

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
John C. Hayes, Circuit Court Judge

RECEIVED
APR 27 2018
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DENNIS DEMARIO OBRIAN KENNEDY,

APPELLANT

APPELLATE CASE NO 2016-002538

RECORD ON APPEAL

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**THE FOLLOWING EXHIBIT IS ON FILE WITH THIS COURT:
COURT'S EXHIBIT #2 (CI DRUG BUY VIDEOTAPE)**

State of South Carolina.,)	In the General Sessions
)	Court of York
)	
)	
)	Case No. 2016-GS-46-01367
)	2016-GS-46-01369
)	2016-GS-46-01370
County of York.	)

State of South Carolina.,)	
)	
Plaintiff.,)	
)	Transcript of Record
)	Motion To Compel Discovery
Dennis Demario O'Brian)	
Kennedy.,)	
)	
Defendant.)	

November 3, 2016
York, South Carolina

B E F O R E:

The Honorable Wayne Creech, Judge, and a jury.

Mrs. Marina Hamilton
Assistant Solicitor
Sixteenth Judicial Circuit
Union and York Counties
For the Plaintiff

Mrs. Mindy Harvey Lipinski
Sixteenth Judicial Circuit
Union and York Counties
For the Defendant

ORIGINAL

Wanda S. Nelson, CVR-M
Official Court Reporter
To The Honorable John C. Hayes, III
Sixteenth Judicial Circuit
Union and York Counties

I-N-D-E-X

E-X-A-M-I-N-A-T-I-O-N

WITNESS

BY:

PAGE NO.

No witnesses were called.

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>

No Exhibits were received into the record.

1 (COURT IN SESSION IN THE MATTER OF STATE V. DENNIS
2 DEMARCO KENNEDY, THURSDAY, NOVEMBER 3, 2016 AT 03:48 PM.)

3 THE COURT: All right.

4 SOLICITOR HAMILTON: Thank you, your Honor.

5 This is Dennis Demario Kennedy. This is gonna be a
6 discovery motion that the Defense wished to have, hopefully
7 to try to push this case along.

8 He is currently charged with trafficking cocaine;
9 possession with intent to distribute crack cocaine, third
10 offense; possession with intent to distribute cocaine in
11 proximity to a park; possession with intent to distribute
12 crack within proximity to a park; possession of a firearm
13 during the commission of a violent crime and possession of
14 a stolen pistol.

15 THE COURT: All right. The motion again is what?

16 MRS. LIPINSKI: It's a Motion to Compel Discovery,
17 your Honor.

18 THE COURT: All right.

19 MRS. LIPINSKI: I think it's somewhat a motion you
20 might have heard before, hopefully I put a novel spin on
21 it. Mr. Kennedy is charged with those offenses as a result
22 of a search warrant that was executed at his house. The
23 basis of the search warrant is -- was a no-knock warrant.
24 It was signed by a magistrate and it is believed, because
25 that's kind of what is laid out in the affidavit for the

1 search warrant, that the probable cause was an under-cover
2 buy.

3 I have ask the State in just kind of preliminary
4 discussions for access to among other things the report,
5 the video, still's from the video, some type of means in
6 terms of my ability to evaluate search warrant, the
7 probable cause, and those type things for the under-cover
8 buy.

9 The policy I think is a Sixteenth Circuit on not just
10 this case but other cases is he's not charged with a buy
11 and we're not going to give you anything as it relates to
12 the buy. You have a search warrant and based on the search
13 warrant that should be enough and that's really what you
14 and your client need go evaluate in evaluating the offer
15 that is tendered by the State.

16 I kind of let this go until we get to a trial posture
17 before and I don't believe that the Court's necessarily
18 sympathetic when it comes on that late date, so what I
19 wanted to do, and ask Mrs. Hamilton to do, is to put this
20 before you and allow me to file a motion to compel at this
21 time for that evidence either all of it or some of it or
22 part of it.

23 I've ask her if I could have the report, just the
24 report at least, to begin my investigation and then from
25 there evaluate the need to see the video or the tape or

1 stills of the tape. And the reason it becomes important
2 particularly with a no-knock warrant is that the affidavit
3 in the search warrant indicates that my client was seen
4 with a gun on him and that's the reason the no-knock
5 warrant was signed and those type things; the proximity of
6 it and those type issues.

7 I understand the case law that says that a search
8 warrant is evaluated on the four corners of the search
9 warrant and that's where the court's inquiry should be and
10 therefore perhaps it's where the defense inquiry should be.
11 But I would pass up to the Court -- and I did make copies
12 of this case -- *State v. Jones*.

13 If you could hand that to him.

14 (DOCUMENTS RECEIVED UP BY THE COURT.)

15 MRS. LIPINSKI: This was a search warrant case where
16 it was later determined to be that the -- the person who
17 was the affiant on the search warrant actually didn't know
18 anything. Another officer had called in the search warrant
19 and basically they said some other guy who didn't know
20 anything, or knew very little, to sign the search warrant
21 because the main investigator was out on the scene where
22 they were investigating the crime.

23 Notably in this case in *State v. Jones* it says that a
24 false affidavit circumvents the affidavit requirement of
25 South Carolina Code annotated 17-13-1040 which requires

1 that search warrants be supported by oath or affirmation in
2 the state of South Carolina. It goes on to say at least on
3 Page 3 of 5 of mine, a defendant has the right to challenge
4 mistreatments in the search warrant affidavit citing *Franks*
5 *v. Delaware* a US Supreme Court case 438 US, 154 and *State*
6 *v. Saks*, a South Carolina Supreme Court case.

7 A defendant is entitled to an evidentiary showing if
8 the following criteria are met. The defendant's attack is
9 more than a conclusary it's supported the bond more than
10 a desire to cross-examine the affiant. The defendant makes
11 allegations of deliberate falsehood or reckless disregard
12 for the truth which accompanied by an offer of proof. And
13 three, that the affiant has made the allegedly false or
14 reckless statement.

15 It goes on to say that in this particular case the
16 affiant admitted to the magistrate -- and I'm sorry -- in
17 this case they've used the term agent, that an agent had
18 made an under-cover buy which is actually a CI that made an
19 under-cover buy and that false statement undermined the
20 warrant, and the Supreme Court went on to agree with the
21 Court of Appeals that because the veracity of the informant
22 was not established and in fact it was and informant and
23 that they had intentionally misrepresented the facts to the
24 magistrate that the search warrant was problematic and
25 therefore the evidence should have been suppressed.

1 Another case -- and I thought I had three copies of
2 this one -- but I give you the sorts - cite and I'll hand
3 it up is *State v. Wright*. That is W-r-i-g-h-t, not unlike
4 left to right. That was decided in 2016 of this year.
5 It's at 416 SC 353.

6 In this particular case what they again looked at in
7 terms of establishing the search warrant was that false
8 representations had made in the affidavit and that were
9 false representations were made that affidavit was not
10 truthful and therefore could not basically survive
11 constitutional mustard. They did find over all that if you
12 took the false parts out the truthful parts that remain did
13 ultimately establish probable cause. But what it did I
14 think illuminate is that these falsehoods some of them
15 intentionally as was the case in *Jones* and some of them
16 unintentionally as was the case in *Wright* -- and I'll hand
17 this up to the court -- do exist in these particular cases.

18 And I do believe that as counsel affords the defendant
19 the only ways of meaningfully evaluate the credibility of
20 the information contained in the search warrant, it's not
21 enough to merely say is that enough to establish probable
22 cause, but that I had a duty and obligation to explore the
23 veracity of that information; things like whether or not
24 the buy was truly done within seventy-two hours; things
25 that the confidential informant likely relayed or that

1 officers were able to corroborate and therefore used that
2 to conduct the hearings that *Franks v. Delaware*; *State v.*
3 *Jones*, *State v. Wright* anticipate.

4 And that without access to even the report, let alone
5 the video or stills from the video, my ability to do that
6 in any meaningful fashion handicaps my ability to represent
7 my client as we go forward. So I wanted to come here
8 before the Court and seek the compelling of that
9 information from the State, your Honor.

10 THE COURT: All right. So it's your contention
11 there's something's false in the affidavit?

12 MS. LIPINSKI: It's my contention that I have to have
13 a meaningful opportunity to investigate and evaluate that
14 just like any other case where I may go talk to witnesses,
15 or, I may go look at evidence or I may fact check the
16 officers in any way. I don't have the ability to do that
17 without the ability to look even at that report let alone
18 the video or stills from the video, your Honor.

19 THE COURT: So to -- In essence my question is, you
20 don't have anything to indicate that the affidavit is false
21 at this point?

22 MS. LIPINSKI: I've had conversations with my client
23 where he does call into question some of the things in the
24 affidavit, your Honor, which I think getting access to that
25 report or video would help us evaluate more further our

1 ability to make a meaningful decision in terms of whether
2 or not he should plead, or whether or not he should go to
3 trial, and whether or not he can have a chance to do the
4 things that Jones says; that basically I can't go into a
5 suppression hearing just merely wanting to cross-examine
6 and go on a fishing expedition.

7 THE COURT: ,Well that's the word that's running
8 through my mind. Unless you have some meat from the bones
9 of your motion and it really does appear to the court --
10 and I'll hear from the State -- that this is the term I was
11 thinking about that you just used as a fishing expedition.

12 MS. LIPINSKI: Well, your Honor, I can't do it because
13 I can't even get to the lake.

14 THE COURT: Well I thought it was a chicken and egg
15 sort of thing, how do you do one without the other, but so
16 far it looks to me like the court's haven't given that
17 fishing term yet. But let me hear what the State has to
18 say.

19 SOLICITOR HAMILTON: Your Honor, that -- one of the
20 responses that I was gonna state that there is no evidence
21 in this case to make them believe there have been any false
22 statements. Additionally an officer did -- Officer
23 Clevenger did actually swear upon his affidavit versus the
24 *State versus Jones* case makes me believe that an officer
25 actually did not swear on that affidavit in this case is

1 what the defense had statement.

2 Additionally I'm not aware of any rules that require
3 the State to turn over any evidence in the case where there
4 are no charges and that's exactly what she stated. He is
5 not charged with distribution in this case.

6 Additionally they're requesting video stills, a report
7 on this. What we are looking at is a search warrant.
8 We're looking at a distribution that was the basis of the
9 search warrant. The magistrate judge heard the veracity;
10 he heard the witnesses, or he signed this. He stated there
11 was probable cause based on what the affidavit stated and
12 the affiant stated. He found that there was probable
13 cause.

14 At the time of trial we can put that person up,
15 Clevenger, put him on the stand and have her access his
16 credibility; have her access if the buy was conducted
17 properly at that point, but any kind of basis as to who the
18 confidential informant is, or any of the details of the
19 buy, he's not charged with that therefore we believe that
20 on the face of the warrant is what she has to go on. And I
21 have not been made aware of any false statements, any false
22 -- any falsehoods within this, the affidavit to make me
23 believe that there is anything that I should have concerns
24 of.

25 So it's the State's position that we do not have to

1 turn over this evidence. At the time of trial she can
2 access the veracity of the search warrant at the time when
3 we put up our officer and he testifies as to the basis of
4 this buy which is the base of this search warrant, your
5 Honor.

6 And again, I may be familiar with this through the
7 trial that we recently just did, under *State versus Dupree*
8 that's what the State would argue at the time of trial that
9 a controlled purchase by law enforcement officers can be
10 alone enough to provide probable cause if it was a proper
11 buy and that's what we would do at trial.

12 MS. LIPINSKI: And, your Honor, just briefly in
13 response to that. I think if you look at *State v. Wright*
14 and *State v. Jones* what you can see is that the defendant
15 in both of these cases would never have or had the ability
16 to ascertain that the buy not being made by an actual agent
17 was instead made by a confidential informant unless they
18 got information pertaining to that buy.

19 In *State v. Wright* they made representations to the
20 officer that a gun was found at someone's house when really
21 the information they got from law enforcement was that a
22 gun was seen in the area. So the types of falsehoods that
23 these cases illuminate, and I'm not necessarily asaying
24 that they for malfeasance on the part of law enforcement,
25 is that they can make an accurate representations whether

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1 in good or bad faith. And in *Jones* they actually said they
2 intentionally misled the magistrate. In *Wright* I think
3 they were summarizing a great deal of information in a
4 short amount of time and those may have been perhaps more
5 inadvertent.

6 But nonetheless the only way that those were ever
7 revealed to the defendant is he was given information about
8 what set up the search warrant. And that's the only way I
9 get to that information is through those informations. And
10 I am completely sympathetic, I'm not here looking to
11 disclose the CI weeks before trial, I'm not here trying to
12 force the State's hand in terms of the confidential
13 informant. I think this information, particularly just the
14 report which usually contains no CI information whatsoever,
15 but beyond that I think is the way to produce videos or
16 stills from the videos which would allow me to evaluate the
17 veracity of the search warrant in this particular case
18 which is that the CI within seventy-two hours went in saw
19 drugs in my client's house saw him having a gun is my
20 ability to evaluate that.

21 So it's very easy to say well she can have her hearing
22 but I'm cut off from the information that I would use to
23 fact check that that it can be a meaningful hearing from
24 the defendant. And in these cases that information would
25 have never come to light except for that information being

1 produced to the defendant because otherwise he would have
2 never known in particular in *State v. Jones* that they used
3 the CI versus using actual undercover agent.

4 And in *State v. Wright* I think you can see that there
5 is a number of factual inaccuracies, while not necessarily
6 fatal but nonetheless material, that certainly gave the
7 Court pause that again because it came from other witnesses
8 or things the defendant was not privy to would not have
9 been known to the defendant but for the fact. I think this
10 report -- In and of itself the report could be produced
11 without any prejudice to the State than disclosing their CI
12 or anything of that nature.

13 And it's one thing for the State to sit there and say
14 well he's not charged with that buy but when the buy is the
15 res gestae for the search warrant that says oh, my client
16 being in possession of drugs you kind of cuttin off the
17 snake at it's head and then asking to still believe it's a
18 snake and not knowing what it is.

19 I think the Court can strike the appropriate balance
20 that affords the protection the State seeks but nonetheless
21 gives the defendant a meaningful opportunity to explore
22 possible exculpatory information that the *Brady v. Maryland*
23 and *Froginy* entail, your Honor.

24 THE COURT: Well what I'm not seeing in these cases,
25 and I'm looking through the facts, all of a sudden it

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1 dawned on my so I looked back and yes, *Wright* was the case
2 I tried in Horry County, but I haven't gone back over the
3 case to see how -- what there is -- how the case was
4 developed. That is, what you're telling me is you need
5 this to -- you can't access your client's position in this
6 unless you have this information. And -- But the Court
7 seemed to set up a little bit of a bar you have to get over
8 rather than allowing the defendant to go on a fishing
9 expedition as we talked about earlier.

10 Let me take a look at these cases and -- anybody have
11 anything else on it -- I'll issue a short order fairly
12 promptly.

13 MS. LIPINSKI: Just briefly, your Honor, and I don't
14 want to belabor the issue but, I mean, I just want to flush
15 this out. If this is the bar I have meet and I'm cut off
16 from the evidence that would allow me to do it I don't know
17 how that I would ever meet that bar.

18 THE COURT: Well I don't either. I didn't set the
19 bar. I mean I've got to look -- We're a precedential court
20 and I've got to see what the cases have said. Unless
21 somebody can show me some authority I got to go by the
22 authority. I don't always like it and I understand exactly
23 what you're saying but there is a bar there then you got to
24 get over the bar and that's just part of the legal process.

25 MS. LIPINSKI: Thank you, your Honor.

1 SOLICITOR HAMILTON: Just briefly, your Honor. The
2 nature of the buy that's listed in the search warrant, it
3 details the location within the past seventy-two hours. It
4 states there was a firearm -- this is all in the video. It
5 does state the circumstances of the buy in the search
6 warrant.

7 Additionally she's talking about protections to the
8 State. I believe that the magistrate judge by reviewing
9 this information and accessing this information and being
10 able to ask the affiant any kind of questions that he may
11 have he afforded the defendant protection before issuing
12 probably cause on this warrant.

13 We believe that all of these issues that she wants to
14 take up she can take up in front of the trial judge at the
15 appropriate time and that's just the State's position in
16 this case. What we would hand over is basically stated in
17 the search warrant in this case and that's the State's
18 position.

19 MS. LIPINSKI: And, your Honor, if that's the State's
20 position that this magistrate viewed this video to
21 corroborate the information they say is in it was there,
22 but he's a neutral and detached magistrate, he's not there
23 as an advocate on the part of the defendant. He swears the
24 officer in, he listens to what they say, he determines if
25 that's enough probable cause, but he's not there on a fact

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1 checking mission and so I think to sit there and say that
2 he provided the defendant with these protections I think it
3 is not in line with what the role of the magistrate is in
4 executing the search warrant.

5 THE COURT: I'll issue a short order shortly.

6 SOLICITOR HAMILTON: Thank you, your Honor.

7 MS. LIPINSKI: Thank you, your Honor.

8 (END OF TRANSCRIPT OF RECORD.)
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State of South Carolina.,)	In the General Sessions
)	Court of York
)	
County of York.)	Case No.: 2016-GS-46-01367
	2016-GS-46-01369
	2016-GS-46-01370

State of South Carolina.,)	
)	
Plaintiff.,)	
)	
-vs-)	
)	Transcript of Record
Dennis Demario)	Trial
Obrian Kennedy.,)	
)	
Defendant.)	
_____)	

December 13-14, 2016
York, South Carolina.

B E F O R E:

The Honorable John C. Hayes, III., judge , and a jury.

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

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I-N-D-E-XE-X-H-I-B-I-T-S

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6	St.3	Scale	P.	P.154
7	St.4	Bags	P.	P.154
8	St.5	Photo of house.	P.	P.157
9	St.6	Photo of door	P.	P.157
10	St.7	Photo of Cocaine Baggies. . .	P.	P.157
11	St.8	Photo of Crack in Bag	P.	P.157
12	St.9	Photo of crack outside bag. .	P	P.157
13	St.10	Crack	P.	P.240
14	St.11	Cocaine	P.	P.242
15	St.12	Miranda Form.	P.	P.178
16	St.13	Photo of drugs in bag	NOT ENTERED	
17	St.14	NOT ENTERED		
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22	Ct.3	Miranda Form.		P.82
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25	Ct.6	Jury note @ 05:59 pm.		P.319

I-N-D-E-XE-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD.</u>
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Reporter's Note: All Exhibits were filed with the York
County Clerk of Court's Office.

1 (COURT IN SESSION IN THE MATTER OF STATE V. DENNIS
2 DEMARCO BRIAN KENNEDY TUESDAY, DECEMBER 15, 2016 AT 10:35
3 AM.)

4 THE COURT: Take your seats. I apologize, I got
5 stranded. Now, this is the State versus Dennis Kennedy?

6 You Mr. Kennedy?

7 MR. KENNEDY: Yes, sir.

8 THE COURT: Okay. You're represented by Ms. Lipinski?

9 MR. KENNEDY: Yes, sir.

10 THE COURT: All right. I have some -- I'll let the
11 State start but I think the motions that are pending before
12 me are those of ---

13 (COMMOTION IN HALLWAY.)

14 THE COURT: --- the Defendant. It looks like one is
15 reminiscent; I've already heard and ruled upon but I'll be
16 glad to start.

17 SOLICITOR HAMILTON: I do not have a copy of the --

18 THE COURT: Basically it's a motion to reconsider the
19 earlier rulings.

20 MS. LIPINSKI: I served her. I personally walked it up
21 there, your Honor.

22 THE COURT: You might want to --

23 MS. LIPINSKI: I'll try to find them a copy. I have
24 another copy I can give them. Just one second.

25 THE COURT: We can run a copy. Would that be quicker?

1 MS. LIPINSKI: They clocked that as the original and
2 you clocked it as a copy.

3 SOLICITOR HAMILTON: We did not get any of this.

4 MS. LIPINSKI: I handed it to you. Not Melissa. It
5 was the other receptionist in the back. I handed it to
6 Sarah. Well I did give it to you. I will represent that
7 to the Court.

8 I apologize, your Honor. I think that it would - I
9 would make note that the State only intends to proceed on
10 some of the indictments against Mr. Kennedy so I think
11 perhaps the best place to start is to have the State call
12 the case and determine that because that may impact some of
13 the motions already, your Honor.

14 THE COURT: All right. Possession of a weapon.
15 Possession with intent to distribute crack and trafficking
16 in cocaine.

17 SOLICITOR HAMILTON: Yes, your Honor. And I did want
18 to make the Court aware I have made the Defense aware as to
19 the trafficking and cocaine, the CDR Code is incorrect.
20 It's actually a first offense with the CDR Code of 0-2-7-8.
21 The statute's correct in the facts alleged and the
22 indictment are correct. It was just the CDR Code that we
23 would wish to amend to reflect that it's trafficking first
24 offense and not as indicted to trafficking third offense.

25 THE COURT: All right. So the correct CDR Code is?

1 SOLICITOR HAMILTON: 0-2-7-8.

2 THE COURT: Any thoughts on that, Ms. Lipinski?

3 MS. LIPINSKI: She did put my on notice of that, your
4 Honor.

5 THE COURT: All right. Well the CDR Code is not part
6 of the offense. It's a record keeping so I'm gonna change
7 it on the indictment.

8 SOLICITOR HAMILTON: Your Honor, we have been told by
9 the Defense that the defendant has pleaded not guilty to
10 each of the indictments that you just read.

11 THE COURT: All right. Is that correct, Mr. Kennedy?
12 You pleading not guilty to all three of these?

13 MR. KENNEDY: Sir?

14 THE COURT: You're charged with possessing a pistol in
15 a violent crime; possession with intent to distribute crack
16 cocaine and trafficking in cocaine. Are you pleading not
17 guilty to all three of those?

18 MR. KENNEDY: Can I ask her?

19 THE COURT: Yeah. You talk to Mr. Kelly - O'Kelly.

20 MS. LIPINSKI: Your Honor, if I could have a moment
21 just to -- with my client?

22 THE COURT: Yeah, certainly. Take --

23 MS. LIPINSKI: I apologize, your Honor.

24 THE COURT: No, that's fine. We're in no hurry.

25 (PAUSE AT 10:42 AM.)

1 MS. LIPINSKI: May it please the Court, your Honor?

2 THE COURT: Yes.

3 MS. LIPINSKI: Just briefly. I appreciate the Court's
4 indulgence and that opportunity. Mr. Kennedy has kind of
5 been in a tough position all along throughout this trial.
6 You'll hear evidence that he gave statements admitting that
7 some of the drugs being his from the time they searched
8 him. His issue really is these procedural arguments and
9 what he thinks he's entitled to make a fair and accurate
10 determination as to whether or they properly searched 64
11 Reynolds Street.

12 What he would like, if the Court is willing to do, is
13 to proceed with pretrial motions and then ask him whether
14 or not he pleads guilty or not guilty at that point.

15 THE COURT: Well, a defendant doesn't have a right to
16 plead guilty as I understand the law. However, the Court
17 does have the right to accept a plea of guilt if tendered.
18 I think that's my understanding of the law.

19 So we'll hear the procedural matters and then if you
20 discuss with your client and if he wants to tender a plea
21 at that time I'll determine or the State may accreess to
22 that, or, the Court may jurisponste accept the plea.

23 So you can forward with that understanding. I think
24 that -- and you know the law better than I -- if he were to
25 do that and then I think my rulings on the procedural

1 matters would not be appealable because I don't think he
2 can plead and retain appealable issues. Now I may be wrong
3 on that but I think your client needs to be aware of that
4 and I'm sure he is.

5 MS. LIPINSKI: I've tried to explain that too, your
6 Honor, and I've also tried to structure the pretrial ruling
7 and motions to try and best carve out that if possible.

8 THE COURT: Okay. All right. Well you ready to go
9 forward with the hearing? For the record this is a Motion
10 to Reconsider an order I issued in this case on November
11 8th, 2016 after a hearing and after doing some research
12 although I don't see where I cited any cases in my order.

13 And the motion is on the - by the defendant to
14 convince the Court that it should reconsider that order
15 and, so, unless the State has something else I'll let Ms.
16 Lipinski proceed.

17 SOLICITOR HAMILTON: Your Honor, the State would just
18 take the same position it did when we had that hearing that
19 we are not required to disclose the evidence; that from my
20 brief reading of this is being requested which would be the
21 identity of confidential informant.

22 And the defendant being denied the right to
23 investigate any possible false statement, the State just
24 would take the same position as it did at the time that we
25 argued the Discovery Motion. That the defendant is

1 actually charged with a distribution and which was the
2 basis for the search warrant. The defendant has the
3 opportunity today if he wishes to confront the witness to
4 that buy who is the officer in this case.

5 THE COURT: Well wouldn't it be better if I heard from
6 their position before you ---

7 SOLICITOR HAMILTON: Okay.

8 THE COURT: --- before you address that. You hadn't
9 heard what she's gonna say.

10 SOLICITOR HAMILTON: I just - Did you want to go
11 through each one individually in this? That's what I'm -

12 THE COURT: Well, I think she needs to make her
13 presentation but I have a procedural matter. What rule
14 allows a -- Very well known 59(e) in civil court, under
15 what rule does a defendant have a right to make a motion to
16 reconsider other than in the Court's inherent powers?

17 MS. LIPINSKI: Well I don't know that arguably we can
18 file motions to reconsider and I agree. I do think the
19 Motion to Reconsider coupled had within it - Once you - The
20 Court came down with it's order, I reached out to Appellate
21 Defense and ask them whether or not in their opinion this
22 would rise to a level of an interlocutory appeal or a writ
23 of supersedeas given that its so overwhelmingly at that
24 point kind of impacted Mr. Kennedy's ability to move
25 forward in a meaningful way.

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1 THE COURT: Well it's gonna impact a lot of other
2 defendant's too. I mean this is not the first time I've
3 wrestled with this issue.

4 MS. LIPINSKI: I understand that. And I - I just
5 always think it's best to reach out to the people who do
6 appeals and to make those considerations. When they ask me
7 do you because they have dealt with this issue before is
8 that when this issue is raised on appeal and the report or
9 the tapes or the identity of the CI is not made part of the
10 record as a result of the Court's ruling, then the Supreme
11 Court comes down with that she wasn't really preserved for
12 appeal and we don't have a appropriate record ----- to base
13 that motion.

14 So really the motion to Reconsider was not so much
15 taking exception to the Court's ruling but if that is the
16 Court's ruling to ask the State to produce those documents
17 under seal. Well we ask also for an in-camera review
18 figuring that that might balance the interest of the State
19 in protecting the confidential informant while protecting
20 the right of the defendant. But if the court is not
21 inclined to do a in-camera review, and just felt we didn't
22 have a right to go into that information; whether the Court
23 was just gonna stick with a search warrant and not go
24 there; that pursuant to *Adams v. HR Allen* and *State v.*
25 *Ladsen* that those documents be filed under seal by the

1 State in the event -- and understand the Court believes
2 unlikely that the Appellate Court disagrees that the
3 defendant had that right -- basically that information will
4 be available on appeal.

5 And so that's the last paragraph of that Motion to
6 Reconsider, your Honor. And some there where I was trying
7 to protect my client's rights as he would move through this
8 process.

9 THE COURT: All right. Now as I alluded to Rule 59(e)
10 has a ten day period for motions to Reconsider. There is
11 no identical rule in criminal procedures but Rule 29 Rules
12 of Criminal Procedure address post-trial motions and gives
13 a ten-day period of time.

14 Yes, ma'am, you look like you were rising to your
15 feet? One of you, both of you.

16 SOLICITOR HAMILTON: Your Honor, under the Rules of
17 Criminal Procedure, under Rule 4(b) it states a suppliant
18 applications or orders after refusal a motion be made to
19 any judge and be denied for in part or be granted
20 conditionally no subsequent motion upon the same set of
21 facts should be made to any other judge in that action. If
22 upon subsequent motion any order be made it should -- it
23 shall be void.

24 That would be the State's position; that she's not
25 entitled to a rehearing on the issue based on the fact that

1 this is the same set of facts in which you have already
2 ruled on. We've - I do not remember the exact date, your
3 Honor, but have already ruled on and denied her motion. It
4 was November 8, 2016.

5 THE COURT: Well it just says to any other judge.

6 I'm not any other judge. I'm the same judge. So 9b),
7 Rule 4(b) doesn't have any application here that I can
8 garner.

9 SOLICITOR HAMILTON: Your Honor, we just need to state
10 the position that he does not have a right to have this
11 reheard since you have already ruled.

12 THE COURT: Well what's that good Latin maximum about
13 inclusion one the exclusion of the other? It's not exactly
14 the way it is and that's not Latin but the fact that they -
15 that the rule states that it can't be made before any other
16 judge the contrary to that seems to be that it can be made
17 before the original judge. I'm gonna allow the motion to
18 proceed.

19 MS. LIPINSKI: The Court's indulgence, he's asking me
20 more questions.

21 THE COURT: Okay.

22 MS. LIPINSKI: My apologies. Thank you, your Honor.

23 THE COURT: All right. You ready to proceed? I don't
24 believe we need any testimony on this. Again, I know what
25 the issue is. I've already ruled and the question is

1 whether or not the Court should reconsider the order of
2 November 8th.

3 MS. LIPINSKI: Well, there are some new things in the
4 motion. At the time I made the motion originally it was a
5 discovery motion to compel. At this particular time
6 there's not only a Motion to Suppress the Search and I do
7 have Judge Young who executed the Search Warrant here today
8 we do intend to call as a witness.

9 THE COURT: You may.

10 MS. LIPINSKI: However ---

11 THE COURT: You may.

12 MS. LIPINSKI: --- I also subpoenaed his file because
13 I do believe Magistrates do a large number of search
14 warrants and I don't expect them to remember every one. I
15 forwarded that subpoena to the Bond's Clerk of Court and
16 she informed Mr. -- Judge Young this morning that his files
17 have been boxed up and are now in an unknown location.

18 THE COURT: That's scary.

19 MS. LIPINSKI: It is. It is very scary especially for
20 the Defendant, your Honor, who was hoping that Mr. Young
21 would be able to recall information that they provided to
22 him in seeking that search warrant and right now what's
23 roughly going off on, wrote from memory versus specific
24 memory of this case.

25 THE COURT: All right, when was he served with the

1 request, the subpoena?

2 MS. LIPINSKI: I served it with him last week, your
3 Honor, and he ask me to forward it to his clerk so they
4 could pull the file. And I forwarded the subpoena because
5 its also documents as well to her.

6 THE COURT: Well, he was not - he nor his record was
7 subpoenaed prior to my entry of the November 8th order?

8 MS. LIPINSKI: No, your Honor, but that was a
9 discovery motion. This also couples a motion to suppress.

10 THE COURT: I understand but --

11 MS. LIPINSKI: And there's some other issues with the
12 Search Warrant that the defendant would like to raise.

13 THE COURT: All right. Well, we're kind of mudding
14 the water. This is a Motion to Reconsider. This isn't a
15 motion to suppress. This is still a discovery motion as I
16 understand it.

17 MS. LIPINSKI: Yes.

18 THE COURT: Because you can't make it -- As I
19 understand your position is you can't make a motion to
20 suppress unless I grant you the relief you request.

21 MS. LIPINSKI: I think I'm substantially handicapped.
22 I don't -- Yes, but there are still some other issues not
23 dealing with the CI that the defense would like to raise.

24 THE COURT: All right, a step at a time. Let's worry
25 about -- not worry but let's address whether or not I

1 should reconsider my November 8th order and that's the
2 Discovery Order.

3 MS. LIPINSKI: Yes, your Honor. That motion, your
4 Honor, is that outlaid in the motion in the search warrant
5 normally search warrants or at least my experience is the
6 affidavit for the search warrant contains within it
7 representations that were made to the magistrate regarding
8 the reliability or the credibility of the confidential
9 informant.

10 In this particular case the search warrant is void of
11 that information.

12 THE COURT: I keep -- I hate to keep stopping you but
13 I don't have the search warrant this time. I had it the
14 last time.

15 MS. LIPINSKI: I have a copy.

16 THE COURT: Okay.

17 (DOCUMENT RECEIVED UP BY THE COURT.)

18 THE COURT: Thank you. All right.

19 MS. LIPINSKI: And the reason for the affiant's
20 belief, your Honor, it goes on to say that instead of
21 vouching for the credibility of the CI it states that the
22 officer was able to monitor the transaction via a body
23 wires. The CI identified Kennedy the defendant by name and
24 by photo. The CI communicated via cell phone although I
25 don't know that that was every corroborated, they just

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1 state that. And then it says that the CI provided
2 information that Kennedy regularly carries a firearm and I
3 believe the corroboration would then coming a firearm is
4 visible in the video of a purchase, so, while we were doing
5 the original hearing, your Honor, is, he also made the
6 comment that she believed that the magistrate had viewed
7 the video of the CI and perhaps then to cross-examine or at
8 least question the affiant regarding the credibility of the
9 CI.

10 As she stated that is part of her - the State's reason
11 why they felt we were not entitled to either stills from
12 the video obtained from a report or something of that
13 nature and we have Judge Young here to at least clarify
14 those issues.

15 THE COURT: All right. Call him to the stand.

16 MS. LIPINSKI: If we could call Judge Young to the
17 stand.

18 SOLICITOR HAMILTON: Your Honor, I do want to state
19 for the record that that is not correct what I said on the
20 record. What I stated was Officer Clevenger the affiant in
21 this case had viewed the video and seen the firearm. Not
22 that the magistrate judge viewed the video. It was Officer
23 Clevenger who had viewed the video. I just wanted to
24 clarify that, your Honor.

25 MS. LIPINSKI: My recollection is somewhat different.

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1 I think the record will speak for that, your Honor.

2 THE COURT: We don't have the record.

3 MS. LIPINSKI: I apologize, your Honor, but my
4 recollection was that she stated that a neutral and
5 detached magistrate had served the process safe guarding
6 the defendant's interest by viewing the video tape and
7 cross examined the officer. I stated that I did not
8 believe that to be the case that my experience with
9 magistrates they had not viewed the video tape. At that
10 point I think she fell back on that the officer had viewed
11 the video tape but I do believe and just so there's no
12 question on appeal I do want to clarify that.

13 THE COURT: All right. Well let's just have Judge
14 Young take the stand and we'll see if he has any
15 recollection.

16 JUDGE YOUNG: Good morning, your Honor.

17 THE COURT: Good morning. Put your left hand on the
18 Bible and raise your right.

19 (WHEREUPON, MANDRILE YOUNG,
20 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

21 THE COURT: All right.

22 DIRECT EXAMINATION

23 JUDGE MANDRILE YOUNG BY SOLICITOR HAMILTON:

24 Q. If you could just state your name for the record.

25 A. Mandrile Young.

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1 Q. And on January 1st of 2016 in what capacity were you
2 employed?

3 A. As a York County Magistrate located in the Bond Court.

4 Q. And as part of one of your duties and responsibilities
5 did you sign search warrants when they were sought by --
6 from you by officers?

7 A. I did.

8 Q. And --

9 MS. LIPINSKI: Can I approach, your Honor?

10 THE COURT: Yes you may.

11 MS. LIPINSKI: Ms. Nelson.

12 (WHEREUPON, COURT'S EXHIBIT NUMBER ONE, IDENTIFIED AND
13 MARKED, RECEIVED INTO EVIDENCE.)

14 Q. Let me show you what's been marked just for this
15 hearing Court's Exhibit Number One. We've given a copy to
16 Judge Hayes. I ask you to look at that document. It's
17 signed several places by a magistrate. Is that your
18 signature?

19 A. It is.

20 Q. And what happens to the original copy of that search
21 warrant?

22 A. The original copy is taken by the affiant and I
23 typically have a copy to file to comply with state law to
24 retain records in the magistrate's office.

25 Q. And I served you with a subpoena to be here today.

1 Did that also include a copy of your file?

2 A. That is correct.

3 Q. And were you able to retrieve your file?

4 A. I was not.

5 Q. And this is almost a year ago at this point; correct?

6 A. Correct.

7 Q. Do you have a personal recollection of this search
8 warrant?

9 A. I do not.

10 Q. All right. But have you had the opportunity because
11 I believe I also did forward to you a copy of your search
12 warrant to review the search warrant that you signed?

13 A. Yes.

14 Q. All right. And in the affidavit portion of the
15 search warrant it states there is nothing as it relates at
16 least if I can notate regarding the reliability of the
17 confidential informant. Not the typical language that I'm
18 use to seeing.

19 A. That's correct.

20 Q. All right. Do you know from your own personal
21 recollection whether any oral or sworn testimony was used
22 to supplement that?

23 A. I can only attest to my procedure. If the attestation
24 for the reliability of the CI isn't present and typically
25 that's because I have received oral testimony from the

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1 affiant.

2 Q. All right. Could it have been the case that they
3 just used the video of the buy to corroborate the CI in
4 this particular case?

5 A. Possibly.

6 Q. All right. And do you recall ever viewing the video
7 in this case?

8 A. I do not.

9 Q. And how long have you been so employed as a
10 magistrate?

11 A. Twelve years, eight months, and two weeks.

12 Q. Have you ever viewed a video tape of an under cover
13 buy when a search warrant was signed?

14 A. I have not.

15 Q. So not only do you not have any personal recollection
16 but your testimony is that you didn't in this particular
17 case because that would have been something so extraordinary
18 you would have remembered it?

19 A. That's correct.

20 Q. All right. And is there any place on the search
21 warrant where you would normally have the practice of
22 notating whether or not oral testimony was used? Some of
23 them write in as a line somewhere or notate it in some
24 fashion.

25 A. I don't see anything that I noted on here to note or

1 to note that oral testimony was received.

2 Q. Is that something you would otherwise normally do?

3 A. No. Typically when I am submitted with a - when I'm
4 presented with a request I typically if I don't have the
5 written information as a part of the actual record or the
6 search warrant then I have the oral testimony from the
7 affiant.

8 Q. But in this case what you would have gone on is what
9 Officer Clevenger represented to you and that may or may
10 not have included oral testimony but you have no basis to
11 testify to that because you don't have your file?

12 A. That's correct.

13 Q. But it is possible that this was the totality of
14 information provided to you and that the buy was the only
15 thing used in corroborating the CI?

16 A. That is correct.

17 Q. If you had gotten oral testimony would there be notes
18 in your file?

19 A. Not if it was just oral. And I say that in this
20 context, sometimes when I am presented with oral testimony
21 there is -- there are notes that the affiant may give me or
22 that they might have written down. And if they had written
23 down notes to basically I lead them in their oral testimony
24 to me then I would ask for a copy of that particular copy
25 of notes. But typically that would be an anomaly. They

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1 would just supplement any sort of affiant, any sort of
2 affidavit with oral testimony.

3 Q. But you did nothing in this particular case to review
4 the video tape of the CI buy in order to evaluate whether
5 Officer Clevenger was being truthful in stating that the
6 firearm was visible or that a pipe purchase was able to be
7 monitored via that recording equipment?

8 A. That's correct.

9 Q. And do you have a couple of other questions that
10 relates to the motion to suppress not related to the CI
11 buy?

12 MS. LIPINSKI: I can ask him those just --

13 THE COURT: Let's go ahead while he's on the stand.
14 We don't want to hold him up too long.

15 MS. LIPINSKI: Thank you.

16 Q. At the -- This was actually a no-knock warrant;
17 correct?

18 A. Yes.

19 Q. And specifically what part of the search warrant
20 states that the defendant had a no-knock warrant? What --
21 What do you look for in issuing a no-knock warrant versus a
22 normal warrant?

23 A. It would have to be a matter of safety. There would
24 have to be a reason to for the affiant to present to me
25 that it was a safety issue for them if they did not require

1 a no-knock warrant.

2 Q. All right. And in addition to stating that the CI
3 they provided information that Kennedy regularly carries a
4 firearm; correct?

5 A. Correct.

6 Q. Or that a firearm was visible in the video it also
7 states that Kennedy's criminal history has convictions with
8 an "s"; correct?

9 A. That's correct.

10 Q. For violence against police?

11 A. That is correct.

12 Q. And when you give convictions for violence against
13 police what do you interpret that to mean? Would you have
14 looked at his criminal record? Would you have gone off
15 what the officer told you?

16 A. I would have gone off the testimony or the affidavit
17 of the officer.

18 Q. But what type of convictions would you anticipate
19 that that referred to? Conviction for violence against
20 police.

21 A. It would have to be or I would say resisting;
22 resisting (a) I believe or (b) I believe. I would assume
23 if it were a violence against police.

24 Q. All right. And if Resisting (a) is resisting without
25 assault and resisting (b) is resisting with assault, would

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1 you anticipate that would be a conviction for resisting (b)
2 then?

3 A. That's correct.

4 Q. And if you learned later that he only had one
5 conviction for resisting (a) would that undermine the
6 probable cause for a no-knock warrant in your opinion as
7 the issuing magistrate?

8 A. It would have caused me to ask more probing questions
9 so I would say yes.

10 Q. So you don't know whether or not you would have still
11 issued it but obviously that isn't what was represented to
12 you if it turned out not to be the case?

13 A. That is correct.

14 Q. All right.

15 MS. LIPINSKI: That's all we have as to that
16 additional --

17 THE COURT: Cross?

18 CROSS-EXAMINATION

19 JUDGE MANDRILE YOUNG BY SOLICITOR HAMILTON:

20 Q. In the search warrant it did state -- sworn testimony
21 by the officer in this affidavit did state that there was a
22 firearm visible on the video of the purchase. Would that
23 cause you concern in moving forward with issuing a no-knock
24 search warrant or would you feel that that is a basis for
25 moving forward with a no-knock search warrant that there

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1 was a firearm present in the home during the buy?

2 A. That would have been a basis to move forward with
3 the no-knock.

4 Q. Okay. And that is a safety issue?

5 A. Absolutely.

6 Q. And as to the reliability of the confidential
7 informant, the affiant stated in the sworn statement that
8 he had received information for a confidential informant
9 that he could buy from Dennis Kennedy. That was
10 corroborated by following that within the next seventy-two
11 hours. That corroboration does that make a difference in
12 you issuing this search warrant in finding probable cause?

13 A. It does.

14 Q. And does the subsequent buy after the confidential
15 informant says he can buy cocaine from this residence and
16 the defendant that subsequent buy that is on surveillance
17 does that go to the reliability that you take into account
18 as to the confidential informant?

19 A. Yes.

20 SOLICITOR HAMILTON: Thank you.

21 JUDGE YOUNG: Your welcome

22 MS. LIPINSKI: Just briefly one followup.

23 REDIRECT EXAMINATION

24 JUDGE MANDRILE YOUNG BY MS. LIPINSKI:

25 Q. And what was referenced if it was no oral testimony

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1 regarding the CI because it is not listed in anyway at
2 least on the search warrant and issues that they
3 represented that he had convictions for violence against
4 police which turned out not to be true, the representations
5 regarding the buy namely that they weren't able to monitor
6 the transaction or that the firearm wasn't visible in the
7 video and they could not in any other way corroborate the
8 CI, would those things have undermined the probable cause
9 necessary to get this search warrant?

