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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Kristi Lea Harrington, Circuit Court Judge

NELSON H. CASTRO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000021

APPENDIX

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
2010-GS-26-00445

State of South Carolina,)
)
Plaintiff,)
)
-VS-)
)
Nelson H. Castro,)
)
Defendant.)
_____)

TRANSCRIPT OF RECORD

April 7-8, 2010
Conway, South Carolina

B E F O R E:

HONORABLE LARRY B. HYMAN, Circuit Judge.

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

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DIXIE COX EUBANK
OFFICIAL REPORTER

APRIL 7, 2010

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E X H I B I T S

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1 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF**
2 **THE JURY.)**

3 **MR. GRAUSTEIN:** Judge, he does not want to plead.

4 **THE COURT:** Very well.

5 **MR. GRAUSTEIN:** Judge, I might ask if you would
6 address the Defendant and make sure that this is a free
7 and voluntary decision that he is making to reject this
8 offer or if it is against his attorney's advice.

9 **THE COURT:** And the Defendant's name?

10 **MR. GRAUSTEIN:** Nelson Castro.

11 **THE COURT:** Nelson Casper?

12 **MR. GRAUSTEIN:** C-A-S-T-R-O.

13 **THE COURT:** All right, Mr. Castro, do you understand
14 English?

15 **MR. CASTRO:** Yes.

16 **THE COURT:** Mr. Castro, you are represented by Mr.
17 Diggs. I have an indictment which has been true billed by
18 the Grand Jury and, as a matter of fact, it would appear
19 that I have four indictments, is that correct?

20 **MR. GRAUSTEIN:** Yes, Your Honor, but for
21 clarification, the State would only be proceeding on one.

22 **THE COURT:** All right. You have four indictments,
23 an indictment for trafficking cocaine, ten to twenty-eight
24 grams, another indictment for ten to twenty-eight grams, a
25 possession with intent to distribute cocaine, and a

1 trafficking in cocaine, twenty-eight to one hundred grams.
2 These are four separate and distinct charges, is that
3 correct, Mr. Graustein?

4 **MR. GRAUSTEIN:** That is correct, Your Honor.

5 **THE COURT:** Mr. Graustein has agreed to allow you to
6 plead to one indictment, and that is an indictment for
7 trafficking in cocaine, twenty-eight to one hundred grams.
8 Your exposure on that would be seven to twenty-five years.
9 Upon your plea, he would be dismissing the other charges
10 that you are looking at.

11 I have pre-tried this with your attorney, and I will
12 tell you I am inclined to sentence on a plea seven years.
13 I would not be so inclined in the event of trial. Also,
14 you would, regardless of how this trial comes out, you
15 would still be looking at the other three charges as well
16 for which you could be tried and would be tried. Mr.
17 Graustein has indicated that he will try you for those --
18 those offenses.

19 Now, your attorney tells me that you do not wish to
20 accept this offer by the State, that you want to go to
21 trial on this charge, and ultimately for all the charges.
22 Is that what you want to do, Mr. Castro? Are you sure
23 that's what you want to do?

24 **MR. CASTRO:** Yes, Your Honor.

25 **THE COURT:** Have you had plenty of time to talk

1 about this with your attorney?

2 MR. CASTRO: Yes, I did, but he didn't tell me we
3 were coming today.

4 THE COURT: He did what?

5 MR. CASTRO: Yes, he did tell me about it. He told
6 me about all the charges, and -- but he didn't tell me
7 that we were supposed to be here today, so I wanted to go
8 talk to another lawyer before I go to trial.

9 THE COURT: That's not going to happen. You're
10 going to go to trial today.

11 MR. DIGGS: Could I make a statement for the record,
12 too?

13 THE COURT: Yes, sir.

14 MR. DIGGS: Your Honor, we did -- Ms. Eserzi is
15 here. She is my paralegal. She has worked in my office
16 for ten years. She called a couple of days ago, if I can
17 get precisely when it was, Monday, to tell him to be here
18 this afternoon at two o'clock. He knew we were going to
19 be in Court. Now, what we did not know was that we would
20 be called for trial today at two o'clock, and, Your Honor,
21 for the record, we didn't find that out until about eleven
22 o'clock this morning.

23 THE COURT: Well, this case was on the roster and
24 notice was given that this case was going to be tried.

25 Mr. Castro, I am not going to delay this case. I

1 have a jury in Courtroom C. I have forty-five people
2 there who are ready to be sworn, or a jury picked, from
3 that group, and we're going to begin your case just as
4 soon as we get that jury sworn.

5 Now, if you want another five minutes or so to talk
6 to your attorney, that's fine. Otherwise, we're going to
7 go straight into this trial. Mr. Castro, you have an
8 experienced attorney, a good attorney. I would suggest,
9 Mr. Castro, whatever advice he's given you, that you
10 consider that advice very carefully, because this, as I
11 said, is not one charge. You're looking at multiple
12 trials that you could be looking at here and consecutive
13 sentences, not just concurrent sentences.

14 This is a very, very, very serious matter that's
15 before me, and if you reject this deal, it is rejected.
16 You're going to trial and you're going to have to live
17 with whatever verdict this jury returns, and regardless of
18 how they return a verdict today, you're still going to be
19 facing these other charges as well.

20 Now, do you need about another five minutes to talk
21 to your attorney or are you ready to go?

22 **MR. CASTRO:** Yes.

23 **THE COURT:** All right, Mr. Diggs, you can talk with
24 him.

25 **MR. DIGGS:** Your Honor, could we approach for just a

1 second?

2 **THE COURT:** Yes, sir.

3 (A Bench Conference was held with Counsel off the
4 record.)

5 (Mr. Diggs speaks with Mr. Castro off the record.)

6 **MR. CASTRO:** I am going to trial.

7 **THE COURT:** All right. Bring in the jury.

8 Mr. Graustein, have you got a witness list?

9 **MR. GRAUSTEIN:** Yes, sir.

10 **THE COURT:** Mr. Diggs, do you have a witness list?

11 **MR. DIGGS:** Your Honor, we don't have any witnesses
12 other than perhaps the Defendant.

13 **THE COURT:** All right.

14 (THE FOLLOWING TAKES PLACE IN THE PRESENCE OF THE
15 JURY VENIRE.)

16 **THE COURT:** Ladies and gentlemen, we are here to
17 begin the case of State of South Carolina versus Nelson
18 Hercules Castro. Mr. Castro is charged under a true bill
19 of indictment with the offense of trafficking in cocaine,
20 twenty-eight to one hundred grams.

21 The indictment alleges that on or about the 28th day
22 of August of 2009, that Mr. Castro did possess in some
23 form or fashion cocaine in the amount of twenty-eight
24 grams -- at least twenty-eight grams, but not more than
25 one hundred grams.

1 This indictment is nothing more than a charging
2 document. It is the document which is prepared which
3 brings this matter to the Court's attention and puts the
4 Defendant on notice of what he is being charged with. As
5 I said, it is not evidence and should not be considered by
6 the jury that is selected in this case as evidence.

7 Now, we are going to select twelve jurors and two
8 alternates from this jury panel. Before we get into that
9 process, though, I want to qualify you as jurors in this
10 case.

11 The most important thing about selecting a jury is to
12 make sure that a jury is selected that can be fair and
13 impartial in this case, that is that it can give both the
14 State and the Defendant a fair trial. In that regard, let
15 me begin by asking you these questions.

16 Before I do that, though, I want to have you placed
17 under oath again.

18 If you would, Madam Clerk.

19 **THE CLERK:** Please stand and raise your right hand.

20 (The Jury Venire is placed under oath by the Clerk.)

21 **THE COURT:** All right. Is there any member of this
22 jury panel who has ever been related by blood or marriage
23 either to the Defendant, Nelson Hercules Castro, who is
24 seated here at the Defense table -- Mr. Castro, if you
25 would, please stand, turn around and face the jury, or are

1 you a close personal friend, or do you have any close
2 social relationship with Mr. Castro? (No response.) And
3 there is no response. You may sit down.

4 I have a list of witnesses who may be called in this
5 case. This is a list of potential witnesses. The fact
6 that a witness may be called, his name may be called and
7 later is not called in trial certainly should not mean
8 anything to you. We ask the attorneys to tell us the
9 names of all persons who might possibly be called because
10 we want to know if you have any sort of relationship with
11 any of these witnesses.

12 The witnesses who may be called in this case are Joe
13 Necessary, Matthew Hooper, Trevor Howlett, Will
14 Kitelinger, Will Lynch, Ryan Wood, Dean Bishop, Donna
15 Bell, Lisa Floyd, Genero Bustos, Angela Dinalazo, and
16 Christopher Norris.

17 Is anyone related by blood or marriage, or do you
18 have a social or close personal relationship with any of
19 these potential witnesses that I have named? And there is
20 no response.

21 Has anyone on this jury panel ever been represented
22 by Attorney Bill Diggs who represents the Defendant? Mr.
23 Diggs is standing, or Mr. Scott Graustein? Mr. Graustein
24 is with the Fifteenth Circuit Solicitor's Office, works
25 for Mr. Hembree. Has anyone ever been represented by

1 either of these parties? (No response.) All right.

2 Has any member of the jury panel formed any opinion
3 or expressed an opinion about any issue or matter in this
4 case? Now, I briefly described to you when this occurred
5 and what facts give rise to this charge. As I said
6 earlier, that's not evidence, but it is merely a brief
7 description of this case. Does anyone know anything about
8 this case or do you know any reason whatsoever why you
9 would not be able to give both the State and the Defendant
10 a fair trial in this matter? (No response.) Again there
11 is no response.

12 Is any member of the jury panel aware of any bias or
13 prejudice towards either the State or the Defendant in
14 this case? (No response.)

15 Is there any member of the jury panel who is a member
16 of, contributed to, or associated with any group which has
17 as its primary concern the promotion of law enforcement or
18 victims rights, and these groups would be such things as
19 MADD, SADD, CASA, CAVE, which is Citizens Against Violent
20 Crime, anything like that? (No response.)

21 Is there any member of the jury panel who knows any
22 reason whatsoever why he or she should not serve as a
23 juror in this case with particular emphasis being placed
24 on your ability to be fair and impartial both to the State
25 and to the Defendant? And there is no response.

JURY SELECTION

13

1 Are there any other questions for voir dire, Mr.
2 Diggs?

3 **MR. DIGGS:** Your Honor, we don't have anything
4 further.

5 **THE COURT:** Mr. Graustein?

6 **MR. GRAUSTEIN:** No, Your Honor.

7 **THE COURT:** Very well. I find that the jury panel
8 as seated is qualified, and if you would, Madam Clerk,
9 call the names.

10 Let me tell you how we're going to do this. As your
11 name is called, please come forward and turn around right
12 here down in front of me and face the attorneys and your
13 fellow jurors. At that time, the State will go first and
14 the State will either say "Present the juror" or "Excuse
15 the juror."

16 If the State for some reason were to say "Excuse the
17 juror" when you are standing there, you can immediately
18 return to your seat and you will not be on this jury. If
19 the State says, "Present the juror," then the Defense will
20 have an opportunity to either say "Swear the juror" or
21 "Excuse the juror." If the Defendant says, "Swear the
22 juror," you will come around and be seated in the jury
23 box. If they excuse you again, you can return to your
24 seat.

25 All right, if you would, Madam Clerk.

1 **THE CLERK:** Please bring any belongings you have, if
2 you'll bring them up with you.
3 Number 15, Stacy Barrera.
4 What say the State?
5 **MR. GRAUSTEIN:** Present the juror.
6 **THE CLERK:** Defense?
7 **MR. DIGGS:** Swear the juror.
8 **THE CLERK:** Please be seated in the jury box.
9 306, Edward Sweatt.
10 What say the State?
11 **MR. GRAUSTEIN:** Present the juror.
12 **THE CLERK:** Defense?
13 **MR. DIGGS:** Swear the juror.
14 **THE CLERK:** Please be seated in the jury box.
15 224, Stephen Morgan.
16 What say the State?
17 **MR. GRAUSTEIN:** Present the juror.
18 **THE CLERK:** Defense?
19 **MR. DIGGS:** Swear the juror.
20 **THE CLERK:** Please be seated in the jury box.
21 312, Michael Thomas.
22 What say the State?
23 **MR. GRAUSTEIN:** Present the juror.
24 **THE CLERK:** Defense?
25 **MR. DIGGS:** We'll excuse the juror from the trial of

JURY SELECTION

15

1 this case.

2 THE CLERK: You're excused from this particular
3 case.

4 10, Cynthia Baine.

5 What say the State?

6 MR. GRAUSTEIN: Present the juror.

7 THE CLERK: Defense?

8 MR. DIGGS: Swear the juror.

9 THE CLERK: Please be seated in the jury box.

10 1, Milanov Abbott.

11 What say the State?

12 MR. GRAUSTEIN: Excuse the juror from the trial of
13 this case.

14 THE CLERK: You're excused from this particular
15 case.

16 258 Susie Roberts.

17 What say the State?

18 MR. GRAUSTEIN: Present the juror.

19 THE CLERK: Defense?

20 MR. DIGGS: Excuse the juror from the trial of this
21 case.

22 THE CLERK: You're excused from this particular
23 case.

24 107, Robert Flick.

25 What say the State?

1 **MR. GRAUSTEIN:** Present the juror.
2 **THE CLERK:** Defense?
3 **MR. DIGGS:** Swear the juror.
4 **THE CLERK:** Please be seated in the jury box.
5 108, Samuel Floyd.
6 What say the State?
7 **MR. GRAUSTEIN:** Please excuse Mr. Floyd.
8 **THE CLERK:** You're excused from this particular
9 case.
10 131, Jared Hall.
11 What say the State?
12 **MR. GRAUSTEIN:** Present the juror.
13 **THE CLERK:** Defense?
14 **MR. DIGGS:** Swear the juror.
15 **THE CLERK:** Please be seated in the jury box.
16 278, Eric Shaw.
17 What say the State?
18 **MR. GRAUSTEIN:** Present the juror.
19 **THE CLERK:** Defense?
20 **MR. DIGGS:** Swear the juror.
21 **THE CLERK:** Please be seated in the jury box.
22 180, Heather Kouba.
23 What say the State?
24 **MR. GRAUSTEIN:** Present the juror.
25 **THE CLERK:** Defense?

JURY SELECTION

17

1 MR. DIGGS: Swear the juror.

2 THE CLERK: Please be seated in the jury box.

3 294, Kelli Willoughby.

4 What say the State?

5 MR. GRAUSTEIN: Present the juror.

6 THE CLERK: Defense?

7 MR. DIGGS: Swear the juror.

8 THE CLERK: Please be seated in the jury box.

9 299, Sharon Stiller.

10 What say the State?

11 MR. GRAUSTEIN: Present the juror.

12 THE CLERK: Defense?

13 MR. DIGGS: Swear the juror.

14 THE CLERK: Please be seated in the jury box.

15 189, Margaret Lawrence.

16 What say the State?

17 MR. GRAUSTEIN: Present the juror.

18 THE CLERK: Defense?

19 MR. DIGGS: We would excuse the juror from the trial
20 of this case.

21 THE CLERK: You're excused from this particular
22 case.

23 239, Tina Jordan.

24 What say the State?

25 MR. GRAUSTEIN: Present the juror.

1 THE CLERK: Defense?

2 MR. DIGGS: Swear the juror.

3 THE CLERK: Please be seated in the jury box.

4 136, Theresa Hardwick.

5 What say the State?

6 MR. GRAUSTEIN: Present the juror.

7 THE CLERK: Defense?

8 MR. DIGGS: We would excuse the juror from the trial
9 of this case.

10 THE CLERK: You're excused from this particular
11 case.

12 332, Michael Watts.

13 THE COURT: Mr. Flick, come down to the first seat,
14 please.

15 THE CLERK: What say the State?

16 MR. GRAUSTEIN: Please excuse this juror.

17 THE CLERK: You're excused from this particular
18 case.

19 297, Michael Stephens.

20 What say the State?

21 MR. GRAUSTEIN: Present the juror.

22 THE CLERK: Defense?

23 MR. DIGGS: We will excuse the juror from the trial
24 of this case.

25 THE CLERK: You're excused from this particular

JURY SELECTION

19

1 case.

2 MR. DIGGS: Now we're into the alternate, Madam
3 Clerk?

4 THE COURT: No. You have one more juror.

5 THE CLERK: 193, Bashawn Lewis.

6 What say the State?

7 MR. GRAUSTEIN: Present the juror.

8 THE CLERK: Defense?

9 MR. DIGGS: Your Honor, may I inquire, we've
10 exhausted our strikes, is that correct? We had five?

11 THE COURT: Yes, five and five.

12 MR. DIGGS: That being the case, swear the juror.

13 THE CLERK: Please be seated in the jury box.

14 249, Samuel Prince.

15 THE COURT: One and two for each alternate. We'll
16 select two alternates. The State has one; the Defense has
17 two.

18 MR. GRAUSTEIN: I'm sorry, which juror was that?

19 THE CLERK: 249, Samuel Prince.

20 MR. GRAUSTEIN: Present the juror.

21 MR. DIGGS: We would excuse the juror from the trial
22 of this case.

23 THE CLERK: You're excused from this particular
24 case.

25 80, China Davis.

1 What say the State?

2 **MR. GRAUSTEIN:** Present the juror.

3 **THE CLERK:** Defense?

4 **MR. DIGGS:** Swear the juror.

5 **THE CLERK:** Please be seated in the jury box.

6 42, Bobby Brown.

7 What say the State?

8 **MR. GRAUSTEIN:** Present the juror.

9 **MR. DIGGS:** We would excuse the juror from the trial

10 of this case.

11 **THE CLERK:** You are excused from this particular

12 case.

13 117, James Gill.

14 What say the State?

15 **MR. GRAUSTEIN:** Please excuse this juror.

16 **THE CLERK:** You're excused from this particular

17 case.

18 205, Helen Marcus.

19 What say the State?

20 **MR. GRAUSTEIN:** Present the juror.

21 **MR. DIGGS:** We would excuse the juror from the trial

22 of this case.

23 **THE CLERK:** 303, Kelly Sturgill.

24 What say the State?

25 **MR. GRAUSTEIN:** Present the juror.

JURY SELECTION
JURY OUT/ON RECORD

21

1 **THE CLERK:** Defense?

2 **MR. DIGGS:** Please excuse the juror from the trial
3 of this case.

4 **THE CLERK:** You're excused from this particular
5 case.

6 100, Frederica Fanelli.

7 What say the State?

8 **MR. GRAUSTEIN:** Present the juror.

9 **THE CLERK:** Defense?

10 **MR. GRAUSTEIN:** Swear the juror.

11 **THE CLERK:** Please be seated in the jury box.

12 **THE COURT:** All right, ladies and gentlemen, I'm
13 going to send you into your jury room.

14 Ms. Davis and Ms. Fanelli, always occupy those two
15 seats. You will be our alternates.

16 Mr. Flick, if you would, always occupy that seat.
17 You will be our Foreperson.

18 Mr. Ropp, if you would, take the jury into their jury
19 room for just a moment, okay?

20 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF**
21 **THE JURY.)**

22 **THE COURT:** Mr. Graustein, Mr. Diggs, will there be
23 challenges?

24 **MR. GRAUSTEIN:** None from the State, Your Honor.

25 **MR. DIGGS:** We don't have any.

1 **THE COURT:** Okay, very well.

2 All right, ladies and gentlemen, the balance of the
3 jury panel is excused for today. Please call back after
4 six o'clock and find out whether we need you in the
5 morning. Thank you very much.

6 Gentlemen, I intend to give the jury about ten
7 minutes to refresh themselves before I bring them back in.
8 I'll be bringing them back in at ten minutes after three,
9 and at that time, I will give them a preliminary charge.
10 I will have them sworn, and you can go right into opening
11 statements. Thank you.

12 **MR. DIGGS:** Thank you, Your Honor.

13 **(THE FOLLOWING TAKES PLACE AFTER A BREAK WITHIN THE**
14 **PRESENCE OF THE JURY.)**

15 **THE COURT:** Ladies and gentlemen, if at any time
16 during this trial you have difficulties hearing what's
17 being said or perhaps there's an exhibit being referred to
18 and you can't see it, I'll ask you to please raise your
19 hand and let me know that because it's important that you
20 are able to hear and see everything that is presented to
21 you today during this trial.

22 Also if at any time during the trial you become
23 uncomfortable, you need a moment to refresh yourselves,
24 you need to return to your jury room, please, again, just
25 raise your hand.

1 Mr. Flick is going to be the foreperson of your jury.
2 If you have any concerns during this trial, if you have
3 any problems, bring them to Mr. Flick's attention, and Mr.
4 Flick, if you would then bring them to the attention --
5 and my bailiff, Mr. Ropp, and I think you probably all
6 have met Mr. Ropp, and he will make sure that anything
7 that needs to be brought to my attention will be brought
8 to my attention.

9 Now, we are about to begin this trial. I told you a
10 little bit about the trial and what this trial is about.
11 Let me tell you that this trial will probably not be like
12 those trials that you have seen on T.V., might be, but
13 generally speaking when we watch trials on T.V., they're
14 filled with suspense and there's always something about to
15 happen, and they're very exciting. That may not be the
16 case in this trial. It usually is not in most trials.

17 The search for the truth is sometimes very
18 repetitive. It's a slow and deliberate process that we
19 must follow. During that process you should keep in mind
20 that the burden is upon the State to prove to you that the
21 Defendant is guilty of the charge that he is facing beyond
22 a reasonable doubt.

23 In this Court, we have two different standards of
24 proof. If this were a civil case, the Plaintiff would
25 only have to prove that -- prove its case by a

1 preponderance of the evidence, that is prove that the
2 facts that it seeks to establish are more likely than not.
3 It's a much higher standard in a criminal case, and that's
4 what we have here today.

5 In a criminal case, the State must prove to your
6 satisfaction and beyond a reasonable doubt that the
7 Defendant has committed each and every one of the elements
8 of the particular offense.

9 Now, at the end of this trial, I will instruct you
10 fully on the law that you will apply in this case, and you
11 must apply the law as I give it to you. If you have a
12 notion as to what the law ought to be or is and it's
13 different from what I tell you, you're going to have to
14 set that aside because you are bound to apply the law
15 exactly as I give it to you during your deliberations.

16 However, during that deliberation process, you are
17 the sole and exclusive judges of the facts. That is you
18 must weigh all the evidence that is presented in this
19 trial and determine what the ultimate facts are. That is
20 an awesome responsibility because if I commit some error
21 in instructing you as to the law or perhaps the process
22 that we follow during this trial, the procedure, that can
23 be corrected by an appellate court, but there's almost no
24 way that an appellate court can correct an erroneous
25 finding of fact by the jury. That's why it's so important

1 that you pay close attention to the evidence presented in
2 this case.

3 Now, you, of course, in determining what the facts
4 are must determine the credibility of the testimony that
5 you hear in the case, and let me tell you credibility
6 means nothing more than believability. You can consider
7 almost any test that you have learned through your life
8 experiences to lead you to the truth can be applied here.
9 You can believe one witness over many. You can believe
10 many over the one. You can believe all that a witness
11 tells you or none of what a witness tells you. You can
12 believe part of what a witness says and reject the other
13 part.

14 You can consider such things as the witness's
15 demeanor on the witness stand. That is how he appeared.
16 You can consider whether or not a witness had an
17 opportunity to see or hear what he or she is testifying
18 about. You can consider whether the witness may have any
19 interest, prejudice, or bias in the outcome of this case
20 in determining what witnesses you will believe and what
21 witnesses you will not believe.

22 Now, throughout the trial of the case you may hear
23 someone say, "Your Honor, we have a matter to take up," or
24 "Your Honor, I object," and I will be sending you out of
25 the courtroom if that occurs. It's not that we are trying

1 to keep anything away from you. It's just that in order
2 to rule sometimes on evidentiary matters, I may have to
3 comment on my view of a particular piece of evidence, and
4 I tell you the law does not permit me to have an opinion
5 about any particular piece of evidence, and if I say or do
6 anything during this trial that makes you believe that I
7 favor one witness over another or that I place greater
8 credibility over one piece of evidence than another, you
9 should reject that and put it out of my -- your minds
10 because you are the sole judges of the facts, and if an
11 objection is made and I have to rule, I don't even want
12 you to hear what I may say about a particular piece of
13 evidence or say in ruling on an evidentiary matter, and
14 that's why we send you out. It's not that we're trying to
15 keep anything from you.

16 Now, in just a few minutes, these attorneys are going
17 to give you what we call opening statements. It will
18 begin by Mr. Graustein giving you the State's opening
19 remarks. In that he is going to tell you basically what
20 he believes he can show through evidence and testimony
21 during this trial. What he says is not evidence. You
22 will only consider the evidence that you hear from the
23 witness stand in your deliberations in this matter.

24 Following Mr. Graustein's opening remarks, the
25 Defense will be given an opportunity to give opening

1 remarks, and they may or may not choose to give an opening
2 remark. It's their choice, but if they do, again, the
3 things that Mr. Diggs may tell you are his view of the
4 facts in this case and they are not to be considered by
5 you as evidence standing alone.

6 Now, as I said, it is extremely important that you
7 pay close attention to the evidence that is presented
8 through this case. Now, as soon as the opening remarks
9 are completed, we will begin the evidence in this case.

10 Mr. Graustein, are you ready to go?

11 **MR. GRAUSTEIN:** Yes, Your Honor.

12 **THE COURT:** All right.

13 Let's -- let's swear the jury.

14 **THE CLERK:** Would you please stand and raise your
15 right hand.

16 (The Jury is placed under oath by the Clerk.)

17 **THE COURT:** All right, now that you are sworn, let
18 me tell you one other thing. Please do not discuss this
19 case even among yourselves until you have heard all of the
20 evidence that is presented in the case. To do so would be
21 premature deliberations and you should hear both sides of
22 the story, both sides of the case before you begin your
23 deliberations.

24 I don't anticipate we're going to finish this case
25 today. I'm certain it will go over into tomorrow. Again,

1 I ask you even when you go home this evening, I am sure
2 your wives, your husbands, your boyfriends or girlfriends
3 are going to say, "What have you been doing?" Tell them
4 that you'll be glad to tell them all about the case as
5 soon as it is completed.

6 I will ask you not to try to read anything that might
7 be in the newspaper. I don't believe there would be
8 anything in the newspaper tomorrow about this case, but I
9 ask you not to read any article that you may come across.
10 Don't go into the Internet to try to find out anything
11 about this case. Don't go and do any independent
12 investigations, like go to the scene where this alleged
13 offense may have occurred. Base your verdict in this case
14 solely on what you hear here and wait until you have all
15 the evidence before you begin your deliberations.

16 All right.

17 **MR. GRAUSTEIN:** Thank you, Your Honor.

18 Ladies and gentlemen of the jury, my name is Scott
19 Graustein and I'm Assistant Solicitor for the Fifteenth
20 Circuit. It's my job to prosecute the Defendant in this
21 case.

22 The Judge has his job in this case, and he is the
23 ultimate sayers of what the law is and how it's to be
24 interpreted, so if I say anything about the law, what the
25 law is, and you think that it's in conflict with what the

OPENING STATEMENT (GRAUSTEIN)

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1 Judge has said, you go with what the Judge says. His
2 Court Reporter will be taking down everything said in this
3 -- in the courtroom.

4 I would like to thank y'all for being here. I know
5 it's a big inconvenience, and it's my understanding y'all
6 have been kind of getting strung along here the last
7 couple of days, so I sure appreciate y'all being here and
8 doing one of the most important duties anybody and any
9 citizen in Horry County can do, and that's to sit on a
10 jury and be the ultimate decider of facts in a criminal
11 case.

12 Now, the Judge told you that our burden, the State's
13 burden, is to prove to you with evidence of the
14 Defendant's guilt beyond a reasonable doubt. That is not
15 an easy burden. It is purposefully difficult, but that
16 doesn't mean we have to prove it beyond any doubt
17 whatsoever, because y'all know, you have your own common
18 sense, very few things out there are not able to be
19 interpreted a bunch of different ways, so it's not a
20 question of whether there's any question in your mind.
21 It's a question of whether there is a reasonable doubt,
22 and the Judge will instruct you on what a reasonable doubt
23 is, but that means essentially something that would cause
24 a reasonable person to pause or say, "Did that really
25 happen? Did it happen that way?"

1 Now, I talk to you about reasonable doubt and a lot
2 of things are open to a lot of interpretation. I don't
3 think you're going to have that problem in this case.
4 You're going to hear -- you're going to hear testimony
5 from numerous witnesses. Some of them are police officers
6 who were present. Some of them are co-defendants, some of
7 the people who were arrested in the same incident, and
8 some of them are individuals who -- and one is an
9 individual who was working for the police. He's not a
10 police officer, so the police call them a confidential
11 informant.

12 Now, I'm sure the Defense -- and it's going to be up
13 to you to decide who to believe in this because obviously
14 the folks who were arrested at the same time as the
15 Defendant and charged at the same time, and then come in
16 here to testify regarding what happened, we perfectly
17 understand. We'll say, "Okay, why -- you know, here's
18 what they are telling me. Is that the truth?" But you
19 listen to them because all of the testimony you're going
20 to hear is going to overlap, what these folks are going to
21 be testifying to, including the folks who have broken the
22 law, overlaps with what other witnesses are going to be
23 telling you, and a lot of those witnesses will be the
24 police officers.

25 And we're going to have a confidential informant.

1 Well, obviously a confidential informant, he's not doing
2 it, you know, necessarily out of the goodness of his
3 heart. He doesn't run up to the police one day and say,
4 "I want to start working for you." He's had his own
5 issues. Sure, he does, and we make no qualms about it.

6 But probably one of the most telling pieces of
7 evidence you're going to see or that can be presented to
8 you is video recordings of what went on. You'll be able
9 to see a video of what went on, and I understand juries
10 love videos now. They love to see a video of everything,
11 and luckily we have something like that for you to see.
12 You'll be able to see if any -- what these folks are
13 testifying to, if that's backed up by the pictures and the
14 audio, so it's up to you as the finders of fact to look at
15 all of this evidence that we are going to present, sift
16 through it.

17 It's up to you to decide who's telling the truth, who
18 isn't, who to believe, what not to believe what they say,
19 and sure, some of their character is going to be brought
20 up, and if they're going to be -- you're going to be asked
21 a question why these folks are testifying, why some of
22 these witnesses are testifying, and what's their
23 motivation, and you'll listen to their testimony. Listen
24 to all the testimony. Look at all the evidence. You'll
25 see that it all fits together.

1 I don't think you should throw out any -- any of what
2 these witnesses have to say. I think you'll find that
3 after looking at all the evidence that there really is no
4 reasonable doubt. This Defendant is charged with
5 trafficking in cocaine, twenty-eight grams to a hundred
6 grams.

7 In South Carolina, we have a graduated system and
8 that's based -- and it's based on the weight of the drugs,
9 and I'm sure some of you -- a hundred grams, that sounds
10 like a lot. It's about three ounces, about three ounces,
11 a little more than three ounces, so if you are waiting to
12 see us bring in some big ol' brick of cocaine and show you
13 because he's charged with trafficking, we're not going to
14 show you anything like that, but there will be an amount
15 of drugs that we allege the Defendant was in possession
16 of, because that's all you have to be is in possession of.

17 The evidence will show you not only was he in
18 possession of it, he was selling it, so those are --
19 that's the elements that we're having to show, that he was
20 in possession of cocaine greater than twenty-eight grams,
21 but less than a hundred grams.

22 We'll bring the witnesses in and they'll testify and
23 have reports as to what he was in possession of, what --
24 and -- and what the weight of that is. It will ultimately
25 be up to you to decide whether or not the Defendant was,

1 in fact, in possession of that quantity of illegal
2 cocaine.

3 Again, I thank you. Just look at all the evidence.
4 I think it will be clear to everybody. Thank you.

5 **THE COURT:** Mr. Diggs.

6 **MR. DIGGS:** May it please the Court.

7 Good afternoon. My name is Bill Diggs, and I'm here
8 this afternoon representing Mr. Nelson Castro. Nelson,
9 would you stand up and let the jury see you. (Mr. Castro
10 stands.)

11 The lady seated -- you can sit. Thank you.

12 The lady seated behind us is Johanna Beauford. She
13 is a paralegal in my office, and she is actually from
14 Albania. She is an attorney, a licensed attorney in
15 Albania, but she is not licensed here, so she works in the
16 role of a paralegal, so if you see her running in and out,
17 and see me talking to her, it's about this case and it's
18 about our job, and that's why she's here.

19 When the Solicitor stands up and talks to you about
20 the case, he has a lot of people that have assisted him in
21 putting the evidence of what he believes is a prosecutable
22 case together, and there's a gentleman seated there at the
23 table with him. I am sure that the Solicitor is going to
24 introduce him, and you'll have a chance to find out who he
25 is and what his role was in this case, but just as he has

1 people that assist him, so do we, and that's what Ms.
2 Beauford is doing here.

3 Now, what the Solicitor said in his opening, it's
4 very difficult in an opening statement to talk to you
5 about what the evidence is going to show because we don't
6 really know what it's going to show. We think we have a
7 pretty good idea of what we're going to be able to show
8 the jury for its consideration and deliberation, but we
9 don't really know.

10 That's why we have the Judge here. A lot of times
11 the Solicitor and I will dispute about what the evidence
12 is and what it should be, and when he and I disagree, we
13 have the Judge that makes the decision about what is
14 pertinent to this case and what is not, and you never know
15 when those disputes are going to arise, and it's kind of a
16 test of faith, I guess, to stand up and tell you what
17 you're going to see.

18 What I do agree with the Solicitor on in this
19 situation is that this is the State of South Carolina
20 that's trying this case. These gentlemen are employees of
21 the State of South Carolina. They're paid by tax dollars
22 that you and I and everyone who lives in this State pay,
23 and they do a good job for the most part. They're good
24 people and we're fortunate to have them, and because of
25 that, we hold them to a standard in just about every way

1 you can imagine..

2 One of those standards is the burden of proof. We
3 have that right as a citizen of this State and of the
4 United States. I don't want to stress or over-stress for
5 you, but that's an important rule, and when you're sworn
6 as a juror, you promise to follow the law that is
7 instructed to you, and I guarantee you in this case you're
8 going to be given instructions about the burden of proof
9 and beyond a reasonable doubt, and you've got to follow
10 that instruction because you promise to do that.

11 That's an element of the State's case, is the burden
12 of proof, and when you hear evidence in this case that
13 might say -- you've got an individual up on this witness
14 stand and they say, "Yep, I saw Nelson Castro distributing
15 these drugs," you're not going to be able to just take
16 that at face value because you, as a juror and
17 collectively as a jury, have to decide is he telling the
18 truth, or is it a situation where his testimony has been
19 purchased, have they purchased with promises of leniency.

20 The Solicitor himself said, "Hey, there are co-
21 defendants here," and I assume you're going to hear
22 testimony, to follow the Solicitor's lead, from some of
23 those co-defendants about what my client's actions
24 allegedly were, and you have to decide, "Well, yeah, he's
25 saying that, but is he telling us the truth, and can I

1 believe that to the point that I don't have any reasonable
2 doubt about what he's telling me," so you see how they
3 interplay.

4 It's not as simple as saying, "Well, we've got an eye
5 witness that says we saw such and such, so we've got a
6 slam-dunk." It's more difficult than that because you've
7 got to look at that testimony and say, "Okay, does he have
8 a reason to lie? We know he's going to jail probably,"
9 and we'll get into that during the course of the trial,
10 too, as these people come up and testify, and you have to
11 decide, okay, does this man's testimony convince me beyond
12 a reasonable doubt.

13 Reasonable doubt is a doubt for which you can give a
14 reason. If you think that a witness up here is testifying
15 untruthfully because his testimony has been purchased,
16 that's a reason to have a doubt about it, and so those
17 kinds of things have to be taken into consideration.

18 It's an important time for Mr. Castro. He is on
19 trial here in this courtroom. The State of South Carolina
20 is alleging that he's violated a law that our Legislature
21 has passed, and they want to put him -- they want to
22 punish him as permitted by the law that he's allegedly
23 broken, and let me tell you what, these gentlemen can do
24 that. They have all the power that they need to convict
25 him and punish him for what they think he's done that's

OPENING STATEMENT (DIGGS)

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1 illegal, but as in every case, you collectively stand as a
2 gate that says, "Wait a minute, Mr. Solicitor, and wait a
3 minute, State of South Carolina, not so fast. There's
4 some things here that you've got to do and that is to show
5 us guilt beyond a reasonable doubt," and then go forward.

6 You, collectively, -- I -- you know, it's a
7 remarkable process and a remarkable right that we have,
8 that with all the power they have as representatives of
9 our government, the jury system keeps guard over that
10 authority, and you, isn't it amazing, collectively have
11 the right to stop the State of South Carolina in their
12 tracks if you don't believe they have convinced you of my
13 client's guilt beyond a reasonable doubt. It's an
14 important consideration.

15 You were selected on this jury because you struck us,
16 both sides, as being able to keep that oath and follow
17 those instructions as they are given to you. We
18 appreciate your being here. You can see how important
19 your role is here in our case to Mr. Castro. You can see
20 that.

21 I won't take -- and we won't take any more of your
22 time than is necessary, but we've got to make sure that
23 the State of South Carolina can prove what it's alleging
24 and what has been stated to you in the opening statement
25 beyond a reasonable doubt. Thank you very much.

1 **THE COURT:** Thank you.

2 Mr. Graustein.

3 **MR. GRAUSTEIN:** Thank you, Your Honor.

4 The State calls Joe Necessary.

5 **JOSEPH NECESSARY, BEING FIRST DULY SWORN,**

6 TESTIFIES AS FOLLOWS:

7 **DIRECT EXAMINATION BY MR. GRAUSTEIN:**

8 **Q.** Mr. Necessary, what's your occupation?

9 **A.** I'm a police officer with the Myrtle Beach Police
10 Department. At the time of the case, I was assigned to
11 the Fifteenth Circuit Drug Enforcement Unit.

12 **Q.** At the time of this case, you were assigned to the
13 Drug Enforcement Unit for the Fifteenth Circuit?

14 **A.** Yes, sir.

15 **Q.** And, I guess, in addressing you, would you prefer I
16 refer to you as agent, or officer?

17 **A.** Officer is fine.

18 **Q.** Officer is fine, okay, and you're with Myrtle
19 Beach ---

20 **A.** Myrtle Beach Police, yes, sir.

21 **Q.** And this incident occurred when?

