

Volume I of II

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Roger L. Couch, Special Circuit Court Judge

RECEIVED

JUL 20 2015

S.C. Supreme Court

MICHAEL GONZALES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

TRISTAN M. SHAFFER
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JULY 22, 2002.....	1
APPLICATION FOR POST-CONVICTION RELIEF	566
RETURN	574
AMENDMENT TO APPLICATION FOR POST-CONVICTION RELIEF	579
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED SEPTEMBER 20 AND NOVEMBER 8, 2007	582
CONTINUED POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JANUARY 11, 2010	722
ORDER OF DISMISSAL	740
MEMORANDUM IN SUPPORT OF PRAYER FOR RECONSIDERATION.....	749
RULE 59(e), SCRCP, MOTION TO ALTER OR AMEND	754
RETURN AND MOTION TO DISMISS MOTION TO ALTER OR AMEND	761
ORDER.....	764
INDICTMENT	766

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG)

THE STATE)
-vs-) TRANSCRIPT OF RECORD
) 02-GS-42-2742
) 02-GS-42-2754
MICHAEL GONZALES,)
STEVEN JOSH SHELHAMER,) JULY 22, 2002
Defendant.) SPARTANBURG, SOUTH CAROLINA

VOLUME I

B E F O R E:

HONORABLE GARY E. CLARY, JUDGE; and a jury.

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

JASON T. WALL, ASSISTANT SOLICITOR
Attorney for the State.

RICKY HARRIS, ESQUIRE
Attorney for Defendant Michael Gonzales.

CAMERON "BOZZY" BOGGS, ESQUIRE
Attorney for Defendant Steven Josh Shelhamer.

Michael R. Watts
Circuit Court Reporter

INDEX

1		
2		
3	WITNESSES	PAGE
4	(JULY 22, 2002)	
5		
6	(SUPPRESSION HEARING)	
7		
8	OFFICER JACOB DEFFENBAUGH (SW)	
9	Direct Examination by Mr. Wall	35
10	Cross Examination by Mr. Harris	42
11	Redirect Examination by Mr. Wall	47
12		
13	(JURY TRIAL)	
14		
15	Jury Voir Dire -- page 92	
16	Jury Sworn -- page 109	
17	Opening Statement by Mr. Wall -- page 117	
18	Opening Statement by Mr. Harris -- page 122	
19	Opening Statement by Mr. Boggs -- page 131	
20		
21		
22		
23		
24		
25		

INDEX

	WITNESSES	PAGE
	(JULY 23, 2002)	
	(JURY TRIAL)	
	OFFICER KENNETH HANCOCK (SW)	
	Direct Examination by Mr. Wall	148
	Cross Examination by Mr. Harris	154
	Cross Examination by Mr. Boggs	165
	Redirect Examination by Mr. Wall	167
	OFFICER RHETT FOX (SW)	
	Direct Examination by Mr. Wall	171
	Cross Examination by Mr. Harris	210
	Cross Examination by Mr. Boggs	226
	Redirect Examination by Mr. Wall	241
	Recross Examination by Mr. Boggs	262
	OFFICER ROBERT ROSENBERG (SW)	
	Direct Examination by Mr. Wall	271
	Cross Examination by Mr. Harris	272
	Cross Examination by Mr. Boggs	273
	Redirect Examination by Mr. Wall	277

INDEX

	WITNESSES	PAGE
1	JOHNNY SOLOMON (SW)	
2		
3	Direct Examination by Mr. Wall	281
4	Cross Examination by Mr. Harris	296
5	Cross Examination by Mr. Boggs	308
6	Redirect Examination by Mr. Wall	324
7	Recross Examination by Mr. Harris	328
8	Recross Examination by Mr. Boggs	329
9	OFFICER ASHLEY HARRIS (SW)	
10	Direct Examination by Mr. Wall	331
11	(No Cross Examination by Mr. Harris)	
12	Cross Examination by Mr. Boggs	341
13	Redirect Examination by Mr. Wall	347
14	Recross Examination by Mr. Boggs	348
15	OFFICER JACOB DEFFENBAUGH (SW)	
16	Direct Examination by Mr. Wall	350
17	Cross Examination by Mr. Harris	367
18	Cross Examination by Mr. Boggs	375
19	Redirect Examination by Mr. Wall	391
20	Recross Examination by Mr. Harris	396
21	Recross Examination by Mr. Boggs	397
22	OFFICER JACOB DEFFENBAUGH (SW) (PROFFERED TESTIMONY)	
23	Cross Examination by Mr. Boggs	402
24		
25		

INDEX

WITNESSES

PAGE

(JULY 24, 2002)

Closing Argument by Mr. Wall -- page 449

Closing Argument by Mr. Harris -- page 473

Final Argument by Mr. Boggs -- page 495

Jury Instructions -- page 515

Jury Verdict -- page 545

INDEX

WITNESSES

PAGE

(JULY 25, 2002)

Sentencing -- page 556

Reporter's Certificate -- page 567

1	EXHIBITS			
2	NO.	DESCRIPTION	ID.	EV.
3	S-1	Map		399
4	S-2	Drugs		352
5	S-3	Map		399
6	S-4	Audio Tape		199
7	S-5	Form C - Rule 6	271	
8	S-6	Drug Report		341
9				
10	CT-1	I.D. Picture Lineup	33	
11	CT-2	Defendant Gonzales proposed	424	
12		Jury Question		
13	CT-3	Deft. Gonzales Requested Charges	548	
14	CT-4	Deft. Shelhamer Requested Charges	548	
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

1 (Proceedings, July 22, 2002)

2 MR. BOGGS: May it please the court, it's my
3 understanding that the prosecution intends to call
4 to trial the case against my client, Steven Joshua
5 Shelhamer, and Mr. Harris' client, Michael Gonzales.

6 I would ask Your Honor to make a motion before
7 the court for a continuance; or in the alternative,
8 a severance of the trials against these
9 co-defendants.

10 Your Honor, essentially, quite briefly to the
11 severance of the trial, I intend to bring up
12 evidence of Mr. Harris' defendant's, I guess, modus
13 operandi or community standards of being a marijuana
14 dealer, Your Honor. I know that Mr. Wall cannot
15 bring those up because of his lack of convictions.
16 However, it goes to the heart of my defense in this
17 trafficking case, in which my client was in the car.

18 Your Honor, concerning a continuance, this case
19 occurred on June 3rd of this year, less than two
20 months ago. Mr. Harris' client is in custody and I
21 think that's why it's sort of on the fast track. My
22 client is on bond.

23 THE COURT: We are trying to fast track all of
24 them now.

25 MR. BOGGS: Yes, sir, I understand.

1 THE COURT: We don't do it like they used to do
2 it.

3 MR. BOGGS: Yes, sir. I understand that. Be
4 that as it may, judge, I just would be remiss if I
5 didn't ask for a continuance, in that there is so
6 many -- well, without -- I mean, judge even last
7 week there was a murder in Spartanburg County and
8 the police showed up at my client's door asking
9 questions, which may or may not relate to this case,
10 and I'm referring to the murders that were in
11 Thursdays paper up in the Campobello area. And Your
12 Honor, I don't know whether they are directly
13 related to this case, or not, but until I find out
14 more information about that, and the fact that this --
15 really we are talking about fifty days, I think,
16 since arrest.

17 THE COURT: The way it ought to be done.

18 MR. BOGGS: Well, Your Honor --

19 THE COURT: You know, that's -- we got rules
20 that, you know -- normally people coming in here
21 wanting motions to -- making motions for speedy
22 trials.

23 MR. BOGGS: My client waives that, Your Honor.

24 THE COURT: So it's kind of unusual for someone
25 to come in and say we are trying to do it too soon.

1 Well, let me hear from you other gentleman.

2 MR. WALL: Your Honor, as -- I don't know if
3 there is an order that you would rather hear the
4 argument regarding, this but as to the continuance,
5 he's not citing a specific reason that he would need
6 the case continued, some right that his client would
7 be deprived of, or something that he would be able
8 to pursue, given the continuance. It's basically
9 that we are bringing it up too soon. And I think
10 that -- and obviously all this is in the court's
11 discretion, but in my opinion that's not a specific
12 enough reason or a reason to continue the case.

13 In terms of the -- and I don't know if this was
14 part of the continuance motion or part of the
15 severance motion, but I think it's the continuance
16 motion. In terms of the murders being related to
17 this, I'm -- I have no information regarding that,
18 that those murders are in any way related to this
19 case.

20 As to the severance, I know Your Honor is
21 familiar with the law. I have read through that,
22 and in terms of the cases on severance and the fact
23 that -- and I know Your Honor knows this, but the
24 fact that they have different defenses, that one may
25 be pointing at the other, I think there is a series

1 of cases saying that that's not enough, that it has
2 to be a lot more detail and get into specific
3 regarding that. And I believe that what he's
4 talking about getting into with regard to Mr.
5 Gonzales, I don't believe he's going to be able to,
6 nor would I be able to, and I don't believe that it
7 would be dispositive. I think that even if he were
8 able to somehow show that Mr. Gonzales was a drug
9 dealer, that that's not a -- that's not mutually
10 exclusive. You can have more than one drug dealer
11 in a car at the same time. And just to give, Your
12 Honor -- I know that we are not here to try the
13 case, but so that you have a brief summary of the
14 facts before you, he was -- under the State's
15 evidence, as we would be presenting the case, his
16 client was sitting more than simply in the car. His
17 client was the person -- our evidence, as we would
18 present it, would be that Mr. Gonzales arranged the
19 transaction, that Mr. Gonzales was in charge of the
20 transaction, but the person that actually handed the
21 drugs to the officer was Mr. Shelhamer.

22 THE COURT: Mr. Harris.

23 MR. HARRIS: If it please the court, Your
24 Honor, good morning.

25 THE COURT: Good morning.

1 MR. HARRIS: My client has no basis to ask for
2 a continuance. And I guess I really have no
3 position on that in terms of my co-defendant.

4 As to the severance, though, I'm very concerned
5 about the reason that's stated or asking for a
6 separate trial. If I'm understanding it correctly,
7 Mr. Boggs intends to pursue a defense for Mr.
8 Shelhamer that would somehow involve demonstrating
9 that my client has been accused in the past of drug
10 trafficking, namely trafficking in marijuana, and
11 that, therefore, somehow that means that he, and he
12 alone, is the guilty party in this transaction. I'm
13 not sure if I understand how counsel intends to get
14 there, but it's obvious that he has some road map
15 that we don't know about. But I will say now for
16 the record that if a joint trial is held, I will
17 certainly most strenuously object to any mention of
18 my client's prior arrest for trafficking in
19 marijuana in a case, an indictment that's still
20 pending for trial. And I would likewise resist any
21 attempt on the part of any party to place my
22 client's character at issue, when we are talking
23 about this one discreet drug transaction.

24 So I guess that my position about a joint trial
25 is if the court were inclined to permit such a

1 defense in a joint trial, then I certainly don't
2 want him sitting beside me, if that's going to be
3 it. And I, of course, leave it to the court as to
4 whether that would be an appropriate line of defense
5 at any rate.

6 THE COURT: All right, Mr. Boggs.

7 MR. BOGGS: Thank you, Your Honor. May it
8 please the court.

9 Your Honor, without getting into the details of
10 my planned defense, I mean, I would be glad to
11 explain further. I think that I have a way to bring
12 up Mr. Gonzales' propensity to deal in marijuana.

13 THE COURT: How can you do that in a joint
14 trial?

15 MR. BOGGS: Well, Your Honor, my client is
16 charged with trafficking, which is specific -- in
17 trafficking in methamphetamines, which is a specific
18 intent crime, Your Honor. The evidence will show
19 that the State called Mr. Gonzales. They talked to
20 Mr. Gonzales. Mr. Gonzales was the one they
21 expected. They didn't expect my client. My client
22 was in the car, and that what my client allegedly
23 handed to them was a sealed package, Your Honor.
24 And that package has been sealed -- had been sealed
25 prior to my client allegedly ever seeing it, Your

1 Honor. And, therefore, my -- my reason for bringing
2 up this propensity for marijuana is to show that my
3 client in no way could have known that it was
4 methamphetamine. And, Your Honor, I think that goes
5 to the specific intent of that particular
6 trafficking crime. He is and has been arrested for
7 trafficking in marijuana, and that's how my client
8 knew of him. And, in fact, the evidence will show
9 that their C.I. called up asking for marijuana
10 because that's what he does best.

11 THE COURT: Have you got any statements
12 involved in this case?

13 MR. HARRIS: Well, Your Honor, there are some
14 tape recorded telephone conversations that purport
15 to be between a paid informant - not a law
16 enforcement officer - and my client.

17 There also is an audio tape that purports to be
18 one of the transactions that occurred at a
19 convenience store in Spartanburg County on the date
20 and time alleged.

21 There is a statement, a written statement, of
22 the paid informant, but none -- no statements I'm
23 aware of by either defendant.

24 THE COURT: Is that correct?

25 MR. WALL: Yes, sir. And I was going to

1 mention the audio recordings that we allege to be
2 between Mr. Gonzales and the C.I. do not reference
3 Mr. Shelhamer in any way.

4 MR. HARRIS: I think the only recording would
5 be the recording of the transaction. That would be --
6 well, I'm not even sure if they claim that Mr.
7 Shelhamer's voice is on that recording, but I
8 believe that they do. It's very hard for me to
9 understand what's on the recording.

10 MR. BOGGS: My understanding, his voice doesn't --
11 is not on any part of the recording, talking about
12 Mr. Shelhamer.

13 MR. WALL: I think there may be a portion on
14 there of the transaction regarding the weight.
15 There is none -- there is none regarding any
16 telephone conversations.

17 MR. HARRIS: But specifically, Your Honor, I
18 guess to answer what I think the court's inquiry is
19 on the severance motion, there are no
20 self-incriminating, self-inculpatating or exculpating
21 statements that would need revision, redaction.

22 THE COURT: Thank you, sir.

23 MR. HARRIS: I would say, Your Honor, further
24 it's my understanding the theory of the State's
25 case, the State going forward on a sale, or

1 attempted sale, of drugs, and not a conspiracy
2 theory, per se.

3 THE COURT: Now, the only thing that concerns
4 me about this issue, Mr. Wall, is when I look at the
5 case of State v. Dennis, I think that is the case
6 that probably gives us the most guidance in this
7 regard, and that is 523 S.E. 2d 173, 337 S.C. 275,
8 and it's a 1999 case, which states that "criminal
9 defendants who are jointly tried -- this was murder,
10 case of murder, "are not entitled to separate trials
11 as a matter of right."

12 A defendant who alleges that he was improperly
13 tried jointly must show prejudice before the court
14 will reverse his conviction. That's from the State
15 v. Crowe, a 1972, C-r-o-w-e. "The general rule
16 allowing joint trials applies with equal force when
17 a defendant's severance motion is based upon the
18 likelihood he and a defendant will present mutually
19 antagonistic defenses; i.e., accuses one another of
20 committing the crime." And that cites the State
21 v. Leonard, 287, 287 S.C. 462, 339 S.E. 2d 159, a
22 1986 case, which was reversed on other grounds at
23 292 S.C. 133, 355 S.E. 2d 270, a 1986 and '87 cases
24 respectively.

25 The only thing that concerns me here is that if

1 the basis of his defense is that the other guy did
2 it, you know, I have got no problem with them trying
3 the case that way. The only thing that if he's
4 tried in a separate trial and he wants to talk about
5 this defendant's prior drug involvement, then he
6 doesn't have the problem that he does here from Mr.
7 Harris' point of view. How do you want to address
8 that?

9 MR. WALL: Again, Your Honor, I just don't
10 believe that that would be a proper avenue for him
11 to proceed either way. I don't believe it's a --
12 again, it's a defense which excludes his guilt. If
13 it were in some way going to exclude his guilt, then
14 I might be able to understand it better, but I go
15 back to my earlier argument, that those ideas aren't
16 mutually exclusive. And if I sense what he's saying
17 correctly, basically what he's going to argue to a
18 jury is I thought it was marijuana I was handing,
19 not methamphetamine.

20 I think that -- again, I don't think that that
21 excludes his guilt, and I don't believe that he
22 should be allowed to go into that, whether or not he
23 is --

24 THE COURT: Because, once again, he is just
25 simply charged, correct?

1 MR. WALL: Sir.

2 THE COURT: He's just simply charged with the
3 crime of marijuana.

4 MR. WALL: Yes, and I would point out that they
5 are totally -- as the State would allege, they are
6 two totally different scenarios.

7 This is basically a buy-bust scenario.

8 The marijuana, as we allege it, is Mr. Gonzales
9 allegedly getting -- when I say allegedly, we are
10 going to prosecute him for it, taking a load of
11 1,100 pounds of marijuana as part of a cross-country
12 shipment in two completely different transactions.
13 We believe Mr. Gonzales played two completely
14 different roles in the transaction here and the
15 transaction regarding the marijuana and don't really
16 see how they could be linked up. We are not talking
17 about a small amount of marijuana.

18 MR. BOGGS: Your Honor, if I may be heard, even
19 if you disregard my argument, which I, of course,
20 don't want you to do, Mr. Wall's latest argument is
21 flawed, in that his own C.I. was calling. And it
22 could be easily inferred that he was calling to set
23 up a marijuana transaction. And that Mr. Gonzales,
24 assuming that's his voice, says he can get the other
25 instead of marijuana, so I think I can directly

1 correlate the fact that they were looking for
2 marijuana, because they busted him.

3 THE COURT: Just because they are looking for
4 marijuana doesn't preclude them from arresting
5 somebody on some other charge, Mr. Boggs.

6 MR. BOGGS: Oh, yes, sir, I understand that,
7 but I'm saying getting towards my defense, I mean,
8 even they knew he was a marijuana dealer. And I
9 think it goes to -- he says my defense would not go
10 to exclude my client -- or excuse my client's --

11 THE COURT: So what your client is doing is
12 he's just dealing in marijuana and not in --

13 MR. BOGGS: Your Honor, he wasn't dealing in
14 anything. His sister dated him. Your Honor -- You
15 understand?

16 THE COURT: No, I understand what you are
17 talking about.

18 MR. BOGGS: The knowledge. The knowledge is
19 required of the item in question.

20 THE COURT: Motion for severance is denied. I
21 do not believe that the issues that have been raised
22 are such that causes me to sever this case, and
23 there will be no mention of the prior dealings.

24 MR. BOGGS: Not even as to his knowledge,
25 specific knowledge, of the defendant's prior

1 distribution of marijuana?

2 THE COURT: Once again, that gets into Mr.
3 Harris' defense. And while I understand what you
4 are saying, that's not something the State could
5 use. It's not something that I'm going to allow you
6 to use. And so, no, sir, that's not coming in.

7 You do object to that, don't you, Mr. Harris?
8 Isn't that what you told me?

9 MR. HARRIS: I stated any mention of my
10 client's prior arrest record, any attempt in any
11 form that I can -- that could be imagined to place
12 my client's character at issue, I have to object to
13 it.

14 THE COURT: Yes.

15 MR. BOGGS: Your Honor, that's the foundation
16 of my client's defense. So in so ruling, you are
17 denying my client an opportunity to a fair trial.

18 THE COURT: Well, are you going to be able to
19 get it in in a separate trial?

20 MR. BOGGS: If he's not on trial, I should be
21 able to.

22 THE COURT: Mr. Wall?

23 MR. WALL: Your Honor, again, we would object
24 to that. We wouldn't think that that's proper. We
25 would think that that's really just improper and

1 irrelevant material for the --

2 THE COURT: Will you be able to tell the State
3 Supreme Court that, if you go down there?

4 MR. WALL: Sir?

5 THE COURT: Will you be able to tell the State
6 Supreme Court that, if you go down there, arguing
7 such a case?

8 MR. WALL: Yes, sir.

9 THE COURT: All right.

10 We are ready to proceed then.

11 MR. BOGGS: Your Honor, if I may. I'm sorry --

12 THE COURT: Well, now, you know, please
13 understand I have ruled on this issue. If you want
14 to keep arguing it, I think that I have given you
15 ample time to argue it. If you got something new to
16 argue, I would be glad to hear from you.

17 MR. BOGGS: Your Honor, I guess I'm asking for
18 an advisory opinion as to potential evidence or
19 potential testimony and my client. I mean, if --
20 suppose my client, or a witness, testifies that he
21 has bought marijuana from Mr. Gonzales before, you
22 are saying that will not be allowed to come in?

23 THE COURT: That's correct.

24 MR. BOGGS: Even though it goes directly to the
25 knowledge my client may have had of what particular

1 drug was allegedly being trafficked, which is a
2 requirement the State has to prove? So it's giving
3 my client no way to defend himself. I mean, I'm
4 sorry, I just --

5 THE COURT: All right. I've heard that. You
6 address that and I'm going to rule it.

7 MR. BOGGS: Yes, sir.

8 THE COURT: Because I think I have ruled, but I
9 want to you address it, Mr. Wall.

10 MR. WALL: Again, I don't believe that he would
11 be allowed to go into that. I don't believe that
12 that would exclude his guilt.

13 I would add for the record, Your Honor, the
14 substance that we are dealing with in this case is a
15 one pound package of methamphetamine. I could show
16 it to the court, if the court would like to see it.
17 In no way could it be confused for a trafficking
18 amount of marijuana, because we are talking about
19 the one pound that -- the substance weighs one pound
20 and it's a very tightly compressed substance.

21 THE COURT: Yes, sir, I understand.

22 MR. BOGGS: He just made my point, judge.
23 There is no way my client could have known what was
24 going on, based on his prior dealings with this
25 gentleman. And I'm -- I apologize, Your Honor. I

1 just -- you are denying -- I mean, your ruling
2 denies me a defense. And I understand your ruling
3 based on the cases as the case as you see it, but --

4 THE COURT: Well, sir, then that's a good
5 reason to take it to Columbia, if your man gets
6 convicted.

7 MR. BOGGS: Yes, sir. Thank you.

8 THE COURT: All right. Are we ready to
9 proceed?

10 MR. WALL: I think they have some pretrial
11 motions.

12 MR. HARRIS: If it please the court, Your
13 Honor, the Defendant Gonzales would like to present
14 pretrial motions at this time.

15 THE COURT: Let me ask you this. How long are
16 these pretrial motions going to take, because if
17 they are going to take a period of time, I don't
18 want the jury sitting back there. I can bring them
19 back this afternoon, and that's a fault that we have
20 in our system when you want to do all these things.

21 MR. WALL: Yes, sir.

22 THE COURT: Give me some time, gentlemen.

23 MR. WALL: That might be --

24 MR. HARRIS: It certainly would take no more
25 than an hour.

1 THE COURT: We will bring them back at 2:30.

2 MR. HARRIS: Might even take less time than
3 that.

4 THE COURT: Well -- but, you know, every time
5 somebody tells me that, it winds up being two hours.
6 So, you know, I'm not getting into that. We will
7 bring them back at 2:30. Y'all can wait rather than
8 them.

9 MR. BOGGS: Judge, if you recall, I wanted to
10 make these motions last Thursday, but Mr. Wall
11 informed me that he wouldn't be calling this case.
12 And that's -- and, Your Honor, I would ask that you
13 rule on my motion for a continuance on the record.
14 I understand what the ruling is going to be, but --

15 THE COURT: Well, Mr. Boggs, if you will give
16 me some other reason, other than the fact that it's
17 only fifty days old. Are you telling me you are not
18 prepared?

19 MR. BOGGS: Your Honor, quite honestly, yes.
20 In light of your ruling, I am not prepared. And
21 Your Honor --

22 THE COURT: Well, how long have you been
23 planning on arguing this motion, because you came to
24 see me about arguing a motion about two or three
25 weeks ago.

1 MR. BOGGS: Your Honor, it was just last week.
2 It was last Monday.

3 THE COURT: Well, that's a long time in my
4 life.

5 MR. BOGGS: Yes, sir Your Honor. And if you
6 recall, I came back there and told you that we
7 didn't need to argue the --

8 THE COURT: Well, sir, let me -- and let's get
9 something else straight. From now on we are going
10 to start doing things on the record.

11 MR. BOGGS: Yes, sir.

12 THE COURT: We are not coming back to chambers
13 to deliver messages, because what I'm doing is I'm
14 trying to -- all I'm trying to do is schedule.

15 MR. BOGGS: Yes, sir.

16 THE COURT: And if you can't work something out
17 with Mr. Wall, then y'all can come in here at any
18 time and we will put it on the record.

19 MR. BOGGS: Yes, sir, Your Honor.

20 THE COURT: Please don't try to put me in the
21 position of, you know, it's Mr. Wall or it's the
22 judge, because I'm here. I was here Friday
23 afternoon and we finished at one o'clock. We could
24 have done it then. So if you are telling me that
25 you are not prepared, and give me the very good

1 reasons other than you didn't anticipate this,
2 because I think you could anticipate that a judge
3 might rule this way. I mean, it's within the realm
4 of possibility, Mr. Boggs.

5 MR. BOGGS: Yes, sir, Your Honor.

6 THE COURT: So give me some other reasons that
7 you are not prepared.

8 MR. BOGGS: Your Honor, I'm prepared to go to
9 trial.

10 THE COURT: All right. Now, let's get into our
11 motions.

12 MR. HARRIS: If it please the court, Your
13 Honor, on behalf of Defendant Gonzales, the first
14 motion goes to the beginning portion, and that only,
15 about thirty seconds worth, of two audio recordings
16 are purportedly telephone conversations between the
17 paid informant and Mr. Gonzales.

18 At the beginning of the telephone recording
19 that begins at 1358 on the subject date, a paid
20 informant phones up a certain telephone number and a
21 female voice answers and a female voice is heard in
22 a fashion saying things that could be construed as
23 identifying my client as the person that's being
24 called. It is -- I have looked at a witness list
25 and I have talked to Mr. Wall about this and it's my

1 understanding that -- and, likewise, the phone call
2 at 1410 is a similar scenario, the very beginning of
3 the tape. I object to the female voice being heard
4 on the tape, because that voice -- and I think it's
5 two different voices, to be honest, have been
6 unidentified. So there is no way that I could
7 cross-examine or even know who to cross-examine, so
8 I'm going to ask that the State start the tape at a
9 point after the female voice is heard on those two
10 recordings.

11 THE COURT: Okay.

12 MR. HARRIS: The 1358 and the 1410 recording.

13 MR. WALL: And the State's position on that,
14 and I think Mr. Harris is talking about the same,
15 where she says a female voice -- the C.I. asks for
16 Mike, or Michael, and the female voice calls out
17 Michael and calls him to the telephone. Our
18 position is to her simply someone asking for Michael
19 and her calling out for Michael is that that is not
20 an assertion by her that would fall under the
21 hearsay rule. She's not making any declarations.
22 She's simply spontaneously then asked for Michael
23 and she's calling out for him, and we would -- we
24 would argue that that's admissible.

25 MR. HARRIS: Your Honor, well, it's clearly

1 hearsay and there is an identification issue in this
2 case.

3 I am aware from discovery that the State has
4 actually had a search warrant issued to the phone
5 company for telephone records for this phone number
6 that was called and have gotten those records. It
7 is my understanding that the State is going to --
8 wants to have the female voice on the tape for the
9 purpose of asserting that that is an identification,
10 and that's -- and these persons - I think it's more
11 than one person - are unidentified. They are not
12 going to be witnesses at this trial. My client
13 would have no opportunity to confront those
14 witnesses and cross-examine them, and I don't know
15 of any hearsay exception to that. It certainly --
16 it does not matter what the intent of the hearsay
17 declarant is. It matters what the intended use of
18 the hearsay is by the State, and certainly they
19 intend to introduce that evidence for the truth of
20 the matter that this is Michael Gonzales they
21 called.

22 THE COURT: Anything else, Mr. Wall?

23 MR. WALL: No, sir.

24 MR. BOGGS: Your Honor, the only thing I would
25 add is that we would object to suppressing that

1 particular portion of the call. And, Your Honor, I
2 guess along the lines of the phone records or the
3 phone calls, I would ask that if Mr. Wall intends to
4 put into evidence the phone records, which were part
5 of the discovery, and that's just along those lines.

6 THE COURT: Well, Mr. Wall, you say that you
7 think that -- are you telling me that this should
8 come in under Rule 803 in some way?

9 MR. WALL: Your Honor, the possible way that it
10 would come in, insofar as an exception, and I would
11 freely admit that this may be a square peg in a
12 round hole, but it is the present-sense impression.
13 And and the reason that I think that is because it's
14 much like a present-sense impression, if you see --
15 I see a blue car driving down the road and they are
16 saying that as they see it, that she is
17 spontaneously responding to a present-sense
18 impression; that is, that she is being asked for
19 Michael and she's calling and she's saying "Michael,
20 come to the phone." And I believe that that has the
21 same type indicia of reliability that a
22 present-sense impression does, because it's really
23 just a spontaneous statement on her part of
24 something she's presently sensing and that there is --
25 there is no reason to believe that this is

1 unreliable in any way and that this is in any way
2 conjured up on the female's part. I think to
3 believe that you would have to assume that she knew
4 she was being taped, that this was all part of an
5 undercover operation. There is no evidence
6 indicating that at all.

7 THE COURT: Anything else, Mr. Harris or Mr.
8 Boggs?

9 MR. HARRIS: No, Your Honor. I would just say
10 that the probative value of this is far outweighed
11 by the prejudice.

12 MR. BOGGS: No, Your Honor; that's to say we
13 want it in. I just -- if we are just dealing with
14 that particular issue, I do have concerns about the
15 phone record. I didn't know if that was coming in
16 or not, or if there was anything to do with that.

17 THE COURT: I think that under 803(1) we talk
18 about hearsay exceptions, the following are not
19 excluded by 802:

20 The availability of the declarant is really
21 immaterial, that being a present-sense impression,
22 that a description or explanation of the event made
23 while perceived by a declarant or immediately
24 thereafter.

25 I'm going to allow it to be admitted under that

1 square-peg round-hole theory that you have
2 presented.

3 MR. WALL: Thank you, Your Honor.

4 MR. HARRIS: Your Honor, the next matter for
5 the court's consideration is the efficacy of an
6 identification procedure.

7 What happened, Your Honor, is that -- from my
8 investigation, is that a paid informant approached
9 members the Spartanburg County sheriff's department
10 with information about my client. Based on that
11 information, an undercover investigation was
12 launched that culminated in an attempted buy-bust of
13 Mr. Gonzales.

14 Apparently the primary investigating officer --
15 or the undercover -- the police undercover
16 operative, investigator Deffenbaugh, who was working
17 in conjunction with the paid informant, were to have
18 had a meeting, a prearranged meeting, with Mr.
19 Gonzales in Spartanburg County. Prior to that
20 meeting, Investigator Deffenbaugh was shown a
21 photograph, which still has not been made clear to
22 me, but I have reason to believe it is a mug shot
23 type photograph of Mr. Gonzales, because
24 Investigator Deffenbaugh didn't know what Mr.
25 Gonzales looked like. Mr. Gonzales then arrives at

1 the location, along with -- purportedly along with
2 Defendant Shelhamer. Whatever transpired did
3 transpire. Apparently Mr. Shelhamer handed the
4 package of drugs to Investigator Deffenbaugh, at
5 which point Investigator Deffenbaugh gave a verbal
6 cue for the entire takedown team to come in and
7 they, according to what I heard on the tape,
8 definitely came in in a fury. It is alleged that my
9 client fled the scene. And apparently -- well, was
10 not -- was not found or located until I arranged to
11 have him turned into custody a few days later.

12 At some point after that Investigator
13 Deffenbaugh was asked to view a six-man photographic
14 array for the purpose of making an identification of
15 the individual. Well -- and it's not plain to me
16 what he was asked to do, but he made an
17 identification of what turned out to be Mr. Gonzales
18 from the six-person photo array. It is my
19 understanding that at this trial Investigator
20 Deffenbaugh will be asked to make an in-court
21 identification of my client.

22 I move at this time to suppress any attempted
23 in-court identification of Mr. Gonzales, because the
24 out-of-court identification procedure was
25 impermissibly suggestive. And I think, classically

1 so, when you show them a picture and say this is the
2 person and then say later in a six-person photo
3 identify the same photograph. So we would move to
4 suppress the in-court -- the attempted in-court
5 identification, and to further suppress the
6 impermissible out-of-court identification.

7 I have, and I would like to mark as an exhibit,
8 the six-person photo array that's in question, if I
9 could hand that up.

10 THE COURT: Yes.

11 (Six-Person Photo Lineup marked as Court's
12 Exhibit No. 1 for identification)

13 MR. HARRIS: Thank you, Your Honor.

14 THE COURT: Mr. Wall.

15 MR. WALL: Your Honor, we have Officer
16 Deffenbaugh here and we can take testimony from him,
17 if necessary.

18 Our position would be that, yes, he was shown a
19 photo of the target as a part of a procedure that
20 they would normally do when running undercover
21 operation, that this was meant to be a buy-bust at
22 the location. So, as a result, he was, and I
23 believe the testimony would be that they commonly
24 are shown the person so they know who the target is
25 and who they are supposed to be dealing with, and he

1 saw that photo.

2 The events transpired much as Mr. Harris
3 described them. There was some communication face
4 to face between Officer Deffenbaugh and Mr.
5 Gonzales. Officer Deffenbaugh could testify to the
6 particulars of that, regarding his ability to see
7 him, and his closeness, proximity to him, and so
8 forth. And as a result I believe that an in-court
9 identification should be allowed, taking the
10 totality of the circumstances and looking at Officer
11 Deffenbaugh's defenses training, the fact that his
12 purpose for being there was to be an undercover
13 officer in an operation targeted at Michael
14 Gonzales. And so naturally he was shown the
15 target's photo. He was not merely a witness in a
16 grocery store when a robbery occurs that didn't know
17 that they needed to be a witness, that they were
18 preparing to be a witness. He knew from the onset
19 that to pay attention to particulars and to look, to
20 be able to identify individuals, and as a result is
21 able to identify Michael Gonzales.

22 THE COURT: All right. Well, let's go ahead
23 and take that testimony.

24 MR. WALL: Yes, sir.

25 Call Jake Deffenbaugh.

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

35

1 OFFICER JACOB DEFFENBAUGH, having been first
2 duly sworn, testified as follows:

3 THE COURT: Please state your name for the
4 record, sir, and spell your last name.

5 THE WITNESS: Jacob Edward Deffenbaugh,
6 D-e-f-f-e-n-b-a-u-g-h.

7 MR. WALL: Thank you, Your Honor.

8 DIRECT EXAMINATION BY MR. WALL:

9 Q You are employed with the Spartanburg County
10 narcotics, is that correct?

11 A Yes, sir.

12 Q And you were the undercover officer in this
13 case --

14 A Yes, sir.

15 Q -- involving Michael Gonzales and Josh
16 Shelhamer?

17 A Yes, sir.

18 Q When did you first see a photo of Michael
19 Gonzales?

20 A Prior to June 3rd?

21 Q Yes, prior to this incident date.

22 A Prior to this incident date, roughly four
23 months prior.

24 THE COURT: Could you slide up a little bit
25 closer to that microphone, please.

1 A Three to four months prior. I can't be exact,
2 sir.

3 BY MR. WALL:

4 Q What was that involving?

5 A An investigation the Spartanburg County
6 narcotics unit was conducting in coordination with
7 the DEA.

8 Q That's the marijuana case, right?

9 A Yes, sir.

10 Q The jury is not here, so don't worry about it.
11 Now, as we get closer to this actual operation,
12 were you shown the photo again?

13 A Yes, sir.

14 Q And when did you see the photo?

15 A That day.

16 Q That day?

17 A Yes, sir.

18 Q And was that as a -- let me back up for a
19 moment.

20 When y'all plan an undercover operation like
21 this, is there a plan? I mean --

22 A Yes, sir we have a --

23 Q -- do you have a team meeting?

24 A We have a raid plan which is written and also
25 drawn on a board inside of our office.

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

37

1 Q Does that include photos of targets?

2 A Yes, sir.

3 Q And was there a photo of this person?

4 A Yes, sir.

5 Q And did you see that?

6 A Yes, sir.

7 Q And what the purpose of you being shown that as
8 the undercover person?

9 A Just to refresh my memory as to who the target
10 is, just so everybody knows that there may be
11 subjects involved and that takedown teams that have
12 no prior knowledge of the suspect. So everybody is
13 shown a picture of the suspect as a precaution or
14 anticipatory of the takedown.

15 Q So you are able to identify who you are dealing
16 with?

17 A Yes, sir.

18 Q Is that --

19 A Yes, sir.

20 Q And as a part of the takedown and rest of the
21 operation?

22 A Yes, sir.

23 Q Did that occur in this case?

24 A Yes, sir.

25 Q Now, getting to the actual date, when did you

1 first encounter Michael Gonzales?

2 A As of this operation?

3 Q Yes, sir.

4 A June 3rd? Was approximately -- I have to refer
5 to my notes, if that's okay.

6 Q That's fine.

7 A It was around 1800 hours, which is six o'clock
8 p.m..

9 Q And that's at the incident location?

10 A Yes, sir.

11 Q And just describe for the judge, if you will,
12 how you encountered him and when you first saw him.

13 A As I was sitting in the truck with the
14 informant waiting for Mr. Gonzales to arrive, we
15 noticed his Camaro pull up to the location in the
16 parking lot, to the gas pumps. From that point the
17 operative left the vehicle or the -- went into the
18 store there, which was the Little Cricket, where Mr.
19 Gonzales had also went into. He had a conversation
20 inside the store, which I can't testify to that
21 conversation. I didn't hear that.

22 Q Let me stop you for a minute. Did you see Mr.
23 Gonzales go into the store?

24 A Yes, sir.

25 Q How far were you away from the store?

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

39

1 A Approximately twenty-five feet, maybe.

2 Q Now, did they come out of the store at some
3 point?

4 A Yes, sir.

5 Q And what happened then?

6 A They both returned to -- Mr. Gonzales and the
7 operative returned to Mr. Gonzales' Camaro. From
8 that point I believe Mr. Gonzales was pumping gas
9 and had finished doing that. The operative walked
10 back towards the vehicle that I was sitting in --
11 seated in. And as he was walking, he said that --
12 he asked me if I wanted to see the stuff. I said
13 yeah. He told me Mike was going to pull his car
14 over. From that point he pulled his car directly
15 next to the spot in which our vehicle was sitting.

16 Q So the cars were side by side?

17 A Yes, sir.

18 Q Does Mr. Gonzales get out of the car?

19 A Yes, sir.

20 Q And did you get out of the truck?

21 A Yes, sir.

22 Q What contact did you have with him at that
23 point?

24 A I was introduced to him, briefly. From that
25 point he walked to an air hose that was located in

1 front of the building and made the statement "I need
2 to look like I'm doing something."

3 Q Were you looking at him during this period of
4 time?

5 A Yes, sir.

6 Q Were y'all having face-to-face contact?

7 A Yes, sir.

8 Q How close were you when y'all were introduced?

9 A Within two feet.

10 Q How close were you when he was at the air hose?

11 A He stretched the hose all the way over to his
12 car, which I don't think it would quite reach his
13 car, so we were within five feet.

14 Q And, again, you were looking at him?

15 A Yes, sir.

16 Q And had --

17 A Conversation with him as well.

18 Q Short conversation with him?

19 A Yes.

20 Q Any contact beyond that?

21 A No, sir, as far as -- we maintained probably a
22 five to six feet separation.

23 Q During the transaction?

24 A During the transaction.

25 Q Did you look at him any more during the -- did

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

41

1 you ask him if you could weigh it?

2 A Yes, sir, I asked specific questions. The
3 first question was "where is the stuff?" And he
4 pointed to Mr. Shelhamer and said "he has it."

5 From there I retrieved it and then again looked
6 at Mr. Gonzales and said "do you mind if I weigh
7 it?" And he said "no, go right ahead."

8 From that point I went to the truck and got a
9 scale that I had, electronic scale. Mr. Gonzales
10 commented on the scale. He said "those are nice,"
11 something to that effect. He was inquiring about
12 the scale. I asked if it was all right if I weighed
13 it inside his car, in which I then weighed the
14 package inside of the Camaro.

15 From there the takedown order was given. I had
16 possession of the package.

17 Q Let me -- each time that you communicated with
18 Mr. Gonzales, were you looking at him?

19 A Yes, sir, directly at him.

20 Q Is part of your police training observing
21 traits of people, observing what they look like?

22 A Yes, sir.

23 Q Do you have any doubt that you can identify
24 Michael Gonzales?

25 A No, sir.

- 1 Q Is he in the courtroom today?
- 2 A Yes, sir.
- 3 Q Could you point to him?
- 4 A Sitting right there.
- 5 Q Were you shown a photo lineup?
- 6 A Yes, sir.
- 7 Q Prior to seeing that photo lineup, were you
- 8 able to -- I mean, were you able to identify Michael
- 9 Gonzales?
- 10 A Yes, sir.
- 11 Q In fact, an arrest warrant had already been
- 12 sought?
- 13 A Yes, sir.
- 14 Q This is a basically a followup with the photo
- 15 lineup?
- 16 A Yes, sir.
- 17 Q And I believe -- I show you what's Court's
- 18 Exhibit 1. Is this lineup that you were shown?
- 19 A Yes, sir.
- 20 Q Who showed that to you?
- 21 A Investigator Rhett Fox.
- 22 Q What were you asked to do?
- 23 A Pick out Michael Gonzales from the six
- 24 pictures.
- 25 Q Were you able to do that?

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. HARRIS

43

1 A Yes, sir.

2 Q Now, again, prior to seeing this photo, would
3 you have been able to identify Michael Gonzales?

4 A Yes, sir, through prior investigation.

5 MR. WALL: No further questions, Your Honor.

6 THE COURT: Mr. Harris?

7 CROSS EXAMINATION BY MR. HARRIS:

8 Q So, Investigator Deffenbaugh, the last two
9 answers that you gave, if I am to understand is,
10 that the identification procedure that was utilized
11 when you viewed the photographic array was that your
12 partner, Investigator Fox, showed you a six-person
13 photographic array that's been marked as Court's
14 Exhibit No. 1 and your instructions were to pick out
15 Michael Gonzales?

16 A Yes, sir, to identify him in the lineup.

17 Q Not to identify the individual that fled the
18 scene or that you dealt with at this scene on June
19 3rd, 2002, but to pick out Michael Gonzales?

20 A That was part of it, to pick out Michael
21 Gonzales. He said his name, sir.

22 Q And you are saying that your identification,
23 your ability to identify Michael Gonzales, either
24 through the photo array, or otherwise, was based on,
25 quote, your prior investigation, is that correct?

1 A Yes.

2 Q Which means the viewing of the photos of
3 Michael Gonzales on two separate occasions,
4 including only a short while before the June 3rd,
5 2002 incident, is that correct?

6 A Yes, sir, I have seen his picture prior to June
7 3rd.

8 Q And that photograph, was that a mug shot type
9 identification photograph?

10 A Yes, sir, it was.

11 Q With identifying information on it, including a
12 photograph?

13 A Yes, sir.

14 Q And the mug shot profile form, I think is what
15 you all call it, is that right?

16 A Something to that effect, sir.

17 Q It has -- its a letter-sized sheet of paper.
18 Do you have it with you today to show?

19 A No, sir, I don't have a picture.

20 Q But it has various identifying characteristics
21 written out of Mr. Gonzales and it has a photograph,
22 is that right?

23 A Yes, sir.

24 Q And is it correct that the photograph that you
25 selected from the six-person photographic array was

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. HARRIS

45

1 the same photograph that you were shown on two
2 previous occasions before actually having any
3 face-to-face contact purportedly with Mr. Gonzales
4 on June 3rd, 2002?

5 A I could see -- the picture I was shown on June
6 3rd was a mug shot taken. I'm not -- we have
7 several mug shots. It just depends upon how many
8 times Mr. Gonzales has been arrested. So I can
9 testify that I have seen a picture, a mug shot
10 picture, of Mr. Gonzales, but I'm not sure if it's
11 the same one, because there are several on the
12 computer back there, several -- if the subject had
13 been arrested two or three times, there are
14 different pictures.

15 Q And is it further correct that when you first
16 saw who you have identified through the photographic
17 array as Mr. Gonzales on June 3rd, 2002, when you
18 first saw him, you made in your own mind an
19 identification of Mr. Gonzales by relying upon the
20 photographs that you have been shown, is that
21 correct?

22 A Yes, sir.

23 Q Now, if it is true that you had ample
24 opportunity to make a -- to view Mr. Gonzales and
25 his physical characteristics and make an

1 identification of him outside the photos that you
2 had been shown previously, why was it necessary and
3 why were you asked to make an identification through
4 a photographic array?

5 A That's just procedure that we follow as part of
6 our case file.

7 Q Was there some concern on your part, or on
8 Investigator Fox part, or anyone else, that you
9 could not, in fact, identify Mr. Gonzales as the
10 individual who was present at the scene and fled?

11 A Not that I'm aware of, sir.

12 Q But you have never been asked to identify
13 Michael Gonzales -- to identify the individual who
14 was present at the scene and fled? You have only
15 been asked to identify Mr. Gonzales by pick out the
16 picture of Mr. Gonzales, is that right?

17 A Pertaining to the person who was at the scene,
18 who fled the scene, yes, sir.

19 Q And, of course, any identification that you
20 would make now would, of course, include the
21 knowledge of the physical characteristics of Mr.
22 Gonzales as you gained knowledge of those
23 characteristics of reviewing the photographs?

24 A Could you repeat the question, sir?

25 Q Any identification that you could make now

OFFICER JACOB DEFFENBAUGH - REDIRECT BY MR. WALL

47

1 would necessarily involve a reliance upon the
2 physical characteristics that you observed in
3 viewing the photographs, is that correct?

4 A I'm not quite sure I understand that.

5 Q Thank you, sir.

6 MR. HARRIS: No further questions.

7 THE COURT: Anything else?

8 REDIRECT EXAMINATION BY MR. WALL:

9 Q Independent of any photos that you have seen,
10 are you able to identify the person that was with
11 Mr. Shelhamer at the incident location?

12 A Yes, sir.

13 Q Are you able to identify him in this courtroom?

14 A Yes, sir.

15 MR. HARRIS: Your Honor, I have to at this
16 point interpose an objection, even in an in-camera
17 hearing, if what we are getting ready to have is a
18 show-up identification of the individual who fled
19 the scene right here in this courtroom. I feel like
20 I have to do that to protect my client's rights.

21 THE COURT: Do you want to be heard on that?

22 MR. WALL: Well, Your Honor, we -- the purpose
23 of the State doing that was to merely, I believe,
24 have Mr. Deffenbaugh, Officer Deffenbaugh, point out
25 that he can identify the subject who ran from the

1 scene. I was fearful that we had gotten caught up
2 in calling him Michael Gonzales and having him
3 identify Michael Gonzales, and I wanted to point out
4 that in addition to identifying Michael Gonzales, he
5 can also identify the person who ran from the scene,
6 who is the same person.

7 THE COURT: Well, do you want to lay some more
8 foundation for that as to how he's able to do that?

9 Note your objection and it's sustained at this
10 point in time.

11 MR. WALL: Yes, sir, and to be sure I'm not
12 wasting the court's time, much of the foundation I
13 would seek to lay would be what I asked Officer
14 Deffenbaugh about his proximity and so forth. Would
15 the court like for me to do that?

16 THE COURT: Well, I understand that part, but I
17 think that we need to get to the issue as to how he
18 can make that identification, the one that you are --
19 if you need to go through all that again, fine, but
20 I think just for him to all of the sudden bounce up
21 and make the identification, I think that there
22 needs to be some more foundation for it.

23 MR. WALL: Yes, sir.

24 BY MR. WALL:

25 Q Officer Deffenbaugh, at the location, you were

OFFICER JACOB DEFFENBAUGH - REDIRECT BY MR. WALL

49

1 there with the C.I. correct?

2 A Yes, sir.

3 Q The Camaro pulled up?

4 A Yes, sir.

5 Q How many people were in that Camaro?

6 A Two.

7 Q Did you see both of those individuals?

8 A Yes.

9 Q How close did you get in proximity to those
10 individuals?

11 A Within two feet of both subjects.

12 Q Were you having face-to-face contact with them
13 at that time?

14 A Yes, sir, at certain times. Face-to-face
15 contact?

16 Q Yeah. I mean at different times?

17 A Yes, sir.

18 Q Are you able to describe them in terms of their
19 race or their ethnicity?

20 A Yes, sir.

21 Q Please do that, if you can.

22 A One subject, Michael Gonzales, Hispanic male.
23 The other, Shelhamer, is a white male.

24 Q Was Mr. Gonzales seated or standing when you
25 observed him?

- 1 A To which time, sir?
- 2 Q At the incident location.
- 3 A He was seated and standing.
- 4 Q So --
- 5 A Both.
- 6 Q -- you observed him both different ways?
- 7 A Yes, sir.
- 8 Q What occurred once the takedown team came in?
- 9 A Mr. Gonzales fled the scene past the store
- 10 behind the -- running adjacent to the store, back
- 11 behind the store and into the woods.
- 12 Mr. Shelhamer was still seated within the
- 13 vehicle, the Camaro.
- 14 Q When did you see the Hispanic male flee?
- 15 A As soon as the vehicles arrived to affect the
- 16 buy-bust.
- 17 Q Was there anyone else involved in this
- 18 transaction? Now, I know that you had other
- 19 officers involved in terms of the takedown team, but
- 20 were there any other suspects involved?
- 21 A Just Mr. Gonzales and Mr. Shelhamer. That's
- 22 it.
- 23 Q And were you able to -- would you be able to
- 24 identify or describe other characteristics regarding
- 25 the Hispanic male?

OFFICER JACOB DEFFENBAUGH - REDIRECT BY MR. WALL

51

1 A A little darker complexion, brown hair.

2 MR. HARRIS: Your Honor, at this point -- I'm
3 sorry, at this point I have to object because the
4 reason is this. The witness is looking at the
5 subject that he is seeking to identify and being
6 asked to say what are the characteristics that you
7 used, and that's my whole point same with the --

8 THE COURT: The objection is overruled then.

9 MR. HARRIS: All right.

10 THE COURT: It would have been a good way to
11 have cured that.

12 Continue.

13 A Dark brown blackish hair. Brown eyes, dark
14 complexion. Approximately 5'6", maybe 5'7". I
15 would guess 160, 65 pounds, to the best of my
16 knowledge at the time.

17 Mr. Shelhamer had long brown hair. He's a
18 white male. He was seated in the vehicle the whole
19 time. I believe he might be 5'9", 5'10", 150 pounds
20 maybe, 145 pounds, somewhere around there. I'm not
21 exactly. If I had to guess.

22 BY MR. WALL:

23 Q What would you place the age at of the Hispanic
24 male?

25 A Twenty years, or younger.

1 Q Are you able to, based on those observations,
2 identify that Hispanic male today?

3 A Yes, sir.

4 Q And is he in the courtroom?

5 A Yes, he is, sir.

6 Q Could you identify him, please?

7 A Seated right there.

8 MR. HARRIS: I object.

9 THE COURT: I think we have already gone
10 through this, haven't we?

11 MR. WALL: I apologize. I thought --

12 THE COURT: I was looking at the other
13 identification.

14 MR. WALL: I apologize, Your Honor. I missed
15 that entirely.

16 THE COURT: You know, I mean, we have gone
17 through that one time. You know, let's get to the
18 other.

19 I note your objection. It is overruled.

20 MR. WALL: You want me to go through the lineup
21 identification?

22 THE COURT: Well, I want you to get to the
23 point to where you presented your case, and then I
24 could make a determination after their showing as to --
25 you know, either -- you know, we will be able to --

1 I understand that he's identified this man. I
2 thought that you were working toward another
3 identification.

4 MR. WALL: No, sir. No, sir.

5 THE COURT: Okay.

6 MR. WALL: I apologize, Your Honor.

7 I don't believe there is any motion as to Mr.
8 Shelhamer's side of the case.

9 MR. BOGGS: No, Your Honor.

10 THE COURT: But I thought that was Mr. Harris'
11 objection to another man. Was that it?

12 MR. HARRIS: No.

13 THE COURT: Maybe I misunderstood.

14 MR. HARRIS: Actually I was objecting at that
15 point, because what was getting ready to happen was
16 a further and separate identification procedure, in
17 essence.

18 THE COURT: I got you.

19 MR. HARRIS: The only -- I guess my argument
20 would be the only -- now we know from the witness'
21 testimony the only identification that's been made
22 is he's been asked to identify Michael Gonzales'
23 picture.

24 MR. HARRIS: Uh-huh.

25 THE COURT: He's never been.

1 MR. HARRIS: He's never been asked to identify
2 the individual that fled from his scene, by his own
3 words. And, of course, I would resist what is
4 tantamount to another impermissible identification
5 procedure for that individual that fled the scene.

6 THE COURT: All right. Anything further, Mr.
7 Wall?

8 MR. WALL: No, Your Honor.

9 THE COURT: Do you have any questions of this
10 man?

11 MR. HARRIS: Oh, no, sir, not on this issue.

12 THE COURT: You can step down.

13 MR. HARRIS: Your Honor, I guess then to sum up
14 the argument, the objection has been made to any
15 attempted in-court identification of Mr. Gonzales as
16 the individual who fled the scene and who
17 participated on June 3rd, 2002, and further to
18 suppress the impermissible and unduly suggestive
19 out-of-court identifications by Investigator
20 Deffenbaugh of Mr. Gonzales. The reason being that --
21 I think there is no question that two separate
22 occasions prior to the attempted photographic array
23 identification. The cardinal rule of identification
24 procedure was basically breached by showing a
25 photograph that identified in every respect Mr.

1 Gonzales. Then a witness, although having described
2 some brief encounter with an individual at the
3 scene, is later asked, for purposes we don't -- I
4 guess just procedure, to make an identification, but
5 the identification was made was simply pick out Mr.
6 Gonzales, not pick out the individual who was
7 allegedly the perpetrator of the crime that fled the
8 scene. For all of those reasons I believe that the
9 identifications should be suppressed and any
10 in-court identification not be permitted.

11 THE COURT: Solicitor?

12 MR. WALL: Your Honor, I would state first that
13 we're not relying on, or necessarily relying on, the
14 lineup in terms of identification. It's true that
15 Officer Deffenbaugh saw the photo on at least two
16 occasions. One related to the marijuana
17 investigation from months earlier and one related to
18 the raid plan as to the operation that was going to
19 occur on June 3rd.

20 This would, I think -- Your Honor, if it were a
21 different type case, if you were showing a photo to
22 a victim of a robbery and you said, okay, here is a
23 single photo, now can you identify him, that
24 certainly would be a different case than what we
25 have here. But from the very beginning Michael

1 Gonzales was named as the party. They knew from
2 their operational plan his name, and it is only
3 natural that the undercover officer would be shown
4 his photo and know who he is dealing with.

5 So to step back -- to ask Officer Deffenbaugh
6 to step back and pretend that he doesn't know
7 Michael Gonzales, his photo, and know him by name, I
8 don't believe would be proper.

9 I think that Officer Deffenbaugh, as he has
10 testified, saw those photos for purposes of
11 identifying the target in terms of the operation and
12 for safety reasons. He was able to do that. He has
13 testified as to the description, testified as to the
14 face-to-face contact he had with him and
15 conversations he had with him.

16 All along, Your Honor, I would point out all
17 during that time part of his job in training is to
18 observe who he's dealing with and certainly observe
19 the target and he can identify that person. He
20 testified that he could identify that person
21 independent and prior to the lineup that he was
22 shown. So I would argue any suggestive nature of
23 the lineup would not necessarily apply, because he
24 could have, as he testified, identify him based on
25 prior information he had and contact he had

1 regarding Mr. Gonzales.

2 THE COURT: Anything else, Mr. Harris?

3 MR. HARRIS: No, Your Honor.

4 THE COURT: Well, I think that the issue that's
5 presented here is one that is unique in regards to
6 the issues that we normally are involved in in
7 identification matters. Normally it's an
8 identification where you have a non-governmental
9 witness that's making some type of an identification
10 and they are making that from photographs that have
11 been prepared -- or a photographic lineup that's
12 been prepared by the police and presented to them to
13 see if they could pick out someone in this regard.

14 I believe that the issues to be addressed are
15 still those that are contained in Mason
16 v. Braithwait, which is 432 U.S. 98, 97 S.Ct. 2243,
17 53 L.Ed.2, 140, a 1977 case, and then the State
18 v. Moore, 343 S.C. 282, 540 S.E. 2d 445, a 2000
19 case.

20 And in evaluating the identification, in
21 looking at the two-step process or the two-step
22 procedures was "out-of-court identification process
23 unduly suggestive. If so, was the identification
24 nevertheless so reliable that no substantial
25 likelihood of misidentification existed." That's

1 quoting from State v. Moore. "and reliability is
2 the linchpin in determining the admissibility of the
3 identification testimony. And the factors to
4 determine that are the witness' opportunity to view
5 the criminal at the time of the crime;

6 "The witness' degree of attention;

7 "The accuracy of the prior description of the
8 criminal of the witness' level of certainty at the
9 confrontation;

10 "And the time between the confrontation of the
11 crime."

12 And that also cites Neal v. Biggers, 409 U.S.
13 188, 93 S.Ct. 375, 34 L.Ed.2d 401, a 1972 case, and
14 then, once again, State v. Moore.

15 "And against these factors must be weighed the
16 corrupting effect of unnecessarily suggestive
17 procedure."

18 And I think that the way that I view this
19 particular instance, when police are conducting an
20 investigation, certain information comes to their
21 attention and they are trained in a different way as
22 to what to look for and the things that they are to
23 observe. And I believe that the issues that are
24 presented here, that certainly this officer had seen
25 this individual's photograph previously, at least on

1 two prior occasions, and then he was thrust into the
2 position of being involved in this buy-bust and from
3 there made an identification.

4 I think that the photo lineup in and of itself,
5 the way that it was presented when you are to pick
6 out Michael Gonzales, that that's done to a
7 nongovernmental witness would be one that would
8 suggest -- be suggestive and create problems for
9 admissibility, but I think that the issues that have
10 been presented here are such that this gentleman,
11 number one, knew from the photograph whom he was
12 looking for; at the confrontation thereafter made
13 the positive identification. And, as such, I find
14 that they are reliable under our case law, and, as
15 such, the motion to suppress is denied.

16 MR. HARRIS: Your Honor, there is one more
17 matter.

18 THE COURT: All right, sir.

19 MR. HARRIS: -- from Defendant Gonzales.

20 From my discussions prior to today and from
21 what's been said in court today, I feel that it
22 incumbent to move in limine for the suppression of
23 any evidence that would purport to suggest or
24 directly say that Mr. Gonzales was the, quote,
25 target of an investigation, or any reference such as

1 that that would -- could be deemed to place his
2 character in issue. That's as specific,
3 unfortunately, as I could be about it, but I think
4 the court has gained the sense of this from some of
5 the things that we have discussed today.

6 THE COURT: Yes, sir. All right, sir.

7 MR. BOGGS: Your Honor, if I may be heard first
8 concerning that specific motion, I understand the
9 court's ruling earlier as to my desire to bring up
10 prior bad acts which are not convictions of Mr.
11 Gonzales, but if you rule in Mr. Harris' favor on
12 this new motion, it would seem that I can't even
13 argue or even, I guess, highlight under testimony by
14 the State that my client wasn't the target. And I
15 think that's relevant to my defense, and, therefore,
16 I would have to oppose it, although I understand Mr.
17 Harris' concerns. And I just bring that to the
18 court's attention, because I intend to at least
19 highlight the target part and whose phone was
20 involved, whose car was involved, all of those
21 things.

22 THE COURT: Yes, sir. Solicitor?

23 MR. WALL: Your Honor, we certainly intended to
24 identify Mr. Gonzales as the subject that this
25 investigation began around and that who -- he was

1 the subject of this investigation. If it's
2 semantics, if it's the mere word target, then that
3 that would be an issue certainly that we would be
4 willing to refer to in some other way.

5 The State would like to, of course, if the
6 court permits, would refer to him -- he was the
7 subject of this investigation. Mr. Shelhamer did
8 not become a part of this investigation until he
9 showed up in the car with Mr. Gonzales. So that
10 would be, I think, the only fair way to describe the
11 investigation. As to the particular word target, I
12 obviously leave that, as everything else, with the
13 court.

14 THE COURT: Anything else, Mr. Harris?

15 MR. HARRIS: No, Your Honor.

16 In cases of this type, this often arises, and I
17 don't think that it would hamstring the State's case
18 to simply say, and their witnesses be informed, for
19 instance, if a paid informant testifies, of course,
20 Investigator Deffenbaugh to say on such and such a
21 date we embarked upon a plan to make certain
22 telephone calls to an individual that we identified
23 and I believe as Michael Gonzales for the purpose of
24 attempting to entice him or arrange a drug
25 transaction and then events followed from there. If

1 that is the case, of course, what I'm getting at is
2 for any witness to get up and say because we know
3 Michael Gonzales is a drug dealer, or to imply
4 because of my past dealings I knew that we could
5 call him and get him to do this, that's where the
6 character evidence comes in. That's where the
7 problem comes in.

8 Now, Mr. Boggs, I mean, that's tricky to
9 anticipate anybody's defense, but if he intends to
10 pursue his line of cross-examination of the State's
11 witnesses or present evidence from his client or
12 other witnesses to demonstrate that the police knew,
13 had knowledge, or acting on knowledge of my client's
14 alleged past drug dealing, then that's what this
15 goes to.

16 THE COURT: Well, now, it was my understanding
17 that your motion was simply to -- I think that I
18 have ruled on that issue of prior activity of which
19 there is no conviction, that there are charges
20 pending at this time, that that's not going to come
21 in. But this issue as to whether or not this person
22 is the focus, the target, the subject, I believe
23 that we are getting a little bit beyond that. I
24 have already ruled on that issue. I'm still dealing
25 with the issue that you and Mr. Wall are talking

1 about. Are you trying to expand that somewhat now?

2 MR. HARRIS: Well, no, Your Honor, I think it
3 concerns me when I hear the solicitor say if it's
4 just a matter of semantics. It is not for Mr.
5 Gonzales a matter of semantics, although it
6 certainly includes a matter of semantics, but if
7 there is an attempt to place my client's character
8 in issue by saying directly or implying that my
9 client is a drug dealer, then if that is an
10 expansion of the argument --

11 THE COURT: Let me -- let me interrupt you
12 here. Have you got any case law in this regard?

13 MR. HARRIS: Well, the closest that would come,
14 Your Honor, would be State v. Watts, which I know
15 the court is familiar with, which I think pretty
16 much makes the point. The use of language, such as
17 target, is tantamount to having the effect of
18 placing a criminal defendant's character in issue.
19 But that language can take many forms. I'm bound to
20 ask the court to prevent the introduction of any
21 evidence, including those words, that would tend to
22 imply to the jury that my client is of bad character
23 and that he was acting in conformity with that.

