

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

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Opinion No. 2012-UP-351 (S.C. Ct. App. filed 6/13/2012) ~~2012~~ Supreme Court
09-GS-04-1737.

THE STATE,

RESPONDENT,

V.

KEVIN JEROME GILLIARD,

PETITIONER

Appellate Case No. 2012-213344

APPENDIX

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1

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Kevin Jerome Gilliard, Appellant.

Appellate Case No. 2009-147948

Appeal From Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

Unpublished Opinion No. 2012-UP-351
Heard March 14, 2012 – Filed June 13, 2012

AFFIRMED

Tristan M. Shaffer, of Dessausure Law Firm, of
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Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Salley W. Elliott, and Assistant
Attorney Deborah R.J. Shupe, all of Columbia; and
Solicitor Christina T. Adams, of Anderson, for
Respondent.

PER CURIAM: Kevin Gilliard (Gilliard) appeals his conviction for trafficking crack cocaine, arguing the circuit court erred in refusing to provide a jury instruction on spoliation of evidence based on the State's failure to produce a videotaped recording of the booking area at the detention center. We affirm pursuant to Rule 220(b)(1), SCACR.

We find the circuit court properly refused Gilliard's request for a jury instruction because there was no evidence the State acted in bad faith, and Gilliard failed to show the exculpatory value of the destroyed videotape. Moreover, Gilliard's counsel specifically stated he did not think the videotape was destroyed in bad faith. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (holding that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process); *see also State v. Cheeseboro*, 346 S.C. 526, 538-539, 552 S.E.2d 300, 307 (2001) ("The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.").

AFFIRMED.

WILLIAMS, THOMAS, and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

KEVIN JEROME GILLIARD,

APPELLANT

Appeal from Anderson County

J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 2012-UP-351

Appellate Case No. 2009-147948

PETITION FOR REHEARING

Pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, the undersigned counsel would petition for rehearing in the above titled appeal on the ground that this Court may have misinterpreted appellant's argument regarding the state's destruction of a videotape to be a due process violation via federal law despite the fact that appellant's question raised on appeal (spoliation doctrine) addressed a state law issue involving a request for an instruction that would have allowed the jurors to draw a favorable inference on behalf of the defense upon learning of the state's destruction of this evidence in the case. In other words, this Court did not rule on the

doctrine of spoliation presented by appellant in this case on appeal. In support of this petition for rehearing, appellant would submit the following information.

1.) Anderson County Police Officer Brandon Surratt testified that appellant was searched pursuant to a traffic stop that occurred on April 19, 2009, and that appellant had approximately fifty grams of crack cocaine in his possession at the time of the stop and before he was transported to the Anderson County Detention Center. Later, however, Surratt changed his story and testified that Officer Lunz found the crack cocaine on appellant while they were inside the booking room at the detention center. However, neither Surratt nor appellant's counsel could obtain a copy of a videotape of the search of appellant in the booking room because it had been taped over, i.e. destroyed. Surratt's story *change about* where he found the crack on appellant's person was suspicious. This suspicion was compounded when the corroborating witness, i.e., Lunz, *chose* not to properly document the alleged search. This story was further supported by codefendant Robertson who denied having any knowledge of the fifty grams of crack; which enabled him to plead guilty to PWID instead of trafficking. The state contended that the latest version of the story was backed up by a videotape that was allegedly requested, but destroyed before appellant was ever aware that it existed.

2.) On appeal, the South Carolina Court of Appeals found no error and held as follows:

We find the circuit court properly refused Gilliard's request for a jury instruction because there was no evidence that the State acted in bad faith, and Gilliard failed to show the exculpatory value of the destroyed videotape. Moreover, Gilliard's counsel specifically stated he did not think the videotape was destroyed in bad faith. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (holding that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process); *see also State v. Cheeseboro*, 346 S.C. 526, 538-539, 552 S.E.2d 300, 307 (2001) ("The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. To establish a due process violation, a

defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.”).

3.) However, the Court of Appeals, incorrectly decided the spoliation issue on federal constitutional law instead of state law. The sole issue presented before this Court was “whether the trial court erred in refusing to instruct the jury that when material evidence is destroyed by the State, they may infer that the evidence would have been favorable to [the defense].” The issue of whether criminal juries should be advised of state law concerning the spoliation issue was encompassed within the question presented on direct appeal in the case.

4.) When a party fails to preserve material evidence for trial, an inference may be drawn that the evidence would have been unfavorable to that party. *Stokes v. Spartanburg Regional Medical Center*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006). “The courts of South Carolina have long recognized that a party is entitled to favorable presumptions about the contents of missing evidence when an opponent is responsible for the destruction of evidence that might otherwise be expected to have been relevant.” Kevin Eberle, *Spoliation in South Carolina*, 19 S.C.Law. 26 (2007). South Carolina Courts have primarily given spoliation charges in civil cases. *See, e.g., Stokes, Supra*, 368 S.C. 515, 629 S.E.2d 675; *Kershaw County Board of Education v. U.S. Gypsum*, 302 S.C. 390, 396 S.E.2d 369 (1990). However, spoliation charges are routinely¹ appropriate in criminal cases as well. In this case, a spoliation charge was appropriate; therefore, this Court should have found that the trial court erred in refusing the requested charge. Spoliation charges are given because when evidence is destroyed by one party, the other party is often incapable of proving what

¹ *See Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988) (Stevens, J. *concurring*) (finding that the loss of evidence did not prejudice the criminal defendant, *when* the trial judge read a spoliation charge); *People v. Martinez*, 71 N.Y.2d 937, 940, 524 N.E.2d 134, 136 (N.Y. 1998); *People v.*

that evidence would show. Without an inference against the destroying party, *the jury is often left with only one side of the story*. That is what happened in appellant's case. Therefore, it was crucial for the jurors to know that they could draw a negative inference from the State's destruction of the videotape in question. *See id.*, 368 S.C. at 522, 629 S.E.2d at 679. In appellant's case, the failure to instruct the jury on the spoliation of evidence was reversible error. If the state *chose* not to preserve material evidence in a criminal case, it should have been held to the *same* degree of accountability as a party in a civil case.

5.) In this case, the Court of Appeals relied on *Arizona v. Youngblood*, 488 U.S. 51(1988), and *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001) per the opinion. However, those cases interpret federal constitutional law rather than state law on the spoliation of evidence question. Although this Court's opinion reconstructed the question presented as a due process issue, *it was not*. Appellant expounded further on the nature of this issue when he argued the following:

Although factually similar to some due process challenges, the issue on appeal is not predicated upon the due process jurisprudence relied upon by the state in the Brief of Respondent. Instead, the issue is whether a spoliation instruction similar to those approved *Stokes* or *Kershaw*² should be given in a criminal case, or in other words, whether the state should be held to the same standard to preserve evidence in a criminal case as any party in a civil case. Appellant's Reply Brief at p. 5.

Therefore, appellant's claim, like the issue in *Stokes*, was governed by state law, and this Court's reliance on *Youngblood* and *Cheeseboro* was misplaced. Appellant's question presented might have seemed *superficially* similar to the due process claims in *Cheeseboro* *but in* reality these issues are just as distinct as state hearsay jurisprudence is from cases interpreting the Confrontation Clause.

Safford, 74 A.D.3d 1835, 902 N.Y.S.2d 866 (2010) (adverse inference charge appropriate when the State lost a video tape).

²*Kershaw County Board of Education v. U.S. Gypsum* 302 S.C. 390, 396 S.E.2d 369 (1990)

6.) In the Brief of Respondent, the state opened its argument with the following:

“Relying on civil case law and a law review article, [appellant] contends the circuit court erred in denying his request for a spoliation of evidence jury charge. He argues a spoliation charge was mandated by the state's failure to preserve the booking room videotape from the night he was arrested, and the differences between Surratt's incident report and his trial testimony regarding discovery of the crack cocaine. *This argument ignores applicable law regarding spoliation of evidence in criminal cases.*

The state does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the state destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. *State v. Moses*, 390 S.C. 502, 702 S.E.2d 395, 404 (Ct. App. 2010). ” BOR 6. (emphasis added).

Thus, essentially, the Court improperly followed the state's suggestion to view the spoliation issue as a due process issue without recognizing the distinctions between the doctrine of spoliation and the issue raised in *Moses*. BOR 6-8. In *Moses*, the defendant, “argue[d] the trial court erred in *refusing to dismiss* the charges due to the failure of the state to preserve or disclose videotaped evidence.” *Moses*, 390 S.C. 502, 515, 702 S.E.2d 395, 402 (emphasis added). *Moses* argued that destruction of evidence was a *due process violation* that warranted *dismissal*. However, appellant argued that he was entitled to a *jury instruction* based on a long standing doctrine in *common law*.

The *Moses* type due process challenge can readily be distinguished from the spoliation issue raised in *Stokes*³. As previously argued by appellant:

“In *Stokes*, this court found that a decedent's estate, in a medical malpractice case, was entitled to a new trial against a hospital when the trial judge refused to instruct the jury on the spoliation of evidence. Prior to decedent's death at the hospital, nurses prepared a vital signs flow chart and taken blood from the decedent. Both of these items were either misplaced or destroyed. The trial judge denied the decedent's requested spoliation charge. That denial was reversible error. This Court also commented that, it was crucial for the jury to know it could draw a negative

³ *Stokes v. Spartanburg Regional Medical Center* 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006)

inference from the hospital's failure to produce evidence which would show how the decedent died." BOA 8-9 (citations omitted).

Stokes relied upon a common law doctrine rather than a due process analysis. Also, a jury instruction was requested in *Stokes*.

Although factually similar to some due process challenges, the issue on appeal was not predicated upon the due process jurisprudence relied upon by the state in the Brief of Respondent⁴. Instead, the issue was whether a spoliation instruction similar to those approved *Stokes* or *Kershaw*⁵ should be given in a criminal case, or in other words, whether the state should be held to the same standard to preserve evidence in a criminal case as any party in a civil case.

7.) Although appellant's case arose from a criminal charge, the issue was essentially the same as the issue presented to this court in *Stokes*. The jurors were asked to determine if Surratt found the cocaine base on appellant's person, but evidence essential to that determination was destroyed by the state. The destruction of the videotape by the state prejudiced appellant by denying him any effective means of contradicting Surratt's second version of the facts.

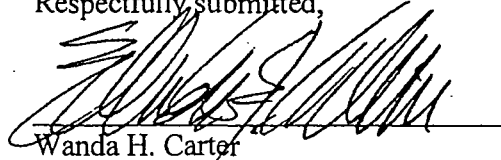
The fact that appellant's case was criminal in nature and *Stokes* was civil in nature only prejudiced the appellant more than the aggrieved party in *Stokes*. The essence of the rule is that the destruction of material evidence by one party makes the other party incapable of arguing his case. See Kevin Eberle, *Spoliation in South Carolina*, 19 S.C.Law. 26 (2007) ("The absence of evidence meant that the other party was hamstrung in the proof of his own case.") (citing *Halyburton v. Kershaw*, 3 Des 105, 3 S.C.Eq. 105 (1810)). Even without the missing evidence, the aggrieved party

⁴ In his brief, Appellant does cite to Justice Stevens concurrence in *Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988), but this was primarily to demonstrate that spoliation instructions are appropriate in criminal cases. BOA 8 & 10.

in *Stokes* had experts who could testify to the probable cause of death. Appellant did not have that option. A spoliation charge would have cured the problem. *See Youngblood*, 488 U.S. at 59-60 (Stevens, J. concurring).

WHEREFORE, inasmuch as the Court did not entertain the spoliation state law issue raised by appellant on appeal, counsel would request a rehearing in order to have the same addressed in the case.

Respectfully submitted,



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This 28th day of June, 2012.

⁵*Kershaw County Board of Education v. U.S. Gypsum* 302 S.C. 390, 396 S.E.2d 369 (1990)

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

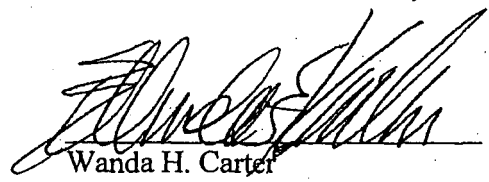
V.