22 **A.** The date was August the 28th of 2009.

23 **Q.** Okay, and how long have you -- how long have you
24 been employed with Myrtle Beach?

25 **A.** I started my career in 1994.

1 Q. And that was with Myrtle Beach?

2 A. Yes, sir, as a police officer.

3 Q. Okay, and then you said you were assigned to the
4 Drug Enforcement Unit at the time of this -- this
5 incident?

6 A. Yes, sir.

7 Q. And how long have you been with the Drug
8 Enforcement Unit?

9 A. With Myrtle Beach, I was assigned to Narcotics
10 approximately a year and a half before they assigned us to
11 the Drug Enforcement Unit, which basically just gives us
12 jurisdiction in Horry and Georgetown County instead of
13 just Myrtle Beach, and I was assigned there for
14 approximately a year and a half as well, so about three
15 years.

16 Q. Okay, and what were your duties while with the Drug
17 Enforcement Unit?

18 A. Basically to locate and eradicate Horry and
19 Georgetown County of any illegal narcotics and sales.

20 Q. And so your primary duty was investigating
21 narcotics related cases?

22 A. Yes, sir. Narcotics was the only thing for this
23 task force that we were allowed to work.

24 Q. Okay, and you were involved in the incident that is
25 stated in the indictment in this case where the Defendant

1 is Nelson Castro?

2 A. Yes, sir. I was the actual what we call the case
3 agent, which means the officer in charge of the whole case
4 from start to finish. I did -- I was involved with every
5 aspect as where other officers could come in and help
6 sometimes with your case, but I was there with everything
7 that happened from start to finish with this case.

8 Q. Okay, and you said the arrest date -- did you say
9 what the arrest date was?

10 A. Yes, sir. It was also August 28th, 2009.

11 Q. And when did you become involved in this -- in this
12 particular case?

13 A. The first -- the first contact I had in reference
14 to the Defendant, Mr. Castro, was on August 12th of 2009.
15 I got information from what he was explaining earlier as
16 the confidential informant, that he was a person who sells
17 cocaine and ---

18 MR. DIGGS: Your Honor, I would object.

19 THE COURT: Sustained.

20 Q. Okay, but you became -- you became involved in this
21 investigation?

22 A. Yes, sir. I can give the date. August 12th is
23 when I got information about this case.

24 Q. Okay, and was it a -- what, I guess, for lack of a
25 better question, was it a quick operation?

1 **A.** No, sir. It was something I did surveillance on
2 prior to the actual operation taking place and identifying
3 Mr. Castro, and ...

4 **Q.** All right, so -- so there was some work that
5 happened over time?

6 **A.** Yes, sir. I had to corroborate -- corroborate any
7 information that was given to me as being true before I
8 could actually go into any -- starting the investigation.
9 I had to make sure the information that I gathered was all
10 true and that the person may have been involved in
11 narcotics.

12 **Q.** All right, so you were corrob- -- you corroborated
13 this information, any information that you had -- had
14 received. Had you ever supervised an operation like this
15 before?

16 **A.** Yes, sir. We -- in the three years that I worked
17 in narcotics, that's basically what we do, is we basically
18 go out and make our own cases, gather information,
19 corroborate it, and then follow it through hopefully to
20 get illegal narcotics off the street.

21 **Q.** Okay, and now with -- with the Drug Enforcement
22 Unit, that's who you were working for at the time?

23 **A.** Yes, sir.

24 **Q.** Did they have any specific procedures that you --
25 any standard procedures that you follow when conducting an

1 operation like this or ---

2 A. Yes, sir. Basically any time we conducted a
3 operation, we had to make sure we had enough manpower to
4 make sure everybody was safe, and placement of your
5 manpower so we could gather evidence for the trial.

6 Q. And did you follow those procedures in this --
7 this ---

8 A. Yes, sir.

9 Q. --- particular instance? Okay. Do you know how
10 many officers or agents were involved in this?

11 A. I can't give you an exact number, but I could
12 estimate it was between probably twelve and fifteen.

13 Q. And during the course of the operation that led to
14 the arrest of the Defendant, did y'all -- did y'all
15 utilize any sort of surveillance?

16 A. Yes, sir. We -- do you mean prior to the actual
17 case -- the case being made, the arrest being made, or
18 just throughout the whole thing?

19 Q. Through- -- throughout the whole thing.

20 A. Yes, sir. We -- we also for this case used audio
21 and video recording devices.

22 Q. You used video. Was it a camera that was ---

23 MR. DIGGS: I would object because it's kind of
24 confusing. The question was did he use any -- did he do
25 any surveillance, and then the answer was, "Yeah, we did

1 audio and video." I would ask that the Solicitor -- have
2 Your Honor ask the Solicitor to supply -- are we talking
3 about the incident that occurred supposedly on August the
4 28th of '09 or some -- some other surveillance that
5 was ---

6 **THE COURT:** Be a little more specific, if you would,
7 Mr. Necessary, as to when you used it.

8 **A.** Yes, sir. The only date that we used audio and
9 video recording devices was the date of the incident,
10 which was August the -- I think I said the 28th, August
11 the 28th of 2009.

12 **Q.** And what sort of audio, video device did you use?

13 **A.** The recorder we used for audio and video is called
14 a Oculus, and it's basically a button camera which records
15 audio and video, and it basically is a very small
16 concealed video camera.

17 **Q.** All right, so this isn't some big video camera that
18 you had set up someplace on a tripod?

19 **A.** No, sir.

20 **Q.** And where was this device located?

21 **A.** The device was located as a button on the shirt of
22 the informant that we used to buy -- purchase the cocaine.

23 **Q.** Had you ever used this device before?

24 **A.** Yes, sir, several times.

25 **Q.** Okay. Who set up this -- this video equipment?

1 A. I personally put the video and recording devices on
2 the confidential informant.

3 Q. And was it working that day?

4 A. Yes, sir.

5 Q. Did -- what's it record on?

6 A. I'm sorry?

7 Q. What's it record on?

8 A. It's -- it's a digital recorder that we download to
9 our computers and then we could place them on a DVD or a
10 CD.

11 Q. All right, and did you -- but the video equipment
12 was operating and functioning properly?

13 A. Yes, sir.

14 Q. And to your knowledge, did it function and operate
15 properly throughout the entirety of the ---

16 A. Yes, sir, from start to finish.

17 Q. Okay, and you said that the -- well, this equipment
18 was located on the person of the confidential informant?

19 A. Yes, sir. It was on the shirt that the
20 confidential informant was wearing to purchase the
21 cocaine.

22 Q. All right, and did you -- and did you put a -- did
23 it have a little card in there for recor- -- I mean a ---

24 A. No, sir. It's self-maintained. It's all internal.
25 Once you turn it on, it's recording, and when you turn it

1 off, it stops, and then we place it on our computer to put
2 on a DVD or a CD, and then we have to erase it completely
3 because there's not much memory on it.

4 Q. Okay, but that memory card, was it in the recorder?

5 A. It's internally inside. We don't have access to
6 the memory card. It's internal on the machine. We don't
7 remove them or place them in at all.

8 Q. All right, because I'm not a techie.

9 A. All right.

10 Q. I don't understand this. My wife does that, but so
11 you take this -- this piece, this recording device, this
12 equipment and plug it into the computer to download it?

13 A. Yes, sir. You plug it into the computer and then
14 you remove it from the recording device onto the computer
15 to be placed on a DVD or a CD.

16 Q. So it's not like one of those photo cards or
17 something like that ---

18 A. No, sir.

19 Q. --- that you pop out and stick in a computer?

20 A. No, sir. You actually have to plug a wire into it
21 and then into the computer.

22 Q. And was this recording device at the time you were
23 utilizing it on the 28th of August, 2009, was it blank
24 when you started using it?

25 A. Yes, sir.

1 Q. And how do you know if it's blank?

2 A. I check it prior to using it.

3 Q. And when you got that -- and I assume that device
4 was returned to you?

5 A. I'm sorry?

6 Q. I assume that recording device was returned to you?

7 A. Yes, sir; yes, sir. I personally took it off of
8 the confidential informant myself.

9 Q. And did you check to see if anything had been
10 recorded on it?

11 A. Yes, sir.

12 Q. Had anything been recorded on it?

13 A. Yes, sir. I got an audio and video recording from
14 the device onto the computer and placed it onto a DVD.

15 (DVD MARKED FOR IDENTIFICATION AS STATE'S EXHIBIT
16 NUMBER 1.)

17 Q. Officer, I'm going to hand you something and ask
18 you if you recognize it. It's marked as an exhibit.

19 A. Yes, sir. This is the DVD that I made with all the
20 recordings from the case involving Mr. Castro.

21 Q. And that -- this is what you downloaded from that
22 recording?

23 A. Yes, sir.

24 Q. Okay. Has it been altered in any way?

25 A. No, sir, not that I can tell.

1 Q. Do you know of any way to alter ---

2 A. No, sir. Once -- once you finalize it, you can't
3 add anything to it or remove anything from it to my
4 knowledge.

5 THE COURT: Has that been marked?

6 MR. GRAUSTEIN: Yes. It's marked as State's Exhibit
7 1 for identification.

8 THE COURT: For identification only?

9 MR. GRAUSTEIN: For identification.

10 THE COURT: Okay.

11 Q. So we've gone through your operation that you set
12 up and you said that you got a recording from that. Now,
13 this operation, how was it supposed to run?

14 A. This one in particular being the large amount of
15 money that we had to use to purchase the cocaine, we wired
16 the confidential informant with the audio and video
17 recording devices. We had other agents with the Drug
18 Enforcement Unit set up in the area where the transaction
19 was supposed to take place, which we had previously made a
20 recorded phone call, which is also on the DVD, to Mr.
21 Castro to do the purchase of three ounces of cocaine at
22 his residence, which was 166 Tipton Lane -- Circle in
23 Myrtle Beach, and once we wired him up, officers were in
24 the area to watch the house, and myself and Agent Lynch
25 followed the confidential informant, who drove his own

1 vehicle to the house, until he got there, and then we went
2 around the corner while other officers were sitting next
3 door in a vacant house and watched the transaction from
4 that point.

5 Q. You said a large amount of money?

6 A. Yes, sir.

7 Q. So you say there was a large amount of money
8 involved?

9 A. Yes, sir. The State supplied the money used for
10 the purchase of the cocaine in this particular incident.
11 It was Three Thousand, One Hundred and Fifty Dollars.

12 Q. And this money was given to who?

13 A. I actually get it from the bank, and then I take a
14 picture of it to document all the serial numbers of the
15 money used for the purchase. At that point prior to going
16 to make the purchase, I issue it to the confidential
17 informant while it's being recorded.

18 Q. So it's your testimony that you -- all the money
19 that you're giving to that confidential informant has been
20 identified and distinguishes it from other money?

21 A. Yes, sir, pre-recorded. We photograph it, record
22 the picture in our police report case file. That way, if
23 we recover the money, we can match it to the serial
24 numbers.

25 Q. Okay, and again, I go back to a large amount of

1 money. You said it was somewhere in the area of Three
2 Thousand Dollars?

3 A. Yes, sir, just over Three Thousand Dollars.

4 Q. Was that an -- is that an unusual amount of money?

5 A. It's one of the larger cases that I've done in this
6 area.

7 Q. It's fair to say you're not normally pulling out
8 Three Thousand Dollars ---

9 A. No, sir; no, sir.

10 Q. --- to do this -- this sort of operation?

11 All right, now, so you did -- did the operation, and
12 you said that the confidential informant came back and you
13 had a recording, and you said there were other agents
14 involved, right?

15 A. Yes, sir.

16 Q. What happened after the confidential informant came
17 back?

18 A. The confidential informant returned to meet with me
19 at our predetermined location, which at this point was the
20 Police Department Annex on the Air Force Base in Myrtle
21 Beach. We followed him from the residence all the way
22 back. We never lost any visual contact with him, and once
23 he returned back to the Police Department, he -- he handed
24 over the cocaine that he purchased, and I forgot to say
25 earlier prior to him leaving our Police Department, he was

1 searched and his vehicle was also searched by Law
2 Enforcement to make sure he didn't have any contraband, or
3 any of his own money, or anything involved with this case,
4 and when he returned and he turned over the cocaine, again
5 he was searched and his vehicle was searched as well.

6 Q. And what were the results of that?

7 A. There was nothing else found other than the cocaine
8 that he returned to us.

9 Q. And did -- was he under constant surveillance from
10 when he departed on the operation until he arrived?

11 A. Yes, sir. He was -- he was under constant
12 surveillance visually until he arrived at the house where
13 Mr. Castro was staying, and once he went inside, of
14 course, we lost visual, but we had a recording device on
15 him that also transmitted. Therefore, we could hear the
16 conversation that was going on in our vehicle. That way,
17 we could call out what was going on to the other agents
18 and keep them informed, so while he was in the house, we
19 weren't able to actually visually see him, but as soon as
20 he walked out, we picked him back up and we were able to
21 hear everything from the time he left us to the time he
22 returned.

23 Q. But, I guess, so from the time you had the
24 recording device and he was going to conduct this
25 operation, he was under constant surveillance, and what --

1 and did he stop anywhere along the way?

2 A. No, sir. The only place, once he left our contact
3 when I first put the wire on him and issued the money to
4 go to Mr. Castro's house, he went straight there, stopping
5 and talking to nobody, and on the way back, the same
6 thing. He never -- the only people he met with were
7 inside Mr. Castro's house.

8 Q. Okay. You said he brought back what he stated was
9 cocaine?

10 A. Approximately three ounces of cocaine, yes, sir.

11 (COCAINE IN SEALED ENVELOPE MARKED FOR IDENTIFICATION
12 AS STATE'S EXHIBIT NUMBER 2.)

13 Q. I show you what's been marked as State's Exhibit
14 Number 2 and ask if you can identify that.

15 A. Yes, sir. That -- that appears to be the white
16 substance that the confidential informant returned to me
17 that he purchased from Mr. Castro's house. Just so you
18 know, when he first handed it to me, it was weighed by
19 myself, and it weighed approximately ninety-one point
20 eight grams, which is just over three ounces, and I did
21 what we call a field test on it, which is basically they
22 issue us small cylinders where we take a small piece of
23 the purchased item, place it into a test kit.

24 MR. DIGGS: We would object at this point, and I
25 have a matter of law.

1 **THE COURT:** All right. Take the jury out.

2 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF**
3 **THE JURY.)**

4 **THE COURT:** All right.

5 **MR. DIGGS:** Your Honor, I was going to wait until
6 later when we actually got to the point where we were
7 going to introduce the stuff into evidence, but seeing
8 that the witness at this point was going to go into the
9 facts that he field-tested the substance and it turned out
10 to be cocaine and that it was cocaine that was taken out
11 of my client's apartment at the time supposedly that the
12 informant, confidential informant, he was wired with video
13 and audio, went into my client's home.

14 Now, what I'm getting at is I think at this point
15 based on this witness's testimony it would be proper to
16 make a Fourth Amendment motion to suppress anything that
17 came out of the apartment pursuant to the confidential
18 informant's involvement.

19 Your Honor, Mr. Castro retained me last March. I've
20 been his attorney, attorney of record, representing him
21 with respect to charges that have been brought by the
22 State of South Carolina through the Circuit Solicitor's
23 Office in this circuit.

24 I've been his attorney of record for more than a
25 year, and what I would suggest is sending a confidential

1 informant into my client's home when that informant was
2 wired with a recording device that recorded video and
3 audio without a warrant to go in, I would submit that is
4 simply a violation of the Fourth Amendment. It's an
5 unreasonable search of my client's -- the interior walls
6 of my client's dwelling and that they certainly would have
7 been required to get a search warrant at that time to send
8 this officer or this undercover agent into the confines of
9 my client's private dwelling and video tape him and audio
10 record him and actually do so while the police were
11 listening to the audio while it was being spoken.

12 Now, I understand that there are wire-tapping or wire
13 interception statutes that have been used in the past the
14 government has relied on to listen to telephone recordings
15 and things of that nature, but I would submit that it's
16 not -- those types of statutes are not applicable in this
17 kind of situation. We have simply an unreasonable search
18 and seizure of my client's -- search of my client's
19 private dwelling and seizure of whatever materials were
20 taken out at that point, and I would ask the Court to
21 suppress any evidence that was recovered by way of in
22 conversations, by way of activities, by way of substances
23 that were removed from his home.

24 **THE COURT:** All right, Mr. Graustein.

25 **MR. GRAUSTEIN:** Yes, Your Honor. First of all, the

1 confidential informant, yes he was working for the police,
2 but he was invited in. He did not force his way in.

3 Secondly, the intercepting of wire and oral
4 communication statute is very clear in South Carolina that
5 oral and wire communication may be intercepted and
6 recorded as long as a party to that conversation has
7 consented to that recording, and lastly, and that, to my
8 knowledge, -- and that very closely follows the Federal
9 statute, and to my knowledge there is not a single case
10 out there that says that this sort of operation being
11 conducted by the police and recorded ---

12 **THE COURT:** Well, I was sort of disappointed in Mr.
13 Diggs not having a case for me on that, but I'm not
14 surprised.

15 **MR. DIGGS:** But you know what, Your Honor, I looked
16 also at the cases that supported the State's position, and
17 there aren't any of those either. It is a -- it's a
18 unique situation. You know, we have the Fourth Amendment.
19 You certainly are entitled to an expectation of privacy
20 there, but for the police to be able to simply send in
21 someone into your home, prewired, and, you know, for audio
22 and video, I submit that is the same thing as the police
23 going in and conducting a search without a warrant, and I
24 would ---

25 **THE COURT:** You don't see any distinction where they

1 went in and there was an offer and an acceptance of a
2 contract to buy some drugs?

3 **MR. DIGGS:** I would submit that the wire intercept
4 statutes -- I don't know the particular statute that the
5 Solicitor is relying upon, but it's my understanding it's
6 a wire communication. I don't think it's wired in terms
7 of being set up or undercover surveillance ---

8 **THE COURT:** So your position, Mr. Diggs, would be if
9 you send a confidential informant to a residence to buy
10 drugs, you can't use those drugs?

11 **MR. DIGGS:** No, that's not what I'm arguing. What
12 I'm arguing ---

13 **THE COURT:** It's pretty close to it.

14 **MR. DIGGS:** Pretty close to it, but what I'm arguing
15 is you can't use the video and you can't use the audio
16 because the Fourth Amendment doesn't allow it. Now,
17 allowing him to go in, you know, you've got the fruit of
18 the poisonous tree here. You've got a Fourth Amendment
19 violation, and you've got the poisoned fruit that falls
20 from that tree, so to speak, and so we don't have a legal
21 act.

22 That's why I stated to the jury you hold the State to
23 a higher standard. They've got to show that their
24 conduct, I would submit respectfully, is legal, and they,
25 by going in with a wire, sending an undercover agent, so

1 to speak, in with audio and video wire, I would submit
2 that's not legal. You can't use the conversation. You
3 can't use the video, and you can't use the material taken
4 from ---

5 **THE COURT:** If that was -- if that was illegal or an
6 unlawful search and seizure, John Gotti would have never
7 been convicted.

8 **MR. DIGGS:** Well, I don't know what all the evidence
9 was in that case. They may have had a warrant to conduct
10 that surveillance, which we didn't have here.

11 **THE COURT:** Well, I would respectfully deny your
12 motion.

13 Okay, let's bring the jury back in.

14 **MR. GRAUSTEIN:** Thank you, Your Honor.

15 **MR. DIGGS:** Your Honor, could we take a two minute
16 break before they come back?

17 **THE COURT:** Okay, two minutes, sure.

18 **(THE FOLLOWING TAKES PLACE AFTER A BREAK WITHIN THE**
19 **PRESENCE OF THE JURY.)**

20 **THE COURT:** Mr. Graustein.

21 **MR. GRAUSTEIN:** Thank you, Your Honor.

22 **DIRECT EXAMINATION BY MR. GRAUSTEIN OF OFFICER NECESSARY**
23 **CONTINUES:**

24 **Q.** Officer Necessary, we were talking about -- I
25 believe you were telling us about State's Exhibit 2, and I

1 believe you said the confidential informant -- this is
2 what the confidential informant brought back to you?

3 A. Yes, sir. That's what the confidential informant
4 exchanged the funds that I issued him for, and when I
5 received it, again, I was saying I weighed it, which it
6 weighed ninety-one point eight, I believe is what I said,
7 grams, which is just over three ounces, and I field-tested
8 it, which is a small test kit that's issued to us,
9 basically gives us a preliminary reading whether the
10 cocaine or the substance is actually cocaine or contains
11 cocaine. It will turn a certain color, and it did test
12 positive that it actually did contain cocaine.

13 Q. Okay, and I just want to be clear. From your
14 observation of State's Exhibit 2, does that appear to be
15 -- have been tampered with since you took possession of
16 it?

17 A. The only thing is, which the packaging is still in
18 the -- in the thing, but in order for the Crime Lab to
19 actually test it, they had to remove the whole thing from
20 the package. When I tested it, I just cut a small slit in
21 it and removed just a very small amount, but it appears to
22 be the same cocaine, yes, sir.

23 Q. Okay, and that was returned to you by the
24 confidential informant?

25 A. Yes, sir.

1 Q. And at the time he got back, you said you searched
2 him?

3 A. Yes, sir.

4 Q. Okay. Did you find anything else?

5 A. No, sir. The -- there was nothing else on his
6 person or in the vehicle that he drove to Mr. Castro's
7 house.

8 Q. What about any of the money you gave him?

9 A. He did not have any of that money. He advised me
10 that he left it with Mr. Castro in exchange for the
11 cocaine.

12 Q. At this point, just so we're clear, the
13 confidential informant has come back, delivered State's
14 Exhibit 2 to you?

15 A. Yes, sir.

16 Q. And now is that the end of your operation?

17 A. No, sir. As a matter of fact, I -- I skipped over
18 the one part. I didn't skip over it, but the confidential
19 informant, we observed -- officers observed that were
20 sitting right outside the house that a van pulled up where
21 two other Hispanic males entered the house while he was
22 inside, and he was -- he advised me when he returned that
23 he got taken to a back bedroom and then when he came back
24 out, the two Hispanic males were leaving, but he did
25 observe them leaving the house, and he ---

1 **MR. DIGGS:** Your Honor, object to what -- what he was
2 told on the grounds that it's hearsay.

3 **THE COURT:** Yes. I don't think it's even been
4 established who said it. I'm going to sustain the
5 objection at this point.

6 You will disregard that last remark about what the
7 Defendant -- or the informant may have been told.

8 Q. Okay, so let's just talk about what -- after the
9 confidential informant has come back, and you have what's
10 marked as State's Exhibit 2 in your possession, what did
11 -- what did the officer -- or what actions did the agents
12 or officers who you were working with, ---

13 A. Yes, sir.

14 Q. --- what did they do?

15 A. As I was advising, what was observed was a van
16 pulled in with two Hispanic males who went into the house
17 for a short period of time. They then came back out of
18 the house and drove away. At that time, we had two agents
19 follow them from the house, at what point they observed a
20 traffic violation, and we had a Highway Patrolman stop
21 that vehicle, which contained the two co-defendants, Mr.
22 Bustos and Mr. Penelosa, I believe is how you pronounce
23 his name.

24 At that time, they actually were in -- they actually
25 had in their possession a large amount of the pre-recorded

1 funds that we administered to the confidential informant,
2 but they didn't have it all at that point.

3 Q. Okay, so you stopped these two and they -- and you
4 find the buy money, some of the buy money?

5 A. Yes, sir, a large amount of it, but not all of it.

6 Q. Okay.

7 A. Also at that same time, we also had Agents
8 Kitelinger and Wood approach Mr. Castro's house, knock on
9 the door, and speak with Mr. Castro. They advised that
10 they were addressing a narcotics ---

11 Q. All right, let's hang on a second. Okay. Let's
12 not talk about what -- what they -- what they did.

13 A. Okay.

14 Q. Just talk about what you saw and what you did.

15 A. Okay.

16 Q. So let's -- suffice it to say you have agents going
17 to Mr. Castro's residence?

18 A. Yes, sir. I ---

19 Q. Okay.

20 A. I assigned Agent Kitelinger and Wood to approach
21 Mr. Castro's house.

22 Q. All right, and based on whatever they did, did you
23 get any new information?

24 A. Yes, sir. Agent Kitelinger was able to get a ---

25 **MR. DIGGS:** Your Honor, we object to what the

1 information was from Agent Kitelinger.

2 **THE COURT:** I don't know what it was.

3 Let's send the jury out.

4 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF**
5 **THE JURY.)**

6 **THE COURT:** All right, now where are we going?

7 **MR. GRAUSTEIN:** The agents went in and conducted a
8 search, a consensual search. Officer Necessary wasn't
9 there, but he was provided the pictures of what was found
10 from that search and was able to identify some
11 incriminating evidence from those pictures.

12 **THE COURT:** Well, he can't really testify as to what
13 occurred during the search. He wasn't there. It would
14 certainly be hearsay.

15 **MR. GRAUSTEIN:** I'm not asking what was done during
16 the search.

17 **THE COURT:** If he were to say a search was
18 conducted. Subsequent to that search, I was presented
19 with -- or later in the day I saw an object that I can
20 identify. I mean, I can see that, but I don't want him to
21 testify as to how the search took place, who found what,
22 where it was found. I don't think that ---

23 **MR. GRAUSTEIN:** And maybe my question wasn't phrased
24 well, but that's -- essentially what I was asking him to
25 do was say a search was conducted and then he would

1 give ---

2 **THE COURT:** If you want to ask him what happened
3 next, and he said a search was conducted. Were you there?
4 No. Subsequent to that search, can you tell us what
5 happened? I was presented with some evidence.

6 **MR. GRAUSTEIN:** Yes, that's -- that's what ---

7 **THE COURT:** And I don't want you to say where it
8 came from or anything like that. We'll have to let the
9 other officers testify to that.

10 All right, bring them back in.

11 **MR. GRAUSTEIN:** All right.

12 **(THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE**
13 **JURY.)**

14 **THE COURT:** All right, Mr. Graustein.

15 **MR. GRAUSTEIN:** Thank you, Your Honor.

16 **DIRECT EXAMINATION BY MR. GRAUSTEIN OF OFFICER NECESSARY**
17 **CONTINUES:**

18 Q. Officer Necessary, I guess I wasn't asking my
19 question very -- very clearly or very artfully, but you
20 testified a search was conducted?

21 A. Yes, sir. Agents conducted a search at Mr.
22 Castro's house.

23 Q. Okay, and as a result of that search, were you
24 presented with any new evidence?

25 A. Yes, sir. They -- they called me to the scene

1 being that I was the case agent and pointed out other
2 evidence that was located there, at which time I
3 photographed and collected it.

4 Q. Okay, and what was that evidence?

5 A. It was some marijuana and some more of the currency
6 that was issued to the confidential informant in the
7 residence.

8 Q. So that the buy money, some of that buy money ---

9 A. Yes, sir.

10 Q. Did you do anything else in connection with this
11 investigation?

12 A. Once I collected all the evidence and returned, you
13 know, back to the Police Department, we took the
14 photograph of the money that I took prior to issuing it to
15 the confidential informant and was able to recover all the
16 money, and I've got it broken down as the -- to the
17 amounts of which was found if that's needed for anything.

18 Q. No. That's -- we won't get into that right --
19 right now.

20 A. A portion was found in the house and a portion was
21 found in the vehicle of the other two that were leaving.

22 Q. Okay. State's Exhibit 2, what did you do with
23 that?

24 A. I then took that, placed it in a Horry County Best
25 Packet, which is provided to us by the county. It's

1 sealed and secured and turned -- dropped over into the
2 Horry County Police Department's Property and Evidence
3 Section. At that point, a specialist will test it and get
4 back with us on the results, and weigh it, and prior to
5 dropping it there, it was a Friday afternoon, and it was
6 late and we had other cases, it was turned over to my
7 supervisor, Agent Dean Bishop, who placed it in the large
8 safe within the DEU Office, which is secured at all times,
9 and it was returned to me on Monday so I could -- from
10 Dean Bishop to drop in Horry County Evidence.

11 Q. All right, so just so the jury is clear, as you
12 were collecting this evidence, you took the drugs, or took
13 what's marked as State's Exhibit 2 and you took that to
14 the Drug Enforcement Unit Office?

15 A. Yes, sir.

16 Q. And you gave that to your supervisor, Dean Bishop?

17 A. Yes, sir.

18 Q. And what did he do with it?

19 A. He placed it in the large safe inside our office
20 which is secured and been approved to do so.

21 Q. Okay. Is that a -- is that a common way to do
22 business?

23 A. Yes, sir. In situations where we just don't have
24 time to get to the county Property and Evidence Section,
25 where they do have a night drop, but with the other cases

1 going on and other things pending that we had to take care
2 of, that's -- that's pretty common.

3 Q. Okay, and then that was a -- and this was a Friday
4 night, you said?

5 A. Yes, sir.

6 Q. Was that the night -- was that August 28th, the
7 night of August 28th?

8 A. Yes, sir.

9 Q. Okay. So that's a Friday night, and you testified
10 Monday you came and got it ---

11 A. Retrieved the cocaine from the safe.

12 Q. Retrieved it. Now, did you get it out of the safe
13 yourself?

14 A. No. Dean Bishop took it out of the safe and
15 returned it to me, which he signed the paperwork showing
16 the chain of custody, and at that time I took it to Horry
17 County Evidence and dropped it in the box.

18 **MR. DIGGS:** Your Honor, we object unless he saw Mr.
19 Bishop take it out. I don't know if he was there.

20 A. Yes, sir, I saw it.

21 **MR. DIGGS:** We don't have an objection.

22 **THE COURT:** All right.

23 Q. And between dropping that with Dean Bishop on
24 Friday night and when you picked it up on Monday -- or it
25 just says Monday. I'm not sure what time of day it was.

JOSEPH NECESSARY - DIRECT BY GRAUSTEIN
CROSS BY DIGGS

66

1 A. Two-thirty in the afternoon.

2 Q. At two-thirty in the afternoon on Monday, did you
3 -- on that Monday, did you inspect the package?

4 A. Yes, sir; yes, sir. It was just as I had left it.
5 Like I said, it goes in the Horry County Best Package
6 which is sealed and is tamper-proof, and just to be more
7 specific, we actually observe Agent Bishop place it in the
8 safe, and shut the safe, and lock it, and then we observe
9 him retrieve the items from the safe.

10 Q. Okay, and it did not appear to have been tampered
11 with?

12 A. No, sir.

13 Q. Or anything removed from the Best package, or
14 anything?

15 A. No, sir.

16 Q. Was -- the Defendant, was he arrested that day?

17 A. Yes, sir. He and the two co-defendants were all
18 arrested that day.

19 MR. GRAUSTEIN: Please answer any questions Mr.
20 Diggs has.

21 THE COURT: Mr. Diggs.

22 CROSS EXAMINATION BY MR. DIGGS:

23 Q. Officer Necessary, the confidential -- did you tell
24 us who the confidential informant was?

25 A. I did not, sir.

1 Q. Was it Mr. Norris?

2 A. Yes, sir, it was.

3 Q. Okay, and what do you know about Mr. Norris in
4 terms of his drug dealing and drug involvement, or drug
5 history?

6 A. The information that I had with him on his drug
7 history, basically the involvement I had when I first met
8 him was I got a call from one of the Solicitors in
9 reference to him having information of drugs being sold by
10 Mr. Castro, and I believe he was being charged -- he was
11 being charged with ---

12 Q. Did I ask you anything about Mr. Castro's past?

13 A. No, sir.

14 Q. Listen to my question, ---

15 A. Yes, sir.

16 Q. --- okay, because you didn't know anything about
17 Mr. Castro, correct?

18 A. Prior to Mr. Norris, no, sir.

19 Q. I asked you what you knew about Mr. Norris's drug
20 history.

21 A. I didn't know any- ---

22 Q. Does he use drugs? What do you know now as you sit
23 here?

24 A. I know that he was charged with burglary and I
25 didn't -- I don't know of any drug past for him.

1 Q. All right. Is he being charged in this case or do
2 you know?

3 A. In this case, no, sir.

4 Q. Do you have any knowledge concerning any drug
5 charges against him in the past?

6 A. I believe he has been charged in the past, but not
7 by me, sir.

8 Q. Okay, but he's been charged by other police
9 detectives or agencies?

10 A. I don't have his criminal history in front of me,
11 but I believe he has.

12 Q. Did you get a -- do you have access to his criminal
13 history?

14 A. I do, yes, sir.

15 Q. And so if I called you back as a defense witness
16 and asked you about his criminal history, you are able to
17 get that information for us?

18 A. Yes, sir.

19 Q. All right. Would you do that?

20 A. If that's what you need, sir.

21 Q. I think it would be useful for us to know about his
22 criminal history, especially if it involved drug use, yes,
23 sir. Do you agree?

24 A. I'm sorry?

25 Q. Do you agree with me?

1 A. I don't understand what you are asking me.

2 Q. Do you agree that it would help us to know about
3 his drug use and drug history if he has one?

4 A. If he has one, yes, sir.

5 Q. All right, because would it -- let me ask you this:
6 Your testimony is you know that some cocaine was within or
7 inside of Mr. Castro's apartment?

8 A. No, sir. I -- I got information that he could buy
9 cocaine from Mr. Castro.

10 Q. And supposedly where was Mr. Castro when that took
11 place?

12 A. He called the day of the -- the arrest.

13 Q. No, no, when Mr. Castro allegedly sold the cocaine
14 that you're saying he sold to Mr. Norris?

15 A. It was in -- it was in Mr. Castro's house.

16 Q. All right, it was in his apartment, okay?

17 A. That's where the transaction took place, yes, sir.

18 Q. All right. Now, do you have any knowledge as to
19 how the cocaine got in Mr. Castro's apartment?

20 A. As far as I know, what we assume happened and ---

21 Q. I don't want you to assume.

22 A. Okay, yes, sir.

23 Q. I want to know if you know ---

24 A. I know that he returned from Mr. Castro's house
25 with the cocaine.

1 Q. All right. Do you know how the cocaine ---
2 A. No, sir.
3 Q. --- got in Mr. Castro's apartment to begin with?
4 A. No, sir, I don't know.
5 Q. Can you tell us under oath beyond any doubt that
6 Mr. Norris did not have anything to do with putting that
7 cocaine in the apartment?
8 A. Not the day that he was with us, yes, sir.
9 Q. No, all right, but he could have on another
10 occasion, correct?
11 A. I guess he could have, yes, sir.
12 Q. You don't know?
13 A. I don't know.
14 Q. He has -- you do know he has a drug past?
15 A. I -- I -- I believe he did. I don't know for sure.
16 I haven't looked at his criminal history lately.
17 Q. All right, but you've looked at it before?
18 A. Yes, sir.
19 Q. And he's doing something to try to work off
20 criminal charges against him, correct?
21 A. A burglary charge, yes, sir.
22 Q. Yeah, and what, by the way, can you get for
23 burglary?
24 A. I'm not real sure.
25 Q. Was it a first degree burglary?

1 A. It was a second degree burglary -- burglary.

2 Q. Well, were the facts such that they supported a
3 first degree burglary?

4 A. I don't know, sir.

5 Q. Okay. It could have been ---

6 A. It wasn't my case.

7 Q. It wasn't your case, but anyway, he's trying to
8 save his back side, we know that?

9 A. I don't know why he's working with other ---

10 Q. And you're will- -- ready, willing, and able,
11 correct, to help him?

12 A. If he knows where there's drugs being sold and he
13 can help us, yes, sir.

14 Q. Right. Now, when you sent him in there, who was it
15 that wired him up with all this electronic stuff?

16 A. It was me, sir.

17 Q. You did it?

18 A. Yes, sir.

19 Q. And what Judge gave you the warrant in order to go
20 in there within the confines of his home with a video
21 camera and an audio recording?

22 A. I didn't have a warrant and I didn't go in his
23 house with an audio and video recorder.

24 Q. All right, but you sent your agent, because he was
25 working for you, correct?

1 A. He went into Mr. Castro's house. That's where Mr.
2 Castro told him to meet him.

3 Q. But you -- you hired him? You sent him in there?
4 He was working for you, correct?

5 A. He was working for -- with us.

6 Q. Okay, and for you?

7 A. He was working with me.

8 Q. All right.

9 A. I mean, I didn't pay him for it.

10 Q. He was working for the State of South Carolina and
11 you and what other police officers had put him up to that,
12 correct?

13 A. I don't understand. I don't agree with put him up
14 to it. He did it on his own free will, but yes, he was
15 working with us.

16 Q. Did he go down and buy a video camera to use?

17 A. No, sir.

18 Q. All right. You gave that to him, didn't you?

19 A. I placed it on -- I didn't give it to him. We
20 wired him with it, but we retrieved it.

21 Q. He got it from you?

22 A. Yes, sir.

23 Q. Bottom line, he got it from you? He didn't get it
24 from me or the Judge, ---

25 A. Yes, sir.

1 Q. --- he got it from you?

2 A. (No response.)

3 Q. And you sent him in there with instructions to
4 purchase cocaine, correct?

5 A. That's what he was going to buy, drugs, from the
6 house, yes, sir.

7 Q. And you told him to do that if he could do it,
8 correct?

9 A. Yes, sir.

10 Q. All right, and you wanted him video taped while
11 that was occurring, correct?

12 A. Yes, sir.

13 Q. And you wanted his audio recorded ---

14 A. Yes, sir.

15 Q. --- while that was going on, correct?

16 A. Yes, sir.

17 Q. And we were doing this in order to protect or to
18 help Mr. Norris in part?

19 A. He was going to help himself, yes, sir.

20 Q. Right, and you were going to do everything you can
21 to help Mr. Norris, correct?

22 A. It's not my decision to help him. It's the
23 Solicitor's decision.

24 Q. But you're not going to object to it, are you?

25 A. If he can help me get narcotics with the thing that

1 he was going for me ---

2 Q. And when he comes in here to Court, you're going to
3 in some way or fashion, or your fellow officers, are going
4 to help Mr. Norris get a less amount of time in prison for
5 his burglary, correct?

6 A. That's -- that's not my decision, sir.

7 Q. I know, but you're going to help him?

8 A. Okay. I'm going to give the Solicitor the
9 information that he provided us with and what the case
10 turned out, yes, sir.

