

5 MR. VON HERRMANN: Your Honor, we would move State's
6 Exhibits #11 and #12 into evidence.

7 MR. TAYLOR: No objection, Your Honor.

8 THE COURT: All right, sir.

9 Without objection.

10 (The Court Reporter accepts State's Exhibits #11 and #12 into
11 evidence.)

12 Q. Specifically, Ms. Floyd, can you tell the defendant Kevin
13 Cox's distribution, State's Exhibit #11, what your results with
14 regards to that - - those drugs?

15 A. Ah, yes. That was Lab # L070735.

16 And for that particular lab number it was an off-white rock
17 substance in a corner baggie and it was found to be cocaine base
18 which is commonly referred to as crack was found in the amount of
19 3.16 grams which is 48.75 grains.

20 Q. Let me show you State's Exhibit #12 that's in evidence.

21 Can you tell the jury - - how many packages or items were
22 tested in this particular case?

23 A. Um, there were two items.

24 Q. And can you please tell the jury the results you found with
25 regards to those?

MS. FLOYD - DIRECT EXAMINATION BY MR. VON HERRMANN

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1 A. Um, that was Lab #070733.

2 And for that particular case, Item 1 was a white rock
3 substance in a sandwich baggie inside of another sandwich baggie
4 with Item 2. It was found to be cocaine with a weight of 55.75
5 grams which is 860.22 grains, and Item 2 was a white rock substance
6 in a sandwich baggie also found to be cocaine in the amount of
7 27.73 grams which is 427.87 grains.

8 Q. I hate to put you on the spot. Could you tell us the
9 combined weight of the cocaine?

10 A. Yes.

11 Um, the total weight was 83.48 grams which is 1,277.32 grains.

12 Q. And I just want to make sure for the purposes of the jury so
13 they understand. The smaller amount, the 3.16, is actually crack
14 cocaine, and that's the one that's attributed to the sale. Is that
15 correct?

16 A. I'm not sure about the particulars. The 3.77 grams is
17 cocaine base which is commonly referred to as crack.

18 Q. And the larger is cocaine?

19 A. That's correct.

20 MR. VON HERRMANN: No further questions, Your Honor.

21 MR. TAYLOR: Your Honor, I have no questions of this
22 witness.

23 THE COURT: You may come down.

24 Thank you.

25 (The witness leaves the witness stand.)

THE STATE RESTS/MOTIONS AND RULING OF THE COURT

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1 THE STATE RESTS

2 MR. VON HERRMANN: One second, Your Honor.

3 Your Honor, at this time the State rests.

4 THE COURT: All right.

5 Gentlemen and ladies, it's 12:00. So, I think we'll break for
6 lunch and then continue this afternoon at 1:30. Is that convenient
7 to everybody. That will give this jury an hour and a half for
8 lunch.

9 Let's break for lunch and ask that you be back in the jury
10 room at 1:30.

11 Remember, do not discuss this case with anyone. Let no one
12 discuss it with you. Make no independent inquiry.

13 So, you are excused, now, to be back in the jury room at 1:30.

14 It's now 12:00.

15 (The jury is released for lunch at 11:53 a.m. to return at
16 1:30 p.m.)

17 MOTIONS AND RULING OF THE COURT

18 THE COURT: Mr. Taylor, any motions at this time?

19 MR. TAYLOR: Yes, sir, Your Honor.

20 Your Honor, I move for a directed verdict based on those
21 motions I had made earlier, um, regarding the chain of custody as
22 well as there's no testimony that has been presented that at the
23 point in time that this alleged transaction occurred to the point
24 in time that the vehicle was stopped, there's no testimony that I
25 can recall where there is a direct line of sight.

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1 The original agent on - - on the scene that drove the CI,
2 Officer Garcia, she leaves the scene. There's been no testimony
3 by Vescovi that he saw my client get to the location where it was
4 stopped. There's just testimony that they called the highway
5 patrol.

6 Based on that fact, I'd move for the direct verdict.

7 THE COURT: For the record you care to make a response?

8 MR. VON HERRMANN: No, sir, Your Honor. We would stand
9 on our previous arguments.

10 THE COURT: Yes, sir.

11 The evidence in my view there's a plethora of evidence to
12 substantiate the jury verdict if they find the evidence to be
13 truthful.

14 Your motion is respectfully denied.

15 MR. TAYLOR: Thank you, Your Honor.

16 THE COURT: All right.

17 I'm going to charge as soon as we get back and then I'll have
18 final arguments, and you will have the first and you the last.

19 Any specific requests to charge here.

20 Obviously, I'll charge distribution and, ah, I'll charge the
21 law as to trafficking. I'll charge the elements that they must
22 show with regards to the statement.

23 MR. TAYLOR: Yes, sir.

24 THE COURT: Failure to testify.

25 Anything further?

THE DEFENDANT RESTS

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1 MR. TAYLOR: Not that I can see, Your Honor. The standard
2 charge will be fine with me.

3 MR. VON HERRMANN: Your Honor, one thing we would
4 request is circumstantial evidence charge being that the drugs - -

5 -
6 THE COURT: I've got the circumstantial evidence charge.

7 MR. VON HERRMANN: Thank you.

8 That's all I would have, Your Honor.

9 THE COURT: All right. I'll see you at 1:30.

10 MR. TAYLOR: Thank you, Your Honor.

11 The Court recesses the trial of this case for lunch and
12 convenes the trial of this case at 1:36 p.m.).

13 THE COURT: Good afternoon. Be seated.

14 Bring jury in.

15 (The jury returns to the courtroom at 1:37 p.m.)

16 THE COURT: Good afternoon, Mr. Foreman, ladies and
17 gentlemen.

18 THE DEFENDANT RESTS

19 MR. TAYLOR: Thank you, Your Honor.

20 Your Honor, the defense rests, and we have no further evidence
21 to present.

22 THE COURT: All right, sir.

23 Then we, ah, we will go ahead and proceed with, ah, charge on
24 the law and summation.

25 MR. TAYLOR: Thank you, Your Honor.

CHARGE OF THE COURT

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1 CHARGE OF THE COURT

2 THE COURT: Ladies and gentlemen, in this case the State
3 has placed its case up for your consideration, and, of course, the
4 State has the burden of proof as I have told you.

5 The defendant rests, elects not to put up any testimony or the
6 defendant himself elects not to testify. That is his absolute
7 constitutional right. He's presumed innocent. He doesn't have to
8 prove a thing. The State's got to prove him guilty to your
9 satisfaction beyond a reasonable doubt.

10 So, do not hold it against the defendant that he didn't put up
11 any testimony or that he didn't testify himself. That's not his
12 burden. The burden rests with the Solicitor's Office in this
13 case.

14 Now, there are two indictments for your consideration, and
15 these indictments, ah, have been previously explained to you.

16 One is the indictment of trafficking in cocaine of 28 - -
17 between 28 and 100 grams, and the, ah, trafficking is, basically,
18 a possession offense, and depending on the quantity that you have
19 you can be guilty of possession or possession with intent to
20 distribute or if there be a sufficient quantity, you are guilty of
21 trafficking.

22 In this case the allegations are that this defendant is guilty
23 of trafficking in that it is alleged that he had between 28 and 100
24 grams, and I'll be talking about that with you in a moment.

25 And the next indictment is a distribution of cocaine base,

CHARGE OF THE COURT

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1 distribution simply means, as you would know, to give it away or to
2 sell it or to pass it on with or without pay.

3 Distribute means, of course, to move it from to somebody else.

4 Now, as to these indictments you will consider the evidence
5 separately. Your verdict may be the same as to each indictment as
6 to not guilty or guilty. It may be not guilty of one and guilty
7 of the other.

8 The point I'm making, Mr. Foreman, is you take each indictment
9 separately and look at the evidence and the other matters in
10 connection with that indictment and write your verdict separately.

11 Now, I continue to tell you as to these indictments, this
12 defendant has pled not guilty which places the burden of proof upon
13 the State of South Carolina of proving him guilty beyond a
14 reasonable doubt if they can to your satisfaction unanimously.

15 Now, I charge you it is a vital, important rule of law of
16 evidence that a defendant in a criminal case no matter how serious
17 or great may be the charge is always presumed innocent, must always
18 be presumed innocent and until his guilt has been established
19 beyond a reasonable doubt.

20 Now, let me talk to you about terminology of reasonable doubt.

21 The State of South Carolina has the burden of proving the
22 defendant guilty beyond a reasonable doubt. Some of you may have
23 served as jurors in civil cases, perhaps this week, where you were
24 told that it is only necessary to prove a fact is more likely true
25 than not.

CHARGE OF THE COURT

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1 In criminal cases, the government's proof must be more
2 powerful than that. It must be beyond a reasonable doubt.

3 Ladies and gentlemen, proof beyond a reasonable doubt is proof
4 that leaves you firmly convinced of the defendant's guilt.

5 There are very few things in this wide world that we know with
6 absolutely certainty, and in criminal cases the law does not
7 require proof that overcomes every possible doubt.

8 If, based on your consideration of the evidence, you are
9 firmly convinced that the defendant is guilty of the crime charged,
10 you must find him guilty. If on the other hand you think there is
11 a real possibility that he is not guilty, you must give him the
12 benefit of that doubt and find him not guilty.

13 Now, ladies and gentlemen, under the Constitution and laws of
14 this state you are the finders of the facts in this case, the sole
15 finders.

16 As trial judge I am not entitled to a factual opinion and I
17 have none. If any word, ruling, mannerism of mine might tend to
18 indicate to any of you how I feel about any factual situation,
19 please disregard that. I am not entitled to a factual opinion,
20 and I have none.

21 You twelve are the finders of the facts in this case, and from
22 this moment on there's nobody in this wide world that can tell what
23 the facts are except you twelve.

24 I tell you, too, that you are the judges of the credibility
25 and believability of all the witnesses who testified and in judging

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1 their credibility and believability you will pass upon their
2 demeanor. You will pass upon their knowledge. You will consider
3 did they know what they talking about. You will consider whether
4 or not they had some reason to be biased or prejudiced. You bring
5 your common sense to bear as you do in everyday life when folks
6 tell you things, and you size them up whether you want to believe
7 them or not.

8 As to any witness on this stand, you may believe all of what
9 the witness says or none. You may believe a small portion,
10 disregard the larger or the other way around.

11 Obviously, you do not determine the truth or falsity of a
12 matter by counting up the number of witnesses who may have
13 testified on one side or the other.

14 Mr. Foreman and ladies and gentlemen, in judging credibility
15 you have but one single job, just one, and that is to seek the
16 truth regardless of what source that truth may be derived, to seek
17 and find the truth and let your verdict thereafter express that
18 truth.

19 Now, by the same Constitution that makes unto the finders of
20 the facts, that august document makes unto me the instructor in the
21 law, and under your oath as jurors you are required to accept the
22 law as I now charge it to you even though or I for that matter
23 might disagree with what the law is or ought to be. For the
24 purpose of this trial, please accept the law as I tell it to you
25 remembering that you take the facts as you find them to be and

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1 apply those facts to the law and, thereafter reach what we know as
2 a verdict.

3 Verdict comes from the Latin word "verdicto" meaning to speak
4 the truth. So, thereafter, let your verdict speak the truth.

5 Now, with regards to the first charge which is distribution of
6 a controlled substance, it is a violation of the criminal laws of
7 South Carolina for any person to distribute or to possess a
8 controlled substance with the intent to manufacture or distribute
9 the same. This indictment with regards to that issue charges
10 Kevin Davonne Cox with - - that he did willfully and unlawfully and
11 feloniously distribute a quantity of crack cocaine.

12 For the defendant to be convicted of this crime there are
13 certain elements in the state that in - - that the State must prove
14 beyond a reasonable doubt.

15 First, the State must prove that the substance involved in
16 this case was cocaine, not crack cocaine but cocaine.

17 I charge you that cocaine is a controlled substance.

18 This indictment says - - charges that Mr. Cox did in Horry
19 County on or about the 14th day of August, 2007, distribute or
20 deliver a controlled substance as, ah, known as methamphetamine or
21 cocaine base.

22 And, secondly, the State must prove that it was him that did
23 it and that he distributed it.

24 And they must prove these issues beyond a reasonable doubt.

25 Now, I have charged you earlier that, ah, this defendant did

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1 not testify, and I charge you again that that fact must not be
2 considered by you in any way. It would be a violation of his
3 constitutional rights for you to do that.

4 He doesn't have to prove a thing. If you or I are being
5 tried, we don't have to prove a thing. The State's got to prove us
6 guilty beyond a reasonable doubt, and, Mr. Foreman, I tell you
7 again. Do not let that even enter into your conversations in the
8 jury room that he didn't testify or that he was not here. It
9 doesn't diminish in any way the State's burden of proof which is
10 beyond a reasonable doubt.

11 Now, I charge you that there are two types of evidence which
12 are generally presented during a trial, direct evidence and
13 circumstantial evidence.

14 Direct evidence is the testimony of a person who asserts or
15 claims to have actual knowledge of a fact such as an eye witness.

16 Circumstantial evidence is proof of a chain of facts and
17 circumstances indicating the existence of a fact.

18 The law makes absolutely no distinction between the weight or
19 value to be given to either direct or circumstantial evidence nor
20 is a greater degree of certainty required of circumstantial
21 evidence than of direct evidence.

22 You must weigh all the evidence in the case. After
23 considering and weighing all of the evidence if you are not
24 convinced of the guilt of this defendant beyond a reasonable doubt,
25 then you must find that defendant not guilty.

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1 Now, while the Court generally determines the admissibility of
2 evidence, I instruct that as regards any alleged statement made by
3 this defendant that you, members of the jury, must make the
4 ultimate determination of whether or not the defendant made that
5 statement and if he did make that statement, whether the statement
6 was made by the defendant voluntarily and of his own free will and
7 accord and, finally, just what if any should be given to any
8 alleged statement.

9 I charge you that you must determine if the alleged statement
10 was a product of an essentially free and unconstrained choice by
11 its maker. If you determine it was and the burden is upon the
12 State to prove this fact as all other facts beyond a reasonable
13 doubt, then you may give that statement such further consideration
14 as you deem appropriate and proper.

15 If you determine the alleged statement was not the free and
16 voluntarily willed expression of the defendant, then you should not
17 consider the statement at all.

18 In determining whether a defendant's will was overcome in
19 obtaining an alleged statement, you should consider both the
20 characteristics of the accused, the details of the interrogation
21 which is referred to in law as the totality of the circumstances.

22 Some of the factors that you may consider are, if you choose,
23 the age of the accused, his education or lack thereof, his mental
24 ability or capacity, his I.Q. or intelligence, his background and
25 environment.

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1 You may consider the advice or lack thereof to the accused of
2 his constitutional rights including but not limited to the
3 procedural safeguards known as the Miranda Warnings concerning the
4 right to remain silent, that a statement could be used against him
5 in a court of law, the right to have an lawyer present. If an
6 indigent and he could not afford a lawyer, then a lawyer would be
7 appointed to represent him without any cost..

8 Other factors that you may consider are the place and length
9 of detention, the nature of the questions. You, the jury, must
10 carefully scrutinize all of the surrounding circumstances before
11 you give any weight to an alleged statement. You must be
12 satisfied beyond a reasonable doubt that the statement was made by
13 the accused uninfluenced by promise or reward, threat of injury or
14 diminution of his rights.

15 Now, I have previously stated to you the law with regards to
16 the charge of distribution of cocaine. Let me now discuss with you
17 the indictment relative to trafficking wherein the State alleges
18 that he trafficked in cocaine in that he had in his possession
19 cocaine between 28 and 100 grams.

20 Now, any person in accordance with 44-53-370, I charge you
21 that any person who knowingly sells, manufactures, delivers or
22 bring into this state or who provides financial assistance or
23 otherwise aids, abets or conspires to sell, manufacture, deliver or
24 bring into this state or who is in knowingly in actual or
25 constructive possession of a quantity of cocaine in the - - between

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1 the amounts of 28 and 100 grams is guilty of trafficking in that
2 substance.

3 This indictment charges that in substance that on or about the
4 14th day of August, 2007, that this defendant did traffic by
5 willfully and unlawfully having in his possession this specific
6 quantity of cocaine alleged to be between 28 and 100 grams, and the
7 State, of course, must prove that beyond a reasonable doubt.

8 Now, there are certain elements of this offense which the
9 State must prove beyond a reasonable doubt before the defendant can
10 be convicted and found guilty. Each of these elements must be
11 found by you, the jury, and should you fail to find them beyond a
12 reasonable doubt that all of these elements exist, your verdict
13 must be not guilty.

14 Now, first, with regard to these elements, you must find that
15 the defendant did possess a quantity of the controlled substance at
16 the time and place and in the amount alleged in this indictment.

17 Possession requires that a person be in the actual or
18 constructive possession of the controlled substance with actual
19 knowledge of its presence.

20 Actual possession of a controlled substance exists when the
21 controlled substance is found in the physical custody of the person
22 charged with possession.

23 Constructive possession of a controlled substance exists when
24 a person although not in actual physical possession of a controlled
25 substance exercises the dominion over the controlled substance or

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1 has the right to exercise dominion and control over the controlled
2 substance.

3 A person has possession of a controlled substance within the
4 meaning of the law when he has the power and intent to control its
5 disposition or use.

6 It must be shown that the defendant had possession of the
7 controlled substance and that the defendant knew he had possession
8 of the controlled substance in his possession. Knowledge of the
9 presence of the controlled substance by the defendant is essential.

10 Now, secondly, the State must prove beyond a reasonable doubt
11 that the substance was a controlled substance, and I charge you as
12 a matter of law that cocaine is a controlled substance.

13 The State must prove beyond a reasonable doubt that the
14 quantity of the controlled substance was between 28 and 100.

15 And, of course, all of these things must be proven beyond a
16 reasonable doubt.

17 Sometimes people wonder what's the difference between actual
18 or controlled substance. If I have this cup in my hand, I have
19 actual possession of it. If it put it over there on the table and
20 I know it's on the table and I'm going to pick it up later, it's
21 constructive possession but it's still possession.

22 And, of course, it is for you to determine whether or not this
23 defendant had either actual or constructive possession of the
24 controlled substance and whether or not what amount that it was in.

25 Now, ladies and gentlemen, you've been selected as fair and

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1 impartial jurors sworn to impartially try and determine the facts
2 of this case, and when you comply with your oath to do so, then no
3 one will have a right to criticize your verdict, and you will have
4 fully discharged your - - your duty as jurors.