KEVIN JEROME GILLIARD,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, on this 28th day of June, 2012.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

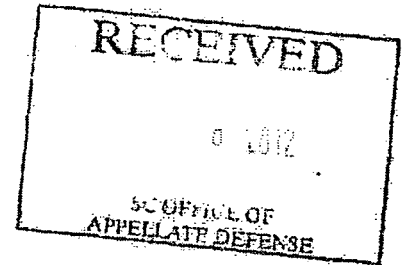
SWORN TO BEFORE ME this 28th day
of June, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 21, 2013.

The South Carolina Court of Appeals

The State, Respondent,
v.
Kevin Jerome Gilliard, Appellant.

Appellate Case No. 2009-147948



ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

I would grant rehearing H. B. Wood J.
Paul D. Thomas J.
James E. Schuler J.

Columbia, South Carolina

cc:

Wanda H. Carter
Tristan M Shaffer
Deborah R.J. Shupe
John W. McIntosh
Salley W. Elliott
Alan McCrory Wilson

FILED

October 9, 2012

19017

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ANDERSON COUNTY

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN JEROME GILLIARD,

APPELLANT

RECORD ON APPEAL

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State of South Carolina

County of Anderson

In the Court of General Sessions

State,

Plaintiff,

-VS-

Kevin Jerome Gilliard,

Defendant.

2009-GS-04-1736, 1737

December 7, 8, 9, 2009

Transcript of Record

BEFORE:

The Honorable J. Cordell Maddox, Jr., Judge

APPEARANCES:

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Assistant Solicitor for 10th Judicial Circuit
Attorney for the State

Andrew Potter, Esquire
Attorney for the Defendant

Renee H. Tollison
Circuit Court Reporter

1 morning.

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

3 DECEMBER 8, 2009

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

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

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

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

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

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

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

20 (WHEREUPON, the witness was duly sworn.)

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

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

3 MADAM CLERK: Thank you.

4 DEMETRIUS ROBERTSON,

5 Being first duly sworn, testified as follows:

6 IN-CAMERA EXAMINATION

7 BY MR. CAMPBELL:

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

10 A. Yes, sir.

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

13 A. Yes, sir.

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

16 A. Yes, sir.

17 Q. And was that your crack cocaine?

18 A. Yes, sir.

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

20 A. No, sir.

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

23 A. Yes, sir.

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

25 A. No, sir.

1 Q. Did he know that marijuana was in the car?

2 A. No, sir.

3 Q. As well as there was a set of scales and also a
4 forty-five caliber pistol?

5 A. Yes, sir.

6 Q. And were both of those yours?

7 A. Yes, sir.

8 Q. Did he know either one of those were in the car?

9 A. No, sir.

10 Q. And you're taking responsibilities for those items
11 -- those charges or those illegal items?

12 A. Yes, sir.

13 Q. Now, did you know anything about the crack cocaine
14 that was found in his pants?

15 A. No, sir.

16 Q. Did he tell you that he had crack cocaine on him?

17 A. No, sir.

18 Q. And you were charged with these -- you were charged
19 with the same crime; is that correct?

20 A. Sir?

21 Q. You were also charged with possession with intent to
22 distribute ---

23 A. Yes, sir.

24 Q. --- marijuana, the pistol charge and also PWID crack
25 cocaine?

1 A. Yes, sir.

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

3 A. Sir?

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

5 A. Yes, sir.

6 Q. And you are currently represented by attorney

7 Carolyn Galloway; is that right?

8 A. Yes, sir.

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

11 A. Yes, sir.

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

13 A. Yes, sir.

14 MR. CAMPBELL: I have no further questions.

15 THE COURT: Any questions?

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

18 THE COURT: Pardon?

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

20 THE COURT: Yeah, I do too. Thank you, sir.
21 You can go.

22 (WHEREUPON, the witness exited the courtroom.)

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

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

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

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

7 MR. CAMPBELL: That's correct.

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

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

14 MR. CAMPBELL: The State does not.

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

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

20 THE COURT: However you want to do that.

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

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

25 MR. POTTER: None.

1 MR. CAMPBELL: None from the State.

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

9 MR. CAMPBELL: Yes, sir.

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

11 MR. POTTER: If it pleases the Court.

12 THE COURT: Yes, sir.

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

15 THE COURT: All right. Yes, sir.

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

25 When this incident allegedly occurred, it's my

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

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

22 THE COURT: All right.

23 Yes, sir?

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

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

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

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

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

3 THE COURT: Within certain bounds, yeah.

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

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

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

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

12 MR. POTTER: Yes, sir.

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

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

17 THE COURT: Okay. Any objection to that?

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

20 THE COURT: Okay.

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

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

1 MR. POTTER: The chain people, no.

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

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

6 THE COURT: Okay.

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

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

11 THE COURT: Okay.

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

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

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

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

20 THE COURT: Yeah.

21 MADAM CLERK: Uh-huh (affirmative).

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

25 Okie doke. Bring them in.

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Preliminary Charge

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

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

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

11 Yes, ma'am.

12 MADAM CLERK: Thank you, Your Honor.

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

16 (WHEREUPON, the jury was duly sworn.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 All right. Ladies and gentlemen, thank you.

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

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

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

17 THE COURT: Okay. You can precede.

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

20 OPENING STATEMENT

21 BY MR. CAMPBELL:

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

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

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

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

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

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

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

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

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

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

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

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

25 And as he told you, the reasonable doubt definition

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

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

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

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

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

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

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

21 Thank you.

22 THE COURT: Yes, sir.

23 MR. POTTER: May it please the Court.

24 THE COURT: Yeah.

25 OPENING STATEMENT

1 BY MR. POTTER:

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

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

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

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

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

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

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

1 make that decision.

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

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

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

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

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

2 Thank you.

3 THE COURT: Call your first witness.

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

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

8 (WHEREUPON, the witness was duly sworn.)

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

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

15 **BRANDON WILLIAM SURRATT,**

16 Being first duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. CAMPBELL:

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

21 A. Yes, sir, I am.

22 Q. And what position are you employed as?

23 A. Deputy.

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

1 A. Approximately three years.

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

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

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

8 A. Yes, sir, I was.

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

11 A. Yes, sir.

12 Q. Is he present in the courtroom today?

13 A. That's correct.

14 Q. Can you identify him, please?

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

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

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

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

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

5 A. It was at Delia Street.

6 Q. Is that in Anderson County?

7 A. Yes, sir.

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

10 A. Yes, sir, I was.

11 Q. I mean the same type of uniform?

12 A. Yes, sir.

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

14 A. That's correct.

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

17 A. Yes, sir.

18 Q. And does your car have video capabilities?

19 A. It does not have video.

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

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

23 Q. How many cars is that?

24 A. Maybe seven or eight.

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

1 Sheriff's Office?

2 A. A hundred.

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

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

7 Q. Do you recall what day it was?

8 A. Sunday.

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

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

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

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

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

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

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

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

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

24 A. Yes, sir.

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

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

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

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

10 A. Yes, sir.

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

13 A. Yes, sir.

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

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

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

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

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

1 to search someone thoroughly?

2 MR. POTTER: Objection, Your Honor.

3 A. It does.

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

5 What's the objection?

6 MR. POTTER: Judge, I don't think he is

7 qualified to make that type of opinion or testimony to

8 this jury.

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

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

14 THE COURT: Yeah, I know. Yeah.

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

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

18 A. That's correct.

19 Q. Had any backup units arrived?

20 A. No, sir.

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

23 A. That's correct.

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

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

4 Q. Did backup eventually arrive?

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

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

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

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

14 A. That's correct.

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

17 A. Three other officers arrived on the scene.

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

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

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

23 A. No, sir.

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

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

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

10 A. Yes, sir.

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

14 A. Yes, sir.

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

17 A. That's correct. I was.

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

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

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

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

8 A. That's correct.

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

11 A. Yes, he was.

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

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

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

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

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

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

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

10 A. That's correct. I did.

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

14 A. Yes, sir.

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

17 A. There was nothing on the floor.

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

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

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

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

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

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

5 THE COURT: Any objection?

6 MR. POTTER: No objection, Judge.

7 THE COURT: All right. Without objection.

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

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

13 A. That's correct.

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

16 A. That's correct.

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

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

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

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

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

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

16 A. That's correct.

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

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

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

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

3 Q. You were present while they did it?

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

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

8 A. That's correct.

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

12 A. In the report?

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

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

18 Q. For cocaine ---

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

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

22 A. That's correct.

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

1 this there at the Sheriff's Office?

2 A. I did.

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

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

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

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

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

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

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

16 A. That's correct.

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

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

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

23 A. No, sir.

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

1 is that right?

2 A. That's correct.

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

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

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

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

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

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

14 CROSS EXAMINATION

15 BY MR. POTTER:

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

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

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

22 A. --- to deputies.

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

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

1 Q. Okay.

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

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

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

11 Q. Okay.

12 A. I believe it's in between.

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

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

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

19 A. That's correct, I did.

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

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

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

1 A. That's correct.

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

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

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

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

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

12 A. Yes, sir.

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

15 A. That's correct.

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

18 A. That's correct.

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

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

23 Q. Okay. But you signed the warrant?

24 A. Yes, sir, I did.

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

1 A. That's correct.

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

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

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

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

8 Q. Sure.

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

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

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

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

18 Q. Okay. Can I have the warrant?

19 A. Yes, sir.

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

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

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

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

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

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

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

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

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

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

18 THE COURT: All right.

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

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

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

24 THE COURT: Without objection.

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

1 for identification only.)

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

3 A. Yes, sir.

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

6 THE COURT: Any objection?

7 MR. CAMPBELL: None from the State.

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

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

11 THE COURT: Sure.

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

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

17 A. That's correct.

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

20 A. That's correct.

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

24 A. That's correct.

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

- 1 warrant was signed, correct?
- 2 A. That's correct.
- 3 Q. That is your signature on the warrant?
- 4 A. Yes, that's my signature.
- 5 Q. Now, the incident report that you completed --
- 6 again, through your training, incident reports are case
- 7 summaries to be used by you and the Solicitor's Office;
- 8 is that correct?
- 9 A. An incident report?
- 10 Q. Yes, sir.
- 11 A. Yes, sir. The Solicitor's Office gets a copy as
- 12 well as it goes to the State.
- 13 Q. Right. And typically these items are turned over to
- 14 defense attorneys as part of their discovery request,
- 15 correct?
- 16 A. I'm not sure what the defense attorney ---
- 17 Q. Okay. Typically they are because I got a copy from
- 18 the State.
- 19 A. Okay.
- 20 Q. When you complete an incident report, in your
- 21 training you were told to be as concise and as accurate
- 22 as possible, correct?
- 23 A. Yes, sir. Be as thorough as you can or as you can
- 24 remember.
- 25 Q. I understand. And the incident report -- when you

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

3 A. That's correct.

4 Q. --- approval?

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

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

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

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

18 Where did you field test this at?

19 A. At the Sheriff's Office.

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

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

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

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

4 A. Yes, sir.

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

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

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

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

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

23 A. That's correct.

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

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

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

2 MR. POTTER: Judge, this is my cross

3 examination.

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

5 THE COURT: All right.

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

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

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

12 A. I'm familiar.

13 Q. Is this something that you complete?

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

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

19 A. (No verbal response)

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

24 A. No, sir, I did not.

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

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

3 A. That's correct.

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

9 A. That's correct.

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

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

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

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

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

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

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

21 A. That's correct.

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

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

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

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

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

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

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

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

16 A. Okay.

17 THE JUROR: Here you go.

18 MR. POTTER: If you're through.

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

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

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

1 A. That's correct.

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

4 A. (No verbal response)

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

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

8 A. I didn't find them on Brown Street; that's correct.

9 I found them at the detention center.

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

12 A. That's correct.

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

15 A. That's correct, he is.

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

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

20 Q. Okay.

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

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

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

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

9 THE COURT: All right. Anything on redirect?

10 MR. CAMPBELL: Yes, sir.

11 REDIRECT EXAMINATION

12 BY MR. CAMPBELL:

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

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

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

20 A. Approximately.

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

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

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

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

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

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

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

9 A. That's correct.

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

13 A. That's correct.

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

16 A. Yes, sir, we did.

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

19 A. Yes, sir.

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

22 THE COURT: Yeah, sustained.

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

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

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

5 MR. POTTER: Objection, Your Honor.

6 A. It does not.

7 THE COURT: Pardon?

8 MR. POTTER: Objection, Your Honor.

9 THE COURT: What's the objection?

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

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

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

16 A. No, sir.

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

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

25 THE COURT: Sustained.

1 MR. CAMPBELL: I have no further questions.

2 THE COURT: All right.

3 MR. POTTER: Nothing further, Judge.

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

5 THE WITNESS: Thank you.

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

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

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

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

16 THE COURT: You can bring them in.

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

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

24 Yes, sir?

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

1 approach for a second?