24 The evidence can take so many different forms
25 that it is virtually impossible for a criminal

1 defendant to be able to state at this point in a
2 proceedings specifically what would be over the
3 line, but I get a strong sense here before we
4 impanel a jury and hear any testimony that the State
5 would like to in some form or fashion introduce that
6 evidence and that my co-defendant wants to
7 demonstrate out and out that my client is a drug
8 dealer. Now that he's by prior ruling has been
9 prevented from doing it directly, what he would like
10 to do is cross-examine the State's witnesses to say,
11 you know, y'all were after Michael Gonzales, you
12 were specifically targeting him. The word doesn't
13 have to be used for the implication to have a
14 damaging prejudicial effect. That kind of thing is
15 what I'm talking about with this motion.

16 THE COURT: Give me a cite on that State
17 v. Watts.

18 MR. HARRIS: Your Honor, it's to be found at
19 320 S.C. 377, 465 S.E. 2d.

20 THE COURT: 359.

21 MR. HARRIS: 359.

22 THE COURT: All right, solicitor.

23 MR. WALL: Again, Your Honor, I think the
24 description of the case includes the fact that this
25 was an operation that was launched. Its purpose was

1 to make a trafficking purchase from Michael
2 Gonzales. He was the subject of the investigation.
3 He was the purpose of this particular investigation.
4 All of the telephone calls were made to him. And I
5 think to describe it any other way would be
6 incorrect.

7 I think when asked on cross examination, or on
8 direct examination, to describe this operation, it
9 would have to include the fact that Michael Gonzales
10 was the sole suspect in the investigation. And I
11 think to describe it -- you know, I see Mr. Boggs
12 poised to stand to probably echo what I'm going to
13 say. To characterize it as an investigation that
14 began to include Mr. Shelhamer would simply be
15 false.

16 MR. BOGGS: Judge, I hope that's on tape.

17 THE COURT: Hope what's on tape?

18 MR. BOGGS: I'm sorry, judge, I was just making
19 light of Mr. Wall's statement. But, Your Honor, I
20 intend to ask the confidential informant how he told
21 the police to call Michael Gonzales. Not in terms
22 of, you know, soliciting what Mr. Gonzales prior
23 acts were, but I think I'm entitled to have the jury
24 know that what Mr. Harris is trying to keep out.
25 And, Your Honor, just -- it's for that reason that I

1 made the motion for severance earlier, and -- it's a
2 problem to be avoided on my questioning if I'm not
3 involved in this case. And, Your Honor, I just -- I
4 think my client is entitled for me to ask that
5 question, or something similar to that, from all the
6 prosecution witnesses.

7 MR. HARRIS: Well, I just say briefly then what --

8 THE COURT: How about showing me in that
9 opinion where -- I mean, I know that Judge Houston
10 sustained the objection, but where was that ruled
11 upon by the appellate court?

12 MR. HARRIS: Well, the actual ruling of Watts
13 was that it was unnecessary to rule specifically on
14 the issue which arose in a mistrial context --

15 THE COURT: Yeah.

16 MR. HARRIS: -- because the court found that
17 the questions never went -- and the answers, I
18 guess, never went far enough to create actual
19 prejudice, but the clear implication of the case is
20 that those answers would have created prejudice.
21 The court describes the question as being one of
22 claiming the solicitor placed his character in issue
23 by asking if he was targeted. In essence, the way
24 the court described it, in essence, telling the jury --

25 THE COURT: That was Rob Wise saying that.

1 That wasn't the court saying that, was it?

2 MR. HARRIS: Well, Your Honor, I think clearly
3 the court is agreeing with Mr. Wise that that's
4 exactly the intent of that line of questioning. And
5 had Mr. Wise not been as good a lawyer as he was and
6 as quick on his feet as he apparently was, that
7 trial would have ended in a mistrial for the
8 prejudice that was caused. I'm trying to avoid --

9 THE COURT: And it ended in his client being
10 convicted because of the overwhelming evidence of
11 his guilt anyway, by reading that opinion.

12 MR. HARRIS: Your Honor, that's true, and
13 that's fortunate that they didn't have to retry that
14 case. I'm trying to prevent us from having to retry
15 this one.

16 THE COURT: Well, I appreciate that.

17 MR. HARRIS: I mean -- and I don't say that
18 pejoratively. That's my concern. And I'll just say
19 this. I --

20 THE COURT: Of course, if I got it all right,
21 those people in Columbia would be out of a job
22 anyway, Mr. Harris.

23 MR. HARRIS: That's true, Your Honor. We are
24 thankful to have their guidance now.

25 THE COURT: Well, a lot of times then when it

1 goes onto the State Supreme Court, the Court of
2 Appeals doesn't give you much guidance.

3 MR. HARRIS: I wouldn't argue that point, Your
4 Honor.

5 I would say this. For instance, Mr. Boggs
6 posits the scenario that if the paid informant gets
7 on the stand, that the paid informant would be
8 permitted to describe his past dealings.

9 THE COURT: No, sir, that's not coming in.

10 MR. HARRIS: And that's --

11 THE COURT: You know, I want to make myself
12 clear, Mr. Harris. You don't need to argue that any
13 more. If that comes in, then you will be back here
14 trying this case, because there will be a mistrial.

15 MR. HARRIS: All right.

16 THE COURT: I mean, you know, we won't even
17 have a discussion about it.

18 MR. HARRIS: And I understand that, Your Honor.
19 I guess it may be that I am so extremely concerned
20 that the attempts that my --

21 THE COURT: I mean, you know, I know I look
22 stupid, but I understand that now. You know, I
23 understand where you are going with that.

24 MR. HARRIS: Your Honor, please understand, I'm
25 not implying --

1 THE COURT: And I have already ruled on that.
2 And I'm -- you know, quite frankly I don't need to
3 hear that any more. Unless you got something new to
4 tell me here, I'm on the issue of that target once
5 again, and you keep talking about character, and I'm
6 also reading a --

7 I was looking at another Court of Appeals case
8 involving Mr. Watts, I guess, Judge Floyd and Judge
9 Houston. He had a busy fall down there that year.
10 I was trying to see if there was anything in Judge
11 Floyd's case about Mr. Watts being a target.

12 MR. HARRIS: I'm not familiar with that case.

13 THE COURT: There were two cases of Mr. Watts
14 that were tried within a couple months of each
15 other, I guess.

16 MR. HARRIS: It would be, His Honor Henry
17 Floyd, Your Honor?

18 THE COURT: Yes, sir, and Judge Houston tried
19 the other one.

20 MR. HARRIS: I'm familiar with that case from
21 discussions with Judge Floyd outside of court, but
22 I'm not aware of the specifics of the reported case.

23 Your Honor, thank you for hearing the
24 arguments. I know that the court is aware of my
25 concerns.

1 THE COURT: Well, the other State v. Watts case
2 contained similar issues concerning that character
3 issue. It was just discussed in a different light.

4 I'm going to deny the motion in limine, with
5 the ruling that you can talk about -- I mean, the
6 fact that this gentleman is the object of an
7 investigation, subject, that type of thing, I don't
8 think that that certainly introduces character in
9 any way. It's much the same as if anyone is the
10 subject of any type of an investigation. But I do
11 want to limit everyone's testimony from standpoint,
12 and that goes to the State and Mr. Boggs, that there
13 is to be absolutely no discussion of any prior
14 dealings, prior charges, those types of things.

15 Now, of course, we know that -- you know, in
16 order to present evidence of how you know someone,
17 that limits it, but I think that it's not going to
18 be well, you know, I seen him sell marijuana, or
19 knew that he had sold marijuana, he's been charged
20 with marijuana, those types of things. That's not
21 going to come in. That is very clear.

22 So the motion in limine is denied, but it is
23 granted in accordance with my -- or in accordance
24 with my prior ruling. The testimony is going to be
25 limited strictly to this transaction here that we

1 are in court about.

2 MR. HARRIS: Your Honor, those are all the
3 pretrial matters that the Defendant Gonzales has.

4 THE COURT: Thank you, sir.

5 THE COURT: Mr. Boggs, do you have anything?

6 MR. BOGGS: Yes, sir. Your Honor, may it
7 please the court.

8 THE COURT: And I might add, Mr. Harris, you
9 were correct, it took you about an hour, but now we
10 have got Mr. Boggs to do.

11 MR. BOGGS: Your Honor --

12 THE COURT: And that's the only reason that I
13 wanted to send the jury away.

14 MR. BOGGS: Your Honor, I believe Mr. Harris
15 touched on it earlier, but it was brought up, but it
16 wasn't addressed as to the audio recording of the
17 actual location, incident location I will call it.
18 It was addressed as to the phone call to the
19 residence. I guess my motion is two-fold.

20 One is a motion to suppress the transaction
21 audio, in that it is alleged by the prosecution that
22 my client's voice can be heard. And, Your Honor,
23 quite frankly, at best, that's the conversation or
24 the recording is poor. It's not their fault. It's
25 just the way it is. And, Your Honor, so I don't

1 think that -- absent a linguistic specialist or some
2 sort of breakdown of the actual tape itself, I don't
3 think that the speculation as to what's being said
4 would prove anything, especially when their
5 witnesses are here to testify, Your Honor.

6 And along those lines I had asked earlier
7 whether there was going to be -- I guess it's a
8 motion in limine to determine what the use of the
9 phone records will be and who is going to testify as
10 to such. I see the names of their potential
11 witnesses, but I don't see anyone from the phone
12 company. And, therefore, I want to know if this is --
13 do they intend to use the phone list that was in --
14 or, excuse me, the phone records that were in
15 discovery?

16 And quite frankly, judge, on that particular --
17 it was my -- on that particular issue, it was my
18 understanding that the prosecution had intended to
19 use this to identify the times of their calls. Yet
20 some of the calls and phone numbers identified on
21 the phone record are coded, because they use what's
22 called Star 67, and I know everyone is familiar with
23 that, Your Honor, but I don't know who is going to
24 testify as to how they know [REDACTED] which was the
25 number listed, is the number that comes up for Star

1 67. And absent them having someone here to testify,
2 Your Honor, I guess in retrospect found a reason to
3 ask for -- to reask for a continuance in order to
4 obtain verification of the calls. And, Your Honor --

5 THE COURT: Well, let's see what the State says
6 about what they are going to do with it, Mr. Boggs.

7 MR. BOGGS: Thank you, Your Honor.

8 MR. WALL: Your Honor, we did not -- we are not
9 seeking to put those phone records into evidence.
10 The reason we are not seeking to do that is -- it is
11 a record of calls that were made to a particular
12 telephone number. We were not able to get through
13 the subscriber information the name of the owner of
14 that account or able to identify the particular
15 house that it went to. So as a result all we can do
16 with that information is put it with a telephone
17 number, and we are already doing that. I mean, that
18 could be perhaps anybody's telephone number.

19 The C.I. is going to testify that it's -- that
20 he knows that to be Michael Gonzales' telephone
21 number. He's going to testify that that's Michael
22 Gonzales that he's calling, and so forth and so on,
23 but I don't think that would be any further -- that
24 that really corroborated any more by the records
25 that we have.

1 What I was going to seek to do with the records
2 is ask the case agent, Rhett Fox, simply ask him did
3 he attempt -- did he subpoena phone records and
4 attempt to identify the owner of that account and so
5 forth. And his testimony, I believe, would be,
6 because he and I discussed it earlier, that he did
7 do that and he was unable to -- based on the
8 information that he got back, unable to identify
9 that account. The reason that I would ask him about
10 that would simply be to show that he did make a
11 thorough effort to do so. And so, quite frankly,
12 Mr. Harris wouldn't have the opportunity to say in
13 his closing why didn't they do this. So I had
14 intended to ask him about what they had pursued, but
15 that ultimately that, based on the information that
16 they got, they were not able to identify the owner
17 of that account.

18 MR. BOGGS: I guess my response to that, Your
19 Honor, is that I know that somehow in this -- in the
20 phone system they can be compelled to say whose
21 number this is. And it was my understanding in my
22 conversations with Mr. Wall, and even with the
23 officers, that they had identified this number as
24 being that of either Mr. Gonzales or his residence
25 and maybe his mother, Lucy Santana. And, Your

1 Honor, for that reason I would make a motion for a
2 continuance to allow me to subpoena the records, in
3 that as of Thursday we were not going to trial, but
4 as of 5:09 Thursday we were. And even if I had
5 subpoenaed them on Friday, I don't think that -- if
6 they couldn't have got them in a month, then I know
7 I couldn't have gotten them in a day. And, Your
8 Honor, that's the limited scope of this motion for a
9 continuance at this time.

10 THE COURT: Anything else?

11 MR. HARRIS: I'm satisfied with what Mr. Wall
12 says his intended use of them.

13 MR. BOGGS: I don't think he is, Your Honor,
14 any time.

15 MR. HARRIS: His attempt to get the records, of
16 course, I was aware that they never have been able
17 to put a name and an address with the phone numbers.
18 And -- I mean, I'm certainly satisfied with
19 Investigator Fox getting up and giving that
20 preemptory explanation.

21 THE COURT: All right, sir.

22 Mr. Boggs, anything else?

23 MR. BOGGS: Well, Your Honor, concerning this
24 issue, I feel like each -- each little thing is
25 going to pit me as prosecutor and Ricky as

1 prosecutor, and I know that's the way it works
2 sometimes, but I just feel in this particular issue
3 of the phone, I'm entitled to find out where the
4 calls came from, who was called in response. And,
5 again, this record was identified to me as discovery
6 from Michael Gonzales' file, because I was being
7 given --

8 THE COURT: When did you get that discovery?

9 MR. BOGGS: Sir?

10 THE COURT: When did you get that?

11 MR. BOGGS: Your Honor, I think I picked it up
12 less than two weeks ago. I think it was the Friday --
13 actually it was -- I think maybe it was two weeks
14 ago Friday, July 5th, because it was the day after,
15 I believe, because I came up here and met with their
16 office. And Tommy and I talked about these calls
17 and it was related to me that this was Lucy
18 Santana's or Michael Gonzales' phone records. And
19 it was not until today, Your Honor, that I see that --
20 or I understand that they do not intend to verify
21 that on the record. And again, judge, that's just --
22 I don't know whether -- I can't argue it's undue
23 surprise, but at the same time -- and I don't think
24 that Mr. Wall was trying to --

25 THE COURT: Sandbag you?

1 MR. BOGGS: No, sir, I don't. I mean, I
2 concede that, because he's been very forthright, but
3 at the same time I think he will tell you that when
4 I was over here Thursday morning and I talked to
5 him, they intended to call a different case. And I
6 know things change. But, again, Your Honor keeps
7 referring to the folks in Columbia, and I'm trying
8 to avoid all that together by making sure that all
9 the ducks are in a row the first time around.

10 THE COURT: You know, Mr. Boggs, I really -- I
11 understand and appreciate that, and I like you so
12 much and I hate to keep telling you no. It's kind
13 of like I was over in Greenville for the defense
14 trial lawyers academy a few weeks ago, and one of my
15 old law clerks was trying a case in front of Judge
16 Ross Anderson in a mock trial.

17 MR. BOGGS: Yes, sir.

18 THE COURT: And she said that I don't think
19 that he likes me because he keeps telling me no. I
20 was in another courtroom and I said no, that doesn't
21 have anything to do with it. He likes you. It's
22 just because what are telling him doesn't really
23 appeal to him from the standpoint that it's
24 admissible or an issue.

25 And when I talk about the folks down in

1 Columbia, all of them are my very good friends, and
2 at one time I coveted being one of them, but that's
3 not something that I covet any more. And from that
4 standpoint, I have to deal with the issues that are
5 before me today.

6 MR. BOGGS: Yes, Your Honor.

7 THE COURT: And, you know, I do it in anywhere
8 from thirty seconds, to maybe forty-five minutes, to
9 an hour. Sometimes even less than thirty seconds.

10 From the time that we started talking about
11 this, the issues that you have presented to me have
12 not really changed my mind. I think that the facts
13 that you have raised here certainly -- even if you
14 conducted an investigation of these numbers with the
15 telephone company, I don't know that you would be
16 any more successful than the solicitor's office
17 would be.

18 If you wanted me to sign an order at this time,
19 if you wanted to draft an order directing that the
20 telephone company give you that this afternoon, I
21 would do that and to have them expedite it. But,
22 once again, since the State is not going to use it,
23 it is their burden of proof. You don't have to
24 prove anything. And I know that you and Mr. Harris
25 are going to be there kind of pointing at each

1 other, and I may have to separate y'all before this
2 thing is over and put you at a different little
3 table. I don't think so but --

4 MR. BOGGS: I would prefer that, judge. I want
5 to be as far as possible from him.

6 THE COURT: But I'm going to deny your motion
7 for a continuance on that basis. You know, I
8 certainly don't think that this is anything that is
9 prejudicial. While this case is moving very
10 quickly, I believe that it's something that if you --
11 as I say, if you want to get together an order and
12 get it to the telephone company, I'll sign it today
13 and see if we can get something quicker, but I don't
14 believe that that is something that is relevant to
15 the issues here before us today, from that
16 standpoint.

17 MR. BOGGS: Yes, sir. And, Your Honor, just
18 for the record, I want that information based on the
19 issue of the fact that it's not my client's phone
20 and that the numbers called were not my client.

21 And, Your Honor, as to the -- I know I had a
22 long motion. How about the motion as to the
23 suppression of the audio tape of the scene?

24 THE COURT: I don't believe -- I want you to
25 address that for me.

1 MR. WALL: Your Honor, it is a tape -- as often
2 you know, the body wire tapes are, that is hard to
3 make out at times. You certainly can't make out all
4 of it.

5 Now, the -- I don't think he mentioned the
6 speculation as to the witnesses. I don't think that
7 they would be speculating. They would be speculate --
8 they will be testifying, rather, as to the
9 conversations that they remember. And now whether
10 or not -- so I think quite naturally it might be
11 more detectable to them on a tape than it would be
12 somebody else that wasn't involved in this
13 conversation. I think that it still ultimately goes
14 to what the jury can hear on the tape, and that
15 would be -- you know, they will certainly have that --
16 we would hope have that tape to listen to. So I
17 think the witness would be testifying as to what
18 occurred as to what conversation they believed is on
19 the tape, based on them being in that conversation.
20 But I think that's separate and apart that the jury
21 will make their own independent observation of the
22 evidence, I believe.

23 THE COURT: Motion to suppress is denied. I
24 think that those will be issues of fact to be
25 determined by the triers of fact from the testimony

1 and evidence. If it's like most of these things
2 are, Mr. Boggs, quite frankly, about the only thing
3 that I have heard on a lot of them is dogs barking
4 and cars going by and that kind of thing. So if the
5 quality is any better than that, it will shock me.

6 Anything else, Mr. Boggs?

7 MR. BOGGS: Your Honor, on that tape at the end
8 are several, I guess, expletives, and it's been
9 conceded by the State that those are law enforcement
10 personnel. I just want to see if they are willing
11 to stipulate that such language, which may be
12 offensive to any one juror -- of course, I would
13 hope not, but, I mean, I just would hope -- I guess
14 I'm asking for a ruling or a stipulation from the
15 State that it is the jump-out folks, as they are
16 called, and not any particular defendant, especially
17 mine.

18 THE COURT: Well, isn't that something that you
19 could question the jump-out folks about?

20 MR. BOGGS: Yes, sir. But, again, I don't
21 think that they are here.

22 THE COURT: Well, what do you say about that,
23 Mr. Wall?

24 MR. WALL: Your Honor, Your Honor, the tape at
25 the end has police officers as a part of their

1 takedown. They are the ones using that language. I
2 had planned on, quite frankly, at some point
3 addressing that in opening statement, that there is
4 going to be language that they hear from the C.I.
5 and language that they hear in the tape that may be
6 offensive to them and making some reference.

7 THE COURT: Are you going to say it's from the
8 police officers?

9 MR. WALL: Yes, we can. Yes, sir.

10 MR. BOGGS: Thank you, Your Honor.

11 THE COURT: All right. Anything else, Mr.
12 Boggs?

13 MR. BOGGS: I may think of something over lunch
14 judge. I'll reserve the right.

15 THE COURT: We will be back here.

16 Anything else from the State?

17 MR. WALL: The only -- just very quickly, Your
18 Honor, and it would be in a matter of a nature of a
19 motion in limine. I know in discussions that I have
20 had with Mr. Harris, not necessarily Mr. Boggs, but
21 it would include both of them, in relation to their
22 age. Obviously they are free to mention -- their
23 age will come out, but Mr. Harris, in conversations
24 with me, and I don't know that he would intend to do
25 this in court, makes reference as to him basically

1 being a juvenile and so forth and so on, which, of
2 course, he is not. He's very close. And I would
3 just make -- he's seventeen, I believe. I would
4 make a motion regarding that, to exclude either of
5 them from mentioning the word juvenile I think in
6 any way and from really harping on their age for any
7 particular reason.

8 And then the other motion would be the same as
9 to any reference. And I know they wouldn't do this,
10 but I just want to put this on the record, any
11 reference to the potential sentences, which is a
12 mandatory minimum.

13 THE COURT: Well, sentencing is reserved to the
14 court.

15 MR. WALL: Yes, sir.

16 THE COURT: Mr. Harris?

17 MR. HARRIS: You know, I'm kind of astounded.
18 I can't ask the police what information they have
19 about my client, including his age, when there is a
20 substantial identification issue involved in this
21 case, when they viewed photographs?

22 THE COURT: I'm not --

23 MR. HARRIS: I don't know if I want to harp on --
24 I mean, whether he's a juvenile or not, hopefully
25 the twelve men and women in the jury will understand

1 that somebody is seventeen and they are not
2 forty-seven.

3 THE COURT: Yeah, I think the fact -- that
4 there is no question that they are properly before
5 this court, but insofar -- if they are seventeen or
6 seventy-seven, if they want to discuss that and
7 argue that, they may do so.

8 MR. WALL: Yes, sir.

9 MR. HARRIS: I mean, I would never infer to the
10 jury that the case ought to be tried in another
11 forum, if that's the concern, no.

12 THE COURT: All right. So you are not limited
13 in that regard of -- I mean, you can certainly talk
14 about his age, but this case is properly before this
15 court. So anything beyond that or along those
16 lines, you know, that there is any thought that it
17 is not properly before the court would not be
18 permissible, but anything else you may argue

19 MR. HARRIS: I would say, it may avoid the
20 problem, I don't know if it will. The only way that
21 I could conceive that the issue of the possible
22 punishment that any defendant faces in this case
23 could arise would be if perhaps -- for instance, if
24 Mr. Shelhamer were to decide to take the stand. I
25 don't know what he would say, but it's conceivable,

1 Your Honor, that impeachment evidence would include
2 him saying things to avoid the consequences of the
3 punishment that he faces for his alleged crime. And
4 I wouldn't want to be bound by that. Of course, I
5 don't know what he's going to say, or even if he is
6 going to take the stand, but certainly for me to
7 stand up in front of the jury and say this is
8 trafficking more than 400 grams and carries a
9 mandatory sentence of twenty-five years, of course,
10 I can't say that.

11 THE COURT: We will approach that other issue
12 once we get to it, if the gentleman takes the stand,
13 if we get to that point in the trial.

14 All right. Anything else?

15 MR. WALL: No, sir.

16 THE COURT: Let's be back here about 2:15 and
17 see if there are any other issues to develop and
18 then we will try to get started with picking our
19 jury about 2:30.

20 (Proceedings recessed)

21 (Proceedings reconvened)

22 THE COURT: Are we ready to proceed?

23 MR. HARRIS: Your Honor, may I hand up the
24 proposed voir dire?

25 THE COURT: Yes, sir.

1 All right. Mr. Boggs, I think you had
2 something that you wanted to put on the record, sir?

3 MR. BOGGS: Yes, sir, Your Honor.

4 Your Honor made mention of two cases earlier in
5 denying my motion for severance, Your Honor, and I
6 just as a matter of protecting the record, I want to
7 call the court's attention, if I may, Your Honor --

8 THE COURT: All right.

9 MR. BOGGS: -- to another case, in which
10 severance was again denied, but it was more on
11 point, because it was a trafficking case. It was
12 State v. Castinera.

13 THE COURT: All right.

14 MR. BOGGS: 535 S.E. 2d 449, Your Honor, and
15 essentially in that case, the severance was denied
16 because the defendant did not identify prejudice,
17 Your Honor, so I would call your attention to that.
18 In light of your ruling Your Honor, I just want --
19 I'm just trying to protect myself.

20 THE COURT: All right.

21 MR. BOGGS: And also, Your Honor, in a Fourth
22 Circuit case, United States v. Shuford, which is 454
23 Fed.2d, 772, Your Honor, essentially -- in that,
24 Your Honor, in that case the defendant argued that
25 essentially in forcing him to be tried jointly, that

1 denied him the ability to cross-examine his
2 co-defendant, who may -- or call as a witness, who
3 may invoke his right not to testify. This has been
4 specifically addressed by South Carolina courts in I
5 believe that was State v. Allen, Your Honor, but
6 again, I just ask -- my argument is is that this is
7 specific case with specific facts which would
8 distinguish it from the prior decisions, in light of
9 Your Honor's denial of my motion. I appreciate your
10 allowing me to put that on the record.

11 THE COURT: Thank you, sir.

12 MR. WALL: Your Honor, I would address one
13 matter that I discussed with them just prior to us
14 coming in here. There is a -- as the court knows,
15 there is an audio tape of the telephone calls, as
16 well as an audio tape of the incident itself. The
17 tape that was made was made on a variable speed
18 recorder. As a result, the copy that I got, the
19 copies that the defense got, and, in fact, the
20 original copy has to be played on a smaller recorder
21 that uses a variable adjuster in order to play it.
22 And what officer or Investigator Fox did yesterday
23 is at the -- he went to the sheriff's office and
24 made a copy that is all one speed.

25 What my understanding is, what he did, and he

1 can tell you, if necessary, but my understanding is
2 that he simply made one copy at the same speed. It
3 didn't change or doesn't even have the ability to
4 change the content of the tape, other than -- other
5 than make one copy at the same speed. That would
6 allow us to play it on a larger system as well as
7 avoid the difficulty of adjusting the speed and so
8 forth and going back and forth during the trial.

9 Now, having said that, I mentioned that to Mr.
10 Boggs and Mr. Harris prior to us coming in and I
11 think that they may have some issue with that or may
12 want to hear it, I'm not sure.

13 THE COURT: Okay.

14 MR. HARRIS: Well, Your Honor, it a little hard
15 for me to know issue to actually take with -- I
16 guess what I'm hearing is the defendant has been
17 provided several -- well, an audio tape containing
18 several recorded conversations and a transaction and
19 gleaned from it whatever so much could be gleaned
20 from the form it was given. And now I guess I'm
21 understanding that it's been enhanced, or redone, or
22 something to -- I don't know what effect it has, but
23 obviously --

24 THE COURT: Have you provided them with a copy
25 of it?

1 MR. WALL: No, sir. I just --

2 THE COURT: Well, why was this not -- why was
3 this done today, rather than sometime in the last
4 fifty some days?

5 MR. WALL: Yes, sir, I agree, and it should
6 have been. What I was going to propose -- and I
7 will say it is my understanding it has not been
8 enhanced at all.

9 THE COURT: Well, I understand that, but if
10 they haven't heard it --

11 MR. WALL: Yes, sir.

12 THE COURT: -- then, you know, it gets back to
13 that old thing -- I mean, why did you call this case
14 if you haven't done all this stuff? You know, why
15 weren't they given this earlier today? Why weren't
16 they -- you know, why do you just now do this, Mr.
17 Wall?

18 MR. WALL: Yes, sir, and --

19 THE COURT: That's what frustrates me so much.

20 MR. WALL: And I apologize.

21 MR. HARRIS: Your Honor, I would have to resist
22 the use of the remake.

23 THE COURT: Play the old original version then.

24 MR. WALL: Yes, sir.

25 THE COURT: Once again, that's kind of like

1 these statements coming in that they just remember
2 the day before or that morning. It's not going to
3 happen.

4 MR. WALL: Yes, sir.

5 THE COURT: They made the case. Let them do
6 it.

7 MR. WALL: Yes, sir.

8 THE COURT: Do you have any objection to that,
9 Mr. Boggs?

10 MR. BOGGS: Your Honor, I agree with you one
11 hundred percent.

12 THE COURT: Thank you, sir. I'm glad you and I
13 finally had a meeting of the minds.

14 MR. BOGGS: I agree on that particular issue,
15 Your Honor.

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

18 MR. WALL: No, sir.

19 THE COURT: Mr. Harris?

20 MR. HARRIS: The defendant is prepared for jury
21 selection.

22 THE COURT: Mr. Boggs?

23 MR. BOGGS: Yes, sir, subject to my prior
24 motions.

25 THE COURT: Yes, sir.

1 All right, gentlemen, this being a multiple
2 defendant felony, you will be entitled to ten
3 strikes and y'all twenty.

4 MR. HARRIS: So, in essence, ten, ten, and ten?

5 THE COURT: Yes, sir.

6 All right, let's bring our jury panel around.

7 MR. HARRIS: Your Honor, does the court have a
8 preferred order of striking, other than --

9 THE COURT: We'll go here, here and here, the
10 way that you are seated.

11 MR. BOGGS: Your Honor, can we proceed in that
12 manner throughout the trial?

13 THE COURT: Yes, sir.

14 MR. BOGGS: Yes, sir.

15 THE COURT: Just kind of go around the horn.

16 MR. BOGGS: Thank you, Your Honor.

17 (Whereupon, the Jury Venire Panel was brought
18 into the courtroom)

19 THE COURT: All right, solicitor, call your
20 case, please.

21 MR. WALL: Your Honor, the State calls the
22 cases of the State versus Michael Gonzales for
23 trafficking in methamphetamine and the State versus
24 Josh Shelhamer for trafficking in methamphetamine.

25 THE COURT: Good afternoon to you, ladies and

1 gentlemen of the jury. We're about to begin the
2 trial of the case of the State versus Michael
3 Gonzales and the case of the State versus Steven
4 Josh Shelhamer.

5 Mr. Gonzales is charged in Indictment
6 2002-GS-42-2742, that he did, in Spartanburg County,
7 on or about June 3, 2002, knowingly sell,
8 manufacture, deliver, purchase, or bring into this
9 state, or did provide financial assistance, or
10 otherwise aid, abet, attempt, or conspire to sell
11 manufacture, deliver, purchase, or bring into this
12 state, or did knowingly, actually or constructively
13 possess, or did knowingly attempt to actually or
14 constructively possess more than 400 grams of
15 methamphetamine, a Schedule II controlled substance,
16 in violation of the Section 44-53-375 of the Code of
17 Laws of South Carolina, 1976, as amended.

18 And Mr. Shelhamer is charged in Indictment
19 2002-GS-42-2754, that he did, in Spartanburg County,
20 on or about June 3, 2002, knowingly sell,
21 manufacturing, deliver, purchase, or bring into this
22 state, or did provide financial assistance, or did
23 otherwise aid, abet, attempt, or conspire to sell,
24 manufacture, deliver, purchase, or bring into this
25 state, or did knowingly, actually or constructively

1 possess, or did knowingly attempt to actually or
2 constructively possess more than 400 grams of
3 methamphetamine, a Schedule II controlled substance,
4 in violation of the Section 44-53-375 of the Code of
5 Laws of South Carolina, 1976, as amended.

6 Ladies and gentlemen of the jury, these are
7 charges of trafficking in methamphetamine.

8 And I want you to understand that the
9 indictments from which I have read are merely the
10 mechanism or the vehicle by which these cases are
11 brought into this court. They are not in any sense
12 evidence of any of the allegations which they
13 contain. It is the burden of the State of South
14 Carolina in this, and every criminal case, to prove
15 the facts -- or to prove the elements of the crime
16 with which the defendant is charged beyond a
17 reasonable doubt. And a defendant has absolutely no
18 burden, no responsibility to prove himself innocent.

19 Now, with that bit of introduction, ladies and
20 gentlemen, before we actually seat a jury in this
21 case, there are a number of questions that I will
22 present to you. Once again, if any of these
23 questions do apply to you, I want you to please
24 stand, give me your juror number and allow me to
25 properly identify you for the record, and then I'll

1 continue with my questioning.

2 Now, would the defendant, Michael Gonzales,
3 please stand and face the jury? Thank you very
4 much, Mr. Gonzales. You may be seated, sir.

5 Is there any member of the jury panel who is
6 related by blood or marriage or do you have any
7 close personal, social or business relationship with
8 the defendant Michael Gonzales? If so, please
9 stand.

10 (no response)

11 THE COURT: Now, would the defendant Steven
12 Josh Shelhamer please stand and face the jury?
13 Thank you, sir. You may be seated.

14 Is there any member of the jury panel who is
15 related by blood or marriage or do you have any
16 close personal, social or business relationship with
17 the defendant Steven Josh Shelhamer? If so, please
18 stand.

19 (no response)

20 THE COURT: Now, ladies and gentlemen of the
21 jury, the following individuals have been listed as
22 potential witnesses in this case. As I call their
23 names, I would like for them to please stand, if
24 they are in the courtroom. If they are not -- if
25 they do not stand, ladies and gentlemen, it's very

1 important that you listen very carefully to these
2 names as they are called, because I will be
3 presenting you a question as to whether you have any
4 connection with any of these potential witnesses.

5 Rhett Fox, Spartanburg County sheriff's office.
6 Turn and face the jury, please. Thank you, sir.

7 Jake Deffenbaugh, Spartanburg County sheriff's
8 office. Thank you, sir.

9 Robert Rosenberg, Spartanburg County sheriff's
10 office.

11 Ashley Harris, Spartanburg County sheriff's
12 office.

13 Ken Hancock, Spartanburg County sheriff's
14 office.

15 Johnny Solomon from here in Spartanburg.

16 The following individuals have also been listed
17 as potential witnesses in this case, ladies and
18 gentlemen.

19 Jessica Shelhamer.

20 Darlene Charlton.

21 George Nelson.

22 David Allison.

23 Lucy Santana.

24 Is there any member of the jury panel who is
25 related by blood or marriage or do you have any

1 close personal, social or business relationship with
2 any of the potential witnesses whose names I have
3 called? If so, please stand.

4 (no response)

5 THE COURT: Now, ladies and gentlemen of the
6 jury, the State of South Carolina is represented in
7 is this matter by the Seventh Judicial Circuit
8 Solicitor's Office, in particular Assistant
9 Solicitor Tommy Wall. Mr. Wall, if you would please
10 stand. Thank you, sir.

11 Is there any member of the jury panel who is
12 related by blood or marriage or do you have any
13 close personal, social or business relationship with
14 Mr. Wall or any member of the Seventh Judicial
15 Circuit Solicitor's Office, its staff, or do you
16 have any close political connection with that
17 office, in particular with Solicitor Tray Gowdy? If
18 so, please stand.

19 (no response)

20 THE COURT: Now, the defendant, Mr. Gonzales,
21 is represented by attorney Ricky Harris. Mr.
22 Harris. Thank you, sir.

23 Is there any member of the jury panel who is
24 related by blood or marriage or do you have any
25 close personal, social, or business relationship

1 with Mr. Harris, or are you currently represented or
2 have you been represented in the past by attorney
3 Ricky Harris? If so, please stand.

4 (no response)

5 THE COURT: Now, the defendant, Mr. Shelhamer,
6 is represented by attorney Bozzy Boggs. Mr. Boggs,
7 if you would please stand. Thank you, sir.

8 Any member of the jury panel who is related by
9 blood or marriage, or do you have any close
10 personal, social or business relationship with Mr.
11 Boggs, or are you currently represented or have you
12 been represented in the past by attorney Bozzy
13 Boggs? If so, please stand.

14 (no response)

15 THE COURT: Now, has any member of the jury
16 panel formed or expressed an opinion about any issue
17 or matter involved in this case? If so, please
18 stand.

19 (no response)

20 THE COURT: Is there any member of the jury
21 panel aware of any bias or prejudice toward either
22 the State or the defendants in this case? If so,
23 please stand.

24 (no response)

25 THE COURT: Is there any member of this jury

1 panel who was also a member of the Grand Jury for
2 Spartanburg County for the year 2002, which found
3 the True Billed indictments in these cases? If so,
4 please stand.

5 (no response)

6 THE COURT: Now, is there any member of the
7 jury panel or any member of your immediate family
8 who is currently or was formerly employed with any
9 federal, state, county, municipal police
10 association, or city police department, or any
11 military police organization? If so, please stand.

12 Okay. Let me start right here with this
13 gentleman here on the right. If you would give me
14 your jury number, please, sir.

15 JUROR NUMBER 26: Juror number 26. Sister and
16 brother-in-law.

17 THE COURT: Just one second, please. You are
18 Mr. Cobb?

19 JUROR NUMBER 26: Yes, sir.

20 THE COURT: All right, sir. And tell me whom
21 you are related to.

22 JUROR NUMBER 26: My sister and brother-in-law
23 both work for the county detention center.

24 THE COURT: For the county detention center.
25 And their names are?

1 JUROR NUMBER 26: Melanie and Tim Knight.

2 THE COURT: Melanie and Tim Knight?

3 JUROR NUMBER 26: Knight.

4 THE COURT: Thank you, sir. You may be seated.

5 Yes, ma'am.

6 JUROR NUMBER 85: 85. My grandpa is a --

7 THE COURT: Just one second, please, ma'am.

8 And you are Ms. Keadle?

9 JUROR NUMBER 85: Keadle.

10 THE COURT: Keadle. I'm sorry.

11 Yes, ma'am.

12 JUROR NUMBER 85: My grandpa is a cop in
13 Gaffney. His name is a Sammy Crowe.

14 THE COURT: Thank you, ma'am.

15 Yes, sir.

16 JUROR NUMBER 164: Juror 164.

17 THE COURT: Mr. Sullivan?

18 JUROR NUMBER 164: Yes, sir. My father was a
19 former judge in the magistrate court downstairs.

20 THE COURT: And his name?

21 JUROR NUMBER 164: Warren Sullivan.

22 THE COURT: Thank you, sir.

23 Yes, ma'am.

24 JUROR NUMBER 160: Juror 160.

25 THE COURT: Ms. Atkins?

1 JUROR NUMBER 160: Yes. My uncle is, Rhett
2 Reynolds, retired from the county police, and my
3 cousin is Mike Atkins who used to be a policeman.

4 THE COURT: Thank you, ma'am.

5 Yes, sir.

6 JUROR NUMBER 119: 119.

7 THE COURT: Mr. Rich?

8 JUROR NUMBER 119: Yes, sir. My daughter works
9 for the Greenwood County sheriff's department.

10 THE COURT: Thank you, sir.

11 Now, those of you who stood in response to my
12 last question, the fact that you have a relative in
13 law enforcement, would that in any way interfere
14 with your ability to render a fair and impartial
15 verdict for either the State or the defendants in
16 this case? If it would, I want you to please
17 restand.

18 (no response)

19 THE COURT: Now, is there any member of this
20 jury panel who is a member of or a contributor to
21 any group which has as its primary concern the
22 promotion of law enforcement or victims rights?
23 These groups would include, but certainly not be
24 limited to, the following: MADD, SADD, CAVE or
25 CADRY. If so, please stand.

1 Yes, ma'am.

2 JUROR NUMBER 16: 16.

3 THE COURT: Number 16. Ms. Brewington?

4 JUROR NUMBER 16: Yes, I have given money to
5 the Sheriff's Association.

6 THE COURT: To the Sheriff's Association?

7 JUROR NUMBER 16: Yes.

8 THE COURT: The fact that you contribute to
9 that organization, would that in any way interfere
10 with your ability to render a fair and impartial
11 ability for either the State and the defendant in
12 this case?

13 JUROR NUMBER 16: No, sir.

14 THE COURT: Thank you, ma'am.

15 Yes, sir, right here on the end.

16 JUROR NUMBER 174: 174.

17 THE COURT: Mr. Ballard?

18 JUROR NUMBER 174: Yes, sir. I have
19 contributed to the South Carolina Sheriff's
20 Association.

21 THE COURT: The fact that you contribute to
22 that organization, would that in any way interfere
23 with your ability to render a fair and impartial
24 verdict for either the State or the defendant in
25 this case?

1 JUROR NUMBER 174: No, sir.

2 THE COURT: Thank you, sir.

3 JUROR NUMBER 133: 133.

4 THE COURT: Mr. Strickland?

5 JUROR NUMBER 133: Yes, sir. I have
6 contributed to the State Trooper Association.

7 THE COURT: The fact that you contribute to
8 that organization, would that in any way interfere
9 with your ability to render a fair and impartial
10 verdict for either the State or the defendant in
11 this case?

12 JUROR NUMBER 133: No, sir.

13 THE COURT: Thank you, sir.

14 Ms. Atkins, I think.

15 JUROR NUMBER 133: Yes.

16 THE COURT: Who is juror number --

17 JUROR NUMBER 160: 160.

18 THE COURT: What was your number again ?

19 JUROR NUMBER 160: 160.

20 THE COURT: 160.

21 JUROR NUMBER 160: And I contributed to the
22 Troopers Association.

23 THE COURT: The fact that you contribute to
24 that organization, Ms. Atkins, would that in any way
25 interfere with your ability to render a fair and

1 impartial verdict for either the State or the
2 defendants in this case?

3 JUROR NUMBER 160: No, sir.

4 THE COURT: Thank you, ma'am.

5 Now, has any member of the jury panel read,
6 seen or heard any news accounts concerning this
7 case, or any similar case, that would in any way
8 interfere with your ability to render a fair and
9 impartial verdict for either of the defendants in
10 this case? If so, please stand.

11 (no response)

12 THE COURT: Has any member of this jury panel
13 served in the past on a jury when a criminal
14 defendant was accused of a drug offense? If so,
15 please stand.

16 (no response)

17 THE COURT: Has any member of the jury panel or
18 any member of your immediate family ever been
19 employed by, volunteered in, or participated in any
20 program or institution for drug rehabilitation,
21 treatment, or counseling? If so, please stand and
22 come forward.

23 Come up, please, ma'am.

24 The lawyers may approached.

25 (The following was an on-the-record bench

1 conference with Juror Number 150)

2 THE COURT: If you would give me your name.

3 JUROR NUMBER 150: Margaret Zimmerman, 150.

4 THE COURT: All right. Ms. Zimmerman is number
5 150. And tell me about your response to my
6 question.

7 JUROR NUMBER 150: My sister works for the
8 South Carolina Drug and Alcohol Commission in
9 Anderson.

10 THE COURT: In Anderson. Would the fact that
11 you have a sister in that capacity, would that in
12 any way interfere with your ability to render a fair
13 and impartial verdict for either the State or the
14 defendants in this case?

15 JUROR NUMBER 150: No, sir.

16 THE COURT: Are you in any way biased or
17 prejudiced as the result of her association with
18 that organization?

19 JUROR NUMBER 150: No, sir.

20 THE COURT: Thank you, ma'am.

21 JUROR NUMBER 150: Thank you.

22 (Bench Conference with Juror Number 150 was
23 concluded)

24 (The following was an on-the-record bench
25 conference with Juror Number 92)

1 THE BAILIFF: Number 92, judge.

2 THE COURT: This is Ms. Levy, correct?

3 JUROR NUMBER 92: Yes, correct.

4 THE COURT: Okay.

5 JUROR NUMBER 92: I have a sister who has had
6 drug problems when she was fourteen. She's going to
7 be thirty some years old. She has been going in and
8 out of the rehabilitation programs and I don't know
9 if that makes a difference, but I should mention it.

10 THE COURT: If y'all couldn't hear her, she
11 said she has a sister in and out of rehab since she
12 was fourteen and she's now thirty.

13 JUROR NUMBER 92: Yeah, thirty-three she's
14 going to be.

15 THE COURT: And the fact that you have a sister
16 that's been involved in this type of situation,
17 would that in any way interfere with your ability to
18 render a fair and impartial verdict for either the
19 State or the defendants in this case?

20 JUROR NUMBER 92: I would try to be as fair as
21 possible, but I don't think -- I'm not sure. I'm
22 not sure.

23 THE COURT: Let me ask you this. Does her
24 situation, does that cause you to be prejudiced or
25 biased in any way?

1 JUROR NUMBER 92: Well, in a way, yes.

2 THE COURT: Tell me about that.

3 JUROR NUMBER 92: Because I am upset at people
4 who do drugs.

5 THE COURT: I will do this. I will excuse you
6 from consideration of this case. If you would, I'm
7 going to allow you to resume your seat, but do not
8 discuss this with anyone. Okay?

9 JUROR NUMBER 92: Okay.

10 THE COURT: Thank you.

11 (Bench Conference with Juror Number 92 was
12 concluded)

13 THE COURT: Juror number 92 is excused from
14 this case only.

15 Now, has any member of the jury panel or any
16 member of your immediate family, in addition to the
17 previous question that I have asked you concerning
18 whether or not you or any family member has ever
19 been employed by any federal, state, county,
20 municipal law enforcement agency, or any military
21 police agency, has any member of the jury panel or
22 any member of your immediate family ever been a
23 volunteer for any of these organizations? If so,
24 please stand.

25 (no response)

1 THE COURT: Now, does any member of the jury
2 panel know of any reason whatsoever why you should
3 not serve as a juror in this case, with particular
4 emphasis being placed upon your ability to be fair
5 and impartial to either the State or the defendants.
6 If you cannot, I want you to please stand.

7 (no response)

8 THE COURT: Additional questions from the
9 State?

10 MR. WALL: None, Your Honor.

11 THE COURT: From the Defendant Gonzales?

12 MR. HARRIS: Yes, sir, Your Honor. We would
13 ask that the court inquire as to --

14 THE COURT: Well, how about approaching. I'll
15 see if I will inquire.

16 (Lawyers approached the bench)

17 MR. HARRIS: That's all, yes.

18 THE COURT: Anything else from the Defendant
19 Shelhamer?

20 MR. BOGGS: No, Your Honor.

21 THE COURT: All right. Ten strikes for the
22 State, ten strikes for each defendant.

23 Ladies and gentlemen of the jury, the manner in
24 which a jury is selected here in General Sessions
25 Court, if you have not participated in this before,

1 as your names are drawn at random from the jury
2 cylinder by the clerk of court and your name is
3 called, I want you to please bring all of your
4 personal belongings with you and come and stand in
5 the well of the courtroom where our bailiff, Mr.
6 Cottonaro, is standing, turn and face the lawyers
7 and they will make a determination as to whether or
8 not you will participate in this case.

9 All right, Madam Clerk, let's get a jury.

10 (Whereupon, the Jury Panel was selected)

11 THE COURT: All right. Anything from the State
12 concerning the method or manner or selection of the
13 jury?

14 MR. WALL: No, sir.

15 THE COURT: From the Defendant Gonzales.

16 MR. HARRIS: No, Your Honor.

17 THE COURT: From the Defendant Shelhamer?

18 MR. BOGGS: No, Your Honor.

19 THE COURT: Ms. Vickers, I'm going to ask that
20 you swap seats with the lady here in the first chair
21 on the first row and serve as the foreperson of our
22 jury, please, ma'am.

23 And if you, Madam Foreperson, and Ms. Alverson,
24 our alternate, if you two ladies would continue to
25 sit in the chairs that you presently occupy

1 throughout the course of this trial. The remainder
2 of the jury may sit in any other seat that's
3 available, other than those two chairs.

4 All right, Madam Clerk, let's swear this jury,
5 please.

6 (Whereupon, the Jury Panel was sworn by the
7 Clerk)

8 THE COURT: Thank you.

9 Madam Foreperson, ladies and gentlemen, we are
10 going to take a short break before we actually start
11 the trial of this case. As I send you to the jury
12 room, even though you know precious little about
13 this matter, what you do know you are not to discuss
14 under any circumstances or in any manner whatsoever
15 while you are in the jury room. You can talk about
16 a lot of things while you are in the jury room, but
17 not this case.

18 The jury may retire. We will get you back in
19 just a few minutes.

20 Everyone else remain seated, please.

21 (The following takes place outside the presence
22 of the jury panel)

23 THE COURT: Ladies and gentlemen of the jury, I
24 want to thank you very much for your participation
25 here this afternoon. This is going to conclude your

1 responsibilities in this courtroom for this
2 particular day.

3 I'm going to be sending you back to the jury
4 room assembly room. I'm going to have the clerk to
5 check and see what your future participation is here
6 with Judge Beatty. I'm not sure exactly how long
7 this case will last, but I'm sure that it will last
8 into tomorrow, and maybe even into Wednesday, but I
9 will look forward to seeing you a little bit later
10 on this week. I hope you have a very pleasant
11 afternoon and evening. If you would, please return
12 to the jury assembly room for further instructions.

13 (Whereupon, the Jury Venire Panel was
14 dismissed)

15 THE COURT: Let's take about a ten minute
16 break, gentlemen.

17 (Proceedings recessed)

18 (Proceedings reconvened)

19 MR. WALL: Your Honor, I have talked to both
20 defense counsel. I don't have a short witness here.

21 THE COURT: Let's just do our openings then.

22 MR. WALL: That's what we discussed.

23 THE COURT: Okay.

24 MR. HARRIS: Your Honor, may it please the
25 court, I'm sure the court will do this at whatever

1 appropriate time, but if I may, in the court's
2 preliminary instructions to the panel --

3 THE COURT: Uh-huh.

4 MR. HARRIS: -- I would like for the court to
5 go ahead and emphasize that although these
6 defendants are being tried together, their cases
7 should in every respect be considered separately.

8 THE COURT: Okay.

9 MR. HARRIS: Thank you.

10 MR. BOGGS: I'll join in that, Your Honor.

11 THE COURT: Okay.

12 All right. Let's bring our jury back, please,
13 Mr. Bailiff.

14 (The following takes place in the presence of
15 the jury panel)

16 THE COURT: Ladies and gentlemen of the jury,
17 the cases that we are about to try are the cases of
18 the State versus Michael Gonzales, the defendant,
19 and the State versus Steven Josh Shelhamer.

20 Please understand that even though these cases,
21 these defendants are being tried together, their
22 cases are separate and shall be considered as
23 separate throughout the trial of this case.

24 Now, what I will now say is intended to serve
25 as an introduction to the trial of this case. These

1 remarks are not a charge on the law in this matter.
2 I will instruct you on the law applicable to this
3 case at the end of the trial, before you retire to
4 consider your verdict.

5 This is merely an explanation of the procedure
6 that we will follow in the trial of this case and so
7 that you may have a better understanding as to what
8 may be happening from time to time.

9 Let me instruct you that you are not to take
10 any notes during the trial of this case.

11 Now, each defendant is charged by a separate
12 indictment filed in this court with the crime of
13 trafficking in methamphetamine, the elements of
14 which will be explained to you shortly.

15 Now, these indictments are simply the charges
16 by which these cases are placed into this court and
17 they are not in any sense evidence of any of the
18 allegations they contain. Each defendant has pled
19 not guilty to his particular indictment. The State,
20 therefore, has the burden of proving each of the
21 elements of each indictment beyond a reasonable
22 doubt, and it will be your duty, ladies and
23 gentlemen, to decide whether or not the State has
24 met that burden.

25 Your purpose as jurors is to find and determine

1 the facts. You are the sole judges of the facts,
2 and if at any time I make any comment regarding the
3 facts, you must disregard it. You are to determine
4 the facts from the testimony you hear and the other
5 evidence introduced in court. It is up to you to
6 determine the inferences which you feel may be
7 properly drawn from the evidence. It is especially
8 important that you perform your duty of determining
9 the facts diligently and conscientiously.

10 Now, on the other hand, and with equal
11 emphasis, the same law that makes you the judges of
12 the facts makes me the judge of the law. The law as
13 given to you by this court is the only law you may
14 consider. You must accept and follow it, even
15 though you may disagree with it. I cannot tell you
16 what the facts are and you cannot disagree with me
17 about what the law is, or should be. Your job is to
18 take the law as I give it to you and apply it to the
19 facts as you find them from the testimony of the
20 witnesses and any other evidence that is introduced.
21 After doing that, you will render your verdict, a
22 true and just verdict, under the solemn oath that
23 you took just a few moments ago as jurors.

24 Now, until I advise you to begin your
25 deliberations, you must not discuss this case with

1 anyone, including your fellow jurors, friends,
2 family members, and anyone involved in this case.
3 After this case is submitted to you, you must
4 discuss it only in the jury room among yourselves.

5 The attorneys and parties in this case have
6 been advised that they are not to talk to you at
7 all. So if you see anyone involved in this case and
8 they do not even speak and say hello, keep in mind
9 that they are not being unfriendly. They are very
10 simply following my instructions.

11 Now, during the course of this trial do not
12 read, listen to or watch any news reports about this
13 case. This includes anything that may be in the
14 newspapers or on the internet, radio, or television.
15 It is important that you keep an open mind and not
16 decide any issue in this case until all of the
17 evidence has been presented, the parties have made
18 their closing arguments and I have instructed you on
19 the law that applies to this matter. It is your
20 solemn responsibility to determine the guilt or
21 innocence of each defendant and your verdict or
22 verdicts must be based solely on the evidence as it
23 is presented to you in this trial and on the law as
24 I instruct you during and at the conclusion of this
25 case.

1 Now, in just a moment the solicitor will make
2 what is called an opening statement, in which he
3 will explain to you the issues in this case, or at
4 least what he thinks the issues in the case are.
5 The attorneys for the defendant - and when I say the
6 attorney for the defendant, that is the defendant
7 Mr. Gonzales and also Mr. Shelhamer - each
8 defendant's attorney will also be allowed to make an
9 opening statement, although he is not required to do
10 so.

11 Now, what the attorneys will tell you during
12 their opening statements is not evidence in this
13 case. It is only their contention as to what the
14 issues are. The evidence in this case will be
15 presented to you by the testimony of sworn witnesses
16 from the witness stand and by any exhibits that may
17 be introduced into evidence.

18 Now, from time to time during this trial you
19 may hear one of the lawyers say something like "I
20 believe we have a question or a matter of law to
21 discuss," or "may we approach the bench?" Or
22 sometimes I might find it necessary to excuse you
23 from the courtroom for a short while so the
24 attorneys and I can actually discuss matters of law.
25 Now, the reason for this, once again, is because you

1 are the judges of the facts in this case. And
2 sometimes when I'm discussing a matter of law with
3 the attorneys, it may be necessary for me to make
4 some comment as to the facts in connection with
5 ruling whether or not a particular law applies.
6 Now, once again, I am not supposed to tell you what
7 I think the facts are, so I will excuse you from the
8 courtroom while these discussions take place so that
9 in no way will you be influenced by anything that I
10 might say or do in connection with the facts.

11 Now, in determining what the true facts are in
12 this case, you must decide whether or not the
13 testimony of the witnesses is believable. It will
14 be my responsibility to rule as a matter of law as
15 to whether certain testimony is admissible at all or
16 not, but once I have allowed that testimony to be
17 admitted, whether or not you believe it is solely
18 for you to determine.

19 Now, in deciding whether to believe a witness,
20 you have the right to consider the interest of any
21 witness, the bias of any witness, the prejudice of
22 any witness, the opportunity for the witness to have
23 seen the matters and things about which he or she
24 may testify, as well as the way the witness acts on
25 the witness stand. You have a right to consider

1 anything that is in the record that will help you to
2 evaluate the testimony of the witnesses. That means
3 that it is your duty to pay close attention to the
4 witnesses, to observe and listen to them and to pay
5 close attention to the attorneys and to this court.
6 Do not let your thoughts wander, but give strict
7 attention to the testimony in this case, so that at
8 the end of all that testimony, after the arguments
9 of the lawyers and then the charge or instruction on
10 the law by me as the judge of this court, you will
11 then be in a position to determine what the true
12 facts are and to apply the law to those facts and
13 thus render a true and just verdict.

14 Now, it is your added duty, Madam Foreperson,
15 to preside in the jury room and be the jury
16 spokesperson here in court, and it will also be your
17 duty to write the verdicts in these cases, but I'll
18 give you further instructions about that at the end
19 of the trial.

20 We will now begin the trial of the case.

21 Opening statement, please, solicitor.

22 MR. WALL: Thank you, Your Honor.

23 Good afternoon. My name is Tommy Wall. I'm
24 the assistant solicitor prosecuting this case.

25 As you know, both defendants are charged with

1 trafficking in methamphetamine. The State has the
2 burden of proof to prove beyond a reasonable doubt
3 each element of this crime, and we accept that
4 burden. We are here today to accept that burden,
5 because we will be able to present to you over the
6 course of this trial the necessary evidence to prove
7 that Michael Gonzales is guilty of trafficking in
8 methamphetamine and Josh Shelhamer is guilty of
9 trafficking in methamphetamine.

10 The judge at the end of the trial will give you
11 the details of the law and the elements. I'm going
12 to give you a brief overview. Trafficking in
13 methamphetamine, under the law of South Carolina, if
14 you possess, or sell, or deliver, or attempt to do
15 any of that, or you aid or abet anybody in
16 attempting to do any of that, 10 grams, or more, of
17 methamphetamine, then you are trafficking in
18 methamphetamine.

19 In this case these defendants are charged with
20 trafficking in methamphetamine 400 grams, or more,
21 of methamphetamine. So in this particular case we
22 would have to prove that they were dealing with 400
23 grams, or more. And you will see that in the case
24 as the evidence is presented.

25 What I want to be sure everyone understands is

1 that when the elements were read, there is several
2 aspects of them. Only one of those has to be proven
3 for a defendant to be guilty. In other words, we
4 don't have to prove that they were selling,
5 delivering, and possessing. We have to prove that
6 they were selling, or aiding, or abetting somebody,
7 or attempting to do that, or delivering with all
8 those aiding, abetting, or attempting, or that they
9 possessed that much methamphetamine, either
10 constructively or they actually possessed it on
11 their person.

12 This case occurred on June 3rd, 2002, in
13 Spartanburg County, at the Little Cricket off
14 Highway 11, near the Campobello area. The case
15 officer is Rhett Fox, seated here. You will also
16 hear from Officer Jake Deffenbaugh seated behind
17 him. And you will hear from Johnny Solomon, who is
18 not in here presently. He is an informant. He's a
19 paid informant. He was paid for his work. And you
20 will hear the tapes. He contacted Michael Gonzales.
21 And in the course of conversations, Michael Gonzales
22 agreed to sell him a pound of methamphetamine. They
23 agreed to a meeting location. That meeting location
24 was a Little Cricket in Campobello off Highway 11.

25 Jake Deffenbaugh was acting as an undercover

1 officer. He goes with the informant, Johnny
2 Solomon. They go to the Little Cricket. They park
3 there and then Michael Gonzales drives up with Josh
4 Shelhamer.

5 You will hear the details through the witnesses
6 that take the stand, and I'm not going to try to
7 present all that to you at this time. It's better I
8 believe for you to hear it under sworn testimony,
9 but essentially Michael Gonzales gets out of the
10 vehicle, talks with Johnny Solomon. They have
11 conversations. Jake Deffenbaugh asked Michael
12 Gonzales about the product, whether he has it. He
13 points to Shelhamer. Asked if he could weigh it.
14 Mr. Gonzales says "yes, he will let you weigh it."
15 And at that time Jake Deffenbaugh goes over to Mr.
16 Shelhamer.

17 Mr. Shelhamer produces the drugs that we will
18 put into evidence, over 400 grams of
19 methamphetamine. He produces that. It's weighed
20 out. It's weighed out in the car that Mr. Gonzales
21 and Mr. Shelhamer are in.

22 At that point -- this is all being monitored,
23 because there are other police in the area as part
24 of the support team. At that point this agent gives
25 a code signal for the takedown team to come in and

1 arrest the suspects. As they come in, Johnny
2 Solomon goes to the ground. Jake Deffenbaugh goes
3 to the ground. Mr. Shelhamer stays in the vehicle
4 and then he's arrested. Mr. Gonzales runs. Gets
5 away. Is pursued, but he gets away. And that is
6 going to be the case that we present to you, that
7 Michael Gonzales had set up the deal. He brought
8 Josh Shelhamer with him. Josh Shelhamer actually
9 produced the methamphetamine, actually gave it to
10 the officer. And so as a result, under any number
11 of the ways to prove trafficking, at the end of this
12 trial, once we have presented the evidence to you, I
13 believe that you will find them guilty. Josh
14 Shelhamer merely by having or possessing it and then
15 by handing it to somebody else was delivering it.
16 Michael Gonzales as a result of the conversations
17 that you will hear in setting up the transaction and
18 bringing it to the Little Cricket and his
19 participation, certainly under several different
20 trafficking elements, would be guilty of
21 trafficking.

22 One thing I want to mention to you is you will
23 hear -- when you hear the C.I., that's the
24 confidential informant's audio tape, you will hear a
25 lot of bad language coming from the C.I., a lot of

1 cursing. When the takedown team comes in, you are
2 going to hear a fair amount of cursing from the
3 officers. I ask you -- we don't mean to offend
4 anybody with that, and hope that we don't. I
5 apologize if we do, but we do need to play the tapes
6 for you, though, and that's what occurred. And so
7 as a result we are going to be playing the tapes for
8 you.

9 I thank you for your attention, and at the end
10 of this case we will have shown you the evidence to
11 prove that Michael Gonzales was trafficking in
12 methamphetamine and that Josh Shelhamer was
13 trafficking in methamphetamine. Thank you very
14 much.

15 THE COURT: Mr. Harris.

16 MR. HARRIS: Thank you, Your Honor.

17 Madam Forelady and ladies and gentlemen of the
18 jury, I got something that I want to show you in a
19 minute. It's probably the most important thing that
20 you know about this case, in a minute.

21 First of all, I want to make very clear
22 something that His Honor has already explained to
23 you, because in any criminal trial, including this
24 trial, involving young Michael Gonzales and the
25 slightly older, but still very young Josh Shelhamer,

1 there are two very important legal concepts that
2 this country was founded on and that we are here to
3 observe today in this courtroom, and in every
4 courtroom. It's the beginning, the middle, and end
5 of every criminal trial, and it's something that you
6 need to fix clearly in your mind and focus on
7 throughout this trial. His Honor has just
8 instructed you that every defendant that comes into
9 a courtroom accused by law enforcement of a crime is
10 presumed innocent. Those are not merely just words
11 that we hear in television shows. That concept or
12 that principle exists and lives and affects
13 everything that we do in this courtroom. So when my
14 friend, the solicitor, points the accusing finger
15 very dramatically toward defense counsel and these
16 young defendants, bear in mind that he's condemning
17 them without proving his case, and that is a
18 violation of the presumption of innocence. We will
19 see if he can prove his case by your judgment.