10 A. Yes.

11 THE COURT: Anything further?

12 SOLICITOR HAMILTON: Nothing.

13 THE COURT: All right. Can the witness be excused?

14 MS. LIPINSKI: Yes, your Honor. I don't know what the
15 State may call in response and the defense obviously is
16 somewhat --

17 THE COURT: Judge Young, you mind sticking around a
18 little bit?

19 MS. LIPINSKI: We can call him back if we need him.

20 I don't have any problem with him being excused ---

21 THE COURT: That's fine.

22 MS. LIPINSKI: --- today. And then if they call some
23 testimony and we need him in the future I can.

24 THE COURT: Stay on line.

25 JUDGE YOUNG: Thank you, sir.

1 THE COURT: Thank you.

2 (WITNESS LEAVES WITNESS STAND.)

3 THE COURT: All right. What else?

4 MS. LIPINSKI: As it relates to the Brady Motion, your
5 Honor, obviously what Judge Young has testified to is that
6 that being the evidence of oral testimony the buy, the
7 video tape of the buy became a linch pin of corroboration
8 that typically what we see in search warrants is that the
9 affiant is able to produce information to the magistrate
10 that suggest we worked on him before, he's provided
11 reliable information in the past, he's provided other buys
12 in the past, those buys have led to convictions, and this
13 is the language we typically see; this search warrant is
14 somewhat unique in that at this point on it's face the buy
15 seems to be a linch pin to corroboration.

16 Without that and if there aren't any issues then the
17 Defendant is deprived of having a meaningful Franks v.
18 Delaware hearing. I think the issues of representing to
19 the magistrate that he has convictions for violence against
20 law enforcement when he has a conviction for resisting (a)
21 on his record -- one not two. It was pled down to a (b)
22 but it was pled down to an (a) arguably for a reason was an
23 indication that there were perhaps misstatement or
24 inaccurate statements made to the magistrate in securing
25 the search warrant such that the Defendant should be

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1 allowed at a bare minimum to look at stills from the video,
2 review the video subject to a protective order to ascertain
3 whether or not the corroboration is in fact there.

4 And the defendant feels the lack of admissibility to
5 do so and it becomes very -- I understand what we're asking
6 for is extraordinary but arguably this is why the Fourth
7 Amendment exist. It says that you can't go into another
8 mans house without going to get a search warrant. The
9 belief is that when the officers go and get a search
10 warrant that they make truthful statements. And while the
11 resisting is they're still resisting, and arguably that's
12 still an issue, there's noting that says how the CI knew
13 Mr. Kennedy to carry a firearm.

14 And if there was nothing about his experience or
15 relationship with Mr. Kennedy then that was an
16 unsubstantiated assertion. And then if the firearm, while
17 it could be a firearm in the video, but it could also be
18 the cell phone in the video. Those kind of things are
19 things that the defendant would be able to use in a *Franks*
20 *v. Delaware* hearing in order to attack the search warrant.
21 That part of my role particularly in a case where for the
22 most part the suppression motion falls that drugs are
23 coming in and arguably my client has little to no defense.

24 Had I been able to say either I could view the video
25 and what they say is on there is on there, here are the

1 stills from the video that clearly show you, without
2 divulging the identity of the CI that shows a firearm being
3 visible then I think it would have been -- my client would
4 have understood that he had the ability to examine the
5 evidence before him and therefore would have been able to
6 engage in meaningful plea negotiations with the State
7 because he would have understood the evidence against him
8 and had the opportunity to review that evidence.

9 I think the court was able -- can view it while
10 striking the appropriate balance. We tried to do it early
11 on to prevent the disclosure of the confidential informant
12 to allow the court to strike that balancing test between
13 the court's interest, but arguably if there is information
14 on those video tapes which calls into question that, and I
15 do have other buys where the equipment malfunctioned where
16 what you hear isn't clearly a drug transaction, where what
17 they believed to be a firearm turns out to be a cell phone
18 or something of that nature such that the defendant would
19 be able to challenge the veracity of the probable cause of a
20 search warrant, he is being deprived of *Brady* material and
21 his ability to engage in meaningful plea negotiations and
22 that's all we every truly wanted access to this information
23 in order to do. And it was something we represented to the
24 State on a number of occasions.

25 If he has that *Kyle v. Whitley* right of confrontation

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1 and right to see the evidence against him, then it's very
2 easy for him to make that decision. Otherwise you're
3 basically asking him to go on the blind; they have what
4 they say they have but I can't show it to you. And that
5 arguably when that is a justification for making not just
6 an intrusion into a residence but a no-knock intrusion by a
7 SWAT team into a residence and there's a way that a court
8 can grant access to that information without jeopardizing
9 the identity of the CI then I think the defendant is
10 entitled to that information and at a time period where it
11 can be of some benefit to him either at the plea
12 negotiations stage or at the pretrial motion to suppress
13 stage.

14 THE COURT: The State have that video?

15 SOLICITOR HAMILTON: We do not have it with us, your
16 Honor, but he stated that he could go get it.

17 THE COURT: I thin I need to make an in-camera review
18 of that video. I probably wouldn't and I'm not finding
19 fault with the officer but I probably would not even go
20 that far except for the fact that the - under oath he
21 states there were quote convictions end quote of violence.

22 That so far has not been established and you can
23 certainly pull the NCIC and make that a part of the record
24 for this case too, but I'd like to see that video.

25 SOLICITOR HAMILTON: Okay. Your Honor, we can attempt

1 to get that but the State does have a position as to the
2 no-knock portion of this.

3 THE COURT: Well I think the threshold is based on the
4 judges' it's got to be some reason and the reasons here are
5 the pistol, as I understand it, and the quote convictions
6 with a plural. And so I need to have -- I need to know --
7 And I hate to use this word but I have to because it's what
8 the law requires to see if there's any false information in
9 the affidavit.

10 SOLICITOR HAMILTON: Okay. How do you want to go
11 about getting -- do you want to take a break and then --

12 THE COURT: No, when I take a break I don't think we
13 can go forward until I see the video and you see about
14 getting his NCIC.

15 SOLICITOR HAMILTON: Okay. All right then.

16 THE COURT: So we'll take a break until we get that
17 and then I'll look at it. I'll view it in-camera.

18 SOLICITOR HAMILTON: Okay.

19 THE COURT: All right, we'll be at ease until further
20 action.

21 I think he needs to stay incarcerated during the --
22 for the rest of the trial. Holding him out on bond, I
23 presume he's been out on bond, but the nature of these
24 charges I think my usual practice is to require
25 incarceration during the trial.

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1 MS. LIPINSKI: Just for the benefit of my client, your
2 Honor, I did speak with his bondsman and he -- Mr. Adams --
3 he did state he would remain on Mr. Kennedy's bond pending
4 the trial. I understand it's in the court's discretion but
5 I also told my client I'd make that representation to the
6 court and aks you to let him remain out.

7 THE COURT: I think he needs to remain in during the -
8 - there are severe penalties associated with the crimes,
9 and he did show up today.

10 MS. LIPINSKI: He did, your Honor.

11 THE COURT: But I - my safety - my comfort level would
12 be higher if he was still around.

13 MS. LIPINSKI: Thank you, your Honor.

14 SOLICITOR HAMILTON: Thank you, your Honor.

15 (COURT AT EASE AT 11:26 AM.)

16 (COURT BACK IN SESSION AT 11:52 AM.)

17 THE COURT: Thank you, take your seats. We can get
18 Mr. Kennedy out. And I can go ahead and do this outside of
19 the presence of -- I don't know how I'm gonna rule yet. I
20 know the video is on and the NCIC for me to look at, but
21 assuming I were to side with the defense on the no-knock
22 provision, if the no-knock provision is invalid does that
23 invalidate the whole search warrant?

24 SOLICITOR HAMILTON: It does not, your Honor, and we
25 have actually handed up case law as to we will argue that -

1 THE COURT: Well I'm smarter than I thought I was.

2 (DEFENDANT, DENNIS KENNEDY, REENTERS COURTROOM.)

3 THE COURT: All right. We had a brief conference
4 wherein the State ask me to go forward at this point even
5 though I have resolved what I needed resolved on the video
6 and NCIC issue. All right.

7 SOLICITOR HAMILTON: Thank you, your Honor. I do want
8 to just let you know that we have actually gotten the video
9 in our possession ---

10 THE COURT: Okay.

11 SOLICITOR HAMILTON: --- to play at the conclusion of
12 this hearing --

13 THE COURT: Okay.

14 SOLICITOR HAMILTON: Your Honor, the State's position
15 is we do want to address the misstatement in the search
16 warrant. I have spoke to the officer; he's handed me his
17 original file. In the original file it did state there was
18 an assault on an officer arrest. All he saw was a ----
19 charge for resisting arrest and conviction. It didn't
20 specify if it was (a) or (b). He did state that was on his
21 part a misstatement because he believed that's what it was.
22 It wasn't a blatant lie in the search warrant. This was
23 just something that he believed -- It just said resisting
24 arrest, he believed that to be the resisting arrest that he
25 was originally charged with, your Honor.

1 THE COURT: Without an "s"?

2 SOLICITOR HAMILTON: I'm sorry, your Honor.

3 THE COURT: Without an "s"?

4 SOLICITOR HAMILTON: Yes, your Honor. Your Honor, the
5 State's position on the argument from the defense is based
6 on the case on State versus Jones. We do understand that
7 this was a misstatement in the search warrant as to the
8 conviction for violence against police of the defendant but
9 striking that falsehood misstatement we believe there is
10 still valid PC under the search warrant to issue -- 64
11 Reynolds Street to be searched based on the controlled buy
12 and the grounds for the controlled buy.

13 But according to *State versus Jones* the defendant is
14 entitled to an evidentiary hearing to challenge a search
15 warrant if the following criteria are met. The first one
16 would be the defendant's attack is more than conclusory and
17 is supported by more than a mere desire to cross-examine.

18 Two, the defendant makes an allegation of deliberate
19 falsehood or reckless disregard for the truth by proof of
20 that. And third, the affiant has made the allegedly false
21 or reckless statement and there is not enough probable
22 cause in that search warrant striking that falsehood. In
23 this case striking that falsehood we still have plenty of
24 evidence to support probable cause. The State's position
25 is that we have plenty of evidence to support probable

1 cause even striking that statement.

2 That statement - striking that statement would go to
3 the knock and announce issue we believe in this case and
4 not suppression of the search warrant because we do not
5 believe that as we stated that we still believe that this
6 is a valid search warrant.

7 Going to the validity of the search warrant based on
8 State versus Barney or *State versus Dupree* ---

9 THE COURT: All right.

10 SOLICITOR HAMILTON: --- if a controlled buy was
11 properly conducted no one can provide that sufficient --

12 THE COURT: Can you give me a page?

13 SOLICITOR HAMILTON: This is *State versus Dupree*.

14 This should be --

15 THE COURT: I got it.

16 SOLICITOR HAMILTON: Page 5, your Honor.

17 This is going to be half way down in the second para
18 or the second column.

19 THE COURT: Okay.

20 SOLICITOR HAMILTON: If the control buy was properly
21 conducted alone can provide sufficient or facts sufficient
22 to establish probable cause for a search warrant. On the
23 controlled buy supervised by law enforcement officers would
24 alone have provided probably cause even if an officer
25 cannot provide information regarding the veracity --

1 THE COURT: All right. Wait a minute. I can't find
2 that. He said second column half way down. Right above
3 law analysis?

4 SOLICITOR HAMILTON: It should be right under where it
5 says to Wayne 15 and 16, your Honor. It's gonna be in the
6 second column beginning at the control buy.

7 She has a copy that says page 8. That might be
8 different than mine.

9 THE COURT: Different from mine.

10 SOLICITOR HAMILTON: I think they're all printing
11 differently but I can hand up --

12 THE COURT: I see. Okay, head notes 15 and 16.

13 SOLICITOR HAMILTON: Yes, your Honor.

14 THE COURT: All right.

15 SOLICITOR HAMILTON: Even as the officer cannot
16 provide information regarding the veracity of an informant
17 or the basis of his knowledge attempting to provide prove
18 reliable portions of the tip were sufficiently
19 corroborated.

20 We believe in this case that the affiant, Officer
21 Clevenger, received information from a confidential
22 informant that Dennis Kennedy is selling cocaine from that
23 residence which was [REDACTED]. That information
24 was corroborated within seventy-two hours and monitored
25 actually by the officer in a controlled purchase of cocaine

1 therefore validating that information that the confidential
2 informant did report therefore proving reliability of that
3 confidential informant.

4 Additionally going to -- So that would be what we
5 believe is probable cause in issuance of this striking the
6 conviction for violence. Now going to the knock and
7 announce issue as to suppression of the search warrant.
8 The state's position based on *Hudson versus Michigan* which
9 is a Supreme Court of the United State's case, the knock
10 and announce rule has never protected one's interest in
11 preventing the government from seeing or taking evidence to
12 striking a warrant.

13 Interest in that case were violated but they had
14 nothing to do with the seizure of evidence. The
15 exclusionary rule is inapplicable. Exclusion of evidence
16 obtained by a warrant-less search vindicates that
17 entitlement the interest protected by the knock and
18 announce requirement are quite different. They do not
19 include the shielding of potential evidence from the
20 governments eye. On the statement or the case state's
21 issue or reasons for knock and announce such as being
22 allowing a person to get ready prior to coming to the door;
23 preventing the destruction of evidence but this does not
24 exclude evidence -- This does not exclude the warrant, your
25 Honor. It just -- It does not -- Let's just say, your

1 Honor, it does not actually protect or it does not lead to
2 suppression, your Honor.

3 So that would be the State's position that even if
4 this misstatement in the search warrant ask the criminal
5 history in convictions for violence against police is
6 struck. That would not require you to invalidate the
7 search warrant. It would just invalidate the knock and
8 announce which still would not invalidate the search
9 warrant.

10 Additionally, your Honor, this is sworn testimony
11 given by the officer that he viewed in that video that
12 firearm which did corroborate what the confidential
13 informant stated that the defendant regularly carries a
14 firearm. So we believe that that also goes to -- And
15 that's what when I would question the magistrate as to that
16 he did state that the firearm in the video would have
17 caused him concern. Not just the criminal history, your
18 Honor. And would be the basis for requesting a no-knock
19 search warrant. So that's the state's position in this
20 that this search warrant we have enough probable cause on
21 the face of it that even if striking that we can move
22 forward with the search warrant as being valid.

23 THE COURT: All right. Ms. Lipinski.

24 MS. LIPINSKI: Just briefly, your Honor. I think
25 we're kind of at two stages of the game. The first is

1 whether or not the defendant is entitled to a *Franks v.*
2 *Delaware* hearing by creating this and then ultimately what
3 probable cause exist and then whether or not search warrant
4 nonetheless perseveres. I think the stage we're at is how
5 do we establish enough that the affiant made a deliberate
6 falsehood; was reckless? They can sit there and state that
7 oh, we thought he had two and he only had one and we
8 thought it was b and an a but ultimately it's not
9 convictions it's one and it's a conviction for resisting a
10 which does involve violence on an officer.

11 Maybe he misread the rap sheet wrong but clearly
12 there's nothing about the rap sheet that showed multiple
13 convictions. So at that point I think it's at least enough
14 that the door opens to scrutiny and the defendant should be
15 entitled to a *Franks v. Delaware* hearing subject that we
16 would be entitled to review the tape.

17 I understand the Court's willing to do a in-camera
18 review and -- But I think the Court at least has to go
19 forward because at this point I think there's a crack in
20 the probable cause sufficient that its subject to more
21 scrutiny than just on the face. And while they say we can
22 knock this out if the firearm isn't visible and you don't
23 have the convictions then they're left with the CI noticing
24 him to carry a firearm and there's nothing in the affidavit
25 that establishes a relationship between the CI and the

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1 defendant such that that information is corroborated. And
2 if the buy is not visible on the video tape or there's
3 other people in the room or the transaction doesn't happen
4 within seventy-two hours or any of the other building
5 blocks upon which a search warrant is based begin to
6 crumble as well then our foundation of probable cause I
7 think is in jeopardy. If we get to that point if it's not
8 a no-knock warrant does that mean the whole thing goes
9 away, I think we have to look at whether or not there's
10 more than just is the convictions the only thing that is
11 factually in error. And then how much of those other
12 things do we remove away and then does that no-knock take
13 away and then does that mean that the search warrant goes
14 away. So I think it's premature to maybe get to that
15 stage. I understand we've kind of both jumped ahead to
16 kind of get back to where we are.

17 I would ask the Court also to consider, and I know
18 we're just on the record and I know the tapes here but
19 while we're on the record before the court views it, this
20 was part of our original motion that depriving him of an
21 in-camera hearing ahead of time when the plea offer was
22 still on the table not only deprived him of proper *Brady*
23 material but also meaningful representation and his *Fifth*
24 and *Sixth Amendment*. And I would just ask the Court to
25 also look at ----- *v. Cooper and Missouri v. -----* and

1 I have some copies for the Court.

2 But that goes to because I couldn't tell him whether
3 or not we could challenge the search warrant at the trial
4 stage. I couldn't meaningfully advise him whether to
5 accept the plea offer and that's what those cases go to.
6 They're not search warrant cases per se.

7 THE COURT: You want to hand up a video?

8 SOLICITOR HAMILTON: Yes, your Honor, we have the
9 video but we do want to state the Magistrate did not view
10 this video when looking at the face of the search warrant
11 and in this case the magistrate did not view the video.
12 You heard the testimony from the officer so I --

13 THE COURT: That's what he testified to.

14 SOLICITOR HAMILTON: Do what, your Honor?

15 THE COURT: That's what he testified to.

16 SOLICITOR HAMILTON: Yes.

17 THE COURT: I agree.

18 SOLICITOR HAMILTON: Do you want me to hand up the
19 video to you?

20 THE COURT: Please. That's the only way I can see it.

21 SOLICITOR HAMILTON: May I approach?

22 THE COURT: Yes.

23 (CD/VIDEO RECEIVED UP BY THE COURT.)

24 MS. LIPINSKI: Your Honor, I just think at this time
25 I'm not trying to challenge the court's ruling in trying to

1 pursue my client's rights. We would renew that we should
2 have the opportunity to view the video tape as well.

3 THE COURT: I understand that's your position. I'm
4 gonna look at it right now in-camera by myself.

5 MS. LIPINSKI: Thank you, your Honor.

6 THE COURT: I might have my law clerk look at it.

7 MS. LIPINSKI: I understand.

8 I don't think that violates any rules.

9 We'll be at ease.

10 (COURT AT EASE AT 12:06 PM.)

11 (COURT BACK IN SESSION AT 12:29 PM.)

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

13 (DEFENDANT, DENNIS KENNEDY, BLACK MALE, REENTERS
14 COURTROOM.)

15 THE COURT: All right, anything from the State?

16 SOLICITOR HAMILTON: Nothing from the State, your
17 Honor.

18 THE COURT: The Defense?

19 MS. LIPINSKI: No, your Honor.

20 THE COURT: All right. The motion is to reconsider my
21 order and I'm not gonna reconsider it. I find that the
22 order as earlier issued sums up and correctly disposes of
23 the issue as to going behind this search warrant. As to
24 the search warrant itself I find that it does contain
25 sufficient indicia of reliability of the CI sufficient to

1 support probable cause and the reliability of the informant
2 based on the information about there being a controlled buy
3 at the residence. That the CI vehicle was searched, no
4 contraband found; surveillance officers followed the CI and
5 recovered the cocaine, and that the officers monitored the
6 transaction. Also -- Let me put on my glasses -- there
7 also corroborating is the information that the defendant
8 regularly carries a firearm. I'm not gonna put the -- I'm
9 gonna put the video under seal but I have reviewed it and
10 there is a firearm in the video and its actually handled by
11 someone. I can't tell who is actually handling it but it's
12 present in this room in the home in which this transaction
13 took place.

14 I'm gonna set aside the no-knock - I take that back.

15 I'm not gonna set aside the no-knock because there is
16 correct information about there being a firearm in -- the
17 information about Kennedy regularly carries a firearm and
18 there being in the video as indicated by the affiant that a
19 firearm was visible in the video of the purchase that is a
20 correct statement of law so I'm not gonna suppress the
21 search.

22 And I'm not going to change my earlier order about
23 requiring the State to divulge any other information about
24 the search warrant. And I am going to keep the video and
25 put it under seal for purposes of an appeal and make it

1 Court's Exhibit Number Two.

2 (WHEREUPON, COURT'S EXHIBIT NUMBER TWO, IDENTIFIED AND
3 MARKED, RECEIVED INTO EVIDENCE.)

4 THE COURT: All right, anything else from the State?

5 SOLICITOR HAMILTON: Nothing from the State, your
6 Honor.

7 THE COURT: Anything else from the Defense?

8 MS. LIPINSKI: No. The Court's indulgence one moment,
9 your Honor.

10 (PAUSE.)

11 THE COURT: Ms. Lipinski, if you want to talk to your
12 client we're gonna break. The jury's not here yet. It's
13 not quite one o'clock so ---

14 MS. LIPINSKI: I understand. I apologize.

15 THE COURT: --- we'll break until one o'clock then.

16 MS. LIPINSKI: All right. Thank you, your Honor.

17 (COURT IN RECESS AT 12:35 PM.)

18 (COURT BACK IN SESSION AT 01:19 PM.)

19 THE COURT: Thank you. You may take your seats.

20 Is the State ready to proceed?

21 SOLICITOR HAMILTON: Yes, your Honor. The State has a
22 Jackson versus Denno hearing we want to do ---

23 THE COURT: Okay.

24 SOLICITOR HAMILTON: --- before the jury.

25 THE COURT: All right.

1 MS. LIPINSKI: Your Honor, we do have some other
2 search issues at some point I understand.

3 THE COURT: All right. Let's go finish the search
4 issue then. All right. Yes, ma'am.

5 MS. LIPINSKI: Just briefly, your Honor. And I don't
6 want to take exception to the Court's ruling, but I
7 understand you conducted an in-camera review at this stage
8 in the game. Obviously the Defendant would maintain that
9 had that been done earlier in the process of the motion to
10 compel hearing that that would have allowed him to
11 meaningfully participate in plea negotiations pursuant to
12 Missouri v. ----- and Lackerby v. Coffey and Coffey
13 Whitley that impacted his Sixth Amendment rights and as a
14 result of that he would renew that.

15 As to the search warrant --

16 THE COURT: Whoa, whoa. What remedy do you seek? You
17 put an issue on the table, what's the remedy? What are you
18 -- If you say I committed some error you got to tell me how
19 to correct it.

20 MS. LIPINSKI: The remedy would be allow him to go
21 back and accept the offer that was on the table at the
22 motion to compel stage.

23 THE COURT: Any objection to that?

24 SOLICITOR HAMILTON: The State would have an objection
25 to that, your Honor.

1 THE COURT: Would have what?

2 SOLICITOR HAMILTON: We would have an objection. The
3 State actually -- I don't want to go too far into plea
4 negotiations but did extend the offer for a substantial
5 period of time allowing him an opportunity to think about
6 this, to accept that offer and then I had to eventually
7 pull the plug.

8 THE COURT: Okay. All right.

9 MS. LIPINSKI: But that --

10 THE COURT: I've -- There's no -- There's no offer so
11 if your client plead he'd be pleading straight up.

12 MS. LIPINSKI: I understand that, your Honor, but for
13 the purposes of preserving the record on appeal I feel that
14 had that been done at that time when that offer was still
15 made he would have been able to accept it and benefit from
16 that at that time.

17 THE COURT: I understand, it's a logical argument.

18 MS. LIPINSKI: All right. As to the search warrant, I
19 will note that the Court stated that -- and I just keep
20 this in mind as we kind of go through the search warrant --
21 I haven't obviously had the benefit of reviewing the tape
22 but you did state that a gun was visible but it wasn't
23 clear who was handling the gun?

24 THE COURT: Well the search warrant doesn't say who
25 was handling the gun. It just says there was a gun present

1 and someone picked it up but there was a gun in the house.

2 MS. LIPINSKI: I think the search warrant states that
3 it was visible on the defendant's person.

4 THE COURT: I -- It says the firearm was visible in
5 the video of the purchase period. Because I was concerned
6 about that and when I was watching it I was concerned about
7 watching that. The video was not the best, they rarely
8 are, but in part of the video it very plainly and clearly
9 and graphically -- if that's the right word -- there is a
10 pistol there. But I did check it against this sentence and
11 this sentence does not say on his person.

12 MS. LIPINSKI: Well, and the only followup argument I
13 would then make, your Honor, is that if it's not clearly
14 attributable to the defendant then does that further call
15 into question the no knock characterization because if that
16 is done to corroborate the CI's allegation that Mr. Kennedy
17 is known to carry a firearm and they were not able to
18 corroborate that he is deed the one carrying the firearm,
19 does that further eviscerate the probable cause both for
20 the warrant or for the no-knock warrant?

21 THE COURT: No it does not because I find that the
22 heart of the issue is whether or not somebody can get shot
23 with it they go on the house. There is -- The video shows
24 the pistol being handled by someone in the house where
25 allegedly this took place. I can't make a finding of fact

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1 that it -- based on what the CI -- information given to the
2 CI and what's in the search warrant there is a pistol
3 present and I find that that is a safety issue.

4 MS. LIPINSKI: But it is not attributable to the
5 owner's of the home. If it was someone the CI or a third
6 party brought to the home then it wouldn't be a concern for
7 people executing the search warrant later.

8 THE COURT: Well we don't know who the owner of the
9 house was.

10 MS. LIPINSKI: I understand that but I'm just saying
11 that I think that that further and arguable not completely
12 but it does kind of that coupled with a life of convictions
13 does. The Defendant would make the motion that that
14 further undermines probably cause.

15 THE COURT: Well, I agree pistols are mobile. I agree
16 because it was there, a pistol was there then and it could
17 have been gone ten minutes later. I agree with that.

18 MS. LIPINSKI: Thank you, your Honor.

19 THE COURT: And I agree that the pistol wasn't
20 recovered so no hand - fingerprints or anything like that.
21 The gun was in what supposedly was 644 Reynolds Street
22 which is where they wanted to go in and be safe.

23 MS. LIPINSKI: The next argument the Defense would
24 make, your Honor, is a motion to suppress the evidence
25 seized. From the defendant's personal search warrant only

1 list their ability to search the house and not the
2 defendant. My reading of the report is that they searched
3 the defendant because he was found in proximity to a
4 weapon. But the report indicates that they uncovered the
5 weapon on a couch not in proximity to the defendant; that
6 they were gonna place the defendant there, and therefore
7 the search of the defendant exceeded the scope of the
8 search warrant and was also backed based on a lack of
9 probable cause.

10 THE COURT: What's the State have to say about that?

11 SOLICITOR HAMILTON: The defendant was actually in
12 fact searched incident to arrest. He was arrested for
13 possession of a stolen pistol. He was arrested for the
14 possession of a Smith and Wesson pistol. When ran the
15 serial number came back as stolen.

16 THE COURT: Well how did they find the pistol on him?

17 That's the search issue. How did they find the pistol
18 and how did they connect it to him?

19 SOLICITOR HAMILTON: They connected it to him because
20 it was actually identified by -- Well, this same type of gun
21 was the gun believed to be in that video in which the buy
22 was off of Mr. Kennedy. Additionally --

23 THE COURT: We might need some testimony. We'll need
24 some testimony on how they got -- I need some testimony on
25 how why they search him.

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1 It's clear, she's right, the Reynolds Street address
2 is the place sought to be searched. We don't have a search
3 warrant for his person so I need testimony on that.

4 SOLICITOR HAMILTON: He was searched actually incident
5 to arrest. This is found in the couch cushion across from
6 the defendant and --

7 THE COURT: Did you -- Am I not clear? I can't take
8 your word for it. I know you're an officer of the court
9 and you're not gonna tell me anything that's not true but
10 whoever did it needs to tell me that under oath.

11 SOLICITOR HAMILTON: I can actually put Officer
12 Cleavenger --

13 THE COURT: Well then why don't you?

14 SOLICITOR HAMILTON: I will, your Honor. I will put
15 Officer Cleavengre on the stand and put him under oath and
16 let him testify as to that.

17 THE COURT: Okay.

18 MS. LIPINSKI: Your Honor, and we did a followup but I
19 think it may be appropriate at this time to maybe sequester
20 the rest of the State's witnesses ---

21 THE COURT: All right.

22 MS. LIPINSKI: --- when we start taking testimony.

23 THE COURT: We'll sequester the -- sequester reciprocal
24 barring defense's.

25 MS. LIPINSKI: Thank you, your Honor.

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1 THE COURT: The case agent can stay in.

2 (WHEREUPON, ROGER CLEVINGER,
3 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

4 SOLICITOR HAMILTON: May it please the Court, your
5 Honor.

6 THE COURT: Yes, ma'am.

7 DIRECT EXAMINATION

8 OFFICER DAVID CLEVINGER BY SOLICITOR HAMILTON:

9 Q. Would you please state your full name for the record?

10 A. David Heath Clevenger.

11 Q. Okay. And what is your occupation?

12 A. I am a Investigator with the York County Multi-
13 Jurisdictional Drug Unit.

14 Q. And were you employed in that position on January 7th,
15 2016?

16 A. I was.

17 Q. And what happened on the afternoon of January 7th,
18 2016?

19 A. We served a search warrant on [REDACTED] in
20 Rock Hill the County of York.

21 Q. You served a search warrant. In that search warrant
22 was there an allegation as to a weapon?

23 A. Yes, ma'am.

24 Q. Okay. And would you please describe that allegation
25 in the search warrant?

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:
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1 A. During the control buy the video of the buy showed
2 the black Smith and Wesson M&P pistol in the video.

3 Q. How did you know that to be that type of gun?

4 A. I'm very familiar with firearms and I own a M&P, Smith
5 and Wesson M&P pistol.

6 Q. So you recognize in the buy video in which the
7 defendant was in that same exact gun?

8 A. Yes, ma'am.

9 Q. I'm gonna ask you about your entry into the home.
10 You executed the search warrant at [REDACTED].

11 Could you please describe what happened once you
12 entered that residence?

13 A. When I entered the residence Mr. Kennedy was standing
14 in the living room and what we usually do is mainly once we
15 get the subjects detained is we try to clear an area to sit
16 them down so they don't have to stand up the whole time
17 while we're searching the house. So I started searching
18 the couch just to the right of the door and I when I lifted
19 up a cushion in the couch to be sure there were no weapons
20 or contraband in the couch I located a Smith and Wesson
21 pistol.

22 Q. Is this the same pistol that you believed to be in
23 the video ---

24 A. Yes, ma'am.

25 Q. --- in the search warrant? And was there anyone else

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:
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1 in the home with the defendant at this time?

2 A. No, ma'am.

3 Q. Okay. Did you find anything else associated with
4 that gun?

5 A. Yes, ma'am, I found a holster and magazine.

6 Q. And that holster and magazine, did that fit the
7 Smith and Wesson gun that was found in the couch?

8 A. It did.

9 Q. Okay. And where was that located or purposes ---

10 A. It was located next to the love seat across the room
11 in a plastic tote.

12 Q. And where was that in location to the defendant?

13 A. Right next to - The room was relatively small and the
14 love seats on one wall and the couch is on the opposite
15 wall and he's basically standing not dead center of the room
16 but right in front of the love seat in between the love
17 seat and couch. The tote would have been just to his right
18 and the couch across from him.

19 Q. Did you subsequently - - Did you subsequently identify
20 the serial number or did you find a serial number on this
21 gun?

22 A. I did.

23 Q. Okay. And what did you do with that serial number?

24 A. I contacted dispatch to run the serial numbers on the
25 gun which is common practice to verify if the gun was

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON: PRETRIAL -56-
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1 stolen or not.

2 Q. Okay. And was the gun stolen?

3 A. Yes as indicated by NCIC check dispatch.

4 Q. Okay. And is that what you subsequently arrested
5 the defendant for?

6 A. Yes, ma'am.

7 Q. And I just want to reiterate. Was there anyone else
8 in that home?

9 A. No, ma'am.

10 SOLICITOR HAMILTON: Please answer any questions the
11 defense may have.

12 CROSS-EXAMINATION

13 OFFICER DAVID CLEVINGER BY MS. LIPINSKI:

14 Q. The SWAT team was actually involved in the execution
15 of the search warrant, correct?

16 A. Correct.

17 Q. And they would have made entry into the home first?

18 A. Correct.

19 Q. So when you made entry into the home they were already
20 had Mr. Kennedy standing there?

21 A. Yes, ma'am.

22 Q. So you weren't aware of where he was located prior
23 to the entry by the search SWAT team?

24 A. I believe they indicated to me that he was on the
25 love seat in that first room that they made entry into

1 from the front door.

2 Q. You believe they indicated to you?

3 A. Yes, ma'am.

4 Q. Okay. But that's not documented anywhere in your
5 report is it?

6 A. No, ma'am.

7 Q. All right. And you stated that when you made entry
8 he was actually standing there with SWAT officers, correct?

9 A. Yes, ma'am.

10 Q. And that you make the decision to set him on a couch.

11 Is that different than the love seat or we're using
12 those two terms interchangeably?

13 A. My definition is a love seat is generally just a
14 little bit smaller than a couch.

15 Q. I just want to make sure there's two of 'em.

16 A. Yes, ma'am, they are. They are across the room from
17 one another.

18 Q. All right. So we have two seating apparatuses.

19 A. Yes.

20 Q. One couch and one love seat?

21 A. Yes, ma'am.

22 Q. I haven't seen the video so I'm flying blind. Bare
23 with me. And when you make entry he's just standing there
24 and you make the decision to sit him on the couch and for
25 your safety pick up the seat cushion and say let's make

OFFICER DAVID CLEVENGER: CROSS BY MS. LIPINSKI: PRETRIAL

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1 sure there's nothing here that he can grab that would in
2 any way be a danger to anyone?

3 A. Or evidence that he can destroy.

4 Q. Or evidence.

5 A. Yes, ma'am.

6 Q. And that you see the gun?

7 A. Yes, ma'am.

8 Q. All right. And you stated that you recognized it as
9 the gun from the video beyond make and model. What
10 idiosyncratic detail about that gun led you to believe that
11 was the gun?

12 A. It was located in the same basic care that it was in
13 the video.

14 Q. Again, I haven't seen the video, but what I heard
15 described is that the gun is handled in the video, correct?

16 A. Yes, ma'am.

17 Q. All right. And then also in the search warrant it
18 says he's known to carry. It wasn't being carried by him,
19 correct?

20 A. At which time?

21 Q. At the time you go into the house.

22 A. The search warrant, correct.

23 Q. Its under the couch cushion.

24 A. Correct.

25 Q. All right. And you make the decision to put him

1 there?

2 A. Yes, ma'am.

3 Q. And while you believe he was seated on the love seat
4 he could a been asleep in a chair or in a back bedroom.

5 A. I don't believe there were any other seating
6 apparatus's in that room but yes he could a been asleep in
7 the floor anywhere else in the room.

8 Q. All right. And you stated that you've seen the video
9 and other than make and model that's all you - you can't
10 see the serial number in the video and therefore you looked
11 to the serial number once you recovered ---

12 A. No, ma'am.

13 Q. --- it and said that's the gun?

14 A. No, ma'am.

15 Q. All right. And is the holster gun specific?

16 A. No, ma'am.

17 Q. So it's a generic holster that could fit a variety
18 of weapons. Not any weapon but a variety of weapons?

19 A. Yes, but the magazine in the holster matched. It was
20 the same type required to operate a Smith and Wesson M&P
21 pistol. Same caliber also.

22 Q. All right. Also in your report you indicate that
23 there is mail found at the house belonging to a number of
24 people, correct?

25 A. Correct.

OFFICER DAVID CLEVENGER: CROSS BY MS. LIPINSKI: PRETRIAL

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1 Q. And that you found the mail in the house addressed
2 to Mr. Kennedy but not that house?

3 A. Correct.

4 Q. All right. And no where else in your report could I
5 indicate that you found any other personal items
6 contributable to Mr. Kennedy in the house?

7 A. In the report?

8 Q. Yes.

9 A. It may not be in the report. There's a --
10 Can I ask a question of the Solicitor as far as --

11 THE COURT: No.

12 BY MS. LIPINSKI:

13 Q. To the best of your recollection.

14 A. Not written in the report, no.

15 Q. All right. And -- Again, I haven't seen the video.

16 It's been described that there is a firearm visible;
17 that it's not clear who is handling the gun, correct?

18 A. Correct. Well, you don't see him pick it up but there
19 are two individuals there one being the CI and one being
20 Mr. Kennedy.

21 Q. All right.

22 MS. LIPINSKI: The Court's indulgence one moment.

23 (PAUSE.)

24 MS. LIPINSKI: Nothing further of this officer.

25 THE COURT: Anything else?

OFFICER DAVID CLEVINGER: REDIRECT BY SOLICITOR HAMILTON:
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1 SOLICITOR HAMILTON: Just briefly, your Honor.

2 REDIRECT EXAMINATION

3 OFFICER DAVID CLEVINGER BY SOLICITOR HAMILTON:

4 Q. You stated to defense that you do not recall if it
5 was in your report about a location of the defendant when
6 SWAT entered the residence, correct?

7 A. I do not recall.

8 Q. And you do not recall anything else attributable to
9 the defendant on scene.

10 A. There were pictures. There were like a family photo.

11 Q. Okay.

12 A. That's why as I stated written in the report. No I
13 don't recall but there was a picture in the case file that
14 was like a family picture like they were on vacation that
15 had Mr. Kennedy in that family photo.

16 Q. Would it refresh your recollection for you to take a
17 second to read the report?

18 A. Yes.

19 Q. And then make that analysis.

20 A. Yes, ma'am.

21 Q. Just take a second to read that.

22 A. All right.

23 (WITNESS COMPLIES.)

24 A. It states in the report that Mr. Kennedy claimed a
25 set of keys that were stuck in a door and in the front.

OFFICER DAVID CLEVINGER: REDIRECT BY SOLICITOR HAMILTON:
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1 door. So the front door I believe was open when the SWAT
2 Team got onto the porch to open the door. There were a set
3 of keys that I took a picture of that was also in the file
4 and those keys Mr. Kennedy did claim those keys that were
5 in the front door also.

6 Q. And do you recall now where the defendant was located
7 when SWAT got into the residence?

8 A. Right there at the love seat.

9 Q. Was he on the love seat?

10 A. No, he was standing up.

11 Q. What does the Incident Report state?

12 A. Kennedy was found on the love seat across from the
13 door in the first room when entering the front door of the
14 house.

15 Q. Okay. Thank you.

16 SOLICITOR HAMILTON: I'm sorry, no further questions
17 from the State.

18 MS. LIPINSKI: You know, before we go further, your
19 Honor, at this point the defendant would renew his motion
20 to view the video so that we may cross-examine Officer
21 Clevenger regarding this issue.

22 THE COURT: All right. Motion denied.

23 MS. LIPINSKI: I have no further questions, your
24 Honor.

25 THE COURT: You can step down. Thank you.

1 (WITNESS LEAVES WITNESS STAND.)

2 THE COURT: The State have anything else on this
3 issue?

4 SOLICITOR HAMILTON: No further testimony from our
5 officer, your Honor, but we do have a position --

6 THE COURT: Okay. Any witnesses on behalf of the
7 Defendant?

8 MS. LIPINSKI: None on behalf of the Defendant.

9 THE COURT: All right. And what's the Defendant's
10 position?

11 MS. LIPINSKI: The Defendant's position, your Honor,
12 is that he is -- he's not found on a couch, he's not found
13 seated on the couch, he's across the room on another love
14 seat where the gun is not found; that by the officer's own
15 testimony there were multiple people receiving mail at this
16 house that could have been the owners or possessors of this
17 gun; nothing to suggest that he knew the presence of this
18 gun.

19 The only thing they have that really attributed to him
20 is their allegation that in viewing the video they could
21 tell it was a gun. I having not viewed the video can't
22 really cross-examine the officer beyond how well the gun is
23 seen; is it capable of being attributed by make and model;
24 what other guns may be similar enough that that in and of
25 itself is enough to attribute the gun.

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1 The Court has made the comment that the Court is not
2 aware of he was handling the gun so it could have been
3 someone else handling the gun. That doesn't tie it to Mr.
4 Kennedy. The search warrant is limited to the residence;
5 it's not for Mr. Kennedy. They're the ones that put him in
6 proximity to the gun; to then charge him with possession of
7 a stolen handgun and then argue that he's being arrested
8 for that. And also, nothing other than we called dispatch
9 and said it was stolen establishes that he knew or should
10 have known the gun was stolen. So at that point I'm not
11 sure how we're charging him with this crime that begets a
12 search of him.

13 Just because a gun is stolen doesn't mean that he knew
14 or reasonably should have known the gun was stolen and
15 therefore is guilty of a crime for which he could have been
16 arrested and for which he could have searched incident to
17 that arrest.

18 The report is very clear that that is why they
19 searched Mr. Kennedy, and not because the search warrant
20 does. As a result of that we feel that it's an illegal
21 search of the defendant and therefore anything found on his
22 person should be suppressed in this trial.

23 THE COURT: All right. What's the State's position?

24 SOLICITOR HAMILTON: The State's position is that
25 there was probable cause for arrest in this case based on

1 the proximity in which the weapon was found on the
2 defendant.

3 This is also corroborated by the video that Officer
4 Clevenger --

5 THE COURT: Well what about the search?

6 SOLICITOR HAMILTON: Well the search is incident to
7 this arrest for which is the basis of the stolen pistol.
8 I'm going to the facts as to how they came to the
9 conclusion of and the PC for the arrest to make this a
10 valid search.

11 THE COURT: All right. Go ahead.

12 SOLICITOR HAMILTON: So the Smith and Wesson was we
13 believe in constructive possession of the defendant. He
14 had the means to control the possession of it.
15 Subsequently it was investigated as to the knowledge of
16 this in which he did state that this was in fact his gun.

17 Additionally the gun was found across from where he
18 was standing next to the love seat.

19 THE COURT: Did you say under arrest at that time?

20 SOLICITOR HAMILTON: He was arrested with a stolen
21 pistol at the time he did --

22 THE COURT: No, before they found the pistol.

23 SOLICITOR HAMILTON: No, he was not, your Honor.

24 THE COURT: But how could it be a search incident to
25 arrest if he wasn't under arrest?

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1 SOLICITOR HAMILTON: He -- Okay. He was -- When they
2 entered they detained him for safety reasons. They
3 searched the area for weapons for safety reasons and at
4 that time before placing the defendant under arrest for
5 that weapon they had found that weapon underneath the couch
6 cushion directly across from where he was; ran the serial
7 number and then arrested him subsequent to finding that
8 weapon.

