

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

JAMES L. MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001051

APPENDIX

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

THE STATE) TRANSCRIPT OF RECORD
-VS-) 2009-GS-10-8446
JAMES LAMONT MOORE,)
DEFENDANT.)

OCTOBER 17 & 18, 2012
CHARLESTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE KRISTI L. HARRINGTON, JUDGE; AND A JURY.

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

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RANDALL STONEY, ASSISTANT SOLICITOR
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I N D E X

(SW) - DENOTES STATE'S WITNESS

(DW) - DENOTES DEFENSE WITNESS

(IC) - DENOTES IN CAMERA

WEDNESDAY, OCTOBER 17, 2012

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1 Wednesday, October 17, 2012

2 MS. LINDER: Your Honor, we are here today for the
3 State vs. James Lamont Moore. I think it's important to
4 bring to the Court's attention that the defendant is not
5 present, and I believe -- I would be asking for a TIA in
6 this case, and I believe Mr. King will be asking for you
7 to issue a bench warrant.

8 I'm happy to go into the general history of the
9 case and why I think TIA is appropriate in this matter if
10 you would like to hear.

11 THE COURT: Well, first of all, where's your
12 client, Mr. King?

13 MR. KING: Your Honor, I've been trying since
14 yesterday.

15 THE COURT: Is he out on bond?

16 MR. KING: He is out on bond. He was here --

17 THE COURT: What does the bonds person say? Where
18 is the bondsman?

19 MR. KING: The bondsman is looking for him. She
20 has my cell numbers. He was here Monday. He was here
21 Monday, he left.

22 THE COURT: Did you see him, Ms. Linder?

23 MS. LINDER: He was here Monday and I'm happy to go
24 into more detail. He has, in my opinion, a selective
25 attendance record, report.

1 MR. KING: I tried calling yesterday and --

2 THE COURT: Do we know where he lives, where he
3 works?

4 MR. KING: The bondsman was told that he works for
5 Trojan Labor. She called Trojan Labor. They said, We
6 don't have a James Moore. So the bondsman has looked
7 into that, as far as talking to his mother. The bondsman
8 talked to his mother.

9 When I called it was -- it would ring. The message
10 said, This phone cannot receive voicemail at this time,
11 last night, up until, like, eight o'clock. Today I was
12 able to leave a voicemail. So I left a voicemail first
13 thing, Be here at one o'clock.

14 I kept calling periodically throughout the day,
15 called the bondsman. The bondsman is trying to call. I
16 did get -- someone answered the phone before I walked
17 over here, said it was his friend, he's at work. Just
18 get the same thing, that he's at work, Trojan Labor.

19 THE COURT: Trojan Labor, but Trojan Labor doesn't
20 know him?

21 MR. KING: According to the bail bondsman that's
22 what she said. She tried Trojan Labor and they don't
23 know him. I think that -- he has been on the docket a
24 lot and hadn't gone. I don't think he's necessarily run
25 away but maybe he just doesn't realize that it's going to

1 go or thinks maybe it's not going to go. But I would
2 request a bench warrant, Your Honor. He's looking at a
3 minimum 15, maximum 30. It's serious, serious charges.

4 THE COURT: We had a pretrial conference on this.
5 Did you indicate to him that he was number two?

6 MR. KING: I did, Your Honor.

7 THE COURT: Did you explain to him what that meant?

8 MR. KING: I told him we would probably either be
9 going Monday or today. That was what I told him.

10 MS. LINDER: And, Your Honor, to go on that, both
11 Mr. King and myself were in plea court Monday morning
12 after jury qualifications and about 12:30 I had went back
13 to my office and saw a message from Mr. Whetmore that you
14 were hoping to pick a second jury that day. I called
15 Mr. King and Mr. Moore came right back thinking that we
16 were going to pick a jury, and by the time we got here
17 y'all were arguing to the first motion hearing for Adam
18 Young. So he was well aware that he was -- actually
19 thought he was picking a jury Monday.

20 THE COURT: All right. Well, do we have another
21 case to try if I don't try this one in his absence, TIA?

22 MS. LINDER: Your Honor, I can contact Mr. Smiley
23 and try to get the next case, Norris Steplight, ready to
24 go if Your Honor would prefer that.

25 THE COURT: What's the likelihood he's going to be

1 here, Mr. King?

2 MR. KING: I've had no luck for the past two days.
3 I honestly don't know. Like I said, he showed up before.
4 You know, he's shown up, I think every time. There was
5 one time I didn't represent him he didn't show up on a
6 Monday and it was a holiday, but he generally shows up.
7 I apologize. I just don't know. I've tried everything
8 but I just can't get him on the phone.

9 THE COURT: Well, did you indicate to the bonds
10 person where we were procedurally with this, calling this
11 case for trial?

12 MR. KING: Absolutely, Your Honor. I told her
13 we're starting at 2:30. She was getting out the message
14 to be here at one, just like I had left on his voicemail,
15 so he would be here in plenty of time I could talk to
16 him. But, no, the bondsman didn't have any more
17 information to give me.

18 THE COURT: Is Mr. Smiley's case in custody?

19 MS. LINDER: No. He is out of jail.

20 THE COURT: Can we proceed with the motions without
21 your client, Mr. King?

22 MR. KING: Well, I would prefer if we just issued a
23 bench warrant and went forward because if -- I mean,
24 issue a bench warrant and go forward with another case.
25 I would prefer him to be here for this whole trial, if he

1 could be here.

2 THE COURT: What motions are we having today?

3 MR. KING: I was making a motion to go into the
4 record of the informant that are older than 10 years. He
5 has a record that's older than 10 years but not much in
6 the past 10 years. So I was making a motion to go beyond
7 the 10 years to impeach that informant, and I've got a
8 motion to redact some portions of the video, the video of
9 the alleged drug transaction, and we have an issue with
10 the confidential informant's file. There's a file.

11 You know, I think they are reluctant to just turn
12 over everything to me. I told them if they needed you to
13 review it in camera and decide what I should get, so
14 there's a motion regarding the CI's file.

15 THE COURT: Are you prepared on those?

16 MS. LINDER: Your Honor, the State is the prepared
17 to go forward on all three of those. I have the case
18 agent present and I also have the head of the narcotics
19 unit who is here with the CI file. The State would
20 respectfully request that if these motions are heard then
21 we do continue into selecting a jury tomorrow and
22 continuing on --

23 THE COURT: If they are heard; is that what you
24 said?

25 MS. LINDER: Yes, Judge.

1 THE COURT: How long do you think these motions
2 will take for me to hear, Ms. Linder?

3 MS. LINDER: Judge, I would say that it would take
4 maybe an hour total --

5 THE COURT: All right.

6 MS. LINDER: -- to take everything.

7 THE COURT: Out of an abundance of caution I'm
8 going to pass this case until 3:50, and hopefully by then
9 you'll have some information from your bonds person. Do
10 you want me to issue a warrant now?

11 MS. LINDER: If Your Honor would be willing to
12 issue a bench warrant at this time, yes. I can get the
13 paperwork within five minutes to Your Honor.

14 THE COURT: All right.

15 MS. LINDER: Thank you, Judge.

16 THE COURT: Thank you.

17 MR. KING: Thank you, Your Honor.

18 (WHEREUPON, the case was recessed.)

19 THE COURT: Is your client here?

20 MR. KING: No, Your Honor. I don't believe he's
21 coming.

22 THE COURT: All right. Well, I signed a bench
23 warrant so that's put in the system.

24 (Off the record.)

25 THE COURT: Did you explain to him that if he

1 doesn't come he's going to get locked up?

2 MR. KING: Yes, Your Honor, and that possibly the
3 trial might continue as well, but I don't think he's
4 coming from the conversation I had with him. He said he
5 was in Mount Pleasant. He was looking for a ride but
6 then, you know, the other part of the conversation --

7 THE COURT: I thought you told me he was on his
8 way, Mr. King?

9 MR. KING: He told me he was on his way. He would
10 be here in 15 -- he said he was coming, he would be here
11 in 15 minutes.

12 THE COURT: That was about an hour ago; is that
13 right? Well, maybe not quite an hour ago.

14 MR. KING: Right, Your Honor. Then he said he was
15 still looking for a ride. I don't believe that he's
16 coming. I honestly don't.

17 THE COURT: Okay.

18 MR. KING: And I would -- you're right that you
19 issue a bench warrant and we would not go forward with
20 the case at this time.

21 THE COURT: I've already issued the bench warrant
22 so...

23 MR. KING: And I can let the bail bondsman know.

24 THE COURT: The bail bondsman needs to know that we
25 are going to go forward with our hearings at a minimum.

1 (WHEREUPON, a conversation took place off the
2 record pertaining to an unrelated case.)

3 THE COURT: All right. Let's do our motions in
4 this case. I note your objections, Mr. King, and that
5 your client is not here but it is 4:20. I told you we
6 would begin at 2:30. I've given, I believe, ample time
7 and you've made ample efforts. So we are going forward
8 on the hearings. Thank you.

9 MR. KING: Yes, ma'am.

10 MS. LINDER: And, Your Honor, I would respectfully
11 request that -- with proceeding with these motions. I
12 understand that you did sign a bench warrant, that we
13 would be able to continue tomorrow if he has not shown up
14 tomorrow, into this trial.

15 THE COURT: I'm hoping that the bench warrant is
16 going to be effectuated some time today and that we can
17 proceed with him tomorrow.

18 MS. LINDER: My intention is once we get a copy of
19 the file I've got two people from the City here right now
20 and I'm sure they will gladly hand it out to the other --

21 THE COURT: And I'm sure the bonds person will be
22 in a position to assist.

23 All right. We have two motions from Mr. King, and
24 does the State have any motions?

25 MS. LINDER: No, Your Honor.

1 THE COURT: Ms. Linder, let's just do it the simple
2 way. Your position on the motion to use evidence of
3 convictions greater than 10 years?

4 MS. LINDER: Mr. Stoney is going to handle that
5 motion.

6 MR. STONEY: That's right.

7 THE COURT: All right, Mr. Stoney.

8 MR. STONEY: Your Honor, the State would oppose
9 allowing the -- I believe he wants to get the 1988
10 convictions in. The State would oppose allowing those in
11 under the Court of Appeals opinion State V. Williams in
12 which the Court of Appeals upheld Judge Dennis's denial
13 with those convictions in 2006. It was the same CI, the
14 same sort of scenario where it was a controlled buy under
15 the direction and control of the City of Charleston. In
16 that case, in Williams, the Court held under 609 that the
17 prior convictions --

18 THE COURT: Did you say that it was the same CI
19 that was used in that case?

20 MR. STONEY: Yes. Yes, Your Honor, and so we would
21 argue that if they weren't allowed in in 2006 --

22 THE COURT: Is that true, Mr. King?

23 MR. KING: I was the defense attorney and
24 Ms. Linder was the prosecutor, and it was the same CI.

25 THE COURT: Mr. Stoney, were you the law clerk?

1 MR. STONEY: I was not. I was in college, I
2 believe.

3 THE COURT: All right. Mr. King, so why should I
4 -- what's different?

5 MR. KING: Well, in the In Re: Williams case they
6 did note that the informant said on the witness stand I
7 spent half my life in prison. So I actually did get sort
8 of what I wanted in that trial.

9 THE COURT: Right.

10 MR. KING: And they ruled that it was a harmless
11 error, it is in the judge's discretion. There's been
12 some difference now, and since he's continued to get in
13 trouble, Your Honor. He's been --

14 THE COURT: The CI?

15 MR. KING: Yes, Your Honor. He's been arrested
16 for, you know, contempt of family court in three
17 different times; 2007, 8 and 2010. And also recently
18 he's had convictions for urinating in public and public
19 intoxication, and I put in my motion I wasn't intending
20 to go into those but I believe that he has continued to
21 break the law, you know, and that his subsequent history
22 is relevant in the case law or the Colf, C-o-l-f,
23 factors.

24 The CI's credibility is crucial to the trial. The
25 CI is going to have to explain what's going on in the

1 video. The video doesn't show everything so the
2 testimony of the CI and his credibility is very
3 important. The factors are -- oh, another thing. The
4 defendant's rights aren't implicated in this situation.
5 Some of the cases involved the defendant testifying and
6 going into a defendant's prior record. This isn't that
7 situation. So no defendant's rights are being
8 implicated. I think that weighs in my favor.

9 In the impeachment value of prior crimes, you know,
10 I'm only asking to get in dishonest crimes. There were
11 some other things on there. So I'm sticking with just
12 the larceny, forgery, grand larceny and armed robbery as
13 crimes of dishonesty. I think that they have a high
14 impeachment value.

15 I mentioned the subsequent histories of getting
16 arrested for family court contempts and urinating in
17 public and public intoxication. There's a factor of the
18 similarity of the past crimes and the crime charged.
19 That's not an issue here. I think that applies for a
20 defendant but there's no similarity. And it's just
21 credibility is the central issue in the case.

22 In order -- he has a bad record but it's old, and
23 recently, you know, other than those convictions I've
24 mentioned, you know, there's not a lot I can go into. I
25 think there's a receiving stolen goods around 2002. I

1 believe Ms. Linder was okay going into that one. She
2 doesn't have an objection to me asking about receiving
3 stolen goods in 2002 but that's it.

4 I don't think the jury can get a fair view of the
5 guy's credibility, of this witness's credibility without
6 knowing his full record, you know, because it's really
7 bad a long time ago. And since his credibility is so
8 important I think the jury should be able to hear his
9 entire record to be able to evaluate his credibility.

10 And I had cited to a case. There's a fairly new
11 case called State vs. Jason Ervin Black. That case, the
12 prior convictions were not allowed in but best
13 distinguishable from this case because they were prior
14 manslaughter convictions, which is a crime of violence
15 and doesn't have a high impeachment value because it's
16 not a crime of dishonesty. So these charges I'm trying
17 to get in, I believe, are all crimes of dishonesty.

18 THE COURT: And tell me again what's changed
19 between the prior case that the Court of Appeals has
20 ruled on -- excuse me, the Supreme Court. I'm sorry.
21 I'm looking at -- I had them all stacked up, the Court of
22 Appeals and this instant.

23 MR. KING: Well, first of all, I think it's in Your
24 Honor's discretion, so it's discretionary. I think, you
25 know, different judges could come to a different

1 conclusion on it so, you know -- and the fact that he's
2 continued to get in trouble. That's the main thing
3 that's changed is he's continued to get arrested for --

4 THE COURT: But you are not asking me to allow you
5 to introduce those convictions, the misdemeanor, the
6 public and the urinating in public, correct?

7 MR. KING: That's right. I think that's just
8 evidence of his subsequent history that he has.

9 THE COURT: That you wish for me to consider in my
10 analysis; is that correct?

11 MR. KING: Yes. That's correct, Your Honor.

12 THE COURT: All right. Is there any reason I need
13 hear from you, Mr. Stoney?

14 MR. STONEY: No, Your Honor.

15 THE COURT: Mr. King, I am denying your request. I
16 find that they are too remote, and while several years
17 ago may have had significant impeachment value the
18 probative value at the time substantially outweighs the
19 prejudicial effect and the centrality of the credibility
20 issue to a 1988 armed robbery of the CI. So I note for
21 the record and I appreciate the argument and the cases
22 that you have cited. Thank you.

23 The motion to redact the statement?

24 MR. KING: Yes, Your Honor. There's really sort of
25 two issues going on there with the motion to redact.

1 I'll start off with the improper comments on the
2 defendant's character, and that I'm citing the State vs.
3 German, 325 S.C. 25. In that case, the police officer
4 testified that he had several tips that the petitioner
5 was distributing or selling crack cocaine, and that was
6 ruled to be improper.

7 In another case we cited in German where I think
8 the police were allowed to go into the fact that there
9 was a high drug area and that was the reason that there
10 was an investigation there. But once the comments refer
11 specifically to the defendant then under German that
12 would be an improper comment on issues on Mr. Moore's
13 character.

14 And what I'm talking about on the video, in the
15 beginning of the video they are preparing the
16 confidential informant. They are in a vehicle and they
17 are going to drive to the drop-off location.

18 The police officer is talking, there's also a
19 radio that's going on, and he's talking with the
20 informant and some statements are made such as, We're
21 going to drop you off at the same spot; the house across
22 from the gas station where the boys are always hollering
23 at you trying to do that. They are always out there,
24 always hollering at you.

25 Then a little bit later -- and this is the

1 beginning of the video, Your Honor. So I don't think it
2 is that relevant anyway. It's before the informant is
3 dropped off and begins to walk toward the targeted
4 location.

5 On the drive there there's a police radio and I
6 believe there -- you know, I believe they're maybe
7 surveilling the area, telling him that there's some
8 people out there, and they're talking about another guy
9 in front of the house, He's out there. There's a couple
10 of guys out there. They are right out there on the
11 corner past the gas station in a white T-shirt. One of
12 them has cast on, and that's supposed to be referring to
13 Mr. Moore, has alleged to have had a cast on at the time.

14 So these are, you know, preliminary discussions
15 which the implication being that, you know, Mr. Moore is
16 always out there trying to sell drugs, and I believe
17 that's the improper comment on his character. I don't
18 think it's relevant for anything.

19 It's the beginning of the video so it's really just
20 preparation for the CI and, you know, these comments can
21 easily seem to be saying that, you know, these are the
22 guys that are always out there, they are always yelling
23 at you, and it's implying that he's always out there
24 selling drugs. I believe that's unfairly prejudicial and
25 an improper comment on character and any probative value

1 it would have is outweighed by its unfair prejudice.

2 There are more statements, Your Honor, during the
3 actual, what's supposed to be the transaction, and this
4 goes into the second part of the motion. The informant
5 is narrating on the video. He's talking so that the
6 officers listening in can hear him and he says again at
7 that point, referring to what's alleged to be my client,
8 That's the same guy that be in the yard all time, be
9 yelling at me.

10 You know, they keep saying the same thing over and
11 over again about him being in the yard all the time
12 yelling at him, again, the implication that he's always
13 out there trying to sell drugs to them.

14 The second part of the -- and that's right in the
15 middle of some statements that go into the second part of
16 my motion, which are the prior consistent statements.
17 During his narration you can't necessarily see everything
18 going on in the video so the informant is narrating.
19 He's getting ready to go across the street and go get it,
20 The one with the blue cast on. And that's mixed in with
21 the improper comments on his character of that's the same
22 guy that's in the yard all the time yelling at me.

23 And then he tells the police where he's going.
24 He's going in the yard. When you turn in on this street
25 it's the first, second, the third. He's telling which

1 house they are going to, and so I'm moving to keep those
2 out.

3 After the buy is over there are more what I would
4 say prior consistent statements. After the alleged buy
5 finishes he narrates again into the microphone that I got
6 it from -- I believe he says I got it from the guy with
7 the cast on. It says -- yes. After the alleged buy is
8 over he narrates into the microphone, The one with the
9 blue cast is the one I got it from, the white tank top
10 and black pants.

11 Then when he finally gets back to the car and at
12 the very end of the video he says again, I got it from
13 the dude with the cast on.

14 So I believe that those -- some of those are prior
15 consistent statements which will be bolstering and
16 hearsay, and other ones are improper comments on the
17 defendant's character, and in at least one part of the
18 narration they are sort of fixed together. So I would
19 ask to redact those portions. The informant can narrate
20 and testify on the stand and describe what's going on in
21 the video, and I think, you know, that would be
22 appropriate to explain that to the jury and it's not
23 necessary to have it played on the video.

24 Oh, and I left this out, too, Your Honor. When the
25 informant says on the video, I pass you all the time

1 sometimes, and that would go again into, you know, they
2 keep talking about how he's always out there. That's the
3 implication that I'm trying to prevent the jury from
4 hearing, is the idea that he's always out there yelling
5 at people and trying to sell drugs. It will make it
6 difficult to redact this, you know, and plus it being
7 mixed in with the consistent statements but I think
8 there's a way it can be done.

9 THE COURT: Whose argument is this?

10 MS. LINDER: Mine, Your Honor. First I'd like to
11 address kind of how Mr. King outlined the two separate
12 issues. There's the issue that he claims which is
13 comments on character. Mr. King pretty much stated it
14 accurately. As you watch the video you hear the two
15 agents in the car, the two investigators kind of speaking
16 to one another and then telling the confidential
17 informant, you know, where to go.

18 I would submit, Judge, that they are targeting a
19 location. They are not targeting a person. They don't
20 mention him by name. They mention, actually, a
21 description of multiple people who are out there, and
22 while them boys hollering may mean drug dealing to some
23 people it doesn't necessarily mean that to everyone.

24 And part of why they do this and why they discuss
25 this in a case is a lot of it is about safety. They've

1 got other officers, they are all talking on walkie
2 talkies --

3 THE COURT: Is that what that means, they are
4 always hollering at you, is drug dealing?

5 MS. LINDER: That is what Mr. King is saying.

6 MR. KING: I think that that's the implication
7 there. They are wanting to find someone to buy drugs
8 from. So they are targeting -- on the video there are
9 two people, and that's who they are talking about. Those
10 are the guys that are always out there yelling.

11 So I think that's the -- if that's the implication
12 why else would they be targeting these guys, is that they
13 are the ones always out there yelling at the -- I guess
14 to the informant. He says they are always yelling at
15 him. The implication is that he's yelling at them to
16 sell drugs to them, is the implication.

17 THE COURT: Okay.

18 MR. KING: It's not outright stated that he's
19 trying to sell -- always out there trying to sell drugs
20 but it's -- you know, it's --

21 THE COURT: Do you have the video?

22 MS. LINDER: I do, Your Honor. If you'd like to
23 watch it. We can mark it as a court's exhibit.

24 THE COURT: Show me that, about the hollering at
25 you. And what about the prior consistent statements?

1 MS. LINDER: As far as the prior consistent
2 statements, I'd actually classify that as pretty much the
3 exact definition of a present sense impression. He's
4 saying -- you know, you hear him because they drop him
5 off in a parking lot. He says, I'm passing Burris, I'm
6 passing a liquor store. I'm about to cross Meeting
7 Street.

8 THE COURT: How long is the video?

9 MS. LINDER: A total of, I think 10 minutes.

10 THE COURT: All right. Let me just see the video.
11 Wouldn't that be easier, Mr. King?

12 MR. KING: Yes.

13 THE COURT: Just watch the video, then how
14 difficult is it going to be redact it, if needed?

15 MS. LINDER: Your Honor, I would say that as far as
16 the beginning part with the officers commenting on
17 Mr. Kinley's character, I do not believe that would be
18 difficult. I believe if you take away one of the two
19 senses of an audio and video recording being sound I
20 think it more or less takes away -- it loses a lot of
21 what the whole case is.

22 THE COURT: All right. Let me watch it.

23 MS. LINDER: Would you like me to play it here or
24 hand it up to the Court?

25 THE COURT: Right there because you can see it on

1 here, right?

2 MS. LINDER: Yes, Judge.

3 THE COURT: We have the new equipment, we might as
4 well use it.

5 What time do you want the panel to report back,
6 Mr. King? What time do you want to get started in the
7 morning?

8 MR. KING: 9:30.

9 THE COURT: Does that work for you, Ms. Linder?

10 MS. LINDER: I'll be ready whenever you are.

11 THE COURT: Oh, I forget. I have something else
12 scheduled in the morning. Ten?

13 MR. KING: Yes, Your Honor.

14 THE COURT: Have the jury report back at ten. That
15 will give you time to tell your -- I want you all here at
16 9:30 in case there's any pretrials.

17 All right. Let me know, are we starting?

18 MS. LINDER: Yes.

19 (WHEREUPON, the video was played.)

20 THE COURT: All right. Pause it for just a second.

21 Mr. King, is that your position that that means
22 that they are trying to -- they want to sell him drugs?

23 MR. KING: I believe that the implication of that
24 is, is that they are always out there and they are
25 hollering at him, I believe that that can easily be

1 interpreted that they are out there selling drugs. I
2 mean, I don't know what else -- that's what it sounds
3 like to me, and that's why he's -- that's why they are
4 the target, the guys that are always out there and always
5 yelling at you. Why would they target them if they are
6 just out there saying, Hey, how you doing?

7 The fact they are out there, they are out there
8 yelling trying to get -- you know, I guess they are
9 trying to sell drugs and yelling trying to get customers.
10 That's what -- the only interpretation I can get on that.
11 Why else would they be a target?

12 THE COURT: Ms. Linder?

13 MS. LINDER: Judge, I would just say that, you
14 know, them boys always hollering at me, it does not say
15 Mr. Moore, it does not specifically say one single person
16 out there. It says there's a group of people out there.
17 Hollering at could mean a variety of things.

18 I understand what Mr. King is saying what he
19 believes the implications are and I think perhaps in
20 certain circles those are the implications but I would
21 hold that it is not necessarily a comment on character.
22 Most specifically it's not a comment on the defendant's
23 character. It's merely a target location.

24 He is describing the house behind the gas station,
25 and that's also to just let the rest of the operation

1 know where the perimeter officers need to be circling for
2 safety for everyone involved in the operation.

3 THE COURT: All right. Continue.

4 And, Mr. King, if you'll just alert me which
5 statements that you want me to focus on.

6 MR. KING: Yes, Your Honor.

7 (WHEREUPON, the video resumed play.)

8 MR. KING: And this is the next conversation I
9 would object to.

10 THE COURT: Have they been in the car the entire
11 time?

12 MS. LINDER: Yes, Judge, just driving.

13 MR. KING: I'm sorry. There's a radio in the
14 background and I think it says there's another guy in
15 front of the house, then the informant thinks that he's
16 talking to him but the officer is talking to somebody
17 else on the radio. Sorry. I just wanted to explain what
18 was going on there.

19 And this whole conversation is the same thing that
20 -- they are radioing in about people being out, the same
21 guys who were out there, and that's going to continue
22 for, I think the next minute or so.

23 THE COURT: And this is what -- you are objecting
24 to this?

25 MR. KING: Yes. Yes, Your Honor.

1 THE COURT: All right. Starting from now?

2 MR. KING: I believe from here, Your Honor.

3 (WHEREUPON, the video resumed play.)

4 MR. KING: They are now going to talk for just
5 about 30 or 40 more seconds, Your Honor, and then
6 continue talking about the same thing, and I'm objecting
7 to this next conversation, too.

8 And that's going to be it for a few minutes. He
9 walks to the target location.

10 THE COURT: All right.

11 MR. KING: Do you want to let it play or skip
12 ahead?

13 THE COURT: Well, can you mute it until it gets to
14 the points?

15 (WHEREUPON, the video was muted.)

16 THE COURT: Thank you.

17 MR. KING: Your Honor, we're just going to jump to
18 what is the alleged transaction. He walks along, he says
19 a few things but nothing that I'm objecting to on the
20 walk to the location.

21 So I believe this is the alleged buy and this is
22 where the narration is going to come in that I was saying
23 was the prior inconsistent statement.

24 (WHEREUPON, the the video resumed play, with
25 volume.)

1 THE COURT: Is that your client that has the blue
2 cast on?

3 MR. KING: My client is alleged to be the one in
4 the tank top, the white tank top.

5 THE COURT: Does he have a blue cast?

6 MR. KING: According to State.

7 THE COURT: I'm just trying to --

8 MR. KING: That's who they are saying my client is.

9 THE COURT: Is it your position that the person
10 that is selling the drugs had the cast on?

11 MS. LINDER: Yes, Judge.

12 THE COURT: Is that correct?

13 MS. LINDER: Yes, Judge.

14 THE COURT: And your issue is that the CI is
15 narrating and says, It's the guy with the blue cast on?

16 MR. KING: Right, Your Honor. He's narrating in
17 the video. He's giving these statements. Narrating in
18 the video about things that are going on off camera, and
19 he can do that on the stand. He can take the stand and
20 explain what's going on but I'm arguing that it would be
21 a prior consistent statement bolstering that and what
22 he's narrating there on the video.

23 THE COURT: Okay. Do I need to watch any more of
24 this? Have I seen and heard?

25 MR. KING: It continues. At some point later just

1 a minute or two he says to, who's allegedly my client
2 with the blue cast on, that I pass you all the time
3 sometimes but I'm down there.

4 What he's saying is I pass you all the time but I
5 go to these guys down the street. So he's saying, again,
6 I'm passing you and I know you are selling drugs but I'm
7 going to these guys down the street, is what it -- I just
8 don't see any other interpretation of that.

9 So he says that actually to the person that the
10 State's alleging is my client, then after it's over he
11 then comments more, you know, narrates about what just
12 happened and says, I'm on my way back. The one with the
13 blue cast is the one I got it from, with the white tank
14 top and the black short pants. He went across the street
15 to the white house to get it and then when he finally --

16 THE COURT: So he's narrating all of this to the
17 officers through the microphone?

18 MR. KING: That's correct, Your Honor. And then
19 when he finally returns back to the car at the end of the
20 video he says, I got it from the dude with the blue cast
21 on. He says it one more time at the very end of the
22 video.

23 THE COURT: How is this not a prior consistent
24 statement?

25 MS. LINDER: Judge, I would say that this is

1 exactly in line with Rule 803(1) the exception to hearsay
2 with present sense impression. He is saying what's about
3 to happen, he is saying it as it's happening. He's
4 describing what is happening.

5 You know, as far as Mr. King saying he's narrating
6 something that's off screen, I mean, quite frankly the
7 pin cam is in one location and it doesn't have peripheral
8 vision. It's not on his head. It doesn't turn where his
9 head turns, and so I think it exactly fits the bill and
10 definition of a present sense impression.

11 He is saying in live time of what is happening. He
12 is relaying it to law enforcement, and that's telling
13 them not only what's happening but it's also reassuring
14 them in their monitoring of the live feed that everything
15 is okay, that his safety is not in question, and so on
16 and so forth.

17 THE COURT: Mr. King?

18 MR. KING: Your Honor, I still think that it's --
19 he's saying he's getting ready to go across the street
20 and go get it. I don't know if that's describing
21 something that's actually happening. That's describing
22 what he thinks is going to happen in the future.

23 And then he says in that same paragraph -- that's
24 the problem, is that they are going to be mixed together.
25 That same paragraph he says, That's the same guy that's

1 in the yard all the time that's yelling at me. And then
2 he describes -- he tells them where he's going. I
3 understand some of that could be present sense
4 impression --

5 THE COURT: But this is the whole buy, correct,
6 from the time they wired him up until the time he gets
7 unwired, correct?

8 MR. KING: I believe that's correct, Your Honor, as
9 far as I know. That's all the video I was provided.

10 MS. LINDER: I think that you can separate most of
11 what Jason is saying as far as comments on character in
12 the beginning versus the CI's actual present sense
13 impression of what's happening. I think there are times
14 to separate that out.

15 THE COURT: What this video is is the time he gets
16 in the car, he's wired up, until he returns back to the
17 car and unwired?

18 MS. LINDER: Yes.

19 THE COURT: I just want to be clear because when
20 you're talking separate paragraphs it just kind of in my
21 mind thought maybe we were two separate times. So this
22 is all one chunk?

23 MR. KING: Right. Right. What I mean is that I
24 have two different motions regarding the two different
25 reasons.

1 THE COURT: Two different paragraphs on your
2 motion. I'm sorry. Thank you.

3 MR. KING: Right. I'm sorry. And they are kind of
4 -- you know, this one paragraph when he starts that
5 narration, Everybody is getting ready to go across the
6 street at about 9 minutes and 45 seconds, part of that
7 I'm objecting to as a prior consistent statement, but the
8 next sentence is the improper comment of the character;
9 That's the same guy that's in the yard all the time
10 yelling at me.

11 So, I mean, the two issues are in the same -- you
12 know, same narration that the informant is giving. So
13 it's tough to separate them out from the other, so that's
14 why I'm asking that it be muted during that part and let
15 the informant explain what's going on from the stand.

16 I don't believe that -- and even if what's being
17 said, that he's getting ready to go across the street to
18 go get it, even if that's present sense impression there
19 I don't think the later statements are. The later
20 statements, you know, when it's already over he's saying
21 what happened in the past. I don't think that's a
22 present sense impression.

23 THE COURT: Ms. Linder, what about just having the
24 CI testify from the stand as to what's going on?

25 MS. LINDER: Judge, I think that can cause some

1 issue because this is what happened over three years ago.
2 As you will hear from when the CI takes the stand and as
3 you will see, if Your Honor so wishes to see the CI file,
4 this CI has been working with law enforcement for over 10
5 years. He has hundreds of buys.

6 I cannot -- he also, due to his age and advanced
7 glaucoma at this point, three years later, does not have
8 the best vision. He watched this and initialed the video
9 a year ago in a dark room with the laptop. I cannot say
10 that based on his ability to view this with no sound his
11 memory is going to be -- to be able to recount this as
12 accurate as his present sense impression did over three
13 years ago.

14 I'm happy with Mr. King, he has the ability to
15 cross the CI on what is said in this video. He can ask
16 the CI all the questions he wants to on the stand about
17 the present sense impression but I do not think it's a
18 prior consistent statement.

19 I do not intend to ask the CI to take us through
20 step by step what happened. I intend to lay the
21 foundation, get it admitted, and with the Court's
22 permission publish the video in its entirety or in the
23 amount that the Court allows, and then that is the
24 extent of my intention to use the confidential informant
25 in this trial.

1 THE COURT: All right. Mr. King, anything else?
2 Anything else I need to know?

3 MR. KING: Just like to mention that in addition to
4 the prior consistent statement when -- I guess when the
5 statement alleged the transaction is actually going down
6 he's saying, I pass you all the time sometimes, which
7 again ties back into the previous statements of the guy,
8 says he's always out there. He says, I pass you all the
9 time sometimes but I'm -- but I'm -- but I've called my
10 boy down the street down there.

11 So I think that's again implying he's always out
12 there selling drugs, and that's unfairly prejudicial and
13 a prior bad act, 404(b), and improper comment on the
14 character. I think it's so -- it's going to be
15 complicated to take parts of it out that I would ask just
16 to mute it and have the informant narrate it.

17 THE COURT: Mr. King, I guess -- and maybe I'm
18 unsure as to exactly what it is that I'm going to need
19 you to provide me other than I'm just going to try to
20 make this simple. I don't know of any reference that can
21 be inferred, I've never heard it connected with drug use
22 or drug selling as they are always hollering at you.

23 MR. KING: I think when you look at all the
24 statements together they all build on each other. When
25 he says in the beginning, The guys are always out there,

1 and what makes it clear is when he says I pass you all
2 the time sometimes but I'm going down to the people down
3 the street.

4 What he's saying is, I pass you sometimes, but it's
5 not said but implied I've been buying from these guys
6 down here, not you. The more the statements build on
7 each other it starts to become -- becomes clear what he's
8 talking about.

9 So just saying -- right. If you just take the
10 statement, They are always out there hollering at you,
11 you know, you might not know what that means, but within
12 the context of the whole video and all the statements
13 added together it clearly means that he's out there
14 selling drugs all the time.

15 THE COURT: But, Mr. King, I'm concerned because I
16 like to work in my yard and when my neighbors walk by I
17 holler at them, and so is that to assume that I'm -- I
18 mean, that's where I'm getting at.

19 MR. KING: And the police would never target you in
20 your yard to try to buy drugs from you. It's -- that's
21 -- what other reason would there be for them to be the
22 target of this investigation? Not just because they are
23 out there. Right. If they are just out there saying,
24 Hey, how are you doing, just yelling and being friendly,
25 that wouldn't give the police a reason to make them

1 investigate. It's the context of the whole video becomes
2 clear what that means.

3 Just taking that statement isolated, right,
4 hollering doesn't necessarily mean that but it becomes
5 clear that's what that means when you watch the whole
6 video and hear all the statements, and when you think
7 about why would the police -- why would the police send
8 the informant to go -- why are they even guarding him to
9 go send the informant to him? Because they are standing
10 out there selling drugs, is what they are saying.

11 It's just not as innocent as they are out there
12 hollering greetings or, you know, there would be no
13 reason to try to buy drugs from someone who is just being
14 friendly. That doesn't raise any suspicion at all.

15 THE COURT: All right. Mr. Linder, anything
16 further?

17 MS. LINDER: Your Honor, I believe I've stated
18 everything about the State's position. Thank you, Judge.

19 THE COURT: All right. Mr. King, you would agree
20 I've viewed the majority of the video and have listened
21 to and seen parts that you are objecting to?

22 MR. KING: Yes, Your Honor. I believe so.

23 THE COURT: Ms. Linder, do you agree that I've seen
24 the majority of the video and got the flavor of what's
25 going on?

1 MS. LINDER: I do agree, Judge.

2 THE COURT: All right. What is your explanation of
3 the hollering?

4 MS. LINDER: Judge, I think it can be taken in a
5 variety of ways, kind of as you said. Who knows if you
6 are out in your yard. I holler at my neighbors when they
7 go by, have a baby, they walk by with a stroller. I
8 holler at those people, some people holler at me.

9 He says I see -- as Mr. King, and I'm going to
10 paraphrase this, something like I see you out here all
11 the time sometimes. I usually go down the street.

12 I mean, does the momma live down the street, does a
13 friend live down the street? He says he passes by. I
14 don't necessarily think that that means I pass you by to
15 go buy drugs elsewhere.

16 I will say that there's a different vernacular for
17 -- and lingo for people who are on the street, and I may
18 not necessarily know all of that and I think it could
19 mean different things to different people. But I
20 definitely do not think that that has an implication of
21 drug sales and I definitely do not think that has an
22 implication of Mr. King's defendant is the drug dealer.

23 When you listen to it, as Your Honor has, they talk
24 about location. They actually describe multiple
25 different people who are out there. I would submit that

1 that is in doing good police work. It's in trying to
2 identify a location, trying to identify the people who
3 are around there so the officers who are doing perimeter
4 are aware of who's out there, are aware of where the CI
5 is walking, are aware if the CI's safety is in danger.
6 That's the importance of that live feed. That's the
7 importance of all these recordings.

8 And, Judge, I do think that the comments on the
9 character, as Mr. King describes it, versus the prior
10 consistent statements, I would argue that would be
11 present sense impression. I do think those two items are
12 two separate issues for Your Honor to rule upon.

13 THE COURT: All right.

14 MR. KING: And, Your Honor, I left one thing out.

15 THE COURT: Please.

16 MR. KING: This falls back, there's Rule 403 that
17 whenever it's probative of that it's outweighed by the
18 danger of unfair prejudice. You know, there's a danger
19 it could be misinterpreted.

20 You know, I interpret it that way after I watched
21 the video. That's the only interpretation I can come to
22 after watching the video in its entirety and listening to
23 everything they are saying. I didn't come to any other
24 conclusion of what they are out there doing hollering.

25 So I think that, you know, even if we can interpret

1 it more than one way there's a danger of unfair prejudice
2 and I would cite to rule 403, in addition to what I
3 argued before.

4 THE COURT: All right. I have observed the video
5 and then both of you know that prior to taking the bench
6 I did prosecute drug offenses, and based upon my review
7 of the video there is nothing that causes me any concern
8 that that's the automatic implication that I go to.

9 I have never heard that expression in any other
10 drug case that I either prosecuted or have presided over
11 during the last few years on the bench. And based upon
12 that I do not, in doing -- and I'm glad you brought up
13 403. I do not find that there's any undue prejudice.
14 That was not my assumptions even knowing that that's what
15 you were challenging. And so I deny your motion that
16 it's improper character evidence because I do not think
17 that it's a comment on anyone's character, let alone your
18 client.

19 I do find that based upon my observation of the
20 video and the arguments presented and reading the rules
21 that it is clearly a present sense impression, and as
22 Ms. Linder intends to use the video that it most
23 definitely will be a present sense impression if she is
24 not going to question and go step by step on the video
25 but just play the video as a recorded recollection of

1 what happened. I deny your motion to redact the
2 statements and note your exception for the record. Thank
3 you.

4 MR. KING: Thank you, Your Honor.

5 THE COURT: All right. So with that there's
6 nothing further, Mr. King?

7 MR. KING: One issue, Your Honor.

8 THE COURT: Yes.

9 MR. KING: I requested the confidential informant's
10 file. It's something, you know, we always ask for. I
11 don't know what records they keep on the informant but I
12 just didn't know if there's anything in there that might
13 be discoverable that I might use for cross-examination.

14 The State, I know, is concerned about the informant
15 and, you know, other buys that he's done. I mean, I'm
16 not trying to find out other names of other people that
17 he's bought from. I'm just looking for things like
18 anything in the file that, you know, reflect on his
19 dishonesty or credibility, the records of, you know, how
20 many buys he's made, how much money he's made, things
21 that I think that I could use in cross-examination.

22 The State, I believe, has an issue with that. I
23 understand that's the confidential informant, so I don't
24 know how to handle that, but I would request -- I'd have
25 to request the file for anything that I can use.

1 THE COURT: Ms. Linder, you said that the officer
2 is here with -- the detective is here with the file?

3 MS. LINDER: Yes, Your Honor, and I understand the
4 Court would like to do an in-camera hearing.

5 THE COURT: All right. Just bring me the file.
6 I'll do it right here on the bench.

7 MS. LINDER: May I approach?

8 THE COURT: You may.

9 MS. LINDER: And, Your Honor, if you have any
10 questions about what's in the file Jonathan Shealy is
11 here. He's the case agent. And then also Lieutenant
12 Dutton is here who's over the narcotics unit for the
13 city, if you have any questions about the information
14 contained.

15 (PAUSE.)

16 THE COURT: All right. Mr. King, what is it that
17 you are requesting?

18 MR. KING: Your Honor, I'd request anything in --
19 if there is any anything in the file that would reflect
20 on his credibility, his honesty, dishonesty, and also the
21 number of buys that he has done over his career.

22 He is a paid informant, you know, so he's not
23 working off any pending charges or anything like that.
24 This is -- he gets money for this. I'm looking for the
25 number of times he's done it over the years and how much

1 money he's made.

2 I mean, I can ask the informant but I would have to
3 trust that he's telling me the truth. I don't know if
4 there's any records to back that up, and how many buys
5 he's made and how much money he's made. Those are the
6 main things we're looking for.

7 MS. LINDER: And, Your Honor, I would be cautious
8 to do that. Also, I would also want the Court to know
9 that the CI, and I relayed this to Mr. King and the CI is
10 happy to talk about it on the stand, he's actually worked
11 for at least three agencies in the area, not just the
12 city. I did not contact them for any CI files because it
13 was much older.

14 It's also my understanding that that's the newer
15 file for this CI and in fact he has many other buys. The
16 file was getting quite thick due to the amount of
17 paperwork from the number of previous buys. And I
18 believe that Mr. King's concerns and questions as far as
19 how many buys he's done and if he gets paid, how much
20 does he get paid, I believe the CI can answer those
21 questions with approximations and I have no problem
22 sorting out those approximations if he so desires.

23 THE COURT: How are you going to sort out the --

24 MS. LINDER: I'm happy to talk to the CI and
25 facilitate a conversation so Mr. King is aware and is

1 aware of what the CI tends to indicate.

2 THE COURT: Mr. King, from the record, from the
3 file I will just be -- there's no way that I can count
4 these. The records are -- I can't -- and I do not want
5 to be in a position to give you a number and based upon
6 the -- and then have that be incorrect. There are
7 numerous buys in here and without going through, and
8 really I think I would have to sit down with the
9 lieutenant in charge of the file -- and that's Dutton
10 now?

11 MS. LINDER: Yes, ma'am.

12 THE COURT: You are lieutenant now?

13 MR. DUTTON: Yes, ma'am.

14 THE COURT: Thank you.

15 To really make a determination, but I will tell you
16 there are numerous buys in here, several, several pages
17 and it's a matter --

18 MR. KING: Is this --

19 THE COURT: I'm sorry?

20 MR. KING: -- something names could be redacted
21 where there's no -- Your Honor, I'm not trying to get any
22 information about any other defendants or anything. It's
23 really so -- is redaction possible, the names --

24 THE COURT: So, Mr. King, you want the number of
25 buys contained in this file?

1 MR. KING: And the amount of money that he's made
2 off of those.

3 THE COURT: Over the entire lifetime or per buy?

4 MR. KING: I'd at least like a rough idea. You
5 know, I can ask the CI but I don't know if he would --
6 you know, I don't know if he would tell me the truth, and
7 that could document whether he's telling the truth.

8 So I guess, you know, I would be happy with a rough
9 -- you know, a rough estimate of how many buys he's done
10 and the amount of money he's made. I would be fine with
11 that. So I could say you've done this a hundred times,
12 you've done it two hundred times. I have no idea.

13 THE COURT: Ms. Linder?

14 MS. LINDER: Judge, I would submit that Your
15 Honor's indication to Mr. King that there are numerous
16 buys, numerous pages you have been flipping through is
17 sufficient. He is welcome to ask the CI on the stand.

18 I also agree with what the Court has mentioned,
19 that if you did sit and count every single buy that is in
20 that file, I have not brought every other agency he has
21 ever worked for. So it is impossible to say, well, if he
22 did X amount for one agency he must have done the same or
23 a different number for another. I believe the CI can
24 approximate to Mr. King whether it is over 20, over a
25 hundred, however many it may be.

1 THE COURT: Mr. King?

2 MR. KING: I just -- how do I know if he's telling
3 the truth?

4 THE COURT: Well, what are you going to do -- let
5 me as it this way. What are you going to do even if you
6 know the number and he says the number is wrong?

7 MR. KING: I can call Lieutenant Dutton to say that
8 that's not true, as far as -- not going to go into
9 specifics but I can impeach that with Lieutenant Dutton
10 who would know how many or someone -- or whoever else
11 would have knowledge from the file.

12 THE COURT: Well, Ms. Linder, I'm kind of at a
13 loss because I've never had a file with this many buys
14 in it before, so I don't know how to address that issue
15 without sitting -- and it's 5:20, without sitting and
16 going over it.

17 But I think, Mr. King, the point that you want to
18 show is that he's conducted numerous buys --

19 MR. KING: Yes, Your Honor.

20 THE COURT: -- and has received money; is that
21 correct?

22 MR. KING: The very fact that he has done that many
23 and how many he's done, and that he gets paid for each
24 one of these. So I don't know how much money that could
25 add up to, if he's making money off of each one of those,

1 how much money he's made over the last --

2 THE COURT: He makes different amounts on each buy
3 so for me to tell you there's X number of entries here,
4 you know, each there's not -- I mean, there's not -- it
5 doesn't appear to me that he gets paid the same twice,
6 and so I don't know how to tell you without telling you
7 each one.

8 And is there some reason we need to provide him
9 with each entry?

10 MS. LINDER: I do not believe there is, Your Honor.

11 THE COURT: Because of names. The reason why,
12 Mr. King, I'm not inclined to say come up here, let's
13 look through the file together, is the name is here.

14 MR. KING: Yes, Your Honor.

15 THE COURT: The name of other people.

16 MR. KING: Right, and I understand that, and I'm
17 not asking for that information. Is it too difficult to
18 redact that? I mean, have copies and then redact the
19 names?

20 THE COURT: My quick count was there's over 15
21 pages of entries of buys. So practically, I would say
22 yes, to redact them.

23 MR. KING: It would be too difficult to redact?

24 THE COURT: I would say practically at 15 pages
25 it's not -- that doesn't mean that there's 15 buys. Each

1 page has an entry log so...

2 MR. KING: And I'm not sure how to handle it
3 either. I just want to make clear what I'm trying to get
4 at. I just don't know how -- you know, I can ask him and
5 the informant may be completely honest and may have an
6 idea but he may be way off, and without something to
7 compare it to I have no way to impeach him or know if
8 he's telling the truth. So I don't know how to resolve
9 that.

10 THE COURT: Ms. Linder, just my quick review, and
11 again, you put me in a position without actually having a
12 discussion on how to look at it, how to review the file,
13 would you ask Lieutenant Dutton if it's a fair review of
14 the file that there's over a hundred buys and on average
15 that the purchase is \$20.

16 MS. LINDER: Your Honor, if I may step to the bar
17 to ask?

18 THE COURT: Or I can ask him.

19 Lieutenant Dutton, I'm going to swear you in.

20 LIEUTENANT DUTTON, after having been duly
21 sworn, testified as follows:

22 EXAMINATION

23 BY THE COURT:

24 Q. Lieutenant Dutton, would it be fair that based upon
25 your review of the CI's file that there are over a

1 hundred buys?

2 A. Yes, ma'am.

3 Q. And that on average the payment to the CI is
4 approximately \$20?

5 A. \$20, yes, ma'am.

6 Q. And that there were sometimes that it was \$60 or
7 \$50, but the average seems to be \$20?

8 A. About \$20, yes, ma'am.

9 Q. So that would be a fair estimation without going
10 through each one of about a hundred buys?

11 A. Yes, ma'am.

12 THE COURT: All right. Is that sufficient,
13 Mr. King?

14 MR. KING: I would prefer to have redacted copies
15 so I could review it but if that's the best I can get
16 then I'll take that.

17 THE COURT: All right. Lieutenant Dutton, if I
18 give this file back to you can you provide me a copy of
19 the file with redacted names and any identification?

20 INVESTIGATOR DUTTON: If that's what you want I'll
21 be glad to do that for you.

22 THE COURT: Would you be able to do that by -- I'm
23 assuming that we are going to have the CI first thing.
24 Will you be able to do this by about 10:30 in the
25 morning?

1 INVESTIGATOR DUTTON: Yes, ma'am.

2 THE COURT: Will that give you sufficient time,
3 Mr. King?

4 MR. KING: I believe so, Your Honor.

5 THE COURT: Once you see it it's pretty self
6 explanatory what it is. It's just to calculate it at
7 this point.

8 MR. KING: That's right, maybe five or ten minutes
9 to look at them. That's all I might need. I wouldn't
10 need any --

11 THE COURT: All right. I'm going to give you the
12 file to take with you. Thank you, Lieutenant Dutton.

13 INVESTIGATOR DUTTON: Yes, ma'am.

14 THE COURT: All right. Is there anything else?

15 MS. LINDER: Nothing from the State, Your Honor.

16 MR. KING: Nothing from the defense, Your Honor.

17 THE COURT: All right. And when will we know if
18 he's been picked up on the bench warrant?

19 THE COURTROOM DEPUTY: That's what I just told him,
20 Judge. If he's picked up tonight they need to make sure
21 he's transported.

22 THE COURT: Who they?

23 THE COURTROOM DEPUTY: The solicitor.

24 THE COURT: The solicitor.

25 MS. LINDER: I will make sure.

1 THE COURT: You need to make sure he has clothes,
2 Mr. King.

3 MR. KING: Yes, Your Honor. We have clothes that
4 we can get for him.

5 THE COURT: All right. Do you know his size so
6 that we can -- that you already know that you have some
7 clothes?

8 MR. KING: I don't know his sizes, Your Honor, but
9 if he's here then I can -- I mean, if we're starting at
10 10:00 or 9:30, if he's here in the morning I could ask
11 him and probably get that together pretty quickly.

12 THE COURT: Okay. All right.

13 MR. KING: My investigator can help with that so I
14 can go down in the holding and ask him his sizes.

15 THE COURT: How will we know, Ms. Linder, to have
16 him transported?

17 MS. LINDER: I can, as soon as I go back, contact
18 Captain McKinney, and if he has already left for the day
19 I know probably it takes probably --if I can catch him,
20 if not tonight, if he's already left, he gets here about
21 7:30 in the morning. So I make sure that we are updated
22 and know about that.

23 I can also make sure -- I'm going to give a copy of
24 my bench warrant that Your Honor signed to Lieutenant
25 Dutton and Detective Shealy. They'll make sure the city

1 has it and they can call me and let me know at any time
2 overnight if and when he's picked up so I can make sure
3 he is transported.

4 THE COURT: Okay. All right. Ms. Linder, will you
5 call Mr. King and let him know that his client got picked
6 up --

7 MS. LINDER: Yes, I will. I will.

8 THE COURT: -- so he can plan accordingly?

9 And anything else you need, Mr. King?

10 MR. KING: I believe that's it, Your Honor.

11 THE COURT: All right. Assuming that he's picked
12 up on this bench warrant before we begin trial he will
13 stay in custody until we finish the trial.

14 MR. KING: I understand.

15 THE COURT: So there will be no need to have the
16 form signed by a bonds person.

17 MR. KING: I don't believe she would sign it anyway
18 but I understand.

19 THE COURT: So that issue is cleared up, and I'm
20 sure you will make the appropriate motions. As I
21 indicated, I've got a plea tomorrow starting at nine and
22 a sentencing after that. So as soon as I get those two
23 things done we will begin. The jury will be here at
24 10:00 a.m.

25 Is that correct, Mike?

1 THE CLERK: Yes, Your Honor.

2 THE COURT: And we'll begin. So if I can have
3 y'all here about 9:30.

4 And just tell your client if he chooses to show up
5 now at 9:30.

6 Anything else you can do?

7 MS. LINDER: I don't have anything else, Your
8 Honor.

9 THE COURT: You've got your video? What exhibits
10 do you have? If there's anything we can mark?

11 MS. LINDER: We will have the video, which we'll
12 premark. Detective Shealy, the case agent, will bring
13 the drugs over from evidence. And we will also have the
14 lab report from -- that shows the chemical analysis of
15 other things. So just those three exhibits.

16 THE COURT: Okay.

17 MR. KING: I'm trying to streamline it, Your Honor.
18 The defense is going to stipulate to chain of custody and
19 chemist report, so I'm trying to streamline that part so
20 they don't have to bring in the chain witnesses or even
21 the chemist. So I'm really just sticking with the -- you
22 know, the informant is really my issue.

23 THE COURT: Okay. And are you requesting -- going
24 to be requesting -- and we haven't heard any testimony
25 but might as well start with another charge, any lesser

1 includeds or any special requests to charge?

2 MR. KING: Possibly like mere presence, just your
3 standard charges. It wouldn't be anything that's not
4 just a standard charge in any drug case. I'm just not
5 exactly sure. It depends on the direction it goes but I
6 would guess maybe mere presence, maybe identification,
7 just those standard charges.

8 THE COURT: This is a 2009 case?

9 MS. LINDER: Yes, judge.

10 THE COURT: What's been happening?

11 MS. LINDER: It has been on the trial docket since
12 2010. That is part of my insistence and request to have
13 it as a TIA. I'm happy to go through the entire history
14 of this.

15 THE COURT: Mr. King, have you been his attorney
16 since 2010?

17 MR. KING: I have not, Your Honor. I was his
18 attorney for a brief period. He was sent out of the
19 office, appointed to private counsel. That counsel had
20 him for a while, moved to be relieved, and then it came
21 back to me six months ago, maybe. Six months to a year
22 ago. So I haven't had it the whole time, Your Honor.

23 THE COURT: All right, Mr. King. I hope that your
24 client shows up tomorrow.

25 MR. KING: If I can get him on the phone I'll do

1 everything I can to have him here, if the deputies don't
2 get him already, or the bondsman. I'm going to talk to
3 the bail bondsman, too, after I leave.

4 THE COURT: Regardless of what happens, whether or
5 not your client is here, just please be prepared to call
6 the case. All right?

7 MS. LINDER: Yes, Your Honor.

8 THE COURT: And you're only going forward on one
9 indictment?

10 MS. LINDER: That is correct, Judge, just the
11 distribution.

12 THE COURT: It's his first offense?

13 MS. LINDER: It is the third.

14 THE COURT: So the penalty is?

15 MS. LINDER: The penalty will be 15 to 30 through
16 the old law. So it will be 15 to 30 not suspendable, and
17 that of course would be the entire sentencing if he's
18 found guilty.

19 THE COURT: Is that your understanding, we're just
20 going forward on one?

21 MR. KING: That's correct, Your Honor. Just one
22 count of distribution.

23 THE COURT: So if it's just -- how many witnesses
24 then will you have?

25 MS. LINDER: Your Honor, I intend to have three law

1 enforcement officers and the one CI. Two of my law
2 enforcement officers should be pretty quick.

3 THE COURT: So in all likelihood we could be done
4 with -- this case could be to the jury fairly early in
5 the afternoon?

