

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

UCI 12 2018

S.C. SUPREME COURT

The Honorable R. Lawton McIntosh

Appellate Case Number: 2018-001202

Lower Case Number: 2016-CP-07-2267

Dwayne Chisolm,..... Petitioner

v.

State of South Carolina,.....Respondent

APPENDIX

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WITNESSES

A Boland / BCSO DTF

ARREST WARRANT NUMBER

J338233

ACTION OF GRAND JURY

True Bill

B. M. Mathis
Foreperson of Grand Jury
Date:

JUL 22 2010

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2010GS0701251

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

July
June Term 2010

THE STATE

vs.

Dwayne Chisolm

Indictment for

Trafficking in cocaine, 100 grams or more

SC Code: 44-53-0370(e)(2)(c)
CDR Code:0280

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I
Hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. and G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT
2010GS0701251

At a Court of General Sessions, convened on ^{July 22,} ~~June 24,~~ 2010, the Grand Jurors of Beaufort County present upon their oath:

Trafficking in cocaine, 100 grams or more

That in Beaufort County, South Carolina, on or about May 19, 2010, the Defendant, Dwayne Chisolm, unlawfully and knowingly did sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: Cocaine, in excess of 100 grams; in violation of 44-53-370 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.



Solicitor

WITNESSES

A. Boland / BCSO DTF

ARREST WARRANT NUMBER

J338234

ACTION OF GRAND JURY

True Bill

B. Smith
Foreperson of Grand Jury
Date:

JUL 22 2010

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2010GS0701252

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

July
June Term 2010

THE STATE

vs.

Dwayne Chisolm

Indictment for

Possession with Intent to distribute crack

SC Code: 44-53-0375(B)(1)
CDR Code:3014

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

Hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. and G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

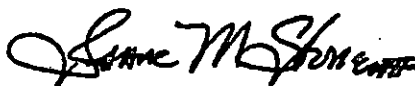
INDICTMENT
2010GS0701252

At a Court of General Sessions, convened on ^{July 22} ~~June 24~~, 2010, the Grand Jurors of Beaufort County present upon their oath:

Possession with intent to distribute crack

That in Beaufort County, South Carolina, on or about May 19, 2010, the Defendant, Dwayne Chisolm, 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, deliver a controlled substance or a controlled substance analogue, to wit: Crack; 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.



Solicitor

WITNESSES

A. Boland / BCSO DTF

ARREST WARRANT NUMBER

J338236

ACTION OF GRAND JURY

True Bill

[Signature]
Foreperson of Grand Jury
Date:

JUL 22 2010

VERDICT

Foreperson of Petit Jury
Date:

INDICT

DOCKET NO. 2010GS0701254

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

July
~~June~~ Term 2010

THE STATE

vs.

Dwayne Chisolm

Indictment for

**Possession of a firearm with an obliterated
serial number**

SC Code: 16-23-0030; 16-23-0050(A)
CDR Code: 2364

After being fully advised as to my legal
rights, I hereby waive presentment to the
Grand Jury.

Defendant

I
Hereby appear in my own proper person
and plead guilty to the within indictment or
to

Defendant

Witness:

C.C.C. PLS. and G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

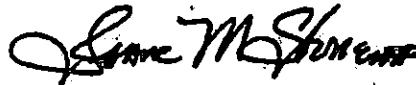
INDICTMENT
2010GS0701254

At a Court of General Sessions, convened on ^{July 22} ~~June 24~~, 2010, the Grand Jurors of Beaufort County present upon their oath:

Possession of a firearm with an obliterated serial number

That in Beaufort County, South Carolina, on or about May 19, 2010, the Defendant, Dwayne Chisolm, knowingly, receive or possess a gun where the original serial number had been removed or obliterated, to wit: a HiPoint 9mm; in violation of Section 16-23-30(C), Code of Laws of South Carolina, (1976), as amended

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



Solicitor

WITNESSES

A Boland / BCSO DTF

ARREST WARRANT NUMBER

J338235

ACTION OF GRAND JURY

True Bill

B. Smith
Foreperson of Grand Jury
Date: JUL 22 2010

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2010GS0701253

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

July
June Term 2010

THE STATE

vs.

Dwayne Chisolm

Indictment for

Possession of a weapon during violent crime

SC Code: 16-23-0490
CDR Code:0549

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____
Hereby appear in my own proper person and plead guilty to the within indictment or to _____

Defendant

Witness:

C.C.C. PLS. and G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT
2010GS0701253

At a Court of General Sessions, convened on ^{July 22,} ~~June 24,~~ 2010, the Grand Jurors of Beaufort County present upon their oath:

Possession of a weapon during violent crime

That in BEaufort County, South Carolina, on or about May 19, 2010, the Defendant, Dwayne Chisolm, did possess a gun or visibly display what appeared to be a gun during the commission, or attempted commission, of Trafficking cocaine, a violent crime. This is in violation of 16-23-490 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.



Solicitor

1 DWAYNE CHISOLM: Yes, ma'am.

2 THE COURT: Have you had an opportunity to speak
3 with your lawyers about whether or not you wish to
4 testify?

5 DWAYNE CHISOLM: Yes, ma'am.

6 THE COURT: Sir, do you want to testify in this
7 case?

8 DWAYNE CHISOLM: No, ma'am.

9 THE COURT: All right, sir. And is that your
10 decision?

11 DWAYNE CHISOLM: Yes, ma'am.

12 THE COURT: All right. Sir, I appreciate that, and
13 you may go ahead and be seated. Is the Defense going to
14 put up any other evidence?

15 MR. BAX: No, your Honor. The Defense will rest
16 when we bring the jury back out. And then, we can go to
17 closings and charge.

18 THE COURT: Okay. I will tell you that we are just
19 finishing up working on the charge right now. Would you
20 all rather take a little break right now, or would you
21 rather -- I mean, my intent would be is that, we'll come
22 back, you can rest for them, and I'll just note for the
23 record to renew your previous motions. And then, we'll
24 just go ahead and go into opening [sic] statements.
25 Obviously, you didn't put anything in, so you get the

ORIGINAL

1 closing argument.

2 Who is going to do it for the two of you? Ms.
3 Saxon? Okay. And Ms. Concannon, you're doing it for
4 the State?

5 MS. CONCANNON: Yes, your Honor.

6 THE COURT: Okay. Anything else we need to do?
7 Anything else you all are concerned about, as far as the
8 charges are concerned?

9 MR. BAX: Yes, your Honor, and I want to make sure
10 I put this out before you go any further with the
11 charge. Just in looking at the case over the evening
12 hours, the case law does say -- we talked about
13 possession as a lesser included, and that's not listed
14 as a lesser included for trafficking. We made an
15 argument on that. We respect the Court's ruling.

16 In looking at the case law and the statute,
17 possession with intent to distribute is a lesser
18 included offense of trafficking that, from my research
19 -- and I'm looking at the *Drug Litigation Book*, the most
20 recent edition of that -- both the statute, as well as
21 *Matthews versus State*, and I believe, your Honor, that
22 could be found at 387 Southeast 2nd 258. It's a 1990
23 case. They were looking at the issue of double jeopardy
24 in that case, whether you could charge both trafficking
25 and PWID, based on the same amount of drugs. And the

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1 end result, based on the summary given by the author in
2 this book, is that, they decided that, because those
3 were both put in the same section, it was the
4 legislature's intent not to create double jeopardy. And
5 so, we can't charge PWID and trafficking from the same
6 amount. However, they also ruled that PWID can be and
7 should be a lesser included offense if the facts support
8 it.

9 We would argue that the facts do support it in this
10 case, based on similar argument to the what we made the
11 other day. There are separate amounts of cocaine in
12 this case that are attributed, through the testimony of
13 the State's witnesses, to Mr. Chisolm. There is
14 evidence that a jury could infer that, while they may
15 decide he doesn't have possession, or that the element
16 of possession hasn't been proven for some of the drugs,
17 they may find that the element of possession has been
18 proven for other amounts of the drugs.

19 I specifically reference the amount of cocaine that
20 was found in the living room on the love seat or couch,
21 depending on how you interpret that chair.

22 THE COURT: Let me ask you, Mr. Bax, the drugs that
23 Mr. Greene pled guilty to, he pled guilty to PWID. Was
24 it crack or cocaine?

25 MS. SAXON: Crack.

ORIGINAL

1 MS. CONCANNON: It was the cocaine located in his
2 bedroom.

3 THE COURT: The cocaine located in his bedroom.

4 MS. CONCANNON: Which was not admitted in evidence
5 in this case.

6 THE COURT: And so, he is not charged -- Mr.
7 Chisolm is not charged with any of that, correct?

8 MR. BAX: That's correct, your Honor.

9 THE COURT: Okay. Okay. I'm sorry. I didn't mean
10 to interrupt you, but go ahead.

11 MR. BAX: Thank you, your Honor. No problem.
12 There is, as I was stating, there's a couple of
13 different amounts here that he's being charged with, of
14 the cocaine. I'm excluding this argument as to the
15 crack, because his charge is only the possession with
16 intent to distribute crack or cocaine.

17 THE COURT: Right.

18 MR. BAX: But I think that, under the facts,
19 especially when you take into consideration the other
20 evidence that's been introduced by the State, such as
21 the scales and the baggies and the other items that
22 Master Sergeant Florencio has testified about, in his
23 experience, these things can be indicia of sales. If
24 you combine that, even with the smallest amount of
25 cocaine found in this case that's attributed to Mr.

ORIGINAL

1 Chisolm was .23 grams, which would be under the
2 inferential weight. However, as your Honor knows, in
3 PWID cases, they don't always have to get the weight.
4 It can be a totality of the evidence, with baggies and
5 scales and cash. So, I think that those things taken
6 together means there's evidence that would necessitate a
7 lesser include charge of a PWID cocaine on the
8 trafficking charge.

9 THE COURT: Go ahead.

10 MS. CONCANNON: Your Honor, I would defer to my
11 argument yesterday regarding the possession, the PWID,
12 the trafficking. Here, we don't have a problem of
13 weight. That one bag found in Mr. Chisolm's shoe was
14 125 grams of cocaine, well above trafficking. It is
15 actually not even close to PWID amount, far exceeds the
16 first level of trafficking and goes into the second
17 level of trafficking. We feel that charging a lesser
18 included would be creating new charges that he wasn't
19 indicted on. If you separated the drugs.

20 THE COURT: The State would get to choose. If you
21 wanted to, you could have. You could have charged him
22 with each separate set, I guess, if you wanted to.

23 MS. CONCANNON: We could have.

24 THE COURT: And you didn't.

25 MS. CONCANNON: We could've separated the drugs and

ORIGINAL

1 charged him with trafficking, as well as PWID for the
2 cocaine that was found in the bowl, along with the
3 crack, as well as possession for the cocaine that was
4 found on the couch, based on the weights. However, he
5 only has the one indictment for the drugs, because of
6 the weight, mainly, of that big bag of cocaine that's
7 125 grams, and we feel like trafficking encompasses it
8 all. And if you would charge lesser included, it's,
9 again, creating charges he wasn't indicted for.

10 THE COURT: Mr. Bax, I understand what you're
11 trying to say, but I think, in this case, other than the
12 one set of cocaine found in Mr. Greene's bedroom, your
13 client took responsibility for all of this.

14 MR. BAX: Well, and obviously, your Honor, from a
15 factual standpoint, your Honor, I think that, based on
16 the nature of my client's statement, the jury could
17 decide that his taking possession was a noble gesture of
18 an older brother.

19 THE COURT: But that would be possession of all of
20 it, though. That would be all of it.

21 MR. BAX: Your Honor, not necessarily, because the
22 problem is, the law requires you to prove it's actual
23 possession, regardless of one noble gesture to take
24 possession of it while the police are standing around
25 you, to keep your brother out of jail. The jury might

ORIGINAL

1 find that that doesn't constitute possession.

2 THE COURT: But the problem is, two people can
3 constructively possess the same drugs, as long as they
4 both have domain and control over it.

5 MR. BAX: If the jury decides that they do, yes.
6 But I think that they could also decide that they don't.

7 THE COURT: I think it would be a straight up or
8 down, then. I think if they decide that it isn't, then
9 he would get a not guilty on the trafficking.

10 MS. KENNEY: Your Honor, could I just add --

11 THE COURT: Sure.

12 MS. KENNEY: I'm sorry to interrupt. *Matthews*
13 *versus State*, the case which Mr. Bax relies upon, the
14 case does say that, when there's conflicting evidence
15 as to what the amount of -- in that case, it was
16 marijuana involved -- is sufficient to invoke the
17 trafficking statute, then you charge both PWID and
18 trafficking. There's not conflicting evidence. In
19 this case, the statute says, cocaine trafficking
20 statute, says that it's cocaine or any mixture. So,
21 there's absolutely no conflicting evidence that the 130
22 -- 25 grams is below the trafficking amount. And so, we
23 would respectfully --

24 THE COURT: I would be more concerned in this case
25 if you were finding different pieces of cocaine over the

ORIGINAL

1 house, and none of it rose to the level of it being over
2 the 100 grams that is charged in the trafficking, over
3 100 grams. But we know that, in the one bag, is 125
4 grams of cocaine. So, that already goes up higher than
5 the threshold. I don't think it's appropriate in this
6 case to charge PWID on a cocaine. I think that is so
7 confusing for a jury. I'm not going to charge that.

8 Anything else, Mr. Bax and Ms. Saxon?

9 MS. SAXON: Your Honor, just before we take a brief
10 break, I would ask that you -- just so I can make notes
11 of the charges that you plan to give. I know we talked
12 about a couple of extra things yesterday. I wanted to
13 confirm that mere presence would be among the charges.

14 THE COURT: Actually, mere presence is within every
15 single one of these charges. I mean, it's actually --
16 it's going to be beaten like a dead horse, but I think
17 it needs to appropriately be, because they have to
18 decide each one of these separately. So, it speaks
19 about mere presence within the trafficking, within the
20 PWID, within that possession of a weapon, and then
21 possession of a handgun, you know, with an obliterated
22 serial number. So, yes, it is there.

23 MS. SAXON: Thank you.

24 THE COURT: Yes.

25 MS. CONCANNON: Your Honor, briefly, and I'm sure

ORIGINAL

1 this already is in there, your constructive possession
2 charge, we just need to mention that two people can
3 possess -- can constructively possess the same quantity
4 of drugs. Is that within your jury charge?

5 THE COURT: I think it's -- I think it's within --
6 I think I explained that. What I did end up -- what I
7 did in the charge is, the first charge that I've
8 explained to them is the trafficking. And I went
9 through and added some of *Anderson's* language, because I
10 just think charging the statute is just -- people don't
11 understand what in the world that means by the time
12 you're done, when you say aid and abet and everything
13 else. So, it is within that portion of the charge.

14 MS. CONCANNON: Okay.

15 THE COURT: So, yes, it is in there, pursuant to
16 what I've added. What you're going to hear is the
17 general and basic PWID charge, but the trafficking
18 explains a little more in-depth actual and constructive
19 possession in what I call the *Anderson* way, which is
20 just very verbose, in making sure they actually
21 understand it.

22 MS. CONCANNON: Yes. Okay. Thank you.

23 THE COURT: So, I think that's helpful. Okay?
24 Anything else?

25 MR. BAX: No, your Honor.

ORIGINAL

1 THE COURT: No? Okay. All right. You all, let's
2 take maybe ten minutes or so, fifteen minutes, and you
3 all kind of collect yourselves.

4 MR. BAX: Okay.

5 THE COURT: And I'll go through -- and do you have
6 the verdict form yet? Okay. The verdict form is
7 printing, and when we get that done, I want you both to
8 take a look at it. And let's just take a little break.

9 MS. SAXON: Thank you.

10 OFF THE RECORD 11:10 A.M.

11 BACK ON THE RECORD 11:10 A.M.

12 BY THE COURT:

13 THE COURT: Thank you all. Please be seated. Any
14 objections to the verdict form from the State?

15 MS. CONCANNON: No, your Honor.

16 THE COURT: From the Defense?

17 MR. BAX: No, your Honor.

18 THE COURT: Okay.

19 MS. SAXON: Your Honor, the only thing, just to
20 make the Court aware, after Ms. Concannon finishes, I
21 will probably take a minute to organize the evidence, so
22 I can get my hands on what I need.

23 THE COURT: Certainly.

24 MS. SAXON: It might just take me a couple seconds.

25 THE COURT: Certainly. And I know that lady in the

ORIGINAL

1 back knows that she can't bring a child into the
2 courtroom. Is that correct?

3 MR. BAX: Yes, your Honor. I already instructed.
4 That's why she's taking him out.

5 THE COURT: Beautiful child. Beautiful child.
6 Okay. But, so, anyway. Appreciate it. State ready to
7 go?

8 MS. CONCANNON: Yes, your Honor.

9 THE COURT: Is the Defense ready to go?

10 MS. SAXON: Yes, your Honor.

11 THE COURT: All right. Let's bring the jury in.

12 BAILIFF: The jury is entering the courtroom, your
13 Honor.

14 THE COURT: Thank you.

15 JURORS ENTER COURTROOM 11:38 A.M.

16 BAILIFF: The jury is seated, your Honor.

17 THE COURT: Thank you. Welcome back, ladies and
18 gentlemen. Ms. Saxon.

19 DEFENSE RESTS, RENEWS ALL PRIOR

20 OBJECTIONS AND MOTIONS:

21 MS. SAXON: Thank you, your Honor. The Defense
22 rests at this time, and renews all prior objections and
23 motions for the record.

24 THE COURT: Thank you. I appreciate it, and it's
25 noted, for the record. I'm going to deny your directed

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1 verdict again, and based on the same arguments and
2 rulings.

3 Ladies and gentlemen, at this time, you are now
4 going to hear the closing arguments from the attorneys.
5 The Defense has rested their case. Again, if you would
6 give these attorneys your attention. After they argue,
7 I will then charge you on the law that's applicable to
8 this case, and we're going to send the case to you for
9 your deliberations. All right? So, if you would give
10 Ms. Concannon your attention.

11 MS. CONCANNON: Thank you, your Honor, and may it
12 please the Court?

13 THE COURT: Thank you.

14 CLOSING ARGUMENT ON BEHALF OF
15 THE STATE, BY MS. CONCANNON.

16 MS. CONCANNON: Dwayne Chisolm, seated at that
17 table, is a businessman. His business is drugs. More
18 specifically, cocaine and crack cocaine. And we know
19 that from the testimony and the evidence you heard from
20 that witness stand yesterday and this morning.

21 So, what do we know? We know that, back in May of
22 2010, Beaufort County Sheriff's Office executed a search
23 warrant at 39 Garrett Small Road. We know that 39
24 Garrett Small Road is a small residence, with two
25 bedrooms, a kitchen, and a living room.

ORIGINAL

1 About those rooms, we know that Bedroom 1, which
2 was identified by law enforcement as Bedroom 1, was
3 David Greene's bedroom. How do we know this? He was in
4 there with a woman. When the Sheriff's Office responded
5 with that no-knock search warrant, he was in that
6 bedroom. Who was in Bedroom Number 2? Nobody. Why?
7 Because the Sheriff's Office had just seen Dwayne
8 Chisolm leave that residence. Bedroom 2 was his
9 bedroom. There was nobody in there, because he was in
10 his car, driving away. He had to be brought back to the
11 residence.

12 How else do we know that Bedroom 2 is Dwayne
13 Chisolm's bedroom? A couple different ways. We know
14 it's his bedroom because inside his bedroom, in a
15 dresser drawer, was his Belk credit card with his name
16 on it. We also know it's his bedroom, because inside is
17 Dwayne Chisolm's passport, a very important government
18 document, in his bedroom. We also know it's his
19 bedroom, because his car title was in there. Dwayne
20 Chisolm, with the address of 39 Garrett Small Road, the
21 same residence where the search warrant was executed.

22 We also know that, during the search warrant, the
23 Sheriff's Office collected numerous items, and you saw
24 all those items yesterday, and I'm going to show them to
25 you again, here, this morning. But what I asked you

ORIGINAL

1 yesterday, when I first spoke to you all, is that, I
2 wanted you all to pay attention to where everything was
3 located in this residence during the execution of the
4 search warrant, and more importantly, where it wasn't
5 located. Nothing in evidence yesterday or today was
6 located in David Greene's room. Everything that was
7 located and that is on the evidence bar today was found
8 in Dwayne Chisolm's bedroom, the kitchen or the living
9 room, not David Greene's room.

10 So, what did they find? I'm going to take you,
11 room by room, through that residence. Let's start in
12 the kitchen. I'm going to refer to the kitchen as
13 Dwayne Chisolm's office. That's where he kept his
14 office supplies, his tools of the trade, if you would.
15 He had his scales. He needed to weigh his product to
16 see how much his customers could get. He had one, two,
17 three scales, all different sizes for all different
18 weights, all different customers.

19 What else did he have in his kitchen? Well, he
20 needed to put his product in something. He has plastic
21 baggies. His customers needed to be able to take their
22 product out of that house, so what is he going to put it
23 in? He's going to put it in these plastic baggies.

24 What else did he have in his kitchen?

25 He had a police scanner from Radio Shack, a typical

ORIGINAL

1 scanner. He needed to know what was going on. He
2 needed to protect his business. He needed to know what
3 law enforcement was doing.

4 He also had his cutting agent, and you heard
5 testimony from Master Sergeant Florencio about what a
6 cutting agent does. Here it is, the Inositol. He
7 specifically stated this is something that's commonly
8 found in drug dealers' homes. They use this to increase
9 their product. They cut their cocaine with this powder
10 to make it multiply. They increase their profit with
11 this. You can buy it at Walgreen's, GNC, Walmart. He
12 had this in his kitchen, in his office.

