

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marion County

Honorable Paul M. Burch, Circuit Court Judge

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S.C. SUPREME COURT

TYRONE DAVIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000854

APPENDIX

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STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIONS
COUNTY OF MARION	)	2008-GS-33-291
	)	
	)	
	)	
State of South Caroloina	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Tyron Deshawn Davis	)	
<u>DEFENDANT</u>	)	November 12-13, 2009
		Marion, South Carolina

B E F O R E:

THE HONORABLE WILLIAM H. SEALS, JR., JUDGE; and a jury.

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

JOHN JEPERTINGER DEPUTY SOLICITOR
STEVEN DEBERRY, ASSISTANT SOLICITOR
Attorney for the State

JACK LAWSON, CHIEF PUBLIC DEFENDER
Attorney for the Defendant

KESHIA REED
Official Court Reporter

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1 MR. JEPERTINGER: Your Honor, while the
2 defendants are going out, the State is going to call State
3 against Tyron Deshawn Davis on 08-291. It is a charge of
4 distribution of cocaine base and distribution of cocaine
5 base within proximity of a school or park. There was a
6 scrivener's error on Count 2, instead of 4453 445(b)(2),
7 it was listed as B1. With consent of the defense, we are
8 amending it to B2.

9 THE COURT: Mr. Lawson.

10 MR. LAWSON: No objection, Your Honor.

11 THE COURT: The amendment is made and ordered.

12 MR. JEPERTINGER: May we approach one second.

13 (WHEREUPON, a bench conference was held in the
14 presence of the jury panel, but out of the hearing of
15 the jury panel.)

16 THE COURT: Is the Solicitor ready to draw a
17 jury?

18 MR. JEPERTINGER: The State's ready, yes, sir.

19 THE COURT: The defendant?

20 MR. LAWSON: Is ready, Your Honor.

21 THE COURT: Members of the jury panel, we're at
22 that point this week where we need to call another jury
23 for another case. And to do that, I need to ask you
24 certain questions. I need for you to please remember you
25 are under oath. And I need for you to respond if any of

1 these questions apply and I need for your responses to be
2 truthful and accurate. The questions are as follows: The
3 State has made the allegation that a Mr. Tyron Deshawn
4 Davis has been charge with distribution of cocaine base,
5 as well as distribution of cocaine base within the
6 proximity of a school or park. In that regard, if any of
7 you have seen, heard, read or have any knowledge from any
8 source about this case including but not limited to the
9 newspaper, the news, internet or television, if so please
10 stand? Let the record reflect that one no one stood.

11 The defendant in this case is Tyron -- what's
12 his middle name?

13 THE CLERK: Deshawn.

14 THE COURT: Deshawn Davis. Are any of you
15 related by blood or marriage or have a close personal or
16 social relationship with this individual, if so please
17 stand? Let the record reflect that no one stood.

18 Solicitor, if you stand up and introduce
19 yourself and your staff.

20 MR. JEPERTINGER: Yes. My name is John
21 Jepertinger, I'm deputy solicitor here in the Twelfth
22 Circuit, that's Florence and Marion. I met some of you
23 earlier this week when we were involved with the other
24 trial. Sitting with me in this case is Steven Deberry.
25 And other members of my staff, you met Ryan Waller Monday.

1 The young man that is going to try the case earlier today
2 was Fitzlee McEachin. The Solicitor is Ed Clements. And
3 I think that's all we have practicing over here. Thank
4 you so much.

5 THE COURT: Thank you very much.

6 Are any of you related by blood or marriage or
7 have a close, personal or social relationship with any of
8 these attorneys or have ever been represented by any of
9 these attorneys at any point in time the past, if so
10 please stand? Let the record reflect that no one stood.

11 Mr. Lawson, if you stand up and introduce
12 yourself and your staff.

13 MR. LAWSON: May it please the Court, I'm Jack
14 Lawson and I'm the circuit public defender here in the
15 Twelfth Circuit, that includes Florence and Marion County.
16 Also my staff is Hank Anderson, who tried a case earlier
17 this week. Craig Brown is also with the office and, of
18 course, Molly Sloan, who runs our office here in Marion.

19 THE COURT: Thank you.

20 Are any of you related by blood or marriage or
21 have a close, personal or social relationship with Mr.
22 Lawson or any member of his staff or have ever been
23 represented by him at any point in the past, if so please
24 stand? Let the record reflect that no one stood.

25 Solicitor, do you have a witness list?

1 MR. JEPERTINGER: I do, Your Honor.

2 THE COURT: Mr. Lawson, do you have a witness
3 list?

4 MR. LAWSON: No, Your Honor.

5 THE COURT: The witnesses in this case are
6 Aurelius Cribb, Rosa Carmichael, Beth Hoover, Captain Jim
7 Gray, Lieutenant Bryan Wallace, Selena Kinard, and Sherry
8 Rhodes. In that regard, are any of you related by blood
9 or marriage or have a close personal or social
10 relationship with any of the witnesses in this case, if so
11 please stand? Let the record reflect that no one stood.

12 Are any of you aware of any conscious or bias or
13 prejudice for or against the State in this case, if so
14 please stand? Let the record reflect that no one stood.

15 Has any member of the jury panel formed an
16 opinion as to the guilt or innocence of the defendant,
17 Mr. Tyron Deshawn Davis, in this case, if so please stand?
18 Let the record reflect that no one stood.

19 Is there any member of a jury panel who is a
20 member of or a contributor to any group which has as its
21 primary concern the promotion of law enforcement or
22 victims' rights, these groups would not include but
23 certainly not be limited to MADD, SADD or CAVE, if this
24 applies to you please stand? Let the record reflect that
25 no one stood.

1 Is there any member of the jury panel who knows
2 of any reason whatsoever why they could not give the
3 parties in this case a fair and impartial trial, if so
4 please stand? Let the record reflect that no one stood.

5 Does any member of the jury panel have any
6 religious or philosophical objections to rendering
7 judgment against their fellow man, if so please stand?
8 Let the record reflect that no one stood.

9 Has any member of the jury panel or any member
10 of their family ever been prosecuted by the Solicitor or
11 any member of his staff, if this applies to you please
12 stand? Let the record reflect that no one stood?

13 Anything further from the State?

14 MR. JEPERTINGER: No, sir.

15 THE COURT: Anything further from the defense?

16 MR. LAWSON: Your Honor, might inquire if any
17 member of the jury or member of their family has ever been
18 treated for drug addiction.

19 THE COURT: Has any member of the jury panel or
20 your immediate family ever been treated for alcoholism or
21 drug addiction, if so please stand?

22 And your name and number again?

23 PROSPECTIVE JUROR: Catherine Blackmon 82.

24 THE COURT: All right. And tell me your
25 circumstances, if you don't mind?

1 PROSPECTIVE JUROR: Four years ago, I went to
2 drug rehab, not in treatment now.

3 THE COURT: Thank you very much.

4 Anybody else?

5 All right. I find the jury panel qualified for
6 this case.

7 Ms. Clerk, give us a jury.

8 THE CLERK: If I call your name, if you'll come
9 forward, please, and just stand in front of this desk and
10 face outward.

11 THE COURT: And we'll go with one alternate.

12 THE CLERK: Number 108 Patrick C. Romeo.

13 (The juror, a white male, comes forward.)

14 THE CLERK: What say the State?

15 MR. JEPERTINGER: Please present the juror.

16 THE CLERK: Say the defense?

17 MR. LAWSON: Please swear Mr. Romeo.

18 THE CLERK: Sir, if you'll have a seat in the
19 jury box. Thank you.

20 Number 137 Sieara T. White.

21 (The juror, a black female, comes forward.)

22 THE CLERK: What say the State?

23 MR. JEPERTINGER: We excuse this juror for
24 purposes of this trial only.

25 THE CLERK: You excuse from this trial, Ms.

1 White. Thank you.

2 Number 64 Gregory L. Hewett.

3 (The juror, a white male, comes forward.)

4 THE CLERK: What say the State?

5 MR. JEPERTINGER: Please present the juror.

6 THE CLERK: What say the defense?

7 MR. LAWSON: Please swear Mr. Hewett.

8 THE CLERK: If you'll have a seat in the jury
9 box.

10 Number 29 Shirley A. Davis.

11 (The juror, a black female, comes forward.)

12 THE CLERK: What say the State?

13 MR. JEPERTINGER: Please present the juror.

14 THE CLERK: Say the defense?

15 MR. LAWSON: Please swear Ms. Davis.

16 THE CLERK: Ms. Davis, if you'll have a seat in
17 the jury box.

18 Number 91 Kimberly W. Murphy.

19 (The juror, a black female, comes forward.)

20 THE CLERK: What say the State?

21 MR. JEPERTINGER: We excuse this juror for
22 purposes of this trial only.

23 THE CLERK: You excuse from this trial. Thank
24 you, ma'am.

25 Number 87 Bobbie J. McCormick.

1 (The juror, a black female, comes forward.)

2 THE CLERK: What say the State?

3 MR. JEPERTINGER: Please present the juror.

4 THE CLERK: What say the defense?

5 MR. LAWSON: Please swear Ms. McCormick.

6 THE CLERK: Ms. McCormick, if you'll have a seat
7 in the jury box please, ma'am.

8 Number 138 Archie N. Wilks, Jr.

9 (The juror, a white male, comes forward.)

10 THE CLERK: What say the State?

11 MR. JEPERTINGER: Please present the juror.

12 THE CLERK: What say the defense?

13 MR. LAWSON: Please swear Mr. Wilks.

14 THE CLERK: Mr. Wilks, if you'll have a seat in
15 the jury box please, sir. Thank you.

16 Number 40 Lonnie R. Foxworth.

17 (The juror, a white male, comes forward.)

18 THE CLERK: What say the State?

19 MR. JEPERTINGER: Please present the juror.

20 THE CLERK: Say the defense?

21 MR. LAWSON: Please swear Mr. Foxworth.

22 THE CLERK: Number 70 Oattie L. Hooks.

23 (The juror, a white female, comes forward.)

24 THE CLERK: What say the State?

25 MR. JEPERTINGER: Please present the juror.

1 THE CLERK: Say the defense?

2 MR. LAWSON: We will excuse Ms. Hooks.

3 THE CLERK: Thank you, ma'am.

4 Number 2 Jessie M. Allen.

5 (The juror, a black female, comes forward.)

6 THE CLERK: What say the State?

7 MR. JEPERTINGER: Please present the juror.

8 THE CLERK: Say the defense?

9 MR. LAWSON: Please swear Ms. Allen.

10 THE CLERK: Have a seat in the jury box, Ms.

11 Allen.

12 Number 51 Charlotte D. Green.

13 (The juror, a black female, comes forward.)

14 THE CLERK: What say the State?

15 MR. JEPERTINGER: If you'll excuse this juror

16 for purposes of this trial only.

17 THE CLERK: You excused from this trial Ms.

18 Green. Thank you.

19 Number 5 Matt G. Bessetti.

20 (The juror, a white male, comes forward.)

21 THE CLERK: What say the State?

22 MR. JEPERTINGER: Please present the juror.

23 THE CLERK: Say the defense?

24 MR. LAWSON: Please swear Mr. Bessetti.

25 THE CLERK: Number 37 Regina Y. Floyd.

1 (The juror, a black female, comes forward.)

2 THE CLERK: What say the State?

3 MR. JEPERTINGER: Please present the juror.

4 THE CLERK: Say the defense?

5 MR. LAWSON: Please swear Ms. Floyd.

6 THE CLERK: Number 69 Clifton J. Holton.

7 (The juror, a black male, comes forward.)

8 THE CLERK: What say the State?

9 MR. JEPERTINGER: Please present the juror.

10 THE CLERK: What say the defense?

11 MR. LAWSON: Please excuse Mr. Holton for this
12 case.

13 THE CLERK: Thank you, sir.

14 Number 48 Ronda Grant. What say the State?

15 MR. JEPERTINGER: Your Honor, I would like to
16 challenge this juror for cause. At the trial on Monday or
17 Tuesday, Your Honor. At the end of the verdict, she had
18 some consternation about having to serve on jury duty the
19 rest of the week. She, I think, her response to the Court
20 was that when told she had to be back Thursday, that she
21 did not -- she express some disinterest in doing that.

22 THE COURT: All right. Mr. Lawson.

23 MR. LAWSON: I don't think that would be
24 reason -- she's here. Obviously, she decided that she had
25 a duty to be here and I think she should be given the

1 opportunity to serve.

2 THE COURT: Juror name again is?

3 THE CLERK: Ronda Grant number 48.

4 THE COURT: Ms. Grant, if you got chosen for
5 this trial, the jury right here, could you be fair and
6 impartial or would you be fair and impartial to both sides
7 of this case?

8 PROSPECTIVE JUROR: That's a hard question for
9 me. That's a hard question for me to answer. I just had
10 a bad experience in jury duty and that's why I'm just
11 petrified. I don't like doing it, but I know I have to.

12 THE COURT: Well, let me ask you, could you be
13 fair and impartial if you were chosen as a juror?

14 PROSPECTIVE JUROR: No.

15 THE COURT: All right. I will dismiss this
16 juror.

17 PROSPECTIVE JUROR: Thank you.

18 THE CLERK: Number 95 Nance P. Perritt.

19 (WHEREUPON, juror number 95 did not come to
20 court.)

21 THE CLERK: Number 50 Shuler Graves.

22 (The juror, a black male, comes forward.)

23 What say the State?

24 MR. JEPERTINGER: We excuse this juror for
25 purposes of this trial only.

1 THE CLERK: You excused from this trial, Mr.
2 Graves. Thank you, sir.

3 Number 88 Loretta G. McGill.

4 (The juror, a black female, comes forward.)

5 MR. JEPERTINGER: Your Honor, I'm not sure if
6 Ms. McGill is a relative of someone that works in my
7 office. That will be first name Susan McGill.

8 PROSPECTIVE JUROR: Susan is my niece.

9 MR. JEPERTINGER: Out of fairness.

10 THE COURT: Mr. Lawson, any objection?

11 MR. LAWSON: Yes, Your Honor.

12 THE COURT: I will excuse you for cause. You
13 may be seated.

14 THE CLERK: Number 106 Connie F. Rogers Bryant.

15 (The juror, a black female, comes forward.)

16 THE CLERK: What say the State?

17 MR. JEPERTINGER: Please present the juror.

18 THE CLERK: What say the defense?

19 MR. LAWSON: Please swear Mrs. Bryant.

20 THE CLERK: Mrs. Bryant, please have a seat in
21 the jury box.

22 116 Donna R. Stackhouse.

23 (The juror, a white female, comes forward.)

24 THE CLERK: What say the State?

25 MR. JEPERTINGER: Please present the juror.

1 THE CLERK: Say the defense?

2 MR. LAWSON: Please excuse Ms. Stackhouse from
3 this trial.

4 THE CLERK: Number 140 Cynthia P. Williams.

5 (The juror, a black female, comes forward.)

6 THE CLERK: What say the State?

7 MR. JEPERTINGER: Please present the juror.

8 THE CLERK: Say the defense?

9 MR. LAWSON: Please swear Ms. Williams.

10 THE CLERK: Ms. Williams, if you'll have a seat
11 in the jury box please, ma'am.

12 Number 10 Randy A. Brown Lee.

13 (The juror, a white female, comes forward.)

14 THE CLERK: What say the State?

15 MR. JEPERTINGER: Please present the juror.

16 THE CLERK: Say the defense?

17 MR. LAWSON: Please swear Ms. Lee.

18 THE CLERK: We need one alternate.

19 Number 53 Katorah A. Griffin.

20 (The juror, a black female, comes forward.)

21 THE CLERK: What say the State?

22 MR. JEPERTINGER: Please present the juror.

23 THE CLERK: Say the defense?

24 MR. LAWSON: Please swear Ms. Griffin.

25 THE CLERK: Ms. Griffin, if you'll have a seat

1 in the alternates chair.

2 THE COURT: All right. Is there any objections
3 to the jury or the process by which the jury was drawn?

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

6 THE COURT: Says defense?

7 MR. LAWSON: Nothing from the defense.

8 THE COURT: We will start this trial at three
9 o'clock this afternoon.

10 MR. JEPERTINGER: Three o'clock, yes, sir.

11 THE COURT: All right, members of the jury, we
12 are gone start this trial at three o'clock this afternoon.
13 I will need you back here at 2:45 and I'll need for you to
14 be in the jury room.. You know very little about this case
15 other than what I told you right now. So since you know
16 so little, you don't have the law and you don't have the
17 facts. You haven't heard from the witnesses. Do not
18 discuss the case at all with anyone, but you can have a
19 long lunch break. You are excused at this time. Be back
20 at 2:45.

21 (WHEREUPON, the jury was excused for a lunch
22 break.)

23 THE COURT: The remainder of you are excused for
24 the rest of the day. If you would call back in at six
25 o'clock or after six to find out further instruction for

1 the rest of week. Thank you.

2 (WHEREUPON, the remaining jury panel is excused
3 for the day.)

4 THE COURT: All right, Solicitor, what you want
5 to do?

6 MR. JEPERTINGER: Your Honor, you know there was
7 a bench warrant on this individual. And we would just
8 need to make sure cause they telling us they don't have
9 any paperwork. I know Fitzlee moved for a bench warrant
10 on this guy two or three days ago.

11 THE CLERK: I just did the bench warrants
12 yesterday.

13 MR. JEPERTINGER: Okay. But they don't have any
14 paperwork yet, so we're ---

15 PROBATION AGENT: Your Honor, I had an old
16 general sessions bench warrant on him that was from last
17 year that's in my system as still active, but I don't have
18 a recent one that was just done.

19 MR. ANDERSON: Does she need a recent one?

20 MR. JEPERTINGER: They can bring him up on the
21 old one.

22 THE COURT: Anything further?

23 MR. JEPERTINGER: Not on this case, Your Honor.

24 (WHEREUPON, a lunch break was taken.)

25 THE COURT: Solicitor, you can call your first

1 case.

2 MR. JEPERTINGER: Well, Your Honor, we've
3 already called State against Tyron Deshawn Davis. On
4 08-291, Your Honor. We are going to as I told the Court
5 in chambers, obviously, Mr. Davis is not here. I don't
6 know if you want to do this in front of a jury or outside
7 the presence of the jury, Your Honor, but if for some
8 reason he is not here, but in order to proceed with this
9 case, we need to take up some testimony that he was
10 notified to be here at least.

11 THE COURT: Mr. Lawson, you want to do it
12 outside the jury's presence?

13 MR. LAWSON: Please, Your Honor.

14 THE COURT: All right. Mr. Lawson, have you
15 given the defendant any notice that we could put into the
16 record?

17 MR. LAWSON: Your Honor, on October the 16th, we
18 sent the defendant, Tyron Davis, a letter address to [REDACTED]
19 Wildwood Loop Marion, South Carolina 29571, which we were
20 advised was his address. Your Honor, that letter has not
21 come back. In that letter, we advised the defendant to
22 please call our office immediately upon receipt. And we
23 stated that the State has informed us that they are going
24 to call your case for a jury trial during the upcoming
25 term of General Sessions Court in Marion County beginning

1 Monday, November the 9th, 2009, at nine o'clock.

2 Therefore, it's extremely important that you contact our
3 office, so that we may prepare for trial.

4 So, Your Honor, that letter went individually.

5 I thought -- Your Honor, also in the September term,
6 during the September term on September 9th 2009, I
7 personally talked with Mr. Davis, had talk with
8 Mr. Jepertinger and Bryan Wallace, had advised him of what
9 was going on in relation to negotiations with his case.
10 He advise me that at that point he did not wish to take
11 the offer. And I told him at that point that he would be
12 up for trial during the November term. So we notified him
13 by the letter and also personally advised him last term of
14 court that he would be up this term of court for trial.

15 THE COURT: Do you mind if we get a copy of that
16 letter and make it a part of the record?

17 MR. LAWSON: No, sir.

18 THE COURT: And who's got the bond form?

19 MR. JEPERTINGER: We do. I don't think. It's
20 listed as State's Exhibit 1 for identification at this
21 point. Would you have any problem just moving it into
22 evidence, Mr. Lawson?

23 MR. LAWSON: No objection.

24 THE COURT: Let's make specific notice.

25 MR. JEPERTINGER: State's Exhibit 1 will be

1 moved into evidence, Your Honor.

2 (WHEREUPON, State's Exhibit No. 1 was admitted
3 into evidence.)

4 MR. JEPERTINGER: And I would call if possible
5 Mrs. Rhodes to the stand just to tell the Court what she
6 notified the defendant.

7 THE COURT: I'm looking at State's Exhibit
8 Number 1; is that right?

9 MR. JEPERTINGER: Yes, sir.

10 THE COURT: It is a specific acknowledgement in
11 there by the defendant whereby he says I understand and
12 have been informed that I have a right and obligation to
13 be present at trial and should I fail to attend trial, the
14 trial will proceed in my absence. He did sign it and it's
15 dated April the 7th 2009. It's signed by Tyron Davis.

16 MR. JEPERTINGER: I don't think we need to call
17 Mrs. Rhodes with you reading it into the record, Your
18 Honor. But that was the substance of her testimony.

19 THE COURT: Can we have the bailiff go outside
20 of the courthouse steps and call his name three times and
21 come back in.

22 BAILIFF: What's his name?

23 MR. LAWSON: Tyron Deshawn Davis. Your Honor,
24 if I could, this letter if we could mark it as a Court's
25 Exhibit for purposes of this.

1 (WHEREUPON, Court's Exhibit No. 1 was admitted
2 into the record.)

3 MR. JEPERTINGER: Of course, that will not go to
4 the jury at the end of trial.

5 THE COURT: Come around and take the oath.

6 THE CLERK: Do you solemnly swear to tell the
7 truth, the whole truth, and nothing but the truth so help
8 you God?

9 THE WITNESS: Yes, ma'am.

10 WHEREUPON,

11 James Bennett,

12 after first having been duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. JEPERTINGER:

15 Q Okay. Yes, sir, please state your name?

16 A James Bennett.

17 Q Sir, did you have an opportunity to go outside the
18 courtroom and call the name of Tyron Davis at least three
19 times?

20 A I did.

21 Q And today's date is November the 12th 2009; is that
22 correct?

23 A Yes, sir.

24 Q And was there any response when you called that name
25 out?

1 A None.

2 Q Thank you so much.

3 THE COURT: Thank you.

4 Any questions?

5 MR. LAWSON: No questions, Your Honor.

6 THE COURT: Thank you. You may step down.

7 (WHEREUPON, the witness leaves the witness
8 stand.)

9 THE COURT: Based on the form, the Court hereby
10 finds that the defendant in this case has been notified
11 right to present at the trial and was warranted it be
12 tried in his absence should he fail to appear. Therefore,
13 the Court hereby finds that the defendant is absent from
14 court even though he has had notice. Therefore, the trial
15 will proceed in his absence.

16 MR. LAWSON: May it please the Court, one point,
17 I know when the State put the bond form in, it was State's
18 Exhibit 1. Is that bond form you intend on submitting
19 that to the jury? I see no need for the bond form to go
20 to the jury other than if there's an issue raised as to
21 whether the defendant has a duty.

22 MR. JEPERTINGER: That's a good point. If we
23 could just use it for -- we can move it to Court's Exhibit
24 Number 2. The reason being because I know in your charge
25 you will charge the jury that the defendant doesn't have a

1 -- doesn't need to be here in court during the course of
2 his trial.

3 THE COURT: We will make that Court's Exhibit
4 Number 2.

5 (WHEREUPON, Court's Exhibit No. 2 was admitted
6 into the record.)

7 MR. LAWSON: Thank you, Your Honor.

8 THE COURT: Is everybody ready to proceed?

9 MR. JEPERTINGER: Yes, sir.

10 THE COURT: Bring out the jury.

11 (WHEREUPON, the jury came into open court.)

12 THE COURT: I'm going to appoint Mr. Hewett the
13 foreperson again since he has experience.

14 And, Mrs. Clerk, you go ahead and swear them in.

15 (WHEREUPON, the jury panel was sworn.)

16 THE COURT: Good afternoon, jurors. About half
17 of you, I told the same thing to yesterday and then I have
18 a few of you that are new, so I'm going to let you know
19 also. We're getting ready to start the trial of The State
20 of South Carolina vs. Tyron Deshawn Davis. Several things
21 I'm going to tell you before we actually begin. One is
22 that the State has a burden of proof. They have to prove
23 the defendant guilty of these charges beyond a reasonable
24 doubt. And I want to explain that to you more in the end.
25 The second thing I want to tell you is that you are the

1 judges of the facts. You will listen to the individuals
2 that take this witness stand and testify. And you will
3 determine who is telling the truth, who is not telling the
4 truth. You can believe part of what a witness says. All
5 of what a witness says. You can believe one witness
6 against many or many against one. But that is your job to
7 determine what the facts are in this case.

8 Now, at the very end, you will take what you
9 have determine the facts to be and you'll go back there in
10 the jury room along with the instruction of the law that
11 I'm going to give you at the very end. You'll have to
12 accept the law as I give it to you. You have any
13 preconceived ideas as to what you think the law is, you
14 need to ignore it and you have to accept it as I give it
15 to you. When the end comes and I tell you to begin your
16 deliberations, you will couple your findings of fact along
17 with the law as I give it to you and you will make a
18 decision therefrom.

19 Next thing I want to tell you is that from time
20 to time throughout this trial, I need to send you back
21 into the jury room. When I send you back into the jury
22 room, it's because we're out here taking up issues of law.
23 And I'll need to determine those issues before we can
24 actually get them before you. So I want you to understand
25 that when you're back in the jury room and you're talking

1 about the weather or whatever, I want you to know we'll be
2 working out here. I'm not going to be waisting your time
3 at all.

4 Next thing I want to tell you is that what the
5 lawyers tell you is not evidence. They are spokespersons
6 and advocates for their clients. The evidence you need to
7 be concerned with comes from that chair, that witness
8 stand, and the documents that go back with you into your
9 jury room.

10 The next thing I want to tell you is that only
11 when I tell you to begin your deliberations, and most of
12 you know this from yesterday, which would be at the very
13 end, only then will you begin your discussions of the
14 trial. As we proceed all day long and it may go into
15 tomorrow morning, and we take breaks or you go home
16 tonight and you go back into the jury room while I take up
17 points of law with the lawyers, do not discuss the case.
18 You can talk about politics, weather, sports whatever you
19 want to talk about, but not this case. And the reason I'm
20 telling you that is because you haven't heard it all.
21 It's not until the very end that you've heard everything
22 along with what I have to tell you before you have all of
23 the ingredients you need to make a decision.

24 Now, today, I want to let you know we're going
25 to proceed in this order: The State will give their

1 opening statement first, followed by the defense. The
2 State will put up their witnesses and evidence first,
3 followed by the defense should they choose. We go in that
4 order because the State has the burden of proof.

5 So right now I just want you to sit back. I
6 want you to relax and soak it all up and listen, that's
7 your job right now.

8 And I recognize the State for their opening
9 argument.

10 MR. JEPERTINGER: Please the court, counsel,
11 once again, ladies and gentlemen of the jury, my name is
12 John Jepertinger, I'm a deputy solicitor here. I kind of
13 feel like Yogi Bear. The old New York Yankees is deja vu
14 all over again. I recognize most of your faces from the
15 last trial even though I was not the principle attorney.
16 You know, Edmond Burke is attributed with saying that all
17 that is necessary for evil to triumph is for good men to
18 do nothing. In this case, we have a good person in the
19 form of the confidential informant. Her name is Rosa
20 Carmichael. Rosa will tell you she basically got tired of
21 drugs in her neighborhood and what they were doing to her
22 community, so she began working for -- for the police
23 excuse me, as a confidential informant. She started
24 probably back in 1997. She was getting paid for doing
25 actually this type of dangerous work of going out and

1 making drug purchases.

2 In this case as in most these of cases that
3 happen here in Marion, she was hooked up with an
4 audiovisual system. Now, one thing I want you to know
5 right off the bat. This isn't Steven Spielberg type of
6 production. You are not going to have a video where it's
7 wide screen or big. It's going to be concealed. This
8 hidden camera is going to be hidden somewhere on her
9 person. There's going to be moving and jumbling around.
10 But what this movie camera does, audiovisual equipment
11 does it corroborates what she's going to tell you. For in
12 this crime, the defendant, Tyron Davis, is accused of two
13 things. One, he's accused of distribution of cocaine
14 base. Distribution simply means as you heard before, if
15 you haven't heard it is sell, give, pass cocaine base
16 obviously or also known as crack giving that to someone.
17 It is against the law. There is a separate criminal
18 offense with which this individual is charged, it is
19 distribution of cocaine base, the same thing that we just
20 talked about.

21 However, it was done within one half mile radius
22 of a school or a park. In this case, the school we are
23 talking about is the Marion County Alternative School.
24 This drug transaction happened within one half mile of
25 that alternative school. Quite simply what you are going

1 to see probably on the video is this individual, Ms.
2 Carmichael, after having met with law enforcement, after
3 having been searched, walked to the incident location
4 after she been dropped off at a certain point by law
5 enforcement and walked up to this location. You will see
6 a vehicle pull up to her with Tyron Davis being the
7 passenger in the vehicle. There was a female driving this
8 gold-color Chevrolet. A transaction is consummated.

9 Now, I will tell you this, if you get your hopes
10 up with that, Man, we're going to see it now, you want.
11 What you will hear is a cigarette pack being pass from her
12 to him. And apparently, she's going to testify that he
13 put the crack cocaine .38 grams of crack cocaine in this
14 Newport cigarette pack and then they drove off. She's
15 also going to tell you she knew this young man. She's
16 known him since he was a little boy. You're going to hear
17 that she knows who this individual is. You're going to
18 hear her on the video say and you're going to hear clearly
19 that she mark down the license tag of the car that these
20 individuals were in. And, of course, you're going to find
21 this woman -- I found her to be quite likeable on the
22 video and you'll like her in person. She's a likable
23 individual. You will see members of the community come
24 out and greet her. They know her.

25 And at the end, you are going to have to come to

1 a judgment whether the State and whether that witness is
2 credible that Tyron Davis distributed those drugs to her
3 on March 14th of 2008, and whether that happened within
4 one half mile of the alternative school. We're not here
5 to reward anyone. We're not here to punish anyone. What
6 are we here for? We are here to seek the truth, bottom
7 line. When my children ask me, dad, what do you do for a
8 living? I often tell them, Son, I'm in the business of
9 trying to seek the truth, not trying to reward people, not
10 trying to punish people, but trying to call things as they
11 are impartially without emotion. And looking at things
12 and making a judgment call and saying, this happened on
13 this date. Folks, if you can get ahold of the truth in
14 this trial, you will have done both myself and the defense
15 and the court has a hold the greatest service you can do
16 for your county. I appreciate you listening to me and I'm
17 going to turn it over now to my good friend and colleague
18 Mr. Lawson.

