

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

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S.C. Supreme Court

JOSE LUIS G. HERNANDEZ ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002061

APPENDIX

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STATE OF SOUTH CAROLINA' COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON 2007-GS-10-0056

STATE OF SOUTH CAROLINA)
Plaintiff)
V.) TRANSCRIPT OF RECORD
JOSE HERNANDEZ,)
Defendant.)

MARCH 3, 2008
Charleston, South Carolina
VOLUME 1

B E F O R E:

THE HONORABLE R. MARKLEY DENNIS, JR., JUDGE

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

MS. JULIE CARDILLO, Assistant Solicitor
MS. STEPHANIE BIANCO, Assistant Solicitor
Representing the State

MR. ANDREW GRIMES, Assistant Public Defender
MR. BEN LEWIS, Assistant Public Defender
Representing the Defendant

Anne Bouley Meyer, RPR
Circuit Court Reporter

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1 THE COURT: Now we have to have a Court -- are
2 some of the witnesses Hispanic?

✓3 MS. CARDILLO: No, Your Honor, the state is
✓4 not calling any Hispanic witnesses. So I'm not sure
✓5 as far as the interpreter what the Court would need.
✓6 I wanted to make sure the Court was provided every
✓7 opportunity since the defendant, Mr. Hernandez, is
8 Spanish speaking.

9 I know the public defender's office does have
10 an interpreter themselves, so I'm not sure. I think
11 Mr. Grimes can speak toward that.

12 THE COURT: Mr. Grimes, who's providing -- Ms.
13 Gaines, are you working in the second case as well?

14 THE INTERPRETER: I'm sorry, Your Honor.

15 THE COURT: Are you working in the second case
16 as well?

17 THE INTERPRETER: It's up to the Court, Your
18 Honor.

19 THE COURT: Okay.

✓20 MR. GRIMES: I don't believe we need one. I
✓21 have been able to talk to Mr. Hernandez about an
✓22 interpreter.

23 THE COURT: He said he is comfortable enough
✓24 with his understanding of the English language.

25 MR. GRIMES: Yes, sir. There might be a few

1 words here or there that I might need to explain just
2 as anyone else.

3 THE COURT: When he gets in we'll have him
4 place on the record that he does not wish to have an
5 interpreter, okay?

6 All right. Let the record reflect that Mr. --
7 you are Jose Hernandez? He doesn't have to stand,
8 that's fine.

9 THE DEFENDANT: Yes, sir.

✓10 THE COURT: Your lawyer has advised me that
✓11 you have discussed with him whether or not you wish
✓12 to have an interpreter present. Do you wish to have
✓13 an interpreter?

✓14 THE DEFENDANT: I'm fine, I think that I
✓15 understand.

16 THE COURT: So it is not your desire that the
17 court appoint an interpreter. We have someone
18 present who can serve in that capacity if you need
19 it.

20 THE DEFENDANT: All right. Well, I think I'm
21 all right.

22 THE COURT: You are all right?

23 THE DEFENDANT: Yes.

24 THE COURT: Thank you very much. Thank you
25 very much, appreciate that but we will not need an

1 interpreter.

2 Mr. Grimes, I have been handed a copy of your
3 motion for ten preemptory strikes. The state, you
4 may rely on the written motion that you filed for
5 support of your motion. Do you wish to supplement it
6 by argument?

7 MR. GRIMES: Briefly, Your Honor. I just
8 note, someone is looking at 25 years he should be
9 entitled to as many strikes as someone who's only
10 looking at five or ten years.

11 THE COURT: Thank you, sir. The statute
12 provides it's 5 and 5. Does the state wish to
13 respond to the motion?

14 MS. CARDILLO: No, Your Honor.

15 THE COURT: Very well. The motion is
16 incorporated in the record for purposes of review.
17 You may rely on your motion fully. The Court denies
18 the motion for ten preemptory strikes, the strikes
19 will be 5 and 5.

20 Okay any other preliminary matters that we
21 need to address before we bring in the jury?

22 MS. CARDILLO: Nothing from the state, Your
23 Honor.

24 THE COURT: Mr. Grimes?

25 MR. GRIMES: No, sir.

1 THE COURT: Okay. It appears we are going
2 forward at the earliest would be tomorrow. And we'll
3 try to keep you posted.

4 (Whereupon, the prospective jurors enter the
5 courtroom.)

6 THE COURT: Thank you very much, ladies and
7 gentlemen. I appreciate your patience. There were
8 matters I needed to take up before we could bring
9 upstairs, and that's normal with this procedure.
10 Sometimes we can bring you straight in, sometimes we
11 have to resolve some matters before we do that. I
12 appreciate your patience and understanding.

13 The dispute in which we need your assistance
14 is a dispute that's entitled the state of South
15 Carolina versus Jose Hernandez. Mr. Hernandez is
16 named as a defendant in this dispute only because he
17 is the party against whom the claims have been made.
18 And of course this being a criminal dispute, the
19 state is the party making the claim.

20 First let me introduce to you Mr. Hernandez.
21 Mr. Hernandez is seated at the table to my left.
22 Good morning, Mr. Hernandez. This is Jose Hernandez.

23 Thank you, you may take your seat. Are there
24 any members of the jury panel related by blood or
25 marriage, have any business dealings with, social or

1 casually acquainted with, have any connection at all
2 with Mr. Hernandez, if so please stand.

3 Thank you, there are none.

4 Mr. Hernandez is being represented by Mr.
5 Grimes. If you would identify yourself and anyone
6 that will be assisting you, please?

7 MR. GRIMES: Thank you, good morning. My name
8 is Andrew Grimes, I'm an attorney with the Public
9 Defender's Office. Assisting me today is Ben Lewis,
10 another attorney with the Public Defender's Office.
11 And also possible assistance today may be Santiago
12 Alameda.

13 THE COURT: I'm sorry, who was the last one?

14 MR. GRIMES: Santiago Alameda.

15 THE COURT: Are there any members of the jury
16 panel related by blood or marriage, have any business
17 dealings with, social or casually acquainted with Mr.
18 Grimes, Mr. Lewis or Mr. Alameda, or ever been
19 represented by Mr. Grimes, Mr. Lewis, if so please
20 stand.

21 Yes.

22 PROSPECTIVE JUROR: Your Honor, I attend
23 church with Mr. Alameda.

24 THE COURT: All right. The fact that you
25 attend church with him, would that affect you in this

1 matter?

2 PROSPECTIVE JUROR: I have know him for some
3 time, and we have served on committees together.

4 THE COURT: Very well. Your number, please.

5 PROSPECTIVE JUROR: 252.

6 THE COURT: 252 will be excused from
7 participation in this dispute. Call the number
8 please after 6:00 tonight and follow that
9 instruction. Have a good day, sir.

10 PROSPECTIVE JUROR: Thank you, sir.

11 THE COURT: Yes, sir.

12 PROSPECTIVE JUROR: Your Honor, John McWayne,
13 I also go to church with Mr. Alameda and I attended
14 law school with Mr. Grimes.

15 THE COURT: Would that affect you in this
16 case?

17 PROSPECTIVE JUROR: No.

18 THE COURT: Would you decide the case based on
19 the evidence and the law and would the decision be
20 fair to the state and to Mr. Hernandez?

21 PROSPECTIVE JUROR: Yes.

22 THE COURT: Thank you, sir. Your number
23 again, please.

24 PROSPECTIVE JUROR: 181.

25 THE COURT: Thank you.

1 Are there others? There appear to be none.

2 Are there any members of the jury panel
3 related by blood or marriage, have any business
4 dealing with, socially or casually acquainted with
5 anyone employed with the Public Defender's Office for
6 Charleston County, if so please stand.

7 There appear to be none.

8 PROSPECTIVE JUROR: Is that them over there?

9 THE COURT: No, no. The public defender's
10 office, Mr. Grimes and Mr. Lewis work with that
11 office. And let me state if you are related by blood
12 or marriage, have any business dealings with, ever
13 been represented by Mr. Ashley Pennington, who is the
14 Public Defender for the 9th Circuit, if so please
15 stand.

16 Okay. Thank you. There appear to be none.

17 The state is represented by Ms. Cardillo. If
18 you would identify yourself and anyone that will be
19 assisting you.

20 MS. CARDILLO: My name is Julie Cardillo, I am
21 an assistant solicitor in Charleston County. Helping
22 me today is another assistant solicitor, Stephanie
23 Bianco, and also a paralegal with our office, Jessica
24 Baldwin.

25 THE COURT: Thank you, you may be seated. Are

1 there any members of the jury panel related by blood,
2 marriage, have any business dealings with, socially
3 or casually acquainted with Ms. Cardillo, Ms. Bianco,
4 or Ms. Baldwin, or ever been represented by Ms.
5 Cardillo or Ms. Bianco, if so please stand.

6 Yes.

7 PROSPECTIVE JUROR: Now is the right time. I
8 know Stephanie Bianco through being members of the
9 Charitable Society of Charleston.

10 THE COURT: Okay. The fact that you have
11 worked with her in the capacity, would it affect or
12 influence you on this matter.

13 PROSPECTIVE JUROR: It would not.

14 THE COURT: Would you base your decision on
15 the evidence and on the law and would that decision
16 be fair to both the state and Mr. Hernandez.

17 PROSPECTIVE JUROR: Yes, it would.

18 THE COURT: Your name and number, please.

19 PROSPECTIVE JUROR: Heidi Richards and it's
20 223.

21 THE COURT: Thank you.

22 PROSPECTIVE JUROR: Thank you.

23 THE COURT: Are there others?

24 There appear to be none.

25 Are this any members of the jury panel related

1 by blood or marriage, have any business dealings
2 with, are solely casually acquainted with, or ever
3 been represented by Scarlet Wilson, who is the
4 solicitor for the 9th circuit, if so please stand.

5 Thank you, there are none.

6 Are there any members of the jury panel
7 related by blood, marriage, have any business
8 dealings with, socially or casually acquainted with
9 anyone employed with the solicitor's office for the
10 9th Circuit, it has two locations, one in Moncks
11 Corner and the other in Charleston, if so please
12 stand.

13 Yes, sir.

14 PROSPECTIVE JUROR: Yes, I have some
15 association with the solicitor's office.

16 THE COURT: Here in Charleston.

17 PROSPECTIVE JUROR: Yes, sir.

18 THE COURT: The fact that you have that -- is
19 that with one person or just the office in general?

20 PROSPECTIVE JUROR: Several people.

21 THE COURT: Would that affect or influence you
22 in this matter.

23 PROSPECTIVE JUROR: Not especially.

24 THE COURT: Well, not especially is an
25 interesting answer. You are going to have to make a

1 commitment to the state and to Mr. Hernandez that you
2 would not be influenced in way by that association.

3 PROSPECTIVE JUROR: I don't believe I would be
4 influenced.

5 THE COURT: Well, it's got to be more than
6 that.

7 PROSPECTIVE JUROR: No, I won't be influenced.

8 THE COURT: You have to promise. In other
9 words you'll raise your hand and say you'll promise
10 that it will not. It's not a matter of I don't think
11 it will be, it will not. You have to be that
12 emphatic. Can you make that commitment?

13 PROSPECTIVE JUROR: Yes, sir.

14 THE COURT: Okay. And you'd base your
15 decision on the evidence and the law and be fair to
16 the state and Mr. Hernandez?

17 PROSPECTIVE JUROR: Yes, sir.

18 THE COURT: Your name and number.

19 PROSPECTIVE JUROR: John Casella, number 55.

20 THE COURT: Number 55. Thank you, sir, you
21 may be seated.

22 Are there others? Yes, sir.

23 PROSPECTIVE JUROR: Yes, sir, I'm Dave Lawson.
24 Scarlet Wilson and I went to law school together. I
25 also made a donation to her campaign. I'm not sure

1 if that --

2 THE COURT: Thank you, sir. Would that affect
3 or influence you in this matter?

4 PROSPECTIVE JUROR: No, it would not.

5 THE COURT: Would you base your decision, Mr.
6 Lawson, on the evidence and the law, and would that
7 decision be fair to the state and to Mr. Hernandez?

8 PROSPECTIVE JUROR: Yes, it would be fair to
9 both sides.

10 THE COURT: Thank you, sir. And your number
11 again?

12 PROSPECTIVE JUROR: 165.

13 THE COURT: Thank you.

14 Are there any others? There appear to be
15 none.

16 I'm going identify a number of persons, ladies
17 and gentlemen, if you are related by blood or
18 marriage, have any business dealings with, socially
19 or casually acquainted with any of these individuals
20 you need to stand and share that information, please,
21 with the Court.

22 Steven Lasaine. Modesto Hernandez. Mario
23 Munoz. Justin Hembree. Mike Lynch. Sean Kaneli.
24 Arthur Santos. Angie Mitchell, all of whom are
25 employed with the Mount. Pleasant Police Department.

1 Susan Moody. Jennifer Leiser. Both of whom
2 are employed with the Charleston Police Department.

3 Any of those persons, please stand.

4 Yes.

5 PROSPECTIVE JUROR: A couple of those
6 individuals you mentioned I have an association with.

7 THE COURT: The fact that you have -- is it a
8 casual association with them.

9 PROSPECTIVE JUROR: Basically, yes.

10 MS. CARDILLO: Your Honor, may we approach?

11 THE COURT: Yes.

12 (Whereupon, a discussion was held at the bench
13 off the record.)

14 THE COURT: All right. Number 55 I'm going to
15 excuse you from participation in this dispute out of
16 an abundance of caution. Have a good day, sir. Call
17 the number after 6:00 tonight, please.

18 PROSPECTIVE JUROR: Will do.

19 THE COURT: Okay.

20 I'm going to ask you the same question, if you
21 are related by blood or marriage, have any business
22 dealings with, socially or casually acquainted with
23 Martino Bentencourt, Luis Sastru, Eduardo Martinez.
24 Any of those? S-A-S-T-R-U.

25 Thank you, there appear to be none.

1 This dispute, ladies and gentlemen, is
2 basically framed by these two documents that I hold
3 in my hand. They are what they appear to be you,
4 pieces of paper. They're called indictments. An
5 indictment is simply a formal document that makes an
6 accusation against a person and brings them to court
7 for the matter to be resolved. In other words, it
8 brings a dispute.

9 What I'm going to share with you now is not
10 evidence, it's just the allegations -- some of the
11 allegations contained in the indictments because I
12 need to ask you certain questions about it.

13 But by these documents Mr. Hernandez is
14 accused of committing the offense of trafficking in
15 cocaine and committing the offense of possession with
16 intent to distribute cocaine within proximity of a
17 school.

18 And that it's alleged that on August 7th,
19 2006, he did knowingly sell, manufacture, cultivate,
20 deliver, purchase or bring into this state, or did
21 provide financial assistance, or otherwise aid, abet,
22 attempt or conspire to sell, manufacture, cultivate,
23 deliver, purchase or bring into this state, or was
24 knowingly having actual or constructive possession,
25 or knowingly attempted to become an actual or

1 constructive possession of cocaine. And the amount,
2 it's further alleged, was in excess of 200 grams but
3 less than 400 grams.

4 It is further alleged that at the time he was
5 allegedly to be in possession of this substance that
6 he was within one-half mile proximity of Bell Hall
7 Elementary School, which is located at 385 Egypt Road
8 in Mount. Pleasant, which would be further a
9 violation of the law in this state.

10 I share with you those allegations first to
11 find out if any member of the jury panel has heard
12 anything, read anything, if you have any prior
13 knowledge of this dispute, please stand.

14 Thank you, there are none.

15 Is there anything about the nature of this
16 dispute that you, because of something that maybe
17 occurred to you or a family member or close personal
18 friend, some philosophy you may have, some strong
19 feelings you may have, anything that you can think of
20 that would affect your ability to be a fair and
21 impartial judge with me in this case, that is to be
22 the judge of the facts, if there is something, please
23 stand.

24 Thank you, there are none.

25 Are there any members of the jury panel, now

1 or formerly, or members of your immediate family, now
2 or formerly, employed in connection with law
3 enforcement in any capacity, if so please stand.

4 All right, yes, sir.

5 PROSPECTIVE JUROR: My son is a police
6 officer.

7 THE COURT: With what agency?

8 PROSPECTIVE JUROR: Mechanicsburg,
9 Pennsylvania.

10 THE COURT: Would that affect or influence you
11 in this dispute, sir?

12 PROSPECTIVE JUROR: Yes, sir, it might.

13 THE COURT: Very well, your number, please.

14 PROSPECTIVE JUROR: 130

15 THE COURT: Number 130 will be excused from
16 participation in this dispute. Call the number after
17 6:00 tonight have a good day, sir.

18 PROSPECTIVE JUROR: Yes, sir.

19 THE COURT: Yes, ma'am.

20 PROSPECTIVE JUROR: My boyfriend is a South
21 Carolina State trooper.

22 THE COURT: State trooper. Would that affect
23 you in this dispute?

24 PROSPECTIVE JUROR: No.

25 THE COURT: Would you base your decision on

1 the evidence and the law and be fair to the state and
2 be fair to Mr. Hernandez?

3 PROSPECTIVE JUROR: Yes.

4 THE COURT: Your name and number, please.

5 PROSPECTIVE JUROR: Shirley Warren. My number
6 is 283.

7 THE COURT: Thank you, Ms. Warren.

8 Are there any others?

9 There appear to be none.

10 Are there any members of the jury panel,
11 members of your immediate family that are -- have any
12 connection with, any affiliation with any group whose
13 basic purpose is to support law enforcement. And by
14 way of example such groups as Mothers Against Drunk
15 Driving known as MADD; Students Against Drunk
16 Driving, SADD; Citizens Against Violence, which is
17 known as CAV; and any similar organizations, if so
18 please stand.

19 Thank you, there are none.

20 Are there any members of jury panel -- one
21 juror already mentioned making a contribution -- who
22 are actively involved in any campaign for the
23 election of the Attorney General or solicitor,
24 either this county or any other county in the state,
25 if so please stand.

1 Thank you, there are none.

2 Are there any members of the jury panel that
3 have ever been involved, in any capacity, in a
4 criminal dispute of any nature; that is you were
5 accused, you accused someone, you were a witness in
6 the accusing someone, in other words you were a
7 witness for the state or you were a witness for
8 someone accused of a crime which would be the
9 defendant, if so please stand. Had any involvement?

10 Okay, I will ask that juror to come forward
11 please, we will meet you down by the court reporter.

12 (Whereupon, the following discussion was held
13 at the bench.)

14 THE COURT: Your name, please.

15 PROSPECTIVE JUROR: Delores Porter.

16 THE COURT: Yes, ma'am.

17 PROSPECTIVE JUROR: My Number is 217.

18 THE COURT: Okay.

19 PROSPECTIVE JUROR: I was accused of by my
20 neighbor, she had me arrested in 2005.

21 THE COURT: Okay. And what was the charge?

22 PROSPECTIVE JUROR: I have the paper,
23 remember?

24 THE COURT: I know.

25 PROSPECTIVE JUROR: I can't remember.

1 THE COURT: Okay.

2 PROSPECTIVE JUROR: No, but she didn't show up
3 for the court date.

4 THE COURT: So the charge was dropped?

5 PROSPECTIVE JUROR: Dropped.

6 THE COURT: Would that affect or influence you
7 in this matter?

8 PROSPECTIVE JUROR: No, it would not.

9 THE COURT: Thank you, ma'am, you may take
10 your seat.

11 (In open court.)

12 THE COURT: Are there any others?

13 Thank you, there appear to be none.

14 Any other specific questions from the State?

15 MS. CARDILLO: No, Your Honor.

16 THE COURT: Any other specific questions from
17 the defendant?

18 MR. GRIMES: No, sir.

19 THE COURT: Ladies and gentlemen, as I
20 mentioned to you when I qualified you, what will
21 happen and you've already heard me in asking the
22 jurors certain questions, we are going to select our
23 12 jurors and an alternate.

24 And the first thing that's going to happen
25 after that jury has been selected is the clerk will

1 ask you to stand and raise your right hand, and you
2 will make a commitment to the Court, to the state,
3 and to Mr. Hernandez that you would, at the
4 appropriate time, apply your common sense, your sense
5 of logic, and you will fairly and impartially analyze
6 the evidence in this case to decide what you believe
7 to be true. And then once you decide that, the true
8 facts, you would further promise that you would take
9 the law as I give it to you and apply that law fairly
10 and impartially to those facts so that your decision
11 will fairly, justly, reasonably resolve this dispute.

12 Is there anything about what you've heard
13 involved in this dispute that would you give you any
14 concern about your ability to make that commitment to
15 the state and to Mr. Hernandez and to the Court, if
16 so please stand. Anything at all?

17 Thank you very much, ladies and gentlemen.
18 what will happen now, we will be calling your names,
19 and you'll come forward, and what you will do is come
20 here and stand, just as I am standing, facing the
21 parties and the attorneys. And each side can excuse
22 five persons. The state will have the first option
23 and they will either say seat the juror or excuse the
24 juror. If they seat the juror, Mr. Hernandez will
25 have an opportunity to say seat the juror or excuse

1 the juror.

2 And we will go through that process until we
3 have selected our 12 persons and then our alternate.
4 The fact that either side should excuse you, please
5 don't read anything into that. That means nothing,
6 it's part of the process if you are excused just
7 return to your seat, take your seat. And we'll go
8 through it until we identify our jurors. Thank you
9 very much. I'll turn it over to you. Thank you,
10 sir.

11 THE CLERK: Ladies and gentlemen, if I call
12 your name please bring your belongings and come up to
13 the podium.

14 Juror Number 217, Delores Porter.

15 What say you for the state?

16 MS. CARDILLO: Please excuse this juror.

17 THE CLERK: Ms. Porter, have a seat back in
18 the audience, you have been excused from the trial in
19 this case.

20 Juror Number 44, Rose Budnick.

21 What say you for the state?

22 MS. CARDILLO: Please present this juror.

23 THE CLERK: What say you for the defendant?

24 MR. GRIMES: Please seat the juror.

25 THE CLERK: Ms. Budnick, please have a seat in

1 the jury box, you have been selected as a juror in
2 this case.

3 Juror Number 274, Roland O'Neil.

4 What say you for the state?

5 MS. CARDILLO: Please present this juror.

6 THE CLERK: What say you for the defendant?

7 MR. GRIMES: Please seat the juror.

8 THE CLERK: Mr. O'Neil, please have a seat in
9 the jury box, you have been selected as a juror in
10 this case.

11 Jury 145, Randolph Jenkins.

12 What say you for the state?

13 MS. CARDILLO: Please present this juror.

14 THE CLERK: What say you for the defendant?

15 MR. GRIMES: Please excuse the juror.

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

19 Juror 174, Katherine Lundy.

20 What say you for the state?

21 MS. CARDILLO: Please present this juror.

22 THE CLERK: What say you for the defendant?

23 MR. GRIMES: Please seat Ms. Lundy.

24 THE CLERK: Ms. Lundy, please have a seat in
25 the jury box, you have been selected as a juror in

1 this case.

2 Jury 250, Elizabeth Smith.

3 What say you for the state?

4 MS. CARDILLO: Please present this juror.

5 THE CLERK: What say you for the defendant?

6 MR. GRIMES: Please excuse this juror.

7 THE CLERK: Ms. Smith, have a seat back in the
8 audience, you have been excused from the trial in
9 this case.

10 Juror Number 29, Brenda Boch.

11 What say you for the state?

12 MS. CARDILLO: Please present this juror.

13 THE CLERK: What say you for the defendant?

14 MR. GRIMES: Please seat the juror.

15 THE CLERK: Ms. Boch, please have a seat in
16 the jury box, you have been selected as a juror in
17 this case.

18 Juror Number 314, Richard Sutton.

19 What say you for the state?

20 MS. CARDILLO: Please present this juror.

21 THE CLERK: What say you for the defendant?

22 MR. GRIMES: Please excuse this juror.

23 THE CLERK: Mr. Sutton, please have a seat
24 back in the audience, you have been excused from the
25 trial in this case.

1 That's three strikes for the defendant.

2 Juror 198, Marcus Notij.

3 What say you for the state?

4 MS. CARDILLO: Please present this juror.

5 THE COURT: What say you for the defendant?

6 MR. GRIMES: Please seat the juror.

7 THE CLERK: Sir, please have a seat in the
8 jury box, you have been selected as a juror in this
9 case.

10 Juror Number 206, Jennifer O'Steen.

11 What say you for the state?

12 MS. CARDILLO: Please present this juror.

13 THE CLERK: What say you for the defendant?

14 MR. GRIMES: Please seat the juror.

15 THE CLERK:, Ms. O'Steen, please have a seat in
16 the jury box, you have been selected as a juror in
17 this case.

18 Juror Number 203, Kerstin Olsen.

19 What say you for the state?

20 MS. CARDILLO: Please present this juror.

21 THE CLERK: What say you for the defendant?

22 MR. GRIMES: Please seat the juror.

23 THE CLERK: Ms. Olsen, please have a seat in
24 the jury box, you have been selected as a juror in
25 this case.

1 Juror Number 75, David Dent.

2 What say you for the state?

3 MS. CARDILLO: Please present this juror.

4 THE CLERK: What say you for the defendant?

5 MR. GRIMES: Please seat the juror.

6 THE CLERK: Mr. Dent, please have a seat in
7 the jury box, you have been selected as a juror in
8 this case.

9 Juror Number 105, Dale Glunt.

10 What say you for the state?

11 MS. CARDILLO: Please present this juror.

12 ~~THE CLERK: What say you for the defendant?~~

13 MR. GRIMES: Please excuse the juror.

14 THE CLERK: Mr. Glunt, please have a seat back
15 in the audience, you have been excused from the trial
16 in this case.

17 Four strikes for the defendant.

18 Juror 173, Aaron Lucas.

19 What say you for the state?

20 MS. CARDILLO: Please excuse this juror.

21 THE CLERK: Mr. Lucas, please have a seat back
22 in the audience, you have been excused from the trial
23 in this case.

24 That's two strikes for the state.

25 Juror Number 67, Sue Danenberg.

1 What say you for the state?

2 MS. CARDILLO: Please present this juror.

3 THE CLERK: What say you for the defendant?

4 MR. GRIMES: Please excuse the juror.

5 THE CLERK: Ms. Danenberg, have a seat back in
6 the audience, you have been excused from the trial in
7 this case.

8 That's five strikes for the defendant.

9 Juror Number 223, Heidi Rickter.

10 What say you for the state?

11 MS. CARDILLO: Please present this juror.

12 THE CLERK: Any challenge from the defendant?

13 MR. GRIMES: No, sir.

14 THE CLERK: Ms. Rickter, please have a seat in
15 the jury box, you have been selected as a juror in
16 this case.

17 Juror Number 212, Calvin Pickney.

18 What say you for the state?

19 MS. CARDILLO: Please excuse this juror.

20 THE CLERK: Mr. Pickney, have a seat back in
21 the audience, you have been excused from the trial in
22 this case.

23 Jury Number 83, Dixie Dunbar.

24 What say you for the state?

25 MS. CARDILLO: Please present this juror.

1 THE CLERK: Any challenge from the defendant?

2 MR. GRIMES: No, sir.

3 THE CLERK: Ms. Dunbar, please have a seat in
4 the jury box, you have been selected as a juror in
5 this case.

6 Juror Number 275, Latasha Tucker.

7 What say you for the state?

8 MS. CARDILLO: Please present this juror.

9 THE CLERK: Any challenge from the defendant?

10 MR. GRIMES: No, sir.

11 THE CLERK: Ms. Tucker, please have a seat in
12 the jury box, you have been select as a juror in this

13 case.

14 Juror Number 253, Robert Kyle Smith.

15 What say you for the state?

16 MS. CARDILLO: Please present this juror.

17 THE CLERK: Any challenge from the defendant?

18 MR. GRIMES: No, sir.

19 THE CLERK: Mr. Smith, please have a seat in
20 the jury box, you have been selected as a juror in
21 this case.

22 One alternate, Your Honor?

23 THE COURT: Yes, strikes will be 1 and 2.

24 THE CLERK: Juror Number 222, Lynn Rightbart.

25 What say you for the state?

1 MS. CARDILLO: Please present this juror.

2 THE CLERK: What say you for the defendant?

3 MR. GRIMES: Please excuse this juror.

4 THE CLERK: Sir, please have a seat back in
5 the audience, you have been excused from the trial in
6 this case.

7 Juror Number 248, Tricia Smalls.

8 What say you for the state?

9 MS. CARDILLO: Please present this juror.

10 THE CLERK: What say you for the defendant?

11 MR. GRIMES: Please seat the juror.

12 THE CLERK: Ms. Smalls, please have a seat in
13 the jury box, you have been selected as a juror in
14 this case.

15 Your Honor, the jury has been selected and
16 seated.

17 THE COURT: Thank you very much.

18 Are there any motions from the state regarding
19 the selection process?

20 MS. CARDILLO: No, Your Honor, thank you.

21 THE COURT: Any motions from Mr. Hernandez
22 regarding the selection process?

23 MR. GRIMES: No, sir.

24 THE COURT: Very well. Ladies and gentlemen,
25 those of you that were not selected, thank you for

1 your assistance, you are now free to leave. Please
2 call the number after 6:00 tonight. I hope you have
3 a good day. Follow the instructions tonight.

4 Ladies and gentlemen, you that were selected,
5 thank you for your assistance as well. We are now
6 about 12:20, 12:25. I think it's probably a good
7 point to stop and take our lunch break rather than
8 start and then go just a few minutes and then have
9 our lunch break.

10 Please remember that you've heard no evidence
11 in this case. So it would be improper for you to
12 ~~talk about this case or speculate about this case.~~

13 You will take an oath when you return to decide the
14 case based on what happens in the courtroom, of
15 course that means the evidence that you hear and the
16 law that you hear.

17 Therefore it's very important that you not
18 talk with anyone outside of this courtroom or permit
19 anyone to talk with you about this case. And if
20 someone should be talking about this case where you
21 are seated, please ask them to stop. If they persist
22 please report that upon your return. Have a good
23 lunch. I'm going to ask that you exit through the
24 door to your left. They will show you where you need
25 to come after lunch. Be back in your jury room at

1 2:00 o'clock, please, and we will resume the trial at
2 that time. Have a good lunch.

3 (Whereupon, the jurors exit the courtroom.)

4 THE COURT: Anything from the state before we
5 recess?

6 MS. CARDILLO: Nothing from the state, Your
7 Honor.

8 THE COURT: Anything from the defendant.

9 MR. GRIMES: I think for the Court's
10 information we do have a Jackson v. Deno issue.

11 THE COURT: We need to hear it now. You have
12 your witnesses present?

13 MS. CARDILLO: Your Honor, I have Detective
14 Hembree in the courtroom.

15 THE COURT: Do you want to go ahead and let's
16 do that now?

17 MS. CARDILLO: That's completely fine, Your
18 Honor.

19 THE COURT: All right, call your witness on
20 the Jackson v. Deno hearing.

21 MS. CARDILLO: Thank you, Your Honor. State
22 calls Detective Hembree.

23 MR. JUSTIN HEMBREE,
24 after having first been duly sworn to state the
25 truth, the whole truth and nothing but the truth,

1 testified on his oath as follows:

2 DIRECT EXAMINATION

3 BY MS. CARDILLO:

4 Q Detective Hembree, can you name the date and
5 place of where the statement of Mr. Hernandez was
6 given?

7 A Yes, ma'am, it was August the 7th, 2006, at
8 the Food Lion grocery store parking lot, 697 Long
9 Point Road in the town of Mount. Pleasant.

10 Q And were you present during this questioning?

11 A Yes, ma'am.

12 Q Do you know whether or -- when you were

13 speaking with the defendant did he appear to be under
14 the influence of alcohol or drugs that would impair
15 his ability to understand your questioning?

16 A No.

17 Q Now this was outside in the parking lot of the
18 Food Lion?

19 A That's correct.

20 Q So you never questioned him inside an
21 interview room or anything of that nature?

22 A Not that I recall, no, ma'am.

23 Q What was the length of questioning of the
24 defendant at the Food Lion parking lot?

25 A It was fairly short. He was advised of his

1 Miranda rights. He acknowledged that he understood
2 his Miranda rights. He spoke very clear English at
3 that time.

4 And we asked him, after he agreed to further
5 speak to us, we asked him what he stood to gain out
6 of the transaction, trying to identify who was in
7 fact the main player in the drug transaction. He and
8 the co-defendant expressed that they were to make
9 \$200 off of this transaction.

10 Q Now let me go back just a minute, was the
11 defendant -- I think you already said this -- was he
12 understand arrest at this time?

13 A Yes, ma'am.

14 Q And was he free to go at all during this time
15 before your questioning but after he was arrested?

16 A No.

17 Q Now did he -- had the investigation into the
18 crime focused on the defendant as a suspect or
19 defendant at the time of questioning?

20 A Yes.

J21 Q And was he responding to your questions?

22 A Yes.

23 Q Was he advised of the nature of the
24 investigation?

25 A Yes.

1 Q And I think you've already previously stated
2 this, but was he advised of his constitutional rights
3 pursuant to Miranda?

4 A Yes, ma'am.

5 Q How was the advisement of the warning
6 accomplished.

7 A Verbal.

8 Q So it wasn't read from a card?

9 A No.

10 Q Did he have -- did he appear to have any
11 trouble understanding his rights, for example ability
12 to understand English, since he is an Hispanic male.

13 A He had no trouble at that time.

14 Q Did his answer appear to be rational and
15 responsive?

16 A Yes.

17 Q Was he emotional in any way, or did he appear
18 in any way to not understand your questions?

19 A Obviously I would say he was visibly upset
20 that he had just been arrested. But he understood
21 what I was saying.

22 Q Did he ask -- did he -- let me just ask you
23 this. Did he ask for an attorney prior to you asking
24 him these questions?

25 A No.

1 Q Did he agree to talk to you without an
2 attorney?

3 A Yes.

4 Q Did he ever change his mind and ask to stop to
5 be questioned because he wanted an attorney?

6 A Yes.

7 Q And did all questions at that time cease?

8 A Yes, ma'am.

9 Q To the best of your knowledge was the
10 defendant's statement freely and voluntarily given?

11 A Yes.

12 Q Was this statement ever reduced to writing?

13 A No.

14 Q Again, what did the defendant state to you in
15 the statement?

16 A He indicated that he was there to make \$200 by
17 facilitating the transaction.

18 Q And that was the extent of what he stated?

19 A Yes, ma'am.

20 MS. CARDILLO: Court's indulgence one moment,
21 Your Honor.

22 THE COURT: Sure.

23 MS. CARDILLO: Your Honor, I have nothing
24 further.

25 THE COURT: Okay, cross-examination.

1 MR. GRIMES: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. GRIMES:

4 Q You testified that you advised Mr. Hernandez
5 of his constitutional rights?

6 A I may have misstated. He was advised of his
7 Miranda rights Detective Christmas and I advised Mr.
8 Martinez.

9 Q And how far was Mr. Martinez away from Mr.
10 Hernandez?

11 A Sgt. Kaneli, myself, I advised Mr. Martinez of
12 his Miranda rights on one side of the vehicle, I

13 believe it was the driver's side tailgate. Detective
14 Christmas was advising Mr. Hernandez of his Miranda
15 rights on the passenger side of the vehicle. So I
16 could hear his conversation as well.

17 Q And you had one officer had a Kell Recorder?

18 A That's correct.

19 Q Was this conversation recorded in any way?

20 A I believe the Kell recorder was stopped
21 immediately upon the arrest of the defendants.

22 Q Was Mr. Hernandez's statement to Detective
23 Christmas recorded in any way?

24 A No, sir.

25 Q Was Detective Christmas's advisement of rights

1 to Mr. Hernandez recorded in any way?

2 A No.

3 Q Does Mr. Pleasant Police Department have
4 advisement of rights forms?

5 A They do.

6 Q Did you use that in this case?

7 A Not in this case because we were on scene.

8 Q Did you advise Mr. Hernandez of his right to
9 notify his consulate of his arrest?

10 A Yes.

11 Q You did?

12 A Yes.

13 Q Where is that in your report?

14 A Just in the catch-all phrase of I advised him
15 of -- or he was advised of Miranda rights by
16 Detective Christmas. In the Miranda we state they
17 have the right to an attorney.

18 Q I asked you a little bit different question.

19 A Okay.

20 Q Did you advise Mr. Hernandez that he had the
21 right to notify the Mexican Consulate that he had
22 been arrested?

23 A No, I did not.

24 Q Now are aware of the provision of the Vienna
25 convention?

1 A No.

2 MS. CARDILLO: Your Honor, objection, outside
3 the scope of this motion.

4 THE COURT: Sustained.

5 Q (By Mr. Grimes) And all Mr. Hernandez said is
6 he was supposed to make \$200 off this?

7 A Yes, sir.

8 Q Nothing else?

9 A Not that I recall.

10 Q Did he say anything about having a gun at his
11 apartment?

12 A Not that I recall.

13 If I may. During the transaction he did make
14 a comment that he had a gun in his home that was
15 found by his child, which lead us to believe that
16 there would be guns in the house.

17 Q One last question. When you say Detective
18 Christmas advised him of his constitutional right,
19 what rights did he advise him of?

20 A Just Miranda.

21 Q Which are?

22 A He has a right to remain silent. Anything he
23 says can and will be used against him in a court of
24 law. He has the right to an attorney. If he cannot
25 afford an attorney one will be appointed to him at no

1 cost. And does he understand the rights that are
2 explained to him and he said he did.

3 Q So from your testimony, Detective Christmas
4 did not advise him he had a right to stop at any
5 time.

6 A Yes, I mean, full Miranda, I can't say
7 verbatim what exactly he told him. But we say the
8 same thing as we are trained from the department.

9 MR. GRIMES: Thank you, I have no further
10 questions.

11 THE COURT: Redirect.

12 MS. CARDILLO: Briefly, Your Honor.

13 REDIRECT EXAMINATION

14 BY MS. CARDILLO:

15 Q You were present when Mr. Hernandez was given
16 Miranda rights?

17 A Yes, ma'am.

18 Q Now were any promises made for the defendant's
19 statement after he waived his rights?

20 A No, ma'am.

21 Q Any threats made toward the defendant?

22 A No.

23 MS. CARDILLO: Thank you. I have nothing
24 further, Your Honor.

25 THE COURT: Any additional questions?

1 MR. GRIMES: No, sir.

2 THE COURT: Do you wish to call any additional
3 witnesses?

4 MS. CARDILLO: Your Honor, no. The state is
5 not calling any additional witnesses.

6 THE COURT: Okay. You may step down. Thank
7 you, sir.

8 Did you wish to present any testimony?

9 MR. GRIMES: Yes. We call Mr. Hernandez at
10 this time.

11 THE COURT: All right.

12 MR. JOSE LUIS GUTIERREZ HERNANDEZ,

13 after having first been duly sworn to state the
14 truth, the whole truth and nothing but the truth,
15 testified on his oath as follows:

16 DIRECT EXAMINATION

17 BY MR. GRIMES:

18 Q Mr. Hernandez, do you recall when you were
19 arrested in August 2006?

20 A Yes.

21 Q Who were you arrested by?

22 A Being arrested on Long Point Road for Mount.
23 Pleasant Police.

24 Q Okay. And do you recall giving a statement to
25 the Mount Pleasant Police?

1 A Say that again.

2 Q Do you remember giving a statement to the
3 Mount Pleasant Police officers?

④ A Yes, I remember they a statement when they
⑤ take me to the Mount Pleasant Department and one of
⑥ those officer, they told me my right, that I needed
⑦ to do like, you know, I got a chance to call a
⑧ lawyer, but they mix it like a little bit of Spanish
⑨ and English.

10 Q Where was that at?

11 A I'm not exactly the location but that's in
12 Mount Pleasant.

13 Q Was it at the police department or was that
14 outside of the Food Lion?

15 A No, in the police department.

16 Q Now while you were at the Food Lion, do you
17 recall any officer reading you your constitutional
18 rights?

19 A Um.

20 Q Let me rephrase that. Do you remember any
21 officer telling you that you had a right to remain
22 silent?

23 A (No,) they don't tell me in the moment after
24 they transferred me to the office, to the building,
25 the police department. And I remember one of those

1 officers, they show up in a small room and started
2 asking me question and that's when he told me you can
3 -- you gotta -- you can call a lawyer and everything
4 that you say, you know, they go against you.

5 Q But when was the first time that they told you
6 that you could call a lawyer?

7 A When they take me to that police department.

8 Q All right. Mr. Hernandez, please answer any
9 questions that the state's attorney may have for you.

10 THE COURT: Cross-examination.

11 MR. CARDILLO: Your Honor, state has no
12 questions.

13 THE COURT: Thank you, you may come down, sir.
14 Any additional witnesses?

15 MR. GRIMES: No, Your Honor.

16 THE COURT: Okay. Anything in response from
17 the state?

18 MS. CARDILLO: Your Honor, just for the
19 record, Detective Christmas was not called. We have
20 him -- can have him present if he needs to testify.
21 But since Detective Hembree was present as well we
22 felt that was sufficient evidence to go forward.

23 Nothing further otherwise from the state, Your
24 Honor.

25 THE COURT: Okay. Mr. Grimes.

1 MR. GRIMES: You've heard the testimony of one
2 officer that said he was advised of his rights
3 beforehand, Mr. Hernandez denies that. I guess the
4 Court will ultimately decide.

5 THE COURT: Based on the evidence I have I'm
6 not going to allow the statement. Thank you.

7 MR. GRIMES: Thank you, Your Honor.

8 THE COURT: Okay. Anything else?

9 MS. CARDILLO: Nothing from the state, Your
10 Honor.

11 THE COURT: Thank you, we will be at ease
12 until 2:00 o'clock.

13 (Whereupon, a recess was taken.)

14 (Whereupon, State's Exhibit Nos. 1 through 4
15 are marked for identification.)

16 THE COURT: Is the state ready?

17 MS. CARDILLO: Yes, Your Honor.

18 THE COURT: Defense ready?

19 MR. GRIMES: Yes, sir.

20 THE COURT: Let the record reflect Mr.
21 Hernandez is present. We have the jurors, let's
22 bring in the jury panel, please.

23 (Whereupon, the jurors enter the courtroom.)

24 THE COURT: Thank you very much. Thank you,
25 ladies and gentlemen. Hope you had a good lunch.

1 We are ready now to continue in the matter we
2 started before lunch. Before I ask the clerk to
3 administer your oath, let me talk about the seat
4 arrangements. First of all, Ms. Smalls, you may have
5 either of those chairs there, they belong to the
6 alternate juror, that is you. But that term really
7 has no significance at the moment. At the conclusion
8 of the trial if the first 12 selected are able to
9 continued, then you would not participate in the
10 final deliberations.

11 Since neither you nor I know the status of
12 those jurors now, please remember you are very much a
13 part of this jury panel, notwithstanding you are the
14 alternative.

15 There is only one other designated seat,
16 ladies and gentlemen, this lady on the first row is
17 occupying that, that is the seat that will be
18 occupied by your presiding juror. Any of you, the
19 first 12 will be eligible to serve in that capacity.
20 The presiding juror is also called foreperson,
21 foreman, forelady. Someone has to be responsible for
22 signing the verdict form on behalf of the jury. If
23 there are exhibits that are introduced during the
24 trial it's the responsibility of the presiding juror
25 to receive those when it begins its deliberations,

1 and of course returning those to the Court.

2 Other than that, that's really the essence of
3 your additional responsibility. The statute permits
4 me to select a presiding juror or you to select a
5 presiding juror. I let the jury pick theirs. At
6 some point if you could do that. Once you've
7 identified that person I simply ask that person
8 occupy that seat for the balance of the trial. Until
9 then any of you are free to occupy that seat when you
10 come in the courtroom, except Ms. Smalls.

11 Please give your attention now as you
12 administer the oath, please.

13 THE CLERK: Yes, Your Honor.

14 (Whereupon, the Clerk administers the oath to
15 the jury panel.)

16 THE COURT: Thank you, sir.

17 Thank you, ladies and gentlemen. I mentioned
18 that you would be making that commitment and now by
19 virtue of that commitment you and I will work
20 together to resolve this dispute. You become a judge
21 with me, and now you and you alone have the
22 responsibility of deciding the true facts of this
23 dispute.

24 And you promised the parties, the Court, the
25 attorneys, that you would, at the appropriate time,

1 apply your common sense, your sense of logic and
2 reason, fairly and impartially decide those facts,
3 and then once you determine those facts taking the
4 law as I give it to you and apply that law to those
5 facts. When you do that you will honor the
6 commitment that you just made. And I'm confident
7 that each one of you will do that.

8 As I mentioned to you this morning you bring
9 with you, when you walked into this courtroom,
10 everything that's essential to performing that task.
11 You have brought your life experience, your common
12 sense, your sense of logic and reason and knowledge,
13 and everyone expects you to use it at the appropriate
14 time.

15 You also brought something else with you which
16 I will respectfully submit is very important to
17 fulfilling the commitment that you just made. You
18 brought with you an open mind. If you think about
19 the questions that I asked, you heard me ask some and
20 I may have asked you, would that influence or affect
21 you, would you decide the case based on the evidence
22 and the law, and would it be fair to both sides.

23 And either by not responding to my question,
24 or by standing and responding, you have indicated you
25 would and could do that. You also indicated that you

1 knew nothing about this dispute and there was nothing
2 about it, do you remember the last question I said is
3 there anything about what you heard that would give
4 you any concern about your ability to make the
5 commitment that you just made. And none of you
6 responded to that question so you've indicated
7 absolutely not.

8 In other words, I have an open mind about this
9 dispute. There's nothing about it that would cause
10 me any concern about my ability to maintain that open
11 mind. And to further that I would not predetermine
12 any issues. And that's very important, I would
13 suggest, to performing the task of being a judge for
14 a number of reasons.

15 Number one, you have made a commitment that
16 you are going to decide this case based on the
17 evidence and the law. Part of the instruction that I
18 will give to you when you begin your deliberations in
19 this case, in fact the last instruction that I give
20 to you, will be when you may begin your
21 deliberations. Until you receive that it would be a
22 violation of the law to deliberate either
23 collectively or individually. So please remember
24 that and that means do not decide anything until you
25 are instructed to do so.

1 The other reason is equally important, I would
2 suggest, and that is this possess of dispute
3 resolution has four distinct parts. Twice the
4 attorneys will have an opportunity to speak to you.
5 The first will occur in just a few minutes when I
6 have concluded my remarks, and they will talk with
7 you and give you an overview of the dispute. We call
8 it opening statements, and basically they may
9 discussion some of the evidence with you, they may
10 discuss some of the legal principles you will be
11 asked to address or apply when you decide the case.

12 Very important, very helpful, and it will
13 certainly be beneficial as we move into the
14 evidentiary portion. The evidentiary portion is when
15 you will hear the testimony and receive the evidence.
16 Of course that's very important to the process. And
17 it's very important you go through the entire process
18 before you make your determination.

19 And there are a number of reasons for that.
20 Number one, of course, because you should hear all of
21 the evidence before you make any decision.
22 Secondly, in this particular dispute, the state of
23 South Carolina, as I mentioned to you, makes the
24 claim against Mr. Hernandez.

25 And Mr. Hernandez, as any person in this state

1 or in this country who's accused of committing a
2 criminal offense is just that, he is just accused of
3 that. It means nothing more than that. In fact the
4 law says the state has the right to make the
5 accusation, but the state and the state alone has the
6 burden of proving that case.

7 And in order to prove the case they have to
8 prove each element of each offense to a standard that
9 I will discuss with you in my charge portion called
10 beyond a reasonable doubt.

11 Now maybe some of you have participated as
12 jurors before, maybe you served in civil cases, and
13 if you did you heard a standard of burden of proof
14 called the preponderance or greater weight of the
15 evidence, which is a probability standard. Beyond a
16 reasonable doubt is a standard greater than that.
17 It's higher than that. And that's the standard the
18 state has to establish.

19 And I will tell you now, and I will define it
20 for you when I give you the charge, but beyond a
21 reasonable doubt is that doubt that would make an
22 honest conscientious juror searching for the truth in
23 a case to hesitate to take some action. And that's
24 the standard you would apply.

25 What do I mean? I mean at the appropriate

1 time that you will analyze the evidence and ask
2 yourself, am I convinced that the state has
3 established for me beyond a reasonable doubt that
4 particular element. If the answer is yes, then you
5 move to the next element and so on until you've
6 completed the process.

7 If at any time if you all agree that the state
8 has not met the burden of proof, or you feel they
9 have not, the state has not, then you must not return
10 a verdict of guilty. Why? Because the state has to
11 prove each element to that standard to be entitled to
12 a verdict of guilty. And if they fail, then they're
13 not, under the law, entitled. And that's quite
14 simply what the verdict means in a criminal dispute.
15 Guilty means the state has convinced that jury beyond
16 a reasonable doubt of each element of that particular
17 offense.

18 Not guilty means simply that the state failed
19 to convince the jury of each element and they failed
20 on one or more. And that jury, as the law required,
21 returns a verdict of not guilty in that particular
22 dispute. And that's what you will be deciding.