2 THE COURT: Uh-huh (affirmative).

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

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

7 THE COURT: All right.

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

11 (WHEREUPON, the witness was duly sworn.)

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

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

18 MADAM CLERK: Thank you.

19 **ANDREW LUNZ,**

20 Being first duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. CAMPBELL:

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

25 A. Yes, sir.

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

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

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

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

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

7 A. Yes, sir.

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

9 A. Yes, sir, I was.

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

12 A. Yes, sir, I did.

13 Q. Is he in the courtroom today?

14 A. Yes, sir, he is.

15 Q. Can you please identify him?

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

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

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

24 Q. And how big is this booking area?

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

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

2 Q. Is it long too?

3 A. It's short on both sides.

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

5 A. Stop.

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

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

8 Q. And can you briefly just tell the ladies and

9 gentlemen of the jury what do y'all do during the booking
10 process at the jail?

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

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

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

19 Q. Never seen him before?

20 A. No, sir.

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

23 A. Yes, sir, it was.

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

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

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

8 A. Yes, sir.

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

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

21 Q. Did he eventually spread his feet?

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

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

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

4 A. Yes, sir, he was.

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

7 A. Yes, sir.

8 Q. Doing the pat down?

9 A. Yes, sir.

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

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

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

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

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

1 Can you please identify what this is, sir?

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

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

4 A. Yes, sir.

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

6 A. No, sir, I did not.

7 Q. Deputy Surratt handled all of that?

8 A. Yes, sir. We saw it at the same time. And I still

9 had my hands conducting the pat down search, and Deputy

10 Surratt bent over and picked it up out of the floor.

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

12 search?

13 A. Yes, sir, I did.

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

15 search?

16 A. Yes, sir.

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

18 A. No, sir.

19 Q. Now, when you find narcotics or something like this

20 comes off of the person being brought into the detention

21 center to be booked, do you report it to your supervisor?

22 A. Yes, sir, we do.

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

24 A. No, sir, I did not.

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

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

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

7 A. Yes, sir, I did.

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

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

13 Q. Was anything found on him?

14 A. No, sir.

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

17 A. No, sir, I did not.

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

19 A. No, sir, I did not.

20 MR. POTTER: Objection.

21 THE COURT: What's your objection?

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

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

1 legitimate question.

2 Go ahead.

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

5 Please answer any questions Mr. Potter may have.

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

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

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

25 (WHEREUPON the jury exited the courtroom at

1 approximately 12:54 p.m.)

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

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

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

19 All right. See you at two thirty.

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

22 THE COURT: You can bring them in.

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

25 CROSS EXAMINATION

1 BY MR. POTTER:

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

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

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

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

14 Q. Right.

15 A. ... to the lieutenant.

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

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

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

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

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

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

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

1 happened?

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

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

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

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

9 A. Yes, sir, in most places.

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

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

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

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

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

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

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

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

25 Q. Nothing further. Thank you.

1 THE COURT: Any redirect?

2 MR. CAMPBELL: No, Your Honor.

3 THE COURT: Thank you, sir.

4 Can he be excused?

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

7 THE COURT: Any objection?

8 MR. POTTER: No, Your Honor.

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

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

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

15 (WHEREUPON, the witness was duly sworn.)

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

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

20 ERIC NUBERN,

21 Being first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. CAMPBELL:

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

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

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

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

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

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

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

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

22 MR. POTTER: No questions, Judge.

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

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

1 they certified scales?

2 A. Yes, they are.

3 Q. And you weighed it in this case; is that right?

4 A. Yes.

5 Q. And what weight did you come up with?

6 A. 44.63 grams which is approximately 1.57 ounces.

7 Q. And as a result of that, did -- you also tested it,
8 this test you're talking about, and were you able to form
9 an opinion on what type of substance that was brought
10 over to you in this test kit?

11 A. Yes. I found that the item contained cocaine base
12 which is also called crack cocaine.

13 Q. And that's considered a Schedule II narcotic; is
14 that right?

15 A. Correct.

16 Q. And what exactly does Schedule II mean?

17 A. Schedule II means that there is some accepted
18 medical use, but the schedule goes from Schedule I, being
19 the worst basically to Schedule V. This is a Schedule II
20 drug that the Drug Enforcement Administration has placed.

21 Q. So it's illegal?

22 A. Right.

23 MR. CAMPBELL: Your Honor, at this time I move
24 what's been identified as State's Exhibit 2 into
25 evidence.

1 THE COURT: All right. See you tomorrow
2 morning.

3 MR. POTTER: Thank you, Judge.

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

5 DECEMBER 9, 2009

6 (WHEREUPON, court convened with all parties present
7 and the following proceedings were had commencing at
8 approximately 10:34 a.m.)

9 MR. CAMPBELL: Judge, I'm going to -- we
10 cleaned up the indictment.

11 THE COURT: Oh, good. That's what I was
12 getting ready to ask you. Well, good. I can use this as
13 the verdict form. That's a lot easier.

14 Any objection to this?

15 MR. POTTER: No objection.

16 THE COURT: I know y'all looked through the
17 charge, and there was some question about whether I
18 needed to define deliver. You don't have any strong
19 objection to that, do you?

20 MR. CAMPBELL: No, sir. I mean, there was no
21 testimony regarding it. I didn't know -- I know it's
22 part of the definition of trafficking, and that was the
23 only reason I brought it up.

24 THE COURT: Okay. Any objection from the
25 Defense?

1 MR. POTTER: No, Your Honor. If it pleases the
2 Court, we would ask for additional instruction in
3 reference to the fact that the video of the booking area
4 was destroyed. We would ask for an inference that that
5 be in essence that there was evidence that was
6 exculpatory or beneficial to the Defendant and the fact
7 that it was destroyed, the jury can make an inference
8 that it was beneficial to the Defense. Again, this is --
9 I think it's -- I don't think it was destroyed in bad
10 faith.

11 THE COURT: No.

12 MR. POTTER: However, there's no other way --
13 there's no other additional evidence that we can look to
14 or point to or rely upon that is along the same level as
15 that video. And as such, I think we're entitled to the
16 instruction.

17 THE COURT: Okay. I understand why you'd ask
18 it. I'm not going to instruct that. I think that
19 instruction, in my mind, is meant more for evidence that
20 has been purposely destroyed or -- but you know, you're
21 protected on the record. That may be

22 MR. POTTER: Yes, sir. The only -- in regards
23 to housekeeping, when the State does close their case, I
24 do want to make a record to move for a directed verdict.
25 I don't know if you want to kind of do that now and then

1 he can rest when the jury's in or however you want to do
2 it.

3 THE COURT: Yeah. As soon as your guys gets
4 here let's do that, and we'll let y'all rest and ...

5 (WHEREUPON, the Defendant entered the courtroom.)

6 THE COURT: Okay. Does the State rest?

7 MR. CAMPBELL: Yes, sir. The State rests.

8 THE COURT: All right. Any motions?

9 MR. POTTER: Judge, we do have a directed
10 verdict motion. And I'm sure Your Honor -- I know Your
11 Honor's familiar with regards to the standard light most
12 favorable to the nonmoving party. Viewing all the
13 evidence, we would respectfully submit that the elements
14 of the crime have not been met, and we would submit that
15 issue to Your Honor.

16 THE COURT: All right. I'm going to deny that
17 motion based upon the evidence that has been introduced.

18 And you're resting?

19 MR. POTTER: Your Honor, yes, we are resting.

20 THE COURT: Okay.

21 MR. POTTER: There were two exhibits for the
22 Defense that were already admitted as evidence. So I
23 just want to make sure that those are admitted as
24 Defendant's evidence.

25 THE COURT: Yeah. You got the packet of

1 cocaine.

2 MR. CAMPBELL: And the marijuana we marked as a
3 Court's Exhibit.

4 THE COURT: Right.

5 MR. CAMPBELL: And the rest are Defense
6 exhibits.

7 THE COURT: And then the -- just for the
8 record, the indictment has been cleaned up so that it
9 only states the charge of trafficking cocaine twenty-
10 eight grams or more. And I'll actually allow them to use
11 this now as the verdict form.

12 Okie doke. Well, I'm going to call them in and tell
13 them that the State has rested, the Defense has rested.
14 I'll initially tell them that you're going to give your
15 closing arguments and then my charge. Of course, I'm
16 going to hit hard quite frankly on the fact that he
17 doesn't have to testify. I think that's important so
18 they don't have any inference there.

19 Okie doke. Everybody ready?

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

21 MR. POTTER: Yes, sir.

22 THE COURT: You can bring them in.

23 (WHEREUPON, the jury entered the courtroom at
24 approximately 10:39 a.m.)

25 THE COURT: Good morning, ladies and gentlemen.

1 Ladies and gentlemen, the State has rested in this case
2 which means you've heard all the testimony that you're
3 going to hear from the State. The Defense has also
4 rested in this case. So in other words, you have heard
5 all of the testimony that you're going to hear in this
6 case. We've now reached the point in the trial where
7 it's time for the attorneys to give you their closing
8 arguments.

9 I want to tell you now -- and I'll also tell you
10 when I read to you the charge -- the Constitution of this
11 country and -- well, mainly the Federal Constitution --
12 has a Fifth Amendment, contains a Fifth Amendment, which
13 allows a defendant not to testify. That -- just as a
14 presumption of innocence is sort of bantered around the
15 newspaper and on the radio as sort of just some words,
16 this presumption of innocence and this prohibition
17 against requiring someone to testify is a substantial
18 right. I will tell you when I get to that portion of the
19 charge, but I want to tell you early, you should not
20 consider the fact that the Defendant has not testified.
21 That should never come up in your deliberations,
22 shouldn't be talked about and shouldn't influence you in
23 any way. The exercise of a constitutional right is
24 perfectly within the Defendant's rights. He has pled not
25 guilty, and the burden is still on the State to prove

1 each and every element.

2 Now, as I said earlier yesterday, the closing
3 arguments are not evidence. The attorneys do have a
4 right to argue and try to sway you to their position, but
5 you shouldn't consider it evidence. You'll have -- we've
6 had several documents and one packet introduced into
7 evidence. You'll have that in the jury room with you.
8 And then anything that was said from the witness stand
9 would be evidence. But anything the lawyers say now is
10 not evidence, but it is an opportunity for them to sway
11 you.

12 After they've given you their closing arguments, I
13 have to read to you verbatim this. If at any time during
14 the course of my reading to you, you need a break, let me
15 know. As I tell juries, the last time I read to people
16 other than being as a judge, it was when I was trying to
17 put my children to sleep. I really need you not to go to
18 sleep. So if you start to get sleepy and I start to sort
19 of modulate low, raise your hand and I'll either start
20 yelling at you or give you a break. Okay? All right.
21 Thank you.

22 Yes, sir?

23 MR. CAMPBELL: May it please the Court, Your
24 Honor.

25

CLOSING ARGUMENT

1 he knew it was there. He was hoping that it wouldn't be
2 found, but it fell out anyway.

3 It's kind of one of those things, actions speak
4 louder than words. And that's what this is. His own
5 actions of how he acted at the booking area says it all.
6 And because of that, he was charged with it. And he
7 should be held accountable and responsible for what he
8 has done.

9 Ladies and gentlemen, you'll have an opportunity to
10 go back there and you'll have an opportunity to
11 deliberate. We just ask that you bring back a verdict
12 that speaks the truth and that justice demands. And in
13 this case, it's a verdict of guilty.

14 Thank you.

15 MR. POTTER: May it please the Court.

16 THE COURT: Yes, sir.

17 CLOSING ARGUMENT

18 BY MR. POTTER:

19 When we talked yesterday morning, I told you the
20 Government wants to convict Kevin based on its word.
21 Based on its word. And the fact of the matter is I don't
22 think the Government knows what the true facts of this
23 case is. We have a deputy who signs a warrant verifying
24 or alleging he found the drugs at one place. We have a
25 deputy who submits the incident report that says he found

1 the drugs at one place. We have a case summary that a
2 supervisor or a representative testified to a Grand Jury
3 saying he found drugs at one place, and he gets up on
4 this stand and say something totally different.
5 Completely different.