11 Q. In order that it be used to help Mr. Norris,
12 correct?

13 A. Yes.

14 Q. All right, just real simple. Now, why didn't you
15 go and get a warrant in this case?

16 A. Because it's not needed.

17 Q. Have you ever read the Fourth Amendment?

18 A. Yes, sir.

19 Q. And who told you that it wasn't needed? At that
20 time, who told you it wasn't needed?

21 A. It was a decision by me and my supervisors from the
22 knowledge of the law.

23 Q. All right, and you made a decision on your own that
24 you didn't have to have a warrant to send a video tape
25 machine and an audio recording device into a private

1 residence?

2 A. I'm sorry; you said I didn't have?

3 MR. GRAUSTEIN: Objection, Your Honor. The
4 Defendant is basically asking the officer to make a --
5 he's asking him to make -- to draw a legal conclusion.

6 MR. DIGGS: No. I'm asking him if he made the
7 decision, Your Honor, to send somebody into a private
8 residence with a video recorder and an audio recording
9 device.

10 THE COURT: Well, I think he's answered the
11 question, but answer it again.

12 A. Yes, sir, me and my supervisors did.

13 Q. All right, and you made the decision that you
14 didn't have to have a warrant to do that?

15 A. Yes.

16 Q. And I'm asking you did any of your superiors tell
17 you that you didn't have to have a warrant?

18 A. Yes, sir. It was common knowledge among all of us,
19 and, yes, sir.

20 Q. All right, so if you do that on a regular -- well,
21 let me ask you this: Do you do that on a regular basis?

22 A. Yes, sir.

23 Q. Has any Judge anywhere ever told your department
24 that you didn't have to have a warrant to send an
25 undercover agent into a private home and video tape them

1 and audio record them?

2 A. It's never come up in any of my cases.

3 Q. Never come up?

4 A. (No response.)

5 Q. Did you -- is it a reasonable suggestion or a
6 reasonable argument that a warrant might be necessary ---

7 **MR. GRAUSTEIN:** Objection, Your Honor.

8 Q. --- for the police to do that ---

9 **MR. DIGGS:** I didn't finish the question.

10 I mean, I understand -- the question is, Your Honor,
11 if the witness believes it's reasonable to send a police
12 agent into a private home armed with a video recorder and
13 an audio recording device without a warrant. That's the
14 question.

15 **THE COURT:** Well, what you're doing is asking him to
16 draw a legal conclusion, and if he doesn't know, he
17 doesn't know.

18 **MR. DIGGS:** Your Honor, I asked him if he thought it
19 was reasonable.

20 **MR. GRAUSTEIN:** Your Honor, I would also object that
21 he asked him what his -- asked him for his opinion as to
22 reasonableness of a question of a legality.

23 **MR. DIGGS:** Well, let me ask it this way.

24 **THE COURT:** All right.

25 Q. You knew where Mr. Castro lived, correct?

1 A. Yes, sir; yes, sir.

2 Q. And you didn't have any information that he was
3 about to run or skip out of town?

4 A. No, sir.

5 Q. You had plenty of time to get a warrant if you
6 chose to do so?

7 A. Yes, sir.

8 Q. There weren't any exigent circumstances there that
9 would have required that you act immediately and with
10 great haste?

11 A. There was no immediate circumstances that we had to
12 get a warrant.

13 Q. All right. You just made a decision that you were
14 not going to do it?

15 A. According to the law, we -- we didn't have to.

16 Q. Well, I'm not asking you that. I'm asking you if
17 you made a decision then and there to send him in without
18 the warrant, yes or no?

19 A. Not then and there, no, sir. It was a few days
20 working.

21 Q. At any time thereafter, did you make a decision
22 to ---

23 A. It was our decision ---

24 Q. --- send him in there without a warrant?

25 A. It was our decision to send Mr. Norris to Mr.

1 Castro's house without a warrant, yes.

2 Q. All right, that's all I asked, and your testimony
3 is that you, as an agent for the State, can do that
4 whenever and wherever you choose to do so?

5 A. With the -- with the -- according to the law, yes,
6 sir.

7 Q. I didn't ask you according to the law. It's your
8 opinion you can do that whenever and wherever you choose
9 to do?

10 A. I'm not ---

11 MR. GRAUSTEIN: Objection, Your Honor. He's
12 asking ---

13 THE COURT: I think his response is appropriate, Mr.
14 Graustein, according to the law.

15 MR. GRAUSTEIN: All right.

16 Q. Mr. -- or Officer Necessary, have you any knowledge
17 about whether Mr. Norris had pled guilty to that burglary
18 that he was charged with?

19 A. No, sir. I just gave the Solicitor the information
20 from the case that he made with me, and then it was the
21 Solicitor's decision.

22 Q. Okay.

23 MR. DIGGS: Thank you very much. I appreciate it.

24 A. Yes, sir. Thank you.

25 THE COURT: Mr. Graustein.

1 **MR. GRAUSTEIN:** Thank you.

2 **REDIRECT EXAMINATION BY MR. GRAUSTEIN:**

3 Q. And just for a clar- -- Officer Necessary, did you
4 make any recommendation as to the Solicitor's treatment of
5 Mr. Norris?

6 A. I advised that he was very cooperative and that we
7 did have a good case, and that if there was any leniency
8 she could show him, yes, sir, I did.

9 Q. And under the circumstances that were present here
10 in sending Mr. Norris in to Mr. Castro's residence with a
11 video and audio recording, to your knowledge do you need
12 to obtain a warrant prior to doing that?

13 A. No, sir. According to the law, it's not needed.

14 **MR. GRAUSTEIN:** Thank you.

15 **MR. DIGGS:** Your Honor, I would move that be
16 stricken. This is not an attorney. He's not a Judge. He
17 doesn't know ---

18 **THE COURT:** You've been making him one all
19 afternoon.

20 **MR. DIGGS:** No. I asked him what his opinion was.

21 **THE COURT:** Well, I think that's what Mr. Graustein
22 just asked him. I'm going to allow it.

23 Anything further, Mr. Graustein?

24 **MR. GRAUSTEIN:** Nothing further, Your Honor.

25 **THE COURT:** Anything further, Mr. Diggs?

1 MR. DIGGS: Not at this time.

2 THE COURT: All right.

3 You can step down, Mr. Necessary.

4 Call your next witness.

5 MR. DIGGS: Your Honor, I don't want to excuse him,
6 though, because it may be necessary for us ---

7 THE COURT: I think he's lead. He's going to be
8 here.

9 MR. DIGGS: Thank you.

10 MR. GRAUSTEIN: Your Honor, just for the Court's
11 information, I'm going to take a couple of witnesses out
12 of order that's chain witnesses just so they can ---

13 THE COURT: Very well.

14 MR. GRAUSTEIN: --- give their testimony and be
15 done.

16 I would call Donna Bell.

17 DONNA BELL, BEING FIRST DULY SWORN, TESTIFIES AS
18 FOLLOWS:

19 MR. DIGGS: Your Honor, could we approach for just a
20 second?

21 THE COURT: Yes.

22 (A Bench conference was held in the presence, but out
23 of the hearing, of the jury.)

24 THE COURT: Take the jury back for just a moment,
25 sir.

1 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF
2 THE JURY.)

3 THE COURT: All right, Mr. Graustein.

4 MR. GRAUSTEIN: Thank you, Your Honor.

5 (OFF THE RECORD)

6 ON THE RECORD

7 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF
8 THE JURY.)

9 THE COURT: Bring the jury in.

10 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
11 JURY.)

12 THE COURT: All right, Mr. Graustein.

13 MR. GRAUSTEIN: Thank you, Your Honor.

14 Was the witness sworn?

15 THE CLERK: Yes.

16 DIRECT EXAMINATION BY MR. GRAUSTEIN:

17 Q. Just for the jury's benefit, could you state your
18 name.

19 A. Donna Bell.

20 Q. Donna Bell, and what's your occupation?

21 A. I'm an Admin. Assistant at the Horry County Police
22 Department in the Evidence Division.

23 Q. Okay, and you're employed with the Horry County
24 Police Department. Now, how long have you been employed
25 with them?

1 A. I've been in the Evidence Department for over a
2 year.

3 Q. When you say the Evidence Department, were you
4 employed somewhere else within the department before that?

5 A. I was in Records in the Horry County Police
6 Department.

7 Q. And what are your duties as an Evidence clerk?

8 A. I key and release evidence.

9 Q. Okay, and do your duties include accepting evidence
10 collected from drug investigations?

11 A. Yes, sir.

12 Q. And do you have evidence -- and how do you accept
13 that if it's turned in to you?

14 A. By this case, it was dropped off, you know, in a
15 Best Kit, and we just take it out to lockers.

16 Q. Was it handed to you personally?

17 A. Sometime it is and sometimes it's dropped off in a
18 drop slot.

19 Q. Okay, and was this put in the drop?

20 A. To my knowledge, I don't remember. It could have
21 -- it's still in a, you know, sealed place where no one
22 can't get ahold of it.

23 Q. And what sort of procedures do you have when you're
24 handling the evidence?

25 A. We take it -- we sign the chain of custody because

1 we are the one that, you know, keep it in, and the
2 evidence is in a, you know, sealed plastic bag. We don't
3 even really handle -- we just handle the plastic bag, the
4 envelope and plastic bag that's sealed.

5 Q. Okay, and can you tell me if you received what's
6 been marked as Defendant's Exhibit -- or State's Exhibit
7 2?

8 A. Yes, sir.

9 Q. And so you received that at the Horry County Police
10 Evidence?

11 A. Yes, sir.

12 Q. Okay. Does it appear to be in the same condition
13 as when you received it?

14 A. Yes, sir.

15 Q. In case you need to see it ---

16 A. Yes, sir, except when I get it, it's in this sealed
17 container, and then when I release it to Lisa, she seals
18 it in this container.

19 Q. Okay. Is it in the same condition as when you
20 initially received it?

21 A. Yes, sir.

22 Q. Let me ask you this: Do you remember when that was
23 turned in to you?

24 A. It was last year, in '09.

25 Q. I'm going to hand you a document to look at to

1 refresh your memory. I'm going to show you this document
2 and tell me if you can identify it for me.

3 A. Yes, sir.

4 Q. What is it?

5 A. This is our chain of custody forms that handle the
6 evidence, and like my last one is where I handled it and
7 released it.

8 Q. Okay, and can you tell from that document when you
9 received that Exhibit 2 in evidence?

10 A. August the 31 of '09.

11 Q. August 31 of '09, okay. All right, thank you.

12 Oh, I'm sorry. So you received what's been marked
13 as State's Exhibit 2 at the Horry County Evidence on
14 September -- well, I'm sorry, was it August 31st?

15 A. Yes, sir.

16 Q. Okay, of 2009. All right, and do you know who you
17 got the item from? Would it help you if you looked at
18 this chain of custody?

19 A. It was Necessary -- Necessary, ---

20 Q. Officer Necessary?

21 A. Officer Necessary.

22 Q. And where -- where would this have occurred? Where
23 would you have taken custody of this?

24 A. In the Evidence Department, at the Police
25 Department in Horry County.

1 Q. Okay. When you received it, did the packaging
2 appear to be damaged or tampered with in any way?

3 A. No, sir.

4 MR. DIGGS: Your Honor, I would have to object to
5 that because how would she know if it had been tampered
6 with. Maybe she can describe what it looked like when she
7 received it, but ---

8 THE COURT: I think that's correct, Mr. Graustein.
9 Was it in a sealed package, that sort of thing?

10 A. Yes, sir, it was in a sealed packet.

11 Q. And did you receive it in the packaging that it's
12 in right now?

13 A. Yes, sir, this package right here, yes, sir, uh-
14 huh.

15 Q. Did you transfer that Exhibit to anybody else after
16 you received it?

17 A. I transferred it to Lisa.

18 Q. To Lisa. When you refer to Lisa ---

19 A. Lisa Floyd, our drug lab.

20 Q. And why was it transferred to her?

21 A. To be tested.

22 Q. Do you know when it was transferred? Would it help
23 if you were able to look at this, ---

24 A. Yes, sir.

25 Q. --- I'm sorry, the chain of custody?

- 1 A. February the 1st of '10, this year.
- 2 Q. February 1st of 2010, you transferred State's
- 3 Exhibit 2 to Lisa Floyd?
- 4 A. Yes, sir.
- 5 Q. While State's Exhibit 2 was in your custody, did
- 6 you tamper with it at all?
- 7 A. No, sir.
- 8 Q. Did you manipulate it at all?
- 9 A. No, sir.
- 10 Q. Did you change or alter it in any way?
- 11 A. No, sir.
- 12 Q. And did you -- did you follow all procedures to
- 13 maintain the integrity of the item while it was in your
- 14 custody?
- 15 A. Say that again, sir.
- 16 Q. Did you follow all procedures to maintain the
- 17 integrity of State's Exhibit 2 while it was in your
- 18 custody?
- 19 A. Are you saying follow all ---
- 20 Q. Follow all procedures?
- 21 A. Yes, sir. Sorry.
- 22 Q. Of your knowledge, nothing happened with regard to
- 23 its integrity?
- 24 A. Correct.
- 25 Q. And when you were -- after the -- and did you

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1 receive the item back from Lisa Floyd or from somebody at
2 the drug lab ---

3 A. You mean after she tested it?

4 Q. --- after they tested it?

5 A. Yes, sir. She -- she releases it back to me. Then
6 we -- we seal it -- I meant put it in a vault.

7 Q. Okay. To your knowledge, and you received it back,
8 and where has State's Exhibit 2 been since you got --
9 since you received that back?

10 A. It's in a secure vault, a sealed vault, that no one
11 has access.

12 Q. At the Horry County Police Department?

13 A. Yes, sir.

14 Q. And has it been there since you received it back?

15 A. Yes, sir.

16 Q. And how did it get to the Courthouse today?

17 A. I brought it.

18 **MR. GRAUSTEIN:** Thank you very much. Answer any
19 questions Mr. Diggs may have for you.

20 **THE COURT:** Mr. Diggs.

21 **MR. DIGGS:** Thank you, Your Honor.

22 **CROSS EXAMINATION BY MR. DIGGS:**

23 Q. Ms. Bell, I don't think I have any questions, but
24 may I ask how do you spell your last name?

25 A. I'm sorry; B-E-L-L.

1 Q. Bell, okay.

2 MR. DIGGS: I don't have any questions at this
3 point.

4 THE COURT: All right.

5 Step down, Ms. Bell.

6 Mr. Graustein.

7 MR. GRAUSTEIN: Thank you, Your Honor.

8 The State would call Lisa Floyd.

9 LISA FLOYD, BEING FIRST DULY SWORN, TESTIFIES AS
10 FOLLOWS:

11 DIRECT EXAMINATION BY MR. GRAUSTEIN:

12 Q. Ms. Floyd, where are you currently employed?

13 A. For the Horry County Police Department. I run the
14 Drug Analysis Laboratory.

15 Q. And working at the Drug Analysis Laboratory, what
16 are your duties?

17 A. I receive and test what's believed to be controlled
18 substances that are turned in by police officers.

19 Q. And I'm going to show you what's been marked as --
20 how long have you been employed with the Horry County Drug
21 Analysis Department?

22 A. I've run the Drug Lab since September of 2002.

23 MR. GRAUSTEIN: If there's no objection, I believe
24 the Defense is going to stipulate that Ms. Floyd is an
25 expert in drug analysis and chemistry.

1 **MR. DIGGS:** Your Honor, it's my understanding she
2 has twelve years experience in that. You know, given
3 that, I'm not going to object to ---

4 **THE COURT:** All right. She's so admitted as an
5 expert.

6 **MR. GRAUSTEIN:** Thank you.

7 **Q.** Ms. Floyd, I show you what's been marked as State's
8 Exhibit 2 and ask if you can identify that?

9 **A.** Yes, I can.

10 **Q.** Okay, and what is that?

11 **A.** This is a package that I re-sealed after testing.
12 The lab numbers that are written on the internal package,
13 all of the evidence packaging, as well as heat-sealed into
14 the top along with my initials and the date that it was
15 re-sealed all match the lab number for this case, as well
16 as the control number that is preprinted on that inner
17 envelope.

18 **Q.** And when did -- and do you know when you took
19 custody of that item?

20 **A.** I received it from Donna Bell on February 1st,
21 2010.

22 **Q.** Okay, and when -- so you analyzed this stuff. Did
23 you manipulate or did you open the package at all while it
24 was in your custody?

25 **A.** Yes, I did. When it comes to me, it's in the blue-

1 designed package that you see inside here, and it's
2 actually folded in half so you only see half of it. When
3 I receive that, there's a line at the bottom on the front.
4 It says "Cut here to open," and I open it in that place
5 every time. I remove whatever is inside of it, and it
6 gets removed from whatever packaging it might be in inside
7 of in this envelope as well, and that is to determine a
8 weight separate from any packaging.

9 Q. And did you conduct -- and you were doing this to
10 conduct a test of this material?

11 A. That's correct.

12 Q. Now, what were you testing for exactly?

13 A. This with any evidence that I receive, I simply
14 test for the presence of any controlled or prescription
15 substances.

16 Q. Now, is this the same test that Officer Necessary
17 testified that they conduct out there on the street?

18 A. No, it is not.

19 Q. Okay. How does it differ?

20 A. I do conduct what's called a presumptive test,
21 which is similar to an officer's sealed test kit. In this
22 case, it would be a simple color test similar to what he
23 described and the same as he testified, it tested
24 presumptively positive for cocaine, and at that point, I
25 do what's called a confirmatory analysis and that is.---

1 **MR. DIGGS:** Your Honor, I want to make sure that the
2 record shows our objection to this testimony based on ---

3 **THE COURT:** All right.

4 Go ahead.

5 A. The confirmatory analysis is done with what's
6 called a gas chromatograph with a mass selective detector
7 or a GCMS for short. That is a common forensic instrument
8 that's used in drug analysis. It's been used for many
9 decades, and it simply gives an electronic printout as to
10 a fingerprint, if you will, for whatever substances might
11 be in there, and then that fingerprint, if you will, is
12 compared to an electronic library that has been around for
13 decades, and it gives me what it believes is the best
14 match, and then at that point I have to look at that and
15 determine whether or not I agree with it, and as long as I
16 agree with the confirmatory analysis results and the
17 presumptive results match, then at that point I would
18 consider that substance positive for that controlled
19 substance.

20 Q. All right, and other than opening the packaging as
21 necessary for you to conduct your test, did you maintain
22 the integrity of -- of that item?

23 A. Yes.

24 Q. And when you were done with -- when you were done
25 with your test, what did you do with -- with State's

1 Exhibit 2?

2 A. When I'm finished testing, then the original,
3 what's called I referred to as the Best Kit, which is in
4 our blue-edged envelope in there, is placed into this
5 outer clear bag that you see, and the evidence is
6 repackaged in a Ziploc bag. I use the little red-top
7 Ziplocs, and any packaging that came with that submission
8 also would be repackaged in this clear baggie with it as
9 well.

10 Q. After you have completed your test, in your expert
11 opinion, what is the substance that is in that package
12 that's been marked as State's Exhibit 2?

13 A. You have my report there.

14 (LAB REPORT MARKED FOR IDENTIFICATION AS STATE'S
15 EXHIBIT NUMBER 3.)

16 Q. I'm going to hand you what's marked as State's
17 Exhibit 3. Can you identify that?

18 A. This is a copy of the drug report that was issued
19 for this particular case.

20 Q. And will that tell you -- does that report -- do
21 you prepare that as a routine matter of following your
22 testing?

23 A. Yes, I do.

24 Q. And after reviewing your report, in your expert
25 opinion, what is the substance contained in the package

1 marked as State's Exhibit 2?

2 THE COURT: All right, your objection is continuing
3 as to all this testimony.

4 MR. DIGGS: Thank you, Your Honor.

5 THE COURT: Thank you, Mr. Diggs.

6 Go ahead, Mr. Graustein.

7 Q. And after reviewing your report, in your expert
8 opinion, what is the substance that is contained in that
9 package marked as State's Exhibit 2?

10 A. There was one item present, a compressed white
11 powder substance and a sandwich baggie wrapped in plastic
12 wrap, and it was found to be cocaine and a substance
13 called Levamisole, a de-worming agent, and the amount of
14 the substance was eighty-three point six nine grams, which
15 is one thousand, two hundred ninety one point three three
16 grains.

17 Q. Your report states that this is cocaine and some
18 other substance. What other substance was that exactly?

19 A. Levamisole. Often there will be other substances
20 present in street drugs, and a lot of times they're just
21 cutting agents.

22 In this case, it happened to be one that is for
23 veterinary purposes, and on my reports I list anything
24 that is a controlled or prescription substance, so in this
25 case it was listed because it is considered a prescription

1 substance.

2 Q. And again, what was the weight of that substance
3 that tested positive for cocaine?

4 A. The total weight was eighty-three point six nine
5 grams, which is one thousand, two hundred and ninety one
6 point three three grains.

7 Q. Could you state what the lab report number is on
8 your report there?

9 A. Yes. The lab number that I assign it is L100078.

10 Q. And are there any other identifying marks that make
11 it unique to this case?

12 A. There's a control number on the package that it's
13 submitted in, which begins with an H for Horry County, and
14 in this case it was 011514, which is also on my report and
15 all the paperwork that follows this case.

16 MR. GRAUSTEIN: Your Honor, the State would move to
17 admit Ms. Floyd's report into evidence.

18 MR. DIGGS: No additional objection, Your Honor.

19 THE COURT: Subject to your prior objection.

20 (STATE'S EXHIBIT NUMBER 3 ADMITTED INTO EVIDENCE.)

21 Q. And following your -- your -- the completion of
22 your testing, and resealing the package as you stated,
23 then what do you do with stuff that's sent to you for
24 testing?

25 A. Typically I store it until I fill a box that goes

1 in my safe and then it's all bulk-transferred back to
2 Evidence at one time, and there's a separate chain of
3 custody sheet that's used at that time.

4 Q. And to your knowledge, has what's been marked as
5 State's Exhibit 2 been tampered with other than what you
6 were aware of as far as for your testing?

7 A. No. It's still air-tight from where I sealed it at
8 the top.

9 MR. GRAUSTEIN: The State would move to enter
10 State's Exhibit 2 into evidence subject to the final chain
11 of custody witness, Your Honor.

12 THE COURT: All right.

13 MR. DIGGS: Objection.

14 THE COURT: No objection?

15 MR. DIGGS: We do object, Your Honor, on the same
16 basis.

17 THE COURT: All right.

18 (STATE'S EXHIBIT NUMBER 2 ADMITTED INTO EVIDENCE.)

19 MR. GRAUSTEIN: Your Honor, may I present it to the
20 jury?

21 THE COURT: Yes.

22 MR. GRAUSTEIN: Ms. Floyd, please answer any
23 questions the Defense may have.

24 MR. DIGGS: May it please the Court.

25 THE COURT: Yes.

1 **CROSS EXAMINATION BY MR. DIGGS:**

2 Q. Ms. Floyd, how are you?

3 A. Good, thank you.

4 Q. What is Levamisole?

5 A. Levamisole is -- it's a de-worming agent. I
6 believe it's typically used by farmers. It's something
7 that commonly shows up in cocaine samples.

8 Q. What kind of agent did you say, a farming agent?

9 A. My research at the time, the first time I saw it,
10 that was commonly what came up on the Internet was farming
11 use for de-worming farm animals.

12 Q. De-worming?

13 A. De-worming, yes.

14 Q. So I assume it looks like cocaine?

15 A. I truly have never seen Levamisole by itself so I
16 don't know.

17 Q. But it showed up in your analysis?

18 A. That's correct, yes.

19 Q. Now, when you do the analysis, are you able to
20 break it down into what percentage is cocaine and what
21 percentage is Levamisole or what other agent might be
22 present?

23 A. Certain agent -- or certain cutting agents will
24 show up or just other things present in that sample. Not
25 all other things that are in there will show up simply

1 because it's how the instrument is set up because we're
2 looking specifically to find if there's controlled or
3 prescription substances there, so a few things are not
4 going to show up that way, and I do not do any type of
5 purity analysis, to answer that question.

6 Q. Okay, so your test will only check for the presence
7 of cocaine or not present -- not -- no presence of
8 cocaine? Do you understand what I'm saying?

9 A. It's simply a qualitative test. Yes, there's no
10 quantitation involved.

11 Q. Okay. How sensitive is your measurement, do you
12 know?

13 A. It's fairly sensitive, yes.

14 Q. In other words, of the three, we got -- you say
15 eighty-three grams, not ninety-one, but eighty-three?

16 A. Eighty-three, yes, eighty-three point nine one, I
17 believe.

18 Q. Okay. Now, of that eighty-three grams, can you
19 tell us about how much of that would have to be cocaine in
20 order to register on your test equipment?

21 A. I really cannot.

22 Q. Okay. It could be one gram?

23 A. Sure; yes.

24 Q. So your equipment would be sensitive enough to test
25 for the presence of one -- one gram of cocaine even though

1 it was in a mixture that totaled eighty-three grams?

2 A. Yes, definitely. In this particular case, the --
3 the printout that I receive shows me -- it's a measure of
4 time, just a chart. It has time on the X-axis and then on
5 the Y-axis would be abundance, which is simply how much
6 the instrument detects is there, and in this case, I use
7 approximately the same amount of sample every time so as
8 not to overload the instrument, and it's -- the cocaine
9 present is actually the highest abundance constituent of
10 that sample.

11 Q. Okay, and explain to me again, please, ma'am, how
12 you know that.

13 A. Simply looking at the abundance levels from the
14 instrument's printout.

15 Q. Okay. What does the abundance level tell you?

16 A. That there is plenty enough present for the
17 instrument to detect it. I also use an internal standard
18 and I know approximately what the abundance level should
19 be each time for that.

20 Q. Okay. Now, tell me again, because I think I missed
21 this. What are you talking about when you say -- when you
22 mention the abundance level?

23 A. Simply put, it's just a measure of how much ---

24 Q. Let me ask you this question: Your abundance level
25 would be the abundance necessary in order to register on

1 your equipment?

2 A. There -- there is a minimum threshold, and that
3 minimum threshold would be the base line.

4 Q. Is that the abundance level that we're talking
5 about?

6 A. The abundance level of the cocaine in this case is
7 about four million times the base line.

8 Q. All right, which means that there's enough sample
9 there to get a legitimate or reliable measurement with the
10 use of your equipment?

11 A. That's correct, yes.

12 Q. All right, but it's not telling us what the
13 breakdown in terms of the percentage of that substance is
14 in terms of cocaine and Levamisole?

15 A. No.

16 Q. In fact, when you're asked to check for the
17 presence of cocaine, that's not even something that in
18 your job you're asked to check, isn't that correct?

19 A. You're asking do I routinely check the purity level
20 on substances?

21 Q. Yeah, are you asked. Do police agencies ask you to
22 check the purity level?

23 A. No, I do not -- they do not.

24 Q. Okay, all right, and that's not something that
25 normally the law is going to ask you to do?

1 A. That's correct.

2 Q. So if we had hypothetically a substance -- let's
3 say we had a substance here of, let's say, twenty-five
4 grams of Levamisole and we mix it up -- if I could see
5 that cocaine pouch -- all right, let's say we took
6 hypothetically this pouch and I took some of the
7 Solicitor's Levamisole, twenty-five grams worth of his
8 Levamisole, and I mixed it all in here and took it home,
9 and then the police were to come and find me in possession
10 of this, would it be hypothetically possible, if you know,
11 for me to be charged with over a hundred grams of cocaine,
12 because we've got eighty-three here, correct?

13 A. Uh-huh (affirmative response), that's correct.

14 Q. This material outside of the packing weighs eighty-
15 three grams?

16 A. That's correct.

17 Q. Some of which is Levamisole and some of which is
18 cocaine?

19 A. Correct.

20 Q. All right, and if I added twenty-five more grams of
21 Levamisole I would have eighty-three plus twenty-five,
22 correct?

23 A. Correct.

24 Q. Putting us over a hundred grams of cocaine,
25 correct?

1 A. That's correct.

2 Q. And thereby being subject to prosecution for having
3 more than a hundred grams of cocaine?

4 MR. GRAUSTEIN: Objection, Your Honor. I don't
5 think this witness is qualified to ---

6 THE COURT: Where are you going ---

7 Q. If you know.

8 THE COURT: --- with this, Mr. Diggs?

9 Q. If you know.

10 MR. DIGGS: Your Honor, what I'm trying to establish
11 is that this -- the weight of this substance can be
12 altered by the introduction of additional Levamisole,
13 thereby enhancing or increasing the weight ---

14 THE COURT: Well, why don't you just ask her could
15 you put more in it and make it weigh more.

16 MR. DIGGS: Right. That's what I'm asking.

17 THE COURT: Okay.

18 MR. GRAUSTEIN: Your Honor, I have to object to his
19 questions about what somebody could be potentially charged
20 with. This witness has no way of knowing what ---

21 THE COURT: I think we got to a simple question. If
22 you put more Levamisole, would it weigh more?

23 A. Yes.

24 Q. And it would, okay, and it would depend totally on
25 how much Levamisole we put in here as to what the ultimate

1 weight would be, correct?

2 A. That's correct. The total weight is the weight of
3 the substance and any mixture thereof, yes.

4 Q. Right, and it doesn't matter how much cocaine or
5 how little cocaine, correct? It would be the same, part
6 of it cocaine, part of it Levamisole, correct?

7 A. That's correct, yes.

8 Q. And that's where we are now. We have eighty-three
9 grams of this stuff, and we know it consists of Levamisole
10 and cocaine, but we don't know how much of each?

11 A. That's correct.

12 Q. And, Ms. Floyd, have you always worked here in
13 Horry County or have you been employed in other agencies?

14 A. This is the only law enforcement agency that I've
15 ever worked at.

16 Q. So all your twelve years plus was done here in
17 Horry County?

18 A. No. I've been a chemist prior to that.

19 Q. Prior to -- and where were you a chemist?

20 A. I worked for General Nutrition Products. They made
21 the vitamins that are sold in GNC stores, vitamin
22 supplements, and I worked as a quality control chemist and
23 we routinely tested the vitamins before they went to the
24 stores for sale to make sure the appropriate ingredients
25 were in there in the correct quantities.

LISA FLOYD - CROSS BY DIGGS
DEAN BISHOP - DIRECT BY GRAUSTEIN

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1 Q. Okay. How long have you been associated with law
2 enforcement?

3 A. Since September of 2002.

4 Q. Okay. I think he asked you that on Direct.

5 MR. DIGGS: That's all I have. Thank you very much.

6 THE COURT: Mr. Graustein?

7 MR. GRAUSTEIN: No questions, Your Honor.

8 THE COURT: You may step down.

9 Have you got a short one you can do, Mr. Graustein?

10 MR. GRAUSTEIN: Yes, sir. I have one more chain of
11 custody witness, Your Honor.

12 THE COURT: All right.

13 MR. GRAUSTEIN: Dean Bishop.

14 Your Honor, if there's no objection, Ms. Floyd and
15 Ms. Bell can be released from their subpoenas.

16 MR. DIGGS: Your Honor, I would not object.

17 THE COURT: There's no objection, and they are
18 released from their subpoenas.

19 MR. GRAUSTEIN: Thank you.

20 DEAN BISHOP, BEING FIRST DULY SWORN, TESTIFIES AS
21 FOLLOWS:

22 DIRECT EXAMINATION BY MR. GRAUSTEIN:

23 Q. Agent Bishop, where are you currently employed?

24 A. I am currently employed by the Fifteenth Circuit
25 Solicitor's Office.

1 Q. And what are your duties with the Fifteenth
2 Circuit?

3 A. I am the Deputy Commander of the Fifteenth Circuit
4 Drug Enforcement Unit.

5 Q. And how long have you been employed with the Drug
6 Enforcement Unit?

7 A. I was assigned to the Drug Enforcement Unit in
8 January of '06. I was employed by the Horry County Police
9 Department at that time, though.

10 Q. And you said you are a Deputy Commander?

11 A. Yes.

12 Q. How long have you been Deputy Commander?

13 A. Four years.

14 Q. And you were with Myrtle Beach prior to that?

15 A. No.

16 Q. Or Horry County Police Department?

17 A. Horry County Police Department, yes.

18 Q. And how long were you with Horry County?

19 A. I was with the Horry County Police Department since
20 1997.

21 Q. And was that your first law enforcement job?

22 A. No. I worked for the Conway Police Department
23 before that.

24 Q. How long were you with them?

25 A. About four years. I have a combined total of about

1 eighteen years.

2 Q. All right, and what are some of your duties as
3 Deputy Commander, I guess? Were you Deputy Commander at
4 the time of this incident as of August 28th, 2009?

5 A. Yes, I was.

6 Q. All right, and what was some of your duties, just
7 real brief?

8 A. I handled the administrative field operations for
9 the Fifteenth Circuit Drug Enforcement Unit, basically
10 checked the incident reports and the case files when they
11 would come in and forward them on to the Solicitor's
12 Office, among other duties.

13 Q. Are part of your duties taking custody of evidence
14 taken from operations of the Drug Enforcement Unit?

15 A. Yes. Occasionally I will take evidence from the
16 agents to store in a safe that's housed at our office.

17 Q. This safe, who has access to that safe?

18 A. Myself and the Commander, Bill Knowles.

19 Q. Okay, but the agents themselves do not have access
20 to that?

21 A. No one has access but the two of us.

22 Q. And did you take custody of what's been marked as
23 State's Exhibit 2 on, I believe it was, August 28th of
24 2009?

25 A. Yes, this looks like the package.

- 1 Q. Okay, and where did you get that?
- 2 A. I got that from Joe Necessary.
- 3 Q. Okay, and where did you take custody of that?
- 4 A. At the office that we have on Main Street here in
- 5 Conway.
- 6 Q. And is that where the safe is located that you were
- 7 telling us about?
- 8 A. That's exactly where the safe is located.
- 9 Q. All right, and when you took custody of that, what
- 10 did you do with State's Exhibit 2?
- 11 A. I would place that in the safe and lock it up, and
- 12 then I would pull it back out for Agent Necessary when he
- 13 needed to finish his paperwork and drop it at the Horry
- 14 County Police Department for housing.
- 15 Q. Okay, and on this occas- -- on this particular
- 16 occasion on August 28th, 2009, you testified that you took
- 17 custody of that, of State's Exhibit 2?
- 18 A. That's correct.
- 19 Q. And did you place it in the safe?
- 20 A. I did. This occurred about 7:00 P.M. at night.
- 21 Q. And was it in packaging at that point?
- 22 A. Not in this particular packaging.
- 23 Q. Not in that particular packaging, but it was in
- 24 some sort of packaging?
- 25 A. Right; it was packaged, yes.

1 Q. Okay. What kind of packaging was it in?

2 A. I don't recall.

3 Q. And did you alter or manipulate State's Exhibit 2
4 in any way while it was in your custody?

5 A. No, I did not.

6 Q. Okay. Did you open the packaging?

7 A. No, sir.

8 Q. And did you alter it in any way?

9 A. No, sir.

10 Q. How long was it in your custody, do you know?

11 A. We pulled it out of the safe on August 31st about
12 two-thirty in the afternoon.

13 Q. Was -- did -- and when you took -- did you ever
14 touch it while it was in the safe?

15 A. No. Once I put it in the safe, that was a Friday
16 afternoon. I did not return until Monday morning, and
17 then that afternoon Agent Necessary asked me to retrieve
18 it from the safe for him.

19 Q. And at the time you retrieved it on August 31st,
20 did it appear that that State's Exhibit 2 had been
21 altered, or manipulated, or tampered with in any way?

22 A. No, it did not.

23 Q. And what did you do with it at that point?

24 A. I signed it over to Agent Necessary.

25 Q. Did you ever have any custody of it after that

1 point?

2 A. No, sir.

3 MR. GRAUSTEIN: Thank you. Answer any questions Mr.
4 Diggs may have.

5 MR. DIGGS: May it please the Court.

6 CROSS EXAMINATION BY MR. DIGGS:

7 Q. Deputy Commander Bishop, I've got kind of confused.
8 I don't think I have many questions, but the package was
9 delivered to you initially by whom?

10 A. Agent Necessary.

11 Q. And that package before, it was in the outer
12 wrappings?

13 A. No. I don't -- I don't believe it came to me
14 inside of the Best Kit that is there now.

15 Q. And you received it when?

16 A. It should have been August 28th, about 7:00 P.M. at
17 night, ---

18 Q. All right.

19 A. --- on Friday evening.

20 Q. On Friday, and you took it and put it in the vault?

21 A. In the safe, yes, sir.

22 Q. The safe, and it remained there until Monday?

23 A. Until Monday when I pulled it out.

24 Q. All right, and no one had access to it except you
25 and your superior?

1 A. My Commander, yes, sir.

2 Q. Okay, and then you went and retrieved it out of the
3 safe?

4 A. Yes, sir, on August 31st.

5 Q. And who had requested you do that?

6 A. Agent Necessary.

7 Q. All right, and so you did so, took it out about
8 two-thirty?

9 A. I believe it was about two-thirty in the afternoon.

10 Q. And what did you do at that time?

11 A. Signed it over to Agent Necessary.

12 Q. And when you say signed it over, ---

13 A. There's a chain of custody form that we fill out
14 for transferring evidence from one person to another.

15 Q. All right, and that was done on the 31st?

16 A. Yes, sir.

17 Q. And thereafter, did you have any involvement with
18 that particular package?

19 A. No, sir, not until today.

20 Q. Not until today?

21 A. Right.

22 MR. DIGGS: Thank you very much. That's all I have.

23 THE COURT: All right, Mr. Graustein?

24 MR. GRAUSTEIN: No questions, Your Honor.

25 THE COURT: Thank you. You may step down, Mr.

1 Bishop.

2 All right, ladies and gentlemen, we are going to
3 break for the afternoon. I would ask you to be back in
4 your jury room at nine-thirty in the morning and Mr. Ropp
5 will have you some ham biscuits or something there for
6 you, and we will get started back as soon thereafter as
7 possible.

8 Attorneys, I want you here by nine, okay?

9 MR. DIGGS: Thank you.

10 MR. GRAUSTEIN: Yes, sir.

11 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF
12 THE JURY.)

13 THE COURT: All right, gentlemen, I'll see you back
14 -- be here at nine o'clock, okay, and we will hear any
15 preliminary matters.

16 MR. DIGGS: Yes, sir, Your Honor.

17 (END OF DAY)

18 (THE FOLLOWING TAKES PLACE ON APRIL 8, 2010, OUTSIDE
19 THE PRESENCE OF THE JURY.)