23 Because the state has the burden of proof,
24 they go first. Now, Mr. Hernandez has nothing to
25 prove or disprove, he certainly does not have to

1 prove his innocence. He doesn't have to present any
2 evidence at all. Because that's not -- he is not
3 required to do that. The law says the state has the
4 burden of proving the guilt.

5 But, while he has no burden of proof in
6 anything, he still has the right, if he chooses to,
7 to present evidence for your consideration. Well,
8 you won't hear that until the state has finished its
9 case. So you can begin to see another very important
10 reason that you not make any decision prematurely,
11 because you need to hear all of the evidence.

12 And then of course after you've heard all the
13 evidence will be the second opportunity for the
14 attorneys will have to speak to you in what we call
15 closing arguments. And that's a very important part
16 too, because then the attorney will discuss with you
17 the evidence that has been presented, suggest
18 reasonable inferences that you may draw from that
19 evidence. And I know that when you begin the process
20 of deciding this case, you will find those remarks
21 extremely helpful to you.

22 The last stage is the charge when I will give
23 you the law. Obviously you should not make a
24 decision until you've heard the law because you don't
25 have any basis to make that decision until you've

1 received the law. So you see when I said there are a
2 number of reasons why you see how it all fits, each
3 part is important to the process and it's important
4 to your decision. So, please, maintain that open
5 mind throughout the entire proceedings.

6 I appreciate your attention to my remarks. I
7 ask you to give that attention to the attorneys in
8 just a moment as they give their opening remarks, but
9 I will remind you and I will tell you at the end of
10 this, remind you during the charge, our remarks are
11 certainly important for the parts that we play or the
12 ~~parts that we represent in this process in dispute~~
13 resolution. The attorneys as I mentioned are
14 officers of this Court, have very important role and
15 responsibility of presenting the evidence and the law
16 in a fashion that will assists us in making the
17 decisions that we will be called upon to make. So
18 you should give them your attention.

19 Please remember something, my remarks, the
20 attorneys remarks, should never be considered
21 evidence at any time. Because the evidence will come
22 to you through the testimony of witnesses, and it's
23 that evidence that you ultimately analyze at the
24 appropriate time.

25 Thank you. I look forward to trying this case

1 with each one of you. Please give your attention now
2 to the attorneys as they give their opening
3 statements on behalf of their clients.

4 Ms. Cardillo.

5 MS. CARDILLO: Thank you, Your Honor, may it
6 please the Court.

7 THE COURT: Yes.

8 MS. CARDILLO: Good afternoon, ladies and
9 gentlemen of the jury. As discussed before I'm Julie
10 Cardillo and I represent the state in this matter.
11 And the good news about this case is that it's
12 relatively short. Another good piece of news is it's
13 relatively simple. On August 7th of 2006, at the
14 Food Lion shopping center in Mount Pleasant,
15 Charleston County, South Carolina, this defendant,
16 Jose Hernandez, was involved in a drug deal to
17 distribute, deliver and conspire to deliver and
18 distribute a quarter kilo of cocaine.

19 Now this happened maybe a little bit after
20 1:00 or 1:30 or so. Busy parking lot, middle of the
21 day, a lot of people coming and going, and this was
22 going on in the side parking lot of that Food Lion,
23 to the left of it if you are facing it.

24 Now unbeknownst to him, he was delivering or
25 conspiring to sell a quarter kilo of cocaine to an

1 undercover police officer. Now that undercover
2 police officer, you will hear from the evidence, had
3 the perfect bird's-eye view of everything that went
4 on that day. And that would be Detective Hembree.

5 He was in that car with the defendant for over
6 45 minutes while they discussed the drug dealing of
7 this transaction, and discussed how they were -- the
8 defendants and others involved with him worked
9 together to bring a quarter kilo of cocaine, costing
10 about \$6,300 to buy from -- to sell to Detective
11 Hembree on that afternoon.

12 ~~Now when the defendant showed up you'll hear~~
13 from Detective Hembree that he, out of respect in the
14 drug world, got into the back seat of the vehicle
15 that he was in, and shook hands, and over the next 45
16 minutes to an hour discussed this transaction. You
17 will also hear from Detective Hembree that others
18 were involved in this. That the defendant's role was
19 kind of to show up, feel out Detective Hembree, the
20 undercover officer who he never met with before or
21 dealt drugs with before, kind of like a scout if you
22 will, if you want to feel the place out.

23 You'll also hear from Detective Hembree that
24 there was counter-surveillance going on with other
25 people involved in this transaction making sure that

1 there were no police around, that there were no --
2 nothing could pop up. Trust factor, that's not going
3 to occur in a drug transaction.

4 So after about 45, 50 minutes another
5 individual showed up, shook hands with Detective
6 Hembree and they all proceeded to talk about numbers.
7 You'll hear from Detective Hembree that this
8 defendant was in the front seat using a calculator on
9 his phone, calculating 63 to the \$6,300.

10 You're going to next hear that the person that
11 came to the left rear door, the other individual
12 involved in this transaction, conspiring with this
13 defendant, met with Detective Hembree and wanted to
14 see the money.

15 That person then left, exited out of the
16 vehicle, and two other individuals were the ones who
17 actually brought the drugs to the scene. These were
18 also, from the evidence you'll see, that they were
19 the ones doing some counter-surveillance going on.

20 Then everything happens real quick. Detective
21 Hembree, you'll hear, had the drugs in his hand,
22 opened to make sure that it was in fact cocaine, or
23 what he observed with his training and law enforcement
24 experience as cocaine, then showed them the money
25 that he had, and then that's when the police came in.

1 You'll hear also there were other officers in
2 the parking lot observing them, not only for
3 Detective Hembree's safety, but also because it was a
4 team working together as police officers during this
5 transaction. After that occurred everybody was
6 arrested, including the defendant on the scene.

7 Now, what is important, what I would like for
8 you to remember or keep in mind when you are
9 listening to all of the testimony is look for, did
10 the defendant conspire to distribute a quarter kilo
11 of cocaine to Detective Hembree. And look for the
12 evidence that this was a well-planned organization
13 business where all these people acted in concert
14 together to meet one goal of delivering and selling
15 illegal drugs.

16 In addition you'll hear from the evidence that
17 this occurred well within a half a mile of a school,
18 that's the second charge the defendant is charged
19 with; proximity of drugs within a school zone. And
20 this school is Bell Hall Elementary school. It's
21 clearly visible from where the drug transaction or
22 the drug deal took place.

23 Now the Judge has already said read you the
24 indictment. But what I want you to particularly pay
25 attention to is that this defendant is charged with

1 trafficking 200 grams to 400 grams; and that he
2 knowingly did sell, manufacture or cultivate cocaine
3 weighing in excess of 200 grams; or he did provide
4 financial assistance; or did aid, abet or conspire to
5 sell, manufacture, cultivate, deliver, purchase, or
6 bring into the state cocaine.

7 We believe after the close of the evidence you
8 will find that the defendant guilty as charged.

9 Thank you.

10 THE COURT: Thank you, Ms. Cardillo.

11 Mr. Grimes.

12 MR. GRIMES: Thank you, Your Honor.

13 Good afternoon, ladies and gentlemen of the
14 jury. Ms Cardillo is right, this is going to be a
15 simple case. It is going to be a short case. The
16 state's first witness will probably be Detective
17 Hembree. They're going to call him, he is going to
18 tell you what he observed that day, probably going to
19 show you a video of the buy.

20 After the state rests, Jose is going to tell
21 you what happened that day. He will admit to you
22 that he was out there. He'll admit to you that he
23 aided, set up this drug deal, that he made one phone
24 call. You may be asking yourselves, why are we here,
25 Mr. Grimes, maybe he is guilty.

1 This case kind of reminds me of a book. What
2 the state has done is jump into to the last chapter,
3 the last conclusion, say look, show you one frame.
4 The one frame, very powerful evidence against Jose.
5 But what they're not showing you, is what led up to
6 it.

7 In this case, there will be evidence that
8 Detective Hembree had arrested Steven Lasaine on
9 several serious drug charges. That Steven Lasaine
10 was trying to work those charges off. That Jose knew
11 Steven from construction. That they had worked
12 together and Steven used to give him a lot of
13 business.

14 You will hear evidence from Jose that Steven
15 asked him to get involved in drugs, help him buy some
16 drugs, Jose would say no. You will hear evidence
17 that Steven -- as we get closer to the date in August
18 that Steven said, I got a big job for you, like
19 \$25,000 job, \$20,000 job. If you help me out I can
20 help you out.

21 If you don't help me out, I'm not going to be
22 able to give you that job. Jose wanted the job.
23 You'll hear evidence that he had his own business.
24 He had it incorporated with the secretary of state.
25 He is doing all the right things.

① well, he made a mistake. He made a phone call
② for Steven, and that's what we call entrapment. What /
③ the state has to show is that Jose lacked the
④ predisposition to commit this crime. And that he was
⑤ somehow induced by officers of the state or agent
⑥ corporations of the state such as CI.

7 In this case, the evidence will show that
8 Steve Lasaine induced him to sell this amount of
9 drugs, to set this drug deal up.

10 Now I will be frank with you, when you watch
11 the video you are going to hear some evidence that
12 sounds like Jose has been involved in drugs before.
13 We believe the evidence in this case will show you
14 that he was just kind of talking, you know a car
15 salesman talks a good talk, I will get you to buy the
16 car. Detective Hembree is in there talking, talking
17 about being scared he might be arrested. We know
18 that's not true.

19 That's doesn't make Detective Hembree a liar.
20 He is doing his part to put Jose at ease. You know,
21 common sense says that Hispanic are easy targets.
22 They get robbed a lot. Jose is trying to put
23 Detective Hembree at ease, maybe he is not an easy
24 target that can be robbed.

25 Jose is talking a good talk about his past

① activities to show that he is not somebody that can
② get taken advantage of, so he does not get shot that
③ day, doesn't get hurt, doesn't get robbed.

④ And if you follow Judge Dennis' instructions,
⑤ like he said downstairs do the best you can, we are
⑥ confident you'll find Jose is not guilty of
⑦ trafficking cocaine. Thank you.

8 THE COURT: Thank you, Mr. Grimes.

9 You may call your first witness, Ms. Cardillo.

10 MS. BIANCO: Thank you, Your Honor. May it
11 please the Court, state calls Detective Lynch.

12 MR. MICHAEL LYNCH,
13 after having first been duly sworn to state the
14 truth, the whole truth and nothing but the truth,
15 testified on his oath as follows:

16 DIRECT EXAMINATION

17 BY MS. BIANCO:

18 Q How are you doing today, Detective Lynch?

19 A Fine, thank you.

20 Q What is your occupation?

21 A I'm a detective with the Mount Pleasant Police
22 Department in the narcotic division.

23 Q What do some of your duties include there with
24 Mount Pleasant?

25 A Our duties vary. Primarily we are assigned to

1 investigate the sales of illegal drugs in the town of
2 Mount Pleasant, working undercover and conducting
3 street level deals as far as larger operation.

4 Q Did you have the occasion to be working on
5 August 7, 2006?

6 A Yes, ma'am.

7 Q And did you have occasion to become involved
8 in the investigation of this case on that day?

9 A Yes, ma'am.

10 Q How were you brought into this case and what
11 happened with this case on that day?

12 A On that particular day I was assigned to the
13 U.S. Marshalls fugitive task force. And I was
14 contacted by the case agent, which was Detective
15 Hembree, and asked to assist in a buy/bust operation,
16 a narcotic operation occurring in the town of Mount
17 Pleasant.

18 Q Can you explain to the jury what typically
19 happens in a buy/bust and what happened in a buy/bust
20 on this day?

21 A On that particular day in the buy/bust
22 operations, narcotics operations, in this particular
23 case an undercover officer, and also somebody working
24 with the police department, had contact with the
25 defendant and had made arrangements for the defendant

1 to supply the undercover officer and the other
2 subject working with the detective a quantity of
3 cocaine.

4 Q What that happens, if you could kind of
5 explain a little more. They arrange it, but how do
6 thing typically go down? I mean do they arrange it
7 and meet in a place, do they arrange it and talk
8 about location, about quantity, is that typically
9 discussed or do people show up or?

10 A Well typically -- first of all drug deals are
11 dynamic and they're ever changing. In this
12 particular case I was advised by Detective Hembree
13 that they --

14 MR. GRIMES: Objection, hearsay.

15 THE COURT: Sustained.

16 Q (By Ms. Bianco) if you can testify to things
17 that you are aware of, not being told by Officer
18 Hembree.

19 A Buy/bust narcotic transactions involve a
20 supplier of illegal drugs bringing drugs to a
21 specific location. And during a buy/bust the deal is
22 completed, or in the middle of a deal the law
23 enforcement will move in and arrest immediately the
24 subjects that were involved in the illegal activity
25 as opposed to other types of narcotic investigations

1 where if it was a smaller amount we would let the
2 deal go and let the bad guy leave the area so we can
3 conduct further long-term investigation such as their
4 supplier. But not in a buy/bust situation, the
5 arrest is made immediately.

6 Q And with buy/bust situations, typically are
7 there other precautionary measures, for example in
8 this case with an undercover officer being involved
9 are there extra precautionary measures done by law
10 enforcement and yourself?

11 A Certainly. Buy/bust operations are considered
12 one of those dangerous operations in drug work. And
13 that's because you are going into to make an arrest
14 on somebody that is not expecting it. Also in cases
15 involving larger quantities of drugs it's typical
16 that counter-surveillance measures will be deployed
17 by the persons selling the drugs.

18 And with an undercover officer safety is
19 paramount. So we took ever precaution to have enough
20 people there to provide people in the parking lots to
21 protect against and observe any type of
22 counter-surveillance measures for the protections of
23 not only the undercover officers, but the protections
24 of the defendants in the case and everyone involved.

25 Q Through your training and experience you had

1 mentioned that in larger quantity cases the
2 counter-surveillance and buy/bust is very important
3 to do. In your training and experience would this
4 case classify as one dealing with a larger quantity?

5 MR. GRIMES: Objection, Your Honor, I don't
6 believe the appropriate foundation has been laid.

7 THE COURT: Overruled.

8 A Yes. This particular case involved an
9 Hispanic male. And I have been a narcotic
10 investigator for over seven years, and in my training
11 and experience Hispanic subjects that are engaged in
12 sales of drugs are quite organized.

13 Also they, in almost every case, utilize
14 counter-surveillance measures and --

15 MR. GRIMES: Your Honor, I would object to
16 relevance.

17 THE COURT: Sustained at this point.

18 Q (By Ms. Bianco) detective Lynch, you have been
19 talking about or mentioning counter-surveillance.
20 You said that in this case counter-surveillance --
21 was counter-surveillance done in this case?

22 A Yes, ma'am.

23 Q Can you explain to the jury what is
24 counter-surveillance and how it was done in this case
25 please?

1 A Well I was specifically assigned to be -- I
2 had several responsibilities on that day. And the
3 first one was for the safety of everyone involved,
4 and the second was to be an observant for
5 counter-surveillance measures.

6 On this particular date there was the initial
7 meeting of the subject with the undercover officer,
8 and after that initial meeting other vehicles would
9 pass and they were later found to be involved with
10 this incident. Therefore, the counter-surveillance
11 is that the vehicles that were driving through the
12 parking lot during this incident were looking for law
13 enforcement. Just common sense looking to see if
14 anything was out of the ordinary.

15 MR. GRIMES: Objection, Your Honor, calls for
16 speculation.

17 THE COURT: Overruled.

18 A Looking to see if law enforcement was present,
19 seeing if anybody was sitting in the cars, just
20 checking to scene to make sure that this drug deal
21 could be pulled off successfully without arrest.

22 Q (By Ms. Bianco) And, Detective Lynch, you
23 said you were involved in the bust aspect of the
24 buy/bust on August 7, 2006?

25 A Yes, ma'am.

1 Q What happened when that happened? How did you
2 and other law enforcement know when to go in for the
3 bust and what happened at that point?

4 A Well as had been prearranged in the planning,
5 a bust signal is typically an almost always set. In
6 this case it was set by Detective Hembree who was the
7 undercover officer in the case. And he was wearing
8 an audio and visual or video recorder on his person
9 which was being monitored by another officer involved
10 in this operation, whom after hearing the bust signal
11 communicated that to the other subjects that were in
12 the area, and that's when we moved in to affect the
13 arrest.

14 MS. BIANCO: Beg the Court's indulgence.

15 THE COURT: Certainly.

16 MS. BIANCO: Thank you very much, Detective
17 Lynch, please answer any questions defense may have.

18 THE COURT: You may cross-examine.

19 MR. GRIMES: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. GRIMES:

22 Q We heard some testimony about
23 counter-surveillance; is that fair to say?

24 A That's fair to say.

25 Q Did the defendant, did Mr. Hernandez in this

1 case have a cell phone?

2 A I don't know.

3 Q Would you know if any of the co-defendants who
4 were arrested had cell phones?

5 A I don't know that personally.

6 Q All right.

7 MR. GRIMES: Thank you, Your Honor, I have no
8 further questions.

9 THE COURT: Redirect?

10 MS. BIANCO: Nothing further, Your Honor.

11 THE COURT: Thank you, sir, you may come down.

12 MS. BIANCO: Your Honor, the state would ask
13 at this time that Detective Lynch be excused.

14 THE COURT: Any objection?

15 MR. GRIMES: No, Your Honor.

16 THE COURT: You are also free to leave.

17 THE WITNESS: Thank you.

18 THE COURT: Call your next witness, please.

19 MS. CARDILLO: Thank you, Your Honor, the
20 state calls Detective Justin Hembree.

21 MR. JUSTIN HEMBREE,

22 after having first been duly sworn to state the
23 truth, the whole truth and nothing but the truth,
24 testified on his oath as follows:

25 DIRECT EXAMINATION

1 BY MS. CARDILLO:

2 Q Detective Hembree, where are you employed?

3 A Mount Pleasant Police Department.

4 Q And for how long?

5 A Coming up on my seventh year.

6 Q What are your current duties with the Mount
7 Pleasant Police Department?

8 A Currently assigned to the Mount Pleasant
9 Narcotics Unit.

10 Q And what type of training and law enforcement
11 experience do you have in drug enforcement?

12 A Well, we received a variety of different
13 trainings with respect to undercover transactions,
14 drug identification, street-level drug deals, just a
15 variety of different courses I had those.

16 Also participated in numerous undercover
17 transactions with most of the local agencies to
18 include DEA, FBI, Charleston County Sheriff's Office.

19 Q Roughly how -- have you ever participated as
20 an undercover officer in any other drug transaction
21 prior to August 7th of '06?

22 A Yes, ma'am.

23 Q Approximately how many?

24 A I cannot give you an honest answer. A lot.

25 Q Now were you working on august 7th, 2006?

1 A Yes, ma'am.

2 Q And in what capacity were you working?

3 A I was acting as an undercover officer as well
4 as a case agent in reference to making a pre-sale
5 arrangement as well as acting as an undercover
6 officer to complete a sale where I would be buying
7 nine ounces of cocaine from a subject.

8 Q Now how were you brought into this
9 investigation?

10 A A confidential informant assisting the
11 narcotics unit advised me that --

12 MR. GRIMES: Objection, hearsay.

13 THE COURT: Sustained.

14 Q (By Ms. Cardillo) After you -- where did this
15 drug deal take place?

16 A It was at the Food Lion grocery store at 697
17 Long Point Road in the town of Mount Pleasant.

18 Q And is that in Charleston County, South
19 Carolina?

20 A Yes, ma'am.

21 Q Now as part of this drug investigation what
22 did you do?

23 A Well, I met with the confidential informant.
24 I also arranged a cover team, a team to monitor the
25 audio and video from the transaction. Or they

1 couldn't monitor the video but they could hear it.
2 They would be in two separate vehicles. Both
3 vehicles would be a part of the arrest procedures
4 once I gave a prearranged buy/bust signal.

5 I equipped myself with an audio/video
6 transmitter and I met with Mr. Hernandez and three
7 co-defendants there to complete that transaction.

8 Q Do you recall what time of day this occurred?

9 A The actual transaction?

10 Q The start.

11 A Started about 10 to 12:00.

12 Q And when was it completed?

13 A It was completed approximately around 3:00

14 p.m.

15 Q Detective Hembree, do you see one of the
16 participants in the drug transaction in court today?

17 A Yes, ma'am.

18 Q And can you, for the record, point out where
19 this person is located and what they are wearing?

20 A It would be Mr. Hernandez there in the white
21 shirt and blue tie standing between Mr. Grimes and
22 Ben. Can't remember your last name, sorry.

23 Q Thank you, Detective Hembree.

24 MS. CARDILLO: For the record, your Honor, the
25 state would establish that Detective Hembree has

1 identified the defendant as --

2 THE COURT: The record will reflect.

3 MS. CARDILLO: Thank you, Your Honor.

4 Q (By Ms. Cardillo) Now you stated that you
5 were equipped with a video device to record the
6 events of this incident?

7 A Yes, ma'am.

8 Q How was that on your person?

9 A Well, we have a variety of different recording
10 devices. This particular one was in -- it was in
11 place of a button on my shirt to where I don't have
12 the ability to turn the camera, the only thing I can
13 do is turn my body. I also can't see real-time what
14 is recording, so I have to assume it's recording
15 everything in front of me.

16 It's a very clear video, as you'll see, but
17 it's hard to -- sometimes I don't have the
18 opportunity to turn and pan without being obvious
19 since it's a very dangerous thing.

20 MS. CARDILLO: May I approach, Your Honor.

21 THE COURT: You may.

22 Q (By Ms. Cardillo) Detective Hembree, I'm
23 going to you what has been previously marked as
24 State's proposed Exhibits 1 and 2. Do you recognize
25 those?

1 A Yes, ma'am.

2 Q How do you recognize those?

3 A These would be the copies of the original drug
4 transaction that was recorded by the video
5 transmitter.

6 Q Now, are those your initials on each of those
7 CD's?

8 A Yes, ma'am.

9 Q And have you reviewed this video prior to
10 coming to court today?

11 A Yes, ma'am.

12 Q Do they accurately depict the events that
13 occurred on August 7th, 2006?

14 A Yes, ma'am.

15 Q And what exactly is on these videos briefly?

16 A Well briefly you'll see T'm in a vehicle
17 front passenger seat positioned with an informant. A
18 phone call was made to Mr. Hernandez. When he
19 arrives at the parking lot he will eventually be
20 directed by the informant to exactly where we were
21 at.

22 I step out of the front passenger seat of the
23 vehicle and get in the rear passenger seat of the
24 vehicle, it's actually done for two reasons. One for
25 officer safety, I never want to be in front of

1 someone who's sitting behind me that I can't see.
2 Secondly, I have a video transmitter and I want it to
3 be able to catch the transaction. I guess three
4 reasons, the third reason being out of respect I want
5 Mr. Hernandez to feel somewhat comfortable, I don't
6 want him to feel like I'm making him sit in the back
7 seat of the vehicle.

8 MS. CARDILLO: Now at this time, Your Honor,
9 the state would move for the admission of the video
10 into evidence.

11 THE COURT: Any objection?

12 MR. GRIMES: No, sir.

13 THE COURT: Without objection State's 1 and 2
14 are admitted.

15 (Whereupon, State's Exhibit Nos. 1 and 2 are
16 admitted into evidence.)

17 MS. CARDILLO: At this time, Your Honor, the
18 state would request to publish the video to the jury.

19 THE COURT: You may do so.

20 Ladies and gentlemen, obviously when exhibits
21 are introduced they become -- when I say they're
22 admitted into evidence that means they will accompany
23 you to the jury room. So if you need to review this
24 again you'll have an opportunity.

25 But quite frequently attorneys publish

1 exhibits for your review. But you'll have an
2 opportunity, should you need to, to study it in
3 greater detail during your deliberations should that
4 become necessary.

5 MS. CARDILLO: Thank you, Your Honor. Just
6 one additional question prior to the video.

7 Q (By Ms. Cardillo) Is this all on one -- is
8 this a continuous video that we will be seeing or
9 is it separated?

10 A The video is continuous but the way the
11 program works the disc will only hold so much volume,
12 so it's separated. It's in four separate discs.

13 Q Thank you.

14 A Yes, ma'am.

15 (Whereupon, State's Exhibit Nos. 1 and 2 are
16 played in open court.)

17 MS. CARDILLO: That does conclude the video.

18 THE COURT: At this point, ladies and
19 gentlemen, I'm going to let you take a break and go
20 to the jury room. Do not begin your deliberations,
21 don't discuss the case, we will be with you in about
22 10 minutes.

23 (Whereupon, the jurors exit the courtroom.)

24 THE COURT: All right. Anything from the
25 state before we recess?

1 MS. CARDILLO: Nothing from the state.

2 THE COURT: Anything from the defendant before
3 we recess?

4 MR. GRIMES: No, sir.

5 THE COURT: We will be at ease. Detective
6 Hembree, during the break you are free to walk
7 around, but do not have any conversation with any of
8 the attorneys.

9 THE WITNESS: Yes, sir.

10 THE COURT: Thank you. Okay, we will be at
11 ease for about 10 minutes or so.

12 (Whereupon, a recess was taken.)

13 (Whereupon, State's Exhibit No. 5 is marked
14 for identification.)

15 THE COURT: State ready to continue?

16 MS. CARDILLO: Yes, Your Honor.

17 THE COURT: Defendant ready to continue?

18 MR. GRIMES: Yes, sir.

19 THE COURT: Let the record reflect Mr.
20 Hernandez is present.

21 Invite the jury back. Thank you, sir.

22 (Whereupon, the jurors enter the courtroom.)

23 THE COURT: Thank you very much. Thank you,
24 ladies and gentlemen. Appreciate it. I assume from
25 the sigh that was a sigh of excitement that you have

1 been selected as the presiding juror; is that
2 correct? Have you been so selected, sir?

3 A JUROR: Yes, sir.

4 THE COURT: Thank you very much. For the
5 record your name and juror number, please?

6 A JUROR: My name is Marcus Notij and my
7 number is 198.

8 THE COURT: Thank you so much. And thank you,
9 ladies and gentlemen, and that will of course be your
10 seat for the balance of the trial. Appreciate it,
11 sir.

12 All right. You may continue your examination
13 of the witness.

14 MS. CARDILLO: Thank you, Your Honor. May it
15 please the Court.

16 THE COURT: Yes.

17 Q (By Ms. Cardillo) Detective Hembree, we all
18 just watched a fairly long video. Would you explain
19 to the jury -- well, first of all let me go back.
20 How long were you in the vehicle with confidential
21 informant, the defendant in this case and yourself,
22 approximately?

23 A Little over an hour.

24 Q Now in the video can you please explain where
25 each person, including yourself, were located during

1 the video so that we can get a better idea of what
2 was going on in the car. Where was the defendant
3 located, the confidential informant and yourself?

4 A The confidential informant was in the driver's
5 side front seat. Mr. Hernandez was in the front
6 passenger seat. I was positioned directly behind him
7 in the rear passenger seat.

8 Q Now going back to, could you explain to the
9 jury the most important aspect of this drug
10 transaction? Maybe that's too much of a loaded
11 question.

12 A As far as synopsis of?

13 Q Well, let me go back and ask you a little bit
14 more specifics. What was the defendant's involvement
15 from your bird's-eye view from the back seat?

16 A It appeared that he was the original person
17 that the transaction was arranged with. It appeared
18 from my position that he was in charge in some way of
19 interviewing me to make sure that I wasn't a police
20 officer or any threat to the people that actually had
21 the drugs that were going to be en route to our
22 location.

23 He -- I guess his overall responsibility was
24 just to be part of the organization and make sure
25 that everything was okay and make the final

1 arrangements and direct the other folks to where we
2 were at.

3 Q Now when you get into the -- during part of
4 the video Mr. Hernandez was talking on the phone
5 several times?

6 A Yes.

7 Q What was that about?

8 A Well I don't speak Spanish, but I could
9 understand bits and pieces and he would somewhat
10 narrate after certain calls what had happened. There
11 were calls where he was inquiring about where the
12 people who had the drugs were at, where the exact
13 location was so that we would have somewhat of a
14 timeline as to when they were going to show up.

15 He was directing the other folks as far as
16 that location, I could tell that due to the fact that
17 he would say things such as Waffle House, Food Lion,
18 Subway, things that I recognized.

19 I only know small bits of Spanish, and
20 truthfully I was just trying to make sure I didn't
21 hear the words guns, anything like that. But other
22 than that it appeared that he was letting them know
23 that everything was okay, that everything seemed
24 normal and that exactly where we were located.

25 Q From -- you spoke with the defendant on the

1 video about some other people's involvement. What
2 exactly was this involvement?

3 MR. GRIMES: Objection, relevance.

4 THE COURT: Overruled. I mean, if he knows.
5 You have to lay foundation.

6 MS. CARDILLO: Right, Your Honor, I'm sorry.

7 Q (By Ms. Cardillo) Now you mentioned earlier,
8 was there anything else going on, any other -- first
9 of all, can you tell me where the other officers were
10 located while you were in the back seat of this car?

11 A Yes, ma'am. There was one vehicle which was
12 Sgt. Kaneli and Detective Knox, they were in an
13 undercover vehicle in the front of the store about
14 center-ways of the parking lot so that they be blend
15 with traffic and appear normal.

16 Additionally Detective Lynch, Detective
17 Christmas and U.S. Marshall Dennis Susco were in a
18 separate undercover vehicle in the same part of the
19 parking lot, not directly beside the vehicle but
20 close by. They were both acting as a cover team, but
21 Sgt. Kaneli and Detective Knox monitored the Kell
22 recorder to listen for things such as danger signals,
23 arrest signals, changes in the transaction, things
24 like that.

25 Q Now you -- going back to when you spoke, well

1 the defendant was speaking about talking with others
2 on his cell phone. Were there any other people
3 involved in this incident?

4 A Yes, ma'am, there were three co-defendants.

5 Q And what were their roles in -- during the
6 video?

7 A Well, starting with Mr. Hernandez' role was to
8 meet me, he was the original -- he started the entire
9 transaction basically. As far as we knew at the time
10 of meeting with Mr. Hernandez he was the person that
11 was arranging the drug transaction. We knew that we
12 would be meeting with one additional subject.

13 After he met me and interviewed me in detail,
14 I felt like, to make sure everything was normal,
15 there was a person that was tasked with bringing the
16 drugs -- or excuse me -- coming to the drug deal and
17 seeing the money to make sure I did in fact have the
18 money. It's a common tactic amongst drug dealers to
19 make sure that they're not going to get robbed,
20 things such as that.

21 So one person's function, which was a
22 co-defendant in this case, was to make sure that I
23 did in fact have a quantity of money that was around
24 \$6,300. Once that person was comfortable in knowing
25 that I did have that money, he was given the go-ahead

1 at some point to deal with the other two
2 co-defendants who were in the same vehicle who
3 actually brought the drugs to the transaction.

4 In this particular case it appeared the two
5 folks were assigned to driving the drugs to the
6 transaction as security; two is better than one. And
7 they would arrive last to make sure that every -- all
8 the checks were made, all the i's were dotted and the
9 t's were crossed before they actually met with me and
10 handed me the drugs.

11 Q Let me ask you, speaking of those two other
12 people that you've stated brought the drugs, what
13 were they driving?

14 A They were driving a black Expedition. Prior
15 to -- after meeting with Mr. Hernandez and prior to
16 me receiving the drugs, I observed that vehicle
17 passing our location. It passed a total of four
18 times.

19 Didn't start passing us until about 2:35, I
20 tried to make a mental note of it on my watch. but
21 due to the fact we were on the side of the parking
22 lot where there was a little bit less vehicle traffic,
23 I did make a note of the vehicle. I noticed it was
24 occupied by two Hispanic males.

25 At the time they weren't easily identifiable,

1 the trunk I was in had tinted window in the rear and
2 they were driving by. So without being obvious I
3 couldn't make an exact identification of those
4 subjects. But then once they arrived to bring the
5 drugs I immediately recognized that that was the same
6 two subjects that had been driving past my location,
7 and I believe they were counter-surveillance.

8 Q Let me ask you, let me show the tail end, just
9 the very tail end of the video. I'm going to stop it
10 as we go and ask you a few questions regarding
11 details.

12 (Whereupon, a portion of State's Exhibit No. 1
13 is played in open court.)

14 Q (By Ms. Cardillo) What were you pointing at
15 at that point in the video?

16 A I did not catch it. Would you mind playing it
17 again, I'm sorry.

18 Q That's quite all right. Me too. I'm trying
19 figure out this machine. I'm more used to
20 typewriters.

21 (Whereupon, a portion of State's Exhibit No. 1
22 is played in open court.)

23 Q (By Ms. Cardillo) What was going on during
24 that moment?

25 A He had described earlier in the discussion he

1 described that one of the guys would be driving a red
2 truck F-150 that had 26-inch rims on it. And he also
3 said he was the only person around with 26-inch rims.
4 I did see a red truck that had 26-inch rims, I pretty
5 much assumed that that was going to be his associate.

6 (Whereupon, a portion of State's Exhibit No. 1
7 is played in open court.)

8 Q (By Ms. Cardillo) At this particular point
9 where -- do you see where he is turning around to or
10 are you focussing straight ahead?

11 A I don't recall exactly what he was looking at.
12 It's kind of a stalemate because I don't want to be
13 too obvious with that camera. I don't want to be
14 looking around a lot and making as though I might be
15 tipped off that there might other people involved.
16 It might be obvious to him.

17 (Whereupon, a portion of State's Exhibit No. 1
18 is played in open court.)

19 Q (By Ms. Cardillo) Now what are you referring
20 to when you talk about these two guys, two people?

21 A Okay. A co-defendant in the red truck, that I
22 earlier mentioned, pulled in directly between Mr.
23 Hernandez' vehicle and the informant's vehicle parked
24 up against the building. When it did that, a black
25 Expedition, the same one that I had seen pass four

1 times, pulls in directly behind us and parks directly
2 behind our vehicle. Not perpendicular, but actually
3 in a parking place.

4 Q Is that when you are saying --

5 A I said, do you have two cars of vehicles?
6 Basically I was trying to let the cover team know
7 that there were more vehicles in case they couldn't
8 see everybody involved.

9 (Whereupon, a portion of State's Exhibit No. 1
10 is played in open court.)

11 Q (By Ms. Cardillo) Now what is going on at
12 this particular point when he said unlock the door?

13 A The co -- do you want me to name names or just
14 co-defendant.

15 Q Co-defendant is fine.

16 A The co-defendant is approaching the vehicle.
17 Mr. Hernandez instructs me to open the door, the
18 driver's side rear door to allow him in the vehicle.

19 (Whereupon, a portion of State's Exhibit No. 1
20 is played in open court.)

21 Q (By Ms. Cardillo) Let me ask you, is this
22 when the actual drug deal starts to take place after
23 you had discussed it with Mr. Hernandez?

24 A Yes, as far as it started when I met with Mr.
25 Hernandez. But, yeah, this is where it's actually

1 about to exchange hands.

2 Q During the process you are talking about
3 money, or what are you discussing with Mr. Hernandez
4 and the co-defendant?

5 A The co-defendant wants to see the money
6 immediately when he entered the vehicle. It was
7 pretty obvious this was his task in this whole thing.
8 From doing a bunch of prior drug deals it's kind of
9 common knowledge that you don't want to hand over the
10 money without seeing some kind of product or
11 something of that nature.

12 I was basically explaining that I did have
13 money in my possession, but I wanted to see the drugs
14 first before I handed anything over.

15 (Whereupon, a portion of State's Exhibit No. 1
16 is played in open court.)

17 Q Now I heard a car door slam. Did the
18 co-defendant leave at this point or what is going on?
19 It's hard to see from the camera angle.

20 A I tell him that I have 7, meaning \$7,000. And
21 I tried to get him to say a final price. When I let
22 him know that I did in fact have the money, he exited
23 the vehicle and he says, okay as he is existing the
24 vehicle and shuts the door.

25 Q What is Mr. Hernandez doing at this point

1 talking about money?

2 A Well, it was a little bit of a language
3 barrier so I said 7 or 6,700. At that time Mr.
4 Hernandez opens his phone. I try to pay attention to
5 everybody in the vehicle just for my safety and the
6 safety of the informant. And I noticed he was
7 multiplying 9 times 7 which is 63, which I knew 9
8 ounces was a quarter kilo, \$700 an ounce would be
9 \$6,300. So I knew he was totalling out the money
10 that I was to pay.

11 (Whereupon, a portion of State's Exhibit No. 1
12 is played in open court.)

13 Q (By Ms. Cardillo) Let ask you, on the video
14 there is a sound of a door opening again. What is
15 going on?

16 A I didn't catch the door opening again.

17 Q The video the drugs, you are looking at the
18 drugs?

19 A What you don't see on the camera is the
20 co-defendant, after he exits the vehicle after he
21 sees the money that I have, he walks to this vehicle
22 that's behind me. As he exits the vehicle to walk
23 towards the other two co-defendants they back out of
24 the parking place and block the back of informant
25 vehicle in.

1 When they do that, it's very organized. The
2 co-defendant I showed the money to goes and reaches
3 in the passenger side of that vehicle. One of the
4 co-defendant retrieves a McDonald's happy meal from
5 the center console area if the vehicle, opens it,
6 shakes it slightly towards the driver, shuts it,
7 hands it to the co-defendant and he brings it to me
8 directly inside the vehicle.

9 I'm inspecting it, or acting as if I'm
10 inspecting it. Basically the comments about getting
11 robbed, I'm worried about getting robbed, it's stall
12 tactic purely. The prearranged help signal in this
13 deal would be help, so anything other than help I can
14 say. So I was just kind of stalling, also wanting to
15 look and make sure it was real cocaine as far as I
16 knew, and sit it at my feet to where anyone began to
17 run from the scene or fleeing from the vehicle they
18 wouldn't have access to it.

19 Q What is -- could you describe the cocaine or
20 the substance that was given to you by the
21 co-defendant?

22 A Yes, ma'am. When I opened the happy meal box
23 it was large gallon Ziploc bag and had a large white
24 chunk of cocaine, or white powder at that time. It
25 smelled consistent to what I smelled in the past and

1 knew to be cocaine.

2 It had a strong odor and it was in a block
3 which is common if it's in a kilo measurement
4 imported from out of the country, it's usually in a
5 kilo size block and it was about 1/4 of a block.

6 Q What -- you just stated, where did you place
7 the white powder when you received it after you
8 checked it?

9 A The signal for the arrest was, it looks good.
10 You'll hear me say that several times. While I'm
11 saying that I zip it back up, put it back in the
12 happy meal box, secure it to my feet to make sure if
13 anybody started to reach for it I could control it.

14 (Whereupon, a portion of State's Exhibit No. 1
15 is played in open court.)

16 Q (By Ms. Cardillo) What are you doing here?

17 A I unroll a bundle of money and act as if I'm
18 counting out \$6,300 for Mr. Hernandez and the
19 co-defendant.

20 Q Where did you obtain the money?

21 A Police funds. We have a certain amount of
22 money allocated to completing drug transaction. It
23 wasn't \$7,000 due to the dynamic nature I guess of
24 these deals, a lot of times we don't have immediate
25 access to that amount of money so it wasn't \$7,000.

1 It was a bundle of money portrayed to be 7,000.

2 (Whereupon, a portion of State's Exhibit No. 1
3 is played in open court.)

4 Q (By Ms. Cardillo) Now was the defendant
5 immediately arrested?

6 A Yes, ma'am.

7 Q Out of the front seat?

8 A That's right.

9 MS. CARDILLO: May I approach, Your Honor?

10 THE COURT: You may.

11 q (By Ms. Cardillo) Detective Hembree, do you
12 recognize this?

13 A Yes, ma'am.

14 Q What is it?

15 A It's an aerial photo of the Food Lion as well
16 at Bell Hall Elementary and surrounding
17 neighborhoods.

18 Q Does this accurately depict the area during
19 the events of August 7th of 2006?

20 A Yes, ma'am.

21 MS. CARDILLO: Beg the Court's indulgence.

22 THE COURT: Certainly. Just hold it, you
23 stand in front of the jury.

24 MS. CARDILLO: I will do that. May Detective
25 Hembree step down for a moment?

1 THE COURT: Yes, he may.

2 Q (By Ms. Cardillo) Detective Hembree, explain
3 where this incident took place, if you would draw it
4 on the diagram.

5 THE COURT: Detective, you are going to have
6 stand so the jury can see.

7 THE WITNESS: May I get a little closer.

8 THE COURT: Sure, absolutely. You can do it
9 one at a time, you can do it a section at a time.
10 Just don't be testifying there, you can point to it
11 because the court reporter needs to hear and it's
12 very difficult for her to hear from there.

13 THE WITNESS: Yes, sir. Food Lion --

14 THE COURT: Keep your voice elevated, please.

15 THE WITNESS: Yes, sir. Food Lion grocery
16 store. This is the side of the building if you are
17 facing the building, Long Point Road is here, Food
18 Lion is on the side. First parking place on the side
19 going my self.

20 Q (By Ms. Cardillo) where was second
21 individual's vehicle?

22 A He parked -- excuse me, Mr. Hernandez or?

23 Q I'm sorry, Mr. Hernandez.

24 A Mr. Hernandez parked with one space gap
25 between the informant vehicle and his vehicle.

1 Q And what about the individual who came when
2 you were in the back seat?

3 A He parked directly between us. So he would be
4 two cars in the road basically. As he was arriving
5 the Expedition parked in this spot here.

6 Once the actual drugs changed hands, the
7 Expedition backed out and was basically blocking the
8 back of the vehicle. This would be the whole
9 informant vehicle.

10 Q Where was your surveillance team located?

11 A Roughly in the parking lot here and here,
12 somewhere in that ball park. I don't remember the
13 exact space.

14 Q And this is Bell Hall Elementary?

15 A Yes, ma'am.

16 Q Thank you. Now did this incident take place
17 within a half mile of Bell Hall Elementary School?

18 A Yes, ma'am.

19 Q How do you know this?

20 A We have done past drug transactions there in
21 the parking lot of the Food Lion where it has been
22 GPS'd. Also you could almost hit a golf ball, it's
23 very close. You can see it from the parking lot.

24 Q When this incident, were all of the -- was the
25 defendant working with the other persons that arrived

1 at the scene?

2 A Yes, ma'am. It appeared to be a joint effort
3 between all the subjects involved. The nature of
4 larger scale drug deals, based on my training and law
5 enforcement experience, is that it works just like
6 this. Everyone has a function, they all work
7 together for a common goal. Just like any other
8 business working as a team to complete a task.

9 Q Now. What is a field test?

10 A Field test is where you use a kit of sorts to
11 -- has a reaction with the drugs and gives you a
12 positive indicator that it may contain whatever you
13 are testing it for. For cocaine the test actually
14 turns blue. It's a pink piece of paper and when you
15 make contact with cocaine or cocaine base it turns
16 blue.

17 Q Now was one done in this particular case?

18 A Yes, ma'am. Detective Knox completed that in
19 my presence.

20 Q What was the result of that?

21 A It did show presumptive positive results for
22 the presence of cocaine.

23 Q Was the cocaine also weighed at this time?

24 A Yes, ma'am.

25 Q What was the approximate weight at the time?

1 A 9.2 ounces.

2 Q And you were buying a quarter kilo for how
3 much?

4 A \$6,300.

5 Q What was the street value of this?

6 A Well --

7 MR. GRIMES: Objection, relevance.

8 THE COURT: Overruled.

9 A Usually when asked to equate street value to
10 drugs we break it down to gram quantities, as a
11 street dealer would do, selling gram quantities for
12 \$100 it was 252 grams is what the laboratory weight
13 was so \$25,200.

14 Q Now, you said the defendant was arrested on
15 scene?

16 A Yes, ma'am.

17 Q What was he charged with?

18 A Trafficking cocaine over 200 grams, and then
19 possession with intent to distribute cocaine within
20 proximity to the school which is the Bell Hall
21 Elementary at 285 Egypt Road.

22 MS. CARDILLO: Your Honor, the state would
23 move to admit Exhibit No. -- People's proposed
24 Exhibit No. 4 at this time.

25 THE COURT: State's Exhibit 4, any objection?

1 MR. GRIMES: No, sir.

2 THE COURT: Without objection it is admitted.

3 MS. CARDILLO: Thank you.

4 (Whereupon, State's Exhibit No. 4 is admitted
5 into evidence.)

6 Q (By Ms. Cardillo) I'm going to show you what
7 has been previously marked as State's proposed
8 Exhibit No. 5. Do you recognize that?

9 A Yes, ma'am.

10 Q And how do you recognize this?

11 A I can see inside the envelope that it's the
12 gallon size freezer bag containing the white powder
13 which was handed to me by the co-defendant.

14 Q Now does it accurately depict what you
15 received on August 6th, 2007?

16 A Yes.

17 Q Is it relatively, substantially the same?

18 A May I pull it out?

19 Q Please.

20 A Yes, ma'am. When I received it it was in a
21 one block quantity. It has been somewhat dissolved
22 but it's still somewhat a block. And it was within a
23 McDonald's happy meal container.

24 (Whereupon, State's Exhibit Nos. 6 and 7 are
25 marked for identification.)

1 Q (By Ms. Cardillo) Detective Hembree, I may be
2 asking you a redundant question but what is this?

3 A It's a McDonald's happy meal container. It
4 appears to be.

5 Q And is that the box that you are referring to
6 that the drugs came in?

7 A Yes, ma'am.

8 Q Thank you.

9 THE COURT: What was the exhibit number for
10 that?

11 MS. CARDILLO: I'm sorry, Your Honor, State's
12 Proposed Exhibit No. 6.

13 THE COURT: Thank you.

14 MS. CARDILLO: And the state would at this
15 time to move the McDonald's box into evidence.

16 THE COURT: Any objection?

17 MR. GRIMES: No, sir.

18 THE COURT: Without objection State's Exhibit
19 No. 6 is admitted.

20 (Whereupon, State's Exhibit No. 6 is admitted
21 into evidence.)

22 Q (By Ms. Cardillo) Now what did you do with
23 the white substance after you had it between your
24 feet?

25 A Once everyone was placed in handcuffs I

1 transported it directly to the Mount Pleasant Police
2 Department.

3 Q And what did you do with it once you arrived
4 there?

5 A Maintained control of it. I recall opening
6 the bag from Detective Knox to conduct the field
7 test. He filled out a sheet in my presence while I
8 opened the bag, and then I placed the drugs into the
9 bag.

10 Q What did you do with the evidence after you
11 placed it into the bag?

12 A He had pre-filled out the sheet to assist in
13 the investigation and it was placed in an evidence
14 locker nearby.

15 Q So the evidence at that point had been turned
16 over to evidence?

17 A Yes, ma'am.

18 Q And you observed this?

19 A Yes.

20 MS. CARDILLO: Court's indulgence for one
21 moment.

22 THE COURT: All right.

23 Q (By Ms. Cardillo) Was the defendant the
24 original person that was the target of this deal?

25 A Yes, ma'am.

1 Q And as far as his role again, did he overview
2 the transaction?

3 MR. GRIMES: Leading.

4 THE COURT: Sustained. Rephrase your
5 question.

6 MS. CARDILLO: Thank you, Your Honor.

7 Q (By Ms. Cardillo) Did the defendant have a
8 role in this deal?

9 A Yes, ma'am.

10 Q Please state what that was?

11 A Basically he did the presale arrangements
12 assisting where they mutually arranged, he and the
13 informant, at some point to meet at the --

14 MR. GRIMES: Objection, I believe this calls
15 for a hearsay response.

16 THE COURT: Sustained. Lay the foundation of
17 what he personally knows of his own knowledge.

18 Q (By Ms. Cardillo) What did you personally
19 observe of the defendant's role?

20 A I personally observed that he arrived at our
21 location, as I believed he would. Met with me in an
22 ~~undercover capacity. Discussed the drug sale and~~
23 ~~past drug sales that he had conducted.~~

24 Expressed to me during ~~that discussion~~
25 ~~sometimes he allowed other folks to do drug~~

1 transactions for him to where he does not catch any
2 heat. He didn't say to where our location, but he
3 made that indication to me.

4 MR. GRIMES: Objection, Your Honor, it's
5 beyond the scope of the question.

6 THE COURT: Overruled.

7 A And then he controlled the flow of the
8 transaction. He instructed me when to open the door
9 for Mr. Martinez. He had phone contact, I believe,
10 with -- excuse me, with the co-defendant and directed
11 him to our location. Calmed me by telling me that
12 they were with him.

13 Basically just controlled the entire flow of
14 the transaction. He assisted me in the negotiated
15 price by calculating it on his phone and letting me
16 know exactly how much I was to pay. And then he
17 remained through the duration of the deal. I believe
18 probably as security at that point.

