

Volume II of II

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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

MICHAEL GONZALES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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1 system works. I concede that. You have got people
2 who are in a bind and want to save their ass. Okay.
3 That's what he wants to do. And so he states, well,
4 I went to the police because I knew I could set up a
5 deal. But during his testimony he goes I knew Mike
6 Gonzales. Mike always has people hanging around
7 him. And there was evidence he knew who Josh was.
8 If Josh is the source, and if the C.I. knows both of
9 them, why didn't the C.I. give him Josh's number?
10 Why didn't he call Josh directly? Why didn't he
11 expect Josh to be there? They had a plan of attack.
12 The C.I. told them what kind of car, told him who it
13 was - Michael Gonzales - described him, I'm sure.
14 Why didn't he say Josh was going to be there? I'll
15 tell you why. Because Josh was Mike Gonzales'
16 safety net. And nobody should have known, and Josh
17 shouldn't have known that methamphetamines were
18 involved.

19 And further evidence that the man in charge is
20 right here, is that when the C.I. was trying to
21 negotiate the price, from 13-5 down to 13 even, it
22 was met with an immediate response, no, can't do it.
23 Mike didn't have to check with anybody. He knew
24 what he was doing. He knew what he wanted. He knew
25 what he had. But this witness, nor any other, can

1 say that Josh was even involved in any of the plan
2 or anything. He just happened to be there. That's
3 the gist of their story and they want you to convict
4 him on it.

5 In fact, Mr. Wall says that his witness got
6 flustered, he got confused, because there were three
7 lawyers asking him questions. Well, I simply asked
8 him isn't it true that Josh got out of the car to
9 ask you for a cigarette? He goes oh, yeah; oh,
10 yeah; oh, man, that's right. You're right. Right.
11 Then he testified two different ways as to whether
12 Josh got back in the car or didn't get back in the
13 car before it was pulled over to the side. And then
14 finally as I was walking away, you saw me do the
15 double-take, he said well, Josh didn't even get back
16 in the car. I'm like what? You know, where we
17 going? That's your confidential informant. And
18 what they really call him is -- and this is funny,
19 confidential reliable informant. That's his middle
20 name. It's not his C.I.. It's C.R.I.. That's who
21 they rely on and that's who they base their case on.
22 That was the person they wired. He can't even
23 remember whether my client got back in the car, but
24 he's sure, he's sure, that my client took some drugs
25 out of his pants pocket, so he had dominion and

1 control. Well, we have got to have that because we
2 have got to tie Josh in a little bit more, so be
3 sure to say that, C.I.. You saw this. I don't care
4 if you are wearing parachute pants, if somebody gets
5 out and walks up to you and has this in their pants
6 leg, you are going to notice it, and he admitted
7 that he walked up to him. And then he doesn't even
8 know when he got back in the car, but he is sure
9 that after he got in the car Josh put the drugs in
10 his pocket. That doesn't make sense, so it can't be
11 trustworthy. The police don't even trust him giving
12 him money. They put the wire on him so they can
13 make sure he doesn't screw up the deal, the deal
14 with Mike Gonzales. Tommy says he's truthful. The
15 officers said -- and by Tommy, I mean Mr. Wall, he
16 said he was trying to be truthful, but the cops
17 don't trust him. He said he's getting out of the
18 business. But if he's in the business, then he knew
19 who the businessmen were. Who did he bring to him?
20 Not Josh Shelhamer.

21 Now, isn't it funny that of all the places in
22 Spartanburg County, out of all the convenience
23 stores, out of all the restaurants where little
24 brother could be, big brother Frankie shows up while
25 the C.I. is -- before the deal goes down. And it

1 just so happened that the C.I. knows Frankie.
2 Johnny Solomon knows Frankie Gonzales, the older
3 brother of Mike Gonzales. And isn't it funny that
4 there is some sort of car title that they have got
5 to discuss? Well, why didn't they know about that?
6 Because something else was going on. I submit to
7 you, I think he was telling the truth. There was
8 some sort of investment or some sort of collateral
9 that the Gonzales, plural, were worried about, but I
10 don't think it was a car title. Somebody was there
11 to protect the investment, some other collateral.
12 And here it is.

13 Now, we had Jake Deffenbaugh up here, and I
14 like Jake. I like Rhett. I have gotten to know
15 them throughout my years as a prosecutor and as a
16 defense attorney, and Jake's testimony was
17 borderline useless. He is sitting in the truck as
18 the driver, not twenty feet from where everybody is
19 going in and out of the door. Yet he says he didn't
20 even see the C.I. give Josh Shelhamer a cigarette,
21 even though the C.I. admitted it, and it happened
22 right there in front of the store. And when I asked
23 him about that, well, I don't remember the direct
24 movement, quote, unquote, of everybody in the case.
25 It's an undercover operation and he can't remember

1 the direct movement? Yet, he's ready to testify
2 that my client was involved and he knew what was
3 going on and that these drugs were right there in
4 his pants pockets and he handed them to me, but my
5 client -- he didn't say my client said here is the
6 meth; he asked him for a package; Mike Gonzales told
7 my client to give it to him; or motioned for him to
8 give it to him. And even then they respected or
9 thought that my client was so involved, so in
10 control and such a vital part of this transaction,
11 that the first thing that Jake Deffenbaugh does is
12 says Mike, can I weigh this. Do they seriously
13 think at that point in time that Josh knows what's
14 going on? No, they still don't. They want Mike.
15 And they will take anybody just to get him.

16 Now, Mr. Deffenbaugh, or Jake, he made mention
17 of the fact that my client straightened out the
18 scales, or said -- he didn't straighten them out,
19 but said try them on the floorboard. What does that
20 have to do with knowledge or specific intent to
21 traffic in methamphetamine? Nothing. I asked him.

22 I said if I'm trying to write like this, what are
23 you going to tell me, even if you don't me? I'm
24 sitting there, you are going to tell me to flip it
25 over. You have got a scale sitting on a Camaro

1 seat. Your natural reaction is to say put it on the
2 floorboard where it's flat, it will work. That
3 doesn't mean a damn thing. And just because you, or
4 you, or you tell me to straighten out my pen, Jake
5 said that doesn't mean he's responsible for what I
6 write. That doesn't mean that Josh is responsible
7 for what's in that package.

8 Then we get the chemist, an employee of the
9 State of more -- is a friend of mine, but he's got
10 more degrees than a thermometer. He gets up there,
11 he's been to school all these years and he
12 testifies, but the obvious question is when this is
13 wrapped up, can you tell what it is? No. Then I
14 said well, what's this stain? He said well, that's
15 where the stuff seeped in when they had to open it.
16 Okay. Well, the State's chemist says it doesn't
17 affect the weight. What do you expect to State's
18 chemist to say? The truth is we may never know how
19 much this was.

20 The State's chemist also said that it's packed
21 this way for the purpose of alluding for drug
22 sniffing dogs. I submit to you for the purpose of
23 transportation, hiding for long-term purposes. If
24 Mike went to get this stuff from Josh, why would
25 they have to pack it up like that? Because it was

1 already packed up and Josh didn't know what it was.
2 If Josh knew that they were going to a sale and if
3 Josh had this stuff and not Mike, why would he pack
4 it up? It's because Josh didn't know. It was
5 already packed up and it came from a third party.
6 That third party might have been the one that
7 dropped by to check on some collateral. A car
8 title. And in whatever code he said I'm doing
9 business. So he pulls off, everything is okay.

10 Josh knows Mike. No other reason he was with
11 him. The C.I. said they knew each other. The C.I.
12 says it's Mike's style for them to be around. Does
13 that mean Josh is guilty of trafficking in meth?
14 No. Does that mean he made a bad decision on that
15 day? Of course he did. Do you think he wanted to
16 get in a car that ultimately led to his arrest for
17 trafficking this and sitting before you? No. Are
18 you saying on the morning of June 3rd, 19 -- excuse
19 me, June 3rd, 2002, when Josh got up, he said I
20 think I'm going to do a big drug deal today and I
21 may get arrested? I don't think so. We know who
22 was capable when they woke up of doing a deal, and
23 it wasn't Josh.

24 The key here, among others, is Josh's
25 knowledge. They say well, Josh should have known

1 and he knew. Well, the police, the C.I., everyone
2 involved intended for this to be a marijuana
3 transaction, but it's not okay for Josh to assume
4 it's marijuana in a package that he can't see.
5 What's good for the goose is good for the gander.
6 They can't have it both ways, and that's what they
7 are trying to do.

8 According to the co-defendant's trial or his
9 attorney's questioning, he stepped back and
10 insinuated well, Josh must be the mastermind. Well,
11 if Josh knew this was meth, and if Josh was in
12 charge, and if Josh was the real mastermind and not
13 the pawn and not the safety net, why didn't he look
14 to see some money? Isn't that what this is about?
15 \$13,500.00. Tommy Wall, without banging, but with
16 the emphasis. Why didn't Josh ask to see the money?
17 Because he wasn't involved. He was just in the car,
18 in a situation, in too deep without knowing what the
19 hell is going on.

20 You have got the chemist's testimony that I
21 went over earlier. That goes to the fact that Josh
22 couldn't have known what it was. It verified.

23 You have got the fact that methamphetamine, or
24 meth, or crank not said at all in any part of the
25 transaction. Don't you think the police, when they

1 are wiring themselves, or their C.I., want to know
2 where the stuff is? Don't you think if it was
3 important to them to make sure everybody what was
4 involved, they would say you got the meth? He said
5 the stuff. How is Josh supposed to know it's not
6 marijuana? They were looking for marijuana. When
7 they started their investigation that day, it was
8 going to be a marijuana buy. Is it so far fetched
9 that Mike thought -- excuse me, that Josh thought
10 that Mike had a marijuana buy or a marijuana sale?
11 Doesn't excuse him for being there, no. But the
12 State can't prove specific intent. Josh made a bad
13 decision with hanging out with Mike. He's eighteen.
14 It's not on the phone. You don't hear him on the
15 phone masterminding a \$13,500.00 drug deal, but he's
16 got a Camaro. He's got his Tommy shoes. He's got
17 his Tommy shirt. When you are eighteen, who do you
18 want to hang out with? The person with the duds,
19 the person with the clothes, the person with the
20 car.

21 The first thing Josh did when he got to the gas
22 station, he gets out and goes to the C.I. because he
23 knows him and says "hey, can I have a cigarette?"
24 There is no evidence that Josh was like looking out.
25 There is no evidence that Josh was participating,

1 going in the bathroom, like the plan. He got a
2 cigarette and walked away.

3 The pants testimony I think I have covered.
4 It's just not possible that the drugs were in the
5 pants. There is no credible testimony to it. And,
6 in fact, it really doesn't matter, because Josh
7 didn't know what was in there. It's evident. And
8 why was Josh there? Because Mike needed his pawn.
9 Why did Mike step out of the car? Why did Mike
10 dictate everything? Why did he go up to the air
11 hose? Because it was right by the edge of the
12 building. What was behind the building? Kudzu.
13 Where was it? Close to Mike's house. Not close to
14 Josh's house. It was a setup, because Mike knew
15 what was going on, how serious it was. And if
16 something went down, I'm getting the hell out of
17 here. So he said Josh, you just stay in the car.

18 Mike distances himself the whole time. And
19 Tommy Wall says doesn't make any sense that Josh
20 didn't know. It makes a lot of sense when you think
21 about where Mike was, who was on the phone, who was
22 called, who was the target, and who dictated the
23 price, where, when, what location, whose brother
24 came by checking on some collateral. It does make
25 sense. He needed somebody to take the fall in case

1 something went wrong. That's why Josh is sitting
2 here today.

3 You have the power to find Josh not guilty, and
4 you should. Don't let this man take him down with
5 him. It's not right, it's not fair and it's not
6 just.

7 The prosecution, they think they have a sure
8 thing. They think they have their cake and they
9 want Josh to be the icing. Two-for-one special.
10 Not for the sake of our Constitutional Rights; not
11 for the sake of our law; not for the sake of our
12 jury system, which can decide Josh's faith. And I
13 trust you, and Josh trusts you, that you know what's
14 going on. See the big picture.

15 Mr. Harris asked is there any evidence that
16 Michael told Josh what to do. Well, maybe not, but
17 for that matter is there any evidence that Mike told
18 Josh what was in the package? No.

19 If Josh knew the severity of this situation, if
20 he knew what was going on, if he knew that there was
21 400, plus, grams of methamphetamine, if he knew that
22 this was \$13,000.00 involved, why didn't he run?
23 Wouldn't you? I sure as hell would, or at least die
24 trying. He didn't know what was going on. It's
25 evidence by the actions of the defendant. One sat

1 there not knowing what's going on. The other one
2 took off. Why did he run? Because the safety net,
3 his pawn, the minnow could take the fall. His
4 friend could take the fall. Some friend.

5 Now, you have seen Josh in here with me
6 throughout the trial. And I introduced his
7 stepfather and his mother and the rest of his family
8 members. Don't you think that Josh and each and
9 every one of them are embarrassed to be in front of
10 you here today? And if any of your family members
11 were in this situation, they would be embarrassed to
12 be --

13 MR. HARRIS: Your Honor, I object.

14 THE COURT: I sustain the objection. That is
15 not proper argument, and ladies and gentlemen of the
16 jury, you are to disregard that. It's to be
17 stricken from the record.

18 MR. BOGGS: I apologize, Your Honor.

19 They are embarrassed because he made a stupid
20 decision which led to this serious case against him.
21 And our system allows us, and it allows him, to
22 throw his faith to you. And it's not with
23 confidence; it's not with an ego; it's not with
24 assuming. It's with hopes that you see the picture
25 for what it is, the picture that Tommy Wall painted

1 for you and the fact that Josh got caught in the
2 net. The easiest way for me to win this case would
3 be not be here, or Josh had not been in that car.
4 And they aren't going to win, because they have had
5 a to go through this. So it's a no-win situation,
6 but you can tell the prosecution that hey, you did a
7 good job, but be for real. You went a little too
8 far. There is not enough there and so we aren't
9 going to let you -- give you a two-for-one special,
10 your icing on the cake.

11 All of the testimony, all of the arguments,
12 none of it proves that Josh knew what was going on.
13 And without that, I submit to you you must find him
14 not guilty. And I submit that you can do that
15 without hesitation. I submit to you that reasonable
16 doubt means a doubt which would cause someone to
17 hesitate to act; in this case hesitate to vote
18 guilty. If there is any doubt in any one of your
19 minds, then you must vote not guilty for Josh
20 Shelhamer. You must stick by that decision, and
21 don't be afraid to do that. The law allows it. We
22 don't assume guilt. There is a presumption of
23 innocence.

24 You know, it's funny -- I want to mention one
25 other thing, I apologize.

1 You know, the C.I., he wasn't surprised when
2 Frankie Gonzales pulled up. I said do you know him?
3 He goes yeah, but the only way that I know to get
4 through to him is through Mike. He had another
5 nexus of what was really going on. People don't
6 know this, or -- I say non-lawyers don't know this,
7 but typically if a lawyer is called for jury duty,
8 he's not picked, because, you know, the other
9 lawyers would feel that he knows too much that
10 doesn't have to do with the case. But the funny
11 thing is as a trial lawyer, I have to figure out
12 what y'all are seeing and if you are seeing the same
13 thing I am. And, again, it comes down to trust. It
14 comes down to whether I feel that you see the same
15 thing I do, or for that matter, if one of you sees
16 the same thing that I do. And, again, Josh trusts
17 you. His family trusts you. I trust you that you
18 will see this for what it is. Okay. That you will
19 see this, as Mr. Harris said, for their fishing
20 expedition where they caught what they wanted, and
21 somebody got caught up in the net; that someone
22 engineered a deal to make himself a lot of money and
23 had a safety valve who didn't know what was going
24 on; someone who ran, and someone who didn't know
25 what was going on.

1 I know you are going to do the right thing. I
2 appreciate your attention. And you can, and I
3 submit that you should, vote not guilty when
4 determining the case against Josh Shelhamer. Thank
5 you for your attention.

6 THE COURT: Ladies and gentlemen of the jury, I
7 am going to send you to the jury room at this time
8 before I give you my charge or instruction on the
9 law. The clerk will follow you in there. She's
10 going to take your lunch order, and we will see that
11 that's delivered so that it will be here at the end
12 of my charge or instruction on the law in this case.
13 We have been in here for quite some time now and I
14 know that you probably need a break. And as a
15 result of that, we are going to take a short break,
16 with the explicit instruction that you are not to
17 discuss this case among yourselves in any manner or
18 fashion whatsoever.

19 We will get you back into the courtroom as soon
20 as the clerk completes her duties and then go
21 directly into my charge or instruction on the law.

22 The jury may retire. Everyone else remain
23 seated please.

24 (The following takes place out of the presence
25 of the jury panel)

1 THE COURT: We are going to take a short break
2 while the clerk accomplishes all of that.

3 Madam Clerk, if you would just notify me when
4 you are ready to proceed.

5 (Proceedings recessed)

6 (Proceedings reconvened)

7 THE COURT: All right. Let's bring our jury
8 back.

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

11 THE COURT: Ladies and gentlemen of the jury,
12 the indictments charge the defendants Michael
13 Gonzales and Steven Josh Shelhamer in this case.
14 I'll remind you that the fact that each defendant
15 was arrested, charged and indicted in this matter is
16 not evidence in this case and cannot be considered
17 by you as evidence of guilt in this case, nor does
18 it create any presumption or inference of guilt.
19 These documents, the indictments, are simply the
20 formal written instruments which contain the charges
21 made against each defendant. They are the formal
22 documents by which these cases are brought into this
23 court.

24 Now, I charge you that there are two defendants
25 in this case, each of whom is charged with

1 trafficking in methamphetamine more than 400 grams.
2 The case of each defendant and the evidence and the
3 law concerning that defendant should be considered
4 separately and individually. Your verdict does not
5 have to be the same for both defendants. The fact
6 that you may find one defendant guilty or not guilty
7 should not control your verdict as to the other
8 defendant.

9 Where more than one person is charged with a
10 crime, if the evidence warrants it, you may convict
11 one and acquit the other, or you may acquit both, or
12 you may convict both. It will depend upon your view
13 of the testimony and evidence. You must take each
14 defendant and consider the evidence as to that
15 defendant and my instructions to you on the law.
16 You will then write a separate verdict of guilty or
17 not guilty for each individual defendant.

18 Now, each defendant has pled not guilty to his
19 respective indictment, and that plea puts the burden
20 on the State to prove the defendant guilty. A
21 person charged with committing a criminal offense in
22 South Carolina is never required to prove himself
23 innocent.

24 I charge you that it is an important rule of
25 the law that the defendant in a criminal trial, no

1 matter what the seriousness of the charge may be,
2 will always be presumed to be innocent of the crime
3 for which the indictment was issued, unless guilt
4 has been proven by evidence satisfying you of that
5 guilt beyond a reasonable doubt.

6 Now, this presumption of innocence does not end
7 when you begin your deliberations, but it
8 accompanies each defendant throughout the trial and
9 until you reach a verdict of guilty, based upon
10 evidence satisfying you of that guilt beyond a
11 reasonable doubt.

12 The presumption of innocence is like a robe of
13 righteousness placed about the shoulders of the
14 defendant, which remains with him until it has been
15 stripped from the defendant by evidence satisfying
16 you of the defendant's guilt beyond a reasonable
17 doubt.

18 The presumption of innocence is not merely a
19 legal theory. It is not just a legal phrase. It is
20 a substantial right to which every defendant is
21 entitled unless, you, the jury, are satisfied from
22 the evidence of the defendant's guilt beyond a
23 reasonable doubt.

24 Now, what is a reasonable doubt in the law? A
25 reasonable doubt is the kind of doubt that would

1 cause a reasonable person to hesitate to act.

2 The State has the burden of proving the
3 defendant guilty beyond a reasonable doubt.

4 Now, some of you may have served as jurors in
5 civil cases where you were told that it is only
6 necessary to prove that a fact is more likely true
7 than not true, such as by the greater weight or the
8 preponderance of the evidence.

9 Now, in criminal cases the State's proof must
10 be more powerful than that. It must be beyond a
11 reasonable doubt.

12 Proof beyond a reasonable doubt is proof that
13 leaves you firmly convinced of the defendant's
14 guilt. Now, there are very few things in this world
15 that we know with absolute certainty, and in
16 criminal cases the law does not require proof that
17 overcomes every possible doubt.

18 If, based on your consideration of the
19 evidence, you are firmly convinced that the
20 defendant is guilty of the crime charged, you must
21 find the defendant guilty.

22 If, on the other hand, you think there is a
23 real possibility that the defendant is not guilty,
24 then you must give the defendant the benefit of the
25 doubt and find him not guilty.

1 Now, I'll remind you that during this trial you
2 and I have certain duties to perform.

3 As the trial judge it is my responsibility to
4 preside over the trial of this case and I also have
5 the duty to rule on the admissibility of the
6 evidence offered during this trial. You are to
7 consider only the competent evidence before you. If
8 there was any testimony ordered stricken from the
9 record in this case during this trial, you must
10 disregard that testimony. You are to consider only
11 the testimony which has been presented from the
12 witness stand and any exhibits which have been made
13 a part of the record in this case.

14 Now, I have the additional duty to charge you
15 the applicable law to this case. As the presiding
16 judge I am the sole and the only instructor of the
17 law in this matter, and it is your duty as jurors to
18 accept and apply the law as I now state it to you.
19 If you already have any idea as to what the law is
20 or what the law ought to be and it does not agree
21 with what I now tell you the law is, then you must
22 abandon your idea, because you are sworn to accept
23 the law and apply the law exactly as I state it to
24 you.

25 In every case tried in this court before a

1 jury, the jury becomes the sole and exclusive judge
2 of the facts in a case. A trial judge cannot
3 intimate, state, comment on, or make any statement
4 to a trial jury about the facts in a case. Since
5 you, the jury, are the sole judges of the facts in
6 this case, you are not to infer from what I have
7 said during the progress of this trial in ruling
8 upon the admissibility of evidence, or otherwise, or
9 anything that I say now during the course of this
10 instruction to you that I have any opinion about the
11 facts in this case. Quite simply, the law does not
12 allow me to have an opinion about the facts in this
13 case. This is a matter solely for you, the jury, to
14 determine.

15 As jurors it is your duty to determine the
16 effect, value, weight and truth of the evidence
17 presented during this trial.

18 Now, ladies and gentlemen, there are two types
19 of evidence which are general presented during a
20 trial: Direct evidence and circumstantial evidence.

21 Direct evidence is the testimony of a person
22 who claims to have actual knowledge of a fact, such
23 as an eyewitness. It is evidence which immediately
24 establishes the main fact to be proved.

25 Circumstantial evidence is proof of a chain of

1 facts and circumstances indicating the existence of
2 a fact. It is evidence which immediately
3 establishes collateral facts from which the main
4 fact may be inferred.

5 Circumstantial evidence is based on inference
6 and not on personal knowledge or observation.

7 Now, the law makes absolutely no distinction
8 between the weight or value to be given to either
9 direct or circumstantial evidence, nor is a greater
10 degree of certainty required of circumstantial
11 evidence than that of direct evidence. You should
12 weigh all the evidence in this case. And after
13 weighing all the evidence, if you are not convinced
14 of the guilt of the defendant beyond a reasonable
15 doubt, then you must find the defendant not guilty.

16 Conversely, if you are convinced of the guilt
17 of the defendant beyond a reasonable doubt, then you
18 must find him guilty.

19 Now, necessarily you must determine the
20 credibility of the witnesses who have testified in
21 this case. Credibility simply means believability.
22 It becomes your duty as jurors to analyze and to
23 evaluate the evidence and determine which evidence
24 convinces you of its truth.

25 In determining the believability of witnesses

1 who have testified in this case, you may believe one
2 witness over several, or several over one.

3 You may believe a part of the testimony of a
4 witness and reject the remaining part of the
5 testimony of the same witness.

6 You may believe the testimony of a witness in
7 its entirety or reject the defendant of a witness in
8 its entirety.

9 You may consider whether any witness has
10 exhibited to you any interest, bias, prejudice, or
11 other motive in this case.

12 You may also consider the appearance and manner
13 of the witness while on the witness stand.

14 Now, the rules of evidence ordinarily do not
15 permit witnesses to testify as to their opinion or
16 conclusions. An exception, however, to this rule
17 does exist as to those whom we call or we refer to
18 as expert witnesses. Expert witnesses are those
19 who, by education and experience, have become expert
20 in some art, science, profession or calling. These
21 witnesses may state their opinion as to relevant and
22 material matter in which they profess to be an
23 expert and may also state their reasons for that
24 opinion.

25 Now, you should consider expert opinion

1 received as evidence in this case and give it such
2 weight as you may think it deserves. If you should
3 decide that the opinion of an expert witness is not
4 based upon sufficient education and experience, or
5 if you should conclude that the reasons given in
6 support of the opinion are not sound, or if you feel
7 that it is outweighed by other evidence, then you
8 may disregard the opinion entirely.

9 Now, I charge you further, Madam Foreperson and
10 members of the jury, that the fact that a defendant
11 or defendants elect not to testify in his or their
12 own behalf cannot and must not be considered against
13 that defendant under any circumstances or in any
14 manner whatsoever. The decision of any defendant
15 not to take the witness stand and testify in his own
16 behalf does not create any inference against him.
17 And I tell you now that you must not permit that
18 fact to weigh in even the slightest degree against
19 the defendant. You should not permit this fact to
20 enter into the discussions or deliberations of the
21 issues in this case.

22 Now, ladies and gentlemen, as you are well
23 aware, each defendant is charged with the crime of
24 trafficking in methamphetamine, 400 grams, or more.

25 Now, the State must prove beyond a reasonable

1 doubt that the defendant knowingly sold,
2 manufactured, cultivated, delivered, purchased,
3 brought into this state, provided financial
4 assistance, or otherwise aided abetted, attempted or
5 conspired to sell, manufacture, cultivate, deliver,
6 purchase, or bring into this state, was knowingly in
7 actual or constructive possession, knowingly
8 attempted to become in actual or constructive
9 possession of methamphetamine.

10 Now, pursuant to Section 44-53-375, the State
11 must also prove beyond a reasonable doubt that the
12 amount of methamphetamine was 400 grams, or more.

13 Now, contained in the greater charge, which I
14 have just discussed with you, are the lesser
15 included offenses, which are as follows:

16 That is, trafficking in methamphetamine 200
17 grams, or more, but less than 400 grams;

18 Or, 100 grams, or more, but less than 200
19 grams;

20 Or, 28 grams, or more, but less than 100 grams;

21 Or, 10 grams, or more, but less than 28 grams.

22 In other words, if you find the defendant or
23 defendants guilty of trafficking in methamphetamine,
24 you will have to make that determination in the
25 amount of methamphetamine which was proven by the

1 State beyond a reasonable doubt.

2 Now, to prove possession, the State must prove
3 beyond a reasonable doubt that the defendant had
4 both the power and intent to control the disposition
5 or use of the methamphetamine.

6 Possession may be either actual or
7 constructive.

8 Now, actual possession means that the
9 methamphetamine was in the actual physical custody
10 of the defendant.

11 Constructive possession means that the
12 defendant had dominion and control -- excuse me.
13 Constructive possession means that the defendant had
14 dominion and control or the right to exercise
15 dominion or control over either the methamphetamine
16 itself or the property on which the methamphetamine
17 was found.

18 Mere presence at the scene where the drugs were
19 found is not enough to prove possession, nor is mere
20 association with a person who commits a crime does
21 not make a defendant an accomplice or an aider and
22 abettor of the person committing the crime involved.

23 Actual knowledge of the presence of the
24 methamphetamine is strong evidence of the
25 defendant's intent to control its disposition or

1 use. The defendant's knowledge and possession may
2 be inferred when the substance is found on the
3 property under the defendant's control. However,
4 this inference is simply an evidentiary fact to be
5 taken into consideration by you, along with the
6 other evidence in this case, and to be given the
7 weight you decide it should have.

8 Now, I further charge you that two or more
9 persons may have joint possession of a drug.

10 Now, to deliver means to actually,
11 constructively, or attempt to transfer the drug.

12 Distribute means to deliver, other than by
13 administering or dispensing a drugs.

14 Manufacture means to produce, prepare, convert,
15 process, plant, cultivate, grow, or harvest a drug
16 naturally or chemically.

17 Manufacturing including any packaging or
18 repackaging of the drug or labeling or relabeling of
19 that drug's container.

20 Now, an attempt is an effort to accomplish a
21 crime which does not succeed. An attempt includes a
22 specific intent to do a particular criminal act
23 along with an act falling short of the act intended.
24 The State must show more than mere preparation and
25 intent. There must be some overt act committed in

1 the effort to commit the crime.

2 Intent means intending the result which
3 actually occurs, not accidentally or involuntarily.
4 Intent may be shown by acts and conduct of the
5 defendant and other circumstances from which you may
6 naturally and reasonably infer intent.

7 Now, there has been raised in this case the
8 issue of entrapment. Entrapment is shown if:

9 1. The crime was conceived and planned by an
10 officer or someone acting as an agent of law
11 enforcement.

12 2. The officer or agent induced, solicited,
13 proposed, initiated, suggested, or persuaded the
14 defendant to commit the crime.

15 3. The defendant would not have committed the
16 crime without the trickery, persuasion or fraud of
17 the officer or agent.

18 The State is required to prove beyond a
19 reasonable doubt that the defendant was predisposed
20 to commit the crime without the inducement of the
21 officer or agent.

22 Predisposed to commit the crime means that the
23 defendant had the intent, purpose, readiness or
24 willingness to commit the crime without the
25 inducement or persuasion of the officer or agent.

1 The fact that the officer or agent merely presented
2 opportunities or facilities for the commission of
3 the crime is not entrapment.

4 If you find that the defendant had any
5 predisposition, without any government inducement
6 and influence to commit the crime, the defense of
7 entrapment would not apply.

8 In deciding whether the defendant had any
9 predisposition to commit the crime, you may consider
10 evidence, such as:

11 1. An existing course of criminal conduct by
12 the defendant similar to the crime charged;

13 2. An already formed plan by the defendant to
14 commit the crime;

15 3. A willingness to commit the crime charged
16 as shown by the defendant's ready response to the
17 inducement.

18 If you find that the defendant was entrapped
19 into committing the crime, then you must find the
20 defendant not guilty.

21 Now, in order to establish criminal liability,
22 criminal intent is required. Criminal intent must
23 be proven by the State beyond a reasonable doubt.
24 Criminal intent is always a matter that must be
25 determined by the jury from the circumstances

1 surrounding the situation. There is no way to prove
2 intent to a mathematical certainty. There is no way
3 medical science can dissect a person's brain and
4 determine what the person had in mind, so the law
5 says that criminal intent may be inferred from the
6 circumstances shown to have existed. This is how
7 you make a determination of whether or not the
8 element requiring intent was present.

9 It is not necessary to establish intent by
10 direct and positive evidence, but intent may be
11 established by inference, in the same way as any
12 other fact, by taking into consideration the acts of
13 the parties and all the facts and circumstances of
14 the case.

15 Now, ladies and gentlemen, you have been
16 selected as fair and impartial jurors, sworn to
17 impartially try and determine the facts of this
18 case. And when you comply with your oath to do so,
19 then no one will have a right to criticize your
20 verdict and you will have fully discharged your duty
21 as jurors. You are to decide this case according to
22 the testimony that you have heard from the lips of
23 the sworn witnesses, along with the other evidence
24 introduced in this case.

25 I charge you that as jurors you must decide the

1 issues in this proceeding without bias and without
2 prejudice to any party. You cannot allow yourself
3 to be governed by sympathy, by prejudice, by
4 passion, by public opinion, or any other arbitrary
5 factor. Both the State and the defendants have the
6 right to expect that each of you will have carefully
7 and impartially consider all the evidence in this
8 case and that you will follow the law as I have
9 explained it to you.

10 Now, ladies and gentlemen, let me thank you
11 very much for the attention that you have paid
12 throughout the course of this trial, and I want to
13 direct your continued attention to me as I explain
14 to you the verdict forms in these cases.

15 Now, ladies and gentlemen, please keep in mind
16 that the manner in which I list these verdicts is to
17 in no way convey or imply anything to you. It is
18 very simply that one verdict must be listed before
19 the other.

20 Now, I'm going to discuss these cases in the
21 manner in which they have been presented to you in
22 this trial.

23 The first case is that of the State versus
24 Michael Gonzales, the defendant. This is Indictment
25 2002-GS-42-2742. And I hold in my hand the verdict

1 form in this case.

2 And Madam Foreperson, I want you to pay
3 particular attention to all of this, as well as all
4 members of the jury, because you are going to be
5 responsible for presiding over the deliberations in
6 the jury room and actually writing the verdicts in
7 these cases.

8 As to this case of the State versus Michael
9 Gonzales, it reads we, the jury, by unanimous
10 consent find the defendant Michael Gonzales, and the
11 first possible verdict is guilty of trafficking in
12 methamphetamine. If you find that he is guilty of
13 trafficking in methamphetamine, you will place a
14 check or an X to the left on the line provided.

15 Then Madam Foreperson, ladies and gentlemen,
16 you will make a determination as to what the State
17 has proven beyond a reasonable doubt as to the
18 amount of methamphetamine that was trafficked;

19 That being 10 grams, or more, but less than 28
20 grams;

21 Or, 28 grams, or more, but less than 100 grams;

22 Or, 100 grams, or more, but less than 200
23 grams;

24 Or, 200 grams, or more, but less than 400
25 grams;

1 Or, 400 grams.

2 Whatever amount if you have determined that the
3 defendant -- and that would be unanimously
4 determined that the defendant was guilty of
5 trafficking in methamphetamine, once you unanimously
6 agree as to one of these amounts, Madam Foreperson,
7 you would place a check or an X on the appropriate
8 line that you have determined.

9 Or the other possible verdict is not guilty.

10 And Madam Foreperson, if you reach a not guilty
11 verdict, you would simply place an X or a check on
12 the space provided. Then sign your name as the
13 foreperson of the jury and date it today, which is
14 July 24th, 2002, and your deliberations would be
15 concluded as to that indictment.

