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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable J. Mark Hayes, Circuit Court Judge

DOMINIQUE AGURS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001001

APPENDIX

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**THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
STATE’S EXHIBITS NO. 1 and NO. 2 (Photographs)**

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<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 VERSUS
2 DOMINIQUE JULIUS AGURS ON MONDAY, APRIL 21, 2014 AT 1:42
3 P.M..)

4 THE COURT: Thank you. You may take your seats. Good
5 afternoon. State ready?

6 SOLICITOR SHELTON: Yes, sir, Your Honor.

7 Your Honor, may it please the Court. The State calls
8 the case of State versus Dominique Julius Agurs.

9 It's one indictment that has been True Billed before
10 the York County Grand Jury December of 2013.

11 The indictment alleges one count of distribution crack
12 cocaine True Bill Indictment 2013-GS-46-04248.

13 Your Honor, for the record, Mr. Matthews and I have
14 attempted to negotiate this case. Plea negotiations have
15 been unsuccessful. It's my understanding Mr. Agurs is
16 hereby requesting a jury trial and we're ready to proceed.

17 THE COURT: All right.. Mr. Matthews, are you ready
18 to proceed?

19 MR. MATTHEWS: Yes, Your Honor, we are.

20 THE COURT: Mr. Agurs, you ready to proceed?

21 MR. AGURS: Yes, sir.

22 THE COURT: All right. You have some pre-trial
23 motions. You got the witness list from the State and then
24 Mr. Agurs list from the defense. Have each of you gone
25 over the other's voir dire?

1 Mr. Matthews, do you have any concerns about the
2 State's Request for Voir Dire?

3 MR. MATTHEWS: Your Honor, the only one I saw, there
4 was the request for if there was anybody had a history I
5 believe it's stated history, - Let me pull it up right
6 here. Member of any family ever had a substance abuse
7 problem, alcohol or drugs, if so would it affect your
8 ability to be fair.

9 The rest of them, Your Honor, are pretty straight
10 forward except for Number Five. Do you have any beliefs,
11 religious or otherwise, that would prevent you from
12 rendering judgment against the person?

13 Your Honor, I don't know where the voir dire about
14 past alcohol or drug abuse or problems of that that may be
15 relevant to the jury deciding whether or not they can be
16 fair and equitable to this case or their religious beliefs.
17 Therefore, Your Honor, I would request Number One and Five
18 be taken off their list.

19 THE COURT: All right. I'll charge them in some
20 fashion.

21 How about Mr. Matthews, do you have any concerns about
22 his?

23 SOLICITOR SHELTON: No, sir, Your Honor.

24 THE COURT: All right. Do you have motions, pre-trial
25 motions?

1 MR. MATTHEWS: Your Honor, on my behalf I'm going to
2 hand up - I'm handing up originals. These were originally
3 dated for a trial date that we had previously on April 1st
4 the earlier part of this month; however, I'm handing it up.

5 The first one is the typical Motion to ensure
6 compliance with discovery. The list in my Motion is the
7 discovery that was sent to me physically, either by disk or
8 by email, and it's consistent with and was drawn somewhat
9 from a list that was brought to me by the solicitor and he
10 was asked to make sure I had these. This is the items I
11 received.

12 I've given a copy to solicitor. I'm asking to make
13 sure other than - Excuse me - other than the statement that
14 I received of the CI on today's date and two pieces of
15 information about the CI's past criminal history. I wanted
16 to make sure that there wasn't anything else to be
17 submitted at this time.

18 SOLICITOR SHELTON: Your Honor, this list is almost
19 identical to a discovery confirmation I sent to Mr.
20 Matthews. We've both gone over it. I think this includes
21 everything.

22 I would note for the record, I just showed Mr.
23 Matthews one still photograph that I intend to introduce as
24 evidence in trial that I had not provided to him earlier.

25 It's premarked for identification as State's Number

1 Mine and I don't know if Mr. Matthews would object to it at
2 a certain time but I have shown it to him this afternoon.

3 MR. MATTHEWS: Your Honor, that is one photo that I
4 would object to at this point. I received still photos
5 from the video. These are still photos. They were taken
6 from a video that was attached - from a camera attached to
7 the CI at the time of the alleged transaction.

8 I received - From that video I received the still
9 photo of a person that they are indicating is identified as
10 my client. Also, a blurred picture of money that
11 supposedly was involved in the transaction, and a still
12 photo of the governmental funds that was taken prior to
13 handing it to the CI at that time.

14 This photo alleges show is from the video supposedly
15 and the video very quickly, the video itself of the
16 transaction only last about two or three seconds. This
17 supposedly is the thumb and forefinger of the CI holding a
18 little baggy that has white substance in it. I have not
19 seen it until today. Today they were planning on using it
20 during today's trial and I would object because I haven't
21 received it before today and it really would not be any
22 reason why I couldn't have received it before today's date.

23 SOLICITOR SHELTON: Your Honor, let me just start with
24 the most recent one he talking about. I can show Your
25 Honor the photo if you'd like.

1 THE COURT: Well we're not so concerned with what it
2 shows, in fact - Well you better show it to me.

3 SOLICITOR SHELTON: Yes, sir.

4 THE COURT: His concern is the lateness and it doesn't
5 really show the CI.

6 SOLICITOR SHELTON: Well, Your Honor, this is from the
7 video and as I explained to Mr. Matthews earlier, it's at
8 the end of the investigation when the CI returned to the
9 drug unit with one of the investigators who had driven him
10 to and from the buy. This is not from the actual drug
11 transaction. The State will just tell the Court there is
12 no video of the actual hand to hand in this case.

13 This is a still photo as the CI was getting out of the
14 vehicle. You can see that he has drugs in his hands. His
15 testimony would be he's been instructed to keep what he
16 bought in his the entire time and that it simply shows that
17 when he got out, he had this in his hand prior to handing
18 it to the investigator.

19 THE COURT: Well, his point is you didn't give it to
20 him before today.

21 SOLICITOR SHELTON: Well, Your Honor, it's on the
22 video. I pulled it from the video so he has it. It's just
23 that he just hadn't slowed it down enough like I did this
24 weekend to pull it but he has the video.

25 MR. MATTHEWS: I do have the video, Your Honor,

1 however I was not informed today that that was going to be
2 entered into evidence from that still photograph until
3 today date, so having the video was cut off as he's going
4 into the building at the police department, so, Your Honor,
5 yes for all candor, I do have the video but in
6 consideration of the fact that he has not been hesitant to
7 give me the still photographs that he intends to show
8 during the trial months ago, and I'm not sure why this
9 particular photograph which I don't even know if the jury
10 would actually see that because they had to slow it down to
11 be able to get it, the jury would see it and I would submit
12 that they could have submitted that photograph to me at the
13 same time that they submitted the others. And this case is
14 - this is the third date that we're up for trial and today
15 is the first day I've received it. So I would object based
16 on the discovery violation.

17 SOLICITOR SHELTON: Your Honor, I just recently
18 noticed it myself on the video as I was preparing this
19 weekend and I printed a copy and put it into evidence. I
20 showed it to Mr. Matthews before we got here.

21 THE COURT: When we get to it, I'll allow it in. If
22 it's on the video, Mr. Matthews, you had the video. I
23 can't find a discovery violation and I can't find
24 apparently based on what you related to me that's the
25 grounds for your concern and your motion so I can't find

1 any -- other than you also include the lateness of it, but
2 you had it in one form and you hadn't got it in every form.

3 MR. MATTHEWS: Yes, Your Honor. Would that ruling
4 wouldn't preclude a possible objection down the road as to
5 admissibility on other grounds?

6 THE COURT: No. No. I don't ever preclude anybody
7 from making objections. I might sustain them but ---

8 MR. MATTHEWS: I understand.

9 The court: --- but if you need to for the record.
10 All right, anything else before we get the jury up?

11 SOLICITOR SHELTON: Your Honor, one other thing I'd
12 like to put on the record regarding discovery. I don't
13 think Mr. Matthews said this, but I did give him a copy of
14 the statement from the confidential informant this
15 afternoon. Under Rule 5 and I don't believe we're required
16 to turn that over until the person has testified, but I
17 went ahead and gave it to him just so we wouldn't forget
18 throughout the trial.

19 MR. MATTHEWS: Oh, and Your Honor, I didn't state
20 that previously. Mr. -- the solicitor and I had talked
21 previously about that statement coming to me and he's
22 right, according to the rules, I'm not actually entitled to
23 it until after the CI testifies but he provided it to me
24 beforehand and I pointed out a concern and he and I
25 discussed it on that, but I'll handle that in another

1 motion.

2 Your Honor, the only other thing is that I was shown
3 here today, I was aware they were planning on using it but
4 I thought they were going to use it for a completely
5 different reason was - but there is a photograph of my
6 client that they plan on putting into evidence.

7 My understanding is they were going to put it into
8 evidence because the previous two times we were having
9 trial, my client was not going to be able to be present and
10 they were going to put - submit the photograph in to assist
11 with identification and today they're telling me they're
12 going to submit it in anyway. But my client is present and
13 here for the jury to see him to compare to the video, so I
14 would object to my client's, for lack of a better term,
15 mugshot that they are planning on putting into evidence.

16 SOLICITOR SHELTON: Your Honor, these are what have
17 been marked as - for identification State's Number Seven
18 and Eight. These are photographs that we obtained from the
19 Detention Center when Mr. Agurs was booked in on June 21st
20 - excuse me, March 21st of 2013 on this charge.

21 This incident occurred on March 5th of 2013. We do
22 have a video and he is clearly shown on the video but since
23 there has been a sixteen day gap in time, the case agent,
24 Investigator Harrelson, who made this case, also executed
25 the arrest and was the booking officer, he can testify that

1 this is how Mr. Agurs appeared on the day that he was
2 arrested on this charge and booked in.

3 I think it serves - it can serve the jury in helping
4 them to identify - helping them to find that he has been
5 properly identified, Mr. Agurs as the individual who sold
6 the crack on the day alleged.

7 THE COURT: And your objection again is based on
8 simply your client is here and we don't need the
9 photograph?

10 MR. MATTHEWS: Pretty much, Your Honor. They don't
11 need photographs. They have the opportunity to look at my
12 photo - my client and with him being present if that piece
13 of evidence comes in at this point, Your Honor.

14 THE COURT: All right. Well, I overrule the
15 objection, I'll allow it in. Anything else?

16 MR. MATTHEWS: Your Honor, just some things I need to
17 put on the record based on previous agreements with the
18 State as to evidence.

19 First is what's kind of call in layman's term the
20 "reveal the deal" aspect. I had a motion to reveal. They
21 have revealed to me the basis of the CI's cooperation
22 involving this case, my understanding is based on some
23 traffic violations and they actually have assisted with
24 obtaining the funds for those traffic violations to be
25 paid. That's the extent of the reveal the deal that I have

1 received at this point in time and I want to put on the
2 record if there is any other reasons for the testimony.

3 SOLICITOR SHELTON: Your Honor, there is nothing else
4 that I'm aware of and I've asked multiple times.

5 THE COURT: Okay.

6 MR. MATTHEWS: Also, Your Honor, the next thing is the
7 issue of - I had made a motion or prepared a motion to
8 redact the video and audio tape, and because that requires
9 some prior prep time by the State, he and I talked about
10 that prior to the first time this case was up for trial, he
11 had sent me the redacted video and the redacted audio tape.
12 Those have been redacted consistent with what I was
13 planning on moving here today and that has been handled and
14 that he is informed me that that the two, if they are
15 entered into evidence, that they are the redacted versions.

16 SOLICITOR SHELTON: That is correct.

17 MR. MATTHEWS: Your Honor, I do have some other
18 motions in limine; however, I've heard the solicitor so far
19 mention this case. I'm assuming and I don't wish to assume
20 in this case but I'm assuming there's not going to be any
21 mention to the jury or at any point in time that this -
22 what offense level this is but just the basic charge of
23 distribution of crack cocaine.

24 SOLICITOR SHELTON: That's correct.

25 MR. MATTHEWS: Your Honor, the final pre-trial

1 consideration at this point in time is I do only have one
2 witness, that is my client if he wishes to testify halfway
3 through. However the State has ten witnesses on their
4 list, which involve law enforcement or people involved with
5 the chemical testing of the evidence that was taken into
6 custody other than the CI.

7 I ask that there be sequestration of the State's
8 witnesses with the exception of the - Mr. Harrelson from
9 the York County Multi-Drug Enforcement Unit, who my
10 understanding he's the lead officer in the case.

11 THE COURT: And I'll grant that. There is no need to
12 it reciprocally because you only listed your client.

13 MR. MATTHEWS: Your Honor, just for the record, I'm
14 going to hand up the written motion I made. Your Honor, at
15 this point in time, the other motions are based off of
16 evidence as it comes through the trial so I'm ready to move
17 forward with picking a jury.

18 THE COURT: All right. The jury is not coming back
19 until 2:30 so it's right at two, I understand we have some
20 other matters.

21 SOLICITOR SHELTON: Yes, sir. I do need to put a
22 couple more things on the record ---

23 THE COURT: All right.

24 SOLICITOR SHELTON: --- I wanted to flush out with Mr.
25 Matthews. We had talked prior to coming in. I was going

1 to make a motion to determine the extent of what prior
2 convictions he could impeach Michael Tumblin, the
3 confidential informant for the State in this case, under
4 Rule 609. Mike and I agreed that under the rules he could
5 only go back ten years from today's date for impeachment
6 purposes and so that still leaves him with a good bit of
7 impeachment material, Your Honor, but there is a
8 shoplifting conviction from February of 2003 that's a
9 misdemeanor, municipal magistrate level offense.

10 My understanding Mr. Matthews is not intending to
11 produce that. In fact, we had communicated that he was not
12 going to go back any further than the ten years, so what we
13 would be starting with would be in 2004 and there were a
14 couple of arrest dates for multiple charges of violation of
15 drug distribution and obtaining drugs by fraud in
16 Greenville County and then with the South Carolina
17 Department of Health and Environmental Control and we would
18 go forward from there.

19 MR. MATTHEWS: Your Honor, for your review since there
20 is several charges, I've handed to Mr. Shelton a memorandum
21 that is derived from the information he's given me which
22 list out the charges. The dates on here are conviction
23 dates. I then went ahead and put which agency for the ones
24 that were listed in the system, what they were just for
25 purposes of expediency and efficiency.

1 SOLICITOR SHELTON: Your Honor, we also would move to
2 determine whether or not the defense has complied with the
3 reciprocal Rule 5 discovery motion that was filed with the
4 Clerk and served on defense prior to trial.

5 MR. MATTHEWS: Your Honor, at this point in time, I've
6 looking at the alibi defense, I've interviewed witnesses
7 and such of that nature. At this point in time, we've
8 complied with what we can - what I've submitted over. The
9 witness list, I've given to them, and it is my client if he
10 wishes to testify. As to the affirmative defenses, I
11 believe we've complied with the Rule 5 reciprocally.

12 SOLICITOR SHELTON: Your Honor, we also need to have a
13 Biggers hearing, but before we do that, I would like to put
14 a couple of things on the record just so we have a
15 consistent record. We've had many hearings in this
16 particular case over the last few months. As I eluded to
17 earlier, we were trying to work this case out.

18 January 22nd 2014, Mr. Agurs rejected his original
19 plea offer of twelve years in front of Your Honor. Ms.
20 Wanda Nelson was the court reporter.

21 At the defense's request, we reopened the
22 investigation February 27th, 2014. He was given a chance
23 to change his mind with the twelve year offer. He again
24 rejected it this time in front of Judge Hill. Ms. Aminah
25 Hardy was the court reporter.

1 At that time the State served Mr. Agurs with Notice of
2 Intent to seek life without parole if he were convicted of
3 this, this being his third conviction. Again, Ms. Hardy
4 was the court reporter and that Notice has been filed with
5 the Clerk of Court on February 24th, 2014 and it was
6 personally served on Mr. Matthews and Mr. Agurs in the
7 courtroom at that time.

8 We had the case set for trial March 10th, 2014. In
9 preparation for that, Mr. Matthews and I entered into a
10 consent protection order regarding the CI video and the CI
11 information. That was signed by Judge Alford on March 3rd,
12 2014; filed with the Clerk's office the following day. I
13 gave a copy of that to Mr. Matthews. It's basically the
14 standard consent order that we seek in these type cases,
15 Your Honor. I know you are familiar with it.

16 The Defendant failed to appear for court on March 10th
17 and March 31st. We intended to try him in his absence.
18 Did not reach those - reach trial either one of those
19 court dates because of scheduling.

20 On April 12th, 2014, he was arrested on bench warrants
21 for failure to appear. He is currently being held on those
22 bench warrants.

23 April 15th, Mr. Matthews talked with Mr. Agurs in the
24 jail. We had agreed on a revised offer of twenty years.

25 It is my indication that Tuesday morning Mr. Agurs was

1 going to take that deal. We had it schedule for a plea
2 this past Thursday, April 17th, in the morning in front of
3 Your Honor.

4 Prior to coming in front of Your Honor, Mr. Agurs
5 changed his mind; did not enter his guilty plea.

6 He specifically rejected the State's attempts to
7 resolve this case and I put on the record at that time, and
8 I believe Ms. Nelson was the court reporter if my memory
9 serves correct, that there are no offers. If he is
10 convicted at trial, he is looking at life without parole,
11 this being - We will seek life without parole, this being
12 his third strike and that the trial was scheduled to begin
13 today.

14 I just wanted to be very clear since we've had a
15 number of hearings so we keep the record consistent.

16 THE COURT: Any comment on the record, Mr. Matthews?

17 MR. MATTHEWS: Your Honor, we've put it on the record
18 each time the rejection. There was an eighteen-year offer
19 at one point in between the twelve and the twenty-year
20 scenario.

21 I've informed my client that when we appear at trial
22 today, if the jury convicts him, that he would receive life
23 without the possibility of parole in this matter. That
24 information has been conveyed on numerous occasions to my
25 client.

1 THE COURT: All right.

2 SOLICITOR SHELTON: Your Honor, at this time if it
3 pleases the Court, we would go ahead and do the Biggers
4 hearing.

5 THE COURT: All right. Call your first witness.

6 SOLICITOR SHELTON: We need Michael Tumblin on the
7 witness stand.

8 MADAM CLERK: Raise your right hand, place your left
9 hand on the Bible.

10 (WHEREUPON, MICHAEL TUMBLIN,
11 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

12 MADAM CLERK: Thank you. Please have a seat.

13 DIRECT EXAMINATION

14 MICHAEL TUMBLIN BY SOLICITOR SHELTON:

15 Q. Good afternoon, sir.

16 A. Good afternoon.

17 Q. Please state your name for the record.

18 A. Michael Tumblin.

19 Q. How old are you, sir?

20 A. I'm fifty-four.

21 Q. Are you presently employed?

22 A. Yes, sir.

23 Q. How far did you go in school?

24 A. I graduated high school.

25 Q. In March of 2013, did you meet with officers of the

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON - IN CAMERA

-21-

1 Drug Unit for York County to discuss working as a
2 confidential informant with them?

3 A. Yes, sir, I did.

4 Q. Were you able to set up a crack cocaine buy deal on
5 March 5th, 2013?

6 A. Yes, sir.

7 Q. Did you tell officers from the Drug Unit who you could
8 buy from that day?

9 A. Yes, I did.

10 Q. So they didn't tell you who to buy from; you told them
11 who you could buy from; is that correct?

12 A. That's correct, sir.

13 Q. And prior to the deal, what description, if any, did
14 you provide the officers about the person you said you
15 could buy crack from on March 5th, 2013?

16 A. It was a black guy that goes by the name of D.J.

17 Q. And did you know this guy D.J.'s full name or last
18 name at that time?

19 A. No, sir. I just knowd he was D.J.

20 Q. Did you have a phone number for him?

21 A. Yes, sir, I did.

22 Q. Did you call that number on March 5th, 2013?

23 A. Yes, sir, I did.

24 Q. Approximately how many times prior to that day, that
25 day being March 5th, 2013, had you met with this guy, D.J.,

1 in person?

2 A. Five, six times at least.

3 Q. And at those meetings, about how long were you in his
4 presence at each time?

5 A. Sometimes five minutes. Two to five minutes probably.

6 Q. And could you clearly see his face during those
7 meetings?

8 A. Yes, sir.

9 Q. And did you - So we're clear, did you know him before
10 this day?

11 A. Yes, sir.

12 Q. About how long had you known him?

13 A. I'd known him probably five or six months. Yes, sir.

14 Q. And on March 5th, 2013, did you purchase crack cocaine
15 from that same black male you knew as D.J. as part of the
16 Drug Unit's investigation?

17 A. Yes, I did.

18 Q. Was that video recorded?

19 A. Yes, sir.

20 Q. And was that recorded by equipment that DEU officers
21 had hid on your person?

22 A. Yes, it was.

23 Q. And after the buy deal on March 5th, did Office
24 Harrelson from the Drug Unit show you a collection of
25 photographs?

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON - IN CAMERA

-23-

1 A. Yes, sir, he did.

2 Q. Excuse me?

3 A. Yes, sir, he did.

4 Q. I'm going to show you, Mr. Tumblin, what's been marked
5 for trial as State's Exhibit Number Five - or excuse me,
6 State's Exhibit Number Four. If you'll just take a quick
7 second to look at this, please.

8 (WITNESS REVIEWING EXHIBIT.)

9 Q. Mr. Tumblin, are there three pages in that document?

10 A. Yes, sir, There are.

11 Q. And were you - So we're clear, were you shown the
12 first page only?

13 A. That's correct. Yes, sir, I was.

14 Q. And is this the photo lineup you were shown that day?

15 A. Yes, sir, it was.

16 Q. These are the photos that officers from the Drug Unit
17 showed you?

18 A. Yes, sir.

19 Q. Where were you when they showed you the photos?

20 A. I was at the Drug Unit at the Rock Hill Police
21 Department.

22 SOLICITOR SHELTON: Your Honor, I don't know if you
23 would like me to put a copy in as a Court's Exhibit or just
24 simply show you the lineup that's been marked for
25 identification.

1 THE COURT: You're asking me what I want. I mean, I
2 just - What I want is what you plan to do as far as proving
3 your case.

4 SOLICITOR SHELTON: Yes, sir. I will show Mr. Tumblin
5 a copy of this.

6 Q. Mr. Tumblin, I'm going to hand you a second document.

7 SOLICITOR SHELTON: Let me mark this as Court's
8 Exhibit Number One, please.

9 (WHEREUPON, COURT'S EXHIBIT NUMBER ONE, PREMARKED FOR
10 IDENTIFICATION.)

11 Q. Mr. Tumblin, can you please compare what's marked as
12 Court's Exhibit Number One with what's been marked as
13 State's Exhibit Number Four.

14 A. Yes, sir. They're identical.

15 Q. So that appears to be an accurate and true copy of the
16 original State's Number Four?

17 A. Yes, sir, it is.

18 Q. Okay. So when I'm asking you these questions, I'm
19 referring to both of these documents, since there is the
20 original and a copy.

21 A. Yes, sir. They're the same. Yes, sir.

22 MR. MATTHEWS: Your Honor, I'm going to object. I'm
23 not real sure why making this a Court's Exhibit would
24 proffer moving forward with his motion that established
25 under Biggers whether or not this photo lineup was done

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON - IN CAMERA

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1 properly or not, so I would object to making it a Court's
2 Exhibit.

3 THE COURT: I'm not sure I understand why you're
4 objecting it being a Court's Exhibit during a hearing but I
5 overrule your objection.

6 SOLICITOR SHELTON: Your Honor, at this time since Mr.
7 Tumblin has identified this as an exact copy, I would move
8 this in as Court's Exhibit Number One.

9 THE COURT: In over objection.

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

12 SOLICITOR SHELTON: And, Your Honor, if I can hand both
13 of these up to you so you can look at them while I'm
14 talking with Mr. Tumblin.

15 (EXHIBITS RECEIVED UP BY THE COURT.)

16 Q. Mr. Tumblin, do you remember anyone else being with
17 you in the room when you were shown those photographs?

18 A. No, sir.

19 Q. So it was just you and Office Harrelson?

20 A. Yes, sir.

21 Q. And what, if any thing, do you remember Officer
22 Harrelson telling you prior to viewing these photographs?

23 A. Go over and see if I recognize anyone - anybody's
24 photograph.

25 Q. Did he tell you that anyone in particular was in that

1 group of photos?

2 A. No, sir.

3 Q. Did he say anything that would influence or suggest to
4 you which photograph to select?

5 A. No, sir, he did not.

6 Q. Was this the only lineup or grouping of photos you
7 were shown?

8 A. Yes, sir.

9 Q. Did you select a photograph?

10 A. Yes, I did.

11 Q. Did you mark your selection somehow?

12 A. Yes. I circled and put my initials on it.

13 Q. And did you also write the date underneath it?

14 A. Yes, I did.

15 Q. And do you recall from looking at that document just a
16 moment ago, did you write the date as being March 5th,
17 2012?

18 A. Yes, sir, I did.

19 Q. Was it actually 2013?

20 A. It was actually 2013 it sure was.

21 Q. So you had written the wrong date?

22 A. Yes, sir. Just the wrong year. I read the wrong year
23 on it.

24 Q. Yes, sir. But it was March 5th 2013?

25 A. Correct. Yes, sir.

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON - IN CAMERA

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1 Q. And you also signed at the bottom of that document?

2 A. Yes, sir.

3 Q. And did you sign a statement indicating that your
4 selection was freely and voluntarily made?

5 A. I did, yes, sir.

6 Q. Was that on a separate piece of paper?

7 A. Yes, sir, it was.

8 Q. And is it one of those three pages that you just
9 looked at, State's Number Four and Court's Number One?

10 A. Yes, sir.

11 Q. The person you selected, is that the same person who
12 sold you crack cocaine on March 5th, 2013?

13 A. Yes, sir., it is.

14 Q. Is that the man you knew prior to this as D.J.?

15 A. Yes, sir, it was.

16 Q. Do you see him in the courtroom today?

17 A. Yes, sir.

18 Q. Could you please point him out?

19 A. D.J., sitting right here.

20 SOLICITOR SHELTON: Your Honor, I would ask that the
21 record reflect that Mr. Tumblin has pointed to the
22 defendant, to the individual sitting next to Mr. Matthews
23 at defense counsel table.

24 (WITNESS INDICATED TO DEFENDANT.)

25 SOLICITOR SHELTON: I have no further questions for

MICHAEL TUMBLIN: CROSS BY MR. MATTHEWS - IN CAMERA
REDIRECT BY SOLICITOR SHELTON - IN CAMERA

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1 this witness.

2 THE COURT: Mr. Matthews.

3 CROSS EXAMINATION

4 MICHAEL TUMBLIN BY MR. MATTHEWS

5 Q. You said you - If I understood what you just said, you
6 said you believed it's the gentleman sitting --

7 A. No, sir. I said that's him sitting right there. I
8 didn't say believe.

9 Q. Okay. Can you tell us specifically when on the day in
10 question on March 5th, you actually saw these photographs?

11 A. The day of before I went and made the drug buy.

12 Q. Before you went and made the drug buy?

13 A. Yes, sir.

14 Q. All right. So you made this - picked this out before
15 you went out to the drug buy?

16 A. I picked the picture out.

17 Q. All right.

18 MR. MATTHEWS: Your Honor, no further questions at
19 this point.

20 REDIRECT EXAMINATION

21 MICHAEL Tumblin BY SOLICITOR SHELTON:

22 Q. Mr. Tumblin, have you been shown the buy video before
23 you were show this photo lineup?

24 A. Sir?

25 Q. Have you been shown the video that was produced with

MICHAEL TUMBLIN: REDIRECT BY SOLICITOR SHELTON - IN CAMERA

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1 the drug unit equipment before you were shown this lineup?

2 A. No, sir.

3 Q. And in fact, have you seen it once - a couple times
4 before coming into court for trial?

5 A. Yes, sir.

6 Q. Was that a few weeks ago the first time you saw it?

7 A. Yes, sir, it was.

8 Q. A year ago after this investigation was the first time
9 you had seen the buy video?

10 A. Yes, sir, it was.

11 SOLICITOR SHELTON: Nothing further from this witness,
12 Your Honor.

13 MR. MATTHEWS: Your Honor, at this time I would move
14 to suppress the photo lineup. The witness has indicated
15 that he --

16 THE COURT: I'm not sure they are through with all
17 their witnesses.

18 SOLICITOR SHELTON: No, sir. We are not.

19 MR. MATTHEWS: All right. I apologize, Your Honor.

20 THE COURT: Thank you. You can step down. Thank you.
21 You can go back and have a seat.

22 (WITNESS LEAVING WITNESS STAND.)

23 SOLICITOR SHELTON: Your Honor, the next witness we
24 would call would be Investigator Leland Harrelson.

25 (WHEREUPON, LELAND HARRELSON,

INVESTIGATOR LELAND HARRELSON: DIRECT BY SOLICITOR SHELDON
IN CAMERA

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1 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

2 DIRECT EXAMINATION

3 INVESTIGATOR LELAND HARRELSON BY SOLICITOR SHELTON:

4 Q. Please state your name for the record.

5 A. Hugh Leland Harrelson, Junior.

6 Q. Do you work for the Drug Unit?

7 A. Yes, I do.

8 Q. All right. How long have you been with the DEU?

9 A. I've been with the Drug Unit approximately four years.

10 Q. During those years, have you participated in
11 controlled drug buy investigations?

12 A. I have. Yes, sir.

13 Q. And investigations that involve confidential
14 informants?

15 A. Yes, sir.

16 Q. On March 5th, 2013, did you meet with Michael Tumblin
17 during an investigation while he was working as a CI for
18 the Drug Unit?

19 A. Yes, sir, I did.

20 Q. And did Mr. Tumblin set up a crack cocaine deal on
21 that day, on the date of March 5th, 2013?

22 A. Yes, sir, he did.

23 Q. Prior to the deal, what description, if any, did
24 Tumblin provide you about the person he would be buying the
25 crack from?

INVESTIGATOR LELAND HARRELSON: DIRECT BY SOLICITOR SHELDON
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1 A. He said the suspect went by the name of D.J. He was a
2 black male.

3 Q. Did he know any full name or did he simply know him
4 by D.J.?

5 A. He just simply knew him as D.J.

6 Q. So we are clear, did you all tell him who he should
7 buy from or did he tell you who he could buy from?

8 A. No, sir. Mr. Tumblin came to us and stated he could
9 buy from D.J.

10 Q. And did Mr. Tumblin call this guy D.J. to set up a
11 drug deal?

12 A. Yes, he did.

13 Q. Did he have the guy's phone number?

14 A. Yes, he did.

15 Q. Did he call that number from his phone?

16 A. Yes, he did.

17 Q. And was that phone call recorded?

18 A. Yes, sir, it was.

19 Q. Did Tumblin indicate that he had bought crack from the
20 guy that day?

21 A. Excuse me?

22 Q. Did Tumblin indicate he had bought crack from that guy
23 D.J. that day?

24 A. Yes, sir, he did.

25 Q. And was the investigation where he bought crack

1 recorded?

2 A. Yes, it was.

3 Q. Did you review the video recording after the crack
4 deal?

5 A. Correct. Yes, sir.

6 Q. And after reviewing the video, were you able to tell
7 the identity of the person who sold crack cocaine to
8 Tumblin on March 5th, 2013?

9 A. I was.

10 Q. Who was it?

11 A. Dominique Agurs.

12 Q. Is his middle name Julius?

13 A. Yes, it is.

14 Q. At that time, did you know him as Dominique or D.J.?

15 A. I knew him previously. I had dealt with him back when
16 I was an officer with the City of Rock Hill.

17 Q. And approximately how many dealing did you have with
18 him in person prior to that?

19 A. I believe two.

20 Q. And did you get a good look at him during those
21 dealings?

22 A. Yes, sir, I did.

23 Q. So when you saw - When you looked at the video, were
24 you able to tell that Dominique Julius Agurs was the other
25 man on the video?

INVESTIGATOR LELAND HARRELSON: DIRECT BY SOLICITOR SHELDON
IN CAMERA

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1 A. Yes, sir. When I saw the video, I recognized him. I
2 went back through some police records; I located a picture
3 of him and compared the picture with the picture on the
4 video.

5 Q. And after looking at the videos - After looking at the
6 videos in this case, were you then able to prepare a photo
7 lineup?

8 A. I was, yes, sir.

9 Q. Is that how you knew what picture to put in the photo
10 lineup

11 A. Yes, sir.

12 Q. Do you see Dominique Agurs in the courtroom today?

13 A. Yes, sir, I do.

14 Q. Please point him out.

15 A. It's the gentleman in the black and red shirt.

16 Q. Sitting next to Mr. Matthews?

17 A. Correct.

18 SOLICITOR SHELTON: Your Honor, if I could hold those
19 Exhibits there.

20 Q. Investigator, I'm going to show you what has been
21 marked as State's Exhibit Number Four for trial and what
22 has been entered as Court's Exhibit Number One for this
23 hearing. Are those the same - Is one the original and the
24 other a copy of the same document?

25 A. Yes, sir, it is.

INVESTIGATOR LELAND HARRELSON: DIRECT BY SOLICITOR SHELDON
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1 Q. And what is it?

2 A. It is the photo lineup I showed Mr. Tumblin.

3 Q. Is the one marked State's Number Four the original?

4 A. Yes, sir, it is.

5 Q. And Court's Exhibit Number One is the copy?

6 A. That is correct.

7 Q. And how did you generate this six pack of photo
8 lineups?

9 A. It was through a police computer program. If you - I
10 knew my suspect. I chose him and then it randomly chooses
11 me, you know, several hundred people that matches age and
12 description, and then out of those people I am able to
13 chose five other individuals that closely match him.

14 Q. And on what date did you show Tumblin this lineup?

15 A. It was the day after we had made the crack purchase.

16 Q. And were there any identifying markings on the lineup
17 when you showed it to him?

18 A. No, sir, there were not.

19 Q. Did you show the lineup before or after the drug buy?

20 A. It was after the drug buy when we had returned to the
21 office.

22 Q. And were you at the drug unit when you showed him the
23 photos?

24 A. Yes, sir, I was.

25 Q. Was anyone else with the two of you at that time?

INVESTIGATOR LELAND HARRELSON: DIRECT BY SOLICITOR SHELDON
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1 A. No, sir.

2 Q. What, if anything, do you remember telling Tumblin
3 prior to showing him those photographs?

4 A. I told Mr. Tumblin there were six photos on this page.
5 The suspect may or may not be on there. Look at each photo
6 carefully. Look at facial features because his weight and
7 age may be different from what he remembers.

8 Q. Did any of the other officers who participated in this
9 investigation help you prepare the lineup?

10 A. No, sir.

11 Q. Did you or any other officers influence or suggest to
12 Tumblin which photos to select?

13 A. No, sir.

14 Q. Was this the one and only lineup you showed Tumblin?

15 A. That is correct.

16 Q. And did he select a photograph?

17 A. He did.

18 Q. How do you know?

19 A. He circled it. Also, I asked him to initial it and
20 sign it and place the date.

21 Q. And are those markings - the written markings found on
22 these exhibits?

23 A. Yes, sir, they are.

24 Q. And was the year actually 2013?

25 A. Yes, sir. That is correct.

INVESTIGATOR LELAND HARRELSON: DIRECT BY SOLICITOR SHELDON
IN CAMERA

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1 Q. He just simply wrote down the wrong year on the date?

2 A. Yes, sir.

3 Q. Did he indicate to you the person he'd selected as the
4 person that sold crack cocaine to him on March 5th, 2013?

5 A. Yes, sir, he did.

6 Q. And was Dominique Agurs charged with the crime of
7 distributing crack cocaine on March 5th, 2013?

8 A. Yes, sir, he was.

9 Q. And an arrest warrant obtained?

10 A. That is correct.

11 Q. Were you the affiant?

12 A. I was.

13 Q. And it was signed by a judge?

14 A. Yes, sir.

15 Q. Did you participate in his arrest on March 21st or
16 22nd of 2013 on that charge?

17 A. I did. Yes, sir.

18 Q. And were you also the booking officer?

19 A. I was.

20 Q. Did this happen in York County?

21 A. It did. Yes, sir.

22 SOLICITOR SHELTON: Nothing further, Your Honor.

23 THE COURT: Cross.

24 MR. MATTHEWS: May I approach the witness, Your Honor?

25 THE COURT: Yes, sir.

INVESTIGATOR LELAND HARRELSON: CROSS BY MR. MATTHEWS
IN CAMERA

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1 MR. MATTHEWS: May I see the original?

2 INVESTIGATOR HARRELSON: Yes, sir.

3 CROSS-EXAMINATION

4 INVESTIGATOR LELAND HARRELSON BY MR. MATTHEWS:

5 Q. Whenever looking at this document, the original in
6 front of you, when we say that he put the wrong year down,
7 what year did he put down on the piece of paper?

8 A. A 12.

9 Q. So he put down March what, of 20 - put March 5th,
10 2012?

11 A. Yes, sir.

12 Q. And did you review what he had initialed and reviewed
13 whenever you saw him write that down? Did you review it
14 before putting it in your file?

15 A. Yes, sir. I did not catch the error of the date.

16 Q. And so there is the wrong date on there?

17 A. Correct.

18 Q. Now just to make sure, your testimony - was your
19 testimony as to the second page that's on the Exhibit where
20 it says names and addresses and dates. When was that
21 attached to the photo lineup?

22 A. It goes in my case folder. I did not show him this
23 page. He simply sees the first page with just the
24 pictures.

25 Q. Now let me refer you to the first page, the one that

1 is marked Photographic Lineup.

2 A. Yes, sir.

3 Q. Okay. Now, this is the one - Whose signature is on
4 this page?

5 A. Mr. Tumblin.

6 Q. And then he prints his name out. Right?

7 A. That is correct.

8 Q. Is there any date listed on there?

9 A. No, sir, there is not.

10 Q. Okay. Is there any other information on this sheet?

11 A. No, sir, there is not.

12 Q. Okay. You didn't put your name down? It says officer
13 signature and print name. You didn't put your information
14 there?

15 A. No, sir. It was a clerical issue.

16 Q. Okay. So the only information that we have as to this
17 photo lineup is it's dated March 5th, 2012, and then on the
18 last page no officer witnessing his signature?

19 A. That is correct.

20 Q. And my understanding, you said that the pictures were
21 pulled up. You were given a list or a showing of different
22 pictures you could pull from from the computer?

23 A. That is correct.

24 Q. But you're still responsible for pulling out the
25 different pictures?

INVESTIGATOR LELAND HARRELSON: CROSS BY MR. MATTHEWS
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1 A. That is correct.

2 Q. And you would agree with me that on this photo lineup,
3 there is at least two out of the six individuals that we
4 would consider to be lighter skinned individuals?

5 Number one - if you're going down the list on the
6 first column, number one and number three?

7 A. There is a little bit of difference there.

8 Q. Okay. Well the reason I asked is because the rest of
9 them, they are darker. You know, no disrespect to my
10 client, but they are darker skinned in nature to the point
11 they kind of blend in with the background because these are
12 black and white pictures. Is that - Would you say there is
13 a difference between those four and the two that I am
14 referring to?

15 A. Yes, sir.

16 Q. So would you agree with me that the - really and
17 truthfully that Mr. - the CI in this case, Mr. Tumblin,
18 really only has selection of four individuals?

19 A. No, sir. There are six individuals. I go through the
20 pictures that I have presented to me and pick out the ones
21 that I can closely match, you know, to my suspect. Every
22 picture is not going to be perfect, you know, as far as
23 skin color, but I try to get as close as I can.

24 Q. Okay. How many photographs are you given at one time
25 by the computer?

INVESTIGATOR LELAND HARRELSON: CROSS BY MR. MATTHEWS
IN CAMERA

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1 A. It's a couple of hundred.

2 Q. A couple a hundred?

3 A. Yes, sir.

4 Q. Okay. And you're saying these six, or these five
5 other individuals on here, or these six, are the closest
6 that you could come out of two hundred that resemble my
7 client?

8 A. Yes, sir. At the time when I went through the
9 program, these were the photos that I chose.

10 Q. I understand that you chose them but you're saying out
11 of the two hundred there were not at least another two of
12 them that were similar in - to my client in his color,
13 being lighter versus dark?

14 A. No. I did not go through the entire two hundred. I
15 went through until I chose five pictures that I felt like
16 resembled him.

17 Q. So again, we have this computer program but you are
18 the sole person that chooses these pictures?

19 A. Yes, sir, the officer does.

20 Q. And if there was any other officers in the room, they
21 would need to sign that sheet of paper; is that correct, on
22 page three?

23 A. Yes, and there were no other - I was the only other
24 officer in the room.

25 Q. Okay. So other than yourself, if they were in the

INVESTIGATOR LELAND HARRELSON: CROSS BY MR. MATTHEWS
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1 room, they would have had to have signed this document?

2 A. Yes, sir.

3 Q. And this is the same document that you didn't sign
4 either. Correct?

5 A. Correct. Yes, sir.

6 MR. MATTHEWS: No further questions, Your Honor.

7 THE COURT: All right. Redirect?

8 SOLICITOR SHELTON: No, sir.

9 THE COURT: All right. You can step down. Thank you.

10 (WITNESS LEAVING WITNESS STAND.)

11 SOLICITOR SHELTON: Your Honor, that's the State's
12 proffer. We would ask you to consider --

13 THE COURT: Will you hand me those exhibits?

14 (EXHIBITS RECEIVED UP BY THE COURT.)

15 THE COURT: We just simply ask you to consider what's
16 been entered as Court's Number One, a copy of what's marked
17 as State's Number Four, which is the original lineup.

18 THE COURT: Mr. Matthews?

19 MR. MATTHEWS: Your Honor, I'm referring to the
20 standard that has been placed on -- we commonly call it the
21 Biggers hearing, Neal versus Biggers, a U.S. Supreme Court
22 case that is also mentioned in several cases, the most
23 recent one being the State versus Lewis from 2005 in that
24 case.

25 Your Honor, there are a couple things I want to

1 mention for purposes of consideration of admissibility of
2 this photo lineup.

3 One, the CI himself is the one who actually did the
4 photo lineup indicated clearly on both direct and cross-
5 examination that he did this prior to any drug transaction
6 that occurred, so, Your Honor, I would ask that you
7 consider that.

8 The second thing is that the officer testified that he
9 receives approximately two hundred pictures from the
10 computer. The computer being hopefully the most non-biased
11 way of picking out photographs, but he's still the one who
12 picks out the six photographs that go on the photo lineup.

13 I would submit to Your Honor these are black and
14 white. These are the ones that I was shown on the original
15 as well as in the copies. Black and white. We did not
16 have the color photos. I'm assuming that at the same time
17 Mr. Tumblin did not have the color photos; he had these
18 black and whites. Two individuals on there clearly
19 lighter skinned than the other four and therefore, I would
20 submit to Your Honor my client was not allowed to have a
21 full-photo lineup. He only had a photo lineup that showed
22 four individuals and did not have the benefit of a full
23 lineup, these two being lighter in skin color at that
24 point.

25 And then the third piece of information I give to Your

1 Honor or the third piece of information is that in doing
2 this case, very serious case, Mr. Tumblin dated this 2012.

3 Your Honor, this is the same individual who had said
4 that he did this prior to a drug transaction.

5 And then the final thing that I would point out to you
6 is that on the third page, proper procedure was not taken.
7 I would submit that the reason why I'm pointing this out is
8 that it shows that the entire process was not properly
9 done. That the officer did not sign or print his name, put
10 any information on here. This document was not dated. It
11 was just attached to as page three to the photo lineup.

12 I would submit to Your Honor under the five standards
13 or under Biggers, that this photo lineup does not meet
14 standard and I would ask that it would be suppressed.

15 SOLICITOR SHELTON: I would ask you to consider
16 Investigator Harrelson's testimony. He testified he was
17 the only officer in the room. He testified he was present
18 when the photo lineup was shown to Mr. Tumblin and it was
19 not suggestive. He said there were no other officers. The
20 fact that he didn't fill out a form indicating he was
21 present does not negate the fact that he was present and
22 his testimony is, is he was the only officer that was
23 there.

24 As for the date, 2012 by Mr. Tumblin, that's simply a
25 clerical mistake. Investigator Harrelson noted he hadn't

1 even noticed it until some time after the statement had
2 been signed, so it was just simply a mistake. There is no
3 question this was done in 2013.

4 Harrelson's recollection and in his testimony was that
5 he showed Mr. Tumblin the lineup after the buy. In fact,
6 Harrelson said that he had to look at the video first to
7 determine who this person D.J. was. He knew this guy as
8 Dominique Agurs from looking at the video. That's how he
9 was able to know who to add in as one of the six photos.

10 He did not - I'd also say that Mr. Tumblin did not
11 testify on direct that he was shown the lineup prior to the
12 drug deal. He testified that on cross and it appeared to
13 me like he was confused as to the question but his answer
14 is his answer and Your Honor can consider what has been
15 presented before you today.

16 There is ample evidence to find that it was not in
17 violation of Biggers.

18 THE COURT: All right. I find by a preponderance of
19 the evidence that the identification procedure was not
20 informissibly suggestive. In looking under the totality of
21 the circumstance, there is not a substantial likelihood of
22 irrepreible misidentification. Whether or not this was one
23 prior or whether or not the witness testified that it was
24 done prior to or after the buy is certainly fodder for
25 cross-examination, but the testimony from Officer Harrelson

1 was it was not prepared until after the buy, so I think
2 that by the preponderance of the evidence shows that it was
3 done after the buy although you certainly can explore that
4 on cross-examination as far as the jury's consideration.

5 As to the four that - or the two that were not the
6 same skin tone, that is - there is some varying degree of
7 facial - or skin tone on the photographs, I do not find
8 that they are substantially such that they would taint the
9 liability which is what we look at of the identification
10 procedure. The skin tone may be somewhat different but the
11 haircuts are the same. The other facial features, eyes,
12 nose, lips, are very similar on all six so I do not find
13 that there was any impermissible suggestiveness in the
14 lineup itself.

15 There are flaws in the clerical side of the procedure,
16 no doubt. The date being one and the form not being
17 completely filled out as to date, time and witness. Those
18 are certainly also fodder for cross-examination but they
19 are not required elements of the Court's consideration of
20 whether or not the lineup and the out of court
21 identification based on it was inadmissibly suggestive and
22 I find that it is not, so I'm going to allow the CI to make
23 an identification based on the photo lineup.

24 Anything else before we get the jury up?

25 SOLICITOR SHELTON: No, sir. There is nothing else.

1 You were correct earlier that there were a couple of
2 matters scheduled. I think we have gone over that
3 scheduled time but I think they are prepared to --

4 THE COURT: All right. Let's go forward with a couple
5 of matters and then while the jury is coming up, we'll take
6 a break. All right. First.

7 (COURT IN RECESS AT 02:35 P.M..)

8 (JURY ENTERS COURTROOM AT 02:38 P.M..)

9 (COURT BACK IN SESSION AT 02:42 P.M..)

10 THE COURT: Thank you. Take your seats.

11 Members of the jury panel, I'm John Hayes. I of
12 course did not get a chance to meet you this morning.
13 Judge Alford handled that part of what we do when we have
14 trial court.

15 I am now going to start the first trial in this
16 courtroom for the week, and that is the case of the State
17 versus *Dominique Julius Agurs*.

18 Mr. Agurs, would you stand up and let the jury see who
19 you are.

20 (DEFENDANT STOOD.)

21 THE COURT: This is Mr. Agurs. Mr. Agurs is charged
22 with distribution of crack cocaine on March 5th, 2013 in
23 York County, South Carolina. You may be seated.

24 He is represented by Mr. Michael Matthews.

25 (ATTORNEY MATTHEWS STOOD.)

1 THE COURT: The State is represented by Mr. Matthew
2 Shelton and Tessa Weaver.

3 (SOLICITOR'S STOOD.)

4 THE COURT: You may be seated.

5 I just told you that Mr. Agurs is charged with
6 distribution of crack cocaine on March the 5th of last
7 year. He has entered a plea of not guilty to this charge
8 and this plea places on him the burden - places on, I'm
9 sorry, the State; not on him. He is presumed innocent. He
10 need not prove his innocence. He need not prove his
11 innocence. The State must prove his guilt beyond a
12 reasonable doubt before he can be convicted by a trial
13 jury.

14 I have several questions to go over similar to what
15 Judge Alford did this morning but these are more case
16 specific, and what I'll ask you to do is if you need to
17 respond to any of these, just simply stand where you are.

18 First, are any of you related by blood or marriage or
19 are you a close personal friend of Mr. Agurs, Mr. Matthews,
20 Ms. Weaver or Mr. Sheldon; if so, please stand?

21 No one stands.

22 Are any of you or have you in the past been clients of
23 Mr. Matthews who practices in Rock Hill; if so, please
24 stand?

25 No one stands.

1 This case is being prosecuted by two members of Mr.
2 Brackett, our Solicitor's office. Have any of you worked
3 with that office in any capacity whatsoever? Have you been
4 a victim that has worked with that office? Have you been a
5 volunteer with that office or have you been a witness for
6 Mr. Brackett's office; if so, please stand.

7 No one stands.

8 Were any of you members of the Grand Jury which passed
9 on this indictment at an earlier time; if so, please stand?

10 No one stands.

11 Do any of you have any knowledge about this case,
12 heard about it from any source whatsoever, or have any of
13 you formed or expressed an opinion about any matter or
14 issue that could be involved in this case; if so, please
15 stand?

16 No one stands.

17 If any of you are a member — you or any of you or a
18 member of your immediate family members of organizations
19 such as Mother's Against Drunk Drivers, Students Against
20 Drunk Driver, Citizens Against Violence, Trooper's
21 Association, Sheriff's Association or Fraternal Order of
22 Police; if so, please stand.

23 No one stands.

24 If any of you or a member of your immediate family are
25 involved in law enforcement at any level, or in the

1 prosecution of criminal cases at any level, anything from
2 our solicitor, local police, sheriff, military police, U.S.
3 Marshall, district attorney, state's attorney, anything
4 like that, U.S. attorney; if so, please stand?

5 No one stands.

6 Have any of you or a member of your immediate family
7 in your opinion, and I'm not going to ask you to go into
8 the details of this, been adversely effected by someone
9 using illegal substances? That is, if you had someone in
10 your family and again, I'm not going to ask you to go in
11 great deal about that, who has had a problem with illegal
12 substances, or if you've had some kind of event such as
13 some other event that you relate to having been
14 precipitated or caused by someone who was involved in the
15 use of or distribution of illegal drugs; if so, please
16 stand?

17 All right. Again, I'm not going to ask you to go into
18 detail. I'm just going to ask you to give me your name and
19 your number and then to remain standing.

20 Yes, sir?

21 A. 152, Keith Lyon.

22 THE COURT: All right. Just remain standing.

23 Yes, ma'am.

24 A. Teresa Curtice, 59.

25 THE COURT: Yes, ma'am.

1 A. Cheryl Lawson, 144.

2 THE COURT: All right. Yes, sir.

3 A. Bryon L. Hicks, 113.

4 THE COURT: Yes, sir.

5 A. Jack Kierce, 137.

6 THE COURT: Now the five of you who are standing, if
7 the fact that you had that as part of your life experience
8 and if that would prevent you from being fair and impartial
9 in this trial, please raise your right hand?

10 None do.

11 Thank you. You may be seated.

12 Do any of you have any philosophical or theological or
13 any other beliefs which would prevent you from being fair
14 and impartial in a the trial of this particular case; if
15 so, please stand?

16 No one stands.

17 Have any of you have any bias or prejudice that you
18 are aware of against the State, the solicitor, the
19 solicitor's office, Mr. Matthews, Mr. Agurs, or the nature
20 of this crime or alleged crime; if so, please stand?

21 No one stands.

22 The following are possible witnesses in addition to
23 the people introduced I'm now going to - already introduced
24 to you, I'm going to read a list of possible witnesses.

25 If any of you know any of these individuals, if you

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1 are related to them, or associate with them or just know
2 them, please stand.

3 From the York County Multi-District Multi-Unit - local
4 DEU, drug enforcement unit. It's got a long name and I
5 mumbled it. Sorry. Leland Harrelson, Jim Lubben, Tanya
6 Ervin, Jamie Faulkenberry, Mark Brown.

7 From the York County Sheriff's Office, Patrick
8 Patterson, Cynthia Mitchum, Cheryl Guzman, James Long.

9 And then an individual not associated with law
10 enforcement, Michael Tumblin. Are any of you related by
11 blood or marriage, close or personal friend or acquaintance
12 of any of those individuals; if so, please stand?

13 No one stands.

14 Anything further from the State?

15 SOLICITOR SHELTON: No, sir. Your Honor.

16 THE COURT: The Defense?

17 MR. MATTHEWS: Your Honor, just in case I missed
18 anything in relation to outside information from any type
19 of media.

20 THE COURT: All right. I have not asked if anybody
21 had had any information from any source whatsoever about
22 this case, but I'll ask it again, particularly from the
23 news media.

24 I don't know if there has been any news coverage, but
25 have any of you been exposed to any information about this

1 case from any source whatsoever including particularly the
2 news media; if so, please stand.

3 No one stands.

4 Anything else, Mr. Matthews?

5 MR. MATTHEWS: No, Your Honor. That's it.

6 THE COURT: Do any of you know any reason whatsoever
7 why you could not or should not serve as a fair and
8 impartial juror in this case; if so, please stand?

9 No one stands.

10 Now the strikes in this are five and five. Correct?

11 We're drawing one alternate. Strikes will now be one
12 and two.

13 If you hear your name called, please come forward and
14 stand by the Bailiff. Bring with you any personal
15 belongings that you may have. When you get up here, turn
16 and face the table where Ms. Weaver and Mr. Shelton are
17 seated. One of them will say either excuse the juror, if
18 you hear those words, return to your seat. Or present the
19 juror, if you hear those words, turn and face the table
20 where Mr. Agurs and Mr. Matthews are seated and Mr.
21 Matthews will say either excuse the juror. Again that
22 means you may return to your seat, or he will say swear the
23 juror. If you hear the words swear the juror, the Bailiff
24 will show you where to take a seat in the jury box.

25 Madam Clerk.

1 MADAM CLERK: Number 97, Matthew Hagley.
2 (WHITE MALE COMING FORWARD.)
3 MADAM CLERK: What say you for the State?
4 SOLICITOR SHELTON: Please excuse the juror.
5 MADAM CLERK: You may return to your seat.
6 Number 226, Billy Thomas.
7 (WHITE MALE COMING FORWARD.)
8 MADAM CLERK: What say you for the State?
9 SOLICITOR SHELTON: Please present the juror.
10 MADAM CLERK: Defense:
11 MR. MATTHEWS: Please swear the juror.
12 MADAM CLERK: Please have a seat in the jury box.
13 Number 45, Tara Comer.
14 (WHITE FEMALE COMING FORWARD.)
15 MADAM CLERK: What say you for the State?
16 SOLICITOR SHELTON: Please present the juror.
17 MADAM CLERK: Defense.
18 MR. MATTHEWS: Please excuse the juror.
19 MADAM CLERK: You are excused from this case.
20 Number 173, Dianna Moore.
21 (WHITE FEMALE COMING FORWARD.)
22 MADAM CLERK: What say you for the State?
23 SOLICITOR SHELTON: Please present the juror.
24 MADAME CLERK: Defense?
25 MR. MATTHEWS: Please swear the juror.

1 MADAME CLERK: Please have a seat in the jury box.

2 Number 196, Charles Presler.

3 (WHITE MALE COMING FORWARD.)

4 MADAM CLERK: What say you for the State?

5 SOLICITOR SHELTON: Please present the juror.

6 MADAM CLERK: Defense?

7 MR. MATTHEWS: Please excuse the juror.

8 MADAM CLERK: You are excused from this case.

9 Number 103, Joseph Harrell.

10 (WHITE MALE COMING FORWARD.)

11 MADAM CLERK: What say you for the State?

12 SOLICITOR SHELTON: Please excuse this juror.

13 MADAM CLERK: You are excused from this case.

14 Number 113, Byron Hicks.

15 (WHITE MALE COMING FORWARD.)

16 MADAM CLERK: What say you for the State?

17 SOLICITOR SHELTON: Please excuse this juror.

18 MADAM CLERK: You are excused from this case.

19 Number 154, Mark Mackiewicz.

20 (WHITE MALE COMING FORWARD.)

21 MADAM CLERK: What say you for the State?

22 SOLICITOR SHELTON: Please present the juror.

23 MADAM CLERK: Defense?

24 MR. MATTHEWS: Please excuse this juror.

25 MADAM CLERK: You are excused from this case.

1 Number 29, Catherine Brandon.
2 (WHITE FEMALE COMING FORWARD.)
3 MADAM CLERK: What say you for the State?
4 SOLICITOR SHELTON: Please present the juror.
5 MADAM CLERK: Defense?
6 MR. MATTHEWS: Please swear the juror.
7 MADAM CLERK: Please have a seat in the jury box.
8 Number 205, Anthony Rossano.
9 (WHITE MALE COMING FORWARD.)
10 MADAM CLERK: What say you for the State?
11 SOLICITOR SHELTON: Please present the juror.
12 MADAM CLERK: Defense.
13 MR. MATTHEWS: Please swear the juror.
14 MADAM CLERK: Please have a seat in the jury box.
15 Number 75, Shirley Elkins.
16 (WHITE FEMALE COMING FORWARD.)
17 MADAM CLERK: What say you for the State?
18 SOLICITOR SHELTON: Please present the juror.
19 MADAM CLERK: Defense?
20 MR. MATTHEWS: Please swear the juror.
21 MADAM CLERK: Please have a seat in the jury box.
22 Number 234, Stephen Turner.
23 (WHITE MALE COMING FORWARD.)
24 MADAM CLERK: What say you for the State?
25 SOLICITOR SHELTON: Please present the juror.

1 MADAM CLERK: Defense.

2 MR. MATTHEWS: Please excuse this juror.

3 MADAM CLERK: You are excused from this case.

4 Number 223, James Summers.

5 (WHITE MALE COMING FORWARD.)

6 MADAM CLERK: What say you for the State?

7 SOLICITOR SHELTON: Please present the juror.

8 MADAM CLERK: Defense.

9 MR. MATTHEWS: Please swear the juror.

10 MADAM CLERK: Please have a seat in the jury box.

11 Number 144, Cheryl Lawson.

12 (WHITE FEMALE COMING FORWARD.)

13 MADAM CLERK: What say you for the State?

14 SOLICITOR SHELTON: Please present the juror.

15 MADAM CLERK: Defense?

16 MR. MATTHEWS: Please strike the juror.

17 MADAME CLERK: You are excused from this case.

18 Strikes are three and five.

19 Number 227, Mia Thompson.

20 (BLACK FEMALE COMING FORWARD.)

21 MADAM CLERK: What say you for the State?

22 SOLICITOR SHELTON: Please present the juror.

23 MADAM CLERK: Defense?

24 MR. MATTHEWS: Please swear the juror.

25 MADAM CLERK: Please have a seat in the jury box.

1 Number 158, William Masterson.
2 (WHITE MALE COMING FORWARD.)
3 MADAM CLERK: What say you for the State?
4 SOLICITOR SHELTON: Please present the juror.
5 MADAM CLERK: Defense.
6 MR. MATTHEWS: Please swear the juror.
7 MADAM CLERK: Please have a seat in the jury box.
8 Number 167, Charles Miles.
9 (BLACK MALE COMING FORWARD.)
10 MADAM CLERK: What say you for the State?
11 SOLICITOR SHELTON: Please present the juror.
12 MADAM CLERK: Defense.
13 MR. MATTHEWS: Please swear the juror.
14 MADAM CLERK: Please have a seat in the jury box.
15 Number 178, Blaine Mullis.
16 (WHITE MALE COMING FORWARD.)
17 MADAM CLERK: What say you for the State?
18 SOLICITOR SHELTON: Please present the juror.
19 MADAM CLERK: Defense.
20 MR. MATTHEWS: Please swear the juror.
21 MADAM CLERK: Please have a seat in the jury box.
22 Number 192, James Pebbles.
23 (WHITE MALE COMING FORWARD.)
24 MADAM CLERK: What say you for the State?
25 SOLICITOR SHELTON: Please present the juror.

1 MADAM CLERK: Defense.

2 MR. MATTHEWS: Please swear the juror.

3 MADAM CLERK: Please have a seat in the jury box.

4 Number 225, Clyde Tate.

5 (WHITE MALE COMING FORWARD.)

6 MADAM CLERK: What say you for the State?

7 SOLICITOR SHELTON: Please excuse this juror.

8 MADAM CLERK: You are excused from this case.

9 Number 238, Kelly Walker.

10 (WHITE MALE COMING FORWARD.)

11 MADAM CLERK: What say you for the State?

12 SOLICITOR SHELTON: Please present the juror.

13 MADAME CLERK: Defense?

14 MR. MATTHEWS: Your Honor, may we approach?

15 THE COURT: You may.

16 (WHEREUPON, BENCH CONFERENCE OFF THE RECORD AT 03:00
17 P.M..)

18 THE COURT: Mr. Walker, you haven't done anything
19 wrong, but I'm going to let you step back to your seat.

20 MR. WALKER: Okay.

21 MADAM CLERK: Number 185, Nannette Norton.

22 (WHITE FEMALE COMING FORWARD.)

23 MADAM CLERK: What say you for the State?

24 SOLICITOR SHELTON: Please present the juror.

25 MADAM CLERK: Defense?

1 MR. MATTHEWS: Please swear the juror.

2 MADAM CLERK: Please have a seat in the jury box.

3 THE COURT: We'll draw one alternate. The strikes
4 will be one for the State and two for the defense.

5 MADAM CLERK: Number 137, Jack Kierce.

6 (WHITE MALE COMING FORWARD.)

7 MADAM CLERK: What say you for the State?

8 SOLICITOR SHELTON: Please excuse this juror.

9 MADAM CLERK: You are excused from this case.
10 Number 210, Anne Self.

11 (WHITE FEMALE COMING FORWARD.)

12 MADAM CLERK: What say you for the State?

13 SOLICITOR SHELTON: Please present the juror.

14 MADAM CLERK: Defense?

15 MR. MATTHEWS: Please excuse this juror.

16 MADAM CLERK: You are excused from this case.
17 Number 54, Kelly Craig.

18 (BLACK FEMALE COMING FORWARD.)