6 If we could just determine what the truth is. Is
7 the truth what he said from the stand? Is the truth what
8 he said on the warrant? Or is there something that's not
9 there that hasn't been testified to or hasn't been told,
10 that hasn't been included in the incident report that we
11 know is wrong, that hasn't been included in the warrant
12 that we know is wrong?

13 Ultimately, it's the Government's word that they're
14 asking you to convict Kevin on. And the best way I can
15 think about this is this. When you get a bowl of soup at
16 a restaurant and there's a fly in it, you don't pick that
17 fly out and eat the soup. You send the soup back.
18 That's what we have. A situation where we don't know
19 what's going on. The Government doesn't know. They've
20 got different facts.

21 We had a video that would allegedly show what
22 happened, but it's gone. Why didn't -- why didn't
23 Surratt make sure he had a video copy when he left that
24 detention center? Conveniently it's gone. We don't know
25 what's on that video. So it's the Government's word.

1 And the Government's word is we found it at a traffic
2 stop. No, no, no. We found it at booking. What is it?
3 Is that something you can convict Kevin on? Is that the
4 type of word you expect from the Government?

5 You will have the warrants to read when you go back
6 there. Read it. They tried and they tried, well, it was
7 a traffic stop. And okay, the traffic stop continues
8 when you're booked in. That's not right. Plain reading
9 of the language. Y'all can do that. You know what a
10 traffic stop is. You know what it means. This is a
11 signed, verified, sworn-to statement.

12 The thing that scares me is this. The case summary
13 that we talked about. A case summary -- and we verified
14 and Deputy Surratt confirmed that a representative uses
15 the case summary to testify to a Grand Jury. Was Kevin
16 indicted on facts that were not presented to y'all today?
17 That's a concern. That's scary. That's the problem with
18 the State's case.

19 The State's word doesn't mean anything because it
20 doesn't know what the facts are. You can't convict on
21 that. You can demand better. This is a fellow citizen
22 who got arrested on a warrant, and not one piece of fact
23 from that warrant was testified to. We have a video
24 that's gone. And we have a detective -- excuse me -- a
25 deputy at the Anderson County Detention Center who

1 violates policy when drugs are allegedly found at the
2 detention center. Policy and procedure. Fill out an
3 incident report, report it to your supervisor. He chose
4 not to do that.

5 You can take the fly out of the soup, but the soup
6 is still bad. You're not going to eat that soup. Find
7 Kevin not guilty. The Government's word cannot be
8 trusted.

9 Thank you.

10 THE COURT: All right. Ladies and gentlemen,
11 do any of you need a break before I begin?

12 (No response)

13 THE COURT: All right.

14 CHARGE

15 BY THE COURT:

16 You've heard all the testimony that you're going to
17 hear in this case. And as I told you at the beginning of
18 the week and yesterday, it is now my obligation to charge
19 you with the law in this case. I want to remind you that
20 the Defendant in this case has been charged with
21 trafficking in crack cocaine. The fact that he was
22 arrested, that he was charged, that he was indicted in
23 this case is not evidence and cannot be considered by you
24 as evidence of guilt and does not create a presumption of
25 guilt. The document that you'll have with you in the

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1 jury room, the indictment, is merely a sheet of paper
2 which sets forth the claims of the State and should not
3 be used to consider -- be considered by you in any way.
4 And I've told you that and I know you understand it. I'm
5 obligated to tell you that mainly because it's such an
6 important right that we have in this State.

7 Now, ladies and gentlemen, I charge you the
8 Defendant has pled not guilty to this indictment, and
9 that plea puts the burden on the State to prove the
10 Defendant guilty. A person charged with committing a
11 criminal offense in South Carolina is never required to
12 prove himself innocence -- innocent. I charge you that
13 it's an important rule of law that the defendant in a
14 criminal trial, no matter what the seriousness of the
15 charge may be, will always be presumed to be innocent of
16 the crime for which the indictment was issued unless
17 guilt is proven by evidence satisfying you of that guilt
18 beyond a reasonable doubt.

19 The presumption of innocence does not end when you
20 begin your deliberations, but it accompanies the
21 Defendant throughout the trail until you reach a verdict
22 of guilt based upon evidence satisfying you of that guilt
23 beyond a reasonable doubt. I used the example of the
24 robe of righteousness or innocence. That's still across
25 his shoulders when you begin your deliberations. He will

1 have that across his shoulders, that robe of innocence
2 will be with him, until you strip it from him. So he's
3 still, when you begin your deliberations, innocent of the
4 charges.

5 I want to tell you again that the presumption of
6 innocence is not a mere legal theory. It's not just a
7 legal phrase. It's a substantial right to which every
8 defendant and every citizen is entitled to unless you,
9 the jury, are satisfied from the evidence of the
10 Defendant's guilt beyond a reasonable doubt.

11 I told you earlier during the initial charge a very
12 short definition of reasonable doubt. And I told you
13 that reasonable doubt is the kind of doubt that would
14 cause a person, a reasonable person, to hesitate to act.
15 I'll give you another definition that's substantially
16 longer. In every criminal case, I charge you that the
17 State has the burden of proving the Defendant is guilty
18 beyond a reasonable doubt.

19 Some of you may have served as jurors in civil cases
20 where you were told that it was only necessary to prove
21 that a fact is more likely true than not true. Such is a
22 by a greater weight or preponderance of evidence. In
23 criminal cases the State's proof must be more powerful
24 than that. It must be beyond a reasonable doubt.

25 Proof beyond a reasonable doubt is that proof that

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1 leaves you firmly convinced of the Defendant's guilt.
2 There are very few things in this world that we know
3 without absolute certainty. And in criminal cases, the
4 law does not require proof that overcomes every possible
5 doubt. If, based on your consideration of the evidence,
6 you're firmly convinced the Defendant is guilty of the
7 crime charged, you must find the Defendant guilty. If,
8 on the other hand, if you think there is a real
9 possibility that the Defendant is not guilty, you must
10 give the Defendant the benefit of the doubt and find him
11 not guilty.

12 As I told you also during the -- or at the beginning
13 of this case, you and I have very different roles and
14 have had very different roles. I don't think that I've
15 raised my voice or turned red or anything. But in the
16 event that I have given you the indication that I have
17 believed or disbelieved a witness, disregard it.

18 You have to determine -- based upon what you heard
19 in this courtroom and what you'll review back in the jury
20 room, you have to determine what the facts are. If you
21 make a mistake on the facts, not a lot can be done. If I
22 make a mistake, a legal error, if I've introduced
23 evidence or allowed evidence to be introduced that
24 shouldn't be introduced, if I made a mistake in my charge
25 that I've written, there can be an appeal to the Supreme

1 Court, and they can change it.

2 If you make a mistake on the facts in that closed
3 room back there, there's very little that can be done.
4 In fact, there's almost nothing that can be done. So you
5 need to understand that you need to deliberate very
6 carefully and understand that your role is to determine
7 what the facts are.

8 Your role also is to take this law as I'm giving it
9 to you and apply it to those facts. And you can't wish
10 that the law were different or hope that the law is
11 different or think that the law is different. You have
12 to apply this law to the facts.

13 I know -- I've been watching you. I know you've
14 been paying attention and I do appreciate it. But you
15 are the sole judge of the facts. I'm the sole judge of
16 the law. And here's the point where we sort of mesh.

17 Now, ladies and gentlemen, I charge you there are
18 two types of evidence which are generally presented
19 during a trial. There's direct evidence and
20 circumstantial evidence. Direct evidence is the
21 testimony of a person who claims to have actual knowledge
22 of a fact such as an eyewitness. It is evidence which
23 immediately establishes the main fact to be proved.
24 Circumstantial evidence is proof of a chain of facts and
25 circumstances indicating the existence of a fact. It is

1 evidence which immediately establishes collateral facts
2 from which the main fact may be inferred. Circumstantial
3 evidence is based on inference and not on personal
4 knowledge or observation.

5 The law makes absolutely no distinction between the
6 weight to be given either direct or circumstantial
7 evidence, nor is a greater degree of certainty required
8 of circumstantial evidence than of direct evidence. You
9 should weigh all the evidence in this case. And after
10 weighing all the evidence, if you are not convinced of
11 the guilt of the Defendant beyond a reasonable doubt,
12 then you must find the Defendant not guilty.

13 Now, necessarily one of the things you have to do is
14 determine the credibility of the witnesses. Credibility
15 is the legal phrase for believability. You have to
16 determine who you believe based upon your observations of
17 that person. You can take the testimony of a witness and
18 believe everything they said. You can believe one
19 sentence of what they say and disregard the rest. You
20 can believe one witness and not another. It's completely
21 up to you as to whether or not you believe a witness is
22 credible. And again, if any -- if there's been any
23 indication from me that I believed or disbelieved a
24 witness, please disregard it.

25 Ladies and gentlemen, I charge you that the rules of

1 evidence ordinarily do not permit witnesses to testify to
2 opinions or conclusions. An exception to this rule
3 exists where witnesses -- or for witnesses that we call
4 expert witnesses. We had an expert witness testify in
5 this case. A witness who by education and experience has
6 become expert in some art, science, profession or calling
7 may state an opinion as to relevant material matter in
8 which the witness claims to be an expert, and he or she
9 may also state the reasons for that opinion.

10 I charge you that you should consider any expert
11 opinion received in evidence in this case and, like any
12 other evidence, give it the weight that you think that it
13 deserves. If you decide that the opinion of an expert
14 witness is not based on sufficient education or
15 experience or if you conclude that the reasons given in
16 support of the opinion are not sound or that the opinion
17 is outweighed by other evidence, you may disregard the
18 expert witness' opinion in its entirety. An expert
19 witness' testimony is to be given no greater weight than
20 that of other witness simply because the witness is an
21 expert. Further, you're not required to accept an
22 expert's opinion even though it's uncontradicted.

23 Now, ladies and gentlemen, I instruct you and I
24 emphasize that the fact that the Defendant did not
25 testify in this case is not a factor to be considered by

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1 you in any way in your deliberations and in your
2 consideration on the question of guilt or the innocence
3 of the Defendant. It must not be considered by you in
4 any manner whatsoever. A defendant has a constitutional
5 right to remain silent. And the assertion of this right
6 must not be considered by you in your deliberations.

7 I repeat that under your oath you are to draw no
8 conclusion whatsoever from the fact that the Defendant in
9 this case didn't testify. The fact that this Defendant
10 did not testify should not even be discussed in the jury
11 room. The burden of proof, as I stated to you before, is
12 on the State. The Defendant is not required to prove his
13 innocence. The burden of proof remains on the State to
14 prove guilt beyond a reasonable doubt.

15 Now, ladies and gentlemen, I charge you that in
16 order to establish criminal liability, criminal intent is
17 required. For example, the mental state required to be
18 proven by the State for a particular crime might be
19 purpose, intent, knowledge, recklessness or criminal
20 negligence. Criminal intent must be proven by the State
21 beyond a reasonable doubt.

22 Criminal intent is always a matter that must be
23 determined by the jury from the circumstances surrounding
24 the situation. There's no way to prove intent to a
25 mathematical certainty. There's no way you can dissect a

1 persons psyche or brain and determine what the person had
2 in mind, so the law says that criminal intent may be
3 inferred from circumstances shown to existed at the time
4 of the act. This is how you make a determination of
5 whether or not the element requiring intent was present.
6 It is not necessary to establish intent by direct and
7 positive evidence, but intent may be established by
8 inference in the same way as other facts by taking into
9 consideration the acts of the parties and all of the
10 facts and circumstances of the case.

11 Criminal intent is a mental state, a conscience
12 wrongdoing. It's up to you to determine what the
13 Defendant intended to do based on the circumstances shown
14 to have existed at the time of the act. Criminal intent
15 can arise from an action or a failure to act. It may
16 arise from negligence, recklessness or an indifference to
17 duty or to consequences that is considered by the law to
18 be the equivalent of criminal intent. Excuse me.

19 Ladies and gentlemen, I charge you that the
20 Defendant is charged with trafficking in crack cocaine.
21 The State must prove beyond a reasonable doubt that the
22 Defendant knowingly sold, manufactured, cultivated,
23 delivered, purchased, brought into this State, provided
24 financial assistance or otherwise aided, abetted,
25 attempted or conspired to sell, manufacture, cultivate,

1 deliver, purchase or bring into this State, was knowingly
2 in actual or constructive possession of, knowingly
3 attempted to become in actual or constructive possession
4 of crack cocaine.