19 Q (By Ms. Cardillo) Now did you purchase over
20 200 grams from the defendant and the co-defendants
21 for \$6,300?

22 A I never handed them the money but, yes, ma'am.

23 Q Was the deal, in your training and law
24 enforcement experience, completed?

25 A Yes, ma'am.

1 Q And that is when?

2 A That is when the drugs are handed to me and I
3 begin to count the money.

4 MS. CARDILLO: Thank you, Your Honor, the
5 state has nothing further. Please answer any
6 questions that Mr. Grimes may have for you.

7 THE COURT: You may cross-examine.

8 MR. GRIMES: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. GRIMES:

11 Q Detective Hembree, I'd like to ask you some
12 little background questions.

13 A Okay.

14 Q Did you testify that you went to the criminal
15 justice academy?

16 A I have not yet testified to that but I did.

17 Q How long were you at the criminal justice
18 academy?

19 A I believe nine weeks.

20 Q And it's mandatory for anyone that wants to
21 become a police officer?

22 A Yes.

23 Q And at the academy they sort of teach you the
24 basics of police work?

25 A Yes.

1 Q Report writing?

2 A Yes.

3 Q The importance of documenting cases?

4 A Yes.

5 Q They teach you about the importance of
6 following up on leads?

7 A I don't recall specifically. There is a broad
8 variety of things taught.

9 Q Would you agree with me it is important to
10 follow up on leads that you get?

11 A Sure.

12 Q And to verify as much information as you can?

13 A According to -- depending on what they're
14 pertaining to, yes.

15 Q Okay. And I believe you testified you worked
16 for DEA?

17 A I have never worked for DEA.

18 Q With the DEA?

19 A Yes, sir.

20 Q FBI?

21 A Yes, sir..

22 Q And other police agencies?

23 A Yes, sir.

24 THE COURT: Hold on a second. Approach,
25 please.

1 (Whereupon, a discussion was held at the bench
2 not on the record.)

3 (In open court.)

4 Q (By Mr. Grimes) And how long have you been a
5 narcotics investigator?

6 A I was assigned I believe June of 2003.

7 Q And during your work in narcotics, have you
8 every dealt with confidential informants?

9 A Yes, sir.

10 Q Is it typical confidential informants may be
11 arrested for a charge?

12 A Prior to working with us, yes, sir.

13 Q And then as a way to try to reduce their
14 sentence they try to work the charge off?

15 A Yes. We have no direct control. We don't --
16 you say work the charge off, we don't dismiss it or
17 anything like that. They work in consideration, in
18 corporation with us to get credit from the
19 solicitor's office or whomever it may be.

20 Q Is it fair to say you might have some input
21 with the solicitor's office if someone helps you out?

22 A Yes, sir.

23 Q If they help you out you try to help them out?

24 A Yes, sir.

25 Q And when you work with CI's do you monitor

1 them?

2 A I'm sorry?

3 Q Do you try to monitor their activities?

4 A There is a set of rules they're expected to
5 follow, yes, sir.

6 Q As part of that set of rules when they decide
7 to become a CI they sign an agreement, a CI
8 agreement; is that fair to say?

9 A Yes.

10 Q It's part of that agreement they agree not to
11 break the law?

12 A That's correct.

13 Q Not to use drugs?

14 A That's correct. That's not specifically
15 worded in the agreement they can't use drugs, but
16 they can't violate criminal laws in furtherance of an
17 ongoing investigation.

18 Q And when you do work with CI's you like --
19 they're doing an undercover buy, do you audiotape the
20 buy?

21 A Yes.

22 Q Videotape the buy if you can?

23 A That's correct.

24 Q Is it fair to say that's because the CI might
25 have some questionable credibility?

1 A No, sir. At the Mount Pleasant Police
2 Department, at least when I was put in narcotics or
3 offered that position, part of our training is that
4 we make the best possible case for the solicitor's
5 office. And part of that meaning we use this in this
6 particular case a \$9,000 piece of equipment to obtain
7 the best video possible.

8 Q But when you work with a CI trying to get his
9 charges reduced, or get some help with his charge, he
10 would have a motive to maybe falsify testimony?

11 A I can't answer what any -- that's broad. I
12 mean how many informants would be out there.

13 Q That's fair. Now you used a CI in this case?

14 A Initially, yes.

15 Q And that was Steven Lasaine?

16 THE COURT: Answer the question.

17 A I was making sure. Yes, his name was Steven
18 Lasaine. I wasn't sure if we were disclosing that.

19 THE COURT: No objection, you have to answer
20 the question.

21 Q (BY Mr. Grimes) You arrested Mr. Lasaine on
22 several trafficking charges, didn't you?

23 A Yes, sir.

24 MR. GRIMES: May I approach, Your Honor?

25 THE COURT: You may.

1 MR. GRIMES: Thank you.

2 Q (By Mr. Grimes) Are you able to see the
3 board?

4 A Yes.

5 Q Did you arrest him on the November 23rd, 2005
6 for distribution of cocaine?

7 MS. CARDILLO: Objection, Your Honor,
8 relevance.

9 THE COURT: Sustained.

10 MR. GRIMES: Your Honor, I believe we have a
11 matter of law.

12 THE COURT: Yes, sir. Ladies and gentlemen,
13 we will let you go out to the jury room. Do not.
14 begin your deliberations, don't discuss the case,
15 please.

16 (Whereupon, the jurors exit the courtroom.)

17 THE COURT: Yes, sir, Mr. Grimes.

18 MR. GRIMES: Thank you, Your Honor. May it
19 please the Court. We believe the evidence shown of
20 Mr. Lasaine's prior arrest is relevant to this case
21 under State versus Brown.

22 THE COURT: How about, you can rely on your
23 decisions, let's not cite any law right now because I
24 want you to tell me in your mind how in the world you
25 can see a CI's truthfulness relative to this

1 particular action.

2 MR. GRIMES: It goes to -- I'm not trying to
3 show his truthfulness, we're trying to show he had a
4 motive to induce Mr. Hernandez.

5 THE COURT: You have not asked him about that.
6 You have not brought up any of that, in fact you
7 objected to that. That's exactly what you asked them
8 not to testify to, that's hearsay.

9 That's precisely what you objected to and I
10 sustained the object. We're exactly where we were
11 when I had the bench conference, Mr. Grimes. If you
12 want to go into that then I'm going to allow him to
13 testify to all of that, and how many times he's had
14 dealings with Mr. Hernandez, and all of those things
15 that are germane to this case.

16 But now that's up to you. Because the problem
17 that you have in this case, and your clients has is
18 we are not talking about a CI's buy, we are talking
19 about we all watched it, everybody. So it hasn't got
20 a thing in the world to do with his credibility
21 insofar as this transaction is concerned as to what
22 sort of deals he is getting. I don't know how in the
23 world that affects anything because he is not
24 testifying. Unless you call him.

25 MR. GRIMES: No, sir.

1 THE COURT: Well then what in the world --
2 what is the relevance of the deals cut with this
3 person to this officer's testimony and to the video
4 itself? That's why I'm asking you. The objection is
5 relevance, not that it may have in some cases some
6 pertinence to it. I want to know what it has to do
7 in this particular case?

8 MR. GRIMES: And I may be opening doors to
9 notice I don't like.

10 THE COURT: I'm just asking you, answer the
11 first question. What in the world is the relevance
12 in this case right now?

13 MR. GRIMES: It goes to show he had a motive
14 to induce Mr. Hernandez to sell over 200 grams of
15 cocaine.

16 THE COURT: Well I don't know that he did. We
17 don't have that testimony.

18 MR. GRIMES: Well I -- Mr. Hernandez will be
19 testifying.

20 THE COURT: That's fine, you call this officer
21 at that point in time.

22 MR. GRIMES: Okay, thank you.

23 THE COURT: But I'm not going to allow it at
24 this juncture.

25 MR. GRIMES: Thank you.

1 THE COURT: Okay, that's fine. This officer,
2 he will have to be available and subject to recall.
3 But I'm not going to allow it. I assume you object
4 to this line of questing at this point?

5 MS. CARDILLO: Yes, Your Honor.

6 THE COURT: Okay. Now if you want -- since
7 your client is going to testify about all of this if
8 you want to permit them to ask questions you are free
9 to go into that. But again you're opening the door
10 that you had me close.

11 But if you want to do that that's your call,
12 I'm not trying to try your case for you. I'm just
13 trying to be consistent with what you asked me to do.
14 I want to be sure that's where you want to go. So if
15 you want to do that now that's fine.

16 MR. GRIMES: I think I thought I closed a
17 different door.

18 THE COURT: All right, sir.

19 MR. GRIMES: If I understand the Court's
20 ruling I can't question this line of questioning
21 until Mr. Hernandez --

22 THE COURT: No, sir, I did not say that.
23 That's what I said the second part, Mr. Grimes, I
24 didn't make myself clear. If you want to ask him all
25 these questions that's perfectly all right. Then

1 I'll turn to Ms. Cardillo and say, do you have any
2 redirect, I bet she's going to have a little bit
3 about dealings with this gentleman because it's going
4 to open that door.

5 MR. GRIMES: Yes, sir.

6 THE COURT: In my opinion. So over your
7 objection, of course, but whatever you want to do
8 that's fine.

9 MR. GRIMES: Your Honor, if I understand the
10 court I may continue that line of questioning?

11 THE COURT: Mr. Grimes, maybe I'm not speaking
12 clearly, I'm sorry. You can do whatever you want to
13 do provided they don't object and I sustain the
14 objection, how about that. That's what you can do.

15 MR. GRIMES: Thank you, Your Honor.

16 THE COURT: As long as you understand that I
17 don't want to hear, objection well that's hearsay,
18 when show goes back to it.

19 MR. GRIMES: I understand.

20 THE COURT: Okay, fine. Thank you sir.

21 MR. GRIMES: Thank you, Your Honor.

22 THE COURT: Bring in the jury.

23 (Whereupon, the jurors enter the courtroom.)

24 (Whereupon, a discussion was held at the bench
25 not on the record.)

1 (In open court.)

2 THE COURT: Thank you very much, ladies and
3 gentlemen. I apologize. I thought of one thing else
4 before I brought you back I needed to further
5 clarify. Thank you.

6 From time to time that's what we do, I
7 apologize to you. I no it's somewhat cumbersome.
8 But just as we will not be present when you begin
9 your deliberations and deciding what you believe to
10 be the truth in this case, typically most of the time
11 when we were doing matters of law they are done out
12 of your hearing.

13 The one exception is when you've heard me
14 sustain objections or overrule objections. Those are
15 not for your consideration, that's part of it, but
16 rather than excuse you I go ahead and make that
17 ruling so that we can keep the case moving.

18 Sometimes both sides or one or both sides may
19 need to put something on the record so we have to
20 excuse you and that's what we just did. Thank you
21 for your patience.

22 Mr. Grimes, thank you, sir. You may continue,
23 sir.

24 MR. GRIMES: Thank you, Your Honor.

25 THE COURT: Yes, sir.

1 Q (By Mr. Grimes) Did you arrest Mr. Lasaine on
2 November 23rd, 2005 for distribution of cocaine?

3 MS. CARDILLO: Objection, Your Honor,
4 relevance.

5 THE COURT: Overruled.

6 A I'm not sure on the exact date.

7 Q (By Mr. Grimes) Is it fair to say he was
8 arrested for distribution?

9 A Yes, sir.

10 Q November, sometime in November 2005?

11 A Roughly, yes.

12 Q At the same time did you also arrest him for
13 trafficking cocaine?

14 A One arrest was for several charges.

15 Q And is it fair to say one of the traffickings
16 was for a weight between 10 and 28 grams?

17 A Yes, sir.

18 Q And you arrested him also for a second
19 trafficking charge?

20 A Yes.

21 Q And was that one also for 10 to 28 grams?

22 A I believe so, yes.

23 Q And you also arrested him for distribution of
24 cocaine in proximity of a school?

25 A I believe it was proximity to a playground.

1 Q All under the same statute?

2 A Yes, sir.

3 Q You also arrested him for a third trafficking
4 charge?

5 A I believe so.

6 Q And that was also 10 to 28 grams?

7 A I'm not sure what. I assume so.

8 Q And there was a second charge of distribution
9 of cocaine in proximity of a school?

10 A Are you asking me?

11 Q Yes, sir.

12 A If there was a purchase that was over the
13 10-gram threshold it would constitute a trafficking
14 charge and it was within a half mile of a playground
15 or school then, yes, the charge would be made off
16 that same transaction. It wasn't a separate
17 transaction.

18 Q Somewhat like this case?

19 A Yes.

20 Q I believe the last charge that you arrested
21 him for was trafficking cocaine over 100 grams?

22 A That's correct.

23 Q And after he was arrested he was taken to
24 jail?

25 A Yes.

1 Q And at his preliminary hearing the state
2 consented to a bond reduction, correct?

3 A I don't know if they did or not.

4 Q If I showed you the order, would that refresh
5 your memory?

6 A Sure.

7 MS. CARDILLO: Objection, Your Honor.

8 THE COURT: Sustained. Not relevant.

9 Q (By Mr. Grimes) And Mr. Lasaine pled guilty
10 to trafficking of cocaine between 28 to 100 grams in
11 February of 2007, correct?

12 A I'm not sure exactly when he pled or exactly
13 what he pled to.

14 Q And he received a 12-year sentence, correct?

15 A That's correct.

16 MS. CARDILLO: Objection, Your Honor.

17 THE COURT: Sustained. He's answered the
18 question he does not know so he is speculating.
19 Thank you, sir, move on

20 Q (By Mr. Grimes) And the charge of trafficking
21 cocaine was dismissed, at least the first one,
22 correct?

23 A I don't know which particular charge would be
24 dismissed, or if certain ones were dismissed I don't
25 recall.

1 MS. CARDILLO: Again, Your Honor, objection.

2 THE COURT: Sustained, he doesn't know. Under
3 602 he is speculating.

4 MR. GRIMES: Thank you, Your Honor.

5 Q (By Mr. Grimes) After Mr. Hernandez was
6 arrested, Charleston County Sheriff Office obtained a
7 search warrant for his residence, correct?

8 A Yes.

9 MS. CARDILLO: Your Honor, state objects.
10 This is beyond the scope of direct.

11 THE COURT: Excuse me. Overruled.

12 Q (By Mr. Grimes) And as part of the search
13 warrant you were looking for books, records,
14 receipts, ledgers or papers related to purchase of,
15 distribution of controlled substances, correct?

16 A That's correct.

17 Q Papers, tickets, notes, schedules, receipts,
18 or other items relating to domestic or international
19 travel; is that correct?

20 A That's standard wording for a drug search
21 warrant. Sounds familiar.

22 Q Look for books, records, receipts, bank
23 statements, money drafts. Were you also looking for
24 those?

25 A Again, the sheriff's office were the

1 applicants on the search warrant and I don't recall
2 exactly what they were looking for. That is common
3 terminology for drug cases.

4 Q Also looking for to see if there were any
5 drugs at his residence?

6 MS. CARDILLO: Objection, again, Your Honor,
7 he doesn't know.

8 THE COURT: Precisely, he is not the person
9 executing the warrant. Sustained, move on. Under
10 602 he doesn't have any knowledge of what's there.

11 Q (By Mr. Grimes) You are the case agent in
12 this case, correct?

13 A In the trafficking where he met me at the Food
14 Lion parking lot and facilitated the deal, yes.

15 Q And as the case agent you would review all the
16 documents that come to you, correct?

17 A Are you referring to the search warrant?

18 Q Including the search warrants?

19 A Well, I would look upon --

20 THE COURT: Hold on a second. Mr. Grimes, I
21 think I sustained that objection, sir. That means
22 move on to some other area, sir.

23 MR. GRIMES: Thank you, Your Honor.

24 THE COURT: Thank you, sir.

25 Q (By Mr. Grimes) Now after Mr. Lasaine bonded

1 out, did you monitor any telephone calls he might
2 have had with Mr. Hernandez?

3 A No.

4 Q You don't know what he may have told Mr.
5 Hernandez before this August 7, 2006?

6 A No.

7 Q Do you ever obtain any wire tabs on Mr.
8 Hernandez' home?

9 A No.

10 Q Did you pull cell phone records from Lasaine's
11 case?

12 A Mr. Lasaine?

13 Q Yes, sir.

14 A No.

15 Q Did you pull cell phone records from Mr.
16 Hernandez?

17 A No.

18 Q Would it be fair to say you have no idea if
19 Mr. Lasaine promised Mr. Hernandez anything to get
20 him to come to the Food Lion on August 7th, 2006?

21 A When an informant that works for me or anyone
22 else in the narcotics unit is read and explained the
23 informant agreement, it is clearly stated that they
24 cannot make any kind of promises or anything like
25 that.

1 We let them know what constitutes entrapment
2 and things like that. We also let them know what
3 they can't do. They can't give someone drugs, for
4 instance, and then ask them to bring it to us because
5 then that would be illegal. Same goes for things
6 like that, what you are talking about.

7 Q But you don't know what Mr. Lasaine may have
8 told Mr. Hernandez, do you?

9 A I know what Mr. Lasaine told me, but you say
10 that's hearsay.

11 MR. GRIMES: Thank you, Your Honor, no further
12 questions.

13 THE COURT: Okay. Redirect.

14 MS. CARDILLO: Thank you, Your Honor.

15 REDIRECT EXAMINATION

16 BY MS. CARDILLO:

17 Q Mr. Grimes asked you multiple questions about
18 the confidential informant in this case, all these
19 charges. Where is the confidential informant right
20 now?

21 A He is in prison.

22 Q Do this these charges?

23 A Yes, ma'am.

24 Q Now, Detective Hembree, in regards to the
25 confidential informant's involvement with this case,

1 what was his involvement?

2 A Can I start prior to that day?

3 Q Yes, please.

4 A Anyone who's a confidential informant of our
5 agency in the drug unit is asked to actively pursue
6 any leads that they may know of or anything that
7 comes to them in reference to drug sales -- any
8 illegal activity, we would pass it on to the
9 appropriate division if it were a property crime or
10 something like that.

11 Once I was made aware of this transaction, his
12 function was to simply make an introduction and
13 that's it. To introduce Mr. Hernandez to me.

14 Q And did that occur?

15 A Yes, ma'am.

16 Q Did you have occasion other than on August 7,
17 2006 to meet with this defendant to do a drug deal?

18 A No, ma'am.

19 Q How did the CI, confidential informant, excuse
20 me, how does the confidential informant know the
21 defendant?

22 A They work together.

23 Q Do you know for how long?

24 A I'm not sure.

25 Q Now when the confidential informant was

1 working with the defendant, did the confidential
2 informant come to you or your agency with regards to
3 the defendant?

4 A Yes.

5 Q And for what reason?

6 A He advised me that he worked with an Hispanic
7 male subject that he knew as Luis or Mexi that had
8 engaged him in conversation about his ability to sell
9 a quantity of cocaine to the informant.

10 Q Now, when -- once you obtained this
11 information from the confidential informant, what did
12 you do as part of your investigation of this
13 defendant with this information?

14 A Typically drug dealers we use slang names,
15 phrases to conceal their identity somewhat. So a
16 name like Luis or Mexi would not be enough to fully
17 identify the subject. For my safety I'd rather
18 identify him prior to the drug.

19 I asked him if he could obtain a tag number
20 the next time they had contact. He was able to do
21 that, describe the informant's vehicle. Now on the
22 morning of the transaction I went to the address
23 listed for Mr. Hernandez and did put eyes physically
24 on that vehicle. It fit the description given by the
25 informant.

1 Then I ran a couple other vehicle tags that
2 also indicated he was living at that residence
3 because there were other vehicles registered.

4 Q Was this vehicle that you observed in the
5 defendant's yard the same one he drove up to the
6 incident location of the Food Lion?

7 A Yes, ma'am.

8 Q From the conversations that you had with Mr.
9 Hernandez during the video, did it -- was there
10 information that he told you or informed you of that
11 he had had prior dealings with regarding drugs?

12 A Yes, ma'am.

13 Q Drug deals I guess?

14 A Yes, ma'am.

15 Q What were those conversations?

16 A He made numerous references -- first of all
17 sorry if there is any offensive language in the
18 video, it's common to have to portray a certain type
19 of behavior so that you don't give away that you're
20 law enforcement.

21 Having said that he made certain comments
22 like, you have to have balls to get away with it, you
23 can't act nervous, you can't act paranoid. If you
24 act nervous things will happen.

25 He made reference to getting pulled over by

1 the sheriff who searched the vehicle and there was
2 some drugs behind a load of dirty clothes and he
3 didn't find it. He made phrases such as, closing the
4 deal, shipments, things that I recognize immediately
5 to be consistent with that of drug transaction talk;
6 upper-level drug transaction talk, street-level
7 dealer doesn't use a term like close a deal for a
8 drug transaction.

9 In playing my undercover role as being nervous
10 or apprehensive about the presence of multiple people
11 I made a comment about, I believe it was something to
12 the effect of, I don't want to get robbed or ripped
13 off. He says, no one wants your money -- something
14 to the effect of no one wants your money, if I do my
15 job I can get \$6,000 in two days. I will make two
16 million dollars and go back to Mexico. Something to
17 that effect.

18 He makes reference to going into a gas station
19 high and the fact that people were staring at him.
20 He made reference to using some drugs and his face
21 was numb. He made reference to that while I was
22 speaking to him. And then he said something to the
23 effect of he liked to conduct business from his house
24 because it's just him and his wife there.

25 He made reference to having other folks

1 complete transaction for him so that they don't know
2 that he is in fact the guy behind the drug
3 transaction.

4 Q Let me ask you, on part of the video he talked
5 about the boss, the boss wouldn't come, he sent
6 little guys in?

7 A Yes, ma'am.

8 Q What is that referring to?

9 A I believe it would be referring to basically
10 what seemed to have happened in this case. A younger
11 fellow was the one that actually handed me the drugs.
12 I believe he was around 25. And it's common for
13 people that are involved in large drug transactions
14 not to physically put hands on the drugs.

15 There is some type of belief in the drug
16 dealer community that if you don't physically touch
17 the drugs then you're not guilty of the transaction
18 or the offense of trafficking or dealing.

19 Q Did he make mention of that actually in the
20 video?

21 A He made reference to having someone else
22 complete the deal. Yes, ma'am.

23 Q Did the defendant, in your training and law
24 enforcement experience seem new to the narcotic drug
25 trade?

1 A Not at all.

2 MS. CARDILLO: One moment, Your Honor.

3 THE COURT: Certainly.

4 MS. CARDILLO: State has nothing further.

5 Thank you, detective.

6 THE COURT: Recross-examination, Mr. Grimes.

7 MR. GRIMES: Thank you, Your Honor.

8 THE COURT: Yes, sir.

9 RECROSS-EXAMINATION

10 BY MR. GRIMES:

11 Q You said Mr. Lasaine came to you at the Mount
12 Pleasant Police Department and said he had some
13 information on Mr. Hernandez?

14 A No, sir. I believe he telephoned me with that
15 information.

16 Q What date did he telephone you?

17 A I don't have it in front of me.

18 Q Was it documented?

19 A I document everything an informant does in
20 informant notes. I don't document things such as the
21 exact date he called me, but I document what
22 information was obtained the day I spoke with him.

23 Q Do you have the document with you?

24 A I don't have it with me.

25 Q And you work with more than one confidential

1 informant, don't you?

2 A Yes.

3 Q And you testified on re-direct about an
4 incident in North Carolina. Did you ever call North
5 Carolina to investigate that or try to verify that?

6 A I never named the state. Are you talking
7 about the traffic stop?

8 Q Yes, sir.

9 A I never named the state. In the video he
10 makes reference to taking shipments from Greenville
11 and North Carolina, but I don't know if he is talking
12 about Greenville, North Carolina or what part of
13 North Carolina, I don't recall.

14 Q But apart from his statement you don't have
15 any evidence showing that he was involved in other
16 dealings?

17 A His statements during the transaction.

18 MR. GRIMES: Thank you.

19 THE WITNESS: I apologize, I wasn't quite
20 finished.

21 THE COURT: If it's further in response to
22 that question you may give it.

23 THE WITNESS: It is. The other thing that
24 made me believe he had prior experience with drug
25 sales was the absolute organization of this thing.

1 It was very well thought out to the very end.

2 Q (By Mr. Grimes) But apart from the statements
3 and the events of that date you don't have any
4 information showing he had been involved in drugs
5 before, did you?

6 A Aside from the day?

7 Q Yes, sir.

8 A No, sir.

9 Q Okay, thank you.

10 THE COURT: You may come down.

11 All right, ladies and gentlemen. At this
12 point we will take our recess for the evening.

13 Please remember that you are not at liberty to begin
14 your deliberations in this case, that means to
15 discuss the case among yourselves, or to discuss this
16 case with anyone outside the courtroom.

17 So if you go home tonight and someone is there
18 I imagine the first question will be, what are you
19 doing and what is this case about? And that would be
20 a pretty normal question and it would be very normal
21 to respond. But you promised the parties and the
22 court and the attorneys that you will not.

23 Talk about something else. Tell them you are
24 not at liberty to talk about it. You'll be finished
25 with this case probably tomorrow. So if you want to

1 talk about it after it's concluded that would be your
2 right but right now talk about something else.

3 Have a good evening. I ask you to return, I'm
4 going to give you a little bit of break tomorrow, I'm
5 supposed to -- I thought I could get it done Friday
6 afternoon late, but the doctor went out. I have got
7 to run by the dentist office in the morning at 8:15.
8 I should be here by 9:30. I'd ask you to be in the
9 jury room at 9:45, hopefully I will be here and we
10 will bring you in very quickly.

11 Look forward to seeing you tomorrow, have a
12 good evening. Do not call the number that has been
13 given to you, that message does not apply to you.
14 Thank you.

15 (Whereupon, the jurors exit the courtroom.)

16 THE COURT: Thank you. Anything from the
17 state before we recess?

18 MS. CARDILLO: Nothing, thank you.

19 THE COURT: Anything from Mr. Hernandez before
20 we recess?

21 MR. GRIMES: No, sir.

22 THE COURT: Just for planning purposes, not --
23 certainly aren't married to any statement, you are
24 but Mr. Grimes is not. How many witnesses, more
25 witnesses are you going to call?

1 MS. CARDILLO: Your Honor, we have two chain
2 and the chemist after and we can -- those should be
3 very quick.

4 THE COURT: I imagine the chains will be
5 quick, the chemist also I assume. I don't think
6 there is a question as to -- maybe, I'm learning as
7 this case unfolds a lot of things.

8 But assuming that, in your opening statement
9 obviously you implied Mr. Hernandez is going to take
10 the stand.

11 MR. GRIMES: Yes, sir.

12 THE COURT: Is anyone else going to take the
13 stand?

14 MR. GRIMES: No, sir.

15 THE COURT: Just the one witness?

16 MR. GRIMES: Yes, sir.

17 THE COURT: Okay. All right, let's stick with
18 that call it 11:00, 12:00.

19 MR. GRIMES: I guess I don't want to --

20 THE COURT: Certainly you have the right, if
21 you need to recall him, certainly that would be
22 understandable.

23 MR. GRIMES: I may try to introduce those
24 certified copies of Mr. Lasaine's convictions, show
25 he received 12 years.

1 THE COURT: I don't know what the issue is.

2 MS. CARDILLO: Your Honor, I agree. The state
3 does not believe it's relevant.

4 THE COURT: I understand that and I appreciate
5 that. I think it has some relevance, why not just
6 agree to stipulate that that's what his sentence was?

7 MS. CARDILLO: I don't have a problem with
8 that, Your Honor.

9 THE COURT: You shouldn't have, because it's
10 not anything wrong, nobody got any benefits out of
11 this, it's just a deal so be it.

12 MS. CARDILLO: I will stipulate, Your Honor.

13 THE COURT: Okay. Do a stipulation we can
14 agree to that.

15 MR. GRIMES: Okay. Thank you, Your Honor.

16 THE COURT: Okay. Thank you.

17 MS. CARDILLO: Thank you.

18 (Whereupon, the proceedings in this matter
19 before the Court were adjourned for the evening.)

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C E R T I F I C A T E

I, the undersigned, ANNE BOULEY MEYER,
official Court Reporter for the Ninth Judicial
Circuit of the State of South Carolina, do hereby
certify that the foregoing is a true, accurate, and
complete transcript of record of all the
proceedings had and evidence introduced in the
trial of the captioned case, relative to appeal, in
the Circuit Court for Charleston County, South
Carolina, on the 3rd day of March, 2008.

I do further certify that I am neither
of kin, counsel, nor interest to any party hereto.

--- Anne Bouley Meyer ---

Anne Bouley Meyer, RPR
Circuit Court Reporter

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF GENERAL SESSIONS
2007-GS-10-0056

STATE OF SOUTH CAROLINA
Plaintiff
V.
JOSE HERNANDEZ,
Defendant.

TRANSCRIPT OF RECORD

MARCH 4, 2008
Charleston, South Carolina
VOLUME 2

B E F O R E :

THE HONORABLE R. MARKLEY DENNIS, JR., JUDGE

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

MS. JULIE CARDILLO, Assistant Solicitor
MS. STEPHANIE BIANCO, Assistant Solicitor
Representing the State

MR. ANDREW GRIMES, Assistant Public Defender
MR. BEN LEWIS, Assistant Public Defender
Representing the Defendant

Anne Bouley Meyer, RPR
Circuit Court Reporter

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1 THE COURT: Are there any matters from the
2 state we need to take up before bringing in the jury?

3 MS. CARDILLO: No, Your Honor.

4 THE COURT: Let the record reflect Mr.
5 Hernandez is present. Good morning, Mr. Hernandez.

6 THE DEFENDANT: Good morning, sir.

7 THE COURT: Any matters Mr. Hernandez needs to
8 raise at this time?

9 MR. GRIMES: No, sir.

10 THE COURT: Okay. Do we have all of them?

11 THE BAILIFF: All the jurors are present.

12 THE COURT: Let's invite the jury to return
13 then, please.

14 (Whereupon, the jurors enter the courtroom.)

15 THE COURT: Good morning. I hope you had a
16 good evening. We are ready now to continue the
17 matter. Please give your attention to the next
18 witness.

19 You may call your next witness, solicitor.

20 MS. CARDILLO: Thank you, Your Honor. Officer
21 Angie Mitchell.

22 MS. ANGELA ROBIN MITCHELL,
23 after having first been duly sworn to state the
24 truth, the whole truth and nothing but the truth,
25 testified on her oath as follows:

1 DIRECT EXAMINATION

2 BY MS. CARDILLO:

3 Q Good morning.

4 A Good morning.

5 Q Where are you presently employed?

6 A Town of Mount Pleasant.

7 Q How long have you been with Mount Pleasant?

8 A I have been there since 2000.

9 Q What is your position there?

10 A Right now I work in crime scene and evidence
11 technician. It's the same job.12 Q Now do you assign evidence a case number or
13 any identifying marker when it's received?14 A The case number is assigned through our
15 dispatcher through an automated system. When the
16 evidence comes to me, it's a computer-generated
17 number that is assigned to each piece of evidence
18 individually.

19 Q How do you log in evidence?

20 A The evidence itself is put in a secure locker
21 where the officer puts it and shuts the door to the
22 locker and then it's locked from the outside. And
23 then whenever I open the interior locker, which is
24 inside our evidence room, I take it out, look at it,
25 and verify what is on the -- in the bag or boxes or

1 whatever they put in with what's on the paper. And
2 then put the number on it and log it in.

3 Q Now, on August 8h of 2006, did you receive
4 evidence from a Detective Hembree?

5 A Yes, ma'am.

6 Q And what item was that that you received?

7 A There were several items in the locker. Do
8 you want me to go through all of them?

9 Q Well, let me --

10 MS. CARDILLO: May I approach, Your Honor?

11 THE COURT: You may.

12 Q (By Ms. Cardillo) Let me show you what has
13 been previously marked as State's proposed Exhibit
14 No. 5.

15 A This would be -- can I open this?

16 Q Please. Do you recognize that?

17 A Yes, ma'am. This is what we do, we get the
18 evidence in whether it's in a bag like this or
19 another type of bag and look at what they have got on
20 here and match it up with here.

21 And then I fill out this piece of paper with
22 the evidence information on it. And this is the
23 sticker that I put on it. And this is the bag that
24 was placed in the locker, yes, ma'am.

25 Q And did you follow the proper procedure in

1 securing this evidence?

2 A Yes, ma'am.

3 Q And when it was in -- was it under your
4 custody and control the entire time that it was in
5 evidence?

6 A It's in a locked facility that only evidence
7 technicians have access to. And then it's placed
8 inside of another locker that only evidence
9 technicians have access to.

10 Q Is this substantially the same condition as it
11 was when you first received it on -- well, when did
12 you first receive this?

13 A I received it on August the 8th, at 11:32.

14 Q When was it logged in?

15 A That's when this was logged in.

16 Q When was it placed in evidence?

17 A It would have been placed by Detective Hembree
18 or one of the detectives. The time that they
19 received it was 2:50 in the afternoon on the 8th.
20 And it would have been placed in that locker as soon
21 as they are able to put it inside the locker where it
22 was locked and secured until I received it in.

23 Q And once you did receive it in, what was your
24 responsibility for these drugs?

25 A The responsibility is to fill out a drug sheet

1 and have it ready to go to the lab. And then I guess
2 on the 15th of August I drove it to the lab of
3 Charleston City and it was in my possession until I
4 handed it off to the ladies at the drug lab.

5 Q And when you get to the drug lab, is this the
6 Charleston Police Department lab?

7 A Yes, ma'am.

8 Q What do you do as the process of giving it
9 over to the lab?

10 A To start at the police department we log all
11 the evidence out that goes to the drug lab and put it
12 in a secure briefcase. And then we transport it to
13 the Charleston City drug lab. And when I get there
14 we sign paperwork showing that I'm handing it off to
15 the lady at the drag lab and I hand her the drugs out
16 of the secure briefcase.

17 Q Do you know who in this case you gave these
18 to?

19 A To Susan Moody.

20 MS. CARDILLO: One moment. Court's
21 indulgence.

22 THE COURT: Yes.

23 Q (By Ms. Cardillo) What time did you pick up
24 the evidence out of the locker at Mount Pleasant?

25 A The first time when I pulled it out of the

1 locker?

2 Q Yes.

3 A At 11:32 on August 8th.

4 Q And again do you recall when Detective Hembree
5 logged it in? Was it that day or the day before?

6 A It would have been the day before.

7 Q August 7th?

8 A Yes.

9 Q Of '06?

10 A Yes.

11 Q Thank you.

12 MS. CARDILLO: State has nothing further.

13 Please answer any questions Mr. Grimes may have.

14 THE COURT: Cross-examination?

15 MR. GRIMES: No questions, Your Honor.

16 THE COURT: Thank you, you may step down.

17 MS. CARDILLO: Your Honor, may officer

18 Mitchell be excused, please?

19 THE COURT: Any objection?

20 MR. GRIMES: No, sir.

21 THE COURT: You are free to leave, officer

22 Mitchell. Thank you.

23 Call your next witness, please.

24 MS. CARDILLO: Thank you, Your Honor. Susan

25 Moody.

1 MS. SUSAN MARIE MOODY,
2 after having first been duly sworn to state the
3 truth, the whole truth and nothing but the truth,
4 testified on her oath as follows:

5 DIRECT EXAMINATION

6 BY MS. CARDILLO:

7 Q Good morning.

8 A Good morning.

9 Q Where are you presently employed?

10 A City of Charleston Police Department.

11 Q How long have you been employed with the
12 Charleston Police Department?

13 A Since July 5th, 2005.

14 Q What division do you work in with the police
15 department?

16 A I work in the laboratory which is under
17 forensics services.

18 Q Now what are your duties or responsibilities
19 as working at the forensic laboratory?

20 A I'm a laboratory technician which means I am
21 the evidence custodian for the lab. I'm responsible
22 for doing reports, paperwork, quality control, making
23 sure we are up to date and all the paperwork is
24 correct.

25 Q Were you working in that capacity on August

1 15th of 2006?

2 A Yes, ma'am.

3 Q And what do you do with evidence that is given
4 to your lab, specifically narcotic evidence that is
5 given to your lab or brought to your lab by a police
6 agency?

7 A It's brought over by an officer from the
8 contributing agency. When they come we make sure our
9 submittal, which is the paperwork they need, is
10 filled out correctly. We make sure they have signed
11 it and dated it. The evidence needs to be sealed in
12 an evidence container. And the initials have to be
13 on the seal, half on and half off to make sure that
14 it hasn't been opened since it was sealed.

15 We assign it a laboratory number. And then I
16 sign it over to myself, generate the paperwork and
17 put it in our drug safe.

18 Q Now in the present case on August 15th, did
19 you receive evidence from the Mount Pleasant Police
20 Department?

21 A Yes, ma'am.

22 Q And from who did you receive this evidence?

23 A I sign it over from Officer Mitchell.

24 Q And what date?

25 A It was August 15th, 2006 at 9:12 in the

1 morning.

2 MS. CARDILLO: May I approach, Your Honor?

3 THE COURT: Yes.

4 MS. CARDILLO: Let me show you what has been
5 previously marked as State's proposed Exhibit No. 5.
6 If you would open that and please, what is that or do
7 you recognize that?

8 A Uh-hum. This is the envelope that Mount
9 Pleasant brings, this is one of them, that they bring
10 over. It has their -- and this would be the evidence
11 bag that was submitted to us and it was sealed and it
12 was initialed half on and half off the seal.

13 Q And once you received this evidence on August
14 15th of '06, what specifically did you do with this?

15 A I assigned it a lab number, I entered it into
16 our database, and I put it in our secure drug safe in
17 the lab.

18 Q And who has access to that secure drug safe?

19 A The employees of the laboratory.

20 MS. CARDILLO: Just a moment. Court's
21 indulgence.

22 THE COURT: Very well.

23 MS. CARDILLO: I have no further questions.
24 If you would answer any questions from Mr. Grimes.

25 MR. GRIMES: No questions, Your Honor.

1 THE COURT: You may come down. Thank you.

2 Do you wish the witness to be excused?

3 MS. CARDILLO: Please, Your Honor.

4 THE COURT: Any objection?

5 MR. GRIMES: No, sir.

6 THE COURT: You are free to leave.

7 MS. CARDILLO: State calls Jennifer Leiser.

8 MS. JENNIFER SUSAN LEISER,

9 After having first been duly sworn to state the
10 truth, the whole truth and nothing but the truth,
11 testified on her oath as follows:

12 DIRECT EXAMINATION

13 BY MS. CARDILLO:

14 Q do you go by Jenny?

15 A Yeah.

16 Q I will just say that, thank you. What is your
17 profession or occupation?

18 A I am the associate criminalist for the City of
19 Charleston forensic lab.

20 Q Now how long have you been employed with the
21 Charleston City or Charleston Police Department lab?

22 A It will be two years in April.

23 Q And what are your duties as working within the
24 lab?

25 A I analyze evidence submitted to the lab.

1 Q What type of training and experience do you
2 have as a chemist -- is it safe, are you a chemist?
3 Is that --

4 A That's part of my duties, correct.

5 Q What type of training and experience do you
6 have as a chemist?

7 A I have a biology degree from the college of
8 Charleston. I have attended the SLED marijuana
9 analysis training school. I have completed the City
10 of Charleston's training protocol, which includes
11 shadowing, lectures, demonstrations, examinations.
12 And I have also attended the DEA's chemistry seminar.

13 Q Have you had occasion to chemically analyze
14 substances to determine whether the substance is or
15 contains a narcotic?

16 A Yes, I have.

17 Q Do you know how many times?

18 A Our lab does about 3,000 cases a year. I do
19 about half of those. About 400 of those cases a year
20 contain narcotic or narcotic-type drugs.

21 Q Have you had occasion to chemically analyze
22 substances to determine whether they contain cocaine,
23 or the substance partially contains cocaine?

24 A (Affirmative head shake.)

25 Q How many times?

1 A That's roughly 400 times a year.

2 Q Now how many cocaine analysis do you do on a
3 given week?

4 A About 15 to 20 usually.

5 Q And is this analysis a regular part of your
6 duties?

7 A Yes.

8 Q And have you had an occasion to qualify as an
9 expert in this area in court before?

10 A Yes, twice.

11 MS. CARDILLO: Your Honor, the state would
12 like to offer Jennifer Leiser as an expert in the
13 field of chemistry and analysis of narcotics at this
14 time.

15 THE COURT: Care to examine her as to her
16 qualifications?

17 MR. GRIMES: No, sir.

18 THE COURT: Very well, she will be permitted
19 to render opinions in that area.

20 MS. CARDILLO: Thank you, Your Honor.

21 Q (By Ms. Cardillo) I'm going to show you what
22 has been marked at State's Proposed Exhibit No. 5.
23 It was initially in this bag. Can you identify this
24 exhibit?

25 A This is the evidence that was given to us by

1 the Mount Pleasant Police Department.

2 Q Does it have any identifying characteristics
3 on how you identified it?

4 A Susan had put on her lab number on the
5 package.

6 Q Did you at any time mark this exhibit or
7 initial?

8 A After I completed my analysis I sealed this
9 bag, this is my seal here, and I initialed it, and I
10 also put on the evidence label.

11 Q Do you know when you received this exhibit?

12 A I received it from Susan on August 15th, 2006.

13 Q And where did you receive this exhibit?

14 A Once Susan is finished putting it in the
15 database she seals it in the evidence locker. And
16 when I'm ready for analysis I retrieve it.

17 Q For what purpose did this exhibit come into
18 your possession?

19 A It was given to us to analyze for controlled
20 substances.

21 Q What is the weight of the substance?

22 A An official weight was 252.28 grams. In that
23 case I removed the substance from the plastic bag it
24 was contained in.

25 Q Did you have an occasion to make an analysis?

1 A Yes.

2 Q And what tests were -- what test did you
3 perform on the substance?

4 A I did three tests on the substance. The first
5 one is just a presumptive to narrow the scope of my
6 analysis, and that was a wet chemical test. It was
7 very similar to the field test they did earlier.

8 Based on that I suspected it might contain
9 cocaine so I went ahead with our confirmatory test,
10 that was with our gas chromatograph mass
11 spectrometer. And I confirmed that with our FTIR,
12 which is Fourier Transform Infrared Spectroscopy.

13 Q From these tests were you able to form an
14 expert opinion as to what this exhibit is or
15 contains?

16 A Yes.

17 Q And please state your opinion?

18 A It is my opinion that this evidence contains
19 cocaine.

20 Q And the official weight you stated was 252.28
21 grams?

22 A Yes.

23 MS. CARDILLO: Your Honor, at this time the
24 state would move for the admission of State Proposed
25 Exhibit No. 5.

1 THE COURT: Any objection?

2 MR. GRIMES: Yes, sir.

3 THE COURT: What is the objection?

4 MR. GRIMES: I believe procedure, chain of
5 custody.

6 THE COURT: Overruled. Subject to the object
7 it's admitted.

8 (Whereupon, State's Exhibit No. 5 is admitted
9 into evidence.)

10 MS. CARDILLO: With the Court's indulgence for
11 one moment.

12 The state has nothing further from this
13 witness, Your Honor. If you may answer any questions
14 from Mr. Grimes that he may have for you.

15 THE COURT: Cross-examination.

16 MR. GRIMES: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. GRIMES:

19 Q Good morning.

20 A Good morning.

21 Q I believe you said you got this evidence from
22 Ms. Susan Moody?

23 A Yes.

24 Q And you prepared a report in this case,
25 correct?

1 A Correct.

2 Q And you have a copy of your report?

3 A Yes.

4 Q And on your report you said you received it
5 from Officer Mitchell, correct?

6 A On the report it says that it was submitted to
7 the lab by Officer Mitchell.

8 Q Okay. And after it was -- after you analyzed
9 the substance, what did you do with the substance at
10 that time?

11 A Once I finished my analysis I repackaged the
12 substance, and I submitted it back to Susan Moody.

13 Q Do you know what Susan Moody did with the
14 substance at that time?

15 A It was locked in our locker.

16 Q Do you know how that substance got from your
17 locker to court today?

18 A No, I don't.

19 MR. GRIMES: Your Honor, I renew my objection
20 to the chain of custody.

21 THE COURT: Redirect. You don't need to do
22 that, sir.

23 MR. GRIMES: Thank you, Your Honor.

24 MS. CARDILLO: Your Honor, state has nothing
25 further from this witness. We would ask she be

1 excused.

2 THE COURT: Any objection?

3 MR. GRIMES: No, sir.

4 THE COURT: Thank you. You can come down.
5 You are free to leave.

6 Call your next witness.

7 MS. CARDILLO: Your Honor, the state at this
8 time rests.

9 THE COURT: Ladies and gentlemen, at this
10 point there are matters of law I must take up out of
11 your presence. If you go to your jury room, do not
12 begin your deliberations, do not discuss the case
13 among yourselves. We will be with you fairly
14 quickly. Thank you.

15 (Whereupon, the jurors exit the courtroom.)

16 THE COURT: All right, anything from the
17 state?

18 MS. CARDILLO: No, Your Honor.

19 THE COURT: Mr. Grimes.

20 MR. GRIMES: Thank you, Your Honor. At this
21 time Mr. Hernandez would move for directed verdict of
22 acquittal based upon the state's failure to prove
23 that he trafficked in cocaine in the amount of 200
24 grams and within a half mile of a school.

25 THE COURT: Okay. Well, that's an interesting

1 motion because all the state has to prove is that it
2 was -- there were more than 200 grams and less than
3 400, they have established 252.28 grams of cocaine.

4 They have established by virtue of an hour of
5 him talking to people, directing people, exercising
6 dominion and control over the substance, and being a
7 part of having it arrive. That is clearly on the
8 tape. If that's not trafficking, there is no such
9 thing.

10 So thank you. Motion is denied.

11 The defendant is planning to testify as I
12 understand.

13 MR. GRIMES: Yes, sir.

14 THE COURT: Okay. Mr. Hernandez, is that
15 correct, sir?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Did you talk with your lawyer
18 about this particular matter?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And you have been able to inquire
21 of them, and ask them questions about any concerns
22 you have about your case?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And after full consultation with
25 your lawyer and time to reflect, and their advise as

1 well as the investigation in this matter you've made
2 a decision for yourself; is that true?

3 THE DEFENDANT: That's true, sir.

4 THE COURT: And that decision is to take the
5 stand?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: You understand it would be your
8 right not to testify in this matter?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And if you chose not to testify I
11 would instruct the jury that they cannot even
12 consider that against you, do you understand that?
13 In fact they can't even talk about that; do you
14 understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Obviously if you take the stand
17 you will be subject to cross-examination; do you
18 realize that?

19 Your lawyer is going to get to ask you
20 questions, but the state is going to get to ask you
21 questions.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And they get to ask you any
24 questions they want to; do you understand?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: So you are basically fair game.

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. Are you under the
4 influence of any alcohol, any drugs here today?

5 THE DEFENDANT: No, sir.

6 THE COURT: Do you know of anything that is
7 affecting your ability to make this type of a
8 decision, sir?

9 THE DEFENDANT: No, sir.

10 THE COURT: Are you comfortable with your
11 decision?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Are you comfortable with the
14 manner in which your attorneys have advised you?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Very well, thank you, sir, you may
17 take your seat.

18 I find Mr. Hernandez has the benefit of
19 competent counsel. He indicates he is totally
20 satisfied with them, with their advice concerning
21 this matter; is that correct, Mr. Hernandez?

22 THE DEFENDANT: That's correct, sir.

23 THE COURT: Doesn't have to stand, thank you
24 very much. And I find that he had demonstrated by
25 his responses that he is fully aware of the nature of

1 the charges and the circumstances surrounding it, has
2 indicated he has had sufficient time to think about
3 whether or not to testify or not to testify and he
4 has desired to testify. And I find that to be a
5 decision that he makes freely, voluntarily, knowingly
6 and intelligently.

7 Mr. Hernandez, if between now and when your
8 lawyer calls you to take the stand you change your
9 mind, will you let your lawyer know and we can excuse
10 the jury and I will continue our conversation. Okay.

11 You don't have to stand. For the benefit of
12 -- your benefit and your lawyers' benefit, a judge --
13 and it finally made sense to me. I don't know
14 whether he was accurate or not I just accept it and
15 that's my practice.

16 I was reading a transcript years ago, and he
17 is now on the Supreme Court. And just as all lawyers
18 do that, it's proper that they observe the decorum
19 and his response was, the first time I ever really
20 gave a thought as to why lawyers did it.

21 Lawyers, as I have announced a number of times
22 are officers of this court. They have an obligation
23 by virtue of their oath, by virtue of their position.
24 You are not an officer of this court, this is your
25 courtroom. You are a citizen. You don't have to

1 stand for me when I talk to you because you don't
2 have any duty or responsibility to do so. If you
3 chose to that's fine. But you don't have to.

4 So that's why. It's not a matter of you doing
5 anything wrong it's just not necessary. I don't
6 require it. Some judges do but I don't because of
7 that very same thing. It's part of the process, part
8 of the oath, yes, they have to do that.

9 We do that for recognizing certain formalities
10 of what this whole process is about. But when we are
11 doing work, you don't have to do that. So don't
12 worry about that.