13 He also had a straw that Sergeant Boland said that
14 she collected, to check to see if there was residue.
15 Again, his clients had to see what they were getting.

16 What else did he have in his kitchen? Well, he had
17 more mail addressed to him. Why? Because it's his
18 kitchen. It's his house; it's his kitchen.

19 He also had a MoneyGram receipt on the top of the
20 refrigerator. He went to every part of that kitchen,
21 including top to bottom. Top of the refrigerator,
22 MoneyGram receipt. He sent \$1,000.00 from himself,
23 Dwayne Chisolm, at 39 Garrett Small Road.

24 And lastly, in the kitchen, they found a business
25 card for Dwayne Chisolm's business, seafood business,

ORIGINAL

1 but we know today that that's not his only business.
2 His business is drug trafficking. We also know that all
3 of these items found in the kitchen were found in very
4 close proximity to one another. We have the cutting
5 agent, the plastic baggies, and the scale, all right
6 there. You need your tools at your hand, handy. You
7 need to be able to grab that stuff in the heat of the
8 moment to fulfill your customers' needs.

9 And what does he have behind all that stuff? He
10 has his capital. He has his profits, or his change when
11 his customers needed change for what they buy. Five
12 rolls of cash in a kitchen cabinet, behind plastic
13 baggies to store his product, the scale to weigh his
14 product, and the cutting agent to increase his product.

15 Next, we're going to go into the living room.
16 Living room, one of the first rooms you get into when
17 you walk into Dwayne Chisolm's residence. And what do
18 you see? You see a handgun and another bag of cocaine,
19 the bag of cocaine Dwayne Chisolm said would be there.
20 A handgun he said would have his fingerprints on it.

21 Here's a closer picture of the cocaine and a straw.
22 This bag is one of the bags that Florencio talked to you
23 about a dime bag, personal use bag, one gram or so.
24 Next to it is this nine-millimeter handgun, his
25 security. He had to protect his business. His house

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1 was full of drugs and cash. He had to protect all of
2 that. And on this serial gun -- on this gun, right
3 here, you will take it back there with you all in
4 evidence, but you can see there's no serial number on
5 this handgun. Nothing. It looks like maybe it's been
6 scratched or burned off, but it's obvious to the naked
7 eye that it's not there. Why is it not there? Because
8 Dwayne Chisolm wanted this gun untraceable. That gun
9 was loaded when the Sheriff's Office responded. It had
10 a full magazine. He was there to protect his business.

11 And here is that personal use bag of cocaine, tiny,
12 tiny amount of cocaine. That is what a customer comes
13 to Dwayne Chisolm's house to get. Where does he get
14 this small amount of cocaine from? For that, I'm going
15 to take you to Bedroom Number 2. That's Dwayne
16 Chisolm's bedroom. He doesn't want to keep his product
17 out front for everybody to find. So, what does he do?
18 Puts it in his closet in a shoe. Keeps it away from his
19 office. He doesn't want it to be out there in the open.
20 He wants to hide it. So, he puts it in his closet, in
21 this shoe, 125 grams of cocaine.

22 Master Sergeant Florencio testified that typical
23 personal use is one gram. This is 125 grams. And this
24 can increase. He had the tools, the cutting agent, to
25 make this multiply. And here's a picture of where it

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1 was, stuffed in his shoe in that closet. Not hidden.
2 It's right there in his closet. So, he knows where it
3 is at all times. There's another picture of it in his
4 closet. It's his closet, his shoe, his cocaine.

5 What do we find next to his cocaine in that same
6 closet? Another shoe with \$2,000.00 cash in a Ziplock
7 bag. Now, do some people have \$2,000.00 cash? Maybe.
8 I don't have \$2,000.00 cash. I certainly wouldn't keep
9 it in a shoe if I did. It would be in the bank. This
10 is Dwayne Chisolm's bank.

11 What else do we find in Dwayne Chisolm's room?
12 Extra ammunition. Not only one, but two. He was arming
13 himself for something. What? Probably to protect all
14 that cash and all his drugs he had.

15 And I mentioned earlier, we also found crack
16 cocaine. Here it is, 3.3 grams of crack cocaine. And
17 in South Carolina, there is an inference that, if you
18 possess over one gram of crack cocaine, you intend to
19 distribute that drug. Well, he had over three times
20 that amount. And what is it next to? It's next to
21 another bag of powder cocaine. Where did he get that
22 powder cocaine? Well, probably out of here, because
23 this was his product. And he was cutting it up, and he
24 was making it smaller, because he needed to supply his
25 customers with it.

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1 And how do we know all of that stuff is Dwayne
2 Chisolm's? Because he said it was. He said:

3 *This is my residence; I live here.*
4 *Bedroom to the left. That's all my*
5 *property. That money in that shoe in*
6 *that closet, that's my money.*

7 Bedroom to the left was identified as Bedroom
8 Number 2 by the Sheriff's Office. Bedroom Number 2 is
9 where the drugs were found.

10 Now, I mentioned that Dwayne Chisolm made some
11 statements. He said:

12 *That's my residence; that's my stuff;*
13 *I'm going to do the time for the drugs*
14 *because they're mine.*

15 He says that he rents the residence from a
16 landlord. He said, while he's speaking with Corporal
17 Squires:

18 *There might be some cocaine on the couch*
19 *in there, and there might be a handgun in*
20 *there. And, oh, yeah, you may find my*
21 *fingerprints on that handgun.*

22 Well, you know what? They found that handgun, and
23 they found that cocaine on the couch. He was telling
24 the truth, so we need to believe what Dwayne Chisolm is
25 saying.

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1 He also said that people must be 21 years old to
2 conduct business in his house. Pretty sure he's not
3 talking about his seafood business.

4 The residence is under his name. He is responsible
5 for everything in that house. He said any money inside
6 was his. He said the clothes and the property in the
7 bedroom to the left was his. Bedroom to the left is
8 Bedroom Number 2, where the 125 grams of cocaine was
9 located.

10 He finished his conversation with Deputy Squires,
11 and he said:

12 *You know what? I'm taking all the drugs*
13 *in the house; I'm going to do the time for the*
14 *drugs.*

15 Why would he say that? Because they're his drugs.
16 It's his house, his closet, his bedroom, his closet, his
17 shoe, his cocaine, his handgun. He said it would have
18 his fingerprints on it.

19 Now, at the end of these closing arguments, the
20 Judge is going to instruct you on the law and what she
21 says is the law. And briefly, I wanted to touch on that
22 a bit. And if we differ in any way, please go with what
23 Judge Mullen says.

24 But today, Dwayne Chisolm is charged with
25 trafficking cocaine, 100 to 200 grams. And in South

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1 Carolina, when any person who knowingly sells,
2 cultivates, delivers, purchases, or brings into the
3 state, or provides financial assistance, or otherwise
4 aides, abets, attempts to conspire to sell, manufacture,
5 cultivate, deliver, purchase, bring into the state, or
6 who is knowingly in possession, either actual or
7 constructive, of between 100 and 200 grams of cocaine,
8 is guilty of trafficking cocaine.

9 Well, we know from Renita Berry's testimony, the
10 chemist you heard yesterday, there was over 125 grams.
11 25 grams is in between 100 and 200 grams. We also know
12 it's cocaine. She tested it. It hadn't been tampered
13 with prior to her testing it. It's cocaine. It is 125
14 grams of cocaine.

15 We also know that Dwayne Chisolm possessed this
16 cocaine. No, it wasn't in his pocket, but it was in his
17 bedroom. It was in his bedroom closet.

18 Now, I've been writing with a couple pens all week,
19 but I've been writing with this pen all week. It's my
20 pen. It's actually one of my favorite pens. I'm kind
21 of particular about that. But I've been writing with it
22 all week. It's mine. If I put it in my pocket, it's
23 still my pen. And when I go home this afternoon, and
24 I'm going to take my jacket off, and maybe I'll hang it
25 up in my closet, that pen doesn't change ownership.

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1 It's still my pen. Even though it's not in my hands,
2 does not mean that I don't have dominion and control
3 over that pen. It's in an article of my clothing. It's
4 in my house and in my closet. It's mine.

5 It's the same with these drugs. No, they were not
6 on his person, but he acknowledged there would be
7 cocaine in that house, and there was cocaine in that
8 house. That cocaine was in his bedroom, in his closet,
9 in his shoe. Though it wasn't on his person, he had
10 possession of that cocaine.

11 He's also charged with possession of a weapon
12 during the commission of a violent crime. Now, in South
13 Carolina, trafficking cocaine is a violent crime. And
14 I'll acknowledge that, when you think of the word
15 *violent crime*, you probably think of an assault, a rape,
16 some sort of homicide, a murder. You maybe don't think
17 of the drug trade. But why is trafficking cocaine a
18 violent crime? Master Sergeant Florencio told you about
19 that. Because when you have this in your house, a
20 quantity this much, one of these is not far away.

21 He's also charged with possession of a weapon with
22 an obliterated serial number, and I'll ask you, when you
23 go back into that jury room, to take a look at this
24 handgun. You look right here. It's where the serial
25 number should be. It's not there. I don't see it. It

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1 looks like it's been scratched off, chiseled off, burned
2 off, somehow, but it's not there. Why is it not there?
3 Because Dwayne Chisolm wanted this gun untraceable. He
4 did not want it linked to him.

5 He's also charged with possession with intent to
6 distribute crack cocaine. In his bedroom, in a bowl in
7 his bedroom, this bowl right here, he had cocaine that
8 was in the Batman bag, crack cocaine right next to it.
9 Same bag. And if you look closely, it looks like those
10 are corners of plastic baggies. Master Sergeant
11 Florencio testified that's common in the drug trade.
12 They use those corners to put their products in to sell
13 to customers. Those drugs are right here. 3.3 grams of
14 crack cocaine, three times what you've heard would be
15 personal use.

16 This wasn't his for personal use. He intended to
17 sell this. He was going to use his scales. He was
18 going to put it in a baggie. He was going to protect
19 himself while he did this, and he was going to
20 distribute it to his customers.

21 Now, when I opened this case yesterday, I told you
22 all that Dwayne Chisolm is a businessman. He is a
23 businessman. He is a drug dealer. He has his product.
24 He has his 125-plus grams of powder cocaine. He has his
25 tools of the trade. He has his scales, his baggies, his

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1 cutting agent, his cash. Now, I can see people may have
2 all of those in their home, but when they are located
3 like this in the kitchen, all in close proximity, with
4 125 grams of cocaine in the next room, they only have
5 one purpose. He had his tools. He had his product, his
6 tools, his capital, and his security. He was arming
7 himself because he was a drug dealer. And everything I
8 have shown you this morning has either come from Dwayne
9 Chisolm's bedroom, the bedroom he said was his; the
10 kitchen; or the living room. Nothing from Bedroom
11 Number 1.

12 And remember, Dwayne Chisolm told you:

13 *This is my residence. I live here.*

14 *I rent it from a landlord. That bedroom to*
15 *the left, that's my bedroom. Everything in*
16 *that bedroom is mine. I'll take the drugs.*
17 *I'll do the time for the drugs.*

18 Why did he say that? Because they're his drugs.

19 I want you and I ask you to please use your common
20 sense when you go into that jury room and deliberate,
21 and I want you to think about all those pieces of
22 evidence, not separate, but together. Link it together,
23 as Dwayne Chisolm did for his business. And ask that
24 you find him guilty of all of his charges. And I ask
25 that you, today, you shut his business down. Thank you.

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1 CLOSING ARGUMENT ON BEHALF OF

2 THE DEFENDANT, BY MS. SAXON:

3 MS. SAXON: Good afternoon. At the beginning of
4 this trial, my co-counsel addressed you, and he spoke
5 about loss of liberty. He depicted it the way we often
6 see it in movies, and how we imagine it in grand way,
7 with tanks and soldiers led by a dictator coming to rip
8 up our *Constitution*, and force us into some sort of
9 uncomfortable-type position where our rights, our
10 privacy, and our freedom are no longer our own. But the
11 truth, as he stated, is that liberty is most often taken
12 from us one at a time. But what we have to remember is,
13 liberty lost one by one eventually adds up, and you have
14 liberty lost en masse.

15 Yet, that eventuality of such large-scale loss of
16 liberty is why we have a jury system. That, combined
17 with the possibility of unnecessary loss of system -- of
18 freedom is why the twelve of you are sitting here today.
19 It is why the State has to prove that an innocent man,
20 that an innocent Dwayne Chisolm, is guilty. And it's
21 why the burden is set so highly at proof beyond a
22 reasonable doubt.

23 Reasonable doubt sounds like some term of art, some
24 legaleze, but that's not. And a way I like to think
25 about it is by comparing it to certain words that you

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1 use every day. Is it perhaps possible that this
2 occurred? That's reasonable doubt. Is it if you might
3 suspect that it occurred the way the State says it is?
4 That's reasonable doubt.

5 Is it maybe likely? Well, that's reasonable doubt,
6 ladies and gentlemen. Those words, *perhaps*, *suspect*,
7 *believe*, *maybe*, those are words that mean the State has
8 not met its burden. Those are words that mean Mr.
9 Chisolm is innocent.

10 And the law, ladies and gentlemen, does not allow
11 assumptions to be made. You must be firmly convinced,
12 not assume that there is guilt.

13 The State told you a number of things, and some of
14 those facts were mis-characterized, and we're going to
15 go through. I'm just going to tell you a couple
16 different things.

17 They want you to believe that Dwayne Chisolm is a
18 bad guy. To further that end, they've gone as far as
19 dismissing the charges against David Greene, Jr., the
20 other resident of the home. What charges? Well,
21 trafficking one to two hundred grams of cocaine;
22 possession of a firearm during the commission of a
23 violent crime; possession with intent -- excuse me --
24 possession of a firearm with an obliterated serial
25 number. These are the exact same crimes that Dwayne is

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1 facing today. Only he has been singled out. They want
2 you to believe that he is guilty, but they have not
3 proven any such guilt.

4 So, let's talk about the evidence. The State says
5 that this is Dwayne Chisolm's gun. Well, this gun was
6 found in the living room on a couch, near no one, and
7 it's a nine-millimeter. That means it can only shoot
8 bullets that are nine-millimeter caliber bullets.
9 Bullets like these. You can't shoot these little
10 bullets. You can't shoot these other two. They won't
11 fit. The gun wouldn't work. They say these are
12 Dwayne's bullets, and this is Dwayne's gun.

13 But you know what they didn't do? They didn't
14 check this gun for fingerprints. They didn't check this
15 gun for DNA. A gun that you hold, that you load a
16 magazine into, that you pull the clip on. They bothered
17 not to. They didn't do their job. They made an
18 assumption, and they want you to make that assumption.
19 The law says you can't do that.

20 And again, ladies and gentlemen, I want to stress a
21 point to you. The State has labeled Bedroom 2 as
22 Dwayne's bedroom. The State has. They said we found
23 these papers in this bedroom, and therefore, it is his.

24 They also found documentation of Mr. Greene in that
25 house. They found documentation to Mr. Chisolm in the

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1 kitchen and in a number of places. The State has
2 assigned that bedroom to him, and they want you to
3 assign that bedroom to him, and to make that assumption.
4 But again, the law doesn't allow that.

5 Items in the kitchen. You heard Master Sergeant
6 Florencio. He said that items in the kitchen typical of
7 everyone -- scales, plastic baggies, straws. Items in
8 any kitchen. Items that are completely legal.
9 Vitamins, totally legal. You can own all these things.
10 And in fact, they also found this business card from Mr.
11 Chisolm's seafood business. Seafood & Wings, that was
12 his business. That's what he did. That's how he made
13 his living.

14 What did he use these scales for, characterized as
15 deli or grocery scales? He used them to weigh seafood.
16 You know, what did he used these baggies for? To
17 package seafood. Have you ever bought seafood from a
18 local person? It comes in a Ziplock baggie. And again,
19 ask yourself, were any of these items tested? Did the
20 State bother to swab for residue or fingerprints or DNA
21 on any of these? They specifically said they collected
22 this straw to test it, decided not to. No, we're good;
23 we don't need to do that. We don't need to do our job.
24 We don't know if there are fingerprints or DNA or
25 residue or anything on these items.

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1 And you know why we don't know? Because they
2 didn't do it, and not because they couldn't, but because
3 they chose not to. They made an assumption. The same
4 assumption they want you to make.

5 Now, let's talk about the drugs. The State says
6 this is 125 or so grams of cocaine. But the State just
7 said that Mr. Chisolm's cutting his cocaine with at
8 least one supplement, and that it's common that people
9 cut their cocaine with something. I mean, how else are
10 you going to make money, right? So, if we're cutting
11 this with something, then how do you know that that's
12 100 grams of cocaine?

13 MS. CONCANNON: Objection.

14 THE COURT: Okay. Overruled. Go ahead.

15 MS. SAXON: How do you know that that's 100 grams
16 of cocaine? You don't. Why? Because the State didn't
17 test it for anything. They looked to see, are there
18 drugs in there, and it came back, yeah, there are drugs
19 in there. But they didn't use their technology to
20 separate anything else. They didn't look for these
21 fillers that the State has told you people use in the
22 drug trade, their expert told you people use in the drug
23 trade to cut these things down.

24 Let's also talk about how this was found. A shoe.
25 In a shoe, in a closet, in a pile of other shoes. Whole

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1 bunch of shoes in here. I'm pretty sure that pink one,
2 the small woman's boot, doesn't belong to my client.
3 I'm pretty sure there are plenty of shoes in there that
4 don't belong to my client. How do we know this shoe
5 belongs to my client? You don't, because, again, it was
6 an assumption made by the State. They decided it
7 belonged to him, without doing anything to find out.
8 This is not a new shoe. This has been worn. It's been
9 walked in. Test it for DNA. Check for something. Do
10 your job.

11 Let's talk about what Mr. Greene said -- or Mr.
12 Chisolm said. Now, we know that Corporal Squires
13 interviewed David Greene. We know, based on the
14 questions that I asked him, that Corporal Squires didn't
15 believe what David Greene was saying. I also asked him
16 about his interview with Mr. Chisolm, and he said:

17 *Yeah, I talked to him.*

18 I said:

19 *Did you believe him?*

20 He said:

21 *I did. I felt like he was being honest*
22 *with me.*

23 So, what did he say? What did he actually say?
24 Well, he stated that people need to be 21 to conduct
25 business. He didn't say they needed to be 21 years old;

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1 he said 21, and that is a street term. That's slang.
2 That means you need to be up front about what you're
3 trying to do in my house. You have to be 21. You have
4 to be on the up and up. Don't do things in my house and
5 lie to me. Because the next thing he says is, he cannot
6 believe his little brother is selling dope out of his
7 house. Cannot believe it. He didn't say that it wasn't
8 where he lived. He admitted to it. But he never went
9 and said, despite what the State wants you to believe,
10 that, these are my drugs. He never said, those are
11 mine. What he said was:

12 *I can't believe my brother is selling*
13 *dope out of my house, my little brother; and*
14 *can I talk to him for a minute?*

15 And so, they brought him over to his little
16 brother, and he said:

17 *I'll take this hit for you. I'll take*
18 *responsibility, because you have too much*
19 *going on.*

20 Now, remember, ladies and gentlemen, when the
21 search was going on, Mr. Chisolm had no idea what was
22 going to come out of that house. He had no idea that
23 there was going to be 125-plus, grams of anything in
24 that home. He was trying to protect his little brother.

25 My big brothers did it to me. I can't count the

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1 number of times I got into bad situations, and my
2 brothers, they looked out for me. They protected me,
3 because that's what older siblings do. It's a natural
4 reaction. It's how we react to people that we love. He
5 did a noble thing that day by trying to save his brother
6 the pain of going through this process. But doing a
7 noble thing, trying to take that hit to spare his
8 brother, does not make him guilty. It doesn't make him
9 guilty of anything.

10 Dwayne is before you as an innocent man. Remember
11 that as you go into the jury room. He is innocent. And
12 the Judge will tell you that his innocence has to be
13 stripped away by the evidence the State has given you.
14 He is an innocent man who has placed his future squarely
15 in your hands. He trusts that each of you, with your
16 knowledge, your common sense, and your integrity, will
17 look at the facts that have been presented, will look at
18 the lack of facts that were presented, will look at
19 flaws in the job that the Sheriff's Office did, and
20 realize that they can't prove their case, that their
21 case is nothing but assumptions. It's half sentences.
22 It's blanks that they want you to fill in.

23 Ladies and gentlemen, you can't fill in those
24 blanks. The law doesn't allow it. It has to be proven
25 to you beyond a reasonable doubt. He is trusting that

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1 you twelve individuals will give him back his life; that
2 he can go home to his wife and son. He is trusting that
3 you twelve individuals will not make him an unnecessary
4 statistic in a long line of statistics in this country.

5 You alone can do what is right and what is just.
6 You alone can find him not guilty. Therefore, I ask
7 that, when you go back in the jury room and you are
8 given all this evidence, you think about it critically;
9 you realize what the State has failed to do, and you
10 find Mr. Chisolm not guilty of all charges.

11 JURY CHARGE, BY THE COURT:

12 THE COURT: Madam Foreperson, members of the jury,
13 you followed very patiently and listened very
14 attentively to the presentation of the evidence in this
15 case, and I want to thank you for that. It now becomes
16 the duty of the trial judge under the *Constitution* of
17 this state to charge and instruct you on the law that's
18 applicable to this case. And it is your duty as jurors
19 to accept and apply the law as I will now state it to
20 you.

21 As jurors, it is your exclusive duty to decide all
22 of the issues of fact in this case. You must determine
23 the effect, the value, the weight, and the truth of the
24 evidence. Both the State and the defendant have the
25 right to expect that you will carefully consider and

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1 evaluate the evidence and apply the law of the case to
2 the evidence. By doing so, both the State and the
3 defendant will receive a fair and impartial trial in
4 this matter.