20 THE COURT: We have a juror who is not here yet, a
21 Mr. Hall, I believe, is that correct?

22 THE DEPUTY: Yes, sir.

23 THE COURT: Mr. Graustein and Mr. Diggs, do you have
24 the jury questionnaire on Mr. Hall?

25 MR. DIGGS: Your Honor, I don't have.

1 **MR. GRAUSTEIN:** I don't have the questionnaire, Your
2 Honor.

3 **THE CLERK:** Judge, we should have one. I'll have
4 her bring it up.

5 **THE COURT:** All right, thank you.

6 All right, let me hear you on it, gentlemen. He's
7 thirty minutes late now.

8 **MR. GRAUSTEIN:** I have no objection to seating an
9 alternate at this point, Your Honor.

10 **THE COURT:** What does Mr. Diggs have to say about
11 that?

12 **MR. DIGGS:** Your Honor, I know the Solicitor and I
13 know they didn't have anything to do with a juror not
14 showing up. Having said that, I mean, if I had any -- any
15 inkling of something like that, I would ask for a
16 mistrial, of course, but I don't. The alternate
17 procedure, we have no objection to that under the
18 circumstances.

19 **THE COURT:** All right. Would anyone have any
20 objection -- I have taken the names of the two alternates,
21 and that was Ms. Fanelli and Ms. Davis; is that correct,
22 gentlemen? Were those the two alternates, Ms. Fanelli and
23 Ms. Davis?

24 **MR. GRAUSTEIN:** I believe so, Your Honor.

25 **THE COURT:** I have had Claire write each of their.

1 names on a slip of paper. I will fold them. They appear
2 to be -- the paper is the same size, and I am going to put
3 them here in a cup. Would anybody have any objection to
4 Ms. Smith drawing the lot?

5 **MR. DIGGS:** No, Your Honor.

6 **MR. GRAUSTEIN:** No, Your Honor.

7 **THE COURT:** All right, Ms. Smith, if you would.

8 All right, Ms. Smith has drawn the name of Ms.

9 Fanelli, so Ms. Fanelli will move up on the jury.

10 Ms. Smith, could you make sure that an Order is
11 prepared for Mr. Hall's arrest, a bench warrant, and let's
12 have that issued today. I am going to execute it as soon
13 as possible.

14 Mr. Hemingway, or whoever will be in charge of that,
15 once he is taken into custody, I want him taken directly
16 to the Horry County Jail and held there until I am ready
17 to deal with him, okay? Here is some information that
18 might help you in locating him, I'm not sure, but we're
19 not going to tolerate that.

20 All right, gentlemen, are we ready to go forward?

21 **MR. GRAUSTEIN:** I am, Your Honor. If I could just
22 have ten seconds to locate ---

23 **THE COURT:** All right.

24 **MR. GRAUSTEIN:** Thank you, Your Honor.

25 **THE COURT:** All right, are we ready?

1 **MR. GRAUSTEIN:** The State is ready, Your Honor.

2 **THE COURT:** Mr. Diggs, are you ready?

3 **MR. DIGGS:** I'm sorry. Yes, Your Honor.

4 **THE COURT:** Okay; all right.

5 **(THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE**
6 **JURY.)**

7 **THE COURT:** Good morning, ladies and gentlemen. I
8 apologize for the delay, but as you probably have noticed,
9 one of your jurors has not appeared today. Mr. Hall
10 chose not to come to trial. We've not heard anything from
11 him. I have sent a Sheriff's Deputy to locate Mr. Hall,
12 and Mr. Hall will not be on our jury for the balance of
13 this trial.

14 Ms. Fanelli, your name was chosen by lot as the first
15 alternate to fill his place, so if you would move up to
16 the regular juror's seat, and you will become our twelfth
17 juror. All right, thank you very much.

18 The attorneys tell me that we are ready to go
19 forward. I hope that you found everything to your
20 satisfaction this morning.

21 All right, Mr. Graustein.

22 **MR. GRAUSTEIN:** Thank you, Your Honor.

23 The State calls Agent Trevor Howlett.

24 **THE COURT:** Mr. Howlett, come around this way.

25 Thank you.

1 **TREVOR HOWLETT, BEING FIRST DULY SWORN, TESTIFIES**
2 AS FOLLOWS:

3 **DIRECT EXAMINATION BY MR. GRAUSTEIN:**

4 Q. Mr. Howlett, what's your title? Are you an agent,
5 an officer?

6 A. I'm a Deputy Commander with the Fifteenth Circuit
7 Drug Enforcement Unit.

8 Q. Okay, and you are currently employed ---

9 A. With the Horry County Sheriff's Office.

10 Q. With the Horry County Sheriff's Office ---

11 A. Yes, sir.

12 Q. --- as Deputy Commander of the -- you said the Drug
13 Enforcement Unit?

14 A. Yes, sir.

15 Q. And how long have you been with the Drug
16 Enforcement Unit?

17 A. With the Drug Enforcement Unit, two and a half
18 years.

19 Q. And how long have you been in law enforcement?

20 A. I'm in my tenth year.

21 Q. Your tenth year. Is that all in the local area?

22 A. Yes, sir.

23 Q. And what are your present duties with the Drug
24 Enforcement?

25 A. Deputy Commander to the Myrtle Beach office,

1 supervise the office, that end of Horry County.

2 Q. And as part of your duties, do you participate in
3 drug inves- -- drug investigations?

4 A. Yes, sir.

5 Q. And were you involved in the drug investigation
6 that was headed up by Officer Necessary in August of 2009?

7 A. I was.

8 Q. And were you involved in that investigation which
9 led -- ultimately led to the arrest of the Defendant here?

10 A. Yes, sir.

11 Q. And what were your -- what were your duties
12 involved in that inci- -- in that investigation?

13 A. I was assigned to a surveillance team. During buys
14 like that, we'll have units watching a house or a target
15 area where the buy would occur, and we'll watch that
16 before, after, and during a buy, and I was assigned to
17 watch that house.

18 Q. Which house is that?

19 A. I do not have the address. It was the house that
20 Mr. Castro was residing in.

21 Q. Okay.

22 A. I had parked in the neighboring driveway to watch
23 that during the operation.

24 Q. Okay, and what, if anything, did you observe on
25 August 28th while you were conducting your duty?

1 A. In brief, during the operation, Agent Necessary let
2 us know when the informant was leaving a pre-determined
3 little staging location and heading to the house where the
4 controlled buy was supposed to happen.

5 We observed our informant arrive in his vehicle. The
6 Defendant came outside, and I can't remember if he came
7 out the front door or the garage door, but he opened the
8 garage door and allowed the informant to actually pull his
9 car into the garage, and then we didn't really see
10 anything for a while, and then the two co-defendants in
11 the case came in a separate vehicle and went inside.

12 Shortly thereafter, both the co-defendants and the
13 informant left, and that was all I saw. We stayed on the
14 house in case anything needed to be secured.

15 Q. And how long did you stay observing the house after
16 the vehicle, the second vehicle that arrived, left?

17 A. I think in total I was probably at the house on
18 surveillance and during the follow-up investigation
19 probably three hours that day.

20 Q. After your confidential informant arrived at -- at
21 the residence, do you know about how long it was until the
22 second vehicle arrived?

23 A. I really don't. I would -- I would probably
24 estimate around fifteen to twenty minutes.

25 Q. And you ---

1 A. I can remember him being in there for -- it wasn't
2 like two minutes and then a -- then a car pulled up. I
3 think he was in there for a brief amount of time.

4 Q. Okay, and do you know how long that other vehicle
5 was there, about how long was that other -- that second
6 vehicle, how long ---

7 A. No, sir, I do not.

8 Q. Was it there for an hour or ---

9 A. I rea- -- I hate to say.

10 Q. Okay.

11 A. I radioed the activity and didn't -- wasn't the
12 actual person documenting times or, you know, how long
13 that -- that was going on, so I really hate to answer
14 that.

15 Q. And during your -- and you said that you saw -- you
16 did observe the confidential informant arrive at the
17 residence?

18 A. Yes, sir; yes, sir.

19 Q. During the time that you observed the confidential
20 informant, did you meet with anybody other than the
21 Defendant?

22 A. No.

23 Q. Did you -- you didn't talk with anybody else or ---

24 A. No, no, not that we could see.

25 Q. And did you see him fairly well?

1 A. Very well. We actually parked in the neighbor's
2 driveway.

3 Q. And about how far was -- were you from the
4 house ---

5 A. Easy less than a hundred feet. I mean, it was --
6 the houses in that neighborhood are pretty close together.
7 They just have a small breezeway between them, and we were
8 just in the neighbor's driveway.

9 Q. Was this at night?

10 A. No, sir.

11 Q. It was during the day?

12 A. It was during the day.

13 Q. Was it sunny that day?

14 A. Clear. It was clear and sunny.

15 Q. Okay.

16 MR. GRAUSTEIN: Please answer any questions Mr.
17 Diggs may have.

18 THE COURT: Mr. Diggs.

19 MR. DIGGS: May it please the Court.

20 CROSS EXAMINATION BY MR. DIGGS:

21 Q. Deputy Commander Howlett, the -- there's no doubt
22 about it, the confidential informant was Chris Norris, or
23 do you know that?

24 A. I believe that's his name, but I was never provided
25 with that.

1 Q. Okay, so you didn't know his name, ---

2 A. No, sir.

3 Q. --- regardless?

4 Did you have any contact with Mr. Norris prior to
5 your observing him arrive on the occasion that you've just
6 testified to?

7 A. Did I? No, sir.

8 Q. Right, and did you have any other involvement with
9 this case other than providing or doing surveilling work
10 at that time on August the 28th of '09?

11 A. No, sir.

12 Q. All right, so you don't know any information about
13 what the informant, Mr. Norris, would have done once he
14 got inside the house?

15 A. I read the report, but ---

16 Q. All right, but in terms ---

17 A. --- but as far as actually part of that
18 investigation, knowing what was going on, or hearing a
19 wire, or debriefing him, no, sir, ---

20 Q. Right, okay.

21 A. --- and the only questions I could answer is just
22 from what that I've read.

23 Q. Okay, so your contribution to the evidence in this
24 case is that you watched Mr. Norris arrive at Mr.
25 Castro's?

1 A. Yes, sir.

2 Q. You saw two other fellows come in sometime
3 thereafter?

4 A. Right.

5 Q. In a different car?

6 A. Yes, sir.

7 Q. And how long were those individuals there?

8 A. I do not believe they were there more than probably
9 a ten minute period.

10 Q. All right.

11 A. I would have to look at any -- any notes Officer
12 Necessary had on that.

13 Q. All right, and of your own knowledge, do you have
14 any -- any information about why they came there, what the
15 purpose was, and what they did while they were there?

16 A. No.

17 Q. All right. They just came, they were there for a
18 few minutes, and left?

19 A. Yes, sir.

20 Q. And did anyone else leave with them when they left
21 the residence?

22 A. In their vehicle, no. The -- of course, the
23 informant, his vehicle left as well.

24 Q. Okay. Now, did he leave at the same time or was it
25 sometime thereafter?

1 A. I don't know. I mean, it was -- it was within a
2 relatively short period of time, and what happened, we
3 wanted to stop the vehicle that left, so we immediately
4 began to radio the other surveillance units, "Hey, we've
5 got a vehicle leaving." We know how to identify these
6 folks, and we only needed one vehicle to follow the
7 informant, you know, to meet back with him.

8 Q. Now, did you follow the informant back?

9 A. No. I stayed on the house.

10 Q. Okay, and you remained there ---

11 A. Yes, sir.

12 Q. --- for about how much longer?

13 A. At that house, we were probably there at least
14 another hour, ---

15 Q. Okay.

16 A. --- because we ended up doing a follow-up
17 investigation following that, so we stayed on the house
18 until ---

19 Q. All right.

20 A. --- they were able to meet with the informant,
21 identify the co-defendants.

22 Q. Okay. Now, can you tell us what it was that you
23 did in your follow-up investigation?

24 A. I just stood by for manpower ---

25 Q. Okay.

1 A. --- just in case they needed anything.

2 Q. Did you actually have to do anything beyond that?

3 A. No, sir.

4 Q. And eventually you left that area?

5 A. Yes, sir.

6 Q. Did you ever go in the home?

7 A. I did.

8 Q. When did you go in, and tell us what you did?

9 A. I had another agent with me in our surveillance
10 team, and I don't know, maybe ten minutes after the home
11 was -- we were the last two agents to go into the house,
12 and we just went in in case they needed any help, if they
13 were going to do a search or if they needed us to watch
14 anybody while they interviewed someone.

15 Me and the other agent didn't have a direct
16 involvement in the case, so it wasn't important for us to
17 really be hands-on with interviews or doing things like
18 that inside the house, so we were just kind of -- we were
19 there for any assistance.

20 Q. All right. Now, did you witness -- were there any
21 other officers there inside the home while you were there?

22 A. Yes, sir.

23 Q. And do you remember who they were?

24 A. Agent Kitelinger was there. Officer Necessary was
25 there. Agent Hooper was there. Agent Wood was there,

1 Agent Mullinax, and Agent Lynch.

2 Q. And what were they doing there, if you know?

3 A. Agent Necessary was the -- the investigating
4 officer, but on that day it took him just a little bit to
5 get back to the house, so Agent Kitelinger was to go to
6 the house and try to gain consent to go in to secure the
7 possible buy money, because on the co-defendants, we had
8 received radio information that they had recovered what
9 was believed to be our buy money.

10 Q. Do you know how much money was recovered from those
11 people?

12 A. I would have to look. Roughly, I would think
13 around Three Thousand Dollars, somewhere in that
14 neighborhood.

15 Q. Most -- most of the money, most of the buy money?

16 A. Yes, sir, but -- but we were -- the information was
17 relayed to us that they believed some of that buy money to
18 be missing.

19 Q. All right.

20 A. You know, they had recovered that, but we needed to
21 try to make sure we secured that.

22 Q. Now, I want to get this straight. The two guys
23 that you observed leaving ---

24 A. Yes, sir.

25 Q. --- were shortly thereafter stopped by police and

1 law enforcement?

2 A. Yes, sir.

3 Q. And most of the money was in their possession?

4 A. It was.

5 Q. Okay, and was a search, general search, done of the
6 home?

7 A. It was, Agent Kitelinger, and he'll have to -- I
8 can't speak for him on this because we weren't -- weren't
9 there when he obtained it or discussed this with the
10 Defendant, but he gained written consent to conduct a
11 search of the house, and a search was conducted.

12 Q. My client did?

13 A. Yes, sir.

14 Q. He gave permission to search?

15 A. That's what I was -- I was told.

16 Q. All right, and, of course, this was after the
17 alleged drug deal ---

18 A. Yes, sir.

19 Q. --- had taken place?

20 A. Yes, sir.

21 Q. Okay. Do you remember who it was that did the
22 search or if the search was actually done?

23 A. No, sir, I do not.

24 Q. You don't know?

25 A. No, sir.

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1 Q. Okay.

2 MR. DIGGS: That's all I have at this point. Thank
3 you very much.

4 A. Thank you.

5 THE COURT: Mr. Graustein, anything further?

6 MR. GRAUSTEIN: No other questions; no further
7 questions, Your Honor.

8 THE COURT: All right.

9 Sir, you may step down.

10 MR. GRAUSTEIN: And, Your Honor, if there's no
11 objection, if Deputy Commander Howlett could be released
12 from his subpoena at this time?

13 MR. DIGGS: No objection.

14 THE COURT: All right.

15 You are released from your subpoena.

16 MR. GRAUSTEIN: Thank you, Your Honor.

17 Your Honor, the State calls Agent Will Kitelinger.

18 WILLIAM KITELINGER, BEING FIRST DULY SWORN;

19 TESTIFIES AS FOLLOWS:

20 DIRECT EXAMINATION BY MR. GRAUSTEIN:

21 Q. Agent Kitelinger, what's your occupation?

22 A. I am a narcotics officer with the Myrtle Beach
23 Police Department, assigned to the Fifteenth Circuit Drug
24 Enforcement Unit.

25 Q. So you are actually employed by the Myrtle Beach

1 Police Department?

2 A. Correct.

3 Q. Okay, and you are assigned to the Drug Enforcement
4 Unit?

5 A. Yes.

6 Q. And how long have you been assigned to the Drug
7 Enforcement Unit?

8 A. Three years.

9 Q. Three years, and how much law enforcement
10 experience do you have?

11 A. I've been a law enforcement officer for nine years.

12 Q. Is that all in the local area police departments?

13 A. All in the City of Myrtle Beach Police Department.

14 Q. And what are your duties with the Drug Enforcement
15 Unit?

16 A. My duties are to investigate and conduct arrests of
17 persons conducting illegal narcotics activity within the
18 jurisdiction of Horry and Georgetown County.

19 Q. Okay. It sounds like one of your major duties is
20 conducting drug enforcement -- investigations?

21 A. Yeah.

22 Q. And were you involved in the -- the operation that
23 was headed up by Officer Necessary on August 28th, 2009?

24 A. I was.

25 Q. And what was your involvement with that -- with

1 that operation?

2 A. My part of the operation was to approach the
3 residence, make contact with the Defendant, and ask
4 consent for a search of his residence.

5 (CONSENT TO SEARCH MARKED FOR IDENTIFICATION AS
6 STATE'S EXHIBIT NUMBER 4.)

7 Q. I'm going to show you a document that's been marked
8 for identification as State's Exhibit 4 and ask if you can
9 identify that?

10 A. Yes. This is a consent to search form for Horry
11 County that I used the day that I asked permission of the
12 Defendant to search his residence.

13 Q. On the top of that document, whose name is that?

14 A. The name of the Defendant.

15 Q. And who wrote that there?

16 A. I did.

17 Q. You wrote that? Okay, and then down here in the
18 middle of the page, it has -- looks to be an address?

19 A. That was the address of the residence that we
20 approached.

21 Q. Okay. Was that the same residence to your
22 knowledge that the confidential informant had met the
23 Defendant at?

24 A. Yes.

25 Q. Down here at the bottom there's two signatures.

1 Can you identify those?

2 A. The signature to the left of the document is, in
3 fact, the signature of the Defendant, and the signature to
4 the right is my signature.

5 Q. And how do you know that that's the Defendant's
6 signature?

7 A. I witnessed him signing it.

8 MR. GRAUSTEIN: The State would move to admit into
9 evidence State's Exhibit 4.

10 THE COURT: Have you shown it to Mr. Diggs?

11 MR. GRAUSTEIN: Oh, I'm sorry.

12 MR. DIGGS: I don't have any objection.

13 THE COURT: All right, without objection, State's
14 Exhibit Number 4.

15 May I see it?

16 MR. GRAUSTEIN: Yes, sir.

17 THE COURT: Thank you.

18 (STATE'S EXHIBIT NUMBER 4 ADMITTED INTO EVIDENCE.)

19 Q. Agent Kitelinger, after obtaining this consent to
20 search, was a search -- to your knowledge, was a search,
21 in fact, conducted?

22 A. Yes.

23 Q. Did you participate in that search?

24 A. No.

25 Q. You did not? Do you have any knowledge about what

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1 evidence was recovered?

2 A. No. I -- the time that I spent after was with the
3 Defendant.

4 MR. GRAUSTEIN: Please answer any questions Mr.
5 Diggs may have.

6 THE COURT: Mr. Diggs.

7 CROSS EXAMINATION BY MR. DIGGS:

8 Q. Good morning. Is it Agent Kitelinger?

9 A. That's fine, sir.

10 Q. All right. Now, when my client signed that form,
11 were y'all standing outside in the yard?

12 A. No.

13 Q. Okay. Why not?

14 A. He invited us inside the residence.

15 Q. Invited you in, and explain to me how that
16 happened.

17 A. I approached the residence. I was wearing tactical
18 gear that plainly displayed that I was a police officer.
19 The Defendant answered the door. I explained to him that
20 I had a complaint of drug activity from the residence.

21 Q. And what was the source of that complaint, do you
22 know?

23 A. It was the -- the whole investigation, the ---

24 Q. Involving Mr. Norris?

25 A. Yes.

1 Q. All right, so based on the word of Mr. Norris, you
2 approached the home and asked for -- for a -- or knocked
3 on the door?

4 A. Yes, knocked on the door.

5 Q. All right, and explain to us what happened at that
6 point.

7 A. Again, the Defendant came to the door; he answered
8 the door.

9 Q. Now, was this the front or -- I'm sorry to
10 interrupt.

11 A. That's quite all right.

12 Q. But I understand there were two entrances. There
13 was a front door and then a garage entrance?

14 A. This was the front door.

15 Q. Okay. Go ahead and explain to us or tell us what
16 happened.

17 A. I knocked on the front door; he answered. We're,
18 again, plainly marked as police officers. There's no -- I
19 mean, my badge was out. We had tactical gear on. I
20 explained that we had the drug complaint. I asked him if
21 there were any illegal narcotics inside the residence. He
22 stated he had a small amount of marijuana. I asked him,
23 "Do you want to talk about this here? Would you like us
24 to come inside?" He said, "Please come inside."

25 We walked to the kitchen area. I explained to him

1 the consent to search form, and ---

2 Q. Now, let me ask you this: When you asked -- and I
3 want you to repeat it because I want you to be as specific
4 as you can, the precise wording you used in order to
5 elicit from him the statement, let's go inside and talk.

6 A. I don't know if I'm going to be able to recall the
7 exact wording. I mean, that's some months ago.

8 Q. All right. Now, was there any discussion at that
9 point about his right to privacy in his home?

10 A. No.

11 Q. All right. Before he invited you into -- did you
12 say the kitchen?

13 A. Yes. When you walk through the front door, the
14 kitchen area is immediately to the front -- to the right
15 as you go through the door. It's almost right there.
16 It's a very small foyer into the kitchen thing.

17 Q. So you entered into that area of the home without
18 any discussion with him concerning his Fourth Amendment
19 right to privacy inside his home?

20 A. No.

21 Q. Was there ever a discussion about that particular
22 right?

23 A. As soon as we walked into the kitchen, I had a
24 black folder in my hand. I took out the piece of paper.
25 I began to explain what the consent to search is, which

1 explains -- in my opinion, which explains his rights to
2 refuse the search or allow the search.

3 Q. Okay, and this is the form that Nelson -- Mr.
4 Castro signed in your presence inside his home?

5 A. Either that or a copy, yes, sir.

6 Q. Now, do you know who it was that draft- -- this is
7 your form, correct, that you use in your office?

8 A. Yes.

9 Q. Do you know who it is that actually wrote this
10 form?

11 A. I have no idea.

12 Q. But it's something your superiors in your agency
13 put together for your use and other agents' use in the
14 field ---

15 A. Yes.

16 Q. --- doing your work?

17 A. Yes.

18 Q. All right. Now, did you -- to the best of your
19 ability, can you describe for us the nature of the
20 conversation you had with Mr. Castro about the search and
21 his right to refuse that or his right to consent to it?

22 A. I actually read the document. I had Mr. Castro
23 read the document. I mean, I don't recall any questions
24 that he had about it.

25 Q. Okay. Now, he's not from around here, correct?

1 A. Uh-huh (affirmative response).

2 Q. English is not his native language?

3 A. No, but I felt comfortable in speaking to him
4 initially that he was very comfortable in understanding
5 what I was telling him.

6 Q. All right. He's from El Salvador?

7 A. Correct.

8 Q. And by the way, do you know what his status was?
9 He was -- was he legal at that time?

10 A. I don't know. I didn't know.

11 Q. All right, but you felt comfortable that he
12 understood, you know, in the English language what you
13 were telling him?

14 A. Yes.

15 Q. And he equally read and comprehended the written
16 English language contained in the form?

17 A. Yes, and I -- and I specifically asked him, "Do you
18 have any questions?" Nobody was out to trick anybody.

19 Q. How many agents were there other than yourself at
20 the time he signed the form?

21 A. I don't recall. I would say more than three.

22 Q. Okay, you and three additional ones at least?

23 A. I -- myself and two at least.

24 Q. Okay. Were there any uniformed agents?

25 A. No, but everybody was wearing their tactical gear.

1 They're plainly marked police officers and have their
2 badges out.

3 Q. Okay. Now, are you, meaning all of you, are you or
4 some of you armed with weapons at that time?

5 A. Yes.

6 Q. And they're visible?

7 A. Of course.

8 Q. And so -- were all of you armed?

9 A. Yes.

10 Q. So there were three or four people standing around
11 him in his home armed when this conversation was taking
12 place?

13 A. Yes.

14 Q. Did anyone discuss this process of executing the
15 form with Mr. Castro other than yourself?

16 A. Not that I'm aware of.

17 Q. All right. Did you hear anybody in any way --
18 you've been in law enforcement for ten years?

19 A. Yes, sir.

20 Q. All right. Did you hear anyone in any way threaten
21 him in an effort to get him to sign this form?

22 A. No, sir.

23 Q. All right, and you're telling us that that did not
24 occur at this time?

25 A. Yes.

1 Q. Now, after he signed the form, what happened?

2 A. They conducted a search. I stayed with Mr. Nelson.

3 Q. Castro?

4 A. With Mr. Castro.

5 Q. At the kitchen table or with ---

6 A. In the kitchen area, yes.

7 Q. Where was Mr. Norris at that time? He had left the
8 premises, correct?

9 A. I have no idea.

10 Q. All right. Who was there to the best of your
11 recollection conducting the search?

12 A. It was myself, Agent Wood, I believe Agent Hooper,
13 Agent Mullinax.

14 Q. Okay. Did you actually conduct any of the search
15 or were you pretty much just with Mr. Castro?

16 A. Yes.

17 Q. So these other three agents conducted the actual
18 search?

19 A. Yes -- to the best of my knowledge, yes.

20 Q. And approximately how long did this search
21 continue?

22 A. I -- I would think we were in the residence for an
23 hour.

24 Q. All right.

25 MR. DIGGS: Agent Kitelinger, I appreciate it. I

1 don't think I have any additional questions at this time.

2 Thank you very much.

3 THE COURT: Mr. Graustein, anything further of this
4 officer?

5 MR. GRAUSTEIN: No, Your Honor.

6 THE COURT: All right.

7 You may step down.

8 MR. GRAUSTEIN: There's no objection, Your Honor,
9 if ---

10 THE COURT: Will you have further need for him?

11 MR. DIGGS: No, Your Honor, we don't.

12 THE COURT: All right.

13 Then you are excused from your subpoena. Thank you.

14 MR. GRAUSTEIN: Your Honor, may I approach very
15 briefly?

16 THE COURT: Certainly.

17 (A Bench conference was held in the presence, but out
18 of the hearing, of the jury.)

19 MR. GRAUSTEIN: Your Honor, the State would recall
20 Officer Necessary.

21 THE COURT: All right.

22 Officer Necessary, you are still under oath, okay?

23 OFFICER NECESSARY: Yes, sir.

24 JOSEPH NECESSARY, BEING PREVIOUSLY SWORN,
25 TESTIFIES AS FOLLOWS:

1 **DIRECT EXAMINATION BY MR. GRAUSTEIN:**

2 Q. Officer Necessary, I just want to cover a few
3 things before we get to our next witness just for
4 clarification for the jury. You've already provided
5 testimony regarding what's been marked as State's Exhibit
6 1?

7 A. Yes; yes, sir.

8 Q. All right. Now, this -- is this the -- and I
9 believe you testified that this disk is made from
10 downloading your recording device via computer?

11 A. Yes, sir, recording it to a computer, and then I
12 make the disk off of that.

13 Q. Okay. Do you make more than one disk?

14 A. Actually, sir, I make an original disk that goes in
15 my case file, and then we have a copy machine where I take
16 that disk over to the copy machine and it will do multiple
17 copies at the same time, so I take the original disk and
18 then make a copy for you and for myself.

19 Q. Okay, and are those altered in any way?

20 A. No, sir. They are the exact same thing that's on
21 the disk, the original disk that's made. All it does is
22 copy everything.

23 Q. So if somebody were to have viewed the copy or the
24 disk that's in your case file and then view the disk that
25 you copy, made on the copy machine, those would be the

1 same, to your knowledge would be the same?

2 A. Yes, sir. There should be the exact same thing is
3 on it.

4 Q. And very briefly, I just want to touch on something
5 Defense Counsel was asking about. A search was conducted
6 of the residence?

7 A. Yes, sir.

8 Q. Of Mr. Castro's residence?

9 A. Yes, sir.

10 Q. And was any -- any evidence that was recovered, was
11 that presented to you?

12 A. Yes, sir. What happened was Officer Kitelinger,
13 Agent Kitelinger, gained consent to search, and I believe
14 Agents Wood and Mullinax began the search, but the way we
15 handle things as for chain of custody in evidence in these
16 cases is if they locate anything, they leave it where it
17 is and then the case agent comes, photographs it where it
18 is, and then takes possession of it. That way, there's
19 not a bunch of people handling the evidence.

20 Q. Okay, so any evidence that was recovered, you
21 actually took ---

22 A. Yes, sir; it was only handled by me.

23 Q. You're the one that took custody of it?

24 A. Yes, sir.

25 MR. GRAUSTEIN: All right, thank you. Answer any

1 questions the Defense might have of you.

2 MR. DIGGS: I don't think I have any questions of
3 this witness.

4 THE COURT: Thank you.

5 You may step down, Mr. Necessary.

6 MR. GRAUSTEIN: At this time, Your Honor, the State
7 would call Christopher Norris.

8 CHRISTOPHER NORRIS, BEING FIRST DULY SWORN,
9 TESTIFIES AS FOLLOWS:

10 DIRECT EXAMINATION BY MR. GRAUSTEIN:

11 Q. Mr. Norris, are you currently employed?

12 A. Yes, sir.

13 Q. You are?

14 A. Yes, sir.

15 Q. And where are you employed?

16 A. I own my own business.

17 Q. You own your own business?

18 A. Yes.

19 Q. And what business is that?

20 A. Detailing.

21 Q. Detailing, like cars, ---

22 A. Yes, sir.

23 Q. --- auto detailing?

24 A. Yes, sir.

25 Q. Okay, and how long have you been doing that?

1 A. For about nine months.

2 Q. And where do you live?

3 A. Myrtle Beach, 804 Todd Circle.

4 Q. Now, Mr. Norris, there came a time where you

5 assisted law enforcement agencies or a law enforcement

6 agency?

7 A. What do you mean by that?

8 Q. Did you -- did there come a time when you began

9 assisting a law enforcement agency?

10 A. Do you mean ---

11 Q. You worked with them?

12 A. Yes, sir.

13 Q. Okay, and when was that?

14 A. Last year, in '09.

15 Q. Last year, in '09. Do you know about what time,

16 when in '09, what month?

17 A. You say when I worked for them?

18 Q. When you started working with them.

19 A. I think it was like in -- probably like June maybe.

20 Q. Are you still doing work with law enforcement

21 agencies?

22 A. No, sir.

23 Q. Okay. Now, Mr. Norris, you've been arrested

24 before, correct?

25 A. Yes, sir.

1 Q. Go ahead and tell the jury what you've been -- what
2 offenses you've been arrested for.

3 A. Simple possession, possession with intent of
4 marijuana. I think it was distributing cocaine, and first
5 degree burglary.

6 Q. Okay. Now, how did you come to start working with
7 law enforcement?

8 A. I went through my lawyer, Axelrod. He worked it
9 all out with the Solicitor.

10 Q. Okay, and what exactly did he work out? To your
11 knowledge, what was worked out?

12 A. I was to buy cocaine and help my charges.

13 Q. Okay, and what particular charges, if any, were you
14 supposed to receive consideration?

15 A. First degree burglary and cocaine.

16 Q. Were those charges dropped?

17 A. I got five years probation.

18 Q. Okay, so you're on probation right now?

19 A. Yes, sir.

20 Q. Did you plead guilty to those charges?

21 A. I went for a plea.

22 Q. Okay, so you pled guilty to those charges. All
23 right, and you just testified you had several drug
24 arrests, correct?

25 A. Yes, sir.

1 Q. Is it fair to say you know how to conduct a drug
2 deal?

3 A. Yes, sir.

4 Q. Okay. Do you believe your ability to make a drug
5 deal is what would make you an asset to law enforcement?

6 A. What do you mean by that?

7 MR. DIGGS: Your Honor, I object to that, too. I
8 don't know that it's relevant what he believes.

9 THE COURT: Just rephrase your question.

10 Q. All right, so you're currently on probation. What
11 did you plead guilty to as far as those charges?

12 A. First degree burglary and distributing cocaine.

13 Q. You pled guilty to first degree burglary or was
14 that sentence reduced, or that charge reduced?

15 A. I'm pretty sure it was first degree.

16 Q. Okay. Now, as far as any consideration you got or
17 assistance you got -- well, let me back up a second. Who
18 specifically at law enforcement did you work for?

19 A. Joe Necessary.

20 Q. And did he ever make you any promises regarding the
21 charges that you had pending against you?

22 A. No, sir.

23 Q. To your knowledge, did he have anything to do with
24 how your case was eventually resolved?

25 A. No, sir; no, sir.

1 Q. Did he ever promise you anything?

2 A. No, sir.

3 Q. All right. Now, let's get to the heart of the
4 matter here. Do you know the Defendant in this case?

5 A. Yes, sir.

6 Q. You know Nelson Castro?

7 A. Yes, sir.

8 Q. And when did you first come to know Mr. Castro?

9 A. About two years ago.

10 Q. About two years ago, and this would be in 2008?

11 A. Yes, sir.

12 Q. All right, so it was -- would it be fair to say
13 that on October (sic) 28th, 2009, that was not your first
14 time you had met with Mr. Castro?

15 A. No, sir.

16 Q. And what -- I mean, were you friends?

17 A. Yes, sir.

18 Q. You were, or no?

19 A. Well, we dealt with each other, doing business.

20 Q. You dealt with each other. Okay, fair enough; fair
21 enough. About how often would you see him, let's say, in
22 the course of a year?

23 A. Maybe like every week.

24 Q. Maybe every week, all right. Now, and you started
25 working for -- assisting law enforcement agencies. Let's

1 talk specifically about what happened on August the 28th,
2 2009. Do you remember that day?

3 A. Yes, sir.

4 Q. All right. Officer Necessary testified that they
5 conducted an operation that day. Did they just come out
6 of the blue and say, "Hey, we're going to go run an
7 operation against Mr. Castro"?

8 A. No, sir. We tried the day before and I called
9 Nelson and he told me to wait 'til tomorrow, and then so I
10 met Joe Necessary like that morning about nine o'clock or
11 eight o'clock, I think it was, and I started putting a
12 wire on and Nelson called me and told me he was at the
13 dentist and that he would be home in like thirty minutes,
14 so then I went there.

15 Q. Okay. Let's -- let's go through August 28th, 2009.
16 Who contacted you about regarding that the Drug
17 Enforcement Unit was going to conduct an operation?

18 A. Joe Necessary.

19 Q. Okay, and what -- and what did you do on the 28th?

20 A. We met at his office.

21 Q. Okay. You met at his office. Then what happened
22 after you met with Officer Necessary?

23 A. I called Nelson to purchase, to buy, and we put the
24 wire on me and then we left.

25 Q. Okay, so you called the Defendant?

1 A. Yes, sir.

2 Q. Do you know where he was? Was this on a cell phone
3 or ---

4 A. Yes, sir.

5 Q. His cell phone, okay, so you called him and what
6 did -- what did y'all talk about?

7 A. Just asked him was he ready.

8 Q. Ready for what?

9 A. For the -- so I could come see him to buy coke.

10 Q. Come see him for what?

11 A. To buy coke, three ounces.

12 Q. Okay, and did y'all talk about how much coke?

13 A. Three ounces.

14 Q. Three ounces. Did y'all talk about the price?

15 A. Yeah. He already told me a Thousand Fifty each.

16 MR. DIGGS: Your Honor, I object to the leading.

17 It's kind of an important area and I would ask that ---

18 THE COURT: I don't think that's a leading question.

19 He just asked him if he generally spoke about price.

20 That didn't suggest an answer.

21 Go ahead and answer the question.

22 A. Yes, sir.

23 Q. Okay, you spoke about price?

24 A. Yes, sir.

25 Q. Was a price determined, how much ---

1 A. Yes, sir.

2 Q. Were you supposed to bring the money?

3 A. Yes, sir.

4 Q. All right, so how much money were you supposed to
5 bring?

6 A. Thirty One Fifty.

7 Q. Okay. Did you get this money?

8 A. Do what?

9 Q. Did you get this money?

10 A. Yes, sir.

11 Q. Where did you get it from?

12 A. Joe.

13 Q. All right, so you meet with Joe at his office. You
14 call the Defendant. Now what hap- -- then what happened?

15 A. We left. I got in the car and drove. Joe followed
16 me, and I went to his house.

17 Q. Did you do anything with regards -- before leaving?

18 A. He put a wire on me.

19 Q. Put a wire on you. Had you ever worn a wire
20 before?

21 A. No, sir.

22 Q. No?

23 A. No, sir.

24 Q. The first time you had ever worn a wire?

25 A. Yes, sir.

1 Q. Did you know how to operate that wire at all?

2 A. No, sir. I just wore it.

3 Q. You just wore it. Did they tell you what this wire

4 was going to do?

5 A. Yes, sir.

6 Q. They did, and what was that?

7 A. Video and audio.

8 Q. All right, and did you have any way of knowing if

9 it was working or not?

10 A. Yes, sir. He tested it. He told me to say

11 testing.

12 Q. All right. Did you know how to -- so you didn't

13 know how to operate it. Did you know how to remove any

14 recording devices from it?

15 A. No, sir.

16 Q. No. All right, so you've got a wire on you, video

17 and audio, correct?

18 A. Yes, sir.

19 Q. And then you head out, is that what you said?

20 A. Yes, sir.

21 Q. And where did you go?

22 A. By Ivory Stone to his house.

23 Q. Ivory Stone?

24 A. It was a housing development across the street.

25 Q. And where is that located, ---

- 1 A. I don't know the ---
- 2 Q. --- just generally?
- 3 A. Off 17 Bypass.
- 4 Q. Off 17 Bypass. Is that down at the beach?
- 5 A. Yeah. It's by the McDonald's at 707.
- 6 Q. Okay, so you never left the county?
- 7 A. No, sir.
- 8 Q. No, so you drove down there and did you stop
- 9 anywhere along the way?
- 10 A. No, sir.
- 11 Q. Talk to anybody along the way?
- 12 A. No, sir.
- 13 Q. Stop and pick up any drugs along the way?
- 14 A. No, sir.
- 15 Q. And when you got -- okay; and, now, did you know
- 16 whether or not you were going to be under surveillance
- 17 this whole time?
- 18 A. Yes, sir.
- 19 Q. You did know?
- 20 A. Yes, sir.
- 21 Q. Okay. Did -- so let's -- let's -- you're on the
- 22 road and you're headed towards the Defendant, okay, and
- 23 did -- did you get there?
- 24 A. Yes, sir.
- 25 Q. Okay. You got to the Defendant, and what happened

1 when you got there?