13 You are satisfied with your lawyers? Both
14 lawyers?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Very well. I find that he has
17 just indicated that to me clearly. And therefore he
18 will be permitted to testify and he makes that
19 decision understanding the consequences.

20 Anything else? Mr. Grimes.

21 MR. GRIMES: No, sir.

22 THE COURT: Okay. We will be at ease for
23 about five minutes, start again.

24 MR. GRIMES: Thank you, Your Honor.

25 (Whereupon, a recess was taken.).

1 THE COURT: State's ready?

2 MS. CARDILLO: Yes, Your Honor.

3 THE COURT: Let's bring in the jury, please.

4 (Whereupon, the jurors enter the courtroom.)

5 THE COURT: Thank you, ladies and gentlemen.

6 Mr. Grimes, does the defendant wish to present
7 any testimony?

8 MR. GRIMES: Yes, Your Honor.

9 THE COURT: All right, you may proceed.

10 MR. GRIMES: Thank you, Your Honor. At this
11 time defense would call Jose Hernandez.

12 THE COURT: Okay. Mr. Hernandez.

13 MR. JOSE LUIS GUTIERREZ HERNANDEZ,
14 after having first been duly sworn to state the
15 truth, the whole truth and nothing but the truth,
16 testified on his oath as follows:

17 DIRECT EXAMINATION

18 BY MR. GRIMES:

19 Q Good morning, Mr. Hernandez.

20 A Good morning.

21 Q I want to jump right into August 7, 2006. We
22 saw the video, and you made several statements on
23 there. When you told Mr. Hembree about making \$6,000
24 in two days, what were you talking about?

25 A That day when I said that thing to the

1 officer, we used to be talking about some job because
2 my work that I do the framing work, I'm a little
3 subcontractor, and the way that I say I can make
4 \$6,000 in two days that's because my job that's doing
5 framing and I'm charging sometime like \$7 a square
6 feet or \$8 a square feet, that cheap. Usually I did
7 like 1,000 square feet in one day, that's \$8,000.

8 so that's when I was talking about I can
9 making like \$6,000 dollars, or I can making \$5,000.
10 The reason that I say that that's because that day
11 I'm so scared, and the officer said you're not going
12 to robbing me. And I tell him, my thing is not
13 robbing people. For \$6,000 I'm not going to be rich.
14 The thing is doing my job working in framing.

15 If, yeah, maybe I can make 5 or \$6,000 doing
16 my job, why am I going to rob somebody?

17 Q Mr. Hernandez, after you got arrested you were
18 interviewed by one of the police officers, correct?

19 A Correct.

20 Q How much money did you tell the officer you
21 were going make off this deal?

22 A When one of the Officer Burn asked me how much
23 money I'm going to be making for that deal, I tell
24 him \$200. But the reason that I say \$200, that's
25 because that Mexican guy, the one that they show up

1 out there with that drug, they told me like --

2 MS. CARDILLO: Objection, hearsay.

3 THE COURT: Sustained.

4 Q (By Mr. Grimes) How much did you tell the
5 officer you were going make off this deal?

6 A \$200.

7 Q Now there is also some statement on the video
8 about making millions and going back to Mexico. Why
9 did you tell this officer that?

10 A I don't, I don't say I can make any millions.
11 And I don't see -- that's impossible making a million
12 dollars. Even if I work too much I can't make that
13 kind of money.

14 Q I believe you also told the officer you may
15 have sold drug out of your house, and did business
16 out of your house for drugs. Why did you tell him
17 that?

18 A The reason that I say that that's because
19 that's my first time I see him. To me that's a
20 strange people. And the reason that I say that
21 that's because that's my first time I'm trying -- I
22 am being involved in drug transaction, and they make
23 me scared thinking about -- I used to see so many
24 Mexican movies and American movie, and every time I
25 see when they doing things like that they can be --

1 somebody they can be hurt or they can try to rob them
2 or things like that. They can kill somebody.

3 So the reason that I say that that's because
4 I'm trying don't let demonstrate the man I'm scared,
5 you know, because I don't got any kind of experience
6 with drug transaction. But I was trying to make him
7 feel like I'm not scared, and I trying to make him
8 believe I look like drug dealer or something like
9 that.

10 Q When you got in that truck what did you do to
11 the officer? Did you pat the officer down for
12 anything?

13 A No. Just the only I say that's hi and that's
14 it.

15 Q Did you ask the officer to see his money?

16 A No.

17 Q I want to go back a little bit, talk a little
18 bit about your background. How old are you, Mr.
19 Hernandez?

20 A I'm 34 years old.

21 Q Have you ever been convicted of a crime?

22 A No, I never been convicted for drugs.

23 Basically that's not my thing, my thing that
24 s Trying to make money the more state that I can do
25 my work. Don't matter if I'm making a little money,

1 but I'm thinking if you making the right way and
2 doing clean money I'm going to get more places.

3 Q And where are you from, Mr. Hernandez?

4 A I'm from Mexico. I'm from the state of
5 Javasco (phonetic). Javasco, that's a little country
6 from the big city, that's when I come from.

7 Q And how far did you go in school?

8 A Well disfortunately, I don't get too much time
9 to going to school because I coming from a big
10 family, and my family that support poor peoples, I
11 got seven sister and only me. I don't got no more
12 brothers.

13 The reason I don't get chance to going to
14 school that's because my father, all the time after I
15 remember my daddy he used to be diabetic. And he
16 don't, can't work too much. So I have to do
17 something to help my mother and my father because my
18 daddy did used to use dialysis, so that's kind of
19 hard for him work because they used to get dialysis
20 and his stomach because they got real -- they used to
21 be real sick.

22 Q What kind of work did you do in Mexico?

23 A The work that I do in Mexico doesn't do that
24 the more heavy work, labor work. Started work when I
25 got 13 years. There used to be a little factory

1 close to my house and ranch.

2 so that's the only way I can make money
3 working in that factory because first of all I don't
4 got no school. And if you are trying to find a
5 better job nobody can hire you because they're asking
6 me for papers for what kind of school did I got,
7 disfortunately I don't got no school. Only I
8 finished my sixth grade and I don't got no -- people
9 they don't got no school in Mexico, they don't got
10 that kind of opportunity.

11 so I have to do that more heavy job making
12 like 60 cents, pesos for hour. Like 60 cents,
13 dollars for hour.

14 Q Now are you married, Mr. Hernandez?

15 A Yes, I'm married.

16 Q When did you get married?

17 A I get married but in Mexico at eight years,
18 nine years ago.

19 Q Do you have any children?

20 A Yeah, I got three girls. And I got my little
21 son too.

22 Q Little what?

23 A I got my little baby, my little man.

24 Q When did you move to the United States?

25 A I moved in the United States back in '94. And

1 the reason that I move from the United States that's
2 because the money that I used to make in the factory
3 they don't used to be enough. Especially because in
4 Mexico we don't got that kind of help like Medicaid
5 of something like that.

6 My daddy they used to use, the more time they
7 passed they used more dialysis and more dialysis. I
8 remember my daddy we used to got a little ranch.
9 They had to sell that little ranch for buy the
10 dialysis so that's when they make me take decision to
11 come to the United States to provide better life to
12 my family.

13 Q Let me ask you a sort of delectate question.
14 Are you here legally or illegally?

15 A Unfortunately I'm illegal in this state.

16 Q Now since you have been here, have you been
17 pay your taxes?

18 A Yeah. When I come here and I started -- first
19 of all when I come from Mexico I have to move from
20 Kentucky and started working and doing some tobacco
21 work. The job that's finished so I moved from North
22 Carolina. And I started working in North Carolina
23 back in '94.

24 Q Mr. Hernandez, let me jump ahead a little bit.
25 Now at the time that you got arrested, did you have a

1 business?

2 A The time when I get arrested I used to got a
3 business.

4 Q What was the name of your business?

5 A My company's name was Painting Mix Framing
6 Renovation. What I used to do was paint some house,
7 doing a little bit of framing and doing some
8 remodeling work.

9 Q And how did you set up your company?

10 A That's a little long story but I don't trying
11 to be a shorty, you know, with that conversation.
12 Back in '95 when I work in the Wilmington, North
13 Carolina, I suffered some big accident, a fork lift
14 they running in my body, so I get disability check.

15 And, I get -- being worse for two years so
16 that's the way I get money for starting with my
17 business because I get like 60 percent disability so
18 I don't can't do no more heavy work, I can't even
19 walk in the warehouse when I'm doing framing.

20 So I used part of my compensation money that
21 they paid me for establishing my own company. And I
22 used part of that money to buy my only -- my truck,
23 my equipment and my worker's comp and my union and I
24 started work like that.

25 Q Where did you buy your worker's compensation

1 from?

2 MS. CARDILLO: Your Honor, relevance.

3 objection.

4 THE COURT: Sustained.

5 MR. GRIMES: May I approach briefly, Your
6 Honor?

7 THE COURT: Yes, sir.

8 (Whereupon, a discussion was held at the bench
9 not on the record.)

10 Q (By Mr. Grimes) Let me go back a little bit.
11 I'm sorry for jumping around. When you first moved
12 to the United States where did you go to?

13 A When I first come to the United States the
14 first place I moved that's Kentucky.

15 Q And how long did you live in Kentucky?

16 MS. CARDILLO: Objection again, Your Honor,
17 relevance.

18 THE COURT: I will allow some leeway. Let's
19 move on, please.

20 MR. GRIMES: Thank you, Your Honor.

21 A What I said again, please?

22 Q How long did you live in Kentucky?

23 A I'm living a shorty time maybe be about 4, 5
24 months up to tobacco work they used to be out there
25 in that time.

1 Q when did you move to South Carolina?

2 A when I moved from Kentucky, I move from
3 wilmington, North Carolina. So when I move from
4 wilmington to South Carolina that's when my accident
5 happened because I used to got my sister in here and
6 that's the only person I can count sometimes --

7 MS. CARDILLO: Objection again, Your Honor,
8 relevance.

9 THE COURT: I will allow it. Overruled.

10 Q (By Mr. Grimes) After you were in wilmington,
11 where did you move to in South Carolina?

12 A I am moving to Mount Pleasant.

13 Q And how long did you live in Mount Pleasant?

14 A I am living like at least about a year.

15 Q And where did you move to after you lived in
16 Mount Pleasant for a year?

17 A Hanahan.

18 Q And how long did you live in Hanahan?

19 A About four or five years.

20 Q And is that where you were living in 2006, in
21 August of 2006?

22 A Yes, sir.

23 Q How did you meat Steve Lasaine?

24 A The way that I meet Steven, that's because
25 when I started with my company that's kind of hard

1 for a person started, especially when you don't got
2 no customers and you don't you know how to speak very
3 good English.

4 I try to explain like the way that I speak
5 right now, that's completely different like the way
6 that I used to speak 20 months ago. I used to speak,
7 most people they can't understand me so sometimes
8 that's the problem, I don't can't find a job.

9 so the way I find Steven that's because my
10 brother-in-law he doing some framing work. And at
11 that time Steven is looking for somebody can doing
12 labor work and doing some siding and shingle work.

13 Q How long did you know Steven before August of
14 2006?

15 A I used to got only about a year that I know
16 Steven. And I used to consider that Steven like one
17 of those the best customers because they used to help
18 me with a lot of work. And plus they come with a lot
19 of peoples around everywhere like Mount Pleasant,
20 downtown.

21 so basically that's my customer, they used to
22 provide me a lot of work. So that's a little money,
23 but that's -- little that I not so I used to doing
24 some little work for him.

25 Q Now how much work did Steven provide for you?

1 A Basically all the time. In one year I have
2 that's the one they used to provide me a lot of jobs,
3 you know. But the reason they provide me a lot of
4 job, that's because Steven didn't know I can do good
5 work, and they used to accommodate me with some
6 customers or with some friends of him.

7 But for every recommendation they used to pass
8 me, or whatever little work that I used to do for
9 him, I have to give him a small commission. Like say
10 I'm going to doing a job that cost \$3,500 to do,
11 Steven then used to tell me charge him \$4,000 and
12 give him \$500 profits for him just to, you know, just
13 to help me find a job.

14 Q And had you ever been involved in any drug
15 deals with Steven before August of 2007 -- 2006?

16 A I never used to be involving in drugs. And as
17 a matter of fact I don't even know if -- I used to
18 got, you know, they make me think like maybe they
19 doing some drugs or they doing some kind of --

20 MS. CARDILLO: Objection, Your Honor,
21 speculation.

22 THE COURT: All right, I will sustain the
23 objection if that's what you want.

24 Q (By Mr. Grimes) Have you ever sold drugs to
25 Mr. Steven Lasaine?

1 A I never used to sell drugs. And what happened
2 in August 2006, the reason I be involved in that --

3 Q Mr. Hernandez, just try to answer the
4 questions, all right. Have you ever bought drugs
5 from Steven Lasaine?

6 A No, I never buy drugs from him.

7 Q Has Steven ever asked you to sell drugs?

8 A A lot of times Steven told me like, you will
9 be broke because you want it because I can teach you
10 how to make more money.

11 Q When is the first time that Steven asked you
12 to sell him drugs?

13 A When at least I got like five months working
14 for him doing some work.

15 Q And when he asked you to sell him drugs, what
16 did you tell him?

17 A All the times my answer they used to be no
18 because to me I'm be worried about my little baby
19 and I don't try to be in trouble.

20 Q And when was the second time that he asked you
21 to sell him drugs?

22 A The second time that he used to asking me for
23 selling drugs that's one day when I don't got no job
24 they told me if I going to sell them drugs and I tell
25 them no.

1 Q Do you remember the date or around the time
2 when that happened?

3 A I know it's -- I think they used to be
4 Christmas because they don't -- nobody got kind of
5 work in that time. So they told me that's kind of
6 hard in Christmas to find some work so I can put you
7 in the game and making some money. You don't have to
8 work.

9 Q Christmas of, what year?

10 A About 2005, 2006. 2005.

11 Q 2005 or 2006?

12 A 2000, yeah 2005.

13 Q And when was the third time he asked you to
14 sell him drugs?

15 A The third time he is asking me that's because
16 -- I don't remember exactly the time when he asking
17 me. But I did used to insisting me to sell him
18 drugs. Most of the time when they try and be in
19 conversation with me, most of the time the way they
20 used to say that's like, you can make more money
21 selling drug, I tell him no.

22 Q When was the fourth time that he asked you to
23 sell him drugs?

24 A The fourth time when he asked to sell him
25 drugs that's when I used to working for somebody.

1 And I'm making a little bit of money so they insist
2 me again to sell them drug, I tell him no.

3 Q And do you remember what date that was?

4 A Yeah, that's close to August like in the
5 beginning, like in the start in August.

6 Q And what year was that?

7 A 2006.

8 Q And when was the fifth time that he asked you
9 to sell him drugs?

10 A First time that's when --

11 Q The fifth time.

12 A Yeah, when I -- they show up around, they used
13 to driving around and they hear for some friend of
14 mine that I got like one month out on steal work. So
15 the man say, you got the choice, you want to make
16 money just let me know. And my answer, I say no.

17 Q And when was next time that Steven asked you
18 to sell him drugs?

19 A Next time when Steven is asking me to sell
20 drugs that's when I call him for let me borrow some
21 money for pay my rent. And they told me they don't
22 got no money, but they can put me -- they can help me
23 another way. And they told me the way that they can
24 help me, that's give me some drugs for selling.

25 I say why they trying to use me for selling

1 drugs when my thing that's working and framing work.
2 And I tell them I don't want to be involved in things
3 like that.

4 Q Let's talk about what led up to this incident
5 in August 2006. How did Steven -- what did Steven
6 say to you to get you to arrange this, make phone
7 calls in this case?

8 MS. CARDILLO: Objection to hearsay, Your
9 Honor.

10 THE COURT: Sustained.

11 MR. GRIMES: Your Honor, I believe we have a
12 matter of law.

13 THE COURT: Ladies and gentlemen, I need for
14 you to go to the jury room. Do not begin your
15 deliberations, don't discuss the case.

16 (Whereupon, the jurors exit the courtroom.)

17 THE COURT: Yes, sir.

18 MR. GRIMES: Thank you, Your Honor. May it
19 please the Court. We are offering the evidence not
20 to show the truth of the matter asserted.

21 THE COURT: Mr. Grimes, that is an insult to
22 the Court. You asked him, what did he do to get you
23 to do that and you are now asking him to say what he
24 said. So he obviously is relying on it, it's
25 obviously offered for the truth of the matter

1 asserted.

2 MR. GRIMES: No, Your Honor, it's offered to
3 show what was said and the fact of his state of mind.

4 THE COURT: Again it's offered for the truth
5 of the matter asserted. If it affected him he has
6 got to be true, he's got to believe it's true and he
7 is asking the jury to believe it's true.

8 Thank you, Mr. Grimes. I'm not going to allow
9 it, it's hearsay, it's right hearsay. You can call
10 him, you can ask him the questions. You know what
11 the rules says. Once he is on the stand and denies
12 it then you can bring this in.

13 But you have to set it up that way. The rule
14 allows it, it's there. All you do is you have to
15 present the witness. The witness has to previously
16 testify. And then you can ask that witness, didn't
17 you tell him such-and-such. Now he can say that
18 because now the rule provides for that. But you
19 cannot testify to it now.

20 MR. GRIMES: Just for the record I would argue
21 Kent versus State.

22 THE COURT: All right, I'm happy to read it.

23 MR. GRIMES: Thank you, Your Honor.

24 THE COURT: Well, first of all Mr. Grimes this
25 is a decision out the Florida.

1 MR. GRIMES: Yes, sir.

2 THE COURT: Please tell me where we have
3 anything that closely proximates it in this state?

4 MR. GRIMES: I believe Burton versus South
5 Carolina 58 South Carolina 339.

6 THE COURT: Do you have a copy of that
7 decision?

8 MR. GRIMES: No, sir, not with me.

9 THE COURT: All right, hold on just a second.
10 What is the cite?

11 MR. GRIMES: 58 South Carolina 339.

12 THE COURT: Page number again?

13 MR. GRIMES: 339.

14 THE COURT: First of all, you've read that
15 case?

16 MR. GRIMES: Yes, sir.

17 THE COURT: That case has nothing to do with
18 criminal prosecution, number one.

19 MR. GRIMES: Yes, sir.

20 THE COURT: Number two, it deals with the
21 freedom of information, the evidence that was
22 testimony cited I agree has nothing to do with
23 anything except forming and establishing a mind set.

24 You have a -- first of all, all I have, the
25 question I have is what did he tell me. In relation

1 to what? why don't you go ahead, and you're going to
2 have to proffer it so you proffer it. what is the
3 line of questions. And be specific, Mr. Grimes,
4 don't go into areas that are otherwise admissable.

5 MR. GRIMES: Thank you, Your Honor.

6 Q (By Mr. Grimes) what did Steven tell you to
7 help convince you to call Mr. Martinez to set up this
8 drug deal?

9 A The way Mr. Steven convinced me to call
10 Martinez, that's because they told me they got a long
11 -- a big job in Long Point Road. They got a building
12 they have to remodeling and take the roof off and put
13 it back. And they told me it's going to cost
14 \$20,000.

15 So they told me if I help him, they're going
16 to give me that job. That day and that time I used
17 to be broke so to me the more important just keep
18 that job like that way I can keep in business my guys
19 that used to work for me.

20 Q what did you believe would happen if you said
21 no to Steven?

22 A what I believe, that's my only choice I got at
23 that time. I used to looking around for some job and
24 I can't find a job. So they make me believe if I
25 don't got this job we don't got no money for pay my

1 rent, don't got no money to pay my bill, I'm gr
2 be broke for at least three or four or five months.

3 MR. GRIMES: Thank you, Your Honor.

4 THE COURT: How does that statement connect
5 the state with anything?

6 MR. GRIMES: Because Mr. Lasaine was a
7 confidential informant.

8 THE COURT: He doesn't know that. Where is
9 his knowledge that he is there for Mr. Hembree?
10 Where is his connection with Mount Pleasant Police
11 Department? Where is his knowledge of that?

12 MR. GRIMES: There is no knowledge and I would
13 submit that's irrelevant, Your Honor.

14 THE COURT: Based on what? Based on --
15 because you've got to prove -- irrelevant to what?
16 Because maybe you and I aren't reading it the same
17 because you've got to tell me how the government is
18 inducing him unless he knows it. How he is being
19 coerced by them, through them indirectly?

20 Because the case that you cited clearly,
21 clearly they were working with him, they knew of him
22 and they had no knowledge of his prior involvement.
23 This officer that your question now has prior
24 knowledge of involvement prior to ever coming there.
25 Whether it was accurate or not, don't know. But

1 there is knowledge that he had upon which he was
2 acting and it proved to be true.

3 So what this -- this is a decision he makes to
4 try to make some money, has nothing to do with being
5 coerced. The state has to be involved in committing
6 the fraud. Where is the connection that he said this
7 is how you get him?

8 MR. GRIMES: When the CI tells him that if he
9 doesn't do this job, or when he believes he does not
10 do the job he is not going to get the money --

11 THE COURT: Where is the testimony that this
12 CI got him to do that on this particular occasion?

13 MR. GRIMES: I believe that's why he
14 testified, that's why he did it.

15 THE COURT: No, he didn't he said I did. But
16 where is the testimony that the state said get him
17 for this particular occasion?

18 No question he's a CI, he's admitted to that.
19 But where is the question that he was involved in
20 arranging this other than being present?

21 MR. GRIMES: Maybe I'm misunderstanding your
22 question and I apologize. This whole thing is set
23 up, I believe the evidence has shown that Mr. Lasaine
24 is trying to work out this charge.

25 THE COURT: That's correct.

1 MR. GRIMES: He is trying to get Mr. Hernandez
2 to sell the drugs, it's all the state's plan.

3 THE COURT: That's correct. But where is it
4 that there is anything that we have had before where
5 the state is privy to the fact that this man doesn't
6 want to do anything, is not interested, because
7 that's the key to these things. Not that it
8 happened.

9 MR. GRIMES: I think I understand that
10 question.

11 THE COURT: Okay, that's what I'm saying. I
12 don't quarrel with the fact Lasaine may have talked,
13 no quarrel with the fact that he was involved in it.
14 But where is the question -- where is the force and
15 coercion coming from Mount Pleasant in this case?

16 MR. GRIMES: Basically their agent, Mr.
17 Lasaine, that he is the one applying the force and
18 coercion. And his prior testimony came in he said no
19 5, 6 times before shows that it --

20 THE COURT: Where is there knowledge that they
21 knew that?

22 MR. GRIMES: I have no evidence to show that
23 Officer Hembree or any law enforcement officer apart
24 from Mr. Lasaine knew that, Your Honor.

25 THE COURT: All right, what is the state's

1 position?

2 MS. CARDILLO: Your Honor, as regards to this
3 there is no evidence to show that there has been any
4 fraud on the behalf of Mount Pleasant Police
5 Department or its agents.

6 We would contend that this was not a good line
7 of questioning regarding the defendant and there has
8 been no fraud, no inducement, no threats made, no
9 evidence. Therefore we ask that it be excluded.

10 THE COURT: The statement, Mr. Grimes, you are
11 using Mr. Lasaine as being an agent. But this case,
12 and I don't have anything other than what is in the
13 factual recitation here and I haven't read it
14 thoroughly as to -- it appears to me that in this case
15 they were detectives, they were officers, they were
16 undercover officers that were working with -- not a
17 confidential informant, that's totally, totally, I
18 don't quarrel with that because that's easy, that's
19 the states doing this. The state is encouraging.

20 Just as in Judge Gregory's case that you've
21 cited, the one where he was reversed, the State
22 versus Brown, clearly there were officers involved,
23 there is no question about that. And the Brown case
24 said, I don't want to deal witness. They left and
25 then they forced a situation and continued to pursue

1 it. I don't have any of evidence of that.

2 I don't quarrel with the Florida case if we
3 are talking about officers, I don't have any problem
4 with that. That's clearly, no question about that.
5 But this has nothing to do with it because there is
6 no connection other than the fact that he is a CI.

7 Sorry. So thank you very much and I sustain
8 the objection.

9 MR. GRIMES: May I have just a moment to
10 confer with Mr. Lewis on that?

11 THE COURT: Yes.

12 I have one of your cites right here, we have
13 been talking about it. Anything further?

14 MR. GRIMES: Briefly, Your Honor.

15 THE COURT: Yes, sir.

16 MR. GRIMES: Two points. First Detective
17 Hembree testified that he signed a confidential
18 informant agreement.

19 THE COURT: I don't have any problem with the
20 fact he is a CI, that's not my concern. The concern,
21 and we have just talked about it, the concern is
22 number one in the Florida case they were officers,
23 they were the people.

24 And in this case, the Brown case, the CI is
25 the one doing the deal, in the Brown case.

1 MR. GRIMES: Yes, sir.

2 THE COURT: It does not elaborate, I'm
3 assuming he has wired everything else in this case
4 and he says no at the end of it, but they persist in
5 pursuing it. No question in this case the CI is
6 involved in it. In fact he is involved in the
7 purchase itself, he is involved in establishing the
8 crime itself. So he is intricately involve in the
9 predisposition and persuading him to do something.

10 This, I don't have enough, I don't have enough
11 I think to show that this guy has refused -- you see
12 I don't see -- this case the Court talked about, the
13 Brown case, it talked about this person and his
14 reputation and you've established his reputation.
15 And we don't know or it doesn't indicate to me what
16 ultimately put him over the top.

17 But we have, as a part of the overall crime
18 itself, because they went to him first, and one of
19 the big problems that you have I think in
20 distinguishing this case, to me at least, is further
21 supported by what came out yesterday.

22 There is nothing in there that says he has to
23 verify prior drug involvement, he just has to have
24 some knowledge of it. In this case these officers
25 had no knowledge of it. And the Court made a point

1 of that. And the footnote they said, however, the
2 record reflect the judge was initially inclined to
3 give the charge of entrapment until the solicitor
4 eluded the predisposition element of the offense of
5 entrapment was satisfied by Brown's prior drug
6 dealings.

7 Then it says, however, there is no evidence
8 that came in the record indicating that Brown had a
9 drug dealing history. Well, we have that in this
10 case.

11 MR. GRIMES: I understand your ruling on that.

12 THE COURT: I mean I understand, that again,
13 that's for the jury to determine. The question is
14 whether or not there is any evidence of it, there is
15 evidence. There wasn't any evidence of it in this.

16 MR. GRIMES: Yes, sir.

17 THE COURT: Then in this case it seems to talk
18 about -- just one second let me just read. My clerk
19 piqued my interest too, so hold on just a second.

20 The Brown case, which is the only one that I
21 have been able to find you provided me that deals
22 specifically with this issue in South Carolina. And
23 reading that, one of these parts that is getting to
24 the point that while I don't agree with you legally,
25 I think the reason is not very good and that's not my

1 call that's the jury's call as to whether the reason
2 is sufficient or not.

3 But the problem I have and the concern I have
4 is simply I don't think Brown says that every
5 conversation had with someone automatically comes in
6 without meeting certain tests, number one.

7 But assuming just for the sake of discussion
8 that I can in my mind put Lasaine in the same status
9 as Detective Hembree, that is the state encouraging
10 him. This case has something which I think is fairly
11 significant; two things. Number one, the lack of
12 knowledge of prior drug dealings which the Court made
13 specific mention of.

14 But secondly, and the Court used this to get
15 around the argument because in this case was really
16 interesting and I'm not so sure I would not have done
17 the same thing Judge Gregory did because they didn't
18 offer any evidence. And the burden, it's a sort of a
19 hybrid burden of proof you have here. You have a
20 burden to a degree but then the state has to prove
21 certain things.

22 But clearly it's not -- it's an affirmative
23 defense in the true sense of the word. But in this
24 particular case we have something that is not
25 present, and it's my feeling is very controlling

1 dealing with predisposition. He refuses, absolutely
2 refuses to deal with the undercover agent. Will not
3 deal with him, period. Only will deal with the
4 person he knows to be a drug dealer.

5 Now we are getting into the area the state is
6 really doing something, they're working through and
7 they fraud and they forced him to do something, but
8 for the fact he is there with that CI there would not
9 have been any. I don't have anything here with that.
10 None whatsoever.

11 I mean if he had gotten in the car, give you a
12 scenario, if he had said, I don't want to deal with
13 you, I don't know you, we can't do business and he
14 walked away. And they asked Lasaine to stay and meet
15 with the people go meet them, yeah, I think you are
16 right. I think you are absolutely right. Lasaine's
17 pressure is imperative.

18 I don't think it's there. It's just not
19 there. It's not the state. What I have right now is
20 the state saying, you shouldn't make any offers, you
21 shouldn't do anything. And I have got this person
22 coming and voluntarily sitting in the car for an hour
23 talking about things that are drug related.

24 And that, unfortunately is just contrary to
25 Brown, it's contrary to anything other than a

1 reasonable conclusion that that's okay with him. It
2 may have been his first time. I don't know whether
3 it was or it wasn't. He says it is. That's not the
4 issue.

5 The fact that they set it up is not
6 entrapment. The fact they made it available to him,
7 the opportunity, is not entrapment. Clearly as I
8 read the decision, I mean if that was all then it
9 would be easy. But that's not what the Court is
10 saying.

11 The Court says, and I think this case talks
12 about this, that this person has said I don't want to
13 do this and didn't do it but for that deal with the
14 CI. We don't have that here.

15 MR. GRIMES: I understand the Court's ruling.
16 I just for the record I believe that goes to the
17 weight for the jury to decide and not for the Court
18 to decide.

19 THE COURT: I appreciate that and I think
20 that's a good argument. I think that maybe we will
21 have another decision if we have to. The jury may
22 not create the issue for you.

23 But, clearly in this particular situation to
24 me I think there is a threshold issue that deals with
25 whether or not I'm going to allow the hearsay

1 testimony.

2 Now he can certainly say based on
3 conversations I had with him about a job, I thought I
4 was going to get a job out of this. He can testify
5 to his mental state he just can't testify to the
6 conversation.

7 Now whether or not he said that I agree with
8 that, that's not hearsay. But you've asked him, tell
9 me what he said.

10 MR. GRIMES: I see.

11 THE COURT: There is another way of getting
12 the evidence in but that to me is not the issue. You
13 can still get the effect of what you're trying to do,
14 I haven't stopped you from that.

15 MR. GRIMES: Yes, sir.

16 THE COURT: I don't think there is any basis
17 for the hearsay at this point. Clearly in this
18 particular situation, unlike the other case and the
19 Florida case, these people -- these are all
20 undercover agents, number one. These are all
21 Hembree's in that and that's an easy one. That one
22 is simple because they're officer. Now they're the
23 state.

24 At the time that he was out there was he
25 working for the state? Arguably no because he

1 exceeded his authorization, he wasn't authorized to
2 do that. There are all sorts of technical arguments
3 to that. But to avoid all of that the easy way to do
4 it is you talking about his mind set, he can testify
5 to his mind set.

6 okay. Let's bring in the jury, please.

7 (Whereupon, the jurors enter the courtroom.)

8 THE COURT: Very much. Thank you for your
9 patience, ladies and gentlemen.

10 Mr. Grimes, you may continue your examination,
11 sir.

12 MR. GRIMES: Thank you, Your Honor.

13 Q (By Mr. Grimes) Mr. Hernandez, without saying
14 what Mr. Lasaine told you, did you have a
15 conversation with him on August 7th of 2006?

16 A Yes.

17 Q All right. And after you talked to him, what
18 did you believe would happen if you called Mr.
19 Martinez to help set up this drug deal?

20 A What happened is in that situation when I
21 called Mr. Martinez, Steve they told me like that I
22 help, they're going to give me a job.

23 MS. CARDILLO: Objection again, hearsay.

24 THE COURT: I will allow it.

25 Q (By Mr. Grimes) Go ahead.

1 A I helping him to find drugs they're going to
2 give me that job. In that situation I really needed
3 to make that money because I don't used to got no
4 money to pay my rent and plus I got bills to pay.
5 And in another way they make me think about my guys.
6 If I don't keep my job everybody is going to be at
7 home and doing nothing so that's why I did it.

8 Q How big a job was this that Mr. Lasaine was
9 talking about?

10 A I never seen the building but they told me
11 that's a big building, that's going to cost about
12 \$20,000 just to do the remodeling work.

13 Q And what did you believe would happen if you
14 refused Mr. Lasaine?

15 A What I believe if I don't help him they told
16 me, I remember they told me like, one hand wash the
17 other hand, so they make me feeling like if you don't
18 do for me I'm not going to give you no more job and
19 I'm not going to help you no more.

20 So make me feeling like if I don't help I'm
21 going to be broke because they're not going to help
22 me no more to find a job.

23 Q Now after this conversation with Mr. Lasaine,
24 what did you do next?

25 A Say again?

1 Q After you talked to with Mr. Lasaine about
2 this job, what did you do after that?

3 A I don't no understand.

4 Q I'm sorry. Did you call anybody after you
5 talked to Mr. Lasaine?

6 A Yes, after I talked to Mr. Steve I called a
7 Mexican guy.

8 Q And what was the name of the Mexican guy?

9 A That's Eduardo Martinez.

10 Q And what did you tell Mr. Martinez?

11 A I told Mr. Martinez the guy that I work for, I
12 working for him, that he told me if I help them to
13 find some drugs they are going to give me a job. And
14 plus I telling him trying and do you know somebody?
15 So Mr. Martinez told me, they are going to try.

16 And but they don't give me answer at that time
17 up to about one hour later they call me and they told
18 me, call the guy you work for and tell him I got that
19 thing.

20 Q And by that thing what did you understand that
21 to be?

22 A When they told me that thing they make me
23 figure out they got the drug, they got the nine
24 ounces.

25 Q And what happened after Martinez told you that

1 he got that thing?

2 A After that Mr. Steven they call me again and
3 he asking me again so what the deal is going to be.
4 And I tell him I have already talked with this guy
5 but I don't know nothing, I can't make it so quick,
6 so I don't know what's going to happen.

7 So after that Mr. Steven told me, don't worry
8 about it. Just come to the Mount Pleasant to Long
9 Point, I'm going to show you the job that I got for
10 you.

11 Q When this deal was set up did you pick the
12 location in any way?

13 A No. Mr. Steven was the one they told me they
14 going to meet me in Waffle House. That's one thing
15 we were still talking about it, Mr. Steven they
16 started calling me about 11:30 in the morning.

17 And at that time I used to be so busy, they
18 keeping calling me up to that time they make me go
19 out there because they told me, don't worry for you
20 can't find that thing just come I'm going to show you
21 the job because the man that is going to give me the
22 job they still here around Long Point, so we need to
23 catch him today like that way you can give him the
24 estimate so that you can starting work any day.

25 I tell him I can start work tomorrow. They

1 told me if I set him up the deal and I give him a
2 good price I can start any time.

3 Q Now we have heard about some co-defendants
4 being out there. Did you know Martino Bentencourt?

5 A No.

6 Q When was the first time you ever saw Martino
7 Bentencourt?

8 A The first time that I seen Bentencourt that's
9 the day when they arrested us in Mount Pleasant.

10 Q Had you ever talked to Mr. Bentencourt before?

11 A Never. Never in my life.

12 Q What about Luis Sastru, when was the first
13 time you met him?

14 A First time I seen him that's the same day they
15 arrested us. And I see him police department to
16 Mount Pleasant.

17 Q Had you ever talked with Mr. Sastru before?

18 A No.

19 Q Who was in charge of this drug deal that went
20 on in Mount Pleasant?

21 A Say that again?

22 Q Were you in charge of this drug deal that
23 happened in Mount Pleasant?

24 A Yes.

25 Q You said you were in charge?

1 A I don't understand was is in charge mean.

2 Q I'm sorry. If you don't understand a
3 question, make sure and let me know, okay?

4 A All right.

5 Q Were you controlling what Mr. Bentencourt and
6 Mr. Martinez and Mr. Sastru were doing on August 7,
7 2006?

8 A No.

9 Q Were you arranging for them to do
10 counter-surveillance in any way?

11 A No.

12 Q When you were in the car with Detective
13 Hembree, how did you feel that day?

14 A When I was still in the car first thing I --
15 the first thing I got in my mind just go out there
16 and talk with Steven and tell him about the first
17 thing that's show me the job. But Mr. Steven told
18 me, come on in the truck.

19 And the first thing I thinking when I see the
20 man in the back of the truck make him feeling like
21 that's the person they're going to give the job.
22 After I hear from Mr. Steven, that's the person they
23 want the job. So they make me feeling scared and
24 make me nervous.

25 Q Have you ever been involved in a drug

1 transaction before?

2 A Never in my life up to that time.

3 Q And after you were arrested, where were you
4 taken?

5 A Where?

6 Q Where did the police take you after you were
7 arrested?

8 A When they arrested me in Mount Pleasant they
9 take to Mount Pleasant department of police.

10 Q And after that where did they take you?

11 A They make me stay for a little while there and
12 later they, just maybe about six o'clock or seven,
13 they bring us to here county jail.

14 Q Have you been in the county jail since?

15 MS. CARDILLO: Objection, Your Honor.

16 THE COURT: Sustained.

17 Q (By Mr. Grimes) Have you done anything --
18 have you ever used drugs before, Mr. Hernandez?

19 A Yeah, I used to.

20 Q What caused you to use drugs?

21 A The reason that I make me use drug, that's
22 because basically when I am making almost all my
23 dreams true, and finally I used to got a little
24 support for help my daddy and my mother, my daddy
25 died and I don't care.

1 And everything when I am making, that's for
2 nothing because now I got a better position but the
3 man that I am trying to help, it's no more.

4 Q And because you used drugs do you know people
5 who may sell drugs?

6 A Because that I know that I use drug? Yeah,
7 they make me get -- maybe some guy they sniffing but
8 I never know somebody that used to deal with big
9 things.

10 Q Why did you call Mr. Martinez on August 7,
11 2006?

12 A I call Mr. Martinez on August 6, 2006 because
13 Mr. Martinez they used to go in the Mexican bars and
14 sometime when I talk to him they would tell me like
15 Mexican bars they got so many people selling drugs
16 out of there.

17 MR. GRIMES: Can I have one moment, Your
18 Honor?

19 THE COURT: Yes, sir.

20 Q (By Mr. Grimes) I want to ask you a few
21 questions in conclusion. Why did you use that
22 language that you used on the video that day?

23 A First of all I'm sorry for me talking like
24 that, but I used that kind of language because I used
25 to see so many movies, Mexican movies and I got -- at

1 that time I be a-scared because the thing that I am
2 feeling is maybe I can be hurt, and make me feeling
3 inside of me that if I talk like that maybe I'm going
4 to make him believe to me I'm no little. Maybe
5 they're going to scare me too.

6 You know, maybe they're going to feeling
7 respect or they're going to feeling like I'm maybe in
8 the same level with him.

9 Q When you went there did you have any weapons
10 with you?

11 A No.

12 Q Who brought the drugs to Long Point Road?

13 A Mr. Martinez.

14 Q Who got paid or who was going to be paid for
15 the drugs?

16 A Mr. Martinez.

17 Q Why were you out there that day?

18 A I used to be out there because I try and not
19 up to they finish with whatever thing they do try and
20 go up and see the job.

21 Q At any time during your conversations with the
22 officer and Mr. Lasaine did you ask to leave to go
23 look at the job?

24 A Yeah, I asked him. I asked him, Mr. Steve,
25 show me the job because Mr. Steve they used to look

1 like kind of desperate because the guy be taking so
2 much time so I tell him, why after this guy coming,
3 why you don't go and show me the job.

4 Q And would they let you leave at that time?

5 A They don't -- they don't -- they stopped to
6 show me the job because the person they used to be
7 behind us in the truck, that's this officer right
8 there, they said they don't want to go anywhere
9 because they got money with him and they don't want
10 nobody can robbing him.

11 Q And why did you call Mr. Martinez on August
12 7th, 2006.

13 MS. CARDILLO: Objection, Your Honor, asked
14 and answered.

15 THE COURT: Sustained. You have gone through
16 that, Mr. Grimes, thank you very much.

17 MR. GRIMES: Thank you, Your Honor.

18 Please answer any questions the solicitor may
19 have for you, Mr. Hernandez.

20 THE WITNESS: Yes, sir.

21 THE COURT: Cross-examine.

22 MS. CARDILLO: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MS. CARDILLO:

25 Q Good afternoon.

1 A Good afternoon.

2 Q Morning still. Mr. Hernandez, did you watch
3 the video yesterday with all of us in the courtroom?

4 A Yes, ma'am.

5 Q Had you seen the video prior to yesterday?

6 A Yes.

7 Q Now when you went to the Food Lion that day
8 were you alone when you arrived?

9 A Yeah.

10 Q Did anybody point a gun at you prior to you
11 going to the Food Lion to make you go to the Food
12 Lion to conduct this drug sale?

13 A Well, the reason I go and Food Lion --

14 Q Sir, the --

15 THE COURT: First, Mr. Hernandez, answer the
16 question. Then if it needs explanation you certainly
17 are free to explain it but you must answer the
18 question first.

19 THE WITNESS: All right.

20 Q (By Ms. Cardillo) Did anybody point a gun at
21 your head to make you go to the Food Lion that day?

22 A No.

23 Q When you met with the officer, you sat in the
24 same car with him for over an hour, almost an hour,
25 right?

1 A Right.

2 Q And when you the video you seem pretty calm on
3 that video, didn't you?

4 A Say that again?

5 Q Didn't you see pretty calm on that video that
6 you watched yesterday that was an hour long?

7 A I don't understand what is calm mean.

8 Q Were you relaxed? You seemed pretty relaxed
9 on that video.

10 A No.

11 Q Looking at it. You were laughing, weren't
12 you, in that video?

13 A I laugh, yeah.

14 Q You were joking around with the confidential
15 informant and the undercover officer?

16 A I laughing because, you know, we talk
17 something funny.

18 Q Joked around about a girl that you thought was
19 good looking in your neighborhood, didn't you?

20 A Right.

21 Q You did not come across scared at all in that
22 video, did you?

23 A I don't try to demonstrate I scared.

24 Q Now, let's talk a little bit about some of the
25 things you did say on that video. You were advising

1 or helping the undercover officer telling him how to
2 be relaxed when it came to drug deals, didn't you?

3 You were trying to tell him how to act when he
4 was doing drug deals, aren't you -- didn't you?

5 A Yeah, I tell him.

6 Q Didn't you talk, you talked about how not to
7 be paranoid, didn't you?

8 A Say that again.

9 Q You talked about how not to be scared, didn't
10 you?

11 A Yeah, I tell him don't be a-scared.

12 Q Did you tell him how you acted when you were
13 high and went to the store, how you were paranoid
14 when you got high and went to the store, didn't you?

15 A No, I tell him.

16 Q Did you say that on the video, that you went
17 into the store when you were high? Do you want me to
18 show you the video?

19 A When I high?

20 Q Didn't you say on the video that you were high
21 when you went to a store and you were paranoid
22 because you were high?

23 A The night before they make me --

24 Q Did you say that on the video that you went to
25 the store high?

1 A I don't say I go --

2 MR. GRIMES: If she can let him explain his
3 answer.

4 THE COURT: Well first he needs to answer the
5 question, then he can explain his answer, Mr. Grimes.

6 Answer the question, then you can explain it.

7 A I don't say I go in high that day.

8 Q (By Ms. Cardillo) Did you go -- I will move
9 on. You talked about other drug deals during this
10 52-minute long video, didn't you?

11 A I tell that to make the man feeling like I'm
12 not scared.

13 Q Did you talk about other drug deals prior to
14 the one that you were doing that day?

15 A I talk about that, but.

16 Q Did you talk about going to North Carolina?

17 A Yeah.

18 Q Did you talk about going to Greenville?

19 A No, I tell him about North Carolina situation.

20 Q Did you talk about going -- transporting
21 illegal drugs?

22 A No.

23 Q Did you want to see the video?

24 THE COURT: No, that's argumentative. The
25 jury has that evidence. That's an argumentative

1 question.

2 Q (By Ms. Cardillo) Did you talk about doing
3 this drug deal, do it quick, boom boom, get out
4 quick?

5 A Because that's what Mr. Steven told me.

6 Q Is that what you said on the video?

7 A That's what Mr. Steven --

8 Q Let's do this, boom boom, quick?

9 A I said that but that's what Mr. Steven told me
10 they're going to do, doing everything fast.

11 Q Did you talk about how fast, how much the cost
12 would be for the undercover officer?

13 A No.

14 Q You did not talk about how it would be 67, or
15 Detective Hembree asked you if it would be 7 and you
16 said 67?

17 A 67 what?

18 Q Did you talk about the cost of this drug deal
19 with Detective Hembree?

20 A No. Detective Hembree, the only -- they
21 asking us how much is 9 times 7.

22 Q And how much is 9 times 7?

23 A They asked him, first of all he asked Mr.
24 Steven and Mr. Steven asked me, I just say 9 times to
25 7 that's 63.

1 Q And that's how much the drugs cost \$6,300 that
2 you sold on that day, right?

3 A Yeah.

4 Q You told the person you were talking on the
5 phone with the location where you were, that you were
6 at the Food Lion?

7 A First of all that day I get like four phone
8 calls.

9 Q Did you tell this person that you spoke to
10 that you were at the Food Lion to do this drug deal?

11 A That's the last phone call I tell the man
12 where I'm on Long Point.

13 Q Would you agree that selling cocaine is
14 illegal in this country?

15 A Say that again.

16 Q Would you agree that selling drugs is illegal?

17 MR. GRIMES: Objection, Your Honor.

18 THE COURT: Sustained.

19 Q (By Ms. Cardillo) When you went -- you stated
20 on direct that you were scared a lot. When Mr.
21 Grimes was questioning you stated that you were
22 scared?

23 A Right.

24 Q And that you were just acting this way on the
25 video?

1 A Right.

2 Q You know a lot for someone who has never been
3 involved in any drug deals before, though, on this
4 video?

5 A I see so many movies.

6 Q So you are telling me and this jury that the
7 only reason you talk like this was because you
8 learned it from a movie?

9 A Because I see movies and I used to hear it
10 from Mr. Steven.

11 Q Mr. Hernandez, isn't it true that you were
12 involved in the set-up of this drug deal on August
13 7th of 2006?

14 A I used to be involved in that drug
15 transaction, but Mr. Steven they told me to do it.

16 Q I'm sorry, I'm not sure you answered my
17 question let me ask you again. Were you involved in
18 this drug deal of cocaine on August 7th of 2006?

19 A Yes, I be involved.

20 Q The bottom line is you helped set this up to
21 sell a quarter kilo of cocaine to an undercover
22 officer; isn't that correct?

23 A Say that again.

24 Q Isn't the bottom line that you helped conspire
25 to set up this drug deal, a quarter kilo of cocaine,

1 to this undercover officer?

2 A Yes.

3 MS. CARDILLO: Thank you, Your Honor, I have
4 nothing further.

5 THE COURT: Redirect.

6 MR. GRIMES: Thank you, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. GRIMES:

9 Q Why did you help set up this drug deal?

10 A Excuse me?

11 Q Why did you help set this drug deal up?

12 A The reason that I help that's because they
13 used to be a big job between that help.

14 Q And what big job was this?

15 A A building in Long Point that's going to cost
16 \$20,000 to remodel that job.

17 MR. GRIMES: Thank you, Your Honor, I have no
18 further questions.

19 THE COURT: Recross?

20 MS. CARDILLO: No, Your Honor, thank you.

21 THE COURT: Thank you. Mr. Hernandez, you may
22 step down, sir.

23 Call your next witness if you wish.

24 MR. GRIMES: The only remaining evidence would
25 be to publish the stipulation, Your Honor.

1 THE COURT: Okay, did you have the
2 stipulation?

3 MS. CARDILLO: Your Honor, the state has the
4 stipulation.

5 THE COURT: You want to publish it you may do
6 so.

7 MR. GRIMES: Thank you, Your Honor.

8 The state of South Carolina and Jose Luis
9 Gutierrez Hernandez stipulate that Steven Lasaine
10 received a negotiated sentence of 12 years on the
11 lesser included charges of trafficking in cocaine in
12 an amount of between 28 and 100 grams.

13 I believe we introduce this as Defense Exhibit
14 1.

15 THE COURT: Just becomes a Court's exhibit,
16 it's stipulated.

17 Ladies and gentlemen, stipulated facts are
18 simply the parties rather than call a witness from
19 time to time agree this is what the information would
20 have been and they put -- reduce that to writing in
21 the form of a stipulation.

22 That's a fact now that you consider with all
23 other facts in deciding what you find to be the truth
24 of this dispute. Thank you.

25 MR. GRIMES: May I approach, Your Honor?

1 THE COURT: You may. Anything else?

2 MR. GRIMES: No, sir. Defense would rest at
3 this time.

4 THE COURT: Any reply testimony?

5 MS. CARDILLO: No, Your Honor.

6 THE COURT: All right. Ladies and gentlemen,
7 at this point I'm going to let you go to the jury
8 room. Do not begin your deliberations, don't discuss
9 the case, we will be with you shortly.