6 MS. LINDER: If we pick at 10:00, then I would say
7 the jury could get it by four o'clock.

8 MR. KING: Well, I have two possible witnesses. I
9 don't know if I plan to call them. It's an issue that I
10 just found out this morning there was an affidavit --
11 there's an affidavit signed by the informant where he
12 claims that he lied at a previous trial on the stand, a
13 previous distribution trial that I represented the client
14 on, the same case cited to you for the going beyond the
15 10 years. This is like a reunion for me and Ms. Linder
16 and the informant.

17 So the informant has written an affidavit from
18 January 2012 regarding State vs. Onrae Williams that he
19 lied on the stand during that trial. So I have Mark
20 Pepper who took that affidavit and his assistant. I
21 don't know if I would need to call them. I may be able
22 to just do that on cross. So I'm assuming if we're
23 stipulating to the chain it should move pretty quickly.
24 I may have to call two witnesses but I don't think they
25 will take very long.

1 THE COURT: Okay. All right.

2 MR. KING: And I don't believe Mr. Moore at this
3 point, he told me he doesn't plan on testifying but I
4 will let --

5 THE COURT: We'll see you tomorrow and I'll advise
6 him of his rights.

7 MR. KING: Thank, Your Honor.

8 MS. LINDER: Thank you, Judge.

9 THE COURT: Mr. King, just out of an abundance of
10 caution because you know that I just avoid any appearance
11 of impropriety, my law clerk attended a baby shower that
12 was hosted at Ms. Linder's house over the weekend.

13 MR. KING: I have no problem with that.

14 THE COURT: All right. But I'll need you to convey
15 that to your client. I'm assuming the State doesn't have
16 any objection?

17 MS. LINDER: No, Your Honor.

18 THE COURT: And, Mr. King, you don't have any
19 objection, so I just need out of an abundance of caution
20 however you wish to proceed I just remembered that. I am
21 so sorry. So please let me know. All right?

22 MR. KING: Yes, Your Honor.

23 THE COURT: Thank you.

24 MS. LINDER: Thank you, Judge.

25 (WHEREUPON, the trial of this case was recessed for

1 the day.)

2 Thursday, October 18, 2012

3 THE COURT: Mr. King, any announcements?

4 MR. KING: His mother has left now. His mother was
5 over there. I was trying to impress on her how important
6 this was. She's not around there now. I still have no
7 Mr. Moore, Your Honor.

8 THE COURT: All right.

9 MS. LINDER: Judge, I obviously would say that
10 this is a quintessential TIA. With regard to the
11 questions that he didn't receive notice I would say he
12 did receive notice. He was here on Monday outside of
13 this exact courtroom. He has willfully not shown up.
14 His bondsman has been looking for him last night and told
15 Mr. King of this.

16 The CP put out a wanted flyer for him and put it
17 throughout the whole agency last night, people were out
18 looking for him. His mom came so she obviously knew
19 something was going on. Mr. King talked to Mr. Moore
20 yesterday. This is willfully not showing up, and I
21 respectfully request a TIA.

22 THE COURT: Mr. King, I will note your objection
23 that you do not wish to go forward but we are going to go
24 forward. I don't see that this situation is going to
25 change. It's been on the trial docket, was informed, was

1 here Monday. He knew he was second up.

2 As a matter of fact, had the jury not been released
3 we would have already had a jury picked. That was my
4 intent, to pick it before we broke for lunch on Monday.
5 So he knew that he was second up and close that we were
6 going to have time to pick a jury this week for this
7 case. So we will proceed in his absence.

8 MR. KING: Yes, Your Honor.

9 THE COURT: Thank you. And I'm assuming that if he
10 should get picked up at any time that he will be brought
11 over?

12 MS. LINDER: Yes, Judge. And Mr. Stoney actually
13 talked with Captain McKinney and he's aware to keep
14 checking the jail status, and also the city officers will
15 be notified if he is picked up at any time that he will
16 be transported over.

17 THE COURT: All right. Strikes are five and five;
18 is that correct, Ms. Linder?

19 MS. LINDER: Yes, Judge.

20 THE COURT: Do you agree, Mr. King?

21 MR. KING: Yes, Judge.

22 THE COURT: We're going to bring up a panel of 50
23 and just pick from that. Any objection?

24 MS. LINDER: No objection, Your Honor. If we may
25 quickly approach and premark our three exhibits?

1 THE COURT: You may.

2 (WHEREUPON, State's Exhibit Numbers 1 through 3
3 were marked for identification only.)

4 THE COURT: Mr. Stoney, is this primarily your
5 case? You'll be doing the openings?

6 MS. LINDER: Judge, I'll be doing openings,
7 closing. I will do three of the four witnesses.

8 THE COURT: Okay. How many more than four
9 witnesses do you have, Ms. Linder?

10 MS. LINDER: Since Mr. King is stipulating to the
11 chain and lab analysis we're getting rid of three. So
12 we're going to have three law enforcement officers and
13 the CI. Two of those law enforcement officers should be
14 pretty quick.

15 THE COURT: Okay. Thank you.

16 Ms. Linder, could you please tell me how to
17 pronounce Dena --

18 MS. LINDER: It's Dena Piecuch, but she is not
19 going to be called, so we can strike her.

20 THE COURT: But we're going to mention her name,
21 correct?

22 MS. LINDER: Dena Piecuch.

23 THE COURT: Piecuch?

24 MS. LINDER: Piecuch. And, Your Honor, I don't
25 remember if I indicated to your law clerk or not, the

1 CI's name, if I didn't type on there before, it's Joseph
2 Ancrum.

3 THE COURT: We have it.

4 MS. LINDER: Okay. Thank you, Judge.

5 THE COURT: All right. Do you have any additional
6 witnesses? I have Mr. Pepper and Ms. Lawrence.

7 MR. KING: That's all.

8 THE COURT: Mr. King?

9 MR. KING: Yes.

10 THE COURT: Do you agree that your client had
11 sufficient notice? I didn't ask you to respond. Do you
12 agree that he was here on Monday and that he knew that he
13 was second on the trial list?

14 MR. KING: Yes, Your Honor. I don't think that he
15 believed it was actually going to happen because of the
16 history of the case and the fact it's been on the docket
17 many times.

18 THE COURT: But there was no indication that the
19 case was not going to be called?

20 MR. KING: Right. I did not indicate that to him.
21 I told him we were either going Monday or Wednesday.

22 THE COURT: All right. Thank you.

23 MS. LINDER: Your Honor, as previously mentioned by
24 Mr. King and myself, we are stipulating that the chain of
25 custody, that things were handled properly and also that

1 the drugs are in fact drugs. I have went ahead and done
2 a stipulation. Mr. King and I both signed it. Would you
3 like this marked as an exhibit, and how would you prefer
4 to handle that?

5 THE COURT: Let's do a court's exhibit then because
6 I don't want it to go back to the jury. But either one
7 of you can read it or I can read it, your preference.

8 MS. LINDER: Okay. I will go ahead and bring this
9 up as a court's exhibit now have.

10 THE COURT: All right. Thank you.

11 (WHEREUPON, Court's Exhibit Number 1, a
12 Stipulation, was marked and made a part of the record.)

13 THE COURT: I'm assuming, Mr. King, since your
14 client is not present he's waiving formal arraignment?

15 MR. KING: Yes, Your Honor.

16 THE COURT: No objection to the defendant's voir
17 dire?

18 MS. LINDER: No objection from the State, Your
19 Honor.

20 THE COURT: And no objection to the State's voir
21 dire?

22 MR. KING: No, Your Honor.

23 THE COURT: All right. Thank you. Everybody
24 ready? Let's bring in the jury.

25 (WHEREUPON, the jury panel enters the courtroom at

1 approximately 10:30 a.m.)

2 THE COURT: Good morning, ladies and gentlemen.

3 It's a pleasure to see you again. I'm awfully delighted
4 as well, I see at least one of my jurors are from my
5 previous trial.

6 And what those of you who were not serving, have
7 not been chosen to serve previously, you need to know my
8 jury from earlier this week, they were given the option
9 to be excused for the remainder of the week, so I just
10 want you to know that it was a positive and educational
11 experience and at least one of my previous jurors showed
12 up for jury duty today.

13 So with that being said, we are going to select the
14 jury for the case of the State vs. James Lamont Moore.
15 Mr. Moore has been charged with an indictment for
16 distribution of cocaine base.

17 The State alleges that in Charleston County, South
18 Carolina on or about July 16th of 2009, the defendant did
19 manufacture, distribute, dispense, deliver, purchase or
20 did aid, abet, attempt or conspire to manufacture,
21 distribute, dispense, deliver or purchase, or did possess
22 with the intent to distribute, dispense or deliver a
23 controlled substance or a controlled substance analog, to
24 wit, cocaine base in violation of 44-53-375 of the South
25 Carolina Codes of Laws, 1967 as amended.

1 Is there any member of the jury panel that knows
2 anything about this case other than what I just read to
3 you? If so, please stand.

4 Thank you. There are none.

5 Mr. King, if you will please stand, tell us a
6 little bit about your client, and introduce yourself and
7 Mr. Cooper.

8 MR. KING: I'm Jason King with the public
9 defender's office. I'm representing James Lamont Moore.
10 He is not present here today but I ask you not to hold
11 that against him. He doesn't have to argue anything.
12 The State is required to prove anyone guilty beyond a
13 reasonable doubt.

14 Sitting with me is Michael Cooper, in my office as
15 well, the public defender's office.

16 THE COURT: And, Mr. King, do you agree on the
17 front of the indictment with the descriptor's date of
18 birth and race and gender?

19 MR. KING: Yes, Your Honor.

20 THE COURT: James Lamont Moore is a black male,
21 date of birth [REDACTED] which would be [REDACTED] [REDACTED]. Is
22 there any member of the jury panel that knows Mr. James
23 Lamont Moore, related to him by blood, marriage, close
24 personal friend, ever had any business, professional
25 dealings with Mr. Moore? If so, please stand.

1 Thank you. There are none.

2 Any member of the jury panel represented by blood,
3 marriage, close personal friend, ever have any business,
4 personal, professional dealings or ever been represented
5 by Mr. King or Mr. Cooper, or anyone in the public
6 defender's office? If so, please stand.

7 Thank you. There are none.

8 Ms. Linder, if you would please stand, introduce
9 yourself, any persons who may assisting you throughout
10 this trial as well as the office with which you are
11 employed.

12 MS. LINDER: Thank you, Judge. My name is
13 Stephanie Linder, and I am assistant solicitor for the
14 Ninth Judicial Circuit. Scarlet Wilson is my boss. And
15 this is Rand Stoney. He will be assisting me with the
16 trial. Also seated at our table is Detective Jonathan
17 Shealy from the City of Charleston Police Department. He
18 is the case agent of this case.

19 You will also see assisting us with getting
20 witnesses in and out from my officer Investigator Kenny
21 Barfield, and he previously before being in my office was
22 also with the City of the Charleston Police Department.

23 THE COURT: Is there any member of the jury panel
24 related by blood, marriage, close personal friends, ever
25 had any business, personal, professional dealings, or

1 ever been represented by Ms. Linder or Mr. Stoney, or any
2 matters handled by the solicitor's office either here in
3 Charleston or in Berkeley County? If so, please stand.

4 Yes, your jury number and name?

5 POTENTIAL JUROR: 193 Ed Royall. I've known Rand
6 Stoney for 13 years, close personal friend.

7 THE COURT: And is there anything about that that
8 would affect your ability to be fair and impartial in
9 this case?

10 POTENTIAL JUROR: Not in fact but maybe in
11 appearance.

12 THE COURT: All right. And your jury number?

13 POTENTIAL JUROR: 193.

14 THE COURT: 193. I'm going to excuse you from the
15 trial of this case. That means you do not have to answer
16 any more questions. I'm going to have you stay with us
17 and then you will receive further instructions regarding
18 your service for the week. So stay with us but you do
19 not have to answer any more questions. Thank you.

20 Is there anyone else?

21 Thank you. There are none.

22 I'm now going to call a list of potential
23 witnesses who may be called to testify in this case. If
24 you are related by blood, marriage, close personal
25 friend, ever have any business, personal, professional

1 dealings with any of these individuals, please stand when
2 I call their name. Jonathan Shealy, Charleston Police
3 Department; Jeff Robertson, Charleston Police Department;
4 Jake Grill, Charleston Police Department; Elizabeth
5 Wiggins-Mitchell, Charleston Police Department; Linda
6 Wilson, Charleston Police Department; Susan Moody,
7 Charleston Police Department; Brian Sigmon, Charleston
8 Police Department; Dena Piecuch, Charleston Police
9 Department; Bryant Gilmore, Charleston Police Department;
10 Michael Burke, Charleston Police Department; Eric Light,
11 Charleston Police Department; Joseph Ancrum; Mark Pepper;
12 Elizabeth Lawrence. If you are related by blood,
13 marriage, close personal friend with any of those
14 individuals, please stand.

15 Thank you. There are none.

16 Any member of the jury panel currently employed,
17 formerly employed or have a friend or family member that
18 is currently or used to be employed with the Charleston
19 Police Department? If so, please stand.

20 Yes, sir. Your jury number and name?

21 POTENTIAL JUROR: Juror number 30, David Brueck.

22 My cousin works for Charleston Police Department.

23 THE COURT: And what is your cousin's name?

24 POTENTIAL JUROR: Adam Demming.

25 THE COURT: And what does he do with the Charleston

1 Police Department? Is he an officer?

2 POTENTIAL JUROR: Yep.

3 THE COURT: Is there anything about that that would
4 affect your ability to be fair and impartial in this
5 case?

6 POTENTIAL JUROR: Nope.

7 THE COURT: And your jury number and name?

8 POTENTIAL JUROR: Thirty, David Brueck.

9 THE COURT: Thank you.

10 Yes, sir?

11 POTENTIAL JUROR: Mark Walker, 231. I have a
12 friend and neighbor that was a former police officer for
13 Charleston City.

14 THE COURT: And about how long ago was he employed
15 with the Charleston Police Department?

16 POTENTIAL JUROR: Until about 18 months ago, 16
17 months ago.

18 THE COURT: And his name?

19 POTENTIAL JUROR: Charles Mitchell.

20 THE COURT: Is there anything about your
21 relationship with former Officer Mitchell that will
22 affect your ability to be fair and impartial in this
23 case?

24 POTENTIAL JUROR: Not to my knowledge.

25 THE COURT: And your jury number and name?

1 POTENTIAL JUROR: 231, Mark Walker.

2 THE COURT: Thank you.

3 Is there anyone else?

4 (There was no response.)

5 THE COURT: Thank you. Is there any member of the
6 jury panel that is a former, current law enforcement
7 employee? If so, please stand.

8 Thank you. There are none.

9 Is there any member of the jury panel that belongs
10 to a civic group such as Mothers Against Drunk Driving,
11 People Against Rape, Citizens Against Violent Crime,
12 anything of that nature? If so, please stand.

13 Thank you. There are none.

14 Ladies and gentlemen, I now have a series of
15 questions that I have determined that you will need to
16 answer in private. So please pay attention because
17 there's about six questions I have and so I need you to
18 pay close attention to them. You will come forward at
19 the appropriate time.

20 Have you or any member of your family ever been
21 accused of a crime? Do you have a member of your family
22 that is currently incarcerated? Do you hold any belief
23 that illegal drugs should be legalized? Is there any
24 member of your family or a close personal friend, or you,
25 yourself, have ever been arrested by the Charleston

1 Police Department or the Drug Enforcement Agency,
2 otherwise known as DEA? Do you or any member of your
3 family have a problem with alcohol or substance abuse?
4 Do you live in an area where you consider drug use a
5 problem?

6 If you need to speak with me concerning the answers
7 to any of those questions, or if there's something about
8 the questions or what I have read to you in the
9 indictment that causes you some concern about your
10 ability to listen to the facts as presented from the
11 witness stand, apply the law as the Court gives it to
12 those facts and render a verdict based only upon those
13 things free of any personal, religious, moral, political
14 beliefs that you may have, if you need to speak with me
15 concerning any matter, please come to the center.

16 And I know we are a little tight in here, so please
17 come to the center and we will address it at this time.
18 Is there anyone that needs to come forward?

19 (WHEREUPON, the following sidebar was reported.)

20 THE COURT: Yes, sir?

21 POTENTIAL JUROR: The question about immediate
22 family?

23 THE COURT: Yes.

24 POTENTIAL JUROR: I had an uncle and cousin that
25 were arrested multiple times for heroin. My cousin died

1 of an overdose of heroin. My sister's ex-husband also
2 was arrested for heroin and did time in a recovery
3 facility.

4 THE COURT: Is there anything about what you have
5 shared with us that would affect your ability to be fair
6 and impartial in this case?

7 POTENTIAL JUROR: Yeah, it could.

8 THE COURT: Yes, you can be fair and impartial?

9 POTENTIAL JUROR: No. It could affect my ability.

10 THE COURT: All right. Your jury number and name?

11 POTENTIAL JUROR: Mark Walker.

12 THE COURT: I'm going to protect you from the
13 trial of this case but I need you to stay with us for
14 further instructions. Thank you, Mr. Walker.

15 (WHEREUPON, the sidebar was concluded.)

16 THE COURT: Number 231 is excused from the trial of
17 this case. Thank you.

18 THE BAILIFF: Juror number 96.

19 THE COURT: Yes, sir, please come forward.

20 (WHEREUPON, the following sidebar was reported.)

21 THE COURT: Good morning.

22 POTENTIAL JUROR: Good morning. I'm 68 years old
23 and I have trouble hearing but I think if I heard your
24 first question is has a member of my family been arrested
25 for drugs.

1 THE COURT: Yes. Yes.

2 POTENTIAL JUROR: I have a brother that has been
3 arrested for drug dealing.

4 THE COURT: All right. Was that here in Charleston
5 County or someone else?

6 POTENTIAL JUROR: It was here in Charleston County.

7 THE COURT: And about how long ago was that?

8 POTENTIAL JUROR: Twenty years ago, maybe longer.

9 THE COURT: All right. Is there anything about
10 that that would affect your ability to be fair and
11 impartial in this case?

12 POTENTIAL JUROR: No. No, ma'am.

13 THE COURT: And your juror number?

14 POTENTIAL JUROR: Ninety-six.

15 THE COURT: Ninety-six. And thank you for your
16 service. If you are selected I will make sure we can
17 make adjustments to make sure that you're okay to hear.

18 POTENTIAL JUROR: Thank you.

19 THE COURT: Thank you.

20 (WHEREUPON, the sidebar was concluded.)

21 THE COURT: Juror 96 will remain.

22 THE BAILIFF: Number 118.

23 (WHEREUPON, the following sidebar was reported.)

24 POTENTIAL JUROR: I'm Chuck Jenkins. Charles
25 Jenkins. I thought the Court should know that I'm a

1 director of human resources for a company and run several
2 undercover drug investigations in manufacturing
3 facilities which result in employee termination.

4 THE COURT: Is there anything about that that would
5 affect your ability to be fair and impartial in this
6 case?

7 POTENTIAL JUROR: Well, the only thing is fact
8 patterns tend to prove out -- is proven out in my
9 experience that.

10 THE COURT: Mr. Jenkins, will you be able to listen
11 to the facts from the witness stand in this case, apply
12 the law as the Court gives it to you --

13 POTENTIAL JUROR: I believe I will.

14 THE COURT: And will you be able to render a fair
15 and impartial verdict free of any outside influence?

16 POTENTIAL JUROR: I believe I would.

17 THE COURT: All right. And I do that very same
18 thing. I just need a simple yes or no, not a I think so
19 or I believe so.

20 POTENTIAL JUROR: Okay.

21 THE COURT: Will you be able to be a fair and
22 impartial juror?

23 POTENTIAL JUROR: Yes.

24 THE COURT: All right. Thank you. You will remain
25 with us. Your juror number one more time?

1 POTENTIAL JUROR: Is 118.

2 (WHEREUPON, the sidebar was concluded.)

3 THE COURT: Number 118 will remain. Thank you.

4 THE BAILIFF: Number 32.

5 (WHEREUPON, the following sidebar was reported.)

6 THE COURT: Good morning.

7 POTENTIAL JUROR: Juror number 32, Yvonne Bullock.

8 My grandson which we raised, Christopher Bullock, was
9 arrested by City of Charleston Police for drinking, and
10 then my son has been arrested for drugs but it wasn't in
11 Charleston.

12 THE COURT: Is there anything about what you shared
13 with us that will affect your ability to be fair and
14 impartial in this case?

15 POTENTIAL JUROR: No, ma'am.

16 THE COURT: Okay.

17 POTENTIAL JUROR: And were you talking earlier
18 about Pepper, was it Mark Pepper?

19 THE COURT: Yes.

20 POTENTIAL JUROR: Okay. Our family is together
21 during the school years on the soccer team and stuff like
22 that so I mean...

23 THE COURT: So you know Mr. Pepper?

24 POTENTIAL JUROR: I know him from the family, yes,
25 ma'am.

1 THE COURT: Is there anything about your
2 relationship with Mr. Pepper that will affect your
3 ability to be fair and impartial in this case?

4 POTENTIAL JUROR: No, ma'am.

5 THE COURT: All right. Ms. Bullock, you're going
6 stay with us. Juror 32?

7 POTENTIAL JUROR: Yes, ma'am.

8 (WHEREUPON, the sidebar was concluded.)

9 THE COURT: Juror 32 will remain. Thank you.

10 THE BAILIFF: Juror 150.

11 (WHEREUPON, the following sidebar was reported.)

12 POTENTIAL JUROR: I have two family members that
13 were convicted 25 years.

14 THE COURT: Were they convicted here in Charleston
15 County or somewhere else?

16 POTENTIAL JUROR: Charleston County.

17 THE COURT: And were they prosecuted by the
18 solicitor's office?

19 POTENTIAL JUROR: I'm pretty sure.

20 THE COURT: Is there anything --

21 POTENTIAL JUROR: I think they were mostly federal.

22 THE COURT: Mostly federal. Is there anything --
23 what were they convicted of?

24 POTENTIAL JUROR: Distribution of drugs.

25 THE COURT: And what type of drug; do you remember?

1 POTENTIAL JUROR: I think it was crack cocaine.

2 THE COURT: Okay.

3 POTENTIAL JUROR: Not really sure.

4 THE COURT: Is there anything about that that would
5 affect your ability to be fair and impartial in this
6 case?

7 POTENTIAL JUROR: No, ma'am.

8 THE COURT: You will be able to listen to the facts
9 from the witness stand, apply the law as the Court gives
10 it and render a verdict based only on those things?

11 POTENTIAL JUROR: Yes, ma'am.

12 THE COURT: And your jury number and name?

13 POTENTIAL: One-fifty, Stacey Manigault.

14 THE COURT: Thank you, Mr. Manigault.

15 (WHEREUPON, the sidebar was concluded.)

16 THE COURT: One-fifty will remain. Thank you.

17 THE BAILIFF: Juror number 15.

18 (WHEREUPON, the following sidebar was reported.)

19 THE COURT: Good morning, how are you?

20 POTENTIAL JUROR: A lot of rehab, not court
21 ordered. Nothing with convictions or anything but I was
22 maybe 20, 21; 1982, '83 last, and I stay in shape now and
23 it's something in the past.

24 THE COURT: All right. Were you ever arrested or
25 convicted?

1 POTENTIAL JUROR: No.

2 THE COURT: And is there anything about that that
3 -- what you shared with us --

4 POTENTIAL JUROR: No.

5 THE COURT: -- that would affect your ability to be
6 fair and impartial in this case?

7 POTENTIAL JUROR: No.

8 THE COURT: All right. Your juror number and name?

9 POTENTIAL JUROR: Gregg Black, number 15.

10 THE COURT: Thank you, Mr. Black. You will remain.
11 Thank you for sharing that.

12 (WHEREUPON, the sidebar was concluded.)

13 THE COURT: Juror 15 will remain. Thank you.

14 THE BAILIFF: 243.

15 (WHEREUPON, the following sidebar was reported.)

16 THE COURT: Good morning.

17 POTENTIAL JUROR: Morning. I have a younger
18 sibling that was accused of the same exact thing.

19 THE COURT: And was that here in Charleston County
20 or somewhere else?

21 POTENTIAL JUROR: Charleston County.

22 THE COURT: And was the Charleston Police
23 Department involved?

24 POTENTIAL JUROR: I think it was North Charleston.

25 THE COURT: All right. And was the solicitor's

1 office involved?

2 POTENTIAL JUROR: I have no idea.

3 THE COURT: Were the charges dismissed or did it go
4 to a trial or something else?

5 POTENTIAL JUROR: I think it was dismissed.

6 THE COURT: Is there anything about that that would
7 affect your ability to be fair and impartial in this
8 case?

9 POTENTIAL JUROR: No.

10 THE COURT: And your jury number and name?

11 POTENTIAL JUROR: 243.

12 (WHEREUPON, the sidebar was concluded.)

13 THE COURT: Number 243 will remain. Thank you.

14 Ladies and gentlemen, just for clarification, one
15 of the witnesses that I called is Mark Pepper. Mark
16 Pepper is an attorney here in Charleston County. Is
17 there any member of the jury panel that has had any
18 business dealings or ever been represented by Mr. Pepper?
19 If so, please stand.

20 Thank you. There are none.

21 Ladies and gentlemen, I anticipate that we should
22 be done with this trial this afternoon, if not before
23 lunch tomorrow. I recall that I spoke to at least one
24 individual that there was a conflict tomorrow afternoon.
25 Is there any member of the jury panel who cannot remain

1 with me until tomorrow afternoon? If so, please come
2 forward.

3 Thank you. There are none.

4 Any additional questions?

5 MS. LINDER: No additional.

6 THE COURT: Any additional questions?

7 MR. KING: No.

8 THE COURT: All right. Thank you.

9 THE CLERK: Ladies and gentlemen, if I call your
10 name if you'll please gather your belongings, come up to
11 this podium, turn and face the parties. I'll then ask
12 the parties questions and I'll either ask you to have a
13 seat back in the audience or I'll ask you to have a seat
14 in the jury box. The bailiffs will direct you, so please
15 don't worry.

16 Juror 99, Mary Ellen Hart.

17 (A white female came forward.)

18 THE CLERK: What say you for the State?

19 MS. LINDER: Please present this juror.

20 THE CLERK: What say you for the defendant?

21 MR. KING: Please seat this juror.

22 THE CLERK: Ms. Hart, please have a seat in the
23 jury box. You have been selected as a juror in this
24 case.

25 Juror number 175, Shirley Polite.

1 (A black female came forward.)

2 THE CLERK: What say you for the State?

3 MS. LINDER: Please excuse this juror.

4 THE CLERK: Ms. Polite, please have a seat back in
5 the audience. You have been excused from the trial of
6 this case.

7 Juror number 31, Gregory Bulanow.

8 (A white male came forward.)

9 THE CLERK: What say you the State?

10 MS. LINDER: Please present this juror.

11 THE CLERK: What say you for the defendant?

12 MR. KING: Please excuse this juror.

13 THE CLERK: Sir, please have a seat back in the
14 audience. You have been excused from the trial of this
15 case.

16 Juror number 23, James Boyet.

17 (A white male came forward.)

18 THE CLERK: What say you for the State?

19 MS. LINDER: Please present this juror.

20 THE CLERK: What say you for the defendant?

21 MR. KING: Please seat this juror.

22 THE CLERK: Mr. Boyet, please have a seat in the
23 jury box. You have been selected as a juror in this
24 case.

25 Juror number 94, Johnny Hall.

1 (A white male came forward.)

2 THE CLERK: What say you for the State?

3 MS. LINDER: Beg the Court's indulgence.

4 THE COURT: Take your time.

5 (Pause.)

6 MS. LINDER: Please present this juror.

7 THE CLERK: What say you for the defendant?

8 MR. KING: Please seat this juror.

9 THE CLERK: Mr. Hall, please have a seat in the
10 jury box. You have been selected as a juror in this
11 case.

12 Juror number 7, John Barker.

13 (A white male came forward.)

14 THE CLERK: What say you for the State?

15 MS. LINDER: Please excuse this juror.

16 THE CLERK: Mr. Barker, please have a seat back in
17 the audience. You have been excused from the trial of
18 this case.

19 Juror number 62, James Eidson.

20 (A white male came forward.)

21 THE CLERK: What say you for the State?

22 MS. LINDER: Please present this juror.

23 THE CLERK: What say you for the defendant?

24 MR. KING: Please seat this juror.

25 THE CLERK: Mr. Eidson, please have a seat in the

1 jury box. You have been selected as a juror in this
2 case.

3 Juror number 22, Rebecca Bowman.

4 (A white female came forward.)

5 THE CLERK: What say you for the State?

6 MS. LINDER: Please present this juror.

7 THE CLERK: What say you for the defendant?

8 MR. KING: Please seat this juror.

9 THE CLERK: Ms. Bowman, please have a seat in the
10 jury box. You have been selected as a juror in the case.

11 Juror number 47, Robert Cox.

12 (A white male came forward.)

13 THE CLERK: What say you for the State?

14 MS. LINDER: Please present this juror.

15 THE CLERK: What say you for the defendant?

16 MR. KING: Please seat this juror.

17 THE CLERK: Mr. Cox, please have a seat in the jury
18 box. You have been selected as a juror in this case.

19 Juror number 188, Rita Roache.

20 (A black female came forward.)

21 THE CLERK: What say you for the State?

22 MS. LINDER: Beg the Court's indulgence.

23 THE COURT: Take your time.

24 (Pause.)

25 MS. LINDER: Please excuse this juror.

1 THE CLERK: Madam juror, please have seat back in
2 the audience. You have been excused from the trial of
3 this case.

4 That's three strikes for the State.

5 Juror number 104, Heidi Herrington.

6 (A white female came forward.)

7 THE CLERK: What say you for the State?

8 THE COURT: Just for the record, we're not related.

9 THE CLERK: What say you for the State?

10 MS. LINDER: Please present this juror.

11 THE CLERK: What say you for the defendant?

12 MR. KING: Please excuse this juror.

13 THE CLERK: Ms. Herrington, please have a seat back
14 in the audience. You've been excused from the trial of
15 this case.

16 Juror number 33, Wayne Burdick.

17 (A white male came forward.)

18 THE CLERK: What say you for the State?

19 MS. LINDER: Please present this juror.

20 THE CLERK: What say you for the defendant?

21 MR. KING: Please excuse this juror.

22 THE CLERK: Thank you, Mr. Burdick. Please have a
23 seat back in the audience. You've been excused from the
24 trial of this case.

25 That's three strikes for the defense.

1 Juror number 50, Elizabeth Criswell.
2 (A white female came forward.)
3 THE CLERK: What say you for the State?
4 MS. LINDER: Please present this juror.
5 THE CLERK: What say you for the defendant?
6 MR. KING: Please seat the juror.
7 THE CLERK: Ms. Criswell, have a seat in the jury
8 box. You have been selected as a juror in this case.
9 Juror number 96, James Hare.
10 (A white male came forward.)
11 THE CLERK: What say you for the State?
12 MS. LINDER: Beg the Court's indulgence.
13 THE COURT: Take your time.
14 (Pause.)
15 MS. LINDER: Please present this juror.
16 THE CLERK: What say you for the defendant?
17 MR. KING: Please excuse this juror.
18 THE CLERK: Mr. Hare, please have a seat back in
19 the audience. You have been excused from the trial of
20 this case.
21 That's four strikes for the defense.
22 Juror number 173, Shaun Payne.
23 (A white male came forward.)
24 THE CLERK: What say you for the State?
25 MS. LINDER: Please present this juror.

1 THE CLERK: What say you for the defendant?

2 MR. KING: Please seat this juror.

3 THE CLERK: Mr. Payne, please have a seat in the
4 jury box. You have been selected as a juror in this
5 case.

6 Juror number 243, Brintney White.

7 (A black female came forward.)

8 THE CLERK: What say you for the State?

9 MS. LINDER: Please excuse this juror.

10 THE CLERK: Ms. White, please have a seat back in
11 the audience. You've been excused from the trial of this
12 case.

13 That's four strikes for the State.

14 Juror number 206, Devorah Slick.

15 (A white female came forward.)

16 THE CLERK: What say you for the State?

17 MS. LINDER: Please present this juror.

18 THE CLERK: What say you for the defendant?

19 MR. KING: Please seat this juror.

20 THE CLERK: Ms. Slick, please have a seat in the
21 jury box. You have been selected as a juror in this
22 case.

23 Juror number 171, Laurie O'Quinn.

24 (A white male came forward.)

25 THE CLERK: What say you for the State?

1 MS. LINDER: Please present this juror.

2 THE CLERK: What say you for the defendant?

3 MR. KING: Please seat this juror.

4 THE CLERK: Mr. O'Quinn, please have a seat in the
5 jury box. You have been selected as a juror in this
6 case.

7 Juror number 85, Alan Goldkin.

8 (A white male came forward.)

9 THE CLERK: What say you for the State?

10 MS. LINDER: Please present this juror.

11 THE CLERK: What say you for the defendant?

12 MR. KING: Please seat this juror.

13 THE CLERK: Mr. Goldkin, please have a seat in the
14 jury box. You have been selected as a juror in this
15 case.

16 Juror number 150, Stacey Manigault.

17 (A black male came forward.)

18 THE CLERK: What say you for the State?

19 MS. LINDER: Please excuse this juror.

20 THE CLERK: Mr. Manigault, please have a seat back
21 in the audience. You have been excused from the trial of
22 this case.

23 That's five strikes for the State.

24 Juror number 169, Mary Noble.

25 (A white female came forward.)

1 THE CLERK: Any challenge from the State?

2 MS. LINDER: No challenge.

3 THE COURT: What say you for the defendant?

4 MR. KING: Please seat this juror.

5 THE CLERK: Ms. Noble, please have a seat in the
6 jury box. You have been selected as a juror in this
7 case.

8 Your Honor, that was one alternate?

9 THE COURT: Yes.

10 THE CLERK: Now picking alternate. The strikes are
11 one and two.

12 Juror number 83, Rachael Giblin.

13 (A white female came forward.)

14 THE CLERK: What say you for the State?

15 MS. LINDER: Please present this juror.

16 THE CLERK: What say you for the defendant?

17 MR. KING: Please seat this juror.

18 THE COURT: Ms. Giblin, please have a seat in the
19 jury box. You have been selected as a juror in this
20 case.

21 Your Honor, the jury has been selected and seated.

22 THE COURT: Any motions or matters pertaining to
23 the jury as selected?

24 MS. LINDER: None from the State, Your Honor.

25 THE COURT: Mr. King?

1 MR. KING: Yes, Your Honor, I do.

2 THE COURT: You have a motion?

3 MR. KING: I have a motion.

4 THE COURT: All right. Please approach.

5 (WHEREUPON, the following bench conference was
6 reported.)

7 THE COURT: Outside the presence of the juror but
8 articulating that we are on the record, your challenge is
9 to?

10 MR. KING: There were all four black jurors that
11 were struck and the jury is all white. It's 12 white.

12 THE COURT: Okay.

13 MR. COOPER: It's 175.

14 THE COURT: Okay. Your first challenge is 175?

15 MR. KING: That's correct.

16 THE COURT: Why did you strike Ms. Polite?

17 MS. LINDER: She has a prior record for fraudulent
18 check.

19 THE COURT: And now your turn, Mr. King, to show me
20 -- or to challenge.

21 MR. KING: I have no challenge.

22 THE COURT: No challenge. So 175 is okay. Your
23 next challenge?

24 MR. KING: 188.

25 MR. STONEY: I think she has a prior conviction.

1 MS. LINDER: I apologize. I need to see who 188
2 was.

3 THE COURT: 188 is Rita Roache.

4 MS. LINDER: She worked for South Carolina Legal
5 Services and I am concerned that she could have
6 impartiality to the public defender's office when she
7 works for legal services.

8 THE COURT: All right.

9 MR. KING: I understand that. I don't challenge
10 that.

11 THE COURT: So you withdraw your objection? I
12 guess the proper way is you agree that that is racially
13 neutral?

14 MR. KING: Yes, Your Honor.

15 THE COURT: All right. The next one would be?

16 MR. KING: 243.

17 THE COURT: 243, Brintney White.

18 MS. LINDER: She is the one who said that her
19 brother was arrested for this exact same thing, dealing
20 crack in North Charleston. I obviously don't know. She
21 said she thinks it was dismissed but that to me is enough
22 for me to be concerned.

23 MR. KING: And she kind of made it sound like he
24 was arrested but then he wasn't guilty so it didn't sound
25 like he would be --

1 THE COURT: What I recall her saying is she didn't
2 know -- what I recall her saying when I asked her was it
3 a trial or dismissed or something else, she couldn't
4 remember. What is your response or explanation to her
5 explanation?

6 MR. KING: I felt like what she said up there
7 wouldn't make her a bad juror for -- okay. Never mind.

8 MR. COOPER: She responded that she would be
9 impartial.

10 THE COURT: All right.

11 MR. KING: I'm sorry. I'm thinking up here.

12 THE COURT: That's okay.

13 MR. KING: Okay. I believe that's race neutral.
14 I'll accept that as a race neutral reason.

15 THE COURT: Okay. All right. And anyone else?

16 MR. KING: Number 150, Stacey Manigault.

17 THE COURT: 1-5-0.

18 MS. LINDER: That is the gentleman who came forward
19 and said he has two family members doing 25 years federal
20 time, he thought it was federal time, for drug dealing.

21 THE COURT: That was a black male?

22 MR. KING: Yes.

23 THE COURT: All right. So, Mr. King?

24 MR. KING: I'll accept that as a race neutral
25 explanation.

1 THE COURT: Is there anything else?

2 MR. KING: No, Your Honor.

3 THE COURT: And based upon that I feel that the
4 State has provided race neutral reasons and you have not
5 provided the Court anything to challenge them to make
6 them implausible, so I deny your motion. Thank you.

7 (WHEREUPON, the bench conference was concluded.)

8 THE COURT: With the exception of the conference we
9 had at the bench any objection to the jury as seated?

10 MS. LINDER: No objection.

11 THE COURT: Any motions or matters?

12 MS. LINDER: Nothing from the State, Your Honor.

13 THE COURT: Any motions or matters other than what
14 we just conducted at the bench?

15 MR. KING: No, Your Honor.

16 THE COURT: All right. Ladies and gentlemen, you
17 have been selected as the jury in this case. If you will
18 please be escorted to your jury room we will receive you
19 back momentarily. Please take any comfort break that you
20 may need at this time and we will receive you back in
21 just a few moments.

22 Stay seated. Thank you.

23 (WHEREUPON, the jury leaves the courtroom at
24 approximately 11:10 a.m.)

25 THE COURT: Outside the presence of the jury, other

1 than the motion we just heard anything further --

2 MS. LINDER: Nothing from the State.

3 THE COURT: -- regarding jury selection?

4 MR. KING: No, Your Honor.

5 THE COURT: Ladies and gentlemen, some of you may
6 have been wondering what I have been doing up here on my
7 laptop. I will tell you the last work that I was doing
8 on my laptop is to determine where you will be going for
9 the remainder of the week.

10 Ladies and gentlemen, it appears to the Court that
11 your work here is done for the week. So you have
12 completed your service for this week, so you are excused.
13 You have each earned your exemption for the next three
14 years. So I look forward to seeing you back here in
15 three years. I appreciate you being here today and your
16 service to Charleston County. So you are excused.
17 Please have a wonderful afternoon. Thank you.

18 (WHEREUPON, the jury panel was excused.)

19 THE COURT: All right. Counsel, just for
20 scheduling I just need one of you.

21 (WHEREUPON, a bench conference occurred, off the
22 record.)

23 THE COURT: Could you have them pick the foreman
24 and go ahead and give them their notepads. And just let
25 me know when they are ready.

1 THE BAILIFF: Yes, ma'am.

2 THE COURT: Anybody need to take a comfort break
3 please do so now.

4 (WHEREUPON, a brief recess was taken.)

5 THE COURT: We are just going to go until lunch
6 gets here, if that's okay, then break 30 or so minutes,
7 then get started again.

8 MS. LINDER: That works for us. Thank you, Judge.

9 THE COURT: All right. Thank you.

10 We ready?

11 MS. LINDER: The State is ready, Your Honor.

12 MR. KING: The defense is ready, Your Honor.

13 THE COURT: Thank you.

14 (WHEREUPON, the jury enters the courtroom at
15 approximately 11:28 a.m.)

16 THE BAILIFF: All seated, Your Honor.

17 THE COURT: Thank you. Please be seated.

18 Ladies and gentlemen, you have been selected as the
19 jury to try this case, and just a few procedural matters.
20 You may have noticed when you came in this time the
21 attorneys and the parties involved will be standing and
22 they will remain standing until all 13 of you are seated.
23 The reason for this is out of respect for your new
24 position as judges of the facts.

25 Ladies and gentlemen, you have also been given

1 notepads. You are allowed to take notes but please
2 remember one juror's notes are no more correct or
3 accurate than another juror's notes. Some of us were
4 much better note takers in school than others, and so
5 those are for your own use.

6 Ladies and gentlemen, we will now administer to you
7 the oath to try this case.

8 Mr. Clerk?

9 (WHEREUPON, the jury was given their oath.)

10 THE COURT: Thank you. All 13 jurors have taken
11 the oath.

12 Ladies and gentlemen, Ms. Noble has been selected
13 as your foreperson here in this case and that means that
14 she is the jury spokesperson. So if at any time you are
15 having any inconvenience or you need an additional break
16 if you will let your foreperson know and she will alert
17 the bailiff and we'll handle the matter immediately.

18 Ms. Giblin, you are my alternate so you need to
19 remain in that seat.

20 And, Ms. Noble, you will need to remain in that
21 seat.

22 The rest of you when we take breaks and return back
23 you may sit whatever you choose. All right. There's
24 only two assigned seats.

25 Ladies and gentlemen, the case that we are about to

1 begin is the case of the State of South Carolina vs.
2 James Lamont Moore. What I say is intended to serve as
3 an introduction to the trial of this case. I will
4 instruct you on the law applicable to this case
5 throughout this trial and at the close of the trial
6 before you retire to consider your verdict. This is
7 simply an explanation of the procedure that we will
8 follow so you'll be better able to understand what is
9 happening.

10 The defendant is charged by an indictment filed in
11 this Court with the crime of distribution of cocaine
12 base. I will explain the elements of that charge to you
13 at a later time.

14 The indictment is simply the charge by which this
15 case is brought into court. It is not any evidence of
16 the allegations that it contains.

17 The defendant has pled not guilty to this
18 indictment. The State has the burden of proving each of
19 the elements of this indictment beyond a reasonable
20 doubt. It becomes your duty, ladies and gentlemen, to
21 decide whether the State has met its burden.

22 Your purpose as jurors is to find and determine the
23 facts. If at any time I make any comment regarding the
24 facts you must disregard it. You are to determine the
25 facts that you hear from the testimony and any other

1 evidence introduced in this Court. It is up to you to
2 determine the inferences which you feel may be properly
3 drawn from the evidence.

4 It is important that you perform your duty of
5 determining the facts diligently and conscientiously
6 because ordinarily there is no way to correct an
7 erroneous determination of the facts by a jury.

8 On the other hand, and with equal emphasis, the
9 same law that makes you the judges of the facts makes me
10 the judge of the law. The law as given by this Court is
11 the only law that you may consider, even though you may
12 disagree with it. I cannot tell you what I think the
13 facts are and you cannot disagree with me about what the
14 law is or what the law ought to be.

15 Ladies and gentlemen, until I advise you to begin
16 your deliberations you must not discuss this case with
17 anyone. That includes your fellow jurors, your friends,
18 your family members or anyone else.

19 Ladies and gentlemen, you may not read, watch,
20 listen to or do any independent investigations regarding
21 this case. It is important that you keep an open mind
22 and not decide any issue in this case until all of the
23 evidence has been presented, the parties have made their
24 closing arguments and I have instructed you on the law
25 applicable to this case.

1 It is your solum responsibility to determine the
2 guilt or innocence of the defendant and your verdict must
3 be based solely on the evidence as it is presented to you
4 in this trial.

5 In just a moment the solicitor will make to you
6 what is called an opening statement in which the
7 solicitor will explain to you the issues in this case or
8 at least what the solicitor thinks the issues are. The
9 attorney for the defendant may also make an opening
10 statement; although, he is not required to do so.

11 What the attorneys tell you in opening statements
12 is not to be considered evidence in this case as it is
13 merely their contention as to what the issues will show.
14 The evidence in this case will come to you from the
15 testimony of the sworn witnesses from this witness stand
16 as well as any exhibits that may be part of the record in
17 this case.

18 Ladies and gentlemen, you will have an opportunity
19 when you retire to consider your verdict. The evidence
20 that is admitted will go back to you during your
21 deliberations.

22 Please remember from time to time there may be an
23 issue of law that I must take up outside of your presence
24 or maybe up at the bench. If we are up at the bench, and
25 you observed a bench conference right after you were

1 selected, please do not try to listen to what we are
2 saying, try to read our lips or speculate. Please do not
3 think we are hiding anything from you.

4 Ladies and gentlemen, the reason that I have bench
5 conferences or excuse you for a short time is sometimes
6 it is necessary for me to make a comment regarding the
7 facts in order to issue a ruling on the law. And as I
8 indicated to you, the law does not allow me to have an
9 opinion about the facts in this case so I find it
10 necessary to excuse you so that in no way will my
11 comments influence your decision regarding the facts.

12 In determining what the true facts are in this case
13 you must decide whether or not the testimony of the
14 witnesses is believable. It is my responsibility to
15 determine as a matter of law whether the testimony is
16 admissible, but whether or not you believe it is solely
17 for you to determine.

18 In deciding whether or not to believe a witness you
19 have the right to consider the interest of the witness,
20 the bias of the witness, the prejudice of the witness, as
21 well as the way the witness acts on the witness stand.
22 You have a right to consider anything that is in the
23 record that will help you determine and evaluate the
24 testimony of the witnesses.

25 That means it's your duty to please pay close

1 attention. Do not let your thoughts wander so at the end
2 of testimony, after closing arguments and I have
3 instructed you on the law applicable to this case you
4 will be in a position to determine what the true facts
5 are, apply the law to those facts and render a true and
6 just verdict.

7 Please give your attention.

8 Ms. Linder?

9 MS. LINDER: Thank you, Your Honor. May it please
10 the Court?

11 THE COURT: Yes, ma'am.

12 MS. LINDER: Good morning, ladies and gentlemen.
13 We're here today about something pretty simple. Drugs
14 are illegal. It is illegal to possess drugs, it is
15 illegal to distribute drugs. Cocaine base, is typically
16 known as crack or cocaine base crack, is a drug. It is
17 illegal to distribute cocaine base. That's why we are
18 here today. Back on July the 19th of 2009 James Lamont
19 Moore, the defendant in this case, did just that. He
20 distributed cocaine base.

21 You are going to hear from some police officers on
22 the stand and you'll also hear from what's known as
23 confidential informant or a CI. I submit that you will
24 hear from them on the stand that back on that day on July
25 16th, 2009, they decided they were going to conduct an

1 operation. They decided they were going to conduct a CI
2 buy. And what they do is -- it's a fairly complicated
3 yet simple idea. They get together, they search the
4 confidential informant, they wire him up with a recording
5 device.

6 Law enforcement kind of sets out around an area to
7 patrol, to make sure it's safe, to make sure that they
8 have control over what's happening that day, and then the
9 confidential informant goes out. All the law enforcement
10 officers are listening. They have a live audio feed.
11 They are listening to everything that happens. There's
12 also on the device a recording. So you can see it, and I
13 submit you'll see it later on.

14 The confidential informant goes out. It's all
15 controlled by the City Narcotics Unit, City of
16 Charleston. He goes out, he makes contact with the
17 defendant in this case. He makes contact with James
18 Lamont Moore. He asks him for some drugs, and James
19 Lamont Moore does that.

20 James Lamont Moore, the defendant in this case,
21 distributes cocaine base and in return gets money for it.
22 He gets paid for it. The confidential informant goes
23 back to law enforcement. The drugs are then tested and
24 indeed they are drugs, they are cocaine base.

25 That is this case. It is that simple. Drugs are

1 illegal. It's illegal to distribute drugs, and cocaine
2 base crack is a drug. And I submit to you that by the
3 end of this trial I ask that you return a verdict of
4 guilty that James Lamont Moore did distribute cocaine
5 base crack back on July 19 of 2009 -- or rather July 16
6 of 2009 here in Charleston County. Thank you.

7 THE COURT: Mr. King?

8 MR. KING: This case ought to be simple but it's
9 not. You know, the police are in control of this
10 investigation. A typical investigation, let's say a
11 robbery, maybe you read about these in the paper or on
12 the street, you know, the police have to look for
13 witnesses, maybe there's some surveillance video from a
14 nearby store that happens to capture something, maybe it
15 does, maybe it doesn't, and the police have to gather all
16 this evidence that might be out there.

17 Well, in this case the police are in complete
18 control of everything. This is an operation that they
19 set up. You know, with all the technology that we have
20 today you would think they would get a better video than
21 what they are going to show.

22 So this should be simple if there is a drug
23 distribution and it's recorded on a video camera. It
24 ought to be open and shut. Well, it's far from that
25 because you're going to see this video, and there are two

1 people in the video. You're not going to see any money
2 in the video, you're not going to see any cocaine base or
3 anything that you might think would be drugs in the
4 video. You're not going to see anybody exchanging
5 anything with their hands.

6 You know, the camera is going to be pointing off in
7 the sky at the point that they say that there's a drug
8 distribution. And if they are in control of this then
9 there ought to be better evidence.

10 If the police go through all this trouble with the
11 technology that we have to wire this informant up, and
12 this informant who I'm going to talk about next, you're
13 going hear from the guy, Joseph Ancrum, and you're going
14 to have to take his word because you're not going to be
15 able to watch this video and make a good decision on what
16 this video shows.

17 So then they are going to have an informant take
18 the stand to try to fill in the holes in that video and
19 explain it to you. And this guy is not some guy that you
20 can trust. He's been convicted of a crime of dishonesty
21 in past. He's been doing it for years, should be a pro
22 at it, but you're going to hear evidence about how many
23 times he's done this and he makes a descent amount of
24 money from doing it.

25 This isn't an informant who's been arrested for

1 something and trying to get out of charges, sometimes
2 that happens. This is a paid informant. This is him
3 making a living. He gets significant income from this.
4 And it's important for him to, you know, produce cases
5 and generate this income because he gets paid for every
6 one that he does.

7 And probably the most important thing about
8 Mr. Ancrum is that he signed an affidavit not too long
9 ago swearing that he took that witness stand a few years
10 ago and lied in a case very similar to this. So he's got
11 some real problems. So they are going to show you video
12 that doesn't really show what it's supposed to show, then
13 they are going to put an informant up there that has no
14 credibility.

15 So they are asking you something very serious.
16 This isn't simple at all. This is very serious. This is
17 asking the -- the State's asking you to convict someone
18 of a very serious crime, and to do that, you know, we
19 have a burden of proof in criminal cases. And you
20 probably heard it before, proof beyond a reasonable
21 doubt. But I want you to think about what that means.
22 You hear it a lot but sometimes you hear things so much
23 you don't really think about what the words are.

24 In a criminal case the State is required to prove
25 everything. The defense doesn't have to prove anything.

1 They have to prove someone guilty beyond a reasonable
2 doubt, and they have to build the case. They build a
3 case with evidence. And they have to convince you, the
4 jurors, that there's no reasonable doubt in this case.
5 And when the police are in control of everything, that
6 ought to be easy, and it's not.

7 And I'm asking you to pay close attention, to watch
8 the video, watch that informant when he takes the stand
9 and, you know, you are going see that there's something
10 not right with this.

11 They didn't arrest anyone that day. There wasn't
12 an arrest until -- you know, an arrest warrant until
13 later. You know, if they could have went and arrested
14 someone that day, and if he's out there selling drugs,
15 then they have marked money, he would have marked money
16 in pocket, they would know exactly who he is and arrest
17 him right there.

18 They don't arrest anybody that day. So now three
19 years later they are asking you to convict him of this
20 crime. And I just want you to see what kind of evidence
21 they have when they are asking you to do this. Thank
22 you.

23 THE COURT: Call your first witness.

24 MS. LINDER: Thank you, Your Honor. The State
25 calls Jake Grill.

CHARLES J. GRILL - DIRECT BY MS. LINDER 105

1 CHARLES JACOB GRILL, after having been duly
2 sworn, testified as follows:

3 THE CLERK: Speak into the mic, and state your full
4 name and spell your last name for the record.

5 THE WITNESS: Yes, sir. My name is Detective
6 Charles Jacob Grill, G-r-i-l-l.

7 DIRECT EXAMINATION

8 BY MS. LINDER:

9 Q. Hi, Detective Grill. How are you doing today?

10 A. Great.

11 Q. What's your occupation or profession?

12 A. I am a police officer with the City of Charleston.
13 I am currently assigned to the DEA, Drug Enforcement
14 Administration Task Force. I'm a detective.

15 Q. And what are your duties with CPD and also DEA?

16 A. I'm currently assigned to the special investigation
17 -- special investigation unit, which is narcotics and
18 vice. They handle those and other issues in the
19 department, but the easiest way for me to explain it is
20 basically I'm on loan to the DEA, and the DEA is the
21 federal agency. It's the Drug Enforcement
22 Administration, and they basically investigate large
23 scale drug operations in South Carolina, the Charleston
24 area and throughout the nation.

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

1 A. Over seven years.

2 Q. And can you please tell the jury about your
3 education, your training and experience.

4 A. Yes, ma'am. I graduated from the Citadel in 2005.
5 I got hired on with the police department June of 2005,
6 and from there I went to the academy. I graduated from
7 the academy and I was assigned to the team one patrol
8 division which is -- team one is just an area of patrol
9 that is in the City of Charleston, which is the upper
10 peninsula area of Charleston.

11 And I did that for two years then I was assigned to
12 the -- what was then called the Narcotics Unit and Vice
13 Unit. I was assigned to them. I was there with them for
14 two years. On paper I'm still with them but now I'm on
15 loan to the DEA. I've been there for over two years.
16 Actually, over three years now.

17 But, you know, throughout that time frame I've
18 taken many, many classes, extra hours of training,
19 specialized training anywhere from -- I've been to a
20 couple DEA schools. One of those schools was the basic
21 investigator school, drug investigator, and then another
22 specialized which is task force officer training, which
23 is my title with the DEA.

24 I've attended money laundering classes put on by
25 the Department of Justice. I have taken undercover

1 narcotics techniques. That was put on by the Criminal
2 Justice Academy, which is the Academy. I've taken
3 classes at the Academy while going through the Academy on
4 drugs, and just taken a lot of classes.

5 Q. Detective Grill, did you have the occasion to be
6 working back on July 16, 2009?

7 A. Yes, ma'am, I did.

8 Q. And did you have the occasion to become involved in
9 investigation of this case, the State vs. James Lamont
10 Moore, back on that date?

11 A. Yes, ma'am, I was.

12 Q. And what exactly were you doing back on that date?
13 Was this your case or what were you doing back on that
14 date?

15 A. No, ma'am. I was assisting Detective Shealy. I
16 was riding with him and helping him out throughout this
17 case, and I was actually -- I mean, I guess the
18 navigator. I was in the passenger seat, so-to-say, and
19 literally.

20 Q. You were in the passenger seat with Agent Shealy.
21 What were you all conducting that day?

22 A. We were conducting -- we were doing a buy walk
23 operation, what we call a buy walk, and that's where we
24 use an informant or undercover officer, whatever we want
25 to use, or whatever we can use. We use the -- the term

1 buy walk is basically what we use to say you are buying
2 drugs and then walking away. You are not making an
3 arrest immediate -- if you make an immediate arrest what
4 we call that operation is a buy bust operation, but on
5 this particular day what we were doing is we were just
6 doing a buy walk, simply buying drugs and walking away.

7 Q. And can you describe to the jury what exactly a
8 controlled buy is.

9 A. Yes, ma'am. A controlled buy is basically when we
10 -- it's an operation, it's the terms that we use when we
11 are conducting an operation using an informant. And, you
12 know, we use the word controlled buy and the reason we
13 use those terms are because we try to control as much --
14 as many variables as we can.