9 THE COURT: Okay.

10 SOLICITOR HAMILTON: Then did *Miranda* rights on him
11 then subsequently questioned him as to his knowledge prior
12 to seeking a warrant on that.

13 But, your Honor, we believe there is enough probable
14 cause as to the initial arrest for the stolen handgun in
15 this case based on the video, the officer's knowledge as he
16 would testify that this resembled the gun that was seen in
17 the video in which the defendant had initiated a buy with a
18 confidential informant. It was seen in the video, he
19 believed it to be the same gun. Maybe not the serial
20 number matching but the same type make and model.

21 Additionally, found near the defendant was a holster
22 with the same magazine.

23 THE COURT: Wait, wait a minute, I hate to keep
24 interrupting but if he's basing his arrest on the pistol he
25 saw in the video then that might have to change my position

1 on whether or not the State's - the Defense is entitled to
2 the video.

3 SOLICITOR HAMILTON: Taken into account only --

4 THE COURT: No, he testified that it was the same.
5 Go ahead.

6 SOLICITOR HAMILTON: Taken into account just what
7 happened on the scene alone we believe there is enough
8 probable cause for arrest at that moment.

9 He is the only person in that home at the time. This
10 is found in close proximity to him. Additionally he has
11 next to him, where he is standing, in the love seat a
12 magazine that has the exact rounds of a Smith and Wesson
13 M&P pistol in it.

14 THE COURT: That's not against the law.

15 SOLICITOR HAMILTON: Its not against the law but when
16 it corroborates a pistol that is found up right across from
17 you, this is found next to you, there is a pistol found in
18 the couch right across from you it corroborates your
19 knowledge as to it being there because this is an open -
20 this is open right next to you. This pistol ---

21 THE COURT: I didn't hear --

22 SOLICITOR HAMILTON: --- magazine.

23 THE COURT: I didn't hear him testify it was open. He
24 said it was a plastic tote. I didn't hear him say whether
25 it was open or closed. You can't get any information from

1 him now.

2 SOLICITOR HAMILTON: Its in close proximity to the
3 defendant who was standing next to the love seat. We
4 believe that this is a constructive possession case; that
5 there is enough probable cause. It's a low standard.
6 There is enough probable cause in this case to believe that
7 he did possess. He is the only person in the home when
8 this weapon is found and he subsequently confesses to this
9 knowledge of the presence of this weapon.

10 THE COURT: Well, but - and I don't want to open a can
11 of worms, but doesn't this bolster the Defense argument if
12 he's basing the connection of the gun to the defense - not
13 the defense - but obtaining the search warrant. Maybe I'm
14 getting confused. I mean his testimony was - and - was
15 that it was the same pistol he saw in the video so he has
16 brought up the prior video in accessing his arrest of Mr.
17 Kennedy.

18 SOLICITOR HAMILTON: No. Yes, that was mentioned but
19 that is not how he assessed his arrest the day of. That
20 being found in proximity is the reason why they arrested
21 him. The close proximity of that weapon to where the
22 defendant was, stolen pistol, is why they arrested him at
23 that time. Possession of a stolen pistol at that time.
24 And that is what they arrested him on, the close proximity
25 to this weapon. The defendant was the only person in the

1 home at the time and the close proximity to the thing - the
2 holster and the magazine that matched the weapon that was
3 found across from him. So it's a constructive possession
4 argument in this case.

5 THE COURT: I understand that. I understand that.

6 SOLICITOR HAMILTON: And that alone we believe is
7 probable cause for the arrest not even taking into account
8 the video.

9 THE COURT: Why did he testify about the video if it
10 isn't relevant?

11 SOLICITOR HAMILTON: Because we're talking about the
12 search warrant. I thought this is what we were going on.
13 This is all -- We're still on the search warrant issue.
14 From what I understand this is what she's arguing.

15 THE COURT: Well, she's arguing though that the search
16 of his person or the search of the immediate surrounding
17 area was -- was not based on probable cause.

18 SOLICITOR HAMILTON: Your Honor, this actually -- This
19 weapon was mentioned to the issuing magistrate in this
20 case, the Smith and Wesson, and we believe that goes into
21 also the issuance of the search warrant to search this home
22 and that's why we brought that up because she did argue
23 that -- Okay. We'll argue as to the search warrant's
24 validity as to the firearm too, your Honor, and that is why
25 we brought that up.

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1 But like I said, alone we believe that there is enough
2 probable cause which is a low threshold. And the incident
3 report too sufficiently find that this was a stolen weapon
4 and arrest him for that.

5 THE COURT: So he was in custody but not arrested?

6 SOLICITOR HAMILTON: He was handcuffed for safety
7 reasons. Detained, your Honor.

8 THE COURT: All right.

9 MS. LIPINSKI: Your Honor, if I could hand up the
10 Incident Report which states that he was placed under
11 arrest for possession of a stolen vehicle and searched
12 consenting to that arrest.

13 THE COURT: A vehicle?

14 MS. LIPINSKI: I'm sorry, pistol.

15 SOLICITOR HAMILTON: We're not disputing that, your
16 Honor.

17 (DOCUMENT RECEIVED UP BY THE COURT.)

18 THE COURT: And just in a sentence or two, what is the
19 motion of the Defense?

20 MS. LIPINSKI: The Defense motion is to suppress any
21 evidence seized off of Mr. Kennedy is lack in probable
22 cause. Their argument that they can attribute it to him
23 based on the video is not born out by the testimony and
24 that the video does not say even he is the one that handled
25 the gun. The search warrant is obtained on January 1st.

1 This warrant is not executed until seven days later on
2 January 7th. The State's on witness stated that multiple
3 people were receiving mail in the home. Their testimony is
4 that the magazine is not found on him or on the love seat
5 as indicated by the statement in a plastic tote.

6 Arguably he could have been sitting next to it and
7 have no idea but its under the seat cushion of the couch
8 across, again, they knew nothing to attribute it to him.

9 They're trying to boot strap probable cause based on
10 statements he made later. But if that arrest of him falls
11 away and that search of him falls away, then arguably those
12 statements would fall away as fruit of the poisonous tree
13 and the defendant would renew his motion because we are
14 hand stringed in our ability to cross-examine Officer
15 Clevenger and question the probable cause search of the
16 defendant because we're not able to see the video that
17 keeps getting invoked as part of the probable cause not
18 only to search my client, the residence at [REDACTED]
19 Street, the officer searched my client personally.

20 The report clearly states that they placed him under
21 arrest for possession of a stolen handgun and then searched
22 him incident to that arrest. That is what the officers
23 wrote at that particular time. They don't say put him in
24 investigative custody and then once we get all these
25 statements from him then we decide to do it and during a

1 pat down search for weapons the drugs are found.

2 It specifically says "Search incident to arrest for
3 possession of a stolen handgun." And the officer testified
4 that is what he believed.

5 SOLICITOR HAMILTON: Your Honor, reading the Incident
6 Report it does state "officer secured Kennedy in
7 handcuffs". They checked the area where they will place a
8 person that is handcuffed to be sure it is safe and there
9 is no evidence in the furniture. While they were clearing
10 a place for Mr. Kennedy to sit they lifted the cushion on a
11 couch to check for weapons. Under that cushion is when
12 they discovered the stolen pistol, your Honor, after he was
13 detained. He was not arrested at that time until that gun
14 came back as stolen.

15 Your Honor, we just - the State's position they keep
16 bringing up the video and the gun in the video. What we're
17 trying to say is this alone entering that residence and
18 finding this weapon running it and finding that it's stolen
19 with him being the only person in that home at the time and
20 additionally the keys that are in the door that the officer
21 testified to belonging to the defendant, we believe that's
22 sufficient evidence to arrest at that moment.

23 That's constructive possession. They found a stolen
24 pistol in close proximity to the defendant who subsequently
25 says it is his weapon. They - He was not under arrest

1 prior to finding this. He was detained for officer safety
2 reasons and upon search of the couch across from the
3 defendant in close proximity to him was this weapon found.

4 MS. LIPINSKI: We're not challenging the search of the
5 gun, your Honor. I'm challenging the search of my person
6 and their ability to attribute it to him. It's mere
7 presence in a room without more, without some more ability
8 to attribute it to him. Statements moments or hours later
9 not withstanding at the time they arrest him for possession
10 of a stolen handgun, they have no proof that he knew the
11 gun was in the residence or that he knew or reasonably
12 should have known the gun was stolen, any search of him
13 therefore must fall.

14 THE COURT: I deny the motion. I find that he was in
15 custody for safety reasons and that the protective --
16 that's not the -- maybe not the right word to use but that
17 they had the -- the law enforcement had -- it was within
18 their providence to search the area within his immediate
19 control for weapons and other possible evidence and that
20 that's sufficient to support the seizure of the pistol and
21 the arrest.

22 All they needed at that point was probably cause.
23 They didn't need a lock-down-absolute beyond a reasonable
24 doubt case. They just needed to have probable cause and I
25 find that they did. This is a constructive possession case

OPENING STATEMENT: BY SOLICITOR HAMILTON:
BY MS. LIPINSKI:

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1 back row and you can stand whenever you want.

2 A. Okay.

3 THE COURT: And Ms. Quinones, I'm gonna ask you to be
4 the foreperson of this jury. We're not gonna move around
5 this afternoon but from now on you will sit in this first
6 seat in the first row. The two alternates will sit in
7 those last two seats on the back row. There is no other
8 assigned seating.

9 I'm gonna chat with you for just a minute then I'm
10 gonna turn the case over to the attorneys. At this point
11 they will have the right to make opening statements. They
12 are not required to make opening statements but they
13 probably will both come before you and give you an outline
14 or a blue print of the trial. They are not testifying
15 because they are not witnesses and they are not arguing
16 their case at this point. They have an opportunity at a
17 later time to do that.

18 Mr. Kennedy as to these three charges has entered
19 pleas of not guilty. This places the burden on the State
20 the burden of proving his guilt as to each beyond a
21 reasonable doubt.

22 Now I have three primary jobs as a trial judge. One
23 is to be the mechanical person, make sure that one person
24 is talking at a time, make sure that we break for lunch,
25 the logistics part of the case. The other is that I rule

OPENING STATEMENT: BY SOLICITOR HAMILTON:
BY MS. LIPINSKI:

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1 on questions of evidence. That's what I've been doing
2 already to make things go smoother. One side believes some
3 certain evidence should not be admitted for your
4 consideration and the other believes based on some legal
5 principle that the evidence is inadmissible and not
6 relevant, I have to make a ruling on that. And again,
7 that's what I've been doing since ten o'clock this morning.

8 My third job is that I am the sole judge of the law in
9 this case. You must take, accept, and apply the law as I
10 charge it even if I charge the law in error or even if you
11 think the law should be different. I am giving you some
12 legal principles now, I may during the trial give you some,
13 and at the end of the trial I will give you a concise and
14 comprehensive charge on the law that you are to apply to
15 the facts as you determine them to be.

16 Now you are not to infer anything from anything I say
17 as being an opinion of mine on the facts. Our law does not
18 allow a trial judge to formulate or express to a jury any
19 opinion on the facts. That is solely your job. It is
20 solely up to you to examine the evidence and give to the
21 evidence the effect, the value, the weight, and the truth
22 you believe it should have.

23 In doing this you may believe one witness as opposed
24 to several. Several witnesses as opposed to one, you may
25 believe all, part, or none of a witnesses testimony. Use

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BY MS. LIPINSKI:

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1 your common sense your sense of logic your sense of reason.
2 Use your experiences in life as you analyze the evidence.
3 As judges of the facts you necessarily must judge the
4 credibility, that is, the believability of the witnesses
5 who have testified. In accessing credibility use the
6 things I've just talked about; use those things that you
7 find in your day to day life are indicates of truthfulness
8 such as the witnesses demeanor, how they act on the stand.
9 Are they hesitant or straightforward. Is their testimony
10 consistent or inconsistent? Consider any bias or prejudice
11 a witness may have. That is whether a witness would wish
12 ot help or hurt one side or the other. And consider the
13 opportunity a witness had to actually know those things
14 about which a witness testifies.

15 Analyze the evidence, determine the true facts, apply
16 the law and you'll be able to return a verdict that speaks
17 the truth.

18 Do not talk about the case among yourselves. That is
19 do not discuss the case, anything about the case until I
20 instruct you to jointly deliberate and return a unanimous
21 verdict. Prior to that time you are not equipped with all
22 the tools you need to make a fair and reasonable decision.

23 Don't try to even make up your own mind until we reach
24 that point, again, because you don't know all the facts and
25 you hadn't heard my charge on the law. So don't do any

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1 premature deliberation or even try to factor into your own
2 mind what the verdict ought to be until I instruct you to
3 jointly deliberate and come to a unanimous verdict.

4 Do not let anyone outside the courtroom discuss this
5 case with you and if anyone tries to tell them you are on
6 the jury and cannot discuss the case. Report back to me if
7 anyone tries to discuss this case with you.

8 Do not let yourself be exposed to any news coverage if
9 there is any. I do not know that there will be any but
10 don't let yourself be exposed. Don't read, watch, or
11 listen to anything that would remotely deal with this
12 trial.

13 Do not use anything like Google or access any kind of
14 data source to obtain any information about this case or
15 about the parties to the case or about court procedure.
16 That would be improper. So don't do any independent
17 research particularly don't access anything through any
18 electronic media.

19 Don't even go on a social site such as Face book or
20 Tweet out Hey, guess what, I'm on a jury, because that
21 sounds innocent enough but someone may respond with
22 something that's not healthy for you to serve as a juror in
23 this case.

24 If you can't see, you can't hear, let me know. Cup
25 your ear, give me a voice raising gesture, a nudging

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1 gesture, and I'll try to correct that because we want you
2 to see and hear what you need to see and hear. We take
3 breaks about every hour and half. I find that's good break
4 time but if any of you need a break at any time, raise your
5 right hand and with no questions ask we'll take a break.

6 We want to move the case along but we're not in such a
7 hurry that we don't -- we'll not take a break when someone
8 needs to. And I extend that to counsel and Mr. Kennedy.

9 Now, Madam Forelady, you will sit in this first seat
10 with you reconvene tomorrow. You will be the liaison
11 between the jury and myself. You will preside over the
12 jury's deliberation and ultimately enroll the jury's
13 unanimous verdict.

14 Counsel.

15 OPENING STATEMENT BY SOLICITOR HAMILTON:

16 SOLICITOR HAMILTON: May it please the Court, your
17 Honor?

18 THE COURT: Yes, ma'am.

19 SOLICITOR HAMILTON: Good afternoon, ladies and
20 gentlemen. We are here today because the Defendant, Dennis
21 Kennedy, is charged with multiple offenses. As you heard
22 the judge state he is charged with trafficking cocaine over
23 ten grams; possession with intent to distribute crack
24 cocaine, and possessin of a weapon during the commission of
25 a violent offense.

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1 On the afternoon of January 7th, 2016 officers with
2 the York County Drug Enforcement Unit assisted by SWAT
3 executed a valid search warrant on the residence of 64
4 Reynolds Street within York County.

5 You will hear from officers that upon entering that
6 residence the defendant was standing in front of the love
7 seat in the living room. They secured him, searched the
8 area around him for officer safety reasons and in doing so
9 found across from him in the couch a pistol. That gun was
10 loaded. The defendant was placed under lawful arrest; upon
11 search of the defendant officers found in his jacket pocket
12 fourteen point two nine grams of cocaine in multiple
13 plastic baggies, eight point two eight grams of crack
14 cocaine; a digital scale that had white powder residue on
15 it and three hundred and ninety four dollars all on his
16 person.

17 You will then hear from Officer Vaughn who sequently
18 interviewed the defendant back at the Rock Hill DEU
19 headquarters, he interviewed the defendant. And at that
20 time the defendant had been given his rights; he waived his
21 rights and spoke with the officers. And in that interview
22 he stated that the drugs found in fact were his. Drugs
23 found on his person were his.

24 He also admitted that the gun that was found in the
25 couch was his. It was given to him. He also stated that

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1 he sells these drugs to support his family. He's not a
2 drug user, he sells 'em.

3 You will then hear from Cynthia Mitchum after Officer
4 Vaughn. You will hear from her, she is the Drug Lab
5 analyst. She will testify as to the substances found were
6 crack cocaine and cocaine and she will testify as to the
7 amounts that were found. This is a simple case, ladies and
8 gentlemen. Don't be fooled by the distractions.

9 Now what I'm gonna do is I'm gonna go over the law
10 with you the judge will actually charge you at the
11 conclusion of the trial on the law and I'm just gonna go
12 over some of the basic elements that the state's required,
13 I'm required to prove beyond a reasonable doubt.

14 As I stated the defendant is charged with trafficking
15 cocaine over ten grams. There are two elements of this
16 crime. The defendant was in knowing possession, knowingly
17 in actual or constructive possession of cocaine and that
18 was in fact ten grams or more of cocaine.

19 Now in this case what we're dealing with is actual
20 possession. We're not dealing with constructive possession
21 in this case. He had actual possession of the drugs which
22 means they were actually found on his person. They were
23 not found across the room. They weren't found in another
24 room.

25 Actual possession is when there was physical contact

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1 of that object and in this case they were on him and he had
2 physical contact with them. You will hear from Cynthia
3 Mitchum that this did weigh over ten grams. The cocaine
4 that was found did weigh over ten grams.

5 The second charge that he is - The second crime that
6 he is charged with is possession with intent to distribute
7 crack cocaine. This is a little more complicated than the
8 trafficking which is just mere possession. And in this
9 case we have to prove that the defendant was in knowing
10 actual possession which it was -- It was on his person --
11 of crack. And you'll hear from Cynthia Mitchum that this
12 did in fact test positive for crack cocaine. And that the
13 defendant possessed this crack cocaine with the intent to
14 distribute it. And in trying to analyze his intent to
15 distribute these drugs, you look to multiple things.

16 The legislature has come up with an inference level
17 for crack cocaine which is one gram. What that allows you
18 to do is if the defendant is in possession of more than one
19 gram of crack cocaine that allows you to make a permissive
20 inference that the defendant possessed those drugs with the
21 intent to distribute it due to the weight of the drugs.

22 In this case the defendant possessed eight point two
23 eight grams of crack cocaine; over seven times the
24 inference level. In addition to that inference level and
25 the permissive inference that you can take away from that,

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1 you can also take into account other evidence. Totality of
2 circumstances such as money found on him. Three hundred
3 and ninety-four dollars. You additionally take into
4 account cutting agents found on the scene. You can take
5 into account digital scales with residue on them. You can
6 take into account the packaging of the material. If it was
7 packaged separately or in a bag or of itself. You can also
8 consider statements made by the defendant.

9 In this case he stated he sells drugs. His intention
10 was to sell these drugs; to possess that crack cocaine with
11 the intent to distribute it.

12 And the last crime is possession of a weapon during
13 the commission of a violent offense. Trafficking cocaine
14 over ten grams is classified as a violent offense and he
15 was in possession of that firearm during the commission of
16 the trafficking of cocaine.

17 Now it is our burden and -- me and my co-counsel -- is
18 to prove as the State beyond a reasonable doubt the
19 elements of these crimes. Trafficking cocaine over ten
20 grams; possession with intent to distribute crack cocaine,
21 and possession of a weapon during the commission of a
22 violent crime.

23 Now ladies and gentlemen, I ask that you listen and
24 weigh all the evidence throughout the trial - both sides.
25 And listen carefully as it's presented to you; listen to

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1 the witnesses; listen to us as counsel, and at the
2 conclusion of this trial I will stand back before you and
3 ask that you find a verdict that speaks the truth in this
4 case and that you find the defendant guilty of all charges.

5 Thank you.

6 OPENING STATEMENT BY MS. LIPINSKI:

7 MS. LIPINSKI: May it please the Court, your Honor?

8 Following after that you're probably asking yourself
9 why you're here. I mean it seems so cut and dry and so
10 obvious and why are we taking you away from your time and
11 your family, your jobs; things that you'd rather be doing
12 than here today.

13 The Solicitor, who says that it is, she said it was
14 his, case closed everything's done, why are we here?

15 What she didn't tell you is that the defendant sitting
16 there, even after this statement by the prosecutor, is
17 innocent. As you look at him right now it is part of your
18 oath to cast your eyes upon him as an innocent man. And if
19 you can't do that already you need to catch yourself
20 because the United States Constitution, we hear about it,
21 we've studied it reluctantly sometimes in US History class,
22 it's mentioned occasionally on the news, it's referenced in
23 books we might read but no one really pays attention to it
24 until you're seated kind of where Mr. Kennedy is here today
25 on trial for some very serious charges.

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1 And part of the foundation of that Constitution is
2 that he is presumed innocent by it. You must be able to
3 look at him throughout this entire trial that he is
4 innocent. The judge often refers to it when they charge
5 the jury as a cloak of innocence that surrounds him and
6 that he keeps with that until he can get back into the jury
7 room. And the reason for that is it's easy to come in here
8 and make it seem like cut and dry and, you know, the drugs
9 were on him and therefore he must be guilty and where
10 really everybody's wasting your time but he's not. He is
11 innocent.

12 He is presumed innocent and the State has to meet
13 their burden. And while they would like to make it a very
14 cut and dry, simple, cleanup, little event, the reality is
15 they are some very serious charges. And while you will
16 hear from some well dressed officers like Officer
17 Clevenger, Officer Harrelson, there's also some people you
18 won't hear from. There's some details that cannot be
19 brought out. There's some things that you will be made
20 aware of as the trial goes through.

21 It's kind of one of those things don't make up your
22 mind until you've seen the whole movie. Because there are
23 things that I as a defense attorney am here to do. I'm
24 here to challenge the evidence; I'm here to question the
25 witnesses because the burden lies solely on the State to

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1 prove the defendant - the defendant - guilty beyond a
2 reasonable doubt. And we hear those terms a lot but what
3 does that mean?

4 It means that at the end of this trial you must be
5 firmly convinced that Dennis Kennedy is guilty of these
6 charges on each and ever one of these charges beyond a
7 reasonable doubt. Some of you may have been involved in a
8 wreck where you had a lawyer and there was a suit against
9 the insurance company and sometimes if you have that
10 experience all you have to do is tip the scale slightly in
11 one party's favor to prevail in civil court.

12 But in criminal court the burden is much higher. And
13 so as you listen to the evidence that is going to be put in
14 front of you tomorrow I suspect, at this point in the game
15 you have to think of it with Dennis Kennedy being innocent
16 in your mind. And only once you hear all those witnesses
17 and you don't hear just the obvious presentation by the
18 State as they want to call that, but you allow his attorney
19 to question the witnesses to find out what they did and
20 didn't do. What was said to Mr. Kennedy if anything before
21 he made that statement because one of the other things that
22 you are gonna be charged with doing at the end of this
23 trial is before you accept he made these statements, the
24 judge is gonna instruct you that you must find he made that
25 statement freely, voluntarily, knowingly, and

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1 intelligently. Did he make that statement?

2 Was it written down? Was it recorded? If it wasn't,
3 why not? What did these officers tell him; promise him,
4 indicate to him prior to that statement being made?

5 You will hear from a few witnesses but you will also
6 hear that there were a number of other people there that
7 day that you won't hear from. You will hear some things
8 about the evidence that call into question that it's not
9 just so cut and dry as the Solicitor's office would like
10 you to believe. And so I ask you as difficult as it may be
11 because I understand we all watch TV at the end of the
12 night and we make decisions. We watch something on the
13 show and it says so and so got arrested and sometimes we
14 hear various atrocious crimes and we think oh, the police
15 wouldn't have arrested him, and we already start pre-
16 formulating opinions about guilt or innocence.

17 But part of your role as a jury is to strongly resist
18 that urge unless and until at the conclusion of the case
19 and you go back and deliberate and then and only then start
20 peeling away the cloak of innocence that Mr. Kennedy wore
21 here to trial today. Because if you can't do that, because
22 - and that's how this process is built, that is why you are
23 here, you are here in essence to kind of keep that cloak on
24 him until you pull it away.

25 And it is in your hands. You are the tries of the

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1 fact. You will ultimately answer those three questions.
2 Did he have on his possession these drugs? Did he have not
3 in actual possession because the gun was not found on him
4 but what that attributable to him; was it attributable to
5 the defense for which he's charged and is he guilty of
6 that? Because it's not enough at the end of the day, you
7 don't get the luxury any more now that you're sitting in
8 the box to sit there and evaluate this evidence like you're
9 watching the news at night when you turn to your spouse and
10 go he's guilty or I don't believe she did that or what's
11 going on there, something seems like of fishy about that.
12 You don't have those luxuries any more. You are here to be
13 the finders of fact; that the word burden means to speak
14 the truth and until you can do that I simply ask that you
15 wait and you get all the facts. And that you not jump to
16 conclusions and you give Mr. Kennedy the benefit of that
17 presumption of innocence that the Constitution guarantees
18 him.

19 Because what the Constitution says is that just
20 because the State makes these charges, just because law
21 enforcement makes these arrest, you don't have to lay down.
22 The State is required to come in front of a court in front
23 of a jury and prove his guilt not based on conjecture or
24 speculation but on solid evidence that leaves you firmly
25 convinced of the defendant's guilt. So I just ask for your

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1 patience and I ask for your indulgence and I ask for that
2 presumption of innocence as we go through the evidence here
3 over the next couple of days. Thank you.

4 THE COURT: Members of the jury panel, we usually go a
5 little later than we're stopping today but rather than get
6 into a witness and have their testimony kind of chopped up,
7 we're gonna stop for the day and I'm gonna ask you to be
8 back at ten in the morning. If you'll follow the bailiff
9 he will take you to the jury room. That's where you will
10 report in the morning. Keep in mind the seating
11 arrangements that I've discussed. And we'll see you at ten
12 in the morning. Have a pleasant evening.

13 (JURY EXITS COURTROOM ON OVER NIGHT RECESS AT 03:51
14 PM.)

15 THE COURT: Anything for the record from the State?

16 SOLICITOR HAMILTON: Your Honor, I just wanted to
17 point out because we did not anticipate doing openings, --

18 THE COURT: Start over again. She was -

19 SOLICITOR HAMILTON: We did not anticipate doing
20 openings and prior to the jury being seated Officer
21 Harrelson was in here and he is supposed to be sequestered.
22 We just wanted to make you aware that during opening
23 statements he was --

24 THE COURT: That's kind of my bad because I told you
25 all we weren't gonna do openings.

1 Any problem with that?

2 MS. LIPINSKI: It was really more about other fact
3 witnesses, your Honor, than openings.

4 THE COURT: All right. We'll be at ease until ten in
5 the morning.

6 MS. LIPINSKI: Thank you, your Honor.

7 (COURT IN EVENING RECESS AT 03:52 PM.)

8 (COURT BACK IN SESSION TUESDAY, DECEMBER 14, 2016 AT
9 09:39 AM.)

10 THE COURT: Thank you. Take your seats. Good
11 morning. (STEVEN WOOD PLEA WITH JESSICA RUSSO.)

12 (COURT AT EASE AT 09:58 AM.)

13 (COURT BACK IN SESSION AT 10:02 AM.)

14 THE COURT: Thank you. You may take your seats.
15 Is the State ready to proceed?

16 SOLICITOR HAMILTON: The State's ready, your Honor.

17 THE COURT: Get Mr. Kennedy in.

18 (DEFENDANT DENNIS KENNEDY, REENTERS COURTROOM.)

19 MS. LIPINSKI: Your Honor, before you bring the jury
20 up, one last kind of pretrial motion. Yesterday when we
21 did the *Jackson v. Denno* hearing there was a comment that
22 during one of Mr. Kennedy's statements he said based on my
23 prior record I do what I do to support my kids. The
24 defendant would move to exclude that fraction of that
25 reference to his record from the jury as just being unduly

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1 prejudicial.

2 THE COURT: Yeah, I think under a 403 analysis that's
3 more prejudicial than approbative.

4 SOLICITOR HAMILTON: Yes, your Honor. And I have
5 actually spoken to each officer and they know not to
6 mention anything about his prior record and to keep that
7 out of his statement, so I made them aware of that, your
8 Honor.

9 MS. LIPINSKI: I just wanted to protect the record.
10 Thank you.

11 THE COURT: Bring in the jury.

12 (JURY REENTERS COURTROOM AT 10:16 AM.)

13 THE COURT: Good morning. I'll turn the case over to
14 the attorneys at this time.

15 Call your first witness.

16 SOLICITOR HAMILTON: Thank you, your Honor. The State
17 calls Officer Heath Clevenger.

18 THE COURT: Step up and be sworn.

19 (WHEREUPON, THE HEATH
20 CLEVANGER, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS
21 FOLLOWS:)

22 SOLICITOR HAMILTON: May it please the Court, your
23 Honor.

24 THE COURT: Yes, ma'am.

25 DIRECT EXAMINATION

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:

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1 OFFICER DAVID CLEVINGER BY SOLICITOR HAMILTON:

2 Q. Could you please state your full name for the court?

3 A. David Heath Clevenger.

4 Q. And what is your occupation?

5 A. I'm an investigator with the York County Multi-
6 jurisdictional Drug Enforcement Unit.

7 Q. And how long have you been employed in the law
8 enforcement field in general?

9 A. Over nineteen years.

10 Q. And specifically with the York County Drug Enforcement
11 Unit.

12 A. About two and a half years in the Drug Unit.

13 Q. What type of work do you do in that position?

14 A. Investigations all related to around narcotics from
15 making controlled buys with confidential informants to
16 serving search warrants to following up on Intels on other
17 crimes related to narcotics.

18 Q. And were you employed in that capacity on January 7th
19 of 2016?

20 A. Yes, ma'am.

21 Q. Now what I want to do is draw your attention of that
22 afternoon. Do you recall what you were doing that
23 afternoon around three o'clock?

24 A. Yes, ma'am. We were serving a search warrant at 64
25 Reynolds Street in Rock Hill in the county of York.

OFFICER DAVID CLEVENGER: DIRECT BY SOLICITOR HAMILTON:

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1 Q. Okay. And so you were serving a search warrant is
2 what you stated?

3 A. Yes, ma'am.

4 Q. Was anybody else assisting in that?

5 A. Yes, ma'am. Due to particulars relating to this case
6 we had the Rock Hill City SWAT Team serve the initial entry
7 into the structure to secure the structure and the people
8 inside.

9 Q. Could you please describe how you came in contact with
10 the defendant that afternoon?

11 A. After the SWAT Team had gone in and secured the
12 residence and secured Mr. Kennedy I walked into the front
13 door into a living room area and he was standing across
14 from the door just in front of a love seat.

15 Q. And did you make contact with him?

16 A. I did.

17 Q. What happened after you made contact with him?

18 A. After I made contact with him generally any time we
19 have somebody we're gonna be in there searching for a few
20 minutes so we try to get them a place secured to sit down.
21 So I started searching the couch which was across the room
22 from where he was at and checking under the cushions to be
23 sure that there weren't any drugs or weapons that he could
24 access when we set him on that couch. And when I picked up
25 a cushion I located a Smith and Wesson handgun underneath

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1 one of the cushions in the couch.

2 Q. And was that handgun loaded?

3 A. It was.

4 Q. Was there anyone else in the house with the defendant
5 at that time?

6 A. No, ma'am.

7 Q. So he was the only person inside --

8 A. He was the only person there that day yes, ma'am.

9 Q. And how far was that couch from where the defendant
10 was standing next to the love seat?

11 A. Seven, eight feet approximately.

12 Q. I'm gonna hand you what has been marked as State's
13 Exhibit One and Two.

14 THE COURT: Is one of those the pistol?

15 SOLICITOR HAMILTON: Yes, your Honor.

16 THE COURT: Has it been checked for courtroom
17 protocol?

18 OFFICER CLEVINGER: Yes, sir.

19 SOLICITOR HAMILTON: It has. I can actually show
20 Lieutenant Hager.

21 LIEUTENANT HAGER: I looked at it.

22 THE COURT: Mr. Hager, you looked at it? Okay.

23 Before we allow weapons to be presented in court,
24 they're obviously dangerous, so we have a protocol where
25 they are checked and double checked to make sure that they

OFFICER DAVID CLEVENGER: DIRECT BY SOLICITOR HAMILTON:

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1 are unloaded and that there is no possibility that they
2 will double fire. So I don't want you to be alarmed when
3 we're handing around a pistol that's been checked and
4 double checked to make sure we get - reach the protocol and
5 that its documented.

6 BY SOLICITOR HAMILTON:

7 Q. I'm gonna hand you what's been marked for
8 identification purposes as State's Exhibit One and Two.

9 I'd like for you to just take a look at those. I'm
10 gonna ask you a few questions.

11 (WITNESS COMPLIES.)

12 A. Yes, ma'am.

13 Q. Now you stated that the defendant was standing next to
14 a love seat, correct?

15 A. Yes, ma'am.

16 Q. Did you find anything around that love seat upon
17 searching that area?

18 A. Yes, ma'am. At the end of the love seat was a plastic
19 tote and inside the plastic tote was this holster and
20 magazine. It is also in a holster.

21 Q. And you've taken a look at Exhibit One and Two,
22 correct?

23 A. Correct.

24 Q. Have you ever seen Exhibit One before?

25 A. Yes, ma'am.

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:

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1 Q. Can you please tell the court what that is?

2 A.. This is the gun I found underneath the couch cushion.

3 Q. And Exhibit Two how do you recognize that?

4 A. This is the holster and magazine that I found in the
5 tote next to the love seat close to where ---

6 Q. And the magazine in that holster is that a magazine
7 that would be compatible with that weapon?

8 A. It is.

9 Q. Are these substantially in the same -- both exhibits,
10 Exhibit One and Two -- are they substantially in the same
11 condition and appearance as they were when you first bagged
12 them up and saw them?

13 A. Yes, ma'am.

14 Q. And how do you know that this is the same gun and
15 holster recovered from [REDACTED]?

16 A. Because on the heat seals for the plastic are my
17 initials and the date which I sealed it in the bag. And
18 also on the front of the evidence log there it has my name
19 and where I placed it into the evidence drop that day.

20 SOLICITOR HAMILTON: Your Honor, the State would offer
21 State's Exhibit One and Two for admission into evidence.

22 THE COURT: Any objection?

23 MS. LIPINSKI: I don't believe the chain has been
24 clearly established so at this point we would object, your
25 Honor.

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:

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1 THE COURT: Well, he -- I'll let the jury go to the
2 jury room just a minute while we take up a matter of law.

3 (JURY EXITS COURTROOM AT 10:24 AM.)

4 THE COURT: I'll be glad to hear from the State.

5 Maybe I better hear from the defense first.

6 This isn't a fungible item. I'm not sure that the
7 chain can't be established on something that he can
8 identify as an item that is the same item that is the same
9 item that he had an earlier time. Again this is not a
10 fungible item but I'll be glad to hear from you.

11 MS. LIPINSKI: I just to say that it's not a fungible
12 item that doesn't mean that it hasn't been in some way
13 tampered with. I don't know where that items been since he
14 seized it. I just think that those type questions I think
15 need to be cleared up in order to resolve that.

16 I don't know that -- He said his name's on a heat
17 seal. You could have opened it from another end; somebody
18 else could have handled that weapon. I think those are
19 questions that need to be resolved before that gun is
20 properly put before the jury.

21 THE COURT: What's the State's position?

22 SOLICITOR HAMILTON: That is what I was going to
23 argue. This is not a fungible item. I would not be
24 opposed if it would satisfy the defense and your Honor when
25 either that's been ask any evidence of tampering on these

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:

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1 bags. I believe that him saying it was sealed and the heat
2 seal was still intact with his signtuar or it was enough I
3 can reiterate.

4 THE COURT: I'm gonna allow it in over objection.

5 You can certainly cross-examine on those issues but I
6 find that's not a question that as to admissibility.

7 MS. LIPINSKI: While the jury's out I'd also like to
8 renew our pretrial motion regarding the search warrant and
9 all the evidence seized against the defendant was done so
10 in violation of his Fourth, Fifth and Sixth Amendment
11 rights.

12 THE COURT: I thought that was gonna be your objection
13 but it is and my ruling is the same.

14 MS. LIPINSKI: Thank you, your Honor.

15 THE COURT: Bring in the jury.

16 (JURY REENTERS COURTROOM AT 10:27 AM.)

17 THE COURT: Members of the jury panel, I've allowed
18 these exhibits into evidence over the objection.

19 (WHEREUPON, STATE'S EXHIBIT NUMBER ONE AND TWO,
20 IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

21 THE COURT: All right. You may proceed.

22 SOLICITOR HAMILTON: Thank you, your Honor.

23 Q. Officer Clevenger, I just wanted to ask you one
24 additional question. You did state that these were heat
25 sealed with your signature over them. Did you notice any

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1 kind of tampering of the bags whatsoever?

2 A. No, ma'am.

3 Q. And what did you proceed to do with the gun and
4 holster and magazine once you recovered them?

5 A. Initially when I found the gun and the first thing I
6 did was unload it and secured it in a bag so that you
7 wouldn't have to worry about a loaded weapon being in the
8 room with the suspect even though he was handcuffed. Just
9 didn't want to take any chances. And then when we find
10 evidence we place it in an evidence bag - in a general
11 evidence bag -- and maintain custody and control of that as
12 we search a house.

13 Q. So once you took those in your possession what
14 happened next? What did you proceed to do?

15 A. Proceeded to run the serial number to dispatch through
16 a NCIC computer.

17 Q. Let me ask you --

18 MS. LIPINSKI: Your Honor, I object to that part. I
19 think that information was irrelevant and in violation of a
20 pretrial ruling.

21 SOLICITOR HAMILTON: We're gonna move on, your Honor.

22 THE COURT: All right. Well I sustain the objection
23 and strike the last question and answer and she will move
24 on too.

25 Do not consider it, members of the jury panel, and the

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1 State will move forward.

2 BY SOLICITOR HAMILTON:

3 Q. So what happened with the custody of the defendant
4 after that? You said you had secured him ---

5 A. Yes, ma'am.

6 Q. --- and placed him on the couch. What happened
7 after that?

8 A. He was placed under lawful arrest.

9 Q. Okay. And what happened once he was placed under
10 arrest?

11 A. He was searched incident to the arrest and on his
12 person we found powder cocaine.

13 MS. LIPINSKI: Your Honor, again I just feel the need
14 to renew my pretrial motions regarding the ---

15 THE COURT: All right.

16 MS. LIPINSKI: --- search of the defendant personally
17 and that we're getting into that additional Lyle.

18 THE COURT: Over ruled.

19 BY SOLICITOR HAMILTON:

20 Q. Proceed. Sorry.

21 A. We searched his person and found approximately sixteen
22 grams of powder cocaine on his person and approximately ten
23 grams of crack cocaine on his person.

24 Q. And where on his person did you locate these items?

25 A. In a -- They were located in a - in several bags

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1 inside his pocket in a jacket that he was wearing.

2 Q. And were these - What were these packaged - What was
3 the crack and the cocaine packed in inside his pocket?

4 A. They were in plastic bags and if I can refer to my
5 case summary real quick to be sure I get this absolutely
6 correct.

7 Q. You can put the -- You can put the gun and the holster
8 down.

9 A. The cocaine was in multiple plastic bags in a green
10 Crowe -- bag ---

11 Q. Okay.

12 A. --- that was inside a Daritos bag.

13 Q. Okay. And could you describe what the crack looked
14 like?

15 A. The crack was a very large crack rock or what is
16 commonly called on the street is a crack cookie. It's
17 distribution weight and size much larger than what an
18 individual would use for his person. It being --

19 MS. LIPINSKI: I object to that testimony as being -

20 THE COURT: I sustain the objection.

21 Disregard his testimony about the size being more than
22 one person would use. Thank you.

23 Go ahead.

24 BY SOLICITOR HAMILTON:

25 Q. Did you find anything else on the defendant?

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1 A. The powder cocaine was packaged in several different
2 plastic baggies.

3 Q. Was -- Did he have anything else on him?

4 A. He did. He had some scales with some powder residue
5 on the scale and three hundred and ninety-four dollars in
6 cash also.

7 Q. And what color was that powder residue on that scale?

8 A. White.

9 Q. I'm gonna hand you what's been marked as State's
10 Exhibit Number Three and Four.

11 Would you please take a look at these.

12 (WITNESS COMPLIES.)

13 MS. LIPINSKI: Your Honor, while he's looking at them
14 we would renew our objections to State's Three and Four
15 based on pretrial motions.

16 THE COURT: Objection is over ruled.

17 A. Yes, ma'am.

18 Q. And Officer Clevenger, you testified you recovered a
19 scale from the defendant's pocket and some bags that the
20 drugs were ---

21 A. Yes, ma'am.

22 Q. --- in. Do you recognize those exhibits?

23 A. This is the digital scale that we pulled from his
24 pocket.

25 Q. And what exhibit is that?

OFFICER DAVID CLEVENGER: DIRECT BY SOLICITOR HAMILTON:

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1 A. This is Exhibit Number Three, State's Exhibit Three.

2 Q. Okay. And how do you recognize that?

3 A. I recognize it to be the scale because several
4 different in the bag that I signed it was placed into the
5 evidence drop. It is sealed and untampered with my
6 initials and the date that it was sealed on the back of the
7 bag. And again where I signed for it in evidence yesterday
8 morning when I picked it up for court.

9 Q. So that -- Is that in substantially the same condition
10 and appearance as it was when you recovered it on - from
11 the defendant's pocket January 7th, 2016?

12 A. Yes, ma'am.

13 Q. And it does not appear to be tampered with in any way?

14 A. No, ma'am.

15 Q. Okay. And how about State's Exhibit Number Four. How
16 do you recognize that?

17 A. I recognize that to be the Crowe Royal bag and the
18 Daritos bag which the narcotics were located in in his
19 jacket.

20 MS. LIPINSKI: Your Honor, I object to him showing the
21 evidence to the jury before it's been placed into evidence.

22 THE COURT: All right.

23 MS. LIPINSKI: He keeps holding it up and handling it
24 like it's already --

25 THE COURT: I sustain, I sustain the objection.

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:

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1 It has to be in evidence before we publish to the
2 jury.

3 SOLICITOR HAMILTON: Exactly.

4 Q. If you can keep those things ---

5 A. Okay.

6 Q. --- down ---

7 A. I apologize.

8 Q. --- when you're reading from them. Are these bags in
9 substantially the same condition of appearance as they were
10 when you first recovered them from the defendant's person?