10 The next two parts are of course the charge
11 and the instruction on the law. The clerk is going
12 to assist with ordering of your food for you. And we
13 will have menus will be provided for you and you take
14 advantage of doing that at this point as well.

15 When we come back we will do the argument and
16 charge and by the time we finish that hopefully
17 you're food will be you can have that and then you
18 can deliberate.

19 Thank you, you may retire. Do not begin your
20 deliberations now.

21 (Whereupon, the jury exits the courtroom.).

22 THE COURT: Anything from the state at this
23 point?

24 MS. CARDILLO: No, Your Honor.

25 THE COURT: Mr. Grimes.

1 MR. GRIMES: For the record we would renew or
2 motion for directed verdict, Your Honor.

3 THE COURT: Thank you, sir. For the record I
4 would respectfully deny that.

5 I have no -- any specific requested charge
6 from the state?

7 MS. CARDILLO: No, Your Honor, just the
8 standard jury instructions on these charges.

9 THE COURT: Okay. I have a packet of
10 requested charges from Mr. Grimes submitted for Mr.
11 Hernandez there are 12 in number. Any additional
12 requested charges?

13 MR. GRIMES: I would ask for a character
14 charge, Your Honor.

15 THE COURT: Okay. Character charge? All
16 right. Okay.

17 MR. GRIMES: I brought it up.

18 THE COURT: That's fine. No problem. The
19 requested charge number one. The requested charge
20 number one, two, seem to deal with evaluating the
21 testimony of a witness not just the fact that it
22 exists. I don't think that's --

23 MR. GRIMES: I would withdraw those requests.
24 I anticipated co-defendants in this case.

25 THE COURT: I figured you may have, I just

1 wanted to be sure.

2 MR. GRIMES: I believe four will also be
3 withdrawn.

4 THE COURT: What about three, you want me to
5 charge accomplice?

6 MR. GRIMES: No, sir.

7 THE COURT: Three is withdrawn, four is
8 withdrawn because he did not testify. Five, I'm
9 going to charge general law pertaining to possession
10 with intent to distribute within proximity of a
11 school.

12 MR. GRIMES: Your Honor, on five our only
13 special request on that would be that the mens rea
14 element on the knowledge of the school being within a
15 half mile of the sale. And I will stipulate for the
16 record there is no case law to support that.

17 THE COURT: I'm going to charge there has to
18 be criminal intent you can do that. But I don't
19 think it is because I think the crime -- criminal
20 intent is distribute of having possession of drugs if
21 your location it's the crime of location.

22 So but I'm not going to charge specific intent
23 as to the school. It's noted and denied and
24 protected for the record.

25 MR. GRIMES: Thank you, Your Honor.

1 THE COURT: Your entrapment, I have a general
2 entrapment which I think incorporates all of the
3 requests that you had. The one that you've given to
4 me though that says entrapment for trafficking but
5 not for possession with intent to distribute or -- I
6 don't see that.

7 I mean you're position there would be, well I
8 intended to just do some possession but I didn't have
9 -- that may apply in a situation. I was trying to
10 think of where that could possibly be. Yeah, it
11 could be.

12 MR. GRIMES: I don't believe the testimony in
13 this case supports those charges. He testified he
14 sold just small quantities, no dealing.

15 THE COURT: To me it's either he is entrapment
16 in this transaction or it's either guilty not guilty
17 is the way I see it.

18 MR. GRIMES: Yes, sir.

19 MS. CARDILLO: Your Honor, with regards to any
20 proposed any entrapment charge in general would be --

21 THE COURT: I understand you oppose it, I
22 appreciate that and I understand that. You can argue
23 why to the jury it's not appropriate if the facts
24 support it. Thank you.

25 And I note as a lawyer why you did it because

1 I did it to. But I'm going to protect you against
2 yourself there. I'm going to charge it.

3 All right.

4 MR. GRIMES: Number 12, I'm not sure if there
5 is evidence to support that, he did admit there was
6 knowledge.

7 THE COURT: 11 and 12 are similar in the sense
8 that dealing with -- an interesting proposition,
9 frankly, I never thought about being entrapped. I
10 was going to do a crime but ended up being forced to
11 do another crime which is interesting. I don't know
12 that we had that. Looks like an United States case
13 that you cited. A Supreme Court case.

14 But anyway, I think my charge will cover the
15 essence of the entrapment defense. And basically the
16 language in it really is kind of one of the things
17 that cause me to, in addition to your arguments and
18 the law, but the charge itself says the defendant in
19 this case has raised the defense of entrapment.
20 Entrapment is shown if the crime was conceived and
21 planned by an officer or someone acting as an agent
22 of law enforcement, that's the first element.

23 Second, the officer or agent induced,
24 solicited, proposed, initiated, suggested or
25 persuaded the defendant to commit the crime. So the

1 agent is in there acting.

2 Three, the defendant would not have committed
3 the crime without the trickery, persuasion or fraud
4 of the officer or agent. The state is required to
5 prove beyond a reasonable doubt that the defendant
6 was predisposed -- and I think that's what the law
7 says the state has to do -- predisposed to commit the
8 crime without the inducement of the officer or agent.

9 Then predisposed to commit means that the
10 defendant had the intent, purpose, readiness or
11 willingness to commit the crime without the
12 inducement or persuasion of the officer or agent.

13 The fact that the officer or agent merely
14 presented opportunities or facilities for the
15 submission of the crime is not entrapment. That
16 sentence is in there.

17 Then it goes through and just talks about if
18 you find there was predisposition then -- that if you
19 find that the defendant had any predisposition
20 without any government inducement then there would be
21 no entrapment.

22 In deciding whether the defendant had
23 predisposition you consider such evidence as existing
24 courses of criminal conduct by the defendant similar
25 to any already formed plan by the defendant to commit

1 the crime or willingness to commit the crime charged
2 as shown by the defendant's ready response to the
3 inducement. That's part of my charge.

4 MR. GRIMES: Thank you, Your Honor.

5 THE COURT: Thank you, sir.

6 MR. GRIMES: I think number eight the charge
7 uses the language, in evaluating predisposition we
8 consider his character, reputation.

9 THE COURT: I will. I will certainly do that,
10 that's part of the -- I think that's part of the
11 state v Brown holding as well. So yes, sir, I will
12 include that as well.

13 MR. GRIMES: Thank you, Your Honor.

14 THE COURT: Uh-hum. All right. We will take
15 a few minutes then we will be ready to go.

16 (Whereupon, a recess was taken.)

17 (Whereupon, the jurors enter the courtroom.)

18 THE COURT: Thank you, ladies and gentlemen.
19 We are ready now to continue the matter. We have
20 completed the evidentiary portion, there still
21 remains of course the last opportunity for the
22 attorneys to speak to you in closing arguments, and
23 then following that I will give you the law that you
24 will, of course, accept and apply very shortly when
25 you begin your deliberations to the facts that you

1 will ultimately determine.

2 While you will hear no evidence in either of
3 these two phases, it's still very important that you
4 give the attorneys your attention and then of course
5 give the Court your attention during the charge.

6 I thank you for your attention thus far.
7 Please give your attention now to the attorneys.

8 Mr. Grimes.

9 MR. GRIMES: Thank you, Your Honor. May it
10 please the Court.

11 THE COURT: Yes.

12 MR. GRIMES: Good morning, ladies and
13 gentlemen of the jury. We are going to ask you find
14 Jose not guilty because Steven Lasaine entrapped him.
15 You heard Jose testify that he is not a drug dealer.
16 That he -- you heard he has never been convicted of
17 any drug crimes. You heard no evidence that he has
18 been convicted of any crime. And he is 34 years old.

19 You heard him testify that Steven called him
20 eight to ten times asking him to sell drugs. What is
21 his response? No. No. No. Why do you keep calling
22 me, why don't you call your friends. No. No.
23 You've heard evidence that Steven Lasaine had not
24 one, not two, not three trafficking charges but at
25 least four.

1 And one was over 100 grams. You heard
2 Detective Hembree said, well, Steven helped him out,
3 scratched him on his back, he helped Steven out,
4 scratched him on his back. You heard Detective
5 Hembree testify that Steven went actively Lee seeking
6 sources.

7 Use your common sense. If you are facing four
8 trafficking charges, one involving over 100 grams,
9 two proximity charges, at least one distribution
10 charge, and you end up with 12 years, you know you
11 are going to be active. Imagine how much time he
12 would have got if he had not been active. If he had
13 not set up Jose in this case. Jose was his ticket
14 out of here.

15 You've heard Jose talk about movies he has
16 watched. He watches lots of drug movies. And when I
17 was kid I may have watched movies, may have played
18 Starsky and Hutch when I was a little kid with my
19 friend, played Spiderman, Superman.

20 If you are not involved in drugs, maybe you
21 just know some people that may use some, deal some,
22 you have got a very limited source of information.
23 And there are all sorts of movies out there;
24 Scarface. I forget the name of it now but the one
25 with Jack Nicholson and Leonardo DeCaprio. American

1 Gangster. People pick up that stuff and try to act a
2 certain way.

3 Ladies and gentlemen, the evidence in this
4 case, or the lack of it, kind of essentially shows
5 the state is hiding evidence. An example of that
6 during the trial, when I was questioning Detective
7 Hembree about Lasaine's background, about all of the
8 charges he has picked up, what was the first thing
9 the state did when I sat down? Came up here and
10 closed it. Hide his history from you.

11 I mean ask yourself, where is Mr. Lasaine? We
12 heard he is in prison. The state has the burden of
13 proving this case. Why haven't they called him to
14 testify?

15 You heard Detective Hembree testify, well he
16 signed an agreement he wouldn't do any of this stuff.
17 I submit to you, you can infer that if he was a
18 believable witness, Ms. Cardillo would call him.
19 That if he was a credible witness, Ms. Cardillo would
20 call him.

21 If he would have honored the agreement that he
22 signed with Detective Hembree, Ms. Cardillo would
23 call him. And where is that agreement? I bet you my
24 next paycheck there is nothing in there about
25 entrapment.

1 I would submit to you that the state is hiding
2 evidence or not producing evidence that they have
3 access to. There must be a reason for that. And
4 that reason is the reason that would cause a
5 reasonable, honest, conscientious juror to have a
6 reason to hesitate to act.

7 In other words, that's a reasonable doubt. If
8 you have a reasonable doubt in this case under your
9 oath that you took you must find Jose not guilty.

10 Now Judge Dennis is going to tell you that
11 Jose is presumed innocent. And he'll explain to you
12 what that means much better than I can. But the
13 common example I think about is think about the
14 presumption of innocence. If you are driving down
15 the highway, you see the highway patrol pull someone
16 over, a lot of times you say, I wonder what they did,
17 speeding, taillight out, something else.

18 But that's just the opposite of presumption of
19 innocence, that's the presumption of guilt.
20 Presumption of innocence would be, don't you make a
21 mistake? We know what happens when evidence isn't
22 produced or evidence is hid. And you try to strip
23 away that presumption of innocence. The Duke
24 lacrosse case is a perfect example, the sex case is a
25 great example.

1 Now the state has the burden of proof in this
2 case. And they must convince each one of you beyond
3 a reasonable doubt that Jose is guilty of
4 trafficking. And they must disprove to you beyond a
5 reasonable doubt that he was not entrapped by Steven
6 Lasaine.

7 Again, Judge Dennis is going to explain to you
8 what a reasonable doubt is. An example I find useful
9 when I talk to my clients, so you look at the scales
10 of justice. In civil case when someone is suing
11 someone for money, the party bringing the claim has
12 to show by a preponderance of the evidence, just sort
13 of tip the scale, that the other party, the
14 defendant, was at fault.

15 When someone calls Bill Green up and says, I
16 got rear-ended, Bill Green has got to produce some
17 evidence to convince a jury by a preponderance of the
18 evidence that his client was in the right and the
19 other person was wrong.

20 Now, when the stakes get a little bit higher,
21 stakes such as a DSS case where the state is trying
22 to take someone's child, they have to show by clear
23 and convincing evidence that the person is an unfit
24 parent.

25 And when you try to take someone's liberty,

1 the stakes are even higher. The state has to produce
2 evidence beyond a reasonable doubt that convinces all
3 of you the person is guilty. And in this case they
4 have to produce evidence beyond a reasonable doubt
5 that Steven Lasaine did not entrap Jose.

6 There is one thing I will get straight with
7 you right off. I think we all can agree that we
8 don't like drugs. We may know people in college who
9 may have smoked some, some people may have done it
10 themselves, but when we start getting into heavier
11 drugs, larger quantities, no one likes that.

12 But there is a principle involved in this
13 trial that I want to talk to you a little bit about.
14 That's what we call the lady justice who's
15 blindfolded. And I respect her. This is what the
16 system stands for. And I will submit to you everyone
17 in this courtroom respects her.

18 Now she doesn't care how rich you are or how
19 poor you are, where you came from. She doesn't care
20 what race you are. Does not matter to her who you
21 are. She has no friends to reward and no one to
22 punish. And she cries out in anguish when her system
23 gets out of kilter. That's what we have here.

24 The state is supposed to bring the witnesses
25 to convince each of you beyond a reasonable doubt.

1 And it is out of kilter when the main witness is not
2 even called.

3 And I think we can agree that probably three
4 key witnesses in this case; Detective Hembree, Jose,
5 and Steven Lasaine. And you've heard from two-thirds
6 of those witnesses. Well you are missing a third of
7 something. How can you be convinced beyond a
8 reasonable doubt?

9 Judge Dennis will tell you that in determining
10 whether it's a reasonable doubt you can look at the
11 investigation to see what the officers did to verify,
12 whether there were wire taps, stuff like that. And
13 I'm not going to make a big deal about that. The
14 video is pretty clear.

15 The reason I do mention it is because we want
16 to verify what Mr. Lasaine is doing. And that would
17 be one way to do it. And the officers certainly have
18 the resources to do that. And they didn't do it.

19 Judge Dennis will also tell you that if you
20 have a reason to pause in making important decisions
21 in your life, that gives you some pause here, that
22 that is a reasonable doubt. Some important decisions
23 everyone would make may be choosing a baby-sitter.
24 Ask yourselves, would you let someone like Mr.
25 Lasaine baby-sit your child?

1 Maybe buying a house is another important
2 decision. If you went to go buy a house and you went
3 to the closing and you asked for a termite report or
4 appraisal, someone like Steven Lasaine said, well, I
5 don't have that you can just take my word. Would you
6 trust that person or would you want to verify?

7 Now Steven Lasaine, this person was a
8 confidential informant. There are some other name
9 for people that act as a confidential informant. One
10 is a snitch. One is an informant. Another one is a
11 rat. And ask yourself, what do rats do to survive?
12 They do anything to survive.

13 And we know Mr. Lasaine is in big, big, big,
14 big, trouble. Who wants to go to prison for a long
15 time, being confined to an 8X10 cell, who knows what
16 kind of roommate you would have. Who wants to be in
17 prison where they tell you when to get up, what to
18 eat, what to do, you can't see your family.

19 What would someone do to avoid going to
20 prison? We know what Mr. Lasaine did, he got Jose,
21 set him up. We have heard a lot of talk about this
22 organization or this deal being very organized, how
23 Hispanics are so organized. You've seen Jose
24 testify. Does he come across as a criminal
25 mastermind? You watched him on the video. He come

1 across as a criminal mastermind there?

2 I mean he sits there in that van or truck for
3 an hour running his mouth about all sorts of things.
4 If he was in there to deal drugs, he would have been
5 in and out. His business, if you are sitting there
6 for an hour, who knows who's going to come by. You
7 could have a regular street cop come by and get you
8 for loitering. You don't want to be exposed out in a
9 public place for an hour like that.

10 Quite frankly, Jose is too simple to set
11 something like this up, to organize it. Now you know
12 who might not be too simple, Mr. Martinez. That's
13 why I was asking Officer Lynch about cell phones. We
14 don't know, there was really no evidence about the
15 co-defendants in this case. But we did see some
16 evidence that Jose got some phone calls. We know
17 there is a cell phone used.

18 If the officers had done their job properly we
19 would know whether Martinez has a cell phone. Was he
20 calling Mr. Bentencourt or Sastru at any time,
21 organized it there? All we know this opportunity
22 just fell right into Mr. Martinez' lap.

23 Jose called him up said, look, I have this
24 boss, he is putting a lot of pressure on me about
25 drugs, I got an opportunity to make a lot of money if

1 I help him out, can you help me out? Martinez is
2 like, this is a payday for me. Let me get my crew up
3 and we can go out there.

4 You heard Jose testify, he had never seen
5 Martino Bentencourt before, Luis Sastru before. The
6 state produced no evidence, not even a shred of paper
7 that Jose had any connection to Mr. Bentencourt or
8 Mr. Sastru. No cell phone records, nothing. No
9 wiretap, no surveillance, nothing.

10 Yet they want to say that Jose is in charge of
11 this crew. And he is the one out there telling them
12 what to do, organizing them, feeling everything out.

13 He is just nervous and scared and talking,
14 that's what people do when they get nervous and
15 scared. Drug dealers don't talk about, yeah, I got
16 high the other night when I went to the store. They
17 won't talk about, well maybe I almost got caught in
18 North Carolina, I deal drugs in my house, that's not
19 what drug dealers do.

20 Now we heard evidence that there was a search
21 warrant obtained for Jose's house. And I went
22 through some of the questions with Detective Hembree
23 about that, the kind of things that they look for.
24 well, if Jose is this big-time drug dealer who's
25 organizing, you know, three other Mexicans to go set

1 up drug deals, don't you think there might have been
2 some drugs found there?

3 You know there had been drugs found there,
4 they probably would have had maybe five or six more
5 of these types of packages. They would have indicted
6 him for trafficking over 400 grams.

7 Did we hear any evidence of any type of drug
8 paraphernalia that was found there? The state didn't
9 introduce any evidence that there were scales found,
10 there were guns found. Those are the kind of tools
11 of the drug trade. If you are going to be selling
12 drugs you want to make sure you are getting it right,
13 use scales. They didn't introduce any evidence of
14 that.

15 You've heard detective Hembree testify that
16 drug dealing is a very dangerous business. He was
17 very concerned about his safety. He had his backup
18 people there, his cover team, he was listening for
19 gun. That shows you guns are part of the drug trade,
20 they're tools. There is no evidence that guns were
21 found there. The state produced no evidence at all
22 of that.

23 Now Judge Dennis is going to charge you on
24 what entrapment is. And one part of entrapment is
25 that Jose cannot have been predisposed to commit this

1 type of crime. What is lack of predisposition? If
2 something probably most of us do is speeding; running
3 a little bit late, go over the speed limit.

4 Does that make us criminals? Does that make
5 us predispose to go drive recklessly? We all know
6 the difference between a simple speeding ticket, two
7 point and one that is a six point offense.

8 And then they have to show that the
9 government, either through a police officer or an
10 agent for the police officer, in this case Steven
11 Lasaine was an agent, he signed that agreement, he
12 was helping out Mount Pleasant and they were helping
13 him out.

14 Has to be some type of government inducement
15 to get Jose to commit this crime. And going back to
16 the speeding example, we probably all been in a
17 situation where you are in the left-hand lane, you
18 pass these people, all of the sudden you have big
19 18-wheeler comes up behind him, or a car comes up
20 real fast, you might speed up a lot more than you
21 usually drive to get past this car.

22 Now obviously speeding and drug dealing are
23 two different types of activities. But the principle
24 is the same.

25 It's sort of like March madness coming out, a

1 lot of people going to play in office pools. I used
2 to run the office pool when I worked in Florence.
3 Does that make me some kingpin for a gambling
4 organization? Am I going to have some guy from New
5 York come down and say, look, you have to give me a
6 percentage of the money you're making to have your
7 office pool.

8 In determining whether someone has a
9 predisposition to commit the crime, you have to look
10 to see, what Judge Dennis will probably tell you, did
11 they have this readiness to commit a crime? In this
12 case the evidence is no.

13 If all it was was one phone call, and somebody
14 said, Jose, can you set up this deal for me? Jose
15 said, yeah, by the way I will give you this, that's
16 not trafficking. Undercover officers, that's what
17 they do. They go there and give the person an
18 opportunity to commit a crime, that by itself is not
19 entrapment.

20 When someone says no eight to ten times and
21 the person keeps calling you and calling you and
22 calling you, then we get a different category. And
23 the person in essence offers you \$20,000 to set
24 something up, when you are place is going broke,
25 having trouble paying your lent, trying to care for

1 your family, \$20,000 is a lot of money.

2 If all you have to do is make a few phone
3 calls and go out there, that's hard to say what
4 someone would do. But for the grace of God I have
5 never been in that situation, I have had good parents
6 that provided for me, got me a good education,
7 provided for me and my family. But, if I was in that
8 situation and someone offered me \$20,000, it's hard
9 to say.

10 You can look at the defendant's character.
11 He's 34 years old. No arrest of drugs, no drug
12 convictions. If he is this big-time drug dealer
13 there would have been arrests, there would have been
14 convictions. He is simply not smart enough to get
15 away for 34 years.

16 Officers probably talk, see if there was any
17 arrests for him up there or convictions. He went to
18 North Carolina try to check him out, they didn't do
19 any of that.

20 And we know from the evidence presented it was
21 Steven Lasaine who suggested this criminal activity.
22 We also don't have wiretaps, monitoring, following up
23 on the CI, Mr. Lasaine, come in. If it had been
24 monitored, control, supervised then Detective Hembree
25 would know what he was doing to be able to control

1 him. But if you got someone that's dismissing
2 charges, you're looking at a lot of time, you do
3 whatever they want to get out of it, you got to
4 supervise them.

5 It's like if you run your company, you hire
6 someone, you don't do a background check on them,
7 they go and commit a crime, Walmart see if an
8 employee lost a child, may get sued if the delivery
9 driver runs off the road, it's all controlled, you
10 have to supervise. In this case there is no evidence
11 that Mount Pleasant supervised him.

12 Detective Hembree is very busy, got a lot of
13 CR's, drugs everywhere; simple buys on the street to
14 the treasurers's office.

15 Now Judge Dennis is going to charge you you
16 can consider Jose's character in determining whether
17 he is guilty or not guilty. And that character alone
18 may create a reasonable doubt. And it's kind of a
19 double-edge sword. You watched the video, it doesn't
20 sound like he had a very good character. Why is
21 that? Watching movies, because he is scared, trying
22 to make sure he doesn't get robbed. I mean use your
23 common sense.

24 He is Mexican, a lot of them don't have bank
25 accounts. A lot of people see them walking to the

1 ATM. Now if he was this big time drug dealer, why
2 didn't he pat Detective Hembree down? I got to see
3 if you have a weapon, show me the money.

4 That's why we know the stuff on the video is
5 just talk. Just like a car salesman talking just a
6 good talk, it fits a role.

7 We heard he came to the United States to
8 provide a better life for his family. He has been
9 working hard, paying his taxes, providing worker's
10 comp for his employees. Doing everything that
11 everyone else would do.

12 Now Jose was quite honest with you, he
13 admitted that he was here illegally and that would be
14 taken up in the appropriate time in the appropriate
15 forum. This is not that day, it's not that forum.
16 So you shouldn't consider that at all, otherwise you
17 would be violating your oath.

18 Finally, Judge Dennis will come down and go
19 over the verdict form with you. And charges will be
20 Jose Hernandez guilty of trafficking in cocaine over
21 200 grams and is he guilty of trafficking -- excuse
22 me -- distribution within half mile of a school.. And
23 there are two verdicts, not guilty or guilty.

24 Now when I was in London visiting my family I
25 got a chance to talk to someone they call the Queen's

1 Counsel. We went -- we were sort of talking about
2 comparison between the English system and the
3 American system. There are a lot of similarities.
4 But there is one difference that stood out to me. In
5 their verdict forms they have not guilty, guilty, and
6 not proved guilty.

7 What we have done is kind of combine the not
8 guilty and not proved guilty into one. That's why
9 Judge Dennis well tell you that a reasonable doubt
10 can arise at the state's failure to present evidence.

11 In this case they have. They haven't called
12 Steven Lasaine. They haven't given you a chance to
13 eyeball him. To use your common sense to see if he
14 is a credible witness. You've had your chances with
15 two other main witnesses. Just like school if you
16 get a 66, that's failing.

17 The state, the most they can get to is 66,
18 they failed the test in this case and therefore we
19 would ask you to return a verdict of not guilty.
20 Thank you.

21 THE COURT: Solicitor.

22 MS. CARDILLO: Thank you, Your Honor. Now in
23 my opening we told you that this would be a pretty
24 simple case; not a lot of witnesses, not a lot of
25 evidence. What this case boils down to is that this

1 defendant met with what he didn't know was an
2 undercover officer in a well-populated, well-lit
3 shopping center in Mount Pleasant and was doing a
4 drug deal. That's all this is, it's that simple,
5 that's what it boils down to.

6 He was not talked into doing this, he came
7 voluntarily. He stayed in this car for over, close
8 to an hour. What he did not know that the best
9 evidence against him was not Detective Hembree
10 sitting there but the video. The video shows it all.

11 What this defendant did on August 7th of 2006
12 was he oversaw and helped plan a drug transaction for
13 a quarter kilo of cocaine. Street value at \$26,000.
14 The cost that Detective Hembree in his undercover
15 capacity was going to pay for it was \$6,300.

16 I also asked you in my opening to look at the
17 evidence, look for the defendant's involvement, look
18 for his procurement, his conspiracy to distribute the
19 drugs. Now these other people that Mr. Grimes has
20 talked about, these co-defendants, they will have
21 their day in court. They'll have to answer for what
22 they did. But today this is this defendant's day in
23 court. And today we are asking you to make him
24 answer for what he did on August 6th -- excuse me --
25 August 7th of 2006.

1. Let's look at what the defendant did. What he
2 did what he was involved in and his involvement in
3 this drug deal, let's see, on the video was very
4 calm. Very different from the person that you see
5 today. He was very calm, he was joking. He sat
6 there for over 52 minutes talking with a confidential
7 informant who was in the front seat, and talking with
8 an undercover officer, Detective Hembree, about a
9 whole slew of things that we heard about; everything
10 from the white girl he thought was hot, to his
11 one-year-old son, to drug deals, to what he did in
12 the past.

13 The defense attorney talked about how he has
14 never been convicted of anything, but through his own
15 words -- and we are asking you, the state is asking
16 you to believe the defendant, we are asking you to
17 believe what he said on the video for 52 minutes.

18 He talked about transporting drugs to and from
19 North Carolina, from Greenville, how he even got
20 stopped by an officer and as long as you remain
21 relaxed and not paranoid and don't act scared you are
22 not going to get caught.

23 This is not someone who has no knowledge of
24 the drug trade, that learned it in the movies. He
25 was advising, he was almost bragging in that video of

1 his involvement in dealing drugs.

2 What else did he do in this video? He
3 coordinated this plan. He called Martinez, he said
4 on the phone, and directed him to where he was
5 located. Nobody pointed a gun at this defendant to
6 make him sit there for 52 minutes. It's quite
7 contrary to what he says today. In that video he
8 seemed very calm and very rational and knew exactly
9 what he was doing. According to that video.

10 He organized the transaction, he calculated
11 the cost. Detective Hembree testified that he was
12 calculating 9 times 7 equals 63 for the amount that
13 Detective Hembree was going to pay for this quarter
14 kilo block of freshly cut of cocaine.

15 The defendant also told Detective Hembree,
16 open the door. I quite the detective -- the
17 defendant's personality or involvement in this drug
18 deal it's kind of like a quarterback in a football
19 game; huddles everybody together and talks to the
20 player, tells them what to do and how to get things
21 going, and gives them directions, coordinates the
22 events, and then he passes the football and at the
23 end of the day gets a field goal touchdown. You get
24 the end result. You get the deal that this defendant
25 kept doing the entire 52 minutes.

1 Don't let the defense counsel change or
2 diminish the defendant's role in this. He was
3 clearly an active participant. He was clearly
4 helping to conduct, conspiring to procure this drug
5 deal.

6 There was evidence you heard from the chemist
7 that the total weight of these drugs, cocaine,
8 weighed 252 grams and 252.28 grams is what she
9 stated. And you heard from Detective Hembree this
10 all occurred well within a half mile of Bell Hall
11 Elementary School satisfying the second charge which
12 the defendant is charged with today, distribution
13 within proximity, half mile proximity of an
14 elementary school.

15 This incident was a well-played, well-planned,
16 organized business deal. This defendant aided,
17 abetted, assisted, whatever way you want to look at
18 it, but did -- was involved in this gang. He
19 admitted on the last question to me in
20 cross-examination, were you involved in setting up
21 this drug deal and he said yes.

22 Again I ask you to listen to the defendant on
23 this video. Listen to his words, and listen to his
24 prior involvement in other transactions. And listen
25 specifically for his involvement in this transaction

1 on this date, why we are here today.

2 Now the defense attorney also talked about how
3 a car salesman talks the talk, kind of like the
4 defendant did in the movies. But at the end of the
5 day, the car salesman is still a car salesman. And
6 at the end of the day, this drug dealer is still a
7 drug dealer. There is no way around that.

8 This defendant trafficked in cocaine over 200
9 grams. And the Judge is going to instruct you on the
10 elements and the specifics of what trafficking in
11 cocaine means.

12 But just briefly the defendant, one of the
13 things that you have to determine, does the defendant
14 provide assistance or otherwise aid, abet or conspire
15 to sell, manufacture, cultivate, deliver, purchase or
16 bring into the state cocaine weighing in excess of
17 200 grams. I think the video alone showed that he
18 did.

19 At the end of day there is no question that
20 this defendant was an integral part of this drug
21 deal. There is no question that he was an integral
22 part in trafficking in this illegal weight. He
23 admitted he knew drugs were illegal -- and I think at
24 the end of day I think the state has proven that
25 although the defense attorney was bringing up lots of

1 smoke and mirrors, a lot of things about this
2 confidential informant, you can also see from the
3 video the confidential informant pretty much sat
4 there the whole time.

5 And that confidential informant, he is in
6 prison for 12 years which you can see from the wrap
7 sheet that will be -- that was admitted into court.
8 So he was doing his time for what he did.

9 There is no evidence in this case that this
10 defendant has never been involved in any prior drug
11 deals. He admitted it himself that he has
12 transported, sold. He knows about how the big boss
13 does not get his hands dirty he gives it to the
14 little guys. So the big boss stays clean because if
15 his hands aren't on the actual drugs there is no way
16 they can get convicted.

17 But under our state law if you are conspire to
18 do this, you are just as guilty as Mr. Martinez who
19 brought the drugs and handed them to Detective
20 Hembree on that morning, on that day.

21 Again, we ask you to look at all the evidence.
22 We ask you to believe the defendant in the video, his
23 own words. We believe that the state has proven
24 beyond a reasonable doubt that this defendant did
25 traffick in cocaine in excess of 200 grams and that

1 this incident did occur within a half mile of an
2 elementary school. We would ask that you find the
3 defendant guilty as charged. Thank you.

4 THE COURT: Thank you very much, ladies and
5 gentlemen. Now it becomes my responsibility to give
6 you the charge on the law which of course you
7 promised you will accept and apply to those facts
8 that you will determine very shortly when you begin
9 to evaluate, and you evaluate and conclude your
10 evaluation that process and decide what you find to
11 be the truth.

12 And of course the defendant in this case, Mr.
13 Hernandez, and the state have a right to expect that
14 you will conscientiously abide by that oath, and that
15 is evaluate the credibility of each witness to
16 determine what you find to be believable.

17 And I would also remind you the fact that
18 testimony in a case is not contradicted directly
19 would never necessarily render it undisputed.
20 Because there always remains the inherent
21 credibility, probability of what one says. And that
22 is what you have to asses. And that's that common
23 sense exercise that we have been talking about since
24 we started that's why I told you that you are
25 certainly extremely qualified.

1 And when you do that, when you apply your
2 common sense, your sense of logic and reason in
3 analysing the evidence, decide the true facts fairly
4 and impartially, then take the law and apply it and
5 report your decision, you will have honored the
6 commitment that you made.

7 Now during this instruction, from time to
8 time, you may hear me use -- you've heard me use it
9 throughout, refer to Mr. Hernandez as the defendant,
10 that's simply a term we use that's synonymous with
11 Mr. Hernandez, it simply means the person against
12 whom the claim has been made. And that's the sole
13 significance of that term and nothing else. So when
14 you hear that term please know that I'm referring to
15 Mr. Hernandez.

16 As I mentioned to you when we started, when we
17 qualified you there are two documents that I am
18 holding, they will not accompany you to your jury
19 room because they are not evidence. They merely
20 contain the accusations against Mr. Hernandez, and
21 basically accuse him of committing two offenses,
22 trafficking of cocaine and possession with intent of
23 distributing cocaine within proximity of a school,
24 park or playground.

25 To these indictments Mr. Hernandez has

1 rendered a plea of not guilty, which places upon the
2 state of burden of proving his guilt beyond a
3 reasonable doubt. Because as I stated when we
4 started, person's, as Mr. Hernandez, who are accused
5 of committing criminal offenses in this state are not
6 required to prove anything, they don't have to
7 explain anything, they don't have to justify
8 anything, they have no burden whatsoever with respect
9 to the charge because the law says it's that charge
10 rests -- that burden rests solely upon the state to
11 prove the elements of the crime.

12 And this principle of law we call the
13 presumption of innocence, and it's an active
14 presumption. It means that you must actively presume
15 that Mr. Hernandez is innocent of this charge, or
16 these charges, and that presumption remains
17 throughout the trial of this case and until you, by
18 considering the evidence, are convinced that the
19 state has met its burden, in other words it's charged
20 that position so as to remove that presumption,
21 before you may find him guilty of that offense.

22 The state, of course as I stated, has to meet
23 it, has to establish each element to the level of
24 beyond a reasonable doubt. Let's look at that, what
25 is a reasonable doubt?

1 A reasonable doubt is a doubt which makes an
2 honest, sincere, conscientious juror in search of the
3 truth in a case to hesitate to act or take some
4 action. Proof beyond a reasonable doubt is proof
5 that leave you firmly convinced of Mr. Hernandez'
6 guilt. Now there are very few things in this life,
7 this world that we know with absolute certainty, and
8 in criminal disputes such as this the law does not
9 require proof that overcomes every possible doubt.

10 If based on your consideration of the evidence
11 you are firmly convinced of the defendant's -- that
12 the defendant is guilty of one or more of these
13 crimes charged then you must return a verdict of
14 guilty. If on the other hand you think there is a
15 real possibility that he is not guilty, then you must
16 give him the benefit of that doubt and return a
17 verdict of not guilty.

18 A reasonable doubt, ladies and gentlemen, may
19 arise from the evidence in a case or from a lack or
20 absence of evidence in the case. And it's up to you
21 to determine whether or not a reasonable doubt exists
22 as to the guilt of Mr. Hernandez.

23 And in that regard he is entitled to every
24 reasonable doubt arising in the whole case, and
25 that's simply this. If upon any issue of fact which

1 would be essential for your returning a verdict of
2 guilty, you should have a reasonable doubt as to how
3 that issue is to be resolved, I would instruct you
4 that you must resolve that in Mr. Hernandez' favor
5 and return a verdict of not guilty.

6 The evidence of course which you are to
7 consider consists of the testimony of the witnesses
8 and the exhibits that have been introduced and their
9 testimony, nothing else. The attorneys' remarks are
10 not evidence. Their statements and arguments were
11 given to help you both in analyzing the evidence and
12 in applying the law. But any statement by the
13 attorneys which differs from your recollection of
14 what a witness said or didn't say, you are certainly
15 instructed to go with your recollection.

16 Now please remember if you have a dispute
17 about whether a witness said something or didn't say
18 something, Ms. Meyer is our court reporter, we have
19 the ability to replay testimony should that become
20 necessary. All you need to do is just tell us we
21 need to hear the testimony of such-and-such witness
22 and we can certainly accommodate you in that regard.

23 But your recollect is what is important,
24 because why? Because you are the sole judges of the
25 facts in this case.

1 Likewise if any of the statements differ with
2 any principle of law that I give to you during this
3 instruction, you must take what I say and apply that
4 and disregard what the attorney says that the law is.
5 Why? Because for this proceeding I'm the sole judge
6 of the law as it pertains to this proceeding today.

7 Now, evidence, ladies and gentlemen, is
8 presented in a case such as this, not uncommon to
9 have both types, one is direct evidence, the other is
10 indirect evidence. Indirect evidence is more
11 commonly called circumstantial evidence. And direct
12 evidence, as the name would imply, generally deals
13 with one's sensory perceptions, I saw something, I
14 heard something, I felt something, or the like.

15 And if you are convinced, firmly convinced by
16 that testimony of that particular fact of course that
17 fact has been established. Circumstantial evidence
18 is when one testifies to a number of facts, a number
19 of circumstances. And when you link them they -- you
20 reach a conclusion or the inference that something
21 else or another fact or sometimes the commission of a
22 crime. Again, if you are firmly convinced of all of
23 those circumstances and of the reasonable and logical
24 progression or conclusion, then of course that would
25 establish that particular fact as well.

1 I would charge you with regard to evidence our
2 law makes absolutely no distinction between the
3 weight or the value to be given to direct or
4 circumstantial evidence. Nor is there any greater
5 degree of certainty required of circumstantial
6 evidence than of direct evidence. The law says you
7 weigh all of the evidence, direct, circumstantial,
8 whichever the case may be, and decide what you find
9 to be credible and believable.

10 I would further instruct you, ladies and
11 gentlemen, that the mere fact that the circumstances
12 brought out in a case are strongly suspicious of
13 guilt or that the circumstances are such that the
14 defendant's guilt is probably, but that is not enough
15 because as I told you it has to be more than mere
16 suspicion, it has to be more than someone being
17 probably guilty, it has to be proved that you have
18 concluded that it has been established beyond a
19 reasonable doubt for you to return a verdict of
20 guilty.

21 How do you decide the true facts? You've done
22 it many times. You've had a lot of practice when
23 you've used those methods and considered those
24 circumstances and those various characteristics that
25 you consider about one's statements in assisting you

1 in making those decision in your life.

2 I want to discuss some of the factors that you
3 may want to consider. I will tell you that certainly
4 while this is not all inclusive and if I don't
5 discuss a fact or method you've used in your life and
6 you've found it to be reliable, please use it when
7 you commence the process of resolving this case.

8 But some of the factors you may want to
9 consider would be the appearance of the witness, how
10 did they appear to you, straightforward or hesitant
11 in answering questions? Was the testimony of a
12 witness consistent or inconsistent? Was it
13 strengthened or weakened by other evidence in the
14 case? How did the witness come to know the facts
15 that he or she testified to? What was the ability of
16 that witness to know those particular facts and
17 circumstances?

18 Is the testimony -- is there a reason for the
19 testimony to be given by the witness? In other
20 words, was witness biased or prejudiced in any
21 fashion? In determining the issues of credibility
22 and believability of witnesses, you are given very
23 broad discretions. Where you see you have the right
24 to believe all of a witness's testimony, parts of a
25 witness's testimony, or none of a witness's

1 testimony.

2 Now of course you don't make these decisions
3 arbitrarily. If there is a reason in the record of
4 this case for taking that position, you have that
5 prerogative because your mission, your objective is
6 to determine the truth regardless of the source of
7 the evidence.

8 Now, while you are given very broad discretion
9 when it comes to deciding the issues of fact, please
10 remember that you don't enjoy the same with the law.
11 You promised that you would accept the law as I give
12 it to you.

13 And that means that if you should hear a
14 principle of law with which you may differ, I respect
15 your right to feel that way, and respect your right
16 to do what you think is necessary to change that law.
17 But for the purposes of this proceeding, you've
18 promised the state and Mr. Hernandez and the Court
19 that you'll set aside your personal feelings and take
20 the law as I give it to you and apply it fairly and
21 impartially. I'm confident that you will do that and
22 honor that commitment.

23 The order of my instruction means nothing, I
24 had to put it in some order. Please consider the
25 instruction as a whole, don't focus or put any

1 greater weight on any one aspect as opposed to
2 another. And of course the fact that I give you an
3 instruction on a particular issue of fact should not
4 be considered by you as a suggestion of how you would
5 resolve that factual issue because you and you alone
6 are the judges of the facts in this case.

7 First I want to talk with you about the
8 offense of trafficking in cocaine. And as I
9 mentioned, Mr. Hernandez has been accused in this
10 indictment of trafficking in cocaine in that it's
11 alleged that he did perform certain acts.

12 And obviously the state has to, in order to be
13 obtained a conviction or verdict of guilty, the state
14 must prove beyond a reasonable doubt that Mr.
15 Hernandez knowingly sold, manufactured, cultivated,
16 delivered, purchased, brought into this state,
17 provided financial assistance or otherwise aided,
18 abetted, attempted, or conspired to sell,
19 manufacture, cultivate, deliver, purchase or bring
20 into this state; was knowingly in the actual or
21 constructive possession; or knowingly attempted to
22 become into actual, constructive possession of 200
23 grams -- of at least 200 grams of cocaine or but not
24 more than 400 grams.

25 In other words they have to establish the

1 possession, they have to establish the drug was
2 cocaine, have to establish the amount, and have to
3 establish one of those aspects that I just mentioned;
4 either did it, attempted to, or was actually in
5 possession of.

6 To possess and to have possession as these
7 words are used in my instruction do not necessarily
8 mean physical possession or physical control. But it
9 does mean actual and immediate dominion or control
10 over an object alleged to be possessed. It is also
11 essential that the person charged with the unlawful
12 possession of a controlled substance, as to that
13 aspect that deals with possession, must know that the
14 substance, know about the substance, knows that it is
15 in fact a controlled substance. And being merely
16 present where a controlled substance is does not
17 necessarily imply or impart knowledge of the
18 substance or being in control of the substance.

19 Possession, as I mentioned, may be actual or
20 constructive. Actual possession is when, as the name
21 would imply, a person actually has in their
22 possession a substance, either by dominion or
23 control. The word dominion means a supremacy in
24 determining and directing the actions or in governing
25 the particular place or location. Dominion has an

1 overriding influence. Dominion is a perfect or
2 complete ownership of anything, an exercise of
3 control over the object.

4 Control means -- excuse me, active --
5 constructive possession is when one has dominion and
6 control, I failed to make that clear. Actual is when
7 they physically have it obviously. Dominion --
8 constructive is when they have this dominion and
9 control.

10 Control means to subject to authority, to
11 regulate, govern and direct, to exercise of
12 restraining or directing influence over the object.
13 Possession may be inferred from circumstances. In
14 other words, possession of an object or control of an
15 object give rise to an inference that the person has
16 -- the person charged has both the power and the
17 intent to control the use and possession of the
18 object. In order to prove the -- those are the
19 factors necessary for trafficking.

20 The offense of -- the second offense for which
21 the defendant is charged is a charge of possession
22 with intent to distribute cocaine within proximity to
23 a school. And in that the state has to prove that
24 the defendant, Mr. Hernandez, knowingly manufactured,
25 distributed, dispensed, delivered, purchased, or did

1 attempt, or did aid, abet, attempt, or conspire with
2 others to manufacture, distribute, possess with
3 intent to distribute, dispense, deliver or purchase,
4 or did possess with the intent to dispense or deliver
5 a controlled substance and that substance was
6 cocaine.

7 And furthermore, that where all of this action
8 took place, that was within one-half mile proximity
9 of a park, playground or school. And in this
10 particular case they have alleged that it was Bell
11 Hall Elementary school.

12 If that has been established, all of those
13 factors, you're firmly convinced of each one, they
14 have to prove each one, they have to prove all of one
15 of those aspects that we have talked about, and prove
16 obviously that the drug was cocaine, and that its
17 location was within a half-mile of Bell Hall
18 Elementary.

19 Now, ladies and gentlemen, in this case, the
20 defendant has raised a defense of entrapment. And
21 this is one area where the overall responsibility of
22 the state to prove its case is somewhat modified but
23 very, very limited modification. A very limited
24 modification.

25 For one pleading entrapment has the burden of

1 showing that that person was induced, tricked, or
2 incited to commit a crime which the person would not
3 have committed. If such evidence is produced and
4 introduced, then you must then look to the state to
5 prove beyond a reasonable doubt that he was not
6 predisposed. That he was otherwise not predisposed
7 to commit this crime.

8 The crime -- to believe -- excuse me.
9 Entrapment is shown if the crime was conceived and
10 planned by an officer or someone acting as an agent
11 of law enforcement. That the officer or agent
12 induced, solicited, proposed, initiated, suggested,
13 or persuaded the defendant to commit the crime. And
14 that the defendant would not have committed the crime
15 without the trickery, persuasion or fraud of the
16 officer or agent.

17 The state is required to prove beyond a
18 reasonable doubt that the defendant was predisposed
19 to commit the crime without the inducement.

20 Predisposed to commit the crime means that the
21 defendant had the intent, purpose, readiness or
22 willingness to commit the crime without the
23 inducement or persuasion of the officer or agent.

24 The fact that the officer or agent merely
25 presented opportunities or facilities for the

1 commission of the crime is not entrapment. If you
2 find the defendant had any predisposition without any
3 government inducement and influence to commit the
4 crime, the defense of entrapment would not apply.

5 In deciding whether the defendant had any
6 predisposition to commit the crime you may consider
7 such evidence as the existing course of criminal
8 conduct by the defendant similar to the crime
9 charged. Also an already formed plan by the
10 defendant to commit the crime, and a willingness to
11 commit the crime charged as shown by the defendant's
12 ready response to the inducement.

13 If you find the defendant was entrapped into
14 committing the crime, then you must return a verdict
15 of not guilty.

16 Also in determining whether the defendant was
17 predispose to commit the crime before being
18 approached by the government agents, you may consider
19 the defendant's character and reputation; whether the
20 government initially suggested criminal activity;
21 whether the defendant engaged in activity for profit;
22 the nature of the government's inducement; and any
23 other factors related to predisposition.

24 I also instruct you that the defendant has
25 presented evidence of his good reputation and

1 character to show that it would be inconsistent with
2 the defendant committing the crime or crimes charged.
3 The weight you give to that testimony, like all other
4 testimony in the case, is for you to decide in your
5 good judgment. You may consider the testimony of
6 defendant's good character along with all other
7 evidence in decide whether or not the defendant
8 committed the crime.

9 Also, ladies and gentlemen, as to both crimes
10 criminal intent is a necessary element and that has
11 to be established beyond a reasonable doubt.
12 Criminal intent is always a matter that must be
13 determined by the jury by considering circumstances
14 surrounding the situation.

15 So the law states that a criminal intent may
16 be inferred from circumstances that have been shown
17 to have existed. Criminal intent is a state of mind
18 that operates jointly with an act in the commission
19 of a crime. Intent includes those consequences which
20 represent the very purpose for which an act is done,
21 or are known to be substantially certain to result
22 regardless of its desire.

23 Criminal intent is a mental state of conscious
24 wrongdoing. I instruct you the state must prove
25 criminal intent beyond a reasonable doubt together

1 with all other elements of the crimes charged before
2 you may return a verdict of guilty.

3 You, ladies and gentlemen, in this case were
4 selected, hand-picked to be a fair and impartial
5 judge in this case with me. As judges we are not
6 partisans or advocates for either side. We have no
7 friends to reward, nor do we have any enemies to
8 punish. We are here to perform the task assigned to
9 us using our knowledge, our life's experiences and
10 common sense fairly and impartially to the best of
11 our abilities.

12 It also means that we have to make a
13 commitment, and we have been doing it throughout, but
14 we have to promise as well, and you have to honor
15 this promise, that your decisions in this case will
16 not be motivated by any human emotion because that
17 has no place in this process. You promise that you
18 will set aside all human emotion and decide this case
19 based on the evidence and the law.

20 When you decide those true facts that you will
21 decide in just a moment, apply the law that I have
22 given to you to those facts, then you will certainly
23 fulfill your job and your assignment.

24 To assist you in reporting that, I have
25 prepared verdict forms which I would like to discuss

1 now with you and the other jurors. They are
2 basically the same except one deals with the offense
3 of trafficking in cocaine, and one deals with the
4 offense of possession with intent to distribute
5 cocaine within proximity of a school.

6 You will note that they are captioned and the
7 caption is simply to facilitate the filing of the
8 document, it means nothing else. But the body of
9 each reads -- the one I have here deals with the
10 trafficking, gives you the indictment number, again
11 that's just a formal number that again facilitates
12 the filing -- we the jury by unanimous consent find
13 the defendant, what does that mean? That means that
14 all of you have considered the case, decided the
15 facts, taken the law, and this is the decision of all
16 12 of you; 11 to 1 isn't sufficient, 10 to 2 won't
17 work, 12 to 0 is the vote.

18 There are two choices, the order of the
19 choices mean nothing. The first choice says guilty
20 of trafficking, the second is not guilty. What will
21 you be saying if not guilty is your choice? You will
22 be saying that after analyzing the evidence in the
23 case you are not firmly convinced that the state met
24 each element required of it, and therefore you are
25 returning a verdict of not guilty on that charge.