5 Now, ladies and gentlemen, the State of South
6 Carolina, by the bills of indictment in this case,
7 charge the defendant, Dwayne Chisolm, with trafficking
8 in cocaine, more than 100; possession with intent to
9 distribute crack cocaine; possession of a weapon during
10 the commission of a violent crime; and possession of a
11 firearm with an obliterated serial number.

12 Ladies and gentlemen, I remind you that the fact
13 that the defendant was arrested, charged, and indicted
14 in this case is not evidence in this case, and cannot be
15 considered by you as evidence in guilt in this case, nor
16 does it create any presumption or inference of guilt.
17 An indictment is simply the formal, written instrument
18 which contains a charge made against the defendant. It
19 is the formal document by which the case is brought into
20 the courtroom.

21 Now, ladies and gentlemen, the defendant, Mr.
22 Chisolm, has pled not guilty to these indictments, and
23 that plea puts the burden on the State to prove the
24 defendant guilty beyond a reasonable doubt. A person
25 charged with committing a criminal offense in South

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1 Carolina is never required to prove himself innocent. I
2 charge you that it is an important rule of law that a
3 defendant in a criminal trial, no matter what the
4 seriousness of the charge may be, will always be
5 presumed innocent of the offense for which an indictment
6 was issued, unless guilt has been proven by evidence
7 satisfying you, the jury, of that guilt beyond a
8 reasonable doubt.

9 Ladies and gentlemen, this presumption of innocence
10 does not end when you begin your deliberations, but it
11 accompanies the defendant throughout the trial, until
12 you reach a verdict of guilt, based on evidence
13 satisfying you of that guilt beyond a reasonable doubt.

14 Ladies and gentlemen, the presumption of innocence
15 is like a robe of righteousness that's placed about the
16 shoulders of the defendant, and it remains with him
17 until it has been stripped away by evidence satisfying
18 you of the defendant's guilt beyond a reasonable doubt.

19 Ladies and gentlemen, the presumption of innocence
20 is not a mere legal theory. It is not just a legal
21 phrase we use. It is a substantial right to which every
22 defendant is entitled, unless you, the jury, are
23 satisfied from the evidence of the defendant's guilt
24 beyond a reasonable doubt.

25 Now, ladies and gentlemen, as you understand, the

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1 State has the burden of proving the defendant guilty
2 beyond a reasonable doubt, and the term *reasonable doubt*
3 must be given its plain and ordinary meaning. However,
4 to the extent that I may define it for you, a reasonable
5 doubt is the kind of doubt that would cause a reasonable
6 person to hesitate to act in the most important of their
7 personal decisions.

8 Ladies and gentlemen, the defendant is entitled to
9 every reasonable doubt arising in the case. If, upon
10 any issue of fact essential to a conviction, you have a
11 reasonable doubt as to how that issue should be
12 resolved, you must resolve that reasonable doubt in
13 favor of the defendant.

14 Now, ladies and gentlemen, some of you may have
15 served as jurors in civil cases where you were told that
16 it was only necessary to prove that a fact is more
17 likely true than not true. Such is what we call the
18 greater weight, or the preponderance of the evidence.
19 In criminal cases, the State's proof must be more
20 powerful than that. It must be beyond a reasonable
21 doubt. Proof beyond a reasonable doubt is proof that
22 leaves you firmly convinced of the defendant's guilt.

23 Now, ladies and gentlemen, there are very few
24 things in this world that we know with absolute
25 certainty, and in criminal cases, the law does not

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1 require proof that overcomes every possible doubt. If,
2 based on your consideration of the evidence, you are
3 firmly convinced that the defendant is guilty of the
4 crimes charged, you must find the defendant guilty. If,
5 on the other hand, you think there is a real possibility
6 the defendant is not guilty, you must give the defendant
7 the benefit of the doubt and find him not guilty.

8 I remind you, ladies and gentlemen, that during
9 this trial, you and I have certain duties to perform.
10 As a judge, it is my responsibility to preside over the
11 trial of this case, and I also have the duty to rule on
12 the admissibility of the evidence that's offered during
13 this trial. You are to consider only the competent
14 evidence before you. You are to consider only the
15 testimony which has been presented from the witness
16 stand and any exhibits which have been made a part of
17 the record in this case.

18 I have the additional duty of charging you the law
19 that's applicable to this case. I am the sole judge of
20 the law, and it is your duty as jurors to accept and
21 apply the law as I now state it to you. If you have any
22 idea as to what the law is or what the law ought to be,
23 and it does not agree with what I now tell you the law
24 is, you must abandon this idea, because you are sworn to
25 accept and apply the law exactly as I state it to you.

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1 Ladies and gentlemen, in every case tried in this
2 court before the jury, the jury becomes the sole and
3 exclusive judge of the facts. A trial judge cannot
4 intimate, comment on, or make any statement to a trial
5 jury about the facts in a case. Since you, the jury,
6 are the sole judge of the facts of this case, you are
7 not to infer from what I have said during the progress
8 of this trial in ruling upon the admissibility or
9 otherwise, or anything that I say now during the course
10 of this instruction to you, that I have an opinion about
11 the facts in this case. The law does not allow me to
12 have an opinion as to the facts of this case.

13 I remind you, ladies and gentlemen, this is a
14 matter solely for you, the jury, to determine. And I
15 remind you, as jurors, it is your duty to determine the
16 effect, the value, the weight and the truth of the
17 evidence presented during this trial.

18 Now, ladies and gentlemen, there are two types of
19 evidence which are generally presented during a trial.
20 That is direct evidence and circumstantial evidence..
21 Direct evidence directly proves the existence of a fact,
22 and does not require deduction. Circumstantial evidence
23 is proof of a chain of facts and circumstances,
24 indicating the existence of a fact.

25 Ladies and gentlemen, crimes may be proven by

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1 circumstantial evidence. The law makes absolutely no
2 distinction between the weight or value to be given to
3 either direct or circumstantial evidence. However, to
4 the extent the State relies on circumstantial evidence,
5 all of the circumstances must be consistent with each
6 other, and when taken together, point conclusively to
7 the guilt of the accused beyond a reasonable doubt. If
8 these circumstances merely portray a defendant's
9 behavior as suspicious, the proof has failed.

10 The State has the burden of proving the defendant
11 guilty beyond a reasonable doubt, and this burden rests
12 with the State, regardless of whether the State relies
13 on direct evidence, circumstantial evidence or some
14 combination of the two.

15 Now, ladies and gentlemen, it is your duty to
16 determine the credibility of the witnesses who have
17 testified in this case, and credibility simply means
18 believability. It becomes your duty as jurors to
19 analyze and evaluate the evidence, and determine which
20 evidence convinces you of its truth.

21 In determining the believability of witnesses who
22 have testified in this case, you may believe one witness
23 over several witnesses, or several witnesses over one
24 witness. You may believe a part of the testimony of a
25 witness, and reject the remaining part of the testimony

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1 of that same witness. You may believe the testimony of
2 a witness in its entirety or reject the testimony of a
3 witness in its entirety.

4 You may consider whether any witness has exhibited
5 to you any interest, bias, prejudice, or other motive in
6 this case, and you may also consider the appearance and
7 manner of a witness while they're on the witness stand.

8 Ladies and gentlemen, the rules of evidence
9 ordinarily do not permit witnesses to testify to
10 opinions or conclusions. An exception to this rule
11 exists for witnesses we call expert witnesses. A
12 witness who, by education and experience, has become an
13 expert in some art, science or profession, may give an
14 opinion as to the subject the witness claims to be an
15 expert in, and may also give the reasons for their
16 opinion.

17 You should consider any expert opinion given by a
18 witness, and like any other evidence, give it the weight
19 you think it deserves. If you decide that an expert
20 witness's opinion is not based on sufficient education
21 and experience, or if you decide that the reasons given
22 in support of the opinion are not sound, or that the
23 opinion is outweighed by other evidence, you may
24 disregard the opinion entirely.

25 An expert witness's testimony is to be given no

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1 greater weight than that of other witnesses, simply
2 because the witness is an expert. And you do not have
3 to accept an expert's opinion, even though it is
4 uncontradicted.

5 Now, ladies and gentlemen, I instruct you and
6 emphasize that the fact the defendant did not testify in
7 this case is not a factor to be considered by you in any
8 way in your deliberation and in your consideration on
9 the question of the guilt or innocence of the defendant.
10 It must not be considered by you in any manner
11 whatsoever. A defendant has the constitutional right to
12 remain silent, and the assertion of this right may not
13 be considered by you in your deliberations.

14 Ladies and gentlemen, I repeat, under your oath,
15 you are to draw no conclusion whatsoever from the fact
16 the defendant did not testify in this case. The fact
17 that the defendant did not testify should not even be
18 discussed in the jury room. I remind you, ladies and
19 gentlemen, the burden of proof is on the State. The
20 defendant is not required to prove his innocence, and
21 the burden of proof remains on the State to prove guilt
22 beyond a reasonable doubt.

23 Now, ladies and gentlemen, the defendant is charged
24 with multiple offenses in this case, and you must decide
25 each offense separately. I am now going to go through

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1 each of the offenses so you can determine those.

2 The first offense the defendant is charged with is
3 trafficking in cocaine. Now, the State must prove
4 beyond a reasonable doubt that the defendant knowingly
5 sold, manufactured, cultivated, delivered, purchased or
6 brought into the state, or provided financial
7 assistance, or otherwise aided, abetted, attempted, or
8 conspired to sell, manufacture, cultivate, deliver,
9 purchase or bring into this state, or was knowingly an
10 actual or constructive possession, or who knowingly
11 attempted to become in actual or constructive possession
12 of more than 100 grams of cocaine, or any mixtures
13 containing cocaine.

14 Now, ladies and gentlemen, there are three elements
15 to the offense of trafficking in cocaine that the State
16 must prove beyond a reasonable doubt. They must first
17 prove that the substance involved was, in fact, cocaine;
18 and that the defendant had possession of that cocaine,
19 either actual possession or constructive possession; and
20 that there were, in fact, 100 grams or more of cocaine
21 or any mixtures containing cocaine involved.

22 Ladies and gentlemen, actual possession occurs when
23 a controlled substance is found to be in the actual
24 physical custody of the person charged with possession.
25 Constructive possession is when a person has dominion or

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1 control or the right to exercise dominion or control
2 over either the object or the premises on which the
3 object is located.

4 Ladies and gentlemen, possession may be inferred
5 from the circumstances, and may be imputed to anyone who
6 has the power and intent to control the disposition and
7 use of the object. In other words, possession of an
8 object or premises gives rise to an inference that the
9 person charged has both the power and intent to control
10 the use and disposition of the object.

11 Ladies and gentlemen, however, this inference is
12 simply an evidentiary fact to be taken into
13 consideration by you, along with other evidence in the
14 case, and to be given the weight you, the jury, decides
15 it should have.

16 Ladies and gentlemen, mere presence of a person in
17 an area where the object is found, is not enough in and
18 of itself to give rise to the necessary inference.
19 Proof of possession requires more than proof of mere
20 presence at the place where the controlled substance is
21 found. Ladies and gentlemen, the State must prove the
22 defendant had both the power, that is actual or
23 constructive control, and the intent to control its
24 disposition or use.

25 Now, ladies and gentlemen, the defendant is also

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1 charged with possession with intent to distribute
2 cocaine base, or also known as crack cocaine. Ladies
3 and gentlemen, cocaine base means any alkaloidal cocaine
4 or free base form of cocaine, which is the end product
5 of a chemical alteration, whereby the cocaine, in salt
6 form, is converted to a form suitable for smoking.

7 Ladies and gentlemen, cocaine base is commonly referred
8 to as rock or crack cocaine.

9 Now, ladies and gentlemen, the State must prove
10 beyond a reasonable doubt that the defendant possessed
11 crack cocaine with the intent to distribute it. To
12 prove possession, the State must prove beyond a
13 reasonable doubt that the defendant had both the power
14 and the intent to control the disposition or use of the
15 crack cocaine. And again, possession may be either
16 actual or constructive.

17 I remind you again, actual possession means that
18 the crack cocaine was in the actual physical custody of
19 someone. Constructive possession means that someone has
20 the dominion and control or the right to exercise
21 dominion or control over either the crack cocaine itself
22 or the property on which the crack cocaine was found.

23 Again, I remind you that mere presence at the scene
24 where drugs were found is not enough to prove
25 possession. A defendant must have knowledge, and

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1 possession may be inferred when a substance is found on
2 the property under the defendant's control. Ladies and
3 gentlemen, however, this inference, again, is simply an
4 evidentiary fact to be taken into consideration by you,
5 along with the other evidence in the case, and to be
6 given the weight you think it should have. Ladies and
7 gentlemen, I also tell you that two or more persons may
8 have joint possession of a drug.

9 Ladies and gentlemen, to prove possession with
10 intent to distribute, the State must also prove beyond a
11 reasonable doubt that the defendant intended to
12 distribute the crack cocaine. Distribute means to
13 deliver, other than by administering or dispensing a
14 drug. Now, ladies and gentlemen, intent may be shown by
15 acts and conducts of the defendant -- or conduct, excuse
16 me -- of the defendant, and other circumstances for
17 which you may naturally and reasonably infer intent.

18 In determining whether the defendant had the intent
19 to distribute the cocaine or the crack cocaine, you may
20 consider the circumstances surrounding the defendant's
21 alleged possession. You may consider the amount of a
22 substance alleged to have been possessed, the manner in
23 which it was allegedly possessed, the place where it was
24 allegedly possessed, and other factors which you
25 consider to be important. You must find that the

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1 defendant did not intend to have the crack cocaine
2 solely for his own personal use.

3 Ladies and gentlemen, possession of more than one
4 gram of crack cocaine creates an inference the defendant
5 possessed the crack cocaine with intent to distribute
6 it. This inference does not relieve the State from
7 proving beyond a reasonable doubt that the defendant had
8 the intent to distribute. It is simply an evidentiary
9 fact to be taken into consideration by you, along with
10 the other evidence in the case, and to be given the
11 weight you decide it should have.

12 Now, ladies and gentlemen, the defendant is also
13 charged with possession of a weapon during the
14 commission of a violent crime. The State must prove
15 beyond a reasonable doubt that the defendant was in
16 possession of a firearm or visibly displayed what
17 appeared to be a firearm during the commission of a
18 violent crime.

19 Ladies and gentlemen, a firearm means any machine
20 gun, automatic rifle, revolver, pistol, or any weapon
21 which is designed to or may be readily converted to
22 expel a projectile.

23 Ladies and gentlemen, in order to find a defendant
24 guilty of possession of a weapon during the commission
25 of a violent crime, you must first find the defendant

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1 guilty of committing a violent crime. Ladies and
2 gentlemen, the offense of trafficking in cocaine is a
3 violent crime. Ladies and gentlemen, the State must
4 also prove beyond a reasonable doubt that the weapon
5 further advanced or helped in the commission of the
6 violent crime.

7 Now, ladies and gentlemen, lastly, the defendant is
8 charged with possession of a firearm with an obliterated
9 serial number. The State must prove beyond a reasonable
10 doubt that the defendant knowingly possessed a stolen
11 handgun or one from which the original serial number has
12 been removed or obliterated. Ladies and gentlemen,
13 knowingly means with knowledge, consciously, not
14 accidentally.

15 To prove possession, the State must prove beyond a
16 reasonable doubt that the defendant had both the power
17 and the intent to control the disposition or use of the
18 handgun. And again, ladies and gentlemen, possession
19 may be either actual or constructive.

20 I remind you that actual possession means that the
21 object was in the actual physical custody of a person,
22 and constructive possession means that a person has the
23 dominion and control or the right to exercise dominion
24 or control over either the object itself or the property
25 on which the object was found.

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1 Ladies and gentlemen, again, I remind you, mere
2 presence at a scene where a handgun is found is not
3 enough to prove possession. A defendant's knowledge and
4 possession may be inferred when a handgun is found on
5 the property under a defendant's control. Again,
6 however, this inference is simply an evidentiary fact to
7 be taken into consideration by you, along with the other
8 evidence in the case, and to be given the weight you
9 believe it should have.

10 I remind you that I have permitted you to take
11 notes in this case. Your notes should be used only as
12 aides to your memory, and should not be allowed to take
13 precedence over your independent memory of facts. The
14 notes are only for your personal use in refreshing
15 recollection of the evidence. As I explained at the
16 beginning of the trial, when in your deliberation, do
17 not rely on the recollection of a juror who took notes
18 about the testimony of a witness solely because that
19 juror took notes. You should not be unduly influenced
20 by the notes of other jurors. As we all know, notes can
21 be wrong. Notes are not entitled to any greater weight
22 than each juror's memory of the evidence. Ladies and
23 gentlemen, those jurors who did not take notes should
24 rely on their independent recollection of the evidence
25 and not be influenced by the fact that another juror has

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1 taken notes.

2 Madam Foreperson, members of the jury, as you
3 retire to begin your deliberation, I wish to express the
4 hope that each of you is mindful of the importance of
5 your responsibility here today. You are not called upon
6 very often to serve as jurors, and the proper
7 performance of the duty requires each of you to reach
8 the height of freeing your mind of all improper
9 influences.

10 Ladies and gentlemen, so please do not get the idea
11 that I am trying to intimate to you how I think you
12 should decide this case, because I have already told
13 you, under the laws of South Carolina, you, the jury,
14 are the sole judge of all questions of fact, and it
15 would be highly improper for me to influence you in your
16 performance of that duty.

17 Ladies and gentlemen, so, again, I am not trying to
18 tell you what your verdict should find. However, ladies
19 and gentlemen, as the presiding officer of this court, I
20 am vitally concerned that whatever verdict you reach
21 will be the result of you going back into your jury
22 room, and confining your consideration to the evidence
23 and the law that you have heard here in this courtroom,
24 weighing it fairly and impartially, as I have every
25 confidence you will.

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1 Madam Foreperson, members of the jury, your verdict
2 must be unanimous. It must be the verdict of all twelve
3 jurors. And to that end, my law clerk, Megan, has
4 prepared a verdict form. It simply has the case
5 caption, the State of South Carolina versus Dwayne
6 Chisolm, defendant; and it asks all four questions, all
7 of which you must answer. The first states:

8 *As to the charge of trafficking in*
9 *cocaine, more than 100 grams or more, we,*
10 *the jury, find the defendant, Dwayne Chisolm, --*
11 *either*

12 *not guilty or guilty.*

13 Second question:

14 *As to the charge of possession with*
15 *intent to distribute crack cocaine, we, the*
16 *jury, find the defendant --*
17 *again,*
18 *not guilty or guilty.*

19 Third question:

20 *As to the charge of possession of*
21 *weapon during the commission of a violent*
22 *crime, we, the jury, find the defendant,*
23 *Dwayne Chisolm, --*
24 *again,*
25 *guilty or not guilty.*

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1 And lastly:

2 As to the charge of a firearm with an
3 obliterated serial number, we, the jury,
4 find the defendant, Dwayne Chisolm, --
5 either
6 guilty or not guilty.

7 Ladies and gentlemen, please don not infer the
8 order that we write guilty or not guilty having any
9 significance. Every trial, we just reverse them.

10 After that, Madam Foreperson, there is a line for
11 you to sign. When the jury has reached a unanimous
12 verdict, I ask that you knock on the jury room, and we
13 will accept you back in the courtroom to receive your
14 verdict. All right?

15 Ladies and gentlemen, for the very last time, I am
16 going to send you back to your jury room, and tell you
17 not to begin discussing this case. If there is
18 something further on the law that the lawyers want me to
19 charge you on, I am going to bring you back out, and I
20 am going to charge you further. If not, ladies and
21 gentlemen, I am going to send the verdict form, along
22 with the evidence that's been entered into this case,
23 back to your jury room, and that will be your signal to
24 begin your deliberations, Madam Foreperson. Okay?

25 Ladies and gentlemen, thank you, and I am going to

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1 excuse you back to your jury room.

2 JURORS LEAVE COURTROOM 12:39 P.M.

3 BAILIFF: Jury is clear.

4 THE COURT: Thank you. Any exceptions or additions
5 to the charge from the State?

6 MS. CONCANNON: No, your Honor.

7 THE COURT: From the Defense?

8 MS. SAXON: No, your Honor.

9 THE COURT: All right. You all have looked at the
10 verdict form, and everyone's fine with it. You all need
11 to go through the evidence, and make sure it is all
12 together, and I suggest we do it quickly. Is lunch
13 here?

14 BAILIFF: It is not. But the question is on the
15 alternates?

16 THE COURT: Oh, I'm going to bring them out. When
17 we send the evidence in, we bring them out.

18 BAILIFF: Okay.

19 THE COURT: Okay? And that's the quickest way
20 never to forget and leave your alternates back there.
21 Okay.

22 ATTORNEYS AND COURT REPORTER REVIEWING
23 EXHIBITS.

24 JURORS BEGIN DELIBERATION 12:52 P.M.

25 OFF THE RECORD 12:52 P.M.

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1 BACK ON THE RECORD 1:46 P.M.

2 NOTE FROM JURORS:

3 BY THE COURT:

4 THE COURT: I understand the bailiff gave you a
5 note:

6 *Please describe again constructed*
7 *possession.*

8 I assume they mean constructive possession. I can
9 certainly bring them out here, and charge them again on
10 constructive possession.