19 THE COURT: Mr. Lawson.

20 MR. LAWSON: May it please the Court, Mr.
21 Jepertinger. Mr. Foreman, ladies and gentlemen of the
22 jury, I am Jack Lawson. I'm the public defender here in
23 Marion and also in Florence County. Our offices are one
24 now, it's just like the Solicitor's office they work out
25 of Florence and Marion. For years and year, we had

1 separate offices in the public defender's office, but just
2 within the last two years, they have pass laws in Columbia
3 that has combined our offices and made them one office, so
4 that we now work both in Florence and in Marion Counties
5 or some of us do. You know Hank Anderson, who earlier
6 this week tried a case is in the Marion office, he works
7 here as is Craig Brown.

8 Now, as we proceed, the thing that is important
9 for you is that you remember that you and you alone are
10 the judges of the facts in this and in every case in which
11 a defendant put on trial by the government. Always in
12 this country you, the jury, are the finders of fact and
13 the last resort. The judge will tell you what the law is.
14 The prosecutor and myself will argue back and forth as to
15 how we view the facts, but you and your job is to find
16 whether or not the State in this case proves their case
17 beyond a reasonable doubt.

18 The defense has no burden of proof, that's a
19 very good reason for that. Our forefathers many many
20 years ago at the founding of this country felt that it was
21 almost impossible, if not impossible, for a citizen to
22 prove themselves innocent of a crime. Therefore, they
23 decide that when the government charges a citizen with a
24 crime they, the government, must come forward with
25 evidence that convinces a jury of the individuals' peers,

1 that they are guilty beyond a reasonable doubt. And
2 sometimes we say through moral certainty, but you have to
3 be convinced by the evidence that the State proves to you
4 each and every element of the crime as the judge will
5 define it to you at the conclusion of this trial.

6 You must find that they bring forth evidence
7 that establishes Tyron Deshawn Davis' guilt beyond a
8 reasonable doubt. A doubt which causes a reasonable
9 person to hesitate to act, hesitate to act. So if on the
10 other hand, there is evidence that does not prove to you
11 beyond a reasonable doubt on any element of either or the
12 two offenses, then it is your duty to find the defendant
13 not guilty. If on other hand, you're convinced beyond all
14 and every reasonable doubt that State has produced
15 evidence beyond a reasonable doubt for each and every
16 element of each and every offense, then it's likewise your
17 duty find the defendant guilty in this case, but that is
18 based on you, the jury, determining in your collective
19 wisdom that the government has brought forth evidence that
20 establishes guilt beyond a reasonable doubt on each and
21 every element of each and every offense charged. It's not
22 enough that they allege this happened or that happened or
23 that you like a witness or dislike a witness. You must
24 measure their testimony based on your good common sense as
25 to whether or not someone has a reason to lie. Do they

1 have a reason to misstate the truth. Do they have any
2 incentive, anything to be gained them by misstating the
3 evidence in the case. Those are the things that you are
4 called on as a jury to look at in each and every case for
5 you have to determine the credibility or believability of
6 each witness that testifies, not whether you like them or
7 dislike them, though that may be a part of it. But it's
8 whether their evidence, their testimony based on what you
9 know in your good common sense measures up to that burden
10 that would cause you to go to your jury room and not
11 hesitate to act and determining the guilt or innocence of
12 Tyron in this case.

13 This is not what you would call a long trial.
14 It's not gone be days and weeks like the California trials
15 sometimes that they go on for weeks and weeks. I quite
16 frankly don't know how the juries out there do it. They
17 just go seem like go for weeks and months of trial. We,
18 on the other hand, in South Carolina tend to get our
19 trials tried a great deal faster than that. It may be
20 that we go tomorrow. I don't see it going into the
21 weekend or any longer than that. If it should in fact go
22 into tomorrow, but I do ask you no matter how long it last
23 or how slow it is, to pay close attention to the evidence.
24 Listen to what is presented, look at what is presented.
25 And remember that the State of South Carolina, the

1 government, in this case has the burden of proof. Tyron,
2 the defendant, has no burden of proof. He does not have
3 to prove anything for as our forefathers believe long ago,
4 it sometimes is not always impossible to prove you didn't
5 do something. So instead of that requirement being placed
6 on the citizens of this country, our forefathers and our
7 system requires that the government prove guilt by the
8 evidence beyond a reasonable doubt. I ask you to keep
9 that in the forefront of your mind as we proceed through
10 this case. Thank you.

11 THE COURT: Solicitor, call your first case.

12 MR. JEPERTINGER: Your Honor, we're going to
13 call a witness out of order to get her back to Columbia.
14 We're calling Selena Kinard to the stand.

15 THE CLERK: Ma'am, if you'll come around and let
16 me swear you in please. Place your left hand on the Bible
17 and raise your hand please. Do you solemnly swear or
18 affirm to tell the truth, the whole truth, and nothing but
19 the truth so help you God?

20 THE WITNESS: I do.

21 WHEREUPON,

22 Selena Kinard,
23 after first having been duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. JEPERTINGER:

1 Q Yes, Ms. Kinard, how are you doing today?

2 A Good. How are you.

3 Q Good. And, Ms. Kinard, where do you work, please?

4 A The South Carolina Law Enforcement Division also
5 known as SLED.

6 Q And what are your responsibilities at SLED, please?

7 A I'm a forensic technician within the evidence control
8 department.

9 Q All right. And for those members of the jury that
10 may not had been on jury duty before, can you tell what a
11 technicians responsibilities are, what you specifically
12 do?

13 A Yes, sir. In our department, what we do is we take
14 in evidence from officers from across the state and we log
15 that information into our computer system. And we house
16 the evidence in our locked evidence room.

17 Q All right. And is it an accurate statement that you
18 receive these drugs from a law enforcement agency in
19 what's known as a best pack?

20 A That's correct.

21 Q Okay. Now, the best back is that a manila folder?

22 A Yes.

23 Q Generally with show -- I'm going to show you State's
24 Exhibit 9 for identification only at this point.

25 A Okay.

1 Q All right. Can you identify that would you, please?

2 A Yes, I can identify this based on the yellow label
3 that is affix to the outside of this package.

4 Q All right. Can you tell the jury what that would be,
5 please?

6 A Yes, the yellow label states that it's L08-05424
7 number 1. And each case gets it's own lab number and that
8 just followed with the case throughout the entire lab.

9 Q Right. Now, in terms of this object, State's Exhibit
10 9, when it comes to you, it only comes to you in the
11 manila folder with this inner larger envelope; correct?

12 A That is correct.

13 Q And with whatever smaller envelopes containing the
14 substances are in it; correct?

15 A That's correct.

16 Q And it leaves your department with this big envelope
17 on the outside; correct or SLED?

18 A Leaves SLED back to the agency?

19 Q Yes.

20 A Yes, with that, yes.

21 Q Okay. It's just a manner of protection of the inner
22 envelope; correct?

23 A That's correct.

24 Q All right. Now, in terms of that object L085424, you
25 checked it in; correct?

1 A Yes, I did.

2 Q Okay. Once you checked it in and logged it into the
3 computer, what did you do with it?

4 A On April the 10th of 2008, I received the drugs from
5 Sergeant Cribb with the Marion County Combine Drug Unit.
6 And on 4-10 as well, I put it into our drug evidence
7 intake storage, which is in our locked evidence room and
8 our drugs and weapons are also locked in a separate area
9 within that room.

10 Q And that is a secure area, right?

11 A Yes, it is.

12 Q All right. I'm going to show you State's Exhibit 8

13 ---

14 MR. JEPERTINGER: And I believe the defense does
15 not have an objection in terms of...

16 MR. LAWSON: No objection, Your Honor.

17 MR. JEPERTINGER: We move State's Exhibit 8 from
18 identification to evidence, Your Honor.

19 THE COURT: It's into evidence.

20 (WHEREUPON, State's Exhibit No. 8 was admitted
21 into evidence.)

22 MR. JEPERTINGER: Thank you, Your Honor.

23 BY MR. JEPERTINGER:

24 Q Okay. Is this the verified chain of custody form?

25 A Yes, it is.

1 Q Okay. Now, I notice that you checked it in with
2 April the 10th 2008, at 12:21; correct?

3 A That's correct.

4 Q On April the 10th 12:40, it went into the drug
5 evidence intake storage; is that correct?

6 A Yes, sir, that's correct.

7 Q All right. And thereafter, it looks like on May the
8 7th almost a month later, Nikki Perry a forensic
9 technician, that also works with y'all. She looks like
10 she had the drugs for two minutes?

11 A That's correct.

12 Q Okay. Can you tell us what the analyst normally
13 require you to do in terms of getting drugs from the
14 vault?

15 A Yes, typically what the analyst will do, they will
16 either call us with a list of the lab numbers that they
17 would like to pick up at that time or they will send us an
18 e-mail with that list of lab numbers. On this particular
19 case, Nikki Perry received that request from Beth Hoover,
20 who's the forensic scientist at the time. And she went
21 into the drug vault or the drug area to get the drugs and
22 held those until Beth came downstairs to pick them up
23 basically.

24 Q It looks like two minutes later; is that correct?

25 A Right, that's correct.

1 Q Okay.

2 MR. JEPERTINGER: I don't have any further
3 questions for this witness.

4 THE COURT: Mr. Lawson, cross-examination.

5 MR. LAWSON: May it please the Court.

6 THE COURT: Sure.

7 CROSS-EXAMINATION

8 BY MR. LAWSON:

9 Q Ms. Kinard, my understanding you working in Columbia;
10 is that correct?

11 A Yes, sir, that is correct?

12 Q You do not work in Marion County?

13 A No, sir.

14 Q All right. And on about March the 14th of 2008, were
15 you in Marion County that day?

16 A No, sir.

17 Q All right. Do you recall if you were in Columbia on
18 that day or do you know?

19 A I'm not sure, but this is my first time I've been to
20 Marion County.

21 Q So it's fair to assume that on March 14th of 2008,
22 you were not in Marion County?

23 A That's correct.

24 Q Okay.

25 MR. LAWSON: That's all I have.

1 MR. JEPERTINGER: I don't have anything based on
2 that, Your Honor. I would ask that Ms. Kinard can go back
3 to Columbia.

4 THE COURT: Any objections, Mr. Lawson?

5 MR. LAWSON: No objection, Your Honor.

6 MR. JEPERTINGER: She may want to go by Websters
7 Manor first.

8 (WHEREUPON, the witness leaves the witness
9 stand.)

10 THE COURT: Call your next witness.

11 MR. JEPERTINGER: Thank you. At this time, I
12 would call Aurelius Cribb to the stand.

13 THE CLERK: Do you solemnly swear or affirm to
14 tell the truth, the whole truth, and nothing but the truth
15 so help you God?

16 THE WITNESS: I do.

17 WHEREUPON,

18 Aurelius Cribb,
19 after first having been duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. JEPERTINGER:

22 Q I've always call you Aurelius, but what is your rank
23 Aurelius?

24 A Sergeant.

25 Q Sergeant Cribb, can you tell the, ladies and

1 gentlemen of the jury, for whom do you work?

2 A I work for the Marion Police Department.

3 Q Okay. And as part your responsibilities or maybe all
4 of your responsibilities, are you assign to the Marion
5 County Combine Drug Unit?

6 A Yes, sir.

7 Q Okay. Can you basically tell the, ladies and
8 gentlemen of the jury, what the responsibility for someone
9 who worked in the Marion County Combine Drug Unit does?
10 What do y'all do?

11 A We investigate illegal narcotics in the County of
12 Marion, investigate distributions of drugs and possession
13 and prosecute those individuals.

14 Q All right. Now, obviously, you deal with possession
15 type cases; correct?

16 A Yes, sir.

17 Q Possession drug cases and it could go from pills like
18 hydrocodone, oxycodone, it could be marijuana; is that
19 correct?

20 A Yes, sir.

21 Q It could be cocaine, crack cocaine; is that correct?

22 A Yes, sir.

23 Q It includes cases of possession with intent to
24 distribute those type drugs; is that correct?

25 A Yes, sir.

1 Q Distribution is what we are on trial for today;
2 correct?

3 A Yes, sir.

4 Q As well as trafficking drugs; is that correct?

5 A Yes, sir.

6 Q All right. And who do you work with at the drug
7 unit?

8 A Lieutenant Bryan Wallace.

9 Q Okay. And are there other officers? Can you name
10 some of the other officers you work with?

11 A Agent Glenn Wood, Agent Mark Collins, Agent Chris
12 Smith, Agent Melon Rogers, and Agent Josh Gasky.

13 Q Okay. And how long have you been assigned to the
14 drug unit Sergeant Cribb?

15 A Nine years.

16 Q Now, is it safe to say in that nine year time that
17 you have dealt with these drug distribution type cases?

18 A Yes, sir.

19 Q If you could gander a guess, how many cases are we
20 talking about Sergeant Cribb; is that right?

21 A Probably over 500.

22 Q Now, in these over 500 cases that you deal with are
23 some of them where they're monitored by audiovisual type
24 situations?

25 A Yes, sir, most all of them.

1 Q Now, on a typical audiovisual type situation, the
2 equipment that you use doesn't it include both a
3 transmitter and a audiovisual camera?

4 A Yes, sir.

5 Q All right. Now, I understand that these objects --
6 nothing too specific obviously, but these objects are
7 concealed about the person's body; is that correct?

8 A Yes, sir.

9 Q All right. And when I go to a person, you use --
10 lack of a better term a confidential reliable informant;
11 is that correct?

12 A Yes, sir.

13 Q In this particular case, the confidential informant
14 that you use was a Ms. Carmichael; is that correct?

15 A Yes, sir.

16 Q Now, for her services to you in this case, did you
17 pay her to do this drug bust, I guess?

18 A Yes, sir.

19 Q Do you know what amount of money you paid her,
20 Sergeant?

21 A I paid her \$60.

22 Q And those are out of state funds; is that correct?

23 A Yes, sir.

24 Q All right. And she has been a confidential informant
25 for you and I believe her -- the beginning numbers with

1 her confidential informant number it starts with 97; is
2 that correct?

3 A Yes, sir.

4 Q So at the time of this incident, she had at least
5 worked ten to 11 years for you; is that correct?

6 A Yes, sir.

7 Q All right. Do you recall March 14th 2008, in this
8 particular case? How everything transpired where you got
9 involved with the defendant in this case Tyron Davis?

10 A Yes, sir.

11 Q Please tell the, ladies and gentlemen of the jury,
12 how you met up with Ms. Carmichael and who you're with so
13 on and so forth, if you could?

14 A Ms. Carmichael called me on my cell phone and told me
15 that she could purchase some crack from Ty Davis. And I
16 inform my Lieutenant, Lieutenant Bryan Wallace. I told
17 her to meet us up at Thomas Supply. She met us up there
18 and then we wired her up to send her to talk with Ty Davis
19 to purchase the crack.

20 Q Okay. Now, did you meet her at Thomas Supply or did
21 you meet her at your offices?

22 A We met her at Thomas Supply.

23 Q Okay. Now, what is the first thing you did when you
24 met up with her at Thomas Supply?

25 A I searched her and Lieutenant Wallace watched as I

1 searched. And then we talked about what she was going to
2 buy from Mr. Davis and how much it is going to cost.

3 Q All right. Now, was she wired for sound at that
4 point or did you search her prior to that?

5 A I searched her before we wired her.

6 Q Okay. Now, obviously, you're a fellow, Lieutenant
7 Wallace is a fellow and Ms. Carmichael ain't a fellow,
8 okay. Tell the jury how you went about searching
9 Ms. Carmichael?

10 A First thing I did is have her to open her mouth and
11 lift her tongue up, so I can make sure there's nothing in
12 her mouth. Then I asked her to pull her bra with her two
13 fingers to make sure nothing falls out. I had her pull
14 her pockets out so I can make sure there wasn't anything
15 in there, take her shoes off.

16 Q All right.

17 A And I checked her cigarette box also to make sure
18 there wasn't nothing in there.

19 Q Good point. Let me ask you this, did -- she was
20 carrying what a Newport pack?

21 A Yes, sir.

22 Q Okay. Did -- you open that up, did you?

23 A Yes, sir, I took the cigarettes out.

24 Q And when you took the cigarettes out, did you see
25 anything in the packet at that time?

1 A No, sir.

2 Q You put the cigarettes back?

3 A Yes.

4 Q Okay. You closed it and gave it to her; correct?

5 A Yes, sir.

6 Q All right. Now, when she came up to the scene, was
7 she in a vehicle or was she walking to Thomas Supply?

8 A She walk to Thomas Supply.

9 Q Okay. So she walked?

10 A Yes, sir.

11 Q All right. Now, let me ask you this, in your nine
12 years in over 500 type of these cases that you have dealt
13 with, has there ever been an occasion that you can recall
14 where you have searched a C.I. or their vehicle and found
15 drugs on them?

16 A Yes, sir.

17 Q Could you tell the jury about that, please?

18 A I found crack, weed, and pills in a vehicle and on
19 their persons before they come work for us and we
20 terminate them once we found drugs on them.

21 Q What would you do with a confidential informant at
22 that point that has pills, drugs or marijuana on him?

23 A We would terminate them, they wouldn't work with us
24 anymore.

25 Q Would you send them out to make a buy-control

1 purchase on that day?

2 A No, sir.

3 Q Would you consider the search that you did on Rosa
4 Carmichael on March the 14th to be thorough or as thorough
5 as other searches that you have done with other
6 confidential informants?

7 A Yes, sir, as I done with females, yes, sir.

8 Q At that point after you searched her and Lieutenant
9 Wallace was there the whole time?

10 A Yes, sir.

11 Q All right. Did you do this on the inside of your
12 vehicle or was she standing on the outside or did you go
13 in the bathroom? Was it on the outside of Thomas Supply?

14 A It's on the outside of Thomas Supply where the doors
15 open on the vehicle someone can see us.

16 Q Okay. And at that point after you searched her, what
17 did you do then?

18 A After I search her, we put the transmitter on her and
19 then I issued her \$40 in serialized funds.

20 Q Okay. And when you say serialized funds, I mean is
21 that -- do you just take the numbers of -- mark down the
22 numbers the serial numbers of the bills?

23 A No, sir, we make a copy of the money that I issue to
24 the C.I.

25 Q Now, in this case, you did not -- you arrested Tyron

1 Davis, did you not?

2 A Yes, sir.

3 Q But you did not arrest him on March the 14th 2008; is
4 that correct?

5 A No, sir.

6 Q Okay. In fact, is it accurate to say you arrested
7 him on April the 8th 2008?

8 A Yes, sir.

9 Q Okay. It's almost about three weeks to a month
10 later?

11 A Yes, sir.

12 Q Okay. Now, getting back to March the 14th. After
13 you searched her, what happened then after you gave her
14 the money?

15 A After I give her the money, I turn the transmitter
16 on.

17 Q When did you put the transmitter on her?

18 A After we searched her.

19 Q Okay. Is that before you gave her the money or after
20 you gave her the money.

21 A After I gave her the money.

22 Q After you gave her the money. So the transmitter on
23 her?

24 A Yes, sir.

25 Q Now, the purpose of having an audio transmitter on

1 the individual is -- what's the purpose?

2 A Purpose so we can know what's going on, make sure the
3 person is not in danger, and make sure everything is going
4 as planned and we know where she's is also.

5 Q All right. And then you place the video camera on
6 her somehow; correct?

7 A Yes, sir.

8 Q And it is concealed on her or any object that she has
9 with her; correct?

10 A Yes, sir.

11 Q Any object she has with her at that point is provided
12 by you?

13 A Yes, sir.

14 Q Okay. At that point, what did you guys do with
15 Ms. Carmichael?

16 A We took her down the road, so we can get closer to
17 the destination that she was going to and let her out the
18 vehicle.

19 Q Okay. And she was gone for a while; is that correct?

20 A Yes, sir.

21 Q And then she came back; is that correct?

22 A Yes, sir.

23 Q When she came back, did she come back to Thomas
24 Supply store.

25 A Yes, sir.

1 Q And at Thomas Supply store what happened when she
2 came back?

3 A When she came back, she gave me a Newport box and
4 said that the crack was inside of it.

5 Q Okay. You took the Newport box and what did you do
6 with the Newport box?

7 A I open the Newport box and looked in it to look for
8 the crack. Once I got the crack, I put it in a plastic
9 bag.

10 Q All right. And once you took that crack and put it
11 in a plastic bag, what did you do with those drugs?

12 A Drugs I took them back to the office and put them in
13 a best kit and sealed it and then it was placed into the
14 drug vault at the drug unit.

15 Q All right. At the drug unit, you have a vault;
16 correct?

17 A Yes, sir.

18 Q All right. When you put the drugs in a small bag let
19 me show you State's Exhibit 9 for identification. I see
20 some small bags in State's Exhibit 9. Can you tell me if
21 one of those were the bags that you put it in?

22 A Yes, sir.

23 Q All right. There's a small plastic bag to the right;
24 correct?

25 A Yes, sir.

1 Q And you put that solitary into this kind of middle
2 bag; is that correct?

3 A Yes, sir.

4 Q And sealed it?

5 A Yes.

6 Q Now, let me ask you about the best bag. There is a
7 number -- manila folder -- I mean, a manila envelope;
8 correct?

9 A Yes, sir.

10 Q Does that have a number?

11 A Yes, sir.

12 Q And does that number have to match this outer number
13 on this bag?

14 A Yes, sir.

15 Q And did you verify that that had happened?

16 A Yes, sir.

17 Q Okay. And after you put it in the drug vault, when
18 is the next time you had an occasion to deal with these
19 drugs?

20 A The next occasion was April the 10th when I took them
21 to SLED.

22 Q All right. And when you took them April the 10th,
23 who did you give them to?

24 A To Selena Kinard.

25 Q All right. The lady that just testified; correct?

1 A Yes, sir.

2 Q All right. Now, that's what you did with the drugs.
3 What happened with the video audiovisual equipment, what
4 did you do with that? You didn't make it present to Ms.
5 Carmichael, did you?

6 A No, sir.

7 Q Okay. What happened with that audiovisual equipment?

8 A I took the audiovisual equipment off of her and I
9 then took it back to the drug unit to review the video.

10 Q Okay. Now, this audiovisual equipment apparently
11 does it have like a memory card on it; is that correct?

12 A Yes, sir.

13 Q Okay. And like most things to date, you stick it
14 into a P.C., a computer?

15 A No, sir, you plug a USB port to it and it connect to
16 the computer.

17 Q All right. And then you download what's ever on that
18 audiovisual equipment to the computer; is that correct?

19 A Yes, sir.

20 Q All right. And after that, you can make copies of
21 CD's; is that correct?

22 A DVD's, yes, sir.

23 Q I'm going to show you State's Exhibit 2 for
24 identification. Can you identify this object?

25 A Yes, sir.

1 Q And what is that object?

2 A This is a DVD that I made on Tyron Davis' case.

3 Q Was that the object that was downloaded into your
4 computer and then you download that on to that disk?

5 A Yes, sir.

6 Q And you provided me a copy with it.

7 A Yes, sir.

8 MR. JEPERTINGER: Your Honor, at this time, I
9 would move to have State's Exhibit 2 moved into evidence.

10 THE COURT: Any objection?

11 MR. LAWSON: Bear with me one moment, Your
12 Honor.

13 (WHEREUPON, a pause in the proceedings.)

14 MR. LAWSON: Your Honor, I object on the basis,
15 I'm not sure that there's an appropriate chain of custody
16 been laid in relation to this exhibit.

17 THE COURT: Any response?

18 BY MR. JEPERTINGER:

19 Q Let me ask you, in terms of the equipment, who is the
20 only person that touched the object that went into the USB
21 port?

22 A That would be me.

23 Q That would be you?

24 A Yes, sir.

25 Q You be the one that loaded it into the camera and

1 took it out of the camera; correct?

2 A Yes, sir.

3 Q And load it into the computer?

4 A Yes, sir.

5 Q And then generated this disk?

6 A Yes, sir.

7 Q And this disk fairly and accurately portrays whatever
8 that camera filmed on March the 14th 2008.

9 A Yes, sir.

10 THE COURT: Objections overruled.

11 MR. JEPERTINGER: Thank you, Your Honor. At
12 this time ---

13 THE COURT: Is that number two; is that right?

14 MR. JEPERTINGER: That's number two, Your Honor.
15 At this time, Your Honor, I would like to publish State's
16 Exhibit 2 to the jury.

17 (WHEREUPON, a pause in the proceedings.)

18 (WHEREUPON, State's Exhibit 2, a DVD, was played
19 for the jury.)

20 THE COURT: Let's take a 15 minute recess or 20
21 minute recess. If anyone needs to go out and smoke, we'll
22 have a bailiff walk with you. Otherwise just go into your
23 jury room, do not discuss the case at all.

24 (WHEREUPON, a break was taken.)

25 THE COURT: Would you give me your name and jury

1 number?

2 JUROR: I don't know my jury number, but my name
3 is Cynthia P. Williams.

4 THE COURT: Ms. Williams, you had mention to me
5 right at the beginning of the break that we just took that
6 you thought that you might know the confidential informant
7 in this video; is that correct?

8 JUROR: Yes.

9 THE COURT: How would you know the confidential
10 informant and would that affect your ability to be fair
11 and impartial to both sides in this case?

12 JUROR: No, it wouldn't.

13 THE COURT: Your sure? You can be fair to the
14 State of South Carolina as well as the defendant?

15 JUROR: Yes.

16 THE COURT: All right. Anything further from
17 the State?

18 MR. JEPERTINGER: Nothing further from the
19 State.

20 THE COURT: Anything further for you, Mr.
21 Lawson?

22 MR. LAWSON: Inquire as to the relationship?

23 THE COURT: What is your relationship with the
24 lady in the video?

25 JUROR: Her uncle is my Godfather.

1 THE COURT: Do you have a close relationship
2 with the lady in the video or you just know her casually?

3 JUROR: I just know her from the time he was
4 dying, she was there with him.

5 THE COURT: Is that pretty much the extent of
6 your relationship with her?

7 JUROR: That's it.

8 THE COURT: You don't go to church with her,
9 talk with her things of that nature?

10 JUROR: No.

11 THE COURT: She said that basically their only
12 relationship with her was she saw her and got to know her
13 while her uncle was dying.

14 JUROR: Yes.

15 THE COURT: But other than that, she doesn't
16 have a personal or social or daily relationship with the
17 C.I. When is the last time you saw her?

18 JUROR: It's been since he died in January '08.

19 THE COURT: So you really haven't seen her since
20 January 2008?

21 JUROR: Yes, sir.

22 THE COURT: Anything further, Mr. Lawson?

23 MR. LAWSON: No, Your Honor.

24 THE COURT: Any objection?

25 MR. LAWSON: No, Your Honor.

1 THE COURT: All right, sir. Thank you very
2 much.

3 THE CLERK: It's 140.

4 THE COURT: If you can go ahead and bring the
5 jury out.

6 (WHEREUPON, the jury came into open court.)

7 THE COURT: If that video starts bothering you,
8 you can move back.

9 MR. JEPERTINGER: Your Honor, I would suggest
10 that the alternate move back.

11 (WHEREUPON, the jury continued to watch the
12 DVD.)

13 BY MR. JEPERTINGER:

14 Q Sergeant Cribb, are you familiar after having watched
15 that video where the transaction took place? Are you
16 familiar with that area?

17 A Yes, sir.

18 Q And which county is that street in?

19 A Marion County.

20 Q All right. And are there any schools or parks within
21 the half mile radius of that location where that
22 transaction took place?

23 MR. LAWSON: Objection, Your Honor, that's a
24 leading question.

25 BY MR. JEPERTINGER:

1 Q Are there any -- can you tell any -- the jurors of
2 schools or parks in that area?

3 A Yes, sir.

4 Q Okay. Which school?

5 A Marion County Alternative School.

6 Q And approximately how far is the Marion Alternative
7 School from that location?

8 A It's within half of a mile from that location.

9 Q Okay. Thank you. I am going to show now what's been
10 marked as State's Exhibit 3, 4, 5 and 6 for
11 identification. Can you identify these objects? State's
12 Exhibit 3 can you tell the jury -- can identify that
13 first?

14 A Yes, sir.

15 Q All right. And what is it?

16 A It's a transaction with Mr. Davis.

17 Q Now, let me ask you, is that a still photograph?

18 A Yes, sir, from the video.

19 Q From the video?

20 A Yes, sir.

21 Q Did you help get the still photos from the video?

22 A Yes, sir.

23 Q Okay. And State's Exhibit 4 what is that?

24 A Same picture.

25 Q All right. State's Exhibit 5?

1 A It's the same.

2 Q And State's Exhibit 6?

3 A It's the same photo.

4 Q Do these photographs fairly and accurately portray
5 what the jury just observed on the video?

6 A Yes, sir.

7 MR. JEPERTINGER: At this time, the State move
8 that State's Exhibit 3, 4, 5 and 6 be introduced into
9 evidence.

10

11 THE COURT: Any objection?

12 MR. LAWSON: Yes, Your Honor. The defense would
13 object to the introduction. The best evidence is the
14 video. I would ask that the jury be allowed the video and
15 that the still meant nothing but to enhance certain
16 provisions of the video or certain segments of the video
17 as oppose to the overall evidence that was shown in the
18 video. It's just taken parts of it and placing more
19 emphasis on some of the evidence and on other portions of
20 the evidence, Judge.

21 THE COURT: Response.

22 MR. JEPERTINGER: Well, Your Honor, I still
23 think that they can do that.

24 BY MR. JEPERTINGER:

25 Q Would it help explain your testimony or testimony of

1 the informant to the jury?

2 A Yes, sir.

3 THE COURT: Any response? Solicitor, are you
4 still trying to introduce them into evidence?

5 MR. JEPERTINGER: Yes, sir.

6 MR. LAWSON: Your Honor, of course, the response
7 to that question is a simple assertion of a question
8 obviously intended to obtain that response. How does it
9 enhance your testimony simply by having still photographs,
10 is not the video itself the best evidence of what the
11 State is intending to establish here?

12 MR. JEPERTINGER: It may not be the best
13 evidence of every aspect of the testimony, Your Honor.

14 THE COURT: All right. Give me one second.

15 (WHEREUPON, a pause in the proceedings.)

16 THE COURT: I am going to overrule the
17 objection. You can continue.

18 MR. JEPERTINGER: Thank you.

19 THE COURT: State's number 3, 4, 5 and 5 are in
20 evidence.

21 (WHEREUPON, State's Exhibits Nos. 3, 4, 5 and 6
22 was admitted into evidence.)

23 BY MR. JEPERTINGER:

24 Q And if you could come off the stand one second,
25 please. In terms of State's Exhibit 3 for identification,

1 there is a -- what looks like -- what is in the
2 gentleman's left hand on a Newport box. When Rosa got
3 back to your vehicle, she handed you a Newport box; is
4 that correct?

5 A Yes, sir.

6 Q Okay. Did you take that Newport box into evidence?

7 A No, I destroyed the Newport box.

8 Q Now, can you tell the jury why you had destroyed that
9 Newport box?

10 A When she came back, the cigarettes in there had
11 residue from -- the cigarettes were wet from the crack
12 being placed into the Newport box.