20 Proof in a criminal case and proof in this case
21 must be to the required level, which is the highest
22 burden of proof known in our judicial system. The
23 proof that Mr. Wall is bound to present to you, or
24 fails in it, is proof that convinces you, the jury,
25 of Mr. Gonzales guilt, and for that matter, Mr.

1 Shelhamer's guilt, beyond a reasonable doubt.
2 Beyond a reasonable doubt. Again, this is not some
3 phrase that we merely use on TV shows, or in movies,
4 or in John Gresham books. It lives and breaths and
5 means everything.

6 What does it mean then, since it's so
7 important? Let's discuss right now and focus on
8 what proof beyond a reasonable doubt means. It
9 means, and I believe you will be instructed so at
10 the end of this trial, the kind of doubt that would
11 make a reasonable person hesitate to act. That's
12 it. So after you hear everything that the State can
13 throw at these young fellows, everything through all
14 of their resources and investigation and so forth,
15 the prosecution, if you have a hesitation, that is
16 reasonable doubt. You do have reasonable doubt.
17 Your verdict would be, by the oath you just swore,
18 not guilty.

19 And you apply that reasonable doubt standard to
20 each defendant's case separately. At the end of
21 this case you may feel that Mr. Shelhamer is guilty
22 beyond a reasonable doubt. I don't know. I'm not
23 here to try him. I'm not a prosecutor. I'm not
24 here to try Mr. Shelhamer. I'm sure Mr. Wall will
25 try to do a very good job of that himself. You may

1 very well feel that you have heard such evidence
2 that Mr. Shelhamer did, in fact, as is being claimed
3 at this stage, possess a package of drug called
4 methamphetamine and that it did weigh 400 and some
5 grams, and that, therefore, he is guilty -- Mr.
6 Shelhamer is guilty of trafficking in
7 methamphetamine more than 400 grams. But that does
8 not mean that Mr. Gonzales is guilty of anything.
9 His is a separate case. Mr. Gonzales is not
10 responsible for Mr. Shelhamer's actions. For that
11 matter, Mr. Shelhamer is not responsible for Mr.
12 Gonzales' actions. That's what we mean by these are
13 separate cases. Reasonable doubt is the kind of
14 doubt that would make a reasonable person hesitate
15 to act.

16 In order to give you a better idea of how much
17 proof is necessary to meet the reasonable doubt
18 standard, consider this. Our courts in interpreting
19 and defining the shape of the concept of reasonable
20 doubt has often said that it's certainly -- a
21 reasonable doubt certainly is not proven by mere
22 suspicion. But if at the end of this case you have
23 suspicion, even high suspicion, great suspicion,
24 that Mr. Gonzales or Mr. Shelhamer were involved in
25 criminal wrongdoing of the type alleged here, that

1 would not be enough proof. That would not be enough
2 proof. It would not even be enough proof if you
3 think that a crime probably has been committed,
4 because that is not the standard. It is beyond
5 suspicion, beyond possibilities or probabilities to
6 a matter of, as the courts have said from time to
7 time, certainties. Not beyond all fanciful
8 documents or uncertainty, but to a reasonable doubt.
9 In other words, to a reasonable certainty. And this
10 standard applies to every part of the case that the
11 State has to prove. Every part of it.

12 And to the extent that the evidence against
13 either of these young defendants is circumstantial
14 in nature, every circumstance relied upon by the
15 State has to be proven to the required standard.

16 Well, what has been claimed here? The
17 solicitor has already told you that the State has
18 indicted, brought to court on a charge, each
19 defendant identically of trafficking in
20 methamphetamine of more than 400 grams.

21 And yes, I agree with my friend, the solicitor,
22 that the offense of trafficking under our statutory
23 law in South Carolina could be proven in a number of
24 ways, but there is one common element, one thing in
25 common, that has to be shown for the State to prove

1 that any defendant committed any of the acts that
2 are listed out in the statute.

3 One thing that they have to prove that each of
4 these defendants did, but for now I'm going to talk
5 about my client, Mr. Gonzales. That's why I brought
6 this poster, whether it be attempting, whether it be
7 selling, delivering, aiding, abetting, whatever. It
8 may be whatever part. Of course, they don't tell
9 you what part they are claiming was violated, but
10 whatever part that they are during the course of
11 this trial going to try to prove, just remember they
12 have to prove this. "Intent alone, not culpable
13 with some overt act, or putting the attempt into
14 effect, is not cognizable by the courts. The law
15 does not concern itself with mere guilty intention
16 unconnected with any overt act." That's a lot of
17 legal words there, and you are going to learn it.
18 I'm going to learn it with you. However what it
19 takes, my job is to make sure that this jury
20 understands this concept. If you understand it, you
21 will be able to do justice in this case. And if you
22 don't understand it, I fear you will not.

23 Intent alone, not coupled," not together, not
24 existing, along with, some overt act, meaning
25 somebody doesn't just think about doing something,

1 they do it. It connotes action on the part of the
2 person. Not just in their mind they have a plan, or
3 an idea, or a thought of doing some criminal act,
4 but they actually do something about it. They
5 actually committed, or begin to commit, or take
6 steps toward the completion of it. That's what that
7 means, towards putting the intent into effect. It's
8 not enough, not enough. This is not a conspiracy
9 case. It's not enough to think about doing
10 something wrong. Unless you put the intent into
11 effect. Not cognizable by the courts, meaning this
12 is the law of the land. The courts do not concern
13 themselves with guilty intentions, but with guilty
14 deeds, guilty acts, a-c-t-s, acts.

15 Second part, the law does not concern itself
16 with mere guilty intention. That's what that means.

17 Unconnected with any overt act. Overt meaning
18 that you can see, that you can know, that you can
19 hear proof and evidence of and say that person not
20 only thought about committing a crime, but did
21 something to commit the crime.

22 Now, in a drug case, in a drug case, whether it
23 be trafficking, possession, possession with intent
24 to distribute, or whatever it may be, there is a
25 principle very closely connected with this law that

1 we have been studying. And simply put, the phrase
2 that you should familiarize yourself with is mere
3 presence where drugs are found or where drug
4 transactions take place is not enough to prove a
5 case beyond a reasonable doubt, to prove a drug
6 offense beyond a reasonable doubt. Someone being
7 merely present at the scene where drugs are found on
8 other people and other places, being merely present
9 when an attempted drug transaction or drug
10 transaction takes place, is not enough to convict.

11 The solicitor has already given you a glimpse
12 into the factual situation that we are presented and
13 that you are presented in this case. Very briefly,
14 it will be that law enforcement alleges that a
15 for-hire informant got together with the police for
16 money and allegedly made certain phone calls to my
17 client, Mr. Gonzales, in order to try to set him up
18 to entice him to do a drug deal of some kind. And
19 there are supposed to be tapes of this, and they say
20 that they are going to play these tapes for you.
21 Well, we will see what's on them.

22 And then they say that Mr. Gonzales and Mr.
23 Shelhamer show up at this Little Cricket store up in
24 the northern part of the county. Okay? No crime
25 has taken place yet. It doesn't matter what these

1 guilty intention phone calls were about. No crime
2 has taken place yet. Then they say that Mr.
3 Gonzales stands outside of a car while Mr. Shelhamer
4 does a drug deal with an undercover police officer.
5 Mr. Gonzales didn't do a drug deal. Mr. Gonzales is
6 never seen with his hands on any drugs or any
7 package. Mr. Gonzales never received any money.
8 For that matter, I don't think even Mr. Shelhamer
9 received money, if this was supposed to be a drug
10 transaction, but we will see how that develops in
11 the case. Mr. Gonzales never had any drugs on him,
12 never was seen with his hands on any drugs, never
13 was seen handing any drugs to anybody, never was
14 seen getting any money for any drugs, never was seen
15 weighing any drugs or any such thing.

16 If it was Mr. Gonzales in those phone calls,
17 and they will have to prove it beyond a reasonable
18 doubt, and if it was Mr. Gonzales at the Little
19 Cricket, and they will have to prove it beyond a
20 reasonable doubt, then what is Mr. Gonzales guilty
21 of? According to this, nothing. Nothing.

22 I say to you, ladies and gentlemen, that not
23 every criminal defendant that comes into this court
24 is guilty just because the accusing finger is
25 pointed.

1 I say this to you. I am not Mr. Shelhamer's
2 prosecutor. I do not intend to try to prove any
3 case against him. The State must prove their case
4 against each defendant separately. And I merely ask
5 you in the interest of justice to consider, when all
6 is said and done and you evaluate the credibility
7 and believability of these witnesses, as His Honor
8 has instructed, is Mr. Gonzales guilty of intention
9 but not action? And if he's only guilty of any
10 intention, then he's not guilty of a crime. Thank
11 you.

12 THE COURT: Mr. Boggs.

13 MR. BOGGS: Thank you, Your Honor. May it
14 please the court.

15 MR. HARRIS: I'm sorry, I'll remove that, if
16 you would like.

17 MR. BOGGS: I can get rid of it real easy.

18 Madam Forelady and ladies and gentlemen of the
19 jury, my name is Cameron Boggs. I'm a Spartanburg
20 native. My nickname is Bozzy. You heard the judge
21 refer to that. I'm not related to Tam Boggs. I
22 have known him. He's a nice guy. So if you know
23 Tam, we aren't related. I live in Greenville now
24 and after law school I worked for a judge. In fact,
25 I sat right up there where that young lady is. I

1 was a law clerk for a year, and then I was a
2 prosecutor in Greenville for two years, and I sat at
3 the same table where Mr. Wall sits today.

4 The judge -- now I practice in Greenville and
5 in Spartanburg and I'm happy to be here representing
6 Josh Shelhamer.

7 As the judge told you earlier today, and will
8 tell you again, and has how Mr. Wall and Mr. Harris
9 have touched on, there are two defendants, two
10 separate decisions to make. There is going to be
11 one general set of facts, and it's your duty to
12 listen with the impartial ear to both defendants.
13 Mr. Harris represents Mr. Gonzales. He's going to
14 do what he can to pursue Mr. Gonzales' defense. My
15 interests are for Mr. Shelhamer. His name is Steven
16 Josh Shelhamer. He's eighteen years old and he
17 lives up in the Campobello area with his stepfather
18 George Nelson in the second row and his mother, who
19 will be here at certain times during the trial. She
20 was here earlier today.

21 This case presents a difficult decision for you
22 because you have got a confidential informant, who I
23 submit to you is not working for the police because
24 he's a Good Samaritan. You have got a confidential
25 informant, who, for the benefit of the police and to

1 further their interest, makes a phone call or a
2 series of phone calls. And who does he call? He
3 calls Michael Gonzales. The evidence is going to
4 show that. When he calls Michael Gonzales, who does
5 he speak to? The evidence will show he speaks to
6 Michael Gonzales. In fact, at no point in time
7 leading up until it Little Cricket incident scene
8 will the police officers testify that they expected
9 anyone other than Michael Gonzales to be there with
10 whatever drugs the C.I. ordered. He made an order.
11 This was Michael Gonzales' store and he placed an
12 order and the evidence is going to show that.

13 Now, Mr. Harris states that he doesn't want to
14 be Mr. Shelhamer's prosecutor. He wants to be the
15 defense attorney for Mr. Gonzales. I do not want to
16 be Mr. Gonzales' prosecutor. However, in this
17 particular case the judge is going to tell you that
18 you have the ability to find one guilty and one not
19 guilty.

20 You may ask yourself well, how can these two
21 young men be involved, or even remotely involved,
22 with such a serious drug, and how can you find the
23 other -- one or the other not guilty? Just by sheer
24 mention alone, human nature is to condemn each of
25 these gentlemen, or young men, or teenagers. They

1 are teenagers, condemn them with guilt because of
2 what the prosecution says. Well, that's why we have
3 this gentleman up here in the robe, and that's why
4 we have laws, because if it was that easy, you
5 wouldn't be here. Everybody would just plead
6 guilty.

7 Josh Shelhamer is pleading not guilty because
8 he didn't know what was going on. However stupid,
9 however hard to believe you think that is, the
10 evidence will show that this was between this guy,
11 that guy, the C.I., who is working for them, and Mr.
12 Gonzales. And the law is going to allow you, and
13 the facts and testimony that you hear from right
14 here, is going to allow you to convict this man.
15 And personally I think you should. If you can't be
16 impartial and if you can't accept the duty to listen
17 to the facts without making up your mind right now,
18 or at any point in time until it's time to
19 deliberate, then I suggest that you tell the bailiff
20 before you leave today so he can tell the judge.
21 This is an important duty. This is what makes our
22 system work, you sitting right here. Without you,
23 the police can lock up whoever the heck they want to
24 just by throwing the net out and seeing what they
25 catch. And in this case they threw their net out

1 and they had something in mind what they were
2 looking for - a big fish. That's your big fish in
3 the Tommy Jean shirt.

4 Josh Shelhamer, he's no rocket scientist, but
5 he's no drug dealer, and I'm comfortable with saying
6 that. Listen to the -- listen to the officer.
7 Listen to him. When the C.I. said he's calling
8 somebody, he's calling Mike. They never mentioned
9 Josh. Never. And the way that things transpired,
10 the time in which it took for the deal to happen,
11 there is no way that Josh Shelhamer was involved
12 more than being at the scene.

13 Now, Mr. Harris brought up intent, and he's got
14 a fine important board here on the easel to show you
15 the law. I trust that you can understand what I'm
16 saying. The law is going -- the judge is going to
17 tell you what the law says that a defendant has to
18 have knowledge of not only the amount, but also of
19 what's going on, of what the drug is involved in the
20 transaction. Look at the evidence.

21 You will hear testimony as to how it was
22 wrapped. You will see how it was wrapped. There
23 will be no testimony, no testimony, that Josh
24 Shelhamer knew what was in that package, because
25 they can't prove it. It's not a matter of them not

1 being able to prove it, therefore, let him go. They
2 have requirements. They have a burden. Mr. Wall
3 accepted it. I said the same thing when I was
4 sitting on his side. We have got a burden of proof.
5 Well, we accept it, I'm glad to be here. Well, make
6 them do it, because they won't. They can't. And I
7 trust that you will listen to the evidence and not
8 just what I'm arguing, but to the evidence, and you
9 will decide that Josh Shelhamer didn't know what was
10 in that package. And because of that, you will find
11 him not guilty. And that the real person that they
12 were looking for, that they were going to admit that
13 they were looking for, is this guy right here.
14 That's who they expected.

15 I thank you for your time. And again, this is
16 the most important thing that you can do in our
17 society, our legal system, is sit as a juror. And
18 if you are up to the task, I think that you are,
19 that's why you got picked, and it was my pleasure to
20 pick each one of you, because I feel like you can
21 listen to the facts and the testimony and the law
22 and apply it to those facts. And at the end you
23 will find Josh Shelhamer not guilty. Thank you.

24 THE COURT: Ladies and gentlemen of the jury, I
25 think that we have reached an appropriate point in

1 our day to stop the trial of this case. I'm going
2 to allow you to go home for this evening, with the
3 instruction that you are not to discuss this case
4 among yourselves as you exit the courthouse, if you
5 happen to see or speak with each other during the
6 course of this evening, or when you reconvene in the
7 jury room in the morning at the appointed hour.

8 Also you are not to discuss this case with your
9 family, friends, or anyone else that you might come
10 in contact with.

11 And if anyone should attempt to contact you
12 concerning this case, I want you to gather as much
13 information about that person or persons as you
14 possibly can and report that to me in the morning,
15 because that is a very serious matter and I would
16 deal with the person or persons that attempted to
17 contact you accordingly.

18 Now, I do not know that there would be anything
19 in the news media concerning this case, but out of
20 an abundance of caution I'm going to instruct you
21 that you are not to read, watch, or listen to any
22 news accounts concerning this case.

23 Simply put, all I want you to consider in this
24 matter is what you see and hear in this courtroom.
25 Nothing more and nothing less.

1 So with that instruction, I'm going to ask that
2 you report to your jury room and be here in the
3 morning ready to go at 9:15. Please come directly
4 to your jury room. Do not linger outside the
5 courthouse or in the hallways. Do not go to the
6 jury assembly room. Come to the jury room that the
7 bailiffs have placed you in and they will be there
8 to receive you in the morning and be on the lookout
9 for you and we will get started at 9:15 with the
10 testimony in this case.

11 I hope you have a pleasant evening. I'll look
12 forward to seeing you in the morning at 9:15.

13 The jury is excused. Everyone else remain
14 seated, please.

15 (The following takes place outside the presence
16 of the jury panel)

17 THE COURT: All right. Anything else from the
18 State before we break?

19 MR. WALL: Your Honor, I would bring to your
20 attention that Mr. Gonzales is incarcerated.
21 However, Mr. Shelhamer is out on bond. Now that the
22 trial has began, due to the serious nature of the
23 charges, we would ask that he be bound over.

24 THE COURT: Bond is ended once the trial has
25 been started. All right. He will be taken into

1 custody.

2 Anything else, Mr. Harris?

3 MR. HARRIS: No, Your Honor.

4 THE COURT: Mr. Boggs?

5 MR. BOGGS: Of course, Your Honor, we would ask
6 that he be allowed to remain on bond. He has
7 reported and he had even reported last Monday, and
8 I'm remiss if I don't ask.

9 THE COURT: I understand that. Given the
10 charges that have been levied, I'm going to hold him
11 in custody throughout the course of the trial. And,
12 of course, if he's found not guilty, he will be
13 released as soon as this trial is over.

14 MR. BOGGS: Your Honor, I have typed a very
15 basic order for Bell South, for whatever it's worth.
16 I don't have a disk with me. Is there any way that
17 I could get one to print out here for your
18 signature?

19 THE COURT: Yes, sir. Absolutely.

20 Anything else, Mr. Boggs?

21 MR. BOGGS: No.

22 THE COURT: And we will stand in recess until
23 in the morning at 9:15).

24 (Whereupon, proceedings were adjourned to July
25 23, 2002, at 9:15 o'clock a.m.)

STATE OF SOUTH CAROLINA))
COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS

THE STATE)
-vs-) TRANSCRIPT OF RECORD
) 02-GS-42-2742
) 02-GS-42-2754
MICHAEL GONZALES,)
STEVEN JOSH SHELHAMER,) JULY 23, 2002
Defendant.) SPARTANBURG, SOUTH CAROLINA

VOLUME II

B E F O R E:

HONORABLE GARY E. CLARY, JUDGE; and a jury.

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

JASON T. WALL, ASSISTANT SOLICITOR
Attorney for the State.

RICKY HARRIS, ESQUIRE
Attorney for Defendant Michael Gonzales.

CAMERON "BOZZY" BOGGS, ESQUIRE
Attorney for Defendant Steven Josh Shelhamer.

Michael R. Watts
Circuit Court Reporter

INDEX

WITNESSES

PAGE

(JULY 22, 2002)

(SUPPRESSION HEARING)

OFFICER JACOB DEFFENBAUGH (SW)

Direct Examination by Mr. Wall 35

Cross Examination by Mr. Harris 42

Redirect Examination by Mr. Wall 47

(JURY TRIAL)

Jury Voir Dire -- page 92

Jury Sworn -- page 109

Opening Statement by Mr. Wall -- page 117

Opening Statement by Mr. Harris -- page 122

Opening Statement by Mr. Boggs -- page 131

INDEX

	WITNESSES	PAGE
	(JULY 23, 2002)	
	(JURY TRIAL)	
	OFFICER KENNETH HANCOCK (SW)	
	Direct Examination by Mr. Wall	148
	Cross Examination by Mr. Harris	154
	Cross Examination by Mr. Boggs	165
	Redirect Examination by Mr. Wall	167
	OFFICER RHETT FOX (SW)	
	Direct Examination by Mr. Wall	171
	Cross Examination by Mr. Harris	210
	Cross Examination by Mr. Boggs	226
	Redirect Examination by Mr. Wall	241
	Recross Examination by Mr. Boggs	262
	OFFICER ROBERT ROSENBERG (SW)	
	Direct Examination by Mr. Wall	271
	Cross Examination by Mr. Harris	272
	Cross Examination by Mr. Boggs	273
	Redirect Examination by Mr. Wall	277

INDEX

WITNESSES	PAGE
JOHNNY SOLOMON (SW)	
Direct Examination by Mr. Wall	281
Cross Examination by Mr. Harris	296
Cross Examination by Mr. Boggs	308
Redirect Examination by Mr. Wall	324
Recross Examination by Mr. Harris	328
Recross Examination by Mr. Boggs	329
OFFICER ASHLEY HARRIS (SW)	
Direct Examination by Mr. Wall	331
(No Cross Examination by Mr. Harris)	
Cross Examination by Mr. Boggs	341
Redirect Examination by Mr. Wall	347
Recross Examination by Mr. Boggs	348
OFFICER JACOB DEFFENBAUGH (SW)	
Direct Examination by Mr. Wall	350
Cross Examination by Mr. Harris	367
Cross Examination by Mr. Boggs	375
Redirect Examination by Mr. Wall	391
Recross Examination by Mr. Harris	396
Recross Examination by Mr. Boggs	397
OFFICER JACOB DEFFENBAUGH (SW) (PROFFERED TESTIMONY)	
Cross Examination by Mr. Boggs	402

INDEX

WITNESSES

PAGE

(JULY 24, 2002)

Closing Argument by Mr. Wall -- page 449

Closing Argument by Mr. Harris -- page 473

Final Argument by Mr. Boggs -- page 495

Jury Instructions -- page 515

Jury Verdict -- page 545

INDEX

WITNESSES

PAGE

(JULY 25, 2002)

Sentencing -- page 556

Reporter's Certificate -- page 567

146

1	EXHIBITS			
2	NO.	DESCRIPTION	ID.	EV.
3	S-1	Map		399
4	S-2	Drugs		352
5	S-3	Map		399
6	S-4	Audio Tape		199
7	S-5	Form C - Rule 6	271	
8	S-6	Drug Report		341
9				
10	CT-1	I.D. Picture Lineup	33	
11	CT-2	Defendant Gonzales proposed	424	
12		Jury Question		
13	CT-3	Deft. Gonzales Requested Charges	548	
14	CT-4	Deft. Shelhamer Requested Charges	548	
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

1 (Proceedings, July 23, 2002)

2 THE COURT: Is the State ready to proceed?

3 MR. WALL: We are, Your Honor.

4 THE COURT: Defense ready, Mr. Harris?

5 MR. HARRIS: Yes, Your Honor.

6 THE COURT: Mr. Boggs?

7 MR. BOGGS: Yes, Your Honor. Good morning.

8 THE COURT: Good morning.

9 All right. Let's bring our jury back.

10 (The following takes place in the presence of
11 the jury panel)

12 THE COURT: Polling of the jury, by the State?

13 MR. WALL: Waived, Your Honor.

14 THE COURT: By the Defendant Gonzales?

15 MR. HARRIS: Waived.

16 THE COURT: By the Defendant Shelhamer?

17 MR. BOGGS: Waived, Your Honor.

18 THE COURT: Good morning, ladies and gentlemen
19 of the jury. I hope you had a pleasant evening. We
20 are going to start the testimony in the case now.

21 Call your first witness, please, sir.

22 MR. WALL: Thank you. We call Lieutenant Ken
23 Hancock to the stand.

24 OFFICER KENNETH HANCOCK, having been first duly
25 sworn, testified as follows:

OFFICER KENNETH HANCOCK - DIRECT BY MR. WALL

148

1 THE COURT: Sir, if you would, please state
2 your name for the record and spell your last name.

3 THE WITNESS: Kenneth Hancock, H-a-n-c-o-c-k.

4 DIRECT EXAMINATION BY MR. WALL:

5 Q Where are you employed?

6 A Spartanburg County sheriff's office.

7 Q How long have you been employed there?

8 A Eleven years.

9 Q And your current position is lieutenant of the
10 narcotics division, is that correct?

11 A It is, sir.

12 Q How long have you been in the narcotics
13 division?

14 A Nine years.

15 Q I want to take you to June 3rd of 2002. Were
16 you involved in this operation regarding Mr.
17 Gonzales?

18 A Yes, I was.

19 Q What was your involvement?

20 A Basically I was supervisor in charge of the
21 whole division of the whole, that day.

22 Q Where were you at?

23 A I was in a vehicle, along with Investigator
24 Fox, located in the parking lot. I believe it was
25 the Little Cricket there on Highway 11, at 26.

1 Q And what was your role in terms of what you and
2 Mr. Fox were doing?

3 A Basically we were just -- we were to run the
4 A.I.D. kit, which was a wire, a body wire, that was
5 on one of the subjects and listen for anything, if
6 anything went wrong, or just basically to take down
7 a signal to where we could call other units in to
8 take the actual suspects down.

9 Q So you are monitoring that, at least initially,
10 for officer and informant's safety?

11 A Yes, sir.

12 Q I'm going to show you a few photographs.

13 MR. HARRIS: I object to the photographs, Your
14 Honor. They haven't been provided. This is the
15 first time that I have seen this morning.

16 MR. WALL: Your Honor, I made them aware
17 yesterday that I had taken individual photos.

18 THE COURT: Objection is sustained.

19 BY MR. WALL:

20 Q Please describe the location.

21 A It's basically a convenience store parking lot,
22 two lines of gas pumps. It faces Highway 11 on the
23 opposite side from the Mini-Mart of 26. It's
24 basically your convenience store parking lot. It
25 was very busy that afternoon.

OFFICER KENNETH HANCOCK - DIRECT BY MR. WALL

150

1 Q How would you describe the entrance into the
2 convenience store parking lot?

3 A It's kind of open on both ends. You can pull
4 in coming from the -- towards the Lake Bowen area or
5 the Campobello area. There's two entrances into the
6 parking lot, both ways.

7 Q And you were parked away from the location?

8 A Yes, I was parked on the edge of the road close
9 to the Campobello side on the edge of a shaded tree
10 there.

11 Q What did you do once the operation started?

12 A From the start, or after actually the takedown
13 started, or --

14 Q No, once y'all pulled in and got set up.

15 A Once we pulled in and got set up, basically I
16 got out of the vehicle, lifted the hood on the
17 truck, basically looked like we were standing there,
18 like we were working on our vehicle. It was broken
19 down. That way we wouldn't stand out and look out
20 of place. I was outside basically just looking at
21 the motor to make it look like we were broke down in
22 the parking lot.

23 Q Did you really have a view of the car when it
24 pulled in or what was going on and all?

25 A No, I didn't.

1 Q And was that your purpose?

2 A Yes. Investigator Fox was in the vehicle with
3 the A.I.D. kit, and my purpose was just basically
4 look like we were broke down, so we wouldn't stand
5 out.

6 Q And what happened once the takedown begin or
7 how did it begin?

8 A Once I got back in the vehicle -- I let the
9 hood down. I got back in the vehicle. Maybe ten
10 seconds after, or so, after I got in the vehicle,
11 Investigator Fox told all the officers to move in.
12 At that time we waited on I believe it was one of
13 the other takedown units. Once they started pulling
14 in the parking lot, I pulled basically straight
15 ahead into a parking place. I got out of the
16 vehicle. I noticed out of the right side as we were
17 pulling up someone go around the side of the
18 building from where the undercover vehicle was at.
19 I noticed someone go around the building. I went
20 around the edge of the building, along with another
21 officer, and I observed an officer down through the
22 kudzu. It was a deep incline down there and I
23 observed an officer down there.

24 Q Pursuing someone?

25 A Yes.

OFFICER KENNETH HANCOCK - DIRECT BY MR. WALL

152

1 Q What did you do after that?

2 A After that I came back around the building and
3 got in my vehicle, pulled out, went back on No. 11,
4 got on the frontage road. I rode down the frontage
5 road a couple of times, because we had several
6 officers actually pursuing a suspect. We figured
7 the suspect may come back out on the frontage road.
8 I then went to a little -- down on the left side of
9 a -- used to be the old video poker place. There's
10 a little produce stand there. I went there and sat.
11 At that time I called some of the uniformed guys to
12 come up and set up a perimeter. We was going to
13 call the K-9 up there to actually try to track the
14 suspect that we was pursuing.

15 Q Did you do that?

16 A Yes, we did.

17 Q Did they have any luck?

18 A No, they did not.

19 Q What did you attribute -- what were they
20 basically tracking?

21 A Basically they were tracking one of the
22 officers that we had there. They tracked him
23 because he ran a pretty good distance into the
24 woods, so they actually tracked him.

25 Q Now, what's the procedure -- so you come back

OFFICER KENNETH HANCOCK - DIRECT BY MR. WALL

153

1 to the convenience store?

2 A Yes, sir.

3 Q With one suspect arrested and one suspect not
4 arrested?

5 MR. BOGGS: Objection, Your Honor. He's
6 leading the witness. He's testifying. There has
7 been no testimony --

8 THE COURT: I understand your objection.
9 Sustained.

10 BY MR. WALL:

11 Q What did you do after you returned to the
12 location? What did you find the situation to be?

13 A After we had -- after we had failed -- when the
14 dog failed to track a suspect, at that time we
15 dismissed all the uniformed guys. I returned to the
16 parking lot where Investigator Fox was at. He had
17 one suspect in custody, and he stated that the other
18 suspect that had got away was Michael Gonzales and
19 that he had his information that he was going to
20 sign a warrant for him. We waited on the county
21 rollback to two the vehicle, which came back after
22 they came. The uniform transported the suspect that
23 was under arrest to the county jail and we returned
24 to the office, and Investigator Fox then did his
25 report and signed the warrant.

OFFICER KENNETH HANCOCK - CROSS BY MR. HARRIS

154

1 Q And what's done with the signed warrant?

2 A Basically it's turned over to our warrant
3 division and they go through the process of trying
4 to locate the suspect and arrest him.

5 Q Did all of this occur within Spartanburg
6 County?

7 A Yes, it did, sir.

8 MR. WALL: No further questions, Your Honor.

9 THE COURT: Cross-examination, Mr. Harris.

10 MR. HARRIS: Thank you, Your Honor.

11 CROSS EXAMINATION BY MR. HARRIS:

12 Q Yes, sir. On this particular date and time
13 that you described, how were you dressed?

14 A I believe I had a T-shirt on and blue jeans.

15 Q What kind of T-shirt?

16 A I can't recall.

17 Q Did it have graphics on it?

18 A I can't recall.

19 Q You don't remember what color it was?

20 A It was white.

21 Q What kind of pants or shorts did you have on?

22 A I had on a pair of Levi 5 X 5 blue jeans.

23 Q What kind of shoes did you have on?

24 A A pair of black Harley Davidson boots.

25 Q Harley Davidson boots?

1 A Yes, sir.

2 Q Did you have a hat on?

3 A No, sir.

4 Q Were you wearing any kind of jewelry?

5 A Yes, sir, I always wear a blue Timex wrist
6 watch.

7 Q Any other jewelry?

8 A Yes, sir, I got a class ring from Rock Hill
9 High School, class of 1982.

10 Q Now, did any of the clothing that you had on
11 identify you as a police officer?

12 A Not when I was standing outside the vehicle,
13 no, sir.

14 Q That was in the parking lot of the Little
15 Cricket convenience store, is that right?

16 A Yes, sir.

17 Q While you were undertaking whatever
18 surveillance or whatever you were doing in regard to
19 this particular investigation you were conducting?

20 A While I was sitting there before the takedown
21 occurred, I didn't have anything on identifying me
22 as a police officer.

23 Q And you raised -- you were in a car, which at
24 one point you raised the hood up?

25 A Yes, sir.

OFFICER KENNETH HANCOCK - CROSS BY MR. HARRIS

156

1 Q And that was to disguise or not to call
2 attention to yourself, giving you an excuse to do
3 that?

4 A Yes, sir.

5 Q Or seemed to be there?

6 A Yes, sir.

7 Q And were you in a car that had any kind of
8 marking or indication that it was a law enforcement
9 vehicle?

10 A No, sir.

11 Q And Investigator Fox was with you, is that
12 correct?

13 A Yes, sir.

14 Q And how was Investigator Fox dressed?

15 A He had on a pair of maybe blue jeans, a T-shirt
16 and he had his arm in a sling. He had broke his
17 arm.

18 Q Is it true that Investigator Fox was not
19 wearing any kind of clothing that would identify him
20 as a police officer?

21 A No, sir, he didn't have a uniform on.

22 Q Well, there would be just to the casual
23 observer nothing to indicate that you or
24 Investigator Fox were police officers, is that
25 right?

1 A While we were sitting there, no, sir.

2 Q There would have been nothing about your car
3 that would have alerted anyone to the fact that you
4 were a police officer, is that right?

5 A No, sir.

6 Q All right. Now, is it correct that there was a
7 plan for Investigator Deffenbaugh to say or do
8 something that would trigger what y'all term a
9 takedown?

10 A Yes, sir, there should have been, yes, sir.

11 Q To your knowledge did that occur?

12 A It obviously had, because Investigator Fox gave --
13 you know, tell everybody to come in, so obviously he
14 had heard the takedown signal.

15 Q All right. And were you -- did you participate
16 in the takedown?

17 A Actually hands on, no, sir, I did not.

18 Q Well, what was your participation in that
19 takedown?

20 A I pulled to the opposite end of the parking
21 lot, and as I saw someone running the opposite end --
22 where they were parked at, they run around the
23 building, I went around to the edge of the building
24 and stooped right there. That was basically my
25 participation altogether.

OFFICER KENNETH HANCOCK - CROSS BY MR. HARRIS

158

1 Q You were the head of this whole operation?

2 A Yes.

3 Q Did you witness the takedown?

4 A No, sir, I did not.

5 Q Did you hear the takedown?

6 A No, sir, I did not. I was observing. I had
7 two officers chasing a suspect that could possibly
8 be armed at the time. I was more worried about
9 someone like that.

10 Q How many officers actually participated in the
11 takedown, apart from the officers involved in the
12 pursuit of this individual?

13 A Possibly four. We were very short that day.
14 We had been short until about three weeks ago.
15 There was only five investigators in our office
16 until three weeks ago.

17 Q So possibly four?

18 A Possibly.

19 Q And by that you mean four individuals that when
20 the word was given would basically descend upon the
21 area where this activity was taking place?

22 A Yes, sir.

23 Q Now, of course, it has been alleged that you
24 already had one officer there in an undercover
25 capacity, is that correct?

1 A Yes, sir.

2 Q So that would be five officers, is that right?

3 A Yes, sir, he is a police officer, but any time
4 you're in an undercover capacity, you don't take --
5 you don't take any responsibility in the takedown.

6 Q I understand, but you didn't have to worry
7 about him doing anything to you, though?

8 A No, sir.

9 Q I mean, you didn't have to concern yourself.
10 That's my point. You didn't have to concern
11 yourself with Investigator Deffenbaugh's actions in
12 an undercover capacity?

13 A No, sir.

14 Q So there was essentially at that time one
15 individual for you to deal with, and that was Mr.
16 Mr. Shelhamer, is that right?

17 A Except for the person that ran, yes, sir.

18 Q Well, I understand that. I'm talking about the
19 people that surrounded, that descended upon this
20 scene. There was at that point in time one
21 individual for you to be concerned about, is that
22 right?

23 A When we first rolled up, there was two.

24 Q All right. There were two?

25 A Yes, sir.

OFFICER KENNETH HANCOCK - CROSS BY MR. HARRIS

160

- 1 Q At some point?
- 2 A Yes, sir.
- 3 Q Ever how fleeting that may be?
- 4 A Yes, sir.
- 5 Q All right. So it was basically four on two?
- 6 A Yes, sir.
- 7 Q And the four had guns?
- 8 A Yes, sir.
- 9 Q What kind of guns?
- 10 A Sig PP-226 9-millimeter.
- 11 Q Slow down now. What was that again?
- 12 A Sig PP-226 9-millimeter.
- 13 Q What kind of gun is that?
- 14 A That's just your basic issued law enforcement
- 15 handgun.
- 16 Q And these people descended quickly upon this
- 17 scene, is that correct?
- 18 A Yes, sir.
- 19 Q When I say -- I mean very quickly, is that
- 20 correct?
- 21 A No, sir, we didn't really rush in. No, sir, we
- 22 didn't.
- 23 Q You didn't rush in?
- 24 A It was a crowded parking lot. If you had
- 25 rushed in, we would have probably ran into somebody.

1 Q So your testimony is that the officers
2 participating in the takedown didn't rush in?

3 A After we ease in our vehicle, then they
4 probably jumped out, yes, sir, I can say that now.

5 Q Drew their weapons?

6 A I can't say. I wasn't there at that actual
7 takedown area to say if they drew the weapon or not.

8 Q And began to scream at the top of their lungs
9 profanities?

10 A Like I said, I wasn't there. I can't say.

11 Q You don't know about that?

12 A I can't say that, sir.

13 Q Now, is that standard -- if that happened, is
14 that standard police procedure?

15 A What part of that?

16 Q To jump out, guns in hand, screaming at the top
17 of your lungs profanity?

18 A I would say not the profanity, but the guns out
19 and yelling, yes, sir, because one thing we want to
20 do is one thing is we want to make sure you know is
21 we are a police officer.

22 Q Are you aware that anybody participating in the
23 takedown ever identified themselves as law
24 enforcement officers when they jumped out?

25 A I can't say that. I wasn't -- like I said, I

OFFICER KENNETH HANCOCK - CROSS BY MR. HARRIS

162

1 wasn't there at that actual scene.

2 Q Certainly, though, not standard police
3 procedure, by the book academy stuff, to jump out
4 screaming and hollering profanities?

5 A No, sir.

6 Q Not very professional, either, is it?

7 A No, sir.

8 Q If it happened?

9 A Yes, sir.

10 Q I understand you say that you are not aware of
11 it.

12 A Yes, sir.

13 Q You have heard the solicitor make reference to
14 that, is that correct, yesterday?

15 A Yes, sir. No, I wasn't here yesterday.

16 Q Have you discussed it with him?

17 A No, sir.

18 Q Now, is it fair to say that the very purpose of
19 the takedown operation is to apprehend the people
20 that you believe have been involved in illegal
21 activity?

22 A Yes, sir.

23 Q And you, being in charge of that, would take
24 every measure possible, I'm sure, to make certain
25 that the individuals were surrounded and detained,

1 is that right?

2 A Yes, sir.

3 Q That didn't happen, according to you, in this
4 case, at least as to one individual?

5 A Yes, sir.

6 Q Is it fair to say that the takedown that took
7 place was assertive and aggressive?

8 A I think nearly every takedown we do is kind of
9 aggressive.

10 Q Did any, to your knowledge, of the individuals
11 that participated in the takedown have clothing on
12 that identified them as police officers?

13 A When I came back to the scene after I had been --
14 we're working with the dogs, we always wear a raid
15 vest with police on the back or sheriff on the back
16 with a handgun and a badge. I know Officer Turley
17 that was pursuing the suspect had a badge, gun, W.T.
18 in his hand because he lost his badge and his W.T.
19 in the pursuit.

20 Q Well, let me clarify my question. You have
21 stated previously that four officers descended upon
22 the scene where it is alleged illegal activity
23 occurred, is that correct?

24 A Yes, sir.

25 Q Of those individuals, those four, to your

OFFICER KENNETH HANCOCK - CROSS BY MR. HARRIS

164

1 knowledge were any of them wearing clothing that
2 would identify themselves as police officers?

3 A Yes, sir.

4 Q Who and what clothing?

5 A The reason why I say this, it's standard
6 sheriff's office policy that you wear your
7 protective vest and something that states that you
8 are a police officer when you get out. I can't say
9 that they had it on. Like I said, I was not there
10 when they got out of the vehicle.

11 Q I see.

12 A But that's standard sheriff's office policy.

13 Q So today your testimony is in response to the
14 question did any of the four that descended upon the
15 scene have clothing that would identify themselves
16 as police officers, to make certain, you do not know --

17 A No.

18 Q -- the answer to that question?

19 A I was not there -- I was not there when they
20 got out of the vehicle.

21 Q If standard police procedure were followed,
22 they should have had some type of clothing on or
23 body armor on that would identify that?

24 A Yes, sir.

25 Q You don't know what the officers in your

1 operation were wearing and can't tell the jury today
2 whether or not your officers adhered to police
3 procedure, is that correct?

4 A No, sir, I wasn't there when they jumped out of
5 the vehicle. I can't say.

6 Q You were the man in charge?

7 A But I can't be in two places at one time.

8 Q Sir, I understand that. Is it correct you were
9 the man in charge?

10 A Yes, sir, I was.

11 Q And you cannot, sitting here today, tell this
12 jury that your officers under your command followed
13 police procedure?

14 A I can just tell you they were instructed to.
15 That's all I can say.

16 Q Thank you.

17 MR. HARRIS: No further questions.

18 MR. BOGGS: May it please the court.

19 THE COURT: Mr. Boggs.

20 MR. BOGGS: May it please the Court, Your
21 Honor.

22 THE COURT: Yes, sir.

23 CROSS EXAMINATION BY MR. BOGGS:

24 Q Lieutenant, I believe Mr. Wall asked you -- you
25 were the supervisor -- you identified yourself as

OFFICER KENNETH HANCOCK - CROSS BY MR. BOGGS

166

1 the supervisor of this investigation, correct?

2 A Yes, sir.

3 Q And the investigation was of Michael Gonzales,
4 according to Mr. Wall, is that correct?

5 A Yes, sir.

6 Q Did you have a chance to monitor any phone
7 calls prior to going to the Little Cricket?

8 A No, sir, I believe that was Investigator Fox.

9 Q And so you were not privy to any phone calls
10 made by the confidential informant?

11 A No, sir.

12 Q Before you got to the Little Cricket, did you
13 have someone that you were looking for?

14 A Before we left the actual office, there was a
15 raid plan done, Mr. Boggs, and basically --

16 Q Is that like a plan of attack?

17 A Yes, sir, it's basically -- we always --

18 Q Okay.

19 A It's standard procedure you have to do a raid
20 plan. The raid plan was for -- stated that we were --
21 an operation was for Michael Gonzales.

22 Q Was there ever any mention, prior to you going
23 to the Little Cricket, of Josh Shelhamer?

24 A No, sir.

25 Q You mentioned earlier that you were chasing a

1 suspect because they were possibly armed?

2 A Yes, sir.

3 Q That's the way that you feel about any suspect
4 that's fleeing, correct?

5 A Yes, sir.

6 Q And, in fact, there is no evidence of weapons
7 by either defendant in this case for this particular
8 arrest, is that correct?

9 A Not as I can recall, no, sir.

10 MR. BOGGS: I have no further questions, Your
11 Honor.

12 THE COURT: Redirect?

13 MR. WALL: Yes, sir.

14 REDIRECT EXAMINATION BY MR. WALL:

15 Q Mr. Harris asked if you were dressed as an
16 officer, or anything like that. You're in an
17 undercover capacity, is that correct?

18 A Yes, sir, basically.

19 Q I mean, in an undercover surveillance?

20 A Yes, sir.

21 Q Did you have any reason while you were in their
22 surveillance mode to draw that to anyone's attention
23 that you were a police officer?

24 A No, sir.

25 Q You said that when you returned to the scene,

OFFICER KENNETH HANCOCK - REDIRECT BY MR. WALL

168

1 they -- everyone in the takedown team was dressed
2 appropriately?

3 A Yes.

4 Q Identifying themselves as officers?

5 A Yes, sir.

6 Q Do you know of any reason that they would have
7 had to have changed?

8 A No, sir.

9 Q How often do y'all participate in takedowns?

10 A That's really our livelihood. That's what we
11 do on a daily basis.

12 Q And in your experience is it part of procedure,
13 the takedown team wants everybody to know they are
14 police officers?

15 A Yes, sir.

16 Q Why is that?

17 A I can recall on three separate occasions that
18 we have been in --

19 MR. HARRIS: I'm going to object to some kind
20 of colloquy about war stories.

21 THE COURT: Overruled.

22 BY MR. WALL:

23 Q Please continue.

24 A Basically on three different occasions since I
25 have been in the narcotics division we have actually

1 been shot at as -- actually been in a shootout as a
2 police officer. We want to make sure that everyone
3 we come in contact with, there is no doubt in their
4 mind that we are police officers, as far as what we --
5 as far as our gear that we have on and as far as us
6 communicating with them that we are police officers.
7 We always shout it. It's always -- that way nobody
8 can say you whispered it, we heard it, but we can
9 say we shouted it loud.

10 Q And are you -- basically you are trying to
11 obtain control of the situation?

12 A Yes, sir.

13 Q Which car was the first car to pull in, in
14 terms of the police cars?

15 A I can't recall.

16 Q What about your vehicle? Did you roll in?

17 A I was already in the parking lot. We just kind
18 of pulled forward into a parking place and actually
19 parked.

20 Q So my question, would you have been ahead of or
21 behind the takedown team?

22 A Maybe -- maybe a little bit ahead of, per se.

23 Q As I understand your testimony, though, you
24 pulled to a side?

25 A Yes, sir, I was on the opposite end of the

OFFICER KENNETH HANCOCK - REDIRECT BY MR. WALL

170

1 parking area.

2 Q And at that point was the suspect already
3 running?

4 A When I pulled into the parking place, I noticed
5 out of the right someone go beside the building. I
6 can't say who it was or how they were dressed. I
7 just seen somebody run beside the building. It
8 could have been a police officer. I have no idea.

9 Q The monitoring that y'all were doing in the
10 vehicle, is that a listening post, basically?

11 A Yes.

12 Q How does that work?

13 A Basically the person that's doing -- actually
14 doing the undercover work has like a basic
15 microphone on. And that piece of equipment that we
16 have has an antenna with it and it's just like --
17 it's kind of like a radio. The person wearing the
18 microphone is kind of like a radio station. We have
19 got a radio turned on in our car that we can listen
20 to that station. That's basically the way it works.

21 MR. WALL: No further questions, Your Honor.

22 THE COURT: Recross, Mr. Harris?

23 MR. HARRIS: No, thank you, Your Honor.

24 THE COURT: Mr. Boggs?

25 MR. BOGGS: No, Your Honor.

OFFICER RHETT FOX - DIRECT BY MR. WALL

171

1 THE COURT: All right. Thank you, sir. You
2 may step down.

3 MR. WALL: We would ask that he be excused,
4 Your Honor.

5 THE COURT: Without objection he is excused.
6 Next witness.

7 MR. WALL: I call Officer Rhett Fox, Your
8 Honor.

9 OFFICER RHETT FOX, having been first duly
10 sworn, testified as follows:

11 THE COURT: Sir, if you would, please state
12 your name for the record and spell your first and
13 last name.

14 THE WITNESS: Rhett Fox. R-h-e-t-t F-o-x.

15 THE COURT: Thank you, sir.

16 DIRECT EXAMINATION BY MR. WALL:

17 Q Where are you employed?

18 A With the Spartanburg County sheriff's office..

19 Q Are you employed in the narcotics unit?

20 A Yes, sir.

21 Q And are you what's called a case agent?

22 A Yes, I am, for this particular case.

23 Q What does that mean?

24 A Basically that means that I oversee the
25 operation and take care of the paperwork that's

OFFICER RHETT FOX - DIRECT BY MR. WALL

172

1 produced through the investigation.

2 Q How did this investigation begin?

3 A This investigation began when I was contacted
4 by a cooperative witness.

5 Q And that person is?

6 A Johnny Solomon.

7 Q Is he seated right here?

8 A Yes, he is.

9 Q What did that ultimately lead to?

10 A It ultimately led to the events on June the
11 3rd, in which this drug transaction took place.

12 Q Were any -- how did you -- how was Mr. Gonzales
13 contacted?

14 A By telephone.

15 Q Who obtained his telephone number?

16 A The phone number was known to Mr. Solomon, who
17 informed me of that number.

18 Q Just take us through, if you will, what
19 occurred regarding the telephone calls that you
20 witnessed.

21 A Basically on June the 3rd, when I came in to
22 work, I was contacted by Mr. Solomon and we placed
23 phone calls, starting at approximately 1:58 p.m. to
24 the phone number known to Mr. Solomon to be Mr.
25 Gonzales'.

OFFICER RHETT FOX - DIRECT BY MR. WALL

173

1 Q And what occurred?

2 A We placed a phone call at 1:58 p.m., which was
3 a third-party call that I placed from my telephone
4 at my desk, in which I had a tape recorder, this one
5 right here, and I recorded the conversation as I
6 heard it through this speaker on the phone. And in
7 that conversation Mr. Solomon, when the phone was
8 answered, asked for Mike. There was --

9 MR. HARRIS: Objection.

10 THE COURT: I note your objection as previously
11 ruled upon by the court. It's overruled.

12 BY MR. WALL:

13 Q Please continue.

14 A Yes, sir. A female answered the phone and
15 stated that Mike was not available, to call back in
16 forty minutes. Mr. Solomon then stated he could not
17 call back and to put Mike on the phone. At that
18 point, after a short delay, Mike came to the phone
19 and they started talking about drugs. And the voice
20 identified as Mike Gonzales stated that he had one
21 pound of the other stuff for 13-5, if we wanted it.

22 Q What did y'all understand that to mean?

23 A At that point the phone conversation was
24 terminated and I spoke to Mr. Solomon again and I
25 asked him, I said "what does he mean?"

OFFICER RHETT FOX - DIRECT BY MR. WALL

174

1 MR. HARRIS: I'm going to object to what Mr.
2 Solomon said as hearsay.

3 MR. WALL: We have Mr. Solomon here. He will
4 be able to testify.

5 THE COURT: The objection is sustained.

6 BY MR. WALL:

7 Q After speaking with Mr. Solomon, what were you
8 able to determine?

9 A That the other stuff meant crank or
10 methamphetamine. Crank is a street term for
11 methamphetamine.

12 Q What did you understand 13-5 to mean?

13 A The price.

14 MR. HARRIS: Your Honor, I object. I mean, the
15 same thing.

16 THE COURT: I will sustain the objection.

17 MR. WALL: Yes, sir.

18 BY MR. WALL:

19 Q After that conversation -- let me back up just
20 a moment.

21 A Yes, sir.

22 Q Was the original operation to purchase
23 methamphetamine?

24 MR. HARRIS: Objection. The form of the
25 question is leading.

OFFICER RHETT FOX - DIRECT BY MR. WALL

175

1 THE COURT: Well, let me let him ask the
2 question and then I'll rule on it.

3 BY MR. WALL:

4 Q Or was it to purchase some other substance?

5 THE COURT: Sustain the objection.

6 If you want to rephrase.

7 BY MR. WALL:

8 Q What, if any, purpose was -- what, if any, drug
9 was originally sought to be purchased?

10 MR. HARRIS: I object, the same objection.

11 THE COURT: Overruled.

12 A The name of the drug?

13 BY MR. WALL:

14 Q Yes.

15 A Marijuana.

16 Q All right. And so if I'm following this
17 correctly, when you hear the other stuff, the
18 conversation is terminated, essentially, that call?

19 A No, the conversation continued. They talked
20 back and forth. And then once the call was
21 terminated, I spoke to Mr. Solomon again. That's
22 when I asked the question.

23 Q Right. That's the part we're going to, but to
24 see what this new thing is we are talking about?

25 A Yes.

OFFICER RHETT FOX - DIRECT BY MR. WALL

176

1 Q Other than marijuana?

2 A Correct.

3 Q Were calls placed after that?

4 A Yes, they were.

5 Q And did you witness those calls?

6 A Yes, I did.

7 Q What occurred there?

8 A We placed another phone call at 2:10 p.m.,
9 which was again placed from my desk with the
10 recorder in a third-party call to the phone number
11 identified as Michael Gonzales'. And in that
12 conversation Mr. Solomon informed him that --

13 MR. HARRIS: Your Honor, I object on hearsay
14 grounds.

15 THE COURT: Yes, sir, I'm going to sustain the
16 objection as to any conversations he's had with this
17 individual as to what he actually told him.

18 MR. WALL: Yes, sir.

19 THE COURT: That man can testify. You can
20 continue, but, once again, I'm sustaining that
21 objection.

22 BY MR. WALL:

23 Q Just, if you will, limit it to what you
24 actually heard.

25 A Yes.

OFFICER RHETT FOX - DIRECT BY MR. WALL

177

1 Q Again what occurred after that?

2 A In that call I heard the conversation in which
3 price was discussed.

4 MR. HARRIS: Your Honor, that's my objection.
5 This witness is stating what he's heard other people
6 say.

7 THE COURT: Well, as long as it's not what Mr.
8 Solomon said, that's coming in, Mr. Harris.

9 MR. HARRIS: Yes, sir. Well --

10 THE COURT: I don't believe that's --

11 MR. HARRIS: Well, I guess my difficulty here,
12 Your Honor, is I don't know if the witness is going
13 to say something that Mr. Gonzales is alleged to
14 have said or something that Mr. Solomon said.

15 THE COURT: Well, then the solicitor is going
16 to have to ask a question that will enable us to
17 understand that.

18 MR. WALL: Yes, sir.

19 BY MR. WALL:

20 Q Please limit, because we will have Mr. Solomon
21 testifying.

22 A Yes, sir.

23 Q Limit the conversations that you heard to what
24 Mr. Gonzales said. Do you understand my question?

25 A Yes.

OFFICER RHETT FOX - DIRECT BY MR. WALL

178

1 Q Please continue.

2 A In that conversation Mr. Gonzales stated that
3 it would be 13-5, and the location would be the
4 Little Cricket at Highway 11 and I-26.

5 Q The location was ultimately determined to be
6 the Little Cricket?

7 A Yes, and the time was set up to be at 5:30
8 p.m..

9 Q Where did you -- where originally was -- where
10 did you think the transaction was going to occur at
11 at the Little Cricket?

12 A Inside. Inside the store.

13 Q And you based -- is that where Mr. Gonzales
14 wanted it to occur?

15 A Yes.

16 Q Where inside the store?

17 A In the bathroom of the store.

18 Q What happened after these telephone calls? Was
19 that the last call or was there more calls?

20 A No, there are two more calls placed a short
21 time after. After this phone conversation, this is
22 when this operation was started. I typed up a
23 request for the money, asked Investigator
24 Deffenbaugh for his assistance, if he would do the
25 undercover for this case.

1 Q So basically things sort of go in high gear, is
2 that fair to say?

3 A Yes, sir.

4 Q How much money would you have needed to have
5 enough to complete this transaction, to have what
6 was supposed to be there?

7 A Well, the price was 13,500 and we typed up a
8 request for the money. It was a decision to just
9 make a flash roll, and we -- I'm not sure of the
10 exact amount of money that we got, but we had a
11 large amount of one dollar bills with \$100.00 bills
12 placed on top, placed in the stacks and rubber
13 banded to appear as if it was \$13,500.00.

14 Q What's that, the decision as to whether to
15 release \$13,500.00 or not? I mean, what comes into
16 play there?

17 A Basically just the amount of money. If
18 something was to happen and the money exchanged
19 hands and a person was to get away, \$13,500.00 was a
20 lot of money from the sheriff's office account to
21 not be able to account for any more, if it's gone in
22 unrecoverable. So, therefore, we made the decision
23 to just make what is known as a flash roll in order
24 to have a lesser amount of money in case the money
25 did get away.

OFFICER RHETT FOX - DIRECT BY MR. WALL

180

1 Q So you accounted for the possibility that
2 someone could get away, could get away with the
3 money?

4 A Yes, there is always the possibility of that.

5 Q And, again, you had two subsequent calls?

6 A Yes, there were two more calls we placed.

7 Q Is this all on the same day?

8 A Yes, this is all -- all these events take place
9 on June the 3rd.

10 Q What's the basic purpose of the second two
11 calls? Is it after the second call that the
12 location has been determined?

13 A Yes, the call at 2:10, which is the last call
14 placed from the office, pretty much establishes the
15 location and time for this transaction. And the two
16 calls that are placed after that, the one is just a
17 call to confirm that everything is still ready to
18 go, and then the fourth call was placed at the
19 request of Mike Gonzales.

20 Q What do you mean? As part of the third call,
21 he requested a fourth call?

22 A Yes, when we placed our third call, which was
23 at 5:16 p.m., Mr. Gonzales requested that we call
24 back in, I believe he stated, seven minutes. Yes.
25 So we called back in ten minutes, at 5:26 p.m..

OFFICER RHETT FOX - DIRECT BY MR. WALL

181

1 Q And then what time did y'all actually arrive at
2 the Little Cricket?

3 A We arrived at the Little Cricket at 5:50 p.m.,
4 because the time had been changed. At 5:26 p.m. Mr.
5 Gonzales stated that he would be at the Little
6 Cricket in thirty minutes.

7 Q So the time was changed in the fourth call?

8 A Yes.

9 Q So y'all arrive at the Little Cricket?

10 A Yes.

11 Q And you were with Lieutenant Hancock, is that
12 correct?

13 A Yes, sir.

14 Q And basically -- as we were seated here a few
15 moments ago, did you draw a basic sketch of the
16 scene?

17 A Yes, I did, a basic sketch.

18 (Map Drawing marked as State's Exhibit No. 1
19 for identification)

20 BY MR. WALL:

21 Q I'm going to show you what's been marked as
22 State's Exhibit No. 1 for I.D.. Is that your sketch
23 of the scene?

24 A Yes, it is.

25 Q Is your second job as an artist?

OFFICER RHETT FOX - DIRECT BY MR. WALL

182

1 A No, sir, it is not.

2 Q So this is a very basic sketch?

3 A Yes.

4 Q Is that correct?

5 A Yes.

6 Q Is there any videotape of this operation?

7 A No, there is not.

8 Q And why is that?

9 A Basically when we had prepared and left the
10 office to go do this, our understanding was that it
11 was going to take place in the bathroom of the
12 Little Cricket inside, in which we could not video
13 that transaction.

14 Also, as Lieutenant Hancock had alluded to
15 earlier, we were shorthanded that day and did not
16 have people that could be in position there to video
17 without, in essence, alerting people coming in that
18 there was video in progress. We didn't -- we were
19 in an area that basically kind of almost secluded
20 because there is not businesses directly around it
21 that have cars frequently there, where we could
22 maybe park in a parking lot adjacent to it or across
23 the street and video. We had to be in that parking
24 lot to actually video. And then we felt that that
25 would alert the potential sellers of our presence.

OFFICER RHETT FOX - DIRECT BY MR. WALL

183

1 Q Is the same true of photographs? Were there
2 any photographs of it?

3 A No, there were no photographs taken.

4 Q What did you do? What was your role in the
5 monitoring vehicle?

6 A My role was basically to listen to the
7 transmissions that were coming through our -- what
8 the lieutenant described as an A.I.D. kit, which is
9 really just a receiver and recorder and a speaker
10 that allows us to listen to the transmissions from
11 the microphone, basically, on a person.

12 Q And who was it on in this case?

13 A In this case it was on Mr. Solomon.

14 Q Was there one on Officer Deffenbaugh?

15 A No, sir, there was not. If we had two
16 transmitters at the same location, they would cancel
17 each other out and create problems with our
18 receiving. It would not -- there is no way to
19 differentiate the signal.

20 Q Now, are you familiar with these transmitters?

21 A Yes, I am.

22 Q What, if any, problems do you have in terms of
23 quality on these transmitters?

24 A We typically have problems with quality of our
25 transmitters because they are, in fact, a -- what's

OFFICER RHETT FOX - DIRECT BY MR. WALL

184

1 known as a covert-type transmitter. It's designed
2 not to be protruding from a person. I mean, it's
3 designed to be hidden. And unfortunately you can't
4 have a large antenna that would put out a signal.
5 We have trouble receiving quality signals from them
6 from time to time.

7 Q What is the primary purpose of the monitoring
8 that you are doing?

9 A The primary purpose of the monitoring is for
10 officer's safety, in case something were to happen
11 where our undercover officer, they attempted to rob
12 him, or, you know, something extraordinary happened
13 that required us to act at a moment's notice.

14 Q Would you expect some type of signal at that
15 point from the person wearing the monitor?

16 A Yes.

17 Q As you get further away from the device, what,
18 if any, further difficulty do you have hearing
19 voices?

20 A The further away you get, just like with
21 anything else, the signal is decreased and you are
22 not able to pick it up as best as if you were right
23 there next to them.

24 Q You are not speaking into the microphone like
25 that, or anything?

OFFICER RHETT FOX - DIRECT BY MR. WALL

185

1 A No.

2 Q When Lieutenant Hancock pulled his vehicle up,
3 what did you do?

4 A Basically when we parked, I slouched down in
5 the seat so i couldn't be seen and had the kit there
6 monitoring the transmission, which was nothing at
7 the time until the arrival.

8 Q And then once you heard, I assume, the takedown
9 signal?

10 A Yes.

11 Q What was that?

12 A Actually when I was monitoring, we could not
13 hear a quality conversation at the time, and I heard
14 Investigator Deffenbaugh ask to weigh it. When I
15 heard "weigh it," Lieutenant Hancock was getting
16 back in the car. I said "he just asked to weigh it.
17 I don't know if I missed the signal. We need to get
18 the units moving in." And about the time as I got
19 got that out, I heard our takedown signal, which was
20 "the girls are going to like this."

21 Q So if Officer Deffenbaugh, you heard him ask to
22 weigh it?

23 A Yes, sir.

24 Q Which you assumed?

25 A I assumed that he has, A, observed drugs in his

OFFICER RHETT FOX - DIRECT BY MR. WALL

186

1 presence; or, B, had them in his possession and was
2 attempting to weigh it.

3 Q So at that point y'all went in, right?

4 A Yes, I determined at that point when I heard
5 him say "weigh it," that it was best to get the
6 units to start coming that way because the takedown
7 signal was imminent.

8 Q And what, if anything, can you describe about
9 the takedown?

10 A Once I told the units to start coming in, of
11 course, the signal was then given and repeated by
12 Mr. Solomon. We told him to move in again.
13 Lieutenant Hancock and I pulled to the left-hand
14 side of the store, as we were looking at it, and our
15 undercover officer and the Camaro driven by Mr.
16 Gonzales, with Mr. Shelhamer in the passenger's
17 seat, was parked next to him at the right of the
18 store. They had -- Mr. Gonzales was out of the car.
19 We pulled to the left. And as we pulled to the left
20 and parked, I could see someone running. At that
21 point, almost as soon as he started running, a truck
22 driven by another investigator with the narcotics
23 division and a detective pulled in. And I saw that
24 detective start running past the two vehicles after
25 the subject, and the narcotics investigator ran

1 towards my direction, around the other side of the
2 building.