11 MS. CONCANNON: That sounds good, your Honor.

12 THE COURT: Any objection?

13 MR. BAX: No, your Honor.

14 THE COURT: Okay. Let's bring the jury on out.

15 BAILIFF: The jury is entering the courtroom, your
16 Honor.

17 JURORS ENTER COURTROOM 1:49 P.M.

18 THE COURT: Thank you. You all may be seated.
19 Madam Foreperson, you have sent me out a note that says:

20 *Please define, again, constructed*
21 *possession.*

22 And I assume you're talking about constructive
23 possession. Is that correct?

24 MADAM FOREPERSON: Yes.

25 THE COURT: All right, ladies and gentlemen.

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1 Constructive possession means that the defendant had
2 dominion and control, or the right to exercise dominion
3 or control, over either the drugs themselves or the
4 property on which the drugs were found. Mere presence
5 at the scene where drugs are found is not enough to
6 prove possession.

7 The defendant's knowledge and possession may be
8 inferred when a substance is found on the property under
9 the defendant's control. However, this inference is
10 simply an evidentiary fact to be taken into
11 consideration by you, along with the other evidence in
12 the case, and to be given the weight you should decide
13 it should have.

14 Is that what you wanted to hear?

15 MADAM FOREPERSON: Yes, ma'am.

16 THE COURT: Okay. All right. Ladies and
17 gentlemen, I'll send you back to the jury room to
18 continue your deliberations.

19 JURORS LEAVE COURTROOM 1:51 P.M.

20 BAILIFF: Jury is clear, your Honor.

21 THE COURT: Appreciate it, Rick. All right. Any
22 exceptions or additions from the State?

23 MS. CONCANNON: No, your Honor.

24 THE COURT: From the Defense?

25 MS. SAXON: No, your Honor.

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1 THE COURT: All right. We'll sit tight until we
2 hear back from them. Okay? I want to put one thing on
3 the record with Mr. Jenkins and Mr. Hall, if we can,
4 real quick.

5 COURT REPORTER: The exhibit?

6 THE COURT: Pardon?

7 COURT REPORTER: The exhibit?

8 THE COURT: Oh, I'm sorry. We're going to mark
9 this as an exhibit. I apologize. This will be Courts
10 2. Thank you.

11 ITEM IDENTIFIED AS NOTE FROM JURORS

12 MARKED COURT'S EXHIBIT NUMBER 2.

13 OFF THE RECORD.

14 SECOND NOTE FROM JURORS:

15 REPORTER'S NOTE: AT APPROXIMATELY
16 2:14 P.M., JURORS SENT A SECOND NOTE
17 OUT, TO WHICH THE COURT WROTE HER
18 RESPONSE, AND A BAILIFF TOOK SAME BACK
19 TO THE JURORS, ALONG WITH A COPY OF
20 THE ENTIRE JURY CHARGE.

21 THE COURT'S RESPONSE TO JURORS' SECOND
22 NOTE READS AS FOLLOWS:

23 *Defendant objected to sending*
24 *just the constructive possession*
25 *portion of the charge back. So,*

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1 the Court is sending the entire
2 jury charge back.

3 ITEM IDENTIFIED AS SECOND NOTE FROM
4 JURORS MARKED COURT'S EXHIBIT
5 NUMBER 3.

6 ITEM IDENTIFIED AS JURY CHARGE
7 MARKED COURT'S EXHIBIT NUMBER 4.

8 BACK ON THE RECORD 2:54 P.M.

9 BY THE COURT:

10 THE COURT: All right. Ms. Saxon, you're here. I
11 see Mr. Chisolm. All right. Are you ready for me to
12 bring the jury in?

13 MS. CONCANNON: Yes, your Honor.

14 THE COURT: Okay. All right. The rest of you here
15 in the back, please be seated, and you all take a seat
16 when the jury comes in. And ladies and gentlemen,
17 hopefully, I don't need to say this, but if there is
18 anyone here that can't contain themselves when the
19 verdict is read, I need you to remove yourselves now.
20 Unfortunately, if there is any kind of outburst, I'm
21 going to have to have you taken into custody. So,
22 you've had fair warning. Let's bring them in, Norman.

23 BAILIFF: Yes, your Honor.

24 BAILIFF: The jury is entering the courtroom, your
25 Honor.

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1 THE COURT: Thank you.

2 JURORS ENTER COURTROOM 2:58 P.M.

3 THE COURT: Madam Foreperson, I understand the jury
4 has reached a verdict?

5 MADAM FOREPERSON: We have, your Honor.

6 THE COURT: Would you please pass it to the
7 bailiff. Thank you. Would you please publish the
8 verdict.

9 VERDICT:

10 MADAM CLERK: In the State of South Carolina versus
11 Dwayne Chisolm, defendant:

12 As to the Indictment Number 2010-GS-07-01251,
13 the charge of trafficking cocaine, 100 grams or
14 more, we, the jury, find the defendant, Dwayne
15 Chisolm, guilty.

16 As to the Indictment 2010-GS-07-01252, the
17 charge of possession with intent to distribute
18 crack/cocaine, we, the jury, find the defendant,
19 Dwayne Chisolm, guilty.

20 As to Indictment 2010-GS-07-01253, the
21 charge of possession of weapon during the
22 commission of a violent crime, we, the jury,
23 find the defendant, Dwayne Chisolm, guilty.

24 As to the Indictment Number 2010-GS-07-01254,
25 the charge of possession of a firearm with

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1 obliterated serial number, we, the jury, find
2 the defendant, Dwayne Chisolm, guilty.

3 Ladies and gentlemen, if this is your verdict,
4 please raise your hand -- right hand.

5 THE COURT: I note, for the record, everyone's
6 raised their right hand. You may put them down. Thank
7 you, ladies and gentlemen. Okay.

8 Would you like for me to poll the jury?

9 MS. SAXON: Yes, your Honor.

10 JURORS POLLED, BY THE COURT:

11 THE COURT: All right. All right. Ladies and
12 gentlemen of the jury, I am just going to ask each of
13 you individually to stand. And I'm going to ask you if
14 this is your verdict, and if this is still your verdict.
15 All right?

16 Angela Spahn. Ma'am, is this your verdict?

17 JUROR NUMBER 388: Yes.

18 THE COURT: Is it still your verdict?

19 JUROR NUMBER 388: Yes.

20 THE COURT: Thank you, ma'am. Alice Adkins.

21 Ma'am, is this still your verdict?

22 JUROR NUMBER 15: Yes.

23 THE COURT: Is this still your verdict?

24 JUROR NUMBER 15: Yes.

25 THE COURT: Thank you, ma'am. Margaret Carroll.

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1 Ma'am, is this your verdict?

2 JUROR NUMBER 60: Yes, ma'am.

3 THE COURT: Is this still your verdict?

4 JUROR NUMBER 60: Yes, ma'am.

5 THE COURT: Thank you. Ms. White, is this your
6 verdict?

7 JUROR NUMBER 436: Yes, ma'am.

8 THE COURT: Is it still your verdict?

9 JUROR NUMBER 436: Yes, ma'am.

10 THE COURT: Thank you. Ms. Dagel. Is this your
11 verdict?

12 JUROR NUMBER 91: Yes.

13 THE COURT: Is it still your verdict?

14 JUROR NUMBER 91: Yes.

15 THE COURT: Thank you. Mr. Williams. Is this your
16 verdict, sir?

17 JUROR NUMBER 438: Yes.

18 THE COURT: Is it still your verdict?

19 JUROR NUMBER 438: Yes.

20 THE COURT: Thank you. Mr. Johnson. Sir, is this
21 your verdict?

22 JUROR NUMBER 201: Yes, ma'am.

23 THE COURT: Is it still your verdict?

24 JUROR NUMBER 201: Yes, ma'am.

25 THE COURT: Thank you, sir. Ms. Anderson. Ma'am,

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1 is this your verdict?

2 JUROR NUMBER 11: Yes, ma'am.

3 THE COURT: Is it still your verdict?

4 JUROR NUMBER 11: Yes, ma'am.

5 THE COURT: Thank you. Ms. Crawford. Ma'am, is
6 this your verdict?

7 JUROR NUMBER 83: Yes.

8 THE COURT: Is it still your verdict?

9 JUROR NUMBER 83: Yes.

10 THE COURT: Thank you, ma'am. Ms. Gottschalk. Is
11 this your verdict?

12 JUROR NUMBER 153: Yes.

13 THE COURT: Is it still your verdict?

14 JUROR NUMBER 153: Yes.

15 THE COURT: Thank you. Mr. Shannon. Is this your
16 verdict?

17 JUROR NUMBER 364: Yes, ma'am.

18 THE COURT: Is it still your verdict?

19 JUROR NUMBER 364: Yes, ma'am.

20 THE COURT: Thank you. And finally, Ms. Kendall.
21 Is this your verdict?

22 JUROR NUMBER 215: Yes.

23 THE COURT: Is it still your verdict?

24 JUROR NUMBER 215: Yes, ma'am.

25 THE COURT: Thank you. Is there anything further

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1 required of this jury from the State?

2 MS. CONCANNON: No, your Honor.

3 THE COURT: From the Defense?

4 MS. SAXON: No, your Honor.

5 THE COURT: Ladies and gentlemen, I want to thank
6 you so much for helping us resolve not only this case,
7 but many other cases that have come before the Court
8 this week. When I start a trial roster, there's no way
9 I could ever try every case on that roster. A lot of
10 them, when there are jurors here, willing to serve and
11 sit as jurors and decide these issues, we were able to
12 dispose of the cases by other means, either by guilty
13 plea or dismissing the charges, or something along those
14 lines.

15 Ladies and gentlemen, at this time, I am going to
16 go forward, and I'm going to sentence Mr. Chisolm. You
17 are welcome to stay or not stay. It is completely up to
18 you. Again, ladies and gentlemen, I need you to
19 understand that you are certainly not required to stay,
20 and I am going to ask that if you are ready to leave,
21 you can go ahead and leave at this time.

22 However, before I do that, I do want to let you
23 know that you are permitted to discuss this case. When
24 you go home tonight, you can tell your family or friends
25 what you've been doing. Certainly, you're never

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1 required to answer any questions. If, for some reason,
2 someone persists and wants to speak with you, just tell
3 them politely, no, thank you. If there happens to be a
4 problem in any way, shape, or form, you call to the
5 Clerk of Court's Office, tell me who it is, and I will
6 take care of them. All right?

7 Again, ladies and gentlemen, thank you. You are
8 excused for the remainder of the week. If you want to
9 go now, before the sentencing, now is the time to do it.
10 After that, I'm just going to have you keep your seats
11 for those of you who want to stay, and we'll go ahead
12 and sentence Mr. Chisolm. All right? Thank you again.

13 JURORS LEAVE COURTROOM 3:04 P.M.

14 BAILIFF: Jury is clear. Door is closed, your
15 Honor.

16 THE COURT: Thank you. All right. You all can
17 stay right where you are, as far as for the sentencing
18 is concerned. Do you have a sentencing sheet?

19 MS. CONCANNON: Your Honor, we are printing those
20 right now.

21 THE COURT: Okay.

22 MS. SAXON: Your Honor, I had some post-trial
23 motions -- I'm sorry -- I'd like to state to the Court.

24 THE COURT: Certainly.

25 POST-TRIAL MOTIONS:

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1 MS. SAXON: Thank you. My first motion, your
2 Honor, is for a judgment notwithstanding the verdict,
3 and I believe that, based on the evidence in this case,
4 based on the testimony that was elicited, as well as the
5 things that we pointed out in closings, the flaws in the
6 State's case, that the jury was not as -- that they
7 didn't understand, necessarily, what they were looking
8 at when it came to constructive possession issue, and
9 were not properly aware of the knowledge portion of that
10 issue, and believe that they didn't understand their
11 oath when they went back to the room to deliberate.

12 And would ask that, based on all that, as well as
13 the fact that they were only back for about two hours,
14 part of that was lunch, and there was a large amount of
15 evidence that they needed to go over and discuss. And
16 we submit that it doesn't feel that they took the
17 necessary time to review all the evidence in this case.
18 We, therefore, ask for JNOV.

19 COURT REPORTER: *And we, therefore, ask?*

20 THE COURT: For a JNOV. Any response?

21 MS. CONCANNON: Briefly, your Honor. I think they
22 had adequate evidence to reach their unanimous verdict.
23 They all reached a unanimous verdict. Even when polled,
24 they all said that was still their verdict. And we feel
25 that there was plenty of evidence to take it to the

ORIGINAL

1 jury, for them to reach the guilty verdicts.

2 THE COURT: All right. Well, respectfully, the
3 State did have a lot of evidence, and evidence of
4 illicit drug activity. And certainly, I do not think
5 there are grounds for overturning it. Any other prior
6 motion or any other motion?

7 MS. SAXON: Your Honor, just, we would also motion
8 for a new trial, based on all of our prior motions and
9 objections that we've made throughout the course of this
10 trial, beginning with the sufficiency and validity of
11 the search warrant, and moving through everything that
12 we've covered. We believe that those are sufficient
13 grounds for a new trial, and therefore, request one at
14 this time.

15 THE COURT: Okay. Thank you. All right. Well,
16 respectfully, as I ruled on previous, I do think the
17 search warrant was good. I don't think the return
18 signed by a different magistrate was negligent in any
19 way. I think it was just ministerial, and again, just
20 an administrative error, and respectfully will deny that
21 motion. Are you all ready to go forward?

22 MS. SAXON: One second.

23 THE COURT: Okay.

24 MR. BAX: The Defense is prepared to go forward,
25 your Honor.

ORIGINAL

1 THE COURT: Okay.

2 MR. BAX: Would you like us to approach the Bar,
3 your Honor?

4 THE COURT: You're fine right where you are. He's
5 fine.

6 MS. SAXON: Thank you, your Honor. In regards to
7 the sentencing, I want to tell you a little bit about
8 Dwayne outside of this trial, and what has been
9 presented. Mr. Chisolm is married. His wife is here in
10 the courtroom. She is sitting in the back. They have a
11 child together, a son who is 16 months old. He is a
12 licensed industrial pipe fitter and industrial
13 electrician by trade. He has a GED, and he attends
14 church.

15 He's actually spent a portion of his life traveling
16 around the world, seeking enlightenment, pursuing
17 religious ideas, as well as gaining knowledge of just
18 the world around him. He's an extremely well-spoken
19 gentleman. He is a very intelligent man. He has very
20 family-oriented. I think that has been made clear
21 throughout the course of the trial, as well as with the
22 family that has been here.

23 He does have family. His mother and siblings, they
24 live in West Virginia. They have stood by and supported
25 Dwayne through all of this.

ORIGINAL

1 Your Honor, based on everything, we do feel that
2 the minimum in this case is appropriate, the 25-year
3 sentence. That, in and of itself, is a huge, huge
4 chunk. And it is going to be, you know, 85 percent of
5 that sentence. Eighty-five percent of twenty-five
6 years, that is a large portion, if not, possibly the
7 rest of his adult life, as well as that of watching his
8 son grow up. He's going to miss all of that. He's not
9 going to have that time with his family.

10 We think that the minimum on the trafficking of 25
11 years and the other charges run concurrent would be
12 sufficient to do justice.

13 THE COURT: Okay. Do you have a sentencing sheet?

14 MS. CONCANNON: I do, your Honor.

15 THE COURT: May I have his prior record?

16 MS. CONCANNON: Yes, your Honor. His prior record
17 consists of: in 1994, he has a shoplifting. In 1995,
18 failure to stop for a blue light. 1996, possession of
19 marijuana and a DUS. 2000, criminal domestic violence
20 times two and possession of drug paraphernalia.

21 2006, simple assault, improper use of vehicle,
22 driving too fast for conditions, and another failure to
23 stop for blue light. In 2007, he has two counts of
24 possession with intent to distribute cocaine.

25 In Georgia, from 2002, he has a simple battery to a

ORIGINAL

1 family member.

2 Your Honor, I do have certified copies of his prior
3 cocaine convictions I would like to hand up to your
4 Honor. I also have prepared the sentencing sheets for
5 the trafficking, as well as the gun charges. The PWID
6 crack cocaine charge, the sentencing sheet was prepared
7 for a first offense. However, the State would believe
8 that he would be eligible to be sentenced under the
9 third or subsequent offense, based on his two prior
10 cocaine convictions from 2007. They were the same
11 conviction date, but they are two prior incident -- two
12 separate incident dates.

13 THE COURT: Is there a mandatory minimum on it
14 being a third?

15 MS. CONCANNON: Ten years, your Honor.

16 THE COURT: Okay.

17 MS. CONCANNON: And if you would like, I have -- I
18 can prepare a sentencing sheet that is set for the
19 third, instead of the first.

20 THE COURT: All right. Anything further from you
21 all?

22 MR. BAX: Your Honor, yeah, one final thing. I
23 just think, in order to protect my client's rights, and
24 it's something that I have entered on the record before,
25 the Defense would enter an objection, based on *United*

ORIGINAL

1 *States Constitution's* prohibition against cruel and
 2 unusual punishment to the statute requiring a mandatory
 3 minimum of 25, for this and any other crime, but
 4 especially for this crime. It is labeled as violent.
 5 However, it's a narcotics offense, and I think it
 6 violates that provision of the *Constitution*, because it
 7 doesn't allow for you, your Honor, who is sitting up
 8 there listening to the facts, both during the trial, as
 9 well as mitigation presented during the sentencing
 10 phase, to really have any discretion. It takes away
 11 your discretion, and there has been cases in federal
 12 court that have ruled on the issue of discretion, which
 13 is one of the reasons why mandatory aspect of the
 14 sentencing guidelines was overruled in the *United States*
 15 *versus Booker* case.

16 So, based on the *Constitution*, as well as *U.S. v.*
 17 *Booker*, we would object to the 25 years as being
 18 unconstitutional, as well. Thank you.

19 THE COURT: Okay. Anything further?

20 MR. BAX: Nothing, your Honor.

21 SENTENCING:

22 THE COURT: Mr. Chisolm, if you'll stand, please,
 23 and your attorneys. On Indictment 2010-01251, for
 24 trafficking in cocaine, more than 100 grams but less
 25 than 200 grams, the sentence of this Court is you to be

ORIGINAL

1 committed to the Department of Corrections for a period
2 of 25 years, and pay a fine of \$100,000.00.

3 On Indictment 2010-01252, for possession with
4 intent to distribute cocaine base, first offense, the
5 sentence of this court is that you be committed to the
6 Department of Corrections for a period of 15 years.

7 On Indictment 2010-01253, that's for the possession
8 of a weapon during the commission of a violent crime,
9 the sentence of this court is, you be committed to the
10 Department of Corrections for a period of five years.

11 And Indictment 2010-01254, for possession of a
12 pistol with an obliterated serial number, the sentence
13 of this court is, you be committed to the Department of
14 Corrections, again, for a period of five years.

15 Those are to all run concurrent to each other, and
16 I'm giving you credit for the time you've done so far.
17 Good luck to you, sir.

END TRIAL 3:15 P.M.

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CERTIFICATE OF REPORTER

OCTOBER 22 AND 23, 2014 TRANSCRIPT OF TRIAL
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

I, Wanda H. Rowe, CVR-M, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing October 22 and 23, 2014, Transcript of Trial is a true, accurate, and complete record of the proceedings had and exhibits admitted on said date, in the case of State of South Carolina versus Dwayne Lamont Chisolm, Beaufort County, South Carolina, Court of Common Pleas, Case Numbers 2010-GS-07-01251, 2010-GS-07-01252, 2010-GS-07-01253, and 2010-GS-07-01254; that I am of neither kin, counsel, nor interest to any party hereto.

This Certificate of Reporter is attached to the ORIGINAL of this transcript, along with my digital signature. COPIES of this transcript are not authorized for use without my original signature affixed hereto.

Witness my signature March 1, 2015.

S/Wanda H. Rowe
Wanda H. Rowe, CVR-M
Official Court Reporter

ORIGINAL

25-30 years + \$100,000

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Beaufort
STATE VS.
Dwayne Chisolm
AKA:
Race: Sex: M Age: 37
DOB: SS#:
Address:
City, State, Zip:
DL#: SID#:

INDICTMENT/CASE#: 2010GS0701251
A/W#: J338233
Date of Offense: 5/19/2010
S.C. Code § : 44-53-0370(c)(2)(c)
CDR Code #: 0280

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
TO: Drugs / Trafficking in cocaine, 100 g or more, but less than 200 g

☒ CONVICTED OF or ☐ PLEADS

in violation of § 44-53-0370(c)(2)(c) of the S.C. Code of Laws, bearing CDR Code # 0280
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC) ☐ §17-25-45
w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Wanda Rowe 100353
Concannon, Mary 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 25 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$ 100,000; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
☐ Set by SCDPPPS

PTUP
 days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd, in equal, consecutive weekly/monthly
pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

Recipient:
*Fine:
§ 14-1-206 (Assessments 107.5 %)
§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ 100.00
§ 56-5-2995 (DUI Assessment) \$12 \$
§ 56-1-286 (DUI Breath Test) \$25 \$
Proviso 47.9 (Public Def/Prob) \$500 \$
§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00
§ 14-1-213 (Drug Court Surcharge) \$150 \$ 150.00
§ 50-21-114(BUI Breath Test Fee) \$50 \$
§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$
Proviso 90.5 (SOCCA Surcharge) \$5 \$ 5.00
3% to County (if paid in installments) \$ 12231.90
TOTAL \$ 21396.90

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk Wanda Rowe
Court Reporter: Wanda Rowe
SCCA/217 (03/2011)

Presiding Judge C. Mullen
Judge Code: 2142
Sentence Date: 10-25-14

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort

STATE VS.