16 Now, the case 2002-GS-42-2754, the State versus
17 Steven Josh Shelhamer, once again, the possible
18 verdicts -- and please attach no significance to the
19 fact that one is listed before the other, it's very
20 simply that one must be listed first. We, the jury,
21 by unanimous consent find the defendant Steven Josh
22 Shelhamer guilty of trafficking in methamphetamine.

23 Once again, if you unanimously determine that
24 he is guilty of trafficking in methamphetamine, you
25 would place a check or an X to the left and then you

1 would determine the amount that was proven by the
2 State beyond a reasonable doubt.

3 The first possible verdict would be 10 grams,
4 or more, but less than 28 grams;

5 Or, 28 grams, or more, but less than 100 grams;

6 Or, 100 grams, or more, but less than 200
7 grams;

8 Or, 200 grams, or more, but less than 400
9 grams;

10 Or 400 grams, or more.

11 Once again, you would place a check or an X to
12 the left of the amount that you unanimously
13 determined that the State had proven beyond a
14 reasonable doubt as to the trafficking in
15 methamphetamine.

16 Or the other possible verdict is not guilty.

17 And, once again, if you unanimously determine
18 that the defendant is not guilty of the charges,
19 then you would place a check or an X to the left of
20 that verdict and your deliberations, once you have
21 reached a unanimous verdict on this case, would be
22 concluded. You would sign your name as the
23 foreperson, date it once again today, which is July
24 24, 2002.

25 Now, ladies and gentlemen, as you have heard me

1 say throughout my explanation to you of the verdict
2 forms that your verdict must be unanimous. It must
3 be the verdict of all twelve of you. The word
4 verdict comes from the Latin word or term veredicto,
5 which means to speak the truth. And once you have
6 reached a verdict to which all twelve of you agree,
7 then it will speak the truth of you collectively as
8 a jury, as well as individual jurors.

9 Now, ladies and gentlemen, I'm going to be
10 sending you to the jury room in just a moment.
11 Please do not begin your deliberations until I
12 instruct you to do so. If it is necessary for me to
13 bring you back into the courtroom for further
14 instructions, I will do that very quickly.

15 If it is not necessary for me to bring you back
16 into the courtroom for further instructions, then
17 I'm going to send the form of verdict, together with
18 all the evidence in this case, back to the jury room
19 and you may then begin your deliberations.

20 Now, as you are aware, there is an audio tape
21 in this case. And if you desire to hear that,
22 regardless of the number of times that you would
23 desire to hear it, Madam Foreperson, I want you to
24 simply write me a note and send that tape out
25 saying that you would like to hear the tape and we

1 will make arrangements to see that it is played for
2 you one time, or as many times as you need to hear
3 it.

4 Once you have completed your deliberations in
5 these cases and you have filled out the verdict
6 forms as I have instructed you, you have reached
7 unanimous verdicts as to these cases, then simply
8 knock on the door, tell the bailiff that you have
9 reached verdicts and we will then bring you back
10 into the courtroom to publish your verdicts.

11 If you have a question during the course of
12 your deliberations, Madam Foreperson, I want you to
13 write that question out on a piece of paper, knock
14 on the door, give it to the bailiff and he will see
15 that it's delivered to me and I will address that
16 question as I am permitted under the law of the
17 State of South Carolina.

18 Once again, please remember that your verdicts
19 must be unanimous. They must be the verdict of all
20 twelve of you. And do not begin your deliberations
21 until I instruct you to do so.

22 Now, when your lunch arrives, Madam Foreperson,
23 you may do one of several things. I'm going to
24 leave it up to y'all. You can stop, eat lunch, and
25 then resume your deliberations. You can deliberate

1 during lunch. I'll leave that entirely up to you.
2 But, once again, do not begin your deliberations
3 until I instruct you to do so.

4 The jury may retire to the jury room.

5 Hold the alternate just outside of the
6 courtroom, please.

7 (Whereupon, at about 1:43 p.m., the Jury Panel
8 went to jury room, awaiting instructions to begin
9 deliberations)

10 THE COURT: Exceptions or additions from the
11 State?

12 MR. WALL: Your Honor, my only concern would
13 be, and I freely admit I may have not related my
14 research on this because the faulty of my own. I
15 was not prepared for the entrapment charge. My
16 understanding is or was that the entrapment defense
17 is an affirmative defense, that the defense has to
18 prove -- has the burden of proving that.

19 THE COURT: I think that most of those defenses
20 that are raised, that it is up to the State to prove
21 beyond a reasonable doubt that it did not happen,
22 Mr. Wall. I think if you will look at most of those
23 defenses, that that is true.

24 If you are saying that they have to prove it,
25 then I'll note your exception.

1 MR. WALL: Yes, sir, and again, that was just
2 my understanding of the law.

3 THE COURT: All right, sir.

4 Mr. Harris, any exceptions or additions?

5 MR. HARRIS: Your Honor, I ask that the court
6 give an additional instruction that if the jury has
7 a reasonable doubt as to whether the defendant is
8 guilty of the greater or lesser, they are to resolve
9 that doubt in favor of the lesser.

10 THE COURT: I don't believe we have to give
11 that charge anymore.

12 MR. HARRIS: Okay.

13 THE COURT: But I'll give it anyway. It's
14 called the King Charge, but I don't believe that the
15 case law requires that anymore.

16 Mr. Boggs.

17 MR. HARRIS: Thank you, Your Honor.

18 MR. BOGGS: I have no exception, Your Honor.

19 THE COURT: Thank you, sir.

20 MR. BOGGS: Yes, sir.

21 THE COURT: Yes, sir, Mr. Wall, what have you
22 got on your mind?

23 MR. WALL: Your Honor, if I may be briefly
24 heard again, His Honor has ruled and noted my
25 objection and I'm not arguing with the court.

1 THE COURT: Well, then, what are you doing?

2 MR. WALL: Well, I did want to cite one
3 sentence in one case, if I could.

4 THE COURT: All right.

5 MR. WALL: And I'm reading --

6 THE COURT: What is that case?

7 MR. WALL: It is State v. Johnson, 295 S.C.
8 215.

9 THE COURT: What's the date on that?

10 MR. WALL: It's a 1988 case, Your Honor.

11 THE COURT: All right, sir. Read it.

12 MR. WALL: And I'm just citing from the drug
13 litigation handbook which cites that case for the
14 proposition that the defendant bears the burden to
15 prove that he was not predisposed to commit the
16 crime.

17 THE COURT: Well, once again, I think that I
18 have ruled.

19 MR. WALL: Yes, sir.

20 THE COURT: Have you got anything else that you
21 want to put on the record about that?

22 MR. WALL: Not other than that State Supreme
23 Court opinion, no, sir.

24 THE COURT: And when was that book written?

25 MR. WALL: It's a -- it's cited in 1999.

1 And the only thing that I would -- and, again,
2 as I told the court, I have not shepardized that
3 case and cannot state whether that's still good law.
4 I was under the impression that it was. And if, in
5 fact, it is --

6 THE COURT: Well, if, in fact, it is, you might
7 have a grounds for appeal.

8 MR. WALL: Yes, sir.

9 THE COURT: If that's what the State decides to
10 do.

11 All right. Let's bring our jury back, please,
12 sir.

13 (Whereupon, at 1:49 p.m., the Jury panel
14 returned to open court)

15 THE COURT: Ladies and gentlemen, I charge you
16 that if you find the defendant is guilty and there
17 is reasonable doubt of whether he is guilty of any
18 lesser included offense, then you should give him
19 the benefit of that doubt and find him guilty of the
20 lesser included offense at whatever station you
21 would determine as I had instructed you in my
22 instruction as to the form of verdict. But, of
23 course, you could not convict him of any offense,
24 that being trafficking 10 to 28 grams;

25 28 to 100 grams;

1 100 to 200 grams;

2 200 to 400 grams;

3 Or 400 grams, unless his guilt has been
4 established by the State beyond a reasonable doubt.

5 With that further instruction I will send you
6 back to the jury room. Please do not begin your
7 deliberations until I instruct you to do so.

8 You may retire.

9 Hold the alternate just outside the courtroom,
10 please.

11 (Whereupon, at 1:52 p.m., the jury panel went
12 to the jury room, awaiting instructions to begin
13 deliberations)

14 THE COURT: All right. Anything further in
15 that regard, Mr. Harris?

16 MR. HARRIS: No, Your Honor. Thank you.

17 THE COURT: All right. If you would, please
18 look at all your exhibits and make sure that they
19 are properly before the court, and I'll let you look
20 over the forms of verdict also.

21 (off the record)

22 (back on the record)

23 MR. HARRIS: Your Honor, I have looked at the
24 exhibits. They seem to be in order.

25 THE COURT: Thank you, sir.

1 MR. BOGGS: No objection for Mr. Shelhamer as
2 to the verdict form or the presentation of the
3 evidence.

4 THE COURT: Thank you, sir.

5 MR. HARRIS: Your Honor, on behalf of Mr.
6 Gonzales, we find the verdict form in this case to
7 be sufficient.

8 THE COURT: Thank you, sir.

9 MR. WALL: I believe the court noted my
10 objection to the verdict form.

11 THE COURT: Yes, sir.

12 MR. WALL: No objection to the exhibits, Your
13 Honor. They all seem to be in order.

14 THE COURT: Thank you, sir.

15 In regards to the case of the State v. Johnson,
16 which was cited, that case reads as follows:

17 "The affirmative defense of entrapment is
18 available where there is the, quote, conception and
19 planning of an offense by an officer and his
20 procurement of its commission by one who would not
21 have perpetrated it except for trickery, persuasion,
22 or fraud of the officer. It is a well settled
23 principle of law that the defense of entrapment is
24 not available to a defendant exhibiting a
25 predisposition to commit a crime independent of

1 governmental inducement and influence. The fact
2 that a government official merely affords
3 opportunities or facilities for the commission of
4 the offense does not constitute entrapment. One
5 pleading entrapment has the burden of showing that
6 he was induced, tricked, or incited to commit a
7 crime which would not have been otherwise committed.
8 The issue of whether or not the defense of
9 entrapment has been established is ordinarily a
10 question of fact for a jury, unless there is
11 undisputed evidence and only one reasonable
12 conclusion can be reached."

13 This does not say that -- it says that the
14 defendant has the burden of showing that he was
15 induced. But, once again, it is the burden of the
16 State to prove beyond a reasonable doubt that there
17 was no entrapment.

18 So that's -- you know, if you read the case
19 very closely, and I think that our Supreme Court in
20 regards to affirmative defenses, such as
21 self-defense and so forth, that, once again, it's
22 always the burden on the State to disapprove it. So
23 I note your objection once again.

24 All right. Tell the jury that they may begin
25 their deliberations.

1 I want to hold that alternate in another area
2 so that if we need her during the course of
3 deliberations, we can do that. We are not going to
4 dismiss her at this time. So if you will bring her
5 in, I'm going to have you to take her to another
6 jury room and you can feed her and then we will let
7 her go at the end of the case.

8 (Whereupon, at 1:55 p.m., the jury panel was
9 instructed to begin deliberations)

10 (Whereupon, the Alternate Juror was brought
11 into the courtroom)

12 THE COURT: Madam Alternate, I'm going to allow
13 the bailiffs to take you to another room while the
14 jury deliberates. And once your lunch arrives, they
15 will bring it to you.

16 During the course of your staying in another
17 jury room, once again, you are not to discuss this
18 case with anyone. If it is necessary for us to have
19 you further participate in this case, then I will
20 bring you back in and we will instruct you further.
21 But if we could find a bailiff that can take her to
22 another jury room.

23 Would you find a bailiff for me, please? A
24 bailiff?

25 Mr. Nesbitt, how about taking this lady to

1 another jury room. Once her lunch is delivered,
2 would you see that it's delivered to her?

3 THE BAILIFF: Yes, sir.

4 THE COURT: And no one is to discuss this case
5 with her in any manner or fashion whatsoever. And
6 if you would keep her sequestered from anyone else.

7 THE BAILIFF: Yes, sir.

8 THE COURT: All right. We are going to stand
9 at ease. I would say that you gentlemen need to be
10 back here by around three o'clock is when I plan on
11 starting back with all the other matters. And if we
12 get a question during that period of time, we will
13 just hold it until you get back here. So we will
14 see you back here at three o'clock.

15 MR. BOGGS: Thank you, Your Honor.

16 (Whereupon, at 1:58 p.m., proceedings recessed,
17 pending the verdict of the jury panel)

18 (Whereupon, at 3:15 p.m., proceedings
19 reconvened)

20 THE COURT: All right. It is my understanding
21 that the jury has reached a verdict in this case.

22 Let me advise everyone in the courtroom that if
23 you do not feel that you can control your emotions
24 when a verdict is rendered, you need to removed
25 yourself from the courtroom at this time, because if

1 there are any outbursts, the deputies will take
2 anyone into custody and I will hold a contempt
3 hearing shortly thereafter.

4 All right, let's bring our jury back.

5 (Whereupon, at 3:15 p.m., the jury panel
6 returned to open court to report its verdict)

7 THE COURT: Madam Foreperson, it is my
8 understanding that you have reached a verdict to
9 which you all twelve agree, is that correct?

10 JURY FOREPERSON: That's correct.

11 THE COURT: And you have filled out the verdict
12 forms as I instructed?

13 JURY FOREPERSON: I have.

14 THE COURT: Please hand them to the bailiff.

15 You may publish the verdicts, Madam Clerk.

16 THE CLERK: General Sessions Court, Case Number
17 2002-GS-42-2742, the State of South Carolina versus
18 Michael Gonzales, we, the jury, by unanimous consent
19 find the defendant Michael Gonzales guilty of
20 trafficking in methamphetamine, 400 grams, or more.

21 This is signed by the foreperson and dated
22 today's date.

23 Case Number 2002-GS-42-2754, the State of South
24 Carolina versus Steven Josh Shelhamer, we, the jury,
25 by unanimous consent find the defendant Steven Josh

1 Shelhamer not guilty.

2 This is signed by the foreperson and dated
3 today's date.

4 Ladies and gentlemen of the jury, if these are
5 your verdicts and still your verdicts, would you
6 please raise your right hands.

7 So say you all.

8 THE COURT: Let the record reflect that each
9 and every juror has raised their hand in response to
10 the clerk's question.

11 Anything further from the State before the jury
12 is excused?

13 MR. WALL: No, sir, Your Honor.

14 THE COURT: From the defendant?

15 Please be seated.

16 From the Defendant Gonzales?

17 MR. HARRIS: No, Your Honor.

18 THE COURT: From the defendant Shelhamer?

19 MR. BOGGS: No, Your Honor.

20 THE COURT: Ladies and gentlemen of the jury, I
21 want to thank you very much for your participation
22 in this case, the attention that you have paid to
23 it. And on behalf the State of South Carolina, most
24 particularly Spartanburg County, I thank you very
25 much for being here. This is going to conclude your

1 responsibilities as to this case. I'm going to send
2 you to the jury room at this time and will advise
3 you about your further participation. So if you
4 would, please retire to the jury room.

5 (Whereupon, at 3:17 p.m., the jury panel was
6 discharged)

7 THE COURT: All right. Motions?

8 MR. WALL: None by the State, Your Honor.

9 MR. HARRIS: Your Honor, we have no post-trial
10 motions, other than to request that the Court delay
11 sentencing until I have had an opportunity to fully
12 and completely discuss with my client how he might
13 choose to handle other pending charges. I just feel
14 I simply don't have an adequate opportunity right at
15 this very moment to make him fully aware of all of
16 the consequences. He does have another extremely
17 serious charge pending against him. Obviously he's
18 in custody and has been. I ask that the court
19 consider some reasonable postponement.

20 THE COURT: What says the State in that regard?
21 You would know more about other charges than I do.

22 MR. WALL: Your Honor, the State's position on
23 that is that this, as I read the statute, the charge
24 that he's just been convicted of has a mandatory
25 minimum sentence.

1 THE COURT: Yes, sir, I understand that part.

2 MR. WALL: As well as the other charge that he
3 has. It carries the same sentence. The only -- we
4 would certainly discuss with him running those
5 sentences concurrently. I don't believe being
6 sentenced on this one would preclude him from that
7 in any way.

8 THE COURT: I'll do this, Mr. Harris. I'll
9 defer sentencing until tomorrow. And after we get
10 through with the issues in our motions tomorrow
11 morning, we will just have sentencing at that time.

12 MR. HARRIS: Yes, sir. Thank you, Your Honor.

13 THE COURT: All right. And the Defendant
14 Shelhamer is released.

15 MR. BOGGS: Thank you, Your Honor.

16 THE COURT: We will have sentencing in the
17 morning around ten o'clock.

18 MR. WALL: Yes, sir.

19 (Defendant Gonzales Requests to Charge marked a
20 Court's Exhibit No. 3 for identification).

21 (Defendant Shelhamer Requests to Charge marked
22 as Court's Exhibit No. 4 for identification)

23 (Whereupon, proceedings were adjourned to July
24 25, 2002, at 10:00 o'clock a.m.)

25

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 25, 2002
Defendant.) SPARTANBURG, SOUTH CAROLINA

VOLUME IV

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

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1 (Proceedings, July 25, 2002)

2 THE COURT: We are here for sentencing in Mr.
3 Gonzales case.

4 MR. HARRIS: Your Honor, if it please the court --
5 pardon me, I didn't have an opportunity to spread
6 these things out.

7 Your Honor, before sentencing takes place, I
8 ask that the court hear Mr. Gonzales on post-trial
9 motions.

10 THE COURT: Okay.

11 MR. HARRIS: I had -- there are three.

12 THE COURT: Okay

13 MR. HARRIS: And one is basically a renewal of
14 the directed verdict motion that was made at the
15 close of the State's case.

16 THE COURT: All right.

17 MR. HARRIS: And the grounds for that were that
18 the evidence was insufficient to prove anything
19 beyond mere presence at the scene of the crime.
20 That is the first motion.

21 THE COURT: All right, sir.

22 MR. HARRIS: Your Honor, we have also two other
23 motions that are separate, but related issues, that
24 concern the indictment in the case.

25 One raises an issue.

1 THE COURT: Well, I think an issue regarding
2 indictment should be raised before the trial,
3 shouldn't it?

4 MR. HARRIS: Well, one issue relates to subject
5 matter jurisdiction, which, of course, may be raised
6 at any stage of the proceeding. And one issue
7 relates to the efficacy of the jury's verdict as it
8 relates to the crime charged in the indictment.

9 THE COURT: All right. Let me hear from you.

10 MR. HARRIS: Your Honor, of course the
11 indictment --

12 THE COURT: Let me see the indictment, Madam
13 Clerk.

14 MR. HARRIS: The indictment, Your Honor, is
15 captioned trafficking in methamphetamine and alleges
16 in the body of the indictment an offense which is
17 described as trafficking in methamphetamine, a
18 Schedule II controlled substance, in violation of
19 Section 44-53-375 of the Code of Laws of South
20 Carolina.

21 Your Honor, the position of the defendant is
22 that there is no such criminal offense recognized by
23 Section 375 known as trafficking in methamphetamine.

24 The express language of Section 375, which is
25 if a crime has been charged in the indictment

1 against Mr. Gonzales, it is a violation of 375.

2 375(c) describes an offense which is
3 specifically designated -- as a matter of fact, the
4 language, of course, in paragraph C states if these
5 acts are done is guilty of felony which is known as
6 "trafficking in ice, crank, or crack cocaine."

7 So the defendant's position is that in order
8 for the court to have subject matter jurisdiction by
9 the allegations of the indictment, the body of the
10 indictment should allege that the defendant was
11 trafficking in ice, crank, or crack cocaine, as
12 defined by Code Section 44-53-110.

13 Your Honor, I am aware of other cases, which in
14 the context of manufacturing methamphetamine, the
15 offense of manufacturing methamphetamine under
16 44-53-370, have stated that since there is a
17 described offense of manufacturing a Schedule II
18 controlled substance under 44-53-370, that if an
19 individual is convicted of that offense, that the
20 individual is subject to enhanced punishment under
21 44-53-375. However, I can find no case that
22 addresses the issue of whether there is an offense
23 that would be described in our law as trafficking in
24 methamphetamine at all. I don't know the chemical
25 description and designation of all the drugs,

1 although I see way too much of them in my practice,
2 but I can't find the offense of trafficking in
3 methamphetamine described in 44-53-370.

4 I likewise cannot find an offense known as
5 trafficking in methamphetamine in 44-53-375.

6 Now, obviously 44-53-110 has a section which
7 defines what ice and crank are and defines ice and
8 crank as amphetamine or methamphetamine, etcetera.
9 However, I think that the indictment has to allege
10 if there is to be an allegation of a violation of
11 44-53-375. The indictment must allege in the
12 language of 44-53-375 that the defendant has
13 committed the felony known as, to track the language
14 of the statute, trafficking in ice, crank or crack
15 cocaine, as defined by 44-53-110.

16 In the absence of that language, in essence,
17 the argument is the defendant has been indicted
18 under a statute for an offense that is not
19 encompassed by that statute. Therefore, if true,
20 the indictment would be insufficient on its face to
21 confer subject matter jurisdiction on the court.

22 Your Honor the related issue and the second
23 matter I would like to address to the court as to
24 the indictment goes to the relationship of the
25 jury's verdict to the crime charged in the

1 indictment. It is a closely related issue to the
2 argument made about subject matter jurisdiction, but
3 different to the extent that it should be considered
4 separate -- or I ask that it be considered as a
5 separate matter by the court.

6 Again, the defendant was, if he was charged
7 with any crime, he was charged with a violation of
8 44-53-375, trafficking in ice, crank, or crack
9 cocaine. The jury has returned a verdict of guilty
10 as to trafficking in methamphetamine. In essence
11 then the jury has found the defendant guilty of a
12 crime not charged in the indictment, in the sense
13 that the crime charged in the indictment must rely
14 on the reference to the statute and not to the
15 verbage that's used or the caption that's used to
16 describe the offense.

17 It is the defendant's position that in order
18 for the jury to convict him of trafficking in ice,
19 crank, or crack cocaine under 44-53-375, it would be
20 necessary for the jury to find as an essential
21 element of the offense that the defendant -- that
22 the substance that the defendant was alleged to have
23 trafficked in was, in fact, the substance known as
24 ice, crank or crack cocaine as that term or phrase
25 is defined by 44-53-110. Since the jury could not

1 have found that as an essential element, because of
2 the allegations in the indictment, the jury could
3 not have found the defendant guilty of a violation
4 of 44-53-375. Thank you, Your Honor.

5 THE COURT: Mr. Wall.

6 MR. WALL: Your Honor, as the court knows, and
7 I know that His Honor has the section up there, that
8 the portion of the statute says ice, crank or crack
9 cocaine, and then says as defined and otherwise
10 limited in sections, and directly -- the statute
11 directly refers to 44-53-110, which defines it as
12 ice or crank means amphetamine or methamphetamine.

13 The statute clearly refers to the scientific
14 name for the drug. The crank is merely a street
15 name for methamphetamine.

16 The State's position would be that that is all
17 encompassed in that statute. I mean, the
18 legislature refers to it by its street name and then
19 directly refers you to the defining statute, which
20 is methamphetamine. And the State's position would
21 be that the indictment was properly before the court
22 and the court has subject matter jurisdiction
23 regarding this matter.

24 MR. HARRIS: Your Honor, I just say in brief
25 response, I do not think that we could assume, and I

1 do not think that there is anything by reading
2 44-53-375 that would permit a defendant to assume,
3 that crank or ice is simply a street name for a
4 drug. And I stand in here right now and frankly
5 don't really know if that's true or not. It may be,
6 I don't know.

7 THE COURT: Well, I can tell you that it is.

8 MR. HARRIS: But --

9 THE COURT: And I can also tell you that
10 probably if you went down and polled the
11 legislature, that you wouldn't have anyone in there
12 that knew the answer to that.

13 MR. HARRIS: But the requirements --

14 THE COURT: And unfortunately that is just like
15 people that walk in here. Sometimes they don't --
16 well, a lot of times they don't know what they are
17 talking about down there. Sometimes people don't
18 know what they are talking about in here, just as an
19 aside.

20 MR. HARRIS: The point I guess I would like to
21 emphasize is what has to be proven is an offense
22 under 44-53-375, which in the defendant's view would
23 require, for subject matter jurisdiction, that the
24 indictment allege that the defendant traffic in ice,
25 crank or crack cocaine as defined by the 44-53-110;

1 and in terms of the jury's verdict, the efficacy of
2 the jury's verdict, that the jury would have been
3 required to make a finding as an essential element
4 of a violation of 44-53-375, trafficking portion C,
5 that the defendant -- the substance that the
6 defendant, in fact, trafficked in was the substance
7 described in the statute as ice, crank, or crack
8 cocaine as defined by 44-53-110.

9 THE COURT: Well, Mr. Harris, a couple of
10 things come to mind. A close reading of Section
11 44-53-375 in its entirety references all of these
12 things. It references you back to 44-53-110, 210,
13 (b)(4), (d)(1), (d)(2). And I believe that several
14 things here come to mind.

15 Number one, subject matter jurisdiction can be
16 raised at any time. When I asked you if there were
17 any -- if there was anything further from the
18 defendant yesterday, you said that there were no
19 post-trial motions. I am entertaining those though
20 this morning.

21 Number two, I believe that several things here
22 come to mind.

23 Number one, the jury's verdict -- the defendant
24 agreed to the form of the verdict. The defendant
25 had no objection to the charge that was given. The

1 defendant had raised no matters concerning this
2 prior to this time. I believe that the indictment
3 in this case is one that would lead anyone to
4 understand that he was charged with methamphetamine.

5 If there was a request to charge crank, ice,
6 crack cocaine, and all derivatives, I would have
7 done so.

8 I think that a clear reading of 44-53-375 and
9 the related sections 110, 210, and the subsections
10 that I have previously noted, would reveal certainly
11 that methamphetamine is encapsulated in that. And,
12 as such, all motions are denied.

13 MR. HARRIS: Your Honor, the next matter is a
14 matter that in speaking with my client this morning,
15 he has prevailed upon me to make a request of the
16 court, and I feel that I should do that, if he has
17 requested it. Mr. Gonzales has requested that
18 sentencing be further delayed for purposes of his
19 own as relates to the other pending charge for
20 trafficking in marijuana.

21 THE COURT: That motion is denied. I think
22 that this case was called for trial. I gave you
23 time to discuss it with him overnight.

24 Certainly if he wants to try to work out
25 anything, you and Mr. Gonzales with the solicitor's

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1 office, you can do that independent of this case.
2 This case has been determined by the jury. All
3 motions have been ruled upon, and I'm going to
4 sentence him at this time.

5 Bring him around.

6 Anything further that you want to tell me, Mr.
7 Gonzales?

8 THE DEFENDANT: Sir, judge, what I -- what I
9 understood before is that I was supposed to come and
10 supposed to get a bond hearing from before. And
11 then -- then Ricky came to me and told me that I was
12 supposed to get charged on the marijuana case from
13 before. And as soon as I got here, I had no idea
14 that I was going to go up against a methamphetamine
15 case. And as soon as I got here today, he told me
16 that they switched it around and got to the
17 methamphetamine case, which I thought that -- I
18 thought -- in my opinion I thought we were going to
19 go for the bond hearing. I had no idea they were
20 going to go through this already.

21 I just feel that -- that -- we should -- that
22 U.S. v. Verteran, 551 F.3d. 2.9 11 C.R.I. 1995
23 implicit right to counsel and motion of the
24 inadequate time for counsel to prepare defense.

25 THE COURT: Mr. Harris never mentioned anything

1 to me about not being prepared. He tried a very
2 good case.

3 THE DEFENDANT: But I never -- I never -- I
4 hardly -- I hardly -- he prepared the case, but I
5 hardly ever saw him by the time he went to the
6 jailhouse to see him or anything. As all this went
7 on, I probably seen him maybe two times -- two or
8 three times, maybe. I just feel like that we
9 didn't --

10 THE COURT: Anything else from you, Mr. Harris?

11 MR. HARRIS: No, Your Honor.

12 THE COURT: Sentence of the court,
13 2002-GS-42-2742, that's trafficking in
14 methamphetamine more than 400 grams, the defendant,
15 Michael Gonzales, is committed to the State
16 Department of Corrections for a term of thirty years
17 and to pay a fine of \$200,000.00.

18 MR. WALL: Thank you, Your Honor.

19 (END OF REQUESTED TRANSCRIPT OF RECORD)
20
21
22
23
24
25

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG)

Michael Gonzales, 285903)

Full name and prison number (if any) of Applicant.)

2006-CP-42 1550

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF)

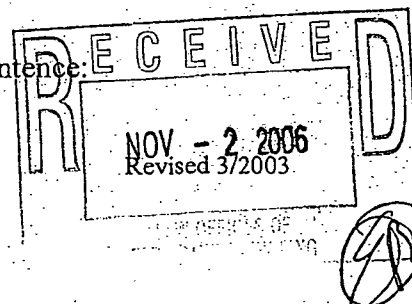
INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution
2. Name and location of Court which imposed sentence Spartanburg Court of General Sessions, Spartanburg, SC
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2002-GS-42-2742 Trafficking in Methamphetamine, 400 grams or more
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) July 25, 2002, 30 years and a fine of \$200,000.00



- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty XX
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction Affirmed
- ii. Petition for Rehearing Denied
- iii. Petition for Writ of Certiorari denied
- (c) the date of each such result:
- i. July 6, 2004
- ii. August 19, 2004
- iii. March 10, 2006
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion No. 3842
- ii. Order Denying Petition for Rehearing
- iii. Unpublished Order
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____

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MARC KITCHENS

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) The Applicant received Ineffective Assistance of Trial Counsel prior and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.

(b) The Applicant received Ineffective Assistance of Appellate Counsel prior and during direct appeal in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Trial counsel had a serious conflict of interest in representing the Applicant and an individual named Dino Perez. Perez was the Applicant's Mother's long time boyfriend who was under federal investigation. Counsel could not effectively represent them both where the authorities wanted the Applicant to testify against Dino Perez.

(b) Trial counsel failed to adequately prepare and present witnesses at trial.

(c) Trial counsel failed to recognize and present objections to errors which occurred during trial.

(d) Trial counsel failed to develop and present viable defenses to the charges against the Applicant prior to and during his trial.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Petition for Writ of Certiorari to the South Carolina Supreme Court.

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. South Carolina Supreme Court

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. Petition Denied

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. March 10, 2006

ii. _____

iii. _____

iv. _____

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

i. N/A

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

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SPARTANBURG COUNTY
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MARC KITCHENS

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) N/A

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? Yes

(c) your sentencing? _____

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Ricky Keith Harris, 145 N. Church St., # 34, Spartanburg, SC 29306

ii. Tara Dawn Shurling, 3614 Landmark Dr., Suite D., Columbia, SC 29204

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trial and Sentencing

ii. Appeal to Court of Appeals; Petition for Writ of Certiorari in Supreme Court of

SC

iii. _____

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

Reversal of conviction and sentence and a new trial.

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

No

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MARC KITCHENS

STATE OF SOUTH CAROLINA)

County of SPARTANBURG)

VERIFICATION

I, Michael Gonzales, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Michael Gonzales

SWORN to and subscribed before me this 5
day of may, 2006

Barbara Ricketson (L.S.)
Notary Public

My Commission Expires: Oct 28, 2012

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MARC KITCHENS

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

I, Michael Gonzales, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Michael Gonzales
Applicant

SWORN or affirmed to and subscribed before me this

5 day of May, 2006

Barbara Richeson
Notary Public

My Commission Expires: Oct 28 2012

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MARC KITCHENS

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Michael Gonzales, SCDC No. 285903,

2006-CP-42-1550

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

The Respondent, making its Return to the Application for Post-Conviction Relief filed May 11, 2006, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Applicant was indicted at the June 2002 term of the Spartanburg County Grand Jury for trafficking in methamphetamine (2002-GS-42-2742). He was represented by Ricky K. Harris, Esquire. On July 22 - 25, Applicant proceeded to trial and was found guilty as indicted. He was sentenced by the Honorable Gary E. Clary, to confinement for a period of thirty (30) years.¹

¹In June 2002 the Applicant was also indicted in Spartanburg County for trafficking in marijuana. He was represented on that charge by Tara D. Shurling. On October 7, 2004, the Applicant pled guilty to the lesser included offense of trafficking in marijuana, 10-100 lbs. He was sentenced by the Honorable D. Garrison Hill to confinement of five years to be served concurrently with the sentence for trafficking in methamphetamine. Applicant is not challenging this conviction or sentence in his current application.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The Applicant was represented in his appeal by Tara D. Shurling. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Michael Gonzales, Op. No. 3842 (S.C. Ct. App. filed July 6, 2004). On March 9, 2006, the South Carolina Supreme Court denied the Petition for Writ of Certiorari filed on Applicant's behalf. The Remittitur was issued March 13, 2006.

Attached herewith and incorporated herein by reference are the records of the Spartanburg County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, the Applicant's trial transcript, and the Applicant's appellate records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel due to
 - a) conflict of interest;
 - b) failure to adequately prepare and present witnesses at trial
 - c) failure to recognize and present objections to errors which occurred at trial
 - d) failure to develop and present viable defenses to the charges prior to and during trial
2. Ineffective assistance of appellate counsel

III.

Applicant's appellate counsel, Tara D. Shurling, has been retained to represent him in this Post-Conviction Relief matter. The Applicant has made allegations of ineffective assistance of appellate counsel. If the Applicant wishes to waive his claim of ineffective assistance of appellate counsel, a hearing on the matter is required. A hearing to examine the Applicant concerning the waiver of the

issue of ineffective assistance of appellate counsel is required. Carter v. State, 293 S.C. 528, 530, 362 S.E.2d 20 (1987). At the hearing, the Court should advise the Applicant that the dual representation will result in the waiver of any claim of ineffective assistance of appellate counsel. The Applicant will then be required to state on the record if he wishes to waive that claim. Id. If the Applicant choosed not to waive his claim of ineffective assistance of appellate counsel, the State moves to have Ms. Shurling relieved.

IV.

The Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. *See* Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Butler, Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held. At the hearing, the State requests the Court to obtain a waiver on the issues of ineffective assistance of appellate counsel before going forward on the claims raised in the application.

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

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Assistant Attorney General

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Telephone: (803) 734-3737

October 31, 2006.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

MICHAEL GONZALES, 285903,)
 Applicant,)

**AMENDMENT TO APPLICATION
 FOR POST-CONVICTION RELIEF**

v.)

06-CP-42-1550

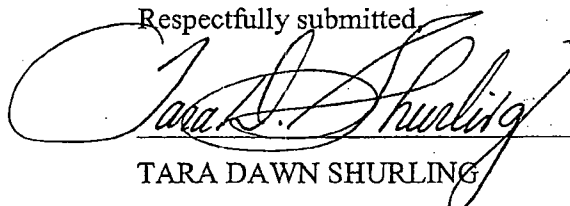
STATE OF SOUTH CAROLINA,)
 Respondent.)

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed in Spartanburg County on May 11, 2006. The Applicant, acting by and through his undersigned counsel, now asks that his Application for Post-Conviction Relief be amended to include the following allegation:

1. The Applicant was denied effective assistance of counsel because defense counsel was simultaneously representing both the Applicant and Dino Perez, a party with seriously adverse interests to the Applicant, at the time of the Applicant's trial.
2. Trial Counsel had a serious conflict of interest in representing the Applicant where Counsel was paid to represent the Applicant by Dino Perez, whose interests were seriously adverse to the Applicant and who was simultaneously represented by the same lawyer.

The simultaneous representation resulted in an actual conflict of interest for defense counsel. Accordingly, the Applicant contends that he is entitled to Post-Conviction Relief pursuant to *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708 (1980) and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

Respectfully submitted,



TARA DAWN SHURLING

3614 Landmark Dr., Suite D
 Columbia, South Carolina, 29204
 (803) 738-8622

ATTORNEY FOR THE APPLICANT

This 13th day of April, 2007.
 Columbia, South Carolina

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2007 APR 17 PM 3:34
 MARC KITCHENS

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

MICHAEL GONZALES, 285903)

CERTIFICATE OF SERVICE

Applicant,)

v.)

2006-CP-42-1550

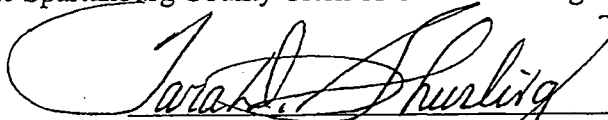
STATE OF SOUTH CAROLINA,)

Respondent.)

The undersigned hereby certifies that a true copy of the Amendment to Application for Post-Conviction Relief in the above matter has been served on opposing counsel this 13th day of April, 2007, by mailing one (1) copy in a stamped envelope properly addressed to

Prentice Counts, Assistant Attorney General
 Office of the Attorney General
 P.O. Box 11549
 Columbia, SC 29211

The original having been sent to the Spartanburg County Clerk of Court for filing.



TARA DAWN SHURLING
 Attorney and Counselor at Law
 3614 Landmark Drive, Suite D
 Columbia, S.C. 29204
 (803) 738-8622
 (803) 738-1600 Fax
 ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 13th day of

April, 2007.

Sharon H. McCallister (L.S.)
 Notary Public for South Carolina

My Commission Expires: January 16, 2017

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
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 MARC KITCHENS

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1 STATE OF SOUTH CAROLINA
2 COUNTY OF SPARTANBURG

} COURT OF COMMON PLEAS NONJURY

3
4 MICHAEL GONZALES,
5 APPLICANT,
6 vs.
7 STATE OF SOUTH CAROLINA,
8 RESPONDENT.

TRANSCRIPT

OF

RECORD

06-GS-CP-1550

9
10 September 20th and November 8th, 2007.
11 Spartanburg, South Carolina

12
13 B E F O R E:

14 THE HONORABLE ROGER L. COUCH, JUDGE.

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

16 TARA D. SHURLING
17 ESQ.
18 Attorney for the Applicant

19 PRENTISS COUNTS
20 ASSISTANT ATTORNEY GENERAL
21 Attorney for the Respondent

22
23
24 PAMELA E. GREEN
25 Circuit Court Reporter
Seventh Judicial Circuit

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P R O C E E D I N G S

THE COURT: All right. We're on the record in the case of Michael Gonzales versus The State of South Carolina, and this is a PCR hearing.

The State ready?

MS. COUNTS: Yes, Your Honor.

THE COURT: Applicant ready?

MS. SHURLING: Ready, Your Honor.

THE COURT: All right. Ms. Shurling, you may proceed.

MS. SHURLING: Thank you, Your Honor.

For the record, my name is Tara Dawn Shurling. I was Court appointed to represent Michael Gonzales in this post-conviction relief action. As Your Honor is aware, I am from the Richland County Bar in Columbia, and it's probably appropriate to first explain to the Court how I came to be involved in this Spartanburg County post-conviction relief case.

THE COURT: We're glad to have you, but you can explain. Go ahead.

MS. SHURLING: Thank you, sir.

I was originally retained to represent Michael Gonzales in a direct appeal from the charges that are before the Court. Those being, of course, the trafficking in methamphetamine charges that were tried in Spartanburg

1 County on July 22nd and 25th, Your Honor, in, back in
2 2002.

3 During the pendency of that direct appeal, I had
4 occasion to try a 42 day drug case in Federal Court in
5 Columbia, South Carolina along with 21 of my brethren, and
6 the Government's lead attorney in that case was Mark Moore
7 who, at the time, was the chief counsel -- I'm not quite
8 certain what their terminology is in the U.S. Attorney's
9 Office is. But he was the head of the drug task force unit
10 of the United States Attorney's Office in Columbia.

11 I was approached by Mr. Moore in court one day. He
12 asked -- he -- well, he didn't ask. He actually informed me
13 that he was aware that I represented Michael Gonzales, and
14 told me that I needed to proffer him up because the Fed's
15 needed him as a witness in a pending prosecution of an
16 individual named Dino Perez.

17 At that point, Your Honor, I was a direct appeal
18 lawyer. I didn't have a lot of background with this young
19 man. Mr. Moore proceeded to inform me that Dino Perez was
20 kind of like an adopted stepfather, if you will, to Michael
21 Gonzales, that he had dated and lived with Michael's mother,
22 Lucy Santana, for a long time starting when Michael was a
23 fairly young child, an adolescent, in any event, and that
24 the government badly wanted Michael as a witness against
25 this Mr. Dino Perez.

1 I, at that time, informed the government that I was
2 very familiar with the difference between the federal system
3 and the state system. That in the state system we sometimes
4 are able to say basically I'll do this for you if you agree
5 to do that for me. Whereas in the federal system, it's
6 essentially you tell them everything you know, and if they
7 like it enough they might help you as a result of your
8 cooperating.

9 But that I didn't know that that would be of any help
10 in this particular case because this young man, who was a
11 mere 17 years old, had a 30 year sentence. And that while
12 that might not be the end of the world to a 17 year old, it
13 certainly could feel like it. So that I doubted he had much
14 incentive to cooperate with the government, but that I
15 certainly would do my job.

16 So, I put the issue to Mr. Gonzales, who initially told
17 me he knew nothing about Mr. Perez's affairs. I was
18 approached again by Mr. Moore who asked, and again he didn't
19 really ask, he insisted that I make Mr. Gonzales available
20 as a witness to the government. Ultimately, it was agreed
21 that Michael would be allowed to enter a federal proffer
22 agreement in which he would be given complete protection for
23 anything that he revealed in exchange for his debriefing
24 with the federal government and he did so.

25 The initial debriefing was conducted at Perry

1 Correctional Institution with an agent from the ATF and an
2 agent from the DEA. This was back in early summer, Your
3 Honor, of -- sorry. My dates escape me sometimes. Summer
4 of 2003.

5 There was subsequently a more extensive debriefing held
6 here in Spartanburg County over at the old Sheriff's
7 Department. At that time, Detective Ritchie Strawn from the
8 Sheriff's Department was present along with myself and DEA
9 Agent Steven Russell, who was, at that time, assigned to the
10 Upstate, primarily out of Greenville. He has subsequently
11 been relocated to the Columbia field office for the DEA.

12 Your Honor, initially I handled that portion of the
13 matter pro bono. Ultimately a federal judge appointed me as
14 Court appointed counsel for a material witness to a
15 government prosecution. I believe it was Judge Hurlong from
16 Greenville that made that appointment, Your Honor, if I'm
17 not mistaken. So, I represented Michael in that capacity up
18 through a point where he had continued to provide extensive
19 debriefings against Dino Perez outlining, with great detail,
20 perhaps more than I have ever seen in any drug debriefing
21 I've been privy to and I do a lot of that kind of practice,
22 concerning the drug operation of Dino Perez and how he had
23 become involved in it as a youngster, 12, 13 years old, on
24 up through the time when this charge happened.

25 Your Honor, all---

1 THE COURT: Are you talking about the charge that he
2 was tried on?

3 MS. SHURLING: Sir?

4 THE COURT: The methamphetamine charge?

5 MS. SHURLING: Yes, sir.

6 THE COURT: Okay.

7 MS. SHURLING: Okay. Now, when this---

8 THE COURT: There's, there's two---

9 MR. SHURLING: What then happened, Your Honor, is
10 that---

11 THE COURT: There's two sentencing sheets in here.
12 One's from marijuana where we pled, and one is the trial.

13 MS. SHURLING: And I'm gonna get to that, sir.

14 THE COURT: Okay.

15 MS. SHURLING: And I'll try to speed it up a bit.

16 THE COURT: All right.

17 MS. SHURLING: But what happened, Your Honor, is that
18 in the process of representing him as Court appointed
19 counsel in U.S. District Court for a material witness, I
20 became aware that he had an outstanding state charge for
21 trafficking in marijuana, which, as Your Honor knows,
22 certainly a second trafficking charge would be devastating
23 for anyone in South Carolina, and I went back and discussed
24 the situation with the federal government, and I also was
25 able to address my concerns to Judge Hayes here in

1 Spartanburg, Judge Mark Hayes. I requested that I be
2 appointed outside of circuit to represent Young Michael in
3 the Spartanburg County marijuana case because I felt that
4 the background of the case had become so convoluted at that
5 point that it would be unfair for local public defender to
6 have to reinvent the wheel, if you were, and represent him.
7 So, I then, at that point, became counsel of record on the
8 marijuana charge as well.

9 The direct appeal was lost. Dino Perez subsequently
10 entered pleas of guilty to drug trafficking charges in the
11 U.S. District Court in Greenville and was sentenced, and I
12 negotiated a five year concurrent sentence on a reduced
13 charge, on the marijuana charge in Spartanburg County for
14 Mr. Gonzales, and he entered that plea and was the recipient
15 of the five year concurrent charge.

16 In preparation for filing a post-conviction relief
17 action, I made very certain that Mr. Gonzales understands
18 that one of the things he had a right to raise in a PCR
19 action was a claim on ineffective assistance of counsel
20 against me for how I represented him in the direct appeal.
21 And that if he wanted me to be his PCR lawyer, he wouldn't
22 be able to raise that cause I'm certainly not gonna PCR
23 myself.

24 I also explained to him that he, in theory, had a right
25 to file a, a separate PCR action with regard to the five

1 year concurrent marijuana sentence, with regard to that
2 judgment and sentence, and that he needed to make his own
3 well thought out decision about that because I was counsel
4 of record in General Sessions Court on that matter. And
5 once again, I certainly was not going to direct a Sixth
6 Amendment claim at myself.

7 He has indicated that he is willing here today to, on
8 the record, waive any claim of ineffective assistance of
9 counsel against me for the way I handled the direct appeal
10 from the trafficking in methamphetamine case, and as well to
11 acknowledge that he is not raising any Sixth Amendment
12 claims against me for the manner in which I handled the
13 marijuana case for which he received the five year
14 concurrent term.

15 I would guess that perhaps the best most expedient
16 starting place would be to have Michael questioned on the
17 record about whether he's made a knowing, voluntary,
18 intelligent decision to waive those collateral rights.

19 THE COURT: All right. Raise your right hand to the
20 best of your ability.

21 MICHAEL GONZALES, being first duly
22 sworn, testified as follows:

23 THE COURT: You can be seated.

24 WITNESS: Thank you.

25 THE COURT: Your name is Michael Gonzales, is that

1 correct?

2 WITNESS: Yes. Yes, Your Honor.

3 THE COURT: Mr. Gonzales, you were present in the
4 courtroom and heard Mrs. Shurling go over with me the
5 history of your case and her involvement in those matters.

6 Is that correct?

7 WITNESS: Yes, Your Honor.

8 THE COURT: Do you agree that she has correctly and
9 accurately related those facts to me?

10 WITNESS: Yes, Your Honor.

11 THE COURT: She indicated that she has gone over with
12 you the possibility that you might have some claim against
13 her for the handling of both your appeal as well as your
14 guilty plea in a marijuana trafficking case. That is Case
15 Number 02-GS-42-2132.

16 Do you understand that, sir?

17 WITNESS: Um---

18 THE COURT: Do you understand that you have a potential
19 claim against her for the way she handled those matters?

20 WITNESS: I understand that, Your Honor.

21 THE COURT: All right. Do you understand that, that,
22 in order for her to be able to handle this case today, it
23 would be necessary for you to either give up or waive any
24 potential claim that you might have against her.

25 Do you understand that?

1 WITNESS: Yes, Your Honor.

2 THE COURT: And do you, in fact, freely and voluntarily
3 waive or give up those potential claims?

4 WITNESS: Yes, Your Honor.

5 THE COURT: Are you asking her to proceed as your
6 attorney in this matter?

7 WITNESS: Yes, Your Honor.

8 THE COURT: Are you satisfied with her services at this
9 time?

10 WITNESS: Completely.

11 THE COURT: All right, sir. Now, I want to be sure
12 that you are not suffering from any type of mental,
13 physical, or nervous condition that would prevent you from
14 making good decisions today.

15 Is that true?

16 WITNESS: I'm---

17 THE COURT: You're not suffering from any problems---

18 WITNESS: No.

19 THE COURT: ---like that?

20 WITNESS: No, Your Honor.

21 THE COURT: All right, sir. Also, sir, have you taken
22 or used any substances that might affect your ability to
23 reason or make decisions today?

24 WITNESS: No, Your Honor.

25 THE COURT: So, you know what you're doing, Mr.

1 Gonzales?

2 WITNESS: Yes, Your Honor.

3 THE COURT: Are you ready to proceed with Ms. Shurling
4 serving as your attorney?

5 WITNESS: Yes, Your Honor.

6 THE COURT: Do you wish to ask any other questions of
7 him, ma'am?

8 WITNESS: No, sir, Your Honor.

9 THE COURT: The State wish to ask any questions of him?

10 MS. COUNTS: No, Your Honor.

11 THE COURT: All right. The applicant may proceed.

12 MS. SHURLING: And I would just note for the record
13 that, despite very limited educational opportunities, I have
14 always found Michael to be bright and articulate and have no
15 concern whatsoever that he lacked the ability to understand
16 any portion of this proceeding.

17 THE COURT: All right. Thank you, ma'am.

18 You may call your first witness.

19 MS. SHURLING: Thank you, Your Honor.

20 One more little thing I'd like to put on the record---

21 THE COURT: Sure. That will be fine.

22 MS. SHURLING: ---before we actually -- perhaps two.

23 THE COURT: Yes, ma'am.

24 MS. SHURLING: In presenting this case to the Court, as
25 part of my offering on the prejudice prong of the

1 Washington, Strickland versus Washington standard, I had
2 wanted to introduce the testimony of DEA Agent Steve
3 Russell, who is the primary DEA agent in this case, and very
4 familiar with the exact, exact dates during which Dino Perez
5 became a target and was the, on the receiving end of a
6 federal scrutiny and investigation and as well as familiar
7 with early efforts to gain cooperation from Michael
8 Gonzales. He has been transferred to Columbia and was
9 involved in a DEA operation and would not be available here
10 today.

11 Earlier we spoke with Your Honor about the proposition
12 that we would depose him at a later date. Subsequently I
13 had the opportunity at a break to discuss this matter with
14 Ms. Counts and found out that Your Honor has the honor or
15 perhaps not honor of being the presiding judge for the next
16 term of post-conviction relief in this circuit anyway.

17 THE COURT: I think that's in November, is that right,
18 Ms. Counts?

19 MS. COUNTS: November 5th, Your Honor.

20 THE COURT: All right.

21 MS. SHURLING: So, what we have agreed, with leave of
22 the Court if Your Honor will sign off on what we have sort
23 of informally agreed to, that we would simply recess at the
24 end of the proceeding here today and reconvene at the next
25 term of court. That would enable Ms. Counts to go ahead and

1 give me a date certain. She can pick a date---

2 THE COURT: Okay.

3 MS. SHURLING: ---that week.

4 THE COURT: I'll agree to that procedure. We'll, we'll
5 leave the record open, once we complete the hearing today,
6 for the receiving his testimony in November.

7 THE COURT: Thank you.

8 MS. SHURLING: Next, there were two documents produced
9 as a result of my client's extensive cooperation concerning,
10 concerning the criminal enterprise of Dino Perez. One is a
11 DEA 6, which was prepared on June 4th of 2003. The other
12 lengthier document is a transcript of the proceeding held at
13 the Spartanburg County Sheriff's Office, Your Honor, on
14 June 26th of '03.

15 Ms. Counts and I are going to review together my effort
16 at a redacted version of these documents and propose to
17 admit them at the time of Mr. Russell's testimony at the
18 subsequent term---

19 THE COURT: All right.

20 MS. SHURLING: ---rather than try to make a decision in
21 haste about which portions need to be redacted. It may even
22 be that Agent Russell will have some input as to which
23 portions he would, as a representative of the DEA.

24 THE COURT: Okay. I'll leave the record open for that
25 purpose as well.

1 MS. SHURLING: Thank you.

2 MS. COUNTS: Your Honor, the State would just reserve
3 the right to object to the entry of those documents.

4 THE COURT: I understand. You're not agreeing to their
5 admissibility. You are agreeing that she would be allowed
6 to present them for admission at that time.

7 MS. COUNTS: Yes, Your Honor.

8 THE COURT: Okay.

9 MS. SHURLING: Absolutely.

10 THE COURT: All right.

11 MS. SHURLING: And lastly, Your Honor, this falls under
12 category of my mistake. In heading here this morning, I
13 discovered that my copy of the trial transcript, along with
14 some notes I had made, was inadvertently not put into my
15 briefcase, and we were almost to Spartanburg when I made
16 that discovery. It, it -- the lion share of this case has
17 to do with the conflict issue between the representation of
18 Dino Perez and the representation of Michael Gonzales by the
19 same attorney.

20 I did not get an opportunity to review my flags and
21 notes that were sticking in the transcript. I can -- I will
22 say, as an officer of the Court, I do not believe that there
23 were any issues pertinent to the trial that I intended to
24 raise here today. If, when I get back to Columbia and
25 review the transcript, if I discover that there's something

1 specific that I had intended to bring up that I simply don't
2 recall at the moment, I will file a petition to be allowed
3 to raise those issues at the next proceeding, and I
4 understand the State may object, but we can -- it's probably
5 a moot point. I don't anticipate there being anything.

6 But---

7 THE COURT: I would just ask that you put the State on
8 notice as to what you might intend to, to present or what
9 issue you may intend to raise so that they'll be prepared on
10 that point.

11 MS. SHURLING: Thank you, sir.

12 THE COURT: All right.

13 MS. SHURLING: At this point, I believe we are prepared
14 to proceed. I would want to make sure that Your Honor has a
15 copy of my amended application for post-conviction relief
16 that was filed April 17th, 2007, as a part of your bench
17 package.

18 THE COURT: Just one second. Let me look. I have the
19 May 11th of '06. I don't believe I have that, Your Honor.

20 MS. COUNTS: Your Honor, I have a copy.

21 MS. SHURLING: I have an extra one, Your Honor.

22 MS. COUNTS: I have a copy.

23 THE COURT: Do you have a copy?

24 MS. SHURLING: I have an extra one, Your Honor.

25 THE COURT: All right.

Ricky Harris - Direct examination
by Ms. Shurling

1 MS. SHURLING: And while I'm putting your bailiff to
2 the trouble, I'll go ahead and pass up four South Carolina
3 cases dealing with conflict of interest that I intend to
4 refer to here today.

5 THE COURT: And you want to provide the State with a
6 copy of that amended---

7 MS. SHURLING: I have already done so, Your Honor.

8 THE COURT: All right. She's got it.

9 MS. SHURLING: Thank you, Your Honor.

10 THE COURT: All right.

11 MS. SHURLING: Your Honor, at this time I would call
12 Ricky Harris to the stand.

13 THE COURT: Mr. Harris, come forward and be sworn.

14 RICKY HARRIS, being first duly
15 sworn, testified as follows:

16 THE COURT: Have a seat, sir. And once you're seated,
17 state your name for the record.

18 WITNESS: Ricky Harris.

19 THE COURT: Your witness, Ms. Shurling.

20 MS. SHURLING: Thank you.

21 DIRECT EXAMINATION

22 BY MS. SHURLING:

23 Q Mr. Harris, do you recall representing Michael
24 Gonzales?

25 A Yes.

Ricky Harris - Direct examination
by Ms. Shurling

1 Q Who hired you to represent him?

2 A His mother.

3 Q His mother and?

4 A His mother, Lucy Santana, contacted me, best of my
5 recollection, said -- very upset. Said that her son Michael
6 had gotten arrested. I asked her what for. She said she
7 didn't really know. She knew it was very very serious. I
8 believe that I went to the jail on that occasion to speak
9 with him, find out, tried to find out what it was about,
10 quoted Mrs. Santana a fee, and she came to the office and
11 paid it. I don't remember if she paid it all at one time or
12 separately. But essentially I dealt with her.

13 Q Do you remember what your fee was?

14 A I don't. It was probably -- at that time, I think I
15 was charging an average of about \$25,000 for those cases.

16 Q And was it paid in cash or by check?

17 A I, I know at least part of it was in cash. I don't
18 specifically remember. I have the records.

19 Q You do have a record?

20 A I have the records, yes.

21 Q Yes, sir.

22 And at my request, did you bring your file with you
23 here today?

24 A I did.

25 Q And would that file include a record of the payment of

Ricky Harris - Direct examination
by Ms. Shurling

1 your fee?

2 A Yes.

3 Q Can you check it for us and, and tell us when you were
4 paid and, and by whom?

5 A Okay. On my ledger cards, show on January 5th, 2002, I
6 received a payment from Lucy Santana. The memo is fees,
7 trafficking, which I, I believe would relate to the
8 marijuana trafficking case, \$25,000 fee, paid in cash.

9 Q Well, actually you were retained both on the
10 trafficking in methamphetamine and the trafficking in
11 marijuana case, weren't you?

12 A I was retained first on the trafficking in marijuana
13 case, and then I subsequently was retained to represent Mr.
14 Gonzales on trafficking in methamphetamine.

15 Q Okay. And were you paid a separate fee for that?

16 A Yes.

17 Q And what was the amount of that fee and when was it
18 paid?

19 A It looks like, although I'm not completely sure, I
20 could try to refer to my other notes, June 5th, 2002, it
21 looks like there's a notation, new trafficking meth case is
22 what I think I'm reading my paralegal's handwriting.

23 Q Yes, sir.

24 A And we show that the person from whom we received
25 payment was Dino Perez and the check. There was -- it was a

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by Ms. Shurling

1 check for \$3,220 leaving a balance of \$22,000.

2 Q And was that remaining portion of that fee ever paid?

3 A Yes.

4 Q And when was that paid?

5 A It looks like June 6th, 2002, and that was a check from
6 the actual -- there's a check from J&M Contractors, which I
7 was given to believe was, trying to remember, somebody's
8 employer.

9 Q Okay.

10 A I don't remember whose -- I don't know if it's
11 Michael's employer or Dino Perez's employer or Lucy. I
12 don't remember who it was, but they paid the remainder of
13 the fee.

14 Q Now, at the time you were paid part of the fee in cash
15 by Dino Perez, what was your understanding of who Dino Perez
16 was?

17 A Dino Perez didn't pay any fees in cash.

18 Q Pardon me?

19 The 3,000 he paid I believe?

20 A That was a check.

21 Q That was a check?

22 A Yes.

23 Q A personal check?

24 A I, I may have copies to refer to. My recollection is
25 that I had worked on a case for Dino Perez and that case was

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1 successful. Now, please understand this is a recollection,
2 it could be faulty, but it seems to me like I had recovered
3 some monies, perhaps some monies subject, subject to
4 forfeiture, and that they were trying to find money for
5 Michael Gonzales, and either I suggested or Mr. Perez or
6 Lucy Santana suggested that since I had gotten that money
7 back, could, could they apply some of that money to his fee
8 balance.

9 Q Okay.

10 A I think. I have all these records.

11 Q Sure.

12 A The government has all these records. But I'm doing
13 the best I can on that.

14 Q Okay. Now, when you say funds involving a previous
15 case with Dino Perez, would be a previous criminal case --

16 A Yes.

17 Q -- in which sums of cash had been seized?

18 A I think so. I, I---

19 Q Okay.

20 A I can't be -- I don't recall exactly. I don't have Mr.
21 Perez's file with me and I haven't reviewed any of this. As
22 you may be aware of, I've been out of town. I've rushed
23 here from other court appearances. I haven't reviewed any
24 of those---

25 Q Sure.

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1 A ---visits to speak of.

2 Q We all understand.

3 A My records would show it. But I, I -- right now, off
4 the top of my head, it seems to me like I did a case for
5 Mr. Perez that involved a small amount of drugs and that
6 case was resolved successfully, and they had taken some
7 amount of cash from him at that time and they had to give it
8 back.

9 Q Okay.

10 A I recovered it back and I had an agreement with him to,
11 that I would charge a fee to him to recover that money, and
12 he applied what he, his net proceeds from that was going to
13 be to---

14 Q Represent Michael?

15 A ---to this, yeah.

16 Q Okay. And when you say they were looking for money for
17 Michael, by they you mean Lucy Santana and Dino Perez?

18 A I think everybody Michael Gonzales knew.

19 Q Okay. But did you understand Dino Perez, Lucy Santana,
20 and your client to be a family?

21 A No.

22 Q Well, who---

23 A That was never my understanding. I'm sorry. I know
24 that the government has claimed otherwise. That was never
25 my understanding.

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by Ms. Shurling

1 Q Well, you've testified that you were looking for money,
2 they were looking for money to represent Michael, and you
3 suggested, as a possible source of money, this pot of cash
4 that he was getting back on a forfeiture action that you had
5 handled, correct?

6 A Well, I wouldn't refer to it as a pot of cash
7 because---

8 Q Well---

9 A It was money that the government had held---

10 Q Money?

11 A ---in return, but---

12 Q And what was the relationship to Dino Perez to the
13 Gonzales family that made you think that he would want to
14 contribute money to Michael Gonzales' defense?

15 A I don't really know the answer. But if you would like
16 for me to speculate, I could speculate.

17 Q Well---

18 A I don't know the answer. I don't know what their
19 relationship was or what it was claimed to be then or what
20 it's claimed to be now or what they'll claim for it to be in
21 the future.

22 Q I understand that, Mr. Harris.

23 My question is this, Lucy Santana had come to you and
24 hired you to represent her son, Michael Gonzales?

25 A That is correct.

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by Ms. Shurling

1 Q And you subsequently became aware of yet another
2 serious drug charge against this young man?

3 A That's correct.

4 Q He was 17 years old at the time?

5 A Yes, I think.

6 Q Okay. And you say that those in his circle were
7 looking for sources of cash money, I don't mean cash
8 specifically, but funds to pay for his lawyer on the new
9 charge, correct?

10 A That's my recollection.

11 Q Okay.

12 A They were very interested.

13 Q And it's your recollection that at some point you
14 suggested that this money that you had been able to net for
15 Dino Perez they might consider applying to Michael's legal
16 fees?

17 A My testimony was that I don't remember if it was at my
18 suggestion or theirs. I mean by Lucy. I don't know. I
19 really don't remember. But I know that Lucy Santana,
20 Michael Gonzales' mother, was desperate to get him out of
21 jail and desperate to get him legal representation, and one
22 way or another that money was applied.

23 Now, your question was, ma'am, do, do I know that
24 Michael Gonzales, Lucy Santana, and Dino Perez are a family.
25 I take it for you to mean a nuclear family. Not a crime

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1 family. And I didn't know anything about that either.

2 Q Okay.

3 A And still don't.

4 Q Well, I'll break the questions down more pointedly
5 then.

6 Obviously, if these funds were in your law firm's bank
7 account at the time, you would of had to have the permission
8 of Dino Perez to apply the money to defend Michael Gonzales?

9 A Correct.

10 Q That's a given, whether you have a specific
11 recollection of it or not, you know that to be true?

12 A And I know that happened.

13 Q Okay. And my question is, at that time, did you know
14 the relationship between Lucy Santana and Dino Perez?

15 A I knew what Lucy Santana told me.

16 Q Did you have any discussions with Dino Perez concerning
17 his relationship to Lucy Santana and Michael Gonzales?

18 A Not until the question of a conflict was raised by
19 A.U.S.A. Moore did I have a specific conversation with Dino
20 Perez about what his exact relationship was to Michael
21 Gonzales on a personal level or on a criminal level. I was
22 aware, at the time that I began representing Michael
23 Gonzales on the methamphetamine charges, that Lucy Santana
24 was his mother, that Dino Perez was either Lucy Santana's
25 boyfriend or friend or ex-boyfriend or friend. I -- that

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1 was the extent of my knowledge about their personal
2 relationships.

3 Q Do your records indicate an address for your client,
4 Dino Perez?

5 Do you know what his address was?

6 A I probably do know it, but I don't think I have that
7 information here.

8 Q And---

9 A I didn't bring Dino Perez's file.

10 Q Okay.

11 A I, I, I don't think. I could look through this whole
12 file, but I doubt that I have an address for Dino Perez in
13 Michael Gonzales' file. I don't know if they lived together
14 or not.

15 Q Did you---

16 A And I didn't then.

17 Q Did you question Lucy Santana concerning the source of
18 the \$25,000 in cash that she brought you?

19 A Yes.

20 Q And what was her explanation?

21 A She, she had gotten, taken time and gone around to all
22 of, everybody that she knew and gathered up money.

23 Q And I'm, I'm -- I want to be sure I'm not misstating
24 your testimony.

25 Did you say a moment ago you knew what she said the

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1 relationship to Dino Perez was and she said they were
2 dating?

3 Is that correct?

4 A I, I somehow want to think that at some point in time
5 Lucy Santana told me that Dino Perez was either her
6 boyfriend or her friend, and I want to think -- my, my
7 impression was they had some kind of romantic relationship,
8 but I mean I didn't, maybe I should of, I didn't see any
9 need to go into vast detail with Lucy Santana about the, her
10 personal relationship with Dino Perez.

11 Q Okay. Well---

12 A So, that's why -- what I meant by that is some, somehow
13 or another I seem to recall me saying well, have do you know
14 Dino Perez or what is he to you or something like that, and
15 she said he's either, something like either he's my
16 boyfriend or my friend.

17 Q How much longer---

18 A And I think she said boyfriend, but---

19 Q I'm sorry. I didn't mean to interrupt you.

20 How long after that, after being retained in the two
21 charges against Michael, were you retained to represent Dino
22 Perez in more drug charges?

23 A When you -- could you clarify what you mean by more
24 drug charges?

25 Q Well, after Michael Gonzales was arrested and charged

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by Ms. Shurling

1 with these two trafficking charges, some time shortly
2 thereafter Dino Perez was once again arrested on drug
3 charges and hired you to be his lawyer, isn't that true?

4 A So, that -- you're asking me after, the point after
5 Michael Gonzales' second drug trafficking arrest, the
6 methamphetamine arrest, when was the next time I was hired
7 to represent Dino Perez?

8 Q Well -- and or in-between. If, if you were hired to
9 represent Dino Perez in-between when you were hired on the
10 marijuana charge and the methamphetamine case, I'd certainly
11 like to know that as well. I want to know the timing of
12 when you became counsel for Dino Perez on drug charges in
13 relationship to when you were engaged in representation of
14 Michael Gonzales.

15 A Okay. On February 5th, 2001, I undertook
16 representation of Dino Perez on several misdemeanor drug
17 charges in Spartanburg Magistrate's Court. I'm using my
18 notes here because there's no way that I can recall all
19 these dates and times.

20 Q That's why I subpoenaed your file. I wanted you to
21 have them.

22 A These charges resulted in the forfeiture of over \$6,000
23 in cash, but no drug convictions. An individual who
24 described herself as a close personal friend of Dino Perez,
25 so that's Lucy Santana, that's, that must of been the

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1 language she used, came in to consult with me about
2 representing Mr. Perez on these charges and stated that
3 Mr. Perez could not himself come into the office because he
4 worked everyday and he did not speak very much English.
5 After verifying that Dino Perez did have several charges
6 pending in Magistrate's Court, I accepted representation and
7 a fee was paid by Lucy Santana for representation. That
8 case was successfully resolved in Magistrate's Court through
9 a jury trial a few months later.

10 Q And when was the next time you were hired to represent
11 Dino Perez?

12 A On April 15th, 2002, Dino Perez was arrested by
13 Spartanburg County sheriff's deputies for trafficking more
14 than a thousand pounds of marijuana along with two other
15 individuals otherwise unknown to me. Very -- and by that I
16 mean, after some point in time in my representation, I came
17 to know those people's names, but I, I didn't know who they
18 were or what, if any, connection they had to Dino Perez.

19 Very soon after, after the arrest, Lucy Santana came to
20 me and asked me to go see Dino Perez in jail and counsel
21 with him concerning his arrest and determine if he wanted me
22 to represent him. After consultation with Dino Perez, he
23 stated that he did want me to represent him and I undertook
24 representation. So that was in April, April of 2002.

25 Q And who paid your fee to represent Mr. Perez?

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1 A My notes say that very soon after my, very shortly
2 after my first consultation with Perez at the jail, Perez's
3 close personal friend, Lucy Santana, made arrangements to
4 pay Perez's attorney fees for representation in the
5 marijuana trafficking case. That's, that's all my notes
6 say. Likewise, I have detailed records of these things
7 probably though in the Perez file, and, and the government
8 has all these records.