15 We give the CI or give confidential informant, we
16 give him or her instructions. We search the informant
17 before and after a buy. We provide the informant with
18 our money. You know, we check the informant for weapons.
19 We try to get in the area before buy.

20 I mean, we try to take every -- we try to account
21 for every variable. Of course, we can't but we never
22 know what could happen out there, but we try to control
23 every aspect of it. You know, and that's why we call it
24 a controlled buy.

25 Q. And with a controlled buy do you typically target a

1 location or do you target a person? How is that done?

2 A. Well, I mean, you can target both. It really
3 depends on your informant, your informant's capabilities
4 and your end objective, your main goal where you are
5 trying to target, but you can target both. You can
6 target individuals if your informant knows an individual
7 and going to send them to that individual, or if you are
8 targeting a residence.

9 I mean, if you know a drug house or a house that's
10 being utilized to distribute drugs you're going to target
11 that house so you have to -- you know, then you can use
12 your informant to go to that house or if you know -- you
13 know if there's an open air drug market where they are
14 doing hand-to-hand drug transactions in plain view you're
15 going to target that area, and there's going to be more
16 than one person out there selling so you're going to
17 target that whole area.

18 Q. Detective Grill, you have mentioned the term buy
19 walk to the jury. Can you explain to the jury kind of
20 the pros and cons of doing a buy walk versus a buy bust?

21 A. Yes, ma'am. It basically boils down to what are
22 you -- what are we trying to accomplish. If we are
23 trying to have an immediate impact, obviously, a buy bust
24 because you are making an arrest as soon as that
25 transaction is made and as soon as it is safe to make

1 that arrest. I mean, that's kind of just a determination
2 that we have to make either right there on the street or
3 we have to plan for it.

4 Now, with that comes, you know, the pro and the
5 con. You know, the main reason we don't like to use that
6 is to keep our informant's identity unknown because
7 basically if I arrest a guy that I just sold -- you know,
8 that just sold drugs to an informant he's going to know
9 who he or she just bought from, so to say, and he's going
10 to -- we got some other issues with that that could
11 happen down the line.

12 And, you know, with buy walk operation typically
13 what we like to do is, you know, do the buy, allow some
14 time to pass that way it's more -- it's less likely that,
15 you know, the suspect or offender was going to know who
16 he or she sold drugs to. So it just allows a lot of time
17 to pass and keeps our informant -- or identity
18 confidential.

19 And another reason is -- why I do buy walks is just
20 for safety issues. I mean, you know, you can't do a buy
21 bust operation in the middle of a crowded street or a
22 crowded shopping center, or whatever.

23 I mean, there's all kind of variables that can
24 happen there where, you know, the public is put in some
25 bad situations and we don't like to do that. That's why

1 sometimes it is more -- it's safer for us and the public
2 for us to do a buy walk operation basically where you
3 just let it walk, exactly what it says.

4 Q. And you've been saying CI and confidential
5 informant a lot. Can you explain to the jury the
6 different types of CIs there are?

7 A. Yes, ma'am. Typically we encounter a couple
8 different types of informants. Probably the most
9 available or the most that we encounter is an informant
10 that's working off charges. Basically, they were
11 arrested for something and they say, Boom, I want to
12 flip. I want to -- this is what I know. This is the
13 information that I know. This is the guy or girl that I
14 can go and buy drugs from. You know, and that person is
15 basically what we say is working off charges.

16 There's another type of informant then that is
17 called a paid informant. Simply what it says, an
18 informant that is getting paid to go out and do
19 undercover buys or provide information that helps us.

20 And then there's also what we call a good citizen
21 informant. Basically, they are not working off charges,
22 they are not receiving money. They just basically do it
23 because they want to do it. They are trying to make an
24 impact in their community. And then you have -- that's
25 about it so...

1 Q. And can you tell the jury what type of CI was used
2 in this case out of your different classifications?

3 A. Yes, ma'am. This was a paid informant.

4 Q. And can you tell the jury about the CI in this
5 case?

6 A. Yes, ma'am. The CI, he was used many, many other
7 times, and he has been a paid informant for a long, long
8 time.

9 Q. Okay. We're going to get back to the date in
10 question with this incident. Back on July the 16th of
11 2009 when and how did you first start being involved in
12 this investigation?

13 A. I mean, I guess it first started, you know,
14 Detective Shealy, he was the case agent and I was just
15 assisting him. We went and picked up the informant and
16 brought the informant to a predetermined location
17 basically where we can -- an area that's secluded,
18 there's not a lot of people around.

19 We searched the informant, equipped the informant
20 with audio and video recording device and an audio
21 transmitting device so we can monitor what's going on out
22 there on the street while he's doing the transaction.

23 And then we basically held a briefing of the
24 operation there. We met with other detectives, other
25 officers that were helping out in uniform presence,

1 trying to give them -- you know, they don't need to know
2 every detail but they just need to be there available in
3 case, in case we need them. From there we carry the
4 informant to the drop off location.

5 Q. I apologize for interrupting, Detective Grill.
6 Let's talk about this briefing that you do on the front
7 end. What exactly do you do to prepare the CI? What was
8 done to prepare the CI for this buy back on July 16th?

9 A. Basically, the informant was searched. You know,
10 you got to search them before, you got to search his
11 body, his pockets, I mean, everything to ensure that he
12 or she does not have drugs on them before the buy. And
13 then from there --

14 Q. Do you give the confidential informant any words of
15 wisdom or --

16 A. Yes, ma'am. We instruct the informant on the
17 limitations of what they can and cannot do and what we
18 want them to do, you know, stuff like that.

19 Q. And you also said that other officers who are
20 involved with the operation are present at that briefing?

21 A. Yes, ma'am.

22 Q. What specifically are the other officers told to do
23 or what responsibilities do they have in one of these
24 operations?

25 A. A typical operation is basically you have a case

1 agent, you have a supervisor that's on the street with
2 us, and then you have other detectives and other uniform
3 officers that can be present.

4 Basically, those detectives are -- you know, we are
5 in undercover capacity. You know, our hair is a little
6 longer, we grow beards, and we do that to blend into the
7 community and that way people can't walk down the street
8 and say, That's a police officer right there.

9 The reason why we do that is typically on these
10 buys after we do the briefing we send our surveillance
11 units there -- surveillance detectives out and kind of
12 put them in the area just so they can keep an eye what's
13 going on. Then from there, you know, during the briefing
14 detectives are selected for that and they go ahead and
15 head on out immediately after the briefing, just try to
16 get in the area and blend in and just kind of be ready
17 and keep us updated of what's going on.

18 Q. Okay. So after the briefing and people left and
19 went to go to the perimeter, like you said, what did you
20 and Detective Shealy do with the CI?

21 A. Well, once they were established in the area -- and
22 I probably didn't make this clear enough, but another
23 thing at the briefing is certain duties and
24 responsibilities are assigned to the detectives, and
25 basically those duties are, you know, to monitor that

1 audio transmitter, which is what we are listening to in
2 our vehicles while the informant is out there on the
3 street, and if anything happens or whatever during that
4 that we see that may put the informant, or the public, or
5 the suspect in jeopardy, you know, we got to take action
6 right there and then. So that's why we do it. That's
7 why we equip the informant with an audio transmitting
8 device and so -- I'm sorry. Can you repeat your
9 question? I'm sorry.

10 Q. I was asking what you and Detective Shealy did with
11 the CI after the briefing.

12 A. So basically after the briefing and after all the
13 surveillance units were in there, they were established,
14 myself and Detective Shealy drove the informant to the
15 target area -- or near the target area and dropped the
16 informant off behind Burris liquor, which is -- I don't
17 remember the exact address but it was the parking lot
18 behind Burris Liquor.

19 Q. All right. So once you got up there to the Burris
20 Liquor location and you let out the CI what did you do?

21 A. Burris Liquor is located on Reid Street, which is a
22 one way between Meeting and King. So once the informant
23 was out and was walking towards our target area we drove
24 down Reid Street, and then behind the Morris Sokol
25 furniture store there's a little cut-through, you can cut

1 over to Wolfe Street.

2 So we drove down Wolfe -- or we cut over to Wolfe
3 Street and we just parked on Wolfe Street. That way in
4 the event that anything happened or the informant gave a
5 danger signal, or one of our surveillance units saw
6 something going on we can just shoot right down there and
7 rescue or take action, whatever we needed to do, but we
8 just stayed right there the remainder of the buy.

9 Then after the -- once the informant went out, made
10 contact, you know, did his purchase and was on his way
11 back and, you know, the whole time the informant is out
12 we're there listening to what's going on so we can hear,
13 we can keep up to date with what's happening. So once it
14 sounded like he was leaving the area we drove down Wolfe
15 Street, made a right on Meeting and came back up Reid and
16 just picked the informant up at the same location we
17 dropped him off, and then that's about it.

18 Q. Immediately upon picking up the confidential
19 informant in this case what happened? What did the CI
20 do?

21 A. Well, the first thing I think happened was
22 Detective Shealy took control of the narcotics, the crack
23 or cocaine base, and from there we drove back to the
24 station location which is where we, you know, had the
25 briefing and searched the informant.

1 Once we got back there we -- Detective Shealy
2 searched the informant again and didn't find any drugs on
3 him and then we -- the informant provided a written
4 statement of basically the events of the transaction
5 between the CI and the suspect. And also when he got in
6 the car he was also giving us a description of the
7 subject that sold him the drugs.

8 Then once we go back to the station location and
9 took care of our, you know, collecting evidence and the
10 statement Detective Shealy called Officer Burke who was
11 on his way in from work or on his way into work and kind
12 of -- he just relayed the description and had Detective
13 Burke ride through that area, and Detective Burke
14 identified the suspect.

15 Q. Did you ever identify an individual?

16 A. From during the buy?

17 Q. Yes.

18 A. Yes, ma'am. When we were out there on the way to
19 drop the informant off and on the way to pick the
20 informant up after the buy we identified a guy that was
21 -- our surveillance units, and saw some individuals
22 hanging out in the area of the gas station right there at
23 Meeting. I believe it's 420 Meeting. It's the Exxon gas
24 station right there. It's basically at the end of Wolfe
25 Street, right before Wolfe turns into Amherst.

1 And one of those individuals was wearing a blue
2 arm cast on his left arm, about up to probably his mid
3 bicep area all the way down the whole arm, basically.
4 And we saw that individual and a couple other guys
5 hanging out there when we were dropping him off, the
6 informant, and that's who the informant met with. And
7 when we went to pick up the informant he was still
8 standing there when we basically made that right back
9 onto Meeting to go pick him up.

10 And from there Detective Burke -- or, I mean,
11 Officer Burke gave us his name and information and we
12 pulled the driver's license photograph from DMV from his
13 name. You know, he gave us the defendant's name, James
14 Lamont Moore, Jr., and we compared it to the video
15 footage of the buy, the actual buy, and you could tell
16 it's them.

17 MS. LINDER: Beg the Court's indulgence.

18 THE COURT: Take your time.

19 (PAUSE.)

20 MS. LINDER: I have no more questions at this time,
21 Detective Grill. Please answer any questions that
22 Mr. King has.

23 THE COURT: Mr. King?

24 MR. KING: Thank you.

25 CROSS-EXAMINATION

- 1 BY MR. KING:
- 2 Q. Detective Grill?
- 3 A. Yes, sir.
- 4 Q. You testified you've had lot of training?
- 5 A. Yes, sir.
- 6 Q. And in this area?
- 7 A. Yes, sir.
- 8 Q. Taken classes, right?
- 9 A. Yes, sir.
- 10 Q. You've conducted controlled buys before this?
- 11 A. Before?
- 12 Q. Before the incident --
- 13 A. Yes, sir.
- 14 Q. -- we're talking about?
- 15 A. Yeah, absolutely. Yes, sir.
- 16 Q. So how many times you think you've done -- have
- 17 been involved in a controlled buy operation?
- 18 A. Wow. Before this? Before 2009?
- 19 Q. Yeah. Right. Right. From the time of the event?
- 20 A. Oh, from the incident. Oh, man. I'd say at least
- 21 a couple hundred.
- 22 Q. Okay. You've done it a lot?
- 23 A. Yes, sir.
- 24 Q. You know what you are doing?
- 25 A. Yes, sir.

1 Q. Your office gets funding, I guess, to buy -- maybe
2 federal funding to buy equipment and stuff to use; is
3 that right?

4 A. No, sir, not really. I mean, I don't know about
5 the federal funding. I mean, basically our money that we
6 use comes from assets that we seize and from their
7 proceedings, you know, drug money that we seize and then
8 basically we use to fight drugs. So that money from what
9 I'm aware that's our training and equipment purchase.

10 Now, our budget, city budget, I have no clue about this.

11 Q. I'm talking about the equipment, I guess. You use
12 that and you buy these cameras?

13 A. Yes, sir.

14 Q. What kind of cameras are they? Describe those.

15 A. For this one?

16 Q. Yeah.

17 A. It was what we call the Hawk. It's just a name
18 brand of the camera company. That's the model of it. So
19 that's just what we refer to it as.

20 Q. And you put it on his --

21 A. On his person.

22 Q. You know where at on him it's placed or in this
23 situation where it was placed on him?

24 A. It was basically -- it was basically about right
25 here (indicated). It's just a button that looks like --

1 I mean, it's a camera that looks like a button. So it's
2 a button cam and you just put it on.

3 Q. And so it's right in this area here. So it would
4 -- you know, and right there where people's hands are as
5 well, right? It's right in this area and would film out.
6 I imagine you're trying to capture a person's face on
7 video?

8 A. I mean, that's the ultimate goal. We would love
9 to.

10 Q. And you also want to capture, you know, money on
11 the video?

12 A. I mean, basically what we're trying to capture is
13 the transaction.

14 Q. Right.

15 A. I guess you could say. But, I mean, we got to get
16 what we can get out there. We're not shooting a major
17 motion picture. I mean, we're just out there.

18 Q. Right. But you had a lot of training, right?

19 A. Uh-huh.

20 Q. So you've done this enough times, and ideally you
21 would like to capture a whole transaction on videotape,
22 right?

23 A. Yeah, absolutely.

24 Q. And you don't always use informants you said?

25 A. No, sir.

- 1 Q. Sometimes you use an undercover police officer?
- 2 A. Yes, sir.
- 3 Q. So in this case you could have used somebody other
- 4 than Mr. Ancrum. You could have used an undercover
- 5 police officer to make a buy, right?
- 6 A. We could have, I imagine.
- 7 Q. And you do a lot of preparation for this. You said
- 8 you wire up the informant, search him and everything?
- 9 A. Yes, sir.
- 10 Q. You give him \$20, in this case?
- 11 A. Yeah, whatever we gave him. I don't know the
- 12 exact. I mean, I could look.
- 13 Q. You always make a photocopy of that money, though,
- 14 and keep a record so you know what the serial number is
- 15 on the money?
- 16 A. Well, we try to. We try to at least either write
- 17 it down or, you know, make a photocopy.
- 18 Q. And you are familiar with Mr. Ancrum, the informant
- 19 used in this case?
- 20 A. Yes, sir, I am.
- 21 Q. You've worked with him a good bit?
- 22 A. Yes, sir, we have.
- 23 Q. And you said that he had been doing this a long
- 24 time?
- 25 A. He's been doing this for a long time, yes, sir.

- 1 Q. And you said many, many times he's done -- you
2 know, been involved in these operations?
- 3 A. Yes, sir.
- 4 Q. So he knows what he's doing as well, right?
- 5 A. Yes, sir.
- 6 Q. Are you familiar with his file at all?
- 7 A. Yes, sir.
- 8 Q. Because would you agree, like, just for 2009 he's
9 done maybe over a hundred buys, between one and two
10 hundred buys? Does that sound accurate to you?
- 11 A. Yeah. Yeah. Yes, sir, it does. I mean...
- 12 Q. And he's making money for each one of those?
- 13 A. Yes, sir.
- 14 Q. Would you say he's making anywhere from 20 to a
15 hundred dollars, or \$150 sometimes, maybe an average
16 about \$60? Would you agree with that?
- 17 A. That's about right. Yes, sir.
- 18 Q. Using over a hundred buys, let's just say \$60. I
19 mean, that's \$6,000. Making a rough guess it could even
20 be much higher than that, right?
- 21 A. Possibly, yes, sir.
- 22 Q. And he's done this a lot of times, you said, so he
23 knows what he's supposed to do, correct?
- 24 A. Yes, sir.
- 25 Q. And he knows that he's supposed to try to capture

1 the transaction on video, if he can?

2 A. Yes, sir.

3 Q. And your role in this is you were with Shealy the
4 whole time?

5 A. Detective Shealy.

6 Q. Detective Shealy.

7 A. Yes, sir.

8 Q. You all were together the whole time?

9 A. Yes, sir.

10 Q. And you all were in the vehicle?

11 A. Yes, sir, his vehicle. Yes, sir.

12 Q. And you all were just listening in on the audio
13 coming from the informant?

14 A. Yes, sir. We don't -- we don't have the video
15 capability. We can't watch like a live feed. I mean,
16 we're just listening to audio.

17 Q. Just make sure if anything bad were to happen or go
18 down you all can move right in?

19 A. Yes, sir.

20 Q. But you're not watching what's actually going on
21 out on the street. You're just listening in?

22 A. We try to, you know, get our physical eyesight but
23 we're not, like, watching what the camera is showing. I
24 mean, we are doing surveillance during the buy. I mean,
25 we have our units that are in the area that were right

1 around the corner but, I mean, so in a way we are
2 watching it but -- does that answer your question?

3 Q. Yes. That's fine.

4 MR. KING: That's all the questions I have.

5 THE COURT: Redirect?

6 MS. LINDER: No redirect, Your Honor.

7 THE COURT: Is this witness excused?

8 MS. LINDER: I would ask that he be excused but if
9 he elects to do so to remain in the courtroom.

10 THE COURT: Any objection to him remaining in the
11 courtroom?

12 MR. KING: No, Your Honor.

13 THE COURT: All right. You may step down. Please
14 stay with us. Thank you.

15 THE WITNESS: Yes, ma'am. Thank you.

16 THE COURT: Call your next witness.

17 MS. LINDER: The State calls Joseph Ancrum.

18 Judge, may my investigator assist?

19 THE COURT: Yes.

20 JOSEPH ANCRUM, after having been duly sworn,
21 testified as follows:

22 THE CLERK: And speak into the microphone and say
23 your full name and spell your last name.

24 THE WITNESS: Joseph Ancrum, A-n-c-r-u-m.

25 THE CLERK: Thank you.

1 THE COURT: Thank you. Ms. Linder?

2 MS. LINDER. Thank you, Your Honor. May it please
3 the Court.

4 DIRECT EXAMINATION

5 BY MS. LINDER:

6 Q. Joseph, how are you doing today?

7 A. All right. All right.

8 Q. Joseph, can you please tell the jury generally
9 where you are from.

10 A. All over.

11 Q. Have you been in the Charleston area for a length
12 of time?

13 A. Yeah, about 16 years.

14 Q. And, Mr. Ancrum -- do you want me to call you
15 Mr. Ancrum or Joseph?

16 A. Either. You ain't got to address me Mr., just
17 Joseph.

18 Q. All right, Joseph. Have you cooperated with law
19 enforcement before?

20 A. Yes.

21 Q. And how long would you say you cooperated with law
22 enforcement? How many years can you say you cooperated
23 with law enforcement?

24 A. About over 20 years or longer.

25 Q. And just locally here in the greater Charleston

1 area what agencies, what law enforcement agencies have
2 you worked with before cooperating with them?

3 A. The County, North Charleston, and the City.

4 Q. Okay. Joseph, do you have any pending criminal
5 charges?

6 A. No.

7 Q. Joseph, were you convicted of a receiving stolen
8 goods charge back in 2002?

9 A. Yes.

10 Q. When you work with law enforcement for your number
11 of years do you get paid?

12 A. Yes.

13 Q. And when you work with law enforcement what does
14 that mean? What do you do when you work with law
15 enforcement?

16 A. Send me to buy drugs.

17 Q. And do you receive anything for doing this work?

18 A. Yes, money.

19 Q. Were you working with the City of Charleston Police
20 Department back on July 16th of 2009?

21 A. Yes.

22 Q. What was your contact person back with the City of
23 Charleston?

24 A. Detective Shealy and Gill -- Grill.

25 Q. All right. Your contact person with the City, you

- 1 say Gilmore and Shealy; do you talk to one more than the
2 other now?
- 3 A. No, not Gilmore.
- 4 Q. Grill?
- 5 A. Grill.
- 6 Q. I apologize. I misheard you.
- 7 A. Yeah.
- 8 Q. What did you do back on July 16th of 2009?
- 9 A. Buy drugs.
- 10 Q. What type of drugs did you buy?
- 11 A. Crack cocaine.
- 12 Q. How much did you pay for it?
- 13 A. \$20.
- 14 Q. Where did this happen?
- 15 A. On Wolfe Street.
- 16 Q. And where is Wolfe Street? Is that in North
17 Charleston, is that downtown? Where is that?
- 18 A. Downtown.
- 19 Q. Okay. We're going to get into a few more specifics
20 about that day, about the beginning of that day. Can you
21 tell me how you first got up with Detective Shealy that
22 day?
- 23 A. They come and picked me up from my location.
- 24 Q. Okay. After they picked you up did they just say
25 go on out there, or what did they do with you?

1 A. No. They picked me up and they searched me, take
2 my shirt and shoes and everything, they search me inside
3 and outside. Then I jump in the car they say we going to
4 the location where they always go at.

5 Q. Okay. Did they -- they searched you. Did they
6 attach anything to you? Did they wire you up?

7 A. When they picked me up the first time they searched
8 me and everything, then when we get to the location they
9 search me again and wire me.

10 Q. Okay. And did they give you any sort of
11 instructions as far as what you can and cannot do?

12 A. Don't jump in nobody car, don't go in the house.

13 Q. Did they give you any money in order to make this
14 drug buy?

15 A. Yes.

16 Q. You mentioned being searched. When they searched
17 you do they check your pockets?

18 A. Uh-huh, shoes and all.

19 Q. Did they find anything on you?

20 A. No, ma'am.

21 Q. You mentioned that the second time you were
22 searched before starting that you -- you said you were
23 wired; is that correct?

24 A. No, before I get wired. I get searched two times,
25 yeah.

1 Q. Then you were wired?

2 A. Then I'm wired.

3 Q. Are you aware that a video and audio recording was
4 made of this drug buy?

5 A. Yes, ma'am.

6 Q. And have you watched the video?

7 A. Yeah, that when my eyes been good then.

8 Q. Did you watch this video back in my office back
9 with me about a year ago?

10 A. Yes, ma'am.

11 MS. LINDER: Your Honor, may I approach the court
12 reporter for an exhibit?

13 THE COURT: You may.

14 MS. LINDER: May I approach the witness, Judge?

15 THE COURT: You may.

16 BY MS. LINDER:

17 Q. Joseph, I'm going to come up and approach you now.

18 Do you recognize anything on this disk?

19 A. Yes, ma'am, Rick B.

20 Q. And what is Rick B?

21 A. My informant name.

22 Q. And who wrote Rick B on this disk?

23 A. Me.

24 Q. And when did you do that?

25 A. In your office.

1 Q. Did you do that before or after watching this
2 video?

3 A. Before -- I mean, afterwards.

4 Q. And did you do that -- when you watched this video
5 was it a fair and accurate representation of what
6 happened that day?

7 A. Yes, ma'am.

8 MS. LINDER: Your Honor, I would ask at this time
9 that the State's Exhibit 3 be admitted into evidence?

10 THE COURT: Any objection?

11 MR. KING: I just renew my objections made at
12 pretrial, Your Honor.

13 THE COURT: State's 3 into evidence over your
14 objection. You may publish.

15 MS. LINDER: Thank you, Your Honor.

16 (WHEREUPON, State's Exhibit Number 3, a Video, was
17 admitted into evidence.)

18 BY MS. LINDER:

19 Q. Joseph, you can just sit tight for a while. We are
20 actually going to play this for the jury. So you can
21 just sit there on the stand for a while.

22 (WHEREUPON State's Exhibit Number 3 was played for
23 the jury.)

24 BY MS. LINDER:

25 Q. Joseph, can you describe the person you bought the

1 drugs from back on July 19th -- or 16th, rather, of 2009?

2 A. Yeah. He about five-eight, five-nine, keep a low
3 cut hair, and a little darker than me.

4 Q. All right. And what was he doing or wearing that
5 day?

6 A. He had a blue cast on his right arm, about a
7 three-quarter, come up to about right here (indicated).
8 I call them a three-quarter.

9 Q. Okay. And what clothing wise was he wearing?

10 A. A white T-shirt, black short pants.

11 Q. Was he wearing a T-shirt? Did it have sleeves on
12 it?

13 A. No, a tank top.

14 Q. After you did this drug buy where did you walk to?

15 A. Walked like -- okay, like, I leave Wolfe Street
16 then walk across the street where the bar's at and walk
17 right behind past the store, and walk right behind the
18 store where Shealy and Grill at.

19 Q. Okay. And what did you do with the drugs that you
20 bought?

21 A. I give them to -- I think it been -- I think it
22 been Grill, I think. I think Shealy been driving. I
23 can't remember. I think Shealy was driving.

24 Q. All right. And then what happened with your wire,
25 with the stuff that you were wired up with?

1 A. They pat me inside the car and everything and they
2 take -- I think we take -- no, we take the wire off to my
3 location.

4 Q. What happened at the location?

5 A. We get to the location, they pat me down, you know,
6 my pockets inside out, my shoes, socks, everything. You
7 know, and they didn't find nothing but the drugs I buy
8 from everybody to give to them.

9 Q. All right. And do you remember if you gave a
10 statement that day about what happened?

11 A. Yeah.

12 Q. Okay. Is everything that you told us today true?

13 A. Yes, ma'am, the Lord Heaven's truth.

14 MS. LINDER: All right. Beg the Court's
15 indulgence?

16 THE COURT: Yes, ma'am.

17 BY MS. LINDER:

18 Q. All right, Joseph. That's all I have for you right
19 now. The defense attorney is going to ask you a couple
20 questions. Please answer any questions he has.

21 A. Okay.

22 THE COURT: Mr. King?

23 CROSS-EXAMINATION

24 BY MR. KING:

25 Q. Mr. Ancrum?

- 1 A. Yes.
- 2 Q. You said you go -- you also go by Rick D?
- 3 A. Yes. Yes, sir.
- 4 Q. That's the name you use as an informant?
- 5 A. Yeah, that's name I use.
- 6 Q. You also go by another name, Jep Brown?
- 7 A. Yeah.
- 8 Q. Now, you're doing this informant work, you do it,
- 9 you get paid for it, right?
- 10 A. Yes, sir.
- 11 Q. You get -- what other income you get? You have
- 12 disability coming in?
- 13 A. Yeah.
- 14 Q. You have glaucoma; is that right?
- 15 A. Yeah.
- 16 Q. And that affects your eyesight?
- 17 A. Uh-huh.
- 18 Q. How much money do you get from disability?
- 19 A. I ain't going to discuss that.
- 20 Q. You can't tell me how much money?
- 21 A. I got to tell him? For all of my check?
- 22 Q. Yes.
- 23 A. Almost 700.
- 24 Q. A month or a week?
- 25 A. A month.

- 1 Q. Seven hundred a month?
- 2 A. Yeah. J
- 3 Q. That's not a whole lot to live on, is it?
- 4 A. No, not when you have bills to pay.
- 5 Q. And you have a lot of bills to pay?
- 6 A. You know all depends, you know.
- 7 Q. You have child support, right?
- 8 A. No, I disabled.
- 9 Q. Back in 2007?
- 10 A. Oh, yeah, back then.
- 11 Q. Okay. So back then you had child support to pay?
- 12 A. Uh-huh. Yes, sir.
- 13 Q. What happens if you don't pay that child support?
- 14 MS. LINDER: Objection, Your Honor.
- 15 THE COURT: Mr. King, he said he doesn't have child
- 16 support anymore.
- 17 MR. KING: He said he did back at the time this
- 18 happened.
- 19 THE COURT: You asked 2007. This happened 2009.
- 20 MR. KING: I apologize, Your Honor.
- 21 MS. LINDER: Yes, Judge this was in 2009.
- 22 BY MR. KING:
- 23 Q. In 2009, the time this video was shown, you had
- 24 child support right back then, didn't you?
- 25 A. No, because I put it like this here. They locked

1 me up two times and when I go -- every time I go to the
2 court the judge tell me I don't supposed to be there
3 because I disabled.

4 Q. Okay. You didn't get locked up June 22nd, 2010 for
5 child support?

6 A. I disable. They lock me up but they ain't charge
7 me because I disabled.

8 Q. Okay. Okay. But back in at least as recent as
9 June 22nd, 2010 you had child support because you got
10 locked up for that, right?

11 A. They locked me up.

12 Q. And that's what happens. If you don't pay the
13 child support you can get locked up, right?

14 MS. LINDER: Objection, Your Honor.

15 THE COURT: If he knows he may answer.

16 A. Yeah, but -- yeah.

17 Q. Okay. So during the time this video was shown you
18 were having to pay child support, right?

19 A. No.

20 Q. No?

21 A. I ain't got to pay it.

22 Q. I don't understand.

23 MS. LINDER: Your Honor, may we approach?

24 THE COURT: You may.

25 A. I understand --

1 THE COURT: Hold on one second, Mr. Ancrum.

2 (WHEREUPON, the following sidebar was reported.)

3 MS. LINDER: I think he had said numerous times
4 he's been locked up for child support but because he's
5 disabled he doesn't have to pay. I think he said that
6 numerous times. I don't know what else he's trying to
7 get from him.

8 THE COURT: What is that, Mr. King?

9 MR. KING: I just didn't understand that they let
10 him go because he's disabled. I was just --

11 THE COURT: That's what he says. He said at least
12 twice that the judge let him go because he was wasn't
13 supposed to be locked up. He's disabled. I've never
14 heard that but...

15 MR. KING: Okay.

16 THE COURT: I mean, that's -- I don't know what
17 else he's going to tell you.

18 MR. KING: Okay. I'll move on.

19 THE COURT: All right. Thank you.

20 (WHEREUPON, the sidebar was concluded.)

21 THE COURT: Thank you, Mr. King.

22 MR. KING: You're welcome.

23 BY MR. KING:

24 Q. How long have you had glaucoma?

25 A. Great God. When I find out -- when I really find

1 out it been about 10, 12 -- about 10, 12 years ago, but I
2 think it been a little longer than that because I used to
3 see darkness.

4 Q. Yeah. What are your symptoms from that?

5 A. Symptoms from now?

6 Q. From glaucoma.

7 A. I ain't got no vision right here (indicated). I
8 got tubes, holes and all in my eye.

9 Q. How was it back in 2009 when that video was filmed?

10 A. It been all right.

11 Q. You have to get treatment for your glaucoma?

12 A. I go see my doctor every three, four, six months.

13 Q. Does that include going all the way back to 2009.

14 A. Yeah.

15 Q. So you have to pay, you have doctor bills you have
16 to pay?

17 A. Uh-uh, Medicaid.

18 Q. Medications?

19 A. Yeah, they pay for my medicine.

20 Q. So you been doing this work as informant since
21 2003; is that about right, almost 10 years?

22 A. Maybe longer than that.

23 Q. Maybe longer than that?

24 A. Yeah.

25 Q. You make a decent amount of money from that, right?

- 1 A. Yeah.
- 2 Q. Probably make more than you get from the
- 3 disability, wouldn't you say?
- 4 A. Yeah. I mean, when you add them up. You don't
- 5 give me all that at one time. When you add it up.
- 6 Q. Right.
- 7 A. You feel me?
- 8 Q. Right. Let's say I was able to see you -- you
- 9 agree in 2009, just in 2009 you did maybe over a hundred,
- 10 hundreds of these controlled buys? Does that sound
- 11 right, between a hundred and two hundred?
- 12 A. You about right.
- 13 Q. And you get paid anywhere from maybe \$20 on one?
- 14 What would you say your average is you get paid for this?
- 15 A. Sixty, 80.
- 16 Q. \$60. Okay. Sometimes more than that?
- 17 A. All depends.
- 18 Q. Sometimes less?
- 19 A. All depends.
- 20 Q. So if you made 60, just in one year you do a
- 21 hundred buys, that's \$6,000?
- 22 A. Oh, no, sheesh. I ain't get -- I ain't -- no. You
- 23 ain't going to make me lie. No.
- 24 Q. But you said you've done --
- 25 A. I ain't said I do no -- my bad now. I ain't going

1 say I did no 100 in one year now because I been from here
2 to the county and all that now. You talking about for
3 the city?

4 Q. Yeah, I'm talking just for the city for 2009?

5 A. No, I ain't did all that in one year.

6 Q. Okay.

7 A. No.

8 Q. And you've worked not just for the city but for
9 other police departments?

10 A. Yes, sir.

11 Q. So you've made a decent amount of money over the
12 past 10 years or more, right? It's definitely more money
13 than you're getting from disability?

14 A. Yeah.

15 Q. That's your main source of income, right?

16 A. That's the only income I get, disability, SSI.

17 Q. And but you get more than that for doing these --
18 for working with the police, right?

19 A. I don't know. I ain't never added it up.

20 Q. Okay. You've done it a lot of times, right, so you
21 know what you're doing?

22 A. Yes, sir.

23 Q. You know the drill. You know what you are supposed
24 to do when you're working on one of these cases?

25 A. Yes, sir.

- 1 Q. And in 2009, had you done it hundreds of time
2 before 2009?
- 3 A. I can't answer that question because I don't know.
4 I don't never keep a count.
- 5 Q. But you've done many, many of them? Many, is that
6 fair?
- 7 A. Quite a few.
- 8 Q. Okay. You were doing it until as recently as a few
9 months ago, too?
- 10 A. No, I done quit over a year.
- 11 Q. And you've been convicted of receiving stolen
12 goods?
- 13 A. Yeah. You done asked me that two times.
- 14 Q. I think Ms. Linder asked you.
- 15 A. Okay.
- 16 Q. And I want to ask you this. You've testified
17 before at trial, right?
- 18 A. That's a different case there now.
- 19 Q. Right.
- 20 A. Okay.
- 21 Q. You testified in a trial back around 2007. Do you
22 remember that?
- 23 A. Yeah.
- 24 Q. And you took the stand and you lied back then.
- 25 A. No, I ain't lie because you been the lawyer.

1 Q. That's right. Well, you signed an affidavit in
2 January 2012, right? And on this affidavit you swore
3 that it was the truth, the whole truth and nothing but
4 the truth, right?

5 A. Yeah.

6 Q. Just like you took the stand today.

7 A. Okay.

8 Q. And you put your hand on the Bible?

9 A. Yeah.

10 Q. And you swore to tell the truth?

11 A. Yes, sir. Yes, sir.

12 Q. And just like when you testified at that trial back
13 in 2007 --

14 A. Yes, sir.

15 Q. -- you swore to tell the truth?

16 A. Yes, sir.

17 Q. And in this affidavit that you wrote, signed before
18 a notary --

19 A. I didn't write that affidavit. I didn't write
20 that.

21 Q. You --

22 A. I signed it.

23 Q. You signed it?

24 A. But it ain't the truth though.

25 Q. You signed it saying this is the whole truth,

1 nothing but the truth so help me God. Do you need to see
2 the affidavit?

3 A. Huh?

4 Q. Do you remember the affidavit saying that, that
5 it's the whole truth, nothing but the truth so help me
6 God?

7 A. If I signed that?

8 Q. Right.

9 A. No, I ain't signed nothing. I mean, I signed it
10 after he done write it out but I ain't know what he been
11 writing. Okay?

12 Q. In the affidavit you signed it said, I feel bad
13 that I lied on the stand about who sold me the drugs but
14 I didn't feel like I had a choice if I wanted to keep
15 getting money from the detectives to buy drugs --

16 A. Man, I ain't say that.

17 Q. You didn't say that?

18 A. I ain't say that.

19 Q. You agree that's in the affidavit that you signed?

20 A. I know I signed -- I know I signed a paper.

21 Q. And you said you're not being pressured by anyone
22 to say these things?

23 A. How you mean I ain't being pressured and the same
24 dude -- and the same dude, his friend been threatening me
25 up until he going to jail. That's the reason why I go

1 into his office with his sister and the cousin.

2 Q. You went --

3 A. Because they were pressuring me.

4 Q. You went to a lawyer's office?

5 A. Yeah, they been pressuring me.

6 Q. And you signed an affidavit?

7 A. Okay. That's right.

8 Q. And that affidavit said --

9 A. Okay. I'll put this here. Whatever I say in the
10 court the first time, I did buy the dope from him, \$60
11 worth of dope. They got the video, \$60 worth of dope
12 from him. Baby Dean (phonetic) the one who called his
13 name and he come from by the fence and served me, and you
14 can see it in broad daylight, put in hand and everything.
15 Okay?

16 So when Mr. Peppers, or whatever his name is, he
17 write, he could see -- he could see that's a lie. He
18 know he did -- they know I did -- he know I buy the drug
19 from Onrae, I buy the drug from Onrae. Onrae ain't
20 crazy, he ain't stupid. Just like your guy who's
21 supposed to be to court now. See, you believe in him.
22 He ain't here right now because he lying.

23 Q. Well, you are the one who signed an affidavit
24 saying --

25 A. That's right.

1 Q. -- that you lied, right?

2 A. That's right because I been pressured.

3 MR. KING: That's all the questions I have.

4 THE COURT: Redirect?

5 MS. LINDER: Yes, Your Honor, just briefly.

6 REDIRECT EXAMINATION

7 BY MS. LINDER:

8 Q. Joseph, the defense attorney was asking you some
9 questions about your eyesight.

10 A. Uh-huh.

11 Q. I'm wearing glasses right now and I used to not
12 have to a couple years ago. How is your eyesight today?

13 A. I barely see.

14 Q. How was your eyesight back in 2009, on July 16th?

15 A. On a scale from one to a hundred I had about a 60,
16 about a 60 vision, and that been a good vision, too.

17 Q. And, Joseph, Mr. King was asking you questions
18 about an affidavit that you signed. An affidavit is
19 legal talk for a piece of paper.

20 A. Yes, ma'am.

21 Q. Where did you sign that piece of paper?

22 A. West Ashley.

23 Q. Do you drive?

24 A. No.

25 Q. How did you get to that law office?

- 1 A. Onrae sister and cousin, they come and get me.
- 2 Q. And who is Onrae?
- 3 A. Onrae the one who doing the life sentence right
- 4 now.
- 5 Q. And is Onrae the person that you testified against
- 6 at trial?
- 7 A. Yes, ma'am.
- 8 Q. And was Mr. King the defense attorney at that
- 9 trial?
- 10 A. Yes, ma'am.
- 11 Q. Was I the prosecutor at the trial?
- 12 A. Yes, ma'am.
- 13 Q. So you were driven by the defendant you testified
- 14 against relative to a law office?
- 15 A. Yes, ma'am.
- 16 Q. And that was in January of 2012, correct?
- 17 A. Yes, ma'am.
- 18 Q. You said -- correct me if I'm wrong. Did you sign
- 19 a piece of paper?
- 20 A. Yes, ma'am.
- 21 Q. Did you read that piece of paper?
- 22 A. I can't see the little small writing. I can't see
- 23 no writing.
- 24 Q. Why did you sign a piece of paper?
- 25 A. Okay. I put it like this here. Let me ask you

1 something right now. You want me to start from when I be
2 getting threats, and that's the reason why I go to the
3 office or what?

4 Q. I just want you to explain to the jury why you
5 would sign a piece of paper.

6 A. Is the jury over here?

7 Q. Yes.

8 A. The reason why I signed -- the reason why I signed
9 the paper because one Friday night -- one Friday evening
10 I been going to the store. So by me going into the store
11 the guy name Baby Dean been walking up at the same time I
12 was walking in, and so he come back and making a big
13 amean (verbatim) inside the store. Oh, I going to get
14 you. I going to get you because I been looking for you
15 for a long time. You put my boy in jail, in prison for
16 the rest of his life.

17 I say, No, I didn't put him in jail the rest of his
18 life. He put himself in jail for rest of his life.

19 But he said when he come in the store, I going to
20 get you. Said it with him and three other guys together.
21 So me and my two little girls, we stayed inside the store
22 until they live.

23 And so about two weeks later he been to the same
24 store with the threat again, he going get me and he don't
25 care who be at my home where he gets me at. And so after

1 that about either a month one of his little partners, one
2 of his drug dealer partners in North Charleston, I be
3 going to the other store, so he said, I want to talk to
4 you.

5 I said, Why do you want to talk to me?

6 He said, Baby Dean is going to get you.

7 I said, Kill me for what?

8 He said, Baby Dean going to put a new hit on you.

9 THE COURT: Mr. Ancrum, can you slow down, Just a
10 little bit. She can't type that fast.

11 A. Oh. He said, Baby Dean going to put a hit on you.

12 He said, I going to call Baby Dean right now and tell

13 Baby Dean you at this store.

14 I said, You do what you got to do.

15 Okay. So about a couple weeks later I been home in
16 the room looking at TV, although I can barely see the TV.

17 So my son -- I think it was my son come. Said, Jep.

18 They said, Some girl want to see you at the door. So I

19 go on to the door and I said, who is you? I can't

20 remember what her name is but she tell me.

21 She said, I Onrae first cousin.

22 I said, You Onrae first cousin?

23 So I go out where she on the porch. She said, Jep,

24 we need you to come write a statement for Onrae.

25 I said, For what?

1 Cause every court -- whatever he said. Every court
2 or whatever he done been to they keep turning him down.
3 And so after that I think his lawyer had called me after
4 she been there. So she left. She said what I could
5 do -- she said, When I come back from Atlanta -- she live
6 in Atlanta. She said, When I come back from Atlanta I
7 coming to get you so you can go meet the lawyer.

8 I said, Meet with the lawyer? I said, Okay.

9 And so after that I say how she know where I live
10 at because she tell me, said they been looking for me.
11 So I put two and two together. I said, Well, if you all
12 been looking for me all this time somebody done tell Baby
13 Dean where I live at because they done tell me one time,
14 I hear him saying Baby Dean going to pay \$500 -- oh,
15 yeah, I am a liar. He did approach me the first time.
16 He tell me, said if I sign a statement he would give me
17 five cash under the door. I tell him no. I tell him no.

18 And so after that I -- she come pick me up and we
19 going to his lawyer office. So I go to the lawyer
20 office, me, him -- I mean, me, the lawyer and Onrae's
21 sister, and cousin, and Onrae, he in prison. He on his
22 cell phone in his room on the cell phone. They put him
23 on loud speaker, and they talking, you know.

24 So just like I say, the reason why I signed the
25 paper, I get so frustrated. I been trying to get this

1 thing over. I ain't trying to get killed for nobody.
2 You know, I ain't trying to get killed. I love my life
3 and I love my family, but right now every day when I walk
4 to go walk I look back behind me, look back every day,
5 you know. It ain't like yeah, yeah, yeah, I buy drugs
6 from them. Yeah, I buy drugs from him, but I lied.

7 Yeah, I did the wrong thing when I signed that
8 paper but he know he guilty, and his lawyer know he
9 guilty. Just like the guy who supposed to be on trial
10 here, he guilty --

11 Q. Joseph. Joseph.

12 A. That's all I got to say.

13 MR. KING: Your Honor, I object to that and ask for
14 a curative instruction.

15 THE COURT: Ladies and gentlemen, please strike the
16 last statement from your notes.

17 A. My bad.

18 THE COURT: Madam foreperson, please do not allow
19 that statement to be considered in any way in your
20 deliberations.

21 BY MS. LINDER:

22 Q. Joseph, in the trial that we're talking about right
23 now, not this one, but back in Onrae's trial, did you
24 tell the truth?

25 A. Yes, ma'am.

1 Q. Are you telling the truth today?

2 A. I telling the truth today.

3 Q. Were you telling the truth on July 16th of 2009
4 when you were relaying to the police officers what was
5 happening?

6 A. Yes, ma'am.

7 Q. And who was it who sold you the drugs that day in
8 2009? Can you describe him?

9 A. Let me see. He catch me about right here
10 (indicated). Yeah, about right here (indicated). He got
11 a low cut here (indicated), and he a little stockier than
12 me back then. But right now if you had a lineup right
13 now and I get close to a mirror I could point him out. I
14 could point him out.

15 MS. LINDER: Beg the Court's indulgence.

16 THE COURT: Yes, ma'am.

17 Q. Joseph, that's all I have for you.

18 A. Okay.

19 Q. Please answer any questions that the defense
20 attorney may have.

21 THE COURT: Mr. King?

22 MR. KING: I have no further questions.

23 THE COURT: You may step down.

24 MS. LINDER: Judge, I ask is that Joseph be excused
25 and able to leave.

1 THE COURT: Any objection, Mr. King?

2 MR. KING: No, Your Honor.

3 THE COURT: You are excused. You are free to leave
4 the courtroom. Thank you.

5 Do you have a short witness available?

6 MS. LINDER: Your Honor, the next witness will
7 probably be the longest witness we have. I would guess
8 that he will take about half an hour to an hour from the
9 State's perspective.

10 THE COURT: All right. Do you have a stipulation?

11 MS. LINDER: We do have a stipulation, Your Honor.
12 If you would like, I'm happy -- I do have one short
13 witness I can call a little out of order, if that would
14 make the Court happy.

15 THE COURT: Our lunch will be here in about 10
16 minutes so --

17 MS. LINDER: Yes --

18 THE COURT: -- keep utilizing the time.

19 MS. LINDER: The State calls Michael Burke.

20 MICHAEL BURKE, after having been duly sworn,
21 testified as follows:

22 THE CLERK: Please state your full name and spell
23 your last name for the record.

24 THE WITNESS: Michael Burke, B-u-r-k-e.

25 DIRECT EXAMINATION

1 BY MR. STONEY:

2 Q. Good morning. Detective Burke, what is your
3 occupation?

4 A. I'm employed with the City of Charleston Police
5 Department.

6 Q. And what are your duties with the City of
7 Charleston?

8 A. Currently, I'm assigned to the special
9 investigations unit. My primary task is investigating
10 narcotics violations.

11 Q. And how long have you been employed with the City?

12 A. Over five years.

13 Q. And can you please tell the jury about your
14 training, education and experience.

15 A. Yes, sir. I received a Bachelor's of Science in
16 Criminal Justice from the Fairmont State University.
17 Prior to becoming a police officer I was hired by the
18 department in 2007. From that time, I went to the police
19 academy, graduated from the police academy, went through
20 field training, assigned to patrol division.

21 After about a year I was reassigned to our power
22 shift, which is a proactive patrol unit assigned to
23 target high crime areas. During that time, numerous drug
24 arrests. About a year and a half after that I was
25 reassigned to our special investigating -- special

1 investigations unit where I'm currently assigned.

2 Q. And were you working on July 16th, 2009?

3 A. Yes, I was.

4 Q. And did you become involved in this case in the
5 investigation of this case, State vs. James Lamont Moore?

6 A. Yes, sir.

7 Q. And how were you first made aware of this case?

8 A. I received a phone call from Detective Shealy in
9 reference to a control buy that had just taken place. He
10 gave me a description of the offender in this case
11 wearing a white tank top and blue cast on his arm and he
12 asked me if I could go drive through the area where the
13 deal had taken place to attempt to identify this
14 individual.

15 Q. And is it typical for police officers familiar with
16 an area to receive calls like such as that?

17 A. Yes, sir.

18 Q. And what did Detective Shealy request to you?

19 A. He asked me if I could go to the area of Wolfe
20 Street. As I stated a second ago, the narcotics unit had
21 conducted a control purchase in the area. He was calling
22 me to go identify the offender.

23 Q. And you did do that?

24 A. Yes, sir. I went to the area.

25 Q. Did you look at an individual matching the

- 1 description?
- 2 A. Yes, sir, the defendant.
- 3 Q. Did you know who this person was?
- 4 A. Yes. I knew who he was.
- 5 Q. And who was that person?
- 6 A. James Lamont Moore.
- 7 Q. And how long have you known him?
- 8 A. For several years.
- 9 Q. Do you know his date of birth?
- 10 A. Yes, sir. It's [REDACTED], [REDACTED]
- 11 Q. And how do you know that that's his --
- 12 A. We share the same birthday.
- 13 Q. Did you stop and speak with the defendant on July
- 14 16th --
- 15 A. No. I didn't stop and speak with him that day.
- 16 Q. Did he have anything on that helped you identify
- 17 him?
- 18 A. A blue cast.
- 19 Q. Did anyone else in the area have on a blue cast?
- 20 A. No, sir.
- 21 Q. And were you involved in the arrest of the
- 22 defendant when he was arrested?
- 23 A. Yes, sir.
- 24 Q. And was that arrest made in the same area?
- 25 A. Yes, sir. It was made about -- it was actually

1 made across the street from where the controlled buy had
2 taken place.

3 Q. And where was that again?

4 A. The arrest or the --

5 Q. Purchase -- buy.

6 A. It was on Wolfe Street.

7 Q. And is that in Charleston County?

8 A. Yes, sir.

9 Q. Is there any question in your mind that the
10 defendant was in the area of matching the description at
11 the time of the controlled buy?

12 A. No question.

13 MS. LINDER: Beg the Court's indulgence.

14 THE COURT: Take your time.

15 (PAUSE.)

16 MR. STONEY: No further questions.

17 BY MR. STONEY:

18 Q. Please answer anything that the defense attorney
19 may ask you.

20 A. Yes, sir.

21 CROSS-EXAMINATION

22 BY MR. KING:

23 Q. You weren't undercover? You were uniform?

24 A. That's correct, sir. I was still assigned to
25 patrol division.

- 1 Q. Okay. And you just went by just to see who it was?
- 2 A. Yes, sir.
- 3 Q. You didn't make any sort of contact?
- 4 A. No, sir?
- 5 Q. You didn't stop the person with the cast on?
- 6 A. No, sir.
- 7 Q. You didn't search him?
- 8 A. I didn't exit my vehicle.
- 9 Q. So you weren't aware if he had the marked \$20 in
- 10 his pocket?
- 11 A. No, sir.
- 12 Q. Or if he had drugs on him or anything like that?
- 13 A. No, sir.
- 14 Q. And you didn't record anything that you saw, right?
- 15 You didn't video record?
- 16 A. No, sir.
- 17 Q. You didn't write a report about that either, did
- 18 you?
- 19 A. No, sir.
- 20 Q. One of big parts of being an officer is writing
- 21 reports; is that right?
- 22 A. Yes, sir.
- 23 Q. And generally when you're involved in something
- 24 you're going to write a report?
- 25 A. I would say that depends on the circumstances.

1 Q. You did write a report in this case. It's the
2 report of when Mr. Moore was arrested.

3 A. That's correct.

4 Q. But you didn't write one about when you said you
5 drove by and made an identification?

6 A. That's correct.

7 MR. KING: That's all the questions I have.

8 THE COURT: Redirect?

9 MR. STONEY: No, Your Honor.

10 THE COURT: Is this witness excused?

11 MS. LINDER: I would ask that this witness please
12 be excused, Your Honor.

13 THE COURT: Any objection, Mr. King?

14 MR. KING: No, Your Honor.

15 THE COURT: You are excused but feel free to remain
16 with us. Thank you.

17 THE WITNESS: Thank you, Your Honor.

18 MS. LINDER: Your Honor, I would ask at this time
19 we publish the stipulations to the jury.

20 THE COURT: All right.

21 Ladies and gentlemen of the jury, a stipulation is
22 simply an agreement between counsel, and in this case
23 what that is going to do -- and the State is going to
24 publish or read to you the stipulation. They've agreed
25 to the testimony of witnesses and so those witnesses

1 don't have to come into court and testify.

2 MS. LINDER: The stipulation is in the State of
3 South Carolina vs. James Lamont Moore. The cocaine base
4 offered into evidence by the State in this trial is the
5 same cocaine base that was given to Investigator Jonathan
6 Shealy by the confidential informant, and the cocaine
7 base was handled properly by the Charleston Police
8 Department and the Forensic Services Division.

9 Item two, the cocaine base crack offered into
10 evidence by the State is, in fact, cocaine base as
11 provided in the drug analysis report from Charleston
12 Police Department Forensic Laboratory. The weight of the
13 cocaine base crack is .09 grams, as provided in the drug
14 analysis report from the Charleston Police Department
15 Forensic Laboratory.

16 THE COURT: Thank you. Was the stipulation
17 accurately read?

18 MR. KING: Yes, Your Honor.

19 THE COURT: And that is the stipulation that you
20 entered into with the State?

21 MR. KING: Yes, Your Honor.

22 THE COURT: All right. And just for the record,
23 that will be Court's 1.

24 Is that correct?

25 THE COURT REPORTER: Yes, ma'am.

1 THE COURT: Thank you.

2 Ladies and gentlemen, regardless if your lunch is
3 here it's an appropriate time for us to take a break. If
4 the lunch is going to be here while we're taking our
5 break then we are going to go ahead and take
6 approximately 30 minutes for you all to eat your lunch.

7 I would prefer that you stay in the jury room so
8 that we can -- once after 30 minutes that we could resume
9 promptly. If any of you during your lunch would like to
10 go outside for a smoke break or any other fresh air break
11 if you'll just let the bailiffs know, and hopefully by
12 the time we break your lunch is going to be there and
13 then we'll take about a 30-minute break.

14 Regardless of what happens, do not begin your
15 deliberations, do not discuss this case amongst
16 yourselves. If we take our lunch break and you go
17 outside they will give you your phone back. You may not
18 do any independent investigations. You may not discuss
19 this case with anyone, and that does include your fellow
20 jurors. Please don't read, watch, listen to any news
21 accounts should there be any.

22 Depending upon the arrival of lunch, it may just be
23 a few minutes, and we'll go ahead and take our lunch
24 break.

25 Please rise for the jury.

1 You may leave you notepads in your chairs if you
2 wish to do so. Thank you.

3 (WHEREUPON, the jury leaves the courtroom at
4 approximately 1:05 p.m.)

5 THE COURT: Thank you. Be seated.

6 Ms. Linder, how many more witnesses do we have?

7 MS. LINDER: The State has one more witness.

8 THE COURT: And who will that be?

9 MS. LINDER: It will be Jonathan Shealy.

10 THE COURT: And your witnesses will be here at what
11 time?

12 MR. KING: I don't intend to call any witnesses at
13 this time.

14 THE COURT: All right.

15 MR. KING: There's a matter I would just like to
16 bring up real quick. Based on the last statement by
17 Mr. Ancrum on the stand I would make a motion for a
18 mistrial. I know I requested a curative instruction but
19 I don't believe that this is enough to cure any prejudice
20 caused to Mr. Moore and would ask you to grant a
21 mistrial.

22 MS. LINDER: Your Honor, I would submit that a
23 curative instruction as you already have given the jury
24 is sufficient. I'm happy if you want to give yet another
25 one to the jury and also include in the charge somehow to

1 remind the jury that they are not to take statements that
2 the Court previously ordered them not to, to take into
3 account. I think that resolves the issue.

4 THE COURT: At this time, I deny your motion for a
5 mistrial. I will actually over our break review the
6 context and make sure that my curative instruction, that
7 I do feel that it was appropriate, been addressed, and if
8 there's any further instruction that needs to be placed
9 into my charge to the jury I will do that.

10 MR. KING: Thank you, Your Honor.

11 THE COURT: Thank you.

12 MS. LINDER: Your Honor, I would ask at this time,
13 especially since everything was stipulated to, if we
14 could admit the drugs into evidence.

15 THE COURT: And that will be what number?

16 MS. LINDER: I believe that is State's Exhibit 1.
17 And I would also ask that State's Exhibit 2 be admitted
18 into evidence, which is this lab report for the drugs.

19 THE COURT: Any objection to either one of those?

20 MR. KING: No, Your Honor.

21 THE COURT: State's 1 and 2 into evidence without
22 objection.

23 (WHEREUPON, State's Exhibit Numbers 1 and 2 were
24 admitted into evidence.)