Dwayne Chisolm

AKA:

Race: Sex: M Age: 37

DOB: SS#:

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Drugs / manufacture, distribution, etc. of cocaine base, 1st

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS0701252

A/W#: J338234

Date of Offense: 5/19/2010

S.C. Code §: 44-53-0375(B)(1)

CDR Code #: 3014

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 44-53-0375(B)(1) of the S.C. Code of Laws, bearing CDR Code # 3014

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Concannon, Mary

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the

for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP.

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

Proviso 47.9 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(I) (Vehicle Assessment)

Proviso 90.5 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

\$

\$

\$100

\$

\$100

\$

\$12

\$

\$25

\$

\$500

\$

\$25

\$

\$150

\$

\$50

\$

\$40/ea

\$

\$5

\$

\$16.90

\$

\$236.90

\$

days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

0-Syrs.

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
STATE VS.
Dwayne Chisolm
AKA:
Race: Sex: M Age: 37
DOB: SS#:
Address:
City, State, Zip:
DL#: SID#:

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS0701254
A/W#: J338236
Date of Offense: 5/19/2010
S.C. Code §: 16-23-0030; 16-23-0050(A)
CDR Code #: 2364

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADS

TO: Weapons / Sale or delivery of pistol to, and possession by, certain persons unlawful; stolen pistol

in violation of § 16-23-0030; 16-23-0050(A) of the S.C. Code of Laws, bearing CDR Code # 2364

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State. (defendant's initials)

ARREST: the Concannon 100353
Concannon, Mary 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 5 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☒ The Defendant is to be given credit for time served pursuant to S.C. Code by the State Department of Corrections.

§ 24-13-40 to be calculated and applied

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:
§ 14-1-206 (Assessments 107.5 %)
§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$
§ 56-5-2995 (DUI Assessment) \$12 \$
§ 56-1-286 (DUI Breath Test) \$25 \$
Proviso 47.9 (Public Def/Prob) \$500 \$
§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00
§ 14-1-213 (Drug Court Surcharge) \$150 \$
§ 50-21-114(BUI Breath Test Fee) \$50 \$
§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$
Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00
3% to County (if paid in installments) \$ 340
TOTAL \$ 133.90

PTUP days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk Wanda Rowe
Court Reporter: Wanda Rowe
SCCA/217 (03/2011)

Presiding Judge C. Muller
Judge Code: 2142
Sentence Date: 10-28-14

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
STATE VS.

Dwayne Chisolm

AKA:

Race: Sex: M Age: 37

DOB: SS#:

Address:

City, State, Zip:

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Weapons / Poss. weapon during violent crime, if not also sentenced to life without parole or death

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS0701253

A/W#: J338235

Date of Offense: 5/19/2010

S.C. Code §: 16-23-0490

CDR Code #: 0549

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense,The plea is: ☐ Without Negotiations or Recommendation,☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)☐ Negotiated Sentence, ☐ Recommendation by the State.

ARREST: Concannon, Mary 100353

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the

for a determinate term of 5 days/months/years or ☒ State Department of Corrections, ☐ County Detention Center,

and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

Proviso 47.9 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

Proviso 90.5 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

\$

\$

\$100

\$

\$100

\$

\$12

\$

\$25

\$

\$500

\$

\$25

\$

\$150

\$

\$50

\$

\$40/ea

\$

\$5

\$

\$390

\$

\$133.70

PTUP

days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

**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.

Dwayne Chisolm, Appellant.

Appellate Case No. 2014-002327

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2016-UP-332
Submitted April 1, 2016 – Filed June 29, 2016

APPEAL DISMISSED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, and Dwayne Chisolm, pro se, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General John Benjamin Aplin,
both of Columbia, for Respondent.

PER CURIAM: Dismissed after consideration of Appellant's pro se brief and review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.¹

APPEAL DISMISSED.

HUFF, KONDUROS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

2016-08-07-2267

STATE OF SOUTH CAROLINA

County of BEAUFORTDwayne Chiselm 325820

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST-CONVICTION RELIEF2016 OCT 24 PM 3:28
JENNIFER R. BERRY, AU.
BEAUFORT COUNTY, S.C.
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 LEE Corr Inst 990 Wsacky Hwy
Bishopville S.C. 29010
2. Name and location of Court which imposed sentence _____
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) 2010GS0701251
 - (b) 2010GS0701252

(c) 2010630701253

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 10/23/14 25 YEARS

(b) 10/23/14 15 YEARS

(c) 10/23/14 5 YEARS

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty found guilty by Jury

(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. DENIED

ii. _____

iii. _____

(c) the date of each such result:

i. JUNE 29, 2016

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Said NO MERITS

ii. _____

iii. _____

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) Failure to properly Mirandize me prior to questioning
 - (b) Misconduct of several officers involved in my case
 - (c) Affid.v Refuse to state grounds for warrant, NO INFO ON INFORMANT
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) MIRANDA WAS READ, CONFESSION WAS ALLOWED WITHOUT MIRANDA FORM
 - (b) NUMEROUS OFFICERS OF THE DRUG TASK FORCE HAVE BEEN DISCIPLINE, TERMINATED, ETC
 - (c) WARRANT DIDNT STATE RELIABILITY OF CONFIDENTIAL INFORMANT
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Court of Appeals
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NA
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
 - (d) any other petitions, motions or applications in this or any other Court? NA
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. Appeal Court of South Carolina
 - ii. _____
 - iii. _____
 - iv. _____
 - (b) the name and location of the Court in which each was filed:
 - i. S.C. Court of Appeals Columbia SC
 - ii. ↓
 - iii. ↓
 - iv. _____

(c) the disposition thereof:

i. Appeal denied

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

Revised 3/2003

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) N/A
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? N/A
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Esq. Jessica Saxon Beaufort County Public Defender
Office, At Trial
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Appeal South Carolina Court of Appeals Esq. Wanda
Carter
- ii. _____
- iii. _____

Revised 3/2003

19. State clearly the relief you seek in filing this application:

NEW TRIAL

20. Are you now under sentence from any other court that you have not challenged?

N/A

STATE OF SOUTH CAROLINA

County of Beaufort, SC

VERIFICATION

I, Dwaine Chisolm, 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.

Dwaine Chisolm

SWORN to and subscribed before me this 20
day of Oct, 2014.

Debra Easterday (L.S.)
Notary Public

My Commission Expires: 3/3/2022

Revised 3/2003

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Dwayne Chisolm, 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.

Dwayne Chisolm
Applicant

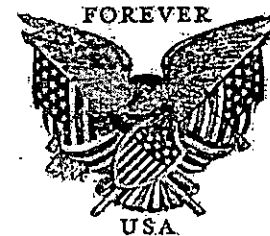
SWORN or affirmed to and subscribed before me this

20 day of Oct, 2014.

Debra Eastburg
Notary Public

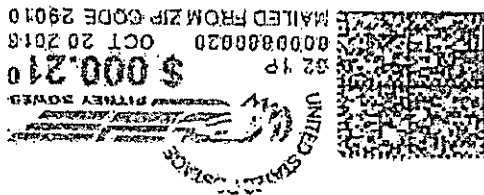
My Commission Expires: 3/3/2024

Dwayne Chisdm-325820-fb1257
Lee County Correctional Facility
990 Wisacky Hwy
Bishopville, SC 29010



92

Jerri Ann Roseneau
Beaufort County Clerk of Courts
P.O. Drawer 1128
Beaufort, SC 29901



STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
Case Number 2016-CP-07-2267

DWAYNE CHISOLM #325820)
Applicant,)

v.)

STATE OF SOUTH CAROLINA)
Respondent.)

FIRST AMENDED APPLICATION
FOR POST- CONVICTION RELIEF

2017 JAN -3 PM 12:34
JERRI A. JOSEPH
BEAUFORT COUNTY S.C.
CLERK OF COURT

[Note: This application follows SCRCF Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCF.]

1. The Applicant is currently detained at is detained at the Lee Correctional Facility.
2. The sentence was imposed by the Beaufort County Court of General Sessions, the Carmen T. Mullen, presiding.
3. There are no co-defendants to this case.
4. The indictment numbers upon which the offenses for which sentences were imposed are:
 - (a) 2010-GS-07-1251 - Trafficking Cocaine 100- 200 grams, First Offense
 - (b) 2010-GS-07-1252 - Possession With Intent to Distribute Crack Cocaine, First Offense
 - (c) 2010-GS-07-1253 - Possession of a Weapon during the Commission of a Violent Crime
 - (d) 2010-GS-07-1254 - Possession of a Firearm with an Obliterated Serial Number
5. The date upon which sentences were imposed and the terms of the sentence are:
 - (a) Sentenced on October 23, 2014 to twenty-five years, concurrent, and a fine of \$100,000.00.
 - (b) Sentenced on October 23, 2014 to fifteen years, concurrent.
 - (c) Sentenced on October 23, 2014 to five years, concurrent.

- (d) Sentenced on October 23, 2014 to five years, concurrent
6. The Applicant was convicted following a trial conducted before a judge and jury on October 22 and 23rd, 2014.
7. The Applicant filed an appeal from the judgment of conviction and imposition of sentence.
8. (a) The Courts to which petitioner appealed:
(i) South Carolina Court of Appeals
- (b) The result in each Court to which the Applicant appealed:
(i) The convictions and sentences were affirmed.
- (c) The date on which each Court affirmed the sentence or denied certiorari:
(i) June 29, 2016.
- (d) Citations of any written opinion or orders entered pursuant to such results:
(i) Unpublished Opinion Number 2016-UP-332
9. Not applicable.

10 & 11

Grounds for Relief and Concise Statement of Supporting Facts.¹

Ground A²

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law based upon trial counsel's failure to adequately challenge the admission of a statement attributed to the Applicant: Strickland v. Washington, 466 US 668 (1984) and Miranda v. Arizona, 384 US 436 (1966) and Jackson v. Denno, 378 US 368 (1964).

Supporting Facts for Ground A

¹ Applicant reserves his right to further amend this application as allowed by law.

² Applicant's grounds A, B and C are matters raised in his original *pro se* Application and are merely restated here by undersigned counsel out of an abundance of caution.

- (1) During the trial, the State introduced evidence that the Applicant made an inculpatory statement to law enforcement.
- (2) Trial counsel failed to properly challenge the introduction of this statement.
- (3) But for counsel's deficient performance, the outcome of the proceeding would have been different.

Ground B

Applicant was denied due process as guaranteed by the Fifth and Fourteenth Amendments to the US Constitution and Article 1, Section 14 of the South Carolina Constitution based upon the suppression of impeachment information concerning the officers involved in his case. Brady v Maryland, 373 US 83 (1963) and Riddle v Ozmint, 631 SE2d 70 (SC 2006).

Supporting Facts for Ground B

- (1) The State presented the testimony of several law enforcement officers during the Applicant's criminal trial.
- (2) The State was aware of impeachment information concerning misconduct committed by law enforcement.
- (3) The State failed to disclose this information to Trial Counsel.
- (4) This suppression of impeachment information, favorable to the Applicant, deprived the Applicant of due process.

Ground C

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law based upon trial counsel's failure to adequately challenge the admission of evidence seized pursuant to a search warrant. Strickland v. Washington, 466 US 668 (1984) and State v. Gentile, 646 SE2d 171 (SC Ct App. 2007)

Supporting Facts for Ground C

- (1) The State introduced evidence seized pursuant to a search warrant.
- (2) Trial counsel failed to adequately argue the deficiencies in this warrant.

- (3) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground D

Petitioner was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law based upon trial counsel's failure to object to improper jury charges. Strickland v. Washington, 466 US 668 (1984) and State v. Stukes, 787 SE2d 480 (SC 2016).

Supporting Facts for Ground D

- (1) The trial court provided jury instructions regarding constructive possession.
- (2) These instructions were provided four times, once for each charge for which the Applicant was convicted. The trial court again provided these instructions again following a jury question during deliberations.
- (3) These instructions constituted an improper comment on the facts.
- (4) These instructions improperly lessened the State's burden of proof by conflating the elements of the offense.
- (5) Trial counsel failed to object to these instructions.
- (6) But for counsel's deficient performance, the outcome of the proceedings would have been different.

12 & 13.

The Applicant has not filed any previous applications for post-conviction relief or any other applications or petitions other than his *pro se* application filed on October 24, 2016. The Applicant has not previously filed a petition for a writ of habeas corpus in state or federal court.

14. None of the grounds set forth in (10) have been presented to this or any other state or federal court.
15. N/A
16. Generally claims of IAC are not cognizable on direct appeal.

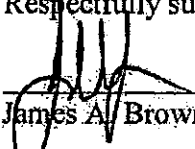
17 & 18

The Applicant was represented at trial by Jessica Saxon and Arie Bax of the Beaufort County Public Defender Office at trial. Their office is located at 102 Ribaut Road, Beaufort, SC 29902.

The Applicant was represented on his direct appeal by Wanda Carter of the SC Office of Appellate Defense. Her address is PO Box 11589, Columbia, SC 29211-1589.

19. The Applicant seeks the vacation of his convictions and sentences.
20. The Applicant is not under sentence from any other court.

Respectfully submitted,


James A. Brown, Jr.

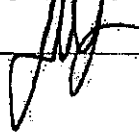
Law Offices of Jim Brown, P.A.
1600 Burnside Street, Suite 100
P.O. Box 592
Beaufort, SC 29901-0592
(843) 470-0003

December 30, 2016
Beaufort, SC

Attorney for the Applicant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon all parties of record in this proceeding this 30th day of December, 2016.



Law Offices of Jim Brown, P.A.

1600 Burnside St., Suite 100 • P.O. Box 592

Beaufort, SC 29901-0592

Phone: (843) 470-0003 Fax: (843) 470-0004

jimbrownlaw@hargray.com

www.attorneyjimbrown.com

December 30, 2016

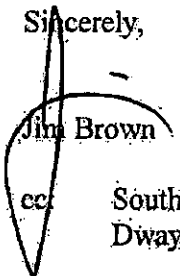
Clerk of Court, Common Pleas
Beaufort County Clerk of Court
PO Box 1128
Beaufort, SC 29901

Re: Dwayne Chisolm v. South Carolina; 2016-CP-07-2267

Clerk:

Please find enclosed a First Amended Post-Conviction Relief application for the above referenced matter for filing in your office. Thank you for your assistance and should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,


Jim Brown

cc: South Carolina Attorney General's Office, w/ enclosure
Dwayne Chisolm, w/ enclosure

2017 JAN -3 PM 12:34
JENN AM ROSE HEAU
BEAUFORT COUNTY S.C.
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
Dwayne Chisolm, #325820,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2016-CP-07-2267

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on October 24, 2016, would respectfully show this Court:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Beaufort County. Applicant was indicted by the July 2010 term of the Grand Jury for Beaufort County for trafficking cocaine 100-200 grams, first offense (2010-GS-07-1251), possession with intent to distribute crack cocaine, first offense (2010-GS-07-1252), possession of a weapon during the commission of a violent crime (2010-GS-07-1253) and possession of a firearm with an obliterated serial number (2010-GS-07-1254). Applicant was represented by Jessica Saxon, Esquire, and Ari Bax, Esquire. Assistant Solicitors Mary Concannon and Julie Kate Kenney prosecuted the case.

On October 23, 2014, Applicant was convicted as indicted. The Honorable Carmen T. Mullen sentenced Applicant to twenty-five years imprisonment for trafficking cocaine 100-200 grams, first offense, fifteen years imprisonment for possession with intent to distribute crack cocaine, first offense, five years imprisonment for possession of a weapon during the

commission of a violent crime, and five years imprisonment for possession of a firearm with an obliterated serial number to be served concurrently.

Applicant filed a timely notice of appeal. An appeal was perfected by Wanda H. Carter, Esquire, of the South Carolina Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction on June 29, 2016. Unpublished Op. No. 2065-UP-332. The remittitur was issued on July 15, 2016.

II. ALLEGATIONS

Applicant filed a PCR application alleging the following:

1. "Failure to mirandize me prior to questioning"
2. Mis-conduct of several officers involved in my case"
3. "Affidavit refuse to state grounds to warrant no info on informant"

Applicant's PCR attorney, Jim Brown, Esq., subsequently filed an amendment to Applicant's application alleging the following:

1. Ineffective Assistance of Counsel
 - a. "Trial counsel failed to challenge the introduction of an inculpatory statement made by the state"
 - b. "Trial counsel failed to argue the deficiencies in evidence seized pursuant to a search warrant that the state introduced"
 - c. "Trial counsel failed to object to jury instructions that contained improper comments on the facts"
2. Brady Violation
 - d. "The state failed to disclose impeachment information concerning misconduct to trial counsel"

Attached are the records of the Beaufort County Clerk of Court regarding the subject convictions, the transcript from Applicant's trial, Applicant's appellate records, and Applicant's records from the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant claims Ineffective Assistance of Counsel. Respondent contends that Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

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. See Strickland, 466 U.S. at 669. Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced 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. With respect to plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 52 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record, a question of fact is raised which can only be resolved by an evidentiary hearing. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983). If the court does determine that Applicant alleges specific instances of ineffective assistance which are not conclusively refuted by the record, then Respondent would request an evidentiary hearing to fully resolve this issue.

IV. BRADY VIOLATION

Applicant alleges his due process rights were violated by the State's failure to disclose *Brady* evidence. In evaluating post-trial *Brady* claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A *Brady* violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268.

Respondent submits that Applicant cannot satisfy the test outlined in *Brady*. However, where an application for post-conviction relief alleges specific due process violations, a question of fact is raised which can only be resolved by an evidentiary hearing. See Sharper v. State, 279

S.C. 264, 265, 305 S.E.2d 247, 248 (1983). Respondent would request an evidentiary hearing to fully resolve this issue.

V. AMENDMENTS

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VI. CONCLUSION

Each and every allegation contained within the application not either expressly admitted, qualified, or explained is hereby denied. WHEREFORE, having made its Return, Respondent requests that a hearing be held on the claims of ineffective assistance of counsel and denial of due process.

(signature block to follow)

Respectfully submitted,

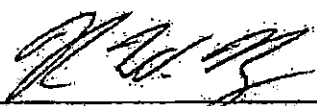
ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

RUSTON W. NEELY
Assistant Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

April 17th, 2017

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

DWAYNE CHISOLM, #325820,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

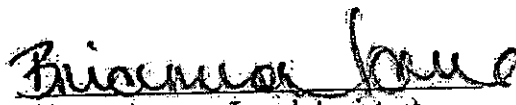
2016-CP-07-2267

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James Falk, Esquire
Falk Law Firm
PO Box 1058
Charleston, SC 29402

DATED this 17th day of April, 2017.


Brianna Arnone, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF COMMON PLEAS
CASE NUMBER 2016-CP-07-02267

DWAYNE CHISOLM

APPLICANT

VERSUS

STATE OF SOUTH CAROLINA

RESPONDENT

JANUARY 31, 2018

TRANSCRIPT OF POST-CONVICTION RELIEF HEARING

BEAUFORT, BEAUFORT COUNTY, SOUTH CAROLINA

BEFORE HON. R. LAWTON MCINTOSH, JUDGE

WANDA H. ROWE, CVR-M
OFFICIAL COURT REPORTER

APPEARANCES

ON BEHALF OF APPLICANT
DWAYNE CHISOLM:

HON. JIM BROWN
LAW OFFICES OF JIM BROWN, P.A.
1600 BURNSIDE STREET, SUITE 100
POST OFFICE BOX 592
BEAUFORT, SOUTH CAROLINA 29901-0592
843-470-0003
jimbrownlaw@hargray.com

ON BEHALF OF RESPONDENT
STATE OF SOUTH CAROLINA:

HON. CHRISTIAN SAVILLE
ASSISTANT ATTORNEY GENERAL
STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, SOUTH CAROLINA 29211-1549
803-734-3970

ORIGINAL

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ATTACHMENTS

Certificate of Reporter.....	38
------------------------------	----

EXHIBITS

COURT:

- 1 Document to Have
Been Court's Exhibit
Number 1 was Never
Provided

APPLICANT:

- 1 Document Identified as
Trial Excerpts.....14
- 2 Document Identified as
Actual Objections.....14

ORIGINAL

1 BEGINNING 9:47 A.M.

2 BY THE COURT:

3 THE COURT: All right. Call your next case.

4 MR. BROWN: State calls Dwayne Chisholm.

5 MR. SAVILLE: May it please the Court?

6 THE COURT: All right, sir.

7 MR. SAVILLE: This is Dwayne Chisolm versus the
8 State of South Carolina. Number 2016-CP-07-02267.
9 Applicant is presently confined in the South Carolina
10 Department of Corrections pursuant to orders of
11 commitment from the Clerk of Court of Beaufort County.
12 Applicant was indicted by the July 2010 term of the
13 Grand Jury of Beaufort County for trafficking cocaine,
14 100 and 200 grams, first offense; possession with intent
15 to distribute crack cocaine, first offense; possession
16 of a weapon during the commission of a violent crime;
17 and possession of a firearm with an obliterated serial
18 number.

19 Applicant was represented by Jessica Saxon,
20 Esquire; and Ari Bax, Esquire. Assistant Solicitors
21 Mary Concannon and Julie Kate Keeney prosecuted the
22 case. On October 23, 2014, Applicant was convicted as
23 indicted. The Honorable Carmen T. Mullen sentenced
24 Applicant to twenty-five years for trafficking cocaine
25 100 to 200 grams; fifteen years imprisonment for

ORIGINAL

1 possession with intent to distribute crack cocaine,
2 first offense; five years imprisonment for possession of
3 a weapon during the commission of a violent crime; and
4 five years imprisonment for possession of a firearm with
5 an obliterated serial number, to be served concurrently.
6 Applicant filed a timely notice of appeal, and appeal
7 was perfected by Wanda H. Carter, Esquire, of the South
8 Carolina Office of Appellate Defense. The South
9 Carolina Court of Appeals confirmed the conviction on
10 June 29, 2016. Remittitur was issued on July 15, 2016.