9 Q Do you have a recollection of what your fee was for
10 representing Dino Perez?

11 A Probably \$25,000. That's what I was charging at that
12 time for drug trafficking cases of that magnitude.

13 Q And you've just recalled or refreshed your recollection
14 that that fee was paid to you, brought to you by Lucy
15 Santana?

16 A That -- apparently. My notes say that she made
17 arrangements to pay his attorney fees.

18 Q Was it in cash that time?

19 A I don't know. I, I don't have those records. Those
20 are Mr. Perez. I didn't bring Mr. Perez's records.

21 Q Okay.

22 A I, it -- I just don't know. It may---

23 Q Now---

24 A It might of been. It might not. I don't know.

25 Q And this was April 2002 before Michael Gonzales' trial?

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by Ms. Shurling

1 A I think so. I think Mr. Gonzales' methamphetamine
2 trial was in the Summer of 2003, is that correct?

3 I'm---

4 Q June 3rd, 2000. Pardon me, Your Honor. I'm gonna have
5 to refer to counsel. Pardon me. July 22nd, 2002.

6 A Oh, okay.

7 Q But in any event, it was before then?

8 A That's right.

9 Q Okay. At this point, having been paid two large fees
10 to represent Michael Gonzales and Dino Perez both in drug
11 cases, having been paid those fees in both instances, at
12 least a portion thereof by Lucy Santana, and a portion of at
13 least one of the fees by Dino Perez for Michael, when Dino
14 Perez was then arrested on charges of trafficking in a
15 tremendous quantity of marijuana, did you consider that you
16 might have a conflict of interest in continuing with your
17 representation of Michael Gonzales?

18 A No.

19 Q Lucy Santana had described to you, at least as
20 refreshed by your own notes, a close personal relationship
21 with Dino Perez?

22 A Yes.

23 Q Michael was 17 years old, correct?

24 A I think so.

25 Q And charged with being involved in the trafficking of

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1 large quantities of two different kinds of drugs including
2 marijuana?

3 A That's right.

4 Q And then Dino Perez, who had paid part of your fee for
5 representing Michael, is charged in a very similar case,
6 correct?

7 A Similar -- well --.

8 Q Trafficking in marijuana?

9 A Well, charged with the same thing. The cases were not
10 similar.

11 Q Did you explore at all what, if any, connection there
12 was between the two?

13 A No, I, I -- maybe I should of. Although I can say, at
14 the time, given everything that I knew, the only thing I
15 knew that Michael Gonzales and Dino Perez had in common was
16 Lucy Santana. It, it is not uncommon, at least in my
17 experience not uncommon, that individuals that are related
18 to one another or friends with one another, whatever degree
19 of personal relationship they, they have, often wind up in
20 trouble and, and often in the same kind of trouble, but that
21 doesn't mean it's the same trouble.

22 Q Well, did law enforcement ever consult with you about
23 the possibility of having your client, Michael Gonzales,
24 give testimony or information against Dino Perez?

25 A If they did I don't have a record of it. The, the --

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1 if -- it was so thinly veiled that I failed to appreciate it
2 if they did.

3 Q Did Michael ever attempt to discuss with you
4 information he had concerning Dino Perez that might be
5 valuable in plea negotiations?

6 A No.

7 Q Once Dino Perez was arrested in the marijuana
8 trafficking case, knowing that he had paid a portion of your
9 client's fee in one of his troubles, did you consult with
10 Michael as to whether he wished to waive any potential
11 conflict of interest in your representing Dino Perez?

12 A No.

13 Q Did you consult with Dino Perez about whether he was
14 willing to waive any potential conflict of interest in your
15 continuing, your undertaking representation of him when you
16 had ongoing representation of Michael?

17 A No.

18 Q Did you ask anyone in law enforcement whether they
19 foresaw any problem with you representing these two
20 individuals?

21 A No. But let me explain. I'm not in the habit of
22 asking law enforcement who I ought to be representing.

23 Q Well---

24 A I mean -- I don't mean that in any, in any other way
25 except plaintively stated. It would not cross my mind to

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by Ms. Shurling

1 call up the police and ask them do they think it's a good
2 idea for me to represent somebody that they've charged with
3 a crime.

4 Q Okay.

5 A Because, you know, they're liable to say no, you know,
6 and then nobody gets a lawyer.

7 Q And it sent off no warning bells at all to you?

8 A Ms. Shurling, I'm sorry, as plain as I can put it, I --
9 if a conflict existed, either actual or potential, I did not
10 recognize it at that time.

11 Q Okay. Well, let's move forward a bit, shall we?

12 You represented Michael at trial and he was convicted
13 and you were kind enough to send me the case for the direct
14 appeal.

15 A I referred---

16 Q Correct?

17 A I referred that case to you, yes, I did.

18 Q Okay. At that time you are still representing Dino
19 Perez in his ongoing problems with the federal government,
20 correct?

21 A Consult my notes. I do not believe, I -- well, let me
22 look at my notes.

23 MS. COUNTS: Your Honor, the State would object to the
24 relevancy of going into what Mr. Harris found out about the,
25 any relationship after he already represented him in the

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1 trial for this PCR.

2 THE COURT: What would that have to do with this
3 case---

4 MS. SHURLING: Your Honor?

5 THE COURT: ---if he, if he already referred the case
6 to you for your appeal?

7 MS. SHURLING: Thank you and I didn't mean to speak
8 over you, Your Honor.

9 THE COURT: It's all right.

10 MS. SHURLING: I would represent that if counsel did
11 not -- it's my position that he had a duty to inquire and to
12 ascertain what, if any, conflict existed between these
13 individuals based on the facts. Even those demonstrated
14 thus far. But that even if he didn't hear warnings bells
15 and didn't recognize the potential conflict of interest at
16 that point, that, as the case against Dino Perez unfolded
17 and he became aware that it was the government's position
18 that Michael was involved in the drug circle in which Dino
19 Perez was being prosecuted, that he would of had a duty to
20 disclose, perhaps make a motion for a new trial, or in some
21 way bring to the Court's attention that there had been a
22 potential conflict of interest, taking counsel at his word
23 that he didn't perceive at the time, but is now been brought
24 to his attention.

25 THE COURT: I'll allow you to ask it.

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1 MS. SHURLING: Thank you.

2 THE COURT: And I'll, I'll decide what it's, might,
3 value it might have.

4 You may proceed.

5 MS. SHURLING: Thank you.

6 Q Did you continue to represent Dino Perez in Federal
7 Court?

8 A I have not yet started representing Dino Perez in
9 Federal Court as of the time of Michael Gonzales
10 methamphetamine trafficking trial.

11 Q Okay. But did--

12 A There were, there were no federal charges pending
13 against Dino Perez---

14 Q I understand.

15 A ---until much later.

16 Q I'm trying to clarify the chronology.

17 You were representing Dino in a pending trafficking
18 marijuana case in State Court correct?

19 A That's correct.

20 Q Were those charges eventually taken over by the federal
21 government and did they become the subject of a federal
22 prosecution?

23 A Yes.

24 Q So, you were representing Dino Perez on charges that
25 ultimately became the federal case against him?

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1 A Because my representation of Dino Perez in Federal
2 Court was short circuited by a claim of a conflict of
3 interest, I -- anything I say about the federal government's
4 treatment of the case against Perez or what case they had
5 against Perez, it must be understood that I, I do not have
6 full knowledge of that because the, of my representation of
7 Mr. Perez was short circuited by the actions of the United
8 States Attorney's Office.

9 Q Well, let---

10 A But, but I can answer the question this way if it will
11 clarify matters. The marijuana trafficking case, the many
12 thousands of pounds case against Dino Perez, involved an
13 allegation that he and two other individuals were engaged in
14 secreting marijuana in the yard of a residence that was
15 claimed by the government to be connected to Dino Perez,
16 but, which he denied. At least at one point to me he
17 clearly denied it was his.

18 The methamphetamine, that case was pending at the time
19 of Michael Gonzales' methamphetamine trafficking case. The
20 methamphetamine trafficking case involved an allegation that
21 Michael Gonzales, along with another, a codefendant, set up
22 and attempted to make a sale of meth, a large quantity of
23 methamphetamine, and that -- the case -- their arrest was
24 occasioned by the fact that this was the subject of the
25 Spartanburg County Sheriff's Office sting operation. That

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1 was the case that was tried.

2 So far as I know, knew then and so far as I know now,
3 although you may know far more than I do about it at this
4 point in time, but as far as I knew then and as far as I
5 know now, there was no connection between those two things,
6 those two occurrences, those, the occurrence of those two
7 crimes.

8 Q I believe you've already testified that you were first
9 represented, hired to represent Michael Gonzales in a case
10 involving large quantities of marijuana.

11 A That's right. And that case involved an allegation
12 that Michael Gonzales, another named individual, and other
13 people who it was claimed to me identities were unknown,
14 were caught in a sting operation with Michael Gonzales I
15 think driving, but at least occupying a big truck that
16 allegedly had marijuana in it. When that case started and
17 when I first undertook representation and for a long time
18 after that I thought and assumed, and based on everything I
19 knew, that that was an operation conducted by state law
20 enforcement authorities.

21 Unbeknownst to me, and at a much later point in time, I
22 found out that that was actually a federally orchestrated
23 sting operation. Why it was that that fact was I, I think
24 withheld from me for so long I can not tell you. I, I, I
25 have speculation about it, but that is just speculation.

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1 But nevertheless, I didn't know that.

2 Now, having said that, I was not aware of, did not
3 appreciate, if any existed, any connection to and was never
4 told directly in anyway prior to the trial of Michael
5 Gonzales on methamphetamine trafficking charges that there
6 was any connection at all between Michael Gonzales'
7 marijuana trafficking case and Dino Perez's marijuana
8 trafficking case.

9 Q Did you ever ask him---

10 A I was led to believe it was two totally separate
11 unrelated occurrences.

12 Q By whom?

13 A The discovery in the case, no government agent ever
14 that I can remember or documented ever said hey, this is all
15 part of same thing. Nothing like that.

16 Q Did you ever talk to Michael Gonzales about his
17 relationship with Dino Perez?

18 A I don't specifically recall asking him are you in a
19 drug conspiracy with Dino Perez. I, I didn't have any
20 reason to ask that. And you know, I have to just say again,
21 if a potential or actual conflict existed, I, I did not
22 appreciate it. I failed to, to, to apprehend that fact.

23 I -- that's all I can say. I don't -- I didn't, I
24 didn't -- I, myself, didn't see any reason to go to my
25 client and, and, and interview him on the subject of who are

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1 you in a drug conspiracy with.

2 Q Okay.

3 A If he was in a drug conspiracy bearing in mind that his
4 position to me every time I talked to him about either of
5 his cases was that he was, he had, he hadn't done anything
6 wrong.

7 Q Let's bounce forward a little bit.

8 After Mr. Gonzales was convicted in the methamphetamine
9 case, which was, as you say, actually the second case
10 brought against him and the second one you were hired for,
11 but it just happened to be the one that went to trial,
12 right?

13 A It was the one that went to trial. I, I don't --.

14 Q Okay.

15 A It, it was and you'll see in the transcript a bit of an
16 oddity how that case actually got called for trial. I've
17 never known the reason---

18 Q Okay.

19 A ---why it happened.

20 Q Well, let's stop there for just a moment.

21 At that point, you, or at least up to a point, you were
22 still representing Dino Perez in Federal Court, right?

23 A No, ma'am, at the time of the methamphetamine
24 trafficking trial for Michael Gonzales, Dino Perez, so far
25 as I knew, had no federal case pending.

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1 Q No, sir, that's not -- that was not my question. I
2 understand that you were retained to represent -- to get the
3 chronology straight.

4 You were retained to represent Michael Gonzales in the
5 trafficking marijuana charge. Shortly thereafter you were
6 retained to represent him in the trafficking of
7 methamphetamine case. Somewhere after that you were
8 retained to represent Dino Perez in a trafficking in
9 marijuana case, a state charge.

10 A On, on February 5th, 2001, I undertook representation
11 of Perez on misdemeanor charges. On January 1st, 2002,
12 Michael Gonzales was arrested by the South Carolina Highway
13 Patrol for trafficking in marijuana more than a thousand
14 pounds. On April 15th, 2002, some months later obviously,
15 I undertook representation of Dino Perez for trafficking in
16 marijuana more than a thousand pounds. That's the burying
17 the marijuana in the yard case. On June 3rd, 2002, Mr.
18 Gonzales was arrested as a result of being targeted in a
19 sting operation for trafficking in methamphetamine.

20 Q Okay. So as we sort of suspected a while ago, you were
21 hired to represent Dino on the trafficking charge in the
22 middle of when you were hired to represent Michael on the,
23 his two drug charges?

24 A That happened in-between those two, yes.

25 Q Okay. And after Mr. Gonzales' trial, at some point

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1 Dino Perez' state trafficking in marijuana case became a
2 federal case, did it not?

3 A I think it became part of a federal case.

4 Q Okay. Well, those charges were adopted by the federal
5 government, isn't that accurate?

6 A Yes, I would say they, they were adopted, but there was
7 an intervening event that created, that I believe created
8 all of that.

9 Q Okay. And at some point, when it is coming close to
10 time for Mr. Perez to go to trial, you are asked to stand
11 down as his attorney by the United States Attorney's Office,
12 is that correct?

13 A I was asked to -- well, actually the United States
14 Attorney's Office threatened me if I didn't withdraw and
15 agree with their position that there was a conflict of
16 interest. I can not state in what proximity that occurred
17 to any proposed trial of Mr. Perez. I can state that that
18 happened on the heels of my vigorous demand of Assistant
19 U.S. Attorney Johnson in Greenville for full discovery in
20 the Perez case.

21 Q And did you receive full discovery in the Perez case?

22 A No.

23 Q Prior to being, full discovery in the Perez case being
24 released, you were approached by Mark Moore and asked to
25 recuse, to use a judicial expression?

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by Ms. Shurling

1 A On May 12th, 2003, I telephoned A.U.S.A. Johnson to
2 give him an ultimatum concerning providing complete
3 discovery on Mr. Perez's case. A.U.S.A. Johnson informed me
4 that the government had decided to seek a superceding
5 indictment against Mr. Perez and other unnamed
6 co-conspirators. The dates of the conspiracy were from
7 early 2002 until the present. No issue concerning a
8 potential or actual conflict of interest was raised in that
9 telephone conversation with A.U.S.A. Johnson.

10 On, three days later, on Thursday, May 15th, 2003, I
11 had a message to call A.U.S.A. Mark Moore concerning
12 Mr. Perez's case. I returned that phone call in the middle
13 of a trial and was told by A.U.S.A. Moore that he intended
14 to disqualify me from the case on the grounds of multiple
15 representation of Mr. Perez and Mr. Gonzales and because I
16 was going to be a witness or a potential witness in the
17 Government's case, a case of which I was unaware until that
18 time, by virtue of the discovery of attorney fee
19 arrangements.

20 Mr. Moore, at that time in that conversation, informed
21 me that it was the Federal Government's theory involving the
22 conspiracy and it was, it was their theory there was a
23 conspiracy and that included an allegation that Mr. Gonzales
24 and Mr. Perez were co-conspirators.

25 Q At that time---

Ricky Harris - Direct examination
by Ms. Shurling

1 A So---

2 Q ---or shortly thereafter, did you ask to be relieved as
3 counsel or formally resign?

4 How did you, how did you formally get off the case?

5 Did you make a motion in Federal Court, write a letter,
6 what happened?

7 A There again, because that involves Mr. Perez's case,
8 they, they were not demanding that I get off of Mr.
9 Gonzales' case, withdraw from Mr. Gonzales' case. They were
10 demanding I withdraw from Mr. Perez' case. So, some of
11 those things are in Mr. Perez's file.

12 My recollection is that after considerable consultation
13 with ethics experts, other knowledgeable attorneys,
14 experienced attorneys with the National Association of
15 Criminal Defense Lawyers and our own state association, and
16 after consultation with clients, I determined that a,
17 whether I believed that a conflict really did exist, that a
18 substantial enough conflict was being claimed that it was
19 appropriate for me to withdraw, and my recollection was that
20 some time in the Summer of, it would, 2003 I guess, at I
21 believe at scheduled, scheduled pretrial conferences or
22 status hearings in Federal Court in Greenville, I informed
23 A.U.S.A. Johnson that I would appear and I would voluntarily
24 withdraw---

25 Q Okay.

Ricky Harris - Direct examination
by Ms. Shurling

1 A ---which I did.

2 Q Okay.

3 A And I was permitted to do so.

4 Q Pardon me. I'm sorry.

5 And at that time you withdraw in front of U.S.

6 Magistrate Judge Bruce E. Hendrix I believe, is that true?

7 A That sounds right.

8 Q Okay.

9 A I'm not sure I remember the judge.

10 Q Now, at anytime leading up to this event were you made

11 aware by Ike Johnson, and I apologize, Your Honor, it's

12 Isaac something, but we all know him as Ike, Ike Johnson,

13 A.U.S.A. Ike Johnson or Mark Moore that your client, Michael

14 Gonzales, was anticipated to be a witness against Dino

15 Perez?

16 A I never had any communication with, with, with A.U.S.A.

17 Moore until the May conversation.

18 Q And in his conversations with you when he suggested

19 that he was going to ask to have you removed as Dino's

20 attorney, you said that he, he intimated that there were,

21 some potential charges that might be raised vis-a-vis

22 superceding indictment, and indicated that there was some

23 charge of a conspiracy involving Michael Gonzales and Dino

24 Perez?

25 Is that an accurate restatement?

Ricky Harris - Direct examination
by Ms. Shurling

1 A On Monday, May 12th, 2003, A.U.S.A. Johnson, in my
2 discussion with him about providing discovery, informed me
3 that the government had decided to seek a superceding
4 indictment against Mr. Perez that would allege a conspiracy
5 between Perez and other unnamed and unindicted
6 co-conspirators. That's all he would tell me.

7 Q But a few moments ago you indicated that someone had
8 indicated to you that there were allegations or concerns of
9 conspiracy between Michael Gonzales and Dino Perez.

10 Wasn't that your testimony?

11 A Yes, on May 15th, three days later---

12 Q Okay.

13 A ---A.U.S.A. Moore called and demanded that I withdraw
14 from Mr. Perez's case. Told me that the government had a
15 theory of conspiracy that included Mr. Perez and Mr.
16 Gonzales, and that if that wasn't enough for me to withdraw,
17 that he was going to make me a witness in the case by trying
18 to discover my attorney fee arrangements with Mr. Perez and
19 Mr. Gonzales.

20 Q Now, a few moments ago when you were refreshing your
21 recollection from your file it sounded as though you were
22 reading some sort of formal statement or synopsis.

23 Had you prepared that for some proceeding or review of
24 a consultation of some sort?

25 What is that document?

Ricky Harris - Direct examination
by Ms. Shurling

1 A I'm reading from a memorandum to Attorney Marty
2 Penniless, who is, at that time, and I think still is, one
3 of the leading criminal defense attorneys in America who I
4 was consulting with concerning -- I had been referred to
5 Mr. Penniless as the person to talk to with the National
6 Association of Criminal Defense Lawyers in matters involving
7 what at that time, and I think possibly still is, a
8 disturbing trend across the country in federal jurisdictions
9 of Attorney General's Office attempting to short circuit
10 private representation of defendants by making claims about
11 attorneys fees. And because I was aware of that, because
12 that was the claim in this case, and because I was a member
13 of that organization, I contacted them for help and guidance
14 in the state of the law concerning those matters.

15 So, Mr. Penniless asked me to write a narrative of, in
16 essence, a summary of my representation for him to consider,
17 which I did, and it's been useful to me in refreshing my
18 recollection about this.

19 Q And I'm glad you have it.

20 Mr. Harris, did you, at this time, represent clients in
21 State and Federal Court routinely?

22 A I did. Well, I certainly provided, had a lot cases in
23 State Court. I had a few cases in Federal Court. I will
24 say that my Federal Court experience is far more limited
25 than my State Court experience.

Ricky Harris - Direct examination
by Ms. Shurling

1 Q In both state---

2 A Cause I'm not part of the Federal Defender's Program.

3 So --.

4 Q I understand.

5 In both State and Federal Court, in your experience, is
6 it possible for a defendant to sometimes barter knowledge
7 they have about other drug dealers for favorable deals in
8 plea negotiations?

9 A Now that, that seems to be very common.

10 Q Okay. And once you became aware that Michael Gonzales
11 had been charged with drug charges and his mothers very
12 close personal friend, Mr. Dino Perez, had been charged in
13 drug charges, and that Lucy Santana had paid you a large
14 cash fee to represent her son, and that Dino Perez had paid
15 part of your fee to represent Michael, did it ever occur to
16 you that you might have a problem with not being the best
17 person to shepherd this young man through a potential plea
18 negotiation with law enforcement?

19 A If a potential or actual conflict existed at the time
20 that Mr. Gonzales case, and to lead up to his trial or at
21 the time of his trial, if it existed, I did not appreciate
22 it.

23 Q Okay.

24 A I didn't appreciate the existence of it, and so,
25 therefore, I did not act on that which I did not know. Mr.

Ricky Harris - Direct examination
by Ms. Shurling

1 Gonzales had never given me any indication whatsoever, and
2 still hasn't, not me personally, not as his attorney, that
3 he knew anything about Dino Perez's drug activities, that he
4 was part of any drug activity of Dino Perez, or that he was
5 part of any drug activity at all. He denied he was part of
6 any drug activity at all.

7 Q But I believe that you---

8 A And, and, so, in the face -- well, please let me
9 finish. In the face of representing somebody who not only
10 denies his culpability in the actual pending charges, but
11 who gives you no indication whatsoever that he's got
12 anything of value to offer to barter with, I, I guess in
13 that circumstance maybe I assumed, and if I assumed wrongly
14 then I did, but I assumed there was nothing to barter with.

15 Q What was the date you were, you relieved yourself
16 before Judge Bruce E. Hendrix?

17 Did you---

18 A I don't have the exact date. I believe that it -- it
19 was certainly some time after the May 15th conversation
20 with Mark Moore. I do remember, you know, going to fairly
21 extraordinary involved efforts to, to talk with ethics
22 experts, to talk with the people at the national
23 association, the state association, other knowledgeable
24 colleagues to see if they had run into these kind of
25 problems, if they had been subject to the kind of treatment

Ricky Harris - Direct examination
by Ms. Shurling

1 that I felt I was being subjected to. I, I felt the
2 treatment that I was being subjected to by Mr. Moore was,
3 was deleterious to my client's interest. I, I -- suffice it
4 to say, I, I felt it ill motivated and I found -- as I found
5 out, I found out that this was a trend across the country.

6 Q Well, let me ask you---

7 A So it took some while for that to happen. But at some
8 point, after all of that and after consultation with the
9 clients, I determined that, under all the circumstances, I
10 should withdraw.

11 Q And that was May roughly of 2003?

12 A I believe it was later than May because May, the May
13 15th, 2003, was the conversation with, with Attorney Moore,
14 and then I undertook all these other efforts and that took
15 some time. I can't remember how long.

16 Q Okay.

17 A But it was after -- I believe it was, it was perhaps as
18 late as July or August. I don't know. I don't have that
19 information with me.

20 Q Okay. Once you were notified by Mark Moore that, in
21 the opinion of the United States Attorney's Office you had a
22 conflict of interest representing Michael Gonzales and Dino
23 Perez, did you, in any capacity, become any better
24 enlightened as to information that had been given to law
25 enforcement by Michael Gonzales concerning Dino Perez?

Ricky Harris - Direct examination
by Ms. Shurling

1 Did you find out more about it?

2 A Well, I talked with you, and you told me of the
3 conversation that you had had with Mr. Moore in Court during
4 your multi, multi-defendant case that you referred to
5 earlier. I said okay. I had received some -- I, I came --
6 somebody sent to me after that or it may of been in response
7 to a direct request I made to Mr. Moore for information to
8 substantiate his allegations that, at some point, somebody
9 sent to me either a full or a redacted version of a DEA
10 record that showed a prison conversation with Mr. Gonzales.

11 Q A prison conversation?

12 A Well, I kind of -- I was -- some, some kind of
13 interview that, that the authorities had had with Mr.
14 Gonzales while he was doing time on the methamphetamine
15 charge---

16 Q Okay.

17 A ---is what I mean by that.

18 Q Sure.

19 A And of course, unbeknownst to me, nobody told me that
20 was going on --

21 Q Sure.

22 A -- that -- you know, I, I was still representing him on
23 the marijuana trafficking case, which at that time was still
24 a State Court case. But if that was part of what the
25 federal people were gonna make a Federal Court case with

Ricky Harris - Direct examination
by Ms. Shurling

1 Michael Gonzales, they, they went behind my back. Didn't
2 tell me they were gonna go see my client and talk to him.

3 Q Well, let's, let's---

4 A But at some later point after, you know after this,
5 some, somebody filled me in to at least enough to an extent
6 to try to substantiate part of what Mr. Moore was claiming.

7 Q Okay. So, you -- some time after you were relieved or
8 got off the case, however it was formally phrased---

9 A I withdrew from---

10 Q You withdrew.

11 A ---from Mr. Perez's case.

12 Q After you withdraw, you did see the DEA 6's or at least
13 a portion of them and become aware that Michael Gonzales had
14 given extensive information to state and federal agents
15 concerning Dino Perez's involvement in trafficking in
16 various kinds of drugs?

17 A I don't, I don't remember the timing of it, but I do
18 know, at some point after Mr. Moore's initial demand and,
19 and assertion that, that the government was gonna bring a
20 case, they hadn't yet, but they were gonna bring a case
21 against Mr. Gonzales and Mr. Perez that would create a
22 conflict, that I demanded information from them as to what
23 the basis of their knowledge or information was about this
24 connection that allegedly existed for a conspiracy to exist,
25 and it seems to me that at some point after that demand was

Ricky Harris - Direct examination
by Ms. Shurling

1 made that somebody provided some, I thought it fairly
2 limited information, but enough for me to determine that Mr.
3 Gonzales had, in fact, given statements to the, the federal
4 authorities in an attempt at least to provide information
5 against Mr. Perez. I can -- I don't remember the timing of
6 that, but I am aware generally that at some point, at some
7 point in time---

8 Q After you excused yourself?

9 A ---that, that all transpired, yeah. But I---

10 Q Can you give us a ball park estimate of how long it was
11 after you excused yourself that you were given the
12 opportunity to review those materials?

13 A I really don't remember. I mean -- I don't remember.

14 Q Okay.

15 A I, I, I think the information I was given was pretty
16 limited. I mean at the point in time that, that I -- what
17 the, the government was demanding of me was to withdraw from
18 the Perez case. I made the determination that I should
19 withdraw from the Perez case, and I took prompt steps to do
20 that. I think after that time I, I had pretty limited
21 information, but was generally aware from the occasional
22 conversation -- well, actually the occasional conversation
23 with you that -- I think, you know, that you were trying to
24 put together a deal for him.

25 Q I'm gonna hand you a DEA 6, and be careful, I've

Ricky Harris - Direct examination
by Ms. Shurling

1 redacted the last paragraph, and it's still wet.

2 Does that look familiar?

3 A I, I may of seen this before or not or in some form of
4 fashion. I just don't remember looking at it.

5 Q And can you tell the Court what the date on that DEA 6
6 is?

7 A Are you referring to the date on synopsis or the date,
8 date prepared?

9 Q The date of the interview.

10 A Oh, 5-29-2003.

11 MS. SHURLING: Okay. Your Honor, I'd move to introduce
12 this as Applicant's 1. It has been redacted for information
13 concerning an ongoing investigation by agreement with the
14 Respondent.

15 THE COURT: Any objection?

16 MS. COUNTS: Your Honor, the State objects to the
17 relevance of this report or what was produced after the
18 trial. Mr. Harris is testified that he's not, if he saw it,
19 he didn't see it till years after the trial. I don't think
20 it is relevant to if Mr. Harris gave ineffective assistance
21 of counsel or had a conflict in interest in the 2002 trial.

22 THE COURT: I'll admit it for what it's worth and
23 decide what---

24 MS. SHURLING: Thank you, Your Honor.

25 THE COURT: ---weight should be assigned.

Ricky Harris - Direct examination
by Ms. Shurling

1 MS. SHURLING: I'll tie it up with argument
2 subsequently.

3 (Whereupon, the DEA 6 was marked as Applicant's Exhibit
4 No. 1 and received into evidence at this time.)

5 MS. SHURLING: Thank you.

6 Q Now, you said a few moments ago that at this point in
7 Spring, early Summer 2003 you were still representing
8 Michael in the case that you were originally hired to
9 represent him in, the trafficking in marijuana case in the
10 State Court right?

11 A That's correct.

12 Q And, of course, you subsequently became aware of the
13 U.S. Attorney's position concerning a conflict of interest
14 between your representation of these two individuals?

15 A That's correct.

16 MS. SHURLING: A moments indulgence, Your Honor. I've
17 shuffled my papers and misplaced something. One second.

18 (Pause.)

19 MS. SHURLING: Thank goodness for young paralegals with
20 good minds.

21 Q Can you recognize this document for me, Mr. Harris?

22 A It's -- I do.

23 Q Would you identify that document?

24 A It is a pleading in the case of State versus Gonzales
25 under Indictment 2002-GS-42-2132, a motion to be relieved

Ricky Harris - Direct examination
by Ms. Shurling

1 as counsel, dated July 16th, 2004.

2 Q So, a little over a year after you first became aware
3 of the Government's position concerning the conflict of
4 interest between you and your representing Mr. Perez and Mr.
5 Gonzales, you filed to be relieved as counsel on Michael's
6 State Court marijuana trafficking case?

7 A That's when I filed a formal motion, yes.

8 Q Okay. And in the body of this motion you say the
9 motion is made upon the grounds that because of certain
10 actions undertaken by the defendant in his own behalf, the
11 undersigned has an irreconcilable conflict of interest so as
12 to preclude his further representation.

13 Can you tell the Court what that action on the part of
14 Michael Gonzales was?

15 A Well, engaging in negotiations and, and other --
16 negotiation, interviews, et cetera, with whoever it was. I
17 didn't even really know who it was, but I guess the federal
18 government. Essentially I, I, I had no opportunity to
19 really exercise any control over the conduct of his case or
20 any representation. I had no knowledge of what cooperation
21 agreements that he had truly made or what the basis of that
22 was.

23 Essentially, during, from Spring of 2003 until I
24 formally moved to withdraw in 2004, pretty much the only
25 information I had about Michael Gonzales' case was through

Ricky Harris - Direct examination
by Ms. Shurling

1 you. The -- I can tell you what occasioned my formal
2 motion.

3 Q Well, may I back up before you explain that?

4 By the time you asked to be relieved or, or you took
5 yourself off the case in early June or so of 2003, you were
6 aware of the Government's position on the conflict?

7 A Yes.

8 Q Some time thereafter you received the opportunity to
9 review a DEA 6 and become aware of the extent of the
10 information Michael Gonzales had provided concerning or at
11 least some idea---

12 THE COURT: For, for my information---

13 Q ---of what---

14 THE COURT: For my information, the DEA 6 I assume is a
15 transcript or a written report of an interview given by Mr.
16 Gonzales---

17 MS. SHURLING: Yes, sir, Your Honor, the---

18 THE COURT: ---in prison at which Mr. Harris was not
19 present?

20 MS. SHURLING: That's correct, Your Honor.

21 THE COURT: All right. Go ahead.

22 MS. SHURLING: And Mr. Harris has testified that after
23 he removed himself from representing Mr. Dino Perez, somehow
24 he was given the opportunity to see at least part of a DEA 6
25 outlining some of Michael Gonzales---

Ricky Harris - Direct examination
by Ms. Shurling

1 THE COURT: I'm familiar with just. I just wanted to
2 be sure I understood what it was.

3 Go ahead.

4 MS. SHURLING: Yes, sir. I'm sorry. It's a shorthand
5 form. DEA statement's are referred to as DEA 6's.

6 THE COURT: Oh, I understand what it is.

7 You may proceed.

8 MS. SHURLING: Thank you.

9 A As I stated, I don't remember the timing. But
10 certainly I became aware of not only allegations that Mr.
11 Gonzales was attempting to or was providing information
12 against Mr. Perez or intended to, and I'm not sure the
13 extent of the information I had. But certainly it was
14 enough information for me to appreciate the fact that I was
15 not gonna be representing Mr. Gonzales any longer. But not
16 because of, essentially because of the actions that he had
17 undertaken on his own or within, or in concert with you, who
18 at that point was representing him.

19 And I believe I remember -- I think -- well, I'm sure
20 that we had some conversation whenever a case, the
21 trafficking case showed up on the county docket a couple of
22 times. I remember contacting you and saying, you know,
23 it's, this case is on the docket and if you're gonna
24 represent him, you need to get -- I think we discussed maybe
25 a substitution of counsel by whatever method. But at some

Ricky Harris - Direct examination
by Ms. Shurling

1 point the Solicitor's Office here wanted some clarity,
2 absolute clarity about who was representing him because they
3 wanted to handle the case and that's what prompted my formal
4 motion at that time.

5 Q Thank you.

6 Your Honor, I'd move to introduce a copy of the motion
7 into the record.

8 THE COURT: Any objection?

9 MS. COUNTS: Without objection, Your Honor.

10 THE COURT: Without objection it will be placed in the
11 record.

12 (Whereupon, the motion was marked as Applicant's
13 Exhibit No. 2 and received into evidence at this time.)

14 Q Mr. Harris, I can appreciate that you were in a
15 difficult situation here.

16 Once you found out that your client, Mr. Michael
17 Gonzales, had given information concerning, concerning Dino
18 Perez's drug business and were aware of the United States
19 Attorney Office's position concerning your having a conflict
20 of interest, did it ever occur to you to go back to the
21 Circuit Court and file any sort of motion on behalf of
22 Michael Gonzales making the Court aware that you might have
23 had an unrecognized or unperceived conflict in representing
24 Michael on the methamphetamine charge?