3 Q So what I'm trying to understand was when this
4 person began running, at what point was that?

5 A That was right -- right at the point when the
6 vehicle driven by the narcotics investigator pulled
7 into the parking lot up close to where these two --
8 our undercover officer was at.

9 Q So were there -- was there any member of the
10 takedown team out of their vehicles at that point?

11 A No, sir. As soon as the -- it appeared to me
12 from what I saw, is as soon as the vehicle pulled
13 in, that they knew what was going on and that the
14 person ran.

15 Q What we are going to hear on the tape, and we
16 will hear it at the end of the tape, some bad
17 language. Did all of that yelling and so forth, did
18 that occur before or after the running suspect had
19 already began running?

20 A That would be after, because the suspect that
21 ran, ran -- he was running before I believe any of
22 our investigators got their feet on the ground.

23 Q So he was long gone?

24 A Yes.

25 Q Mr. Solomon was acting in an undercover

OFFICER RHETT FOX - DIRECT BY MR. WALL

188

1 capacity as an informant, is that correct?

2 A Yes.

3 Q What, if any, reason did you have to maintain
4 that undercover capacity? In other words, did you
5 want -- how was he treated when the police arrived?

6 A He was treated just like a normal suspect would
7 be. He was -- when I got to the scene, he was
8 laying on the ground next to Investigator
9 Deffenbaugh, in between the undercover truck that
10 they were driving and the green Camaro. I
11 approached the scene and went to the passenger's
12 side where Mr. Shelhamer was seated and had him step
13 out of the vehicle.

14 Q So for all the -- basically for all the world
15 to know, Officer Deffenbaugh and Mr. Solomon were
16 being arrested, is that correct?

17 A Yes. I didn't want to compromise the integrity
18 of their undercover capacity at that time.

19 Q And who actually is on the tape doing a fair
20 amount of the yelling?

21 A The yelling I believe is Investigator Lindsay.
22 I'm on there and I do use profanity specifically
23 with Mr. Solomon at the point of the takedown when
24 he's on the ground.

25 Q And he's working with you?

OFFICER RHETT FOX - DIRECT BY MR. WALL

189

1 A Correct.

2 Q So was that -- were you mad at Mr. Solomon or
3 was that for show?

4 A Really that was for show, because I knew there
5 was, you know, another suspect there with us, and I
6 didn't want to -- you know, it was for show, yes.

7 Q We will see if we can -- I'm going to have you,
8 if you will, step down.

9 A Yes.

10 (witness off the witness stand)

11 BY MR. WALL:

12 Q So that you can refer to this.

13 Move it as you need to or point where you need
14 to. I will step back for a moment.

15 Now, again, this is a rough sketch and not to
16 scale, is that correct?

17 A That is correct.

18 Q Where basically were you and Officer Hancock?

19 A We were -- we were parked closer to the roadway
20 in the left side of the parking lot as we were
21 looking at the store. Basically right over here
22 near a tree.

23 Q Now, I'm going to just put an H right there.

24 Again, this is not to scale. Tell me -- I
25 mean, in reality is this location as close to the

OFFICER RHETT FOX - DIRECT BY MR. WALL

190

1 gas station of the store as it appears, or is it
2 further back?

3 A It may be further back. It's definitely
4 further back from the gas pumps as it appears there.

5 Q What I'm trying to understand is are these gas
6 pumps actually this close to Highway 11?

7 A No, sir, they are not.

8 Q So there is more road coming in?

9 A Yes, sir, there is more room to drive around
10 on.

11 Q Where was the actual undercover vehicle, as
12 well as Mr. Gonzales' vehicle?

13 A The undercover vehicle was parked about right
14 here near the edge of the building. And the green
15 Camaro, after it had pulled in and went to the gas
16 pump and pulled in and parked next to it, right
17 here.

18 Q I'm going to have you, if you will, just write
19 in there U.C.V. for the U.C. vehicle. And beside
20 that write wherever you see the green Camaro was at.

21 A Where the green Camaro was at, write green
22 Camaro?

23 Q Yes.

24 Now, was your visual -- what, if any, ability
25 did you have to really see what was going on? If I

1 can see your pen, from here over to there?

2 A Initially I observed the green Camaro when it
3 was coming down Highway 11 from the I-26 direction,
4 when it pulled into this side of the Little Cricket
5 parking lot and pulled over to one of these pumps
6 here. I'm not for sure which one it was. And then
7 I observed Michael Gonzales walk to the front door
8 here where my vision, my line of sight was
9 unobscured. From where we were seated at, I could
10 not see our undercover vehicle because of the
11 vehicle that was parked at the gas pumps. And then
12 once he come back to his car and pulled over next to
13 our undercover vehicle, I did not have a line of
14 sight to either our undercover officer or to the
15 people in the vehicle.

16 Q But you were able to identify Michael Gonzales
17 getting out of the car and walking into the gas
18 station?

19 A Yes.

20 Q How did you know that to be Michael Gonzales?

21 A Through pictures I had seen in the past.

22 Q What was Lieutenant Hancock doing at this time?

23 Was he still appearing to be working on the truck?

24 A Yes, he was out of the vehicle with the hood
25 raised.

OFFICER RHETT FOX - DIRECT BY MR. WALL

192

1 Q All right. When Lieutenant Hancock, where did
2 he pull up to?

3 A Approximately over, right in here, near this
4 side of the store.

5 Q What is behind this store?

6 A I never went behind the store. What I could
7 see from where I was here was a large amount of
8 kudzu, and there is a wood line here, and it looked
9 like woods back behind it.

10 Q I'll let you retake the stand.

11 (witness back on the witness stand)

12 BY MR. WALL:

13 Q After the operations you approached Officer
14 Deffenbaugh?

15 A Yes, I did.

16 Q What, if anything, did you take from his
17 possession?

18 A He was laying on the ground. I approached him
19 and I asked him if he had -- I think I said dope.
20 He said "yeah, it's right here." He had it laying
21 under him. He handed it to me and I took that and
22 put it in my possession.

23 (Drugs marked as State's Exhibit No. 2 for
24 identification)

25 BY MR. WALL:

OFFICER RHETT FOX - DIRECT BY MR. WALL

193

1 Q I'm going to show what's been marked as State's
2 Exhibit No. 2 for identification. Can you identify
3 that blue bag?

4 A Yes.

5 Q What is that?

6 A That is what we call our best bag for drugs.
7 It's a name given to it. It's basically a plastic
8 bag which enables you to seal it, once you place
9 your drugs into it, to be sent to the lab for
10 testing, to maintain the integrity of those drugs
11 while they are inside so they are not tampered with.

12 Q I'll have you inspect that bag, if you will.
13 What, if any, information is on that bag?

14 A On this bag, there, of course, is a control
15 number that is assigned to this bag so we can
16 document what bag our drugs go into. There is, of
17 course, markings that are put on the bag for
18 identification that is Spartanburg County sheriff's
19 office bag. And then there is fill in the blanks
20 where we write in our agency's O.R.I. number, which
21 identifies our agency; the date that we seal the
22 bag, where I wrote in there, 6-3-02; a place for you
23 to print the person sealing the envelope, where I
24 have printed R.J. Fox; and then a spot for you to
25 sign for the person sealing the envelope. And after

OFFICER RHETT FOX - DIRECT BY MR. WALL

194

1 you seal it, you sign your full signature.

2 Q And did you do -- did the drugs leave your
3 possession until you put them in that best bag?

4 A No.

5 Q And then once you put them into the best bag,
6 what occurred?

7 A Once I put it into -- you place it into the
8 bag. There is a pull-off seal across this top where
9 you pull it off and it's very sticky. You seal the
10 bag. Put it into an envelope with more paperwork
11 concerning the case and I place it into a -- what is
12 known as a drop box in our squad room. That is a
13 secured container with one opening. You can't get
14 down into it. And you place it in there to be
15 picked up by our evidence technician.

16 Q So this is actually what you found? This is
17 what you took from Officer Deffenbaugh?

18 A Yes, it was wrapped in black tape.

19 Q Other than being wrapped in black tape, did it
20 have anything else?

21 A Yes, when I initially picked the package up it
22 felt kind of squishy almost, and I pulled back some
23 black tape and squeezed it and I could feel that
24 there was some substance in there. Then I peeled
25 more back and cut some tape with a knife. What

1 appeared to be yellow mustard came out of the
2 package. It completely surrounded inside there. It
3 was quite messy.

4 Q So it was this substance wrapped in black tape
5 with mustard around it?

6 A Yes.

7 Q In your experience as a narcotics officer, do
8 you have -- why would the mustard be around it?

9 A Sometimes people attempt to wrap drugs with any
10 type of scented objects - dryer sheets, oils, things
11 like that - to conceal the odor that may come from
12 the drugs so it cannot be detected by a trained drug
13 dog to smell the odor of that drug.

14 Q Did you attempt to obtain information regarding
15 the telephone number that was called?

16 A Yes, I did.

17 Q What attempts did you make?

18 A Initially I typed up a search warrant for the
19 phone records sent to Bell South with the number
20 that we dialed that day that was given to me by Mr.
21 Solomon. I also checked the phone book under
22 several listings for it and what is known as a
23 cross-reference where we could cross-reference
24 either an address to a phone number or a phone
25 number to get an address and it was not contained in

OFFICER RHETT FOX - DIRECT BY MR. WALL

196

1 any of them.

2 Q So you were not able to determine -- you made
3 efforts but were not able to determine the owner of
4 that phone number?

5 A Correct. When the search warrant came back, it
6 gave me -- I requested information on the number.
7 It did not provide subscriber information with it as
8 who the billing might go to. It just gave me the
9 number, what calls had been given from that number
10 and to that number during the period of time that I
11 requested.

12 Q Did y'all -- was there anything fingerprinted
13 in this case or any other forensic-type evidence?

14 A No, sir, there was not.

15 Q And why was that?

16 A Basically the package that contained the
17 methamphetamine was handed directly from Mr.
18 Shelhamer to our undercover Officer, Mr.
19 Deffenbaugh, who handled it, and then, in fact,
20 turned it to me. And then in an attempt to field
21 test it, I had removed the outer layer of tape. I
22 inquired with our chemist if we could fingerprint it
23 and he said not after that outer layer of tape had
24 been taken off, because the tape itself, the
25 stick-em, will remove the prints from the other

OFFICER RHETT FOX - DIRECT BY MR. WALL

197

1 layers on the inside.

2 Q Would you have been able to test what you had
3 without taking the tape off?

4 A No.

5 Q So, I mean, the tape had to come off?

6 A Correct.

7 Q Did you have information as to the address or
8 the location where Mr. Gonzales was living?

9 A Yes, I did.

10 Q Were you able to determine just the approximate
11 proximity from the incident location to his house?

12 A Yes, I was.

13 Q And what was that?

14 A It was -- it was fairly close to. It's in that
15 general area out there. I knew it from firsthand
16 from going by the location known to be the residence
17 of Michael Gonzales and also I confirmed that with a
18 map.

19 (Map marked for as State's Exhibit No. 3 for
20 identification)

21 BY MR. WALL:

22 Q I show you State's Exhibit No. 3 for
23 identification and see if you can identify that?

24 A Yes.

25 Q Is that the map that you generated?

OFFICER RHETT FOX - DIRECT BY MR. WALL

198

1 A Yes, this is a copy of the map that I generated
2 from the computer.

3 Q I'm going to set it up here.

4 What is that location?

5 A The -- the tack?

6 Q Yes.

7 A What I did was I typed in the known address of
8 Mr. Gonzales, which is [REDACTED]
9 to the basic map generator on the internet and it
10 placed the thumbtack approximately where that
11 residence is in relationship to the surrounding
12 roads, which was 11 and -- Highway 11 and Interstate
13 26.

14 Q Now, where -- and I may have to ask you this,
15 okay? Is this an arrow here that you put in? What
16 is that?

17 A If I could step down? It's hard to see.

18 Q Let me ask you to step down so I can point it
19 out.

20 (witness off the witness stand)

21 A What were you asking?

22 BY MR. WALL:

23 Q And you can draw them better, if you need to.

24 A Okay.

25 Q I was asking you to point out where the Little

OFFICER RHETT FOX - DIRECT BY MR. WALL

199

1 Cricket is in relation to --

2 A The Little Cricket is located approximately
3 right here at the intersection of Highway 11 and
4 I-26, on this side, right there.

5 Q You can retake the stand.

6 (witness back on the witness stand)

7 BY MR. WALL:

8 Q Did you audio tape -- well, we know you audio
9 taped. You witnessed all four audio tapes, is that
10 correct, the telephone calls?

11 A Yes, they were -- the recorder was manually
12 activated by me.

13 Q And do you have that original?

14 A Yes, I do. I have the original tape in the
15 tape deck right now.

16 Q If you would, take that out of the tape deck
17 for a moment.

18 MR. HARRIS: Your Honor, if the State is moving
19 the introduction of the tape, then I object on the
20 grounds previously submitted to the court.

21 (Audio Tape marked as State's Exhibit No. 4 for
22 identification)

23 THE COURT: Noting the previous objection, your
24 objection is overruled.

25 MR. BOGGS: As to me as well, Your Honor.

OFFICER RHETT FOX - DIRECT BY MR. WALL

200

1 THE COURT: As to Mr. Boggs' defendant also the
2 objection is overruled.

3 BY MR. WALL:

4 Q I'm going to show you what's been marked as
5 State's Exhibit No. 4. Is this, in fact, the
6 original tape?

7 A Yes.

8 Q That tape, was it -- describe the tape in terms
9 of the speed. Was it recorded at variable speed?

10 A The first two phone conversations were recorded
11 at my desk with this hand-held recorder and
12 apparently this is a dual-speed recorder to save
13 tape. The first two conversations, this selector
14 was over on double, to double the speed -- or double
15 the length of the type. And, therefore, when it's
16 played back on a normal recorder, it's very fast.

17 And the second.

18 Q Sounds like chipmunks?

19 A Yes.

20 And the second -- or the third and the fourth
21 conversation were taped away from the office using a
22 covert recorder on our A.I.D. kit and that's taped
23 at normal speed. So, therefore, there is a
24 differing speed between the first two conversations
25 and then the second two, which can easily be

OFFICER RHETT FOX - DIRECT BY MR. WALL

201

1 adjusted on the hand-held recorder.

2 Q Is that what you are going to do, in fact, as
3 you are playing it?

4 A Yes, it will just need to be adjusted slightly
5 with this button. It was my fault.

6 Q I'm going to ask you to do that, if you will.
7 And if you will, hold it -- I think the best way
8 would be near the microphone.

9 A Yes.

10 (tape played)

11 Q Please continue.

12 (tape played)

13 A That there is background noise from our office
14 at my desk.

15 (tape played)

16 MR. HARRIS: Your Honor, I'm going to ask that
17 the witness not be allowed to narrate the tape.

18 THE COURT: Yes, sir. If you would just let it
19 play, sir.

20 A Yes, sir.

21 (tape played)

22 BY MR. WALL:

23 Q Is that the completion of the first call?

24 A Yes, I believe we start narrating the
25 completion of the call.

OFFICER RHETT FOX - DIRECT BY MR. WALL

202

1 Q And then is that when the operation began more
2 toward --

3 THE COURT: You need to speak up a little bit,
4 please, sir.

5 BY MR. WALL:

6 Q Yes, sir. Is that when the operation began to
7 focus more on methamphetamine?

8 A Yes.

9 Q Please continue.

10 (Tape played)

11 BY MR. WALL:

12 Q Had you given instructions to Mr. Solomon in
13 terms of a location, or a type of location?

14 A Yes, prior to that second call I knew we would
15 be setting up location, we knew, first of all, that
16 we did not want to do it at the residence. We would
17 like it to be a public place where we could, you
18 know, be in the area and not look -- not stand out,
19 as far as our units there to observe and to arrest
20 the subjects.

21 Q So that's why he couldn't agree to go to Mr.
22 Gonzales house?

23 A No, it would not be safe for our undercover.
24 It would not be safe for Mr. Solomon or for the
25 units arriving there.

OFFICER RHETT FOX - DIRECT BY MR. WALL

203

- 1 Q I'm going to have you continue, please.
- 2 A Yes.
- 3 (tape played)
- 4 BY MR. WALL:
- 5 Q That just said the second call that was being
- 6 placed, and we have already heard previous calls.
- 7 A Yes, that was a mistake of mine. That was the
- 8 second call from when we had actually met Mr.
- 9 Solomon, placed -- there was a second call from my
- 10 cellular phone, but the time is correct. I give the
- 11 time as 5:26 p.m..
- 12 Q The first two calls were made from where?
- 13 A The sheriff's office, at my desk.
- 14 Q And the second two calls were made from?
- 15 A We met Mr. Solomon in the parking lot at the
- 16 Clock Restaurant in Boiling Springs on Highway 9 and
- 17 I believe it's near Old Furnace Road.
- 18 Q And made a cell phone call?
- 19 A Correct, from my county issued cell phone. I
- 20 dialed the numbers and let him speak.
- 21 Q So this is the second cell phone call?
- 22 A This is the second cell phone call, yes. That
- 23 was my mistake.
- 24 Q Please continue.
- 25 (Tape played)

OFFICER RHETT FOX - DIRECT BY MR. WALL

204

1 BY MR. WALL:

2 Q Is that the completion -- is that the
3 completion of the tape?

4 A No, sir.

5 (Tape played)

6 BY MR. WALL:

7 Q Let me stop you for just a moment. Is that the
8 completion of the telephone call at that point?

9 A Yes, that was the completion of the telephone
10 call.

11 Q We are about to go in the body wire tape, or
12 have we already --

13 A We have already gone into it. When you hear
14 that beeping sound, that was the activation of the
15 recording device.

16 Q The voice that we heard -- we heard two voices
17 on the tape?

18 A Yes.

19 Q Are you able to identify those voices?

20 A Yes, I could identify the voice of Johnny
21 Solomon.

22 Q He's having a conversation with somebody that
23 I'll ask him to identify later.

24 A Yes.

25 Q Please continue.

OFFICER RHETT FOX - DIRECT BY MR. WALL

205

1 (tape played)

2 BY MR. WALL:

3 Q I want to ask you to stop it right there.

4 The quality of that tape wasn't as nearly as
5 the good as the first four?

6 A No, sir.

7 Q Why was that?

8 A The first two telephone conversations were
9 recorded from this hand-held recorder right at the
10 speaker on the telephone.

11 The next two phone conversations that were
12 recorded from the cellular phone were recorded
13 within a different type of device that was used from
14 what was on Mr. Solomon that day, which isn't as
15 high quality of a transmitter, doesn't put out as
16 much, but is disguised easier than what this was to
17 record the phone conversations.

18 Q This is June, 2002, June 3rd?

19 A Yes, this is just June 3rd, 2002..

20 Q I assume it's reasonably -- what's the weather?
21 Is it hot?

22 A Yes, it was hot that day.

23 Q Where, if anywhere, could he have hidden that
24 thing?

25 A Hidden this recorder?

OFFICER RHETT FOX - DIRECT BY MR. WALL

206

1 Q Right.

2 A Nowhere that I would be comfortable with
3 putting it on him for safety-wise.

4 Q At the end of the tape we hear some tires
5 squealing. What's that?

6 A I believe that is Lieutenant Hancock when he
7 pulls away to get back around to the other side of
8 the Little Cricket when he went to assist the other
9 units who were chasing the subject.

10 Q They were pursuing?

11 A Yes.

12 Q Now, the language -- we heard the language on
13 the tape?

14 A Yes.

15 Q And that's you?

16 A Yes, there are two parts on there that are me
17 engaging in conversation with Mr. Solomon.

18 Q We hear that part pretty clearly?

19 A Right. I was right there on -- he was laying
20 down and I was in front of him, correct.

21 MR. WALL: No further questions, Your Honor.

22 THE COURT: Before we start the cross
23 examination we are going to take a short break.
24 Ladies and gentlemen of the jury, I'm going to send
25 you to the jury room, with the instruction that you

1 are not to discuss this case among yourselves. We
2 will get you back in just a very few minutes.

3 The jury may retire. Everyone else remain
4 seated, please.

5 (The following takes place outside the presence
6 of the jury panel)

7 THE COURT: All right. Let me remind you that
8 you are still subject to further examination. You
9 are to have absolutely no discussions with anyone
10 during this break --

11 THE WITNESS: Yes.

12 THE COURT: -- concerning your testimony. You
13 may step down from the stand.

14 MR. HARRIS: May it please the court, Your
15 Honor, very briefly I have a matter before we break.
16 I at this point in time am going to request the
17 sequestration of witnesses Solomon and Deffenbaugh
18 prior to my cross examination at this point.

19 THE COURT: Well, how about giving me the
20 reason for that, because I had a trial last week
21 when a lawyer sequestered witnesses and I found that
22 it was for absolutely no purpose, other than spite
23 and --

24 MR. HARRIS: Well --

25 THE COURT: You know, that's just about done me

1 with sequestering witnesses. I hate to paint
2 everyone with the same brush, but the sequestration
3 of witnesses, after having sat through everything
4 yesterday and today, really -- and, once again,
5 that's something that's reserved to the sound
6 discretion of the trial judge. So unless you can
7 give me some kind of a very good reason. Your
8 colleague last week probably just about did
9 sequestration in for me.

10 MR. HARRIS: Well, I can assure you that it's
11 not for any ill motive. I want to ask this witness
12 questions that will be likewise asked of the other
13 witnesses. That's what I anticipate. And
14 sequestration is the surest way that I can have of
15 testing the consistency of the testimony as between
16 the three witnesses, who are in my view the most
17 important witnesses. I haven't asked for it to this
18 point. Obviously I'm not just trying to simply
19 throw people out of the courtroom. It's only for
20 purposes of cross examination.

21 THE COURT: I see Mr. Boggs up. What have you
22 got to say, Mr. Boggs?

23 MR. BOGGS: Your Honor, for once I'll agree
24 with Mr. Harris, and I'll go a little further. My
25 specific concern is that due to the -- in this

1 particular case, due to the poor quality of the
2 tape, I think it's going to be important as to what
3 Mr. Fox's impression of what was going on and to
4 what Mr. Solomon says he heard or understood to be
5 said, and, of course, what Mr. Deffenbaugh said.
6 And I agree with Mr. Harris. I don't want this to
7 be a blanket response by way of influence of the
8 other witnesses.

9 THE COURT: Well, I tell you what, gentlemen.
10 I'll grant the sequestration as to any witness that
11 is potentially to be called. If there is anyone in
12 the courtroom from this point in time who is going
13 to testify, then they will not testify, because I'm
14 not going to sequester just John Doe and Ricky Roe.
15 Anybody that you have as potential witnesses, either
16 side, just leave them outside from now on and we
17 will just proceed with people. Anyone who is here
18 in the courtroom will not testify in the future.

19 MR. HARRIS: That's fine, Your Honor.

20 THE COURT: Except for the case agent. He can
21 stay in here.

22 MR. HARRIS: Thank you, Your Honor.

23 MR. BOGGS: Thank you, Your Honor.

24 (Proceedings recessed)

25 (Proceedings reconvened)

OFFICER RHETT FOX - CROSS BY MR. HARRIS

210

1 MR. BOGGS: Judge, just for the court's
2 knowledge, I have asked three of my potential
3 witnesses to step outside for the remainder of the
4 trial.

5 THE COURT: All right.

6 Is the State ready to proceed?

7 MR. WALL: Yes, Your Honor.

8 THE COURT: Defense ready?

9 MR. HARRIS: Yes, Your Honor.

10 MR. BOGGS: Yes, Your Honor.

11 THE COURT: All right. Bring our jury back.

12 I'll remind you, sir, that you are still under
13 oath.

14 THE WITNESS: Yes, Your Honor.

15 (The following takes place in the presence of
16 the jury panel)

17 THE COURT: Thank you very much, Madam
18 Foreperson, ladies and gentlemen. We will continue
19 with the examination of this witness.

20 Cross examination, Mr. Harris.

21 MR. HARRIS: Thank you, Your Honor.

22 CROSS EXAMINATION BY MR. HARRIS:

23 Q Investigator Fox, your role in this situation,
24 I guess, was as a secondary individual to
25 Investigator Hancock?

OFFICER RHETT FOX - CROSS BY MR. HARRIS

211

1 A No, Investigator Hancock is our supervisor over
2 our unit and I'm the case agent. This is my case.

3 Q This is your case. So you are aware of what
4 the plan of attack was on, I guess by your words, my
5 client, Mr. Gonzales?

6 A As far as the arrest?

7 Q As far as the plan of attack of enticing him to
8 sell drugs to the police?

9 MR. WALL: Your Honor, I object to the
10 characterization enticing.

11 THE COURT: It's overruled.

12 BY MR. HARRIS:

13 Q What is your answer?

14 A Can you repeat that for me again? I don't
15 really understand the question.

16 Q You are the person then with the police in
17 charge of formulating a plan to entice my client,
18 Mr. Gonzales, to sell drugs to the police, is that
19 correct?

20 A I'm in charge? Not to entice.

21 Q What would you call it?

22 A Investigation.

23 Q Investigation?

24 A Yes.

25 Q Well, I thought that you said that you paid Mr.

OFFICER RHETT FOX - CROSS BY MR. HARRIS

212

1 Solomon, a Johnny Solomon, money to cooperate with
2 you to attempt to lure Michael Gonzales into a
3 situation where he would be found selling drugs to
4 an undercover police officer. Did I misunderstand
5 you?

6 A You may have. Mr. Solomon was paid after the
7 fact.

8 Q Oh, he only gets paid if he does somebody in,
9 is that right?

10 A He gets paid for completed work.

11 Q Kind of a contingent arrangement with Mr.
12 Solomon, was it, in this case?

13 A No, sir, Mr. Solomon was not expecting payment
14 in this case.

15 Q Oh, he just got paid out of the goodness of
16 your heart?

17 A No, sir, he got paid because of the work that
18 he completed through this investigation.

19 Q And that work was, under your direct
20 supervision with your recorder there, to place
21 several phone calls to Michael Gonzales in an
22 attempt to convince him to participate in an illegal
23 drug transaction, right?

24 A I supervised him throughout this to place phone
25 calls to arrange for, yes.

OFFICER RHETT FOX - CROSS BY MR. HARRIS

213

1 Q The purpose -- the purpose of those phone calls
2 was to convince Michael Gonzales to sell drugs to an
3 undercover police officer, is that correct?

4 A I wouldn't call it convince. I would call it
5 arrange for, yes.

6 Q All right. Have it your way. To arrange --

7 A Yes.

8 Q -- for Michael Gonzales to sell drugs to the
9 police?

10 A Yes, sir.

11 Q Right?

12 A Yes, sir.

13 Q And who you have described as your cooperating
14 individual, Mr. Solomon, was paid for his role in
15 helping you set all that up, is that right?

16 A Yes, sir.

17 Q Now, but you are saying Mr. Solomon never asked
18 you for any money for his participation?

19 A No, sir.

20 Q You simply after the fact decided what he had
21 done was worth you volunteering \$200.00, is that
22 correct?

23 A No, sir, I knew all throughout this
24 investigation once it was complete he would be paid.
25 It was not --

OFFICER RHETT FOX - CROSS BY MR. HARRIS

214

1 Q Well, Investigator Fox --

2 THE COURT: Excuse me, Mr. Harris, don't cut
3 him off. Let him answer the question, and then you
4 can pose another one. If he's got something else to
5 say, let him say it.

6 BY MR. HARRIS:

7 Q Go ahead.

8 A I knew throughout this investigation that once
9 this was complete, he would be paid.

10 Q How were those arrangements made?

11 A As far as the payment?

12 Q As far as you knowing from the very beginning
13 that you were going to pay Mr. Solomon, if he
14 performed?

15 A Because he did not have charges pending against
16 him where he was arrested. He contacted us and
17 that's how we compensate our informants for help
18 that they give us in investigating individuals.

19 Q So you knew from the beginning you were going
20 to pay Mr. Solomon if he performed, is that right?

21 A Yes, sir.

22 Q And is it correct that Mr. Solomon knew all
23 along that if he performed, he would get paid?

24 A No, sir.

25 Q He didn't know that?

OFFICER RHETT FOX - CROSS BY MR. HARRIS

215

1 A No, it is in the rules that we read out when
2 they come in to us that they will be paid, if they
3 don't have charges, but I do not believe he was
4 expecting payment at the end, because when I paid
5 him, it was kind of a surprise to him.

6 Q Just kind of a lucky bonus Mr. Solomon got for
7 his participation in this, is that right?

8 A No, sir. I mean, it's compensation for his
9 time.

10 Q You figured it was worth \$200.00?

11 A Yes, sir.

12 Q I see.

13 You and Mr. Solomon placed phone calls to Mr.
14 Gonzales?

15 A Yes, sir.

16 Q And as a result of those phone calls you were
17 convinced and expected that Mr. Gonzales would meet
18 you at a predetermined location, at a predetermined
19 time, and sell methamphetamine to an undercover
20 police officer in exchange for \$13,500.00, is that
21 right?

22 A Yes, that was my understanding from the phone
23 conversations.

24 Q And that was clearly your understanding that
25 that was what had been arranged and was going to

1 take place, is that correct?

2 A Yes, sir.

3 Q And when you and Investigator Hancock and all
4 the rest of the takedown team and whoever else was
5 there, including Investigator Deffenbaugh and Mr.
6 Solomon, went there, every single one of you
7 expected that you were going to have Michael
8 Gonzales give somebody methamphetamine and get in
9 exchange \$13,500.00, or what you were going to pose
10 as \$13,500.00, is that right?

11 A Yes, sir.

12 Q That didn't happen though, did it?

13 A The exchange of money did not take place. Mr.
14 Gonzales did arrive. The hand to hand did not occur
15 with Mr. Gonzales.

16 Q Right. So what you expected and what was part
17 of your plan never materialized, did it?

18 A Not to the exact picture that I painted in my
19 mind as far as what would happen that day.

20 Q Not anything like what you thought, was it?

21 A Not exactly what I was thinking, but --

22 Q As a matter of fact, the -- I'm sorry.

23 A But, I mean, definitely nothing far outside the
24 lines.

25 Q What in fact occurred, in reality occurred, was

OFFICER RHETT FOX - CROSS BY MR. HARRIS

217

1 that, according to your version, Mr. Gonzales and
2 Mr. Shelhamer arrived at this location, Mr. Gonzales
3 went inside, came back outside, stood outside of his
4 car, and Mr. Shelhamer handed Investigator
5 Deffenbaugh the package that is before you now, and
6 Investigator Deffenbaugh weighed it or attempted to
7 weigh it? Is that your understanding of what
8 happened?

9 A Yes, in the presence of Michael Gonzales.

10 Q In the presence of. Well, for that matter, in
11 the presence of you and Investigator Hancock and
12 rest of the takedown team and the store clerk and
13 everybody else that was there, right?

14 A Not in the close proximity as Mr. Gonzales was
15 to it.

16 Q In the area of? You are accusing Mr. Gonzales
17 of being in the area of the drug transaction?

18 A No, sir, we are accusing Mr. Gonzales of
19 trafficking methamphetamine.

20 Q Well, is it correct that what you expected to
21 happen, which was Mr. Gonzales handing over drugs
22 for money, did not happen, is that correct?

23 A Correct, he did not hand the drugs over.

24 Q Did not happen.

25 Now, as a matter of fact, this was supposed to

OFFICER RHETT FOX - CROSS BY MR. HARRIS

218

1 be what you all call a buy-bust, was it?

2 A Yes, sir.

3 Q Meaning that you would attempt to arrange a
4 drug transaction, get to a predetermined location at
5 a predetermined time and have in place the
6 wherewithal to have someone sell you drugs, is that
7 correct?

8 A Correct.

9 Q And you went there -- or you all, the police,
10 went there for the purpose of buying drugs, is that
11 right?

12 A Yes, buying drugs, correct.

13 Q So you could try to catch somebody buying
14 drugs, right? Charge them with whatever crime you
15 could, right?

16 A No, sir, we catch somebody selling drugs and
17 charge them with the appropriate crime, yes.

18 Q Selling. But that didn't happen in this case
19 either, did it?

20 A The actual sale?

21 Q Right.

22 A No, the money did not exchange hands.

23 Q There was no sale of drugs in this case by
24 anybody, was there?

25 A There was an exchange, but the money did not

1 leave our investigator's hands.

2 Q Well, there was, would it be fair to say, a
3 relinquishment of a package which you claim
4 contained methamphetamine to an undercover police
5 officer for purposes of weighing it?

6 A Yes.

7 Q As a matter of fact, the roll was never
8 demonstrated to Mr. Shelhamer, was it, to your
9 knowledge, the roll of money?

10 A No, sir, the money was never produced. We
11 typically try to avoid producing the money,
12 especially when it would be a flash roll.

13 Q What actually occurred was, isn't it correct,
14 Mr. Shelhamer handing a package, which you say
15 contained drugs, to Investigator Deffenbaugh, and
16 Investigator Deffenbaugh either began weighing it or
17 did weigh it and that point in time you gave the
18 signal to move and the takedown team came in, is
19 that the way it happened, as you can understand it
20 now?

21 A The way I understand it, Mr. Shelhamer handed a
22 package to Investigator Deffenbaugh that was found
23 and determined to have drugs inside and that he did
24 subsequently weigh, and at that point the signal was
25 given for the arrest team to move in, yes.

OFFICER RHETT FOX - CROSS BY MR. HARRIS

220

1 Q But Investigator Deffenbaugh never paid, never
2 produced money in exchange for what he was given, is
3 that correct?

4 A No, sir, we moved in before the money was to
5 exchange.

6 Q So actually if you wanted to accomplish a
7 buy-sell of drugs, you didn't accomplish that?

8 A We did not accomplish exchanging money, no. We
9 did accomplish accepting the drugs that were for
10 sale and then moving in at the time prior to the
11 money exchanging hands, just for our safety purposes
12 and the safety of our money and the investigation.

13 Q Now, when the takedown team came in and after
14 the hysteria subsided, is it correct that you went
15 over to your colleague, Investigator Deffenbaugh, to
16 see if he had the package that you expected to be
17 drugs?

18 A Yes.

19 Q And he did have it, didn't he?

20 A Yes, he did.

21 Q Where did he have it?

22 A He was -- it was underneath his torso,
23 somewhere, as he was laying on the ground.

24 Q All right. And do you have any idea how it got
25 there?

OFFICER RHETT FOX - CROSS BY MR. HARRIS

221

- 1 A He had it in his possession and he put it
2 there.
- 3 Q He was outside the car lying on the ground, is
4 that right?
- 5 A Yes, sir, he was laying in a parking lot.
- 6 Q Now, did he still have the money with him?
- 7 A Yes, he did.
- 8 Q A made-up roll.
- 9 Now, Mr. Solomon supposedly was present during
10 all this as well, is that right?
- 11 A Yes, he was present, yes, sir.
- 12 Q And he was going to pretend to be sort of like
13 a broker of sorts of this deal, is that right?
- 14 A Yes, in a way.
- 15 Q He was acting as kind of a go-between?
- 16 A Correct.
- 17 Q The plan was that you were going to have him
18 pretend that he had identified individuals who were
19 willing to purchase drugs?
- 20 A Yes.
- 21 Q Is that right?
- 22 A Yes, sir.
- 23 Q So the plan was never that Mr. Solomon himself
24 would buy or sell drugs, is that right?
- 25 A No, that was not the plan. We determined that

OFFICER RHETT FOX - CROSS BY MR. HARRIS

222

1 hand-to-hand transaction between an undercover
2 officer is far better than a hand-to-hand
3 transaction between an informant and a suspect.

4 Q Now, you have also stated that it was your
5 expectation that Mr. Gonzales would go inside the
6 convenience store and make a hand-to-hand
7 transaction, is that right?

8 A Correct.

9 Q That did not happen, did it?

10 A No, sir.

11 Q Did you personally ever see Michael Gonzales
12 with that package that lays in front of you in his
13 possession?

14 A No, sir, I did not.

15 Q To your knowledge as the chief agent on the
16 case, the agent in charge, did anybody ever see
17 Michael Gonzales with that package in his
18 possession?

19 A Not to my knowledge, no.

20 Q You have done a thorough enough investigation
21 I'm sure as you possibly can to follow up, is that
22 right?

23 A Yes.

24 Q Including taking statements from -- a
25 handwritten statement from Johnny Solomon, for

OFFICER RHETT FOX - CROSS BY MR. HARRIS

223

1 instance?

2 A Yes, sir, that statement was taken by
3 Investigator Deffenbaugh.

4 Q All right. But, I mean, as the agent in charge
5 you are familiar with that activity in the case?

6 A Yes, I directed that.

7 Q Of course, you had followup in way of payment
8 to Mr. Solomon?

9 A Yes, sir.

10 Q Got money for him?

11 A Yes, sir.

12 Q Put all the paperwork together?

13 A Yes, sir.

14 Q To your knowledge did anyone ever see anybody
15 but Mr. Shelhamer with that package in his
16 possession?

17 A Not to my knowledge, no, sir.

18 Q How old is Michael Gonzales?

19 A I believe he's seventeen years old.

20 Q Seventeen, on June 3rd, 2002, to your
21 knowledge?

22 A To my knowledge he was seventeen years of age
23 on that date.

24 Q And still is, to your knowledge?

25 A I'm not sure what his birth date is, sir.

OFFICER RHETT FOX - CROSS BY MR. HARRIS

224

1 Q How old a fellow is Johnny Solomon? Do you
2 know his age?

3 A I'm not sure of his exact age.

4 Q What would you --

5 A Maybe -- if I had to guess, in his twenties.

6 Q And how old a fellow would you say Mr.
7 Shelhamer is?

8 A Early, early twenties, late teens. I'm not
9 sure of his exact age, really.

10 Q How old are you?

11 A I am twenty-seven years old.

12 Q And how old is Investigator Deffenbaugh?

13 A I believe he's approximately close to my age.

14 Q So mid to late twenties? I'm not making you
15 older than you are, understand, sir.

16 A That's fine, sir.

17 Q Is it fair to say that Mr. Gonzales was the
18 youngest person involved in this entire thing?

19 A Yes, that may be fair to say.

20 Q Now, it's correct that you were never able to
21 determine in your investigation who the subscriber
22 of that phone number that you called was, is that
23 right?

24 A That is correct.

25 Q For that you, I assumed, just have to take the

1 word of Mr. Solomon that that's Mike Gonzales'
2 number, is that correct?

3 A Yes, sir, that's the number he identified to me
4 as Mike Gonzales' phone number at home.

5 Q On the recorded telephone conversations, on
6 that part of the tape that you played, you have
7 stated that you could identify the voice of Mr.
8 Solomon, is that correct?

9 A Yes, sir.

10 Q And for ease of trying to identify what voice,
11 the voice that uses most of the profanity is Mr.
12 Solomon's?

13 A No, sir.

14 Q On the telephone call?

15 A Oh, yes, sir, on the telephone calls, correct.

16 Q I'm not talking about what happened at the
17 scene, at the Little Cricket. On the telephone
18 calls?

19 A Yes, sir.

20 Q The way that we might could pick out Mr.
21 Solomon's voice is to pick out the person that's
22 using the profanity, is that right?

23 A That may be a way. He's the one that initiates
24 the conversations also.

25 Q He's always talking first?

OFFICER RHETT FOX - CROSS BY MR. BOGGS

226

1 A I wouldn't say always, but he's -- he's asking
2 for Mike, things like that. He has a more
3 predominate voice in some of the conversations.

4 Q Thank you, sir.

5 MR. HARRIS: No further questions.

6 THE COURT: Mr. Boggs?

7 MR. BOGGS: Thank you, Your Honor. May it
8 please the court.

9 CROSS EXAMINATION BY MR. BOGGS:

10 Q What is your rank? Investigator?

11 A I'm just an investigator, yes, sir.

12 Q Investigator Fox, I'll try not to ask you
13 duplicate questions, but I need to clarify a few
14 things.

15 You said this is your case, is that correct?

16 A Yes, sir, that is correct.

17 Q So you are responsible for what was going on,
18 is that correct?

19 A Yes, sir.

20 Q I believe the first -- one of the first few
21 mentions by Mr. Wall or by you in your direct
22 testimony of the confidential informant was that you
23 were contacted by Johnny Solomon. Is that what you
24 said earlier?

25 A Yes, sir, that is true.

1 Q And when Mr. Harris was cross-examining you,
2 you stated that you had paid this confidential
3 informant \$200.00 after it was over, correct?

4 A Correct, that evening.

5 Q Now, but you said Mr. Solomon wasn't expecting
6 to be paid, correct?

7 A Correct.

8 Q And you mentioned that you usually didn't pay
9 if there were -- or excuse me, you only paid if
10 there were no pending charges usually, is that
11 correct?

12 A Correct.

13 Q Well, I'm no math major, but one and one equals
14 two, so obviously Mr. Solomon had prior pending
15 charges, is that correct?

16 A No, sir. He had been arrested before, but not
17 anything that was pending at this time.

18 Q If I was to ask you what does holding a warrant
19 mean, what would your answer be?

20 A I would say that holding a warrant would be if
21 you have a warrant signed by a magistrate judge and
22 you have that in your possession, but it is not
23 served, for one reason or another, on a person.

24 Q And until a warrant is served, someone is not
25 arrested, is that correct?

OFFICER RHETT FOX - CROSS BY MR. BOGGS

228

1 A That is correct.

2 Q So out of the goodness of his heart Johnny
3 Solomon called you up and said I want to help the
4 police?

5 A I was contacted at the end of March by him when
6 I was on call, because he knew that -- that we had
7 been looking into him, but there was not information
8 sufficient enough to charge him or attempt to sign a
9 warrant.

10 Q So, in other words, the heat was on Johnny
11 Solomon, right? Is that a fair assessment, the
12 heat, being you, the police?

13 A True.

14 Q Thank you. And accordingly -- or because of
15 that he called you as a preemptive strike, correct?

16 A Correct. He contacted me, yes.

17 Q And he said to you I can buy some drugs from
18 Michael Gonzales, correct?

19 A Correct.

20 Q From March, when he first called you, until
21 June 3rd, when this incident occurred, did he
22 mention Josh Shelhamer's name, yes or no?

23 A Not Josh Shelhamer. In the discussion he did
24 mention someone named Josh.

25 Q When you sat down on June 3rd and he called you --

1 he called you, correct, on the 3rd?

2 A Yes, I believe he initially contacted me when I
3 came in to work. Under my direction I told him to
4 call.

5 Q Did he set up a deal with Josh Shelhamer?

6 A No, sir.

7 Q Did you know that Josh Shelhamer was going to
8 be at the Little Cricket?

9 A No, I did not.

10 Q And you monitored all the phone calls, correct?

11 A Yes, sir.

12 Q Did you hear every word that was said on that
13 tape the first time?

14 A Yes.

15 Q I mean you heard every word as it happened,
16 correct?

17 A Yes.

18 Q Did Josh Shelhamer's voice appear on any of the
19 phone calls?

20 A Not that I know of, but I'm really not familiar
21 with Josh Shelhamer's voice. I don't believe it's
22 on there, no.

23 Q But when the C.I. -- when you were dialing the
24 phone for the C.I., the agent, or the paid
25 informant, he said, and it was your understanding,

OFFICER RHETT FOX - CROSS BY MR. BOGGS

230

1 that he was calling Mike Gonzales, correct?

2 A That is correct, yes.

3 Q And when he asked for someone named Mike, they
4 called for Mike, is that correct?

5 A Yes.

6 Q So you have no reason to believe that Josh
7 Shelhamer was talking to the C.I. at any time during
8 the four phone calls?

9 A No, sir, I do not.

10 Q You mentioned that you had subpoenaed phone
11 records?

12 A Yes, I actually issued a search warrant for the
13 records, not a subpoena to them.

14 Q From whom?

15 A The search warrant was issued to Bell South.

16 Q Did you receive an answer from Bell South?

17 A Yes, I did.

18 Q Did you -- were you the one that issued the
19 search warrant?

20 A Yes, I typed the search warrant, signed it, and
21 faxed it to Bell South subpoena compliance center.

22 MR. BOGGS: If I may approach, Your Honor?

23 THE COURT: Yes, sir.

24 BY MR. BOGGS:

25 Q If you could identify the document I just

OFFICER RHETT FOX - CROSS BY MR. BOGGS

231

1 handed to you?

2 A This is a copy of the information that was sent
3 to me from Bell South in reference to the search
4 warrant that I sent them on -- they received on it
5 June 6th, 2002.

6 Q In calling your attention to the page that's
7 marked with a 21 circled at the top, do you have
8 that in front of you?

9 MR. HARRIS: Objection, Your Honor. I object
10 to the witness making use of the document that has
11 not been authenticated. There is nobody here from
12 the phone company to do that, apparently, and I
13 would have to object on that basis.

14 THE COURT: Mr. Boggs?

15 MR. BOGGS: Your Honor, he testified earlier,
16 without objection, that he subpoenaed phone records,
17 and I merely intend to ask him whether there were
18 phone calls that he can identify as the same time as
19 the time he made his calls.

20 THE COURT: Objection is overruled.

21 BY MR. BOGGS:

22 Q Calling your attention to that page I just
23 mentioned, if you would look at line number 6, where
24 it says number 6.

25 A Yes.

OFFICER RHETT FOX - CROSS BY MR. BOGGS

232

1 Q All right. And it lists a date and a time?

2 A Yes. The June 3rd, 2002, at 1357 hours.

3 Q And the number that is listed as the calling
4 number, is that an extension that you recognize?

5 A Yes, sir, that is my sheriff's office phone
6 located at my desk at the sheriff's office,
7 narcotics office.

8 Q And the number that was called was?

9 A [REDACTED] the number identified to me as
10 the number to Michael Gonzales' home.

11 Q And who identified that to you?

12 A That was identified as his home number from
13 Johnny Solomon.

14 Q Do you have any reason to believe that it
15 wasn't Michael Gonzales' home?

16 A No, sir, not at all.

17 Q And then on line 8, is that the second call
18 that was testified to earlier?

19 A Yes, that is a call on that same day at 1410
20 hours from my desk phone to that same number,

21 [REDACTED] duration of six minutes.

22 Q And the next incoming call is call number 19.
23 What time did that occur?

24 A That occurred at 1717 hours.

25 Q Which is 5:17 p.m., is that correct?

OFFICER RHETT FOX - CROSS BY MR. BOGGS

233

1 A That is correct.

2 Q All right. Do you recognize that number?

3 A No, I do not.

4 Q Is that the approximate time that you called
5 from your cell phone?

6 A Yes, sir, that is.

7 Q Did you block the number from your cell phone?

8 A Yes, I did. Prior to dialing the [REDACTED] number, I
9 dialed Star 67 on my phone to block my number.

10 Q Immediately after your call number 19, does
11 there appear to be an outgoing call?

12 A Yes, there appears to be a call from [REDACTED]
13 to --

14 MR. HARRIS: Your Honor, I object again,
15 because apparently we are outside of calls that
16 demonstrate that this individual made placed to this
17 number. And here again reference is made to a
18 record that contains information that hasn't been
19 authenticated.

20 MR. BOGGS: Your Honor, I apologize. I'm move
21 on. I was just trying to get to the fourth call
22 that he testified to.

23 THE COURT: I ask that the last answer be
24 disregarded by the jury and it's to be stricken from
25 the record.

OFFICER RHETT FOX - CROSS BY MR. BOGGS

234

1 Move along, please.

2 MR. HARRIS: Thank you, Your Honor.

3 BY MR. BOGGS:

4 Q And finally concerning these records, on number
5 22, is that the approximate time that you called,
6 which would be call number four?

7 A Here is 1727, and in my notes, which my watch
8 may be off one minute on each of them, it's 1726.

9 Q And that appears -- and that number was calling
10 whom?

11 A [REDACTED]

12 Q If I could get that back from you, please.
13 Thank you, sir.

14 A Thank you.

15 Q What was your -- you listened to all the calls?

16 A Yes, sir.

17 Q And as the lead officer, you developed an
18 impression as to what was going to take place, is
19 that correct?

20 A That is correct.

21 Q That's your job, right?

22 A Yes, sir.

23 Q Was it your impression that Michael Gonzales
24 was responding to the confidential informant's
25 request for drugs? Yes or no.

OFFICER RHETT FOX - CROSS BY MR. BOGGS

235

1 A Yes.

2 Q Was it your -- was it your impression or
3 opinion that throughout this series of phone calls,
4 that the C.I. was calling Mr. Gonzales, and Mr.
5 Gonzales alone, asking about drugs, is that correct?

6 A That is correct.

7 Q It's hard to hear parts of the phone call, and
8 what I heard was that the C.I. asked for something --

9 MR. HARRIS: Objection to a form of the
10 question is testimonial.

11 THE COURT: Yes, sir. If you want to ask him a
12 question, Mr. Boggs, you may do so, but I'm not
13 going to allow you to testify.

14 MR. BOGGS: Thank you, Your Honor.

15 THE COURT: Objection sustained.

16 BY MR. BOGGS:

17 Q On the tape your C.I. asked for drugs, correct?

18 A Correct.

19 Q Was his first request for drugs granted or met
20 with a yes, I can help you?

21 MR. HARRIS: Objection. Your Honor, I would
22 object to this witness being asked to interpret or
23 characterize a tape recording now in evidence and
24 played to the jury for their own consideration.

25 THE COURT: Objection is overruled.

OFFICER RHETT FOX - CROSS BY MR. BOGGS

236 .

1 You can answer the question, sir.

2 BY MR. BOGGS:

3 Q Do you remember my question?

4 A Can you restate or rephrase it for me?

5 Q I will.

6 Your C.I. asked for drugs and he made an
7 initial request?

8 A Yes.

9 Q Is that correct?

10 A Correct.

11 Q That initial request was denied, is that
12 correct?

13 A Correct.

14 Q Why was it denied? What is your impression as
15 to why it was denied?

16 A My opinion as to why it was denied?

17 Q Yeah.

18 A Because what was initially asked for --

19 MR. HARRIS: Objection. The question calls for
20 the witness to speculate about a subject that he
21 apparently has no knowledge.

22 THE COURT: I will sustain the objection if
23 it's -- if you are going to be speculating, sir.

24 Only if you know can I allow you to answer that, so
25 the objection is sustained.

OFFICER RHETT FOX - CROSS BY MR. BOGGS

237

1 Why don't you try to rephrase that question.

2 MR. BOGGS: Yes, sir, Your Honor.

3 THE COURT: See if you can get one that he can
4 answer from his own knowledge.

5 MR. BOGGS: I apologize, Your Honor. I'm just
6 trying to.

7 THE COURT: Well, sir, just move along.

8 MR. BOGGS: Yes, sir. I'll move on, judge.

9 BY MR. BOGGS:

10 Q You testified earlier that my client, Josh,
11 handed the package to Deffenbaugh. Did you see
12 that?

13 A No, sir.

14 Q So you don't know how it got there, with your
15 own direct knowledge?

16 A Not direct knowledge, no, sir.

17 Q Where was the wire during all of this? Who was
18 wearing it?

19 A Johnny Solomon.

20 Q From your vantage point at the scene, the
21 incident scene, could you see everything that was
22 going on?

23 A No, sir.

24 Q Is that because you were slouched down in the
25 car or in the truck, as you were saying?

OFFICER RHETT FOX - CROSS BY MR. BOGGS

238

1 A I still had view out of the window, but our
2 view was obstructed from the vehicles parked at the
3 gas pumps in relationship to where we were parked to
4 where our undercover officer was parked.

5 Q Could you see anyone go into the store prior to
6 moving the cars over to the right?

7 A Yes.

8 Q Who went into the store?

9 A Michael Gonzales.

10 Q With whom?

11 A By himself.

12 Q You testified earlier that this package right
13 here, there appears to be a white brick right here,
14 was that seen to the eye, the human eye, at the time
15 that you recovered this package from Investigator
16 Deffenbaugh?

17 A No, sir, that was under the several layers of
18 tape and the mustard.

19 Q Several layers of tape and mustard. Could you
20 smell mustard outside of the tape?

21 A Not until it was opened.

22 Q Was that package completely sealed when you
23 obtained it and put it into that bag?

24 A It was sealed with the tape to the point that
25 the mustard did not come out, yes.

1 Q And, therefore, what was under the mustard
2 could not be seen, correct?

3 A Correct.

4 Q And you testified earlier that it felt squishy?

5 A Yes, sir.

6 Q All right. Could you have -- if you had to
7 guess to an absolute certainty as to what was
8 inside, if somebody handed you that type package,
9 could you say for a hundred percent sure that it was
10 methamphetamine?

11 A No, sir. That's why I opened it and field
12 tested it.

13 Q At any point in the transaction was that
14 package opened?

15 A No, sir, that package was not opened until it
16 was in my possession.

17 Q At any point in the transaction was this
18 identified as methamphetamine or the package
19 identified as methamphetamine?

20 A Not that I heard on the transmission from the
21 wire.

22 Q How many drug arrests have you made in your
23 career?

24 A I could not say. Probably well over a hundred.

25 Q Have you ever arrested anyone younger than

OFFICER RHETT FOX - CROSS BY MR. BOGGS

240

1 Michael Gonzales?

2 A Yes, I have.

3 Q Were there any weapons confiscated off of my
4 client?

5 A No, sir.

6 Q Is there any mention of weapons in this
7 particular investigation, other than those carried
8 by the police?

9 A No, sir.

10 Q As soon as Johnny Solomon called you for the
11 first time that particular morning or early
12 afternoon --

13 A Yes.

14 Q -- did you have any plan to arrest Josh
15 Shelhamer, based on that conversation?

16 A No, sir.

17 Q Did you know who he was, based on that
18 conversation?

19 A No, I did not know his identity at that time.
20 I knew of Josh, but not specifically Josh Shelhamer.

21 Q When you drove to the Little Cricket, did you
22 expect anyone to be there other than Michael
23 Gonzales?

24 A No, sir.

25 MR. BOGGS: No further questions.

OFFICER RHETT FOX - REDIRECT BY MR. WALL

241

1 THE COURT: Redirect?

2 MR. WALL: Yes, sir.

3 REDIRECT EXAMINATION BY MR. WALL:

4 Q I want to start off with Mr. Solomon.

5 A Yes.

6 Q Mr. Solomon, the day of this incident, was that
7 the first time that he had come to you?

8 A No.

9 Q When had y'all met?

10 A I believe we met for the first time at the end
11 of -- I think it was March or April.

12 Q Is that when he came forward --

13 A Yes.

14 Q -- to work as a C.I.?

15 A Yes, sir.

16 Q What's the procedure for -- what do you do when
17 somebody comes forward?

18 A What we initially do is we'll have an initial
19 interview just to see what exactly their intentions
20 are. Typically we will go over confidential
21 reliable informant packet with them, which gathers
22 all their information, and then we sit down either
23 at that time or at a later time and have a complete
24 and total debriefing where that person kind of
25 explains all the dealings that he's had related to

OFFICER RHETT FOX - REDIRECT BY MR. WALL

242

1 the drug trade for your knowledge.

2 Q And what are you trying -- are you trying to
3 determine at that point if this person can be use to
4 you?

5 A Yes, sir, basically at that point in time we
6 take information that is pretty much already known
7 to us at some time. First of all, we want to see if
8 they are going to be completely and totally honest
9 with us and tell us everything, and we want to know
10 if they are aware of actors in the drug trade that
11 may be of interest or that can produce drugs to this
12 person.

13 Q And during this debriefing did the name Michael
14 Gonzales come up?

15 MR. HARRIS: Objection.

16 THE COURT: Do you want to give me some basis?

17 MR. HARRIS: Well, yes, sir, Your Honor. It
18 may be a matter that would be best at side bar or --

19 THE COURT: We can just send the jury out.

20 Ladies and gentlemen of the jury, I have a
21 matter of law I need to take up with the lawyers
22 outside of your presence. I'm going to send you to
23 the jury room. While I do that, I'll remind you
24 that you are not to discuss this case among
25 yourselves. We will get you back in just a few

1 minutes.

2 (The following takes place outside the presence
3 of the jury panel)

4 THE COURT: Yes, sir.

5 MR. HARRIS: Your Honor, the reason I objected
6 to the question during this debriefing did the name
7 Michael Gonzales come up was because the question
8 was posed immediately after a line of questioning
9 that seemed to elicit just only general procedural
10 information about how informants are handled. And
11 the witness' answer was that we obtain information
12 from them as part of this routine procedure about
13 people that are known actors in the drug trade, I
14 think was the phrase. Then the question comes well,
15 during the debriefing of Mr. Solomon, did the name
16 Michael Gonzales come up, which I think clearly
17 would permit this witness to basically say Michael
18 Gonzales is a known drug dealer.

19 THE COURT: What do you have to say about that,
20 Mr. Wall?

21 MR. WALL: Your Honor, where I was going with
22 that is Mr. Harris asked on cross-examination, and I
23 objected to him asking questions regarding -- and I
24 understand the overruling of that objection. The
25 question such as didn't you have Mr. Solomon trying

1 to entice Mr. Gonzales, trying to lure him in,
2 wasn't his --

3 THE COURT: That doesn't open the door, though,
4 to that kind of a question with the line of
5 questions that you have been asking him.

6 MR. WALL: Yes, sir.

7 What I wanted to do, and what I plan to do in
8 further redirect of him, is simply establish that
9 Mr. -- not going into any prior drug dealings or
10 anything like that, but to establish that the
11 purpose of Mr. Solomon was to make contact with a
12 person in Mr. Gonzales who trusted him and who he
13 would be able to introduce an undercover officer
14 through.

15 THE COURT: Well, then, why don't you ask him
16 that rather than --

17 MR. WALL: Yes, sir.

18 THE COURT: -- these other questions that you
19 are asking, because that appears to be a back door
20 attempt to get in something that I am not
21 permitting, and I ruled that yesterday on any number
22 of occasions.

23 MR. WALL: Yes, sir, and I apologize. I was
24 not attempting to do that. I was trying to -- I
25 thought I would need to lay a foundation, and I was

1 trying to do that before I asked him questions, such
2 as the ones that I plan to ask next about Mr.
3 Solomon used -- his purpose was to be an
4 introduction to someone Mr. Gonzales trusted.

5 THE COURT: Well, then why do you ask a
6 question about this known drug connection -- you
7 know, that type of a loaded question about some type
8 of a prior drug history? I think that that's the
9 thing that concerns me.

10 MR. WALL: Yes, sir, and I apologize. I was
11 attempting to elicit from him, and he and I have had
12 conversations coming up to this trial about Mr.
13 Solomon giving him the name Michael Gonzales as
14 someone that he could buy from. And that's
15 basically what I'm attempting to show, somebody that
16 trusts him, somebody that he can buy from, and
17 somebody that he can buy weight from, and that's --
18 that's what I'm attempting to show, and don't -- do
19 not intend to go into prior dealings, that prior
20 drug deals that have gone on between Mr. Solomon and
21 Mr. Gonzales. In fact, I have had my investigator
22 and another officer drill into Mr. Solomon again
23 today that when he testifies, none of that is to
24 come out.

25 MR. HARRIS: Your Honor, I view it as the same.

1 If you ask -- if the question is asked of the
2 witness, you know, basically is it true that you
3 used Mr. Solomon for this purpose because he was
4 someone known to Mr. Gonzales, that he knew that he
5 could do business with, and substantial business
6 with, you might as well just say that -- I mean,
7 that is prior drug dealings.

8 THE COURT: Well, Mr. Harris, we are not here
9 on any other charge, number one. My ruling was as
10 to marijuana, that there was going to be nothing as
11 to that.

12 Now, surely they didn't come up with this guy
13 just out of the thin air. And, quite frankly, I
14 think that you are hoping against hope to think that
15 he's not going to be able to testify that there was --
16 that this informant had a basis for fingering him
17 and for saying that he could maybe entice him, as
18 you might say it. That is something that -- while
19 I'm not going to allow the prior marijuana charge to
20 come in, the way that Solomon got him, that's --
21 that's going to be part of it.

22 Now, he's not going to mention any prior
23 marijuana, this kind of thing, but, you know, they
24 are going to be able to testify that they apparently
25 could make a deal with this man, or entice him, as

1 you might say. So that objection is overruled, but
2 with the instruction that -- you know, you walking a
3 tight rope with all these witnesses. So, of course,
4 that's what you get for dealing with people like
5 this.

6 Bring the jury back.

7 MR. BOGGS: Your Honor, I'm sorry before --

8 THE COURT: Just a minute, Mr. Nesbitt.

9 MR. BOGGS: I apologize, judge.

10 Pursuant to my motion yesterday and in reading
11 the case law, I at some point would intend to
12 proffer testimony from this potential witness as to
13 the excluded material.

14 THE COURT: Well, let's go ahead and get that
15 done, because this sending the jury in and out --

16 MR. BOGGS: Yes, sir.

17 THE COURT: -- is not something that I like,
18 because -- of course, it doesn't make any difference
19 to me, because it's y'all's case.

20 MR. BOGGS: Yes, sir.

21 THE COURT: I can send them out as many times
22 as you want me to. But if you want to proffer
23 something, you go right ahead.

24 MR. BOGGS: Thank you, Your Honor.

25 (Whereupon, the following was proffered

1 testimony)

2 BY MR. BOGGS:

3 Q You are still under oath. Do you understand
4 that.

5 A Yes, sir.

6 Q Proffer means that this is not before the jury.
7 Pursuant to your dealings with your C.I. on
8 this particular case, did he inform you that he
9 could -- that he had dealt with Michael Gonzales
10 before?

11 A Yes.

12 Q In drug transactions?

13 A Correct.

14 Q And did you evaluate Michael Gonzales to be a
15 likeable or -- or excuse me, a likely target for
16 your operation on this particular day?

17 A Yes.

18 Q Did you ask for marijuana for a reason?

19 A Yes.

20 Q Why?

21 A Because that's what Johnny Solomon was known to
22 deal with Michael Gonzales with, was marijuana.

23 Q And, in fact, had you had known of Michael
24 Gonzales' name prior to June 3rd and prior to your
25 dealings with Mr. Solomon?

1 A Yes.

2 Q And why?

3 A In the beginning part of January of 2002, he
4 was arrested for trafficking a thousand pounds of
5 marijuana.

6 MR. BOGGS: I have nothing further in terms of
7 proffer, Your Honor.

8 THE COURT: All right.

9 MR. BOGGS: Thank you, Your Honor.

10 THE COURT: Let's bring out jury back.

11 (The following takes place in the presence of
12 the jury panel)

13 THE COURT: Thank you, ladies and gentlemen.

14 You may continue.

15 MR. WALL: Thank you, Your Honor.

16 BY MR. WALL:

17 Q We were discussing Johnny Solomon, I believe.
18 We were discussing Johnny Solomon?

19 A Yes, sir.

20 Q In your discussions with Mr. Solomon, were you
21 able to make a determination as to whether or not he
22 could contact Michael Gonzales for you?