5 Ladies and gentlemen, I charge you that in this
6 State the State must prove beyond a reasonable doubt that
7 the amount of the crack cocaine was twenty-eight grams or
8 more but no -- but less than one hundred grams.

9 I charge you that in order to prove possession, the
10 State must prove beyond a reasonable doubt that the
11 Defendant had both the power and the intent to control
12 the disposition or use of the crack cocaine. Possession
13 may be either actual or constructive.

14 Actual possession means that the crack cocaine was
15 in the actual physical custody of the Defendant.
16 Constructive possession means that the Defendant had
17 dominion and control or the right to exercise dominion
18 and control over either the crack cocaine itself or the
19 property in which the crack cocaine was found.

20 Mere presence at the scene where the drugs were
21 found is not enough to prove possession. Actual
22 knowledge of the presence of the crack cocaine is strong
23 evidence that the Defendant's intent to control its
24 disposition or use. The Defendant's knowledge and
25 possession may be inferred when a substance is found on

1 the property under the Defendant's control. However, the
2 inference is simply an evidentiary fact to be taken into
3 consideration by you along with every other piece of
4 evidence in this case and to be given the weight you
5 decide it should have.

6 I charge you that the definition of the deliver --
7 of deliver, it means to actually, constructively or
8 attempt to transfer the drug. I charge you that
9 distribute means to deliver either -- other than
10 administering or dispensing a drug. I charge you that
11 manufacturing means to produce, prepare, convert,
12 process, plant, cultivate, grow or harvest a drug
13 naturally or chemically. Manufacturing includes any
14 packaging or repackaging of the drug or labeling or re-
15 labeling of the drug's container.

16 Now, ladies and gentlemen, there are two possible
17 verdicts that you can find in this case. There's guilty
18 and not guilty. The fact that I've used the phrase
19 guilty prior to not guilty means nothing. There are only
20 two ways you can go in this, and I have to start with
21 something. Your verdict must be unanimous. Each of you
22 has to agree on this verdict, and you have to agree
23 unanimously the State has met it's burden in this case.

24 Madam Forelady, what I'm going to do is I'll send
25 back the indictment form. And if you'll see down on the

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1 far left corner, there's the word verdict. Once the
2 jury's reached its verdict of not guilty or guilty, you
3 just need to write that down and sign your name and knock
4 on the door. And then, of course, we'll bring you back
5 in and deliver the verdict.

6 As I said, you'll have the evidence. You will not
7 have the jury charge with you. It's not proper for me to
8 send it with you. If you get back there and start your
9 deliberations and you need a clarification or if you have
10 any question whatsoever, what I need you to do, Madam
11 Forelady, is write down the question, sign your name,
12 knock on the door, and they will bring it to me. What
13 I'll do is bring you back into the courtroom. If I can
14 answer a question, I'll answer it. If legally I can't
15 answer it, I'll just tell you, sorry, I can't answer that
16 question. If you need me to recharge or explain anything
17 in my charge in part or in whole, I'll be happy to do
18 that. You just need to write out the question or the
19 problem you're having and let me know.

20 Now, what I'm going to do now is I'm going to send
21 you back to the jury room, but I'm going to ask you not
22 to begin deliberating yet. I'll give both attorneys an
23 opportunity to ask me to correct my charge, to either add
24 or subtract something or if I've made a mistake in
25 reading it. I'm going to give them that opportunity. If

1 I'm going to make a change, I'll bring you back in. If
2 I'm not going to make a change, in just a minute Buck
3 will bring you back the evidence. And at that point,
4 once you get this indictment and the evidence, you can
5 begin your deliberations.

6 Again, if you have any problem or any questions,
7 write it out. We'll be waiting for you. Take all the
8 time you need and let me know if there's a problem.

9 Take everybody back except the alternate.

10 (WHEREUPON, the jury exited the courtroom at
11 approximately 11:19 a.m.).

12 THE BAILIFF: You want all of them back in here
13 or ...

14 THE COURT: Just out there. I'll come out
15 there in the hall.

16 Any objections to the charge?

17 MR. CAMPBELL: No, Your Honor.

18 MR. POTTER: If it pleases the Court, and I may
19 have blocked this out. Did you read the credibility of
20 witnesses instruction to the jury?

21 THE COURT: Yeah. Actually, I didn't read it
22 verbatim.

23 MR. POTTER: Okay.

24 THE COURT: I'm -- I went through and told them
25 believability, et cetera, et cetera.

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1 MR. POTTER: Right. The only other thing that
2 we would ask again for that instruction related to
3 destruction of the video and the inference to the benefit
4 of the Defendant?

5 THE COURT: Okay. Yeah. And I understand, and
6 all of your arguments are incorporated from before. I
7 deny it, but you're protected.

8 MR. POTTER: Thank you, Judge.

9 THE COURT: Anything else?

10 MR. CAMPBELL: Nothing from the State.

11 THE COURT: Y'all make sure that's together and
12 here's that indictment. And I'll be out to talk to the
13 alternate in just a second.

14 (WHEREUPON, the exhibits in evidence and verdict
15 form were delivered to the jury to begin their
16 deliberations at approximately 11:22 a.m. after
17 which court stood at recess awaiting the verdict of
18 the jury.)

19 THE COURT: I understand we have a verdict.
20 What I'll do is bring them in and receive their verdict.
21 Then I'll go back and speak to them depending on what the
22 verdict is, and we'll go from there. Any objection to
23 that?

24 MR. CAMPBELL: None from the State.

25 THE COURT: Any objection from the Defense?

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1 MR. POTTER: No, Your Honor.

2 THE COURT: Okay. You can bring them in.

3 (WHEREUPON, the jury entered the courtroom at
4 approximately 12:21 p.m.)

5 THE COURT: All right. Madam Forelady, I
6 understand you have a verdict.

7 THE JUROR: Yes, sir.

8 THE COURT: If you would hand it to the
9 bailiff, please.

10 (WHEREUPON, the verdict form was handed up to the
11 Court.)

12 THE COURT: All right. You can publish it.

13 MADAM CLERK: This is case 2009-GS-04-1737, the
14 State versus Kevin Jerome Gilliard, indictment for
15 trafficking crack cocaine twenty-eight grams or more but
16 less than one hundred grams. The verdict of the jury is
17 guilty.

18 Madam Forelady, ladies and gentlemen of the jury, if
19 this is your verdict, would you please indicate by
20 raising your right hand?

21 (WHEREUPON, all jurors hands were raised.)

22 MADAM CLERK: All hands raised, verdict of the
23 jury, Your Honor.

24 THE COURT: All right. Thank you.

25 Ladies and gentlemen, I have to send you back one

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1 last time. I'll be back to speak to you in just a
2 minute. But please go back to the jury room one last
3 time.

4 (WHEREUPON, the jury exited the courtroom at
5 approximately 12:22 p.m.)

6 THE COURT: All right. Any motions?

7 MR. CAMPBELL: None from the State, Your Honor.

8 MR. POTTER: None at this time, Your Honor.

9 THE COURT: All right. What I'm going to do is
10 go back and talk to them and obviously give them the
11 opportunity to come back out if they want to. You got
12 everything ready?

13 MR. CAMPBELL: Yes, sir.

14 THE COURT: Okay. I'll be back in just a
15 second.

16 (WHEREUPON, court stood at recess for a short break
17 during which State's Exhibits Number 2 and 3 were
18 marked for identification only.)

19 THE BAILIFF: All rise.

20 THE COURT: Thanks. Have a seat.

21 All right. Y'all can come on up.

22 (WHEREUPON, the Defendant and counsel approached the
23 bar.)

24 THE COURT: Yes, sir.

25 MR. CAMPBELL: Your Honor, may it please the

1 Court. I'm going to hand up the sentence sheet involved
2 in this case, and I also have some documents to go on the
3 record.

4 THE COURT: Okay. All right. You can go ahead
5 and put those on the record.

6 MR. CAMPBELL: Your Honor, I'm introducing --
7 and I'm going to show this to Mr. Potter. Court's
8 Exhibit Number 2 is actually a copy of the Anderson-
9 Ocone Forensic Lab Report regarding the cocaine and the
10 weight. And then the -- this is actually a third
11 conviction, the two certified convictions I have. The
12 first one, indictment number 94-GS-04-1184, he was
13 convicted of -- initially it was possession with intent
14 to distribute, and it looks like they reduced it down to
15 possession of crack. And then in 01-GS-04-2141, he was
16 convicted of distribution of marijuana. In that he was
17 actually given three years jail time.

18 He does have a fairly lengthy record. In '92,
19 prowling, receiving stolen goods, receiving stolen goods.
20 Got eight years suspended and probation. In '93, there's
21 grand larceny, breaking in to motor vehicle, another
22 grand larceny, and another grand larceny charge. Then in
23 '94, the crack cocaine conviction. In '95, a reckless
24 driving, D.U.S., false information, failure to accompany,
25 assault and battery, two counts. '99, another giving

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1 false information. '99, he was convicted of failure to
2 stop for a blue light. '01, simple possession of
3 marijuana. 2000, disorderly conduct, public disorderly
4 conduct. In 2001, the distribution of marijuana, and
5 also he had another possession of marijuana conviction
6 along with that. '90 --'06, failure to accompany and
7 also another possession of marijuana. And then in 2008,
8 a criminal domestic violence conviction. This will be
9 his third offense. And I'll hand up these Court's
10 Exhibits.

11 THE COURT: And just for the record, what's the
12 range, statutory range for sentencing?

13 MR. CAMPBELL: Twenty-five to thirty, Your
14 Honor.

15 THE COURT: Twenty-five to thirty?

16 MR. CAMPBELL: Yes, sir.

17 THE COURT: So twenty-five minimum. Is there a
18 fine?

19 MR. CAMPBELL: The fine is ---

20 THE COURT: Fifty thousand dollars?

21 MR. CAMPBELL: --- fifty thousand.

22 THE COURT: Is that an and a fifty thousand
23 dollar fine? I think it is.

24 MR. CAMPBELL: Let's see. For a third or
25 subsequent offense, mandatory minimum imprisonment not

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1 less than twenty-five ...

2 THE COURT: Okay.

3 MR. CAMPBELL: ... and ...

4 THE COURT: All right. Yes, sir?

5 MR. POTTER: Judge, a couple of things in

6 regards to his prior convictions that are being used to

7 enhance. First off, the '94 conviction doesn't indicate

8 he was represented by counsel on that particular case.

9 There is no attorney listed on the sentencing sheet or

10 anything about that that I can see. I would respectfully

11 submit as a result, that cannot be used for enhancement

12 purposes in sentencing. It appears he did not have the

13 benefit of counsel from a reading of the sentencing sheet

14 and what was signed by Judge Epps.

15 In addition, we would submit obviously that the

16 enhancement process -- I think he's entitled at the very

17 least to a jury trial to make a finding whether or not he

18 is -- these are two prior convictions that are something

19 could be enhanced upon for this conviction.

20 Finally, we would submit, Judge, that the mandatory

21 minimum set forth by the General Assembly is a violation

22 of the separation of powers, Eighth Amendment and due

23 process clauses of the United States and the South

24 Carolina Constitution. I'm going to ask that you

25 sentence him in a reasonable fashion as per your

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1 responsibilities of duty. But the main problem I've got
2 is that '94 conviction doesn't have any indication that
3 he was represented by counsel.

4 THE COURT: What's y'all's position on that?

5 MR. CAMPBELL: Your Honor, it was a general
6 sessions charge back in 1994. If I recall correctly,
7 they don't have -- they didn't have it where the
8 attorneys were signing it. It doesn't indicate either
9 way. It's still a general sessions charge. It's still a
10 conviction under the statutes. We're not even
11 considering the little minor simple possession of
12 marijuana charges. It is a general sessions charge.
13 There's no indication from him that he wasn't
14 represented. And to my knowledge and my opinion, I feel
15 like that should count as an enhancement. Furthermore,
16 even if it was considered as a second offense, the
17 penalty range is seven to thirty.

18 THE COURT: Okay.

19 All right. Mr. Gilliard, anything you want to say?

20 THE DEFENDANT: Yes, sir. I don't feel that I
21 should be like enhancement for my '94. I was young and
22 dumb back then, you know. It's been many years.

23 THE COURT: Well, the problem I got is you're
24 not young and dumb now. I mean, what are you still out
25 there doing this for?