19 MADAM CLERK: What say you for the State?

20 SOLICITOR SHELTON: Please present the juror.

21 MADAM CLERK: Defense?

22 MR. MATTHEWS: Please excuse the juror.

23 MADAM CLERK: You are excused from this case.
24 Number 71, Donald Dragon.

25 (WHITE MALE COMING FORWARD.)

1 MADAM CLERK: What say you for the State?

2 SOLICITOR SHELTON: Please present the juror.

3 MADAM CLERK: Defense?

4 MR. MATTHEWS: Please swear the juror.

5 MADAME CLERK: Please have a seat in the jury box.

6 THE COURT: Anything from the State involving the
7 striking of the panel?

8 SOLICITOR SHELTON: No, sir, Your Honor.

9 THE COURT: Anything from the defense?

10 MR. MATTHEWS: No, Your Honor.

11 THE COURT: All right. Those of you who were not
12 chosen, I'm going to allow you to leave and I'm going to
13 ask you to do so quietly because I am going to start
14 talking with this panel.

15 Please call back tonight and follow whatever
16 instructions you receive. Thank you.

17 (JURY DISMISSED AT 03:04 P.M..)

18 THE COURT: Those of you who were chosen, if you will
19 stand and raise your right hand, the Clerk will administer
20 the oath.

21 (PETIT JURY SWORN AT 03:04 P.M..)

22 MADAM CLERK: Thank you. Please be seated.

23 THE COURT: You may be seated.

24 Mr. Summers, I'm going to ask you to be the
25 foreperson. You will sit in that seat.

1 Mr. Dragon, you will always sit in that seat as the
2 alternate.

3 There is no other assigned seating but those two
4 people who have assigned places to sit.

5 I want to chat with you just for a few minutes and
6 then I'm going to turn the case over to the attorneys for
7 them to make opening statements.

8 These opening statements that they make are not
9 evidence and they are not -- the attorneys are not arguing
10 their case at this time. They are simply giving you an
11 outline or a blueprint of the trial.

12 Mr. Agurs has entered a plea of not guilty to this
13 charge, and therefore the State must prove his guilt to
14 your satisfaction unanimously beyond a reasonable doubt you
15 could convict him of the charge. As I told you earlier, he
16 is presumed innocent.

17 I have three primary jobs in a trial. One is to be
18 the mechanical, logistics person. Make sure that people
19 are where they are supposed to be at the right time. That
20 one person is talking at a time. That you can see things,
21 that you can hear things, that we take breaks. The
22 mechanical part of the trial is something that I am in
23 charge of.

24 I'm also in charge of questions of admissibility of
25 evidence. One side believes certain evidence should be

1 allowed in the record for your review and the other based
2 on some legal principle believes it should not be allowed
3 to be introduced, it is up to me to make a determination as
4 to the introduction of that evidence.

5 My third job is that I am the sole judge of the law in
6 this case. I'm giving you some legal principles now. I
7 may during the trial give you some legal principles. At
8 the end of the trial I will give you a concise and
9 comprehensive charge on the law that you are to apply to
10 the facts as you determine them to be.

11 You also are the judges of the facts in this case.
12 You are not to infer from anything I say or do at any time
13 during this trial as indicating an opinion of mine of the
14 facts.

15 Our laws does not allow a trial judge to formulate or
16 express to a jury any opinion on the facts. It is solely
17 your job to examine the evidence, give to the evidence the
18 effect, the value, the weight and the truth you believe it
19 should have.

20 You may believe one witness as opposed to several;
21 several witness as opposed to one. You may believe all,
22 part or none of a witness's testimony.

23 In analyzing the evidence, use your commons sense,
24 your sense of logic, your sense of reason and use your
25 experiences in life.

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1 As judges of the facts, you necessarily must judge the
2 credibility, believability of the witnesses who testify.
3 In assessing credibility, use the things that I have
4 already talked. Use the things that you, in your day to
5 day life, find as indicators of truthfulness in an
6 individual and you can use certain evaluators - a witness'
7 demeanor, how they act on the stand. Are they hesitant or
8 straightforward. Look at consistencies or inconsistencies
9 in their testimony. Look to see if they have any bias or
10 prejudice, that is, whether they wish to help or hurt one
11 side or the other, and you can consider the opportunity a
12 witness has to know those things to which the witness
13 testifies.

14 All these things you consider, determine the true
15 facts, apply the law and your verdict will be one that
16 speaks the truth.

17 You are not to make up your mind or discuss the case
18 among yourselves until I instruct you to jointly deliberate
19 and return a unanimous verdict. Prior to that time, you do
20 not have all the tools you need to make a fair and
21 reasonable decision.

22 Do not let anyone discuss this case with you outside
23 the courtroom. If anyone tries to discuss this case with
24 you, report that back to me. I will have to deal with that
25 person for having talked to a seated juror. So don't talk

1 or initiate a conversation with anyone and don't let anyone
2 initiate a conversation with you.

3 Do not do any kind of independent research on this
4 case. Particularly do not use any electronic means to
5 obtain any information that could deal with this case.
6 Don't go to Google or any of those social - Cloud or
7 anything, to find out anything about the law or about the
8 rules of evidence, about me, about the attorneys involved,
9 about Mr. Agurs. Do not do any independent research and
10 particularly do not do any through any electronic device.

11 Don't even go on Facebook and use that while you are
12 serving as a juror. You may think it's - there's no
13 problem with that, but you may if you were to put on
14 Facebook that you were serving as a juror, receive some
15 information back from somebody that would not be fair for
16 you to hear during the trial of this case.

17 Do not let yourself be exposed to any news coverage,
18 if there is anything in new coverage. Don't let yourself
19 be exposed to it. Don't read about, watch or listen to
20 anything that can remotely deals with this trial.

21 If anything catches your eye or ear, don't let - don't
22 pay any attention to it. You have got to base your verdict
23 solely on the law and the evidence that's developed in the
24 trial.

25 You don't need to take notes. We take breaks about

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1 every hour and a half, I find a good comfort level time,
2 but if any of you need a break at any time just raise your
3 right hand and with no questions asked we'll take a break.
4 I know you won't be able to pay attention if you are not
5 comfortable so if you need a break, let me know and we'll
6 take a break. And I extend that to counsel and to Mr.
7 Agurs also.

8 If you can't see or you can't hear, let me know. Cup
9 your ear or give me a voice raising gesture. If something
10 is in your way, give me a moving gesture and I will see
11 that whatever is blocking your view will be relocated.

12 I'm going to ask you to listen attentively at this
13 time. I'm going to turn it over to the attorneys to make
14 their opening statements.

15 SOLICITOR SHELDON: May it please the Court, Your
16 Honor.

17 THE COURT: Yes, sir.

18 SOLICITOR SHELTON: Good afternoon.

19 This case is about selling drugs. Dominique Agurs is
20 on trial charged with one count of distribution of crack
21 cocaine. It is alleged that this occurred on March 5th,
22 2013 in York County.

23 It's alleged that Mr. Agurs sold crack cocaine to a
24 man named Michael Tumblin. You will hear from Mr. Tumblin
25 testify. Mr. Tumblin was working with the Multi-

1 Jurisdictional Drug Enforcement Unit or the DEU as it's
2 commonly called. You may hear it called the Drug Unit. He
3 was working with them as a confidential informant or a CI.

4 Basically his role in the investigation was to go
5 undercover and attempt to purchase crack cocaine on March
6 5th, 2013. I posit to you the evidence will show that that
7 was done. Mr. Agurs sold crack cocaine to Mr. Tumblin on
8 that day. It was recovered as evidence. It was tested by
9 a chemist who works for the sheriff's department, Ms.
10 Mitchum. The drug deal was recorded on hidden audio/video
11 surveillance equipment. You will get to see a video and you
12 will get to hear things that were said and done throughout
13 the deal.

14 You will also hear a phone call setting up the deal.

15 You will hear from officers who had direct
16 participation in the investigation. You will hear from
17 Investigator Jim Lubben. You will hear from Investigator
18 Tanya Ervin and you will hear from the case agent, Mr.
19 Leland Harrelson. He is an investigator with the Drug Unit
20 as well.

21 At the end of the evidence - let me back up a second.
22 After every officer or every witness testifies, Mr.
23 Matthews will have an opportunity to cross examine them,
24 ask them his own questions.

25 At the conclusion of the evidence, we will stand up

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1 and argue our positions to you. At the end of this trial,
2 you will have all of the information you need to make a
3 fair and informed decision. And your decision must be
4 unanimous as Judge Hayes indicated earlier and I posit to
5 you that when the evidence concludes in this case, your
6 verdict will be guilty as charged.

7 Thank you.

8 THE COURT: Mr. Matthews.

9 MR. MATTHEWS: May it please the Court, Your Honor.

10 THE COURT: Yes, sir.

11 MR. MATTHEWS: My name is Michael Matthews. I'm an
12 attorney here in York County. I am representing Dominique
13 Agurs in this matter and what you need to do is a little
14 bit more than what you have heard so far.

15 Your job is - It sounds egregious when it's explained
16 to you by the solicitor's office, but if you pay attention
17 to the evidence, what your job is to do is to look at
18 inconsistencies of the evidence being presented to you and
19 does it in fact show what he claims it shows.

20 See, as his Honor told you, the presentation by the
21 Solicitor is not evidence. What's evidence is what you
22 hear or see coming from the stand.

23 And what you have to consider for a case like this is
24 you are deciding, all twelve members of the jury, are
25 deciding whether or not my client beyond a reasonable doubt

1 did what they are alleging he did.

2 The burden of proof stays solely in camp at this
3 table. It is never, ever transferred to this table.

4 The State must meet it's burden of proof and I would
5 submit to you, once you start seeing the inconsistencies,
6 start seeing the little bits and pieces that you see
7 throughout this, that it all starts to fall apart.

8 And what I would ask you is to pay close attention to
9 evidence. Are you seeing or are you hearing what the
10 solicitor is suggesting to you happened. If not, it's over
11 and you decide unanimously that my client is not guilty of
12 the charge.

13 So it is a lot more to it than just hearing what the
14 charge is. Each individual person that ever steps into
15 this courtroom or any other courtroom within this Country,
16 has the right to come in and say, stop. I want a jury of
17 my peers to consider the evidence and show that they
18 haven't met their burden. That what the State initially
19 tells you in opening statements didn't happen. And that's
20 what my client is asking of the jury, is to look and break
21 the evidence down and look at everything with a fine tooth
22 comb and start noticing that this is not as simple as this
23 case is about selling drugs.

24 And as you go through it, pay attention to what
25 witnesses say, what evidence shows you, what it does not

SERGEANT JIM LUBBEN: DIRECT BY SOLICITOR SHELDON

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1 show you, and the credibility of such evidence. That's the
2 crux of what needs to be done here today.

3 With that, we appreciate the time you are going to
4 give us. I wish it could go as quickly as some times we
5 see on TV, but I will say we're not in California either so
6 we're not going to take two or three weeks of your time.
7 But we are going to take the remainder of today and some of
8 tomorrow to do this, so we appreciate the time and effort
9 that you are going to put into it.

10 Thank you.

11 THE COURT: Call your first witness.

12 SOLICITOR SHELDON: May it please the Court, Your
13 Honor. The State calls Investigator James Lubben.

14 I believe he is out in the hallway.

15 (WHEREUPON, JIM LUBBEN, BEING
16 FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

17 DIRECT EXAMINATION

18 SERGEANT JIM LUBBEN BY SOLICITOR SHELTON:

19 Q. Good afternoon.

20 A. Good afternoon.

21 Q. Would you please identify yourself for the jury?

22 A. My name is Jim Lubben.

23 Q. And what is your occupation?

24 A. I am a sergeant with the Rock Hill Police Department.

25 Q. How long have you worked in law enforcement?

1 A. Approximately seventeen years.

2 Q. And did you or do you currently work with the drug
3 enforcement unit?

4 A. I did for approximately thirteen years.

5 Q. What do you do now?

6 A. I am the sergeant over homicide and cold cases for the
7 Rock Hill Police Department.

8 Q. Were you working with the drug unit in March of 2013?

9 A. Yes, I was.

10 Q. And what was your rank with the Drug Unit at that
11 time?

12 A. I was one of the line commanders for the drug
13 enforcement unit. The drug enforcement unit has four
14 commanders. You have a Senior Commander who is over the
15 entire drug enforcement unit. And then you have three line
16 commanders, basically like a junior commander. We have
17 three offices. One here with the York County Sheriff's
18 Office, one in Rock Hill, and then one in Fort Mill. I was
19 one of the line commanders who was over the Rock Hill
20 office.

21 Q. So were you the supervisor at that office?

22 A. Yes, I was.

23 Q. Will you please explain to this jury what is the drug
24 enforcement unit?

25 A. The drug enforcement unit was designed to conduct

SERGEANT JIM LUBBEN: DIRECT BY SOLICITOR SHELDON

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1 narcotic investigations along with gambling or prostitution
2 and other violent crimes. Each local law enforcement
3 agency within York County has investigators assigned to the
4 unit along with the Solicitor's office. Each investigator
5 has county-wide jurisdiction.

6 Q. During your time with the drug unit, did you
7 participate in controlled drug buys?

8 A. Yes, I did.

9 Q. Approximately how many?

10 A. It is hard to say. Over thirteen years making several
11 buys almost everyday you're talking hundreds of buys.
12 There is no way I can put a number on it.

13 Q. Will you please explain what is a controlled drug buy?

14 A. A controlled buy is where law enforcement tries - has
15 control over the buy. What they do is they bring in either
16 a confidential informant or utilize an undercover officer
17 to purchase drugs or guns or other - like stolen property.
18 We search the informants before the buys are made. We give
19 the informants law enforcement funds that are issued by the
20 government. And then we also search the informants after
21 the buy when they come back. They also have guidelines
22 they have to follow, kind of do's and don'ts, that they're
23 instructed to do.

24 Q. Is that the informants you are instructing to do? Is
25 that what you are saying?

1 A. Yes. I'm sorry.

2 Q. And so these procedures for searching and so on and so
3 forth, is that in order to keep this buy controlled as
4 you're suggesting?

5 A. Yes, sir. That way we know when the informant, or
6 whoever leaves our presence, they don't have anything on
7 them. There is nothing on their person; there is nothing
8 in their vehicle when they leave. When they meet the
9 person and come back, we know that they bought whatever
10 they're buying that came from that person.

11 Q. And please explain what is a confidential informant?

12 A. A confidential informant is somebody who is
13 cooperating with law enforcement. It could be somebody who
14 just calls in information, or they can take a more active
15 role where they actually go out and make buys for law
16 enforcement. They can either be paid to do that for law
17 enforcement, or also if they have gotten in trouble and
18 they're seeking some type of assistance on their charges.

19 Q. Were you involved in a drug investigation on March
20 5th, 2013, that led to the arrest of Dominique Julius
21 Agurs?

22 A. Yes, I was.

23 Q. Was a confidential informant used in that
24 investigation?

25 A. Yes.

SERGEANT JIM LUBBEN: DIRECT BY SOLICITOR SHELDON

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1 Q. Was he more of an active confidential informant?

2 A. Yes.

3 Q. And is his name Michael Tumblin?

4 A. Yes, it is.

5 Q. And did you have a role in that investigation?

6 A. Yes. I searched the informant before the buy. I was
7 also part of the surveillance team, and I also assisted
8 Officer Harrelson with providing the informant with a body
9 wire and the undercover video surveillance.

10 Q. So you said you conducted a search of Mr. Tumblin.

11 Would you please describe that in a little more detail?

12 A. Yeah. It is a pretty thorough search. Basically you
13 go into all their pockets. Search all their pockets, check
14 their waistband, shake their clothes, make them take their
15 shoes off, take their socks off, check everything. Check
16 their groin area and check their shirts, and all parts of
17 their body.

18 Q. And where did this search take place?

19 A. At the Rock Hill Law Enforcement Office.

20 Q. Was that on the day of the controlled buy?

21 A. Yes, it was.

22 Q. Approximately how soon before leaving, before sending
23 the CI out for the buy was the search done?

24 A. They had been right before we left to go make the buy.

25 Q. And do you all do these things the same way every

1 time?

2 A. Yes. The informant's searched just before leaving to
3 make the purchase.

4 Q. During that search, did you make sure that Mr. Tumblin
5 did not have anything on him?

6 A. Yes, I did.

7 Q. Did you search him thoroughly?

8 A. Yes, I did.

9 Q. And did you search him in the manner you just
10 described the normal way of searching a CI?

11 A. Yes, I did.

12 Q. Was anyone else present during this search?

13 A. I don't remember. Officer Harrelson was in and out at
14 the time. He was the case agent. He could have been
15 there, but I don't recall if he was in there at the time.

16 Q. And I think you mentioned you did something else as
17 part of this investigation as well?

18 A. I assisted Officer Harrelson with providing the
19 informant with undercover video surveillance. And also as
20 part of the surveillance team, monitoring the buy.

21 Q. Why do you provide them with audio and video
22 surveillance equipment, the CI's that is?

23 A. So we can verify what's going on. When they come
24 back, we have good video of the person and hopefully we do
25 have the transaction on video. It helps us identify the

SERGEANT JIM LUBBEN: DIRECT BY SOLICITOR SHELDON

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1 suspects that we are dealing with in case it's somebody we
2 do not know, and also to use in court.

3 Q. So is it an evidence gathering technique?

4 A. Yes, it is.

5 Q. And is it also to make sure that you are not just
6 relying on the confidential informant?

7 MR. MATTHEWS: Your Honor.

8 THE COURT: That was a leading questions, please ---

9 SOLICITOR SHELDON: Yes, sir.

10 THE COURT: --- in a different fashion.

11 BY SOLICITOR SHELTON:

12 Q. And what is the surveillance team?

13 A. Basically, it's officers who go out and monitor the
14 controlled purchase. We have a body wire that we can hear
15 what's going on. We cannot always see the buy occurring,
16 but we can hear it over the body wire, so that way we can
17 confirm and verify that they are meeting with somebody and
18 the transaction is taking place, or if it is not taking
19 place. And it's also for - so we can record it for court
20 proceedings and also for the informant's safety so we can
21 be there if something happens to them.

22 Q. So this - The audio and video recording equipment,
23 does it also include a live-wire feed?

24 A. Yes, it's live.

25 Q. And were you, as part of the surveillance team,

1 listening to that live audio feed during this
2 investigation?

3 A. Yes, I was.

4 Q. How did Tumblin get to the buy location?

5 A. Officer Ervin drove him to the location.

6 Q. What vehicle did she drive?

7 A. We have an undercover vehicle that we use on
8 operations such as this if a person doesn't have
9 transportation. In this case, Officer Ervin drove our
10 undercover vehicle to the buy.

11 Q. And was that vehicle regularly maintained and
12 vacuumed?

13 A. Yes, it is.

14 Q. Was it kept on city or county property?

15 A. Yes.

16 Q. Was it kept at the law center in Rock Hill?

17 A. Yes.

18 Q. Is it used by Drug Unit officers for Drug Unit
19 business?

20 A. Yes. It is only used by the narcotics unit. Nobody
21 else uses it.

22 Q. Is it ever loaned out to confidential informants who
23 do not have their own transportation?

24 A. Yes, it is.

25 Q. If it is loaned out to informants, would that have

SERGEANT JIM LUBBEN: DIRECT BY SOLICITOR SHELDON

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1 only been as part of an investigation?

2 MR. MATTHEWS: Your Honor, objection.

3 THE COURT: You're going back into leading questions.

4 Start over.

5 BY SOLICITOR SHELTON:

6 Q. For what purpose would you loan a - the Drug Unit
7 vehicle to an informant?

8 A. In case they don't have transportation. If they don't
9 have a vehicle to drive, we will provide the vehicle for
10 them.

11 Q. And that would be during Drug Unit investigations?

12 A. Yes. It would only be for a Drug Unit investigations.

13 Q. Would it have been thoroughly searched before and
14 after?

15 A. Yes.

16 Q. Why?

17 A. To make sure when they leave again that when they
18 meet with the target that what they are buying from the
19 target is actually from them and it's not hidden or placed
20 anywhere inside a vehicle or on their person so when they
21 come back, we know that it actually came from them.

22 Q. What other officers were involved in this
23 investigation?

24 A. Officer Harrelson, Officer Ervin, Officer
25 Faulkenberry, and Commander Brown.

SERGEANT JIM LUBBEN: DIRECT BY SOLICITOR SHELDON
CROSS BY MR. MATTHEWS

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1 Q. Do you recall what each of their roles was in this
2 investigation?

3 A. Commander Brown was part of the surveillance team.
4 Officer Ervin drove the informant from the police
5 department to the buy and then back to the police
6 department. Officer Faulkenberry was just part of the
7 surveillance team. Officer Harrelson was the case agent,
8 he had control over the informant. He was also there for
9 the buy. I believe he searched the informant after the buy
10 was made. And then of course myself, part of the
11 surveillance team and searching the informant before the
12 buy.

13 Q. To your knowledge was the buy successful?

14 A. Yes, it was.

15 Q. And to your knowledge, did Tumblin return with
16 Investigator Ervin to the Drug Unit after the buy?

17 A. Yes, he did.

18 Q. Did the entire investigation occur in York County,
19 South Carolina?

20 A. Yes.

21 MR. SHELTON: Nothing further.

22 CROSS-EXAMINATION

23 SERGEANT JIM LUBBEN BY MR. MATTHEWS:

24 Q. Do you remember what time Mr. Tumblin got to the Rock
25 Hill Police Department?

SERGEANT JIM LUBBEN: CROSS BY MR. MATTHEWS

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1 A. I believe it was just after two o'clock p.m., around
2 that time frame. Two, 2:30.

3 Q. From two o'clock when did you do the search of this
4 person?

5 A. 2:43 p.m.

6 Q. So he got there at two o'clock and then you did a full
7 search at 2:43?

8 A. Yes, sir.

9 Q. And without stating the obvious, that means he's been
10 sitting - he was sitting somewhere in Rock Hill PD for a
11 little over forty minutes?

12 A. He would have been in our office.

13 Q. All right. And did he meet with anybody during that
14 period of time?

15 A. He met with Officer Harrelson?

16 Q. Now, he met with Officer Harrelson before you did the
17 search of him at 2:43?

18 A. Yes.

19 Q. Now, you said you did a full search. That means does
20 he - without getting too graphic - does he just strip down
21 and you search him, or how does that process work?

22 A. No. We don't do strip searches. Their clothes are
23 on, but we go through everything. All of their clothing
24 and things like that. We don't do body cavity searches.
25 Body cavity searches are against drug unit policy, Rock

1 Hill Police Department policy. I believe every law
2 enforcement agency's policy we can't do body cavity
3 searches, but only a medical physician can do that. You
4 can cause severe bodily injury if you do a body cavity
5 search, so that's against our policy to do a body cavity
6 search. But we do do a full body search with their clothes
7 on.

8 Q. Okay. So you're patting them down?

9 A. Well, it is more than just a pat down. We're grabbing
10 their clothing, going in their pockets. If they have a
11 wallet, we take the wallet out and go through the wallet.
12 If they have a purse, we go through everything in their
13 purse. We are pretty hands on. It's not just a pat down.
14 We make them take their shoes off and go through their
15 shoes and go through their socks. Things like that.

16 Q. Okay. And did you - In your experiences, is it common
17 for people to hide drugs in their underwear or in the
18 crotch area of their pants or anything like that?

19 A. Yes, that has occurred.

20 Q. And do you check for that?

21 A. Yes.

22 Q. And your testimony is there was nothing there?

23 A. That is correct. Nothing there.

24 Q. All right. Do you remember what he was wearing that
25 day?

SERGEANT JIM LUBBEN: CROSS BY MR. MATTHEWS

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1 A. No, I don't.

2 Q. Do you know if he was wearing different layers of
3 clothing or whether just --

4 A. To the best of my knowledge he was wearing a pair of
5 pants and a shirt. What it consisted of, I couldn't tell
6 you.

7 Q. And when you are checking in different pockets and
8 everything, if he had multiple layers, are you reaching
9 into the multiple layers to make sure?

10 A. Yes. If he's wearing - Say he's wearing a pair of
11 pants and a pair of shorts underneath his pants. I will
12 make him drop his pants and then check his shorts. I will
13 go through the pockets. The same with shirts. If he's
14 wearing multiple layers of shirts, I will go through each
15 shirt.

16 Q. Do you know - Do you remember whether he was wearing a
17 coat that day?

18 A. No, I don't.

19 Q. Do you know if he was wearing any other - Do you
20 remember whether or not he was wearing any other layers of
21 coats or layers of clothes involving his pants, or anything
22 of that nature?

23 A. No.

24 Q. Now you indicated your part of this other than the
25 search was to handle the - doing the video and the audio;

1 is that correct?

2 A. Right. I assisted on providing the informant with an
3 undercover video camera.

4 Q. Do you remember where you placed that camera on him?

5 A. It would have been on his body.

6 Q. Okay. Where specifically?

7 A. Around the chest area.

8 Q. Around the chest area? Now, would you clip it to
9 something or how - I mean what does it look like?

10 A. You can basically - It goes through like a buttonhole.

11 Q. Okay. But it's strictly limited by where the
12 direction it's pointed?

13 A. Yes. That's correct.

14 Q. And you only see his - See on the camera what? If he
15 is moving back and forth, where that camera is pointing?

16 A. Yes.

17 Q. Where is the microphone at?

18 A. It's part of the camera.

19 Q. As part of the camera. All right.

20 Now, when you are monitoring, are you monitoring the
21 audio or are you monitoring the video, or both?

22 A. We are just monitoring the audio.

23 Q. So you are not seeing what he's seeing in realtime?

24 A. That's correct.

25 Q. Now, you indicated that normally this vehicle that was

SERGEANT JIM LUBBEN: CROSS BY MR. MATTHEWS.

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1 used - What kind of vehicle was used in this particular
2 case?

3 A. It's an undercover vehicle.

4 Q. What kind?

5 A. It's a truck.

6 Q. And you said the officer driving the truck was who?

7 A. Officer Tanya Ervin.

8 Q. And is that a male or female?

9 A. Female.

10 Q. And - And the CI, is that a male or female?

11 A. Male.

12 Q. Now the - The vehicle you said you loaned out to
13 confidential informants; is that correct?

14 A. We have in the past.

15 Q. Oh you have in the past. And do you know when was the
16 last time this vehicle - you personally know when this
17 vehicle was last loaned out to a confidential informant?

18 A. No, I do not remember

19 Q. At the time of this incident, did you personally
20 search this vehicle?

21 A. No, I did not.

22 Q. Do you know who searched the vehicle after it was last
23 used by a CI?

24 A. I would have to look at that case to see who searched
25 it.

SERGEANT JIM LUBBER: CROSS BY MR. MATTHEWS
REDIRECT BY SOLICITOR SHELTON

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1 Q. Okay. But right now today, can you tell us who that
2 was?

3 A. No I can't.

4 Q. And can you today tell us based on looking at records
5 or whatever, do you know whether or not that search was
6 actually conducted?

7 A. Again, I would have to look at that case to see if it
8 was conducted.

9 Q. Okay. But as of today, you can't tell us?

10 A. Going through procedure and the way we do things, I
11 can pretty much say that, yes it did occur, because that's
12 the way we do every single buy as the vehicle is searched
13 before and after.

14 Q. But as to this particular vehicle and this particular
15 time, other than procedure, you can't say whether or not
16 somebody searched that vehicle or not?

17 A. No sir.

18 MR. MATTHEWS: No further questions, Your Honor.

19 THE COURT: Counsel.

20 SOLICITOR SHELTON: Yes, sir, Your Honor.

21 REDIRECT EXAMINATION

22 SERGEANT JIM LUBBEN BY MR. SHELTON:

23 Q. Was the investigator - To your knowledge, was
24 Investigator ervin in control of the DEU truck the whole
25 time?

SERGEANT JIM LUBBEN: REDIRECT BY SOLICITOR SHELTON

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1 A. Yes, she was.

2 Q. To your knowledge, did she search the truck prior to
3 going out?

4 A. Yes, she did.

5 Q. And you testified a moment ago you do not remember if
6 Tumblin was wearing a coat. If he had been wearing a coat,
7 would you have searched it?

8 A. Yes, sir. That's just part of the clothing we take -
9 take off the coat and we go through the pockets and
10 everything, just like their clothing.

11 Q. And the same thing with any layers?

12 A. Yes.

13 Q. And your testimony is you didn't find anything?

14 A. That is correct.

15 MR. SHELTON: Nothing further, Your Honor.

16 MR. MATTHEWS: Nothing further, Your Honor.

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

18 MR. SHELTON: Your Honor, I'd ask that Sergeant Lubben
19 be excused?

20 THE COURT: You may be excused.

21 (WITNESS LEAVING WITNESS STAND.)

22 THE COURT: Call your next witness.

23 MR. SHELTON: Yes, sir, Your Honor. The State's next
24 witness is Michael Tumblin.

25 Your Honor, I need to walk out to one of the outer

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 rooms.

2 THE COURT: Come up here and put your left hand on
3 this Bible and raise your right.

4 (WHEREUPON, MICHAEL TUMBLIN,
5 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

6 THE COURT: Have a seat up here on the witness stand.

7 DIRECT EXAMINATION

8 MICHAEL TUMBLIN BY SOLICITOR SHELTON:

9 Q. Good afternoon.

10 A. Good afternoon.

11 Q. Would you please introduce yourself to the jury?

12 A. I'm Michael Tumblin.

13 Q. Do you go by Mike?

14 A. Yes, sir, I go by Mike.

15 Q. Where are you from Mike?

16 A. I live in Rock Hill, South Carolina.

17 Q. How long have you lived here?

18 A. I've lived here since 2006.

19 Q. And how old are you?

20 A. I'm fifty-four years old.

21 Q. Do you have a job?

22 A. Yes, I do.

23 Q. What do you do?

24 A. I help a tree company here in Rock Hill. We cut
25 trees, do tree work yes, sir.

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 Q. Mr. Tumblin, have you ever been convicted of a crime?

2 A. Yes, sir, I have.

3 Q. Were you convicted of obtaining prescription drugs by
4 fraud, arrested on January 15th, 2014.

5 A. Yes, sir.

6 Q. Is that a misdemeanor?

7 A. Yes, sir.

8 Q. And were you sentenced to six months in prison on
9 that?

10 A. Yes, I was.

11 Q. And the same day, January 15th, 2004, were you
12 arrested for - seven counts of violation of the drug
13 distribution law?

14 A. Yes, sir, I was.

15 Q. Was that in Greenville County?

16 A. Yes, sir.

17 Q. Were those felony charges?

18 A. Yes, sir.

19 Q. And were you sentenced to probation on those cases?

20 A. Yes, sir, I was.

21 Q. July 14th, 2004, were you convicted of another four
22 counts of violation of drug distribution law on charges
23 from South Carolina and Department of Health and
24 Environmental Control?

25 A. Yes, sir.

1 Q. Are those felony charges?

2 A. Yes, sir.

3 Q. Were you sentenced to three years in prison on those
4 charges?

5 A. Yes, sir, I was.

6 Q. In 2005, 2007, and 2009, were you convicted of grand
7 larceny?

8 A. Yes, sir, I was

9 Q. Were all three of those separate convictions? Are
10 those three separate convictions?

11 A. Yes, sir, they were.

12 Q. Are they felony charges?

13 A. Yes, sir, they were.

14 Q. And were you sentenced to one year - excuse me, one
15 year in prison on the 2005 conviction?

16 A. Yes, sir, I was.

17 Q. Were you sentenced to thirty days and probation on the
18 2007 conviction?

19 A. Yes, sir, I was.

20 Q. And were you convicted - sentenced to three years in
21 prison on the 2009 conviction?

22 A. Yes, sir, I was.

23 Q. In 2012 and 2013, were you convicted of shoplifting?

24 A. Yes, sir, I was.

25 Q. Were those in city court in Rock Hill?

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 A. Yes, sir.

2 Q. Were those misdemeanor charges?

3 A. Yes, sir.

4 Q. And were you made to pay a fine on those two
5 convictions?

6 A. Yes, sir, I was.

7 Q. Mr. Tumblin, are you or were you a user of crack
8 cocaine?

9 A. Yes, sir, I have been. Yes, sir.

10 Q. How long did you use crack?

11 A. Several years, several years of my life. It was many
12 years.

13 Q. Do you still use?

14 A. No, sir. I have been clean for over a year now.

15 Q. Mr. Tumblin, in February of 2013, were you charged
16 with traffic offenses, driving under suspension, license
17 plate violation, failure to possess registration card, and
18 failure to maintain proof of motor vehicle insurance?

19 A. Yes, sir, I was.

20 Q. And were those traffic offenses in Magistrate Court?

21 A. Yes, sir, they were.

22 Q. They were in York County?

23 A. Yes, sir.

24 Q. Did each of those carry up to thirty days in jail and
25 or fine?

1 A. Yes, sir, they did.

2 Q. Did you meet with officers from the Drug Enforcement
3 Unit after you were arrested on those traffic charges?

4 A. Yes, sir, I did.

5 Q. Was that around the beginning of March 2013?

6 A. Yes, it was.

7 Q. Did you agree to work with the Drug Unit as a
8 confidential informant?

9 A. Yes, sir, I did.

10 Q. Were you hoping to work off traffic charges?

11 A. Yes, sir.

12 Q. And in particular, those traffic charges from February
13 2013 I just named?

14 A. Yes, sir, exactly. Yes, sir.

15 Q. Would you have gotten credit toward working off those
16 charges whether or not you had been able to buy drugs?

17 A. Yes, sir.

18 Q. Was that your understanding from talking with the
19 officers?

20 A. Yes, sir, it was.

21 Q. And would you have been given credit for honest effort
22 to buy drugs even if it wasn't successful?

23 A. Yes, sir.

24 Q. And that was your understanding of the agreement with
25 the drug unit?

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 A. Yes, sir. The understanding I had with them.

2 Q. Are those traffic charges still pending?

3 A. No, sir, they are not.

4 Q. Were three of those charges dismissed?

5 A. Yes, sir.

6 Q. And were you given \$30.00 or \$35.00 to pay - to pay
7 the fine on the fourth one?

8 A. Yes, sir, I was.

9 Q. And was that the result of you working for the Drug
10 Unit as a CI?

11 A. Yes, sir.

12 Q. And in particular in March of 2013?

13 A. Yes, sir.

14 Q. Mr. Tumblin, were you arrested again in August of
15 2013?

16 A. Yes, sir, I was.

17 Q. Were you charged with shoplifting and receiving stolen
18 goods then?

19 A. Yes, sir.

20 Q. And were those felony charges?

21 A. Yes, sir.

22 Q. Did you plead guilty of those charges?

23 A. Yes, sir, I did.

24 Q. And were you sentenced to one year in prison
25 concurrent as part of the plea deal on those charges?

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 A. Yes, sir.

2 Q. Mr. Tumblin, did Drug Unit officers or anyone else
3 make you any promises or have anything to do with those
4 charges from August of 2013?

5 A. No, Sir.

6 Q. So just so we are clear, those August 2013 charges
7 were handled separately from the work you did with the Drug
8 Unit in March of 2013?

9 A. Yes, sir.

10 Q. And in fact had you already completed your work as a
11 CI by that time?

12 A. Yes, sir.

13 Q. And had those traffic charges already been resolved by
14 that time?

15 A. Yes, sir, they have been.

16 Q. Mr. Tumblin, on March 5th, 2013, were you involved in
17 an investigation with the Drug Unit where you worked
18 undercover as a confidential informant?

19 A. Yes, sir.

20 Q. Did you go to the Drug Unit office that day?

21 A. Yes, sir, I did.

22 MR. MATTHEWS: Your Honor, I'm gonna, again, we are
23 leading the questions. I respectfully request that the
24 questions be limited to non-leading questions of this
25 witness. Let the witness testify.

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 THE COURT: Just don't ask leading questions.

2 BY SOLICITOR SHELTON:

3 Q. Mr. Tumblin, did you indicate to Drug Unit officers
4 whether or not you could buy drugs from someone that day?

5 MR. MATTHEWS: Again, , Your Honor, this is a leading
6 question.

7 THE COURT: That is a leading question. You need to
8 rephrase your questions.

9 BY SOLICITOR SHELTON:

10 Q. Why did you meet with the Drug Unit on March 5th,
11 2013?

12 A. I was hoping I could work off some of them traffic
13 tickets yes, sir.

14 Q. Did you tell them you could do anything?

15 A. Yes, sir, I told em I could buy crack cocaine.

16 Q. Did you tell them who you could buy from?

17 A. Yes, sir.

18 Q. Who?

19 A. A black guy named D.J.

20 Q. This guy D.J., did you know him?

21 A. Yes, I knew him.

22 Q. Did you know him before that day?

23 A. Yes, I knew him before that day.

24 Q. Approximately how long had you known him?

25 A. I'd known him for six months or better.

1 Q. Had you seen him in person before that day?

2 A. Yes, sir.

3 Q. Approximately how many times?

4 A. A half of dozen or more yes, sir.

5 Q. Did you know his last name at that time?

6 A. No, nobody called him by his last name.

7 Q. Did you know how to get in touch with him?

8 A. Yes, sir.

9 Q. Did you know his phone number?

10 A. Yes, sir.

11 Q. Did you call that number on March 5th, 2013?

12 A. Yes, sir, I did.

13 Q. Why did you call that number?

14 A. To set up a drug deal - - -

15 Q. Was that ---

16 A. --- for crack cocaine.

17 Q. I'm sorry.

18 A. To set up a crack - a drug deal for crack cocaine for
19 the undercover unit.

20 Q. Did you make the call from your cell phone?

21 A. Yes, sir, I did.

22 Q. And where were you when you made that call?

23 A. I was at Rock Hill Police Department.

24 Q. Was that phone call recorded?

25 A. Yes, sir, it was.

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 Q. By Drug Unit officers?

2 A. Yes, it was.

3 Q. Have you had a chance to listen to that call prior to
4 testifying in court today?

5 A. Yes, sir, I have.

6 Q. Mr. Tumblin, I am going to show you what is the marked
7 for identification as State's Exhibit Number One.

8 Will you please take a moment to look at this?

9 A. Yes, sir.

10 Q. Do you recognize this disc?

11 A. Yes, I do.

12 Q. Is there a recording on it?

13 A. Yes, sir, there are.

14 Q. Have you listened to the audio recording on this disc
15 prior to coming to court today?

16 A. Yes, sir, I have.

17 Q. What's it a recording of?

18 A. It's a recording of the conversation I had on the
19 telephone with D.J.

20 Q. On March 5th, 2013?

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

22 Q. And is it true and accurate as to that phone call?

23 A. Yes, sir, it is.

24 MR. SHELTON: Your Honor, I move to have State's
25 Number One entered as evidence.

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 THE COURT: Mr. Matthew, any objection?

2 MR. MATTHEW: Your Honor, the objection is, there is
3 incomplete foundation set. He just says he mentions
4 somebody D.J., but he has not identified who that person is
5 as to who he talked to.

6 THE COURT: All right. I over rule your objection.

7 It's in over objection.

8 (WHEREUPON, STATE'S EXHIBIT NUMBER ONE, IDENTIFIED AND
9 MARKED, RECEIVED INTO EVIDENCE.)

10 MR. SHELTON: I request to publish this call.

11 (STATE'S EXHIBIT NUMBER ONE PUBLISHED TO THE JURY AT
12 03:52 P.M..)

13 Q. Mr. Tumblin, were you able to hear that recording that
14 was published for the jury?

15 A. Yes, sir, I did.

16 Q. Was that your voice on there?

17 A. Yes, sir, it was.

18 Q. Did you ask the other man on the call for something?

19 A. Yes, sir, I did.

20 Q. What did you ask for?

21 A. A whole one which is a whole gram of crack cocaine.

22 Q. And how much is a whole one? A gram?

23 A. A gram. Yes, that's slang talk for a gram of cocaine.
24 Yes, sir, a whole one.

25 Q. Is it also known as a G?

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 A. Yes, it's known as a G too. Yes, sir.

2 Q. After that phone conversation, did you have an
3 understanding as to whether or not this other guy would you
4 sell you a gram of crack?

5 MR. MATTHEWS: Objection, Your Honor. Again, leading
6 questions. Just ask what his understanding was.

7 THE COURT: I over rule the objection.

8 You may answer the question.

9 A. Yes, sir, my understanding that I was gonna to get a
10 gram of crack cocaine from him yes, sir.

11 Q. Did you know how much you had to pay for that?

12 A. Usually Eighty Dollars yes, sir.

13 Q. And did you agree to meet this other man somewhere?

14 A. Yes, sir, I did.

15 Q. Where?

16 A. McCullum Street.

17 Q. Did you go to meet him after this call?

18 A. Yes, sir, we did. Yes, sir, I did.

19 Q. Did you go by yourself or with anyone else?

20 A. No, sir. I went with an officer from the Drug Unit.
21 Transported me over there.

22 Q. Do you remember who?

23 A. Yes, it was a lady. It was Tammy.

24 Q. Tanya?

25 A. Tanya.

1 Q. Was that investigator Tanya Ervin?

2 A. Yes, sir, with the Drug Unit. Yes, sir.

3 Q. Did you drive your vehicle, or did you ride in hers.

4 A. Rode in hers.

5 MR. MATTHEWS: Your Honor, we're still - we're
6 gradually heading back into leading questions again.

7 THE COURT: Well, that's getting close, but I overrule
8 the objection on this.

9 Just watch how you phrase your questions.

10 A. Yes, sir, we rode in her Drug Unit vehicle.

11 Q. Were you searched before you left?

12 A. Yes, sir, I was.

13 Q. Who searched you?

14 A. Officer Harrelson with the Drug Unit.

15 Q. Were you given any money before you left?

16 A. Yes, sir, I was given Eighty Dollars. Yes, sir.

17 Q. Who gave it to you?

18 A. Officer Harrelson with the Drug Unit.

19 Q. Did Drug Unit officers hide an audio video recording
20 equipment on you?

21 A. Yes, sir, they did.

22 Q. To your knowledge, was it recording everything that
23 happened after it was turned on until they took it off you?

24 A. Yes, sir, it was.

25 Q. Did that equipment produce a recording?

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 A. Yes, sir, it did.

2 Q. Have you had a chance to watch that recording?

3 A. Yes, sir, I have.

4 Q. Did you watch it prior to coming to court to testify
5 today?

6 A. Yes, sir, I have.

7 Q. Mr. Tumblin, I am showing you what's been marked for
8 identification as State's Exhibit Number Two.

9 Do you recognize this?

10 A. Yes.

11 Q. Is there a recording on this disc?

12 A. Yes, sir.

13 Q. Have you watched the recording on this disc?

14 A. Yes, sir, I have.

15 Q. Is it an audio video recording?

16 A. Yes, sir.

17 Q. And what is on it?

18 A. The transaction of the drug buy.

19 Q. Have you watched the whole thing prior to testifying
20 here today?

21 A. Yes, sir, I have.

22 Q. And is it true and accurate as to the events from your
23 perspective that happened that day?

24 A. Yes, sir, it is.

25 MR. SHELTON: Your Honor, I would move this into

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 evidence.

2 THE COURT: Any objection?

3 MR. MATTHEWS: Your Honor, I am going to object based
4 on the foundation he wasn't the one that did the recording.

5 I think there needs to be other testimony before -
6 from whoever the officers were that were operating it
7 before it can be entered into evidence.

8 THE COURT: I overrule that objection.

9 It's in over objection.

10 (WHEREUPON, STATE'S EXHIBIT NUMBER TWO, IDENTIFIED AND
11 MARKED, RECEIVED INTO EVIDENCE.)

12 MR. SHELDON: Your Honor, I would like permission to
13 publish this to the jury?

14 THE COURT: You may.

15 (PAUSE.)

16 MR. SHELDON: Your Honor, I'm having some technical
17 difficulties. This is not my forte. Can we have a brief
18 minute to get this sorted out?

19 THE COURT: We will go ahead and take about a ten to
20 twelve minute break. We will get refreshed and we'll send
21 for you when we get this working.

22 (JURY EXITS COURTROOM AT 03:56 P.M.)

23 THE COURT: Mr. Shelton, let me know when it's
24 operable.

25 SOLICITOR SHELTON: Yes, sir.

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 (COURT IN RECESS AT 03:57 P.M.)

2 (COURT BACK IN SESSION AT 04:08 P.M..)

3 THE COURT: Thank you. Take your seats.

4 Are you ready?

5 SOLICITOR SHELTON: Yeah, Your Honor. We got it
6 sorted out. If it's okay with you, what we - Mr. Matthews
7 and I were just discussing, we'd like to try to get through
8 Mr. Tumblin's testimony, direct and cross, and that would
9 probably be a good place for a break just so we can kind of
10 project.

11 THE COURT: We just took a break.

12 SOLICITOR SHELTON: Well, I mean, for the day, Your
13 Honor. That will probably take us to the end of the
14 evening into the afternoon.

15 THE COURT: Well, I do have drug court tonight so
16 it's probably a good plan.

17 All right. Bring in the jury.

18 (JURY ENTERS COURTROOM AT 04:10 P.M.)

19 THE COURT: Ready to proceed.

20 SOLICITOR SHELTON: Thank you, Your Honor. At this
21 time, I'd like to ask to publish the video to the jury.

22 THE COURT: You may.

23 (STATE'S EXHIBIT TWO PUBLISHED TO THE JURY.)

24 (STATE'S EXHIBIT TWO, VIDEO, STOP AT 04:40 P.M..)

25 DIRECT EXAMINATION - CON'T

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 MICHAEL TUMBLIN BY SOLICITOR SHELTON:

2 Q. Mr. Tumblin, who were you talking with on the phone
3 during the ride to Dollar General?

4 A. D.J.

5 Q. During those calls, was the meeting location changed?

6 A. Yes, sir. Yes, sir, it was.

7 Q. Where was it changed to?

8 A. Burger King there on Saluda Street.

9 Q. That's still in Rock Hill. Right?

10 A. Yes, sir. It's still in Rock Hill and it's still just
11 a few blocks from Collins Street.

12 Q. Where did Officer Ervin park the truck?

13 A. At the Dollar General. Yes, sir.

14 Q. Was that right across the street?

15 A. Yes, sir. Right across the street from Burger King.

16 Q. Is that where you got out of the vehicle?

17 A. Yes, sir.

18 Q. Where did you go once you got out of the vehicle?

19 A. I walked across the intersection and walked over to
20 the Burger King and stood out - out there on the side of
21 the building.

22 Q. Did you make any stops along the way to the Burger
23 King?

24 A. No, sir.

25 Q. Did you meet with anyone on the way?

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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- 1 A. No, sir.
- 2 Q. Did you go inside the restaurant?
- 3 A. No, sir.
- 4 Q. Did you meet with anyone outside the restaurant?
- 5 A. No, sir.
- 6 Q. Did you make a phone call while you were outside the
7 restaurant?
- 8 A. Yes, sir, I did.
- 9 Q. Who did you call?
- 10 A. I called D.J.
- 11 Q. Who was driving the white car that pulled up?
- 12 A. That was D.J.
- 13 Q. Was that the same car you got in?
- 14 A. Yes, sir, it was.
- 15 Q. Was anyone with him?
- 16 A. No, sir. He was by his self.
- 17 Q. What, if anything, did you see inside the car when you
18 got in?
- 19 A. I seen the crack cocaine laying there in between the
20 seats in a little console there.
- 21 Q. What did you do when you saw that?
- 22 A. I handed D.J. Eighty bucks and he nodded toward the
23 crack there and I picked it up so I made a transaction.
- 24 Q. Please describe what the crack looked like.
- 25 A. Well, it was just a little round white crack rock kind

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 of - I mean it weighted a gram. It was just a crack rock.

2 Q. Was it loose or was it wrapped in anything.

3 A. It was wrapped in clear plastic. He just like balled
4 it up. I mean, it wasn't wrapped - I believe it was just
5 wrapped enough to contain it in it.

6 Q. Was there any conversation between you and D.J. in the
7 car?

8 A. I think I asked him was the weight right and he said
9 yeah, it weighed 1.2 grams.

10 Q. So is that more or less than what you had ordered?

11 A. It was like .2 grams - .2 grams over. Just a little
12 bit over a gram.

13 Q. And is that what D.J. told you it weighed?

14 A. Yes, sir. That's what he told me it weighed. Yes,
15 sir.

16 Q. Did you have any scales with you?

17 A. No, sir. I didn't have any scales.

18 Q. So you had no way to check the weight?

19 A. No, sir.

20 Q. What did you do after that?

21 A. I put the crack in my hand and walked back across the
22 road to the female undercover agent that works with the
23 Drug Unit. Got back in the truck with her and we rode back
24 to the Rock Hill Police Department and once I got there, I
25 gave the crack to Officer Harrelson.

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 Q. What did D.J. do after you got out of the car?

2 A. He backed up and went out the exit and straight across
3 to the car wash and went behind the car wash and I guess
4 it's a little back road back up to McCullough Street there,
5 back where maybe he just slept.

6 Q. Mr. Tumblin, on your way back from the meeting
7 location, did you make any stops along the way?

8 A. No, sir, I did not.

9 Q. Did you meet with anyone on your way back to meet with
10 Ervin?

11 A. No, sir, I did not.

12 Q. What did you do with the crack?

13 A. I held it in my hand and when we got to the - back to
14 Rock Hill Police Department, I give it to Officer Harrelson
15 with the Drug Unit.

16 Q. Did the crack leave your possession during that time
17 before you gave it to Harrelson?

18 A. No, sir.

19 Q. And did you hold it in your hand the whole time?

20 A. Yes, sir, I did.

21 Q. Is that what officers instructed you to do?

22 A. Yes, sir.

23 Q. Were you searched again back at the DEU?

24 A. Yes, sir, I was.

25 Q. Mr. Tumblin, were you shown a photo lineup on March

1 5th 2013 after this deal?

2 A. Yes, sir, I was.

3 Q. Who showed you that photo lineup?

4 A. Officer Harrelson.

5 Q. Did anyone show you that video before they showed you
6 the lineup?

7 A. No, sir.

8 Q. Where were you when you were shown the photo lineup?

9 A. Sir?

10 Q. Where were you when they showed you the photos?

11 A. I was still inside the Drug Unit in the little office
12 they have there. Yes, sir.

13 Q. Was anyone else with you?

14 A. Officer Harrelson.

15 Q. Mr. Tumblin, I'm showing you what has been marked for
16 identification as State's Exhibit Number Four. You can
17 hold onto that. Do you recognize that, sir?

18 A. Yes, sir, I do.

19 Q. What is it?

20 A. This is the lineup that Officer Harrelson showed me
21 that day on the purchase.

22 Q. Is this the only lineup you were shown?

23 A. Yes, sir.

24 Q. How many pictures are on that lineup?

25 A. There's six individual pictures on here.

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 Q. And how many pages are in that Exhibit?

2 A. There are three in this one today. Three.

3 Q. Were you shown the first page only?

4 A. Yes, sir. First page only.

5 Q. Is there a second page that has names and identifying
6 information on it?

7 A. Yes, sir, there are.

8 Q. Were you shown that page when you were shown the
9 lineup?

10 A. No, sir, I was not.

11 Q. And did the pictures you were shown have any names or
12 identifying information on them?

13 A. No, sir, they did not.

14 Q. Did anyone tell you who to pick out, who not to pick
15 out?

16 A. No, sir, he did not.

17 Q. Did anyone say or do anything to suggest to you what
18 picture you should select?

19 A. No, sir, he did not.

20 Q. Did you select a picture?

21 A. Yes, sir, I did.

22 Q. Which one of those pictures did you select?

23 A. I selected the picture of D.J. He's the guy known as
24 D.J.

25 Q. And did you mark your selection?

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON:

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1 A. Yes. I circled it and then I put my initials up under
2 it and then in the bottom I signed it.

3 Q. Did you write the date on there?

4 A. Yes, sir, I did.

5 Q. What date did you write on there?

6 A. I wrote 3-5-12 on it.

7 Q. Was that the correct date?

8 A. No, sir. It was 3-5-13.

9 Q. So we're clear, did you write down the wrong year?

10 A. Yes, sir, I did write the wrong year down. The months
11 spelled --

12 Q. I'm sorry. I don't mean to interrupt you.

13 A. It was March the 5th, 2013.

14 Q. That's when this actually occurred?

15 A. That was the actual date this happened. Yes, sir.

16 Q. And on that video we just watched, did we see a date
17 on there?

18 A. Yes, sir. I seen a date on there.

19 Q. Was that the correct date on there?

20 A. No, sir, it was not.

21 Q. Did you give a sworn statement to Drug Unit officers
22 after the buy was done?

23 A. Yes, sir, I did.

24 Q. Mr. Tumblin, do you see the person here in court today
25 that you know as D.J.?

MICHAEL TUMBLIN: DIRECT BY SOLICITOR SHELTON
CROSS BY MR. MATTHEWS

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1 A. Yes, sir, I do.

2 Q. Can you please point him out for the jury.

3 A. That's D.J. sitting right there beside his attorney.

4 SOLICITOR SHELTON: Your Honor, please let the record
5 reflect the witness has pointed to the defendant sitting
6 next to Mr. Matthews.

7 (WITNESS INDICATED TOWARD DEFENDANT.)

8 SOLICITOR SHELTON: No further questions, Your Honor.

9 THE COURT: Mr. Matthews.

10 CROSS-EXAMINATION

11 MICHAEL TUMBLIN BY MR. MATTHEWS:

12 Q. As I understand from when we started your questioning,
13 Mr. Tumblin, when we started the questioning earlier today,
14 that you went through this list of your criminal history.

15 Right?

16 A. Yes, sir.

17 Q. And that is your criminal history?

18 A. Yes, sir, it's my criminal history.

19 Q. Okay. And you, if I understand the testimony
20 correctly, you approached the police. Correct?

21 A. Yes, sir.

22 Q. And the reason why you approached the police is
23 because you wanted help with your charges that were pending
24 at the time?

25 A. Yes, sir.

1 Q. And you knew they could do that for you?

2 A. I knew it was a possibility.

3 Q. So your intention as you placed yourself in this
4 situation, your intention was if I did something for the
5 police; hopefully they'll do something for me?

6 A. It was a possibility. Yes, sir.

7 Q. Now, other than us hearing you on the tape, we don't
8 hear anybody. We hear somebody on the other side of the
9 phone call, correct, that you made to a person named D.J.?

10 A. Yes, sir.

11 Q. All right. But we don't have anything other than your
12 testimony that the person on the other side of that was my
13 client? Is that right?

14 A. Sir?

15 Q. We don't have anything else other than your testimony
16 indicating that the person you called was my client?

17 A. No, sir.

18 Q. Okay. You don't have any phone records showing that
19 the number you called from your phone was in fact to my
20 client?

21 A. I had it programmed in my phone listed under D.J. Yes
22 I do.

23 Q. But do you have phone records here to show that to us
24 today?

25 A. No, I don't have any phone records.

MICHAEL TUMBLIN: CROSS BY MR. MATTHEWS

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1 Q. Do you have any phone records to indicate that the
2 date that you are saying this happened, March 5th, was in
3 fact March 5th of 2013?

4 A. No, sir, I don't.

5 Q. Okay. What were you wearing that day?

6 A. What was I wearing that day?

7 Q. Yes, sir.

8 A. I had on a pair of blue jeans and I had on a shirt
9 similar to this and I had a pull over shirt that the
10 narcotics unit supplied me with a camera in it on one of
11 the buttons.

12 Q. Anything else?

13 A. Socks and shoes.

14 Q. Were you wearing a jacket?

15 A. I didn't wear no jacket to make the buy. No, sir.

16 Q. Okay. The reason why I ask, on the video we see what
17 looks like a zipper covering up the camera at some point in
18 time.

19 A. Yes, sir. Button - is a shirt with just a little
20 buttons here and the camera was in the button.

21 Q. Okay. Were you searched before you put that shirt on?

22 A. Yes, sir, I was.

23 Q. Were you given any instructions about what to do with
24 the video or audio?

25 A. No, sir.

MICHAEL TUMBLIN: CROSS BY MR. MATTHEWS

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1 Q. Did you meet with the Officer Harrelson before you
2 were searched?

3 A. Other than just coming in I mean - Did I meet with
4 him? No, sir. I was coming in to maybe get suited up and
5 searched and go make the buy.

6 Q. What time did you get to the Rock Hill Police
7 Department?

8 A. It was after lunch.

9 Q. Okay. How long were you there before you were
10 searched?

11 A. Just about immediately when I got there I was
12 searched.

13 Q. So as soon as you got to the Rock Hill Police
14 Department you were searched?

15 A. Pretty much. Yes, sir.

16 Q. Now, you indicated - When did you indicate in your
17 testimony that you saw a photo lineup?

18 A. I indicated in this one here that it was after the
19 purchase. I knowed D.J. before I seen him in the lineup.
20 I knowed him after I seen him in the lineup. There's no
21 question of whether it was before or after. I might have
22 got confused on whether it was before or after but
23 regardless, I knowed D.J. either way before or after.

24 Q. The only question I asked you was, when did you see
25 the photo lineup?

MICHAEL TUMBLIN: CROSS BY MR. MATTHEWS

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1 A. When did I see the photo lineup? I stated earlier it
2 might have been before, but I'm pretty sure it had to be
3 afterwards.

4 Q. All right. So you admit to earlier today you said you
5 saw the photo lineup before you were searched?

6 A. Well that's been over a year ago. I never checked
7 that part. The impression in my mind was before or after
8 because either way, I have knowed D.J. regardless of seeing
9 him in a lineup so I didn't say well was it before or after
10 till you asked me that question off guard there, and I just
11 acknowledged knowing him in the lineup.

12 Q. So again, you acknowledged previously that you saw him
13 before you went in?

14 A. I might have. Yes, sir.

15 Q. Okay. And who showed it to you?

16 A. Officer Harrelson with the Drug Unit.

17 Q. Were you given any instructions when you saw it?

18 A. No, sir.

19 Q. Okay. And now your testimony is that you saw it
20 after?

21 A. I believe it was after. Yes, sir. Like I say, I
22 never dwelled on putting that part in my mind that was it
23 before or after because I knew D.J. either way. I knowed
24 him before and after, so that may have been what I got
25 confused on that. That confused you but if I did, it is

MICHAEL TUMBLIN: CROSS BY MR. MATTHEWS

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1 just something that I didn't try to remember because I
2 already knew D.J. either way, so I mean, there was nothing
3 that stuck out there to me, but.

4 Q. When you went out, you were let out at the -- which
5 store were you let out at?

6 A. I was let at the Dollar General.

7 Q. Okay. And when you went by -- were walking across the
8 street. Correct?

9 A. Yes. I walked across the street. Yes, sir.

10 Q. All right. In the video we see a person getting in a
11 red vehicle. Did that person hand you anything out of that
12 red vehicle?

13 A. A red vehicle? I don't recall seeing a red vehicle.
14 I recall seeing a white vehicle, I believe, no one handed
15 me nothing.

16 Q. Okay. When you walk across the street, you don't
17 actually cross from Dollar General across the street
18 towards Burger King. You actually go toward the car wash?

19 A. No. I go towards the Citgo filling station there on
20 the corner and then I crossed over yes, sir.

21 Q. Okay. And that used to be called the Old Tomato
22 Place. Right?

23 A. I have no idea. I know the Citgo filling station
24 there.

25 Q. Okay. When you walked toward that, do you remember

MICHAEL TUMBLIN: CROSS BY MR. MATTHEWS

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1 passing by a person who was getting in a vehicle?

2 A. I seen a guy walk out and get in a vehicle. I seen it
3 in a film. I have no idea who that was.

4 Q. Okay. Are you saying that you didn't get handed
5 anything from that person?

6 A. No, sir.

7 Q. Okay. When you crossed over to Burger King, do you
8 remember seeing a car cranking up and leaving right where
9 you were standing?

10 A. I don't actually remember dwelling on it but I'm sure
11 there was because there was traffic in and out. I mean, it
12 was busy. It was shortly after lunch. I'm sure there;s
13 plenty of cars coming and going while I was standing there.

14 Q. Okay. But in this particular video, we're talking
15 about this video, do you remember seeing that car pull out
16 and leave?

17 A. I mean, I didn't dwell on it. I'm sure there was. I
18 mean --

19 Q. Are you telling the jury that you didn't get handed
20 anything by that person?

21 A. No, sir. / I didn't get handed anything by no one
22 whatsoever.

23 Q. All right. We also see a gray van, where somebody
24 gets in a gray van on the video while you were at the
25 Burger King. Are you saying you didn't get handed anything

1

2

A. No. We had the video right here. Did any of you all see them hand me anything?

3

4

THE COURT: Just - he's asking you.

5

A. No, sir. No one handed me anything.

6

7

Q. Okay. Now, you acknowledged already that you had signed or dated your photo lineup on March 5th 2012.

8

Correct?

9

A. That's correct. Yes, sir.

10

11

Q. Okay. And you are indicating to the jury that's a mistake?

12

13

A. The year is a mistake. Yes, sir. Instead of 13 I put 12 and that's not the first time I've done that.

14

15

16

Q. All right. And then you indicated the January 16th, 2007 date that is on the video, you indicated that was wrong?

17

18

19

20

A. Well, that's not the date that it happened. That's what was on the video, on the camera. I guess they had it programmed and reset it or whatever they do to it but I noticed that on the video yes, sir.

21

22

Q. Okay. And so in your position that was a mistake whether unintentional or intentional?

23

24

25

A. Yes, sir. Sure was.

Q. On the video itself, I'm asking for you, watching that video yourself, did you see a drug transaction on that

MICHAEL TUMBLIN: CROSS BY MR. MATTHEWS

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1 video?

2 A. Yes, sir, I did.

3 Q. You saw a transaction on the video there?

4 A. Yes, sir.

5 Q. We see you get into a car but where did we see you -
6 just point it out to us where we can look at it, point out
7 where did you get the drugs --

8 A. The drugs was laying in between the console between
9 the two seats there. D.J. nodded towards the drugs. I
10 grabbed the drugs and handed him the money.

11 Q. Now understand that you're being videoed. You know
12 that it's very important to get everything on video
13 according to what you have been instructed by the police.

14 Correct?

15 A. I - I mean, I know there is a video. I mean he didn't
16 give me no certain instructions to do any certain thing a
17 certain way. No, sir, they didn't.