1 or that the state may have met the elements
2 but the defendant established that he was induced and
3 the state did not persuade you beyond a reasonable
4 doubt that the inducement did not cause him to commit
5 the crime. In other words, notwithstanding all of
6 that he was still predisposed to commit the crime and
7 therefore that defense of entrapment applies. And
8 either one, or both, would result in your returning a
9 verdict of guilt -- of not guilty.

10 Guilty means that you've analyzed the evidence
11 and you are convinced the state has established
12 beyond a reasonable doubt that the defendant did, on
13 that particular day, do one of those elements that we
14 have talked about for trafficking, that the drug was
15 cocaine and that the amount was more than 200 grams
16 but less than 400 grams.

17 whatever your choice again it has to be
18 unanimous. If you will sign where it says presiding
19 juror. Once that choice -- and you'll notice the
20 line that precedes it if you'll place a check or draw
21 an x in that, either would be fine, and sign it and
22 then you will have completed it. Then you move to
23 the next one, whichever order, I just happened to
24 pull this one, then look at the other charge, that
25 being possession with intent to distribute within

1 proximity of a school, and you will again analyze
2 those elements.

3 One of those aspects that we talked about,
4 various acts that can take place, that the substance
5 was cocaine, and that the transaction occurred within
6 one-half mile of a school.

7 If the state fails on any one or more of
8 those, or you are not convinced that the state has
9 established that he was predisposed to commit the
10 crime, then you would return a verdict of not guilty.

11 On the other hand, if after considering all of
12 the evidence, including the evidence concerning
13 entrapment, you are convinced the state has met its
14 burden a proof as to each element, then you must
15 return a verdict of guilty, that would be your first
16 choice. Again place a check or cross and sign it.

17 And once you've complete both forms you will
18 -- we would ask that you knock on the door and we
19 will be glad to return you to the courtroom to
20 receive your verdict.

21 I know you are anxious to get started. And I
22 told you that last thing I would tell you is when you
23 may commence. In just a moment I'm going to excuse
24 you, and when you get into the jury room, I have to
25 discuss the charge with the attorneys, it might be

1 necessary to return you to the courtroom to give you
2 some follow-up explanation or clarification.

3 If so we will do that and return you to the
4 courtroom. If not we will gather the exhibits and
5 deliver them to you. When you get your exhibits then
6 you may begin your deliberation but not before.

7 Once the deliberation start, and I used the
8 jury room recently to have a conference, and I know
9 there is a little book that has some things, so
10 follow that booklet, that's good instruction.

11 The one that is critical I think, all of them
12 are important, but one is very important, no
13 deliberations if any juror has to leave the table for
14 any reason you have to stop deliberating until all 12
15 are gathered. Other than that, you can proceed as
16 you deem fit and proper.

17 I thank you for your attention. Now I need to
18 ask the first 12 if any of you believe that you will
19 not be able to continue to the completion of this
20 process please raise your hand.

21 Ms. Smalls, at this point it appears the first
22 12 will be able to continue. So when the jury
23 retires I'm going to ask that you not rejoin them in
24 your jury room. They will take you to another room
25 and I will be in to discuss with you how much longer

1 I need for you to remain with us. Obviously if we
2 return the jury for any further instruction we will
3 bring you in the courtroom as well at that time.

4 One other thing I would want to tell you, one
5 item of evidence of course is the video. We don't
6 have a portable video that we can send. If the jury
7 needs to view the video at any time during your
8 deliberations for any reason, you just send a note
9 that says, we need to view it, we will set it up and
10 we will let you see it as long as you need to
11 whatever you decide, that's your call.

12 But you will not -- we will not send the
13 videos back with you, we will keep those here, the
14 court reporter will have them, that way they will be
15 available should you need them.

16 Thank you very much. Please retire to your
17 jury room and wait for your exhibits before
18 commencing your deliberations.

19 (Whereupon, the jurors exit the courtroom.).

20 THE COURT: Any exceptions or additions from
21 the state?

22 MS. CARDILLO: None, Your Honor.

23 THE COURT: Any exceptions or additions from
24 the defendant?

25 MR. GRIMES: Two quick ones, Your Honor.

1 THE COURT: Yes, sir.

2 MR. GRIMES: On the defendant charge of
3 entrapment you gave the charge from the State versus
4 Brown case talked about we have the burden to show
5 that Mr. Hernandez was induced, we would object to
6 that charge as a burden issue charge.

7 THE COURT: You can object to it, state court
8 says that's the law. Thank you. At least when you
9 argue a principle I just ask you, for the court's
10 reviewing purposes, I appreciate your philosophy,
11 give me something that says it's the burden shift and
12 that specifically.

13 Because I will tell you this, we just recently
14 had a decision that talks about self-defense dealing
15 with an element that's why the state has to disprove
16 it. But that's the only one that it is. Because
17 entrapment is not an element they have to disprove.

18 MR. GRIMES: I believe -- the reason I would
19 argue that, I believe that goes to whether you are
20 entitled to the instructions. We have to produced
21 evidence to show that we are entitled to it. And
22 once we are entitled to it then to say, to tell the
23 jury that we get to prove that I think that's where
24 the burden comes in and that's my basis, Your Honor.

25 THE COURT: Thank you very much, but I think

1 if you will look at the law on the affirmative
2 defenses they are just that. There has to be -- you
3 have to prove it to be entitled to the jury to
4 consider. You have to present evidence that you did
5 which you did.

6 MR. GRIMES: Yes, sir.

7 THE COURT: There is no question about that.

8 MR. GRIMES: Yes, sir. The second one was on
9 the character charge. I apologize not having the
10 case, but I believe it's State versus Harrison.

11 THE COURT: Yes, sir.

12 MR. GRIMES: Court in that language said
13 character alone may be enough to create a reasonable
14 doubt. And I believe the juror instruction was, you
15 may consider character law with any other evidence.

16 THE COURT: That's exactly right. I don't
17 think that has any greater weight than anything else.
18 Thank you, sir.

19 MR. GRIMES: Thank you, Your Honor.

20 THE COURT: I think that's a charge on the
21 facts, too.

22 MR. GRIMES: Thank you, Your Honor.

23 THE COURT: Thank you, sir. Your exceptions
24 are noted. Anything else?

25 MR. GRIMES: No, sir.

1 THE COURT: Thank you. We will be at ease,
2 you all gather the exhibits. Thank you.

3 (Whereupon, a recess was taken.)

4 THE COURT: All right. Let the record
5 reflect, please, Mr. Hernandez is present. I have a
6 note from the jury. The first one obviously I can't
7 answer and that's what I'm going to tell them, I'm
8 going to bring them in the courtroom to accomplish
9 it.

10 The first question: Is there anyplace in the
11 testimony of Detective Hembree or the defendant as to
12 who set the place of the deal? That's a factual
13 issue, I cannot comment on that or resolve that so
14 that's what I'm going to instruct them.

15 The second question: Does entrapment apply to
16 the second indictment of proximity. And obviously
17 there was -- your charge, I think you said it doesn't
18 apply but I think it applies to the whole thing.

19 MR. GRIMES: Yes, sir.

20 THE COURT: It's either a complete defense or
21 there is no defense. And that's going to be my
22 instruction, yes, it applies to both charges. Okay.
23 Let me state also in response, I thought I read it
24 somewhere, whether or not it is or isn't I want to
25 put on the record why I -- your objection to the

1 charge about the defendant requiring to prove as
2 being the burden shifting. It's State versus New
3 (phonetic), it's Justice Moore's decision and in that
4 case they raised the decision of Judge Anderson's
5 that was reversed, says state has to disprove. And I
6 think Judge Beatty also has charged that accordingly
7 which was affirmed. Has to disprove self-defense.

8 And the reason for that, it is clearly set
9 forth, and I believe it's the rationale for this
10 particular case and why I chose not to give any
11 clarification. In this case it dealt with the
12 defense of duress which is an affirmative defense.
13 And the objective that the state should have to
14 disprove duress and the rationale given by the Court
15 is that the element of self-defense deals
16 specifically with one of the elements of the charge.

17 Obviously malice of forethought without just
18 cause or excuse. Just cause, illegal cause is
19 self-defense so they have to disprove that since it
20 is an element of the defense. They said the
21 defendant in this case had the burden of proving
22 duress because duress is not an element of the
23 offense. It does not have to have anything to do
24 with it.

25 The same is true here. The elements of the

1 defense are those elements as set forth in the
2 statute, the amount of the drug, but it has nothing
3 to do with the defendant's motivation for getting
4 into the crime, therefore I liken it to duress. And
5 similarly the only difference is it says in that case
6 it has to be more than a scintilla.

7 I could have said preponderance of the
8 evidence but I did not state they had to prove it
9 beyond a reasonable doubt. So I don't think the
10 charge as a whole affects that part. But I note your
11 objection to the burden shifting is protected but
12 that was my rationale for it for the Court's purpose
13 in review should that be necessary.

14 MR. GRIMES: You said State versus New?

15 THE COURT: State versus New and it's found at
16 640 S.E.2d 871, it's a 2007 case.

17 MR. GRIMES: Thank you, Your Honor.

18 THE COURT: Thank you. Okay, let's bring in
19 our jury, please.

20 (Whereupon, the jurors enter the courtroom.)

21 THE COURT: Thank you, please be seated.
22 Thank you, ladies and gentlemen. Thank you for your
23 patience. I hope you did not think I was ignoring
24 your questions. We were in the process of selecting
25 that jury in the next case and we had to complete

1 that process before I could answer your questions.

2 I have now what is Court's Exhibit No. 3,
3 there are two questions. The first question: Is
4 there anyplace in the testimony of Detective Hembree
5 or the defendant as to who set the place of the deal?

6 I would have to respond by saying, ladies and
7 gentlemen, that's an issue of fact which you must
8 resolve. I cannot assist you in that, that's your
9 prerogative. You determine that as to whether or not
10 that is and whether or not that's necessary that's up
11 to you, consistent with my instruction of course of
12 what the state is required to prove.

13 The second question is: Does entrapment apply
14 to the second indictment of proximity. Entrapment
15 applies to both offenses equally.

16 Having answered that I'd ask you to retire to
17 your jury room and resume your deliberations. Thank
18 you.

19 (Whereupon, the jurors exit the courtroom.)

20 THE COURT: Any exception or additions from
21 the state?

22 MS. CARDILLO: None, Your Honor.

23 THE COURT: Exceptions or additions from the
24 defendant?

25 MR. GRIMES: No, sir.

1 THE COURT: All right. You may want to stay
2 close from what I have heard.

3 (Whereupon, a recess was taken.)

4 THE COURT: They have a verdict in one and
5 they're hung on one. They have a verdict on the
6 trafficking. I intend to receive the verdict on the
7 trafficking. They are two separate charges, they're
8 independent. No way that's conflicting, I think.
9 Although I think I understand if it's what I think it
10 is, it could be.

11 But, anyway, what's the state's desire? If
12 they have reached a verdict on one they have
13 completed one, we need to receive that verdict as far
14 as I'm concerned. And then I'll ask them to continue
15 to deliberate for us to talk about the second one.

16 Hopefully, whatever the verdict is, if it's
17 not guilty then I would trust the state will just say
18 thank you very much we'll drop that, and that will be
19 gone. If this is guilty I would hope the state would
20 say, thank you very much, we'll drop that and we will
21 be gone.

22 Since those are not consecutive, the
23 trafficking carries 25 years if it's guilty then I
24 don't think this is a significant other one here.
25 But any objection?

1 MR. GRIMES: My concern would be with the
2 inconstistence.

3 THE COURT: Well you can argue that at the
4 appropriate time.

5 MR. GRIMES: Thank you, Your Honor.

6 THE COURT: It's not inconsistent if they
7 withdraw it.

8 MS. CARDILLO: No objection from the state,
9 Your Honor.

10 THE COURT: Okay, thank you. Do you have an
11 objection to my receiving the verdict? They've
12 completed one.

13 MR. GRIMES: No, sir.

14 THE COURT: Ask the foreperson to come in and
15 ask him to bring with him -- leave all of the
16 exhibits right now for the time being in the jury
17 room -- to bring with him the verdict form on the
18 charge they have completed. The entire jury.

19 (Whereupon, the jurors enter the courtroom.)

20 THE COURT: Thank you, ladies and gentlemen,
21 as I understand, it's now Court's Exhibit No. 4, the
22 note says: We are unanimous on the first charge,
23 trafficking -- and I assume first is you all did that
24 first is the first one -- and we are hung on the
25 second, meaning intent to distribute within proximity

1 of a school.

2 JURY FOREPERSON: Yes, sir.

3 THE COURT: Did you bring with you the verdict
4 form that you have completed on the charge involving
5 trafficking?

6 JURY FOREPERSON: Yes, sir.

7 THE COURT: If you would pass that verdict
8 form, please, Mr. Williams.

9 The verdict form has been properly completed
10 on the verdict form dealing with indictment
11 2007-GS-10-56. I am going to ask the clerk if he
12 would assist me in publishing that verdict. I ask
13 the defendant to please rise.

14 THE CLERK: Verdict form in the matter of
15 State of South Carolina versus Jose Luis Gutierrez
16 Hernandez, defendant. As to indictment number
17 2007-GS-10-56, we the jury by unanimous consent find
18 the defendant guilty of trafficking in cocaine,
19 signed Marcus Notij, foreperson of the jury on March
20 4, 2008.

21 Ladies and gentlemen of the jury, if this was
22 your verdict please raise your right hand. Thank you
23 very much.

24 THE COURT: Let the record reflect each juror
25 raised their right hand in response to the court's

1 question.

2 Anything further for the jury concerning that
3 charge? I'm going to give them further instructions
4 concerning the second charge at this point. Anything
5 further from the jury at this point?

6 MS. CARDILLO: Nothing from the state, Your
7 Honor.

8 MR. GRIMES: I'm not sure if I should ask to
9 request a poll at this time or wait until --

10 THE COURT: Whatever you want to do.

11 Ladies and gentlemen, what the clerk is going
12 to ask you now are two questions. You basically
13 responded by raising your right hand, but we want it
14 placed on the record.

15 And the clerk is going to ask you, was that
16 your verdict and is it still your verdict. If you'll
17 just respond to his questions, give your response to
18 each one I'd appreciate it. Thank you.

19 THE CLERK: Please raise your hand when I call
20 your name. Jury 198, Marcus Notij, was that your
21 verdict.

22 A JUROR: On the first charge, sir?

23 THE CLERK: Yes, sir.

24 A JUROR: On the first charge.

25 THE COURT: Yes, sir. The trafficking charge.

1 A JUROR: Yes.

2 THE CLERK: Is that still your verdict?

3 A JUROR: Yes.

4 THE CLERK: Thank you. Juror 29, Brenda Boch.

5 A JUROR: Yes.

6 THE CLERK: Was that your verdict?

7 A JUROR: Yes.

8 THE CLERK: Is that still your verdict?

9 A JUROR: Yes.

10 THE CLERK: Thank you. Juror 44, Rose
11 Budnick.

12 A JUROR: Yes.

13 THE CLERK: Was that your verdict?

14 A JUROR: Yes.

15 THE CLERK: Is that still your verdict?

16 A JUROR: Yes.

17 THE CLERK: Jury 75, David Dent.

18 A JUROR: Yes.

19 THE CLERK: Was that your verdict?

20 A JUROR: Yes.

21 THE CLERK: Is that still your verdict?

22 A JUROR: Yes.

23 THE CLERK: Jury 83, Dixie Dunbar. Was that
24 your verdict?

25 A JUROR: Yes.

1 THE CLERK: Is that still your verdict?

2 A JUROR: Yes.

3 THE CLERK: Jury 174, Katherine Lundy.

4 A JUROR: Yes.

5 THE CLERK: Was that your verdict?

6 A JUROR: Yes, sir.

7 THE CLERK: Is that still your verdict?

8 A JUROR: Yes, sir.

9 THE CLERK: Juror 203, Kerstin Olsen. Was
10 that your verdict?

11 A JUROR: Yes.

12 THE CLERK: Is that still your verdict?

13 A JUROR: Yes.

14 THE CLERK: Jury 274, Roland O'Neil.

15 A JUROR: Yes.

16 THE CLERK: Was that your verdict?

17 A JUROR: Yes.

18 THE CLERK: Is that still your verdict?

19 A JUROR: Yes.

20 THE CLERK: Jury 206, Jennifer O'Steen.

21 A JUROR: Yes, sir.

22 THE CLERK: Was that your verdict?

23 A JUROR: Yes, sir.

24 THE CLERK: Is that still your verdict?

25 A JUROR: Yes, sir.

1 THE CLERK: Jury 223, Hiedi Rickter.

2 A JUROR: Yes.

3 THE CLERK: Was that your verdict?

4 A JUROR: Yes.

5 THE CLERK: Is that still your verdict?

6 A JUROR: Yes, sir.

7 THE CLERK: Jury 253, Robert Smith.

8 A JUROR: Yes.

9 THE CLERK: Was that your verdict?

10 A JUROR: Yes.

11 THE CLERK: Is that still your verdict?

12 A JUROR: Yes.

13 THE CLERK: Thank you. Jury 275, Latasha

14 Tucker. Was that your verdict?

15 A JUROR: Yes.

16 THE CLERK: Is that still your verdict?

17 A JUROR: Yes.

18 THE CLERK: Was there any juror whose name I
19 did not call?

20 THE COURT: Thank you, the jury has been
21 polled. Thank you, Mr. Callahan.

22 Ladies and gentlemen, at this point we have
23 received that verdict and, Mr. Notij, as your note
24 expressed there are still some discussions on the
25 second charge, that being the charge of possession

1 with intent to distribute within proximity of a
2 school.

3 I'm going to ask you and the other jurors to
4 retire to the jury room and resume your
5 deliberations. We will be here to assist you should
6 you need it, sir. Thank you, you may retire.

7 (Whereupon, the jurors exit the courtroom.)

8 THE COURT: Are there any motions from the
9 state?

10 MS. CARDILLO: None from the state, Your
11 Honor.

12 THE COURT: Anything from the defense?

13 MR. GRIMES: For the record we renew our
14 motion for directed verdict.

15 THE COURT: That motion I think the evidence
16 was sufficient to support the verdict. I think there
17 is no basis for me to not accept the verdict. I
18 think it is supported by the evidence and the law. I
19 decline to offer him a new trial.

20 What is the state's position? Because I can
21 easily, easily with given the second question,
22 entrapment is a slam dunk for where the officer set
23 up the deal. That could be easily construed to be
24 entrapment, that you brought him into this spot and
25 you created it by putting it within a half-mile of

1 it.

2 so I don't have any problem with that being --
3 that to me is probably as close to following the law
4 as I can think of. Because I frankly -- that's one
5 of the issues that we talk about in this courtroom
6 all the time. I know law enforcement deals with it
7 as well.

8 I don't know how you do it. As I have told
9 people -- I know in the peninsula city I don't think
10 there is anywhere, unless you go in the ocean, that
11 you aren't within a half-mile of a park, playground
12 or school. I don't think that's intentional but I
13 understand the jury's view of that given that charge
14 so.

15 MS. CARDILLO: Your Honor, the state will
16 non-pros the proximity charge.

17 THE COURT: Very well. Any objection to the
18 non-prosing of that charge?

19 MR. GRIMES: No, sir.

20 THE COURT: Then the jury would be excused
21 from further participation. Does the state wish me
22 to bring the jury back and excuse them or may I step
23 in there and thank you them and excuse them?

24 MS. CARDILLO: You can thank them and excuse
25 them in the back.

1 THE COURT: Any objection of my doing that
2 from the defense?

3 MR. GRIMES: No, sir.

4 THE COURT: Thank you. We will be at ease for
5 a moment while I excuse them. Then I will be back in
6 to complete the matter.

7 (Whereupon, a recess was taken.)

8 THE COURT: That was precisely the issue about
9 location and setting it there. It looked to be about
10 2 or 3 shaking their heads. That in the overall -- I
11 shared with them, we have share this here, I don't
12 fault law enforcement. You didn't draw up the
13 statute, you are enforcing the law just like I do.
14 And I don't blame you a bit in the world and I'm not
15 suggesting that you are doing anything wrong.

16 I don't think that was the intent of that law.
17 I think that law was designed to stop people from
18 dealing drugs with kids and people who can't make the
19 call. I don't think -- I think that was the intent
20 of that law. Unfortunately the way it's applied and
21 the way it exists, it's simply applies for anybody.

22 I mean we have seen ones where people's homes,
23 they have the drugs in their homes but their homes
24 happen to be located within a half-mile, well, hello,
25 guess what, you are guilty of that. I don't think

1 that was what evident intent again.

2 But be that as it may, that apparently was the
3 issue. And so I share that with you not to affect
4 anything that we have done just to report that. That
5 was -- became very clear when you considered the
6 questions that were asked. It was almost a big red
7 arrow saying this is the direction. Thank you,
8 solicitor, appreciate you taking that position. They
9 thanked you as well. But I want you to know I
10 thanked them too because they helped facilitate a
11 resolution of that charge as well by their
12 deliberation.

13 All right. Are we ready for sentencing?

14 MS. CARDILLO: State is ready to proceed, Your
15 Honor.

16 THE COURT: Okay. Is Mr. Hernandez ready?

17 MR. GRIMES: Yes, sir.

18 THE COURT: Okay. Anything further from the
19 state concerning that I need to consider before
20 imposing the sentence?

21 MS. CARDILLO: No, Your Honor.

22 THE COURT: Okay. Mr. Grimes, it's pretty
23 much a -- I've looked at the statute, as I read the
24 statute it's 25 years.

25 MR. GRIMES: Yes, sir. I would note that the

1 fine is suspendible.

2 THE COURT: The fine is suspendible the way
3 it's drafted and I'm not going to impose a fine in
4 this case. I don't think -- the jury has spoken.

5 I'm not so convinced that I believe that the
6 was Mr. Hernandez' first time, and I'll give you my
7 rationale for that having been around it a long time,
8 I don't think you find yourself around that much
9 cocaine unless you have some kind of understanding,
10 and some people have some understanding about you as
11 a person. People aren't going to put themselves in
12 that situation unless they have.

13 And that probably is the most compelling
14 factor to me that really contradicts the statement
15 that I have never done this. Nor do I think you can
16 pick up a telephone and call somebody and they will
17 jump at your wish. Notwithstanding he may have been
18 -- no question he thought he could make some money
19 out of it. And that frankly we have been having our
20 discussion.

21 We may be seeing more than entrapment
22 defenses, I guess, because if that's the deal, that
23 probably motivates 60, 70 percent of the people, I
24 need some money. They promised me I could make some
25 money therefore in reliance on that promise that I

1 could make some money, I'm going to do that because
2 I'm going to lose my business or lose something else.
3 well, I don't think that's entrapment, I think that's
4 a choice you make.

5 Be that as it may, based on the evidence
6 submitted, the jury considered it. I think the
7 jury's reluctance to return a verdict showed the jury
8 gave true deference to the entrapment defense in this
9 case. I really do. And, obviously, I found that
10 they weren't so compelled on the second one.

11 Having said that, but I don't think that he
12 made a lot money. I thought he might thought he
13 could make some. But I think maybe good law
14 enforcement stopped him before that happened.

15 So at least it's nothing that I have seen or
16 heard that reflects that. I think he's probably a
17 hard working man as he has testified to, I don't
18 doubt that for a second. I think he is absolutely
19 right in his business of framing.

20 The guy that built the house I'm living in I
21 got to be good friends with him, he is a remarkable
22 individual, had a great crew. He went to Clemson,
23 got his degree in mechanical engineering and tried to
24 work in that field for about a year and said, I don't
25 want this anymore I want to go back to what paid, put

1 himself through school and he went back to framing
2 and that's what he chose to do.

3 And he said the reason for it is that you can
4 move. You get a good crew, you can be productive in
5 doing that. You put it up, it goes up if you know
6 what you're doing. I don't question he can make some
7 money in that at all. So I don't attribute any of
8 the things he has or he testified he had as being
9 drug related.

10 So I share that with you, but I would be happy
11 to hear from you.

12 MR. GRIMES: I don't think there is much I can
13 say. The statute is mandatory, it's very harsh. In
14 dealing with the federal guidelines a similar
15 quantity with no convictions would be a 4 or 5 year
16 sentence.

17 THE COURT: Correct.

18 MR. GRIMES: We are not in federal court, it's
19 state court. The Court has no discretion in this
20 matter.

21 THE COURT: Nope. That's why those deals,
22 where they might not be the best thing in the world,
23 they kind of start looking nice after the fact.
24 That's -- if we all knew what the end result would
25 be, there would be no choice.

1 MR. GRIMES: Yes, sir.

2 THE COURT: That's what life is all about.

3 Mr. Hernandez, is there anything you wish to
4 add, sir?

5 THE DEFENDANT: No, sir.

6 THE COURT: Thank you, sir. For the sake of
7 whatever it is, sir, I do not think that you are a
8 big time drug dealer. Mr. Hembree has some evidence
9 otherwise and I respect him, but I don't think you
10 are. I know that you won't be for 20 years now.

11 And I hope that when you get out what you will
12 do, is what most people could have done, and I think
13 would have been first the question if I would have
14 been on the jury I would have said, I understand
15 about the family, but I understand no is a tough word
16 to say, but sometimes you got to say no when you know
17 it's wrong.

18 Money, I don't care how it comes, there is no
19 way in the world the ends don't justify the means.
20 And we as a people have to stand up and say no even
21 though it may result in our losing our home, may
22 result in us losing everything we have. I think the
23 law is that important that we uphold that law. And I
24 think that's what we are required to do.

25 I don't think you are an evil man. I think

1 you succumbed to some pressures that a lot of us
2 succumb to. It's a tough thing when you are facing
3 the possibility. I understand that. I practiced law
4 for 21 years in a small practice, had my own
5 practice.

6 And I was telling my law clerk just this week,
7 the pressures of sitting there, and I would have love
8 to be in a big law firm where you didn't have to
9 worry about cash flow, but mine didn't worry about
10 that. I had to worry about it all the time.

11 I am very grateful and very blessed that I was
12 able to have a decent practice and was able to
13 provide for my family. But I will tell you there
14 were tons of Fridays I sat and I thought, how in the
15 world am I going to make payroll next week. Somehow
16 the good Lord looked after me and we were able to get
17 through it.

18 There is nothing that justifies what you did,
19 nothing. So, that's the problem. And I think that's
20 the reason the law is written the way it is, because
21 it is a very, very serious law. And the our law in
22 this state says basically two things; the amount and
23 if you are -- that's a pretty broad range when you
24 think about it, assist, aid, abet, you are involved
25 in it, it's that much dope, you are there.

1 So, thank you very much. Given the amount of
2 the drugs, given all of that is there, the sentence
3 of the Court is 25 years. I give him credit for time
4 that he has served since.

5 MR. GRIMES: August 7, 2006.

6 THE COURT: August 7th of 2006.

7 Good luck to you, Mr. Hernandez.

8 THE DEFENDANT: Thank you, sir.

9 MR. GRIMES: Thank you Your Honor

10 THE COURT: Thank you.

11 MS. CARDILLO: Thank you Your Honor.

12 (Whereupon, the proceedings in this matter
13 before the Court were adjourned.)

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C E R T I F I C A T E

I, the undersigned, ANNE BOULEY MEYER,
Official Court Reporter for the Ninth Judicial
Circuit of the State of South Carolina, do hereby
certify that the foregoing is a true, accurate, and
complete transcript of record of all the
proceedings had and evidence introduced in the
trial of the captioned case, relative to appeal, in
the Circuit Court for Charleston County, South
Carolina, on the 4th day of March, 2008.

I do further certify that I am neither
of kin, counsel, nor interest to any party hereto.



Anne Bouley Meyer, RPR
Circuit Court Reporter

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No.: 2007-GS-10-0056

THE STATE,

RESPONDENT,

v.

JOSE LUIS GUTIERREZ HERNANDEZ,

APPELLANT.

BRIEF OF APPELLANT

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ISSUES PRESENTED

- I. WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT A DIRECTED VERDICT OF NOT GUILTY WHEN THE EVIDENCE CONCLUSIVELY PROVED THAT THE APPELLANT WAS ENTRAPPED.
- II. WHETHER THE TRIAL COURT ERRED BY GIVING THE JURY AN IMPROPER INSTRUCTION ON THE DEFENSE OF ENTRAPMENT.

STATEMENT OF THE CASE

During the January 2007 term of the Charleston County Grand Jury, the Appellant was indicted for Trafficking Cocaine (2007-GS-10-0056) and Possession with Intent to Distribute (PWID) within Proximity of a School (2007-GS-10-0057). R. pp. 275-278. On March 3-4, 2008, a jury trial was held in front of the Honorable R. Markley Dennis, Jr., at the Charleston County Courthouse. R. p. 1. The Appellant was represented by Mr. Andrew Grimes, Assistant Public Defender, and Mr. Ben Lewis, Assistant Public Defender. The State was represented by Ms. Julie Cardillo, Assistant Solicitor, and Ms. Stephanie Blanco, Assistant Solicitor.

At the close of the trial, the jury found the Appellant guilty as indicted for Trafficking Cocaine (2007-GS-10-0056), and the State dismissed the indictment for PWID within Proximity of a School (2007-GS-10-0057). R. pp. 259, 265. The Honorable R. Markley Dennis sentenced the Appellant to a term of twenty-five (25) years for Trafficking Cocaine (2007-GS-10-0056). R. p. 273.

A timely Notice of Intent to Appeal was submitted on the Appellant's behalf. An Initial Anders Brief was filed by the Office of Appellate Defense on or around January 21, 2009. On February 13, 2009, Tricia A. Blanchette, undersigned counsel, filed a Motion for Substitution of Counsel and Substitution of Brief of Appellant. The State submitted a Return to Motion for Substitution of Counsel and Substitution of Brief of Appellant on February 20, 2009. On March 19, 2009, this Court issued an Order granting the Appellant's Motion. This Brief follows.

STATEMENT OF THE FACTS

In November 2005, Steven Lasaine (hereinafter "CI") was arrested by the Mount Pleasant Police Department on a series of drug charges. R. pp. 110-111. As a result, the CI was taken to jail. R. p. 111. Thereafter, the CI began assisting the Mount Pleasant Police Department with undercover operations. Specifically, on August 7, 2006, the CI met with Detective Hembree of the Mount Pleasant Police Department and contacted the Appellant numerous times. R. pp. 68-70, 72. As a result of the contact made by the CI, the Appellant met the CI and Detective Hembree in the Food Lion parking lot on Long Point Road in Mount Pleasant. R. p. 69. Upon arrival, the Appellant joined the CI and Detective Hembree in their vehicle, which was under video surveillance. R. p. 72.

While on the stand, Detective Hembree testified to the contents of several phone conversations conducted by the Appellant, while in the undercover vehicle. R. p. 78 Even though Detective Hembree only heard one end of the Spanish conversation and admittedly did not speak Spanish, he testified that the Appellant directed the individuals delivering the drugs to the Food Lion location. R. p. 78. Thereafter, individuals arrived and delivered the drugs at issue to Detective Hembree. R. pp. 86-88.

During the presentation of the Appellant's case, the Appellant took the stand. He explained that he came to the United States and started his own construction company. After he started his company, he met the CI through his brother in law that was working on the CI's framing crew. R. p. 161. For approximately a year before the incident date, the Appellant explained that he worked on a number of construction / remodeling jobs for the CI and that the CI was one of his best customers. R. pp. 160-1. The Appellant further explained that about five months after meeting the CI, he began telling the Appellant that he could make good money

selling drugs. R. p. 162. Even though the CI propositioned him several times, the Appellant refused to sell drugs for the CI. R. pp. 162-4.

Regarding the crime at issue, the Appellant testified that he was broke and the CI contacted him on August 6, 2006 regarding a \$20,000.00 remodeling job. R. p. 181. In return for this job and the prospect of not losing all potential jobs with the CI, the CI wanted the Appellant to obtain cocaine for him. R. pp. 181-82. The Appellant admitted that he contacted an individual for the CI regarding the drug purchase. R. pp. 182-3. The Appellant explained that the CI kept calling him and told him to meet him at the Food Lion parking lot, so he could show him the site for the remodeling job. R. p. 183. The Appellant further explained that he did not know several of the individuals that arrived at the scene with the requested drugs. R. p. 185.

During his opening statement, defense counsel stated: "Well, he made a mistake. He made a phone call for Steven, and that's what we call entrapment." R. p. 59, lines 1-2. Defense counsel moved for a directed verdict at the close of the State's case, which was denied. R. p. 144. After the conclusion of the Appellant's case, the court agreed to charge the jury on entrapment. R. p. 203. Following the entrapment charge, defense counsel entered an objection on the grounds of burden shifting. R. p. 251.

During the course of the jury's deliberations, they returned with the following question: "Does entrapment apply to the second indictment of proximity." R. p. 256, lines 13-14. The court responded to the jury, as follows: "Entrapment applies to both offenses equally." R. p. 256, lines 14-15. After the jury returned a guilty verdict on the trafficking indictment, defense counsel renewed his motion for a directed verdict. R. p. 264. Thereafter, the court stated that "entrapment is a slam dunk for where the officer set up the deal", and the State decided to dismiss the remaining proximity charge. R. pp. 264-5, line 22.

ARGUMENT

I. The Trial Court Erred By Failing to Grant a Directed Verdict of Not Guilty When the Evidence Conclusively Proved that the Appellant was Entrapped.

It is well established that entrapment is an affirmative defense, which places the burden on a defendant to show that he was inducted, tricked or incited to commit a crime that he would not have otherwise committed. See State v. Johnson, 295 S.C. 215, 367 S.E.2d 700 (1988). "The defendant has the initial burden to produce more than a scintilla of evidence that the government induced him to commit the charged offense, before the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." United States v. Sligh, 142 F.3d 761, 762 (4th Cir. 1998). Therefore, an entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition. State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (Ct. App. 2004). The United States Supreme Court has explained the underlying rationale as follows:

When the criminal design originates, not with the accused, but it is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is stopped by sound policy from prosecution therefor.

Sorrells v. United States, 287 U.S. 435, 445, 53 S.Ct. 210 (1932).

In the instant case, the trial court determined that the Appellant met the burden of proof for a jury instruction to be given on the affirmative defense of entrapment, but the trial court denied counsel's request for a direct verdict on the grounds of entrapment. R. pp. 144, 203, 264. The Appellant would submit that the trial court erred by failing to grant a directed verdict of not guilty when the evidence conclusively proved that the Appellant was entrapped.

Regarding the first element of government inducement, the following was shown at trial:

1. The CI was arrested for a series of drug charges (including trafficking), taken to jail, worked as a confidential informant, had a number of charges dismissed and entered a plea for twelve years. R. pp. 103, 110-112, 198.
2. Pursuant to Detective Hembree, the CI made a call to the Appellant and directed him to the Food Lion parking lot. R. p. 72.
3. No calls were monitored between the CI and Appellant prior to the incident date nor were any phone records obtained by law enforcement. R. p. 115.
4. The Appellant owned his own company and knew the CI as a result of legitimate remodeling contracts. R. p. 157
5. The Appellant promised a \$20,000.00 remodeling job if he made a phone call to obtain drugs for the CI. R. p. 181.
6. The CI had previously asked him to sell drugs, and the Appellant had previously refused those requests. R. pp. 161-163.

As to the second element of predisposition, the Appellant does not have any previous drug convictions nor had he previously been connected to any drug investigations. It is also clear from his testimony that he knew the CI as a result of remodeling work his construction company had been contracted to complete. Defense counsel also noted that a search warrant was executed at the Appellant's residence and no drug evidence was found. R. p. 216. During sentencing, the court made the following comments: "I don't think you are a big time drug dealer. Mr. Hembree had some evidence otherwise, and I respect him, but I don't think you are... I don't think you are an evil man. I think you succumbed to some pressures that a lot of us succumb to." R. pp. 271-2.

In Johnson, the South Carolina Supreme Court held: "The issue of whether or not the defense of entrapment has been established is usually a question of fact for the jury unless there is undisputed evidence and only one reasonable conclusion can be reached." 295 S.C. at 217, 367 S.E.2d at 701. The Appellant submits that the trial court was presented clear evidence regarding the Appellant's lack of predisposition and government inducement from which only

one conclusion could be reached. Ironically, the trial court reached the conclusion that the Appellant was entrapped, yet he failed to direct a verdict of not guilty.

After the case was submitted to the jury, the jury sent requested that the court clarify if the entrapment defense applied to both charges. R. pp. 255-256. The jury returned to the courtroom and the trial court instructed the jury: "Entrapment applies to both offenses equally." R. p. 256, lines 14-15.

Following the additional instruction, the jury informed the court that they had reached a verdict on one charge, and the court entered the jury's verdict on the trafficking charge. R. pp. 257-259. The jury was sent back out to deliberate, and the trial court commented on the proximity charge, as follows:

Entrapment is a slam dunk for where the officer set up the deal. That could be easily construed to be entrapment, that you brought him into this spot and you created it by putting it within a half mile of it. So I don't have any problem with that being – that to me is probably as close to following the law as I can think of.

R. p. 264-65, lines 22-25, 1-4. As a result of the court's comments, the State dismissed the proximity charge. R. p. 265.

As stated above, an entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition. State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (Ct. App. 2004). Clearly, the trial court found that both elements were met since he commented that entrapment was a "slam dunk" on the proximity charge. Pursuant to the court's own instruction, "Entrapment applies to both offenses equally." R. p. 256, lines 14-15. Unfortunately, the trial court failed to heed his own instruction and did not apply the entrapment defense to the trafficking charge "equally." The Appellant would submit that the court's finding of entrapment as to the proximity charge required a finding of entrapment as to the trafficking charge. Therefore, the Appellant respectfully requests that this Court find that the trial court erred by

failing to grant a directed verdict of not guilty when the evidence conclusively proved that the Appellant was entrapped.

II. The Trial Court Erred by Giving the Jury an Improper Instruction Regarding the Defense of Entrapment.

In general, a trial judge is required to charge only the current and correct state law.

Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004), State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002). On appellate review, this Court must consider the jury charge as a whole in light of the evidence and issues presented at trial. State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003), State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005). If as a whole, the jury charge contains the correct definition, is free from error, and adequately covers the law, then the charge is correct. State v. Buckner, 341 S.C. 241, 534 S.E.2d 15 (Ct. App. 2000), State v. Johnson, 315 S.C. 485, 445 S.E.2d 637 (1994), Zeigler, 364 S.E.2d 94, 610 S.E.2d 859 (Ct. App. 2005).

In the instant case, the trial court agreed to charge the jury on the defense of entrapment.

R. p. 203. A portion of the court's charge was given as follows:

Now, ladies and gentleman, in this case, the defendant has raised a defense of entrapment. And this is one area where the overall responsibility of the state to prove its case is somewhat modified but very, very limited modification. A very limited modification. For one pleading entrapment has the burden of showing that that person was induced, tricked, or incited to commit a crime which the person would have not committed. If such evidence is produced and introduced, then you must then look to the state to prove beyond a reasonable doubt that he was not predisposed to commit this crime. That he was otherwise not predisposed to commit this crime.

R. pp. 241-2, lines 19-25, 1-7. Defense counsel objected to the court's charge, specifically on the ground of burden shifting. R. p. 251. The trial court noted counsel's exceptions to the charge. R. p. 252, lines 23-24.

Following a jury question on entrapment, the court revisited the issue for appellate review. The court likened the charge to a duress charge, but noted that “the only difference is it says in that case it has to be more than a scintilla.” R. p. 255, lines 4-6. The court continued to reason: “I could have said preponderance of the evidence but I did not state that they had to prove it beyond a reasonable doubt. So I don’t think the charge as whole affects that part.” R. p. 255, lines 7-10.

In United States v. Sligh, 142 F.3d 761, 762 (4th Cir. 1998), the court set forth the law to be charged on the defense of entrapment, as follows:

The defendant has the initial burden to produce more than a scintilla of evidence that the government induced him to commit the charged offense, before the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to the commit the crime.

See State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (2004).

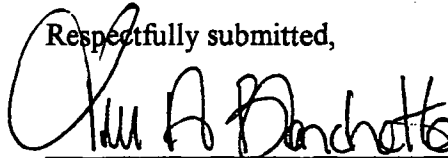
The Appellant submits that the trial court erred by giving the jury an improper instruction on the affirmative defense of entrapment. The current and correct law clearly states that the defendant must produce a scintilla of evidence regarding inducement before the burden shifts to the State to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. Here, the trial court acknowledged that he failed to instruct the jury that the Appellant only had to produce a “scintilla” of evidence. R. p. 255. The court failed to acknowledge the more devastating error that occurred when he improperly stated: “If such evidence is produced and introduced, then you must then look to the state to prove beyond a reasonable doubt that he was not predisposed to commit this crime. That he was otherwise not predisposed to commit this crime.” R. p. 242, lines 3-7 (emphasis added). Not only did the court fail to properly state the Appellant’s burden, but he also clearly did not state the correct and current law in the State regarding the predisposition prong. Due to this clear and uncorrected error of law, the Appellant

would urge this Court to find that the trial court committed reversible error in the jury charge on the defense of entrapment.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse the Appellant's conviction and remand the case for a new trial.

Respectfully submitted,



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August 12, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

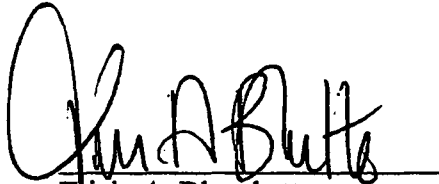
V.

JOSE LUIS GUTIERREZ HERNANDEZ,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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August 12, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
R, Markley Dennis, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

JOSE LUIS GUTIERREZ HERNANDEZ,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL**I.**

Did the trial court correctly deny Appellant's motion for a directed verdict when there was ample evidence presented that Appellant was predisposed to commit the crime and was therefore not entrapped?

II.

Did the trial court give the correct charge on entrapment when read in its entirety; and when the one incorrect statement of the law was corrected and restated correctly several times?

STATEMENT OF THE CASE

For purposes of this Brief, the Respondent concurs with the Statement of the Case provided by Appellant.

STATEMENT OF FACTS

On August 7, 2006, Detective Justin Hembree of the Mount Pleasant Police Department was acting in an undercover role in a drug buy/bust operation. A confidential informant (CI) had given Detective Hembree information that he knew a Hispanic man that had engaged the CI in conversations about his ability to sell a quantity of cocaine to the CI. (R.pp.68-69; pp.80). On the morning of the transaction, Detective Hembree met with the CI and arranged a cover team to monitor the audio of the transaction. Hembree was equipped with a button camera that recorded audio and video. (R.pp.69-71). The recording, which was approximately one hour long, was played for the jury. (R.pp.73-74).

Detective Hembree then explained portions of the video for the jury. He testified that Appellant appeared to be the person who arranged the transaction. He testified that he believed that Appellant was in charge of interviewing him to make sure he was not a police officer and to ensure that he was not a danger to the people that were bringing the drugs to the transaction. Hembree testified that he heard Appellant on the phone direct the people who had the drugs to the location where he and Appellant and the CI were waiting to conduct the deal. While Appellant spoke Spanish on the phone, Hembree picked up bits and pieces of the conversation by recognizing location words such as Food Lion, Waffle House, and Subway. Appellant also related portions of the telephone conversations to Hembree after he finished the conversations. Hembree testified that law enforcement had two undercover vehicles present in the parking lot to monitor the audio, to protect Hembree, and to make the arrest once the transaction was completed. (R.pp.76-80).

Detective Hembree also testified that Appellant was in charge of the drug transaction

and that the others involved had specific roles to play. Hembree, Appellant and the CI waited in the car in the parking lot for about an hour before the other people arrived. He testified that one individual was tasked with coming to the vehicle and checking to make sure Hembree had the money. That co-defendant drove up in a red truck and parked between Appellant's and the CI's vehicles. Once that person saw the money, he left the CI's vehicle and a black Expedition pulled behind the CI's vehicle, blocking it in. The co-defendant that checked the money then approached the Expedition and reached inside. Another co-defendant in the Expedition retrieved a McDonald's Happy Meal bag from the center console, shook it toward the driver, and handed it to the co-defendant still outside the car. That co-defendant then brought the bag to Hembree in the CI's vehicle. Hembree opened the McDonald's bag and found a gallon Ziploc bag inside with a large white chunk of white powder in it. Hembree knew it to be cocaine. Hembree began to count out the money, while at the same time saying, "It looks good." This was the signal for law enforcement to come in and make the arrests, which they did. (R.pp.81-89).

Appellant testified in his own behalf. He testified that he was broke and that the CI promised him a \$20,000 remodeling job if he would arrange the drug deal for the CI. He testified that he had never been involved in drugs before and that he needed the money from the remodeling job. Appellant testified that he was supposed to make \$200 for arranging the drug deal. He testified that he told Hembree in the car that he had sold drugs out of his house before because it was the first time he saw Hembree and he was scared. He testified that based on watching American and Mexican movies, he did not want to demonstrate to Hembree that he was scared and that he was trying to make Hembree believe he was a drug

dealer. Appellant also testified he told Hembree how to act relaxed during drug sales, how not to be scared. (R.pp.151-153; p.161;p.191, line 21 - p.192, line 11). Appellant testified that the CI had asked him several times previously to sell him drugs, but that he had not agreed prior to the transaction at issue. He testified that he needed to make money to pay rent and bills, that he had employees that needed work too, and that is why he set up the transaction. (R.pp.162-165; 180-181).

ARGUMENT

I.

The trial court correctly denied Appellant's motion for a directed verdict when there was ample evidence presented that Appellant was predisposed to commit the crime and was therefore not entrapped.

The Respondent submits that the trial court did not err in denying the motion for a directed verdict when there was ample evidence that demonstrated Appellant was indeed predisposed to commit the crime of trafficking cocaine. The video of the transaction, along with Detective Hembree's testimony, clearly show that Appellant was in charge of the transaction. During the almost one hour wait for the drugs to arrive, Appellant, Detective Hembree and the CI engaged in conversation. Appellant talked about other drug activity he had been involved in. He talked about using drugs, about selling drugs out of his house, and about getting stopped on the highway when he had a lot of cocaine in the car and the officer did not find the drugs. Appellant also instructed Hembree on how to appear calm and relaxed so as not to arouse the suspicions of law enforcement and how important it is to appear calm. The video and the testimony from Hembree constituted enough evidence of Appellant's guilt to require sending the case to the jury.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Furthermore, a defendant is entitled to a directed verdict at the trial level when the State does not produce evidence of the offense charged; however, if the State presents *any* evidence at trial which reasonably tends to prove the defendant's guilt, the case must go to the jury. State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005);

State v. Ezell, 321 S.C. 421, 468 S.E.2d 679 (Ct. App.1996) (emphasis added).

In deciding whether the trial court erred in failing to direct a verdict in favor of a defendant in a criminal case, the appellate court must view the testimony in the light most favorable to the State. State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976).

Entrapment is recognized as a valid defense in this State. State v. Jacobs, 238 S.C. 234, 119 S.E.2d 735 (1961). It is an affirmative defense which necessarily assumes that the acts charged were committed. State v. Haulcomb, 260 S.C. 260, 195 S.E.2d 601 (1973). The defense of entrapment is not available to a defendant exhibiting a predisposition to commit a crime independent of governmental inducement and influence. State v. Johnson, 295 S.C. 215, 217, 367 S.E.2d 700, 701 (1988) (citing Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932)). The issue of whether or not the defense of entrapment has been established is ordinarily a question of fact for a jury unless there is undisputed evidence and only one reasonable conclusion can be reached. State v. Johnson, 295 S.C. at 217, 367 S.E.2d at 701.

Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. State v. Jacobs, 238 S.C. at 234, 119 S.E.2d at 740 (1961). The fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Sorrells v. United States, 287 U.S. 435, 441, 53 S.Ct. 210, 212, 77 L.Ed. 413 (1932). "It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent

and law abiding into the commission of a crime.” Id., at 445, 53 S.Ct. at 214 (citing Newman v. United States, 299 F. 128, 131 (CA4 1924)). The entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition. State v. Brown, 362 S.C. at 262, 607 S.E.2d at 95. Predisposition focuses upon whether the defendant was an “unwary innocent” or, instead, an “unwary criminal” who readily availed himself of the opportunity to perpetrate the crime. Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 886, 99 L.Ed.2d 54 (1988).

Entrapment is an affirmative defense to the crime charged and imposes upon the accused the burden of showing that he was induced to commit the act for which he is being prosecuted. State v. Brown, 362 S.C. at 263, 607 S.E.2d at 95. The defendant has the initial burden to produce more than a scintilla of evidence that the government induced him to commit the charged offense, before the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. Id. (citing United States v. Sligh, 142 F.3d 761, 762 (4th Cir.1998)). A defendant is not entitled to an entrapment instruction unless he can meet this initial burden of producing some evidence of government inducement. Id. The trial court may find as a matter of law that no entrapment existed, when there is no evidence in the record that, if believed by the jury, would show that the government’s conduct created a substantial risk that the offense would be committed by a person other than one ready and willing to commit it. Id. (citing United States v. Osborne, 935 F.2d 32, 38 (4th Cir.1991)).