11 Applicant filed a timely PCR application on October
12 24, 2016, alleging failure to *Mirandize*, misconduct of
13 several officers involved in this case, and an affidavit
14 refusing to state grounds to warrants, no information
15 from informants.

16 Applicant's PCR attorney, Mr. Jim Brown, Esquire,
17 subsequently filed an amendment to the application on
18 December 30, 2016, alleging the following: ineffective
19 assistance of counsel for failure to challenge
20 statements, failure to argue deficiencies in the search
21 warrants, failure to object to jury instructions, and a
22 *Brady* violation. The State made its return on April 17,
23 2017.

24 Applicant is present today and represented by Mr.
25 Jim Brown, Esquire. I'll turn it over to him. Thank

ORIGINAL

1 you.

2 THE COURT: Mr. Brown, if you would, would you
3 state the meritorious, recognizable claims that your
4 client is proceeding under.

5 MR. BROWN: I will, your Honor. And you have a
6 copy of the application before you. I've got a copy for
7 the Court, if I can just hand that up.

8 THE COURT: Okay. Sure.

9 MR. BROWN: If I may approach. And there's a
10 footnote in there, and I'm going to reference that, your
11 Honor.

12 THE COURT: Okay. Thank you, Jim.

13 MR. BROWN: To try to -- to show that we've kind of
14 already put this out there at the very beginning.
15 Claims A, B, and C were actually, what I'm going to say,
16 raised in the original pro se application. It's
17 slightly stated differently. However, we're going to
18 waive all three of those, A, B, and C, with this caveat.
19 On Ground B is a *Brady* claim.

20 I do think it's worth putting on the record that we
21 believe, upon information and belief, that there was
22 some *Brady* information regarding one of the officers --
23 and I'm not trying to embarrass anybody. I'm going to
24 put it on the record.

25 Officer Michaud was an officer who testified in my

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1 client's trial. He is of some importance, because he
2 testified regarding an admission against interests by my
3 client. It's not exactly a confession, because he
4 doesn't admit every element, such as, in this case,
5 diminutive control of some drugs. He does make some
6 statement about what's in the house was his, but there's
7 -- he's charged with more than one item. There's
8 actually three items that he's charged with: crack,
9 powder cocaine, and the gun.

10 Nonetheless, I have obtained Officer Michaud's
11 personnel file. He was separated from that law
12 enforcement agency. It does have a fairly significant
13 amount of information about him involved in misconduct
14 with an informant, and with him potentially
15 misrepresenting that relationship to his supervisors.
16 However, that misconduct is alleged to have occurred
17 about seven weeks after my client's trial.

18 THE COURT: There was no evidence it was related to
19 any events in this case?

20 MR. BROWN: There's no way that trial counsel would
21 have been able to get that, or the State would have been
22 able to provide that, because the act had not occurred
23 yet.

24 THE COURT: Right.

25 MR. BROWN: And so, we have asked the State for

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1 their file, because I have a defense lawyer's file, my
2 client's file from the trial counsel, and it doesn't
3 have any Brady material in there, and I wanted to
4 compare the two. But it's been represented to me that
5 there is an affidavit that the Solicitor's Office no
6 longer has that file. So with that caveat, we are
7 withdrawing Ground B, as well.

8 You know, I do think there arguably would be some
9 inference I might ask the Court to take from the no
10 longer having possession of the file. I cannot, in good
11 faith, tell you that that would be enough to clear by a
12 preponderance of the evidence standard. But it was a
13 non-frivolous claim, because there was some misconduct.
14 It's just the timing does not assist Mr. Chisolm.

15 And that would leave us with Ground D, and it's a
16 failure to object to --

17 THE COURT: Ground?

18 MR. BROWN: D. And that's a failure to object to a
19 jury instruction.

20 THE COURT: Okay.

21 MR. BROWN: And if you want me to go ahead and
22 proceed on that issue.

23 THE COURT: No, let me do something for the record,
24 if I may.

25 MR. BROWN: Yes, sir.

1
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1 THE COURT: First, yesterday, we had a phone
2 conference here --

3 MR. BROWN: Yes, sir.

4 THE COURT: -- with Mr. Brown --

5 MR. BROWN: Yes, sir.

6 THE COURT: -- and Mr. Saville, where the issue
7 came up that you had subpoenaed the State's -- a witness
8 from the State, and as well as their file, to come to
9 court and testify. The A.G.'s Office took the position
10 that was discovery, and I said it's not, because it's
11 directing somebody to appear at a hearing, and so it's
12 differentiated. We met in my office this morning. Sean
13 Thornton from the Solicitor's Office, who, I know well,
14 has represented to me that there's no file that can be
15 laid on. Is that right? You filed an affidavit to that
16 effect?

17 MR. THORNTON: It is correct, your Honor. The
18 affidavit was filed by Linda Delahunty, who is the
19 executive assistant to the solicitor and a records
20 custodian. Mr. Brown had subpoenaed her today, and she
21 is present in the courtroom, as was discussed in the
22 back. But I can handle it for the Court. A lot of
23 these older paper files, we were archiving. Beaufort
24 County actually -- we use their services. We asked them
25 to look through it. They searched. We found other Mr.

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1 Chisolm files, but not this one. We sent Mr. Brown a
2 letter to that effect. I sent it to him after Ms.
3 Delahunty checked.

4 THE COURT: She actually did the checking herself?

5 MR. THORNTON: And then, subsequently to that, she
6 actually had them bring the box over, and she personally
7 went through the box that it should be in. It's just
8 not there, which happens with these older archived
9 files. So I am representing to the Court, based on her
10 search, that we do not have the paper file from that.
11 Again, we found a couple other files, but they were not
12 the ones represented in this case.

13 THE COURT: All right. Is there any reason why
14 Mr. Thornton and Ms. Delahunty can't be excused from
15 this hearing?

16 MR. BROWN: None at all, and we excuse them from
17 our subpoena. As a matter of formality, we would ask
18 the affidavit be submitted however it can be, as an
19 applicant's exhibit or however that may be. Just the
20 affidavit about -- I think they said they --

21 THE COURT: I tell you what. Make it a court
22 exhibit.

23 DOCUMENT IDENTIFIED AS AFFIDAVIT
24 WAS NOT PROVIDED.

25 MR. BROWN: Yes, sir. Yes, sir..

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1 MR. THORNTON: I provided a copy to the Attorney
2 General's Office, your Honor.

3 THE COURT: Very good.

4 MR. THORNTON: Thank you, Judge.

5 THE COURT: Thank you.

6 MR. SAVILLE: May I approach, your Honor?

7 THE COURT: Yes, sir.

8 MR. THORNTON: Thank you, your Honor.

9 THE COURT: All right. Mr. Brown, are you ready to
10 proceed?

11 MR. BROWN: I am ready. Your Honor, I do want to
12 go back. My client wanted me to make it clear on the
13 record that it's Officer Michaud who testified that my
14 client made an admission; that that is not conceded on
15 our part, but it's in the record.

16 THE COURT: Could you explain it. I'm not --
17 somehow that's going over my head. That's easy to do.

18 MR. BROWN: No, no, no. During his trial, during
19 my client's trial, Officer Michaud took the stand and
20 testified regarding a statement that Officer Michaud
21 says my client made.

22 THE COURT: I get you.

23 MR. BROWN: My client wants to make the distinction
24 clear that he doesn't concede he ever made any
25 admission.

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1 THE COURT: I got you. Okay. Very good.

2 MR. BROWN: Yes, sir.

3 MR. SAVILLE: If I may, your Honor, just for a
4 moment. According to the trial transcripts, Officer
5 Michaud did not testify regarding the statement. It was
6 actually Corporal Squires who testified regarding the
7 statement.

8 THE COURT: Corporal Squires.

9 MR. SAVILLE: Yes, your Honor. Officer Michaud
10 actually testified --

11 THE COURT: I don't have a brown packet. Do you
12 have that?

13 MR. SAVILLE: I think that I put it on the left
14 side of the counter. I'm sorry, your Honor. It was a
15 little bit -- kind of a stocky one.

16 THE COURT: I have Chisolm.

17 MR. SAVILLE: That's the one, your Honor.

18 THE COURT: Okay. Do you concede that, Mr. Brown?

19 MR. BROWN: We would also like to go back to that
20 other material. It's Officer Squires, and it showed
21 both are involved in that I.A. investigation, but
22 subsequent to my client's trial.

23 THE COURT: Okay.

24 MR. BROWN: So. But my client just wanted to make
25 clear that he didn't -- he doesn't concede he made any

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1 admissions.

2 THE COURT: Well, let's make something clear.
3 Let's let him come up here, and let's get a witness
4 going, and let's go forward here. Okay?

5 MR. BROWN: Yes, sir. And actually, this is an
6 argument, your Honor.

7 THE COURT: Obviously. We don't need testimony?

8 MR. BROWN: No, sir.

9 THE COURT: Okay.

10 MR. BROWN: I don't believe so, because, if I may
11 present the materials I have, I would ask that your
12 Honor take a look at the transcript. I have already
13 pulled it for you. Pages 311 through 336. And I've
14 given --

15 THE COURT: That's the record on appeal transcript
16 or the --

17 MR. BROWN: Yes, that's the -- yes, sir, trial
18 transcript. And for what it's worth, I think it's -- to
19 do my due diligence, I need to ask that the underlying,
20 entire trial transcript be made a part of this record.

21 THE COURT: Absolutely.

22 MR. BROWN: Yes, sir. And so, if I may approach
23 with that excerpts of the tran -- I think it's easier to
24 look through.

25 THE COURT: Sure.

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1 MR. BROWN: And I've also excerpted actual
2 objections for the instructions I have objection to. If
3 I can have those marked as Applicant's 1 and Applicant's
4 2.

5 THE COURT: Absolutely.

6 DOCUMENT IDENTIFIED AS EXCERPTS

7 FROM TRIAL TRANSCRIPT

8 MARKED APPLICANT'S EXHIBIT NUMBER 1

9 ADMITTED AS EVIDENCE.

10 DOCUMENT IDENTIFIED ACTUAL OBJECTIONS

11 MARKED APPLICANT'S EXHIBIT NUMBER 2

12 ADMITTED AS EVIDENCE.

13 MR. BROWN: Your Honor, if I may hand those up,
14 Applicant's 1 and 2.

15 THE COURT: Absolutely.

16 MR. BROWN: And to make it somewhat simple, the
17 excerpts that I've typed up from there are the jury
18 instructions that we take issue with.

19 THE COURT: Yes, sir.

20 MR. BROWN: They are taken out of the entirety of
21 the instructions. I would suggest they make up about
22 one-sixth of the jury instruction pages in there, and I
23 just point that out because they are significant. But
24 the gist of my argument is that these are a charge on
25 the facts. I've got a copy of the Article 5, Section

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1 21. I will say there's a typo in my application for
2 PCR. I used a section I'd used before, but that's what
3 we believe it violates. And if I just may read, and I
4 think it's a -- I think it's an instruction a lot of
5 lawyers have heard before, but essentially, it says, in
6 the first instance:

7 *Constructive possession is when a person*
8 *has dominion or control, or the right to*
9 *exercise dominion or control, over either the*
10 *object or the premises on which the object is*
11 *located.*

12 And it goes down:

13 *Possession may be inferred from*
14 *circumstances, and may be imputed to anyone*
15 *who has the power and intent to control the*
16 *disposition and use of the object. In other*
17 *words, position of an object on the premises*
18 *gives rise to an inference that the person*
19 *charged has both the power and intent to*
20 *control the use or disposition of the object.*

21 That is repeated. She charges that -- she gives a
22 charge on the elements of each of the four criminal
23 charges against my client, and she charges the
24 possession language at each point where she's charging
25 each of the possession charges. So it's charged at

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1 least four times.

2 It is not all identical. I will point out that one
3 of the words used that we think makes it especially
4 infirm is that it discusses imputing, and that's not the
5 same as an inference, and that's suggesting the weight
6 that should be given to a fact.

7 But I would point out, as it goes down, after all
8 of those instructions, essentially just four times that
9 she discusses constructive possession and says
10 essentially that the proof of the dominion and control
11 of a premises is enough for the State to meet its burden
12 if you believe so. And that happens at least four
13 times. The jury goes out for deliberations at 12:52;
14 they take lunch during that time; they come back
15 approximately fifty-four minutes later with a note. And
16 the note, quote: *please describe again constructed*
17 [sic] *possession*.

18 And they come out, and the judge gives yet a fifth
19 charge on the very same thing. And it's saying:

20 *Constructive possession means the*
21 *defendant had dominion and control, or the*
22 *right to exercise dominion or control, over*
23 *either the drugs themselves or the property*
24 *on which the drugs were found.*

25 Clearly telling the jury if he has dominion and

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1 control over the property, well, that could be your
2 possession. And for what it's worth, the lead charge
3 that he got the most time on, the twenty-five-year
4 charge, was the charge of trafficking based on
5 possession, which, essentially, the two elements that
6 usually aren't in dispute is what the substance is,
7 because it would be a directed verdict, or the weight,
8 which would, again, be a directed verdict if that didn't
9 come back factually. The State had no proof of that.
10 So then, the -- really, the issue, usually in
11 trafficking cases, possession.

12 But here's what's important, that's -- they go back
13 out at 1:51. So five minutes after they sent the note,
14 they're instructed again on that; they go back out; they
15 send a second note. And this time, the Court does not
16 bring them back in. She sends a note back, and I think
17 the note has other problems, but I'm not raising that as
18 a direct issue. But the Court sends a note back to the
19 jury that says the defendant objected to sending just
20 the constructive possession charge back. So the jury
21 also gets this little flavor that, hey, the defense
22 doesn't want you to focus on this issue. And so, the
23 Court is sending the entire jury charge back. And they
24 send that back, and within two hours after being sent
25 out, they finish lunch and convict him.

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1 And again, we believe -- and I've got some law I
2 kind of want to hand up. But we believe that that is an
3 improper charge on the facts. I've got -- your Honor,
4 if I may hand up -- and I don't believe they need to be
5 marked, because they're just -- it's just law. I've
6 already given a copy to the Attorney General, and if I
7 may hand up a copy of *Article 5, Section 21*. And then,
8 I've got a series of cases, your Honor. And if I could
9 just kind of give you my summary of what that law says.

10 The first case -- and there is nothing like citing
11 a civil case in a criminal matter, but it is a 1909
12 South Carolina Supreme Court case involving negligence
13 with a train. And long story short, the plaintiff
14 prevails, and the defendant filed an appeal. And part
15 of the appeal is based upon a failure for the trial
16 court to charge an instruction regarding -- and it
17 starts -- it appears that a railway company runs a
18 train, and the past the -- blah, blah, blah. Well, long
19 story short, the court -- it's on the very back page of
20 this opinion -- the Supreme Court says that *while it's*
21 *assigned as error*, they go forward:

22 Negligence is a mixed question of law
23 and fact. It's the duty of the Court to
24 define negligence, but it's the province of
25 the jury to draw the inference from the fact.

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1 And I find that important because -- and they're
2 citing the same code section on judges can't instruct
3 the jury on facts. And it's important, because they're
4 saying you can define what negligence is, like you can
5 define what drug trafficking is, but it's up to the jury
6 to find the inferences that whatever they infer is what
7 they infer. And then, the judge said -- provides us
8 inference languages, kind of signaling this is important
9 stuff, and especially in my client's case. And so, I
10 point that out because that shows that this has been an
11 issue for a long time, and that shows the way the court
12 was thinking about it, at least in 1909.

13 Now, I want to move forward. There are two cases
14 that are commonly cited for the proposition that this
15 jury instruction is proper. And those are *State v.*
16 *Hudson* from 1981. Followed up by -- and that's a
17 Supreme Court case. And then -- and I don't think the
18 Court of Appeals was in existence then. Followed by
19 *State versus Muhammed*, which is a Court of Appeals case
20 that ultimately was decided in '99, cert denied in 2000.
21 Both of those cases discuss that very point of law,
22 whether dominion and control over the premises equals or
23 is evidence of dominion and control over the drugs,
24 constructive possession. Both cases are cases regarding
25 sufficiency of the evidence to get past a directed

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1 verdict motion.

2 And so, succinctly, the court's saying that is the
3 law. They never say that that is a proper jury
4 instruction. And that brings me to the *Stukes* case,
5 decided by our South Carolina Supreme Court in 2016.
6 And in *Stukes*, that issue was a jury instruction, and it
7 listed an improper charge on the facts. It actually --
8 *Stukes* uses a dissent from, I believe it was then
9 Justice Pleicones, but uses a dissent from Pleicones in
10 a previous case, which was decided not very far back.
11 I'm waiting for the exact date. The *Rayfield* case. But
12 in short, the jury instructed that a sexual assault
13 victim's testimony need not be corroborated, and that
14 was provided as a jury instruction. And the Court, in
15 *Stukes*, the Supreme Court, upon review, says that is our
16 law. However, that is an improper statement of law to
17 tell the jury, and to go through and talk about the fact
18 that it places emphasis on that fact, that that
19 instruction might be proper as a devaluation at the D.V.
20 stage, but it's not proper to instruct the jury because
21 of that emphasis that's placed there.

22 And I point out that 2016 case, because we also
23 know that *Belcher* came out and struck down the
24 significant inference instruction, generally in assault
25 and murder cases and homicide cases, saying that a lot

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1 of times, or sometimes, you don't get that inference
2 charge by malice from the inference from the use of a
3 deadly weapon. I believe this shows the court's trend
4 to restrict the jury instructions from making statements
5 that the jury can use to equivocate some facts with the
6 other facts. And as the case law talks about, one of
7 the fears is that it lessens the burden of proof. And I
8 think that while I'm bringing the claim as one under
9 Article 5, Section 21, I think that really is the fear,
10 that the jury doesn't have to find proof beyond a
11 reasonable doubt that my client had dominion and control
12 over the drugs.

13 THE COURT: Well, let me ask you, of the charge
14 that was given --

15 MR. BROWN: Yes, sir.

16 THE COURT: -- and you recognize, I'm sure
17 everybody does, that that is the standard charge that's
18 given across the state by most trial judges?

19 MR. BROWN: I actually tried a drug trafficking
20 case in August with the same trial judge, and she gave
21 the same instruction, yes, sir.

22 THE COURT: Right. But if you would --

23 MR. BROWN: Yes, sir.

24 THE COURT: -- would you point to the particular
25 language in the charge that you find to be offensive?

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1 MR. BROWN: Yes, sir.

2 THE COURT: Now, I also heard that you said in the
3 charge as given --

4 MR. BROWN: Yes, sir.

5 THE COURT: -- not only is the charge a statement
6 or a comment on the facts in violation of the
7 *Constitution*, but that the use of certain terms, I think
8 it was imputed versus inference, makes the charge itself
9 improper because it changes the meaning.

10 MR. BROWN: That's correct. And for what it's
11 worth, that's why I typed the excerpts. They're not --
12 she doesn't read exactly the same words every time.

13 THE COURT: Okay.

14 MR. BROWN: But I would suggest this. I don't
15 believe that she needs to instruct the jury regarding
16 any dominion and control over the premises.

17 THE COURT: Well, so, gentlemen, tell me, for the
18 record.

19 MR. BROWN: Yes, sir.

20 THE COURT: Because this is going to be looked at.

21 MR. BROWN: Sure.

22 THE COURT: What is the offensive language, in
23 general that you're asking the Court to strike?

24 MR. BROWN: You got it. On Page 320, that the
25 excerpt starts on Page 320, Line 25. I believe it's

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1 proper to instruct constructive possession when a person
2 has dominion and control over the object. But then,
3 you've got the *Stukes* language that says, *or the right*
4 *to exercise dominion and control over the premises in*
5 *which the object is located.* And it would take me
6 having to go in and strike out words, but any part where
7 it talks about his dominion and control over the house,
8 because that's not at issue in the trial. He's not
9 charged with running a crack house. In fact, I think
10 that may actually be a criminal charge in South
11 Carolina.

12 THE COURT: So it's not a necessary element of the
13 charge or a charge given.

14 MR. BROWN: Absolutely. And so, it is proper that
15 to be charged on constructive possession, because it is
16 a discussion about what the jury needs to find if
17 they're going to believe that it's having a sub-element.
18 If possession is an element of trafficking, then a sub-
19 element would be the elements of constructive
20 possession. But the equating some type of other conduct
21 that's innocent conduct with the very issue in most of
22 these possession/trafficking-type cases, which is
23 possession of the item itself, that -- again, that's a
24 charge of the facts, because it emphasizes that there's
25 importance to his dominion and control over the

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1 premises. And your Honor, I could go through on each
2 one, but it is two pages. Well, a page-and-a-half,
3 single-spaced.

4 THE COURT: Well, I mean, listen. Let me tell you,
5 this is your case.

6 MR. BROWN: Yes, sir.

7 THE COURT: And to be honest with you, I don't
8 necessarily disagree with your argument, but I think
9 that you need to isolate it --

10 MR. BROWN: Yes, sir.

11 THE COURT: -- so that when you have somebody
12 looking at it again --

13 MR. BROWN: Yes, sir.

14 THE COURT: -- you have somebody looking at it.

15 MR. BROWN: Yes, sir. And if I may, then, I'm
16 going to keep going down this excerpt list. Then the
17 next line, it begins with a dot, dot, dot, possession, I
18 think it starts with ladies and gentlemen:

19 Possession may be inferred from the
20 circumstances, and may be imputed to anyone
21 [sic] has the power and intent to control the
22 disposition and use of the object.

23 I think that is fine.

24 But then, she goes on:

25 In other words, possession of an object

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1 or the premises.