18 Q. Well, I mean, you've presented yourself to the police
19 as a confidential informant.

20 A. Right.

21 Q. Okay. Based on your testimony, you are saying that
22 you put yourself out there so that a drug transaction could
23 be caught on video. Correct?

24 A. Uh-huh.

25 Q. And you know that's what the police are wanting.

1 A. Right.

2 Q. Correct?

3 A. Uh-huh.

4 Q. All right.

5 THE COURT: Try to say yes or no instead of uh-huh.

6 A. Yes, sir. Yes, sir.

7 Q. Okay. So you didn't position yourself to see whatever
8 transaction that may have occurred in the car?

9 A. Well, I took it that the camera was picking up
10 everything. I mean, it looked like to me it did a pretty
11 good job at it.

12 Q. And you said that it was in the console?

13 A. Just a little - it wasn't a console. It was just a
14 little change there or something to keep change in there
15 between the seats.

16 Q. Okay. And so you're saying that it was in the
17 console.

18 A. No, it wasn't in a console. It was just an open area
19 there. Just maybe a three by four area there to keep
20 change or whatever. It's not inside the console. No, sir.

21 Q. Okay. And you are saying that it was in this open
22 area.

23 A. Yes, sir.

24 Q. You handed Eighty dollars supposedly to my client, he
25 nodded to the area, ---

MICHAEL TUMBLIN: CROSS BY MR. MATTHEWS

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1 A. Uh-huh.

2 Q. --- and then you picked it up and left?

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

4 Q. And you indicated here just a few minutes ago that you
5 gave a statement to the police. Correct?

6 A. Yes, sir.

7 Q. Okay. And you described it as you handed D.J. the
8 Eighty dollars and D.J. handed me the crack.

9 A. He nodded at it and I got the crack. Yes, sir.

10 Q. I just want to make sure because you've already
11 indicated several mistakes have been made. I want to make
12 sure which one is it. Is it it was on the console or he
13 handed it to you?

14 A. I handed D.J. the money. I got the crack out the
15 console. Got out and shut the door and D.J. left.

16 Q. Okay. And on this video, you're saying that's on that
17 video?

18 A. Yes, sir, it's on the video.

19 Q. Okay. You agree that we've gotten whatever is on the
20 video is there and you are saying you picking it up out of
21 that console is on the video?

22 A. Yes, sir.

23 Q. And that after everything is said and done, you leave
24 the Burger King parking lot?

25 A. Yes - no. Yes, sir.

1 Q. Are you sure?

2 A. I really wasn't in the parking lot. I was down the
3 sidewalk and back across the road to the Family Dollar. I
4 wasn't standing out in the parking lot. He pulled up and
5 parked by the walkway. I walked and got in his car and
6 made the transaction. He backed out and I walked back
7 across to the Family Dollar store.

8 Q. Okay. So you cross over the road and then you crossed
9 again to go towards Burger King - I mean, towards the
10 Dollar General store?

11 A. That's correct. Yes, sir.

12 Q. And if I understand what was on the video, you
13 actually walked past the Dollar General store?

14 A. Uh-huh.

15 Q. And you turn around?

16 A. Yes, sir.

17 Q. And no body was there that you met whenever you went
18 down there to the Dollar General store?

19 A. Actually she let me out behind the Dollar General
20 store so I thought that's where she was going to be parked.
21 When I walked by there, she had parked around the front
22 side, so I just turned around and walked back to the front
23 side and there she was parked. Uh-huh.

24 Q. And you got in the car at that point?

25 A. I got in the truck at that point. Yes, sir.

MICHAEL TUMBLIN: CROSS BY MR. MATTHEWS

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1 Q. And there was no conversation at all during the time
2 you got in the truck until you got there about any
3 transaction?

4 A. There was very little. I mean, it was very little.
5 She didn't ask any questions. She just asked what kind of
6 car was he driving and I told her that I had the crack in
7 my hand and I told her what kind of car he was driving. I
8 mean, other than conversation.

9 Q. All right. So you are saying you showed her what was
10 in your hand?

11 A. I just said - I showed her I got the buy yeah.

12 Q. Did she make any comment? I want to make sure what's
13 on the video.

14 A. She just asked me what he was driving. I told her a
15 white Cadillac and was he by his self and I told her yes.

16 Q. She didn't make any comment about the fact you showed
17 her crack in your hand?

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

19 Q. Did you put your hands in your pockets at all during
20 the drive back?

21 A. Never did. No, sir.

22 Q. And you are saying all the time that you were walking
23 back to the car you had it in your hand?

24 A. Yes, sir, I did.

25 Q. Do you remember what the weather was that day?

1 A. It was kind of cloudy. Yes, sir. It was kind of a
2 cloudy day. I mean, it wasn't raining or anything, but it
3 was just overcast.

4 Q. Okay. What kind of temperature was it? Do you
5 remember?

6 A. I don't know. I mean, it wasn't cold, cold, cold, but
7 it wasn't hot. It was just - I'd say - temperature wise I
8 would say it was in the low fifties.

9 Q. Okay. Going back to - Now, you are gone and you go
10 back to the Rock Hill Police Department. Correct?

11 A. Uh-huh. Yes, sir.

12 Q. And you'd agree with me, on the video we don't ever
13 see you get searched again do we?

14 A. No. We - I wasn't video searched. No, sir.

15 Q. Okay. And there was no video of you getting searched
16 beforehand?

17 A. Not that I'm aware of. No, sir.

18 Q. Okay. Who searched you beforehand?

19 A. Officer Harrelson.

20 Q. Harrelson did?

21 A. Uh-huh.

22 Q. And that was right as you got there to the scene?

23 A. Yes, sir.

24 MR. MATTHEWS: One moment, Your Honor.

25 (PAUSE AT 05:05 P.M..)

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1 Q. Now when you got to the Rock Hill Police Department,
2 how long did it take you to - before you could leave?

3 A. It wasn't long at all. I'd say within - probably
4 within thirty to forty-five minutes.

5 Q. Thirty to forty-five minutes after you got back to the
6 Rock Hill Police Department?

7 A. I'm just guessing. Yes, sir.

8 MR. MATTHEWS: One moment, Your Honor.

9 No further questions, Your Honor.

10 THE COURT: Redirect?

11 SOLICITOR SHELTON: No, sir.

12 THE COURT: You can step down and be excused. Thank
13 you, Mr. Tumblin.

14 MR. TUMBLIN: Thank you, Your Honor.

15 (WITNESS LEAVING WITNESS STAND.)

16 THE COURT: Members of the jury panel, we're going to
17 stop for the day. We'll start back at ten in the morning.
18 I have a couple of hearings in the morning so I may be a
19 few minutes after ten, but you please be here by ten and
20 we'll try to start as promptly as we can.

21 Have a pleasant evening and keep in mind those things
22 I've told you about, not letting yourself be exposed to
23 anything about this case or discussing the case or making
24 up your own mind.

25 Have a pleasant evening and we'll see you back at ten

1 in the morning.

2 (JURY EXITS COURTROOM AT 5:07 P.M.)

3 THE COURT: We'll be at ease until ten in the morning.

4 (COURT IN RECESS AT 5:10 P.M.)

5 (COURT HELD MINOR SETTLEMENT IN CAMERA OFF THE RECORD
6 WITH CHAD MCGOWAN TUESDAY, APRIL 22, 2014 AT 09:15 A.M.)

7 (COURT BACK IN SESSION TUESDAY, APRIL 22, 2014 AT
8 09:45 A.M.. IN THE MATTER OF STATE VERSUS RONALD FRED
9 GREGORY WITH CHIEF PUBLIC DEFENDER HARRY DEST.)

10 (COURT IN RECESS AT 10:11 A.M..)

11 (COURT BACK IN SESSION AT 10:18 A.M. IN THE MATTER OF
12 STATE VERSUS RYAN ROHADFOX WITH ATTORNEY TODD RUTHERFORD.)

13 (COURT BACK IN SESSION IN THE MATTER OF STATE VERSUS
14 DOMINIQUE JULIUS AGURS AT 10:26 A.M..)

15 SOLICITOR SHELTON: Your Honor, for the Court's
16 information, Ms. Weaver, my co-counsel, is in a plea next
17 door. She may need to slide in. I'm sure she will try to
18 do that when there is a natural break in the action so she
19 won't disturb the jury. I just wanted to let you know
20 that.

21 (DEFENDANT DOMINIQUE AGURS REENTERS COURTROOM AT 10:29
22 A.M..)

23 THE COURT: All right. Mr. Agurs is present.
24 State ready?

25 SOLICITOR SHELTON: Yes, sir.

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1 THE COURT: Defense ready?

2 MR. MATTHEWS: Yes, Your Honor.

3 THE COURT: Bring in the jury.

4 (JURY ENTERS COURTROOM AT 10:29 A.M.)

5 THE COURT: Good Morning. I'm glad I told you all I
6 had some hearings so you wouldn't think I been sitting
7 around loafing, or forgot how to tell time, but we did have
8 actually three hearings this morning and we just now
9 concluded the third, and so we're now into the trial. So
10 I'll turn the matter back over to the State.

11 SOLICITOR SHELTON: Thank you, Your Honor. May it
12 please the Court. The State's next witness is Investigator
13 Tanya Ervin.

14 THE COURT: Please come up and put your left hand on
15 the Bible and raise your right.

16 (WHEREUPON, TANYA ERVIN, BEING
17 FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:

18 DIRECT EXAMINATION

19 OFFICER TANYA ERVIN BY SOLICITOR SHELTON:

20 Q. Good morning, ma'am.

21 A. Good morning.

22 Q. Would you please introduce yourself to the jury.

23 A. My name is Tanya Ervin. I'm a police officer with the
24 Fort Mill Police Department.

25 Q. How long have you worked in law enforcement?

1 A. I've been in law enforcement almost fourteen years.

2 Q. Did you work for the York County Multi-Jurisdictional
3 Drug Enforcement Unit?

4 A. Yes. I worked for the Drug Unit for two years, 2012,
5 2013.

6 Q. So you are not working with the Drug Unit right now?

7 A. No, sir. I'm back with Fort Mill as a evidence clerk.

8 Q. And in March of 2013 were you working with the Drug
9 Unit?

10 A. Yes.

11 Q. During your time with the Drug Unit, did you
12 participte in controlled buy drug investigations?

13 A. I did.

14 Q. Can you give an approximate number of how many?

15 A. Probably over fifty.

16 Q. Have you ever seen crack cocaine in person?

17 A. Yes, I have.

18 Q. Were you involved in a controlled drug buy on March
19 5th, 2013.

20 A. Yes, I was.

21 Q. And did that buy utilize a confidential informant?

22 A. Yes, it did.

23 Q. Was that a man named Michael Tumblin?

24 A. I believe so. Yes.

25 Q. Please tell the jury what role you had in that

OFFICER TANYA ERVIN: DIRECT BY SOLICITOR SHELDON

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1 investigation.

2 A. Mr. Tumblin came in and he didn't have a driver's
3 license so he needed transportation. We have a undercover
4 Drug Unit vehicle that is maintained by the Drug Unit and
5 my responsibility that day was to search the drug unit to
6 make sure nobody had left anything in there, any kind of
7 contraband, and then to drive the confidential informant to
8 the location, the drug deal.

9 Q. So to be clear it up. You search the Drug Unit
10 vehicle; is that correct?

11 A. That's correct.

12 Q. And were you also part of what's called the
13 surveillance team?

14 A. Yes.

15 Q. So let's talk about that vehicle that you drove for a
16 second. This was a Drug Unit vehicle?

17 A. That's correct.

18 Q. This was not your personal vehicle?

19 A. No, it was not.

20 Q. And was it a vehicle kept on city or county property?

21 A. It was kept on city property. Yes.

22 Q. Was it kept under lock and key?

23 A. Yes.

24 Q. And was it used for Drug Unit purposes?

25 A. Yes.

1 Q. Was the vehicle regularly maintained and vacuumed?

2 A. Yes.

3 Q. Was it kept cleaned out?

4 A. Yes. Commander Brown kept that vehicle maintained.

5 Q. And on March 5th, 2013 was the vehicle cleaned out?

6 A. Yes.

7 Q. Was that prior to you searching it?

8 A. Yes, it was.

9 Q. All right. And did you in fact search that vehicle
10 that day?

11 A. I did.

12 Q. Where were you when you searched it?

13 A. In the parking lot at the Rock Hill Police Department.

14 Q. And was anyone else with you during the search of the
15 vehicle?

16 A. Not that I recall.

17 Q. Explain to the jury how you conducted the search,
18 please.

19 A. I would open the driver's side door, look under the
20 seats. Look under the console in the center or - the door
21 consoles, the center console. Go to the passenger side of
22 the vehicle. It was a pick up truck so I would - it only
23 had two doors on it so I would look up under the passenger
24 side. Look in the glove box and in any type of area that
25 something might be hidden.

OFFICER TANYA ERVIN: DIRECT BY SOLICITOR SHELDON

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1 Q. And what were you looking for?

2 A. I was looking for any type of contraband.

3 Q. Such as?

4 A. Marijuana, crack, cocaine, any pills..

5 Q. Would you have also been keeping an eye out for any
6 money or anything like that?

7 A. Yes.

8 Q. And why did you conduct that search?

9 A. We wanted to make sure that there is no question
10 whenever we are making a buy that there was anything in the
11 vehicle or somebody could claim that there was something in
12 the vehicle.

13 Q. And that's something you all do as procedure even
14 though it was a Drug Unit vehicle?

15 A. Yes. We do it on every vehicle that's used in
16 undercover buys.

17 Q. Did you find any drugs or contraband or money in the
18 vehicle?

19 A. I did not.

20 Q. Did you maintain control of the vehicle after you
21 searched it?

22 A. I did.

23 Q. Can you explain exactly what we mean by maintaining
24 control?

25 A. I had the only set of keys. After I searched the

1 vehicle, I locked the vehicle. Went back to the office
2 with the vehicle locked and waited for everyone to prepare
3 to leave and when they left, I went and picked up the
4 truck. Brought it down and picked up the CI at the door
5 and the truck was with me the entire time. And when we got
6 back with the CI after the drug buy, I searched the vehicle
7 again and I did not find anything in the vehicle.

8 Q. And after you locked - After you searched the vehicle
9 and locked it back up, you said you went back inside the
10 Drug Unit?

11 A. Yes.

12 Q. Were the windows rolled up or were they down?

13 A. Yes. The vehicle was secure.

14 Q. And I just want to be clear on this. Did anyone else
15 get in the truck or put anything in the truck before you
16 left the drug unit to your knowledge?

17 A. No. No one else entered that vehicle.

18 Q. Did you drive Mr. Tumblin to the buy location?

19 A. I did.

20 Q. And where were you all headed when you left the Drug
21 Unit?

22 A. We were going to a Dollar General store at the corner
23 of Heckle and - I'm trying to remember the name of that
24 road - Saluda, I believe.

25 Q. And why were you going to the Dollar General?

OFFICER TANYA ERVIN: DIRECT BY SOLICITOR SHELDON

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1 A. I was going to drop the CI off to meet with a drug
2 dealer to buy crack.

3 Q. Why didn't you just drive him to the buy location?

4 A. Didn't want him to see me and think that I was a
5 police officer.

6 Q. During the time when you were driving from the drug
7 unit to Dollar General, was the buy location changed?

8 A. It was.

9 Q. And was that changed during a conversation that Mr.
10 Tumblin had with another person on the phone?

11 A. Yes, it did.

12 Q. Where was the --

13 A. We were in route --

14 Q. I'm sorry?

15 A. We were in route to Dollar General when it changed.

16 Q. And where was the location changed to?

17 A. It was changed to the Burger King which is kind of
18 diagonally across the street from Dollar General on Saluda.

19 Q. So your drop off point was -- you could still keep your
20 drop off point at Dollar General the same?

21 A. Yes.

22 Q. And was Burger King within walking distance of that
23 Dollar General?

24 A. Yes. That's what he did. He got out of the vehicle
25 and walked across the street to the Burger King.

1 Q. And when the buy location changed on the way to Dollar
2 General, did you let other officers from the drug unit know
3 that?

4 A. Yes. We all had surveillance or hand-held radios and
5 I radioed everyone to let them know where the deal was
6 going to happen.

7 Q. And when you got to the Dollar General, what's the
8 first thing you did?

9 A. I let the CI out of the vehicle - Well first of all, I
10 parked in a parking space and let him out of the vehicle
11 and watched him walked across the street. And at that
12 point, I believe the surveillance term was getting in place
13 before he made it across the street. But I watched him
14 walk over to the Burger King.

15 Q. So you watched Mr. Tumblin walk from the Drug Unit
16 vehicle all the way over to the Burger King?

17 A. Yes.

18 Q. Did you stay with the truck at the Dollar General
19 parking lot?

20 A. I stayed with the truck and in the truck. Never left
21 the truck.

22 Q. And were you able to see whether or not Mr. Tumblin
23 had any contact with anyone on the way to Burger King?

24 A. Yes. He didn't. He went straight to Burger King. He
25 didn't stop and talk with anyone or go any other place.

OFFICER TANYA ERVIN: DIRECT BY SOLICITOR SHELDON

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1 Q. Could you see him outside of the Burger King in the
2 little walkway area?

3 A. Yes.

4 Q. Did he meet with anyone there?

5 A. He met with someone there. We could hear him on
6 surveillance video recordings, you could hear him meeting
7 with someone.

8 Q. And that would have been the target or the person he
9 was intending to buy from?

10 A. That's correct.

11 Q. And when you were listening to that, did you hear any
12 kind of music of anything playing leading up to that
13 encounter?

14 A. I believe so.

15 Q. And was that the only encounter he had with anyone
16 else ---

17 A. Yes.

18 Q. --- while he was at Burger King?

19 A. Yes.

20 Q. And so you indicated you were listening in. Were you
21 able to listen to a live audio feed coming from the CI's
22 wire?

23 A. Yes.

24 Q. You and the other members of the surveillance team?

25 A. Yes.

1 Q. And in your experience and training, did anything
2 unusual or out of the ordinary occur during this time
3 frame?

4 A. No. Everything went smoothly.

5 Q. I'm sorry. I missed that last word.

6 A. Everything went smoothly.

7 Q. Thank you. And did you wait with the truck or in the
8 truck at Dollar General for Tumblin to return?

9 A. I did.

10 Q. Did he return?

11 A. He did.

12 Q. Did he get back in the truck?

13 A. He got back in the truck.

14 Q. When he got back in the truck, did he say anything to
15 you?

16 A. He may have.

17 Q. Did he have anything in his hand?

18 A. He did. He had some crack cocaine in his hand.

19 Q. Did you get the impression at that point that the buy
20 was successful?

21 A. Oh, yes. Absolutely.

22 Q. Did you take possession of the crack?

23 A. I did not. Mr. Tumblin maintained possession until we
24 got back to the office.

25 Q. Can you explain how he maintained possession?

OFFICER TANYA ERVIN: DIRECT BY SOLICITOR SHELDON

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1 A. He was riding in the passenger seat and he was holding
2 it in his hand.

3 Q. And you were in the driver's seat and he was in the
4 passenger's seat?

5 A. Correct.

6 Q. Were you able to kind of keep an eye on him as you
7 were driving back?

8 A. Absolutely. He was right beside me yes, sir.

9 Q. Did he make any motions as if he was trying to hide
10 anything?

11 A. No.

12 Q. Did he make any motions as if he was trying to
13 retrieve anything?

14 A. No.

15 Q. Did you see the crack in his hand the whole time or
16 that he had it in his hand the whole time?

17 A. Yeah I could see that he had it in his hand.

18 Q. And you drove straight back to the drug unit?

19 A. I did.

20 Q. And is that - Just so we're clear, that's at the Rock
21 Hill Police Department. Correct?

22 A. Yes, it is.

23 Q. And when you all got back there, did you get out of
24 the truck?

25 A. I backed the truck up and the other officers that were

OFFICER TANYA ERVIN: DIRECT BY SOLICITOR SHELTON

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1 with us on surveillance, opened the door and let him in, at
2 which time I think Harrelson may have taken possession. I
3 can't really testify to that because I stayed in the truck
4 and went and searched the truck and parked it back in the
5 parking spot after I let him out.

6 Q. You say you searched the truck after the buy as well?

7 A. Yes, sir.

8 Q. Did you find anything in the truck?

9 A. I did not.

10 Q. And did you search in the same manner that you
11 described earlier?

12 A. Yes, I did.

13 Q. And you were looking for the same things?

14 A. I was.

15 Q. And what's the purpose of searching it again after the
16 buy?

17 A. To make sure there wasn't anything in the vehicle that
18 - any contraband or any money in the vehicle.

19 Q. Did all of these events occur in the city limits of
20 Rock Hill?

21 A. Yes, they did.

22 Q. In York County, South Carolina?

23 A. Yes, sir.

24 SOLICITOR SHELTON: I have nothing further, Your
25 Honor.

OFFICER TANYA ERVIN: CROSS BY MR. MATTHEWS

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1 THE COURT: Cross.

2 CROSS-EXAMINATION

3 OFFICER TANYA ERVIN BY MR. MATTHEWS:

4 Q. What time did you get to the Rock Hill Police
5 Department? Do you remember?

6 A. Before the buy to start my day or after the --

7 Q. Before.

8 A. Before. We generally are -- we start up at around two
9 o'clock but I probably got there about one-thirty.

10 Q. Okay. In relation to getting there at one-thirty,
11 when did you search the vehicle?

12 A. Probably about two-fifteen. Between two-fifteen and
13 two-thirty, approximately.

14 Q. About two-fifteen, two-thirty?

15 A. Yes, sir.

16 Q. Now when you searched the vehicle, after you searched
17 the vehicle, you said you rolled up the windows and locked
18 the doors?

19 A. Well, it was already locked and secured. All I did
20 was unlock it, search it and lock it back so the windows
21 were already rolled up and secure.

22 Q. Where did you go after you searched the vehicle?

23 A. I went back into the office.

24 Q. Okay. And how long were you in the office?

25 A. Probably fifteen, twenty minutes after that.

1 Q. Okay. When you came back out after leaving the
2 vehicle after you searched it, did you search it again?

3 A. No. I did not.

4 Q. Okay. So you left the vehicle - Where did you leave
5 the vehicle at?

6 A. In a parking space behind the Rock Hill Police
7 Department.

8 Q. Okay. Is this a gated area?

9 A. No.

10 Q. Okay. Is this - Even though you do not want this area
11 accessible to other people, is it accessible?

12 A. Yes.

13 Q. And you did not search it during that time when the
14 truck was out of your sight?

15 A. Not prior to my first search. I didn't search it a
16 second time. No, sir.

17 Q. Okay. Now, the - You said that they brought Mr.
18 Tumblin out. Put him in the car and you all drove to the
19 Dollar General store?

20 A. Correct.

21 Q. Okay. Where did you park at the Dollar General store?

22 A. I parked in front of the store.

23 Q. Okay. Were you facing the store or backed up in the
24 parking --

25 A. I was facing the store.

OFFICER TANYA ERVIN: CROSS BY MR. MATTHEWS

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1 Q. Okay. Now, the - You have the Dollar General store
2 from the parking lot to the intersection at Heckle
3 Boulevard.

4 A. Okay.

5 Q. Okay. How far away would you say that was?

6 A. Probably ten to fifteen yards, maybe.

7 Q. Okay. And then from there basically across the entire
8 intersection is the Burger King?

9 A. Probably about another twenty-five yards.

10 Q. Okay. And so are we saying that just to kind of put
11 it in layman's terms, are we saying this is about half of a
12 football field away from you?

13 A. If you estimated it, yeah. I mean, it would be close.

14 Q. Did you see any vehicles anywhere near Mr. Tumblin as
15 he was going towards the Burger King?

16 A. I don't recall, no.

17 Q. Okay. Did you see any - Do you remember any vehicles
18 while he was waiting that was near him pulling away or
19 anybody coming around him?

20 A. No.

21 Q. Now, when you said you saw him - you heard him, but
22 that's all you heard. You heard Mr. Tumblin?

23 A. No. I maintained visual contact with Mr. Tumblin.

24 Q. Okay. But you said you heard across the audio.

25 A. Yes.

1 Q. Did you have access to the audio?

2 A. Yes.

3 Q. Okay, and you heard the music?

4 A. Yes.

5 Q. Now, you saw him. What did you actually see though?

6 A. I saw him waiting by the Burger King for the gentleman
7 with the crack cocaine to arrive.

8 Q. Okay. Now, but did you actually see the person in the
9 vehicle?

10 A. I did not actually see anybody in the vehicle. I saw
11 the vehicle drive up. I knew somebody was driving the
12 vehicle but I did not know who was in the vehicle.

13 Q. And obviously because you're that far a distance away,
14 you did not see anything occur inside the vehicle?

15 A. No.

16 Q. And when you got into the - or when Mr. Tumblin got
17 back into the vehicle, okay, he has a camera on him.

18 Right?

19 A. Yes.

20 Q. Okay. And you didn't say anything to him about "do
21 you have the crack" or "do you have the drugs on you?"

22 A. I don't know if I did.

23 Q. Okay. If you had, it would have been on the video
24 audio?

25 A. Absolutely. Absolutely.

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1 Q. And you didn't have him hold up the drugs that he had
2 in his hand as soon as he got in the car to show it in
3 front of the camera so that you can see that as he got into
4 the truck he had it with him?

5 A. I don't recall. No, sir. It would be on video if I
6 did.

7 Q. Okay. If you had done that, it would be on the video?
8 And no conversation --

9 THE COURT: Give her a chance to answer that question.

10 A. Yeah. I'm not really understanding. You're asking me
11 if I asked him to hold the crack up in front of the camera?
12 Is that what you are asking me?

13 Q. Yes.

14 A. I don't recall.

15 Q. Okay. Did you -- Do you remember having any
16 conversations with him as soon as he got in the car about
17 the drug transaction?

18 A. I'm sure we had conversation, but I don't recall what
19 it was about unless I looked at the video. That's been
20 over a year ago.

21 Q. Okay. And after you got back to the Rock Hill Police
22 Department and Mr. Tumblin got out of your vehicle, that
23 was the end of your involvement?

24 A. It was the end of my involvement with the CI. I
25 maintained control of the vehicle and drove it back to a

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1 parking area and searched the vehicle again and secured the
2 vehicle after the search.

3 Q. Once that was all done, that was the end of your
4 involvement?

5 A. Yes.

6 MR. MATTHEWS: One moment, Your Honor.

7 (PAUSE.)

8 MR. MATTHEWS: All right. No further questions, Your
9 Honor.

10 THE COURT: Redirect?

11 SOLICITOR SHELTON: Yes, Your Honor. Briefly.

12 REDIRECT EXAMINATION

13 OFFICER TONYA ERVIN BY SOLICITOR SHELTON:

14 Q. Investigator, prior to leaving the Drug Unit to go to
15 the buy, you testified earlier I believe, did you have the
16 only set of keys to the vehicle?

17 A. Yes. There's only one set of keys and they are left
18 in a locked box in the Drug Unit and I took possession of
19 those keys and kept possession of those keys until I placed
20 them back in a lock box after the vehicle was searched and
21 the return of the drug deal.

22 Q. So after you initially searched the vehicle before the
23 buy, ---

24 A. Yes, sir.

25 Q. --- you testified that you went back into the drug

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1 unit and then came back outside a short period of time
2 later?

3 A. Yes.

4 Q. You testified you didn't re-search the truck? You
5 didn't search the truck a second time ---

6 A. Right.

7 Q. --- before leaving for the buy.

8 A. Right. I had already searched the vehicle.

9 Q. Okay. I just wanted to make sure we were on the same
10 page with what I'm going to ask you.

11 A. Yes, sir.

12 THE COURT: Let's don't talk over each other. One at
13 a time.

14 A. Yes, sir.

15 SOLICITOR SHELTON: Yes, sir, sir.

16 Q. Was the truck still locked?

17 A. Yes.

18 Q. Were the windows busted out?

19 A. No.

20 Q. Was there any signs of forced entry?

21 A. None.

22 Q. So the vehicle was still secure?

23 A. Yes.

24 Q. And when you were watching Mr. Tumblin walk from the
25 Dollar General across the street to the Burger King, did

OFFICER TANYA ERVIN: REDIRECT BY SOLICITOR SHELTON

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1 any vehicles stop and meet with - and the drivers meet
2 witnesses Mr. Tumblin on the way there?

3 A. No. Not on the way.

4 Q. Did he meet with anyone on the way there?

5 A. No. He didn't meet with anyone on the way there. He
6 met with someone when he got there.

7 Q. Did he meet with anyone in the parking lot other than
8 the target ---

9 A. No ---

10 Q. --- the person he was trying to buy - -

11 A. --- he did not.

12 Q. I'm sorry. What was your answer?

13 A. He did not.

14 Q. Thank you.

15 THE COURT: That's the problem with two people talking
16 at the same time.

17 SOLICITOR SHELTON: Yes, sir. Your Honor, I have no
18 further questions.

19 THE COURT: Recross?

20 MR. MATTHEWS: No, Your Honor. No further questions.

21 THE COURT: You can step down and be excused.

22 MS. ERVIN: Thank you, Your Honor.

23 THE COURT: We appreciate your time.

24 MS. ERVIN: Yes, sir.

25 (WITNESS LEAVING WITNESS STAND.)

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1 THE COURT: Call your next witness.

2 SOLICITOR SHELTON: Your Honor, the State's next
3 witness is Investigator Leland Harrelson.

4 (WHEREUPON, LELAND HARRELSON,
5 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

6 DIRECT EXAMINATION

7 INVESTIGATOR LELAND HARRELSON BY SOLICITOR SHELTON:

8 Q. Good morning.

9 A. Good morning.

10 Q. Please introduce yourself to the jury.

11 A. My name is Hugh Leland Harrison, Junior.

12 Q. And what do you do for a living?

13 A. I'm a police officer for the City of Rock Hill. I've
14 been with them approximately six years. I'm currently
15 assigned to the York County Multi-Jurisdictional Drug
16 Enforcement Unit and I've been with them for approximately
17 four years.

18 Q. What prior law enforcement experience did you have
19 before that?

20 A. None.

21 Q. Were you working with the Drug Unit in March of 2013?

22 A. Yes, sir, I was.

23 Q. And during your time with the unit, have you been
24 involved in the investigation of any drug crimes?

25 A. Yes, sir, I have.

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1 Q. Approximately how many?

2 A. I would say four hundred plus. We do, you know,
3 approximately four hundred plus deals a year of which I'm
4 involved in. Some that you are, you know, the case agent;
5 that you are leading up the investigation. Others you may
6 be a supporting role, such as in surveillance or searching
7 someone.

8 Q. And would you have also been involved in other
9 investigations such as search warrant executions and that
10 sort of thing?

11 A. Yes. As part of our duties, we do execute search
12 warrants. We also help locate wanted fugitives. We have a
13 variety of tasks from the Drug Unit.

14 Q. And do any of those drug investigations involve crack
15 cocaine?

16 A. Yes, they have.

17 Q. Have you ever seen crack cocaine before?

18 A. I have.

19 Q. Had you seen it before March 2013?

20 A. Yes, sir, I have.

21 Q. During your time with the Drug Unit, have you
22 participated in what are known as controlled drug buy
23 investigations?

24 A. Yes, sir, I have.

25 Q. And during those investigations, did they involve

INVESTIGATOR LELAND HARRELSON: DIRECT BY SOLICITOR SHELDON -147-

1 confidential informants?

2 A. Yes. We utilize a lot of confidential informants in
3 our work. Also, we sometimes use undercover officers, so
4 we do both roles.

5 Q. So approximately how many investigations involved
6 confidential informants?

7 A. The majority of our investigations involve
8 confidential informants. You know, I would say probably a
9 small five percentage where we actually use an undercover
10 officer.

11 Q. Why is that?

12 A. You know, I mean Rock Hill in York County is such a
13 small town that, you know, when you are out there in the
14 public, and everybody starts off in the uniform division,
15 no matter what department you are with and you really get
16 to know the people, you know, in the city and where you
17 work and, you know, a majority of the people that I arrest
18 know me just because we've had interaction.

19 And, you know, we're not like Charlotte and they're a
20 big enough city where you could work in one section of the
21 city and go do undercover police work in another. Rock
22 Hill is just so small where we don't have that luxury.
23 When we do have to use confidential informants to do our
24 work just because we are known just due to the size of Rock
25 Hill and York County.

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1 Q. Does the Drug Unit have procedures regarding
2 controlled drug buys?

3 A. Yes, we do.

4 Q. And specifically ones that involve CI.'s?

5 A. Yes, sir.

6 Q. Are you familiar with those procedures?

7 A. I am, yes.

8 Q. Can you explain how a controlled drug buy using a CI
9 works?

10 A. A typical controlled drug buy is we'll have that
11 informant come meet us at the Rock Hill Police Department
12 and we'll kind of talk about what we want to do. We'll ask
13 him, you know, they have to have the information, you know,
14 who can you buy from. You know, we'll talk to the
15 individual about it and we'll kind of put, you know,
16 together a game plan, because, you know, we want to try to
17 have all our bases covered.

18 We'll also have the informant at times make a phone
19 call, you know, to that individual to try to set up a deal.
20 Sometimes they'll make the call beforehand but a lot of
21 times we'll also shoot a call so we can record it.

22 You know, we search the informant. We want to make
23 sure they don't have any contraband with them before we
24 leave. I know Sergeant Lubben went over how he searched
25 him beforehand. We issue the confidential informant police

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1 government funds, to give them the money, to actually go
2 out and purchase the drugs for us. And we give them some
3 video equipment and also a wire so we can listen to the
4 deal.

5 And the biggest reason we give them a wire is to help
6 us maintain control of the deal. Because you try your best
7 to keep a visual on them at all times, but you know, you
8 have traffic and other things in the city and you can't
9 watch them, you know, every second so we are listening to
10 what's going on. And also for the safety of our informant.
11 We don't want anything to happen to him if the drug deal
12 happens to turn bad, you know, we'll take some kind of
13 action at that point.

14 But we get him ready and then we'll have a small
15 briefing to make sure everybody on the unit who is
16 participating in the deal is on the same page. And also
17 they search the vehicle beforehand before we leave.

18 We'll go out and everybody kind of has an assignment -
19 they know what they are doing - and we'll go out to do the
20 deal.

21 In the drug world things change all the time and I
22 rarely will have a deal that happens exactly, you know, the
23 time and place it's suppose to happen. A lot of the guys
24 that we deal with typically will change up, you know, the
25 time and the place when they show up. And they're looking

1 for police. You know, they are looking to see if police
2 are in the area, so we do have to be kind of cautious of
3 that.

4 So as in this case, we were going to the deal; the
5 location changed, which is not uncommon, so we kind of -
6 you know, we regroup and just kind of put another little
7 plan into action so it's not uncommon for us to do that.

8 So in this case, the location did change at the last
9 minute. We regrouped and, you know, had the informant, you
10 know, proceed to our new location. And, you know, we'll
11 drop the informant off and of course this informant walked
12 across the street, made the drug transaction and then met
13 back up with out officer. And then after the deal is done,
14 we all regroup back at the police department.

15 We'll, you know, recover the evidence from our
16 informant and of course we re-search them, re-search the
17 vehicle and we'll take a statement from the informant, you
18 know, explaining in their own words what they saw and what
19 happened and then there's some various paperwork that we do
20 for the deal.

21 Q. And all the searching of the vehicle and the CI,
22 what's the purpose of that?

23 A. Just to make sure they don't bring any contraband, to
24 make sure drugs aren't in the vehicle and make sure they
25 don't bring any weapons. You know, we don't want them

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1 bringing weapons to a drug deal. So we want to make sure
2 that they don't have any crack on them, that they're not
3 bringing it, and also we want to make sure that they didn't
4 take any crack from which they purchased to try to hide in
5 the vehicle or on themselves.

6 Q. Investigator, during your career in law enforcement,
7 especially your time with the drug unit, have you ever
8 interviewed users of crack cocaine and/or sellers of crack
9 cocaine?

10 A. Yes, I have.

11 Q. Approximately how many interviews have you
12 participated in?

13 A. I've probably participated in, you know, a hundred and
14 fifty plus interviews.

15 Q. And based on the experience from those interviews, do
16 drug users and drug dealers use different terminology than
17 normal people may use?

18 A. They do. They have their own language and if you are
19 not familiar with it, it is a little bit different. But,
20 you know, as you would go to McDonald's and you order a Big
21 Mac you ask for a Big Mac. But when somebody is dealing
22 they are not going to ask for crack or a crack rock. They
23 just use slang terms and some of the slang terms that are
24 used that I've seen in my, you know, years on the drug
25 service are, you know, they'll say a twenty or they'll want

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1 one or a G, and it all kind of means the same thing and
2 everybody is a little bit different but there are a lot of
3 slang terms that are used in the drug world.

4 Q. What about a whole one?

5 A. A whole one is another one and that's referring to a
6 whole gram of crack.

7 Q. What does crack cocaine look like?

8 A. Crack is typically a white rock. It's just a small
9 rock. It's very small. It's probably just a little bit
10 smaller than my fingernail and it's very soft. The way
11 they make it, they boil it in water and mix it with another
12 chemical to actually form the crack so when it's made, it
13 is actually wet. You can purchase wet crack. It's just
14 because it's been manufactured recently and, you know, it
15 takes time to dry that out.

16 So crack to me is kind of like a little small piece of
17 chalk that you've kind of broken off and sometimes if it's
18 wet, I mean, if you smush it, it will smush right down. It
19 doesn't take much. And usually if it's dried out, you
20 know, it's rather brittle and it just kind of - you know,
21 you could squeeze it in your hands just like you could a
22 small piece of chalk and it would just, you know, just kind
23 of crush and crumble.

24 Q. And what amounts or quantities is crack cocaine
25 commonly sold on the streets?

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1 A. It's sold everywhere from, you know, you can buy
2 ounces, kilos. You can buy, you know, just a couple of
3 grams or just a crack rock. A crack rock in our area
4 typically goes for about Twenty Dollars.

5 Q. How big is a twenty?

6 A. A twenty is - like it's probably just no bigger than
7 the size of my fingernail. It's very small. It's like
8 just a real small pebble.

9 Q. What about a G or a whole one?

10 A. It's a little bit bigger. It's going to be close to a
11 gram, so it is probably double, you know, that little size.

12 Q. And a twenty, what's the approximate weight on a
13 twenty?

14 A. It kind of varies. I mean, you are not going to get
15 exact weights out there, but a twenty is around .5 grams.

16 Q. How is crack commonly packaged for sale?

17 A. Typically they will use just a small corner of a
18 plastic baggy and package it that way.

19 Q. And in your experience, is Eighty Dollars a fair price
20 for a gram or a G of crack?

21 A. It is.

22 Q. And in your experience, do drug dealers always give
23 their clients the amount they say they are going to give
24 them?

25 A. No, they do not.

1 Q. Can you explain that?

2 A. You know, these guys - people that sell the drugs are
3 in it to make money and they are going to maximize their, I
4 guess, profits the best they can and it is very common for
5 us to go out and for us to expect to get a gram and it's
6 not uncommon for us to be shorted because typically users
7 do not carry a scale around with them. They're not going
8 to go out and weigh the crack, you know, before they
9 purchase it. They are going to see it and of course just
10 purchase whatever, you know, they have to sell to them.

11 Q. You said shorted. Is that what you mean by giving
12 them less than what they agreed on?

13 A. Yes. There would, you know, they'll give less.
14 They're still getting their full, you know, money.
15 Whatever they agree how much they are going to sell it for,
16 but then the product is typically a little bit less.

17 Q. On March 5th, 2013, did you meet with a man named
18 Michael Tumblin?

19 A. Yes, sir, I did.

20 Q. Was he working with the Drug Unit as a CI at that
21 time?

22 A. Yes, sir, he was.

23 Q. Where did you meet with him that day?

24 A. I met with him at our office at the Rock Hill Law
25 Center.

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1 Q. To your knowledge, was there some kind of an agreement
2 between the Drug Unit and Tumblin at that time regarding
3 his work with the Unit as a CI?

4 A. Yes. He had signed what's called a Confidential
5 Informant Agreement, so he was set up to work with us as a
6 confidential informant.

7 Q. And was he hoping to get any benefit for his work as a
8 CI?

9 A. Yes, he was.

10 Q. What is your understanding of what he was hoping to
11 gain from working as a CI?

12 A. Mr. Tumblin had some traffic violations and he was
13 hoping to get some help with his traffic citations.

14 Q. Is that sometimes referred to as getting credit on a
15 charge?

16 A. Yes, sir, it is. Now we don't promise them anything.
17 You know, if they come and work for us, we will go back to
18 the officer or the attorney who made the charge and speak
19 with them about it, but we can't promise that if they do
20 come in and work that, that citation would just be dropped.

21 Q. And are they at least given some credit for a good-
22 faith honest effort to make a buy?

23 A. Yes. If he goes out there and puts forth a good
24 effort, not every buy goes, we do give them credit for it.

25 Q. Please explain - What do you mean, not every buy goes?

1 A. Sometimes we'll set up an actual buy and go out there
2 and, you know, nobody shows up. That's very common so, you
3 know, he lived up to his end of the deal. He made the
4 call. You know, we tried to set it up and go out there.
5 It just didn't happen so we still do give him credit
6 because, you know, he did his part, what we had asked him
7 to do, so he will still get credit for his attempt.

8 Q. And by giving credit, you mean you would speak to the
9 officer or the attorney handling the case on his behalf?

10 A. That's correct.

11 Q. And what if the drugs - What if the buy was successful
12 and the drugs turn out to be fake?

13 A. We would still give him credit. We would still go
14 back and speak to the attorney and, you know, state that
15 the informant had done what we asked him to do.

16 Q. But your testimony is Tumblin was not promised
17 anything?

18 A. That is correct.

19 Q. Do you know if he was actually given credit on those
20 traffic charges?

21 A. Yes, he was.

22 Q. And what credit was he given?

23 A. I think some traffic charges were dropped for him and
24 I think he received a little money to help him pay out his
25 traffic citation.

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1 Q. Would that have been like Thirty or Thirty-five
2 Dollars to pay for the tickets?

3 A. I think that is correct.

4 Q. On March 5th, 2013, you testified Tumblin came to the
5 Drug Unit. Why was he there?

6 A. He was there to go out and purchased crack from -
7 crack from somebody for us. When he got there, we briefly
8 talked. He stated he could purchase crack from a black
9 male that he knew as D.J. and then from that point, you
10 know, we started preparing and getting ready for our deal.

11 Q. Did Tumblin know how to get in contact with that guy,
12 D.J.?

13 A. He did. Mr. Tumblin had his phone number.

14 Q. You guys didn't give him the number?

15 A. No, sir, we did not.

16 Q. And did Tumblin make a phone call?

17 A. He did. I witnessed and also recorded the phone call
18 that he made.

19 Q. And did he indicate who he was calling?

20 A. He stated he was going to call D.J.

21 Q. And did you document any where the number that he
22 called?

23 A. I did. I put it in my paperwork the phone number who,
24 you know, he had for D.J.

25 Q. Do you recall that number off the top of your head?

1 A. I have it right here in my paperwork.

2 Q. Would looking at it help you recall what it is?

3 A. Yes, sir. The phone number we called is [REDACTED].

4 Q. And that phone call was recorded?

5 A. It was.

6 Q. Have you listened to that recording?

7 A. I have.

8 Q. That was State's Exhibit Number One?

9 A. I believe, yes, sir.

10 Q. And during that call, did Tumblin ask the other party
11 to the call for something?

12 A. Yes, sir, he did.

13 Q. What did he ask for?

14 A. I believe he - it was either a G or a whole one, which
15 is referring to a gram of crack?

16 Q. And a fair price for a gram of crack would be Eighty
17 Dollars?

18 A. Yes, sir, it is.

19 Q. And after the phone call, did Tumblin indicate or did
20 you get the impression as to whether or not he could
21 purchase crack cocaine from this guy?

22 MR. MATTHEWS: Your Honor, I'm going to object on the
23 leading question.

24 THE COURT: I sustain the question.

25 SOLICITOR SHELTON: I'll withdraw it.

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1 Q. What did you do next?

2 A. After we placed the phone call, Sergeant Lubben
3 searched Mr. Tumblin to make sure he didn't have any
4 contraband. We also got his government funds ready. Also
5 Sergeant Lubben and myself placed a wire and a camera on
6 Mr. Tumblin so he could record the deal and also so we
7 could listen to the deal. We issued Mr. Tumblin the
8 government funds.

9 During that time, Investigator Ervin had searched the
10 vehicle and then we all kind of regrouped together once we
11 were all ready to go and just had a small briefing. Just
12 kind of, you know, to make sure everybody's on the same
13 page and then we left at that point to go meet for the drug
14 deal.

15 Q. Investigator Lubben is the officer who searched
16 Tumblin prior to the deal?

17 A. That is correct.

18 Q. Did you witness that search?

19 A. No, I did not.

20 Q. And during the whole time that Tumblin was at the Drug
21 Unit, was he constantly in the presence of a Drug Unit
22 officer?

23 A. Yes, he was. We have a conference room which we
24 typically will meet with our informants in and there is
25 always an officer in there, you know, meeting with him. So

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1 if one guy comes out to do something else, we typically
2 will send another officer in to either sit with them or,
3 you know, do another part of the investigation.

4 Q. And did you assist in putting the recording devices on
5 Tumblin during this investigation?

6 A. Yes, sir, I did.

7 Q. Were the devices hidden on his person somewhere?

8 A. Yes, they were.

9 Q. Why were they hidden?

10 A. Of course we don't want the guy that we're going to
11 meet to know that he's working with law enforcement, so
12 we'll hide a camera on him and we'll also hide a recording
13 device so we can also listen to the transaction and listen
14 to everything that's going on.

15 Q. Did Tumblin know where it was hidden?

16 A. Yes, he did.

17 Q. Did he know how it worked?

18 A. He didn't know how to turn it on or off. We
19 typically, you know, just place it on them and then we'll
20 activate everything ourselves. We don't go into with them
21 or how to turn on or off the equipment.

22 Q. Did he know how broad or narrow the scope of the lens
23 was?

24 A. No, he didn't. I do kind of tell them, you know, I'm
25 placing a camera on your body, this is where it is. You

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1 try to tell them to turn the best that they can because
2 you're hoping to get the best video that you can because
3 there's a lot of variables in there. You know, you may
4 stand up and meet with somebody or you may sit down in a
5 vehicle, so of course that changes the view of your camera
6 and, of course, Mr. Tumblin is not an expert at this and,
7 you know, neither am I because you don't do this every day.
8 I go in with them a little of detail on how I would like
9 for them to try to position their body just due to I'm
10 hoping to get the best video that I possibly can.

11 Q. Was he allowed to manipulate that camera? Like move
12 it, put it in a different location or anything like that?

13 A. No, he was not.

14 Q. And was Tumblin given money with which to buy the
15 crack?

16 A. Yes, he was.

17 Q. Was a photocopy of that money made first?

18 A. Yes. We make a photocopy of all the identifiable
19 government funds when we issue somebody. We'll make a
20 photocopy of them so we do have the serial numbers on
21 record.

22 Q. And is that for record keeping purposes?

23 A. That is correct.

24 Q. Investigator, I want to hand to you what's been marked
25 as State's Exhibit Number Six for identification.

1 A. Yes, sir.

2 Q. Do you recognize that?

3 A. Yes, sir, I do.

4 Q. What is it?

5 A. It's a photocopy of the money that was made before we
6 issued it to Mr. Tumblin.

7 Q. Is it a true and accurate copy of the money that was
8 issued to Mr. Tumblin for the buy in this case?

9 A. Yes, sir, it is.

10 SOLICITOR SHELTON: Your Honor, I would move to have
11 State's Exhibit Number Six entered as evidence.

12 MR. MATTHEWS: No objection, Your Honor.

13 THE COURT: In without objection.

14 (WHEREUPON, STATE'S EXHIBIT NUMBER SIX IDENTIFIED AND
15 MARKED, RECEIVED INTO EVIDENCE.)

16 Q. All the preparations for the buy, were those done at
17 the Drug Unit office?

18 A. Yes, they were.

19 Q. Was that at the Law Center at Rock Hill Police
20 Department?

21 A. That is correct.

22 Q. Was the audio/video recording equipment turned on
23 prior to Investigator Ervin and Tumblin leaving the office?

24 A. Yes. That is correct.

25 Q. What did you do after Ervin and Tumblin left the

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1 office?

2 A. I left myself in my vehicle and I was part of the
3 surveillance team. That was when - We also will follow
4 them even though they are in a police vehicle. We will
5 follow them to the actual location and then of course we'll
6 all kind of spread out around the area and try to get the
7 best view that we can of the - of, you know, where they're
8 going to meet our target.

9 Q. And what factors does the surveillance team have to
10 take into account when positioning for a buy?

11 A. There's a lot of different factors. There's traffic.
12 You do want to stay far enough back, you know, so he
13 doesn't, you know, notice that law enforcement is in the
14 area. Of course, if he sees us, he's not going to show up.
15 So we do have to try to blend in with our environment.

16 Q. And what officers other than Ervin were part of the
17 surveillance team?

18 A. Can I look at my notes?

19 Q. Sure.

20 A. The surveillance was myself, Investigator
21 Faulkenberry, Commander Brown, Sergeant Lubben and
22 Investigator Ervin.

23 Q. And you may have already mentioned this but I want to
24 be clear. What's the purpose of the surveillance team?

25 A. It's to watch the confidential informant. You know we

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1 want to maintain a safety and also the integrity of our
2 buy.

3 Q. And during transport when Ervin was driving Tumblin to
4 the buy location, did the location change on the way there?

5 A. It did. We had originally we were going to meet on -
6 he was going to go to McCullough Street and meet him. On
7 the way there when they almost got, you know, around the
8 area, there was a phone call. You know, then they changed
9 it to meet at a Burger King, which is fine with us. It
10 happens all the time. So at that point, we just kind of
11 shifted on what our roles were, where we were going to be
12 and people just kind of would go out and scout out a
13 different location for them to see it so they could just
14 blend into the area and also keep an eye on the drug deal.

15 Q. So does it take the surveillance team time to adjust?

16 A. It does take us, you know, a few minutes to adjust.

17 Q. Is it common or uncommon for a buy location to change?

18 A. It's very common.

19 Q. So at some point, did you and the surveillance team
20 set up to monitor the Burger King buy location?

21 A. Yes, we did.

22 Q. And please describe where you were in relation to the
23 Burger King.

24 A. Okay. If you are familiar with Burger King, it's
25 right at the intersection of Saluda Road and its 901 Heckle

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1 Boulevard, so I was down at an angle just a little bit
2 further down Saluda Road like towards - you're going out
3 towards Mount Holly and towards the Chester area and there
4 was a daycare center which is right down there and I simply
5 just pulled in the parking lot of the daycare center so I
6 could see the front of the Burger King where Mr. Tumblin
7 was going to meet our target in front of.

8 Q. Were you able to see the parking lot of Dollar General
9 from there?

10 A. Yes, I could.

11 Q. Where were the other officers in relation to your
12 position?

13 A. I don't recall where everybody else set up. I know
14 Investigator Ervin, who drove Mr. Tumblin out there, was in
15 the parking lot of the Family Dollar. As to the other
16 surveillance team, I don't recall exactly where they were
17 set up.

18 Q. And when you had gotten in position at the daycare,
19 were you able to make visual contact with Tumblin?

20 A. Yes. Now, I didn't see Tumblin get out of
21 Investigator Ervin's vehicle at that time because he had
22 already got out while I'm trying to set up into a different
23 location and he had already walked across the parking lot
24 so when I parked, I could see him standing in front of the
25 Burger King there. Now I can't see him like we can see

1 each other. I'm probably about a half a block away but
2 with some binoculars I can make out, you know, that that's
3 him of course standing in front of the Burger King.

4 Q. And were you able to see him walk back from the Burger
5 King to the Dollar General to meet back up with Ervin?

6 A. Yes, I did. After the deal was done, he started to
7 walk back. As he crossed the street, I kind of broke off
8 contact at that point. I wanted to follow our target to
9 make sure he wasn't following, you know, our CI, you know,
10 going back to meet Investigator Ervin in our police
11 vehicle, you know, which is an undercover vehicle, so kind
12 of at that point when he was headed back to her direction,
13 I had broke off to see where our target had - was driving
14 off to.

15 Q. And where did the target drive to after the buy?

16 A. He drove kind of across the street. There's a car
17 wash and there's another street right across there. He
18 went down, I believe down that street in that general area.
19 We just want to make sure after the deal that everybody
20 kind of goes their separate ways. We, of course, don't
21 want them to see, you know, him get in the vehicle with
22 whomever and return to the Rock Hill Police Department.
23 That would kind of give everything away, so we do make sure
24 both parties kind of split so, you know, we're taking him
25 back to a secure location at the police department and we

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1 want to make sure that our target doesn't know still that
2 they are cooperating with law enforcement.

3 Q. Does the Drug Unit have any interest in protecting
4 CI's?

5 A. Yes, we do.

6 Q. And is that - Never mind. Were you and the other
7 officers listening to a live audio feed from the
8 audio/video equipment hidden on Tumblin?

9 A. Yes, sir. We could hear everything that Mr. Tumblin
10 said.

11 Q. Did you have a visual feed as well or just an audio
12 feed?

13 A. No. We just have an audio feed. The camera that we
14 use is simply - it's just a camera. It's recording
15 everything to a little small micro disk that's actually
16 inside the camera.

17 Q. Did you hear anything unusual or out of the ordinary
18 during this investigation on that audio feed?

19 A. No. The deal went pretty much as normal. You know,
20 there was some loud music, you know, when he entered our
21 target's vehicle. You know, that of course kind of makes
22 it difficult to hear, but as a whole, the deal was just
23 kind of a regular deal for us. There was nothing unusual.

24 Q. Did you hear anything that would suggest he'd stopped
25 and met with anyone else?

1 A. No, I did not.

2 Q. And did you see him stop and meet with anyone else
3 when you had visual contact on him?

4 A. I did not.

5 Q. Did he meet with anyone else other than the target at
6 Burger King?

7 A. He did not.

8 Q. Had Tumblin been instructed not to stop and talk with
9 anyone else?

10 A. Yes, he had. We do talk to them about what we want
11 them to do so, you know, he knew when he got out of the
12 vehicle he was suppose to walk over to the location. Not
13 talk or meet with anybody. Not even go into the
14 restaurant. You know, he was suppose to just wait for him
15 outside, which he did. And of course whenever he's done,
16 he's suppose to return back and meet with Investigator
17 Ervin in our vehicle.

18 Q. And did he meet with someone who you describe as the
19 target at Burger King?

20 A. Yes, sir, he did.

21 Q. Was that person on foot or in a vehicle?

22 A. He was in a vehicle. He was in a white Cadillac.

23 Q. Were you able to see the actual meeting between
24 Tumblin and the man in the vehicle?

25 A. I could see some of it. I observed the white Cadillac

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1 pull in and circle the parking lot and pull into a parking
2 space and I observed Mr. Tumblin walk over and get inside
3 the vehicle. Now at that point I can't see exactly what
4 they're doing. I am kind of - I'm a half a block down the
5 road but I could see him get inside the vehicle. I could
6 hear, you know, them talking to each other and making an
7 exchange or interaction. And of course I observed him, Mr.
8 Tumblin, get out of the vehicle and start back across the
9 street over to where Investigator Ervin was waiting in the
10 vehicle.

11 Q. But you couldn't see inside the car from where you
12 were?

13 A. No, I could not.

14 Q. Could you see the driver of the car from where you
15 were?

16 A. I mean, I could see there was somebody driving the
17 vehicle. I could not make out who it was.

18 Q. How long was Tumblin in the car?

19 A. It was just a few seconds.

20 Q. Did the driver ever get out of the car?

21 A. No, he did not.

22 Q. Specifically at the Burger King?

23 A. That is correct.

24 Q. Shortly after Tumblin got back to the Dollar General
25 to meet up with Ervin, did you receive a radio call from

1 Ervin?

2 A. Yes. She stated that she had him back and that they
3 were going to proceed back to the - our meeting point,
4 which was at the Rock Hill Law Center.

5 Q. Were you given any identifying information as to the
6 vehicle that the target had been in?

7 A. She also stated that he was in a white Cadillac, which
8 was the target.

9 Q. And what did you do after you received that call from
10 Ervin?

11 A. At that point, of course, we were - I was looking for
12 the white Cadillac to make sure we were going to split off
13 into two separate directions. So I kind of hung around for
14 a few minutes and I was looking for the Cadillac and as
15 soon as I saw the Cadillac was going in the opposite
16 direction that we were going, then I broke off from that
17 and then met everybody back up at the Rock Hill Law Center.

18 Q. And at that point when you were following the
19 Cadillac, were you able to identify the driver at that
20 point?

21 A. I was not.

22 Q. Did you go back to the Drug Unit?

23 A. I did. I returned back to the office. And part of my
24 role, I met with Mr. Tumblin and I recovered the evidence
25 from him which I placed in an evidence bag. And I also

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1 searched Mr. Tumblin and I searched Mr. Tumblin in the same
2 fashion that Sergeant Lubber does. We all kind of do it
3 the same way. And I'll search his, you know, his shirt.
4 You know, pull it out. I search his waist band. Also I
5 search inside of his belt and I check inside of his pockets
6 and if he has anything in his pockets, a wallet, cigarette
7 pack, whatever it may be, I'll search that also and I also
8 ask them to take their shoes and socks off. So we search
9 them thoroughly to make sure that they didn't keep any
10 contraband on them, to make sure that we are getting
11 exactly, you know, the crack back that we had purchased
12 from the individual.

13 THE COURT: Mr. Shelton, this may be a good time for
14 us to take a short break.

15 SOLICITOR SHELTON: Okay.

16 THE COURT: Let the jury go to the jury room for a
17 break at this time.

18 (JURY EXITS COURTROOM AT 11:25 A.M.)

19 THE COURT: We'll be at ease for about ten to twelve
20 minutes.

21 (COURT IN RECESS AT 11:26 A.M..)

22 (COURT BACK IN SESSION AT 11:36 A.M..)

23 THE COURT: Thank you. Take your seats.
24 Bring in the jury.

25 (JURY ENTERS COURTROOM AT 11:38 A.M.)

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1 THE COURT: Mr. Shelton.

2 SOLICITOR SHELTON: Thank you, Your Honor. May it
3 please the Court.

4 DIRECT EXAMINATION

5 INVESTIGATOR HUGH HARRELSON BY SOLICITOR SHELTON:

6 Q. Investigator Harrelson, before the break we were
7 talking about you returning to the Drug Unit after the buy.

8 A. Yes.

9 Q. When you got back there, did you meet with Tumblin and
10 Ervin?

11 A. Yes, I did. When I got back I met with Mr. Tumblin.
12 I recovered the evidence, the crack, from him and placed it
13 in a evidence bag that we use at the police department.

14 Q. And can you describe what the item of evidence you
15 recovered looked like?

16 A. The item I recovered was - looked - you know crack and
17 it was also inside of a small plastic baggy.

18 Q. And did Tumblin have that in his hand?

19 A. He did.

20 Q. Had he been instructed to hold it in his hand the
21 entire time?

22 A. Yes, he had. He had been instructed to keep it with
23 him until an officer recovered it from him, which I did
24 that whenever we returned back to the Rock Hill Law Center.

25 Q. And the crack, was it - You testified it appeared to

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1 be in rock form?

2 A. Yes, sir. It was one solid piece of crack. It wasn't
3 in little bits.

4 Q. I believe you have with you what's been marked as
5 State's Exhibit Number Nine.

6 A. Yes, sir, I do.

7 Q. Would you please retrieve that?

8 A. Yes, sir.

9 Q. And would you please describe to the jury what that
10 item of evidence is?

11 A. Yes, sir. This is - I know it's hard to see. Down
12 here inside of these two plastic baggies is a smaller
13 plastic baggy and I placed the crack and also the plastic
14 baggy that came with it inside of that and I marked DEU on
15 it so we know that that particular bag is our's; it came
16 from the Drug Unit. And then we take it and we place it
17 inside of this - this is actually our evidence bag. This
18 outer bag is something that the chemist does whenever she
19 takes a sample, but inside of our evidence bag here, the
20 top here opens up and I'll place it down inside of there
21 and then I'll seal the top. It has some self-adhesive to
22 it.

23 And also if you can see it, I'll initial it that I'm
24 the one that sealed it and I'll place the date on it, the
25 date that I actually sealed everything up. And then on the

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1 front here, I put all the information that's pertaining to
2 the case. I place our case number. I place what it is I
3 put inside of there, which I put crack. Also where I found
4 the evidence, which was from our confidential informant's
5 hand, and I place the date and the time that I actually
6 recovered it from our confidential informant. I put
7 whoever our suspect is, which is Dominique Agurs, and also
8 the offense which is violation of drug law.

9 I put who recovered it which is my name, Harrelson,
10 and also I put my badge number there and then I actually
11 sign it over. I sign it over from myself to the evidence
12 locker. In our office, we have our own set of evidence
13 locker, which is under control of the York County evidence,
14 so after this we will do an evidence sheet and I'll sign it
15 and say I'll put this actually in the locker at 3-5-2013 at
16 5:00 P.M., so that's the time that I placed it inside of
17 the locker, which is a secure area.

18 So once I place it in there, I'm unable to retrieve
19 it. Only an evidence technician with the county is able to
20 retrieve the evidence and they come by periodically and
21 gather the evidence and bring it here to the Moss Justice
22 Center where they store it and also where they take samples
23 of the crack to make sure it is crack.

24 MR. MATTHEWS: Your Honor, I'm going to object. He
25 keeps referring to the information, the item in the bag is

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1 crack, but at this point in time there is no evidence of
2 any testing of the material..

3 THE COURT: I sustain the objection.

4 Just refer to it as substance obtained through the
5 buy.

6 A. Yes, Your Honor.

7 THE COURT: You may proceed.

8 SOLICITOR SHELTON: Thank you, Your Honor.

9 Q. Mr. Harrelson, was that bag sealed after you recovered
10 the substance?

11 A. Yes, it was. I sealed it right here and I placed my
12 initials and also the date that I sealed the bag.

13 Q. And the substance that you put in the sealed bag, is
14 that what you recovered straight from Tumblin's hand?

15 A. Yes, it is.

16 Q. And was that on March 5th, 2013?

17 A. Yes, sir, it was.

18 Q. Was it continuously in your custody and control before
19 you put it in the evidence drop locker?

20 A. Yes, sir, it was.

21 Q. And once it was in the drop locker, did you have
22 access to it again?

23 A. No, sir, I did not.

24 Q. Who has access to that locker?

25 A. The evidence custodians with the York County Sheriff's

1 Office.

2 Q. Is Patrick Patterson one of those men?

3 MR. MATTHEWS: Your Honor, I object to the leading
4 question.

5 THE COURT: That's a leading question. Rephrase your
6 question.

7 Q. Who are the evidence technicians?

8 A. I believe they have three evidence technicians at the
9 York County Sheriff's Office. I know one of them is
10 Patrick Patterson.