The Respondent submits that a review of the video of the transaction clearly demonstrates Appellant’s predisposition to commit this crime.

When Appellant first got in the CI's car, he was apparently talking about the guy who was coming with the drugs and he stated, "I used to carry so much shit with me." (Video clip No. 1). Appellant was wearing a gold watch, gold bracelet, gold ring, and an earring.

After receiving a phone call, Appellant told Hembree and the CI about the person who had just called. He told the others in the car that this person drinks too much and that he had been drinking all weekend and then showed up at the Appellant's house and asked if Appellant had anything; Appellant told this person he did not have anything but he gave him a phone number to call. (Video Clip No. 1). The Respondent submits this was clearly a request for drugs and the Appellant knew what the person wanted and gave him information as to how to obtain what he wanted.

Shortly thereafter, Hembree stated that he was uncomfortable with the situation and that he was worried about how long they had to wait for the drugs. Appellant discussed how if you act scared and nervous everything will be "fucked up" and that if you see police, you will start shaking. Appellant then stated, to do "this kind of business" you, "have to have big balls." (Video Clip No. 1--Approx 8:30).

Appellant also stated that this was the first time he was dealing with a white man but this was a special case and "normally I'm not the person, you know, gonna show, uh..." (Video Clip No. 1--Approx 9:06).

Hembree again states that he is scared and does not want to go to jail. Appellant then talks about how he used to handle certain deals and that everybody is scared when they do deals. He discusses that if the "shit" is not good, the price goes down. He discusses scales, counting money, and not taking too much time. Appellant states that he used to close deals

at his house. He talks about little things that make him nervous. (Video Clip No. 1--Approx 13:00).

Appellant says "that shit that this guy give you last night, that's not something but a (inaudible). My lady tell me go in the store, you know and I'm still fucking high and I walk in to the store and I feel everybody is looking at me and that's because I'm still freak up and I cannot taste (inaudible) give me something to drink because I don't feel near and I got my nose because I don't feel my nose so I'm feel like I got a big hole and everything go clear. Take me crazy but, uh, one hour gets only two hits with that shit." (Video Clip No. 2--Approx 1:09).

Appellant then talks about the police being corrupt in Mexico and about getting charged about one hundred American dollars for an eighth in Mexico. The guy who sold to Appellant told Appellant not to "hit" the kids with that stuff because too much is bad. He said, "Anytime I feel come down, hit that (inaudible) with that shit, whoosh, make me wake up again. I don't do too much right now, man." (Video Clip No. 2--Approx 3:30).

Appellant then talks about how if somebody else wants something, "I can find it for him, I tell him, I never tell him I'm sell that shit, I tell him I can call somebody, he can come back and bring me here." (Video Clip No. 2--Approx 4:20).

Appellant then talks about how much "shit" he used to carry in his truck. He talks about driving from Greenville and from North Carolina. He said last time he was driving a convertible from Wilmington, the sheriff stopped him and saw some pills and asked Appellant if the pills were cocaine and Appellant said the doctor had given him the pills and he did not know if the pills had cocaine in them. Appellant told the sheriff to test it and

apparently showed him the bottle with the doctor's phone number on it. He said the sheriff never looked in the back where he had a lot of cocaine hidden behind some dirty laundry. Appellant explained that because he acted like he was relaxed, the officer did not get suspicious. (Video Clip No. 2--Approx 10:06).

The Respondent submits that the above conversations clearly demonstrate Appellant's willingness to participate in the transaction and that he was not entrapped.

In support of his argument that the trial judge should have granted a directed verdict, Appellant asserts that the CI contacted the Appellant numerous on the day of the transaction. However, the testimony indicates that the CI called Appellant to set up the deal and the rest of the phone calls were simply to arrange the details of the transaction. Hembree testified that the CI told him he knew a Hispanic male that had conversations with him (the CI) about his ability to sell a quantity of cocaine to the informant. He never testified that the CI called Appellant several times the day of the transaction; in fact he did not testify to any telephone calls made by the CI to Appellant. Hembree testified that confidential informants that work for law enforcement are expected to follow a set of rules and that they have to sign an agreement when they decide to become a CI. He testified that when an informant works for narcotics, the informant agreement is read and explained to the informant and the informant is told that he cannot make any promises or anything like that. Informants are told what constitutes entrapment and are told what they cannot do. (R.p.102; pp.115-116; pp.117-118).

At trial, Appellant testified that the CI had called him several times previously and asked Appellant to sell drugs to the CI. Appellant's testimony indicates that these previous

requests were spaced out over some time; the first request was about five months after Appellant met the CI. Appellant testified that the CI asked him several more times to sell drugs, but he did not testify that any of these requests were on or near August 7, 2006. (R.pp.159-165). In addition, there was no testimony or evidence presented that at the time the CI made those previous calls, he was acting as an agent of the Mount Pleasant Police Department.

Appellant testified that when the CI called him on August 7, 2006, he told Appellant that if Appellant would help set up the drug deal, Appellant would get a remodeling job. He also testified that he believed if he did not set up the deal, he would be broke because he would not have any work. Appellant testified he then called Mr. Martinez and told him that if he could help the CI get some drugs, he (Appellant) would get a job. Appellant testified the CI called him again to find out what the deal was going to be and that the CI told the Appellant to come to Mount Pleasant. Appellant did testify that the CI "kept calling me," but this was after Appellant placed the phone call to Martinez to initialize the deal. (R.pp.180-184).

While Appellant testified he was nervous and scared during the transaction, Detective Hembree testified, and the video supports Hembree's testimony, that Appellant was calm and collected and was in complete control of the operation. Appellant testified that he used bad language and talked about drugs based on what he had seen and heard in movies and that he was trying to "make the man feeling like I'm not scared." (R.p.193, lines 11-12; pp.195-196).

The Respondent submits that ample evidence was presented to survive the motion

for a directed verdict. At this stage of the proceeding the trial judge is concerned with the existence of evidence, not its weight. State v. Weston, supra. Appellant's own statements and actions constitute evidence sufficient to survive the *any* evidence standard required for a directed verdict motion. State v. Gentry, supra. While Appellant may not have any prior convictions, he clearly had prior involvement in drugs. He is heard on the video talking about his own prior drug use, about selling drugs at his house, about driving with large quantities of drugs in his car, and about how to remain calm so as not to alert the suspicions of law enforcement.

Furthermore, Appellant argues, "Ironically, the trial court reached the conclusion that the Appellant was entrapped, yet he failed to direct a verdict of not guilty." (App.Br.p.10). The Respondent submits the trial judge did not reach the conclusion that Appellant was entrapped. This was a factual question for the jury to determine and they did; they found he was not entrapped when they returned a guilty verdict. The trial judge did not, and cannot, make such findings of fact. Appellant also argues the trial judge did not apply the entrapment defense equally to both charges in that the trial judge made a finding of entrapment as to the proximity charge. This is not correct. While the trial court certainly questioned how entrapment applies to a proximity charge, and even indicated that entrapment would be a 'slam dunk' when the officer set the place for the deal, he did not find that the officer set the place for the deal, nor did he find that Appellant was entrapped. This discussion occurred after the jury had returned a verdict of guilty on the trafficking charge, and could not reach a verdict on the proximity charge. At that point, the State elected to dismiss the proximity charge; thus, there is no issue with regard to entrapment as it applies

to a proximity charge and the trial judge did not make any findings in this regard.

The Respondent submits that the video and Hembree's testimony clearly support the conclusion that Appellant was an "unwary criminal" and not an "unwary innocent." Mathews v. United States, supra. The trial judge did not err in denying the motion for a directed verdict.

II.

The trial court gave the correct charge on entrapment when read in its entirety; the one incorrect statement of the law was corrected and restated correctly several times.

The Respondent submits that while the trial judge did initially misstate what the State was required to prove to defeat the affirmative defense of entrapment, he immediately corrected the misstatement and repeated the correct burden several times.

Generally, the trial judge is required to charge only the current and correct law of South Carolina. State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (Ct. App. 2006). In South Carolina, a trial judge must "declare the law" to the jury. See S.C. Const. art. V, § 17 (1895). The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001); State v. Dingle, 279 S.C. 278, 306 S.E.2d 223 (1983). Jury instructions must be considered as a whole, and if as a whole they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

The following is the entire charge on entrapment given by the trial judge in this case:

Now, ladies and gentlemen, in this case, the defendant has raised a defense of entrapment. And this is one area where the overall responsibility of the state to prove its case is somewhat modified but very, very limited modification. A very limited modification.

For one pleading entrapment has the burden of showing that that person was induced, tricked, or incited to commit a crime which the person would not have committed. If such evidence is produced and introduced, then you must then look to **the state to prove beyond a reasonable doubt that he was not predisposed. That he was otherwise not predisposed to commit this crime.**

The crime - - to believe - - excuse me. Entrapment is shown if the crime was

conceived and planned by an officer or someone acting as an agent of law enforcement. That the officer or agent induced, solicited, proposed, initiated, suggested, or persuaded the defendant to commit the crime. And that the defendant would not have committed the crime without the trickery, persuasion or fraud of the officer or agent.

The state is required to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime without the inducement. Predisposed to commit the crime means that the defendant had the intent, purpose, readiness or willingness to commit the crime without the inducement or persuasion of the officer or agent.

The fact that the officer or agent merely presented opportunities or facilities for the commission of the crime is not entrapment. If you find the defendant had any predisposition without any government inducement and influence to commit the crime, the defense of entrapment would not apply.

In deciding whether the defendant had any predisposition to commit the crime you may consider such evidence as the existing course of criminal conduct by the defendant similar to the crime charged. Also an already formed plan by the defendant to commit the crime, and a willingness to commit the crime charged as shown by the defendant's ready response to the inducement.

If you find the defendant was entrapped into committing the crime, then you must return a verdict of not guilty.

Also in determining whether the defendant was predispose[d] to commit the crime before being approached by the government agents, you may consider the defendant's character and reputation; whether the government initially suggested criminal activity; whether the defendant engaged in activity for profit; the nature of the government's inducement; and any other factors related to predisposition.

(R.pp.241-243) (emphasis added).

The Respondent submits that while the trial judge mis-spoke at the beginning of the charge, he did correct that misstatement and repeated the correct charge several times. The bold text is the portion of the charge that the trial judge mis-stated. The Respondent submits that the underlined passages are the portions of the charge that correctly state the burden of

proof and clarify that the State must prove beyond a reasonable doubt that Appellant was predisposed to commit the crime. The Respondent submits that the jury charge, when read as a whole, clearly instructed the jury that in order to find that Appellant was entrapped, the State was required to prove that he was predisposed to commit the crime. The Respondent also submits that the trial judge also charged the jury to use their common sense and that common sense dictates that the State would not have to prove that the Appellant was not predisposed to commit the crime; that would be requiring the State to prove that Appellant was entrapped. Obviously, the State is not required to prove the defendant's defense.

Appellant also argues that the trial judge failed to instruct the jury that Appellant only had to produce a "scintilla" of evidence, and therefore, the trial court failed to properly state the Appellant's burden of proof with regard to predisposition.

The Respondent submits that the trial judge's failure to use the specific word, "scintilla" did not change the import of the charge and that the charge, when read as a whole, properly instructed the jury as to the burden of proof. The trial judge did instruct the jury that the State carried the burden of proving each element of the offense beyond a reasonable doubt. He also instructed the jury, "And this is one area where the overall responsibility of the state to prove its case is somewhat modified but very, very limited modification." (R.p.241, lines 21-23). He went on to explain that when a defendant relies on entrapment as a defense, he first has to show that he was induced, tricked, or incited to commit a crime which he would not have committed. He then reiterated the State's burden of proof as "beyond a reasonable doubt." (R.pp.241-242).

The Respondent submits that the jury charge, when read as a whole, was a correct

statement of the law. State v. Brown, supra; State v. Smith, supra.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

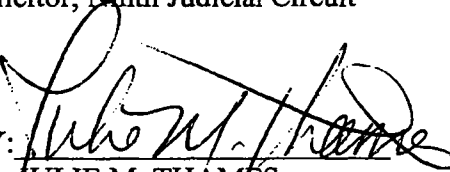
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

JULIE M. THAMES
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY:


JULIE M. THAMES

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

September 8, 2009.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
R, Markley Dennis, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

JOSE LUIS GUTIERREZ HERNANDEZ,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

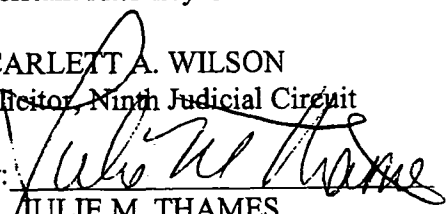
HENRY DARGAN McMASTER
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September 8, 2009.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
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THE STATE,

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vs.

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Appellant.

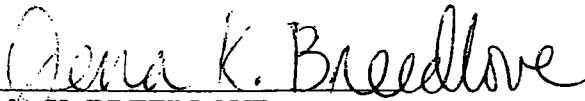
PROOF OF SERVICE

I, Jena K. Breedlove, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tricia A. Blanchette, Esquire
Law Offices of Tricia A. Blanchette
P.O. Box 12725
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 8th day of September, 2009.


JENA K. BREEDLOVE
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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.

Jose Luis Gutierrez Hernandez, Appellant.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Unpublished Opinion No. 2011-UP-032
Submitted September 1, 2010 – Filed January 26, 2011

AFFIRMED

Tricia A. Blanchette, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott,
Assistant Attorney General Julie M. Thames,
Office of the Attorney General, all of Columbia;
Solicitor Scarlett Anne Wilson, of Charleston, for
Respondent.

PER CURIAM: Jose Luis Gutierrez Hernandez appeals his conviction for trafficking cocaine. Hernandez argues the trial court erred by (1) failing to direct a verdict of not guilty when the evidence proved that Hernandez was entrapped and (2) improperly instructing the jury on the defense of entrapment. We affirm.^[1]

FACTS

In November 2005, Detective Justin Hembree with the Mount Pleasant Police Department's Narcotics Unit (the Department) arrested Steven Lasaine for distributing and trafficking cocaine. After his arrest, Lasaine worked as a confidential informant with the Department. Lasaine asked Hernandez to arrange a cocaine buy in exchange for a \$20,000 remodeling

job. Hernandez agreed to arrange the drug deal.

On August 7, 2006, Lasaine and Hembree conducted an undercover drug buy with Hernandez at a Food Lion parking lot in Mount Pleasant. Hernandez joined Hembree and Lasaine in the undercover vehicle that was under video surveillance. While in the undercover vehicle, Hernandez made phone calls in Spanish to the other participants involved in the drug transaction. Although Hembree admitted he did not speak Spanish, he testified that he understood "bits and pieces" of the conversation and that Hernandez relayed the substance of some of the phone conversations in English.

The drug transaction commenced when a Ford F-150 truck and a Ford Expedition arrived in the Food Lion parking lot. One of the co-defendants got in the undercover vehicle to confirm the presence of the money. The co-defendant then exited the undercover vehicle and approached the passenger side of the Expedition and retrieved a McDonald's happy meal box from another co-defendant. The co-defendant then handed the happy meal box to Hembree, which contained 252.28 grams of cocaine. Hernandez was subsequently arrested for trafficking cocaine and possession with intent to distribute cocaine within proximity of a school. [2]

At trial, Hernandez testified that Lasaine asked him to sell drugs to him on several occasions. Hernandez stated he repeatedly refused Lasaine's offers, but he agreed to arrange a cocaine buy in exchange for a \$20,000 remodeling job because of his limited financial means. Hernandez moved for a directed verdict after the conclusion of the State's case and at the close of all the evidence. The trial court denied both of these motions. After closing arguments, the trial court instructed the jury with the defense of entrapment. The jury convicted Hernandez, and the trial court sentenced him to twenty-five years' imprisonment. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Martucci, 380 S.C. 232, 246, 669 S.E.2d 598, 605-06 (Ct. App. 2008). This court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). This court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence. State v. Moore, 374 S.C. 468, 473-74, 649 S.E.2d 84, 86 (Ct. App. 2007).

LAW/ANALYSIS

A. Directed Verdict Motion

Hernandez argues the trial court erred in denying his directed verdict motion when the evidence proved he was entrapped. We conclude this issue is not preserved for our review.

At the conclusion of the State's case, Hernandez's counsel moved for a directed verdict and stated, "At this time Mr. Hernandez would move for [a] directed verdict of acquittal based upon the [S]tate's failure to prove that he trafficked in cocaine in the amount of 200 grams and within a half mile of a school." The trial court denied this motion and stated, "[A]ll the state has to prove is that it was - - there were more than 200 grams and less than 400, they have

established 252.28 grams of cocaine."

Hernandez's only argument to support his directed verdict motion was the State's failure to meet its burden of proof regarding the drug trafficking charge. Because Hernandez failed to raise the defense of entrapment argument to the trial court in support of his directed verdict motion, we conclude this issue is not preserved for our review. See *State v. Kennerly*, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) (concluding issues not raised to the trial court in support of a directed verdict motion are not preserved for appellate review when reviewing a denial of a directed verdict motion).

B. Jury Instruction

Hernandez contends the trial court erred in misstating the State's burden of proof regarding the predisposition prong of the defense of entrapment during its jury instruction. We conclude this issue is not preserved for our review.

During the jury instruction, the trial court stated,

[A person] pleading entrapment has the burden of showing that the person was induced, tricked, or incited to commit a crime which the person would not have committed. If such evidence is produced and introduced, then you must then look to the [S]tate to prove beyond a reasonable doubt that he was not predisposed. That he was otherwise not predisposed to commit this crime.

After the jury instruction, Hernandez objected and argued the trial court improperly instructed the jury that Hernandez had the burden to prove inducement. On appeal, Hernandez argues the trial court incorrectly stated the law on the defense of entrapment when it stated the State had the burden to prove that Hernandez was not predisposed beyond a reasonable doubt to commit the crime of drug trafficking. The charge should have read that the State had the burden to prove that Hernandez was predisposed beyond a reasonable doubt.

Hernandez's argument that the trial court erred when it charged the jury that the State had "to prove beyond a reasonable doubt that he was not predisposed" is a different argument on appeal and is not preserved for our review. *State v. Adams*, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (stating a defendant may not argue one ground below and another on appeal).

Additionally, Hernandez asserts the trial court misstated the law on the defense of entrapment when it failed to instruct the jury that he had the burden to prove inducement by "more than a scintilla of evidence." We conclude this issue is not preserved for our review.

When Hernandez objected to the trial court's jury instruction on the ground that he had the burden to prove inducement, the trial court stated,

You can object to it, state court says that's the law. Thank you. At least when you argue a principle I just ask you, for the court's reviewing purposes, I appreciate your philosophy, give me something that says it's the burden shift and that specifically.

Because I will tell you this, we just recently had a decision that talks about self-

defense dealing with an element that's why the state has to disprove it. But that's the only one that it is. Because entrapment is not an element they have to disprove.

Defense: I believe - - the reason I would argue that, I believe that goes to whether you are entitled to the instructions. We have to produced [sic] evidence to show that we are entitled to it. And once we are entitled to it then to say, to tell the jury that we get to prove that I think that's where the burden comes in and that's my basis, Your Honor.

Court: Thank you very much, but I think if you will look at the law on the affirmative defenses they are just that. There has to be - - you have to prove it to be entitled to the jury to consider. You have to present evidence that you did which you did.

The trial court subsequently revisited Hernandez's objection and likened the entrapment jury instruction to a duress charge. The trial court stated, "The only difference is it says in that case it has to be more than a scintilla." The trial court further stated, "I could have said preponderance of the evidence [in regard to the burden of proving inducement] but I did not state they had to prove it beyond a reasonable doubt. So I don't think the charge as a whole affects that part."

Hernandez's argument that the trial court erred in not charging the jury that he had the burden to prove inducement by "more than a scintilla of evidence" is a different argument on appeal. Moreover, Hernandez failed to make a contemporaneous objection regarding the trial court's failure to instruct the jury that Hernandez had the burden to prove inducement by "more than a scintilla of evidence." Therefore, we conclude Hernandez's argument is barred from appellate review. See Adams, 354 S.C. at 380, 580 S.E.2d at 795 (stating arguments raised for the first time on appeal are not preserved for our review); see also State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (stating to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court).

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

WILLIAMS, PIEPER, and KONDUROS, JJ., concur.

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

[2] The State nol prossed the charge of possession with intent to distribute cocaine within proximity of a school.

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jose Luis Gutierrez Herndandez, 326877,
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

2011-CP-10-2878
IN THE COURT OF COMMON PLEAS

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 the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Institution, 386 Redemption Way,
McCormick, SC 29899

2. Name and location of Court which imposed sentence Charleston County Court of
General Sessions, 101 Broad Street, Charleston, SC 29401

3. Name(s) of co-defendant(s) (if any) X

4. The indictment number or numbers (if known) upon which and the offenses for which
sentence was imposed:

(a) 2007-GS-10-056: trafficking cocaine

(b) X

(c) X

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

Revised 3/2003

ATTORNEY GENERAL'S OFFICE
RECEIVED 4/27/11

ADMINISTRATIVE INSTRUCTIONS

MP

☒ FILE ☒ OPEN ☐ END☐ HAVE ☐ COPIES MADE☐ ROUTE TO ☐☐ ORDER ☐ TRANSCRIPT☐ PEN RECORDS ☐ CLERK RECORDS☐ OTHER: ☐

- (a) March 4, 2008; 25 years
- (b) x
- (c) x
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes.
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. x
- iii. x
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. Petition for Rehearing Denied
- iii. x
- (c) the date of each such result:
- i. January 26, 2011
- ii. March 25, 2011
- iii. x
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Op. No.: 2011-UP-032
- ii. x
- iii. x
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) x
- (b) x
- (c) x

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Trial Counsel.
 - (b) Ineffective Assistance of Appellate Counsel.
 - (c) Violation of 14th Amendment of the U.S. Const.
11. State concisely and in the same order the facts which support each of the grounds set out in (10): (See Attachment)
- (a) Failure to advise Applicant of plea offer in a timely manner.
 - (b) Failure to properly prepare and investigate.
 - (c) Failure to properly raise an entrapment argument.
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. X
 - ii. X
 - iii. X
 - iv. X
 - (b) the name and location of the Court in which each was filed:
 - i. X
 - ii. X
 - iii. X
 - iv. X
 - (c) the disposition thereof:
 - i. X

ii. X

iii. X

iv. X

(d) the date of each such disposition:

i. X

ii. X

iii. X

iv. X

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

i. X

ii. X

iii. X

iv. X

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

No.

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

(a) which grounds have been presented:

i. X

ii. X

iii. X

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

i. X

ii. X

iii. X

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) PCR is the proper forum.

(b) X

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- (c) x
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? x
 - (b) your trial, if any? Yes.
 - (c) your sentencing? Yes.
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Andrew Grimes, 8630 Grassy Oak Trail, North Charleston, SC 29420
 - ii. Ben Lewis, 101 Meeting Street, Charleston, SC 29401
 - iii. Tricia Blanchette, PO Box 12725, Columbia, SC 29211
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Trial
 - iii. Appeal
19. State clearly the relief you seek in filing this application:
A new trial.
20. Are you now under sentence from any other court that you have not challenged?
No.

STATE OF SOUTH CAROLINA

)

)

VERIFICATION

County of McCormick

)

I, Jose Luis Gutierrez Herndandez, 326877, , 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.

Jose Luis Gutierrez Hernandez

SWORN to and subscribed before me this 13
 day of April, 2011
Debra L. Young (L.S.)
Notary Public
 My Commission Expires: 8 28 2011

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

I, Jose Luis Gutierrez Hernandez, 326877, , 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.

José Luis Gutierrez Hernandez
Applicant

SWORN or affirmed to and subscribed before me this

13 day of April, 2011
Joelle L. Young
Notary Public

My Commission Expires: 8-28-2011

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
Jose Luis Gutierrez Hernandez, #326877,	)	2011-CP-10-2878
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

FILED
2011 AUG 24 PM 2:10
JULIE J. HARRIS-STRONG
CLERK OF COURT

The Respondent, making its Return to the application for post-conviction relief filed April 21, 2011, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the January 2007 term of the Charleston County Grand Jury for trafficking in cocaine (2007-GS-10-0056). Andrew Grimes, Esquire, and Ben Lewis, Esquire, represented the Applicant. The Applicant proceeded to trial on March 3-4, 2008, after which a jury found him guilty as indicted. The Honorable R. Markley Dennis, Jr. sentenced the Applicant to confinement for twenty-five (25) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Tricia A. Blanchette, Esquire, represented Applicant on appeal. After full briefing by both sides, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Hernandez, Op. No. 2011-UP-032 (S.C. Ct. App. filed January 26, 2011). The Remittitur was issued on April 29, 2011.

Attached herewith and incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the trial transcript, the Final Brief of Appellant, the Final Brief of Respondent, the Court of Appeals' opinion affirming the conviction and sentence, and the Remittitur dated April 29, 2011.

II.

In his application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel
 - a. Failed to advise Applicant of plea offer in a timely manner.
 - b. Failed to properly prepare and investigate.
 - c. Failed to properly raise an entrapment argument.
2. Ineffective assistance of appellate counsel in that counsel raised an issue that was not preserved for appeal review.

III.

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, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Strickland, 466 U.S. 668: The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the 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.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent contends that the Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this allegation.

V.

The Respondent denies each allegation that is not expressly admitted, qualified, or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: Matthew J. Friedman
ATTORNEYS FOR RESPONDENT

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

August 23, 2011.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

2011-CP-10-2878

Jose Luiz Gutierrez Hernandez, #326877)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

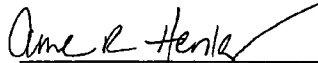
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DATED this 23rd day of August, 2011



Anne R. Henley, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON 2011-CP-10-2878

JOSE LUIS G. HERNANDEZ,)
Applicant,) TRANSCRIPT OF RECORD
-vs-) December 4, 2012
STATE OF SOUTH CAROLINA,)
Respondent.) Charleston, South Carolina

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

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

Mark Peper, Esquire
Attorney for the Applicant

Ashleigh Wilson, Esquire
Attorney for the Respondent

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1	I N D E X				
2	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	Jose Hernandez	4	20	30	32
4	Andrew Grimes	34	46	53	--
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1 (December 4, 2012.)

2 THE COURT: Are you Jose Luis Hernandez?

3 THE APPLICANT: Yes, sir.

4 THE COURT: We're going today to give you
5 your hearing on your application for post-conviction
6 relief. Your lawyer tells me you're ready to proceed; is
7 that correct?

8 THE APPLICANT: That's correct.

9 THE COURT: Okay. Well, Mr. Peper, since
10 it's your case, would you like to make a little brief
11 opening and tell me what's up?

12 MR. PEPER: We just got a couple issues here.
13 We did not amend his application, so his application is
14 what we're here on today, Judge. While we're not
15 dismissing any of the grounds, most of hearing today will
16 focus on ineffective assistance of counsel.

17 I plan to call my client and then Mr. Grimes,
18 who was his trial counsel, and that's pretty much our
19 position that the factors of the Strickland test.

20 THE COURT: Call your witness then.

21 MR. PEPER: Mr. Hernandez then.

22 JOSE LUIS HERNANDEZ,

23 having been first duly sworn,

24 was examined and testified as follows:

25 DIRECT EXAMINATION

1 BY MR. HERNANDEZ:

2 Q. Mr. Hernandez, Mark Peper. I've been appointed to
3 represent you on this case, and we met before; is that
4 correct?

5 A. Correct.

6 Q. How old are you, Mr. Hernandez?

7 A. Thirty-eight.

8 Q. What kind of education do you have?

9 A. High school in Mexican school.

10 Q. Able to read and write?

11 A. Yes.

12 Q. And I understand that English language is your
13 second language, but you're able to communicate properly?

14 A. Yes.

15 Q. You don't feel the need for a translator or
16 anything along those lines?

17 A. Well, it could be better, if you could get a
18 translate, because I can't speak best and I can't
19 understand especially with, you know --

20 Q. If at any time you don't understand my question,
21 then you stop me, and I'll try to better explain it,
22 okay?

23 It's my understanding, Mr. Hernandez, that you
24 were indicted and convicted of trafficking cocaine; is
25 that correct?

1 A. That's correct, sir.

2 Q. And as a result of that trial, were you -- you
3 were sentenced to 25 years; is that correct?

4 A. That's correct.

5 Q. And who was your attorney at that trial?

6 A. Mr. Andrew Grimes.

7 Q. And he's with the public defender's office?

8 A. Yes.

9 Q. Were you incarcerated the entire time that you
10 were -- between the time of your arrest and your trial?

11 A. Yes. I spent two years in the county jail.

12 Q. Okay. Were you able to meet with Mr. Grimes as
13 often as you would have liked?

14 A. Yes.

15 Q. Okay. Approximately how many times did you
16 consult with Mr. Grimes?

17 A. That's about two or three times. The first time
18 he show up in the county and told me what the situation
19 that I would expect and what they told me that I don't
20 have nothing to worry about it. They going to work.
21 They going to try and help me out.

22 Q. Okay. Did he show you and go over the evidence
23 that was to be used against you at trial?

24 A. Well, on that particular time, he told me that
25 there is not much to worry about it because they only --

1 I think it was a phone conversation, but they been
2 telling me that police, they don't even admitting that
3 they don't even understand English, so he said, We're
4 going to try to work and see how we're going to work.

5 The second time, when they show up on the -- I
6 remembered that him telling me that they try to give me a
7 lot of time, so I get angry and I tell them they make me
8 lose all the time, expecting to help me.

9 Q. Let's back up and talk about that. Were you
10 extended a plea offer by the State?

11 A. Well, the first time they told me that they have
12 to wait, and they said eventually you get a better deal
13 because they don't got much they can make you guilty. So
14 on that time, I don't even speak too much English, and I
15 guess it was my mistake they don't understand because
16 only one time they took interpreter and they told me the
17 situation.

18 The second time they told me that I'm facing a lot
19 of time, but I don't even understand proper English, so
20 they are making me state they're offering me, like, 15
21 and I think they were offering me five zero, so I
22 refused.

23 Q. So Mr. Grimes -- the first offer is that
24 Mr. Grimes relayed to you was an offer to plead guilty to
25 a sentence of 15 years, one five?

1 A. Yeah.

2 Q. And what was the -- did you turn that plea offer
3 down?

4 A. Yeah, because I don't even understand they offer
5 me one five. I was thinking they offer me five zero.

6 Q. Okay. So you misunderstood Mr. Grimes because of
7 the language barrier?

8 A. Yeah.

9 Q. And you thought the offer was 50, five zero,
10 years?

11 A. Yes.

12 Q. From that point forward, in preparing for trial,
13 did Mr. Grimes consult with you and review the evidence
14 that would be presented at trial?

15 A. No.

16 Q. All right. Did he explain the elements of the
17 crime that you had been charged with?

18 A. The second time, yeah, but --

19 Q. Okay.

20 A. It still -- they tell me that I don't have to
21 worry, because -- and the crime, they make me look bad.
22 That's the phone call I made.

23 Q. Okay. What phone call are you referring to?

24 A. Well, back in 2006, I was working for a
25 contractor, named Steve Lusano, so I was working. I had

1 my license to do construction work, and one day he call
2 me and he tell me that they need a favor, and asking what
3 kind of favor he need.

4 Q. Who is this that is asking you for a favor?

5 A. Steven Lusano.

6 Q. And he's employed by --

7 A. The person that provide all the works that I been
8 doing, like framing, like paint, like siding, roofing.

9 Q. Okay. So he was hiring you, this Steven
10 gentleman, was hiring to you do construction work for
11 him?

12 MS. WILSON: Objection, Your Honor. I'm not
13 sure of the relevance of the question.

14 MR. PEPER: I asked him what phone call he
15 was referring to. I'm just allowing him to explain the
16 phone call.

17 THE COURT: Go ahead.

18 BY MR. PEPER:

19 Q. This phone call that you referred to, is it my
20 understanding your testimony is that it was made by
21 Steven?

22 A. Yes.

23 Q. And what was or what is Steven's full time
24 occupation?

25 A. Well, Steven was a contractor, and the phone call

1 they ask me one day about 11:00 was not relating about
2 work. He was relating about could I could help him find
3 some drugs.

4 Q. Okay. Why did you need to find some drugs?

5 A. Because they told me that they used to got a good
6 friend of him that was looking for some drugs, and the
7 first time I tell him I don't have nothing to do with
8 that.

9 Q. Now, you ended up selling, or taking part in, a
10 transaction whereby drugs were sold to a confidential
11 informant; is that correct?

12 A. Correct.

13 Q. And was Steven a part of that?

14 A. Yes.

15 Q. And who was the arresting agency that orchestrated
16 this setup?

17 A. Steven pretty much, with Detective Hembree.

18 Q. Of Mount Pleasant police?

19 A. And Mount Pleasant police.

20 Q. All right. Did you explain all of that to your
21 attorney?

22 A. I explained to the jury. I explained to the
23 attorney that I never called Steven, Steven call me about
24 11:00 and it's already about 3:00, but Steven calling me
25 up. I finally convinced myself to go out there to give

1 that estimate job they supposed to give to me, but when I
2 show up in the place, I see some white person with him
3 and they started talking about drugs.

4 Q. So you originally went to meet with Steven?

5 A. Yes.

6 Q. Were you under the impression that you were going
7 to meet with him about a job?

8 A. Yes. They told me that I had to meet him in the
9 Waffle House, and when I go on the way to go out there,
10 they call me again and they told me don't meet me out
11 there because I change the place because what I'm going
12 to meet you is still close to the project that I'm going
13 to give to you, so I show up in the place, and that's
14 when I see that another person with him and they started
15 talking about drugs.

16 I was scared because I was watching in a movie bad
17 stuff, and so I started talking a lot of bad things. And
18 I told the person that -- because they asked me if I
19 selling drugs, and I told him if I look like a drug
20 dealer. And I said, I work and clean. Are you scared
21 being a drug dealer, why do you have this money that
22 you're trying to spend on drugs and get your own
23 insurance, like what I'm doing.

24 Q. Okay. So at this point they're now looking to you
25 to move forward with any drug sale or buy, right?

1 A. Well, that's what I expect that, you know, the
2 drugs, the drug, they don't even be more important
3 because they told me don't worry if the person, they
4 don't answer the phone. Let's go see the job. That's
5 what we expect to do when that person -- they still --
6 they told him they don't try to go nowhere because then I
7 look like I'm a bad person and they scared that I'm
8 trying to rob this money.

9 So he make me mad, and I tell him that he needed
10 to quit trying to be a drug dealer and use the money to
11 get a different job if he's so scared like that.

12 Q. Okay. Did you know who was there to purchase the
13 drugs?

14 A. No.

15 Q. All right. What ended up happening that evening
16 that you went to meet Steven?

17 A. Well, when finally we try and go see the job was
18 behind the place we get arrest, I see Steven talking with
19 the person, and they told him to make me make -- asking
20 to make a phone call and see what's the deal, so Steven
21 told me, like, I need that favor.

22 See if you can get in contact with that person, so
23 I tell him, like, you know, if that person, they don't
24 even answer the phone, that don't got nothing.

25 He said, Yeah, I understand that, and I'm sorry

1 for me bothering you so early. That's 3:00, but I really
2 need that transaction. I really need to help out my
3 friend in here like I would have to pay the framer that I
4 owe him.

5 Q. So fast forward a little bit. Did the transaction
6 end up taking place that same day?

7 A. Yeah.

8 Q. And who was involved in the transaction?

9 A. In the transaction, Steven made me make a phone
10 call.

11 Q. Right.

12 A. And the person that they show up out there was --
13 they doing time right now. His name is Martinez, and
14 they showed up there and they talked with the person they
15 trying to buy the drugs, and I was -- I was talking with
16 Steven, but I get so scared so I wasn't in play, but, you
17 know, after that I see all the drugs show up, but I don't
18 even know who the person was.

19 Q. Okay. Who purchased -- who paid cash for the
20 drugs?

21 A. The person who was with this Steven.

22 Q. The Mount Pleasant police officer?

23 A. Yes.

24 Q. And he was inside your vehicle?

25 A. No, he was inside Steven's truck.

1 Q. Okay. All right. Did you explain all of that to
2 your attorney?

3 A. Yes.

4 Q. All right. Did your attorney discuss with you
5 what we call the defense of entrapment?

6 A. Yes.

7 Q. Did he explain that to you fully?

8 A. Yes. They explain me that I got good case, that
9 pretty much I don't got nothing to do out there because I
10 shown up in a place behind promise about some work. I
11 don't even know -- really, I show up out there because in
12 that time another person that used to be painting with me
13 because I was finding job and provide to my laborers that
14 way they can support his family, so for me it, was a good
15 deal to give me another job. That way I can do it and I
16 can help my own people. I can help myself.

17 Q. Okay. Did you ever touch the drugs?

18 A. No.

19 Q. Did you ever touch the cash?

20 A. No.

21 Q. Now, the phone call you were referring to earlier,
22 was that phone call recorded?

23 A. Yes.

24 Q. Okay. Did your attorney ever meet with you and
25 allow you to listen to the recording?

1 A. Yes. One time they show me that they let me hear
2 the recording of the -- the phone recording, and I never
3 tell the person that was my drug or be my drug, nothing
4 like that. I just told the person, like, A, this person
5 in here, they fight me so hard, so tell me please what
6 you want to do, but you're going to go in here and talk
7 to this person, let me know, like that way that way I can
8 move and go back to my job because I'm scared.

9 Q. Okay. So he did -- he did show you or let you
10 listen to the phone call that he showed you, the video of
11 the transaction?

12 A. Yes. They showed me the video and then they let
13 me hear the phone call, but I never say nothing about
14 drugs, and I think that's why he told me that I have to
15 stay in town and wait because pretty much they told me
16 you have to be crazy for you selling drugs when pretty
17 much we don't have too much in that it really makes you
18 look bad.

19 Q. Okay. So whose decision it was to turn out --
20 well, strike that, Judge.

21 At that point, was the 15 year plea offer still
22 available to you?

23 A. Well, the first time when they offer me it, I
24 refused because I thought it was five zero.

25 Q. I understand.

1 A. And when the second time he show up, they told me
2 that the solicitor came back with me because I don't want
3 to say guilty, but if I plead, if I plead guilty for the
4 15 year, I have to admit that I'm selling drugs and I was
5 part of the deal and that was part of what it was, and
6 they told me the solicitor was mad and now they offer me
7 18.

8 Q. Eighteen?

9 A. Yeah. So I -- well, they don't offer me five zero
10 no more and he said they never offered five zero, they
11 offered one five. So that's what I say, Oh, I make
12 mistake.

13 And they still said if I take the 18 year, I have
14 to do it day by day and I have to admit that I'm guilty
15 because it was my contracts and I have to say they trying
16 to give me trafficking and position in distribution when
17 I don't even know who the drug was belong to.

18 Q. Whose decision was it to turn down the 18-year
19 plea offer?

20 A. I guess the solicitor.

21 Q. Did your attorney explain to you that it was your
22 decision and your decision alone?

23 A. Yes.

24 Q. And in response to that, did you turn down 18
25 years?

1 A. Yeah. Because they told me that I had to do the
2 18 years day by day, but we still got the possibility of
3 going to trial, and I prove that I don't have nothing to
4 do, maybe I can walk away from the courtroom.

5 Q. All right. Did your attorney, in addition to
6 explaining what I think you said, day for day on the 18,
7 did he also explain to you that by pleading guilty or
8 being found guilty that you would be deported?

9 A. They never told me that deportation then. He
10 could held me -- they never told me if I was found guilty
11 deportation, that could be a collateral consequence that
12 maybe they can help me get deported back to my country.

13 Q. Okay.

14 A. Also, I want to say something. I really
15 appreciate to get the opportunity to be here. I was -- I
16 got already about seven years in prison, and I had to
17 learn to speak English like I went to school because,
18 see, what happened the first time, I don't get
19 interpreted, so right now I don't feel like I can speak
20 very good, but I can speak a little bit more like the
21 first time when I went to court and the judge gave me the
22 sentence.

23 Q. Okay. Now, this gentleman, Steven, your
24 codefendant, he was also arrested, correct?

25 A. Well, yeah. I don't even know nothing about

1 Steven after we go in court, and they shown Steven
2 Lusano's record, he have ten convictions, and that's his
3 third time trafficking drugs, and the solicitor, my
4 lawyer, were trying to show to the judge that that's
5 impossible. They give me a lot of time when the other
6 person that was meeting there they were working for the
7 Mount Pleasant police in combination with Deputy Hembree
8 who was trying to get a better deal for his own self.

9 But the solicitor, they told that, you know,
10 objected that -- that my lawyer was trying to make the
11 judge see. It didn't work for myself because they say
12 that I was guilty anyway.

13 Q. Okay. At your trial, you were convicted of
14 trafficking in cocaine, correct?

15 A. Yes.

16 Q. All right.

17 A. Also, on that third time when Andrew Grimes
18 visited me, I fire him and tell him that I don't want --
19 he can't represent me because they made me lose almost
20 about 18 months in jail and all along they been telling
21 me that probably what the judge can do, that's maybe
22 probably less time. Maybe they could give me three
23 years, so when they told me that I'm facing a lot of
24 time, they trying to put me in front of the judge and say
25 I'm telling the judge, that I want Mr. Andrew Grimes

1 removed from my case.

2 So I fire him. Pretty much when I try to hire a
3 lawyer, a paid lawyer, I am asking my family if they can
4 help me, and then days later, when the paid lawyer
5 visited me for the first time and they told me don't
6 worry about it, you got a pretty good interest in your
7 case. We want to work together, they told me one day
8 that Mr. Andrew Grimes, they told me you better be
9 prepared and call your lawyer because we're going to
10 trial tomorrow, and I don't even -- the paid lawyer, they
11 still researching my case, and I was trying to give it
12 the first payment.

13 And I tell him, well, you know, the lawyer that I
14 hired is not ready yet, so how are you going to take me
15 to trial?

16 He said, Well, don't worry about it because the
17 judge, they look like a pretty good person, and I spoke
18 to him and they're going to give you a good deal.

19 Q. So you did not feel as though your attorney was
20 ready to proceed at trial?

21 A. No.

22 Q. Why is that?

23 A. Because, first of, all they met me as paying 15
24 months out there, waiting for the best decision, and
25 after that they come with that I wasn't getting a short

1 time, that I was taking a lot of time when all the way
2 they been telling me that don't get scared, don't worry.
3 They only got one phone call, and, also, Detective
4 Hembree they don't even speak no Spanish, so he don't
5 even know what you're saying in the conversation.

6 Q. All right. Was there ever any discussion with you
7 and your attorney about asking the Court to consider
8 charging you with lesser included offense of possession
9 with intent to distribute as opposed to trafficking?

10 A. Well, I was back on the type of deal I was going
11 to get, but the solicitor, they really trying to make me
12 down, so he make me look bad in front of the jury. Also,
13 when they took two days of trial, also one day to pick
14 the jury, they only pick -- they don't want any Spanish
15 people on my jury to select.

16 I'm thinking maybe I could have somebody that they
17 can understand using my language and they can comprehend
18 what that conversation was, maybe could I get a better
19 deal, but --

20 Q. But at the trial, did you and your attorney
21 discuss being convicted of possession with intent to
22 distribute cocaine as opposed to trafficking cocaine?

23 A. Yeah.

24 Q. Okay. And it's my understanding that you filed an
25 appeal?

1 A. Yes.

2 Q. Is that correct?

3 A. Yes. I filed a direct appeal.

4 Q. Okay. And what was the result of that appeal?

5 A. Well, the result of the direct appeal, I don't
6 know, because my lawyer they don't even raise that -- the
7 only element, entrapment, that was my only -- pretty much
8 my only issues that I --

9 Q. So the issue that --

10 A. Yeah, they can help me out.

11 Q. So the issue that you attempted to appeal was not
12 preserved for appeal by Mr. Grimes at trial?

13 A. Right, because they don't even preserve the way
14 he's supposed to.

15 Q. Okay. That's all the questions I have. The
16 Attorney General is going to have some questions for you,
17 okay?

18 A. Okay.

19 MR. PEPER: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MS. WILSON:

22 Q. May it please the Court: Good afternoon,
23 Mr. Hernandez.

24 A. Good afternoon.

25 Q. So how many times did you say you met with

1 Mr. Grimes before you went to trial?

2 A. About -- pretty much about three time.

3 Q. Three times. And about how long did he talk to
4 you each time he met you? Was it over an our, less than
5 an hour, more than an hour?

6 A. The first time I think we talked at least about 40
7 minutes.

8 Q. And you're not sure about the other two times?

9 A. Well, the other days he showed up, maybe 20, 30
10 minutes. Sometimes he didn't show up and pretty much
11 they show up about three times, but the first time he
12 took a little while to explain me what the situation.

13 Q. Okay. And do you recall him going over your
14 discovery? Did he show you, like, any videos, pictures
15 of any statements that he had gotten from witnesses or
16 anything about your case?

17 A. They don't even have no tape. All they have is
18 one phone call.

19 Q. So you're saying today that the only thing he
20 reviewed with you was a phone call?

21 A. Yes.

22 Q. Okay. Do you recall a minute ago saying that he
23 reviewed an audiotape as well as a videotape of the
24 transaction?

25 A. Yes.

1 Q. Okay. So he reviewed the videotape as well?

2 A. Yeah, but that one, the only time -- he told me
3 one day that I had phone recorded, and the second time
4 when he showed me the video was in court when I was in
5 trial.

6 Q. And do you recall him discussing any possible
7 defenses for you at trial?

8 A. Like I say, you know, when they took me in trial
9 before that, I -- and when they told me my lawyer better
10 be prepared and I tell them that I don't even give him
11 the first payment to represent me, he been studying my
12 case because I used to give him 500.

13 Q. Do you recall your attorney talking about
14 entrapment throughout your trial?

15 A. All the time at the beginning.

16 Q. Okay. And did he tell you about that, that is
17 what y'all were going to talk about at trial before you
18 went to trial?

19 A. No. At the beginning, that's what we been focus
20 because the way that thing happened, pretty much, was
21 entrapment because that's one thing that all the time I'm
22 asking my lawyer, you better get the phone record, who
23 called who, because I never called Steven. He called me.

24 Q. Okay. And did you give your attorney, like, any
25 leads or any witness that you wanted him to talk to or

1 anybody that you wanted him to investigate?

2 A. Yeah. I tell my lawyer to call my watchman, the
3 person I been doing the job, remodelling at that time,
4 and also they give you, like, a recommendation paper
5 telling that I was working for him for a long time and
6 that I don't have to sell drugs because I've been making
7 pretty good money at that time.

8 Q. So was it your decision to go forward to trial?

9 A. Well --

10 Q. You know, I'm going to take that question back.

11 So you say that Mr. Grimes talked to you about
12 first a plea offer for 15 years; is that correct?

13 A. Well, yes, it was correct, but in that time, I
14 don't even understand how much they offering me, and I
15 got scared because I thought they offered me five zero.

16 Q. Okay. And when you thought that he said five
17 zero, did you ever tell Mr. Grimes you misunderstood?

18 A. No, because it took him a little while to come and
19 visit me the second time.

20 Q. Okay. So you just told Mr. Grimes that you did
21 not want to take the 15-year plea offer?

22 A. Yes. Well, I do that. I remember that I send him
23 a letter -- well, I don't know how to write English. I
24 can read now a little bit, but I asked them, the inmates
25 around me, to help me sending the letter to the Kirkland

1 or something. They help you out with the public
2 defenders, and I ask him why they try to give me a lot of
3 time and he told me he don't even know why.

4 Q. Then you said he came to you with a second plea
5 offer, the solicitor's office offered you a second plea
6 offer, and that was for 18 years, is that correct, right?

7 A. Eight years.

8 Q. And you told Mr. Grimes did you not want to take
9 that plea offer as well, correct?

10 A. They told me if I take that 18 year I have to do
11 it day by day but I have to admit that I had use of what
12 was going on, that I had to admit that I know who the
13 drug was, and I don't even know that, I don't even know
14 who the drug was. I don't even know the person they
15 delivered the drugs out there. I don't know that.

16 Q. So it was your decision not to take the plea
17 because you didn't want to serve it day for day and you
18 didn't want to admit that you were the person -- that you
19 were trafficking drugs; is that correct?

20 A. Pretty much.

21 Q. So that's a yes?

22 A. No.

23 Q. No. Okay.

24 A. Pretty much that the lawyer told me if I take --
25 if I have to do an 18, but I could at trial -- I could do

1 25 or I can walk away. So he told me you might as well
2 take the trial and pray for the best.

3 Q. Okay. So on Mr. Grimes's advice, you decided not
4 plead guilty?

5 A. Pretty much.

6 MS. WILSON: Beg the Court's indulgence for a
7 second, Your Honor.

8 BY MS. WILSON:

9 Q. Okay. You testified earlier that during the
10 first -- when Mr. Grimes talked to you about the first
11 plea offer for 15 years, you said that you thought the he
12 was talking about 50 years, five zero, and you said that,
13 you know, you didn't understand because you couldn't
14 speak good English; is that correct?