25 THE COURT: With that, since we just have one

1 witness, let's go ahead -- is the lunch here?

2 All right, Counsel. Is 30 minutes going to be
3 sufficient for you to eat lunch? '

4 MS. LINDER: Your Honor, if we could be back here
5 at 1:45 the State will be ready go with the last witness
6 and straight into closing.

7 THE COURT: All right.

8 MR. KING: That sounds good to me, Your Honor.

9 THE COURT: All right, 1:45. I will see you then.
10 So we just have one witness. How long do you anticipate,
11 you said he would be lengthy?

12 MS. LINDER: I anticipate him taking probably about
13 a half an hour.

14 THE COURT: Oh, okay. Thank you. All right.
15 We'll be at ease until 1:45. Thank you.

16 MS. LINDER: Thank you, Judge.

17 (WHEREUPON, a lunch break was taken.)

18 THE COURT: Were you able to reach your client
19 during the break?

20 MR. KING: I haven't heard anything, Your Honor. I
21 think at this point any damage of him not being here has
22 been done, and I haven't seen his mother either.

23 Your Honor, the solicitor says she intends to
24 qualify the next witness as an expert.

25 THE COURT: Okay.

1 MR. KING: And I may have an objection to that. I
2 think she wants me to qualify as an expert in drug
3 transactions. I just don't know that that's an area
4 where an expert would need to be required or need to have
5 expert testimony.

6 I also think it could possibly be bolstering. It's
7 kind of like -- there's some recent cases coming out
8 where they are putting in child sex videos and they'll
9 have the people testifying along with those videos, and I
10 just say I don't think that's anything that an expert is
11 needed for and that would be improper bolstering of the
12 video with Mr. Ancrum's testimony.

13 THE COURT: Ms. Linder, do you have a case?

14 MS. LINDER: Judge, I was mainly relying on -- the
15 case that I would be moving, State V. Jamison, which is
16 from 2007. And in it it cites Nelson V. Taylor, which is
17 a 2001 Court of Appeals case, and it states that
18 qualification of a witness as an expert in the
19 admissibility of his or her testimony are matters left to
20 the sound discretion of the trial judge. And further in
21 here -- I'm happy to hand -- this is my own copy. I'm
22 happy to hand it up.

23 In this case, there was an officer who was
24 qualified as an expert and they testified -- it was a
25 trafficking case, and they testified to the street level

1 value of the drugs because that was a piece of
2 information that was outside the common knowledge of a
3 juror, and in this case there will be sometimes when I
4 would ask Shealy questions where his expertise through
5 being not just law enforcement but with his expertise
6 with street level narcotics transactions would allow him
7 to give his expert opinion to help the jury understand
8 certain facets of street level narcotics.

9 If you'd like me to be more specific, I'm happy to.
10 If you would like the case, I'm happy to hand this up as
11 well.

12 THE COURT: Mr. King, do you wish to voir dire him
13 on his qualifications outside the presence of the jury?

14 MR. KING: No. It's not really his qualifications.

15 THE COURT: It's just whether or not he should be
16 qualified. Not that he is not an expert but whether or
17 not he should be qualified in front of the jury. Is that
18 your objection?

19 MR. KING: Right. I'm saying this isn't an area
20 that needs any expertise. To label him expert, I think,
21 kind of gives him -- that's kind of bolstering his
22 testimony, too.

23 THE COURT: All right. I'm sure you're going to
24 lay the qualifications?

25 MS. LINDER: Yes.

1 THE COURT: So I'll make the determination as I
2 hear from you.

3 All right. Let's bring them in.

4 (WHEREUPON, the jury enters the courtroom at
5 approximately 1:52 p.m.)

6 THE COURT: Call your next witness.

7 MS. LINDER: The State calls Detective Jonathan
8 Shealy.

9 JONATHAN SHEALY, after having been duly
10 sworn, testified as follows:

11 THE CLERK: If you'll state your full name then
12 spell your last name for the record.

13 THE WITNESS: Yes, sir. Jonathan Shealy,
14 S-h-e-a-l-y.

15 DIRECT EXAMINATION

16 BY MS. LINDER:

17 Q. Good afternoon, Detective Shealy. What is your
18 occupation?

19 A. I'm a police officer with the City of Charleston
20 Police Department.

21 Q. And what are your duties with CPD?

22 A. Currently, I'm assigned to the special
23 investigations which investigates narcotics and vice
24 operations. Primarily, I'm a detective with the
25 narcotics side.

1 Q. And how long have you been employed by CPD?

2 A. Just a little over six years now.

3 Q. And can you please tell the jury about your
4 education.

5 A. Yes, ma'am. I have a Bachelor of Science in
6 Criminal Justice from Charleston Southern University, as
7 well as a Master's Degree in Criminal Justice at
8 Charleston Southern University. I have attended the
9 South Carolina Criminal Justice Academy there, a 12-week
10 basic course for being a police officer.

11 Being in this unit I've been allowed to go to many
12 classes, one of which was an interview in an
13 interrogation class which has given me the opportunity to
14 better interview subject -- suspects, as well as
15 confidential informants.

16 I've also been to several surveillance courses
17 throughout my career which has given me a better sense of
18 being able to get out into the field, survey areas where
19 narcotic activity is taking place, learn the subjects'
20 habits, the new trends that's going on.

21 I've been to several gang classes, which is closely
22 affiliated with narcotic activity, again, learning the
23 new trends.

24 I've been to the criminal justice -- South Carolina
25 Criminal Justice undercover course which has given me the

1 opportunity to actually go out and buy narcotics, to see
2 the trends of street level narcotics, the way they
3 operate, as well as reverse that role and actually be a
4 seller, and I know how that operation works well.

5 I attended a two-week basic narcotics investigators
6 school which was conducted by the Drug Enforcement
7 Administration, DEA, which kind of went over an overall
8 aspect of narcotic investigations, anywhere from
9 preplanning to actually testing, field testing drugs.

10 I've been to a tactical techniques and procedures
11 and use of confidential informants, basically teaching
12 you how to control them, pick them, make sure everything
13 goes accordingly.

14 I've been to tactical drug operations school, which
15 is more the tactical side of drug operations which
16 includes takedowns, surveillance, actual warrant service.
17 I was given the opportunity to become a basic instructor
18 for the City of Charleston two-week course, Criminal
19 Justice Academy, where I can actually write lesson plans,
20 and I did actually create a lesson plan on managing and
21 controlling informant, which can be used by the City of
22 Charleston. Not only by the City of Charleston but any
23 other law enforcement agency within South Carolina.

24 I have another surveillance course. I'm also a
25 member of our Charleston Police Department SWAT Team.

1 I've been to several SWAT schools, which the SWAT team
2 handles a lot of our major narcotic search warrants.

3 Q. And can you give a rough estimate of the number of
4 drug related cases that you have been involved with?

5 A. I've been involved in well over a thousand, well
6 over a thousand narcotics related.

7 Q. And have you during the course of being in law
8 enforcement have you had other law enforcement officers
9 ever call on you to render your opinion as far as drug
10 related investigations?

11 A. Yes, ma'am. It's very typical for patrol units to
12 call upon one of the investigators that's in the
13 narcotics unit to ask opinions on certain things that
14 they encountered within the field.

15 MS. LINDER: Your Honor, at this time I would ask
16 that Detective Shealy be admitted as an expert in street
17 level narcotics transactions.

18 THE COURT: Mr. King?

19 MR. KING: Just renew my objection I made
20 previously, Your Honor.

21 THE COURT: Do you wish to voir dire on the record?

22 MR. KING: No, Your Honor.

23 THE COURT: No objection to his qualifications?

24 MR. KING: No, Your Honor.

25 THE COURT: And you wish to qualify him as an

1 expert in street level narcotics transactions?

2 MS. LINDER: Yes, Your Honor.

3 THE COURT: All right. Counsel, approach.

4 (WHEREUPON, the following bench conference was
5 reported.)

6 THE COURT: The Jameson case relies on -- the case
7 that involves this, to be very narrowly tailored about
8 the monetary value. Why do you need him to --

9 MS. LINDER: What I wanted him to more or less be
10 able to explain is how, you know, it's common for both
11 people to be standing together at a street level
12 narcotics as opposed to just one person. And also when
13 the defendant goes across the street how it's very common
14 for the stash of drugs, so-to-speak, to not be physically
15 on the person so if law enforcement were to come up they
16 would not be charged with drugs. Like, that's just kind
17 of like the general --

18 MR. COOPER: That's not expert testimony. That's
19 just his experience that he can testify to. I don't
20 understand what his expert opinion would be in this.

21 MS. LINDER: To me his expert opinion would be able
22 to be based on all his training and experience to say
23 that it is typical for there to be more than one person,
24 it is typical for --

25 THE COURT: But you're not going to object to that

1 testimony, you wouldn't object to that statement, would
2 you?

3 MR. KING: If that's all it is then I think I'm
4 okay with that if that's --

5 MS. LINDER: That's why I wanted him to explain
6 more of how street level drugs are done.

7 THE COURT: I don't know that he needs to be for
8 just an explanation. I think just based upon his
9 training and experience I think what you want him to be
10 an expert for would be in my opinion this guy was selling
11 drugs. You're not going to have him say that anyway.

12 MS. LINDER: Right. I'm going to have him -- I
13 intend to show a very short excerpt of the video, so
14 probably like a two-minute segment so he can --

15 THE COURT: Do it this way. I'm going to reserve
16 my ruling on it based upon his objection. If it becomes
17 where he needs to issue an opinion then approach the
18 bench and we'll deal with that.

19 MS. LINDER: Okay. Thank you.

20 (WHEREUPON, the bench conference was concluded.)

21 THE COURT: I'm going to reserve ruling on that
22 issue.

23 You may continue.

24 BY MS. LINDER:

25 Q. Detective Shealy, did you have the occasion to be

1 working on July 16th of 2009?

2 A. Yes, ma'am, I did.

3 Q. Did you have the occasion to be become involved in
4 the investigation in this case, the State vs. James
5 Lamont Moore on that date?

6 A. Yes, ma'am, I was.

7 Q. And what was your role that day?

8 A. My role in this particular investigation is I was
9 the case agent involved in this operation, which
10 typically means I was pretty much not in charge. Our
11 supervisor is in charge, but I was in charge of setting
12 up this whole operation from getting a plan together,
13 getting the right personnel together, and that pretty
14 much, as said before, picking up the CI, bringing him to
15 a debriefing location, searching that CI.

16 When I'm talking about searching the CI, the case
17 agent typically does that. He typically handles all that
18 himself. I searched the CI, the inner clothing, the
19 outer clothing, the pockets, socks, shoes. Typically we
20 try to search that CI to the point -- besides strip
21 searching that subject and getting inappropriate. So we
22 do that before and after.

23 After that's done, me being the case agent, I wired
24 that confidential informant up with an audio device as
25 well as an audio and video device. As heard before, the

1 audio device is so that we as investigators can hear
2 realtime what's going on. The video and audio device is
3 what you've seen earlier. The video has possible sound.

4 After that's done typically the discussion of
5 debriefing, what your goal is, the history of the case,
6 what you're trying to accomplish, whether it's a buy
7 walk, a buy bust is discussed.

8 You assign responsibilities to each detective there
9 as well as the officer, whether it be a takedown unit,
10 whether it be perimeter security, pre surveillance, who's
11 actually responsible for that CI if something does
12 happen, which is typically the case agent and his partner
13 at the time who's with him, which was Detective Grill.
14 We were responsible for the CI's safety. If something
15 did go bad we were to get him out.

16 We discussed if there is targets in that area of
17 criminal history. We discuss the actual geographic area
18 of layout, if there's any schools in that area, getting
19 out. If there's children in the area. We go over
20 contingency plans; if something does happen this is what
21 we're going to do.

22 And after that's done we typically send out the pre
23 surveillance detectives, the patrol unit, send them out,
24 get them set up. That's when the prerecorded U.S.
25 currency is turned over to the CI. And again, we kind of

1 really debrief him, the CI there, what we want. You
2 know, we explain to them where we want them to go, how
3 much we are going to use, what drug we want to buy, what
4 area we're targeting. So that's typically what we do.

5 Q. And in this case where did the controlled buy occur
6 back on July 16, 2009?

7 A. This control buy actually occurred in front of █
8 Wolfe Street which is located between Meeting and Nassau,
9 just east of the Exxon gas station on Meeting Street.

10 Q. And is that Charleston County?

11 A. Yes, ma'am.

12 Q. As the case agent did you make the decision of if
13 this was going to be a buy walk or a buy bust?

14 A. Yes, ma'am, I did.

15 Q. And what decision did you make in this case?

16 A. This was going to be a buy walk operation.

17 Q. And can you explain what that is and what your
18 reasoning was to make that determination?

19 A. Yes, ma'am. Typically, a buy walk is just how it
20 sounds. Again, we go in, CI buys drugs, walks away.
21 Just what it sounds like. We do this for several
22 reasons. First off, the safety of the community is
23 number one. We don't want to go right back in, arrest
24 somebody, cause a problem.

25 The identity of the CI is another reason. Safety

1 of the CI, safety of the officers, and what basically our
2 common goal is at that time. If we have complaints of
3 constant narcotic activity we may want to get more than
4 one person. If we go in there and do a buy bust right
5 away it could jeopardize the CI's identity, we can't send
6 that CI in there anymore. So typically a buy walk, we'll
7 do several buys in that area over a short period of time
8 then we'll go in there and do what we call a round up.

9 Q. You mentioned the CI, the CI was used in this case.
10 Can you tell the jury a little bit about the CI in this
11 case and your experience with him.

12 A. The CI in this case was signed up by me in 2009,
13 early 2009. This particular CI had worked with the
14 Charleston Police Department prior to that and conducted
15 numerous operations prior to me even coming to this unit.

16 I signed up this CI to work for me but ultimately
17 for the unit again. With me, personally, the CI
18 conducted multiple, multiple buys over -- I would say at
19 least over a hundred buys, maybe more within my time in
20 working with that CI. The CI in every buy was always
21 reliable, always on time which is --

22 MR. KING: Objection, Your Honor. He's vouching
23 for the credibility of the informant.

24 THE COURT: All right. Rephrase.

25 Ladies and gentlemen, please strike the word

1 reliable from your notes.

2 Rephrase that question for him. Thank you.

3 MS. LINDER: Your Honor, may we approach?

4 THE COURT: You may.

5 (WHEREUPON, the following bench conference was
6 reported.)

7 MS. LINDER: To me what he's saying is, as the
8 follow-up was, that he was there always on time whenever
9 he would call.

10 THE COURT: Just have him say -- because I -- was
11 your objection to reliable?

12 MR. KING: Right. This sounds like he's saying
13 he's trustworthy.

14 THE COURT: And so I think it's just --

15 MS. LINDER: Word choice.

16 THE COURT: -- the question. It's just word
17 choice. So just --

18 MS. LINDER: I can ask him when you called him was
19 he there when you --

20 THE COURT: That's the part of reliable, and I like
21 to give -- there's a distinction into being a
22 confidential and reliable that -- you know, that that's
23 the way, and I don't want him to -- I mean, just let him
24 choose his words. I don't mean to be too picky but...

25 MS. LINDER: Okay.

1 THE COURT: Thank you.

2 (WHEREUPON, the bench conference was concluded.)

3 BY MS. LINDER:

4 Q. With the CI involved in this case, when you called
5 him did he answer?

6 A. Yes, ma'am.

7 Q. Did he ever call you?

8 A. Yes, ma'am.

9 Q. With the CI in this case, did he drive and meet you
10 or did you typically pick him up?

11 A. I picked him up.

12 Q. Was he there when he -- was he at your pickup spot?

13 A. Every time.

14 Q. If you told him to call you did he call you when
15 instructed?

16 A. Yes, ma'am.

17 Q. With this CI, do you find him -- with this CI that
18 you used in this case, why did you select him to be used
19 for this case?

20 A. Typically when we work in an area we contact CIs we
21 have. We have contacted this particular CI, asked him if
22 he could go into this area and purchase narcotics. He
23 said he could. And in the past all the operations that
24 we have conducted with the CI have been successful, so we
25 used this CI to target this area.

1 Q. Can you tell me how you first met up with the CI on
2 this day and what your interaction with the CI was up
3 until the point when he did this buy?

4 A. Yes, ma'am. Myself and Detective Grill met the CI
5 closer to the CI's home. We picked the CI up. We do a
6 quick pat down, make sure no weapons or anything. We
7 come down to our predetermined location. At that point
8 is where the CI is again searched very, very well.

9 Once the search has taken place -- this is all done
10 by the case agent, myself. Once the search is conducted
11 that's when the wiring process starts. We wire that CI
12 up with audio and video monitoring.

13 Q. Did you find anything on the CI when you searched
14 him?

15 A. No, ma'am.

16 Q. Please continue in explaining the wiring.

17 A. So typically we wire the CI up again with an
18 audio-video recording device which is the video we're
19 going see, and audio device so that we can hear live feed
20 of what's going on during the entire operation, and it's
21 for safety purposes to give us an idea of where the CI is
22 going and what's happening, live time.

23 At this point, I pretty much instruct the CI on
24 what we want accomplished, what we want done, where to
25 go, what area to target. Tell the CI typically do not

1 get into any vehicle because we're not controlling that
2 situation at that point. Whoever is driving that car is
3 in control then.

4 Typically, explain to the CI that if he does get
5 into a vehicle what's going to happen, we'll make a
6 traffic stop. We will make it look like the CI had a
7 warrant, get the CI out of that situation.

8 If we're not aware or sure about a residence we
9 typically tell the CI you can go up to a residence but do
10 not go inside. Once they are inside that residence we
11 still have control to a point but it's a little bit
12 harder for us to get inside a residence to rescue that CI
13 if something happens.

14 So once we kind of briefed the CI we'll have our
15 typical briefing, again, where we go over the mission,
16 what we want to accomplish, the history of the case.
17 Assignments are given out to detectives and the officer
18 that's with us. They go out to that area.

19 The prerecorded U.S. currency that is prerecorded,
20 again by me, is given to the CI and the CI is told what
21 we are going to try to buy, and that's up to the point
22 where we go to the drop-off location.

23 Q. And when you went to the drop off location what
24 happens when you get to the drop off location? What does
25 the CI do?

1 A. When we get to the drop off location first off we
2 make sure the CI has the money. The CI gets out of that
3 vehicle. Before we get to the drop off location we go
4 over all the rules again. We instruct that CI to let us
5 know where you're going, what road you cross. That way
6 if something happens we know exactly where you are.

7 Typically we'll tell them if at all feasible
8 explain to us what's going on. Don't put yourself in any
9 kind of danger. Don't, you know, talk out loud if you
10 can't but if you can do so because typically when we wire
11 a CI up it's a small camera system so it doesn't have
12 peripheral vision. It can't go, you know, so many places
13 and it typically doesn't look right if a confidential
14 informant is, you know, constantly moving toward you.

15 The confidential informant has to play it off as
16 naturally as possible. So we typically say try to get at
17 least a good -- the guy in the video so we can at least
18 see the face. And in a real world situation I tell the
19 CI try to get everything. Try to get money, try to get
20 everything but that's not going to happen in our
21 situation. So we at least want the CI to try to get a
22 picture of the guy's face. And then the CI goes to the
23 location and pretty much does his thing.

24 Q. At this time I would ask that a short excerpt of
25 the video be played and, Detective Shealy, for you to

1 answer some questions through your experience as far as
2 what is occurring.

3 A. Yes, ma'am.

4 Q. And I would ask that -- feel free. We're fast
5 forwarding a lot and feel free to speak over it. The
6 volume has been turned down fairly low.

7 A. Okay.

8 MS. LINDER: Your Honor, I ask permission for
9 Investigator Shealy to be able to stand up if need
10 be or --

11 THE COURT: Are you good there?

12 THE WITNESS: Yes, ma'am. I'll be fine.

13 THE COURT: Thank you. Just speak loudly.

14 THE WITNESS: Yes, ma'am.

15 THE COURT: Thank you.

16 (WHEREUPON, States's Exhibit Number 3 was played
17 during the following examination.)

18 A. Right here we've already wired the CI up. We've
19 already given the prerecorded U.S. currency and we are to
20 the drop off spot. Right here the CI is already out of
21 the vehicle and walking towards the target loca -- well,
22 not target location but the location of █ Wolf Street.

23 So it's going to be a little while before he gets
24 there but I'll kind of try to guide you where the CI is
25 at and also you probably can hear the CI telling us.

1 He's by Earl's liquor store, which is on the corner of
2 Reid and Meeting right now.

3 Q. What is that weird kind of like a cow bell sound
4 going on?

5 A. With the equipment it all depends on where it's
6 located on the body. If it's a muffled sound it's just
7 something with our equipment that makes that sound,
8 sometimes it does, sometimes it doesn't. It could be the
9 clothing going up and down the microphone that's making
10 that muffled sound.

11 I think right here he said he's already crossed
12 Meeting Street. So he's on Meeting Street, he's going
13 north on Meeting Street towards Wolfe Street now.

14 Right here you can see what the CI calls the store.
15 It's the Exxon gas station on the corner of Wolf and
16 Meeting Street. He's cutting through that parking lot
17 now.

18 Q. And that's all here Downtown Charleston?

19 A. Yes, ma'am.

20 He's pretty much made his way across the parking
21 lot. He should be on the sidewalk on Wolfe Street
22 walking up Wolfe Street towards Nassau Street.

23 Okay. Here, this is where he approached the two
24 gentlemen here. One standing up, the defendant sitting
25 down on a ledge. One of them asked, What do you need?

1 He said --

2 MR. KING: Your Honor, objection. Lack of personal
3 knowledge.

4 THE COURT: Overruled.

5 A. He asked for a 20, which is commonly referred to on
6 the street as 20 dollars worth of cocaine base. It's
7 just street terms. Sometimes they say 20 hard but he
8 just said 20. This guy knows what he means.

9 The defendant, it was showed earlier got up and
10 walked across. You could see the top of the cast and is
11 going across the street now to retrieve the cocaine base
12 which is very common in a street transaction. Narcotics
13 dealers don't tend to want to keep the narcotics on them.
14 They can get robbed, a police officer can get out with
15 them, find it in an arm's reach.

16 Again, he's describing the defendant is going
17 across the street to get it and you saw earlier there was
18 two guys. This is also typical in street narcotics
19 transactions, strength in numbers. There's a lookout,
20 call out, things of that nature. So that's common as
21 well. It looks -- it doesn't look more obvious if you
22 have one or two, three people on a corner and just one
23 guy sitting on a corner, you know, by himself. So at
24 this point the defendant is across the street.

25 The CI is just waiting, just waiting on him to come

1 back. You hear the CI say, Is it hot enough for you?

2 Now you clearly see the gentleman with the white
3 shirt go by. A couple seconds is going to pass. Now the
4 defendant is coming back. He's walking up to him now.
5 The drugs were -- the defendant handed the drugs. The CI
6 handed him \$20 in prerecorded U.S. currency.

7 He's giving a phone number now, his phone number so
8 that in future times the CI, which he said, I normally go
9 down the street, won't go down the street. Now he'll
10 come to him.

11 See, he's explaining now that I normally -- which
12 is just made up. I normally go down to the graveyard,
13 because he's got to make this stuff up, make it look
14 normal. I normally go down to the graveyard. Now I have
15 your number. Next time I come through I'll call you.

16 Q. And then after this the jury has seen this
17 previously. He returns to your vehicle. What happens
18 when the CI returns to your vehicle?

19 A. When the CI gets back into our undercover vehicle
20 immediately I recover the cocaine base from the CI, so it
21 stays in my custody. As heard before, the case agent
22 typically tries to do everything. That way it's real
23 simple. I searched him, I wired him, I recovered the
24 narcotics. So as soon as he got back in the undercover
25 vehicle I recovered that narcotic. I recovered the

1 cocaine base from the CI.

2 Q. And what did you do with that cocaine base?

3 A. Once we get the cocaine base we do what we call a
4 field test on that substance. Typically, we view that
5 substance. We can determine -- we can't determine
6 exactly if it's cocaine base by just reviewing it so we
7 drop -- our lab makes us up a chemical substance. It's a
8 pink liquid. We take a small, small portion of that
9 cocaine base. We drop one drop of that substance onto
10 the cocaine base and it turned blue. If it turns blue it
11 field tests presumptive as cocaine base, which we then
12 send to the lab for the official testing.

13 Q. After the CI returned to your vehicle where did you
14 go with the vehicle and CI?

15 A. We went back to the previous debriefing location,
16 straight back to the previous debriefing location to meet
17 back up with the detectives and the officer.

18 Q. And what did you do to or with the CI once you are
19 back at that location?

20 A. Well, on the way back to the location, again, we
21 recovered the -- well, immediately recovered the
22 narcotics. I again got a description of the defendant.

23 Once back at that location -- once we got back to
24 that location I called Officer Burke, at the time, which
25 is a detective with us now. I called him to make sure he

1 was working because I know that Officer Burke was
2 familiar with that area, was familiar with the subjects
3 in that area.

4 He said he was working. I gave him a full
5 description; white tank top, blue cast, black shorts.
6 Just made a narcotics transaction in the area at █ Wolfe
7 Street, can you go to that area, can you try to ID that
8 guy? I specifically told Officer Burke if you can ID
9 that guy without getting out with him do that because it
10 just brings up suspicion why are you getting out with me;
11 I just sold, that guy could have been a confidential
12 informant. So I gave Officer Burke a description.

13 I then searched that CI again, same thing to the
14 point of almost a strip search. I took off the equipment
15 and basically had a small debrief of what happened, what
16 went right, you know, what we could do better the next
17 time with the detectives involved in the operation.

18 Q. And you called now Detective Burke to go to that
19 area. Did he respond to you after you requested that?

20 A. Yes, ma'am. A short time after Detective Burke
21 called me back by phone and said that he identified the
22 subject --

23 MR. KING: Objection, hearsay.

24 THE COURT: Any exception?

25 MS. LINDER: Your Honor, I would state it's law

1 enforcement sharing information about an ongoing
2 investigation.

3 THE COURT: Rephrase your question. Sustained.

4 BY MS. LINDER:

5 Q. Did Detective Burke make a positive identification?

6 MR. KING: Objection. Same objection.

7 THE COURT: He could answer if he has personal
8 knowledge.

9 A. Yes.

10 Q. During the video we heard a phone number toward the
11 end, and I believe you touched on it when we were playing
12 the excerpt. What if anything did you do with that phone
13 number?

14 A. I ran it through our local, our city data base as
15 well as SCIEX, which is a statewide database. It came
16 back nothing on it, which is typical. When dealing with
17 street level narcotics they have throw phones, burner
18 phones, or either just borrowing someone else's phone.
19 So nothing came back on the phone.

20 Q. Did you end up reviewing the video in this case?

21 A. Yes, ma'am.

22 Q. And are you able to identify anyone on this video?

23 A. Yes, ma'am. I identified James Lamont -- James
24 Lamont Moore, whose birthday is [REDACTED] the [REDACTED] [REDACTED] in
25 that video.

1 Q. And who was he in that video?

2 A. He was the gentleman who was wearing the white tank
3 top, blue cast, black shorts who made a narcotics
4 transaction with the confidential informant.

5 MS. LINDER: Please beg the Court's indulgence.

6 THE COURT: Take your time.

7 (PAUSE.)

8 MS. LINDER: That's all the questions I have for
9 you at this time, Detective Shealy. If you can please
10 answer any questions that Mr. King has.

11 THE COURT: Mr. King?

12 CROSS-EXAMINATION

13 BY MR. KING:

14 Q. Detective Shealy?

15 A. Yes, sir.

16 Q. You testified you were the case agent in this case,
17 right?

18 A. Yes, sir.

19 Q. And you decided to use the informant over an
20 undercover cop?

21 A. Yes, sir.

22 Q. Although sometimes, many times an undercover cop is
23 used?

24 A. Sometimes an undercover cop is used, yes, sir.

25 Q. You gave the informant \$20, right?

- 1 A. Yes, sir.
- 2 Q. And you photocopied that, right?
- 3 A. Yes, sir.
- 4 Q. So you would have a record of that?
- 5 A. Yes, sir.
- 6 Q. But you never recovered that \$20, right?
- 7 A. No, sir.
- 8 Q. And you never recovered it from James Moore?
- 9 A. No, sir.
- 10 Q. You were with Detective Grill this whole time; is
- 11 that correct?
- 12 A. Yes, sir.
- 13 Q. And y'all were dropping him off where he gets out
- 14 of the car and starts walking?
- 15 A. Yes, sir.
- 16 Q. And at that point you all maintain an audio,
- 17 listening to what's going on?
- 18 A. Yes, sir.
- 19 Q. And that's why he's telling you where he is?
- 20 A. Yes, sir.
- 21 Q. But you are not actually seeing this alleged
- 22 transaction taking place?
- 23 A. No, sir.
- 24 Q. So when you are describing what is going on in the
- 25 video it's not because you saw it happen. You are going

1 by what the informant is telling you?

2 A. Yes, sir.

3 Q. Is that right? You are taking his explanation to
4 what happened there and then you're -- it sounded like
5 you were describing it to the jury like you were seeing
6 it yourself.

7 A. I did not see it in person. I was explaining it
8 from watching the video, yes, sir.

9 Q. Okay. Did you see in the video any drugs?

10 A. No, sir.

11 Q. Did you see any money?

12 A. No, sir.

13 Q. Did you see anything exchange hands?

14 A. No, sir.

15 Q. And when the informant comes back, all right, he
16 gives you a piece of cocaine base?

17 A. Yes, sir.

18 Q. And at that point you didn't go and make an arrest
19 of anyone?

20 A. No, sir.

21 Q. And actually, you didn't even draft the arrest
22 warrant until almost a month later; is that right?

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

24 Q. Obviously this happened July 16th. The arrest
25 warrant was issued August 12th?

- 1 A. That is correct. Yes, sir.
- 2 Q. And you've worked with Mr. Ancrum you said before?
- 3 A. Yes, sir.
- 4 Q. Did you work with him a lot in 2009?
- 5 A. Yes, sir.
- 6 Q. And he said that he's done over a hundred buys,
- 7 just in 2009?
- 8 A. I would feel comfortable saying close to a hundred
- 9 buys. I can't say over but he did a lot. That's when I
- 10 signed him up, early 2009.
- 11 Q. Right.
- 12 A. So it all depends on what month it was.
- 13 Q. Okay. And he's making around -- I think Mr. Ancrum
- 14 said about \$60 was average for each one?
- 15 A. Average \$60. It ranged from 20 to 60 on up. It
- 16 would all depend.
- 17 Q. But higher than 60 sometimes?
- 18 A. Sometimes.
- 19 Q. So a hundred buys, average of \$60 a buy, \$6,000,
- 20 right? And that's just in 2009?
- 21 A. Again, I can't put a number on a hundred buys. I
- 22 know it was a lot in 2009, but again, that's when we
- 23 signed him up was in 2009. So we'd have to go back and
- 24 figure out the date we signed him up. It could have been
- 25 -- you know, I can't honestly say it was a hundred buys.

1 I'm not sure.

2 Q. But you don't think that number is too far off
3 though, do you?

4 A. It was a lot of buys.

5 Q. That's all the questions I have.

6 Oh, one more. I'm sorry. One more question. How
7 recently have you worked with Mr. Ancrum? When was the
8 last time you did work with him?

9 A. It's been almost a year, over a year.

10 MR. KING: That's all the questions I have.

11 THE COURT: Thank you.

12 Ms. Linder, do you have any redirect?

13 MS. LINDER: Nothing further for this witness, Your
14 Honor.

15 THE COURT: You may step down. Thank you.

16 Call your next witness.

17 MS. LINDER: Your Honor, at this point the State
18 rests.

19 THE COURT: All right. Reserving all motions and
20 matters, Mr. King, do you have any witnesses?

21 MR. KING: No, Your Honor. At this time I believe
22 the defense would rest.

23 THE COURT: Ladies and gentlemen, that signifies to
24 the Court that there is a matter of law that I must take
25 up outside of your presence. Do not begin your

1 deliberations, do not discuss this case amongst
2 yourselves. We will receive you back in the courtroom,
3 at that time you will hear closing arguments and I will
4 instruct you on the law applicable to this case. Please
5 do not begin your deliberations.

6 Please rise for the jury. Thank you.

7 (WHEREUPON, the jury leaves the courtroom at
8 approximately 2:30 p.m.)

9 THE COURT: Thank you. Be seated.

10 I'll be happy to hear from you, Mr. King.

11 MR. KING: Your Honor, at this time I'd make a
12 motion for a directed verdict. I know the standard. I'm
13 familiar with the standard for a directed verdict but I
14 do think with the video not showing any money or not
15 showing any obvious transaction there that you can see on
16 the video, coupled with the informant and the credibility
17 problems that he has that there's not enough competent
18 evidence for this to go to the jury.

19 MS. LINDER: Your Honor, in response to Mr. King I
20 would say that whether or not the CI is credible in this
21 case is a matter left up to the sound discretion of the
22 jury. Your Honor will instruct them as far as that is
23 concerned.

24 You heard testimony from the officers that this CI
25 was searched before. He had nothing on him. They issued

1 money to him. When he came back he had no money on him
2 and he did have drugs on him. So a transaction did
3 indeed occur.

4 As far as who did the deal. There was testimony
5 put up by the State through the CI as far as who did make
6 that transaction, who did distribute that cocaine base,
7 and I believe there was more than enough in the light
8 most favorable to the State for this to continue on and
9 ultimately go to the jury.

10 THE COURT: Your response, Mr. King?

11 MR. KING: I'll just leave my arguments as is.

12 THE COURT: In ruling on the motion for directed
13 verdict the Court is concerned with the existence or
14 nonexistence of the evidence, not as to its weight.
15 There was testimony of the CI as well as the officers
16 that a transaction took place, and again, the CI was
17 searched when he returned. There was prerecorded money
18 when he returned, did not have the money and had drugs on
19 him. Based upon the testimony as presented I deny your
20 motion for a directed verdict.

21 MR. KING: Thank you, Your Honor.

22 THE COURT: And you have rested and so that was --
23 do you wish to renew? I think it's -- but just to
24 preserve the record.

25 MR. KING: Right. I'll renew the motion. I want

1 to preserve it on the record. But, yes, I would make
2 another motion.

3 THE COURT: All right. And we have now reached the
4 end. So any lesser includedes?

5 MS. LINDER: Nothing from the State, Your Honor.

6 MR. KING: Your Honor, I would request mere
7 presence and a charge on identification.

8 THE COURT: All right.

9 MR. KING: And the charge on -- is there a standard
10 charge for a defendant not being present for court and
11 that can't held against him?

12 THE COURT: Yes.

13 MR. KING: I would make that request, too.

14 THE COURT: Yes. We have all those.

15 MS. LINDER: The State has no specific requests to
16 charge. We believe that the Court's standard charges
17 will be sufficient.

18 THE COURT: All right. How long do you all need
19 for -- I've got the verdict form. Please come and review
20 the verdict form. How long do you need to get ready for
21 closing?

22 MS. LINDER: Not even five minutes, Judge.

23 MR. KING: That's good with me.

24 THE COURT: Just make sure the verdict form is
25 correct.

1 (PAUSE.)

2 THE COURT: All right. Ms. Linder, we ready?

3 MS. LINDER: The State is ready, Your Honor.

4 THE COURT: Mr. King?

5 MR. KING: The defense is ready.

6 THE COURT: All right.

7 (WHEREUPON, the jury enters the courtroom at
8 approximately 2:38 p.m.)

9 THE BAILIFF: All seated, Your Honor.

10 THE COURT: Thank you. Please be seated.

11 Ladies and gentlemen, we have now reached the stage
12 of the trial where you will hear closing arguments on
13 behalf of counsel. The State will present her closing
14 argument first and then Mr. King will present his closing
15 argument on behalf of Mr. Moore.

16 After that I will instruct you on the law
17 applicable to this case and then you will retire to
18 consider your verdict. Please give your strict
19 attention.

20 MS. LINDER: Thank you, Your Honor. Please the
21 Court.

22 As the Judge just told you, you will hear from her
23 about the law, and that's what you need to listen to when
24 it comes to what the law is in this case. I just want to
25 hit on a few items about the law first before we get

1 started, how the laws are done in this case.

2 Mr. James Lamont Moore is charged with distribution
3 of cocaine base, and as Judge Harrington will describe to
4 you, distribution could mean a variety of things.
5 Distribution is delivering, it's dispensing, it's
6 physically delivering -- excuse me, physically
7 distributing, and also can be aiding and abetting. It
8 can be conspiring to distribute. All of those items are
9 part of what distribution of cocaine base is.

10 And again, I'm telling you to please -- I refer to
11 Judge Harrington for the ins and outs of all of that but
12 I just want to highlight those things for you and please
13 keep note of that.

14 In the beginning I told you a simple statement,
15 which is drugs are illegal. It's the same thing a couple
16 hours later. Drugs are illegal. It's illegal to possess
17 drugs and to distribute drugs. Cocaine base or crack
18 cocaine is a drug. I submit to you, ladies and gentlemen
19 of the jury, that in this case James Lamont Moore did in
20 fact distribute cocaine base.

21 There's been a lot that you've heard from the stand
22 and a lot that you've seen on the TV screen and I ask
23 that you go back and you review all of that. Think about
24 it, review all of it.

25 First you heard from Detective Grill. He explained

1 to you the basics, the ins and outs of what a controlled
2 buy is, what a CI buy is, what a buy walk is, all of the
3 terminology that's used in law enforcement.

4 And he described to you all the technicalities of
5 it, that there's a lot of planning that goes into it.
6 They meet with the informant, they search that informant.
7 They look at the clothing, they take off the shoes. They
8 search him, and then they give the informant money.

9 They have multiple other police officers out in the
10 area in plain clothes, in undercover vehicles just moving
11 perimeter, patrolling the area to make sure that
12 everything is going as planned, to make sure that
13 everything is fine.

14 With CI buys there's been some talk about the
15 camera. You know, technology is what it is. That cow
16 bell noise that you heard, I refer to it as cow bell
17 noise, is kind of annoying. It's tough to hear through
18 it. Certain things are louder than others.

19 Not everyone has the kind of obnoxiously loud of a
20 voice that I do so it's tough to hear every word that
21 everybody says all the time, but you can listen to the
22 video when you watch it. And I also urge that you listen
23 to the people who testified on that chair up there today.

24 With the camera, it's placed on you. If I had a
25 lapel pin on, which I don't, it would be here. It

1 doesn't follow where my head goes. It doesn't follow
2 where my hand goes.

3 I could be facing my co-counsel but doing this and
4 talking to you but all you would see would be my
5 co-counsel. It doesn't mean you are not here. It
6 doesn't mean I'm not addressing you, I'm not talking to
7 you. It merely means that there are limitations with
8 technology, even in 2012, or in 2009 when this happened.
9 There are limitations. Law enforcement, they do what
10 they can and they use the resources that are available
11 to them at that time.

12 You heard from Detective Grill a lot of things
13 about the general operation, why a CI is used as opposed
14 to an undercover officer, and he also talked about he was
15 there. He was in the car with Detective Shealy. He was
16 in the car with the CI, with Joseph. He also was there
17 when Detective Shealy did the search, searched
18 everything. So Detective Grill told you all of that
19 from the stand.

20 The next person you heard from was the CI. The CI,
21 confidential informant, Joseph. His friends call him
22 Jep. Sometimes I get away with calling him Jep. But
23 Joseph, as you heard from him on the stand, I submit to
24 you, was being Joseph. Joseph acknowledged when Mr. King
25 asked about child support. He acknowledged that, yeah,

1 he had been locked up before but he's disabled so he's
2 not supposed to be able to be locked up for that.

3 He also, when asked by Mr. King, said, Yeah, I get
4 paid to do this.

5 I submit people have motives for doing a variety of
6 things and being paid when you are on a limited income is
7 definitely a motivation and I do not think, and I submit
8 to you, you should not punish Joseph for wanting to be
9 able to pay his bills.

10 He was up there and he told you -- I don't even
11 remember what he said but he made some "whew" when the
12 question was asked how many have you done. He's told
13 you. He's been working with law enforcement for over 10
14 years. He named North Charleston, the County and the
15 City. So at least three agencies he has worked with as
16 an informant. He said he's paid. He said that this is
17 -- you know, this is part of what he does. He wants to
18 do this, he wants to cooperate.

19 You heard from him on the stand that he reviewed
20 the video in my office, and a while ago, over a year ago
21 when he did that, when his vision was a little better. I
22 thankfully do not have glaucoma at this point. I do not
23 know what that feels like. I do not know what kind of
24 impairments that gives; however, you heard him say that
25 his vision in 2009 when this happened, he could see.

1 I submit to if he could not see he could not
2 explain and be telling the officers over the live wire,
3 over the feed what was happening. If he couldn't see it
4 how could he be telling the officers?

5 I submit to you that his vision today is not at
6 issue. His vision at that time is what we can consider,
7 and unfortunately neither myself nor the detective can
8 transport us back in time so we know exactly at that
9 moment what his vision was.

10 You heard on the video the CI discussing a variety
11 of things. You heard on the video and then also with the
12 CI when he testified that there was a fellow in a blue
13 arm case. There was a fellow in a blue arm cast. I
14 think he called them short pants. It was July. I take
15 short pants to be shorts, and he said a tank top.

16 I submit, did you see on the video a guy with an
17 arm cast with a white tank top? The CI also told you
18 that he brought the drugs, he bought the cocaine base
19 from the guy in the tank top and black short pants and
20 the blue arm cast.

21 Mr. King when doing his cross-examination of the CI
22 brought up an affidavit; fancy legal term for a piece of
23 paper. That piece of paper Joseph told you, heck, yeah,
24 he signed it. He was getting threatened. I trust that
25 you will remember the different items that he told you

1 while on the stand about his motivations at that point.

2 I submit to you he has not worked, as he testified
3 to, with the City for a good year. He's not getting paid
4 to be here. He is here.

5 You can watch the video, I can watch the video, law
6 enforcement can testify, Joseph testified. Who is the
7 guy in the blue arm cast? That's what it comes down to.
8 Who is the guy in the blue arm cast?

9 You heard not one, not two but three law
10 enforcement officers tell you who the guy in the blue arm
11 cast is. The guy in the blue arm case is James Lamont
12 Moore. He was in the blue arm cast. You had officers
13 review the video and say, yes, that's him.

14 You had an officer immediately after the buy go to
15 that area and say that's him. In fact, we share the same
16 birthday. I mean, I know everyone who has a birthday of
17 [REDACTED] [REDACTED] because that's my birthday, you know. So I
18 submit to you that officer in particular definitely has a
19 reason to remember who this person is.

20 That same officer, Detective Burke, also told you
21 that less than a month later after this he was part of
22 the group who ended up affecting the arrest on this
23 defendant, arrested in that area, literally across the
24 street at [REDACTED] Wolf versus [REDACTED] Wolf where this happened.

25 Investigator Shealy -- Detective Shealy, rather,

1 also talked to you about the ID of the defendant in this
2 case. He also said he reviewed the video. So you have,
3 as I said previously, not one, not two but three law
4 enforcement officers telling you who it was with the
5 blue arm cast.

6 What did the guy with the blue arm cast do? Joseph
7 told you, sold the drugs. Sold me a 20 hard. Twenty
8 means \$20 worth. Hard is kind of street slang for crack.
9 Joseph told you who sold it to him. Joseph described who
10 it was who sold it to him. In realtime he relayed to the
11 officers who sold it to him.

12 I submit to you, go back and watch the video.
13 Think of all the things that Joseph said on the video
14 that I submit to you are true. I'm crossing Meeting
15 Street.

16 We saw him run and almost be hit by a car.

17 I'm passing the store. Then he says, Oh, no, it's
18 the gas station.

19 He calls it a store. Potato, potato, in my
20 opinion.

21 Then he says -- he tells you where he's crossing.
22 And then he explains the guy is going across the street
23 to get it. You heard Detective Shealy tell you why with
24 street level operations and drug transactions that's
25 common. If something is in my pocket I'm going to be

1 stuck with it if the cops pull up. If something is
2 across the street, heck, I'm good. You heard Detective
3 Shealy tell you all about that.

4 You also heard Joseph explain a lot of other
5 things. He said, The guys going across the street -- and
6 I'm paraphrasing here. You can listen to his actual
7 words back on that video. The guy is going across the
8 street. He's going to the one, two, I think he said the
9 third house, like he is explaining where it all is.

10 He is telling you so many, what I submit to you,
11 are true statements time and time, and time again the
12 whole way of the video. And then the defense wants you
13 to believe that although all those may be true statements
14 there is one untruth.

15 I submit to you, go back, think about Joseph. It's
16 up to you. You are the judges. You along with Judge
17 Harrington are the judges. You are the judges of fact.
18 Think about it. Do you believe him? That's up to you.
19 Do you believe him when he said he was threatened? Do
20 you believe him when he said he received disability? Do
21 you believe him when he said his vision is only so-so
22 now? Do you believe him when he said he was scared when
23 people were knocking on his door for testifying before?
24 Do you believe him when he said the guy with the blue arm
25 cast is the one who sold him the drugs?

1 Ladies and gentlemen of the jury, I ask that you
2 take your time, that you think about this case, that you
3 think about all the people that you heard from on that
4 witness stand and that you think about the video in this
5 case. And I ask that after you think about that, and
6 after you review that, and after you analyze it, and
7 after you all come together and deliberate I ask that you
8 comb back with a verdict of guilty for distribution of
9 cocaine base on James Lamont Moore. Thank you.

10 THE COURT: Mr. King?

11 MR. KING: First I want to talk to you just a
12 minute, you've been read a stipulation. I want to
13 explain that to you real quick, what's that's about.
14 None of us want to waste your time. So to save a little
15 bit of time with some other officers getting up there
16 proving what we call chain of custody, we cut that all
17 out because that's not really an issue here.

18 I don't doubt that Joseph Ancrum put a piece of
19 crack in Detective Shealy's hands, then from there on I
20 don't think the police tampered with anything like that,
21 that that's the same crack that Joseph Ancrum gave
22 Detective Shealy.

23 So that's not what we're talking about. We
24 stipulated to that to save time of having witnesses get
25 up there, and a chemist get up there to testify that it

1 really is cocaine. So cutting that out because it's
2 Joseph Ancrum that is the problem in this case.

3 I told you before when I first started talking in
4 opening statement about the police being in control of
5 all this, and you've heard them, that they were in
6 control of all aspects of this. They set this whole
7 thing up. They prepared for this.

8 This was not, you know, something that happens out
9 on the street that some surveillance cameras might
10 capture, some may or may not see. They are in control of
11 all this. So they control what evidence that they are
12 going to give and bring to you, and this is what they
13 brought. And it shouldn't be difficult. The video
14 should explain everything. You shouldn't have to rely on
15 the word of someone like Joseph Ancrum.

16 And as I told you and you saw in the video, you're
17 not going to see any money on the video. You're not
18 going to see any drugs or cocaine base on the video. You
19 are not going to see -- you know, I think you might see a
20 hand pass across the camera. You know, that could be a
21 hand, I guess. The camera is right there. There is
22 nothing shown on there.

23 But there's two people on the video. You've got
24 to believe Joseph Ancrum to believe what's going on in
25 that video, and it's not a person that you should

1 believe. It's not a person of credibility enough to
2 make a determination like this. I submit he wasn't
3 being forthright up there. He wasn't being completely
4 honest up there.

5 You know, they could have used an undercover police
6 officer, an undercover police officer who didn't have any
7 criminal record who doesn't have as much of an interest
8 to get up there and lie. That's not what we are talking
9 about. This is just a man who is making a career out of
10 this. He's making a living out of this.

11 And he's determined. You heard him on the stand.
12 He's determined to get him convicted, and other people
13 that he sent to prison, you know, telling you that, oh,
14 they are guilty, too. That's his livelihood. This is
15 his income.

16 You know, I asked him, you know, how many times
17 he's done it. He didn't want to admit how much money he
18 got from disability. That's like \$700 a month. That's
19 not a whole lot of money. So, you know, he's really
20 supplementing his income with this business. He's been
21 doing this for, like, nine years.

22 And when I added it up, how much he made, you know,
23 Oh, no, not that much. He wants to downplay how much
24 money that he's made because he doesn't want you all to
25 know that, that he might have made \$6,000 or more just in

1 2009, off doing things like this. Do you think he has
2 any interest in stopping that money from coming? This is
3 a big source of bread and butter for him.

4 He has three names. He's Eric B, he's Jep Brown,
5 and Joseph Ancrum. He's been convicted of receiving
6 stolen good, and you get a crime of dishonesty.

7 Do you believe him about the child support? I'm
8 asking questions up there, asking if he's paying child
9 support. He's like, Oh, no, no. They arrested me and
10 just let him go because he's disabled. Do you believe
11 that? You know, if he has child support that he owes and
12 he doesn't pay it they are going to look him up. He
13 needs this money and even without that, we all need
14 money. We want money. We got to live, you got to pay
15 your rent and buy nice things with money.

16 So no one is going to turn down any money. No
17 wonder he shows up every time they call him. Of course
18 he shows up, because that's easy money. Sixty dollars
19 for that? That's what he gets. And he's done it so
20 much. He's done it for 10 years or more. Not just with
21 the City of Charleston Police Department but with several
22 different agencies. He's a pro.

23 And I think it is important. He signed a sworn
24 affidavit, an affidavit is where you swear to tell the
25 truth, the whole truth and nothing but the truth, just

1 like when you take the witness stand. And he signed an
2 affidavit that said that he lied on the witness stand
3 about another case just like this, that he lied on the
4 stand about who sold him the drugs and that he did it
5 because he didn't want to stop getting the money from the
6 police. He signed that statement.

7 He wants to act like he didn't know what was in
8 there, he couldn't read it. You know, you think he's
9 being honest about all that? He's done this so much that
10 he knows exactly what he's doing. He knows the whole
11 procedure. So he knows, you know, all he has to do is
12 come back to the police with a piece of crack cocaine and
13 he gets paid, and then point the finger at somebody.
14 Serve up somebody and he gets \$60, and move on to the
15 next one.

16 He should have been able to get something on video.
17 I know -- and maybe they can't control where the video
18 goes but the video is right here. You know, he can't get
19 money on the video? He can't get the piece of drugs on
20 the video? You know, if he's been doing it this long he
21 ought to be able to get something on video to show you
22 jurors so that you can really see what's going on.

23 I understand if he'd never done this before maybe
24 that's one thing, but this guy has done it a lot. A
25 hundred times just in 2009, and this goes back to 2003,

1 2002, 10 years ago or more. You shouldn't have to take
2 Joseph Ancrum's word for anything, if this is supposed
3 to be a distribution on video. You shouldn't have to.
4 It should be easy.

5 The police, you know, they are experts with this,
6 too. They have done this a lot. So the police know
7 what they are doing. But still, this is all that they
8 can show you? You know, they claim he's out there
9 selling drugs. They don't go and arrest him though.
10 They don't even take out an arrest warrant until almost
11 a month later.

12 You know, if he's out there selling drugs arrest
13 him first. You know, that's public safety there. Saying
14 they don't arrest him for public service, well, if
15 someone is out there selling drugs they should arrest
16 them right then, and then know exactly who it is.

17 And they also have the marked 20-dollar bill in his
18 pocket that they could present to you, the jurors.
19 Here's the \$20 dollars. We found it in his pocket. We
20 arrested him right there. This serial number matches up
21 to the photocopy we took of the money, they could prove.
22 That's not being done today.

23 There were multiple police officers out there.
24 There's Detective Grill, Detective Shealy, and evidently
25 multiple officers on the perimeter looking all around.

1 Not a single officer testified that they saw anything.
2 They didn't see Mr. Moore put the drugs in this
3 informant's hand. They didn't see anything.

4 I mean, why didn't they have another -- they could
5 have another camera in the background, do surveillance
6 somewhere in the background. They could film this from a
7 distance. There's cameras that can zoom in. There's
8 technology for this.

9 So, you know, there's a way that this could have
10 been done if he's out there selling drugs where it would
11 be easy to prove. It's done right out there in the open.
12 So if he's doing this they ought to be able to prove it
13 easily, but that's not what's going on here.

14 They've got a video that's not any good and an
15 informant trying to fill in the holes who you shouldn't
16 believe, and we're dealing with something very serious
17 here. You know, they are asking you to convict a man of
18 a serious crime and in a system where they are required
19 to prove beyond all reasonable doubt that he did it, and
20 they are in control of it.

21 So, like I said, this should be easy for you but
22 it's not easy because you can't see what's going on in
23 the video. And the man, Joseph Ancrum, who took that
24 stand is not an honest person.

25 So this is what jurors are for. This is why we

1 pick jurors and we have this some because we don't just
2 convict people because they might have done something
3 suspicious or think they probably did it. This is proof
4 beyond any reasonable doubt. If there's any reasonable
5 doubt that Mr. Moore didn't do this it's your duty to
6 find him not guilty.

7 And hold them to that standard. You know, tell
8 them, you know, if you want to convict someone of a crime
9 like this and you're going to be in charge of it and you
10 are going to make a video, well, make it clear. Get it
11 clear on the video if that's what you want.

12 This case has been rotting and stinking for over
13 three years. It's Thursday. Where I live Thursday is
14 garbage day. So I'm asking you today to throw out the
15 trash. This is a stinking case for over three and a half
16 years and I'm asking you to put it to an end and throw
17 this case out and find him not guilty. Thank you.

18 THE COURT: I remind you that during this trial you
19 and I have had certain duties to perform. As the trial
20 judge it is my responsibility to preside over the trial
21 of this case and I have the additional duty to charge you
22 the law applicable to this case.

23 You are to consider only the competent evidence
24 before you. If there was any testimony that was ordered
25 stricken from the record you must disregard that

1 testimony. You are to consider only the testimony that,
2 has been presented from the witness stand, any exhibits
3 which have been made part of the record in this case, as
4 well as any stipulations of counsel.

5 As the presiding judge I am the sole judge of the
6 law in this case. It is your duty to accept the law and
7 apply the law as I state it to you now. If you have any
8 idea as to what the law is or what the law ought to be
9 and it does not agree with what I'm about to tell you,
10 you must abandon your own idea because you are sworn to
11 accept the law and apply the law exactly as I state it
12 to you now.

13 Ladies and gentlemen, in every case tried in this
14 Court before a jury the jury becomes the sole and
15 exclusive judges of the facts. A trial judge may not
16 make any comment regarding the facts in this case.

17 You are not to infer from anything that I have said
18 when ruling upon the admissibility of evidence, or
19 otherwise during the progress of the trial, or during
20 anything that I say while I'm instructing you on the law
21 that I have any opinion about the facts in this case.
22 The law does not allow me to have an opinion about the
23 facts in this case.

24 The indictment in this case charges the defendant
25 with distribution of cocaine base. I remind you, the

1 fact that the defendant was arrested, charged and
2 indicted in this case is not evidence and cannot be
3 considered by you as evidence of guilt, nor does it
4 create any presumption or inference of guilt. An
5 indictment is simply the formal document which contains
6 the charge made against the defendant.

7 The defendant has pled not guilty to this
8 indictment. A person charged with committing a criminal
9 offense in South Carolina is never required to prove
10 himself innocent.

11 I charge you it is an important rule of law that
12 the defendant in a criminal trial, no matter what the
13 seriousness of the charge may be, will always be presumed
14 to be innocent of the crime for which the indictment was
15 issued unless guilt has been proven by evidence
16 satisfying you of that guilt beyond a reasonable doubt.

17 This presumption of innocence does not end when you
18 begin your deliberations. It accompanies the defendant
19 throughout the trial until you reach a verdict of guilt
20 based upon evidence satisfying you of that guilt beyond a
21 reasonable doubt.

22 This presumption of innocence is not a mere legal
23 theory. It is not just a legal phrase. It is a
24 substantial right to which every defendant is entitled
25 unless you, the jury, are satisfied from the evidence of

1 the defendant's guilt beyond a reasonable doubt.