11 Q. Did you take this item back in your possession for
12 court?

13 A. I did. Yes, sir.

14 Q. Was it in a sealed bag?

15 A. Yes, sir. It was sealed up just like it is today.

16 Q. And when did you first take it back in your possession
17 for court?

18 A. I took it out - I retrieved it from the evidence
19 locker 4-2-2014 at 9:10 in the morning.

20 Q. And did you return it to the evidence locker some time
21 after that?

22 A. I did. I returned it back to the evidence locker at
23 4-3-2014 at 13:30.

24 Q. Why did you have it in your possession during that
25 time frame?

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1 A. We were scheduled to go to trial on this case. I had
2 retrieved it from the evidence locker and had it in my
3 possession. I was involved in another case. When I got
4 through, the evidence - they close at five. They had
5 already closed so I secured the evidence inside of my
6 vehicle and then the following day when I came back and
7 finished with court, I returned this to the evidence locker
8 - to the evidence custodians.

9 Q. Was it continuously in your custody and control during
10 that time period?

11 A. Yes, sir, it was.

12 Q. And did you recover it again yesterday before court?

13 A. I did. Yes, sir.

14 Q. And have you had it ever since?

15 A. No, sir. Yesterday they were still open so I went
16 back down to the evidence locker and I entered it back in.
17 They held onto it overnight and I actually went back this
18 morning and checked it back out for court.

19 Q. So during the time that you had it for court, was it
20 continuously in your custody and control?

21 A. Yes, it is.

22 Q. And if you will take a moment to inspect the substance
23 inside the evidence bags, is that the condition the
24 substance was in when you recovered it from Tumblin's hand?

25 A. No, sir, it's not. The substance now, as you can see,

1 has just fallen apart. It can be due to a couple different
2 reasons. A lot of times in my experience you can buy
3 what's called wet crack, which is - it's just been cooked
4 up and it has a lot of moisture in it and just over a
5 period of time that moisture will evaporate and of course
6 just make it into just a harder brittle type substance.

7 Sometimes we do buy crack that doesn't have any
8 moisture in it and it's very easy to break or to pull
9 apart the crack rock, so at this point obviously some type
10 of pressure had just been on the bag and the rock has just
11 fell a part, which is all sealed and contained inside the
12 smaller bag which I had placed it in whenever I recovered
13 it.

14 Q. And during the time frame that you had the evidence
15 bag in your possession for court, was it in a sealed bag,
16 the state that it's currently in?

17 A. Yes. It has always been inside this sealed bag.

18 Q. I'm going to hand you what has been marked for
19 identification as State's Exhibit Number Eleven.

20 Do you recognize that item?

21 A. Yes, sir, I do.

22 Q. What is it?

23 A. It is the crack the way it was - excuse me, it's the
24 substance that we had purchased in it's original state when
25 I had I guess placed everything inside the evidence bag.

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1 It's there as one piece and also the plastic baggy in which
2 it came in.

3 Q. And would that photograph have been taken some time
4 prior to these court proceedings?

5 A. Yes, sir, it would have.

6 Q. And so is that the state that it was in in the
7 evidence bags after you placed it into evidence?

8 A. Yes, it was.

9 SOLICITOR SHELTON: Your Honor, I would move to admit
10 what's been marked as State's Exhibit Number Eleven into
11 evidence.

12 MR. MATTHEWS: Your Honor, I object under Rule 901 as
13 in the authentication of this photograph. There is no
14 information at all in the photograph that showed that this
15 is in fact the substance that was taken in at the time they
16 placed it into the bag.

17 THE COURT: I overrule the objection. I think he's
18 testified it is.

19 SOLICITOR SHELTON: Your Honor, at this time --

20 THE COURT: In over objection.

21 Go ahead.

22 (WHEREUPON, STATE'S EXHIBIT NUMBER ELEVEN IDENTIFIED
23 AND MARKED, RECEIVED INTO EVIDENCE.)

24 SOLICITOR SHELTON: Your Honor, at this time, I would
25 like to publish that picture to the jury.

1 THE COURT: Okay.

2 (STATE'S EXHIBIT NUMBER ELEVEN, PUBLISHED TO THE JURY
3 AT 11:50 A.M..)

4 Q. Is that a projection of the photograph in your hand,
5 you are holding in your hand that's been admitted as
6 State's Exhibit Number Eleven?

7 A. Yes, sir, it is.

8 Q. And is that the condition the substance was in when
9 you retrieved it from Tumblin?

10 A. Yes, sir, it is.

11 Q. And we see kind of a hazy image at the bottom towards
12 the right hand corner of that picture. What is that?

13 A. That is the plastic baggy in which the substance came
14 in.

15 Q. And the top left hand corner, is that the chalky
16 substance that appears to be crack cocaine?

17 A. Yes, sir, it is.

18 SOLICITOR SHELTON: Thank you.

19 May I approach?

20 Q. And were you able to weigh that substance after you
21 retrieved it from Tumblin?

22 A. Yes, sir, I did.

23 Q. And was that an approximate weight?

24 A. It is. We have scales in our office. They are not
25 calibrated. They are just kind of over the counter scales.

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1 When it is sent to the laboratory to be tested, that's
2 where the official weight is weighed.

3 Q. And why do you weigh substances prior to submitted
4 them into evidence?

5 A. We weigh it because sometimes you can be charged on
6 the weight of the drug. It would change your charge. So
7 if it weighs over so many grams, you may be charged a
8 different type of charge, so we weigh it to make sure it is
9 in the approximate range so we do make the appropriate
10 charge.

11 Q. And what was the approximate weight of this substance?

12 A. May I look at my notes?

13 Q. Sure.

14 A. When I weighed it, it was approximately .8 grams.

15 Q. Was Tumblin searched after he gave you the substance?

16 A. Yes, he was.

17 Q. And did you search him?

18 A. I did.

19 Q. Did you search him in the manner you described
20 earlier?

21 A. Yes, I did. I searched, you know, searched his chest
22 area, his shirt. If he has any pockets inside his shirt.
23 If he had a jacket on, I would have searched his jacket.
24 Again, his waistband, his belt, pockets, and move all the
25 way down and I search his, you know, his legs and I also

1 search his socks and shoes.

2 Q. Was he continuously in the presence of Drug Unit
3 officers before you searched him?

4 A. Yes, ---

5 MR. MATTHEWS: I objection to leading questions.

6 THE COURT: I sustain the objection.

7 Rephrase your question.

8 Q. Was anyone with him prior to you searching him?

9 A. Yes, he was. Somebody was with Mr. Tumblin the entire
10 time.

11 Q. Who? Who would that somebody have been with?

12 A. It was myself and also I believe Sergeant Lubben was
13 in there at one point. I recovered the crack, Sergeant
14 Lubben went in --

15 MR. MATTHEWS: Your Honor, objection to the referring
16 of crack.

17 THE COURT: Rephrase your answer.

18 A. I'm sorry. I recovered the substance that we had
19 purchased, placed it in the evidence bag. And he was with
20 Sergeant Lubben until I went back into the conference room
21 and then Sergeant Lubben left and at that point I searched
22 him again and also took a statement.

23 Q. Did you find any contraband or drugs on him?

24 A. I did not.

25 Q. Did you find any money on him?

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1 A. No, I did not.

2 Q. Was the audio/video recording equipment removed from
3 his person?

4 A. Yes, sir, it was.

5 Q. And did that equipment produce a video recording?

6 A. Yes, sir, it did.

7 Q. Have you watched that video?

8 A. I did.

9 Q. Is that what's been entered as State's Exhibit Number
10 Two?

11 A. Yes, sir.

12 Q. Did you notice a time stamp on that video?

13 A. We do have the time stamp on our videos but we do not
14 use them. It's kind of like your VCR clock. A lot of
15 times, you know, if the battery dies on our equipment, you
16 would have to go in and reset it so just having to do that
17 multiple times due to it's not like a VCR. The buttons
18 are on it. You have to plug it into the computer and kind
19 of program every thing. We just do not use the time and
20 date stamp on any of our recording equipment in the Drug
21 Unit.

22 Q. What date did this investigation actually occur?

23 A. This date occurred on March the 5th, 2013.

24 SOLICITOR SHELTON: Beg the Court's indulgence.

25 (PAUSE.)

1 Q. Investigator, I'm handing up to you what's been marked
2 for identification as State's Number Three, Five and Nine.
3 Would you please take a moment to look at those.

4 Do you recognize those items?

5 A. I do. Yes, sir.

6 Q. And what are they?

7 A. One picture is a still shot from our camera which
8 captured Mr. Agurs inside of his vehicle --

9 MR. MATTHEWS: Your Honor, I'm going to object. He is
10 publishing a photograph that has not been entered into
11 evidence; just to the jury.

12 THE COURT: I sustain the objection. They are not in
13 evidence so don't publish them at this point.

14 Q. Investigator, if you would please, you simply look at
15 those and answer my questions and then if they are
16 admitted, we will show them to the jury.

17 A. Yes, sir.

18 Q. Continue.

19 A. One is a picture of Mr. Agurs taken from a still shot
20 of our video camera. Another picture is a picture of the
21 money that we had issued our informant. Another picture is
22 a hand with a substance that we had purchased from Mr.
23 Agurs.

24 Q. And you said that they are still shots. What does
25 that mean?

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1 A. It's just a frame from our video that we made. Just
2 made it into a picture.

3 Q. So it's like pausing the video and making a picture of
4 it from the video?

5 A. Correct. Yes, sir.

6 Q. So these pictures are actually from the video that's
7 in evidence as State's Number Two?

8 A. That is correct.

9 Q. And Number Three - Well hang on just a second. Before
10 I ask you questions about it, are the pictures true and
11 accurate as pictures from the video in State's Number Two?

12 A. Yes, they are.

13 SOLICITOR SHELTON: Your Honor, at this time I would
14 move to admit these as State's Exhibits.

15 MR. MATTHEWS: Your Honor, I'm going to object. I
16 have some issues to take outside in camera on these.

17 THE COURT: I'm going to let the jury go to the jury
18 room while we take up some matters of law.

19 (JURY EXITS COURTROOM AT 11:54 A.M.)

20 THE COURT: All right.

21 MR. MATTHEWS: Your Honor, before we go into these
22 issues, he has not stated on the record that he was the one
23 that drew these photographs off of the video. Also, the
24 video is very clear that there is a time stamp on it. At
25 least two of those photographs do not have any time stamps

1 on it at all, which would indicate the third picture, which
2 is the last picture, does actually have the time stamp from
3 the video on it. Those first two pictures do not have at
4 all - any indication at all that they came from this video.
5 He has not testified whether or not he was the one who took
6 the still pictures off the video.

7 I would submit under Rule 901, he has not testified to
8 the information that would authenticate these photographs
9 from this video.

10 SOLICITOR SHELTON: Your Honor -

11 THE COURT: Would the State make a proffer?

12 SOLICITOR SHELTON: Excuse me?

13 THE COURT: Would you like to make a proffer?

14 SOLICITOR SHELTON: Make a proffer? Yes, sir. I can
15 but I as a matter of law I think if you allow me to argue
16 in response, I don't believe --

17 THE COURT: Go ahead. Go ahead.

18 SOLICITOR SHELTON: I don't believe there's anything
19 in the rules that require any showing of who made the
20 stills. Investigator Harrelson testified that he watched
21 the video and he's testified that these are still shots
22 from that video. It's very clear that they are from the
23 same video. The video was published to the jury before.
24 The only one that would - it was so quick it's hard to see
25 is the last one that does have the time stamp, the picture

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1 of who we believe to be Mr. Agurs and the picture of money
2 are on the screen for a period of time where anyone
3 watching the video can see that this is simply for the
4 convenience of the jury and being able to present the
5 State's case in a useable, presentable manner since these
6 videos are so swift some times.

7 THE COURT: I believe he did testify that these did
8 come from Exhibit Number Two, which was the video. I don't
9 think he has to testify that he is the one who captured
10 them, so to speak, but he has testified that that's where
11 they came from. If you have some evidence that they did
12 not and you can certainly use that in cross examination so
13 I overrule your objection.

14 Bring in the jury. Bring in the jury.

15 MR. MATTHEWS: Your Honor, while we are on the record
16 before the jury comes in, I would ask that he refrain from
17 his statement that the first picture was the picture of Mr.
18 Agurs. Identification solely to their --

19 THE COURT: I sustain the objection. I tried to
20 interject earlier because I agree.

21 MR. MATTHEWS: Yes, sir, I understand.

22 THE COURT: I agree, I cannot refer to that as Mr.
23 Agurs because nobody has identified that as Mr. Agurs to
24 this point so that objection is sustained.

25 OFFICER HARRELSON: Do I need to rephrase?

1 THE COURT: I can't coach.

2 OFFICER HARRELSON: Yes, sir. I'm sorry.

3 (JURY REENTERS COURTROOM AT 11:59 A.M.)

4 THE COURT: You may proceed.

5 SOLICITOR SHELTON: Thank you, Your Honor.

6 Q. Investigator Harrelson, --

7 SOLICITOR SHELTON: Your Honor, for the record, I
8 would like to move State's Exhibit's Number Three, Five and
9 Nine into evidence.

10 THE COURT: Over objection they are admitted into
11 evidence.

12 (WHEREUPON, STATE'S EXHIBIT NUMBERS THREE, FIVE AND
13 NINE, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

14 SOLICITOR SHELTON: At this time, I would like to
15 publish those exhibits to the jury.

16 THE COURT: You may.

17 (WHEREUPON, STATE'S EXHIBITS NUMBER THREE, FIVE AND
18 NINE PUBLISHED TO THE JURY.)

19 Q. Investigator, I'm showing what's been entered as
20 State's Number Five. Do you recognize this?

21 A. Yes, sir. It's a picture of some of the confidential
22 funds that were issued to the confidential informant.

23 Q. Is this picture from the buy video that's State's
24 Number Two?

25 A. Yes, sir, it is.

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1 Q. And having reviewed that video, can you tell the jury
2 what part of the time line this picture is from?

3 A. Time line?

4 Q. Yeah. In particular, who, what, when, where is kind
5 of what I am getting at. What part of the video is this
6 picture from?

7 A. Yes. I believe this is when our informant was inside
8 the vehicle with our target.

9 Q. And in your review of the video, would these funds
10 have been - whose hands were these funds in at the time of
11 this picture?

12 A. Our confidential informant.

13 Q. I'm now showing what's been entered as State's Number
14 Nine. Do you recognize this?

15 A. Yes, sir. That is a picture of the substance that we
16 had purchased.

17 Q. And do you know where in the video this picture was
18 retrieved from? What part of the video?

19 A. It was towards the end when the confidential informant
20 was in the vehicle with Officer Ervin.

21 Q. And in your review of the video, are you able to
22 determine whose hand that is holding the substance?

23 A. Yes. That is our confidential informant's hand.

24 Q. Did you watch the buy video that day?

25 A. Yes, I did.

1 Q. And were you able to identify the driver of the
2 vehicle?

3 A. Yes, sir, I was.

4 Q. Did you know that individual prior to that day?

5 A. Yes. I had dealt with him before when I was on the
6 Street Crimes Unit with the City of Rock Hill.

7 MR. MATTHEWS: Objection, Your Honor. Based on prior
8 ruling I have a motion.

9 THE COURT: All right. Let me let the jury go to the
10 jury room again while I take up a matter of law.

11 (JURY EXITS COURTROOM AT 12:02 P.M.)

12 THE COURT: Mr. Matthews.

13 MR. MATTHEWS: Your Honor, prior to the trial being
14 started there was a discussion in the pre-trial motions
15 about - no discussions about any prior contact or prior
16 knowledge of my client other than they knew him. The CI
17 was instructed specifically not to testify that he knew him
18 from prior drug transactions or anything of that nature, or
19 anybody to discuss prior contact other than just the
20 general idea of prior contact.

21 This officer is now brought into the issue before any
22 decisions were made whether or not my client is going to
23 testify or not as to the issue that he has had prior
24 contact with my client because through the street crimes
25 division. And Your Honor, that I would submit is very

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1 prejudicial and is against the prior discussions and
2 rulings that we've had in this case. Therefore, Your
3 Honor, I am going to ask that the - that we declare a
4 mistrial because he's brought in information that - as to
5 my client's past history.

6 THE COURT: Mr. Shelton, he makes a good point.

7 SOLICITOR SHELTON: Your Honor, I would call the
8 courts attention to exactly what was said. Knew him from
9 prior dealings with street crimes unit. He didn't say in
10 what context.

11 THE COURT: Street crimes? I mean how much more of
12 context do you need?

13 SOLICITOR SHELTON: Well - he could have been a
14 witness. He could - like there is any number of things. I
15 mean there's no indication of any prior drug activity.
16 There is no indication of any - any prior crimes at all. I
17 would suggest that if a curative instruction could remedy
18 any proceeding prejudice, there has been simply no
19 suggestion that Mr. Agur's was accused of any other crime
20 in any of those prior dealings.

21 Officers have contact with individuals on a daily
22 basis that are not charged with crimes. So there is
23 nothing in what he said prior dealings with him - as an
24 officer of the street crimes unit that - that says he was a
25 - a criminal or convicted, or even charged with anything in

1 those dealings.

2 THE COURT: I don't agree with that. I think it's
3 pretty - The implication - he didn't mean it as an
4 implication to the jury - is certainly that his - He is a
5 law enforcement officer and dealing with street crimes. He
6 dealt with the Defendant in that context so I - I don't buy
7 that the jury would think well he just happened to see him
8 when he run out for ice cream or something. But, I am not
9 going to grant a mistrial because I don't believe there is
10 any manifest necessity based on that one interjection.

11 I will be glad to give a curative instruction although
12 I don't - Well, I'm not going to give a curative
13 instruction, because I believe that would just call
14 attention to it. But I am going to deny the Motion for a
15 Mistrial. I don't believe there is any manifest necessity
16 based on that one comment.

17 MR. MATTHEWS: Your Honor, if I may, in the context of
18 the ruling. Your Honor, the issue is that I agree that
19 common jurors being common folks is going to infer that
20 there has been prior - the prior contact that in an arrest
21 and therefore that information is more prejudicial than
22 probative. I agree with the Court that a curative
23 instruction would only bring it - bring it back to their
24 attention. However, I think that with the cat out of the
25 bag, I think that because we don't have a curative

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1 instruction that the jury will consider those, that piece
2 of information in deciding whether or not my client is
3 guilty of the charge or not.

4 The severity of the possible sentencing - or not the
5 possible sentencing, the sentencing in this case if
6 convicted is severe enough that in all abundance of
7 caution, I would request that a mistrial so that we have a
8 clean record before the jury for them to make a decision
9 without any undue influence by a statement of prior
10 connection with the Street Crimes Division.

11 THE COURT: Well you took the inference one step
12 further than I take it, and you indicated that you felt
13 that that would - be an inference that he was arrested. I
14 don't think it's quite an inference that he was arrested,
15 just that there was interaction between this officer and
16 Mr. Agurs regarding street crimes.

17 I don't know that that in of itself, we suppose these
18 are in the jury's mind or we suppose that there was an
19 arrest made, but I'm going to deny the motion. Again, I
20 don't feel a manifest necessity to grant a mistrial. But I
21 will ask the witness not to make any such references again
22 or there will be a mistrial.

23 OFFICER HARRELSON: Yes, Your Honor.

24 THE COURT: Bring in the jury.

25 And after that last comment, unless the door is open

1 to make such a comment.

2 MR. MATTHEWS: I understand.

3 (JURY REENTERS COURTROOM AT 12:09 P.M..)

4 THE COURT: You may proceed.

5 SOLICITOR SHELTON: May it please the court, Your
6 Honor.

7 THE COURT: Yes.

8 BY SOLICITOR SHELTON:

9 Q. Investigator, you testified that you have known the
10 person convicted in the video - the other person. How long
11 had you known that person?

12 A. Five years approximately.

13 Q. Did you know that person's name?

14 A. Yes I did.

15 Q. And what was that name?

16 A. Dominique Agurs.

17 Q. Had you seen him face to face prior to March 5th,
18 2013?

19 A. Yes, sir, I have.

20 Q. And did you get a good look at him?

21 A. Yes, I did.

22 Q. Do you see the man you know as Dominique Agurs in the
23 courtroom today?

24 A. Yes, sir, I do.

25 Q. Please point him out for the jury.

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1 A. The gentleman there in the white - excuse me - the
2 black, red and gray striped shirt.

3 Q. And is it your testimony that that's the same man you
4 saw in the video State's Number Two.

5 A. Yes, sir, it is.

6 Q. Prior to watching the video, did you know the identity
7 of the person Tumblin described as D.J.?

8 A. No, I did not.

9 Q. After watching the video, did you know that person's
10 identity?

11 A. Yes, sir, I did.

12 A. And did you prepare group of six photographs for
13 Tumblin to view?

14 A. Yes, sir, I did.

15 Q. Was one of those photographs a picture of Dominique
16 Julius Agurs?

17 A. Yes, sir, it was.

18 Q. Is that collection of six photographs commonly
19 referred to as a photo lineup?

20 A. Yes, sir, it is.

21 Q. Investigator, I'm handing to you what's been marked
22 for identification in State's Exhibit Number Four.

23 Please take a moment to look over that item.

24 A. Yes, sir.

25 Q. Do you recognize that item?

1 A. Yes, sir, I do.

2 Q. What is it?

3 A. It's the photograph lineup that I had shown our
4 confidential informant.

5 Q. Is this the original lineup?

6 A. Yes, sir, it is.

7 Q. And is it the actual lineup you showed Tumblin on
8 March 5th, 2013?

9 A. Yes, sir, it is.

10 Q. How many pages are in that exhibit?

11 A. There's three pages.

12 Q. And the first page, is that the page that includes the
13 photographs?

14 A. Yes, sir, it is.

15 Q. Is that the only page you showed Tumblin?

16 A. Yes, sir, it is. I did show him the last page
17 afterwards. It is a - a page that's the Drug Unit that we
18 actually do stating that he freely and voluntarily picked
19 out - whoever he picked out out of the lineup, that we did
20 not force or coerce him.

21 Q. Was he shown that last page after making a selection
22 from those six photographs?

23 A. Yes, sir, he was.

24 Q. And did he sign that last page?

25 A. Yes, sir, he did.

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1 Q. The first page, does it appear to have any markings on
2 it?

3 A. Yes, sir, it does.

4 Q. Were those markings there when you handed it
5 originally to Tumblin?

6 A. No, sir.

7 Q. Who made those markings?

8 A. Mr. Tumblin did.

9 Q. And what do those markings reflect?

10 A. He circled the photograph that he picked out. He also
11 initialed it and then signed it at the bottom and placed
12 the date.

13 Q. And did you take possession of that picture page after
14 he indicated his selection?

15 A. Yes, sir, I did.

16 Q. And at that time is that when you showed him the third
17 page regarding the statement and about free and voluntarily
18 selecting?

19 A. Yes, sir, that is correct.

20 Q. And he signed that third page?

21 A. Yes, sir, he did.

22 Q. What is the second page?

23 A. The second page is a list of the names and
24 descriptions of all the suspects in our lineup.

25 Q. Was he - Was Tumblin ever shown that page?

1 A. No, sir, he was not.

2 Q. Was that for your record keeping purposes?

3 A. Yes, sir, it is.

4 Q. And did you add that page into what's marked as
5 State's Number Four after Tumblin made his selection?

6 A. Yes, sir, that is correct.

7 Q. And is that the same condition now as when you
8 finalized the packet for your case file?

9 A. Yes, sir. it is.

10 SOLICITOR SHELTON: Your Honor, I would move to have
11 this exhibit admitted into evidence.

12 MR. MATTHEW: Your Honor, still the same objection
13 made based on Neil versus Biggers.

14 THE COURT: Over objection I allow it in.

15 (WHEREUPON, STATE'S EXHIBIT NUMBER FOUR IDENTIFIED AND
16 MARDED, RECEIVED INTO EVIDENCE.)

17 SOLICITOR SHELTON: Your Honor, at this time I would
18 request to publish the photo page of State's Number Four.

19 THE COURT: You may.

20 (STATE'S EXHIBIT NUMBER FOUR PUBLISHED TO THE JURY AT
21 12:15 P.M..)

22 Q. Investigator Harrelson, I'm showing on the projector
23 what's been admitted as State's Number Four.

24 Is this the photo page that you showed Mr. Tumblin?

25 A. Yes, sir, it is.

1 Q. And is the photo on the bottom right corner the
2 selection he made?

3 A. Yes, sir, it is.

4 Q. And is there a date underneath the signature line
5 there?

6 A. Yes, sir. Mr. Tumblin put 3-5 of 2012, which at the
7 time I did not catch it and it was actually - the date was
8 2013 instead of 2012.

9 Q. So it was still 3-5-13?

10 A. Correct. Yes, sir.

11 Q. How did you prepare this lineup?

12 A. When I recognized the gentlemen in our video I can
13 plug into - his name into our computer database, and it
14 will actually bring up some two hundred odd pictures
15 matching his description. And then out of those pictures,
16 I will select the ones that closely resemble him as far as
17 - you know - skin tone, facial features, hair style, and I
18 will put that lineup together and then it prints it - both
19 pages out for me.

20 Q. Did you show Tumblin the buy video prior to showing
21 him the lineup?

22 A. No, sir, I did not.

23 Q. Where were you when you showed - where were you and
24 Tumblin when you showed him the lineup?

25 A. We were in a conference room together.

1 Q. At the Rock Hill Police Department?

2 A. Yes, sir, we were.

3 Q. At the Drug Unit?

4 A. Yes, sir.

5 Q. And did you have him show - see the lineup that same
6 day?

7 A. Yes, I did.

8 Q. Did you show him the lineup before or after the drug
9 buy?

10 A. It was after the buy.

11 Q. Was anyone else present with you when you showed him
12 the lineup?

13 A. No, sir, they were not.

14 Q. What, if anything, did you say to Tumblin before
15 showing him this lineup?

16 A. I simply asked him to take a look at these six photos.
17 The suspect may or may not be in the photos; to look at his
18 facial features, that the age or of course weight may be a
19 little bit different than what he had just remembered.

20 Q. Did you say or do anything to suggest to Tumblin what
21 photo to select?

22 A. No, sir.

23 Q. Did anyone else?

24 A. No, sir.

25 Q. Whose photograph did Tumblin select?

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1 A. Dominique Agurs.

2 Q. After the buy and the lineup, did you seek an arrest
3 warrant for Dominique Julius Agurs?

4 A. Yes, sir, I did.

5 Q. Was that for the charge of distribution of crack
6 cocaine from March 5th, 2013?

7 A. Yes, sir.

8 Q. Were you the affiant on that warrant?

9 A. I am.

10 Q. Was it signed by a magistrate or a municipal judge?

11 A. Yes, sir. It was signed by a magistrate.

12 Q. And was Agurs arrested on that warrant?

13 A. Yes, at a later date.

14 Q. What date was that?

15 A. May I go back to my notes?

16 Q. Of course.

17 A. He was arrested on 3-21-2013.

18 Q. Were you the arresting officer?

19 A. I was.

20 Q. Was he was booked into the jail?

21 A. Yes, he was.

22 Q. Was that at the Law Center in Rock Hill or at Moss
23 Justice?

24 A. He's booked in at the Moss Justice Center. We take
25 him back to the Rock Hill Police Department in which we

1 work out of to complete all of our paperwork, and then he
2 is placed in the holding facility at the Rock Hill Police
3 Department and then he's transferred to the Moss Justice
4 Center where he's actually booked in.

5 Q. And were you the booking agent at the jail at Moss
6 Justice Center?

7 A. Not at the Moss Justice Center. No.

8 Q. At the Rock Hill Law Center?

9 A. At the Rock Hill Police Department, I was. I fill out
10 a booking sheet.

11 Q. Okay. And during that booking process, are there a
12 series of standard questions that you ask individuals who
13 have been arrested?

14 A. Yes. Yes, sir.

15 Q. And did you ask Agurs that series of standard
16 questions?

17 A. I did.

18 Q. And are those questions more like identifying
19 questions?

20 A. Yes, they are.

21 Q. And was that information documented?

22 A. It was.

23 Q. Did the man arrested identify himself?

24 A. He did. He identified himself as Dominique Agurs.

25 Q. What's his middle name?

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1 A. Julius.

2 Q. Did he give you - Hang on just a second.

3 Investigator, I want to show you what's been marked as
4 State's Exhibits Number Seven and Eight. Please take a
5 look at those without showing them to the jury.

6 Do you recognize those photographs?

7 A. Yes, sir, I do.

8 Q. Do you recognize the person in those photographs?

9 A. Yes, sir, I do.

10 Q. And is the - Are both exhibits the photograph of the
11 same person?

12 A. Yes, they are.

13 Q. Who is that person?

14 A. Dominique Julius Agurs.

15 Q. And is it a fair and accurate photograph of how Mr.
16 Agurs looked when you arrested him on March 21st, 2013?

17 A. Yes, sir, it is.

18 Q. During the booking process, did Mr. Agurs tell you a
19 phone number?

20 A. Yes, sir, he did.

21 Q. And indicating it was his phone number?

22 A. Yes, sir.

23 Q. Is that one of the standard booking questions?

24 A. It is. Yes, sir.

25 Q. And did you document that number on the booking

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CROSS BY MR. MATTHEWS

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1 report?

2 A. Yes, sir, I did.

3 Q. What number did he give you?

4 A. Can I look at my notes?

5 Q. Sure.

6 A. The number he gave me was [REDACTED]

7 Q. And is that the same number Mr. Tumblin had called on
8 March 5th, 2013 to set up the drug deal?

9 A. Yes, sir, it was.

10 Q. Did all these events occur within the city limits of
11 Rock Hill?

12 A. Yes, they did.

13 Q. In York County, South Carolina?

14 A. Yes, sir.

15 SOLICITOR SHELTON: Thank you. Please answer any
16 questions Mr. Matthews may have for you.

17 THE COURT: Mr. Matthews.

18 CROSS-EXAMINATION

19 INVESTIGATOR LELAND HARRELSON BY MR. MATTHEWS:

20 Q. I believe we had already established that whenever you
21 were involved in the case that Mr. Tumblin wanted some
22 benefit from working with the police; is that correct?

23 A. That is correct.

24 Q. And that you all searched him; didn't have anything on
25 him?

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1 A. That is correct.

2 Q. What time did he get to the Rock Hill Police
3 Department?

4 A. May I take a look at my notes?

5 Q. Sure.

6 A. He arrived at the police department just a little bit
7 after two in the afternoon.

8 Q. Okay. And when was he searched?

9 A. He was searched at approximately 2:43 in the
10 afternoon.

11 Q. So he was there approximately thirty to forty minutes?

12 A. Yes, sir.

13 Q. And did you meet with him at all during that period of
14 time?

15 A. Yes, sir, I did.

16 Q. And you indicated you were not involved in the search
17 previous to him going to the truck where Officer Ervin was
18 located?

19 A. That is correct.

20 Q. Do you know who was involved in that search?

21 A. Sergeant Lubben.

22 Q. Was anybody with him?

23 A. Not to my knowledge.

24 Q. Was there any documentations placed in your file or
25 anybody's file indicating how they searched him and whether

1 they found anything?

2 A. No, sir.

3 Q. Okay. So there is nothing to document either visually
4 or in documentation how that search occurred?

5 A. No, sir. We simply - we document on our paperwork
6 that he was searched and who he was searched by.

7 Q. But that's it?

8 A. Yes, sir. That is correct.

9 Q. And that there is no documentation or audio, visual or
10 documentation, as to when in the procedures when Ervin
11 checked the truck?

12 A. Again, we go back on the same paperwork and document
13 who searched the vehicle and at what time.

14 Q. But there is no other paperwork that would just show
15 that where she searched, what she did, and what she found
16 or didn't find?

17 A. No, sir.

18 Q. It's the same thing with a search of the CI. There is
19 nothing to show how they searched him, what he was wearing,
20 what his condition was, what they searched, and whether
21 they found anything?

22 A. We do documents - No. That is correct.

23 Q. Okay. Now, you indicated that your involvement once
24 he gets, once Mr. Tumblin gets in the truck, you get into
25 your vehicle and follow him?

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1 A. That is correct.

2 Q. And you indicated to the jury earlier that you are in
3 your vehicle. Is anybody else in your vehicle?

4 A. Yes, sir.

5 Q. Who else is in your vehicle?

6 A. I had another officer with me, Investigator
7 Faulkenberry.

8 Q. Okay. So Officer Faulkenberry is in the vehicle with
9 you but you are the driver?

10 A. That is correct.

11 Q. All right. And you indicate you parked at the daycare
12 center on - a little bit further down Saluda Road?

13 A. Yes, sir. That is correct.

14 Q. Now, isn't it true or help me understand, there is a
15 car wash on the corner of Heckle and Saluda Road. Correct?

16 A. I think it's a gas station at the corner of Heckle and
17 Saluda.

18 Q. Well, there's a gas - there is a car wash right behind
19 it?

20 A. That is correct. Yes, sir.

21 Q. Okay. And it used to be called and may still be
22 called the Tomato Place.

23 A. I'm not sure about that.

24 Q. Okay. Well, you've been here for how - you said you
25 worked for six years at Rock Hill Police Department.

1 Correct?

2 A. That is correct.

3 Q. All right. Now, and you are familiar that right down
4 from the car wash is there any obstruction, any trees or
5 anything like that between the car wash and the daycare
6 center?

7 A. Yes, sir. There are some trees.

8 Q. Okay. And we have the daycare center. How far off
9 the road is the daycare center sitting?

10 A. It's right on the - The parking lot is right in front
11 up close to the road and then the building sits back off of
12 it just a little bit.

13 Q. Now in that parking lot, that parking lot extends
14 through the whole front of the building. Correct?

15 A. That is correct.

16 Q. And where was your vehicle at?

17 A. In the front parking lot of the daycare center.

18 Q. Okay. But where in the front parking lot? Closer to
19 the trees or to the other side of the parking lot?

20 A. I don't recall exactly, the exact location of where I
21 had parked in the parking lot.

22 Q. And but your intent was that not - was there any other
23 cars in the parking lot?

24 A. Yes, sir, there were.

25 Q. Was there any children in the daycare center?

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1 A. No, sir. There weren't any children out in the
2 parking lot.

3 Q. All right. So you are sitting at the parking lot and
4 are you facing the road or parked away from the road?

5 A. My vehicle is - I'm parked where my rear of my vehicle
6 is facing the road.

7 Q. Okay. So the rear of your vehicle is facing the road
8 and so would you agree with me that the daycare center is
9 further down Saluda Street than Burger King is?

10 A. Yes, sir. That is correct.

11 Q. All right. So you are sitting in the driver's seat.
12 Correct?

13 A. That is correct.

14 Q. That seat would be the farthest away from Burger King?

15 A. Yes, sir. That is correct.

16 Q. And so you would have to twist around and look out the
17 back window or the back passenger window to be able to see
18 anything in the parking lot?

19 A. Yes, sir. I laid my seat all the way down to where
20 I'm able to kind of swivel over and look out of the rear
21 window of my vehicle.

22 Q. Okay. And how far away would you say you were?

23 A. Approximately half a block.

24 Q. And where was Mr. Tumblin standing at the Burger King?

25 A. In the front of the Burger King.

1 Q. And that's what you're saying we are going to see in
2 the video itself?

3 A. Yes, sir. It was the side that was facing Saluda
4 Street.

5 Q. And you saw a vehicle drive up?

6 A. Yes, sir, I did.

7 Q. Okay. Now, if I remember correctly, and please
8 correct me if I'm wrong, but earlier you indicated that
9 because the change up, you got to the parking lot, Mr.
10 Tumblin had already gotten to the Burger King?

11 A. That is correct.

12 Q. So you saw nothing that happened from the time he left
13 the Dollar General as he walked down the street and went to
14 the Burger King?

15 A. That is correct.

16 Q. And you indicated that after everything was said and
17 done, your focus was on the vehicle that was leaving?

18 A. That is correct.

19 Q. So while you are watching that vehicle, is your
20 attention directed away from Mr. Tumblin walking down back
21 down toward the Dollar General?

22 A. I saw Mr. Tumblin leave and then I was focused on the
23 vehicle and that's why we have multiple units out on the
24 surveillance team so another surveillance - another officer
25 would pick up something else if I had to focus my attention

INVESTIGATOR LELAND HARRELSON: CROSS BY MR. MATTHEWS

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1 on something else and vice versa if they had to do the
2 same.

3 Q. But you indicated when you testified earlier, that you
4 indicated whenever you saw Mr. Tumblin at - you saw a car
5 drive up and you saw him getting in the car.

6 A. That is correct.

7 Q. But you couldn't see who was in the car.

8 A. That is correct.

9 Q. How you mentioned you saw an exchange but you are so
10 far away if you didn't - that's not accurate. You couldn't
11 see what was inside the car. Correct?

12 A. I don't believe I said I saw an exchange. I believe I
13 said I heard on the audio what was to be an exchange.

14 Q. All right. But you heard loud music?

15 A. Yes, sir, I did.

16 Q. You don't have an automatic feed on the video.

17 Correct?

18 A. No, sir, we do not.

19 Q. So you couldn't see what was going on inside the car?

20 A. That is correct.

21 Q. You couldn't see who the person was in the driver's
22 seat?

23 A. That is correct.

24 Q. Now, you indicated through your testimony that when
25 you answered questions about the video camera, the video

1 camera was placed on Mr. Tumblin by who?

2 A. By myself and Sergeant Lubben.

3 Q. Okay. And that you gave Mr. Tumblin instructions
4 about what you all wanted to see on the video. Correct?

5 A. Yes, sir. We try to tell him how to point the best
6 that he can. We don't want him to be too obvious, but try
7 to tell him to direct his body into the location where the
8 person is sitting.

9 Q. Okay. And to try to get as much information on the
10 video as possible?

11 A. Yes, sir, that is correct.

12 Q. And you indicated - Of course, he is not an expert,
13 but did you give him instructions about trying to get
14 whatever drugs he may be getting in front of the camera so
15 it can be seen?

16 A. No, sir, I didn't. I don't go into a lot of detail
17 because he has a lot that's going on, so I really just try
18 to tell him to position his body to where whoever he's
19 dealing with, that he's facing.

20 Q. But you would agree that would be the best scenario
21 would it not?

22 A. It would be, but at the time, you know, there is a lot
23 that's going on. You know, he's working with the police.
24 The stress of that. The stress of, you know, him being
25 found out that he is cooperating with law enforcement. I

INVESTIGATOR LELAND HARRELSON: CROSS BY MR. MATTHEWS

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1 try to point them in a general area. I don't want to
2 overload them with too much information, but I want them to
3 try to capture the best possible video that they can.

4 Q. Now, you indicated that the arrest was made on March
5 21st. Correct?

6 A. Yes, sir, that is correct.

7 Q. About seventeen days later?

8 A. Yes, sir.

9 Q. And the photograph of the funds that you've entered
10 into evidence, that was taken prior to any transaction that
11 may have occurred?

12 A. Yes, sir, that is correct.

13 Q. The substance that you indicated that you took into
14 evidence, was it field tested?

15 A. No, sir, it was not.

16 Q. Okay. And explain to the jury what is field testing.

17 A. We do have a small kit that we can put a sample inside
18 of the field test and actually test to see if it tests
19 positive for cocaine or not.

20 Q. And in this particular situation, it was not field
21 tested?

22 A. No, it was not. With my training and experience, I
23 believe that that substance was crack.

24 Q. But it was not verified at the time of this particular
25 - when you searched Mr. Tumblin?

1 A. Can you repeat that, please?

2 Q. You didn't verify it. You didn't do a field test?

3 A. When I searched Mr. Tumblin?

4 Q. When you searched him after everything was said and
5 done and you put the substance in, before you put it into
6 the baggy, you didn't verify it?

7 A. That is correct. I did not field test it.

8 Q. Now you would agree with me that the video that was
9 shown I believe yesterday during trial, there is a time
10 stamp on it. I believe you testified to it a few minutes
11 ago.

12 A. Yes, sir, that is correct.

13 Q. And it showed January 16th, 2007?

14 A. I'm not sure of the date, but the date does not match
15 up on when we did the video.

16 Q. Okay. All right. So that's at the bottom, very
17 prominent at the bottom of the video. Correct?

18 A. Yes, sir, it is.

19 Q. Is there anything else on that video at any point in
20 time that would indicate that it was March 15th of 2013?

21 A. No, sir. Not to my knowledge.

22 Q. Knowing that the time stamp is wrong - Well, let me
23 ask this. You knew before the video was cut on, that the
24 time stamp would be wrong?

25 A. Yes, sir, that is correct.

INVESTIGATOR LELAND HARRELSON: CROSS BY MR. MATTHEWS

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1 Q. Okay. At no point in time during that video you all
2 didn't hold up a sign or anything else that would indicate
3 this was March 15th, 2013?

4 A. No, sir. It's not a common practice that we do that.

5 Q. But you understand why - You understand the concern.
6 The concern is that the burden of proof is here and there
7 is nothing on this video indicating the time.

8 A. Yes, sir. Our command staff has decided that we are
9 not going to go back and reset the time/date stamp on every
10 single time just due for time.

11 Q. Well, I understand not setting it for every single
12 time. You've indicated you do four hundred of these in a
13 given year so it would be cumbersome, but you know, someone
14 stating on the front end of the video this is March 15th,
15 2013 or --

16 SOLICITOR SHELDON: Objection. Is there a question?

17 THE COURT: Rephrase it. Put a question mark on it.

18 MR. MATTHEWS: Yes, sir.

19 Q. So you all made the decision - Is it my understanding
20 that you all made the decision not to put any
21 identification on this video or any video as to the date?

22 A. It is not a common practice that we do at this point.

23 Q. On the two photographs that were put into evidence
24 which, and let me make sure I state for the record which
25 one.

1 MR. MATTHEWS: May I approach, Your Honor.

2 Q. On State's Exhibit Number Three, is there a time stamp
3 at the bottom of that photograph?

4 A. No, sir, there is not.

5 Q. And on Exhibit Number Five, is there a time stamp at
6 the bottom of that photograph?

7 A. No, sir, there is not.

8 Q. But you are indicating to the jury that those two
9 photographs were taken from this particular video?

10 A. That is correct. I am not the one that took the
11 photos.

12 Q. You are not the one that took the photos did you?

13 A. I am not the one that made these still copies.

14 Q. Okay. But wouldn't you agree that if they came from
15 this video that the time stamps would be on those
16 photographs?

17 A. I would have to go back and review the video with the
18 software that was used. I can imagine maybe it would have
19 been cut out. I'm not sure because again, I'm not the one
20 that made the pictures.

21 Q. So these photographs, you're saying - Well then, how
22 do you know those photographs came from this video if you
23 didn't take those pictures?

24 A. It looked - From the video that I watched after the
25 buy and also what I reviewed before court, it appears to be

INVESTIGATOR LELAND HARRELSON: CROSS BY MR. MATTHEWS

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1 from the video that was made on the date.

2 Q. Is there anything on those videos - on those two
3 pictures, that indicate that they came from March 15th of
4 2013?

5 A. No, sir, there is not.

6 Q. Is there - Is the time stamp from this video on those
7 two photographs?

8 A. No, sir. Not those two photographs.

9 Q. Now, on Exhibit Number --

10 MR. MATTHEWS: I apologize, Your Honor.

11 Q. On Exhibit Number Five, can you look at that
12 photograph for me please?

13 A. Yes, sir.

14 Q. Now, what kind of car did you all indicate was the
15 type vehicle that was used? That - Let me rephrase it.
16 Let me be more specific.

17 The car that drove up to the Burger King that you
18 testified Mr. Tumblin got in, what kind of car was it?

19 A. It was a Cadillac.

20 Q. Can you look at that Exhibit Number Five for me?

21 A. Yes, sir.

22 Q. Can you tell us whether or not the key fob in that
23 picture is a Cadillac key fob?

24 A. No, sir, I cannot.

25 Q. Can you see the hand that's in the picture?

1 A. No, sir, I cannot.

2 Q. The hand that's in the picture.

3 A. No, sir. There is not a hand in this particular
4 picture.

5 MR. MATTHEWS: One moment, Your Honor.

6 Q. I want to show you another picture, okay, and I want
7 you to compare the two if you don't mind. Okay?

8 A. Yes, sir.

9 SOLICITOR SHELTON: Your Honor, may we approach.

10 (BENCH CONFERENCE OFF THE RECORD OUT OF THE HEARING OF
11 THE JURY AT 12:40 P.M..)

12 BY MR. MATTHEWS:

13 Q. And I show you a picture for identification.

14 A. Yes, sir.

15 Q. Can you identify the picture I just handed you?

16 A. It is just a smaller copy of the original picture that
17 I had. This is kind of zoomed out a little bit.

18 Q. It's zoomed out a little bit?

19 A. Yes, sir, it is.

20 MR. MATTHEWS: Your Honor, I would like to submit this
21 picture as an exhibit for the defense.

22 SOLICITOR SHELTON: May I look at it, sir?

23 (SOLICITOR SHELTON REVIEWING EXHIBIT.)

24 SOLICITOR SHELTON: No objection, Your Honor.

25 THE COURT: In without objection.

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1 MR. MATTHEWS: It would be marked as Number One, Your
2 Honor.

3 (WHEREUPON, DEFENSE EXHIBIT NUMBER ONE, IDENTIFIED AND
4 MARKED, RECEIVED INTO EVIDENCE.)

5 BY MR. MATTHEWS:

6 Q. Defense Number, Exhibit Number One you said was an
7 expanded picture of the one that's been marked as Number
8 Five for the State; is that correct?

9 A. Yes, sir, that is correct.

10 Q. In that photograph, do you see a hand?

11 A. Yes, sir, I do.

12 Q. In Defense Exhibit Number One, can you indicate the
13 color of a hand of the person's - of the person's hand in
14 that photograph?

15 A. A white, Caucasian person.

16 Q. Is it based on your view of that picture, does it
17 appear that the hand is on the driver's side of the
18 vehicle?

19 A. Yes, sir, it is. Seeing this different picture now,
20 it appears to me that this picture was taken inside the
21 confidential - excuse me, the vehicle that was used with
22 the confidential informant instead of the vehicle where the
23 buy actually took place.

24 Q. So you are now indicating that that was not a
25 photograph from inside the white Cadillac?

1 A. Yes, sir, that is correct.

2 Q. So you were mistaken previously?

3 A. Yes, sir, that is correct.

4 Q. Now on the photo lineup that you had, you indicated
5 that you had approximately two hundred pictures that kind
6 of met the criteria that you put into the computer?

7 A. Yes, sir, that is correct.

8 Q. Now, the computer to get these two hundred pictures,
9 why do you ask for two hundred pictures?

10 A. I don't. It's just what the computer gives me.

11 Q. Do you know why the computer gives you two hundred
12 photographs?

13 A. I would imagine that two hundred some-odd photographs
14 that match the description that you are looking for.

15 Q. But the final process is you pick the five pictures
16 out.

17 A. Yes, sir, that is correct.

18 Q. And you make the final decision which five pictures,
19 or actually which six pictures you are going to use.

20 Correct?

21 A. Well, one picture is chosen for me of the suspect and
22 I choose the other five.

23 Q. All right. And you agree that you are trying your
24 best to get as many photographs in that photo lineup that
25 are similar in nature. Correct?

INVESTIGATOR LELAND HARRELSON: CROSS BY MR. MATTHEWS

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1 A. Yes, sir, that is correct.

2 Q. And looking at the photo lineup that's been placed
3 into evidence, would you not agree with me that there are
4 two individuals in that photo lineup that are lighter
5 skinned than the other four?

6 A. Yes, sir, that is correct.

7 Q. But out of two hundred, you could have picked five
8 individuals that are very similar in nature?

9 A. I try to pick five individuals that match. I'm
10 looking at skin tone, hair style, facial features, so it's
11 just not strictly one item I'm looking at. I'm looking at
12 a lot of different items.

13 Q. I understand, but the most obviously feature to look
14 at an individual is the skin tone. Correct?

15 A. Well I feel like hair, facial hair, as well. You
16 know, its very obvious, so those are things also that I try
17 to match. I try to match them all in general that they do
18 resemble the suspect. No every picture is going to be
19 perfect.

20 Q. Okay. But you agree that there is out of the six
21 individuals in that photo lineup, only four are, with all
22 due respect, are considered darker skinned individuals.

23 Correct?

24 A. I will say that those two are a little bit lighter
25 skinned than the other four photographs.

INVESTIGATOR LELAND HARRELSON: CROSS BY MR. MATTHEWS
REDIRECT BY SOLICITOR SHELTON

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1 Q. And that would mean that Mr. Tumblin really only had a
2 choice of four individuals to look at?

3 A. No, sir, he had a total of six.

4 Q. Were you with Officer Ervin whenever she checked the
5 truck out?

6 A. No, sir, I was not.

7 Q. Okay. And were you with her -- Was there anyone else
8 with the vehicle during the time frame that she indicated
9 she left the vehicle alone?

10 A. Not to my knowledge.

11 Q. And you were the only one that did the search of Mr.
12 Tumblin at the end of the day?

13 A. That is correct. At the end when we returned back to
14 the Law Center, I am the one that searched him.

15 MR. MATTHEWS: One moment, Your Honor.

16 THE COURT: Okay.

17 (PAUSE.)

18 MR. MATTHEWS: No further questions, Your Honor.

19 THE COURT: Redirect?

20 SOLICITOR SHELTON: Yes, sir, Your Honor.

21 May it please the Court.

22 REDIRECT EXAMINATION

23 INVESTIGATOR LELAND HARRELSON BY SOLICITOR SHELTON:

24 Q. Investigator, there seemed to be some confusion as to
25 where in the video State's Number Five and Defense Number

INVESTIGATOR LELAND HARRELSON: REDIRECT BY SOLICITOR SHELTON -223-

1 One came from?

2 A. Yes, sir.

3 Q. Would it be helpful for you to look at the video with
4 the jury here to determine where those still shots came
5 from in the video?

6 A. Yes, sir, it would.

7 SOLICITOR SHELTON: Your Honor, I'd like to publish
8 State's Number Two for Investigator Harrelson to review.

9 THE COURT: You gonna do the whole thing?

10 SOLICITOR SHELTON: No, sir. I actually will just
11 focus on the relevant time period.

12 THE COURT: Okay.

13 SOLICITOR SHELTON: I just need a moment to cue this
14 up, Your Honor.

15 Your Honor, for the record I'd like to note that I'm
16 beginning this video at the 17 minute, 12 second mark of
17 State's Exhibit Number Twelve[sic] and I'll play it through
18 just for a couple of moments.

19 THE COURT: Okay. The lights.

20 (STATE'S EXHIBIT TWO PUBLISHED TO THE JURY.)

21 Q. Investigator Harrelson, I paused this video at the 18
22 minute, 35 second mark. Seeing this video, does that
23 refresh your recollection where State's Number Five and
24 Defense Number One are from in the video?

25 A. Yes, it does. It was the vehicle that the target was

1 in.

2 SOLICITOR SHELTON: I have no further questions, Your
3 Honor.

4 MR. MATTHEWS: Nothing further, Your Honor.

5 THE COURT: All right. You can step down. You may be
6 excused. Appreciate your time.

7 (WITNESS LEAVING WITNESS STAND.)

8 SOLICITOR SHELTON: Your Honor, we can call our next
9 witness or we can take a lunch break.

10 THE COURT: We're gonna break for lunch.

11 It's ten till one so we're gonna break until 2:15, so
12 have a pleasant lunch and we'll see you back at 2:15.

13 Thank you.

14 (JURY EXITS COURTROOM FOR LUNCH RECESS AT 12:51 P.M..)

15 THE COURT: This can be off the record.

16 (COURT IN LUNCH RECESS AT 12:52 P.M..)

17 (COURT BACK IN SESSION AT 02:18 P.M..)

18 THE COURT: Thank you. Take your seats.

19 Is the State ready?

20 SOLICITOR SHELTON: Yes, sir.

21 THE COURT: Is the Defense ready?

22 MR. MATTHEWS: Yes, Your Honor.

23 THE COURT: Bring in the jury. Bring in the jury.

24 (JURY REENTERS COURTROOM AT 02:20 P.M..)

25 THE COURT: You may call your next witness.

JAMES LONG: DIRECT BY SOLICITOR SHELTON

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1 SOLICITOR SHELTON: Your Honor, the State's next
2 witness is James Long.

3 MADAME CLERK: Please raise your right hand and place
4 your left hand on the Bible.

5 (WHEREUPON, JAMES LONG, BEING
6 FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

7 MADAME CLERK: Thank you. You may have a seat.

8 DIRECT EXAMINATION

9 JAMES LONG BY SOLICITOR SHELTON

10 Q. Good afternoon, sir.

11 A. Good afternoon.

12 Q. Would you please introduce yourself to the jury?

13 A. My name is James Long. I am the systems technician
14 for York County Detention Center. I've been with the
15 County for fourteen years.

16 Q. I'm sorry. I missed your job title. What was that?

17 A. System technician. I'm the assistant to the keeper of
18 the records.

19 Q. And who is that?

20 A. Lieutenant Cheryl Guzman.

21 Q. And what duties do you have in that role?

22 A. I am responsible for maintaining all of our computer
23 equipment, security systems, expungements, assisting with
24 quality control on records, taking the photographs,
25 fingerprints, et cetera on an as needed basis.

1 Q. And do photographs and fingerprints have to do with
2 the booking process?

3 A. Yes, they do.

4 Q. And that's here at Moss Justice Center?

5 A. Yes.

6 Q. How long have you been in this job?

7 A. A year and three months, twenty-two days.

8 Q. Were you working this job in March of 2013?

9 A. Yes.

10 Q. And do you have access to the records kept as part of
11 your job in the booking department with the detention
12 center?

13 A. Yes, I do.

14 Q. And would you have access to records going back,
15 farther back than when you were employed in this job?

16 A. Yes.

17 Q. Was your direct supervisor Lieutenant Guzman served
18 with a subpoena for booking records related to this case?

19 A. Yes.

20 Q. And to be clear, was that in relationship to the
21 booking of Dominique Julius Agurs in March of 2013?

22 A. Yes.

23 Q. And to your knowledge, did she comply with that
24 subpoena?

25 A. She did.

JAMES LONG: DIRECT BY SOLICITOR SHELTON

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1 Q. Did her - Did she send documents to the Solicitor's
2 office?

3 MR. MATTHEWS: Your Honor, I object to leading
4 questions again.

5 THE COURT: Rephrase your question.

6 SOLICITOR SHELTON: Okay.

7 Q. How did she comply?

8 A. She sent the documents via email.

9 Q. And the documents, were they photographs?

10 A. Yes.

11 Q. And are they photographs from booking?

12 A. Yes, they are from his 2013 booking.

13 Q. I want to show you what has been marked for
14 identification as State's Exhibit Number Seven and Eight.
15 Without showing this to the jury, please look at them.

16 (WITNESS REVIEWING EXHIBITS.)

17 Q. Do you recognize those photos?

18 A. Yes.

19 Q. Are those photos from the booking office?

20 A. Yes, they are.

21 Q. Are those photos kept in the normal course of
22 business?

23 A. Yes.

24 Q. And are those photos of Dominique Julius Agurs?

25 A. Yes, they are.

1 Q. Are they fair and accurate as to the photographs kept
2 on file with the detention center?

3 A. Yes.

4 Q. And were these photos that would have been taken
5 during the booking process?

6 A. Yes, they would.

7 Q. And what day was that approximately?

8 A. I would have to look at the computer. I'm not sure
9 off the top of my head. Whenever he was - Directly
10 basically the day he was brought in was the day that they
11 were taken.

12 Q. Okay.

13 A. So.

14 SOLICITOR SHELTON: Your Honor, I would move to have
15 these admitted as State's Exhibits.

16 MR. MATTHEWS: Your Honor, I state on the record the
17 same objections I had yesterday as to these photographs
18 coming in and I object thereto.

19 THE COURT: All right. Objection overruled. They're
20 in over objection.

21 (WHEREUPON, STATE'S EXHIBITS NUMBER SEVEN AND EIGHT,
22 IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

23 SOLICITOR SHELTON: Your Honor, at this point I would
24 request permission to publish these photos to the jury.

25 THE COURT: All right.

JAMES LONG: DIRECT BY SOLICITOR SHELTON

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1 (STATE'S EXHIBITS SEVEN AND EIGHT PUBLISHED TO THE
2 JURY.)

3 BY SOLICITOR SHELTON:

4 Q. Officer, is this photograph you are holding,
5 projection of a photograph you hold in your hand State's
6 Number Seven?

7 A. Yes, it is.

8 Q. And is this a projection of the photograph you hold in
9 your hand State's Number Eight?

10 A. Yes, it is.

11 SOLICITOR SHELTON: No further questions, Your Honor.

12 MR. MATTHEWS: No questions for this witness, Your
13 Honor.

14 THE COURT: You can step down and be excused. We
15 appreciate your time.

16 (WITNESS LEAVING WITNESS STAND.)

17 THE COURT: Thank you.

18 Call your next witness.

19 SOLICITOR SHELTON: Your Honor, if it please the
20 Court. The next witness the State calls is Patrick
21 Patterson.

22 (WHEREUPON, PATRICK PATTERSON,
23 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

24 MADAME CLERK: Thank you. You may have a seat.

25 DIRECT EXAMINATION

1 PATRICK PATTERSON BY SOLICITOR SHELTON:

2 Q. Hello.

3 A. Hello.

4 Q. Please introduce yourself to the jury.

5 A. Patrick Patterson.

6 Q. Mr. Patterson, where do you work?

7 A. York County Sheriff's Office.

8 Q. How long have you been with the Sheriff's office?

9 A. Three and one-half years.

10 Q. And what are your present duties at the Sheriff's
11 office?

12 A. I'm an evidence control technician.

13 Q. Were you working in that role last March 2013?

14 A. Yes, sir.

15 Q. And what are your job duties in that role?

16 A. My office is in the evidence room and we intake
17 evidence and we secure it. At the time we take it in, we
18 sign the evidence to show that we have taken custody of it.
19 We secure that evidence until it leaves our custody. At
20 that time, we sign it to show that it has left our custody.

21 Q. And the evidence that you bring into the sheriff's
22 office at the Moss Justice Center, is there a chain of
23 custody kept with those?

24 A. Yes, sir.

25 Q. And are you familiar with the information on those

PATRICK PATTERSON: DIRECT BY SOLICITOR SHELDON

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1 chains?

2 A. Yes, sir.

3 Q. And as part of your job, are you required to add --

4 MR. MATTHEWS: Your Honor, I'm going to again, the
5 solicitor is testifying.

6 THE COURT: Yeah, you're leading. Just ask questions
7 without leading him.

8 BY SOLICITOR SHELTON:

9 Q. Are you required to add information on those chains?

10 A. Just our signatures and dates and times.

11 Q. And what does that relate to?

12 A. The items coming into our custody and leaving our
13 custody.

14 Q. I want to show you what has been marked for
15 identification as State's Number Ten.

16 Do you recognize that item?

17 A. Yes, sir.

18 Q. How do you recognize it?

19 A. By my signature on it. It shows that I picked this
20 item up.

21 Q. And where did you pick it up?

22 A. From the Rock Hill P.D. evidence drop.

23 Q. When was that?

24 A. That was on March the 3rd, 2008 -- or March the 8th,
25 2013. Excuse me. At 8:30 in the morning.

1 Q. And where is that evidence drop location?

2 A. It's located at Rock Hill P.D.

3 Q. And is this item in the same condition as when you
4 last saw it?

5 A. Yes, it is.

6 Q. Is that a secure location at Rock Hill Police
7 Department?

8 A. Yes, sir. We have lockers that the lock's on when an
9 item is dropped in. A lock's placed on it. Only myself
10 and my two co-workers have keys to those locks.

11 Q. And was the evidence or substance inside these bags
12 was it sealed inside of a bag when you gained possession of
13 it on March 8th, 2013?

14 A. Yes, sir.

15 Q. Does it appear to have been tampered with in any way?

16 MR. MATTHEWS: Your Honor, again I object. The
17 question is leading.

18 THE COURT: I overrule the objection.

19 Try to watch the way...

20 BY SOLICITOR SHELTON:

21 Q. What condition was it in when you got it in your
22 possession?

23 A. It was in a sealed drug bag.

24 Q. Please describe the manner of handling when you got
25 it; had it in your custody and control.

PATRICK PATTERSON: DIRECT BY SOLICITOR SHELDON

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1 A. When I took it in my custody it was transported to the
2 Moss Justice Center where we took it in to our evidence
3 room.

4 Q. How did you get it from the drop location to the
5 evidence room?

6 A. It went in the vehicle I was driving.

7 Q. Was it continuously under your care and control at
8 that time?

9 A. Yes, sir. It never left my possession.

10 Q. And what day did you recover it?

11 A. It was on March the 8th, 2013.

12 Q. What day was it brought back into the evidence locker
13 - or the evidence room, I mean. Sorry.

14 A. That same day.

15 Q. Okay. And that's at Moss Justice Center?

16 A. Yes, sir.

17 Q. And what did you do with it when you had it back at
18 Moss Justice?

19 A. When we get it in we will log the evidence in our
20 system and then we secure it until it needs to leave our
21 custody.