13 Q Okay. So you did not give the cigarettes back to
14 her?

15 A No, sir.

16 Q And you felt that that had no evidentiary value?

17 MR. LAWSON: Objection, Your Honor, that's
18 leading.

19 THE COURT: Sustained.

20 BY MR. JEPERTINGER:

21 Q How did you perceive that box in terms of prosecution
22 of this case?

23 A I didn't need it any more.

24 Q Thank you very much. Now, you were the individual
25 that arrested Mr. Davis; is that correct?

1 A Yes, sir.

2 Q All right. And upon arrest, did you take a
3 photograph of Mr. Davis?

4 A Yes, sir.

5 Q All right. And I am going to show you State's
6 Exhibit 7 for identification. Can you identify that
7 object I just handed you?

8 A Yes, sir, it's a picture that I took of Mr. Davis.

9 Q And was that on the date of his arrest?

10 A Yes, sir.

11 Q Okay. Would that be April the 8th 2008?

12 A Yes, sir.

13 Q All right. I would move -- one more question. Did
14 that picture fairly and accurately portray Mr. Davis on
15 April the 8th 2008, at the time of his arrest?

16 A Yes, sir.

17 MR. JEPERTINGER: Your Honor, I would move
18 State's Exhibit 7 into evidence?

19 THE COURT: Any objection?

20 MR. LAWSON: Yes, Your Honor. It's in form of a
21 booking photograph, it's nothing more than that no less.
22 Based on the question and went through in relation to what
23 originated this picture, I find it being no different than
24 that.

25 THE COURT: Any response?

1 MR. JEPERTINGER: If I could just inquire a
2 little further.

3 BY MR. JEPERTINGER:

4 Q Did the person in State's Exhibit 7 for
5 identification identify himself to you as any individual?
6 Who does he say he was?

7 A He says he's Tyron Davis.

8 Q All right.

9 MR. JEPERTINGER: At this stage, I would move
10 State's Exhibit 7 into evidence.

11 THE COURT: Any further objection?

12 MR. LAWSON: Nothing further, Your Honor.

13 THE COURT: All right. I'm going to overrule
14 the objection. State's Number 7 is into evidence.

15 (WHEREUPON, State's Exhibit No. 7 was admitted
16 into evidence.)

17 MR. JEPERTINGER: That's all the questions I
18 have for this witness. Please answer any questions that
19 Mr. Lawson might have for you.

20 THE COURT: Cross-examination.

21 MR. LAWSON: May it please the Court?

22 THE COURT: Sure.

23 CROSS-EXAMINATION

24 BY MR. LAWSON:

25 Q Did I understand you testified as Sergeant Cribb; is

1 that correct?

2 A Yes, sir.

3 Q The rank of sergeant?

4 A Yes, sir.

5 Q And you been with law enforcement for how long?

6 A Nine years.

7 Q And has all -- are you with Marion County or the
8 City?

9 A I work for the City of Marion?

10 Q The City of Marion?

11 A Yes, sir.

12 Q Okay. You are presently assigned to the combine
13 drug unit?

14 A Yes, sir.

15 Q Where -- do all the individuals that work for the
16 combine drug unit, do they all work for the City of
17 Marion?

18 A No, sir, there's two from the City of Marion, three
19 from the County and one from Mullins.

20 Q Okay. So the City of Mullins, the City of Marion and
21 the Marion County Sheriff's Department?

22 A Yes, sir.

23 Q Okay. Have you -- you said nine years and the whole
24 nine years you been assign to the combine drug unit?

25 A Eight years with the drug unit.

1 Q And is it been continuously over the last eight
2 years?

3 A I had a two and a half year break, I was with the
4 military.

5 Q Two and a half year break?

6 A Yes, sir.

7 Q I must be adding something wrong. You been with
8 Marion for eight years -- for nine?

9 A Yes, sir.

10 Q You been with the combine drug unit for eight years?

11 A Yes, sir, I was assign there, but I was activated for
12 two and a half of these years?

13 Q So you counting those two and a half years?

14 A Yes, sir.

15 Q All right. So you hadn't -- that's not two and a
16 half on top of that?

17 A No, sir.

18 Q Okay. Now, how many drug transactions have you been
19 involved in with the combine drug unit one, two?

20 A A lot. I can't give an exact number.

21 Q Generally?

22 A Probably over 500.

23 Q Over 500 in the whole eight years?

24 A In my -- yes, sir.

25 Q So it's over 500 in eight years that would be less

1 than a 100 a year; is that correct? Or would it be more
2 like a hundred a year?

3 A I'm not exactly sure.

4 Q Way less than a hundred a year?

5 A Probably a little over. Depends on which -- certain
6 years are more productive than others.

7 Q What's that?

8 A Some years are more productive than others.

9 Q Okay. So I would assume the two and a half years
10 that you were deployed were inactive basically?

11 A Yes, sir.

12 Q So you did nothing during -- as far as the combine
13 drug unit is concern during those two and a half years;
14 correct?

15 A Yes, sir.

16 Q Now, is it standard policy to have men search women
17 informants?

18 A When we don't have another female officer.

19 Q You have a female working at the combine drug unit,
20 do you not?

21 A At that time, it was just me and Lieutenant Bryan
22 Wallace. We didn't have any other agents there at that
23 particular time.

24 Q All right. Were there any female agents that worked
25 for the sheriff's department or with the city police

1 department at the time?

2 A They weren't working that day.

3 Q Were there any employees with the sheriff department
4 female?

5 A Secretaries.

6 Q What about Judy Barker, isn't she a captain with the
7 sheriff's department?

8 A Yes, sir.

9 Q And wasn't she active with the sheriff's department
10 at that time? She was an investigator, was she not?

11 A I'm not sure if she was there that day or not.

12 Q Well, she was not just a secretary at that time, was
13 she?

14 A No, sir.

15 Q I assume there were others as well; is that correct
16 or not? There were no other female officers other than
17 Judy Barker?

18 A There's probably more female officers, yes.

19 Q Is it not a better idea to have a female search a
20 female than to have a male search a female?

21 A Normally, we usually do our own investigation by
22 ourselves and sometimes they're usually doing something
23 else.

24 Q Well, I'm asking as a general proposition, don't you
25 think it would be better procedure to have a female search

1 a female than a male search a female?

2 A Yes, sir. When we can schedule someone to be there,
3 we usually have one come. But at that particular time, I
4 don't think she was available.

5 Q So you didn't have anybody come, but you had somebody
6 that you used on these occasions normally.

7 A Sometimes we have a female officer, but at this
8 particular time we didn't.

9 Q Well, how often do you have a female officer search a
10 female informant 90 percent of the time, 95 percent of the
11 time, ten percent of the time? How often?

12 A It depends on the situation.

13 Q You have different situations with different female
14 informants or... Why would one female informant be
15 different than another female informant?

16 A It depends on what time of day it is and if any of
17 the female officers are working?

18 Q Okay. It's basically as a matter of convenience as
19 oppose to proper or appropriate police procedure?

20 A Negative. Sometimes drug buys are done at the spare
21 of the moment when there's just two of us there, that's
22 all we have available at that particular time?

23 Q All right. So this was on what day that this took
24 place?

25 A It was on a Friday.

1 Q Of what day of the month?

2 A Friday morning the 14th.

3 Q Of what year 2008?

4 A Yes, sir.

5 Q All right. And I think it was over approximately

6 four o'clock in the afternoon; is that correct?

7 A We met in front of ---

8 Q What time did you complete the transaction?

9 A She had met back up with us 3:38 p.m.

10 Q What's that?

11 A 3:38 p.m.

12 Q 3:38. All right. What were you doing about five

13 o'clock that evening?

14 A Five o'clock that evening, I was probably doing the

15 case.

16 Q Do you remember?

17 A No, sir.

18 Q Do you have independent recollection of this

19 transaction?

20 A Just what I have in my report, that's it.

21 Q In your report which is that, you met an informant,

22 that you searched an informant and that the informant came

23 back and gave you a package and you put it in a best bag

24 basically; is that correct?

25 A I remember parts and bits as it happened.

1 Q All right. Did you work a transaction on March the
2 15th of 2008?

3 A You said did I work a case on March 15th?

4 Q March the 15th the next day?

5 A I am not sure.

6 Q What about March the 13th the day before?

7 A I am not sure.

8 Q Okay. So it's fair to say that you recall this
9 because you looked at the video and you reviewed your
10 notes and that's actually what you remember about this
11 case?

12 A Most cases I can remember the ones that were actually
13 my cases.

14 Q Okay. And is there anything peculiar or special that
15 stands out in this case that would make you remember it
16 over some other cases?

17 A Yes, it's her bringing me back the Newport box. This
18 is the second one that I had someone brought it back in a
19 Newport box.

20 Q Okay. So it was an exception to have a Newport box?

21 A It's exception for the C.I. to come back with drugs
22 in a Newport box, that's the second time I ever had that
23 happen to me.

24 Q And though that was an exception, you didn't find it
25 such an exception that you wanted to keep the Newport

1 box; is that correct?

2 A I didn't see no reason to keep it.

3 Q On a Newport box, do you know what's on the inside of
4 it besides cigarettes?

5 MR. JEPERTINGER: Your Honor, if Mr. Lawson is
6 going to introduce a piece of evidence, he needs to do
7 that instead of ---

8 MR. LAWSON: Your Honor, I'm well aware of the
9 rules of evidence. And if I intend to introduce one, I
10 will introduce one.

11 MR. JEPERTINGER: Well, he's pulling out a
12 Newport box to show and that's not in evidence, Your
13 Honor.

14 MR. LAWSON: Well, I'm not moving it into
15 evidence nor do I intend to.

16 MR. JEPERTINGER: Your Honor, then I would ask
17 him to place it back in his pocket.

18 MR. LAWSON: Does my Newport box intimidate the
19 prosecution, I'll put it back in my pocket.

20 BY MR. JEPERTINGER:

21 Q And I will now ask the witness to tell me what's on
22 the inside of a Newport box without the benefit of the
23 Newport box. What's on the inside of it?

24 A Cigarettes.

25 Q What else?

1 A There's like aluminum foil type of paper.

2 Q Aluminum foil.

3 A It's like a cirrus kind of paper.

4 Q Something that may or may not carry a fingerprint?

5 What about the box itself may or may not carry a
6 fingerprint, what do you think?

7 A Maybe.

8 Q Maybe?

9 A Yes, sir.

10 Q But now when you investigate the crime, you don't
11 want to check for fingerprints, do you?

12 A Yes, sir, but...

13 Q But not when you're investigating this kind of crime
14 you don't want fingerprints, do you?

15 A Every since I been working here when we turn that
16 type of evidence into SLED, it always came back no
17 fingerprints found, so that's why I didn't keep the box.

18 Q So since no fingerprints found in the past, they'll
19 never be any found in the future, so don't send it in is
20 that the philosophy that you operate under in accumulating
21 information for cases?

22 A No, sir.

23 Q That how you accumulate evidence?

24 A I figure there's enough evidence on the video.

25 Q You do. So the Newport box -- oh, by the way, you

1 said the cigarettes were wet? Is that what you told the
2 prosecution?

3 A Yes, sir.

4 Q Wet in a wet soaking wet? How were they wet?

5 A Lightly wet from the crack.

6 Q Wet from the crack?

7 A Yes, sir.

8 Q So the cigarettes could have been submitted to SLED
9 and tested for residue?

10 A Could have been, but there's enough crack there to
11 send to SLED itself.

12 Q And so the -- what did the crack sweat is what
13 happened?

14 A No, it look like it had just been cooked.

15 Q Part of it just changed into water; is that what
16 happened?

17 A It look like it had just been cooked and it was still
18 wet.

19 Q It was still wet?

20 A Yes, sir.

21 Q Now, when you searched the informant, did she have on
22 underwear?

23 A I am not sure.

24 Q So you didn't check anything below the waist?

25 A I had to pull her pockets out and check the feet, her

1 shoes.

2 Q You mean pull her pockets out like that?

3 A Yes, sir.

4 Q What about underneath?

5 A No, I didn't check that?

6 Q I assume -- did she have shoes on?

7 A Yes, sir.

8 Q Socks?

9 A I am not sure.

10 Q You don't remember?

11 A It's part of my practice when I search someone, I
12 make them take their shoes and socks off.

13 Q But if she did have socks on, you made her take them
14 off; is that right?

15 A Yes, sir.

16 Q But you don't remember if you did or you didn't?

17 A No, sir.

18 Q Why did it take so long to get back to the car when
19 it didn't seem like it took a minute to get from the car
20 to the initial location?

21 A When we dropped her off, we dropped her in a location
22 where the buy was going to take place. When we went to go
23 pick her up, everybody was out and we couldn't pick her
24 up. So we had -- we was trying to get sometime, so we can
25 try to pick her up and everybody kept walking up talking

1 to her.

2 Q So who you talking about the agents? There were no
3 agents that could pick her up?

4 A Negative. Myself and Lieutenant Wallace.

5 Q Now, were you driving the vehicle that she got into
6 or were you a passenger?

7 A I was a passenger.

8 Q And who was driving?

9 A Lieutenant Wallace.

10 Q All right. And who drove the car that dropped her
11 off?

12 A She was in the vehicle with us.

13 Q You remember who was driving.

14 A Lieutenant Wallace.

15 Q Lieutenant Wallace?

16 A Yes, sir.

17 Q Now, this was basically in the same area; is that
18 correct?

19 A Yes, sir.

20 Q So were y'all in an unmarked car or a marked car?

21 A Unmarked.

22 Q A marked car?

23 A Unmarked.

24 Q Unmarked car?

25 A Yes, sir.

1 Q Do most of the people in Marion County or Marion --
2 were are in the City of Maron or in the County?

3 A City of Marion.

4 Q The City of Marion. Most of the people in the city
5 know you as a police officer?

6 A Most ones I dealt with, yes.

7 Q What about Officer Wallace, they know him as a police
8 officer?

9 A Yes, sir.

10 Q But yet your informant was riding around in the car
11 with y'all?

12 A She was in the back.

13 Q And got back in the car with you; correct?

14 A Yes, sir.

15 Q And now was this informant paid for this?

16 A Yes, sir.

17 Q How much?

18 A Sixty-dollars.

19 Q Huh?

20 A Sixty-dollars.

21 Q Sixty-dollars?

22 A Yes, sir.

23 Q And that is for just this transaction?

24 A Yes, sir.

25 Q And if nothing had happened and she had gone out and

1 not been successful in buying anything, what would you
2 have paid her?

3 A Nothing.

4 Q What's that?

5 A Nothing.

6 Q Nothing?

7 A Yes, sir.

8 Q Okay. So the informants have to produce in order to
9 get paid; is that correct?

10 A Yes, sir.

11 Q You've reviewed the video; is that correct?

12 A Yes, sir.

13 Q And did you notice that there was a female in the car
14 with Mr. Davis?

15 A Yes, sir, I did.

16 Q There was a female in that car?

17 A Yes, sir.

18 Q You find out who that was?

19 A Yes, sir.

20 Q Did you ever question her?

21 A No, sir.

22 Q Did you charge her with anything?

23 A No, sir.

24 Q Why not?

25 A Cause Mr. Davis is the primary contributor to the

1 drug transaction.

2 Q What's that?

3 A He was the primary contributor to the drug
4 transaction.

5 Q And that's base on your informant.

6 A Informant and the video.

7 Q Okay. But you weren't there when the alleged
8 transaction took place, were you?

9 A No, sir.

10 Q You basing that on the video; correct?

11 A And the informant.

12 Q And what the informant told you?

13 A Yes, sir.

14 Q Without what the informant told you -- let me ask you
15 if you watch that video not knowing anything else, what
16 would you come away with?

17 A I come away with a drug transaction made.

18 Q That what?

19 A Drug transaction was made.

20 Q You would come away just from watching that video
21 with that fact you would -- though you see no money, you
22 see no drugs, you would be of the opinion that a drug
23 transaction took place?

24 A Yes, sir.

25 Q Without knowing anything -- anything from the

1 informant not having privy to talk to her before or after
2 just watching video?

3 A Yes, sir, with my experience in this type of business
4 that's what I would have observed.

5 Q So I guess it's true beauty is in the eye of the
6 beholder.

7 MR. LAWSON: I don't any other questions.

8 THE COURT: Redirect.

9 REDIRECT EXAMINATION

10 BY MR. JEPERTINGER:

11 Q Let me ask you in terms of acquiring a fingerprint
12 for any object if you have a known person doing an action,
13 a crime, do you acquire or attempt to acquire a
14 fingerprint from SLED?

15 A No, sir.

16 Q Okay. And on State's Exhibit 3 that's in evidence,
17 what did you observe?

18 A I observe Mr. Davis giving the C.I. a Newport box
19 with crack in it.

20 Q So you would have been aware of him holding a
21 cigarette box?

22 A Yes, sir.

23 MR. JEPERTINGER: That's all the questions I
24 have. Thank you.

25 THE COURT: Recross?

1 MR. LAWSON: Yes, may it please the Court.

2 CROSS-EXAMINATION

3 BY MR. JEPERTINGER:

4 Q You know whether it came from the driver of the car?

5 A The cigarette box came from the C.I. and he received
6 it.

7 Q Do you know whether or not the driver had that
8 cigarette box?

9 A Both her hands was on the steering wheel at that
10 particular time.

11 Q And there's no point in time when you can't see
12 neither the person here or the driver and the cigarette
13 box?

14 A That's probably a time.

15 Q Is there not an opportunity for the driver to touch
16 that cigarette box or hold it or have it in their hand?

17 A Yes, sir.

18 Q Could you possibly find her fingerprint on there had
19 that happen?

20 A It's a possibility.

21 MR. LAWSON: Thank you.

22 MR. JEPERTINGER: Nothing further, Your Honor.

23 (WHEREUPON, the witness leaves the witness
24 stand.)

25 THE COURT: Solicitor, do you have one more

1 short witness or do you want to break for the evening?

2 MR. JEPERTINGER: May we approach one second.

3 (WHEREUPON, a bench conference was held in the
4 presence of the jury, but out of the hearing of the
5 jury.)

6 THE COURT: Members of the jury, we are going to
7 adjourn for the evening. We are going to start back at
8 10:30 in the morning. Normally, we would start earlier
9 than that, but one of the lawyers has a doctor's
10 appointment, so we're going to try to work with him on
11 that. I want you to keep in mind when you leave tonight
12 as I told you in the beginning do not talk about this case
13 with anyone, that means among yourselves, with your
14 spouses, with your family members, with your children or
15 anybody. When it's over, it's a different story, but
16 until it's over, don't talk about it with anyone about it
17 whatsoever. And I'll see you back in the morning shortly
18 before 10:30.

19 (WHEREUPON, the jury was excused for the day.)

20 THE COURT: Anything further from the State
21 before we adjourn for the night?

22 MR. JEPERTINGER: No, sir.

23 MR. LAWSON: Nothing, Your Honor.

24 THE COURT: We adjourn until 10:30 in the
25 morning.

1 (WHEREUPON, the proceedings were concluded for
2 the day to be reconvened on November 13, 2009.)

3 THE COURT: You ready?

4 MR. JEPERTINGER: Your Honor, the State would
5 ask the Court to inquire of the jury if anybody's heard
6 anything during the course of the evening break?

7 THE COURT: Mr. Lawson, you ready?

8 MR. LAWSON: Yes, Your Honor.

9 THE COURT: If you would bring the jury out.

10 MR. LAWSON: I would like to thank Your Honor
11 for giving me an opportunity as is normally the case when
12 I was in a hurry to the doctor's office.

13 THE COURT: We can't start without you.

14 (WHEREUPON, the jury came into open court.)

15 THE COURT: Everybody ready to start and
16 conclude? Let me just ask you one other thing just for
17 the record. Of course, I instructed you yesterday that
18 you are not to talk about this case with anybody including
19 among yourselves. I just want to check for the record to
20 see if any of you did speak with anybody or talk to
21 anybody about this case over the evening. If you did,
22 please raise your right hand? All right.

23 (WHEREUPON, none of the jurors' hands were
24 raised.)

25 THE COURT: State ready?

1 MR. JEPERTINGER: State's ready, Your Honor.

2 THE COURT: Call your next witness.

3 MR. JEPERTINGER: State call Lieutenant Bryan
4 Wallace to the stand.

5 THE CLERK: Do you solemnly swear or affirm to
6 tell the truth, the whole truth, and nothing but the truth
7 so help you God?

8 THE WITNESS: I do.

9 WHEREUPON,

10 Bryan Wallace,
11 after first having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. JEPERTINGER:

14 Q Lieutenant Wallace, can you tell the, ladies and
15 gentlemen, jury what you do?

16 A I work with Marion County Sheriff's Office and I'm
17 assign to the Marion County Combine Drug Unit. My duties
18 at the drug unit, I am the lieutenant. I supervise and
19 oversee cases and work drug cases myself to supervise
20 agents under my direct supervision.

21 Q And how long you been doing that sort of work?

22 A I work two years on patrol with sheriff's office.
23 And I work four years in the criminal investigation
24 division. And then I work the last four years I been with
25 the Marion County Combine Drug Unit almost two years in a

1 supervisory capacity.

2 Q And in that time that you spent with the combine drug
3 unit, have you participated in these drug distribution
4 type cases and work them?

5 A Yes, sir, probably several hundred times.

6 Q Several hundred times; is that correct?

7 A Yes, sir.

8 Q All right. And of those several hundred times, have
9 most of them or a lot them, I don't know if you quantify
10 the number where you use audiovisual equipment?

11 A Yes, sir.

12 Q All right. And as kind of a using that audiovisual
13 equipment have you observed those drug transactions on
14 video before?

15 A Yes, sir, we've in the last three years we went to
16 audio and video system. Prior to that, we were mainly
17 using a audio only system. But with the technology, we're
18 able to use video which helps us in the drug cases.

19 Q All right. If you can keep your voice up a little,
20 I'm having trouble hearing today.

21 A I'm sorry.

22 Q The humidity or something has got to me. Have you
23 had an opportunity in those videos that you have viewed to
24 see transactions where these kind of roadway vehicle type
25 stops are conducted?

1 A Yes, yes, sir. During my tenure with the drug unit,
2 as I stated we worked cases where we done drug deals in
3 the middle of the road, in houses, you know, on the street
4 corners or wherever in numerous places, but a lot of times
5 in the road way is where transactions take place.

6 Q On these drug transactions, do the vehicles linger
7 there for a while with the confidential informant or they
8 normally quick transactions?

9 A Those transactions on -- any drug transactions
10 especially in the road way or out in public, those
11 transactions they're very quick just a few seconds and,
12 you know, it's over with.

13 Q All right. Obviously, I think this question
14 Mr. Lawson asked Sergeant Cribb yesterday. You're kind of
15 notorious or notoriety that people in the community may
16 know both Sergeant Cribb and yourself as being narcotics
17 agents; is that correct?

18 A Yes, sir, that's true. You know, I live here in
19 Marion County, I've lived here all my life and people do
20 know us and know the job that I do. And they also certain
21 people become familiarize with our vehicles.

22 Q So it wasn't unusual to have your vehicle driving
23 through some of these areas in the community; is that
24 correct?

25 A No, sir. We occasionally drive through these areas

1 certain areas which are areas that may have higher crime
2 rates or particularly areas of concern where we receive
3 complaints from citizens in the community about drug
4 activity.

5 Q Okay. Now, let me ask you, in terms of setting up
6 these drug transactions like the one we saw yesterday
7 happened on March 14th 2008, what is your policy in not
8 driving from Thomas Supply store and stopping that gold
9 colored Caprice and just arresting both the driver and
10 Tyron Davis immediately? Why didn't you do it on
11 March 14th, when you knew you just made the sell and also
12 had the money that you made copies of?

13 A Really, it's for two reasons. The first reason is
14 for the safety of the confidential informant. If we'd
15 stop right there at that time and stop that vehicle and
16 arrested that guy, he would have known exactly who the
17 informant was which would have jeopardized her safety ---

18 MR. LAWSON: Objection, Your Honor, that's
19 speculation.

20 THE COURT: Sustained.

21 MR. LAWSON: It's also a comment on the
22 defendant's state of mind.

23 BY MR. JEPERTINGER:

24 Q But is your policy -- can you tell us what your
25 policy is in terms of these type of situations?

1 A The reason we do not arrest is for the safety of the
2 informant. And also, if that informant's working with us,
3 they may be working for us for a long period of time. We
4 don't want -- the term we use is burn the informant. We
5 try to use that informant as long as we can to work as
6 many transactions as we can.

7 Q Now, had you worked with this informant previously?

8 A Yes, sir, I have.

9 Q Okay. And each of these instances is basically the
10 same scenario is it not that she searched; is that
11 correct?

12 A Yes, sir.

13 Q All right.

14 A All informants any time we're doing a buy they're
15 searched.

16 Q And in this particular case on March 14th 2008, you
17 were present when Sergeant Cribb searched her?

18 A Yes, I was.

19 Q Did you search her at all?

20 A No, Sergeant Cribb done the search. I was there and
21 witnessed it.

22 Q All right. In the times that you have used her as an
23 informant, have you ever found drugs on her?

24 A In my -- when she work with me during the last three
25 or four years, I have never -- she's never had drugs on

1 her. And prior to her working before 2005 when I went --
2 came to the drug unit, there's never nothing documented
3 that she's been untruthful or has brought drugs to the
4 buy.

5 Q In fact, she's been a confidential informant since
6 1997; isn't that correct?

7 A According to her C.I. number -- that number that's
8 the beginning number is the year that they started. I
9 don't know when in that year she started or how many cases
10 she's done in that year or in that time period, but that's
11 when she was initially signed up as an informant.

12 Q All right. Did you have anything to do with -- let
13 me show you State's Exhibit 9 for identification. Did you
14 do anything with the drugs or was it Sergeant Cribb?

15 A Sergeant Cribb was the officer who took initial
16 custody and was also the officer who transported those
17 drugs to SLED.

18 Q All right.

19 A I was just present when she came back to the vehicle.

20 Q Did you see Sergeant Cribb retrieve the drugs from
21 the cigarette pack?

22 A Yes, sir, I was the driver of the vehicle, so I was
23 able to -- when he got the cigarette pack, I could see
24 when he retrieved the drugs and placed them in the plastic
25 bag.

1 MR. JEPERTINGER: That's all the questions I
2 have for this witness, please answer any questions that
3 Mr. Lawson may have.

4 THE COURT: Cross.

5 MR. LAWSON: May it please the Court.

6 CROSS-EXAMINATION

7 BY MR. LAWSON:

8 Q Lieutenant Wallace, when did you start with the
9 combine drug unit?

10 A January of 2005.

11 Q And when did you start with the sheriff's department?

12 A August of 1999.

13 Q And is your entire law enforcement experience in
14 Marion County with the Marion County Sheriff's Department?

15 A I had a brief period with the Mullins Police
16 Department. And then I was hired with the sheriff's
17 office shortly after graduating from the police academy.

18 Q So you were originally hired by the Mullins Police
19 Department?

20 A Originally, I worked there for a short period of
21 time.

22 Q So this informant has you by a couple years working
23 for the drug unit?

24 A She's actually been there longer than I have, yes,
25 sir.

1 Q I would assume then that cases have been made with
2 the assistance of this informant going all the way back to
3 '97?

4 A Yes, sir, that's my understanding.

5 Q And this event took place on March the 14th of 2008?

6 A Yes, sir.

7 Q About 11 years later; is that correct?

8 A Yes, sir.

9 Q During that 11 years, there had never been a
10 situation where this informant was burned?

11 A Yes, sir. She has -- it's my understanding, I wasn't
12 here, but she has testified in general sessions court
13 before.

14 Q So the need to protect the identity of an informant
15 wouldn't seem to exist in this particular case; wouldn't
16 it?

17 A Yes, sir, it would.

18 Q Now, would it be fair to say that on each and every
19 occasion that she participated with the drug unit, that
20 she would have been searched?

21 A On any informant we're getting ready to conduct a
22 transaction, any informant or informants are searched.

23 Q So assuming since '97, I believe Sergeant Cribb
24 testified that occasionally you do have women agents that
25 conduct searches of a woman informant; is that correct?

1 A If that's available we do. A lot of times we have
2 limited resources at the drug unit.

3 Q So the informant be it male or female -- well, I
4 assume being female that when they come in, they don't
5 know whether you're going to have a female available or
6 not?

7 A That's right. They don't know if a female will be
8 there when we show up at the location where we want to
9 meet, the prearrange meeting location.

10 Q But they do know the process of being searched if
11 they have done it a number of times?

12 A Yes, sir, that is true.

13 Q And they know what to expect in relation to the
14 search; is that correct?

15 A They know our protocol that they will be searched and
16 any items they have will be searched. They also be
17 searched when they return.

18 Q Is it my understanding in this case on March the 14th
19 2008, when she first came she had a box of Newport
20 cigarettes?

21 A Yes, sir, she does smoke.

22 Q And did she have some with her that day?

23 A Yes, sir.

24 Q And that box was searched by Officer Cribb?

25 A Yes, sir.

1 Q Did he give them back to her?

2 A Yes, sir, he completes the -- he done the complete
3 searching of the informant.

4 Q Did he mark that box in any way to identify it when
5 it came back?

6 A No, sir, not that I know of.

7 Q Now, you say I think you said on direct that when you
8 ride around people know who you are. And they know your
9 vehicle; is that correct?

10 A A lot of people, a lot of people.

11 Q And if they see you riding with Officer Cribb, they
12 wouldn't think anything about that, would they generally?

13 A Generally not, no, sir.

14 Q What if there's somebody else in the car that they
15 don't recognize as a member of your unit?

16 A Well, our vehicles -- for instance, the vehicle that
17 I was driving at that time was an unmarked white Explorer.
18 And if any of you know our windows have dark tint on them,
19 so that we're able to have informants or have people that
20 we want -- don't want people in the community to see
21 riding around with us. And those windows on that vehicle
22 they're tinted extremely dark, so I don't know if anybody
23 would have been able to -- I know they wouldn't been able
24 to have seen her in the back of the vehicle.

25 Q And you were not present at the location of the

1 allege drug transaction, were you?

2 A What do you mean as far as present?

3 Q Your actual physical presence on site as a witness to
4 the situation?

5 A No, sir, no way we would have been able to be present
6 there.

7 Q And it is my understanding that you were monitoring
8 the informant?

9 A Yes, sir, the informant we place on her a transmitter
10 and that transmitter sends out audio to what we have in
11 our vehicle as a receiver and we're able to hear what's
12 going on.

13 Q You could not see what was going on?

14 A No, sir, we do not have a live feed with video, that
15 technology is not available to transmit a live feed at
16 such a distance only a short distance not a far away
17 distance.

18 Q So you were monitoring it orally but not visually?

19 A Had audio only.

20 Q Audio?

21 A Yes, sir.

22 MR. LAWSON: I don't have any other questions.

23 THE COURT: Redirect?

24 MR. JEPERTINGER: Yes, sir.

25 REDIRECT EXAMINATION

1 BY MR. JEPERTINGER:

2 Q A couple things, when she testified in court
3 Mr. Lawson was the prosecutor at the time, wasn't he?

4 A I think he has prosecuted some cases with her.

5 Q All right. And Janet Creights, who was your
6 secretary, correct over at the drug unit?

7 A Yes, sir, she's been the secretary there probably
8 nine or ten years.

9 Q What was her availability on Friday afternoons?

10 A She works four and a half days a week. And on Friday
11 afternoon at 12 o'clock, she's like most of us, that's
12 time for her to get off, she's out the door.