5 You must not, ladies and gentlemen, be influenced by opinions
6 or expressions of opinions which you may have heard on the outside
7 but you are to decide this case according to the testimony and the
8 evidence that you heard from the lips of the sworn witnesses along
9 with such other evidence that is in this record.

10 Now, I'm going to provide for you two verdict forms, and your
11 verdict - - you can deal with them in the way that you choose.

12 With regards to the charge of distribution your verdict will
13 either be guilty or not guilty. It must be the unanimous verdict
14 of all of you.

15 With regards to the verdict of trafficking in cocaine would
16 not - - I used the word crack cocaine, we talking about cocaine.
17 Ah, he's charged with distribution of cocaine.

18 And with reference to trafficking, as to the charge of cocaine
19 - - yes, sir?

20 MR. VON HERRMANN: Your Honor, I apologize.

21 The distribution is of crack cocaine.

22 THE COURT: Sir?

23 MR. VON HERRMANN: The distribution is of crack cocaine,
24 Your Honor.

25 THE COURT: Okay.

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1 MR. VON HERRMANN: The trafficking is of cocaine.

2 THE COURT: All right, sir.

3 I appreciate your telling me that. That is true.

4 The distribution involves the crack cocaine, and the
5 trafficking involves powder cocaine.

6 MR. VON HERRMANN: Yes, sir.

7 THE COURT: You agree with that?

8 MR. TAYLOR: I do, Your Honor.

9 THE COURT: All right.

10 Now, as to the distribution charge, it would be either guilty
11 or not guilty, and the verdict form is the following as - - with
12 regard to trafficking.

13 As to the charge of trafficking cocaine more than 28 grams but
14 less than 100, we, the jury, unanimously find the defendant either
15 guilty or not guilty.

16 As to each one, Mr. Foreman, you would sign your name and date
17 it and let the bailiff know, and we'll call you out to accept your
18 verdict.

19 Clearly, now, we are dealing with crack cocaine and the State
20 must prove crack cocaine as I've indicated to you beyond a
21 reasonable doubt.

22 With regards to the allegations of trafficking, it is powder
23 cocaine, and the State must prove that beyond a reasonable doubt.

24 Does that deal with that? I thank you for calling that to my
25 attention.

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1 All right. Under our rules, ah, you will proceed first
2 followed by him.

3 Okay?

4 SUMMATION BY MR. VON HERRMANN

5 MR. VON HERRMANN: Thank you, Your Honor.

6 May it please the Court?

7 Folks, I don't want to really belabor the point too much but
8 I do want out a few things.

9 This is a serious case, and I know that you've heard from five
10 witnesses but I just want to point a couple of things that I think
11 the Court and, you know, we harp on and we talk about our
12 confidential and reliable informants, and the truth of the matter
13 is we just can't take preachers and nuns and people like that and
14 take them in a car and send them out to buy drugs from these
15 people. They don't know who they are. We have to use people
16 that are involved in drug use and drug trade and things like that,
17 and that's just the way it is.

18 But what we do do to make sure that that is - - we document it
19 as well as we do, we send the undercover person with them to make
20 sure they don't have - - you know, they're searched. They don't
21 have drugs or money. They can't snitch it away. In this case we
22 did that. We immediately get the drugs.

23 So, I don't want you to be confused, and I don't want you to
24 be, you know, kind of waylaid about the virtue of the fact that we
25 have a drug user who is purchasing drugs because that's who does

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1 it, and that's a law enforcement technique that's tried and true,
2 and it's just the way it is, and I think that's important.

3 The second thing I want to point out to you is about the
4 possession and dominion and control. We know that it was in the
5 car, the trafficking weight in cocaine, and we know that he sold
6 the crack cocaine, and we know that he knew it was in the car and
7 had dominion and control over it because when you look at the
8 photographs, the Rental Agency Certificate is in his name and is in
9 the same compartment as the drugs.

10 We also know by the testimony that he routinely would rent and
11 drive rental cars. So we know all of that. And then you add in
12 the confession.

13 And, again, I don't want to belabor, you know, all of the five
14 witnesses that you've heard but the only other thing that I want to
15 tell you is that you heard Ms. Floyd testify that there was about
16 83 grams of powder cocaine that were located in that car within the
17 dominion and control, ultimately, with all of the evidence of Kevin
18 Cox, the defendant in this case. That rises to the level of
19 trafficking in cocaine.

20 The crack cocaine comes in, and I just want to be very
21 specific because they are two different substances, excuse me. The
22 crack cocaine was distributed at the gas station to Ms. Cooper who,
23 then, in turn gave it to Crystal Garcia.

24 And if you'll notice throughout the trial when I was asking
25 the questions, I was very specific to make sure that nobody added,

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1 took away, changed the form, substance, content, any of that of the
2 - - of the, um, substance that was sold, and that's important
3 because I did have to prove beyond a reasonable doubt, and the way
4 I did that and the way I've shown you is by virtue of the fact that
5 we've sent it to an independent lab who is able to weigh it,
6 measure it and test it, and, ultimately, on the distribution, she
7 has come back with the conclusion that it is crack cocaine. She
8 had also come back with the conclusion that is powder cocaine in
9 the level between 28 a 100 grams although packaged in a separate
10 container but it is within his dominion and control in one bag.

11 Now, ladies and gentlemen, as I explained to you this morning,
12 this case is an important case. It might seem relatively simple,
13 and it might seem relatively straight forward it is an important
14 case.

15 Ms. Cooper, while she was trying - - I mean, obviously, and I
16 believe defense counsel is absolutely right. I am sure that Ms.
17 Cooper is hoping somewhere down the line that she is going to get
18 some help on her charges. I don't think that's anything that we're
19 going to hide from anybody. That's the way it is.

20 She had other people that she had bought from. Mr. Cox has a
21 co-defendant in this case that's going to be dealt with before
22 another jury or before another judge down the road. That is not
23 reasonable doubt. That is the way drug trafficking works and the
24 drug trials work.

25 What your concern today is is did Kevin Cox violate the laws

SUMMATION BY MR. TAYLOR

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1 that we have charged him with, and that's it. It's not whether Ms.
2 Cooper is going to get a lighter sentence or a heavier sentence or
3 whether Ms. Gamble is going to go to trial. None of that matters.

4 It's not hiding the ball on you, and it's not telling you or
5 not telling you something about those cases. What it is is it's
6 just not relevant to whether Mr. Cox is guilty of the offenses of
7 trafficking cocaine and distributing crack cocaine, and that what
8 you folks are sworn to pay attention to and make a decision on.

9 Different juries, different judges in different ways are the
10 way cases are worked and to try to use that as a defense to the
11 charge is just - - it's - - it's crazy because that's not what
12 we're here for.

13 Mr. Cox has asked for this trial. We have given him his
14 trial. We have now proved to you beyond a reasonable doubt
15 through confessions and through everything else that he has
16 committed these offenses, and it's time, now, folks, to turn it
17 over to you. Let you go back and deliberate, and I'm confident
18 that you're going to return a guilty verdict on both charges.

19 Thank you.

SUMMATION BY MR. TAYLOR

21 MR. TAYLOR: Thank you, Judge.

22 Hello again.

23 This case on its face may look terrible. It may look bad. It
24 does in a lot of cases but that doesn't mean that my client is
25 automatically assumed to be guilty. You have to go back and look

SUMMATION BY MR. TAYLOR

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1 at all the evidence, go through everything that was presented to
2 you today and analytically look through it and see - - weigh both
3 sides.

4 And the State's job here, Mr. Von Herrmann is an excellent
5 attorney but his job is to make sure that my client goes to the
6 jail as well as the State. That's what they're here to do.

7 My job is to give you a different view point on it, look at it
8 and say, "Well, let's look at the box from a different angle and
9 see, not just automatically convict based on what he said."

10 In this case you had Crystal Garcia who had no idea who my
11 client was. She was the Drug Enforcement Unit Officer that drove
12 the confidential informant to the location.

13 She comes in and her - - by her testimony they were there for
14 maybe sixty seconds. She doesn't know what my client - - who he
15 is. Never seen him before. She's in and she's out. She says that
16 she sees my client's vehicle down the street.

17 Now, again, you've got to weigh the credibility of the
18 testimony of everybody here today. Again, their job is to convict
19 people that are here, that are here at trial.

20 Thinking about it from that standpoint, she says she's in.
21 There's a transaction that goes by. Sixty seconds go by. The
22 confidential informant gets in the car, and they're gone.

23 If that's the case, then how does she pass the defendant down
24 the street and see that he's parked on the side of the road. The
25 times don't match up.

SUMMATION BY MR. TAYLOR

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1 So, again, you have to look at it from a credibility
2 standpoint.

3 And, then, the confidential informant who is charged with
4 possession of cocaine, possession of crack cocaine, possession of
5 a Schedule IV and possession with intent to distribute cocaine,
6 she's here to testify today. She's looking at fifteen years. I
7 think that she as well has some form of bias that she's going to do
8 whatever she can to help the State.

9 She's got two children, and she's never been to prison before.
10 Now, she's looking at - - at fifteen years. By her own testimony
11 she was using crack cocaine twice a day. She said that she did
12 stop using it until December which is around Christmas but this
13 occurs allegedly back in August.

14 So, we have somebody that's using cocaine twice a day, crack
15 cocaine which is probably the most serious drug out of there.
16 She's using this twice a day, how do we even know whether she was
17 sober at that point?

18 As far as the Drug Enforcement Unit, what do they care whether
19 she's sober or not? They just want her to make buys. She called
20 people all morning trying to make them call her back and set up a
21 drug buy.

22 Well, how does she know which one actually called her back if
23 she's high, and they don't care.

24 "You know, we got people in here. Maybe they're drug
25 dealers, maybe they're not but if we arrest them and convict them,

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1 well, we just got somebody off the street."

2 That's not how our legal system works. You got to prove
3 beyond a reasonable doubt whether something did or didn't occur.
4 That is a high standard by the way. You just don't have a hunch
5 that, well, maybe he did it or maybe he didn't. That's not how it
6 works. You have to feel beyond a reasonable doubt that my client
7 convicted for - - should be convicted based on these two charges.

8 Now, again, she's, ah, she doesn't know my client. She said
9 some guy named Flattop. She's only told later that his name is
10 Kevin Cox who is the defendant in this case.

11 And, again, if she's using crack cocaine, who is to say
12 whether it's Kevin Cox, Flattop, some guy named E or somebody else
13 who sold drugs to her.

14 And, again, what does she care as long as they say, "Show up
15 in court today on March 5th and say what we want you to say, and
16 we'll work out your case. You're not going to go to prison.
17 You're charge is going to get dismissed."?

18 Because that's what's going to happen.

19 Now, Freddie Curry comes in and by Officer Garcia's admission
20 which was the first witness, everybody was around the corner.
21 People were around the corner because they didn't want to made as
22 far as, you know, that somebody is under surveillance. So, they're
23 available by, apparently, some type of communication being the
24 radio to come in if something happens - - something happens.

25 So, what credibility does he have as far as seeing anything

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1 that occurred that day. He said he was across the street. Well,
2 if he is across the street and this agent flies and is in there for
3 sixty seconds and is gone, what does he see? How can he see it?

4 He couldn't see the transaction.

5 And, again, if he's across the street over here, the gas
6 station is here, there's a van here and the CI's vehicle is here,
7 how does he see anything anyway? There's a vehicle blocking his
8 view. He's across the street, and he's looking but, again, how
9 can he see that the person in the car is my client? How can he
10 see whether or not a transaction occurred or not, and there's audio
11 that's bad? So, what does he really prove here today other than
12 the fact that he works for the Drug Enforcement Unit.

13 Now, my client was stopped down the street, and there was Mr.
14 Vescovi who came in and testifies, and he testifies that he took
15 some pictures of the vehicle. There's no testimony that has been
16 given today that shows specifically that because the confidential
17 informant's car leaves, and there's nobody that shows that he was
18 followed or kept in sight a hundred percent of the time, and any -
19 - during this entire thing no testimony to that.

20 Now, that could have been a very - - very important fact.

21 There is testimony that there is Trooper McGaha, well, a
22 trooper. It was Trooper McGaha that's called to say look out for
23 this vehicle. It's coming your way to stop.

24 So, how do they know that this was my client that made this
25 transaction at a gas station?

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1 Now, again, you've heard the State's case. You haven't heard
2 anything from the defendant other than what I'm saying here today
3 and what I've questioned. Again, you'll have to look at both sides
4 of the coin and not just say, "Hey, I'm looking at heads at this
5 side, and I'm not going to worry to flip it over to look at the
6 tail side of the view. I'm just going to look at heads."

7 That's not the way it works. You have to see both sides.
8 You can't just make a decision based on what the State has said
9 here today. You have to take everything into consideration, and
10 you have to - - if you are going to convict, you have to have as
11 the Court has given you the law, you have to find my client's guilt
12 beyond a reasonable doubt. You can't prove that he's guilty or
13 you don't feel that he's guilty beyond a reasonable doubt, then you
14 can't convict him. That was the oath that you took.

15 Same as the oath that I took that I was going to represent
16 somebody that sits next to me whenever I have to come to the
17 courtroom.

18 Whether I like it or not, that's what I have to do. Whether
19 you like it or not, that's what you have to do.

20 Even though you may think that he's guilty, you have to think
21 that beyond a reasonable doubt.

22 If you have a hunch, if you have a clue, maybe a gut feeling,
23 not enough. It's got to be beyond a reasonable doubt.

24 I hope that you'll take all of the evidence that's been
25 presented to you today and look at it from that standpoint and not

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1 just from the head side. Flip the coin over and look at it from
2 the tail side. Make a decision. That was your oath that you
3 took.

4 Thank you very much.

5 THE COURT: Thank you, Mr. Taylor.

6 MR. TAYLOR: Thank you, Your Honor.

7 FINAL CHARGE OF THE COURT

8 THE COURT: Thank you, Mr. Von Herrmann.

9 Ladies and gentlemen, you've now heard all of the testimony in
10 the case. Various evidence has been introduced for your
11 consideration. I've instructed you with regards to the law on
12 these various issues, and I ask that you please keep the law in
13 mind as you consider this case with regards to the various issues.

14 Remember that your verdict as to each indictment must be the
15 unanimous verdict of all twelve of you. It cannot be a verdict of
16 the majority. Obviously, would not be one of the minority.

17 I would ask that the alternates stay in the courtroom. Mr.
18 Foreman, go the jury room. Do not begin your deliberation until
19 I send these verdict forms in. They'll be coming in in just a
20 moment.

21 (The jury retires to the jury room at 2:15 p.m.)

22 THE COURT: All right. Gentlemen, come forward and look
23 at these verdict forms.

24 (Both counsel review verdict forms.)

25 THE COURT: First, any exceptions or additions on behalf of

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1 the State to the charge?

2 MR. VON HERRMANN: None from the State.

3 THE COURT: How about the defendant?

4 MR. TAYLOR: None from the defendant, Your Honor.

5 THE COURT: All right.

6 I want the record to specifically reflect that I am not
7 sending the indictments into the jury room because they contain
8 words that may be considered prejudicial. By consent of the
9 parties, I am sending in simple verdict forms.

10 For the State do you agree to that verdict form?

11 MR. VON HERRMANN: Your Honor, with the exception of or
12 the charge of distribution of cocaine, it should be cocaine base,
13 crack cocaine.

14 THE COURT: Well, what - - what did it - - -

15 MR. VON HERRMANN: It just says distribution of cocaine

16 THE COURT: Well, change it right quick like.

17 MR. VON HERRMANN: Just on the distribution. I think -
18 - let me read this. Yes, sir, on the trafficking I have no
19 objection.

20 THE COURT: Well, the reason I did that, I was unclear in
21 my mind because usually these indictments say crack cocaine.

22 MR. VON HERRMANN: Yes, sir. About two years ago they
23 changed the statute.

24 THE COURT: How long will it take you to change it?

25 LAW CLERK: About two minutes.

EXHIBITS AND VERDICT FORM AGREED UPON.

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1 THE COURT: Okay. Let's change it.

2 All right. Let's get together and agree on what goes in to
3 the jury room.

4 COURT REPORTER: Your Honor, you want to dismiss the
5 alternates?

6 THE COURT: No. Unfortunately, I can't dismiss them.

7 Let them go to a place where they'll be real comfortable, and
8 when we get a verdict I'll bring them back out, and, of course, if
9 somebody gets sick or has to leave, I'll get one of them to
10 substitute.

11 (The alternate jurors are escorted to a location separate to
12 the jury.)

13 EXHIBITS AND VERDICT FORMS AGREED UPON

14 (The attorneys review the exhibits with the Court Reporter and
15 agree upon the evidence to go to the jury.)

16 COURT REPORTER: Your Honor, they've agreed as to the
17 exhibits, and, of course, the Court's Exhibits will not go into the
18 jury.

19 THE COURT: All right.

20 Come to order, please.

21 By agreement we just did motions just before the jury came
22 back so that they wouldn't have to do it again.

23 Yeah, the motions for directed verdict on the grounds of
24 insufficient evidence are on the record.

25 We're in recess.

DELIBERATIONS BEGIN 2:23 P.M./VERDICT REACHED 2:35 P.M.

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1 (The Court recesses the trial of this case awaiting the advice
2 of the jury.

3 The jury begins deliberations at 2:23 p.m. and advises a
4 verdict has been reached at 2:35 p.m.)

5 DELIBERATIONS BEGIN 2:23 P.M./VERDICT REACHED 2:35 P.M.

6 THE COURT: All right. Where is Mr. Taylor?

7 MR. VON HERRMANN: Your Honor, he went down to the, ah,
8 Family Court for the hearing that he mentioned to you this morning.
9 He was down there.

10 MR. HUMPHRIES: They said he'd be here. He was in the
11 middle of whatever they're doing in Family Court putting something
12 on record but, in any event, they were to return him right back up
13 here soon. He was just in front of the judge.

14 THE COURT: All right.

15 (The Court awaits the arrival of Mr. Taylor, and Mr. Taylor
16 then comes into the courtroom.)

17 THE COURT: All right. I understand we have a verdict.

18 Have you given the information on the phone to the
19 authorities?

20 MR. TAYLOR: Yes, sir, Judge.

21 MR. VON HERRMANN: Yes, sir.

22 THE COURT: Have they found him?

23 MR. VON HERRMANN: My investigator has not found him as
24 notified me of it. It takes a little while to get it the U. S
25 Marshall to ping that cell phone, and if he's lost - - if he'

VERDICT

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1 thrown the cell phone away.