2 A. When I pulled up in the driveway, I went to the
3 door. Nelson opened the door and told me to pull the car
4 up under the carport, and then I went inside.

5 Q. Okay, so I just want -- you went through that
6 pretty quick and I just want -- so you pulled up in his
7 driveway, correct?

8 A. Yes, sir.

9 Q. Did -- and then I want to be very clear about what
10 happened after you pulled up into the driveway. You just
11 tell us exactly, nice and slow, so we all can hear what
12 exactly happened.

13 A. I got out of the car. I walked to the door to
14 knock on it. Nelson opened the door and told me to pull
15 the car up underneath the carport, so I did, and he went
16 around and opened the garage door and I went inside.

17 Q. Okay. Was that -- was that his garage?

18 A. Yes, sir.

19 Q. All right, and you went inside or you went inside
20 the garage?

21 A. There was a door that goes in the garage to the
22 house.

23 Q. Okay, so there's a door, and when you said you went
24 inside, you went from the garage into -- into the house?

25 A. The house.

1 Q. Okay. Did -- did the Defendant at any point say do
2 you want to ---

3 MR. DIGGS: Your Honor, we object to any leading
4 questions.

5 THE COURT: Well, let me hear the question.

6 Q. Did the Defendant at any point tell you he wanted
7 you to leave or don't come in here?

8 A. No, sir.

9 THE COURT: I'll allow the question.

10 Q. All right. Now, what -- now, what happened once
11 you got -- got inside?

12 A. We was just talking for a minute. He was waiting,
13 and then he took me ---

14 Q. Okay. He was waiting. Was he -- do you know what
15 he was waiting for?

16 A. Waiting on people to bring it.

17 Q. To bring what?

18 A. He said his friends was bringing it. They're on
19 the way with the coke.

20 Q. Okay, so you were just -- you said you were just
21 talking?

22 A. Yeah. I was looking at his house. We was talking
23 about his house ---

24 Q. Okay.

25 A. --- and the dogs.

1 Q. And at this point, had you removed any of the
2 recording equipment that had been provided to you?

3 A. No, sir.

4 Q. Had you shut it off?

5 A. No, sir.

6 Q. As far as you -- to your knowledge, was it still
7 working?

8 A. Yes, sir.

9 Q. All right, so you're talking. About how long were
10 you talking, were y'all talking?

11 A. It was a while. I was there for a while.

12 Q. Okay, but you don't know exactly -- do you know how
13 -- exactly how long?

14 A. No, sir.

15 Q. Okay. All right, so then what happened after you
16 had been talking for a while?

17 A. He got a phone call and -- his girl said he had a
18 phone call, and then he took me into the room, a bedroom,
19 and closed the door, counted the money, and then he went
20 out into another room to meet them, I guess. I didn't
21 see, and then, I guess, come back in.

22 Q. And then ---

23 MR. DIGGS: Your Honor, we object to anything that
24 he guesses.

25 THE COURT: Just tell us what you know, okay?

1 A. Yes, sir. We went into the room. He closed the
2 door. I gave him the money. He counted it. He left out
3 of the room, closed the door. He come back. While he was
4 gone, his girl kept talking to me. We was talking about
5 the puppies, and the door was open. Then they come out of
6 the bedroom. We closed the door, and he gave me the coke.

7 Q. Okay, he gave you the coke. Okay. Did he say
8 anything to you or did he just hand you the coke?

9 A. It was all wrapped up. He asked me did I want to
10 unwrap it. I told him no, it was fine, and he put it on a
11 scale and he weighed it. I think he said that's like a
12 GP, because it had all the wrap on it.

13 Q. So did you leave immediately following?

14 A. No, sir.

15 Q. Okay. Well, what -- what were you doing? You
16 testified that the coke -- he gave you the coke all
17 wrapped up. Then what did y'all do?

18 A. I talked to him for a few more minutes.

19 Q. Uh-huh. What did y'all talk about?

20 A. I talked to him about buying some marijuana, talked
21 to him about the bar and the strip club down the street,
22 and that's pretty much it.

23 Q. Okay. How long did that go on for?

24 A. Probably about fifteen minutes.

25 Q. All right. Then what did you do?

1 A. I began to leave.

2 Q. All right. You began to leave?

3 A. I left.

4 Q. Okay, so you left. How did you leave? Did you

5 walk?

6 A. In my car.

7 Q. By car?

8 A. My car, yes, sir.

9 Q. That same car you came in?

10 A. Yes, sir.

11 Q. All right. Did,-- and where did you go in your

12 car?

13 A. Back to meet Joe at the office.

14 Q. All right, so he was -- so you went to meet Officer

15 Necessary at his office. Did you stop anywhere along the

16 way?

17 A. No, sir.

18 Q. Talk to anybody along the way?

19 A. As soon as I got in the car, Joe called, ---

20 Q. Uh-huh.

21 A. --- asked me did I have it. I told him yes. I

22 asked him did he want me to go back to the office. He

23 said yes, that he was behind me, following me.

24 Q. All right. Now, at any point during this time --

25 do you know about how long it took, the whole thing, any

1 idea?

2 A. From the time we left his office until we got back,
3 it might have been about a hour.

4 Q. Okay, and to your knowledge, was the recording
5 equipment working the whole time?

6 A. Yes, sir.

7 Q. And was -- and did you stop and talk to anybody
8 during that hour other than the Defendant ---

9 A. No, sir.

10 Q. --- and his girlfriend?

11 A. No, sir.

12 Q. Did you get anything from anybody?

13 A. No, sir.

14 Q. Did anybody give you anything other than what was
15 provided to you by the police and by the Defendant?

16 A. No, sir.

17 Q. Now, have you been given an opportunity to view
18 what was captured on that recording equipment?

19 A. Yes, sir.

20 Q. All right, and I will ask you if you recognize this
21 item?

22 **MR. DIGGS:** Your Honor, I don't have any objection
23 to the copy, but I do have an objection that we made on
24 yesterday.

25 **THE COURT:** All right, and you're preserved.

1 **MR. DIGGS:** Subject to that.

2 **THE COURT:** Okay.

3 Q. I'm going to ask you if you recognize this item?

4 A. Yes, sir.

5 Q. And what is that?

6 A. My initial.

7 Q. Okay, and what are your initials on?

8 A. C.N. on the CD.

9 Q. Okay, what's on the CD? Do you know what's on that
10 CD?

11 A. Video.

12 Q. Okay. Where did you get this?

13 A. The Solicitor had me watch it earlier.

14 Q. Okay, and where did it come from, do you know, this
15 -- this disk?

16 A. They had it.

17 Q. Okay. It came from Officer Necessary?

18 A. Yes, sir.

19 Q. And is what is on that disk a true and accurate
20 representation of what occurred on August 28th, 2009?

21 A. Yes, sir.

22 Q. It is?

23 A. Yes, sir.

24 Q. And to your knowledge, was anything left out of
25 that recording?

1 A. No, sir.

2 Q. Anything been added to it?

3 A. No, sir.

4 Q. And to your knowledge, what is on the disk and what
5 is also -- would also be on State's Exhibit 1, is that
6 what actually -- an accurate recording of the events as
7 they actually occurred between you and the Defendant on
8 August 28th, 2009?

9 A. Say that again.

10 Q. I'm sorry. Is that recording that you viewed, and
11 would thus also be the same recording that's been
12 identified as State's Exhibit 1, are those recordings of
13 the actual events that occurred between you and the
14 Defendant on August 28th, 2009?

15 A. Yes, sir. That tape is exactly right.

16 MR. GRAUSTEIN: Your Honor, at this time, the State
17 would move to enter State's Exhibit 1 into evidence.

18 THE COURT: All right. Subject to your objection,
19 Mr. Diggs?

20 MR. DIGGS: Yes, sir.

21 THE COURT: All right, thank you very much.

22 MR. DIGGS: Thank you.

23 THE COURT: So admitted.

24 (DVD OF DRUG BUY ADMITTED INTO EVIDENCE AS STATE'S
25 EXHIBIT NUMBER 1.)

1 **MR. GRAUSTEIN:** And, Your Honor, the State would ask
2 or move to publish this ---

3 **THE COURT:** All right. My understanding is this
4 tape is about an hour, is that correct?

5 **MR. GRAUSTEIN:** Yes, that is correct.

6 **THE COURT:** Okay. I don't want to break your tape,
7 but I don't want the jury sitting for two and a half
8 hours, so what we will do is let's let the jury have about
9 a ten minute break to kind of refresh themselves before we
10 begin the tape so we can go straight through it, okay?

11 **MR. GRAUSTEIN:** Very good, Your Honor.

12 **THE COURT:** Is that all right, Mr. Flick?

13 **MR. FLICK:** Yes, sir.

14 **THE COURT:** Take the jury panel and give everybody
15 the opportunity to refresh themselves.

16 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF**
17 **THE JURY.)**

18 **THE COURT:** Mr. Graustein, is it also so we can do
19 it on the big screen?

20 **MR. GRAUSTEIN:** Yes, it is, Your Honor.

21 **THE COURT:** This is the first time in about four
22 trials we've been able to do that.

23 **MR. GRAUSTEIN:** At least it was working earlier
24 today.

25 **MR. DIGGS:** Your Honor, I would argue -- we can do

1 it now or before they come back.

2 **THE COURT:** We can do it now.

3 **MR. DIGGS:** I would submit that the -- we would
4 probably need to do this outside the presence of the
5 witness also.

6 **THE COURT:** All right. Let's let the witness -- Mr.
7 Brooks, please take him back wherever you hold the
8 witnesses.

9 (Christopher Norris departs the Courtroom.)

10 **THE COURT:** All right, Mr. Diggs.

11 **MR. DIGGS:** Your Honor, I don't know -- I would
12 submit that Mr. Graustein's question didn't get him over
13 the threshold. It got him to there, but he didn't -- he
14 put it in a neutral way, did he say leave, did Mr. Castro
15 say leave. No, he didn't. He didn't ask the expression
16 about did he invite you in, did he ask you to come in and
17 do this, and so I would submit that he just didn't make
18 the showing that's necessary to make use of those -- that
19 line of cases that talk about bringing the wrongdoer in,
20 and as Judge Anderson might say, do away with the tent,
21 you know, advising ---

22 **THE COURT:** Okay, let me tell you where I am with
23 that, Mr. Diggs.

24 **MR. DIGGS:** All right.

25 **THE COURT:** I have looked at the Seidman case. It's

1 a Fourth Circuit case. I think **Seidman** is as close to
2 anything on point as I have found. There is no question
3 that a person has the right or an expectation of privacy
4 in his home, and that was the threshold that gave me some
5 concern in this particular case. I don't think we have to
6 get to the issue of whether or not this was a -- a lawful
7 or an unlawful warrant or search. I don't think we need
8 to get into the exceptions to a warrant, a search of a
9 home.

10 I am going to, for argument's sake and without making
11 a finding, but for argument's sake, I am going to give you
12 that. I am going to say, okay, this was or should have
13 been a warrant type search. I am going to give you the
14 fact that the informant was an agent of the police and it
15 was a Fourth Amendment search, so we're going to get past
16 that. I'm going to give you that for the -- for the
17 purpose of argument.

18 If you look at **Seidman**, the Court talked in terms of
19 subsequent conduct, purging the taint of the unlawful
20 search, and that's the key here, and we have to look at
21 the totality of the circumstances.

22 In this case, something sort of stands out to me,
23 unlike **Seidman**, when there was more or less an unannounced
24 visit. This was not an unannounced visit. This was
25 prearranged. The Defendant knew that the informant was

1 coming. That's been established, at least if we take it
2 in the light most favorable to the government, which we
3 must at this juncture.

4 The -- it was an announced visit. Whenever the
5 informant appeared, not only was he directed into the
6 house, he was directed to pull his vehicle into the
7 garage, carport, I'm not sure which one it was, instructed
8 to come around to a side door. While they engaged in
9 approximately, from what I can gather, about forty-five
10 minutes of conversation, thirty to forty-five minutes of
11 conversation, which involved many other things from the
12 dog, to the strip clubs down the street, a lot of other
13 things.

14 Also, I think that this case is somewhat
15 distinguished from **Seidman**, although **Seidman** made the
16 ruling that I believe I'm going to rule -- make in
17 upholding the search, but in **Seidman**, the purpose of the
18 informant was to get the Defendant in that case to talk
19 about essentially the embezzlement of Union funds, which
20 he did.

21 In this case, we go beyond that. We have a situation
22 where the Defendant actually participated in the unlawful
23 act during the visit, which I think carries it even one
24 step further. He has invited this person to his house.
25 He has engaged in the unlawful act while the informant was

1 coming. That's been established, at least if we take it
2 in the light most favorable to the government, which we
3 must at this juncture.

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5 informant appeared, not only was he directed into the
6 house, he was directed to pull his vehicle into the
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20 he did.

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22 where the Defendant actually participated in the unlawful
23 act during the visit, which I think carries it even one
24 step further. He has invited this person to his house.
25 He has engaged in the unlawful act while the informant was

1 that they can make a claim that Mr. Castro has violated
2 the law.

3 The purging based on this witness's testimony, it's
4 apparent that these -- that the drugs were delivered there
5 to the residence after Mr. Norris had already gone into
6 the home, so it's kind of like after the confidential
7 informant gets there, he's -- he's still orchestrating
8 things so that the drugs can be delivered to Mr. Castro,
9 and Mr. Castro is not even a necessary participant.

10 You know, I would just suggest that Mr. Castro's
11 conduct is kind of going along with whatever is being
12 orchestrated by Mr. Norris and the DEU people. I would
13 respectfully argue that there's not any conduct by this
14 witness -- by this Defendant that purges anything that is
15 done ---

16 **THE COURT:** Well, in **Wong** -- **Wong Sun** case, which is
17 a Supreme Court case ---

18 **MR. DIGGS:** Pardon?

19 **THE COURT:** **Wong Sun**, the Supreme Court ruled, and I
20 -- the broad exclusionary prohibition against warrantless
21 searches would allow an intervening act of free will to
22 purge the primary chain of the unlawful invasion, and the
23 relevant factors set forth in **Wong** as well as in **Seidman**
24 are that the amount of time between the illegal action and
25 the acquisition of evidence.

1 Here we have an entry, if it was unlawful, and I'm
2 going to give you that for the purpose of argument, we
3 have an entry. We have a substantial period of time
4 passing. Coincidentally, it's about what we're talking
5 about in the **Seidman** case. It's about a thirty, forty-
6 five minute conversation. The Court found that to be a
7 sufficient amount of time between the intrusion, the
8 Fourth Amendment intrusion, and the acquisition of
9 evidence, also, the presence of intervening circumstances,
10 and in the **Seidman** case, the Court found that these other
11 conversations that the parties engaged in and these common
12 interests that they have that they discussed were
13 certainly intervening circumstances, and finally, the
14 purpose and flagrancy of the official misconduct.

15 Under this case, I believe that there was sufficient
16 evidence for the police to -- or the State to have just
17 gone and gotten a warrant, I think that they put a -- I
18 don't think that this is a situation where they went in
19 knowing that they could not get a warrant. I think it's a
20 situation where they went in thinking that a warrant was
21 not going to be required by the Fourth Amendment. I don't
22 see this as being a flagrant violation. They came back an
23 hour later and he gives them consent to search.

24 Considering the facts that are set out in **Wong Sun**
25 and **Seidman**, I just don't believe that a warrant -- or

1 that the absence of a warrant would call for exclusion of
2 the evidence in this case. The better practice would have
3 been probably to get a warrant, but I am not going to
4 exclude the evidence.

5 **MR. DIGGS:** Your Honor, just a couple of things. I
6 don't believe you've had a chance to look at the tape, the
7 actual video, yet.

8 **THE COURT:** And I -- I give you that. I may change
9 my mind when I look at it.

10 **MR. DIGGS:** Most of the conversations did not
11 involve the Defendant. You're going to see that most of
12 the conversation, the bulk of the time, took place ---

13 **THE COURT:** But it involves the Defendant's
14 home, ---

15 **MR. DIGGS:** The home, yes, sir.

16 **THE COURT:** --- and that's what we're protecting
17 here. The Fourth Amendment protects his right to privacy
18 of that home.

19 **MR. DIGGS:** And I would submit it runs to the
20 Defendant, not -- the right of privacy runs to the
21 Defendant regardless of where the Defendant is, and
22 certainly ---

23 **THE COURT:** Yes, even if he hadn't even been there,
24 it would have still been ---

25 **MR. DIGGS:** But with the Court's analysis that there

1 were intervening circumstances due to the conversations, I
2 just want to point out that the bulk of those
3 conversations occurred between Mr. Norris and the fiance
4 that was in the home.

5 **THE COURT:** And the intervening circumstance of the
6 actual sale of drugs. Under **Seidman**, they were just
7 talking about an offense that had occurred at some earlier
8 time. In this case, we have an actual sale, the crime
9 itself taking place, or it's a possessory crime,
10 trafficking, there doesn't have to be a sale, but the
11 possession was during the time that the informant was
12 there.

13 **MR. GRAUSTEIN:** Your Honor, I would also point out
14 that as testified to by Mr. Norris, Mr. Castro removed
15 himself to meet with these other people, so it wasn't that
16 it's ---

17 **THE COURT:** And I considered that. He leaves him in
18 one room, goes to another room, says stay here, and he
19 comes back with the drugs. It's obvious what's going on,
20 and everyone there knew what it was, and it was probably
21 just in the furtherance of his business to keep his
22 supplier separate from his customer. That's what it
23 appears.

24 All right, I want to take a few minutes for a break
25 and we'll start back up, and Mr. Castro, if you could -- I

1 mean, Mr. Graustein, if you could make sure that we've got
2 that thing ready to go, ready to roll.

3 (THE FOLLOWING TAKES PLACE AFTER A BREAK AND OUTSIDE
4 THE PRESENCE OF THE JURY.)

5 THE COURT: Are you ready, Mr. Graustein?

6 MR. GRAUSTEIN: Yes, Your Honor.

7 And, Your Honor, just for the Court's information, a
8 couple of very brief questions of the witness before we
9 play the video.

10 THE COURT: Okay.

11 MR. GRAUSTEIN: Your Honor, do you want the witness
12 to resume the ---

13 THE COURT: Yes. Go ahead and put him on there.
14 Let's bring in the jury.

15 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
16 JURY.)

17 THE COURT: All right, we're all ready to go.
18 Mr. Graustein, continue with your witness.

19 MR. GRAUSTEIN: Thank you, Your Honor.

20 CONTINUING DIRECT EXAMINATION BY MR. GRAUSTEIN OF
21 CHRISTOPHER NORRIS:

22 Q. Mr. Norris, just a couple of brief questions. I
23 want to ask you if you recognize what's been marked as
24 State's Exhibit 2. Do you recognize that?

25 A. Yes, sir.

- 1 Q. And what is that?
- 2 A. Cocaine.
- 3 Q. Could you speak up?
- 4 A. Cocaine.
- 5 Q. Cocaine, and do you know where this cocaine came
- 6 from?
- 7 A. What I had, it was wrapped up.
- 8 Q. It was wrapped up?
- 9 A. Yes, sir.
- 10 Q. And that is when -- and where did you get it from?
- 11 A. Nelson.
- 12 Q. From Nelson, the Defendant?
- 13 A. Yes, sir.
- 14 Q. All right, and after you took possession of it and
- 15 you left, just remind the jury where you went.
- 16 A. Back to the office to meet Joe.
- 17 Q. Okay. What did you do with the co- -- with the
- 18 cocaine when you got back to the office?
- 19 A. Joe opened up a envelope and I dropped it in it.
- 20 Q. Okay. Between the time you left the Defendant's
- 21 residence and the time you got to the office and met with
- 22 Officer Necessary, did you open the package?
- 23 A. No, sir.
- 24 Q. Did you take anything out of the package?
- 25 A. No, sir.

1 Q. Did you add anything to the package?

2 A. No, sir.

3 Q. To your knowledge, to the best of your knowledge,
4 was the condition of the cocaine the same when you gave it
5 to Officer Necessary as it was when you took possession of
6 it?

7 A. Yes, sir.

8 **THE COURT:** All right, you may step down.

9 Mr. Hemingway, put the witness in the -- where they
10 are being sequestered. We will bring him back out when
11 Mr. Diggs has an opportunity to cross examine.

12 **MR. GRAUSTEIN:** Your Honor, at this time, the State
13 moves to publish the video tape.

14 **THE COURT:** All right.

15 Can everyone on the jury panel see that? Anyone not
16 able to see? (No response.)

17 All right.

18 **(STATE'S EXHIBIT NUMBER 1 IS PUBLISHED IN ITS**
19 **ENTIRETY TO THE JURY IN OPEN COURT.)**

20 **THE COURT:** Mr. Diggs, cross examination will
21 probably take some time, so let's go ahead and take that
22 up after lunch.

23 Be back in your jury room at two o'clock. Thank you.

24 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF**
25 **THE JURY.)**

1 **THE COURT:** Mr. Diggs, I assume you will wait until
2 after you have finished your cross examination to renew
3 your motion?

4 **MR. DIGGS:** Yes, Your Honor.

5 **THE COURT:** All right, very well.

6 All right, we are at ease until two o'clock.

7 **(THE FOLLOWING TAKES PLACE AFTER A LUNCH BREAK AND**
8 **OUTSIDE THE PRESENCE OF THE JURY.)**

9 **THE COURT:** Do you want to do anything further on
10 the record before ---

11 **MR. DIGGS:** Well, I want the record to reflect that
12 we objected to both the cocaine and the video and the
13 audio recording ---

14 **THE COURT:** Right.

15 **MR. DIGGS:** --- on the ground that there's a Fourth
16 Amendment violation, and, of course, after looking at the
17 **Seidman** opinion I would argue that the initial entry was
18 illegal and the illegality was made more flagrant by the
19 recording devices that were also used, and on those bases,
20 in addition, once we have that illegal entry, Your Honor,
21 I would argue respectfully that the taint was not
22 attenuated, that it continued because the recordings
23 themselves continued as well.

24 **THE COURT:** All right, and just let me say for the
25 record that I've had an opportunity to review this matter.

1 Not only have I seen the tape and heard the testimony, but
2 I've read **Seidman** and other cases as well.

3 It would appear to me that for the purposes of my
4 analysis I would be correct in assuming that this was a
5 situation that would have normally carried a -- required a
6 warrant, and for the purpose of my analysis, I will
7 consider that.

8 It was a home and there was an entry by an agent of
9 the police. However, the factors to consider in
10 determining what the taint of the violation, that is the
11 Fourth Amendment violation, carries over to require the
12 suppression of the evidence would be whether or not or the
13 amount of time between the illegal action and the
14 acquisition of the evidence.

15 I find that there was a substantial period of time
16 after the informant entered the home. This went on for
17 quite some minutes, probably at least a half an hour.
18 There was intervening circumstances, such as the fact that
19 these parties knew each other well. There was a
20 prearranged meeting. The informant was invited into the
21 home. In fact, the Defendant actually asked him to park
22 in his garage, move his car, and he invited him inside.

23 He was there for quite some time, talked with the
24 lady companion of the Defendant. I don't know who that
25 was, but there was a lady there. They talked about many,

1 many different things, from the dogs, to the house. All
2 sorts of things were discussed. It would appear that it
3 was a very cordial situation. There was never any request
4 that the informant leave, and the purpose and flagrancy of
5 the official conduct is not such that it would rise to a
6 requirement that the evidence be suppressed.

7 I think that when we look at all of these factors
8 combined and we take them all together, they weigh against
9 suppression and any taint from the unlawful entry of the
10 home is purged by the Defendant's voluntary conversations
11 with the informant, who presented absolutely no threat or
12 coercion to the Defendant, and I'm also compelled by the
13 fact that this not as in **Seidman** a mere discussion of
14 prior criminal activity. It was an ongoing act. The
15 events occurred on the tape, so I'm going to allow it.
16 Thank you.

17 **MR. DIGGS:** Your Honor, just for the record, I'm
18 going to make clear for the record, we're talking about
19 **Harry Seidman, United States v. Harry Seidman**. It's found
20 at 156 F.3rd 542, a Fourth Circuit case from 1998.

21 **THE COURT:** The cite I have is 156 F.3rd 542, a 1998
22 case. All right, thank you.

23 **MR. DIGGS:** Yes, sir, and also, Your Honor, I'm
24 going to ask the Court and the Counsel to consider at the
25 conclusion of this case, I want to argue the illegality of

1 conclusion of this case, I want to argue the illegality of
2 the entry initially to the jury, and I know there might be
3 some objection to that.

4 **THE COURT:** And I'm sure there would be.

5 **MR. DIGGS:** Pardon?

6 **THE COURT:** And I'm sure there would be. You know,
7 I -- if this were a purely -- an involuntariness issue, I
8 would be inclined to agree with you. I think certainly
9 the matter of the voluntariness of a confession is a
10 matter for the jury to consider even though the Judge may
11 have made a preliminary ruling.

12 I don't think that is the case with this Fourth
13 Amendment violation, and I would not want you to argue
14 that because I have made a ruling that the taint has been
15 purged. All right, thank you.

16 **MR. DIGGS:** Your Honor, I don't need to reiterate
17 that again at the time of closing, correct?

18 **THE COURT:** All right, you would not have to. Thank
19 you.

20 How many more witnesses do you have, Mr. Graustein?

21 **MR. GRAUSTEIN:** One after Mr. Diggs is done with Mr.
22 Norris.

23 **THE COURT:** All right.

24 Let's get the witness in, if you would, Norris, yes,
25 the confidential informant.

1 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
2 JURY.)

3 THE COURT: All right, Mr. Diggs.

4 MR. DIGGS: Thank you, Your Honor. May it please
5 the Court.

6 CROSS EXAMINATION BY MR. DIGGS:

7 Q. Mr. Norris, how are you this afternoon?

8 A. All right.

9 Q. You doing okay?

10 A. Yes, sir.

11 Q. All right, I want to talk a little bit about your
12 criminal past, okay, and I want you to kind of give me an
13 overview. First of all, how old are you?

14 A. Twenty-two.

15 Q. Twenty-two?

16 A. Yes, sir.

17 Q. And when was the first time you were arrested and
18 convicted of a crime?

19 A. It was when I was young, alcohol and simple
20 possession.

21 THE COURT: Mr. Norris, this is not a place to
22 whisper. I want you to speak up and speak clearly so the
23 jury can hear you.

24 A. I don't know exactly how old I was.

25 Q. Okay, but that was possession of alcohol and

1 Q. Okay, but that was possession of alcohol and
2 possession of marijuana?

3 A. Simple possession.

4 Q. And you testified that you were working with law
5 enforcement in order to get some help on sentencing, is
6 that correct?

7 A. Yes, sir.

8 Q. Were some concessions by the State -- by
9 concessions, I mean giving you a break, okay? For
10 example, you testified you were initially arrested for
11 burglary in the first degree, correct?

12 A. Yes, sir.

13 Q. Now, you had an attorney on that charge, is that
14 correct?

15 A. Yes, sir.

16 Q. You had a chance to discuss with your attorney what
17 the potential punishment was for that offense, correct?

18 A. Yes, sir.

19 Q. And do you remember what the penalty that you faced
20 for that offense was?

21 A. No, sir.

22 Q. Was it thirty years in prison?

23 A. I had a few pleas.

24 Q. I'm sorry?

25 A. I have different pleas. I don't know what they

1 were, though.

2 Q. I know; I know, but in terms before that, the
3 burglary in the first degree, did anybody ever tell you
4 what the penalty, potential penalty, you were facing for
5 that was?

6 A. Axelrod said something about three years.

7 Q. Three years?

8 A. Yes, sir.

9 Q. All right. Did anybody else ever tell you that it
10 could have been thirty years and maybe life?

11 A. No, sir.

12 Q. They didn't? All right. Have you been sentenced
13 as we sit here today? Have you been sentenced for the
14 burglary charge?

15 A. Yes, sir.

16 Q. And what did you get?

17 A. I had different charges that was combined and it
18 was five years probation with cocaine.

19 Q. All right, so you don't have to do a day in jail?

20 A. No, sir.

21 Q. And all you had to do was set up my client on a
22 drug charge?

23 A. Yes, sir.

24 Q. How many other people did you set up?

25 A. Just him.

- 1 A. Yes, sir.
- 2 Q. And they dismissed all of the other stuff because
- 3 of your working on my client, his case?
- 4 A. Not dismissed.
- 5 Q. Pardon?
- 6 A. Probation.
- 7 Q. All right. Let's see, you were arrested in 2005
- 8 for possession of marijuana, ten grams or less, first
- 9 offense?
- 10 A. Yes, sir.
- 11 Q. You were convicted of that?
- 12 A. No, sir.
- 13 Q. Why not?
- 14 A. Axelrod is still waiting to go to Court.
- 15 Q. All right. That is still pending?
- 16 A. Yes, sir.
- 17 Q. And you were arrested for criminal domestic
- 18 violence, first degree?
- 19 A. Yes, sir, but that got dropped.
- 20 Q. And why was it dropped, do you know?
- 21 A. Because nothing happened. The Judge dismissed it.
- 22 Q. All right, but you got arrested for that, correct?
- 23 A. Yes, sir.
- 24 Q. What did you do in order to get arrested?
- 25 A. We were arguing, me and one of my friends.

1 A. We were arguing, me and one of my friends.

2 Q. With who? Who were you arguing with?

3 A. One of my friends.

4 Q. A friend that you lived with?

5 A. No, sir.

6 Q. So you got arrested for criminal domestic violence
7 with -- because you were involved with somebody you did
8 not live with?

9 A. Yes, sir.

10 Q. All right, and you were driving while your license
11 was under suspension?

12 A. Yes, sir.

13 Q. Why was it suspended?

14 A. For alcohol and simple possession.

15 Q. All right. You were in possession of some other
16 drug with intent to commit a crime. Do you remember what
17 that was in 2007?

18 A. Yes, sir.

19 Q. You were arrested with some kind of drug and
20 possession with intent to distribute?

21 A. The only thing I've been charged with is the
22 marijuana, simple possession, so that one intent to
23 distribute.

24 Q. The one intent to distribute from 2007, correct?

25 A. Yes, sir.

1 possession charge from 2005, correct?

2 A. What are you saying from 2005?

3 Q. Yes, it's in addition to the 2005 charge? The 2007
4 charge is an additional charge, correct?

5 A. That was a first for distributing, intent,
6 possession with intent.

7 Q. Yeah, that was the first distributing one, but the
8 other one was simply possessing it, correct?

9 A. Yes, sir. I got quite a few of those.

10 Q. Sorry?

11 A. I got quite a few of simple possessions.

12 Q. All right.

13 A. I don't know what year.

14 Q. How many do you have?

15 A. I don't know.

16 Q. You also tried to outrun the police, didn't you?

17 A. Yes, sir.

18 Q. Pardon?

19 A. Yes, sir.

20 Q. They had a blue light on. Why didn't you stop for
21 them?

22 A. Just was running. I had a warrant out for
23 burglary.

24 Q. Okay, so you had committed the burglary, correct?

25 A. Yes, sir.

1 Q. And even though you committed it and you ran away
2 from the police with a blue light chasing you, the State
3 of South Carolina has agreed just to let you go with five
4 years probation, correct?

5 A. Yes, sir.

6 Q. And as a condition of that, was a requirement made
7 that you come in and testify in this case?

8 A. I didn't know I was going to testify in it until
9 yesterday. I got a phone call.

10 Q. But you knew that was a possibility, didn't you?

11 A. Yes, sir.

12 Q. I mean, I didn't know we were coming to court
13 either until I got a call telling me to be here, so we're
14 kind of in the same boat, right?

15 A. Yeah.

16 Q. But we both knew that was a possibility, didn't we?

17 A. Yes, sir.

18 Q. Pardon?

19 A. Yes, sir.

20 Q. Okay, and what would have happened if you didn't
21 come in and testify?

22 A. I don't know.

23 Q. All right. Did anybody ever tell you, "Well, we're
24 going to prosecute you on the burglary charge"?

25 A. No, sir.

1 Q. Nobody ever said that?

2 A. No, sir.

3 Q. Nobody?

4 A. No, sir.

5 Q. I'm just saying, you know, you're under oath. You
6 promised to tell the truth, but your testimony is that
7 nobody ever promised you anything as a result of your
8 testimony here?

9 A. No, sir.

10 Q. And nobody ever said, "We're going to prosecute you
11 for burglary if you don't cooperate in this case"?

12 A. No, sir.

13 Q. Or curiously, curiously, why did they even come to
14 you, then, if you know, to get wired and go in and see my
15 client?

16 A. Axelrod talked to the Solicitor. I made the offer.

17 Q. Why did you ultimately begin to believe it was a
18 good idea to go under cover and work with the police? Why
19 did -- why did you even think about doing that?

20 A. Because I had a nine month old little girl.

21 Q. So because you had a daughter, you decided to go
22 ahead and become an under cover agent for the police?

23 A. To help myself out, to better myself.

24 Q. All right, to help yourself out. That's all I'm
25 trying to get you to say. Why is it so hard?

1 A. What you mean?

2 Q. All right, you're here testifying to save your
3 skin, your back side, because you've committed illegal
4 conduct far worse perhaps than anything you're saying my
5 client did. You're trying to get out of that by
6 testifying in this case, correct?

7 A. Yes, sir.

8 Q. In fact, not even going far beyond that, going in
9 and putting on a wire and a camera, going into a man's
10 home and tricking him into doing a drug deal supposedly
11 just to save your back side, isn't that what you did?

12 A. I didn't trick no one.

13 Q. Oh, okay. Did you ever tell him you were there as
14 a police informant?

15 A. No, sir.

16 Q. That's kind of tricking him, isn't it?

17 A. I wouldn't say so.

18 Q. Did you ever tell him that you had on a wire?

19 A. No, sir.

20 Q. That's kind of tricking him, isn't it?

21 A. (No response.)

22 Q. Did you ever tell him you were video-taping him?

23 A. No, sir.

24 Q. Video-recording him, that's kind of tricking him,
25 isn't it?

1 A. (No response.)

2 Q. So you want to re-think your response to my

3 question about trying to trick him? Your testimony was

4 that you didn't trick anybody. Is that true?

5 A. I didn't trick no one.

6 Q. Your testimony is you didn't trick my client?

7 A. Yes, sir.

8 Q. You told him you were coming in with a video

9 recorder?

10 A. No, sir.

11 Q. You told him you were coming in working for this

12 man right here?

13 A. No, sir.

14 Q. You didn't tell him any of those things, but you

15 didn't trick him, correct?

16 A. I wouldn't classify that as tricking him.

17 Q. All right, I understand. It's certainly not being

18 honest, correct?

19 A. Repeat that question.

20 Q. You're not being honest with Mr. Castro?

21 A. He didn't ask me.

22 Q. Let me ask you if you're being honest today?

23 A. Yes, sir.

24 Q. Let's go back and I want you to tell me when it was

25 you first met this gentleman, Agent Necessary. When did

1 you first met this gentleman, Agent Necessary. When did
2 you first meet him?

3 A. I can't tell you for date, but I met him at this
4 courthouse right here for my rollcall that I went to Court
5 with Axelrod.

6 Q. And your attorney was saying, "Look, Chris, I can
7 help you out by hooking you up and letting you be an under
8 cover agent. Are you willing to do that?" and what did
9 you say?

10 A. Yes, sir, and Heather gave me his number.

11 Q. Who is Heather?

12 A. The Solicitor.

13 Q. Did you call Officer Necessary on your own?

14 A. Heather did.

15 Q. Heather; she's the lady that was prosecuting you?

16 A. Yes, sir.

17 Q. Okay, and did she set up a meeting or what?

18 A. Yes, sir. He come up there.

19 Q. This gentleman came ---

20 A. To here.

21 Q. --- up to here?

22 A. Yes, sir.

23 Q. And you met with him?

24 A. Yes, sir.

25 Q. And tell us where you met and what you did when you

1 met with him.

2 A. He took my picture. I filled out paperwork, told
3 him my name. I met him in the courthouse in a little
4 room, and I told him about Nelson, and then we got -- he
5 said, "I'll call you later."

6 Q. Do you remember where it was in this courthouse
7 that you met Agent Necessary?

8 A. I know it was in a little room. It might have been
9 on this third floor or the second floor.

10 Q. Now, at that point, what did Agent Necessary tell
11 you, if anything?

12 A. That he would talk to Heather and get back with me.

13 Q. And to your knowledge, did he do that?

14 A. He told me he did.

15 Q. Okay. About how long was it -- how much time went
16 past before he got back in touch with you?

17 A. I called him like about every week, every other
18 week.

19 Q. You were really eager to work for him, weren't you?

20 A. Yes, sir.

21 Q. You were really eager to help him out because you
22 knew that might help you with your burglary charge and
23 that massive, huge sentence that would go with it, didn't
24 you?

25 A. It was burglary and cocaine.

1 Q. Burglary ---

2 A. And cocaine.

3 Q. I'm just going to ask you this, ---

4 MR. DIGGS: And, Your Honor, I'm on cross
5 examination.

6 Q. Did you know that people used to be executed for
7 committing burglary?

8 A. No, sir.

9 Q. Well, they did. That's part of the history of this
10 country, and I would suggest that still, even now, it
11 carries a pretty substantial prison sentence, burglary in
12 the first degree, and that's what you committed, isn't it?

13 A. Yes, sir.

14 Q. All right, even though you weren't prosecuted for
15 that. We understand that.

16 A. Yes, sir.

17 Q. Now, after you met with -- after Agent Necessary
18 called you back, tell us what occurred or what was
19 discussed during that telephone conversation.

20 A. I asked him how much do I need to buy to help
21 myself out. He called Heather. He called back, and he
22 said I needed at least three ounces.

23 Q. So it was the police that came up with the idea of
24 three ounces, correct?

25 A. He asked me where I could buy them. I said the

1 most I've ever bought was three.

2 Q. Let me ask you this: What was discussed, okay, and
3 I want you to tell me the best you remember, and don't
4 switch it around, okay? Tell us what happened, how the
5 conversation unfolded, please, sir.

6 A. First he asked me that day when we was here how
7 much have I ever bought, and I told him, and on the
8 conversation, I asked him what did I need to help myself
9 out. He talked to Heather.