11 A. Yes, ma'am.

12 Q. And do you -- Does that bag appear to be tampered with
13 in any way?

14 A. No, ma'am.

15 SOLICITOR HAMILTON: Your Honor, the State would offer
16 State's Exhibit Three and Four for admission into evidence.

17 MS. LIPINSKI: We renew our pretrial objections, your
18 Honor.

19 THE COURT: Based on earlier rulings objection over
20 ruled.

21 (WHEREUPON, STATE'S EXHIBIT NUMBERS THREE AND FOUR,
22 IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

23 BY SOLICITOR HAMILTON:

24 Q. I'm going to go through some photos with you that were
25 taken on scene and hand those to you.

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:

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1 MS. LIPINSKI: Your Honor, if we can approach just
2 briefly.

3 THE COURT: Okay.

4 (WHEREUPON, BENCH CONFERENCE OFF THE RECORD OUT OF THE
5 HEARING OT THE JURY AT 10:35 AM.)

6 THE COURT: Yes, ma'am.

7 SOLICITOR HAMILTON: Thank you, your Honor.

8 Q. Officer Clevenger, I'm gonna hand you what has been
9 marked just for identification purposes State's Exhibit
10 Five through Nine.

11 A. Okay.

12 Q. Again, could you please keep these ---

13 A. Yes, ma'am.

14 Q. --- down so that the jury -- Thank you.

15 Just take a look at those photos and I'm gonna ask
16 you a question.

17 (WITNESS REVIEWS PHOTOS.)

18 A. Yes, ma'am.

19 Q. Do you recognize these photos?

20 A. I do.

21 Q. Okay. How do you recognize those photos?

22 A. The photos of the drugs that were recovered were taken
23 that day when we got back to the office and used the scale
24 in the office to get an approximate weight. There is also
25 a picture of a key in a door knob and there is a picture of

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:

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1 the front of the house that we used to identify the house
2 to the members of the SWAT Team so they would have a visual
3 not only a address but know when they pulled up to that's
4 the address. That's what the house looks like. It looks
5 like a right porch. It helps us ensure that we hit the
6 right house.

7 Q. And did you take these photos?

8 A. I did except for the one of the front of the house. I
9 believe it was off of a Google image off the internet.

10 Q. And does that photo specifically the house I believe
11 -- Let me -- exhibit Number Five specifically. Does the
12 picture of that house appear to be the same as it was on
13 January --

14 A. It is representative of the day that we served the
15 search warrant the house looking in somewhat condition.

16 Q. And the other photos of the drugs that were seized
17 from the defendant do they fairly and accurately depict the
18 drugs removed from the defendant's person in the residence
19 at [REDACTED] back January 7th, 2016?

20 A. They do.

21 Q. And do you notice any alterations or deletions made
22 from these photos?

23 A. No, ma'am.

24 SOLICITOR HAMILTON: Your Honor, the State would offer
25 Exhibit Number Five through Nine for admission into

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:

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1 evidence.

2 THE COURT: Objection to Seven, Eight and Nine?

3 MS. LIPINSKI: Subject to our previous motion, your
4 Honor, we can put more of that on the record.

5 THE COURT: But you object to Seven, Eight and Nine?

6 MS. LIPINSKI: Yes, your Honor.

7 THE COURT: All right. All of 'em are in over --

8 All but Seven, Eight and Nine without objection.

9 Seven, Eight and Nine over objection.

10 (WHEREUPON, STATE'S EXHIBIT NUMBERS FIVE THROUGH NINE,
11 IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

12 SOLICITOR HAMILTON: The State would request to
13 publish.

14 THE COURT: You may.

15 (WHEREUPON, STATE'S EXHIBIT NUMBERS FIVE THROUGH NINE,
16 PUBLISHED TO THE JURY AT 10:39 AM.)

17 BY SOLICITOR HAMILTON:

18 Q. Okay, I have a pointer for you and I am not great
19 to the knowledge, I think there should be a button on that
20 pointer. There is a red button.

21 A. Okay.

22 Q. You can use that as -- Yeah, a pointer for any
23 references.

24 A. All right.

25 Q. I'm gonna ask you, could you please describe what

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:

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1 we're seeing a picture of?

2 A. This is a picture of the front of the house. Those
3 are the steps and that is the front door.

4 Q. And is this the house that the search warrant was
5 executed on January 7th, 2016?

6 A. Yes, ma'am.

7 Q. What is that address?

8 A. [REDACTED], Rock Hill, county of York.

9 Q. And that's the front door that you entered. Could you
10 please point that out for the jury?

11 A. Right here.

12 Q. And from the outside where is the room in which --

13 A. It is just through that front door.

14 Q. Okay.

15 A. So as soon as you go through that front door right
16 there. The front door goes into the living room area.

17 Q. Okay what we're looking at is State's Exhibit Number
18 Six. Could you please describe to the jury what this is,
19 what we are seeing?

20 A. Those are the keys, Mr. Kennedy's keys in the door.

21 Q. Okay. And what -- How did you know those were Mr.
22 Kennedy's keys?

23 A. Later we ask Mr. Kennedy if those were his keys. He
24 admitted that they were.

25 Q. And had a -- Had you witnessed the defendant being

OFFICER DAVID CLEVENGER: DIRECT BY SOLICITOR HAMILTON:

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1 read his *Miranda* rights at any time?

2 A. I did.

3 Q. So he had been read his *Miranda* rights prior to
4 admitting --

5 A. Prior to stating those keys were his yes, ma'am.

6 Q. Now what we're gonna go to is State's Exhibit Number
7 Seven. And what are we seeing here?

8 A. This is a picture of the cocaine in its packaging
9 sitting on a scale inside the -- that's located in our
10 narcotics office.

11 Q. And these photos that we're looking at, were these
12 taken on scene?

13 A. No, ma'am.

14 Q. Okay. Where were these photos taken?

15 A. These were taken in our office, our east office in
16 the Rock Hill Police Department.

17 Q. Okay. And this is what we're displaying as State's
18 Exhibit Number Eight. Could you please describe for the
19 jury what we are seeing here?

20 A. That is the crack that we located on Mr. Kennedy in
21 it's plastic bag on the scale in the office.

22 Q. And the -- What we're gonna also look at the next one
23 is State's Exhibit Number Nine. This is a picture of what?

24 A. That's the crack out of the bag just to get a more
25 accurate weight.

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:

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1 Q. And do you have experience in investigating drug
2 crimes and distributions?

3 A. I do.

4 Q. About how many case -- drug cases have you worked over
5 your career?

6 A. Hundreds. No way to keep the exact count.

7 Q. Approximately?

8 A. Well into the hundreds.

9 Q. Okay. And based on your experience in investigating
10 drug crimes what does this look like to you?

11 MS. LIPINSKI: Your Honor, I object to that point. He
12 hasn't been qualified as an expert in any field.

13 THE COURT: I sustain the objection.

14 BY SOLICITOR HAMILTON:

15 Q. What did you proceed to do after you found that drugs?

16 A. I placed them in the evidence bag and detained them
17 until we took them back to the police department.

18 Q. Did you -- When did you seal the envelopes that you
19 placed these drugs in?

20 A. I placed them in the evidence bag, we take 'em back to
21 the office, we won't seal 'em on the scene so we can get an
22 accurate or an approximate weight, excuse me, when we get
23 back to the office. After we get an approximate weight we
24 put 'em in the evidence bag and then we seal it up so we
25 can turn it into the evidence drop.

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:

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1 SOLICITOR HAMILTON: Beg the Court's indulgence.

2 Your Honor, may we approach? May we approach briefly?

3 (WHEREUPON, BENCH CONFERENCE OFF THE RECORD OUT OF THE
4 HEARING OF THE JURY AT 10:44 AM.)

5 THE COURT: We can put that on the record later.

6 SOLICITOR HAMILTON: Okay.

7 BY SOLICITOR HAMILTON:

8 Q. What I'm gonna do is hand you what's been marked as
9 State's Exhibit Number Ten and -- for identification
10 purposes Ten and Eleven.

11 And again I'm handing you what's been marked as
12 State's Exhibits for identification purposes Ten and
13 Eleven. If you could keep those down.

14 MS. LIPINSKI: Your Honor, prior to getting into this
15 line of questioning the defendant would renew his pretrial
16 motion regarding the evidence which was seized.

17 THE COURT: All right. The motion is over ruled
18 based on earlier pretrial rulings.

19 BY SOLICITOR HAMILTON:

20 Q. Officer Clevenger, do you recognize, I'm gonna start
21 with Exhibit Number Ten. Do you recognize this Exhibit?

22 A. I do.

23 Q. Okay. And what is that?

24 A. This is crack cocaine that we recovered --

25 MS. LIPINSKI: Your Honor, I'm going to object to that

1 A. It's the substance I took off of Mr. Kennedy on the
2 day of his arrest.

3 Q. Okay. And how else do you recognize it? Do you have
4 any identification on that bag?

5 A. Yes. I've signed the bag and initialed the top and
6 I sealed it on the day on January 7th.

7 Q. And that particular exhibit, the powder like
8 substance, was that continuously in your custody and
9 control prior to being sealed and secured?

10 A. Yes, ma'am.

11 Q. And what did you do once you sealed that bag and
12 secured it?

13 A. I placed into a evidence drop.

14 Q. And where was that evidence drop again?

15 A. Located in the narcotics office in the Rock Hill
16 Police Department.

17 Q. And once you put it in the evidence drop box does
18 anyone else have access to that?

19 A. Just the evidence technicians.

20 Q. And that's a secured location?

21 A. Yes, ma'am, it's locked. It's a steel box.

22 Q. And when - For both of these exhibits when they
23 left your possession what was the condition of those
24 envelops? Had they been tampered with in any way?

25 A. No they were sealed. Signed and sealed along with

OFFICER DAVID CLEVINGER: DIRECT BY SOLICITOR HAMILTON:

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1 the other pieces of evidence and paperwork that goes along
2 with it to have it placed into evidence.

3 Q. Okay. Now do you see the person in the courtroom
4 today who you recovered the rock like substance; the powder
5 like substance that we saw in the photos, the scales and
6 the money and pistol from the afternoon of January 7 --

7 MS. LIPINSKI: Your Honor, I'm gonna object
8 specifically as to the question as her she states the
9 pistol. It's my belief the testimony of Officer Clevenger
10 was the pistol was recovered from a couch or a love seat
11 area.

12 THE COURT: Rephrase your question.

13 SOLICITOR HAMILTON: Yes, your Honor.

14 Q. From the home of 6 -- the pistol specifically, I know
15 you recovered the rock like substance, the powder
16 substance, the scales and the money from the defendant's
17 person?

18 A. Correct.

19 Q. Do you see him in this courtroom?

20 A. Mr. Kennedy.

21 Q. Okay. Would you please point him out?

22 Your Honor, the State would ask the record reflect
23 the defendant - I mean that the witness pointed out Mr.
24 Kennedy.

25 (WITNESS INDICATED TO DEFENDANT.)

OFFICER DAVID CLEVINGER: CROSS BY MS. LIPINSKI:

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1 SOLICITOR HAMILTON: And please answer any questions
2 the defense may have.

3 CROSS-EXAMINATION

4 OFFICER DAVID CLEVINGER BY MS. LIPINSKI:

5 Q. Is it Officer Clevenger or what's your rank? I'm
6 sorry.

7 A. Investigator is my ---

8 Q. Investigator.

9 A. --- title.

10 Q. And you're currently with the Drug Enforcement Unit?

11 A. Yes, ma'am.

12 Q. And you work under the supervision of Commander
13 Marvin Brown, correct?

14 A. That's correct.

15 Q. And from under Marvin Brown you however get a paycheck
16 from what law enforcement agency?

17 A. The York County Sheriff's Office.

18 Q. But Commander Marvin Brown actually works for the
19 Solicitor's office?

20 A. That's correct.

21 Q. All right. And you stated that you worked for the
22 sheriff's office for nineteen years?

23 A. I have nineteen years in law enforcement.

24 Q. In law --

25 A. I've worked at a couple of different agencies.

OFFICER DAVID CLEVENGER: CROSS BY MS. LIPINSKI:

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1 Q. Okay. Have you -- But you stated only two and a half
2 years in narcotics specific?

3 A. Correct.

4 Q. Work? So prior to that the other fifteen years
5 arguably you would have responded to more generic type
6 calls; burglaries, auto breaking, those type things?

7 A. Response to calls yes, ma'am.

8 Q. Okay. And were you specialized in your previous
9 law enforcement experience or did you have more general
10 assignments?

11 A. I performed both. I had some -- There was a time
12 where I was on the specific traffic unit or that was my
13 primary role and then also spent some time in training.

14 Q. All right. But did you ever work the road?

20 A. Yes.

21 Q. What they call work the road?

22 A. Yes, ma'am.

23 Q. And that means you drive around in a patrol car and
24 someone calls 911 you're the one that shows up at their
25 house?

1 A. Yeah, start cars, respond to calls, get out with
2 suspicious persons. All that.

3 Q. So you have that regular scope of knowledge as well?

4 A. Yes, ma'am.

5 Q. So while the DEU may have one way of doing things

OFFICER DAVID CLEVINGER: CROSS BY MS. LIPINSKI:

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1 you've been exposed to a broad way of investigating various
2 crimes?

3 A. Correct.

4 Q. All right. And this particular case you stated that
5 you were not one of or part of what I would commonly refer
6 to as an entry team into [REDACTED] Street, correct?

7 A. I was not on the initial entry team, no, ma'am.

8 Q. That is done by SWAT?

9 A. Correct.

10 Q. So you have no personal first-hand knowledge of where
11 Mr. Kennedy was when SWAT went into the residence?

12 A. I did not see where he was when the SWAT made entry,
13 no, ma'am.

14 Q. Thank you. And you stated that for the most part it
15 appears to me, and correct me if I'm wrong, that you are in
16 somewhat taking the lead as it relates to evidence
17 gathering at this scene, correct?

18 A. Yes, ma'am.

19 Q. All right. So this was not something where you
20 would have called the Forensic Service Unit?

21 A. No, ma'am.

22 Q. And while there are other DEU or Drug Enforcement
23 officers there with you, you're not there by yourself
24 obviously, you obviously in terms of the number of items
25 that we've talked about today, took that lead, correct?

OFFICER DAVID CLEVENGER: CROSS BY MS. LIPINSKI:

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1 A. Yes, ma'am.

2 Q. And so you would have had the discretion to take any
3 number of items into evidence or decide which items were
4 necessary or not necessary, correct?

5 A. Yes, ma'am.

6 Q. And that one was your call, correct?

7 A. Yes, ma'am.

8 Q. All right. And there's not a DEU or a York County
9 Sheriff's Office or any other policy that says you're
10 limited to a specific number of items.

11 A. No, ma'am.

12 Q. You know we don't want you to take the whole house
13 contents with us but ultimately you do have some
14 discretion, correct?

15 A. Correct.

16 Q. All right. And we have seen I think five photographs
17 four of which you took, right?

18 A. Yes, ma'am.

19 Q. And one you downloaded from the door, correct?

20 A. Correct.

21 Q. All right. But did you take that just with your
22 cell phone?

23 A. I don't recall ---

24 Q. All right.

25 A. --- what I took it with.

OFFICER DAVID CLEVINGER: CROSS BY MS. LIPINSKI:

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1 Q. Did you have a camera out there?

2 A. We have cameras in the office and we do sometimes use
3 a cell phone too.

4 Q. Okay. But at some point you had some photographic
5 ability out there?

6 A. Yes, ma'am.

7 Q. All right. And just like the pieces of evidence that
8 you collected you would have also had the opportunity
9 arguably to take other photographs, right?

10 A. Yes, ma'am.

11 Q. You weren't like running out of Cloud storage and you
12 only got two photos that day other than that the camera
13 shut down, right?

14 A. I don't believe so.

15 Q. Okay. And you stated - And there's been some
16 confusion so I just want to clear it up. Items were taken
17 out of a jacket include the money, the white drug suspected
18 items, and some packaging that they may have been in,
19 correct?

20 A. Yes.

21 Q. It was taken from a jacket I believe.

22 A. Yes, ma'am.

23 Q. All right. And the gun came from a couch on one
24 side of the room underneath a seat cushion, correct?

25 A. Yes, ma'am.

OFFICER DAVID CLEVINGER: CROSS BY MS. LIPINSKI:

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1 Q. And then the holster came from a plastic bin like a
2 storage bin I'm guessing?

3 A. Yes, ma'am.

4 Q. All right. And that was on a love seat?

5 A. It was beside the love seat across the room, yes,
6 ma'am.

7 Q. And you took a picture of the key in the door. Did
8 you put the key in the door to make sure it worked or that
9 was there when you got there?

10 A. That was there when we got there.

11 Q. And I also heard testimony that you recovered scales
12 but I only saw -- And I know even being a lawyer they give
13 us those little tiny scales all the time and they put 'em
14 in our office, but we're talking about a digital scale,
15 correct?

16 A. Correct. One unit.

17 Q. One. Right.

18 a. Right. Scales is just -- the "s" is just common
19 --

20 Q. It's a good-luck wheel term. I get that but I don't
21 want it to be in there. There were multiple sets of
22 scales; you got one item and there's one thing in that box,
23 correct?

24 A. Yes, ma'am.

25 Q. All right.

OFFICER DAVID CLEVINGER: CROSS BY MS. LIPINSKI:
REDIRECT BY SOLICITOR HAMILTON:

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1 MS. LIPINSKI: The Court's indulgence one moment.

2 That's all we have for --

3 THE COURT: Any redirect?

4 SOLICITOR HAMILTON: Beg the Court's indulgence, your
5 Honor.

6 REDIRECT EXAMINATION

7 OFFICER DAVID CLEVINGER BY SOLICITOR HAMILTON:

8 Q. When you entered the residence after the SWAT Team
9 had secured it, did you visually see the defendant?

10 A. Yes, ma'am.

11 Q. And where was he located when you visually made
12 contact --

13 A. Standing in front of the love seat.

14 Q. And she talked about you taking all of these things
15 from the home. Did you take what you believed to be
16 illegal substances from the home?

17 A. Yes, ma'am.

18 Q. And that's all you felt the need to take, correct?

19 A. Took what I felt to be relevant evidence necessary for
20 the case from the home, yes, ma'am.

21 SOLICITOR HAMILTON: Nothing further --

22 THE COURT: Recross?

23 MS. LIPINSKI: Nothing, your Honor.

24 THE COURT: You can step down. As the case agent you
25 will remain in the courtroom.

OFFICER LELAND HARRELSON: DIRECT BY SOLICITOR HAMILTON:

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1 Call your next witness.

2 SOLICITOR HAMILTON: Thank you, your Honor.

3 The State would call Officer Leland Harrelson.

4 THE COURT: Step up here and be sworn, please, sir.

5 OFFICER HARRELSON: Yes, sir.

6 (WHEREUPON, LELAND HARRESLON,
7 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

8 SOLICITOR HAMILTON: May it please the Court, your
9 Honor?

10 THE COURT: Yes, ma'am.

11 DIRECT EXAMINATION

12 OFFICER LELAND HARRELSON BY SOLICITOR HAMILTON:

13 Q. Could you please state your full name for the record?

14 A. Hugh Leland Harrelson, Junior.

15 Q. And, Officer Harrelson, what is your occupation?

16 A. I'm employed by the Rock Hill Police Department. I'm
17 currently assigned as an investigator to the York County
18 Narcotics Unit.

19 Q. Okay. How long have you been in law enforcement?

20 A. I've been in law enforcement for approximately nine
21 years and I've been assigned to the drug unit for
22 approximately six.

23 Q. What type of work do you do in that position?

24 A. As an investigator I work different types of narcotic
25 cases. I work some cases with a confidential informant to

OFFICER LELAND HARRELSON: DIRECT BY SOLICITOR HAMILTON:

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1 anywhere just working surveillance operations or just going
2 up to somebody's house and, you know, knocking on the door
3 if we had Intel that they're selling drugs and just
4 speaking with them about it.

5 Q. And were you employed in that present or in that
6 capacity on January 7th, 2016?

7 A. Yes I was.

8 Q. What I want to is draw your attention to that
9 afternoon around three o'clock. What were you doing?

10 A. I was assisting our office with the execution of a
11 search warrant.

12 Q. And where were you executing that search warrant?

13 A. Let me look at my notes. I just don't remember the
14 address.

15 Q. Okay.

16 A. It was at Number [REDACTED] in Rock Hill.

17 Q. And is that within York County?

18 A. It is, yes.

19 Q. And could you please describe when you came in
20 contact with the defendant?

21 A. I came in contact with him after the residence was
22 secure. My job was to read the Search Warrant and also
23 read him his *Miranda* warnings.

24 Q. And you stated you read his *Miranda* warnings. What
25 did you read him his *Miranda* Warnings from? Do you have a

OFFICER LELAND HARRELSON: DIRECT BY SOLICITOR HAMILTON:

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1 card, if was paper?

2 A. Yeah, in the Drug Unit we have a piece of paper that's
3 universal throughout our unit and it has some *Miranda*
4 warnings on there and it also has some other information
5 that we fill in as far as the date and time, what officer
6 read the Miranda Warnings. And then we have the person
7 sign it stating that they understood their *Miranda*
8 warnings.

9 Q. I hand you what's been marked as State's -- for
10 identification purposes State's Exhibit Number Twelve.

11 Would you please take a look at that?

12 A. Yes.

13 Q. And if you can keep it down close to you and not
14 publish to the jury prior to it being admitted.

15 A. Yes.

16 Q. Is this the form that you have in DEU to read off of?

17 A. Yes it is.

18 Q. Could you please read the rights as you read them to
19 the defendant that you - Sorry, could you please read the
20 rights as you read them to the defendant that afternoon
21 January 7th, 2016?

22 A. Yes.

23 "You have the right to remain silent. Anything
24 you say can be used against you in court. You have
25 the right to talk to a lawyer for advice before

1 answering any questions and to have your lawyer
2 present during questioning. You have the right to the
3 advice and presence of a lawyer even if you could not
4 afford to hire one. We have no way of appointing you
5 a lawyer but one will be appointed by the court for
6 you if you wish. If you wish you may answer questions
7 without the presence of a lawyer and you may stop
8 answering any time you desire."

9 Q. And where was the defendant when you read him these
10 rights?

11 A. In the living room of the residence.

12 Q. Could you please tell us a little bit about that
13 environment? How many officers were around? How big was
14 the room?

15 A. You had just a I guess a regular size living room. It
16 had a couch on one side. I believe a love seat on the
17 other side. There were a couple of officers in the
18 residence with me.

19 Q. Okay. Was anyone threatening the defendant when you
20 read him these rights?

21 A. No.

22 Q. Do you remember if he was handcuffed when you read him
23 his rights?

24 A. I believe he was, yes..

25 Q. Was he able to understand what was going on and what

OFFICER LELAND HARRELSON: DIRECT BY SOLICITOR HAMILTON:

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1 you were reading to him?

2 MS. LIPINSKI: Your Honor, object to the leading.

3 THE COURT: I sustain the objection.

4 BY SOLICITOR HAMILTON:

5 Q. Did the defendant indicate that he understood these
6 rights?

7 A. Yes, he did.

8 Q. And how did he acknowledge that he understood these
9 rights?

10 A. Verbally and also by signing the form.

11 Q. And the form that you have in your hand, do you
12 recognize that form to be the same one that he signed on
13 January 7th, 2016?

14 A. Yes, I do.

15 Q. Any alterations, deletions made to that form?

16 A. No.

17 Q. And you witnessed him sign that form?

18 A. I did, yes.

19 Q. Was there a date on that form in which he signed?

20 A. There is. It is January the 7th, 2016.

21 Q. And in signing that form what did he do? What is the
22 effect of him signing that form?

23 A. We ask him to please sign the form stating that you
24 understand the rights that I just read to you.

25 Q. And did he waive those rights?

OFFICER LELAND HARRELSON: DIRECT BY SOLICITOR HAMILTON:

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1 A. He did not.

2 Q. Or did he waive the rights and agree to speak is what
3 I'm asking.

4 A. Yes, at that time when I spoke with him he did not
5 ask for an attorney.

6 Q. Okay. So he waived those rights?

7 A. Yes, he did.

8 SOLICITOR HAMILTON: Your Honor, the State would offer
9 State's Exhibit Number Twelve in -- as admission - into
10 evidence, admission into evidence.

11 THE COURT: Any objection?

12 MS. LIPINSKI: Without objection.

13 THE COURT: In without objection.

14 (WHEREUPON, STATE'S EXHIBIT NUMBER TWELVE, IDENTIFIED
15 AND MARKED, RECEIVED INTO EVIDENCE.)

16 SOLICITOR HAMILTON: Thank you, your Honor.

17 Can we please publish for the jury? Or we're asking
18 for permission to publish to the jury, your Honor.

19 THE COURT: You may.

20 SOLICITOR HAMILTON: Thank you.

21 (WHEREUPON, STATE'S EXHIBIT NUMBER TWELVE, PUBLISHED
22 TO THE JURY AT 11:06 AM.)

23 BY SOLICITOR HAMILTON:

24 Q. And there is a pointer right next to you, in front
25 of you. That has a red button on it that you can actually

OFFICER LELAND HARRELSON: DIRECT BY SOLICITOR HAMILTON:

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1 point at things if you would like to point while certain
2 items are on the screen.

3 A. Okay. Sure.

4 MS. LIPINSKI: Okay, the State is publishing State's
5 Exhibit Number Twelve.

6 Q. Is this a copy --

7 THE COURT: Excuse me just a minute. You need to
8 make sure that you're not blocking the jury's view.

9 SOLICITOR HAMILTON: Oh, thank you, your Honor.

10 Q. Is this a form that you have in your hand that is
11 State's Number Twelve?

12 A. It is, yes.

13 Q. Okay. And could you please point out what we're
14 seeing on this form?

15 A. Yes, this is our form. These are the rights that I
16 read to Mr. Kennedy. This is the case number that's
17 involved in this case and then the address on where this
18 took place and also I have my date and my time and I put my
19 name down as I'm the one that read him his rights.

20 And then we get his name, date of birth and address
21 and then we ask him to sign it down there that he
22 understand -- understood the rights that I explained to
23 him.

24 Q. And the acknowledgment of Rights, could you please
25 read that for the jury?

OFFICER LELAND HARRELSON: DIRECT BY SOLICITOR HAMILTON:

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1 A. Yes.

2 "I have read and had read to me the statement
3 of my rights shown above. I understand what my rights
4 are and I know what I am doing. I know that the
5 person or persons talking to me is slash are a
6 police officer. I understand that he she is talking.
7 I understand what he she is talking about."

8 Q. Thank you.

9 SOLICITOR HAMILTON: Please answer any questions that
10 the defense may have.

11 A. Yes.

12 SOLICITOR HAMILTON: Oh, sorry, your Honor. Just
13 briefly if we can ask one more question of the witness.

14 Q. Do you see the person in the courtroom today who
15 you read these rights to and witnessed him sign waiving
16 these rights and agreeing to speak to officers?

17 A. Yes, I do.

18 Q. Would you please point to him?

19 A. Yes. Mr. Kennedy in the brown shirt.

20 SOLICITOR HAMILTON: May the record reflect the
21 witness pointed out the defendant Mr. Kennedy for
22 identification purposes.

23 (WITNESS INDICATED TO DEFENDANT.)

24 SOLICITOR HAMILTON: Please answer any questions from
25 the Defense.

OFFICER LELAND HARRELSON: CROSS BY MS. LIPINSKI:

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1 THE COURT: Cross?

2 CROSS-EXAMINATION

3 OFFICER LELAND HARRELSON BY MS. LIPINSKI:

4 Q. You're not also a member of the SWAT Team are you?

5 A. I am not, no.

6 Q. So, while Ms. Hamilton began this discussion about
7 your conversation with Mr. Kennedy, let's understand the
8 context from which that conversation took place.

9 He had arguably been in the home previously when
10 SWAT made entry into the home, correct?

11 A. Yes, that is correct.

12 Q. And SWAT makes entry into the home. Its not like
13 Mr. Rogers going through the neighborhood, right? The SWAT
14 Team is dressed in full gear, correct?

15 A. They do have full gear, yes.

16 Q. So they're wearing teflar, they're wearing BDU's,
17 they have vest on, helmets?

18 Q. I'm not sure about helmets. I wasn't part of the SWAT
19 Team. My role in that particular situation I was on the
20 outer perimeter so I wasn't present when the SWAT entered
21 the residence.

22 Q. But you've been on - where SWAT's been involved before
23 they do wear helmets, correct?

24 Q. They do wear helmets but I could not testify if they
25 wore helmets this particular day.

OFFICER LELAND HARRELSON: CROSS BY MS. LIPINSKI:

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1 Q. Armed with weapons?

2 A. They do have weapons, yes.

3 Q. And not in their holster or under a suit jacket like
4 you may or may not be today, they have those weapons
5 drawn?

6 A. At times I would say that they do. I cannot testify
7 whether they had the weapons drawn this particular day. I
8 was not present when the SWAT Team entered the residence.

9 Q. Okay. But you stated that you read the search
10 warrant, correct?

11 A. I did, that is correct.

12 Q. And so you're familiar that it's a no-knock warrant,
13 correct?

14 A. Yes, I knew it was a no-knock warrant.

15 Q. Which means that the search - the SWAT Team did not
16 even have to knock on the door?

17 A. That is correct.

18 Q. They had the lawful authority to barge into that
19 house?

20 A. That is correct, yes.

21 Q. And given that it's unlikely that their guns were
22 holstered at the time they made entry into the home?

23 A. Yeah it's unlikely but I can't testify whether the
24 officers did or did not. I wasn't just a part of that
25 particular operation.

OFFICER LELAND HARRELSON: CROSS BY MS. LIPINSKI:

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1 Q. The SWAT Team is normally armed not only with standard
2 issued glock or something like that of the DEU; they
3 actually have assault rifles do they not?

4 A. Yes, I believe that they do.

5 Q. So that all transpires before you come into the
6 living room with this form, correct?

7 A. Yes, when I came in the house was already secure and
8 at that time the SWAT Team turns the residence over to the
9 investigators on the Narcotics Unit.

10 Q. And then you stated that --

11 I'm sorry, I don't know the number, Wanda.

12 MADAM COURT REPORTER: I'm sorry, it's Number Twelve.

13 BY MS. LIPINSKI:

14 Q. You read Number Twelve to the defendant?

15 A. I did, that is correct.

16 Q. You said you referred to some notes. Can I just look
17 at your notes? Was it just the address that you had
18 written down?

19 A. Yes. Actually this is the Case Summary I just have
20 right here.

21 Q. Okay.

22 MS. LIPINSKI: Sorry, your Honor.

23 Q. You stated that you read this form to the defendant,
24 correct?

25 A. Yes, that is correct.

1 Q. At that point you're in the living room, correct?

2 A. Yes, that is correct.

3 Q. And it contains the typical rights.

4 "You have the right to remain silent anything
5 you say can and will be used against you in a court
6 of law. You have the right to talk to a lawyer for
7 advice before any answering - answering any questions
8 or to have your lawyer present during questioning."
9 Correct?

10 A. That is correct.

11 Q. And then you go on to say,

12 "You have the right to the advice and presence
13 of a lawyer even if you cannot afford one." Correct?

14 A. That is correct.

15 Q. But then you under cut that and say but we have no
16 way of appointing you a lawyer and one may be appointed by
17 the court later on if you wish.

18 A. Correct.

19 Q. And in viewing State's Exhibit Number Twelve, I'm
20 not a handwriting expert, but the defendant's name, date of
21 birth, and the address is in your handwriting, correct?

22 A. Yes, that is correct.

23 MS. LIPINSKI: The Court's indulgence one moment.

24 (PAUSE AT 11:13 AM.)

25 MS. LIPINSKI: That's all we have, your Honor.

OFFICER LELAND HARRELSON: REDIRECT BY SOLICITOR HAMILTON:

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1 THE COURT: Any redirect?

2 REDIRECT EXAMINATION

3 OFFICER LELAND HARRELSON BY SOLICITOR HAMILTON:

4 Q. Officer Harrelson, when you read the defendant his
5 rights, his Miranda Warnings, how long after the SWAT had
6 secured the residence? What was the time period after
7 they secured it that you initiated reading the search
8 warrant and the rights to the defendant?

9 A. Maybe approximately five minutes.

10 Q. So there was some down time between you reading that
11 search warrant to --

12 MS. LIPINSKI: Objection as to leading, your Honor.

13 THE COURT: Yeah, that was leading. Please rephrase
14 your questions.

15 BY SOLICITOR HAMILTON:

16 Q. Was there a time period in between?

17 A. Yes there is. It's just a time period where the
18 SWAT Team finishes up their whatever their doing and you
19 know they turn it over to us so we're outside. I was
20 actually down the street so I had to drive up to the
21 residence get out get the paperwork that I had and go into
22 the residence.

23 Q. And as you were reading him these warnings, did you
24 see anyone pointing a weapon at the defendant?

25 A. I did not, no.

OFFICER LELAND HARRELSON: REDIRECT BY SOLICITOR HAMILTON:

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1 Q. Anyone threatening the defendant?

2 A. No.

3 Q. I just want to ask you if you could look at State's
4 Exhibit Number Twelve. What is the last sentence at the
5 bottom the Constitutional rights as you read them out?

6 A. The last sentence is, "If you wish you may answer
7 questions without the presence of a lawyer and you may stop
8 answering at anytime you desire."

9 Q. And you -- Did you witness the defendant sign this
10 form?

11 A. I did, yes.

12 Q. And that signature on there is his signature?

13 A. Yes, it is.

14 SOLICITOR HAMILTON: Nothing further from the State.

15 THE COURT: Recross?

16 MS. LIPINSKI: No, your Honor.

17 THE COURT: You can step down and be excused. We
18 appreciate your time.

19 (WITNESS LEAVES WITNESS STAND.)

20 THE COURT: Members of the jury panel, we'll take
21 about
22 a ten, fifteen minute break so we'll be ease for about
23 fifteen minutes.

24 (JURY EXITS COURTROOM ON RECESS AT 11:15 AM.)

25 THE COURT: We'll be at ease.

INVESTIGATOR DAVID VAUGHN: DIRECT BY SOLICITOR HAMILTON:

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1 intoxicating dose because that is -- that does require
2 scientific -- would require a scientific background and
3 someone with such a background to testify to. So I'm gonna
4 allow him to testify to what I just said and we'll get the
5 jury back in.

6 Bring in the jury.

7 You want to have a seat out there so you can retake
8 the stand?

9 DETECTIVE VAUGHN: Yes, sir.

10 (WITNESS LEAVES WITNESS STAND.)

11 THE COURT: And we'll re-swear you.

12 DETECTIVE VAUGHN: Yes, sir.

13 (JURY REENTERS COURTROOM AT 11:49 AM.)

14 THE COURT: You may call your next witness.

15 SOLICITOR HAMILTON: Thank you, your Honor.

16 The State would call Detective Vaughn, David Vaughn.

17 THE COURT: Please come up and be sworn.

18 Please come up and be sworn.

19 (WHEREUPON, DAVID VAUGHN,
20 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

21 DIRECT EXAMINATION

22 DETECTIVE DAVID VAUGHN BY SOLICITOR HAMILTON:

23 Q. Can you please state your full name for the record?

24 A. David Vaughn.

25 Q. And, Detective Vaughn, what is your current

1 occupation?

2 A. I'm currently a detective with the York County
3 Sheriff's Office.

4 Q. What did you do prior to becoming a detective with
5 the York County Sheriff's Office?

6 A. I was an investigator with the York County Multi-
7 jurisdictional Drug Enforcement Unit.

8 Q. And how long were you employed the York County Drug
9 Enforcement Unit?

10 A. Approximately five years.

11 Q. And how long have you been employed in the law
12 enforcement field in general?

13 A. For eleven years.

14 Q. Now when you were employed with the Drug Enforcement
15 Unit what type of work did you do in that position?

16 A. I investigated drug crimes. Part of our goal was to
17 investigate street level drug dealers here in York County.

18 Q. And were you employed in that capacity on January
19 7th, 2016?

20 A. Yes.

21 Q. Now I wanted to ask you pretty much about your
22 background in investigating drug crimes. How many drug
23 arrest have you made in your years working in law
24 enforcement?

25 A. I couldn't put a number on it but I'd say hundreds.

INVESTIGATOR DAVID VAUGHN: DIRECT BY SOLICITOR HAMILTON:

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1 Q. And those are specific to drug use?

2 A. Yes.

3 Q. And have you interviewed drug users and sellers?

4 A. Yes.

5 Q. And how many interviews have you conducted?

6 A. Hundreds of interviews with dealers and sellers.

7 Q. What have you learned through those interviews?

8 A. How drugs are typically packaged when a user has
9 them or when a dealer has them.

10 Q. And in addition to that what items do you usually or
11 -- Excuse me.

12 SOLICITOR HAMILTON: I beg the Court's indulgence.

13 Q. Do you have any training in regards to identifying
14 narcotics, drug paraphernalia, packaging and street value
15 of drugs and transactions?

16 A. Just on the job training.

17 Q. On the job. How many training classes have you
18 attended to establish --

19 A. None.

20 Q. None on the job?

21 A. No.

22 Q. Just experience on the job?

23 A. Just experience on the job.

24 Q. And do you have experience as to how drugs are
25 typically packaged?

1 A. I do.

2 Q. And do you have experience in - What's your experience
3 in identifying a user versus a dealer?

4 A. Generally a user carry -- a crack user for instance -

5 MS. LIPINSKI: Your Honor, I think the Court can give
6 its opinion, at this point she will need to proffer him
7 before the jury.

8 SOLICITOR HAMILTON: Your Honor, the State would
9 proffer Detective Vaughn as an expert in the field of
10 street level dealing and use of narcotics.

11 THE COURT: Any voir dire at this time?

12 MS. LIPINSKI: Not at this time, your Honor, but
13 subject to our prior objection.

14 THE COURT: All right. I find he is qualified as I
15 earlier stated.

16 SOLICITOR HAMILTON: Thank you, your Honor.

17 Q. What items did you expect to usually find on a
18 dealer versus a user of crack cocaine?

19 A. A dealer generally carries a large amount of crack
20 cocaine, digital scales, packing material. When you say
21 packaging I'm talking about plastic baggies and such.

22 Q. And what does a user normally have in their
23 possession?

24 A. A user generally has some sort of smoking device.
25 Just a little bit of drugs.

INVESTIGATOR DAVID VAUGHN: DIRECT BY SOLICITOR HAMILTON:

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1 Q. And through your training and experience on the job
2 and interviewing drug users and sellers, what amounts do
3 you normally see on a seller?

4 A. From a seller standpoint generally seller's ---- From
5 a crack dealer I'd say from a eight ball and above we're
6 talking about three and a half grams and above or more than
7 a gram.

8 Q. And what do you normally find on a person who is
9 user of drugs?

10 A. I generally find a user has like what we call a
11 twenty-dollar rock. Just a couple of small rocks.

12 Q. And this is in regards to crack cocaine?

13 A. In regards to crack cocaine.

14 Q. Okay. I'm going to show you what is in evidence, I
15 believe is State's Exhibit Number Nine. Now something like
16 this, what would you describe this as user or seller?

17 A. Seller.

18 Q. And why?

19 A. Based off the weight and the size. What I see in the
20 picture.

21 Q. What do you normally see when you see this? What
22 would a dealer do with this? In your experience and what
23 you've seen in the field what would you see a dealer do
24 with something like this, a rock this big?

25 A. This would be broken down to smaller rocks and sold

1 individually.

2 Q. And in your opinion is this user level or dealer
3 level?

4 A. Dealer level.

5 Q. Now what I want to do is focus now on the afternoon
6 of January 7th, 2016. I'd like to draw your attention to
7 that afternoon. What were you doing that day?

8 A. I was present at a -- this search warrant was executed
9 at [REDACTED] Street in Rock Hill.

10 Q. Is that in York County?

11 A. That is in York County.

12 Q. And please describe to me how you came into this
13 investigation in executing the search warrant.

14 Q. I work in the western side of Narcotics Division.
15 This is the Eastern side of Narcotics Division. On that
16 day I believe they ask for assistance. I came to support
17 them. While I was at the residence after the residence was
18 cleared by the SWAT Team I was at the residence when
19 Investigator Harrelson and Investigator Clevenger.
20 Investigator Harrelson read the Search Warrant while at the
21 residence and also read the Miranda Rights to Mr. Kennedy
22 while I was present.

23 Q. And did you hear his response in regards to - -

24 THE COURT: He is who?

25 SOLICITOR HAMILTON: Excuse me?

INVESTIGATOR DAVID VAUGHN: DIRECT BY SOLICITOR HAMILTON:

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1 THE COURT: You said his. There is no --

2 SOLICITOR HAMILTON: Oh, sorry, your Honor.

3 Q. Did you hear the defendant's response to after being
4 read his *Miranda* rights?

5 A. I don't recall.

6 Q. So what did you proceed to do after you were on scene
7 and had assisted in executing the Search Warrant?

8 A. I was basically from the front door and outside. Just
9 assistance capacity. I really didn't do anything at the
10 house. I didn't have any responsibilities besides standing
11 there at that point.

12 Q. Okay. Did you subsequently have contact with the
13 defendant Mr. Kennedy?

14 A. Yes.

15 Q. And what was the nature of that contact?

16 A. When he was brought back to the Rock Hill Police
17 Department to our narcotics office, I was task with sitting
18 him -- sitting with him while the other people were working
19 on paperwork and such.

20 Q. Did you take a statement from the defendant?

21 A. I did.

22 Q. When you did get that statement from the defendant
23 was anyone else from law enforcement with you?

24 A. Commander Brown was in and out. He had a lot of
25 things going on trying to help people do paperwork and come

1 back and forth to me.

2 Q. And when you took a statement from him where did
3 this take place? Where did the interview take place?

4 A. We have a interview room inside our narcotics office
5 on the Eastern side.

6 Q. And do you remember the date of that interview?

7 A. January 7th, 2016.

8 Q. And when did that occur in relation to the search
9 warrant being executed? What I'm looking for is a time
10 line.

11 A. I think it was around thirty to forty minutes after
12 the search warrant was executed.

13 Q. And that's after he was read his *Miranda* rights?

14 A. Yes.

15 Q. Tell us a little bit about the environment, about
16 how big the room is, how small the room is that you
17 interviewed him.

18 A. I would say the rooms probably half the size of the
19 jury box here if you cut this in half. There's a big table
20 in the room with six or seven chairs around the table.

21 Q. And while you were interviewing him was anyone making
22 any threats towards him?

23 A. No.

24 Q. Was anyone pointing a gun at the defendant?

25 A. No.

INVESTIGATOR DAVID VAUGHN: DIRECT BY SOLICITOR HAMILTON:

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1 Q. Were people in the room? I believe you stated
2 sometimes Commander Brown was in the room.