13 Q So if this thing happened at 3:00 p.m. she would not
14 have been available to you?

15 A I know for a fact she was not available. She leaves
16 every Friday at 12.

17 Q Obviously, I know the defense brought up the point of
18 Judy Barker with sheriff's department. Did you go down
19 that avenue at all?

20 A No, sir, any time we try to conduct, we try to be
21 discreet as possible. And I don't know if she was
22 available or not, I do not know.

23 Q Okay.

24 MR. JEPERTINGER: Thank you so much, I
25 appreciate it.

1 THE COURT: Anything further, Mr. Lawson?

2 MR. LAWSON: Nothing from the witness, Your
3 Honor.

4 THE COURT: All right. You may step down thank
5 you.

6 (WHEREUPON, the witness leaves the witness
7 stand.)

8 THE COURT: Call your next witness.

9 MR. JEPERTINGER: Can you get Ms. Carmichael,
10 she's downstairs?

11 MR. LAWSON: Your Honor, I need to take up
12 something outside the presence of the jury.

13 THE COURT: All right. Members of the jury, if
14 you would step into your jury room at this time and do not
15 discuss the case. We will take up the matters of law. We
16 will be back with you shortly.

17 (WHEREUPON, the jury retire to the jury room.)

18 THE COURT: Mr. Lawson.

19 MR. LAWSON: May it please the Court, Your
20 Honor, at the very end of redirect examination, my
21 understanding and for what reason I can only assume the
22 Solicitor asked the question if I prosecuted when this
23 informant testified and the answer was, yes. I did not
24 object at the time because I was shocked and taken aback
25 and didn't quite think I heard what I heard until

1 Ms. Sloan advise me that's what was said. I would at this
2 time move for a mistrial, Your Honor, that is indirectly
3 an attempt by the prosecution to bolster the credibility
4 of the informant through the fact that I may have
5 prosecuted with her as a witness. I think that's
6 inappropriate. I think that -- I don't know what could be
7 done to correct that. It will be in the minds of the jury
8 from here on as we go through this case and it's just not
9 an appropriate -- wasn't appropriate question, is not
10 appropriate for the jury to have that even to consider in
11 their deliberations.

12 THE COURT: Solicitor.

13 MR. JEPERTINGER: Your Honor, if you recall, he
14 brought up in cross-examination about her testifying in
15 court before and that was simply, Your Honor, I think
16 something that he brought up in cross-examination. And I
17 think it was fair game in redirect, Your Honor, about her
18 testifying in court before.

19 THE COURT: I'll give them a curative
20 instruction and we'll proceed on with that. I'll overrule
21 rule your the objection. Anything further?

22 MR. LAWSON: Well, Your Honor, I would like to
23 reply. I was asking in relation to the apparent effort by
24 the State to say that the reason they don't arrest is to
25 protect an informant. And in a situation where the

1 informant has been working for over 11 years would just
2 make sense that that informant has at some point testified
3 or been burned for lack or been revealed and that need in
4 a normal situation to protect identity would not exist
5 where you had a long term informant. I was simply asking
6 a question in relation to the questions that were asked on
7 direct not with the -- I could have just as easily brought
8 out the same question had I thought that was appropriate
9 for the jury.

10 THE COURT: All right. I'm going to overrule
11 the objection and give them a curative instruction. Let
12 me get it right, the comment was that Mr. Lawson had
13 prosecuted a case whereby this confidential informant was
14 a witness is that it? That's all about I heard of it.
15 Quite frankly, I didn't hardly catch it, I imagine most of
16 the jury didn't catch it, but if they did, I'll give them
17 a curative instruction.

18 MR. LAWSON: Well, Your Honor, if you're
19 overruling the objection, I'm not sure that a curative
20 instruction would cause more problems.

21 THE COURT: That's your call. No objection was
22 made at the time.

23 MR. LAWSON: I would rather not have a curative
24 instruction if the objection is overruled.

25 THE COURT: Solicitor.

1 MR. JEPERTINGER: That's fine.

2 THE COURT: All right. We'll bring them out and
3 resume. The objection is overruled. Bring them back out.

4 MR. LAWSON: I would like, Your Honor, that
5 there be no further questions along that line.

6 THE COURT: I would agree with that.

7 You understand that, Solicitor?

8 MR. JEPERTINGER: Yes, sir.

9 THE COURT: All right, let's continue.

10 (WHEREUPON, the jury came into open court.)

11 THE COURT: All right. Solicitor, call your
12 next witness.

13 MR. JEPERTINGER: I would call Rosa Carmichael
14 to the stand. Ms. Carmichael, if you come around to be
15 sworn please.

16 THE CLERK: Let me swear you in, Ms. Carmichael.
17 Do you solemnly swear or affirm to tell the truth, the
18 whole truth, and nothing but the truth so help you God?

19 THE WITNESS: I do.

20 THE CLERK: Thank you. You may have a seat in
21 the witness box.

22 WHEREUPON,

23 Rosa Carmichael,
24 after first having been duly sworn, testified as follows:

25 DIRECT EXAMINATION

1 BY MR. JEPERTINGER:

2 Q Okay. Miss Carmichael, would you tell us generally
3 where you live?

4 A I live here in Marion on Dunlap Extension.

5 Q Okay. And how long have you lived in Marion County,
6 ma'am?

7 A Approximately 30 years.

8 Q All right. And are you employed anywhere, ma'am?

9 A No, I'm not.

10 Q You got involved with being a confidential informant?

11 A Yes, sir.

12 Q Is it safe to say that you started back in 1997?

13 A Yes, sir.

14 Q All right. Can you tell the, ladies and gentlemen of
15 the jury, why started doing this type of informant work?

16 A It was a pretty summer day and I was doing laundry
17 and hanging clothes on the line and a little boy was out
18 in the backyard playing. And in order to go in my
19 backyard, you have to come up in my drive way and go
20 around my house to go in the back and I heard somebody
21 talking. So I went back out the door to see what they was
22 doing and it was these guys out there between my sheet
23 give up their dope and their money. And he said to me he
24 said, When I grow up, I'm gone do that, I'm gone have
25 money like that. And that just kind of mess my head up,

1 you know. And I figure that if I didn't do something to
2 get that out of my neighborhood and keep him away from
3 that, that he would end up that way.

4 Q All right. So at that point, did you call law
5 enforcement to say you wanted to get involve?

6 A Yes, I did.

7 Q All right. And back in 1997, when you got started,
8 did you get any payment for doing these type things?

9 A No not in the beginning, no.

10 Q Okay. About how long did you work without payment?

11 A Probably about a year.

12 Q Okay. So from about 1997, '98 you did this for free?

13 A Yeah.

14 Q Okay. And in 1998, you started getting paid for
15 this?

16 A Yes, sir, Heybern.

17 Q Heybern was a officer that worked ---

18 A Yes, sir, Heybern Hendley. He came to me and talk to
19 me about some people that was selling drugs and he told me
20 if he could help him out, that he would, you know, see if
21 he could give me a little something for my trouble.

22 MR. LAWSON: Your Honor, I'm gone object to the
23 continued hearsay.

24 THE COURT: Sustain.

25 MR. JEPERTINGER: Your Honor, we're not offering

1 what Heybern said to her as for the truth of the matter
2 asserted, Your Honor, just her motivation for doing what
3 she did.

4 THE COURT: All right. Then I'll overrule your
5 objection. You can continue briefly.

6 BY MR. JEPERTINGER:

7 Q Go ahead.

8 A He talk with me briefly about helping him -- working
9 with him. He told me that it wasn't a lot, but he could
10 -- it would be considered as a job and that he would pay
11 me accordingly, you know what I am saying.

12 Q And has that continued through the years, ma'am?

13 A Yes, sir.

14 Q Okay. And about how many purchases do you think
15 you've helped make?

16 A I'm not sure, I say maybe about 15 or 20.

17 Q Over the 11 year period. Is that a guess, ma'am?

18 A Yes, it is.

19 Q Now, back on March 14th, 2008, did you have an
20 occasion to meet Sergeant Cribb and Lieutenant Wallace?

21 A Yes, I did.

22 Q Okay. Let me ask you something, did you know Tyron
23 Davis?

24 A Yes, I did.

25 Q How did you know Tyron?

1 A I watched him grow up in Marion.

2 Q I guess the better is question how long have you
3 known him?

4 A Every since he was a little boy.

5 Q All right. And did know his family?

6 A Yes, I did.

7 Q Did you call Tyron Davis that day?

8 A Yes, sir.

9 Q Okay. And what did you call him for, ma'am?

10 A I called him to make a purchase of crack cocaine.

11 Q All right. And did you tell Lieutenant Wallace and
12 Sergeant Cribb that you had called Tyron?

13 A Yes, I did.

14 Q And where did you meet -- if you recall where did you
15 meet them -- meet the officers?

16 A In front of Thomas Supply off of 76.

17 Q Did Officer Cribb search your person?

18 A Yes, he did.

19 Q And did they put audiovisual equipment on you?

20 A Yes, sir.

21 Q And let me ask you this, prior to you getting there,
22 did you have crack cocaine on your person before you meet
23 them?

24 A Oh, no.

25 Q Have you ever smoked crack cocaine?

1 A Oh, no.

2 Q All right. Do you drink?

3 A I use to drink like a fish, I don't drink any more.

4 Q And forgive me, if I'm not getting too personal, but

5 you were a little heavier on this drug video; is that

6 correct?

7 A Oh, yes, sir, I was weighing 200 pounds.

8 Q And you've lost weight?

9 A Yes, sir.

10 Q Since then. Did you know where to meet Tyron?

11 A Well, when I called him to ask him -- yes, sir.

12 Q When you called him -- what were you going to say?

13 A When I called him, I basically asked him where it

14 was.

15 Q And did you tell the officers where to take you?

16 A Yes, sir.

17 Q Okay. Now, they didn't drive you right up to the

18 location, did they?

19 A No, sir.

20 Q Okay. What did you do, ma'am?

21 A After I met them, they drop me off on the corner of

22 Mill and Read Street -- Mill and Huggins Street because

23 Mill runs into Huggins and Mill and Read run into Huggins

24 from both directions, so I got out on the corner and I

25 walked.

1 Q Now, we had an opportunity and I believe you also
2 seen the video on State's Exhibit 2; is that correct?

3 A Yes, sir.

4 Q Okay. When the car pulled up, what did you observe?
5 How many people were in the car?

6 A They were two people in the car.

7 Q Okay. Who was driving do you know?

8 A It was a female driver and I didn't know her
9 personally?

10 Q And did you know obviously who was the passenger in
11 the vehicle?

12 A Tyron was the passenger?

13 Q All right. And at that point, what conversation did
14 you have with Tyron?

15 A I think it started off, he ask me where I called him
16 from. And I told him -- I told him I was sitting in my
17 front yard when I called him. And I told him I said do me
18 a favor give me a big fat 40. And he ask for my cigarette
19 box.

20 Q What does that mean a big fat 40?

21 A Well, I mean, I don't know it was just something I
22 would hear people say, so I just picked it up.

23 Q Okay. What did you think it mean by that?

24 A Getting more than the money was worth.

25 Q Of cocaine base?

1 A Yes, crack.

2 Q At that point, when you asked him to do you a favor,
3 what did he ask you, ma'am?

4 A He ask for my cigarettes and I asked him I said, You
5 want my cigarette box? He said, yes. So I pass my
6 cigarette box into the window and he put it in a cigarette
7 box and gave it back to me.

8 Q Okay. And did the woman ever touch the cigarette box
9 one way or the other?

10 A No, sir, she didn't.

11 Q And at that point, they drove off; correct?

12 A Uh-huh.

13 Q And let me ask you on the video, there was a guy that
14 was on a bicycle that began to talk to you almost from the
15 time that vehicle pulled off. Do you remember that
16 person?

17 A Yes, I do.

18 Q Who was that?

19 A Derrick Foxworth.

20 Q Now, let me ask you, did Derrick Foxworth pass you
21 any drugs?

22 A No, sir, he didn't.

23 Q Okay. Did you reach over and ask him to stick
24 anything in a cigarette box?

25 A No, I didn't.

1 Q As you were walking down the street, there were
2 several people that seem to have call out to you?

3 A Yes, sir.

4 Q Would any of them throw any drugs to you that you
5 stoop down and picked up stuck it in a cigarette box?

6 A No, sir.

7 Q It seems to me that -- did you know those people that
8 were calling out to you?

9 A Yes, I did.

10 Q Then there seems to be a vehicle that pulled up to
11 you with at least two individuals in the vehicle that look
12 like they're eating chicken?

13 A Yes, sir.

14 Q Okay. You seem to know those individuals?

15 A I knew the driver, I didn't know the passenger.

16 Q Okay. And the driver was?

17 A Willie Crawford.

18 Q Okay. Are you kin to Willie at all?

19 A Yes, sir.

20 Q And did Willie -- did he ever roll down the window
21 all the way?

22 A No, he didn't.

23 Q Did you ever hand him a cigarette box?

24 A No, I didn't.

25 Q Did he ever hand you a cigarette box?

- 1 A No, he didn't.
- 2 Q Did he give you anything?
- 3 A No, he didn't.
- 4 Q All right. Then you kept on walking?
- 5 A Yes, sir.
- 6 Q Is that correct?
- 7 A Yes, sir.
- 8 Q It seems that another individual came out on a
9 bicycle and asked if you were Ms. Dorothy?
- 10 A Yes.
- 11 Q Did you know that individual at all?
- 12 A No, I didn't know who that was.
- 13 Q Did that person hand you a cigarette box?
- 14 A No, sir.
- 15 Q Did that person give you anything?
- 16 A No, sir.
- 17 Q Who's the only person that gave you anything that
18 day?
- 19 A Tyron Davis.
- 20 Q And was it -- did you see him put something in the
21 cigarette box that you had hand to him?
- 22 A Yes, I did.
- 23 Q Ma'am, you walked all the way back to Thomas Supply
24 store; is that correct?
- 25 A Yes, I did.

1 Q What did you do with that cigarette box, ma'am, once
2 you got back to Thomas Supply store?

3 A I got in the backseat of the car, I gave it to
4 Officer Cribb.

5 Q And did he ever give you the cigarette box back?

6 A Oh, no.

7 Q And did you want your cigarettes back?

8 A No, they were wet.

9 Q What do you mean they were wet?

10 A That stuff kind of melted on the bottom of my
11 cigarettes and I didn't want them back.

12 Q All right. So did you tell Cribb I don't want the
13 cigarette box back?

14 A Yeah.

15 Q And at that point, ma'am, did you ever see the
16 cigarette box again?

17 A No, sir, I didn't.

18 Q Okay. And whatever came out of that cigarette box
19 other than the cigarettes whatever Tyron stuck in there,
20 Officer Cribb had at that point?

21 A Yes, sir.

22 MR. JEPERTINGER: Please answer any questions
23 the defense may have for you.

24 MR. LAWSON: May it please the Court.

25 CROSS-EXAMINATION

1 BY MR. LAWSON:

2 Q Okay. Ms. Carmichael, it's my understanding you have
3 been participated since 1997?

4 A Yes, sir.

5 Q In this activity?

6 A Yes, sir.

7 Q Have you brought marijuana?

8 A No, sir.

9 Q Have you ever brought marijuana?

10 A Yes, sir.

11 Q And you smoke marijuana?

12 A I think I was probably about 16 or 17 and it didn't
13 agree with me and I didn't buy any more.

14 Q Never purchase cocaine?

15 A No more than for the officers.

16 Q Okay. Never brought any on your own?

17 A No, sir.

18 Q Never smoked it on your own?

19 A No, sir.

20 Q But yet cocaine dealers were willing to sell to you
21 just out the blue; is that correct?

22 A Yes, they would.

23 Q But they would have no reason to think that you smoke
24 cocaine or smoke crack?

25 A I don't think they really cared.

1 Q And Willie Crawford was one of the people that you
2 saw that day?

3 A Yes, he was.

4 Q And you did buy from Willie Crawford, did you not?

5 A Yes, I did.

6 Q Now, if Willie Crawford had saw you getting in or out
7 of the policeman car, would that have been something that
8 he would have been interested in, do you think?

9 A Yes, sir.

10 Q By the way, was this in Marion or Mullins?

11 A Marion.

12 Q Now, you were paid if I'm not mistaken \$60 on this
13 particular day; is that correct?

14 A Yes, sir.

15 Q And that was for basically about 38 minutes of work;
16 is that correct?

17 A Probably.

18 Q Okay. And did I understand your testimony on direct
19 that since 1997, you've made 15 or 20 cases?

20 A I am guessing.

21 Q Okay. That would be not too many more than one a
22 year?

23 A It might have been more than one a year.

24 Q Do you have any idea?

25 A I think in '97, when I first started I made seven

1 buys. And after that, I kind of lost track because my
2 health wasn't good and I was basically staying in the
3 house and out of the streets.

4 Q I understand you were fighting an infection fairly
5 recently; is that correct?

6 A It was a little more than an infection, but, yes, I
7 have been ill.

8 Q Gangrene?

9 A Yes, sir.

10 Q And you were in the hospital?

11 A Yes, sir, from March to June.

12 Q That was in Florence or in Marion?

13 A I went to the hospital in Marion the 30th of March.
14 I went into long-term care the 27th of April. May the
15 fourth, I went in Carolina and had a second surgery and I
16 didn't come back home until the 16th of June.

17 Q That's Carolinas Hospital in Florence?

18 A Yes, sir.

19 Q Did you get in any trouble while you were in the
20 hospital?

21 A No, sir, I didn't, no more than my illness.

22 Q Now, is it fair to say that you have talked with
23 Mr. Jepertinger, the prosecutor, in preparation for your
24 testimony today?

25 A Yes, sir.

1 Q And you talk with Officer Wallace or with Officer
2 Cribb?

3 A Yes, sir.

4 Q You watched the video; is that correct?

5 A Yes, sir.

6 Q And that was all done fairly recently, was it not?

7 A Yes, sir.

8 Q When was that, do you know?

9 A Yesterday.

10 Q Yesterday?

11 A Again this morning.

12 Q Now, would it be fair to say that watching that video
13 refreshed your memory as to what took place?

14 A Somewhat.

15 Q So I would assume that something that happened almost
16 a year and a half ago, plus with what you been through
17 physically, would have been less than clear in your mind?

18 A Somewhat.

19 Q When you went to meet with the officers on that day,
20 did you expect to be searched?

21 A Yes, sir.

22 Q You knew you would be searched?

23 A Yes, sir.

24 Q You been searched in the past?

25 A Yes, sir.

- 1 Q You knew what they did in relation to searches?
- 2 A Yes, sir.
- 3 Q Had you been searched at times by a woman?
- 4 A Yes, sir.
- 5 Q You have been doing this for some time in March of
- 6 2008 some 11 years. Did you know that on Friday afternoon
- 7 the secretary that -- and I assume was the secretary the
- 8 one that would search you on occasions when a female would
- 9 search you?
- 10 A If I was at the SLED office, yes.
- 11 Q Okay. That's the drug unit?
- 12 A Yes, sir.
- 13 Q Huh?
- 14 A Yes, sir.
- 15 Q Okay. And if you weren't at the drug unit's office,
- 16 you usually weren't searched by a female; is that correct?
- 17 A That's right.
- 18 Q Okay. So when you met them outside of the unit and
- 19 outside on a Friday afternoon, you knew that it wouldn't
- 20 be a female searching you?
- 21 A Yes, sir.
- 22 Q Now, were there any other years during that process
- 23 that you had seven buys?
- 24 A Sir?
- 25 Q You had said in '97 that you made probably seven

1 deals in that year and that you slowed down after that.
2 Were there any years where you made seven transactions in
3 a year?

4 A No, sir.

5 Q Now, I believe on direct you testified you were not
6 employed at this time?

7 A No, sir.

8 Q In '97 when you started this, were you employed at
9 that time?

10 A Yes, I was.

11 Q Where did you work then?

12 A If I'm not mistaken, I was cooking at Williams
13 Barbeque.

14 Q How long did you work there?

15 A I worked in Marion for about a year and then I went
16 to Nichols and worked.

17 Q How long total did you work at that job?

18 A I think two and a half three years.

19 Q When this took place in March of 2008, were you
20 employed at that time?

21 A No, sir.

22 MR. LAWSON: I don't have any other questions?

23 THE COURT: Redirect?

24 REDIRECT EXAMINATION

25 BY MR. JEPERTINGER:

1 Q You were paid \$60 for this transaction; correct?

2 A Yes, sir.

3 Q That's \$60 now covers going out to purchasing the
4 drugs; correct?

5 A Yes, sir.

6 Q But did you get paid for coming to court yesterday?

7 A No, sir.

8 Q Did you get paid for coming to court today and
9 testifying?

10 A No, sir.

11 Q In terms of Willie Crawford, this was not the same
12 date with -- that you purchased from Willie Crawford; is
13 that correct?

14 A That's right.

15 Q I believe you're kin to Willie Crawford, aren't you?

16 A Yes, sir.

17 Q All right. And even though you knew that Ms. Janet
18 didn't work on Friday afternoons, you didn't know if any
19 other female police officer would be out there on Friday
20 afternoon; is that correct?

21 A That's correct.

22 MR. JEPERTINGER: Thank you, that's all I have.

23 THE COURT: Recross?

24 MR. LAWSON: I don't have anything else.

25 THE COURT: You may step down.

1 (WHEREUPON, the witness leaves the witness
2 stand.)

3 THE COURT: Call your next witness.

4 MR. JEPERTINGER: We call Beth Hoover.

5 THE COURT: Why don't we take a 20 minute break.
6 We will take a 20 minute break. Do not discuss the case
7 again.

8 (WHEREUPON, the jury retire to the jury room.)

9 (WHEREUPON, a break was taken.)

10 THE COURT: State ready to proceed?

11 MR. JEPERTINGER: We ready to proceed, Your
12 Honor.

13 THE COURT: What about you, Mr. Lawson?

14 MR. LAWSON: The defense is ready.

15 THE COURT: Call your next witness.

16 MR. JEPERTINGER: Please the Court, the State
17 would call Beth Hoover to the stand.

18 THE CLERK: Do you solemnly swear or affirm to
19 tell the truth, the whole truth, and nothing but the truth
20 so help you God?

21 THE WITNESS: I do.

22 THE CLERK: Please be seated.

23 WHEREUPON,

24 Beth Hoover,

25 after first having been duly sworn, testified as follows:

DIRECT EXAMINATION

1 BY MR. JEPERTINGER:

2 Q Okay. Ms. Hoover, for whom are you employed?

3 A I'm currently employed with the Alabama Department of
4 Forensic Sciences.

5 Q Okay. And what are your responsibilities at the
6 Alabama Department of Forensic Sciences?

7 A I am certified as a chemical analyst. What I do is I
8 perform testing analysis for controlled-dangerous
9 substances that come in as evidence.

10 Q And where were you formally employed?

11 A I was formally employed for the South Carolina Law
12 Enforcement Division also known as SLED.

13 Q And how long did you work for SLED?

14 A I worked there for just under two years.

15 Q And currently with the Alabama Department, how long
16 did you work for them?

17 A I work with them for over one year.

18 Q And your responsibilities at SLED were they the same
19 as they are for the Alabama Department?

20 A Yes, I have those same responsibilities.

21 Q Okay. Now, what specialize training have you had to
22 hold that job?

23 A Beginning with my education, I graduated summa
24 cum-laude from Columbia college with a bachelor of science
25

1 in biology and chemistry. I am presently finishing my
2 masters from the University of the South Carolina in
3 criminology and criminal justice. When I was hired on by
4 SLED, I did a training at the Academy in legal and law
5 matters. I also completed a -- I believe, it was about a
6 eight-month training on a different classification of
7 drugs and how to test for them. I went through rigorous
8 testing to make sure that I understood what different
9 classifications were and confirmation test to show that I
10 knew how to do them.

11 Q Have you testified in court before?

12 A Yes, I have.

13 Q Have you ever testified in Marion before?

14 A Yes, I have.

15 Q Would, I guess, Tuesday of this week be the most
16 recent time?

17 A Correct.

18 Q And have you ever been qualified as an expert before?

19 A Yes, I have.

20 Q In what fields have you been qualified as an expert?

21 A In drug chemistry.

22 Q Okay.

23 MR. JEPERTINGER: At this time, Your Honor, I
24 would move to have Ms. Hoover qualified as expert in the
25 area of drug chemistry.

1 THE COURT: Any objection?

2 MR. LAWSON: None, Your Honor.

3 THE COURT: Ms. Hoover is hereby certified as a
4 expert still in drug chemistry.

5 BY MR. JEPERTINGER:

6 Q Ms. Hoover, did you have occasion -- I'm going to
7 show you State's Exhibit 9. Did you have an occasion to
8 receive this pack?

9 A Yes, I did.

10 Q How can you tell, ladies and gentlemen of the jury,
11 how do you know you received that particular package?

12 A The package that I would have received was the inside
13 package here. When I request this case from downstairs, I
14 get it. I put my initials on the date that I received it
15 or the day that I was going to work the analysis on this.
16 So my initials, the date that I received it and that this
17 package was intact when I received it is on there.
18 Therefore, I know that this was a case that I had worked.

19 Q All right. And in terms of that package, you
20 requested analysis of that package on which date, ma'am?
21 Let me show you State's Exhibit 8, which is currently in
22 evidence?

23 A When this evidence came into SLED on 4-10 of '08,
24 there was a request for analysis to be done. On 5-7 of
25 '08, about a little less than a month later, I requested

1 for that evidence to be put into my custody to work that
2 case.

3 Q My understanding that Selena Kinard checked in the
4 evidence; is that correct?

5 A Correct.

6 Q And I believe you sent Nicki Perry on the May 7th to
7 retrieve a parcel of drugs to be analyze; is that correct?

8 A Yes, when I request cases, I usually do it at 10 to
9 20 cases at a time. I give them a list, I literally stand
10 there while she retrieves them and she puts them into my
11 custody.

12 Q All right. And is that what happened with this
13 particular case?

14 A Yes.

15 Q All right. Now, did you perform an analysis on the
16 substance or substances that are found in that packet?

17 A Yes, I did.

18 Q Can you tell the, ladies and gentlemen of the jury,
19 what test you may have performed presumptive and
20 confirmatory please and explain the difference between the
21 two?

22 A Sure. Whenever we get evidence, we write down the
23 description of what the evidence is. We take it out of
24 the packaging and we do our initial weight. At that
25 point, we do a presumptive test. In this case, it's a

1 color test, just a little chemical test to any tiny piece
2 of substance and figure out kind of a classification. So
3 if it turns a particular color, it's an indication of what
4 classification of drug it could be, that gives us an idea
5 of or gives me an idea of which type of analysis to do on
6 this. In this case, I did an infrared spectroscopy or
7 I.R. conformity analysis on this evidence.

8 Q And when you conducted that confirmatory or both
9 presumptive test excuse me -- and the confirmatory test,
10 what within a reasonable degree of drug chemistry
11 certainty, what were your conclusions in terms of that
12 substance?

13 A My conclusions for this case is that evidence was
14 cocaine base also known as crack.

15 Q Okay. And the weight that you found on that, ma'am?

16 A 0.38 grams.

17 Q Okay.

18 MR. JEPERTINGER: Now, Your Honor, at this time,
19 I would move State's Exhibit 9 into evidence?

20 THE COURT: Any objection?

21 MR. LAWSON: No, Your Honor.

22 THE COURT: State's Number 9 into evidence.

23 (WHEREUPON, State's Exhibit No. 9 was admitted
24 into evidence.)

25 BY MR. JEPERTINGER:

1 Q In terms of the process of making crack cocaine,
2 ma'am, is crack cocaine -- can it ever be in a state where
3 it is wet?

4 A Yes, it can.

5 Q Okay. Can you give a scenario of in terms of you
6 processing the cocaine to crack how that happens?

7 A When it starts out, it's actually not considered
8 crack, it's cocaine which is basically a salt form of
9 this. And what they try to make into crack to make it a
10 easier smokeable form, which gives it a quicker high for
11 the person. So what they have to do is they add water,
12 sometimes a dilutant, which tends to be inositol. It can
13 be benzocaine, anything to kind of bulk up the substance.
14 And then they add baking soda and that turns it into a
15 base which makes the temperature less for a smoking
16 product. So at that point, if they do not dry the
17 substance all the way, it will still have water in that.

18 Q Now, if the allege offense happened on March 14th and
19 you didn't analyze it until May the 7th of 2008, in your
20 expert opinion would that substance had time to dry?

21 A It could have. It depend on the temperature that it
22 was stored at before we got it, how long had it been
23 sitting out in the air. There's a lot of different
24 variations variances on it, drying speed of it.

25 Q If the substance had been wet or when you tested it,

1 you would have made notations of that on your report; is
2 that correct?

3 A Yes, I would have.

4 Q What you tested was dry; correct?

5 A Let me refer to my note one minute, please?

6 Q Sure.

7 A I just stated that a plastic bag containing rock
8 substance which means that it was a dry substance at the
9 time it came in.

10 Q Okay. It came in that way you tested on May 7th;
11 correct?

12 A I tested it on May 7th, it came in on ---

13 Q April the 10th?

14 A Correct.

15 Q Okay.

16 MR. JEPERTINGER: All right. Thank you so much,
17 please answer any questions that the defense attorney may
18 have.

19 THE COURT: Cross?

20 CROSS-EXAMINATION

21 BY MR. LAWSON:

22 Q Okay. Is it Agent Hoover, Scientist Hoover or what?

23 A Forensic scientist.

24 Q Scientist Hoover. The State's Exhibit 9, did not
25 come to you in this outside packaging; is that correct?

1 A Correct.

2 Q When you got it, how would you have received it?

3 A I would have received just the inside package. It is
4 at this point folded in half. But I would have just
5 receive the evidence inside the package and I would have
6 checked for any sort of tearing or manipulation of the
7 packaging beforehand?

8 Q All right. So what I'm understanding is that the
9 package before you would have tested it, you would have
10 insured that the package had not been opened previously by
11 anyone?

12 A Correct.

13 Q If it had been opened, you would have not have tested
14 it?

15 A That is correct.

16 Q Okay. So this is actually the best pack when they
17 talk about the best pack, the inside pack; is that
18 correct?

19 A Correct.

20 Q And that would be normally prepared by the officer
21 making the arrest or making the case at the scene; is that
22 also your understanding?

23 A Yes.

24 Q So when this is brought to SLED, it's sealed?

25 A Yes.

1 Q And those seals are waterproof, dust resistant and
2 everything like that; is that correct?

3 A Yes, they are.

4 Q So the first person to have submitted this substance
5 to air after it was received, would have been you?

6 A Correct.

7 Q Now, the -- it appears that there's a small bag on
8 the inside, is that part of the best pack?

9 A No, the best kit itself is just this plastic bag.
10 There are two plastic bags inside of that. The only one
11 that would have come in the best kit was this little one
12 here, which was where the evidence was. I repackaged it
13 and I repackaged the evidence into the ziplock bag.