25 A Well, that's what I did when I filed the motion.

Ricky Harris - Direct examination
by Ms. Shurling

1 Q Well, you filed a motion to be relieved on the as of
2 yet outstanding marijuana charge.

3 My question is, once you saw all of what was coming to
4 light, did it occur to you to possibly file some sort of
5 motion with the Spartanburg County Court of General Sessions
6 asking for a new trial on behalf of Michael or telling the
7 Court that a, a previously unrecognized and, and unperceived
8 conflict of interest had now been brought to your attention
9 and that, that the Court needed to convene a hearing to
10 determine whether there was perhaps some remedy this young
11 man would be entitled to?

12 A No, I didn't consider doing that. I, I didn't see a
13 basis for it. I don't know what I would of said. I don't,
14 I don't -- I mean I stand up and say I don't think there was
15 a conflict, but the, you know, Mr. Moore does.

16 Q Okay.

17 A They've now filed a case that creates a conflict.

18 So---

19 Q Well, I---

20 A I just -- I'm sorry. I---

21 Q No, I understand.

22 A I can't structure that argument in my mind.

23 Q And I, and I promise I'm not trying to beat this to
24 death, but let's go back to that cause you said it twice.

25 You've said that, that Mr. Moore was threatening to

Ricky Harris - Direct examination
by Ms. Shurling

1 file charges that would create the conflict.

2 A (Witness nods affirmatively.)

3 Q Okay.

4 A Yes.

5 Q Once you became aware that Michael Gonzales had given
6 extensive information to---

7 MS. COUNTS: Your Honor, I'm gonna object. This has
8 been asked and answered.

9 MS. SHURLING: This precise question isn't.

10 THE COURT: I'll let her finish the question.

11 Q Once you became aware that Michael Gonzales was a
12 material witness against Dino Perez in the drug trafficking
13 business, you had a conflict of interest whether they
14 charged Michael with an actual crime for being in a
15 conspiracy with Dino Perez or not, didn't you?

16 A At that time I did or I determined that I did.

17 Q Okay.

18 A At that time.

19 Q But you, you have a conflict of interest with
20 representing a material witness against another client,
21 wouldn't you?

22 A In certain circumstances.

23 Q Thank you.

24 No further questions, Your Honor.

25 THE COURT: Your witness, Ms. Counts.

Ricky Harris - Cross-examination
by Ms. Counts

1 CROSS-EXAMINATION

2 BY MS. COUNTS:

3 Q Mr. Harris, when you represented the applicant,
4 preparing for trial and during trial, did he ever indicate
5 to you that he was connected in a drug conspiracy with Dino
6 Perez---

7 A With Dino Perez or anybody else.

8 Q ---because he claimed that he didn't do anything wrong?

9 A Well, he claimed that, he, he claimed that he, he was,
10 he was not guilty of the charges they made against him and
11 that he had no knowledge of what was, in essence in the
12 marijuana trafficking case, my perception of his position
13 there was he didn't know what was going on.

14 Q Did the solicitor, Tommy Wall, ever contact you and
15 indicate to you there was any connection between Dino Perez
16 and the applicant?

17 A If -- I don't remember it. If he did, he said it in
18 such a veiled way that I, it went right over my head.

19 Q Anybody from the Spartanburg law enforcement indicate
20 to you there was a connection?

21 A No, I don't, I don't recall any direct dealings with,
22 with them leading up to the methamphetamine trial at all.

23 Q Anyone from the U.S. Attorney's Office at that point in
24 time contact you about a connection with Dino Perez?

25 A No, I, I -- nobody that I remember ever came to me and

Ricky Harris - Cross-examination
by Ms. Counts

1 said, you know, you know, basically what Mr. Moore said,
2 which is hey, look, you know, they're all in it together
3 and---

4 Q Did anyone ever ask you if your client would testify
5 against Dino Perez?

6 A No, I, I never -- I don't remember anybody making any
7 offer that we'll do this in exchange for cooperation, we'll
8 do this in exchange for testimony. It seems to me, and this
9 is a vague recollection, that Tommy Wall, solicitor, he was
10 the solicitor who handled the trial for the State,
11 methamphetamine trial, at one time said well, you know, I
12 was concerned and basically my position was look, you know,
13 this, this fellow is too young for you to take the stance
14 that you're taking, which was no deals whatsoever, and he
15 may of said something to the effect of well, you know, well,
16 maybe, you, you know, if you want to reduce the charge,
17 you'll have to, I can't remember exact -- it was something
18 to the effect of I can't do anything, but even if I did
19 anything, it wouldn't be anything -- you know, it'd be like
20 23 years, 24 years. But he -- I said well, put that in
21 writing, you know, make me an offer. He never made an
22 offer.

23 Q And nothing in the discovery you got on this case
24 indicated there was a connection with Dino Perez?

25 A If there's anything in it, it, it went over my head.

Ricky Harris - Cross-examination
by Ms. Counts

1 I, I didn't -- I just did not, looking at discovery in the
2 cases, if they're dots to connect, I did not connect them.

3 Q And you testified earlier that federal agents went to
4 visit your client while you were still representing him, but
5 you weren't present?

6 A Apparently so, yes.

7 Q And how did you find out about that?

8 A Well, it -- there was -- I received a phone call from
9 Lucy Santana. I believe it was a phone call. She was very
10 upset and said that -- I believe she said that she had
11 received some kind of communication from Michael Gonzales.
12 Maybe a letter or maybe a phone call. I'm not sure. But
13 anyway, some kind of communication that he wanted to get
14 word to me that the police officers had been down there to
15 question him and that he was concerned about that, and Lucy,
16 of course, Mrs. Santana was wanting to know was that true,
17 and why didn't I know about it.

18 And I told her I didn't know if it was true and I
19 certainly didn't know about it. And I -- so, I -- that was
20 a -- it was basically more or less just a rumor. I tried to
21 check on it and that's when things started, I started
22 getting an idea that they were going behind my back.

23 I -- now I say that. I didn't like the fact that
24 people were talking with my client and I didn't know about
25 it. And I didn't know, any idea what he might of been

Ricky Harris - Cross-examination
by Ms. Counts

1 saying or anything else.

2 But as it turns out, I later learned that, that
3 Mrs. Santana's statements to me were not exactly accurate in
4 that a, apparently Mr. Gonzales had written apparently to
5 his mother to try to get word to the authorities that he
6 wanted to talk to them, and that's why they went to see him.
7 But see I, I didn't know that, that -- I found that out way
8 after the fact.

9 Q After Mrs. Santana contacted you about the agents going
10 to see your client, did you consult any, anyone about any
11 ethical violations?

12 A Not about ethical violations.

13 Q Possible conflict of interest. I'm sorry.

14 A I, I did not believe I committed any ethical
15 violations.

16 Q I misspoke.

17 A I consulted -- I was very disturbed with, with A.U.S.A.
18 Moore's demeanor to me on the phone, with the words and
19 phrases that he used. I felt like it was an attempted
20 intimidation. Frankly, I felt it, at least if not
21 unprofessional, borderline unprofessional and I was very
22 upset and disturbed about that. The things that he was
23 saying were, were certainly new to me or at least in the way
24 that he's putting those things. I have not heard those
25 things before, that he's, you know, Ike Johnson had told me

Ricky Harris - Cross-examination
by Ms. Counts

1 three days later the State was gonna bring a case alleging
2 Mr. Perez as part of a conspiracy with unnamed individuals,
3 but now they were saying that one of the individuals was Mr.
4 Gonzales. Anyway, all of that concerned me.

5 So, I contacted ethics experts, colleagues, all the
6 people I've said, to find out if they could do this to me,
7 if they could do this to my client. If -- you know, because
8 I, I felt, at the time, that it was an attempt to gain
9 leverage in Mr. Perez's case where they, they didn't think
10 the case was going to suit them, and I was making demands
11 for information they obviously didn't want to give me or
12 they had resisted, and then this came on the heels of that.

13 I mean that, right or wrong, I, I suspected this was,
14 this was an attempt to intimidate his counsel.

15 Q Did you contact John Freeman about the alleged
16 conflict?

17 A I did.

18 Q And at his advice, did you go visit your client?

19 A I did.

20 Q And what was the purpose of that visit?

21 A To broach the subject of these allegations that had
22 been made about basically what A.U.S.A. Moore had claimed
23 and to have a discussion about whether or not these things
24 were, that he was cooperating -- if Mr. Gonzales was
25 cooperating, and if this was true, and if he was aware of

Ricky Harris - Cross-examination
by Ms. Counts

1 what effect that had, that, that he, you know, that -- if he
2 was going to do that, that it created a conflict of
3 interest. I certainly thought it, it did. And to advise
4 him that it may or may not be in his best interest to have
5 me continue in his marijuana trafficking case, that if, if
6 he did want me to continue in that case, that he would need
7 to sign a waiver after full disclosure and I did the same
8 thing with Mr. Perez.

9 Mr. Gonzales denied to me that he had any dealings with
10 Mr. Perez and that there was any connection or anything of
11 the sort, but stated that he wanted to think about it before
12 he signed any waiver, and I certainly -- I respected that.
13 I -- and I never did hear back from him in any way. And
14 then after that I became aware of this other information and
15 that, and, you know, then subsequently that Ms. Shurling was
16 going to be representing him. And so---

17 Q Did Dino Perez indicate there was a connection between
18 him and the applicant?

19 A No, he, he didn't. Acted like he didn't know what we
20 were talking about.

21 Q When you went to go visit Mr. Perez and Mr. Gonzales,
22 did you go by yourself?

23 A I'm certain that I, I had a colleague of mine go with
24 me and that was, that was on advice of, of some of the
25 ethics people that I discussed the case with. And I, I'm

Ricky Harris - Cross-examination
by Ms. Counts

1 pretty sure that, that I had somebody go with me to see
2 Mr. Perez. But my recollection of that is less clear.

3 I'm absolutely certain that, Terry Haselden is an
4 attorney here in town, went with me down to the correctional
5 facility to see Mr. Gonzales. We went on a Saturday
6 afternoon.

7 Q And Mr. Gonzales, Gonzales denied any connection?

8 A Yeah, he, he, he never said to me he's, anything like
9 that he was cooperating or that he wanted or that there was
10 a connection. It was essentially kind of taking the same
11 position that I assumed was the case all along. But you
12 know, I mean -- I guess maybe at that time he had his own
13 reasons to say what he said, but I mean -- to me that's
14 not -- you know, the fact is I went, I said look, you know,
15 if this is the case, this creates a problem with my
16 representation. If you see it's a problem, fine. If you
17 don't see it's a problem, you can sign a waiver. That was,
18 that was really the only purpose in me going.

19 I mean if he was doing what he felt he needed to do to
20 help himself, I don't begrudge any defendant to do that so
21 long as it's, you know, what they're doing is, is
22 responsible.

23 Q So, during the trial, you didn't know of a connection
24 between Perez and Gonzales?

25 A I did not. I mean I know I've said it a lot. But if

Ricky Harris - Cross-examination
by Ms. Counts

1 there was, if there was a connection, I, I, I didn't make
2 it.

3 Q And a year later when you went to go visit the
4 applicant, he still denied a connection?

5 A Yes.

6 Q Now, when you represented Mr. Gonzales at trial, you
7 were representing Mr. Perez on the marijuana trafficking at
8 the same time, weren't you?

9 A I'm, I'm sorry.

10 Could you say that again?

11 Q When you represented the applicant at trial, you were
12 also representing Mr. Perez on a pending trafficking
13 marijuana charge at the same time?

14 A Yes, at the time of the methamphetamine---

15 Q Okay.

16 A ---trial Mr. Perez's State Court drug, marijuana
17 trafficking case was pending.

18 Q Did that dual representation of those two clients have
19 any affect on your trial with Mr. Gonzales?

20 A In my mind, none whatsoever. I tried the case just as
21 hard and the same way I would of no matter who I represented
22 otherwise.

23 MS. COUNTS: Beg the Court's indulgence.

24 THE COURT: Yes, sir.

25 (Pause.)

Ricky Harris - Redirect examination
by Ms. Shurling

1 MS. COUNTS: No further questions, Your Honor.

2 THE COURT: Redirect?

3 REDIRECT EXAMINATION

4 BY MS. SHURLING:

5 Q Mr. Harris, in fairness, I believe you've acknowledged
6 that when I was first approached by A.U.S.A. Mark Moore I
7 called you and notified you of that contact, didn't I?

8 A I really don't -- I know we talked about it. I really
9 don't know -- my recollection is that, that I may of called
10 you and that came, that had happened just right at the same
11 time. But nevertheless, I think very shortly, very shortly
12 after you were approached by Mr. Moore we talked.

13 Q Okay.

14 A I -- actually I believe it was -- we had that
15 conversation very shortly after Mr. Moore first contacted me
16 because I was still very upset about Mr. Moore, and I didn't
17 know him, and I think we, I asked you for information about
18 who he was.

19 Q Sure.

20 And in, in candor, Your Honor, I don't have a clear
21 recollection of who called whom on that score either.

22 But I did make you aware that I had been approached by
23 Mr. Moore and what I was approached about---

24 A You---

25 Q ---and how it involved your former client or your

Ricky Harris - Redirect examination
by Ms. Shurling

1 client rather, Mr. Gonzales?

2 A That seems to me to be the case. I know we had a
3 conversation about Mark Moore and I remember you telling me
4 about that long big case that you had.

5 Q And then---

6 A But I can't -- well, and I -- but I can't, you know,
7 you asked me this question. I can not really remember
8 though if I'm blending two conversations or that was the
9 same conversation. I know in that conversation I am, I was
10 asking you who, who he was because I didn't know him. I had
11 never dealt with him and I, I felt -- well, I've said what I
12 felt. And so, it leaves me to believe -- I wouldn't of
13 known Mark Moore's name I don't think otherwise.

14 Q Okay. And at some point subsequently, and to be candid
15 with the Court, I don't remember how, but I made you aware
16 that I had been appointed by the Federal Court to represent
17 Michael as---

18 A Yeah.

19 Q ---a material witness?

20 A I know I was you, I, you -- I was aware that you had
21 formally undertaken representation, undertaken
22 representation of him, and in connection with that, that
23 you-all had, were trying to make a deal or get a deal done
24 for him to give him some relief. But I'm not sure I
25 remember the, as a material witness or whatever it was. I'm

Ricky Harris - Redirect examination
by Ms. Shurling

1 not sure that---

2 Q Okay.

3 A ---I knew that. But --.

4 Q When you represent defendants in drug cases, isn't it
5 true that you, and I'm not talking about Michael Gonzales,
6 I'm talking about any defendant in a major drug case, that
7 you frequently attempt to negotiate a plea bargain based at
8 least in part on what information that defendant might be
9 able to provide law enforcement and prosecution concerning
10 people higher up in the food chain?

11 A That's done. I know that that is a common practice.

12 Q And have you, as an attorney in your practice, either
13 been involved in or seen cases where people have gotten
14 extremely favorable plea bargains where they were willing to
15 provide either the State of South Carolina or the federal
16 government extensive information concerning someone that was
17 perhaps a bigger player than they themselves were?

18 A I've, I've handled cases where plea bargains have been
19 hammered out that involve full cooperation and varying
20 degrees of benefit to, to the defendant. But you hope you
21 get all the benefit you can.

22 Unfortunately, I, I don't think that I myself have,
23 have had; had the opportunity to have a major drug client
24 get a sweetheart deal for cooperation. But I know it
25 happens or at least I hear people talk about it happening.

Ricky Harris - Redirect examination
by Ms. Shurling

1 I sometimes wonder, you know, whether it, it all, all
2 happens the way it's described in---

3 Q Okay.

4 A ---conversation. But I, I know that's possible. It
5 depends on -- you know, every case is different. Every case
6 depends on the circumstances. Unfortunately, particularly
7 in the State Court system, and I have found it somewhat true
8 in the Federal Court system, that, you know, all the players
9 don't always show all their hand all the time like you would
10 hope, and you can't always count on your clients being as
11 forthcoming, open, and honest as you want them to be. You
12 can't always count on opposing counsel to give you all the
13 information that you'd like to have.

14 You know, if, if there's an opportunity for a plea
15 bargain, and substantial benefit to the client based on
16 cooperation of any kind, I certainly think an attorney ought
17 to pursue it if there's any reasonable chance anything about
18 the facts, the case, the circumstances. In this case, if
19 that possibility existed, I did not appreciate the fact that
20 it did.

21 Q Okay. Did you ever ask anyone in law enforcement if
22 there was any possibility of your client working with them
23 or providing them information in an effort to earn a
24 favorable position in the prosecution?

25 A I don't remember any conversations with law enforcement

Ricky Harris - Redirect examination
by Ms. Shurling

1 at all about that subject as concerns Mr. Gonzales, and I --
2 it is, it is not -- it would not be my general practice to,
3 in every drug case I have, go to law enforcement and say
4 hey, if my client can provide information, will you give him
5 a deal. I, I -- if I have a client who is maintaining his
6 innocence and if I have a client whose given me no inkling
7 whatsoever that he has any information to give or any
8 willingness to provide whatever information he may have, I,
9 I do not stand on a client to, to say look, you've got to
10 give it up, you've got to give up the information.

11 Q Okay.

12 A I don't, I don't -- maybe other attorneys do that. I
13 don't do that. I -- if a client though gives me reason to
14 believe that he's willing to do that and some do, or if
15 there's anything about a case that, that alerts me to the,
16 the fact that there may be some substantial benefit to be
17 gained, I wouldn't hesitate to broach that subject with law
18 enforcement or a prosecutor.

19 Q Okay. Well, let me ask you this.

20 In your experience, do your clients always necessarily
21 tell you the truth the first time?

22 A Unfortunately I think it's, it's probably that, that,
23 as I said before, clients are not always open and honest.
24 They're not always forthcoming. No, they're not. But
25 they're your client.

Ricky Harris - Redirect examination
by Ms. Shurling

1 Q I understand.

2 But my question is haven't you had clients that at
3 least initially denied culpability, and after working with
4 them extensively over a period of time, they have come to
5 trust you and admit their involvement in a crime after all?

6 A I'm not sure I've had, had very many dramatic episodes
7 like that, no.

8 Q Okay. Well, you said you represented people in State
9 and Federal Court?

10 A Yes.

11 Q Okay. And in Federal Court, have you ever signed a
12 client up to sign a federal proffer agreement?

13 A I don't know. I can't remember that.

14 Q And what is exactly---

15 A I can't---

16 Q What is the benefit of and, and what is the procedure
17 that's employed with a client when they sign a proffer
18 agreement?

19 A Well, the benefit of it would be if you, to, to, if you
20 will, give the prosecutor or whoever you're negotiating with
21 some kind of idea of what sort of cooperation or information
22 that the client can give and what benefit that might be to
23 the government. Either what benefit you think it might be
24 or could be or, you know, what benefit the government might
25 think that it could be. It, it's a -- it would be a tool to

Ricky Harris - Redirect examination
by Ms. Shurling

1 be used in the proper circumstance to either start or
2 further or complete a negotiation. It's just another tool.

3 Q And when the standard proffer agreement is signed in
4 the federal system---

5 MS. COUNTS: Your Honor, I'm gonna object. This goes
6 outside my scope of cross, and I would also object to
7 relevance.

8 MS. SHURLING: I'll get to the point real quick.

9 THE COURT: It's need -- you need to get to it quick
10 because I'm not sure what the procedure of a proffer
11 agreement in Federal Court has to do with this claim.

12 Q Under the terms of a traditional proffer letter, your
13 client tells the government everything they know about
14 illegal activity in exchange for potential benefit and
15 prosecution, correct?

16 A That's -- I'd say that's correct.

17 Q And the government agrees not to use anything given to
18 them, pursuant to proffer, against the person making the
19 statement?

20 A Ideally you get full immunity, yes.

21 Q Did you ever consider offering for your client, Michael
22 Gonzales, to enter into a similar agreement with the State
23 authorities in this methamphetamine case?

24 A No, I don't know what I'd put in it.

25 Q Well, how about the same thing that's in the federal

Ricky Harris - Redirect examination
by Ms. Shurling

1 proffer letter?

2 A Well---

3 Q Same language.

4 A If I had known that information, it, it, I could have
5 discussed that with Mr. Gonzales. I'm, I'm -- I didn't know
6 the information. I didn't know that.

7 Q Okay. So, you -- last question I suppose, did you, did
8 you ever ask Michael Gonzales whether he had any information
9 about anyone engaged in the illegal drug business in South
10 Carolina that you might help him use to his advantage in
11 plea negotiations?

12 A I don't remember it. If the subject came up -- I, I
13 don't recall. I do remember this, that, that my client, Mr.
14 Gonzales' position, was that he was not guilty, that he
15 wanted, you know, wanted to stand trial. He never indicated
16 to me a willingness to plead guilty---

17 Q Okay.

18 A ---to anything.

19 Q And this really is my last question.

20 Did you obtain a written waiver from Mr. Gonzales
21 authorizing you to accept payment of your legal fees from a
22 third party?

23 A No, I don't have any waivers like that.

24 Q Did you ever discuss that characteristic of his case
25 with him, the fact that all or a portion of his fee was

Ricky Harris - Redirect examination
by Ms. Shurling

1 being paid by a third party?

2 A I think I did discuss with him what the fees would be,
3 and, and I think he indicated to me that he would have his
4 mother or whoever he could get to try to come and, and, and
5 pay the fee, and that, you know, I told him, I said, I'm
6 pretty sure I did that, but you're my client. You know, you
7 make the decisions in the case. I deal with you. You know,
8 I don't discuss things with other people unless you want me
9 to, et cetera, and made clear to these other people that,
10 that Michael Gonzales was my client, not them. No matter
11 who paid the fee, that they're not my clients. That's good
12 of them to do if they're willing to do it. But, but that
13 gives them no control over the case.

14 Q Thank you. No further questions.

15 THE COURT: Anything further from the State?

16 MS. COUNTS: No, Your Honor.

17 THE COURT: You may step down.

18 MS. SHURLING: May we approach, Your Honor?

19 THE COURT: Please do.

20 (Whereupon, a bench conference was held at this time.)

21 MS. SHURLING: Thank you, sir.

22 THE COURT: During our bench conference it's been
23 agreed -- I believe there's a witness, an attorney witness
24 who is present who will be fairly brief. We're at 4:30 in
25 the afternoon, and we are gonna reconvene the hearing in

Terry Haselden - Direct examination
by Ms. Counts

1 November. So, I've allowed the State to go -- I believe
2 it's gonna be a State witness, is that correct?

3 MS. COUNTS: Yes, Your Honor.

4 THE COURT: Allowed the State to call the witness.
5 You may proceed.

6 MS. COUNTS: Your Honor, the State calls Terry
7 Haselden.

8 THE COURT: Come forward and be sworn, sir.

9 TERRY HASELDEN, being first duly
10 sworn, testified as follows:

11 THE COURT: Have a seat, sir. Once you're seated, state
12 your name for the record.

13 WITNESS: My name is Terry Haselden.

14 THE COURT: Your witness, Ms. Counts.

15 DIRECT EXAMINATION

16 BY MS. COUNTS:

17 Q Mr. Haselden, you weren't retained to represent the
18 applicant, were you?

19 A No, ma'am.

20 Q Do you have any connection with the applicant?

21 A No.

22 Q Did you go with Mr. Harris to the prison to interview
23 the applicant?

24 A I did.

25 Q And what was the purpose of that meeting?

Terry Haselden - Direct examination
by Ms. Counts

1 A I think it was sort of twofold. Number one, I think it
2 was basically so Mr. Harris could talk to him and have a
3 witness present. I think it was also so that I could give
4 him my opinion as to whether there might be a conflict
5 there, whether it might be waivable or even if it was
6 waivable, whether it would still be the right thing for him
7 to continue to, in the, in the case. So, I would say it's
8 more than one reason.

9 Q So, did y'all ask the applicant if there was any
10 connection with Dino Perez?

11 A We did. Mr. Harris advised the applicant that it had
12 been alleged that there might possibly be some sort of
13 connection between him and Mr. Harris' other client. Mr.
14 Gonzales was adamant that there was no connection of any
15 shape or form between the two, that he knew nothing about
16 Mr. Perez's involvement in any criminal activity, and they
17 just, you know, traveled in different circles as far as that
18 was concerned.

19 Mr. Harris asked him this several times. I think I
20 also asked him as well and he was repeatedly adamant that
21 there was no connection between the two of them.

22 MS. COUNTS: Okay. No further questions, Your Honor.

23 THE COURT: Your witness.

24 CROSS-EXAMINATION

25 BY MS. SHURLING:

Terry Haselden - Cross-examination
by Ms. Shurling

1 Q How extensive was your knowledge concerning how Mr.
2 Harris had gotten involved with Dino Perez and Michael
3 Gonzales?

4 A Prior to our trip over there -- it was not terribly
5 extensive at all. As I recall, I got a phone call from him
6 sort of at the last minute saying I had, giving me a brief
7 outline that there had been some suggestion of a possible
8 conflict, could I ride over to, I think it was Perry, if I'm
9 not mistaken, to meet with him and the client that Saturday.
10 As I recall, I forgot about the meeting and he had to call
11 and remind me that morning, and we rode over to Perry for
12 the meeting.

13 Naturally, we talked about it a little bit more on the
14 way over, and I explained some of the same things that he,
15 that's been discussed today. But not in, not in as great a
16 detail as has been discussed earlier.

17 Q Were you aware, for example, that Mr. Harris had been
18 paid a \$25,000 cash fee to represent Michael in the
19 marijuana case?

20 A I was not aware of the amount of the fee. I was aware
21 that he had been hired to retain Michael in two cases. That
22 one of them had already been tried, and that it was on
23 appeal, and that you were representing him on the appeal.

24 I was aware that there was a second or another case
25 pending. I don't know that I was aware at the time that the

Terry Haselden - Cross-examination
by Ms. Shurling

1 second charge had been tried first. I think today may of
2 been the first time I heard that or if I, if I heard it
3 before, I don't recall that and I was aware that there was
4 charges against Mr. Perez.

5 Q Were you aware that Mr. Perez had paid a portion of
6 Michael Gonzales' legal fees?

7 A If I was I don't recall that.

8 Q Were you aware that there was a close personal
9 relationship of some sort between Michael's mother and Dino
10 Perez?

11 A I was aware, if I'm not mistaken, that she may of been
12 friend, girlfriend, something along those lines or may
13 have -- I --- you know, I'm not sure whether this came from
14 my conversation with Mr. Harris or from our conversation
15 with Mr. Gonzales. I want to say that maybe Mr. Gonzales
16 might have said that they use to date or something. I'm not
17 sure exactly. But I was aware that there had been or was
18 some sort of relationship there.

19 Q And during that particular interview, Michael Gonzales
20 did decline to sign a waiver?

21 A Mr. Gonzales indicated that he wanted to think about it
22 and that's the way it was left. I mean there was, you
23 know---

24 Q He didn't want to sign it right then and there?

25 A The impression that I got was that he wanted to consult

Terry Haselden - Cross-examination
by Ms. Shurling

1 with somebody else before signing that waiver.

2 Q And you've heard Mr. Harris' testimony today that he
3 never eventually -- he did not eventually sign one?

4 A I heard that testimony, yes.

5 Q Thank you. No further questions.

6 THE COURT: Anything further?

7 MS. COUNTS: No, Your Honor.

8 THE COURT: You may step down.

9 I take it your next witness would be the applicant, is
10 that correct?

11 MS. SHURLING: It would, Your Honor, and I anticipate
12 his testimony taking at least an hour. It could run as long
13 as two---

14 THE COURT: All right.

15 MS. SHURLING: ---with cross.

16 THE COURT: We're gonna adjourn the hearing at this
17 point in time. I'll ask Ms. Counts to reschedule it for my
18 next week of PCR's.

19 Thank you very much.

20 MS. COUNTS: Thank you.

21 MS. SHURLING: Thank you, Your Honor.

22 I would like to ask that we go ahead and reach an
23 agreement as to what day of the week that we're going to --
24 not necessarily today, but soon, what day---

25 THE COURT: All right. I'll allow you folks to work

1 that out among yourselves.

2 MS. SHURLING: Okay. And we will go ahead and schedule
3 that for a sizeable block of time so that we won't interfere
4 with other cases.

5 THE COURT: That will be fine.

6 Thank you very much.

7 MS. SHURLING: Thank you, sir.

8 MS. COUNTS: Thank you, Your Honor.

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10 (Whereupon, this case was in recess for the evening.)

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1 Thursday, November 8th, 2007

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3 THE COURT: We're on the record in the case of Michael
4 Gonzales versus The State of South Carolina.

5 I believe this is a continuation of a previous hearing,
6 is that correct, Ms. Counts?

7 MS. COUNTS: Yes, Your Honor.

8 THE COURT: And Ms. Shurling?

9 MS. SHURLING: That's correct, Your Honor.

10 THE COURT: And Ms. Shurling, it's my understanding you
11 have additional witnesses you wish to present?

12 MS. SHURLING: I do, Your Honor, and I would take my
13 witnesses somewhat out of order and go ahead and call
14 Mr. Ike Johnson because I believe he has an obligation that
15 he needs---

16 THE COURT: All right.

17 MS. SHURLING: ---to get to after his appearance today.

18 THE COURT: All right. Mr. Johnson, come forward.

19 MS. COUNTS: Your Honor, for the record, the State
20 would object to Mr. Johnson's testimony. It is
21 our understanding that his testimony deals with
22 circumstances that happened after the trial of the applicant
23 and would not be relevant for this PCR for ineffective
24 assistance of counsel for the trial.

25 THE COURT: I understand the State's position. I will

Ike Johnson - Direct examination
by Ms. Shurling

1 allow him to testify and rule as to the appropriateness of
2 the testimony after we've heard it.

3 MS. SHURLING: Thank you.

4 THE COURT: Come forward, sir.

5 MS. COUNTS: Thank you, Your Honor.

6 IKE JOHNSON, being first duly
7 sworn, testified as follows:

8 THE COURT: Have a seat on the witness stand please.
9 Once seated, state your name for the record.

10 WITNESS: Isaac Johnson, Junior.

11 THE COURT: Ms. Shurling, it would be your witness.

12 MS. SHURLING: Thank you.

13 DIRECT EXAMINATION

14 BY MS. SHURLING:

15 Q Good morning, Mr. Johnson.

16 Where are you currently employed?

17 A I am employed in the law firm of McGangus, Gadlocke,
18 and Currie.

19 Q And you're a partner in that firm?

20 A That's correct.

21 Q And I understand that this is a fairly recent position
22 for you having left the Greenville division of the U.S.
23 Attorney's Office when, sir?

24 A My first day with McGangus was August 13th. I
25 believe I left the U.S. Attorney's Office the end of July.

Ike Johnson - Direct examination
by Ms. Shurling

1 I'm not certain of the exact date.

2 Q Thank you.

3 Congratulations on the new position.

4 A Thank you.

5 Q How long were you with the U.S. Attorney's Office?

6 A Eight years.

7 Q And prior to that you were a state prosecutor for a
8 time as well, were you not?

9 A I was a state prosecutor for eight years as well.

10 Q And in which office were you a state prosecutor?

11 A I was a, was in the Eighth Circuit in Greenwood for
12 four years and the Thirteenth Circuit in Greenville for four
13 years.

14 Q Thank you.

15 Now, there's been testimony earlier in this case from
16 trial counsel Ricky Harris about representing Dino Perez in
17 a trafficking in marijuana case that originated in the state
18 system and ultimately wound up in the federal system.

19 You were the prosecutor assigned to prosecute Dino
20 Perez, were you not?

21 A Yes.

22 Q And in connection with the prosecution of Dino Perez by
23 the federal authorities, you and other members of your
24 office solicited the cooperation of my client, Michael
25 Gonzales, is that right?

Ike Johnson - Direct examination
by Ms. Shurling

1 A As I recall, yes.

2 Q And at that time, you may not recall, but I was
3 representing Michael on direct appeal from the State
4 conviction.

5 Do you remember that?

6 A Vaguely.

7 Q Okay. Now, at your request, did I solicit the
8 cooperation of Michael Gonzales in the prosecution of Dino
9 Perez?

10 A To the best of my recollection, yes.

11 Q And are you aware of the fact that Mr. Michael Gonzales
12 subsequently gave extensive debriefings to various federal
13 agencies as a result of, of my getting him to come to the
14 table and cooperate?

15 A As I recall, yes, he did.

16 Q And was he a valuable witness for you?

17 Well, let me rephrase that.

18 Dino Perez didn't end up going to trial, did he?

19 A He did not.

20 Q He pled guilty?

21 A Yes.

22 Q But his statements against, Michael Gonzales'
23 statements concerning Dino Perez and his drug organization
24 would of been part of the discovery materials given to
25 defense counsel in Dino Perez's case, correct?

Ike Johnson - Direct examination
by Ms. Shurling

1 A Ms. Shurling, as you well know, that case was
2 prosecuted a number of years ago. I do remember Mr.
3 Gonzales cooperating with us. As far as his, his
4 cooperation being incorporated, so to speak, in a discovery
5 package, I don't recall. But if he gave, if he gave a
6 statement and if we found that statement to be beneficial to
7 the government, it would have been included in a discovery
8 package given to Dino Perez.

9 Q Well -- and just whether you have an independent
10 recollection of this case or not, if Michael Gonzales gave
11 statements implicating Dino Perez and his associates, they
12 would of been in the discovery package given to Dino Perez's
13 lawyer, correct?

14 A If that were the case, yes.

15 Q And as a matter of fact, the converse would also be
16 true, if he had given statements that were exculpatory, you
17 would of had to turn them over under Brady?

18 A I would of been duty bound to do so, yes.

19 Q So, any statements Michael gave would of been in the
20 package of materials given to Dino Perez's lawyer?

21 A Unless they weren't helpful and germane and
22 exculpatory, yes.

23 Q Okay. And your recollection is that Michael was
24 helpful to your case?

25 A Honestly, I, I remember Michael being extremely

Ike Johnson - Direct examination
by Ms. Shurling

1 cooperative, I remember his coming to our office and being
2 debriefed, and I remember his giving an honest effort to
3 cooperate and assist the government. I'm just, I'm just --
4 I don't know that I can answer it any other way.