2 THE COURT: Where does his relatives live, what part of
3 Brooklyn? I can tell you what street he's on.

4 MR. VON HERRMANN: I think he's in Georgetown.

5 I'm thinking with the amount of money they gave him, he might
6 not make Florence based on gas money.

7 MR. TAYLOR: Judge, I told you it wouldn't be a long trial
8 as of this morning.

9 THE COURT: Well, I may send you to go get him since you've
10 got his cell phone number.

11 MR. TAYLOR: Thank you, Judge.

12 (The jury returns to the courtroom at 2:46 p.m.)

13 VERDICT

14 THE COURT: Mr. Foreman, have you and your jury reached a
15 unanimous verdict as to both indictments?

16 FOREMAN OF JURY: We have, Your Honor.

17 THE COURT: If this be the unanimous verdict of this jury
18 as to both indictments, please signify by raising your right hands.

19 The jury has so signified. Accept the verdict.

20 Publish the verdict.

21 CLERK OF COURT: The State of South Carolina vs. Kevin
22 Davonne Cox, Indictment #06-GS-26-4401, as to the charge
23 trafficking in cocaine more than 28 grams but less than 100 grams,
24 we, the jury, unanimously find the defendant guilty.

25 Dennis Gerald, Foreperson.

VERDICT

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1 The State of South Carolina vs. Kevin Davonne Cox, Indictment
2 #07-GS-26-4399, as to the charge of distribution of cocaine base,
3 we, the jury, unanimously find the defendant guilty.

4 Dennis Gerald, Foreman.

5 THE COURT: If this be your verdict, so signify again,
6 please, by raising your right hands.

7 (All jurors raise their right hands.)

8 THE COURT: Now, Mr. Foreman, I did not send these
9 indictments in to you because they contained information which
10 would have been prejudicial to the defendant. These indictments
11 read that this is a third and subsequent offense as to both.
12 He's been previously convicted twice for doing the same thing.

13 You may wonder, "Well, why didn't we know about that?"

14 Well, our rules are that if you convict someone at all,
15 convict him on what he's charged with, not what he did.

16 So, I'm going to hand you these - - Madame - - have him put
17 guilty and sign his name under the verdict form.

18 That's why I didn't send the verdict forms in to you.

19 Now, you also need to know where is he. Well, he was here
20 Monday. He was here Tuesday, and he - - he knew that this case
21 was going to start this morning. We investigated and sent the
22 bondsman out for him, and he's running. He's probably somewhere
23 between here and New York but, ah, our rules provide that if an
24 individual knows his case is going to be tried and knows we goin'
25 to proceed in his absence, the State has the absolute right to try

SENTENCE SEALED AND DELIVERED TO CLERK OF COURT

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1 him, and if it were different from that, if somebody wanted to
2 avoid a trial they'd just take off and not show up.

3 So, ah, he was tried in his absence, and I didn't give you
4 that information. Again, I didn't want to prejudice the
5 defendant. I can tell you now, though, that the evidence was just
6 simply overwhelming. I don't believe a jury of his brothers could
7 have found him not guilty with that evidence found directly on him.

8 I want to thank all of you for your services. As I understand
9 it, there may be another trial tomorrow in one of the four courts
10 we got running. So, I'm going to excuse you now and ask you to be
11 back in your jury room downstairs at 9:30 in the morning and thank
12 you of your services in this case.

13 You do need to know. This is a big-time drug dealer that
14 they going to find and apprehend and I'm going to sentence him
15 accordingly.

16 Thank you.

17 (The jury is released from this case and departs the courtroom
18 with instructions to return to the jury pool room on Thursday at
19 9:30 a.m.)

20 SENTENCE SEALED AND DELIVERED TO THE CLERK OF COURT

21 THE COURT: Gentlemen, as I under the rule, now, I'm going
22 to issue a sealed sentence which will be placed in an envelope as
23 to both indictments.

24 MR. TAYLOR: Yes, sir, Your Honor.

25 MR. VON HERRMANN: Your Honor, if I could just for the

SENTENCE SEALED AND DELIVERED TO CLERK OF COURT

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1 purposes of third or subsequent.

2 THE COURT: Yeah, let's do that for penal purposes.

3 MR. VON HERRMANN: Thank you, Judge.

4 Your Honor, he has under his name of Kevin Davonne Cox he has
5 a 1994 distribution of cocaine, a possession of cocaine; 2004,
6 possession of Schedule I, II and III drugs; 2004, distribution of
7 crack; 1996, distribution near a school.

8 In addition, we believe he has an alias by the name that he
9 goes under which is under the same SID number from the NCIC folks
10 of Tyrone Wilson. Under that he has had three counts of
11 distribution, a three count conviction of distribution of crack
12 cocaine and, also, a 1995 distribution of crack cocaine, two
13 counts.

14 So, it appears, Your Honor, that Tyrone - - -

15 THE COURT: Does he have two prior trafficking charges?

16 MR. VON HERRMANN: No, sir, he does not.

17 THE COURT: You got third offense but, ah - - -

18 MR. VON HERRMANN: Yes, sir. It will be enhanced by th
19 - - under the State statute trafficking enhancement.

20 THE COURT: Under the minimum twenty-five years.

21 MR. VON HERRMANN: Yes, sir. The trafficking in
22 cocaine carries twenty-five to thirty, and the, ah, distribution,
23 third, carries twenty-five mandatory minimum.

24 THE COURT: I understand.

25 All right. I'm going to issue a sealed sentence.

MOTIONS AND RULING OF THE COURT

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1 Anything else, Mr. Taylor?

2 MR. TAYLOR: No, sir, Your Honor. The sentence is what it
3 is.

4 THE COURT: Thank you so much.

5 MR. TAYLOR: Thank you.

6 (The Court seals the sentences as to both indictments and
7 delivers them to the Clerk of Court.)

MOTIONS AND RULING OF THE COURT

9 MR. TAYLOR: Your Honor, I'm sorry. I didn't want to
10 interrupt you. I just wanted to renew the motions I'd made earlier
11 in the trial for a new trial, a mistrial and motions I made to
12 sequester -- not sequester the witnesses -- suppress. I want to
13 preserve them for the record.

14 THE COURT: I understand.

15 And for the reasons stated at the time of your making the
16 motions, I again specifically and respectfully deny those motions.

17 MR. TAYLOR: Thank you, Your Honor.

18 THE COURT: All right. The evidence was simply
19 overwhelming.

20 MR. TAYLOR: Yes, sir.

21 THE COURT: Thank you.

22 We are in recess.

23 (The Court adjourns the trial of this case.)

24 - - - END OF TRANSCRIPT - - -

CERTIFICATE OF COURT REPORTER

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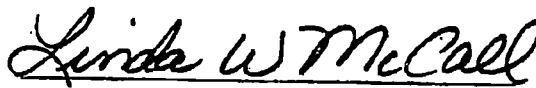
1 STATE OF SOUTH CAROLINA)

2 COUNTY OF HORRY)

3
4 I, the undersigned Linda W. McCall, Official Court
5 Reporter for South Carolina Court Administration, do hereby
6 certify that the foregoing is a true, accurate and complete
7 Transcript of Record of all the proceedings had and evidence
8 introduced in the trial of the captioned case relative to
9 appeal, in the Court of General Sessions of Horry County, South
10 Carolina.

11 I do further certify that I am neither of kin, counsel,
12 nor interest to any party hereto.

13 May 18, 2009

14
15 

16 Linda W. McCall

17 Official Reporter
18
19

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
07-GS-26-4399
07-GS-26-4401

STATE OF SOUTH CAROLINA,
vs.
KEVIN DAVONNE COX.

TRANSCRIPT OF RECORD

FEBRUARY 12, 2009
CONWAY, SOUTH CAROLINA

BEFORE:

THE HONORABLE, STEVEN H. JOHN, JUDGE

APPEARANCES:

BY: MICHAEL J. O'SULLIVAN, ESQ.
ATTORNEY FOR STATE

BY: R. PAUL TAYLOR, ESQ.
ATTORNEY FOR KEVIN DAVONNE COX

BRENDA R. BABB
Circuit Court Reporter

QUALIFYING PLEAS

2

INDEX

PRESENTATION BY MR. O'SULLIVAN

3

RULING OF COURT

4

CERTIFICATE OF REPORTER

5

SENTENCING

3

1 MR. SULLIVAN: YOUR HONOR, THIS IS STATE V.
2 KEVIN DAVONNE COX. MR. COX WAS TRIED FOR TRAFFICKING
3 COCAINE, TRAFFICKING HEROIN, AND DISTRIBUTION OF CRACK
4 COCAINE ON MARCH 3RD, 2008, AND TRIED IN HIS ABSENCE BY
5 SOLICITOR VON HERRMANN WITH DEFENSE COUNSEL PAUL TAYLOR
6 PRESENT FOR THAT TRIAL. THE PURPOSE FOR BEING HERE TODAY
7 IS SIMPLY TO UNSEAL HIS SENTENCE.

8 THE COURT: ALL RIGHT, ALL RIGHT, REGARDING THIS
9 PARTICULAR MATTER THE STATE V. KEVIN COX 2007-GS-26-4399
10 AND 2007-GS-26-4401 THIS MATTER WAS TRIED BEFORE THE
11 HONORABLE JUDGE COTTINGHAM WITH COURT REPORTER LINDA
12 MCCALL.

13 THE DETERMINATION WAS MADE BY JUDGE COTTINGHAM
14 THAT THE DEFENDANT SHOULD BE TRIED IN HIS ABSENCE. THAT
15 DETERMINATION HAS ALREADY BEEN MADE BY JUDGE COTTINGHAM AT
16 THAT POINT IN TIME, THEREFORE, THE PURPOSE AT THIS POINT IN
17 TIME IS TO UNSEAL AND READ THE SENTENCE, WHATEVER THAT IS,
18 THAT JUDGE COTTINGHAM IMPOSED REGARDING THE TRIAL IN THIS
19 PARTICULAR MATTER.

20 THE COURT FINDS THAT GUILTY VERDICTS WERE
21 RENDERED AS AGAINST THE DEFENDANT IN BOTH CASES BY THE JURY
22 ON MARCH 5TH, 2008, AS EXECUTED BY THE FOREMAN OF THE JURY
23 AT THAT POINT IN TIME. THE JURY HAVING FOUND THE DEFENDANT
24 GUILTY OF THE CRIMES CHARGED JUDGE COTTINGHAM ISSUED THE
25 FOLLOWING SENTENCES.

SENTENCING

4

1 REGARDING 2007-GS-26-4401 THE STATE OF SOUTH
2 CAROLINA COUNTY OF HORRY V. KEVIN COX AS FAR AS TRAFFICKING
3 IN COCAINE WEIGHT 28 TO 100 GRAMS THIRD OFFENSE THE
4 DEFENDANT IS COMMITTED TO THE STATE DEPARTMENT OF
5 CORRECTIONS TO A DETERMINATE TERM OF 25 YEARS CONCURRENT
6 WITH 2007-GS-26-4399 THE SENTENCE BEING THE SAME THE
7 DEFENDANT BEING GIVEN A 25-YEAR SENTENCE BY JUDGE
8 COTTINGHAM. THANK YOU VERY MUCH.

9 MR. SULLIVAN: THANK YOU, YOUR HONOR.

10 END OF REQUESTED TRANSCRIPT - - - -

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED BRENDA R. BABB, OFFICIAL COURT REPORTER THE SOUTH CAROLINA COURT ADMINISTRATION, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR HORRY COUNTY, SOUTH CAROLINA.

I DO FURTHER CERTIFY THAT I AM NEITHER KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

May 9, 2009
Brenda R. Babb
BRENDA R. BABB, CVR

OFFICIAL REPORTER

FORM 5

JRB
STATE OF SOUTH CAROLINA)County of HORRY)

IN THE COURT OF COMMON PLEAS

Kevin Davonne Cox #232745)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR
POST-CONVICTION RELIEFHORRY COUNTY
CLERK OF COURT
OCT 19 PM 3:32

- 2009 CP 26 10212 -

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 Perry Correctional Institution, 430 oaklawn Rd, Pelzer S.C. 29669
2. Name and location of Court which imposed sentence Fifteenth Judicial Circuit, Conway South Carolina 29528
3. Name(s) of co-defendant(s) (if any) Keona Gamble
4. The indictment number or numbers (if known) upon which and the offense for which sentence was imposed:
(a) 2007 G-52604401 - Trafficking Cocaine

CLERK OF COURT
HORRY COUNTY
OCT 22 PM 9:24
2009
CERTIFIED COPY

- (b) 2007 G-604399- Drugs manufacture, distribution of
methamphetamine or cocaine base
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) March 5, 2008 - 25 years, Unsealed - February 12, 2009
- (b) March 5, 2008 - 25 years, Unsealed - February 12, 2009
- (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. The South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. Dismissed - May 20, 2009 ; notified July 31, 2009
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Rule 221(b) of the South Carolina Appellate Rules
- ii. _____
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) _____

- (b) _____
 (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel
 (b) Violation of Constitutional Rights
 (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) See Attachment
 (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? _____
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 i. _____
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. _____
 ii. _____
 iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Ineffective assistance - P.C.R. matter
- (b) Violation of Constitutional Rights - P.C.R. matter
- (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? _____
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. R. Paul Taylor ; P.O. Box 50388, Myrtle Beach, South Carolina 29579
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial - R. Paul Taylor ; P.O. Box 50388, Myrtle Beach, South Carolina 29579
- ii. Appeal - ↑ ↑ ↑ ↑ ↑ ↑
- iii. _____

19. State clearly the relief you seek in filing this application:

that my conviction's be reversed and remanded
for new trial

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 Horry)

VERIFICATION

I, Kevin Davonne Cox # 232745, 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.

Kevin D. Cox

SWORN to and subscribed before me this 13th
day of October, 2009.

[Signature] (L.S.)
Notary Public
My Commission Expires: May 17th 2014

HORRY COUNTY
09 OCT 19 PM 3:32
MELANIE HUGGINS
CLERK OF COURT

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Kevin Davonne Cox # 232745, 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 D. Cox
Applicant

SWORN or affirmed to and subscribed before me this
13th day of Oct, 2013.

[Signature]
Notary Public

My Commission Expires: May 12th, 2014

HORRY COUNTY
09 OCT 19 PM 3:32
MELANIE HUGGINS
CLERK OF COURT

Attachment

<1/A> Counsel failed to object to inadmissible testimony, hearsay; improper comments, and erroneous instructions.

Counsel's performance fell below range of competency generally demanded of attorney's in criminal cases, constituted ineffective assistance, where counsel committed many errors, and where several errors were sufficiently grave to preclude review of serious claims on direct appeal.

Counsel failed to prepare for trial or seek continuance.

Right to effective assistance of counsel contemplates guiding hand of able and responsible lawyer, devoted solely to interest of his client, who has ample opportunity to acquaint himself with law and facts of case, and is afforded opportunity to present them to court or jury in their most favorable light. Counsel relying only upon the government's version of facts, failed to investigate and properly prepare for trial, failed to file any pre-trial motions, which allowed for the introduction of inadmissible evidence.

DOUGLAS HUGGINS
CLERK OF COURT
JULY 19 1982
PH 3:32
HARRIS COUNTY

Counsel violated the Integrity of the Court's, the Integrity of the Rules for Professional conduct, and the Integrity of his client.

counsel committed grave error when he engaged in the conduct involving dishonesty, fraud, deceit, and misrepresentation. A leading principle that prevades the entire law of criminal procedure is that after indictment has been found, nothing shall be done in the absence of the accused whose duty is to be present at trial. The right of the accused to be present at trial is grounded in common law, and shall not be disturb without a showing of fact that accused received sufficient notice given by courts of general session as to term in which accused is to be tried, thus allowing accused to waive his rights knowingly and intelligently of his right to be present. Counsel while I am sure is following the instructions of the trial court, which informed him to protect himself, maintains that he informed applicant as to a trial date, applicant contends that counsel never notified him as to a trial date, nor was applicant given sufficient notice of trial pursuant to South Carolina Rules of Criminal Procedure. With Counsel's failure to request a continuance, and abandoning of his client's rights, he left the burden of proof on applicant, oppose to that of state.

Counsel was ineffective by counsel's failure to move for dismissal of applicant's indictment based on solicitor's noncompliance with constitutional and statutory laws, jurisdictional in nature, in obtaining indictment.

A counsel's failure to object to a fatally defective indictment constitutes ineffective assistance of counsel that is per se prejudicial.

¶ 116 Applicant being a citizen of the United States and to South Carolina is entitled to the protection of the laws thereof, and no state shall make or enforce any law which shall abridge the privileges or immunities of such person, nor deprive a person of due process, nor deny the equal protection of the law. Applicant contends that his due process and equal protection rights has been violated, no person or class of persons shall be denied the protection of the laws enjoyed by other persons or classes in the same place and under like circumstances, as stated applicant was tried in absentia, however applicant's co-defendant received the same notice to appear for roll call, and on numerous occasions failed to appear. Co-defendant was never tried in absentia opposite that of applicant.

Applicant knows and understands that, In a P.C.R. action the burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.

Applicant contends that all referenced issues can be upheld with factual evidence. Applicant would therefore like to preserve the right to amend as well as issue a memorandum of law in support of applicant's Post conviction Relief.

Applicant would like to thank the court's for your time and patience.

Please clock, stamp, date and send a copy back to applicant.

Respectfully Submitted,
Kevin D. Cox

sworn and subscribed before me
this 13th Day of October, 2009
15/ [Signature]
Notary Public
15/ [Signature] 2014
my commission expires

15/ Kevin D Cox
Perry Corr. Inst. Q2-B-201
430 oaklawn Rd.
Pelzer S.C. 29669

October 14, 2009

HORRY COUNTY
09 OCT 19 PM 3:32
MELANIE HUGGINS
CLERK OF COURT

Certificate of Service

This is to acknowledge that I Kevin Davonne Cox #232745 is placing within the United States Postal service mail box at Perry Correctional Institution an application for Post Conviction Relief (P.C.R.) on the date stamped, to the Clerk of Court of Horry County

CERTIFIED COPY
2009 OCT 22 AM 9:24
Melanie Huggins-Black
CLERK OF COURT
HORRY COUNTY

Melanie Huggins
clerk of court
1301 2nd Avenue
Conway S.C.
29526

Kevin D. Cox
A2-B-207
430 Oaklawn Rd.
Pelzer S.C.
29669

RECEIVED

OCT 14 2009

P.C.L. MAILROOM

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2009-CP-26-10212

Kevin Davonne Cox, # 232745,

Applicant,

v.

State of South Carolina,

Respondent.