14 Q So the little ziplock bag with the red marking at the
15 top is the bag that you placed the substance in after you
16 tested it?

17 A Yes.

18 Q And apparently, this is also a bag and that would
19 have been in the best kit when you got it?

20 A Yes, correct.

21 Q And you don't know where that came from?

22 A No, I do not.

23 Q Was that little bag sealed when you got it?

24 A No, it was not.

25 Q Do you -- does it appear to be initials on that bag?

1 A Yes, those initials are mine whenever we get evidence
2 in. And actually this bag may have been sealed, I would
3 have to open this up to see the seal on there. I just put
4 in my notes if it was a plastic bag, paper bag that sort
5 of thing.

6 Q Okay. So the markings even on that bag was yours?

7 A Correct.

8 Q And I think there's markings on the little bag with
9 the red strip across the top as well, that would be your
10 writing as well?

11 A Correct to make sure that all evidence gets into the
12 same place.

13 Q So the only writing that was on this when you
14 received it would have been the writing that's on the
15 outside of the best kit; is that correct?

16 A The writing in black that I believe Aurelius Cribb
17 had written on there was the only writing on the outside
18 of the packaging. When I received it, I went ahead and
19 took the best kit number that was on my paperwork and
20 applied the L number, the lab number that SLED assign to
21 this case on the outside, so I had the best kit number and
22 the lab number paired up at this time. And at that point,
23 before I opened up the case or this best kit, I also put
24 that the seal was intact to show that I had looked at the
25 evidence for any tampering with the date that I had done

1 that in my initials, so those were added after I had put
2 that evidence into my custody.

3 Q And based on your review of your notes, the
4 indication is when you open these bags that the substance
5 was a rock-like substance?

6 A Correct.

7 Q Which would indicate that it was not wet at the time?

8 A Doesn't mean there wasn't moisture in it, but, yes,
9 to me. And this is just an observation by my eyes and not
10 by any other sort of chemical test at that point that my
11 description of it is a rock substance?

12 Q Okay. So they're not testing it for dampness or
13 anything else at that point?

14 A Correct.

15 Q And the lab number different from the best pack
16 number; correct?

17 A Correct.

18 Q And the lab number is assign by SLED?

19 A Right.

20 Q The best pack is the number come preprinted on them?

21 A Correct. And they already have those at the
22 agencies, we have supplied them with those best kits.

23 Q So that would have just been the next best pack in
24 order. You didn't receive any cigarettes or cigarette
25 packs in this case, cartons of cigarettes?

1 A They would have been noted in my notes, therefore,
2 no, I had not.

3 Q You did not see any. Did I understand on direct that
4 you said there were presumptive test and what's the other
5 type test?

6 A Confirmatory.

7 Q And what is the presumptive test the things that you
8 use for that are they prepackaged?

9 A It is chemicals that we put together, we make
10 ourselves as analyst and they are tested on a regular
11 bases to make sure that they are still good chemicals that
12 do the test that we ask them to do.

13 Q And you do those test first?

14 A Yes.

15 Q And then when you complete those test, you move on to
16 the other test?

17 A Correct.

18 Q Do you come up with a chemical formula for the
19 substance you're testing?

20 A No.

21 Q So you don't test it, you're testing it chemically,
22 but you don't come up with the formula that you're
23 testing; is that correct?

24 A In a around about way, you do come up with a formula.
25 We don't necessarily write down that formula, we don't

1 need to know the formula. What we do is on our
2 confirmatory test, we come up with spectrum or depending
3 on which confirmatory test. In this particular case, I
4 did an I.R., which comes up with a spectrum and we compare
5 that spectrum of basically a fingerprint of that drug to a
6 known standard and we compare those two spectrums for
7 confirmation of what it is.

8 Q So as I understand it, it comes out in a draft form;
9 is that correct?

10 A Correct.

11 Q And so what you do is basically overlay the substance
12 that you're testing with the known situated, what do you
13 call ---

14 A Standard.

15 Q Grafts that lead to say cocaine or crack cocaine or
16 morphine or whatever the drug may be?

17 A That is one of the forms of analysis that we look at.

18 Q Is that the form that you used in this case?

19 A Yes, it is.

20 Q And so the -- instead of coming with up an actual
21 chemical formula, you come up with a graft that's
22 indicating to you that the substance has this chemical
23 fingerprint?

24 A Yes.

25 Q And then you match that to your known sample.

1 A Correct.

2 Q Now, one -- when you were with SLED, you worked in
3 the Columbia office; is that correct?

4 A That is the only state office there was so, yes.

5 Q All right. Well, SLED has offices around the state,
6 but they are investigative offices; is that correct?

7 A That is correct. The laboratory is just in Columbia.

8 Q So the only location of the lab is in Columbia and
9 anything that's tested by SLED is tested there in
10 Columbia?

11 A Correct.

12 Q So it be fair to say on March the 14th of 2008, you
13 were not in the Marion Mullins -- Marion County area nor
14 did you have anything to do with this case until May the
15 8th of 2008?

16 A That is correct.

17 Q May the 7th?

18 A Right, May the 7th.

19 Q And up until today when you testified after you
20 completed your analysis, I assume that you finished that
21 on May the 7th also?

22 A Yes, the analysis would have been completed on May --
23 let me look here real quick. May the 7th is when I
24 receive it -- on May the 13th is when I actually did my
25 analysis on it. And then on May 14th is when I finished

1 my analysis and wrote the report.

2 Q Where was it between May 7th and May the 13th where
3 was the substance?

4 A It was down in evidence in a locked secure location.

5 Q Did you -- at what point did you actually open the
6 bag and check or check the bag to make sure it had not
7 been tampered with in anyway?

8 A It was on May the 13th.

9 Q So you would not have opened the bag until May
10 the 13th?

11 A Correct.

12 Q And then from May the 14 until today when you're
13 testifying, did you have any other occasion to work on
14 this case?

15 A No, it was complete at that time.

16 Q And the only thing you done in this case is the
17 chemical analysis; is that correct?

18 A That is correct.

19 MR. LAWSON: I don't have any other questions.

20 THE COURT: Redirect examination?

21 MR. JEPERTINGER: No, sir.

22 THE COURT: You may step down. Thank you.

23 (WHEREUPON, the witness leaves the witness
24 stand.)

25 MR. JEPERTINGER: That would be State's case,

1 Your Honor.

2 THE COURT: The State rest. Members of the
3 jury, we have to take up certain matters of law. If you
4 would just step into your jury room, do not discuss the
5 case. We will be back with you in just a moment.

6 (WHEREUPON, the jury retire to the jury room.)

7 THE COURT: Motions from the defense?

8 MR. LAWSON: May it please the Court, the
9 defense would move for a directed verdict in relation to
10 both charges. Basis that there's insufficient evidence
11 been presented on which the jury could reasonably differ
12 or specifically as to Count 2. Your Honor, the only
13 testimony that I recall in relation to proximity was
14 testimony from Sergeant Cribb in which he said that it was
15 approximately a half mile, that was the language that he
16 used when questioned how far is it from this location to
17 the alternative school. His answer was approximately one
18 half mile. I don't believe that that testimony rises to
19 the level which would allow the jury to find the defendant
20 guilty of distribution within proximity of a school or
21 park. And would specifically ask for a directed verdict
22 on the charge of proximity.

23 Your Honor, also I would renew my motion for
24 mistrial on the basis of the comment that were elicited
25 from Lieutenant Wallace in relation to my having

1 prosecuted previously with the use of this informant.

2 THE COURT: Dealing with that in particular,
3 I'll be glad to give them a curative instruction if you
4 would like regarding that particular comment. If you like
5 me to instruct them to disregard it, be glad to do that.

6 MR. LAWSON: I understand, Your Honor.

7 THE COURT: All right. So you're withdrawing
8 your motion or do you want me to instruct them to
9 disregard that comment?

10 MR. LAWSON: I'm not withdrawing the motion,
11 Your Honor, but I'm not requesting a curative instruction.

12 THE COURT: You do not want a curative
13 instruction; is that correct?

14 MR. LAWSON: No.

15 THE COURT: All right. Solicitor, would you
16 like to respond?

17 MR. JEPERTINGER: As to that issue, no. As to
18 the other issues, I believe, Your Honor, I don't remember
19 Aurelius really saying approximately. And I'm being
20 judgment day honest, Your Honor, I don't remember him
21 using that term. I think that there was an objection to
22 me leading asking him if it was within a half mile, I
23 think he said yes. He objected said I was leading and
24 that there was another question after that I cannot tell
25 you. I don't think he use the word approximately.

1 THE COURT: What if he did use the word
2 approximately?

3 MR. JEPERTINGER: Well, approximately doesn't
4 mean that it's longer than half a mile it could be shorter
5 than a half mile.

6 THE COURT: Question for the jury to decide.

7 MR. JEPERTINGER: Yes, sir. The other thing
8 everything else goes to the weight of the evidence, Your
9 Honor.

10 THE COURT: Motion denied. Have you all had a
11 chance to look over the charges? Mr. Lawson, you plan on
12 putting up a defense any witness, any evidence of any
13 kind?

14 MR. LAWSON: No, Your Honor.

15 THE COURT: You resting at this time also? You
16 rest with the defense's case at this time also.

17 MR. LAWSON: Yes, Your Honor.

18 THE COURT: All right. Thank you. Be glad to
19 hear.

20 MR. JEPERTINGER: The State doesn't have any
21 objection to any of this charge other than you adding the
22 hand of one being the hand of all. There was some
23 testimony, I guess, solicited during the
24 cross-examination. I believe that Sergeant Cribb if I'm
25 not mistaken about the female in the vehicle possibly

1 handing the drugs to the driver -- passenger to the driver
2 back to Rosa Carmichael. And I think there are no
3 accommodation sells or accommodation type deals for
4 schedule-two drugs which cocaine is, Your Honor, under the
5 statute.

6 THE COURT: So are you requesting the hand of
7 one?

8 MR. JEPERTINGER: Yes, sir, I am.

9 THE COURT: All right. I'll put it in there.
10 How about the verdict form any objections to the verdict
11 form?

12 MR. JEPERTINGER: No, sir, not at all.

13 THE COURT: Mr. Lawson, any objection to the
14 charges?

15 MR. LAWSON: Can I have just a moment, Your
16 Honor?

17 THE COURT: Sure.

18 (WHEREUPON, a pause in the proceedings.)

19 MR. LAWSON: It's fine, Your Honor, I was just
20 looking that I was going to request mere presence. I
21 notice it's in there.

22 THE COURT: Everything is fine with the charges?

23 MR. LAWSON: Yes, Your Honor.

24 THE COURT: All right. How about the verdict
25 form?

1 MR. LAWSON: I don't object to the content. I
2 object to Count 2 still being in over my objection, Your
3 Honor. And I for the sake of precaution, I'll renew all
4 my motions made in the State's case at the end of defense
5 case as well, Your Honor.

6 THE COURT: And I'm going to overrule all of
7 those motions.

8 Are you all ready to proceed with the closing
9 arguments?

10 MR. JEPERTINGER: Yes, sir.

11 THE COURT: And the State will go first followed
12 by Mr. Lawson; is that correct?

13 MR. JEPERTINGER: Yes, sir.

14 THE COURT: All right.

15 MR. LAWSON: Can we have just a short break?

16 THE COURT: Sure. How long do you need?

17 MR. LAWSON: Five or ten minutes.

18 THE COURT: We'll be at ease for five minutes.

19 (WHEREUPON, a break was taken.)

20 THE COURT: If you would bring the jury out.

21 (WHEREUPON, the jury came into open court.)

22 THE COURT: Members of the jury, the lawyers are
23 getting ready for their closing statements. In that
24 regard, you must not consider these statements as
25 evidence. Rather, the attorneys are simply articulating

1 their positions regarding their respective cases. State
2 I'll be glad to hear from you regarding closing.

3 MR. LAWSON: May it please the Court, Your
4 Honor, for matters of the record, the defense would rest
5 at this time and renew all motions previously made.

6 THE COURT: Thank you. Motions denied.

7 MR. JEPERTINGER: Please the Court, Mr. Lawson.
8 First of all, ladies and gentlemen, I want to thank you
9 for your participation in this matter. I know you didn't
10 have much of a choice because we sat you, which means that
11 of all the people out there you look fairest to both
12 sides. I don't know if that's good or bad, but that's
13 just the way it is at this stage of the game.

14 This is the last time I will have a chance to
15 address you. Of course, after I get done with my
16 comments, Mr. Lawson will get up and give his take on what
17 he considers very important.

18 You know, this case really hinges on one thing,
19 one thing along. I think everybody thinks this is crack
20 cocaine, no question about it. Question is whether you're
21 going to believe Rosa Carmichael or not, that's where it
22 gets down to where the rubber meets the road, no more, no
23 less. Here is a woman back in 1997 that basically just
24 got tired of what was going on in her community to the
25 point where a little boy said, I just want to grow up and

1 be like those fellows. She had enough, understandably, so
2 she started doing this work for law enforcement.
3 Uncategorically, without people like Rosa Carmichael, law
4 enforcement couldn't function.

5 Now, you may not like a person that tells on
6 someone else, but you took an oath to God that you would
7 render a verdict that's speaks the truth. And the
8 question you have to ask yourself and the only question
9 you have to ask yourself is did Tyron Davis distribute,
10 give, sell, a quantity of crack cocaine. I'll give my
11 closing. Did Tyron Davis give a quantity of crack
12 cocaine, sell a quantity of crack to Rosa Carmichael.

13 At the beginning during opening statement, I
14 asked you to consider the evidence in the case.
15 Obviously, we have a video. The video wasn't done by
16 Hollywood. However, on the video which you will have
17 access to if you want to watch it again and I'm sorry it
18 moves and jumbles and cause some of you to get sick.
19 However, that is the quality of the video that we have in
20 this case. But if you watch it again, there were certain
21 things stated when that car pulled up, you will hear Tyron
22 Davis ask her did you call from St. John's church. And
23 her reply, No, I called from home from my front yard. And
24 then you hear her say do me a favor. Now, if she took
25 that cigarette pack and was going to loan him a cigarette

1 pack, she would have not say do me a favor. Then she says
2 unfortunately you can' hear this, give me a fat one.

3 MR. LAWSON: Objection, Your Honor. If he says
4 something that is not on the video, it is inappropriate.

5 MR. JEPERTINGER: She testified to it, Your
6 Honor.

7 THE COURT: Stick to the evidence and I have
8 instructed the jury that the closing arguments are not
9 evidence.

10 MR. JEPERTINGER: Rosa Carmichael said give me a
11 fat 40, she testified to that from this stand. When he
12 hands the cigarette pack back to her, also you hear this
13 from her, Oh, you want to put it in the cigarette box.
14 Who's going to put it in a cigarette box? If he was just
15 grabbing the cigarette box, don't you think you would have
16 heard what are you talking about, I'm just borrowing a
17 cigarette. When he left, you know what she said. Thank
18 you. Thank you for what? If she loaned him a cigarette,
19 he would be the one to say thank you. There's only one
20 logical conclusion that you can come. He stuck something
21 in that cigarette box.

22 Now, I know that there were other people that
23 you see or at least you can perceive in the video.
24 Derrick Foxworth, the guy on the bicycle, coming by. Did
25 you see her reach out the cigarette box? He's kind of

1 behind her to the left. You see that cigarette box go to
2 the left? No. When she's walking down the street and
3 people are shouting to her, and she says, I can't stop and
4 talk. You see anything like, Derrick, come over here get
5 some drugs. No. When the car that Willie Crawford, who
6 she's C.I. against, when that car stops, you can see if
7 you look carefully on the video and I ask you to watch the
8 video, the reflection in the window of Ms. Carmichael.
9 You don't see any cigarette box going there or coming
10 back. You don't see the window going down. You don't see
11 any of that. When she keeps walking down the road and see
12 the younger fellow, he sounded young and says are you Ms.
13 Dorothy? You don't see any cigarette box either way.
14 There is only one person that she says put those drugs in
15 the cigarette box that she delivered to Aurelius Cribb and
16 that's Tyron Davis. You know why she's believable
17 because she's you telling you the truth.

18 Now, in each and every case, the State has to
19 prove a person's guilt beyond a reasonable doubt. You
20 have to be firmly convinced that the person is guilty. If
21 you don't think he's guilty, find him not guilty.

22 However, a reasonable doubt doesn't mean beyond
23 a shadow of doubt. It means beyond a reasonable doubt,
24 that type of doubt which would cause a reasonable person
25 to hesitate to act that's all that means. Now, I know

1 Mr. Lawson is going to come up and say, Woo, there are no
2 fingerprints on that. You didn't test for fingerprints,
3 you didn't send the box to SLED, you didn't do this, you
4 didn't do that. Now, I don't know why they would need to
5 do fingerprints when, you know, his fingerprints are right
6 on there. He's handing her back the box. Normally, you
7 get fingerprints when you don't know who the individual
8 is. Why do it? And as any good defense attorney is going
9 to come in here and try to point out inconsistencies, love
10 the, When Beth Hoover tested the drugs, they were in a
11 sealed compartment, a sealed best bag. The drugs should
12 still be wet. Well, I mean, folks, it was March the 14th
13 2008, all the way to May the 13th or 14th when Beth Hoover
14 tested it, drugs had two months to dry. You know,
15 sometimes I come -- well, every time I come into this
16 courtroom I see that portrait of Francis Marion in there,
17 of course, and I look at the horses behind him. I was
18 wondering if that's for the attorneys or who that's for,
19 but, you know, the fact of the matter look at that. You
20 know, that kind of thing reasonable doubt is kind of like
21 this. We don't have a perfect case. I mean, I would love
22 to have, you know, here's the money, here's the drugs. I
23 love to have that. You know, I don't know what we're
24 suppose to do send guys like, Jack, the judge's law clerk
25 up there, Hello, I like to purchase some crack cocaine

1 also known as cocaine base and please look at me lapel
2 pen. You don't do that. I mean, it just doesn't make
3 sense, but every time I like come in here I look at that
4 horse and kind of reasonable doubt, you know, you can get
5 away from some of the evidence, say we take off the horses
6 hind leg and tail cause you don't have a complete picture.
7 Now, you're missing a tail and a hind leg. Mr. Lawson
8 would say, there's reasonable doubt things are missing,
9 you can't say it's a horse, chop the horse's head off,
10 mane and all. Oh, you can't have a horse there.

11 Folks, you can use your God given common sense
12 to come to the conclusion that Rosa Carmichael is telling
13 you the truth, that Ty Davis, who she knew as a little boy
14 sold her crack cocaine. And what did we learn? Not only
15 did he sell her crack cocaine, we learn from Aurelius that
16 it's within one half mile radius of the Marion Alternative
17 School. That's what he's charged with. And that's what
18 you taken an oath to determine whether the State produced
19 enough evidence to leave you firmly convinced of Tyron
20 Davis' guilt.

21 It's a great honor to think that the jury duty
22 that you are on, the jury duty that you're serving. You
23 know, this is really the only part of -- unless you're
24 involved with the government somewhere, you know, run for
25 office. This is a participatory democracy. The judicial

1 branch is the only branch of service where average
2 citizens can come in and participate, think about it.
3 Someone I think it was Winston Churchill stated that the
4 greatest service that a citizen has to offer other than a
5 time of war is to serve on jury duty.

6 Now, of course, Winston Churchill I know didn't
7 get paid ten dollars a day for doing it, however much
8 you're going to get. But the fact of the matter is, we
9 couldn't do this without you. You taken an oath and hold
10 the State responsible for proving him guilty beyond a
11 reasonable doubt. Now, Rosa said why when Mr. Lawson was
12 examining, Why would he sell you crack if you never
13 purchased it? And I think she hit right on it when she
14 says I don't think they really care. They are in it for
15 the buck unfortunately, unfortunately. What can we do?
16 What we can do? I ask you, ladies and gentlemen of Marion
17 County, to hold Tyron Davis responsible for selling this
18 \$40 worth of crack cocaine to Rosa Carmichael on
19 March 14th 2008, within half a mile of Marion Alternative
20 School, that's what I ask. Thank you. I know Mr. Lawson
21 is going to do a good job as he always does, but please
22 don't forget the veracity and truthfulness of Rosa
23 Carmichael. Thank you.

24 THE COURT: Mr. Lawson, you're recognized.

25 MR. LAWSON: May it please the Court. Mr.

1 Foreman and ladies and gentlemen of the jury, as I
2 indicated in opening it was not an extremely long case.
3 It was a case where I, as well as the State, thank you for
4 your attention to the details of the case and to the
5 evidence in this case. It is my duty at this point now to
6 give a summation. What I consider to be the important
7 things that I think you should talk about when you get
8 into your jury room and deliberate. The things that I say
9 and the things that Mr. Jeperfinger say to you in
10 summation is not evidence. The evidence was presented
11 from the witness stand or from the lack of evidence which
12 you have every right to consider in determining whether or
13 not the State has proven their case beyond a reasonable
14 doubt.

15 For in the long run, ladies and gentlemen, the
16 question in every criminal case is whether or not the
17 government in that case has presented evidence to you, the
18 jury, to establish guilt beyond a reasonable doubt. Now,
19 I may disagree with Mr. Jeperfinger as to what and what is
20 not a reasonable doubt. However, it's up to you as a
21 collective body to determine whether or not you believe
22 that the State has brought forth evidence to establish
23 their case beyond a reasonable doubt. If you think that
24 they have, that you have no reasonable doubt, that there
25 is no hesitation to act, in your deliberations, then it is

1 your duty under your oath to find the defendant guilty.
2 However, if you believe as I believe that there are a
3 number of questions which rise to the level of reasonable
4 doubt in this case, then it is also your duty and just as
5 much your duty to find the defendant not guilty in this
6 case. Tyron Davis comes into this courtroom accused of a
7 crime by the State of South Carolina. This is not a trial
8 about Rosa Carmichael. It's not a trial about Sergeant
9 Cribb or Lieutenant Wallace or who may or may not work for
10 them, how many females are not available to search female
11 informants. This is a case about my client and whether or
12 not the State has brought forth evidence to establish his
13 guilt beyond a reasonable doubt.

14 Interesting, I find that as they go through the
15 case and determine the important issues to show the jury,
16 one of the important issues that they make into a blow up
17 is the box of Newport cigarettes. It's so important that
18 of all the video, this is the only one that has anything
19 close to evidentiary value in the case. The rest of them
20 the blow up are for identification purposes one, two,
21 three, out of four blow ups, three have pictures of the
22 box of cigarettes. How hard would it have been for that
23 piece of evidence to be retained and brought into this
24 courtroom, was there something unusual about this box of
25 Newport that it was heavier than every other box of

1 Newport in the history of the world. They could not
2 preserve that piece of evidence. It's evidence, ladies
3 and gentlemen. Why do I want it to come into court? Just
4 because I like to see the evidence in a case. I like to
5 be able to touch physical evidence. That's why they are
6 suppose to retain physical evidence no more, so then I
7 would want to see the gun in a murder case. And I find
8 out that the gun is recovered and thrown away or deposed
9 of, would that upset me, yes. Would it upset you as a
10 jury? I hope. In this case that box is our gun, but, oh,
11 no, we rely on Ms. Hoover to bring us the cocaine. Dare
12 say that best bag -- and you can open this thing if you
13 want to, but you get that best bag out, there's plenty
14 room in there for a pack of cigarettes. And if this was
15 wet and it was sticky all over the cigarette, why weren't
16 they sent to be tested for drug purposes? I don't know
17 what happened to the cigarettes. Do you? Maybe, they
18 were given back to the informant. I don't know.

19 One thing for sure if they were seize and placed
20 into evidence like they should have been, we know where
21 they were because they be right here and I be showing them
22 to you right now. What about this? What about when the
23 officer search the cigarettes in the first place? If he
24 just taken a little pen and put a mark on the box on the
25 bottom, the top, the side somewhere, so that if that box

1 comes back to him, he'll know it's the same box that he
2 searched prior to the event because quite frankly, we
3 don't know that the box that was brought back with drugs
4 in it was the same box that left without drugs in it. Did
5 you see the box go from the informant to my client? I
6 didn't. So how hard would it be for the box to be
7 switched by anyone or three or four or more people that
8 had access to the informant between the time she left law
9 enforcement and re-met law enforcement.

10 We don't see the box being handed to my client.
11 So we're to assume we would see it in any other case in
12 the world. Especially, if the informant didn't want us to
13 see it. Were there opportunities for that to have
14 occurred? Oh, more than once. Is it possible that
15 somebody else in the car could have handled that box as
16 well? Yes, that's possibly. It may even rise to the
17 level of probably. Sometimes, you take fingerprints for
18 purpose of exclusion as well as inclusion.

19 Yes, we would expect to find Tyron fingerprints
20 on the box. But what about the other female? What about
21 Willie Crawford? What about somebody else that was on a
22 bicycle? What about somebody else that walked up? What
23 about somebody else that we didn't even see? Is there
24 reasonable doubt? Is there evidence in this case that
25 rises to the level that you can go into your jury room and

1 firmly convinces you that this guy is guilty? Because,
2 ladies and gentlemen, that's what we're talking about is
3 the State proving their case beyond a reasonable doubt.

4 In this case, there are two many questions to be
5 answered. Why I ask does anybody sell drugs to someone
6 who never uses drugs? Why do we protect somebody that's
7 already been a witness in drug cases, that's informant
8 level is known since '97 before Lieutenant Wallace even
9 went to work with law enforcement. Sixty dollars for 38
10 minutes of work. Based on the report that I saw, three
11 o'clock there was a contact with law enforcement, 3:38 it
12 was over. That's 38 minutes that's 60 bucks. That's
13 pretty good that's \$120 an hour. That's pretty good for
14 somebody that's unemployed, pretty good money.

15 As we look through this case, as we look at the
16 evidence, we have to look at it with a crystal eye
17 because the citizens of this country demand that you, the
18 jury, find guilt beyond every reasonable doubt and that
19 you consider every reasonable doubt that occurs and that
20 you give credit for those doubts, it's called presumption
21 of innocence. We are presumed innocent in this country.
22 The government cannot charge us, try us and throw us in
23 some prison just because they want to like what has happen
24 in totalitarian states like happen to our forefathers who
25 had to face the prospects of a general warrant, that's a

1 warrant that was issued at the hands of a judge with
2 nobody name on it.

3 In other words, they could fill in the name
4 whenever they got through searching your house or locking
5 you up. And because our forefathers had been through
6 tyrannical rule, they created a system where that would
7 never happen, where the government would have to prove a
8 citizen guilty beyond every reasonable doubt. And that
9 that citizen would come into this courtroom presumed to be
10 innocent and that you, the jury, are the only people in
11 this world that have the right to remove that presumption
12 of innocence from Tyron Davis. You 12 and you 12 alone
13 are the only one and that is by design and it's by the
14 design of our forefathers that when considering a criminal
15 case the citizens of this country will sit in judgment,
16 not the judge, not the lawyer not the prosecutor, no the
17 police, but the citizens and that after hearing the
18 evidence presented, those citizens will make a decision as
19 to whether or not the government has to carry its burden
20 of proof and prove guilt beyond a reasonable doubt. If
21 they have not, the citizen must stand up against the
22 government and say, no, you didn't, that is why they are
23 here. You are the buffer between the citizen and the
24 government. You protect every citizen in this country
25 that's accused of having done something against the law.

1 You are the buffer zone, the protector, the freedom wall
2 between the citizens of the this country and the
3 government. Where not for our process and our jury
4 system, there would never be justice in this country, but
5 because of you and people like you all over this country
6 who are willing to give of their time and into this
7 courtroom and judge the government's evidence and judge it
8 critically and look at it with an eye toward
9 reasonableness and understanding of the duty of the
10 government to prove guilt and not of the defendant. We
11 don't have a duty. We have a duty to point out the
12 weaknesses and ask you to judge it and determine whether
13 or not in your opinion the government has proven guilt
14 beyond a reasonable doubt.

15 In this case, there are a number of reasonable
16 doubts, reason to doubts. Reasons to doubt the
17 sufficiency of the evidence something evidence could have
18 explained it. It is not your duty to go in that jury room
19 and solve a case. The government suppose to bring you
20 solve cases and put up evidence that establishes that
21 beyond every reasonable doubt and they have failed to do
22 that. They have not brought the evidence that withstands
23 scrutiny for when you ask the hard questions the answer is
24 I don't know. I don't understand. I don't know. Why
25 didn't you keep the box? I don't know. Didn't need it.

1 Didn't want it. Why you do this? Why you don't do that?
2 Any time there is a possibly that there is evidence there
3 that can be retained and can be used to establish guilt or
4 innocence, I say it's the government's job preserve that
5 evidence and go the extra mile to establish either guilt
6 or innocence. For they have that obligation and they
7 cannot shirk it by simply saying, Well, we don't do that.
8 There's a lot of things we don't -- didn't use to do that
9 we do now because science has caught up with us.

10 D.N.A. for example, never use to be done. All
11 we use do was type match blood to the type A positive, B
12 positive. We were lucky if we could tell if it was animal
13 or human blood. Now, it's one of the best identifying
14 concepts that's ever come down the pipe genetic
15 identification through the D.N.A. molecule. Didn't use to
16 do it. Would you accept that as an explanation now as to
17 why it wasn't done in a case or no, no, no. Everything, I
18 am asking you and every question I ask are things that
19 could have been done and weren't done.

20 The informant knew exactly where that camera
21 was, knew what activated that camera, knew what she had to
22 do to make something come up on that camera. So you could
23 see what was going on. Why do we see so little? Because
24 she wanted you to see so little. She countrolled the
25 camera. When she turned, she could turn and the camera

1 angle changes and so does your vision in your capability
2 to see it. What was going on or what transpired? The
3 money. Why don't we know about money? If Tyron Davis had
4 been picked up and he had \$40 in his pocket and that \$40
5 matched the \$40 that they had given the informant and
6 taken pictures of, it would not be hard to match that
7 would it. But we have none of that because it wasn't done
8 protecting the informants identity. One who had been an
9 informant for over 11 years when this happened, give me a
10 break, that ain't why. It doesn't make sense. And it
11 doesn't make sense to me. It doesn't make sense to you,
12 then it don't make sense.

13 And, ladies and gentlemen, I'm going to ask that
14 you go into your jury room and consider the thing that
15 don't make sense. If there are things that are clear, if
16 this is clear, and you don't have reasonable doubt about
17 anything, find Mr. Davis guilty. If on the other hand,
18 you believe that there are questions that need to be
19 answered, if you believe there is a reason to hesitate,
20 stop in your jury deliberations and say wait a minute.
21 Then, ladies and gentlemen, it's your duty to find him not
22 guilty. And I ask you to so find. Thank you.

23 THE COURT: All right. Now, members of the
24 jury, now is the point in time where I instruct you as to
25 the law in this case. It is very important and to make

1 sure I get it right and it's accurate for you, I'm going
2 to read it to you and it will take a few minutes, but I
3 need you to listen and to listen carefully.