1 THE DEFENDANT: I wasn't, sir.

2 THE COURT: All right. Okay.

3 Anything else?

4 MR. CAMPBELL: Nothing from the State, Your
5 Honor.

6 MR. POTTER: Judge, he's thirty-four years old.
7 He turns thirty-five in June -- January. He does have a
8 G.E.D., five children. He is engaged, works
9 construction, contractor type work. Been locked up since
10 he was arrested on this charge, which by my count is two
11 hundred and thirty-four days.

12 THE COURT: Okay.

13 MR. POTTER: Again, I would just echo my
14 previous comments related to the '94 conviction as well
15 as to the overall enhancement issues related to this
16 case. I think he's entitled to a jury trial in regards
17 to those priors as to whether they can be considered for
18 enhancement. Also, I think they're a violation of the
19 separation of powers, Eighth Amendment and due process.

20 THE COURT: Okay. All right. Well, as I said,
21 I may agree with you on some of those legal arguments,
22 but the statute is pretty clear.

23 Mr. Gilliard, the jury has found you guilty. I've
24 denied all motions. What I'm going to do is sentence you
25 to the minimum maximum or the maximum minimum, I guess it

State v. Kevin Jerome Gilliard 2009-GS-04-1736, 1737
Verdict and Sentencing

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1 is, of twenty-five years and a fine of fifty thousand
2 dollars. I'm going to give you credit for the two
3 hundred and thirty-four days that you've served.

4 And I think that's about it. There's no other --
5 nothing it needs to run concurrent with, no revocations?

6 MR. CAMPBELL: No, sir. I dismissed the other
7 charges.

8 THE COURT: Everything's been dismissed?

9 MR. CAMPBELL: Yes. I've already handed those
10 up to Ms. Phillips.

11 THE COURT: All right. Good luck to you.

12 MR. CAMPBELL: Thank you, Your Honor.

13 MR. POTTER: Thank you, Judge.

14 (WHEREUPON, the Defendant was escorted from the
15 courtroom.)

16 MR. CAMPBELL: Just one second. Can I look at
17 the sentencing sheet?

18 (Pause)

19 MR. CAMPBELL: Actually, Your Honor, I need to
20 make a correction on the record.

21 THE COURT: Stop him then. We need to get him
22 back in.

23 MR. POTTER: What's that?

24 MR. CAMPBELL: The CDR code on the sentencing
25 sheet is wrong.

1 THE COURT: What is it?

2 MR. CAMPBELL: Your Honor, on the sentencing
3 sheet, it has a CDR code of 392 as his first offense, and
4 it's not.

5 THE COURT: Okay. Yeah, you got to change
6 that.

7 (WHEREUPON, the Defendant entered the courtroom.)

8 THE COURT: Mr. Gilliard, hold on a minute.
9 They got -- there was just a technical problem here, but
10 I wanted you here for everything.

11 The one that was corrected is down there.

12 MR. CAMPBELL: Yeah, 349. Your Honor, I'm
13 going hand this up to you for correction. Actually, the
14 indictment is right. It says 349, but we went and
15 printed one out with a new sentencing sheet that came
16 back as 392. So the CDR code should be 349. And if
17 you'll just scratch out the first offense.

18 THE COURT: So 349 instead of 392?

19 MR. CAMPBELL: Yes, sir. I'm going to hand the
20 indictment back to you.

21 THE COURT: All right. You understand what
22 I've done here?

23 MR. POTTER: Yes, Judge.

24 THE COURT: I just struck through the CDR code
25 and struck through the first offense.

State v. Kevin Jerome Gilliard 2009-GS-04-1736, 1737
Verdict and Sentencing

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1 Sorry about that, Mr. Gilliard. I had to bring you
2 back in here to do this.

3 All right. Good luck to you.

4 MR. POTTER: Thank you, Judge.

5 THE COURT: Thank you.

6 (WHEREUPON, the trial ended at approximately 12:47
7 p.m.)

8 (END OF REQUESTED TRANSCRIPT OF RECORD)

1

CERTIFICATE OF REPORTER

2 I, the undersigned Renee H. Tollison, Official Court
3 Reporter for the Tenth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all
6 the proceedings had and evidence introduced in the
7 trial/hearing of the captioned case, relative to appeal,
8 in the Circuit Court for Anderson County, South Carolina,
9 on the day 7th through 10th days of December 2009.

10 This transcript may contain quoted material. Such
11 material is reproduced as read by the speaker.

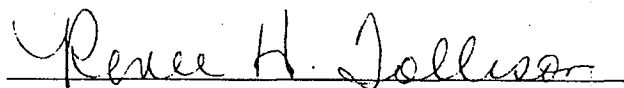
12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 March 8, 2010

15

16

17



Circuit Court Reporter

J-896841

April 21, 2003
SCCA 513

STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of

Anderson

2009 APR 23 P 2:42

THE STATE

2009-20901

against

COMMON PLEAS AND
GENERAL SESSIONS

Kevin Jerome Gilliard

Address:

Phone: _____ SSN: _____

Sex: M Race: B Height: 5 10 Weight: 155DL State: SC DL #: _____DOB: _____ Agency ORI #: SC0040000Prosecuting Agency: Anderson County SheriffProsecuting Officer: B Surratt - 547Offense: Drugs / Trafficking in ice, crank or crack - 28 g or
more, but less than 100 g - 1st offenseOffense Code: 0392Code/Ordinance Sec: 44-53-0375(C)(2)This warrant is CERTIFIED FOR SERVICE in the☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to
defendant
on _____

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
100 South Main Street
Po Box 8002
Anderson, SC 29622

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Anderson

Personally appeared before me the affiant B Surrattbeing duly sworn deposes and says that defendant Kevin Jerome Gilliarddid within this county and state on or about 04/19/2009

violate the criminal laws

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Anderson

in the following particulars:

DESCRIPTION OF OFFENSE Drugs / Trafficking in ice, crank or crack - 28 g or more, but less than 100 g - 1st offenseI further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:That on April 19, 2009, the defendant Kevin Jerome Gilliard in the county of Anderson did knowingly have in his possession
approximately 49 grams of an off white rocklike substance that field tested positive for crack cocaine base. This was found during
lawful traffic stop. This incident did occur on Brown Street and Market Street, Anderson, S.C.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Anderson

Affiant's Address 305 Camson Road
Anderson, SC 29625-

Affiant's Telephone _____

A TRUE COPY

DEC - 9 2009

Clerk of Court

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe

on or about 4/19/2009 defendant Kevin Jerome Gilliard

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Anderson) as set forth below:DESCRIPTION OF OFFENSE: Drugs / Trafficking in ice, crank or crack - 28 g or more, but less than 100 g - 1st offenseHaving found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or
soon thereafter as is practicable

Sworn to and subscribed before me

on 01/01/1Signature of Issuing Judge
Denise M Malone (L.S.)

Denise M Malone

Judge Code: 7105Judge's Address P.O. Box 8002
Anderson, SC 29622-Judge's Telephone (864)222-6637Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

11

BAIL set by

Judge James A Cox
 on 4-20-09
 Type and Amount: 35000\$
 Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____
 on _____
 Defendant Attorney: _____
 Decision: _____

DISPOSITION before

Judge _____
 on _____
 by _____
 (indicate jury trial, bench trial, plea, nol. pros., etc.)
 Disposition: _____
 Sentence: _____

JURORS

WITNESSES

Name: _____
 Address: _____
 Telephone: _____
 Name: _____
 Address: _____
 Telephone: _____
 Name: _____
 Address: _____
 Telephone: _____
 Name: _____
 Address: _____
 Telephone: _____
 Name: _____
 Address: _____
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 Telephone: _____
 Name: _____
 Address: _____
 Telephone: _____
 Name: _____
 Address: _____
 Telephone: _____
 Name: _____
 Address: _____
 Telephone: _____

CODEFENDANTS

WITNESSES

B Surratt, Anderson County Sheriff's Dept.

The State of South Carolina

County of Anderson

COURT OF GENERAL SESSIONS

JUL 28 2009

Term

ARREST WARRANT NUMBER

J896841

THE STATE

vs.

Kevin Jerome Gilliard

ACTION OF GRAND JURY

TRUE BILL

JUL 28 2009

Foreperson of Grand Jury
Date: Foreperson

VERDICT

Guilty
Brendon Woods
Foreperson of Petit Jury
Date: 9 Dec 09

RLC

Indictment for

Drugs / Trafficking crack cocaine - 28 g or
more, but less than 100 g
SC Code: 44-53-0375(C)(2)(c)
CDR Code: 0349

A TRUE COPY

DEC - 9 2009

Cathy M. Phillips
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on JUL 28 2009, the Grand Jurors of Anderson County present upon their oath:

Drugs / Trafficking crack cocaine - 28 g or more, but less than 100 g

That the Defendant, Kevin Jerome Gilliard, on or about April 19, 2009, in Anderson County, South Carolina, did knowingly sell, manufacture, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of more than twenty-eight (28) grams but less than one hundred (100) grams of Crack Cocaine, a schedule II controlled substance, as defined and otherwise limited in Sections 44-53-110, 44-53-210(b)(4), 44-53-210(d)(1), or 44-53-210(d)(2), all in violation of Section 44-53-375, Code of Laws of South Carolina, (1976) as amended.

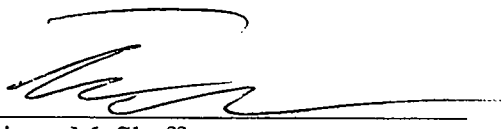
Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Rame L. Campbell
ASSISTANT SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 13th, 2011



Tristan M. Shaffer
Appellate Defender

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

ATTORNEY FOR APPELLANT

RECEIVED

JAN 11 2013

S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN JEROME GILLIARD,

APPELLANT

FINAL BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

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

Attorney for Appellant

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Other Authorities

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in refusing to instruct the jury that when material evidence is destroyed by the State, the jury may infer that evidence would have been favorable to Appellant?

STATEMENT OF THE CASE

Procedural History

On July 29, 2009, Appellant was indicted for Trafficking in Crack Cocaine in the amount greater than twenty-eight grams, but less than one hundred grams. R. 115. Appellant's case was called to trial on December 7, 2009 before the Honorable J. Cordell Maddox. R. 1. Appellant was represented by Andrew Potter. State was represented by Assistant Solicitor Rame Campbell. On December 9, 2009, the jury found Appellant Guilty. R. 102, ll. 13-16. Appellant was sentenced to twenty-five years in prison and ordered to pay a fine of \$50,000. R. 109, ll. 1-3.

Factual History

On April 19, 2009, Deputy Surratt of the Anderson County Sheriff's Department observed a silver Pontiac Grand Am run a stop sign. R. 33, ll. 20-25. Surratt initiated a traffic stop. The driver of the vehicle was Demetrius Robertson. Surratt observed Appellant seated in the passenger seat holding a partially smoked marijuana cigarette. R. 36, ll. 1-7. Appellant also had a small bag of marijuana in his pocket. Surratt took the two men into custody. Soon back-up arrived from both the Anderson County Sheriff's Department and Anderson City Police Department. Surratt then searched the vehicle. From pretrial testimony, it is evident that Surratt found 2.9 grams of crack cocaine; approximately half of a pound of marijuana; scales; and a forty-five caliber pistol. R. 3-5. Also concerning the search, Surratt's incident report reads:

"I went around to the passenger side of the vehicle and asked [Appellant] to step out of the vehicle. I advised him that he was under arrest. . . search incident to arrest I located inside [Appellant's] pants a clear plastic baggy containing an off-

white colored rock-like substance weighing approximately fifty grams that did field test positive for cocaine base.”

R. 55, ll. 5-7; R. 54 ll.13-17.

Surratt testified that according to the incident report, he found the clear bag of cocaine base before he took the Appellant to jail. R. 55, ll. 5-19. Appellant was then arrested and transported to the Anderson County Detention Center.

Appellant was booked by Deputy Lunz, a jailer at the Anderson Detention Center. The booking room was equipped with surveillance cameras. R. 75, ll. 10-13. Appellant was allegedly searched in the booking room by Deputies Lunz and Surratt. A videotape was made of the search, but that tape was later destroyed. R. 75, ll. 18-24.