RETURN
(Attorney Appointment Requested)

Respondent, making its Return to the Application for post-conviction relief filed October 19, 2009, by Kevin Davonne Cox, would respectfully show this Court:

I. – Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to convictions from Horry County. The Applicant was indicted in October 2007 for distribution of crack cocaine, third offense (2007-GS-26-4399); trafficking in heroin, 4-14 grams, second offense (2007-GS-26-4400); and trafficking in cocaine, 28-100 grams, third offense (2007-GS-26-4401). R. Paul Taylor, Esquire, represented the Applicant. On March 5, 2008, the Applicant was tried in his absence for trafficking cocaine and distributing crack, and was convicted. The Honorable Edward B. Cottingham imposed a sentence of twenty-five years on each charge, with the sentences to run concurrently, and the sentence was sealed. On February 12, 2009, the sealed sentence was opened and read by the Honorable Steven H. John. The trafficking in heroin indictment was dismissed on February 13, 2009. A Notice of Appeal was filed, but on May 20, 2009, the appeal was dismissed because the Notice of Appeal was not timely. The case was remitted to the circuit court on June 5, 2009.

Incorporated herein by reference are the records of the Horry County Clerk of Court regarding the Applicant's convictions, the Applicant's records from the South Carolina Department of Corrections, and the records from the Court of Appeals. The trial transcript will be forwarded upon receipt. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. – Allegations and Relief Sought

In his Application, Mr. Cox alleges that his custody is unlawful for the following reasons:

(1) Ineffective assistance of counsel, to include the following:

- a. Failure to object to inadmissible testimony, hearsay, improper comments, and erroneous jury instructions;
- b. Failure to properly investigate and prepare for trial;
- c. Failure to file pre-trial motions to suppress inadmissible evidence;
- d. Engaging in dishonesty, fraud, deceit, and misrepresentation by telling the trial judge that he had notified the Applicant of the trial date;
- e. Failure to request a continuance of trial; and
- f. Failure to object to a fatally defective indictment.

(2) Violation of constitutional rights, including right to due process and equal protection, where the Applicant's co-defendant was not tried in his absence even though he failure to appear for numerous roll calls.

The Applicant states he is seeking reversal of his convictions and remand for a new trial.

III. – Ineffective Assistance of Counsel

Respondent interprets both of the Applicant's allegations as ineffective assistance of counsel allegations. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000) (when asserting violations of constitutional rights, an applicant generally must frame the issue as one of ineffective assistance of counsel). In a post-conviction relief action, the applicant bears the burden of proving his allegations by a preponderance of the evidence. Stalk v. State, 375 S.C. 289, 297, 652 S.E.2d 402, 405 (Ct. App. 2007) (citations omitted); Rule 71.1(e), SCRPC. "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.'" Dalton v. State, 654 S.E.2d 870, 873 (Ct. App. 2007) (citing Strickland v. Washington, 466 U.S. 668, 669 (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. Id.

A two-pronged test is used to evaluate allegations of ineffective assistance of counsel. Dalton v. State, 654 S.E.2d 870, 873 (Ct. App. 2007). "In order to prove that counsel was ineffective, a PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007) (citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Id. (citations omitted). "Furthermore, when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. Id. (citations omitted). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Id. (citations omitted). The applicant must overcome this strong presumption in order to obtain relief. Stalk, *supra* (citation omitted).

The Respondent submits that the Applicant will not be able to prove ineffective assistance of counsel or resulting prejudice. Respondent further submits that the record will reflect that the Applicant was given proper actual or constructive notice of his trial date, pursuant to established law and procedure. However, because the allegations may raise questions of fact

that the record does not conclusively refute, Respondent requests an evidentiary hearing to fully resolve the issues. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation, claim, or statement contained within the Application not expressly admitted, qualified, or explained is DENIED.

V.

WHEREFORE, having made its Return, the Respondent requests that counsel be appointed and an evidentiary hearing held.

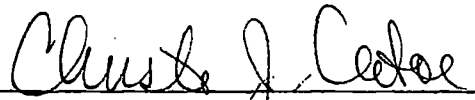
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
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Assistant Deputy Attorney General

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November 23, 2009

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Kevin Davonne Cox, # 232745,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2009-CP-26-10212

ORDER OF DISMISSAL WITH PREJUDICE

This matter came before the Court pursuant to an Application for post-conviction relief filed October 19, 2009, by Kevin Davonne Cox. Respondent made its Return on November 23, 2009. An evidentiary hearing was convened at the Horry County Courthouse on February 9, 2010. The Applicant was present in court and represented by Paul Archer, Esquire. The Respondent was represented by Christina J. Catoe, Assistant Attorney General.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to convictions from Horry County. The Applicant was indicted in October 2007 for distribution of crack cocaine, third offense (2007-GS-26-4399); trafficking in heroin, 4-14 grams, second offense (2007-GS-26-4400); and trafficking in cocaine, 28-100 grams, third offense (2007-GS-26-4401). R. Paul Taylor, Esquire, represented the Applicant. On March 5, 2008, the Applicant was tried in his absence for trafficking cocaine and distributing crack, and was convicted. The Honorable Edward B. Cottingham imposed a sentence of twenty-five years on each charge, with the sentences to run concurrently, and the sentence was sealed. On February 12, 2009, the sealed sentence was opened and read by the Honorable Steven H. John. The heroin indictment was dismissed the next day, February 13, 2009. A Notice of Appeal was filed, but on May 20, 2009, the appeal was dismissed. The case was remitted to the circuit court on June 5, 2009.

STANDARD OF REVIEW

In a post-conviction relief proceeding, the applicant bears the burden of proving his or her allegations by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109-110, 525 S.E.2d 514, 517 (2000); Rule 71.1(e). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The correct measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, supra. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Caprood, supra, at 109, 525 S.E.2d at 517 (citations omitted). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. When a defendant challenges his conviction after a trial, the proper consideration is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007). (citations omitted). In order to receive relief, an applicant must prove both ineffective assistance and resulting prejudice. See, e.g., Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

Allegations

In his PCR Application, Mr. Cox alleged that his custody was unlawful for the following reasons:

- (1) Ineffective assistance of counsel; and
- (2) Violation of constitutional rights.

Testimony at the PCR Hearing

The Applicant

The Applicant testified that his attorney, Paul Taylor, seemed to be against him rather than his advocate. He stated that near the beginning of the representation, Mr. Taylor flipped through the discovery material, told him that all the evidence was against him, and stated that he should become a confidential informant or else he would get twenty-five years in prison. The Applicant stated that he explained that he was innocent of the charges, and told his attorney that the statement he gave to the officers claiming the drugs was coerced. He stated that his attorney was not sure if his priors could be used against him, since they were over 10 years old, and had to ask another attorney who was present at the time. The Applicant testified that he was never willing to plead guilty and never had any knowledge of any plea bargain being arranged. The Applicant noted that he had appeared for every scheduled roll call.

The Applicant testified that he had absolutely no knowledge of his trial date. He stated that on Monday, March 3, 2008, the last information he had regarding his case was that the case would remain on the trial roster but was not being called that week. The Applicant stated that he only learned of his trial date on August 8, 2008, while he was in New York. After he was sent back to South Carolina, his trial counsel saw him at the jail and told him about the trial in absence that occurred on March 4-5, 2008. The Applicant stated that Mr. Taylor accompanied him to court when the sealed sentence of twenty-five years was imposed. The Applicant stated that he later wrote to the clerk of court and to the solicitor's office to find documentation regarding his trial in

absence, but he did not receive any information that such a trial had ever occurred.

The Applicant stated that if he had been present at trial, he would have taken the stand and testified in his own behalf notwithstanding his prior criminal record. He stated that the jury would understand that he was not guilty of this particular conviction even though he had similar convictions in the past. He stated that he would explain to the jury "who he was," and further, would have pointed out all of the inconsistencies in the testimony of the State's witnesses. The Applicant indicated that in his trial testimony, he would have told the jury that on the date in question, he drove his co-defendant to meet someone to do a transaction. He was then pulled over, frisked, and drugs were found in the co-defendant's purse, which was in the car. Thereafter, they were both arrested. He stated that his co-defendant was pregnant at the time, and the police told him that if he gave a statement confessing to the drugs, the co-defendant would be let go. However, they did not end up releasing her at that time. The Applicant further testified that the references to the drugs which he made in his statement did not match the drug weight evidence introduced at trial.

The Applicant testified that he was aware of his right to appeal. However, he testified that he never asked his attorney to file an appeal. Instead, not trusting his attorney, he later attempted to file an appeal himself. He learned at some point that his attorney had, in fact, filed a notice of appeal. Ultimately, the appeal was dismissed as not timely filed.

The Applicant also testified regarding numerous errors he alleged his attorney committed at trial. First, he alleged that his counsel failed to object to improper vouching, perjured testimony, and inadmissible testimony. (See Transcript, pages 43, 46, 61, 121, and 122). Second, he alleged that counsel was ineffective in his opening statement for implying that the Applicant was a violent person. (See Transcript, page 51, lines 7-17). Third, he alleged that counsel failed to object when the jury heard that the police also found heroin in the bag of drugs, where the Applicant was not

being tried for the heroin charge at that time.¹ Fourth, the Applicant alleged that counsel failed to investigate and file pre-trial motions. Fifth, the Applicant alleged that counsel failed to object to problems with the chain of custody for the drugs. Sixth, the Applicant alleged that counsel failed to object to the qualifications of the drug analyst – the Applicant contended that it was not proper for a chemist to be trained by a “former” SLED agent. Seventh, the Applicant alleged that counsel should have challenged the circumstances behind the statement he gave to police and should have pointed out discrepancies with regard to the weight of the drugs actually found. Finally, the Applicant alleged that counsel should have objected to the solicitor’s repeated mention of the CD that allegedly contained audio of the drug transaction, where the CD was not introduced into evidence at trial.

Trial Counsel

The Applicant’s trial attorney, R. Paul Taylor, testified that he had been practicing criminal law since May 2002. He stated that he was appointed to represent Mr. Cox on these charges and the corresponding heroin charge. He stated that the Applicant’s charges arose after police learned that the Applicant, known on the street as “Flattop,” was a “big player” in the drug-dealing business. The police set up a buy, using a confidential informant, at a local gas station and then had the Applicant and his girlfriend (and co-defendant) pulled over by highway patrol. Marked money (with matching serial numbers) was found on the Applicant, and large quantities of various drugs were found in plain view in the car. The transaction was observed by numerous law enforcement officers, many of whom testified at trial. The buy was also audiotaped, although the quality of the tape was fairly poor. Counsel did not see a valid basis to challenge the traffic stop or to contest probable cause.

Counsel met with the Applicant after reviewing the discovery, and advised him that the facts

¹ Notably, the Applicant’s own written statement to police, which was properly admitted into evidence at trial, mentioned the heroin. (See Transcript, pages 95-98). The solicitor later elected to dismiss the heroin charge against the Applicant on February 13, 2009, the day after the sealed sentence of twenty-five years was imposed upon the Applicant.

were very much against him. He stated that there was "overwhelming" evidence of guilt. He also advised the Applicant that he was facing a mandatory minimum of 25 years, up to 30 years, since these were third or subsequent drug offenses. Counsel advised the Applicant that under S.C. Code Ann. § 44-53-470 (2), his prior offenses could be used to enhance his sentence, notwithstanding the fact that they were over ten years old. The Applicant stated that he needed a second opinion on that issue, and since Orrie West, Horry County Public Defender, was also present in the building at that time, the Applicant confirmed this with her. Counsel stated that he and Mr. Cox discussed the possible penalties for each of the offenses, and discussed the Applicant's constitutional rights several times. They also reviewed the discovery together. Counsel stated that, considering the evidence, he advised Mr. Cox that he was unable to discern any plausible defense to the charges. However, counsel did advise the Applicant that because the State was seeking to apprehend his drug supplier, if the Applicant would agree to cooperate as a confidential informant, it might help him on his charges. However, the Applicant refused.

Over the next few months, the case appeared on the trial rosters, and the Applicant did show up for roll-calls. Counsel stated that the Applicant continued to be rude and uncooperative with the assistant solicitor. Finally, the assistant solicitor informed the Applicant and counsel that the case would be called during the term of court extending from Friday, Feb. 29, 2008 – Friday, March 14, 2008. A subpoena was issued for the Applicant that covered this entire period and warned the Applicant to be present "each day this term of court or until disposition of case." (See Court's Exhibit # 2 from trial).² On Friday, Feb. 29, 2008, at roll-call, the assistant solicitor advised counsel and the Applicant that he intended to call the Applicant's case the next week - the week beginning on Monday, March 3, 2008. At that time, the assistant solicitor extended a plea offer for 15 years.

Counsel and the Applicant met over that weekend to prepare for trial and to discuss the plea

² Also made a Court's Exhibit at trial (# 1) was bond paperwork signed by the Applicant, wherein he acknowledged that he was aware of his "right and obligation" to be present at trial, and that if he failed to appear for trial, he would be tried in his absence and a warrant for his arrest would be issued.

offer. Eventually, after much discussion, the Applicant indicated to counsel that he would accept the plea offer. Counsel told the Applicant to appear at court on the following Monday morning, March 3, 2008, to either accept the plea or to go to trial. On Monday morning, the Applicant did appear, but the assistant solicitor was out with a sick child. Therefore, counsel told him he would have to return sometime the next day, Tuesday, March 4, 2008, to either go to trial or accept the plea offer. Counsel stated that he would call him and let him know what time to be there on Tuesday. However, there was no question that the Applicant knew he had to appear in court on Tuesday, and no question he knew that if he did not appear, the trial would proceed in his absence.

When counsel learned that the case would be called at 2:00 pm on Tuesday, he had his office staff contact the Applicant. Counsel also personally spoke with the Applicant, on his cell phone, several times that day to confirm that the Applicant was on his way. The Applicant continued to indicate that he was on the way to court. When it appeared that the Applicant was late, counsel continued to call; however, the phone had, at that point, been switched over to voice mail. Counsel was unable to reach the Applicant from that point forward. The State made a motion for a trial in the Applicant's absence, and counsel had no legitimate grounds to object or to request a continuance, since his client clearly knew to be there and also knew he would be tried in his absence. The court granted the motion and a bench warrant was issued for the Applicant. It was counsel's opinion that, although the Applicant did faithfully appear at the roll-calls, once he knew he was actually going to have to go to prison, either following a plea or a trial, he decided to flee since he did not want to do even one day in prison. Counsel testified that there was "no question" that the Applicant had proper notice to be present in court on the date of his trial.

During the trial on March 4-5, 2008, the State called several witnesses in its case-in-chief. The Applicant's written statement was introduced into evidence during the testimony of one of the officers. The Applicant's statement was as follows, written in the Applicant's own handwriting: "I, Kevin Cox went to Georgetown to see a guy, don't know his name, I met him through a friend of

mine in Riley, North Carolina, his name is Black, I paid \$2800 for the drugs I have today. 2 1/4 oz of coke and 5 bundles of heroin." The Applicant was given his Miranda rights prior to writing the statement, and he also signed a Miranda waiver form. Counsel did not see any plausible grounds for suppression of the statement. Counsel also indicated that he did not detect any significant discrepancies with the drug amounts listed in the Applicant's statement as compared with the drugs introduced at trial. Counsel indicated that in his experience with drug cases, drug dealers are not always exact or consistent with respect to their measurements. Counsel also testified that, having reviewed the discovery documents, he did not discern any legitimate objection to the chain of custody. He was familiar with the officers involved and the evidence custodian, Lori Rabon. Further, he was familiar with the chemist, Lisa Floyd, and had no legitimate objection to her expert qualifications.

Counsel testified that after trial, in August 2008, the Applicant was picked up in New York. The Applicant had an argument with his brother, and his brother, knowing about the bench warrant for the Applicant's failure to appear for trial in South Carolina, turned him in to police. Counsel stated that the Applicant "played stupid" when he got back to South Carolina, pretending that he never had any notice of the trial. Counsel accompanied the Applicant to the sentencing proceeding on February 12, 2009, where Judge John read the sealed sentence of twenty-five years. Although the Applicant had already been advised of his right to appeal, the Applicant did not ask counsel to file an appeal or express any desire to appeal. Counsel was unable to recall the details of what occurred after sentencing, but it is apparent that he, on his own, filed a notice of appeal sometime in February 2009. He had no further involvement from that point forward, because the Office of Appellate Defense took over the appeal. The appeal records, while somewhat conflicting, ultimately reflect that the appeal was dismissed on May 20, 2009 "due to the failure of appellant to provide a motion to file the notice of appeal out of time with the Court in the above matter, and as requested by letter from this office dated April 23, 2009."

Set forth below are the relevant findings of fact and conclusions of law, as required by S.C.

Code Ann. § 17-27-80 (2003):

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In considering the Applicant's case, this Court had before it the Applicant's PCR file, including the records of the Horry County Clerk of Court regarding the convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, and the exhibits introduced by the Applicant at the PCR hearing. This Court listened carefully to the testimony at the hearing, and found the testimony of Mr. Taylor to be highly credible. In contrast, this Court found the testimony of the Applicant to be entirely self-serving and not credible, especially his testimony that he had no notice of the trial date.

First, this Court finds that the Applicant had notice, as well as actual knowledge, of his trial date. He knew that he was supposed to be present in court on Tuesday, March 4, 2008, for either a trial or a plea, and he knew he would be tried in his absence if he did not appear. This Court is convinced that the Applicant became fearful of going to prison and that he willfully failed to appear for trial. This Court further finds that counsel had no legitimate basis to object to a trial in his absence and no legitimate grounds for a motion for a continuance. Notably, counsel attempted to persuade the Applicant to cooperate with the State, and later, to accept a plea offer carrying a significantly lesser sentence. However, the Applicant continued to ignore counsel's advice because he did not wish to spend *any* time in prison.

Second, based upon the testimony at the PCR hearing, in conjunction with the trial transcript, this Court finds that the Applicant failed to prove any ineffective assistance of counsel. This Court finds that the Applicant failed to prove that counsel should have raised objections to the testimony he alleges was improper. This Court finds that the Applicant failed to prove that counsel was ineffective in his opening statement, where it is clear from the context that counsel was making a legitimate point regarding the potential bias of the confidential informant. This Court further

finds, with respect to the mention of "heroin," that although counsel did attempt to raise an objection to the comment, the court properly found that the officer could testify to what he actually found in the Applicant's car – which included heroin. Further, the defendant himself mentioned heroin in his written statement. In any event, considering the overwhelming evidence of guilt on the cocaine and crack cocaine charges, this Court finds that the jury could not possibly have been prejudiced by the mention of other drugs that were found with the cocaine and crack cocaine in the same incident.