4 Now, members of the jury, it is my duty as the
5 trial judge under the constitution of this state to charge
6 and instruct you on the law applicable to this case. And
7 it is your duty as jurors to accept and apply the law as I
8 now state it to you. Furthermore as jurors, it is your
9 exclusive duty to decide all issues of fact in this case
10 and to determine effect, the value, the weight and the
11 truth of the evidence. Both the State and the defendant
12 have a right to expect that you will carefully consider
13 and evaluate the evidence and apply the law of this case
14 to it, so that in the end both the State of South Carolina
15 and the defendant will receive a fair and impartial trial.

16 I want you to understand that when I use the
17 word defendant, I refer to Mr. Tyron Deshawn Davis.
18 Furthermore, it is important to understand that the State
19 of South Carolina by bill of indictment in this case
20 charges the defendant, Tyron Deshawn Davis, with the
21 offense known as distribution of cocaine base. And the
22 offense known as distribution of cocaine base within the
23 proximity of a school or a park.

24 To these charges, the defendant has entered a
25 plea of not guilty. This plea of not guilty by the

1 defendant places the burden of proof on the State to prove
2 the guilt of the defendant to you, the jury, beyond a
3 reasonable doubt. It is vital to understand that the
4 defendant, Tyron Davis, is presumed under the law to be
5 innocent of these charges. It is a cardinal and
6 fundamental rule of our law that a defendant irrespective
7 of the seriousness of the charges against him is always
8 presumed innocent of the crimes for which he is charged
9 unless and until his guilt has been prove by evidence that
10 satisfies you, the jury, beyond a reasonable doubt.

11 The presumption of innocence is not a mere legal
12 theory, it is not a legal phrase. The presumption of
13 innocence is very important and you need to understand
14 that this presumption accompanies the defendant from the
15 time of his arrest and appearance in court and continues
16 with the defendant even after you retire to the jury room
17 to deliberate. In other words, the defendant receives the
18 benefit of the presumption of innocence until the very end
19 of this trial. When you, the jury, would deliberate upon
20 the evidence and decide whether the State has proved his
21 guilt beyond a reasonable doubt.

22 Proof beyond a reasonable doubt is proof that
23 leaves you firmly convinced of the defendant's guilt.
24 There are few things in this world that we know with
25 absolute certainty, so even in criminal cases the law does

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

8 Jurors please understand that reasonable doubt
9 may arise from evidence which has been presented in the
10 case or from the lack of the evidence in the case. You,
11 the jury, must determine whether or not reasonable doubt
12 exist as to the guilt of this defendant. I charge you
13 that the defendant is entitled to every reasonable doubt
14 arising in the whole case. If upon any issues of fact
15 essential to conviction and a verdict of guilty, you have
16 a reasonable doubt as to how that issue should be
17 resolved, it would be your duty to resolve that reasonable
18 doubt in favor of the defendant.

19 Thus in summary, it is important to understand
20 that a defendant is not required to prove his innocence.
21 Instead, the State is required by law to prove every
22 essential element of the offense charged against the
23 defendant by evidence which satisfies you of his guilt
24 beyond a reasonable doubt, only then can you convict the
25 defendant and find him guilty. I further instruct you

1 that the fact that a defendant in the trial of a criminal
2 case did not testify on his own behalf is not a factor to
3 be considered by you in any way in your deliberations and
4 in your consideration on the question of guilt or
5 innocence of the defendant. Please understand it must not
6 be considered by you in any manner whatsoever against the
7 defendant. In this regard, a defendant has the
8 constitutional right to remain silent. And the exercise
9 of this right cannot and must not be considered by you in
10 your deliberations. Under oath, you are to make no
11 inference and draw no conclusion whatsoever from the fact
12 that the defendant in this case did not testify. The fact
13 that this defendant did not testify should not even be
14 discussed in the jury room.

15 The burden of proof as I have stated to you is
16 on the State. The defendant has no obligation to prove
17 his innocence. The burden of proof remains with the State
18 to prove the defendant's guilt beyond a reasonable doubt
19 and the fact that a defendant did not testify is not a
20 factor to considered by you in determining the guilt or
21 the innocence of the defendant. When you consider the
22 whole case if you have a reasonable doubt as to the guilt
23 or innocence of the defendant, then he is entitled to that
24 reasonable doubt and would be entitled to a verdict of not
25 guilty. However, if upon considering a whole case, you

1 find that the State has proved by evidence which satisfies
2 you of the guilt of the defendant beyond a reasonable
3 doubt, then in such circumstance it would equally be your
4 duty to convict the defendant and find him guilty.

5 During this trial, you and I have separate
6 duties to perform. As the trial judge, it is my
7 responsibility to preside over this trial. And I also
8 have the duty to rule upon the admissibility of the
9 evidence offered during the process of this trial. In
10 that regard, you are to consider only the competent
11 evidence before you. And you are to disregard from your
12 mind any testimony ordered stricken from the record of
13 this case during the progress of this trial if be any.
14 And you are to consider only the testimony which has been
15 presented from this witness stand together with any
16 exhibits admitted into the record of this case in any
17 stipulations of counsel made into the record if there be
18 any.

19 Furthermore, I have the additional duty to
20 charge you on the law of this case. And in that regard,
21 I, as the presiding judge and the sole judge of the law of
22 this case. It is your duty to accept and apply the law as
23 I now state it to you. If you have any preconceived idea
24 as to what the law is or what the law ought to be and it
25 should not agree with what I tell you the law is, you are

1 obligated under your oath to abandon this preconception
2 because you are sworn to accept the law precisely as I
3 state it to you. In this trial, you are the sole and
4 exclusive judge of the facts and I am the judge of the
5 law.

6 The Constitution of this state has declared that
7 the trial judge shall not comment upon or make any
8 statement to a trial jury about the facts in a case.

9 Again, you are the sole judge of the facts.
10 Thus in that regard, do not infer that I have any opinion
11 about the facts in this case from anything I have said
12 during the course of this trial or in ruling upon the
13 admissibility of evidence or otherwise or from anything
14 that I now say during the course of this charge to you.
15 In this regard, the law simply does not permit me to have
16 an opinion about the facts, that is a matter solely for
17 you, the jury, to determine.

18 As jurors then, it is your duty alone to
19 determine the effect, value, weight, and truth of the
20 evidence presented during the course of this trial. In
21 determining what's facts in this case, what the facts are,
22 you must judge the credibility which simply means the
23 believability of the witnesses and the value of weight to
24 be given their testimony. You alone must decide the
25 force, effect and truth of the testimony. In making this

(1 decision, there are many things you may and should take
2 into consideration such as one: The appearance and manner
3 of the witness on the stand. Characteristic often
4 referred to as the demeanor of a witness. Two, was a
5 witness forthright or hesitate. Three, was the witness'
6 Testimony consistent or did it contain discrepancies.
7 Four, what was the ability of the witness to know the
8 facts about which or she testified. Five, did the witness
9 have a cause or reason to be bias or prejudice in favor of
10 the testimony he or she gave. Six, was the testimony of
11 the witness corroborated or made stronger by other
12 testimony and evidence or was it made weaker or impeached
(13 by such other testimony and evidence.

14 Furthermore, you have heard testimony from a
15 person described as an expert. Person's who by their
16 education and experience have become expert in some field,
17 thus may state their opinion on matters in that field and
18 may also state their reasons for their opinion. You
19 should judge expert opinion testimony just like any other
20 testimony. You may accept it or reject it and give it as
21 much weight as you think it deserves considering the
22 witness' education and experience. The reasons given for
23 the opinion and all the other evidence in the case.

(24 Also, members of the jury, please understand
25 that the testimony of a police officer is not entitled to

1 more weight than that of any other witness. You are the
2 sole judges of the credibility of a witness and you are
3 not to give more weight to a police officers' testimony
4 solely because he is a police officer. Rather, you should
5 judge an officer's testimony by the same standards that
6 you apply to all the other witnesses.

7 As jurors please understand that you have the
8 right to believe a small portion of a witness' testimony
9 and disregard the larger portion or vice versa. You may
10 believe all of a witness' testimony or none. You may
11 believe the testimony of a single witness against that of
12 many witnesses or the other way around. In exercising
13 your mental processes and attempting to decide the truth,
14 the law simply requires that you exercise your good
15 judgment, your common sense, your sense of logic and
16 reason and your experiences in life. You then apply these
17 attributes to the evidence and apply the law as I now
18 state it to you and thus arrive at a verdict.

19 If a crime is committed by two or more people
20 who are acting together, then the act of one is the act of
21 all. A person who joins with another to commit an
22 unlawful act is criminally responsible for everything done
23 by the other person which happens as a probable or natural
24 consequence of the acts done in carrying out the common
25 plan or purpose. For example, two people can be guilty of

1 killing another person when only one of the two had a gun.
2 There was only one bullet and only one of the two fired
3 the shot that caused the death. If two or more people are
4 together acting together assisting each other in
5 committing the offense, the act of one is the act of all
6 or as it is sometimes said the hand of one is the hand of
7 all.

8 Prior knowledge that a crime is going to be
9 committed without more is not sufficient to make a person
10 guilty of that crime. Mere knowledge that another person
11 was going to commit a crime even if the defendant is
12 present when the crime is committed is not sufficient to
13 convict the defendant as a principle. Guilt as a
14 principle is shown by actual or constructive presence at
15 the scene as a result of a prior arrangement. Therefore,
16 a finding of a prior arranged plan or common scheme is
17 necessary for a finding of guilt as a principle.

18 The State must prove beyond a reasonable doubt a
19 competent evidence the theory of a hand of one is the hand
20 of all. A principle in a crime is one who either actually
21 commits the crime or who is present aiding, abetting or
22 assisting in committing a crime. When a person does an
23 act in the presence of plan with the assistance of another
24 the act is done by both. Where two or more are acting
25 with a common plan or intent are present at the commission

1 of a crime, it does not matter who actually commits the
2 crime all are guilty. The hand of one is the hand of all.
3 Present at the commission of a crime means to be
4 sufficiently near so as to aid and abet and assist in the
5 commission of a crime. However, mere presence at the
6 scene of a crime is not sufficient to convict one as a
7 principle on the theory of aiding and abetting.

8 Furthermore, intent is also a necessary element
9 for there must have been a common design or intent to
10 commit the crime. And the crime must have been committed
11 pursuant thereto with the person aiding and abetting by
12 some overt act. Intent means intending a result, which
13 actually occurs not accidentally or involuntary. Intent
14 may be shown by acts and conduct of the defendant and
15 other circumstances from which may naturally and
16 reasonably infer intent. The State must prove these
17 elements beyond a reasonable doubt.

18 If you find from all the evidence that the
19 defendant was merely present at or near the scene of this
20 allege crime on the date in question, you are instructed
21 that such presence can only create a suspicion and you
22 cannot find the defendant guilty because of suspicion.
23 Mere presence at or near the scene of a crime does not in
24 itself permit inference to be drawn by you that the
25 defendant had knowledge of any criminal plan which might

1 have been formed nor does mere presence support an
2 inference of intent to engage in or to aid in criminal
3 conduct. Thus in summary, suspicious circumstances like
4 mere presence are not sufficient for a finding of guilt
5 against any defendant. The defendant in this case is
6 charged with two offenses. I would discuss each offense
7 for you in term.

8 The defendant is charged first with distribution
9 of cocaine base. I will now define this offense for you.
10 The defendant is charged with distribution of cocaine base
11 commonly referred to as crack cocaine. The State must
12 prove beyond a reasonable doubt that the defendant
13 distributed cocaine base. Distribute means to deliver or
14 to actually, constructively or attempt to transfer a drug
15 other than by administering or dispensing. Deliver means
16 to actually or constructively transfer a drug or attempt
17 to transfer a drug. A transfer can involve an exchange of
18 money, a barter or a gift. There does not have to be
19 anything given in exchange for the drugs or a transfer to
20 constitute distribution.

21 The defendant is also charged with distribution
22 of cocaine base within proximity of a school or park. I
23 will now define the second charge for you. The State must
24 prove beyond a reasonable doubt that the defendant has
25 distributed, sold, purchased, manufactured or unlawfully

1 possessed within intent to distribute cocaine base while
2 within one half mile of the grounds of a public or private
3 elementary, middle or secondary school. A public
4 playground or park, a public vocational or trade school or
5 technical education center or a public or private college
6 or a university.

7 Ladies and gentlemen, I am now drawing near the
8 end of my charge and I want you to clearly understand that
9 you are not partisans or advocates for South Carolina or
10 for this defendant. You are not to serve as jurors to
11 reward your friends or punish your enemies.

12 In this regard, you have been selected by the
13 State and this defendant to be fair and impartial jurors.
14 It is your duty by your joint deliberations to determine
15 the truth in this case giving to this defendant the
16 benefit of every reasonable doubt on each and every issue.
17 Then to the facts which you determine to be true, you
18 should take and apply the law which has been given to you
19 by this court and thus arrive at a verdict which speaks
20 the truth in this case. In fact, the word verdict which
21 is a Latin derivative means a true saying. Thus, when you
22 have accomplished these responsibilities, you would have
23 satisfied your oath as jurors and you will have discharged
24 your duty to this court.

25 Mr. Bailiff, if you would at this time hand this

1 verdict form to the foreperson. Now, Mr. Foreperson,
2 regarding the verdict form, you must render a verdict on
3 each of the two charges in this case. For each charge, if
4 the State has failed to prove the guilt of this beyond a
5 reasonable doubt, your verdict would be two words not
6 guilty. Likewise for each charge, if the State has proved
7 the guilt of this defendant beyond a reasonable doubt,
8 your verdict would be one word guilty.

9 Mr. Foreman, once a decision has been made, just
10 check whichever choice is your verdict. The verdict that
11 you render in this case must be the verdict of each and
12 every juror. It must be a unanimous verdict. All 12
13 jurors must agree on the verdict that you authorize the
14 foreman to write for the jury. Mr. Foreman and members of
15 the jury, I want you to further understand that the order
16 in which the choice of verdict appear on the verdict form,
17 are not suggestive of any verdict on the part of this
18 court. The verdict in this case is to be determine by
19 you, the jury, not the Court. Furthermore, ladies and
20 gentlemen, please understand that even though I have given
21 a verdict form to the foreman, it is not his verdict
22 alone. It is the verdict of all 12 of you. And I
23 emphasize again it must be unanimous.

24 I now ask you to please retire to the jury room,
25 but do not begin your deliberations until you are told to

1 do so. In this regard, the law requires that I now
2 consult with the attorneys to make sure that I have not
3 left anything out of these charges. After I have checked
4 with the attorneys, the bailiff will bring in the items of
5 evidence and instruct you to begin your deliberations.
6 Also should you have any questions during your
7 deliberations, you must put them in the form of writing
8 and send them out by the bailiff. The court bailiff will
9 be placed immediately outside of the jury room door to
10 provide you security for your deliberations. Once you
11 have reached a verdict, please knock on the jury room door
12 and ask the bailiff to advise the Court that you have
13 reached a verdict. And we will return you to the
14 courtroom as promptly as possible. Thank you, ladies and
15 gentlemen, you may now retire to the jury room, but again
16 do not begin your deliberations until you have been
17 advised to do so. Thank you.

18 (WHEREUPON, the jury retire to the jury room at
19 1:34.)

20 THE COURT: Any objections from the State?

21 MR. JEPERTINGER: Not from the State, Your
22 Honor.

23 THE COURT: Any objections from the defense?

24 MR. LAWSON: No, Your Honor.

25 THE COURT: All right. If you all would look at

1 the evidence count them up and place on the record what is
2 going into the jury room and they take the evidence in
3 there by the bailiff, I want you to remove the alternates
4 and tell them to begin.

5 (WHEREUPON, a pause in the proceedings.)

6 THE COURT: All right, Solicitor, Mr. Lawson,
7 has all the evidence been reviewed?

8 MR. JEPERTINGER: Yes, sir.

9 THE COURT: Is everything in order?

10 MR. LAWSON: Yes, sir.

11 MR. JEPERTINGER: Everything is in order.

12 THE COURT: Any objections to the evidence going
13 into the jury room?

14 MR. LAWSON: No, Your Honor.

15 MR. JEPERTINGER: Not from the State, Your
16 Honor.

17 THE COURT: If you'll send it in and bring the
18 alternate out and tell them to begin deliberations.

19 (WHEREUPON, a pause in the proceedings.)

20 THE COURT: I appreciate you coming and putting
21 up with this. I hope you enjoyed your service.

22 (WHEREUPON, the alternate was excused.)

23 (WHEREUPON, deliberations began at 1:37.)

24 (WHEREUPON, court at ease awaiting the jury
25 verdict.)

1 THE COURT: Bring the jury out.

2 (WHEREUPON, the jury came into open court with a
3 verdict at 2:19.)

4 THE COURT: Mr. Foreman, have you reached a
5 verdict?

6 MR. FOREMAN: Yes, we have.

7 THE COURT: Pass it up to the bailiff.

8 (WHEREUPON, a pause in the proceedings.)

9 THE CLERK: State of South Carolina County of
10 Marion vs. Tyron Deshawn Davis in the Court of General
11 Sessions docket number 08-GS-33-00291. Verdict as to the
12 indictment 08-GS-33-00291, Count 1 distribution of cocaine
13 base, we, the jury, unanimously find the defendant, Tyron
14 Deshawn Davis, guilty.

15 As to the indictment number 08-GS-33-00291 Count
16 2 distribution of cocaine base within proximity of a
17 school or a park, we, the jury, unanimously find the
18 defendant, Tyron Deshawn Davis, guilty. I certify this is
19 a unanimous decision of the jury signed Gregory Hewett,
20 foreperson. November 13th 2009. Is this your verdict say
21 you one say you all?

22 (WHEREUPON, all jurors agreed in the
23 affirmative.)

24 THE CLERK: Thank you.

25 THE COURT: Any further request for polling from

1 the State?

2 MR. JEPERTINGER: No, sir.

3 THE COURT: From the defense?

4 MR. LAWSON: No, Your Honor.

5 THE COURT: All right. Members of the jury, I
6 want to thank you your hard work and I want to thank some
7 of you for your hard work twice. Your week is now over
8 with. You have done everything that we could ask you to
9 do. You have been very polite and nice and attentive.
10 You been here on time even those of you who got sick stuck
11 around to work. We sincerely appreciate it.

12 I want to let you know that you have earned a
13 three-year exemption. You will not be called. You do not
14 have to serve again in three years in this court in
15 circuit court in Marion County. I want to thank you and I
16 want you to have a good weekend. You are dismissed.
17 Thank you.

18 (WHEREUPON, the jury was dismissed.)

19 MR. LAWSON: May it please the Court, the
20 defense would renew it's motions previously made and we
21 further move specifically as to Count 2, Your Honor, as
22 moved at the end of the State's case. And again, I must
23 reiterate in my memory the only thing that was offered
24 testimony as it relates to distance was approximately by
25 the officer. And I don't believe that that's sufficient

1 to rise to the level of proof that the distribution was
2 within one half mile of a school or playground. And I
3 would ask you for directed verdict as to that count, Your
4 Honor.

5 THE COURT: Motion is denied. Anything further?

6 MR. LAWSON: No, sir.

7 THE COURT: Anything from State?

8 MR. JEPERTINGER: Not in terms those motions,
9 Your Honor.

10 THE COURT: Any motions for the State?

11 MR. JEPERTINGER: No motions from State, Your
12 Honor. I have the sentencing sheets, Your Honor. I will
13 point out that I have certified copies of his prior drug
14 records, Your Honor. I have a sentence from 27 day of
15 February 1996. Look like Judge Westbrook where he pled to
16 possession of crack cocaine second offense concurrent with
17 possession of crack cocaine third offense sentence sheet
18 on that one, Your Honor. And then I have certified true
19 copy of a sentencing event looks like Judge Brogdon
20 signature back in November 30th 1998 for distribution of
21 crack cocaine third offense two counts, Your Honor.

22 THE COURT: Anything in mitigation, Mr. Lawson?

23 MR. LAWSON: Not at this time, Your Honor.

24 THE COURT: Thank you very much. Anything from
25 the State?

1 MR. JEPERTINGER: Nothing, Your Honor, I believe
2 we are dismiss for the day.

3 THE COURT: Anything further from defense?

4 MR. LAWSON: None from defense.

5 THE COURT: Court is hereby adjourned.

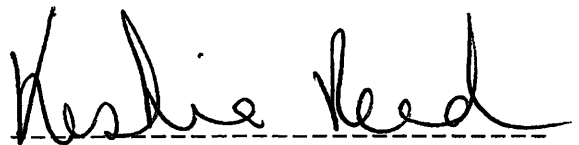
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF MARION)

I, Keshia Reed, Court Reporter and Notary Public in and for the State of South Carolina At Large, do hereby certify that the above-entitled cause was heard as hereinafter set out; that I was authorized to and did transcribe the said proceedings; and that the foregoing and annexed paged, numbered 1 through 173, inclusive, constitute a true and accurate transcription of my stenographic report of the said cause taken during the said hearing. In the Court of General Sessions for Marion County, South Carolina, on the 12th and 13th day of November, 2009.

I do further certify that I am neither of kin, counsel nor interest to any party hereto. In witness whereof, I have hereunto affixed my signature this 23rd day of July 2010.

A handwritten signature in cursive script, reading "Keshia Reed", written over a horizontal dashed line.

Keshia Reed, Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County

William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYRON DESHAWN DAVIS,

APPELLANT

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT.

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in denying appellant's motion for a mistrial due to dual instances of improper bolstering where the solicitor in effect vouched for the credibility of the state's informant and insinuated that defense counsel vouched also for the informant's credibility as well, by placing on the record information that defense counsel used the testimony of this informant in previous drug cases when he was a prosecutor despite the fact that counsel's present role in the case at bar was defense counsel for appellant.

STATEMENT OF CASE

Appellant Tyron Deshawn Davis was tried in absentia and convicted by jury of guilty of distributing cocaine base and distribution of cocaine base within proximity of a school/park during the November 2009 term of the Marion County General Sessions Court before the Honorable William H. Seals, Jr., Judge. A sealed sentence was imposed and subsequently published on February 22, 2010, by Judge Seals. Appellant was sentenced to imprisonment for an aggregate period of twenty years.

Appellant appealed his convictions and sentences in the case. This brief follows.

ARGUMENT

The trial judge erred in denying appellant's motion for a mistrial due to dual instances of improper bolstering where the solicitor in effect vouched for the credibility of the state's informant and insinuated that defense counsel vouched also for the informant's credibility as well, by placing on the record information that defense counsel used the testimony of this informant in previous drug cases when he was a prosecutor despite the fact that counsel's role in the case at bar was defense counsel for appellant.

City of Marion Police Officers Aurelius Cribb and Bryan Wallace testified that they arranged for and monitored a controlled buy where confidential informant Rosa Carmichael purchased crack cocaine from appellant. R. 17, l. 8 – p. 31, l. 9. Informant Carmichael testified at trial. Carmichael stated that on March 14, 2008, she gave appellant \$40.00 to purchase crack cocaine and received the drugs in return for the money. R. 75, l.23 - p. 85, l. 21. At some point during Wallace's testimony, he explained that appellant was not arrested on the date of the transaction and that the arrest was delayed in order to protect the secrecy and safety of informant Carmichael. Carmichael had been used as an informant since 1997. R. 63, lines 5-17; R. 65, lines 5-11. Then, on redirect examination of Officer Wallace, the solicitor attempted to bolster and vouch for the credibility of informant Carmichael by asking Officer Wallace if informant Carmichael had testified as an informant in cases previously tried when appellant's defense attorney was a prosecutor in the past. The officer answered in the affirmative. R. 71, lines 1-4.

At the close of the officer's testimony, counsel moved for a mistrial on the ground that the solicitor's question regarding his prior role as prosecutor and prior dealings with Carmichael constituted improper bolstering of the credibility of the informant." The trial

judge denied the motion for a mistrial. R. 74, lines 10-24. The solicitor's response was that he asked the question due to defense counsel's queries regarding the informant's in-court testimony. R. 73, lines 13-18. However, counsel's questions regarding the informant were centered only around the subject of how long she had been working as an informant (R. 66, lines 20-25), and what was the reason for all the secrecy since she had obviously testified in court in the past. R. 67, lines 1-17.

Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented by the jury supports the testimony. State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). The Court reversed in Kelly, where the solicitor queried a witness on his (solicitor's) standard of testifying truthfully at trial and in relation to a plea agreement, which in turn suggested that the solicitor believed that the witness was telling the truth, and this meant that the witness' testimony "carried with it the imprimatur of the government." The Kelly Court held that this type of improper bolstering that might have "induced the jury to trust the state's judgment about the witness." See also Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002), where the Court reversed where the state improperly vouched for the witness' credibility at opening arguments because the solicitor praised one of the perpetrators for coming "clean" and in effect "cleansing" his soul by admitting his role in the armed robbery of the victim in the case.

Here, not only did the solicitor in effect vouch for the informant's credibility by producing testimony that the informant was valuable and credible because she had been used to make buys in the past and testified in court in the past, but the solicitor went on to

bootstrap appellant's attorney's alleged voucher of the informant as credible as well by eliciting testimony that this informant testified in the past when appellant's attorney was a prosecutor. In other words, the inference is the appellant's attorney believed the informant in the past when he was a prosecutor and used her testimony to convict, so how could he attack the informant's credibility in the present case. This was improper and impermissible bolstering and vouching on two levels, which in turn doubled the improper bolstering error and the prejudice that followed. The issue of the secrecy of the informant's identity was not an invitation or justification for the improper bolstering in question. The informant's credibility and her status as a "secret weapon" were mutually exclusive issues.

In addition, the error in question raised the issue of an actual attorney conflict of interest with respect to counsel's representation of appellant at trial. If an actual conflict of interest adversely affects counsel's performance at trial, then the adequacy of counsel's representation is compromised and prejudice need not be shown. See reversals in Staggs v. State, 372 S.C. 549, 643 S.E.2d 690 (2007); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Since the instant jury was armed with the knowledge that appellant's counsel previously endorsed the informant's credibility as proved by his prior use of her as a credible witness when he was a prosecutor in the past, then a conflict resulted due to counsel's diminished ability to successfully attack this informant's credibility in appellant's defense at the instant trial. This conflict certainly compromised and adversely affected counsel's delivery of a defense for appellant and undoubtedly impacted the jury's interpretation of appellant's defense.

The decision to grant or deny a mistrial is within the sound discretion of the trial judge. State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (2000). Here, where the improper

bolstering and attorney conflict errors prejudiced appellant's defense, the trial judge erred in denying the mistrial motion; and as a result, appellant did not receive a fair trial as guaranteed under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Based on the foregoing argument, appellant's convictions and sentences should be reversed and his case remanded to the lower court for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT.

This 26th day of April, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 26th, 2011

A handwritten signature in black ink, appearing to read "Wanda H. Carter", is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marion County

William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

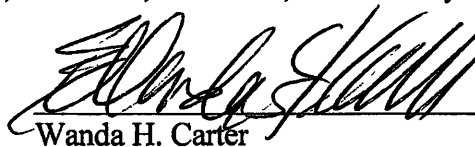
V.

TYRON DESHAWN DAVIS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of April, 2011.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 26th day of April, 2011.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 2, 2013.

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.

Tyron Deshawn Davis,

Appellant.

Appeal From Marion County
William H. Seals, Jr., Circuit Court Judge

Unpublished Opinion No. 2012-UP-289
Submitted April 2, 2012 – Filed May 9, 2012

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter,
of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, and
Senior Assistant Attorney General David Spencer, all

of Columbia; and Solicitor E.L. Clements, III, of Florence, for Respondent.

PER CURIAM: Tyron Deshawn Davis appeals his convictions of distributing cocaine base and distributing cocaine base within proximity of a school or park, arguing the trial court erred in denying his motion for a mistrial because of improper bolstering of a witness. We affirm¹ pursuant to Rule 220(b)(1), SCACR, and the following authority: State v. Watts, 321 S.C. 158, 164-65, 467 S.E.2d 272, 276 (Ct. App. 1996) (holding appellant waived any complaint he had to the challenged testimony in rejecting the trial court's offer to give a curative instruction).

AFFIRMED.

FEW, C.J., and HUFF and SHORT, JJ., concur.

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

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF MARION

IN THE COURT OF COMMON PLEAS

TYRON DESTAUN DAVIS # 232416
Full name and prison number (if any) of Applicant.

2012-CP-33-590

v.

State of South Carolina

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - 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 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 Correctional Institution, 970 W. Sixth St.
2. Name and location of Court which imposed sentence Marion County Court
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-95-33-00291; Distribution of
 - (b) 2008-95-33-00291; Distribution of
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) November 13, 2009; Twenty (20) years
 - (b) November 13, 2009; Twenty (20) years

RECEIVED COPY OF THE
FILED IN THIS OFFICE
Revised 3/2003

R. Rhoden
CLERK OF COURT, MARION COUNTY

6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes, I did
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. *South Carolina Court of Appeals*
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. *Affirmed*
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. *May 9, 2012*
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. *Unpublished Opinion Number 2012-OP-233*
- 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) Denial of Effective Assistance of Counsel
 (b) Denial of Right to Confrontation
 (c) Denial of Right to Due Process of Law

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Appellate Counsel failed to perfect a Petition
 (b) I was tried in my absence and not given
 (c) Resulting from Judicial and Prosecutorial

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No.
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
 (d) any other petitions, motions or applications in this or any other Court? No.

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. N/A
 ii. _____
 iii. _____
 iv. _____

(b) the name and location of the Court in which each was filed:

- i. N/A
 ii. _____
 iii. _____
 iv. _____

(c) the disposition thereof:

- i. N/A
 ii. _____
 iii. _____

/v.

(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?

No, they have not.

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.

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)

(b)

(c)

(10)(a); First Collateral Attack
 (10)(b); First Collateral Attack
 (10)(c); First Collateral Attack

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, I went.
- (c) your sentencing? Yes, I went.
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes, I went.
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

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. Joseph Lawson,
- ii. Wanda H. Carter, Post Office Box 11589,
- iii.

- (b) the proceedings at which each such attorney represented you:

- i. Trial and Sentencing
- ii. South Carolina Court of Appeals
- iii.

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

Conviction and Sentences Vacated, or in the

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

No, I am not.

STATE OF SOUTH CAROLINA)

VERIFICATION

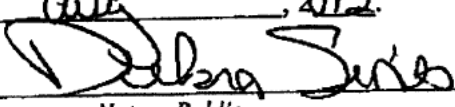
County of

MARION)
TYRON DESHAUN DAULTS, #232416)

I, , 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.


 Tyron D. Daults

SWORN to and subscribed before me this 14
day of Aug, 2012.

 (L.S.)
Notary Public

My Commission Expires:

11-4-2015

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

TYRON DESHAWN DAVIS, #232416

I, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Tyron D. Davis
Applicant

SWORN or affirmed to and subscribed before me this

14 day of Aug, 2012.