On April 23, 2009, Surratt obtained an arrest warrant for Appellant for the charge of trafficking in cocaine base. In the application for the arrest warrant, Surratt swore:

“[Appellant] did knowingly have in his possession approximately 49 grams of [cocaine base]. This was found during a lawful traffic stop. This incident occurred on Brown Street and Market Street, Anderson S.C.” R. 113.

The traffic stop occurred at Brown Street and Market Street. R. 59, ll. 5-9.

Within ten days of the arrest, Surratt submitted a case summary to the solicitor’s office. R. 56, ll. 9-15. Officers are instructed to fill in the facts of the case in chronological order so that a representative of the Sheriff’s department can present the case to the grand jury. R. 56, ll.20-25; R. 57, ll. 1-3. In Surratt’s case summary he wrote:

“during the course of a traffic stop Demetrius Robertson and Appellant, search incident to arrest, were found to be in possession of approximately fifty-four grams of crack cocaine”

R. 57, ll. 4-8.

This testimony was used to indict Appellant for trafficking in cocaine base.

Before trial, Codefendant Robertson claimed responsibility for the 2.9 grams of crack cocaine; approximately half of a pound of marijuana; scales; and a forty-five caliber pistol. R. 3-5. Codefendant Robertson pleaded guilty to possession with intent to distribute cocaine (PWID)¹. R. 4, ll. 24-25; R. 5, ll. 1-5. However, Codefendant Robertson denied he had possession of the forty-nine grams of cocaine base that was the basis of Appellant's trafficking charge. R. 4, ll. 13-17.

At some point prior to trial, Surratt's story on where he found the cocaine base inexplicably changed. In Surratt's new version of the facts, Lunz found the bag of cocaine base while searching Appellant in the booking room, *not* at the point of arrest. R. 41-42. Likewise, Lunz also states that he found the cocaine base while searching Appellant. Lunz admits that according to detention center policy, if he found drugs on Appellant, he should have submitted an incident report regarding the search. R. 74, ll. 8-13. But Lunz chose not to submit an incident report regarding the alleged search. R. 74, ll. 22-24.

The alleged search at the booking room would have been videotaped. The detention center had a policy of only keeping the videotapes for a certain amount of time. At some point, Surratt allegedly requested a copy of the videotape. R. 77, ll. 1-7. Surratt claims that when he went back to obtain a copy of the video, he was informed that it had been taped over. R. 77, ll. 13-17. When Appellant's counsel became aware of Surratt's new version of

¹ Codefendant Robertson testified pretrial that he was charged with PWID crack cocaine. R. 4, ll. 21-23. The record does not state whether Codefendant Robertson was ever charged with the higher trafficking in cocaine charge. But it is clear from Surratt's case summary that he intended for Codefendant Robertson to also be accountable for the trafficking charge.

the facts, Appellant's counsel also requested a copy of the video, but by that time, the video had already been destroyed. R. 8, ll. 2-8.

At trial, the Appellant asked for a spoliation of evidence charge to be read to the jury. R. 8, ll. 8-14. The trial judge agreed that "[the destruction of the video] really should not have happened." R. 11, l. 7. But the trial court refused to instruct the jury on the destruction of evidence. Instead, he only allowed Appellant to question witnesses regarding the missing video. Appellant renewed his request throughout the record and eventually the trial judge noted his arguments were all protected. R. 101, 1-7.

ARGUMENT

1. The trial court erred in refusing to instruct the jury that when material evidence is destroyed by the State, the jury may infer that evidence would have been favorable to Appellant.

When a party fails to preserve material evidence for trial an inference may be drawn that the evidence would have been unfavorable to that party. *Stokes v. Spartanburg Regional Medical Center*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006). “The courts of South Carolina have long recognized that a party is entitled to favorable presumptions about the contents of missing evidence when an opponent is responsible for the destruction of evidence that might otherwise be expected to have been relevant.” Kevin Eberle, *Spoliation in South Carolina*, 19 S.C.Law. 26 (2007). South Carolina Courts have primarily given spoliation charges in civil cases. *See, e.g., Stokes, Supra*, 368 S.C. 515, 629 S.E.2d 675; *Kershaw County Board of Education v. U.S. Gypsum*, 302 S.C. 390, 396 S.E.2d 369 (1990). But spoliation charges are routinely² appropriate in criminal cases as well. In Appellant’s case, a spoliation charge was appropriate; therefore this Court should find that the trial court erred in refusing the requested charge.

Stokes and Appellant’s Case

In *Stokes*, this Court found that a decedent’s estate, in a medical malpractice case, was entitled to a new trial against a hospital when the trial judge refused to instruct the jury on the spoliation of evidence. *Stokes*, 368 S.C. 515, 629 S.E.2d 675. Prior to decedent’s

² *See Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988) (Stevens, J. *concurring*) (finding that the loss of evidence did not prejudice the criminal defendant, *when* the trial judge read a spoliation charge); *People v. Martinez*, 71 N.Y.2d 937, 940, 524 N.E.2d 134, 136 (N.Y.

death at the hospital, nurses prepared a vital signs flow chart and taken blood from the decedent. *Id.* 368 S.C. at 519, 629 S.E.2d 677. Both of these items were either misplaced or destroyed. *Id.* 368 S.C. at 519, 629 S.E.2d 677. The trial judge denied the decedent's requested spoliation charge. That denial was reversible error. *Id.* 368 S.C. at 522, 629 S.E.2d 679. This Court also commented that, it was crucial for the jury to know it could draw a negative inference from the hospital's failure to produce evidence which would show how the decedent died. *Id.* 368 S.C. at 522, 629 S.E.2d at 679.

Although Appellant's case arises from a criminal charge, the issue is essentially the same as the issue presented to this court in *Stokes*. The jurors were asked to determine if Surratt found the cocaine base on Appellant's person, but evidence essential to that determination was destroyed by the State. The destruction of the video by the State prejudiced Appellant by denying him any effective means of contradicting the Surratt's second version of the facts.

The fact that Appellant's case is criminal in nature and *Stokes* was civil in nature only prejudices the Appellant more than the aggrieved party in *Stokes*. The essence of the rule is that destruction of material evidence by one party makes the other party incapable of arguing his case. See Kevin Eberle, *Spoliation in South Carolina*, 19 S.C.Law. 26 (2007) ("The absence of evidence meant that the other party was hamstrung in the proof of his own case.") (citing *Halyburton v. Kershaw*, 3 Des 105, 3 S.C.Eq. 105 (1810)). Even without the missing evidence, the aggrieved party in *Stokes* had experts who could testify to the

1998); *People v. Safford*, 74 A.D.3d 1835, 902 N.Y.S.2d 866 (2010) (adverse inference charge appropriate when the State lost a video tape).

probable cause of death. Appellant did not have that option. A spoliation charge could have cured that problem. *See Youngblood*, 488 U.S. at 59-60 (Stevens, J. *concurring*).

Allowing Appellant to mention the missing evidence did not cure the error.

The trial court allowed Appellant's trial counsel to question the witnesses about the missing video; and even to argue that the video might have shown that Surratt and Lunz were lying. R. 11, ll. 1-3. But this speculation is not sufficient to cure the prejudice to Appellant. During the trial judge's preliminary charge to the jury he instructed them "the only evidence in this case will come from this witness stand and from and all documents or exhibits that are introduced." R. 20, ll. 7-9. This statement restrained the jury's ability to draw conclusions about what the video might have contained. Therefore, the judge should have cured this problem by granting Appellant's spoliation charge.

Why the Court should grant a new trial.

From the time Surratt *changed his story* regarding where he found the crack the Appellant's arrest became, at the very least, suspicious. That suspicion is compounded when the corroborating witness, Lunz, *chose* not to properly document the alleged search. This story is further supported by Codefendant Robertson who denied having any knowledge of the fifty grams of crack; which enabled him to plead guilty to PWID instead of trafficking. The State contends, the latest version of the story is backed up by a video that was allegedly requested, but then that video was destroyed before Appellant was ever aware that it existed.

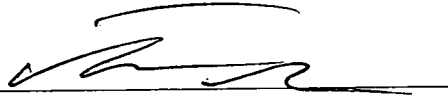
Spoliation charges are given because when evidence is destroyed by one party, the other party is often incapable of proving what that evidence would show. Without an inference against the destroying party, *the jury is often left with only one side of the story.*

That is what happened in Appellant's case. It is therefore crucial for the jurors to know they could draw a negative inference from the State's destruction of the video. *See id.*, 368 S.C. at 522, 629 S.E.2d at 679. In Appellant's case, failure to instruct the jury on the spoliation of evidence is reversible error. If the State *chooses* not to preserve material evidence in a criminal case, it should be held to the *same* degree of accountability as a party in a civil case.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court grant him a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tristan M. Shaffer', written over a horizontal line.

Tristan M. Shaffer
Appellate Defender

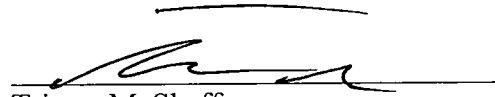
ATTORNEY FOR APPELLANT.

This 2nd day of June, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 2nd, 2011



Tristan M. Shaffer
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

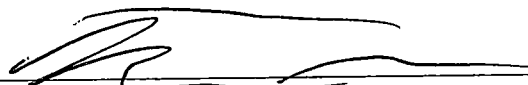
V.

KEVIN JEROME GILLIARD,

APPELLANT

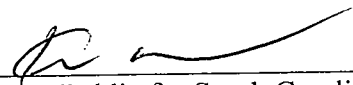
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of June, 2011.


Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 2nd day of June, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013 .

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JAN 11 2013

Appeal from Anderson County

S.C. Supreme Court

The Honorable J. Cordell Maddox, Jr. Circuit Court Judge

THE STATE OF SOUTH CAROLINA

Respondent

v.

KEVIN JEROME GILLIARD

Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

A spoliation jury charge was not warranted in this case because the State did not intentionally destroy the booking room videotape, and there was no indication the videotape contained exculpatory evidence.

STATEMENT OF THE CASE

Respondent concurs with the "Procedural History" portion of Appellant's Statement of the Case.

STATEMENT OF FACTS

On July 28, 2009, the Anderson County Grand Jury indicted Appellant Kevin Jerome Gilliard ("Gilliard") on one count of trafficking between twenty-eight and one hundred grams of crack cocaine. (Indictment 2009-GS-04-01737; Record on Appeal [R.], pp. 115-116). The matter was called for a jury trial on December 7, 2009, before the Honorable J. Cordell Maddox, Jr., Circuit Court Judge.

Prior to trial, Gilliard advised the court a videotape of the booking process during which the crack cocaine was found had been destroyed, and requested a jury instruction allowing an inference the videotape contained exculpatory evidence. The State responded that the arresting officer did request a copy of the videotape, but the detention center failed to make one before the videotape was recycled. The State argued a jury instruction was not warranted because both officers who were present in the booking room when the drugs were found were going to testify, and Gilliard could argue to the jury about the missing videotape.

The court indicated it would not give an instruction regarding destruction of evidence, but Gilliard could question the witnesses about the videotape. (Trial Transcript [TT], pp. 39-43; R., pp. 7-11). During his opening statement to the jury, Gilliard talked at length about the missing videotape. (TT, pp. 63-64; R., pp. 31-32).

Deputy Brandon Surratt ("Surratt") of the Anderson County Sheriff's Office testified he was on patrol on April 19, 2009, when he saw a car run a stop sign. There were two men in the car, and during the subsequent traffic stop, Surratt determined the driver's license was suspended. Further, Surratt detected a strong odor of marijuana coming from inside the car. (TT, pp. 64-67; R., pp. 32-35).

Gilliard, a passenger in the car, had his right fist clenched, and for safety reasons, Surratt asked him to open his fist. When Gilliard opened his hand, Surratt saw a marijuana cigarette in it, and Gilliard stated he had smoked it earlier. Surratt placed both the driver and Gilliard under arrest, but was only able to do a quick pat-down of both men for possible weapons because he was the only officer on the scene at the time. During the pat-down of Gilliard, Surratt felt something in his right pants pocket, and determined it was a bag of marijuana. (TT, pp. 67-69; R., pp. 35-37).

Surratt put both men in the back of his patrol car and transported them to the Anderson County Detention Center. As part of the booking process, Deputy Andrew Lunz ("Lunz") of the Detention Center conducted a more thorough search of Gilliard, who initially refused to move his legs apart. When Lunz finally forced Gilliard's legs apart, he and Surratt saw a clear plastic baggy fall out of his pants leg. Surratt picked it up, and the substance inside field tested positive for crack cocaine. Subsequent testing determined it was 44.63 grams of crack cocaine. (TT, pp. 68-79, 127; R., pp. 36-47, 78).