23 A Yes.

24 Q Were you able to make a -- and what was that
25 determination?

OFFICER RHETT FOX - REDIRECT BY MR. WALL

250

1 A He knew him personally and knew how to reach
2 him.

3 Q What was your purpose in having him contact
4 Michael Gonzales, rather than you, for example,
5 rather than Rhett Fox calling up and saying Mike,
6 can you get me a half kilo of meth?

7 A I do not know Michael Gonzales to ask him that.

8 Q So had you determined that there was a level of
9 trust between these two?

10 MR. HARRIS: Objection to the form of the
11 question. Leading.

12 THE COURT: Sustain the objection.

13 BY MR. WALL:

14 Q What, if anything, had you determined regarding
15 the level of trust between Johnny Solomon and
16 Michael Gonzales?

17 A I determined that Mr. Solomon knew Mr. Gonzales
18 well.

19 Q What, if anything, had you determined about Mr.
20 Solomon's ability to get an undercover officer into
21 this transaction?

22 A I determined, from talking to Mr. Solomon, that
23 he could, in fact, introduce someone to Michael
24 Gonzales, an undercover officer.

25 Q And what does that mean when you say introduce?

OFFICER RHETT FOX - REDIRECT BY MR. WALL

251

1 What does that entail when you say you are looking
2 for someone that can introduce you?

3 A To bring a third party into a conversation or a
4 deal.

5 Q And you are wanting -- or what, if anything,
6 are you wanting in terms of Michael Gonzales'
7 reaction to this? Are you wanting him to trust --

8 A To accept that person, yes.

9 Q So based on your conversations with Mr.
10 Solomon, this operation was began -- it began,
11 right?

12 A Yes.

13 Q And Mr. Solomon's purpose, as I understand it,
14 was to introduce an undercover officer?

15 A That is correct.

16 Q To a person that he could make a drug purchase
17 from?

18 A Correct.

19 Q Make a large drug purchase from?

20 A Yes, I consider one pound of methamphetamine a
21 large drug purchase.

22 Q So going back to Mr. Harris' questions about
23 enticing or luring, that business, was it that?

24 A No, sir.

25 Q Or was an attempt to infiltrate this?

OFFICER RHETT FOX - REDIRECT BY MR. WALL

252

1 A This was an attempt to conduct an investigation
2 that would result in an arrest and confiscation of
3 illegal drugs.

4 Q From Michael Gonzales?

5 A Correct.

6 Q To infiltrate his inner circle?

7 A Correct.

8 Q All right.

9 MR. HARRIS: Your Honor, I'm going to object
10 and I ask that the witness' answer -- the question
11 and the answer be stricken.

12 THE COURT: Sustain the objection. I'm going
13 to direct the jury to disregard the last question
14 and answer and that it's to be stricken from the
15 record.

16 BY MR. WALL:

17 Q Now, regarding the payment, you say you knew
18 that Mr. Solomon was going to get paid all along?

19 A Correct.

20 Q And that was part of the sign-up agreement?

21 A Yes, that is in our agreement.

22 Q So what do you mean when you say you just think
23 he was surprised to get it?

24 A I mean, it's nothing that I emphasize on a
25 daily basis to them that, hey, if you do this, you

1 are getting money. I mean, he was aware of it in
2 the beginning.

3 Q There were some discussion about warrants and
4 warrants held. Does he have any warrants pending?
5 Does he have any current drug charges?

6 A No. No, he does not. There was no information
7 ever received to sign warrants or charge him on
8 anything.

9 Q Have you made any deals with him --

10 A No, sir.

11 Q -- to not charge him with drug cases?

12 A No, sir.

13 Q Have you asked me to make any deals with him?

14 A No, sir. He knows that there was an
15 investigation going on, but not that -- you know,
16 not no --

17 Q Into his drug activity?

18 A Right.

19 Q Mr. Harris asked you or there were discussions
20 about the fact that the money didn't change hands,
21 that your original plan was for money to change
22 hands?

23 A Correct.

24 Q Was that in any way an impediment to the
25 investigation?

OFFICER RHETT FOX - REDIRECT BY MR. WALL

254

1 A No. Actually our original plan is not for the
2 money to change hands. Our plan is to have our
3 undercover officer see the drugs, the package, and
4 then give the signal to come in, so we can prevent
5 our money from exchanging hands. That's how we
6 operate in order to maintain the integrity of our
7 money, so we don't lose it.

8 Q So if somebody gets away, it's gone?

9 A Correct.

10 Q Like in this case?

11 A Correct.

12 Q But it didn't change hands?

13 A No, it did not.

14 Q And, again, I don't want to repeat myself, but
15 he asked you about so that part of it failed. Did
16 you see the operation in any way as a failure?

17 A No, sir, I do not see it as a failure at all.

18 Q That amount of drugs was seized, wasn't it?

19 A That is correct.

20 Q And it was exchanged?

21 A Yes, it was.

22 Q Mr. Harris said that Gonzales just stood
23 outside during all of this.

24 A Correct, he did state that.

25 Q Is that your understanding of what, in fact,

1 occurred?

2 A No, from my observations and my understanding
3 through this investigation is that he did have
4 conversation with Investigator Deffenbaugh. He was --
5 he came over to the vehicle where they were at and
6 even commented on the scales.

7 Q While the transaction was going on?

8 A Yes, sir.

9 Q Investigator Deffenbaugh, in fact, didn't he,
10 was having the initial discussions with Mr.
11 Gonzales?

12 A That is correct.

13 Q About whether it's here, can I weigh it?

14 A Yes.

15 Q Those were conversations with Mr. Gonzales?

16 A Correct.

17 Q You said that he went in the store alone when
18 he walked in the store. Did anybody walk in the
19 store after him?

20 A Yes, Johnny Solomon walked into the store to
21 have a conversation with him, stating that the way --
22 the way that I had planned it for him to go in there
23 was to tell him that Investigator Deffenbaugh,
24 posing as an undercover, would not let the money
25 come in there, as stated in the phone conversation

OFFICER RHETT FOX - REDIRECT BY MR. WALL

256

1 by Mr. Gonzales.

2 Q So Mr. Gonzales wanted it to go down in the
3 bathroom?

4 A Correct.

5 MR. HARRIS: I object to that as calling -- I
6 don't know how this witness could know what's in the
7 mind of Mr. Gonzales.

8 THE COURT: Sustain the objection.

9 BY MR. WALL:

10 Q What, if anything, did you -- you monitored the
11 telephone calls we just listened to, didn't you?

12 A Yes, I did.

13 Q What, if anything, did you hear on the
14 telephone call from the voice, not Mr. Solomon's
15 voice, but the other voice regarding how he wanted
16 to do it?

17 A One of the --

18 MR. HARRIS: Your Honor, once again, I object
19 to the witness interpreting the tape as a piece of
20 evidence.

21 THE COURT: Overruled.

22 BY MR. WALL:

23 Q Please continue.

24 A In one of the conversations that I heard the
25 voice that was identified as Michael Gonzales

OFFICER RHETT FOX - REDIRECT BY MR. WALL

257

1 stating that he would be in the bathroom. And then
2 I believe it was in a different call said that he
3 would be holding a package, come in and exchange the
4 money and go on their way.

5 Q And none of that -- none of that occurred, in
6 fact?

7 A No.

8 Q And you have -- and the reason none of that
9 occurred is because y'all had Solomon instructing
10 you that the money was outside?

11 MR. HARRIS: I object to that. Why Mr.
12 Gonzales did not go through with the plan, if there
13 was a plan, is not something that this witness could
14 know.

15 THE COURT: Sustain the objection.

16 BY MR. WALL:

17 Q You had just testified, I believe -- or what,
18 if anything, did you tell Mr. Solomon regarding the
19 transaction going down inside, in the bathroom?

20 A I told him that the money was going to stay
21 with Investigator Deffenbaugh and that I did not
22 want them going inside.

23 Q So there was no money inside?

24 A No, sir.

25 Q And it couldn't go down in there?

OFFICER RHETT FOX - REDIRECT BY MR. WALL

258

1 A Right.

2 Q You have no way of knowing whether or not the
3 meth was inside at that point, do you?

4 A No, I do not.

5 Q You have no way of knowing of whether Mr.
6 Gonzales had it on him?

7 A I do not.

8 Q You were asked if we could identify Johnny's
9 voice by the language that was being used. He used
10 a lot of profanity?

11 A Yes.

12 Q Was his voice the only voice that used
13 profanity on that tape?

14 A No.

15 Q Primarily it was Johnny's voice, though?

16 A True.

17 Q But that's not -- what I'm getting to is if a
18 voice is using profanity on the tape, does that
19 automatically mean it's Johnny's?

20 A No, it does not.

21 Q You saw, you testified, I believe -- and again
22 this goes back to the question of Mr. Gonzales just
23 standing there. You saw -- or what did you see him
24 pull in in? What type of automobile?

25 A A green Chevrolet Camaro with gold stripes.

OFFICER RHETT FOX - REDIRECT BY MR. WALL

259

1 Q And who was determined to be the owner of that
2 green Chevy Camaro?

3 A The owner of that was determined to be Lucy
4 Santana.

5 Q And through your information, what relationship
6 is she to Michael Gonzales?

7 A Mother.

8 Q You were asked by Mr. Boggs if holding that
9 package, if you could know that it was meth?

10 A Correct.

11 Q And the answer is obviously no?

12 A Right.

13 Q You felt -- you said it felt mushy on the
14 outside. Could you press down to where it was hard
15 or did it feel just entirely mushy?

16 A Yes, it was -- you could press down and feel
17 that there was something inside and it was hard on
18 the corners and then squishy on top and a little bit
19 on the sides. You could tell from its weight that
20 by pushing on it that it was hard inside.

21 Q I mean, you -- I'm not trying to be tripe, but
22 could you tell it wasn't a bag of jello?

23 A Yes.

24 Q There was something hard?

25 A Yes, there was something in the middle.

OFFICER RHETT FOX - REDIRECT BY MR. WALL

260

1 Q Would you know -- you had no -- you would have
2 no way of independently knowing by pressing on that
3 object wrapped in that that it was methamphetamine?

4 A Correct.

5 Q But, of course, if you had driven over there
6 and had been part of the transaction, would you have
7 known?

8 MR. HARRIS: Objection.

9 MR. BOGGS: Objection.

10 MR. HARRIS: That is purely a speculative
11 answer.

12 THE COURT: Sustain the objection.

13 MR. WALL: Yes, sir.

14 BY MR. WALL:

15 Q What type of scales were these weighed on, or
16 do you know?

17 A It was weighed on a large set of digital
18 scales. I believe they were black with blue stripe.
19 As far as at the scene?

20 Q Right.

21 A Yes, at the scene that's what they were weighed
22 on.

23 Q And what, if any, involvement did Mr. Shelhamer
24 have in that weighing?

25 A My understanding he was present at the time

1 when Investigator Deffenbaugh weighed them. And
2 Investigator Deffenbaugh was directed at one point
3 that he could weigh them on the floorboard instead
4 of on the seat because it would be more level.

5 Q And, finally, Mr. Harris -- I believe Mr.
6 Harris made a point of asking you about there was no
7 one ever saw this in Michael Gonzales' possession?

8 A Correct.

9 Q The hand to hand was not from Michael Gonzales?

10 A No, it was not.

11 Q Did that shock you?

12 A No.

13 Q In your experience as a narcotics officer, is
14 it unusual for someone who orchestrates a drug deal
15 to try to distance themselves from the actual drugs?

16 MR. HARRIS: Objection.

17 THE COURT: State your grounds.

18 MR. HARRIS: The question has no relevance to
19 any issue in this case. It's not a seminar on the
20 theory of --

21 THE COURT: Relevance is your objection?

22 MR. HARRIS: Yes, sir.

23 THE COURT: It's overruled.

24 BY MR. WALL:

25 Q Please answer the question.

OFFICER RHETT FOX - RECROSS BY MR. BOGGS

262

1 A To my knowledge, typically other people may be
2 involved in drug deals to help separate individuals
3 from either the money or the drugs, to keep them
4 separate in case law enforcement was to intervene.

5 Q And, to your knowledge, does the likelihood of
6 that occurring increase or decrease as the weight
7 increases?

8 MR. HARRIS: Same objection.

9 THE COURT: I'll sustain that objection.

10 MR. WALL: Yes, sir.

11 No further questions, Your Honor.

12 THE COURT: Recross.

13 MR. HARRIS: None from Gonzales, Your Honor.

14 THE COURT: Mr. Boggs.

15 MR. BOGGS: Thank you, Your Honor. May it
16 please the court.

17 RECROSS EXAMINATION BY MR. BOGGS:

18 Q You stated that you could tell that it was
19 hard, the package that is, on the inside, is that
20 correct?

21 A That is correct.

22 Q All right. But just because it's hard doesn't
23 mean it's methamphetamines, right?

24 A No.

25 Q In fact, you have seen other drug busts

1 involving other drugs, correct?

2 A Correct.

3 Q You said you made over a hundred. And some of
4 those cases even marijuana has been freeze dried, is
5 that correct?

6 A I have never seen it freeze dried, but I have
7 seen it vacuum sealed.

8 Q Vacuum seemed, into like a brick?

9 A Correct.

10 Q Much as the shape of this package right here?

11 A Sometimes.

12 Q So you have seen marijuana in this shape harder
13 than what people would think is marijuana plants,
14 correct?

15 A Part of marijuana plant?

16 Q I said you have seen marijuana in this shape?

17 A Correct.

18 Q And in this texture in packages, correct?

19 A Not that texture.

20 Q But this package was in what you called a
21 squishy -- it felt squishy?

22 A Correct.

23 Q I think I know what it means, but squishy isn't
24 hard, is that correct?

25 A No.

OFFICER RHETT FOX - RECROSS BY MR. BOGGS

264

1 Q So you don't know what was in that package when
2 you first felt it, right?

3 A No. I mean it was squishy and hard on the
4 inside.

5 Q And, in fact, just because it's hard doesn't
6 mean it's actually drugs, is that correct?

7 A Correct.

8 Q It could have been a container full of
9 marijuana, is that correct?

10 A I believe anything could be possible.

11 Q All right. My point is that.

12 Now, in drug transactions trickery is involved,
13 isn't it?

14 MR. HARRIS: Objection. I don't -- I don't
15 even know how that question could be answered,
16 trickery is involved?

17 THE COURT: Well, would you state a grounds for
18 your objection?

19 MR. HARRIS: Relevance

20 THE COURT: I'll sustain the objection.

21 BY MR. BOGGS:

22 Q In this particular case your C.I. had
23 negotiated with Michael Gonzales to purchase some
24 drug for \$13,500.00?

25 A That is correct.

OFFICER RHETT FOX - RECROSS BY MR. BOGGS

265

1 Q You stated earlier you didn't have \$13,500.00,
2 correct?

3 A Correct.

4 Q And, in fact, you rolled it up over -- rolled
5 up some hundreds over ones to trick the defendant,
6 Michael Gonzales, into thinking that you had
7 \$13,500.00, right?

8 A I wouldn't call it tricking. It's a roll that
9 is made to appear as \$13,500.00.

10 Q Well, I call that tricking.

11 It was not.

12 THE COURT: Well, sir, Mr. Boggs, what you call --
13 I don't want you to testify.

14 MR. BOGGS: Yes, sir.

15 THE COURT: You can ask him questions. Your
16 statements are not questions. So let's put it in
17 the form of a question, please, sir.

18 BY MR. BOGGS:

19 Q Was it \$13,500.00?

20 A No, it was not.

21 Q Was it your intent to advertise that roll as
22 \$13,500.00?

23 A Yes, if it came down to it where money needed
24 to be shown.

25 Q Based on your experience as a drug officer,

OFFICER RHETT FOX - RECROSS BY MR. BOGGS

266

1 have you ever set up a deal to purchase a certain
2 type of drug and it's been something else, yes or
3 no?

4 A No, not in my experience.

5 Q Based upon your knowledge of law enforcement
6 techniques, has that occurred?

7 A That has occurred where a false product would
8 be given, but presented as that product.

9 Q I get back to my original question. Is there
10 any evidence that Josh Shelhamer identified this
11 package as methamphetamine?

12 A Not directly known to me, no, sir.

13 Q Not directly to anybody?

14 A I can't speak for anybody else who may testify.

15 Q You monitored the whole situation, didn't you?

16 A Yes.

17 Q And you testified earlier when I asked
18 basically the same question no. Which is it?

19 A Not directly known to me. If it was stated in
20 the background or in a part that was jumbled, then
21 that is not known to me, sir.

22 Q And you created a report as a result of this
23 arrest, correct?

24 A Yes, sir, I did.

25 Q Did you list anywhere in your report that Josh

1 Shelhamer ever identified this package as
2 methamphetamine?

3 A No, I do not believe I did.

4 Q So you have got a C.I. that contacts you?

5 A Yes, sir.

6 Q Says he can set up a deal with Mike Gonzales?

7 A Yes, sir.

8 Q He calls Mike Gonzales?

9 A Yes, sir.

10 Q And he negotiates with Mike Gonzales?

11 A Yes, sir.

12 Q Mike Gonzales tells him where to go?

13 A Yes, sir.

14 Q Tells him the amount?

15 A Yes.

16 Q You show up looking for Michael Gonzales?

17 A Yes.

18 Q They're in Mike Gonzales' mom's car?

19 A Correct.

20 Q Mike Gonzales runs?

21 A Correct.

22 Q And you go to Mike Gonzales' house?

23 A I did not personally.

24 Q But the calls that were made went to Mike
25 Gonzales' house?

OFFICER RHETT FOX - RECROSS BY MR. BOGGS

268

1 A Yes, the calls were to.

2 Q Who leases or owns that house?

3 A I believe it's Lucy Santana.

4 Q Who is?

5 A Mike's mother.

6 Q Did you come into close contact with my client
7 at the time of the arrest?

8 A Yes, I did.

9 Q Were you able to see his clothing?

10 A Yes, I was able to see his clothing.

11 Q Do you have a good sense of smell?

12 A I would like to believe so, yes.

13 Q When you opened that package, could you smell
14 mustard?

15 A When it was opened, yes.

16 Q You testified earlier you couldn't smell
17 mustard before you opened it, right?

18 A True.

19 Q Did you have a chance to smell my client?

20 A I was in close proximity to him, yes.

21 Q So where if he smelled like mustard, could you
22 have smelled it?

23 A I believe so, if he had an odor of -- a strong
24 odor of mustard, I believe I would have smelled it.

25 Q Would you classify this as a strong odor of

1 mustard when you opened it up, speaking of the
2 package in question?

3 A Not an overwhelming odor, but you could smell
4 mustard.

5 Q It didn't smell like ketchup?

6 A No, sir.

7 Q Did you smell any mustard on my client?

8 A No, I did not smell mustard on your client.

9 Q Did you see any mustard on his hands?

10 A No, sir.

11 Q Did you see any mustard on his clothes?

12 A Not that I recall. I don't believe that I
13 inspected him.

14 Q You had a chance to inspect him, though, right?
15 He didn't run, correct?

16 A Correct.

17 Q He was there?

18 A Right.

19 Q All right. You processed him, or someone from
20 your office processed him, correct?

21 A That is correct.

22 Q What was your impression of this package? It's
23 hard to tell when it's in this plastic. And by that
24 I mean what was your impression as to its age?
25 Could you form an opinion as to how old that package

OFFICER RHETT FOX - RECROSS BY MR. BOGGS

270

1 was?

2 A No, I can't date when it was wrapped. The
3 black electrical tape on the outside appeared to be
4 in good shape. It wasn't beat up or wasn't --

5 Q Well, it's your testimony that you can't date
6 when this package was wrapped?

7 A Correct, I cannot.

8 MR. BOGGS: I have no further questions.

9 THE COURT: Thank you, sir. You can step down.

10 Is this a good time for us to break for lunch
11 or if --

12 MR. WALL: Your Honor, I have Robert Rosenberg,
13 who is about five minutes.

14 THE COURT: Go ahead and call him.

15 MR. WALL: Robert Rosenberg.

16 OFFICER ROBERT ROSENBERG, having been first
17 duly sworn, testified as follows:

18 THE COURT: Sir, state your name for the record
19 and spell your last name for us, please.

20 THE WITNESS: Officer Robert Rosenberg. Your
21 request?

22 THE COURT: Spell your last name for us,
23 please, sir.

24 THE WITNESS: R-o-s-e-n-b-e-r-g.

25

OFFICER ROBERT ROSENBERG - DIRECT BY MR. WALL

271

1 DIRECT EXAMINATION BY MR. WALL:

2 Q Officer Rosenberg, you are employed with the
3 Spartanburg sheriff's office?

4 A Yes, sir.

5 Q In what capacity?

6 A I'm currently the evidence officer for the
7 sheriff's department.

8 Q What does that entail?

9 A What I do is when officers collect evidence,
10 they turn it in and it's categorized and then logged
11 in and stored into court dates.

12 Q I'm going to show you --

13 (Form C-Rule 6 marked as State's Exhibit No. 5
14 for identification)

15 BY MR. WALL:

16 Q I going to show you what's been marked as
17 State's Exhibit No. 5 for identification. Can you
18 tell me what that is?

19 A It's a custody chain. It includes where
20 someone has taken evidence into custody and it just
21 shows a paper trail basically of what's occurred.

22 Q And what was the evidence in this case?

23 A It was one best bag marked S-003983.

24 Q I'm going to show you what's been marked as
25 State's Exhibit No. 2 for identification and ask you

OFFICER ROBERT ROSENBERG - CROSS BY MR. HARRIS

272

1 to look at that control number?

2 A It's 003983, yes, sir.

3 Q So it would have been this substance?

4 A Yes, sir.

5 Q What does it indicate occurred with that
6 substance?

7 A What it indicates is that Officer Deffenbaugh
8 apparently had seized from Steve Shelhamer and
9 turned it over to Officer Rhett Fox, who put it in a
10 secured drop box at the sheriff's office, where I
11 picked it up and put it in the drug room after I had
12 entered it in the computer.

13 Q And so the drop box that it's recovered from,
14 again that's a secured location?

15 A It's a secured locked location. No one can get
16 into it.

17 Q You accessed it and then you put it in another
18 secured location?

19 A Yes, sir.

20 Q Then what -- it awaits a chemist at that point,
21 is that correct?

22 A Yes, sir.

23 MR. WALL: No further questions, Your Honor.

24 CROSS EXAMINATION BY MR. HARRIS:

25 Q Where did you get the package from?

OFFICER ROBERT ROSENBERG - CROSS BY MR. BOGGS

273

1 A It's a secured evidence drop box. It's a steel
2 fortified box. It's locked. Only two officers have
3 keys for this. It's similar to a mailbox, where you
4 can drop in it, but you cannot retrieve it, and it's
5 secured and locked. And every morning the other
6 officer or myself will go and obtain the evidence
7 out of the locked box.

8 Q What individual placed the items into the drop
9 box from which you obtained it?

10 A From the sheet, let's see, Officer Rhett Fox.

11 Q Where did Officer Fox get it from?

12 A From this sheet, in person from Officer
13 Deffenbaugh.

14 Q Where did Officer Deffenbaugh get it?

15 A From this sheet, from Steve Shelhamer.

16 Q Steven Shelhamer?

17 A Yes, sir.

18 Q Thank you.

19 MR. HARRIS: No further questions.

20 THE COURT: Mr. Boggs.

21 CROSS EXAMINATION BY MR. BOGGS:

22 Q Do you have any direct knowledge as to the
23 incident which resulted in that package being in
24 your possession? In other words, do you know how
25 Mr. Deffenbaugh --

OFFICER ROBERT ROSENBERG - CROSS BY MR. BOGGS

274

1 A No, sir.

2 Q Okay. All you are testifying to is from forms,
3 is that correct?

4 A Yes, sir.

5 Q And when were those forms filled out?

6 A The first one was dated June 3rd, 02, which was --
7 make sure I have these right. Officer Deffenbaugh
8 received it from Steve Shelhamer.

9 Q And when did you fill out your form?

10 A On June 4th.

11 Q And did it appear to be the package that is in
12 the same, I guess --

13 A We received the envelope that's inside here.
14 We don't receive -- this is done at the lab, the
15 outer envelope.

16 Q Well, the inside package that you received out
17 of the lock box, could you see this white block of
18 substance?

19 A There would be a sheet that would be between
20 the substance and this package. On this side would
21 be -- excuse me, this package, and there is a chain
22 that's filled out for Officer Ashley Harris that's
23 inverted on the inside of the envelope, on the back
24 side.

25 Q But you didn't open the package, correct?

1 A No, sir. It's sealed.

2 Q So you don't know what was -- what sheet was in
3 there. Just a sheet of paper was in there?

4 A Well, on the back of it, it's -- you can see
5 through the back of the sheet and it's facing
6 outwards, where you can read. It will have like
7 which officers were involved and the suspects names.

8 Q And so my earlier question was is this package,
9 the inside package that you handled, in the same
10 condition as it was that day when you obtained it
11 from the drop box?

12 A No, when I obtained it from the drop box, it's
13 in a brown envelope. And these chains are down in
14 the brown envelope and there is another chain that
15 goes to the chemist.

16 When the officer fills out this best bag, which
17 is the white inner bag here, he will fill out the
18 outside evidence. I will mark who the suspects were
19 and I put this label on the inside.

20 And then the officer, though -- when I receive
21 it, it's sealed, but the officer will take the chain
22 from Ashley Harris', tear off a copy of it and put
23 it down in the back. And then it comes to me sealed
24 down inside the brown envelope with the chains.

25 Q So it --

OFFICER ROBERT ROSENBERG - CROSS BY MR. BOGGS

276

1 A I'm the one that wrote -- I put that label on
2 right there.

3 Q You put this label on right there?

4 A Yes.

5 Q What does that label say, the second line?

6 A Michael Gonzales.

7 Q Okay.

8 A And the warrant number.

9 Q How many of these packages do you handle a
10 year?

11 A A year?

12 Q Yeah.

13 A In the thousands.

14 Q Do you recall anything specific about this
15 package?

16 A No, sir, not --

17 Q Are those envelopes leak proof? Are the sealed
18 envelopes?

19 A They are sealed envelopes.

20 Q They don't leak?

21 A They don't -- as far as I know, no, sir.

22 Q They don't have odors?

23 A I have never them leak.

24 Q Have you ever been able to smell through a
25 package?

OFFICER ROBERT ROSENBERG - REDIRECT BY MR. WALL

277

1 A No, sir.

2 MR. BOGGS: No further questions.

3 THE COURT: Redirect?

4 MR. WALL: Just a few questions, Your Honor. I
5 just want to be sure after all that.

6 THE COURT: How about, if you would, just
7 limiting yourself to redirect.

8 MR. WALL: Yes, sir, I apologize.

9 REDIRECT EXAMINATION BY MR. WALL:

10 Q This best bag had sealed -- was sealed when you
11 received it?

12 A Yes, sir.

13 Q Did you ever unseal it?

14 A No, sir.

15 Q Do you ever unseal them?

16 A No, sir.

17 Q The control number on this bag, does it match
18 the documents that you have signed?

19 A Yes, sir.

20 Q Indicating what you received and what you did
21 with them?

22 A Yes, sir.

23 MR. WALL: No further questions, Your Honor.

24 THE COURT: Mr. Harris?

25 MR. HARRIS: No, thank you, Your Honor.

1 MR. BOGGS: Nothing, Your Honor.

2 THE COURT: Thank you, sir. You may step down.

3 Madam Foreperson, ladies and gentlemen of the
4 jury, I think we have reached an appropriate point
5 in our day to take our lunch break.

6 Once again, as I send you away from the
7 courthouse, let me remind you that you are not to
8 discuss this case among yourselves under any
9 circumstances or in any manner or fashion
10 whatsoever.

11 Also you are not to discuss this case with your
12 family, friends or anyone else that you might come
13 to contact with.

14 And if anyone should attempt to contact you
15 concerning this case, once again, I want you to
16 gather as much information about that person or
17 persons and report that to me immediately upon your
18 return to the courthouse, because that is a very
19 serious matter and I would deal with the person or
20 persons that attempted to contact you accordingly.

21 Once again, I do not know that there would be
22 anything in the news media concerning this case, but
23 out of an abundance of caution, let me remind you
24 and instruct you that you are not to read, watch, or
25 listen to any news accounts concerning this case.

1 All I want you to consider in this matter is what
2 you see and hear in this courtroom. Nothing more
3 and nothing less.

4 I'm going to ask that you be back in your jury
5 room at 2:15. Please report directly to your jury
6 room. Do not go to jury assembly. Do not come back
7 to the courtroom. Do not linger in the hallways or
8 outside the courthouse. Come directly to your jury
9 room. I'll look forward to seeing you at 2:15.

10 The jury is excused. Everyone else remain
11 seated, please.

12 (The following takes place outside the presence
13 of the jury panel)

14 THE COURT: All right. Anything from the State
15 before we break for lunch?

16 MR. WALL: No, sir, Your Honor.

17 THE COURT: Defendant Gonzales?

18 MR. HARRIS: No, Your Honor.

19 THE COURT: Defendant Shelhamer?

20 MR. BOGGS: No, Your Honor.

21 THE COURT: See you gentlemen at 2:15.

22 (Proceedings recessed)

23 (Proceedings reconvened)

24 THE COURT: All right. Is the State ready to
25 proceed?

1 MR. WALL: Yes, sir, Your Honor.

2 THE COURT: Defense ready?

3 MR. HARRIS: Yes, Your Honor.

4 MR. BOGGS: Yes, Your Honor.

5 THE COURT: Bring them back, please, Mr.

6 Nesbitt.

7 (The following takes place in the presence of
8 the jury panel)

9 THE COURT: Polling of the jury, by the State?

10 MR. WALL: Waived, Your Honor.

11 THE COURT: By the defense?

12 MR. HARRIS: Waived, Your Honor.

13 MR. BOGGS: Waived, Your Honor.

14 THE COURT: All right. Ladies and gentlemen, I
15 hope you had a nice lunch break. We are going to
16 continue with the State's case.

17 Call your next witness, please.

18 MR. WALL: Thank you, Your Honor.

19 We call Johnny Solomon.

20 JOHNNY SOLOMON, having been first duly sworn,
21 testified as follows:

22 THE COURT: Sir, if you would, please state
23 your name for the record and spell your last name.

24 THE WITNESS: Johnny Solomon, S-o-l-o-m-o-n.

25 THE COURT: Solicitor.

JOHNNY SOLOMON - DIRECT BY MR. WALL

281

1 MR. WALL: Thank you, Your Honor.

2 DIRECT EXAMINATION BY MR. WALL:

3 Q How old are you, Mr. Solomon?

4 A Twenty-three.

5 Q Are you currently working?

6 A Yes.

7 Q Where do you work?

8 A Sam's.

9 THE COURT: I need to get you to speak up just
10 a little bit, please, sir.

11 BY MR. WALL:

12 Q You worked as the informant in this case, is
13 that correct?

14 A Yes, sir.

15 Q How did you come into contact with Mr. Fox,
16 Officer Fox?

17 A I called him.

18 Q And when you called him, what, if anything, did
19 you offer to do?

20 A I offered to help him out in any way I could.

21 Q So basically you offered to be an informant?

22 A Yes, sir, I did.

23 Q As a part of that offer did you tell him that
24 you could make a purchase, a large purchase, from
25 Michael Gonzales?

JOHNNY SOLOMON - DIRECT BY MR. WALL

282

1 MR. HARRIS: Object to the form of the
2 question.

3 THE COURT: I'll sustain the objection. If you
4 want to ask a direct question, you may do so.

5 MR. WALL: Yes, sir.

6 BY MR. WALL:

7 Q What, if anything, did you tell him about your
8 ability to purchase drugs from Michael Gonzales?

9 It's a very limited question.

10 A I just told him I could.

11 Q Did you, on behalf of the police, make
12 telephone calls to Michael Gonzales?

13 A Yes, sir, I did.

14 Q Let me back up for a moment. About how long
15 had you known Mike Gonzales?

16 A I would say two or three years, give or take a
17 little.

18 Q Had you seen him frequently?

19 A Yeah, I seen Mike. I did see Mike a pretty
20 good bit.

21 Q Face to face?

22 A Yeah.

23 Q Did you talk to him on the telephone at any
24 time?

25 A Yes, sir.

JOHNNY SOLOMON - DIRECT BY MR. WALL

283

1 Q Do you have any doubt about your ability to
2 recognize his voice or recognize him in person?

3 A No, sir.

4 Q Now, as a part of this, you were also paid,
5 right, at the end?

6 A Yes, sir.

7 Q For this operation you received, what, a
8 \$200.00 payment?

9 A Yes, sir.

10 Q Is that correct?

11 A Yes.

12 Q Have you heard the audio tapes of the telephone
13 conversations?

14 A Yes, sir.

15 Q Are you able to identify the voices on those
16 tapes?

17 A Yes, sir.

18 MR. WALL: Your Honor, at this time I would
19 like to play the tapes for him to identify the
20 voices.

21 THE COURT: All right, sir.

22 MR. WALL: And I'll need the assistance of
23 Officer Fox with this recorder.

24 THE COURT: All right.

25 MR. WALL: Go ahead.

JOHNNY SOLOMON - DIRECT BY MR. WALL

284

1 (Tape played)

2 MR. WALL: Could you stop it right there.

3 BY MR. WALL:

4 Q Is that your's or Michael Gonzales' voice?

5 A No.

6 Q To your knowledge, was that any part of this
7 conversation?

8 A No, sir.

9 Q You need to speak up, please, sir.

10 A I'm sorry.

11 THE COURT: Well, I think that in order for you
12 to play that, you are going to have that microphone
13 down, but, sir, if you would just speak up, we can
14 all hear you.

15 A Okay.

16 BY MR. WALL:

17 Q Were there -- is that basically background
18 noise, as far as you know?

19 A Yes, sir.

20 Q If you would continue.

21 (Tape played)

22 MR. HARRIS: Your Honor, I would like to
23 continue my previous objection.

24 THE COURT: So noted. Overruled.

25 (tape played)

1 BY MR. WALL:

2 Q Can you identify the person that came to the
3 phone?

4 A Mike.

5 Q Mike who?

6 A Michael Gonzales.

7 Q Who is the other person speaking on that tape?

8 A Me.

9 Q All right. Go ahead.

10 (Tape played)

11 BY MR. WALL:

12 Q The voice that says that would be 13-5 apiece,
13 whose voice is that?

14 A Mike's.

15 Q And you asked him on the tape, you seemed to be
16 asking him about two difference things?

17 A Yes, sir.

18 Q You asked him about they might take some of
19 that other stuff. What are you referring to?

20 A Crank, methamphetamines.

21 Q Was it your understanding -- did you believe
22 that you were communicating that to Mike Gonzales?

23 A Yes, sir.

24 Q Just by you saying that other stuff?

25 A Yes, sir.

JOHNNY SOLOMON - DIRECT BY MR. WALL

286

1 Q So it's my understanding you were confident he
2 understood what you meant?

3 A Yes, sir.

4 Q Continue.

5 (Tape played)

6 BY MR. WALL:

7 Q Now, again, can you -- and this is just for the
8 record, can you identify those two voices?

9 A Yes, sir, I can.

10 Q And whose voices are they?

11 A Mine and Mike's.

12 Q The person who just said "there is no way I'm
13 getting in the car with that stuff," who was that?

14 A That was me.

15 Q On the tape your voice asked him -- you get
16 back on and you asked him about 13?

17 A Yes, sir.

18 Q But now he just said earlier 13-5, right?

19 A Right.

20 MR. HARRIS: Your Honor, I'm going to object to
21 the solicitor telling -- I guess that is in the
22 nature of a leading question, but telling the
23 witness what it says. The witness is supposed to be
24 identifying who is saying what.

25 THE COURT: I'll sustain the objection. This

1 gentleman is fully capable of understanding a
2 question without you leading him into it.

3 MR. WALL: Yes, sir.

4 BY MR. WALL:

5 Q What I'm asking you is what, if any, reason did
6 you have for lowering the price?

7 A I was just trying to get it cheaper.

8 Q And were you able to?

9 A No, sir, I wasn't.

10 Q The voice that said "well, then I'll guess I
11 will have to do that," whose voice was that, that
12 was trying to make -- trying to make some money?

13 A That was mine.

14 Q Yours?

15 A Yes, sir.

16 Q I need to ask you -- you earlier said that that
17 other stuff meant crank?

18 A Yes, sir.

19 Q What if anything else is crank known by? It's --
20 I'm not talking about slang terms, what drug is
21 that, crank?

22 A Methamphetamines.

23 Q Please continue.

24 (taped played)

25 BY MR. WALL:

JOHNNY SOLOMON - DIRECT BY MR. WALL

288

1 Q The voice that said "I don't want it to be
2 wrong. I don't want the f'n money to be wrong,"
3 Whose voice is that?

4 A Mike's.

5 Q Mike Gonzales?

6 A Yes, sir.

7 (tape played)

8 BY MR. WALL:

9 Q What is he wanting to do?

10 A He's wanting to meet in the bathroom at the
11 Little Cricket off Highway 11 and exchange it there.

12 Q Did you finally agree to do that?

13 A Yes, sir.

14 Q A voice earlier says "I won't even get mine out
15 until you take it back to your house and count it,"
16 whose voice is that?

17 A Mine.

18 Q What did you mean by that?

19 A That I was making money off of it, so I was
20 telling him that I wouldn't even take my part out.
21 I would let him take it out.

22 Q After he took it home and counted it?

23 A Yes, sir.

24 Q So did you expect him to count it on the scene?

25 A No, sir.

1 Q You believed he had that much trust in you?

2 A Yes, sir.

3 (Tape played)

4 BY MR. WALL:

5 Q Again who are the two voices on that tape?

6 A Mine and Mike's. Michael's.

7 Q Michael Gonzales?

8 A Yes, sir.

9 (Tape played)

10 BY MR. WALL:

11 Q The voice that says "thirty minutes at the
12 Little Cricket," whose voice is that?

13 A Mike's.

14 Q Who is the other voice on there?

15 A Mine.

16 Q What basically took place during that last
17 conversation?

18 A We were just discussing where we was going to
19 meet and how we was going to exchange everything.

20 (Tape played)

21 BY MR. WALL:

22 Q Who is that conversation between?

23 A Me and the undercover officer.

24 Q Is that -- where y'all at when that
25 conversation is taking place?

JOHNNY SOLOMON - DIRECT BY MR. WALL

290

1 A I think we was on our way over to No. 11.

2 Q To the scene?

3 A Yes, sir.

4 (Tape played)

5 BY MR. WALL:

6 Q Whose voice was that that was just detected on
7 the tape?

8 A The voice that said "let me see them"?

9 Q Right.

10 A Mike's.

11 Q Did you know what he was referring to?

12 A Yes, sir, I did.

13 Q What was that?

14 A The scales.

15 Q At what point are we in the scenario now?

16 A Where the undercover is about to weigh. He's
17 about to weigh the methamphetamines.

18 Q Prior to that -- hold up on tape for just a
19 minute. Prior to that, as you introduced -- prior
20 to that, what, if anything, did you discuss with Mr.
21 Gonzales at the scene?

22 A I told him that the guy wouldn't -- he didn't
23 let me hold the money, that I would introduce them
24 to each other and we would just exchange it and be
25 on our way.

- 1 Q Did you introduce him to Officer Deffenbaugh?
- 2 A Yes, sir, I did.
- 3 Q How did you introduce him?
- 4 A Mike, this is Dean. Dean, this is Mike.
- 5 Q What happened after that?
- 6 A I asked the undercover officer if he wanted
- 7 to -- if he wanted to see it and he said yeah. And
- 8 he asked -- Mike said that Josh had it. And me and
- 9 the undercover officer walked around there to the
- 10 passenger's side of the car and he pulled it out of
- 11 a side pocket on his pants or --
- 12 Q Who is he?
- 13 A Josh.
- 14 Q Pulled out what?
- 15 A A black package. It was a taped-up package.
- 16 Q What did he do with it?
- 17 A He handed it to the undercover. And the
- 18 undercover asked Mike if he could weigh it and Mike
- 19 said yeah, sure.
- 20 Q Where were you at during -- what -- let me back
- 21 up. Where was Mike at during all of this?
- 22 A He was at the air hose, air pump.
- 23 Q In relation to the cars, where was the
- 24 undercover car in relation to the car that Mr.
- 25 Gonzales was in?

JOHNNY SOLOMON - DIRECT BY MR. WALL

292

1 I'm going to show you just kind of a rough
2 sketch.

3 A Where was the car we was in?

4 Q Yes.

5 A In the second parking space over.

6 Q And who was parked there?

7 A Mike.

8 Q Now, where -- and if you need to stand down to
9 point to it, that's fine. I need you to show me
10 basically where Mike was standing, how far he was
11 from the car.

12 A He wasn't very far from the car.

13 Q Very far from his car or very far --

14 A Yes, sir, from his car.

15 Q On this -- was he on this side or on this side?

16 A He was at the front of the driver's side.

17 Q Somewhere in this area?

18 A Yes, sir.

19 Q And he had pulled over an air hose or
20 something?

21 A Yes, sir.

22 Q What, if any, reason did he have for doing
23 that, do you know?

24 A I guess he wanted to look like he was doing
25 something.

JOHNNY SOLOMON - DIRECT BY MR. WALL

293

1 Q Why don't you continue the tape, if you will,
2 please.

3 (Tape played)

4 BY MR. WALL:

5 Q What's that conversation regarding?

6 A A title.

7 Q Who is that conversation with?

8 A It's between me and Mike, but his brother had
9 pulled up at the time.

10 Q Who, Mike's brother.

11 A Yes, sir.

12 Q Where did he pull up?

13 A Right in behind Mike.

14 Q Right in behind Mike?

15 A Yes, sir.

16 Q So in the midst of this transaction he pulled
17 up right behind Mike?

18 A Yes, sir.

19 Q What's this -- just briefly, what's this
20 business about a car title?

21 A I gave Mike a car and he gave to it his
22 brother, but I never give him the title. So they
23 was just asking about the title.

24 Q Does it have anything to do with what's going
25 on here today?

JOHNNY SOLOMON - DIRECT BY MR. WALL

294

1 A No, sir.

2 Q Go ahead and continue.

3 (Tape played)

4 BY MR. WALL:

5 Q The voice said "you don't mind if I weigh it
6 out," whose voice is that?

7 A The undercover officer.

8 Q And who is it that responds?

9 A Mike.

10 Q Mike Gonzales?

11 A Yes, sir.

12 (Tape played)

13 BY MR. WALL:

14 Q What occurred after the undercover asked if he
15 could weigh it?

16 A The takedown order was "the girls are going to
17 like this," and everyone came in.

18 Q What did you do when the police came in?

19 A Laid on the ground.

20 Q What did Officer Deffenbaugh do?

21 A He laid on the ground.

22 Q What did Mr. Shelhamer do?

23 A He was sitting in the car.

24 Q At the time the police came in, was Mike
25 Gonzales near you?

JOHNNY SOLOMON - DIRECT BY MR. WALL

295

1 A We wasn't very far apart.

2 Q What, if anything, did he do?

3 A He took off running.

4 Q What, if anything, did he say before he took
5 off?

6 A He said --

7 MR. HARRIS: Objection. May I have a word?

8 (off the record)

9 (back on the record)

10 BY MR. WALL:

11 Q Let me move onto another question.

12 At what point, if you could tell, did Mr.
13 Gonzales beginning running?

14 A When he saw all the vehicles coming in behind
15 us?

16 Q There was a fair -- you have heard this entire
17 tape?

18 A Yes, sir.

19 Q Did Officer Fox approach you?

20 A Yes, sir, he did.

21 Q Verbally was he fairly rough with you?

22 A Yes, sir.

23 Q What, if anything -- did you understand what
24 was going on?

25 A Yes, sir, I did.

JOHNNY SOLOMON - CROSS BY MR. HARRIS

296

1 Q What was that?

2 A I don't understand your question.

3 Q Well, why did you -- why did you think he was
4 speaking to you that way?

5 A He was trying to make it look like I wasn't
6 involved.

7 Q Trying to maintain your cover?

8 A Yes, sir.

9 MR. WALL: Excuse me one moment.

10 (off the record)

11 (back on the record)

12 BY MR. WALL:

13 Q Did you see the officers as they were
14 approaching, the team that came in?

15 A Yes, sir.

16 Q Did they identify themselves as officers?

17 A Yes, sir.

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

19 THE COURT: Mr. Harris.

20 MR. HARRIS: Thank you.

21 CROSS EXAMINATION BY MR. HARRIS:

22 Q Mr. Solomon, you have already been paid \$200.00
23 for your services in this case, is that correct?

24 A That's right.

25 Q Have you been given anything else?

1 A No, sir, I haven't.

2 Q Have you been promised anything else?

3 A No, sir, I haven't.

4 Q How much do you expect to get paid for doing
5 this today?

6 A I haven't even been informed that I was going
7 to be getting paid to do this today.

8 Q You weren't informed for that matter that you
9 were going to get paid for trying to phone up Mike
10 Gonzales and set him up?

11 A No, sir, I wasn't. It ain't about the money.

12 Q Would you say that again?

13 A It's not about the money.

14 Q Would you just say that one more time?

15 MR. WALL: Your Honor, I object to the
16 repetitive question.

17 THE COURT: Let him answer the question one
18 more time and then we'll move on.

19 A It's not about the money.

20 BY MR. HARRIS:

21 Q You made phone calls in cooperation with the
22 police. And as a result of those phone calls, you
23 believed and expected Michael Gonzales to come to
24 the Little Cricket at a certain predetermined time
25 and be introduced to Investigator Deffenbaugh and

JOHNNY SOLOMON - CROSS BY MR. HARRIS

298

1 sell Investigator Deffenbaugh methamphetamine for
2 money, is that correct?

3 A Yes, sir.

4 Q Could you speak up, please?

5 A Yes, sir.

6 Q But that didn't happen, did it?

7 A What didn't happen, that Mike sold it?

8 Q That did not -- the plan for Mr. Gonzales to
9 come there, be introduced and exchange drugs for
10 money, that did not happen, did it?

11 A No, sir, Mike did not hand it to an undercover
12 officer.

13 Q As a matter of fact, you have said that under
14 your view of things that Mr. Gonzales was supposed
15 to go inside the store, into the bathroom, is that
16 correct?

17 A Yes, sir.

18 Q And who was he -- who was Mr. Gonzales supposed
19 to meet in the bathroom?

20 A Me.

21 Q And for what purpose?

22 A To exchange the methamphetamines and money.

23 Q Well, I thought you said the plan was for you
24 to introduce Mr. Gonzales to an undercover officer
25 to whom Mr. Gonzales was expected to exchange drugs

1 for money, is that correct?

2 A That is correct, but after I asked Mike and --
3 I told Mike the guy wouldn't let me hold his money,
4 then that's when I decided to introduce them to each
5 other.

6 Q So the plan was -- the real original plan, the
7 first plan, was for you to meet Mike Gonzales in the
8 bathroom of the store and for Mike Gonzales to sell
9 you drugs, is that correct?

10 A Yes, sir.

11 Q And that didn't happen either, did it?

12 A No, sir, it didn't.

13 Q So the backup plan that you had with the police
14 was to go outside and try to introduce Mr. Gonzales
15 to an undercover operative and have Mr. Gonzales
16 sell drugs to an undercover police officer, is that
17 right?

18 A Yes, sir.

19 Q And plan B failed, too, that didn't happen,
20 right?

21 A No, sir, it didn't.

22 Q Two strikes.

23 But Josh Shelhamer, you say, you witnessed hand
24 Investigator Deffenbaugh a black package, which he
25 retrieved from his pants pocket, is that correct?

JOHNNY SOLOMON - CROSS BY MR. HARRIS

300

1 A Yes, sir.

2 Q Now, at the time that Mr. Shelhamer handed the
3 package to Investigator Deffenbaugh, where were you
4 standing?

5 A I was standing there with the undercover.

6 Q Where in relationship --

7 A On the passenger's side of the car.

8 Q Passenger's side of whose car?

9 A Mike's car.

10 Q The Camaro, is that right?

11 A Yes, sir.

12 Q And the passenger's side of the Camaro is where
13 Mr. Shelhamer was seated, in the passenger seat, is
14 that correct?

15 A Yes, sir.

16 Q And you and Investigator Deffenbaugh were
17 standing outside the passenger window, in essence?

18 A Yes, sir.

19 Q And you witnessed, you say, Mr. Shelhamer take
20 out of his pants pocket a black package and directly
21 hand it to Investigator Deffenbaugh, is that
22 correct?

23 A Yes, sir.

24 Q In what manner? Through the window, or was the
25 door ajar?

1 A Yes, sir, through the window.

2 Q Through the window, just like that?

3 A Yeah.

4 Q Right there in a public parking lot of the
5 convenience store?

6 A Yes, sir.

7 Q In the daylight?

8 A Yes, sir.

9 Q Now, when this handing through the window took
10 place, where was Mike Gonzales?

11 A He was at the front of the car.

12 Q Where you have described that the front of the
13 car on what would amount to the driver's front of
14 the Camaro, is that right?

15 A Yes, sir.

16 Q Essentially standing beside the store and
17 approximately, what, eight feet away from the side
18 wall of the store?

19 A I'm not sure, sir. I just know he was at the
20 front of the car.

21 Q He wasn't with you and Shelhamer and
22 Deffenbaugh? That's for sure, correct?

23 A No, sir, he wasn't.

24 Q Now, at some point in time you say that Mr.
25 Gonzales' brother drove up and parked in behind Mr.

JOHNNY SOLOMON - CROSS BY MR. HARRIS

302

1 Gonzales' Camaro, is that right?

2 A Yes, sir.

3 Q As a matter of fact, that happened in the
4 middle of all of this, didn't it?

5 A Yes, sir, it did.

6 Q And Mr. Gonzales had a conversation with his
7 brother about that car, is that right?

8 A Yes, sir.

9 Q And did Mr. Gonzales go over to his brother, to
10 the vehicle his brother was driving, or did they
11 shout across the parking lot, or how did that
12 happen?

13 A I don't believe he went all the way over to the
14 car. I believe he may have walked towards the car
15 and was talking with his brother.

16 Q Went from where he was standing at the front
17 driver's part of his Camaro to at least near where
18 his brother was parked, is that right?

19 A Yes, sir.

20 Q And engaged in some kind of conversation with
21 his brother?

22 A Yes, sir.

23 Q About something totally unrelated to this
24 situation?

25 A Yes, sir.

1 Q Now, exactly what was going on with
2 Investigator Deffenbaugh and Mr. Shelhamer when Mr.
3 Gonzales was involved in the conversation with his
4 brother?

5 A I can't really recall that time, sir, you know.
6 I don't know. I don't --

7 Q Well, the entire episode didn't last more than
8 about two minutes, did it?

9 A It happened pretty fast. I don't know how long
10 it lasted.

11 Q How long did Mr. Gonzales spend talking to his
12 brother?

13 A Not very long at all.

14 Q Would you say a minute?

15 A Yeah, I would say a minute.

16 Q Minute or two?

17 A It wasn't very long, because Mike told his
18 brother he was doing business, to leave.

19 Q Oh, decided you just remembered that?

20 A No, I knew that.

21 Q So, anyway, what's going on when you were there
22 and you hear the testimony -- what was going on
23 between Shelhamer and Deffenbaugh when Mr. Gonzales
24 was talking to --

25 A I don't anything, sir.

JOHNNY SOLOMON - CROSS BY MR. HARRIS

304

1 Q You don't think anything?

2 A I think everybody was just -- everybody had
3 just focused on the van pulling up behind the car,
4 you know.

5 Q Had the package been exchanged between
6 Shelhamer and Deffenbaugh at that point in time? Do
7 you remember?

8 A I don't think so, sir.

9 Q You don't think so?

10 A (shaking head no)

11 Q Or was the weighing going on?

12 A I don't -- I don't really think that the
13 package had already been exchanged then, no.

14 Q You don't think so?

15 A No, sir.

16 Q But, at any rate, while this was happening, two
17 things were going on at one time, basically. You
18 are there trying to arrange what you hoped to be an
19 undercover buy of drugs and there right in the
20 middle of that Mr. Gonzales' brother comes up to
21 talk about a car?

22 A Yes, sir.

23 Q So these things are happening at the same time,
24 basically, correct?

25 A Yes, sir.

1 Q Now, did you ever see at the Little Cricket,
2 either inside the store or in the parking lot, did
3 you ever see Mike Gonzales with this black package?

4 A No, sir, I didn't.

5 Q Did you ever see Mike Gonzales hand the black
6 package to Mr. Shelhamer?

7 A No, sir, I didn't.

8 Q Now, Investigator Deffenbaugh at some point in
9 time, is it correct, began to weigh the package, is
10 that correct?

11 A Yes, sir.

12 Q Where did that take place?

13 A Inside the car.

14 Q Where inside the car?

15 A I think in the seat, sir.

16 Q In what seat?

17 A The driver's side seat.

18 Q Well, how did Investigator Deffenbaugh get over
19 to the driver's side seat?

20 A Because he asked could he weigh it and they
21 said yeah. He asked Mike could he weigh it, and
22 Mike said yeah, so he got the scales out of the
23 passenger's side of the truck, laid them in the
24 driver's side seat of the Camaro.

25 Q And did he get in the car? Did Investigator

JOHNNY SOLOMON - CROSS BY MR. HARRIS

306

1 Deffenbaugh get in the car?

2 A No, sir, I don't believe that he got in the
3 car. He just leaned over in the window.

4 Q So if Mike Gonzales said yes in response to a
5 direct question "can I weigh it," that would be on
6 that tape, wouldn't it?

7 A Yes, sir, it should have been.

8 Q You were trying to record the whole thing for
9 posterity?

10 A Unless I was not close enough to the undercover
11 officer where it could record, because the
12 undercover officer didn't have a recorder on.

13 Q Well, or could it be that Mike Gonzales wasn't
14 close enough to any of you for it to be recorded?

15 A No, sir.

16 Q As a matter of fact, anything that you claimed
17 that Mike Gonzales said should be on that tape,
18 shouldn't it?

19 A It should be, if it picked it up, yeah.

20 Q Is it possible, if anything was said, that Mr.
21 Gonzales made some comment to the effect that Mr.
22 Shelhamer could do all of that with Investigator
23 Deffenbaugh? They could, not him, not he, Gonzales,
24 they could? Is that possible?

25 A You are asking me is it possible that he told

1 me that just to deal with Josh?

2 Q No, sir. For instance, is it possible that if
3 a direct question were asked of Mike Gonzales "can I
4 see the stuff," is it just possible that Mr.
5 Gonzales would have responded "he has it"?

6 MR. BOGGS: Judge, I'm going to object to
7 triple speculation.

8 THE COURT: Overruled.

9 BY MR. HARRIS:

10 Q Is it possible that actually the conversation
11 with Mr. Gonzales on each of these occasions where
12 he's responding is actually saying he, meaning Mr.
13 Shelhamer, has it, he will let you see it, he will
14 let -- not him. Is that possible?

15 A Yes, sir, he did say Josh had it.

16 Q If he said any of this you are claiming, we
17 boil it down now to, sir, haven't we, if he said any
18 of it that you claimed that he said, what he
19 actually did say, in whatever manner, was not me?

20 MR. BOGGS: I'm going to object, Your Honor.
21 It's not form of a question.

22 THE COURT: I'll sustain that objection. If
23 you want to restate it, Mr. Harris, you may attempt
24 to.

25 BY MR. HARRIS:

JOHNNY SOLOMON - CROSS BY MR. BOGGS

308

1 Q Is it possible that if those things were ever
2 said, that the response was always that Josh could
3 do those things, had those things, would show those
4 things?

5 A I things -- everything that I'm telling you was
6 said that he said that Josh had it, if that's the
7 question you are asking me, Mike's said Josh had it.

8 Q So, you went there to get Mike Gonzales to sell
9 you drugs and that didn't work, did it? He didn't
10 sell you drugs, did he?

11 A No, sir, Mike didn't sell me drugs.

12 Q And then plan B was to try and get Mike
13 Gonzales to sell drugs to Investigator Deffenbaugh
14 and Mike Gonzales did not do that either, did he?

15 A No, sir.

16 Q Thank you.

17 MR. HARRIS: No further questions.

18 THE COURT: Mr. Boggs.

19 MR. BOGGS: Thank you, Your Honor. May it
20 please the court.

21 CROSS EXAMINATION BY MR. BOGGS:

22 Q You go by Johnny or John?

23 A Johnny, John, either one.

24 Q Johnny, you understand that you are under oath,
25 correct?

1 A Yes, sir, I do.

2 Q You are trying to tell the truth, is that
3 correct?

4 A I am telling the truth.

5 Q Are you nervous?

6 A Yes, sir, I am.

7 Q Have you ever testified before?

8 A No, sir, I haven't.

9 Q So you aren't trying to lie, correct?

10 A No, sir, I'm not.

11 Q So earlier when you testified that you were on
12 the passenger's side of Mike Gonzales' vehicle along
13 with Investigator Deffenbaugh, it's possible that
14 Investigator Deffenbaugh was already on the other
15 side, is that correct?

16 A I don't understand which time that you are
17 talking about here.

18 Q I'm talking about the time -- well, somehow
19 Investigator Deffenbaugh in your earlier testimony
20 was right beside you on the passenger's side,
21 correct?

22 A Yes, sir.

23 Q But in Mr. Harris' cross-examination, Mr.
24 Deffenbaugh or Investigator Deffenbaugh ended up on
25 the driver's side leaning in the window, correct?

JOHNNY SOLOMON - CROSS BY MR. BOGGS

310

1 A Yes, sir, after the package had already been --
2 I mean, he already had the package. He asked could
3 he weigh it. He got the scales out of the truck,
4 sat them down in the driver's side.

5 Q Isn't it true that the drugs weren't handed out
6 the passenger's window?

7 A No, sir, it was handed out the passenger's side
8 window.

9 Q Investigator Deffenbaugh carried that package
10 around the truck -- or excuse me, around the car to
11 the driver's side and then put it back in the car to
12 weigh it?

13 A Yes, sir, after he got the scales out of the
14 truck.

15 Q Let's go back to the beginning.

16 Before you called in the sheriff's office that
17 day --

18 A Yes, sir.

19 Q -- was it your impression that you could buy
20 drugs from Mike Gonzales that day?

21 A Yes, sir, it was.

22 Q Was it your impression that you could buy
23 methamphetamines from Michael Gonzales that day?

24 A The original call wasn't for methamphetamines,
25 no, sir.

1 Q But eventually the deal became for
2 methamphetamine?

3 A Yes, sir, it did.

4 Q Was it your impression that Mike Gonzales had
5 the drugs available to sell to you?

6 A Yes, sir.

7 MR. HARRIS: Objection. I think that
8 particular question calls for the witness to
9 speculate. I don't know how he could know, unless
10 he saw that.

11 THE COURT: Overruled.

12 BY MR. BOGGS:

13 Q Isn't it true that Michael Gonzales didn't say
14 he had to go get it?

15 A You are asking me did he say he had to go get
16 it?

17 Q Yes.

18 A Yes, sir.

19 Q He did say he had to go get it?

20 A Yes, sir, he did.

21 Q Did Michael Gonzales say he had to pack it up?

22 A No, sir, not that I can recall.

23 Q Weren't you supposed to meet Michael Gonzales
24 in the store?

25 A Yes, sir, I was.

JOHNNY SOLOMON - CROSS BY MR. BOGGS

312

1 Q Did he say that someone else was going to meet
2 you?

3 A No, sir.

4 Q Isn't it true when you were in the car driving
5 to the Little Cricket, you expected just Michael
6 Gonzales to be there?

7 A No, I didn't expect Mike to be there.

8 Q Who did you expect to be there?

9 A I mean, every time I seen Mike, he's never by
10 himself. I didn't know it was going to be Josh with
11 him, but I didn't expect him to be by himself.

12 Q So in your dealings or your conversations or
13 being around Mike Gonzales, you have seen him with
14 people before?

15 A Yes, sir, I have seen him with people before.

16 Q He's got people hanging out with him all the
17 time?

18 A Yes, sir.

19 Q Just hanging out?

20 A Yeah.

21 Q That's not so unusual, right?

22 A No, sir.

23 Q I was a little confused on the tape player that
24 someone said "follow me into the bathroom." Was
25 that Michael Gonzales or was that your conversation

1 with Investigator Deffenbaugh?

2 A That was when we was talking -- that was the
3 conversation between me and undercover.

4 Q Have you ever used drugs before?

5 A No, sir, I haven't.

6 Q You haven't?

7 A No, sir.

8 Q Have you ever bought drugs before?

9 A Yes, sir, I have.

10 Q Have you ever bought pot before?

11 A Yes, sir, I have.

12 Q What's the most amount of pot that you have
13 bought?

14 A At a time? At one time?

15 Q Yes, sir.

16 MR. HARRIS: Your Honor, I feel that my
17 obligation at this point is to make sure that this
18 witness is aware of his right against
19 self-incrimination for this line of questioning. I
20 don't know what conversations have taken place or
21 anything, but I would have that concern about any
22 witness.

23 THE COURT: Sir, do you understand that you
24 have a Fifth Amendment right not to answer any
25 question that might incriminate you? Do you

JOHNNY SOLOMON - CROSS BY MR. BOGGS

314

1 understand that?

2 THE WITNESS: I do now, sir.

3 THE COURT: All right, sir. And if you wish to
4 invoke that right, you may simply do so by saying
5 that I wish to invoke my Fifth Amendment Right not
6 to incriminate myself.

7 BY MR. BOGGS:

8 Q What's the most amount of marijuana that you
9 have bought before at one time?

10 A I wish to invoke my right not to answer that
11 question.

12 Q Had the police ever happened upon one of your
13 purchases of drugs? And by that I mean come into
14 the situation -- come into the transaction as it's
15 going on?

16 A I don't understand your question.

17 Q Have you ever been arrested?

18 A No, sir, I haven't. Not for any drug related
19 charges.

20 Q Why did you call the police that day?

21 A Because I want to change my life, started doing
22 right for my family, my kids.

23 Q Okay.

24 A I felt like it was the right thing for me to
25 do.

1 Q Isn't it true that when you first got to the
2 Little Cricket, that after you had your first
3 conversation with Mr. Gonzales, that Josh got out of
4 the car and approached you? Isn't it true?