10 Q. All right. Let me stop you right there. You asked
11 what you needed to do to help yourself, correct?

12 A. Yes, sir.

13 MR. DIGGS: Your Honor, could we -- could I have a
14 matter of law, to discuss a matter of law at this point.

15 THE COURT: Take the jury out.

16 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF
17 THE JURY.)

18 THE COURT: All right.

19 MR. DIGGS: Your Honor, I don't know if the witness
20 intends to do this, but I do not want to ask any questions
21 that might elicit some response from this witness that,
22 oh, well, that's how much I purchased before from this
23 particular Defendant. I'm going to ask if -- outside the
24 presence of the jury ---

25 THE COURT: You're getting close to that, though.

1 **MR. DIGGS:** He's close now. Now, where we are in
2 this case, and I didn't object to it earlier, when the
3 Solicitor was in direct examination, the Solicitor asked
4 the nature of their relationship, how often they saw each
5 other, and he was clearly implying, in my opinion, at that
6 time that he had had a regular dealing, drug dealing, a
7 past with my client ---

8 **THE COURT:** That would seem to be a reasonable
9 inference from the testimony we've heard.

10 **MR. DIGGS:** Correct; correct, and, Your Honor, I
11 would have objected had he gone any more in that
12 direction; I would have objected to prevent interjecting
13 the issue of character into the case when it hadn't been
14 placed into evidence by the Defendant.

15 What I want to ask the Court to do is to instruct the
16 witness not -- unless I specifically ask him have you
17 purchased drugs or cocaine, or any type of controlled
18 substance from Mr. Castro in the past, I don't want him to
19 say, well, I've made other purchases and here's how much I
20 purchased from him.

21 **THE COURT:** Are you going to ask him if he's bought
22 it from Mr. Castro in the past?

23 **MR. DIGGS:** I'm not going to ask him. It's my
24 understanding he has not.

25 **THE COURT:** Well, what do you want to ask him?

1 **MR. DIGGS:** I want to ask him where the idea of the
2 three ounces came from, did Mr. Castro interject that in
3 some way, or did that come from the Police Department or
4 from himself?

5 **THE COURT:** Well, he has said that the policemen or
6 Mr. Necessary asked him what's the most he ever bought,
7 okay? He said three ounces. That's where we are right
8 now.

9 **MR. DIGGS:** Absolutely, but I did not want him to
10 say, in fact, I bought three ounces from him just last
11 month.

12 Could I ask the witness if he had sold before to the
13 Defendant?

14 **THE COURT:** Ask him.

15 Q. Have you ever sold before to him?

16 A. To him?

17 Q. Yes, sir.

18 A. No, sir.

19 Q. No. All right, sir.

20 **THE COURT:** You asked the question backwards, Mr.
21 Diggs. You asked him had he ever sold to Mr. Castro.

22 Q. Did Mr. Castro ever purchase from you or sell to
23 you, sell to you?

24 **THE COURT:** I think you want to ask him if he ever
25 bought it from Mr. Castro.

1 Q. Did you ever purchase from Mr. Castro?

2 A. Yes, sir.

3 Q. All right. How many occasions do you contend he
4 has done that?

5 A. It's been a lot of times.

6 Q. What was the largest amount that you did?

7 A. Three ounces of coke.

8 MR. DIGGS: Your Honor, I'm going to ask -- I'm not
9 going to ask him in the presence of the jury that
10 question. I'm asking Your Honor if you will instruct him
11 not to say that in the presence of the jury.

12 THE COURT: Let me hear from Mr. Graustein.

13 MR. GRAUSTEIN: Your Honor, Mr. Diggs is trying to
14 elicit a response and attempting to give the impression to
15 the jury that the idea is coming from the police to go out
16 there and -- you go out and set up the Defendant for three
17 ounces, without telling them where that's coming from.

18 THE COURT: Mr. Diggs, if you want to ask this
19 Defendant if -- in response to an inquiry, how much you
20 ever -- is the most you ever bought, and he said three
21 ounces, and then you want to ask him did the police want
22 you to get three ounces, or how much did they want you to
23 get, and he says three ounces, and you leave it there,
24 that's fine, but you better walk very carefully around
25 this because you're getting close to opening up that door.

1 **MR. DIGGS:** And that's why I asked for the jury to
2 go out.

3 **THE COURT:** I'm not going to let you have it both
4 ways. I'm not going to let you go way deep into this
5 thing about his drug dealing and not be able to have Mr.
6 Graustein come back on you on that.

7 We know where he says he got -- he's getting the
8 drugs. He's told us that, is he gets them from Mr.
9 Castro. I mean, I would be very, very cautious about this
10 if I were you. I would simply ask him was it then Mr. --
11 at Mr. Necessary's suggestion that you buy three ounces,
12 and I'd kind of leave it right there.

13 **MR. DIGGS:** Okay.

14 **MR. GRAUSTEIN:** Well, I just want to be clear, Your
15 Honor, that if he asks that, I mean if leaving it that the
16 police picked this number out of the air, say, okay,
17 what's going to help you out, three ounces ---

18 **THE COURT:** Well, I think he's already established
19 that the police -- what's the most you ever bought? I
20 bought eight -- three ounces, although he's contradicted
21 that subsequently by saying he bought a half a pound, but
22 three ounces -- what did the police want you to buy?
23 Three ounces. And if I were you, I would kind of leave it
24 right there, Mr. Diggs, ---

25 **MR. DIGGS:** Your Honor, ---

JURY OUT/ON RECORD
JURY IN/ CHRISTOPHER NORRIS - CROSS BY DIGGS

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1 **THE COURT:** --- because if you go much further than
2 that, you're opening a door here.

3 **MR. DIGGS:** I certainly understand and, you know,--I
4 appreciate your time, Your Honor, and that's why I asked
5 for the jury to go out. I don't want to go in that
6 direction.

7 **THE COURT:** All right. I've got all the time you
8 need to try this case.

9 Mr. Norris, I want you speaking up. I want you to
10 stand up -- sit up straight in that chair. I want you to
11 get near that microphone, and I want you to speak up.

12 **(THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE**
13 **JURY.)**

14 **THE COURT:** All right, Mr. Diggs, you can continue.

15 **MR. DIGGS:** Thank you.

16 Q. Mr. Norris, we were talking about your decision to
17 work with the police in trying to help yourself, and I
18 want to go back and ask you to recount that conversation,
19 if you could, that you had with Agent Necessary about what
20 you needed to do to help yourself, and did you ask -- you
21 or did anyone -- did you ask him, let me put it that way,
22 what you needed to do in order to help yourself in this
23 burglary situation?

24 A. First of all, I -- we talked and he asked me how
25 much I've ever bought from Nelson, what kind of drugs

1 I've bought from him, and I told him I had bought
2 marijuana and cocaine, and he said ---

3 **MR. DIGGS:** Your Honor, I have a matter of law.

4 **THE COURT:** All right.

5 Take the jury back out.

6 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF**
7 **THE JURY.)**

8 **THE COURT:** All right.

9 Mr. Norris, what I want you to understand is this:
10 Unless Mr. Diggs asks you specifically if you bought
11 drugs from Mr. Norris -- I mean Mr. Castro, I do not want
12 you indicating that you bought any other drugs from Mr.
13 Norris (sic), all right? You just responded that Mr.
14 Necessary wanted to know what amount of drugs you had
15 bought from Mr. Castro. I want to just leave that right
16 there.

17 What we are going to talk about are general things.
18 I don't want you to be talking about any other purchases
19 from Mr. Castro other than the one in question here. Do
20 you understand that?

21 A. Yes, sir.

22 **THE COURT:** All right.

23 **MR. DIGGS:** Your Honor, I've got to -- I
24 respectfully would request a mistrial because I know -- I
25 mean, just looking at the witness's face, he did that on

1 purpose. It was not responsive to the question, and I
2 would point out that he sat right here a minute ago ---

3 **THE COURT:** Well, I'm not going to -- I'm not going
4 to grant a mistrial in this. I'll give you a curative
5 charge if you want to over- -- to emphasize it, or we'll
6 let it go. I'll do it any way you want, but I'm not
7 going to grant a mistrial.

8 We've been talking around all day long the
9 relationship that these men had. I've told him not to
10 mention it any further. You're in a very dangerous area
11 as far as asking these questions. You wanted to know why
12 the three ounces was requested. We've got the -- I'm
13 just not going to grant a mistrial.

14 I will tell you, Mr. Norris, again, do not discuss
15 any other transactions that you've had with Mr.
16 Castro, ---

17 A. Yes, sir.

18 **THE COURT:** --- okay?

19 All right.

20 **MR. DIGGS:** We're ready.

21 **THE COURT:** All right, let's bring them back in.

22 **MR. GRAUSTEIN:** Your Honor, do you want the State to
23 instruct the witness -- give instructions to the witness
24 regarding his answers to Mr. Diggs' questions?

25 **THE COURT:** With what?

1 **MR. GRAUSTEIN:** Would you want us to give --
2 instruct the Defendant (sic) ---

3 **THE COURT:** I think I've made it clear to him.

4 **(THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE**
5 **JURY.)**

6 **THE FOREMAN:** Your Honor, they're still having
7 trouble hearing.

8 **THE COURT:** All right.

9 Again, Mr. Norris, I want you speaking up.

10 If at any time you cannot hear, raise your hand. Let
11 me know.

12 All right, go ahead, Mr. Diggs.

13 **MR. DIGGS:** Thank you, Your Honor.

14 Q. Now, there came a time when Agent Necessary called
15 you back and contacted you about assisting their Drug
16 Enforcement Unit, is that true?

17 A. Yes, sir.

18 Q. I'm sorry?

19 A. Yes, sir.

20 Q. Yes, and this was after you met here in the
21 courthouse. He called you up, and tell us what happened
22 at that point. Was another meeting set up, or did you
23 just converse on the phone? Tell us what transpired as a
24 result of him calling you.

25 A. He come and picked me up and wanted me to show him

1 the address of the residence.

2 Q. All right. Now, at any time did you ever ask the
3 question, what can I do to help myself, or what can I do
4 to help myself with this burglary charge I have pending
5 against me?

6 A. I never said just burglary; it was with the
7 cocaine, too.

8 Q. All right. Did you ever ask him, what can I do in
9 order to help myself with the criminal charges pending
10 against me?

11 A. I already knew I was making a buy.

12 Q. Did you ask him, yes or no?

13 A. Repeat the question again.

14 Q. Did you ask him, what can I do to help myself?

15 A. I already knew what I was going to do to help
16 myself.

17 Q. I know, but that's not answering the question.

18 A. No.

19 Q. Please answer the question. You did not ask him?

20 A. No, sir.

21 Q. You testified earlier that you did. Do you recall
22 that?

23 A. Yes, sir.

24 Q. You did, all right. Did you misspeak on purpose
25 or was it something that you did as a result of an error?

1 A. An error.

2 Q. So you never asked him anything about what you
3 could do to help yourself?

4 A. No, sir, because we already talked with my lawyer
5 and Heather.

6 Q. All right, and what did Heather tell you you
7 needed to do?

8 A. Axelrod said something about ---

9 Q. Not Axelrod. Heather is not Heather Axelrod,
10 correct?

11 A. Yes, sir, but I never talked to Heather. Axelrod
12 talked for me.

13 Q. I thought you just said you talked -- you, and
14 Heather, and your attorney had talked about it?

15 A. We did. I talked to Axelrod, standing there. He
16 would talk to Heather.

17 Q. In your presence, was Heather saying things that
18 you could hear?

19 A. Yes, sir.

20 Q. All right, and did she say anything about what
21 amount of drug buy she needed to have on your behalf in
22 order to help you?

23 A. No, sir.

24 Q. She never mentioned anything about it?

25 A. No, sir. Axelrod mentioned up to a ounce, he

1 could probably get a ounce.

2 Q. All right, and what did Ms. Von Herrmann, Heather
3 Von Herrmann, what did she say when your attorney,
4 Axelrod, suggested a one ounce?

5 A. She said, you should have talked to me earlier,
6 and she gave me the number, and she called Mr. Joe.

7 Q. She called who?

8 A. Joe Necessary.

9 Q. All right, and eventually, tell us how it came to
10 be that you were in the presence of Mr. Necessary getting
11 that wire put on. How did that come about?

12 A. How did it come about? He called, and we set it
13 up, and I met him at the office to make the buy, and I
14 called Nelson the night before, because there was
15 actually two days. The first day, I guess, is the 27th.
16 I called him and it was that evening around three or four
17 o'clock, and he said wait 'til tomorrow, and then ---

18 Q. All right. Why did you call him?

19 A. To purchase the cocaine.

20 Q. All right. Nelson did not call you? You called
21 Nelson?

22 A. Yes, sir.

23 Q. And at the time you called Nelson, had you
24 determined that you were going to work for the police in
25 that regard?

- 1 A. We were going to make the buy?
- 2 Q. Yes.
- 3 A. Yes.
- 4 Q. And you were going to do it on behalf of the
5 police, correct?
- 6 A. I don't understand how you're saying on behalf of
7 the police.
- 8 Q. What don't you understand about it?
- 9 A. You're saying on behalf of the police. Can you
10 explain that to me?
- 11 Q. You weren't doing it on behalf of yourself? You
12 weren't going to ---
- 13 A. I was doing it for myself.
- 14 Q. You weren't going to get the cocaine and snort it,
15 were you?
- 16 A. No, sir.
- 17 Q. You were going to get it and give it to the
18 police, weren't you?
- 19 A. Yes, sir.
- 20 Q. So you could come in and testify against Nelson in
21 this trial, correct?
- 22 A. Yes, sir.
- 23 Q. That's what I mean on behalf of the police. Do
24 you understand?
- 25 A. Yes, sir.

1 Q. And that's why you did it, correct?

2 A. Yes, sir.

3 Q. You were doing it because the police ultimately
4 asked you to do it, correct?

5 A. Yes, sir.

6 Q. Now, in the video there were two other
7 individuals. Do you know who they were?

8 A. No, sir.

9 Q. By that, I mean there were two male figures that
10 walked out of the door.

11 A. Yes, sir.

12 Q. Do you recall seeing that?

13 A. Yes, sir, I seen a glimpse of them.

14 Q. All right. Did you -- did you see them the day
15 you were there in the apartment, or excuse me, in the
16 home?

17 A. In the house, at his home?

18 Q. In the home, yes.

19 A. Yes, sir. I seen them as they were leaving,
20 walking out the door.

21 Q. What were they doing there, do you know?

22 A. They was bringing cocaine.

23 Q. All right. Do you know who they were?

24 A. No, sir.

25 Q. To your knowledge, did the police know who they

1 were?

2 A. No, sir.

3 Q. Now, where did the mon- -- where did the money
4 come from that you used in this particular transaction,
5 supposedly?

6 A. Joe Necessary gave me the money at the office.

7 Q. Okay. He gave you the money at the same time he
8 put the wire and the recording devices on you?

9 A. Yes, sir.

10 Q. And the amount of money that was given to you by
11 Agent Necessary is what amount?

12 A. Thirty One Fifty.

13 Q. Whose car was it that you drove over to the
14 residence?

15 A. My car.

16 Q. What kind of car was it?

17 A. A '95 Cutlass Oldsmobile Sierra.

18 Q. Now, before the car was used by you to go over to
19 my client's home, did the police inspect it, to your
20 knowledge, to see if there was any cocaine in it?

21 A. No, sir.

22 Q. They did not?

23 A. Not to my knowledge, no, sir.

24 Q. All right. Did you ever tell them what car you
25 were going to use to drive over there?

1 A. Yes, sir. I met Joe and he walked out to the car
2 with me.

3 Q. All right, the day you went over?

4 A. Yes, sir.

5 Q. Now, let me ask you something, if I could. Now,
6 this -- your testimony is that this is what you bought
7 from my client?

8 A. I told you earlier it was wrapped up. I never
9 seen the coke that was wrapped up. He asked me did I
10 want to unwrap it. I said no.

11 Q. All right. Well, you believe this is the cocaine
12 you bought from my client?

13 A. Yes, sir.

14 Q. But you're not willing to say it looked like this
15 when you bought it?

16 A. No, sir. It's been unwrapped.

17 Q. Well, what kind of wrapping was it in?

18 A. Saran wrap, it looked like, with like hot sauce in
19 it.

20 Q. Okay, Saran wrap with hot sauce?

21 A. Pretty sure.

22 Q. Have you ever seen this bag, that one?

23 A. No, sir.

24 Q. Come down, if you would.

25 **MR. DIGGS:** Your Honor, with your permission?

1 **THE COURT:** Certainly.

2 **MR. DIGGS:** Could I get the witness down here.

3 Q. All right, we're looking at some crumbs. Is that
4 what you would call it?

5 A. Yes, sir.

6 Q. And a couple of rocky things, right?

7 A. Yes, sir.

8 Q. Now, have you ever seen that?

9 A. Have I ever seen that before?

10 Q. Yeah, this material, this substance?

11 A. Yes, sir.

12 Q. You saw it in that rocky formation?

13 A. Yes, sir.

14 Q. And if you would, tell us specifically, as close
15 -- as best you can, what this stuff was in when you saw
16 it as it was delivered to you supposedly by my client.

17 A. When Nelson handed it to me, it was wrapped like
18 Saran wrap and had like hot sauce in the Saran wrap.

19 Q. All right, Saran wrap, meaning not a bag, but just
20 a wrapper ---

21 A. In plastic.

22 Q. All right, and you've never seen this bag here?

23 **MR. DIGGS:** For the record, it has a marking on it,
24 L100078.

25 A. No, sir.

1 Q. You've never seen that bag?

2 A. No, sir.

3 Q. And this L100078 writing down here, does that look
4 like it's on Saran wrap?

5 A. You can take it out of the bag and look.

6 MR. DIGGS: Your Honor, can we take it out of the
7 bag?

8 THE COURT: Let me see how it's packaged first.

9 MR. DIGGS: It's really difficult to see when it's
10 packaged.

11 THE COURT: You want to take out the smaller bag,
12 but it's still going to be enclosed, right?

13 MR. DIGGS: Yes, sir.

14 THE COURT: I mean, what would you -- what are you
15 trying to show? I hate -- this is a controlled
16 substance. It's sealed, and I want to keep it sealed,
17 but what are you trying to see here?

18 MR. DIGGS: I'm trying to see if there's a packaging
19 -- a packaging material in there that looks anything like
20 what we saw on the video.

21 THE COURT: Mr. Graustein.

22 (A Bench conference was held in the presence, but out
23 of the hearing, of the jury.)

24 THE COURT: Let's send the jury back for just a
25 moment, okay?

1 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF**
2 **THE JURY.)**

3 **THE COURT:** This is the problem I have with this.
4 This has been admitted as an Exhibit in this fashion.
5 It's been identified by witnesses who are not here. Now,
6 I don't want to change that because if there's a re-trial
7 on this, I mean, how are we going to deal with that?

8 It would appear to me, Mr. Diggs, that there is a wad
9 of orange stain, Saran wrap, or something of that nature,
10 in here and it is marked as outer plastic.

11 **MR. GRAUSTEIN:** And according to Officer Necessary,
12 that is what it was delivered -- when it came to him in
13 the packaging, that it came to him in.

14 **THE COURT:** Now, Mr. Diggs, if -- you know, if
15 you're insistent, we can open that, but I think you can
16 see it, that that's what it is.

17 **MR. DIGGS:** Okay. I think that we can live with
18 this ---

19 **THE COURT:** I would hope so because I don't want to
20 change the form of it, and I want it to stay in evidence
21 in that fashion.

22 **MR. DIGGS:** Yeah, I'm not going to ask that that ---

23 **THE COURT:** And what we've got, it's got three bags
24 sealed inside of one bag, and it's introduced as one
25 exhibit.

JURY OUT/ON RECORD
JURY IN/ CHRISTOPHER NORRIS - CROSS BY DIGGS

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1 **MR. DIGGS:** And it seems that in -- its own separate
2 pouch, Your Honor, is that Saran wrapping kind of stuff
3 that the witness described.

4 **THE COURT:** And it's labeled outer plastic wrap.

5 **MR. GRAUSTEIN:** Yes. It's my understanding that
6 when -- when the chemist gets it, he takes it, bags it,
7 and puts it all back, which he takes it out of that
8 packaging that it came in.

9 **THE COURT:** And, you know, ask -- ask this witness
10 if he can identify that, if that's what it looks like, if
11 he says it's there or not.

12 All right, bring them back.

13 **(THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE**
14 **JURY.)**

15 **THE COURT:** All right, Mr. Diggs.

16 **MR. DIGGS:** Thank you, Your Honor.

17 Just very briefly, if we can get the witness down,
18 maybe we can get, Your Honor, what I'm trying to get to
19 without opening the package.

20 **THE COURT:** Okay.

21 Q. All right, Mr. Norris, we got a material here in a
22 pouch contained within this big -- bigger bag. It seems
23 to be separately packaged itself apart from the
24 substance, correct? I want you to look at that and see
25 if you can tell me whether or not that is the material

1 that this cocaine mixture was in when it was supposedly
2 delivered to you in this incident.

3 A. Yes, sir. That looks just what -- like it was
4 because it's got the hot sauce orange tint to it.

5 Q. All right, so your testimony is when it was
6 delivered to you by my client, you had basically a couple
7 of large rocky ---

8 A. It was round --- that whole Saran wrap wrapped all
9 around it.

10 Q. --- substances?

11 **THE REPORTER:** Excuse me. I cannot hear you.

12 Q. Speak up.

13 **THE COURT:** You've got to speak up, Mr. Norris.

14 A. It was round, and it was like that, and it was
15 wrapped all up in Saran wrap with the orange hot sauce in
16 it while it was wrapped.

17 Q. Okay. Let me ask you this: Was it solid like
18 this, or was it more powder?

19 A. I can't tell you because it was wrapped so much.

20 Q. All right. You can go back to your seat.

21 Now, on the tape that we -- the video we had an
22 opportunity to look at, tell us how it was that you took
23 possession of the substance, okay, that cocaine?

24 A. You want me to tell you how I bought it?

25 Q. No. When did it go from my client's hands into

1 your hands?

2 A. As they walked out the door, he handed it to me.

3 I walked out of the bedroom. He handed it to me. He
4 went -- he let me look at it. He went to -- he put it
5 on the scale and he was like, man, that's like a GP,

6 because it had all the wrap on it. It must have weighed
7 like way over eighty-one grams or whatever.

8 Q. All right. Now, none of that is on the tape,
9 correct?

10 A. It should be on the tape.

11 Q. But you -- well, okay. You were not in the
12 courtroom when the tape played, or were you?

13 A. No, sir.

14 Q. You weren't in the courtroom?

15 A. No, sir.

16 Q. All right, but your testimony is the tape will
17 show him changing or handing that cocaine mixture
18 directly to you from his hand?

19 A. Yes, sir. It should show it because I had a wire
20 on.

21 Q. I understand. Now, where was it when you went to
22 Officer Necessary's office to get the wire? Where is his
23 office located?

24 A. In the Air Force Base.

25 Q. All right, and you went to my client's address,

1 which is located in what neighborhood?

2 A. By Ivory Stone, off the Bypass.

3 Q. Okay, so you left the Air Force Base, got on
4 Highway 17?

5 A. And went down the Air Force Base road and got --
6 turned onto the 17 Bypass.

7 Q. And headed south?

8 A. I took a left, went towards Pawleys Island.

9 Q. All right, and about how far is it from the Air
10 Force Base, the back gate, to the entrance of the
11 neighborhood where Mr. Castro lived?

12 A. About ten minutes.

13 Q. Ten minutes. There was no doubt at the time that
14 you -- let's go back. You made a phone call the night
15 before?

16 A. Yes, sir.

17 Q. You made an inquiry as to whether or not you could
18 make a purchase?

19 A. I asked him could I get the three ounces.

20 Q. Okay. Had you agreed to work with the police as
21 of that time or not?

22 A. Yes, sir.

23 Q. And when did you make the agreement with this
24 gentleman about being an agent for his agency?

25 A. When did I make the agreement?

1 Q. Yeah.

2 A. When he come to this courthouse and took my
3 picture.

4 Q. All right, and again, that was after you initially
5 met him or at the same time you initially met him?

6 A. The first time I met him.

7 Q. All right, so you left here, you left the
8 courthouse that day knowing that you were going to be a
9 police informant?

10 A. Yes, sir.

11 Q. Okay, and approximately again, how much time
12 trans- -- elapsed between the first meeting and the
13 second meeting when you got your wire put on?

14 A. It was a few months, two or three months.

15 MR. DIGGS: Beg the Court's indulgence for just a
16 second.

17 THE COURT: All right.

18 Q. All right, Mr. Norris, when was the last time that
19 you sold drugs -- or let me ask you, have you ever sold
20 drugs yourself?

21 A. Yes, sir.

22 Q. When was the last time you sold a controlled
23 substance?

24 A. I can't tell you like for day, but it's been last
25 year.

1 Q. Okay, within the past twelve months?

2 A. Yes, last year.

3 Q. All right, in the year 2009?

4 A. Yes, sir.

5 Q. Okay, and did you get arrested for that?

6 A. Yes, sir.

7 Q. Have you sold controlled substances on occasions
8 when you did not get arrested?

9 A. Have I ever sold it and not got arrested?

10 Q. Right.

11 A. Yes, sir.

12 Q. On how many occasions?

13 A. For a while.

14 Q. Sorry?

15 A. For a while.

16 Q. For a while?

17 A. Yes, sir.

18 Q. Would that be a lot of occasions?

19 A. Yes, sir.

20 MR. DIGGS: All right, I appreciate your time this
21 afternoon.

22 I don't have any additional questions, Your Honor.

23 THE COURT: All right, Mr. Graustein, anything
24 further?

25 MR. GRAUSTEIN: Just very briefly, Your Honor.

1 **REDIRECT EXAMINATION BY MR. GRAUSTEIN:**

2 Q. Do you remember Mr. Diggs asked you if you were
3 here testifying to save your skin? Do you remember him
4 asking you that?

5 A. Yes, sir.

6 Q. All right. Did anybody ever ask you to not tell
7 the truth?

8 A. No, sir.

9 Q. Is everything that you testified to here today the
10 truth?

11 A. Yes, sir.

12 **MR. GRAUSTEIN:** All right, thank you.

13 **THE COURT:** All right, you may step down.

14 **MR. GRAUSTEIN:** Your Honor, if there's no objection,
15 if this witness can be -- Mr. Norris could be ---

16 **THE COURT:** Any objection to excusing this witness,
17 Mr. Diggs?

18 **MR. DIGGS:** Your Honor, just bear with me for a
19 second.

20 Your Honor, we don't have any objection.

21 **THE COURT:** All right. He's excused.

22 **MR. GRAUSTEIN:** Thank you, Your Honor.

23 Your Honor, the State's final witness has
24 representation, Mr. Ralph Wilson, who is here. He is
25 walking in the door ---

1 **THE COURT:** All right. I saw Mr. Wilson just a
2 moment ago.

3 **MR. GRAUSTEIN:** Thank you, Your Honor.

4 The State calls Genaro Bustos.

5 **THE COURT:** Ladies and gentlemen of the jury, we
6 have Ms. Guardino, who is a court interpreter. She is
7 certified by the court to interpret in trials, and she
8 will be assisting this witness in his testimony.

9 Swear the interpreter first.

10 **MARIA MERCEDEZ GUARDINO**, is first duly sworn by
11 the Clerk as a Court Interpreter for GENARO BUSTOS, and
12 interprets as follows:

13 **GENARO BUSTOS-BUSTOS**, being first duly sworn by
14 the Clerk, and interpreted by MARIA MERCEDEZ GUARDINO,
15 states as follows:

16 **THE INTERPRETER:** (Speaks to the witness.)

17 **MR. BUSTOS:** Genaro Bustos-Bustos.

18 **THE INTERPRETER:** (Speaks to the witness.)

19 B-U-S-T-O-S.

20 **THE COURT:** All right.

21 **DIRECT EXAMINATION BY MR. GRAUSTEIN:**

22 Q. Good afternoon, Mr. Bustos.

23 (The Interpreter speaks to the witness.)

24 A. Interpreter: Good afternoon.

25 Q. Mr. Bustos, do you know the Defendant, Nelson

1 Castro?

2 (The Interpreter speaks to the witness.)

3 A. Interpreter: Yes.

4 Q. Mr. Bustos, where are you currently residing?

5 (The Interpreter speaks to the witness.)

6 A. Interpreter: Conway.

7 Q. Where do you curr- -- where do you currently live?

8 (The Interpreter speaks to the witness.)

9 A. Interpreter: The Correction.

10 Q. Would that be the Department of Corrections?

11 (The Interpreter speaks to the witness.)

12 A. Interpreter: Uh-huh (affirmative response), yes.

13 Q. And why are you currently in the Department of

14 Corrections?

15 (The Interpreter speaks to the witness.)

16 A. Interpreter: Trafficking drugs.

17 Q. When were you arrested for trafficking drugs?

18 (The Interpreter speaks to the witness.)

19 A. Interpreter: August 28, 2009.

20 Q. Now, were you -- or are you -- or were you a co-

21 defendant of this Defendant?

22 (The Interpreter speaks to the witness.)

23 A. Interpreter: I do not understand the question.

24 Q. Let me ask you another way. Did you see or meet

25 with Mr. Castro on the day you were arrested?

1 (The Interpreter speaks to the witness.)

2 A. Interpreter: Yes.

3 Q. And why did you meet with him then?

4 (The Interpreter speaks to the witness.)

5 A. Interpreter: Because I was going to bring him a
6 -- the coke -- coke.

7 Q. So is it your testimony that you were bringing him
8 cocaine?

9 (The Interpreter speaks to the witness.)

10 A. Interpreter: Did I give him cocaine?

11 Q. Yes?

12 (The Interpreter speaks to the witness.)

13 A. Interpreter: Yes.

14 Q. Do you know how much cocaine you gave him that
15 day?

16 (The Interpreter speaks to the witness.)

17 A. Interpreter: Three ounces.

18 Q. How did you know to bring cocaine to this
19 Defendant?

20 (The Interpreter speaks to the witness.)

21 A. Interpreter: A friend is to call me. We will put
22 it in the car and I will take off.

23 Q. Did you receive any payment for bringing this
24 cocaine?

25 (The Interpreter speaks to the witness.)

1 A. Interpreter: Yes.

2 Q. Did you get paid that day?

3 (The Interpreter speaks to the witness.)

4 A. Interpreter: No.

5 Q. What -- can you tell me after you met with the
6 Defendant what happened after that?

7 (The Interpreter speaks to the witness.)

8 A. Interpreter: I went back.

9 Q. You were -- oh, go ahead.

10 (The Interpreter speaks to the witness.)

11 A. Interpreter: Half a mile away from there, the
12 police stop me.

13 Q. Okay. Is that when you were arrested?

14 (The Interpreter speaks to the witness.)

15 A. Interpreter: Yes.

16 Q. And if you know, do you know what you were -- what
17 you were charged with?

18 (The Interpreter speaks to the witness.)

19 A. Interpreter: Trafficking cocaine.

20 Q. Are those charges currently pending?

21 (The Interpreter speaks to the witness.)

22 A. Interpreter: No. I already paying now.

23 Q. So they are not pending? Have they been -- have
24 you been found guilty of that charge?

25 (The Interpreter speaks to the witness.)

1 A. Interpreter: Yes.

2 Q. And could you tell the jury what your sentence
3 was, the sentence you received?

4 (The Interpreter speaks to the witness.)

5 A. Interpreter: Three years, violent.

6 Q. And what is your immigration status?

7 (The Interpreter speaks to the witness.)

8 A. Interpreter: Illegal.

9 Q. Do you know what will occur when you complete your
10 prison sentence with regards to your immigration?

11 (The Interpreter speaks to the witness.)

12 A. Interpreter: Yes.

13 Q. And what's going to happen?

14 (The Interpreter speaks to the witness.)

15 A. Interpreter: They're going to deport me.

16 Q. Has anybody -- did you -- is it your understanding
17 that you -- your sentence was based upon your truthful
18 testimony today?

19 (The Interpreter speaks to the witness.)

20 A. Interpreter: Yes.

21 Q. And has your testimony here today been truthful?

22 (The Interpreter speaks to the witness.)

23 A. Interpreter: Yes.

24 MR. GRAUSTEIN: Thank you, Mr. Bustos. Please
25 answer any questions Mr. Diggs may have.

1 (The Interpreter speaks to the witness.)

2 **CROSS EXAMINATION BY MR. DIGGS:**

3 Q. How are you, Mr. Bustos?

4 (The Interpreter speaks to the witness.)

5 A. Interpreter: Fine.

6 Q. Good.

7 (The Interpreter speaks to the witness.)

8 Q. My name is Bill Diggs and I represent Nelson
9 Castro.

10 (The Interpreter speaks to the witness.)

11 Q. He's being prosecuted for trafficking in cocaine.
12 Were you aware of the fact that he was being prosecuted?

13 **THE COURT:** I think she was waiting for you to
14 finish the question there.

15 Let's back up, Ms. Guardino, to the statement he
16 made. You need to just back up.

17 **THE INTERPRETER:** I apologize.

18 Q. All right, let's start over.

19 Mr. Bustos, your testimony is that you gave three
20 ounces of cocaine to Mr. Castro?

21 (The Interpreter speaks to the witness.)

22 A. Interpreter: Yes.

23 Q. And where did you get the cocaine?

24 (The Interpreter speaks to the witness.)

25 A. Interpreter: A friend gave it to me.

1 Q. Do you know the name of the friend?
2 (The Interpreter speaks to the witness.)
3 A. Interpreter: No.
4 Q. Why do you call him friend?
5 (The Interpreter speaks to the witness.)
6 A. Interpreter: That is how we call it, friend or a
7 cousin.
8 Q. But you don't know the person's name?
9 (The Interpreter speaks to the witness.)
10 A. Interpreter: Huh-uh (negative response).
11 Q. Your testimony is under oath you don't know this
12 person's name?
13 (The Interpreter speaks to the witness.)
14 A. Interpreter: No.
15 Q. And that's the truth?
16 (The Interpreter speaks to the witness.)
17 A. Interpreter: Yes.
18 Q. Have you been convicted in the past for any crime?
19 (The Interpreter speaks to the witness.)
20 A. Interpreter: No.
21 Q. Is this the first time you've been arrested?
22 (The Interpreter speaks to the witness.)
23 A. Interpreter: Yes.
24 Q. And how about Mr. Penelosa, do you know him?
25 (The Interpreter speaks to the witness.)

1 A. Interpreter: He's my friend.

2 Q. Is he the one who gave you the cocaine?

3 (The Interpreter speaks to the witness.)

4 A. Interpreter: No.

5 Q. But he's in -- he's in jail, too, correct?

6 (The Interpreter speaks to the witness.)

7 A. Interpreter: Yes.

8 Q. Because he was with you at the time you supposedly
9 brought this cocaine ---

10 (The Interpreter speaks to the witness.)

11 A. Interpreter: Uh-huh (affirmative response).

12 Q. --- to Mr. Castro?

13 (The Interpreter speaks to the witness.)

14 A. Interpreter: Yes.

15 Q. Is he here in town today?

16 (The Interpreter speaks to the witness.)

17 A. Interpreter: Yes, he is.

18 Q. Okay. He's being held right back here where you
19 were?

20 (The Interpreter speaks to the witness.)

21 A. Interpreter: Yes, he's here.

22 Q. Okay. Have you talked -- have you talked to
23 anyone about your testimony in this trial today?

24 (The Interpreter speaks to the witness.)

25 A. Interpreter: No.

1 Q. No one has talked to you about it?

2 (The Interpreter speaks to the witness.)

3 A. Interpreter: No.

4 Q. When did you learn, if you did, that you were
5 going to come here and testify?

6 (The Interpreter speaks to the witness.)

7 A. Interpreter: Tuesday morning. I think Tuesday
8 morning.

9 Q. Could I ask you who told you that?

10 (The Interpreter speaks to the witness.)

11 A. Interpreter: Who told me?

12 Q. Yes.

13 (The Interpreter speaks to the witness.)

14 A. Interpreter: They just brought me here. Until
15 yesterday, they told me that I was going to come here to
16 Court.

17 Q. Who was that, do you know?

18 (The Interpreter speaks to the witness.)

19 A. Interpreter: Do what?

20 Q. Who told him he was going to be brought here?

21 (The Interpreter speaks to the witness.)

22 A. Interpreter: The police officer, the police that
23 is there, and that he said you're going to go to Court.

24 Q. Okay. Does he remember what police officer?

25 (The Interpreter speaks to the witness.)

1 A. Interpreter: Those are there in jail. I ask them
2 where we are going and they said that we were going to go
3 to Court.

4 Q. And that was yesterday?
5 (The Interpreter speaks to the witness.)

6 A. Interpreter: Yesterday.

7 Q. Have you ever seen this?
8 (The Interpreter speaks to the witness.)

9 Q. Do you want to look at it?
10 (The Interpreter speaks to the witness.)

11 A. Interpreter: I already look at it.

12 Q. Okay. Have you seen it before?
13 (The Interpreter speaks to the witness.)

14 A. Interpreter: When I went to bring the stuff, when
15 I went to bring it.

16 Q. Is that when you saw it?
17 (The Interpreter speaks to the witness.)

18 A. Interpreter: What's that?

19 Q. Is that when you saw it?
20 (The Interpreter speaks to the witness.)

21 A. Interpreter: Yes.

22 Q. Was it packaged like that?
23 (The Interpreter speaks to the witness.)

24 A. Interpreter: No.

25 Q. How was it different?

1 (The Interpreter speaks to the witness.)
2 A. Interpreter: It was wrapped in plastic.
3 Q. Who wrapped it?
4 (The Interpreter speaks to the witness.)
5 A. Interpreter: I don't know.
6 Q. Did you wrap it?
7 (The Interpreter speaks to the witness.)
8 A. Interpreter: No.
9 Q. Did Mr. Penelosa wrap it?
10 (The Interpreter speaks to the witness.)
11 A. Interpreter: No.
12 Q. Did his friend wrap it?
13 (The Interpreter speaks to the witness.)
14 A. Interpreter: He put it there. Then he put it in
15 the van, and then I -- I took off.
16 Q. Who put it there?
17 (The Interpreter speaks to the witness.)
18 A. Interpreter: The other friend.
19 Q. And what was his name?
20 (The Interpreter speaks to the witness.)
21 A. Interpreter: No, I do not know his name.
22 Q. Had you ever seen that person before?
23 (The Interpreter speaks to the witness.)
24 A. Interpreter: That person?
25 Q. Yes, that person.