This Court also finds that the Applicant failed to present any evidence supporting that counsel was ineffective for failing to investigate and file pre-trial motions. This Court finds that counsel was not ineffective for failing to challenge the chain of custody of the drugs. See State v. Taylor, 360 S.C. 18, 598 S.E.2d 735 (Ct. App. 2004) (chain of custody is sufficient if the identity of each person in the chain handling the evidence is established, and the manner of handling is reasonably demonstrated). This Court also finds that counsel was not ineffective for failing to challenge the qualifications of the chemist, where counsel was familiar with the chemist and had no legitimate basis to object to her testimony. This Court further finds no ineffective assistance of counsel with respect to the admission of the Applicant's post-Miranda written statement, particularly where the Applicant willfully failed to appear at trial and could not be called as a witness to dispute the testimony of the officers regarding the voluntariness of the statement. Further, this Court finds that counsel reasonably determined that any minor discrepancies with respect to the weights of the drugs were not a point of contention, given his experience in drug cases. Finally, the record reflects that, contrary to the Applicant's assertion at the PCR hearing, the CD containing the audio of the drug transaction was, in fact, introduced into evidence through the testimony of Officer Vescovi. (See Transcript, pages 89-90). This was notwithstanding the fact that the State had initially indicated that it would not introduce the tape due to the poor audio

quality. (See Transcript, page 40, lines 2-7). Counsel had no legitimate basis to object to the introduction of the CD; therefore, this allegation is without merit.

With respect to a belated appeal, this Court notes that the Applicant did not seek a belated appeal in his PCR application, nor did he amend his Application to include such a request. This Court finds that the Applicant is not entitled to a belated appeal. The record reflects that the Applicant was clearly aware of his right to appeal. However, he did not ask his attorney to file an appeal and did not convey to his attorney a desire to appeal. See Roe v. Flores-Ortega, 528 U.S. 470 (2000). The fact that trial counsel, on his own volition, filed an appeal (which was later dismissed) does not entitle the Applicant to a belated appeal. Further, the overwhelming evidence of guilt, as discussed below, convinces this Court that an appeal would have been futile. Accordingly, this Court concludes that the Applicant is not entitled to a belated direct appeal.

Finally, this Court finds that the Applicant failed to prove prejudice from any of the alleged errors of counsel, even assuming that such errors did occur. This Court finds that, given the overwhelming evidence of guilt, none of the alleged errors could have had any effect upon the outcome. See, e.g., Harris v. State, 377 S.C. 66, 80, 659 S.E.2d 140, 147 (2008) (a reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). Notably, the jury deliberated for only twelve minutes. Further, the trial judge commented upon the "overwhelming evidence of guilt" on two occasions. (See Transcript, page 136; page 138). The overwhelming evidence of guilt in this case precludes a finding of prejudice.

CONCLUSION

Based upon the foregoing, this Court finds and concludes that the Applicant failed to prove any of his claims. Therefore, the Application for post-conviction relief must be denied and dismissed with prejudice for failure to meet the burden of proof under Strickland v. Washington, 466 U.S. 668 (1984), and Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Counsel's attention is directed to Marlae v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and Rule 59(e), SCRCP, regarding the filing of a Motion to Alter or Amend should counsel believe this Order fails to adequately address all issues raised as required by S.C. Code Ann. § 17-27-80 (2003). This Court further advises that if Applicant desires to secure appellate review of this Order, a notice of appeal must be filed and served within thirty (30) days of the service of this Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

IT IS THEREFORE ORDERED THAT:

1. The Application for post-conviction relief is **DENIED** and **DISMISSED** with **PREJUDICE**.
2. The Applicant must remain in the custody of the State for completion of his sentence.

AND, IT IS SO ORDERED this 4th day of March, 2010.

Benjamin H. Culbertson

Benjamin H. Culbertson
Presiding Judge
Fifteenth Judicial Circuit

Georgetown, South Carolina

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FORM 5

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

Kevin Davonne Cox #232745
Full name and prison number (if any) of Applicant.

28 14 318

v.

State of South Carolina

APPLICATION FOR
POST-CONVICTION RELIEF

RECEIVED
JAN 11 PM 2:34
CLERK OF COURT
HORRY COUNTY

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Correctional Institution
2. Name and location of Court which imposed sentence Fifteenth Judicial circuit
3. Name(s) of co-defendant(s) (if any) Keona Gamble
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2007GS2604401 - Trafficking Cocaine 28-100
 - (b) 2007GS2604399 - Drugs manufacture, distribution
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) march 5, 2008 - 25 years, unscaled - February 12, 2009
 - (b) march 5, 2008 - 25 years, unscaled - February 12, 2009

Revised 3/2003

- (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 "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The South Carolina Court of Appeals
- ii. Harley County Court of Common Pleas
- iii. The South Carolina Court of Appeals (writ of certiorari)
- (b) the result in each such Court to which you appealed:
- i. Dismissed
- ii. Dismissed
- iii. Dismissed in Part, Granted in Part (Belated Appeal)
- (c) the date of each such result:
- i. May 20, 2009 ; Notified July 31, 2009
- ii. March 4th 2010
- iii. July 28 2012
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Rule 221 (b) of The South Carolina Appellate Rules
- ii. Strickland v. Washington, 466 US 668 (1984)
- iii. Belated Appeal (Dismissed Rule 220(b) SCACR)
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Appellate Counsel

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) "See Attachment"

(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? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. South Carolina Court of Appeals Direct Appeal

ii. Horry County Court of Common Pleas (PCR)

iii. _____

iv. South Carolina Court of Appeals, writ of certiorari and Related Appeal

(b) the name and location of the Court in which each was filed:

i. South Carolina Court of Appeals

ii. Horry County Court of Common Pleas

iii. _____

iv. South Carolina Court of Appeals

(c) the disposition thereof:

i. Dismissed

ii. Dismissed

iii. Dismissed in Part Granted in Part

- iv. _____
- (d) the date of each such disposition:
- i. May 20, 2009
- ii. March 4th 2010
- iii. _____
- iv. July 28, 2012
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. Rule 221 (b) of South Carolina Appellate Rules
- ii. Stockland v. Washington, 466 U.S. 668 (1984)
- iii. _____
- iv. White v. State 263 S.C. 110, 208 S.E. 2d 35 (1974)
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?
N/D
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Post-Conviction Relief issue
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
- i. R. Paul Taylor ; P.O. Box 50388, Myrtle Beach S.C. 29579
 - ii. Paul Archer ; 8231 Ocean Highway Pawleys Island
 - iii. Wanda H. Carter ; P.O. Box 11589, Columbia S.C. 29211-1589
Division of Appellate Defense S.C. 29585
- (b) the proceedings at which each such attorney represented you:
- i. Trial
 - ii. Post Conviction Relief
 - iii. Writ of Certiorari and Belated Appeal

19. State clearly the relief you seek in filing this application:

That issue's be viewed and Ruled upon by State Supreme Court

20. Are you now under sentence from any other court that you have not challenged?

no

STATE OF SOUTH CAROLINA

County of Horry

) 21 14 VERIFICATION 318

I, Kevin D Cox, 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.

Kevin D Cox

SWORN to and subscribed before me this 15th
day of January, 2014.

Nancy C. Merchant (L.S.)
Notary Public

My Commission Expires: 1-23-2023

14 JAN 21 PM 2:34
CLERK OF COURT
WARD

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

14

318

I, Kevin D. Cox, 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 D Cox
Applicant

JAN 21 PM 2:34
CLERK OF COURT
WARD

SWORN or affirmed to and subscribed before me this

15th day of January, 2014.

Nancy C. Merriam
Notary Public

My Commission Expires: 1-23-2023

Attachment

14

318

- 11(a) Applicant contends that his appellate Counsel was ineffective for failing to raise meritorious issues. Appellate Counsel failed to raise meritorious issues at applicant's Petition for writ of certiorari and his Belated appeal.

The courts has found that the right to appellate counsel is now firmly established. *Evitts v. Lucey*, 469 U.S. 308, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985). *Strickland v. Washington*, 466 U.S. 668-88, 694, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) established the standard for ineffective assistance of counsel, and though it is phrased in terms of ineffective assistance of trial counsel it can be used as a basis for establishing a standard for effective assistance of appellate counsel. Accord *Brown v. Foltz*, 763 F.2d 191, 195 (6th Cir. 1985) (Coutie J. dissenting); *Schwander v. Blackburn*, 750 F.2d 494, 502 (5th Cir. 1985); *Mitchell v. Scully*, 746 F.2d 951, 954, (2nd Cir. 1984)

under *Strickland*, ineffective assistance of counsel will be found when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 104 S.Ct. at 2064. The *Strickland* standard envisions a two-prong analysis. First, counsel's performance must have been deficient, and second, the deficiency must have prejudiced the defense. *Id.* Had appellate counsel failed to raise a significant and obvious issue, the failure could be viewed as deficient performance. If an issue, which was not raised, may have resulted in a reversal of the conviction, or an order for a new trial, the failure was prejudicial. *Id.* at 352.

Applicant was appointed Appellate Counsel, Wanda H. Carter, for representation on appeal of Post Conviction Relief (PCR). Applicant wrote Mrs. Carter concerning obvious and significant issues to be raised on Petition for writ of certiorari (see attachment 1. and response letter attachment 2.) on the 3rd day of November, 2010 Counsel filed in the Supreme Court of South Carolina a petition for writ of certiorari raising four issues. (see Attachment 3.)

On the 9th day of November, 2010, Plaintiff wrote Mrs. Carter concerning these issue's and the absence of obvious and significant issue's (see attachment 4.) Applicant also wrote to the Honorable chief Justice Tol concerning the action's of Counsel. (see attachment 5. and response letter attachment 6.) Also, (see attachment 7.) for return correspondence from Mrs. Carter.

Applicant claims that appellate counsel failure to raise clearly meritorious issue's well established under constitutional law constitutes ineffective assistance and establishes "cause" for failure to raise the error. Counsel abandoned the required duty of loyalty to her client; Counsel did not simply make poor strategic or tactical choices; she acted with reckless disregard for her clients best interest and apparently with the intention to weaken her clients case.

Applicant was adamant concerning his Trial in absentia; and chain of custody issue's. Though Judge Culbertson sign an order dismissing Applicant's PCR application, Applicant showed appellate counsel with Trial transcript as well as PCR transcript where trial counsel was not only ineffective, but admitted to being ineffective by his actions.

Applicant was awarded a Belated Appeal on his Petition for writ of certiorari. Appellate Counsel again proved to be ineffective by raising an issue that was not preserved by trial counsel, and failing to raise an issue that was preserved by trial counsel which was the chain of custody issue, (see Trial Transcript Pg. 98 lines 9-25; Pg. 106, lines 18-25) Applicant's Belated appeal was dismissed due to trial counsel ineffectiveness to preserve issue and appellate counsel failure to raise preserved issue's.

Appellate counsel was briefed concerning these issue's by Applicant, yet she refused to acknowledge them as meritorious issue's. Applicant states that because the Strickland test of effective assistance of counsel applies with equal force to analysis of the performance of appellate counsel, that appellate counsel is ineffective for failing to raise clearly meritorious issue's in applicant's Petition for writ of certiorari or ~~then~~ Applicant's belated appeal.

January 2014

Certificate of Service

REC'D - CLM:1
14 JAN 21 PM 2:05
ALLIANCE - WARD
CLERK OF COURT

This is to acknowledge that I Kevin Davonne
Cox #232745 is placing within the United States Postal
Service mail box at Perry Correctional Institution an
application for Post Conviction Relief (PCR) on the
date stamped by Postal officer, to the clerk of Court
of Horry County.

Melanie Huggins
Clerk of Court
1301 2nd Avenue
Conway, S.C.
29526

Kevin D. Cox #232745
Perry Corr Inst.
Q3-B-222
430 Oaklawn Rd.
Pelzer S.C. 29669

RECEIVED

JAN 15 2014
P.C.I. MAILROOM

Attachment 2

RE: Letter to Mrs. Wanda H. Carter

CLERK OF COURT
14 JAN 21 PM 2:35
WARD

Plaintiff is not able to send a copy of attachment one, due to the fact that Plaintiff was placed in Security Management Unit (SMU) on the 12th day of November, 2012 and some of his legal material has been misplaced. Plaintiff has taken the necessary steps (Inmate Grievance system) in obtaining this material back. However Attachment 2 is the response letter confirming that Plaintiff did indeed wrote Mrs. Wanda H. Carter concerning his case.

Sworn and subscribed before me
this 29th DAY of January, 2013
1st Justin T. Williams
Notary Public

1st November 7, 2016
My Commission Expires

1st Kevin D. Cox
Kevin D. Cox # 282745
Perry Corr. Inst
Q3-B-102
430 Oaklawn Rd.
Pelzer S.C. 29669

**SCCID**

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11688
Columbia, South Carolina 29211-1588
Telephone: (803) 734-1330
Facsimile: (803) 734-1337

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

August 16, 2010

Mr. Kevin D. Cox #232745
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

Dear Mr. Cox:

Thank you for the background information in your case. I have not reviewed your case file, but rest assured, I will get to your case within the next two months. The appeal process takes a year or so, which means you must be patient until your case reaches my desk.

I will contact you again after reviewing your file.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/mwl



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

November 3, 2010

Mr. Kevin Davonne Cox #232745
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

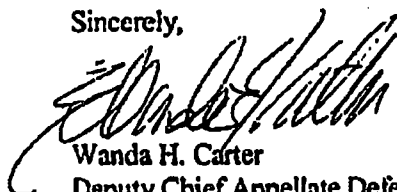
Re: Your appeal

Dear Mr. Cox:

Enclosed please find a copy of the petition for writ of certiorari and a copy of the appendix in your case that I filed today with the South Carolina Supreme Court on your behalf.

Should you have any questions concerning this matter, please contact me.

Sincerely,



Wanda H. Carter
Deputy Chief Appellate Defender

WHC/fkb

Enclosures

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Kevin Davonne Cox,
S.C.D.C. No. 232745,

Applicant,

v.

State of South Carolina,

Respondent.

2014-CP-26-318

RETURN

In response to the post-conviction relief (PCR) application filed January 21, 2014,
Respondent would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted during the October 2007 term of the Horry County Grand Jury for trafficking cocaine, ten to twenty-eight grams (2007-GS-26-4401), and distribution of methamphetamine or cocaine base (2007-GS-26-4399). Robert Paul Taylor, Esquire, represented Applicant. Applicant was tried in his absence, and a jury found him guilty as indicted. On March 5, 2008, the Honorable Edward B. Cottingham sentenced Applicant to concurrent terms of imprisonment of twenty-five years, and the sentence was sealed. On February 12, 2009, the Honorable Steven H. John opened and read Applicant's sentence.

Applicant appealed, and the South Carolina Court of Appeals dismissed his appeal on May 20, 2009. The remittitur was issued on June 5, 2009.

First PCR Application: 2009-CP-26-10212

Applicant filed his first PCR application on October 19, 2009, alleging the following grounds for relief:

1. Ineffective assistance of counsel; and
2. Violation of constitutional rights.

Respondent made its return on November 23, 2009. An evidentiary hearing was held on February 9, 2010, at the Horry County Courthouse. Paul Archer, Esquire, represented Applicant. By order filed March 4, 2010, the Honorable Benjamin H. Culbertson denied and dismissed the application with prejudice.

Applicant appealed, and the South Carolina Court of Appeals denied his petition for a writ of certiorari as to Applicant's allegations of ineffective assistance of counsel but granted him a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The appellate court affirmed his conviction on November 27, 2013¹, and issued the remittitur on December 17, 2013.

First Federal Habeas Corpus: 5:14-2069

Applicant filed a pro se federal petition for a writ of habeas corpus on May 23, 2014. The Honorable Kaymani D. West, United States Magistrate Judge, issued a report on July 15, 2014, recommending Applicant's petition be dismissed without prejudice. On July 28, 2014, Applicant filed objections to Judge West's report. Upon information and belief, Applicant's petition is pending.

II.

Applicant filed his *second* and current application on January 21, 2014, alleging the following grounds for relief:

¹ Unpublished opinion may be found at 2013 WL 8541592.

1. Ineffective assistance of appellate counsel:
 - a. Failing to raise meritorious issues on appeal.

For the purpose of this return, Respondent incorporates the Horry County Clerk of Court's records regarding the subject convictions, South Carolina Department of Corrections records, Applicant's appellate records, and Applicant's previous and current PCR records. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent contends that the Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this allegation.

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; SCRCP 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. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

V.

Respondent denies each allegation not expressly admitted, qualified or explained.

[Signature block to follow]

VI.

WHEREFORE, having made its Return, Respondent requests that a hearing be held on the claim of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

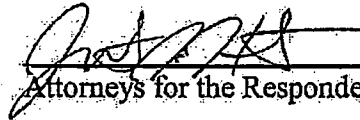
ROBERT BOLCHOZ
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondent

February 8th, 2017

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

KEVIN D. COX, 232745,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

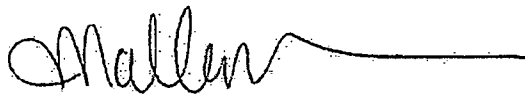
2014-CP-26-0318

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Daniel A. Selwa, II, Esquire
 516 29th Avenue North
 Myrtle Beach, SC 29577

DATED this 8th day of February, 2017.



Mallory Morris, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2014-CP-26-00318

KEVIN D. COX,)

Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)

Respondent.)

Transcript of Record
Post-Conviction Relief

September 18, 2017

B E F O R E:

Honorable William H. Seals
Horry County Courthouse
Conway, South Carolina

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

Johnny E. James, Jr., Esquire
Attorney for Plaintiff

Daniel A. Selwa, II, Esquire
Attorney for Defendant

Kay H. Richardson
Circuit Court Reporter

Cox v. White - 2014-CP-26-00318
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12

13

14

E X H I B I T S

15

No.ID EV

16

17

(No Exhibits were marked or admitted.)

18

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21

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23

24

25

Cox v. White - 2014-CP-26-00318
BY THE COURT

3

1 (SEPTEMBER 18, 2017 - 1:27 P.M.)

2 BY THE COURT:

3 MR. JAMES: If it may please the Court, the State calls
4 the matter of Kevin Cox versus State of South Carolina. That
5 is docket number 2014-CP-26-318. Mr. Cox is here today in the
6 courtroom and is represented by Mr. Daniel Selwa. He was
7 convicted and sentenced on February 12th, 2009 for trafficking
8 in cocaine 10 to 28 grams and distribution of methamphetamine
9 or cocaine base.