Surratt testified he mistakenly stated in the incident report he found the crack cocaine when he put Gilliard under arrest during the traffic stop, but the crack cocaine was discovered pursuant to a subsequent search incident to that arrest. He further testified his trial testimony regarding discovery of the cocaine was accurate. (TT, pp. 75-94; R., pp. 43-63).

After Gilliard was booked, Surratt asked the Detention Center supervisor on duty that night to make a copy of the surveillance videotape from the booking area. When he went back to get the videotape for court, however, he learned the officer did not make a copy, the

videotape had already been taped over, and there was no way to retrieve the footage from when Gilliard was booked. (TT, p. 122; R., p. 77).

Lunz testified about the booking process and his search of Gilliard. He stated the crack cocaine fell out of Gilliard's pants during the booking search, and Surratt immediately took custody of it. (TT, pp. 96-102, 105-106; R., pp. 65-71, 74-75).

During the jury charge conference, Gilliard again requested a charge allowing the jury to infer the videotape would have contained exculpatory evidence, but conceded the State did not destroy the videotape in bad faith. The court denied the requested charge, stating it was meant for evidence that was purposely destroyed. (TT, p. 136; R., p. 80). Gilliard then argued in closing that the missing videotape made the State's entire case suspect in light of the discrepancies between Surratt's incident report and his trial testimony. (TT, pp. 151-154; R., pp. 85-88).

The jury convicted Gilliard as charged, and the circuit court sentenced him to twenty-five years incarceration and a \$50,000 fine. (TT, pp. 168-175; R., pp. 102-109). This appeal followed.

ARGUMENT

A spoliation jury charge was not warranted in this case because the State did not intentionally destroy the booking room videotape, and there was no indication the videotape contained exculpatory evidence.

Relying on civil case law and a law review article, Gilliard contends the circuit court erred in denying his request for a spoliation of evidence jury charge. He argues a spoliation charge was mandated by the State's failure to preserve the booking room videotape from the night he was arrested, and the differences between Surratt's incident report and his trial testimony regarding discovery of the crack cocaine. This argument ignores applicable law regarding spoliation of evidence in criminal cases.

The State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 702 S.E.2d 395, 404 (Ct. App. 2010) (*citing* State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 [1991]). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Moses, 702 S.E.2d at 403.¹

As a threshold matter, the videotape was, at best, "potentially" useful evidence, and the State did not have an absolute duty to preserve it. Therefore, Gilliard must show either

¹Significantly, while Gilliard cites a concurring opinion in Youngblood, he ignores the majority opinion analysis, and then completely ignores applicable South Carolina cases.

bad faith by the police, or the videotape had "readily apparent" exculpatory value before it was taped over. The State submits he cannot meet either prong of the spoliation analysis, and therefore, a spoliation jury charge was not warranted in this case.

Gilliard does not contend the videotape was intentionally destroyed to avoid revealing exculpatory evidence. Rather, the undisputed evidence established Surratt asked the jail to make a copy of the videotape, and he did not know jail personnel failed to do so until the tape had already been taped over. (TT, p. 122; R., p. 77). Significantly, Gilliard's counsel specifically stated he did not think the videotape was destroyed in bad faith. (TT, p. 136; R., p. 80). Thus, Gilliard clearly cannot meet the first prong of the spoliation analysis.

Nor can Gilliard show the videotape had any exculpatory value, much less "readily apparent" exculpatory value, before the jail re-used the tape. On the contrary, both Surratt and Lunz testified about how Lunz found the cocaine while searching Gilliard at the jail pursuant to his arrest for possession of marijuana. Surratt also testified his incident report incorrectly indicated the cocaine was seized at the traffic stop location, but he reiterated the search at the jail was incident to Gilliard's arrest during the traffic stop, so it all arose from the initial traffic stop. (TT, pp. 72-77, 82-83, 86-90, 93, 97-102; R., pp. 40-45, 50-51, 54-58, 62, 66-71).

In the absence of any evidence the State acted in bad faith, or the videotape had exculpatory value, the State was not required to preserve the videotape, and failure to do so did not violate Gilliard's due process rights. Gilliard contends he was entitled to a spoliation charge simply because the videotape was no longer available. Mandating a spoliation charge

under the circumstances of this case effectively eviscerates the limits established in Youngblood, and adopted by the courts of South Carolina, by requiring the State to preserve any evidence the defense might claim was "potentially" useful, even if there is no indication the evidence had exculpatory value. Such a result imposes an unwarranted burden on the State, which will face the negative inference of a spoliation charge based on nothing more than a defendant's conclusory claim particular evidence might have helped the defense.

Further, specifically instructing the jury it could infer the videotape in this case was adverse to the State would be tantamount to a prohibited charge on the facts. S.C. Const. Art. V, §21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). It is undisputed the videotape footage from the night Gilliard was arrested was no longer available because the jail taped over it in the ordinary course of business. Even if stated as a permissible inference, a specific jury charge regarding the unavailable videotape would improperly focus on the fact the videotape was unavailable.

While a spoliation jury charge may be appropriate in civil cases where the parties have an equal burden of proof, given the State's significantly higher burden of proof in criminal cases, a negative inference charge such as the one requested by Gilliard is not appropriate in the absence of misconduct by the State or clear exculpatory value.² Gilliard

²Gilliard asserts spoliation charges are "routinely" given in criminal cases, but the only support he cites for that assertion is the concurring opinion in Youngblood and two New York cases indicating the trial court gave an adverse interest charge. In his Youngblood concurrence, Justice Stevens merely noted the trial court's adverse inference charge turned the State's negligent failure to preserve evidence on the victim's clothing to the defendant's advantage. 488 U.S. at 59-60. One of the New York cases cited dealt with a loss of evidence the government was specifically required to give the defendant. People v. Martinez, 71 N.Y.2d 937, 524 N.E.2d 134 (1980). The other New York case cited merely noted the trial court's adverse inference charge sufficiently addressed any failure to preserve videotape

referenced the missing videotape in his opening statement, questioned witnesses about it, and argued in closing that the missing videotape created reasonable doubt. (TT, pp. 61-64, 105-106, 151-155; R., pp. 29-32, 74-75, 85-89).

The circuit court properly instructed the jury it was the sole judge of the facts and the witnesses' credibility. (TT, pp. 50-51, 154-159; R., pp. 18-19, 88-93). There was no evidence of State misconduct or that the videotape had any exculpatory value, and the circuit court properly denied Gilliard's request for a spoliation jury charge.

evidence. People v. Stafford, 74 A.D.3d 1835, 902 N.Y.S.2d 866 (2010). None of the cited cases held the adverse inference charge was required in the absence of misconduct or clear exculpatory value.

CONCLUSION

Based on the foregoing, Respondent respectfully submits Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

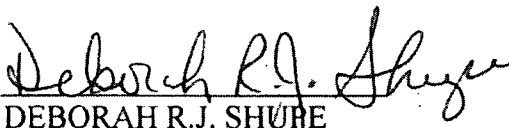
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June 2, 2011

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

KEVIN JEROME GILLIARD,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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June 2, 2011

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Respondent,

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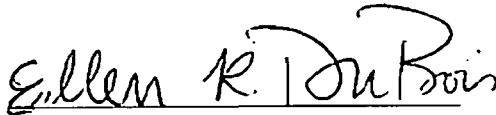
PROOF OF SERVICE

I, Ellen R. DuBois, certify I served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tristan M. Shaffer, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 2nd day of June, 2011.


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JAN 11 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

S.C. Supreme Court

Appeal from Anderson County

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN JEROME GILLIARD,

APPELLANT

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ARGUMENT IN REPLY

In the Brief of Appellant, Appellant asserted that he was entitled to a spoliation of evidence jury instruction under South Carolina common law. BOA 8-11. Brief of Appellant did *not* ask this Court to review whether prosecution should have been barred because the destruction of the video constituted a due process violation. BOA 12.

In the Brief of Respondent, the State seems to be confused regarding the doctrine of spoliation, as its brief attacks Appellant's claim as if it were a due process argument. BOR 6. The State has reframed Appellant's argument as a *superficially* similar due process claim, however it does not articulate a *sound justification*¹ for spoliation instructions to only be given in civil cases. The principles of the doctrine of spoliation apply to *all parties* irrespective of the context of the litigation.

The State's argument invites this Court to conflate the common law doctrine of spoliation of evidence with a due process violation resulting from the destruction of evidence. BOR 6. However these are *separate* issues with *separate* tests and *separate* remedies.

Distinction between Spoliation and Due Process

In the Brief of Respondent, the State opens its argument with the following:

“Relying on civil case law and a law review article, [Appellant] contends the circuit court erred in denying his request for a spoliation of evidence jury charge. He argues a spoliation charge was mandated by the State's failure to preserve the booking room videotape from the night he was arrested, and the differences between Surratt's incident report and his

¹ In the Brief of Respondent the State asserts, “While a spoliation jury charge may be appropriate in civil cases where the parties have an equal (sic) burden of proof, given the State's significantly higher burden of proof in criminal cases, a negative inference charge ... is not appropriate in the absence of misconduct by the State or clear exculpatory value.” BOR 8. However, the State failed to provide any justification for this argument.

trial testimony regarding discovery of the crack cocaine. *This argument ignores applicable law regarding spoliation of evidence in criminal cases.*

The State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. *State v. Moses*, 390 S.C. 502, 702 S.E.2d 395, 404 (Ct. App. 2010). " BOR 6. (emphasis added).

Essentially, the State urges this Court to view the spoliation issue as a due process issue.

However, the State fails to recognize the distinctions between the doctrine of spoliation and the issue raised in *Moses*. BOR 6-8.

In *Moses*, the defendant, "argue[d] the trial court erred in *refusing to dismiss* the charges due to the failure of the State to preserve or disclose videotaped evidence." *Moses*, 390 S.C. 502, 515, 702 S.E.2d 395, 402 (emphasis added). Moses argued that destruction of evidence was a *due process violation* that warranted *dismissal*. However, Appellant argues that he was entitled to a *jury instruction* based on a long standing doctrine in *common law*.

The *Moses* type due process challenge is readily distinguishable from the spoliation issue raised in *Stokes*². As previously argued by Appellant:

"In *Stokes*, this court found that a decedent's estate, in a medical malpractice case, was entitled to a new trial against a hospital when the trial judge refused to instruct the jury on the spoliation of evidence. Prior to decedent's death at the hospital, nurses prepared a vital signs flow chart and taken blood from the decedent. Both of these items were either misplaced or destroyed. The trial judge denied the decedent's requested spoliation charge. That denial was reversible error. This Court also commented that, it was crucial for the jury to know it could draw a negative inference from the hospital's failure to produce evidence which would show how the decedent died." BOA 8-9 (citations omitted).

² *Stokes v. Spartanburg Regional Medical Center* 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006)

Stokes relied upon a common law doctrine not a due process analysis. *Stokes* also requested a jury instruction rather than a constitutional bar to prosecution.

Although factually similar to some due process challenges, the issue on appeal is not predicated upon the due process jurisprudence relied upon by the State in the Brief of Respondent³. Instead, the issue is whether a spoliation instruction similar to those approved *Stokes* or *Kershaw*⁴ should be given in a criminal case, or in other words, whether the State should be held to the same standard to preserve evidence in a criminal case as any party in a civil case.

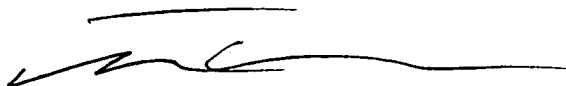
³ In his brief, Appellant does cite to Justice Stevens concurrence in *Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988), but this was primarily to demonstrate that spoliation instructions are appropriate in criminal cases. BOA 8 & 10.

⁴*Kershaw County Board of Education v. U.S. Gypsum* 302 S.C. 390, 396 S.E.2d 369 (1990)

CONCLUSION

Appellant respectfully requests this Court grant him a *new trial*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tristan M. Shaffer', written over a horizontal line.

Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR APPELLANT.

This 2nd day of June, 2011.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

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APPELLANT

CERTIFICATE OF SERVICE

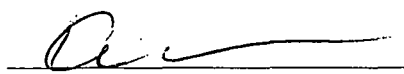
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of June, 2011.



Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 2nd day of June, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.