2 The State has the burden of proving the defendant
3 guilty beyond a reasonable doubt. Some of you may have
4 served as jurors before in civil cases where you were
5 told that it was only necessary to prove that a fact is
6 more likely true than not true, such as by the greater
7 weight or preponderance of the evidence. In criminal
8 cases the State's proof must be more powerful than that.
9 It must be beyond a reasonable doubt.

10 Proof beyond a reasonable doubt is proof that
11 leaves you firmly convinced of the defendant's guilt.
12 There are very few things that we know in this world with
13 absolute certainty, and in criminal cases the law does
14 not require proof that overcomes every possible doubt.

15 If based upon your consideration of the evidence
16 you are firmly convinced that the defendant is guilty of
17 the crime charged you must find the defendant guilty. On
18 the other hand, if you think there is a real possibility
19 that the defendant is not guilty you must give the
20 defendant the benefit of the doubt and find him not
21 guilty.

22 There are two types of evidence generally presented
23 during a trial, direct evidence and circumstantial
24 evidence. Direct evidence is the testimony of a person
25 who claims to have actual knowledge of the facts such as

1 an eyewitness. It is evidence which immediately
2 establishes the main fact to be proved.

3 Circumstantial evidence is proof of a chain of
4 facts and circumstances indicating the existence of a
5 fact. It is evidence which immediately establishes
6 collateral facts from which the main fact may be
7 inferred. Circumstantial evidence is based on inference
8 and not on personal knowledge or observation.

9 The law makes absolutely no distinction between the
10 weight or value to be given either direct or
11 circumstantial evidence, nor is a greater degree of
12 certainty required of circumstantial evidence than that
13 of direct evidence.

14 You should weigh all of the evidence in this case,
15 and after weighing all of the evidence if you are not
16 convinced of the guilt of the defendant beyond a
17 reasonable doubt you must find the defendant not guilty.

18 Necessarily, you must determine the credibility of
19 the witnesses who have testified in this case.
20 Credibility simply means believability. It becomes your
21 duty as jurors to analyze the facts and determine which
22 evidence convinces you of its truth.

23 In determining the believability of the witnesses
24 who have testified in this case you may believe one
25 witness over several witnesses or several witnesses over

1 one witness. You may believe a part of the testimony of
2 a witness and reject the remaining part of the testimony
3 of that same witness.

4 You may believe the testimony of a witness in its
5 entirety or reject the testimony of a witness in its
6 entirety. You may consider whether any witness has
7 exhibited to you any interest, bias, prejudice or other
8 motive in this case. And you may also consider the
9 appearance and manner of a witness while on the
10 witness stand.

11 A person who has a past criminal record is
12 competent to testify during a trial. A past record does
13 not affect the ability of that witness to testify. The
14 past record may only be considered by you, if at all, in
15 determining the witness's believability. Remember, you
16 are the sole judges of the facts in this case and of the
17 believability of any and all of the witnesses.

18 I instruct you and emphasize that the fact that the
19 defendant did not testify is not a factor to be
20 considered by you in any way in your deliberation and in
21 your consideration on the question of the guilt of the
22 defendant. It must not be considered by you in any
23 manner whatsoever.

24 A defendant has the constitutional right to remain
25 silent and the ascertain of this right must not be

1 considered by you in your deliberations. I repeat, under
2 your oath you are to draw no conclusion whatsoever from
3 the fact that the defendant in this case did not testify.

4 Madam foreperson, the fact that the defendant did
5 not testify in this case should not even be considered by
6 you or discussed by anyone in the jury room.

7 The burden of proof, as I have stated to you, is on
8 the State to prove guilt beyond a reasonable doubt. The
9 defendant is not required to prove his innocence.

10 Likewise, under the law of this State a defendant
11 may be tried even if the defendant does not attend the
12 trial, but the fact that the defendant is not present may
13 not be considered against the defendant in any manner
14 whatsoever. The defendant's failure to appear may not be
15 construed as an admission of guilt.

16 In order to establish criminal liability criminal
17 intent is required. For example, the mental state
18 required to be proven by the State for a particular crime
19 might be purpose, intent, knowledge, recklessness or
20 criminal negligence.

21 Criminal intent must be proven by the State beyond
22 a reasonable doubt. Criminal intent is always a matter
23 that must be determined by the jury from the
24 circumstances surrounding the situation.

25 There is no way to prove intent to a mathematical

1 certainty. Because there is no way to tell with exact
2 certainty what a person had in mind the law says that
3 criminal intent may be inferred from the circumstances
4 shown to have existed. This is how you make a
5 determination of whether or not the element requiring
6 intent was present.

7 It is not necessary to establish intent by direct
8 and positive evidence but intent may be established by
9 inference in the same way as any other fact by taking
10 into consideration the acts of the parties and all the
11 facts and circumstances of the case.

12 Criminal intent is a mental state, a conscious
13 wrongdoing. It is up to you to determine what the
14 defendant intended to do based upon the circumstances
15 shown to have existed. Criminal intent can arise from
16 action or a failure to act. It may arise from
17 negligence, recklessness or an indifference to duty or to
18 consequences that is considered by the law to be the
19 equivalent of criminal intent.

20 Mere presence at the scene is not sufficient to
21 prove someone guilty of a crime. A defendant's presence
22 where a crime is being committed or mere association with
23 a person who commits a crime does not make a defendant an
24 accomplice or an aid or an abettor of the person
25 committing the crime. The burden is on the State to

1 prove every element of the crime charged.

2 If you find after reviewing all of the evidence
3 that the State has proved that the defendant was only
4 present at the scene of the crime and they have not
5 proved beyond a reasonable doubt any other participation
6 of the crime then you must find the defendant not guilty.
7 The law is that proof of at the scene of the crime is not
8 sufficient to find someone guilty.

9 An issue in this case is the identification of the
10 defendant as the person who committed the crime charged.
11 The State has the burden of proving identity beyond a
12 reasonable doubt. You must be satisfied beyond a
13 reasonable doubt of the accuracy of the identification of
14 the defendant before you may convict the defendant.

15 Identification testimony is an expression of belief
16 or impression by a witness. You must determine the
17 accuracy of the identification of the defendant. You
18 must consider the believability of the identification
19 witness in the same way as any other witness.

20 You may consider whether the witness had an
21 adequate opportunity to observe the offender at the time
22 of the offense. This will be affected by things like how
23 far or close the witness was, how long or short a time
24 was available, the lighting conditions, and whether the
25 witness had a chance to see or hear the person in the

1 past.

2 Once again, I instruct you the burden of proof on
3 the State extends to every element of the crime charged
4 and this specifically includes the burden of proving
5 beyond a reasonable doubt the identity of the defendant
6 as the person who committed the crime. If after
7 examining the testimony you have a reasonable doubt as to
8 the accuracy of the identification you must find the
9 defendant not guilty.

10 The defendant is charged with distribution of
11 cocaine base. The State must prove beyond a reasonable
12 doubt that the defendant distributed cocaine base.
13 Distribute means to deliver or to actually constructively
14 or attempt to transfer a drug other than by administering
15 or dispensing.

16 Deliver means to actually, constructively or
17 attempt to transfer a drug. A transfer can involve an
18 exchange for money, a barter or a gift. There does not
19 have to be anything given in exchange for the drugs for a
20 transfer to constitute distribution.

21 Ladies and gentlemen, I'll now go over the verdict
22 form with you. Again, there is no significance in the
23 way that I read the verdict form. It's simply one must
24 go first.

25 In the Court of General Sessions, Ninth Judicial

1 Circuit, 2009-GS-10-8446, State of South Carolina vs.
2 James Lamont Moore, we, the jury, find the defendant not
3 guilty; or we, the jury, find the defendant guilty of
4 distribution of cocaine base.

5 It must be a unanimous decision of the jury.

6 Madam foreperson, once you have reached a unanimous
7 decision, meaning all 12 of you agree, you will sign and
8 date the verdict form. After that, please alert the
9 bailiff and we will receive you back into the courtroom.

10 Ladies and gentlemen, this will be the last time I
11 say this to you. Do not begin your deliberations, do not
12 discuss this case amongst yourselves. We're gathering
13 the evidence and the verdict form, and once all of those
14 things have been gathered the bailiffs will alert you
15 that you may begin your deliberations.

16 Ms. Giblin, this completes your service to this
17 case but I ask that you remain with us. They will put
18 you in a very small room all by yourself. So please do
19 not discuss this case or begin your deliberations in case
20 I need to plug you in at the last minute.

21 Please rise for the jury.

22 (WHEREUPON, the jury leaves the courtroom at
23 approximately 3:15 p.m.)

24 THE COURT: Thank you. Be seated.

25 Ms. Linder, any objection, corrections to the

1 charges read?

2 MS. LINDER: None from the State, Your Honor.

3 THE COURT: Mr. King?

4 MR. KING: None from the defense, Your Honor.

5 THE COURT: All right. Thank you. And no
6 objection to the verdict form, and State's 1, 2, and 3
7 are going back; is that correct?

8 MS. LINDER: Yes. I'm bringing up State's 3 at
9 this time, if I may approach.

10 THE COURT: You may.

11 (WHEREUPON, the jury was instructed to begin
12 deliberations at approximately 3:20 p.m., and court was
13 in recess while awaiting their verdict.)

14 THE COURT: Anything before we bring in the jury?

15 MS. LINDER: Nothing from the State, Your Honor.

16 THE COURT: Mr. King?

17 MR. KING: Not from the defense, Your Honor.

18 THE COURT: All right. Let's bring in the jury.

19 Thank you.

20 (WHEREUPON, the jury enters the courtroom at
21 approximately 3:45 p.m.)

22 THE BAILIFF: All present, Your Honor.

23 THE COURT: Thank you. Please be seated.

24 Madam foreperson, I understand that you have
25 reached a verdict. If you would please hand the verdict

1 form to the bailiff.

2 Mr. King, on behalf of Mr. Moore if you'll please
3 rise.

4 THE CLERK: The verdict form in the matter of the
5 State of South Carolina vs. James Lamont Moore,
6 defendant, we, the jury, find the defendant guilty of
7 distribution of cocaine base. Signed by the foreperson
8 on October 18th, 2012, and is certificated that this
9 decision is a unanimous decision of the jury.

10 Ladies and gentlemen of the jury, if this was your
11 verdict, please raise your right hand. Thank you.

12 Please let the record reflect that all 12 jurors
13 raised their right hand.

14 THE COURT: Thank you. Anything further required
15 of the jury, Mr. King?

16 MR. KING: I'd request to poll the jury.

17 THE COURT: All right. If you'll please poll the
18 jury.

19 (WHEREUPON, the jury was polled, all answering in
20 the affirmative.)

21 THE CLERK: Your Honor, the jury had been polled
22 and the verdict stands.

23 THE COURT: Mr. King, anything further?

24 MR. KING: No, Your Honor.

25 THE COURT: Is the State prepared for sentencing?

1 Do you have your sentencing sheet?

2 MR. KING: Mr. Stoney is going to run upstairs and
3 grab one. Thank you, Judge.

4 THE COURT: Mr. King, what I'm going to do is just
5 explain for the benefit of the jury so that they know
6 kind of a little more explanation. As you know that I
7 don't necessarily impose sentencing at this time but I
8 will fill out the sentencing sheet to be sealed at a
9 later time.

10 So at this time, I'm going to hear from Ms. Linder
11 as to possible punishment and your client's previous
12 convictions, should there be any, and then I will allow
13 you to argue on behalf of your client any mitigation.
14 Thank you.

15 MR. KING: Thank you.

16 THE COURT: And, of course, we are reserving all
17 motions and matters outside the presence of the jury.
18 Thank you.

19 MR. KING: Yes, ma'am.

20 THE COURT: Ms. Linder, first of all, I just want
21 to know what the possible punishment is. This is a third
22 offense; is that correct?

23 MS. LINDER: This is a third offense and the
24 possible punishment is 15 to 30 years, not suspendable.

25 THE COURT: And is there a classification as to

1 violent?

2 MS. LINDER: Your Honor, this is classified as
3 nonviolent; however, it is a serious offense so it is a
4 strike offense.

5 THE COURT: All right. And do you have the
6 defendant's prior criminal record? This is at least his
7 third drug offense. Do you have his prior record?

8 MS. LINDER: Yes, Your Honor. His prior record, in
9 2000 he has possession of stolen motor vehicle; in 2001
10 he has two counts of possession of crack; in 2003 he has
11 a resisting arrest, and a possession of a scheduled
12 substance; in 2005 he has a possession of crack; in 2006
13 he has possession of marijuana and possession of crack;
14 in 2008 he has a possession with intent to distribute
15 crack.

16 THE COURT: And what was the sentence that he
17 received on the 2008?

18 MS. LINDER: In 2008 he received a six-month active
19 sentence after he had been in jail awaiting a plea, and
20 he violated probation numerous times previous.

21 THE COURT: And the State's position as to
22 sentencing?

23 MS. LINDER: Your Honor, the State would trust in
24 the Court's discretion as far as the suitable sentence.
25 Mr. Moore, this is not a true third. Were this to be a

1 true third I believe something in the minimum perhaps
2 would be applicable; however, this is not a third
3 offense. This, in fact, if my numbers are right, I
4 believe this is actually a sixth or seventh offense, and
5 I ask that you sentence accordingly.

6 THE COURT: All right. And just for the jury's
7 benefit, it's third or subsequent, correct?

8 MS. LINDER: Yes, Your Honor.

9 THE COURT: I just want to be clear. And,
10 Ms. Linder, you are dismissing an indictment; is that
11 correct?

12 MS. LINDER: Yes, Your Honor. The State will be
13 nolle prosequing a proximity charge, and the State will also
14 be nolle prosequing a separate arrest, two charges that
15 arose from that separate arrest, which is another
16 proximity charge, and possession with intent to
17 distribute crack cocaine. So the State will be nolle
18 prosequing three charges as a result of this trial.

19 THE COURT: All right. Thank you.

20 Mr. King, I will be happy to hear from you.

21 MR. KING: Thank you, Your Honor. He does have
22 prior convictions. Most of those are possessions. So
23 it's -- I guess he hasn't been convicted three times of
24 distribution. I believe there may just be one that's
25 above a possession offense level.

1 He's never had a lengthy sentence, Your Honor. I
2 think maybe a year is the lengthiest sentence, six months
3 on the most recent one. So I'd ask if you would consider
4 the minimum 15 years. You know, he's going from having
5 to serve maybe one year, you know, jumping all the way up
6 to 15 to 30.

7 Also, you know, in 2010 it's, you know, just a
8 matter I think not very long before the law changed our
9 legislature seemed fit to make this less serious. If he
10 were arrested for this today then he would be looking at
11 a minimum of 10 years.

12 So considering that, you know, I know he wasn't
13 present, Your Honor. I ask that you not hold that
14 against him. I believe that he was afraid. You know, I
15 don't think -- he had some trust problems with me and I
16 believe, you know, maybe hoped that it would go away but,
17 you know, it doesn't go away.

18 But I don't think that he is a violent person or
19 dangerous person. And Ms. Linder may -- I believe she
20 would agree that he's not, you know, going to be number
21 one out on the streets as far as drugs are concerned
22 either. I don't believe he is a big-time player or
23 anything in the drug business. I think at most he would
24 just be one of the low level street dealers. So we'd ask
25 you to consider sentencing him to the minimum sentence

1 which is -- I believe is too harsh, 15 years, but I'd ask
2 you to sentence him to the minimum allowed.

3 MS. LINDER: And, Your Honor, I do have copies of
4 his certified convictions of his previous arrests if the
5 Court would like them to put as part of the record.

6 THE COURT: Yes.

7 MS. LINDER: If I may approach?

8 THE COURT: You may.

9 You agree, Mr. King, that this is at least his
10 third conviction?

11 MR. KING: Yes, Your Honor, I do.

12 THE COURT: Mr. Cooper, anything you wish to say on
13 behalf of Mr. Moore?

14 MR. COOPER: No, Your Honor. Thank you.

15 THE COURT: All right. Ladies and gentlemen, this
16 is -- since the defendant has been tried in his absence I
17 do not sentence him at this time. A warrant has been
18 issued for his arrest and when he is picked up -- I will
19 fill out to complete the sentencing sheet and that
20 sentence will be sealed, and once he is picked up then
21 whatever judge is presiding will open the envelope and
22 pronounce the sentence to Mr. Moore.

23 So you have completed your service to this case and
24 I wanted you to come see the completion because sometimes
25 most of my jury, they are ready leave, and so I knew this

1 wasn't going to take entirely too long to impose the
2 sentence and it was kind of unusual that we have a trial
3 in absence so I thought just go ahead and let you stay
4 seated and see the completion so you would understand a
5 little bit more about the procedure.

6 Ladies and gentlemen, this also completes your
7 service for the week. You have earned your exemption and
8 so I hope to see you back in three years. If you would
9 please wait for me in your jury deliberation room. I'll
10 be there in just a few moments to personally thank you
11 for your service to Charleston County.

12 Please rise for the jury.

13 (WHEREUPON, THE jury was excused at approximately
14 3:53 p.m.)

15 THE COURT: Thank you. Be seated.

16 Mr. King, I will allow you the full 10 days for any
17 posttrial motions since your client is not here. I will
18 impose sentence and seal it pursuant, but I will allow
19 you the full 10 days to argue any posttrial motions.

20 MR. KING: Yes, ma'am.

21 THE COURT: Based upon that is there anything
22 further, Mr. King?

23 MR. KING: Yeah. I guess at this time I just renew
24 any previous motions and my previous motion for a
25 mistrial.

1 THE COURT: All right. And, again, the Court -- I
2 haven't heard anything that would make me change my
3 ruling on any of my initial rulings but your argument is
4 preserved for the record.

5 Anything further, Ms. Linder?

6 MS. LINDER: Your Honor, no, nothing further from
7 the State.

8 THE COURT: I need the sentencing sheet.

9 MS. LINDER: Your Honor, this sentencing sheet has
10 the improper indictment and warrant number. I can strike
11 it right through and initial or go print a new one.

12 THE COURT: I have plenty of time. I'm going to
13 release the jury. I'll be right here. And so -- is that
14 correct what Mr. King has indicated, that the new statute
15 is 10, minimum of 10?

16 MS. LINDER: Yes. Distribution third now is 10 to
17 30.

18 THE COURT: And is it also a serious offense?

19 MS. LINDER: Yes, still a serious offense and still
20 classified as nonviolent.

21 THE COURT: The only thing that's changed is the
22 minimum mandatory?

23 MS. LINDER: Correct, Your Honor.

24 THE COURT: All right. Thank you.

25 I'm going to release the jury. Any objection,

1 Mr. King?

2 MR. KING: No, Your Honor.

3 THE COURT: And, Ms. Linder?

4 MS. LINDER: No objection, Your Honor.

5 THE COURT: And just to -- I know, Mr. King, it was
6 difficult for you to try this case without your client
7 here but on behalf of your client I do believe that you
8 have presented a very zealous defense.

9 And, Ms. Linder and Mr. Stoney, thank you again.
10 This trial ran very smoothly. Thanks to the officers for
11 being here and kind of working to get this done very,
12 very timely and efficient. So I appreciate everybody's
13 efforts to get that done. Thank you.

14 (WHEREUPON, the trial was concluded.)

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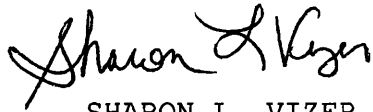
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I, Sharon L. Vizer, Official Court Reporter for the
Ninth Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete transcript of record of all the proceedings had
and the evidence introduced in the hearing of the
captioned case in Circuit Court on the 17th and 18th day
of October 2012.

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

May 24, 2013


SHARON L. VIZER

CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)
Plaintiff,)
vs.) Case No.: 2009-GS-10-8446
JAMES L. MOORE, JR.,)
Defendant.)

ORIGINAL

TRANSCRIPT OF PROCEEDINGS
SENTENCING HEARING
HEARD BEFORE JUDGE KRISTI LEA HARRINGTON
ON NOVEMBER 16, 2012

ROLAYNE M. VOLPE, CCR, RPR
Court Reporter for the State of South Carolina at Large
Post Office Box 342
Summerville, South Carolina 29484

A P P E A R A N C E S

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Reported By:
Rolayne M. Volpe, CCR, RPR
Official Court Reporter for the State of Carolina

2009-GS-10-8446, State v James L. Moore, Jr.
Sentencing Hearing, November 16, 2012

I N D E X

DESCRIPTION

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REPORTER'S CERTIFICATE

8

E X H I B I T S

DESCRIPTION

PAGE

(No exhibits were offered or marked.)

Reported By:

Rolayne M. Volpe, CCR, RPR

Official Court Reporter for the State of Carolina

2009-GS-10-8446, State v James L. Moore, Jr.
Sentencing Hearing, November 16, 2012

1 The above-styled cause came on for hearing on
2 the 14th day of September, 2012, at 1:23 p.m., before
3 Judge Roger Young, Judge at Large, presiding over the
4 Circuit Court for the County of Charleston, when the
5 following proceedings were had and entered of record, to
6 wit:

7 PROCEEDINGS

8 SENTENCING HEARING

9 THE COURT: Mr. King, are you ready to proceed
10 with sentencing?

11 MR. KING: Yes, your Honor. I'd ask that
12 my -- just to be safe, I'm not sure if they were able to
13 make it -- or the mother. I know she was upset when I
14 talked to her on the phone about the sentencing, so
15 -- but I'm ready to proceed as long as you are ready?

16 THE COURT: Ms. Linder, if you'll state your
17 name for the record, the party you're representing, and
18 the purpose of today's hearing.

19 MS. LINDER: Thank you, your Honor. May it
20 please the Court. My name is Stephanie Linder, and I'm
21 representing the Solicitor's Office. Randell Stoney is
22 here in the courtroom with me. The purpose today is
23 that we are here because there was a trial done the week
24 of October the 15th on James Lamont Moore, Jr. At the
25 conclusion of that trial, he was found guilty of the one

2009-GS-10-8446, State v James L. Moore, Jr.
Sentencing Hearing, November 16, 2012

1 count that the State went forward on, and at that time,
2 your Honor sentenced under seal, and we're here today
3 for that sentence to be unsealed and sentence to be
4 imposed in this case.

5 THE COURT: All right.

6 MS. LINDER: And I believe at that time, your
7 Honor, I did hand up to the Court certified drug
8 convictions. I'm happy to read his record into today's
9 record if you would like, but the certified convictions
10 were handed up at the time of trial.

11 THE COURT: All right. Thank you.

12 Mr. King, I'll be happy to hear from you.

13 MR. KING: Thank you, your Honor. I guess I'd
14 go ahead and make the motion for a new trial again. I
15 had done that before at the end of the trial, but we --
16 we'd ask you to reconsider that and consider giving him
17 a new trial so he can be present for trial. Only thing
18 that did -- did have an affect on the verdict with him
19 not being present. If you would consider that, your
20 Honor.

21 THE COURT: Your Motion for New Trial is
22 denied. Mr. Moore was given sufficient notice to be
23 here for his trial. Is that correct, Mr. King?

24 MR. KING: Yes, your Honor.

25 THE COURT: And if I recall correctly, he was

2009-GS-10-8446, State v James L. Moore, Jr.
Sentencing Hearing, November 16, 2012

1 present Monday for jury selection, knew that his case
2 was on the docket; isn't that correct?

3 MR. KING: Yes, your Honor.

4 THE COURT: All right.

5 Mr. Moore, please stand as I impose sentence.

6 Mr. Moore has been picked up on his bench
7 warrant; is that correct?

8 MR. KING: Yes, your Honor. Mr. Moore wanted
9 to speak regarding that same thing, your Honor, before
10 sentencing is imposed.

11 THE COURT: Well, Mr. King, I have already
12 imposed sentence, so, at the appropriate time, if you
13 wish to make the appropriate motion for me to reconsider
14 my sentence, but the procedural -- the proper procedural
15 way to handle this is for me to impose sentence, and
16 then for you to file any appropriate motions.

17 Mr. Moore, that's one of the benefits of you
18 being at trial, when you're here, before I impose
19 sentence, you would have had the opportunity to address
20 the Court. Because you chose not to be present for your
21 trial, I based the -- my sentence upon the testimony
22 that was presented, as well as your prior record.

23 It's the Order of the Court on Indictment
24 2009-GS-10-8446, that you be committed to the State
25 Department of Corrections for a term of 17 years. I'll

2009-GS-10-8446, State v James L. Moore, Jr.
Sentencing Hearing, November 16, 2012

1 give you credit for the time that you have served.

2 Mr. Moore, you have the right to appeal this
3 sentence. You have ten days -- or you or your attorney
4 must do so within ten days. This is considered a
5 serious offense.

6 Mr. King, did you explain to your client what
7 this means?

8 MR. KING: I believe at some point during the
9 representation I did, your Honor.

10 THE COURT: All right. Anything further from
11 the Court here today, Mr. King?

12 MR. KING: No, your Honor.

13 THE COURT: All right.

14 MS. LINDER: Nothing from the State, your
15 Honor.

16 THE COURT: All right. Good luck to you,
17 Mr. Moore. Thank you.

18 (The hearing of this cause concluded
19 at 9:26 a.m., on November 16, 2012.)

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REPORTER'S CERTIFICATE

Reported By:
 Rolayne M. Volpe, CCR, RPR
 Official Court Reporter for the State of Carolina

STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO.: 2009-GS-10-08466

STATE OF SOUTH CAROLINA)
)
VS.)
)
JAMES L. MOORE,)
)
DEFENDANT.)

MOTION TO RECONSIDER

held before the Honorable Kristi L. Harrington
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Charleston County Courthouse
Charleston, South Carolina
on Thursday, December 13, 2012, Commencing at 9:59 a.m.

SUSAN "MIA" PERRON, CVR-CM-M
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
Charleston, South Carolina 29417-1865
1-706-231-6028

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EXHIBITS

[None]

State v. James Moore
Motion to Reconsider
December 13, 2012

PROCEEDINGS

1
2 THE COURT: All right. We're on the record.
3 State of South Carolina v. James Moore. We're here on
4 a motion for reconsideration of sentence.

5 Ms. Linder, you're prepared to proceed?

6 MS. LINDER: Yes, Your Honor.

7 THE COURT: I'm assuming you take the position
8 the sentence was fair and appropriate?

9 MS. LINDER: Yes, Your Honor. The State's
10 position is that the sentence was fair and
11 appropriate. And, quite frankly, seventeen on a range
12 of fifteen to thirty is very much on the low end of
13 that. I'm happy, if Your Honor would like, to read
14 into the record his prior record if you would like.

15 THE COURT: All right. This was a third
16 offense; is that correct?

17 MS. LINDER: This was third offense under the
18 old law so it's a mandatory fifteen, minimum up to
19 thirty.

20 And also, Your Honor, I would just like to state
21 that Detective Shealy and the case agent were in
22 touch, was planning to come. They're actually doing
23 two search warrants as we speak, so he is unable. But
24 he also wanted me to pass along that law enforcement
25 opposes any sort of reduction in this case.

State v. James Moore
Motion to Reconsider
December 13, 2012

1 THE COURT: Thank you. Mr. King?

2 MR. KING: Thank you, Your Honor.

3 I had filed this motion because Mr. Moore wasn't
4 present for the trial so -- and he really didn't get a
5 chance to speak and his family missed the hearing,
6 sentencing, when he was arrested and never did really
7 get a chance to speak. So I really just wanted to
8 give an opportunity for them to speak because you
9 didn't really get a chance to find out much about
10 Mr. Moore at all except what you heard, you know, from
11 the State's case.

12 I had argued before sentencing that -- you know,
13 the mandatory minimum, my understanding, is fifteen.
14 I explained that to Mr. Moore. He got seventeen
15 years. We're asking you to consider the minimum of
16 fifteen.

17 And, you know, one of the arguments I had made
18 was that our legislature changed this law in 2010.
19 They -- you know, our legislature made it less
20 serious. So if he were to -- if he were arrested
21 probably just months later, he would only be looking
22 at a mandatory minimum of ten. So I think our
23 legislature --

24 THE COURT: And a maximum of?

25 MR. KING: And a maximum of thirty.

State v. James Moore
Motion to Reconsider
December 13, 2012

1 THE COURT: All right.

2 MR. KING: But I believe our legislature gave an
3 indication that maybe the penalties were too harsh,
4 too many years, and they reduced that down. So I
5 think that's something that should be considered, that
6 our legislature has determined that a minimum fifteen
7 is too harsh of a penalty.

8 And I know you gave him seventeen, Your Honor.
9 I know he has a prior record. But this was, you know,
10 .09 grams of cocaine base. It was a very small
11 amount. He wasn't, you know, arrested with a large
12 quantity of drugs. I don't believe that the State
13 would allege that he was any sort of major player in a
14 drug gang. So considering that, we would ask you to
15 consider a minimum of fifteen, and hear from him and
16 his family if they would like to speak. I believe
17 some of his family would like to speak.

18 THE COURT: When I imposed sentence, did I not
19 hear from Mr. Moore?

20 MR. KING: No, Your Honor. You said it would be
21 appropriate to file a motion to reconsider. That's
22 why I filed it.

23 THE COURT: All right. Mr. Moore, I'll be happy
24 to hear from you.

25 MR. MOORE: Your Honor, I throw myself at the

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1 mercy of the Court. I apologize to the Court for
2 missing my trial, but, Your Honor, as you can see, I
3 never missed a court date ever before. If I know I
4 was supposed to be at trial, I would have been here.
5 I didn't get no paperwork that -- saying that I'm
6 supposed to be here. I didn't get no paperwork at my
7 house or nothing, so I didn't know about the trial. I
8 would have been here, Your Honor. I never missed a
9 court date or -- never. I just --

10 THE COURT: Anything further, Mr. Moore?

11 MR. MOORE: Ma'am, I'm just asking you for
12 leniency, ma'am.

13 THE COURT: I will hear from one family member,
14 Mr. King.

15 MR. KING: This is Ms. Linda Moore, his mother,
16 Your Honor.

17 THE COURT: All right. Ms. Moore, I need you to
18 state your full name for the record. And please spell
19 your last name.

20 MS. MOORE: My name is Linda Moore. Spell my
21 last name?

22 THE COURT: Yes, ma'am. Just for the record.

23 MS. MOORE: M-O-O-R-E.

24 THE COURT: Thank you.

25 MS. MOORE: I'm the mother of James Moore.

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1 That's my son. And my son is a good young man. And
2 my son is -- my son is -- after all of this my son has
3 been changing his life around. And before this
4 happened, he was -- applied to a job to go to work, do
5 construction work. He have five -- he have four kids.
6 He has a step-daughter right here. She's outside.
7 And that's his fiancé. He's planning to be married.
8 But he has changed his life, have turned around, and I
9 ask you today for your mercy.

10 THE COURT: Thank you for being here, Ms. Moore.
11 Mr. King, does the fiancé wish to address the Court?

12 MR. KING: Yes, ma'am, if you'll allow it.

13 THE COURT: All right. The same thing. I need
14 you to state your full name for the record and please
15 spell your last name.

16 MS. HOLMES: My name is Lathee [phonetic]
17 Holmes. H-O-L-M-E-S is my last name.

18 THE COURT: Thank you, Ms. Holmes.

19 MS. HOLMES: I want to speak on behalf of James.
20 James is a good guy. He had a previous record but
21 he's now turned his life around before this happened.

22 And, actually, he didn't even have a court paper
23 saying that he had to have been at trial that day.
24 When trial was going on, it was a officer at the
25 house. I was at work. And my stepmother was there

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1 saying that James had to -- they had a warrant for his
2 arrest due to not showing up for court. But
3 otherwise, James is a good guy. Me and James was
4 getting married on August 17th until this happened.

5 THE COURT: Thank you, Ms. Holmes.

6 MS. HOLMES: Uh-huh.

7 THE COURT: Anything further, Mr. King?

8 MR. KING: No, Your Honor.

9 THE COURT: Mr. King, I recall -- and just so
10 the record is correct, we called this case maybe on a
11 Wednesday, that Mr. Moore had been present on Monday
12 and you indicated that it was likely that this would
13 be called for trial. Is that a correct recollection?

14 MR. KING: Yes, Your Honor.

15 THE COURT: All right. And I believe before we
16 began this trial, we even broke over the evening hour.
17 Is that -- did we break to allow him to show up?

18 MR. KING: We did pretrial motions on Wednesday
19 afternoon and we picked the jury on Thursday morning.

20 THE COURT: And did -- how many attempts did you
21 make for Mr. Moore to let him know that we were
22 selecting his jury?

23 MR. KING: I did try to call him and I reached
24 him on Wednesday afternoon and talked to him on the
25 phone.

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1 THE COURT: And indicated that we were in the
2 process of a jury trial?

3 MR. KING: Yes, Your Honor.

4 THE COURT: Anything further, Mr. King?

5 MR. KING: No, Your Honor.

6 THE COURT: Mr. King -- and I may have said this
7 before, but for the benefit of Mr. Moore and for his
8 family members, you were a very zealous advocate on
9 behalf of Mr. Moore, even though he chose not to show
10 up for court. And I recall giving him every
11 opportunity, and breaking, so that you could have him
12 present. You did all the appropriate pretrial motions
13 and were a very zealous advocate on behalf -- and gave
14 him a very vigorous defense, even though Mr. Moore
15 chose not to show up.

16 I based my sentence not on the fact that he was
17 or was not here, although I did not hear from him.
18 Seventeen years was a very appropriate sentence,
19 considering his past record. And I did take into
20 account the legislature's reducing of the mandatory
21 minimum. Seventeen years, based upon the facts as
22 presented, the jury's verdict, and as well as
23 Mr. Moore's prior record, is more than appropriate. I
24 do not find that it was unnecessarily severe under
25 either the law that he was charged on or the current

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1 law. But I did sentence him applicable to the law
2 that he was arrested and in place at the time. I
3 am -- I have reconsidered the -- I'm considering the
4 sentence, but I am not changing. The order of the
5 Court stands, the sentence of seventeen years.

6 Good luck to you, Mr. Moore.

7 MS. LINDER: Thank you, Your Honor.

8 THE COURT: Thank you. Anything further?

9 Mr. Moore, now that I have reconsidered the
10 sentence, you have ten days to file your appeal.
11 Because Mr. King has gone above and beyond by filing a
12 motion to reconsider, so that the appeal -- your
13 appeal rights are now ticking. Do you understand what
14 that means? You have ten days to file your motion for
15 appeal.

16 MR. MOORE: Yes, Your Honor.

17 THE COURT: Thank you.

18 You have gone over that with him, Mr. King?

19 MR. KING: Yes, Your Honor.

20 THE COURT: All right. Thank you. Anything
21 further, Ms. Linder?

22 MS. LINDER: Nothing further.

23 THE COURT: Thank you.

24 [HEARING CONCLUDES AT 10:07 A.M.]

25

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C E R T I F I C A T E

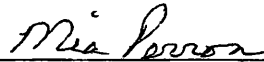
STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the motions hearing held before the Honorable Kristi L. Harrington, on Thursday, December 13, 2012.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 15th day of August, 2013.



Mia Perron, CVR-CM-M
Circuit Court Reporter
9th Judicial Circuit

MIA PERRON, CVR-CM-M

-12-

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge

RECEIVED

JUL 25 2014

SC Court of Appeals

Case No. 2012-213734

The State of South Carolina, ... Respondent,
v.
James Lamont Moore, ... Appellant.

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STATEMENT OF THE ISSUES ON APPEAL

- I. The trial court abused its discretion by denying Appellant counsel's motion *in limine* to redact statements in the State's video exhibit because the statements improperly weighed on Appellant's character and prior bad acts, and the probative value of the statements was substantially outweighed by the unfair prejudice caused to Appellant.**
- II. The trial court abused its discretion by denying Appellant's motion for mistrial after the State's witness blurted out, "he guilty," and the trial court's curative instruction could not, and did not, cure the prejudice caused to Appellant.**
- III. The trial court improperly allowed Appellant to be tried in absentia.**

STATEMENT OF THE CASE

Appellant was indicted by a grand jury for distribution of crack cocaine in the November 2009 Term of the Charleston County Court of General Sessions. (True Bill and Indictment, ROA 2). Appellant was tried in his absence on October 18, 2012 by the Honorable Kristi L. Harrington and a jury. Stephanie Linder and Randall Stoney represented the State of South Carolina ("The State"). Jason King represented Appellant. Appellant was found guilty as charged under S.C. Code Ann. § 44-53-375. (See Verdict Form, ROA 1). Judge Harrington sentenced Appellant to seventeen (17) years in prison. (See Sentence Sheet, ROA 7). On December 12, 2012, Judge Harrington denied Appellant's motion to reconsider the sentence. (Motion to Recons., ROA 200). This Appeal followed.

STANDARD OF REVIEW

“An abuse of discretion occurs when the trial court’s ruling is based on an error of law.” *State v. Cope*, 405 S.C. 317, 334-35, 748 S.E.2d 194, 203 (2013). The standard of review for whether the trial court properly admitted evidence a defendant's “prior bad acts” is an abuse of discretion standard. *State v. Mathis*, 359 S.C. 450, 462, 597 S.E.2d 872, 878 (Ct. App. 2004). The standard of review for the denial of a motion for mistrial is an abuse of discretion standard. *State v. Bantan*, 387 S.C. 412, 420, 692 S.E.2d 201, 205 (S.C. Ct. App. 2010).

ARGUMENT

- I. **The trial court abused its discretion by denying Appellant counsel's motion *in limine* to redact statements in the State's video exhibit because the statements improperly weighed on Appellant's character and prior bad acts, and the probative value of the statements was substantially outweighed by the unfair prejudice caused to Appellant.**

The State presented a fifteen minute video, which captured the alleged drug buy as a trial exhibit. (ROA 86; State's Exh. 3). The State played this video on three separate occasions, twice during the State's case in chief and once during Appellant's pre-trial motions. (ROA 86, 136). The video contained a conversation between law enforcement and the confidential informant Joseph Ancrum ("Mr. Ancrum") en route to the location previously targeted by law enforcement. (*Id.* at 25). The conversation lasted approximately six minutes and a half minutes. (*See* State's Exh. 3 0:00-6:30). Upon exiting the car, Mr. Ancrum began to narrate his experience to law enforcement. (*Id.* at 7:32-15:10).

Appellant's trial counsel moved *in limine* to redact portions of the video based on the fact that (1) the conversation constituted improper comments on Appellant's character and (2) that any probative value of the video recorded conversation was substantially outweighed by unfair prejudice to Appellant. (ROA 24-30). The trial court denied Appellant's motion and did not

redact any of the statements in the video made by the officers or by Mr. Ancrum. (*Id.* at 47). Counsel for Appellant renewed his objection to the video during trial. (*Id.* at 86). Over the objection of Appellant's counsel, the trial court allowed the State to present the video for the jury both while Mr. Ancrum and Detective Jonathan Shealy were on the witness stand. (*Id.* at 86, 136).

A. The trial court's failure to redact the statements that Appellant was "always hollering" at Mr. Ancrum violated Rule 404 of the South Carolina Rules of Evidence.

Rule 404(b) of the South Carolina Rules of Evidence provides that, as a general rule, evidence of a defendant's "other crimes, wrongs, or acts" is not admissible to prove "the character of a person in order in order to show action in conformity therewith." Rule 404(b), SCRE. The trial court improperly allowed the following conversation regarding Appellant's prior bad acts:

Officer: I'm going to drop you off at the same spot . . . you know that house right across from that gas station the boys always holler at you?

Mr. Ancrum: Oh you want that one?

Officer: Yep.

Mr. Ancrum: If he out there.

Officer: Yep. He be always out there . . . always hollering at you right there right across from that gas station.

Mr. Ancrum: Yeah . . . Oh you talking about the one holler at me all the time when I go through there on the left-hand side?

Officer: First intersection.

Mr. Ancrum: Yeah, okay.

(State's Exh. 3 at 1:12-1:44).

During Appellant's motion *in limine*, the trial court posited whether "hollering" was more of a salutation than a solicitation of a drug purchase. (ROA 43). The trial court reasoned, "I'm concerned because I like to work in my yard and when my neighbors walk by I holler at them, and so is that to assume that I'm – I mean, that's where I'm getting at." (*Id.*). The State argued, "I holler at my neighbors when they go by, have a baby, they walk by with a stroller. I holler at those people, some people holler at me." (*Id.* at 45).

Appellant's counsel correctly argued, albeit unsuccessfully, that in this context, the only logical implication was that "hollering" meant solicitation of a drug purchase. (*Id.* at 32-33). As Appellant's counsel noted:

"If they are just out there saying, 'Hey, how you doing,' just yelling and being friendly, that wouldn't give the police a reason to make them investigate. It's the context of the whole video becomes clear what that means. Just taking the statement isolated [] hollering doesn't necessarily mean that but it becomes clear that's what that means when you watch the whole video and hear all the statements, and when you think about why would the police – why would the police send the informant to go – why are they even guarding him to go send the informant to him? Because they are out there selling drugs . . . [i]t's just not as innocent as they are out there hollering greetings, or . . . there would be no reason to try to buy drugs from someone who is just being friendly. That doesn't raise any suspicion at all.

(*Id.* at 43-44).

Other statements in the video confirm that Mr. Ancrum and law enforcement meant "solicitation of drug purchases" by use of the term "hollering." During Mr. Ancrum's narration of the drug buy, Mr. Ancrum stated, "[h]e getting ready to go up the street to go get the one with the blue cast on . . . [t]hat the same guy that be in the yard all the time, be yelling at me . . . [t]hat where he going." (State's Exh. 3 at 9:43-10:09). Later in the video, Mr. Ancrum states, "Yeah. Okay. I can thank you. I'll holler back" in the context of contacting the person again for drugs in the future. (*Id.* at 11:06-11:25).

The trial court abused its discretion because these statements improperly weigh on Appellant's character and call into question Appellant's prior bad acts. "It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual." *State v. Coleman*, 301 S.C. 57, 60 389 S.E.2d 659, 660 (1990). Moreover, "[t]he inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." *State v. Wilson*, 274 S.C. 635, 637, 266, S.E.2d 426, 427 (1980). In a criminal case, the State cannot attack the character of the defendant unless the defendant himself or herself first places his or her character in issue. *State v. Bostic*, 307 S.C. 226, 414 S.E.2d 175 (1992).

The Supreme Court offered guidance with respect to the admissibility of "prior bad acts" in *State v. Fletcher*, 379 S.C. 17, 664 S.E.2d 480 (2008) as follows:

Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Pagan*, 369 S.C. 201, 631 S.E.2d 262 (2006); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must *logically* relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. *Id.*; *State v. Beck*, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000).

Id. at 23-24, 664 S.E.2d at 483 (emphasis added) (holding that the defendant's alleged prior bad acts were inadmissible absent "clear and convincing evidence" that the defendant committed the prior bad acts.).

In this case, Mr. Ancrum's conversation with law enforcement that "the boys always holler at [Mr. Ancrum]" and "[he] be always out there . . . always hollering at [Mr. Ancrum]" in the context of a prospective drug buy, is a direct reference to Appellant's prior bad acts, namely that the Appellant "always" solicited Mr. Ancrum to purchase drugs. These statements, coupled

with Appellant's cocaine distribution charge, improperly suggest that Appellant acted in conformity with the asserted bad character and criminal propensity. Furthermore, the conversation between law enforcement and Mr. Ancrum occurred well before law enforcement dropped off Mr. Ancrum to walk to the targeted location. (See State's Exh. 3 at 1:12-1:44). By asserting that Appellant was "always" out there "hollering," the officers and Mr. Ancrum cast aspersions that Appellant had a prior history of soliciting drug purchases. These statements logically relate to the crime for which Appellant was charged. Therefore, the trial court improperly allowed the State to offer these statements to the jury.

B. The trial court abused its discretion by allowing the statements that Appellant was "the one that caused all the problems."

Several minutes into the video, before Mr. Ancrum exited law enforcement's vehicle, an occupant in the vehicle identified who he believed to be Appellant stating "one of those guys has a cast on . . . [t]hat's the one that caused all the problems." (State's Exh. 3 at 6:01-6:17). The State's main theory of the case was that Appellant wore a cast. In the State's closing argument, the assistant solicitor made the following comments:

You can watch the video, I can watch the video, law enforcement can testify, Joseph testified. Who is the guy in the blue arm cast? *That's what it comes down to.* Who is the guy in the blue arm cast? You heard not one, not two but three officers tell you who the guy in the blue arm cast is. The guy in the blue arm cast is James Lamont Moore.

(ROA 154) (emphasis added); (see also *id.* at 29, 117-18; 154-55, 183, 201). Similar to the statements regarding Appellant's criminal propensity to solicit drug sales, the statement that Appellant "caused all the problems" improperly weighed on Appellant's character and called into question Appellant's unspecified bad acts. The declarant never clarified what "problems" Appellant "caused." Rather, by admitting this statement, the trial court left the matter for the intrigue of the jury.

German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996) is similar to this case. In *German*, two agents performing undercover drug operations received tips that Mr. German "was distributing or selling crack cocaine." 325 S.C. at 26, 478 S.E.2d at 688. The agents received identifiable information about Mr. German, specifically that "[h]e had a large cast on his arm. It was a very ornate cast." *Id.* The Supreme Court held that the statements were improper comments on Mr. German's character because the statements specifically referenced Mr. German. *German*, 325 S.C. at 27, 478 S.E.2d at 688. The court remanded the case for a new trial, finding that defense counsel's failure to object to the improper character statements prejudiced Mr. German. *German*, 325 S.C. at 28, 478 S.E.2d at 688. Moreover, the Court distinguished its holding in *German* from *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994). In *Brown*, the Court held that statements offered to prove why the police began surveillance did not amount to hearsay because the statements were not offered to prove the truth of the matter asserted. 317 S.C. at 63, 451 S.E.2d at 894. Namely, the statements in *Brown* referred to "drug activity in the apartment complex in which the defendant lived." *German*, 325 S.C. at 28, 478 S.E.2d at 688.

This identifying information, which the Court held improperly weighed on the defendant's character in *German*, is strikingly similar to the information Appellant's counsel moved to exclude. The statements attributed to Appellant as "that one" and "the one holler at me" and then later "one of those guys has a cast on . . . [t]hat's the one that caused all the problems" violates Rule 404.

C. The trial court failed to employ a "clear and convincing" standard to exclude character evidence presented in the video testimony and improperly relied on the present sense impression exception to hearsay.

As basis for denial of Appellant's motion to exclude improper statements in the State's video exhibit, the trial court stated as follows:

I have observed the video and then both of you know that prior to taking the bench I did prosecute drug offenses, and based upon my review of the video there is nothing that causes me any concern that that's the automatic implication that I go to. I have never heard that expression in any other drug case that I either prosecuted or have presided over during the last few years on the bench. . . . And so I deny your motion that it's improper character evidence because I do not think that it's a comment on anyone's character, let alone [Appellant]. I do find that based upon my observation of the video and reading the rules that it is clearly a present sense impression . . .

(ROA 47).

The trial court incorrectly applied the "clear and convincing" standard necessary for evidence of prior bad acts. Rather, the trial court's basis for admitting the entire video exhibit was that "nothing" caused the trial court "any concern" that the statements made by Mr. Ancrum and law enforcement gave the "automatic implication" that the State called Appellant's, or "anyone's," prior bad acts into question. (*Id.*). The record does not indicate whether the trial court considered any exception to Rule 404(b) in making its ruling. As set forth above, the video statements logically relate to the Appellant and to the crime for which Appellant was charged.

Furthermore, the trial court cited "present sense impression" exception to the rule on hearsay, SCRE Rule 803(1), as basis to admit the video in its entirety. Rule 803(1) provides that "a statement describing or explaining an event or condition" is admissible if "made while the declarant was perceiving the event or condition, or immediately thereafter." Rule 803(1), SCRE; *See also State v. Garcia*, 334 S.C. 71, 77, 512 S.E.2d 507, 510 (1999) (holding that the trial court erred in admitted testimony when "there was no indication of when Appellant had "kicked or threatened the deceased.").

In *Wilson v. Childs*, this Court affirmed the trial court's exclusion of testimony of statements made by a decedent just before his death as inadmissible hearsay. 315 S.C. 431, 434 S.E.2d 286, 292 (Ct. App. 1993). This Court reasoned that because the decedent made the

statement in reflection of a past event, the statement did not qualify as a present sense impression. *Wilson*, 315 S.C. at 439, 434 S.E.2d at 291-92.

In this case, the first six and a half minutes of the State's video exhibit consists of a conversation between Mr. Ancrum and law enforcement. (See State's Exh. 3 at 0:00-6:31). The statements in that conversation were not made while the declarants perceived an event, namely the purchase of drugs, but rather consisted of details in reflection of past events. The statements that Appellant, or his associates, "always holler[ed]" at Mr. Ancrum and that the person suspected to be the Appellant "ha[d] a cast on" and "caused all the problems" were not made while "perceiving the event or condition, or immediately thereafter." In addition, after completing the alleged transaction Mr. Ancrum stated to the officers, "I get it from the dude with the cast on." This statement occurred three and a half minutes after the event occurred and while Mr. Ancrum had reached a point of safety in law enforcement's vehicle. (See State's Exh. 3 14:30-14:40).

Based on the above, the trial court incorrectly extended the present sense impression exception to hearsay to statements reflecting on past events concerning Appellant's character.

D. The probative value of the statements, taken collectively, were substantially outweighed by the unfair prejudice caused to Appellant under Rule 403 of the South Carolina Rules of Evidence.

The statements made by law enforcement and Mr. Ancrum in the video compounded on one another and caused Appellant unfair prejudice under SCRE, Rule 403. As the Supreme Court summarized in *State v. Fletcher*:

Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); *State v. Gillian*, 373 S.C. 601, 646 S.E.2d 872 (2007); *State v. Braxton*, 343 S.C. 629, 541 S.E.2d 833

(2001). The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364, *cert. denied*, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

379 S.C. at 23-24, 664 S.E.2d at 483. Moreover, "[u]nder our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal immoral acts." *State v. Gore*, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984). "When as here, a previous alleged bad act is strikingly similar to the one to which the defendant is being tried, the danger of prejudice is enhanced. *Gore*, 283 S.C. at 121, 322 S.E.2d at 13.

In *State v. Bostic*, an individual hired by the police to make drug buys testified that he had bought crack cocaine from the defendant at a variety store. 307 S.C. at 227, 414 S.E.2d at 176. A police officer providing testimony for the State blurted out that he had "intelligence" before the drug buy that the "defendant had been selling crack cocaine from the store." *Id.* "His statement was not in response to any question." *Id.* The Supreme Court held that the probative value of the evidence in the case was "greatly diminished by its very nature because the police officer did not claim to have first hand knowledge that the defendant had previously sold crack cocaine." 307 S.C. at 229-30, 414 S.E.2d at 177. Instead, "he based his testimony to this effect on something he referred to, nebulously, as 'intelligence.'" *Id.* at 230, 414 S.E.2d at 177. The Court concluded that the "probative value of his testimony was substantially outweighed by its prejudice." *Id.*

In this case, the probative value of the statements captured in the video are substantially outweighed by the prejudice caused the defendant. The "intelligence" of law enforcement and Mr. Ancrum that Appellant was "always" out there "hollering" and that Appellant "ha[d] a cast on" and "caused all the problems" is equally nebulous and prejudicial. The trial court erred by

failing to exclude these statements because probative value of these statements were substantially outweighed by the unfair prejudice caused to Appellant.

II. The trial court abused its discretion by denying Appellant's motion for mistrial after the State's witness blurted out, "he guilty," and the trial court's curative instruction could not, and did not, cure the prejudice caused to Appellant.

A. The trial court erred in failing to grant Appellant's motion for mistrial.

"A motion for a mistrial is, by its very nature, both an allegation of error and an allegation of prejudice sufficient to warrant a mistrial." *State v. Wilson*, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010). "A mistrial should only be granted when absolutely necessary, and movant must show both error and prejudice in order to be entitled to a mistrial" and "the determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *Wilson*, 389 S.C. at 585-86, 698 S.E.2d at 865-66. A party must make a contemporaneous objection for an alleged error to be the basis of a mistrial motion. *State v. Sosebee*, 284 S.C. 411, 413, 326 S.E.2d 654, 655 (1985).

In this case, during the State's redirect examination of Mr. Ancrum blurted "he guilty" in direct reference to Appellant. (ROA 105). The State asked Mr. Ancrum about an affidavit that he signed in a previous case admitting to his dishonesty about statements he made about a criminal defendant at trial. (*Id.* at 100-105). Mr. Ancrum explained the circumstances surrounding the previous situation and took the opportunity to comment on Appellant's guilt:

A: Yeah, I buy drugs from him, but I lied. Yeah, I did the wrong thing when I signed that paper but he know he guilty, and his lawyer know he guilt. Just like the guy who supposed to be on trial here, he guilty --

Q: Joseph. Joseph.

A: That's all I got to say.

(*Id.* at 105). Counsel for Appellant promptly objected to Mr. Ancrum's statements and asked the trial court for a curative instruction. (*Id.*). The trial court instructed the jury to "strike the last statement from your notes" and asked the foreperson not to consider Mr. Ancrum's statement in the jury's deliberations. (*Id.*). Upon a brief recess, Appellant's counsel moved for a mistrial:

Based on the last statement by Mr. Ancrum on the stand I would make a motion for a mistrial. I know I requested a curative instruction but I don't believe that this is enough to cure any prejudice caused to Mr. Moore and would ask you to grant a mistrial.

(*Id.* at 116). The trial court denied the motion for mistrial. (*Id.* at 117). Appellant's counsel renewed the motion for mistrial following the trial. (*Id.* at 182).

The trial court abused its discretion by failing to grant the motion for mistrial based on the facts of this case and the circumstances surrounding Mr. Ancrum's unsolicited remarks that Appellant was "guilty." Mr. Ancrum cooperated with law enforcement "about over 20 years or longer." (ROA 81). Law enforcement compensated Mr. Ancrum for his work. (*Id.* at 78, 84). At the time of this trial, Mr. Ancrum had made between one "hundred and two hundred" drug buys in his work with law enforcement. (*Id.* at 94). According to the Detective Charles Grill, Detective Grill had "worked with [Mr. Ancrum] a good bit" and that Mr. Ancrum "knows what he's supposed to do." (*Id.* at 77-78). Mr. Ancrum arrived "every time" at his assigned "pick up spot." (*Id.* at 132). Mr. Ancrum would "call [law enforcement] when instructed." (*Id.*). "In the past all the operations" that law enforcement "conducted with [Mr. Ancrum]" proved "successful." (*Id.*). With this background, coupled with the improper video statements, Mr. Ancrum's comments on the Appellant's guilt made an irreversible impact on the jury such that the trial court abused its discretion by failing to grant a mistrial.

B. The trial court's curative instruction was not sufficient to cure the prejudice suffered by the defendant.

In opposition to the motion for mistrial, the State argued that the trial court's curative instruction sufficiently prohibited any potential prejudice suffered by Mr. Moore. (ROA 116-17). The court offered to "review the context and make sure that the curative instruction" sufficed and to examine whether "any further instruction" in the charge was necessary at a later time. (*Id.* at 117). However, nothing in the record indicates that the trial court specifically revisited Mr. Ancrum's indictment of Appellant other than to state in the charge to the jury "if there was any testimony that was ordered stricken from the record you must disregard that testimony." (*Id.* at 164-65).

An instruction to the jury to disregard objectionable evidence *usually* cures the error of admitting the evidence unless, on the facts of the particular case, it is probable prejudice exists notwithstanding such an instruction. *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985) (emphasis added). By use of the word "usually" this Court has recognized that this is the general rule and that this rule is not absolute. Mr. Ancrum blurted out "he guilty," the State intervened, yet he added "that's all I got to say." No instruction to the jury could repair the prejudicial damage caused to Appellant. These intentional statements could not be removed from the minds of the jury and the trial court's instruction to the jury could not, and did not, cure prejudice caused to Appellant.

III. The trial court improperly allowed Appellant to be tried in absentia.

Appellant's trial was originally scheduled for the November 2009 term of the Charleston County Court of General Sessions. (*See* ROA 2). The record does not provide specific guidance on the circumstances related to the continuance of the original trial date. However, Appellant appeared in court on Monday, October 15, 2012. (ROA 12).