10 Your Honor, the procedural history in this matter is a
11 little bit contorted, but to try and give the shortest summary
12 possible. He didn't have a proper appeal to start with, filed
13 for PCR was denied. Appeal from that PCR the Court granted
14 them *White* appeal. The Office of Appellate Defense attended
15 to that *White* appeal, his conviction was affirmed, and he now
16 challenges the effectiveness of appellate counsel on that
17 *White* appeal. So, the only issue that is before the Court
18 today is effectiveness of appellate counsel.

19 THE COURT: All right. Mr. Selwa?

20 MR. SELWA: Your Honor, may it please the Court, I'd like
21 to bring something up to the Court. There seems to be some
22 discrepancy between me and my client here regarding what we
23 can actually go forward on. My understanding is that this is
24 an ineffective assistance of counsel of appellate as the AG's
25 office had stated. However, my client wishes to bring some

Cox v. White - 2014-CP-26-00318
BY THE COURT

4

1 other issues up in regards to some of the original issues
2 which would involve Mr. Taylor, and from what I understand,
3 Mr. Taylor is not here. And, Your Honor, I ask that Court to
4 inquire or to direct us rather regarding what issues we can
5 proceed on.

6 THE COURT: What issues are in his application?

7 MR. JAMES: Your Honor, what I have marked here in the
8 State's return is very simply that he failed to raise
9 meritorious issues on appeal. And if I may have just one
10 moment, I'll look at his application. His application under
11 Subsection 10 states ineffective assistance of appellate
12 counsel and refers to see attachment. He then has a somewhat
13 -- well, a two-page written attachment to expand upon 11(a)
14 and primarily he is upset with appellate counsel because he
15 demanded appellate counsel address issues regarding trial in
16 absentia, and for raising an issue that was not preserved by
17 trial counsel. And I don't see it highlighted here just
18 skimming over but I understand he was also -- he also desired
19 that appellate counsel raise chain of custody.

20 THE COURT: So, that's all we're dealing with is ---

21 MR. JAMES: That's all we're supposed to deal with today.
22 Any other issues would be barred as successive and untimely
23 and so on and so forth.

24 THE COURT: Correct.

25 MR. SELWA: Your Honor, I mean, honestly at this point,

Cox v. White - 2014-CP-26-00318

5

KEVIN D. COX - DIRECT BY SELWA

1 my client disagrees with that position.

2 THE COURT: Well, that's what we're doing. Go ahead and
3 call your first witness.

4 MR. SELWA: Your Honor, I would call Kevin Cox to the
5 stand.

6 KEVIN D. COX, HAVING BEEN DULY SWORN,
7 TESTIFIED AS FOLLOWS:

8 CLERK: Have a seat and state your name.

9 MR. COX: My name is Kevin Cox. Your Honor, before I
10 begin, I would like to place on the record ---

11 THE COURT: Why don't we let your lawyer ask the
12 questions?

13 MR. COX: Thank you.

14 MR. SELWA: May it please the Court, Your Honor?

15 THE COURT: Yes, sir.

16 MR. SELWA: Thank you.

17 DIRECT EXAMINATION OF KEVIN D. COX BY MR. SELWA:

18 Q: Mr. Cox, you have filed a PCR alleging several issues
19 related to appellate counsel; is that correct?

20 A: Yes, that is.

21 Q: And you are stating that she was ineffective, is that
22 right as well?

23 A: Yes.

24 Q: And in what ways was appellate counsel ineffective?

25 A: If it may please this Court, Petitioner wrote Ms. Carter

Cox v. White - 2014-CP-26-00318
KEVIN D. COX - DIRECT BY SELWA

6

1 a letter explaining through numerous issues was that those
2 numerous issues was raised as far as I can see the best two
3 issues that we could've raised was trial in absentia and chain
4 of custody. Petitioner would like to present Exhibit Number
5 1, a letter that I wrote to Ms. Carter ---

6 MR. JAMES: Objection, if it's coming through Mr. Selwa
7 then we can have the conversation but I don't think it's
8 proper for the witness to introduce the exhibits.

9 A: Okay.

10 THE COURT: Sustained.

11 A: Okay. Your Honor, my PCR ---

12 THE COURT: Why don't you hold on. Answer questions that
13 your lawyer asks.

14 A: Sir ---

15 THE COURT: His job is to look after you and make sure
16 you do things like you're supposed to do.

17 A: Right, but I need to put on the record that this case has
18 been on -- I filed my PCR in 2014. I met my lawyer -- I got a
19 letter from him May the 8th of this year. I met him May the
20 22nd, which was 13 days later. We came here, the Judge gave
21 us a continuance. I never spoke to him since that continuance
22 and now we're back here again. He has no understanding of
23 what's going on in my case. I gave him this letter from the
24 Fourth District explaining that I am able to raise any issue
25 that I need to raise today, not just the Wanda Carter issue.

Cox v. White - 2014-CP-26-00318
KEVIN D. COX - DIRECT BY SELWA

7

1 So, there seems to be a big misunderstanding going on right
2 now in the courtroom. I have not had time to speak to him
3 about anything. So, he knows nothing about my case. And the
4 Sixth Amendment doesn't guarantee that. His mere presence is
5 not what's given to me by the Sixth Amendment.

6 MR. JAMES: Your Honor, if I may, I can shed a partial
7 light on why there was such a considerable delay in getting
8 Mr. Cox into the courtroom here today. Under the procedures
9 of the Attorney General's office, prior -- once the office
10 received an application of -- was outside the statute of
11 limitations or successive, it would go into a separate pile
12 for staff attorneys to attend to. As you may recall, I
13 attended to a number of those as a staff attorney. At that
14 time is when I actually initially reviewed Mr. Cox's
15 application and determined that because of the unusual
16 procedural history, it was not appropriate for summary
17 disposition and it was moved into the merits pile to be
18 brought before the Court. Unfortunately, over the course of
19 the past year, we've had four different attorneys assigned to
20 the Fifteenth Circuit and it was not possible to actually get
21 Mr. Cox an attorney and get him into the courtroom until last
22 term, at which time it was continued because Mr. Selwa, as Mr.
23 Cox had indicated, had only just been assigned to him. And as
24 you can tell, Mr. Cox is understandably passionate about his
25 case.

Cox v. White - 2014-CP-26-00318
KEVIN D. COX - DIRECT BY SELWA

8

1 THE COURT: And that was when? When was it continued
2 from?

3 MR. JAMES: It was continued from the May term of this
4 year.

5 THE COURT: Okay. Mr. Selwa ---

6 A: And this is a letter ---

7 THE COURT: Hold on. You just ---

8 A: Excuse me.

9 MR. SELWA: Your Honor, I spoke with my client here,
10 understood what the issues were to be addressed and got the
11 information and went from there. So, I understand the case;
12 I'm familiar with it.

13 THE COURT: You've had all summer and you feel prepared?

14 MR. SELWA: Yes, sir.

15 THE COURT: All right. Let's continue.

16 A: Sir, this is an amendment that I sent to Mr. Selwa on
17 July the 7th concerning my post-conviction ---

18 THE COURT: Let him ask his questions and then I'll let
19 you say whatever you want to say at the end of your hearing.

20 A: Well, can he please answer why he didn't amend my PCR
21 application?

22 THE COURT: Your job is to answer questions. His job is
23 to ask them.

24 Go ahead.

25 BY MR. SELWA:

Cox v. White - 2014-CP-26-00318
KEVIN D. COX - DIRECT BY SELWA

9

1 Q: Now, Mr. Cox, you indicated that you had written Ms.
2 Carter, the appellate counsel, asking her to appeal specific
3 issues; is that correct?

4 A: Yes, I did.

5 Q: Okay. And when you wrote Ms. Carter, did she respond to
6 you in regards to those issues that you brought before her?

7 A: Yes. She responded to me and she told me that thank you
8 for the background information that I received in your case
9 and, as soon as I receive all your paperwork, I will get back
10 to you.

11 Q: Did she get back to you on that?

12 A: No, she did not get back to me. All she did, she filed
13 the writ of certiorari and she filed four issues. And out of
14 those four issues, she failed to file trial in absentia or
15 chain of custody that I requested her to file.

16 Q: So, you're telling the Court that you wanted Ms. Carter
17 to file an appeal on the issue of trial in absentia, correct?

18 A: Right.

19 Q: And she didn't do that?

20 A: Right.

21 Q: What did she do on the trial in absentia? Did she ---

22 A: I wanted her to file trial in absentia because there was
23 proof for my PCR when my trial counsel, he admitted that
24 should've asked for a continuance on the record, at which we
25 failed to do. He told the Court that he requested a

Cox v. White - 2014-CP-26-00318
KEVIN D. COX - DIRECT BY SELWA

10

1 continuance in the Judge's chambers, but if you turn to the
2 PCR transcript, it shows that he did not request a
3 continuance, that he persuaded the Judge, or pardon persuaded,
4 he told the Judge to continue in my absence, that I was
5 otherwise engaged that afternoon. And how did that prejudice
6 me? That prejudiced me because I was offered a plea for 15
7 years. Had he requested a continuance, that plea was still on
8 the table. I would not have -- if they had given me the plea
9 for 25 years, it's less than the 25 years. You couldn't offer
10 me a plea for 15 years with third offense trafficking.
11 Q: Mr. Cox, you indicated that he made statements on the
12 record, did he not request a continuance?
13 A: Yes, he did.
14 Q: Can you show us in the transcript?
15 A: Yes, I can. PCR transcript, Page 62, it says, I'm not
16 sure of the -- I think his name is Mr. Archer, Paul Archer.
17 He questioned Mr. Taylor. He said, Did you make a formal
18 motion for a continuance on the record with Judge Cottingham?
19 Mr. Taylor said, I can't remember if I did or not without
20 looking back at the transcript. He said, Well, would assume
21 that I did but I'm not -- I'd have to look at the transcript.
22 I don't know that we discussed it. He said, Well, let me ask
23 you this, I've read the transcript and you did not. Okay.
24 Was there a reason that you did not ask for a continuance?
25 You could at least put it on the record for a continuance and

Cox v. White - 2014-CP-26-00318

11

KEVIN D. COX - DIRECT BY SELWA

1 try to find him, correct? I don't know what I didn't ask for
2 a continuance, probably because I had asked the Judge in the
3 Judge chambers and Judge Cottingham said no. I mean, I
4 probably just was thinking more along the lines of what I was
5 going to do with the case at hand. All right. But as an
6 attorney, wouldn't it have been better in retrospect that you
7 would ask for a formal continuance and maybe you would've
8 gotten it? Well, in retrospect, I think I probably could
9 think of a hundred things I would do in almost every trial.
10 In retrospect, looking back at it, you always could've done
11 something a little better. I'm just talking about this
12 specific point. Sure, in retrospect, yes, I probably
13 should've -- I probably should've done it.

14 Now, and we go back to the trial transcript, it says, Mr.
15 Taylor? Yes, sir, Your Honor. The Court asked him, Are you
16 ready for trial?

17 MR. JAMES: Hold on. At what portion of the transcript
18 are we reading from?

19 A: I'm going to trial transcript Page 9, starting at Line 1.

20 MR. JAMES: Thank you.

21 A: Are you ready? It says, Mr. Taylor? Yes, sir, Your
22 Honor. Are you ready for trial? Mr. Taylor said, I am, Your
23 Honor. He said, I note that the Defendant is not here but you
24 have asked that we proceed in his absence, that he is
25 otherwise engaged this afternoon. Is that correct? Mr.

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1 Taylor says, That's correct, Your Honor. The Court says, And
2 so with your permission, you have asked us to go forth and
3 select this case? Yes, sir, Your Honor, by Mr. Taylor. So,
4 that alone shows perjury on Mr. Taylor's part. He tells the
5 Court that he requested a continuance and the Judge told him,
6 no, yet it shows where he did not requested a continuance but
7 told the Judge to proceed in my absence, that I was otherwise
8 engaged that afternoon. And, again, how that prejudice me?
9 Because I was offered a plea for 15 years. This plea was
10 still on the table had I came to court. I came to every
11 subpoena that was ever sent to me. I was never given another
12 subpoena, never told about a trial or anything. So, if I had
13 can came and accepted that plea, there's no way I would've
14 been charged with trafficking cocaine third offense because
15 you cannot give me 15 years with a 25 -- I mean, you cannot
16 give me 25 years or 15 years with trafficking third offense.
17 Q: Okay. And so that was not an appealable issue, correct?
18 A: What do you mean?
19 Q: Mr. Taylor did not object to going forward?
20 A: With the trial, no, he did not object.
21 Q: And so basically, you're claiming that his actions were
22 ineffective for not raising the objection, correct?
23 A: Explain yourself.
24 Q: You're claiming that his conduct as your attorney were
25 ineffective?

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1 A: Yes.

2 Q: Okay, for not objecting to it, preserving it for appeal;
3 is that correct?

4 A: No, I said he was ineffective for not -- on this issue
5 for not requesting a continuance for not objecting to it but
6 not requesting a continuance.

7 Q: Okay. And that prejudiced you and that's why you filed a
8 PCR against it, correct?

9 A: Right.

10 Q: And you had a PCR hearing; is that right?

11 A: Right.

12 Q: And how did they rule at the PCR hearing?

13 A: In the PCR hearing, the Judge said that Mr. Taylor was
14 more credible and that my -- what I said was more self-
15 serving.

16 Q: Okay. So, based on that, you requested Ms. Carter to
17 appeal that decision, correct?

18 A: Yes.

19 Q: And did she raise that issue?

20 A: No, she did not.

21 Q: Okay. Did the Court hear that issue at all?

22 A: They didn't have a chance to hear it because she wouldn't
23 raise it.

24 Q: Okay. What other issues do you claim that Ms. Carter did
25 not ---

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1 A: Chain of custody issue.

2 Q: Okay. Tell me about that.

3 A: The chain of custody issue was preserved at trial by Mr.
4 Taylor. I spoke to Ms. Carter about raising the issue of the
5 chain of custody. I explained to her that the State failed to
6 prove a complete chain of custody, that we have the chain of
7 custody form where the lead detective explains that he turned
8 this evidence into the evidence custodian on August the 14th,
9 2007 at 6 o'clock. The evidence custodian is saying something
10 completely different. He says he did not receive this
11 evidence until August the 17th at 2:40. So, somehow, someway
12 this evidence disappeared for three days, and I explained this
13 to Ms. Wanda Carter, I sent Ms. Wanda Carter the paperwork
14 explaining this and I also showed her in my trial where Mr.
15 Taylor preserved that issue because he objected to it, yet she
16 still failed to raise it.

17 Q: And so the Court did not address that issue as well?

18 A: Didn't have a chance to because she would not raise it.

19 Q: What other issues did Ms. Carter not raise?

20 A: Those were the two issues that I mainly was talking
21 about, and then the issue I showed her and showed you whereas
22 my PCR was denied because as the Judge said, Mr. Taylor was
23 more credible. However, I showed you the letters from 2008
24 until now where I was writing, saying that Mr. Taylor was
25 deceiving the courts and misrepresentations and they took --

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1 they barred him for the same thing that I was telling the
2 courts he was doing to me the whole time in 2014.

3 Q: So, you've raised an issue of the fact that he was
4 disbarred for dishonesty?

5 A: Right. And I've been saying this since 2008, the same
6 exact thing.

7 Q: And what specifically are you referencing regarding his
8 dishonesty that was ineffective in this ---

9 A: Because he misled the Court; he deceived the Court. He
10 told the Court that I had knowledge of my trial. I did not
11 have knowledge of my trial. I've explained this to the Court.
12 I came to every subpoena that was ever sent to me. Mr. Taylor
13 said I appeared on March the 3rd, I believe, which was a
14 Monday. He said that I appeared to have trial, yet Mr. von
15 Herrmann's son was sick. I never appeared. However, to
16 believe Mr. Paul Taylor's story that I appeared Monday only
17 gives him more reason to ask for a continuance. If someone is
18 gonna appear Monday for trial and he's appeared to every
19 subpoena that you have ever sent to him and you have a 15-year
20 plea on the table, then why not request a continuance in the
21 best interest of your client?

22 Q: And so did Ms. Carter raise that issue in regards to his
23 credibility ---

24 A: No, she did not.

25 Q: --- your prior claims or anything like that?

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1 A: I asked her to. I wrote her letters to, yet she still
2 refused to. I wrote the Supreme Court asking them why she
3 would not raise these issues. They sent me paperwork telling
4 me to file a complaint. I never filed the complaint; I just
5 filed another PCR.

6 Q: Now, you also mentioned that you had some authority by
7 which you could raise other issues; is that correct?

8 A: No, what I was telling you was that chain of custody and
9 trial in absentia issue would still be able to be raised
10 because those are the issues that I was trying to get Ms.
11 Wanda Carter to raise, and also a statement issued that she
12 used -- that my statement is the foundation of this whole
13 case, and I have paperwork showing where my statement is -- it
14 just doesn't match the evidence. It was falsified and I can
15 prove that it was falsified and that's basically that.

16 Q: And so regarding that issue, was that Mr. Taylor
17 ineffectiveness or Ms. Carter's ineffectiveness?

18 A: That was Mr. Taylor ineffectiveness. However, Ms. Carter
19 raised the issue of the statement but she did not investigate
20 the issue of the statement, so she just -- she raised it but
21 she raised it with no evidence. I gave her the evidence, I
22 still have the evidence, yet she failed to present the
23 evidence and just raise the issue.

24 Q: And what evidence are you referring to? What evidence
25 are you referring to?

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1 MR. JAMES: Your Honor, respectfully, I do have to object
2 to relevance. I can't find anything in the application by Mr.
3 Cox to indicate any complaint about appellate counsel's
4 failure to raise any issues arising about a statement that was
5 introduced at the original trial. Accordingly, it's not
6 before this Court for review.