22 Q. Did it leave your custody after that?

23 A. According to the chain of custody, it left our custody
24 on July 22nd, 2013, and it went from me to the chemist.

25 Q. And who is that?

1 A. That is Cynthia Mitchum.

2 Q. Prior to it leaving your possession on July 22nd,
3 where was it kept?

4 A. It was secured in our evidence room.

5 Q. Is that a secure location?

6 A. Yes, sir.

7 Q. Who all has access to that location?

8 A. Only myself and two co-workers.

9 Q. Did you on July 22nd give the item directly to Ms.
10 Mitchum?

11 A. Yes, sir.

12 Q. Was the item in the same condition then as when it was
13 logged in at the Moss Justice?

14 A. It was.

15 Q. Was the seal still intact?

16 A. Yes, sir.

17 Q. At some point after that, did you receive possession
18 of the item again?

19 A. I did. It was returned to our evidence room on
20 January 21st, 2014.

21 Q. Was there anything different with the bag at that
22 time?

23 A. The bag had been placed in an outer bag that the
24 chemist places it in.

25 Q. Is that common procedure after the chemist has it?

PATRICK PATTERSON: DIRECT BY SOLICITOR SHELDON

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1 A. Yes, sir.

2 Q. Was it in a sealed outer bag?

3 A. Yes, sir.

4 Q. What did you do with it when you got it back?

5 A. At that time, we secured it in our evidence room
6 again.

7 Q. Did you receive it directly from Ms. Mitchum at that
8 time?

9 A. I did.

10 Q. And did you handle this item again after that?

11 A. I did. It had been signed out.

12 Q. When was that?

13 A. The first time on April the 2nd, 2014.

14 Q. Did you recover it from the evidence storage room on
15 that day?

16 A. I did. On that day I did. I signed it over to
17 Officer Harrelson.

18 Q. Did you get it back in your possession after that?

19 A. I did.

20 Q. When was that?

21 A. On April the 3rd, 2014.

22 Q. Who did you get it from?

23 A. Officer Harrelson.

24 Q. Did you receive it directly from him?

25 A. I did.

1 Q. Was the seal still intact?

2 A. Yes, sir.

3 Q. And did you again handle it after that?

4 A. I signed it back over to Officer Harrelson on April
5 the 21st, 2014.

6 Q. Did you hand it directly to him?

7 A. I did.

8 Q. And have you seen it since?

9 A. It was returned that same day.

10 Q. Who returned it?

11 A. Officer Harrelson.

12 Q. What did you do with it when he returned it?

13 A. I secured it again in our evidence room.

14 Q. And did you handle it again after that?

15 A. I did. I signed it over to Officer Harrelson on the
16 22nd, this morning.

17 Q. And have you seen it since then?

18 A. No, sir.

19 Q. Prior to testifying today?

20 A. No, sir.

21 Q. Those times you got it in April, was the seal intact?

22 A. Yes, sir.

23 Q. Did it appear that it had been tampered with in any
24 way?

25 A. No, sir.

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1 SOLICITOR SHELTON: Nothing further of this witness,
2 Your Honor.

3 MR. MATTHEWS: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 PATRICK PATTERSON BY MR. MATTHEWS:

6 Q. If I'm understanding what you testified to, you
7 indicated that you were the one who handled this particular
8 item?

9 A. Yes, sir.

10 Q. Okay. None of the other two individuals in your
11 office handled it?

12 A. As far as signing it over, custody to someone, no one
13 else. No other signatures are on it.

14 Q. Okay. Based on how you just presented it, is it
15 possible that somebody else in your office handled it?

16 A. Someone could have handled it in the process of
17 entering it in our system. Yes.

18 Q. And they are not required to sign off on it when they
19 pick it up?

20 A. Not when it's in our evidence room. No, sir.

21 Q. Now, you said that what you have in your hands is in
22 the same condition as when you received it on March the 8th
23 of 2013?

24 A. The condition it's in now, it's - The drug bag that it
25 was originally in has been placed in another bag.

PATRICK PATTERSON: CROSS BY MR. MATTHEWS
REDIRECT BY SOLICITOR SHELTON

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1 Q. Okay. The item itself is contained in the bag. Is it
2 in the same condition as when you received it on March the
3 8th?

4 A. Yes, sir.

5 Q. And that's the first time you've seen the item that's
6 contained in this bag?

7 A. The first time I've seen it?

8 Q. Was March the 8th?

9 A. Yes, sir.

10 Q. And it has remained as it appears right now since
11 March 8th?

12 A. As it appears right now, since it went to the chemist,
13 I'm assuming something was done with it while the chemist
14 had it in her possession, as far as I can tell, it appears
15 the same.

16 MR. MATTHEWS: No further questions, Your Honor.

17 THE COURT: Redirect?

18 SOLICITOR SHELTON: Yes, sir.

19 REDIRECT EXAMINATION

20 PATRICK PATTERSON BY SOLICITOR SHELTON:

21 Q. Mr. Patterson, on a daily basis how many items of
22 evidence would you say you handle?

23 A. On average - I mean, it varies but it would go
24 anywhere from ten to fifty a day.

25 Q. Since March 8th, 2013, approximately how many items of

PATRICK PATTERSON: REDIRECT BY SOLICITOR SHELTON
CYNTHIA MITCHAM: DIRECT BY SOLICITOR SHELTON

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1 evidence do you think you've handled?

2 A. Hundreds, if not thousands.

3 Q. Is there anything about this item of evidence that you
4 specifically recall from handling it on March 8th, 2013?

5 A. Nothing that I recall other than my signature being on
6 it.

7 Q. So you don't have a specific recollection as to what
8 condition it was in on that day?

9 A. My only recollection, I know that the seal was intact
10 on it.

11 SOLICITOR SHELTON: Nothing further.

12 THE COURT: Recross?

13 MR. MATTHEWS: Nothing further, Your Honor.

14 THE COURT: You can step down and be excused. We
15 appreciate your time.

16 (WITNESS LEAVING WITNESS STAND.)

17 THE COURT: Call your next witness.

18 SOLICITOR SHELTON: Okay. The next witness is Cynthia
19 Mitcham.

20 (WHEREUPON, CYNTHIA MITCHAM, BEING
21 FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

22 DIRECT EXAMINATION

23 CYNTHIA MITCHAM BY SOLICITOR SHELTON:

24 Q. Good afternoon.

25 A. Good afternoon.

1 Q. Would you please identify yourself to the jury?

2 A. I'm Cynthia Mitchum.

3 Q. Ms. Mitchum, what do you do for a living?

4 A. I work with the York County Sheriff's Office in the
5 drug analysis laboratory.

6 Q. How long have you been working in that job?

7 A. In May it'll be fourteen years at the Sheriff's
8 office.

9 Q. Do you have any prior experience in that field?

10 A. Yes. Prior to working for the Sheriff's office, I
11 worked for the South Carolina Law Enforcement Division
12 commonly known as SLED in Columbia, South Carolina, also in
13 their drug analysis laboratory and I was there for seven
14 and a half years.

15 Q. What type of duties do you perform in your job?

16 A. I receive in evidence and I will analyze the evidence
17 for controlled and non-controlled substances and then make
18 a report out to the officers so they can go forth with
19 their case.

20 Q. Did you receive any education, training, anything like
21 that that would qualify you for this job?

22 A. Yes.

23 Q. Could you please explain that?

24 A. I have a Bachelor's of Science in Chemistry which I
25 received from Winthrop University in 1990. And I've also

CYNTHIA MITCHUM: DIRECT BY SOLICITOR SHELTON

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1 through various instrumentation experience through SLED and
2 through the Sheriff's office.

3 Q. Have you received any certifications from your
4 training in that field?

5 A. No. Not - I'm not sure what you're asking.

6 Q. I'll withdraw that question. Have you ever been
7 qualified in court as an expert in the field of chemical
8 and drug analysis and identification?

9 A. Yes.

10 Q. Approximately how many times?

11 A. In excess of two hundred times.

12 Q. Approximately how many samples have you tested during
13 your career?

14 A. Usually around - it's around two hundred - two
15 thousand items of evidence a year, so you take that and
16 multiply it by twenty-one years. A lot.

17 SOLICITOR SHELTON: Your Honor, we would offer Ms.
18 Mitchum as an expert in the field of chemical and drug
19 analysis and identification.

20 THE COURT: Any voir dire?

21 MR. MATTHEWS: No, Your Honor.

22 THE COURT: I find she is qualified.

23 BY SOLICITOR SHELTON:

24 Q. Ms. Mitchum, if you'll take a look at the item of
25 evidence in front of you on the bar there, it's been marked

1 as State's Number Ten. Have you ever seen that before?

2 A. Yes, I have.

3 Q. And how do you recognize it?

4 A. I recognize it through the signatures. My signature
5 is in the chain of custody and my initials on the evidence
6 itself.

7 Q. And did you analyze the substance in the bag?

8 A. Yes, I did.

9 Q. Please describe how it came to be in your possession
10 for analysis.

11 A. I received this from Patrick Patterson on 07-22 of
12 2013.

13 Q. Did you receive it directly from him?

14 A. Yes.

15 Q. What did you do with it when you received it?

16 A. Once I received it, then I signed it in and checked it
17 to make sure it was sealed and everything and then I put
18 that into a lock box that I have in the drug analysis
19 laboratory until the time I had to be able to open it and
20 do my analysis on it.

21 Q. What condition was it in when you received it?

22 A. The condition I originally received it was this inner
23 bag with the blue fillabree and that was intact and I know
24 this because I got Okay, the date I received it and my
25 initials.

CYNTHIA MITCHUM: DIRECT BY SOLICITOR SHELTON

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1 Q. So the seal was intact?

2 A. Yes.

3 Q. Did it appear to have been tampered with in any way
4 prior to you receiving it?

5 A. No.

6 Q. Was the item continuously under your custody and
7 control while you had it in your possession?

8 A. Yes.

9 Q. Explain how you analyzed and tested the contents of
10 the bag, please.

11 A. What I did was I cut the bottom open of the bag and
12 removed the substance and then I did what's called a
13 chemical test and an instrumental test on the substance
14 itself and then I resealed it back in this outer bag which
15 is a bag I have in the laboratory.

16 Q. And what did you do with it after that?

17 A. I sealed it until the time I could return it back to
18 evidence.

19 Q. And did you return it back to evidence?

20 A. Yes, and it's still in that condition, the seal and
21 the date that I sealed it in the heat seal.

22 Q. Okay. On what date did you seal it?

23 A. I sealed it on 10-31 of 2013.

24 Q. And when did you return it to the evidence room?

25 A. On January 21st of 2014.

1 Q. And during the intermediary time frame, what did you
2 do with it?

3 A. It stays in my custody back in the lock box in the
4 drug lab.

5 Q. Does anyone else have access to that lock box?

6 A. No.

7 Q. Is the evidence bag, the outer bag, State's Number
8 Ten, in the same condition now as when it left your
9 possession?

10 A. Yes, it is.

11 Q. Did you mark your name on the chain?

12 A. Yes.

13 Q. And is that indicating when you received it and when
14 you returned it?

15 A. Yes.

16 Q. And is your signature on there?

17 A. Yes.

18 Q. Were you able to determine through your analysis what
19 the substance is?

20 A. Yes, I did.

21 Q. What is it?

22 A. State's Exhibit Number Ten, which is Item Number One
23 in this case, was found to be cocaine base, also known as
24 crack, in the amount of 0.53 grams or 8.17 grains and that
25 it is a controlled two substance.

CYNTHIA MITCHUM: DIRECT BY SOLICITOR SHELTON

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1 Q. Did you perform your analysis of the substance in
2 accordance with your training?

3 A. Yes.

4 Q. Did you prepare a report of your findings?

5 A. Yes, I did.

6 Q. Did you when you weighed the substance, can you
7 describe what - your scales in that process?

8 A. I have a balance that I use and the balance is
9 calibrated monthly and also every six months by an outside
10 agency and what I'll do is I'll take my sample and then put
11 the sample in the balance to get my weight.

12 Q. And, Ms. Mitchum, did you bring a copy of your report
13 to court today?

14 A. Yes. I brought the original.

15 Q. May I hold that, please?

16 A. Yes.

17 SOLICITOR SHELTON: Your Honor, I would like to have
18 this marked for identification as State's Exhibit Number
19 Eleven, please.

20 I'm sorry. I think I might be on Number Twelve.

21 (WHEREUPON, STATE'S EXHIBIT NUMBER TWELVE PREMARKED
22 FOR IDENTIFICATION.)

23 Q. Ms. Mitchum, I'm handing you back what's now been
24 marked as State's Exhibit Number Twelve. Is this the
25 original report you made of your findings in this case?

1 A. Yes, it is.

2 SOLICITOR SHELTON: Your Honor, I'd offer Ms.
3 Mitchum's report into evidence.

4 MR. MATTHEWS: No objection, Your Honor.

5 THE COURT: In without objection.

6 (WHEREUPON, STATE'S EXHIBIT NUMBER TWELVE IDENTIFIED
7 AND MARKED, RECEIVED INTO EVIDENCE.)

8 SOLICITOR SHELTON: And at this point I would offer
9 State's Number Ten in evidence.

10 THE COURT: What's that? The bag?

11 SOLICITOR SHELTON: Yes, sir.

12 MR. MATTHEWS: Your Honor, I object based on the fact
13 that during the chain testimony there was indication there
14 was the possibility that two other people could have been
15 involved in that chain.

16 THE COURT: I overrule the objection. You can
17 certainly use that ---

18 MR. MATTHEWS: Yes, sir.

19 THE COURT --- for whatever value it has but I over
20 rule the objection.

21 (WHEREUPON, STATE'S EXHIBIT NUMBER TEN IDENTIFIED AND
22 MARKED, RECEIVED INTO EVIDENCE.)

23 SOLICITOR SHELTON: Your Honor, I have no further
24 questions of this witness.

25 CROSS-EXAMINATION

CYNTHIA MITCHUM: CROSS BY MR. MATTHEWS

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1 CYNTHIA MITCHUM BY MR. MATTHEWS:

2 Q. Ms. Mitchum, can you state again for the record how
3 many tests you do during the course of say a month?

4 A. The course of a month, I probably do over two hundred
5 items of evidence.

6 Q. And so obviously that's in excess of about an average
7 of a thousand over a year. Correct?

8 A. Correct.

9 Q. And the condition of the substance that you tested in
10 this evidence Number Ten, is it in the same condition as
11 when you saw it when it first came to you?

12 A. When it first came to me, it was in this fillagree
13 bag. It was a zip lock bag inside of that, so it was
14 inside of a plastic bag that was in there. And I had
15 probably taken the evidence out of that smaller plastic bag
16 and just couldn't get it back into there so I just put it
17 all into a zip lock bag so that might be the only
18 difference.

19 Q. I understand about the bag, but I'm talking about the
20 actual substance in the bag. Is it in the same condition
21 as when you received it?

22 A. Pretty much. It might be a little bit more broken
23 apart because - and it's like a rock substance but it's not
24 like a diamond rock substance. It's more like chalk type
25 so it's easily to come apart when I'm doing my analysis.

CYNTHIA MITCHUM: CROSS BY MR. MATTHEWS

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1 Q. Okay. But are you for sure?

2 A. No. I'm not for sure. I couldn't tell you if it was
3 like one rock or two rocks or if it was in this one.

4 Q. Okay. If I'm understanding correctly, when did you
5 actually receive the item to be tested?

6 A. On 7-22 of 2013.

7 Q. Okay. And based on the information that you have,
8 when was it taken to the actual evidence locker at Rock
9 Hill P.D.?

10 A. The chain here says on March - let's see, March the
11 5th, 2013, and then from Rock Hill to the York County
12 evidence on March the 8th of 2013.

13 Q. But you never received it until July 22nd, 2013?

14 A. That's correct.

15 Q. And when did you actually do the test?

16 A. I did the test - My analysis was October the 31st of
17 2013.

18 Q. The report that was put into evidence is dated when?

19 A. Now, which date?

20 Q. On the Number Twelve, your report.

21 A. Now the report here is March the 5th of 2014. That's
22 just simply when they asked me to do the report, so that
23 date's just simply when I printed this actual report.

24 Q. Okay. But you received the sample on July 22nd, but
25 you didn't do the testing until October 31st?

CYNTHIA MITCHUM: CROSS BY MR. MATTHEWS
REDIRECT BY SOLICITOR SHELTON

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1 A. That's correct.

2 MR. MATTHEWS: No further questions, Your Honor.

3 SOLICITOR SHELTON: Yes, sir. On redirect, please.

4 REDIRECT EXAMINATION

5 CYNTHIA MITCHAM BY SOLICITOR SHELTON:

6 Q. Ms. Mitchum, State's Number Twelve, is that what you
7 might call your official report?

8 A. Yes.

9 Q. Do you prepare an official report for every case?

10 A. No, I did not.

11 Q. Do you prepare a worksheet for every case?

12 A. Yes.

13 Q. When do you prepare the official report?

14 A. When the case is actually gonna go forth to court.

15 Q. And you prepared your official report on March 5th,
16 2014?

17 A. Correct.

18 SOLICITOR SHELTON: No further questions, Your Honor.

19 THE COURT: Recross?

20 MR. MATTHEWS: Nothing further on recross.

21 THE COURT: You may step down. Thank you. We
22 appreciate your time. You can be excused.

23 (WITNESS LEAVING WITNESS STAND.)

24 THE COURT: Call your next witness.

25 SOLICITOR SHELTON: Your Honor, the State rests it's

1 case.

2 THE COURT: Members of the jury panel, the State is
3 resting; that means the State has presented it's evidence.
4 We have to take up some matters of law outside your
5 presence at this time.

6 You are not yet in a position to make up your mind or
7 discuss the case. We haven't reached that point, but we do
8 need to take a break at this time so I'll let you follow
9 the Bailiff to the jury room.

10 (JURY EXITS COURTROOM AT 02:49 P.M..)

11 THE COURT: Anything from the State?

12 SOLICITOR SHELTON: No, sir.

13 THE COURT: Defense?

14 MR. MATTHEWS: Your Honor, Motion on Directed Verdict
15 taken the evidence most favorable in light of the State and
16 I would ask that the case not be sent to the jury based on
17 insufficient evidence at this point.

18 THE COURT: I find there is substantial evidence -
19 enough sufficient evidence from which a jury could make a
20 decision that the State has proven it's case of Mr. Agurs
21 having been involved in this transaction, that the
22 transaction took place and that the substance involved was
23 crack cocaine and therefore I deny the Motion for Directed
24 Verdict.

25 MR. MATTHEWS: Your Honor, if I may have just a few

1 minutes with my client to discuss the next steps.

2 THE COURT: Okay. Let me speak to him first.

3 Mr. Agurs, can you hear me?

4 MR. AGURS: I can hear you.

5 THE COURT: All right. We've reach a point in the
6 trial where the State has presented it's evidence and you
7 can present evidence if you wish. You can call witnesses
8 on your behalf but you don't have to because you are
9 presumed innocent. You need not prove your innocence. The
10 State must prove your guilt beyond a reasonable doubt.

11 Now you can testify or you can remain silent. If you
12 testify, you will be under oath and the State would be able
13 to cross examine you and ask you about this event. And
14 also I believe there are some impeachable offenses --

15 SOLICITOR SHELTON: Yes, sir.

16 THE COURT: All right. You want to tell me about
17 them?

18 SOLICITOR SHELTON: Yes, sir, Your Honor.

19 He has convictions for distribution of crack cocaine
20 and trafficking of crack cocaine within the last ten years.
21 I have certified copies of those.

22 Would you like for me to make them Court's exhibits?

23 THE COURT: Well, we probably should but those are
24 both felonies and you want to couch your questions
25 regarding whether or not he had a record of felonies as

1 opposed the - the nature of the offense?

2 SOLICITOR SHELTON: Yes, sir. I believe under the
3 rules, we would also be able to go into the sentence but
4 I'm not a hundred percent clear on that.

5 THE COURT: You'll have to show me that.

6 SOLICITOR SHELTON: Okay. I could just couch his
7 felonies, Your Honor, just to be on the safe side. I don't
8 have a problem with that.

9 THE COURT: Well you can say - go with the sentence
10 crimes that carry a penalty that exceeded one year.

11 SOLICITOR SHELTON: Okay. And Your Honor, for the
12 record, that would be a charge of - he has a possession of
13 crack cocaine with intent to distribute conviction from
14 2005, which of course is a felony. Possession of crack
15 cocaine with intent to distribute from - a separate one
16 from 2005 and a separate indictment number, and a proximity
17 companion charge to one of those from the same year,
18 separate indictment number. And then from a 2008
19 indictment number, trafficking crack cocaine, and a
20 companion and proximity, two separate indictment numbers.

21 THE COURT: All right. Mr. Agurs, if you testify the
22 State can ask you whether you have a criminal record not
23 regarding the nature, that is, can't bring the jury's
24 attention to these drug charges, simply that you have that
25 record of convictions.

1 They can do this only regarding whether or not the
2 jury should believe you, and I will tell the jury that your
3 prior record is allowed into the evidence if you testify
4 and one of the purposes of them assessing your
5 believability, your credibility. I will tell them they
6 cannot use your prior record as any indication that you are
7 guilty of this offense.

8 You have the right to remain silent. If you exercise
9 that right, I will tell the jury that that's what you've
10 done, that you have exercised your Constitutional right to
11 remain silent. I will tell the jury they cannot use that
12 against you in any way whatsoever.

13 They cannot discuss among themselves the fact that you
14 exercised your right to remain silent and I will tell them
15 that they cannot even in their own mind use as a factor in
16 determining what verdict to return the fact that you
17 exercised your Constitutional right to remain silent.

18 I will remind them that you do not need to prove your
19 innocence; that you are presumed innocent and the State
20 must prove your guilt beyond a reasonable doubt.

21 Do you understand all that?

22 MR. AGURS: Yes, sir.

23 THE COURT: Do you have any questions about it?

24 MR. AGURS: No, sir.

25 THE COURT: Did you explain that to him, Mr. Matthews?

1 MR. MATTHEWS: Yes, Your Honor, I have explained that
2 to him.

3 THE COURT: Do you believe he understands it?

4 MR. MATTHEWS: I believe he understands it.

5 THE COURT: All right. Mr. Agurs, it's not your
6 lawyer's decision or anyone else's. It's your decision as
7 to whether to testify or not.

8 We are going to take about a ten minute break and give
9 you and your attorney a chance to talk and you'll come back
10 and let me know. Or your attorney can let me know whether
11 he has any witnesses - you are the only one he had listed -
12 whether he intends to call any witnesses or whether you
13 intend to testify or not.

14 And moving to a different subject, does either side
15 have any request to charge?

16 SOLICITOR SHELTON: None from the State, sir.

17 MR. MATTHEWS: Your Honor, on the issue of
18 circumstantial evidence, jury instruction on circumstantial
19 evidence, I request on behalf of my client that include the
20 Logan charge.

21 THE COURT: Hand me that up. I've got the - but I'll
22 take a look at that one. I'll take a look at this one and
23 see.

24 MR. MATTHEWS: Your Honor, this is an excerpt from a
25 presentation made at a CLE this year. This is a 2013 case.

1 THE COURT: All right. It looks like it's based on
2 the Logan that you would be entitled to the Logan charge so
3 I'll hear that.

4 All right. We'll take about a ten minute break.

5 (COURT IN RECESS AT 02:55 P.M..)

6 (NOTE FROM JURY AT 03:04 P.M..)

7 (COURT BACK IN SESSION AT 03:04 P.M..)

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

9 Mr. Agurs, I understand from your attorney that you
10 are going to exercise your right to remain silent and not
11 to testify.

12 MR. AGURS: Yes, sir.

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

14 Now we received your note that says there is a
15 question about the photos of the defendant. Was it allowed
16 and if so, it was not published to the jury.

17 The photos are so much of a concern as the fact that
18 they already got a question and they are not suppose to be
19 discussing the case.

20 Any comments by the State?

21 SOLICITOR SHELTON: No, sir, Your Honor. I can't
22 think of anything.

23 THE COURT: Defense?

24 MR. MATTHEWS: Yes, Your Honor. I feel that the only
25 way that I can remedy this situation is I'm going to have

1 to request a motion for a mistrial because your
2 instructions were very clear at the very beginning of this
3 trial that the jury was not to consider or discuss this
4 case not only with people outside the jury room but between
5 themselves here in this case until we hand it to them which
6 does not occur until after arguing and charging of the
7 jury.

8 Obviously this jury has already started deliberations
9 based on the fact that they are sending out a question,
10 they put it in writing actually, a question referring to
11 evidence of what photographs have been put into evidence,
12 why weren't they published. They are already having those
13 conversations before we even get to the final stage of the
14 case, which is in direct violation of the instructions that
15 you gave them.

16 I do not believe a curative instruction would save the
17 impartiality of the process for this jury. I believe they
18 have already started that process.

19 It is therefore, Your Honor, based on those grounds, I
20 am going to ask for a mistrial and schedule this for a new
21 trial with a new jury.

22 SOLICITOR SHELTON: Your Honor, I think that the only
23 appropriate way to handle this is just to ask the jury have
24 they begun deliberations and instruct them not to do so. I
25 think the note itself doesn't indicate that they have.

1 THE COURT: I definitely - I'm going to take the
2 motion under advisement after I talk to the jury. Now,
3 help me think this out.

4 Do we call just the foreman in or do we call the whole
5 jury in and quiz the foreman in front of the jury? Anybody
6 have any --

7 MR. MATTHEWS: I hate to do with all of them, but I
8 think that's the only way we can make sure we get - make
9 sure we get everything on the record is to quiz them with
10 everybody present so that if somebody disagrees with what
11 the foreman says, they can be - their opinion can be
12 voiced.

13 THE COURT: I agree.
14 Bring in the jury.

15 (JURY RETURNS TO THE COURTROOM AT 03:08 P.M..)

16 THE COURT: Members of the jury panel, I've received a
17 note and I'm not going to get to the substance of the note
18 at this point.

19 My main concern is that I had instructed you not to
20 deliberate and there is a question in my mind as to how a
21 question could come up regarding evidence if there wasn't
22 some sort of discussion about the case. I instructed you
23 several times not to discuss the case, so Mr. Foreman, I
24 hate to put you on the spot, but has the jury been
25 discussing the case?

1 MR. FOREMAN: No, sir.

2 THE COURT: Well how did this question come up?

3 MR. FOREMAN: There was no question that came up in
4 any discussions.

5 THE COURT: Well but it says here there is a question
6 about the photos of the defendant, was it allowed and if
7 so, it was not published to the jury. Did that come from
8 the jury? That was from the alternate?

9 ALTERNATE JUROR: It was just a question that I had
10 myself, Your Honor.

11 THE COURT: Okay. Did you write the note?

12 ALTERNATE JUROR: Yes, sir.

13 THE COURT: Okay. Well then - And there was no
14 further discussion?

15 ALTERNATE JUROR: No, sir.

16 THE COURT: All right. Well, you are the alternate
17 anyway so I'm going to go ahead and excuse you at this
18 time. That's not going to encourage anybody else to write
19 a note.

20 (ALTERNATE JUROR DISMISSED AT 03:09 P.M..)

21 THE COURT: But anything before I move forward?

22 SOLICITOR SHELTON: No, sir, not from the State.

23 MR. MATTHEWS: Not anything further from the defense
24 on this situation.

25 THE COURT: Okay. Well let me let you go to the jury

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1 room one minute and don't discuss the case. You got me gun
2 shy now. So if any of the lawyers they want to put on the
3 record about what I have just taken care of, I'll let them
4 do that outside your presence.

5 I'm going to let you go to the jury room. When you
6 come back, you'll be in a position to hear the closing
7 statements of the attorneys.

8 (JURY EXITS COURTROOM AT 03:10 P.M..)

9 (WHEREUPON, COURT'S EXHIBIT NUMBER TWO, IDENTIFIED AND
10 MARKED, RECEIVED INTO THE RECORD.)

11 THE COURT: All right. Any comments by the State?

12 SOLICITOR SHELTON: No, sir.

13 THE COURT: Defense?

14 MR. MATTHEWS: Your Honor, let me clarify my previous
15 statement. My previous statement I still - I understand
16 what was said and the alternate's indicated that he solely
17 wrote it. I would still put my motion forward for the
18 request of a mistrial.

19 THE COURT: All right. That motion is denied. I
20 think whatever issues there were have been resolved by -
21 and again, the alternate's here.

22 (ALTERNATE JUROR ENTERS IN THE BACK OF THE COURTROOM.)

23 THE COURT: I'm not going to fuss at you. You can
24 come on in and you can still watch the closing arguments
25 and I appreciate you being honest and telling me that you

1 were the one who did it.

2 So I deny the motion for mistrial. I think everything
3 has been cured. Whatever was problematic has just been
4 cured, so we'll go forward with closing.

5 MR. MATTHEWS: Your Honor, as to the issue of closing,
6 my presentation does not involve a demonstrative
7 presentation.

8 My understanding from the State is that they have a
9 demonstrative presentation would be a Power Point
10 presentation. I've asked to see that. I have not seen it
11 yet to see if there is anything objectionable to prevent
12 objection during the closing argument and would like to ask
13 if I could see those slides real quick to make sure that
14 there is nothing in there that would be objectionable to
15 the defense.

16 THE COURT: How long will that take?

17 SOLICITOR SHELTON: I've got them printed out.

18 THE COURT: All right. Show them to him.

19 SOLICITOR SHELTON: Yeah. I don't have no problems,
20 no secrets here. Some of these I removed so let me --

21 (SIDE BAR DISCUSSION BETWEEN SOLICITOR SHELTON AND MR.
22 MATTHEWS OFF THE RECORD AT 03:12 P.M..)

23 THE COURT: All right. Now, Mr. Matthews, I may have
24 made a mistake in letting you do this because I am not
25 requiring you to tell me what you are going to say in your

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1 closing arguments, and also what you are doing now is
2 having an opportunity to in your opening statements address
3 things that are going to be coming up in his because I
4 notice you are taking notes.

5 MR. MATTHEWS: Your Honor, all I'm taking notes is so
6 that I can refer to them specifically so he can see which
7 ones I am referring to.

8 Mainly the ones I am objecting to - he has cut out a
9 couple of them that kind of go down the road I was going
10 to, but he's referring to either attributing a statement to
11 Mr. Agurs which is solely to the discretion of their's but
12 he's putting quotes, statements in there. He playing the
13 video and playing the audio in here, but he's putting
14 quotes of what was said in his presentation and I would
15 object to that because they are going to hear what they are
16 going to hear.

17 THE COURT: If it's in there, he's got a right to do
18 it. He can quote it if it's in there just as good as he
19 can just say it out of his mouth. I mean, you just need to
20 object as we go along because I can't ask him to tailor his
21 closing argument to suit you. And so if there's anything
22 objectionable, you'll just have to object as we go along
23 because really what I have done is put the State in a - I'm
24 not sure a disadvantage - but I've put them in a situation
25 where now they get the right to close but I've given you

1 the right to see what they are going to say just as if they
2 had opened. So I kind of correct myself and we'll go
3 forward.

4 SOLICITOR SHELTON: Judge, I would -

5 THE COURT: If there is anything you need to object
6 to, just do it when it comes up.

7 SOLICITOR SHELTON: I will say for the record, Judge,
8 I will be showing clips from the video but they are clips
9 that are from the video that's entered into evidence so
10 rather than thumbing through the video itself, it's clips
11 of the exact video they will have for their own
12 consideration, the phone calls, that sort of thing, so I
13 don't know if that's - I don't perceive that as being
14 objectionable at all. It's in evidence and anything I'm
15 gonna talk about quotes or whatever, just discussing what's
16 in there.

17 THE COURT: You can't tell him what's not
18 objectionable just like --

19 SOLICITOR SHELTON: Yes, sir. I just wanted to up
20 front - I mean, --

21 THE COURT: Mr. Matthews, as I've told you, object to
22 whatever you feel is objectionable ---

23 MR. MATTHEWS: I will.

24 THE COURT: --- whether Mr. Shelton says it is or is
25 not.

CLOSING ARGUMENT: BY MR. MATTHEWS

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1 All right. Bring in the jury.

2 (JURY RE-ENTERS COURTROOM AT 03:18 P.M..)

3 THE COURT: We will now have the closing arguments of
4 counsel. Mr. Matthews will go on behalf of Mr. Agurs first
5 and then the State will go last.

6 Counsel.

7 MR. MATTHEWS: Ladies and gentlemen of the jury, I do
8 appreciate the fact that you've been here now for the
9 better part of two days listening to the testimony that we
10 have here today.

11 As I stated in my opening statement, the most
12 important thing for a jury to do is to keep an open mind.
13 You cannot walk into a situation with preconceived notions
14 or any type of presentation before you have all the
15 evidence and heard everything.

16 And in this case, the best way that whenever I was
17 thinking through this case it was in evaluating the
18 testimony that you have heard today and yesterday was
19 inconsistencies. And that is a very important part of the
20 presentation, is that you have to consider everything and
21 have to consider the credibility of the witnesses and the
22 inconsistencies between each of the witnesses. The
23 witnesses were kept apart as part of the process to make
24 sure that nobody talked to each other during the testimony.

25 And because of that, you saw inconsistencies

1 throughout the entire case that I would submit to you are
2 very important for your consideration.

3 And what I'm asking on behalf of Mr. Agurs, is that
4 when you consider those inconsistencies, is there a
5 constant flow of inconsistencies that would lead to a
6 consideration that has the State in fact met it's burden of
7 proof.

8 Now, you heard yesterday in the beginning and then you
9 are going to hear today about burden of proof. Let me
10 explain that a little bit for you and you are going to hear
11 His Honor explain it to you a little bit better.

12 One is a definition that has been thrown around is a
13 reasonable doubt is a doubt which would make a person to
14 hesitate to act. Okay. That is a definition that is used
15 to describe reasonable doubt.

16 It means that the State has a tremendous burden that
17 they have to meet. In other courtrooms that I practice in,
18 that burden is not as common. In family court, it is not
19 as high as beyond a reasonable doubt.

20 In civil court where we are in front of the jury
21 asking juries to consider whether it's a car wreck or a
22 medical malpractice case or something like that where we
23 are talking about financial issues, the burden is
24 substantially lower.

25 But in criminal court, because we are talking about

CLOSING ARGUMENT: BY MR. MATTHEWS

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1 the most important aspects of a person's life, we have set
2 that bar extremely high. And the reason why we did that is
3 because if you go back in history in England the standard
4 was reversed.

5 When you went before the Barrister or you went before
6 the Solicitor, or whom ever that you appeared before in a
7 courtroom, a person who's is charged with something, had
8 the burden to show that I'm not guilty. And the State at
9 that point in time didn't have a high burden so we changed
10 that.

11 We changed it to such that when we go in front of a
12 jury, the State has to meet their burden of proof. My
13 client has no burden to present.

14 Now, so when you are looking at that burden, you are
15 looking at direct and circumstantial evidence. Those are
16 the two types of evidence that we present.

17 Direct evidence His Honor will explain to you is
18 evidence that you pretty much see, touch. And then
19 circumstantial evidence, a series of events.

20 But it's not when we look at that burden of proof, we
21 are not just talking about the charge. Each charge has
22 certain elements. And His Honor is going to explain to you
23 what the elements are for this particular charge that my
24 client is facing as presented to you for consideration.
25 There's different elements and each one of those elements

1 must meet that proof.

2 So it is not like, well we - they met the burden on
3 element number one, two and five; but they really didn't do
4 it on three and four; but we're going to find him guilty
5 because the overall case we think they met.

6 That's not how it works. Each element, if three and
7 four - the third and fourth elements of the crime, and I'm
8 just using these numbers as an illustration, third and four
9 don't meet that burden, then the responsibility is to rule
10 in favor of Mr. Agurs.

11 So let's talk about the inconsistencies. And the
12 inconsistencies go to several matters. It goes to the
13 elements and it also goes to credibility. The credibility
14 of witnesses or the credibility of evidence or the
15 credibility of what happened to evidence has to be factored
16 in and that's where the inconsistencies come into play.

17 Let's first start off with Mr. Tumblin. Now, both the
18 State and the defense presented information that Mr.
19 Tumblin came to the police because he wanted a favor. So
20 you get to consider what was his motives. Why was he
21 there. What was he doing. And he was trying to help
22 benefit himself. But he was inconsistent.

23 During the questioning he and I had he talks about the
24 issue of - I asked him when did he do the photo lineup and
25 he said afterwards. After the transaction that he alleged

CLOSING ARGUMENT: BY MR. MATTHEWS

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1 to have occurred and then I asked him some more about it
2 and then he said, well I know I said before, but I didn't
3 mean it. You get to consider the inconsistencies there.

4 You get to consider the inconsistencies of how a photo
5 lineup is set up and there are certain restrictions that we
6 have to have and credibility of, did he really have the
7 ability to have - did my client truly have a credible
8 lineup to be put in there so that there was a possibility
9 that Mr. Tumblin could have picked someone else in the
10 photo lineup.

11 We also have a discrepancy among witnesses. Did the
12 CI have just a pair of pants and clothes on, a shirt on, or
13 did he have a jacket on or did he have multiple layers on
14 because that's important because the issue is is the drugs
15 that or the items that were tested and supposedly came up
16 as drugs. Sergeant Lubben says there is a procedure to be
17 done to make sure but because this event happened a year
18 ago, he wasn't sure about where things were at and how many
19 clothes were on and the CI said he had multiple layers on.

20 Also, the CI says that he - Mr. Tumblin says that he
21 got there right before the search. The officers all
22 indicated that beforehand he got there about forty minutes
23 ahead of time and that they met with him during that period
24 of time.

25 Is it possible that they met with him as he stated,

CLOSING ARGUMENT: BY MR. MATTHEWS

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1 the possibility he met before he went in or after about the
2 photo lineup.

3 They talked about the searches. They talked about the
4 searching of the person and the search of the vehicle.
5 This is important. The reason why it's important is
6 because there has to be established by the State that the
7 items that were tested by the chemist was in fact what they
8 took from the CI at the time of March 5th, 2013. And then
9 they have to establish there was no other way for him to
10 get the drugs from anybody else.

11 A couple things. One is, if it's that important, if
12 the police know it's that important for them to make sure
13 that there is nothing in the car and nothing on the CI, why
14 didn't they video tape it or document it and have
15 documentation to present to you as a juror? And you can
16 consider the lack thereof of evidence and there is nothing
17 there.

18 There is not even a situation of where they have a
19 second officer present during the searches to have what we
20 call a corroborating witness to substantiate what's being
21 told.

22 Only one officer did the search of Mr. Tumblin.
23 Nobody else was there or they don't remember if anybody
24 else was there. No video documentation.

25 Then the search of the truck. Officer Ervin says she

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1 goes in and searches the truck, locks it up and leaves it
2 for about twenty minutes.

3 Again, make absolutely sure that there is nobody else
4 that gets in an ungated parking lot accessible to other
5 people.

6 The State has indicated - Well whenever I ask her if
7 the car was locked or the windows busted out before it came
8 back and she indicated no, but again, it's left unlocked.
9 Is there a possibility that somebody went into that vehicle
10 ahead of time? She didn't check it when she came back.
11 She left it completely by itself for twenty minutes and
12 didn't check it when she came back.

13 Again, Officer Harrelson and Sergeant Lubben made a
14 big deal about the fact of procedure, procedure, procedure.
15 If it's that important to make sure that there's nothing in
16 the vehicle, why didn't they check when she came back after
17 she left it alone. Why wasn't it videoed taped? Why
18 wasn't there documentation, a checklist, anything or a
19 second officer with her to corroborate what she did. And
20 then again the search afterwards.

21 Now, you were shown a picture of what appeared to be
22 the substance that they claim they took off of Mr. Tumblin
23 after the events of March 5th, 2013 and they show you a
24 substance, I think Harrelson referred to it as about the
25 size of a thumbnail or a little bit bigger. But then when

CLOSING ARGUMENT: BY MR. MATTHEWS

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1 they present evidence here today, and you will be able to
2 look at it back in the back, it's all crushed.

3 The evidence manager from the York County Sheriff's
4 Department indicated to you that it's in the same condition
5 that it was when he first got it. Now when we were on
6 cross examination, and now he doesn't remember - or on
7 redirect he doesn't remember. But initially when asked, he
8 indicated it was in the condition and he got it three days
9 after on March 8th. Is it the same substance?

10 There is no evidence to indicate to you - again burden
11 of proof - No indication has been given to you to indicate
12 that this is the same substance. There was no field test.

13 That whole questioning about the field testing is
14 this: Officer Harrelson indicated that they do have the
15 ability to field test. Now, remember what was said about
16 the weight. He said that whenever he weighed it on his
17 scales at the Rock Hill Police Department it came out to .8
18 grams. Didn't field test it so we have no indication at
19 that time that what they had in their possession was drugs.

20 March, April, May, June, July. Late July, July 22nd
21 Ms. Mitchum says she received the packet at that time.
22 Believes but she is not sure, but believes it was in that
23 same condition as you see it here today and tested it at
24 that time. Four months later. Actually, she got it in
25 July and then tested it in October, late October. August,

CLOSING ARGUMENT: BY MR. MATTHEWS

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1 September, October. Late October. Like on the 31st I
2 believe she said. The weight at that time, .53. Actually
3 it's on - if I'm off on 3, it's on the sheet. A different
4 weight. Consideration is is this the same - is what's in
5 that bag the same stuff, substance that they took back on
6 March 5th of 2013.

7 The other thing that would indicate not only that but
8 let's move forward to the events at Burger King. And I
9 want you to consider again where people are located and
10 what they could see or not see.

11 The - Office Harrelson indicates he's at the daycare -
12 which if you drive down before you get - before you get to
13 - headed toward Chester on 72 where Saluda Street comes in,
14 Heckle comes kind of - runs right into Saluda and then if
15 you turn to your right, you are headed toward Chester -
16 sitting at that daycare in that parking lot. Says the back
17 end of his vehicle is facing the road.

18 He has got another officer in the car with him, that
19 officer didn't come in today or yesterday. Another officer
20 and he's laying back and he's watching what's at Burger
21 King. Doesn't see Mr. Tumblin walking from the Dollar
22 General up to the Burger King. Doesn't see all that. And
23 you have what you have in evidence. Didn't see there was a
24 vehicle over here and somebody was in it had gotten out and
25 was getting into it or come around and got into it and

1 didn't see whether or not there was a non-verbal
2 communication with that person, between Mr. Tumblin and
3 that individual. Didn't see him walking back either. And
4 didn't really mention anything about the people who were
5 right at where he was at getting in the vehicle.

6 But the one thing he focused in - on was a white
7 vehicle, but he couldn't tell you who was in the car.
8 Couldn't tell you what happened in the car, so he really
9 didn't have a viewpoint from that perspective.

10 Then we have Officer Ervin. Officer Ervin is at the
11 Dollar General. She's parked in face forward in the
12 parking space. She had already let him off, parked in
13 there and she said she was watching him.

14 My question is for a jury to consider is in listening
15 to the audio tape - or excuse me, to the audio part of the
16 video, is she testified she saw a white - what she saw was
17 a white Caddy with an individual driving up. If she saw
18 that, why is she on the video asking the CI what color was
19 the vehicle and was anybody in it. If she saw what she
20 says she saw on the stand, why is she asking those two
21 questions to Mr. Tumblin?

22 Then the video itself. Now the officer had indicated
23 that he had - that - and we saw it up here, the time stamp
24 on the video. One of the things that's being presented is
25 that an event occurred on March 5th of 2013. There is

CLOSING ARGUMENT: BY MR. MATTHEWS

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1 nothing on the video. Despite what may appear to be on
2 that video, there is nothing on the video that indicates
3 when that video was taken. Nothing at all. No - He said
4 the reason why they did it is because they don't want to
5 time stamp every time they use it. Okay, but nobody held
6 up a card, a little post card, events from March 5th, 2013
7 to make absolutely sure that we all knew that that was that
8 date. There was no newspaper held up to show what the date
9 was on that video. There was nothing at all distinctive on
10 the video to show that that video occurred on that day.
11 And this is their major piece of information they are
12 giving to you and they are saying this is what happened on
13 that day but nothing to show us that.

14 Nothing on the photographs to indicate it was from
15 that day. Nothing. And there was nobody, or at least
16 nobody presented here in the last couple of days, that
17 would indicate they were close enough to see what happened.

18 And then there was a - During the ride, there was a
19 phone call brought in. Not about going to Burger King or
20 anything like that, but a phone call come in from
21 completely somebody we don't know who they are.

22 Don't know what was said. Don't know what it was
23 about. Officer Ervin didn't ask him what it was about, and
24 so my question is, is that somebody else that was suppose
25 to be - that was there? We don't know because we don't

1 have any information from anybody to explain that phone
2 call.

3 I would submit to you that because of the
4 inconsistencies, because of no corroborating evidence as to
5 the time, because of no information about why what Officer
6 Harrelson indicated he was taking into evidence is
7 different not only in weight but also in appearance, is
8 completely different than what was actually tested.

9 There is no - There is inconsistencies or people
10 testifying well it happened a year ago so I don't remember
11 everything that happened. This is important. Very
12 important. This is very important to Dominique. So what I
13 am asking on his behalf is as you are deliberating,
14 consider the credibility. Consider the inconsistencies,
15 whether they are ones I pointed out or they are ones that
16 are considered during deliberations, and those
17 inconsistencies and that information does not rise to the
18 level of beyond reasonable doubt. Because the presumption,
19 and His Honor will explain this to you, presumption is
20 innocence. That's the start. Now after your
21 deliberations, my request on Mr. Agurs' behalf for a
22 verdict of not guilty.

23 SOLICITOR SHELTON: May it please the Court, Your
24 Honor?

25 THE COURT: Yes, sir.

CLOSING ARGUMENT: BY SOLICITOR SHELTON

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1 SOLICITOR SHELTON: Ladies and Gentlemen, what Mr.
2 Matthews is characterizing as inconsistencies, I posit to
3 you it was smoking mirrors. The State's case is clear, the
4 evidence is clear, and I going to ask you to consider
5 everything as a whole in your deliberations.

6 At this time I want to walk you through what the State
7 has presented and argue the State's position.

8 Mr. Agurs is accused of distribution of crack cocaine.
9 You are going to hear Judge Hayes instruct you on a big
10 convoluted law. What's important is a person who
11 distributes or delivers cocaine base in the state of South
12 Carolina has committed the crime of distribution of crack
13 cocaine.

14 It's alleged that this occurred on March 5th, 2013,
15 and it's alleged that Dominique Julius Agurs was the person
16 who committed the crime and the evidence supports those
17 allegations.

18 Two main questions: Was this a drug deal and was it
19 Dominique Julius Agurs? So let's start with the first one.

20 Was this a drug deal? The answer is yes this was a
21 drug deal. Mr. Tumblin told officers from the Drug Unit he
22 could buy crack. He agreed to work as a confidential
23 informant. Mr. Tumblin testified he's a user of crack and
24 he knows who sells it. Mr. Tumblin met with the Drug Unit
25 and gave Investigator Harrelson a description of a man he

1 knew his nickname D.J. He described him as a black male,
2 named that he knows D.J. He knew his phone number and he
3 called him, Dominique Julius Agurs, D.J.

4 Mr. Tumblin called D.J., this man he says he calls
5 D.J., to set up a drug deal, and I would like you to listen
6 to that again please.

7 (STATE'S EXHIBIT NUMBER ONE PUBLISHED TO THE JURY.)

8 SOLICITOR SHELTON: The phone call shows this is a
9 drug deal. You hear Tumblin say, "Hey D.J., this is Mike."
10 You hear the other man who he says is D.J. who the State
11 believes is Agurs. We believe the evidence shows it's
12 Agurs. He responds, "Yeah." He does not say, "Hey man,
13 this ain't D.J., who you calling?" he says "yeah." So he's
14 talking to D.J.

15 Tumblin says, "I am ready to do something man." Agurs
16 says, "I'm over here on McCullough Street." That's where
17 the deal was originally set up. Tumblin asked, "Where is
18 that at?" Agurs says, "Off Heckle beside the apartments,"
19 the area where they end up. Agurs asked, "What you want?"
20 And Tumblin says, "Probably a whole."

21 You heard him testify and you have heard Investigator
22 Harrelson testify a whole one is referencing a gram of
23 crack cocaine. Agurs says, "All right." He does not say,
24 "What do you mean," he says "All right." The deal is
25 struck right there you all.

CLOSING ARGUMENT: BY SOLICITOR SHELTON

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1 Your Honor, I beg the court's indulgence. I need to
2 double check and make sure I redacted the next slide out.

3 (PAUSE.)

4 SOLICITOR SHELTON: So the conversation - The slang
5 words in the conversation are what indicates the deal is
6 struck. "I am ready to do something." "What you want?"
7 "A whole one." "All right." The drug deal is set there.

8 Mr. Matthews tends to suggest that we don't know what
9 they are talking about here. We don't hear things like
10 crack cocaine or things like that. We don't hear him say,
11 "Hey is this Dominique Julius Agurs? This is Michael
12 Tumblin."

13 Folks, people just don't talk like that. People use
14 slang words in every day conversation, and the words they
15 are using are referencing drug activity, crack cocaine in
16 particular. But there's more evidence proving this is a
17 drug deal. You heard that this was a controlled
18 investigation. Officers searched Tumblin and the truck
19 that was a Drug Unit truck before the deal. Before the
20 deal, Tumblin was given \$80.00 and he had no drugs on him.
21 Tumblin was searched again after the deal. After the deal,
22 Tumblin had in his hand a rock of crack cocaine and no
23 money.

24 And then there's the video - State's Exhibit Number
25 Two. In that video, you see evidence of what testimony is

CLOSING ARGUMENT: BY SOLICITOR SHELTON

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1 shown. Ervin drove Tumblin to and from the buy in the Drug
2 Unit vehicle. The drug unit vehicle that she had searched
3 before, that had been maintained at the drug unit that they
4 keep cleaned out, that there was nothing in it.

5 Agurs calls Tumblin on the way. The buy location's
6 changed. The deal is confirmed. The crack order is ready.
7 The video includes the drug deal in the car at Burger King
8 and it includes Tumblin walking straight to the buy and
9 straight back. You see from the video he makes no stops
10 along the way except to wait for cars passing so he doesn't
11 walk out in traffic - to or from - and he does not meet
12 with anyone going to or from. There is simply no evidence
13 that he met with anyone else to or from this buy.

14 Phone call: There were phone calls during the ride to
15 the buy location. Agurs called Tumblin two times back to
16 back. The first call they agreed to meet at Burger King on
17 Saluda Street instead which is near McCullough Street. The
18 second call they got the order straight. And now the
19 second call came immediately after the first call. Tumblin
20 confirmed he wants a "G" or "a whole one," and Agurs said
21 he had it weighed out. They're talking about the crack.

22 So lets listen to those - calls.

23 (STATE'S EXHIBIT NUMBER ONE PUBLISHED TO THE JURY AT
24 04:52 P.M..)

25 SOLICITOR SHELTON: Here is the second call that came

CLOSING ARGUMENT: BY SOLICITOR SHELTON

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1 right after that.

2 (STATE'S EXHIBIT NUMBER ONE PUBLISHED TO THE JURY.)

3 SOLICITOR SHELTON: So during those conversations you
4 hear Tumblin speaking with Tanya Ervin who's driving.
5 She's indicating it's him that called, "We're going to
6 Burger King." He says he's got a way out. Who else is
7 that man talking about than D.J.? That's who he called
8 earlier, that's who's calling him, that's who he's
9 indicating is meeting him, and guess what? D.J. met him
10 there. Everything adds up. The phone calls support the
11 eventual drug buy at Burger King. How else does Dominique
12 Agurs know where to go to sell his crack to this man?

13 Then there is the actual drug deal - on the video.

14 (STATE'S EXHIBIT NUMBER TWO PUBLISHED TO THE JURY.)

15 SOLICITOR SHELTON: Ladies and Gentlemen, the defense
16 team seems to want you to believe that just because you
17 cannot see a hand to hand occur on that video that that's
18 somehow not evidence that a transaction was completed in
19 that call. That completely ignores what the video does
20 show.

21 You see in the video, Tumblin had the buy money in his
22 hand. He had it out in Agurs' car, and that's a State's
23 Exhibit. There was some question on that whether it was -
24 what time frame it was from the video, but we cleared that
25 up on re-direct with Investigator Harrelson. You also have

CLOSING ARGUMENT: BY SOLICITOR SHELTON

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1 the State's Exhibit, be a photograph of the buy money that
2 was handed. It's the same money the Drug Unit gave him.
3 The same exact serial numbers on one of the bills on the
4 left as compared to the one on the right. That confirms -
5 That alone confirms that this investigation occurred on the
6 day that the drug officers say it does. They photographed
7 the bills before they gave it to Mr. Tumblin. That alone
8 shows us this video is from that day.

9 And you also see from this video Tumblin reached down
10 in the center console, I believe he described it as like a
11 coin area in between the seats, he reached down and that's
12 where he said the crack cocaine was in the plastic baggy
13 and reached down and retrieved it.

14 (STATE'S EXHIBIT NUMBER TWO PUBLISHED TO THE JURY.)

15 SOLICITOR SHELTON: You see his arm reach down right
16 where he said it was. And there is conversation during
17 that deal. Tumblin asked Agurs if the weight was right and
18 Agurs tells Tumblin it's 1.2 which he explained was
19 referencing grams of crack cocaine. He ordered a whole
20 one, a whole gram. Agurs told him it was more than a gram.

21 (STATE'S EXHIBIT NUMBER TWO PUBLISHED TO THE JURY.)

22 SOLICITOR SHELTON: What else do they talk about if
23 they're not talking about crack? Folks, this meeting was
24 thirty-six seconds long from start to finish. That in and
25 of itself shows this was a drug deal. The deal was already

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1 set in the phone calls. They only needed a little bit of
2 time to complete the deal. Agurs had indicated to Tumblin
3 that he already had it weighed out. Tumblin knew how much
4 to give - how much money to give to Agurs and he had it
5 ready. You see evidence of an exchange taking place on the
6 video. May not be a hand to hand, but you heard Tumblin's
7 testimony on where the crack was, that Agurs nodded towards
8 it when he handed him the money he reached down and grabbed
9 it. You see the buy money and you see Tumblin reach down
10 in the center console.

11 The only thing they talked about in this meeting was
12 weight. And neither man went inside the restaurant they
13 were parked in front of. Agurs didn't even get out of the
14 car. In fact, Harrelson said he went across the street to
15 the car wash. He did not even go through the drive
16 through.

17 This was not some innocent meeting. It was a crack
18 cocaine deal. And you see evidence of what Tumblin
19 testified earlier that he kept the crack in his hands.
20 This is a picture from the video, State's Number Two. At
21 the very end of the video, you can see the bar at the very
22 end of the video how it's almost the very end of the video.
23 And this is as Tumblin is getting out of the passenger side
24 of the vehicle, that's a shot of his hand. It's very
25 quick, and it's something that can be missed. That's why

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1 one of the reasons we want to put this in as an Exhibit.
2 But you can see what he described. It's a little plastic
3 baggy with the crack substance in it, and it's in his hand.

4 Let's talk about the weight of the crack. You heard
5 testimony there's differing weights that you've heard. You
6 heard Tumblin ask for a "G" or "a whole one." You heard
7 Agurs say it's 1.2. You heard Harrelson say he weighed it
8 at the Drug Unit and it was .8. And you heard Ms. Mitchum
9 say it was .53. I posit to you what Ms. Mitchum says is
10 the most reliable weight. Her scales are calibrated.

11 I posit to you that what Harrelson says, he's
12 indicated that's an estimation. They - They use that for
13 charging purposes. It's not something that is as reliable
14 as the chemist's weight on the certified scales.

15 And he also testified, Mr. Harrelson did, that it is
16 not uncommon for drug dealers to short their clients. They
17 are trying to make money. And Mr. Tumblin testified he
18 didn't walk to that deal with a set of scales so he doesn't
19 get to check the weight. He's taking Agurs' word for it.
20 That's what the evidence suggests here. The evidence
21 suggests that Agurs shorted Tumblin. Again, the Drug Unit
22 weights were estimates, Ms. Mitchum's weight is what
23 counts, and Tumblin did not have scales to weigh the drugs
24 to confirm what Agurs told him.

25 Also, we know that this is the correct - these are the

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1 drugs that he got from Agurs that day because the control
2 nature of the buy. The control nature of the drug buy and
3 the testimony of the agents from the Drug Unit support what
4 Tumblin's testimony is, that he got the crack from Agurs
5 and he gave it to the Drug Unit officers. He was searched
6 before and after the deal, and you heard the officers talk
7 about how he was searched, a very thorough search. They
8 were searching jackets, outer shirts, pockets; they are
9 feeling around, they are going all the way down to their
10 shoes and socks. I mean he ain't hiding anything from
11 those Drug Unit officers. And they did that. That's the
12 procedure that they have. They follow their procedure, and
13 they did it at the beginning and afterwards.

14 Based on what those officer's testimony is, I posit to
15 you that's very reliable evidence. They do this on a daily
16 basis. Lubben and Harrelson have been doing this for
17 years. They have searched many people, conducted many
18 buys, they know what they are doing, and they did not find
19 any drugs on Tumblin before or after.

20 So that's one of the variables that they control in
21 the controlled buy. They are eliminating the possibility
22 that the CI is bringing drugs to the deal, or holding drugs
23 out after the deal. They eliminated that variable, and
24 their testimony is evidence to that effect.

25 The Drug Unit truck was in the Drug Unit's custody and

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1 control. It was on city or county property. It was locked
2 up. The windows were up. It was regularly vacuumed.
3 Tanya Ervin searched it before she went on the buy. She
4 locked it back up. She had the keys. The windows were up.
5 Nobody busted out the windows. Nobody got in that truck
6 and put anything in that truck. She took Tumblin straight
7 to that truck. Drove him straight to the buy location.
8 Stayed with the truck. Waited for him to come back. Drove
9 him straight back to the Drug Unit. He met with Harrelson.
10 Gave Harrelson the crack. Harrelson searched him again.
11 Ervin searched the truck again.

12 Ervin found nothing in that truck before or after.
13 That's another variable that they eliminated. They were
14 not talking about Mr. Tumblin's car or truck here. They're
15 talking about the Drug Unit's truck. And Investigator
16 Ervin was with Tumblin the entire time there and back.
17 It's a truck. He's in the passenger front seat and she's
18 in the driver seat, and she testified she could see him.
19 And especially on the way back she could see that he had
20 the crack in his hand the whole time, and didn't break any
21 off, or hide any, or eat anything, or anything like that.
22 There was no testimony to that effect. It was in his hand
23 the whole time and he gave the crack directly to Harrelson
24 back at the Drug Unit.

25 And, folks, are there things that the officers could

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1 have done to document all of these searches a little
2 better? Sure there are, but that does not negate what
3 their testimony is. There's simply nothing to discredit
4 what they've testified, their procedures, they follow those
5 procedures. There is simply nothing to negate that. I
6 posit to you that all of that would of, could of, should of
7 stuff, smoking mirrors. Don't loose sight of the forest
8 from the trees.

9 And I want to argue this point to you as well. Even
10 if somehow you believe maybe Tumblin, maybe, there is no
11 evidence to suggest this, but maybe Tumblin left something
12 in the truck - some of the crack he got from Agurs. Maybe
13 that's why it's like - But there's no evidence to that. If
14 you somehow believe that, ask this question. Why would
15 Tumblin leave crack cocaine in a Drug Unit truck? He
16 cannot get back into that truck, and they are gonna find
17 it. Why would he leave it there? There is simply no
18 reason. It doesn't make any sense.

19 And furthermore, there's nothing in the law requiring
20 that the State prove a certain weight of drugs involved to
21 meet the elements of this charge. The simple fact is was
22 this crack cocaine? Did it come from Agurs to Tumblin?
23 Everything else is smoking mirrors.

24 So let's move on to question number two. Was this
25 Dominique Agurs? Yes, it was Dominique Julius Agurs. The

1 defense attorney may suggest to you that we don't know that
2 this is Agurs independent of Tumblin's identification from
3 the photo lineup, and what he says and is this guy D.J.,
4 but Officer Harrelson knew him as well. Officer Harrelson
5 identified him as Dominique Julius Agurs.

6 Let's talk real quick about Mr. Tumblin before I
7 forget. Folks, Mr. Tumblin, he has a bad record. He had a
8 drug problem and he got in a lot of trouble.

9 Folks, you can't send a school teacher to buy crack
10 cocaine. It takes a person who's used to that kind of
11 thing, who knows the language, and the people involved. It
12 takes that kind of person to go in and buy drugs. The
13 narcotics officers can't do it. These guys know who they
14 are. They have to utilize people like Tumblin to make
15 these undercover buys.

16 And, folks, the police do not entirely trust Agurs -
17 excuse me - the police don't entirely trust Tumblin.
18 That's why they wired him up with a live audio feed and a
19 audio visual feed. That's one of the reasons they record
20 everything that happened and listened in in his part of the
21 investigation and listened in on live feed. That's why he
22 is searched before and after. They want to make sure
23 everything's on the up and up, and they want to make sure
24 he didn't have a chance to make something up or fabricate
25 evidence or whatever. And in this case, there is simply no

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1 evidence to that effect. This was a controlled buy. The
2 police eliminated all the other variables that could cast
3 out in this case. It was a clean buy.

4 And we talked about the weight. The evidence
5 suggested Agurs shortened Tumblin. There's simply nothing
6 in the evidence to suggests anything other than that.

7 This is not a case about whether Tumblin got a fair
8 deal or not. In fact, under the law, we don't even have to
9 prove that money exchanged hands, we simply have to prove
10 that drugs were given from one person's possession and
11 control to another. And the evidence supports that Agurs
12 gave drugs to Tumblin. Crack cocaine in particular.

13 The evidence presented suggests that Mr. Tumblin is
14 telling the truth. Even though he didn't know a full name,
15 he knew this man as D.J., and that man is Dominique Julius
16 Agurs. You heard Harrelson testify that's the man. He
17 didn't know him as D.J., he knew him as Dominique. But
18 after looking at the video, he knew who it was. Tumblin
19 had met Agurs in person before. He had his phone number.
20 He immediately picked Agurs out of a photo lineup and he
21 was not shown the buy video before the lineup. And the
22 video confirms Tumblin told the truth.

23 There is a snapshot on the left from the video that's
24 State's Number Three, and on the right is State's Number
25 Seven. Those are all - all the pictures are in evidence.

1 I apologize. I believe that the date up there, April 23rd,
2 I believe that's a typo. I think it was March 21st is the
3 testimony from when he was arrested and booked. I
4 apologize for that typo. So you see a front profile and a
5 side profile. On the right is another photo. On the left
6 is a photo from the drug buy. Yes, it's a drug deal. Yes,
7 it's Agurs. Yes, Agurs is guilty.

8 Ladies and Gentlemen, one other point I wanted to
9 touch on. You're going to hear Judge Hayes instruct you on
10 the law and he's gonna instruct you on what the law is
11 regarding reasonable doubt.