5 A No, sir, I don't believe Josh ever got out of
6 the car.

7 Q Isn't it true that Josh came up to you and
8 asked you for a cigarette? Do you recall that?

9 A Yes, sir, he did.

10 Q So?

11 A I mean, I --

12 Q You are not trying to lie, are you?

13 A No, I'm not trying to lie. All of it happened
14 so fast.

15 Q Thank you for your honesty.

16 A You're not wanting me to lie, are you?

17 Q No, sir. No, sir.

18 Now, isn't it true, again, that Josh came out
19 of the car and asked you for a cigarette?

20 A Yes, he asked me for a cigarette and then got
21 back in the car.

22 Q But before he got back in the car, isn't it
23 true that Mike got in the car and moved it over to
24 the far right of the building?

25 A Mike did move the car.

JOHNNY SOLOMON - CROSS BY MR. BOGGS

316

1 Q Before Josh got back in it?

2 A I can't recall, sir. I don't know.

3 Q You testified earlier that Josh pulled out from
4 his pants pocket a package?

5 A He had a side pocket on his pants, sir.

6 Q So when he got out and asked you for a
7 cigarette, did he have that package in his pocket?

8 A I don't know.

9 Q Well, I'm assuming that he approached you to
10 ask you for a cigarette?

11 A Yes, sir, but I wasn't looking at his pocket.

12 Q Does this approximate -- State's Exhibit 2,
13 does that approximate the size of the package that
14 you saw him pull out of his pocket?

15 A Yes, sir. It had black tape on it then.

16 Q So it's your testimony --

17 A He didn't have it in that pocket, sir.

18 Q I didn't ask you if he had it in this pocket.

19 It's your testimony that he had this package in
20 a pocket on is, I guess, right side?

21 A Yes, sir.

22 Q And he walked to you. Did he have a jacket on,
23 like I do?

24 A No.

25 THE COURT: Speak up, please.

1 BY MR. BOGGS:

2 Q It's your testimony that he walked up to you
3 and said "can I have a cigarette?"

4 A Yes, sir.

5 Q Did he ask you anything about the drug
6 transaction?

7 A No, sir, not that I recall.

8 Q And you didn't notice that it was -- this
9 packet was in somewhere on his leg?

10 A It wasn't that bulky then, sir. It was neatly
11 wrapped in black tape. And no, sir, I did not
12 notice it in his pocket.

13 Q So isn't it true that Josh didn't have this in
14 his pocket and that it was on the floorboard of Mike
15 Gonzales' car? And if you don't remember, say that.

16 A No, that's not true, because -- I mean, if it
17 was on the floorboard, why would he have picked it
18 up and put it in his pocket before?

19 Q Excuse me, sir. I asked the question. I'm
20 looking for an answer.

21 A I'm trying to answer you.

22 THE COURT: Yes, sir, and he will ask the
23 questions and you will answer them. If you don't
24 understand it, ask him to restate it.

25 THE WITNESS: Okay.

JOHNNY SOLOMON - CROSS BY MR. BOGGS

318

1 BY MR. BOGGS:

2 Q Isn't it true that the package was on the
3 floorboard and not in Josh's possession?

4 A No, sir, it's not true.

5 Q So it's your testimony that Josh gets out of
6 the car, comes up and asked you for a cigarette and
7 he's in control of the drug, but he doesn't talk
8 about the drug transaction at all? That's your
9 testimony?

10 A I'm not going to say he was in control of the
11 drugs because I don't know.

12 Q Well, you are saying --

13 A All I know is I seen Josh get the package out
14 of his pocket.

15 Q Isn't it possible that he reached down on the
16 floorboard instead of taking it out of his pocket?

17 A No, sir.

18 Q Where were you standing?

19 A On the passenger's side of the car.

20 Q And there was a lot going on?

21 A Yes, sir.

22 Q And it happened so fast?

23 A Yes, sir, it did happen fast.

24 Q Where was the pocket that Josh took this --
25 allegedly took this from, where on his pants?

1 A He had -- he had a side pocket.

2 Q Okay.

3 A Like a -- like on a pair of army pants.

4 Q All right.

5 A It slid down on the right side.

6 Q So it would have been right here,
7 approximately?

8 A Yes, sir.

9 Q All right. So it's your testimony that he
10 walks up to you. Did he have his hands in his
11 pockets, do you recall?

12 A I don't recall.

13 Q So he walks up to you with his hands free and
14 had this in his pocket at the time? Is that your
15 testimony, or do you not know?

16 A He walked up to me and asked me for a
17 cigarette. I didn't see any dope.

18 Q So you're a hundred percent sure that after
19 Mike moved the car over and after Josh got back in
20 Josh, took the time -- and all this happened fast,
21 fast, fast, fast, you are absolutely a hundred
22 percent sure that Josh took the time to take this
23 package, wherever it was, and put it back in his
24 pocket, just so he can take it out, and you saw him
25 pull it out of his pocket again? That's your

JOHNNY SOLOMON - CROSS BY MR. BOGGS

320

1 testimony?

2 A Yes, sir, it is.

3 Q Nowhere on the tape -- -- you were wearing a
4 wire, correct?

5 A Correct.

6 Q Nowhere on the tape did Josh talk about the
7 deal, right?

8 A No, sir, not that I can recall.

9 Q Isn't it true that when he came -- when Josh
10 came up and asked you for the cigarette and Mike
11 moved the car over, correct?

12 A Yes, sir.

13 Q Isn't it true that before Josh got back into
14 the vehicle, that's when Mike's brother pulled up?

15 A I can't recall if Josh ever got back into the
16 vehicle or didn't, I don't know.

17 Q At all?

18 A Yeah, he did get back in the vehicle, but I
19 couldn't recall if he got back in the vehicle before
20 Mike moved the car or after Mike moved the car.

21 Q So you don't recall?

22 A I know he got back in the car, but --

23 Q You don't recall when, correct? You just said
24 it. I'm just trying to make sure I understand.

25 A I know he got back in.

- 1 Q Were you surprised to see Mike Gonzales'
2 brother, yes or no?
- 3 A Yeah.
- 4 Q Do you know Mike Gonzales' brother?
- 5 A Yes, sir, I do.
- 6 Q What's his name?
- 7 A Frankie.
- 8 Q Frankie what?
- 9 A I don't know his last name.
- 10 Q All right. Did his brother want to talk to
11 you, or did Mike do all the talking in that little
12 conversation?
- 13 A Mike did.
- 14 Q Did Mike walk back to his brother's truck?
- 15 A Mike walked towards his brother's truck, but
16 Mike didn't go all the way over there, no.
- 17 Q Where were you standing at the time?
- 18 Mr. Solomon, if it will help you to step down,
19 I'm sure the judge will allow it, or can you see it?
- 20 A I'm okay.
- 21 Q Now, right there, is that where the Camaro was
22 parked during the transaction?
- 23 A Yes, sir.
- 24 Q Immediately behind the Camaro, is that where
25 Michael Gonzales' brother, Frankie Gonzales, pulled

JOHNNY SOLOMON - CROSS BY MR. BOGGS

322

1 up?

2 A Yes, sir.

3 Q You testified earlier that Michael Gonzales was
4 in the front of the car near the air machine, is
5 that correct?

6 A Yes, sir.

7 Q And you were standing on the right-hand
8 passenger's side of the Camaro?

9 A Yes, sir.

10 Q Now, were you standing on the right-hand side
11 of the passenger's side of the Camaro when Frankie
12 Ramirez -- excuse me, Frankie Gonzales showed up, or
13 were you in front of the store?

14 A Sir, I don't recall where I was standing when
15 his brother pulled up.

16 Q But you know Frankie -- you know Frankie?

17 A Yes, sir. I mean -- yeah.

18 Q How did the truck that you gave -- that you
19 gave Mike end up with Frankie, do you know?

20 A It's not a truck.

21 Q How did the vehicle?

22 A Mike gave it to him.

23 Q Did Frankie seem surprised to see you?

24 A Not to my knowledge.

25 Q And y'all talked about a car title that you had

JOHNNY SOLOMON - CROSS BY MR. BOGGS

323

1 never given Mike or Frankie?

2 A Well, I gave Mike the car. I -- I guess Mike.
3 I hardly ever talked to Frankie. I don't know how
4 to get in touch with Frankie.

5 Q But you had talked to him before?

6 A Frankie?

7 Q Yes.

8 A Yes, sir.

9 Q Did you ever give the title to Mike or Frankie?

10 A No, sir.

11 MR. HARRIS: Your Honor, I'm going to object at
12 this point to this line of questioning. It seems to
13 be totally irrelevant to what we are here about.

14 MR. BOGGS: Your Honor, it's on the tape. I'm
15 just trying to find out --

16 THE COURT: The objection is overruled.

17 MR. BOGGS: Thank you, Your Honor.

18 BY MR. BOGGS:

19 Q Have you sat up any other deals for the
20 sheriff's department?

21 MR. WALL: Your Honor, that may be part of an
22 ongoing investigation and I don't believe that we
23 would want revealed at this time point.

24 THE COURT: How about y'all approaching for
25 just a minute, please.

JOHNNY SOLOMON - REDIRECT BY MR. WALL

324

1 (Lawyers approached the bench)

2 MR. BOGGS: I'll withdraw the question, judge.

3 I have no further questions at this time for
4 this particular witness.

5 THE COURT: Redirect?

6 MR. WALL: Yes, sir, Your Honor.

7 REDIRECT EXAMINATION BY MR. WALL:

8 Q Johnny, you testified that you work at Sam's?

9 A Yes, sir, I do.

10 Q What's -- the last two days, what shift do you
11 work?

12 A Third.

13 Q What time do you go in?

14 A Two.

15 Q What time do you generally get off?

16 A Ten.

17 Q You did that yesterday and today, is that
18 right?

19 A Yes, sir.

20 Q Have you had any sleep at all today?

21 A Not today, sir, no.

22 Q And as Mr. Boggs asked you, are you pretty
23 nervous?

24 A Yes, sir.

25 Q Mr. Harris asked you about what he called a

1 plan A and plan B.

2 What was the police plan? What was the -- how
3 did the police want this to happen? Inside the
4 bathroom or outside?

5 A Outside.

6 Q You and Officer Deffenbaugh discussed that.
7 It's on tape, right?

8 A Yes, sir.

9 Q You told Mike he wouldn't let you hold the
10 money?

11 A Yes, sir.

12 Q What's that mean "won't let me hold the money?"

13 A That meant that he wouldn't let me hold -- the
14 undercover officer wouldn't let me hold the money to
15 go purchase. He didn't want me to leave with his
16 money.

17 Q Who first mentioned meeting at the Little
18 Cricket?

19 A Mike.

20 Q Who first mentioned making the transaction in
21 the bathroom at the Little Cricket?

22 A Mike.

23 Q So is it fair to say that that was Mike's plan?

24 A Yes, sir.

25 Q Did y'all, y'all meaning you and the U.C., did

JOHNNY SOLOMON - REDIRECT BY MR. WALL

326

1 y'all really intend to do that?

2 A Did we really intend to meet in the bathroom?

3 Q Right, to do the transaction in the bathroom.

4 A No, sir. It wasn't -- no, sir.

5 MR. BOGGS: Your Honor, I object to Mr. Wall
6 using U.C.. I don't know.

7 MR. WALL: I'm sorry, the undercover officer.

8 MR. BOGGS: Thank you.

9 BY MR. WALL:

10 Q So rather than plan A and plan B, is it fair to
11 say that there was Mike's plan and there was the
12 police plan?

13 MR. HARRIS: Object to the form of the question
14 as leading.

15 THE COURT: Sustain the objection.

16 BY MR. WALL:

17 Q Mr. Harris asked you questions about the tape
18 and about whether everything that was said should be
19 on that tape. Was everything that was said by the
20 people at the scene detectable on that tape?

21 A No, sir, not to my knowledge it wasn't.

22 Q And you gave the reasons for that, right?

23 A Yes, sir.

24 Q You met this man, Mike Gonzales, correct?

25 A Yes, sir.

JOHNNY SOLOMON - REDIRECT BY MR. WALL

327

1 Q And are you able to identify him?

2 A Yes, sir.

3 Q Where is he seated?

4 A Right there.

5 Q What type of shirt does he have on?

6 A Tommy Jeans.

7 Q Mr. Harris asked you is it possible that
8 Gonzales, Mike Gonzales, basically that he pulled
9 out of the deal; that he said Shelhamer has it, you
10 can deal with Shelhamer.

11 Did you ever believe that Mike Gonzales had
12 pulled out of that deal?

13 MR. HARRIS: Objection to the witness' opinion
14 about what Mr. Gonzales intent was is not relevant.
15 It's not admissible. It's whatever happened
16 happened.

17 THE COURT: I'll sustain the objection.

18 BY MR. WALL:

19 Q What, if any, indication -- let me back up.

20 You testified earlier you have had many
21 conversations with Mike Gonzales?

22 A Yes, sir, I have.

23 Q Met him many times?

24 A Yes, sir.

25 Q Do the two of you have any problem

JOHNNY SOLOMON - RECROSS BY MR. HARRIS

328

1 communicating?

2 A No, sir.

3 Q What, if anything, did he say to indicate that
4 he was pulling out of the deal? Did he?

5 A No, sir.

6 Q What, if anything, did he do, if he did
7 anything, to indicate that he was pulling out of the
8 deal?

9 A Nothing.

10 MR. WALL: No further questions, Your Honor.

11 RECROSS EXAMINATION BY MR. HARRIS:

12 Q Now, sir, it's not necessary for Mr. Gonzales
13 to tell you he's not going to go through with it.
14 You already knew that, didn't you?

15 A Yes, sir.

16 Q Because he didn't go through it. His actions
17 were far louder than any words that he could have
18 spoken, right?

19 A Yes, sir.

20 Q Thank you.

21 MR. HARRIS: No further questions.

22 THE COURT: Mr. Boggs.

23 MR. BOGGS: May it please the court, Your
24 Honor.

25

1 RECROSS EXAMINATION BY MR. BOGGS:

2 Q Isn't it true that from beginning to end you
3 thought Mike Gonzales was selling you the
4 methamphetamines that you ordered from Michael
5 Gonzales for the price that he quoted you on the
6 phone?

7 A Yes, sir, that's true.

8 MR. BOGGS: I have no further questions.

9 THE COURT: Thank you, sir. You can step down.

10 Ladies and gentlemen of the jury, we are going
11 to take a short break at this time. As I send you
12 to the jury room, once again, please do not discuss
13 this case among yourselves. We will get you back in
14 just a few minutes.

15 Everyone else remain seated, please.

16 (The following takes place outside the presence
17 of the jury panel)

18 THE COURT: All right. Mr. Boggs, if you want
19 to recall this gentleman for the purpose of
20 proffering some testimony from him, go right ahead.

21 MR. BOGGS: Your Honor, that would be fine, or
22 I can wait and do with Investigator Deffenbaugh all
23 at one time after he testifies, however Your Honor
24 sees fit. I would prefer to wait.

25 THE COURT: However you want to do it, that

1 would be fine with me, just so we can get it done.

2 MR. BOGGS: Yes, sir.

3 THE COURT: You will be the one that has to
4 bring it to my attention.

5 MR. BOGGS: Yes, I will, Your Honor.

6 THE COURT: All right. We will stand at ease
7 for a few minutes.

8 MR. WALL: And Officer Deffenbaugh would be
9 next, Your Honor.

10 THE COURT: All right.

11 (Proceedings recessed)

12 (Proceedings reconvened)

13 MR. WALL: Your Honor, the only matter I think
14 for the record is that there has been some
15 discussion of a proffer regarding Johnny Solomon.
16 It's my understanding that now that Mr. Boggs does
17 not want to make that proffer. And as a result I'm
18 going to --

19 THE COURT: Let him go to bed?

20 MR. WALL: Let him go to bed.

21 THE COURT: Is that correct, Mr. Boggs?

22 MR. BOGGS: Yes, sir, Your Honor.

23 THE COURT: Okay.

24 MR. WALL: And I had indicated, Your Honor,
25 that we were going to call Jake Deffenbaugh. We are

OFFICER ASHLEY HARRIS - DIRECT BY MR. WALL

331

1 actually going to call chemist Ashley Harris next
2 because he has to be in a trial in the morning.

3 THE COURT: All right. Bring our jury back,
4 please, Mr. Nesbitt.

5 (The following takes place in the presence of
6 the jury panel)

7 THE COURT: Thank you very much, ladies and
8 gentlemen.

9 Call your next witness, please.

10 MR. WALL: Thank you, Your Honor. We call
11 Officer Ashley Harris.

12 OFFICER ASHLEY HARRIS, having been first duly
13 sworn, testified as follows:

14 THE COURT: Please state your name for the
15 record and spell your last name, sir.

16 THE WITNESS: Lieutenant Ashley Harris,
17 H-a-r-r-i-s.

18 DIRECT EXAMINATION BY MR. WALL:

19 Q Where are you employed, sir?

20 A I work for the Spartanburg County sheriff's
21 office.

22 Q And what is your position there?

23 A I am the forensic chemist in charge of testing
24 controlled substances and arson evidence.

25 Q What does that entail?

OFFICER ASHLEY HARRIS - DIRECT BY MR. WALL

332

1 A When a drug case is made by an agency in the
2 Spartanburg County, a suspected drug case, they send
3 it to me; for one, to test the identity of the
4 substance, and two, to contain a weight for
5 charging.

6 Q What training have you had in the area of
7 forensic chemistry?

8 A I went through the training course at the South
9 Carolina Law Enforcement Division. I was certified
10 through them to do drug analysis.

11 And my educational background was I have a
12 Masters in Chemistry from Furman University and a
13 Bachelors of Science from Wofford here in
14 Spartanburg.

15 Q And you mentioned the South Carolina Law
16 Enforcement Division?

17 A That's correct.

18 Q You were employed there?

19 A I worked there for a little over two years
20 before coming to Spartanburg County. I opened the
21 forensics division for them.

22 Q What capacity did you work at SLED?

23 A I was a forensic chemist in the controlled
24 substance analysis group, the drug analysis group.

25 Q Have you testified in court before?

OFFICER ASHLEY HARRIS - DIRECT BY MR. WALL

333

1 A Yes, sir, I have been qualified as an expert
2 forty-five times in drug analysis.

3 Q In your area of forensic chemistry?

4 A Yes, sir.

5 MR. WALL: Your Honor, we would offer at this
6 time Mr. Harris as an expert in the area of forensic
7 chemistry, specifically drug testing.

8 THE COURT: Questions concerning his
9 qualifications?

10 MR. HARRIS: None, Your Honor, from Gonzales.

11 MR. BOGGS: None from Mr. Shelhamer.

12 THE COURT: You may continue.

13 (Drug Report marked as State's Exhibit No. 6
14 for identification)

15 BY MR. WALL:

16 Q I'm going to show you what's been marked as
17 State's Exhibit 6. Can you identify that for me?

18 A Yes, sir. This is a lab report that I
19 generated, based on the findings that I had from lab
20 number L-02-0421.

21 Q I'm going to show you State's Exhibit 5 and
22 have you look at that.

23 A Okay.

24 Q What does that appear to be?

25 A This is the copy of the chains of custody from

OFFICER ASHLEY HARRIS - DIRECT BY MR. WALL

334

1 the same case, L-02-0421. A lab number is assigned
2 when the case comes into the lab to be analyzed.
3 The lab number simply is the L stands for lab
4 number. 02 is the year. 421 was the 421st case
5 submitted in the year 2002.

6 Q Would you have filled out one of those also?

7 A Yes, sir, I fill out a similar form called Form
8 A, which is a statement of my qualifications and how
9 I obtained the information.

10 Q Do you have that with you?

11 A Yes, I do.

12 Q What does that indicate?

13 A As I said, this is a form that I fill out.
14 It's very similar to a chain of custodies that are
15 filled out by others officers, that states who I
16 received it from and on what date I received it, and
17 I also place what tests I perform on it, and I sign
18 the date that I have completed all testing on this
19 controlled substance, or questioned controlled
20 substance.

21 Q And are you able to determine if this is the
22 item that was tested?

23 A Yes, the tracking system that I used, again is
24 the lab number, and the lab number is on the bag --
25 on the best bag that is located within this bag and

OFFICER ASHLEY HARRIS - DIRECT BY MR. WALL

335

1 it's also in the seal. And in the seal I also
2 placed my initials and the date in which I prepped
3 the case and sealed it back up after it was tested.

4 Q What is a best bag?

5 A A best bag is a system that was generated by
6 the South Carolina Law Enforcement Division as a
7 uniform way of submitting drug evidence because of
8 the large number of agencies and counties that were
9 submitting drugs to SLED for analysis.

10 When I left SLED and I started the lab here, I
11 decided to mimic that system, because it seems to
12 work really well, and it worked out really well
13 here, because we have one bag that all agencies use
14 to submit drug analysis, and I have nineteen
15 different agencies submitting drugs for analysis to
16 our laboratory.

17 Q Is it a tamper-evident bag?

18 A Yes, the actual plastic bag that's in here, it
19 says county drug analysis security envelope, is a
20 tamper-evident bag. And what that means is if
21 someone tries to open the bag, there is markings
22 down the side, across the bottom, and a glue seal
23 across the top, that if someone tries to open it
24 after it's been sealed, it's very obvious. It will
25 be very clear that someone has tampered with it.

OFFICER ASHLEY HARRIS - DIRECT BY MR. WALL

336

1 after it has been sealed.

2 Q And would you test an item if there appeared to
3 be any problem with the bag?

4 A No. I do an inspection of all evidence when
5 it's first submitted to see if it is in proper
6 condition and sealed. And then when I actually go
7 to prep the case, I do another thorough inspection.
8 And once I do the inspection and find out that it is
9 still sealed, I simply write okay, my initials, and
10 the date on the front of the bag here to prove that
11 I looked at it, and then I open the case from there.
12 If it is not sealed, I will reject the case.

13 Q This outer package, who put that on there?

14 A The heat-sealed bag that's on the outside that
15 has my initials and the lab number and the date in
16 the heat seal is the bag that I placed everything in
17 after the analysis was done. It was originally in
18 this blue bag, the best bag. Everything was taken
19 out. After I took samples and did the analysis,
20 everything was placed in a heat-sealed bag and I
21 sealed it and the bag is still sealed to this day
22 with my initials still in the seal.

23 Q Is the meth itself in a bag?

24 A Yes, the methamphetamine is located in a
25 ziplock bag. It's this white block here.

1 Q Can you unseal that bag, please?

2 A I'm just making sure that it hasn't leaked. It
3 appears that one of the other bags has leaked and
4 I'd rather not do that --

5 Q I understand.

6 A -- because of that.

7 Q Let me ask you this.

8 A Okay.

9 Q What is in there, if you can tell, other than
10 the methamphetamine? There is some packaging.

11 A Right, everything that was -- that is submitted
12 inside a best bag goes back in this pack. What I
13 have here is the large block that tested positive
14 for methamphetamines on the outside.

15 This block was wrapped inside an assortment of
16 other things, including it had a bag and then it had
17 a layer of mustard and then another layer of
18 plastic, then a layer of what appeared to be
19 barbecue sauce. It was a dark substance, appeared
20 to be barbecue sauce, maybe A-1. It had a smell
21 similar to barbecue sauce. And then another layer
22 of plastic and then black electrical tape. That was
23 what was submitted.

24 After I removed all the layers, this white
25 block was at the center of that. I placed all of

OFFICER ASHLEY HARRIS - DIRECT BY MR. WALL

338

1 the packaging in the ziplock bag and placed it in
2 here, but apparently some of the barbecue sauce has
3 leaked out onto the bag.

4 Q How would you describe this item of
5 methamphetamine?

6 A An off-white rock-like substance is kind of a
7 typical description of something having this hard
8 appearance and being kind of off-white is just a
9 typical way of describing something that appears
10 like this.

11 Q Does methamphetamine appear in other forms?

12 A Methamphetamine can be in powder form, a very
13 light powder. It can be in a crystal form, if it's
14 been refined, almost to the point of looking like
15 rock candy, or it can be in this kind of off-white
16 substance. This is somewhere in between the two
17 stages. The powder tends to be a very low grade.
18 The crystal tends to be a very high grade. This is
19 somewhere in between, I would say.

20 Q Are you able to tell if that has been pressed
21 in any way?

22 A It probably has been pressed. With
23 methamphetamine is made, it does typically form into
24 a powder. While that powder is still wet, you can
25 press it and form it into a cake, or a pellet, or

OFFICER ASHLEY HARRIS - DIRECT BY MR. WALL

339

1 something of that fashion.

2 Q Would there be any purpose to that?

3 A Just for packaging ease. When it's a powder,
4 it's light and it's kind of hard to press. And when
5 you take that powder while it's still wet, you can
6 press it into a block and you can then -- that block
7 can be taped or stuck somewhere. It a little easier
8 to hide or conceal.

9 Q Are larger quantities more likely to be done
10 that way?

11 A That is another one of the advantages. It
12 doesn't take up as much space for the same amount of
13 weight.

14 Q Can this be converted back to powder, or how
15 would that be used?

16 A Methamphetamine can be smoked. It can be
17 snorted. It can be injected.

18 If it was going to be snorted, taking
19 internasally through the nose, it would have to be
20 ground up in something similar to -- anything from a
21 coffee bean grinder to a grinder like for tea or
22 something like that, where you are turning it into a
23 very fine powder.

24 If it's going to be smoked, it would actually
25 be broke off into a small rock and smoked that way.

OFFICER ASHLEY HARRIS - DIRECT BY MR. WALL

340

1 Q I guess what I'm getting to, to the average
2 person this may not look like a lot of drugs?

3 A That is an extremely large amount of drugs,
4 actually. The normal dosage unit of methamphetamine --

5 MR. HARRIS: Your Honor, I'm going to object to
6 the witness' qualification of what in his view is a
7 large amount of drugs. I mean, I see his role if he
8 weighs it, that's what it weighs. We know law says
9 about the quantity.

10 THE COURT: I'll sustain the objection. It's
11 up to the jury to determine the amount of the drugs.
12 And certainly from the scientific evidence and other
13 evidence presented, that is what they will base
14 their decision upon all the evidence that they
15 receive, so it's not necessary for him to further
16 comment.

17 MR. WALL: Yes, sir.

18 BY MR. WALL:

19 Q And that total amount is?

20 A 448.80 grams.

21 Q Thank you.

22 MR. WALL: Your Honor, at this time the State
23 would move State's Exhibit 6 into evidence.

24 THE COURT: Any objection?

25 MR. HARRIS: No objection, judge, from

OFFICER ASHLEY HARRIS - CROSS BY MR. BOGGS

341

1 Gonzales, Your Honor.

2 MR. BOGGS: None from Mr. Shelhamer, Your
3 Honor.

4 THE COURT: Without objection, it is admitted.

5 MR. WALL: The State would also move State's
6 Exhibit 2 into evidence.

7 MR. HARRIS: Well, I object because the chain
8 of custody is not complete.

9 THE COURT: Sustain the objection.

10 MR. WALL: No further questions for this
11 witness, Your Honor.

12 MR. HARRIS: No questions of this witness, Your
13 Honor.

14 MR. BOGGS: May it please the court, Your
15 Honor.

16 THE COURT: Yes, sir.

17 CROSS EXAMINATION BY MR. BOGGS:

18 Q What was your rank again?

19 A Lieutenant.

20 Q Lieutenant?

21 A Yes, sir.

22 Q I knew that you were very qualified.

23 Lieutenant Harris, how many drug analyses have
24 you run?

25 A I have been doing this for five and a half.

OFFICER ASHLEY HARRIS - CROSS BY MR. BOGGS

342

1 years. I would say upwards of six thousand cases.

2 Q What types of packages have you seen containing
3 drugs?

4 A Suitcases, plastic, duffel bags, paper. Just a
5 very --

6 Q Coffee cans?

7 A Coffee cans.

8 Q Sealed?

9 A Like with the aluminum -- like with metal seal
10 still in them?

11 Q Yes, sir.

12 A No, sir, I can't say that I have seen one of
13 those, no, sir.

14 Q How about vacuum packed items?

15 A Yes, sir.

16 Q Have you ever seen marijuana vacuum packed?

17 A Yes, I have.

18 Q Into various shapes and sizes?

19 A Yes, sir.

20 Q What's the least amount of marijuana that you
21 have tested as a part of a drug arrest analysis?

22 A The smallest marijuana analysis that I have
23 ever made?

24 Q Yes, sir.

25 A Just residue in a pipe or in a change holder

1 one time.

2 Q Was that part of a drug arrest by some law
3 enforcement agency?

4 A If it's submitted to me, it is, yes, sir.

5 Q Can you tell when testing methamphetamines how
6 old the drugs are?

7 A No, sir, that's not one of the tests that I
8 perform.

9 Q And you say that you have testified forty-five
10 times, at least? I believe that's what you said?

11 A Yes, sir, that's correct.

12 Q And you have been qualified as an expert in
13 analysis. Would you consider yourself an expert in
14 the packaging of the drug?

15 A I'm not -- I don't understand your question.
16 I'm sorry.

17 Q Would you feel qualified to testify before this
18 court as to how you think a particular amount of
19 drugs is packaged, prior to arrest, as to what that
20 package was designed for? Are you qualified to give
21 an opinion in that way?

22 A Through my experience I have seen that
23 different techniques were used to like try to hide
24 the drugs, but that's --

25 Q That's what I'm getting at. Why scientifically

OFFICER ASHLEY HARRIS - CROSS BY MR. BOGGS

344

1 would there be a reason to pack methamphetamines in
2 barbecue sauce and mustard?

3 A As a way of trying to hide the scent from a
4 dog, or to cover the scent of it, or to try to keep
5 it from being detected.

6 Q Would it be fair to say that such packaging
7 would be best used -- or would be most needed, and
8 by that I mean the scent disguise would be most
9 needed, in hiding drugs or delivering drugs, in your
10 opinion?

11 A Both. It would be used in both.

12 Q How about in the transportation of drugs long
13 distances?

14 A It would -- it would be used in that also, yes,
15 sir.

16 Q Were you able to type the drugs? And by that I
17 mean is this, I don't know, Bohemian
18 methamphetamine?

19 A No tests were performed like that from -- under
20 normal conditions, no, sir.

21 Q So this is not some -- in your opinion, this is
22 not some high grade, or special blend, or anything?
23 This is what you would say is methamphetamine?

24 A Right, there was no -- there was no test
25 performed to determine where it came from or

1 anything like that, no, sir.

2 Q Did you test the mustard or barbecue sauce --

3 A No.

4 Q -- for any type clue?

5 A No, sir, I didn't.

6 Q Did you -- you mentioned the weight earlier.

7 A Yes, sir.

8 Q Did that include the packaging?

9 A No, sir, the weights are obtained after the
10 packaging is removed and after all the samples are
11 taken from the substance for the -- in this
12 particular case, chemical tests and the instrumental
13 tests. The weights are always taken after all
14 samples are removed.

15 Q Did you have to drain the methamphetamine of
16 the mustard, or was it --

17 A The methamphetamine was in a plastic bag. And
18 on the outside of that plastic bag was the mustard
19 and the barbecue sauce and things. So the
20 methamphetamine didn't have it directly touching it.

21 Q I noticed a brown stain on this cube that you
22 have identified as methamphetamine. What is that
23 caused by?

24 A The packaging had a small slit in the outside
25 of it. Typically that's used to like to test -- do

OFFICER ASHLEY HARRIS - CROSS BY MR. BOGGS

346

1 a field test or a presumptive test in the field to
2 determine if it is methamphetamine, or cocaine, or
3 whatever the substance is.

4 Q So that's probably leakage of the, in this
5 case, barbecue sauce and mustard?

6 A Yes, sir.

7 Q Isn't it true then that the package was -- or
8 excuse me, the drugs were open to emersion from the
9 liquid that was around it?

10 A There was a small slit, so some could have
11 leaked in, yes, sir.

12 Q You have no idea of knowing how much mustard
13 was in there, do you?

14 A On the actual drugs?

15 Q Yes.

16 A Well, I mean, that's -- that's the stain that
17 there was. There wasn't --

18 Q That's not what I'm asking.

19 A I didn't wipe anything off or anything.

20 Q You have no way of knowing how much mustard or
21 how much barbecue sauce, or I think you even said

22 A-1, was around the drugs, right?

23 A No, sir, I don't.

24 Q And, in fact, the item wasn't weighed prior to
25 being open, because it was already opened before you

1 got it, right?

2 A Well, right, a small slit was made before I
3 received it, yes, sir.

4 Q You have had the opportunity to analyze
5 packages like this. We talked about that earlier,
6 correct?

7 A Similar, yes, sir.

8 Q Similar packages, or all times of packages in
9 which drugs were hidden inside?

10 A That's correct.

11 Q If you had this package with a bag around it --
12 excuse me, if you had this methamphetamine with a
13 bag around it, with a layer of leaky, squishy stuff,
14 with black tape around the leaky, squishy stuff, is
15 there any scientific way that you can say, as an
16 expert, that that's methamphetamine, without testing
17 it?

18 A No, sir.

19 Q Based on feeling the package?

20 A No, sir. No, sir.

21 MR. BOGGS: I have no further questions.

22 MR. WALL: I just have a few on redirect, Your
23 Honor.

24 REDIRECT EXAMINATION BY MR. WALL:

25 Q For that matter, Mr. Harris, looking at it

OFFICER ASHLEY HARRIS - RECROSS BY MR. BOGGS

348

1 through a clear bag, without doing scientific
2 testing, can you say what it is?

3 A No, sir.

4 Q Would you say what it is?

5 A Not without testing it, no, sir.

6 Q Does that spot in any way change your opinion
7 regarding your report?

8 A No, sir. The substance was dry when I took it
9 out. It had a small stain on it. I took samples
10 from the back and the sides away from the
11 discoloration, because it appeared it was from the
12 mustard and barbecue sauce.

13 Q So that in no way affected your opinion, your
14 expert opinion, regarding the weight or the
15 substance?

16 A No, sir. It was dry when I took it out.

17 MR. WALL: No further questions, Your Honor.

18 MR. HARRIS: Nothing further, Your Honor.

19 THE COURT: Recross?

20 MR. BOGGS: Just one followup.

21 THE COURT: Mr. Boggs.

22 RECROSS EXAMINATION BY MR. BOGGS:

23 Q You testified on redirect that if you looked at
24 this bag and it was clear and you could see this,
25 you could at least guess that this is

1 methamphetamines, correct?

2 A I could --

3 Q Based on your experience?

4 A I could guess, yes, sir.

5 Q All right. But if this was covered in the
6 black tape and squishy, it could be anything? It
7 could be an eight track tape, couldn't it?

8 A It could, yes, sir.

9 Q It could be marijuana, couldn't it?

10 A It could, yes, sir.

11 Q All right.

12 MR. BOGGS: I have no further questions.

13 THE COURT: Thank you, sir. You may step down.

14 MR. WALL: We would ask that he be excused,
15 Your Honor.

16 THE COURT: Without objection?

17 MR. BOGGS: No objection, Your Honor.

18 THE COURT: He is excused. Thank you for
19 coming, lieutenant.

20 Next witness.

21 OFFICER JACOB DEFFENBAUGH, having been first
22 duly sworn, testified as follows:

23 THE COURT: Sir, please state your name for the
24 record and spell your last name for us.

25 THE WITNESS: It's Jacob Deffenbaugh,

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

350

1 D-e-f-f-e-n-b-a-u-g-h.

2 DIRECT EXAMINATION BY MR. WALL:

3 Q Where are you employed, sir?

4 A The Spartanburg County sheriff's office.

5 Q And are you with the narcotics unit there?

6 A Yes, sir, I am.

7 Q Did you participate in this case?

8 A Yes, sir, I did.

9 Q And what was your participation?

10 A I was the undercover officer assigned to make a
11 purchase.

12 Q When did you become involved with the case?

13 A Investigator Fox asked me, pertaining to the
14 case on June 3rd, that morning after I believe a
15 series of phone calls was made -- one or two phone
16 calls was made. He then asked me to do the
17 undercover work, along with an informant or an
18 operative.

19 Q Before you all do one of these operations, what
20 do you do? Do you meet and discuss the plan?

21 A Yes, sir, we have what we call our raid plan,
22 which is drafted by the case agent. In this case it
23 was Investigator Fox. We also had a board in our
24 office where we draw the scenario on the board, like
25 maybe a parking lot where he wants our vehicles,

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

351

1 just different -- whatever the scenario may be. We
2 have a briefing of everybody involved. There's
3 assigned a duty, whether you are a takedown unit, or
4 undercover man, or responsible for evidence, or
5 whatever.

6 Q What was the plan in this case, basically?

7 A The plan was for an undercover operative and
8 myself to drive to I believe it's the Little Cricket
9 at Highway 11 and I-26. We were to meet a subject
10 in the parking lot named Michael Gonzales, who was
11 supposed to be bringing us a pound of
12 methamphetamine. And the undercover operative was
13 to introduce me as the purchaser of this pound of
14 methamphetamine.

15 Q Who was supposed to actually -- who was
16 supposed to take the methamphetamine?

17 A I was. I was the person who was supposed to be
18 purchasing the methamphetamine.

19 Q And I'm going to jump ahead for a moment. Did
20 you, in fact, take possession of the
21 methamphetamine?

22 A Yes, sir, I did.

23 Q And who did you take possession of that from?

24 A Joshua Steven -- I believe it's Joshua Steven
25 Shelhamer.

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

352

1 Q Is he in the courtroom today?

2 A Yes, sir, he is.

3 Q Are you able to identify him?

4 A Yes, sir, I can.

5 Q Please do so.

6 A Seated right there.

7 Q In the white shirt?

8 A Yes, sir.

9 Q What did you do with that package once the
10 police came in?

11 A I held onto that package and then turned it
12 over to Investigator Fox.

13 Q I'm going to show you what's been marked as
14 State's Exhibit No. 5 for identification and ask you
15 to look at that page. What does that indicate?

16 A This indicates that I was the initial officer
17 that touched the evidence in this case, which was
18 right here, and that I released the evidence to
19 Investigator Fox.

20 Q And is this the item?

21 A Yes, sir, it is.

22 Q Okay.

23 MR. WALL: At this time, Your Honor, we would
24 move State's Exhibit 2 into evidence.

25 MR. HARRIS: No objection.

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

353

1 MR. BOGGS: Without objection, Your Honor.

2 THE COURT: Without objection, it will be
3 admitted.

4 BY MR. WALL:

5 Q Let's go back a little bit.

6 What were y'all driving?

7 A It's a black Toyota pickup truck, two door.

8 Q Where did -- you can step down, if you need to.

9 (witness off the witness stand)

10 BY MR. WALL:

11 Q You can use that pen. Where was your vehicle
12 parked?

13 A Parked right here.

14 Q Who was driving the vehicle?

15 A I was driving the vehicle.

16 Q And at some point did y'all encounter the
17 suspects?

18 A Yes, sir.

19 Q Suspect?

20 A Yes, sir.

21 Q And how did that occur?

22 A As we were -- as myself and the undercover
23 operative were seated in the vehicle, the operative
24 noticed a Camaro pull into the gas pumps. I believe
25 it's this gas pump right here. Michael Gonzales

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

354

1 then got out of his vehicle and started pumping gas.

2 Continue?

3 Q Sure.

4 A From that point Mr. Gonzales walked through the
5 parking lot into the front door of the Little
6 Cricket there, and I stated to the operative "you
7 need to go inside. There is people in there." And
8 at that point he got out of the car and walked
9 inside the Little Cricket there. And the
10 conversation that they had inside, I can't testify
11 to. I didn't hear that or I wasn't present for
12 that.

13 Q I understand that.

14 Was it your understanding or did you have any
15 knowledge prior to arriving of there being
16 discussion regarding Mr. Gonzales wanting the
17 transaction to go down inside the store?

18 A Somebody had mentioned -- I believe it was
19 Investigator Fox had mentioned that possibly
20 something about a bathroom. However, we didn't
21 decide that that was a good idea for a couple of
22 reasons, officers safety being, number one.

23 The second reason was if for some reason we got
24 separated inside the store, I believe myself and the
25 informant, there is no way that we could

1 communicate.

2 Q Both of you went inside?

3 A Exactly. So one of us had to remain in the
4 parking lot.

5 Q Because you were going to take possession of
6 drugs?

7 A Exactly. Yes, sir.

8 Q So the only way for that to happen would have
9 been for you to go in the store with Solomon?

10 A Yes, sir. And that was not going to happen.

11 Q Was not going to happen?

12 A No, sir.

13 Q So what, if any, instructions did you give
14 Solomon?

15 A I just instructed him to go in and speak with
16 Mr. Gonzales to see if he had the stuff there and to
17 tell him that I wanted to look at it. You know,
18 that we wanted to do this deal, that I wanted to get
19 out of there. Told him that I had the money,
20 everything was ready to go, but, you know, not -- I
21 wasn't coming in the store, and that I didn't trust
22 him, being Mr. Solomon -- I'm sorry, Solomon, with
23 my money, that I wanted to make the exchange.

24 Q So what happened after they went in the store?

25 A They walked back to the Camaro. Again they had

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

356

1 a brief conversation, which I can't testify to what
2 was said there.

3 Q Sure.

4 A Mr. Solomon then walked back towards our
5 vehicle. And as he was walking, he stated to me "do
6 you want to see the stuff?" And I said "yes." And
7 as he got there, he said "he's going to pull the
8 Camaro over here and park next to us."

9 Q And did he, in fact, pull the Camaro over
10 there?

11 A Yes, sir, he finished up pumping the gas, or
12 whatever he was doing there, and pulled the Camaro
13 directly into this spot right here.

14 Q And when we say he, who are you referring to?

15 A Michael Gonzales.

16 Q Prior to this operation, had you seen a
17 photograph of Mr. Gonzales?

18 A Yes, sir, I did.

19 Q Did you have contact, face-to-face contact,
20 with him here?

21 A In the parking lot, yes, sir.

22 Q Are you able to identify Mr. Gonzales?

23 A Yes, sir, I can.

24 Q Just for the record could you do so?

25 MR. HARRIS: I object.

1 THE COURT: State your ground.

2 MR. HARRIS: Your Honor, these are matters that
3 we have already taken up with the court.

4 THE COURT: Noting your previous objection, the
5 objection is overruled and you may continue, sir.

6 A Yes, sir. Michael Gonzales is seated right
7 here, blue shirt, red stripe.

8 THE COURT: You need to speak up, please,
9 officer.

10 THE WITNESS: I'm sorry.

11 BY MR. WALL:

12 Q Please continue, if you would.

13 A Michael Gonzales pulled over here next to the
14 vehicle in which we were seated in, which was the
15 black Toyota truck. Mr. Solomon was in between both
16 vehicles. I exited the vehicle, walked over in
17 between both vehicles, and at that time Mr. Solomon
18 introduced me to Michael Gonzales.

19 Q So did Mr. Solomon get back into the vehicle
20 once he walked back from here to here?

21 A No, sir.

22 Q All right. He introduced you?

23 A He introduce me to Michael Gonzales.

24 Q What occurred then?

25 A I remember Mr. Gonzales walking towards the

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

358

1 front of the store here and got the air holes from
2 an air compressor. And I remember him making the
3 comment "I have to look like I'm doing something."

4 From that point I asked Mr. Gonzales where the
5 stuff was, referring to the methamphetamine, and he
6 pointed to the car and said "he has it." He turned
7 out to be Joshua Shelhamer.

8 I then walked around between the cars over here
9 to where Mr. Shelhamer was seated on the passenger's
10 side. I asked him then "do you have the stuff?"
11 Mr. Shelhamer then lifted up a black taped package
12 and handed it to me.

13 Q Where at that time was Mr. Gonzales?

14 A Here in this area, somewhere towards the front
15 of the Camaro.

16 Q Now, when you asked him did he have the stuff
17 and he said yeah, he's got it, how close were y'all?

18 A We were within five feet.

19 Q I'm going to back up and you just tell me.

20 A Okay. He was standing towards the front of his
21 car. So from the front of the Camaro, maybe a foot
22 or two in front of the Camaro, to the door about
23 here.

24 Q Were you looking at him?

25 A Yes, sir, directly at him.

1 MR. BOGGS: Judge, if I may, may I stand over
2 there by the jury?

3 THE COURT: Absolutely.

4 MR. BOGGS: Just the acoustics with his back to
5 me.

6 THE WITNESS: I'm sorry.

7 MR. BOGGS: No, that's all right.

8 THE COURT: Sir, if you would, please keep
9 voice up, because the court reporter has to hear
10 you. You are not just talking to the solicitor.
11 Everyone needs to hear you.

12 THE WITNESS: Yes, sir.

13 BY MR. WALL:

14 Q You were at the point where Mr. Shelhamer
15 passed it to you?

16 A Yes, sir.

17 Q What occurred then?

18 A From that point, again, I referred to Michael
19 Gonzales, who was standing here, and I asked him did
20 he mind if I weighed it, meaning the package.

21 Q Right.

22 A In which he said no problem, go ahead,
23 something to that affect. And I then returned from --
24 or I had the package. I took it around his car back
25 to the passenger's side of the truck, because within

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

360

1 the truck under the passenger seat I have an
2 electronic scale. I got the scale from the truck
3 and leaned back into the Camaro with the package and
4 the scale. I sat the scale on the seat. I placed
5 the package on the scale and I had a little bit of
6 trouble. The scale wasn't level, and Mr. Shelhamer
7 at that time asked me to place it on the floorboard
8 because I would get a better balance on the scale,
9 in which I didn't. I said "no, it will be all right
10 right here." And my approximate weight at that time
11 was around 580 grams.

12 Q That's with packaging?

13 A Packaging and everything. I never -- I never
14 opened the package or nothing like that.

15 Q Was Mr. Gonzales watching this?

16 A Yes, Mr. Gonzales also made a comment in
17 reference to the scale. He said "where did you get
18 that? Those are nice," and which -- and for that I
19 had no reply. I just kind of acted like I didn't
20 hear him because I was leaning back into the car.

21 Q Did you say the sheriff's office?

22 A No, sir. From that point I gave the takedown
23 sign, which was "I believe the girls are going to
24 like this," which then again was echoed by Mr.
25 Solomon. He has a wire at the time and the takedown

1 teams arrived.

2 Q You can retake your seat there, please.

3 (witness back on the witness stand)

4 BY MR. WALL:

5 Q What did Mr. -- where were you positioned when
6 the takedown team came in?

7 A In between the Camaro and the black truck, the
8 Toyota truck.

9 Q Could you see Mr. Gonzales?

10 A Yes, sir, I could.

11 Q What did he do?

12 A Ran directly alongside the building. And from
13 that point, when he got around the side of the
14 building there, I lost visual.

15 Q What was the sequence in terms of when did he
16 begin to run?

17 A I gave the takedown signal. I know the
18 operative repeated the signal, because I could hear
19 him say it. I remember hearing vehicles come into
20 the parking lot. Remember seeing a look on Mr.
21 Gonzales' face as to a surprise look, like what's
22 going on here. And then I remember seeing him run.
23 As far as what vehicle it was and that, I didn't see
24 who actually pulled in the parking lot, because I
25 was focused on the other suspect at the time.

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

362

1 Q Were the police out at this time and was --
2 there is yelling and so forth on the tape. Was any
3 of this occurring prior to him running?

4 A No, sir.

5 Q The officers at the scene -- did you see the
6 takedown team, once they arrived and once they got
7 out of their vehicles?

8 A Yes, sir, I seen an investigator, Floyd Turley,
9 run, giving chase to Michael Gonzales. Investigator
10 Reed Lindsay, who was present at the Camaro and
11 remained at the Camaro. And also Investigator Rhett
12 Fox. And as far as other guys coming and going, I
13 can't recall that actually dealt with me at the
14 time.

15 Q Did the takedown members, the actual ones who
16 came in, have identifying information?

17 A Yes, sir.

18 Q What would that be?

19 A I remember specifically seeing Floyd Turley run
20 past me. He had a vest on, a ballistic vest. He
21 had a badge, and his gun was holstered, I believe,
22 and he was caring a walkie-talkie in his hand.

23 Reed Lindsay had a ballistic vest on,
24 bulletproof vest, with a badge on his waistline. I
25 believe the badge was on his waistline with the gun.

1 His gun was drawn and he had a walkie-talkie in his
2 hand as well.

3 Investigator Fox, who came later, whose arm was
4 in a sling, had his badge displayed about his neck
5 on a chain.

6 Q You are in the narcotics division?

7 A Yes, sir.

8 Q As a part of your job in the narcotics
9 division, is it your job to know approximate values
10 of different drugs?

11 A Yes, sir.

12 Q What would the approximate wholesale value of a
13 pound of marijuana go for?

14 MR. HARRIS: Objection.

15 THE COURT: Sustain the objection.

16 MR. WALL: Your Honor, may we approach?

17 THE COURT: Yes, sir, you may.

18 (Lawyers approached the bench)

19 THE COURT: Ladies and gentlemen of the jury, I
20 have a matter of law to take up with the attorneys.
21 I'm going to send you to the jury room with the
22 understanding that you will not discuss this case
23 among yourselves. We will get you back in just a
24 moment.

25 (The following takes place outside the presence

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

364

1 of the jury panel)

2 THE COURT: All right. Now, Mr. Harris, let me
3 hear your objection further, and then I'll hear from
4 Mr. Boggs, and then the solicitor.

5 MR. HARRIS: Yes, Your Honor.

6 The witness was asked the question what is the
7 street value of the drug, the amount of drug
8 involved. I objected on the grounds of relevance.
9 The issue in the case and what the State has to
10 prove is that both these defendants, or one of them,
11 committed one of the acts described in the drug
12 trafficking statute and that a certain weight was
13 possessed or attempted to be sold. I think this
14 what we got down here is either a possession,
15 constructive possession with intent to sell case, by
16 the facts, but what the street value is doesn't
17 prove anything. We know what the proposed exchange
18 was. I think that is relevant.

19 THE COURT: Mr. Boggs.

20 MR. BOGGS: May it please the court, Your
21 Honor, I would object, and maybe I heard wrong and
22 please correct me, I thought he asked about
23 marijuana.

24 THE COURT: Marijuana. That's what I thought,
25 the wholesale value of marijuana.

1 MR. BOGGS: And so if that was a misstatement,
2 then, of course, I have no objection. But if isn't
3 a misstatement, then one inference and one line of
4 questioning he's pursuing is is that my client
5 couldn't have thought it was marijuana, because the
6 deal was only for 13,500. And, therefore, the size
7 of the package. So I don't know where he's going,
8 but I don't --

9 THE COURT: Well, we are not getting into any
10 value of marijuana. I know what you are trying to
11 do.

12 MR. WALL: Yes, sir, Your Honor.

13 THE COURT: You know, you are trying to set up
14 a fact that, well, marijuana wouldn't cost this much
15 for this amount or this size, and then he's going to
16 testify that, you know -- there has been ample
17 testimony as to how much was placed on the table, so
18 to speak. So, no, we are not going to -- we are not
19 going to get into this comparison of drugs and that
20 kind of thing, because I have tried to keep you away
21 from all that kind of thing throughout the course of
22 this trial and have been great discussion about what
23 has happened in the past and that's not part of it.
24 So I want you to stay away from that.

25 MR. BOGGS: Your Honor, would now be a good

OFFICER JACOB DEFFENBAUGH - DIRECT BY MR. WALL

366

1 time for me to ask some proffer questions, since the
2 jury is out?

3 THE COURT: Well, no, sir, what I thought is if
4 we get through with this man today, we will let them
5 go home and we will stay here, because, you know, we
6 get paid to stay here. They don't get paid a whole
7 lot.

8 MR. BOGGS: Yes, sir.

9 THE COURT: Bring the jury back, please.

10 (The following takes place in the presence of
11 the jury panel)

12 THE COURT: Thank you very much, ladies and
13 gentlemen.

14 All right. You can continue.

15 MR. WALL: Thank you, Your Honor.

16 BY MR. WALL:

17 Q Officer Deffenbaugh, what role did Michael
18 Gonzales -- that you witnessed, what role did he
19 play in this transaction?

20 MR. HARRIS: I object to that, Your Honor. I
21 don't know what is meant by the question role. I
22 think the question is too broad. The witness has
23 stated what actions he observed, what things Mr.
24 Gonzales has allegedly said.

25 THE COURT: Sustain the objection. How about

1 being a little more -- hone in a little bit more on
2 that question, please, Mr. Wall.

3 MR. WALL: Yes, sir.

4 BY MR. WALL:

5 Q Who did you speak with to ask if the mari -- if
6 the stuff was there?

7 A Michael Gonzales.

8 Q Who did you speak with to ask if you could
9 weigh the meth?

10 A Michael Gonzales.

11 Q Who was directing this?

12 MR. HARRIS: Objection to that.

13 THE COURT: I'll sustain the objection.

14 MR. WALL: No further questions, Your Honor.

15 THE COURT: Cross examination.

16 CROSS EXAMINATION BY MR. HARRIS:

17 Q Investigator Deffenbaugh, you, working in your
18 undercover capacity, posing as a purchaser or
19 prospective purchaser of drugs, is that correct?

20 A Yes, sir.

21 Q It was your expectation at the Little Cricket
22 on the date in time in question that Mr. Gonzales
23 would arrive, have a quantity of methamphetamine in
24 his possession, and exchange that methamphetamine
25 hand to hand with you for money, is that correct?

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. HARRIS

368

1 A Yes, sir.

2 Q That did not happen, did it?

3 A No, sir, it didn't.

4 Q Is it correct that if you chose to, you could
5 have asked Mr. Shelhamer where the stuff was?

6 A I wouldn't have felt comfortable doing that,
7 sir.

8 Q I understand, but you could have done that,
9 couldn't you?

10 MR. BOGGS: Objection, Your Honor. It calls
11 for speculation.

12 THE COURT: Sustain the objection.

13 BY MR. HARRIS:

14 Q You were trying is set Michael Gonzales up.
15 That's what this whole thing was about, wasn't it?

16 A Can you be more specific about that, sir? I'm
17 not sure I understand set up Michael Gonzales.

18 Q You don't know what set up somebody means?

19 A I don't know what text you mean that in, sir.
20 We were there to purchase a quantity of
21 methamphetamine from Michael Gonzales, if that's
22 what you are asking me.

23 Q Right. You were there focused on trying to get
24 Michael Gonzales to do something illegal, is that
25 correct?

1 A Sir, we were there conducting an investigation
2 for a sale of methamphetamines, which is illegal,
3 yes, sir.

4 Q Well, you -- it's illegal to purchase it, isn't
5 it?

6 A It's illegal to possess it.

7 Q It's illegal to purchase it or sell it, right,
8 as far as you know?

9 A Correct.

10 Q So you were doing something illegal?

11 A No, sir.

12 Q Why not?

13 A We never did purchase it.

14 Q There was no completed sale?

15 A No, sir.

16 Q Did you possess it?

17 A Yes, sir.

18 Q Are you certain?

19 A I possessed it for a short time period, yes,
20 sir.

21 Q Was dominion and control over the substance
22 relinquished to you sufficient in your mind for you
23 to believe that you had possession of that item?

24 A Yes, sir.

25 Q All right. So you committed an illegal act

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. HARRIS

370

1 right then?

2 A No, sir. I took it into evidence.

3 Q So when a police officer buys drugs, it's all
4 right?

5 A I think it's all right, as long as he doesn't
6 use them or sell them, yes, sir. As long as he's
7 making a charge on somebody for the sale of the drug
8 or for the possession of the drug, in which this
9 case we made two charges for trafficking.

10 Q Now, you expected and hoped and was trying to
11 do whatever you could do to make Mr. Gonzales be a
12 seller of this drug, is that correct? Is that a
13 fair statement? I mean, that's what you were there
14 for, wasn't it?

15 A No, sir, I don't believe that's a fair
16 statement.

17 Q Well --

18 A I didn't tell Michael Gonzales to show up with
19 a pound of methamphetamine. He did that on his own
20 free will. I didn't tell him to direct me to get it
21 from Mr. Shelhamer. He did that of his own free
22 will. So as far as willing him or wanting him to do
23 something illegal, he did that of his own free will,
24 sir. I didn't will him to do anything.

25 Q I believe you may have misunderstood my

- 1 question, sir.
- 2 A Okay, I'm sorry.
- 3 Q I'm not suggesting by my question, just so we
- 4 can be plain and communicate a little bit, if you
- 5 are willing to.
- 6 A I'm willing to.
- 7 THE COURT: Mr. Harris, please let's limit the
- 8 questions to questions and not infer anything from
- 9 your questions to him or comments to him.
- 10 BY MR. HARRIS:
- 11 Q My question to you only was isn't it true that
- 12 you were there with the expectation of completing a
- 13 purchase of drugs from Michael Gonzales?
- 14 A Yes, sir.
- 15 Q That was your purpose of being there, to buy
- 16 drugs from Michael Gonzales, right?
- 17 A Yes, sir.
- 18 Q But that didn't happen, did it?
- 19 A I believe it did, sir.
- 20 Q Michael Gonzales handed you drugs and you gave
- 21 him money?
- 22 A No, sir, Michael Gonzales directed me to the
- 23 drugs, which Shelhamer handed to me.
- 24 Q So you say by what? By doing what?
- 25 A By me asking a specific question and receiving

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. HARRIS

372

1 a specific answer.

2 Q Let me see. What do you claim was said that
3 makes this a purchase and a sale of drugs? What do
4 you claim was said exactly, verbatim?

5 A I claim that I asked Mr. Gonzales where the
6 stuff was and that he pointed to Shelhamer in the
7 Camaro and stated he has it.

8 Q I believe in your report you have put "yes, he
9 has -- "he has it in the car."

10 A Right.

11 Q Meaning Mr. Shelhamer?

12 A Yes, sir.

13 Q Meaning not Mr. Gonzales?

14 A Correct.

15 Q Then later you asked Mr. Gonzales if you could
16 look at it and the answer was "yes, he will show it
17 to you," meaning Mr. Shelhamer?

18 A Yes, sir.

19 Q Meaning not Mr. Gonzales, correct?

20 A Yes, sir.

21 Q Mr. Shelhamer had the drugs in his pants
22 pocket, correct?

23 A I believe so, sir, yes.

24 Q You got in the car and asked Mr. Shelhamer
25 where was the stuff, didn't you?

1 A No, sir, I never got into any car.

2 Q Do you want to look at your report?

3 A Sure. I have it right here.

4 Q Look at it and see if you didn't ask Mr.

5 Shelhamer where was the stuff.

6 A I'm not saying I didn't ask him. I'm saying I

7 never got into the car. You said I got into the

8 car. No, sir, I never got into the car.

9 Q Did you ask Mr. Shelhamer where is the stuff?

10 A I asked Mike Gonzales where the stuff was.

11 Q Sir, did you ask Mr. Shelhamer where is the

12 stuff?

13 A As I approached him, I said "do you have the

14 stuff?" And he said "yeah, it's right here," and he

15 pulled it out somewhere from his region out of his

16 pants or down there by his leg and handed it to me,

17 yes, sir, that did happen.

18 Q Mr. Shelhamer had it and you found it by asking

19 him, right?

20 A Yes, I was directed there to ask him for it.

21 Q No money exchanged hands?

22 A No, sir.

23 Q Is that correct.

24 None was ever even shown taken out of your

25 pocket, is that correct?

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. HARRIS

374

1 A That's correct.

2 Q You didn't even discuss getting to the point of
3 giving money, is that right?

4 A That's correct.

5 Q So if what you say is true, what actually did
6 happen was that Mr. Shelhamer took a package out and
7 handed it to you and you weighed it and that's it?

8 A Yes, I did receive a package from Mr. Shelhamer
9 that was weighed, yes, sir, that I weighed.

10 Q That's the whole thing. That's it. No
11 purchase, no money.

12 A I never exchanged any money for the
13 methamphetamine. I never gave anybody any money.
14 No, sir, I didn't have.

15 Q As a matter of fact, Mr. Shelhamer never told
16 you that you could have whatever package he gave
17 you, did he? He gave it to you. He didn't say,
18 okay, here, it's yours, take it?

19 A He handed it -- he handed it directly to me,
20 sir.

21 Q For the specific purpose of weighing it and
22 seeing it, is that right?

23 A I believe so.

24 Q So what you were actually asking Mr. Shelhamer
25 was whether you could essentially evaluate it, is

1 that right?

2 A Yes, sir, I guess I would be evaluating it if
3 he handed it to me and I weighed it.

4 Q Well, you asked to weigh it and see it?

5 A Correct.

6 Q Those are the two direct things that you asked,
7 is that correct?

8 A Yes, sir, it is correct.

9 Q And Mr. Shelhamer gave it to you and you saw it
10 and weighed it, is that right?

11 A That's correct, sir.

12 MR. HARRIS: No further questions.

13 THE COURT: Mr. Boggs.

14 MR. BOGGS: Thank you, Your Honor. May it
15 please the Court.

16 CROSS EXAMINATION BY MR. BOGGS:

17 Q You are an investigator, right, or a detective?

18 A Investigator.

19 Q Investigator Deffenbaugh, you stated at the
20 outset in your testimony that you had a plan, you
21 had a board, this is standard operating procedure
22 for these type situations, right?

23 A Yes, sir.

24 Q And do you remember that board? Do you have a
25 picture in your mind of what was on it?

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. BOGGS

376

1 A Yes, sir.

2 Q As you are looking at that mental picture,
3 where is Josh Shelhamer's name on that board?

4 A It is not on that board, sir.

5 Q You were in the car -- or excuse me, what kind
6 of vehicle were you in?

7 A It was a black Toyota pickup truck.

8 Q Whose pickup truck was that?

9 A It's the sheriff's office pickup truck.

10 Q And you were driving it?

11 A Yes, sir.

12 Q All right. And when you pulled in, where did
13 you first park?

14 A The only spot we ever pulled into, sir, was
15 directly there where it's marked U.C. vehicle.

16 Q That's the first and only spot that you pulled
17 into?

18 A Yes, sir.

19 Q Isn't it true that my client got out of the car
20 when they had stopped at the gas station, as you
21 testified earlier?

22 A Your client being?

23 Q Well --

24 A Mr. Shelhamer?

25 Q Josh Shelhamer, yes.

1 A I can't testify that I saw him outside the car
2 at the gas pumps. No, sir, I can't say that.

3 Q Can you testify that -- let me ask you this.
4 When that vehicle pulled up, did you know that was
5 the vehicle that you were looking for?