15 A. That's correct.

16 Q. But do you recall before you proceeded to trial
17 the judge asking you did you need an interpreter?

18 A. Yes, but Mr. Grimes answered that question, and he
19 said we don't think we need an interpreter because me and
20 him, we got communication. I can understand the way he
21 talk, but when he talking about a different contact with,
22 you know, words, no.

23 Q. So you can understand Mr. Grimes?

24 A. Sometimes, yeah, and sometimes they do, like, you
25 know, like Mr. Peper do, like asking a question, or

1 either way if I don't understand what you're trying to
2 say, they have to tell me a different way.

3 Q. But you also stood up and spoke to the judge and
4 told them that you did not need an interpreter. Do you
5 recall that?

6 A. No.

7 Q. If I read it to you from the trial transcript,
8 would you recall, if I read it to you? Okay. I'm going
9 to read it to you, okay?

10 The Court says: When he gets in, we'll have it
11 placed on the record that he does not have to have an
12 interpreter, okay? All right. Let the record reflect
13 that you are Mr. Jose Hernandez. He doesn't have to
14 stand. That's fine.

15 It says the defendant, which would have been you,
16 and you say, Yes, sir.

17 The Court says: Your lawyer has advised me that
18 you have discussed with him whether or not you wish to
19 have an interpreter present. Do you wish to have an
20 interpreter?

21 And your response, the defendant: I'm fine.
22 I think that I understand.

23 Court says: So it is not your desire that
24 the Court appoint an interpreter. We have someone
25 present who can serve in that capacity if you need it.

1 And your response is: All right. I think
2 I'm all right.

3 And the Court says: You're all right?

4 And you say: Yes.

5 Do you recall that conversation? And that's
6 on page four of the transcript.

7 A. Yes.

8 Q. So you do recall telling Court you didn't need --

9 A. Okay. When we meet at the lawyer and the Court,
10 the lawyer told me, I'm thinking we have to get an
11 interpreter because me and you, we got some pretty much
12 communication, so I followed what they told me. They
13 said you don't need it. You don't need it. That's why I
14 admit it.

15 Q. So you agree from what you just said that you told
16 the Court you could speak English and you could
17 understand, for the part?

18 A. Yeah, because I was following Mr. Andrew Grimes.

19 Q. Okay. You gave us your whole story about how this
20 gentleman named Steven convinced you to make a phone
21 call, and, as a result, you were in a car with Steven and
22 a Detective Hembree, made a call to Mr. Martinez who came
23 and brought drugs to Detective Hembree and sold the
24 drugs. Is that -- you recall all that?

25 A. I recall making a phone call and Mr. Martinez

1 showed up out there, but Mr. Martinez, when they talked
2 to Mr. Hembree he don't even have no drug in his
3 possession after somebody else show up after the same
4 place, and that's the person that delivered the drug.

5 Q. And do you recall Mr. Grimes arguing to the Court
6 that you were entrapped and that the government tried to
7 trap you into selling these drugs? You would not usually
8 have done that? Do you recall that at trial?

9 A. Well, Mr. Grimes told me that. That is my defense
10 because Mr. Steven, if they never call me, I never be in
11 that place. Mr. Steven, they told me, for the last time
12 making a phone call, I could be at home with my family
13 right now.

14 Q. All right. So Mr. Grimes told you that entrapment
15 was the defense, that you were going to go forward at
16 trial?

17 A. Yeah.

18 Q. And you testified that as part of your discovery
19 you saw the audio and heard the video that that was taken
20 while you were in the car with the Detective Hembree?

21 A. In court.

22 Q. Okay. And did you testify at your trial?

23 A. No.

24 Q. And do you recall Mr. Grimes cross-examining the
25 State's witnesses on Mr. -- on the gentleman named Steven

1 on his criminal background? Do you recall him doing
2 that, trying to get the Court to be able to discuss his
3 prior record and things of that nature?

4 A. No. That's one of the factors, because if they
5 can call these things on the stands maybe I can get a
6 better deal because they could ask him in direct
7 examination that who was the one that set the place, who
8 is the one that made the meeting? Who is the one that
9 give that idea to me?

10 Q. So you were not satisfied with Mr. Grimes's
11 representation, is that what you're saying here today?

12 A. Yes.

13 Q. Okay. Do you recall telling the Court that you
14 were satisfied with Mr. Grimes's representation during
15 your trial? Do you recall that?

16 A. No.

17 Q. Okay. So can I read you a pages out of the
18 transcript where you tell the Court you're satisfied? Is
19 that okay?

20 A. Yes, ma'am.

21 Q. The Court says to you on page 149 of the
22 transcript, at line 13: Are you satisfied with your
23 lawyers, and Court asks both lawyers?

24 And you testify yes; do you recall that?

25 A. Really, at the time, what I'm supposed to do?

1 Just the bunch of time that I get, I was really
2 frustrated and really sad with 25 years and thinking
3 about I lose my family, I lose everything, I lose my
4 freedom. What I was supposed to do?

5 Q. Mr. Hernandez, you made that statement before you
6 were convicted at trial, so during your trial, you were
7 satisfied with Mr. Grimes's representation before you
8 were sentenced. You were satisfied prior to being
9 sentenced, yes or no?

10 A. No, because, you know, I was trusting that they
11 all -- you know, they're going to come in with some big
12 deals. That's what he told me. Don't worry about it.

13 MS. WILSON: Thank you. I don't have any
14 more questions. Nothing further.

15 THE COURT: Redirect?

16 REDIRECT EXAMINATION

17 BY MR. PEPER:

18 Q. Just quick, Your Honor.

19 What was the issue that you raised on appeal?

20 A. Entrapment?

21 Q. Explain to me why -- did the jury have the option
22 to find you not guilty based upon the defense of
23 entrapment?

24 A. Well, from my lawyer, they raised the issues real
25 good maybe to the jury that they were going to find me

1 guilty, but they really make me look bad. Like, they put
2 me on the stand and asked me some directed question, a
3 solicitor, and everything was so good. The solicitor is
4 used to everything that they used to get out there. They
5 used to drugs and tell the jury that drug was confiscated
6 and that drug transaction, and imagine them as they're
7 getting close to their babies around the school.

8 Q. Okay. But that was down outside of the presence
9 of the jury, correct?

10 A. Yes.

11 Q. And based on that testimony, it's my understanding
12 the judge ruled that entrapment was not a valid defense?

13 A. Yes, because they supposed to have to show the
14 element in trafficking, but Detective Hembree admitted
15 that Steven Lusano was working in combination with him,
16 trying to get a better deal, so I think that the element
17 is --

18 Q. All right. As a matter of fact, in Detective
19 Hembree's testimony, he clearly states in front of the
20 jury that Steven was the actual target of the
21 transaction, correct?

22 A. Yes.

23 Q. Now, was Steven ever called to the stand?

24 A. No.

25 Q. Okay. And still, my understanding that your

1 position is that had Mr. Grimes called Steven to the
2 stand that would have been enough for the judge to charge
3 the jury with the entrapment defense?

4 A. Yes.

5 Q. And is that the issue that was not preserved for
6 appeal?

7 A. Right.

8 MR. PEPPER: That's all I have. Thank you,
9 Judge.

10 THE COURT: Recross?

11 RECROSS-EXAMINATION

12 BY MS. WILSON:

13 Q. Briefly, Your Honor. Mr. Hernandez, do you recall
14 you were before Judge Dennis for your trial. Do you
15 recall Judge Dennis at the end of the case when he gave
16 the jury all their instructions on the law, do you recall
17 him giving instructions about the entrapment defense? Do
18 you recall the judge explaining entrapment for the jury
19 before they went to deliberate?

20 A. No.

21 Q. And you say that -- you just testified on Mr.
22 Peper's redirect that the Steven gentleman did not come
23 to your trial to testify. Do you recall a discussion in
24 your trial about how he was incarcerated and do you
25 recall Mr. Grimes pointing out -- not even the fact he

1 was incarcerated, but the fact he was not here to testify
2 to the jury during his closing, he said to the jury,
3 Mr. Steven isn't here. That's a problem. Do you recall
4 that no?

5 A. No, because that was not my job. That was part of
6 my lawyer's job.

7 Q. Okay. But you were paying attention during the
8 trial?

9 A. You know, I was really, really sad, and I was
10 praying for the best. I wish my lawyer the position to
11 meet that or say something to the Court, you know.

12 Q. But you don't recall whether he said that to the
13 Court or not?

14 A. No, I don't remember.

15 MS. WILSON: Okay. Thank you so much.

16 THE COURT: You can step down.

17 MR. PEPER: That's all.

18 THE COURT: All right. Call your next
19 witness? You weren't going to call your next witness.
20 She was going to call him?

21 MR. PEPER: Yes. Thank you.

22 THE COURT: All right.

23 MS. WILSON: State will call Mr. Andrew
24 Grimes.

25

1 ANDREW GRIMES,
2 having been first duly sworn,
3 was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MS. WILSON:

6 Q. How long have you been practicing law?

7 A. I've lost count. I graduated law school in 1995.

8 Q. So since 1995. Has a majority of that time been
9 spent doing criminal work?

10 A. Yes, ma'am.

11 Q. And do you recall when you were -- I assume you
12 were appointed since you worked for the public defender's
13 office.

14 A. Yes, ma'am.

15 Q. And do you recall when you were appointed to
16 represent Mr. Hernandez?

17 A. I believe it was shortly after I was hired, in,
18 like, December of 2006. I think the case had originally
19 gone to Kelly Kassis and it was reassigned to Chris
20 Kenneally and then I inherited the case.

21 Q. And how many times did you meet with Mr. Hernandez
22 prior to him going to trial?

23 A. If I could refresh my memory with notes.

24 Q. Sure.

25 A. And this is -- it looks like I met with him first

1 on March 2, 2007. Somebody from our office who speaks
2 Spanish was there to help translate. It looks like it
3 was a rather long meeting, from 2:08 to 3:55 on my notes,
4 and I have a note from September 13, 2007, went over a
5 letter to the solicitor's office, went over tape issues,
6 again Ms. Santiago was there.

7 It looks like -- I have sort of a handwritten
8 note. I'm having a hard time reading it all. It looks
9 like from July 9th of 2007. Talking about whether he had
10 retained Mike Bosnak to represent him, and I say planning
11 for a bond reduction.

12 And I think somebody had mentioned about
13 Mr. Bosnak felt there was there was an immigration
14 retainer on him at the time.

15 I think we met again November 8, 2007. I think we
16 did move for a bond reduction and filed a motion to
17 compel to require the State to be in a meeting and to
18 notify his counsel. I forget the name of the judge. He
19 kind of laughed at me, saying why don't you file a
20 motion. Why don't you just do that, so I wrote them a
21 letter about denying the motion for bond reduction.

22 It looks like I met up with him on January 30th of
23 2008, plea, status of the case. It looks like I had
24 notices 15 day, 18 on Monday, talking about 85 percent,
25 and went over, say, math calculations of what 15 -- what

1 85 percent of 15 would be.

2 We talked about sentence, entrapment and
3 trafficking, aiding and abetting in a conspiracy.
4 January 28th we met. Told him about the new plea offer,
5 18 years, and talked about pretrial motions, a motion to
6 be relieved, a motion to quash, CI information.

7 Met with him again on June 14th. I think I wrote
8 him a letter about the plea offer. Said he didn't want
9 to take it. Discuss the case. Said he wanted five
10 years. He said he would take seven years. I told him
11 there may not be a better plea offer. He's talking about
12 his negotiated sentence versus open-ended pleas and
13 recommendations.

14 I met with him on February 28th, discussed the
15 pretrial conference, plea possibilities. He said he
16 wanted one of his codefendants' deal, I think it was
17 Cortina. It might have been Bill Thrower's client, and
18 he said he would take a range between 10 and 20, and it
19 looks like we discussed the telephone calls, character
20 issues.

21 March 1st, it looks like we met with family
22 members in a status conference. Told them the plea offer
23 of 18 expired Monday at 9:30. Told him he would probably
24 get 25 on the trafficking and possibly on 15 on the
25 proximity that would need to be run concurrently.

1 The only thing at that time is he said Joe Condon
2 was representing him. I offered to go over his testimony
3 but defendant said he wasn't interested. Ben Lewis did
4 the second chair with me. Met with him, it looks like,
5 March 22nd.

6 Again, the second deadline for the plead.
7 Explained consecutive versus concurrent. Went over his
8 right to testify and to remain silent. We said if he
9 didn't testify, we could not get an entrapment charge.
10 Discussed cross, sentencing ranges for various types of
11 drug offenses, possession, trafficking through 400 grams.

12 Met with him on March 3rd. Go over his testimony,
13 video. I think originally when I was to -- before I was
14 appointed to represent him, if I recall, I think I
15 discussed this issue with him. It would probably just be
16 the city judge in the city of Hanahan, that after he was
17 arrested in Mount Pleasant, they got an search warrant
18 for his place in Hanahan. And I think I signed that
19 order, and we initially discussed conflicts, and then the
20 solicitor wasn't using any of their information from the
21 search warrant or anything on there, so I think it would
22 be a conflict in trial if it came up on it.

23 So I think I was little bit familiar with this
24 case before I started working here.

25 Q. Okay. Did you file any Brady or Rule 5 motions?

1 So you got all that, but did you file those motions or
2 did the person before you maybe?

3 A. I think Ms. Kassis might have filed a generic Rule
4 5 Brady motion. I know I filed a motion to compel. I
5 remember being a little frustrated with it because the
6 State never gave us the CI's name. I think we found that
7 out on our own, but I was hoping to discuss that at a
8 pretrial matter, which I understand, I'm trying to
9 recall, wanted to get going in the trial.

10 Q. Did you review the discovery material that you or
11 the prior attorney received with Mr. Hernandez prior to
12 going to trial? You reviewed all the videos and audios
13 or bills or statements that have any information that she
14 had with him?

15 A. Yeah. I didn't see an independent note saying we
16 have reviewed partners and some phone calls, but I'm
17 assuming so because we try to deal with some of the
18 issues that we said and kind of got his input into why he
19 said certain words he did, used certain language he did,
20 and I do have a copy of the motion to compel, which was
21 filed -- it looks like it was filed January 29, 2010.

22 Q. Did you also discuss with him the elements of the
23 charges against him and what the State was required to
24 prove?

25 A. I assume so. Again, I remember seeing my notes on

1 aiding, abetting, conspiracies. Even if he wasn't
2 involved in the actual hand-to-hand transactions, one of
3 my personal concerns is he was on the tape, you know,
4 making phone calls, helping out, which could be grounds
5 for her conspiracy comment, hand of one is the hand of
6 all.

7 We discussed that. And in his case, he was
8 actually helping to do the hand-do-hand and discussing
9 marijuana use issues.

10 Q. And when you discussed possible defenses with the
11 Applicant, did you discuss his prior offense prior to
12 going to trial?

13 A. Yes, ma'am. We kind of tried to use two
14 entrapment defenses. One is complete entrapment, and the
15 other we discussed is sentencing entrapment. I think
16 they handed in those jury instructions. The sentencing
17 entrapment would be more a little bit more complicated,
18 which would be for someone who is a user or small time
19 player. He sells maybe like grams and the State
20 commissions him to sell kilograms or a much larger
21 quantity than usual to try to make their conviction
22 bigger.

23 If you can show but for the State's enticements
24 that he would have sold him a gram, then he should be
25 sentenced accordingly to maybe possession or regular

1 distribution, as opposed to, like, trafficking 200 grams.

2 Q. And were either of those entrapment offenses
3 argued at trial?

4 A. We argued the complete entrapment. I don't
5 believe Mr. Hernandez testified in a way that would allow
6 me to argue sentencing entrapment.

7 Q. And was Judge Jefferson inclined to give the jury
8 a jury charge on entrapment for them to consider?

9 A. He seemed like he was a little reluctant, but he
10 could have entrapment. We talked about it. He said
11 maybe on your theory, it almost seems too easy to get
12 that charge, but I do believe he charged it.

13 Q. And did Mr. Hernandez discuss his version of the
14 facts with you while y'all were having all these meetings
15 before trial?

16 A. Yes, ma'am.

17 Q. And could you briefly characterize the State's
18 evidence against Mr. Hernandez.

19 A. Well, they had on videotape a lot of cocaine, or
20 going -- I think to sell a lot of cocaine to undercover
21 agents and had them on phone calls, talking about the
22 deal. It was sort of -- potentially, they had the
23 codefendants that probably could have testified against
24 him, but none of them did, and that is sort of their case
25 in a nutshell.

1 Q. And did you point out to the jury that -- I think
2 the confidential informant's name was Steven. I can't
3 recall his last name. Did you recall pointing out to the
4 jury that he was absent?

5 A. Yes, ma'am. I thought it was probably to
6 Mr. Hernandez's benefit he wasn't here because -- or
7 Mr. Hernandez could testify to everything Mr. Brooks was
8 saying and asked him to do that, and there was no hearing
9 to rebut that, and I think I kind of argued in my closing
10 that if you have two-thirds of the evidence before you,
11 that would be, the 66, which is failing, and if you just,
12 you know, felt the State had failed its, case he should
13 have been found not guilty.

14 Q. Did Mr. Hernandez give you any potential witnesses
15 or any leads for you to investigate once you went over
16 the discovery and everything with him?

17 A. He sort of told me how this guy was trying to
18 persuade him in selling drugs, and I think some character
19 stuff. We tried to get a character charge. I think
20 Judge Dennis denied that.

21 I don't think we called any witness to testify as
22 to his character. It's on his videotape. He's talking
23 about having witnesses and some other stuff showing bad
24 character, so he tried, I guess, to give a good character
25 charge but without going into great detail on good

1 character.

2 Q. Okay. After you received all of Mr. Hernandez's
3 discovery, did you have to do any further investigation
4 to look into it, the charges against him?

5 A. I think probably our main hesitation, I think we
6 found out who the CI was, maybe observed him in court,
7 was pleading and recognized the basis of the deal. So we
8 kind of found out who the CI was by having the State tell
9 us, and we caught them by surprise at the trial. I think
10 the officer -- he just asked if he had to say what the
11 CI's name was when we asked him about it.

12 I remember Officer -- Detective Hembree had been
13 involved. Somebody looked suspicious, I guess his
14 fiancée, and we looked into that to see if there was
15 anything we could impeach him on regarding that, and we
16 didn't really find anything we could use, so we just kind
17 of left that alone.

18 Q. And did you have ample time to prepare for Mr.
19 Hernandez's trial?

20 A. I believe so. I was in a trial the week before in
21 front of Judge Dennis. It was a murder case, but we kind
22 of knew the defense going into it, and I had the
23 entrapment handbook with me, so I tried to have
24 everything lined up. I think Judge Dennis and I had a
25 couple disagreements on what constituted, I guess, a

1 state agent. Ultimately, he did get the entrapment
2 charge.

3 Q. And did you feel like -- if there were any
4 appellate issues regarding your entrapment defense, did
5 you feel like you had fully preserved those for the
6 record?

7 A. I thought I had. I read the State's -- I read the
8 briefs, the appellate briefs. No one raised waiver as an
9 issue. The Court of Appeals said, I guess, I didn't
10 object properly or the issue raised was different -- the
11 issue raised on appeal was different than the issue I
12 raised below.

13 I did object to Judge Dennis's jury charge, being
14 burden shifting, and, you know, I thought I preserved
15 everything -- I think the record will speak for itself.
16 The Court of Appeals said no, I didn't, so I can't argue
17 with them.

18 Q. Did you discuss any other lesser included charges
19 with Mr. Hernandez?

20 A. I don't think we discussed that. I think at the
21 time if the weight is undisputed, over ten grams, that
22 you would have to get a trafficking charge, and I don't
23 know if that's -- since then, I don't think I researched
24 too much.

25 I don't know if the law has changed. I don't know

1 if I read it wrong, but then again he's also charged with
2 PWID proximity. Perhaps that by itself might be a
3 grounds to get a reduced charge of trafficking. I make
4 an argument maybe something in the trafficking statute
5 that says PWID is a lesser included if it's based on
6 possession. I think that there may be a statute on that,
7 but I guess my feel for the case is more -- there's more
8 in possession, more of a distribution, but perhaps, you
9 know, trying to show there is some evidence. I guess in
10 hindsight, I should have asked for the charge.

11 Q. Did you have any difficulty communicating with
12 Mr. Hernandez?

13 A. I think there was probably some issues of
14 language, but I think a lot of that issue was
15 frustration. I know we did have a motion to be relieved.
16 I think Judge Jefferson denied that, and there was some
17 indication in the record he may have hired Bill Thrower
18 I. Saw a letter from Kelly Kassis to Mr. Thrower, and
19 Mr. Thrower -- it's a bit confusing because he
20 represented two of the people, at least, and we would get
21 calls from Joe Condon's office periodically about a case,
22 but he never, I guess, officially became an attorney.

23 Q. Okay. Do you think Mr. Hernandez understood the
24 plea offers that you conveyed to him?

25 A. Yes, ma'am. I have several letters in the file

1 that said he didn't want 15 years. I don't know if he
2 wrote them, or I assume he wrote them, but it was fine
3 English. Maybe someone helped him, as he testified to.

4 Q. And it was his decision to not plead guilty and
5 proceed to trial ultimately?

6 A. Yes, ma'am. I don't think this is one I would
7 have encouraged him to go to trial on. He had some valid
8 defenses, but, you know, I don't think we got the best
9 plea offer in the world, but, you know, 15 is better than
10 25.

11 MS. WILSON: Beg Court's indulgence, Your
12 Honor.

13 BY MS. WILSON:

14 Q. And at trial you don't recall Mr. Hernandez having
15 any difficulty understanding the proceeding?

16 A. I remember one instance, I think we were
17 questioning him, about what Mr. Lesane may have told him,
18 and the State made an objection to hearsay and Judge
19 Dennis sustained it. I rephrased the question, and he
20 gave the exact same answer.

21 There were probably bits and pieces. The language
22 barrier may have interfered, but, overall, I think he
23 understood what was going on. I think we wanted him to
24 have an interpreter because part of our argument was he
25 was here, working hard, paying his taxes, running his

1 business, and just to avoid any sort of give an
2 impression that he was here illegally, running around
3 selling drugs.

4 Q. And do you recall at trial telling the jury that
5 Mr. Hernandez was not in the United States legally?

6 A. Yes, ma'am.

7 Q. And so you knew that there were some potential
8 consequences for him as an illegal immigrant being
9 convicted of a crime?

10 A. Yes, ma'am.

11 Q. Did you discuss that with him?

12 A. Maybe for purposes of bond, you know. There is no
13 purpose -- there is no reason to go forward on bond.
14 They put an ICE hold on him, but if someone is looking at
15 15 or 20 years, it's probably not the most significant
16 thing you're looking at, it's whether you're going to be
17 deported after that.

18 MS. WILSON: Nothing further.

19 CROSS-EXAMINATION

20 BY MR. PEPER:

21 Q. If it please the Court, Your Honor.

22 Good afternoon, Mr. Grimes. Mr. Hernandez has
23 asked me to raise a couple issues. I'll try to be brief.

24 On that note with regards to deportation, it's my
25 understanding that that was not explicitly explained to

1 him, that upon accepting a plea, he would be deported?

2 A. I don't recall saying that to him.

3 Q. And had he known that -- or had he been made aware
4 the deportation was inevitable, that would have altered
5 his decision in whether to take a plea or go to trial?

6 A. I don't think so. I think his decision was on the
7 amount of time offered to him.

8 Q. With regards to that time, when you relayed the
9 prosecutor's offer of 15 years, one five, was an
10 interpreter present for that conversation?

11 A. No. I sent him a letter and sent him -- we talked
12 after a while in a meeting.

13 Q. All right. The next plea offer that was made was
14 18 years, correct?

15 A. Yes, sir.

16 Q. And that was relayed to Mr. Hernandez?

17 A. I think probably orally, but yes, sir.

18 Q. But based on your conversation, was it clear to
19 you that he was confused as to why they would now be
20 coming down from 50 to 18?

21 A. He never said 50.

22 Q. Okay. All right. So is it your testimony that
23 when you relayed the 15, one five, offer, he knew that
24 was 15?

25 A. Yes, sir.

1 Q. Okay. All right. But, again, no interpreter was
2 present.

3 A. No, sir.

4 Q. Okay. With regards to the entrapment issue, were
5 the elements of that defense, the burden, everything that
6 you've alluded to, was that explained to Mr. Hernandez?

7 A. Yes, sir. I mean, it's how we built a defense.
8 It's why we're getting his version to support it.

9 Q. Okay. Is that why -- did that play a part into
10 his decision to testify at trial, the entrapment defense?

11 A. Yes, sir. I know you can't get entrapment
12 defense, but I don't know what basis we would have had in
13 this case about the CI being here.

14 Q. Okay. Well, couldn't you have called the CI to
15 the stand and potentially received an entrapment defense
16 based on the CI's testimony?

17 A. I don't know. I don't know what he would have
18 testified to. He might have denied everything
19 Mr. Hernandez said.

20 Q. He had done that, you would have been able to
21 impeach him, though, correct?

22 A. I wouldn't have any documents to impeach him with.

23 Q. Didn't you have the audio and video?

24 A. Well, I don't believe he's on the video, and I
25 don't know if that was with him or Detective Hembree.

1 Q. Okay.

2 A. Maybe -- I'm not saying he wasn't the on audio,
3 but I'm pretty sure he wasn't on the --

4 Q. Okay. All right. But the decision had been made
5 not to call the confidential informant?

6 A. Correct.

7 Q. And therefore the only way to get the entrapment
8 defense, in your mind, was through the testimony of your
9 client?

10 A. Yes, sir.

11 Q. Even though that would have opened him up to prior
12 bad acts, obviously, correct?

13 A. I think the prior bad contacts would come in
14 regardless of who's on the video. We weren't keeping him
15 out. It wasn't like he had a long record that was coming
16 in.

17 Q. Was that issue -- did you attempt to keep that out
18 at trial?

19 A. I don't recall making any motions to that video.

20 Q. Okay. And therefore if a motion was not made and
21 ruled upon, it obviously would not be an appealable
22 issue, correct?

23 A. Correct.

24 Q. With regards to -- you alluded to the lesser
25 included offense of PWID. Was that discussion had

1 between you and Mr. Hernandez?

2 A. No, sir.

3 Q. Okay. Did you inquire, or did you request that
4 charge from the judge?

5 A. No, sir.

6 Q. Okay.

7 MR. PEPER: Court's indulgence, Your Honor.

8 BY MR. PEPER:

9 Q. Thank you, Your Honor. May it please the Court:
10 Mr. Grimes, Mr. Hernandez is under the impression that
11 there were two questions from the jury that came back to
12 the Court. Is that my understanding?

13 A. I know they had a couple questions. One -- the
14 only one I recall specifically, without reading the
15 transcript, is -- maybe two. Did the entrapment apply to
16 both charges, and is it common to reach a verdict on one
17 and not the other.

18 Q. So as I understand it, the one question was is
19 entrapment an all or nothing defense, or can it be
20 entrapment for one charge but not the other?

21 A. I'm not saying all or nothing, but they asked if
22 it applied to the proximity charge as well as to the
23 trafficking charge.

24 Q. And his answer was yes, that --

25 A. Yes.

1 Q. Okay. And you didn't object to that.

2 A. No.

3 Q. Obviously. All right. And then -- I apologize.
4 Could I approach the witness, Your Honor?

5 Mr. Grimes, this is a copy of the transcript.
6 I'll give you a chance to review it here. This is page
7 235. Once you've had a chance to review that --

8 A. Just that page?

9 Q. All right. So now based on your review of the
10 transcript, do you recall what the additional question
11 was that the jury had, specifically with regard to
12 Detective Hembree's testimony? I believe it's line --

13 MS. WILSON: Did you say 235? It's 253, I
14 believe.

15 BY MR. PEPER:

16 Q. Mr. Grimes, page 253, line 10.

17 A. That first question, Is there anyplace in the
18 testimony Detective Hembree or the defendant as to what
19 took place at the deal, that's a factual issue, I cannot
20 comment on that or resolve that, so that is what I will
21 instruct them.

22 Q. Okay. And so his answer, he brings straight back
23 in his answer is that's a factual issue. It's for you to
24 decide?

25 A. Yes, sir.

1 Q. Okay. And there was no objection made by you to
2 that?

3 A. No.

4 Q. All right. And then, finally, Mr. Grimes,
5 Mr. Hernandez would like me to query you about the jury
6 selection process.

7 Were there any challenges or did you use any of
8 your strikes allowed? Do you recall?

9 A. I don't recall, and if you could --

10 Q. All right. Was Mr. Hernandez involved in the
11 selection process?

12 A. I don't recall, but general practice is I let the
13 client know what background we have on the person,
14 whether a police officer, contractor, whether they
15 answered any of the questions, like are you a crime
16 victim, if a person gives us a mean look or something,
17 try to get a feel for that.

18 Q. Was there voir dire done?

19 A. Yes, sir.

20 Q. And were there any challenges to any jurors that
21 were seated?

22 A. I don't recall.

23 Q. Okay. All right.

24 MR. PEPPER: That's all I have. Thanks.

25 THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. WILSON:

Q. Briefly, Your Honor.

Mr. Grimes, you testified that you sent -- well, the first plea offer for ten years, you sent a letter to Mr. Hernandez about the offer. That was your testimony today, right, for the first plea offer?

A. One moment. Yes, ma'am. I sent it to him on January 4, 2008.

Q. And you said he rejected the plea offer via letter he sent to you in response?

A. Well, they were -- I don't think he sent -- I'm not sure if he sent me a letter rejecting that plea offer, but he sent several letters to the office, several to Judge Hughston, and one saying the State was asking for too much time.

Q. You also testified that he decided not to call the CI, but you also testified earlier that the absence of confidential informant at trial erred to the benefit of the applicant; is that correct?

A. In my opinion it did. I suppose it could be argued I should have called him.

Q. And the two questions from the jury, the first question -- or the second question about is it entrapment or was it the first question. Of the two questions, did

1 you feel like the Court's response was objectionable?

2 A. From the State, I think they could have objected.
3 I think their research by entrapment by location -- I
4 mean, entrapment by location in federal courts said that
5 wasn't an issue, so when the judge kind of allowed that
6 charge, I thought that was to our benefit.

7 Q. And you didn't think his two responses to the jury
8 were objectionable for the defense?

9 A. No, ma'am.

10 MS. WILSON: Nothing further. Thank you,
11 Mr. Grimes.

12 MR. PEPER: No questions, Judge.

13 THE COURT: You can step down.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: Anything further from the State?

16 MS. WILSON: Nothing further from the State,
17 Your Honor.

18 MR. PEPER: Thank you, Your Honor. May it
19 please the Court? We're here with regards to our
20 ineffective assistance of counsel claim. I'll be brief.

21 Test provides two prong, first of which
22 Mr. Hernandez has to prove that the performance was
23 deficient. We would assert, based on the testimony
24 offered today, that prior to trial that there was a
25 significant miscommunication between the attorney and the

1 defendant with regards to the plea offer.

2 THE COURT: How about the fact that even if
3 you buy that he said I misunderstood 15 and 50 that he
4 subsequent to that turned down 18?

5 MR. PEPPER: Yes, sir.

6 THE COURT: Which is still better than what
7 he got.

8 MR. PEPPER: Sure. I would -- Mr. Hernandez
9 would assert that at that point he had actually caused
10 more confusion because he originally thought he was
11 looking at 50, and now 18, so he was confused as to why
12 he felt like his case was getting better, so therefore if
13 this case was getting better by 22 years, why would he
14 accept 18? And some of that may have to do, Judge, that
15 there was a lack of an interpreter on site between the
16 defendant and the attorney.

17 With regards to the entrapment issue, Judge,
18 we take the position that while I certainly understand
19 the quick decisions you have to make at trial, it's my
20 understanding from testimony that a pretrial decision was
21 made by the attorney to assert an entrapment defense
22 through testimony of his client as opposed to the
23 confidential informant, and we believe that was a
24 decision that may have had grave consequences in the mind
25 of the jury, in the eyes of a jury.

1 With regards to the objections, Judge, there
2 is some prior bad acts that were testified to by
3 Detective Hembree that were objected to and overruled and
4 not preserved, and that was the only issue that appellate
5 counsel felt they could move forward with successfully,
6 but unfortunately the Court of Appeals stated that it was
7 not preserved.

8 Based on these assertions of deficiency,
9 Judge, Mr. Hernandez believes the result would have been
10 different had he understood the plea if Detective
11 Hembree, or if the objection would have been preserved
12 with regards to Detective Hembree's testimony regarding
13 defendant's prior bad acts.

14 Then, finally, with regards to the deficiency
15 of not requesting a charge on the lesser included
16 offense, we believe the record reflects that, as
17 evidenced by the fact they were hung on one, were having
18 some difficulty rendering a decision, and we believe that
19 had Mr. Grimes successfully convinced the Court to charge
20 less for included that that would have been an element
21 for them to decide that issue, so for those reasons, we
22 believe Mr. Hernandez has met his burden of proof, and we
23 ask a new trial be granted.

24 Thank you.

25 MS. WILSON: May it please the Court: Your

1 Honor, the State should deny Mr. Hernandez's application
2 for post-conviction relief. From Mr. Grimes's testimony,
3 he has not been deficient in his representation of
4 Mr. Hernandez. He testified that he fully investigated
5 Mr. Hernandez's case prior to trial and he felt prepared
6 for trial and he didn't need any additional time.

7 He also testified that he discussed with the
8 defendant the entrapment defense because to successfully
9 proceed on that defense, he needed to hear the
10 defendant's version of the events, and the record
11 reflects that. Entrapment was argued at trial. It was
12 presented to the jury. In addition, Mr. Grimes's
13 testimony was that he didn't have any significant problem
14 communicating. Every now and again he would have a
15 problem communicating with Mr. Hernandez but that he felt
16 Mr. Hernandez overall understood the trial proceeding and
17 also the two plea agreements that he presented to
18 Mr. Hernandez and even had Mr. Hernandez testify, that he
19 voluntarily rejected the plea offers because he said his
20 first decision -- his second decision to reject the 18
21 years was based on the fact that he didn't want to serve
22 85 percent of the sentence and he didn't want to admit
23 that he committed the crime.

24 With regard to the allegation that he needed
25 an interpreter, we have at least one instance where

1 Mr. Grimes visited Mr. Hernandez in the jail with a
2 translator from his office who would help translate it as
3 needed, but we also have in the trial record Mr.
4 Hernandez telling the Court he could understand and
5 didn't need an interpreter.

6 Further, Your Honor, the State submits that
7 Mr. Hernandez failed to prove that prejudice resulted
8 from Mr. Grimes's representation, and the State would
9 request that you deny his application for post-conviction
10 relief.

11 THE COURT: Well, whatever deficiencies were
12 here, which I really don't see evidence of, were slight,
13 but the question about the turning down the plea offer,
14 again, the plea offer of 15 years because he thought he
15 was saying 50 is negated by the fact that he subsequently
16 turned down 18.

17 Mr. Grimes's notes would also indicate that
18 he did explain to him that it was 15 because he told him
19 what the math was on doing 85 percent of 15, but,
20 nevertheless, I think that even if I were to believe the
21 Applicant, he still subsequently turned down 18 years.

22 And as far as any trial mistakes went, well,
23 I really don't think there were any, because it doesn't
24 sound like Mr. Grimes -- while he may have failed to
25 preserve a particular ground, according to the Court of

1 Appeals, there is no evidence that this would have
2 changed the outcome of the trial in any way. I think
3 that was a slight error, but there is still no evidence
4 that would have made any difference in the outcome of the
5 trial, so I find that Mr. Grimes's testimony on that was
6 certainly more compelling and believable than the
7 Applicant's and would therefore deny the application for
8 post-conviction relief.

9 I would ask that the Attorney General prepare
10 me an order.

11 MS. WILSON: Thank you, Your Honor.

12 MR. PEPER: Thank you, Your Honor.

13 - - -

14 (Whereupon, the proceedings were concluded.)

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 4th of December 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 12, 2013


Circuit Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

2011-CP-10-2878

Jose Luis Guitierrez Hernandez, #326877,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

FILED
2012 DEC 27 PM 2:38
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief (PCR) dated April 21, 2011. The Respondent made its return on August 23, 2011. An evidentiary hearing on the matter was convened on December 4, 2012 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Mark Peper, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified at the hearing, along with Andrew Grimes, Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court records, and the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the January 2007 term of the Charleston County Grand Jury for trafficking cocaine 200-400 grams (2007-GS-10-0056) and possession with intent to distribute within

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proximity of a school (2007-GS-10-0057). He was represented by Andrew Grimes, Esquire, and Ben Lewis, Esquire.

The Applicant proceeded to trial on March 3-4, 2008, after which the jury found him guilty of trafficking cocaine.¹ The Applicant was sentenced by the Honorable R. Markley Dennis to 25 years.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Tricia A. Blanchette, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Hernandez, Op. No. 2011-UP-032 (S.C. Ct. App. filed January 26, 2011). The Remittitur was issued on April 29, 2011.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Failure to advise Applicant of plea offer in a timely manner.
 - b. Failure to properly prepare and investigate.
 - c. Failure to properly raise an entrapment argument.
2. Ineffective Assistance of Appellate Counsel
 - a. Appellate counsel raised an issue that was not preserved for appellate review.

At the hearing, Applicant proceeding solely on the allegations listed in his post-conviction relief application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

¹ The Applicant was PWID Cocaine within proximity of a school was *nolle prossed* after the jury found the Applicant guilty of the trafficking cocaine charge.



Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Summary of the Testimony

The Applicant was present at the hearing and testified that he met with trial counsel three times prior to trial. He testified that he listened to the tape of the phone call he made to the confidential informant and watched a video of the controlled buy with trial counsel prior to trial. The Applicant gave conflicting testimony about his ability to speak English. First, the Applicant testified that he is able to communicate properly in English. Shortly thereafter, he testified that he does not speak good English and as a result did not understand the initial plea offer when it was conveyed to him by trial counsel. He then testified that he told the Court prior to his trial that he did not need an interpreter and that he could speak English.

The Applicant testified that the State initially extended an offer to plead to 15 years, but that he refused the offer because he did not understand and thought the plea offer was for 50 years instead of 15. The Applicant testified that it was his decision to turn down the second plea offer of 18 years because trial counsel told him he would have to serve his time day for day and admit committing the crime.

The Applicant testified that he gave trial counsel the name of his boss as a potential witness. He testified that he wanted his boss present to show that he was making good money and did not need to sell drugs. The Applicant testified that counsel explained the elements of the crimes he was charged with. He testified further that he explained his version of the facts to trial counsel. The Applicant testified that his attorney explained to him that entrapment was his defense and that he had a good case. The Applicant testified that trial counsel did not tell him he



could be deported if he was convicted. Lastly, the Applicant testified that he did not think that trial counsel was ready for trial and that there were no Spanish people on his jury.

Andrew Grimes, Esquire, the Applicant's trial counsel, testified that he has been practicing law since 1995 and the majority of his practice has been in criminal law. He testified that he was appointed to represent the Applicant in December 2006. Counsel testified that prior to trial, he met with the Applicant at least 10 times.

He testified that the Applicant's previous attorney filed Brady and Rule 5 motions on the Applicant's behalf and that he filed a Motion to Compel on the Applicant's behalf in January 2010. Counsel testified that he reviewed the discovery with the Applicant. Counsel specifically recalled reviewing the video of the controlled buy with the Applicant.

Counsel testified that he discussed with the Applicant the elements of the charges against him and what the State was required to prove. He testified that he discussed the Applicant's version of the facts with him prior to trial. Counsel also testified that he discussed a possible entrapment defense with the Applicant and the two types of entrapment that they could argue at trial. He testified that Applicant did not give him any leads or potential witnesses to investigate. Counsel testified that his investigation mainly involved uncovering the identity of the confidential informant. He testified that he was able to discover the identity of the confidential informant prior to trial and surprise the State with the information. He also testified that he investigated the background of the undercover officer, but that he did not find anything that he could impeach the officer with on cross-examination.

Counsel testified further that he discussed both plea offers with the Applicant and that the Applicant rejected both. He testified that the Applicant wanted a plea deal in the 10-15 year range. He testified that it was the Applicant's decision to proceed to trial. Counsel testified that

he did not discuss a lesser-included offense with the Applicant because he thought with the weight of the drugs that it was undisputed that the requirements for a trafficking charge were met. Counsel also testified that he did not recall using any of his strikes during the jury selection process. He testified that it is his general practice to inform the client of the juror's background prior to selection.

Counsel testified that he thought that the entrapment issue was properly preserved for appeal. Counsel also testified that there was some difficulty communicating with the Applicant, but that the majority of it resulted from the Applicant's frustration and not the language barrier. He testified that he felt the Applicant understood the plea offers. He testified that did not specifically recall a discussion about deportation consequences, but that he recalled discussing the Applicant's status in the context of a bond because of a potential ICE hold. Lastly, counsel testified that he did not object to the Court response to the second note from the jury during their deliberation.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the



result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

This Court finds the Applicant’s testimony is not credible, while also finding trial counsel’s testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds that the Applicant failed to meet his burden of proving that trial counsel did not fully investigate his case and was not prepared for trial. “[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” Wiggins v. Smith, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003).

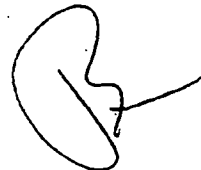
This Court finds that trial counsel thoroughly investigated the charges against the Applicant prior to trial. Counsel gave credible testimony that he investigated both the confidential informant and the undercover officer involved in the controlled buy. Counsel



testified further that as a result of his investigation he was able to discover the identity of the confidential information prior to trial. This Court finds that counsel undertook a reasonable investigation of the facts and circumstances of the case. This Court finds that trial counsel was not deficient for failing to seek out the Applicant's boss prior to trial. This Court finds that the Applicant failed to show what information would have resulted from trial counsel contacting his former boss and that the information discovered would have been beneficial to the Applicant at trial. This Court finds that this allegation is without merit and trial counsel was not deficient for failure to investigate.

This Court finds that the Applicant failed to meet his burden of proving trial counsel did not advise him of the plea offer in a timely manner. During plea negotiations defendants are "entitled to the effective assistance of competent counsel." Lafler v. Cooper, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012) (citing McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. Id. In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. Id.

This Court finds that trial counsel properly advised the Applicant of the substance of all plea offers from the State. This Court finds further that the Applicant knowingly, intelligently, and voluntarily rejected all plea offers and decided to proceed to trial. Both counsel and the Applicant testified that trial counsel advised the Applicant of two plea offers prior to trial. The Applicant alleges that he rejected the initial plea offer of 15 years because he thought trial counsel said the offer was to plead to 50 years. This Court finds that counsel gave credible testimony that the Applicant understood the terms of the plea offers and knew that the initial plea



offer was for 15 years and not 50 years. The Applicant testified that he chose not to accept the plea offers because he did not want to serve a sentence day for day and because he did not want to admit that he was guilty. This Court finds that based on this testimony even if the Applicant misunderstood his discussions with trial counsel, he provided no evidence that he would have accepted the plea offer had he understood the offer to be 15 years. The Applicant's lack of evidence on this issue is further supported by the Applicant's rejection of the second plea offer of 18 years. This Court finds that the language barrier that the Applicant alleges affected his communication with counsel had no effect on the Applicant's decision to reject all plea offers and proceed to trial. This Court finds this allegation is without merit and trial counsel properly conveyed the State's plea offers to the Applicant.

This Court finds that the Applicant failed to meet his burden of proving trial counsel did not properly raise an entrapment argument. This Court finds that the record reflects that the entrapment defense was properly presented to the jury at the Applicant's trial. Trial counsel presented the jury with the Applicant's entrapment defense during both his opening and closing arguments and the jury was given an instruction on entrapment by the trial judge. Trial counsel gave credible testimony that he discussed an entrapment defense with the Applicant prior to trial and that the defense was presented to the jury at trial. Counsel testified further he felt that any issues regarding the entrapment defense was properly preserved for appeal.

This Court finds that an entrapment defense was properly presented to the jury and available for their consideration at trial. This Court finds further that there is no evidence that the proper preservation of the issue for appeal would have changed the outcome of the trial. This Court finds this allegation is without merit and trial counsel properly raised an entrapment argument at trial.



Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). Generally, in analyzing a claim of ineffective assistance of appellate counsel, South Carolina applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Id.

Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (emphasis supplied)). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Id. To prove prejudice, the applicant must show that, but for counsel's errors, 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).

The Court finds that appellate counsel was not ineffective for appealing an issue that was not preserved for review. This Court finds that the Applicant presented no evidence that appellate counsel was deficient or that but for counsel's errors there is a reasonable probability he would have prevailed on appeal. This Court finds that this allegation is without merit.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that appellate counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that appellate counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by appellate counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing

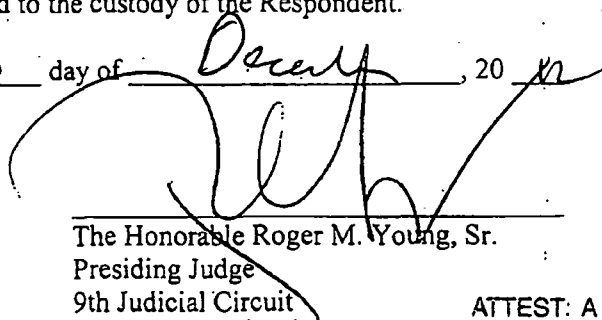
proceedings. Both trial counsel and appellate counsel were not deficient and the Applicant was not prejudiced by their representation. Therefore, this PCR application must be denied and dismissed with prejudice.

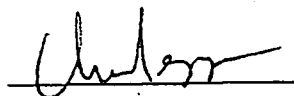
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

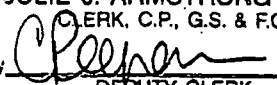
IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice;
and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 28 day of December, 2012


The Honorable Roger M. Young, Sr.
Presiding Judge
9th Judicial Circuit

, South Carolina.

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By 
DEPUTY CLERK

ALF 2008-08-01643

WITNESSES

JEFF OSBURN AND/OR

MATT CASEY

HEMBREE, MPPD

08-P9820

ARREST WARRANT NUMBER

K120740

AUGUST 7, 2008

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2007-GS-10-

0056

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

JANUARY TERM 2007

THE STATE

vs.

JOSE LUIS GUTIERREZ HERNANDEZ

Indictment for

TRAFFICKING IN COCAINE

FILED

JAN 24 2007

JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON) INDICTMENT FOR
) TRAFFICKING IN COCAINE

At a Court of General Session, convened on January 9, 2007 the Grand Jurors of Charleston

County present upon their oath:

That JOSE LUIS GUTIERREZ HERNANDEZ did in Charleston County on or about August 7, 2006 knowingly sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State; or was knowingly having actual or constructive possession or knowingly attempted to become in actual or constructive possession of a controlled substance or a controlled substance analogue, to wit: Cocaine, in excess of Two Hundred (200) Grams but less than Four Hundred (400) Grams. This is in violation of §44-53-370 of the South Carolina Code of Laws (1976) as amended.

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

ASSISTANT SOLICITOR



STATE OF SOUTH CAROLINA

COUNTY OF Charleston
STATE VS.

JOSE HERNANDEZ

AKA:

Race: O Sex: M Age: 2008
DOB: 00-00-0000 SSN: 000-00-0000

Address:

HANAHAN, SC 294060000

DL#:

SID#:

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2007GS100056A/W#: K120740Date of Offense: 8/7/2006S.C. Code § : 44-53-0370(e)(2)(d)CDR Code #: 0288

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☒ PLEADS
TO: Trafficking in cocaine, 200 to 400 grams

in violation of § 44-53-0370(e)(2)(d) of the S.C. Code of Laws, bearing CDR Code # 0288

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

ATTEST:

Gardner Cardillo, Julie

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. Aug 7, 2006☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

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

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:

\$

§ 14-1-206 (Assessments 107.5 %)

\$

§ 14-1-211(A)(1) (Conv. Surcharge)

\$100

\$

100.00

§ 14-1-211(A)(2) (DUI Surcharge)

\$100

\$

§ 56-5-2995 (DUI Assessment)

\$12

\$

§ 35.13 (Public Def/Prob)

\$500

\$

§ 73.3, 1B TP (Law Enforce. Funding)

\$25

\$

25.00

§ 33.7, 1B TP (Drug Court Surcharge)

\$100

\$

100.00

§ 50-21-114(BUI Breath Test Fee)

\$50

\$

§ 56-5-2942(J) (Vehicle Assessment) \$40/cv

\$

3% to County (if paid in installments)

\$

6.75

TOTAL

\$

231.75Callahan
Clerk of Court/ Deputy Clerk

Court Reporter:

Anne Meyer

PRESIDING JUDGE

Judge Code: 210Sentence Date: 8/7/08

SCCA/217 (10/2007)