Debra S. Soria
Notary Public

My Commission Expires: 11-4-2015

ATTACHMENT I

1. Highway, Bishopville, South Carolina 29010

2. of General Sessions, Marion, South Carolina

- A. 4. Cocaine Base
 B. Cocaine Base within Proximity of a School,
 Parks, or Public Playgrounds

A. 10. (Trial and Appellate)

A. 11. for Remanding to the South Carolina Court of
 Appeal; Trial Counsel failed to Investigate
 the Case; Trial Counsel failed to adequately
 present a proper Meaningful Defense; and
 Trial Counsel did not protect my right to
 be present to assist in a Meaningful Defense.

B. the proper opportunity to appear in Court
 for Trial based on no notice of when Case
 would be called for Trial.

C. Misconduct

A. 18. Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARION	)	FOR THE TWELFTH JUDICIAL CIRCUIT
Tyron D. Davis, #232416,	)	Case No. 2012-CP-33-590
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the Application for Post-Conviction Relief filed August 17, 2012,¹ would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marion County Clerk of Court. In November 2008, the Marion County Grand Jury indicted Applicant for distribution of cocaine base and distribution of cocaine base within the proximity of a school or park (2008-GS-33-291). Jack W. Lawson Jr., Esquire, represented Applicant. On November 12, 2009, Applicant was tried in his absence before the Honorable William H. Seals, Jr. and a jury. On November 13, 2009, the jury found Applicant guilty as indicted and Judge Seals issued a sealed sentence. On February 22, 2010, Applicant was brought before the court and Judge Seals pronounced concurrent sentences of twenty (20) years for distribution of cocaine base and fifteen (15) years for distribution of cocaine base within the proximity of a school or park.

¹ Respondent did not receive a copy of the application from the Marion Clerk of Court until September 24, 2013.

Applicant filed a timely notice of appeal and Wanda H. Carter, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on May 9, 2012. State v. Davis, Op. No. 2012-UP-289 (S.C. Ct. App. filed May 9, 2012). The remittitur was returned to the circuit court on May 25, 2012.

II.

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Denial of Effective Assistance of Counsel"
 - a. "Appellate Counsel failed to perfect a Petition for Rehearing to the South Carolina Court of Appeal; Trial Counsel failed to Investigate the case; Trial Counsel failed to adequately present a proper meaningful Defense; and Trial Counsel did not protect my right to be present to assist in a meaningful Defense."
2. "Denial of Right to Confrontation"
 - a. I was tried in my absence and not given the proper opportunity to appear in court for Trial based on no notice of when Case would be called for Trial."
3. "Denial of Right to Due Process of Law"
 - a. "Resulting from Judicial and Prosecutorial Misconduct"

Any claims not specifically enumerated in the Application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

Attached to this Return and incorporated herein are the records of the Marion County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to appellate counsel, the

applicant must prove prejudice by showing "there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citations omitted).

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent submits Applicant's allegations regarding his trial *in absentia* should be dismissed. Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). Applicant's allegations regarding his trial *in absentia* is a direct appeal issue. Applicant could have raised this issues on appeal. His failure to do so has waived this allegations as grounds for relief. Therefore, Respondent requests these allegations be dismissed pursuant to Rule 12(b)(6), SCRCP.

V.

Applicant further alleges due process violations. However, Applicant fails to set forth with specificity any facts supporting his claim that he was denied due process of law. The Uniform Post-Conviction Procedure Act requires that the applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In a post-conviction relief application, the applicant must make at least a *prima facie* showing which would entitle him to relief

before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (“It is, therefore, incumbent upon the applicant to make at least a *prima facie* showing entitling him to relief.” (citing Babb v. State, 240 S.C. 235, 125 S.E.2d 467 (1962); Crosby v. State, 241 S.C. 40, 126 S.E.2d 843 (1962); Tillman v. Manning, 241 S.C. 221, 127 S.E.2d 721 (1962); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965))).

Since Applicant has failed to make even a *prima facie* showing, Respondent would submit that this allegation should be dismissed pursuant to Rule 12(b)(6), SCRCP, for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for Respondent to respond.

VI.

To the extent Applicant also alleges prosecutorial misconduct, Respondent submits such an allegation should also be dismissed pursuant to Rule 12(b)(6), SCRCP. Prosecutorial misconduct is not an issue for post-conviction relief and is procedurally barred by S.C. Code Ann. § 17-27-20(b). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised the issue of prosecutorial misconduct on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant’s burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989).

VII.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

VIII.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held on those issues so requiring one.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

By: Karen Ratigan for JLT
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

April 24, 2014

STATE OF SOUTH CAROLINA

COUNTY OF MARION

TYRON D. DAVIS, #232416

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

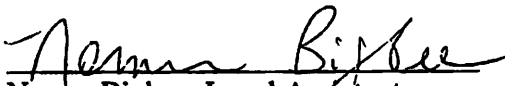
2012-CP-33-590

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 in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tristan M. Shaffer, Esquire
1928 Barnwell St.
Columbia, SC 29201

DATED this 24th day of April, 2014.


 Norma Bigbee, Legal Assistant

State of South Carolina	)	In the Court of General Sessions
	)	Twelfth Judicial Circuit
County of Marion	)	2012-CP-33-0590

TYRONE D. DAVIS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Transcript of Record
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Defendant.	)	
	)	
	)	

Florence, South Carolina
March 16, 2017

B E F O R E:

The Honorable Paul M. Burch

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

Ms. Lindsey McCallister, Esquire
Attorney for Plaintiff

Mr. Tristan M. Shaffer, Esquire
Attorney for Defendant

LISA S. CARTER
CIRCUIT COURT REPORTER

I N D E X

WITNESSESPAGE

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Wanda Carter:

Direct Examination by Mr. Shaffer 23

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Redirect Examination by Mr. Shaffer 32

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>EV.</u>
S-1	Jack Lawson's Information	6

1 MS. McCALLISTER: Your Honor, the next case is Tyrone
2 Davis versus the State of South Carolina, 2012-CP-33-590.

3 We are here today on Mr. Davis' application for post-
4 conviction relief that was filed on August 17, 2012. He is
5 presently confined in the South Carolina Department of
6 Corrections pursuant to the orders of the Marion County Clerk
7 of Court. He was indicted in November of 2008 for
8 distribution of cocaine base and distribution of cocaine base
9 within the proximity of a school or park. He was represented
10 on those charges by Jack Lawson.

11 On November 12, 2009 he was tried in his absence before
12 Judge Seals. He was convicted as indicted and Judge Seals
13 issued a sealed sentence.

14 On February 22, 2010 Judge Seals pronounce the sentence
15 of twenty (20) years for distribution of cocaine base and
16 fifteen (15) years for the distribution within the proximity.

17 He did file a timely notice of appeal and was
18 represented by Wanda Carter of the Office of Appellant
19 Defense. The South Carolina Court of Appeals ultimately
20 affirmed his conviction on May 9, 2012.

21 He is present in the courtroom today and he is
22 represented by Tristan Shaffer and I'll let Mr. Shaffer

23 THE COURT: All right.

24 MR. SHAFFER: Thank you, Your Honor. I'm actually
25 waiting for my computer to boot up. It has my transcripts

1 notes on it so I apologize if I am a little delayed on some
2 of the actual citations.

3 Your Honor, we're ready to move forward today. We
4 actually had plan on orally amending the application on
5 several grounds and Ms. McCallister had notice of. I can go
6 through those if the court would like.

7 The first one is that counsel was ineffective for
8 failing to request a continuance and moving forward with the
9 trial whenever my client, obviously, wasn't present. That my
10 client was not given proper notice and that counsel was
11 ineffective for that and that his rights, his due process
12 rights were violated as well because he wasn't given proper
13 notice. That the court relied on unsworn statements in
14 making a determination that he was given proper notice.
15 There's a, seek the truth argument, that was not objected to
16 and that's on page 31 of the transcript. There is bolstering
17 argument that was not objected to on 141 and 144. And that
18 the -- that, essentially, Mr. Lawson had previously
19 prosecuted cases where the confidential informant that was
20 used in this case. He prosecuted cases using that
21 confidential informant and that was actually brought up and
22 sort of use against him in saying, well, he's even use this
23 guy. I think that's a conflict of interest that got created.
24 The argument certainly was not, should not have been used to
25 say to the jury, hey, he believes this because when Mr.

1 Lawson prosecuted the case and Mr. Lawson used the same
2 confidential informant so obviously our guy is trustworthy.
3 I don't think that's a proper argument to be made. I also
4 think it was a conflict of interest.

5 And, Your Honor, I think that, obviously, Mr. Lawson's
6 not able to be here due to his passing away. I think that we
7 were going to stipulate that several documents came out of
8 the file from the public defender's office. That will, at
9 least, alleviate the need of having one of the PD's show up
10 here to actually testify concerning that. But these
11 documents, I guess, or limitations on the stipulation. We're
12 not saying that this stuff happened, we're just saying that
13 these are documents that the AG's office pulled from the file
14 and that they are authentic from the file.

15 MS. McCALLISTER: So, Your Honor, I have three
16 different documents, one, looks like a sheet that tracks
17 contracts with Mr. Davis. Then there was a letter sent from
18 the public defender's office to Mr. Davis with the court
19 date. And I have Mr. Lawson's trial notes so I would ask to
20 mark them as State's Exhibit, I can mark them separately or
21 together as a packet, whatever you would prefer.

22 THE COURT: You can put them together to simplify.

23 MS. McCALLISTER: Okay.

24 (Whereupon, the Mr. Lawson's Information has been marked and
25 entered into evidence as State's Exhibit No. 1)

1 MR. SHAFFER: Your Honor, I'm going to, because of the
2 fact that Mr. Lawson is not present, in the transcript, I'm
3 going to be heavily relying on because my client wasn't
4 present at the trial. I'm going to call my client just to
5 get out the necessary evidence that I need to supplement the
6 transcript in order to make these grounds and then I would
7 like to do an argument at the end of that if, the court,
8 would allow me.

9 THE COURT: That's fine.

10 MR. SHAFFER: Okay. Now, can we call Mr. Davis?

11 THE CLERK: Raise your right hand as much as you can.
12 Do you swear or affirm to tell the truth, the whole truth,
13 and nothing but the truth so help you God?

14 MR. DAVIS: I do.

15 THE CLERK: Thank you. Have a seat and state your
16 name for the record.

17 MR. DAVIS: Tyrone Davis.

18 TYRONE DAVIS, first being
19 duly sworn, testified as follows:

20 **Direct Examination by Mr. Shaffer:**

21 Q. Now, Mr. Davis, tell us briefly about what the State
22 alleged that you did?

23 A. They alleged that I distribute a quantity of crack
24 cocaine.

25 Q. Okay. And do you know anything about, and I guess, --

T. Davis- Direct Examination by Mr. Shaffer

8

1 you were represented Jack Lawson, correct?

2 A. Yes, sir.

3 Q. Do you recall meeting with Mr. Lawson prior to going to
4 trial?

5 A. Once.

6 Q. Okay. What did you understand the allegations against
7 you to be or the evidence against you to be that you
8 distributed cocaine?

9 A. Excuse me. I'm not ---

10 Q. I guess what I'm asking you is, what did you understand
11 after speaking with Mr. Lawson is the evidence that the State
12 would present against you? Did he ---

13 A. What -- what I understood -- what understood is
14 basically like, um, I was thinking about trial anyway but he
15 was trying to persuade me not to go to trial but then he put
16 it off, he put it off to another date and I spoke to him one
17 more time and then I got a incarcerated on the violation.
18 When I got incarcerated on the violation and when I got out
19 of the violation I spoke to him one time. Then after that it
20 was -- I ain't never talk to him again.

21 Q. Okay. When you got out tell us a little bit -- what you
22 mean by the violation?

23 A. I was on, um, prior to that, that charge I was on
24 probation. I've been incarcerated -- I've been on CSP. So
25 when I got out for the violation that's when I spoke to him

1 about the

2 Q. Well, were you monitored at all, did you get -- did you
3 have any time hanging over your head for the CSP while you
4 were on -- after you got out of there?

5 A. Yes, this charge right here, distribution.

6 Q. Okay. But, no, I mean, of the original charge that --
7 what was the original charge for that you were on CSP for?

8 A. A distribution.

9 Q. Okay. For that distribution after you got violated ---

10 A. Mmm, hmm.

11 Q. --- you were released?

12 A. Mmm, hmm.

13 Q. Did you have -- did you have any monitor or any thing
14 like that, were you back on CSP ---

15 A. Yeah, I mean -- I mean, I had -- I had a leg -- when I
16 got out incarceration -- when I got out of the penitentiary
17 I was on a leg monitor. All right. Okay. After I got out
18 then I did ninety days, I did ninety days on the leg monitor
19 and then I violated. When I violated I went back.

20 Q. You then went back on CSP ---

21 A. Yes ---

22 Q. --- for ninety days.

23 A. --- for violation.

24 Q. Okay. Were you reporting to the probation officer
25 during that time?

1 A. Yes.

2 Q. Okay. Where were you living at that time period, do you
3 recall the address?

4 A. Which time?

5 Q. After you got out -- during the time of the trial, where
6 were you living at?

7 A. At one point, I was staying at [REDACTED] Wildwood Loop.

8 Q. Okay.

9 A. Then I moved to [REDACTED] Gibson Street.

10 COURT REPORTER: What street?

11 A. [REDACTED] Gibson Street. Gibson.

12 Q. Okay. So you move to Gibson Street at some point during
13 that time period, right?

14 A. Yes, sir.

15 Q. Okay. Now, did you inform Mr. Lawson that you had
16 moved?

17 A. I haven't talk -- I haven't spoke to him. He told me he
18 would get back with me.

19 Q. But you never -- you never informed him that you moved?

20 A. Never -- it never ---

21 Q. Okay.

22 A. I never even spoke to him.

23 Q. So do you know the date or around the time that you,
24 that you moved to Gibson Street?

25 A. I can't recall.

1 Q. Okay. Did CSP -- did the probation department know
2 where you were living at ---

3 A. Yes, sir.

4 Q. --- did you change your address with them?

5 A. No. No, sir, I ain't changed with them.

6 Q. Okay. So they didn't know where you live either?

7 A. No.

8 Q. Okay. Now, do you recall Mr. Lawson ever telling you,
9 you needed to notify him and update him of your address?

10 A. No, sir.

11 Q. Do you know anything about your trial?

12 A. The only thing I know about that situation -- no -- yes
13 -- yes and no.

14 Q. Okay.

15 A. I say, yes, because he asked me what I wanted to do and
16 I was like, you know, I told him, nah, I'm not pleading. So
17 he was like, well, we'll have to do a jury, do the jury
18 trial. So at that point he said he would get back with me
19 and he never did.

20 Q. All right. And that was before or after you got locked
21 up on that ninety days for CSP violation?

22 A. That was after I got out.

23 Q. Okay. So you got out and then he told you that, do you
24 know whether at the time of your trial, whether or not you
25 were living at Gibson Street or if you were living at

T. Davis- Direct Examination by Mr. Shaffer

12

1 Wildwood Loop?

2 A. I can't recall.

3 Q. Did you forward your mail from Wildwood Loop to Gibson
4 Street?

5 A. Meaning, like, did I ---

6 Q. Go to the post office ---

7 A. No.

8 Q. --- and forward stuff?

9 A. No.

10 Q. Okay. I'm showing you part of the State's Exhibit,
11 okay. Have you ever seen that document -- well, that document
12 appears to be a letter, correct?

13 A. Yes.

14 Q. And I guess it was the second page and it seems to be a
15 letter dated October 16th of 2009, right?

16 A. Yes. Yes.

17 Q. Who is that letter addressed to?

18 A. Me, Tyrone Davis.

19 Q. Okay. And that's informing you that they're going to
20 bring you to trial, right?

21 A. Yes.

22 Q. Okay. Did you ever receive that letter?

23 A. I don't recall seeing this letter.

24 Q. Okay. Do you recall Mr. Lawson ever calling you?

25 A. No, sir.

1 Q. Did -- I'm showing you now the first page of the State's
2 Exhibit, it appears to be several, two phone numbers at the
3 top, do you recall giving those Mr. Lawson?

4 A. No, sir.

5 Q. Okay.

6 A. The number -- the first number that number right there
7 that's my mom's number. The second is my auntie number which
8 she's been deceased.

9 Q. Okay. What she deceased back in '08 or '09?

10 A. Yeah.

11 Q. She was?

12 A. Yeah.

13 Q. Okay. Would they have been able to reach you at your
14 moms number?

15 A. Yeah, but my aunt, she rarely there.

16 Q. Okay. Your aunt is rarely there but your mom ---

17 A. No. My aunt is deceased. My mom is rarely, she is
18 rarely there at the house.

19 Q. Okay. So he wouldn't have -- he may or may not have
20 been able to reach you, correct?

21 A. Yes.

22 Q. Okay. When did you first learned that you had been
23 tried in your absence?

24 A. Like a few days later.

25 Q. A few days later. And how did you learn of that?

T. Davis- Direct Examination by Mr. Shaffer

14

1 A. The whole town was talking about it.

2 Q. Okay.

3 A. I mean, people talking, you know what I'm saying,
4 talking. Hear it.

5 Q. Okay. Before you were tried, did you ever get notice
6 that your case was going to trial? Did anyone ever tell you
7 beforehand that your case was going to trial on that day?

8 A. Okay. Prior -- okay -- the only reason -- I did go to
9 court when I got out -- when I first got out of the
10 violation, I did go to court. I had to appear to the court.
11 Okay. When I appear to the court they postponed it to the
12 next term and they supposed to -- they postponed it to the
13 next term and I went to Jack Lawson's office and spoke with
14 him that's when I, you know what I'm saying, I was telling
15 him that I'm not pleading guilty to that charge. So he was
16 like from there we're going to jury and he said he would get
17 back to me. He never got back to me.

18 Q. Okay. Do you know if that conversation occurred while
19 you were living on Gibson Street or while you were living on
20 Wildwood Loop?

21 A. Wildwood Loop.

22 Q. Okay. At the time of your trial, do you think you were
23 living at Gibson Street?

24 MS. MCCALLISTER: Objection, Your Honor. He's
25 leading and he has asked that question before.

1 Q. Well, where do you think you were living whenever you
2 went to trial?

3 MS. McCALLISTER: Objection, Your Honor. He has asked
4 that question. It's been asked and answered.

5 MR. SHAFFER: I don't think it necessarily was.

6 THE COURT: Okay. Go ahead.

7 Q. Where do you think you were living whenever you went to
8 trial, whenever your case was tried, excuse me, you didn't
9 go, obviously ---

10 A. Yeah. I was living at [REDACTED] Gibson Street.

11 Q. Okay. At the time of your trial?

12 A. Yeah.

13 MR. SHAFFER: No further questions.

14 **Cross Examination by Ms. McCallister:**

15 Q. This address [REDACTED] Wildwood Loop, that is an address that
16 you or a residence that you lived at some point in the past,
17 is that correct?

18 A. Yes, ma'am.

19 Q. Do you remember when you lived there? What dates?

20 A. I mean, I lived -- I said I've been incarcerated for six
21 years so....

22 Q. Right. But do you recall when you lived there? Were
23 you living there in 2008, 2009, or 2010?

24 A. I can't recall.

25 Q. Okay. But you agree that, that was a valid address at

1 some point?

2 A. At some point.

3 Q. And when you went and talked to Mr. Lawson about the
4 fact that you didn't want to take a plea and your case was
5 going to go to trial, this was your address?

6 A. Sixteen -- yes.

7 Q. Okay. And you knew that Mr. Lawson was representing
8 you, correct?

9 A. Yes.

10 Q. And you knew how to get in touch with him somehow, you
11 knew where his office was, correct?

12 A. Yes.

13 Q. Did you know how to get in touch with him on the phone?

14 A. No.

15 Q. He never called you?

16 A. No.

17 Q. And you never called his office?

18 A. Never.

19 Q. Did you know how to look at the number for the public
20 defender's office?

21 A. Yes. Of course, I know how to do that.

22 Q. And you knew he was a public defender?

23 A. Yes.

24 Q. Okay. And you never called him or his office to tell
25 them that you were moving?

1 A. No.

2 Q. You never sent them a letter from the new address saying
3 you had moved?

4 A. No.

5 Q. Okay. But you knew your case ---

6 A. Okay. Excuse me, I'm saying when he -- he was supposed
7 to have called -- he had my phone number.

8 Q. Okay.

9 A. And he was supposed to contact me with my cell phone.

10 Q. But you knew you had these charges pending, correct?

11 A. Yeah. Correct. Correct.

12 Q. And you knew that your case was going to go to trial
13 because you didn't want to take the plea, correct?

14 A. Correct.

15 Q. Do you think it's important for you to stay in touch
16 with your attorney ---

17 A. Correct.

18 Q. --- during that time?

19 A. Well, at the same time -- ma'am, I didn't pass the bar
20 so I'm advised -- he's the counselor so he's advising me. He
21 said he was going to contact me.

22 Q. Okay. But when you moved, did you think that it might
23 be important to tell him that you had moved so that he could
24 contact you?

25 A. Yes.

T. Davis- Cross Examination by Ms. McCallister

18

1 Q. Okay.

2 A. Yes.

3 Q. And you said you never seen a copy of this letter, is
4 that correct? You didn't get this letter?

5 A. Which ---

6 Q. Saying that you had a trial date, the letter that ---

7 A. The letter that he showed me just now ---

8 Q. --- Mr. Shaffer showed you?

9 A. Let me -- can I see it? Can I see it again?

10 Q. Sure.

11 MS. MCCALLISTER: May I approach, Your Honor?

12 THE COURT: Yes.

13 A. Yeah, I remember it. That's the same letter he had.

14 Q. Okay. But do you agree with me that this letter is
15 addressed to you?

16 A. Yes. It's got my name on it.

17 Q. At your address on Wildwood Loop?

18 A. I'm not agreeing with you there. I said I'm agreeing
19 with you that my name is up there.

20 Q. Right. Do you agree that this address on Wildwood Loop
21 was your address?

22 A. Yeah, it was at some point.

23 Q. At some point, okay. Was it your address on October 16,
24 2009?

25 A. When?

1 Q. October 16, 2009?

2 A. I can't recall.

3 Q. Okay. And Mr. Shaffer showed you this other piece of
4 paper that has phone numbers on it, do you remember that?

5 A. Yes.

6 Q. And you said this first number here is your mom's
7 number?

8 A. Yes, it's my mother.

9 Q. Did you stay with your mom sometimes?

10 A. That's the same address.

11 Q. It's the same address ---

12 A. Yes.

13 Q. --- the Wildwood Loop address?

14 A. Yes.

15 Q. Okay. So that your mom's house?

16 A. Yes.

17 Q. Okay. So if someone -- if someone was calling that
18 number to get to you, were you in touch with your mom at that
19 time?

20 A. I mean, if someone was to call and get in contact with
21 me they should call me, my cell phone.

22 Q. Do you recall giving your cell phone number ---

23 A. Yes.

24 Q. --- to Mr. Lawson?

25 A. He has my cell phone number.

1 Q. He had your cell phone number?

2 A. Yes.

3 Q. Okay. But this number, is ti a home number ---

4 A. Yes ---

5 Q. --- a landline number?

6 A. That's a landline number.

7 Q. And it rings at [REDACTED] Wildwood Loop?

8 A. Yes, ma'am.

9 Q. Okay. I just want to clarify what you said about how
10 many times you talked to Mr. Lawson. Did you say -- how many
11 times did you speak with him?

12 A. There's two different occasions.

13 Q. Two different occasions?

14 A. Yeah, I'm saying -- what I said I talked to him once
15 when I got out. When I had got out when I had to go to the
16 court I talked to him. And prior to that, when I had the
17 charge, I had spoke to him when he send me all the paperwork
18 or whatever, I spoke to the then so I only spoke to him
19 twice.

20 Q. Okay.

21 A. Before I went to -- before they tried me in my absence
22 I had spoke to him once.

23 Q. Okay. And you did, I think you said earlier, you also
24 went to a court term and were told that your case would be
25 called the next ---

1 A. Yeah. That's the same -- that's the same -- that's the
2 first time that I spoke to him.

3 Q. Okay. That's the first time you spoke to him?

4 A. When I got out -- I said when I got out of jail ---

5 Q. Okay.

6 A. --- you know what I'm saying, he told me to come to the
7 courthouse. I had to go to the courthouse.

8 Q. Okay. So when was the second time that you spoke to
9 him?

10 A. The second time that was the violation. That was after
11 the violation. Okay, listen ---

12 Q. I'm sorry, I'm not following you.

13 A. --- you misunderstand. Okay. When I first -- when I
14 got the charge -- when I first got the charge, you know what
15 I'm saying, I bond out -- I went to jail -- I got
16 incarcerated. I got incarcerated twice. The first time I
17 got incarcerated I talked to him. When I got out I went to
18 the courthouse and they told me I need to come back at the
19 next term.

20 Q. Okay.

21 A. Okay. That's the time right there I only spoke to him
22 once.

23 Q. Okay.

24 MS. McCALLISTER: I think that's all the questions I
25 have, Your Honor.

1 MR. SHAFFER: No further questions at this time.

2 THE COURT: You may step down. Thank you.

3 MR. SHAFFER: Your Honor, my next witness is going to
4 be Wanda Carter from the appellate defense and we're going to
5 do that over the telephone.

6 THE COURT: All right.

7 (Whereupon, Mr. Shaffer took a moment to call the witness on
8 the telephone with no avail)

9 MR. SHAFFER: Your Honor, I can probably go forward
10 without her. I think the State would definitely need her and
11 that's the reason I was going to have her as a witness.

12 THE COURT: She's probably going to lunch from 12 to
13 1 now. Let's see, we're still on track with Warrens and
14 Evans?

15 MR. SHAFFER: Warren, Your Honor, I would -- Mr. Evans
16 I think is probably going -- this is a case where the
17 individual has been released. Mr. Warren, I would like to
18 talk to him for a few minutes.

19 THE COURT: Okay.

20 MR. SHAFFER: I think he just showed up. Do you have
21 one more?

22 MS. McCALLISTER: We did but it's off too. So it's
23 just Warren and Evans in the afternoon.

24 THE COURT: We could just go ahead and break for
25 lunch now and come back and maybe she'll be back.

1 (Whereupon, the court broke for lunch)

2 (Whereupon, Mr. Shaffer proceeded to get his witness on the
3 phone)

4 THE COURT: All right. We need to put her under
5 oath?

6 MR. SHAFFER: Yes, Your Honor.

7 THE COURT: Okay.

8 THE CLERK: Do you swear or affirm that the testimony
9 you'll give in the case will be the truth, the whole truth,
10 and nothing but the truth so help you God?

11 MS. CARTER: I do.

12 THE CLERK: Thank you. If you could state your full
13 name for the record.

14 MS. CARTER: Wanda, W-a-n-d-a H. Carter, C-a-r-t-e-r.

15 WANDA CARTER, first being
16 duly sworn, testified as follows:

17 **Direct Examination by Mr. Shaffer:**

18 Q. All right. Wanda, you represented Tyrone Davis,
19 correct?

20 A. Yes. That is correct.

21 Q. Okay. And he was appointed to you, correct?

22 A. That is correct. Yes.

23 Q. Okay. You got appointed after he was convicted while
24 you worked at the Office of Appellate Defense, correct?

25 A. That is correct. Yes.

W. Carter- Direct Examination by Mr. Shaffer

24

1 Q. Tell us a little bit about the issue you raised on
2 appeal?

3 A. Let's see, I filed a final (sic) brief for Mr. Davis,
4 let's see that was back in 2011. I think it was April 26,
5 2011. And, basically, I filed a Barrett (sic) brief actually
6 in his case. I raised the one issue and it had to do with
7 the improper bolstering. There was an issue about the
8 solicitor vouching pretty much for the credibility of one of
9 the State's informants. And that issue did not win on
10 appeal. The Court of Appeals decided that the issue wasn't
11 preserved before appellate review so that was -- that was --
12 that was the close of the case. That was pretty much it.

13 Q. Now, going back, you mentioned bolstering, did you -- do
14 you have your brief in front of you?

15 A. I'm looking at it right now.

16 Q. Okay.

17 A. Yes.

18 Q. Where in the transcript did you think that the -- am I
19 right in saying that trial counsel moved for a mistrial?

20 A. I have that. I have that at the record page 74.

21 Q. Okay. And you know what the small number is, the
22 transcript number?

23 A. I have -- I'm looking at the final brief and my record
24 says page 74.

25 Q. Okay. Do you have your initial brief in front -- do you

1 have that available?

2 A. Let's see, I sure do. Hold on. I can pull that up
3 also. Hold on.

4 Q. Okay.

5 A. Do you want me to see what page of the transcript
6 originally ---

7 Q. Yes.

8 A. --- if I can find that? I have it at page 98.

9 Q. Okay.

10 A. Okay. Yeah.

11 Q. So -- and I'm asking you to back up a little bit and I
12 want you to briefly review between 95 and 99.

13 A. Hold on just a minute because I can find that in the
14 transcript.

15 (Whereupon, the witness took a moment)

16 A. Okay. I have that.

17 Q. Okay. Do you know specifically and I'm going back to 95
18 because I believe that's beginning of the redirect of one of
19 the State's witnesses, do you see that?

20 A. I see that.

21 Q. Okay.

22 A. I see that.

23 Q. Now, at the beginning of that redirect it appears that
24 Mr. Jepertinger is asking a question about Mr. Lawson
25 previously prosecuting a case, correct?

1 A. Is that on 95 or 96?

2 Q. Ninety-five. It would've been 95 lines 2 through 4.

3 A. I see where page 95 -- let's see -- yes, I see that and
4 having prosecuted the case -- oh, I see that, lines 2 through
5 4. I have that, yes.

6 Q. Okay. Did that lead to the objection in the motion for
7 a mistrial on page 98? And I know this has been a long time
8 ago so feel free to review 95 through 99.

9 A. Just one moment.

10 (Whereupon, the witness takes a moment to read material)

11 A. Yes, I believe did, that testimony on page 95.

12 Q. Okay. And that was the motion for a mistrial that you
13 alleged that was the trial court error in denying, correct?

14 A. That's correct.

15 Q. Okay. And if you can and I know it's been a long time
16 but if you can, do you recall the nature of the argument that
17 Mr. Lawson felt was objectionable and warranted a mistrial?

18 A. Basically, the improper bolstering that was pretty much
19 vouching for the informant's credibility. And I see where
20 the judge overruled the objection and there was an issue
21 about curative instruction. But that was the basis for the
22 issue on appeal, the improper bolstering.

23 Q. Okay. And do you recall the opinion on this or do you
24 have access to the opinion?

25 A. Oh, I have that. I have that also, hold on.

1 Q. Okay.

2 (Whereupon, the witness took a moment to look at material)

3 A. With respect to the curative instruction the trial judge
4 offered it and it was objected to and that was the basis from
5 what I'm reading that the Court of Appeals confirmed the
6 conviction.

7 Q. Okay.

8 A. I distinctively remember State v. George which was my
9 case from a very long time ago and it's hard to remember but
10 the rules with the curative instruction and the rejection of
11 that offer I think was the problem.

12 Q. Okay. So in the opinion in this case is 2012-UP-289,
13 correct?

14 A. Yes.

15 Q. Okay. And the court basically denied finding that the
16 trial counsel had waived the objection by declining the
17 curative instruction, right?