1 (The Interpreter speaks to the witness.)

2 A. Interpreter: Some, three times.

3 Q. Did that person have possession of the cocaine?

4 (The Interpreter speaks to the witness.)

5 A. Interpreter: He gave it to me. He put it in the
6 van and ---

7 Q. How did he know to put it in the van?

8 (The Interpreter speaks to the witness.)

9 A. Interpreter: He talked to me by phone.

10 Q. Did that individual call Mr. Bustos or did Mr.
11 Bustos call him?

12 (The Interpreter speaks to the witness.)

13 A. Interpreter: He call me.

14 Q. Why? Does he know why he called?

15 (The Interpreter speaks to the witness.)

16 A. Interpreter: To deliver some stuff that he left
17 in my van or in the van.

18 Q. Who was the person again that called you?

19 (The Interpreter speaks to the witness.)

20 A. Interpreter: A friend, that friend.

21 Q. Okay. That's a drug dealer?

22 (The Interpreter speaks to the witness.)

23 A. Interpreter: He gave them to me. I don't know if
24 he is a dealer. I guess so.

25 Q. At that time, where did you live?

1 (The Interpreter speaks to the witness.)
2 A. Interpreter: Conway.
3 Q. Did you have an address?
4 (The Interpreter speaks to the witness.)
5 A. Interpreter: I don't remember the address.
6 Q. Does he remember the general neighborhood area?
7 (The Interpreter speaks to the witness.)
8 A. Interpreter: No.
9 Q. What kind of van did he own?
10 (The Interpreter speaks to the witness.)
11 A. Interpreter: A Plymouth van, Voya.
12 Q. Voyager?
13 (The Interpreter speaks to the witness.)
14 A. Interpreter: Plymouth.
15 Q. And was it titled to you?
16 (The Interpreter speaks to the witness.)
17 A. Interpreter: No.
18 Q. Who owned it?
19 (The Interpreter speaks to the witness.)
20 A. Interpreter: It was in the name of a friend, a
21 friend.
22 Q. But he doesn't know the name -- what that name
23 was?
24 (The Interpreter speaks to the witness.)
25 A. Interpreter: I don't remember the name. I just

1 had the title there.

2 Q. Does he know -- let me ask you this. How did you
3 acquire possession of the title?

4 (The Interpreter speaks to the witness.)

5 A. Interpreter: The possession of the title?

6 Q. Yes.

7 (The Interpreter speaks to the witness.)

8 A. Interpreter: I bought it.

9 Q. All right, so it was his van?

10 (The Interpreter speaks to the witness.)

11 A. Interpreter: The van?

12 Q. Okay, and you just did -- he just did not get the
13 title re-issued in his name?

14 (The Interpreter speaks to the witness.)

15 A. Interpreter: It's not in my name.

16 Q. I understand, but he paid for the van, did he not?

17 (The Interpreter speaks to the witness.)

18 A. Interpreter: Yes.

19 Q. Now, Mr. Bustos, what was the original charge
20 against you?

21 (The Interpreter speaks to the witness.)

22 A. Interpreter: Trafficking in cocaine.

23 Q. What amount?

24 (The Interpreter speaks to the witness.)

25 A. Interpreter: Three ounces.

1 Q. The original charge? Do you know how many grams
2 that is?

3 (The Interpreter speaks to the witness.)

4 A. Interpreter: Ninety something; ninety, eighty,
5 ninety.

6 Q. All right, so this is what you're charged with
7 trafficking?

8 (The Interpreter speaks to the witness.)

9 A. Interpreter: Yes.

10 Q. And what sentence did you receive?

11 (The Interpreter speaks to the witness.)

12 A. Interpreter: Three years.

13 Q. Three years, and did you discuss with anyone from
14 the Solicitor's Office about receiving a concession on
15 the sentence in exchange for your testifying today?

16 (The Interpreter speaks to the witness.)

17 A. Interpreter: No.

18 Q. Well, did anyone ever tell you -- let me ask you
19 this -- this way.

20 (The Interpreter speaks to the witness.)

21 Q. If you are charged in this State with three ounces
22 of cocaine, trafficking in three ounces of cocaine,
23 you're not eligible for a three year sentence. Did you
24 know that?

25 (The Interpreter speaks to the witness.)

1 **THE INTERPRETER:** I apologize.

2 Q. Okay. If you're charged with trafficking in three
3 grams -- excuse me, three ounces, ---

4 (The Interpreter speaks to the witness.)

5 Q. --- of cocaine, you're not eligible for a three
6 year sentence.

7 (The Interpreter speaks to the witness.)

8 Q. Did you know that?

9 (The Interpreter speaks to the witness.)

10 A. Interpreter: No, I did not know.

11 Q. All right. In other words, you didn't -- you
12 didn't plead guilty to three ounces of cocaine,
13 trafficking in that amount? Do you understand that?

14 (The Interpreter speaks to the witness.)

15 A. Interpreter: Yes.

16 Q. You received a concession, a lesser charge ---

17 (The Interpreter speaks to the witness.)

18 Q. --- from the State, did you not?

19 (The Interpreter speaks to the witness.)

20 A. Interpreter: I do not know about law. Maybe yes.

21 **MR. DIGGS:** Beg the Court's indulgence for just a
22 minute.

23 Just one or two more questions.

24 Q. Do you understand what we're here today to do?

25 (The Interpreter speaks to the witness.)

1 A. Interpreter: Yes.

2 Q. And what is that?

3 (The Interpreter speaks to the witness.)

4 A. Interpreter: About a case of trafficking drugs.

5 Q. And who owns those drugs?

6 (The Interpreter speaks to the witness.)

7 A. Interpreter: A friend.

8 Q. A friend?

9 (The Interpreter speaks to the witness.)

10 A. Interpreter: Uh-huh (affirmative response).

11 Q. The person that gave them to you?

12 (The Interpreter speaks to the witness.)

13 A. Interpreter: Yes.

14 Q. All right. Did you know that Nelson Castro is

15 being prosecuted for that?

16 (The Interpreter speaks to the witness.)

17 A. Interpreter: Yes. He is the person here. I

18 think so.

19 Q. So you understand he's being prosecuted for

20 distributing or trafficking in your cocaine?

21 (The Interpreter speaks to the witness.)

22 A. Interpreter: Yes, he's being processed for that.

23 Q. Yeah.

24 MR. DIGGS: All right, that's all I have. Thank you

25 very much.

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1 (The Interpreter speaks to the witness.)

2 MR. GRAUSTEIN: No further questions. Your Honor.

3 THE COURT: The witness may step down.

4 All right, Mr. Graustein.

5 MR. GRAUSTEIN: The State has no further witnesses.

6 THE COURT: The State rests?

7 MR. GRAUSTEIN: The State rests.

8 THE COURT: All right, ladies and gentlemen, if you
9 would, retire to your jury room. I have some matters
10 that I have to take up.

11 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF
12 THE JURY.)

13 THE COURT: All right, Mr. Diggs.

14 MR. DIGGS: Your Honor, I would request a directed
15 verdict on the grounds that the criminal intent hasn't
16 been demonstrated by the State's evidence with respect to
17 my client's involvement in the transaction.

18 We've got a State's -- a State agent, Mr. Norris, who
19 called to initiate some contact with my client,
20 establishes that he's to orchestrate a transaction to
21 occur in my client's home where the cocaine is brought in
22 there from some other source just to deliver to him so
23 that it can be handed over to the DEU people, simply used
24 my client in the process. There were no drugs there in
25 his home. He didn't -- we hadn't -- had to call -- Mr.

1 Norris had to call in advance just to make sure that some
2 could be delivered there.

3 Your Honor, the evidence that was presented doesn't
4 establish sufficiently so for a rational trier of fact to
5 conclude guilt beyond a reasonable doubt, and given that,
6 I would ask for a directed verdict as to this charge.

7 Also, I would ask the Court to reconsider the prior
8 motion that we made during this trial based on the
9 determination -- Mr. Norris was simply determined he was
10 going to try to smear Mr. Castro's character by talking
11 about all these prior occasions that -- an indication of
12 drug deals.

13 **THE COURT:** I don't know that Mr. Norris is able to
14 think on that level.

15 **MR. DIGGS:** The inference that I got was that was
16 what he was trying to establish in the presence of the
17 jury, so we are asking the Court to reconsider that and
18 grant a mistrial on it or a directed verdict of not
19 guilty based on the lack of evidence with respect to my
20 client's involvement.

21 **THE COURT:** And I would deny your motion for
22 mistrial, and I believe taking the evidence in the light
23 most favorable to the State, there's certainly evidence
24 to support a jury finding of guilt in this matter should
25 they return such a verdict.

1 There's ample evidence. We've got a video tape that
2 shows this transaction going on in Mr. Castro's house.
3 Mr. Castro is obviously there, is clearly seen. There's
4 testimony that the informant was searched before he went
5 to the house. He took Three Thousand Dollars there, got
6 Three Thousand Dollars back after -- either on -- from
7 Mr. Castro or the other two co-defendants, and he had the
8 drugs. I think it's a matter that must go to the jury.
9 Thank you.

10 Let's take a little, brief break while the jury is
11 out.

12 **(THE FOLLOWING TAKES PLACE AFTER A BREAK AND OUTSIDE**
13 **THE PRESENCE OF THE JURY.)**

14 **MR. DIGGS:** Your Honor, ---

15 **THE COURT:** Yes.

16 **MR. DIGGS:** --- I am going to ask Your Honor at this
17 time to address the issue of my client's testifying.

18 **THE COURT:** I am going to do that right now.

19 All right, place him under oath.

20 **NELSON CASTRO,** being first duly sworn, states as
21 follows:

22 **THE COURT:** Mr. Castro, at this time I am going to
23 explain to you certain of your rights, and if you don't
24 understand anything that I say, please let me know. If
25 you want me to explain anything in a more detailed

1 manner, please let me know that. Do you understand?

2 **MR. CASTRO:** Yes.

3 **THE COURT:** Now, we have reached the stage of the
4 trial where you may present your defense. You have the
5 right to claim the protection given you by the Fifth
6 Amendment to the Constitution of the United States. This
7 Amendment says in part, no person shall be compelled in
8 any criminal case to be a witness against himself. This
9 means you cannot be required to testify in this case.
10 You have the right to testify on your own behalf.
11 However, no one can make you testify. This is a personal
12 right, and no one can waive this right except you.

13 If you decide to testify, you will be subject to the
14 same rules that govern other witnesses who you may
15 examine -- excuse me -- other witnesses. You may be
16 examined and cross examined on any relevant issue in this
17 case.

18 In addition, if you have any convictions involving
19 dishonesty or false statement, or for crimes punishable
20 by imprisonment for more than one year and if the Court
21 determines that the probative value of admitting the
22 evidence outweighs its prejudicial effect to you, the
23 Solicitor will be able to introduce your record to attack
24 your credibility.

25 If you decide to testify, this decision on your part

1 must be freely, voluntarily, and intelligently made with
2 knowledge of the protections given you by the Fifth
3 Amendment, and the consequences of your decision to
4 testify.

5 If you decide not to testify, I will instruct the
6 jurors that they cannot give the fact that you did not
7 testify any consideration whatsoever and that there is to
8 be absolutely no prejudice to you because you did not
9 testify. It is left entirely up to you whether or not to
10 testify.

11 Now, you may talk to your attorney, your family, your
12 friends, or anyone else, but the final decision will be
13 left entirely up to you. Do you understand what I have
14 explained to you?

15 MR. CASTRO: Yes.

16 THE COURT: Do you have any questions about what
17 I've explained to you?

18 MR. CASTRO: No.

19 THE COURT: Have you discussed with your lawyer
20 whether you should testify or not?

21 MR. CASTRO: Yes.

22 THE COURT: Do you wish to talk with your lawyer any
23 more about this?

24 MR. CASTRO: No.

25 THE COURT: Have you talked with him fully? Okay,

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1 do you wish to testify?

2 MR. CASTRO: No.

3 THE COURT: Okay. That is your decision.

4 I will advise you, Mr. Castro, that although you have
5 told me you do not wish to testify, if you should change
6 your mind during the remainder of this case, I will
7 certainly let you do so and you can testify if you wish,
8 you understand that?

9 MR. CASTRO: Yes.

10 THE COURT: Okay.

11 All right, let's -- are you going to put up any
12 witnesses, Mr. Diggs?

13 MR. DIGGS: Your Honor, at this time we are not
14 going to, and we will rest as well.

15 THE COURT: Okay.

16 All right, bring in the jury.

17 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
18 JURY.)

19 THE COURT: All right, ladies and gentlemen of the
20 jury, we're back in the courtroom.

21 Mr. Diggs.

22 MR. DIGGS: Your Honor, at this time the Defense
23 chooses not to call witnesses and the Defense rests at
24 this point.

25 THE COURT: Very well.

1 All right, Mr. Graustein, are you ready to argue?

2 MR. GRAUSTEIN: Yes, Your Honor.

3 THE COURT: Ladies and gentlemen, let me tell you
4 what we are about to do.

5 The State has rested in this case, as has the
6 Defense. At the end of closing remarks, I will instruct
7 you fully on the law that you are to apply in this case.

8 Let me remind you that closing remarks are much like
9 opening remarks. They are not testimony. The attorneys
10 are certainly entitled to, if not obliged, to speak to
11 you concerning the evidence that has been presented in
12 their case and speak to you concerning their view of the
13 evidence that has been presented in this case.

14 Likewise, they are entitled to speak to you
15 concerning their interpretation and what they believe the
16 law should be in the case. However, I want you to
17 remember that throughout your deliberation process, the
18 burden is upon the State to prove to you beyond a
19 reasonable doubt that the Defendant is guilty of the
20 offense for which he is charged.

21 In determining whether or not the State has reached
22 that -- or met that burden, you must base your decision
23 entirely on the evidence which you have received from
24 this witness stand and any exhibits that may have been
25 introduced. Also, you must apply only the law as I give

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1 it to you, and you must be guided solely by the law as I
2 give it to you.

3 If either attorney were to comment on the evidence in
4 such a way that you did not hear it or see it, or comment
5 on the law in some other way than as I instructed it to
6 you, again you must rely upon what you heard from the
7 witness stand and the law as I give it to you.

8 All right, Mr. Graustein.

9 **MR. GRAUSTEIN:** Thank you, Your Honor.

10 Ladies and gentlemen, ---

11 **THE COURT:** One moment, please.

12 **MR. GRAUSTEIN:** Ladies and gentlemen of the jury,
13 again let me thank you, as I did at the beginning of this
14 case, for being here. I noticed that you were all very
15 attentive throughout this pretty long couple of days as I
16 know you've been here. It probably seems a lot longer
17 than any couple of days you've had.

18 Y'all seemed very attentive. Y'all seemed to pay
19 close attention to the testimony of the witnesses, and we
20 appreciate that, and we appreciate your time.

21 You are about to get this -- take this evidence back
22 with you to the jury room and decide whether or not the
23 State has proved through that evidence whether or not the
24 Defendant possessed, sold, distributed, also known as
25 trafficking, in cocaine in a quantity greater than

1 twenty-eight ounces -- twenty-eight grams, and less than
2 one hundred grams.

3 The testimony from everybody who ever touched this,
4 from when the confidential informant -- you even heard
5 from people who touched it before it ever got to the
6 house, and then it followed everybody through and it was
7 tested, but there was a little bit of hay about -- with
8 the chemist, about, well, what exactly is in here. How
9 much of each is in here? It's got cocaine in it. It
10 doesn't matter what it's mixed with and how much it is.

11 If the total amount is more than twenty-eight grams
12 and less than a hundred grams, that's what the statute
13 says. It doesn't matter. It doesn't have to be pure
14 cocaine. It doesn't have to be fifty grams of pure
15 cocaine. It's fifty grams of cocaine and whatever else
16 is in there, whether that be de-wormer or some other
17 veterinary product. That's -- that's -- that's just not
18 anything you need to be concerned about.

19 The chemist has this weight as eighty-three grams,
20 approximately eighty-three grams. That's eighty-three
21 grams of cocaine and whatever else is there, but that's
22 eighty-three grams under the statute, well, well within
23 the twenty-eight to one hundred grams. It's not even a
24 close call.

25 The Defense also mentioned just in passing, and I --

1 I -- I wouldn't -- but mentioned that the C.I. may have
2 planted those drugs at the Defendant's house a couple of
3 days before. That still doesn't explain how all these
4 three other folks ended up with all the buy money. Did
5 they sell cocaine they didn't know they had? I don't
6 know, yet that's what the Defense would have you believe,
7 that oh, look, we've got some cocaine laying around the
8 house. Let's sell it to this guy. I don't know. It
9 doesn't make any sense to me.

10 The question is, and you've heard all these
11 witnesses, and I'm going to tell you right now, yeah, I
12 -- I can't put up -- and I've got a confidential
13 informant. He's -- he's not part of a church choir, for
14 having been in his past, and I understand that. Mr.
15 Bustos, he's in prison right now for participating in
16 this -- in this whole event, probably folks you don't
17 think are of the greatest character, but unfortunately,
18 officers like Officer Necessary who are out there trying
19 to catch drug dealers, they need to often times utilize
20 people who know how to break drugs laws and those are not
21 going to be members of the church choir.

22 As Mr. Norris testified, he knows how to do a drug
23 deal. That's somebody the police needs in order to catch
24 drug dealers, somebody who the drug dealers will trust.
25 I dare say that that -- not a lot of folks wouldn't be

1 able to go in and gain the trust of a drug dealer if they
2 didn't know how to do it. Mr. Bustos, hey, he's
3 participating in drug dealing, and he got caught, and he
4 pled guilty.

5 Now, whether or -- and I would also address the
6 treatment by these folks by the State. Each case is
7 evaluated by the prosecutor, and sometimes in their
8 discretion they will give some assistance to a person who
9 can provide information regarding other criminal
10 activities.

11 Whether it's right or not, whether you agree with it
12 or not, it happens, and it's part of the process. Does
13 it mean Mr. Norris got up here and lied, made up a
14 complete story? No, of course not. It doesn't make him
15 a liar, because you've got a video tape that shows he's
16 not lying, and he's testified and you saw a video of
17 everything he testified about. Now, does he have a seedy
18 past? Sure, he does. He also knows where to find the
19 drug dealers.

20 Mr. Bustos, I really couldn't tell you a whole lot
21 about his past, but did he get some possible favorable
22 treatment? He may have, but according to his testimony,
23 if he did, he didn't know about it. He might have got a
24 reduced sentence. He doesn't know. He just came in and
25 testified and agreed to tell the truth.

1 And that's all any of these folks came in here to do
2 is tell the truth, and nobody ever asked them to do
3 anything other than that. Nobody -- nobody with the
4 police, nobody with the Solicitor's Office is asking
5 anybody to come in here and make up some big lie. We
6 don't have the time or energy to go target people like
7 this Defendant and spend a bunch of resources chasing him
8 around the county.

9 The best piece of evidence, or a very compelling
10 piece of evidence, the video tape. That is a second by
11 second recording of everything that happened in one hour
12 when Mr. Norris left the Police Department, left his
13 meeting with Officer Necessary, went, met with the
14 Defendant. You can clearly see the Defendant in that
15 video. They spent a long time in there chit-chatting and
16 talking about various things. There are all kinds of
17 things they talked about during that -- during that
18 video. They were almost talking like old chums in there.

19 They chit-chat for a little while. You see the drugs
20 that come, see Mr. Castro counting the money, and when
21 it's all said and done and they conduct a search, they
22 arrest Mr. Bustos and the other co-defendant, they find
23 some of that buy money on them. Remember, all this buy
24 money has been identified. They find some of the buy
25 money on them. They find some of the buy money on the

1 Defendant.

2 Ladies and gentlemen, one of the best -- the greatest
3 things you bring to this process is your common sense.
4 You have a video that clearly shows exactly what
5 happened. It has not been altered. Drugs are being
6 passed at his house. Use your common sense. We all know
7 what happened here.

8 The evidence is very clear, and what the State has to
9 prove is that for trafficking the Defendant was in
10 possession of more than twenty-eight grams or less than a
11 hundred grams of cocaine, sold it, or -- that's an or --
12 or he sold it, or he distributed it, or he conspired to
13 do any of those things. Well, we've got three people who
14 are involved here. Is Mr. Castro the king pin of this
15 big -- some big drug cartel operating down there by the
16 Air Force Base? I don't know. I don't know. I do know
17 he sold about three ounces of cocaine to the victim or to
18 Mr. Norris, and all of this was recorded.

19 And three ounces, okay? Now, that might get a little
20 confusing for y'all. I know it is for me. It's three.
21 They're all talking about three ounces. Of course, he's
22 charged with something that measures things in the crime
23 in grams, and I got out of school way before they went
24 into grams and all that sort of stuff. Suffice it to say
25 three ounces is more than twenty-eight grams. Twenty-

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1 eight grams is about an ounce, a little bit give or take,
2 and a hundred grams -- and it's less than a hundred
3 grams, so the amount is clearly within the statutory
4 amount to find the Defendant guilty of trafficking in
5 cocaine, twenty-eight to a hundred grams.

6 So you take your time, look at the evidence, the
7 video, the testimony of the witnesses, and after looking
8 at all that evidence, you should return a verdict of
9 guilty of trafficking in cocaine, twenty-eight to one
10 hundred grams. Remember, it's beyond a reasonable doubt.
11 Look at the evidence. Is there any reasonable doubt that
12 this Defendant was in possession of approximately three
13 ounces of cocaine, any reasonable doubt.

14 You are all reasonable people. That's why you are on
15 the jury. Use your common sense. Look at the evidence,
16 and I'm sure you'll return the correct verdict. Thank
17 you.

18 **THE COURT:** Mr. Diggs.

19 **MR. DIGGS:** Your Honor, in a prior ruling of the
20 court, noted, I have a matter of law before I get into my
21 actual closing remarks.

22 **THE COURT:** All right, Mr. Ropp, take the jury out.

23 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF**
24 **THE JURY.)**

25 **MR. DIGGS:** All right, Your Honor, I just want to

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1 make sure how far I can go on this warrant issue. Do I
2 have to stay away from it?

3 THE COURT: Yes sir. I have ruled that the evidence
4 is admissible, or I have done that. It's not a Fifth
5 Amendment situation on voluntariness of a statement. I'm
6 going to ask you to steer clear of it because the Court
7 has made a ruling that it is admissible.

8 MR. DIGGS: Okay, and, Your Honor, I apologize for
9 doing this, ---

10 THE COURT: That's all right.

11 MR. DIGGS: --- but I felt like I had to do that at
12 this point.

13 THE COURT: Okay, I'm glad you did.
14 Bring them back in.

15 MR. DIGGS: Thank you, Your Honor.

16 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
17 JURY.)

18 THE COURT: All right, Mr. Diggs.

19 MR. DIGGS: Thank you, Your Honor. May it please
20 the Court.

21 I apologize for having you sent out again. Sometimes
22 there are questions in our mind that we need to ask or
23 inquire about of the Court, and I had -- before I got up
24 here and said something that I wasn't supposed to say, I
25 wanted to make it clear in my mind what was proper at

1 this point from my perspective.

2 It would be real easy to do your job if you could
3 just sit here and listen to Mr. Graustein's analysis of
4 the evidence. That's perhaps one reasonable way to -- or
5 reasonable view of the evidence is to look at it and just
6 conclude, yeah, that's what the Assistant Solicitor has
7 told us what this evidence shows, so we don't really have
8 anything to do here other than vote guilty, because
9 that's what the Solicitor said, but it's not that simple
10 because there are questions of reliability with respect
11 to the testimony of these witnesses that I would submit
12 are very -- they were real reluctant to be
13 straightforward with you.

14 I mean, you couldn't ask them just a simple question
15 and get a response, yes, or no, or something like that.
16 They had to hem-haw around and skirt around the issue.
17 They did not want to be truthful with you, and I would
18 submit to you that's a reason to question the veracity of
19 what the State has presented in the case.

20 Is the Defendant guilty in this case? He might be.
21 A cursory view of the evidence suggests he might be
22 guilty, and if that's what you're thinking right now, and
23 this is real important, if that's what you're thinking
24 right now, then you've got to return a verdict of not
25 guilty. That's kind of strange, isn't it?

CLOSING STATEMENT BY MR. DIGGS

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1 It's the hardest thing to do, to apply the law. If
2 you think he might be guilty, that is not the standard
3 that you apply. Is there any reasonable doubt as to his
4 guilt? Did you see any drugs change hands on the video?
5 They've got a video, fifty-seven minutes in length. I
6 would suggest to you there wasn't any drugs changing
7 hands in that video. Did we look at it and carefully
8 discern what's going on in that video?

9 Mr. Graustein, I would submit, he's a good
10 prosecutor, but I would suggest what he's saying occurred
11 on that video simply is not there. Maybe he might have
12 -- I never saw that package. Even if it was cocaine, I
13 never saw it change hands. Sleight of hand, could have
14 changed hands, but you didn't really see it on that
15 video. You saw some circumstances, no doubt.

16 Norris is in his home. They're talking about
17 whatever. I'm not sure. There was some discussion about
18 marijuana. You saw some marijuana probably, was green
19 stuff, but I never saw what the State is claiming took
20 place. I never saw it.

21 Mr. Norris stated the police didn't check his car.
22 That's an important consideration. Nonchalant is the way
23 I would describe him. He's not really concerned. I
24 don't know. Burglary in the first degree, but I'm going
25 to get probation. You know, that's absurd. That's not

1 going to happen.

2 These people don't care. They don't give a hoot
3 about the law, or about the truth, or even to find out --
4 you know, it's shocking, the extent that they don't care
5 about what happens to themselves. They don't -- neither
6 one of those guys, the co-defendant or Norris, neither
7 one of them knew what they were pleading to. They didn't
8 know what the charges could have been. They didn't know
9 what the extent was that the State had made concessions
10 to them. They didn't know any of that stuff, and that's
11 shocking, the disrespect for the system. It's a
12 disrespect to the entities, the players in this
13 prosecutorial process, and it's a reason not to believe
14 them. It's a reason to discount their testimony.

15 They might -- it might have been the way they
16 described. This last guy might not know who gave him the
17 cocaine, but it's a friend of his. He might not know
18 it's a reason to discount this case, and you know what,
19 it ain't going to matter if you find my client not guilty
20 because the State has already decided the guilty people,
21 the burglar and the supplier of the cocaine, they're
22 going to either go free or get the mandatory minimum for
23 some much lesser offense.

24 Who needs to be prosecuted in this case? The people
25 who need to be prosecuted, they've decided we can let go

1 in this case. What is it going to do? What harm to the
2 community is going to happen, if a not guilty verdict is
3 returned even if Mr. Castro did what they're alleging
4 that he did. He's the least culpable of all.

5 He's sitting out there. You saw his home on the
6 tape, on the video. This guy comes in. He needs to get
7 help from the prosecution, so he says, hey, I know who we
8 can stir up, and because he's civil, and he'll let me in
9 and talk to me about this stuff, we'll use -- we'll use
10 him to set up, so I'll call and make sure in advance that
11 we can get some stuff lined up there. That's his
12 testimony.

13 That's amazing. I mean, think about this. My client
14 is -- he's guilty of trafficking in cocaine? They
15 searched his home. An armed guard standing there with
16 guns on the hip. He voluntarily signs a form saying they
17 can search his home, and what did they find? You know
18 what, nothing. There were no scales.

19 On the tape, Mr. Norris says he brought the stuff in
20 there, he weighed it out, and it was three ounces, or
21 whatever it was. You saw the tape. Where are the
22 scales. Where did they go when the search was conducted,
23 so it's just not as simple as taking the Solicitor's
24 version of the evidence and saying, yeah, that's right,
25 let's convict him.

1 You have a responsibility to apply the law. Can you
2 do that without looking more deeply into the actual
3 evidence in the case, what does it show, what does it
4 actually prove beyond a reasonable doubt? It shows he
5 might be guilty, but it also shows there's a reasonable
6 doubt here to conclude that at this point.

7 We could have at least brought in some evidence about
8 what was in this man's apartment. He's trafficking in
9 cocaine. There should be some corroboration there.
10 Let's give us a little bit of help here so we're not out
11 on a limb having to believe Chris Norris in order to
12 determine what this man's future is going to be. He
13 deserves better than that and you deserve better than
14 that.

15 You shouldn't ask the jury in a setting such as this
16 to make a leap of faith and trust the prosecutor's
17 interpretation of the evidence. You shouldn't have to do
18 that. You should be able to look at the evidence and
19 decide beyond any reasonable doubt this man's guilt, and
20 you can't do that here. It's simply too -- too many
21 holes, and I would suggest even if you think he's guilty,
22 you can't vote that way because it hasn't been proven
23 beyond a reasonable doubt, and you swore that you would
24 apply the law, and in just a minute, His Honor is going
25 to tell you what that is, and that is you have an

1 obligation if you're not convinced beyond a reasonable
2 doubt of this man's guilt; you've got to under our law,
3 and under the law of every state in this Union, to find
4 him not guilty.

5 It happens all the time. Society doesn't break down.
6 It's our system, but weigh the culpability here of this
7 man compared to the people who are being treated with
8 considerable and great leniency. Fortunately in this
9 case we're not dealing with a murder. You know, we're
10 simply dealing -- you know what this evidence shows, even
11 if you accept as true what the Solicitor is saying?
12 You've got a conduit, a middle man. That's all he is.
13 He's not a cocaine dealer. He doesn't bring the cocaine
14 in. He doesn't process it. He doesn't do anything.

15 Where was the money found when the arrest was made of
16 this other fellow who testified? He said he didn't get
17 paid, but there was testimony they had the bulk, if not
18 all, of the money in their possession. You know, that's
19 not the trafficker, even if you believe the State's
20 evidence in this case. He's not the trafficker.

21 You look at that tape, it seems to suggest one thing,
22 but unless it convinces you beyond a reasonable doubt,
23 along with all of the other evidence in the case that
24 he's guilty, your obligation under the law is not to
25 convict, to find him not guilty, and I would suggest to

1 you that's the only proper verdict in this case. It
2 could have been better if it's as easy as the Solicitor
3 seems to want to indicate. It could have been done.

4 There was corroborating evidence available. If this
5 man is a trafficker, a search would have revealed that.
6 You would have had just something that we didn't have in
7 this case to convince us that we've got guilt beyond a
8 reasonable doubt.

9 I would ask you to go and consider all of the
10 evidence in the case, why would Chris Norris pick out
11 someone to target to help himself, somebody who supplies
12 cocaine, but doesn't know where it came from. They don't
13 know anything; they didn't do anything. It's not a case
14 that would support a guilt under our -- a guilty verdict
15 under our system, and I would ask you to consider those
16 factors, purchased testimony, and it's just as purchased
17 as if money had changed hands.

18 You've got concessions that were made to both of the
19 State's witnesses to say yes, this happened, and you've
20 got a video that doesn't show that transaction occurring.
21 It just shows a bunch of stuff going on, a bunch of
22 conversation. It doesn't show a transaction going on,
23 and you've got money that was found, marked money that
24 was found on other people other than my client.

25 So I would suggest that the only proper verdict in

1 this situation, given the evidence presented in this
2 case, has to be a not guilty verdict.

3 Let me speak just very quickly, briefly, on this
4 issue of the quantity. I would suggest to you that Mr.
5 Nelson -- let's assume for a moment, and I'm not
6 conceding this at all, but just for the sake of this
7 point I'm saying, okay, let's assume that he distributed
8 this cocaine. What evidence do we have in there that he
9 had any idea about what amount was involved in there.

10 Remember when we were talking to the chemist about
11 it, and the Solicitor is true, if you've got a mixture
12 and some of it is cocaine, it doesn't really matter how
13 much is cocaine and how much is the other mixture, part
14 of the mixture, but in this case, that's not quite the
15 end of the story, because he's charged with trafficking
16 in twenty-eight grams or more.

17 What do we have in the evidence to show he knew what
18 the weight of the cocaine was here, or the mixture. Is
19 there room there -- how does he know -- in other words,
20 where is the evidence that talks about the Levamisole.
21 That's an important consideration, and I want you to
22 think about that. I'm going to ask you to think about
23 that, because he doesn't know -- there's nothing in that
24 video, even assuming that he knows it's cocaine, that he
25 knows how much it is, how much it's been cut or anything

1 else of that nature.

2 What I'm getting at here is can we convict him beyond
3 a reasonable doubt? Let's assume everything they're
4 saying is true except the amount and how much -- the
5 extent that this thing has been cut and what amount has
6 been added by -- by the owner of the cocaine. Is there
7 room there for us to say, okay, he knew there was
8 something going on, but we can't say beyond a reasonable
9 doubt it was twenty-eight grams. He doesn't know.

10 I mean, he didn't -- he didn't do anything to look at
11 what weight was involved there. Do you see what I'm
12 saying, so I'm saying he could be found not guilty of
13 this charge simply because there's not any evidence of a
14 criminal intent here to pass along the twenty-eight grams
15 or more, and that's something I'm going to ask you to
16 consider, too, and that's why we kind of spent a little
17 bit of time with the analyst yesterday about it.

18 I would ask you to consider all of the evidence,
19 weigh it against the standard of proof, beyond a
20 reasonable doubt. The world is not going to stop if you
21 decide that the Solicitor doesn't get his -- the
22 Solicitor's Office doesn't get its way today in this
23 case. It's a victory for the system because that is the
24 system that we live for, live under, that we fight for,
25 that our families have fought for, our forefathers and

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1 everybody else, and we're fortunate to have that system,
2 and it's our obligation, and it's our duty and
3 responsibility to apply that law as it is given to us,
4 and I am sure you will.

5 Thank you very much. I am sorry that I drug this out
6 maybe a little bit longer than I should have, but I
7 appreciate your involvement, your participation in the
8 case, because our system wouldn't work without it, and
9 thank you very much. Mr. Castro appreciates it, and I
10 do, and I know the community does as well, so thank you
11 very much.

12 **THE COURT:** Ladies and gentlemen, I am about to
13 instruct you as to the law of this case. I practiced law
14 for about thirty years, and one of the things that I came
15 to understand is that we bring lay people to serve as
16 jurors, and at the end of the trial, the Judge instructs
17 the lay person on sometimes very complex theories of law
18 that would be applied to the case, and it's very
19 difficult to absorb these rather complex theories when
20 you've heard them one time and be able to apply them to
21 the case, so when I became a Circuit Judge, I started
22 doing something that I don't know any other Judges are
23 doing, but it's something that I do in every case, and
24 that is I prepare a transcript of my charge on the law.
25 I have it prepared in advance, and I read verbatim from

1 that transcript on or during my charge.

2 The Supreme Court has said that that's accepted,
3 that's fine that I give you a written charge on the law,
4 but I must do it exactly as I charge you from the Bench,
5 so you might notice that I am reading my charge, but at
6 the end of the charge, I am going to give you the written
7 transcript of my charge on the law. I have found it is
8 very seldom that I ever have a juror come back or a jury
9 come back and ask me to give them further instructions of
10 the law because you're going to have it with you in your
11 jury room.

12 Now, I remind you that during this trial you and I
13 have certain duties to perform. As Trial Judge, it's my
14 responsibility to preside over the trial of this case,
15 and I also have the duty to rule on the admissibility of
16 the evidence offered during the trial.

17 You are to consider only the competent evidence
18 before you. If there was any testimony or words stricken
19 from the record in this case during the trial, you must
20 disregard that testimony. You are to consider only the
21 testimony which has been presented to you from this
22 witness stand, any exhibits which may have been made a
23 part of the record in the case, and any stipulations or
24 agreements of counsel.

25 I have the additional duty to charge you the law

1 applicable in this case. As Presiding Judge, I am the
2 sole judge of the law of the case, and it is your duty as
3 jurors to accept and apply the law as I now state it to
4 you. If you already have an idea of what the law is or
5 what the law ought to be and it does not agree with what
6 I now tell you the law is, you must abandon this idea
7 because you are sworn to accept the law and apply the law
8 exactly as I state it to you.

9 In every case tried in this Court before a jury, the
10 jury becomes the sole and exclusive judge of the facts in
11 the case. A Trial Judge cannot intimate, state, comment
12 on, or make any statement to a trial jury about the facts
13 in a case since you, the jury, are the sole judges of the
14 facts in the case.

15 You are not to infer from anything that I have said
16 during the progress of this trial in ruling upon the
17 admissibility of evidence or otherwise, or anything that
18 I say now during the course of these instructions, that I
19 have any opinion about the facts in the case. The law
20 does not allow me to have an opinion about the facts in
21 this case. This is a matter solely for you, the jury, to
22 determine. As jurors, it is your duty to determine the
23 effect, value, weight, and truth of the evidence
24 presented during the trial.

25 Now, the indictment charges the Defendant with

1 trafficking in cocaine, twenty-eight to one hundred
2 grams. I remind you that the fact that the Defendant was
3 arrested, charged, and indicted in this case is not
4 evidence in this case and cannot be considered by you as
5 evidence of guilt in the case, nor does it create any
6 presumption or inference of guilt. This doctrine -- I
7 mean, this document, that is the indictment, simply is
8 the formal written instrument which contains the charges
9 made against the Defendant. It is the formal document by
10 which the case is brought into the Court.

11 Now, the Defendant has pled not guilty to this
12 indictment and that plea puts the burden on the State to
13 prove the Defendant guilty. A person charged with
14 committing a criminal offense in South Carolina is never
15 required to prove himself innocent. I charge you that it
16 is an important rule of law that the defendant in a
17 criminal matter, no matter what the seriousness of the
18 charge may be, will always be presumed to be innocent of
19 the crime for which the indictment was issued unless
20 guilt has been proven by evidence satisfying you of that
21 guilt beyond a reasonable doubt.

22 Now, this presumption of innocence does not end when
23 you begin your deliberations, but it accompanies the
24 Defendant throughout the trial until you reach a verdict
25 of guilt based on evidence satisfying you of that guilt

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1 beyond a reasonable doubt.

2 The presumption of innocence is like a robe of
3 righteousness placed on the shoulders of the Defendant,
4 which remains with the Defendant until it has been
5 stripped from the Defendant by evidence satisfying you of
6 the Defendant's guilt beyond a reasonable doubt.

7 The presumption of innocence is not a mere legal
8 theory. It is not a mere legal phrase. It is the
9 substantial right to which every defendant is entitled
10 unless you, the jury, are satisfied from the evidence of
11 the Defendant's guilt beyond a reasonable doubt.