Appellant's trial did not go forward on Monday and the trial was continued to Wednesday October 17, 2012 at 2:30 p.m. (*Id.*). Appellant's counsel tried to reach Appellant, who at the time was on bond, by phone on Tuesday October 16, 2012 without success. (*Id.* at 13). Appellant's counsel previously informed Appellant that the trial would go forward either Monday October 15, 2012 or October 17, 2012. (*Id.* at 14). However, Appellant's counsel "had no luck" for "two days" in reaching Appellant but that Appellant "had shown up before . . . every time." (*Id.* at 15). The trial court "pass[ed] the case until 3:50[p.m.]" on October 17, broke for recess, and Appellant had not arrived when the trial court reconvened. (*Id.* at 17).

The trial court signed a bench warrant for Appellant's arrest. (*Id.*). Appellant's counsel expressed that Appellant "told [counsel] he was on his way" but that Appellant "was still looking for a ride [to court]." (*Id.* at 18). The trial court then heard pre-trial motions in Appellant's absence. (*Id.* at 19). Before breaking on Wednesday the trial court stated "regardless of what happens, be prepared to call the case at 9:30 a.m [Thursday, October 18, 2012]." (*Id.* at 49).

On Thursday, Appellant was not in court. (*Id.* at 50). The Charleston Police "put out a wanted flyer" for Appellant the previous evening but did not locate Appellant. (*Id.*). The trial court noted Appellant's objections not to proceed but elected to proceed in Appellant's absence because Appellant "knew that he was second up and close that we were going to have time to pick a jury this week for this case." (*Id.* at 50-51). Appellant's counsel agreed that Appellant knew he was second on the trial list but didn't think that Appellant "believed it was actually going to happen because of the history of the case and the fact it's been on the docket many times." (*Id.* at 53). Appellant's counsel agreed that "there was no indication that the case was not going to be called." (*Id.*)

After the jury was sworn, the State called three witnesses to testify, and then the trial entered a brief recess for lunch. (*Id.* at 118). When trial resumed, the trial court asked whether Appellant's counsel was able to reach Appellant to which Appellant's counsel replied, "I haven't heard anything . . . at this point any damage of him not being here has been done . . ." (*Id.*). The trial concluded without the presence of Appellant.

At Appellant's Sentencing Hearing, Appellant's counsel moved for "a new trial so [Appellant] can be present for trial." (*Id.* at 190). The trial court denied the motion for a new trial. (*Id.*). Appellant's counsel agreed that Appellant received proper notice. (*Id.*).

Appellant's counsel moved to reconsider Appellant's sentence. (*Id.* at 194). Appellant's counsel explained that he had reached Appellant by phone on Wednesday, October 17, 2012. (*Id.* at 199). The trial court heard from Appellant regarding his absence from the trial and Appellant explained the following:

I apologize for missing my trial, but, Your Honor, as you can see, I never missed a court date ever before. If I know I was supposed to be at trial, I would have been here. I didn't get no paperwork – saying that I'm supposed to be here. I didn't get no paperwork at my house or nothing, so I didn't know about the trial. I would have been here, Your Honor.

(*Id.* at 197). In addition, Appellant's fiancé stated that Appellant did not receive court papers reflecting the date and time of the trial. (*Id.* at 198).

In order for a criminal defendant to be tried in absentia, certain requirements must first be met. *State v. Truesdale*, 345 S.C. 542, 548 S.E.2d 896 (Ct.App. 2001). Rule 16, of the South Carolina Rules of Criminal Procedure provides:

Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.

Rule 16, SCRCrimP.

A trial judge must determine whether a defendant voluntarily waived his right to be present at trial in order to try the case in absentia. *State v. Ritch*, 292 S.C. 75, 354 S.E.2d 909 (1987). Specifically, the trial judge must make findings of fact on the record that the defendant (1) received notice of his right to be present, and (2) was warned that the trial would proceed in his absence should he fail to attend. *State v. Jackson*, 288 S.C. 94, 96, 341 S.E.2d 375 (1986).

In this case, although the record indicates that Appellant appeared for trial on Monday, October 15, 2012, the record does not indicate whether Appellant was specifically warned that the trial would proceed other than to state that Appellant spoke with Appellant's counsel on Wednesday, October 17, 2012. Appellant should not be bound by this because the record does not fully address whether Appellant was actually warned before the trial proceeded.

As a result, this Court should reverse and remand this case for a new trial.

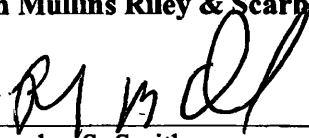
CONCLUSION

The trial court erred by allowing the State to introduce testimony captured by the State's video exhibit that improperly weighed on Appellant's character and caused Appellant to suffer unfair prejudice. The trial court erred by failing to grant a mistrial after the State's witness blurted out that Appellant was guilty. Appellant was improperly tried in absentia. For the foregoing reasons, Appellant requests that this Court reverse and remand for a new trial.

(Signature on following page)

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the 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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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge

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JUL 25 2014

SC Court of Appeals

Case No. 2012-213734

The State of South Carolina, ... Respondent,
v.
James Lamont Moore, ... Appellant.

PROOF OF SERVICE

I certify that a true copy of the **Final Brief of Appellant** in the above referenced case has been served upon Christina J. Catoe, Esquire, at 1000 Assembly Street, Room 519, Columbia, SC 29201.

This 25th day of July, 2014

By: _____

Robert M. Dudek

SUBSCRIBED AND SWORN TO before me this 25th day of July, 2014.

Robert M. Dudek (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022

ORIGINAL 277

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2012-213734

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES LAMONT MOORE,

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JUL 25 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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The Honorable Kristi L. Harrington, Circuit Court Judge

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not abuse its discretion in admitting certain statements in the video of the drug buy where the challenged statements did not specifically refer to any prior bad acts of Appellant and the statements were far too vague and ambiguous to constitute impermissible prior bad act evidence under Rule 404(b), SCRE, or to prejudice Appellant to such an extent that a new trial is required.**
- II. Appellant's mistrial issue is not preserved for appellate review where Appellant objected to the challenged testimony but then failed to make a contemporaneous objection to the sufficiency of the curative instruction and only later, after other evidence was presented, made a motion for mistrial; but, in any event, the extreme remedy of a mistrial was not warranted under the circumstances of Appellant's case.**
- III. Appellant's contention on appeal that he was improperly tried in his absence is not preserved for appellate review and is without merit in any event where the record establishes that Appellant received the appropriate notice and warnings.**

STATEMENT OF THE CASE

Appellant was indicted in Charleston County in November of 2009 for distribution of crack cocaine. On October 17-18, 2012, Appellant was tried in his absence before the Honorable Kristi L. Harrington and a jury. The jury found Appellant guilty as indicted, and Judge Harrington sealed the sentence. On November 16, 2012, Appellant appeared before Judge Harrington and a sentence of seventeen years was imposed. Judge Harrington denied Appellant's motion to reconsider following a hearing on December 13, 2012. A timely notice of appeal was served and filed.

ARGUMENT

Background

Appellant was indicted in November 2009 in Charleston County for distribution of cocaine base in relation to a drug transaction that occurred on July 16, 2009. (See R. p. 2). The case was called for trial on Wednesday, October 17, 2012. (R. p. 8). At the outset of trial, Appellant was not present, and the trial judge inquired about Appellant's location. (R. p. 12). Defense counsel stated that Appellant was out on bond and noted that he had been present that Monday, the first day of the term of court. (R. p. 12-14). Counsel indicated that he had been unable to reach Appellant on his cell phone Monday and Tuesday, but was able to leave a voice mail message that morning instructing Appellant to be at the courthouse at 1:00 pm for his trial. (R. p. 12-13). Counsel also indicated that Appellant's bondsman had been unable to locate Appellant at the place where Appellant supposedly worked. (R. p. 13). Counsel indicated he would prefer that the court issue a bench warrant for Appellant rather than going forward with the trial in Appellant's absence. (R. p. 14-15). The court issued a bench warrant at that time and continued the case until later in the day. (R. p. 17).

Later that afternoon, Appellant was still not present. (R. p. 17-18). When the judge asked defense counsel about Appellant's intentions, defense counsel stated "I don't believe he's coming." (R. p. 17, lines 19-21). Counsel then stated that he had informed Appellant that he would be "locked up" if he did not show up for court and that "possibly the trial might continue as well." (R. p. 17, line 25 – p. 18, line 3). Counsel further elaborated that "I don't think he's coming from the conversation I had with him." (R. p. 18, lines 3-4). He explained that he had a conversation with Appellant over the break

wherein Appellant claimed to be in Mount Pleasant looking for a ride but stated he was on his way to court. (R. p. 18, lines 4-9). Appellant also said he was on his way and would be there in fifteen minutes. (R. p. 18, lines 9-11). Subsequent to that, Appellant again told counsel over the phone that he was still looking for a ride. (R. p. 18, lines 14-15). Counsel reiterated that "I don't believe that he's coming. I honestly don't." (R. p. 18, lines 15-16). Counsel again urged the judge to not go forward with the case. (R. p. 18, lines 18-20). The judge noted counsel's objection but stated that, at a minimum, the pre-trial hearings were going forward. (R. p. 18-19). The judge also noted that she was hoping the bench warrant would be effectuated some time that day and that the trial could proceed with Appellant present the following day. (R. p. 19, lines 15-17).

Thereafter, pre-trial motions were heard. One of the defense's motions was to redact portions of the drug buy video. (See R. p. 24-29). Defense counsel argued that statements in the video referring to a location where people were "hollering" at the confidential informant were improper comments on Appellant's character because the statements implied that Appellant was "always out there trying to sell drugs."¹ (R. p. 25-27). The solicitor responded by pointing out that the statements regarding people "hollering" pertained to multiple people at a particular location and that the statements did not implicate Appellant's character. (R. p. 29; p. 33-34; p. 45-46). Defense counsel then acknowledged that "it's not outright stated that [Appellant is] trying to sell – always out there trying to sell drugs" but asserted it was implied that Appellant was yelling or "hollering" trying to sell drugs. (R. p. 30, lines 6-20). Counsel also argued that Rule 403, SCRE, precluded the evidence because there was a danger that the jury would

¹ Defense counsel also argued that certain statements in the video were inadmissible prior consistent statements that would improperly bolster the confidential informant's testimony. (R. p. 27-28). This specific issue is not being raised on appeal.

“misinterpret” the “hollering” statements and this would unfairly prejudice Appellant. (R. p. 46-47).

After watching the drug buy video (R. p. 32, line 19), the judge stated that she did not know of any drug-related reference that could be inferred from the use of the word “hollering” and stated that she had never heard the word connected with drug use or drug selling. (R. p. 42, lines 20-22). She indicated that she “hollered” at neighbors or passersby when she worked out in her yard. (R. p. 43, lines 15-18). The judge stated that, based upon her review of the video, there was nothing that indicated to her that the “hollering” statements implied that the persons who “hollered” were soliciting drug transactions. (See R. p. 47, lines 4-8). The judge then ruled as follows:

I have never heard that expression in any other drug case that I either prosecuted or have presided over during the last few years on the bench. And based upon that I do not, in doing – and I’m glad you brought up Rule 403. I do not find that there’s any undue prejudice. That [hollering was related to drug transactions] was not my assumption[] even knowing that that’s what you were challenging. And so I deny your motion that it’s improper character evidence because I do not think that it’s a comment on anyone’s character, let alone your client. (R. p. 47, lines 9-18).²

After more pre-trial issues were discussed, the case was recessed until the next day. (See R. p. 48-50). The next day, upon prompting from the judge, defense counsel announced that Appellant was still not present. (R. p. 50). The solicitor then argued that this was a “quintessential TIA” and that Appellant willfully failed to show up for trial. (R. p. 50, lines 9-21). The trial judge stated she was noting defense counsel’s objection that he “did not wish to go forward” but that the trial was going to commence in Appellant’s absence because the case had been on the trial docket, Appellant had been

² In a subsequent ruling, the judge appeared to address defense counsel’s second argument regarding improper prior consistent statements and found that statements made by the confidential informant in the video constituted present sense impressions. (See R. p. 47, line 19 – p. 48, line 3). *See infra* at footnote 5.

informed of this, and Appellant had been in court on Monday of that week and was aware that his case was “second up” for trial. (R. p. 50, line 22 – p. 51, line 1).

Following jury selection, State called four witnesses, and the testimony and evidence presented established the following facts. A black male was captured on video engaging in a drug transaction with the confidential informant. (See State’s Exhibit # 3, DVD, at 9:09-11:40). The confidential informant, who had been used in hundreds of successful operations over the years and who had been thoroughly searched before and after this particular drug transaction; described the appearance of the black male to officers, including the fact that the black male was wearing a blue cast on his right arm. (See State’s Exhibit # 3, DVD; R. p. 67-68; p. 83-84; p. 87; p. 130-32). One of the detectives, who had known Appellant for several years and shared his same birthday, drove by the location immediately after the drug transaction and identified Appellant as the black male wearing the cast. (R. p. 72; p. 109-10). Two other officers then obtained Appellant’s driver’s license photograph, compared it to the drug dealer’s face in the video, and concluded that Appellant was the drug dealer. (R. p. 73, lines 10-16; p. 142, line 20 – p. 143, line 4). Appellant’s counsel stipulated at trial that the confidential informant turned over crack cocaine to police following the drug transaction. (R. p. 114, lines 2-21; p. 157-58).

During cross-examination, defense counsel extensively questioned the confidential informant regarding an affidavit he signed relating to a previous case involving a different defendant wherein the confidential informant indicated that he lied on the witness stand about the defendant selling him drugs. (R. p. 96-100). On re-direct, the solicitor asked the confidential informant to explain the circumstances surrounding his

signing of this affidavit. (R. p. 100-105). In a lengthy response, the confidential informant explained that he signed the affidavit because his life was threatened by the defendant's family and that the statements in the affidavit were written by someone else and were not true. (R. p. 102-105). In concluding his explanation, he stated as follows:

Yeah, I did the wrong thing when I signed that paper but [the previous defendant] know[s] he guilty, and his lawyer know[s] he guilty. Just like the guy who supposed to be on trial here, he guilty -- (R. p. 105, lines 7-10).

The solicitor cut him off at that point, and the confidential informant stated "[t]hat's all I got to say." (R. p. 105, lines 11-12).

Defense counsel objected and asked for a curative instruction. (R. p. 105, lines 13-14). The judge sustained the objection and ordered the jurors to strike the comment from their notes and instructed the foreperson to ensure that the comment was not considered "in any way" during deliberations. (R. p. 105, lines 15-20). Later in trial, defense counsel made a motion for mistrial, stating that he did not believe the curative instruction was "enough to cure any prejudice caused to [Appellant]." (R. p. 116, lines 15-21). The State asserted that the curative instruction given by the judge was sufficient, and the judge denied the mistrial motion but stated that over the break she would review her curative instruction to make sure it was appropriate and would give a further instruction in her charge to the jury if she felt the need to do so. (R. p. 116-17).

After the State rested its case, the defense elected to present no witnesses. (R. p. 147, lines 19-22). Following closing arguments and the final jury charge, the jury returned a guilty verdict after twenty-five minutes of deliberations. (R. p. 175-76). Based on his prior record and the fact that this was Appellant's third or subsequent drug offense, the trial judge sentenced Appellant to seventeen years. (R. p. 177-78; p. 191-92).

- I. The trial court did not abuse its discretion in admitting certain statements in the video of the drug buy where the challenged statements did not specifically refer to any prior bad acts of Appellant and the statements were far too vague and ambiguous to constitute impermissible prior bad act evidence under Rule 404(b), SCRE, or to prejudice Appellant to such an extent that a new trial is required.**

Appellant argues that the trial court abused its discretion by admitting the unredacted video of the drug buy which contained statements constituting prior bad act evidence that improperly weighed on his character. On appeal, Appellant complains about (1) statements regarding “hollering,” and (2) a statement indicating Appellant was the one who “caused all the problems.”

A. Statements Regarding “Hollering”

Appellant first contends that statements contained in the video of the drug buy indicating he was “always hollering” at the confidential informant violated Rule 404(b), SCRE, because those statements implied Appellant committed prior bad acts, i.e., that he always solicited the confidential informant to buy drugs from him. (Brief of Appellant, p. 4-7). Appellant relies on German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996) in support of his argument. In German, the defendant was tried for possession with intent to distribute crack cocaine. German, 325 S.C. at 26, 478 S.E.2d at 688. During opening argument, the solicitor stated that one of the officers involved in the defendant’s arrest had received several tips that the defendant was distributing or selling crack cocaine. Id. On appeal of the post-conviction relief judge’s denial of relief, our Supreme Court held that trial counsel was ineffective for failing to object to the solicitor’s remarks because the statements specifically referred to the defendant and were objectionable as improper comments on the defendant’s character. Id. at 27-28, 478 S.E.2d at 688-89. Appellant also points to State v. Bostick, 307 S.C. 226, 414 S.E.2d 175 (Ct. App. 1992), a similar

case where an officer testified that the police had “intelligence” that the defendant “had been selling crack cocaine from the store.” Bostick, 307 S.C. at 227, 414 S.E.2d at 176. This Court held that the officer’s testimony was improper evidence of prior bad acts and was clearly prejudicial to the defendant, particularly where his defense to the charge for which he was on trial was that the confidential informant had confused him with someone else. Id. at 226-30, 414 S.E.2d at 176-77.

In Appellant’s case, unlike in German and Bostick, the statements in the video of the drug buy regarding “hollering” did not refer to any prior bad acts of Appellant. The American Heritage Dictionary defines “holler” as “to yell or shout; cry out; call.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE EDITION 628 (1980). Similarly, Webster’s Dictionary defines “holler” as “to shout or yell.” WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, 2nd COLLEGE EDITION 669 (1976). Urban Dictionary defines “holler” as “to scream or yell.”³ See *Holler*, Urban Dictionary (May 14, 2014), <http://www.urbandictionary.com/define.php?term=holler>. Urban Dictionary also defines “holla” as “(1) [a] word used to acknowledge the presence of a fellow companion; (2) For a man to express interest in a particularly impressive female specimen; (3) To contact via telephone.” See *Holla*, Urban Dictionary (May 14, 2014), <http://www.urbandictionary.com/define.php?term=holla>.⁴

³ The Urban Dictionary definition of “holler” also includes the following: “[I]n the south east mountains of the [U]nited [S]tates this word is used instead of hollow.”

⁴ As this Court recently noted; “Time Magazine rated Urban Dictionary as one of its “50 Best Websites” in 2008 . . . and described it as follows: ‘To stay hip, visit Urban Dictionary, which has millions of user-submitted words and definitions. Visitors can vote on the best entries....’ Anita Hamilton, *Urban Dictionary—50 Best Websites 2008*, Time (Jun. 17, 2008), http://www.time.com/time/specials/2007/article/0,28804,1809858_1809955_1811527,00.html.” State v. Price, 400 S.C. 110, 111, 732 S.E.2d 652, 652 n1 (Ct. App. 2012).

None of the common definitions of the word “holler” or “holla” include any references to drug solicitation or drug sales, nor does Appellant point to any authority suggesting the word has taken on such a meaning in any setting or context. Moreover, the video itself did not establish that “holler” or “holla” meant anything more than simply making verbalizations, yelling, or making contact with someone. (See State’s Exhibit 3, DVD). In fact, as Appellant acknowledges on page 5 of his brief, in one part of the video, the confidential informant substituted the word “yelling” for “holler.” (See State’s Exhibit 3, DVD, at 9:56-10:00). Further, many of the “hollering” statements in the video were not connected with Appellant because they referred to more than one person at a location or to an unidentified person. (See R. p. 29, lines 18-23; p. 33, lines 13-17 & lines 22-23; see State’s Exhibit # 3, DVD). Contrary to defense counsel’s argument below (see Brief of Appellant, p. 5), there was no evidence before the jury indicating that the police targeted that particular location, or Appellant specifically, due to any so-called “hollering;” instead, the video makes clear that the term was used merely to help officers explain to the confidential informant the location of the drug buy and, later in the video, to describe the persons being discussed. (See State’s Exhibit # 3, DVD). There is no reason to believe the jury would attach a nefarious meaning to the word “holler” as used in the video. In sum, the complained-of statements regarding “hollering” did not refer to any prior bad acts of Appellant and consequently did not violate Rule 404(b), SCRE, or Rule 403, SCRE.

Even assuming the statements regarding “hollering” might be construed as having some type of negative connotation, the references were simply too vague and ambiguous to constitute impermissible prior bad act evidence under Rule 404(b) or to prejudice

Appellant to such an extent as to constitute reversible error. Again, the word “holler” was never directly linked to drug transactions. Further, the State never offered any substantive evidence regarding any prior drug transactions involving Appellant. Accordingly, even assuming some type of error occurred, such error was not sufficiently prejudicial to warrant reversal of Appellant’s conviction.⁵ See State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (recognizing appellant's possible drug dealing was merely suggested and no testimony was presented concerning such behavior); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (noting that references to defendant's prior crimes in arresting officer's testimony were extremely vague); State v. Robinson, 238 S.C. 140, 150-51, 119 S.E.2d 671, 676 (1961) (“We do not think that the testimony referred to creates the prejudicial inference asserted by the appellant,” in case where defendant asserted that a vague reference to his going to the probation office suggested he was convicted of a prior crime); 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. Wiley, 387 S.C. 490, 495-97, 692 S.E.2d 560, 563-64 (Ct. App. 2010) (concluding that the prosecutor’s comment regarding the defendant’s warrant was merely a vague reference to his prior criminal record that was not sufficiently prejudicial to warrant a mistrial; further, even if the jury inferred that

⁵ To the extent the judge may have ruled that statements describing past events were admissible as “present sense impressions,” the State agrees with Appellant that this was error. (See Brief of Appellant, p. 8-10). (See R. p. 47, line 19 – p. 48, line 3). However, the ruling regarding present sense impressions appears to address defense counsel’s *second* argument at trial - which has not been raised on appeal - regarding improper prior consistent statements, rather than his argument regarding improper character evidence with respect to the “hollering” statements. (See R. p. 27, line 14 – p. 28, line 23; p. 47-48). See *supra* at footnote 2. Accordingly, any error in the ruling regarding present sense impressions is inconsequential and harmless.

the defendant committed another crime, the defendant was not prejudiced because the State never attempted to prove he was convicted of some other crime); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (determining law enforcement agent's isolated testimony regarding fingerprint cards was not so prejudicial to defendant as to warrant mistrial because it was questionable whether jury drew connection between fingerprint card and defendant's prior criminal activity); see also State v. Stephens, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.' We 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. A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.") (citations omitted).

Statement Regarding "Causing All the Problems"

Appellant also contends that the statement in the video indicating that the man with the cast on was the one who "caused all the problems" improperly weighed on Appellant's character and "called into question Appellant's unspecified bad acts." (Brief of Appellant, p. 7). This issue is not preserved for appellate review because trial counsel never made mention of this particular statement to the trial judge and, consequently, never argued that this statement raised an issue of prior bad acts. (See R. p. 24-48; p. 86,

lines 8-14). See State v. Holland, 385 S.C. 159, 172, 682 S.E.2d 898, 905 (Ct. App. 2009) (“[The appellant] did not raise this specific ground before the trial court. Therefore, this specific argument is not preserved for this Court’s review.”); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”); State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (a party may not assert one ground at trial and argue another ground on appeal).

In any event, even assuming the issue was somehow preserved, the trial judge did not commit reversible error by admitting the challenged statement. Initially, the statement - made by an unknown officer over the police radio and barely audible in the background noise of the video - is not clearly making reference to Appellant at that point in the video. (See State’s Exhibit # 3, DVD, at 6:05-6:16). It is doubtful the jury would have later connected the incidental comment to Appellant. Furthermore, even if the jurors were to connect the statement with Appellant, the comment did not suggest Appellant committed prior drug transactions, or that he had a propensity to do so, because of the utter vagueness of the comment. Cf. Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000) (noting that prior bad acts involving the *same or similar acts for which the defendant is on trial* are highly prejudicial). In that vein, as discussed above in the context of the “hollering” statements, the comment regarding “causing all the trouble” was simply too vague and ambiguous to constitute impermissible prior bad act evidence under Rule 404(b) or to prejudice Appellant to such an extent as to constitute reversible error, particularly where the State never introduced any evidence about Appellant causing any trouble at some other time. See cases cited *supra*, p. 11-12; see also State v. Brown, 344 S.C. 70, 76-77, 543 S.E.2d 552, 555-56 (2001) (whatever negative connotation

appellant's gambling may have had, its impact was minimal and it did not imply any propensity on his part to commit the crime with which he was charged; thus any error in its admission was harmless beyond a reasonable doubt); State v. Haselden, 353 S.C. 190, 195-96, 577 S.E.2d 445, 448 (2003) (testimony regarding the defendant's habits, which resulted in his not spending much time with his wife and son, was simply not bad character evidence because it was not evidence showing he had a tendency toward committing the crime for which he was on trial).

Overwhelming Evidence of Guilt

In any event, there was overwhelming evidence of Appellant's guilt such that any error in admission of the challenged statements in the video was harmless beyond a reasonable doubt. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. Haselden, 353 S.C. at 196, 577 S.E.2d at 448; see State v. Wiley, 387 S.C. at 497, 692 S.E.2d at 564 ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a

conviction because of insubstantial errors not affecting the result.” State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Thus, when overwhelming evidence of guilt has been presented, trial error will be harmless. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) (“[I]n view of the overwhelming evidence of appellant’s guilt, we hold any error harmless beyond a reasonable doubt.”).

In this case, a black male was captured on video engaging in a drug transaction with the confidential informant. (See State’s Exhibit # 3, DVD, at 9:09-11:40). Appellant’s counsel stipulated at trial that the confidential informant turned over crack cocaine to police following the drug transaction. (R. p. 114, lines 2-21; p. 157-58). The confidential informant, who had been used in hundreds of successful operations over the years and who had been thoroughly searched before and after this drug transaction, described the appearance of the black male to officers, including the fact that the black male was wearing a blue cast on his right arm. (See State’s Exhibit # 3, DVD; R. p. 67-68; p. 83-84; p. 87; p. 130-32). One of the detectives, who had known Appellant for several years and shared his same birthday, drove by the location immediately after the drug transaction and identified Appellant as the black male wearing the cast. (R. p. 72; p. 109-10). Two other officers then obtained Appellant’s driver’s license photograph, compared it to the drug dealer’s face in the video, and concluded that Appellant was the drug dealer. (R. p. 73, lines 10-16; p. 142, line 20 – p. 143, line 4). Finally, it is worth noting that the jury deliberated only twenty-five minutes before reaching its guilty verdict. (R. p. 175-76).

The evidence described above constituted overwhelming evidence of Appellant’s guilt. Therefore, any error with respect to the admission of the challenged statements in

the video was harmless beyond a reasonable doubt. See State v. Bailey, 298 S.C. at 5, 377 S.E.2d at 584 (“When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.”). Appellant’s conviction and sentence should be affirmed.

- II. Appellant’s mistrial issue is not preserved for appellate review where Appellant objected to the challenged testimony but then failed to make a contemporaneous objection to the sufficiency of the curative instruction and only later, after other evidence was presented, made a motion for mistrial; but, in any event, the extreme remedy of a mistrial was not warranted under the circumstances of Appellant’s case.**

Issue Preservation

Appellant now argues that the trial judge should have granted a mistrial after the confidential informant remarked that Appellant was guilty. This issue is not preserved for appellate review because trial counsel failed to **contemporaneously** make a motion for mistrial following the objected-to comment. In State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012), one of the State’s witnesses unexpectedly made a comment about the defendant’s parole leave. Heller at 173, 731 S.E.2d at 321. Defense counsel immediately objected and moved to strike. Id. The trial judge sustained the objection and instructed the jury to disregard the comment. Id. After the State completed its direct examination of the witness, the judge took a fifteen-minute break. Id. At that point defense counsel, apparently having reflected further on the matter, made a motion for a mistrial based upon the parole leave comment, arguing that the State’s witnesses were not supposed to bring up the defendant’s parole and that the curative instruction was an

insufficient remedy. Id. The trial court denied the motion, noting the witness's comment was spontaneous and nonresponsive to the question. Id.

On appeal, the defendant argued that the mention of him being on parole clearly showed he had a prior record and that such evidence constituted reversible error warranting a mistrial where the court's curative instruction was insufficient to cure the error. Id. This Court held that the issue was not preserved for appellate review, finding that, at the time the defendant objected to the testimony, the defendant received the relief he requested - a curative instruction telling the jury to disregard the comment - and his later motion for mistrial did not qualify as a "contemporaneous" motion for mistrial as is required by our error preservation case law. Id. at 174, 731 S.E.2d at 321-22.

The scenario in Appellant's case is essentially identical to the scenario described in Heller, although the issue preservation problem is even more egregious in Appellant's case. Here, defense counsel objected to the unexpected and unsolicited "he guilty" comment made on re-direct examination of the confidential informant and requested a curative instruction. (See R. p. 102, line 4 – p. 105, line 14). The judge sustained the objection and ordered the jurors to strike the comment from their notes and instructed the foreperson to ensure that the comment was not considered "in any way" during deliberations. (R. p. 105, lines 15-20). Defense counsel did not at that time object to the sufficiency of the curative instruction or request a mistrial. Subsequently, the confidential informant provided further testimony on re-direct and then completed his testimony. (R. p. 105-106). Thereafter, another witness was called to the stand and he was examined by the solicitor and cross-examined by the defense attorney. (R. p. 107-13). The solicitor then read into the record a stipulation regarding the crack cocaine. (R.

p. 114). Following the stipulation, the judge recessed for lunch, and, after excusing the jury, inquired about the remaining witnesses from the State and the defense. (R. p. 115-16). Only at that point – well after the conclusion of the testimony of the confidential informant – did defense counsel make his motion for mistrial, stating that he did not believe the curative instruction was “enough to cure any prejudice caused to [Appellant].” (R. p. 116, lines 15-21). As in Heller, defense counsel’s belated motion for mistrial did not qualify as a **contemporaneous** objection to the sufficiency of the curative charge or motion for mistrial. Heller at 174, 731 S.E.2d at 321; see also State v. George, 323 S.C. at 510, 476 S.E.2d at 912 (“No issue is preserved for appellate review if the objecting party accepts the judge’s ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.”). Therefore, the mistrial issue raised on appeal is not preserved for appellate review.

Discussion Regarding the Merits

“The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way.” State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999); see State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) (“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.”). In order to receive a mistrial, a party must show both error and resulting prejudice. See State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). A mistrial should not be granted unless absolutely necessary, and instead, all other methods to cure any possible prejudice should be exhausted before

granting the motion. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Critically, a curative instruction to disregard the testimony is generally deemed to cure any potential prejudice from improper testimony. State v. Ferguson, 376 S.C. 615, 619, 658 S.E.2d 101, 103 (2008). The grant or denial of a mistrial lies within the sound discretion of the trial court, and the ruling will not be disturbed on appeal absent an abuse of discretion or an error of law. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000).

Even assuming the issue had been properly preserved for review, the trial judge did not abuse her discretion by denying a mistrial in this case. As stated above, a curative instruction to disregard the testimony is generally deemed to cure any possible prejudice. Here, the trial judge issued a prompt and concise curative instruction to disregard the testimony, and, later in the final jury charge, she reminded the jurors that it was their duty to disregard any testimony that was ordered stricken from the record. (R. p. 164, line 24 – p. 165, line 1). Significantly, jurors are presumed to follow a judge's instructions to them. See, e.g., State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (jurors are presumed to follow curative instructions given to them by the judge). Appellant has failed to provide a satisfactory explanation, either at trial on appeal, as to why the curative instruction was insufficient to cure any possible prejudice.

Furthermore, any possible prejudice from the "he guilty" comment was slight considering that the comment was basically cumulative to other, un-objected-to testimony from the confidential informant. See, e.g., State v. Price, 368 S.C. 494, 499-500, 629 S.E.2d 363, 366 (2006) (any error in admission of evidence that is merely cumulative to other un-objected-to evidence is harmless). For example, the confidential

informant had already testified during cross-examination that Appellant "ain't here right now because he lying." (R. p. 99, lines 20-22). In that vein, the thrust of the confidential informant's testimony was that Appellant sold the confidential informant crack cocaine, i.e., that Appellant was guilty of the crime for which he was on trial. (See R. p. 80-107). Even assuming the confidential informant's testimony was in fact improper,⁶ it would have hardly been shocking to the jury in this case that the confidential informant believed Appellant was guilty in light of his testimony that established Appellant's guilt. Finally, although defense counsel did not himself elicit the "he guilty" comment, the comment was made as part of the confidential informant's explanation of how he had been coerced into signing an affidavit recanting his trial testimony in a previous case - an issue about which defense counsel *extensively* cross-examined him before the comment was made on re-direct. (See R. p. 96-105). See State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) (a defendant on appeal cannot take advantage of an error to which he contributed at trial); see also State v. Bell, 293 S.C. 391, 402, 360 S.E.2d 706, 712 (1987).

In sum, considering that the degree of possible prejudice from the objected-to comment was slight in light of the other testimony in the record, and that any prejudice was undoubtedly cured by the instructions given by the trial judge, the extreme remedy of a mistrial was not warranted under the circumstances of this case. Therefore, the trial judge did not abuse her discretion by denying Appellant's motion. See State v. Harris, 340 S.C. at 63, 530 S.E.2d at 627-28 (the grant or denial of a mistrial lies within the

⁶ Notably, Appellant cites no authority supporting the proposition that the confidential informant's testimony was actually improper. (See Brief of Appellant, p. 13-14).

sound discretion of the trial court, and the ruling will not be disturbed on appeal absent an abuse of discretion). Appellant's conviction and sentence should be affirmed.

III. Appellant's contention on appeal that he was improperly tried in his absence is not preserved for appellate review and is without merit in any event where the record establishes that Appellant received the appropriate notice and warnings.

Although the Sixth Amendment guarantees a defendant's right to be present at trial, it is well established that this right may be waived. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007); City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 688 (Ct. App. 2006). Rule 16, SCRCrimP, provides that a defendant may waive his right to be present, and may be tried in his absence, upon the court's finding that the defendant received notice of his right to be present and that he was warned the trial would proceed in his absence if he failed to appear. Fairey at 99-100, 646 S.E.2d at 448. Notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 100, 646 S.E.2d at 448. Also, a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear. Fairey, 374 S.C. at 101, 646 S.E.2d at 449. "The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice." Ellis, 267 S.C. at 261, 227 S.E.2d at 306.

A trial judge must determine that the defendant voluntarily waived his right to be present in order to try the case *in absentia*. Aiken v. Koontz at 547, 629 S.E.2d at 689. However, "[i]n order to claim the protection afforded by the rule of law that a criminal

defendant may be tried in his absence only upon a trial court's finding that the defendant has received the requisite notice of his right to be present and advisement that the trial would proceed in his absence if he failed to attend, **a defendant or his attorney must object at the first opportunity to do so, and failure to so object constitutes waiver of the issue on appeal.**" State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010) (citing State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987)) (emphasis added).

Appellant now argues on appeal that he was improperly tried in his absence because the record does not indicate he was specifically warned that trial would proceed in his absence. (Brief of Appellant, p. 17). This issue is not preserved for appellate review and is without merit. Although trial counsel urged the trial judge to continue the case so that Appellant could be present for trial, he conceded over and over again that Appellant had proper notice of trial.⁷ (See R. p. 14, lines 5-9; p. 15, line 22 – p. 16, line 1; p. 18, lines 2-20; p. 50-51; p. 190, line 21 – p. 191, line 3; p. 199-200). He agreed Appellant knew his case was number two on the trial docket and had appeared on Monday of that week prepared to pick a jury, and counsel specifically stated that he explained to Appellant that if he did not appear the trial could continue in his absence. (R. p. 12-17; p. 17, line 25 – p. 18, line 3). Most notably, trial counsel candidly indicated to the judge that, after speaking with Appellant on the telephone, he honestly believed Appellant had chosen not to come to trial.⁸ (See R. p. 17, line 19 – p. 18, line 16; see also p. 180, lines 12-17).⁹

⁷ Obviously, as an officer of the court, trial counsel was bound to truthfully answer the trial judge's questions regarding the notice Appellant received for trial. See Rule 3.3, RPC, Rule 407, SCACR ("Candor Toward the Tribunal").

⁸ The trial judge subsequently made findings that Appellant had chosen not to show up for his trial. (R. p.

Accordingly, any issues regarding the sufficiency of the notice and/or warnings provided to Appellant, and regarding the sufficiency of the trial judge's findings, were waived, are not preserved for review, and are without merit in any event because the record is clear, based on trial counsel's admissions, that Appellant voluntarily elected not to appear for trial after having received proper notice and being warned the trial could continue in his absence. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Dickman, 341 S.C. 293, 295 534 S.E.2d 268, 269 (2000) (a party may not assert one ground at trial and argue another ground on appeal); State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (an issue conceded in the trial court cannot be argued on appeal); State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010) (this Court found it arguable that the defendant did not properly preserve an objection to his trial *in absentia* where, although counsel moved for a continuance until such time as he could locate his client, counsel never specifically objected to a trial *in absentia* and never asserted to the trial judge that his client did not receive the requisite notice of his right to be present or a warning that the trial would proceed in his absence if he failed to attend); State v. Castineira, 341 S.C. 619, 623, 535 S.E.2d 449, 451 (Ct. App. 2000) (trial in absentia issue was without merit where "counsel stipulated that [the defendant] had received the proper notice").

Furthermore, it is undisputed that Appellant was out on bond, and his signed bail form included a provision stating as follows: "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the

50, line 22 – p. 51, line 7; p. 191, lines 20-21; p. 200, lines 9-10 & lines 14-15).

⁹ After the verdict, counsel told the trial judge that he believed Appellant did not attend the trial because he was afraid. (R. p. 180, lines 12-14).

trial will proceed in my absence.” (R. p. 203).¹⁰ The signed bail form also required Appellant to appear for the general sessions term of court beginning on October 9, 2009, and, if his case was not disposed of during that term, to “appear and remain throughout each succeeding term of court until final disposition is made of his case.” (R. p. 202). Appellant’s bail form leaves no doubt that Appellant had proper notice to appear at trial and that he was warned that trial would proceed in his absence. See, e.g., Fairey, 374 S.C. at 101, 646 S.E.2d at 449 (“A bond form that provides notice that a defendant can be tried in absentia may serve as the requisite notice.”).

In light of the representations of the solicitor and Appellant’s defense counsel regarding Appellant’s awareness of when his trial was set to begin, Appellant’s appearance at the courthouse at the beginning of the week, and Appellant’s act of signing the acknowledgement on the bail form before he was released on bond, it is clear Appellant was fully aware of his right to be present for his trial, the scheduled date and time of his trial, and the consequences of his failure to appear for trial. Accordingly, the trial judge did not abuse her discretion in denying Appellant’s continuance request and proceeding with the trial in Appellant’s absence. See State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) (“The trial court’s refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion.”):

¹⁰ The bail form was not directly referenced by the parties or the judge during Appellant’s trial. However, the bail form was properly before the trial court because it was filed with the Charleston County Clerk of Court well before Appellant’s trial, thus making it a part of the clerk’s file in Appellant’s case. See Rule 210(c), SCACR (“The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal.”); see also South Carolina Dep’t of Soc. Servs. v. Janice C., 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) (“These documents were filed with the family court; therefore, they were part of the record.”).

In any event, a court's decision to try a defendant in his absence is subject to a harmless error analysis. State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987). In that vein, "[a]lthough the right to be present is a substantial one, **no presumption of prejudice arises from a defendant's exclusion.**" State v. Whaley 290 S.C. 463, 465, 351 S.E.2d 340, 341 (1986) (emphasis added). Here, the jury was instructed that the fact that Appellant was not present for trial was not to be considered as evidence against him (R. p. 170, lines 10-15), and jurors are presumed to follow instructions given by a trial judge. See, e.g., State v. Grovenstein, 335 S.C. at 353, 517 S.E.2d at 219 (jurors are presumed to follow instructions given to them by the judge). More importantly, Appellant did not identify below, and has not identified on appeal, any prejudice whatsoever resulting from his absence from trial. Furthermore, as discussed above, there was overwhelming evidence of Appellant's guilt and his presence at trial could not possibly have altered the outcome.¹¹ See, e.g., State v. McLeod, 362 S.C. 73, 82, 606 S.E.2d 215, 220 (Ct. App. 2004) ("[A]n insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached."); State v. Sims, 387 S.C. 557, 566-67, 694 S.E.2d 9, 14-15 (2010) (trial error is harmless where there is overwhelming evidence of the defendant's guilt). Therefore, even if the trial judge somehow erred by trying Appellant in his absence, any error was harmless beyond a reasonable doubt. Appellant's conviction and sentence should be affirmed.

¹¹ In fact, his presence at trial would have only harmed him because it would have allowed the jurors to match up his face with the face of the drug dealer in the video of the controlled buy. (See State's Exhibit # 3, DVD, at 9:22-9:30).

CONCLUSION

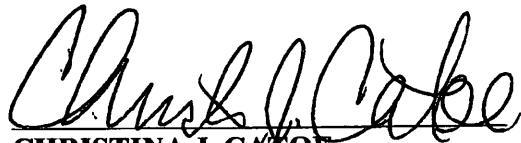
Based on the foregoing, the State requests that this Court affirm Appellant's conviction and sentence for distribution of crack cocaine.

Respectfully submitted,

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July 25, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2012-213734

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

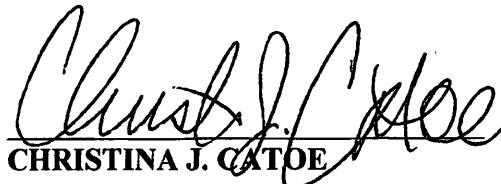
v.

JAMES LAMONT MOORE,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's most recent **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.


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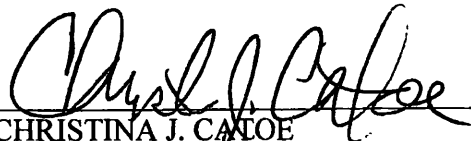
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JAMES LAMONT MOORE,

APPELLANT.

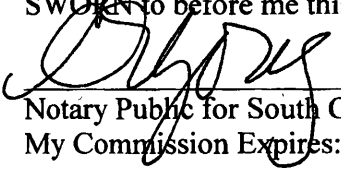
AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Brandon S. Smith**, Nelson, Mullins, Riley & Scarborough, LLP, Post Office Box 11070, Columbia, SC 29211-1070, and **Robert M. Dudek**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this 25th day of July, 2014.


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SWORN to before me this 25th day of July, 2014.


Notary Public for South Carolina
My Commission Expires: 10/28/2014

RECEIVED

JUL 25 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge

Case No. 2012-213734

The State of South Carolina, ... Respondent,
v.
James Lamont Moore, ... Appellant.

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JUL 25 2014

SC Court of Appeals

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ARGUMENT

I. Respondent misconstrues the full context and importance of the State's video exhibit and the improper character statements contained therein.

The South Carolina Supreme Court has "defined the term 'character,' as a 'generalized description of a person's disposition or a general trait such as honesty, temperance, or peacefulness.'" *State v. Brown*, 344 S.C. 70, 74, 543 S.E.2d 552, 554 (2001) (citing *State v. Nelson*, 331 S.C. 1, 7, 501 S.E.2d 716, 718 (1998)). Character evidence is "[e]vidence regarding someone's personality traits or propensities, or a praiseworthy or blameworthy nature; evidence of a person's moral standing in a community." *Black's Law Dictionary* 636 (9th ed. 2009).

Appellant's trial counsel objected to (1) "preliminary discussions" on the State's video exhibit between the confidential informant ("Mr. Ancrum") and the police officers and (2) statements offered by Mr. Ancrum later in the video made during and after the alleged drug-buy in violation of Rules 403, 404(a),¹ and 404(b)² of the South Carolina Rules of Evidence. (Tr. p. 19, 28, 33, 35). Respondent misconstrues the specific references to Appellant in the video as to each set of statements. Respondent argues (1) that these remarks did not refer to any prior bad acts by Appellant and (2) that the comments were "too vague" to be attributable to Appellant.

A. Respondent incorrectly argues that the statements related to Appellant's conduct of prior drug-sale solicitation were not attributable to Appellant.

Respondent relies on three definitions for the words "holler" and "hollering" to demonstrate that this case is distinguishable from *German v. State*, 325 S.C. 25, 478 S.E.2d 687 (1996) and *State v. Bostic*, 307 S.C. 226, 414 S.E.2d 175 (1992) and to show that the statements

¹ No exception to Rule 404(a) applies to this case nor does Respondent so argue. *State v. Bostick*, 307 S.C. 226, 228, 414 S.E.2d 175, 176 (Ct. App. 1992) (The State cannot attack the character of the defendant unless the defendant himself first places his character in issue).

² The State did not raise any exception to prior bad act evidence under Rule 404(b) at trial nor did the trial court reference any Rule 404(b) exception in its ruling. Further, Respondent makes no reference to any 404(b) exception.

at issue did not weigh on Appellant's character or constitute evidence of prior bad acts. (Resp.'s Br. at 9). Respondent urges that because "holler" is not defined in the dictionary as solicitation of drug sales, holler or hollering "did not refer to any prior bad acts of Appellant." (*Id.*). However, both the solicitor and the State's witness, Detective Shealy, recognized that there is vernacular particular to the drug dealing context.³ For example, in testifying for the State, Detective Shealy interpreted the slang "20 hard," used by Mr. Ancrum in the video, as 20 dollars worth of cocaine base and that "[Appellant] kn[ew] what [Mr. Ancrum] mean[t]." (ROA 138).⁴

Similarly, Appellant's trial counsel objected to "holler" and "always hollering" on the basis that the only logical implication, as opposed to a mere possibility, was that Appellant had a history and conduct of drug-sale solicitation exhibited by always hollering, yelling or calling out to Mr. Ancrum. Not only was this important to the initiation of the drug-buy location but Appellant's alleged conduct specifically aided *who* the officers selected to target.

Respondent argues that many of the hollering "statements were not connected with Appellant because they referred to more than one person at a location or an unidentified person." (R. Brief p. 10). However, Respondent fails to address the specific statements describing Appellant. Indeed, the terms "he" and "the one" is unmistakably a reference to one person and

³ The State conceded that this language could mean something other than a dictionary definition. During pre-trial motions, the solicitor acknowledged that "[h]ollering at could mean a variety of things . . . I think perhaps in certain circles those are the implications [solicitation of drug purchases]." (ROA 33). Further, although the State contented that these statements did not indicate that Appellant was a drug dealer, the State agreed "there's a different vernacular for – and lingo for people who are on the street." (*Id.* at 45).

⁴ Detective Shealy's testimony about the meaning of "20 hard" is not on appeal even though Appellant's trial counsel objected to same. (ROA 138). This testimony is cited to demonstrate that there is language outside of traditional and even non-traditional dictionaries that still has communicative importance in the drug-dealing context. Respondent cites to the American Heritage Dictionary, Webster's New World Dictionary, and Urban Dictionary to show that "holler" does not refer to any prior bad act for the purposes of this Appeal. "20 hard" is not found in any of the above dictionaries.

not a group of individuals as Respondent suggests. Further, Respondent ignores the following dialogue captured in the video, objected to by Appellant's trial counsel, and raised on Appeal:

Officer: I'm going to drop you off at the same spot . . . you know that house right across from that gas station the boys always holler at you?⁵

Mr. Ancrum: Oh you want that one?

Officer: Yep.

Mr. Ancrum: If *he* out there.

Officer: Yep. *He be always out there* . . . always hollering at you right there right across from that gas station.

Mr. Ancrum: Yeah . . . Oh you talking about *the one holler at me all the time* when I go through there on the left-hand side?

Officer: First intersection.

Mr. Ancrum: Yeah, okay.

(State's Exh. 3 at 1:12-1:44) (emphasis added).

The record further demonstrates that Appellant was individually targeted based on Appellant's prior conduct. When asked whether officers target a location or a person when conducting a drug-buy, the State's witness, Detective Grill, responded, "you can target both. It really depends on your informant's capabilities and your end objective . . . [y]ou can target individuals if your informant knows an individual and going to send them to that individual . . ." (ROA 64). As to this specific operation, Detective Grill stated, "[w]hen we were out there on the way to drop the informant off . . . we identified a guy that was – our surveillance units, and saw some individuals hanging out in the area of the gas station . . ." (*Id.* at 72). Here, Mr. Ancrum

⁵ Clearly Appellant agrees that "the boys" references more than one person to identify a location. However, the statements immediately following demonstrate that the conversation is directed toward Appellant as the target based on his prior conduct.

knew exactly who the officers referenced as indicated by as "*the one holler at me all the time* when I go through there on the left-hand side." (State's Exh. 3 at 1:12-1:44).

The State's video exhibit further illustrates the improper inference that Appellant was at the location soliciting drug-sales. During Mr. Ancrum's narration of the drug-buy he stated, "that the same guy [Appellant] that be in the yard all the time, be yelling at me." (State's Exh. 3 at 9:40-10:30). Mr. Ancrum then stated to Appellant, "I pass you all the time some time" but that "I done call [my] boy down the street" for drugs.⁶ (*Id.* at 11:00-11:25). He then promised to "holler back" to Appellant with the intention of calling in the future for drug purchases.⁷ Appellant's trial counsel understood the meaning of this vernacular and the context in which it was used, as did the State's witness, which is precisely why Appellant's counsel in pre-trial objected to all of the above statements as "unfairly prejudicial and a prior bad act, 404(b), and improper comment on the character." (ROA 27, 42).

B. Respondent incorrectly argues that the statement that Appellant "caused all the problems" was not preserved for this Appeal and was not made in direct reference to Appellant.

Respondent argues that the statement that Appellant "caused all the problems" was not preserved because trial counsel never made mention of that particular statement. (Resp.'s Br. at 12). On the contrary, as basis for his motion to exclude "preliminary discussions" from the State's video exhibit, Appellant's trial counsel stated, "once the comments refer specifically to the defendant, then under *German* that would be an improper comment on issues on [his] character. And what I'm taking about on the video, in the beginning of the video they are preparing the

⁶ Detective Shealy interpreted this portion of the video for the jury explaining that the confidential informant "normally go[es] down the street" to buy drugs . . . to "make it look normal." (ROA 139).

⁷ Detective Shealy confirmed that this is what the confidential informant meant in the video. On the witness stand, Detective Shealy interpreted the video for the jury where the confidential informant says that he "will holler back" by stating "[s]ee he's [the confidential informant] explaining . . . [n]ext time I come through I'll call you" to purchase drugs. (ROA 139).

confidential informant." (ROA 25). Respondent correctly points out that this statement was made over the radio by an officer not present in the vehicle. (Resp.'s Br. at 13). However, Respondent's assertion that this statement "is not clearly making reference to Appellant at that point in the video" is misguided. (*Id.*). Appellant's trial counsel objected to "th[e] whole conversation" on the radio where the officer on the radio is asked identifying information about Appellant – namely whether Appellant was wearing a blue cast – to which the officer responded, "Yeah, probably. That's the one that caused all the problems." (State's Exh. 3 at 6:01-6:17). Respondent admits that the statements came through the radio. (Resp.'s Br. at 13). Appellant's trial counsel specifically objected to the statements that came in on the radio. (ROA 34-35). Appellant's trial counsel renewed his objection at the time the evidence was offered at trial: (*Id.* at 86). This issue is properly before this Court.

To Respondent's argument on the merits, the statement that Appellant "caused all the problems" is not as benign as Respondent suggests. (Resp.'s Br. at 12). Respondent speculates that it was "doubtful" that the jury would connect this statement with Appellant because of the "utter vagueness" of the comment. (*Id.* at 13). However, this statement was important to the officers' preliminary discussions with the confidential informant on the way to the drug-buy to identify the individual alleged to be Appellant. Because these statements are close in time with statements concerning Appellant's frequency and propensity to solicit drug-sales, the trial court should have excluded this portion of the State's video exhibit under Rules 403, 404(a), and 404(b).

C. Respondent agrees that the present sense impression exception to hearsay is improper to the extent that the trial judge admitted statements describing past events.

In a footnote, Respondent argues that the "ruling regarding present sense impressions appears to address defense counsel's second argument at trial" regarding "improper prior consistent statements." (Resp.'s Br. at 11). However, the trial court never mentions prior consistent statements in making its ruling under the present sense impression exception. Appellant's trial counsel objected to improper character and unduly prejudicial statements captured on the video before, during, and after the drug-buy. (ROA 40).⁸ Indeed, the prior consistent statements and the objectionable character statements were in the "same narration." (*Id.*). In admitting the video exhibit in full, the trial court ruled that because the solicitor intended to "use the video that it most definitely will be a present sense impression if she is not going to question and go step by step on the video but just play the video as a recorded recollection of what happened."⁹ (*Id.* at 47-48). Therefore, to the extent that the trial court allowed the video statements weighing on Appellant's character and prior bad acts under the present sense impression exception, the trial court must be reversed.

D. The error committed by the trial court cannot be held harmless or insubstantial contrary to Respondent's argument.

The evidence of guilt in this case is not as overwhelming as Respondent suggests. (Resp.'s Br. at 14-15). At trial, the State relied on the testimony of three officers and the

⁸ During the transaction the confidential informant stated, "I pass you all the time some time" but that "[he] done call [his] boy down the street" for drugs. (State's Exh. 3 at 11:00-11:25). After the drug-buy and as the confidential informant walked back to the officers' vehicle, the confidential informant stated "I straight. I'm on my way back . . . The one with the blue cast on. That's who I get [the drugs] from." (*Id.* at 14:30-14:40).

⁹ Notably, and as mentioned in Appellant's initial brief, the State played the video twice during trial, which appears to go against the trial court's ruling: first in full when Mr. Ancrum was on the stand and second when Detective Shealy was on the stand. Detective Shealy took the jury "step by step" through a portion of the testimony. Appellant's trial counsel objected to Detective Shealy's direct interpretation of the drug buy. (ROA 138).

confidential informant. The video exhibit was critical to the State's case because the video allegedly identified Appellant and was used to capture statements and events before, during and following the alleged drug-buy. (ROA 30, 72-73; 109-110, 138, 153-54). However, Detective Shealy who arranged the drug-buy, and who reviewed and interpreted the video for the jury, testified that he did not see any drugs in the video, any money, or anything exchange hands. (*Id.* at 190). Detective Shealy waited almost a month to draft a warrant for Appellant's arrest. (*Id.* at 190-91). Another officer monitoring the drug-buy did not observe the actual drug-buy until later reviewing the video. (*Id.* at 124). In addition, Appellant's trial counsel identified Mr. Ancrum's numerous credibility issues, specifically that his prior conviction of stolen goods and a crime of dishonesty. (*Id.* at 208). Further, Mr. Ancrum admitted to lying on the stand in a prior drug-buy case. (*Id.* at 142-145). In addition, although Appellant's trial counsel stipulated that the drugs offered as an exhibit by the State was cocaine, he clarified that did not stipulate that the cocaine was attributable to Appellant. (*Id.* at 207-08). Finally, and perhaps most importantly, Appellant's trial counsel objected to the admission of the video exhibit before and during trial. *State v. Schumpert*, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (noting that any error in admission of evidence cumulative to other unobjected-to evidence is harmless). When statements were offered to interpret the video, Appellant's trial counsel objected. (*Id.* at 183). For these reasons, the trial court's error was not harmless and cannot be overcome by the evidence presented at trial.