3 A. Yes.

4 Q. Were you all nice to him?

5 A. Yes.

6 Q. Do you recall if he was handcuffed or not?

7 A. I don't recall.

8 Q. Did he appear to be hurt or injured?

9 A. No.

10 Q. Did he appear to be clear headed and sober and not
11 intoxicated?

12 MS. LIPINSKI: Objection as to leading, your Honor.

13 THE COURT: Yeah, you are leading. I sustain the
14 objection.

15 BY SOLICITOR HAMILTON:

16 Q. Did he appear to understand what's going on?

17 A. Yes.

18 Q. And what was being said to him?

19 A. Yes.

20 Q. Did anyone make any promises to get him to talk?

21 A. No.

22 Q. Would you please tell us the contents of the
23 statement that the defendant did give to you at that time?

24 A. While we was in the interview room I ask him how much
25 drugs did he have on his person. He stated to me he had

1 between ten to twelve grams of soft and ten to twelve grams
2 of hard. Soft they use generally the term for cocaine and
3 hard is crack. I confronted him about the gun that was
4 found inside the residence. He told me the gun was given
5 to him by a friend. And I tried to get him to tell me who
6 gave him that gun and he wouldn't tell me who gave him that
7 gun. I did ask him if he was a drug user and he stated no.
8 I ask him why he sold drugs and he stated cause he could
9 not get a job and he needed to sell drugs to support his
10 family.

11 Q. So he acknowledged that the drugs found on him were
12 his?

13 A. Yes.

14 Q. Was this interview recorded?

15 A. No.

16 Q. And why was this interview not recorded?

17 A. Well the way I was trained we don't record interviews.

18 Q. Is there a camera in the room?

19 A. No.

20 Q. Do you see the person in the courtroom today who you
21 interviewed on January 7th, 2016 who subsequently told you
22 the drugs found on him and the pistol found in the
23 residence were his?

24 A. Yes.

25 Q. Would you please point him out?

INVESTIGATOR DAVID Vaughn: DIRECT BY SOLICITOR HAMILTON:
CROSS BY MS. LIPINSKI:

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1 A. Mr. Kennedy.

2 Q. And what is he wearing?

3 A. It's a yellowish green and checkered shirt.

4 Q. Okay.

5 SOLICITOR HAMILTON: Your Honor, let the record
6 reflect
7 that the witness has identified the defendant.

8 (WITNESS INDICATED TO DEFENDANT AT DEFENSE TABLE.)

9 SOLICITOR HAMILTON: Please answer any questions the
10 defense may have.

11 CROSS-EXAMINATION

12 DETECTIVE DAVID VAUGHN BY MS. LIPINSKI:

13 Q. Detective Vaughn, you're currently with the York
14 County Sheriff's Office?

15 A. Yes, ma'am.

16 Q. And detective meaning that you investigate non-
17 narcotic for the most part offenses here in York County,
18 correct?

19 A. Yes.

20 Q. Are you assigned to a specific division like property
21 crimes, violence against people?

22 A. I'm assigned to the Property Crimes Unit.

23 Q. All right. So for the most part currently you're
24 doing is are like burglary, auto breaking; would those be
25 good examples?

1 A. Yes.

2 Q. And fair to say each agency has their own protocol
3 and does things their own way?

4 A. Yes.

5 Q. All right. And so -- I show you what's been marked
6 as State's Exhibit Number Twelve. Does the York County
7 Sheriff's Office use that form?

8 A. This exact form?

9 Q. Yes, that exact form.

10 A. No.

11 Q. Do they have their own version of *Miranda Warnings*?

12 A. They do, yes.

13 Q. All right. And do you work here? The York County
14 Sheriff's Office there are some officers that are kind of
15 here attached to the Moss Justice Center, correct?

16 A. Yes.

17 Q. And so within this complex but not within the
18 courthouse portion, right?

19 A. Yes.

20 Q. And you all have interview rooms, correct?

21 A. Have what?

22 Q. Interview rooms down there.

23 A. Yes.

24 Q. All right. And in those interview rooms you have the
25 capacity to record a statement?

INVESTIGATOR DAVID VAUGHN: CROSS BY MS. LIPINSKI:

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1 A. No.

2 Q. You cannot record a statement at the York County
3 Sheriff's Office even if you wanted to?

4 A. No.

5 Q. Do you have a cell phone?

6 A. I do.

7 Q. Does it have a record feature on it?

8 A. Yes.

9 Q. All right. So you do have the capability; it is just
10 the policy not to?

11 A. It's a directive by my captain.

12 Q. All right. But you do have the ability or somebody
13 to write something down and sign it, correct?

14 A. Yes.

15 Q. All right. And you stated that you were in an
16 interview at the DEU, correct?

17 A. Yes.

18 Q. All right. And while the detectives don't necessarily
19 have the same audio and video equipment the narcotic's
20 officers have some pretty specialized equipment, correct?

21 A. Yes.

22 Q. That you may not know present but Investigator
23 Clevenger testified you have some cameras for surveillance,

24 ---

25 A. Yes.

INVESTIGATOR DAVID VAUGHN: CROSS BY MS. LIPINSKI:

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1 A. I do not.

2 Q. All right. So when you sit down to interview him
3 some thirty to forty minutes later, because you don't
4 remember what you said in terms of reading him his rights,
5 you have the ability to go over his rights with him again?

6 A. Yes.

7 Q. And you chose not to?

8 A. Yes.

9 Q. All right. And did anyone ever ask him his
10 education?

11 A. No.

12 Q. Job history?

13 A. No.

14 Q. Did you ask him if he had any difficulty understanding
15 the English language?

16 A. No.

17 Q. Did you ask him if had any emotional or mental health
18 issues?

19 A. No.

20 Q. And this form that you read, State's Exhibit Number
21 Twelve, it says in it you have a right to a lawyer but out
22 on the scene we can't really get you one, right?

23 A. I believe that's what it says. I believe that's what
24 it says.

25 Q. You've seen this form before?

INVESTIGATOR DAVID VAUGHN: CROSS BY MS. LIPINSKI:

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1 A. I have.

2 Q. Okay. And it states that "You have the right to
3 advice and presence of a lawyer even if you cannot afford
4 to hire one", correct?

5 A. Yes.

6 Q. And then it goes on to say "We have no way of
7 appointing you a lawyer."

8 A. Yes.

9 Q. So you have a right to a lawyer but we have no way of
10 getting you one because we're out here at [REDACTED]
11 Street, right?

12 A. Yes.

13 Q. But when you interviewed the defendant you are back
14 at the Rock Hill Police Department, correct?

15 A. Yes.

16 Q. And that is part of the Rock Hill Law Enforcement
17 Center.

18 A. Yes.

19 Q. And that contains the municipal court?

20 A. I believe so.

21 Q. The Rock Hill Police Department?

22 A. Yes.

23 Q. You've never participated in a bond hearing over
24 there in Rock Hill?

25 A. No, ma'am, no.

1 Rogers do they?

2 A. No.

3 Q. Hello, Publisher's Clearing House; Avon calling;
4 anything like that, right?

5 A. Right.

6 Q. They go in there guns drawn?

7 A. Correct.

8 Q. Full gear?

9 A. Yes.

10 Q. Assault weapons?

11 A. Yes.

12 Q. More than your standard issued Glock .40s; whatever
13 you guys carry now, right?

14 A. Yes.

15 Q. Helmet?

16 A. Yes.

17 Q. All of that?

18 A. Yes.

19 Q. And are you aware it was a no-knock warrant?

20 A. Prior to then or prior to court?

21 Q. Are you aware today it was a no-knock warrant?

22 A. I am aware today, yes.

23 Q. All right. And you know that the SWAT Team went in
24 before you?

25 A. Correct, yes.

INVESTIGATOR DAVID VAUGHN: CROSS BY MS. LIPINSKI:

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1 Q. But you were not there when the SWAT Team went into
2 this house?

3 A. No.

4 Q. And it was within five minutes of that that Mr.
5 Kennedy was read his *Miranda* rights?

6 A. I don't know.

7 Q. All right. But still out at the house?

8 A. Out at the house?

9 Q. He was still read his *Miranda* rights out at the
10 house?

11 A. Yes.

12 Q. And you didn't feel the need to go over there and
13 rights with him at the law enforcement center?

14 A. No.

15 Q. Or make him aware that now there might be some
16 ability to get him a lawyer?

17 A. No.

18 Q. And you stated based on, I think, your four to five
19 years in the DEU?

20 A. Yes.

21 Q. That the way you distinguish a dealer from a user is
22 a user would have one to two crack rocks, correct?

23 A. Yes.

24 Q. But you have on occasions seen users with more?

25 A. Yes.

1 Q. And you stated that having scales is something you see
2 with dealers, correct?

3 A. Yes.

4 Q. But you also have, and it's not uncommon for users
5 to have scales, correct?

6 A. Yes.

7 Q. Because they're worried that the dealers are cheating
8 them on the weight, right?

9 A. Yes.

10 Q. So the presence of scales isn't really resolve it one
11 way or the other?

12 A. It's the totality of the items together.

13 Q. Right. You have to look at everything.

14 A. Right.

15 Q. But it's not like, oh, scales, bam dealer, right?

16 A. Yes.

17 Q. All right. And you stated that you also look for
18 packaging materials?

19 A. Yes.

20 Q. Basically you're sometimes looking for large amounts
21 of zip-lock bags with the corners tied off or things like
22 that?

23 A. Yes.

24 Q. And you had known some users to have greater than two
25 rocks, correct?

INVESTIGATOR DAVID VAUGHN: CROSS BY MS. LIPINSKI:

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1 A. Yes.

2 Q. And there are some users who support their habit not
3 necessarily by dealing but simply holding drugs for their
4 dealer?

5 A. Yes.

6 Q. Being a go-between or a mule for their dealer?

7 A. Yes.

8 Q. And so even the presence of a greater weight is not
9 necessarily per se or automatic indication of dealer versus
10 user, correct?

11 A. Yes.

12 Q. Again you want to look at all of these totalities of
13 circumstances?

14 A. Yes.

15 Q. And here you just state that had more than two crack
16 rocks. That's a weight you normally attribute to a dealer
17 but is not dispositive?

18 A. Can you rephrase that question?

19 Q. That the amount of weight -- Ms. Hamilton showed you
20 the picture as something you normally associate with a
21 dealer but it's not dispositive, meaning a user could have
22 that amount on him?

23 A. Yes.

24 Q. And the final question, you stated that Commander
25 Brown came in and out, right?

INVESTIGATOR DAVID VAUGHN: REDIRECT BY SOLICITOR HAMILTON:

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1 A. Yes.

2 Q. And you did not marandize him; Lieutenant Harrelson
3 did, correct?

4 A. Investigator Harrelson.

5 Q. Investigator Harrelson.

6 THE COURT: Him?

7 MS. LIPINSKI: I'm sorry.

8 Q. And let me be clear. You were present when Officer
9 Harrelson marandized the defendant, correct?

10 A. Yes.

11 Q. But when this conversation that you state took place
12 between you and the defendant while Commander Brown may
13 have walked in and out, you were the sole continuous
14 witness for that conversation?

15 A. Yes.

16 Q. There were no secretaries or clerks or jailers or
17 anybody like that around?

18 A. No.

19 MS. LIPINSKI: That's all we have, your Honor.

20 THE COURT: Redirect?

21 SOLICITOR HAMILTON: Just briefly.

22 REDIRECT EXAMINATION

23 INVESTIGATOR DAVID VAUGHN BY SOLICITOR HAMILTON:

24 Q. Detective Vaughn, when you were in the room with the
25 defendant did you intend on interviewing him at that time?

INVESTIGATOR DAVID VAUGHN: REDIRECT BY SOLICITOR HAMILTON:

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1 A. No.

2 Q. How did that become an issue?

3 A. We was sitting in the interview room, what happens
4 when we put somebody in the interview room we like to place
5 an officer with 'em for officer safety and make sure just
6 keep an eye on 'em. What happened instead of just sitting
7 there staring at each other I started into a conversation
8 about what happened.

9 Q. And in questioning, in speaking with the defendant,
10 did he at any time ever ask for a lawyer?

11 A. He did not.

12 Q. If he did would you have gotten him a --

13 A. I would have stopped the conversation about any
14 criminal charges we was accusing him of at the time. I
15 left, basically left the conversation and not said anything
16 else.

17 Q. But he didn't?

18 A. No, he did not.

19 Q. Could you please look at Exhibit Twelve one more time?

20 And the defense made a big deal about the statement,
21 second to last about appointing a lawyer. What's the
22 sentence following that? Could you read that for the
23 Court, the last sentence?

24 A. "If you wish to answer any questions without the
25 presence of a lawyer you may stop answering at any time you

INVESTIGATOR DAVID VAUGHN: REDIRECT BY SOLICITOR HAMILTON:
RECROSS BY MS. LIPINSKI:

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1 desire."

2 Q. And did he stop?

3 A. No.

4 Q. And in speaking with the defendant, what did he say
5 as to whether he was a dealer or user?

6 A. I ask him if he was a drug user.

7 Q. And what was his response?

8 A. He said no.

9 Q. What did he say after that?

10 A. That he did sell drugs to support his family.

11 Q. Thank you.

12 SOLICITOR HAMILTON: Nothing further from this
13 witness.

14 MS. LIPINSKI: Just briefly on redirect, your Honor.
15 The Court's indulgence.

16 RECROSS-EXAMINATION

17 DETECTIVE DAVID VAUGHN BY MS. LIPINSKI:

18 Q. You stated that you didn't intend to interview him,
19 right?

20 A. Right.

21 Q. But you struck up the conversation. You stated about
22 what had happened?

23 A. I did.

24 Q. So you didn't strike up a conversation about the
25 weather.

INVESTIGATOR DAVID VAUGHN: RECROSS BY MS. LIPINSKI:

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1 A. Correct.

2 Q. What you got for Christmas so you intentionally
3 struck up a conversation about what had transpired?

4 A. I struck up a conversation about what transpired.

5 Q. But you don't consider that an intent to interview
6 him?

7 A. I had no intentions of interviewing him at the time.

8 Q. But you did understand by striking up a conversation
9 of that nature you were going to elicit information about
10 what happened which is exactly what you do in an interview?

11 A. Correct.

12 THE COURT: Is that it?

13 MS. LIPINSKI: Yes, your Honor.

14 THE COURT: You can step down and be excused. We
15 appreciate your time. Thank you.

16 (WITNESS LEAVES WITNESS STAND.)

17 THE COURT: Call your next witness.

18 SOLICITOR HAMILTON: Your Honor, the State would call
19 Jimmy Stiles.

20 THE COURT: Step up here and put your left hand on the
21 Bible and raise your right.

22 (WHEREUPON, JIMMY STILES,
23 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

24 SOLICITOR HAMILTON: May it please the Court, your
25 Honor.

OFFICER JIMMY STILES: DIRECT BY SOLICITOR HAMILTON:

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1 THE COURT: Yes, ma'am.

2 DIRECT EXAMINATION

3 OFFICER JIMMY STILES BY SOLICITOR HAMILTON:

4 Q. Can you please state your full name for the record?

5 A. Jimmy Floyd Stiles, S-t-i-l-e-s.

6 Q. And what is your occupation?

7 A. I work for the York County Sheriff's Office, evidence
8 tech.

9 Q. And what are your duties as an evidence tech?

10 A. It's the collection of evidence and have a computer
11 system entered into and have a storage location that the
12 evidence goes to until it's time for court.

13 Q. And how long have you worked there?

14 A. Almost six years.

15 Q. I'm gonna hand you what's been marked for
16 identification purposes as State's Exhibit Number Ten
17 and Eleven. That should be right there. Would you please
18 take a look at those exhibits.

19 (WITNESS COMPLIES.)

20 A. Okay.

21 Q. Do you recognize the signature of the person who
22 picked up this evidence bag from the Rock Hill Police
23 Department . . .

24 A. Yes. My former co-worker Patrick Patterson.

25 Q. Now what date did he pick up?

OFFICER JIMMY STILES: DIRECT BY SOLICITOR HAMILTON:

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1 A. It looks like January 8th, 2016.

2 Q. And is that in regards to both exhibits?

3 A. That's correct.

4 Q. And you stated Patrick Patterson a co-worker.

5 So you're from - are you familiar with this person's
6 signature?

7 A. Yes. We work together the whole time I been here.

8 Q. How many years ---

9 A. Close to six.

10 Q. --- did you work --

11 A. Three months shy of six years.

12 Q. So you're familiar with this person's signature?

13 A. Yes.

14 Q. Now are you familiar with the Rock Hill Police
15 Department evidence drop?

16 A. Yes. That's an off site storage location for officers
17 to store evidence. We usually go there a couple of times a
18 week to pick up.

19 Q. Is that a secured box?

20 A. Yes, it's a secured steel container box with multi
21 doors that have locks on it and myself, Patrick, and
22 Lieutenant Mitchum has keys to it.

23 Q. And do you have a procedure in your office for
24 noting any issues or tampering with evidence bags from
25 noting that on those bags if they had been tampered with?

OFFICER JIMMY STILES: DIRECT BY SOLICITOR HAMILTON:

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1 A. Yes, we do.

2 Q. Okay. What would be on that bag if they had been
3 tampered with?

4 A. The lines would be distorted if it's been tampered
5 with any way.

6 Q. And on Exhibit Eleven and Exhibit Number Ten, do you
7 notice any evidence of tampering?

8 A. No I don't.

9 Q. So when did these bags come into your department's
10 possession?

11 A. It would a been on January the 8th.

12 MS. LIPINSKI: Your Honor, at this point I'm gonna
13 object as to hearsay unless he has some personal knowledge
14 of that.

15 THE COURT: Rephrase your question.

16 What's the question again?

17 SOLICITOR HAMILTON: Beg the Court's indulgence.

18 Q. Is Exhibit Number Eleven and Twelve are they signed?

19 A. Ten and Eleven?

20 Q. Ten and Eleven, yes.

21 A. Yes they're signed.

22 Q. They are signed. Now once that evidence is brought
23 to your department does anyone else outside the evidence
24 technicians have access to these items?

25 A. No.

OFFICER JIMMY STILES: DIRECT BY SOLICITOR HAMILTON:

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1 Q. What's your standard procedure for evidence once
2 you receive it into your department?

3 A. If the case has been entered in the computer system
4 we will take the actual evidence itself and enter all the
5 information into the computer system and then it will give
6 us a tag to put on the evidence and print out the tag for
7 us and this displays the location that we place the
8 evidence into.

9 Q. And on each one of those bags is that signed each
10 time it had left someone's possession?

11 A. Yes.

12 Q. And do you recognize his signature as the person who
13 logged this evidence bag out?

14 A. Patrick Patterson had. According to this he retrieved
15 the evidence at the Rock Hill Police Department January 8,
16 2016. And on January 21st, 2016 Patrick Patterson turned
17 over the evidence to our chemist, drug chemist.

18 Q. And that's in regards to both exhibits?

19 A. That's correct.

20 SOLICITOR HAMILTON: Please answer any questions the
21 defense may have.

22 MS. LIPINSKI: Court's indulgence one moment.

23 CROSS-EXAMINATION

24 JIMMY STILES BY MS. LIPINSKI:

25 Q. If that item had been tampered with in any way prior

OFFICER JIMMY STILES: CROSS BY MS. LIPINSKI:

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1 to it being put into that heat sealed bag or dropped into
2 your box, you would have no way of knowing that, correct?

3 A. When it's retrieved if myself or Patrick Patterson
4 had retrieved it we'd check to ensure that the integrity of
5 the evidence.

6 Q. I get once you get that heat sealed bag -- But let's
7 start at the beginning.

8 A. Okay.

9 Q. Maybe I need to back up a little bit more. Sometimes
10 I jump ahead of myself. These officers like Mr. Clevenger
11 ---

12 A. Uh-huh.

13 Q. --- collect evidence, whatever it is, put it in a
14 heat sealed bag, seal it up, right? Heat seal it up. No?

15 A. No.

16 Q. No. Just seal it?

17 A. Seal it, correct.

18 Q. But not heat seal it. Tape it shut?

19 A. It has a tab that you pull.

20 Q. Oh, so it's a self sealing envelop?

21 A. That's correct.

22 Q. I got to mail something to my mom I'm gonna buy that.
23 It just seals like that, correct?

24 A. Yes.

25 Q. All right. But you're not there for when that

OFFICER JIMMY STILES: CROSS BY MS. LIPINSKI:

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1 evidence is put in that bag, ---

2 A. No.

3 Q. --- correct? So anything happens to that evidence
4 prior to it going into that bag you've got no knowledge of
5 it?

6 A. That's correct.

7 Q. Right. So how ever many times its necessary either
8 you or Patrick or the other officers in the evidence unit
9 y'all go over to these -- and they're basic like mailboxes
10 on steroids, right?

11 A. That's correct.

12 Q. And you have locks to 'em and you can retrieve the
13 evidence from all the officers and then bring it over here
14 and that's so you guys don't stay down there twenty-four
15 seven logging stuff in, correct?

16 A. That's correct.

17 Q. And it's also so that the Rock Hill people don't make
18 thirty trips to the Moss Justice Center everyday, correct?

19 A. That's correct.

20 Q. But Rock Hill has their own evidence, correct?

21 Rock Hill has at least some of their own evidence
22 that they maintain on site, correct?

23 A. The City.

24 Q. The City?

25 A. Yes, ma'am.

OFFICER JIMMY STILES: CROSS BY MS. LIPINSKI:

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1 Q. So if it's the city of Rock Hill case some of that
2 evidence they maintain there, correct?

3 A. That's correct.

4 Q. And you stated that the only other person you
5 indicate who touched that is Patrick, correct, and Cynthia?

6 A. And the officer.

7 Q. And the officer.

8 A. Yeah.

9 Q. And Cynthia Mitchum, correct?

10 A. That's correct.

11 Q. But you didn't call Cynthia and tell Cynthia to
12 come look at that evidence, the chemist, correct?

13 A. Right.

14 Q. That's not a call you make?

15 A. No.

16 Q. You don't decide what evidence, what evidence is
17 tested?

18 A. That's correct.

19 Q. What testing is done on evidence?

20 A. No.

21 Q. If the evidence is even tested that's not your call?

22 A. That's correct.

23 Q. All right.

24 MS. LIPINSKI: That's all we have, your Honor.

25 THE COURT: Redirect?

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 SOLICITOR HAMILTON: Nothing further from the State,
2 your Honor.

3 THE COURT: All right. You can step down and be
4 excused. We appreciate your time. Thank you.

5 (WITNESS LEAVES WITNESS STAND.)

6 THE COURT: Call your next witness.

7 SOLICITOR HAMILTON: The State would call Cynthia
8 Mitchum.

9 (WHEREUPON, CYNTHIA MITCHUM, BEING
10 FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

11 SOLICITOR HAMILTON: May it please the Court.

12 DIRECT EXAMINATION

13 CYNTHIA MITCHUM BY SOLICITOR HAMILTON:

14 Q. Could you please state your full name for the record?

15 A. Its Cynthia Mitchum, M-i-t-c-h-u-m.

16 Q. And what is your occupation?

17 A. I'm a forensic drug chemist and I work in the Drug
18 Analysis Department at the York County Sheriff's Office.

19 Q. What are your duties in the drug lab?

20 A. I receive in evidence and will analyze the evidence
21 for controlled and non-controlled substances.

22 Q. And how long have you worked there?

23 A. I been at the sheriff's office now for sixteen and
24 a half years.

25 Q. And do you have any education and training to

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 qualify you and to be able to identify illegal drugs and
2 controlled substances?

3 A. Yes.

4 Q. Would you please tell those - -

5 A. I have a Bachelor of Science degree in Chemistry which
6 I received from Winthrop University in 1990. And prior to
7 working with the sheriff's office I was with the South
8 Carolina Law Enforcement Division commonly known as SLED in
9 Columbia, South Carolina for seven and a half years in
10 their drug analysis department. And I've also gone through
11 some schooling's for instrumentation analysis and
12 recognition of drugs themselves.

13 Q. And have you ever been qualified in court as an
14 expert in drug identification analysis?

15 A. Yes I have.

16 Q. How many times?

17 A. In excess of two hundred and fifty times.

18 SOLICITOR HAMILTON: Your Honor, the State would offer
19 Ms. Mitchum as an expert in analysis and identification of
20 illegal drugs and controlled substances.

21 THE COURT: Any voir dire?

22 MS. LIPINSKI: None.

23 THE COURT: I find she is qualified.

24 SOLICITOR HAMILTON: Thank you, your Honor.

25 Q. Ms. Mitchum, I'm gonna hand to you or actually could

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 you grab what's right in front of you, State's - What has
2 been marked for identification purposes as State's Exhibit
3 Ten and Eleven. Would you please take a look at those?

4 A. Okay.

5 Q. Have you had contact with both of these exhibits
6 before?

7 A. Yes I have.

8 Q. And did these exhibits come into your possession?

9 A. I received these on January 21st, 2016 from Patrick
10 Patterson.

11 Q. And where did you receive them from?

12 A. In person and he would have brought them back to the
13 drug lab.

14 Q. When you firstg received each of these exhibits,
15 each of these bags, did they appear to have been tampered
16 with in any way?

17 A. No, they had not and I know this because the inside
18 bag is what I originally received and I have okay, the date
19 I received it, and my initials and that's just signifying
20 me I checked it and made sure everything was intact.

21 Q. So they were completely sealed?

22 A. That is correct.

23 Q. And were they signed?

24 A. Yes.

25 Q. And while the evidence was with you in the drug lab

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 did any other person have access to it?

2 A. No, they did not.

3 Q. Now I'm gonna go through each exhibit with you. I
4 want to start with Exhibit Number Eleven or what's been
5 marked as State's Exhibit Number Ten for identification
6 purposes. What is the substance you believe to be drugs in
7 that bag?

8 MS. LIPINSKI: Your Honor, I object at this point.

9 SOLICITOR HAMILTON: I'm sorry.

10 THE COURT: Re --

11 BY SOLICITOR HAMILTON:

12 Q. What was contained in the bag when you received it?

13 MS. LIPINSKI: Your Honor, I object at this point. We
14 may need to take up a matter outside the jury.

15 THE COURT: All right. Let the jury go to the jury
16 room just a minute.

17 (WHEREUPON, JURY EXITS COURTROOM AT 12:32 PM.)

18 THE COURT: That was a leading question but I don't
19 believe that's the reason for objecting.

20 MS. LIPINSKI: We're getting into the point where
21 she's getting into identifying it. I think that evidence
22 needs to be moved into evidence before that and I do have
23 an objection and I would like to be heard on that issue
24 before that gets to that point. I don't think she can jump
25 into identification of evidence and it's not properly

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 before the jury.

2 THE COURT: You lost me. I think she's identified
3 those as packages she received and I know we got the chain.
4 I guess that's where we're headed. But once she identifies
5 them -- I'm lost as to what you're objecting to. And I
6 don't know ---

7 MS. LIPINSKI: My understanding - -

8 THE COURT: --- what you're saying is the next point,
9 where we go from there.

10 MS. LIPINSKI: My understanding was the next line of
11 questioning is what is that item and if she's gonna get
12 into saying that that's crack or that's cocaine I think the
13 evidence needs to properly be admitted into evidence
14 beforehand and if we're going to go there then the
15 defendant has an objection.

16 THE COURT: Well I agree. She's got to testify that
17 that is the substance a different route.

18 SOLICITOR HAMILTON: My line of questioning is going
19 to what is the appearance of the - what's in that bag;
20 what's the appearance, and then I was gonna of course go
21 through the proper questioning as to getting it admitted
22 and what substance.

23 THE COURT: So your question was something about you
24 used the words drugs and that's leading.

25 SOLICITOR HAMILTON: Yes, your Honor. I'm sorry about

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 that.

2 THE COURT: I'm not sure I know where you're headed
3 but just be cautious in the way you continue to head that
4 way.

5 All right, bring in the jury.

6 (WHEREUPON, JURY REENTERS COURTROOM AT 12:35 PM.)

7 THE COURT: You may proceed.

8 SOLICITOR HAMILTON: Thank you, your Honor.

9 DIRECT EXAMINATION CONTINUES

10 CYNTHIA MITCHUM BY SOLICITOR HAMILTON:

11 Q. Could you take a look at State's Exhibit Number Ten
12 please.

13 A. Okay.

14 Q. Did you analyze the substance in this bag?

15 A. Yes, I did.

16 Q. And what test did you run in identifying this
17 substance in this bag?

18 A. I ran a color test and an instrumental test.

19 Q. And how regarded and respected is this type of test
20 in the scientific community in terms of publication and
21 peer reviews?

22 A. Highly regarded.

23 Q. How many times have you performed this test?

24 A. It is a typical test to run with this type of
25 substances excess hundreds of times a month so multiple

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 that by twenty-four years. A lot.

2 Q. How reliable have you found these test to be in your
3 own experience?

4 A. They're very reliable.

5 Q. And do you take quality control measures when testing
6 these substances to ensure that there is no contamination
7 from prior samples?

8 A. Yes, we do.

9 Q. And is this method consistent with what you know about
10 the scientific principles and procedures?

11 A. Yes.

12 Q. And upon testing this substance what did you determine
13 the substance to be?

14 MS. LIPINSKI: Your Honor, I object at this point to
15 that question. That evidence is not properly identified.

16 THE COURT: Its not in evidence so I sustain the
17 objection.

18 SOLICITOR HAMILTON: Your Honor, the State would move
19 to admit Court's or State's Exhibit Number Ten to admission
20 into evidence.

21 MS. LIPINSKI: Your Honor, the defense objects. First
22 we don't believe that they've established a sufficient
23 chain of custody in this particular case. And also at this
24 time we renew pret-trial motions regarding the search and
25 seizure of the evidence.

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 THE COURT: Let me let the jury go back to the jury
2 room for just a minute while we take up another matter.

3 (WHEREUPON, JURY EXITS COURTROOM AT 12:38 PM.)

4 THE COURT: As to the second part of your objection
5 that is over ruled because of my earlier ruling.

6 What's the problem with the chain?

7 MS. LIPINSKI: They testified that an individual by
8 the name of Patrick was the go-between between the Rock
9 Hill DEU and the evidence and he's the one that checked it
10 out to Ms. Mitchum and he hasn't testified nor is his
11 absence been explained or in any way.

12 THE COURT: Well I ask the State to respond but it's
13 my understanding that as long as everyone in the chain is
14 accounted for that that's sufficient but I'll hear what Ms.
15 Hamilton has to say.

16 SOLICITOR HAMILTON: Your Honor, that is our position
17 based on case law. We have identified -- Under State
18 versus Hatcher we have identified each person who has
19 handled this evidence. We had someone to state that they
20 are familiar with the signature of Patrick Patterson; they
21 are familiar with the procedures in which transferred
22 evidence is done and we believe that he's established
23 proper chain in this case in identifying each person who
24 has handled the evidence, your Honor.

25 THE COURT: All right. What the name of the case you

— —

THE COURT: No, I don't need it. I've already stated what I thought it said but I just wanted the record to reflect --

THE COURT: Does it have any numbers behind it?

THE COURT: All right. Thank you. I over rule the

objection. I think that -- Its my understanding is that as long as the pieces of the chain are accounted for that that's sufficient so I over rule your objection.

Bring the jury back.

(WHEREUPON, JURY REENTERS COURTROOM AT 12:41 PM.)

THE COURT: You may proceed.

SOLICITOR HAMILTON: Thank you, your Honor.

The State would move to admit State's Exhibit Number Ten in the chain of evidence.

THE COURT: Over the objection to the defense, its their matter, and it's allowed into evidence.

(WHEREUPON, STATE'S EXHIBIT NUMBER TEN, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

DIRECT EXAMINATION CONTINUES

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 CYNTHIA MITCHUM BY SOLICITOR HAMILTON:

2 Q. Did you determine the amount of substance contained
3 in this bag?

4 A. Yes, I did.

5 Q. What did you determine the substance to be?

6 A. On State's Exhibit Number Ten, which is Item Number
7 Two in this case, was determined to contain cocaine base
8 also known as crack which is a control two substance
9 weighing eight point two eight grams.

10 Q. Okay, I want to go to Exhibit Number Eleven now.

11 I just want to ask you, did you make a written report
12 of your findings as to the crack cocaine?

13 A. Yes, I did.

14 Q. Now going to the analysis of the substance in State's
15 Exhibit for Eleven. What test did you run on this
16 substance?

17 A. I ran a color test and an instrumental analysis.

18 Q. And well regarded and respected is this type of test
19 in the scientific community in terms of publication and
20 peer review?

21 A. Highly regarded.

22 Q. How many times have you performed this type of test?

23 A. In excess of hundreds of times.

24 Q. And have you found this test to be reliable in your
25 own experience?

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 A. Yes.

2 Q. Are there quality control measures to ensure that
3 there are not contamination from prior samples for evidence
4 tested?

5 A. Yes.

6 Q. And is this method consistent with what you know about
7 scientific principles and procedures?

8 A. Yes.

9 SOLICITOR HAMILTON: The State would move to admit
10 State's Exhibit Eleven into admission into evidence.

11 MS. LIPINSKI: And, your Honor, we make the same
12 objection regarding chain and renew our pretrial motions
13 regarding the search and seizure.

14 THE COURT: As to both of those reasons for objection
15 they are over ruled and in over objection.

16 (WHEREUPON, STATE'S EXHIBIT NUMBER ELEVEN, IDENTIFIED
17 AND MARKED, RECEIVED INTO EVIDENCE.)

18 SOLICITOR HAMILTON: Thank you, your Honor.

19 Q. And in regards to State's Exhibit Number Eleven, what
20 did you determine the substance to be?

21 A. State's Exhibit Number Eleven which is Item Number
22 Three in this case was determined to contain cocaine which
23 is control two substance a total weight of fourteen point
24 twenty-nine grams. Also in this Item one of the bags did
25 not analyze the same as the other so I separated it out so

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 it is Item Number Three point one was determined to contain
2 no controlled substance.

3 Q. And I want to --

4 SOLICITOR HAMILTON: Your Honor, could we please
5 publish Exhibit -- State's Exhibit Number Eleven to the
6 jury? Can Ms. Cynthia come down and publish that to the
7 jury?

8 THE COURT: Yes, ma'am.

9 SOLICITOR HAMILTON: Thank you, your Honor.

10 Q. Would you please come down -- Actually first of all
11 I do want to -- You made -- You said you made a written
12 report of your findings on both of these substances?

13 A. Correct.

14 Q. Do you have that written report with you?

15 A. Yes, I do.

16 Q. Okay.

17 (WHEREUPON, STATE'S EXHIBIT NUMBER FIFTEEN, PREMARKED
18 FOR IDENTIFICATION.)

19 Q. I did this as State's Exhibit Number Fifteen.

20 A. Okay.

21 THE COURT: For identification.

22 SOLICITOR HAMILTON: For identification purposes, yes,
23 your Honor.

24 Q. And do you recognize this written report?

25 A. Yes, I do.

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 Q. And how do you recognize it?

2 A. It has my signature on it and it also has the
3 information about this case on it.

4 SOLICITOR HAMILTON: The State would move to admit
5 State's Exhibit Number Fifteen for iden -- Or I mean for
6 admission into evidence, your Honor.

7 MS. LIPINSKI: Your Honor, we would object. There is
8 a lot of extraneous information on this report. She's
9 testified as to her results and we just feel that this is
10 needlessly superfluous to her previous testimony and maybe
11 ultimately can be given to the jury.

12 THE COURT: Let me see it.

13 (DOCUMENT RECEIVED UP BY THE COURT.)

14 THE COURT: I sustain the objection at this point.

15 BY SOLICITOR HAMILTON:

16 Q. You stated on that drug or report that you made the
17 written report your findings. You stated that there was an
18 Item three point one you determined to not be a controlled
19 substance. Could you now step down from the jury box and
20 publish this to the jury and show them what you -- how you
21 determined -- separated this out in the bags?

22 THE COURT: You can step down.

23 (WITNESS LEAVES WITNESS STAND.)

24 MS. LIPINSKI: And the report is not in evidence.

25 Your Honor, can I move so that I --

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 THE COURT: You may.

2 MS. LIPINSKI: Thank you..

3 A. As you can see with this particular item that there
4 are five individual type bags inside the ziplock bag and
5 I've labeled each one. See, you can see those individual
6 bags. Wherein in this case bag three here when I did my
7 analysis bag three analyzed differently than the other bags
8 so I didn't actually separate 'em out because I had already
9 sealed the evidence so I'm not gonna reopen the evidence.
10 But on my results when I was looking at it I noticed that
11 it's different so I then separated it in the report itself
12 and then called it three point one.

13 Q. So you -- Didn't you say you labeled each bag?

14 A. Correct. Each bag is labeled bag one, bag two, bag
15 three, bag four, bag five.

16 Q. And do you remember which specific bag came back as
17 not a controlled substance?

18 A. Bag three.

19 Q. Thank you. You can go back to the jury box.

20 THE COURT: The witness.

21 SOLICITOR HAMILTON: Thank you. I'm sorry, your
22 Honor.

23 THE COURT: You told her to go to the jury box.

24 (WITNESS RETURNS TO WITNESS BOX.)

25 SOLICITOR HAMILTON: Oh, witness box. I'm sorry.

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:

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1 Q. And in labeling that bag three is Item Three point
2 one is a non-controlled substance. Was that bag excluded
3 in the total weight of the cocaine?

4 A. It is.

5 SOLICITOR HAMILTON: Your Honor, may we approach
6 briefly?

7 THE COURT: Yes.

8 SOLICITOR HAMILTON: Thank you.

9 (BENCH CONFERENCE OFF THE RECORD OUT OF THE HEARING OF
10 THE JURY AT 12:48 PM.)

11 SOLICITOR HAMILTON: Your Honor, the State would move
12 to admit State's Exhibit Number Fifteen, the written report
13 of Ms. Mitchum's findings into evidence, admission into
14 evidence.

15 MS. LIPINSKI: Your Honor, we would renew our
16 objection. The report it's superfluous to her testimony
17 and some information we think may be ultimately confusing
18 to the jury. Testimony has not been lengthy and there's
19 really no need to supplement it or inject these, I think
20 ultimately confusing issues.

21 THE COURT: All right. Well I had sustained the
22 objection earlier but my concern was alleviated when I
23 looked at the actual bags that obtained the evidence and so
24 I over rule the objection and allow it into evidence over
25 objection.

CYNTHIA MITCHUM: DIRECT BY SOLICITOR HAMILTON:
CROSS BY MS. LIPINSKI:

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1 SOLICITOR HAMILTON: Thank you, your Honor.

2 (WHEREUPON, STATE'S EXHIBIT NUMBER FIFTEEN, IDENTIFIED
3 AND MARKED, RECEIVED INTO EVIDENCE.)

4 BY SOLICITOR HAMILTON:

5 Q. Ms. Mitchum, I just want to ask you is there any
6 kind of difference in the weight of the drugs on scene
7 versus when you actually weigh the drugs?

8 A. Sometimes there are. It depends on what type of
9 balance the officers we use on scene. Ours are calibrated
10 in the laboratory. Sometimes they will weigh the
11 substances with the bag cause its not easy to untie them.
12 They don't weigh the substance just by itself so yes there
13 can be a weight difference.

14 Q. And so when you test the drugs and a finding as to the
15 weight of the drugs, that is solely the drugs, no bags,
16 correct?

17 A. That's correct. It's the drug itself, no bags
18 included.

19 SOLICITOR HAMILTON: Please answer any questions the
20 defense may have. Thank you.

21 THE COURT: Counsel.

22 CROSS-EXAMINATION

23 CYNTHIA MITCHUM BY MS. LIPINSKI:

24 Q. While the -- Let's kind of start where you ended.

25 While the removal of the bags can in some ways

CYNTHIA MITCHUM: CROSS BY MS. LIPINSKI:

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1 reconcile the difference in weight, there are some other
2 explanations for that difference in weight, correct?

3 A. Yes.

4 Q. So some of the evidence can be lost in handling?

5 A. It can be, yes.

6 Q. Not all of these containers are air tight?

7 A. Correct.

8 Q. If somebody's done anything to tamper with the
9 evidence that arguably could impact the weight?

10 A. That could impact the weight, yes.

11 Q. So while packaging can explain it that's not end of
12 itself the explanation, correct?

13 A. Correct.

14 Q. And you don't do anything to test the packaging weight
15 do you?

16 A. No, I do not.

17 Q. Or in any way try to reconcile the measurements that
18 the officers achieve, correct?

19 A. No, I do not.

20 Q. All right. So you know, take the drugs out, put them
21 on one scale take the bag out put it on another scale and
22 say well together they equal this and that's close to where
23 they got it, correct?

24 A. That's correct, I did not try to figure out what
25 their weight is compared to my weight, no, I did not.

1 Q. So you cannot offer an expert opinion that the
2 discrepancy in weight in this particular case isn't
3 attributable solely to packaging removal?

4 A. Correct. And I do not know the discrepancy in the
5 weight because I have no idea what they're weights are.
6 The weights that we report is the weight that comes from
7 the laboratory.

8 Q. And you tested Item Number Two which I believe is
9 State's Exhibit Number Ten.

10 A. Yes it is.

11 Q. And there is some crumpled up plastic material in
12 here, correct?

13 A. Correct.

14 Q. That's something you would have removed, correct?

15 A. Correct. That's a -- I think it's like a sandwich
16 type bag like you have a sandwich in.

17 Q. Okay. But you don't know it's original packaging?

18 A. There original packaging it came the ziplock bag and
19 then inside that ziplock was the plastic bag and inside the
20 plastic bag was the rock substance.

21 Q. All right. But when the evidence was recovered at
22 64 Reynold's Street, you don't know how it was packaged?

23 A. That's correct, no, I do not know.

24 Q. You basically know that this plastic has been put in
25 one ziplock bag and then put in another bag and in another

CYNTHIA MITCHUM: CROSS BY MS. LIPINSKI:

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1 bag before you get to it?

2 A. Well this bag out here is mine.

3 Q. Right.

4 A. Yeah. So yes, its been put inside of this bag with
5 the blue fillergree around it so, yeah, that's the way I
6 received it, correct.

7 Q. You don't know the original condition of this item,
8 correct?

9 A. Correct.

10 Q. Right now there appear to be multiple pieces of this
11 item?

12 A. Correct. And typically with a rock substance when
13 I do my analysis when I dig into it it will fall apart.
14 But how it was out on the street as you say I do not have a
15 clue.