6 A Yes, sir.

7 Q And how did you know that?

8 A Through the briefing, we were told what kind of
9 vehicle it was going to be.

10 Q And you learned that that was whose car?

11 A Michael Gonzales' car.

12 Q So you were sitting right here, obviously the
13 driver's side of that vehicle, correct?

14 A Yes, sir, that's correct.

15 Q And you said that you couldn't see my client
16 get out of the car here, Mr. Shelhamer?

17 A That's correct.

18 Q But did you see him walk to the front of the
19 store and talk to the C.I.?

20 A No, sir, I did not.

21 Q But you aren't testifying that it didn't
22 happen?

23 A That it did not happen, sir?

24 Q Yes.

25 A I did not see your client talk to the C.I. in

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. BOGGS

378

1 front of the store.

2 Q What were you doing --

3 A I was --

4 Q -- while you were sitting in the car?

5 A -- waiting for the operative to finish speaking
6 with Michael Gonzales to come back to me.

7 Q And that was going on in the store?

8 A Yes, sir, both subjects went inside the store.

9 Q So when the C.I. emerged and walked in front of
10 the store, I assume there is a sidewalk, right?

11 A There is a sidewalk in front of the store, yes,
12 sir.

13 Q You weren't watching the C.I.?

14 A Yes, sir, I saw the C.I..

15 Q But you didn't see my client talk to him?

16 A No, sir, I did not.

17 Q Well, since you can't say for sure that you saw
18 my client talk to the C.I., can you say for sure who
19 pulled the green Camaro in beside you?

20 A Yes, sir, I can.

21 Q Who was that?

22 A Michael Gonzales.

23 Q And how do you know that?

24 A I know Michael Gonzales and I watched him pull
25 the car up.

1 Q You know for sure if Mr. Shelhamer was in the
2 car when it was pulled into that parking space?

3 A Yes, sir, I do.

4 Q Are you sure about that?

5 A Yes, sir, I am.

6 Q It's fair to say then that if you didn't see my
7 client get out of the car and walk up and talk to
8 the C.I., then you didn't notice what he had on?

9 A No, sir, not while he was in the vehicle, I did
10 not.

11 Q Well, I asked -- you didn't see him out of the
12 vehicles, so you didn't know what he had on?

13 A No, sir.

14 Q Did you -- well, did you notice anyone pull up
15 behind Mr. Gonzales' Camaro during this transaction?

16 A At one point, yes, I did, sir.

17 Q All right.

18 MR. BOGGS: I apologize, Your Honor.

19 THE COURT: No problem.

20 BY MR. BOGGS:

21 Q And when I say behind, I mean after it was
22 pulled over here to the right.

23 A Yes, sir.

24 Q Who pulled up or what pulled up?

25 A A mini van of some kind. I'm not exactly sure

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. BOGGS

380

1 of the color. I know a Hispanic male got out of the
2 vehicle from the passenger's side and had a
3 conversation with the operative and with Mr.
4 Gonzales. I was later told that that was Mr.
5 Gonzales' brother.

6 Q Was he identified as Frankie Gonzales?

7 A Not to me he never was, sir. I'm not sure who.

8 Q But he was identified as the brother --

9 A Yes.

10 Q -- of Michael Gonzales?

11 A Yes, sir.

12 Q So at what point in time did you first get out
13 of the car?

14 A When the vehicle pulled up next to me, I got
15 out of my car at that point.

16 Q Did Michael Gonzales get out right away?

17 A Yes, sir.

18 Q Did you meet him right at the front?

19 A I was -- I came around the driver's side of our
20 vehicle, in between the truck and the Camaro, as he
21 was walking in between the --

22 Q You mean -- excuse me, you mean passenger's
23 side of the truck?

24 A I got out of the driver's side --

25 Q Yes, sir.

1 A -- and walked to the passenger's side of our
2 vehicle.

3 Q Did you go on around -- I'm sorry.

4 A It would be in between the Camaro and the
5 truck.

6 Q Did you go around the front or the back?

7 A I went around the back.

8 Q So Michael Gonzales gets out and walks up here
9 to the air hose, I believe that was your testimony?

10 A Yes, sir, walks up towards the air hose.

11 Q Is that your recollection that there was an air
12 hose there?

13 A Yes, sir.

14 Q All right. And then you got out and walked
15 around the back of your vehicle to the driver's side
16 of the Camaro?

17 A Yes, sir.

18 Q All right. Did the C.I., Mr. Solomon, the Good
19 Samaritan, did he get out and stay right there?

20 A He was out of the vehicle already. He went to
21 the gas pumps after they came back out of the store
22 and he came back over to the truck. To my knowledge
23 he never got back in it.

24 Q Well, he went back to the gas pumps in the
25 direction of where Mr. Gonzales' car was just

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. BOGGS

382

1 parked?

2 A Yes, sir. No, when they came out of the store
3 initially, okay, they went to the gas pumps. He
4 walked back to the gas pumps with Mr. Gonzales. As
5 he walked towards me, Mr. Gonzales pulled the Camaro
6 over. From that point of him initially -- Mr.
7 Solomon initially getting out of the truck, I don't
8 remember him getting back in it.

9 Q Talking about Mr. Solomon?

10 A Correct, yes, sir.

11 Q Did he ever go on the right side of the Camaro,
12 the passenger's side of the Camaro, the C.I.?

13 A He may have, I can't recall.

14 Yes, sir, I believe he did, because when the
15 van pulled up in the parking lot with Mr. Gonzales'
16 brother --

17 Q Uh-huh.

18 A -- he was -- I remember him standing on the
19 passenger's side of the vehicle talking. I believe
20 there was some conversation about a title for a
21 vehicle --

22 Q Okay.

23 A -- between Mr. Gonzales and Mr. Solomon and Mr.
24 Gonzales' brother.

25 Q I'm trying to get this straight. As you got

1 out of your driver's side, you walked around the
2 back here?

3 A Yes, sir.

4 Q Mr. Solomon, the confidential informant that
5 y'all were paying to do this work, walked from the
6 gas pumps right here between the cars where you were
7 going?

8 A He was already there before the Camaro pulled
9 over to us.

10 Q I mean -- I'm a little confused. I apologize.
11 I thought you said that he was -- that Michael
12 pulled up while he was standing back there.

13 A No, sir. If I said that, I was mistaken.

14 Q Okay. Is it possible -- is it possible that
15 you don't remember exactly the direct movements of
16 everybody involved? Is that possible?

17 A That's possible.

18 Q Including my client, Mr. Shelhamer, correct?

19 A Yes, sir.

20 Q Is there any doubt in your mind that with your
21 conversations with Mr. Gonzales and the
22 conversations that you were witnessing between the
23 C.I. and Mr. Gonzales, is there any doubt in your
24 mind that Mr. Gonzales was aware of what was going
25 on?

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. BOGGS

384

1 MR. HARRIS: Objection. That calls for the
2 witness to say what's in Mr. Gonzales' mind.

3 THE COURT: Sustain the objection.

4 BY MR. BOGGS:

5 Q When asked about the drugs by either you or
6 your confidential informant, was Mr. Gonzales able
7 to answer that inquiry, yes or no?

8 A Yes, he was.

9 Q Based on your earlier answer, where you don't --
10 you were candid in saying you don't remember the
11 direct movements of everyone, it's possible then
12 that my client got out and talked to the C.I. at
13 some point between the gas stand and the front of
14 the building? It's possible, correct?

15 A It could be, sir. I didn't -- I don't recall
16 seeing that, but, yes, sir, you are right, it could
17 have happened.

18 Q But if that happened, you don't recall seeing
19 what my client had on, because you don't recall
20 seeing him get out of the car, correct?

21 A Not at the gas pumps, no, sir, I did not see
22 him get out.

23 Q You stated earlier that my client had his
24 window down and you had come over here to the right
25 side of the vehicle. When did you leave the

1 driver's side and go to the right side, passenger's
2 side?

3 A After I asked Mr. Gonzales where the stuff was,
4 if he had the stuff, and then he pointed to Mr.
5 Shelhamer in the car and said that he had it.

6 Q - Well, isn't it true that Mr. Shelhamer was
7 directed by Mr. Gonzales to hand over a package?

8 A I would have perceived it that way, yes, sir.

9 MR. HARRIS: Objection to the extent that the
10 question calls for the witness to speculate about
11 what Mr. Gonzales' motives were.

12 Now, if there is some direct statement --

13 MR. BOGGS: Present-sense impression, Your
14 Honor, of what was going on right in front of him.

15 THE COURT: Objection is overruled.

16 BY MR. BOGGS:

17 Q Now, you stated on either direct or cross by
18 Mr. Harris that Mr. Shelhamer grabbed the package
19 from somewhere in the vicinity of his pants, is that
20 right?

21 A Yes.

22 Q Maybe you didn't use that word, but somewhere
23 in the area of his pants?

24 A Yes, sir, that's correct.

25 Q When asked or directed to hand over the

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. BOGGS

386

1 package, was there any difficulty in handling it?

2 By that I mean was there a delay? Was there an
3 instantaneous response? How would you describe how
4 it was asked for, retrieved, and handed?

5 A I would say that after asking Mr. Gonzales
6 could I see it, being directed over there to Mr.
7 Shelhamer by Mr. Gonzales, leaning in briefly and
8 saying do you have the stuff, I was handed the stuff
9 directly, the package directly.

10 Q He said right here, correct, according to you?

11 A Excuse me, sir?

12 Q Mr. Shelhamer said right here when you asked
13 where is the package?

14 A Yes, sir.

15 Q Did he say whose meth?

16 A No, sir, he did not.

17 Q Did you say where is the meth?

18 A No, sir, I didn't.

19 Q Did you say is that the 448 grams of meth?

20 A No, sir, I didn't.

21 Q Did you say is that the 448 grams of any drug?

22 A No, sir, I never used the word gram.

23 Q Did you use the word drug?

24 A No, sir, I did not.

25 Q It was a package?

1 A I never used the word package. I just said
2 stuff.

3 Q Did you ever mention the amount of money that
4 you were or the C.I. was supposed to pay, to Josh
5 Shelhamer?

6 A No, sir, I did not.

7 Q Did Josh Shelhamer ever say where is the money?

8 A No, sir, not that I can recall.

9 Q Have you had an opportunity to participate in
10 drug transactions before in an undercover basis?

11 A Yes, sir, I have.

12 Q When you were attempting to buy in such
13 activities, is it common that you are asked to
14 produce the money?

15 A Yes, sir.

16 Q Did that occur at any time in this transaction?

17 A No, sir, it did not.

18 Q So the flash roll wasn't even necessary?

19 A No, sir, it was not.

20 Q Isn't it true that my client threw the package,
21 the unidentified package, black tape, onto the
22 driver's side seat? Isn't that true?

23 A Not that I can recall, sir.

24 Q But earlier you testified that you got it
25 through the window and then carried it around, isn't

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. BOGGS

388

1 that true?

2 A Yes, sir.

3 Q All right. But now you say not that you
4 recall. So really you don't remember exactly how
5 you got that package, right?

6 A I remember getting the package. I remember him
7 handing it to me, but I don't recall him ever
8 putting it on the seat.

9 Q Well, is it possible he handed it to you as you
10 leaned in the driver's side seat? I mean the
11 driver's side window.

12 A No, sir, I got the package from the passenger's
13 side window.

14 Q And you carried it around the front of the car,
15 as you recall it now, correct?

16 A No, sir, I didn't carry it around the front of
17 the car. I carried it around the rear of the car.

18 Q So you came around the rear of the car with the
19 package?

20 A Yes, sir.

21 Q How were you carrying the package?

22 A Just in my hand.

23 Q All right.

24 A Sort of down at my -- tucked against my leg.

25 Q And you got scales out?

- 1 A Yes, sir, I did.
- 2 Q All right. The scales were in your truck?
- 3 A Yes, sir.
- 4 Q Did anyone ask you, and especially Josh
5 Shelhamer, did he ask you to put the scales into his
6 car and weigh it in front of him?
- 7 A Nobody asked me, sir.
- 8 Q So you did that on your own?
- 9 A Well, I asked if I could.
- 10 Q You asked Mike Gonzales if you could weigh it?
- 11 A Yes, sir, I did.
- 12 Q And on your own you get the scale and put it in
13 the seat of the Camaro, correct?
- 14 A Yes, sir.
- 15 Q Would you describe the scales as being this
16 big?
- 17 A Relatively that size.
- 18 Q Would it contain a base which would allow it to
19 sit flat?
- 20 A Yes, sir.
- 21 Q All right. And you tried to put it in the
22 chair of a Camaro. Would you say that the seat was
23 completely flat?
- 24 A No, sir, it had an angle to it, a little bit
25 backwards.

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. BOGGS

390

1 Q A little bit backwards?

2 A Yes, sir.

3 Q Let me ask you a question. You have stated
4 that my client -- or you seemed to emphasize that my
5 client said why don't you weigh -- put the scales on
6 the floor, right?

7 A Correct.

8 Q If I didn't know you and I was trying to write
9 something down in front of you and I took my pen and
10 started doing this, what's your likely response?

11 A Flip your pen up.

12 Q Does that mean that you know what I'm writing?

13 A No, sir.

14 Q What if I write a threat against someone's
15 life?

16 A I wouldn't know it if I wasn't paying
17 attention, sir.

18 Q You wouldn't know it until it was written?

19 A Correct.

20 Q Isn't that correct?

21 A Correct.

22 Q And Josh Shelhamer wouldn't know it until this
23 was opened up, isn't that correct?

24 A I don't know if that's correct or not, sir.

25 Q But it's possible?

1 A It could be possible, but I can't say that
2 that's correct.

3 Q Is it impossible?

4 A No, sir, it's not impossible.

5 MR. BOGGS: I have no further questions.

6 THE COURT: Solicitor.

7 MR. WALL: Thank you, Your Honor.

8 REDIRECT EXAMINATION BY MR. WALL:

9 Q I just want to go over a few things real
10 briefly. You mentioned the hose, the air hose?

11 A Yes, sir.

12 Q Was that pulled out?

13 A Yes, sir.

14 Q Now, the actual compressor is more over toward
15 the store, is that correct?

16 A I believe it is, sir, yes.

17 Q So were you talking about Gonzales being in
18 that area or this area?

19 A No, he was at the front of the Camaro.

20 Q Okay.

21 A In that area, yes, sir.

22 Q And it was pulled out.

23 You said that you couldn't -- it's possible
24 candidly saying that you don't recall every direct
25 movement of every person there?

OFFICER JACOB DEFFENBAUGH - REDIRECT BY MR. WALL

392

1 A Yes, sir.

2 Q What I'm asking you is are you certain of the
3 things that you have testified to?

4 A Yes, sir, I am.

5 Q Mr. Harris asked you about it being all right
6 when the police to buy drugs. You are a police
7 officer?

8 A Yes, sir.

9 Q You were working for the sheriff's office in an
10 official capacity, is that correct?

11 A Yes, sir.

12 Q Do narcotics units commonly make undercover
13 buys?

14 A Yes, sir.

15 Q He asked you about the fact that the money
16 never changed hands, so it wasn't a sale. Did that
17 matter?

18 A No, sir, it didn't.

19 MR. HARRIS: Object to that, Your Honor. It's
20 calling for -- well, that's a legal conclusion does
21 it matter.

22 THE COURT: Sustain the objection.

23 BY MR. WALL:

24 Q Did you feel that the operation was successful?

25 A Yes, sir, I did.

1 Q You said that you wouldn't -- on cross that you
2 wouldn't feel comfortable asking Josh Shelhamer to
3 weigh it, I believe is what you testified to.

4 MR. BOGGS: I object, Your Honor. I don't -- I
5 don't think that was the context of that statement
6 at all, Your Honor.

7 THE COURT: How about --

8 MR. WALL: I may have misunderstood him.

9 THE COURT: How about, if you would, rather
10 than trying to interpret the testimony. That's for
11 the jury --

12 MR. WALL: Yes, sir.

13 THE COURT: -- to do, to evaluate the testimony
14 and the evidence presented, present him with a
15 question that hopefully he will be able to answer.

16 BY MR. WALL:

17 Q Why, if at all, would you have not felt
18 comfortable asking Mr. Shelhamer?

19 MR. BOGGS: Objection, Your Honor. I don't
20 recall that that was even the context of anything
21 having to do with Mr. Shelhamer. I think that his
22 statement was something totally different, and I
23 just think it's misleading and leading, even though
24 it is redirect, Your Honor.

25 THE COURT: Well, of course, redirect does not

OFFICER JACOB DEFFENBAUGH - REDIRECT BY MR. WALL

394

1 allow him to lead a witness.

2 MR. BOGGS: Yes, Your Honor.

3 THE COURT: He's still on direct examination.

4 Ladies and gentlemen of the jury, I would
5 instruct you, as I have previously, and will do so
6 again several times before this case is ended, that
7 you are the judges of the facts in this case. And
8 as such, you evaluate the credibility and
9 believability of the witnesses. And as the result
10 you also will recall what you find to be the
11 testimony that has been presented. If the lawyers
12 misstate any of the testimony in their efforts to
13 pose a question to any of the witnesses and you find
14 that it disagrees with what the testimony is in your
15 recollection, then, of course, you will follow that
16 recollection.

17 All right, you may continue. I'm going to
18 allow him to ask the question and answer it, if he
19 can.

20 BY MR. WALL:

21 Q Why, if at all, would you have felt
22 uncomfortable or did you feel uncomfortable asking
23 Mr. Shelhamer the questions, rather than asking Mr.
24 Gonzales?

25 A Mr. Gonzales was the one who set the deal with

1 the operative, the one who I felt or I was briefed
2 that was supposed to be delivering this package of --
3 or pound of methamphetamine. As far as I knew, that
4 was the guy to be talking to, was Michael Gonzales.

5 Q Was that born out by your conversations?

6 A Yes, sir.

7 Q And just, finally, were you wearing a
8 transmitter?

9 A No, sir, I was not.

10 Q Why was that?

11 A You can only -- you can only have one
12 transmitter per kit. I mean, the operative had to
13 be wearing a transmitter. Okay. Obviously the
14 operative was to introduce me to Michael Gonzales.
15 So any conversation that he had prior important to
16 the case, we made a decision to equip the operative
17 with the transmitter. For operative's safety, he
18 was never to be so many -- you know, during contact
19 so many feet from me, or -- you know, supposed to
20 stay in my general vicinity. I was going to lose
21 contact with the operative once I was introduced and
22 the deal was to begin.

23 Q You could have yell out if need be?

24 A I could have yelled, yes, sir.

25 MR. WALL: No further questions, Your Honor.

OFFICER JACOB DEFFENBAUGH - RECROSS BY MR. HARRIS

396

1 THE COURT: Mr. Harris.

2 MR. HARRIS: Yes, sir.

3 RECROSS EXAMINATION BY MR. HARRIS:

4 Q Please look at your report, just to clarify one
5 point. Toward the bottom of page one, is it correct
6 you state "I asked Shelhamer -- are you with me,
7 investigator? Do you have your place?

8 A I'm checking where -- I don't see where it says
9 I asked Shelhamer.

10 Q Well, let me point it out to you.

11 A Thank you, sir. Okay.

12 Q Is it correct that at least you wrote in your
13 report "I asked Shelhamer where the stuff was and
14 Shelhamer stated 'right here' pulling a black tape
15 wrapped package from his pants and handing it to
16 me."

17 A Yes, sir, that's correct.

18 Q Is that what happened?

19 A Yes, sir, that is what happened.

20 MR. HARRIS: Thank you.

21 THE COURT: Mr. Boggs.

22 MR. BOGGS: Thank you, Your Honor. May it
23 please the court.

24 THE COURT: Yes, sir.

25

1 RECROSS EXAMINATION BY MR. BOGGS:

2 Q You just testified for certain that he took it
3 from his pants, but you testified earlier that you
4 didn't know, it was from the general vicinity.

5 Which is it?

6 A It was from his pants, sir.

7 Q Okay. But when I asked you if he pulled it out
8 right away and was able to hand it to you right
9 away, you stated yes, right?

10 A Yes.

11 Q So he didn't struggle to hand you the package
12 or put it on the seat?

13 A No, sir, he did not.

14 Q So given your testimony earlier about not
15 knowing every direct movement, it's possible that it
16 was on the floorboard of Michael Gonzales' car under
17 my client's seat? Is it possible, yes or no?

18 A Could have been possible, sir.

19 Q Thank you.

20 Now, did my client comment on the scale after
21 you pulled it out, being Mr. Shelhamer?

22 A Not that I recall, sir.

23 Q Were any comments made?

24 A Concerning?

25 Q The scale.

OFFICER JACOB DEFFENBAUGH - RECROSS BY MR. BOGGS

398

1 A By your client?

2 Q No, by anyone?

3 A Yes, sir, there were.

4 Q What was that?

5 A A comment was made by Michael Gonzales as to
6 what type of scale it was, where did I get it,
7 something to that effect.

8 Q Was he admiring it?

9 A Yes, sir.

10 Q Isn't it true that you don't have any proof,
11 direct proof, that Mr. Shelhamer knew what was in
12 that package?

13 MR. HARRIS: Your Honor, I'm going to object.
14 I think the questions are beyond the scope of
15 redirect and recross.

16 THE COURT: Sustain the objection.

17 MR. BOGGS: Your Honor, I have no further
18 questions then.

19 THE COURT: Thank you, sir. You may step down.

20 MR. WALL: We would ask he be excused, Your
21 Honor.

22 THE COURT: Without objection.

23 MR. BOGGS: I'm going to need him, judge.

24 THE COURT: Yes, sir.

25 If you would remain with us, please, sir.

1 THE COURT: Next witness.

2 MR. WALL: That's all our witnesses, Your
3 Honor, at this time beyond being sure that I have
4 moved in all my exhibits.

5 THE COURT: Why don't you make sure that you
6 have moved them all in.

7 MR. WALL: Your Honor, we at this time would
8 move to put in State's Exhibit 1.

9 MR. HARRIS: Your Honor, I object to it because
10 I understood that was marked for I.D. for
11 demonstrative purposes.

12 THE COURT: He's moving it into evidence now.
13 I understand what it was marked for originally.

14 MR. HARRIS: I object to it because I don't
15 think the way it was used during the course of the
16 trial has any evidentiary value at this point. I
17 mean, it can be used in argument, but it has no
18 evidentiary value.

19 MR. BOGGS: I would concur, Your Honor.

20 THE COURT: The objection is overruled. It's
21 admitted.

22 MR. WALL: We would also, Your Honor, the State
23 would move to put in State's Exhibit 3.

24 MR. HARRIS: No objection.

25 MR. BOGGS: Without objection.

1 THE COURT: It is admitted then.

2 MR. WALL: At this time, Your Honor, the State
3 rests.

4 THE COURT: Ladies and gentlemen of the jury,
5 the State has rested its case in chief. And as a
6 result of that we have also gone a little bit later
7 today than we normally like to and I apologize to
8 you for that.

9 I'm going to be sending you away from the
10 courthouse for this evening, once again reminding
11 you that you are not to discuss this case among
12 yourselves as you exit the courthouse, if you happen
13 to see or speak with each other during this evening
14 or when you reconvene in the jury room in the
15 morning at the appointed hour.

16 Also, ladies and gentlemen, you are not to
17 discuss this case with your family, friends, or
18 anyone else that you come in contact with.

19 And if anyone should attempt to contact you
20 concerning this case, I think that I have given you
21 ample instructions to you are to report that to me
22 immediately upon your return to the courthouse in
23 the morning.

24 Let me remind you and instruct you very
25 strongly that you are not to read, watch or listen

1 to any news accounts concerning this case.

2 Once again, all I want you to consider in this
3 matter is what you see and hear in this courtroom.
4 Nothing more and nothing less.

5 Now, if you would, please be in your jury room
6 in the morning at 9:15. We will get started at that
7 time. Please report directly to the jury room. Do
8 not linger outside of the courthouse, in the
9 hallways, and do not go to the jury assembly room.
10 Please report directly to your jury room.

11 Have a pleasant evening. I'll look forward to
12 seeking all of you in the morning at 9:15.

13 The jury is excused. Everyone else remain
14 seated, please.

15 (The following takes place outside the presence
16 of the jury panel)

17 THE COURT: All right. Let's do this before we
18 do any motions or anything like that. Why don't you
19 your proffer.

20 MR. BOGGS: Thank you, Your Honor.

21 THE COURT: How about coming back up.

22 MR. BOGGS: I call Investigator Deffenbaugh
23 back to the stand, sir.

24 THE COURT: I'll remind you, sir, that you are
25 still under oath.

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. BOGGS
(PROFFERED TESTIMONY)

402

1 THE WITNESS: Yes, sir.

2 (Whereupon, the following was the proffered
3 testimony of Officer Jacob Deffenbaugh)

4 RECROSS EXAMINATION BY MR. BOGGS:

5 Q Investigator Deffenbaugh, just so you know, I'm
6 asking you questions to get some evidence that can't
7 be heard before the jury, so this will be brief.

8 Do you have -- as a law enforcement personnel,
9 as a law enforcement investigator, do you have prior
10 knowledge of Michael Gonzales prior to this case?

11 A Yes, sir, I do.

12 Q And what was that knowledge? Did it relate to
13 drug sales?

14 A Yes, sir, it did.

15 Q And do you know him to be a marijuana drug
16 dealer by prior arrests?

17 A Yes, sir.

18 Q Is that how he was identified to you by the
19 confidential informant?

20 A I knew Mr. Gonzales before I even met the
21 informant.

22 Q And had Mr. Gonzales been arrested for any
23 other drug than marijuana?

24 A That I'm aware of, no, sir.

25 Q Would you classify his business -- or excuse

OFFICER JACOB DEFFENBAUGH - CROSS BY MR. BOGGS
(PROFFERED TESTIMONY)

403

1 me, his family as a drug dealing family?

2 A I don't really know his mother.

3 Q Do you know his stepfather Dino Perez?

4 A Yes, sir.

5 Q Has he been arrested --

6 A Yes, sir, he has.

7 Q -- to your knowledge. And what for?

8 A Marijuana. Trafficking in marijuana.

9 MR. BOGGS: I have no further questions in
10 terms of the proffer, Your Honor.

11 THE COURT: All right.

12 Thank you, sir. You may step down.

13 And without objection he will be excused.

14 MR. BOGGS: Without objection.

15 THE COURT: All right. Now, any motions, Mr.
16 Harris. We will start with you and then go to Mr.
17 Boggs.

18 MR. HARRIS: Your Honor, at this stage of the
19 trial the defendant moves for a directed verdict of
20 acquittal on the grounds that the evidence taken in
21 the light most favorable to the State would prove
22 against the Defendant Gonzales only that he was
23 merely present at the scene of an attempted sale of
24 methamphetamine.

25 THE COURT: Solicitor.

1 MR. WALL: Your Honor, the State's position is,
2 of course, there is ample evidence that Mr.
3 Gonzales, from the audio tapes, was involved in
4 arranging a drug transaction wherein he would
5 deliver drugs. He, in fact, was at the scene,
6 according to the testimony. He was directing the
7 scene. And, in fact, methamphetamine was taken from
8 the person he directed the officers to.

9 THE COURT: Certainly there has been a
10 tremendous amount of testimony that's been
11 presented. And I think that from my view of the
12 evidence that's been presented and the points that I
13 have taken down and looking at the evidence and what
14 it has revealed, that certainly, Mr. Harris, I
15 believe that mere presence is a part of this case,
16 but I also believe that from the totality of the
17 evidence and taking the light most favorable to the
18 State, taking that evidence in the light most
19 favorable to them, that there has been evidence that
20 has been presented to this jury that would allow
21 them to render a verdict in this case. And
22 certainly mere presence would be one of the things
23 that they would consider, if they believed that he
24 was merely present at the scene of the crime. And,
25 as such, your motion for a directed verdict is

1 denied.

2 MR. HARRIS: Your Honor, Defendant Gonzales has
3 no other matters at this time.

4 THE COURT: Thank you, sir.

5 Mr. Boggs.

6 MR. BOGGS: Thank you, Your Honor. May it
7 please the court.

8 I guess as a matter of course I need to renew
9 all my prior motions subject to your prior ruling,
10 Your Honor, just for protecting the record.

11 THE COURT: Yes, sir.

12 MR. BOGGS: Also I would move for a directed
13 verdict of acquittal as to my client, Josh
14 Shelhamer, in that there has been no independent
15 proof that the defendant knew what was in the
16 package, despite his alleged participation, Your
17 Honor. And that despite that participation is
18 required that specific intent is a necessity to
19 proving this case, in that he had to know what was
20 involved was methamphetamine. And, Your Honor, I
21 would respectfully make that motion, in light of the
22 fact that by their own admission throughout the
23 case, each witness has, in essence, stated that he
24 didn't -- that they have no proof that he knew what
25 it was. And, Your Honor, I would just submit that

1 that spoke for itself in terms of that issue and
2 that ground for my motion.

3 MR. WALL: Your Honor, while it is certainly
4 true that we have no evidence of his intent, such as
5 him saying this is meth, here, take this meth, of
6 course, one of the ways that we can determine intent
7 is by someone actually telling you their intent.
8 Many times they don't, and other ways is by
9 inferring it from their conduct and their actions
10 and from the environment that their conduct and
11 their actions occur and the context of that. And
12 that's what has to be in this case.

13 In this case he arrives with Michael Gonzales
14 where a detailed drug transaction was planned with
15 Mr. Gonzales. Mr. Gonzales directs them, the
16 undercover officer to Shelhamer. They are in
17 Shelhamer's presence. He has the stuff. He comes
18 around, the officer does, and says where is the
19 stuff? It's handed to him and then he assists him
20 in the weighing of it.

21 I believe that there is evidence in the record
22 for the jury to conclude, based on his conduct,
23 based on inferences therein that he was
24 participating in a transaction to traffic
25 methamphetamine.

1 THE COURT: Mr. Boggs, I certainly understand
2 both your motion, as well Mr. Harris', but I believe
3 that certainly there is an issue to be presented to
4 the jury here as to what this young man's
5 participation has been. And that could be derived
6 either from direct or circumstantial evidence.
7 There are inferences that can be derived from the
8 testimony that has been presented. And from the
9 testimony that has been presented, I believe that
10 there is a question of fact to be determined by the
11 triers of fact, and your motion is denied.

12 MR. BOGGS: Thank you, Your Honor.

13 THE COURT: All right, insofar as planning for
14 tomorrow, gentlemen, first of all, solicitor, do you
15 have any impeachable offenses that would be used in
16 regards to these individuals?

17 MR. WALL: No, sir, either in regards to Mr.
18 Gonzales nor Mr. Shelhamer do I have any impeachable
19 offenses.

20 THE COURT: What I'll do, gentlemen, is we will
21 all get back together in the morning at nine o'clock
22 and I'll discuss your respective clients Fifth
23 Amendment rights with him, and then we will proceed
24 into whatever the case y'all have to present at that
25 time.

1 Anything else from the State before we break
2 for the evening?

3 MR. WALL: No, sir, Your Honor.

4 THE COURT: From the Defendant Gonzales?

5 MR. HARRIS: No, Your Honor.

6 THE COURT: Mr. Boggs?

7 MR. BOGGS: No, Your Honor. Only I forgot to
8 mention earlier, judge, I have that order that you
9 signed yesterday. Here is the original for the
10 court.

11 THE COURT: Thank you.

12 MR. BOGGS: Here is a copy for each of my
13 co-counsel or opposing counsel.

14 And just for the court's information, I had my
15 paralegal fax that to Bell South this morning. I
16 assume it will go unanswered, but I would let the
17 court know tomorrow.

18 THE COURT: I mean, if we need to get an
19 answer, I believe that we can get one. I mean, I'm
20 not willing just to let it go unanswered. I
21 understand that the constraints of time have
22 necessitated this, but, if necessary, I can call
23 Columbia in the morning to speak with Mr. Lightsey
24 down there and see if we can't maybe get an answer.

25 MR. BOGGS: Yes, sir, Your Honor. As an

1 officer of the Court, of course, by the time I got
2 back to my office yesterday and left a message for
3 my paralegal to do this, I can't speak to whether my
4 paralegal even sent it to there. I hope she did.
5 She usually does what's asked, but I don't want to
6 mislead the court and say it was sent this morning
7 until I go check it out.

8 THE COURT: Why don't you let me in the morning
9 and I'll deal with that then.

10 MR. BOGGS: I sure will.

11 THE COURT: Thank you, gentlemen. See you in
12 the morning at nine okay.

13 (Whereupon, Proceedings were adjourned to July
14 24, 2002, at 9:00 o'clock a.m.)
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG)

THE STATE)
) TRANSCRIPT OF RECORD
-vs-) 02-GS-42-2742
) 02-GS-42-2754
MICHAEL GONZALES,)
STEVEN JOSH SHELHAMER,) JULY 24, 2002
Defendant.) SPARTANBURG, SOUTH CAROLINA

VOLUME III

B E F O R E:

HONORABLE GARY E. CLARY, JUDGE; and a jury.

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

JASON T. WALL, ASSISTANT SOLICITOR
Attorney for the State.

RICKY HARRIS, ESQUIRE
Attorney for Defendant Michael Gonzales.

CAMERON "BOZZY" BOGGS, ESQUIRE
Attorney for Defendant Steven Josh Shelhamer.

Michael R. Watts
Circuit Court Reporter

INDEX

WITNESSES

PAGE

(JULY 22, 2002)

(SUPPRESSION HEARING)

OFFICER JACOB DEFFENBAUGH (SW)

Direct Examination by Mr. Wall 35

Cross Examination by Mr. Harris 42

Redirect Examination by Mr. Wall 47

(JURY TRIAL)

Jury Voir Dire -- page 92

Jury Sworn -- page 109

Opening Statement by Mr. Wall -- page 117

Opening Statement by Mr. Harris -- page 122

Opening Statement by Mr. Boggs -- page 131

INDEX

	WITNESSES	PAGE
	(JULY 23, 2002)	
	(JURY TRIAL)	
	OFFICER KENNETH HANCOCK (SW)	
	Direct Examination by Mr. Wall	148
	Cross Examination by Mr. Harris	154
	Cross Examination by Mr. Boggs	165
	Redirect Examination by Mr. Wall	167
	OFFICER RHETT FOX (SW)	
	Direct Examination by Mr. Wall	171
	Cross Examination by Mr. Harris	210
	Cross Examination by Mr. Boggs	226
	Redirect Examination by Mr. Wall	241
	Recross Examination by Mr. Boggs	262
	OFFICER ROBERT ROSENBERG (SW)	
	Direct Examination by Mr. Wall	271
	Cross Examination by Mr. Harris	272
	Cross Examination by Mr. Boggs	273
	Redirect Examination by Mr. Wall	277

INDEX

1		
2		
3	WITNESSES	PAGE
4	JOHNNY SOLOMON (SW)	
5	Direct Examination by Mr. Wall	281
6	Cross Examination by Mr. Harris	296
7	Cross Examination by Mr. Boggs	308
8	Redirect Examination by Mr. Wall	324
9	Recross Examination by Mr. Harris	328
10	Recross Examination by Mr. Boggs	329
11	OFFICER ASHLEY HARRIS (SW)	
12	Direct Examination by Mr. Wall	331
13	(No Cross Examination by Mr. Harris)	
14	Cross Examination by Mr. Boggs	341
15	Redirect Examination by Mr. Wall	347
16	Recross Examination by Mr. Boggs	348
17	OFFICER JACOB DEFFENBAUGH (SW)	
18	Direct Examination by Mr. Wall	350
19	Cross Examination by Mr. Harris	367
20	Cross Examination by Mr. Boggs	375
21	Redirect Examination by Mr. Wall	391
22	Recross Examination by Mr. Harris	396
23	Recross Examination by Mr. Boggs	397
24	OFFICER JACOB DEFFENBAUGH (SW) (PROFFERED TESTIMONY)	
25	Cross Examination by Mr. Boggs	402

INDEX

WITNESSES

PAGE

(JULY 24, 2002)

Closing Argument by Mr. Wall -- page 449

Closing Argument by Mr. Harris -- page 473

Final Argument by Mr. Boggs -- page 495

Jury Instructions -- page 515

Jury Verdict -- page 545

INDEX

WITNESSES

PAGE

(JULY 25, 2002)

Sentencing -- page 556

Reporter's Certificate -- page 567

416

EXHIBITS

NO.	DESCRIPTION	ID.	EV.
S-1	Map		399
S-2	Drugs		352
S-3	Map		399
S-4	Audio Tape		199
S-5	Form C - Rule 6	271	
S-6	Drug Report		341
CT-1	I.D. Picture Lineup	33	
CT-2	Defendant Gonzales proposed Jury Question	424	
CT-3	Deft. Gonzales Requested Charges	548	
CT-4	Deft. Shelhamer Requested Charges	548	

1 (Proceedings, July 24, 2002)

2 THE COURT: All right. Mr. Harris, and Mr.
3 Boggs, have you discussed your clients Fifth
4 Amendment Rights with them?

5 MR. HARRIS: Your Honor, I have discussed that
6 fully with Mr. Gonzales.

7 MR. BOGGS: Yes, sir, Your Honor, I have.

8 THE COURT: All right, Mr. Gonzales, would you
9 please stand, sir. And also Mr. Shelhamer.

10 Gentlemen, if you would, please raise your
11 right hand.

12 MICHAEL GONZALES, having been first duly sworn,
13 testified as follows:

14 STEVEN JOSH SHELHAMER, having been first duly
15 sworn, testified as follows:

16 THE COURT: Thank you. Please remain standing
17 but you may place your hands down.

18 Now, gentlemen, at this time I'm going to
19 explain to you certain of your Constitutional
20 Rights. If you do not understand anything that I
21 say, I want you to please let me know. And if you
22 need to speak with either Mr. Harris, Mr. Gonzales,
23 you may speak to Mr. Harris; Mr. Shelhamer, you may
24 speak with Mr. Boggs. Simply let me know and I will
25 allow you to do that at any time. Do you understand

1 that, gentlemen?

2 DEFENDANT GONZALES: Yes, sir.

3 DEFENDANT SHELHAMER: Yes, sir.

4 THE COURT: You need to answer out loud for me.

5 We have now reached the stage of the trial
6 where you may present your own defense and you have
7 the right to testify in your own behalf. However,
8 no one can make you testify.

9 Now, it's my understanding that the State does
10 not have any prior records upon which they wish to
11 impeach you. So that would not be an issue in this
12 matter.

13 If you decide or elect not to take the stand, I
14 would instruct the jury that they are not to give
15 that fact any consideration whatsoever and there is
16 to be absolutely no prejudice to you because you did
17 not take the stand and testify.

18 Now, you can talk with your lawyer, your
19 family, friends, or anyone else, but the ultimate
20 decision will be left entirely up to you. Do you
21 understand that, Mr. Gonzales?

22 DEFENDANT GONZALES: Yes, sir.

23 THE COURT: And do you understand that, Mr.
24 Shelhamer?

25 DEFENDANT SHELHAMER: Yes, I do.

1 THE COURT: And what is your decision, Mr.
2 Gonzales?

3 DEFENDANT GONZALES: I decided not to take the
4 stand.

5 THE COURT: You are not going to take the
6 stand.

7 MR. BOGGS: Mr. Shelhamer?

8 DEFENDANT SHELHAMER: I decided not to.

9 THE COURT: Thank you very much, gentlemen.
10 You may be seated.

11 All right. Insofar as any case, will you be
12 presenting any case, Mr. Harris?

13 MR. HARRIS: Mr. Gonzales intends to rest.

14 THE COURT: All right. Mr. Boggs?

15 MR. BOGGS: Mr. Shelhamer intends to rest as
16 well.

17 THE COURT: All right, gentlemen. What I'm
18 going to do then is allow y'all a few minutes to get
19 ready for your closing arguments.

20 If you have any requests for charge, I'll be
21 glad to take those at this time, and then we will
22 talk about those and I will squeeze in a couple of
23 pleas while y'all are getting ready for your closing
24 arguments.

25 MR. HARRIS: Your Honor, Mr. Gonzales also has

1 a matter that I feel we should take up with the
2 court prior to closing argument. ,

3 THE COURT: Okay.

4 MR. HARRIS: It's in the nature of an in limine
5 request. Would the court hear that at this time?

6 THE COURT: We can go ahead and hear that, yes,
7 sir.

8 MR. HARRIS: Your Honor, as the court is well
9 aware, throughout that trial there has been a
10 running battle between the parties as to what
11 extent, if any, the State or the co-defendant may
12 inquire or comment about Mr. Gonzales' past history.
13 There has been accusations of past drug dealings and
14 the like. And I know the court has made great
15 efforts to try to limit that as much as possible
16 within the scope of the evidence rules. Now we have
17 come to the stage of the trial where arguments will
18 be presented by the co-defendant and the State, and
19 while I surely understand myself what is fair
20 argument and I'm sure that my colleagues do too, out
21 of an abundance of caution, and we come this far in
22 this trial, I simply would ask that counsel be
23 prevented from making unfair comment or trying to
24 argue inferences that flow from the evidence that
25 simply are ways to put in front of the jury what we

1 have so far been able to prevent them from hearing.
2 And I feel with every bit of the twenty years that I
3 have had standing up in the courtroom that this is a
4 present and serious danger to my client at this
5 stage. That's the best I know how to put it to
6 raise that issue to get it before the court.

7 THE COURT: Yes, sir. Well, I think that
8 certainly my rulings have been clear, that there is
9 to be absolutely no comment, no reference to,
10 absolutely nothing said about any charges that may
11 be pending, because neither of these gentlemen, and
12 Mr. Gonzales, in particular, has a conviction for
13 any type of a -- any type of a charge that would be
14 used to impeach or attack his credibility. And as a
15 result of that, there is to be absolutely no
16 mention, no inference, no reference as to anything,
17 other than this particular case, because that's --
18 in closing argument you are limited to the facts,
19 the evidence that's been presented, and that is the
20 extent of it.

21 Does the State understand that?

22 MR. WALL: Yes, sir.

23 THE COURT: Mr. Boggs?

24 MR. BOGGS: Yes, Your Honor.

25 THE COURT: And if you have any cause to

1 object, please do so. You know, I think that all of
2 us understand, and I appreciate the fact that
3 objections are sometimes -- we don't like them in
4 closing arguments, but given the nature of this
5 case, if it is necessary for an objection to be
6 lodged, please do so and I'll act upon it.

7 MR. HARRIS: Thank you, Your Honor.

8 Your Honor, Defendant Gonzales does have two
9 specific requests to charge. I would like to hand
10 those up.

11 THE COURT: All right, sir.

12 THE COURT: Do you have some, Mr. Boggs?

13 MR. BOGGS: Yes, sir, Your Honor.

14 Your Honor, they may be duplicative. However,
15 I wanted to provide a choice.

16 THE COURT: No problem.

17 MR. HARRIS: Let me provide these to counsel.

18 MR. BOGGS: Your Honor, I only had time to make
19 one copy, but they are welcome to review my copies
20 to see if they have any problem with them during the
21 break.

22 THE COURT: Okay.

23 MR. BOGGS: Your Honor, I see that Mr. Harris
24 has some more Kinko goodies. I would like to
25 inspect those before they are brought to the jury's

1 attention, just so I can see.

2 MR. HARRIS: It's just cold feet. I may or may
3 not use them.

4 MR. BOGGS: I would like to verify that, as
5 much as I trust Mr. Harris.

6 THE COURT: Well, I believe he will let you
7 look in his Kinko bag.

8 MR. BOGGS: Your Honor, I may have a motion
9 just to protect the record later on, but right now I
10 don't know how best to state it, so I'll take the
11 time to --

12 THE COURT: All right.

13 MR. BOGGS: -- make it concise.

14 THE COURT: Okay. All right.

15 What we will do is take a break in this case,
16 allow y'all to look over the various requests for
17 charge, and then I will get back together with you.

18 MR. BOGGS: Do you have an approximate time,
19 judge? Do you think about an hour?

20 THE COURT: No, no, no, no.

21 MR. BOGGS: All right.

22 THE COURT: Probably looking at maybe
23 forty-five minutes, at the most.

24 MR. BOGGS: Okay. So about ten o'clock.

25 THE COURT: Yes. Don't go very far away.

1 MR. BOGGS: I'm going to be in the conference
2 room.

3 THE COURT: Thank you, gentlemen.

4 (Proceedings recessed)

5 (Proceedings reconvened)

6 (Defense Gonzales Proposed Jury Question marked
7 as Court's Exhibit No. 2 for identification)

8 THE COURT: All right. Insofar as the requests
9 for charge that have been presented by Mr. Harris is
10 concerned, I have a mere presence charge. And I
11 also have an attempt charge. And what I'm doing is
12 I was looking at the attempt charge and it's very
13 similar to one that you have submitted.

14 Mere presence does not probably go into the
15 depth that yours does, but I'm going to look at it
16 during my -- during the closing arguments and I will
17 charge, if not all, a great portion of your mere
18 presence.

19 MR. HARRIS: Yes, Your Honor. I would inquire,
20 the last sentence of the proposed charge.

21 THE COURT: Which one?

22 MR. HARRIS: Of the mere presence charge, the
23 proposition that an inference standing alone is not
24 sufficient to prove beyond -- to prove the case
25 beyond a reasonable doubt will be included in the

1 court's charge in connection with mere presence, or
2 in general?

3 THE COURT: Yes, sir.

4 MR. HARRIS: Thank you, Your Honor.

5 And the other language -- and, of course, I
6 just want to take care of in my argument that I'm
7 correctly stating the law.

8 THE COURT: Well, of course, I tell them that,
9 you know, if the lawyers make any comment as to the
10 law and it differs with what I instruct them that
11 the law is, then, of course, they will follow the
12 law as I instruct it.

13 MR. HARRIS: Well, I know, but I don't want
14 them to think I'm trying to misstate the law on the
15 attempt charge.

16 THE COURT: Uh-huh.

17 MR. HARRIS: Is the court in a position to say
18 whether or not the language included in the last
19 paragraph of the defendant's proposed charge would
20 be appropriate?

21 THE COURT: Well, my charge says is that -- or
22 in parts says "the statements show more than mere
23 preparation and intent. There must be some overt
24 act committed in the effort to commit the crime."

25 MR. HARRIS: I think that's essentially.

1 THE COURT: Yes, sir.

2 MR. HARRIS: Thank you, Your Honor.

3 THE COURT: Yes, sir.

4 All right. Now, insofar as Mr. Boggs charges
5 are concerned, solicitor, there are so many of them
6 I'm going to let -- Mr. Boggs, have you got
7 something that you want to say?

8 MR. BOGGS: Oh, no, sir.

9 THE COURT: Solicitor, what do you have to say
10 in regards to his requests to charge?

11 MR. WALL: Your Honor, he handed me his copy
12 for review. There are many of them, frankly, Your
13 Honor, that I object to.

14 THE COURT: Well, just tell me which ones.

15 MR. WALL: Yes, sir.

16 Defendant's request to charge number 1
17 regarding the merely negligent language and so forth
18 that he listed in there. I think that that's
19 covered by the statute itself, which requires that I
20 prove that they acted knowingly.

21 THE COURT: Okay.

22 MR. WALL: Number --

23 MR. BOGGS: Your Honor, I'm sorry.

24 THE COURT: Well --

25 MR. BOGGS: Do you want to back and forth?

1 THE COURT: I'm in charge right now, Mr. Boggs.

2 MR. BOGGS: Yes, sir.

3 THE COURT: What I going to do is let him
4 object, since he has only one copy. Then I'm going
5 to let him give you your copy back and we will
6 discuss them. And I might just say, you know, right
7 away what I'm going to charge or not charge, but
8 I'll be glad to hear from you. I mean, we have got
9 a lot of repetitive charges here. That's -- you are
10 going to have to pick which one you want on some of
11 these things.

12 MR. BOGGS: Yes, Your Honor.

13 THE COURT: So let's do this. Let's let him go
14 through them and pick the ones that he wants.

15 Number 1, this charge about a police officer,
16 that's not a proper charge. Credibility and
17 believability, Mr. Boggs, goes to any witness. And
18 to specifically point one out, I believe we have got
19 case law in that regard, insofar as picking the
20 jury, as well as the -- that's a comment on the
21 facts of the case, and we are not in Federal Court.

22 MR. BOGGS: Thank you, Your Honor.

23 THE COURT: So --

24 MR. BOGGS: Number 16.

25 THE COURT: Everybody knows that they don't

1 submit that one to me. I don't know why people keep
2 bringing it up, and really to give to any judge, for
3 that matter.

4 MR. BOGGS: Well, judge, as you know, this is
5 the first case I have tried in front of you.

6 THE COURT: I understand that, but my
7 reputation is around a little bit, I think.

8 MR. BOGGS: Judge, I try not to prejudge
9 judges.

10 THE COURT: Well, then you are unusual.

11 MR. BOGGS: Well, I like to think so. Thank
12 you.

13 THE COURT: Tell me which ones that you are
14 going to withdraw that you are duplicative, because
15 I have got, you know, many, many charges on the
16 amount of drugs and the actual constructive
17 possession. I have got mere presence in general,
18 then a party. Co-conspirator. Aider, abetter.
19 Mere association. You are just going to have to
20 tell me which one, because I'm probably going to
21 charge my general charge, unless you can show me
22 something that is a little bit different about what
23 you are trying to give me.

24 MR. BOGGS: Yes, sir. Your Honor, quite
25 frankly the most important charge to me and my

1 client is the one stated defendant's request to
2 charge number 1.

3 And I think concerning the four -- State
4 v. Taylor was a trafficking methamphetamine case
5 which listed the four levels of, I guess, starting
6 with knowledge, and on down to negligence. In that
7 particular case the Court said that the negligence
8 was not enough to convict and it should have been
9 brought before the jury that if they thought that
10 the defendant's acts were negligent in not knowing,
11 then they should have been aware of that charge. So
12 that's the most important one to me, Your Honor, in
13 all due candor. I think that your other --

14 THE COURT: Well, in that case, now, the judge
15 added the charge that the State must prove beyond a
16 reasonable doubt that the defendant was at least
17 criminally negligent. That is not part of my
18 charge. I think my charge --

19 MR. BOGGS: Your Honor, I guess the easiest
20 question for me is what's your standard charge
21 concerning knowing? I apologize. I guess is it one
22 that's in Ervin?

23 THE COURT: Mr. Boggs, I don't use Ervin any
24 more. He's been retired so long. I use the book
25 that Judge Floyd and I have developed and that each

1 and every circuit judge has now.

2 MR. BOGGS: Yes, sir.

3 THE COURT: I mean, I can sit here and read you
4 my charge. Why don't I do that? That would be the
5 easiest thing to do.

6 The defendant is charged with trafficking in
7 methamphetamine. The State must prove beyond a
8 reasonable doubt that the defendant knowingly sold,
9 manufactured, cultivated, delivered, purchased,
10 brought into this state, provided financial
11 assistance, or otherwise aided, abet, attempted or
12 conspired to sell, manufacture, cultivate, deliver,
13 purchase, or bring into this state was knowingly in
14 actual or constructive possession, knowingly
15 attempted to become in actual or constructive
16 possession of methamphetamine.

17 The State must also proof beyond a reasonable
18 doubt that the amount of methamphetamine was 400
19 grams, or more, pursuant to Section 44-53-375(c)(5)
20 of the Code.

21 And then I go into possession. To prove
22 possession, the State must prove beyond a reasonable
23 doubt that the defendant had both the power and the
24 intent to control the disposition or use of the
25 methamphetamine. Possession may be either actual or

1 constructive.

2 Actual possession means that the
3 methamphetamine was in the actual physical custody
4 of the defendant.

5 Constructive possession means that the
6 defendant had dominion and control or the right to
7 exercise dominion or control over either the
8 methamphetamine itself or the property on which the
9 methamphetamine was found.

10 Mere presence at the scene where the drugs were
11 found is not enough to prove possession. Actual
12 knowledge of the presence of the methamphetamine is
13 strong evidence of the defendant's intent to control
14 it's disposition or use. And that comes from
15 Solomon v. The State and The State v. Kimbrell.

16 The defendant's knowledge and possession may be
17 inferred when a substance is found on the property
18 under the defendant's control. However, this
19 inference is simply an evidentiary fact to be taken
20 into consideration by you, along with the other
21 evidence in the case, and to be given the weight you
22 decide it should have.

23 Two or more persons may have joint possession
24 of the drug.

25 To deliver means to actually constructively or

1 attempt to transfer the drug.

2 Distribute means to deliver, other than by
3 administering or dispensing a drug.

4 Then manufacture means to produce, prepare,
5 convert, process, plant, cultivate, grow or harvest
6 a drug naturally or chemically.

7 Manufacturing includes any packaging or
8 repackaging of the drug or labeling or relabeling of
9 drug's container.

10 And then I will -- then you get into attempt.
11 And for your benefit, an attempt is an effort to
12 accomplish a crime which does not succeed. An
13 attempt includes a specific intent to do a
14 particular criminal act, along with an act falling
15 short of the intended act.

16 The State must show more than mere preparation
17 and intent. There must be some overt act committed
18 in the effort to commit the crime.

19 Intent means intending the result which
20 actually occurs. Not accidentally or involuntarily.
21 Intent may be shown by acts and conduct of the
22 defendant and other circumstances from which you may
23 naturally and reasonably infer intent.

24 MR. BOGGS: Your Honor, I agree that that
25 charge would be sufficient and I withdraw my

1 proposed requests.

2 THE COURT: All right. Now, insofar as the
3 others are concerned, as to, you know, like 21, 20,
4 19, 18, 17.

5 MR. BOGGS: Your Honor, I'm sure on 21 the
6 credibility issue of an informer will be addressed
7 by your general charges.

8 20 doesn't apply.

9 18 should be covered.

10 THE COURT: All right.

11 MR. BOGGS: Does Your Honor intend to charge on
12 entrapment? Mr. Harris raised it. So I'll withdraw
13 that one.

14 THE COURT: Well, I'm just nodding my head that
15 I have this. I'm looking at it.

16 MR. BOGGS: I'm sorry.

17 What about number 17?

18 THE COURT: Yes, sir.

19 Well, some of that language in there, in
20 looking at those cases, I guess the parenthetical
21 language is really not -- does not come from that
22 case. That's something that's been added somewhere
23 along the line.

24 MR. BOGGS: Yes, sir, Your Honor, and I wasn't
25 asking about the specific. I just meant in general

1 are you going to charge the jury on the theory of
2 entrapment?

3 THE COURT: Yes, sir. It's part of the case.

4 MR. BOGGS: Yes, sir.

5 And on the aider and abetter, specificity of
6 mere presence, Your Honor, that's my number 12, Your
7 Honor.

8 THE COURT: Yes, sir, that's in my charge.

9 MR. BOGGS: Your Honor, I think that covers all
10 my requests, and I appreciate your time.

11 THE COURT: All right. As to those, Mr. Wall?

12 MR. WALL: As to -- which ones did you --

13 THE COURT: Well, Number 12, the mere presence,
14 as to an entrapment charge.

15 MR. WALL: Regarding entrapment, I had, based
16 on the first witness where the enticement language
17 came out, approached Mr. Harris and asked if he was
18 pursuing an entrapment defense. Because, if so, I
19 was going to frankly, Your Honor, ask for much more
20 leeway on showing predisposition. And it's my
21 understanding, and I confirmed with him again this
22 morning, I don't believe he's pursuing an entrapment
23 in this case.

24 THE COURT: Well, I am --

25 MR. WALL: I understand, yes, sir.

1 THE COURT: You know, Mr. Wall, one thing that
2 I charge from the evidence that's been presented.

3 MR. WALL: Yes, sir.

4 THE COURT: And, you know, Mr. Harris didn't
5 submit one. And there are other charges that I will
6 give that probably are not submitted, because I
7 think it's my obligation to charge the law of this
8 state as it applies to the facts that are presented.

9 Now, the fact that a case has warts on it and
10 that I wouldn't give you any further leeway anyway
11 really has nothing to do with it. You deal with the
12 case that you have brought to you by the agents that
13 made it. You know, unfortunately we all have to do
14 that. And if they are not very clear in what they
15 have done, and that's part of the case, then so be
16 it. You know, you have to deal with what you are
17 dealt.

18 MR. WALL: Your Honor, I would also inquire as --
19 I had no specific charges to hand up. I would
20 inquire as to whether as part of His Honor's normal
21 charge a charge on accomplice liability would be
22 included.

23 THE COURT: I haven't included that, no, sir.

24 MR. WALL: Your Honor, we would request that.
25 We believe that that's merited in this case, and

1 under the two persons charged with principal
2 offenses and can also be charged under accomplice
3 liability, hand of one, hand of all.

4 THE COURT: What do you gentlemen have to say
5 about that?

6 MR. BOGGS: Well, judge, about an hour ago when
7 we were sitting here, you offered to let everybody
8 bring to your attention any charges. I let him hold
9 mine for -- hold my charges for an hour to review
10 and now he brings this up. I would oppose it, Your
11 Honor, just based on that alone and the fact that it
12 may readily apply to one and not mine.

13 THE COURT: I think that my charge that I have
14 read says that two or more persons may be guilty of
15 that. I'm going to charge -- I'm not going to
16 charge that particularly.

17 MR. WALL: And I would inquire, Your Honor, as
18 to His Honor's charge on the conspire section of the
19 statute.

20 THE COURT: You have heard my charge.

21 MR. WALL: Yes, sir.

22 THE COURT: I gave you my entire charge in that
23 regard. We have tried to put it in plain English
24 now rather than making these things totally
25 incomprehensible, and that's -- that is my charge as

1 I have given it.

2 MR. WALL: Yes, sir.

3 THE COURT: Now, gentlemen, insofar as the form
4 of verdict is concerned, and I'm going to instruct
5 the jury, or they will be instructed, that if they
6 do not find that the State has proven that there was
7 a distribution of 400 grams, or more, of
8 methamphetamine, then they would return a not guilty
9 verdict.

10 Do y'all have anything in regards to the amount
11 that you want me to particularly do anything with,
12 or do you just want a verdict of guilty or not
13 guilty?

14 MR. HARRIS: Your Honor, it's an unusual case,
15 but it seems to me from the evidence before the jury
16 that if the State has proven anything, they have
17 proven either an attempted sale, they have proven a
18 delivery, or they have proven actual or constructive
19 possession. Because there is a possibility that the
20 jury could from the evidence find there was no sale,
21 and it is possible they could find there was no
22 delivery, it would then be possible they could find
23 that either or both defendants actually or
24 constructively possessed an amount. Because the
25 jury could base a verdict on trafficking by

1 possession, I think lesser included offenses would
2 be appropriate, including possession with intent to
3 distribute.

4 THE COURT: How about the case of the State
5 v. Raffaltdt in that regard?

6 MR. HARRIS: Well, I'm aware that there are
7 cases that say that when the evidence is specific as
8 to one particular level of trafficking, that
9 trafficking only should be submitted.

10 There are other cases that say that --

11 THE COURT: Give them to me.

12 MR. HARRIS: Well, I don't have the case.

13 THE COURT: I mean, State v. Raffaltdt, if it is
14 a trafficking case, then you're not entitled to a
15 PWID charge. I think that is certainly -- I can
16 pull that up here and read it to you.

17 MR. HARRIS: Your Honor, I concede that this
18 case, having been tried under 375, there --
19 unfortunately I think the State does not have -- we
20 do not have the same language that's included in
21 370.

22 Of course, in 370 there is specific language
23 that says that when trafficking is based upon
24 possession, that intent to distribute is a lesser
25 included offense. And I concede that that language

1 is not in 375. I'm not for a minute saying that.

2 THE COURT: Well, the Raffaldt case, which is
3 456 S.E. 2d 390, that's a 1995 case, says if the
4 amount -- this was cocaine or any mixture containing
5 cocaine, is 10 grams, or more, the trafficking
6 statute is applied. That is where all the evidence
7 indicates the defendant was dealing in quantities of
8 cocaine over 10 grams in connection with criminal
9 activity covered by the trafficking statute, the
10 defendant is only entitled to charges on
11 trafficking, not distribution or possession.

12 MR. HARRIS: Understanding the court's ruling,
13 Your Honor, I would ask that the court consider
14 including as alternate forms of verdict a
15 defendant's finding as to a specific amount of
16 weight --

17 THE COURT: I can do that.

18 MR. HARRIS: -- to be applied.

19 THE COURT: I can do that.

20 MR. HARRIS: The different levels of
21 trafficking.

22 THE COURT: Yes.

23 MR. BOGGS: Your Honor, I agree with the citing
24 of the case law as it applies to the PWID charge.

25 I would join in Mr. Harris' request and also I

1 want to -- I don't know how the jury verdict forms
2 are going to be. Are they going to be two separate
3 or will it have two separate sections?

4 THE COURT: It will be two separate as to -- I
5 mean, these defendants are separate.

6 MR. BOGGS: Yes, sir, and I just want to make
7 sure.

8 THE COURT: Yes, sir, it will be -- it will be
9 separate.

10 MR. BOGGS: And, Your Honor, as a matter of
11 course, to protect the record, again, back to my
12 motion for severance at the beginning of the trial,
13 I would be remiss if I didn't bring up that the --
14 because my motion was denied, it affected how my --
15 it may have affected how my client decided whether
16 to take the stand or not in terms of --

17 THE COURT: Now, I have gone over --

18 MR. BOGGS: Yes, sir.

19 THE COURT: -- his Fifth Amendment Rights with
20 him, Mr. Boggs.

21 MR. BOGGS: Yes, sir.

22 THE COURT: And I think that I have ruled on
23 your motion.

24 MR. BOGGS: Yes, sir.

25 THE COURT: Now, if you are trying to tell me --

1 you know, these are all things that he takes into
2 consideration. The motion has been ruled upon and
3 it's part of the record. His Fifth Amendment Rights
4 are part of the record.

5 Now, if you had something that you wanted to
6 tell me about that, I wish you would have told me
7 that then. I'm going to be glad to listen to you
8 now, but if you want him to take the stand or
9 testify, or if he wants to take the stand and
10 testify, I will be glad for him to.

11 MR. BOGGS: No, sir, I just wanted to protect
12 the record as to -- and that's why earlier, Your
13 Honor, I brought it to your attention that there
14 would be a motion. I understand the court's --

15 THE COURT: Let me hear from you then.

16 MR. BOGGS: Well, Your Honor, I just think that
17 I need to put on the record that it did factor into
18 my client's decision. He is not changing his
19 decision. He understands his Fifth Amendment
20 Rights, but it did factor into his decision that
21 because the cases weren't severed, that the idea of
22 two attorneys cross-examining him weighed in his
23 decision, but that all in all he understands he
24 still has the right to take the stand. And he does
25 not wish to pursue that right today. And that's all

1 I wanted to put on the record, Your Honor, in light
2 of your previous ruling.

3 MR. WALL: Your Honor, I would ask one thing.

4 THE COURT: All right, sir.

5 MR. WALL: With regard to the audio tape that
6 has the variable speed to it, I would ask that in
7 the event the jury, for whatever reason, chooses to
8 listen to that and has difficulty controlling that --

9 THE COURT: Well, they are going to listen to
10 it out here.

11 MR. WALL: That's what I --

12 THE COURT: There is no way that I can allow
13 them to control that. So as a result, if they want
14 to hear that tape, they will send that tape back out
15 and then I will have it replayed for them out here.