5 Could you rephrase, repeat the question?

6 Q Isn't it true that Michael Gonzales gave extensive
7 debriefings concerning Dino Perez's drug organization?

8 A Yes.

9 Q And those debriefings would of been helpful to you in
10 prosecuting Dino Perez?

11 A Again, I don't recall. But I would, I would say yes.

12 Q Okay. Thank you.

13 Your Honor, I believe that we introduced a copy of Mr.
14 Gonzales DEA 6 at the previous proceeding.

15 And Madam Court Reporter, do you have those exhibits
16 with you?

17 COURT REPORTER: No.

18 MS. SHURLING: Okay. Thank you.

19 A moment, Your Honor?

20 THE COURT: Yes, ma'am.

21 (Pause.)

22 MR. SHURLING: Let me move on to something else and
23 I'll come back to this.

24 THE COURT: All right.

25 Q Your first opportunity and the first opportunity of

Ike Johnson - Direct examination
by Ms. Shurling

1 your agents to have the cooperation of Michael Gonzales came
2 at a time when I was representing him.

3 Would you have liked to have had access to him earlier
4 in your investigation?

5 A Specifically I don't remember. Just, just generically,
6 I mean we -- the, the sooner you, we have access to a
7 potential witness in a case the better, and, and in any
8 case. So, if we could of gotten to him sooner, certainly we
9 would, we would have liked to have him sooner.

10 Q Okay. Now, Michael, the record will reflect, was 17
11 years old at the time of the offenses that he was indicted
12 for in Spartanburg County making him a juvenile.

13 If Michael had provided you substantial assistance in
14 the prosecution of Dino Perez prior to being tried in State
15 Court would you have had it within your ability to reward
16 him by taking over those charges in the federal system?

17 Could you have done it?

18 A It would have been very difficult given his age, but
19 I'm sure we could have. Whether we would have, I'm not
20 certain. But certainly we could have.

21 Q Okay. And in a situation where a witness, a juvenile
22 witness was extremely cooperative and substantially assisted
23 you in the prosecution of a case, you could of gone to the
24 Department of Justice and gotten approval to take that
25 charge over and deal with it in Federal Court?

Ike Johnson - Direct examination
by Ms. Shurling

1 A Yes.

2 Q And you would have been willing to do that if he had
3 been a valuable enough witness for you?

4 A No, to be honest with you, I don't think we ever got to
5 the point where we seriously contemplated that. But
6 certainly it, it's possible that we could have taken it
7 over.

8 Q Okay. And as you and I have previously discussed,
9 there actually is an easier alternative for you in those
10 situations, isn't there?

11 If you're dealing with a cooperating witness that's a
12 juvenile, as a federal prosecutor, did you work closely with
13 state and local authorities?

14 A Yes, absolutely.

15 Q And was it sometimes more advantageous or at least more
16 convenient for you to reward a cooperating witness by giving
17 them favorable recommendations with the State and local
18 authorities rather than going to the trouble of actually
19 taking over the charges?

20 A In the sense of a reward, I think that we, it would
21 have been more in the way of a recommendation. A reward
22 probably would have come from the state authorities. But
23 certainly, in this case, as in any other case, when there's
24 a state defendant who assists the federal government, and we
25 deemed that government, that assistance to be substantial,

Ike Johnson - Direct examination
by Ms. Shurling

1 we always notify the State authorities. Be it the State
2 Solicitor's Office and law enforcement.

3 Q And the reason I used the term reward, in the federal
4 system if a witness provides you information that is
5 substantially beneficial to you in the prosecution of
6 someone else, you can either make a 5K1.1 motion for
7 downward departure at the time of sentencing?

8 A Correct.

9 Q Or, after their sentence, you can make a Rule 35
10 motion for a reduction in their sentence?

11 A That's correct.

12 Q And in both of those circumstances, I use the word
13 reward loosely, but it is a quid pro quo for their having
14 provided information to the federal authorities which helped
15 them prosecute someone?

16 A That's correct, yes.

17 Q And, and my question is, even if you had not taken over
18 Michael Gonzales' two state charges, you could have appealed
19 to the local authorities and given them your recommendation
20 that he receive favorable treatment in the plea bargain
21 process as a result of his extensive cooperation?

22 A Yes, no question.

23 Q And you've done that in cases?

24 A I did that numerous times.

25 Q Okay. Let's go back to generalities for a moment.

Ike Johnson - Direct examination
by Ms. Shurling

1 As a prosecutor in the U.S. Attorney's Office, did you
2 handle a significant number of drug prosecutions?

3 A Yes.

4 Q And in fact, when you were a state prosecutor, you
5 prosecuted a lot of drug cases too, didn't you?

6 A Some, but more violent crimes.

7 Q Okay. But you had experience, as a prosecutor, with
8 drug cases in both State and Federal Court?

9 A Yes.

10 Q In drug cases where an individual is what my granddaddy
11 and father would say caught red handed, generally is
12 cooperating with the authorities one of the few ways they
13 can better their situation?

14 A Yes.

15 Q And is it common practice, in the prosecution and
16 indeed defense of drug cases, to explore the possibility
17 that a suspect or a defendant can give information vital in
18 the prosecution of people higher up in the food chain in
19 exchange for favorable treatment?

20 A Yes.

21 Q Is that, in fact, a, a valuable and routine part of the
22 prosecution of drug cases?

23 A Absolutely.

24 Q You depend on that, don't you, as a prosecutor?

25 A Yes.

Ike Johnson - Direct examination
by Ms. Shurling

1 Q And in your prosecution of cases at the state and
2 federal level, did you routinely have defense attorneys come
3 to you and say what can my client do to help himself?

4 A Certainly in the federal system and to some degree in
5 the state system. But more so in the federal system.

6 Q And, and even in the state and federal system, defense
7 attorneys would offer up their clients to give whatever
8 information they had available to use to barter in the
9 negotiation process?

10 A Yes.

11 Q Correct?

12 A Yes.

13 Q Do you recall, and I understand, that a lot of this was
14 handled by Mr. Mark Moore who was, at that time, a
15 supervisor in your U.S. Attorney's Office, but do you recall
16 any issue being raised about Ricky Harris being conflicted
17 out from representing Dino Perez?

18 A Yes, I do.

19 Q And it was the position of the U.S. Attorney's Office
20 that he had a serious conflict of interest in representing
21 Dino Perez and Michael Gonzales?

22 A I think, based on our view of the case, it was apparent
23 to us that there was, at the very least, a potential
24 conflict and possibly a real conflict in representing both
25 Mr. Perez and Mr. Gonzales.

Ike Johnson - Direct examination
by Ms. Shurling

1 Q And you asked Mr. Harris to voluntarily remove himself?

2 A As I recall we did.

3 Q And ultimately he did so?

4 A Yes.

5 MS. SHURLING: No further questions, Your Honor.

6 THE COURT: Ms. Counts.

7 CROSS-EXAMINATION

8 BY MS. COUNTS:

9 Q Mr. Johnson, you testified earlier that you don't know
10 if, what the applicant stated in his debriefing, you don't
11 know if it was substantial?

12 A Gosh, I can only say that I just remember Mr. Gonzales
13 being extremely cooperative. I remember his coming to our
14 office. The content of the information that he gave us, I
15 don't recall whether it was substantial. I can simply say
16 that I remember his being very cooperative with the federal
17 government.

18 Q And this happened, all of this happened after he, after
19 his July 2002 trial?

20 MS. SHURLING: I'm sorry.

21 Could you repeat that question?

22 Q All of this happened after the July 2002 trial?

23 A I do not recall. I, I remember his being prosecuted in
24 state court for a drug charge. I think he had been
25 convicted. I'm also certain he had been convicted. So, I

Ike Johnson - Cross-examination
by Ms. Counts

1 would say if, if -- I think he had been convicted, yes.

2 Q Now, you stated earlier that you're not sure you would
3 of given a recommendation to the State for it's, concerning
4 Mr. Gonzales' second charges, did you?

5 A That's only because I can not remember the content of
6 his cooperation.

7 Q And he didn't---

8 A So, I---

9 Q And he didn't cooperate until after his trial, the 2002
10 trial?

11 A I don't, I don't know how he -- if, if it's your
12 contention that he -- I don't know how he could have then.

13 Q How do you mean that?

14 A If he had already been convicted when, when we
15 confronted him, I -- repeat your question. I'm sorry.
16 Maybe I didn't understand your question.

17 Q I guess my question would be he didn't cooperate -- he
18 had -- he was convicted at trial, then he cooperated, then
19 he had a guilty plea. He didn't cooperate until after his
20 trial.

21 A I guess that would be correct.

22 MS. COUNTS: No further questions, Your Honor.

23 THE COURT: Ms. Shurling, your witness.

24 REDIRECT EXAMINATION

25 BY MS. SHURLING:

Ike Johnson - Redirect examination
by Ms. Shurling

1 Q When I was appointed to represent Mr. Gonzales, I
2 brought him to the table to cooperate, didn't I?

3 A Yes.

4 Q And at the time prior to that, he was, based on your
5 own knowledge, being represented by the same lawyer that was
6 representing Dino Perez?

7 A At some point I would think that because of, of a, of a
8 conflict, yes, I mean they were both being represented by
9 the same lawyer.

10 Q So, to your knowledge, when he got his own lawyer
11 independent of counsel for Dino Perez, he came to the table
12 and cooperated?

13 A He sure did, yes.

14 MS. SHURLING: Your Honor, I am approaching with a copy
15 of the DEA 6 that was introduced at the last proceeding. I
16 apologize that we don't have the marked copy here today.

17 THE COURT: That's all right.

18 Q Can you please take a moment to look at this, Mr.
19 Johnson, and see if it refreshes your recollection about the
20 degree of Mr. Gonzales' cooperation?

21 A It does somewhat refresh, refresh my recollection.

22 Q And would you agree that it provides details concerning
23 Mr. Perez' drug operation that was estimated to be receiving
24 an average of 7,000 pounds of marijuana a month?

25 A Yes.

Ike Johnson - Redirect examination
by Ms. Shurling

1 Q And gives substantial detail concerning that pipeline
2 and who was involved in it?

3 A Yes.

4 Q And would, therefore, that refresh, refresh your
5 recollection as to whether or not this DEA 6 would of been
6 of substantial assistance to you in prosecuting Dino Perez?

7 A I'd like to answer it this way. Provided our
8 investigation revealed his interview to be credible, and we
9 were able, to the extent that we were able to substantiate
10 it, I would say yes.

11 Q And do you have any recollection of ever finding out
12 anything that Michael Gonzales told you wasn't true?

13 A Not to my recollection, recollection.

14 Q And in fact, you know that substantial portions of this
15 were independently verified, don't you?

16 A I would, I would say, based on my recollection, some,
17 if not most of the things he said in this DEA 6 were, in
18 fact, verified. Some of it -- the names of, of some of the
19 people mentioned, I'm not sure if we were able to verify or
20 substantiate that. But some of the stuff regarding the
21 sources of information, the sources of supply being in
22 Kentucky, I think we able to verify parts of the DEA 6.

23 Q And unfortunately named in these drug cases involving
24 large number of, numbers of illegal Mexican immigrants were
25 a frequent problem, weren't they?

Ike Johnson - Recross-examination
by Ms. Counts

1 Didn't many of the players go by various names?

2 A I would say that, that would be correct.

3 Q Thank you. No further questions.

4 THE COURT: Yes, ma'am.

5 RECROSS EXAMINATION

6 BY MS. COUNTS:

7 Q And Mr. Johnson, this DEA 6 report was prepared after
8 his first trial in 2002?

9 A After -- it, it, it states the date prepared, June 4th,
10 2003. You, you keep referring to his state trial. Since I
11 wasn't in state court, I don't recall the date of his state
12 trial. But if you say it was in 2002, then obviously this
13 was prepared subsequent to his state trial.

14 MS. COUNTS: Okay. No further questions, Your Honor.

15 REDIRECT EXAMINATION

16 BY MS. SHURLING:

17 Q And equally obviously, it says in this DEA 6 that
18 present with Michael at the time of the interview was his
19 attorney, Tara Shurling, doesn't it?

20 A It does.

21 Q So, it would be after he had his own lawyer that he
22 was, for the first time, interviewed by the federal
23 authorities?

24 A Obviously.

25 Q Thank you.

Michael Gonzales - Direct examination
by Ms. Shurling

1 THE COURT: You may step down, sir.

2 MS. SHURLING: Thank you for coming, Mr. Johnson.

3 I'd ask that he be excused, Your Honor.

4 THE COURT: Any objection?

5 MS. SHURLING: No objection, Your Honor.

6 THE COURT: You're free to go. Thank you very much.

7 WITNESS: Thank you, Your Honor.

8 MS. SHURLING: Thank you.

9 Your Honor, I would call Michael Gonzales.

10 THE COURT: Okay. Come forward, sir, to be sworn.

11 MICHAEL GONZALES, being first duly
12 sworn, testified as follows:

13 THE COURT: Have a seat on the, the stand. State your
14 name for the record.

15 WITNESS: Michael Gonzales.

16 THE COURT: Mrs. Shurling, your witness.

17 DIRECT EXAMINATION

18 BY MS. SHURLING:

19 Q Michael, how old are you now?

20 A I am 23.

21 Q 23?

22 A Yes, ma'am.

23 Q How old were you when you were arrested on the
24 marijuana trafficking charge?

25 A 17.

Michael Gonzales - Direct examination
by Ms. Shurling

1 Q 17?

2 A Yes, ma'am.

3 Q At that time -- well, let me back up.

4 Your mother is Lucy Santana, correct?

5 A Yes, ma'am.

6 Q At that time, who was your mother living with?

7 A At the time that I got arrested with the marijuana?

8 Q Right.

9 A Dino.

10 Q Dino Perez?

11 A Yes, ma'am.

12 Q And how long had she been dating Mr. Perez?

13 A A while.

14 Q A while.

15 Months, years?

16 A Years.

17 Q Years.

18 A Uh-huh. (Affirmative).

19 Q Had Mr. Perez been sort of like a father to you?

20 A Yes, ma'am.

21 Q And when you were a very young teenager, did he get you
22 involved in his drug business?

23 A Yes, ma'am.

24 Q And you've given lengthy debriefings to the Spartanburg
25 County Sheriff's Department and the federal authorities

Michael Gonzales - Direct examination
by Ms. Shurling

1 about how that involvement in Mr. Perez' business developed,
2 haven't you?

3 A Yes, ma'am.

4 Q Okay. And during that time period, were you living at
5 a compound they call The Camp out in Campobello?

6 A Yes, ma'am.

7 Q And one of your primary jobs was to help unload these
8 huge loads of marijuana that were brought in there?

9 A Yes, ma'am.

10 Q And also guarding it?

11 A Yes, ma'am.

12 Q Okay. When you were arrested, your mother hired Ricky
13 Harris to be your lawyer?

14 A Yes.

15 Q Is that right?

16 A Yes, ma'am.

17 Q And who did you know to be paying for your lawyer?

18 A Dino.

19 Q Dino?

20 A Yes, ma'am.

21 Q And the marijuana that you were caught with the night
22 you were arrested, who were you delivering it to?

23 A Dino and Primo.

24 Q Dino and Primo.

25 And Primo was Dino's boss?

Michael Gonzales - Direct examination
by Ms. Shurling

1 A Yes, ma'am.

2 Q Primo was the big big man?

3 A Yes, ma'am.

4 Q And Dino was under him?

5 A Yes, ma'am.

6 Q And the load of marijuana you were caught with was
7 being taken to Dino for distribution?

8 A Yes, ma'am.

9 Q And your lawyer was hired by your mother and Dino
10 Perez?

11 A Yes, ma'am.

12 Q With Dino's money?

13 A Yes, ma'am.

14 Q And you knew that?

15 A Yes, ma'am.

16 Q A couple weeks later, Mr. Perez was arrested and
17 charged with trafficking in marijuana as well.

18 Were you aware of that?

19 A Yes, ma'am.

20 Q And were you aware of what lawyer was hired to
21 represent Dino?

22 A Ricky Harris.

23 Q Ricky Harris.

24 At that time did Mr. Harris ever have a discussion with
25 you about whether he might have a conflict of interest in

Michael Gonzales - Direct examination
by Ms. Shurling

1 representing you and Dino Perez?

2 A No, ma'am.

3 Q Did he ever discuss the public defender system with you
4 and tell you that if you couldn't afford a lawyer of your
5 own that you could get a public defender so that you would
6 have your own lawyer?

7 A No, ma'am.

8 Q Did he ever ask you to sign anything asking if you were
9 willing to waive a potential conflict of interest in your
10 representing Mr. Perez since you'd already, he'd already
11 been hired to represent you?

12 A As I, as I recall, he had me -- he wanted me to sign a
13 piece of paper at Perry.

14 Q At Perry?

15 A Yes, ma'am.

16 Q And did you refuse to sign it?

17 A Yes, ma'am.

18 Q Okay. Now, did you ever have a discussion with your
19 lawyer about the fact that, although you were the client,
20 that your, his fees for representing you were being paid by
21 a third party?

22 Did he ever have that discussion with you?

23 A No, ma'am.

24 Q Did he ever ask you to sign anything acknowledging that
25 your fees were being paid by a third party that might have

Michael Gonzales - Direct examination
by Ms. Shurling

1 an interest in your case and waiving any problem with that?

2 A No, ma'am.

3 Q Again, he tried to get you to sign a waiver, but you
4 declined?

5 A Yes, ma'am.

6 Q Okay. Now, as time went on while you were on bond, you
7 got arrested in the methamphetamine case, correct?

8 A Yes, ma'am.

9 Q And the methamphetamine case happened when you were out
10 and trying to make money for your family because you and
11 Dino were kind of out of the marijuana business, right?

12 A Yes, ma'am.

13 Q At that time, who hired Ricky Harris to represent you
14 in the methamphetamine case?

15 A Dino.

16 Q Dino.

17 And who paid for it?

18 A Dino.

19 Q Dino.

20 And you knew that?

21 A Yes, ma'am.

22 Q You knew that your lawyer in both your big cases was
23 being paid for by Dino Perez?

24 A Yes, ma'am.

25 Q When you were discussing your cases with your lawyer,

Michael Gonzales - Direct examination
by Ms. Shurling

1 did you ever ask him what, if anything, you could do to help
2 yourself negotiate a better deal?

3 A Yes, ma'am.

4 Q What did you ask him?

5 A I asked him at Pod Six is, cause I had some type of
6 information that it would help me in anyway, and I explained
7 to him the name. The name was Dino Perez and he says he
8 couldn't hear this. He didn't want to -- he couldn't hear
9 this.

10 Q Okay. Let's back up.

11 He said I can't hear this?

12 A Yes, ma'am.

13 Q Did he say why he couldn't hear it?

14 A No, ma'am.

15 Q He just said I can't hear this?

16 A Yes, ma'am.

17 Q And once you asked him whether or not you could give
18 information about Dino Perez, did he then, at anytime, have
19 a discussion with you about whether you might need a
20 separate lawyer?

21 A No, ma'am.

22 Q Did you have any money or resources of your own to hire
23 a lawyer with?

24 A No, ma'am.

25 Q Did you know anything about the Public Defender system?

Michael Gonzales - Direct examination
by Ms. Shurling

1 A No, ma'am.

2 Q How well -- did you speak English at that time,
3 Michael?

4 A Well, as far as, as attorney language and like that, I,
5 I don't have the slightest clue of what was going on.

6 Q You could speak English fairly well even at the time
7 you were arrested?

8 A Yes, ma'am.

9 Q But how far had you gone in school, Michael?

10 A Eighth grade.

11 Q Eighth grade?

12 A Yes, ma'am.

13 Q Did you have any knowledge of the judicial system at
14 all?

15 A No, ma'am.

16 Q Had you ever been in trouble with the law before?

17 A Before the marijuana case?

18 Q Before the marijuana case.

19 A Yes, ma'am.

20 Q What for?

21 A Skipping school.

22 Q Skipping school?

23 A Yes, ma'am.

24 Q How about -- what else?

25 A That's it.

Michael Gonzales - Direct examination
by Ms. Shurling

1 Q That's it.

2 So, you didn't know anything about being entitled to a
3 lawyer, a lawyer and being able to get a free lawyer and all
4 of that?

5 You didn't know how you went about doing that?

6 A No, ma'am.

7 Q Okay. If Ricky Harris had, from the beginning, told
8 you that you might be able to get a good deal for yourself
9 if you agreed to cooperate with the state and federal
10 authorities and tell them everything you knew about the drug
11 business, would you have done it?

12 A Yes, ma'am.

13 Q And if he had told you that before Dino Perez was
14 indicted, you would of already cooperated at that time?

15 A Yes, ma'am.

16 Q Now, once Dino Perez was arrested and indicted, if he
17 had come to you and said I think there might be a problem
18 with me representing both of you, would you have wanted your
19 own lawyer?

20 A Given, given the fact, yes. Yes, ma'am.

21 Q And I was hired to represent you on direct appeal from
22 your conviction in the methamphetamine case, correct?

23 A Yes, ma'am.

24 Q Now although you were arrested on that case second, you
25 were tried on it first, isn't that right?

Michael Gonzales - Direct examination
by Ms. Shurling

1 A Yes, ma'am.

2 Q Do you know why?

3 A No, ma'am.

4 Q Okay. And your mother hired me to represent you on
5 direct appeal?

6 A Yes, ma'am.

7 Q And did I subsequently encourage you to cooperate with
8 the state and local authorities by telling them everything
9 you knew about the drug business?

10 A Yes, ma'am.

11 Q And did you follow my advice?

12 A Yes, ma'am.

13 Q Did you fully cooperate with every agent and every
14 officer that talked to you after that?

15 A Yes, ma'am.

16 Q At my suggestion and advice were you able to convince
17 your mother to leave Dino Perez and cooperate?

18 A Yes, ma'am.

19 Q And as a result of my involvement with your mother,
20 your mother left Dino Perez and cooperated, to your
21 knowledge, cooperated with the federal and state authorities
22 as well?

23 A Yes, ma'am.

24 Q Would you have advised your mother to do that earlier
25 if you'd known it could be potentially beneficial to your

Michael Gonzales - Direct examination
by Ms. Shurling

1 case?

2 A It would of been a little bit scary because I know she
3 was still, Dino was still out there.

4 Q Were you afraid of Dino Perez?

5 A Yes, ma'am.

6 Q Very afraid of Dino Perez?

7 A Yes, ma'am.

8 Q Do you have reason to believe Dino Perez is extremely
9 violent and a dangerous man?

10 A Yes, ma'am.

11 Q And he's had a lot of control over you and your family
12 since---

13 MS. COUNTS: Your Honor, I object to leading.

14 THE COURT: Sustain the objection.

15 Q How old were you when you first met him?

16 A I was a little over 13. Almost -- about 13.

17 Q About 13?

18 A Yes, ma'am.

19 Q Michael, is there any question in your mind that you
20 would of fully cooperated with the state and federal
21 authorities from the very beginning if you had had a lawyer
22 that encouraged you to do it?

23 A Yes, ma'am.

24 Q You would of, you would of cooperated?

25 A Oh, yes, ma'am. Yes, ma'am.

Michael Gonzales - Direct examination
by Ms. Shurling

1 Q After I became your lawyer and you cooperated with the
2 DEA and the Spartanburg County Sheriff's Department, did you
3 enter a plea in your other outstanding charge?

4 A On the marijuana case?

5 Q Marijuana case.

6 A Yes, ma'am.

7 Q You entered a plea?

8 A Yes, ma'am.

9 Q You admitted your guilt and entered a plea?

10 A Yes, ma'am.

11 Q And did you agree to testify against any and everybody
12 they ever wanted you to testify against?

13 A Yes, ma'am.

14 Q Now, you didn't end up having to testify against Dino,
15 did you?

16 A No, ma'am.

17 Q You, you went to the U.S. Attorney's Office a number of
18 times with me to prepare for a trial for Dino Perez, didn't
19 you?

20 A Yes, ma'am.

21 Q And you were being prepared to testify as a witness
22 against him?

23 A Yes, ma'am.

24 Q And ultimately that didn't happen why?

25 A I don't know.

Michael Gonzales - Direct examination
by Ms. Shurling

1 Q He pleaded guilty, didn't he?

2 A Yeah, that's what I -- eventually, yeah.

3 Q And that's the only reason you didn't have to testify?

4 A Yes, ma'am.

5 Q Michael, did your lawyer ever talk to you about your,
6 your big marijuana case, the first arrest?

7 Did he ever even ask you if that case had anything to
8 do with Dino Perez?

9 A No, ma'am.

10 Q When you tried to tell him it did, he didn't want to
11 talk to you?

12 A No, ma'am.

13 Q If you had had a lawyer that had encouraged you to tell
14 everything you knew from the beginning and the state or the
15 federal government had been willing to make you an offer for
16 a plea as a result of that cooperation, would you have pled
17 guilty in that case too?

18 A Yes, ma'am.

19 MS. SHURLING: I don't have any further questions, Your
20 Honor.

21 THE COURT: Ms. Counts.

22 CROSS-EXAMINATION

23 BY MS. COUNTS:

24 Q Mr. Gonzales, so you are guilty of trafficking meth?

25 A Yes, ma'am. Yes, ma'am, I'm guilty.

Michael Gonzales - Cross-examination
by Ms. Counts

1 Q And it was your testimony that you told your lawyer
2 that you had information on Dino Perez and he wouldn't
3 listen to you?

4 A Yes, ma'am.

5 Q You said you didn't know you could have your own
6 lawyer.

7 Is that true?

8 A Yes, ma'am.

9 Q Did the law enforcement read, read your Miranda rights
10 to you?

11 A On my -- on the marijuana charge, yes, they did.

12 Q So, they told you you could have a lawyer if you
13 couldn't afford one?

14 A I can't really -- I knew that they read me my, my
15 rights, but I really can't remember everything that, what
16 was going on. Those months were crazy.

17 Q And the first time that trial counsel ever talked to
18 you about a conflict, you were already at Perry, is that
19 correct?

20 A Yes, ma'am.

21 Q So, you had already been convicted of the trafficking
22 meth charge?

23 A Yes, ma'am.

24 Q Isn't it true that your attorney and a friend of his
25 came and asked you if you were, if there was a connection

Michael Gonzales - Cross-examination
by Ms. Counts

1 between Dino and you told him there wasn't?

2 A Yes.

3 Q You told him that at Perry?

4 A Yes.

5 Q So, that was after you had already told him there was a
6 connection?

7 A I -- when I previously told him that there was a
8 connection, I told him at Pod Six in Spartanburg County.
9 That's when he didn't want to listen to me.

10 Q So, you told him before you went to trial on the meth
11 charge?

12 A Yes, ma'am.

13 Q And then when he came you, came after you'd been
14 arrested on the meth charge, you told him you didn't have a
15 connection with him?

16 A Yes, ma'am.

17 Q Why did you do that?

18 A I felt, I felt that -- I, I don't know. I just felt
19 that he left me out in the water cause I, I came to him
20 before. Now, I got all this time and he's asking these
21 questions now.

22 Q So, you lied to him?

23 A Yes, ma'am.

24 MS. SHURLING: Your Honor, I would just ask that
25 counsel rephrase the question. She's saying after arrest on

Michael Gonzales - Cross-examination
by Ms. Counts

1 the meth case. I believe the original question was it.
2 was -- the visit to Perry was after the conviction in the
3 meth case.

4 MS. COUNTS: Okay. I'm sorry, Your Honor.

5 THE COURT: I understand.

6 MS. SHURLING: It's a critical distinction.

7 THE COURT: Well, I understand if he's at Perry, then
8 he'd been convicted of, on the meth case.

9 Go ahead.

10 MS. COUNTS: No further questions.

11 THE COURT: Redirect?

12 REDIRECT EXAMINATION

13 BY MS. SHURLING:

14 Q Michael, at the time Mr. Harris and his associate came
15 to see you at Perry, you didn't tell the truth about the
16 connection to Dino, did you?

17 A Yes, ma'am.

18 Q But you'd already told the truth to the DEA and the
19 police, hadn't you?

20 A Yes, ma'am.

21 Q And as far as you knew, at that time, Ricky Harris
22 still represented Dino Perez, didn't he?

23 A Yes, ma'am,

24 Q And you were afraid of Dino Perez?

25 A Yes, ma'am.

Michael Gonzales - Redirect examination
by Ms. Shurling

1 Q And your mother was still, at least part of the time,
2 living with Dino Perez, wasn't she?

3 A Yes, ma'am.

4 Q So, at that point, you still had a clear connection in
5 your mind between Ricky Harris and the man you were afraid
6 of, Dino Perez?

7 A Yes, ma'am.

8 Q But you had told the truth, the whole truth to law
9 enforcement?

10 A Yes, ma'am.

11 Q And you tried to tell Ricky Harris that you had
12 information to barter before you were convicted of anything,
13 didn't you?

14 A Yes, ma'am.

15 Q And when you say information about Dino, in fact, you
16 ultimately were willing to give information---

17 MS. COUNTS: Your Honor, she's leading.

18 Q Were you willing to give information about people
19 higher up than Dino?

20 A Yes, ma'am.

21 Q And did you give information about people higher up
22 than Dino?

23 A Yes, ma'am.

24 Q And were you willing to give information about the
25 source of the methamphetamine?

Michael Gonzales - Redirect examination
by Ms. Shurling

1 A Yes, ma'am.

2 Q And you were willing to talk about all of that and did,
3 didn't you?

4 A Yes, ma'am.

5 Q Thank you. No further questions.

6 THE COURT: Ms. Counts.

7 RE CROSS EXAMINATION

8 BY MS. COUNTS:

9 Q Mr. Gonzales, you just testified that the reason you
10 lied at Perry was because you were afraid of Mr. Perez?

11 A Yes, ma'am.

12 Q Were you not afraid of him the first time you told
13 trial counsel?

14 A I was, I was really thinking about to see if I could
15 get some help as far as -- cause I, cause I seen, I seen TV
16 and as far as the federal government help, you know, move
17 your family and stuff.

18 Q But you weren't afraid?

19 A Yes. Yes, I, I knew what he was capable of. But---

20 Q But you told them anyway?

21 A Yes, ma'am.

22 Q No further questions.

23 MS. SHURLING: Very briefly, Your Honor?

24 THE COURT: We've examined and cross-examined. I'm
25 gonna allow him to step down. I think, I think I understand

1 where we're going.

2 MS. SHURLING: Thank you.

3 THE COURT: You may step down.

4 WITNESS: Thank you, Your Honor.

5 MS. SHURLING: Your Honor, the only additional witness
6 I would of had is, is a former narcotic's officer from
7 Spartanburg, Mr. Rhett Fox. Former Detective Fox is now
8 with the Colorado Police, and I have had the opportunity to
9 talk to him about Michael and his cooperation.

10 He was very willing to come and testify. But
11 unfortunately his department would not pay for him to come.
12 I was willing to petition the Court for permission to have
13 him subpoenaed, an out-of-state subpoena issued, and even
14 willing to pay myself for his airfare and hotel and
15 everything. But his department wouldn't pay his salary for
16 the two days he would of been away. And he's a young
17 married man with two babies.

18 So, I would ask Your Honor for leave to do a telephone
19 deposition of him so that we can get his position concerning
20 the fact that the Spartanburg County Sheriff's Department
21 would like to have had the opportunity to interview Michael
22 earlier without burdening the young man with missing work.

23 THE COURT: Any objection from the State to taking the
24 telephonic deposition?

25 MS. COUNTS: Your Honor, the State would object to the

1 relevance of the testimony as previous objections.

2 THE COURT: Well, I, I understand that. But I, I've
3 decided to go ahead and let it come in and I'll rule on its
4 relevance at a later time.

5 MS. COUNTS: But no objection to the telephonic
6 deposition.

7 THE COURT: Okay. Then I'll leave the record open and
8 allow you to take that deposition by telephone.

9 MS. SHURLING: Thank you, Your Honor.

10 THE COURT: All right. Anything further from the
11 applicant?

12 MS. SHURLING: Just, Your Honor, to say that, that---

13 MS. COUNTS: Your Honor, we, we'll have another
14 witness.

15 MS. SHURLING: Oh, I'm sorry.

16 THE COURT: I know you will.

17 MS. COUNTS: Okay.

18 THE COURT: I just wanted to be sure they've, they've
19 rested at this time.

20 MS. SHURLING: Your Honor, only to offer the Court
21 copies of various cases concerning conflict of interest that
22 I referenced in the first hearing.

23 THE COURT: I'll allow you to submit those through my
24 clerk.

25 MS. SHURLING: Thank you.

1 THE COURT: And be sure that Ms. Counts gets a copy.

2 MS. SHURLING: Always, Your Honor.

3 THE COURT: Okay. Any, anything else?

4 MS. SHURLING: Nothing, sir.

5 THE COURT: All right. Now, you have another witness
6 to call for the State?

7 MS. COUNTS: Your Honor, the State would call, recall
8 Ricky Harris.

9 THE COURT: Mr. Harris, come to the stand please.

10 MS. SHURLING: Your Honor, while he's coming around, I
11 did forget one thing. We discussed at the last proceeding
12 an extensive debriefing that was given by my client at the
13 Sheriff's Department, and Ms. Counts and I were going to go
14 through it and see if it could be redacted to remove, remove
15 information relevant to an ongoing investigation concerning
16 Mr. Perez.

17 I've unfortunately poured over this thing several
18 times, and unfortunately the information concerning the act
19 in question is so interwoven in this debriefing that, at
20 this time, I would ask that it be reviewed by Your Honor,
21 and introduced under seal so that it not be a public record.

22 THE COURT: Any objection to that?

23 MS. COUNTS: No, Your Honor.

24 THE COURT: All right. It will be admitted and marked
25 as an exhibit, but it will be kept under seal and reviewed

1 only by the Court.

2 MS. SHURLING: Thank you, Your Honor.

3 MS. COUNTS: Except the previous objection at the last
4 hearing and throughout this.

5 THE COURT: I understand that's to the relevance.
6 Your, your continuing objection to the relevance of this
7 line of questioning is noted by the Court.