II. Contrary to Respondent's Argument, Appellant's trial counsel properly objected to Appellant's trial *in absentia*.

Respondent cites *State v. Ravenell* to support the argument that Appellant's trial counsel waived the right to appeal Appellant's trial *in absentia* by failing to "object at the first opportunity to do so, and failure to so object constituted waiver of the issue on appeal." 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010). After Appellant's trial counsel stated that he

didn't believe that Appellant was coming to trial, the trial court decided to begin trial and stated: "Let's do our motions in this case. I note your objections, Mr. King, and that your client is not here . . . I've given, I believe, ample time and you've made ample efforts." (ROA 19). Following pre-trial motions, the trial court recessed until the following day whereupon Appellant was not present. (*Id.* at 58). Again, the trial court stated, "Mr. King, I will note your objection that you do not wish to go forward but we are going to go forward." (*Id.*). The trial court acknowledged Mr. King's objections to Appellant's trial *in absentia* both before pre-trial motions and immediately upon commencing trial and before the jury was selected. This issue is preserved for Appeal.

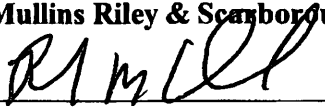
CONCLUSION

For the reasons set forth herein, and for the reasons stated in Appellant's Initial Brief, Appellant requests that this Court reverse the trial court and remand for a new trial.

Respectfully submitted,

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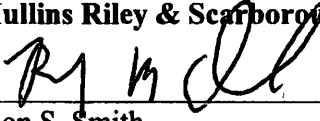
This 25th day of July, 2014

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant 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."

This 25th day of July, 2014

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Columbia, South Carolina 29201

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JUL 25 2014

SC Court of Appeals

Chief Appellate Defender

Robert M. Dudek

S.C. Commission on Indigent Defense

Division of Appellate Defense

1330 Lady Street, Suite 401

Columbia, South Carolina 29201

(803) 734-1343

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge

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JUL 25 2014
SC Court of Appeals

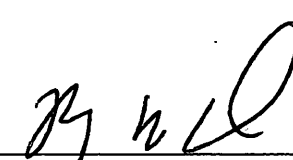
Case No. 2012-213734

The State of South Carolina, ... Respondent,
v.
James Lamont Moore, ... Appellant.

PROOF OF SERVICE

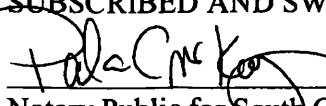
I certify that a true copy of the **Final Reply Brief of Appellant** in the above referenced case has been served upon Christina J. Catoe, Esquire, at 1000 Assembly Street, Room 519, Columbia, SC 29201.

This 25th day of JULY, 2014

By: 

Robert M. Dudek

SUBSCRIBED AND SWORN TO before me this 25th day of July, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: July 24, 2022

**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.

James Lamont Moore, Appellant.

Appellate Case No. 2012-213734

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2015-UP-098
Heard January 6, 2015 – Filed March 4, 2015

AFFIRMED

Brandon Scott Smith, of Nelson Mullins Riley &
Scarborough, LLP, and Chief Appellate Defender Robert
Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan M. Wilson and Assistant Attorney
General Christina Catoe Bigelow, both of Columbia; and
Solicitor Scarlett Anne Wilson, of Charleston, for
Respondent.

PER CURIAM: James Lamont Moore appeals his conviction for distribution of crack cocaine, arguing the trial court erred in (1) denying his motion to redact statements in a video exhibit, (2) denying his motion for a mistrial, and (3) trying him in his absence. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in denying Moore's motion to redact statements in a video exhibit: Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009) (stating "[t]he trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion" in reviewing the admissibility of evidence under Rule 404(b)); Rule 403, SCRE (stating "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"); *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) (providing an appellate court reviews a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and is obligated to give great deference to the trial court's judgment); *id.* ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances."); *State v. Huggins*, 336 S.C. 200, 204, 519 S.E.2d 574, 576 (1999) ("Error without prejudice does not warrant reversal.").

2. As to whether the trial court erred in denying Moore's motion for a mistrial: *State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured."); *id.* ("No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial."); *State v. Heller*, 399 S.C. 157, 174, 731 S.E.2d 312, 321 (Ct. App. 2012) (concluding a motion for a mistrial was not preserved for appellate review when the court sustained an objection and gave a curative instruction and Heller did not contemporaneously move for a mistrial but waited until after the State completed examination of the witness and the court took a fifteen minute recess).

3. As to whether the trial court erred by not making specific findings of fact on the record that Moore received notice of his right to be present and was warned the trial would proceed in his absence: Rule 16, SCRCrimP ("[A] person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court."); *State v. Williams*, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987) (finding error in complying with requirement to make specific findings is subject to a harmless error analysis); *Huggins*, 336 S.C. at 204, 519 S.E.2d at 576 ("Error without prejudice does not warrant reversal.").

AFFIRMED.

HUFF, SHORT, and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2012-213734

THE STATE, ... Respondent,
v.
JAMES LAMONT MOORE, ... Appellant.

Petition for Rehearing

Pursuant to Rules 219 and 221(a) of the South Carolina Appellate Court Rules, Appellant James L. Moore ("Moore") hereby files this petition for rehearing. This matter came before the Panel for oral argument on January 6, 2015 at 10:00 AM. Moore respectfully submits that rehearing and/or issuance of a new opinion reversing the trial court and granting a new trial in favor of Moore is warranted in this action.

The motion is predicated on the basis that the Panel's opinion in this matter overlooked or misapprehended several matters of fact and law. Thus, rehearing should be granted.

RECEIVED
MAR 19 2015
SC Court of Appeals

ARGUMENT

I. The Panel overlooked South Carolina Supreme Court precedent regarding improper admission of character and prior bad act evidence.

In the opinion, the Panel found that although “evidence of other crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show action in conformity therewith[] it may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” *State v. Moore*, Op. No. 2015-UP-098 (S.C. Ct. App. filed March 4, 2015).

German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996) and *State v. Bostic*, 307 S.C. 226, 414 S.E.2d 175 (1992) is the guiding precedent applicable to Moore’s appeal. Both cases are factually and legally analogous to the issues presented in Moore’s appeal. However, the Court’s March 4, 2015 Order does not appear to account for this precedent.

In *German v. State*, two agents performing undercover drug operations received information that Mr. German “was distributing or selling crack cocaine.” 325 S.C. at 26, 478 S.E.2d at 688. The Supreme Court held that the statements were improper comments on Mr. German’s character because the statements specifically referenced Mr. German engaging in the distributing or selling of crack. The Supreme Court explained that statements offered to prove *why* the police began surveillance were not necessarily improper because the statements in *Brown* referred to “drug activity in the apartment complex in which the defendant lived,” yet statements specifically targeted at the defendant’s prior history as a drug dealer were improper. *German*, 325 S.C. at 28, 478 S.E.2d at 688. (emphasis added).

In *State v. Bostick*, the Supreme Court held that the defendant was unduly prejudiced by a police officer’s statement that he believed the defendant had made drug

sales from the same location at a prior time. 307 S.C. 226, 414 S.E.2d 175. In *Bostick*, the State argued that even if the statements were improper, the defendant was not prejudiced the testimony. The Court rejected this argument, stating:

The issue the jury was called upon to decide was whether the individual hired by the police had bought the crack cocaine from the defendant or from some other person he had confused with the defendant. Quite obviously, testimony that the police had information the defendant had previously sold crack cocaine would tend to influence the jury in deciding whether he did so on the occasion in question.

Bostick, 307 S.C. at 228-29, 414 S.E.2d at 176. The State further argued the exceptions to Rule 404 of the South Carolina Rules of Evidence applied, which the Court also rejected. 307 S.C. at 229, 414 S.E.2d at 177. The Court reinforced that the State cannot attack the character of the defendant unless the defendant himself first places his character in issue. *Id.*

In this case, the State's video exhibit is replete with improper statements about Moore that bear upon his character and prior bad acts such that the only logical conclusion that Moore was a perpetual solicitor or distributor of drug-sales. The lead detective called to testify at trial, by the State, confirmed as much. (ROA 139).

In the video capturing the alleged drug-buy, the confidential informant narrated the event to investigating officers and stated, "that the same guy [Appellant] that be in the yard all the time, be yelling at me." (State's Exh. 3 at 9:40-10:30). The confidential informant then stated to Appellant, "I pass you all the time some time" but that "I done call [my] boy down the street" for drugs. (*Id.* at 11:00-11:25). On the stand, the State's officer interpreted this portion of the video for the jury, explaining that the confidential informant "normally go[es] down the street" to buy drugs . . . to "make it look normal." (ROA 139).

Later in the video, the confidential informant promised to “holler back” to Appellant with the intention of calling in the future for drug purchases. Here again, the State’s witness testified that this is what the confidential informant meant. On the stand, the detective interpreted this portion of the video for the jury, namely that where the confidential informant says that he “will holler back” . . . [the confidential informant is] explaining . . . [n]ext time I come through I’ll call you” to purchase drugs. (ROA 139).

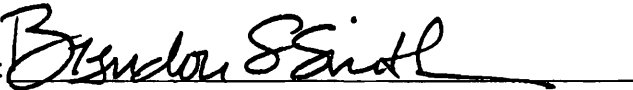
Appellant's trial counsel understood the meaning of this vernacular and the context in which it was used, as admitted by the Solicitor and interpreted by the State's witness, which is precisely why Appellant's counsel in pre-trial objected to all of the above statements as “unfairly prejudicial and a prior bad act, 404(b), and improper comment on the character.” (ROA 27, 33, 42).

The video statements, coupled with the officer’s interpreting testimony, had the “tend[ancy] to influence the jury in deciding whether [Moore distributed drugs] on the occasion in question” causing Moore unfair prejudice that substantially outweighed any probative value of the evidence. *Bostick*, 307 S.C. at 228-29, 414 S.E.2d at 176.

Conclusion

Based on the foregoing, the Panel should grant rehearing to issue a new opinion granting Moore a new trial.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for James L. Moore

Columbia, South Carolina

March 19, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2012-213734

THE STATE, ... Respondent,
v.
JAMES LAMONT MOORE, ... Appellant.

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Petition for Rehearing

Counsel Served:

Christina J. Catoe, Esquire
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street
Columbia, SC 29201

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MAR 19 2015

SC Court of Appeals

Linda Silvey
Linda Silvey
Administrative Assistant

March 19, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAR 30 2015

Appeal from Charleston County **SC Court of Appeals**
The Honorable Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2015-UP-098 (S.C. Ct. App. filed 3/4/15)
Appellate Case No. 2012-213734

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES LAMONT MOORE,

APPELLANT.

RETURN TO PETITION FOR REHEARING

On March 4, 2015, this Court affirmed Appellant's conviction for distribution of crack cocaine. Appellant submitted a Petition for Rehearing on March 19, 2015, arguing that this Court overlooked or misapprehended several points. To the contrary, this Court properly affirmed Appellant's conviction for the reasons discussed below.

I.

In his Petition for Rehearing, Appellant contends that this Court overlooked the cases of German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996) and State v. Bostick, 307 S.C. 226, 414 S.E.2d 175 (Ct. App. 1992), which he contends are "guiding precedent" applicable to his appeal. However, inasmuch as these cases are totally distinguishable from Appellant's case, it was unnecessary for this Court to discuss them in its opinion. his argument. In German, the defendant was tried for possession with intent to distribute

crack cocaine. German, 325 S.C. at 26, 478 S.E.2d at 688. During opening argument, the solicitor stated that one of the officers involved in the defendant's arrest had received several tips that the defendant was distributing or selling crack cocaine. Id. On appeal of the post-conviction relief judge's denial of relief, our Supreme Court held that trial counsel was ineffective for failing to object to the solicitor's remarks because the statements specifically referred to the defendant and were objectionable as improper comments on the defendant's character. Id. at 27-28, 478 S.E.2d at 688-89. In Bostick, an officer testified that the police had "intelligence" that the defendant "had been selling crack cocaine from the store." Bostick, 307 S.C. at 227, 414 S.E.2d at 176. This Court held that the officer's testimony was improper evidence of prior bad acts and was clearly prejudicial to the defendant, particularly where his defense to the charge for which he was on trial was that the confidential informant had confused him with someone else. Id. at 226-30, 414 S.E.2d at 176-77.

The statements in German and Bostick clearly and expressly referred to prior bad acts of the defendant – specifically, prior drug activity – and therefore the statements were improper. In contrast, in Appellant's case, the statements in the video of the drug transaction did not clearly or expressly refer to any prior bad acts or prior drug activity. The complained-of references in the video were simply too vague and ambiguous to constitute impermissible prior bad act evidence under Rule 404(b). Appellant was never directly linked to any prior drug transactions and the State never offered any substantive evidence regarding any prior drug activity involving Appellant. Accordingly, there was no reversible error. See State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (recognizing appellant's possible drug dealing was merely suggested and no testimony

was presented concerning such behavior); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (noting that references to defendant's prior crimes in arresting officer's testimony were extremely vague); State v. Robinson, 238 S.C. 140, 150-51, 119 S.E.2d 671, 676 (1961) ("We do not think that the testimony referred to creates the prejudicial inference asserted by the appellant," in case where defendant asserted that a vague reference to his going to the probation office suggested he was convicted of a prior crime); 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. Wiley, 387 S.C. 490, 495-97, 692 S.E.2d 560, 563-64 (Ct. App. 2010) (concluding that the prosecutor's comment regarding the defendant's warrant was merely a vague reference to his prior criminal record that was not sufficiently prejudicial to warrant a mistrial; further, even if the jury inferred that the defendant committed another crime, the defendant was not prejudiced because the State never attempted to prove he was convicted of some other crime); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (determining law enforcement agent's isolated testimony regarding fingerprint cards was not so prejudicial to defendant as to warrant mistrial because it was questionable whether jury drew connection between fingerprint card and defendant's prior criminal activity); see also State v. Stephens, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.' We 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. A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.") (citations omitted).

Since the complained-of statements in the video did not expressly refer to any prior bad acts of Appellant, this Court properly concluded that the admission of the video did not violate Rule 404(b), SCRE, or Rule 403, SCRE.¹ This Court also properly concluded that Appellant suffered no prejudice even assuming some type of error occurred. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Thus, when overwhelming evidence of guilt has been presented, trial error will be harmless. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988).

In this case, a black male was captured on video engaging in a drug transaction with the confidential informant. (See State's Exhibit # 3, DVD, at 9:09-11:40). Appellant's counsel stipulated at trial that the confidential informant turned over crack cocaine to police following the drug transaction. (R. p. 114, lines 2-21; p. 157-58). The confidential informant, who had been used in hundreds of successful operations over the

¹ In his Petition for Rehearing, Appellant complains repeatedly about the lead detective's testimony "interpreting" portions of the video. (See Petition for Rehearing, p. 3-4). Note, however, that there was no objection to this testimony below. (See R. p. 139).

years and who had been thoroughly searched before and after this drug transaction, described the appearance of the black male to officers, including the fact that the black male was wearing a blue cast on his right arm. (See State's Exhibit # 3, DVD; R. p. 67-68; p. 83-84; p. 87; p. 130-32). One of the detectives, who had known Appellant for several years and shared his same birthday, drove by the location immediately after the drug transaction and identified Appellant as the black male wearing the cast. (R. p. 72; p. 109-10). Two other officers then obtained Appellant's driver's license photograph, compared it to the drug dealer's face in the video, and concluded that Appellant was the drug dealer. (R. p. 73, lines 10-16; p. 142, line 20 – p. 143, line 4).

The evidence described above constituted overwhelming evidence of Appellant's guilt. Therefore, any error with respect to the admission of the challenged statements in the video was harmless beyond a reasonable doubt. This Court properly affirmed Appellant's conviction and sentence for distribution of crack cocaine.

CONCLUSION

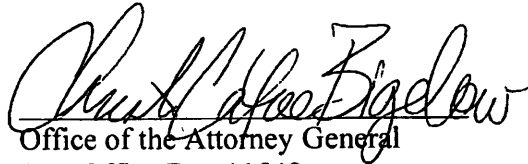
This Court did not misapprehend or overlook any issues of fact or law. Therefore, Appellant's Petition for Rehearing should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA CATOE BIGELOW
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit



Office of the Attorney General
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ATTORNEYS FOR RESPONDENT

March 30, 2015

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2015-UP-098 (S.C. Ct. App. filed 3/4/15)
Appellate Case No. 2012-213734

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES LAMONT MOORE,

APPELLANT.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of Respondent's **Return to Petition for Rehearing** in the above-referenced matter has been served upon **Brandon S. Smith**, Nelson, Mullins, Riley & Scarborough, LLP, Post Office Box 11070, Columbia, SC 29211-1070, and **Robert M. Dudek**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **30th** day of **March, 2015**.


CHRISTINA CATOE BIGELOW
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

The South Carolina Court of Appeals

The State, Respondent,

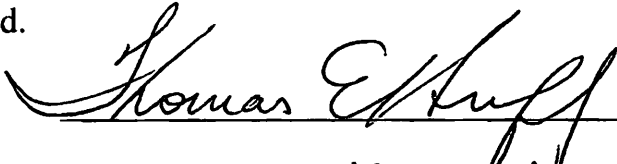
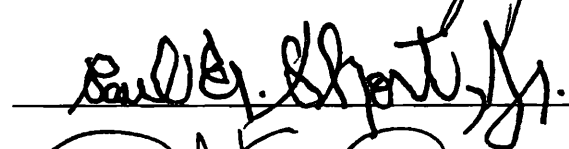
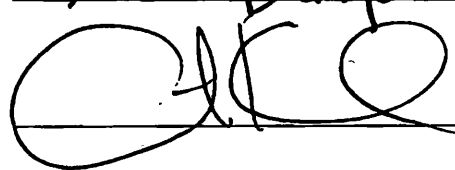
v.

James Lamont Moore, Appellant.

Appellate Case No. 2012-213734

ORDER

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

 J.
 J.
 J.

Columbia, South Carolina

cc:

Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
Brandon Scott Smith, Esquire
Scarlett Anne Wilson, Esquire
Christina Catoe Bigelow, Esquire

FILED

April 04, 2015

The Supreme Court of South Carolina

The State, Respondent,

v.

James Lamont Moore, Petitioner.

Appellate Case No. 2015-001054

Lower Court Case No. 2009GS1008466

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MAY 19 2015

SC Court of Appeals

ORDER

Petitioner has filed a *pro se* petition for a writ of certiorari seeking review of the decision of the South Carolina Court of Appeals.¹ This petition fails to have the content specified by Rule 242(d) of the South Carolina Appellate Court Rules (SCACR). Further, petitioner has failed to file an appendix having the content specified by Rule 242(e), SCACR. Accordingly, this matter is dismissed.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

May 19, 2015

cc: Robert Michael Dudek, Esquire
 Brandon Scott Smith, Esquire
 Christina Catoe Bigelow, Esquire
 Mr. James Lamont Moore, 299043
 The Honorable Jenny Kitchings
 The Honorable Julie J. Armstrong

¹ Before the Court of Appeals, the Appellate Case Number was 2012-213734.

South Carolina Court
(Supreme Court)**RECEIVED**

State,

vs. Respondent,

James Lamont Moore,

299043, Appellant

JUN 10 2015

Appellate # 2015-001054

S.C. SUPREME COURT

Motion or
Petition to
Reinstate Appeal

on May 28, 2015, I, petitioner,
Moore, received a letter Dated
May 26, 2015 from this Honorable
Court regarding filing this very
Motion.

The Court sent a copy to Mr.
Robert M. Dudek of the South
Carolina Office of Defense of
Indigents, Brandon S. Smith and
Mr. Christina C. Bigelow and it
is my understanding it is up to
the Attorneys to file my Appeal,
or Certiorari in compliance with
Rule 240 (SCACR)

I, petitioner, Moore am filing this
Motion to Reinstate within the
specified time under Rule 260(a)
(SCACR).

in the event a statute of limitation
issue arises.

In the meantime I am as best I
could as a pro se litigant
preparing an Appendix of what
documentation I do have available
in compliance with Rule 240 (SCAER),
to the best of my ability.

Respectfully Submitted,

✓ James Moore

James Lamont Moore,
#299043-McDougall C.F.
1516 Old Gilliard Rd.
Ridgerville, SC 29472

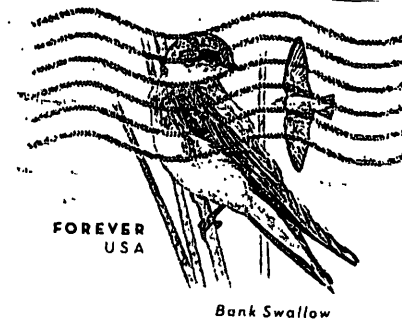
June 3, 2015
Ridgerville, SC

Appellant / Pro se

James Moore 299843B6B
M.C.I
1516 Old Gilliard Rd
Ridgville SC, 29472

CHARLESTON SC 294

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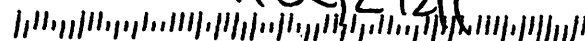
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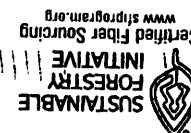
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South Carolina Supreme Court
P.O. box 11330
Columbia SC, 29211



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344

The Supreme Court of South Carolina

The State, Respondent,

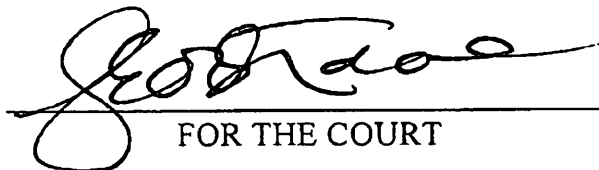
v.

James Lamont Moore, Petitioner.

Appellate Case No. 2015-001054

ORDER

This matter was dismissed based on petitioner's failure to comply with the requirements of Rule 242, SCACR. Petitioner moves to reinstate the matter. The motion is denied.

 C.J.
FOR THE COURT

John W. Kittredge, J., not participating

Columbia, South Carolina

July 23, 2015

cc:

The Honorable Jenny Abbott Kitchings
Alan McCrory Wilson, Esquire
Christina Catoe Bigelow, Esquire
James Lamont Moore, 299043
Julie J. Armstrong



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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August 27, 2015

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: The State v. James Lamont Moore
Lower Court Case No. 2009GS1008466
Appellate Case No. 2012-213734

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: James Lamont Moore, 299043
Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
Brandon Scott Smith, Esquire
Scarlett Anne Wilson, Esquire
Christina Catoe Bigelow, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

Plaintiff(s)

vs.

Defendant(s)

2015-CP-10-0985

(Please Print)

Submitted By: JAMES Lamont MOORE

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29067 HA-160

SC Bar #:

Telephone #:

Fax #:

Other:

E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	20 -CP- _____	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice/ File Med Mal (230)	☐ Personal Injury (350)	☐ Possession (450)
	☐ Other (299)	☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☒ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture-Consent Order (850)	☐ SCDOT (950)
	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Other (899)	☐ Worker's Comp (960)
	☐ Other (799)		☐ Zoning Board (970)
Special/Complex /Other			☐ Administrative Law Judge (980)
☐ Environmental (600)	☐ Pharmaceuticals (630)		☐ Public Service Commission (990)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		☐ Employment Security Comm (991)
☐ Medical (620)	☐ Out-of State Depositions (650)		☐ Other (999)
☐ Other (699)	☐ Sexual Predator (510)		

Submitting Party Signature:

James L. Moore

Date: 12-18-15

FORM 5

STATE OF SOUTH CAROLINA)

County of CHARLESTON)

IN THE COURT OF COMMON PLEAS

2015-CP-10-6985

JAMES Lamont MOORE (299043)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

2015 DEC 29 PM 4:16
JULIE H. BARTON
CLERK OF COURTINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention KERSHAW Corr. Inst. 4848 Goldmine Hwy
KERSHAW S.C. 29067 HAWK
2. Name and location of Court which imposed sentence Charleston County Court
OP General Sessions, Charleston, South Carolina
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2009-GS-1008446 Distribution Crack Cocaine 3rd

- (b) _____
 (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) Oct. 18, 2012 (17) years
 (b) _____
 (c) _____
6. Check whether a finding of guilty was made:
 (a) after a plea of guilty _____
 (b) after a plea of not guilty By Counsel IN defendant's Absence
 (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. S.C. Court of Appeals
 ii. _____
 iii. _____
 (b) the result in each such Court to which you appealed:
 i. Conviction Confirmed (AFFIRMED)
 ii. _____
 iii. _____
 (c) the date of each such result:
 i. MAY 4, 2015
 ii. _____
 iii. _____
 (d) if known, citations of any written opinion or orders entered pursuant to such results:
 i. German, Bostic, HARMLESS ERROR
 ii. PURSUANT TO STATE-V- BAILEY and others IN
 iii. STATES RETURN TO Rehearing Motion.
9. If you answered "no" to (7), state your reasons for not so appealing:
 (a) N/A

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) INEFFECTIVE Assistance of Counsel
- (b) DUE Process violations
- (c) Predjudicial Acts by Court AND Prosecutor
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Counsel did not safeguard 4th 5th 6th AND 14th protections
- (b) SEE Attached Addendum to Application
- (c) SEE Attached Addendum to Application
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? YES
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. Motion For Sentence RE-Consideration
- ii. Motion For Rehearing At Appellate Court
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Charleston County General Sessions
- ii. S.C. Court of Appeals
- iii. _____

- iv. _____
- (c) the disposition thereof:
- i. DENIED Relief sought
- ii. DENIED Relief sought, Conviction (Affirmed)
- iii. _____
- iv. _____
- (d) the date of each such disposition:
- i. DEC. 13, 2012
- ii. MARCH 4, 2015
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. Order of Sentence stayed
- ii. German, Bostic Case(s)
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) Applicant did NOT know law.
 (b) Counselors did not properly Articulate them.
 (c) In other Actions submitted.

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
 (b) your trial, if any? yes (Applicant was Absent)
 (c) your sentencing? yes (Applicant was Absent)
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 i. JASON KING, P.D. Chas County MEETING ST 106 Suite
Chas. County P.D. OFFICE, Chas. SC,
 ii. Brandon Smith SC. BAR No. 100753
1320 MAIN ST. 17 Floor, P.O. BOX 11070 Columbia, SC, 29201
 iii. Robert Dudek, Appellate DEF. 1330 Lady St
Suite 401, Columbia, S.C.
 (b) the proceedings at which each such attorney represented you:
 i. Trial, Sentence, Sentence Reconsideration
 ii. Appellate Motion For Rehearing / Appeal
 iii. Appeal

19. State clearly the relief you seek in filing this application:

A New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Charleston)

VERIFICATION

I, JAMES Lamont MOORE #299043, 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.

James L. Moore

SWORN to and subscribed before me this 21st
day of December, 2015.

Catherine A. Ormsby (L.S.)
Notary Public

My Commission Expires: December 23, 2018

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, JAMES LAMONT MOORE #299043, 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.

James L. Moore
Applicant

SWORN or affirmed to and subscribed before me this
21st day of December, 2015.

Catharine A. Omasor
Notary Public

My Commission Expires: December 22, 2018

ATTACHMENT TO PCR APPLICATION

J.M 10
Item (10) A

COUNSEL ASSISTED THE COURT AND PROSECUTION IN A BATSON-V-KENTUCKY VIOLATION THAT PREJUDICE DEFENDANT IN A JURY SELECTION THAT RESULTED IN AN ALL WHITE JURY WHERE THE COURT MADE IT CLEAR THAT A BLACK MALE WAS BEING TRIED. (T.T. pg 64, line 20), FOLLOWED BY THE PROSECUTIONS STRIKING ALL POTENTIAL BLACK JURORS FOR TRIVIAL REASONS DEEMED REASONABLE BY DEFENSE COUNSEL AS RACE NEUTRAL EXPLANATIONS. THE COURT RULE THE ACTIONS PLAUSIBLE BECAUSE COUNSEL MADE NO REASONABLE BATSON CHALLENGE (pg. 91, lines 3-6)

J.M 10
Item (10) B

IN DEFENDANT'S ABSENCE, ALL DUE PROCESS WAS ADOPTED AND A CAPRICIOUS LYNCHING WAS RENDERED DEFENDANT THAT ABANDONED THE INTENT OF A LIBERTY INTEREST THE COURT, PROSECUTION AND DEFENSE COUNSEL MADE A MOCKERY OF, WHERE THE STATE'S PRIMARY WITNESS STATED OUT THAT DEFENDANT WAS GUILTY AND THE COURT DID NOTHING TO CURE THE DAMAGE OR RULE A MISTRIAL. HAVING TESTIFIED IN OTHER TRIBUNALS AND SIGNED AFFIDAVIT OF FALSE INFORMATION, NO CREDIBILITY WAS PROPERLY PUT BEFORE THE COURT DUE TO AWARENESS BY ALL PRESENT COURT OFFICIALS -

LEGAL

pg(2) OF PCR ATTACHMENT

JM 10
Item(10) C

The Court improperly adjudicated the matter in that defendant never waived his right to presence at trial or gave counsel the effect to do so. The Court even recessed to do the necessary paperwork to proceed after noting caution to move with the case as were prior to recess.
 (pg. 10, lines 7-10)

It is clear in the Trial Transcript that the Court and Prosecutor was in Judicial harmony that was a disadvantage to Defendant's right to a fair trial

S/ James Moore
 Kershaw Corr. Inst.
 HA-160

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

James Lamont Moore, #299043,

2015-CP-10-6985

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed on December 29, 2015, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of commitment. The Applicant was indicted by the November 2009 term of the Charleston County Grand Jury for Distribution of Cocaine Base (2009-GS-10-8446). Jason King, Esquire and Brandon Smith, Esquire represented him. On October 18, 2012, the Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Kristi Lea Harrington sentenced the Applicant to confinement for seventeen (17) years.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v California 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Moore, Op. No. 2015-UP-098 (filed on March 4, 2015). The Remittitur was issued on August 27, 2015.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
2. "Due Process Violations"
3. "Predjudicial (sic) Acts by Court and Prosecutor"

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, and the South Carolina Department of Corrections' records, the application, record on appeal and Court of Appeals opinion. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent construes Applicant's allegation as alleging ineffective assistance of counsel. The Respondent asserts that the Applicant's allegation of ineffective assistance of trial counsel is without merit. The Respondent also asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

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. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). 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 v. Washington. 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). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The Respondent submits that the 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. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Respondent interprets Applicant's second claim as an allegation that he was denied due process of law. The Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and

held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a prima facie showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

The Respondent interprets the Applicant's third allegation as an allegation of 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). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicants burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989).

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

[Signature block on the following page]

VII.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective and whether the Applicant's appellate counsel was ineffective.

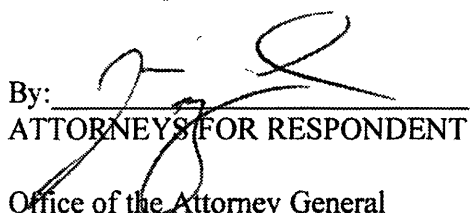
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

MAY 9th, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
JAMES LAMONT MOORE, #299043	)	2015-CP-10-6985
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James K. Falk, Esquire
Falk Law Firm, LLC
PO Box 1058
Charleston, SC 29402-1058

DATED this 9th day of May, 2016.


 Jocelyn Baker, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE 9th JUDICIAL CIRCUIT
	)	
James L. Moore 299043	)	
Applicant	)	2015-CP-10-6985
Vs.	)	
State of South Carolina	)	
Respondent	)	

TO: Megan Jameson, Esq., Office of SC Attorney General, PO Box 11549, Columbia, SC 29211-1549.

Applicant James L Moore by counsel amends his PCR application filed December 29, 2015 to add the following grounds upon which he asserts claims of ineffective assistance of trial counsel.

1. Trial Counsel failed to call Tyeka Alston as a potential alibi witness. On information and belief trial counsel failed to provide the Solicitor notice of a potential alibi witness; and trial counsel made no effort to interview Tyeka Alston prior to Applicant's criminal trial.
2. Trial Counsel was ineffective for failing to move for a mistrial after the State's witness testified that applicant was guilty and that his lawyer knows he is guilty. (Trial Transcript p. 150 ll. 7-10 also Record on Appeal page 105). Additionally trial counsel should have objected to the Court's curative instruction.

Respectfully Submitted,



James Falk
PO Box 1058
Charleston, SC 29402
(843) 606 6007
jfalklaw@gmail.com

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE 9th JUDICIAL CIRCUIT
	)	
James L. Moore 299043	)	
Applicant	)	2015-CP-10-6985
Vs.	)	
State of South Carolina	)	
<u>Respondent.)</u>		

CERTIFICATE OF SERVICE

Undersigned certifies that on December 12, 2017 a copy of the above was both mailed and emailed to Megan Jameson, Esq. at the address listed above.


 James Falk
 Counsel for Applicant

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHARLESTON) Court of Common Pleas
3 _____) Case No. 2015-CP-10-06985
4 JAMES LAMONT MOORE,)
5 Applicant,)
6 vs.) Transcript of Record
7 STATE OF SOUTH CAROLINA,)
8 Respondent.) DATE: February 1, 2018
9 _____)

10 B E F O R E:

11 THE HONORABLE MAITE MURPHY

13 A P P E A R A N C E:

14 JAMES KRISTIAN FALK
15 Attorney for the Applicant

16 MEGAN HARRIGAN JAMESON
17 Attorney for the Respondent

18 Karen V. Andersen, RMR, CRR
19 Circuit Court Reporter

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EXAMINATION

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STEPHANIE LINDER

DIRECT BY MS. JAMESON 40

1 MS. JAMESON: May it please the Court. The first
2 matter today is James Moore vs. The State of South Carolina,
3 Docket No. 2015-CP-10-6985.

4 During the November 2009 term, the Charleston County
5 Grand Jury indicted Mr. Moore for distribution of cocaine base,
6 third or subsequent offense, stemming from a controlled buy of
7 crack cocaine from a confidential informant. He was
8 represented by Jason King.

9 On October 18th, 2012, he was tried in his absence
10 before Judge Harrington. At the conclusion of the trial, he
11 was convicted as indicted. And Judge Harrington sealed her
12 sentence.

13 On November 16th, 2012, he appeared before Judge
14 Harrington, who unsealed her sentence of 17 years imprisonment.

15 Applicant's counsel, Mr. King, filed a motion to
16 reconsider his sentence, and a hearing was held before Judge
17 Harrington. Following the hearing, Judge Harrington denied her
18 motion to reconsider his sentence.

19 He then filed a timely notice of appeal. And an
20 appeal was perfected on his behalf by Brandon Smith. After
21 briefing an oral argument, the Court of Appeals affirmed his
22 conviction and sentence on March 4, 2015.

23 The remittitur was issued on August 27th, 2015. He
24 filed timely application for post-conviction relief on December
25 29th, 2015, alleging counsel was ineffective for failing to

1 challenge his jury based on *Batson* violations and for allowing
2 him to be tried in his absence.

3 The State made its return on May 9th, 2016, requesting
4 an evidentiary hearing. He's represented by James Falk.

5 On December 12th, 2017, Mr. Falk filed an amended
6 application on Mr. Moore's behalf alleging two additional
7 grounds of ineffective assistance. The first for failure to
8 call Tyeka Alston, his alibi witness; and second for failing to
9 move for a mistrial after the State's witness, the confidential
10 informant, told the jury the applicant was guilty; and for
11 failing to object to the trial court's curative instruction at
12 that time.

13 THE COURT: All right. Mr. Falk, this is Mr. Moore,
14 is that correct? Are you Mr. Moore?

15 MR. MOORE: Yes, ma'am.

16 THE COURT: Mr. Moore, before we get started, I'm
17 going to swear you in and ask you a couple of questions. Okay?

18 MR. MOORE: Yes, ma'am.

19 JAMES MOORE,

20 having been duly sworn, testifies as follows:

21 THE COURT: Mr. Moore, I understand that, obviously,
22 you are represented by Mr. Falk in this matter. Have you
23 discussed with him that if your petition is granted, there's
24 obviously some potential benefits and/or potential downfalls
25 for you, because the case could start -- the case would start

1 completely over. And I understand that you received a 17-year
2 sentence. It looks like the range for this case would be 15 to
3 30 years. So you could expose yourself to a full 30-year
4 sentence. Do you understand that, if this is granted?

5 MR. MOORE: Repeat that for me, ma'am.

6 THE COURT: Sure. If your petition is granted, the
7 case would start all over. So you are looking at a potential
8 exposure of a 30-year sentence. You received a 17-year
9 sentence. I just want to make sure that you are fully aware of
10 that before you decide to go forward or not. It's completely
11 up to you. And you need to make that decision freely and
12 intelligently after talking to your attorney. But I want to
13 put you on the record that you fully understand that.

14 MR. MOORE: Yes, ma'am.

15 THE COURT: And you've talked to your attorney about
16 that?

17 MR. MOORE: Yes, ma'am.

18 THE COURT: You feel you understand the potential
19 benefits and downfalls of going forward; is that correct?

20 MR. MOORE: Yes, ma'am.

21 THE COURT: Do you need more time to talk to your
22 attorney about that?

23 MR. FALK: Your Honor, may I have one moment, please?

24 THE COURT: Sure.

25 (Whereupon, an off-the-record takes place from 9:51

1 a.m. to 9:54 a.m.)

2 MR. FALK: Your Honor, we are going forward today.

3 THE COURT: So, Mr. Moore, you wish to go forward
4 after discussing this matter with your attorney?

5 MR. MOORE: Yes, sir. Excuse me, yes, ma'am.

6 THE COURT: That's okay.

7 So, all right, Mr. Falk. You may call your first
8 witness.

9 Thank you, Mr. Moore. You can have a seat.

10 MR. FALK: We call Mr. King to the stand.

11 JASON KING,

12 having been duly sworn, testifies as follows:

13 THE CLERK: Spell your last name for the record.

14 THE WITNESS: Jason King, K-i-n-g.

15 THE COURT: Your witness.

16 DIRECT EXAMINATION

17 BY MR. FALK:

18 Q. Mr. King, you are with the public defender's office?

19 A. Yes.

20 Q. And have you -- did you have Mr. Moore's case from the
21 beginning to the end?

22 A. I had it for most of it. I believe there was a period
23 where he had a private attorney for some period in the middle
24 of the representation, but I represented him for the most of
25 the time he had his cases.

1 Q. And so what's your recollection of how many times you
2 met with him about this case?

3 A. From my notes, I met with him approximately 12 times.

4 Q. And was he out on bond at the time?

5 A. It was a little of both. He was in -- let's see. He
6 was in jail part of the time. And he was out of jail part of
7 the time. I would say I met with him, looking at my notes,
8 one, two, three, four, five. Most of those meetings were while
9 he was in jail. A few of them were while he was out.

10 Q. But prior to -- immediately prior to the trial, was he
11 in custody or out of custody?

12 A. He was out.

13 Q. And were you in communication with him while he was
14 out of custody?

15 A. Yes.

16 Q. Can you tell me what sort of transpired as to leading
17 up to the -- so on the day of trial, do you have a recollection
18 of how this case, you know, came to trial? What day of the
19 week did this come to trial on? Do you recall? Was it Monday
20 or later in the week?

21 A. I think it was Wednesday.

22 Q. So was there a jury selection on Monday of that week?

23 A. I believe -- no.

24 Q. They qualified the jury on Monday?

25 A. They qualified the jury. The judge did mention

1 wanting to pick two juries that Monday. And I think Mr. Moore
2 showed up that Monday. And there was a word about picking two
3 juries. I think we came over here and they had already started
4 the other trial. So we didn't pick a jury that Monday. But I
5 think there was -- there was a plan to, but we didn't.

6 Q. Okay. So he was there on Monday of trial?

7 A. Yes.

8 Q. And what communication was there about that there
9 might be a trial later in the week for him?

10 A. I told him we were going that week, either Monday --
11 the plan was -- I think we were number two. We had a status
12 conference with Judge Harrington. I think it was 8:30 in the
13 morning that Monday. And I believe we were second up. So if
14 the first case went, we assumed we would go around Wednesday.
15 If the first case fell through, we were going to be first up.
16 So what I told him was either Monday or Wednesday we are
17 probably going.

18 Q. Was he actually ever before Judge Harrington on
19 Monday?

20 A. No, I don't think he went in front of a judge, no.

21 Q. Was he ever advised as to what would happen if he was
22 not there for trial?

23 A. Yes. Well, he was sent letters about when the trial
24 date was going to occur. He did show up on that Monday.

25 Q. In those letters, did they indicate the week or did

1 they say it was going to be --

2 A. Just indicated the Monday, the term of court based on
3 the Monday of that week. But after he didn't show up -- so
4 Wednesday, the case was called, and he doesn't show up. And I
5 can't get him. I can't reach him. And judge gives me a little
6 bit of time to reach him. And I was in the work room upstairs
7 by 4D, on the fourth floor. And I did get him on the phone
8 then. And that's when I told him, I said, you know, the trial
9 is starting, you know, everybody is in the courtroom waiting on
10 you. And he acted like he didn't believe me that the trial was
11 starting. But I just remember pleading with him to -- he needs
12 to come to court or this is going to happen without him and he
13 needs to be here for his trial, begging him to come.

14 And he said he was coming at one point. I called him
15 back again. And then he acted like -- I don't know. I
16 eventually got the feeling that he wasn't going to come.

17 Q. Do you have a recollection of what part of the county
18 he was in?

19 A. He told me he was in Mount Pleasant.

20 Q. Okay.

21 A. At one point, I called him, and he said, I'm in Mount
22 Pleasant, I'm on my way. And then we were waiting. I mean,
23 the judge is -- we are taking a recess. The whole courtroom is
24 basically waiting on this, waiting on him to get here. So I
25 would come back in and report. And the judge would give me

1 some more time. I think I got him on the phone again. And at
2 one point, he was like -- he said: Somebody told me there's
3 nothing going on up there. Like, he knew somebody in the
4 courtroom and he said nothing -- and I said, no, that's not
5 true, there's a courtroom full of people waiting on you. It's
6 like he didn't believe me that the trial was actually going to
7 go, but I was pleading with him to come.

8 Q. When you saw him on Monday when they were qualifying
9 the jury, what communication did you have with him before you
10 left the courthouse on that Monday?

11 A. I would have told him to be on standby. I usually
12 have people wait on telephone standby. So if the case gets
13 called, if I call you, I need to get you here within 30
14 minutes. That way, people don't have to stay here the whole
15 time. I put them on telephone standby.

16 Q. Did you have any communication with him on Tuesday?

17 A. I don't think -- let me check. I don't think so. I
18 think it wasn't until Wednesday.

19 Q. So was he ever advised by the court that if he would
20 not appear for trial, he would be tried in his absence?

21 A. I don't think so. I don't think that was ever on the
22 record.

23 Q. Okay. Were there any preliminary matters prior to
24 this? Had this case been called for trial more than once?

25 A. It had. And that may have been a reason why he didn't

1 think it was going to go. I think it was on at least two
2 previous trial dockets.

3 Q. And he appeared at those trial dockets?

4 A. I believe he did. He generally appeared. And I think
5 maybe the case was to be on the trial docket, it would happen a
6 couple of times, and maybe he thought it wasn't going to get
7 reached that week too.

8 Q. When y'all set up appointments, did you have any
9 appointments with him in your office, or were all your meetings
10 with him when he was in custody?

11 A. No. I had at least one office meeting with him. And
12 there were a couple of court dates I think where he may have
13 come to court when he was out and we met and talked. But there
14 was at least one meeting before trial, a lengthy meeting where
15 we met and discussed trial and trial strategy in my office.

16 Q. So did he have a particularly good track record of
17 appearing?

18 A. Right. I think he did. He generally showed up when I
19 needed to get him here where he had court.

20 Q. Prior to that Monday, when y'all qualified the jury,
21 did you have any concern that he wasn't going to show up?

22 A. No.

23 Q. Did you move for a mistrial or ask for a continuance
24 when he didn't appear?

25 A. Yes. Yes. I was really hoping for a continuance,

1 just issue a bench warrant and move forward, and not try him in
2 his absence. The problem was, there was nothing left on the
3 trial docket. There was nothing really left to try. I think
4 if there was another case behind me ready to go, that might
5 have happened, but there was nothing. So I think that's why
6 she moved, the judge went forward with it.

7 Q. And the record will speak for itself, but do you
8 recall her making any findings on the record about that he was
9 advised of his trial rights?

10 A. She may have, but it would have been based on what I
11 told her. It was -- I don't think he ever came and she gave
12 him that talk on the record. It was me on the phone with him
13 trying to get him to come in. And I was communicating that to
14 the judge, because she's asking me, where's your client;
15 where's your client?

16 Q. So how long did the trial last?

17 A. I believe we did pretrial on Wednesday afternoon. It
18 may have been done by that following day, Thursday. I can't
19 remember if it went into Friday or not.

20 Q. I know it's all in the record, but did you open on
21 Thursday or did you open on Wednesday?

22 A. Thursday, right after. Wednesday afternoon we are
23 just doing pretrial. And that's when I'm calling him on the
24 phone, trying to get him to come in, and he doesn't come in.
25 All we did was pretrial. So we are still sort of okay at that

1 point, because the jury hasn't -- the jury hasn't been picked.
2 The jury hasn't seen that he's not here. So he's still okay.
3 He has until Thursday morning to get there.

4 Thursday morning, I'm still trying to call him. Can't
5 get him. His mother shows up. So on Thursday morning, his
6 mother is sitting out on one of the benches in the hallway.
7 And I explained the situation to her. And she's on the phone.
8 And at some point, she's gone. She left. And that was it.
9 And we started the trial that morning. So he still had
10 overnight, that next morning to get there before. I guess he
11 would have missed pretrial, but he wouldn't have missed the
12 jury. And the jury wouldn't have seen that he's not here.

13 Q. Okay. Now, do you recall, do you have any
14 recollection of the picking the jury, not the qualification,
15 but the actual picking of the jury?

16 A. Yes, yes.

17 Q. Did you have any concerns under *Batson v. Kentucky*
18 about the strikes that were being made by the State?

19 A. Well, it's hard to remember exactly back then. When I
20 read through the transcript, it bothered me a little bit.
21 There was -- on paper, it looks like there was a good *Batson*
22 issue. The State struck three black members of the jury panel.
23 One of them was -- let's see. One of them she struck for being
24 a member of the South Carolina Legal Services, which I accepted
25 as a legitimate reason. That's like the civil side of being a

1 public defender. No, she actually struck four. I'm sorry.
2 And one of them was for a prior record for a fraudulent check,
3 which I accepted as a reason.

4 There were two black females or two black people that
5 were struck who stated that their family members had been
6 arrested for drugs or distributing drugs, No. 243, Britney
7 White, and No. 150, Stacey Manigault.

8 And as I'm reviewing it, recently, when I got notice
9 for this PCR, there was a white juror, No. 96, James Hare, who
10 also had a family member who was arrested for dealing drugs
11 that the State did not strike.

12 Q. So you have arguably -- the State struck two people
13 for having family members that had convictions; is that
14 right?

15 A. Right. When we did the voir dire, there was a
16 question, any member of the jury's family ever been prosecuted
17 or convicted of drugs or distributing drugs. And at least
18 three people stood up. And it was those three people, the
19 Juror No. 150, Stacey Manigault, 243, Britney White, and 96,
20 James Hare. So she struck 243 and 150 based on that reason,
21 who were black, but then sat the white juror, No. 96, who gave
22 the same reason.

23 So I'm looking at that. And that worried me. I
24 thought on paper that it looks like a textbook *Batson*
25 violation. So -- but I thought, how could I -- and I worried

1 why would I miss that. I've been practicing law for a good
2 while when I tried this case.

3 The only reason I could see that I wouldn't have made
4 the *Batson* motion is, I saw that I struck that juror. So No.
5 96, the white juror, I struck that juror. So the only thing I
6 could figure is that my reasoning would have been -- and I
7 can't remember exactly what I was thinking at the time. But
8 I'm assuming that I struck -- I didn't make the *Batson* motion
9 because I assume I knew why the State didn't strike that juror.
10 This was a juror who had been with the Department of Defense
11 for 40 years, had retired working for the Department of
12 Defense. It just seemed like such a prosecutor's juror to me.
13 So I struck that juror.

14 So, you know, that's the best I could say, is that I
15 didn't make *Batson* motion because I assumed she sat that juror
16 for the same reason that I struck that juror.

17 Q. Let me -- now, let me sort of go back chronologically.
18 Let's go back to talking about this trial. What was the trial
19 strategy?

20 A. Trial strategy was the video wasn't the greatest
21 video. It didn't really show an exchange of drugs. When I met
22 with him in my office, I showed the video to him and asked him,
23 you know, what's going on. Usually try to show the video to
24 see if there's some explanation, if it's them on the video, and
25 if there's an explanation what's going on.

1 So I met him in my office. It was June 27th, 2012.
2 And he said it was him on the video, but he didn't sell any
3 drugs. So the strategy of trial was that the informant is not
4 telling the truth, go after the informant. The video doesn't
5 show an exchange between anyone, it doesn't capture anything,
6 so to go after the informant and argue that the informant is
7 lying.

8 Q. I'm sorry. Did you say you got a note there about my
9 client saying that it was him on the video?

10 A. Yes.

11 Q. What date was that?

12 A. June 27th, 2012.

13 Q. So was there any conversation about an alibi
14 witness?

15 A. No. And when I was going through the file, I didn't
16 see any note or anything about an alibi witness. But I did see
17 the note where when I met with him, defendant admits it's him
18 on the video, but not selling crack. I'm kind of going
19 through, like I said, showing him the video, trying to get from
20 him where the trial strategy is going to be. So I don't
21 believe he ever mention any alibi witness to me.

22 Q. Do you have a copy of the transcript up there or
23 record of appeal?

24 A. Yes.

25 THE WITNESS: I'm sorry, Judge. I may have left

1 something over there. Do you mind?

2 THE COURT: Sure.

3 BY MR. FALK:

4 Q. So we are on the same page, literally, do you have the
5 record of appeal or the transcript?

6 A. I have the transcript of record.

7 Q. All right. So if you will look at page 150 of that.

8 MR. FALK: And, Your Honor, I'm not sure what you
9 have. On the record on appeal, it's 185.

10 THE COURT: I've got those. So this is the
11 transcript, 150.

12 BY MR. FALK:

13 Q. Does that show -- is that redirect of Joseph Ancrum on
14 the page you are on?

15 A. Yes.

16 Q. What was Joseph Ancrum's role in this case?

17 A. He was the confidential informant.

18 Q. If you could sort of read, I guess, from lines -- just
19 to yourself -- from line 7 down to about 21.

20 You sort of recall that taking place?

21 A. I do.

22 Q. And just so you can summarize, what happened there?

23 A. I cross-examined Joseph Ancrum in two separate trials.
24 This was the second trial.

25 Q. Okay. Let me just -- let me follow-up on that real

1 quick and take it down. Why two trials?

2 A. Two separate defendants, this was -- this informant
3 did a lot of work.

4 Q. I wasn't aware there was a retrial of this one.

5 A. No, no, just a completely separate case that happened
6 to have the same informant. So that's important, because the
7 older case -- in the other case, that informant wrote an
8 affidavit -- first of all, that informant claimed to have
9 bought drugs from that defendant.

10 Q. And this is Joseph Ancrum?

11 A. Right. Right, in a separate case, claimed to bought
12 drugs, just like in this case, but then wrote an affidavit
13 saying that wasn't true, wrote an affidavit retracting that.
14 And I was cross-examining him about that affidavit, about his
15 credibility.

16 But in a previous case, he had claimed to have bought
17 drugs, but then wrote an affidavit saying that wasn't true.
18 That he basically recanted what he had said. So I was
19 cross-examining him about his credibility in this case, that he
20 had done this in another case. So, you know, he had already
21 lied on another case; he was lying on this one.

22 And while I'm doing that, he said: Yeah, I did the
23 wrong thing when I signed that paper, but he knows he's guilty
24 and his lawyer knows he's guilty, just like the guy that's
25 supposed to be on trial here, he's guilty.

1 He was -- he was a good witness on the stand, I will
2 put it that way, as far as informant.

3 Q. Good for who?

4 A. Good for the State. Of any informant I've ever
5 cross-examined, he was the best I've ever seen as far as
6 testifying. He was difficult to control on the stand. And
7 that's where he's blurting stuff out like that. And I moved
8 for a curative instruction. Maybe I should have moved for a
9 mistrial, but I moved for a curative instruction.

10 Q. Let's talk about that. How was the trial going as to
11 this point?

12 A. I guess as good as it could go, I guess, under the
13 circumstances.

14 Q. In the case you got a mistrial, would you have had an
15 opportunity to try the case with actually having the defendant
16 in the seat next to you?

17 A. Possibly.

18 Q. So what was your decision not to ask for a mistrial?

19 A. It's hard to say what my thinking was exactly back
20 then. In the heat of the moment, it may have just been that
21 this witness is getting away from me. In the heat of the
22 moment, it may have just been, I'm doing the best I could.

23 Q. Were you satisfied with the curative instruction from
24 the court?

25 A. Yes. Part of my whole argument was that this

1 informant is trying to set him up anyway, that this informant
2 is lying, trying to set him up, because he gets paid. He makes
3 money for every person he sets up. So I was just hoping that
4 that would just go along with showing his bias toward my client
5 and how he's really trying to get him convicted.

6 Q. But he actually accused you; Mr. Ancrum, right? He
7 says: And his lawyer knows he's guilty, on line 8?

8 A. He did. Yeah, he did say: His lawyer knows he's
9 guilty.

10 MS. JAMESON: Your Honor, just for clarification, I
11 think that might be misreading of this portion of the
12 transcript. I think that's talking about the other defendant,
13 Andre Williams, and the affidavit in there, his lawyer knows
14 he's guilty. Because at this time -- I think that's a stretch.
15 I don't think that's a correct reading of the transcript at
16 this point.

17 MR. FALK: Your Honor, we weren't there. The
18 transcript is what it is.

19 THE COURT: You can certainly cross-examine him on
20 that.

21 MS. JAMESON: Thank you, Your Honor.

22 BY MR. FALK:

23 MR. FALK: I have no further questions of this
24 witness.

25 THE COURT: Cross-examination.

1 MS. JAMESON: Yes, Your Honor.

2 CROSS-EXAMINATION

3 BY MS. JAMESON:

4 Q. Good morning, Mr. King.

5 A. Good morning.

6 Q. Did you file any *Brady* or *Wolfe*-type motions in this
7 case?

8 A. Yes.

9 Q. Did you review that material with Mr. Moore prior to
10 trial?

11 A. I did.

12 Q. Can you briefly go over the allegations as presented
13 by the State of what happened here in this case?

14 A. That he bought, I believe, crack cocaine from an
15 informant, was caught on video.

16 Q. Was there audio too?

17 A. Yes.

18 Q. And your client admitted it was him in the video,
19 correct?

20 A. Right, during trial preparation, when I'm showing the
21 video and developing the trial strategy, yes.

22 Q. Did you also recognize his voice from the audio?

23 A. I believed it was him on the video.

24 Q. And he didn't deny?

25 A. No.

1 Q. So there was no discussion about alibi witnesses,
2 because he admitted it was him the whole time?

3 A. Right. Well, there might have been some point in the
4 beginning when he said it wasn't him, but he did have -- I
5 remember -- he had two separate cases, so I'm not sure. But
6 definitely by a few months before trial, as I'm preparing and
7 showing this specific video, he said it was him.

8 Q. Regarding the trial in absence issue, you spoke to him
9 Monday when he showed up in the courthouse, correct?

10 A. Yes.

11 Q. And he had been advised that his case was on the
12 docket prior to that?

13 A. Right.

14 Q. By letter or phone, or how was he advised?

15 A. Both, letter and the phone.

16 Q. Was the letter from you or from the solicitor's
17 office?

18 A. I sent -- I found two letters, I think, that we had
19 sent.

20 Q. And you talked to him on the phone?

21 A. I believe so, the week before.

22 Q. And I believe you testified you told him that he was
23 second up on the trial docket and his case would go either
24 Monday or Wednesday?

25 A. Right, and definitely knew that by the 8:30 status

1 conference with Judge Harrington.

2 Q. On Monday?

3 A. Monday morning.

4 Q. And that was when your client was still at the
5 courthouse?

6 A. I believe he showed up later, during or after jury
7 qualifications.

8 Q. And you told him his case was definitely going to go
9 that week, Monday or Wednesday?

10 A. Right. After the status conference, we were number
11 two at that point, and the first trial was not going to last
12 all week.