12 Reasonable doubt is not any and all doubt. The State
13 does not have to prove its case beyond a shadow of a doubt.
14 The State has to prove its case and present proof through
15 evidence of each element to you, the kind of proof that
16 leaves you firmly convinced that the crime that's alleged
17 occurred.

18 You heard Mr. Matthews talk about hesitation to act.
19 The other definition is the kind of proof that leaves you
20 further convinced. Please do not consider hesitation to
21 act with you doing your job as a jury. It's your job to
22 deliberate on the evidence. It's your job to discuss this
23 and make an informed decision, because your decision has to
24 be unanimous. And I posit to you that at the end of your
25 deliberations you simply, to carry out your role in this

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1 process, you must consider all of the evidence, you must
2 consider the law as Judges Hayes gives it to you, and you
3 must render a verdict that speaks the truth and that is
4 guilty as charged.

5 THE COURT: Thank you. I appreciate the attention
6 you have given the witnesses, the attorneys, and me to this
7 point. It's now my duty to charge you on the law which you
8 are to apply to the facts that you determine them to be in
9 this case.

10 I remind you Mr. Agurs is charged for distribution of
11 crack cocaine. The State alleges this occurred in York
12 County on March 5th, 2013, and that it was in violation of
13 the laws of our state.

14 The fact that Mr. Agurs has been charged, the fact
15 that he has been indicted, raises no inference of guilt.
16 That's just the way our system works. When someone is
17 thought to have committed an offence and violated the laws
18 of our state, that's the way it works. They are arrested,
19 they are indicted, and then they come to trial, and it is
20 up to a jury to determine whether that person is guilty
21 based on the State having to prove that person's guilty
22 beyond a reasonable doubt.

23 This indictment is a written document which is the -
24 which contains the charge against Mr. Agurs, and is the
25 formal document by way of which this case has been

1 processed through our court system, and is where you Mr.
2 Foreman, and I will tell you more about this later, you
3 will write the unanimous verdict of the jury, and of course
4 you will preside over the jury's deliberation.

5 Mr. Agurs has entered a plea of not guilty. His plea
6 of not guilty places on the State the burden of proving his
7 guilt beyond a reasonable doubt. This presumption of
8 innocence is a substantial right. It is a substantial part
9 of our judicial system. It is not just a mere legal theory
10 or a mere legal phrase. The presumption of innocence
11 attaches to an individual, including Mr. Agurs, at the time
12 of their arrest and remains with them as their case is
13 processed through our court system.

14 The presumption of innocence in Mr. Agurs' favor
15 exists at this moment, and even continues to exist as you
16 deliberate.

17 The presumption of innocence in Mr. Agurs' favor is
18 removed if and when, and only, if, and when, you determine
19 the State has proven his guilt beyond a reasonable doubt.

20 Now, the State is not required to prove his guilt
21 beyond all or beyond every doubt, but beyond a reasonable
22 doubt. Our courts have defined a reasonable doubt as a
23 kind of doubt that would cause a reasonable person to
24 hesitate to act.

25 Proof beyond reasonable doubt is proof that leaves you

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1 firmly convinced of one's guilt. As I said, there are very
2 few things in our world that we could know with absolute
3 certainty and criminal law does not require proof that over
4 comes every possible doubt. If based on your consideration
5 of the evidence you are firmly convinced that Mr. Agurs is
6 guilty, you would find him so.

7 If, on the other hand, you think there is a real
8 possibility that he is not guilty, you would give him the
9 benefit of that doubt and find him not guilty. He is
10 entitled to any reasonable doubt you have as to any issue
11 in this case.

12 I remind you that I am the sole judge of the law in
13 this case, and you must take, accept and apply the law as I
14 charge it. This is true even if you think I charge the law
15 in error, or even if you think the law should be different.
16 Your oath requires you to take, accept, and apply the law
17 as I charge it.

18 You are not to infer from anything I have said or
19 done, or anything I now say or do as indicating an opinion
20 of mine on the facts. Our law does not allow a trial judge
21 to formulate or express to a jury any opinion on the facts.
22 It is solely your job to examine the evidence, give to the
23 evidence the effect, the value, the weight, and the truth
24 you believe it should have.

25 You may believe one witness as opposed to several or

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1 several witnesses as opposed to one. You may believe all,
2 part, or none of a witnesses' testimony. Use your common
3 sense, your sense of logic, your sense of reason. Use your
4 experiences in life as you analyze the evidence. As judges
5 of the facts, you necessarily must judge the credibility,
6 that is, the believability of the witnesses who have
7 testified. In assessing credibility, use the things I just
8 talked about. Use the things that you in your day-to-day
9 life find as being indicators of truthfulness. And you can
10 use certain evaluators, how a witness acts on the stand,
11 their demeanor. Are they hesitant or straightforward when
12 responding to questions? Are they consistent or
13 inconsistent?

14 Look at the opportunity a witness had to know those
15 things to which the witness testified. Consider whether a
16 witness has any bias or prejudice. That is whether a
17 witness would wish to help or hurt one side or the other.

18 Now in this case, we have had the testimony of an
19 expert. Ms. Mitchum testified as a chemist. Generally, an
20 individual can only testify as to facts they've observed.
21 Usually it's something they've seen or heard, but it could
22 be taste, touch, or smell.

23 However, where someone has certain knowledge,
24 training, skill, experience, and education in a certain
25 field, that person can take facts and from those facts

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1 render an opinion. The opinions of experts are allowed in
2 evidence to assist you. They are not binding on you. They
3 are to be looked at with the same eye that you look at any
4 other witness. You look at their credibility and the same
5 things we've gone over earlier. In addition, as to an
6 expert, you look at - even though I have found them to be -
7 her to have been qualified as a chemist, you determine
8 whether she had the expertise to reach the opinion she
9 reached. And you also can look at the reasons she reached
10 the opinion she reached. Keep in mind that testimony of
11 experts is allowed into evidence to assist you. It is not
12 binding on you.

13 Now in this case, Mr. Agurs has exercised his
14 constitutional right to remain silent. The exercise of
15 that right cannot be used against him in any way
16 whatsoever.

17 He has an absolute right to remain silent and his
18 exercise of that right cannot be used against him. You
19 cannot discuss in the jury room the fact that he exercised
20 his constitutional right to remain silent, nor can you
21 factor it into your own deliberations as you determine what
22 the verdict should be in this case.

23 I remind you Mr. Agurs is presumed innocent. He need
24 not prove his innocence, the State must prove his guilt
25 beyond a reasonable doubt before you could, as a trial jury

1 in this case, convict him.

2 An issue in this case is the identification of Mr.
3 Agurs as the person who committed the crime of which he is
4 charged. The State has a burden of proving identity beyond
5 a reasonable doubt. You must be satisfied beyond a
6 reasonable doubt of the accuracy of the identification of
7 the defendant before you could convict him as to this
8 charge.

9 Identification testimony is an expression of belief or
10 impression by a witness. You must determine the accuracy
11 of the identification by the witness, or a witness, of the
12 defendant. You must consider the believability of each
13 identification witness just as you look at the testimony of
14 the other witnesses using those same things I've already
15 discussed.

16 You also may consider whether a witness had an
17 adequate opportunity to observe the offender at the time of
18 the offense. This will be affected by things about how
19 long or short a time frame - the time that was available
20 for the observation, how far or close the witness was from
21 the person they allegedly identified, the lighting
22 conditions at the time, whether the witness had the chance
23 to see another person in the past.

24 Once again, I instruct you that the burden of proof is
25 on the State, and it extends to every element of the crime

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1 charged, and specifically applies to identification.

2 The State must prove beyond a reasonable doubt that
3 Mr. Agurs in fact was the person identified as having
4 committed this offence. If after examining the testimony,
5 you have a reasonable doubt as to the accuracy of the
6 identification testimony, you must give Mr. Agurs the
7 benefit of that doubt.

8 There are two types of evidence which is generally
9 presented in a criminal trial, direct, and circumstantial
10 evidence.

11 Direct evidence is the evidence which directly proves
12 the existence of a fact and does not require deduction.

13 Circumstantial evidence is proof of a chain of facts
14 and circumstances indicating the existence of a fact.
15 Crimes may be proven by circumstantial evidence. Our law
16 makes no distinction between the weight or value to be
17 given either direct or circumstantial evidence. However,
18 to the extent the State relies on circumstantial evidence,
19 all of the circumstances must be consistent with each
20 other, and when taken together point conclusively to the
21 guilt of the accused beyond a reasonable doubt.

22 If these circumstances merely portray a defendant's
23 behavior as suspicious the proof has failed. The State has
24 the burden of proving the defendant guilty beyond a
25 reasonable doubt, and this burden rests with the State

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1 regardless of whether the State relies on direct or
2 circumstantial evidence, or a combination of the two.

3 Now the charge lodged by the State against Mr. Agurs
4 is that of distribution of crack cocaine or cocaine base.
5 He is charged with distributing crack cocaine in violation
6 of the laws of our state. The State must prove beyond a
7 reasonable doubt in order for you to convict Mr. Agurs of
8 this charge that he did in fact distribute crack cocaine.

9 Distribute means to deliver or to actually,
10 constructively, or attempt to transfer a drug.

11 Deliver means to actually, constructively, or attempt
12 to transfer the drug. A transfer can involve an exchange
13 for money or it can be a gift. There does not have to be
14 anything given in exchange for the drugs for there to have
15 been what constitutes a distribution.

16 In addition to proving the distribution of the
17 substance, the State must prove beyond a reasonable doubt
18 that the substance at issue was in fact crack cocaine.

19 Your verdict must be unanimous, all twelve jurors must
20 agree on the verdict before you authorize your foreman to
21 write the verdict on your behalf. And I will tell you
22 about how that it is done in just a moment.

23 Your verdict cannot be based on sympathy, passion,
24 prejudice, public opinion, or matters outside the record.
25 If you have any questions, write them down, knock on the

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1 door, or give a written question to the bailiff. The
2 bailiff will come get me, or bring it to me, and I will
3 confer with the attorneys. It may be that I can write an
4 answer to your question on the note itself. If I send a
5 note back in with an answer, keep that note and turn it in
6 with the evidence, Mr. Foreman. It has to be part of the
7 record. It may be that I will have to bring you back in
8 here in open court to answer your question.

9 I do not send in a written copy of my charge but if
10 you wish to go over any part or all of the charge, let me
11 know and I will bring you back and recharge you here in
12 open court. If you wish testimony to be replayed, let us
13 know and we can bring you back in and do that here in open
14 court also.

15 Again, your verdict must be unanimous. When you've
16 reached a unanimous verdict, knock on the door and tell the
17 bailiff. The bailiff will come and tell me, and I will
18 send for you as promptly as I can. I may be working on
19 something else, but I will try to interrupt that and send
20 for you as promptly as I possibly can.

21 Now when you first go into the jury room, do not start
22 deliberating because I have to go over with the attorneys
23 my charge. If I have made an error, I will have to bring
24 you back in and correct it. If not, the bailiff will bring
25 in the Indictment and the Exhibits and tell you to start

1 deliberating, and at that time you may start deliberating.

2 On the indictment, which you will have in the jury
3 room with you, Mr. Foreman, and it again it is not
4 evidence, on the back you will see the word verdict. There
5 are four lines beneath it, the bottom line is for your
6 signature and the place for the date, today is the 22nd,
7 below your signature. On one of the other lines below the
8 word verdict and above your signature, you will write the
9 jury's unanimous verdict.

10 If the State has failed to prove Mr. Agurs guilty
11 beyond a reasonable doubt, you will write two words, Not
12 guilty.

13 If the State has proven unanimous - to the unanimous
14 satisfaction of the jury Mr. Agurs' guilt beyond a
15 reasonable doubt, you will write the one word, Guilty.

16 Now I am going to allow you to go into the jury room
17 but donot start deliberating yet.

18 (JURY EXITS COURTROOM AT 04:21 P.M..)

19 THE COURT: Anything from the State on the charge?

20 SOLICITOR SHELTON: No, sir.

21 THE COURT: Anything from the Defense?

22 MR. MATTHEWS: No, Your Honor.

23 THE COURT: All right. If we can check the Exhibits
24 and make sure they are correct and we will send back the
25 indictment. Check the Exhibits and make sure they are

1 right, and then we will be at ease. All right, we're at
2 ease.

3 (COURT IN RECESS AT 04:23 P.M..)

4 (WHEREUPON, COURT'S EXHIBITS THREE, AND FOUR
5 IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

6 (COURT BACK IN SESSION AT 05:20 P.M..)

7 (BACK ON THE RECORD AT 5:17 P.M.)

8 THE COURT: Thank you. Take your seats. We're gonna
9 replay at the jurors request, thirty-six seconds in the
10 Cadillac. Any comment on that before we --

11 SOLICITOR SHELTON: No, sir, Your Honor. Simply I
12 have the video State's Number Two cued up to where the
13 vehicle is pulling into the parking lot, so I guess -- I'm
14 assuming after Mr. Tumblin gets out is as far as they
15 wanted to see?

16 THE COURT: Yes. I mean, I guess. It says thirty-six
17 seconds. I think you are the one who put something up that
18 said thirty-six seconds so ---

19 SOLICITOR SHELTON: Yes, sir.

20 THE COURT: --- you know better than anybody else
21 what thirty-six seconds we're talking about.

22 SOLICITOR SHELTON: That's my assumption, Your Honor,
23 is the actual deal in the car.

24 THE COURT: Mr. Matthews?

25 MR. MATTHEWS: The only comment I would have on behalf

1 of the defense is that the video from start to end be free
2 flowing and not stopped to show any particular frames.

3 SOLICITOR SHELTON: Absolutely.

4 THE COURT: No. No, no, no. It's going to be shown
5 as a video.

6 MR. MATTHEWS: Yes, sir.

7 THE COURT: All right. Bring in the jury.

8 (JURY REENTERS TO COURTROOM AT 5:22 P.M.)

9 THE COURT: Mr. Foreman, I'm sorry. The computer
10 isn't cooperating. We've got thirty-six seconds cued up
11 and we'll play it over and over if you'd like. We'll play
12 it once and then if you want us to play it again, we'll
13 play it again. Let's go ahead and cue it up and play it.

14 (STATE'S EXHIBIT TWO, THIRTY-SIX SECONDS, PUBLISHED TO
15 THE JURY.)

16 THE COURT: Would you like it being shown one more
17 time while you are in here? I mean, you all - Okay,
18 somebody's saying yes. Let's cue it back up and redo it.

19 (STATE'S EXHIBIT TWO, THIRTY-SIX SECONDS, PUBLISHED TO
20 THE JURY.)

21 THE COURT: Is that enough for right now? Okay. Just
22 let me know if you want to see it again. I'm gonna let you
23 go back to deliberations.

24 (JURY EXITS COURTROOM AT 5:25 P.M.)

25 THE COURT: Anything from the State?

1 SOLICITOR SHELTON: No, sir.

2 THE COURT: Defense?

3 MR. MATTHEWS: None, Your Honor.

4 SOLICITOR SHELTON: Your Honor, one comment. Do you
5 want me just to put the disks with the court reporter since
6 they really don't need State's Number Two back there?

7 THE COURT: Let's leave it in here for right now.

8 SOLICITOR SHELTON: Okay.

9 THE COURT: All right. We'll be at ease.

10 (COURT AT EASE AT 5:26 P.M.)

11 (COURT BACK IN SESSION AT 5:34 P.M.)

12 THE COURT: Thank you. You may take your seats. The
13 jury has indicated they have a verdict.

14 Is the State ready?

15 SOLICITOR SHELTON: Yes, Your Honor.

16 THE COURT: Defense ready?

17 MR. MATTHEWS: Yes, Your Honor, we're ready.

18 THE COURT: All right. Bring in the jury.

19 (JURY REENTERS COURTROOM AT 5:36 P.M.)

20 THE COURT: Jury panel, Mr. Foreman, I understand the
21 jury has reached a verdict?

22 MR. FOREMAN: We have, Your Honor.

23 THE COURT: If you'll hand it to the bailiff, he will
24 hand it up to me.

25 (VERDICT RECEIVED UP BY THE COURT.)

JURY VERDICT

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1 MADAME CLERK: The State of South Carolina versus
2 Dominique Julius Agurs under Indictment 2013-GS-46-04248
3 for distribution of crack cocaine, the jury finds the
4 defendant guilty. Signed by the foreperson dated today's
5 date.

6 If this be your verdict so say you all by raising your
7 right hand.

8 Let the record show all jurors confirm this verdict.

9 (ALL JURORS AFFIRMED THE VERDICT.)

10 THE COURT: Anything from the State before the jury is
11 dismissed?

12 SOLICITOR SHELTON: No, sir, Your Honor.

13 THE COURT: Anything from the defense?

14 MR. MATTHEWS: No, Your Honor.

15 THE COURT: Members of the jury panel, thank you for
16 your help. I'm told we're not gonna start another trial in
17 the morning. We may still start another for the week
18 later, so call tomorrow after one and receive your
19 instructions as to what to do about whether to call or
20 whether to come in at a certain time, so I'm going to let
21 you leave at this time and thank you so much for your help.

22 Thank you.

23 (JURY DISMISSED AT 5:38 P.M.)

24 THE COURT: Anything from the State?

25 SOLICITOR SHELTON: Your Honor, as we stated earlier I

SENTENCE OF THE COURT

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1 do have a matter to take up regarding sentencing.

2 THE COURT: Yeah, but right - before we get to that
3 cause --

4 SOLICITOR SHELTON: Not at this time, Your Honor.

5 THE COURT: Anything from the Defense?

6 MR. MATTHEWS: Your Honor, I would ask based on the
7 evidence presented during the trial, I ask that the verdict
8 of the jury be set aside based on it's found based on
9 information presented.

10 THE COURT: Well I deny the motion. I find the
11 verdict supports just like I did at the directed verdict
12 stage, I find that the evidence certainly supports the
13 finding of the jury that there is ample evidence from which
14 a jury could believe or disbelieve that the substance
15 involved was crack cocaine. That there was an eye witness
16 which is always except for the argument, I instructed the
17 jury as to how to consider eye witness testimony and there
18 was testimony of someone who the CI who dealt with the
19 defendant before so I find there is ample evidence to
20 support the verdict, so if you'd bring Mr. Agurs around for
21 sentencing.

22 (DEFENDANT APPROACHES THE BAR.)

23 THE COURT: Mr. Shelton.

24 SOLICITOR SHELTON: Your Honor, may it please the
25 Court. As I mentioned at the start of this trial, Mr.

1 Agurs was noticed for life without parole if he was
2 convicted of this offense.

3 This charge is a qualifying offense under the three
4 strikes statute - I believe that's 17-25-45 - and he has
5 been found guilty of that. He has prior convictions that
6 are strikes as well and I outlined those earlier when we
7 were going over what would be impeachment eligible offenses
8 but I also put in for the record, and I have certified
9 copies from our Clerk's office to make part of the Court's
10 record regarding these.

11 I also have a certified copy of the Notice that was
12 filed with the Court. I would make it part of - a Court's
13 exhibit at this point.

14 Your Honor, Mr. Agurs was convicted of possession with
15 intent to distribute crack cocaine in 2005, two separate
16 counts, 2005-GS-46-4-5-6-7 and 4-5-6-8.

17 He was also convicted of a companion charge of
18 possession with intent to distribute crack cocaine within
19 proximity of a school or a park that same year, 2006-GS-46-
20 4-5-6-9. Those were all part of one plea and sentencing so
21 that would have been one of the strikes being the proximity
22 and the other one is a conviction for trafficking crack
23 cocaine, 2008-GS-46-1-6-1-6 and a companion charge of
24 proximity, possession with intent to distribute within
25 proximity of a school or park, crack cocaine, 2008-GS-46-1-

SENTENCE OF THE COURT

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1 6-1-5. Those were convictions at the same time, sentencing
2 at the same time. That would be the second strike; this
3 conviction being the third strike, so at this time I would
4 present these are Court's exhibits and hand them up for
5 your review if you would like.

6 THE COURT: Just make them part of the record.

7 SOLICITOR SHELTON: Yes, sir. And I'm also including
8 a copy of the Notice that's one file with the Clerk's
9 office.

10 THE COURT: Anything else from the State?

11 SOLICITOR SHELTON: No, sir.

12 THE COURT: Mr. Matthews?

13 MR. MATTHEWS: Your Honor, if I could ask the State to
14 do one clarification for us. On the record I know he
15 mentioned the strike, and if he could state on the record
16 which ones were considered serious and which ones were
17 serious and most serious for purposes of clarification.

18 SOLICITOR SHELTON: The priors of, definitely the PWID
19 proximity, is one strike of being a serious offense. The
20 trafficking crack is a strike, as well as the proximity.
21 The trafficking I believe is a violent crime and the
22 proximity is a serious strike. And this is a serious
23 strike under the statute.

24 THE COURT: Three serious and one most serious?

25 SOLICITOR SHELTON: Yes, sir.

1 THE COURT: All right, Mr. Matthews.

2 MR. MATTHEWS: Your Honor, this particular situation,
3 Your Honor, I would respectfully request under, for the
4 record, under the Eighth Amendment for cruel and unusual
5 punishment, I would request Your Honor to consider the
6 possibility that the statute that has been presented, 17-
7 25-45 which says that a person must be sentenced to a term
8 of life in prison without the possibility of parole be
9 deemed subject to unconstitutionality under the U.S.
10 Constitution Eighth Amendment.

11 And what I am referring to is a case that was decided
12 in 2013 where the State Supreme Court did set out an
13 evaluation under the evaluation determining compassionality
14 of the case, determining whether it was grossly exceeding
15 the norms of today's society.

16 One of those is that this charge if it was - went to
17 trial and was convicted on as a third offense, carries ten
18 to thirty.

19 The U.S. Supreme Court has considered the mandatory
20 life without the possibility of parole in kinship with a
21 sentence of a death penalty sentence and considers it very
22 seriously.

23 It has become such an issue right now that the South
24 Carolina Supreme Court decided their case in 2013 when they
25 established a standard there --

SENTENCE OF THE COURT

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1 THE COURT: You got a copy of that case?

2 MR. MATTHEWS: Yes, sir, right here. I asked the
3 public defender's office to make me a copy of it.

4 In that case, and being candor with the Court, they
5 did set a standard but in that case they did rule that the
6 statute did meet the constitutional boundaries in that
7 case. But I also want to mention to you as well is that on
8 the federal level, the federal system is seriously looking
9 into the issue of whether or not to change their mandatory
10 life sentences based on the issue of fairness and
11 proportionality.

12 In this case, my client could have received a ten to
13 third year sentence in this case if he was sentenced, and I
14 would submit to the Court that that potential sentence is
15 sufficient punishment for the charge he has been convicted
16 of and to be sentenced to life with out the possibility of
17 parole, gives absolutely no ability for my client at his
18 young age to rehabilitate.

19 So, Your Honor, I would ask that the life sentence
20 would not be imposed and that he receive a sentence under
21 the statute for crack cocaine, 44-53-375, for a third
22 offense of ten to thirty years. There is no parole. He
23 would have to do a minimum of eighty-five percent and would
24 be sufficient to punish him for these charges.

25 THE COURT: Mr. Shelton, do you have any comment on

1 that?

2 SOLICITOR SHELTON: No, sir, Your Honor. My
3 understanding is that the statute in play is still law of
4 the land.

5 THE COURT: I agree with the State. The statute's
6 clear and fortunately or unfortunately Mr. Agurs was well
7 aware. He was put on notice of life without parole was a
8 possible punishment and he had every right to go to trial
9 which he did, but I do not find that the seriousness of
10 three serious drug offenses - had this just been a
11 distribution that was not enhanced by two previous serious
12 offenses, I would inclined to agree with you. Of course,
13 it wouldn't even apply.

14 But the difference in your analogy is up to thirty
15 years and life without parole, he had had two simple
16 marijuana possessions, I think, but he could have had some
17 prior non-serious, non-most serious offenses which would
18 have enhanced this charge to a third, which would not have
19 thrown it into life without parole, so I don't think this
20 is an extreme punishment for someone who is a repeated drug
21 offender.

22 So, Mr. Agurs is there anything you want to say at
23 this time before you are sentenced?

24 MR. AGURS: I'm fine with it.

25 THE COURT: Okay. Sentence is life without parole.

SENTENCE OF THE COURT

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1 Thank you.

2 (DEFENDANT

3 MR. MATTHEWS: For clarification of another, there is
4 and it's just book keeping issues, there were several bench
5 warrants that I ask to make copies by the Clerk of Court, I
6 need for those to be lifted.

7 THE COURT: We'll lift the bench warrants.

8 SOLICITOR SHELTON: Yes, sir.

9 MR. MATTHEWS: And then for purposes of my court order
10 of appointment, I need to know what the intention of the
11 State is on the other charges.

12 SOLICITOR SHELTON: Your Honor, the other charges will
13 be dismissed. There is no sense in going forward in light
14 of the jury's finding and the sentence in this case.

15 THE COURT: Well, okay, I'll lift the bench warrant.
16 I've got no role in what happens to the other charges. I
17 would like for it to be in the record, and I'm sure it's
18 already in evidence somewhere, the Notice of Life without
19 Parole. I know its been served on him but it ought to be
20 made a part of his record. You already have it. Okay.
21 Good.

22 MR. MATTHEWS: Yes, sir.

23 THE COURT: I do think even though the other charges
24 are from to be apparently noll prossed which means that if
25 this somehow got overturned, it possibly could be and this

1 case comes back, I don't know what the State's intention as
2 far as that they could be resurrected if they were noll
3 prosed - Anyway, that's not my business but I do think that
4 your obligation continues at least to the extent of filing
5 a Notice of Intent to Appeal.

6 MR. MATTHEWS: And I am planning on doing that
7 immediately, Your Honor.

8 THE COURT: I figured you would. We're trying to kind
9 of lay everything out on the table because again, it's none
10 of my business.

11 MR. MATTHEWS: Oh, I understand.

12 THE COURT: Okay. All right. We'll lift the bench
13 warrants and appreciate again everybody's courtesies and we
14 will be at ease until ten in the morning.

15 (COURT ADJOURNED AT 5:50 P.M.)

16 (END OF TRANSCRIPT OF RECORD.)

17

18

19

20

21

22

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25

CERTIFICATE OF REPORTER

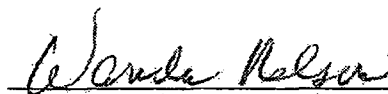
State of South Carolina)

)

County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for York County, South Carolina, on the 21st and 22nd days of April, 2014.

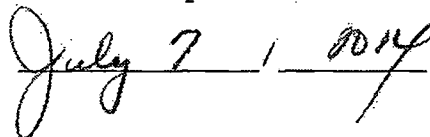
I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



Wanda Nelson, CVR-M
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE:



County: York
 Date: April, 21-22, 2014

JURY VOIR DIRE/BATSON SHEET

Case No.: 2013- GS-46-04248

Judge: Honorable John C. Hayes, III

Pl./State: State of South Carolina

Pl.State Atty's.: Solicitor Matthew Shelton

Defendant: Dominique Julius Agurs

Defense Atty: Michael Matthews

Court Reporter: Wanda Nelson

Juror No.	Name	Sex	Race	STRIKES			
				*Court	Plaintiff	Defense	Accept
97	Matthew L. Hagley	M	W		X		
226	Billy K. Thomas	M	W				X
45	Tara K. Comer	W	F			X	
173	Dianna L. Moore	F	W				X
196	Charles W. Presley, Jr.	M	W			X	
103	Joseph R. Harrell	M	W		X		
113	Bryon L. Hicks	M	W		X		
154	Mark V. Mackiewicz	M	W			X	
29	Catherine M. Brandon	F	W				X
205	Anthony J. Rossano, Jr.	M	W				X
75	Shirley W. Elkins	F	W				X
234	Stephen S. Turner	M	W			X	
223 **	James P. Summers	M	W				X
144	Sheryll R. Lawson	F	W			X	
227	Mia R. Thompson	F	B				X
158	William P. Masterson	M	W				X
167	Charles R. Miles	M	B				X
178	Blaine S. Mullis	M	W				X
192	James D. Peebles	M	W				X
225	Clyde O. Tate, Jr.	M	W		X		
238	Kelly S. Walker	M	W	X			
185	Nannette S. Norton	F	W				X
137	Jack R. Kierce	M	W		X		
210	Anne M. Self	F	W			X	
54	Kelly A. Craig	F	B			X	
71	Donald J. Dragun	M	W				X

*For the Court column, indicate who made the motion to strike the jurors for cause.

C-Court, P-Plaintiff, D-Defense

** Foreperson

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SIXTEENTH JUDICIAL CIRCUIT

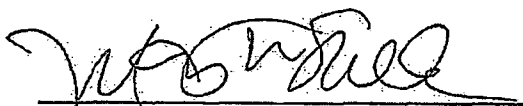
STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF YORK)
STATE OF SOUTH CAROLINA) Indictment number 2013-GS-46-2847, -2848
v.)
DOMINIQUE JULIUS AGURS,)
Defendant.)

NOTICE OF INTENTION TO SEEK
LIFE IMPRISONMENT WITHOUT
POSSIBILITY OF PAROLE SENTENCE

In the above captioned case the Defendant, Dominique Julius Agurs, is charged with Distribution of Crack Cocaine 3rd Offense and Distribution of Crack Cocaine within Proximity of a School, both of which are crimes defined as a "Serious Offense" in South Carolina Code Ann. § 17-25-45(C)(2)(b)(1976 & Supp. 2003).

The State of South Carolina hereby advises that the Defendant has been convicted of two separate counts of PWID Crack Cocaine within Proximity of a School or Park, which is classified as a "Serious Offense" under South Carolina Code Ann. § 17-25-44 (1976 & Supp. 2003). The Defendant has also been convicted of Trafficking in Crack Cocaine, which is also defined by South Carolina Code Ann. § 17-25-45(C)(2) (1976 & Supp. 2003) as a "Serious Offense."

The State of South Carolina through the Solicitor's Office, Sixteenth Judicial Circuit, hereby gives notice that at the trial of the case(s) at bar, which will be scheduled on a date at least ten (10) days after notice to the Defendant, upon a conviction for this, another "Serious Offense," and/or "Violent Offense", the State intends to seek a term of imprisonment for life without the possibility of parole pursuant to South Carolina Code Ann. § 17-25-45(B) (1976 & Supp. 2003).


Matthew W. Shelton
Assistant Solicitor
Sixteenth Judicial Circuit

February 24, 2014
York, South Carolina

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC
2017 JAN -9 AM 8:58
CERTIFIED TRUE COPY

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DOMINIQUE JULIUS AGURS,

APPELLANT

APPELLATE CASE NO. 2014- 000960

FINAL BRIEF OF APPELLANT

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court abuse its discretion by refusing to grant a mistrial where the lead investigator improperly placed Appellant's character and prior arrests at issue by making a comment on direct examination that he "had dealt with [Appellant] before" while assigned to the Street Crimes Unit?

II.

Did the trial court abuse its discretion in admitting Appellant's "mug-shot" photograph into evidence when the State failed to establish that the photograph was necessary to identify Appellant and the "mug-shot" was introduced only to draw attention to the circumstances under which it was taken and to suggest that Appellant had a criminal record; thus making it unfairly prejudicial?

III.

Did the trial court commit reversible error in refusing to grant a mistrial after members of the jury prematurely deliberated before closing arguments as an unsigned note inquired to the judge about photographs presented at trial that were critical to Appellant's defense, and the trial court posited highly suggestive leading questions to the foreman and alternate juror which failed to adequately determine whether premature deliberations took place or negatively impacted Appellant's right to a fair trial?

IV.

Did the trial court abuse its discretion in refusing to grant a new trial where the cumulative effect of the errors was so prejudicial as to deprive Appellant of a fair trial?

STATEMENT OF THE CASE

On December 12, 2013, the York County Grand Jury indicted for Appellant distribution of crack cocaine. R. 244. On February 24, 2014, the State filed notice of intent to seek a sentence of life without parole. R. 5, ll. 1-7.

On April 21, 2014, Appellant proceeded to trial before the Honorable John C. Hayes, III, and a jury. R. 1. Michael G. Mathews represented Appellant, and Assistant Solicitor Mathew Shelton represented the State. The jury found Appellant guilty as charged. R. 235, ll. 1-9. The court sentenced Appellant to life imprisonment without the possibility of parole. R. 241, ll. 25 – R. 242, ll. 1.

This appeal follows.

STATEMENT OF FACTS

On March 5, 2013, at the direction of law enforcement, Michael Tumblin, contacted an individual he knew only as D.J. to purchase one ounce of crack cocaine. R. 8, ll. 3-23. Tumblin, an admitted drug user with a lengthy criminal record, had agreed to work as confidential informant in order to receive cooperation credit and money to pay off outstanding traffic violations. R. 55, ll. 1 – R. 57, ll. 14; R. 111, ll. 12-24. To purchase the drugs, Tumblin was provided with eighty dollars. R. 65, ll. 5-14. Tumblin was searched and then driven by undercover officers to the location of the drug buy. R. 65, ll. 13 – R. 66, ll. 24. He was also equipped with a concealed, chest-mounted camera and microphone to record the transaction. R. 66, ll. 19 – R. 67, ll. 6.

Tumblin entered the target vehicle and left a few seconds later. R. 125, ll. 19-20. The driver of the vehicle never got out of the car and the undercover officers surveilling the area could not see who was in the vehicle or observe what transpired. R. 124, ll. 10 – R. 125, ll. 23. The video footage recorded by Tumblin did not show a hand to hand transaction or an exchange of money.¹ Tumblin left the vehicle and headed toward the undercover car, during his return he walked near to several people and parked vehicles. R. 125, ll. 11-24. Tumblin also briefly walked behind an adjacent building; later claiming to be looking for the police car. *Id.* Once in the police car, Tumblin handed over crack cocaine he claimed to have bought while in the vehicle. R. 128, ll. 16-24. The substance Tumblin produced was determined to be eight tenths of a gram of crack cocaine. R.137, ll. 14-16.

¹ The video footage was entered into the trial record as State's Exhibit No. 2, and is on file with this Court.

During the course of the investigation, Tumblin identified Appellant as the individual he knew as D.J. in a photographic lineup chosen by Investigator Leland Harrelson.² R. 80, ll. 4-18. The lineup included two individuals with significantly lighter complexions than the Appellant. R. 177, ll. 2-6. Tumblin wrote the wrong date on the lineup, indicating it took place on March 5, 2012 instead of March 5, 2013. R. 155, ll. 6-10. Moreover, the time stamp on the undercover video recording indicated that the alleged controlled buy took place several years before the date of the investigation. R. 139, ll. 13-21. In addition, no law enforcement officer signed, dated, or time stamped the last page of the lineup where Tumblin acknowledged that the identification was not the result of intimidation or coercion. *Id.*

Police arrested Applicant on March 21, 2013. R. 169, ll. 4-8. None of the marked buy-money was recovered. R. 222, ll. 21 – R. 223, ll. 6.

Pre-Trial Motions

On April 21, 2014, defense counsel made a series of pre-trial motions. First, counsel objected to the State's plan to introduce Appellant's mug-shot into evidence.³ R. 2, ll. 12-15. Initially, it was thought that Appellant would not be present for trial and so the mug-shot would have assisted the jury in identification. R. 27, ll. 17-19. Appellant was present for trial. The State nonetheless argued that Appellant's mug-shot would still help the jury determine the identification of the individual in the undercover video because the trial was over a year after the buy, so the mug-shot might somehow help the jury more accurately identify Appellant as he appeared at his arrest and that such an identification was relevant to their deliberations. R. 2, 21-

² The photograph line-up was entered into the trial record as State's Exhibit No. 4, and is on file with this Court.

³ This photograph was entered into the trial record as State's Exhibits No. 7 and 8 and is on file with this Court.

24. Despite finding that the State did not need the evidence, in light of Appellant's attendance, the trial court overruled the objection. R. 3, ll. 7-15.

Testimony of Confidential Informant Michael Tumblin

At trial, Tumblin was the State's second witness and the first to testify extensively on the controlled buy. R. 54, ll. 9 – R. 59, ll. 19. The State moved into evidence the video footage and the recording of a telephone call between Tumblin and D.J. R. 64, ll. 6-24; R. 67, ll. 7 – R. 68, ll. 14. Tumblin also testified regarding the above-referenced meeting with D.J. and his subsequent identification of the Appellant.

Testimony of Investigator Harrelson

The State also called Investigator Harrelson to testify. R. 101, ll. 1-17. Harrelson testified on his knowledge of drug sales, how law enforcement uses informants and the particular benefits Tumblin received for his involvement. R. 113, ll. 4 – R. 129, ll. 1. Harrelson then testified as to the chain of custody of the substance that he received from Tumblin following the buy. R. 129, ll. 2 – R. 135, ll. 8. When the State attempted to put a photograph of the substance in Tumblin's hand into evidence, defense counsel objected that under Rule 901 of S.C. R. Evid. there was no testimony authenticating or information supporting that the picture showed crack cocaine. R. 135, ll. 12-16. The court overruled the objection, however the Court did rule that Harrelson could not call the substance crack cocaine until it had been identified. *Id.* at ll. 17-18; R. 138, ll. 2-8.

The State then attempted to enter three photographs into evidence and, upon objection by counsel, the trial court held an *in camera* review. R. 141, ll. 15-20. The photographs purported to show: (1) Appellant in his vehicle taken by Tumblin's concealed camera; (2) the marked money that was used in the alleged drug buy, but never recovered; and (3) a picture of the substance allegedly purchased from Appellant in Tumblin's hand. R. 140, ll. 19-23. The trial court

overruled the objection, but instructed Harrelson not to testify that he believed it was Appellant in the photograph.

When the jury returned, Harrelson testified as to the content of the photographs within the limitations set by the trial court. R. 145, ll. 1-25. However, the State then asked Harrelson if he recognized the driver of the vehicle they observed. R. 146, ll. 1-3. Harrelson answered, “*Yes. I had dealt with him before when I was on the Street Crimes Unit with the City of Rock Hill.*” R. 146, ll. 5-6 (*emphasis added*). Defense counsel promptly objected and moved for a mistrial on the basis that Harrelson brought into issue Appellant’s past criminal record before Appellant has decided whether or not to testify. *Id.* at ll. 13-25. The Court declined to grant a mistrial, “because I don’t believe there is any manifest necessity based on that one interjection.” R. 148, ll. 9-10. The trial court also expressed skepticism that a curative instruction would fix the problem, and instead warned Harrelson not to make such references again. R. 148, ll. 11-14; R. 149, ll. 11-22. Harrelson then testified that he knew Appellant prior to the drug buy and that he identified Appellant based on the video surveillance. R. 150, ll. 9-23.

The State’s next witness, James Long, the records custodian at York County jail, testified about the circumstances in which the mug-shot was taken. R. 184, ll. 1-12. Long stated that he was the records custodian in March of 2013, but that he would have access to records predating his employment. R. 182, ll. 10-16. For unknown reasons, the State twice sought clarification from Long that the photographs were taken as a result of Appellant’s March 2013 arrest. R. 182, ll. 20-22; R. 183, ll. 11-12. On the second occasion, Long replied: “[State’s Exhibits No. 7 and 8] are from his 2013 booking.” *Id.* Before the mug-shot was admitted, defense counsel renewed his objection and was overruled. *Id.* at ll. 14-20. Defense counsel did not cross examine Harrelson. R. 185, ll. 12-15. Appellant did not testify.

Premature Deliberation by the Jury

Before closing arguments, the trial judge received a note from the jury. R. 198, ll. 7-19.

The trial judge explained to the parties:

Now we received [the jury's] note that says *there is a question about the photos of the defendant*. Was it allowed and if so, it was not published to the jury. The *photos are [not] so much of a concern as the fact that they already got a question and they are not supposed to be discussing the case*.

Id. at ll. 14-19 (*emphasis added*). The trial judge then invited the parties to comment, *Id.* at ll. 20-23. The State declined. *Id.* Defense counsel requested a mistrial on the grounds of premature jury deliberation. R. 199, ll. 1-7.

Counsel argued it was obvious the jury was already deliberating and wanted access evidence not published by the State. *Id.* at ll. 8-15. The judge then asked the foreman of the jury, “*I instructed you several times not to discuss the case*, so Mr. Foreman, I hate to put you on the spot, but has the jury been discussing the case?” R. 200, ll. 22-25 (*emphasis added*). The foreman replied “*[t]here was no question [that] came up in any discussions*”. R. 201, ll. 3-4 (*emphasis added*). The foreman did not deny discussions had occurred.

The alternate juror then stepped forward and claimed the question came from him. The alternate explained that he had not discussed this concern with the other jurors. *Id.* at 5-19. The trial judge decided to dismiss the alternate juror. *Id.* The defense then renewed its motion for mistrial which was overruled because the trial court believed dismissing the alternate addressed the issue. R. 202, ll. 14 – R. 203, ll. 4. The trial judge did not give a curative instruction to the remaining jurors and did not question or allow the parties to question the remaining jurors as to other possible deliberations referenced by the foreman’s response.

ARGUMENT

I.

The trial court abused its discretion by refusing to grant a mistrial where the lead investigator improperly placed Appellant's character and prior arrests at issue by making a comment on direct examination that he "had dealt with [Appellant] before" while assigned to the Street Crimes Unit.

Harrelson's comment that "I had dealt with [Appellant] before when I was on the Street Crimes Unit with the City of Rock Hill" was of such a highly prejudicial nature that a curative instruction could not ensure that Appellant would receive a fair trial. R. 146, ll. 4-6. Defense counsel correctly argued that a curative instruction could not solve the prejudice created by the improper comment and that Appellant could not get a fair trial before this jury because "the cat [is] out of the bag." R. 148, ll. 22-25.

The South Carolina Supreme Court has stated that the test for granting a mistrial is whether a "mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). "The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Ferguson*, 376 S.C. 615, 618, 658 S.E.2d 101, 103 (Ct. App. 2008) (citing *State v. Edwards*, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007)). "This Court favors the exercise of discretion of the trial court in determining the merits of [a mistrial] motion in each individual case." *Id.* (citing *State v. Patterson*, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999)). "Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." *Ferguson*, 376 S.C. at 618-19, 658 S.E.2d at 103 (citing *Edwards*, 373 S.C. at 236, 644 S.E.2d at 69).

State v. Johnson, 334 S.C. 78, 91, 512 S.E.2d 795, 803 (1999) (“The prejudicial character of the error must be determined from its relationship to the entire case”). Consequently, for the harmless error rule to apply, the Court must determine “beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.” *State v. Creech*, 314 S.C. 76, 86, 441 S.E.2d 635, 640 (Ct. App. 1993) (citing *Taylor v. State*, 312 S.C. 179, 439 S.E.2d 820 (1993)).

While an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced. *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996). “The vital inquiry usually is whether or not the verdict was substantially influenced by the impropriety.” 75A Am.Jur.2d *Trial* § 502 (1991) (footnotes omitted). Thus, to warrant reversal, “the errors must adversely affect [the defendant’s] right to a fair trial.” *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999).

Here, the “ends of public justice” require Appellant receive a new trial due to the prejudice created by Harrelson’s improper comment for three reasons. First, the improper character evidence is especially prejudicial because it emphasized to the jury that Appellant had been involved in street crimes, clearly implying narcotics, in the past and thus had the propensity to be involved in the drug trade. *Simpson*, 325 S.C. at 37, 479 S.E.2d at 57; *See also State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (when the previous alleged bad act is similar to the one for which the [defendant] is being tried, the danger of prejudice is enhanced).

Second, the jury could not have ignored Harrelson’s improper comment due to its “highly prejudicial nature” and the numerous mistakes and gaps in evidence produced as a result of law enforcement’s suboptimal investigation. *State v. Wilson*, 274 S.C. 635, 637-38, 266 S.E.2d 426, 427 (1980) (improper evidence of past crimes raises a legally unsound presumption of guilt in

the minds of the jurors and the danger of prejudice is enhanced when there has been no trial and conviction for the alleged previous criminal activity).

For example, the State's video surveillance did not show an actual hand to hand exchange of drugs, none of the marked dollar bills were recovered, the time stamp on the video surveillance was inaccurate, and the date which the confidential informant signed the lineup identification was wrong. R. 14, ll. 13-25; R. 117, ll. 17-21; R. 139, ll. 12-23; R. 222, ll. 15-20. In addition, Tumblin admitted that he hoped to get a reduced sentence in his case for assisting law enforcement. R. 111, ll. 1-24. Finally, Tumblin claimed that law enforcement showed him the black and white identification lineup before the alleged controlled buy and the lineup included two individuals with a significantly lighter complexion than Appellant. R. 26, ll. 2 R. 27, ll. 24.

Third, the State "enhanced the prejudice" by highlighting the reliability and expertise of Harrelson no fewer than thirteen times in an effort to explain away the weaknesses and inconsistencies in the State's case. R. 219, ll. 21-25; R. 222, ll. 23-25; R. 224, ll. 11-16; R. 225, ll. 4-24; R. 226, ll. 14-19; R. 227, ll. 9-24; R. 230, ll. 14-17. Crucially, the State assured the jury the "defense attorney may suggest to you that we don't know that this is [Appellant] independent of [the informant's] identification from the photo lineup. . . . *but Officer Harrelson knew him as well. Officer Harrelson identified him as [Appellant].*" R. 229, ll. 1-5 (*emphasis added*). This is a direct reference to the earlier improper testimony.

The State also used Harrelson's identification of Appellant to boost the credibility of the confidential informant, "[t]he evidence presented suggests that [the informant] is telling the truth. Even though he didn't know a full name.... *You heard Harrelson testify that's the man.*" R. 230, ll. 13-18 (*emphasis added*).

Therefore, as a result of the trial court's abuse of discretion and looking to the trial record as a whole, "the public's interest in a fair trial designated to end in just judgment" did not occur. *Prince*, 279 at 33, 301 S.E.2d at 472.

II.

The trial court abused its discretion in admitting Appellant's "mug-shot" photograph into evidence when the State failed to establish that the photograph was necessary to identify Appellant and the "mug-shot" was introduced only to draw attention to the circumstances under which it was taken and to suggest that Appellant had a criminal record; thus making it unfairly prejudicial.

Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) (citing Rule 401, SCRE (providing the definition of relevant evidence)). Although photographs may be used to corroborate other evidence, it is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial. *State v. Edwards*, 194 S.C. 410, 10 S.E.2d 587 (1940); *See* Rule 402, SCRE ("Evidence which is not relevant is not admissible").

The introduction of a "mug-shot" of a defendant is a reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication.⁴ *State v. Denson*, 269 S.C. 407, 237 S.E.2d 761 (1977) (citing *United States v. Harrington*, 490 F.2d 487 (2d Cir.1973)); *see also State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986)(in-court identification by victim and booking date on photograph made introduction of mug-shot a reversible error); *see also State v. Robinson*, 274 S.C. 198, 262 S.E.2d 729 (1980) (mug-shot admissible because defense emphasized informant's inability to identify defendant in line-up). Because of its prejudicial impact, our Supreme Court

⁴ While a reversible error, the erroneous admission of a defendant's "mug-shot" is subject to harmless error analysis. *State v. Traylor*, 360 S.C. 74, 85, 600 S.E.2d 523, 528 (2004) (citing *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000), *cert. denied* 531 U.S. 1093 (2001)).

admonished: “we fervently caution trial court judges against utilization of mug shot photos unless absolutely necessary.” *State v. Traylor*, 360 S.C. 74, 85, 600 S.E.2d 523, 528 (2004).

In this case, the Appellant’s mug-shot was irrelevant, unnecessary to the State’s case and presented solely for the improper purpose of drawing attention to Appellant’s past criminal record in order to suggest that Appellant was guilty in the present case. The State sought to introduce the mug-shot photograph from Appellant’s arrest because the State alleged it “can serve the jury in helping them to identify - helping them to find that he has been properly identified, [Appellant] as the individual who sold the crack on the day alleged.” R. 3, 3-6. Defense counsel objected, arguing that the photograph is not relevant because the jury had watched the video recording and Appellant was present in the courtroom. R. 34, ll. 12-19.

The trial court committed a reversible error in admitting the mug-shot and the State’s justification for using the mug-shot argues against well-established precedent in *Tate*, *Denson*, *Robinson*, and *Traylor*. Turning to the first admissibility factor, Appellant was present at trial for identification by Tumblin, meaning the State had no demonstrable need for the mug-shot. Finally, the State presented no evidence indicating that Appellant’s physical appearance had changed since the date of the video recording.

Turning to the second and third factors, Harrelson’s testimony regarding having “dealt with” Appellant during his time at street crimes as well as Long’s testimony regarding the booking process; served to reinforce to the jury that Appellant must have been a drug dealer because he was known to law enforcement in the street crimes unit, had been arrested and appeared in a mug-shot. Moreover, the State’s questioning of Long about the specific date the mug-shot was taken, clearly implies to the jury that Appellant had other mug-shots on record that

Long had access to. R. 182, ll. 20-22; R. 183, ll. 11-12. Accordingly, the sole purpose of the mug-shot in the present case was to improperly draw attention to its origin, and imply guilt.

Thus, the trial court committed a reversible error in admitting Appellant's mug-shot because the State had no identification related need for it and used it only to establish Appellant's guilt.

III.

The trial court committed reversible error in refusing to grant a mistrial after members of the jury prematurely deliberated before closing arguments as an unsigned note inquired to the judge about photographs presented at trial that were critical to Appellant's defense, and the trial court posited highly suggestive leading questions to the foreman and alternate juror which failed to adequately determine whether premature deliberations took place or negatively impacted Appellant's right to a fair trial.

The constitutional implications of juror misconduct strike at the fundamental fairness of judicial proceedings. *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008) (holding that juror testimony involving internal misconduct "may be received when necessary to ensure fundamental fairness").

In *State v. Aldret*, the Supreme Court set forth the framework for analyzing allegations premature juror deliberation: "the trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial." 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999). The *Aldret* Court noted, "If requested by the moving party, the court may *voir dire* the jurors and, if practicable, tailor a cautionary instruction to correct the ascertained damage." *Id.* The misconduct must relate to a material matter and must indicate an influence of bias or prejudice of the jurors. *State v. Grovenstein*, 335 S.C. 347, 352, 517 S.E.2d 216, 218 (1999). The granting or refusing of a motion for a mistrial will not be disturbed on appeal absent an abuse of discretion. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000).

The internal misconduct in the present case directly implicated the Appellant's right to due process of law, and right to fundamental fairness as the juror's questions dealt with the identification of the perpetrator. R. 198, ll. 13-19; *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783 (1915). Moreover, the judge's leading questions to the foreman, prefaced with a stern reminder of his pre-trial instructions to the jurors, were highly suggestive of the answers desired by the court. R. 200, ll.

22 – R. 201, ll. 19. The trial court concluded that dismissing the alternate juror would cure any prejudice, but did not provide a curative instruction to the remaining jurors or allow further questioning. *Id.* at 14-21. Nor did the trial court properly consider the applicable law as premature deliberation by even a single juror is in error. *State v. McGuire*, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979).

Appellant was prejudiced because this case hinged on whether the State had established beyond a reasonable doubt that Appellant sold drugs to the informant and the inquiry raised by the jury's question is clearly concerned with the quantity of the State's evidence on the issue of identification. R. 201, ll. 5-8. The photographs in question are the Appellant's mug-shot and the still photograph allegedly of Appellant in a vehicle which was purported to have been taken from the Tumblin's undercover video. *Id.* This is crucial evidence as the video footage was inconclusive and failed to show a drug transaction.

The deliberations and note allowed the State the opportunity to tailor their closing argument to the issue of identity, thus leading the State to strategically emphasize Harrelson's improper remarks about recognizing Appellant from the Street Crimes Unit and Appellant's mug-shot. R. 219, ll. 21-25; R. 222, ll. 23-25; R. 224, ll. 11-16; R. 225, ll. 4-24; R. 226, ll. 14-19; R. 227, ll. 9-24; R. 230, ll. 14-17. Furthermore, the trial court failed to interview the individual jurors or ask the foreman to explain what he meant by "any discussions," despite requests for more questions by the parties. R. 199, ll. 8-25; R. 201, ll. 3-8.

Appellant submits that the jury prematurely deliberated on the evidence concerning the identity of the perpetrator and that Appellant was prejudiced by these deliberations. The judge should have ordered a mistrial. At a minimum, the trial judge should have taken additional juror testimony on this issue of fundamental fairness and due process.

IV.

The trial court erred in refusing to grant a new trial where the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial.

Discussion

In *State v. Johnson*, our Supreme Court held that an appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine. 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). Specifically, the errors must adversely affect a defendant's right to a fair trial to qualify for reversal. *Id.*

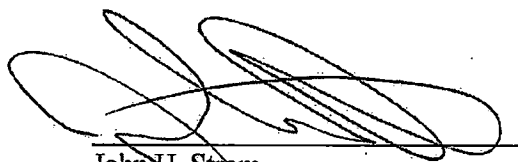
Even if this Court finds that the three previous errors standing alone do not require reversal, the cumulative effect of those errors and others, were so prejudicial as to deprive Appellant of a fair trial. *See Johnson*, 334 S.C. at 93, 512 S.E.2d at 803. For example: (1) the trial court admitted Appellant's "mug-shot" photograph despite Appellant being present for trial and its obvious implication of him being a "perp"; (2) law enforcement's use of a suggestive lineup when asking the informant to identify Appellant included two individuals of significantly different complexion than Appellant; (3) trial court's denial of a mistrial when the lead investigator stated he knew Appellant from dealing with him during his time in the street crimes division; and (4) the trial court's denial of a mistrial motion when the jury prematurely deliberated on identification evidence and the court failed to adequately question the jurors about possible deliberations.

Accordingly, the trial court erred in refusing to grant a new trial because the cumulative effect of the errors were so prejudicial as to deprive Appellant of a fair trial. *See Johnson*, 334 S.C. at 93, 512 S.E.2d at 803; *see also State v. Peterson*, 287 S.C. 244, 246, 335 S.E.2d 800, 801 (1985) (*overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)) (combination of numerous errors committed by the trial court remand for a new trial).

CONCLUSION

By reason of the foregoing arguments, Appellant's convictions should be reversed and this case remanded to the York County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, consisting of several large, overlapping loops and a long horizontal stroke extending to the right.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of May, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and 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."

May 13th, 2015



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

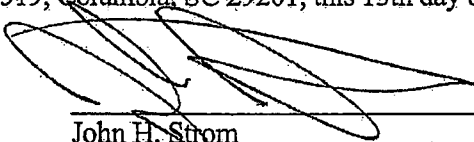
DOMINIQUE JULIUS AGURS,

APPELLANT

APPELLATE CASE NO. 2014- 000960

CERTIFICATE OF SERVICE

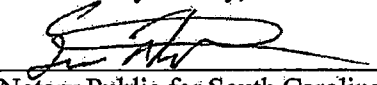
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mary W. Leddon, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of May, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of May, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

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STATEMENT OF ISSUES ON APPEAL

I.

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The trial court did not abuse its discretion in denying Appellant's request for a mistrial based on a note from the alternate juror prior to closing arguments. There were no discussions among the jurors, and the alternate's note was written and submitted to the court by him in order to clarify a procedural matter. Therefore, there were no premature deliberations. Moreover, any possible prejudice was removed through the court's instructions and dismissal of the alternate juror. As such, the extreme remedy of a mistrial was not warranted.

IV.

There is no error, much less cumulative error, and any preserved errors are harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. A defendant is entitled to a fair trial, not a perfect one. In light of the overwhelming evidence of guilt, even a perfect trial would not prevent the inevitable result of Appellant's conviction.

STATEMENT OF THE CASE

Dominique Julius Agurs ("Appellant") was indicted for Distribution of Crack Cocaine. (R. pp. 244-45) A notice of intent to seek life without parole was served on February 24, 2014.¹ (R. pp. 4-6) Appellant proceeded to a jury trial before the Honorable John C. Hayes on April 21-22, 2014. Appellant was found guilty. As this was a "third strike" offense, Appellant was sentenced to life imprisonment. (R. p. 241)

¹ Appellant declined a plea offer of twelve years, a plea offer of eighteen years, and a plea offer of twenty years. (R. pp. 4-6)

STATEMENT OF FACTS

On March 5, 2013, officers with the York County Drug Enforcement Unit ("DEU") utilized a confidential informant ("CI") to make a controlled drug purchase. (R. pp. 41-49) The CI approached DEU officers after he received several traffic tickets which could have resulted in up to 30 days' imprisonment. (R. pp. 57-58) He entered an agreement to "work off" the charges by attempting to make controlled purchases of narcotics. (R. pp. 58-59, pp. 76-77, pp. 111-13)

The CI informed officers he could purchase crack cocaine from "a black guy named DJ."² (R. p. 61, p. 113) He had known DJ for about 6 months and was able to telephone him to set up a drug deal. (R. pp. 61-62) He made the phone call from his cell phone at the Rock Hill Law Enforcement Center. (R. p. 62, p. 113) The call was recorded. (R. p. 62, p. 114) The CI arranged to meet DJ to purchase a gram of crack cocaine for \$80. (R. pp. 64-65)

The CI was thoroughly searched at the Rock Hill Law Enforcement Office prior to the transaction. (R. pp. 44-45, pp. 50-51, p. 66, p. 115) He was outfitted with video and audio surveillance equipment. (R. pp. 45-46, p. 52, pp. 66-67, pp. 115-16) The CI was monitored by a surveillance team. (R. pp. 46-47) Officer Tanya Ervin ("Ervin") drove the CI to the buy location in an undercover vehicle. (R. p. 47, p. 53, pp. 65-66, pp. 91-96) In a further phone call with DJ the meeting location was changed to a Burger King on Saluda Street. (R. p. 69, p. 95, p. 120)

The deal was visually monitored from a distance by Ervin and a surveillance team. The team also had live feed of the audio. (R. p. 97, p. 123) Ervin parked across the street at a Dollar General store, and the CI walked over to the Burger King to wait for DJ.

² The initials "DJ" coincide with Appellant's first name and middle name, Dominique Julius.

(R. p. 69, pp. 96-97, pp. 121-22) DJ pulled up in a white car, and the CI got in. (R. p. 70, pp. 124-25) Crack cocaine was visible in the console of the car. (R. p. 70) The CI gave DJ \$80 and took the crack cocaine in the console. (R. pp. 70-71, pp. 84-85) The CI walked back across the street and rode back to the police department with Ervin. (R. p. 71, pp. 87-88, pp. 98-100, p. 122)

Back at the police department, the CI gave the crack cocaine he purchased from DJ to Investigator Leland Harrelson ("Harrelson"). (R. p. 72, pp. 126-31) Harrelson then showed him a six-photograph lineup. (R. pp. 73-74, pp. 151-57) The CI identified Appellant as the man he knew as "DJ." (R. p. 74, pp. 79-81) The CI also identified Appellant in court. (R. pp. 75-76) Following his arrest on March 21, 2013, during booking Appellant provided the same phone number the CI had dialed to initiate the drug transaction. (R. p. 114, pp. 159-60) The substance purchased by the CI was ultimately determined to be .53 grams of crack cocaine. (R. p. 191)

ARGUMENT

I.

The trial court did not abuse its discretion in denying Appellant's request for mistrial where (1) the police officer's comment did not directly reference prior criminal history and was, at worst, an inadvertent vague reference and (2) the State did not attempt to introduce Appellant's prior criminal record.

"A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citations omitted). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." Id.

In the present case, Harrelson was asked if he was able to identify the driver of the white vehicle based on the video. (R. p. 146) Harrelson responded that he knew the individual prior to the date of the drug buy because "[Harrelson] had dealt with him before when [Harrelson] was on the Street Crimes Unit with the City of Rock Hill." (R. p. 146) Appellant immediately objected and moved for a mistrial because Harrelson's

response “brought in information that – as to [Appellant’s] past history.” (R. pp. 146-47) The trial court declined to grant a mistrial, finding there was no “manifest necessity” to do so based on that single answer. (R. p. 148) Appellant agreed with the trial court that a curative instruction would only call more attention to the comment and therefore should not be given. (R. p. 148) The trial court did not abuse its discretion in denying the mistrial.

Harrelson’s testimony that he recognized Appellant is not objectionable; the only portion of Harrelson’s answer at issue is that he recognized Appellant from his police work with the street crimes unit. However, Harrelson’s testimony that he knew Appellant from his police work did not directly indicate that Appellant had any sort of criminal history. Police officers undoubtedly know many people in a given locality from their work. Police officers have contact not only with the people they arrest but also with victims of crime and the general community in which they work. Harrelson did not indicate that he knew Appellant from previous arrests or convictions, only that he knew Appellant from his work in the street crimes unit in Rock Hill.³ The testimony certainly did not indicate any prior bad act and certainly did not allude to any drug-specific history.⁴ It was never again referenced that Harrelson knew Appellant from police work.

The present case most closely resembles State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). In Council, a SLED agent testified that he retrieved a fingerprint card from SLED records for comparison. Council moved for a mistrial, arguing that the jury was aware from this testimony that Council had a prior criminal record. As in the present

³ Nothing in the record indicates the actual context of Harrelson’s knowledge of Appellant.

⁴ In fact, Harrelson testified that he now works with the City of Rock Hill in the drug enforcement unit, a position he had held for 4 years. (R. p. 101) Therefore, reference to the street crimes unit would not lead to an inference of prior narcotics arrests as it apparently was a separate entity.

case, the defense did not desire a curative instruction, and the trial court agreed. The Supreme Court found that “it is questionable whether the jury even understood the implication of [the agent’s] statement.” *Id.* at 12, 515 S.E.2d 514. The Supreme Court found the testimony was “only an inadvertent vague reference ... to [the defendant’s] prior criminal record,” and the Court noted that the State never attempted to introduce the defendant’s criminal record. *Id.*

Even if Harrelson’s testimony is considered an oblique reference to a criminal past, “[a] vague reference to a defendant’s prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes.” *State v. Thompson*, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003). See also *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) (noting defendant’s involvement in illegal narcotics was merely suggested and no testimony was presented concerning such behavior where witness was asked if defendant was involved in the drug business), *State v. Wiley*, 387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010) (mention of outstanding warrant in State’s opening argument to explain basis for traffic stop not sufficiently prejudicial to warrant mistrial) As such, Harrelson’s statement did not warrant a mistrial.

II.