16 Q. And this isn't the first time you've tested crack
17 cocaine, correct?

18 A. Oh, no.

19 Q. And you stated it falls apart. Its crumbly?

20 A. Correct.

21 Q. And it doesn't always crumble into a specific tenth
22 of a gram, correct?

23 A. That's correct.

24 Q. It's not like if you break off a diamond know the
25 fracture lines may be, you know, we could approximate them.

1 It's not that scientific with crack, correct?

2 A. Correct.

3 Q. Its more like the chocolate chip cookie. I'm trying
4 to feed my dog and it's crumbling in my hand as I'm trying
5 to give it to him?

6 A. That's a good example. Yes, correct.

7 Q. All right. So and arguably as that break down occurs
8 that can impact weight as well, correct?

9 A. No, not really when that impact occurred because it
10 would still be the same amount in the bag so that wouldn't
11 really occur, make any difference in the weight.

12 Q. And you stated that as to State's Exhibit Number Ten
13 you do a color test.

14 A. Correct.

15 Q. And that's where you take a little bit of this,
16 correct?

17 A. Correct.

18 Q. And you put something on it and if it turns a certain
19 color it's a presumptive test for crack cocaine?

20 A. That's correct.

21 Q. And that's similar to what some of the officers
22 although not all of them sometimes do out on the scene,
23 correct?

24 A. Yes.

25 Q. And while Ms. Hamilton grouped this together with the

CYNTHIA MITCHUM: CROSS BY MS. LIPINSKI:

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1 instrumentation test, the color test isn't as reliable as
2 the instrumentation test, correct?

3 A. That is correct because it just gives me an idea of
4 what type of substance I am looking at so I can have an
5 idea on the test, further test I need to do.

6 Q. So that can be wrong. It's really presumptive test,
7 it changes colors, other substances can test false
8 positives. Sometimes they can still test as a controlled
9 substance for you but that color test can fail, correct?

10 A. Correct. And that's like I said, it's just a
11 presumptive test so we're just getting an idea of
12 what we're looking at at that point to if I need to - what
13 I need to dissolve it in later for my instrument test.

14 Q. Okay. So I just don't want the jury -- it hasn't past
15 two conclusive test the way you may have originally
16 answered. It passes presumptive test and that led you to
17 doing more specific and scientific reliable test down the
18 road, correct?

19 A. Correct. And I never relayed to them that they were
20 two highly specific test or confirmed --

21 Q. But she grouped it. And I'm not trying to complain
22 against Ms. Hamilton. I'm really just trying to clarify
23 for the jury's purposes.

24 A. Okay.

25 Q. I know you always do these two test. I'm just saying

1 that they don't necessarily belong together in terms of
2 both being scientifically reliable.

3 A. Oh, correct. Reliability, yes, in that they are not
4 both confirmatory test but that is the test we do with
5 everything to lead us up to get to our result, yes.

6 Q. Okay. And you don't test every chunk of the cookie?

7 A. No, we do a representative sample out of it because
8 if I did everything there would be nothing left to see.

9 Q. Right. So you take a little bit here, a little bit
10 there, and a little bit there, and do what with those
11 things?

12 A. Those are -- First I take some samples to -- and
13 they're gonna be consumed in analysis meaning there will be
14 no goods or they're no longer there. They're not included
15 in the weight either. So I'll take several samples to do
16 my spot test or the color test and then I'll take a
17 different sample for my instrumental test.

18 Q. But we're not taking big samples?

19 A. No, we're not taking big samples.

20 Q. We're taking scrapings or little amounts?

21 A. Just enough to do the color test so that I can.

22 Q. All right. And when I think of a gram because I
23 grew before they love they metric system, I have a hard
24 time appreciating necessarily what a gram is, but I think a
25 common example is some of these Sweet and Low, or Equal

CYNTHIA MITCHUM: CROSS BY MS. LIPINSKI:

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1 packets are basically a gram of that sweetner, correct?

2 A. Yes. As a matter of fact the sweetner packet is - in
3 the pink package I do believe is one gram of sugar so
4 that's a good comparison to it.

5 Q. But some items have greater density and therefore
6 that impacts weight, right?

7 A. It can.

8 Q. Because we're talking weight here not volume, ---

9 A. Correct.

10 Q. --- right? And so this doesn't even look to be a
11 sugar packets of crack cocaine?

12 A. And that would be more than a sugar packet.

13 Q. Okay. And that's because crack's a little bit
14 denser?

15 A. Yes.

16 Q. All right. So let's talk about Item Number Eleven.

17 I looked at your report and the way you have broken
18 down the list of evidence is Item Two which was the rock
19 substance for the crack.

20 A. Correct.

21 Q. The Item Three powder substance, correct?

22 A. Correct.

23 Q. And Item Three point one powder substance, correct?

24 A. Correct, yes.

25 Q. But now you've testified in front of the jury that

1 Item Three actually contains five separate bags?

2 A. Correct.

3 Q. And those aren't bags were you sorted things, correct?

4 A. No, they were already sorted. Those came with five
5 different tied plastic bags and I did an analysis, complete
6 analysis on each single bag.

7 Q. So you would have tested each single bag?

8 A. Correct.

9 Q. And what you've said is that Item Three is fourteen
10 point two nine grams, right?

11 A. Correct. A total weight so I weigh each bag
12 individually and then add those weights together to give
13 you the total weight.

14 Q. But Item three point one was no controlled substance?

15 A. Right. And that was just one of the bags that was out
16 of their Item, Bag Number Three because I have that in my
17 notes also to remind me that Bag Number Three and that's
18 why it's separated out and it's not included in the total
19 weight.

20 Q. But you could have done out of three point one, three
21 point two, three point three, three point four, and three
22 point five and listed those individually, correct?

23 A. Yes I could have done that on the report. I did that
24 individually on my work sheet but not on the report since
25 we did total weight and added 'em together.

CYNTHIA MITCHUM: CROSS BY MS. LIPINSKI:

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1 Q. And you didn't attribute a weight at all to Item three
2 point one?

3 A. No, we do not report out weight when its no controlled
4 substance.

5 MS. LIPINSKI: That's all we have, your Honor.

6 THE COURT: Redirect?

7 SOLICITOR HAMILTON: Nothing further from the State,
8 your Honor.

9 THE COURT: All right, Ms. Mitchum, we appreciate you
10 being here and your testimony and you can be excused.

11 (WITNESS LEAVES WITNESS STAND.)

12 THE COURT: Members of the jury panel, we're gonna
13 break for lunch 'till two fifteen. It's right at one
14 o'clock so we'll see you back at two fifteen. Have a
15 pleasant lunch.

16 (JURY EXITS COURTROOM ON LUNCH RECESS AT 01:01 PM.)

17 THE COURT: Based on the witness list given to me I
18 presume that's the State's case?

19 SOLICITOR HAMILTON: Yes, your Honor.

20 THE COURT: All right. Well I'll let the State rest
21 formally on the record. For purposes of motions I'm --

22 The State rest at this point?

23 SOLICITOR HAMILTON: Yes, your Honor.

24 THE COURT: All right. Anything from the Defense?

25 MS. LIPINSKI: Yes, your Honor. At this time we would

1 renew all pretrial rulings specifically renewing our motion
2 that the search and seizure at 64 Reynold's Street and
3 specifically my defendant violated his Forth, Fifth, and
4 Sixth Amendment rights as well as the South Carolina
5 Constitution in that the search and seizure of that
6 evidence was done in violation of those amendments.

7 That it lacked the sufficient probable cause and there
8 were material falsehoods in the search warrant regarding
9 his previous convictions among other things that called
10 into question whether or not Judge Young properly had
11 probable cause in order to execute the search warrant.

12 And at that point we would renew all our objection as
13 to that. We would move on and make a motion for a directed
14 verdict as it pertains specifically to --

15 THE COURT: Let's cover them where we are.

16 As to your first motion for me basically revisit and
17 you're putting on the record all - incorporate all the
18 motions you previously made which I've ruled on and those
19 motions I -- Don't know exactly how to say this, but those
20 motions still -- The rulings I adopted hereto my earlier
21 rulings so as to those motions and in their entirety and in
22 their particularity they are over ruled.

23 MS. LIPINSKI: Your Honor, specifically as the -- as
24 to the trafficking level indictment, we would move for a
25 directed verdict based on the fact that Ms. Mitchum's

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1 testimony, while it said the Item three point one is
2 fourteen point two nine grams, she did note that one of
3 those baggies was not cocaine and therefore that weight
4 would need to be subtracted and arguably that would bring
5 it under trafficking level weight, your Honor.

6 SOLICITOR HAMILTON: Your Honor, that is not what she
7 stated. She said she left that amount out of the total
8 weight of the cocaine.

9 THE COURT: That's my understanding so that motion is
10 denied.

11 MS. LIPINSKI: We would renew -- We would make a
12 motion for a directed verdict as to the possession with
13 intent to distribute crack cocaine. They have not entered
14 any evidence beyond the speculation of David Vaughn that
15 the weight would put them over the level of intent to
16 distribute.

17 There have been no text messages regarding sales.
18 There has been no evidence admitted before the jury
19 regarding a history with sales off narcotics. And as it
20 relates specifically basically what they are left with is
21 weight; a scale which their element expert indicated is not
22 dispositive and can be consistent with a user of either of
23 these two substances and that users frequently hold these
24 drugs or do not possess them necessarily with the intent to
25 distribute.

1 I noticed that he described the way the packaging
2 he described the crack cocaine to be broken down into
3 individual dose units for sale. It's not done in this
4 particular case. He did not examine the packaging of the
5 cocaine or the powder cocaine to say that that was
6 consistent with what he saw as a dealer. Just merely that
7 the weight level is something he more typically sees with a
8 dealer versus a user.

9 Mr. Kennedy's statements that he does sell were not
10 recorded or audio taped in any way and so the defense feels
11 that they have failed to carry their burden, as to
12 possession with intent to distribute crack cocaine, as it
13 relates to that particular charge, your Honor.

14 THE COURT: All right. Well I deny it. I believe
15 there is direct evidence and substantial circumstantial
16 evidence from which a jury could reach the conclusion that
17 the State has carried it's burden of proof. I'm not making
18 that finding that they will but that they can.

19 MS. LIPINSKI: As to the finding in possession of a
20 weapon during the commission of a violent crime, your
21 Honor, here you have a gun found in a couch. You have a
22 holster found in a plastic tote which I don't know that
23 he's charged with a holster but certainly it's not like he
24 had the magic holster on him. They haven't provided a
25 nexus between him and the gun beyond a conclusory statement

1 by David Vaughn that the gun was his. There has been no
2 forensic testing of the gun to establish that it was his.
3 There has been no fingerprinting, no DNA testing him in any
4 way.

5 And further the charge is not just possession of a
6 weapon but also during the commission of a violent crime,
7 here he had the drugs on his person they did not have them
8 on his person. There is no indication that he was ever
9 gonna pick up the gun while he had this level weight on
10 him. There was no testimony from SWAT officers or other
11 officers that he ditched the gun or abandoned the gun,
12 reached for the gun. Nor has there been any nexus put
13 before the jury because I don't think the court can or the
14 State can rely on their accommodation in the under cover
15 buy that set up the search warrant ---

16 THE COURT: I do agree with that.

17 MS. LIPINSKI: --- to establish a nexus between the
18 gun and the trafficking and this particular case. So
19 first we feel that the State has failed to establish it is
20 his gun. And furthermore that the gun is in any way
21 connected or related to the trafficking in cocaine which is
22 the violent crime that is referenced in the indictment. So
23 we would move separately for a directed verdict on those
24 two arguments, your Honor.

25 THE COURT: The State.

1 SOLICITOR HAMILTON: We believe that we have shown
2 evidence of his constructive possession of the gun while in
3 possession of these drugs that were trafficking level, your
4 Honor.

5 Additionally he subsequently confessed that this was
6 his gun; he's aware of the gun; therefore, we believe
7 that's enough to get - -

8 THE COURT: I agree with the State and I deny the
9 motion for a directed verdict on the gun charge.

10 Anything else?

11 MS. LIPINSKI: Just briefly, your Honor, let me make
12 sure.

13 Your Honor, just briefly. I would renew the objections
14 you made specifically when evidence was admitted. I think
15 there were things regarding using Investigator Vaughn as an
16 expert but also the objection though some of the evidence
17 coming in and we would just renew those objections for
18 purposes of preserving the record on appeal.

19 THE COURT: My earlier rulings are sustained and so
20 those objections are over ruled.

21 All right, Mr. Kennedy, can you hear me?

22 MR. KENNEDY: Yes, sir. Yes, your Honor.

23 THE COURT: We've reached the point in the trial where
24 you have a right to present evidence or present a defense
25 if you wish. You do not have to present evidence because

1 MS. LIPINSKI: I just used that as - -

2 THE COURT: We'll be at ease 'till two fifteen.

3 I've got - We've got stuff at two and we'll reconvene
4 on this at two fifteen.

5 (COURT IN LUNCH RECESS AT 01:10 PM.)

6 (COURT BACK IN SESSION AT 02:05 PM.)

7 (DANIELLA LYNN FREED PLEA WITH ATTORNEY MARK
8 MCKINNON.)

9 (CARWINDO GABRIELLE JACKSON SENTENCING WITH ATTORNEY
10 MARK MCKINNON.)

11 (COURT IN RECESS AT 02:11 PM.)

12 (COURT BACK IN SESSION AT 02:22 PM.)

13 THE COURT: Get the defendant in.

14 (DEFENDANT DENNIS KENNEDY REENTERS COURTROOM.)

15 THE COURT: All right, the defendant is present.

16 Is the State ready to proceed?

17 SOLICITOR HAMILTON: The State's ready to proceed,
18 your Honor.

19 THE COURT: The Defense ready to proceed?

20 MS. LIPINSKI: Yes, your Honor.

21 THE COURT: The Defense have any witnesses?

22 MS. LIPINSKI: We do not have any witnesses, your
23 Honor.

24 THE COURT: Mr. Kennedy, are you gonna testify or
25 exercise your Constitutional right to remain silent?

1 MR. KENNEDY: Your Honor, I'm gonna . . .

2 THE COURT: I'm sorry.

3 MR. KENNEDY: I said, your Honor, I'm gonna remain
4 silent.

5 THE COURT: Okay. All right. Then the State will
6 open and the Defense will have final argument.

7 MS. LIPINSKI: To the extent as necessary at this
8 time, your Honor, we renew our motions for a directed
9 verdict and we renew our pretrial motions and any of the
10 objections that were made during the testimony in order to
11 preserve my client's rights.

12 THE COURT: Those motions are denied. I'll let you
13 rest in front of the jury and then I'll ask if there's any
14 thing from the defense and you can tell me of course no and
15 I'll talk to the jury about where we are.

16 SOLICITOR HAMILTON: Your Honor, the State did want to
17 make sure that you received the request --

18 THE COURT: I did and I charge it. I don't think --
19 Have you seen it?

20 MS. LIPINSKI: I do. My -- And I haven't had a drug
21 trial with you in a while but I think that mixture of
22 language is in your standard charge.

23 THE COURT: I meant while y'all are arguing I'll make
24 sure it's argued -- I mean it's covered right now.

25 SOLICITOR HAMILTON: Thank you, your Honor.

CLOSING ARGUMENT: BY SOLICITOR HAMILTON:

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1 (WHEREUPON, JURY REENTERS COURTROOM AT 02:24 PM.)

2 THE COURT: The State?

3 SOLICITOR HAMILTON: The State rest their case, your
4 Honor.

5 THE COURT: All right. Anything from the Defense?

6 MS. LIPINSKI: Your Honor, we would just renew our
7 motions made earlier.

8 THE COURT: Same rulings.

9 Members of the jury panel, the State has presented
10 it's case and the Defense is chosing to not go forward with
11 any witnesses at this time so we reached the point in the
12 trial where the attorneys will make their closing arguments
13 for you. Unlike the statements that you heard yesterday,
14 at this point the evidence will be argued by the - the
15 evidence in the record will be presented to you by the
16 Solicitor and by the Defendant and they will knowing what I
17 will charge you the law to be will ask you based on the
18 facts and the law you will hear from me why your verdict
19 should be a certain verdict so that's where we are at this
20 stage.

21 SOLICITOR HAMILTON: May it please the Court, your
22 Honor.

23 THE COURT: Yes, ma'am.

24 CLOSING ARGUMENT BY SOLICITOR HAMILTON:

25 SOLICITOR HAMILTON: Good afternoon. I have first

CLOSING ARGUMENT: BY SOLICITOR HAMILTON:

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1 closing in this case so I have to try to anticipate what
2 the Defense is gonna come up here and try to tell you in
3 the case. What I do anticipate there's gonna be a lot of
4 distractions. There's gonna be a lot of calling into
5 question why his statements were not recorded. Why more
6 pictures were not taken. And I'm gonna go over that in my
7 closing but I just want you to focus on what we know to be
8 true in this case, the facts as we apply them to the law.

9 And that's what I'm gonna go over in my closing and
10 focus on. Now again, I'm gonna go over each offense and
11 what I'm gonna do is try to review what facts help meet the
12 elements of each crime; everything that we heard on the
13 stand throughout this trial..

14 The first charge that I'm gonna go over is possession
15 with intent to distribute crack cocaine. That is what the
16 defendant is charged with. As I stated in my opening there
17 are three requirements that he knowingly possessed crack
18 cocaine.

19 Now we know he was in actual possession of that crack
20 cocaine. He had physical contact with that crack cocaine.
21 It was in his jacket pocket. It's eight point two eight
22 grams of crack cocaine. You heard from Cynthia Mitchum,
23 the drug analyst, said that it was eight point two eight
24 grams of crack cocaine. Plain and simple. Actual
25 possession.

CLOSING ARGUMENT: BY SOLICITOR HAMILTON:

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1 Now let's look at the intent to distribute element to
2 this because we have shown from Cynthia Mitchum that it was
3 crack and we've shown he was in actual possession of it.
4 As to the intent to distribute, as I stated in my opening
5 there are different circumstances you can look to to
6 determine intent to distribute.

7 You can look to the weight. The law says that you
8 have this inference of possession - possessing with intent
9 to distribute that one gram. The defendant on the day of t
10 this incident, January 7th, 2016, had in his possession
11 seven times that inference level. An inference can be
12 drawn that prove that he possessed over a gram. He
13 intended to distribute that.

14 Additionally you heard from Detective Vaughn on the
15 stand that the defendant did state he was intending to sell
16 these drugs. His own statement from his mouth, I was
17 planning on selling these drugs. I'm not a user. There
18 wasn't any evidence found on him of use. No crack pipes as
19 you heard Detective Vaughn say would normally be found on a
20 user. Additionally the defendant had in his pocket a
21 scale and three hundred and ninety-four dollars. Additional
22 evidence of distribution of drugs.

23 You also heard from Detective Vaughn on the stand that
24 this amount of crack cocaine is not user level. This is
25 what he normally sees in his experience on the street as

CLOSING ARGUMENT: BY SOLICITOR HAMILTON:

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1 dealer level; that that amount is not something he normally
2 sees with a user which would corroborate the defendant's
3 own statement that he is dealing these drugs, he his not
4 using them.

5 So, ladies and gentlemen, looking at those facts and
6 applying them to the elements of this crime we have met
7 those facts -- we have met those elements.

8 Let's go to the second charge. Trafficking cocaine
9 over ten grams. Again we have to look at him knowingly in
10 possession of this drug. Again let's look and see how we
11 know he was in possession of this drug. This cocaine was
12 found on his person. As you heard from Officer Clevenger
13 its found in his jacket pocket that he had on him. You
14 heard from Cynthia Mitchum it weighed out to be fourteen
15 point two nine grams of cocaine found on his person.
16 Actual possession on his person. That is element one met.

17 Let's go to the ten grams or more of cocaine.

18 As I stated Ms. Mitchum who is a drug analyst stated
19 that this was tested positive for cocaine, four point two
20 nine grams. And I want you to remember that she stated
21 that she tested each bag separately. And there was one bag
22 that she said did not test positive for a controlled
23 substance. It could have been baking soda. It could have
24 been anything. But it wasn't a controlled substance and
25 he's not charged with that. She left that out of the

CLOSING ARGUMENT: BY SOLICITOR HAMILTON:

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1 fourteen point two nine weight of the cocaine. All we have
2 to porve in regards to trafficking -- And I know you hear
3 the word trafficking and you might think these big time
4 movies you see these people trafficking in large huge
5 amounts of drugs and trucks across borders. That's not
6 what trafficking actually is. It is that but we have
7 trafficking is mere possession of over ten grams of
8 cocaine. Just possessing it is all he needs to do.

9 And in this case all we're required to prove is that
10 he possessed that amount or more. And in this case
11 fourteen point two nine grams is what he was in possession
12 of. There's no need for us to prove any specific intent to
13 distribute this. Mere possession.

14 Now, I remember and this is me trying to anticipate
15 what the Defense might have to say. She was questioning
16 Ms. Mitchum as to why - as to the crack and the cocaine -
17 why it wasn't all taken apart, each part specifically
18 tested. Well under our law and the judge she'll charge you
19 - she'll charge you as to this law, that the total weight
20 of a drug - a controlled substance specifically - is
21 determined by the weight of the drug in pure form or
22 compound form, a mixture thereof, so she tested a little
23 piece as she stated and it tested -- or I don't know the
24 size of the piece that she tested -- she tested a chunk of
25 that crack and in testing that it tested positive for crack

CLOSING ARGUMENT: BY SOLICITOR HAMILTON:

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1 cocaine. That could be a mixture of and that whole weight
2 is taken into account. So as I stated we have proved that
3 he is in actual possession of cocaine in this case;
4 therefore, trafficking over ten grams of cocaine.

5 So then the final offense in this case is possession
6 of a weapon during the commission of a violent crime. So
7 what we have seen with the drugs is actual possession.
8 They are on his person, they're in his jacket pocket on
9 him.

10 In this case what we're dealing with is constructive
11 possession of this weapon. ----- it's not actually on his
12 person. Constructive possession is when there's no
13 physical contact with the object but that that person can
14 exercise dominion and control of that object. They know of
15 it's existence and they can exercise control of it and have
16 the ability to do so.

17 And what I'd like to use a reference of example of
18 your cell phone. And I have a cell phone, I'm at a
19 restaurant with my friends. I put the cell phone down and
20 I'm sitting over here. I know that cell phone is there. I
21 know I can exercise dominion and control over that cell
22 phone therefore I still have constructive possession of
23 that cell phone even though I'm not actually touching it
24 which is actual possession.

25 That's what we're dealing with in regards to the

CLOSING ARGUMENT: BY SOLICITOR HAMILTON:

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1 pistol in this case. The pistol was in a couch across from
2 the defendant. He stated he knew of its existence. He
3 knew it was his. He stated that to Detective Vaaughn once
4 he was interviewed. His knowledge of the gun's presence
5 while trafficking and possessing that amount of cocaine
6 which trafficking is a violent offense meets the elements
7 of possession of a weapon during the commission of a
8 violent offense.

9 Now, I know that the defense is making issue as to
10 that when the defendant was read his rights off of this
11 form, and let me grab this form so that I can - This form,
12 the Acknowledgment Of Rights Form. She's going to say he
13 had --- the defendant knows that he had no way of getting -
14 -- she said we have no way of appointing you a lawyer. Yet
15 right after that sentence it says if you wish you may
16 answer questions without the presence of a lawyer or you
17 may stop answering any questions at any time. So what she
18 wants to argue is that he probably did understand that oh,
19 no, you can't be appointed a lawyer, yet he didn't
20 understand the next section, the final section that they
21 stated which is you can stop answering questions at any
22 time.

23 He didn't stop answering questions at any time. He
24 talked to Detective Vaughn, never ask for a lawyer.
25 Detective Vaughn stated that on the stand. He was advised

CLOSING ARGUMENT: BY SOLICITOR HAMILTON:
BY MS. LIPINSKI:

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1 of his rights. He signed a form waiving those rights, and
2 agreeing to speak to officers as you heard Officer
3 Harrelson say, which is a voluntary statement, ladies and
4 gentlemen.

5 Now, I know they're gonna make issue of this statement
6 not being recorded. And we - Even if you take away that
7 statement, set that aside, even if you take away that
8 statement, the evidence that you have of him possessing
9 these drugs on his person in his jacket that evidence that
10 you have of distribution, evidence of the gun in the house,
11 you see only one in this house, he has a key to this home,
12 he admitted that the key in the door is his key; had access
13 to this home; taking into account all of those facts minus
14 the statement, the State believes there is enough evidence
15 to convict him for each one of those crimes.

16 As I said before it is our responsibility to prove the
17 elements of this crime, of these crimes. Again, possession
18 with intent to distribute crack cocaine, trafficking
19 cocaine more than ten grams, and possession of a weapon
20 during the commission of a violent crime.

21 Now reasonable doubt. And we have to prove those
22 beyond a reasonable doubt. Reasonable doubt is not the
23 kind of doubt that would cause - is the kind of doubt that
24 would cause a reasonable person to hesitate to act. It is
25 not one hundred percent certainty. It's not beyond any and

CLOSING ARGUMENT: BY MS. LIPINSKI:

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1 all doubt. Proof beyond a reasonable doubt is proof that
2 leaves you firmly convinced of the defendant's guilt in
3 this case.

4 You are given the important role of fact finders. It
5 is your responsibility to piece together every single piece
6 of evidence that was presented to you on the stand. The
7 officers testimony, the pieces of evidence that will be
8 given to you when you go back and deliberate to take into
9 account all of those. It is a search for the truth in this
10 case. As I said I don't want you to be fooled by
11 distractions; to look at the facts at hand and use your
12 common sense when you deliberate.

13 What I will ask is that you go in that deliberation
14 room and I trust that you will find a verdict that speaks
15 the truth in this case and find the defendant guilty of all
16 charges. Thank you.

17 THE COURT: You may proceed.

18 CLOSING ARGUMENT BY MS. LIPINSKI:

19 MS. LIPINSKI: May it please the Court, your Honor.

20 What if these aren't his words? What if Dennis
21 Demario Kennedy never made these statements that they claim
22 he made? Ms. Hamilton just now tried to say oh, but even
23 without the statement we know it's his. But then she
24 refers to his statement that claiming a set of keys. But
25 what if these aren't his words? Because that's what you

CLOSING ARGUMENT: BY MS. LIPINSKI:

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1 are going to have to first determine for the most part of
2 your jury deliberation. And you are the tryer's of the
3 facts. You do have to decide are these his words, is that
4 exactly what he said. Did he make that statement freely,
5 voluntarily, knowingly and intelligently?

6 But what if they aren't his words? What if that's not
7 what he said? What if he said nothing? What if he said
8 something else? Think about the timing of this statement,
9 the timing of the Miranda warnings. Ms. Hamilton has
10 brought before you Officer's Vaughn, Officer Clevenger,
11 Harrelson.

12 Anybody threaten Mr. Kennedy? No. No, ladies and
13 gentlemen of the jury, we didn't. You know what, you don't
14 have to the SWAT Team does that for you. Cause let's all
15 take a moment to access how this all happens.

16 Mr. Kennedy is at [REDACTED] Street when without
17 announcement, without even a knock, armed officers in full
18 combat gear, with assault weapons barge into his home on 64
19 Reynolds Street, what they to say is his home, taken to the
20 ground made sure he doesn't have any weapons on him, go
21 through the residence secure the entire place stand him up
22 call the DEU in and they rush in and Mr. Kennedy we're
23 gonna read this form. You have the right to remain silent,
24 you have the right and anything you say -- Kennedy's seated
25 -- would you not be a little dazed, a little shocked at all

CLOSING ARGUMENT: BY MS. LIPINSKI:

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1 if the SWAT Team made entry into your home? Would you need
2 not a moment to reconnect, to gather your thoughts, to
3 process what is happening before somebody reads some legal
4 mumbo jumbo to you?

5 Are you really in the right frame of mind to sit there
6 and access and process and digest what is going on? Are
7 you really taking that all in? Are you dissecting these
8 sentences? You hear you have the right to remain silent
9 but then they want you to talk to them. You hear you have
10 the right to a lawyer but then they tell you they really
11 have no way of getting you a lawyer. You hear you can have
12 a lawyer present but they also say you can talk now.

13 Why do they talk out of both sides of our mouth and
14 why does the DEU interject that phrase? We've all watched
15 TV. We all read books. When you read and hear Miranda
16 warnings it is you have the right to remain silent, you
17 have the right to an attorney, if you cannot afford one to
18 be appointed to you the court will appoint you one.

19 Why interject but you know what we can't really get
20 you that lawyer. I mean it is Rock Hill we don't have a
21 lot of money. Nah. And maybe, maybe, we congratulate them
22 for mirandizing him so quickly. But then when Officer
23 Vaughn arguably their expert in interviewing gets him back
24 to the Rock Hill PD where there is a judge in the building
25 why not say you know while we did tell you back then we

CLOSING ARGUMENT: BY MS. LIPINSKI:

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1 didn't have the ability to get an attorney up to 64
2 Reynolds Street for you, we are here now, before I begin
3 questioning I want to make sure you understand your rights.
4 The SWAT Team had just come in and do you have any
5 questions about those rights, and by the way, now we could
6 get you a lawyer if you wanted one.

7 What are they afraid a lawyer's gonna bring to the
8 process? Might be he ask for to be recorded. Might be
9 another witness. Might be he ask for it to be in writing.
10 But see, the solicitor's office controls the DEU. They
11 have their own Commander Marvin Brown that works for them.
12 He sets that policy that says don't record, don't tape,
13 don't anything.

14 SOLICITOR HAMILTON: Objection, Your Honor, that's not

15 --

16 THE COURT: I believe you might be getting into
17 matters outside the record so I sustain the objection.

18 MS. LIPINSKI: I apologize, your Honor, I thought
19 there was testimony about Commander Brown.

20 THE COURT: There was some testimony about him but not
21 the --

22 MS. LIPINSKI: The DEU. Sorry, your Honor.

23 THE COURT: Well, --

24 MS. LIPINSKI: I'm not arguing. I'll move on.

25 Don't record anything. Even in the York County

CLOSING ARGUMENT: BY MS. LIPINSKI:

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1 Sheriff's Office we don't want it. Naw. Why are they so
2 afraid of a recorded statement in front of a jury?

3 They can't even articulate why that is. And maybe an
4 officer out on the street driving around doesn't have all
5 these fancy equipment, but their expert testified the Drug
6 Enforcement Unit more than any other unit, has audio
7 recording equipment; has a video recording equipment, has
8 cameras; has specialized ones, one's you can't even tell
9 are in the room with you; one that you can't even tell a
10 person is wearing. They use them all the time; they're
11 everywhere in the Unit, but we don't turn that on.

12 They say that [REDACTED] Street is his house. It's
13 his house. That's all you've heard, it's his house.

14 MS. LIPINSKI: Objection, your Honor.

15 THE COURT: I sustain the objection.

16 MS. LIPINSKI: That [REDACTED] Street is his house?

17 THE COURT: I don't think there was any testimony it
18 was his house. I think he --

19 MS. LIPINSKI: They argued that it was his house.

20 THE COURT: Well let me --

21 SOLICITOR HAMILTON: May we approach, your Honor?

22 THE COURT: Let me let the jury go to the jury room
23 just a minute.

24 (JURY EXITS COURTROOM AT 02:46 PM.)

25 THE COURT: I thought the argument was that a key --

CLOSING ARGUMENT: BY MS. LIPINSKI:

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1 his keys were in the door but I don't think that there was
2 any particular argument that he --

3 MS. LIPINSKI: I think it's a natural inference of
4 that. I think they said the key was in for any other reason
5 was that he had keys to that house and it was his house.

6 THE COURT: Well but you can't say -- You can argue
7 that they put that in to create an inference. You can't
8 argue that they took the position it was his house.
9 There's a difference. And you can certainly say -- I hate
10 to make your argument for you but I think something along
11 the lines of the State introduced evidence that he admitted
12 those keys were his to lead you to the inference that he
13 had access to and lived there.

14 I don't know if it was argued nor was -- Regardless
15 it's just like the thing about -- go back to Commander
16 Brown. I don't think there was any testimony that he
17 worked for a solicitor. I think it was testimony he was
18 present and he was the commander with the DEU but I don't
19 think there was any testimony he worked for the solicitor.
20 But I think you can go where you want to go without going
21 outside the record because I don't believe there's any
22 testimony that they -- that anybody indicated this was in
23 fact his house so he was there legally and - -

24 MS. LIPINSKI: And I apologize, your Honor, and I
25 believe that in the presence of the jury I did ask

CLOSING ARGUMENT: BY MS. LIPINSKI:

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1 Investigator Harrelson and Vaughn if Commander Brown worked
2 for the Solicitor's office. I made a point to include that
3 in my questioning.

4 THE COURT: Did you? I didn't remember that.

5 SOLICITOR HAMILTON: She did ask that but then she
6 proceeded to state in her closing that the DEU worked for
7 the Solicitor's office and that's not the case --

8 THE COURT: Well I apologize for that then. But you
9 can go back and revisit that because I was wrong.

10 SOLICITOR HAMILTON: And additionally he did not set
11 the policy. Those were our objections when we stood up as
12 to the DEU does not work for the Solicitor's office.

13 THE COURT: Well, but Commander Brown does.

14 SOLICITOR HAMILTON: Yes.

15 THE COURT: And I think the testimony was that
16 Commander Brown set the policy.

17 SOLICITOR HAMILTON: And -- But there was no testimony
18 as to Commander Brown setting any policy. Just that he was
19 --

20 THE COURT: Well let's iron that out before we get
21 back with the jury.

22 MS. LIPINSKI: Your Honor, I think I'm allowed to
23 argue natural factual inference. If he is the commander of
24 the Unit he controls the Unit. They all stated that they
25 work for him. I think they all work at his discretion.

CLOSING ARGUMENT: BY MS. LIPINSKI:

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1 And he goes beyond just each individual agency. That was
2 the purpose of bringing them all under him. And I think
3 they're argument that he had keys to the house and now
4 saying that it's not his house but he had keys to it, I
5 think they have made that characterization and I will
6 challenge it. I won't say it's his house; I would use
7 other words.

8 SOLICITOR HAMILTON: As I stated she had never ask him
9 if he sets the policy because if she did we would have gone
10 down that road and we didn't. It was way more complicated
11 than that. All that was ask was how is he employed and no
12 policy issues.

13 THE COURT: Well I'll let you go back and ask about
14 whether Commander Brown - to show the association - and
15 perhaps he is an employee of the solicitor's office. But
16 unless there's testimony I think you can certainly argue -
17 I'm probably going where I shouldn't but I don't want to
18 let the jury go back out -- that as Commander he certainly
19 knew what the policy was. That's about as far as I can go
20 with trying to give guidance.

21 Bring the jury back in.

22 (JURY REENTERS COURTROOM AT 02:51 PM.)

23 THE COURT: Go back -- Before I do that, this is
24 probably a good time for me to tell you, I will tell you in
25 my charge, but during the course of the trial and at this

CLOSING ARGUMENT: BY MS. LIPINSKI:

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1 , time lawyers have objected to certain things, that's their
2 job, so don't hold that against them the fact that they
3 raised an objection to either testimony or question or
4 argument. Don't hold that against the attorney or their
5 client or the State or Ms. Lipinski because they're just
6 doing their job.

7 MS. LIPINSKI: Thank you, your Honor.

8 CLOSING ARGUMENT BY MS. LIPINSKI CONTINUES:

9 MS. LIPINSKI: It is the Defense's belief that the
10 prosecution was trying to in some way associate this house
11 with Mr. Kennedy. 64 Reynold's Street is the house they
12 are at least trying to indicate that he somehow has access
13 to it. They're trying to do that by some pretty flimsy
14 evidence. Let's talk about what evidence they brought
15 before you at least.

16 There's a form, the Miranda Form, where Investigator
17 Harrelson in his own words states that he writes that as
18 the defendant's address. However you've never been given
19 anything else to substantiate that that is Mr. Kennedy's
20 address. No independent records of any kind. No DMV
21 records. No property tax records. Utility records. They
22 don't say that they found any mail in the house addressed
23 to Mr. Kennedy. You don't have any personal item seized in
24 the house brought before you as evidence. He had full
25 access to this house. Not a very big house, wouldn't take

CLOSING ARGUMENT: BY MS. LIPINSKI:

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1 long. You don't have any of that.

2 The only thing is a key which -- That's right, they
3 didn't admit the key. They didn't keep it. You don't have
4 that set of keys. You don't have testimony from these
5 officers that they took those keys that they say Mr.
6 Kennedy claimed and they turned them over to a loved one.
7 Or, that it went to a car that was registered to him. Or,
8 that they went and found somebody in the neighborhood that
9 said do you know Mr. Kennedy. Does he live there? Do you
10 know these keys? You ever seen them before? Are they
11 his? No key. No nothing.

12 They got a picture of a key. But without his words
13 does that tie him to anything? Ms. Hamilton used that
14 example of the cell phone that established constructive
15 possession. That Mr. Kennedy is in actual constructive
16 possession of these things and her cell phone's over there
17 and she had -- and it might not be on her personally, she's
18 not carrying it in her pocket. You just have to yell at us
19 for those kind of things. But she knows where it is, she
20 can exercise dominion and control over it, she's in
21 possession of that cell phone.

22 When I walked up here I put my cell phone here. Maybe
23 Ms. Hamilton didn't see it, maybe she doesn't know that
24 it's there. If she doesn't know that its there she's not
25 being in constructive possession of that cell phone. And

CLOSING ARGUMENT: BY MS. LIPINSKI:

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1 if you went to the Olive Garden to eat and you sat down in
2 a booth and something had fallen out of somebody's pocket
3 and gotten down into that booth, you don't know what's
4 there, you're not in constructive possession of that item.

5 Maybe we found the phone. How do we know whose phone
6 it is? Arguable Ms. Hamilton and I if they go through our
7 phone and have pictures of our families or dogs or our cats
8 or text messages that name us by name or email. We don't
9 have that here. Nothing from that house. No mail. No
10 power bill. No tax records. So without his words claiming
11 those keys is it possible that those keys were just found
12 in that house? Is it possible that they weren't Dennis
13 Kennedy's? What were his words? Do you really know?

14 Ms. Hamilton gets up here and states well, what do we
15 know as facts, ladies and gentlemen of the jury? What do
16 we know as fact? We know that the drugs were found on his
17 person. That's a fact. It's not a fact. It's not a fact
18 until you say it's a fact. And what evidence do you have
19 of that fact? Their word, that's it. Their word that it
20 was found on his person.

21 You heard a lot of testimony that it was found in a
22 jacket. Is there a picture of him wearing this jacket? We
23 know officers testified they were out there and they got
24 cell phones. We all been somewhere somebody's wearing
25 something crazy we just snap a picture and you believe so

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1 and so wore this to church today or to work today. How
2 easy would it have been to take a picture of him wearing
3 this jacket you claim the drugs were found there? How easy
4 would it have been to bring that jacket here to court? How
5 easy would it have been to do any kind of testing on that
6 jacket? To find somebody in the neighborhood, yeah, he
7 walks up and down the street wearing that jacket all the
8 time. They don't have that. Its not a fact.

9 You have evidence and it seems pretty uncontroverted
10 that the SWAT Team made entry into this home first.
11 Multiple times not just one. We don't call it a SWAT guy,
12 we call it a SWAT Team. Why wouldn't you hear from anyone
13 of those SWAT officers where was Mr. Kennedy when they
14 entered into the home? Was he asleep in a back bedroom?
15 Was he sitting at the kitchen table? Where was he? Was he
16 in proximity to this gun? Was he in proximity to these
17 drugs? Wouldn't it be nice to know those kind of things?

18 Where are those SWAT officers? They don' work for the
19 DEU. No testimony that they worked for Commander Marvin
20 Brown. What might they have to say?

21 Well you can set there and say, well, if the DEU's
22 gonna say they found the drugs on him they would just say
23 they found the gun on him too. But there's no way the SWAT
24 Team was gonna burst into a house and secure an individual
25 and to leave a gun on him so they know they can't go that

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1 far. Why even law enforcement go this far now? Because
2 their evidence falls short.

3 They have a lot of time and money invested in this
4 case. They went and got a special search warrant. They
5 coordinated with the SWAT Team; they had a SWAT Team out
6 there. They had the East side Drug Enforcement Unit out
7 there. They may even had officers from the West side Drug
8 Enforcement Unit out there. They go into this house they
9 find a gun, they find drugs, Kennedy happen to be the only
10 one there and he's the one that's gonna answer for it.

11 And the only thing you have that really answers the
12 questions that it's his are his words nothing else and
13 nothing more. And the why not, why not would an agency
14 that has so many tricks and tools and bells and whistles at
15 their disposal? Maybe we give them a pass.

16 You know what? I was driving down the road
17 unexpectantly I saw something. I went to a house, I didn't
18 know that I was going in there on a search warrant, I had
19 no idea what might be located, I didn't know to bring my
20 equipment with me, I might have been on the way home that
21 day, maybe even get a pass. But when you plan this entry
22 for so long and it's so well coordinated, how hard is it,
23 and why is it that Mr. Kennedy is read his Miranda warnings
24 within minutes of the SWAT Team coming in, but they would
25 have you believe makes no statements whatsoever until he

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1 ends up in a room with Investigator Vaughn.

2 You know they're there, their finding the drugs on him
3 down in the coach, tearing up this house, and he says
4 nothing. And Investigator Vaughn why didn't he go over
5 those Miranda warnings with Mr. Kennedy again? I didn't
6 need to, I was there when he was marandized. Okay. Did
7 you hear his response to any of those Miranda warnings? I
8 don't really recall. You don't recall? Are you sure he
9 even understood? Might we want to double check? Might we
10 want to tell him we can get you a lawyer? No.

11 And when ask, why, why would you not take the simple
12 step to read three or four more sentences to Mr. Kennedy?
13 What did he tell you? I wasn't going to interrogate him.
14 All right, fair enough. What - Who started up the
15 conversation? His testimony was he did. Who picked the
16 topic matter? His testimony was, I started asking him well
17 the stuff we found -- it's not like I never meant to
18 interrogate him but I ask him what he got for Christmas and
19 suddenly he wanted to talk about the drugs and the gun and
20 I never meant to talk about that that's why I didn't
21 mirandize him.

22 No, his own testimony is -- and I don't really
23 understand this distinction without any differences -- I
24 wasn't going to interrogate him but I was going to
25 interview him about the drugs and the gun. I don't what he

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1 thinks interrogation means. Now that the SWAT Teams left
2 they're no longer circling the house that's no longer some
3 type of interrogation? It's just a simple fireside chat in
4 an interview room? An interview room. You are in an
5 interview room, you're going to talk to a suspect, why not
6 review *Miranda* warnings with him and make sure he
7 understands? And why not grab anyone of the many
8 recorders, cell phones, or cameras that you got laying
9 around this place and hit record?