2 I think you have to take that language out. It
3 gives rise to an inference that the person charged has
4 both the power and intent to control the use and
5 disposition of the object. And that's under second --
6 second -- well, it's two sentences, but I guess Sentence
7 2 and 3 for the Page 20 part. Then we drop down to the
8 third paragraph item, begins, *proof of possession*:

9 *Proof of possession requires more than*
10 *proof of mere presence of a place where the*
11 *controlled substance is found.*

12 I think that's proper.

13 *Ladies and gentlemen, the State must*
14 *prove the defendant had both the power, that*
15 *is, actual or constructive control, and the*
16 *intent to control its disposition or use.*

17 I think that whole sentence is wrong, because it
18 immediately follows a discussion about mere presence at
19 the place is not enough. But if he's got constructive
20 or actual control of its use. And she's talking about a
21 premises. So if he's got -- to be in control of the use
22 of a piece of property, that he's the maintenance man in
23 an apartment building, well, I think that's proof he
24 knew about the drugs and intended to control.

25 THE COURT: I don't know if that's the same thing,

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1 but I hear what you're arguing.

2 MR. BROWN: And your Honor, I would agree there's a
3 little ambiguity in there where she says that intent to
4 control its disposition, because I don't know what its
5 referring to. But the sentence above it does not talk
6 about drugs; it talks about premises. And so, in that
7 matter, the jury is going to say, well, you know, that's
8 all he's got to have is constructive control.

9 Constructive control of the premises equals dominion and
10 control of the drugs. There's no way that's a proper
11 statement of the law. It may be that a jury could come
12 up with that conclusion on their own. We don't get to
13 go into their deliberations, their mental impressions.
14 All those are shielded.

15 THE COURT: Well, hang on. You said that wasn't a
16 proper statement of the law. Are you saying -- I
17 thought your argument was, although it is a proper
18 statement of the law, it is an improper comment on the
19 facts.

20 MR. BROWN: It is evidence that could suffice to
21 keep the case going past the D.V., but it's not a
22 statement of law for a jury to lead a jury in making its
23 determination.

24 THE COURT: Okay.

25 MR. BROWN: And I apologize for the ambiguity of my

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1 statement there, but I do think it is -- it is evidence.
2 I mean, I think everybody believes that they're drugs in
3 the car, and you got in the car, that's some evidence
4 there, even if it's hidden in the trunk or whatever, it
5 would be. But I don't believe that that -- that invades
6 the very big -- and for what it's worth, the judge
7 starts at the very beginning of the jury instructions on
8 311 and the next page about how she can't tell them what
9 the facts are that they determine. And she goes through
10 about two pages on it, which I think actually aggravates
11 this, because then she tells them you have to follow the
12 law as I give it to you, and here I'm giving you the
13 law. So she's really converting that inference to her
14 charge on the law. It is, look, if he has dominion and
15 control over these premises, that means he has dominion
16 and control over the drugs.

17 And to keep going down, on Page 325, it continues.
18 Dot, dot, dot:

19 *Constructive possession means that the*
20 *person has dominion and control, or the right*
21 *to exercise dominion and control, over either*
22 *the object itself or the property on which the*
23 *object is found.*

24 The or/on needs to be struck in that.

25 Next line, quoted:

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1 A defendant's knowledge and possession
2 may be inferred when a handgun is found on
3 the property under a defendant's control.

4 And I believe that entire part is improper. They
5 may determine that on their own, but that inference,
6 according to that -- and I believe the case, again, was
7 named -- it's got a strange name, but a 1909 case that's
8 there, the *Turby Phil* (phonetic spell) case talks about
9 that. The court charges on negligence; the jury
10 determines the inferences from the facts. I mean,
11 constructive possession means there is an inference.
12 That's the very definition of -- excuse me --
13 circumstantial evidence, the very definition is
14 inference. So they get to consider circumstantial
15 evidence; they get to draw inferences from it. But the
16 court shouldn't be allowed to tell them what inference
17 to draw. And that's --

18 They could make it that way, saying it's strict
19 liability. If you have dominion and control over
20 objects, and drugs are found on it, you're liable. The
21 legislature can pass that law. If you blow a .08 or
22 above, you are driving with unlawful alcohol
23 concentration. I mean, they take out the inference
24 part. If it's a .08 or above, that's it. That's
25 illegal. If you have drugs on your premises, know about

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1 it or not, you're guilty of negligently having a
2 premises with drugs on it. I mean, I don't know if that
3 would stand up -- I don't know if that would stand up to
4 any other challenges, but they could pass it that way if
5 they wanted it to be, but otherwise, we're changing the
6 elements of the crime here.

7 And your Honor, to keep going, that's when the jury
8 comes back, and we get that constructive possession
9 charge after the first juror note. And it continues:

10 *Constructive possession means that the*
11 *defendant had dominion and control, or the*
12 *right to exercise dominion or control, over*
13 *either.*

14 And I think the *either* needs to be struck. The
15 drugs themselves. And this is the next language:

16 *Or the property on which the drugs*
17 *are found.*

18 I think the *or* really needs to be struck out of
19 that.

20 Next line:

21 *The defendant's knowledge and possession*
22 *may be inferred when a substance is found on*
23 *a property under the defendant's control.*

24 I think that whole line is out.

25 Then they go out to deliberate. They come back

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1 with the second note. The jury charges are sent back in
2 their entirety. I don't have a copy of those. They
3 were not provided. I'm assuming that the instructions
4 are the same that were read, because she said she sends
5 the entire jury instructions back. So I'm assuming she
6 read it verbatim, even though there are slight
7 variances, including the imputed language. I don't have
8 that, and we have not been provided that copy of the
9 transcript, the actual attachments to it, but I would
10 point out that there is that comment, which I don't
11 believe, standing alone, is a claim that I can bring
12 meritoriously. But I do think when she says to the
13 jury, this is just further inference, *the defendant*
14 *objected to sending back just the constructive*
15 *possession portion of the charge.* And that, to me, only
16 serves to, again, reinforce that, and actually suggests
17 that the defendant doesn't want you to consider that.
18 And I think that's really bad.

19 And the last thing I'd point out is that we're
20 talking about deliberations where they come back with
21 the question about constructive possession, fifty-four
22 minutes after they're sent out to have lunch. So
23 they're eating lunch and coming back with that one
24 question. And I believe that passes the harmless error
25 portion. I'm going to call it harmless error. The

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1 prejudice prong of *Strickland*.

2 THE COURT: You've got no emphasis by the time the
3 jury is out in this case. Now, the charge itself is as
4 it is, but the fact that the jury's out fifty-four
5 minutes or fifty-four hours is of no relevance to this
6 argument.

7 MR. BROWN: I believe -- and the only other thing
8 I'm saying is, I believe it should.

9 THE COURT: I don't think it is.

10 MR. BROWN: I understand. But I would submit that
11 is evidence, though, of the second prong, the prejudice
12 prong, of *Strickland*. But for that erroneous
13 instruction, the outcome of the trial would have been
14 different. I will suggest there's no evidence of actual
15 possession of any of these items. And I think that's
16 worth putting in there.

17 And your Honor, succinctly, that's it. I would
18 suggest -- I have another case in here that discusses a
19 little bit of inference language. It is a much more
20 convoluted decision, but it's from -- re-hearing denied
21 in twenty -- it's an opinion issued by the state Supreme
22 Court, 2016. Re-hearing denied in 2016. And in that
23 case, it is actually a PCR case, and they find that
24 defense counsel's failure to object was ineffective
25 assistance, and reversed that conviction. It is much

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1 more convoluted on what part of the opinion -- the
2 inference or instruction they should object to. So I
3 can't tell you it's on all fours factually. I think it
4 is yet another case showing they don't like these
5 instructions going back, telling the jury what some fact
6 can mean.

7 THE COURT: Are you talking about sending the whole
8 charge back versus a particular aspect?

9 MR. BROWN: No, sir. It says in here:

10 *The trial judge objected to the charge*
11 *on the comment on facts, but did not object*
12 *to the trial court's failure to use the*
13 *permissive inference language in 'Elmore.'*

14 And then, they go along and talk about some of the
15 defect in that. All right. And the reason, again, I
16 point that out is that, that's yet another charge in the
17 last -- or opinion in the last ten years. We have
18 *Belcher*, we have *Stukes*, and we have *Gibson*. *Gibson* and
19 *Stukes* were both in the last year-and-a-half, and all of
20 those are reversed for this improper instructions
21 regarding inference. Or in the *Gibson* case, a trial
22 lawyer's failure to object.

23 And that's where I'll conclude on my factual
24 presentation. The record is devoid of an objection from
25 trial counsel on that issue. And in fact, when they're

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1 asked whether they have an objection, they say, no, they
2 don't; continue with the charges.

3 THE COURT: Let me ask you this. Quite frankly, I
4 don't disagree with you. I think this is an Appellate
5 Court issue, though. Would you prepare a charge that
6 you find to be non-offensive to what you are urging the
7 court to look at?

8 MR. BROWN: Absolutely. So you want me to give
9 what it does not have? The language that would've been
10 have been okay to charge here?

11 THE COURT: Yes, sir.

12 MR. BROWN: Absolutely.

13 THE COURT: And make that -- just submit it for a
14 court's exhibit.

15 DOCUMENT TO BE MARKED AS A COURT

16 EXHIBIT WAS NOT PROVIDED TO COURT REPORTER.

17 MR. BROWN: Yes, sir.

18 THE COURT: All right.

19 MR. BROWN: I will say this, timing-wise, I am in a
20 at least 18-witness, burglary/arson trial starting
21 Monday with Mr. Murdaugh.

22 THE COURT: So Tuesday morning, then?

23 MR. BROWN: Well, Matt better get working, so.

24 THE COURT: Just whenever you can. Thirty days?

25 MR. BROWN: That's perfect, your Honor. Yes,

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1 absolutely.

2 THE COURT: All right. Great. Mr. Saville?

3 MR. SAVILLE: Thank you, your Honor. I was about
4 to stand up and make the same argument that I do believe
5 Applicant is raising a direct appeal issue, and it's
6 rather strange to frame this as an ineffective
7 assistance of counsel issue for PCR. Because, at the
8 time, and still, currently, that charge was still proper
9 under South Carolina law.

10 You have *State versus Adams*, which was a 1989 case,
11 where the Supreme Court of South Carolina actually said
12 the proper charge on constructive possession is to
13 instruct the jury that the defendant's knowledge and
14 possession may be inferred if the substance was found on
15 the premises under his control. It does say the judge
16 should explain that they can accept or reject this
17 permissible inference, depending on their view of the
18 evidence, which Judge Mullen did every single time she
19 gave this charge.

20 THE COURT: Well, that's a very good point, Mr.
21 Saville. Mr. Brown, you know, why would this not be
22 more appropriately an issue on direct appeal versus a
23 PCR? Because they could not raise an issue that was not
24 objected to. There's no objection.

25 THE COURT: Well, if it's a current statement of

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1 the -- if it's a correct statement of the current law,
2 and doesn't the law say lawyers are not to have to guess
3 and foresee things that changes the law in the future;
4 and the fact that you don't, doesn't make you
5 ineffective?

6 MR. BROWN: Except we're citing it is a violation
7 of *Article 5 Section 21*, which is not a new development
8 of law, it's the old law.

9 THE COURT: Gotcha. Okay. Thank you. All right.
10 Thank you.

11 MR. BROWN: Yes, sir.

12 THE COURT: All right, Mr. Seville.

13 MR. SAVILLE: Yes, your Honor. We were going to
14 point to the argument that *Gilmore versus State* noted
15 counsel is not required to be held to a standard of
16 clairvoyance. We wanted to distinguish *State versus*
17 *Dukes*, which was a 2016 case that Applicant raised about
18 the jury charge, instructing the jury that they could
19 disregard the fact that there is no corroboration of the
20 sexual crime victim's statement. We think that's easily
21 distinguishable, because the charge in that case
22 actually went to the veracity of a witness's
23 credibility. Likewise, there is no curative language to
24 say that this is an inference that the jury could take
25 into account themselves.

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1 In the present case of Mr. Chisolm, that was that
2 curative language, and the judge made sure to inform
3 them that this inference was something that they could
4 choose to apply, or choose not to apply, depending on
5 their view of the evidence.

6 And we also go back to the fact that this trend in
7 *State versus Dukes* happened after the Chisolm trial.

8 Also, lastly, just very briefly, we'd also like to
9 note that Judge Mullen repeatedly instructed the jury
10 that they are to be the sole judge of the facts, and
11 that she makes no opinion on the facts, no comment on
12 the facts. And looking at *State versus Curry*, which is
13 a 4406, South Carolina Reporter 34, it was noted by the
14 South Carolina Supreme Court that any charge must be
15 prejudicial, and it must be considered in light of the
16 charge as a whole. And we think that, notwithstanding
17 the fact that this was a proper charge, if we choose to
18 believe it was an improper charge, it was cured by the
19 curative language throughout the entire charge. Thank
20 you.

21 THE COURT: Any reply?

22 MR. BROWN: Just very briefly. From the very first
23 page of her jury instruction, in the very first
24 paragraph, she says:

25 *It is your duty as jurors to accept and*

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1 *apply the law as I now state it.*

2 And then, she goes into all this statement. So I
3 understand, I believe, that she's talking about facts,
4 but then she's charging it as law, which is my very
5 issue. Thank you, your Honor.

6 THE COURT: All right. First, Mr. Brown, I'm going
7 to deny your petition. This is a matter first for the
8 appellate courts. I don't disagree with your argument,
9 but it's not ineffective for a trial counsel not to
10 object to a correct statement of the current version of
11 the law, which is the case here. Whether or not the
12 Court of Appeals or the Supreme Court wants to change
13 that charge as being a charge of fact, it's up to them.

14 I'm going to ask Mr. Saville to prepare me an order
15 consistent with his arguments. However, in your order,
16 give Mr. Brown thirty days to provide a court exhibit.
17 It would be a proposed charge consistent with his
18 argument. Okay, sir?

19 MR. SAVILLE: Yes, your Honor. Thank you.

20 THE COURT: Thank you. Good luck.

21 MR. BROWN: Thank you, your Honor.

22 THE COURT: Yes, sir.

 END PROCEEDING 10:28 A.M.

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CERTIFICATE OF REPORTER

JANUARY 31, 2018 TRANSCRIPT OF PCR HEARING

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I, Wanda H. Rowe, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing January 31, 2018 Transcript of PCR Hearing is a true and accurate record of the proceedings had and exhibits admitted that were provided to me on said date, in the case of Dwayne Chisolm versus State of South Carolina, Beaufort County, Court of Common Pleas, Case Number 2016-CP-07-02267; that I am of neither kin, counsel, nor interest to any party hereto.

This Certificate of Reporter is attached to the original of this transcript requested by Hon. Jim Brown. Pursuant to SCACR 607, requests for copies of transcripts must be made to the court reporter. Unauthorized copying/mailing is prohibited.

Witness my signature August 8, 2018.

s/Wanda H. Rowe

Wanda H. Rowe, CVR-M
Official Court Reporter

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STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP-07-02267

DWAYNE CHISOLM
PLAINTIFF(S)

2018 FEB -6 PM 1:01

STATE OF SOUTH CAROLINA
DEFENDANT(S)

Submitted by:

JERRY ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

APPLICANT'S GROUND OF INEFFECTIVENESS FOR TRIAL COUNSEL'S FAILURE TO OBJECT TO COURT CHARGE ON CONSTRUCTIVE POSSESSION, THE ALLOWABLE INFERENCE, IS DENIED. TRIAL COUNSEL NOT INEFFECTIVE FOR FAILING TO OBJECT TO A CORRECT STATEMENT OF CURRENT LAW NOR IS TRIAL COUNSEL REQUIRED TO BE CLAIRVOYANT AS TO CHARGES (OR PROPOSED CHANGES) IN THE LAW. APPLICANT'S COUNSEL HAS THIRTY (30) DAYS TO SUBMIT A "PROPOSED JURY CHARGE". ATTORNEY GENERAL TO DRAFT ORDER.

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

SCRPC Form 4C (02/2017)

145

File

Law Offices of Jim Brown, P.A.

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Beaufort, SC 29901-0592

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jimbrownlaw@hargray.com

www.attorneyjimbrown.com

February 23, 2018

Via Email Only

lmcintoshlc@sccourts.org

The Honorable R. Lawton McIntosh

Presiding Judge

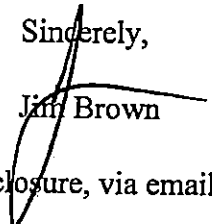
14th Judicial Circuit

Re: Proposed Jury Instruction- Chisolm v State 2016-CP-07-2267

Judge McIntosh:

Under cover of this letter please find enclosed the Applicant's Proposed Jury Instruction regarding Constructive Possession. As indicated below, I am also submitting this instruction for filing with the clerk of court and have copied the Assistant Attorney General. Please let me know if you have any questions or concerns.

Sincerely,


Jim Brown

w/ enclosure, via email

cc: Beaufort County Clerk of Court, via US Mail only, w/ enclosure
Christian Saville, Asst. Attorney General, via Email only, w/ enclosure
Dwayne Chisolm, via US Mail only, w/ enclosure

**Proposed Jury Instruction
CONSTRUCTIVE POSSESSION**

A person may also be considered to have constructively possessed an item.

For an item to be constructively possessed, three factors have to be considered. First, the person must have known of the presence of the item. Second, the person must have intended to control the item. And third, the person must have the ability to exercise dominion and control over the item.

The State must prove the presence of all three of these factors before you may find that the person constructively possessed the item. Further, you must find that the proof as to all three factors exists beyond a reasonable doubt. Finally, all jurors must unanimously agree that all three factors exist before a person can be said to have constructively possessed the item in question.

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP0702267**

Dwayne Chisolm

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order

☐ Statement of Judgment by the Court:

Order of Dismissal

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ R. L. McIntosh
Circuit Court Judge

2155
Judge Code

3/6/2018
Date

For Clerk of Court Office Use Only

This judgment was entered on **March 9, 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **March 12, 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

Dwayne Chisolm #325820 Lee Corr. Inst. F 6 1257 990
Wisacky Hwy Bishopville, SC 29010
James Kristian Falk PO Box 1058 Charleston, SC 29402
James Arthur Brown Jr. PO Box 592 Beaufort, SC 29901

Christian Aaron Saville 1000 Assembly Street Columbia, SC
29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Melissa Kilby

Court Reporter

Jerri Ann Roseneau - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

Case Number 2016-CP-07-2267

DWAYNE CHISOLM #325820)
Applicant,)

v.)

STATE OF SOUTH CAROLINA)
Respondent.)

**APPLICANT'S OBJECTIONS
TO THE PROPOSED
ORDER OF DISMISSAL**

THE APPLICANT SUBMITS THE FOLLOWING OBJECTIONS to this Court following review of a proposed Order of Dismissal. See Pruitt v State, 423 SE2d 127, at 128 (SC 1992). The main objection involves the fact the Order does not discuss the SC Constitutional provision upon which the Applicant's claim was rooted. The second objection involves inclusion of a ruling as to an issue waived by the Applicant in so far as this introduces confusion as to the thrust of the Applicant's case.

OBJECTIONS

At the outset, the Applicant would note that the claims of ineffective assistance of counsel (IAC) are of a constitutional dimension as the claim is rooted in the Sixth Amendment to the US Constitution. If counsel was ineffective, then the Applicant was denied his Sixth Amendment right. As such, the IAC claims are cognizable under the Post Conviction Relief Act. See SC Code Section 17-27-10, et seq.

As to the discussion of the merits of the claim for IAC regarding the failure to object to the jury instruction regarding constructive possession, the Order should indicate that the Applicant asserts the jury instruction was subject to objection as a jury instruction in

contravention of the South Carolina Constitution. Specifically, Article V, Section 21, prohibits a trial judge from giving a charge on the facts. The Applicant's argument made at the hearing asserts that counsel was ineffective for not objecting to the constructive possession charge as a charge on the facts and the Order should reflect the reliance on this SC Constitutional provision.

In contrast, the Order does cite the Applicant's reference to the Stukes opinion. State v Stukes, 787 SE2d 480 (SC 2016). While the Applicant cited this opinion to distinguish a jury instruction standard from a statement of law to consider at the directed verdict stage, the infirmity of the constructive possession charge is that it constitutes a charge on the facts¹. Further, competent counsel need not have been clairvoyant to have recognized that a charge on the facts is prohibited as that constitutional provision has been in existence for more than 100 years.

Finally as to the jury instruction issue, this issue was not cognizable on direct appeal as there was no objection to preserve this issue.

As to the Order's analysis regarding the challenges to the introduction of the statements of the Applicant during his trial, this ground and all other grounds except the IAC claim regarding the constructive possession charge are waived. Undersigned counsel would ask that the discussion found in this portion of the order reflect the waiver instead of a discussion of an issue which was not argued.

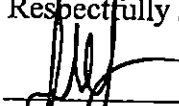
CONCLUSIONS

Thus, undersigned counsel respectfully requests that this Court note the objects and

¹On February 1, 2018, the SC Supreme Court agreed to hear a challenge to constructive possession charge discussed in State v Adams, 352 SE2d 483 (SC 1987). This challenge is based upon the SC Constitution's prohibition on charges on the facts. In Adams, the SC Courts never discussed the constructive possession charge in relation to prohibition on charges on the facts.

modify the Order in a manner consistent with the discussion above.²

Respectfully submitted



James A. Brown, Jr.
Attorney for the Applicant

March 8, 2018
Beaufort, SC

Law Offices of Jim Brown, PA
1600 Burnside Street, Suite 100
PO Box 592
Beaufort, SC 29901
(843) 470-0003

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document
was served upon all counsel of record in this proceeding
this 8th day of March, 2018.