The trial court did not abuse its discretion in admitting the booking photos of Appellant taken when he was arrested for the current offense. The photos were relevant, and it was made clear that the photos were taken when Appellant was arrested for the current offenses. As such, the photographs in no way suggest that Appellant had a prior criminal record.

Appellant expressed concern with the introduction of the booking photo from his arrest for the current charge on March 21, 2013, during pre-trial motions. (R. pp. 2-3)

Defense counsel explained that the case had been called for trial on prior occasions when Appellant was not present, and on those occasions the booking photo was needed to show Appellant for comparison with the video of the CI buy. (R. p. 2) Defense counsel stated that because Appellant was present for trial, it was not necessary to introduce the photo. (R. pp. 2-3) Specifically, Appellant's objection was articulated as "They don't need photographs. They have the opportunity to look at my photo- my client and with him being present if that piece of evidence comes in at this point, Your Honor." (R. p. 3, lines 10-13.) The State argued that the photo would assist the jury in determining that Appellant was properly identified as the person in the video. (R. pp. 2-3) The trial court overruled the objection pre-trial and again when the booking photos were introduced. (R. p. 3, p. 184)

As a preliminary matter, Appellant's objection was not specific nor did it raise any concern regarding the fact that any "mug shot," as such, was inadmissible. "[A] specific objection to the admission of evidence must be made to preserve the issue for appeal." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." Id. "The same ground argued on appeal must have been argued to the trial judge." Id.

Even if preserved as an objection based on relevance, there was no error in admitting the photographs. Appellant's arguments are without merit because the booking photo was relevant to identification and because its probative value substantially outweighed any danger of undue prejudice. The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the

admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006); State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007); State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) (overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001); State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

As a general rule, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treatment of Corley, 353 S.C. 451, 577 S.E.2d 451 (2003); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); Rule 401, SCRE ("‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

Here, the identity of the person who met with the CI and sold him crack was relevant to guilt or innocence at trial, particularly where Appellant questioned the photo lineup (R. pp. 209-10), questioned the time stamp on the video (R. pp. 170-71, pp. 215-16), and questioned the credibility of the CI who identified Appellant. An alibi defense was also mentioned in pretrial discussions, and the solicitor may have anticipated that such a defense might be raised. (R. p. 4) The booking photos had a tendency to make the determination of identity more probable than it would be without the photos; therefore

the photos are relevant. Rule 401, SCRE. In this regard, it is particularly interesting to note that the booking photos reveal that Appellant had a fairly unique thin chinstrap beard when he was arrested just over 2 weeks after the undercover purchase. (State's Exhibits 7 and 8) The still photo from the undercover buy shows the suspect with the same distinctive thin chinstrap beard. (State's Exhibit 3) While it is true that jurors could view Appellant in court and compare his appearance to the video, it is better to have them compare the way he looked at the time of the incident to the video.⁵

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE; see also State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. Hamilton, 344 S.C. at 357, 543 S.E.2d at 593. The appellate courts review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. Id. at 358, 543 S.E.2d at 593. See Aleksey, 343 S.C. at 35, 538 S.E.2d at 256 (trial judge is given broad discretion in ruling on questions concerning relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion).

Appellant failed to argue any prejudice from the photos in his objection to the trial court. On appeal, Appellant argues the introduction of the photos from his *current* arrest

⁵ The trial occurred more than a year after the initial CI purchase. A person's appearance can certainly change over the course of a year, particularly as to features such as facial hair.

were “presented solely for the improper purpose of drawing attention to Appellant’s past criminal record in order to suggest that Appellant was guilty in the present case.” There is no indication in the booking photo from his *current* arrest that he was ever arrested in the past, much less that he had any prior criminal record. The arrest on March 21, 2013, was for the offense for which he is on trial, and this was made clear to the jury. (R. pp. 157-58, pp. 181-85) Appellant’s assertion of prejudice requires a premise that if a person is arrested once, he must have been arrested before. If such were the case, any person on trial would be prejudiced by the imagined existence of a prior record. This is an unreasonable logical leap where, as here, the State went to great lengths to ensure that the jury understood the photos were from the arrest for the charges for which he was on trial. Since Appellant was on trial, it should come as no great surprise that he was arrested and booked in this case. In fact, the trial court instructed the jury that the fact Appellant was charged raises no inference of guilt. (R. p. 232)

Appellant points to the three criteria for admission of a “mug shot” from State v. Denson, 269 S.C. 407, 412, 237 S.E.2d 761, 763-764 (1977):

- (1) The Government must have a demonstrable need to introduce the photographs; and
- (2) The photographs themselves, if shown to the jury must not imply that the defendant has a prior criminal record; and
- (3) The manner of introduction at trial must be such that it does not draw particular attention to the source or implication of the photographs.

The rationale for the three criteria outlined in Denson is that such photographs can be prejudicial where they imply a defendant’s prior bad acts. State v. Traylor, 360 S.C. 74, 85, 600 S.E.2d 523, 528, n. 12 (2004). There was no such concern in the present case. It was made clear to the jury that the photograph was taken on March 21, 2013, just over 2

weeks after the CI buy on March 5, 2013, when Appellant was arrested for that CI buy. (R. pp. 157-59, pp. 181-85) As such, the photograph raised no implication of a prior bad act; it was associated only with the alleged crimes for which Appellant was on trial. Because the picture did not raise an inference of prior criminal activity, the trial court did not abuse its discretion in admitting the photograph. *Id.* (no prejudice to defendant where jury was informed that mug shots were taken upon his arrest for charges on trial); State v. Washington, 658 S.W.2d144 (Tenn. Crim. App., 1983) (where mug shot of defendant admitted at trial bore the date of the offense charged at the trial, pictures did not raise inference of prior criminal activity and were therefore properly admitted). Further, any error in the admission was harmless, particularly in light of the overwhelming evidence of Appellant's guilt.

III.

The trial court did not abuse its discretion in denying Appellant's request for a mistrial based on a note from the alternate juror prior to closing arguments. There were no discussions among the jurors, and the alternate's note was written and submitted to the court by him in order to clarify a procedural matter. Therefore, there were no premature deliberations. Moreover, any possible prejudice was removed through the court's instructions and dismissal of the alternate juror. As such, the extreme remedy of a mistrial was not warranted.

After the State rested and Appellant informed the court he would not testify, the court received a note from the jury. (R. p. 198) The note inquired about the booking photos of the defendant, asking if the photos were allowed and, if so, why they were not shown to the jury. (R. p. 198) Appellant moved for a mistrial, arguing the jury's note indicated they had failed to follow the court's instructions not to consider or discuss the case until they were told to do so. (R. pp. 198-99) The trial judge took the motion for

mistrial under advisement and summoned the jury to the courtroom.⁶ (R. pp. 199-200) The trial judge asked the foreman whether the jury had been discussing the case. (R. pp. 200-01) The foreman replied that there were no discussions. (R. p. 201) The alternate then indicated he personally wrote the note because “it was just a question that [he] had [him]self,” and that there had been no discussions about the question. (R. p. 201) The alternate juror was dismissed. (R. p. 201) The trial court denied the Appellant’s motion for mistrial, noting that any issue had been cured. (R. pp. 202-03)

Appellant’s argument fails for several reasons. First, Appellant’s argument fails because there was no actual deliberation. Jurors are not to *discuss* the case before it is given to them for consideration. The court’s inquiry indicates that no jurors discussed or were even aware of the alternate’s question; the alternate only conveyed his question to the trial court. As such, the alleged “deliberation” occurred only inside the mind of the alternate. Premature deliberations are forbidden because “the human mind is constituted such that when a juror *declares* himself, touching any *controversy*, he is apt to stand by his *utterances to the other jurors* in defiance of evidence.” State v. McGuire, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979). [Emphasis supplied.] A juror is permitted to “keep his own counsel,” though he may not express his thoughts on the case to other jurors. Id. Here, the alternate juror made no declarations or utterances to his fellow jurors, and his note to the judge did not touch on any matter in controversy. In the absence of actual premature deliberation, Appellant’s argument for a mistrial on that basis fails.

Further, State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) is instructive in this matter. In Hoffman, on the fourth day of trial, the jury sent out a note asking for clarification of a witness’ testimony, whether a jury had the right to ask for clarification

⁶ The trial judge agreed with defense counsel’s suggestion that the entire jury should be brought in “so that if somebody disagrees with what the foreman says, they can be – their opinion can be voiced.” (R. p. 200)

of testimony, and whether there was a procedure where a juror could ask a question of a witness. The Hoffman court first noted that the trial judge had not condoned premature deliberations and in fact gave a standard instruction forbidding premature deliberations. The trial judge found that “the note showed that the jury was merely attempting to define their role in the trial process rather than deliberating on the merits.” Id. at 392, 440 S.E.2d 873. In affirming the trial court’s denial of the motion for mistrial, the Hoffman court found the judge’s findings supported by the record and any potential harm cured by the instruction issued regarding premature deliberations.

In the present case, as in Hoffman, the trial court gave ample instruction during the trial regarding premature deliberations. (R. pp. 34-35, p. 90, p. 200) Further, as in Hoffman, the juror’s question indicates a procedural concern more than any consideration of the merits of the case. The alternate merely asked if the photos were allowed into evidence and, if so, why they were not shown to the jury. The photos were, in fact, allowed in evidence. The juror’s question seems particularly logical in light of the fact that other photographs admitted into evidence had been published to the jury when admitted. (See for example R. p. 144, p. 154) As such, the present case does not warrant the extreme measure of a mistrial.

Moreover, Appellant failed to show any prejudice. The trial court in the present case also removed the alternate from the case, presumably in an abundance of caution. Combined with the trial court’s instructions, the removal of the alternate juror certainly prevented any possible prejudice. In grasping at some conceivable prejudice, Appellant argues that the solicitor was able to tailor his closing argument as to the issue of identity. Interestingly, the solicitor had prepared a Power Point slide presentation for his oral argument. (R. p. 203) He shared the entire presentation with defense counsel as soon as

the juror issue was resolved. (R. p. 203) The solicitor would have to be quick indeed in order to create his presentation within seconds of finding out about the juror question. If anything, the defense, in reviewing the Power Point, gained an advantage by previewing the solicitor's argument before making its own. (R. pp. 203-05)

IV.

There is no error, much less cumulative error, and any preserved errors are harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. A defendant is entitled to a fair trial, not a perfect one. In light of the overwhelming evidence of guilt, even a perfect trial would not prevent the inevitable result of Appellant's conviction.

This case does not warrant reversal on cumulative error. As argued above, the State submits there were no trial court errors to consider for a cumulative error analysis. The record reflects the trial court exercised its discretion soundly in each instance. However, the cumulative effect of any errors this Court might find fails to undermine the fact that Appellant did receive a fair trial. Our courts repeatedly stated that "... the Constitution entitles a criminal defendant to a fair trial, not a perfect one." State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998) (finding reversal on cumulative error doctrine not warranted).

The evidence of Appellant's guilt was simply overwhelming. The CI identified the man known to him for several months prior to the buy as "DJ" (the initials of Appellant's first and middle name) from a lineup and in court. The CI's interaction with Appellant was recorded on video. The video makes it clear that the man in the Cadillac was Appellant. In comparing the still shot from the video and Appellant's booking photo approximately two weeks later, it is clear that Appellant is indeed the man in the video. His fairly distinctive thin chinstrap beard in both the video and booking photos helps to confirm the identification. The jury also had the opportunity to view Appellant in court to

determine whether he was the man in the video. The CI was carefully searched before the buy, and he was monitored visually and electronically throughout the operation. The CI returned to law enforcement with crack cocaine. The conversation with the man in the car in which the CI asks about the weight of the substance confirms that the transaction occurred at that point. When he was booked, Appellant provided as his phone number the same number the CI had called to set up the meeting. Appellant certainly had a fair trial, and no alleged error or combination of the alleged errors would have changed the result.

CONCLUSION

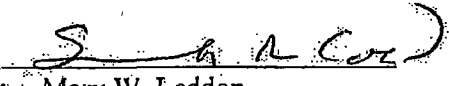
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

May 20, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Appellate Case No. 2014-000960

THE STATE,

Respondent,

v.

DOMINIQUE JULIUS AGURS,

Appellant.

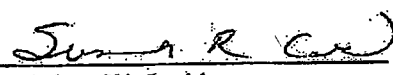
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and 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."

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ATTORNEYS FOR RESPONDENT

May 20, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Appellate Case No. 2014-000960

THE STATE,

Respondent,

v.

DOMINIQUE JULIUS AGURS,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 20th day of May, 2015.


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

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

The State, Respondent,

v.

Dominique Julius Agurs, Appellant.

Appellate Case No. 2014-000960

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2015-UP-562
Heard October 1, 2015 – Filed December 23, 2015

AFFIRMED

Appellate Defender John Harrison Strom, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mary Williams Leddon, both of
Columbia; and Solicitor Kevin Scott Brackett, of York,
for Respondent.

PER CURIAM: Dominique Julius Agurs appeals his conviction of distribution of crack cocaine, arguing the trial court erred in (1) refusing to grant a mistrial when an investigator improperly placed Agurs's character and prior arrests at issue, (2)

admitting Agurs's booking photographs when the State failed to establish the photographs were necessary to identify him, (3) refusing to grant a mistrial after members of the jury prematurely deliberated before closing arguments, and (4) refusing to grant a mistrial when the cumulative effect of the errors was so prejudicial it deprived Agurs of a fair trial. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in refusing to grant a mistrial when an investigator improperly placed Agurs's character and prior arrests at issue: *State v. Crim*, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997) ("[T]he decision to grant or deny a mistrial is within the sound discretion of the trial [court]."); *State v. Stanley*, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) ("A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." (quoting *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000))); *State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) (stating the test for granting a mistrial is whether a "mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment"); *State v. Thompson*, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."); *State v. George*, 323 S.C. 496, 511, 476 S.E.2d 903, 912 (1996) (concluding a mistrial was not warranted when an appellant's "possible drug dealing was merely suggested and no testimony was presented concerning such behavior"); *State v. Wiley*, 387 S.C. 490, 496, 692 S.E.2d 560, 563 (Ct. App. 2010) (concluding the mention of an outstanding warrant in an opening argument to explain the basis of the traffic stop was not sufficient prejudice to warrant a mistrial).²

2. As to whether the trial court erred in admitting Agurs's booking photographs when the State failed to establish the photographs were necessary to identify him: *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) (stating a

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

² We note Agurs's argument the trial court erred in allowing the State to refer to Investigator Harrelson's statement during closing arguments is unpreserved. See *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion that results in prejudice to the defendant); *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999) ("Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy."); *State v. Denson*, 269 S.C. 407, 412, 237 S.E.2d 761, 763-64 (1977) (holding the introduction of a booking photograph of a defendant is not reversible error if (1) the State has demonstrated a need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication).

3. As to whether the trial court erred in refusing to grant a mistrial after members of the jury prematurely deliberated before closing arguments: *Harris*, 340 S.C. at 63, 530 S.E.2d at 627-28 ("The granting or refusing of a motion for a mistrial . . . will not be disturbed on appeal absent an abuse of discretion . . ."); *Stanley*, 365 S.C. at 34, 615 S.E.2d at 460 ("A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." (quoting *Harris*, 340 S.C. at 63, 530 S.E.2d at 628)); *State v. Aldret*, 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999) (setting forth the framework for analyzing allegations of premature juror deliberation: "[T]he trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. If requested by the moving party, the court may *voir dire* the jurors and, if practicable, 'tailor a cautionary instruction to correct the ascertained damage.'" (quoting *United States v. Resko*, 3 F.3d 684, 695 (3d Cir. 1993))).

4. As to whether the trial court erred in refusing to grant a mistrial when the cumulative effect of the errors was so prejudicial it deprived Agurs of a fair trial: *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) ("For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented and with sufficient specificity to inform the [trial court] of the point being urged by the objector." (citation omitted)); *State v. Beekman*, 405 S.C. 225, 236, 746 S.E.2d 483, 489 (Ct. App. 2013) (concluding the cumulative error doctrine must be specifically raised to the trial court to be preserved for review).

AFFIRMED.

FEW, C.J., and KONDUROS and LOCKEMY, JJ., concur.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

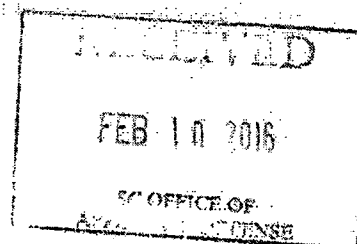
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February 10, 2016

The Honorable David Hamilton
PO Box 649
York SC 29745-0649

REMITTITUR

Re: The State v. Dominique J. Agurs
Lower Court Case No. 2013GS4604248
Appellate Case No. 2014-000960



Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
John Harrison Strom, Esquire
Mary Williams Leddon, Esquire
Kevin Scott Brackett, Esquire

CERTIFIED TRUE COPY

STATE OF SOUTH CAROLINA

2016 DEC 28 AM 9:40

COUNTY OF

YORK

IN THE COURT OF COMMON PLEAS

Dominique Julius Agurs

Full name and prison number (if any) of Applicant.

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

PART I, SECT 9 SC CONT REQUEST
FOR SPEEDY REMEDY:

INSTRUCTIONS - READ CAREFULLY

MANER V. MANER (1983)

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention York County
2. Name and location of Court which imposed sentence General Session
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 (a) 2013-ES-46-02448 Distribution of Criminal
 (b) _____
 (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) LIFE w/o Parole 4-22-2014
 (b) _____

Revised 3/2003

pgs-8-13
ATTACHED.

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SC court of appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. JAN 2016
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

* PROSECUTORIAL AND JUDICIAL MISCONDUCT
 > PROCEDURAL AND SUBSTANTIVE EVIDENCE OF GROSS

- (a) VIOLATIONS OF 4th, 5th, 6th 8th AND 14th AMENDMENTS
- (b) INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL
- (c) VIOLATION SC CODE OF LAWS (AS STATED) INTER ALIA

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) SEE ATTACHED
- (b)
- (c)

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. NO
 - ii.
 - iii.
 - iv.
- (b) the name and location of the Court in which each was filed:
 - i. NO
 - ii.
 - iii.
 - iv.
- (c) the disposition thereof:
 - i. NO
 - ii.
 - iii.

- iv. _____
- (d) the date of each such disposition:
- i. NA
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. NA
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

- i. No
- ii. _____
- iii. _____

- (b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) No
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? NOT LEGALLY INDICTED OR ARRAIGNED
- (b) your trial, if any? MICHAEL MATTHEWS ESP
- (c) your sentencing? ✓
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? JOHN H. STROM APPELLATE DEFENSE
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

- i. MICHAEL MATTHEWS
- ii. JOHN H. STROM
- iii. _____

- (b) the proceedings at which each such attorney represented you:

- i. trial
- ii. APPEAL
- iii. _____

19. State clearly the relief you seek in filing this application:

CONVICTION VACATED W/ PREJUDICE (INDICTMENT QUASHED)

20. Are you now under sentence from any other court that you have not challenged?

0

STATE OF SOUTH CAROLINA

County of R. 2 Greenville

VERIFICATION

I, DS, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Ronnye Ayala
Ronnye Ayala

SWORN to and subscribed before me this 18th
day of Feb, 2016.

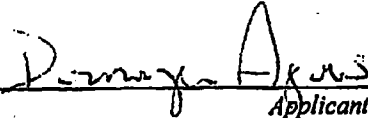
[Signature] (L.S.)
Notary Public

My Commission Expires: 2-22-18

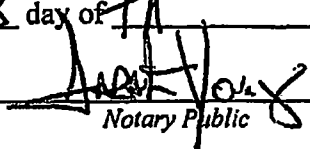
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this

18 day of Jan, 2016.

Notary Public

My Commission Expires: 2-22-18

ALLEGATIONS FOR POST-CONVICTION RELIEF

SCC Code, 17-27-10 (ET SEQ.)

Applicant will allege, AS FOLLOWS:

(1) GROSS PROSECUTORIAL MISCONDUCT IN THE KNOWING USE OF INADMISSIBLE EVIDENCE OF PRIOR BAD ACTS, to include but not limited to, use of a PRIOR DRUG TRANSACTION, to attempt to knowingly present false evidence, that along w/ mug shot, testimony as to contact w/ Police Accuser of IN "STREET CRIMES UNIT" to concoct 'purposeful violation' of SCRE 403/404(b) STATE V LYLES evidence rules to try this applicant and his prior unrelated drug sales / police records.

Giglio v US 405 US 151, 153 (1972) Riddle v Clinton

631 SED 70 (2006) w/ mugshots / ~~video~~ video)

This conduct was FLAGRANT VIOLATION of Giglio Rule IN RE. to videotape as selection KNEW, or SHOULD HAVE KNOWN, the video was TOTALLY UNRELATED TO the OFFENSE CHARGED. STATE V LYLES, the introduction of mug-shots, Street Crimes Unit contact etc, was ONLY to bolster the video to paint applicant as a drug dealer.

* COURT EXHIBITED JUDICIAL BIAS IN NOT GRANTING NEW TRIAL

(2) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL;

TRIAL COUNSEL FAILED to!

(A) OBJECTION TO DISPROPORTIONATE RACIAL COMPOSITION OF both the GRAND JURY AND PETIT JURY VENIRE to show "SYSTEMATIC EXCLUSION OF EQUAL CROSS-REPRESENTATIONS OF BLACKS IN THE VENIRE, AS REQUIRED BY U.S. SUPREME COURT CASE LAW, STATUTORY LAW Campbell v. Louisiana (U.S. SCT. 1998)

- (B) to articulate the hand making the sale of CS of 8 gram crack was that of a Caucasian and Applicant is African-American. THIS EVIDENCE IS FATAL TO STATE'S CASE.
- (C) to object to NUMEROUS INSTANCES OF PROSECUTOR ASKING INSANELY LEADING QUESTIONS (e.g. pg 55) (to search of vehicle) etc.
- (D) FAILED to RECESS when (e.g. pg 54 L 1) he could NOT tell who searched truck - then after LEADING QUESTIONS he STATED ERUM searched vehicle (pg 55.1) COUNSEL COULD HAVE EFFECTIVELY IMPERMEABLE the witness but FAILED to DO SO, AND EXEMPLIFIED the REASONING THE WITNESSES WERE AD LIB testimony.
- (E) TRIAL COUNSEL FAILED to REQUEST A CURATIVE INSTRUCTION OF USE OF "STRICTLY LIMITED" UNIT CONTACT SOLICITORS to MAKE A "EVIDENTIARY SHOWING" OF PRIOR BAD ACTS, the ESSENCE OF the previous PROSECUTORIAL MISCONDUCT, (video + mugs as cumulative error, NOT PROPERLY PRESERVED by trial counsel as included in Appellants BRIEF. AND WAIVED the ERROR I.O.A.C.
- EG: Appellate counsel FAILED to include the Res Gestae of Prosecutorial Plot to present false video, in conjunction with Appeal. Appellate counsel is REQUESTED to BE PRESENT & PER -
- (F) to object to blatant hearsay testimony as to search of vehicle that went to truth of the matter asserted in light of fact there was "no hand to hand" video of this alleged sale, AND C.I. had ample opportunity to hide a 18 gram (pepple) of crack on his person as he was NOT STRIPPED SEARCHED. THIS ALLOWED ability to CONCEAL this PEPPLE OF DRUGS.
- (G) counsel FAILED to CROSS EXAMINE under State v. Jones that C.I. had ample

to HIGHLIGHT Michael Tumbin HISTORY IN JUDICIAL system to have knowledge to make plans, deals etc, and 18 of peopl of color could have been to bolster his credibility (and money) AS C.I. SCENE 608 (C) THIS WAS A CRUCIAL AREA OF C.X. OF STATE ONLY WITNESS.

WHEN NO EVIDENCE BUT C.I. WORD, to ALLOW HARDA that vehicle has been SEARCHED PRIOR to Tumbin ENTRY (US-A USA) STRIPPED SEARCH. WAS INADMISSIBLE AND prejudicial bolstering of TRUTH OF MATTER ASSERTED. S MATTHEWS V. STATE (2003) in light NO STRIP SEARCH, NO VIDEO OF SALE, NO AUDIO DIFFERENT COLORED HANDS etc,

(H) FAILED to ARTICULATE 18 GRAM peopl to IMPOSE NATURAL LIFE IS A 8th AMEND. CRUEL UNUSUAL VIOLATION AND ~~EXCEEDING~~ LYNCHING IN VIOLATION OF 14th AMEND. 18 USC 241, 242, 42 USC 1983, 1985, 1986 IN ANY CIRCUMSTANCES,

(I) FAILED to ARGUE EXTREME JUDICIAL BIAS when ALL OBJECTIONS to EXPOSE obvious plot to TRY APPLICANT ON PRIOR/ FALSE DATED VIDEO WERE BRUSHED ASIDE PRIOR BAD ACTS/ FALSE VIDEO ARE PART-PARCEL, ALLOWED JURY to view video AS OTHER CRIMINAL EVIDENCE. MANIFESTED MANIFEST NECESSITY OF MISTRIAL.

(J) MCCOY V. STATE (2013) JUROR MISCONDUCT IAC/ JUROR FAIL to DISCLOSE MASONIC LODGE AFFILIATION W/ STATE WITNESSES, JUDGE, AND SOLICITOR
(10)

This NONDISCLOSE OF MASONIC TIES IS JUROR MISCONDUCT R.E. TO MCCOY (2013) AND IS IN FACT, ALLEGED THIS PATTERN OF NONDISCLOSURE IS PART OF SCRE 406 PATTERN, HABIT OR ROUTINE EVIDENCE, to show habit that person acted in conformity therewith, SEE BRISQUE V. LAURE (US SUP CT 1983) FBI GOES IN TO LONG PRACTICE OF JURY TACTICS TO ACQUIT WHITES FOR KILLING, BLACKS, AND THAT PROCESS HAS NOW BEEN INVERTED TO GAIN CONVICTIONS THRU MASONRY OR JURY NOT DISCLOSING MASONIC TIES TO SOLICITOR, JUDGE, POLICE WITNESSES ETC,

THIS INFO COULD BE USED TO CAST FAIR STRIKE OF JURY ORGANIZATION, AND JURORS FAIRED TO DISCLOSE MEETS TWO PRONG TEST OF MCCOY.

(K) Appellate COUNSEL WAS INEFFECTIVE FOR FAILURE TO RAISE SEVERAL DEAD BANG WINNING ISSUES UNDER BANKS V. RYAN (4th Cir) C to be AMENDED BY COUNSEL)

(L) BRADY Prosecution FAIRED TO DISCLOSE FAVORABLE EVIDENCE MATERIAL TO GUILT OR PUNISHMENT (to be AMENDED by COUNSEL) CI RECORDS, POLICY, (ETC)

(A) * The GRAND JURY SELECTIONS VIOLATED SC STATUTORY LAW, IN JURY STACKING, AND MASONIC CORRUPTION IN THE JURY PROCESS USCA 5, 6, 14th.

* The Petit JURY VENUE WAS ILLEGALLY DRAWN TO EXCLUDE
(N) BLACKS, MEXICANS AND OTHER MINORITIES TO ~~POSS~~ VIOLATION SC STATUTORY LAW, USCA 5, 6, 14th. AS PART HABIT, PRACTICE SCRE (4th)

JUDICIAL MISCONDUCT (MCCOY)

(Q) Hon. JUDGE C. HAYES III HAS PATTERN OF NON-DISCLOSURE SCRE 406 OF MASONIC TIES TO WITNESSES AND JURORS (CHANCELLER / SPANTRILERS, ETC) AND FILMS "PART AND PARCEL" OF JUDICIAL MISCONDUCT CLAIMS, IN FAILURE TO ENFORCE CONSTITUTION, STATUTORY LAW, AND RULES OF EVIDENCE, INCLUDING MANIFEST NECESSITY MISFEASANCE MOTIONS OF PRIOR BAD ACTS EVIDENCE, BIAS MANIFESTED

ETICAL COUNSEL FAILED TO OBJECT BY RECORD

II MOTION TO COMPEL FULL DISCLOSURE

Applicant seeks A HEARING UPON MOTION TO COMPEL THE PRODUCTION OF GRAND JURY RECORDS OF SELECTION OF RACES OF JURORS, EMPOWERMENT DOCUMENTS (AND WELL AS SAME FOR PETIT JURY MEMBERS)

Judge Hayes MASONIC AFFILIATIONS, AS NON-PROFIT MEMBER THIS PUBLIC DOCUMENTS RELEVANT TO FACT OF THE MATTER ASSERTED.

MICHAEL TUNLIN C.I. RECORDS, YORK CO. SHERIFF C.I. #
 Dept. Policies of C.I. - WIRETAPS etc.

COPY OF BRADY/ Rule 5,

ATTORNEY CLIENT FILE IN MATTER OF RE. HADDOCK.

III

THIS PRO SE AMENDMENT WILL BE BY AMENDED,
 CLARIFIED AND EXPANDED BY COUNSEL.

IV

APPLICANT HAS ART 1, SECT 9 SC CONST. RIGHT TO
 A SPEEDY REMEDY! IN THIS CIVIL ACTION (SEE 360
 DAY ADJUDICATION RULE IN CIRCUIT COURT.) (1)

Relief

CONVICTION VALATED W/ PREJUDICE

RAK

* APPLICANT SEEKS TO HAVE COURT ASSIGN JURISDICTION
 OUT-OF-CIRCUIT VENUE AND COMPETENT LAW
 FIRM CAPABLE ADDRESSING THIS MANIFEST INJUSTICE,

(13)

END

✱

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	OF THE SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	2016-CP-46-3745
Dominique Agurs,	)	
SCDC # 313102	)	
	)	
Applicant,	)	RETURN
	)	
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed January 6, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the York County Clerk of Court. Applicant was indicted at the December 2013 term of the York County Grand Jury for distribution of crack cocaine (2013-GS-46-4248). Michael Matthews, Esquire, represented him. Assistant Solicitor Matthew Shelton, Esquire, represented the State. On April 22, 2014, Applicant proceeded to a trial before the Honorable John C. Hayes, III, after which he was found guilty. Applicant was sentenced to imprisonment for a term of life without parole.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by briefing by Appellate Defender John Strom, Esquire. The South Carolina Court of Appeals affirmed Applicant's convictions by an unpublished opinion. State v. Dominique Agurs, Op. No 2015-UP-562 (Ct. App. filed Dec. 23, 2015). The remittitur was sent February 10, 2016.

II.

In his current application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons:

1. Prosecutorial Misconduct
 - a. "knowing use of inadmissible evidence of prior bad acts"
 - b. "Brady—prosecution failed to disclose favorable evidence material to guilt or punishment (to be amended by counsel), CI records, policy, etc."
2. Judicial Misconduct
 - a. Failure to "disclose Masonic ties to witnesses and jurors"
 - b. "Failure to enforce constitutional, statutory law, rules of evidence, including manifest necessity mistrial motions of prior bad acts evidence"
3. Ineffective assistance of trial counsel
 - a. (See attachment for specific grounds)
4. Ineffective assistance of appellate counsel
 - a. "failure to raise several winning issues"
5. "Juror misconduct, juror failed to disclose Masonic lodge affiliation with state witness, judge, and solicitor"

Attached herewith and incorporated herein by reference are the York County Clerk of Court records regarding the subject convictions, Applicant's appellate records, Applicant's records from the South Carolina Department of Corrections, and the trial transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Id. 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S. Ct. 2052. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Second, counsel's deficient performance must have prejudiced the applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant also alleges ineffective assistance of his appellate counsel. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent contends that Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. Respondent requests an evidentiary hearing on this allegation.

V.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Respondent submits the Applicant has not carried his burden of proving actual prosecutorial misconduct; therefore, this allegation should be summarily dismissed.

VI.

Applicant's second claim is an allegation of judicial misconduct, alleging the trial judge "failed to disclose his Masonic ties to witnesses and jurors" and failed to "enforce constitutional, statutory law, rules of evidence, including manifest necessity mistrial motions of prior bad acts evidence." Judicial misconduct is not an issue for Post-Conviction Relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-Conviction Relief is not a substitute for an appeal. Simmons, 264 S.C. at 423, 215 S.E.2d at 885. A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised his allegations against the trial judge on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is Applicant's burden to prove actual prosecutorial

misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Applicant has not supported this allegation with any facts whatsoever. Respondent submits Applicant has not carried his burden of proving actual judicial misconduct; therefore, this allegation should be summarily dismissed.

VII.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

VIII.

WHEREFORE, Respondent requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JUSTIN J. HUNTER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

May 18, 2017

STATE OF SOUTH CAROLINA

COUNTY OF YORK

DOMINIQUE AGURS, # 313102

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent,

IN THE COURT OF COMMON PLEAS

2016-CP-46-3745

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
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Ashley A. McMahan, Esquire
 Mac | Vance Attorneys, LLC
 PO Box 5501
 West Columbia, SC 29169

DATED this the 18th day of May, 2017.


 Jennifer Jennison, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF YORK

COURT OF COMMON PLEAS
FOR THE 16th JUDICIAL CIRCUIT
Case No.: 2016-CP-46-003745

Dominique J. Agurs, #313102,

Applicant,

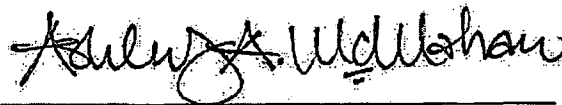
v.

State of South Carolina.

AMENDED POST-CONVICTION
RELIEF APPLICATION

The Applicant, by and through his undersigned attorney, hereby amends his PCR application filed on December 28, 2016, to request that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



ASHLEY A. MCMAHAN, ESQUIRE
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ATTORNEY FOR APPLICANT

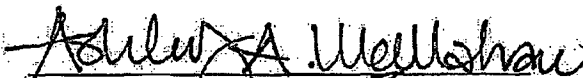
January 19, 2018

CERTIFICATE OF SERVICE

I certify that I have served this document via email to:

Justin J. Hunter
Assistant Attorney General
jhunter2@scag.gov
sixteenthcircuitpcr@scag.gov

This 19th Day of January, 2018.


ASHLEY A. McMAHAN, ESQUIRE
Attorney for Applicant

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
CASE NO.: 2016-CP-46-3745

DOMINIQUE J. AGURS)
vs.) TRANSCRIPT OF RECORD
STATE OF SOUTH CAROLINA)

JANUARY 29, 2018
YORK, SOUTH CAROLINA

BEFORE THE HONORABLE J. MARK HAYES, II

APPEARANCES:

ASHLEY MCMAHAN, ESQUIRE
COLUMBIA, SOUTH CAROLINA

ATTORNEY FOR THE APPLICANT

JUSTIN HUNTER, ASSISTANT ATTORNEY GENERAL
COLUMBIA, SOUTH CAROLINA

ATTORNEY FOR THE STATE

SHIRLEY BROOM
16TH Circuit Court Reporter

I-N-D-E-X

WITNESSES:	DIRECT	CROSS	RE-DIRECT	RE-CROSS
DOMINIQUE AGURS				
By Ms. McMahan	5			
MICHAEL MATTHEWS				
By Mr. Hunter	25			
By Ms. McMahan		42		
JOHN STROM				
By Mr. Hunter	51			
By Ms. McMahan		54		

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
S-1	COPY OF PHOTO		40
S-2	COPY OF PHOTO		42

1 MR. HUNTER - Good morning, Your Honor. May it
2 please the Court. The first case today is Dominique Agurs
3 vs. State of South Carolina, 2016-CP-46-3745. Your Honor,
4 he was indicted at the December, 2013 term of the York
5 County Grand Jury for distribution of crack cocaine. He
6 was represented by Mr. Michael Matthews, and on April 22nd,
7 2014 he proceeded to a jury trial before Judge John C.
8 Hayes, and afterwards he was found guilty as indicted and
9 found guilty of distribution of crack cocaine third
10 offense. He was sentenced after proper notice to life
11 without the possibility of parole. He did file a notice of
12 appeal, and Public Defender John Strom represented him on
13 appeal and filed briefs. On December 23rd, 2015 the Court
14 of Appeals affirmed his conviction, remittitur was sent
15 February 10th, 2016. He filed this current action January
16 6th, 2017. He's present today represented by Ms. Ashley
17 McMahan.

18 MS. MCMAHAN - If it pleases the Court, Your
19 Honor, just before I call Mr. Agurs to the stand, I just
20 wanted you to know that there was a motion to change venue
21 that he filed on his behalf before I was appointed, and
22 we're just -- we're abandoning that.

23 So, Your Honor, at this time, the applicant calls
24 Mr. Agurs.

25 THE COURT - Mr. Agurs?

1 DOMINIQUE J. AGURS, AFTER BEING FIRST DULY SWORN,
2 TESTIFIES AS FOLLOWS -

3 DIRECT EXAMINATION

4 BY MS. MCMAHAN -

5 Q Mr. Agurs, did you file this PCR application? ,

6 A Yes, ma'am.

7 Q And let's just start with some of your allegations.

8 So do you have a copy of it in front of you or do you need
9 to -- do you have a copy of your application?

10 A I have a copy. I've got it right here.

11 Q Okay. So let's start with your first issue that you
12 have. You said gross prosecutorial misconduct. So, could
13 you tell the Court about that issue?

14 A Okay, uh, do I have to read the whole thing out?

15 Q No, just -- the Court has a copy of your application,
16 the judge does, so just tell him about like what -- because
17 you say that there's a Giglio issue about the video-tape.

18 A Oh, yeah. Uh, this crime happened in 2013, but they
19 convicted me off a 2007 video, and that's the only --
20 that's the only thing that they have is this video from
21 2007.

22 Q So just to clarify, in your trial you had a
23 confidential informant.

24 A Yes, ma'am.

DOMINIQUE J. AGURS - DIRECT BY MS. MCMAHAN

6

1 Q And do you -- the confident informant testified about
2 the video.

3 A Yes, ma'am.

4 Q Do you recall what the confidential informant said
5 about the date though?

6 A Uh, about the date of the video?

7 Q Yeah. Did you find out about the date of the video
8 before the trial?

9 A Nah, he said that he saw the video before they,
10 actually, went and made the buy.

11 Q Okay. That's what he said ---

12 A That's ---

13 Q --- in one of the statements that he gave to the
14 police?

15 A Yes, ma'am.

16 Q Okay. And so the date -- what did the date on the
17 video say? It was a date stamp in the corner. Right?

18 A 2007, January.

19 Q And so what -- but what was -- what were the cops
20 saying, what date it happened on?

21 A They said it happened 2013, but the video's showing
22 January, 2007. This video was like six -- over six years
23 old.

24 Q But then they were saying -- what -- what was the
25 actual date that they said this happened?

1 A March the 5th, 2013.

2 Q Okay. But the -- the date stamp said 2007.

3 A Yeah, the date on ---

4 Q So that was your issue with the officer is that ---

5 A Yes, ma'am.

6 Q So tell me why you think -- let me back up. Strike
7 that. What is it about that -- is your issue -- that you
8 feel that the officers lied to you or were lying about the
9 tape?

10 A Yeah, I feel like the whole thing was a set-up,
11 because he admitted like on page 25 that he saw this video
12 before they came and made a buy. I mean he's supposed to
13 be in the video, so how did he see this video before they
14 came to made the buy if wasn't a set-up.

15 THE COURT - When you're saying he, help me out.

16 A The informant.

17 THE COURT - Okay.

18 Q Did you feel like Mr. Matthews appropriately addressed
19 that for you?

20 A I mean he -- I think he did to a certain extent.

21 Q You don't feel like he -- you think he could've gone
22 further with it or ---

23 A Yeah.

24 Q Okay. Did Mr. Matthews appropriately address it in
25 Court, or do you think he should've done more?

1 A I felt he could've done more.

2 Q Okay. Do you know if he did anything prior to you
3 going to trial about it?

4 A What do you mean?

5 Q Like do you know -- did he tell you that he had talked
6 to anybody about that issue or brought that up with you or
7 anything like that?

8 A Yeah, I mean he -- once I seen the video, we talked
9 about it.

10 Q When did you see the video?

11 A It was some time in 2013.

12 Q Was it just before trial?

13 A Yeah, it was before the trial.

14 Q Was it after any plea offers but before trial?

15 A I think it was after a plea.

16 Q So they gave you a plea offer which you declined and
17 then you saw it?

18 A Yeah, I think so.

19 COURT REPORTER - He needs to speak up.

20 A Yes, ma'am.

21 Q Is there anything else you want to talk about in the
22 video with the -- that issue, that you want the Court to
23 know about?

24 A Yeah, uh, the solicitor, he stated that there was no
25 video of a actual hand-to-hand in this case.

1 Q And he stated that on the record, didn't he?

2 A Yes, ma'am, and it's on page 9 of my transcript.

3 Q So the -- so, what did you and Mr. Matthews talk about
4 that? What did he talk to you about that?

5 A You say when?

6 Q Yeah, what did he say to you about that issue? You
7 and Mr. Matthews, when you discussed this video, what were
8 you guys talking about?

9 A Well, basically, circumstantial evidence.

10 Q Okay.

11 MS. MCMAHAN - Your Honor, what he's representing
12 is on page 9, lines 11 through 12.

13 Q Okay, so let's move on to -- for objecting to the
14 disproportionate amount of people in the grand jury. Can
15 you explain that to Judge Hayes, please?

16 A Yeah, uh, I only had two black people in my jury out
17 of twelve.

18 Q And -- you mean in the final jury that was selected?

19 A Yes, ma'am.

20 Q Do you know if he made a motion in Court for you? Did
21 he make a Batson motion?

22 A I don't think so.

23 COURT REPORTER - He needs to speak up.

24 A I don't think so, no.

DOMINIQUE J. AGURS - DIRECT BY MS. MCMAHAN

10

1 Q Okay. So that -- you -- there was no motion made
2 about how there was only two minorities on the -- in the
3 jury for you.

4 A No, ma'am.

5 Q You just went straight into the trial.

6 A Yes, ma'am.

7 Q And then the issue with Mr. Matthews, he didn't
8 appropriately go over the issue where the hand that had the
9 sale -- the stills of the video with the hand with the
10 crack in it was a white person's hand? Did Mr. Matthews
11 bring that up?

12 A Yes, ma'am. He brought it up. He used that as my
13 defense.

14 Q And was that really the only picture with drugs during
15 your whole trial was that one still that the solicitor had
16 put in there?

17 A Yes, ma'am, and that was at the end of the
18 investigation. They never showed drugs during the whole
19 time til they got back to the police station.

20 Q So -- did the confidential informant, did he have
21 something on where he was recording everything?

22 A Yeah, he a, uh, he was equipped with a chest -- a
23 camera on his chest and a audio to record the, uh, the
24 audio part of it.

1 Q And so during the whole video there was no actual like
2 handoff drugs. Is that what you're saying?

3 A No, ma'am, there's no video of a transaction.

4 Q Do you feel like that could've been addressed better
5 in trial?

6 A Yes, ma'am.

7 Q Do you think he adequately addressed it in his closing
8 argument?

9 A No, ma'am.

10 Q Do you think that if he had adequately addressed it in
11 the closing argument, you would've been found not guilty?

12 A I think it could've changed the outcome of trial.

13 Q So let's talk about ineffective assistance of counsel.
14 We're looking at your subsection (c) where didn't object to
15 instances of prosecutor asking leading questions. He did
16 object to quite a few, but is it your assertion there that
17 there were other instances of leading questions that Mr.
18 Matthews didn't appropriately object to?

19 A Yes, ma'am.

20 Q Okay. Do you feel that affected your trial as well?

21 A Yes, ma'am.

22 Q How so?

23 A (No response)

24 Q So he didn't object to all the leading questions.

25 A No, ma'am.

DOMINIQUE J. AGURS - DIRECT BY MS. MCMAHAN

12

1 Q Do you feel that if he had had, (sic) maybe the jury
2 would have found you not guilty also because just the way
3 the solicitor was asking the questions?

4 A Yes, ma'am.

5 Q And just to piggyback off of that, do you -- did Mr.
6 Strom address that in your appeal for you, the leading
7 questions, objections and stuff?

8 A I mean he, uh, he said something about when, uh, the -
9 - Harrison, the investigator who locked me up, when he said
10 that he'd dealt with me before twice when he was on the
11 street crimes unit.

12 Q Yeah, but he did -- he brought that up. Right?

13 A Yes, ma'am.

14 Q Did -- do you recall if Mr. Strom brought up any other
15 objections to the leading questions in your appeal?

16 A (No response)

17 Q It's okay, we can ---

18 A No, I think that's it.

19 Q We can skip that. Okay. You have, failed to re-
20 cross, could not tell who searched the truck after the
21 leading questions, so can you talk about that for us?

22 A Yeah, uh, when they searched -- they -- they only
23 patted him down when they searched him, and my lawyer never
24 cross examined them after they had asked the question, you
25 know, cross examined them.

1 Q About being patted down?

2 A Yeah.

3 Q You talking about the CI?

4 A The CI.

5 Q Did also -- so Mr. Matthews didn't re-cross the CI
6 appropriately about being pat (sic) down either before or
7 after the buy?

8 A Before and after.

9 Q Both times.

10 A (No response)

11 Q Was the CI's testimony somewhat inconsistent about
12 what he was wearing and all that?

13 A Yeah, he didn't even know if he had a jacket on or not
14 during this, uh, -- when he, uh, -- when they put the wire
15 on him, he didn't even remember if he was wearing a jacket
16 or not.

17 Q Do you think if Mr. Matthews had appropriately crossed
18 the confidential informant that the outcome of your trial
19 would've been different?

20 A Yes, ma'am.

21 Q Okay, so we have subsection (e) now, trial counsel
22 failed to request a curative instruction on the street
23 crimes. So you sort of talked about that already, but
24 could you expand on that a little bit for Judge Hayes?

DOMINIQUE J. AGURS - DIRECT BY MS. MCMAHAN

14

1 A Yeah, uh, when they asked Harrison, the investigator,
2 how did he know me, he said he dealt with me before twice
3 when he was on the street crimes unit, and he -- they
4 didn't give me a mistrial because he didn't go directly
5 about how he knew me, but that was my arresting officer
6 both times. That's what he was talking about, but he
7 didn't go directly about how he met me, so they didn't give
8 me a mistrial.

9 Q So Officer Harrison, he actually, -- did he testify
10 twice about that, once in camera and then once in front of
11 the jury about how he knew you?

12 A Yes, ma'am.

13 Q And then when he was in front of the jury, he said the
14 exact same thing, that he knew you from the street crimes
15 unit?

16 A Yeah, even said he been knowing me for like five
17 years, and I ain't even testify. I feel like he brought my
18 past history up.

19 MS. MCMAHAN - And, Your Honor, we're talking
20 about something that starts on page 190 of the transcript.

21 Q And so you feel like that the -- Mr. Matthews
22 should've more fully addressed his objection to that to get
23 a mistrial out of that?

24 A Yes, ma'am.

1 Q And now we're on subsection (f), so what was the
2 hearsay testimony that you felt that was not appropriately
3 objected to?

4 A Excuse me?

5 Q So you have object to blatant hearsay testimony as to
6 the search of the vehicle. Tell Judge Hayes about that.

7 A Okay, well, they had -- even though the -- the car was
8 on the police compound, the doors were still open or
9 whatever and they just only patted him down. They never --
10 I know they don't do strip searches, but they never strip
11 searched him.

12 Q So are you talking about the time when -- so they
13 searched the vehicle first.

14 A Yes, ma'am.

15 Q And then -- was the vehicle left on the lot?

16 A It was left on the lot.

17 Q And then -- then they went out and did the buy.

18 A Yes, ma'am.

19 Q So was there some time in between when the vehicle was
20 searched and between when they, actually, left?

21 A Yes, ma'am, I think like 45 minutes or something like
22 that.

23 Q And do you recall where the vehicle was sitting at
24 that time ---

25 A Uh, ---

1 Q --- that the officer testified to?

2 A Rock Hill Police Department.

3 Q So it was just sitting there.

4 A (No response)

5 Q And is your issue that it wasn't searched again prior
6 to leaving?

7 A Yes, ma'am.

8 Q And then you talk about some -- some hearsay issue
9 with there was no hand on the video of the sale. So your -
10 - is your issue that because there was nothing in the video
11 showing the sale that the CI might've hidden it on him
12 because he wasn't appropriately searched?

13 A Yes, ma'am, and when they got the drugs back, they
14 were wet.

15 Q Okay, and why is that significant?

16 A I think he had it in his mouth being that it was so
17 small.

18 Q And did Mr. Matthews ask him about that?

19 A Nah, we never brought that up about -- about it being
20 in his mouth.

21 Q And how did you know they were wet?

22 A Because they said it was.

23 Q Who's they?

24 A When -- well, in the transcript.

25 Q Okay. The officer does or the ---

1 A The officer.

2 Q Mr. Matthews asked him about him having it in his
3 hand, though, but he never asked him about it being in his
4 mouth. Is that correct?

5 A No, ma'am.

6 Q So now we're on (g), letter (g). You're talking about
7 Mr. Matthews failed to cross examine the confidential
8 informant about his dealings with the legal system. Can
9 you tell Judge Hayes about that?

10 A I mean I think they only agreed to go back like ten
11 years or something like that, but I feel like he wasn't
12 credible, because he got like a hundred charges, like a
13 hundred felonies, something like that.

14 Q And none of those were brought out that -- at trial.

15 A Yeah, I think they only agreed to go back like ten
16 years though.

17 Q But they were only -- those were the only ones that
18 were brought before the jury. Correct?

19 A Yes, ma'am.

20 Q And so now we're on (h). So you -- you're talking
21 about the point eight grams, imposed a life sentence. Can
22 you tell Judge Hayes about that?

23 A Yeah, I felt like they violated my fourteenth
24 amendment and eighth amendment, cruelty unusual punishment

DOMINIQUE J. AGURS - DIRECT BY MS. MCMAHAN

18

1 for a point eight, a life sentence. I felt like that's --
2 that's a -- that's cruel and unusual punishment.

3 Q Did you feel like you were being punished for
4 exercising your right to trial?

5 A Yes, ma'am.

6 Q Did you feel like because of that -- well, you state
7 in here that there should've been a manifest necessity to
8 grant a mistrial?

9 A Yes, ma'am.

10 Q And you had had that happen before, hadn't you? You'd
11 had a mistrial before?

12 A No, ma'am.

13 Q No, you had not? Okay. My apologies. Then you have
14 a juror misconduct issue. I'm sorry. I'm sorry. I
15 skipped over (i). Failed to the judicial bias. Can you
16 tell Judge Hayes why you felt like there was some bias with
17 the judge.

18 A With the judge?

19 Q Yeah.

20 A Yeah, because I think -- if they going by procedure to
21 lock somebody up, they say I sold to somebody in '13, but
22 they convict me off a 2007 video. I felt like that was
23 very bias for him to allow that video into evidence and not
24 really -- it's like six years old, the video, from the
25 crime.

1 Q So you felt like that the judge should've granted a
2 motion to suppress that video?

3 A Yes, ma'am.

4 Q Do you recall if Mr. Strom brought that up on appeal,
5 that the judge was wrong for not suppressing the video?

6 A No, that wasn't one of my issues, but he stated
7 something about the video but he never said like how much
8 time it was, like -- like the date or nothing like that.
9 He said something about the video didn't match up, ---.

10 Q Okay.

11 A --- it was seven years ---

12 Q Okay.

13 A --- old.

14 Q Okay, and then subpart (j) juror failed to disclose
15 masonic lodge affiliation. So talk about that. How'd you
16 find that out?

17 A Excuse me?

18 Q You have part (j), juror failed to disclose masonic
19 lodge affiliation with state witness, judge and solicitor.

20 A I think I'm going to skip that one.

21 Q Okay.

22 MS. MCMAHAN - Your Honor, we're going to withdraw
23 (j).

24 Q So now we're at (k). Now we're talking about Mr.
25 Strom again. So what issues do you think Mr. Strom

1 should've brought up that he did not bring up on appeal?

2 He's brought up four issues, didn't he?

3 A Yes, ma'am.

4 Q What other issues were addressed in the appeal that he
5 should've brought up?

6 A I felt like that video was a major issue.

7 Q So you felt like he didn't address the issue
8 adequately at all in the appeal ---

9 A No.

10 Q --- about it not being suppressed?

11 A No, he didn't even mention that, period.

12 Q Do you remember if Mr. Matthews objected to having the
13 video coming in at all?

14 A I think Mr. Matthews objected to it though.

15 Q Okay. So what was the favorable evidence you felt
16 like that the solicitor didn't disclose to you under (1)?

17 A A transaction.

18 Q So can you give a little more detail on that for us?

19 A They said that I sold to somebody and they got a
20 video, he got a chest (sic) -- he got a camera on his chest
21 and all and they never picked the transaction up, like the
22 actual transaction.

23 Q Do you mean that there's -- was there a video of them
24 going to wherever the car was?

1 A Yeah, there was -- there was a video of them going to
2 the car or whatever but they never --

3 Q And there was video of them leaving?

4 A Yes, ma'am.

5 Q But as far as actual -- there's no handoff. Right? I
6 mean is that what you're saying?

7 A No, ma'am. And on the way to me, he bumped into like
8 two people accidentally on his video somehow, and he said
9 he didn't know who those people were.

10 Q And so how did the solicitor withhold that information
11 from you until the trial?

12 A Oh, about the hand?

13 Q (Indicating yes)

14 A I guess they -- they was -- they was thinking that
15 that was my hand at first. Well, they was saying that that
16 was in my car, in my Cadillac, the one that, actually, went
17 back. It was -- I think it was at the police station at
18 the end of the investigation. Where you see a hand like
19 this -- we don't even know -- I don't even know if it was
20 the informant hand. I just see a hand with drugs in it.

21 Q You saw a white person's hand.

22 A Yeah, a white person's hand.

23 Q So it could've been any other person ---

24 A Anybody's hand.

1 Q Okay. But you didn't, actually, get that actual
2 little still photo until just before trial.

3 A Yeah, the day -- the day of trial.

4 Q Okay. So you're talking about the -- now, we're
5 talking about (m), the grand jury selection violated
6 statutory law. Would you go into a little bit more detail
7 on that for me?

8 A (No response)

9 Q You mean the grand jury that indicted you or do you
10 mean the actual jury in trial?

11 A I want to skip that one, too.

12 MS. MCMAHAN - So we're going to withdraw (m),
13 too.

14 Q What about (n)? (n) I think we sort of already
15 addressed a little bit where you said that your -- the
16 trial -- the jury that tried you didn't have enough
17 minorities on it?

18 A No, ma'am.

19 Q Okay. That is sort of a combination of another issue
20 that we have though. And I know we talked about this, but
21 did Mr. Matthews object to the jury? Did he -- did he
22 raise an issue about the jury not having enough minorities
23 on it?

24 A I don't think so.

1 Q And then (o) you have Hayes -- or -- what are we going
2 to do about (o)? Can you talk about that with Judge Hayes?
3 Judicial misconduct, you had bias ---

4 A Yeah, I felt like, uh, identification -- the only
5 identification they had of me was a mugshot, and the
6 mugshot I was in yellow, and I felt like that poison the
7 jury's mind when they let them -- out of all the pictures
8 they could've got of me, they got a picture of me in the
9 county jail, and when the jury seen it, they automatically
10 think I committed a crime.

11 Q So you mean the line-up, the -- the identification of
12 the six photos? Is that what you're talking about?

13 A No, not that. They had a -- they used my mugshot for
14 identification of me, like this the dude right here that
15 was in the car and they was showing me in the mugshot.

16 Q Yeah, but the mugshot was included with five other
17 ones that weren't mugshots. Is that correct?

18 A No, not that one.

19 Q Okay.

20 A Not the six-man line-up. This is the actual mugshot,
21 like -- that's what they used for identification, be like
22 this the dude that was in the car right here.

23 Q Okay. And they showed that to the jury?

24 A Yes, ma'am.

DOMINIQUE J. AGURS - DIRECT BY MS. MCMAHAN

24

1 Q So do you feel like Judge Hayes should've suppressed
2 that?

3 A Yes, ma'am. I ---

4 Q Do you recall if Mr. Matthews made an objection to
5 that?

6 A Yeah, he did. I mean I was at trial. I felt like
7 they didn't need a mugshot.

8 Q So you felt like that biased the jury because they saw
9 you in -- in the prison outfit.

10 A Yes, ma'am.

11 Q And that Judge Hayes should've granted Mr. Matthews'
12 motion to suppress that?

13 A Yes, ma'am.

14 Q Do you recall if Mr. Strom brought that up in your
15 appeal?

16 A About the, uh ---

17 Q About that mugshot not being suppressed?

18 A Yeah, he -- he, actually, brought that up.

19 Q Okay. What else do you want to tell Judge Hayes today
20 about your case?

21 A That's pretty much it.

22 MS. MCMAHAN - Okay. All right, answer any
23 questions Mr. Hunter has for you.

24 MR. HUNTER - Your Honor, I don't have any
25 questions for this witness.

1 THE COURT - Thank you, sir. You may step down.
2 Watch your step as you're stepping down.

3 MS. MCMAHAN - Your Honor, at this time the
4 applicant rest.

5 MR. HUNTER - Your Honor, the State would call Mr.
6 Michael Matthews.

7 MICHAEL MATTHEWS, AFTER BEING FIRST DULY SWORN,
8 TESTIFIES AS FOLLOWS -

9 DIRECT EXAMINATION

10 BY MR. HUNTER -

11 Q Good morning. Could you please state your name for
12 the record?

13 A Michael Matthews.

14 Q And where are you currently employed?

15 A I'm self-employed. I have my own law firm.

16 Q And were you appointed or retained in this case?

17 A I'll be honest with you, I can't remember.

18 Q Okay. Do you recall if you were the only attorney to
19 handle his case, or was there another one before you?

20 A I was the only attorney that handled his case.

21 Q Okay. So when you began your representation, did you
22 -- do you recall if he bonded out or was he in jail the
23 whole time?

24 A No, he bonded out.

1 Q Okay. So did you meet with him at all in jail or was
2 it at your office?

3 A Most of the meetings we had was at my office.

4 Q Okay. Do you recall about how many times you met
5 before trial?

6 A Exact amount of times? No, I cannot, but we met on
7 several occasions and interviewed witnesses.

8 Q Okay. And during those meetings had -- had you
9 already received the discovery?

10 A Well, I mean, uh, we send in the Rule 5 and Brady
11 Motions after the initial meeting, and then we received
12 discovery throughout and met with him to go through that
13 discovery.

14 Q Okay. And in this discovery, can you just explain --
15 I believe there's some policy about seeing CI videos. Was
16 that -- does that apply to your case, as well?

17 A Yeah, I mean the solicitor's office here in York
18 County, they have a policy of giving all the discovery out
19 except for the information about the CI, including video,
20 photographs, names, that kind of information, so the
21 discovery that I received primarily was the paper
22 discovery, the photo line-ups, the police reports, the drug
23 reports, all the information except for the information on
24 the CI.

1 Q Okay, did you receive any still photographs from that
2 -- from the CI video?

3 A Toward the end of the -- before trial we did, yes,
4 and, actually, received the video.

5 Q Okay, so that's my next question. Ultimately, you
6 received the video?

7 A Yes.

8 Q And did you go over that video with the defendant?

9 A Yes, this was an unusual situation, that the
10 prosecutor went outside of his -- outside the normal policy
11 of the office in negotiating the case. The solicitor's
12 position was that he really didn't want to give Mr. Agurs a
13 year -- I mean life imprisonment, but this was -- but this
14 was an LWOP case, life without the possibility of parole,
15 case. After several negotiations went through, he,
16 actually, gave me the still, gave me the video and with the
17 understanding that I could not give the video to my client
18 to protect the CI, but I could show it to him, show him the
19 still photograph, that kind of stuff.

20 Q Okay, and do you recall, I guess, how -- how late in
21 the game that was, how soon before trial?

22 A I would say -- let's see, we tried this case in April,
23 I believe, so I would say toward the end of February, first
24 of March. I mean it was close to trial.

25 Q Do you recall what that offer was?

1 A At the very end?

2 Q Yes.

3 A At the very end there was a negotiated sentence for
4 twenty years. At the very beginning I got it down to
5 twelve. He offered me thirteen and I knocked it -- we
6 knocked it down to twelve, but by the time we got to trial,
7 the offer was twenty.

8 Q Did you relay those plea offers to the defendant?

9 A Yes. A couple of times he, actually, told me he was
10 going to accept, and I know of one case where I, actually,
11 showed up at the courthouse sitting outside in the hallway
12 waiting on him to show up to sign and go forward, and he
13 never showed up. And I had to leave, because the judge who
14 was on duty that day left early, so I left.

15 Q So did he, I guess, by his actions reject those
16 offers?

17 A Well, on some -- on back and forth he would tell me,
18 yes, I'll take the offer, and then come back and tell me,
19 no, I'm rejecting it, and then when the solicitor -- I was
20 able to get the solicitor to kind of hold tight, he would
21 tell me yes, and then in that particular case he would tell
22 me no, and then I lost contact with him for a period of
23 time.

1 Q Okay, and during these meetings that you had with him,
2 did he give you, I guess, any leads for witnesses or, I
3 guess, his version of the facts?

4 A Yeah, he -- yes, he would. He brought in a witness.
5 He brought in a witness he wanted me to interview, which
6 was, basically, kind of going down the line on mistaken
7 identity and brought him in, and I broke the witness in
8 about five witness. I mean it was -- and I told him that.
9 I said this witness cannot -- is of no use to you, and this
10 line of defense is not going to work in my opinion.

11 Q And so, ultimately, what was your defense strategy at
12 trial?

13 A That's a good question. The strategy was trying to
14 knock as many holes as I could into the case, because at
15 that point in time, you know, his identification defense
16 went out the window whenever I interviewed the cousin or
17 whoever it was that we interviewed and trying to knock as
18 many holes I could into the case to try to dissuade them,
19 but the problem is, is -- I told him is his biggest problem
20 was the video.

21 Q What do you mean by that?

22 A Well, I mean the video shows him in the car seat, and
23 there's no evidence that there was anybody else in the car
24 seat and the transaction was a -- what I call straight-
25 forward distribution transaction.

1 Q And I believe the defendant said that there's no hand-
2 to-hand transaction caught on video. Can you explain that?

3 A Well, the video was kind of -- the -- if I remember
4 correctly, the video -- because it's been since 2014 I've
5 looked at the video, but I believe the video was focused
6 more on him than it was on what was happening in the center
7 console.