7 THE COURT: All right. What do you say, Mr. Selwa?

8 MR. SELWA: Your Honor, Mr. Cox simply stated in his
9 application that Ms. Carter was ineffective for not raising
10 appealable issues and I think that's ---

11 THE COURT: I'll let him testify to that fact. Go ahead.

12 MR. SELWA: Thank you.

13 A: The evidence that I had to present to is real -- let me
14 start right here. It was a big thing with the prosecution,
15 Mr. Bert von Herrmann, trying to make the statement match the
16 evidence in my case. I kept telling everyone that the
17 evidence does not match the statement and they're doing
18 whatever they can do to make it match. And if you don't mind,
19 I would like to go to trial transcript Page 46. The purpose,
20 the purpose of this exhibit is to show the Court how the
21 prosecution misled the jury. Not only does the evidence not
22 match the statement but to try to convince the jury, Solicitor
23 Bert von Herrmann assures them that they don't need to worry
24 about the weight difference because drug dealers are always a
25 little off. And if you would read Mr. Bert von Herrmann's

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1 statement -- do you want me to read it, sir, or ---

2 THE COURT: I think I have it. You go ahead and testify.

3 A: Okay. And here I have -- if it please the Courts, I
4 would like to submit trial transcript Page 35, Lines 9 through
5 12, and Lines 21 through 25, again, where the Court -- they're
6 trying to make the evidence match the statement. Two-and-a-
7 half ounces, I'm not a math genius but two-and-a-half ounces
8 is 70 grams. They're saying -- what Mr. Bert von Herrmann is
9 trying to ensure the jury is drug dealers always add something
10 in the drugs. Well, he's not a specialist to do this. Now,
11 Ms. Lisa Floyd, who is a specialist, after she tested the
12 drugs and weighed it, she still came up and said that --
13 pardon me. If you go to trial transcript Page 105, Lines 8
14 through 11, where Mr. Bert von Herrmann asked the specialist,
15 Ms. Floyd, what is the total weight and she says 83.48 grams,
16 which is approximately 84 grams. Now, my reason for saying
17 this right -- for saying that is, had Detective Vescovi
18 (spelled phonetically) and Detective Curry done the evidence,
19 they would've saw that the evidence don't match my statement.
20 And, they kept saying, well, what reason do you have -- they
21 was trying to figure out what reason did I have to make a
22 statement. In the police report, that they never showed
23 anyone, my codefendant -- they asked -- they questioned my
24 codefendant concerning the purse where these drugs was at. My
25 codefendant stated that she received this purse from the lady

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1 that we just left at the station. You understand me? Which
2 is basically saying I had no reason to confess to the drugs
3 except for the fact that I was given a promise that she would
4 be released because she was pregnant. There is no direct
5 evidence towards me except for my statement. The
6 circumstantial evidence doesn't match anything to me. The
7 only direct evidence they have is my statement, the statement.
8 The evidence does not match the statement. I told them this.
9 They refused to look at this. I asked Ms. Wanda Carter to
10 raise this. I mean, I don't know what else to say.

11 BY MR. SELWA:

12 Q: So, you're saying -- when you say they, you're talking
13 about Mr. Taylor and Ms. Carter?

14 A: Mr. Taylor and Ms. Carter.

15 Q: But this was an issue that was presented to the jury.
16 The jury weighed that evidence, correct?

17 A: Right.

18 Q: Okay.

19 A: Well, the jury only weighed one side of the evidence,
20 sir. The jury did -- the jury only got the prosecution's side
21 and not only did the jury get the prosecution side, the jury
22 got -- they got less of what was mandated by the State, you
23 see what I'm saying? The State -- he -- Mr. Bert von Herrmann
24 told the jury basically not to worry about the weight of the
25 drugs, you see what I'm saying? He told them not to be

1 concerned with that because the evidence matches the statement
2 and that's all you need to be concerned about when it did not
3 match the statement. So, he basically misled the jury into
4 believing that the evidence matched the statement.

5 Q: And so when you say that there was one side of it, you're
6 talking back to the trial in absentia argument, correct?

7 A: Say it again?

8 Q: When you are saying that the evidence presented was only
9 one-sided, you are claiming ---

10 A: Ineffective assistance of trial counsel.

11 Q: Ineffective assistance of counsel for failing to ask for
12 a continuance; is that right?

13 A: Right.

14 Q: And because of that, would you have testified at trial?

15 A: Would I have testified at trial? Yes, of course, I
16 would've testified at trial. I've told them at my last PCR
17 hearing, I told my lawyer that before they had a trial that I
18 would've testified at trial.

19 Q: Okay. And how would that testimony have changed the
20 outcome of the case?

21 A: How would my testimony have changed the outcome of the
22 case? It would've changed the outcome -- it would've changed
23 the outcome of the case because I would've been able to show
24 the jury that the statement was not true. I would have been
25 able to be there to see the evidence that my -- the witnesses

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1 were presenting against me. I would've been able to get Mr.
2 Paul Taylor to cross examine the two most valuable-ist [sic]
3 people in my case that he failed to cross examine, which was
4 the lead detective and the evidence custodian. There's many
5 things I could've done. I could've took the 15-year plea that
6 was still on the table instead of having 25 years. There's
7 many things that I could've done.

8 Q: Had you planned on taking that plea?

9 A: Did I plan on taking that plea? I can't really say right
10 now until that day. I really can't say that until I was
11 there.

12 Q: And so you are claiming that your testimony at trial
13 would have raised enough issues that you feel you would have
14 prevailed in your trial; is that right?

15 A: Yes, of course, because there was no evidence against me
16 except for my statement.

17 Q: Did Ms. Carter explain to you why she didn't appeal that
18 issue?

19 A: No, she didn't.

20 Q: Do you have any correspondence going back and forth
21 regarding why she didn't?

22 A: Yes, I do. Actually, Ms. Wanda Carter -- I wrote Ms.
23 Wanda Carter concerning why she would not raise these issues.
24 This is the first time I wrote Ms. Carter concerning why she
25 didn't raise these issues. She wrote me back January the 28th

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1 and said I raised the meritorious issues on your appeal. I
2 will contact you when the Court make a decision. I wrote her
3 back to get no response and this is when I wrote the Supreme
4 Court. The Court denied my writ of certiorari, and Ms. Wanda
5 Carter, I don't know if she as upset or not. She wrote me a
6 letter telling me that my case was denied and that she no
7 longer has anything to do with my case and that I had one year
8 to file my habeas corpus. I wrote Ms. Wanda Carter another
9 letter after that dated August the 12th asking her why she was
10 so abrupt to leave my case because I had won my belated
11 appeal. And I could not file anything else until we had taken
12 care of that. So, she wrote me back with the *White vs. State*
13 raising -- the issue that Ms. Wanda Carter raised in the *White*
14 *vs. State* was trial judge erred in allowing the jury hear
15 prejudicial testimony and comments regarding appellant's
16 possession of heroin and marijuana, which they said was not
17 preserved. However, the issue that was preserved, that could
18 have been raised on the *White vs. State* was the chain of
19 custody issue because trial counsel, Mr. Paul Taylor, objected
20 to it at trial, yet she still failed to raise it even though I
21 begged her before we got to this point right here of the *White*
22 *vs. State*.

23 Q: Okay. Did she indicate that the issue of the trial in
24 absentia had been preserved, if she could appeal that issue?

25 A: No, she basically didn't tell me none of that, no.

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1 Q: And you're stating basically that her actions amounted to
2 ineffective assistance of counsel?

3 A: Her actions amounted to ineffective assistance and it
4 prejudiced me because it did not give the higher court the
5 opportunity to hear my trial in absentia and chain of custody
6 issue. So, basically, it prejudiced me to a fair trial and
7 hearing or to a fair hearing.

8 Q: Related to a PCR ---

9 A: Related to my PCR issues.

10 Q: And are you -- are you wanting to bring up any other
11 issues at this point? You had indicated you had some
12 authority to bring up other issues or address other things
13 regarding your claims today?

14 A: Outside of Mr. Wanda Carter?

15 Q: Yes.

16 A: The only issue that I have except for what I've told you,
17 trial in absentia, chain of custody, statement evidence, is
18 the fact of Mr. Paul Taylor and his fraud and deceit upon the
19 Court. I have letters -- this is a letter dated March the
20 27th, 2009 ---

21 MR. JAMES: Objection, Your Honor. The State doesn't
22 have any copy of this letter and I don't know where he's going
23 with this. This is all new ground to me.

24 A: This is what I told my ---

25 THE COURT: Let him look at the letters real quick.

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1 Go ahead and look at them.

2 MR. JAMES: If I may approach, Your Honor?

3 THE COURT: You may.

4 MR. JAMES: Let me take a look see.

5 A: This is the letter dated May the 27th, 2009 that I wrote
6 Ms. Melanie Huggins explaining to her, Dear Ms. Huggins, as
7 you are very well aware of, there seems to be a case involving
8 dishonesty, fraud, and deceit. A case where neither party
9 wishes to accept fault. Now, ---

10 MR. JAMES: Hold on a second. Mr. Selwa, do you wish to
11 lay a foundation for these letters or ---

12 A: The reason for the purpose in that letter where I wrote
13 Ms. Huggins is because Mr. Taylor is saying one thing and I
14 was saying another thing. So, to prove the point, I asked Ms.
15 Wanda -- Ms. Melanie Huggins to send me the paperwork to prove
16 -- he said that I had trial on a certain date and time.
17 Everything must be filed through the Clerk of Court, so I
18 requested from her to please send me the paperwork of the
19 trial roster and send me the paperwork that if any other
20 subpoena was ever sent to me. She wrote me back and said that
21 she didn't have any of those. This, if you want to see this,
22 this is my first PCR, again, where I'm claiming the same
23 thing. Counsel committed grave error when he engaged in
24 conduct involving dishonesty, fraud, deceit, and
25 misrepresentation. That's my first PCR dated October the

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1 19th.

2 MR. JAMES: So, the issue that you are raising -- and I
3 apologize if I'm asking questions out of order, Your Honor,
4 but the issue that you are attempting to raise now goes back
5 to that first PCR that your original trial counsel was
6 dishonest when he informed or you when he claimed that he told
7 you when your trial date was?

8 A: Right.

9 MR. JAMES: Okay.

10 A: That he was -- this was the order of dismissal from the
11 Judge concerning my first PCR. And Judge Culbertson said that
12 he denied my first PCR because of the credibility, said that
13 Mr. Paul Taylor was more credible than I was and that my
14 testimony was only self-serving.

15 BY MR. SELWA:

16 Q: And this goes back to your testimony that Mr. Carter did
17 not appeal that issue, correct?

18 A: My point is I have been telling the Court since 2008,
19 since I met Mr. Paul Taylor that he was not telling the truth.
20 I showed through paperwork evidence, everything that I
21 possibly could. I explained to them that he's deceiving you,
22 everything. Now, in 2014, it seems that the Court found this
23 out on their own. That he was deceiving the Courts. That he
24 was -- I don't want to get it wrong, say it wrong, that he was
25 engaging in deceit, fraud, and dishonesty, and they disbarred

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1 him in 2014 for the same issues that I was saying since 2008.

2 MR. JAMES: Your Honor, I do have to object again to
3 relevance because now this is taking the form of a newly
4 discovered evidence claim and it is not raised in the original
5 application and the State is not prepared to argue against
6 that claim.

7 A: It was raised in my amendment. I put an amendment to my
8 lawyer to address these same issues right here in the PCR.
9 So, if it's not on my PCR, it's not my fault, Your Honor,
10 because I did send him an amendment letter which was right
11 here to have these issues in my PCR that I'm having today.
12 This is the letter right here.

13 THE COURT: Mr. Selwa, would you like to respond?

14 MR. SELWA: Your Honor, this, I feel falls under Ms.
15 Carter's PCR ineffectiveness claim that she did not raise
16 meritorious appeals, one of which being the issue of notice
17 and the continuance from Paul -- I'm sorry, Mr. Taylor,
18 obviously that would've been an issue that would've arisen to
19 that appeal.

20 MR. JAMES: It's a little bit tangled to say the very
21 least. To the extent that Applicant is trying to challenge
22 that Ms. Carter was ineffective as PCR appellate counsel, that
23 is not a claim that is cognizable under the Uniform for Post-
24 Conviction Procedure Act and is barred by *Ace v State* (spelled
25 phonetically), just to the same extent as a claim of

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1 ineffective assistance of PCR counsel would be the only window
2 through which Mr. Cox still has an opportunity for relief is
3 with respect to those allegations that could have been raised
4 on the *White* appeal but which were not. And the State does
5 intend to call Ms. Carter for those, at least to some of those
6 issues. But to anything for ineffective assistance of PCR
7 appellate counsel to challenging -- I believe it was Paul
8 Taylor's performance at that hearing, that's not cognizable
9 and that's not before this Court. And as to any issues that
10 were raised and ruled upon by that Court in that order of
11 dismissal, that is barred by successiveness, Statute of
12 Limitations -- well, maybe not Statue of Limitation, that's
13 successive and by res judicata.

14 THE COURT: All right. I'm gonna sustain your objection.

15 MR. JAMES: Thank you, Your Honor.

16 THE COURT: You may continue.

17 MR. SELWA: Thank you, Your Honor.

18 BY MR. SELWA:

19 Q: Do you have anything which you wish to raise before ---

20 A: No, I keep hearing the lawyer say that we can only raise
21 the issue of Wanda Carter or whatever the situation may be but
22 the foundation of the whole case is ineffective assistance of
23 trial counsel. And the reason why Ms. Wanda Carter is
24 ineffective is because she did not raise the issues of
25 ineffective assistance of trial counsel that I raised on my

1 first PCR. So, really, there's no way to get around that.
2 You know, I understand what you're saying but there's really
3 no way to get around that. I've raised these issues in my
4 first appeal. I was told that I was incredible but now here
5 it is you have paperwork showing that, hey, this guy was
6 telling the truth and this lawyer was deceiving the courts the
7 whole time. That must account for something. If I was
8 guilty, if I'd done something wrong, as I've told the Court,
9 then, by God, use the law, convict me with the law, don't
10 manipulate the law to your own hands and convict me. Convict
11 me by using the law and that did not happen. Why would I come
12 to every subpoena, why would I -- if you want take Mr. Paul
13 Taylor's version of the facts, why would I come to Court on a
14 Monday that you tell me I am going to accept the plea or go to
15 trial and then you refuse to request a continuance. You say I
16 came to every subpoena that you ever sent me. You told the
17 Judge that you just spoke to me on the phone and I told you
18 that I was on my way to court. Why would you not ask for a
19 continuance in the best interest of your client, especially
20 when you have 15 years on the table that your client may or
21 may not accept. It's a lot less than 25 years and I could not
22 have been given 15 years, as I have said before with the
23 current trafficking third because it is a mandatory 25-year
24 sentence. And not only that, if you want to go back to the
25 trial in absentia, I mean -- pardon me, sir -- if you want to

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1 go to the chain of custody issue, we must address the issue
2 that you have the lead detective saying, look, I turned this
3 evidence over on August the 14th but you have evidence
4 custodian saying, look, I didn't receive it till August the
5 17th.

6 MR. JAMES: We've heard some details. That's all on
7 these allegations at this time, Your Honor.

8 THE COURT: All right. Anything else?

9 MR. SELWA: Nothing further, Your Honor.

10 THE COURT: Cross examination?

11 MR. JAMES: I have no questions for this witness.

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

13 All right. If you'll call your next witness.

14 MR. SELWA: Nothing further.

15 THE COURT: All right. The State is recognized.

16 MOTIONS:

17 MR. JAMES: Before we proceed and call our witness, the
18 State respectfully motions for a directed verdict as to the
19 allegation that Ms. Wanda Carter, appellate counsel, was
20 ineffective by failing to raise the issue of trial in
21 absentia. Mr. Cox has plainly stated that that issue was not
22 preserved for appeal because his attorney indicated on Page 9
23 of the transcript that he wished to proceed in his absence.
24 And so, Ms. Carter couldn't have been ineffective for failing
25 to raise an unpreserved issue.

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1 THE COURT: All right. What do you say to that, Mr.
2 Selwa?

3 MR. SELWA: Your Honor, I think they brought that up in
4 the PCR of Mr. Taylor. I think that would've been an
5 appealable issue of that PCR hearing and Ms. Carter obviously
6 did not appeal that issue, and that's the gist of his claim.

7 THE COURT: All right. I'm gonna grant your motion.

8 MR. JAMES: Thank you, Your Honor.

9 The State would call Ms. Wanda Carter. Just to make
10 abundantly clear on the record, Ms. Carter is not present here
11 in the courtroom but rather will be conducting this testimony
12 by telephone. And if I may beg the Court's indulgence to give
13 her a call.

14 THE COURT: Yes.

15 MR. JAMES: If we may approach to figure out the
16 mechanics of this.

17 THE COURT: All right.

18 MR. JAMES: I can put her on speaker. Do you want me to
19 sort of set it up here by one of the mics or by you or ---

20 COURT REPORTER: That mic.

21 MR. JAMES: Okay. Give me just one second.

22 THE COURT: Yes.

23 (REPORTER'S NOTE: Phone call placed to Ms. Carter.)

24 MS. CARTER: Wanda Carter speaking.

25 MR. JAMES: Good afternoon, Ms. Carter; this is Johnny

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WANDA CARTER - DIRECT BY JAMES

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1 James with the Attorney General's office. You are on speaker
2 phone in a courtroom in Conway, South Carolina. How are you
3 doing this afternoon?

4 MS. CARTER: I'm doing fine. Thank you. Hold on, let
5 me close my door.

6 I am back with you, Mr. James.

7 MR. JAMES: All right. If you would, please, I believe
8 the Clerk of going to swear you.

9 WANDA CARTER, HAVING BEEN DULY SWORN,

10 TESTIFIED AS FOLLOWS:

11 DIRECT EXAMINATION OF WANDA CARTER BY MR. JAMES VIA TELEPHONE:

12 Q: All right. And can you hear us just fine, Ms. Carter?

13 A: I can hear you just fine, thank you.

14 Q: All right. How long have you been practicing criminal
15 law?

16 A: I've been here at Appellate Defense for over 30 years.

17 Q: What is your current position at Appellate Defense?

18 A: I'm Deputy Chief Appellate Defender.

19 Q: And about how long have you been in that position?

20 A: For the last decade.

21 Q: And do you keep abreast of current issues in criminal
22 law?

23 A: I'm sorry?

24 Q: Do you keep abreast of current issues in criminal law?

25 A: Yes, I do, absolutely.

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WANDA CARTER - DIRECT BY JAMES

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1 Q: What usually happens in your office when a new appeal
2 case is received?

3 A: We will review the transcript of the trial proceedings
4 and isolate which issues have merit to raise on appeal before
5 our Appellate Court.

6 Q: And is that what you did when you received this case?

7 A: That is correct, yes.

8 Q: When writing any type of appellate document, what all
9 resources do you use?

10 A: Well, of course, we have the transcript and we review the
11 objections that were made at trial, and we are familiar with
12 the current case law that's applicable to the issues that have
13 been raised in the case based on the evidence.

14 Q: Are you limited to the record before the lower court?

15 A: Yes, we are. Yes, we are.

16 Q: All right. In his application for post-conviction
17 relief, Mr. Coleman [sic] complains that you failed to raise
18 certain issues with respect to chain of custody. Before we
19 get into that, I do want to ask you, do you recall what issues
20 you did raise on his *White* appeal?