18 A. That's -- that's how I interpreted it, yes.

19 Q. Okay. And that issue that you raised on appeal is in
20 between page 95 and 99 of the transcript, does that appear to
21 be a majority of what ---

22 A. Hold on. I need to go back ---

23 Q. Okay.

24 A. --- to my brief. Yes. Specifically, page 98, is where
25 I had cited to the objection.

W. Carter- Direct Examination by Mr. Shaffer

28

1 Q. Okay.

2 A. But page 95, back to what's before, sets up the
3 foundation for the objection.

4 Q. Okay. Now, if you could read into the record from page
5 96, line 19, um, down to the end of that objection on page
6 97, line 11?

7 A. Ninety-six, line 19?

8 Q. Yes.

9 A. All right. This is Mr. Lawson, "May it please, the
10 Court? Your Honor, at the very end of redirect examination
11 my understanding and for what reason I can only assume the
12 solicitor ask the question if I prosecuted when this
13 informant testified and the answer was yes. I did not object
14 at the time because I was shocked and taken aback and didn't
15 quite think. I heard what I heard until Ms. Lowe (sic)
16 advised me that of what was said. I would at this time move
17 for a mistrial, Your Honor. That is indirectly and attempt
18 by the prosecution to bolster the credibility of the
19 informant through the fact that I may have prosecuted with
20 her as a witness. I think that's inappropriate. I think that
21 I don't know what course could be done to correct that. It
22 would be in the minds of the jury from here on as we go
23 through this case and it's just not an appropriate or was it
24 appropriate, an appropriate question. It's not appropriate
25 for the jury to have that even to consider in their

1 deliberations."

2 Q. Okay. Thank you very much, Wanda. Now, obviously,
3 later on in the transcript the judge declines the mistrial
4 but offers to give a curative instruction, correct?

5 A. Yes. He says I'm going to overrule the objection and
6 give them a curative instruction and that's on page 98, lines
7 10 through 11.

8 Q. Okay. And Mr. Lawson actually declines curative
9 instruction, correct?

10 A. Yes. He says I would rather not have a curative
11 instruction and the objection is overruled. Sometimes I
12 think the thought train is that brings more attention to it
13 but anyway.

14 Q. Okay. But by doing that under the South Carolina case
15 law he waived the issue, correct?

16 A. That's correct.

17 Q. Okay. Had he allowed the curative instruction would
18 that have been a stronger issue on an appeal?

19 MS. McCALLISTER: Objection. That speculation.

20 A. Oh, yes. Absolutely.

21 MS. McCALLISTER: I think ---

22 (Whereupon, the witness could not hear opposing counsel and
23 continues on with answer)

24 A. It would at least been entertain by the Court of Appeals
25 instead of procedurally barred and even then, if the Court of

W. Carter- Direct Examination by Mr. Shaffer

30

1 Appeals rejected our claim we could've petitioned for cert,
2 a petition for certiorari to the South Carolina Court of
3 Appeals. So the waiver just barred a review of the
4 substantive merit of the issue.

5 Q. Okay.

6 THE COURT: Hold up, now.

7 COURT REPORTER: She's barking -- she needs to back
8 up off that microphone a little bit.

9 THE COURT: All right. The Attorney General entered
10 an objection because of the set up here it went on without me
11 interrupting but you want to note your objection now?

12 MS. McCALLISTER: Yes, Your Honor. My objection was
13 that, that would be speculation as to what would happened if
14 he had not waived the objection.

15 THE COURT: I note that.

16 MS. McCALLISTER: Thank you.

17 THE COURT: Go ahead.

18 MR. SHAFFER: Okay. Thank you.

19 Q. Wanda, had he allowed the curative instruction and the
20 Court of Appeals would've denied the issue, would you have
21 sought certiorari in the case ---

22 MS. McCALLISTER: Objection.

23 MR. SHAFFER: --- to the South Carolina Supreme Court?

24 MS. McCALLISTER: That is, I mean, again, speculation.
25 She can't -- she can't -- I'll withdraw.

1 A. Can I answer that?

2 THE COURT: You may.

3 A. All right. I probably would have appealed the Court of
4 Appeals decision to the South Carolina Supreme Court, yes.

5 Q. Okay.

6 MR. SHAFFER: No further questions.

7 **Cross Examination by Ms. McCallister:**

8 Q. Wanda, I believe you said on page 98 that's where Mr.
9 Lawson says, he would rather not have a curative instruction,
10 correct?

11 A. That is correct.

12 Q. And I think you started to say something about maybe
13 there is a strategy there, is this -- is that something that
14 you see frequently?

15 MR. SHAFFER: Objection, Your Honor. Well, I guess -
16 - I guess she -- I'll withdraw the objection. She can answer
17 that.

18 THE COURT: All right.

19 Q. Is, I guess what I'm trying to get at, is the waiver of
20 curative instruction a common issue that you see in your
21 appeals?

22 A. I have seen waivers before and curative measures be
23 offered and defense attorneys refusing or declining under
24 still with the - emphasis to the error. I have seen that
25 before.

W. Carter- Redirect Examination by Mr. Shaffer

32

1 Q. Okay. So you would agree with me that maybe something
2 that would be good for you on an appeal might not necessarily
3 be good at trial, you might have different strategies?

4 A. I would have to agree with that position, yes.

5 Q. Okay.

6 MS. McCALLISTER: Thank you. That's all I have.

7 MR. SHAFFER: Brief redirect, Your Honor.

8 **Redirect Examination by Mr. Shaffer:**

9 Q. Wanda, would any testimony you gave as to trial strategy
10 of Mr. Lawson regarding waiving that issue, would that be
11 speculation on your part or not?

12 A. Well, it would be speculation because my practice is
13 appellate practice so I'm not an expert on trial matters with
14 respect to defense attorney and their strategies. But I can
15 say this was a very good appellate issue and I hate that it
16 was never flushed out for review on the merits.

17 Q. Okay.

18 MR. SHAFFER: Thank you very much.

19 MS. CARTER: And I'm sorry about the delay. Please
20 forgive me. Thank you.

21 THE COURT: Thank you.

22 MS. CARTER: Thank you.

23 THE COURT: All right.

24 MR. SHAFFER: Your Honor, the applicant rest other than
25 a brief argument. You want me to -- I can go ahead and argue.

1 Your Honor, related to the issue that was raised on appeal,
2 basically, if you look at the transcript between 95 and 95
3 and, obviously, the court hasn't had a chance to review that
4 yet, but essentially what happened was the solicitor decided
5 to introduce evidence that Mr. Lawson had previously used
6 that confidential informant in other cases which is
7 completely inappropriate evidence. I mean, basically, he's
8 introducing a relevant matter to use his own attorney against
9 him whenever he wasn't there to defend himself. Obviously,
10 they're using the fact that it was this particular attorney
11 to argue that or put in the minds of the jury that it was a
12 credible witness. Your Honor, it was an inappropriate
13 objection, I mean, an inappropriate thing. Then trial
14 counsel decided to waive the issue, okay. Your Honor, there
15 is no objectively reasonable trial strategy for waiving that
16 issue. Now, I understand the State may insinuate based off
17 the speculation of Ms. Carter that he may have done it for
18 the purposes of not highlighting the issue. The problem with
19 that is that the courts don't look at it as highlighting the
20 issue, okay. South Carolina case law looks at that curative
21 instruction that the jury is actually going to follow that
22 curative instruction. So to say that, that's an objectively
23 reasonable trial strategy is in opposite to the case law that
24 basically says that this is, you know, the curative
25 instruction is binding on the jury. The jury is gonna listen

1 to it. It's basically saying well we're going to ignore the
2 curative instruction and do something contrary to the law
3 because of mister, you know, Mr. Lawson's feelings about it
4 or the speculation that Ms. Carter has about Mr. Lawson's
5 feelings about it. Your Honor, I think there is no trial
6 strategy that can cover that or at least not an objectively
7 reasonable one, Your Honor, because objectively reasonable it
8 has to be what an attorney would do knowing South Carolina
9 case law. So I think that it was deficient performance. I
10 also think that in a case that's based solely on the
11 credibility of that confidential informant to sit there and
12 say, to say that he was the one who actually purchased the -
13 - that he purchased some of her drugs, I think that, that is
14 a, that's a hugely critical issue in the trial of this case
15 is whether or not that person is credible and to say to allow
16 that testimony to go to the jury and allow the jury to draw
17 any reasonable inference from that testimony which is what
18 happened is that the jury could draw any reasonable inference
19 from it. That is, was definitely preconditional to my client's
20 case and I think that warrants post conviction relief.

21 I also think that there's several other issues which
22 I've discussed. There are some other vouching on page 141
23 and 144.

24 There is related to that issue that I talked about
25 earlier with a curative instruction it also almost creates a

1 conflict of interest there because what you have is now an
2 attorney who's very representation is being used as evidence
3 against my client at the trial. I mean, so I think it's a
4 conflict of interest for Mr. Lawson to continue representing
5 him whenever the jury knows, oh, well you put up that witness
6 before, you used her to prosecute people. That creates a
7 conflict of interest. I think he's entitled under the Sixth
8 Amendment to conflict free counsel.

9 And, Your Honor, there's that seek the truth language on
10 page 31 and specifically I referred the court it's 6 through
11 16, line 6 through 16 and 31 and 141, Your Honor, it's lines
12 16 through 17 and 144 it's lines 20 through 23, all those
13 things I think are objectionable that were not objected to by
14 trial counsel. Thank you.

15 THE COURT: Thank you. Counsel?

16 MS. McCALLISTER: Thank you, Your Honor. Your Honor,
17 I disagree with Mr. Shaffer, obviously, I think that there is
18 a reasonable trial strategy for declining curative
19 instruction and I think that Mr. Lawson actually outlines it
20 in the transcript that's also on page 98. You know, the
21 judge makes the comment quite frankly I didn't catch that and
22 I doubt the jury did either and Mr. Lawson says, "you know,
23 if you're overruling the objection I'm not sure that a
24 curative instruction would cause more problems." So I think,
25 I think there is some evidence of what his strategy was there

1 and what his line of thinking was for declining that
2 instruction.

3 I also think, Your Honor, that I, that there is some
4 case law that would be relevant to some of these issues that
5 Mr. Shaffer is raising in terms of the vouching and
6 bolstering and my computer has died so would, Your Honor,
7 allow me to email those to both of you maybe later this
8 afternoon or within 24 hours? Thank you.

9 THE COURT: No problem. All right. Let's do this,
10 so that I can read the transcript I'm going to take it under
11 advisement and proposed briefs and or proposed orders within
12 how many days?

13 MR. SHAFFER: Your Honor, thirty, if possible.

14 THE COURT: Thirty days?

15 MS. McCALLISTER: Thirty days.

16 THE COURT: Okay. Thank you, y'all very much.

17 (CONCLUSION OF THE HEARING ON MARCH 16, 2017)
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CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Fourth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Twelfth Circuit Court for Florence County, South Carolina, on the 16th day of March, 2017.

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

Lisa S. Carter

Lisa Carter

Circuit Court Reporter

August 7, 2018

FILED

FILED

STATE OF SOUTH CAROLINA
COUNTY OF MARION

2018 MAR 23

AM 9:43

IN THE COURT OF COMMON PLEAS
OF THE TWELFTH JUDICIAL CIRCUIT

Tyrone Davis, #194567,

MARION COUNTY SO
CLERK OF COURT

Case No.: 2012-CP-33-590

MARION COUNTY SO
CLERK OF COURT

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed August 17, 2012.¹ Respondent made its Return on or about April 24, 2014. An evidentiary hearing into the matter was convened on March 16, 2017, at the Florence County Courthouse. Tristan Shaffer, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Wanda H. Carter, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division, Applicant's appellate counsel, also testified via telephone. Trial counsel did not testify, as he is now deceased. After hearing testimony and the arguments of counsel, the Court requested post-trial briefs on the issue of whether refusing a curative instruction at the expense of preserving an issue for appellate review can be a valid trial strategy. The Court now denies and dismisses the application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marion County Clerk of Court. In November 2008, the Marion

¹ Applicant's PCR application was not received by Respondent until September 24, 2013.

PMB

County Grand Jury indicted Applicant for distribution of cocaine base and distribution of cocaine base within the proximity of a school or park (2008-GS-33-291). Jack W. Lawson, Jr., Esquire, (Counsel) represented Applicant. On November 12, 2009, Applicant was tried in his absence before the Honorable William H. Seals, Jr., and a jury. On November 13, 2009, the jury found Applicant guilty as indicted, and Judge Seals issued a sealed sentence. On February 22, 2010, Applicant was brought before the court, and Judge Seals pronounced concurrent sentences of twenty years for distribution of cocaine base and fifteen years for distribution of cocaine base within the proximity of a school or park.

Applicant filed a timely notice of appeal, and Wanda H. Carter, Esquire, (Appellate Counsel) of the South Carolina Commission on Indigent Defense - Appellate Defense Division perfected the appeal. The South Carolina Court of Appeals found the sole issue raised was not preserved and affirmed Applicant's conviction on May 9, 2012. State v. Davis, Op. No. 2012-UP-289 (S.C. Ct. App. filed May 9, 2012). The remittitur was returned to the circuit court on May 25, 2012.

ALLEGATIONS

In his application, Applicant alleges that he is being held unlawfully for the following reasons:

1. "Denial of Effective Assistance of Counsel"
 - a. "Appellate Counsel failed to perfect a Petition for Rehearing to the South Carolina Court of Appeal; Trial Counsel failed to Investigate the case; Trial Counsel failed to adequately present a proper meaningful Defense; and Trial Counsel did not protect my right to be present to assist in a meaningful Defense."
2. "Denial of Right to Confrontation"
 - a. I was tried in my absence and not given the proper opportunity to appear in court for Trial based on no notice of when Case would be called for Trial."
3. "Denial of Right to Due Process of Law"

a. “Resulting from Judicial and Prosecutorial Misconduct”

In November 2016, PCR counsel provided Respondent with an updated and amended list of allegations via email. At the evidentiary hearing in this matter, Applicant moved to amend his application to include the following issues:

1. Trial Counsel was ineffective for failing to request a continuance.
2. Trial Counsel was ineffective for failing to object to the trial moving forward in absentia.
3. Applicant was denied his right due process when the Trial Court relied on unsworn testimony from trial counsel to find that Applicant was given proper notice of trial.
4. Appellate Counsel was ineffective for failing to argue that the trial court abused its discretion in finding that Applicant was given proper notice of trial based on unsworn statements from trial counsel.
5. Trial Counsel was ineffective for failing to object to the “we are here to seek the truth” argument made by the State. Tr. 31, ll. 6-16.
6. Trial Counsel was ineffective for failing to object to the vouching/bolstering argument contained in Tr. 141, ll. 16-17 and Tr. 144, ll. 20-23.
7. Trial Counsel was ineffective for failing to move for a curative instruction based the bolstering comments.
8. Trial Counsel was ineffective for failing to move to be relieved when Counsel had previously prosecuted cases using the confidential informant.
9. Applicant was denied his right to conflict free counsel in violation of his Sixth and Fourteenth Amendment rights when trial counsel had previously prosecuted cases using the confidential informant.
10. Trial Counsel was ineffective in failing to make a contemporaneous objection after the question asked at Tr. 95, ll. 2-3.

Applicant proceeded primarily on two issues: (1) whether Counsel was ineffective for failing to properly notify Applicant his case was being called for trial, and (2) whether Counsel was ineffective for refusing a curative instruction, thus failing to preserve for appellate review the issue of improper bolstering comments made by the solicitor. As to any and all allegations that were raised in the application or at the hearing on this matter and not addressed in this Order, specifically Applicant’s allegations regarding the performance of Appellate Counsel and Applicant’s allegations regarding a potential conflict of interest for Counsel, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court

finds Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has reviewed the testimony and arguments presented. This Court has further had the opportunity to observe each witness who testified at the PCR hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, an applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 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. Butler, 286 S.C. at 442, 334 S.E.2d at 814. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, an applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's

performance by its “reasonableness under professional norms.” Id. (quoting Strickland, 466 U.S. at 688). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625.

A. Trial In Absentia

Applicant testified he only spoke with Counsel twice, and Counsel merely tried to persuade him not to go to trial. Applicant stated that he had been on community supervision for a prior distribution charge, was incarcerated for a violation, and then released, at which time he resided at Wildwood Loop in Florence. The address on Wildwood Loop is Applicant’s mother’s house, where she still resides. Applicant further testified that around the time of trial, he moved to Gibson Street. Applicant testified he did not speak to Counsel to inform Counsel he had moved, did not forward his mail, and did not change his address with his probation officer. On cross examination, Applicant agreed it would have been important to keep his attorney updated of his whereabouts so he could be contacted by Counsel.

Applicant testified Counsel contacted him at some point prior to trial to relay a plea offer, which Applicant rejected. Applicant further stated he knew by rejecting the plea, his case would be put on the jury trial docket. Applicant testified he went to court one time, but his case was continued until the next term. Applicant further stated he went to Counsel’s office sometime after that, and Counsel told him his case would go to a jury trial, but Counsel never contacted him again with a date and time. Applicant acknowledged he was living at the Wildwood Loop address at the time of that conversation with Counsel but thought he was living on Gibson Street by the time of trial. Applicant denied ever seeing the letter from Counsel’s file informing him of the trial date, but Applicant agreed the letter was addressed to him at Wildwood Loop. Applicant

could not say whether or not he was living at that address at the time the letter was mailed. Further, Applicant stated the telephone numbers contained in Counsel's notes were his mother's phone number and his aunt's, respectively. Applicant testified that he could "maybe" have been reached at his mother's number at the time, and Applicant admitted that his mother's phone number was a landline that rang at her house on Wildwood Loop. Applicant stated that he did not learn he had been tried in his absence until a few days after the trial had concluded.

It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007). In order to claim the protection afforded by the rule of law, a criminal defendant may be tried in his absence only upon a trial court's finding (1) the defendant has received notice of his right to be present, and (2) he was advised the trial would proceed in his absence if he failed to attend. State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987). Notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 99, 646 S.E.2d at 448. Further, a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear. Fairey, 374 S.C. at 101, 646 S.E.2d at 449.

Although the South Carolina Supreme Court has held that trial counsel's failure to request a continuance, in some circumstances, will be considered ineffective assistance of counsel, this Court finds Applicant's case is distinguishable. See Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006). In Morris, the applicant had accepted a favorable plea offer, but left the

courthouse before the guilty plea could be put on the record. Id. at 280-81, 639 S.E.2d at 54. The Supreme Court found the applicant was prejudiced by his counsel's failure to request the continuance because he received a significantly longer sentence after he was tried in his absence than he would have received under the plea. Id. at 281, 639 S.E.2d at 54. In this case, Applicant rejected the State's plea offer, knowing that doing so would mean his case would be on the next trial docket. Further, the Court of Appeals has clarified the holding in Morris, saying "to read Morris to require a trial judge to grant a continuance anytime a defendant intentionally absents himself from trial of which he has notice would subvert the rule and case law specifically allowing a trial *in absentia* under the proper circumstances...." State v. Ravenell, 387 S.C. 449, 458, 692 S.E.2d 554, 559 (Ct. App. 2010).

This Court finds Applicant's testimony regarding Counsel's deficiency is not credible. This Court finds Counsel provided effective assistance in this case. The record reflects Counsel conferred with Applicant on multiple occasions and conveyed all plea offers to Applicant, who rejected them in favor of maintaining his innocence. This Court finds Counsel made reasonable efforts to notify Applicant of the trial date using the contact information provided by Applicant by sending a letter and by attempting to contact Applicant by phone. The Court further finds, by Applicant's own admission, Applicant knew or should have known he needed to notify Counsel of his address change, and Applicant failed to do so. Furthermore, the trial judge made the required findings on the record that Applicant had received notice that his case was up for trial, he had a right to be present at trial, and he could be tried in his absence if he failed to appear. That Counsel's statements on the record at trial were unsworn is not persuasive as Counsel is an officer of the court, and Respondent introduced evidence at the PCR hearing from Counsel's file which supports this Court's, and the trial court's, finding Counsel made appropriate efforts to

notify Applicant. At the evidentiary hearing, Applicant offered no excuse for his absence except to say *maybe* he had moved to a different address by the time of trial.

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. Applicant also failed to present any evidence or witnesses that he was unable to present at trial due to his absence or the lack of a continuance. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (finding where Applicant presented no witnesses or any specific testimony establishing he would have had a defense if he had had additional time to prepare for trial Applicant failed to demonstrate prejudice as required by Strickland). This Court concludes Applicant has not met his burden of proving Counsel rendered ineffective assistance by failing to object to Applicant’s trial in absentia or to request a continuance. The allegation is denied and dismissed.

B. Waiver of Curative Instruction

The record reflects Applicant’s charges arose out of a controlled drug buy that was captured on video by a confidential informant (CI). At trial, the State called the officer who set up the CI with recording equipment and supplied money for the transaction. During redirect, the solicitor asked the officer whether the CI had previously testified in court for Counsel when he was a prosecutor. See Tr. p. 95. At the end of the solicitor’s redirect questioning, Counsel made a motion for a mistrial on the basis of improper bolstering. See Tr. pp. 96-97. The Court “overruled” the objection, but nevertheless offered to give a curative instruction. See Tr. pp. 97-

98. Counsel refused the curative instruction several times, stating, “[I]f you’re overruling the objection, I’m not sure a curative instruction would cause more problems.... I would rather not have a curative instruction if the objection is overruled.” Tr. p. 98. The denial of the motion for a mistrial was the only issue raised on appeal, and the Court of Appeals found it was waived when Counsel refused the curative instruction. State v. Davis, Op. No. 2012-UP-289 (S.C. Ct. App. filed May 9, 2012).

Appellate Counsel testified she was appointed to represent Applicant through the Office of Appellate Defense. She filed a brief on his behalf, raising the issue of improper bolstering of the State’s informant by the solicitor, but the Court of Appeals ruled Counsel had not preserved the issue for review and declined to address the merits of Applicant’s argument. Appellate Counsel testified that although Counsel objected to the solicitor’s question and moved for a mistrial, the judge declined to grant the motion and offered a curative instruction instead. Because Counsel rejected the curative instruction, the issue was not preserved for review. Appellate Counsel testified that if the issue had been preserved, she would have filed a petition for writ of certiorari to challenge the decision of the Court of Appeals. Appellate Counsel acknowledged Counsel articulated his reasoning for rejecting the curative instruction – that doing so tends to call more attention to the issue – and stated she had encountered the same issue in other cases. Appellate Counsel further acknowledged that trial strategy and appellate strategy are different and can be at odds.

“Counsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” Strickland, 466 U.S. at 690. There is a strong presumption that trial counsel’s decisions are based on tactical

strategy rather than neglect, and “[t]hat presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court ‘may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.’” Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). Counsel’s strategy is reviewed under “an objective standard of reasonableness.” Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

This Court finds Counsel articulated a valid trial strategy in refusing the Court’s offer to give a curative instruction.² Specifically, this Court finds Counsel refused the instruction

² The Court of Appeals found Counsel waived his objection by refusing the curative instruction. However, the judge repeatedly asserted that the objection was *overruled*, and the State argues that language is crucial for understanding and evaluating Counsel’s trial strategy at the time. “When an objecting party is *sustained*, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue. Moreover, as the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review. . . . On the other hand, when an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error.” State v. Wilson, 389 S.C. 579, 583–84, 698 S.E.2d 862, 864 (Ct. App. 2010) (internal citations omitted) (first emphasis added). In this case, the trial judge said he was overruling the objection, and Counsel responded, “[I]f you’re overruling the objection, I’m not sure a curative instruction

because he did not want to call more attention to the issue. Tr. p. 98. In Caprood v. State, the South Carolina Supreme Court reversed the PCR court's finding that trial counsel was ineffective for failing to move to strike or request limiting instructions after his objection to hearsay was sustained. 338 S.C. 103, 108-09, 525 S.E.2d 514, 516-17 (2000). At the evidentiary hearing, trial counsel testified he did not request curative instructions "as a trial strategy... because they tend to bring into focus precisely the item the objector has kept out." Id. at 110, 525 S.E.2d at 517. The Supreme Court found because trial counsel "articulated a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id.

Further, the Court finds Applicant has not met his burden of proving he was prejudiced by Counsel's conduct. This Court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475-76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for

would cause more problems. . . . I would rather not have a curative instruction *if the objection is overruled.*" Tr. p. 98 (emphasis added). Regardless, this Court finds no error.

appellate review, the court must determine the underlying claim was meritorious and that there was a reasonable probability it would have resulted in reversal and a new trial.

On appeal, Applicant would have to meet the high bar of showing the Court's denial of the motion for a mistrial amounted to an abuse of discretion. "The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. A mistrial should be granted only when absolutely necessary. Further, before a defendant may receive a mistrial, he or she must show both error and resulting prejudice." State v. McEachern, 399 S.C. 125, 145-46, 731 S.E.2d 604, 614 (Ct. App. 2012) (internal citations omitted). A "PCR applicant's mere speculation is insufficient to establish prejudice and, accordingly, the applicant must put forth further evidence to support his claim." Glover v. State, 318 S.C. 496, 501, 458 S.E.2d 538, 541 (1995) (Waller, J., dissenting).

The Court finds Applicant has provided no evidence Applicant was prejudiced by Counsel's decision to decline the curative instruction. Appellate Counsel's testimony is purely speculation, which is insufficient for a finding of prejudice. See Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (upholding denial of PCR because applicant's claim was "not supported by any probative evidence and [was] based on pure speculation"). Accordingly, Applicant's allegation Counsel was ineffective for failing to preserve for appellate review the issue of whether the solicitor's question constituted improper bolstering is denied and dismissed.

Applicant also raises the claim that Counsel was ineffective for failing to make a contemporaneous objection to the improper question. However, the decision by the Court of Appeals clearly found the issue was not preserved due to Counsel's refusal of a curative instruction, not because of the timing of the objection. State v. Davis, Op. No. 2012-UP-289

(S.C. Ct. App. filed May 9, 2012). Therefore, this Court finds Applicant's allegation Counsel was ineffective for failing to make a contemporaneous objection is without merit, and it is denied and dismissed.

C. Solicitor's "Seek the truth" argument

In his opening statement, the solicitor told the jury, "we are here to seek the truth, bottom line." Tr. p. 31. The solicitor continued by explaining what he meant by that statement – "not trying to reward people, not trying to punish people, but trying to call things as they are, impartially, without emotion." Tr. p. 31. Applicant contends this was improper, and Counsel should have objected.

As discussed above, "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that trial counsel's decisions are based on tactical strategy rather than neglect, and "[t]hat presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'" Yarborough, 540 U.S. at 8 (quoting Massaro v. United States, 538 U.S. 500 (2003)). Further, "[i]mproper comments do not automatically require reversal if they are not prejudicial. . .," and Applicant "has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

In State v. Aleksey, the South Carolina Supreme Court explained the problem with these comments is the potential for unconstitutional burden shifting to the defendant. 343 S.C. 20, 538 S.E.2d 458 (2000). In the present case, the trial judge explained the State had the burden of proving Applicant guilty beyond a reasonable doubt and then described the jurors' role as being "judges of the facts" who decide which witnesses are credible by determining "who is telling the truth and who is not telling the truth," immediately before the solicitor began his remarks. Tr. pp. 25-26. As in Aleksey, the "seek the truth" language was used in the context of judging the credibility of witnesses, which is a proper jury function, and in that context, is harmless error. 343 S.C. at 259-60, 538 S.E.2d at 477.

Additionally, Counsel's opening statement immediately followed the solicitor's, and Counsel repeatedly emphasized the State's burden of proof beyond a reasonable doubt and the presumption of innocence afforded to Applicant. Tr. pp. 32-35. Finally, at the conclusion of the trial, the judge gave thorough jury instructions on the jury's role as factfinder, determining the weight of evidence, and the State's burden of proof. Tr. p. 153-166. Applicant has not alleged any error in the instructions. This Court finds "it [is] not reasonably likely" that the solicitor's comment in his opening statement caused the jury to act in a "manner inconsistent with the notion that the State has the burden of proof beyond a reasonable doubt." State v. Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 477 (2012). Therefore, Applicant has not met his burden of showing he did not receive a fair trial due to the allegedly improper comment, and this allegation is denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing

proceedings. Counsel was not deficient, nor was Applicant prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice. This Court also finds, as to all allegations relating to Appellate Counsel, Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

The Court notes Applicant must file and serve a notice of appeal within thirty days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, Applicant must serve and file a notice of appeal on his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 15th day of March, 2018.

Chestnut, South Carolina

Paul M. Burch
PAUL M. BURCH
Presiding Judge
Twelfth Judicial Circuit

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MARION COUNTY CLERK
SHERRY R. RHODES
CLERK OF COURT

WITNESSES
J. NEIL ROUSE MCDU
Cribb

PROS:
D/O: 03-14-2008

ARREST WARRANT NO.
J955388 (1); J955387 (2).

ACTION OF GRAND JURY

TB
Foreman of Grand Jury
VERDICT
11-6-08

Foreman of Petit Jury Date:

DOCKET NO. 2008 - GS - 33 - 00291
The State of South Carolina,
County of MARION

COURT OF GENERAL SESSIONS
NOVEMBER TERM 2008

THE STATE
vs.
TYRON DESHAWN DAVIS

Indictment for
UNLAWFUL DRUGS

INDICTMENT FOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF MARION)

UNLAWFUL DRUGS

At a Court of General Sessions, convened on NOVEMBER 6, 2008, the Grand Jurors of MARION County present upon their oath:

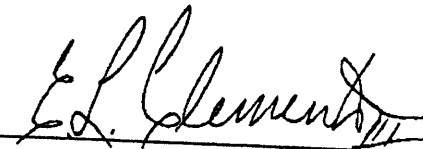
COUNT ONE - DISTRIBUTION OF COCAINE BASE 3RD

That TYRON DESHAWN DAVIS did in MARION County on or about March 14, 2008, violate Section 44-53-0375(B)(3) of the Code of Laws of South Carolina (1976), as amended, in that he did distribute to a confidential informant of the Marion County Combined Drug Unit a quantity of cocaine base, a controlled substance; such distribution not having been authorized by law.

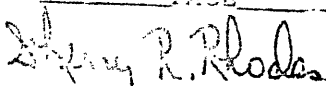
COUNT TWO - DISTRIBUTION OF COCAINE BASE
WITHIN PROXIMITY OF A SCHOOL OR PARK

That TYRON DESHAWN DAVIS did in MARION County on or about March 14, 2008, violate Section 44-53-445(B)(1) of the Code of Laws of South Carolina (1976), as amended, in that he did distribute to a confidential informant of the Marion County Combined Drug Unit a quantity of cocaine base, a controlled substance; such distribution having occurred within one-half mile of a school or park, to-wit: Marion County Alternative School.

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



SOLICITOR

A CERTIFIED COPY OF THE
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BOOK _____ PAGE _____

CLERK OF COURT, MARION COUNTY
SOUTH CAROLINA