²While counsel for the Applicant goes by the nickname "Jim" Brown, his legal name is James Arthur Brown, Jr. Further, the Applicant was committed pursuant to orders from the Beaufort County Clerk of Court and not Berkeley County of Court.

a weapon during the commission of a violent crime (2010-GS-07-1253), and possession of a firearm with an obliterated serial number (2010-GS-07-1254). Assistant Public Defenders Jessica Saxon, Esquire, Ari Bax, Esquire, represented Applicant at trial. Assistant Solicitors Mary Concannon, Esquire, and Julie Kate Kenney, Esquire, prosecuted the case. On October 23, 2014, Applicant was convicted as indicted after a jury trial before the Honorable Carmen T. Mullen. Judge Mullen sentenced Applicant to imprisonment for twenty-five years for trafficking cocaine, 100-200 grams, first offense, fifteen years for PWID crack cocaine, first offense, five years for possession of a weapon during the commission of a violent crime, and five years for possession of a firearm with an obliterated serial number, to be served concurrently.

Applicant filed a timely notice of appeal. Wanda H. Carter, Esquire, of the South Carolina Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 29, 2016. State v. Chisolm Op. No. 2016-UP-332 (Ct. App. 2016). The remittitur was issued on July 15, 2016.

II. ALLEGATIONS

Applicant filed a PCR application alleging the following:

1. "Failure to Mirandize me prior to questioning."
2. "Misconduct of several officers involved in my case."
3. "Affidavit refused to state grounds to warrant no info on informant."

Applicant's PCR Counsel, Jim Brown, Esquire ("PCR Counsel"), subsequently filed an amended application on behalf of Applicant alleging the following:

1. Ineffective Assistance of Counsel
 - a. "Trial Counsel failed to challenge the introduction of an inculpatory statement made by the State."
 - b. "Trial Counsel failed to argue the deficiencies in evidence seized pursuant to a search warrant that the State introduced."
 - c. "Trial Counsel failed to object to jury instructions that contained improper comments on the facts."
2. Brady Violation

- a. “The State failed to disclose impeachment information concerning misconduct to Trial Counsel.”

At the January 31, 2018, hearing, Applicant expressly withdrew his allegations that Trial Counsel failed to argue the deficiencies in evidence seized pursuant to a search warrant that the State introduced as well as the Brady allegation.

III. SUMMARY OF ARGUMENTS PRESENTED

Applicant’s argument

Applicant informed this Court an officer who was later released from his position after facing allegations of misconduct testified at trial about Applicant’s inculpatory statement. Applicant conceded he has no reason to believe the officer’s misconduct later in his career was related in any way to this case. Furthermore, Respondent and this Court noted Applicant was mistaken about the officer’s testimony, as that officer in question did not testify about the statement at trial, nor did the officer have anything to do with Applicant’s inculpatory statement to police. Rather, it was Corporal Squires, against whom Applicant has made no allegations, who testified to Applicant’s statement at trial. See Transcript pp. 201 – 216.

Applicant further argued Trial Counsel was ineffective for failing to object to the trial judge’s charge on constructive possession, which Applicant alleged to be an improper charge on the facts. Applicant enumerated the following selections, in which the trial judge is charging constructive possession as to each of Applicant’s drug charges, as being at issue:

Constructive possession is when a person has dominion or control or the right to exercise dominion or control over either the object or the premises on which the object is located.

...possession may be inferred from the circumstances, and may be imputed to anyone who has the power and intent to control the disposition and the use of the object. In other words, possession of an object or the premises gives rise to an inference that the person charged has both the power and intent to control the use and disposition of the object.

Proof of possession requires more than proof of mere presence at the place where the controlled substance is found. Ladies and gentlemen, the State must prove the defendant had both the power, that is actual or constructive control, and the intent to control its disposition or use.

Constructive possession means that someone has the dominion and control or the right to exercise dominion or control over either the crack cocaine itself or the property on which the crack cocaine was found.

A defendant must have knowledge, and possession may be inferred when a substance is found on the property under the defendant's control.

...constructive possession means that a person has the dominion and control or the right to exercise dominion or control over either the object itself or the property on which the object is found.

A defendant's knowledge and possession may be inferred when a handgun is found on the property under a defendant's control.

Transcript p. 322, l. 19 – p. 326, l. 5.

Applicant argued the harm from the constructive possession charge was compounded by the amount of times it was given to the jury. Applicant noted the jury went to deliberate after the full jury charge, but requested the trial judge to describe constructive possession again. The trial judge proceeded to send the following the charge on constructive possession back to the jury:

Constructive possession means that the defendant had dominion and control, or the right to exercise dominion or control, over either the drugs themselves or the property on which the drugs were found.

The defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control.

Transcript p. 332, ll. 1-9.

After Trial Counsel objected to the trial judge sending only the constructive possession portions of the charge back to the jury, the trial judge sent the entire jury charge.

At the PCR hearing, Applicant argued that case law such as State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), and State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), is evidence of a trend in South Carolina courts to more frequently invalidate jury charges construed

to impermissibly charge on the facts. Moreover, Applicant argued the charge at issue in Stukes was analogous to the charge given in this case.¹ Applicant asserted that the jury charge was unconstitutional, and Trial Counsel was deficient for failing to object to or challenge the charge. He further asserted Trial Counsel's failure to object prejudiced his case.

Respondent's Argument

Respondent submitted the constructive possession jury charge was an issue for direct appeal rather than PCR. Respondent characterized the allegation as an attempt to raise a direct appeal issue by improperly framing the issue as a claim of ineffective assistance of counsel, as Trial Counsel had no reason to object to the jury instruction at the time of trial. The constructive possession charge was and remains the standard charge routinely given to juries.

Notwithstanding, Respondent submitted the trial judge's constructive possession charge was appropriate under State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987) (holding the proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on the premises under his control). Furthermore, Respondent noted the trial judge explained the jury was free to accept or reject the permissible inference depending on their view of the evidence, as instructed by Adams, 291 S.C. at 135.

Furthermore, Respondent argued the present case is distinguishable from Stukes. In the present case, Respondent argued, the trial judge merely gave the commonly accepted charge that knowledge and possession *may* be inferred by whether the substance was found on the premises under his control before explaining they were free to accept or reject the permissible inference depending on *their* view of the evidence (emphasis added). In Stukes, however, the jury charge

¹ In response to this Court's request, Applicant submitted a hypothetical proposed jury charge he feels explains constructive possession without improperly commenting on the facts.

intruded upon the jury's duty to evaluate the veracity of witness testimony by charging the jury that the victim's testimony need not be corroborated due to statute. Respondent also submitted the charge in Stukes lacked the qualifying language from the present case advising the jury they were free to accept or reject the inference. Finally, Respondent noted Applicant's trial took place approximately two years prior to the Stukes opinion, and to find Trial Counsel should have objected to the jury charge based on Stukes would hold Trial Counsel to a standard of clairvoyance.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that 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 (1985). 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.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard arguments from both parties at the post-conviction relief hearing. 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).

INEFFECTIVE ASSISTANCE OF COUNSEL

Failure to Object to Jury Instruction

Applicant alleges Trial Counsel was ineffective for failing to object to the trial judge's jury charge regarding constructive possession. "It is uniformly held that an application for 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). Respondent argued this allegation should be dismissed as a matter for direct appeal rather than post-conviction relief. This Court agrees.

Furthermore, this Court finds Applicant's framing of this issue as a claim of ineffective assistance of counsel to be meritless, as Trial Counsel is not ineffective for failing to object to a correct statement of law. "The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on the premises under his control." State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987) (citing State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981); State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976)). "The trial judge should explain to the jury that it is free to accept or reject this permissive inference of knowledge and possession depending upon its view of the

evidence.” Adams, 291 S.C. at 135-136, 352 S.E.2d at 486. In this case, the trial judge charged the jury on constructive possession in accordance with Adams, which was good law at the time of Applicant’s trial and remains good law as of the issuance of this Order.

In addition to the applicable case law finding the jury charge to be appropriate, the trial judge’s constructive possession charge also traced the language routinely submitted to juries in South Carolina courts and contained in Judge Ralph King Anderson’s widely used book of jury instructions. Ralph King Anderson, Jr., *South Carolina Requests to Charge-Criminal* (2d ed.2007). Trial Counsel’s failure to object to this correct statement of law was clearly not unreasonable under professional norms. See Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Applicant argues the charge was improper under State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), and a “trend” in South Carolina case law is without merit and not applicable to Applicant’s allegations. An attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial. See Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)). Applicant was convicted on October 23, 2014, almost two years before the Stukes opinion was issued. The Court in Stukes found a jury charge to be improper where it addressed witness veracity by instructing the jury that a victim’s testimony need not be corroborated with additional evidence. Stukes, 416 S.C. at 498. This is not analogous to the charge in the present case which did made no comment on veracity and stressed that the jury was free to accept or deny a permissive inference depending on their view of the evidence. Notwithstanding the inapplicability of Stukes to the present case, Trial Counsel cannot be required to anticipate a change or proposed change in longstanding good law.

For these reasons, this Court finds Applicant has failed to meet his burden of proving Trial Counsel was deficient under Strickland, as Trial Counsel had no reason to object to a correct statement of law and cannot be held to a standard of clairvoyance to anticipate changes or proposed changes in the law. Therefore, this allegation is denied and dismissed with prejudice.

This Court further finds Applicant has failed to show he was prejudiced by Trial Counsel's failure to object. Because the jury charge was proper under the law, any objection by Trial Counsel would have been overruled. Applicant has failed to prove that an objection would have changed the outcome of the case and thus can show no prejudice under the second prong of the Strickland test. Accordingly, because Applicant has failed to prove either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

Failure to challenge the introduction of an inculpatory statement

Applicant set forth no grounds to support the allegation that Trial Counsel was ineffective for failing to challenge the introduction of an inculpatory statement. Applicant first mistakenly informed this Court an officer who was later released from his position after facing allegations of misconduct testified at trial about Applicant's inculpatory statement. While Applicant conceded he has no reason to believe the officer's misconduct later in his career was related in any way to this case, this Court also observed that Applicant was mistaken about the officer's testimony, as that officer in question did not testify about the statement at trial, nor did the officer have any involvement with Applicant's inculpatory statement made to police. This Court notes it was in fact Corporal Squires, against whom Applicant alleges no misconduct, who took Applicant's statement and testified about it at trial. See Transcript pp. 201 – 216. Applicant failed to present any evidence that Trial Counsel was ineffective in this manner, and this allegation is denied and dismissed with prejudice.

VI. CONCLUSION

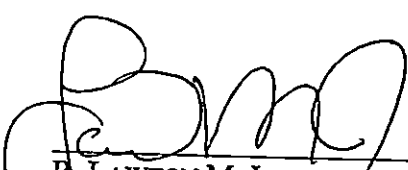
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that 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. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 6 day of MARCH, 2018.


R. LAWTON MCINTOSH
Presiding Judge
Fourteenth Judicial Circuit

Anderson, South Carolina



State of South Carolina
The Circuit Court of the Tenth Judicial Circuit

R. Lawton McIntosh
 Judge

March 7, 2018

Post Office Box 8002
 100 South Main Street
 Anderson, SC 29622-8002
 Phone: (864) 260-4059
 Fax: (864) 224-6320
 mcintosh@sccourts.org

2018 MAR -9 PM 12:28
 JERRI ANN ROSENEAU
 CLERK OF COURT
 BEAUFORT COUNTY, S.C.

Honorable Jerri Ann Roseneau
 Clerk of Court for Beaufort County
 Post Office Box 1128
 Beaufort, South Carolina 29901-1128

Dear Madame Clerk:

Please find enclosed an original Order which has been signed by Judge McIntosh in the following case:

Dwayne Chisolm, #325820 v. State of South Carolina
 CA No. 2016-CP-07-02267

Please file this in your office and provide certified copies to the attorneys of record pursuant to your customary procedure. Thank you for your assistance in this matter.

Sincerely,

Tammy Jennings
 Administrative Assistant to
 R. Lawton McIntosh, Judge
 Tenth (10th) Judicial Circuit

tlj

Enclosure

2018 MAR -9 PM 12:28
 JERRI ANN ROSENEAU
 CLERK OF COURT
 BEAUFORT COUNTY, S.C.

file

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
Case Number 2016-CP-07-2267

DWAYNE CHISOLM #325820)
Applicant,)
v.)
STATE OF SOUTH CAROLINA)
Respondent.)

**APPLICANT'S RULE 59
MOTION TO ALTER OR AMEND**

THE APPLICANT SUBMITS THE FOLLOWING MOTION to this Court requesting that the Court alter or amend the judgment filed on March 9, 2018 and received on March 13, 2018. The primary basis for this motion concerns the orders failure to state the basis for his claim that the jury instruction, provided without objection by trial counsel, violated the SC Constitutional provision upon which the Applicant's claim was rooted and that trial counsel was ineffective for failing to make this objection at trial. The second contention is that the Order of Dismissal discusses an issue which was waived by the Appellant.

As noted in the objections to the proposed Order, the Applicant's sole claim is that he received the ineffective assistance of counsel. It was clearly asserted that trial counsel was ineffective because they failed to object to a jury instruction regarding constructive possession, preventing the presentation of this issue on direct appeal. Trial counsel should have objected to this instruction because the instruction violated the SC Constitutional limitation prohibiting the trial judge from commenting on the facts of a case. See Article V, Section 21.

The Applicant also asserted that had such an objection been made, the outcome of the proceedings would have been different because either the objection would have been upheld or

the appeals court would have reversed the conviction finding the instruction improper.

Also, the Order should reflect that trial counsel need not be clairvoyant to make this objection as the limitation against trial judges providing a charge on the facts has been in existence for more than 100 years. There is no court case which has decided this instruction does not constitute a charge on the facts. The State v. Adams¹ case cited in the Court opinion only involves a holding as to a burden shifting argument.

Further, the Court should alter or amend the Order to include a finding that trial counsel did not object to the jury instruction and that no evidence suggested this failure to object was part of any strategy.

Thus, this Court should alter its order to properly reflect the nature and basis of the argument made by undersigned counsel.

As to the Order's analysis regarding the challenges to the introduction of the statements of the Applicant during his trial, this ground and all other grounds except the IAC claim regarding the constructive possession charge are waived. Undersigned counsel would ask that the discussion found in this portion of the order reflect the waiver instead of a discussion of an issue which was not argued.

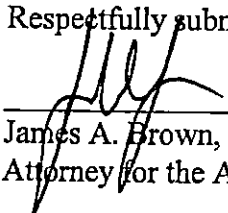
CONCLUSIONS

Therefore, undersigned counsel respectfully requests that this Court alter or amend its order as suggested above, grant the application and reverse the Applicant's convictions and

¹On February 1, 2018, the SC Supreme Court agreed to hear a challenge to constructive possession charge discussed in State v Adams, 352 SE2d 483 (SC 1987). This challenge is based upon the SC Constitution's prohibition on charges on the facts. In Adams, the SC Courts never discussed the constructive possession charge in relation to prohibition on charges on the facts.

sentences.²

Respectfully submitted



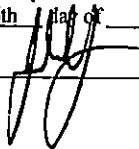
James A. Brown, Jr.
Attorney for the Applicant

March 6, 2018
Beaufort, SC

Law Offices of Jim Brown, PA
1600 Burnside Street, Suite 100
PO Box 592
Beaufort, SC 29901
(843) 470-0003

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document
was served upon all counsel of record in this proceeding
this 16th day of March, 2018.



²While counsel for the Applicant goes by the nickname "Jim" Brown, his legal name is James Arthur Brown, Jr. Further, the Applicant was committed pursuant to orders from the Beaufort County Clerk of Court and not Berkeley County of Court.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2016-CP-07-2267

**ORDER GRANTING RULE 59
MOTION IN PART AND DISMISSING
IN PART**

V.

2018 APR 25 PM 12:27
ELEANOR R. SMITH
CLERK OF COURT
JULY 29
NO DISMISSING
ELEANOR R. SMITH
CLERK OF COURT
JULY 29
NO DISMISSING

Respondent.

I. PROCEDURAL POSTURE

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on October 24, 2016, and later amended January 3, 2017. Respondent submitted its return on April 17, 2017. An evidentiary hearing into the matter was convened on January 31, 2018, at the Beaufort County Courthouse before the Honorable R. Lawton McIntosh. Applicant was present at the hearing and was represented by James K. Arthur Brown, Jr., Esquire. Respondent was represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office. This Court dismissed Applicant's application with prejudice by an order of dismissal signed March 6, 2018, and filed March 9, 2018.

Applicant filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, in which Applicant argues this Court's order of dismissal did not preserve the following **arguments** made at the evidentiary hearing:

That the jury instruction on constructive possession violated the South Carolina Constitutional provision prohibiting a trial judge from commenting on the facts of a case, and therefore Trial Counsel should have objected. See Article V, Section 21. Applicant also argued that but

for this failure to object, the result of the proceeding would have been different.

That Trial Counsel need not be clairvoyant to object to this charge because the limitation against trial judges providing a charge on the facts has been in existence for more than 100 years.

That State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987) is distinguishable because, when the court set forth the appropriate instruction for constructive possession, the court was analyzing the issue in the context of burden-shifting.

That this lack of objection was not part of trial strategy.

Applicant also argued in his motion that the order should not have addressed his other allegations, which he expressly waived.

Lastly, Applicant asks this Court to grant the application and reverse Applicant's convictions and sentences.

II. CONCLUSION

As to Applicant's request that this Court grant the application and reverse Applicant's convictions and sentences, this motion is denied. Applicant has failed to prove Trial Counsel's fell below an objective standard of reasonableness for failing to object to the routinely-given instruction on constructive possession, which the South Carolina Supreme Court has specifically declared as appropriate in State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987) and has not been found to be a charge on the facts. Furthermore, Applicant has failed to meet his burden of establishing prejudice from this alleged deficiency. For these reasons, and the reasons set forth in this Court's order of dismissal, Applicant's motion for this Court to grant Applicant's application and reverse the convictions and sentences is **denied**.

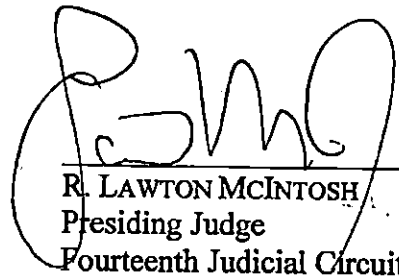
As to Applicant's request that the original order be amended to include the fact he raised the arguments enumerated in Section I of this order, that motion is **granted**. The original order of

dismissal shall be amended to include Applicant's arguments enumerated above, but to deny and dismiss Applicant's application with prejudice.

IT IS THEREFORE ORDERED:

1. For the reasons stated above, Applicant's Rule 59 Motion to Alter or Amend is **denied** to the extent Applicant requests this Court grant his application and reverse his convictions and sentences.
2. For the reasons stated above, Applicant's Rule 59 Motion to Alter or Amend is **granted** to the extent that the order of dismissal should be amended to include the above-listed arguments raised by Applicant, but not to grant the application.
3. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 18 day of April, 2018.


R. LAWTON MCINTOSH
Presiding Judge
Fourteenth Judicial Circuit

Anderson, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh

Case Number 2016-CP-07-2267

Dwayne Chisolm,.....Petitioner.

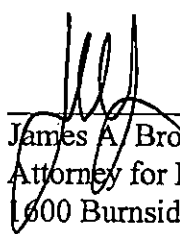
v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Dwayne Chisolm appeals the judgment of the Circuit Court, the Honorable Judge R. Lawton McIntosh, presiding, denying Applicant's request for post conviction relief. The Order of Dismissal was filed on March 9, 2018 and received by counsel for the Applicant on March 13, 2018. The Honorable Judge R. Lawton McIntosh also filed the Order Granting Rule 59 Motion in Part and Dismissing in Part filed April 25, 2018 and received by counsel for Applicant on June 21, 2018.

June 26, 2018


James A. Brown, Jr.
Attorney for Petitioner
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Beaufort, South Carolina 29901
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Opposing Attorney of Record:
Christian, Assistant Attorney General
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Rembert C. Dennis Building
1000 Assembly St.
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh

Case Number: 2016-CP-07-02267

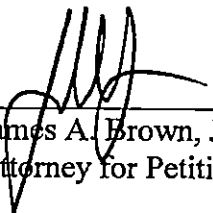
Dwayne Chisolm.....Petitioner.

v.

State of South Carolina.....Respondent

PROOF OF SERVICE

Counsel for Dwayne Chisolm hereby certifies that he has prepared and served a Notice of Appeal on this 26th day of June, 2018, upon the State, as specified in S.C. Code Section 203 (b) (1) , by depositing a copy, postage pre-paid, in the United States Mail, addressed to Attorney for Respondent, Christian Saville, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211-11549, (803) 734-3970.



James A. Brown, Jr.
Attorney for Petitioner

June 26, 2018

Law Offices of Jim Brown, PA
1600 Burnside St., Suite 100
P.O. Box 592
Beaufort, South Carolina 29901
(843) 470-0003

THE STATE OF SOUTH CAROLINA
In the State Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh

Appellate Case Number: 2018-001202

Lower Case Number: 2016-CP-07-2267

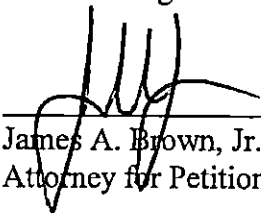
Dwayne Chisolm,..... Petitioner

v.

State of South Carolina,.....Respondent

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Appendix complies with SCACR Rule 243(f).


James A. Brown, Jr.
Attorney for Petitioner

October 9, 2018

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