8 MS. COUNTS: Okay. Thank you.

9 (Whereupon, the statement was marked as Applicant's
10 Exhibit No. 3 and received into evidence at this time.)

11 MS. SHURLING: And one last thing, Your Honor, we
12 introduced the DEA 6 at the last hearing. In reviewing,
13 preparing for this hearing, I would note that Item Nine, the
14 back page of this, contains some information that might be
15 pertinent to that other matter. It doesn't originate with
16 Mr. Gonzales. But it is pertaining to that other matter.

17 So, I would ask for leave of Court to remove the---

18 THE COURT: Any objection to that being removed?

19 MS. SHURLING: ---the last page.

20 MS. COUNTS: No, Your Honor.

21 THE COURT: All right.

22 MS. SHURLING: And---

23 THE COURT: We'll allow you to do so.

24 MS. SHURLING: And substitute this for the previously
25 introduced exhibits.

1 THE COURT: Who has them?

2 COURT REPORTER: Clerk's Office.

3 THE COURT: Okay. All right.

4 MS. SHURLING: Thank you, Your Honor.

5 THE COURT: We'll, we'll have to retrieve the other one
6 from the Clerk's Office and return it to you, but I'll allow
7 you to do that.

8 MS. SHURLING: I'm sorry I didn't catch that before,
9 Your Honor.

10 THE COURT: That's quite all right.

11 MS. SHURLING: I just don't want to jeopardize that
12 investigation.

13 THE COURT: I understand.

14 Now, Mr. Harris, come forward.

15 RICKY HARRIS, being first duly
16 sworn, testified as follows:

17 THE COURT: Have a seat please. State your name for
18 the record, Mr. Harris.

19 WITNESS: Ricky Harris.

20 THE COURT: And your witness, Ms. Counts.

21 MS. COUNTS: Thank you, Your Honor.

22 DIRECT EXAMINATION

23 BY MS. COUNTS:

24 Q Mr. Harris, in your representation of Mr. Gonzales, did
25 he ever confront you and tell you that he had information on

Ricky Harris - Direct examination
by Ms. Counts

1 Dino Perez?

2 A As I testify in these matters, I am mindful that I've
3 had a substantial relationship with these clients, and if
4 there's any relief to be afforded to them, I want them to
5 have it. That includes Michael.

6 But I can not, in conscious, merely agree to statements
7 that I do not believe to be true even if my client is trying
8 to help himself. If Michael Gonzales or any client under
9 similar circumstances ever said anything to me that gave me
10 any hint or idea that they had information which could be
11 useful to their case if presented to the State for a
12 cooperation deal, and if I thought that, even at that, it
13 would create conflict, which might require me to withdraw
14 from other cases, from his case, no matter what the
15 circumstance, I would of acted on it.

16 I, I have to say that I do not believe, I do not
17 recall, and I do not believe at all that Michael Gonzales
18 said such a thing to me. As a matter of fact, the only time
19 that we ever had a conversation about a conflict of interest
20 was when Mark Moore raised this issue. And after
21 consultation with several experts in the field, I went with
22 Terry Haselden to Perry Correctional and asked him the
23 question directly and told him he need not do anything other
24 than tell me the truth, and he denied that there was any
25 connection, and denied it in the context of saying I've

Ricky Harris - Direct examination
by Ms. Counts

1 always, I've never had any, anything to do with Dino Perez.

2 So, that's, that's all, that's how -- that's the only
3 way I know how to answer that.

4 Q And no one from law enforcement or the Solicitor's
5 Office came to you and asked you or told you about any
6 involvement with Dino Perez until Mark Moore?

7 A Mark Moore, in the conversation I've already related in
8 prior testimony, called me and, and, and essentially told me
9 I was going to have to withdraw from the case, that there
10 was a conflict.

11 The conflict to which Mark Moore referred to, however,
12 was the only, the then unbeknownst to me ongoing cooperation
13 of Mr. Gonzales that started months after his incarceration.
14 The conflict that was claimed by the government at that time
15 was no conflict that they recognized or contended existed
16 prior to his methamphetamine trial. But had developed as a
17 result of what I knew now to be, although I was kept in the
18 dark about it the whole time, what I now know to be Ms., Ms.
19 Shurling's ongoing efforts to "present him, give him up to
20 the government."

21 So, I, I think the record needs to be clear that the
22 conflict that was directly alleged by the federal government
23 was a conflict that they themselves alleged developed as a
24 result of his debriefing after his imprisonment for
25 methamphetamine charges.

Ricky Harris - Direct examination
by Ms. Counts

1 Q And in your discovery from the Dino Perez case, did you
2 ever get any statements or debriefing from Gonzales?

3 A No, it -- unless something happened that I didn't know
4 about, and apparently a lot was happening that I didn't know
5 about and was kept from me, whether intentionally or through
6 oversight, the debriefings and, therefore, the statements
7 that would of been generated from that were all the, were
8 all generated, it's my understanding, after, several months
9 after Michael Gonzales was put in prison for his conviction
10 for trafficking meth.

11 Now, it is, it -- hearing Mr. Johnson's testimony, it
12 does raise a question in my mind -- if you'll recall my
13 prior testimony was that Mark Moore's assertion of a
14 conflict of interest and, and attempt to have, to run me off
15 of Dino Perez's Federal Court case came a day or two after I
16 had had a conversation with Mr. Johnson and gave him an
17 ultimatum about providing discovery to me in the Perez case.
18 Discovery, I might add, I never received.

19 So, whether, if they had information at that time that
20 they didn't want to give me, they certainly resisted giving
21 it to me to the extent of running me off the case.

22 MS. COUNTS: No further questions, Your Honor.

23 THE COURT: Ms. Shurling.

24 CROSS-EXAMINATION

25 BY MS. SHURLING:

Ricky Harris - Cross-examination
By Ms. Shurling

1 Q After you got off the case, Dino Perez was given
2 another lawyer, right?

3 A I assume so.

4 Q And you don't know what discovery was given to them
5 after your removal from the case?

6 A The only thing I know about the case subsequent to the
7 time that I withdrew is just things that I've heard in
8 conversation.

9 Q But you, once you removed yourself, you wouldn't have
10 then been privy to the scope of the discovery that the new
11 attorney got?

12 A No, I was out of the case.

13 Q Okay. Can you understand, to a degree, why the
14 government would be reluctant to give you discovery
15 originating with one of your clients concerning the
16 prosecution of another one of your clients?

17 A No, not if they thought I had a conflict of interest or
18 if it would benefit them. I don't, Ms. Shurling, I don't
19 know what discovery would of contained had it been given to
20 me in a timely fashion. I don't know what Ike Johnson had
21 when I made the ultimatum to him.

22 It may have been exculpatory information from
23 Mr. Perez. My assumption at the time was, is that there was
24 probably something beneficial to Mr. Perez that they did not
25 want me to have and were resisting, and the heavy handed

Ricky Harris - Cross-examination
By Ms. Shurling

1 tactics that ensued were part of that. I, I have no idea
2 whatsoever when the first cooperation was, from Michael
3 Gonzales although it, it, it would appear to me, putting two
4 and two together, that that occurred several months after
5 his conviction for trafficking meth.

6 I think what it was, and it's understandable to me,
7 it's a young man facing 30 years in prison would do
8 anything that, that he thought he could, right or wrong, to
9 help himself. But he was not willing to do that and never
10 had given any indication to me or anybody else that he was
11 willing to do that prior to his trial. As a matter of fact,
12 the only thing he told me about that situation was that he
13 was not guilty.

14 Q Well, let's talk about that again now.

15 You were hired by Dino Perez and Lucy Santana to
16 represent Michael Gonzales in a trafficking in marijuana
17 case involving a substantial weight of marijuana?

18 A I was---

19 Q Correct?

20 A I was hired by Lucy Santana, his mother.

21 Q Then you were---

22 A If the money came from Mr. Perez, it did. We went over
23 that before.

24 Q Okay.

25 A I was hired by his mother after I went and talked to

Ricky Harris - Cross-examination
By Ms. Shurling

1 him in jail because he couldn't do it himself. He was in
2 jail.

3 Q But you were paid at least in part, to your own
4 knowledge, by Dino Perez?

5 A I'm not certain to this day that's so. But I, I, I
6 assume it's so. You know, if he says, if Michael says it's
7 so, then that's fine.

8 Q Okay. And not very---

9 A I, I can -- I want to set one thing straight though. I
10 had more than one conversation about Michael with Michael
11 Gonzales along the lines of listen, you're my client, you're
12 the person that I talk to, and you're the one that has to
13 make a decision in your case. It doesn't matter who's
14 paying your fees or what your mother says or anybody else
15 says. The decision about your case has to be made by you.

16 Q And I understand that.

17 But wouldn't the dynamics of that, particularly with a
18 17 year old client, have changed very shortly thereafter
19 when Dino Perez himself was arrested and charged with
20 trafficking in a large amount of marijuana himself?

21 A No.

22 Why would it?

23 I had no information whatsoever, no inkling whatsoever,
24 and was never given any information by the government or
25 anybody else that led me to believe that there was any

Ricky Harris - Cross-examination
By Ms. Shurling

1 connection whatsoever with the alleged criminal activity of
2 Michael Gonzales and the alleged criminal activity of Dino
3 Perez..

4 Q You didn't do---

5 A Now, we can, we can Monday morning quarterback all we
6 want to and make suppositions about what the government
7 might have done or could have done or would of done. And
8 I'm not saying I'm perfect. By I'm saying I had no idea --
9 if it's true. And I don't know that it's true to this day.
10 But I have no idea -- I had no inkling at that time, when
11 the events were occurring, there was any connection
12 whatsoever between the, the Gonzales marijuana trafficking
13 case and the Perez marijuana trafficking case.

14 Q Is it your position that you asked Michael and he
15 didn't tell you?

16 A No, I had no reason to ask.

17 What, how -- why would I ask him something that there
18 was, there was, there was no basis to ask?

19 I -- it never crossed my mind, Ms. Shurling, and it
20 wouldn't have yours.

21 Q So -- oh, yes, sir, it would have mine.

22 A I assure you, I assure you it's easy to say that today.

23 Q Seventeen year old client, you're hired by his mother,
24 the money, at least in part, is coming from Dino Perez, Dino
25 Perez is arrested in a similar case---

Ricky Harris - Cross-examination
By Ms. Shurling

1 A It's not a similar case.

2 Q Trafficking in a large quantity of marijuana within the
3 same small geographical region, and it never occurs to you
4 to ask your client if there's any connection between his
5 marijuana case and Dino Perez?

6 A It did not. There was nothing about any of the cases
7 that led me to make any connection whatsoever. There was no
8 information provided by the government in discovery or
9 otherwise that led me to believe there was a connection.

10 Q Did you ever ask anyone in the State system or the
11 federal system, when you were initially hired to represent
12 Michael, whether or not he could cooperate with them in
13 order to earn favorable treatment in the plea negotiation
14 process?

15 A The only discussions that I recall having with the
16 assistant solicitor that handled Michael Gonzales' leading
17 up to trial was whether or not the State would be willing to
18 make any kind of agreement, any kind of compromise under any
19 kind of circumstance. And they -- I was told that there was
20 no room for negotiation, can't do a thing.

21 Q But you did not ask them if your client would give them
22 information concerning other drug dealers in exchange for
23 them to change that position, did you?

24 A I don't know if I used those words. But I mean when I
25 ask a prosecutor is there any, anything that can done---

Ricky Harris - Cross-examination
By Ms. Shurling

1 Q Did you ever ask anyone in law enforcement whether or
2 not there might be a problem with you representing Dino
3 Perez and Michael Gonzales?

4 A Ms. Shurling, I do not rely upon my adversaries, when
5 I'm representing somebody, to tell me whether or not I ought
6 to be in the case or not.

7 Q Well, I mean---

8 A That -- to me, that seems absurd.

9 Q No further questions.

10 A So, no, no, I didn't ask the police---

11 Q No further questions.

12 A ---if I ought to continue to represent Michael
13 Gonzales, if that would be okay with them. No, I didn't.

14 Q I didn't suggest you ask if it was okay.

15 A Well, that seems to be the implication.

16 Q What I would -- my question was whether you asked
17 anyone in law enforcement whether there was any, anything in
18 their investigation that would suggest that there would be a
19 problem with you representing the two individuals?

20 A I did not ask such a question, and had no reason to ask
21 such a question.

22 Q And you ask them whether there was anything, to their
23 knowledge, connecting the charges of Dino Perez and the
24 charges of Michael Gonzales.

25 A I did not ask such a question. Had no reason to ask

Ricky Harris - Cross-examination
By Ms. Shurling

1 such a question.

2 Q Thank you. No further questions.

3 MS. COUNTS: Nothing on redirect.

4 THE COURT: You may step down.

5 State wish to call any other witnesses?

6 MS. COUNTS: No, Your Honor.

7 THE COURT: All right. Does that conclude the
8 testimony other than the deposition that we've left the
9 record open for?

10 MS. SHURLING: Your Honor, nothing further.

11 I, I would ask if Your Honor would like to hear brief
12 argument at this time since I will not be in a position to
13 do so after the deposition.

14 THE COURT: Well, I don't know. The -- I, I, I don't
15 mind hearing your argument at this time. I don't know
16 whether you want to reserve making that argument until that
17 gentleman is testified or not. That's what I'm -- you can,
18 be submitted in writing or we can reconvene and allow you to
19 argue the case once that's been submitted. So --.

20 MS. SHURLING: Would Your Honor be amenable to
21 accepting proposed orders from both sides after the
22 deposition is entered?

23 THE COURT: I'll allow that, yes.

24 MS. SHURLING: Thank you. That will -- if Your Honor
25 will allow me to submit my proposed order, I'll file it so

1 that the argument's made therein will be considered part of
2 this record---

3 THE COURT: Okay.

4 MS. SHURLING: ---regardless of which way Your Honor
5 rules.

6 THE COURT: That will be fine.

7 Thank you very much. That concludes the hearing.

8 MS. SHURLING: Thank you, sir.

9 (Whereupon, a recess was taken in this hearing.)

10 MS. SHURLING: If I could briefly, I wanted to put on
11 the record in, in the matter we were on right before the
12 recess just briefly.

13 THE COURT: Uh-huh. (Affirmative).

14 MS. SHURLING: I did---

15 THE COURT: Mr. Gonzales' case?

16 MS. SHURLING: Yes, sir, just quickly to remind Your
17 Honor, I am -- I have requested a copy of the transcript
18 from the first half of the proceeding---

19 THE COURT: Uh-huh. (Affirmative.)

20 MS. SHURLING: And I will -- and from today's.

21 THE COURT: Uh-huh. (Affirmative).

22 MS. SHURLING: Madam Court Reporter has been kind
23 enough to tell me she's unusually caught up and will get it
24 to me quickly. I will, of course, share it with opposing
25 counsel when it comes in. Your Honor will have the benefit

1 of the first days testimony I guess is my point.

2 THE COURT: Uh-huh. (Affirmative).

3 MS. SHURLING: But I wanted to be very clear, I did
4 state on the record, as an officer of the Court -- Mr.
5 Harris, in his testimony, had indicated that, that I offered
6 Michael up to the federal authorities. I just wanted the
7 record to reflect, and if, I believe is in my opening
8 comments from the first proceeding, that I was contacted by
9 Mark Moore of the U.S. Attorney's Office concerning
10 proffering up Michael Gonzales at trial.

11 THE COURT: Okay.

12 MS. SHURLING: It was a situation where the government
13 approached me, Your Honor.

14 THE COURT: I understand.

15 MS. SHURLING: Not the other way around.

16 THE COURT: Okay.

17 MS. SHURLING: Thank you.

18

19 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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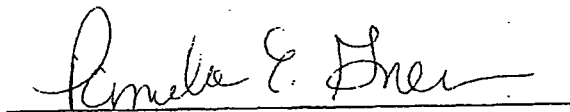
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 20th day of September and the 8th day of November, 2007.

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

November 10th, 2007



PAMELA E. GREEN, Court Reporter

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1 STATE OF SOUTH CAROLINA

2 COUNTY OF SPARTANBURG

} COURT OF COMMON PLEAS NONJURY

3
4 MICHAEL GONZALES,

5 APPLICANT,

6 vs.

7 STATE OF SOUTH CAROLINA,

8 RESPONDENT.

) TRANSCRIPT

) OF

) RECORD

) 06-CP-42-1550

9
10 January 11th, 2010
11 Spartanburg, South Carolina

12
13 B E F O R E:

14 THE HONORABLE ROGER L. COUCH, Judge.

15
16 A P P E A R A N C E S:

17 TARA SHURLING

18 ESQ.

Attorney for the Applicant

19 SUZANNE H. WHITE

20 ASSISTANT ATTORNEY GENERAL

21 Attorney for the State

22
23
24 PAMELA E. GREEN
Circuit Court Reporter
25 Seventh Judicial Circuit

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P R O C E E D I N G S

1
2
3 THE COURT: Yes, ma'am.

4 MS. WHITE: Your Honor, this is the continued PCR case
5 of Michael Gonzales versus The State. It's 2006-GS, oh,
6 excuse me, CP-42-1550. I believe the record -- we have had
7 two different hearings on this, September 20th and
8 November 8th of 2007. The record was then left open for
9 additional testimony. I believe Ms. Shurling has someone
10 here that she'd like to testify additionally.

11 For the record, I just want to make an initial
12 objection. I believe this is a narcotic's agent or someone
13 in the division that actually had no personal involvement
14 with this case. So, I'm not sure of the relevance of the
15 testimony. But I wanted to go ahead and put that on the
16 record.

17 THE COURT: well, we'll probably hear it and here---

18 MS. WHITE: Okay.

19 THE COURT: ---and see what the relevance might be.

20 MS. WHITE: Okay.

21 THE COURT: Ms. Shurling.

22 MS. WHITE: Thank you, Your Honor.

23 MS. SHURLING: Thank you. Good afternoon, Your Honor.

24 THE COURT: How are you today?

25 MS. SHURLING: Just fine, sir.

1 THE COURT: Good.

2 MS. SHURLING: The attorney general is correct. We had
3 an initial hearing September 20th and a second one on
4 November 8th of 2007. I had wanted to introduce testimony
5 from Rhett Fox, one of the narcotics officers actually
6 involved in this case.

7 THE COURT: Uh-huh. (Affirmative).

8 MS. SHURLING: He had subsequently moved to Colorado
9 and we tried unsuccessfully for some time to set up a
10 deposition with him. Ultimately, the nature of the
11 testimony that I need is fairly generic. So, I contacted
12 the Sheriff's Department to see if there might be someone
13 else from the Narcotic's Division that I could use, and they
14 were gracious enough to suggest the head of narcotics, and
15 that would be my witness here today, Lieutenant Steve
16 Cooper.

17 THE COURT: All right. Come forward, sir, to be sworn,
18 to my left.

19 STEVE COOPER, having been first duly
20 sworn, testified as follows:

21 THE COURT: Have a seat in the witness stand please.
22 Once you're seated, please state your name for the record.

23 WITNESS: It's Steven Cooper.

24 THE COURT: Ms. Shurling, your witness.

25 MS. SHURLING: Thank you.

Steve Cooper - Direct examination
by Ms. Shurling

1 DIRECT EXAMINATION

2 BY MS. SHURLING:

3 Q Lieutenant Cooper, can you tell us what your current
4 position is with the Spartanburg Sheriff's Department?

5 A I'm in charge of the narcotics and vice unit contained
6 within CID.

7 Q And how long have you been with the Spartanburg
8 Sheriff's Department?

9 A Almost 21 years.

10 Q Okay. In supervising narcotics investigations, how
11 would you rank cooperating witnesses in terms of their value
12 as a tool for investigating narcotics cases?

13 A It's one of the most important tools that we use. An
14 informant or, or a CRI, as we like to call them, are very
15 valuable when it comes to investigating cases.

16 Q Is it the custom of your office to rely on cooperation
17 from underlings to turn people higher up in a drug
18 organization, for example?

19 A Yes, it is. Kind of start at the bottom and work our
20 way up.

21 Q Roll up as they say?

22 A That's right.

23 Q Now, when someone is arrested, are, are most people
24 willing to cooperate right off the bat?

25 A Some do. Some don't. It just all depends on their

Steve Cooper - Direct examination
by Ms. Shurling

1 mind state at the time.

2 Q If someone initially is offered the opportunity to
3 cooperate and they decline, do you give up on them?

4 A No. And we try to offer all defendants an opportunity
5 to, to help themselves, but, no, we don't give up on them if
6 they initially decline.

7 Q Do a lot of people that initially indicate that they
8 don't want to be a snitch or cooperate come around and end
9 up working with the Sheriff's Department?

10 A Most of the time they do, that's correct.

11 Q And what would you say, in your experience, would be
12 some of the factors that lead someone to come around from
13 initially not cooperating to cooperating?

14 A Most of the time when we, when we arrest someone they
15 don't really know how much trouble they're really in. They
16 don't understand the full scope of, of what's happening to
17 them at that given time. Once they have, most of the time,
18 once they have a chance to reflect, maybe speak with an,
19 with an attorney, and then having that attorney advise them
20 what kind of time or what kind of trouble they may be in, it
21 kind of persuades them to want to help their-self out.

22 Q Do defense attorneys frequently contact you seeking
23 opportunity for their clients to cooperate?

24 A Most of the time the defense attorneys that, that are
25 gonna allow their, their clients to work will actually

Steve Cooper - Direct examination
by Ms. Shurling

1 contact the case agent of the, of a particular case.

2 Q And is it common for the case agent and the attorney to
3 work together to bring a defendant around to the point where
4 he's willing to cooperate?

5 A That's correct.

6 Q In your experience, does one lawyer normally represent
7 two people involved in a drug case?

8 A I've never seen that happen.

9 Q Okay. In your judgment, would it hamper your ability
10 to secure cooperation from a player in a given scenario if
11 the lawyer was also representing one of the higher-ups in
12 the drug organization?

13 A Absolutely.

14 Q Are you familiar with Denno Perez?

15 A Vaguely, I am.

16 Q Okay. At my request have you discussed this matter
17 inter-departmentally with the Spartanburg County Sheriff's
18 Department?

19 A Correct.

20 Q And as a result of that inquiry, have you been able to
21 determine that Denno Perez was, in fact, a person of
22 interest to narcotics back at the time of Michael Gonzales
23 original arrest?

24 A He was. Not only to narcotics, but also to violent
25 crimes division.

Steve Cooper - Direct examination
by Ms. Shurling

1 Q And you say violent crimes division, that would also
2 encompass, encompass the homicide unit?

3 A That is correct.

4 Q So, it's your information that both the narcotic
5 division and the homicide division were interested in
6 turning Michael Gonzales as a State's witness?

7 A That is correct.

8 Q That never happened, did it?

9 A To my knowledge it did not.

10 Q Now, Michael was represented by an attorney here in
11 Spartanburg, Ricky Harris.

12 Are you aware that, that Mr. Harris was also
13 representing Denno Perez?

14 A That is correct.

15 Q In your judgment, did that hamper the ability of your
16 officers to secure Michael Gonzales as a witness?

17 A Yes, it did because ultimately Denno Perez was the
18 target. Michael Gonzales was the person that we wanted to
19 flip on the target. So, absolutely.

20 Q Now, sometime later while Michael Gonzales' case was on
21 appeal, he did, in fact, come around and cooperate, didn't
22 he?

23 A That is correct.

24 Q And at that time, by that point in time who was his
25 lawyer?

Steve Cooper - Direct examination
by Ms. Shurling

1 A I believe it's Ricky Harris.

2 Is that correct?

3 Q By the time Michael came around and actually
4 cooperated, Ricky Harris was no longer his lawyer.

5 A Okay.

6 Q Who was his lawyer by then?

7 A That would of been you.

8 Q Me?

9 A Correct.

10 Q Okay. Thank you.

11 And are you familiar with the extensive debriefings
12 that Michael Gonzales gave your department?

13 A I am.

14 Q And how would you rate them in terms of their
15 thoroughness and, and the kinds of information that he was
16 providing the department?

17 A It was very good reliable information that was
18 corroborated through different outsourcing. Yeah, it was,
19 it was good information.

20 Q And would your department have liked to have had that
21 information much much sooner?

22 A Absolutely.

23 Q In South Carolina a young person, a minor, charged with
24 a serious crime can be prosecuted in the Court of General
25 Sessions.

Steve Cooper - Direct examination
by Ms. Shurling

1 You're aware of that I know?

2 A That's correct.

3 Q Do you run into particular problems with young people
4 when they're charged?

5 A Absolutely. Mainly their fear. You run into the fact
6 of, of their mothers, fathers kind of running interference
7 with law enforcement. Not, not wanting them to come
8 forward, that type of thing. Yeah, minors are definitely a
9 problem when it comes to sitting down actually interviewing
10 them and getting---

11 Q And based on your experience in this field, would
12 Michael Gonzales sharing an attorney with Denno Perez have
13 been a particular problem in light of the fact that he was
14 only 15?

15 MS. WHITE: Your Honor, I would just object to
16 speculation of this. He doesn't even know the case. He
17 wasn't directly involved with the case. I don't believe he
18 can actually testify as to whether or not there was any
19 issue with Mr. Gonzales and the representation of
20 Mr. Harris.

21 MS. SHURLING: I can rephrase, Your Honor.

22 THE COURT: Please do.

23 Q Are you aware that Michael Gonzales was 15 years old at
24 the time of his arrest?

25 A Correct. I am.

Steve Cooper - Direct examination
by Ms. Shurling

1 Q And were you aware that Denno Perez had been living
2 in loco parenti for many years with Michael and his mother---

3 A That is---

4 Q ---at that, at this point?

5 A That is correct. I did not know.

6 Q In your judgment, as a veteran narcotic's officer, did
7 those factors make it more or less critical that Michael
8 have his own lawyer?

9 A It's more critical. Absolutely.

10 Q And, again, just so we're very clear, after Michael's
11 arrest, but before his prosecution, your office would have
12 been very interested in having him as a cooperating witness?

13 A Absolutely.

14 Q You're familiar with the debriefings that he gave after
15 he finally did cooperate.

16 Based on that information that he gave after he'd
17 already been convicted and put in prison, would your office
18 have been willing to go to the Solicitor's Office on
19 Michael's behalf and try to help him get a better deal?

20 A Absolutely.

21 Q You never were given that opportunity, were you?

22 A No, ma'am.

23 Q Thank you. No further questions.

24 THE COURT: Ms. White, your witness.

25 MS. WHITE: Thank you, Your Honor.

Steve Cooper - Cross-examination
by Ms. White

1 CROSS-EXAMINATION

2 BY MS. WHITE:

3 Q I just have a couple questions, Lieutenant Cooper.

4 Back when Mr. Gonzales was arrested, were you involved
5 with the Gonzales case?

6 A No, I was not.

7 Q Have you been involved with the Gonzales case since
8 that time?

9 A No.

10 Q So, you also testified that often you have attorneys
11 that contact your division in regards to representing folks
12 that have been arrested on drug cases and seeing if they can
13 work a deal maybe or do something with you.

14 Does every attorney that represents somebody contact
15 your division?

16 A No, ma'am.

17 Q And is that something that is required of attorneys?
18 Do they have to do that?

19 A If you'll allow me to elaborate. Certainly it's not
20 something that they have to do. But looking out in the best
21 interest of their client, you would think that was something
22 they would want to do.

23 Q And that's your opinion as a narcotic's agent---

24 A That is correct.

25 Q ---for folks that represent the defendants that are

Steve Cooper - Cross-examination
by Ms. White

1 arrested, right?

2 A That is correct.

3 Q Okay. Now, you also testified as to extensive
4 debriefings that you're aware of that, that was done after
5 Mr. Harris ended his representation of Mr. Gonzales.

6 A That's correct.

7 Q And that was by your division?

8 A That -- us and the DEA, that is correct.

9 Q Okay. Do you know if Mr. Gonzales ever informed
10 Mr. Harris of any of this information that he provided
11 several years later?

12 A I do not.

13 Q And do you know if Mr. Harris was ever informed of the
14 connection between Mr. Perez and Mr. Gonzales at the time he
15 represented him?

16 A I do not have firsthand knowledge of that, no.

17 MS. WHITE: Okay. I think that's all I have, Your
18 Honor. Thank you.

19 THE COURT: Redirect?

20 MS. SHURLING: Very quickly.

21 REDIRECT EXAMINATION

22 BY MS. SHURLING:

23 Q You were not involved in, in Michael's case back when
24 he was originally arrested. I understand that.

25 But years later when I was representing Michael, you

Steve Cooper - Redirect examination
By Ms. Shurling

1 were around in the department by then, were you not?

2 A That is correct.

3 Q And you were around during the time period when Michael
4 was giving very useful debriefings?

5 A That is correct.

6 Q So, you do have firsthand knowledge of the value of
7 Michael in terms of his value in terms of a cooperating
8 witness?

9 A I do.

10 Q Thank you. No further questions.

11 THE COURT: Any other questions, ma'am?

12 MS. WHITE: Nothing, Your Honor.

13 THE COURT: You may step down.

14 Any other testimony from the Applicant?

15 MS. SHURLING: Your Honor, I had originally said that I
16 was considering also calling Steve Russell as a witness.
17 Mr. -- Agent Russell is with the DEA. My intent in doing so
18 was to demonstrate how cooperative, how willing, and eager
19 to do a good job and be helpful this young man was once he
20 got hold of a lawyer that was representing his best interest
21 alone. In retrospect, I realize that I introduced at the
22 last proceeding the DEA 6 from his debriefings. I also
23 introduced a copy of Michael's statement, voluminous
24 statement to the DEA, and to the Sheriff's Department. I
25 believe the lengthy and detailed nature of those debriefings

1 is such that they themselves illustrate wonderfully how,
2 with proper guidance and, and advice of counsel, Michael
3 performed once given that opportunity.

4 So, I decided to forego taking Agent Russell away from
5 his duties for the purpose of appearing here today.

6 THE COURT: Okay.

7 MS. SHURLING: I would note a few things for the
8 record. Michael was convicted at a jury trial and his
9 family hired me to his direct appeal. While I was
10 representing him on direct appeal I was trying the longest
11 criminal case ever tried in U.S. District Court in Columbia
12 and Mark Moore was on the other side. U.S. Attorney Mark
13 Moore approached me and told me he needed Michael as a
14 witness against Denno Perez. It was at that juncture that I
15 was appointed by the Federal Court as Court appointed
16 counsel for Michael on a material witness warrant. That's
17 how I originally got into this.

18 After working with this young man and being very
19 impressed with his desire to do the right thing and his
20 willingness to cooperate, at a point in time when I had to
21 look him in the face and say this may never do you any good
22 because you've already been convicted, you've got a 30 year
23 sentence, we don't have a Rule 35 like they do in Federal
24 Court, this may not ever do you any good, and he did what he
25 needed to do anyway.

1 I then was Court appointed by I believe Mark Hayes to
2 represent Michael on a minor outstanding marijuana charge.
3 After that case was over and Michael made it aware that he
4 wanted to file a post-conviction relief case, I agreed to
5 handle that for him as well. So, that's the chronology.
6 That's how we get to where we are today.

7 Your Honor, our prayer is that Michael would be granted
8 a new trial on all of the issues fully developed in the
9 previous hearings as well as the testimony of, of Lieutenant
10 Cooper here today, and that we have an opportunity to go
11 back and rectify what I believe to be a real injustice that
12 was done in this man's original prosecution.

13 THE COURT: Thank you.

14 MS. SHURLING: Thank you, Your Honor.

15 THE COURT: Ms. White, anything further?

16 MS. WHITE: Just in closing, Your Honor, we would ask
17 that, that before any decision's made obviously that the
18 past PCR transcript is reviewed. We believe that Mr. Harris
19 was diligent in his representation. There was no conflict
20 of interest based on some case law and we believe his
21 knowledge at the time. So, we would ask for just a denial
22 of his PCR application.

23 THE COURT: All right. Thank you very much. I'll take
24 a look at it.

25 MS. WHITE: All right.

1 THE COURT: It's been years, a couple of years. So,
2 I'll read over everything thoroughly before I reach a
3 decision.

4 MS. SHURLING: Your Honor, might it be helpful to the
5 Court for me to submit a proposed order?

6 THE COURT: I'll, I'll request the orders one I've read
7 everything.

8 MS. SHURLING: Thank you, Your Honor.

9 THE COURT: Thank you very much.

10 MS. WHITE: Thank you, Your Honor.

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12 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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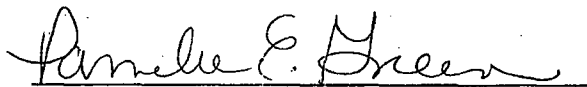
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 11th day of January, 2010.

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

October 8th, 2010

A handwritten signature in cursive script, reading "Pamela E. Green", is written over a horizontal line.

PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

COUNTY OF SPARTANBURG)

Michael Gonzales, #285903,)

2006-CP-42-1550

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 11, 2006, and Amended Application filed April 17, 2007. The Respondent made its Return on or about October 31, 2006. An evidentiary hearing into the matter was originally convened on September 20, 2007. The record was held open and additional testimony from Applicant's witnesses was taken on November 8, 2008, and January 11, 2010, at the Spartanburg County Courthouse. Tara D. Shurling, Esquire, represented the Applicant. S. Prentiss Counts, Esquire, and Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, both represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Applicant also called Isaac Johnson, Esquire, and Lieutenant Steve Cooper to testify on Applicant's behalf. Terry Haselden, Esquire, and Ricky Harris, Esquire, testified on behalf of the State. This Court also had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, Applicant's Appellate records, and exhibits introduced during the PCR proceedings.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections

pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Applicant was indicted at the June 2002 term of the Spartanburg County Grand Jury for trafficking in methamphetamine (2002-GS-42-2742). He was represented by Ricky K. Harris, Esquire. On July 22 - 25, Applicant proceeded to trial and was found guilty as indicted. He was sentenced by the Honorable Gary E. Clary, to confinement for a period of thirty (30) years.¹

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Tara D. Shurling represented the Applicant in his appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Michael Gonzales, Op. No. 3842 (S.C. Ct. App. filed July 6, 2004). On March 9, 2006, the South Carolina Supreme Court denied the Petition for Writ of Certiorari filed on Applicant's behalf. The Remittitur was issued March 13, 2006.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a) "Trial counsel had a serious conflict of interest in representing Applicant and an individual named Dino Perez. Perez was the Applicant's Mother's long time boyfriend who was under federal investigation. Counsel could not effectively represent them both where the authorities wanted the Applicant to testify against Dino Perez;
 - b) Counsel failed to adequately prepare and present witnesses at trial
 - c) Counsel failed to recognize and present objections to errors, which occurred at trial
 - d) Counsel failed to develop and present viable defenses to the charges prior to and during trial; and
2. Ineffective assistance of appellate counsel.