10 Because let me tell you, this trial would be over if
11 they could play you the video of Mr. Kennedy sitting in a
12 room with Detective Vaughn saying these things, but for
13 some reason they don't want that. But they want you to
14 come in here and just rubber stamp everything they say.

15 Let's talk about what else they didn't bring before
16 you today because Ms. Hamilton is trying to say that Mr.
17 Kennedy is a drug dealer and a trafficker; he's got all
18 these drugs on him. There's no testimony about a car.
19 They said well look to packaging materials. The only
20 ziplock bags that were brought to this party were the
21 evidence bags that they keep their packaging in. Searched
22 the entire house they can't find a single sandwich bag.

23 There was - Well, there were scales. Scales:
24 Investigator Clevenger very specifically scales.
25 Investigator Clevenger, were there scales or was there a

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1 scale? There was a scale. No, not scales. Had a powdery
2 substance on it. Must have been used for drug dealing. I
3 heard Ms. Mitchum testify a lot. She testified about all
4 the evidence she looked at. I never heard her testify that
5 she in any way ever examined this drug dealing scale. Was
6 it a minor weight scale? Did it even weigh anything as
7 heavy as ten grams? Did we examine that in any way, shape,
8 or form? No.

9 They brought you pictures of the drugs of which they
10 have reports of which they have bags. You know they have
11 five pictures in evidence. Keys you never get to examine
12 yourself of which other than his words they can't attribute
13 it to him. No other key they can tie it to anything other
14 than this door knob. And a picture of Google Earth of a
15 house. They want you to believe that the gun was found
16 underneath a seat cushion. The holster was found across
17 the room near a love seat in a plastic storage tote.

18 How easy would it be to lift up a seat cushion;
19 there's a gun, let me take a picture of it before I
20 collect, let me preserve it, let me mark it for
21 identification? No. This mystery tote that this gun and
22 this holster and everything that goes along with it is
23 there a picture of that? No. Is there a picture of the
24 room where any of this is? No. Nothing. Just their words
25 and Mr. Kennedy's words.

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1 If they had brought the jacket to you and it was a
2 woman's jacket, would that impact your testimony or your
3 findings? If it didn't fit Mr. Kennedy how would that
4 impact your analysis of his words, of their words?

5 Oh, wait, we got money. No, no money. No money. How
6 easy would it be to photograph the money? Here are the
7 serial numbers; here are the detonations, bring it in here.
8 Oh, we don't want to leave money in evidence but photograph
9 it. Its not going anywhere. It's December 16th today, this
10 case happened January 7th. We'd like to know -- wouldn't
11 you like to know what denominations they were? How was
12 that money, was it in his wallet? Did Mr. Kennedy even
13 have a wallet on him? Was the money wadded up? Was it in
14 a roll? Do you know that? Why wouldn't you know that?
15 Why wouldn't they tell you that? No money, no pills, don't
16 test the scales. They don't bring you a lot of pictures,
17 they don't bring you the keys.

18 They brought you a chemist to test the drugs. There's
19 no forensic testing of any kind. The gun that they want to
20 attribute to Mr. Kennedy is over there, it's been sitting
21 in evidence arguably since January 7th. Wouldn't you like
22 to know if his fingerprints were on that gun; if his DNA
23 was on that gun? If they could tie that gun to him in any
24 way other than he, the drugs, the gun, and a key in the
25 door knob were found at the same house, because that's

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1 arguably without words that's all they've got. How easy
2 would that be to resolve in your mind?

3 For the most part the entire case other than the fact,
4 or what we do know for a fact, is that when they executed
5 the search warrant a gun and some drugs were found at that
6 house. Where they were found comes from the word of the
7 officers alone. How can they be attributed to Mr. Kennedy
8 comes from words that they put in his mouth.

9 But then Ms. Hamilton has the burden of coming in here
10 and proving the defendant's guilt beyond a reasonable
11 doubt. And for the most part that evidence solely comes
12 from, and their ability to tie those things to Mr. Kennedy,
13 the words coming out of his mouth. And that comes from
14 Investigator Vaughn's summary of his non-interrogation.

15 Beyond a - You're not here to be a rubber stamp on yet
16 another law enforcement report. When the framers of the
17 United State's *Constitution* got together and drafted that
18 you have a right to be secure in your own house; that you
19 have a right against search and seizure, that you have a
20 right to an attorney; that you have a presumption of
21 innocence; that you are entitled to due process, they
22 envisioned more when they concocted the jury system that
23 you would be a rubber stamp of words on a page. And that
24 is what Ms. Hamilton is asking you to do because that is
25 all they have brought forward when it would be so easy for

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1 them to bring proof beyond a reasonable doubt.

2 And yes, I have said that I think when there is in a
3 day and age of CSI and NCIS and forensic testing that any
4 number of things could have been brought before you both
5 left at that house or what they claim is there, or isn't
6 there, and the testing of the items that they did manage to
7 decide were worthy of bringing with them or photographing,
8 but it doesn't even take CSI.

9 Proof beyond a reasonable doubt in this particular
10 case doesn't require any of those things it requires.
11 That's all. If any of these three officers had managed to
12 take any type of audio/video or photographs of Mr. Kennedy
13 claiming the drugs or even the jacket where they claim the
14 drugs were found, or where the gun was found, your job
15 would be over.

16 If in addition to giving him a *Miranda Warning Form* to
17 sign, giving him a meaningful lawyer, because imagine if
18 you will, evidence that says Mr. Kennedy was told he could
19 have the right to a lawyer. He did and he still made these
20 statements. How easy that would be. Imagine if
21 Investigator Vaughn in an interview room full of office
22 supplies and everything said, you know what, Mr. Kennedy,
23 if you could just write that down and sign your name to it.
24 Or better yet, I'll write it down and while we're here, can
25 you just sign your name that that's your statement here

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1 today?

2 Beyond a reasonable doubt could be bought for a pen, a
3 piece of paper, and a cheap summary, and what you're left
4 with are words. Are those his words and if they aren't
5 were they voluntary or whether or not he actually said
6 those things, and they were corroborated in any way shape
7 or fashion you would have proof beyond a reasonable doubt.

8 Is that what we've come to? Have we some how
9 regressed that it's enough that law enforcement officers
10 just come in here and say, this is what we saw and this is
11 what other people said and do nothing to actually
12 investigate and document and corroborate what's going on,
13 and how easy would that be in this day and age?

14 And if the charges are this severe, if you're gonna
15 ask that we convict someone of being a dealer and a
16 trafficker and all those other things, isn't it worth a
17 pen, a piece of paper, or a cheat sheet?

18 Facts are not facts until you find them to be facts.
19 Just because law enforcement says it's true doesn't make it
20 so. You are the finders' of the facts. It is your role to
21 question the evidence. Its your role to deliberate over
22 what is the facts and what is the evidence. And I ask you
23 to scrutinize those things as you evaluate this and come to
24 the only sensible conclusion which is that the prosecution
25 failed short of their goal; that they should have gone a

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1 little bit further, taken a few more pictures, collected a
2 few more pieces of evidence, and in some way documented
3 beyond a reasonable doubt this is what Mr. Vaughn says he
4 said when he might or might not have been interrogating him
5 came out of Mr. Kennedy's mouth. Because if these aren't
6 his words then the entire house of cards crumbles.

7 And why would we not record defendant's statements?
8 Why? Maybe back then we didn't have the money but in this
9 day and age when we funded law enforcement with cameras
10 everywhere why not? Because if you had that you would have
11 proof beyond a reasonable doubt. Without it, without the
12 jacket, without the money, without the key, and all those
13 things they want you to believe exist but they didn't put
14 into evidence, their evidence falls short of tying these
15 drugs to Mr. Kennedy and for that reason I ask you to find
16 him not guilty.

17 CHARGE TO THE JURY:

18 THE COURT: All right, members of the jury panel, I
19 appreciate the attention you've given to the witnesses, the
20 attorneys, and myself during the trial and it's now my duty
21 to charge you the law which you are to apply to the facts
22 as you determine the facts to be in this case. It is your
23 duty to determine the facts and apply the law as I charge
24 it.

25 These indictments which you will have with you in the

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1 jury room, Madam Forelady, and members of the jury, are not
2 evidence. They are simply the paperwork by way of which a
3 criminal case is processed through our court system. They
4 will ultimately hold the unanimous verdict of the jury.
5 They set forth the charges against Mr. Kennedy. They are
6 not evidence.

7 The fact that Mr. Kennedy has been charged is of no
8 importance. He is presumed innocent of these charges.
9 Anyone charged with any offense in our system is presumed
10 innocent of that offense until the State can, if it can,
11 proves to a jury that person's guilt beyond a reasonable
12 doubt.

13 Now as to this particular case there are three
14 indictments. Each of these indictments is to be examined
15 separately. You must examine each as to the facts and the
16 law and apply to that indictment and return a verdict
17 separately as to each charge. The only exception to that
18 is the gun charge I'll call it, alleges that Mr. Kennedy
19 possessed a firearm during the commission of a violent
20 crime. They allege that violent crime was trafficking in
21 cocaine.

22 If you find him not guilty of cocaine trafficking,
23 then you can't find him guilty of having a gun while doing
24 it because you have found he didn't do it. So that's the
25 only exception that where one indictment has any relation

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1 to the other. As I was saying he has proved - he has
2 entered a plea of not guilty to these charges and this
3 places on the State the burden of proof, the burden of
4 proving his guilt beyond a reasonable doubt. Anyone
5 charged with an offense in our system is presumed innocent
6 of that charge until such time as a jury is convinced, by
7 the State's evidence, applying the law, that the person,
8 here Mr. Kennedy, is guilty beyond a reasonable doubt.

9 This presumption of innocence is a substantial right.
10 It's not a mere legal theory or a mere legal phrase; it is
11 a substantial right. The presumption of innocence attached
12 to Mr. Kennedy at the time of his arrest; it's remained
13 with him as his case has been processed through our
14 judicial court system. The presumption of innocence
15 remains in his favor at this very moment, and, remains with
16 him as you deliberate.

17 The presumption of innocence in Mr. Kennedy's favor
18 remains throughout your deliberations and is removed only
19 if and when you determine that the State has proven his
20 guilt beyond a reasonable doubt. As I said the presumption
21 of innocence is a substantial right; not a mere legal
22 theory or mere legal phrase. And I said that the State
23 must prove his guilt beyond a reasonable doubt.

24 Our courts have defined a reasonable doubt as the kind
25 of doubt that would cause a reasonable person to hesitate

CHARGE TO THE JURY:

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1 to act. Proof beyond a reasonable doubt is proof that
2 leaves you firmly convinced of someone's guilt. There are
3 very few things in our world that we can know with absolute
4 certainty and absolute certainty is not required in a case
5 such as this. If based on your consideration of the
6 evidence you are firmly convinced that Mr. Kennedy is
7 guilty of one or more of the charges, you would find him
8 so. If on the other hand you think there is a real
9 possibility that he is not guilty, you would give him the
10 benefit of that doubt and find him not guilty.

11 Suspicion however strong is not strong enough to - is
12 not enough to sustain a conviction. Mr. Kennedy is
13 entitled to any reasonable doubt you have as to any of the
14 elements or issues in this trial.

15 I remind you that I have certain duties to perform. I
16 am the trial judge in this case and I have the duty to
17 inform you and charge you on the law that you are to apply.
18 You must take accept and apply the law as I charge it even
19 if you think I charge the law in error or even if you think
20 the law should be different.

21 As I mentioned earlier do not hold against any
22 attorney the fact they may have objected during the trial.
23 That is their job so don't hold that against the attorney.
24 And as to any testimony that I ask you to disregard,
25 disregard it because it is not part of the record for your

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1 consideration. You as I said must take accept and apply
2 the law as I charge it.

3 You are not to infer from anything that I say or do or
4 anything I have said or done during this trial as
5 indicating an opinion of mine on the facts. Our law does
6 not allow a trial judge to formulate or express to a jury
7 any opinion on the facts. It is solely up to you as the
8 trial jury in this case to examine the facts - examine the
9 evidence and determine from that evidence the true facts.
10 Once you have determined the true facts and apply the law
11 your verdict will speak the truth.

12 In accessing the evidence you must judge the
13 credibility of the witnesses who have testified. As I will
14 get back to that in just a moment and tell you the things
15 you can consider when you are evaluating the evidence, I
16 first need to tell you that in cases such as this there are
17 two types of evidence that are generally presented. Direct
18 and circumstantial evidence.

19 Direct evidence is evidence that proves the existence
20 of a fact and does not require deduction. Circumstantial
21 evidence is proof of a chain of facts and circumstances
22 which indicate the existence of a fact. Crimes may be
23 proven by circumstantial evidence. Our law makes no
24 distinction between the weight or value to be given either
25 direct or circumstantial evidence. However to the extent

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1 the State relies on circumstantial evidence, all of the
2 circumstances must be consistent with each other and when
3 taken together point conclusively to the guilt of the
4 accused beyond a reasonable doubt.

5 If these circumstances merely portray a defendant's
6 behavior as suspicion - suspicious the State's proof has
7 failed. The State has proven - The State has the burden of
8 proving Mr. Kennedy beyond a reasonable doubt and this
9 burden rest on the State regardless of whether it depends
10 on direct evidence, circumstantial evidence or a
11 combination of the two.

12 In accessing the or looking at the evidence and
13 determing the true facts you may believe one witness as
14 opposed to several; several as opposed to one, you may
15 believe all, part, or none of a witnesses' testimony.

16 In analyzing the evidence use your common sense, your
17 sense of reason your sense of logic and your experiences in
18 life. As judges of the facts you necessarily must judge
19 the credibility, that is, the believability of the
20 witnesses who have testified. In accessing credibility you
21 use those things I've just chatted about, and use those
22 things that you find in your day to day life as being
23 indicative of truthfulness in an individual.

24 You also can use certain evaluators. How a witness
25 acts on the stand, are they hesitant or straight forward.

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1 Is their testimony consistent or inconsistent? Are they
2 hesitant or straight forward in answering questions? Look
3 at the evidence and determine whether or not the witness
4 had a real opportunity to see or hear the things they say
5 they saw or heard. And you can look at any bias or
6 prejudice a witness may have; that is, any reason to help
7 or hurt one side or the other.

8 All of these things you consider and determine the
9 true facts and as I said you then apply the law and you'll
10 be in a position to return a verdict that speaks the truth.

11 Ordinarily witnesses in cases such as this are not
12 allowed to give opinions. Usually witnesses can only
13 testify as to something they've observed with one of their
14 five senses. It's usually something someone's seen or
15 heard but it could be taste, touch, or smell. However
16 where an individual has certain experience and knowledge
17 and training in a certain area, that person can be
18 qualified by the court to testify as an expert. You look
19 at the expert testimony or the testimony of an expert with
20 the same lense that you look at every witness. Use those
21 same things that I've already talked about believing all or
22 part or none of a expert's testimony just like you can with
23 any other witness.

24 Judge the credibility of the expert witness. And in
25 addition as to your consideration of a non-expert witness

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1 as to an expert witness even though I found that expert
2 qualified you determine whether you believe that expert is
3 qualified to give the opinion they gave. And you also may
4 examine the reason that the expert gave for reaching the
5 opinion they gave.

6 The testimony of experts is allowed into evidence to
7 assist you, it is not binding on you. You can accept or
8 reject it use it for whatever purpose you believe it should
9 be used.

10 Now the fact that Mr. Kennedy exercised his
11 Constitutional right to remain silent may not be considered
12 by you in any fashion whatsoever. Anyone charged with an
13 offense in our system has an absolute right to remain
14 silent. The fact that he remained silent cannot be used
15 against him; cannot be discussed by you in the jury room
16 and cannot be factored into your consideration individually
17 of what verdict to return.

18 You're to draw no conclusion whatsoever from the fact
19 that he exercised his Constitutional right to not testify.
20 As I stated he need not prove his innocence. The State has
21 to prove his guilt beyond a reasonable doubt and that
22 burden remains whether the defendant testifies or not. You
23 cannot hold that against him; that being his exercise of
24 his Constitutional right.

25 Now there have been statements offered into evidence

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1 that allegedly were admitted or allegedly a statement made
2 by Mr. Kennedy. At some point earlier I made the decision
3 that those were admissible. However what I did as far as
4 letting the statements into evidence is not binding on you.
5 It is up to you to determine whether or not Mr. Kennedy
6 made those statements.

7 You must also determine whether or not he made them
8 freely voluntarily knowingly and of his own free will.
9 This means that before you could consider any statement
10 allegedly made by Mr. Kennedy you must find that the
11 statement was not caused by pressure, force, fear, threats,
12 coercion, intimidation, hope or promise of a leniency - -
13 of leniency or a reward of any kind. In determining
14 whether Mr. Kennedy's statement, if you determine he made
15 them at all, you should consider the characteristics of
16 him. Some of these factors that you may consider would
17 include the place and the length of any questioning; the
18 advice or lack thereof to Mr. Kennedy of his Constitutional
19 rights. These Constitutional rights that I've just
20 mentioned are the right to remain silent, the right that or
21 the -- Let me back up.

22 You can consider even though I let the statement in
23 whether it was made freely voluntarily knowingly and
24 intelligently. And in considering that you consider
25 whether or not he was advised of his Constitutional rights

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1 including but not limited to the right to remain silent,
2 that any statement he made could be used against him in a
3 court of law; the right to have an attorney present; that
4 if he could not afford an attorney one would be appointed
5 to represent him without cost and that he could stop making
6 a statement at any time.

7 You must carefully consider all the surrounding
8 circumstances before you may give any weight to an alleged
9 statement.

10 The State has the burden of proving beyond a
11 reasonable doubt that the alleged statement was made and
12 that if made that it was made voluntarily. You may
13 determine if you decide that it was given freely
14 voluntarily and knowingly you may give it such weight as
15 you consider proper. You may give it any weight that you
16 believe it should have; however, if you determine the
17 alleged statement was not a free and voluntary statement of
18 Mr. Kennedy you should give it no consideration whatsoever.

19 The first charge I'm gonna go over is the charge of
20 possessing crack cocaine with intent to distribute. Before
21 I charge you that I need to charge you, tell you about a
22 concept in law called a lesser included offense because as
23 to this offense and as this offense only there is what law
24 calls a lesser included offense. I can best explain that
25 to you by asking you to think about a set of stairs. If

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1 you recall - or not recall - but a set of stairs. Think
2 about a set of stairs. At the top the highest point, then
3 there is a step down which is a lesser point. The higher
4 point as to a charge is the charge which the State has made
5 against Mr. Kennedy; that is, possessing crack cocaine with
6 intent to distribute it.

7 If you determine the State has not proven that beyond
8 a reasonable doubt you may consider whether the State has
9 proven a lesser included charge, a step down, which would
10 be simple possession of crack cocaine.

11 Now as to the charge of possessing with intent to
12 distribute crack cocaine the State must prove beyond a
13 reasonable doubt that Mr. Kennedy possessed crack cocaine
14 with the intent to distribute it. At this time I'm going
15 to charge you regarding the term possession and what it
16 means in the context of all the charges or both of the
17 charges -- well of all three charges, use the word
18 possession so I'm gonna charge you what the word possession
19 means in all of the indictments.

20 To prove possession the State must prove beyond a
21 reasonable doubt that the defendant had both the power and
22 intent to control the disposition or use of the subject at
23 issue crack cocaine, later the cocaine - I mean the crack
24 cocaine, the cocaine, and the pistol. The State must prove
25 possession of those and I'll go over the elements of those

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1 others in just a moment. Right now I'm focusing one.
2 possession with intent to distribute crack cocaine.

3 So to prove possession the Statte must prove beyond a
4 reasonable doubt that Mr. Kennedy had both the power and
5 intent to control the disposition or use of the substance,
6 crack cocaine, as to that indictment.

7 Possession may be either actual or constructive.
8 Actual possession means that the crack cocaine was in the
9 actual physical custody of the defendant. Actual custody
10 of course means as to cocaine or the weapon that it was in
11 the actual physical custody of the defendant.

12 Constructive possession means that the defendant had
13 dominion and control or the right to exercise dominion or
14 control over the substance or the property where the
15 substance was found. Let me repeat that, I kind of garbled
16 that.

17 Constructive possession means that the defendant had
18 dominion and control or the right to exercise dominion or
19 control over either the crack cocaine as to the crack
20 cocaine charge or the property on which the crack cocaine
21 was found. As to all these charges mere presence at the
22 scene where the drugs or pistol were found is not enough to
23 prove possession.

24 Actual knowledge of the presence of the crack cocaine
25 is strong evidence that a defendant intended to control

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1 it's disposition or use. The defendant's knowledge and
2 possession may be inferred when a substance is found on the
3 property under the defendant's control. However this
4 inference is simply an evidentiary fact to be taken into
5 consideration by you along with the other evidence in the
6 case and be given any weight you decide it should have.

7 The State must prove beyond a reasonable doubt as to
8 this charge that Mr. Kennedy possessed the crack cocaine
9 and intended to distribute it.

10 I'm going to charge you what the terms intent and
11 distribute mean in regard to both this charge and the
12 possession of crack cocaine charge with intent to
13 distribute.

14 Distribute means to deliver other than by
15 administering or dispensing a drug. Intent may be shown by
16 acts and conducts of the defendant and other circumstances
17 from which you may naturally and reasonably infer intent.
18 In determining whether the defendant had the intent to
19 distribute the crack cocaine, you may consider the
20 circumstances surrounding the defendant's alleged
21 possession. You may consider the amount of the substance
22 allegedly possessed, the manner in which it was alleged
23 possessed, the place where it was allegedly possessed and
24 other factors which you consider to be important.

25 You must find that Mr. Kennedy did not intend to have

CHARGE TO THE JURY:

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1 the crack cocaine if you find he had it at all solely for
2 his own use. The State must prove as to the crack cocaine
3 charge that the substance at issue was in fact crack
4 cocaine. Our law provides that possession of one or more
5 grams of crack cocaine creates an inference that the
6 defendant possessed the crack cocaine with the intent to
7 distribute it.

8 This inference does not relieve the State from proving
9 beyond a reasonable doubt that a defendant had the intent
10 to distribute it. This inference is simply an evidentiary
11 fact to be taken into consideration by you along with other
12 evidence in the case and to be given any weight you decide
13 it should have.

14 The weight of any controlled substance for the purpose
15 of consideration as to the drug charge is the weight of
16 that substance in pure form or a mixture thereof and that
17 applies both to the crack cocaine charge and the cocaine
18 charge.

19 You may consider whether the State has proven beyond a
20 reasonable doubt that Mr. Kennedy is guilty - Let me back
21 up. If you - As I said earlier, if you find that the State
22 has failed to prove Mr. Kennedy guilty of possessing crack
23 cocaine with intent to distribute it, you may consider that
24 lesser, that one step down, charge and that's as to this
25 indictment only, and that would be you can consider whether

CHARGE TO THE JURY:

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1 or not the State has proven beyond a reasonable doubt that
2 he is guilty of simple possession of crack cocaine. Simple
3 possession means that he possessed it but did not intend to
4 distribute it.

5 He is also charged with trafficking in cocaine. The
6 State must prove beyond a reasonable doubt that Mr. Kennedy
7 was knowingly in actual or constructive possession, or
8 knowingly attempted to become in actual or constructive
9 possession of cocaine. Again, the State must prove the
10 substance at issue is cocaine and I've already charged you
11 as how you consider the issue of weight in these cases.

12 As to the trafficking charge the State must also prove
13 beyond a reasonable doubt that the amount of cocaine or any
14 mixture containing cocaine was ten grams or more.

15 The last charge is the charge of possession of a
16 weapon during the commission of a violent crime. Here the
17 State must prove beyond a reasonable doubt that Mr. Kennedy
18 was in possession of a firearm during the commission of a
19 violent crime or while attempting to commit a violent
20 crime.

21 I've already charged you earlier what the term
22 possession means. A pistol under South Carolina law is
23 considered a firearm. In order to find Mr. Kennedy guilty
24 of possession of a weapon during the commission of a
25 violent crime you, as I have already told you, must first

CHARGE TO THE JURY:

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1 find him guilty of committing a violent crime. Trafficking
2 in cocaine is a violent crime under the law of this State.

3 If you find the defendant not guilty of trafficking in
4 cocaine, you would have to find him not guilty of
5 possessing a pistol during the commission of a violent
6 crime.

7 In a moment I'll explain the verdict forms to you,
8 Madam Forelady. The verdict must be unanimous, all twelve
9 jurors must agree on the verdict. Once all twelve jurors
10 have agreed you enroll on the verdict form that I'll go
11 over with you in a moment the unanimous verdict.

12 Your verdict cannot be based on passion, prejudice,
13 sympathy, public opinion or matters outside the record.
14 While you're deliberating if you have any questions please
15 write them down and knock on the door; give it to the
16 bailiff, the bailiff will bring them to me and I will go
17 over the notes with the attorneys. I may be doing some
18 other work so I might have to delay a minute or two, but I
19 will reply as promptly as I possibly can.

20 If you want testimony replayed please let me know and
21 we can bring you back and here in open court replay any
22 testimony you want to hear. When the jury has reached a
23 unanimous verdict, Madam Forelady, knock on the door, tell
24 the bailiff, the bailiff will come and get me. Again, I
25 may be doing some other work but I will interrupt that as

CHARGE TO THE JURY:

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1 promptly as possible to get you back in here once you've
2 reached a verdict.

3 Ms. Wilson and Mr. Sanders, you will remain here when
4 the jury goes out in just a moment because you're the
5 alternates and we won't be needed any further.

6 When you first go into the jury room, do not start
7 deliberating. You should not deliberate and cannot
8 deliberate until you hear from me to do so. I have to go
9 over my charge with the attorneys, if I have made an error
10 I'll have to bring you back in and correct it. If not,
11 I'll send in the exhibits and the verdict forms and the
12 bailiff will tell you to start deliberating but do not
13 start deliberating until that time because if I have to
14 bring you back in I will do so in just a few moments.

15 Now the verdict forms the first one I will go over is
16 the first one I charged to you which was possession with
17 intent to distribute crack cocaine. There are two options
18 and one option - the first option really has two sub-
19 options. The order these are in is of no importance. I
20 have to put these verdicts in some order. I been doing
21 this for twenty years; I use the same order in all of them
22 so the fact that one is higher on the list than the other
23 is of no importance.

24 The verdict forms as to possession with intent to
25 distribute crack cocaine choice one is -- and this has to

CHARGE TO THE JURY:

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1 be your unanimous verdict -- we find the defendant guilty
2 of and there are two options, either possession with intent
3 to distribute crack cocaine which is the charge set forth
4 in the indictment; or, the second option - and you can only
5 choose one -- if you choose either an option one it says
6 simple possession of crack cocaine, Madam Forelady, you
7 would simply put an X or a check in front of one of those
8 if that is the jury's verdict.

9 The second option is, we find the defendant not
10 guilty. And if you find the State has as to that charge
11 failed to prove Mr. Kennedy's guilt beyond a reasonable
12 doubt you would use that line and simply put an X or check
13 in front of the words we find the defendant not guilty.

14 As to the possession -- I'm sorry, the trafficking
15 charge, there are two options, the first option and the
16 second neither one have a sub-option, if you find the
17 defendant guilty of trafficking in cocaine ten grams or
18 more but less than twenty-eight grams, you would put an X
19 or check in front of that line that says that. That's
20 under one.

21 If you find that the State has failed to prove Mr.
22 Kennedy guilty of trafficking in cocaine you would put an x
23 or check on the second line that says we find the defendant
24 not guilty. The last verdict form is that possession of a
25 weapon during the commission of a violent crime. And I've

CHARGE TO THE JURY:

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1 told you already that if you find Mr. Kennedy not guilty of
2 trafficking in cocaine, you would have to find him not
3 guilty of possessing a weapon during the commission of a
4 violent crime.

5 Two options here also. Use which ever one that the
6 jury determines to be the jury's unanimous verdict simply
7 put a check or X in front of that line. The first says we
8 find the defendant guilty of possession of a weapon during
9 the commission of a violent crime. The second option, and
10 you use this if the State has failed in your unanimous
11 opinion, to prove Mr. Kennedy guilty of possession of a
12 weapon during the commission of a violent crime that is we
13 find the defendant not guilty.

14 There is a place for you to date, Ms. Quinones's, and
15 the date is December 14, there is a place for the date.
16 Now I'm gonna let you go to the jury room but do not start
17 deliberating everybody but the alternates.

18 (JURY EXITS COURT TO DELIBERATE AT 03:41 PM.)

19 THE COURT: Just have a seat. I'll be with you in
20 just a minute.

21 Anything from the State?

22 SOLICITOR HAMILTON: Nothing from the State, your
23 Honor.

24 THE COURT: Anything from the Defense?

25 MS. LIPINSKI: Nothing from the Defense, your Honor.

1 THE COURT: If you'll check the verdict forms and the
2 exhibits and send them back and once that's ready we'll
3 tell the jury to start deliberating.

4 What about the alternates?

5 All right, call back tonight after seven. You can
6 certainly stay if you wish and see what the verdict is, but
7 you're certainly free to leave, Ms. Wilson and Mr. Sanders.

8 Do either of you have anything in the jury room that
9 you need the bailiff's to bring to you?

10 Okay. If you'll just tell the bailiff they will go in
11 and get or ask the Foreman to bring to the door whatever it
12 is you need and we'll get it to you before you leave.

13 Thank you for your help.

14 (ALTERNATES DISMISSED AT 03:42 PM.)

15 THE COURT: All right, we'll be at ease

16 (COURT AT EASE AT 03:42 PM.)

17 (WHEREUPON, COURT'S EXHIBIT NUMBER FOUR, IDENTIFIED
18 AND MARKED, RECEIVED INTO EVIDENCE.)

19 (WHEREUPON, COURT'S EXHIBIT NUMBER FIVE, IDENTIFIED
20 AND MARKED, RECEIVED INTO EVIDENCE.)

21 (COURT BACK IN SESSION AT 04:44 PM.)

22 THE COURT: You may take your seats. We received a
23 note from the jury that indicates they want to have -- I
24 think they ask -- I've given the note to the Court Reporter
25 -- I think it said we need the definition of possession of

1 a weapon during the commission of a violent crime.

2 What I'll do is just recharge them on that charge.

3 All right, bring the jury back in..

4 (JURY REENTERS COURTROOM AT 04:47 PM.)

5 THE COURT: Members of the jury panel, I've received
6 your note and I am going to recharge you the law on
7 possession of a weapon during the commission of a violent
8 crime. If you recall you have an indictment of course as I
9 told you earlier Mr. Kennedy is charged with possession of
10 a weapon during the commission of a violent crime.

11 The State must prove beyond a reasonable doubt that
12 Mr. Kennedy was in possession of a firearm during the
13 commission of a violent crime. I will charge you what the
14 term possession means. I charged it to you in regard to
15 all the charges but I'm gonna single it out since you are
16 asking at this point.

17 To prove possession the State must prove beyond a
18 reasonable doubt that the defendant, Mr. Kennedy, had both
19 the power and intent to control the disposition or use of
20 the weapon. Possession may be either actual or
21 constructive. Actual possession means that the weapon was
22 in the actual physical custody of Mr. Kennedy.
23 Constructive possession means that he had dominion and
24 control or the right to exercise dominion or control over
25 either the weapon itself or the property in which the

1 weapon is found.

2 Mere presence at the scene where a weapon is found is
3 not enough to prove possession. Actual knowledge of the
4 presence of a weapon is strong evidence of a defendant's
5 intent to control its disposition or use. A defendant's
6 knowledge and possession may be inferred when an article is
7 found on the property under that persons' control.

8 However this inference is simply an evidentiary fact
9 to be taken into consideration by you along with the other
10 evidence in the case and to be given such weight as you
11 decide it should have.

12 In addition to having to prove possession in order to
13 prove the commission - in order to prove possession of a
14 firearm during the commission of a violent crime in
15 addition to proving possession, the State must prove that
16 Mr. Kennedy possessed a firearm at the time and that it was
17 during the commission of a violent crime.

18 Trafficking in cocaine is a violent crime under South
19 Carolina law and in order to find Mr. Kennedy guilty of
20 possession of a weapon during the commission of a violent
21 crime you must first find him guilty of a violent crime.

22 That is you must first have found him guilty. I'm not
23 saying you have to but before you could consider this
24 indictment you would have had to have found him guilty of
25 trafficking in cocaine. If you find Mr. Kennedy not guilty

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1 of trafficking in cocaine, you must find him not guilty of
2 possession of a firearm during the commission of a violent
3 crime.

4 So I'll let you go back and deliberate.

5 (JURY EXITS COURTROOM TO CONTINUE DELIBERATIONS AT
6 04:51 PM.)

7 THE COURT: Anything from the State?

8 SOLICITOR HAMILTON: Nothing from the State, your
9 Honor.

10 THE COURT: Defense?

11 MS. LIPINSKI: I raise a concern and I don't think it
12 was certainly an deliberate by the Court, but I think the
13 way that it was bifurcated out it may have left the jury
14 with the impression that if you find him guilty of
15 trafficking I think they can find him guilty of trafficking
16 and find him not guilty of possession of a weapon during
17 the commission of a crime. And I think the way it's
18 relayed if the trafficking is it then the gun must follow
19 could dangerously create the impression that if they find
20 him guilty of the trafficking then --

21 THE COURT: I follow what you're saying but I charged
22 them exactly with the exception of recharging the law on
23 possession is exactly what I charged them earlier. And I
24 charged them - I'm looking at my charge and I presume I
25 pretty much read this or close to it.

1 "The State must prove beyond a reasonable doubt that
2 the defendant was in possession of a firearm during the
3 commission of a violent crime."

4 I don't know how that could be interpreted as saying
5 that they have to necessarily find him guilty of
6 trafficking in cocaine.

7 MS. LIPINSKI: I just think that --

8 THE COURT: Well you're on -- Anything else because we
9 want to have a complete record, but I'm comfortable with
10 the charge as I gave it.

11 MS. LIPINSKI: And the defendant would just ask that
12 it be made clear that they can find him guilty of
13 trafficking and still find him not guilty of the possession
14 of a weapon during the commission of a violent crime.

15 THE COURT: Can you say that again?

16 MS. LIPINSKI: You instructed them before you can
17 consider the possession of a violent crime charge you have
18 to consider the trafficking but I think it's important for
19 the jury to know that they can find him guilty of the
20 trafficking and still conclude that he's not guilty of the
21 possession of a weapon during the commission of a violent
22 crime. And I just think that when you were going over the
23 verdict forms the last time that possibility to me seemed
24 more clear than when you just look at the charge of the
25 definition of the law.

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1 THE COURT: All right. Well, they ask for a
2 definition of possession of a weapon during the commission
3 of a violent crime and I believe I gave them that, so,
4 you're on the record. Thank you.

5 MS. LIPINSKI: Thank you.

6 THE COURT: We'll be at ease.

7 (COURT AT EASE AT 04:54 PM.)

8 (WHEREUPON, COURT'S EXHIBIT NUMBER SIX, IDENTIFIED AND
9 MARKED, RECEIVED INTO EVIDENCE.)

10 (COURT BACK IN SESSION AT 06:00 PM.)

11 THE COURT: Thank you, you may take your seats.

12 The jury has requested to hear the testimony of
13 Officer Clevenger regarding the pistol. The court reporter
14 has done her best to try to isolate that; as far as I
15 understand the entire testimony is about forty-five minutes
16 so we will bring the jury in and play hopefully what they -
17 the portion they want.

18 Anything before the jury comes in?

19 SOLICITOR HAMILTON: Nothing from the State, your
20 Honor.

21 MS. LIPINSKI: Nothing from the Defense, your Honor.

22 THE COURT: Bring in the jury.

23 MADAM CLERK: Just the gun, Judge?

24 THE COURT: We're right.

25 (JURY REENTERS THE COURTROOM 06:00 PM.)

1 THE COURT: All right, Madam Forelady, I've received a
2 note that I interpret to mean that you want to hear - the
3 jury, not you personally, well you personally also, but you
4 want to hear the matter of any confession by Mr. Kennedy
5 regarding the gun.

6 All right, the whole testimony is about forty-five
7 minutes so we're not gonna play all of it. The court
8 reporter has done her best to isolate that and we'll play
9 it for you at this time.

10 (OFFICER DAVID CLEVINGER TESTIMONY REPLAYED/
11 REPUBLISHED TO THE JURY AT 06:02 PM.)

12 THE COURT: That's - Am I correct, is that what you
13 wanted to hear? They are nodding in the affirmative so
14 I'll let you go back to deliberating. If you - If the jury
15 wants us to order a meal it will be pizza if we do, just
16 send out a note and we'll order it. It takes about an hour
17 to get here.

18 (JURY EXITS COURTROOM TO CONTINUE DELIBERATIONS AT
19 06:31 PM.)

20 THE COURT: Anything from the State?

21 SOLICITOR HAMILTON: Nothing from the State.

22 THE COURT: Anything from the Defense?

23 MS. LIPINSKI: Nothing from the Defense.

24 THE COURT: All right, we'll be at ease again.

25 (COURT AT EASE AT 06:32 PM.)

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1 ((WHEREUPON, COURT'S EXHIBIT NUMBER SEVEN, IDENTIFIED
2 AND MARKED, RECEIVED INTO EVIDENCE.))

3 (WHEREUPON, COURT'S EXHIBIT NUMBER EIGHT, IDENTIFIED
4 AND MARKED, RECEIVED INTO EVIDENCE.))

5 (COURT BACK IN SESSION AT 07:00 PM.)

6 THE COURT: Have a seat. Get Mr. Kennedy in. I
7 understand from the jury we have a verdict, or verdicts.

8 (DEFENDANT, DENNIS KENNEDY, REENTERS COURTROOM.)

9 THE COURT: All right, Mr. Kennedy is present. We've
10 received a note from the jury that they have reached a
11 verdict and we will send for them in just a moment. I want
12 to tell everyone that's present that the Court will not
13 tolerate any outburst. I don't know what the verdict is
14 but if anyone is unhappy with the verdict, other than Mr.
15 Kennedy, of course he can't leave, but if you feel like you
16 cannot be comfortable whatever the verdict may be, I
17 suggest you leave now because anyone causes any scene or
18 outburst they will be immediately taken into custody and
19 put in jail for whatever time I determine appropriate.
20 So if you don't think you can handle what the verdict will
21 be I suggest you leave now.

22 Bring in the jury.

23 (JURY REENTERS COURTROOM AT 07:03 PM.)

24 THE COURT: Madam Forelady, I understand the jury has
25 reached verdicts in these three cases, or cases against Mr.

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1 Kennedy.

2 MADAM FORELADY: Yes, your Honor.

3 THE COURT: Hand it up to the bailiff and he'll hand
4 it up to me.

5 (VERDICT RECEIVED UP BY THE COURT.)

6 THE COURT: Madam Clerk.

7 MADAM CLERK: Indictment 2016-GS-46-1367 the State
8 versus Dennis Demario O'briand Kennedy we find the
9 defendant guilty of trafficking in cocaine ten grams or
10 more but less than twenty-eight grams, signed by the
11 Foreperson dated today's date.

12 Indictment 2016-GS-46-1369 the State versus Dennis
13 Demario Brian Kennedy we find the defendant guilty of
14 possession with intent to distribute crack cocaine, signed
15 by the Foreperson dated today's date.

16 Indictment 2016_GS-46-1370 the State versus Dennis
17 Demario Brian Kennedy we find the defendant guilty of
18 possession of a weapon during the commission of a violent
19 crime, signed by the Foreperson dated today's date.

20 Ladies and gentlemen of the jury, if that be your
21 verdict so say you all by raising your right hand.

22 Let the record show all jurors affirmed the verdict.

23 (ALL JURORS AFFIRMED THE VERDICT.)

24 THE COURT: All right. Anything from the State before
25 the jury's dismissed?

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1 SOLICITOR HAMILTON: Nothing from the State, your
2 Honor.

3 THE COURT: Anything from the Defense?

4 MS. LIPINSKI: No, your Honor.

5 THE COURT: All right. Members of the jury panel,
6 you're through for the week. We appreciate your hard work
7 and your patience with me and this finishes your work for
8 the week. We have a few things to take up and then I'll go
9 through the sentencing of Mr. Kennedy for these offenses.

10 I do not require the jury to stay for that because
11 you've been here long enough and done your work. But if
12 you wish to see what happens next as far as I'll go over
13 with Mr. Kennedy and his attorney and the State if he has
14 any prior record, any other circumstances that weigh into
15 sentencing. If you want to see that part the bailiff's
16 will let you come in and we'll clear the back rows on my
17 left side of the courtroom and you can come back in. You
18 don't have to but if you want to you can come back in and
19 see the sentencing proceed. You're dismissed. Thank you.

20 Madam Forelady, the Clerk will show you, we do have to
21 get your signature on these indictments.

22 (JURY DISMISSED AT 07:06 PM.)

23 THE COURT: Anything from the State at this point?

24 Let's wait a minute to see if any of the juror's want
25 to come in and see.

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1 But is there anything as far as verdicts?

2 SOLICITOR HAMILTON: Nothing as far as verdicts, your
3 Honor, no.

4 THE COURT: All right.

5 MS. LIPINSKI: Your Honor, at this time the defendant
6 makes a motion to set aside the verdict and ask the court
7 for a new trial finding that the evidence presented to the
8 jury did not support the verdicts found by this particular
9 jury.

10 And renewing our pretrial motions that depriving the
11 defendant of the key evidence as it relates to the basis of
12 the search warrant undermine both his Brady violation
13 rights and his right under the Fifth, Sixth, and Fourteenth
14 Amendment and the South Carolina Constitution that he was
15 kind of forced into this process when he did not
16 necessarily want to be and as a result of that -- delayed
17 that information -- it compromised his pretrial rights.

18 Also finding that there were material defects in the
19 affidavit of the search warrant that it lacked probable
20 cause and as a result of that it should not have been
21 issued for [REDACTED] Street.

22 Also renewing our motion that the search warrant for
23 [REDACTED] Street did not name Mr. Kennedy and there was
24 not immediate evidence to tie him to the gun; that the
25 search of Mr. Kennedy incident to arrest also violated his

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1 Fourth Amendment rights of search and seizure pursuant to
2 that, and based on all those grounds including the
3 objections we made pretrial and during the trial we would
4 move to set aside verdicts and ask the Court for a new
5 trial.

6 THE COURT: Well as I said at the directed verdict
7 stage is the evidence I felt, substantial circumstantial
8 and direct evidence, was such that the jury could reach the
9 verdicts that they reached so I deny those motions.

10 You made them sort of a general motion as a whole that
11 incorporated all your earlier motions so I deny your motion
12 for a new trial.

13 All right. You want to bring Mr. Kennedy around for
14 sentencing or he can remain right there.

15 All right, let me hear from the State. I understand
16 he does have some prior record and if you'll tell me about
17 that and any other circumstances that go into sentencing.