16 MR. WALL: That's what I wanted to --

17 THE COURT: That would be explained to them.

18 MR. WALL: That's what I wanted to be able to
19 tell them. I wanted to be sure I'm correct.

20 THE COURT: Yes, sir.

21 MR. HARRIS: Your Honor, just for the sake of
22 clarity, back to the form of verdict, we understand
23 the form of verdict to be either not guilty or
24 guilty of trafficking more than 10, or trafficking
25 more than 28, and etcetera, is that correct?

1 THE COURT: Yes, sir, that's what I'm working
2 on right now, to get my -- and I'm going to read it
3 to you and I'll get my clerk to go type it up.

4 All right. Form of verdict as to each
5 defendant, and they will be separate verdicts, "we,
6 the jury, find the defendant guilty of trafficking
7 in methamphetamine." And then I am placing a blank
8 left of each level:

9 10 grams, or more, but less than 28 grams;
10 Or, 28 grams, or more, but less than 100 grams;
11 Or, 100 grams, or more, but less than 200
12 grams;
13 Or 200 grams, or more, but less than 400 grams;
14 Or, 400 grams, or more.

15 And I will tell them that if they find the
16 defendant guilty of trafficking in methamphetamine,
17 that they would make a determination as to the
18 weight of the drug that they unanimously found, or
19 not guilty.

20 MR. WALL: Your Honor, I don't want to try the
21 court's patience.

22 THE COURT: You are not.

23 MR. WALL: I would object to that form. I
24 believe that by -- that that could be accomplished
25 by asking them to record an amount that they find

1 him guilty of, because I don't believe that there is
2 any -- while there may be -- I don't believe there
3 is any question that it's over more than 400 grams.

4 THE COURT: That's a good argument for you to
5 make.

6 MR. WALL: There has been no evidence of that.

7 THE COURT: That's great argument for you to
8 make.

9 MR. WALL: Even if there is some evidence, I
10 don't believe that -- there is certainly none that
11 it's cut in half. I mean, we had an expert opinion
12 that it was 450 grams.

13 THE COURT: Well, I charge them that an expert,
14 that they can believe it or disbelieve it.

15 MR. WALL: Yes, sir.

16 THE COURT: Just like any other witness.

17 MR. WALL: Yes, sir.

18 My concern is, Your, Honor that by it being set
19 out in those particular levels, 10 to 28, 28 to 100,
20 100 to 200, it would not take, I believe, a rocket
21 scientist on the jury to determine that those are
22 several different levels of crimes, and, therefore,
23 allow them to basically compromise on a lesser
24 included offense.

25 I think if there is a question about the

1 amount, if they record that -- if they find him
2 guilty, if they record that they find them guilty of
3 trafficking and put that amount beside the
4 trafficking, then the proper crime would be able to
5 be assessed by that. They would have found them
6 guilt of trafficking. If he finds him guilty of
7 trafficking 125 grams of methamphetamine, then I
8 believe we could obviously take from that that he
9 was he, or both, or any of them, were convicted of
10 trafficking 100 to 200 grams of cocaine.

11 THE COURT: Your objection is noted.

12 MR. WALL: Thank you, Your Honor.

13 THE COURT: All right. The State will open.
14 Then the defendants will have the final arguments.

15 And I'll allow you gentlemen to rest on the
16 record in front of the jury.

17 MR. BOGGS: Thank you.

18 THE COURT: Let's bring our jury back, Mr.
19 Nesbitt.

20 (The following takes place in the presence of
21 the jury panel)

22 THE COURT: Polling of the jury, by the State?

23 MR. WALL: Waived, Your Honor.

24 THE COURT: By the defendants.

25 MR. HARRIS: Your Honor, Defendant Gonzales

1 does request polling.

2 THE COURT: All right, Madam Clerk, would you
3 please poll the jury.

4 THE CLERK: Ladies and gentlemen of the jury, I
5 will pose a question to you, after which I will call
6 your name individually. At that time you will stand
7 and respond to my question, the question being have
8 you read, watched or heard any news reports or had
9 any discussion with anyone in reference to this
10 case.

11 Ezell?

12 A No, ma'am.

13 THE CLERK: Just respond by saying yes or no.

14 A No.

15 THE CLERK: Wyatt.

16 A No, ma'am.

17 THE CLERK: McDaniels?

18 A No, ma'am.

19 THE CLERK: Vaughan?

20 A No, ma'am.

21 THE CLERK: Griffin?

22 A No, ma'am.

23 THE CLERK: Hammond?

24 A No, ma'am.

25 THE CLERK: Oglesby?

1 A No, ma'am.

2 THE CLERK: Cobb?

3 A No, ma'am.

4 THE CLERK: Sullivan?

5 A No, ma'am.

6 THE CLERK: Vickers?

7 A No, ma'am.

8 THE CLERK: James?

9 A No, ma'am.

10 THE CLERK: Young?

11 A No, ma'am.

12 THE CLERK: Alverson?

13 A No, ma'am.

14 THE CLERK: Your Honor, the jury has been

15 polled.

16 THE COURT: Thank you, ma'am.

17 THE COURT: Mr. Boggs, anything further from

18 you?

19 MR. BOGGS: No, Your Honor.

20 THE COURT: All right. Ladies and gentlemen, I

21 apologize for keeping you in the jury room for this

22 period of time, but I'll give you an explanation

23 about that in just a moment.

24 All right. We are now ready to move into the

25 defense case.

1 Mr. Harris.

2 MR. HARRIS: Your Honor, the defendant Gonzales
3 rests.

4 THE COURT: Mr. Boggs.

5 MR. BOGGS: Your Honor, the defendant Josh
6 Shelhamer rests.

7 THE COURT: Ladies and gentlemen of the jury,
8 the defendants have rested their cases. And, as
9 such, what remains in this case are the closing
10 arguments of the lawyers and then my charge or
11 instruction on the law that applies to this case.

12 One of the reasons that I have had you in the
13 jury room for this period of time is in preparation
14 for those matters, because certain things have to be
15 done prior to entering into that process.

16 We are now ready to begin that process of
17 closing arguments. And as we enter into the closing
18 arguments, I want you to give the lawyers your
19 undivided attention, because what they have to say
20 to you is extremely important. However, I want to
21 remind you that what they say does not represent
22 evidence in this case. The evidence in this case
23 has come from the testimony of the sworn witnesses
24 who have appeared on this witness stand, together
25 with any other evidence that's actually been

1 introduced into the trial of this matter.

2 Once again, give the lawyers your undivided
3 attention, but if they say anything that you do not
4 feel agrees with the testimony and evidence, then,
5 of course, you will follow your recollection as to
6 what the testimony and evidence has revealed.

7 Also, if the lawyers make any comment as to the
8 law in this case and it differs with what I instruct
9 you that the law is, then, of course, you are sworn
10 to follow the law as I give it to you.

11 The State will have the opening argument and
12 then each defendant will have a final argument.

13 Solicitor.

14 MR. WALL: Thank you, Your Honor.

15 THE COURT: Yes, sir.

16 MR. WALL: "I'm doing business." That is what
17 Michael Gonzales told his brother when he pulled up
18 asking about the car title. You heard that from
19 Johnny Solomon, in cross-examination. "Go on, I'm
20 doing business."

21 Mr. Shelhamer, when asked by the buyer, who
22 turned out to be an officer, "do you have the stuff?
23 Yeah." Hands it to him. You heard the description
24 of how it was packaged. The small block wrapped in
25 duct tape. He hands it to him through a window.

1 And then when he asked to weigh it, goes around,
2 weighs it in the seat and Mr. Shelhamer says "put it
3 in the floor. You will get a better weight there,"
4 or something to that effect. "It will weigh better
5 on the floor." That really tells you all you need
6 to know about this case. I will go into much more
7 detail, of course, but that really tells you all you
8 need to know about this case.

9 I appreciate the careful attention that you
10 have paid to this case. You have all done that and
11 watched it carefully. You had an audio tape to
12 listen to twice, a great deal of questioning by me
13 and other attorneys, and you were very patient
14 toward or through all that and paid attention and I
15 thank you very much for that.

16 At the beginning of this case I told you that
17 the State stood here to accept the burden of proof
18 beyond a reasonable doubt the elements of this case,
19 and that we would present the evidence to do so, and
20 we have. And I'll go through in a moment the
21 elements and how they have been shown.

22 You heard the audio tapes, the telephone
23 conversations between Michael Gonzales and Johnny
24 Solomon. It couldn't be more straightforward that a
25 transaction was being set up for methamphetamine and

1 that Michael Gonzales was more than ready to sell
2 him a pound of methamphetamine. The only question
3 Mr. Gonzales seemed to have on that tape was a
4 little concern about location, how it was going to
5 be done. When he asked about the money, he wanted
6 to be sure the money was right, and all of that, but
7 he was more than happy to sell the methamphetamine
8 and said that he had.

9 Any idea that he was lured into it, Gonzales
10 was, or enticed into it, it simply doesn't hold
11 water. I mean, he was somehow entrapped into it.
12 This was a man more than willing. You would have to
13 judge his predisposition to see if he was entrapped.
14 More than willing. He had the predisposition to
15 sell the drugs and to sell in this case the
16 methamphetamine.

17 The only sort of trick that was involved has to
18 be done in all undercover cases. You naturally do
19 not tell them that you are working as an undercover
20 informant, that you are involving the police. Sure,
21 he didn't know that. That's not luring him. These
22 not enticing him. The only way that he had -- that
23 that had to be done was -- again, he was concerned
24 about location. He wanted it to be done at his
25 house or at another place, and so you hear a lot of

1 conversation about location and about getting him to
2 come to agree to a location, and it's ultimately the
3 Little Cricket that he selects. That doesn't hold
4 any water at all, but I wanted to be sure that I
5 covered that with you in case it's argued.

6 The State, of course, in this process goes
7 first. I will argue. The two defense lawyers will
8 argue. I will not have the opportunity to get up
9 and argue after them, and that's the process. I
10 want you to understand that, because my failure to
11 get up and argue or comment doesn't mean that I
12 agree with them. It just simply means that I don't
13 have the opportunity to do so. A little bit later
14 in my closing -- the only thing that I can do,
15 therefore, at this point is to try to attempt to
16 anticipate possible things they may say to you in an
17 attempt to deal with them preemptively. That's the
18 only way that I can do that.

19 Now, one or two things commonly happens there.
20 Things I bring up, someone may say, well, of course,
21 Mr. Wall must be concerned about that or he wouldn't
22 have raised it. I'm not concerned about it. Me
23 raising it doesn't mean that I buy into it. It
24 simply means the only thing I can do is try to
25 anticipate it and deal with it now, because I won't

1 have the opportunity to do that later.

2 Having said that, I want to go through the
3 elements with you and the elements that we discussed
4 at the beginning and what I believe the judge will
5 charge you at the end of this trial. And I'm going
6 to do so by putting it up on the screen. If you
7 will forgive me, it's handwritten.

8 We obviously have to show that it's a
9 trafficking amount. That's been for you to
10 determine, but that's certainly been demonstrated to
11 you in this trial. We had an expert, a forensic
12 chemist, whose qualifications were not objected to,
13 and he said that in his expert opinion it was
14 methamphetamine in excess of 400 grams. The exact
15 amount is on your report. I believe it's 440 grams,
16 but in excess of 400 grams.

17 Now, there was some question on
18 cross-examination about whether or not a liquid had
19 seeped into it, or so forth. He testified that the
20 object was dry, that did not affect his opinion.
21 And again, the only expert opinion we have on the
22 matter, and they agreed to his qualifications, is
23 over 400 grams. So that's really not an issue.

24 We have to prove that it's methamphetamine.
25 Again, the expert testified to that, that that was

1 clearly set forth. I don't believe that's an issue.

2 For jurisdictional purposes we have to prove
3 that it occurred in Spartanburg County. That was
4 testified to by one witness to cover that. There is
5 no question about that.

6 Then we go to the definitions of trafficking
7 itself. We know we have a trafficking weight. We
8 know that it's methamphetamine. We know that it
9 occurred in Spartanburg County. Those elements are
10 met.

11 The definition of trafficking itself, there is
12 several ways that trafficking can be proved. They
13 are all alleged in the indictment. There are a few
14 that I'm going to hone in on in this trial.

15 One is possession. If you possess a
16 trafficking amount, you are -- knowingly possess
17 that, then you are guilty of trafficking;

18 Or, if you deliver a trafficking amount;

19 Or, if you sell it;

20 Or, if you aid, or abet, or attempt, or
21 conspire to do so.

22 One thing -- and I don't want to insult you by
23 going over this so carefully, but one thing, because
24 I know that you can follow it, but the one thing I
25 want to be clear about and be sure that you

1 understand is that all of these have or's behind
2 them. We don't have to prove that they possessed
3 it, they delivered it, they sold it. We simply have
4 to prove one of these.

5 Possession. Possession can be proved by actual
6 or constructive possession.

7 Constructive possession -- or rather actual
8 possession is just what it sounds like, you actually
9 got it on your body. You physically possess it.
10 That's pretty straightforward.

11 Constructive possession is you exercised
12 dominion and control or you have a right to exercise
13 dominion and control over that substance. So to be
14 in constructive possession, you don't really have to
15 be anywhere near the drug in question. As long as
16 you have a right to control it and have dominion and
17 control over it, you're in constructive possession
18 of it. If a person -- if I know right now that I
19 have 400 grams of methamphetamine in my house under
20 my bed and I'm miles from my house, I'm in
21 construction I have possession of that. It's in my
22 house. It's mine. I have got control over it.

23 As to Mr. Gonzales and constructive possession,
24 he arranged the deal. That's clear from the audio
25 tapes. He arranged the specifics of it, the amount -

456

1 \$13,500.00 - the drug that was going to be sold, and
2 there was much conversation about where it would be
3 done. Let's do it at the Hot Spot. What about the
4 Hot Spot? Can you come to my house? No, they are
5 not going to come to your house. Finally he
6 suggested the Little Cricket and they agreed upon
7 the Little Cricket. He clearly was arranging the
8 deal. He said he would bring it to the location.
9 He brought it to the location. He went inside, as
10 planned, and he was told by Johnny that he had to go
11 out because the buyer wanted to see it, that he had
12 to come back out. The deal couldn't take place in
13 the bathroom. He drove his car over beside the
14 buyer's vehicle. He got out of the car. He met the
15 buyer and said "I have to look like I'm doing
16 something." He got out of the car. That's
17 important, I think. He got out of the car, met the
18 buyer, was introduced by Johnny, and then gets an
19 air hose and pulls it over and says "I have got to
20 look like I'm doing something." He separating
21 himself a little bit from what's going on.

22 He then, when asked about the stuff, he
23 directed the buyer to see his -- he directed the
24 buyer to his vehicle and the person in it. So he
25 gets out, says "I have got to look like I'm doing

1 something." Then he's told -- then he's asked "do
2 you have the stuff? Do you have it? He's got it."
3 Points to his vehicle that he drove there and to
4 Josh Shelhamer, who is in the vehicle and "you can
5 get it from him."

6 He gave approval to weigh it. He's asked
7 again, the buyer, who is the officer, is dealing
8 with him and looks at him directly five feet from
9 him, or so, and says "can I weigh it?" Says -- he
10 doesn't say -- well, let me back up for a moment.
11 When initially asked "do you have the stuff," he
12 didn't say -- because we are going to get into this
13 withdrawal idea later, he didn't say what are you
14 talking about, I don't know. I'm just coincidentally
15 here to get gas at the time that we agreed to sell a
16 pound of methamphetamine. I don't know what you are
17 talking about. He said "he will show it to you."

18 When asked "can I weigh it," again, he didn't
19 say man, what are you talking about, I'm just trying
20 to get this air compressor hose dragged over here.
21 He said "he will let you weigh it."

22 Now, we will get to that later, but is that a
23 person who has withdrawn from his plan? No, that's a
24 person who is directing the plan. That's a person
25 who wanted to sell the drugs in the privacy of a

1 bathroom, was told he couldn't do that. Didn't --
2 obviously didn't want to do it out in the broad
3 daylight himself, so he gets out to look like he's
4 doing something and directs Shelhamer to do it. Is
5 that uncommon? Ask yourself would that be uncommon
6 for the supplier to want to separate himself a
7 little from the transaction that's going on? Not
8 withdrawing. Trying to separate himself and
9 withdrawing is two very different things. He's just
10 backing off a few feet and kind of from the
11 sidelines saying "he will let you do it. He will
12 let you weigh it," but clearly involved.

13 Michael Gonzales had dominion and control over
14 that methamphetamine, or certainly had the right to
15 exercise dominion and control over that
16 methamphetamine. The methamphetamine, as discussed
17 on the audio tapes, was his. He was going to bring
18 it. The methamphetamine was brought. It was
19 brought in his vehicle. There was a person in his
20 vehicle who he directed the buyer to. It was his
21 methamphetamine to exercise dominion and control
22 over it. On that alone, on what I have presented to
23 you, you could convict Michael Gonzales of
24 trafficking in methamphetamine over 400 grams and
25 not go any further. That alone he could be

1 convicted.

2 Now, as to Mr. Shelhamer in possession, we are
3 still on possession, he had it in his hands. He
4 handed it to the buyer. Now, there was some
5 question about whether he pulled it out of his
6 pocket, whether he pulled it from under his leg, or
7 beside the seat. One witness seemed certain on
8 that. The other witness didn't seem certain on
9 that. For my purposes that really doesn't matter
10 whether he pulled it out of his pants, or from
11 beside his pants, or wherever he pulled it. He had
12 it. If you have it in your hands, how much more
13 possession can I have of this sheet of paper than
14 having it in my hands? There is no issue regarding
15 him possessing it. He clearly had possession.

16 The issue that I believe will be argue is
17 whether he had knowledge of what he possessed,
18 whether he knew that what he was possessed was, in
19 fact, methamphetamine. You can for circumstantial
20 evidence and through inferences you may determine
21 that he had knowledge of what he was doing and what
22 was going on. And I want to -- I'll back around
23 here for a moment. I want to talk about that for a
24 minute. It seems to be -- and, again, I can only
25 anticipate what they will argue, that, well, I had

1 this substance that was wrapped, that was mushy,
2 that was obviously a drug. Obviously some type of a
3 drug deal. I mean, there has been no -- certainly
4 no evidence presented, no testimony presented that
5 Michael -- Josh Shelhamer thought he was handing a
6 box of donuts to the buyer or anything else. It was
7 clearly some type of drug.

8 Now, when determining knowledge or specific
9 intent, there are two real ways to do it. One is if
10 a person actually says what they intend to do, and
11 that would be rare in a case like this. If he says
12 here, Mr. buyer, I am presenting you with the
13 methamphetamine, please take it from me. Do you
14 really expect that to happen in a drug transaction
15 where coded language is being used, they are trying
16 to be somewhat covert about it? So do you expect to
17 hear the specific intent of, or have it be testified
18 to by an officer that Mr. Shelhamer said here is the
19 methamphetamine, please take it. We can't determine
20 Mr. Shelhamer's intent by some sort of magical or
21 scientific process. You know, we can't access his
22 brain to determine what is in someone's mind and
23 what their specific intent is.

24 So what's the other way to determine intent?
25 You can determine it by their conduct, by their

1 conduct in the context they were in, in the
2 situation that was going on. By their actions. And
3 you may infer from that, if you choose to do so,
4 that he had knowledge of what he was doing.

5 Again, going over the facts briefly, he drives
6 over with Michael Gonzales. Michael Gonzales is
7 going to do a \$13,500.00 drug deal. He has Josh
8 Shelhamer with him. Why does he have Josh with him?
9 You heard Johnny say he wouldn't be alone. Does he
10 have him with him so they can talk about the weather
11 on the way over there? Does he have him with him
12 just because he's hanging out? Is that who he's
13 taking with him to do a 13-5 drug deal? I just ask
14 you to draw upon your common sense and ask if that's
15 reasonable to believe, if Josh Shelhamer just drove
16 over there with him knowing nothing.

17 Now, the only two people that know what were
18 actually in their minds is Michael Gonzales and Josh
19 Shelhamer. They are the only two people that know
20 what the actual conversations between them would be.
21 But, again, without that, you can determine, based
22 on the conduct, based on the situation, what you
23 infer or what you conclude happened. And to repeat,
24 and I apologize, does it make any sense at all that
25 a man who is going to do a large drug deal takes

1 along with him somebody that knows nothing about it,
2 who is completely innocent, who would be, I submit,
3 a liability? Or would he take somebody that knows
4 exactly what's going on, somebody who could assists
5 him, if necessary? As it did become necessary in
6 this case. Josh handed the drugs. He's asked "do
7 you have the stuff?" Does he answer what stuff,
8 what are you talking about? No, he says "yeah,
9 right here." Hands it over. He goes around for it
10 to be weighed. Again, asking you to draw upon your
11 common sense. If it's an Amway product, do you
12 weigh it? No. He knows what it is and he knows
13 what's going on.

14 The argument of well -- perhaps the argument is
15 I knew it was illegal. I knew it was drugs. I just
16 didn't know it was methamphetamine. It was wrapped
17 up. Ladies and gentlemen, again, that doesn't hold
18 water. If that's true, then he has just created a
19 patent and should franchise the perfect way to do
20 drug deals. Just wrap it up with duct tape and if
21 you get caught, say I knew I was doing something
22 wrong, but I didn't know what it was. Didn't have
23 any idea what it was. You would just walk every
24 time. Does that make any sense to you? I would
25 submit that it doesn't.

1 Another way, as I discussed, is delivered.
2 Now, the meth was delivered. It was handed to the
3 buyer. The buyer took it around the car, as the
4 officer -- the meth had been delivered. I picked up
5 from some cross-examination, and I don't know if
6 there is going to be argument about whether or not
7 the delivery actually took place. It was handed to
8 the buyer. He took it outside the car and took it
9 around the car. The officer had possession of it.
10 It had been delivered. I don't think there was any
11 question about that, or there shouldn't be.

12 Now, as to Mr. Shelhamer and your ability to
13 convict him under this section. He delivered the
14 meth by handing it to the buyer. Now, even if you
15 think there is an issue about completion of the
16 delivery, and there is not, I submit, but even if
17 you think there is an issue about whether the
18 delivery was completed, he certainly attempted to do
19 so. And that goes back to what we covered earlier,
20 there are the different elements that you can
21 convict under, and you can find that they actually
22 completed that element, or you can find that they
23 aided, abetted, or attempted, or conspired to
24 complete that element. So again, the meth was
25 delivered. The officer had it. If there is any

1 question in your mind about that, then certainly you
2 could find that there was an attempt to do so.

3 As to Mr. Gonzales, again, and I won't go back
4 through the whole series of events, but he certainly
5 aided. And he did that by arranging the deal, by
6 apparently obtaining the drug, is what he said he
7 was going to do on the tape, said he either had it
8 or he was going to get it, driving the vehicle there
9 and directing the operation as it occurred. So
10 while he didn't actually hand deliver the drugs.
11 There is no question about that. He did not hand
12 the drugs to the officer. We are clearly not
13 alleging that. He certainly aided in the delivery
14 of the drugs. Aid, really, frankly, is such a --
15 not enough to cover what he did. He certainly
16 aided, abetted, and conspired to do that.

17 Beyond that is the sale. Cash did not change
18 hands. We are not alleging that cash changed hands.
19 Didn't really want the cash to change hands. From
20 the officer's own testimony, he did not have
21 \$13,500.00. It was going to have to be what they
22 call a flash roll to make it look like he had that
23 money, if they asked him about it.

24 Johnny Solomon testified that based on his
25 relationship with Michael Gonzales, his knowledge of

1 him, that Michael Gonzales had trust in Johnny
2 Solomon, and that the money they didn't think was
3 even going to be counted at the scene. When he
4 talked with Michael on the telephone, you hear him
5 say "I won't get my cut out." Johnny, "I won't get
6 my cut out until you get it back to your house to
7 count it." I asked him about that on the stand. I
8 said is that -- do you think he was going to count
9 it there. He said no. Again, you know, Mike is not
10 wanting to draw attention to himself, not wanting to
11 stand out in the parking lot counting out
12 \$13,000.00. He had a relationship and trust with
13 Johnny Solomon such that he trusted the money would
14 be there. And that all goes toward -- excuse me,
15 I'm going to pull this off. That all goes toward
16 Johnny Solomon and his ability to contact and make
17 such a high weight purchase from Michael Gonzales.
18 At any rate, the sale did not occur, but you can
19 find, as I have discussed, that they certainly
20 attempted and conspired to sell the drugs.

21 Again, every one of those elements does not
22 have to be proven. Every element of one has to be
23 proven. So every element of possession has to be
24 proven to find him guilty under that, and I have
25 gone through that for you. Every element, if you

1 chose to find him guilty under delivery. When I say
2 him, I mean them, both of them. Now, I have to
3 prove every element of that, or every element of an
4 attempt to sale, but I don't have to prove
5 possession, delivery, and sale.

6 Again, I ask you to focus on the facts. Focus
7 on the facts that have been presented to you and the
8 sworn testimony that you heard from this witness
9 stand, as well as the evidence. I can only attempt
10 to anticipate what they may raise. They don't have
11 to raise anything. The judge is clear on that.
12 They don't have to put forth a defense. The burden
13 is on the State.

14 One smoke screen may be that he was set up,
15 that Michael Gonzales was set up, lured, or enticed.
16 I have covered that already. Michael Gonzales on
17 that tape was happy to sell that. That wasn't the
18 issue. He wasn't happy that they wouldn't come to
19 his house. They had some discussions about where
20 are we going to do the deal. That's where all the
21 talk seemed to take place, but selling the meth,
22 there was no problem. This is not somebody that was
23 taken off of a playground and lured into selling
24 methamphetamine. It's just not true.

25 That somehow Mr. Gonzales withdrew from the

1 deal. There is no, no, evidence that he withdrew
2 from the deal. He drove to the scene when he was
3 supposed to be there. He went inside, like he was
4 supposed to. But the meth was not produced inside.
5 Didn't go into the bathroom. The transaction never
6 took place inside. Mr. Solomon's instructions were
7 from the police to get him back outside. It has to
8 go down out here. So he pulls the car around so the
9 buyer can see it right beside where the buyer is.
10 Gets out, as we have already been through. He
11 doesn't get out and leave and just say I'm out of
12 here, I'm just going to leave my car here and I'm
13 withdrawing from this thing completely. He goes
14 about five feet from it, pretends to do something,
15 which is not uncommon. Just like Ken Hancock, the
16 officer, he was pretending to do something so that
17 he wouldn't draw attention to himself. If you will
18 remember, he went out and raised the hood. They
19 were doing some surveillance and he wanted to
20 pretend to do something and not draw attention to
21 himself. Really it's the same way is what Michael
22 Gonzales did. He was just trying to pretend to do
23 something. Standing five or six feet, however far
24 he was from the vehicle, he says when asked "do you
25 have the stuff? He's got it in the car," in Michael

1 Gonzales' car. "Can I weigh it? He will let you
2 weigh it." He's close enough to the transaction in
3 his directives. He's close enough to comment on the
4 scales. He liked the scales the officer had. Said
5 "where did you get those? Those look pretty good."
6 Is that a person that has withdrawn? No. That's a
7 person that thinks he's smart enough to try to
8 separate himself from the transaction only a little
9 bit to basically stick Josh Shelhamer with the dope.
10 Be a little bit away from it, things go bad, I'm out
11 of here. This was what he did.

12 They may try to make a case about Johnny
13 Solomon, make their case attacking Johnny Solomon.
14 He was paid. When asked -- somebody made the
15 comment in the trial sarcastically the Good
16 Samaritan, Johnny Solomon. I'm not presenting this
17 man to you as an angel, as a boy scout. They asked
18 him about it. He said he wanted to get out of the
19 business. Well, which means he was obviously in the
20 business. I'm not presenting to you a boy scout.
21 He was very truthful in his testimony. He was very
22 candid under a barrage of cross-examination. He had
23 three different lawyers questioning him, multiple
24 times. You saw him get a little frustrated there
25 one time by all the questioning, and he had turned

1 around a couple of times. Was tired. We went over
2 that. He worked from two a.m. that morning and sat
3 through one day waiting to testify, and then did it
4 again the next day that he did testify, and he was
5 nervous. This case is not about Johnny Solomon.
6 It's about what he could testify to and what he did
7 tell you and what he told you truthfully. Now,
8 again, he got -- he did. He got turned around a
9 little bit, a couple of times on cross-examination.
10 And Mr. Harris got up and asked him at one point,
11 and this was at the end, isn't it true that Michael
12 withdrew. I'm not sure Johnny was listening to
13 that. He was turned around in frustration. He said
14 yes. But then Mr. Shelhamer's attorney got up right
15 up after that and asked him is isn't it true that --
16 or that Michael Gonzales from beginning to end was a
17 part of this transaction and participated in it.
18 And he said yes, which was from the evidence what
19 occurred. He never ever withdrew. Withdrawing from
20 it would have been just not showing up, stiffening
21 Johnny. Just not showing up with the dope. How can
22 you drive in there with the dope being withdrawing?
23 How can saying there it is, he will let you weigh
24 it, how can that possibly be a withdrawal?
25 They may raise some issue about the audio tape.

1 I want to touch on this. The audio tape has a
2 variable speed to it. I discussed that with you.
3 If you want to hear the tape again, and I encourage
4 you to, the procedure is going to be, as I
5 understand it, that if you ask to hear it again,
6 it's in evidence, you will be brought out and it
7 would be played again for you from that microphone,
8 because of the difficulties in adjusting the speed.
9 I would ask you not to let that deter you from
10 hearing that, if you want to hear the audio tape
11 conversations. The audio taped conversations, you
12 have to listen to them pretty clear. You can hear
13 Mr. Gonzales. He's clearly participating in the
14 drug deal.

15 Now, the wire, the transmission, is not as
16 clear. We have talked about that from the beginning
17 from the first officer I asked about that. They
18 explained that. I mean, the body wire is basically
19 a security measure. When a loud voice is used, the
20 monitoring officer can hear it and can signal the
21 takedown people in the event there is a problem.
22 The monitoring device does not pick up much, and
23 that was testified to, beyond the defendant -- or
24 not the defendant. Beyond the person who is wearing
25 it, who in this case was Johnny Solomon. I frankly

1 cannot hear a lot on that portion of the tape. You
2 can hear conversation between the officer and the
3 informant when they are in an enclosed vehicle real
4 close, and you can obviously hear Rhett Fox yelling
5 at Johnny Solomon, but he's screaming. You can hear
6 that clearly. And that apparently is what it takes
7 to be heard clearly over that type. There was some
8 discussion -- I want to touch on that for a moment
9 about whether that was unprofessional, professional,
10 and so forth. We don't -- we don't condone that. I
11 talked to you about the language in the beginning,
12 but I ask you to remember also that that was all for
13 show. That was testified to. That language was
14 aimed at Johnny Solomon, who was the informant, and
15 it was meant to make it absolutely clear to anybody
16 in the area that Johnny Solomon was being taken
17 down, taken down pretty hard, because they didn't
18 want to blow his cover. Solomon knew what was going
19 on and he was receiving the brunt of that from Mr.
20 Fox. And that again was to protect his cover.

21 The tape simply is not going to pick up much,
22 unless it's a yell or an enclosed situation in close
23 proximity, as they were in that car. So for them to
24 suggest, as they may, well, if it's not on the tape,
25 it didn't happen, they say these conversations took

1 place, but I don't hear it on the tape, again simply
2 doesn't hold water. It's not really -- the primary
3 purpose of the tape, again, is for safety, officer's
4 safety. And certainly if Johnny Solomon needed to
5 yell, or the officer had needed to yell some signal
6 into that microphone, he would have been able to do
7 so.

8 They may, whether they will or not, I don't
9 know, comment on the fact that there aren't any
10 videotapes or any photographs of the scene. That
11 was explained to you during the trial. Simply this
12 is an undercover operation, covert. It was no place
13 for them to set up. No place for them to set up in
14 order to video it or to take photographs of it. You
15 have Rhett Fox, who can turn around a little bit and
16 see the car as it pulls in. You had Ken Hancock,
17 who was under the hood the whole time to make it
18 look like he was working on the vehicle. If he
19 turned around suddenly and starts taking a few
20 snapshots, that's not going to bode well for the
21 undercover operation. And that explains that.

22 Their age has been mentioned. In opening
23 statements they were referred to as young men, young
24 people, and they certainly -- they certainly are,
25 but that's not a defense. Age is simply -- I mean,

1 it's not. They are young men that were trafficking
2 in over 400 grams of methamphetamine. These were
3 not young men who had a joint in their car, or a
4 couple of joints in their car of pot, or young men
5 experimenting. These were young men involved in a
6 transaction of methamphetamine for \$13,500.00 that
7 they brought to the scene and that they delivered.
8 That evidence establishes Michael Gonzales' guilt
9 and the evidence establishes Josh Shelhamer's guilt.

10 The verdict form that you receive I believe
11 will have different ways, in the event that you did
12 find some issue with the expert testimony of the
13 chemist that was straightforward. I would ask you
14 to pay careful attention to that form. If you do
15 find them guilty, the amount the State has presented
16 is over 400 grams, and that's what we ask you to
17 find Michael Gonzales guilty of, and that's what we
18 ask you to find Josh Shelhamer guilty of. Thank you
19 very much.

20 THE COURT: Mr. Harris?

21 MR. HARRIS: Thank you, Your Honor. Counsel.
22 Madam Forelady, ladies and gentlemen of the
23 jury, we have been at this for three days now. And
24 for three days, as has been since June the 3rd of
25 this year, the prosecutor and the sheriff's

1 department have been dead set on getting Michael
2 Gonzales. And I think if anything has been
3 demonstrated beyond a reasonable doubt by the State,
4 and I would submit to you that this is probably the
5 only thing that has been proven to you to that high
6 standard, has been that the prosecutor and the
7 sheriff's department want to get Michael Gonzales.

8 Why do I raise this issue to you at the very
9 beginning of my comments? Now, when I say get
10 Michael Gonzales, I don't mean somehow they hate him
11 and want to destroy him, or anything like that.
12 What I do mean is, and I think obviously is the case
13 from what you have heard, they wanted to catch him
14 committing a drug crime, and didn't do it, which
15 every witness that has come to the stand has
16 admitted to you. That is the reason why I said time
17 and time again isn't it true that what you wanted to
18 have happened, which was for Mr. Gonzales to act on
19 these preparatory phone calls and come to this scene
20 and hand with his hand a quantity of methamphetamine
21 to an undercover police officer in exchange for
22 money, isn't it true that what you planned to
23 happen, what you hoped to happen, what you set in
24 place and in motion and had an elaborate operational
25 plan posted on your office wall to have happen did

1 not happen, correct? Mr. Deffenbaugh, correct?
2 Investigator Fox, correct? Johnny Solomon? What
3 did each witness answer? The words out of their own
4 mouth that they choke on you are right, Mr. Harris,
5 that didn't happen. It did not happen.

6 Therefore, Mr. Gonzales did not commit a crime.
7 No matter how much they want to believe that he did,
8 no matter how much they want to try to sway you to
9 believe that one has been proven. I'm sorry, no
10 matter how much they want him, they didn't get him.

11 You, the jury, having raised your hand and
12 swore the oath that you did have to recognize that.
13 You can't as a jury in a criminal case give them
14 what they want simply because they want it. They
15 have to have made a proper case and proven it to the
16 required standard in court before they could have
17 it. And I ask you not to lose sight of that.
18 That's why I asked you at the very beginning on
19 Monday to remember Mr. Gonzales is presumed
20 innocent. He's entitled to that presumption of
21 innocence by you, this jury. He did not receive any
22 presumption of innocence by the prosecutor. He did
23 not receive the presumption of innocence by the
24 police. He does receive it at your hands. That is
25 why we are here asking for your judgment. That

1 presumption of innocence cannot be removed and taken
2 away from Mr. Gonzales, unless you are convinced and
3 you deliberate this case in a few moments that the
4 State has presented such convincing evidence that
5 Mr. Gonzales, in fact, committed the crime on June
6 3rd, 2002, that you have no hesitation that you
7 believe that they have proven the case beyond any
8 reasonable doubt, that you accept that the burden of
9 proof on the prosecutor is something more beyond
10 mere suspicion, something beyond probability, but to
11 a certainty, so much so that you have no hesitation
12 to believe Mr. Gonzales, in fact, committed a drug
13 crime on June the 3rd, 2002.

14 This discussion that we have just had is my way
15 of reminding this jury of the concept of bias in the
16 presentation of evidence.

17 Now, His Honor at the very beginning of this
18 case explained to you, because it is such an
19 important concept, that you, the jury, are the
20 judges of the facts of this case. You determine,
21 you determine what was done and what was said and
22 what it means. The police don't determine how to
23 interpret what's said on a tape or what somebody
24 actually said. It is not their role in this case to
25 do what they have attempted to do all along, which

1 is tell you what you ought to think, tell you what
2 you are hearing, tell you what you ought to believe
3 somebody was actually saying, whether they really
4 said it or not. That is not the police's role.
5 They are trying to assume that role, because they
6 have such a craving for Michael Gonzales that they
7 cannot see straight.

8 You, the jury, His Honor has instructed you. I
9 think at one point during the trial yesterday
10 emphasized his instruction to you and will instruct
11 you in a few moments. You, the jury, are the sole
12 judges of what the facts are, of what is actually on
13 that tape or not, what somebody actually said or
14 not, and what they meant by it when they said it.
15 You are the judges of the facts. Not the police.

16 As the judges of those facts, His Honor has
17 instructed you and will instruct you, that you judge
18 the believability and the credibility of the
19 witnesses that you have heard. You judge whether or
20 not, in deciding believability and credibility,
21 whether someone, among other things, has bias. What
22 does bias means? That means that they have a
23 particular point of view that makes -- that clouds
24 their statements, that dictates their motivation.
25 They are not just simply saying as a matter of fact

1 here is what happened. I have no reason to shade it
2 one way or the other, here is what happened. Bias
3 is when somebody has a motivation to say things in a
4 particular way in order to try to persuade this jury
5 how to act or do a certain thing. The motivation
6 and, therefore, the bias in all of the State's
7 witnesses is what I have just talked about. The
8 intense desire to catch Michael Gonzales committing
9 a drug crime, that is the bias. It's the bias on
10 the part of the police when they try to tell you,
11 the jury, what they mean; when they try to tell you,
12 the jury, what is to be heard on this tape; when
13 they try to tell you, the jury, what's in the mind
14 of someone, what someone meant, when they don't
15 know. The reason they keep saying Michael Gonzales
16 got arrested in this thing is because of the bias
17 they have, because they want -- they are not just
18 giving you the facts and letting you decide, but
19 they are wanting to tell you what to think. That is
20 bias.

21 Likewise for Johnny Solomon. The solicitor
22 brings up a very good and valid and very important
23 evidentiary point, and he brings it up because he
24 understands that it is devastating to his case
25 against Mr. Gonzales. I mean, devastating. When

1 Mr. Solomon, who is an individual, that you can
2 judge his believability and credibility, what his
3 motivation is, therefore, what his bias is. Mr.
4 Solomon is an individual that is willing to
5 participate in sting operations, in setups of other
6 people for the police for cash money. And that
7 doesn't stop on June 3rd, 2002. He's got to follow
8 through. What do you think would happen to Johnny
9 Solomon if he didn't follow through and come into
10 this courtroom and get on this witness stand and say
11 what the police line is in this case? Mr. Solomon,
12 true enough not a saint, it would seem, but that's
13 not -- I'm not the judge of him and his character.
14 You can be assured, ladies and gentlemen, Johnny
15 Solomon was not about to let himself slip over into
16 telling the real truth about Michael Gonzales' role
17 in what transpired at that convenience store parking
18 lot on the given date. He came into this courtroom
19 bound and determined to step in line with the police
20 attitude about Mr. Gonzales; we have got to get him,
21 we have got to convince that jury to get him,
22 whether there is proof or not. They arrested him
23 without proof. Why shouldn't they expect you to
24 convict him without proof? But see, Mr. Solomon, as
25 sometimes wonderfully happens in court, it doesn't

1 happen often enough. Mr. Solomon, yes, true, under
2 cross examination, but that is the way we conduct
3 examination of witnesses in a courtroom.
4 Cross-examination is the way that we get at the
5 truth. We determine, maybe sometimes, not all the
6 time, but sometimes through intense
7 cross-examination, we get the truth. Isn't that
8 what we are after? His Honor is going to tell you
9 in a few moments you are seeking the truth. And,
10 yes, Mr. Solomon finally did have to admit that Mr.
11 Gonzales did not participate. Yes, he did admit
12 that, as the solicitor has told you. Yes, he did
13 admit it. Yes, he did bow his head. He almost
14 cried and he did admit that. Why did he admit it?
15 Not because he was tired, not because he was
16 confused, but because every now and then the truth
17 will out, even from a witness that you have to drag
18 it from, but thank God that we can drag it sometimes
19 from them. Isn't that a joy? That one statement by
20 Mr. Solomon is reasonable doubt. There is no doubt
21 about that.

22 I could ask you, ladies and gentlemen, to
23 listen to that tape. I know that they want to say
24 oh, listen. The parts that are damaging against the
25 defendants, we want you to listen to those. And the

1 parts that are not there, that we say are there,
2 just give us a pass on that, because it really was a
3 security measure.

4 Well, they made the tape. They claimed that
5 there was a recording of what was said. They are
6 stuck with it.

7 Now, what happened? What really happened? You
8 know, I questioned some of the witnesses did you try
9 to set up Michael Gonzales, and they just -- they
10 have an allergic reaction to the word setup, like
11 it's any secret. I mean, we all know they are
12 setting him up. They paying this guy to make phone
13 calls to him, getting somebody he trusts so he won't
14 question them. Feeds him a line, tells him what to
15 say, get him involved, cajoling him into making a
16 drug transaction, get him over to a site that we can
17 control and get him to sell us drugs. Well, they
18 are trying to set him up. There is no sense
19 quibbling about the language. That's what they are
20 trying to do. You know, we're all adults here.
21 Most of us. But they embark on this plan, this
22 scheme, to get Michael Gonzales. They are focused
23 on him. There is no question like the laser beam.
24 They come to get him. They are going to try to.
25 And you have heard how they tried to do it. I let

1 you judge what the demeanor; that is, the way Mr.
2 Solomon comes across and takes the very aggressive
3 and like a cheerleader encouraging. You know, this
4 thing well, you are not going to make a living or
5 whatever that is, like a cheerleader encouraging
6 this. Of course, he is being egged on by the
7 police. And you can judge how Mr. Gonzales reacts.
8 I think very quietly, very hesitantly. You judge
9 that, and judge what's there, and then judge what's
10 said on the tape of what actually was supposed to
11 transpire in the parking lot. Listen to it and
12 judge it for yourself.

13 But they are certainly trying to get Mr.
14 Gonzales. They had a plan. They brag about having
15 it on the bulletin board. The plan was. You know
16 it buy now to get Michael Gonzales to come there and
17 with his hand deliver a package that will be an
18 illegal drug and get money for it and they will have
19 sold drugs to an undercover police officer. They
20 can nab him and he's committed a crime and they got
21 him and they drag him into court and convict him.
22 The only problem is it didn't work. It didn't work.
23 It just didn't happen. They admitted it didn't
24 happen.

25 Now, the first plan that they had, what they

1 tried to get Michael Gonzales to do, what they made
2 him believe was going to happen, okay, understand
3 this, not Michael Gonzales, what they made believe --
4 made Michael Gonzales believe would happen was that
5 he would come to a convenience store, go in the
6 bathroom and sell drugs to Johnny Solomon, like give
7 drugs to Johnny Solomon in exchange for money. Now,
8 the police knew all along that they didn't want that
9 to happen, or so they say. I don't know what the
10 truth of it is no more than what they say, but they
11 it happened. They say a lot of things. They claim
12 Mr. Gonzales, you know, comes and goes in there.
13 And Johnny Solomon goes in there and makes up a
14 story about, you know, I'm not holding the money, or
15 whatever. And this is a curious thing. Did you
16 ever one time hear Mr. Solomon -- do you remember
17 the police said they couldn't hear the conversation
18 in there. Did you ever one time hear Mr. Solomon
19 say that Mike Gonzales, what Mike Gonzales said to
20 him? No. We don't know what Mike Gonzales' side of
21 that conversation was.

22 Now, there are inferences that we can draw from
23 it. Maybe one inference is that Mike Gonzales, if
24 he had guilty intentions of going in there in the
25 bathroom and selling something to Johnny Solomon, if

1 he had made preparation for that, if he had guilty
2 intentions of doing that, when they refused to let
3 it happen that way, Mike Gonzales said I'm out of
4 there. I'm not doing anything. You can do it with
5 whoever else you want to, but you are not doing it
6 with me. I wish that Johnny Solomon would have had
7 the fortitude to tell us what the conversation was,
8 but he didn't, which brings us to where we started,
9 which was the most important thing.

10 Mr. Wall went through in painstaking detail
11 many of the aspects of the trafficking law. I would
12 just submit to you, based on the facts, if they have
13 proven anything, what it was was an attempt to sell.
14 An attempted sale. And this is the law of attempt,
15 or it's a little part of it. His Honor will
16 instruct you in much more detail about it, about the
17 law of attempt, what it takes to prove an attempt.

18 Now, by attempt we don't mean by thinking about
19 doing something. We mean doing it. We mean
20 actually taking an overt act to commit a crime, but
21 this is the case right here. This is the case.
22 "Intent alone, not coupled with some overt act
23 toward putting the attempt into effect, is not
24 cognizable by the courts." Now, this is my way of
25 putting this. His Honor will instruct you. It may

1 not be in those specific words. Please understand
2 I'm just simply trying to convey the meaning of the
3 law here in words I hope that are understandable,
4 because I believe His Honor will tell you that
5 intent alone, that means having guilty plans, guilty
6 intentions, making a plan to do something illegal,
7 thinking about doing something illegal, making
8 preparations to do something illegal, is not a
9 crime. That does not constitute attempted
10 trafficking.

11 If it must go beyond intent and the State must
12 prove beyond a reasonable doubt an overt act, meaning
13 that you do something, that you -- in this case I
14 planned to do a drug transaction with Johnny
15 Solomon; I made preparations maybe to do that; I get
16 right up to the line of -- if you could just have a
17 dividing line, I go right up to the line of doing
18 that act, that criminal act, or not doing it. What
19 intent alone means is I do all those things, I make
20 all -- maybe I have telephone conversations; maybe I
21 undertake plans; maybe I drive to a place; I get
22 right up there, if your jury rail is the line, I go
23 right up there to that line with my guilty
24 intentions. What this law means that I do not go
25 over that line. I do not hand that drug to that

1 person. I do not take their money. That's what
2 that means. That's what that means. Michael
3 Gonzales, no matter how much they want you to find
4 that that occurred, they have already admitted from
5 their own mouths that it did not occur. There was
6 no overt act. Yes, he may have gotten extremely
7 close to the line. You may find that, but he did
8 not go over it. You cannot convict him of guilty
9 intentions.

10 This is closely related, as I said before, and
11 I want to emphasize to you again, the concept of
12 being merely present at the scene of a drug
13 transaction or in close proximity to drugs, being
14 merely present there. It's a very close cousin to
15 this law that says if you are there, there may be
16 suspicion that you are up to something, but mere
17 suspicion is not enough. There may be strong
18 suspicion even that you are there for no good
19 purpose, for a criminal purpose, but if you don't
20 accomplish the act, if you don't do any of the
21 things that constitute a crime, you have not
22 committed a crime. Again, you have guilty
23 intentions or you have been around people that have
24 more than guilty intentions, but some person having
25 guilty intentions and going over the line doesn't

1 dictate that this jury has to find somebody else who
2 wa there and didn't go over that line has to go down
3 too, to put in a plain language, and I think you may
4 find that that's the case here.

5 I'm not here to argue a case against Mr.
6 Shelhamer. I said before I'm not his prosecutor.
7 Unfortunately Mr. Shelhamer has been, to a large
8 extent, to try to prove a case against Mr. Gonzales.
9 In that sense I think there is bias in that
10 presentation. It's not my intention, not my
11 client's intention, to try to prove any case against
12 Mr. Shelhamer. The State can either prove their
13 case or not, and you are the judges of that, and I'm
14 not going to tell you what to think about Mr.
15 Shelhamer. You know you have heard the evidence
16 against him and you can evaluate, you can determine,
17 but I do have to talk about Mr. Shelhamer's
18 participation in this situation in the parking lot,
19 because the State takes the position somehow that
20 Mr. Gonzales can be guilty for being the, I guess,
21 the puppet master of Mr. Shelhamer. I don't know.
22 That's never been proved or really alleged. I don't
23 know, but it's directing. If it's direction, it's
24 mighty thin direction. I mean, it's mighty poor
25 direction.

1 I say this to you. Have you heard any
2 evidence, any evidence whatsoever, that Mr. Gonzales
3 told Mr. Shelhamer to do anything; that he gestures
4 for Mr. Shelhamer to do anything? Nothing.

5 Now, that is direction. I grant you if the
6 case were different and if the State had a different
7 case than the one they do, if they had this
8 undercover police officer, Mr. Deffenbaugh, they had
9 him going up to Mike Gonzales and saying okay, where
10 is the stuff, and Mike Gonzales says Shelhamer,
11 Josh, deal with the man, give the man the stuff,
12 show the man the stuff, let he man weigh it, he
13 would -- yes, then he would be, perhaps, directing
14 Mr. Shelhamer's possession and disposition of the
15 drugs that they say were in his possession. That
16 would be direction. But it is not directing a
17 crime, not participating in a crime, to be standing
18 there stuck in a situation you don't really want to
19 be in, obviously, and your friend is in the car.
20 You know, he might have guilty intentions or he
21 might just act on those guilty intentions. Nobody
22 ever knows until you get to that line.

23 The question if you believe these things were
24 said in this way, and I don't -- I don't believe the
25 evidence shows that beyond a reasonable doubt, and

1 remember that's the standard for all of them, you
2 listen to that tape and see if you can hear it, but
3 just take for a moment what they claim was said.
4 What they claim was said is Investigator Deffenbaugh
5 goes up and says "where is the stuff?" Mike
6 Gonzales says "he has it. He has it it." Not he
7 has it and he will give it to you, and not that he
8 will, you know, telling Mr. Shelhamer give it to
9 him. It's not that way. "He has it," meaning I
10 don't have it. I'm not -- look, I'm not going to do
11 this. That's what's meant, or at least it is so
12 unclear what's meant, that by giving the reasonable
13 doubt, as you have to to Mr. Gonzales, you have to
14 conclude it's no way to know what that really meant.
15 Was he saying, as they allege, that that was some
16 direction for Mr. Shelhamer, that was some
17 furtherance of the crime? Or was it merely Mr.
18 Gonzales was saying he has it, go to him, don't come
19 to me, go to him. You know, I'm not in the car. I
20 mean, why do you think Mike Gonzales -- it's not a
21 matter of being guilty for Mike Gonzales to get away
22 from the car. He's gets away from the car because
23 he doesn't want to be near the car, not because he
24 is the smartest seventeen year old in the world.
25 Not because of that. He doesn't want to have

1 anything to do with it. He got up to that line,
2 maybe in the store at first, and he didn't cross
3 that line, and he's not going to cross the line now.
4 And if you are going to give the doubt, every
5 reasonable doubt to Mr. Gonzales, that you have to
6 do, then you have got to give him that. He has it.
7 He will show it to you. I'm not going to do it.

8 Now, you have heard what they claim Mr.
9 Shelhamer said. You know, they go to Mr. Shelhamer
10 and ask him to explain he says "here it is," and
11 handsa it. I mean, you find whatever you feel the
12 evidence shows about Mr. Shelhamer. I'm not here to
13 convict him or accuse him, but Mr. Shelhamer, what
14 he did was his guilty intentions has nothing to do
15 with Mr. Gonzales and what he did with his guilty
16 intentions, and that's the bottom line.

17 Mr. Gonzales -- you got two young men,
18 unfortunately way too young to be in a courtroom
19 like this, but they are rightfully here and being
20 tried by you and will accept your judgment. You
21 have got one young man with guilty intentions that
22 did not go over that line; did not commit that overt
23 act; did not commit the crime; did not do what they
24 thought he was going to do; what they probably were
25 sure he was going to do. And you have got one young

1 man that is alleged to have perhaps had those guilty
2 intentions and go over the line. That's for you to
3 determine.

4 Now, there has been testimony about Mr.
5 Gonzales running away. When -- you know, they want
6 to say it was just as the police came, or -- I don't
7 know when it happened. From the tape you can hear
8 all that. I imagine anybody that would be there
9 would be frightened out of their minds. And Mr. --
10 I think this is where the age comes in. Mr.
11 Gonzales is a very young person. I don't think
12 anybody would know how they would react in those
13 situations until they're in those situations, but
14 that has nothing to do with whether he acted on
15 these guilty intentions. That has nothing to do
16 with that. Please don't be misled by that.

17 Now, the State of South Carolina - and this is
18 my final point to you - has charged Mr. Gonzales by
19 an indictment. His Honor has already told you that.
20 That's the way cases come to court, with the offense
21 of trafficking in methamphetamine.

22 Now, they have alleged that Mr. Gonzales
23 violated a statute, and that's a law passed by the
24 legislature. And that statute is South Carolina
25 Code Section, and His Honor, I'm sure, will instruct

1 you on this, 44-53-375. That statute actually makes
2 it a crime -- and pardon me for reading, but I want
3 to try to be as accurate as possible, makes it a
4 crime in one part of the statute to sell,
5 manufacture, deliver, purchase, bring into this
6 state, or provide financial assistance, or
7 otherwise, or aid, abet, attempt, or conspire to
8 sell, manufacture, deliver, or purchase, or bring
9 into this state, or be knowingly in actual or
10 constructive possession, or knowingly attempt to
11 become in actual or constructive possession of 10
12 grams, or more, of ice, crank, or crack cocaine.

13 That is the law, the specific statutory law,
14 that Mr. Gonzales is alleged to have violated. And
15 that is known as, and it says here in here, that is
16 known as trafficking in ice, crack or crank.

17 What we call the verdict form in this case,
18 it's my understanding will be that you will have a
19 choice -- when you consider the cases separately,
20 you will have a choice. If you do not find that the
21 State has proven the case beyond a reasonable doubt,
22 then your verdict would be not guilty, obviously.
23 We certainly believe there is plenty of reason for
24 that to be your verdict.

25 You will have other forms or alternatives,

1 though, to find. And it's my understanding that it
2 will take the form of that you can find, under this
3 statute, that Mr. Gonzales is guilty of the crime of
4 trafficking in ice, crank or crack, more than 10
5 grams. If you find, in other words, that -- if you
6 decide that Mr. Gonzales should be under your view
7 of the evidence guilty -- to be found guilty of the
8 crime of trafficking, guilty of that crime, then you
9 can check the box that will say guilty of
10 trafficking. And you can further check the box more
11 than 10 grams. Okay. And if you do that, you will
12 have found Mr. Gonzales guilty of trafficking.

13 You will have other forms, and there is
14 specific crimes under this statute that are related
15 to amounts of drugs that are trafficking, if you
16 find any of them, and you will have several options
17 to choose from. Different weights. It's like
18 something like more than 10, less than 28 grams;
19 more than 28, but less than a 100; on up to more
20 than 400. You will have those options.

21 I submit to you respectfully, ladies and
22 gentlemen, that the proper verdict for Mr. Gonzales
23 is not guilty for the reasons that I have tried to
24 put forward to you.

25 I respectfully say to you that if in your good

1 judgment you agreed with the State's case and
2 believed that they have proven that case beyond a
3 reasonable doubt, that an appropriate verdict to
4 consider would be to find Mr. Gonzales guilty of
5 trafficking, trafficking, and check the box
6 trafficking, guilty, 10 grams, or more. You will
7 have convicted Mr. Gonzales of that one.

8 Of course, it is up to you to go further than
9 that if you choose. We certainly hope that you
10 never get to the guilty box. We feel the not guilty
11 choice is appropriate. We ask you for that
12 decision.

13 You know, to sum up this case, in a sense, I'm
14 going to make room for my colleague. This case is
15 kind of like in plain language sort of like going
16 out fishing. The police is -- it's like going out
17 fishing, except it's an unusual fishing trip because
18 they only want to catch one fish. It's like they
19 are looking for the fish they want to catch, and
20 they go out there and they do their best. They go
21 through all these little preparations. They might
22 even get him on the line, but the fish doesn't get
23 caught, for whatever reason. It doesn't matter what
24 the reason is. The fish doesn't get caught. The
25 fisherman is not successful.

1 And then if we evaluate that fishing trip, can
2 we say that he caught the fish? No, he didn't catch
3 the fish. You can't blame that on the fish, though.
4 Just like the witnesses said, they tried to get Mr.
5 Gonzales. They did not get him. It is that simple.
6 I thank you.

7 THE COURT: Mr. Boggs.

8 MR. BOGGS: Thank you, Your Honor. May it
9 please the Court.

10 Madam forelady and ladies and gentlemen of the
11 jury, along those fishing lines, here is your shark.
12 Here is your minnow.

13 In the chess game of life, here is your king.
14 Here is your pawn.

15 In this case, here is your dealer. Here is
16 your safety net.

17 Now, it's 12:15. We have been here awhile. We
18 have been here three days listening to the
19 prosecution's case. There are certain rules and
20 procedures on how information is brought to you.
21 That's set by the law. There are certain choices
22 and decisions to be made by Mr. Wall on how he
23 presents his witnesses and the order they go. There
24 are certain decisions to be made by Mr. Harris and
25 his client and certain decisions to be made by me on

1 behalf of my client.

2 This is not a perfect world. And if you think
3 that it's a perfect world, you are mistaken. I wish
4 that I wasn't here representing Josh Shelhamer
5 because of the facts involved, but I am, and I'm
6 happy to be here, because I'm protecting his rights.
7 Josh and I have made the decision on about how the
8 case has been presented to you, because we feel and
9 we trust that you are going to do the right thing.

10 Now, if something is missing in your mind,
11 don't blame the law, don't blame the judge, blame
12 me, but I feel like there is enough there to acquit
13 Josh Shelhamer; that is, to find him not guilty,
14 because there is no proof that he knew the severity
15 of what's going on.

16 Because of the decisions made and how to
17 present the case and how to respond to their case,
18 I'm arguing last. That means that once I'm through,
19 the judge will instruct you as to the law. And in
20 this case, most importantly, the judge will tell you
21 that you may find one defendant guilty and one not
22 guilty. This is like it's two separate trials.

23 Any verdict you reach must be unanimous. All
24 twelve of you must agree. It is incumbent upon you,
25 having said that it must be a unanimous verdict,

1 that if any one of you, or any two of you, or on up
2 to less than twelve, believe in a decision, in a
3 decision that you have made, it's your rights and
4 duty to stand by your decision. The folks around
5 you have a right to be heard in the jury room, but
6 they don't have a right to dictate your decision.
7 It's incumbent upon you not to give in. This is
8 your decision and it's a difficult one.

9 The State must also show in this case that each
10 defendant specifically knew what drug was involved
11 and specifically knew how much weight was involved.
12 Even if you think they should have known how much
13 weight was involved, they have to know that Josh
14 Shelhamer knew that it was methamphetamine. I
15 submit to you there has been no evidence that he
16 knew that. All their witnesses. Out of all their
17 witnesses, not one said he knew what it was.

18 When we started on Monday, it was late in the
19 afternoon when I got to argue then, I said I trusted
20 you, and I do. I trust this system. It's not
21 because it's the only system we got, or that we had,
22 sorry, but it's because the system works. And in
23 cases like this where the prosecution has their big
24 fish and they go after a little extra, you can say
25 hey, wait a minute, that guy didn't know what was

1 going on. There is no way he could have.

2 And, again, it's a very difficult decision that
3 you have to make. A juror is not a witness. In a
4 perfect world we would be able to freeze in time,
5 take you back to the scene, let you watch everything
6 so you wouldn't have to hear it, and then you make
7 your own decision. You can't do that. You're not a
8 witness. And so it's hard to assess credibility
9 from right here. I'll get into the specifics of the
10 State's case soon, but it's very difficult for you
11 to make that decision, but I trust you. Josh trusts
12 you, and we trust the system which allows you to sit
13 here in judgment of him.

14 Specifically in this case Mr. Wall, my
15 adversary, whom I have known for many years and get
16 along with fine, stood up and gave his opening
17 statement. And towards the end I couldn't help but
18 sit back and think I just heard a concession speech
19 towards my client, you know. I heard, and his words
20 were, certainly you can find Mike Gonzales guilty.
21 Now, what does that mean? I tell you what it means;
22 that I know you are going to find him guilty, but
23 while we are here, let's try to get another one. So
24 from the outset of their case, that was Tommy Wall's
25 argument to you. That's the mind set of the

1 prosecution throughout.

2 Lieutenant Hancock, who graced us with his
3 presence, he couldn't get out of here fast enough.
4 He is the supervisor of this guy and this whole
5 operation and their plan of attack. They have a war
6 board and a plan. Where was Josh Shelhamer on that
7 plan? Nowhere. Had Josh Shelhamer not been sitting
8 there beside me, I submit to you that Lieutenant
9 Hancock wouldn't even have known who he was.

10 We have got Rhett Fox. He's the investigator.
11 He's the agent on this case. This is his case.
12 What, if anything, are you looking for? We were
13 looking for marijuana. The police wanted this to be
14 a marijuana case. Why is that? Well, because the
15 C.I. knew Mike Gonzales, knew his phone number, and
16 knew he could buy some marijuana, marijuana, from
17 Mike Gonzales.

18 Rhett Fox testified that this package could be
19 anything. There was no mustard smell outside. It
20 was squishy. There was no smell of mustard on my
21 client. There is no stain on him. They didn't test
22 his fingers.

23 Then we have Mr. Solomon. I don't know if I
24 can say enough about him to truly depict to you what
25 I really think about that man. That's the way the