13 Q. I think you -- the record reflects you tried to call
14 him Wednesday and you couldn't reach him at first. His
15 voicemail was full?

16 A. Right. Well, I can't remember exactly. I couldn't
17 reach him at first. And we took a recess. And the judge was
18 giving me time to try to reach him. And I eventually did reach
19 him that afternoon.

20 Q. And you told him his case was going forward, the jury
21 was being selected, he needed to come?

22 A. Yes.

23 Q. And he told you he was on his way, he was just in
24 Mount Pleasant and trying to find a ride?

25 A. Right.

1 Q. And then afterwards, you talked to him and you then
2 indicated to the court you didn't think he was going to show
3 up?

4 A. Right. And at that point, I'm trying to get a bench
5 warrant issued and move on, because I'm trying to avoid the
6 trial in absence. And I think that's part of the problem. If
7 he had -- if he had just not shown up, then it might have
8 been -- it might have helped getting a bench warrant. But he
9 was leading on as if he were coming and was causing the trial
10 to keep proceeding without him.

11 Q. You asked Judge Harrington more than once for a bench
12 warrant and to continue the case, correct?

13 A. Yes.

14 Q. And when you spoke to him on Wednesday, he told you
15 that he heard nothing was going on, indicating he had someone
16 in the courthouse kind of watching out for his case?

17 A. Yes. The first phone call, he's like, I'm in Mount
18 Pleasant, on my way. So we gave him 20 minutes or amount of
19 time. And judge is asking, where is he at. I'm following up
20 with phone call. And that's when he's acting like he's not
21 coming. And that's when he's acting like he doesn't believe
22 what I'm telling him, that the trial is actually going. And he
23 made some comment about, you know, somebody told me there's
24 nobody even in the courtroom, like he had somebody here who was
25 checking in on the courtroom. And I said, that's not true, we

1 are -- there was a court reporter. Everybody was in the
2 courtroom waiting specifically on him.

3 Q. A lot of this is put on the record. You are informing
4 Judge Harrington and the State what was going on and trying to
5 get ahold of your client, correct?

6 A. Yes.

7 Q. You have a copy of the transcript up there, correct?

8 A. Yes.

9 Q. Will you turn to page 61 of the trial transcript.

10 A. Yes.

11 Q. And review that to yourself.

12 A. Okay.

13 Q. You were asked by Judge Harrington whether Mr. Moore
14 had sufficient notice of his trial date, correct?

15 A. Correct.

16 Q. And what did you respond?

17 A. I had to say yes, because I'm on the phone begging
18 him, your trial is starting right now, you need to be here.

19 Q. And you advised him you would be tried --

20 A. Yes, I said, this is going to happen without you if
21 you don't come, you need to be here.

22 Q. Did you file a motion, any post-trial motions because
23 he was tried in his absence?

24 A. I did a motion to reconsider since, but it may have
25 been since he was picked up. He was brought in. The sentence

1 was read. And I don't think the judge was really giving him a
2 chance to speak because he had already been sentenced. So I
3 filed a motion to reconsider, I think maybe at least to have a
4 chance to have his family come in and argue for a better
5 sentence.

6 Q. Do you recall Judge Harrington making any findings
7 about him having notice during sentencing?

8 A. I think so, but I can't remember for sure.

9 Q. Do you have a copy of the sentencing transcript from
10 November 16th?

11 A. I may not have that with me.

12 MS. JAMESON: May I approach, a copy?

13 BY MS JAMESON:

14 Q. I'm handing you page 5. If you will read the
15 highlighted portions to yourself. So did the court make a
16 finding that he did, indeed, have sufficient notice for trial?

17 A. Yes, she did.

18 Q. Moving on to the *Batson* issue, you testified on direct
19 that you should have made a *Batson* motion, but you did make a
20 *Batson* motion, correct?

21 A. I did not make a *Batson* motion. Oh, I'm sorry. I did
22 make a *Batson* motion, but I think I abandoned it. I don't
23 think I -- I think I made the motion, but then when the State
24 gave their race-neutral reasons, I accepted those.

25 Q. So you made a *Batson* motion. You just didn't respond

1 for step two of the inquiry, arguing that it was pretext and
2 give the solicitor an opportunity to respond?

3 A. Exactly.

4 Q. So you did make the *Batson* motion based on those four
5 African-American jurors that were struck?

6 A. Yes.

7 Q. And I think you agreed on the record that SC Legal
8 Services was a race-neutral reason, the prior record for
9 fraudulent check was a race-neutral reason, and then when
10 Jurors 243 and 150, when the solicitor responded, the family
11 had been arrested for drugs, you accepted those at the time?

12 A. Right.

13 Q. And so your testimony here today is that now after
14 reviewing the transcript, you think you could have argued
15 pretext based on Juror No. 96, James Hare?

16 A. I wish I had fleshed it out on the record more, I
17 guess. I wish I had fleshed it out on the record. Looking
18 back on it, I can come up with an explanation why I didn't
19 challenge it. But, you know, I don't know. I don't remember
20 specifically what I'm thinking back then in this situation.

21 Q. But your recollection is it was because he worked for
22 the Department of Defense for over 40 years?

23 A. When I'm looking back on it, and I'm trying to figure
24 out, you know, why didn't I make that challenge, why would I
25 not have done that, in trying to figure out, that was the

1 explanation that I came up with, was when I saw that I struck
2 the juror and then I looked and I went through the juror cards
3 that they send back with their information that I had, and that
4 was the only explanation I could come up with, why I wouldn't
5 have challenged that, because I struck that juror. And I
6 assumed that the State sat that juror for the same reasons I
7 struck her -- I struck him.

8 Q. This issue with the affidavit signed by the
9 confidential informant, Joseph Ancrum, that affidavit was
10 written after trial on your other client, Mr. Williams's case,
11 correct?

12 A. I think so. I think it was obtained by appellate
13 attorney, so I believe it was after the trial.

14 Q. Do you recall the situation in which that affidavit
15 was procured, whether Mr. Williams's family members had any --

16 A. I want to say what Mr. Ancrum said is -- this is Andre
17 Williams, the other case, that Andre Williams's members had
18 picked him up and drove him to Mark Peper's office, which is
19 Mr. Williams's appellate attorney.

20 Q. And that was fleshed out on cross-examination with
21 Mr. Ancrum, right?

22 A. Right.

23 Q. And you had Mr. Peper, and I think his paralegal or
24 legal assistant, listed as potential defense witnesses,
25 correct?

1 A. Right.

2 Q. What was the reasoning for that?

3 A. I believe it just would have been if Ancrum denied
4 making the statement, just to be able to prove it up. I think
5 that was the only reason. If he admitted or acknowledged that
6 he wrote the affidavit, I wouldn't --

7 Q. And you were able to elicit that testimony?

8 A. Right. He acknowledged he wrote the affidavit, but
9 said that he only did it because, I guess, under duress.

10 Q. And on page 150, when Mr. Ancrum makes the comment
11 about your client being guilty, you did move for a curative
12 instruction, correct?

13 A. Yes.

14 Q. And I think you testified you were satisfied with a
15 curative instruction here?

16 A. I believe so. I didn't make a motion for a mistrial,
17 so I'm assuming I was satisfied with that.

18 Q. I think you testified it actually went along with your
19 trial strategy of showing that Mr. Ancrum was lying and setting
20 up Mr. Moore?

21 A. Yes.

22 Q. So it actually helped your trial strategy?

23 A. Well, I mean, I had to run with it.

24 MS. JAMESON: Moment's indulgence, Your Honor.

25 BY MS. JAMESON:

1 Q. And there was some questioning that your client wasn't
2 told by the court that he could be tried in his absence,
3 correct?

4 A. Right. I don't believe he was ever officially on the
5 record instructed by the judge.

6 Q. But you told him multiple times?

7 A. Yes.

8 Q. And he was aware he could be tried in his absence?

9 A. Yes.

10 Q. And he was out on bond at this time?

11 A. He was.

12 Q. Do you know if his bond form indicated he would be
13 tried in his absence if he didn't appear for trial?

14 A. I think that's the standard small print on the bond
15 form.

16 MS. JAMESON: No further questions.

17 THE COURT: Any redirect?

18 MR. FALK: No, Your Honor.

19 THE COURT: Okay. Step down, Mr. King. Thank you.
20 You may call your next witness.

21 MR. FALK: We will call Mr. Moore to the stand.

22 THE COURT: Come on up, Mr. Moore.

23 JAMES MOORE,

24 having been duly sworn, testifies as follows:

25 THE CLERK: Spell your first and last name for the

1 record.

2 THE WITNESS: James Moore, J-a-m-e-s, M-o-o-r-e.

3 THE COURT: Your witness.

4 DIRECT EXAMINATION

5 BY MR. FALK:

6 Q. Mr. Moore, Mr. King represented you in this trial?

7 A. Yes, sir.

8 Q. He had indicated that you had private counsel for some
9 time; is that correct?

10 A. Uh-huh, yes, sir.

11 Q. And who was that?

12 A. Charlie Whirl at the time.

13 Q. Okay. And then you went back to Mr. King for the
14 trial?

15 A. Yes, sir.

16 Q. Okay. What is your recollection of discussions you
17 had with him regarding your trial strategy?

18 A. As far as?

19 Q. What did you all talk about? What did you all talk
20 about as the strategy for the defense in this trial?

21 A. We never really talked about none. I met him. I
22 talked to him a few times when I was in the county jail. I
23 talked to him a few times then. And we had two meetings at his
24 office. One of the meetings he and me viewed the video. And
25 he was telling me, Mr. Moore, you need to plead guilty to this

1 charge. You know, I told him, why would I plead guilty to a
2 crime that I wasn't even on the scene, of this crime.

3 I never once told him that that was me on this video.
4 I never once told him -- I never told him that. Why would I
5 tell him something I wasn't there?

6 Q. So he never showed you the video and you never said,
7 yeah, that was me, but I wasn't selling any drugs that day?

8 A. Right. Yes, sir.

9 Q. What's your recollection of the day of the week of the
10 trial? Do you recall being in the courthouse on that Monday?

11 A. Yes, sir.

12 Q. And what happened on that Monday?

13 A. On that Monday, he called me: Mr. Moore, I need you
14 to come down here; we are supposed to be picking a jury for the
15 case.

16 And I said, I will be down here 15 minutes. I was
17 down here in like 10 minutes, 15 minutes. My sister brought me
18 down here. When I got there, Mr. King's exact words were:
19 Mr. Moore, we ain't picking a jury again today because they
20 have some motions inside the courtroom.

21 And he was like: I will get back with you. I will
22 send you something in the mail stating -- we are on the docket
23 for this week.

24 He told me we was on the docket for this week. Never
25 told me we were first, second or third. All he told me, he

1 would be sending me something in the mail stating when we got
2 trial on that day.

3 Q. So why were you not there on Monday morning? I mean,
4 he had to call and tell you to come down there. Did you not
5 know that you all were picking a jury that day?

6 A. I came down Monday. I came down that Monday morning
7 when he called me.

8 Q. Okay. Did you know that Sunday night that you were
9 going to need to be in court the next day?

10 A. No, sir.

11 Q. So the first time you knew that you had to be in court
12 that week was when he called you that Monday?

13 A. Yes, sir.

14 Q. Had he sent you letters?

15 A. No, sir. I never received any letters at all. I
16 never received notification. Because if I had received
17 notification, I would have been here, sir. Three years, I was
18 dealing with this charge. Three years, I never missed a court
19 date, never at all.

20 Q. So this case had been called for trial in the past?

21 A. In the past.

22 Q. Do you have any recollection how many times? I think
23 he said two or three. Does that sound right to you?

24 A. Yeah, maybe three.

25 Q. And you were in court at that time?

1 A. All the time, yes, sir.

2 Q. And I guess -- how long were you in custody prior to
3 the trial? He said that you were in custody for a period of
4 time. You said you were in custody for a period of time.

5 A. Yes, for five months.

6 Q. Okay.

7 A. On January the 3rd, 2012, I received a letter from the
8 court saying that I had court on January 3rd, trial. Me and my
9 mother was down here. The whole courtroom was closed. But I
10 got a letter from the court saying I had court. The whole
11 courtroom was closed. Like, a week later, I was leaving my
12 mother's house, I was leaving home, and I got stopped by a
13 police officer, city police officer, saying I got a warrant for
14 not showing up to court. So the police officer detained me.
15 Put me in the backseat. He ran my name. I had no warrant. I
16 had no warrant at all.

17 So ten minutes later, three officers came up to the
18 scene. And one of the officer was Officer Burke, who testified
19 at my trial. And he said, Mr. Moore, you are going to get 15
20 years, you missed trial, I'm going to call your prosecutor
21 right now and inform him, which was Stephanie Linder.

22 He called her. And was, like, I got Mr. Moore right
23 here. So she said, you got Mr. Moore? Oh. She was so excited
24 that they had me locked up, I mean, in handcuffs, welcome to
25 the county jail, with no charge. I had no charge at all, no

1 nothing.

2 So they are saying I was trespassing. I never was
3 trespassing. I was coming from my mother's house walking down
4 the street and he stopped me and said I have a warrant. So he
5 locked me up for trespassing. I sat in the detention, Al
6 Cannon Detention Center for five months.

7 So I wonder what's going on, because I know I never --
8 I know I didn't miss trial, because I was down here. The whole
9 courtroom was closed on that day.

10 Q. Let me go back. Explain again about the letters you
11 received. You said you received a letter.

12 A. Yeah, I received a letter to come to court on January
13 the 3rd, 2012.

14 Q. Okay.

15 A. And I was in county for five months. So Mr. King, he
16 came and visit me. He said he thinks he can get my bench
17 warrant lifted. So I said, sure, because I showed up to court,
18 the courtroom was closed. And so he said, I don't know,
19 Mr. Moore, I will see what I can do. So I said, my mama got
20 the letter that I was there.

21 So I went to court. I went in front of Judge Dennis.
22 So my mother came up with the letter and give it to Mr. King.
23 He gave it to Judge Dennis. Judge Dennis looking at the letter
24 and he was like, this ain't right, the courtroom was closed on
25 that day. And said, Mr. Moore, we apologize for our

1 technicality, you have a nice weekend, your bench warrant is
2 granted.

3 Q. Okay. So this letter all happened January before your
4 case went to trial in October?

5 A. Uh-huh.

6 Q. So you got picked up on a bench warrant for a time
7 that you came to court and the court was closed, but you got
8 picked up for that bench warrant?

9 A. Yes, sir.

10 Q. And how long did you spend in the detention center for
11 that?

12 A. Five months, from January to July.

13 Q. Okay.

14 A. Prior to that, I never talked to Mr. King at all after
15 that, after I came home. And around in October, October the
16 15th, he called me. And he said, Mr. Moore, I need you to come
17 down, we are picking a jury. I came down here.

18 He said, ain't picking the jury again, we have motions
19 in the courtroom. We ain't picking jury again, Mr. Moore. So
20 I said, okay. He said, I will be getting with you, I will send
21 you something in the mail saying trial, what day, what time.

22 He never told me what day. He never told me we were
23 first or second at all. So I said, okay. So I'm waiting.

24 I never got a call from Mr. King on Wednesday. He
25 said he call me on Wednesday. He said I said I had a ride. I

1 never was in Mount Pleasant. I don't know no one in Mount
2 Pleasant. I stay in Charleston, downtown Charleston. He said
3 he spoke to me on that day. Had he spoke to me, I would have
4 been here.

5 Q. He did speak to you on that Monday?

6 A. Uh-huh, he spoke to me on that Monday. I got a call
7 from Mr. King on Monday, and I came.

8 Q. And you told him you would be there in 15 minutes?

9 A. And I came.

10 Q. You are saying you never had a telephone call from him
11 on Wednesday?

12 A. No, sir, because if I had, I would have been here.

13 Q. You never had any calls, and the first you heard --
14 your testimony is the first that you spoke with Mr. King after
15 being released from custody, when you got arrested on the bench
16 warrant, was the day that they were picking the jury on this
17 case?

18 A. Yes, sir.

19 Q. Okay. So when did you have the conversation with
20 him -- when did he show you a video?

21 A. He showed me the video --

22 Q. 2004 some time?

23 A. Yeah, like 2011, he showed me the video, two times.
24 And he was -- I was telling him about I want to go to trial. I
25 said, I never was at the scene of this crime at all. I said, I

1 have an alibi witness. And I told him who she was and told him
2 the number.

3 Q. And who was your alibi witness?

4 A. Tyeka Alston.

5 Q. What is her relationship to you?

6 A. My child's mother.

7 Q. Now, were you ever advised that you would be tried in
8 your absence?

9 A. No, sir.

10 Q. Did you even know that you could be tried in your
11 absence?

12 A. No, sir, I didn't know that.

13 Q. What did you think would happen if your case was
14 called for trial and you weren't in the courthouse?

15 A. Oh, I don't know what could happen, you know. I know
16 something could happen. I don't know what it could be.

17 Q. Okay. So after that Monday, so you left the court,
18 you left the courthouse on that Monday when they were in there
19 qualifying the jury?

20 A. Yes, sir.

21 Q. And where were you the rest of that week? Do you have
22 any recollection?

23 A. I was at my child mother's house.

24 Q. And where does she live?

25 A. [REDACTED].

1 Q. Okay.

2 MR. FALK: I have no further questions.

3 THE COURT: Cross-examination.

4 MS. JAMESON: No questions for this witness.

5 THE COURT: You may step down, sir. Thank you. You
6 may call your next witness.

7 MR. FALK: The next witness would be Tyeka Alston. I
8 don't believe she is present.

9 THE COURT: Do you have a motion regarding the record
10 and her presence?

11 MR. FALK: Your Honor, what we would ask for is that
12 if we could hold the record open so that she can come in and
13 testify as to what -- I would like her to come in and testify
14 before this Court as to what her testimony would have been at
15 his trial.

16 THE COURT: Any objection?

17 MS. JAMESON: The State doesn't object to the record
18 being left open for a brief period of time. I believe Mr. King
19 has another case. I would like the record to be closed after
20 that, because I would like to have an opportunity to have
21 Mr. King still here under subpoena to respond to anything. So
22 if we keep it open for a limited time.

23 THE COURT: I'll grant your motion. We will keep it
24 open until that period of time.

25 MR. FALK: Thank you. Would you like to hear

1 arguments on --

2 MS. JAMESON: The State has a witness.

3 THE COURT: You may call your witness.

4 MS. JAMESON: The State would call Stephanie Linder.

5 STEPHANIE LINDER,

6 having been duly sworn, testifies as follows:

7 THE CLERK: Speak directly into the microphone and
8 spell your first and last name for the record.

9 THE WITNESS: My name is Stephanie Linder,
10 L-i-n-d-e-r.

11 DIRECT EXAMINATION

12 BY MS. JAMESON:

13 Q. Good morning, Ms. Linder.

14 A. Good morning.

15 Q. How are you involved in this case?

16 A. I was the solicitor assigned to this case.

17 Q. Do you recall this trial?

18 A. I do.

19 Q. Did his attorney, Mr. King, make any *Batson* motions?

20 A. I recall him bringing up two jurors, or a number of
21 the jurors, and I did explain some of my reasoning behind those
22 to the judge.

23 Q. And I believe one of the grounds was that it was in
24 regards to four African members of the panel; do you recall
25 that?

1 A. Yes.

2 Q. And one of those worked for South Carolina Legal
3 Services, the record reflects?

4 A. Yes.

5 Q. And the other had some fraudulent check charges?

6 A. Yes.

7 Q. Do you recall the reasons you gave for striking Juror
8 243?

9 A. Yes. In preparation of this PCR, I got my file pulled
10 out of storage. And I was able to go through all my
11 handwritten notes on the jury sheet that I did during jury
12 qual's. Plus, I went through all of my notes from the voir
13 dire in the actual courtroom. And with that, when it came to
14 the question that was asked during voir dire in the courtroom
15 as far as any family member with any drug-dealing history, No.
16 150 stood up, who I believe was Stacey Manigault. And 150 said
17 that two family members were convicted federally for crack
18 distribution and were currently serving 25 years.

19 And then No. 243 stood up. I believe that was Britney
20 White. And what she said when she stood up, she said that her
21 brother was charged with the "exact same thing". And she was
22 right after Manigault, so crack dealing. And she also said
23 that was done by North Charleston Police Department.

24 Q. Did any other members of the panel stand up in
25 response to that question about family member being convicted?

1 A. Yes. No. 96 stood up and he said his brother was
2 arrested for drug dealing. He did not specify the type of
3 drug. And he said it was over 20 years ago.

4 Q. Do you recall what Juror 96, James Hare's, occupation
5 was?

6 A. Yes. He worked for the Department of Defense or was
7 retired from the Department of Defense.

8 Q. If Mr. King had challenged your responses to those
9 four jurors, particularly Juror 150 and Juror 243, and brought
10 to the Court's attention that you had -- well, let me back up.
11 You didn't strike Juror No. 96, James Hare, correct?

12 A. Correct.

13 Q. And he was a white male?

14 A. Correct.

15 Q. Why did you not strike him?

16 A. Well, I think it's important for Your Honor to
17 understand, those were the three that stood up for the drug
18 question. And that's a question that -- I don't do all drug
19 stuff anymore, but I've been in the solicitor's office for
20 almost 13 years now, and that's a question that I care about.
21 If it's a possession, if it's a family member with addiction,
22 those things matter less to me.

23 But what stuck out to me as far as these three jurors,
24 No. 96, he was the white male. As far as the drug thing, it
25 was 20 years prior. It was an arrest. So no specification of

1 conviction. And it was -- he just said drug dealing. He
2 didn't say what type; whereas, No. 150 and 243, 150 said it was
3 two family members, not one. So that is alarming to me. Said
4 it was a conviction. Said it was -- they were currently
5 serving 25 years. And said it was for actual crack dealing.
6 That was important because this was a distribution of crack
7 case. So I thought that those family members would be
8 similarly aligned with Mr. Moore.

9 As far as 243, she also indicated that her brother was
10 charged for crack distribution, again, the exact same charge
11 that this trial was. And she further said that it was done by
12 North Charleston Police Department. So it was a relatively
13 local law enforcement agency, you know. It wasn't out of
14 state. It wasn't in Greenville. It was close. It was right
15 here.

16 So, for me, that's how those three kind of broke down
17 differently as far as the drug questions in my analysis.

18 The other things -- do you want me to say other things
19 I thought about?

20 Q. Sure.

21 A. Okay. The other things that I looked at, when I
22 looked at 96, again, it was arrested, not convicted, 20 years
23 ago, and no specification type of drug. He also was a
24 Department of Defense worker. And there's the one individual.

25 150, it was two family members. It was exact same

1 crime that the trial was. It was a conviction. It was an
2 active sentence. That stood out to me.

3 No. 243, as I stated previously, it was a brother,
4 crack dealings, same as this exact trial. And it was a local
5 agency with North Charleston. Another thing for 243 is that
6 she had two prior convictions for shoplifting.

7 Q. If Mr. King had argued under the second step in *Batson*
8 that your reasons for striking 150 and 243 were pretext, is
9 this the type of argument you would have made to Judge
10 Harrington?

11 A. Absolutely. As far as 96, I think as shown by my
12 discussion or reasoning with the judge for the individual that
13 I struck because they worked for Legal Services, that right
14 there, I think, shows that -- I mean, I absolutely -- that's
15 why we sit there Monday morning, because I absolutely look at
16 the occupation of the individual or their occupation prior to
17 retirement. So, yes, the occupation of 96 absolutely came up
18 in my mind as far as whether or not I wanted to strike him or
19 sit him. And, yes, I would have given all these other reasons,
20 which is the specificity of the type of drug charge, the
21 nearness, I guess, of the drug charge, and the number of
22 individuals in the family, and whether or not it was a
23 conviction, yes.

24 MS. JAMESON: Thank you. No further questions.

25 THE COURT: Any cross-examination?

1 MR. FALK: No cross-examination.

2 THE COURT: You may step down. Thank you.

3 MS. JAMESON: The State has no additional witnesses to
4 call.

5 THE COURT: Parties care to give a brief summation?

6 MR. FALK: If I may have a moment, Your Honor.

7 THE COURT: Sure.

8 MR. FALK: Your Honor, there's certainly conflict in
9 the testimony here regarding my client, whether or not he was
10 ever advised of the fact that he would be tried in his absence.
11 I don't believe that finding on the record after the fact,
12 after the trial at the sentencing, is what the South Carolina
13 law requires. I think it has to be a finding on the record at
14 the beginning of the trial saying that -- putting on record
15 that the client was advised of his threat that he would be
16 tried in his absence if he wasn't present. Certainly is
17 disparaging testimony regarding what kind of communication he
18 was having with Jason King.

19 I think that the fact that my client had been to the
20 court three times prior to that and had not missed any other
21 court appearances certainly lends credibility to the fact that
22 he wouldn't then pick this one day to decide he was going to
23 run out on his trial. I think he did not know, again, his case
24 would be tried that day. I don't think he was ever advised of
25 the threat that his case would be tried in his absence. I

1 don't think there was any finding in the record prior to the
2 commencement of the trial that he was.

3 I do think the fact that Mr. King certainly had an
4 opportunity to fix this whole problem when the one juror -- I
5 mean, when Mr. Ancrum then makes this comment. Whether or not
6 the court would have granted the motion for a mistrial, I'm not
7 sure. But the fact that he didn't even ask for the mistrial,
8 that was never an issue that would have been preserved. So
9 that would have been a chance for him to reset the whole clock
10 and have the trial with the defendant in the chair.

11 I can appreciate -- I honestly don't believe we have a
12 *Batson* issue, since Mr. King actually struck the juror. That
13 would have been the basis for the *Batson* argument.

14 But I think the trial in the absence, with no notice
15 that he would be tried in his absence, and I think the fact
16 that there was an opportunity to ask for a mistrial in the
17 trial that Mr. King could have taken advantage of, was the
18 basis for our motion.

19 THE COURT: From the State.

20 MS. JAMESON: Your Honor, I believe that Mr. Falk
21 might be withdrawing his allegation regarding the *Batson*
22 violation. Out of abundance of caution, the State would submit
23 that a race-neutral reason was given today by the prosecuting
24 solicitor, Stephanie Linder, that it was not pretext for
25 striking Jurors 150 and 243. So the State submits that

1 Mr. Moore hasn't met his burden of proof in regard to that
2 allegation.

3 For the trial in his absence allegation, the record
4 and Mr. King's testimony supports that Mr. Moore had ample
5 notice that his case would be going forward to trial.
6 Additionally, he was notified by the bond form. He was out on
7 bond at the time. And the record also supports not only that
8 Mr. King tried to call him multiple times, but that his mother
9 even showed up Thursday morning.

10 So the State submits that Mr. Moore had ample notice
11 of his trial date and has failed to establish his burden today
12 before this court.

13 As to the issue regarding the alibi witness, I know we
14 are leaving the record open. So the State would like the
15 opportunity to supplement its argument if the alibi witness
16 does, indeed, show up. However, we have credible testimony
17 from Jason King that after watching the video with Mr. Moore,
18 Mr. Moore acknowledged that it was him in the video, that he
19 could recognize his voice in the video, however, Mr. Moore told
20 him that he didn't sell any crack, but he was present in the
21 video. So this allegation should be denied.

22 And for the final allegation for failing to move for a
23 mistrial after the confidential informant indicated that
24 Mr. Moore was guilty, a curative -- Mr. King objected at the
25 time. A curative instruction was given by Judge Harrington.

1 And Mr. King testified that he was satisfied with the curative
2 instruction, and that actually fit his trial strategy.

3 So applicant has not met his burden of proof in regard
4 to that allegation. And the State would ask this Court to deny
5 on all four grounds.

6 THE COURT: Thank you. Considering we are leaving the
7 record open at this juncture, I'm going to take the matter
8 under advisement, and I will notify y'all soon.

9 (Whereupon, a recess transpired at 10:55 a.m.)

10 (Whereupon, proceedings continue at 2:07 p.m.)

11 THE COURT: On the previous matter that we had that
12 we let the record open, obviously, that witness is not present.
13 So we will close the record. And I assume Mr. King is free to
14 go.

15 (Whereupon, the proceedings are adjourned.)

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CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter,
Certified Realtime Reporter for the State of South Carolina at
Large, do hereby certify that the foregoing transcript is a
true, accurate and complete Transcript of Record of the
proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in the
events thereof.


Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
James L. Moore, SCDC # 299043,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-10-6985

ORDER OF DISMISSAL

FILED
2018 MAY -7 PM 2:42
JULIE CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed on December 29, 2015, and amended on December 12, 2017, by James L. Moore (Applicant). On May 9, 2016, the State (Respondent) filed its return requesting an evidentiary hearing. An evidentiary hearing into the matter was convened February 1, 2018, at the Charleston County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its November 2009 term, the Charleston County Grand Jury indicted Applicant for distribution of cocaine base – third or subsequent offense (2009-GS-10-8446) stemming from a controlled buy of crack cocaine from a confidential informant. He was

represented by Assistant Public Defender Jason King of the Charleston County Public Defender's Office. Assistant Solicitor Stephanie Linder of the Ninth Circuit Solicitor's Office prosecuted the case.

On October 18, 2012, Applicant was tried in his absence in the Charleston County Court of General Sessions before the Honorable Kristi L. Harrington, circuit court judge. At the conclusion of the trial, the jury convicted Applicant as indicted and Judge Harrington sealed her sentence.

On November 16, 2012, Applicant appeared before Judge Harrington, who unsealed her sentence of seventeen years imprisonment. Applicant, through counsel, filed a motion to reconsider his sentence, and a hearing on this motion was held on November 16, 2012, before Judge Harrington. Applicant was present at this hearing and was represented by counsel. Following the hearing, Judge Harrington denied his motion to reconsider her sentence.

Applicant filed a timely notice of appeal and an appeal was perfected on his behalf by Brandon Smith, Esquire. On appeal, Applicant argued he was entitled to a new trial on the following grounds: (1) the trial court abused its discretion in denying his motion *in limine* to redact statements made in video of the drug transactions based on alleged impermissible bad acts pursuant to Rule 404(b), SCRE; (2) the trial court abused its discretion in failing to grant a mistrial following Applicant's objection to testimony from a State's witness that Applicant was guilty; and (3) the trial court improperly tried Applicant in his absence. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. James L. Moore, Op No. 2015-UP-098 (Ct. App. filed March 4, 2015). Thereafter, Applicant filed a petition for rehearing, and following the

State's return to the petition, the Court of Appeals denied Applicant's petition for rehearing. Applicant then filed a *pro se* petition for a writ of certiorari to the South Carolina Supreme Court, which was denied by the Supreme Court on May 19, 2015 for failure to comply with Rule 242, SCACR. Thereafter, Applicant filed a petition to reinstate his appeal, which was denied by the Supreme Court on July 23, 2015. The Remittitur was issued on August 27, 2015.

SUMMARY OF FACTS ADDUCED AT TRIAL

Applicant was indicted in November 2009 in Charleston County for distribution of cocaine base in relation to a drug transaction that occurred on July 16, 2009. The case was called for trial on Wednesday, October 17, 2012. At the outset of trial, Applicant was not present, and the trial judge inquired about Applicant's location. (R. p. 5). Defense counsel stated Applicant was out on bond and noted that he had been present that Monday, the first day of the term of court. (R. p. 5-7). Counsel indicated he had been unable to reach Applicant on his cell phone Monday and Tuesday, but was able to leave a voice mail message that morning instructing Applicant to be at the courthouse at 1:00 p.m. for his trial. (R. p. 5-6). Counsel also indicated Applicant's bondsman had been unable to locate Applicant at the place where Applicant supposedly worked. (R. p. 6). Counsel indicated he would prefer the court issue a bench warrant for Applicant rather than going forward with the trial in Applicant's absence. (R. p. 7-8). The court issued a bench warrant at that time and continued the case until later in the day. (R. p. 10).

Later that afternoon, Applicant was still not present. (R. p. 10-11). When the judge asked defense counsel about Applicant's intentions, defense counsel stated "I don't believe he's coming." (R. p. 10, lines 19-21). Counsel then stated he had informed Applicant that he would be "locked up" if he did not show up for court and that "possibly the trial might continue as well."

(R. p. 10, line 25 – p. 11, line 3). Counsel further elaborated “I don’t think he’s coming from the conversation I had with him.” (R. p. 11, lines 3-4). He explained he had a conversation with Applicant over the break wherein Applicant claimed to be in Mount Pleasant looking for a ride but stated he was on his way to court. (R. p. 11, lines 4-9). Applicant also said he was on his way and would be there in fifteen minutes. (R. p. 11, lines 9-11). Subsequent to that, Applicant again told counsel over the phone that he was still looking for a ride. (R. p. 11, lines 14-15). Counsel reiterated, “I don’t believe that he’s coming. I honestly don’t.” (R. p. 11, lines 15-16). Counsel again urged the judge to not go forward with the case. (R. p. 11, lines 18-20). The court noted counsel’s objection but stated that, at a minimum, the pre-trial hearings were going forward. (R. p. 11-12). The court also noted it hoped the bench warrant would be effectuated some time that day and the trial could proceed with Applicant present the following day. (R. p. 12, lines 15-17).

Thereafter, pre-trial motions were heard, including defense’s motions was to redact portions of the drug transaction video. (See R. p. 17-22). Defense counsel argued statements in the video referring to a location where people were “hollering” at the confidential informant were improper comments on Applicant’s character because the statements implied that Applicant was “always out there trying to sell drugs.” (R. p. 18-20). Defense counsel also argued certain statements in the video were inadmissible prior consistent statements that would improperly bolster the confidential informant’s testimony. (R. p. 20-21). The assistant solicitor responded by pointing out that the statements regarding people “hollering” pertained to multiple people at a particular location and that the statements did not implicate Applicant’s character. (R. p. 22; p. 26-27; p. 38-39). Defense counsel then acknowledged “it’s not outright stated that [Applicant is] trying to sell – always out there trying to sell drugs” but asserted it was implied that Applicant

was yelling or “hollering” trying to sell drugs. (R. p. 23, lines 6-20). Counsel also argued Rule 403, SCRE, precluded the evidence because there was a danger the jury would “misinterpret” the “hollering” statements and this would unfairly prejudice Applicant. (R. p. 39-40).

After watching the drug transaction video (R. p. 25), the trial judge stated she did not know of any drug-related reference that could be inferred from the use of the word “hollering” and stated she had never heard the word connected with drug use or drug selling. (R. p. 35, lines 20-22). She indicated that she “hollered” at neighbors or passersby when she worked out in her yard. (R. p. 36, lines 15-18). The judge stated that, based upon her review of the video, there was nothing that indicated to her that the “hollering” statements implied that the persons who “hollered” were soliciting drug transactions. (See R. p. 4-8). The judge then ruled as follows:

I have never heard that expression in any other drug case that I either prosecuted or have presided over during the last few years on the bench. And based upon that I do not, in doing – and I’m glad you brought up Rule 403. I do not find that there’s any undue prejudice. That [hollering was related to drug transactions] was not my assumption[] even knowing that that’s what you were challenging. And so I deny your motion that it’s improper character evidence because I do not think that it’s a comment on anyone’s character, let alone your client. (R. p. 40, lines 9-18).

The judge also addressed defense counsel’s second argument regarding improper prior consistent statements and found that statements made by the confidential informant in the video constituted present sense impressions. (See (R. p. 40, line 19 – p. 41, line 3).

After more pre-trial issues were discussed, the case was recessed until the next day. (See R. p. 41-58). The next day, upon prompting from the judge, defense counsel announced Applicant was still not present. (R. p. 58). The assistant solicitor then argued this was a “quintessential TIA” and that Applicant willfully failed to show up for trial. (R. p. 58, lines 9-

21). The trial judge stated she was noting defense counsel's objection that he "did not wish to go forward" but that the trial was going to commence in Applicant's absence because the case had been on the trial docket, Applicant had been informed of this, and Applicant had been in court on Monday of that week and was aware that his case was "second up" for trial. (R. p. 58, line 22 – p. 59, line 1).

Following jury selection, defense counsel challenged the jury pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), arguing the jury was all-white and the State struck all four black jurors. (R. p. 88). In response, the State gave race-neutral reasons for striking each juror as follows: juror 175 based on a fraudulent check conviction, to which defense counsel poised no pre-text challenge; juror 188 based on her employment at South Carolina Legal Aid which raised impartiality issues towards the public defender's office, to which defense counsel poised no pre-text challenge; juror 243 based on her brother's arrest in North Charleston for dealing crack, for which defense counsel poised no pre-text challenge; and juror 150 based two family member's twenty-five year sentences for federal drug convictions; for which defense counsel poised no pre-text challenge. (R. 88-91). The court found the State had provided race-neutral reasons for all of its preemptory strikes and denied defense counsel's motion. (R. 91).

Thereafter, the State called four witnesses, and the testimony and evidence presented established the following facts: A black male was captured on video engaging in a drug transaction with the confidential informant. The confidential informant, who had been used in hundreds of successful operations over the years and who had been thoroughly searched before and after this particular drug transaction, described the appearance of the black male to officers, including the fact that the black male was wearing a blue cast on his right arm. (R. p. 112-13; p.

128-29; p. 132; p. 175-77). One of the detectives, who had known Applicant for several years and shared his same birthday, drove by the location immediately after the drug transaction and identified Applicant as the black male wearing the cast. (R. p. 117; p. 154-55). Two other officers then obtained Applicant's driver's license photograph, compared it to the drug dealer's face in the video, and concluded that Applicant was the drug dealer. (R. p. 118, lines 10-16; p. 187, line 20 – p. 188, line 4).

During cross-examination, defense counsel extensively questioned the confidential informant regarding an affidavit he signed relating to a previous case involving a different defendant wherein the confidential informant indicated that he lied on the witness stand about the defendant selling him drugs. (R. p. 141-45). On re-direct, the assistant solicitor asked the confidential informant to explain the circumstances surrounding his signing of this affidavit. (R. p. 145-50). In a lengthy response, the confidential informant explained that he signed the affidavit because his life was threatened by the defendant's family and that the statements in the affidavit were written by someone else and were not true. (R. p. 147-50). In concluding his explanation, he stated as follows:

Yeah, I did the wrong thing when I signed that paper but [the previous defendant] know[s] he guilty, and his lawyer know[s] he guilty. Just like the guy who supposed to be on trial here, he guilty -- (R. p. 150, lines 7-10).

The assistant solicitor cut him off at that point, and the confidential informant stated "[t]hat's all I got to say." (R. p. 150, lines 11-12).

Defense counsel objected and asked for a curative instruction. (R. p. 150, lines 13-14). The judge sustained the objection and ordered the jurors to strike the comment from their notes and instructed the foreperson to ensure that the comment was not considered "in any way"

during deliberations. (R. p. 150, lines 15-20). Later in trial, defense counsel made a motion for mistrial, stating that he did not believe the curative instruction was “enough to cure any prejudice caused to [Applicant].” (R. p. 161, lines 15-21). The State asserted that the curative instruction given by the judge was sufficient, and the judge denied the mistrial motion but stated that over the break she would review her curative instruction to make sure it was appropriate and would give a further instruction in her charge to the jury if she felt the need to do so. (R. p. 161-62).

Following closing arguments and the final jury charge, the jury returned a guilty verdict after twenty-five minutes of deliberations. (R. p. 223-24). Based on his prior record and the fact that this was Applicant’s third or subsequent drug offense, the trial judge sentenced Applicant to seventeen years. (R. p. 225-26; Sentencing Hearing Transcript, p. 6-7).

ALLEGATIONS RAISED

In his application and amended application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel for failing to properly challenge the jury selection
2. Ineffective Assistance of counsel for allowing him to be tried in his absence
3. Ineffective assistance of counsel for failing to present Tyeka Alston as an alibi witness
4. Ineffective assistance of counsel for failing to move for a mistrial following a comment on Applicant’s guilt by a State’s witness

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant called his trial counsel, Assistant Public Defender Jason King (counsel), to testify. Counsel testified he was appointed to represent Applicant while employed at the Charleston County Public Defender’s Office. Counsel testified Applicant was briefly represented by private counsel before he was appointed. He testified he met with

Applicant approximately twelve times and that Applicant was released on bond shortly before trial. He testified that he reviewed all discovery material with Applicant, including the video of the crack transaction with confidential informant. He testified Applicant was identifiable in the video, including a distinctive blue cast that Applicant had at the time. He testified Applicant never gave him any possible defenses and admitted it was him on the video, but denied selling crack cocaine to a confidential informant. He testified his defense strategy was to establish the confidential informant was lying to set up Applicant.

Counsel testified he sent letters and called Applicant prior to the term of court advising him his case would be called for trial. He testified Applicant came to the courthouse Monday morning for jury qualifications. Counsel testified he told Applicant that a jury might be selected for his trial that day, but jury selection did not happen that day. Counsel told Applicant his trial would go that week and that they were second on the trial docket following a status conference with Judge Harrington. He testified he advised Applicant that he needed to be present for trial, and if he failed to appear, his trial would go forward in his absence. He also told Applicant he needed to be near his telephone on standby ready to come to the courthouse within thirty minutes.

Counsel testified that on Wednesday, Applicant's case was called for trial. He testified he tried to reach Applicant numerous times without success. He testified he was finally able to reach Applicant and told him his trial was starting and he needed to come to the courthouse immediately. Counsel testified he "begged" Applicant to come for his trial and Applicant told him he was in Mount Pleasant and would try to find a ride downtown. Counsel testified he later called Applicant again when he still had not appeared, and based on this conversation, Counsel

did not believe Applicant was going to appear for his trial. Counsel elaborated that Applicant stated, "I heard nothing going on," which lead counsel to also believe Applicant had someone at the courthouse informing him of his case's progress. He again pleaded with Applicant that he needed to appear for his trial. Counsel testified Applicant's trial did not start until Thursday, giving Applicant additional time to appear, but he still failed to appear and was tried in his absence. Counsel testified Applicant's mother appeared on Thursday for his trial, and he asked her to try to get Applicant to come without success.

Counsel testified Applicant was not advised by the court that he would be tried in his absence, but that he had told Applicant this numerous times. He also acknowledged Applicant's bond form advised him he would be tried in his absence if he failed to appear. He testified the case had been on the trial docket twice before and Applicant had previously appeared. He testified he did not think Applicant would fail to appear based on his prior experiences with Applicant appearing, but he did not feel like there was anything else he could have done to prevent Applicant from being tried in his absence. He testified he asked the court to issue a bench warrant and continue his case, which the court did initially until eventually denying his continuance and proceeding forward without Applicant. He testified the trial court made findings on the record that Applicant had been properly advised of his trial date. Counsel testified he filed a motion to reconsider the sentence to give Applicant an opportunity to address the court and possibly reduce his sentence, which was ultimately unsuccessful following a motions hearing.

Regarding jury selection, counsel testified he raised a Batson issue following jury selection based on an all-white jury and the State's striking of four black jurors. He testified the court conducted a Batson motion, during which the State provided race-neutral reasons for all

four challenged jurors. He testified he believed all four responses from the State were valid race-neutral reasons for striking the jurors, and therefore, he did not argue that these reasons were pre-textual. He testified upon reviewing the record, he believes he could have possibly challenged the State's reasons as to jurors 243 and 150 based on family members being arrested or convicted for drug offenses because another juror (juror 96, a white male) also had a family member with drug convictions but was not struck by the State. However, he testified this would not likely have been successful, as his notes reflect juror 96 had worked for the Department of Defense for decades, which was the reason he struck this juror because he thought this juror would be favorable for the State based on his background and employment history. He testified he believes the State would have been able to establish its reasons for striking jurors 243 and 150 were not pre-textual and his motion would have been denied.

Counsel testified the confidential informant testified and that he had dealt with this confidential informant previously while representing another defendant. He testified he was aware the confidential informant had signed an affidavit post-trial in his other client's case asserting he had lied in his other client's trial. Counsel testified he elicited this testimony during his cross-examination of the confidential informant in Applicant's trial to tarnish his credibility before the jury. He testified the confidential informant became upset and stated that Applicant was guilty. He testified he immediately objected, which was sustained by the trial court. He testified the court advised the jury to strike that testimony and not to consider it at all during deliberations. He testified he later moved for a mistrial, citing a curative instruction would not be enough to cure the prejudice, and that the trial court denied his mistrial motion. Counsel testified he was satisfied with the court's curative instruction and thinks that the confidential informant's

behavior and comments helped his defense strategy of showing Applicant was being set up by the informant.

Applicant testified next on his own behalf. Applicant testified he was originally represented by retained counsel, but eventually was represented by trial counsel who was appointed. He testified he only met with counsel a few times and they never discussed trial strategy. He testified counsel showed him the video of the drug transaction and then told him he needed to plead guilty. He testified he never informed counsel it was him in the video. Applicant testified he told counsel that he had an alibi witness—his child's mother.

Applicant testified he appeared Monday morning for jury selections after receiving a call from counsel. He testified he arrived within fifteen minutes of counsel's call. He testified when he arrived, counsel told him they would not pick his jury that day but that his case was on the docket for that week. He testified counsel never told him it was second on the docket. He testified he never received any letters or calls from counsel the week before trial and his first communication with counsel regarding his trial date was the Monday morning phone call from counsel. He testified he was downtown at his child's mother's house the entire week of his trial and denied ever telling counsel he was in Mount Pleasant.

Next, the State presented testimony from the prosecuting Assistant Solicitor, Stephanie Linder. Linder testified she was the solicitor assigned to Applicant's case and recalled his trial. Additionally, she reviewed her notes and file from Applicant's case. She testified counsel raised a Batson motion regarding four jurors she struck, all of whom were black. She testified she provided race-neutral reasons for striking all four jurors, including jurors 150 and 243. Specifically, Linder testified she struck juror 150 because she had two family members who

were currently serving lengthy federal sentences for crack convictions, which was important because these were recent convictions or current incarcerations and involved the same drug as Applicant—crack. Linder testified she struck juror 243 because this juror had responded that her brother was arrested for “the exact same thing,” i.e., dealing crack, by a local law enforcement agency (North Charleston), as well as this juror’s two prior convictions for shoplifting. When questioned as to why she did not strike juror 96, a white male who also responded that he had a family member who had prior drug arrest, she testified his situation was different because the arrest was much older (twenty years ago) and the drug type and whether he was convicted was unknown. She also testified she believed this juror would be favorable based on his forty-year career with the Department of Defense. She testified her standard practice is to take into account the occupational history of potential jurors during jury selection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v.

Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden of proof and had not established any ineffectiveness of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant:

Allegation: Ineffective assistance of counsel for failing to properly challenge the jury selection

Applicant asserts counsel was ineffective for failing to properly challenge his jury pursuant to Batson. Specifically, Applicant contends counsel should have challenged the State's

race-neutral reasons for striking jurors 150 and 243 based on family member's arrests for crack convictions as pre-text based on the State's failure to strike juror 96, a white male.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a juror on the basis of race. Batson, 476 U.S. at 89; State v. Inman, 409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014); State v. Cochran, 369 S.C. 308, 313, 631 S.E.2d 294, 297 (Ct. App. 2006). "Once a peremptory challenge is opposed, the trial court must, upon request, conduct a Batson hearing and adhere to the procedures set forth in Purkett v. Elem, 514 U.S. 765, 767 (1995), and adopted by our Supreme Court in State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996)." Cochran, 369 S.C. at 314, 631 S.E.2d at 297-98. The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause. Inman at 26, 760 S.E.2d at 108; See Purkett, 514 U.S. at 767-68 (1995).

First, the [party asserting the Batson] challenge must make a prima facie showing that the challenge was based on race. Inman at 26, 760 S.E.2d at 108. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [party opposing the Batson] challenge to provide a race neutral explanation for the challenge. Id. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [party asserting] the challenge has proved purposeful discrimination. Id. The ultimate burden always rests with the [party asserting the Batson challenge] to prove purposeful discrimination. Id.

Step two of the analysis is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible. Purkett, 514 U.S. at 768; Inman at 26,

760 S.E.2d at 108. The explanation must only be “clear and reasonably specific such that the [party asserting the Batson challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on it. Inman at 26, 760 S.E.2d at 108. In contrast, step three of the above analysis requires the court to carefully evaluate whether the party asserting the Batson challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. Id. (emphasis added); see also Batson, 476 U.S. at 93-94 (stating that the court must consider “the totality of the relevant facts,” including both direct and circumstantial evidence). During step three, the party asserting the Batson challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race. Inman at 26, 760 S.E.2d at 108-09. When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection de novo. Cochran at 315, 631 S.E.2d at 298.

Here, the record establishes counsel properly challenged the jury pursuant to Batson, arguing the jury was all-white and the State struck all four black jurors. (R. p. 88). In response, the State gave race-neutral reasons for striking each juror as follows: juror 175 based on a fraudulent check conviction, to which defense counsel poised no pre-text challenge; juror 188 based on her employment at South Carolina Legal Aid which raised impartiality issues towards the public defender’s office, to which defense counsel poised no pre-text challenge; juror 243 based on her brother’s arrest in North Charleston for dealing crack, for which defense counsel

poised no pre-text challenge; and juror 150 based two family member's twenty-five year sentences for federal drug convictions; for which defense counsel poised no pre-text challenge. (R. 88-91). The court found the State had provided race-neutral reasons for all of its preemptory strikes and denied defense counsel's motion. (R. 91).

Applicant's contention that counsel was ineffective for failing to challenge the State's race-neutral reasons for striking jurors 150 and 243 in light of juror 96 is without merit. Both counsel and Assistant Solicitor Linder explained why juror 96 was not similarly situated to jurors 150 and 243 and this Court finds these are valid, race –neutral, non-pretextual reasons for striking jurors 243 and 150, and therefore, there was no Batson violation. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation: Ineffective assistance of counsel for allowing Applicant to be tried in his absence

Applicant asserts counsel was ineffective for allowing him to be tried in his absence. This Court finds this allegation is without merit, as Applicant had proper notice of his trial date, that he would be tried in his absence if he did not appear, and waived his right to be present. Moreover, this Court finds counsel made a considerable effort to persuade Applicant to appear and that Applicant knowingly and voluntarily elected not to be present for his trial.

Although the Sixth Amendment guarantees a defendant's right to be present at trial, it is well established that this right may be waived. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007); City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 688 (Ct. App. 2006). Rule 16, SCRCrimP, provides that a defendant may waive his right to be present, and may be tried in his absence, upon the court's finding that the defendant received notice of his right to be present and that he was warned the trial would proceed in his absence if he failed to appear.

State v. Fairey, at 99-100, 646 S.E.2d at 448. Notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 100, 646 S.E.2d at 448. Also, a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear. Fairey, 374 S.C. at 101, 646 S.E.2d at 449. "The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice." Ellis, 267 S.C. at 261, 227 S.E.2d at 306. A trial judge must determine that the defendant voluntarily waived his right to be present in order to try the case *in absentia*. Aiken v. Koontz at 547, 629 S.E.2d at 689.

Recently, in State v. Wrapp, the Court of Appeals held that before a defendant can be tried in his absence, the circuit court must make specific findings that the defendant (1) received notice of his right to present, and necessarily, of the term of court for which he needed to be present, and (2) was warned he would be tried *in absentia* if he failed to attend. State v. Wrapp, 421 S.C. 531, 536, 808 S.E.2d 821, 823 (Ct. App. 2017), reh'g denied (Jan. 18, 2018).¹

In the present case, Applicant had notice of his trial date, that he would be tried in his absence if he did not appear, and waived his right to be present by refusing to show up for his trial despite considerable and diligent efforts by his counsel. The record shows counsel continuously contacted Applicant in an effort to secure his presence at trial and asked the court to continue the case rather than proceed in Applicant's absence numerous times. Moreover, once

¹ This Court acknowledges that Wrapp was decided years after Applicant's conviction, but nonetheless finds the specific findings required for trying a defendant in his absence as set forth in Wrapp were fulfilled in Applicant's case.

Applicant was convicted, counsel moved for sentence reconsideration to allow Applicant an opportunity to address the trial court in hopes of securing a more lenient sentence. This Court finds counsel's performance was not deficient in any regard as to his absence at trial. This Court finds this allegation is without merit and must be denied and dismissed.

Allegation: Ineffective assistance of counsel for failing to call an alibi witness

Applicant asserts counsel was ineffective for failing to call an alibi witness, Tyeka Alston, in Applicant's defense. Counsel testified credibly that Applicant never denied it was him in the video and never provided him with any alibi witnesses. Moreover, Applicant failed to produce Ms. Alston or any other alibi witnesses at the hearing. Therefore, this Court finds this allegation must be denied and dismissed. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice).

Allegation: Ineffective assistance of counsel for failing to move for a mistrial following a comment on Applicant's guilt by a State's witness

Applicant asserts counsel was ineffective for failing move for a mistrial following a comment by the confidential informant that Applicant was guilty. This Court finds this allegation is wholly without merit. The record establishes counsel immediately objected to this testimony, his objection was sustained, the court struck the testimony and instructed the jurors not to consider it during deliberations, and counsel moved for a mistrial. (Tr. p. 149-150, 161). Counsel

did all of the things that Applicant is now alleging he should have done. This allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this allegation is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 25 day of April, 2018.


 MAITE MURPHY
 Presiding Judge
 Ninth Judicial Circuit

Daanbury, South Carolina

434
SEP 2009 0804745

WITNESSES

BRYANT GILMORE
Charleston City Police Department

AGENCY CASE NUMBER

0913284

ARREST WARRANT NUMBER

K342660

DATE OF ARREST

August 13, 2009

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

NOV 09 2009

VERDICT

Guilty

Mary A. Nable

Foreperson of Petit Jury

Date:

10-18-12

INDICT

DOCKET NO. , 2009GS1008446

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

November Term 2009

THE STATE

vs.

JAMES LAMONT MOORE

DOB: [REDACTED]

B/M

09-4871-1

Indictment for

Distribution of Cocaine Base

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

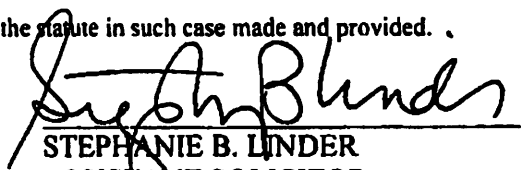
INDICTMENT

At a Court of General Sessions, convened on November 9, 2009 the Grand Jurors of Charleston County present upon their oath:

Distribution of Cocaine Base

That in Charleston County, South Carolina, on or about July 16, 2009, the Defendant, JAMES LAMONT MOORE, did manufacture, distribute, dispense, deliver, purchase; or did aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase; or did possess with the intent to distribute, dispense or deliver a controlled substance or a controlled substance analogue, to wit: Cocaine Base; in violation of 44-53-375 of the South Carolina Code of Laws (1976) as amended.

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


STEPHANIE B. LINDER
ASSISTANT SOLICITOR

436 SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
 STATE VS.
JAMES LAMONT MOORE

INDICTMENT/CASE#: 2009GS1008446A/W#: K342660Date of Offense: 7/16/2009S.C. Code § : 44-53-0375 (B)CDR Code #: 3039

AKA:

Race: BLACK Sex: M Age: 29DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: [REDACTED]DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: PWID/Dist/Mfg Cocaine Base or Meth, 3rd offense

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 44-53-0375 (B) 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.

WITEST:

Stephanie B.
Clerk, Stephanie B.72656
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 17 days/months/years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$; provided that upon the service of days/months/years and/or paymentof \$; 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 ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$	<u>100.00</u>
§ 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	\$	<u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$	<u>150.00</u>
§ 50-21-114(BUI Breath Test Fee)	\$50	\$	
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$	
Proviso 90.5 (SCCJA Surcharge)	\$5	\$	<u>5.00</u>
3% to County (if paid in installments)		\$	<u>8.40</u>
TOTAL		\$	<u>258.40</u>

Clerk of Court/ Deputy Clerk

Court Reporter: N. Volpe

SCCA/217 (03/2011)

PTUP days/hours Public Service EmploymentObtain 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 FundOther:

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Presiding Judge

Judge Code: Sentence Date: 10/18/12Sentence Unsealed11/16/12(15-30 years)