18 SOLICITOR HAMILTON: Okay. Yes, your Honor. I do
19 want to make for the record as Court's Exhibits, I have
20 certified convictions on the defendant for his two priors
21 allowing us to proceed which we believe will allow us to
22 have proceeded on the possession with intent to distribute
23 third offense. That prior being a 2011 conviction for
24 possession with intent to distribute.

25 MS. LIPINSKI: The Court's indulgence, I'm sorry.

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1 He's asking me some questions. I've been handed
2 sentencing sheets, it's hard to -- I'm not trying to --

3 THE COURT: All right. Let's wait. I'm gonna let Ms.
4 Lipinski discuss with Mr. Kennedy anything he --

5 MS. LIPINSKI: I just -- I apologize.

6 THE COURT: That's fine. That's what your -- he's got a
7 right to do that and that's your job.

8 (PAUSE.)

9 MS. LIPINSKI: Thank you for your patience and
10 indulgence, your Honor.

11 THE COURT: All right, go ahead, Ms. Hamilton. You
12 were saying that the Indictment is for trafficking and
13 based on CDR Code first offense?

14 SOLICITOR HAMILTON: Yes, your Honor.

15 THE COURT: And the possession with intent to
16 distribute cocaine -- I mean crack. That is a first
17 offense?

18 SOLICITOR HAMILTON: That is a third offense, your
19 Honor.

20 THE COURT: Third offense.

21 SOLICITOR HAMILTON: And we just wanted to make as
22 Court's Exhibit the Certified and True Certified
23 Convictions -- prior convictions on the defendant. This is
24 the sentencing sheet and the indictments. The first one is
25 from 2011, possession with intent to distribute marijuana

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1 first offense and that is Indictment 2011-GS-46-0-0-1-5-5.

2 And the second conviction that we have a Certified
3 Conviction on is Indictment Number 2011-GS-46-0-3-5-7-9.
4 That's also for a possession with intent to distribute
5 marijuana, and I believe that is also -- that that is a
6 second offense.

7 So the State just wanted to make these Court Exhibits
8 for the purposes of he has possession with intent to
9 distribute.

10 (WHEREUPON, COURT'S EXHIBITS NUMBER NINE AND TEN,
11 IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

12 THE COURT: And --

13 SOLICITOR HAMILTON: And he does have a prior record,
14 your Honor.

15 THE COURT: I was gonna ask does he have anything
16 other than those offenses?

17 SOLICITOR HAMILTON: He does. He has a resisting
18 arrest non-violent. He has a proximity or possession with
19 the intent to distribute marijuana within proximity of a
20 school. Driving under suspension. All of those from 2011.

21 And a 2010 possession of marijuana first.

22 I do want to just put on the record that as a result
23 of this trial that the State is agreeing to dismiss the
24 charges, he has two proximities, possession with intent to
25 distribute within proximity of a school or park. We are

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1 going to be dismissing those at the conclusion of this
2 trial in addition to a possession of a stolen firearm.

3 THE COURT: Ms. Lipinski.

4 MS. LIPINSKI: Your Honor, I think we do need to
5 approach. I think there is a error on --

6 THE COURT: Okay.

7 (BENCH CONFERENCE OFF THE RECORD.)

8 THE COURT: All right, I'll be glad now to hear from
9 you, Ms. Lipinski, and then from Mr. Kennedy himself.

10 Oh, incidentally, has he served any time already? I
11 know he served at least two days.

12 MS. LIPINSKI: He did quite a bit of time, your Honor,
13 before he made bond.

14 The Court's indulgence one moment, your Honor.

15 THE COURT: Yes, ma'am.

16 (PAUSE.)

17 MS. LIPINSKI: He made bond on June 8th and he was
18 arrested on January 7th. I don't want to draw the Court's
19 because I appear to be texting on my cell phone. There's
20 an app for that now in terms of day calculation.

21 THE COURT: That's all right. No.

22 MS. LIPINSKI: I just wanted -- According to their web
23 site it's a hundred and fifty-four days, your Honor.

24 THE COURT: All right. Now, I'll be glad to hear
25 anything in mitigation on behalf of Mr. Kennedy and then

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1 from Mr. Kennedy and then -- I don't know whether there's
2 family members here but I'll be glad to hear from them also
3 if anyone wishes to speak on his behalf.

4 MS. LIPINSKI: May it please the Court, your Honor.

5 When you heard his record, I will note that he was a
6 law abiding citizen for a pretty extended period of time
7 even into adulthood. He then got into some trouble in 2011
8 obviously. The first charge -- set of charges that you
9 heard of he was sentenced to probation and then on the
10 second set of charges he was only sentenced to two years
11 and so he's even been out for some period of time before he
12 just I think admittedly he did struggle trying to support
13 his family and those type of things.

14 I will say that whenever I met with him he -- He does
15 have three young children I believe under the age of ten.
16 His mother who has been a constant source of support for
17 him will tell you that he does homework with them every
18 night; that he takes care of them while their mother goes
19 to work, that he tries very hard to provide with his
20 family, to be there for his family and that's kind of been
21 an over riding concern for him.

22 As I stated, you know, this was not the situation in
23 terms of I had hope to be with Mr. Kennedy. We had some
24 serious concerns about the search warrant and unfortunately
25 just because the kind of law exist, you know this was kind

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1 of the only mechanism by which to challenge them and that
2 is how he ended up here.

3 And then as you well know if he kind of pleads at any
4 part after that and he waives those rights and that has
5 just been something that really has been something he's
6 just had some strong personal feelings about. I had
7 several conversations with him that even if he doesn't
8 agree with the law it is what it is and I don't know that
9 the Court is in a place to make or change the law, but you
10 know that's not to say that these are how cases like
11 Miranda v. Arizona get decided.

12 But nonetheless in terms of meeting with me and I met
13 with him after hours and those kind of things, while we've
14 had some passionate legal debates he ultimately always
15 remained very respectful to me; very willing to discuss
16 things with me and at all times concerned about his family
17 and being away from his family.

18 As the Court knows there was a plea offer made to him.
19 Unfortunately he can't have it both ways and the only way
20 to kind of challenge the search warrant is to get into a
21 trial posture. But I would ask the Court to take into
22 consideration that the State at some point is satisfied
23 with a sentence below that narrow window of ten years.

24 I think that's the floor for the charges that he's
25 been convicted of at trial and I would ask the Court to

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1 stay close to that number. I understand the Court has now
2 heard some other things but despite all the things that
3 you've heard in the trial and heard even more in pretrial
4 testimony, a SWAT Team and a no-knock warrant, and this
5 allegation that he had prior convictions for violence
6 against law enforcement turns out that he had a prior
7 resisting (a). When I talked to him about that he stated
8 that he ran an officer fell in the chase and he didn't
9 cause that injury and that's why they reduced it.

10 There's no indication the SWAT Team covers that Mr.
11 Kennedy was at any time combative with law enforcement;
12 went for that gun, in any way threatened law enforcement,
13 was really anything other than cooperative with them, and
14 so, it wasn't a situation where despite and I understand
15 law enforcement has to be proactive and protect everyone's
16 safety, there's no indication of that type of behavior from
17 Mr. Kennedy and I would just ask the Court to take that
18 into consideration in sentencing him in a lenient fashion.

19 As the Court is aware with these facts and
20 circumstances there's very limited if any parole
21 eligibility for these offenses. He's gonna do a
22 substantial amount of time. Taking that in consideration
23 in consideration of the context of other type cases we see
24 even a ten year sentence his children are gonna be grown;
25 they're gonna lose their father, their mother is gonna

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1 loose his emotional support, family support. His mother
2 who was here for a bond hearing and actually I think spoke
3 with the solicitor at that time and everybody hopefully has
4 a mother like her who is so supportive, you know, expressed
5 to me today the concern that she's not gonna be alive when
6 Mr. Kennedy gets out of jail even if he is sentenced to the
7 lower end of that range.

8 So he does have family out there who I think struggled
9 to try and get him back on the right track and
10 unfortunately those opportunities that avail themselves so
11 I would just ask the Court to take that into consideration
12 and try to impose a sentence of a lower range that is
13 available to the Court based on those factors.

14 I don't know if Mr. Kennedy would like to speak. I
15 ask him briefly and I don't know if the family would like
16 to speak or just have them come up.

17 THE COURT: Okay. Mr. Kennedy, anything you want to
18 say?

19 MR. KENNEDY: Yes, your Honor. I just want to
20 apologize to my family.

21 MS. LIPINSKI: And, your Honor, she's been here the
22 entire time. Very supportive and very concerned about
23 their children and I know she would just ask the Court to
24 also give what mercy you can at this time, your Honor.

25 Thank you, your Honor.

SENTENCING:

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1 THE COURT: Well, I appreciate your remarks and I
2 understand the national concern about individuals that find
3 themselves in Mr. Kennedy's position of having this kind of
4 drug activity and the fact that numerous people are being
5 incarcerated, some for a very lengthy time and these carry
6 lengthily sentences.

7 I have to look at this through the lens of the fact
8 that he's got several priors; three priors. This is a
9 third offense on the cocaine charge. The crack charge, I'm
10 sorry. Possession with intent to distribute crack. And
11 drugs and weapons are a dangerous combination.

12 Mr. Kennedy I'm giving you credit for a hundred and
13 fifty-four days on your sentence. These are all to run
14 concurrent. They are for five years on the pistol. Ten
15 years on the cocaine trafficking and fifteen years on the
16 possession of crack cocaine with intent to distribute third
17 offense. Thank you.

18 That concludes this -- today's -- this concludes the
19 trial and we're through for the day. Thank you.

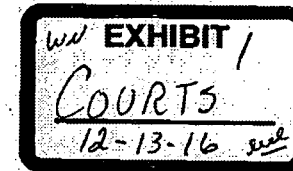
20 (COURT IN RECESS AT 07:24 PM.)

21 (END OF TRANSCRIPT OF RECORD
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23
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25

STATE OF SOUTH CAROLINA

County of York

SEARCH WARRANT

Date 1/1/16Officer D. H. Clevenger

STATE OF SOUTH CAROLINA

SEARCH WARRANT

Form Approved by
S.C. Attorney General
Section 17-13-160
March 16, 1978

COUNTY OF York

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY
OF York

it appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

64 Reynolds St. Rock Hill, SC 29730

It's the first house on the left from the intersection of Hagins St. and Reynolds St. traveling from Black St.

It is an off white house with cement steps and a black hand rail on the steps. 64 is clearly marked on the front of the house.

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

Cocaine, cocaine paraphernalia, currency, records, receipts, and any other items relating to the storing, packaging, shipping, receiving, distribution, manufacturing cocaine and possession of cocaine, firearms, including computer drives, disk, cell phones, cell phone data to include, text messages, e-mails, and any other information contained within the cellular phone.

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

Issuing Authority

within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

York S. C.

January 1 20 11

[Signature]
Signature of Judge

(L. S.)

RETURN

I received the attached Search Warrant January 7, 20 16, and have executed it as follows:
 On January 7, 20 16 at 3:30 o'clock P M, I searched
 (the person) described in the warrant and (the premises)

I left a copy of the warrant with Dennis Kennedy
 Name of person searched or "at the place of search" with.
 Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1) S&W MP (Serial #3859)

2) crack

3) cocaine

4) bag containing items 2 & 3

5) digital scale

6) leather back LG smartphone

7) house key

8) holster containing magazine

9) \$394.00 in US currency

This inventory was made in the presence of Harrelson
 AND Clevenger

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this 12th

day of January, 20 16

[Signature]
 Signature of Judge

(L. S.)

[Signature]
 (Signature of Officer Executing Warrant)

STATE OF SOUTH CAROLINA

COUNTY OF York

AFFIDAVIT

Personally appeared before me, one D. H. Clevenger
 who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Cocaine, cocaine paraphernalia, currency, records, receipts, and any other items relating to the storing, packaging, shipping, receiving, distribution, manufacturing cocaine and possession of cocaine, firearms, including computer drives, disk, cell phones, cell phone data to include, text messages, e-mails, and any other information contained within the cellular phone.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

64 Reynolds St. Rock Hill, SC 29730

It's the first house on the left from the intersection of Hagins St. and Reynolds St. traveling from Black St.

It is an off white house with cement steps and a black hand rail on the steps. 64 is clearly marked on the front of the house.

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

The affiant, D. H. Clevenger, who is a certified law enforcement officer assigned to the York County Multijurisdictional Drug Unit (YCMDEU) and has several years experience to include narcotics investigations, states the following facts to support probable cause to search 64 Reynolds St. Rock Hill, SC. The affiant received information from a confidential informant (CI) that Dennis Kennedy is selling cocaine from the residence. Within the past 72 hours, the affiant utilizing the same CI was able to make a controlled cocaine purchase from Dennis Kennedy while at the residence of 64 Reynolds St. Rock Hill, SC. The CI was given government currency and fitted with a body wire. The CI and the CI's vehicle was searched with no contraband being found. Surveillance officers followed the CI to and from the residence and did recover the cocaine after the purchase. The officer did monitor the transaction via the body wires. The CI identified Kennedy by name and by a SCDMV photo. The CI communicated with Kennedy via cell phones. Based on the affiant's training and experience in narcotics investigations, it is common practice for drug dealers to use and store information on cell phones such as text messages (sent and received), e-mails (sent and received) and all incoming and outgoing calls. The CI provided information that Kennedy regularly carries a firearm. A firearm is visible in a video of the purchase. Kennedy's criminal history has convictions for violence against police. For these reasons, the affiant is requesting a no knock warrant.

Sworn to and Subscribed before me

this 15th day of January, 20 11
[Signature] (L.S.)
 Signature of Judge

D.H. Clevenger
 Affiant

Address 1675-2A York Hwy.

York, SC 29745

Phone 803-628-3059

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	Indictment #2016-GS46-1366, 67, 68, 69, 70, 71
	)	
V.	)	Memorandum in Support of
	)	Defendant's Motion to Compel and Suppress
Dennis Demario Kennedy	)	
Defendant.	)	

This memorandum is in support of the Defendant's Motion to Compel Production of Brady Material, To Reveal the Identity of the Confidential Informant and to Suppress the Evidence seized against him. The memorandum is predicated on premise that failure to produce the law enforcement records, to include but not be limited to, the report, tapes and confidential informant records of the predicate buy, which provide the foundation for the search warrant violate the Defendant's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article 1, section 14, of the South Carolina Constitution. *See Roviato v. United States*, 353 U.S. 53 (1957); *see also State v. Diamond*, 280 S.C. 296, 312 S.E.2d 550 (1984); *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972); *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); and Rule 5, SCRCrimP.

SEARCH WARRANT

The affidavit in the search warrant provides as the probable cause the following:

"The affiant received information from a confidential informant (CI) that Dennis Kennedy is selling cocaine from the residence. Within the past 72 hours, the affiant utilizing the same CI wa(s) able to make a controlled cocaine purchase from Dennis Kennedy while at the residence of [REDACTED] Rock Hill, S.C. The CI was given government currency and fitted with a body wire. The CI and CI's vehicle was searched with no contraband being found. Surveillance officers followed the CI to and from the residence and di recover the cocaine after the purchase. The officer did monitor the transaction via the body wires. The CI identified Kennedy by name and by a SCDMV photo. The CI communicated with the Kennedy via cell phones. Based on the affiant's training and experience in narcotics investigations, it is common practice for drug dealers to use and store information on cell phones such as text messages (sent and received), emails (sent and received) and all incoming and outgoing calls. The CI provided

information that Kennedy regularly carries a firearm. A firearm is visible in a video of the purchase. Kennedy's criminal history has convictions for violence against the police. For these reason(s), the affiant is requesting a no knock warrant."

I. *DISCLOSURE OF EVIDENCE IS REQUIRED

The reliability of the confidential informant lies solely and squarely on the pretense that the officers were able to confirm what the confidential informant relayed to them regarding the buy and/or the firearm by reviewing the audio and video tape. *As a result, depriving the Defendant of his opportunity to inspect and examine the videotape deprives him completely of any ability to investigate the veracity of the allegations made by the affiant, D.H. Clevenger to the magistrate. If any of the following factual allegations proved to be false, then the probable cause for the search warrant would be eviscerated:

- 1) That the buy happened within 72 hours prior to the search warrant being sought.
- 2) That cocaine purchased happened at [REDACTED].
- 3) That cocaine was purchased from Dennis Kennedy.
- 4) That the CI was able to identify Kennedy by name and by a SCDMV photo.
- 5) That cocaine was purchased.
- 6) That a firearm is visible.

The Defendant's sole ability to investigate these claims lies within his opportunity to review the law enforcement records for the predicate buy include and specifically reviewing the audio and video tapes of the buy and/or revealing the identity of the confidential informant.

*Prior to trial, the Sixteenth Circuit Solicitor's Office extended to the Defendant the opportunity to plead guilty in exchange for a negotiated sentence of Seven (7) Years on all charges. In order to make a fully informed decision of whether to accept the deal, the Defendant made repeated requests for access to the records of the undercover buy including but not limited to the General Sessions Case File or Incident Report, the Audio Tapes, the Video Tapes or in the alternative even limited to still shots from said video tapes to the extent that would corroborate the purchase of narcotics and a firearm was visible in a video of the purchase as alleged in the search warrant. At all times, the Sixteenth Circuit maintained that because the Defendant was

not charged with the undercover buy referenced in the search warrant, no records, tapes, or still shots of the buy would be turned over to the Defendant.

On November 3, 2016, prior to the expiration of the plea offer, the Defendant requested a discovery hearing in order to request the Court compel the production of the records, tapes, or still shots of the undercover buy. During the hearing, Assistant Solicitor Marina Hamilton represented to the Court that the Magistrate had cross examined the affiant and had reviewed the videotape of the undercover buy. The Honorable John C. Hayes conducted the hearing, took the matter under advisement and issued an Order denying production on November 8, 2016. (See Attachment A). On November 17, 2016, the Defendant filed a Motion to Reconsider and to Request that the records be submitted under seal to preserve the record on appeal. (See Attachment B).

Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. *See State v. Bryant*, 307 S.C. 458, 415 S.E.2d 806 (1992). The due process rights recognized by *Brady* apply not only to exculpatory evidence, but also to impeachment evidence. *See United States v. Bagley*, 473 U.S. 667 (1985). Notably, “[e]ven absent a request, prosecutors have a constitutional duty to give the defendant exculpatory evidence which would raise a reasonable doubt about his guilt.” *State v. Jackson*, 302 S.C. 313, 396 S.E.2d 101 (1990) (citing *United States v. Agurs*, 427 U.S. 97 (1976)).

In *Bagley*, the United States Supreme Court reiterated the importance of specific requests for undisclosed *Brady* material: “When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.” *Id.* at 681. *Brady* itself involved the State’s failure to disclose evidence that had been specifically requested by the defense, and the Court noted that the nondisclosure was constitutional error if the evidence would “tend to exculpate” the defendant. *Brady*, 373 U.S. at 88. Moreover, there has been no representation by the prosecutor that the State has reviewed the tapes to ascertain whether or not they may contain *Brady* material.

II. FAILURE TO OBTAIN ACCESS TO VIDEO RECORDS OF THE UNDERCOVER BUY VIOLATED THE DEFENDANT’S ABILITY TO FREELY INTELLIGENTLY ENGAGE IN PLEA NEGOTIATIONS.

In order to ascertain whether the Defendant should have accepted the plea offer in this

case, the Defendant should have been granted access to any Brady material, which included his ability to investigate whether there were any materially false allegations contained within the search warrant which lead to drugs being found on his person. In Rivers v. Strickland, the S.C. Supreme Court recognized the general rule that in order for a guilty plea to be made voluntarily, understandingly, and intelligently, he must also enter a waiver of any defenses, including any claims of a violation of his constitutional rights. 264 S.C. 121, 213 S.E.2d 97, 98 (1975). The plea waiver currently utilized in the Sixteenth Circuit contains a specific notation that the Defendant understands he is waiving any defenses he may have, including the right to challenge any evidence which was seized against him or any statements he may have made. In order to make this knowing and intelligent waiver, one must presume he has had access to the information which would allow him to evaluate whether he has any such defenses or the ability or capacity to challenge any of the evidence against him by challenging the validity of any search warrants. See Hyman v. State, 397 S.C. 35, 44, 11 () (citing United States v. Ruiz, 536 U.S. 622, 628, 122 S. Ct. 2450 153 L. Ed. 2d 586 (2002) (quoting Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970))).

As a result, the Defendant in the instant case, should have been granted access, even if limited or subject to some kind of protective order, in order to knowingly engage in plea negotiations and freely waive any defenses he might have. Without access to the information sought, the Defendant was forced to negotiate blind and on faith and without the benefit of effective counsel who could help him evaluate the evidence against him and the potential to raise any defenses at trial, including the ability to challenge whether any false allegations were contained within the search warrant which may have led to the suppression of the evidence against him.

III. *DEFENDANT IS BEING DENIED HIS RIGHT TO CHALLENGE MISTATEMENTS IN A SEARCH WARRANT AFFADIVT.

A defendant has the right to challenge any inaccuracy, misstatement, falsity, or even misrepresentation in a search warrant as undermining the probable cause therein, such that the evidence against him should be suppressed as illegally obtained. State v. Jones, 342 S.C. 121, 126, 536 S.E. 2d 675, 678 (S.C. 2000) citing Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) State v. Sachs, 264 S.C. 541 216 S.E.2d 501 (1975). In Jones, the

Supreme Court evaluated whether an officer's knowing misstatement that an undercover agent versus operative had made a recent purchase of narcotics from the Defendant fatally undermined the probable cause contained within the search warrant. *Id.* The officer did so in order to avoid scrutiny about the veracity and reliability of the undercover operative. *Id.* The magistrate even testified that he would have questioned the affiant further had he known that it was not an undercover officer and instead a lay confidential informant. *Id.* Based on the lack of information establishing the informant's veracity, there was no probable cause. *Id.*

In the case at bar, the tape is the only thing establishing the informant veracity and therefore, the Defendant should be granted access to the tape to establish whether the officer was being truthful in representing that he was able to corroborate the facts relayed but the otherwise unverified confidential informant and whether the gun was truly visible on the videotape.

IV. * FALSE STATEMENTS WITHIN A SEARCH WARRANT UNDERMINE PROBABLE CAUSE.

The Defendant should be permitted the opportunity to inspect and examine law enforcement records that substantiate the probable cause in the search warrant in order to ascertain whether the statements are true or contain any inaccuracies. A Defendant has the right to challenge false statements contained within a search warrant affidavit under the Fourth and Fourteenth Amendments to the United States Constitution. See *State v. Jones*, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000) (citing *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)). Most recently in *State v. Robinson*, the Defendant, similar to the case at bar, was only tried for trafficking in cocaine found pursuant to a search warrant which was premised on three under cover buys but attacked the underlying factual allegations contained within the probable cause affidavit for being materially false. *State v. Robinson*, 415 S.C. 600, 785 S.E. 2d 355 (2016). In *Robinson*, the search warrant affidavit claimed that the confidential informant ("CI") had made the buys, but during the *Franks*, the affiant admitted that the CI had not made the buys, he had merely taken another operative to make the buys and had not personally participated in or witnessed the transactions. *Id.* at 606, 358.

In *State v. Jones*, the S.C. Supreme Court affirmed that where the affiant knowing provided false information in the affidavit, doing so circumvented entirely the affidavit

requirement of S.C. Code Ann. §17-13-140 (1985) 342 S.C. 121, 125, 536 S.E.2d 675, 677 citing *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987).

Here, by preventing the Defendant from viewing the CI buy records, audio, and video, the Defendant is being blocked from potential *Brady v. Maryland* material and as a result deprived of his opportunity to conduct a full and fair *Franks v. Delaware* hearing. Were the Defendant to be allowed the opportunity to inspect the records of law enforcement regarding the undercover buy, he could determine whether any such material falsehoods exist. The same affiant who knowingly made false statements to the magistrate cannot be relied upon to divulge those false statements during a pretrial Motion to Suppress.

V. * THE INFORMANT IS MORE THAN A MERE TIPSTER

Specifically, the informant in this case is more than a mere tipster as has been suggested by the State and the law enforcement records of the predicate undercover purchase of narcotics are the sole foundation for the search warrant as the affidavit contains no representations regarding the reliability of the informant or any other corroboration of his information other than the audio and video of the buy. In the case of *State v. Burney*, upon which the State relies, the buy had transpired ten years prior to the search warrant and was not the "fresh probable cause" being used to justify entry into the home, but merely to establish his credibility and reliability in other more temporal information he was providing. 362 S.E. 2d 635, 294 S.C. 61 (1987). In this particular case, the informant is the lynchpin of probable case.

VI. * DENIED RIGHT TO CONFRONT WITNESSES AGAINST HIM

Defendant Kennedy is being denied the opportunity to confront the witnesses against him. Even assuming that the confidential informant will likely not be called by the State during their case in chief, this does not mean that he does not nonetheless possess the right to confront the confidential informant or any allegations of his which support the search warrant used to gain entry into the residence at [REDACTED]

"The Sixth Amendment guarantees a criminal defendant the right 'to be confronted with the witnesses against him.' " *State v. Dinkins*, 339 S.C. 597, 601, 529 S.E.2d 557, 559 (Ct. App. 2000) (quoting U.S. Const. amend. VI); See S.C. Const. art. I, § and 14. The right of

confrontation is essential to a fair trial because it promotes reliability and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. *Id.* Although the confrontation clause is not identical to the hearsay rule, when the State offers hearsay evidence in a criminal case, the accused's Sixth Amendment right to confront accusers is directly implicated. See *Idaho v. Wright*, 497 U.S. 805 (1990).

VII. *DENIED OPPORTUNITY TO PRESENT A COMPLETE DEFENSE

Both the United States and South Carolina Supreme Courts have held that "[d]ue process requires that a criminal defendant be afforded a meaningful opportunity to present a complete defense." *State v. Mabe*, 306 S.C. 355, 358, 412 S.E.2d 386, 388 (1991) (citing *California v. Trombetta*, 467 U.S. 479 (1984)). The opportunity to present a full and complete defense includes "a defendant's privilege to request and obtain material evidence from the state." *Id.*; see also *Town of Fairfax v. Smith*, 285 S.C. 458, 330 S.E.2d 290 (1985). U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14.

Here, the non-disclosure of the records and tapes of the undercover buy and/or informant's identity denies the Defendant the right to present a full and complete defense. U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14.

VIII. *DUTY TO REVEAL THE IDENTITY OF THE INFORMANT

In *State v. Diamond*, 280 S.C. 296, 312 S.E.2d 550 (1984), our Supreme Court noted that the leading case on the "informant's privilege" is *Roviaro v. United States*, 353 U.S. 53 (1957). In *Rovario*, the United States Supreme Court stated that "[t]he scope of the privilege is limited by its underlying purpose" and that "where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged." *Id.*, 353 U.S. at 60. The *Roviaro* Court also found that "[a] further limitation on the applicability of the privilege arises from the fundamental requirements of fairness." *Id.* Notably, the *Roviaro* Court held:

Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, *the privilege must give way*. In these situations the trial court may require disclosure and, *if the*

Government withholds the information, dismiss the action. Id., 353 U.S. at 60-61 (emphasis added).

As to the issue of balancing the "public interest in protection the flow of information against the individual's right to prepare his defense[.]" the *Roviaro* Court explained, "Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charge, the possible defense, and the possible significance of the informer's testimony, and other relevant factors." *Id.* The *Roviaro* Court held that non-disclosure of the informant's identity was unfair because: (1) the informant was "the sole participant, other than the accused, in the transaction charged[.]" (2) the informant was a "material witness;" and (3) and the informant's testimony "was highly relevant and might have been helpful to the defense." *Id.*, 353 U.S. at 63-64.

Rule 5 of the South Carolina Rules of Criminal Procedure is South Carolina's mechanism for complying with the due process requirement. *Rovario* specifically held that the "informer's privilege" is limited by due process. *Id.*, 353 U.S. at 60. Accordingly, the prosecution must provide the defense with information necessary to investigate the allegations and prepare for a defense. U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14. While this Defendant is not being tried for the underlying transaction similar what transpired in *Roviaro*, the transaction is the sole underlying probable cause for the search warrant, thus it remains the lynchpin of the State's case. While the informant may not be a material witness, he is nonetheless the sole witness referred to in the probable cause affidavit and with him, there would be no search warrant. Law enforcement did no other independent corroboration or investigation beyond reviewing the tapes. The Defendant's access to these tapes and the confidential informant information is his *sole* means to challenge the validity of the search warrant and investigate the veracity of the allegations contained within.

Finally, S.C.R.E 806 provides in pertinent part:

"When a hearsay statement ... has been admitted in evidence, the credibility of the declarant may be attacked ... by any evidence which would be admissible for those purposes if the declarant had testified as a witness.

The Defendant should be granted to the information on the confidential informant so that he may attack his credibility in the search warrant the same as if he were being called as a material witness.

IX. *DISCLOSURE REQUEST

Pursuant to *Roviaro v. United States*, 353 U.S. 53 (1957) and *State v. Diamond*, 280 S.C. 296, 312 S.E.2d 550 (1984), the Defendant respectfully moves this Court to Order the Sixteenth Circuit Solicitor's Office to reveal records and tapes of the undercover buy referenced in the search warrant and the informant's name, address, prior criminal record, and any agreements and/or plans with law enforcement and/or the Sixteenth Judicial Circuit Solicitor's office. The requested information is essential to ensuring the Defendant's constitutional rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitutions, and Article I, Sections 3 and 14, of the South Carolina Constitution. If this motion is granted, Counsel for the Defendant requests a reasonable opportunity to investigate and locate the informant after the identity is revealed. See *State v. Burns*, 294 S.C. 338, 368, 364 S.E.2d 465 (1988). However, if the State refuses to provide the requested information, the Defendant respectfully requests that this Court suppress the evidence against him or dismiss his pending charges with prejudice.

X. *PROTECTION OF THE RECORD ON APPEAL

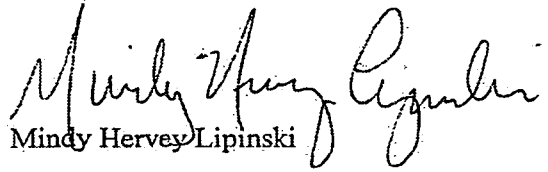
The Defendant renews his Motion to compel the Sixteenth Circuit Solicitor's Office to produce the report, audio, and video of the undercover buy which is the basis of the affidavit in the search warrant under seal to be made part of the record in the event that review of the

material is necessary on appeal. See State v. Ladsen, 373 S.C. 320 (Ct. App. 2007), Adams v. HR Allen, 397 S.C. 652 (S.C. 2012).

*CONCLUSION

The Defendant renews his Motion to Compel the production of the records and tapes of the undercover buy which was used to secure the search warrant of [REDACTED]. The Defendant believes this is the only way to investigate the veracity of the information contained within the search warrant and give meaning to his Fourth, Fifth, Sixth and Fourteenth Amendment Rights of the U.S. Constitution and Article 1, section 14, of the South Carolina Constitution. Depriving the Defendant access to the tapes deprive him of the ability to freely, intelligently and voluntarily engage in plea negotiations by depriving him the ability to evaluate whether he had any defenses which may entitle him to challenge the suppression of evidence consistent with the holding in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995). Moreover, now that the case is being called to trial, the privilege against withholding the informant's reliability has extinguished and the information should be turned over to the Defendant. Accordingly, the Defendant would move to suppress any and all evidence obtained as a result of the Search Warrant due to the affidavit containing material falsehoods which undermine the probable cause. In the alternative, the Defendant asks the Court to dismiss with prejudice the charges against him. Finally, in order to preserve his rights on appeal, the Defendant asks at a minimum for the records and tapes be filed under seal and made part of the record.

Respectfully submitted by,


Mindy Herve Lipinski
Assistant Public Defender

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 STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
 COUNTY OF YORK 2016 NOV 17 PM 3:19 SIXTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA) Case Nos: 2016-GS46-01366, 01367, 01368
 C.C.P. & G.S.) 01369, 01370, 01371
 YORK COUNTY, SC)

Vs.)

) MOTION TO RECONSIDER

)
)
 Dennis Demario Obrian Kennedy)
 Defendant.)

NOW COMES THE DEFENDANT, by and through his attorney, Assistant Public Defender, Mindy Hervey Lipinski, moving before this Honorable Court to RESPECTUFLY RECONSIDER the Court's Order of November 8, 2016 denying the production of requested discovery materials in the above referenced matter.

1. On Thursday, November 3, 2016, the Defendant made a MOTION TO COMPEL PRODUCTION OF DISCOVERY materials related to factual allegations contained within the search warrant leading up to his arrest, namely that an confidential informant, (hereinafter "CI") had made a purchase of narcotics from the Defendant at his address, during which the Defendant was observed to be in possession of narcotics and a firearm. This undercover purchase was allegedly captured on audio and videotape, which narcotics officers were able to review and use to corroborate the factual statements of the CI.
2. Specifically, the search warrant in this case states that within seventy-two (72) hours prior to the obtaining of the search warrant, a CI made a controlled cocaine purchase fitted with a body wire and video. That an officer monitored the transaction via this equipment and that a firearm specifically was visible in the video of the purchase. These factual allegations were the basis of law enforcement requesting a no-knock warrant and establishing the credibility of the CI.
3. The Defendant requested production of materials related to this undercover purchase, specifically but not limited to written documentation of the buy to identify the officers involved in the purchase, the specific time and date of the purchase, and access to the video. Anticipating that the State would object to

the disclosure of information which would divulge the identity of the confidential informant, the Defendant made the more limited request for either a) the attorney for the Defendant to be granted an opportunity to view the audio and video subject to a protective order which would prevent the disclosure of any information regarding the identity of the CI to the Defendant or in the alternative b) for the State to limitedly produce the report and stills from the video confirming that the narcotics and/or firearm can be seen on the video.

4. After the hearing and oral arguments had concluded, the State presented to the Defendant and the Court the case of State v. Burney, 362 S.E.2d 635, 294 S.C. 61 (1987) to substantiate their lack of an obligation to produce the discovery materials. However, the holding in Burney is distinguishable from the facts in this case. In Burney, the CI had made an undercover buy, but it was ten years prior to the execution of the search warrant and the Court found that because this buy was not the per se basis of the search warrant and served only to establish the relationship of the CI to the Defendant and corroborate his reliability, then the State need not disclose his identity. *Id.* at 636.
 - a. First, the Defendant is not moving at this time to compel the identification of the CI. In fact, the Defendant has limited its Motion to Compel to avenues of production which would allow the State to maintain the confidential nature of the CI's identity.
 - b. Second, the buy in this case was not ten years prior, but within seventy-two hours and therefore the actual basis of the search warrant and not limited to "corroborating detail."
5. The Defendant respectfully suggests that the burden should not be on him to establish a basis for the production of materials, but instead upon the State to establish a basis to withhold disclosure and wherein their basis is limited to protecting the identity of the CI, which the Defendant is not seeking, than the Court can adequately strike a balance between the production of the materials which empowers the Defendant to meet its burden while safeguarding the

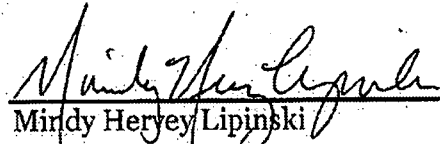
interests of the State. The Defendant is being deprived of meaningful access to the very discovery which would otherwise entitle it to meet its burden. The Defendant has no other way out of this "catch 22" except through access to these materials.

WHEREFORE, for the aforementioned reasons, the Defendant respectfully asks this Court to reconsider its Order denying the production of documents and grant limited disclosure to the Defendant while safeguarding the interests of the State.

IN THE ALTERNATIVE, the Defendant asks the Court to require the State to produce the report of the undercover purchase referenced in the search warrant coupled with the audio and video tapes for an in camera review.

FINALLY, in order to protect the Defendant's rights on appeal and meaningfully establish a record for review, the Defendant asks that the report of the undercover purchase referenced in the search warrant coupled with the audio and video tapes be made a part of the record and filed under seal by the State. State v. Ladsen, 373 SC 320 (S.C. Ct. App. 2007). Adams v. HR Allen, 397 SC 652 (S.C. 2012).

Respectfully submitted by,


Mindy Hervey Lipinski
Attorney for the Defendant

This the 17 day of November, 2016
York, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF YORK

2016 NOV -9 AM 10:11

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA
C.C.P. & S.
YORK COUNTY

Case Nos.: 2016-GS-46-01366, 01367,
01368, 01369, 01370, 01371

vs.

ORDER

Dennis Demario Obrian Kennedy,

Defendant.

Defendant has moved the Court to require the State to provide to him all documents relating to the issuance of a search warrant in this case.

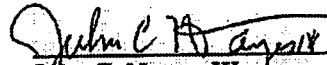
This motion is Denied. There is no evidence of any irregularities in the procuring of the search warrant. The search warrant was issued by a detached, neutral judicial officer based on that judicial officer's assessment that probable cause existed for the issuance of same. There has been no showing of any inaccuracies in the Affidavit upon which the judicial officer relied in determining that probable cause for the issuance of the Warrant existed. There has been no showing that the Affidavit is "false" in any regard.

While seemingly resigned to the accuracy of the above, Defendant argues no such showing can be made absent a review of the material requested. Defendant's argument is essentially that he finds himself in something akin to a "catch 22." He cannot establish his right to the documents unless he has the documents to review. The Court agrees with this conundrum, but absent authority indicating a Defendant may go behind a search warrant Affidavit the Court cannot create a right on Defendant's behalf. If the Court were to accept Defendant's position, the Court would be allowing Defendant what is often termed a "fishing expedition." This, the Court cannot and will not allow.

Again, Defendant's Motion for Discovery of pre-search warrant documents is DENIED.

cc: Solicitor
P.D.

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge 

November 6th, 2016
York, South Carolina

305

WITNESSES

DEU

Witnessing Officer: T. Hager

ARREST WARRANT NUMBER

2016A4610200017

ACTION OF GRAND JURY

Joseph Linder **TRUE BILL**
Foreperson of Grand Jury
Date: 5-12-16

VERDICT

guilty

Theresa Quinn
Foreperson of Petit Jury
Date: 12-14-16

DOCKET NO. 2016-GS46-01367

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

MAY 12, TERM 2016

THE STATE

VS.

**DENNIS DEMARIO OBRIAN
KENNEDY**

INDICTMENT FOR

TRAFFICKING IN COCAINE

SC Code: § 44-53-370(e)

CDR Code: 0147

0218 JC

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

INDICTMENT

At a Court of General Sessions, convened on May 12, 2016, the Grand Jurors of York County present upon their oath:

TRAFFICKING IN COCAINE

The defendant, Dennis Demario Obrian Kennedy, did on or about January 7, 2016, in York County, South Carolina, knowingly sell, manufacture, cultivate, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, 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 ten (10) grams or more of Cocaine or any mixtures containing cocaine, as provided in 44-53-210(b)(4). All in violation of 44-53-370(e), *South Carolina Code of Laws* (1976, as amended).

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


MARINA B. HAMILTON
ASSISTANT SOLICITOR

WITNESSES

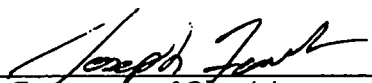
DEU

Witnessing Officer: T. Hager

ARREST WARRANT NUMBER

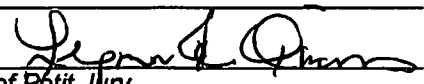
2016A4610200019

ACTION OF GRAND JURY

 **TRUE BILL**
Foreperson of Grand Jury
Date: 5-12-16

VERDICT

guilty


Foreperson of Petit Jury
Date: 12-14-16

DOCKET NO. 2016-GS46-01369

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

MAY 12, TERM 2016

THE STATE

VS.

**DENNIS DEMARIO OBRIAN
KENNEDY****INDICTMENT FOR****POSSESSION WITH INTENT TO
DISTRIBUTE CRACK COCAINE**

SC Code: § 44-53-375(B)
CDR Code: 3039

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant**Witness:****C.C.C. PLS. AND G.S.**

STATE OF SOUTH CAROLINA
COUNTY OF YORK

INDICTMENT

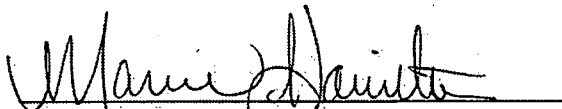
At a Court of General Sessions, convened on May 12, 2016, the Grand Jurors of York County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE CRACK COCAINE

The defendant, Dennis Demario Obrian Kennedy, did on or about January 7, 2016, in York County, manufacture, distribute, dispense, deliver, purchase, or otherwise aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with the intent to manufacture, distribute, dispense, deliver, or purchase crack cocaine, a cocaine base, in violation of the provisions of Section 44-53-370, all in violation of Section 44-53-375(B), *Code of Laws of South Carolina* (1976, as amended).

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC
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123

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


MARINA B. HAMILTON
ASSISTANT SOLICITOR

309

WITNESSES

DEU

Witnessing Officer: T. Hager

ARREST WARRANT NUMBER

2016A4610200020

ACTION OF GRAND JURY

Joseph Fawcett **TRUE BILL**
Foreperson of Grand Jury
Date: 5-22-16

VERDICT

Guilty

Dennis Demario Obrian
Foreperson of Petit Jury
Date: 12-14-16

DOCKET NO. 2016-GS46- 01370

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

MAY 12, TERM 2016

THE STATE

VS.

**DENNIS DEMARIO OBRIAN
KENNEDY**

INDICTMENT FOR

**POSSESSION OF A WEAPON DURING
THE COMMISSION OF A VIOLENT
CRIME**

SC Code: § 16-23-0490
CDR Code: 0549

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

INDICTMENT

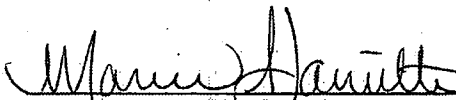
At a Court of General Sessions, convened on May 12, 2016, the Grand Jurors of York County present upon their oath:

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

The defendant, Dennis Demario Obrian Kennedy, did on or about January 7, 2016, in York County, South Carolina, while committing the violent crime of Trafficking Cocaine over 10 grams, possess a Smith & Wesson .40 caliber pistol. All in violation of 16-23-0490, *South Carolina Code of Laws* (1976, as amended).

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DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC
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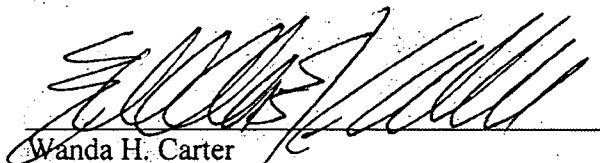
Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


MARINA B. HAMILTON
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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

This 23rd day of April, 2018.

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SC Court of Appeals