8 Q What was happening in the center console ---

9 A Well, I mean -- the -- I mean the passenger gets in or
10 -- either gets in or looks into the vehicle, gets into the
11 vehicle on the passenger side, Dominique's on the driver's
12 side, and there's a transaction going on, but you don't see
13 that transaction. There's discussion, but there -- to mask
14 that discussion, there was loud music playing from the car.

15 Q Okay. So your -- I guess your defense was to just
16 tear apart the inconsistent -- or, I guess, the bad parts
17 of the video?

18 A Try to -- try to tear it apart as much as I could.

19 Q Okay, and you testified to earlier -- can you explain
20 the issue of the time stamp on the video?

21 A Yea, I mean when we saw -- when we looked at the video
22 -- when we looked at the video, there was -- obviously, the
23 time stamp was different, so we had to investigate what the
24 time stamp was, and, actually, -- I called the public
25 defender's office. There were some e-mails that indicate

1 where I had talked to my paralegal where we contacted the
2 public defender to see if they'd run into this issue
3 before, and the issues -- the issue was is that the police
4 officers would indicate that the time stamp was wrong on
5 their machines, but that does not mean that that video was
6 not from that moment, and that they had had several
7 unsuccessful attempts of trying to get the video knocked
8 out because of that, but once the officer would present
9 information that the time stamp's wrong but the video's
10 correct, it kind of dies at that point.

11 Q And that was -- that was brought up at trial.

12 Correct?

13 A I believe it was. I'd had to refer to the transcript,
14 but I believe we did.

15 Q Okay. Now, as far as the -- that video is concerned,
16 was there anything -- I guess, was anything shown or talked
17 about during that video that gave you reason to believe it
18 should be suppressed?

19 A Well, I -- I either moved to suppress it or moved to
20 redact. There was a lot of conversation about prior
21 contact between the CI and Dominique, and if I couldn't get
22 the whole video suppressed, I at least wanted that part
23 redacted, and there was an agreement on the record, I
24 believe, between myself, the solicitor and The Court to
25 redact, and we, actually, put the numbers in on the video

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1 where that portion was to be redacted and my -- I believe I
2 remember we redacted that portion.

3 Q I'm just going to go through some of the allegations.
4 Did you see any reason to bring a motion, I guess, to quash
5 the jury, the seated jury that we had?

6 A If you go back and look at the State's strikes, which
7 I believe were on the back of transcript -- I also -- I
8 have a copy of the qualification sheet that were received
9 from the clerk of court's office in my file -- and I double
10 checked it just to make sure that the information on the
11 back of the sheet was what was on my qualification sheet,
12 there are three strikes I believe the State made. All
13 three strikes were of white individuals.

14 Q So that prevented you from raising a Batson issue?

15 A I -- in my opinion, yes.

16 Q Okay. And can you just explain -- you entered one
17 photo into evidence. I believe it was a still of two
18 hands. Can you explain what those hands were? I believe
19 one was a white hand making a transaction or holding the
20 drugs. Do you recall entering a photo into evidence?

21 A I believe part of the issue that he was bringing up
22 was that he was not part of the transaction. He was trying
23 to say that there was a third party involved in the
24 transaction. I put it into evidence to try to see if we

1 sway, but again there was no evidence that I could find of
2 a third person involved in the transaction.

3 Q Did he ever tell you that there was a third person in
4 that transaction?

5 A I can't recall but -- but he wanted -- he wanted to
6 show that there was -- that he wasn't involved in the
7 transaction.

8 Q Okay, so as far as when he was telling you, was his
9 version or his strategy, just complete denial, ---

10 A Pretty much, ---

11 Q --- that he didn't do it?

12 A --- yeah. Pretty much -- that he wasn't involved in
13 the trans -- it wasn't him that did the transaction.

14 Q Okay.

15 A There was -- there was the issue of what -- could he
16 have met somebody along the way from the route he took to
17 the Burger King where the transaction occurred, somewhere
18 along those lines.

19 Q So like the CI met someone along the way?

20 A Yes.

21 Q Okay. Now, do you recall the issue being brought up
22 where the officer testified that he knew the defendant from
23 the street crimes unit?

24 A Yes.

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1 Q And what'd you do during trial when that was brought
2 up?

3 A Well, we did a motion to prevent any -- pre-trial
4 motion to prevent anybody talking about prior contacts with
5 Dominique in this case, and there was a pre-trial motion
6 and judge -- I believe the judge ruled -- Judge Hayes ruled
7 that there is to be no discussion about any prior bad acts,
8 prior contact. Then the -- the officer had testified to
9 that during the pre-trial motion and the judge ruled that
10 wasn't coming in. Then he mentions it during trial, and
11 then I object, made the motion for a mistrial, went through
12 a -- Judge Hayes was very concerned about the statement
13 being made, but he was tossing around the idea of whether
14 or not to do a mistrial versus curative instruction, denied
15 my motion for a mistrial, then worried about bringing the
16 curative instruction, because then it would bring it back
17 up in front of the jury again and then they'd hear it a
18 third -- a second time, then I came in -- once he ruled
19 that he wasn't going to do a curative instruction, I
20 believe the transcript shows I came back in and said, you
21 know, that the mentioning of this through the street crimes
22 unit would infer that he had been arrested, and because of
23 the severity of the sentencing and stuff like that, give me
24 a mistrial, and Judge Hayes indicated that he thought I
25 took the inference too far, that the contact with the

1 street crimes unit did not necessarily mean he was arrested
2 and he -- he overruled my objection on a mistrial.

3 Q And I -- if you had any involvement post-trial -- did
4 you ever see the appellate brief and opinion in this case?

5 A No.

6 Q Okay. Now, the defendant raises an issue about the
7 drugs being wet. Do you recall did that come up at trial?

8 A I'll be honest with you, the -- my memory of whether
9 or not -- I do not remember anything coming up about the
10 drugs being wet. I mean if somebody wants to show me where
11 that came up in the transcript, I'd be more than happy to
12 look at it, but I -- I don't remember anything being said
13 or even brought up in the discovery about the drugs being
14 wet.

15 Q Okay. And as far as the drugs are concerned, do you
16 recall any issues with their weight, how they were tested,
17 anything like that?

18 A I mean we went through the normal process as to the
19 testing of the drugs and the weight of the drugs, and I
20 believe they had the chemist come in and testify.

21 Q Okay, and the CI had prior dealings with the
22 solicitor's office with -- criminal history. Is that
23 correct?

24 A That's correct.

1 Q And did you raise that or was that raised before the
2 jury?

3 A Well, I -- we went through and -- went through and
4 discussed his prior history because he's a witness. We
5 also -- I asked for his prior history from the solicitor's
6 office. They -- we went through, looked for -- you know, I
7 -- looked for anything that was in -- within that ten year
8 mark, as well as any crimes of moral turpitude, getting
9 into that grey area of whether or not you can go past the
10 ten years or not, but we went through -- through that
11 information.

12 Q And the ten year, of course, is by rule?

13 A That's correct.

14 Q Now, do you recall when he was noticed for LWOP?

15 A I want to say about -- I want to say that it was about
16 -- I have to go back and look exactly when it was filed,
17 but it was given to him -- they -- after -- I would say
18 probably around January maybe, but it was -- it was a
19 significant time after we started the case. They don't
20 just -- they don't usually give me an LWOP until it's
21 getting close to trial, because they want to give him every
22 opportunity to try to negotiate a sentence and enter into a
23 plea agreement, which we went through several versions of
24 that, and finally when we're looking at it looks like it's
25 going to trial, then they're going to serve him with an

1 LWOP to let him know he's facing life without the
2 possibility of parole.

3 Q And so once that notice is served, the judge doesn't
4 have any discretion. Correct?

5 A Once -- once it -- well, unless you go in on a
6 negotiated plea. I mean -- but once you go to trial, once
7 the jury comes back and you're in front of the judge and a
8 sentencing, then my understanding is he has no discretion.
9 As a matter of fact, Judge Hayes told him, I have no
10 discretion, I have to give you life without the possibility
11 of parole.

12 Q And prior to trial, I guess, when he was noticed, did
13 you explain to him what that notice meant?

14 A Yes.

15 Q And do you think he understood it?

16 A I believe he -- well, I believe he understood it. I -
17 - to this day I don't understand why he didn't take some of
18 the offers. The lowest offer I had -- the lowest one I had
19 was there was a range -- well, let me put it this way, the
20 lowest negotiated one I had was twelve years. There was an
21 offer on the table for a range from ten to thirty, but at
22 one point in time it went up and the last offer I had was
23 twenty years, and even though that's eighty-five percent,
24 you know, by then we were looking at the video, we were
25 looking at all kinds of stuff at that point, the solicitor

1 still wanted him to plead. The prosecutor, to his credit,
2 was not a gung-ho prosecutor wanting to put everybody in
3 jail for life. He was trying to give him an opportunity of
4 not to be going to jail for life, and I was trying to help
5 him not to go to jail for life, and I understood that by
6 the time we got up to twenty years and eighty-five percent,
7 at his age he -- he, you know, do the -- you know, that's
8 still a long time, but it wouldn't be life. I mean he's a
9 young man, it wouldn't be life. I begged him not to go to
10 trial in this case.

11 Q And just to reiterate, I think where you said earlier,
12 you relayed all these offers to him. Correct?

13 A Every one of them.

14 Q And he did not take any of the offers.

15 A Nope.

16 Q And just to go back to something prior to trial, you
17 testified about his mugshot being brought in front of the
18 jury. Can you explain that issue?

19 A Well, I mean the -- the -- the mugshot was shown to
20 the CI ahead of him going out, um, I guess to show that he
21 knew Dominique prior to going out on -- he knew who he was
22 supposed to meet up with, and they had several photographs
23 up there and, you know, throughout, and used them -- I have
24 to go back and look -- but I guess they used one of his
25 mugshots that they have on the computer.

1 Q And do you recall how this mugshot looked? Was he
2 depicted in a jumpsuit, anything like that?

3 A If you give me a second, I can pull it up and see and
4 show you. (Pause) Now, the one I have is a black and
5 white -- black and white version of it, but the -- it's of
6 six black males, all of them wearing what appears to be t-
7 shirts, and nothing behind them like -- like you see on TV,
8 like a, uh, measuring how tall they are, anything, it's
9 just photographs of six black males with a white background
10 behind them.

11 Q And that's the -- that's the line-up. Correct?

12 A That's the photo line-up, yes.

13 Q Do you recall his individual mugshot photo being --
14 being shown?

15 A His individual one?

16 Q Yes.

17 A I don't recall that. That doesn't mean it didn't
18 happen, but I didn't recall that.

19 Q Okay. And ---

20 A Now, the one photograph I do remember they showed is,
21 obviously, is from the one -- they did a still shot photo
22 that I objected to from the video.

23 MR. HUNTER - Your Honor, may I approach?

24 THE COURT - Yes, sir.

25 Q Do you recognize that photograph?

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1 A Yes, that's the State's Exhibit Number 3 they entered
2 into evidence. I objected to it, because they shown (sic)
3 -- they had shown the video up on the screen here and then
4 they wanted to put this in, because they said the video
5 went so fast -- there was realtime transaction -- went
6 through it realtime events -- went through, and so they
7 wanted to show this video -- this photograph that showed
8 who was in the driver seat.

9 Q And again that was -- is there an indication on there
10 what number exhibit that is at trial?

11 A It says State's Number 3.

12 Q Okay, and you recall that being the exact photograph
13 from trial?

14 A Yes.

15 MR. HUNTER - Okay, Your Honor, I would move this
16 as State's Number 1.

17 THE COURT - Any objection?

18 MS. MCMAHAN - No, Your Honor, I believe it's
19 already entered anyway as an exhibit at the trial so I have
20 no objection.

21 THE COURT - Okay.

22 MR. HUNTER - Right. It's part of the trial right
23 here.

24 (WHEREUPON, ITEM MARKED INTO EVIDENCE AS STATE'S
25 EXHIBIT NUMBER 1.)

1 MR. HUNTER - Your Honor, may I approach?

2 THE COURT - Yes, sir.

3 Q Can you tell me what that photograph is?

4 A That's a photograph they entered into evidence for a
5 picture of Mr. Agurs.

6 Q And do you recall, I guess, the circumstances around,
7 I guess, the taking of that photograph, what that -- when
8 that photograph was taken?

9 A I don't know what the circumstances are, but it's --
10 it's what we call a classic mugshot of when somebody's
11 arrested in the past.

12 Q Okay. And so that mugshot, does that -- does that
13 give any indication on that photo that he was incarcerated
14 or that he was under arrest?

15 A You know, it shows like a black shirt which is
16 consistent with the photo line-up I had, a light
17 background, his face, as State's Exhibit Number 7. It
18 doesn't give any indication of where the shot was taken.

19 Q And that -- so I believe you said State's 7, that was
20 entered into evidence at trial.

21 A I believe so, yeah.

22 MR. HUNTER - Okay. And, Your Honor, as this part
23 of the trial, I'd move this as State's Number 2.

24 THE COURT - All right, State's 2.

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1 (WHEREUPON, DOCUMENT MARKED AS STATE'S EXHIBIT
2 NUMBER 2.)

3 MR. HUNTER - Beg the Court's indulgence for one
4 second. (Pause) That's all I have. Thank you, sir.

5 CROSS EXAMINATION

6 BY MS. MCMAHAN -

7 Q So you said earlier you have no idea why he didn't
8 take those pleas. Did he ever give you any indication why
9 he wasn't going to plead guilty?

10 A On several occasions he told me he wasn't guilty of
11 the charges.

12 Q So his assertion the whole time was he didn't do it.

13 A Yes.

14 Q And what -- you said that you begged him not to go
15 trial. Why was that?

16 A Well, for several reasons. I mean, uh, that the --
17 from my evaluation of the case that the State was going to
18 present was -- was going to be very difficult to overcome.
19 In reviewing the case law, reviewing the evidence, making
20 phone calls to friends of mine who have been in the same
21 situation, kind of going through how they went through it,
22 you know, getting as much information for Dominique as he
23 can have to make an intelligent decision, but the main
24 thing was is this was going to be a three strikes, you're
25 out. This was -- he was face -- this was a true LWOP case,

1 and, unfortunately, it doesn't matter how much the weight
2 of the drugs were, it was going to be this was a third
3 strike case, and so he was looking at the real possibility
4 -- which ended up being reality -- of serving life without
5 the possibility of parole. I did not want him to do that.

6 Q Okay. And I'm sorry, I'm going to jump around a
7 little ---

8 A Sure, that's fine.

9 Q --- bit with my topics here.

10 A That's fine.

11 Q But was there any DNA at all involved in this?

12 A No.

13 Q So when he was talking about the drugs were wet, there
14 was nothing tested on the outside of the drugs to see if
15 there was any DNA?

16 A No.

17 Q Was this ever set for trial prior to this date?

18 A Yes.

19 Q And why was that continued or not? Why didn't it go
20 forward then?

21 A Different reasons, scheduling between me and the
22 prosecutor. Part of it was just me actively trying to
23 delay the trial so that I could get to the point of -- at
24 one point in time they scheduled the trial and we hadn't
25 seen the video and such like that. We were scheduling and

1 that would've moved it, and then once we continued it, we
2 then got access to the still photo, access to the video,
3 but trying to delay it just to kind of give my client some
4 more time to try to figure out what it was, and then also
5 trial had to be continued because he didn't show up and a
6 bench warrant was issued.

7 Q Did you notify him to be there?

8 A Yes.

9 Q You said there was a lot of music in the video that
10 sort of like over ---

11 A Yeah, it was overpowering, yeah.

12 Q Did he ever discuss like -- did you guys ever have a
13 conversation about that type of music? Was it something he
14 would typically listen to or ---

15 A No, I think the relevance of the music was the fact
16 that it was loud enough to overpower most of the
17 conversation inside the car.

18 Q So you felt that was sort of to your benefit?

19 A Yeah, it was -- you know, the jury wouldn't have been
20 able to hear what the conversation was.

21 Q Did you see if there was an issue with the jury pool
22 as a whole and not just necessarily the petit jury with
23 regards to minorities?

24 A No, I did not.

1 Q So, you didn't see an issue, or you just didn't bring
2 it up?

3 A I didn't bring it up, because the issue was going to
4 be is that -- what I saw was the State struck all white
5 jurors, so only a three strike, so, no.

6 Q And at some point you were talking about the street
7 crimes reference and the judge said it doesn't necessarily
8 mean that he was arrested, that just that he had come in
9 contact with it. Did you ask the judge to maybe give that
10 as a curative instruction to the jury?

11 A I was shooting for a mistrial ---

12 Q Okay.

13 A --- on that one.

14 Q Okay.

15 A And then he did not seem interested in giving a
16 curative instruction at that time.

17 Q So in the pre-trial motions -- I think it came up in,
18 what, like the Biggers hearing? Is that when it ---

19 A I believe so, yeah.

20 Q --- initially came up?

21 A (Indicating yes) Yes.

22 Q Did you think to request from the judge, maybe, to say
23 that he just had contact prior with the police department,
24 not just the street crimes unit?

1 A I have to look at the transcript. I think I didn't
2 want any mention of any prior ---

3 Q Okay.

4 A --- contact, period, because I thought that would
5 start getting into that area of his prior criminal history.

6 Q So you just didn't want the mentioning of any contact
7 on ---

8 A (No response)

9 Q Okay. Did you ever see if there were any issues with
10 the constitutionality of the drug enforcement unit here in
11 York County?

12 A Constitutionality of whether the unit should exist or
13 not?

14 Q Yes.

15 A No, I did not.

16 Q Did you see that as a possible issue at all or ---

17 A It didn't even hit the radar.

18 Q Did Mr. Agurs ever tell you that he was still in jail
19 at the time of the incident?

20 A That he was still in jail at the time of the incident?

21 Q Yeah. Did he ever tell you that?

22 A I'm going to be honest with you, if he had told me
23 that he was in jail at the time of this incident occurring,
24 we would've jumped all over that.

25 Q Okay.

1 A Because that would've been a time-frame issue. That
2 would've not put him -- no way possible he could've been at
3 the scene at that time, but ---

4 Q So that would've been a possible alibi then that you
5 would've ---

6 A Yeah, I would've ---

7 Q --- fleshed out if ---

8 A --- fleshed that out, because that would've been an
9 alibi defense.

10 Q If somebody had mentioned something that (sic) to you,
11 was that something you would've likely skipped over or
12 would you have dove into that ---

13 A No, we would've gone and looked. I would get
14 information on which jail he was at. We would've gone and
15 got the records of the jail to show that he was there,
16 because, for instance, a bench warrant's been issued -- in
17 a situa -- like I say, a bench warrant's been issued, and
18 somebody says, I couldn't have been in Court because I was
19 in jail, then in order to get the bench warrant lifted, we
20 would need to go get that information to show to the judge
21 to have the bench warrant lifted. If he had told me that
22 he was in jail at the time of this transaction, we would've
23 gone to go get all the records showing that he was in jail
24 at that time and when his release date was, and even go so

1 far as to get his photograph from that facility saying that
2 was -- that was who was in -- put in.

3 Q So and then back to the mugshot issue, the State's
4 Exhibit -- I think it was number 7 in the trial -- there
5 was a -- the witness was testifying that that was the
6 booking photo. Was that the booking photo do you recall
7 from this initial arrest on this incident or a prior
8 arrest?

9 A It was similar to the one I had for the photo line-up,
10 ---

11 Q Okay.

12 A --- so I don't know if it was from this incident or
13 not.

14 Q So if they'd had it for the prior -- for the photo
15 line-up, is it possible that it could've been from a prior
16 arrest?

17 A Well, yes, because the issue was is that the photo
18 line-up was showed to the CI before the transaction
19 occurred, so, yes, it could've been from a prior arrest.

20 Q And would that have been an issue then during the
21 trial to allow that witness to testify that it was a
22 booking photo at all?

23 A Well, if they were showing it as a booking photo and
24 they know he's been arrested for this charge, the inference

1 could've been that this was a booking photo from this
2 incident.

3 Q Okay.

4 MS. MCMAHAN - Court's indulgence, Your Honor.

5 (Pause)

6 Q So the time stamp of the video regarding 2007, did Mr.
7 Agurs ever tell you, well, it couldn't have happened in
8 2007 because he was in jail? Or was there ever any issue
9 with that time stamp?

10 A Well, we looked at the time stamp and -- actually, the
11 person that caught it first -- because I had her review it
12 for me -- was my paralegal. She reviewed it, sent me an
13 email saying, hey, the time stamp on this thing is 2007, so
14 we started looking into that issue and got the information
15 that the time stamp on the machine was not working, and
16 that it was -- that this video was from this incident.

17 Q Is that when you consulted with the public defender's
18 office about their issues that they had had.

19 A Yeah. Yeah, because this is not the first time that a
20 video's come in with the wrong time stamp.

21 Q Did you ever get into any discussions with the police
22 department about why they couldn't just fix that?

23 A Most of the police officers I had talked to would tell
24 you that that's something that their IT people work on,

MICHAEL MATTHEWS - CROSS BY MS. MCMAHAN

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1 but, no, they have not -- I did not get into a long
2 discussion about it.

3 MS. MCMAHAN - Nothing further.

4 THE COURT - Any re-direct limited to what she
5 went into?

6 MR. HUNTER - No re-direct, Your Honor.

7 THE COURT - Thank you, sir. You may step down.

8 MR. HUNTER - Your Honor, the State's next witness
9 is former Appellate Defender, John Strom, who currently
10 works at the U.S. House of Representatives in Washington,
11 D.C. As I've discussed with Ms. McMahan and Your Honor, I
12 have a phone number for him. If we could do phone
13 testimony -- I've done it before where we had him -- had
14 the witness on speaker phone, and we all kind of gather
15 around the phone, if that suits Your Honor and madam court
16 reporter.

17 THE COURT - All right, we'll give that a try.
18 I'll step down and if you want to try to get him on the
19 phone and come right back.

20 (WHEREUPON, RECESS TAKEN)

21 THE COURT - John, can you hear us?

22 MR. STROM - Yes, sir.

23 THE COURT - Okay. Raise your right hand and let
24 the clerk swear you in.

JOHN STROM - DIRECT BY MR. HUNTER

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1 JOHN STROM, AFTER BEING FIRST DULY SWORN,
2 TESTIFIES AS FOLLOWS VIA TELEPHONE -

3 MR. HUNTER - Okay, Your Honor, the State is
4 calling former Appellate Defender, Mr. John Strom.

5 DIRECT EXAMINATION

6 BY MR. HUNTER -

7 Q Mr. Strom, can you state your name for the record?

8 A John Strom.

9 Q And where are you currently employed?

10 A I'm currently counsel on the U.S. House of
11 Representative Committee on Natural Resources.

12 COURT REPORTER - Speak up a little bit.

13 Q Speak up a little bit.

14 A I am currently serving as counsel on the United States
15 House of Representatives Committee on Natural Resources.

16 Q Okay. And can you explain how you became involved in
17 Mr. Agurs' case?

18 A Sure. I was appointed to this case -- I don't have it
19 in front of me the exact date of the appointment, but it
20 would've been some time after his trial in April of 2014.

21 Q And that was through appellate defense?

22 A Correct.

23 Q And after you were appointed, when do you receive all
24 of his trial information?

1 A That would've come to us through request that our
2 office makes to the court reporter, as well as requests for
3 exhibits that are made by our office after I've done an
4 initial review of the file, so anywhere from, if I had to
5 guess, up to six months to eight months out from his
6 initial conviction.

7 Q Okay. And once you receive everything in his case, do
8 you have any discussions with him?

9 A We do. Typically, because of our case load, it's hard
10 for us to visit clients in person, but certainly we're
11 available by phone and by letter, and I do have specific
12 recollection of having a couple different calls with Mr.
13 Agurs.

14 Q Okay. And, again, was that -- was that before you
15 file your brief?

16 A It would've been before, yes, and certainly after as
17 we're waiting on the State's response and on the ruling by
18 the Court of Appeals.

19 Q Okay. Can you explain how you chose the issues you
20 did to raise on appeal?

21 A Sure. Essentially, after I've got all the exhibits,
22 as well as we're confirmed we have all the important
23 transcripts from either the hearings or the trial, I'll
24 review the transcript, you know, reading the whole thing at
25 least two or three times and then do essentially issue

1 spotting where you determine, you know, under our rules of
2 error, preservation, what's the scope of the objection, was
3 it renewed so that it can be reviewed on appeal, and so
4 that's how -- that's how I do issue selection of every
5 appeal that I've handled.

6 Q Okay, can you go through specifically the issues you
7 raised in this appeal?

8 A Sure. In my looking back at the briefs and looking at
9 the record of appeal, the issue in this case really turned
10 down -- it was a plea that an alleged uncover -- or excuse
11 me -- alleged control buy, and the issue came down to the
12 identification by Michael Tumblin (phonetic) -- if I'm
13 pronouncing that name correctly -- he had a -- the
14 informant had a criminal record, he had, you know, reasons
15 to want to deliver and to help law enforcement, and so the
16 issues were really just a series of evidentiary rulings by
17 the trial court where it's -- the first one dealt with a
18 reference to Mr. Agurs' past criminal history.

19 Essentially, the -- if I recall correctly, the police
20 officer said that he recognized him from the street, and so
21 we alleged that was prejudicial and then, again, in keeping
22 -- they also relied on his mugshot to identify him and then
23 there was the issue of whether or not the jury began
24 deliberating prematurely and that there was, I believe, a
25 question sent to the judge prior to deliberations asking

JOHN STROM - CROSS BY MS. MCMAHAN

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1 about photos and so -- and then the final issue was just a
2 cumulative error and that, you know, even if any one of
3 these errors are harmless individually in the aggregate, it
4 deprived him of a fair trial.

5 Q Okay, and do you recall how the court, ultimately,
6 ruled on those issues?

7 A Yeah, ultimately, we were unsuccessful on appeal, so I
8 don't have the unpublished opinion in front of me, but it
9 was either a combination of not being a abuse of discretion
10 by the trial court or if it was a error, that that error
11 was harmless. So I don't -- again, I don't have the
12 opinion directly in front of me, but I recall that it was
13 an unpublished opinion that went against us.

14 MR. HUNTER - Okay, that's all I have, John.

15 MR. STROM - Okay.

16 CROSS EXAMINATION

17 BY MS. MCMAHAN -

18 Q Mr. Strom, how did you decide on these four issues?
19 Do you recall?

20 A I don't have a specific recollection in this case. My
21 general practice would be, as I stated earlier, to read the
22 whole transcript. You know, if there's issues out there
23 that weren't objected to, then they're not preserved and so
24 you sort of eliminate those, and so among the objections,
25 among the rule -- evidentiary rulings or decisions that the

1 trial court made that were preserved, that's how I would
2 select it. Certainly if there's, you know, an issue out
3 there that I didn't raise, you know, this isn't like a
4 trial case on appeal, there's no reason -- and I'll use a
5 double negative here -- but there's no reason not to raise
6 a meritorious issue, so, you know, again, if there's a
7 specific issue that I -- that I missed or that should've
8 been raised, I certainly don't have a reason for not
9 raising it.

10 Q What issues do you think you could've raised had they
11 been properly objected to? Were there any in there?

12 A Not to my recollection.

13 Q Do you believe you raised all the meritorious issues
14 you could've?

15 A Again, without a specific recollection, I would
16 certainly hope so, but I don't have any specific
17 recollection as to whether or not there may have been
18 another meritorious issue out there. It would --
19 obviously, if I missed something, I missed something, but I
20 don't have any recollection as to ---

21 Q Okay.

22 A --- there being some issue outstanding.

23 Q And would you have copied Mr. Agurs on all -- on the
24 correspondence with the Court and with the transcript and
25 all that?

1 A Yeah, he should've gotten copies of all that and then
2 that would be still on file or at least in archives at
3 appellate defense.

4 Q And how long did you work at appellate defense?

5 A Three years, little bit over three years.

6 Q And about how many appeals do you think you did in
7 those three years?

8 A Uh, that's a good question. I would say, maybe, a
9 hundred and twenty, hundred and fifty, somewhere in that
10 range.

11 Q Okay.

12 A And that would be both PCRs and direct appeals.

13 Q Yes. And how often are opinions published when they
14 come out from the Court of Appeals and The Supreme Court?

15 A I would say about ten percent of the cases that I
16 finished ended up with a published opinion.

17 MS. MCMAHAN - Court's indulgence, Your Honor. My
18 apologies.

19 Q In the cumulative effect of the errors, was -- is that
20 an issue that's usually recognized here in South Carolina?

21 A I don't know if it has been explicitly recognized. I
22 think if you look at a harmless error jurisprudence, there
23 is a strong case for when they're looking at a singular
24 error that may be on the border between harmless error and
25 being reversible error, that the Courts will consider the

1 other pieces of evidence including whether or not there are
2 other errors in the omission of that evidence against it,
3 so I -- you know, again, if there's a specific case you
4 have in mind, I'm happy to look it up, but I do believe
5 that harmless error is a valid appellate issue,
6 particularly, when you have a series as you did in this
7 case of evidentiary rulings that while, you know, admitting
8 a booking photo may be prejudicial, it tends to be on
9 appellate review if it's a stand alone issue harmless
10 error, and then you've got the reference to a prior
11 criminal act, which was issue one in the appeal. Again,
12 it's one of those things that if it's a single reference,
13 they tend to look at it as harmless error, and so the third
14 issue with the early deliberations by the jury, you have to
15 have a very specific showing of prejudice, and so I think
16 in the context where you have these evidentiary issues
17 coupled with a potential jury deliberation issue that's not
18 -- was not to my recollection sort of fully developed, it
19 helps to try to make the case for cumulative error, and
20 that all that working together deprived him of a fair
21 trial.

22 Q Did you consider taking this up on Cert to The Supreme
23 Court?

24 A I did. This was -- this case was fairly early in my
25 time at appellate defense, and so I would've had

JOHN STROM - CROSS BY MS. MCMAHAN

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1 discussions with Chief Appellate Defender Bob Dudek about
2 whether or not to take -- take this up on Cert. That was
3 not at that this time a decision that could make sort of
4 unilaterally, and so we would've reviewed the case,
5 would've reviewed the evidence, and ultimately, the -- the
6 determination was -- I made the determination that going up
7 on Cert would not be productive.

8 Q Do you have a -- do you recall your reasoning behind
9 that?

10 A Well, the evidentiary issues, unfortunately, all come
11 with a very deferential standard -- and this is,
12 unfortunately, from appellate standpoint -- very
13 deferential standard of review, and so it's unlikely that
14 The Supreme Court -- I just don't believe that The Supreme
15 Court would've reversed this case on appeal on Cert.

16 Q You don't believe they would've accepted the Cert,
17 they would've just denied it?

18 A No, and that's my -- I mean that was my assessment at
19 the time and that's my assessment now having reviewed it.

20 MS. MCMAHAN - Okay. All right, nothing further,
21 Your Honor.

22 THE COURT - Any re-direct?

23 MR. HUNTER - No, Your Honor.

24 THE COURT - All right. Thank you, Mr. Strom.

25 MR. STROM - Yes, sir, thank you, Your Honor.

1

MR. HUNTER - All right, thank you.

2

Your Honor, that's all from the State.

3

THE COURT - Any reply?

4

MS. MCMAHAN - No, Your Honor.

5

THE COURT - All right, I will let you know.

6

MS. MCMAHAN - Thank you.

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MR. HUNTER - Thank you.

8

(END OF TRANSCRIPT)

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C E R T I F I C A T E

I, Shirley Broom, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing 59 pages is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the proceedings of Dominique J. Agurs vs. State of South Carolina, as taken by me in Court of Common Pleas for the Sixteenth Judicial Circuit on January 29, 2018, and provided by me this the 23rd day of July, 2018.

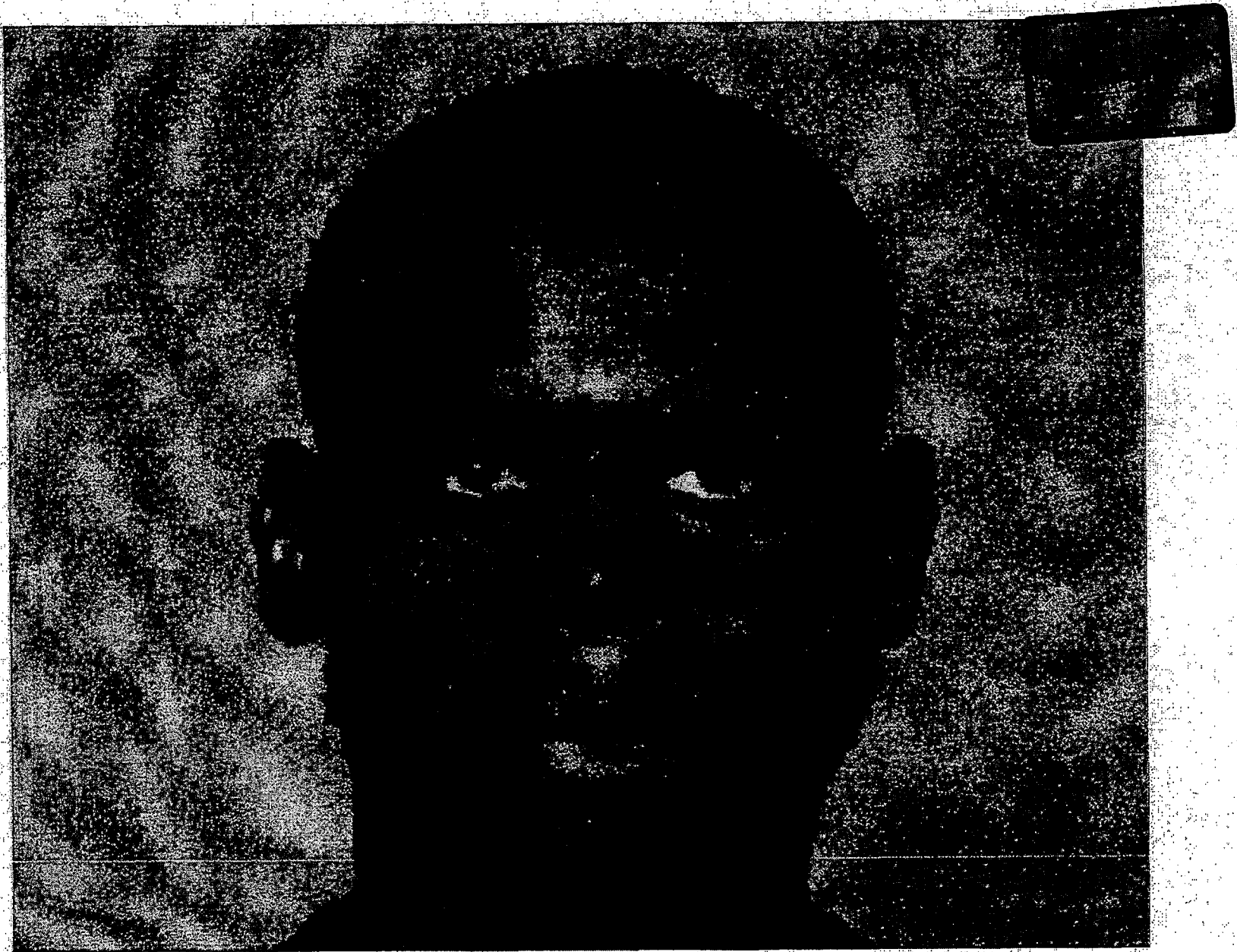
I do further certify that I am neither of kin, counsel, nor interest to any party herein.



Shirley Broom, CVR-M
Official Court Reporter,
Certified Verbatim Reporter, In and
for the State of South Carolina



State's 42



State's #7

STATE OF SOUTH CAROLINA)
 COUNTY OF YORK)

Dominique Agurs,)
 S.C.D.C. No. 313102,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
 OF THE SIXTEENTH JUDICIAL CIRCUIT

2016-CP-46-3745

ORDER OF DISMISSAL

FILED-RECEIVED
 2018 JAN 17 PM 11:44
 CLERK OF COURT
 16TH JUDICIAL CIRCUIT
 YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed January 6, 2017. An evidentiary hearing into the matter was convened on January 29, 2018, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Michael Matthews, Esquire, also testified.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the York County Clerk of Court. Applicant was indicted at the December 2013 term of the York County Grand Jury for distribution of crack cocaine (2013-GS-46-4248). Michael Matthews, Esquire, represented him. Assistant Solicitor Matthew Shelton, Esquire, represented the State. On April 22, 2014, Applicant proceeded to a trial before the Honorable John C. Hayes, III, after which he was found guilty. Applicant was sentenced to imprisonment for a term of life without parole.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by briefing by Appellate Defender John Strom, Esquire. Mr. Strom raised the following issues on

appeal:

1. Did the trial court abuse its discretion by refusing to grant a mistrial where the lead investigator improperly placed Appellant's character and prior arrests at issue by making a comment on direct examination that he "had dealt with [Appellant] before" while assigned to the Street Crimes Unit?
2. Did the trial court abuse its discretion in admitting Appellant's "mug-shot" photograph into evidence when the State failed to establish that the photograph was necessary to identify Appellant and the "mug-shot" was introduced only to draw attention to the circumstances under which it was taken and to suggest that Appellant had a criminal record; thus making it unfairly prejudicial?
3. Did the trial court commit reversible error in refusing to grant a mistrial after members of the jury prematurely deliberated before closing arguments as an unsigned note inquired to the judge about photographs presented at trial that were critical to Appellant's defense, and the trial court posited highly suggestive leading questions to the foreman and alternate juror which failed to adequately determine whether premature deliberations took place or negatively impacted Appellant's right to a fair trial?
4. Did the trial court abuse its discretion in refusing to grant a new trial where the cumulative effect of the errors was so prejudicial as to deprive Appellant of a fair trial?

The South Carolina Court of Appeals affirmed Applicant's convictions by an unpublished opinion. State v. Dominique Agurs, Op. No 2015-UP-562 (Ct. App. filed Dec. 23, 2015). The remittitur was sent February 10, 2016.

PCR Application

In his application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons:

1. Prosecutorial Misconduct
 - a. "knowing use of inadmissible evidence of prior bad acts"
 - b. "Brady—prosecution failed to disclose favorable evidence material to guilt or punishment (to be amended by counsel), CI records, policy, etc."
2. Judicial Misconduct
 - a. Failure to "disclose Masonic ties to witnesses and jurors"
 - b. "Failure to enforce constitutional, statutory law, rules of evidence,

including manifest necessity mistrial motions of prior bad acts evidence"

3. Ineffective assistance of trial counsel

- a. "Failed to object to disproportionate racial composition of both the grand jury and petit jury venire (lack of blacks in the venire)"
- b. "Failed to articulate the hand making the sale of .08 grams of crack was that of a Caucasian and Applicant is African-American, this evidence is fatal to the State's case"
- c. "Failed to object to numerous instances of prosecutor asking insanely leading questions (ex. Pg. 85) (to search of vehicle)"
- d. "Failed to recross when (@ pg 54, l. 1) he could not tell who searched truck, then after leading questions he stated Ervin searched vehicle (pg. 85), Counsel could have effectively impeached the witness but failed to do so, and exemplified the reasoning the witnesses were ad lib testimony"
- e. "Trial counsel failed to request a curative instruction, use of 'street crimes unit' contact solicitor's to make an 'evidentiary showing' of prior bad acts, the essence of the prosecutorial misconduct, video and mugshot as cumulative error, not properly preserved"
- f. "Failed to object to blatant hearsay testimony as to search of vehicle that went to the truth of the matter asserted in light of the fact there was 'no hand to hand' video of this alleged sale, and CI had ample opportunity to hide a .8 gram of crack on his person as he was not stripped search"
- g. "Failed to cross examine under State v. Jones that CI had ample to highlight Michael Tumblin history in judicial system to have knowledge to make pleas, deals, etc., paid .8 of pebble of crack could have been to bolster his credibility as CI. SCRE 608(C) this was a crucial area of C.X. of state only witness"
- h. Failure to articulate .8 gram pebble to impose natural life is an 8th Amendment cruel and unusual punishment violation
- i. "Failed to argue extreme judicial bias when all objections to expose obvious plot to try Applicant on priors/false dated video were brushed aside..."

4. Ineffective assistance of appellate counsel

- a. "failure to raise several winning issues"
5. "Juror misconduct, juror failed to disclose Masonic lodge affiliation with state witness, judge, and solicitor"

At the PCR hearing, Applicant moved to withdraw his allegation of judicial misconduct for failure to disclose Masonic ties to witnesses and jurors. Applicant also moved to withdraw his allegation that Counsel failed to object to the racial composition of the grand jury.

II. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject

convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

**Prosecutorial Misconduct and Ineffective Assistance of
Counsel – Time Stamp on Video**

Applicant alleged the State committed prosecutorial misconduct by presenting the jury with a 2007 video when the police said the incident happened in 2013. He also alleged the CI (Michael Tumblin) saw this video before the controlled buy. Applicant also alleged his counsel was ineffective in this regard because, although he addressed it at trial, he should have done more. Counsel testified he investigated the issue concerning the CI buy video having the incorrect time stamp, and was told it was an IT issue with the police department. He testified he talked to members of the Public Defender's Office, who confirmed they had also had this same issue with videos from the police department. Counsel testified he moved to redact and suppress the video.

This Court finds Applicant has failed to meet his burden of proving actual prosecutorial misconduct or that Counsel was ineffective for failing to properly address the instances of alleged prosecutorial misconduct. It is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). The record reflects the CI buy video time stamp showed January 16, 2007, and the date of the actual buy was March 5, 2013. This Court would express its concern with this issue, but finds the issue was properly addressed by Counsel during the trial. Counsel cross-examined Tumblin about this discrepancy, and Tumblin testified the date on the video was not the date of the events depicted in the video and that the incorrect date was possibly caused by resetting the camera. Tumblin testified the

actual date of the incident was March 5, 2013. Tr. 116. Counsel also cross-examined Investigator Leland Harrleson about the incorrect time stamp, who testified he knew before the video was recorded that the time stamp would be incorrect and their office chose not to reset it. Tr. 214-215. This Court finds Applicant has failed to prove prosecutorial misconduct as it relates to the time stamp on the video. This Court finds the date of the video was a factual question for the jury and the State did not commit misconduct where they represented the video's contents were accurate and the time stamp was a known camera error. Accordingly, Applicant has failed to prove prosecutorial misconduct in this regard.

This Court finds Applicant has failed to prove Counsel's actions were deficient in this regard. This Court finds the error was addressed by the State's witnesses and Counsel properly cross-examined them about the actual date of the incident and attacked the discrepancy between the two dates. Furthermore, this Court finds Applicant has failed to show that the result of his trial would have been different had Counsel done more with the video issue. Accordingly, Applicant has failed to prove ineffective assistance of counsel in this regard.

Prosecutorial Misconduct and Ineffective Assistance of Counsel – Prior bad act evidence

Applicant alleged the State committed prosecutorial misconduct for introducing prior bad act evidence. He also alleged Counsel was ineffective for failing to request a curative instruction on the elicited testimony. The issue involves a comment made by Investigator Harrleson on direct examination, where he stated he was able to identify Applicant because he "had dealt with [Applicant] before when [Harrleson] was on the Street Crimes Unit with the City of Rock Hill." Tr. p. 190, ll. 5-6. Counsel objected and moved for a mistrial based on the court's prior ruling that prohibited discussing details of Tumblin's or officer's prior knowledge of Applicant. The trial judge declined to grant the mistrial and declined to give a curative instruction, stating the

instruction would only call more attention to the comment. Tr. p. 192. Counsel agreed that a curative instruction would call more attention to the comment but again asked for a mistrial. Tr. pp. 192-193. Applicant appealed this issue to Court of Appeals. After briefing, the Court of Appeals affirmed Applicant's convictions, citing cases stating "[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes." See State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003).

This Court finds Counsel was not ineffective and the State did not commit prosecutorial misconduct concerning the comment made by Investigator Harrleson that he had dealt with Applicant before as part of the street crimes unit. This Court finds Applicant has failed to show the State committed actual prosecutorial misconduct when its witness provided concerning and possibly unexpected testimony. Understanding the case law cited by the Court of Appeals in Applicant's case, this Court finds the State did not commit misconduct. Furthermore, Applicant has failed to prove Counsel's actions were deficient in this regard. Although this Court may have ruled differently on the mistrial motion, this does not give rise to an error by Counsel, as he appropriately objected and moved for a mistrial. The Court of Appeals affirmed the trial judge's decision in refusing to grant a mistrial on this ground. As Counsel was not deficient and no misconduct occurred, Applicant has failed to show that the outcome of his trial would have been different had Counsel acted differently in this regard. Accordingly, these allegations must be dismissed.

Brady¹ Violation

Applicant alleged the State committed a Brady violation by failing to disclose favorable evidence including the CI's records. Brady requires the State to disclose evidence in its

¹ Brady v. Maryland, 373 U.S. 83 (1963)

possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)).

Applicant has failed to show that a Brady violation occurred and that the State failed to disclose favorable evidence. Counsel testified he made the proper discovery motions and received all discovery, including the photo lineup, except the information on the Confidential Informant. He testified he eventually saw the CI buy video. This Court finds Applicant has failed to show exculpatory evidence was withheld by the State. During the pretrial motions, Counsel informed the State he had received information about Tumblin's past criminal history and confirmed with the assistant solicitor that all discovery had been shared. Tr. p. 7. This Court finds Applicant has failed to meet his burden of proving an actual Brady violation occurred, and this allegation must be dismissed.

Ineffective Assistance of Counsel – Batson² Issue

Applicant alleged Counsel was ineffective because only two African Americans were seated on the jury, and Counsel should have made the proper motion to address this issue. At the PCR hearing, Counsel testified no Batson violation occurred because the State used all of its strikes on white jurors. Counsel testified he did not see an issue with regard to the number of

² Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

minorities on the jury.

In Batson, the Supreme Court held the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prevents the prosecution from striking potential jurors on the basis of race State v. Cochran, 369 S.C. 308, 313, 631 S.E.2d 294, 297 (Ct. App. 2006). "Thus, during jury selection, either the defendant or the State may oppose the peremptory challenge of a juror who is a member of a cognizable racial group." Id. "Once a peremptory challenge is opposed, the trial court must, upon request, conduct a Batson hearing." Id. This Court finds Counsel was not ineffective for failing to make a Batson motion. It is clear no Batson violation occurred where the State only struck white jurors and Applicant is African-American. As no Batson violation occurred, Counsel was not ineffective. Accordingly this allegation must be dismissed.

Ineffective Assistance of Counsel – Race of Hand Selling Crack

Applicant alleged Counsel was ineffective for failing to articulate the hand making the sale of crack shown in the video was that of a Caucasian and Applicant is African-American. At the PCR hearing, Applicant testified Counsel used this discrepancy as a defense because the State only had a picture of the drugs in question. Counsel testified the video showed no evidence of a third party. He testified the video showed a straightforward depiction of drug distribution and was more focused on Applicant and not the center console area. He testified he discussed the video and the transaction with Applicant.

The record reflects Counsel cross-examined Investigator Harrleson on this issue. Counsel entered a photograph from the buy video into evidence that shows a person's hand, Tr. 219. Counsel elicited testimony from Harrleson where Harrleson admitted the hand appeared to be of a white or Caucasian person. Tr. 219. Harrleson then testified, "Seeing this different picture now,

it appears to me that this picture was taken inside the...vehicle that was used with the confidential informant instead of the vehicle where the buy actually took place." Tr. p. 219, ll. 19-23.

This Court finds Counsel's actions were not deficient, as he entered the photograph in question in evidence, questioned Harrleson about the photograph, and elicited testimony that the photo appeared to show a white or Caucasian hand. This Court finds Applicant has failed to show Counsel's actions were unreasonable and he has failed to show what more Counsel should have done concerning the photograph. Applicant has failed to show that the outcome of his trial would have been different had Counsel employed a different strategy, and this Court will not speculate whether a "better" cross-examination would have helped Applicant. See Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997). Accordingly, this allegation must be dismissed.

Ineffective Assistance of Counsel – Leading Questions

Applicant alleged Counsel was ineffective for failing to object to leading questions from the assistant solicitor. Applicant specifically points to Page 85 of the trial transcript during the assistant solicitor's questions to Sergeant Jim Lubben concerning the search of the CI. The testimony in question reads as follows:

Q. To your knowledge, did [Officer Ervin] search the truck prior to going out?

A. Yes, she did.

Q. And you testified a moment ago you do not remember if Tumblin was wearing a coat. If he had been wearing a coat, would you have searched it?

A. Yes, sir. That's just part of the clothing we take-take off the coat and we go through the pockets and everything, just like their clothing.

Q. And the same thing with any layers?

A. Yes.

Q. And your testimony is you didn't find anything?

A. That is correct.

Tr. p. 85, ll. 2-14.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective for failing to object to the State's questions. In context, the questions are follow-up questions from testimony elicited by the witness during Counsel's cross-examination. This Court finds the questions were not so egregious as to warrant an objection from Counsel, and seemed to follow up on or reiterate prior testimony. This Court further finds it is unlikely an objection would have been sustained and, more importantly, that a sustained objection to these questions would have changed the outcome of the case. Applicant has failed to prove Counsel's actions fell below professional norms and that prejudice resulted. Accordingly, this allegation must be dismissed.

Ineffective Assistance of Counsel – Failure to Re-Cross Sergeant Lubben

Applicant alleged Counsel was ineffective for failing to re-cross Sergeant Lubben during his questioning about the search of the vehicle used by the CI during the buy. During Counsel's cross-examination, Sergeant Lubben stated he did not know who searched the CI's vehicle prior to the buy. Tr. pp. 83-84. He testified it is his office's usual procedure to search the car but he does not have a record of who actually searched it. Tr. p. 84. On re-direct, Lubben testified Officer Tanya Ervin was in control of the car the whole time and searched it prior to the buy. Tr. p. 85. Applicant alleged Counsel should have re-cross-examined Lubben and impeached him on the discrepancy in his testimony.

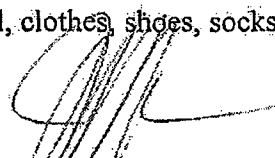
This Court finds Applicant has failed to prove Counsel was deficient in his cross-examination of Sergeant Lubben. Cross-examination is a matter of trial strategy, and as such, this Court must presume that Counsel "rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment.” Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). In making a fair assessment of attorney performance, a court must make every effort to “eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 689. The record reflects Counsel cross-examined Lubben about who searched the car, and his answers constitute a question of credibility and fact for the jury to decide. Any inconsistent testimony was an issue of credibility to be resolved by the finder of fact. See e.g., State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 830 (2001) (witness’s credibility an issue for the jury’s consideration). Any discrepancy in Lubben’s testimony would go to the jury’s judge of his credibility, and it is unlikely further re-cross-examination would have resulted in different testimony than that elicited on cross and redirect examination. This Court can only speculate whether a re-cross examination would have helped Applicant. See Skeen, 325 S.C. 210. Applicant has failed to meet his burden of proving that Counsel’s performance was deficient and that he was prejudiced by his performance. Accordingly, this allegation must be dismissed.

Ineffective Assistance of Counsel – Hearsay Testimony

Applicant alleged Counsel was ineffective for failing to object to hearsay testimony as to the search of the vehicle. He alleged this was highlighted by the fact that there was no hand to hand video of the sale and Tumblin had ample opportunity to hide a 0.8 gram pebble of crack on his person as he was not strip searched.

Applicant has failed to point out specifically which testimony amounted to objectionable hearsay. The record reflects Sergeant Lubben testified he searched Tumblin right before the buy, searching through his pockets, waistband, clothes, shoes, socks, groin area, shirt, and all parts of



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Tumblin's body. See Tr. p. 73, ll. 6-24. Sergeant Lubben testified in general the CI's vehicle is provided by the officers and searched before a buy. Tr. p. 77. He further testified Officer Harrleson was the case agent and searched Tumblin after the buy was made. Tr. p. 78. Sergeant Lubben testified on cross-examination his office does not do strip searches, but all parts of the CI are searched and the office cannot perform a body cavity search. Tr. p. 79.

Regarding the vehicle, Sergeant Lubben testified he did not personally search the vehicle and could not testify as to who did search the vehicle without looking at the case report. Tr. pp. 83-84. He later testified Officer Tanya Ervin searched the vehicle prior to the buy. Tr. p. 85.

Tumblin testified he was searched before the buy by Officer Harrleson. Tr. p. 98; 111-112. Officer Tanya Ervin testified her responsibility in the case was to search the vehicle before and after the drug buy. Tr. pp. 127-130.

After reviewing the record, this Court cannot find objectionable hearsay testimony regarding the search of the vehicle or Tumblin that would change the outcome of Applicant's case. This Court finds Counsel's actions were not deficient in this regard. This Court further finds Applicant has failed to prove that he was prejudiced by Counsel's actions as he has failed to show Counsel should have objected to testimony and the objection would have changed the outcome of the case. As Applicant has failed to meet his burden, this allegation must be dismissed.

Ineffective Assistance of Counsel – Failure to cross-examine the CI as to his history in the judicial system

Applicant alleged Counsel was ineffective for failing to cross-examine Tumblin concerning his history in the judicial system. He alleged this testimony would highlight Tumblin's knowledge to make pleas and deals with the State.

On direct examination, the assistant solicitor went through Tumblin's criminal history

which included obtaining prescription drugs by fraud in 2014 for which he received jail time; seven counts of drug distribution in 2004; four counts of drug distribution in 2004 for which he received jail time; grand larceny in 2005, 2007, and 2009 for which he received jail time; shoplifting in 2012 and 2013; and traffic offenses in 2013. Tr. pp. 86-89. Tumblin also admitted he used crack for several years. Tr. p. 89. He admitted to meeting with Drug Enforcement officers to work as a confidential informant and work off his traffic charges. Tr. p. 90. He testified he knew someone from whom he could buy crack cocaine. Tr. p. 93.

During Counsel's cross-examination of Tumblin, he elicited testimony reaffirming Applicant's lengthy criminal history he explained on direct examination. Tr. p. 109. He elicited testimony that Tumblin was hoping the officers would help him with his criminal charges if he worked as a CI. Tr. p. 110. Counsel testified at the PCR hearing that he went through all of Tumblin's crimes that he is allowed to use for impeachment.

This Court finds Applicant has failed to meet his burden of proving Counsel's actions were ineffective in this regard. This Court finds Tumblin's lengthy criminal history was well-established to the jury. This Court finds Applicant has failed to show how additional impeachment would have changed the outcome of Applicant's case. The Supreme Court has held "[t]he exclusion of impeaching evidence is not prejudicial where it has no meaningful impact on a witness's credibility." State v. Gunn, 313 S.C. 124, 137, 437 S.E.2d 75, 82 (1993). This Court finds Tumblin's credibility was thoroughly impeached with his lengthy criminal history and admission to being a drug addict. This Court finds any additional questions by Counsel about Tumblin's criminal history would have been cumulative and would not have impeached his credibility any further. Furthermore, this Court finds Counsel's cross-examination was not deficient and this Court will not speculate whether a "better" cross-examination would have

helped Applicant. See Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997). As Applicant has failed to meet his burden of proving Counsel was ineffective in this regard, this allegation must be dismissed.

Ineffective Assistance of Counsel – Failure to argue Applicant's sentence amounted to cruel and unusual punishment

Applicant alleged Counsel was ineffective for failing to argue Applicant's sentence of life without the possibility of parole (LWOP) amounted to cruel and unusual punishment in violation of the 8th Amendment of the United States Constitution. At the PCR hearing, Counsel testified he explained to Applicant the trial judge would have no discretion on sentencing if he was found guilty because the State served notice of LWOP.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective. This Court finds the decision to seek a LWOP sentence lies in the discretion of the Solicitor and not with the conduct of trial counsel. The lower court record and the testimony at the PCR hearing indicate LWOP notice was served in an effort to get Applicant to enter a guilty plea. Nevertheless, the trial court addressed the constitutionality of the LWOP sentence at the time of sentencing. Counsel argued against a LWOP sentence, making the exact argument Applicant now alleges Counsel should have made, arguing in part,

I would respectfully request under, for the record, under the Eighth Amendment for cruel and unusual punishment, I would request Your Honor to consider the possibility that the statute that has been presented, 17-25-45 which says that a person must be sentenced to a term of life in prison without the possibility of parole be deemed subject to unconstitutionality under the U.S. Constitution Eighth Amendment.

Tr. p. 306. Counsel continued his argument and introduced case law, stressing that a sentence of LWOP would be akin to a death sentence and is cruel and unusual considering Applicant's charge would usually carry a sentence of ten to thirty years. Tr. p. 307. This Court finds Counsel's actions were not deficient because he made a lengthy argument that the sentence

constituted an 8th Amendment violation. Furthermore, this Court finds Applicant has failed to show the outcome would have been different had Counsel employed a different argument, as the State was legally allowed to seek the LWOP sentence. Accordingly, this allegation must be dismissed.

Ineffective Assistance of Counsel and Judicial Misconduct – Judicial Bias

Applicant alleged Counsel was ineffective for failing to argue judicial bias when all objections to expose an obvious plot to try Applicant based on prior bad acts and a falsely dated video were brushed aside by the trial judge. Applicant also alleged judicial misconduct due to the trial judge's failure to enforce constitutional and statutory law and failure to grant a mistrial based on prior bad act evidence.

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective. This Court finds Counsel properly made a mistrial motion based on prior bad act evidence, preserving the issue which was ultimately upheld by the Court of Appeals. As this issue was reviewed by the appellate court and upheld, it is clear there was no judicial bias and no reason for Counsel to object further. This Court finds Applicant has failed to meet his burden of showing actual judicial misconduct that would require Counsel to object and warrant a new trial. This Court further finds the issue of the wrongly dated video was addressed by Counsel and the trial court. As Applicant has failed to meet his burden of proving judicial misconduct or that Counsel was ineffective for failing to argue judicial bias, these allegations must be dismissed.

Ineffective Assistance of Appellate Counsel

Applicant alleged his appellate counsel, Appellate Defender John Strom ("Appellate Counsel"), was ineffective for failing to address meritorious issues on appeal including the State's use of leading questions and the suppression issue dealing with the incorrect time stamp

on the CI buy video. He also alleged Appellate Counsel should have raised the issues that the actual hand to hand transaction was not shown on video, Tumblin bumped into two people on the way to conduct the buy, and the white hand shown in the video was not that of Applicant.

At the PCR hearing, Appellate Counsel testified he was appointed as appellate counsel after the trial and received the full defense file. He testified he spoke with Applicant prior to writing his brief. He testified he reviewed the record to spot potential appellate issues. He testified he chose four issues: the prior bad acts brought out by the State, the admission of Applicant's mug shot, the jurors premature deliberation, and cumulative error. Appellate Counsel testified his appeal was unsuccessful as the Court of Appeals found no abuse of discretion. He further testified he did not recall any potential issues that were preserved, and would have no reason not to raise a meritorious issue.

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome," Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not deficient

performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985). "To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

This Court finds Applicant has failed to meet his burden of proving Appellate Counsel was ineffective. The potential early deliberation issue by the jury does give this Court pause, but it was properly addressed by Appellate Counsel and the trial court and ruled upon by the Court of Appeals. This Court finds Appellate Counsel is an experienced appellate attorney who described his usual practice of spotting potentially meritorious issues to raise on appeal. This Court finds Applicant has failed to prove the issues of leading questions, the buy video, and the white hand would have been meritorious on appeal. As Applicant has failed to meet his burden of proving Appellate Counsel was deficient, or that he was prejudiced as a result of Appellate Counsel's actions, this allegation must be dismissed.

IV. CONCLUSION

Based on the foregoing facts, the Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Applicant failed to demonstrate that Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

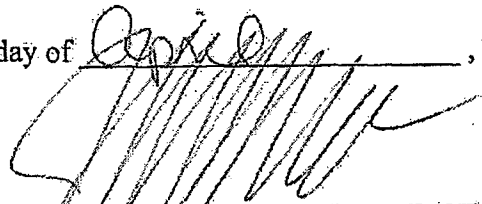
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate

appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 20th day of April, 2018.


 J. MARK HAYES, II
 Presiding Judge
 Sixteenth Judicial Circuit

York, South Carolina

WITNESSES

DEU Harrelson

sgb

ARREST WARRANT NUMBER

G-777564

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

12-12-13

VERDICT

Guilty

Foreperson of Petit Jury

Date:

4/22/14

DOCKET NO. 2013-GS-46-04248

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

December 12, Term 2013

THE STATE

vs.

DOMINIQUE JULIUS AGURS

Indictment for

DISTRIBUTION OF 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 CERTIFIED TRUE COPY INDICTMENT

COUNTY OF YORK

2017 JAN -9 AM 8:57

DAVID HAMILTON
CLERK OF COURT

At a Court of General Sessions convened on December 12, 2013, the Grand Jurors of York County present upon their oath:

DISTRIBUTION OF CRACK COCAINE

On or about March 5, 2013, the Defendant, Dominique Julius Agurs, did manufacture, distribute, dispense, deliver, purchase, or otherwise aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with intent to distribute, dispense, or deliver crack cocaine, a cocaine base, in violation of the provisions of Section 44-53-370. Said incident occurred in York County, South Carolina all in violation of Section 44-53-375 of the Code of Laws of South Carolina, (1976, as amended).

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


ASSISTANT SOLICITOR

COUNTY OF York
STATE VS.

INDICTMENT/CASE#: 2013GS4604248

Dominique Julius Agurs

A/W#: G777564

AKA: CERTIFIED TRUE COPY

Race: BLACK Sex: M

DOB: SS#: 207 JAN -9 AM 9:57

Address: York, SC 29745

City, State, Zip: York, SC 29745

DL#: SID#: SC01669594

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Distribution of Crack Cocaine, 3rd offense.

Date of Offense: 3/5/2013

S.C. Code § : 44-53-0375 (B) (3)

CDR Code #: 3039

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 44-53-0375 (B) (3) of the S.C. Code of Laws, bearing CDR Code# 3039

☒ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC) ☒ §17-25-45 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: *Matthew W. Shelton*
Shelton, Matthew W

74785
SC Bar# Defendant

Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of *Life without Parole* days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ 150
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ 5
3% to County (if paid in installments)		\$
TOTAL		\$ 280

PTUP _____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: *Life without Parole*

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk

David Hamilton

Court Reporter:

Wanda Nelson

SCCA017 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

John C. Wayne
2049
4.22.14