21 A: I did raise the most important issue of the case that I
22 believed and it happened to be a prior bad act sort of a
23 question that I presented to the Court on appeal. There was
24 some mention of marijuana being found pursuant to a search of
25 the vehicle that Mr. Cox was driving at the time of the

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WANDA CARTER - DIRECT BY JAMES

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1 traffic stop. And the position that I took was that this was
2 prejudicial information that the jury should not have heard at
3 trial because he was on trial for other drug offenses, that
4 being crack cocaine and cocaine and there was no mention of
5 marijuana and this information was extremely prejudicial to
6 his case.

7 Q: And you said that this was the most important issue, so
8 does that reflect your belief that it was the best issue
9 available to Mr. Cox?

10 A: Yes. That was the best issue and really the only issue
11 of merit that I saw in the case.

12 Q: Did you consider raising an issue that the State
13 presented insufficient evidence of the chain of custody for
14 the drugs in the case?

15 A: No, not really. I've reread the transcript in the case.
16 Chain of custody issues, that was not really an issue with
17 this case. It's hard to prove a chain of custody objection
18 and that really did not apply to this case. It seemed to be
19 pretty straightforward with respect to the chain.

20 Q: So, you felt the chain of custody was well-established?

21 A: I don't know that it was, which is also another issue
22 with respect to appellate practice, whether or not a
23 particular issue was properly preserved for appellate review.
24 That also factors into the decision-making process with
25 respect to raising those issues on appeal.

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WANDA CARTER - DIRECT BY JAMES

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1 Q: Do you believe that the chain of custody issue was not
2 preserved for appeal?

3 A: There was -- there was some problem with adequate
4 appellate preservation for that issue, not that the issue
5 would've been meritorious or successful but that always comes
6 up as part of the appellate process and what we have to review
7 in presenting these issues to our appellate courts.

8 Q: In this case, and this is going back to the issue that
9 you did raise with respect to the mention of the marijuana,
10 the Court of Appeals dismissed because there was no
11 contemporaneous objection to that issue, correct?

12 A: That is correct.

13 Q: Did that surprise you or ---

14 A: Not particularly, there was an objection made and it was
15 presented to the Court on the record but as far as the
16 objection being contemporaneous with the presentation at
17 trial, there was an issue with respect to that but the
18 objection was made although not quite contemporaneously with
19 that evidence coming out at trial. However, as long as I have
20 something in the record with respect to an objection, I try to
21 at least stretch and present the issue to the Court and just
22 wait for the Court to make the final decision on that. So, if
23 I have an objection and the issue is a really good issue, I
24 will not abandon the issue just because it's not perfectly
25 preserved. I take the opinion that it is preserved.

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WANDA CARTER - CROSS BY SELWA

1 Q: And has that strategy worked for you in the past when
2 representing other defendants on appeal?

3 A: In that past, mostly it has not. But on a rare occasion,
4 there are times when the Court may present a matter for the
5 benefit of the bench and the bar, it just really depends, but
6 usually not but it has happened before. So, I wouldn't rule
7 it out.

8 Q: And so despite the sort of stretch on error preservation,
9 given your thorough review of the transcript and the records
10 before you, you would still hold to your opinion that the
11 issue that you raised was the best issue available to Mr. Cox?

12 A: Oh, it was the best issue, and really the only issue in
13 the case. I can't raise anything frivolous, so this was all
14 there was in this case.

15 Q: It was the only non-frivolous issue?

16 A: That's correct, yes.

17 Q: I have no further questions for this witness. Please
18 answer any questions that Mr. Selwa may have for you.

19 A: Thank you.

20 THE COURT: All right. Mr. Selwa?

21 CROSS EXAMINATION OF WANDA CARTER BY MR. SELWA:

22 Q: Hi, Ms. Carter. Daniel Selwa here.

23 A: Good afternoon.

24 Q: I do have some questions. One, in regards to the -- this
25 is backing up to the trial when Mr. Taylor objected for --

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WANDA CARTER - CROSS BY SELWA

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1 objected or tried to suppress the evidence because of the
2 chain of title, wasn't that properly preserved?

3 A: That was somewhat preserved. Are you referring to a
4 particular page in the transcript?

5 Q: Yes. If you would look at Page 98, Paragraph 9 -- Lines
6 9 through 14.

7 A: All right. I'm there. Thank you.

8 Q: All right. And as you can see there, Mr. Taylor raised
9 an objection or tried to suppress the drugs based on the chain
10 of custody, and was that not properly preserved for appeal?

11 A: Looking back to the beginning of the transcript, the
12 court reporter's index, I'm showing that Page 106 reflects
13 when the drugs were received into evidence. Is that what you
14 have? I don't know if my transcript coincides with yours.

15 Q: One second.

16 A: I'm sorry. I think it's Page 104.

17 MR. JAMES: You're referring to State's Exhibits Number
18 11 and 12?

19 A: Yes, I see that.

20 BY MR. SELWA:

21 Q: Okay. So, you have a situation where Mr. Taylor did not
22 object at that point but raised the issue prior to that; is
23 that correct?

24 A: There was a prior, a prior motion. There was a motion to
25 suppress the drugs. I see that at Page 98.

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WANDA CARTER - CROSS BY SELWA

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1 Q: Okay. Would that not have properly preserved that issue
2 for appeal?

3 A: It could be argued, yes, that that was properly
4 preserved, but I don't see an objection on Page 104. On Page
5 104, I see no objection when the State moves to include
6 Exhibits 11 and 12 into evidence.

7 Q: Okay. Is that ---

8 A: I don't know what my thought process was at the time, but
9 I'm thinking this must've been significant.

10 Q: Is that something you could've at least raised under this
11 appeal?

12 A: At Page 104, Line 7, I see no objection. So, what to do
13 with that -- I don't know if that meant trial counsel waived
14 his prior motion to suppress. I mean, I can't speak for
15 counsel, and I can't tell you what I was thinking back when I
16 read this and wrote the brief, but I'm thinking this might've
17 had some bearing on why this issue was not raised.

18 Q: Okay. Would it have been safe to err on the side of
19 caution there and raise that?

20 A: I really didn't see a problem with the chain of custody
21 not so much as to rise to the level of raising the issue on
22 appeal.

23 Q: Okay. And by that -- can you further explain what you
24 mean by that?

25 A: I'm sorry. Could you repeat that?

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WANDA CARTER - CROSS BY SELWA

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1 Q: With that being said, can you further explain what you
2 mean by that that he would not have prevailed is what you're
3 saying?

4 A: Well, I mean, I know that the rule is that the chain of
5 custody has to be proved as far as practical, and I did not
6 see that as an issue that was meritorious.

7 Q: Okay. Excuse me one second.

8 THE COURT: Sure.

9 (REPORTER'S NOTE: Mr. Selwa confers with Applicant.)

10 BY MR. SELWA:

11 Q: Okay, Ms. Carter, I'm back. I apologize about that.

12 A: That's fine.

13 Q: The other issue -- and do you recall if Mr. Cox had
14 written you regarding a request to specifically raise that
15 issue on appeal?

16 A: I didn't hear your question; I'm so sorry.

17 Q: Do you recall if Mr. Cox had addressed or sent you a
18 letter asking you to address that issue on appeal?

19 A: Oh, I don't recall. This was a while back and I get a
20 lot of letters. If he says that he wrote a letter to me about
21 this, I can't deny that. I'll just have to take him at his
22 word. So, I don't recall that.

23 Q: Okay.

24 A: But he may have. I'm not saying that Mr. Cox didn't.

25 Q: If Mr. Cox did write you a letter, would you have

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WANDA CARTER - CROSS BY SELWA

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1 responded and corresponded with him in regards to why you
2 would not raise that or what your issues were with not raising
3 that?

4 A: In some cases, I do; and in other cases, I do not. I
5 make the final decision as to which issues have legal merit
6 and which issues should be raised and I may have written him a
7 letter thanking him for the background information and his
8 contribution, but that doesn't have any bearing on my final
9 decision unless, unless I research and find to the contrary.
10 That would not have been the case here.

11 Q: Okay. Now, there was also an issue regarding the trial
12 in absentia and the appeal of that.

13 MR. JAMES: Objection. We've already achieved a directed
14 verdict as to that issue.

15 MR. SELWA: I'll withdraw the question.

16 THE COURT: Sustained.

17 A: Can you repeat that?

18 BY MR. SELWA:

19 Q: I'm sorry. It was objected to and sustained by the AG's
20 office. I'll move on.

21 A: Did you say there was another issue?

22 Q: No, I'm sorry. I raised an issue and the AG's office
23 objected and the Court ruled in their favor.

24 MR. JAMES: Just courtroom procedure, Ms. Carter. He's
25 moving on to his next question.

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BY THE COURT

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1 A: Thank you.

2 MR. SELWA: Court's indulgence one minute.

3 THE COURT: Sure.

4 MR. SELWA: At this time, no further questions.

5 THE COURT: All right.

6 MR. JAMES: I have no further questions for this witness,
7 Your Honor.

8 BY THE COURT:

9 THE COURT: All right. Thank you very much. You have a
10 good day, Ms. Carter.

11 MS. CARTER: Thank you very much, my pleasure.

12 MR. JAMES: May I release her from subpoena by hanging
13 up?

14 THE COURT: Any objections? She's already hung up.

15 MR. SELWA: No, sir.

16 MR. JAMES: She's already hung up. All right.

17 THE COURT: Any other witnesses?

18 MR. JAMES: State has no other witnesses, Your Honor.

19 THE COURT: All right.

20 Anything else, Mr. Selwa?

21 MR. SELWA: Nothing further, Your Honor.

22 THE COURT: All right. Thank you very much.

23 I'll take it under advisement and I'll study it and I'll
24 rule by the end of the week.

25 Thank you.

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BY THE COURT

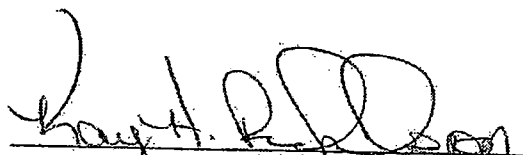
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1 MR. JAMES: Thank you, Your Honor.
2 (ADJOURNED - 2:32 P.M.)
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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Kevin D. Cox versus State of South Carolina, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on September 18, 2017.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Kay H. Richardson

Official Court Reporter

February 26, 2018.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Kevin Davonne Cox,) Case No.: 2014-CP-26-00318
S.C.D.C. No. 232745,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

FILED
CLERK OF COURT
HORRY COUNTY, SC
2017 OCT 27 PM 1:35

This matter comes before the Court by way of an application for post-conviction relief filed by Kevin Davonne Cox ("Applicant") on January 21, 2014. Respondent made its return on or about February 8, 2017. The Court convened an evidentiary hearing into the matter on Monday, September 18, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Daniel A. Selwa, II, Esquire. Johnny E. James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's appellate counsel, Wanda H. Carter, Esquire ("Counsel") also testified.¹ The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the October 2007 term of the Horry County Grand Jury for distribution of methamphetamine or cocaine base

¹ Counsel was not physically present in the courtroom but rather testified by phone by mutual consent of the parties.

(2007-GS-26-4399), and trafficking cocaine, 10 to 28 grams (2007-GS-26-4401). Robert Paul Taylor, Esq. represented Applicant. William Bertram von Herrmann and Candice A. Lively, of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

Applicant was tried in his absence before the Honorable Edward B. Cottingham and a jury. The jury found Applicant guilty as indicted on March 5, 2008. Judge Cottingham sentenced Applicant to a term under seal. Applicant appeared before the Honorable Steven H. John on February 12, 2009, for the unsealing of his sentence. He was again represented by Robert Paul Taylor, Esq. Michael J. O'Sullivan represented the State. Judge John unsealed and pronounced Applicant sentenced to imprisonment for concurrent terms of 25 years on each charge.

Applicant filed a notice of appeal dated February 13, 2009, and clocked March 9, 2009. By order filed May 20, 2009, the South Carolina Court of Appeals dismissed Applicant's appeal "[d]ue to the failure of appellant to provide a motion to file the notice of appeal out of time with the Court in the above matter, and as requested by letter from this office dated April 23, 2009." The Remittitur was issued on June 5, 2009.

First PCR Application: 2009-CP-26-10212

Applicant filed his first application for post-conviction relief on October 19, 2009 (2009-CP-26-10212). He alleged the following grounds for relief in his application (excerpted verbatim):

1. "Ineffective assistance"
 - a. "Counsel failed to object to inadmissible testimony; hearsay; improper comments, and [erroneous] jury instructions."
 - b. "Counsel failed to prepare for trial or seek continuance."
 - c. "Counsel violated the integrity of the courts, the integrity of the Rules for Professional Conduct, and the integrity of his client"

- i. "Applicant contends that counsel never notified him as to a trial date, nor was applicant given sufficient notice of trial pursuant to South Carolina Rules of Criminal Procedure."
- d. "Counsel was ineffective by counsel's failure to move for dismissal of applicant's indictment based on solicitor's noncompliance with constitutional and statutory laws, jurisdictional in nature, in obtaining indictment."
- 2. "Violation of Constitutional Rights"
 - a. "... as stated Applicant was tried in absentia, however Applicant's co-defendant received the same notice to appear for roll call, and on numerous occasions failed to appear. Co-defendant was never tried in absentia oppose to that of Applicant."

Respondent made its return on November 23, 2009, and an evidentiary hearing into the matter was convened on February 9, 2010, before the Honorable Benjamin H. Culbertson. Applicant was present at the hearing and represented by Paul Archer, Esq. Christina J. Catoe, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and R. Paul Taylor, Esq., also testified. By written order dated March 4, 2010, and filed March 19, 2010, Judge Culbertson denied and dismissed the application.

Applicant filed a timely notice of appeal and a petition for writ of certiorari was filed by Wanda H. Carter, Esq. on Applicant's behalf, which raised the following issues to the Supreme Court of South Carolina:

- 1. "The PCR court erred in dismissing petitioner's claim that he did not voluntarily and intelligently waive his right to a direct appeal in the case."
- 2. "Trial counsel erred in failing to investigate into petitioner's motivation for giving a statement to police because it was clear that petitioner confessed in order to activate a promise made by police to free his pregnant girlfriend, who would have been charged in the case, from being prosecuted, which in turn rendered his statement involuntarily given."
- 3. "Trial counsel erred in failing to make a contemporaneous objection to evidence of prior bad drug acts which surfaced at trial, especially when it was clear that this evidence was more prejudicial than probative and served as a negative attack on petitioner's character."

4. "Trial counsel erred in placing petitioner's character in issue in the most negative light during opening remarks in the case."

Respondent filed its Return on January 18, 2011. On July 28, 2012, the South Carolina Court of Appeals found Applicant did not knowingly and intelligently waive his right to a direct appeal and granted the petition *only* as to the White claim, and directed the parties to brief the direct appeal issue set forth in the petition. Cox v. State, S.C. Ct. App. Order filed July 28, 2012.

Accordingly, Applicant submitted a brief on October 26, 2012, raising the following issue:

- "The trial judge erred in allowing the jury to hear prejudicial testimony and comments regarding appellant's possession of heroin and marijuana at the time of his arrest because he was on trial for charges relating to possession of cocaine only."

Respondent filed its Brief of Respondent on February 27, 2013. By unpublished opinion, the Court of Appeals affirmed Applicant's conviction, finding the issue was not preserved. Cox v. State, Op. No. 2013-UP-445 (S.C. Ct. App. filed Nov. 27, 2013). The Remittitur was issued on December 17, 2013.

Federal Habeas Petition: 5:14-2069-RBH-KDW

Applicant subsequently filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on August 7, 2014 (C.A. No. 5:14-2069-RBH-KDW). In his Petition, Applicant set forth the following grounds for relief:

1. "Ineffective Assistance of Trial Counsel violation of due process"
 - a. "Appellate Counsel failed to raise issue on Petitioner's writ of Certiorari"
2. "Ineffective Assistance of Counsel"
3. "Ineffective Assistance of Counsel, due process violation"

Upon initial screening, the Honorable Kaymani D. West, United States Magistrate Judge, issued on July 15, 2014, a Report and Recommendation that the petition be dismissed because state court remedies had not yet been fully exhausted. Cox v. Cartledge, 5:14-2069-RBH-KDW, 2015

WL 2345283 (D.S.C. 2015) (incorporated in District Court Order). The Honorable R. Bryan Harwell, United States District Judge, denied Applicant's Petition on May 13, 2015 and accepted the Report and Recommendation for dismissal.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of Appellate Counsel"
 - a. "Appellate Counsel again proved to be ineffective by raising an issue that was not preserved by trial counsel, and failing to raise an issue that was preserved by trial counsel which was the chain of custody issue[.]"
 - b. "Applicant's belated appeal was dismissed due to trial counsel ineffectiveness to preserve issue and appellate counsel failure to raise preserved issues."
 - c. "Appellate counsel was briefed concerning these issues by Applicant, yet she refused to acknowledge them as meritorious issues."

At the evidentiary hearing, Applicant requested to also proceed on the allegations raised in his first PCR action. This Court denied that request, as those issues would at this point be successive and barred by the statute of limitations.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Appellate Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813

(1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .")).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

At the evidentiary hearing, Applicant testified he wished for Counsel to argue the trial in absentia was in error and that the only reason it was not preserved for appeal was due to the ineffectiveness of trial counsel. Applicant asserted that the chain of custody issue he wished for Counsel to appeal was preserved and meritorious.

Counsel testified she raised what she believed to be the best issue available to applicant—the admission of evidence of a prior bad act. On cross-examination, Counsel testified that she did not see a problem with the chain of custody in the case and that she did not believe the issue was preserved anyway. Counsel firmly asserted that the final call of which issues to brief is her own decision.

The Court finds that Counsel was effective. First, the Court finds that Counsel exercised reasonable professional judgment in excluding the chain of custody issue as not preserved and not likely to prevail on appeal. Second, Applicant conceded in his own testimony that the issue of the validity of his trial in absentia was not preserved for appeal due to the ineffectiveness of trial counsel, which was wholly litigated at the prior PCR. Neither of the two issues advanced by Applicant are clearly preserved for appeal and, therefore, are not clearly stronger than the issue that Counsel raised, despite its own rejection on issue preservation grounds. Accordingly, Applicant has failed to meet his burden and his request for relief is **DENIED**.

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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 the 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 the 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. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 23 day of Oct, 2017.


WILLIAM H. SEALS JR.
Presiding Judge
Fifteenth Judicial Circuit

 _____, South Carolina