¹ In June 2002 the Applicant was also indicted in Spartanburg County for trafficking in marijuana. Tara D. Shurling represented him on that charge. On October 7, 2004, the Applicant pled guilty to the lesser-included offense of trafficking in marijuana, 10-100 lbs. He was sentenced by the Honorable D. Garrison Hill to confinement of five years to be served concurrently with the sentence for trafficking in methamphetamine. Applicant is not challenging this conviction or sentence in his current application.

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In Applicant's Amended Application, he alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a) "Counsel was simultaneously representing both the Applicant and Dino Perez, a party with seriously adverse interests to the Application, at the time of the Applicant's trial;"
 - b) "Counsel had a serious conflict of interested in representing the Applicant where Counsel was paid to represent the Applicant by Dino Perez, whose interests were seriously adverse to the Applicant and who was simultaneously represented by the same lawyer.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

At the evidentiary hearing, Applicant waived claims of ineffective assistance of appellate counsel against Ms. Shurling, who represented him on the direct appeal for this case. Applicant also waived any claims of ineffective assistance of counsel as to Ms. Shurling's representation of him related to his guilty plea for charges of trafficking marijuana. This Court reviewed Applicant's rights with him and found that he waived these allegations and rights freely and voluntarily.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel, in that Counsel operated as his attorney while operating under a conflict of interest because of his representation of Dino Perez. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a

preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Conflict of Interest

The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple

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representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (citing Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984)).

At the evidentiary hearing, Applicant also alleged that he asked Counsel if there was anything that Applicant could do to help negotiate a better deal for himself. Applicant testified that he explained to Counsel that he had information regarding Dino Perez, and Counsel told him that he could not hear that. Applicant testified that he attempted to share this information with Counsel while he was awaiting trial for the trafficking methamphetamine charges.

As to Applicant's allegation that Counsel was ineffective for representing him while a conflict of interest was present, this Court finds that Applicant has failed to meet his burden of proof. Counsel testified that he represented Applicant at trial on charges of trafficking in methamphetamine, while the charges that he was representing Mr. Perez on involved trafficking in marijuana. Although Counsel acknowledged that he was first hired to represent Applicant against charges of trafficking in marijuana, the trial for trafficking in methamphetamine was called first and is ultimately the only charge Applicant proceeded on with Counsel. Counsel testified that at the time, he understood Applicant's trafficking in marijuana charges to involve Applicant and another named individual as the co-defendants, not Mr. Perez. Counsel also consulted numerous experts in the area of conflict of interest and professional responsibility to assure himself that he was not doing anything improper. Counsel testified that at no time during his representation of Applicant was he made aware of or told of any connection between Applicant's trafficking in marijuana case and Mr. Perez's trafficking in marijuana case.

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This Court finds that Counsel's testimony was credible and that Applicant's testimony was not credible respecting the alleged conflict of interest. This Court finds that Counsel was not told by the Applicant, Mr. Perez, or Applicant's mother, that the cases were related or that either defendant was involved with the other's charges. Counsel's testimony was credible that Applicant never gave him any indication that he was aware of or involved with Mr. Perez's drug activity. In fact, this Court finds that Applicant even denied any involvement with Mr. Perez after the trial, after Counsel was made aware of the potential conflict. In addition to Counsel's testimony, this Court also finds the testimony of Mr. Terry Haselden, Esquire, to be credible as to this regard. Mr. Haselden, as a neutral party, accompanied Counsel to the jail, to discuss any potential conflict with Applicant after his conviction for trafficking in methamphetamine. Mr. Haselden testified that during the conversation in the jail, Applicant denied knowing anything about or being involved with Mr. Perez's drug activities. This Court finds that this additional testimony further supports Counsel's consistent testimony that Counsel was unaware of and unapprised of Applicant's knowledge of or involvement with Mr. Perez's activities. Furthermore, as Ms. Shurling indicated during her initial argument before this Court, the Applicant initially informed her that he knew nothing about Mr. Perez's activities. This Court finds that the consistency of the Applicant's protestations to Counsel, impartial observers, and even Applicant's own PCR Counsel, that Applicant knew nothing of Mr. Perez's activities or was involved in his activities, supports Counsel's claims that he was not operating under a conflict of interest.

Additionally, this Court also finds that Mr. Perez denied any connection between himself and Applicant. This Court also finds that Counsel did not refuse to discuss information with Applicant that would potentially help Applicant's case or plea negotiations. Rather, Counsel discussed options

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with Applicant, at which time Applicant reasserted his innocence and expressed his desire to proceed to trial, not plead guilty. This Court finds Counsel's testimony on this issue to be credible and Applicant's testimony in this regard not credible.

This Court finds that it is clear that Counsel was informed of the alleged conflict of interest after his representation of Applicant on the trafficking in methamphetamine charges ended. Counsel testified that he was told that he needed to withdraw from representing Mr. Perez by Assistant United States' Attorney Mark Moore because of an alleged conflict of interest related to Mr. Perez and Applicant as co-conspirators. Applicant presented testimony from former Assistant United States' Attorney, Isaac Johnson, who testified to Applicant's cooperation in their case against Mr. Perez. However, all documents and conversations related to Applicant's cooperation arose or occurred approximately a year following Applicant's conviction for trafficking in methamphetamine, the charge pertinent to this application.

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008) (citing Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007)). Relying on the Zuck v. State of Alabama case, the South Carolina Supreme Court recognized a conflict of interest can be shown when defendant is represented by counsel who might be tempted to dampen the ardor of his defense in order to placate another client. State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005) (citing Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.1979)). This Court finds that Applicant failed to prove that Counsel was operating under a conflict of interest in his representation of Applicant during the trial for trafficking in methamphetamine. Applicant's charges at that time were unrelated to any charges Mr. Perez faced, Applicant denied knowledge of Perez's drug involvement, and there were

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no adverse interests. Additionally, neither Applicant nor Mr. Perez were named as co-conspirators or co-defendants in any discovery obtained by Counsel.

As to allegations of ineffective assistance of counsel related to Counsel's failure to present or call witnesses and Counsel's failure to present and object to errors at trial, this Court finds that the Applicant failed to present any testimony or evidence in support of his allegation. Therefore, this Court finds that the Applicant failed to meet his burden of proof and these allegations should be denied and dismissed.

CONCLUSION

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

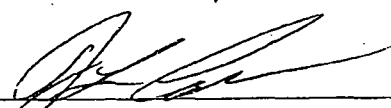
This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243¹ for appropriate procedures for appeal.

¹ Formerly Rule 227, SCACR. Rules 224 through 230, SCACR, were renumbered as Rules 240 through 246, SCACR, by order of the South Carolina Supreme Court dated April 29, 2009.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 4th day of February, 2010.


 Roger L. Couch
 Presiding Circuit Court Judge

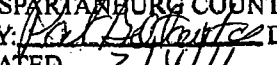
 South Carolina

M. HOPE BLACKLEY

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A CERTIFIED COPY


 M. Hope Blackley
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 SPARTANBURG COUNTY
 BY:  D.C.
 DATED 2/9/11

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

MICHAEL GONZALES, 285903,)
Applicant,)

**MEMORANDUM IN SUPPORT OF
PRAYER FOR RECONSIDERATION**

v.)

06-CP-42-1550

STATE OF SOUTH CAROLINA,)
Respondent.)

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed in Spartanburg County on May 11, 2006. Multiple hearings have been held on this application. Transcripts from those hearings, September 20, 2007, November 8, 2007 and January 11, 2010 have been provided to the court. On March 23, 2010 this Honorable Court notified the parties of its intent to deny this application and instructed the Respondent to draft a proposed order of dismissal. In a subsequent email from the Court dated November 5, 2010 Respondent was instructed to specifically:

reference the fact that the story given to the trial attorney was consistent with the original story given to the PCR attorney. (referenced in the PCR record page 7 lines 16-17 "So, I put the issue to Mr. Gonzales, who initially told me he knew nothing about Mr. Perez's affairs.") . This helps demonstrate that the applicant was giving a consistent story about the facts, the same facts presented to the trial attorney, to the trial attorney and the PCR attorney. Additionally, reference the fact that the trial attorney and a neutral witness (attorney) interviewed the applicant at the jail and received the consistent story which was told prior to this PCR hearing. Please add this information to the previously submitted proposed order.

Counsel for the Respondent would respectfully submit that the Court's emphasis on the fact that the Applicant initially told her he knew nothing about Deno Perez's affairs is greatly misplaced and indicates that she may have failed to adequately convey the heart of her assertion concerning defense counsel's conflict of interest. In support of her request that this Court reconsider its decision to deny relief, Counsel would ask this Court to consider the following.

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The Applicant was thirteen years old when his mother began dating Perez. PCR Hearing pg. 113, ll.15-18. The extensive debriefings of the Applicant by various law enforcement agencies since the time he began cooperating have been made part of this record and they illustrate that Perez very quickly assumed the role of a father figure in his life. He was a young teenager when Perez began to involve him in his drug business. PCR Hearing pg. 104, ll.21-23.

The Applicant was a mere 17 years old when he was arrested on marijuana charges on January 5, 2002 and on the Methamphetamine charges currently before this Court on June 3, 2002. By then, Perez had been the sole support of his family and his father for all practical purposes for four years.¹

Defense counsel undertook representation of Perez *on drug charges* on February 5, 2001 according to his own PCR testimony. PCR Hearing pg. 30, ll.8-19. He represented Perez in multiple matters before the Applicant's trial in July, 2002. PCR Hearing pg. 30, l.15 – pg.33, l. 8. In April, 2002 trial counsel undertook representation of Perez on a charge for trafficking in marijuana. PCR Hearing pg. 31, ll.12-24.

In January, 2002 when the Applicant was arrested for trafficking in marijuana, defense counsel's \$25,000.00 fee was paid in cash by the Applicant's mother. In June, 2002 when he was retained to represent the Applicant on the charge of trafficking in methamphetamine, Perez paid the retainer by check. PCR Hearing pg. 21, l.5 – pg.22, l.1.

PCR counsel acknowledged that when she first asked the Applicant about Perez, he denied knowledge of his affairs, however, her intent was to emphasize that, unlike trial counsel, she did not simply stop the dialog once the denial was made. PCR counsel, who had no allegiance to anyone except this client, carefully explained the Applicant's situation to him, discussed all the reasons why cooperation was the prudent thing to do and was able to obtain the

¹ At the P_CR hearing held in this matter, counsel misspoke and referred to the Applicant as being 15 years old at the time of his arrest. He was born on and therefore was seventeen years old at the time of both these arrests.

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T. HOPKINS

Applicant's full cooperation very quickly. Counsel would assert that no one should have been surprised that this young man would initially refuse to talk about his knowledge of Perez's drug operations. His familial loyalty, if nothing else, should have been expected to require and objective attorney to carefully explore this subject with the Applicant regardless of his initial inclination not to speak against Perez. That being said, it should surprise no one that a lawyer representing Perez and indeed being paid by him to represent the Applicant, would not use due diligence in shepherding this young man down the path to cooperation with the DEA and local law enforcement.

What is abundantly clear is that once the Applicant had a lawyer with no ties to Perez, he came around quickly and fully cooperated with law enforcement. The value of his cooperation is well documented by the witnesses who testified at his PCR hearing. The fact that the Spartanburg Sheriff's Department would have been eager to work with the Applicant as a cooperating witness against Perez before the Applicant's trial is likewise well documented in the record below.

The extensive debriefings of the Applicant demonstrate another key factor. The Applicant's reluctance to cooperate against was ultimately proven to motivated as much, if not more, by fear as it was his mother's personal relationship with Perez. These debriefings reveal that the Applicant had first hand knowledge of acts of extreme violence commented by Perez in his presence. He therefore, had reason to fear Perez and reason to fear discussing cooperating with law enforcement against Perez. See, Applicant's Exhibits A-1, A-2 and A-3. The testimony of the former Assistant United States Attorney who worked on the prosecution of Perez in the United States District Court confirms that the Applicant's cooperation was significant and substantially corroborated by their investigation of Perez. His testimony further establishes that the federal authorities believed that trial counsel had a conflict of interest representing Perez and the Applicant. They asked defense counsel to step down from representing Perez and ultimately he did. His testimony further confirms that it was not until

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after the Applicant had a lawyer of his own, unconnected to Perez, that they were able to interview him and obtain his cooperation. PCR Hearing pg. 89, l. 15 – pg.102, l. 25.

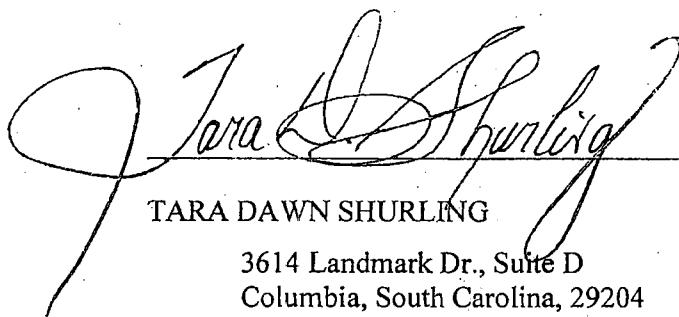
The Applicant would also submit, respectfully, that this Court erroneously places weight on the fact that defense counsel took a “neutral” witness with him to the jail to interview the Applicant about Perez. The fact that the Applicant would not open up and talk about his knowledge of Perez’s criminal enterprises in front of this so called neutral witness should come as no surprise to anyone. This “neutral” witness came to the jail with defense counsel. Defense counsel, Perez’s lawyer, was present and asked many of the questions. The Applicant never spoke with this “neutral lawyer” privately. Even if he had been given the chance to do so, it is doubtful he would have felt safe talking to him since he was brought there by Perez’s lawyer.

The Sixth Amendment right to effective assistance of counsel may be violated when counsel is encumbered by a conflict of interest. Mickens v. Taylor, 535 U.S. 162, 162 (2002); Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Inasmuch as the Applicant never objected to the conflict of interest in the lower court, he must now show that defense counsel had an actual conflict of interest which adversely affected his performance in representing him. Mickens, 535 U.S. at 163; State v. Gregory, 364 S.C. 150, 153; 612 S.E.2d 449, 450 (S.C. 2005); Thomas v. State, 346 S.C. 140, 143-44; 551 S.E.2d 254, 256 (S.C. 2001). Where an actual conflict of interest is demonstrated, prejudice need not be proven. Mickens, 535 U.S. at 163; Gregory, 612 S.E.2d at 450. However, on the facts of this case, the prejudice is apparent. This seventeen year old defendant went to trial and got a thirty year sentence on facts where he could easily have negotiated a favorable deal if he had been willing to negotiate a plea agreement that called for cooperation against Perez. In order to demonstrate an actual conflict of interest, one must establish that counsel owed a duty to a party whose interests were adverse to the concerned client’s interests. U.S. v. Nicholson, 611 F.3d 191, 215 (4th Cir. 2010); Gregory, 612 S.E.2d at 450; Thomas, 551 S.E.2d at 256. Defense counsel had a duty to exercise due diligence in

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exploring plea negotiation on behalf of the Applicant.² Such negotiation would have potentially required that the Applicant take steps adverse to Perez thus, their positions were obviously adverse to each other. Where actions by the Applicant against Perez would clearly have been detrimental to Perez, defense counsel had a textbook conflict of interest in representing two parties whose best interests were terribly adverse to each other. Nicholson, 611 F.3d at 215; Gregory, 612 S.E.2d at 450; Thomas, 551 S.E.2d at 256.

The Applicant respectfully prays that this Court will reevaluate its initial decision in this matter, grant relief and issue an order giving the Applicant the new trial he deserves. The simultaneous representation of the Applicant and Dino Perez resulted in an actual conflict of interest for defense counsel. Accordingly, the Applicant contends that he is entitled to Post-Conviction Relief. Respectfully submitted,


TARA DAWN SHURLING
3614 Landmark Dr., Suite D
Columbia, South Carolina, 29204
(803) 738-8622

ATTORNEY FOR THE APPLICANT

This 18th day of January, 2011

Columbia, South Carolina

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M. HOPE BLACKLEY

² In his PCR testimony, the Applicant said that the one time he mentioned the name of "Dino Perez" in connection with negotiating a plea bargain, defense counsel said he, "couldn't hear this." The Applicant confirmed that even after that conversation, defense counsel never had a discussion with him about the possibility that he might need separate counsel. PCR Hearing p. 108, l. 25-p. 109, l. 21.

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

MICHAEL GONZALES, #285903,)
Applicant,)

v.)

STATE OF SOUTH CAROLINA,)
Respondent.)IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

CASE NO.: 06-CP-42-1550

RULE 59(e), SCRCP, MOTION TO
ALTER OR AMEND

NOW COMES the Applicant in the above-captioned matter, acting by and through his undersigned counsel, respectfully moving this Court to amend its Order of Dismissal pursuant to Rule 59(e), SCRCP. The Applicant asks this Court to reconsider its decision for the following reasons. Counsel for the Applicant would respectfully submit that the Court's emphasis on the fact that the Applicant initially told her he knew nothing about Deno Perez's affairs is greatly misplaced and indicates that she may have failed to adequately convey the heart of her assertion concerning defense counsel's conflict of interest. In support of her request that this Court reconsider its decision to deny relief, Counsel would ask this Court to consider the following.

The Applicant was only thirteen years old when his mother began dating Perez. PCR Hearing pg. 113, ll.15-18. The extensive debriefings of the Applicant by various law enforcement agencies since the time he began cooperating have been made part of this record and they illustrate that Perez very quickly assumed the role of a father figure in his life. He was a young teenager when Perez began to involve him in his drug business. PCR Hearing pg. 11.21-23.

The Applicant was a mere 17 years old when he was arrested on marijuana charges on January 5, 2002 and on the Methamphetamine charges currently before this Court on June 3,

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M. HOPE BLACKLEY

2002. By then, Perez had been the sole support of his family and his father for all practical purposes for four years.¹

Defense counsel undertook representation of Perez *on drug charges* on February 5, 2001 according to his own PCR testimony. PCR Hearing pg. 30, ll.8-19. He represented Perez in multiple matters before the Applicant's trial in July, 2002. PCR Hearing pg. 30, l.15 – pg.33, l. 8. In April, 2002 trial counsel undertook representation of Perez on a charge for trafficking in marijuana. PCR Hearing pg. 31, ll.12-24.

In January, 2002 when the Applicant was arrested for trafficking in marijuana, defense counsel's \$25,000.00 fee was paid in cash by the Applicant's mother. In June, 2002 when he was retained to represent the Applicant on the charge of trafficking in methamphetamine, Perez paid the retainer by check. PCR Hearing pg. 21, l.5 – pg.22, l.1.

PCR counsel acknowledged that when she first asked the Applicant about Perez he denied knowledge of his affairs, however, her intent was to emphasize that, unlike trial counsel, she did not simply stop the dialog once the denial was made. PCR counsel, who had no allegiance to anyone except this client, carefully explained the Applicant's situation to him, discussed all the reasons why cooperation was the prudent thing to do and was able to obtain the Applicant's full cooperation very quickly. Counsel would assert that no one should have been surprised that this young man would initially refuse to talk about his knowledge of Perez's drug operations. His familial loyalty, if nothing else, should have been expected to require an objective attorney to carefully explore this subject with the Applicant regardless of his initial inclination not to speak against Perez. It should surprise no one that a lawyer representing Perez, and actually being paid by him to represent the Applicant, would not use due diligence in

¹ At the PCR hearing held in this matter, counsel misspoke and referred to the Applicant as being 15 years old at the time of his arrest. He was born on [REDACTED] and therefore was seventeen years old at the time of both these arrests.

shepherding this young man down the path to cooperation with the DEA and local law enforcement.

What is abundantly clear is that once the Applicant had a lawyer with no ties to Perez, he came around quickly and fully cooperated with law enforcement. Once the Applicant had an advocate that represented him and him alone, he was readily convinced of the value of cooperation and enthusiastically embraced the opportunity to assist in the prosecution of Deno Perez. The value of his cooperation is well documented by the witnesses who testified at his PCR hearing. The fact that the Spartanburg Sheriff's Department would have been eager to work with the Applicant as a cooperating witness against Perez before the Applicant's trial is likewise well documented in the record below.

The extensive debriefings of the Applicant demonstrate another key factor. The Applicant's reluctance to cooperate against Perez was ultimately proven to be motivated as much, if not more, by fear as it was his mother's personal relationship with Perez. These debriefings reveal that the Applicant had first hand knowledge of acts of extreme violence committed by Perez in his presence. He therefore, had reason to fear Perez and reason to fear discussing cooperating with law enforcement against Perez. See, Applicant's Exhibits 1, and A-3. The testimony of the former Assistant United States Attorney who worked on the prosecution of Perez in the United States District Court confirms that the Applicant's cooperation was significant and substantially corroborated by their investigation of Perez. His testimony further establishes that the federal authorities believed that trial counsel had a conflict of interest representing Perez and the Applicant. They asked defense counsel to step down from representing Perez and ultimately he did. His testimony further confirms that it was not until

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after the Applicant had a lawyer of his own, unconnected to Perez, that they were able to interview him and obtain his cooperation. PCR Hearing pg. 89, l. 15 – pg.102, l. 25.

The Applicant would also submit, respectfully, that this Court erroneously places weight on the fact that defense counsel took a “neutral” witness with him to the jail to interview the Applicant about Perez. The fact that the Applicant would not open up and talk about his knowledge of Perez’s criminal enterprises in front of this so called neutral witness should come as no surprise to anyone. This “neutral” witness came to the jail with defense counsel. Defense counsel, Perez’s lawyer, was present and asked many of the questions. The Applicant never spoke with this “neutral lawyer” privately. Even if he had been given the chance to do so, it is doubtful he would have felt safe talking to him since *he was brought there by Perez’s lawyer*.

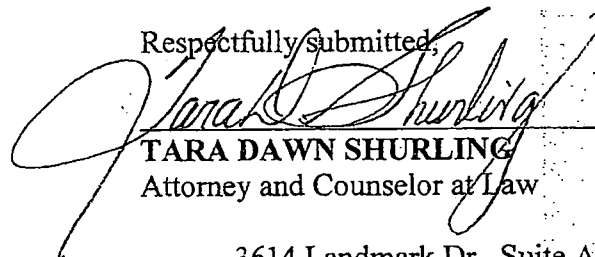
The Sixth Amendment right to effective assistance of counsel may be violated when counsel is encumbered by a conflict of interest. Mickens v. Taylor, 535 U.S. 162, 162 (2002); Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Inasmuch as the Applicant never objected to the conflict of interest in the lower court, he must now show that defense counsel had an actual conflict of interest which adversely affected his performance in representing him. Mickens, 535 U.S. at 163; State v. Gregory, 364 S.C. 150, 153; 612 S.E.2d 449, 450 (S.C. 2005); Thomas v. State, 346 S.C. 140, 143-44; 551 S.E.2d 254, 256 (S.C. 2001). Where an actual conflict of interest is demonstrated, prejudice need not be proven. Mickens, 535 U.S. at 163; Gregory, 612 S.E.2d at 450. However, on the facts of this case, the prejudice is apparent. This seventeen year old defendant went to trial and got a thirty year sentence on facts where he could easily have negotiated a favorable deal if he had been willing to negotiate a plea agreement that called for cooperation against Perez. In order to demonstrate an actual conflict of interest one must establish that counsel owed a duty to a party whose interests were adverse to the concerned

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client's interests. U.S. v. Nicholson, 611 F.3d 191, 215 (4th Cir. 2010); Gregory, 612 S.E.2d at 450; Thomas, 551 S.E.2d at 256. Defense counsel had a duty to exercise due diligence in exploring plea negotiations on behalf of the Applicant.² Such a negotiation would have potentially required that the Applicant take steps adverse to Perez thus, their positions were obviously adverse to each other. Where actions by the Applicant against Perez would clearly have been detrimental to Perez, defense counsel had a textbook conflict of interest in representing two parties whose best interests were terribly adverse to each other. Nicholson, 611 F.3d at 215; Gregory, 612 S.E.2d at 450; Thomas, 551 S.E.2d at 256.

The Applicant respectfully prays that this Court will reevaluate its initial decision in this matter. He asks that this Honorable Court amend its previous order and grant him a new trial. The simultaneous representation of the Applicant and Deno Perez resulted in an actual conflict of interest for defense counsel. Accordingly, the Applicant maintains that he is entitled to Post-Conviction Relief.

Respectfully submitted,


TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Dr., Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

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M. HOPE BLACKLEY

ATTORNEY FOR THE APPLICANT

This 18th day of February, 2011.

² In his PCR testimony, the Applicant said that the one time he mentioned the name of "Dino Perez" in connection with negotiating a plea bargain, defense counsel said he, "couldn't hear this." The Applicant confirmed that even after that conversation, defense counsel never had a discussion with him about the possibility that he might need separate counsel. PCR Hearing p. 108, l. 25-p. 109, l. 21.

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

MICHAEL GONZALES, #285903,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

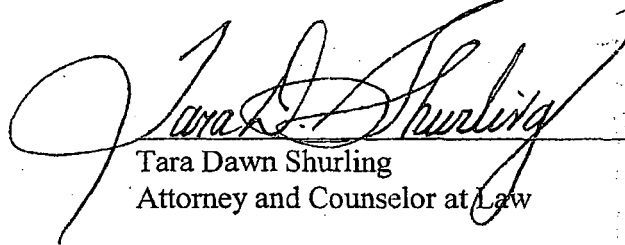
CERTIFICATE OF SERVICE

06-CP-42-1550

The undersigned hereby certifies that a true copy of the Rule 59(e) Motion to Alter or Amend in the above matter has been served on the Honorable Roger L. Couch, presiding judge, this 18th day of February, 2011, by mailing one (1) copy in a stamped envelope properly addressed to:

The Honorable Roger L. Couch
Presiding Judge, Seventh Judicial Circuit
P. O. Box 2614
Spartanburg, SC 29304

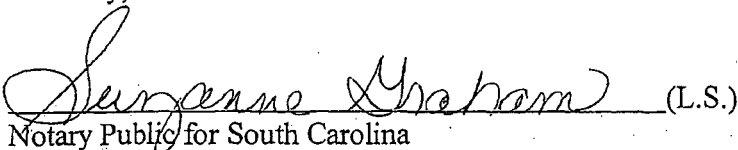
The original having been sent to the Spartanburg County Clerk of Court for filing.


Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT

SWORN TO BEFORE ME this 18th day of
February, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 3/12/2013

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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

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MICHAEL GONZALES, #285903,)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

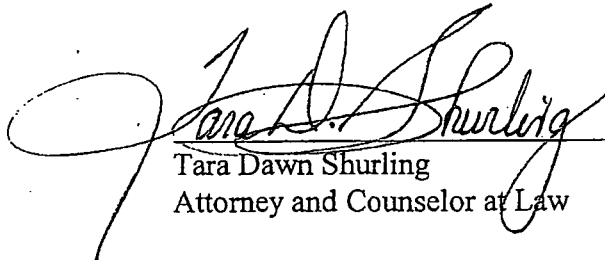
CERTIFICATE OF SERVICE

06-CP-42-1550

The undersigned hereby certifies that a true copy of the Rule 59(e) Motion to Alter or Amend in the above matter has been served on opposing counsel this 18th day of February, 2011, by mailing one (1) copy in a stamped envelope properly addressed to:

Suzanne H. White
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

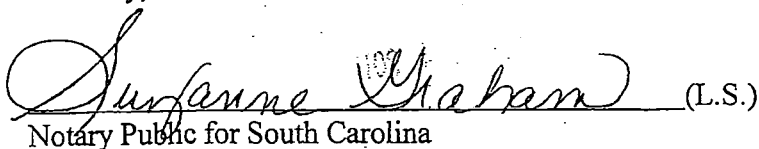
The original having been sent to the Spartanburg County Clerk of Court for filing.


Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT

SWORN TO BEFORE ME this 18th day of
February, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 3/12/2013

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Michael Gonzales, #285903,	)	2006-CP-42-1550
	)	
Applicant,	)	
	)	
v.	)	RETURN AND MOTION TO DISMISS
	)	MOTION TO ALTER OR AMEND
State of South Carolina,	)	DENIAL OF PCR PETITION
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of the Applicant's Motion pursuant to Rule 59(e), SCRCPP, in which he asks the Court to alter or amend its Order dismissing his Application for post-conviction relief (PCR). The Respondent (the State) would submit the following:

I.

The Respondent submits that the Order of Dismissal of the Honorable Roger L. Couch, dated February 4, 2011, contains the findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003), and Rule 52(a) SCRCPP. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). The Respondent also submits that the Applicant's motion fails to identify the portions of the order he alleges to be "defective," or to identify with specificity the contentions that are recited incorrectly, and in what manner the Order of Dismissal is in need of amendment or alteration, other than asking the Court to reconsider its decision. It is incumbent upon the Applicant to present a motion asking the Court to address specific questions or factual and legal matters rather than just generally disagreeing with the outcome of the hearing. See Bennett v. Investor's Title Ins. Co., 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006)(stating that where the trial court did not rule on a specific issue and appellant failed to seek a ruling on the issue in a post-trial motion, the matter is not preserved for appeal); Doe v. Doe, 370 S.C. 206,

634 S.E.2d 51(Ct. App. 2006)(same); Cowan v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005)(same); Jones v. State Farm, 364 S.C.222, 612 S.E.2d 719(Ct. App. 2005)(stating claim is not preserved where appellant argued to the trial court that an issue of fact was created by a form but failed to set forth a legal theory which would entitled him to recovery based upon the form and failed to move to alter or amend judgment); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001)(PCR applicant failed to preserve an ineffective assistance of counsel claim for appellate review where applicant did not file a motion asking the court to rule on the specific issue of applicant's appearance in shackles).

Any alleged omissions and errors are not called to this Court's attention with sufficient specificity to obtain a ruling thereon and to comply with Rule 7(b)(1), SCRCP. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007). Therefore, the motion must be denied.

II.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Motion be denied and that said Motion be dismissed.

Respectfully submitted,

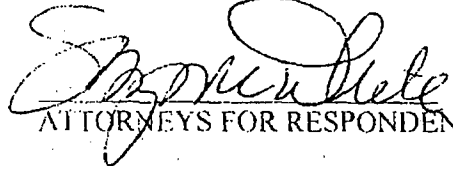
ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SAILEY W. ELLIOTT
Assistant Deputy Attorney General

[signatures continued on next page]

SUZANNE H. WHITE
Assistant Attorney General

BY: 
ATTORNEYS FOR RESPONDENT

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

February 28, 2011.

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Michael Gonzales, #285903,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2006-CP-42-1550

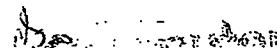
ORDER

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This matter comes before the Court by way of Applicant's Rule 59(e), SCRCF, Motion to Alter or Amend. The Respondent made its Return to this response on February 28, 2011.

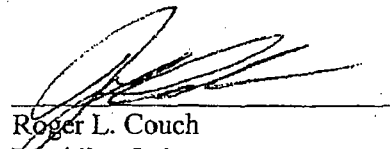
The Order of Dismissal in this matter was signed by me on February 4, 2010. This Court finds that Applicant's Motion failed to properly present grounds for relief, or bring to the attention of this Court, specific matters in need of alteration or amendment. See Rule 7(b)(1), SCRCF (stating that an application to the court for an order shall be made by motion and shall state the grounds and relief sought with particularity). Applicant made no specific allegation of any issue that the Court failed to address properly in the Order of Dismissal, other than disagreeing with the decision of the court and reiterating previous arguments made by Counsel.

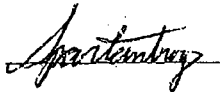
Based upon careful reconsideration of all the evidence in this case and upon full consideration of Applicant's Motion, this Court is not persuaded to alter or amend the judgment.

This Court further finds that oral argument would not aid in the reconsideration of the original judgment. Therefore, this Court finds that the Order of Dismissal, which was filed on February 7, 2011, shall stand as it was written.

AND IT IS SO ORDERED this 31st day of March, 2011.


Roger L. Couch
Presiding Judge
Seventh Judicial Circuit

, South Carolina

2011 APR -5 PM 4:36
M. HOPE BLACKLEY

WITNESSES

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ARREST WARRANT

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TRAFFIC VIOLATIONS COPY

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ACTION OF GRAND JURY

True Bill

[Signature]

Person of Grand Jury

le:

VERDICT

GUILTY of 400 gm or more

[Signature]

Person of Petit Jury

le:

July 24, 2002

02-GS-42-274C

DOCKET NO

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

TERM

THE STATE

VS.

MICHAEL GONZALES

Indictment for

TRAFFICKING IN METHAMPHETAMINE

SC Code: 44-53-375

NOV - 2 2002

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

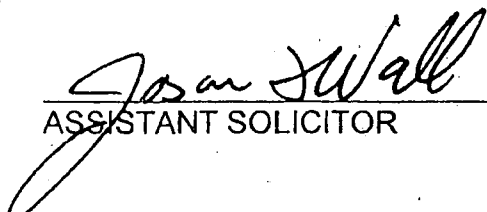
INDICTMENT

At a Court of General Sessions, convened on _____ the
Grand Jurors of Spartanburg County present upon their oath:

TRAFFICKING IN METHAMPHETAMINE

That Michael Gonzales did in Spartanburg County on or about June 3, 2002, knowingly sell, manufacture, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or did knowingly actually or constructively possess, or did knowingly attempt to actually or constructively possess more than (400) four hundred grams of Methamphetamine, a schedule II controlled substance, in violation of §44-53-375, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

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



ASSISTANT SOLICITOR