12 Now, the State has the burden of proving the
13 Defendant guilty beyond a reasonable doubt. That is the
14 burden upon the State. Some of you may have served as
15 jurors in a civil case where you were told that it is
16 only necessary to prove that a fact is more likely true
17 than not such as by the greater weight or preponderance
18 of the evidence. In criminal cases, the State's proof
19 must be more powerful than that. It must be beyond a
20 reasonable doubt.

21 Proof beyond a reasonable doubt is proof that leaves
22 you firmly convinced of the Defendant's guilt. There are
23 very few things in this world that we know with absolute
24 certainty and in criminal cases the law does not require
25 proof that overcomes every possible doubt.

1 If based on your consideration of the evidence you
2 are firmly convinced that the Defendant is guilty of the
3 crime charged, you must find the Defendant guilty. If on
4 the other hand you think there is a real possibility that
5 the Defendant is not guilty, then you must give the
6 Defendant the benefit of the doubt and find him not
7 guilty. What is a reasonable doubt in the law? A
8 reasonable doubt is the kind of doubt that would cause a
9 reasonable person to hesitate to act.

10 There are two types of evidence which are generally
11 presented during a trial, direct evidence and
12 circumstantial evidence. Direct evidence is the
13 testimony of a person who claims to have actual knowledge
14 of a fact such as an eye witness. It is evidence which
15 immediately establishes the main fact to be proved.

16 Circumstantial evidence is proof of a chain of facts
17 and circumstances indicating the existence of a fact. It
18 is evidence which immediately establishes collateral
19 facts from which the main fact may be inferred.

20 Circumstantial evidence is based on inference and not on
21 personal knowledge or observation.

22 The law makes absolutely no distinction between the
23 weight or value to be given to either direct or
24 circumstantial evidence, nor is a greater degree of
25 certainty required of circumstantial evidence than of

1 direct evidence. You should weigh all of the evidence in
2 the case. After weighing all the evidence, if you are
3 not convinced of the guilt of the Defendant beyond a
4 reasonable doubt, you must find the Defendant not guilty.

5 Necessarily, you must determine the credibility or
6 witnesses who have testified in this case. Credibility
7 simply means believability. It becomes your duty as
8 jurors to analyze and evaluate the evidence and determine
9 which evidence convinces you of its truth.

10 In determining the believability of witnesses who
11 have testified in this case, you may believe one witness
12 over several witnesses or several witnesses over one
13 witness. You may believe a part of the testimony of a
14 witness and reject the remaining part of the testimony of
15 that same witness. You may believe the testimony of a
16 witness in its entirety or reject the testimony of a
17 witness in its entirety.

18 You may consider whether any witness has exhibited to
19 you any interest, bias, prejudice, or other motive in
20 this case. You may also consider the appearance and
21 manner of a witness while on the witness stand, sometimes
22 referred to that as a witness's demeanor.

23 I instruct you and emphasize the fact that the
24 Defendant did not testify is not a factor to be
25 considered by you in any way in your deliberations and in

1 your consideration of the question of guilt or innocence
2 of the Defendant. It must not be considered by you in
3 any manner whatsoever. A defendant has the
4 constitutional right to remain silent and the assertion
5 of this right must not be considered by you in your
6 deliberations. I repeat, under your oath you are to draw
7 no conclusion whatsoever from the fact that the Defendant
8 in this case did not testify.

9 The fact that the Defendant did not testify should
10 not even be discussed in the jury room. The burden of
11 proof, as I have stated to you, is on the State. The
12 Defendant is not required to prove his or her innocence.
13 The burden of proof remains on the State to prove guilt
14 beyond a reasonable doubt.

15 Now, the Defendant is charged with trafficking in
16 cocaine. The State must prove beyond a reasonable doubt
17 that the Defendant knowingly sold, manufactured,
18 cultivated, delivered, purchased, brought into this
19 State, provided financial assistance, or otherwise aided,
20 abetted, attempted, or conspired to sell, manufacture,
21 cultivate, deliver, purchase, or bring into the State was
22 knowingly in actual or constructive possession, knowingly
23 attempted to become in actual or constructive possession
24 of cocaine.

25 The State must also prove beyond a reasonable doubt

1 that the amount of the cocaine or any mixture containing
2 cocaine was twenty-eight grams or more, but less than one
3 hundred grams.

4 To prove possession, the State must prove beyond a
5 reasonable doubt that the Defendant had both the power
6 and intent to control the disposition or use of the
7 cocaine. Possession may be either actual or
8 constructive. Actual possession means that the cocaine
9 was in the actual physical custody of the Defendant.
10 Constructive possession means that the Defendant had
11 dominion and control or the right to exercise dominion or
12 control over either the cocaine itself or the property on
13 which the cocaine was found.

14 Mere presence at the scene where the drugs were found
15 is not enough to prove possession. Actual knowledge of
16 the presence of the cocaine is strong evidence of the
17 Defendant's intent to control its disposition or use.
18 The Defendant's knowledge and possession may be inferred
19 when a substance is found on the property under the
20 Defendant's control. However, this inference is simply
21 an evidentiary fact to be taken into consideration by you
22 along with all the other evidence in the case and to be
23 given the weight you decide it should have. Two or more
24 persons may have joint possession of a drug.

25 There are two possible verdicts which you may find on

1 the indictment in this case, guilty or not guilty, and I
2 have prepared a verdict form for you. It's a very simple
3 verdict form, and I tell you there is no significance
4 whatsoever to the fact that I have typed here as to the
5 charge of trafficking cocaine, ten -- or twenty-eight to
6 one hundred grams, we, the jury, unanimously find the
7 Defendant, and I put circle one, and I put guilty, then
8 not guilty. That doesn't mean a thing. We had to put
9 one first and the other second, and that's just how we
10 did it, but you're to draw no conclusion from that.

11 Ladies and gentlemen, your verdict must be a
12 unanimous verdict. Now, Mr. Foreperson, when the jury
13 agrees on a verdict -- I'm going to send you out to your
14 jury room -- you will write the verdict or circle, as
15 I've indicated on the verdict form, your verdict and you
16 will sign it, and then you will knock on your jury room
17 door, and Mr. Ropp will inform me that you have reached a
18 verdict.

19 Now, I'm going to let you return to your jury room at
20 this time. I may have to make an additional charge to
21 you. I may have to supplement the charges that I have
22 already given you. There's a possibility I may have left
23 -- left something out, but let me tell you this: If I
24 send in the verdict form, and the charge on the law, and
25 the exhibits in this case, that is your signal to begin

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1 your deliberations. If I have to bring you out, I will
2 give you further instructions, but if I send in the law,
3 the verdict form, and the exhibits, that means start your
4 deliberations. Do not begin until that time.

5 Now, our alternate is going to be separated from you
6 at this point and we will deal with her in just a few
7 minutes, okay?

8 If you would, Mr. Ropp, take your jury back into the
9 jury room.

10 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF
11 THE JURY.)

12 THE COURT: Any objections from the State?

13 MR. GRAUSTEIN: No objections from the State, Your
14 Honor.

15 THE COURT: From the Defense?

16 MR. DIGGS: No, Your Honor.

17 THE COURT: All right. If you would, gentlemen,
18 come forward and get the exhibits together.

19 Ms. Eubank, would you mark the transcript of the
20 charge as Court's Exhibit 1, and that will go in.

21 Gentlemen, I usually don't even send the indictment
22 back.

23 (TYPED JURY CHARGE MARKED AS COURT'S EXHIBIT NUMBER
24 1.)

25 THE REPORTER: Do you agree on the exhibits?

1 **MR. GRAUSTEIN:** Yes.

2 **MR. DIGGS:** Yes.

3 **THE COURT:** Okay, the verdict form, you've both had
4 a chance to look at it? It's right there.

5 (Counsel for the State and the Defense review the verdict
6 form.)

7 **THE COURT:** All right, take that back to them, and
8 we're at ease.

9 Bring the alternate out, yes, and bring her out here
10 and let me release her.

11 (AT 4:45 P.M., THE EXHIBITS, TYPED JURY CHARGE, AND
12 VERDICT FORM ARE TAKEN TO THE JURY.)

13 (THE ALTERNATE JUROR ENTERS THE COURTROOM.)

14 **THE COURT:** Ms. Davis, thank you so much for your
15 service this week. Once the deliberation begins, I
16 release the alternate. I don't think it's fair if we
17 deliberate for an hour or two, then to interject an
18 alternate that hasn't had the advantage of the prior
19 deliberations, so what I do is release the alternate.
20 Again, thank you for being here. We've moved several
21 cases along this week that would have been trials
22 otherwise.

23 You are certainly welcome to stay with us to see how
24 it comes out, but if you are ready to go home, we will
25 make sure that someone walks you down to your car and you

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1 are out of here.

2 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF
3 THE JURY.)

4 (NOTE FROM JURY MARKED AS COURT'S EXHIBIT NUMBER 2.)

5 THE COURT: All right, Mr. Graustein, do we have the
6 Defendant?

7 MR. GRAUSTEIN: He's on the elevator coming up now.

8 THE COURT: All right.

9 All right, Mr. Diggs, I see the Defendant is here.

10 Mr. Graustein, I have a note from the Foreperson.

11 The Foreperson simply says, "Transcript of video." Of
12 course, there is no transcript of the video. However, I
13 could bring them in and I assume that they -- or maybe
14 they want to see the video. I would suggest that you --
15 that I inquire as to whether or not they needed to see
16 the driving part. I don't think that's what they want.
17 Can you run it forward, fast-forward it to ---

18 MR. GRAUSTEIN: Yes, I can, Your Honor.

19 THE COURT: All right, let's bring them in.

20 If they want to see it all, we'll give them whatever
21 they want.

22 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
23 JURY.)

24 THE COURT: Mr. Flick, I have your -- your note
25 indicating that, I would assume, that you want to see a

1 transcript of the video. The video itself is an exhibit
2 and is, therefore, not transcribed. It becomes an
3 exhibit in and of itself.

4 What we can do is we can re-play that video for you
5 in its entirety. I noticed that there was some at the
6 front and at the end that was just driving in a car. We
7 are more than happy to play all of it, but if you -- we
8 do have the capacity to fast-forward past that.

9 **FOREMAN FLICK:** Your Honor, we are more interested
10 in when they enter the house and when they leave the
11 house, from that point to the end point.

12 **THE COURT:** From the time they enter until they
13 leave?

14 **FOREMAN FLICK:** Correct.

15 **THE COURT:** So that would be all that you would
16 need?

17 **FOREMAN FLICK:** Correct.

18 **THE COURT:** And you don't want me to play it all,
19 just fast-forward to that point.

20 All right, Mr. Graustein.

21 If you could get these lights down right over me.

22 **FOREMAN FLICK:** Your Honor, they said that they want
23 to -- they want to hear it.

24 **THE COURT:** Okay. Well, let's do this. Where was
25 the micro- -- I mean the speaker on that projector? What

1 did you have there, Mr. -- was it just on a ---

2 MR. GRAUSTEIN: It's on the -- off the computer,
3 Your Honor.

4 THE COURT: All right. Can you take a microphone
5 and put down over that?

6 MR. GRAUSTEIN: I will get it as good as I can, and
7 if there's ---

8 THE COURT: Would you be able to see better if we
9 darken these lights up here as well? Okay, let's do
10 that.

11 Let's get the lights back up while they get ready.

12 FOREMAN FLICK: Your Honor, can we enlarge it?

13 THE COURT: Can you make it larger, Mr. Graustein?
14 All right, are you ready to start it?

15 MR. GRAUSTEIN: Yes sir.

16 THE COURT: Okay. Go ahead and get started and then
17 we will deal with the lights.

18 MR. GRAUSTEIN: Yes, sir.

19 (PORTION OF STATE'S EXHIBIT 1 IS PUBLISHED TO THE
20 JURY IN OPEN COURT.)

21 THE COURT: Is that what you needed to see, Mr.
22 Flick?

23 FOREMAN FLICK: Yes sir.

24 THE COURT: All right, thank you very much. If you
25 would return to your jury room.

JURY OUT/DELIBERATION
JURY IN/VERDICT

268

1 (AT 5:30 P.M., THE JURY RETIRES TO THE JURY ROOM, AND
2 THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
3 JURY.)

4 THE COURT: All right, gentlemen.

5 (AT 6:42 P.M., THE FOLLOWING TAKES PLACE OUTSIDE THE
6 PRESENCE OF THE JURY.)

7 THE COURT: All right, we've got a verdict.

8 If you would, bring in the jury.

9 (AT 6:45 P.M., THE FOLLOWING TAKES PLACE WITHIN THE
10 PRESENCE OF THE JURY.)

11 THE COURT: All right, Mr. Foreman, have you reached
12 a verdict?

13 FOREMAN FLICK: Yes sir.

14 THE COURT: And it is -- is it a unanimous verdict?

15 FOREMAN FLICK: Yes sir.

16 THE COURT: Would you give the verdict to the Clerk,
17 if you would.

18 Madam Clerk, may I see the verdict.

19 All right, if you would, publish the verdict.

20 CLERK OF COURT: Indictment Number 2010-GS-26-445,
21 The State of South Carolina versus Nelson Castro, as to
22 the charge of trafficking cocaine, twenty-eight to one
23 hundred grams, we, the jury, unanimously find the
24 Defendant guilty. Dated April 8th, 2010, signed by Juror
25 Number 107, Robert Flick.

POLLING OF THE JURY

269

1 Ladies and gentlemen of the jury, if this is your
2 verdict, so signify by raising your right hand.

3 **THE COURT:** Any request for individual polling?

4 **MR. DIGGS:** Your Honor, we would request it.

5 **THE COURT:** All right. Would you poll individually.

6 **CLERK OF COURT:** When I call your name if you will
7 please stand.

8 Juror Number 15, Stacy Barrera. Is this your
9 verdict?

10 JUROR 15: Yes.

11 **CLERK OF COURT:** Is this still your verdict?

12 JUROR 15: Yes.

13 **CLERK OF COURT:** 306, Edward Sweatt. Is this your
14 verdict?

15 JUROR 306: Yes, it is.

16 **CLERK OF COURT:** Is this still your verdict?

17 JUROR 306: Yes, it is.

18 **CLERK OF COURT:** Thank you.

19 224, Stephen Morgan. Is this your verdict?

20 JUROR 224: Yes.

21 **CLERK OF COURT:** Is this still your verdict?

22 JUROR 224: Yes.

23 **CLERK OF COURT:** Thank you.

24 10, Cynthia Baine. Is this your verdict?

25 JUROR 10: Yes.

1 **CLERK OF COURT:** Is this still your verdict?
2 JUROR 10: Yes.
3 **CLERK OF COURT:** Thank you.
4 107, Robert Flick. Is this your verdict?
5 JUROR 107: Yes.
6 **CLERK OF COURT:** Is this still your verdict?
7 JUROR 107: Yes.
8 **CLERK OF COURT:** Thank you.
9 278, Eric Shaw. Is this your verdict?
10 JUROR 278: Yes.
11 **CLERK OF COURT:** Is this still your verdict?
12 JUROR 278: Yes.
13 **CLERK OF COURT:** Thank you.
14 180, Heather Kouba. Is this your verdict?
15 JUROR 180: Yes.
16 **CLERK OF COURT:** Is this still your verdict?
17 JUROR 108: Yes.
18 **CLERK OF COURT:** Thank you.
19 294, Kelli Willoughby. Is this your verdict?
20 JUROR 294: Yes.
21 **CLERK OF COURT:** Is this still your verdict?
22 JUROR 294: Yes.
23 **CLERK OF COURT:** Thank you.
24 299, Sharon Stiller. Is this your verdict?
25 JUROR 299: Yes.

POLLING OF THE JURY

271

1 **CLERK OF COURT:** Is this still your verdict?

2 **JUROR 299:** Yes.

3 **CLERK OF COURT:** Thank you.

4 239, Tina Jordan. Is this your verdict?

5 **JUROR 239:** Yes.

6 **CLERK OF COURT:** Is this still your verdict?

7 **JUROR 239:** Yes.

8 **CLERK OF COURT:** Thank you.

9 193, Bashawn Lewis. Is this your verdict?

10 **JUROR 193:** Yes.

11 **CLERK OF COURT:** Is this still your verdict?

12 **JUROR 193:** Yes.

13 **CLERK OF COURT:** Thank you.

14 100, Frederica Fanelli. Is this your verdict?

15 **JUROR 100:** Yes.

16 **CLERK OF COURT:** Is this still your verdict?

17 **JUROR 100:** Yes.

18 **CLERK OF COURT:** Thank you.

19 **THE COURT:** All right, thank you.

20 Mr. Diggs, any further matters?

21 **MR. DIGGS:** Not at this time.

22 **THE COURT:** Any motions or anything of that nature?

23 **MR. DIGGS:** Your Honor, we would ask for a new trial

24 -- do you want me to do this at this point?

25 **THE COURT:** Yes sir. Yes, sir.

1 **MR. DIGGS:** A new trial on the grounds that we
2 advanced in the course of the proceedings. Initially we
3 would assert that we should have been permitted to argue
4 the nature of the illegality of the entry of the
5 confidential informant because in curbing Counsel's
6 ability to make that particular point interfered with the
7 effective representation that otherwise could have been
8 provided.

9 Also, we would ask that the Court reconsider the
10 motions made with respect to the mistrial given the fact
11 that you had a State's witness who had been instructed
12 what to say in terms of within the guidelines of how he
13 could respond, and he purposely, I would submit, chose to
14 disregard the Court's instructions and do what he wanted
15 to do at the time which was prejudicial, and on those
16 bases, I would ask the Court to grant a new trial to this
17 Defendant, and we would renew also the directed verdict
18 motion that was made.

19 **THE COURT:** All right, Mr. Diggs, I appreciate your
20 motions. I would respectfully deny these motions on the
21 same grounds that I denied them during the trial of the
22 case. I feel also that as to the directed verdict, there
23 was not only substantial evidence, there was a wealth of
24 evidence to support the jury's verdict in this matter,
25 and I would deny your request for a directed verdict.

1 All right, would you please stand, Mr. Castro. (Mr.
2 Castro stands.)

3 Mr. Diggs, I will hear from you in mitigation.

4 **MR. DIGGS:** Your Honor, in this case, you've got a
5 very pleasant young man. I don't know if the record
6 shows, but what we do have, though, is a young man who is
7 twenty-nine years of age, is from El Salvador. He is in
8 the United States legally. I'm not sure what kind of
9 visa that he had, but he was working here in the United
10 States, and because of this arrest here in Horry County,
11 the immigration people had put a hold on him and then
12 decided not to renew that visa until the resolution of
13 the charges pending in Horry County had been completed
14 and done.

15 He has a fiancé who is here in the courtroom with
16 him. They are expecting a child. She was in the video,
17 Your Honor, and is very much concerned about what happens
18 to the father of her child.

19 Mr. Castro has been a pleasant individual to work
20 with. He's been cooperative for the most part. When
21 I've asked him to meet with me and participate in
22 discussions about the case, he's always done as I've
23 asked him to do and met his responsibilities in that
24 regard.

25 Your Honor, he does not -- I would submit that his

1 culpability in this case is less than, less than the
2 individuals who supplied the cocaine, is less than
3 burglar who is doing five years of probation and my
4 understanding is no time in prison for multiple drug
5 offenses and a charge that as recently as 1977 could have
6 brought him the death penalty.

7 Your Honor, I would ask the Court to consider the
8 concessions that have been made to co-defendants in the
9 case allowing them to plead to offenses that would make
10 them eligible for a three year mandatory minimum term of
11 imprisonment. While I know that particular option is not
12 available to the Court at this time, we're dealing with a
13 mandatory minimum of seven years, I would ask Your Honor
14 to impose that minimum.

15 Now, we have a practical situation here because at
16 some point the United States is going to deport Mr.
17 Castro simply because they didn't renew his visa, and I
18 would ask the Court to take that into consideration and
19 impose the minimum sentence that the Court can impose.

20 I don't know of any other convictions that Mr. Castro
21 has, and I would ask the Court to be merciful, to take
22 again into consideration to what's been given to co-
23 defendants in this transaction, in this situation, and
24 impose the mandatory minimum on Mr. Castro.

25 **THE COURT:** All right.

1 Mr. Graustein.

2 **MR. GRAUSTEIN:** Yes, Your Honor. As Your Honor is
3 well aware, this Defendant was offered to plead to a
4 minimum sentence last month. He was arraigned. He chose
5 to reject that plea offer.

6 **THE COURT:** In addition, he was given the concession
7 of dismissal of several other pending charges that have
8 not been tried?

9 **MR. GRAUSTEIN:** That is correct, Your Honor, if he
10 pled guilty, I believe, although much of this evidence of
11 Mr. Castro's activity was not presented to the jury and
12 properly so. There is ample evidence that he is a --
13 he's a drug dealer and whether or not he is the supplier
14 or not, he gets it out there on the street and he
15 provides it when he wants to. This was a transaction for
16 three ounces of cocaine and according to Officer
17 Necessary, that is a large transaction even for Drug
18 Enforcement even to get involved in. Mr. Castro had
19 large quantities of drugs. We don't believe that he's
20 entitled to any consideration with regards to that.

21 He does have a prior conviction for simple possession
22 of marijuana. The State had given him consideration with
23 regards to that by indicting this as a first offense as
24 to if there was a question of whether or not it would
25 apply to -- for drug enhancement to a second offense, so

1 this was a trial at a first offense level.

2 The State does not seek or request any mercy on this
3 Defendant, Your Honor.

4 **THE COURT:** Mr. Castro, anything you want to tell
5 me?

6 **MR. CASTRO:** (Nods in the negative.)

7 **THE COURT:** Mr. Castro, this is classified by the
8 Legislature in this State as not only a violent crime,
9 but a most serious offense. It has a no probation, no
10 suspension of sentence clause in the sentence.

11 You are different from these other defendants in that
12 they have cooperated and they have acknowledged their
13 responsibility for the crimes that they have committed.

14 Mr. Castro, this is, as I said, an extremely serious
15 offense. The State has had to take you to trial on a
16 case where there was overwhelming evidence of your guilt.
17 The jury has found you guilty, and I sentence you to
18 incarceration in the State Department of Corrections for
19 a period of fifteen years. Thank you, sir.

20 Ladies and gentlemen of the jury, I want to thank you
21 for your service today, or this week. You have provided
22 a great service to this community. No one can criticize
23 your verdict. You were attentive. You were
24 conscientious in your job. I certainly appreciate you
25 being here. I hope that at sometime in the future I will

1 have an opportunity to run into you somewhere about the
2 county. If you see me, please don't hesitate to approach
3 me that you were on my jury. I would love to speak with
4 you.

5 That having been said, goodnight. Your service as
6 jurors this week is completed. Thank you again.

7 Mr. Ropp, make sure they are taken back to the jury
8 room and safely escorted out to their cars.

9 All right, thank you very much.

10 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF
11 THE JURY.)

12 THE COURT: All right, gentlemen.

13 Yes, do we have a sentencing sheet? Fifteen,
14 straight.

15 All right, thank you, gentlemen. It was good to see
16 you all.

17 -----END OF REQUESTED TRANSCRIPT OF RECORD-----
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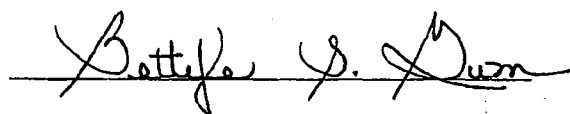
1 STATE OF SOUTH CAROLINA)

2 COUNTY OF HORRY)

3
4 I, the undersigned Bettie S. Gum, Certified Court
5 Reporter and Notary Public in and for the State of South
6 Carolina, do hereby certify that the foregoing is a true,
7 accurate and complete Transcript of Record of all the
8 proceedings had and evidence introduced in the hearing of
9 the captioned case, as taken by Dixie Cox Eubank,
10 Official Reporter, and transcribed by me, relative to
11 appeal, in the Court of General Sessions for Horry
12 County, South Carolina.

13 I do further certify that I am neither of kin,
14 counsel, nor interest to any party hereto.
15

16
17 January 17, 2011

18
19 

20 BETTIE S. GUM, CCR-CVR-CM

21 Certified Court Reporter and
22 Notary Public for South Carolina
23 My Commission Expires: 7/13/14
24
25

NOV 17 10 00 AM '10

(2010-GS-26-445) State vs. Nelson, Hercules (Castro

(Scott Crumpton,
A Sol)

Horry County Courthouse (William I Diggs, 444)

RANDOM STRIKE SHEET

JUDGE NAME :

TRIAL TYPE : Criminal

PANEL ID : HYMAN WEDNESDAY

COURTROOM JAR

DESCRIPTION : HYMAN WEDNESDAY

Sorted by: Random Nbr

Trial

4/7/2010 - 4/8/2010

NAME	JUROR NBR	RACE	SEX	STRIKE	DEFENDANT	REMARKS
1 Barrera, Stacy R	15	W	F	()	()	✓(1)
2 Sweatt, Edward W	306	W	M	()	()	✓(2)
3 Morgan, Stephen M	224	W	M	()	()	✓(3)
4 Thomas, Michael V	312	W	M	()	X ⁽¹⁾	✓(4)
5 Baine, Cynthia B	10	W	F	()	()	
6 Abbott, Milanov K A	1	W	F	X ⁽¹⁾	()	
7 Roberts, Susie J	258	W	F	()	X ⁽²⁾	✓(5) (foreman)
8 Flick, Robert A	107	W	M	()	()	
9 Floyd, Samuel M	108	W	M	X ⁽²⁾	()	✓(6)
10 Hall, Jared T	131	W	M	()	()	✓(7)
11 Shaw, Eric D	278	W	M	()	()	✓(8)
12 Kouba, Heather L	180	W	F	()	()	✓(9)
13 willoughby, Kelli M	294	W	F	()	()	✓(10)
14 Stiller, Sharon M	299	W	F	()	()	
15 Lawrence, Margaret M	189	W	F	()	X ⁽³⁾	✓(11)
16 Jordan, Tina J	239	W	F	()	()	
17 Hardwick, Theresa A	136	W	F	()	X ⁽⁴⁾	
18 Watts, Michael L	332	W	M	X ⁽³⁾	()	
19 Stephens, Michael F	297	W	M	()	X ⁽⁵⁾	✓(12)
20 Lewis, Bashawn R	193	B	M	()	()	
21 Prince, Samuel N	249	W	M	()	X ⁽¹⁾	✓(1) alt.
22 Davis, China D	80	W	F	()	()	
23 Brown, Bobby J	42	W	M	()	X ⁽¹⁾	

State vs. Nelson Hercules Castro

Horry County Courthouse
RANDOM STRIKE SHEET

JUDGE NAME :

TRIAL TYPE : Criminal

PANEL ID : HYMAN WEDNESDAY

COURTROOM JAR

DESCRIPTION : HYMAN WEDNESDAY

Sorted by: Random Nbr

Trial

NAME	JURY NBR	RACE	SEX	PLAINTIFF	DEFENDANT	REMARKS
24 Gill, James O	117	W	M	(X ¹)	() ()	
25 Marcus, Helen L	205	W	F	()	(X ¹) ()	
26 Sturgill, Kelly	303	W	F	()	(X ²) ()	?
27 Fanelli, Frederica G	100	W	F	()	() ()	✓ @ alt.
28 Webster, Celia M	335	W	F	()	() ()	
29 Wadzinski, Mary E	328	W	F	()	() ()	
30 Hutchinson, Thomas A	161	W	M	()	() ()	
31 Curtis, Jennifer L	79	W	F	()	() ()	
32 Bonin, Suzanne M	37	W	M	()	() ()	
33 Miller, Ronna	219	W	F	()	() ()	
34 Russell, Robert F	263	W	M	()	() ()	
35 Pereksta, Robert F JR	243	W	M	()	() ()	
36 Dix, Tanya A	91	W	F	()	() ()	
37 Merryman, David E	216	W	M	()	() ()	
38 Veltre, Bonnie L	325	W	F	()	() ()	
39 St, Blanchard Oswald J	295	W	M	()	() ()	
40 Tyler, Jennifer L	322	W	F	()	() ()	

Total Number of Jurors:

40

** END OF REPORT **

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

STATE OF SOUTH CAROLINA

ORIGINAL

-VS-

2010-GS-26-0445

NELSON H. CASTRO,

DEFENDANT.

THE FOLLOWING PROCEEDINGS WERE HELD BEFORE THE HONORABLE

LARRY B. HYMAN, JR.,

IN THE GENERAL SESSIONS CIRCUIT COURT OF HORRY COUNTY
(15TH JUDICIAL DISTRICT) BEGINNING ON 10:35 AM ON THE
17TH DAY OF JUNE, 2010, IN CONWAY, SOUTH CAROLINA.

REPORTED BY: H. EUGENE BUCKNER, CVR

ORIGINAL

H. EUGENE BUCKNER, CVR
OFFICIAL COURT REPORTER AT LARGE
7TH JUDICIAL DISTRICT
PO BOX 280, DRAYTON, SC 29333

APPEARANCES:

Beverly B.J. Landrum, Esquire
15th Circuit Solicitor's Office
P.O. Box 1276
Conway, SC 29528

(843) 915-8629

.... ON BEHALF OF THE STATE

William I. Diggs, Esquire
Law Office of William Isaac Diggs
1700 Oak St., Ste. D
Myrtle Beach, SC 29577

(843) 626-4243

.... ON BEHALF OF THE DEFENDANT

NO EXHIBITS WERE MARKED AND NO WITNESSES TESTIFIED DURING
THESE PROCEEDINGS.

1 BAILIFF:

2 Order in the court. All rise,
3 please.

4 THE COURT:

5 Thank you. Please be seated.

6 What do we have?

7 MS. LANDRUM:

8 Thank you, Your Honor.

9 Your Honor, we are here on the
10 matter of it Nelson McLeno (phonetic) Castro, Indictment
11 2010-GS-26-445 for trafficking cocaine.

12 Mr. Castro, Your Honor, was tried
13 before Your Honor --

14 THE COURT:

15 Uh-huh.

16 MS. LANDRUM:

17 -- in April; and convicted on
18 April 8th, 2010 to trafficking cocaine 28 to 100 grams
19 with a sentence of 15 years.

20 I believe that that Mr. Diggs has
21 several motions for The Court.

22 THE COURT:

23 All right. Mr. Diggs?

24 DEFENSE COUNSEL:

25 Yes, Your Honor -- uh -- and Madam

1 Solicitor, we -- uh -- Your Honor will recall in this
2 case:

3 We actually made post-trial
4 motions --

5 THE COURT:

6 Right.

7 DEFENSE COUNSEL:

8 -- on the record at the conclusion
9 of the case.

10 THE COURT:

11 Right.

12 DEFENSE COUNSEL:

13 And in terms of the substance of
14 those -- uh -- uh -- issues, I don't want to revisit them
15 today.

16 I think that the record reflects
17 -- uh -- pretty clearly and thoroughly what our objection
18 were; what Your Honor's rulings --

19 THE COURT:

20 All right.

21 DEFENSE COUNSEL:

22 -- were.

23 And so, I don't want to -- I don't
24 want to re-open for purposes of the record today.

25 But I do want to revisit the issue

1 of the sentence.

2 Uh -- Your Honor, as you recall,
3 the -- at the trial of the case, Mr. Castro was sentenced
4 to 15 years.

5 And we understand that the
6 sentencing range is -- uh -- 7 to 25 --

7 THE COURT:

8 Right.

9 DEFENSE COUNSEL:

10 -- here.

11 THE COURT:

12 I hit him about midrange.

13 DEFENSE COUNSEL:

14 So your -- Yes sir, you were.

15 And there were some other charges
16 that were pending -- uh -- against Mr. Castro as well.

17 But --

18 THE COURT:

19 I think they -- those have been
20 nolle-prossed; haven't they?

21 MS. LANDRUM:

22 Not --

23 DEFENSE COUNSEL:

24 They have, Your Honor.

25 MS. LANDRUM:

1 Not --

2 DEFENSE COUNSEL:

3 Well --

4 MS. LANDRUM:

5 Not -- Not yet, Your Honor.

6 THE COURT:

7 But the State doesn't intend to go
8 forward with them; do they?

9 MS. LANDRUM:

10 Uh -- Your Honor, according to Mr.
11 Graustein, who handles these, he says he has 5 pending.
12 And I did look this up. He has actually 4 pending
13 trafficking cocaine charges, and one possession with
14 intent to distribute schedule 1 through 5 pending.

15 The State is inclined to dismiss
16 or nolle-pross those charges, given the sentence on this
17 charge; but they have not yet been dismissed.

18 DEFENSE COUNSEL:

19 But -- And Your Honor, we
20 certainly appreciate that. And we understand the
21 position that the State is in, in this -- uh --
22 particular -- uh -- case.

23 But I would submit that:

24 Seven years, which is the
25 mandatory minimum -- which is available as a sentence in

1 case -- would -- would accomplish the same purposes.

2 What you have is a young man who
3 is 29 years of age. Basically the same set of facts on
4 -- uh -- all of these charges.

5 Your Honor will recall the young
6 man that came in to testify -- uh -- in the case.

7 And -- you know -- he would just
8 call Mr. Castro. And they would wire him up and send
9 him in there; and -- and do this undercover deal.

10 In fact, the evidence showed that
11 Mr. Castro was kind of a conduit between -- uh -- the
12 supplier and the ultimate user, which was the State's
13 confidential informant in this case.

14 THE COURT:

15 But Mr. Diggs --

16 DEFENSE COUNSEL:

17 Yes sir?

18 THE COURT:

19 -- the -- the videotape; didn't it
20 show Mr. Castro counting the money out?

21 Didn't it show Mr. Castro -- uh --
22 or at least hear Mr. Castro weighing the drugs?

23 He -- I recall a comment,
24 something about:

25 You know, you almost got a Q-P

1 here. Uh -- You got a could weight.

2 Uh -- I mean, didn't we have that
3 kind of conduct going on?

4 We had scales.

5 DEFENSE COUNSEL:

6 Your Honor --

7 THE COURT:

8 We had --

9 DEFENSE COUNSEL:

10 -- those things occurring, I
11 believe, on that video was certainly -- uh -- could be
12 construed that way.

13 The jury did.

14 You know, they construed it that
15 way.

16 But -- uh --

17 THE COURT:

18 And this was about a what? Two
19 day trial? Three day trial?

20 MS. LANDRUM:

21 Uh --

22 DEFENSE COUNSEL:

23 Two day's, Your Honor.

24 MS. LANDRUM:

25 I'm not sure, Your Honor.

1 THE COURT:

2 Two days; something like that?

3 MS. LANDRUM:

4 But the State would -- would like
5 a moment when you've reached that point, Your Honor.

6 THE COURT:

7 Okay; we'll talk about it.

8 DEFENSE COUNSEL:

9 He was tried on the seventh --
10 April seventh and eighth.

11 THE COURT:

12 Okay.

13 DEFENSE COUNSEL:

14 But, Your Honor, our argument
15 would be simply -- uh -- that:

16 The drug laws in the US are hard.

17 I know that's not really a

18 consideration --

19 THE COURT:

20 I understand

21 DEFENSE COUNSEL:

22 -- for This -- for This Court.

23 But -- But seven years is a long
24 time.

25 It's -- uh -- uh -- You've got a

1 young man here who has family and friends. Uh -- He's
2 going to be a father here in -- uh -- August.

3 And, Your Honor, I would submit
4 that seven years, which the Legislature has -- uh --
5 indicated was -- uh -- sufficient punishment for -- uh --
6 this type of -- or level of offense, Your Honor, we would
7 -- we would ask you to reconsider the sentence.

8 Just --

9 THE COURT:

10 And doesn't it -- As was indicated
11 earlier, doesn't the State still have three or four more
12 --

13 MS. LANDRUM:

14 Your Honor, we have --

15 THE COURT:

16 -- similarly serious offenses that
17 could be tried?

18 MS. LANDRUM:

19 Yes, Your Honor.

20 We have four trafficking cocaine
21 offenses and one possession with intent to distribute
22 schedule -- uh -- drugs as well.

23 THE COURT:

24 What were they again? I'm sorry.

25 MS. LANDRUM:

1 Uh -- There is four trafficking
2 cocaine 10 to 28 grams, the same as what he's been
3 convicted on.

4 THE COURT:

5 Still pending?

6 MS. LANDRUM:

7 Four pending; yes sir.

8 Uh -- I will say, Your Honor -- uh
9 -- on behalf of Mr. Graustein, who -- who had some notes
10 here that he asked me to present to The Court, that:

11 Mr. Castro was in fact offered a
12 seven --

13 THE COURT:

14 That's right. Mr. Graustein tried
15 the case.

16 MS. LANDRUM:

17 He did.

18 THE COURT:

19 I was wondering -- I was trying to
20 remember whether you were there or not.

21 MS. LANDRUM:

22 It was -- uh -- It was actually
23 Mr. Graustein. And he is out this week; but asked me to
24 step -- uh -- in for him, which I'm happy to do.

25 He did state that he had offered

1 Mr. Castro to plead to the charge with a recommendation
2 of seven years; and that he refused that plea wanted a
3 trial.

4 Prior to trial -- uh -- The Court
5 informed him that he would likely get seven years if he
6 had pled. And he did not plea..

7 The jury deliberated for no more
8 than 10 minutes before convicting Mr. Castro.

9 THE COURT:

10 How long?

11 MS. LANDRUM:

12 Ten minutes, Your Honor..

13 Uh -- The evidence at trial, and
14 on the videotape, and the testimony of the CI -- uh --
15 showed that there were numerous similar drug transactions
16 -- uh -- that were talked about -- uh -- by the CI as
17 well as on the videotape.

18 As -- And as you know, we have all
19 of these pending against him as well.

20 We believe that the 15 years is
21 clearly not excessive or unwarranted given the evidence
22 that was presented at trial; and his propensity to engage
23 in illegal drug activity.

24 And I will say, Your Honor, that
25 the weight of the cocaine was 83.69 grams.

1 So it was more towards the 100-
2 gram level -- uh -- just for the -- uh -- The Court's --
3 uh -- information.

4 I believe that's all that Mr.
5 Graustein has asked me to cover, Your Honor.

6 DEFENSE COUNSEL:

7 Your Honor, just one -- uh --
8 final point.

9 Mr. -- uh -- Castro -- uh -- was
10 here in the United States legally.

11 Uh -- He is a citizen of El
12 Salvador.

13 He was not able to renew -- I
14 think it's a visa -- because of these pending charges.

15 Your Honor, he's going to be
16 deported.

17 And -- uh -- I would submit that's
18 a legitimate consideration.

19 You know, the expense that's going
20 to be allocated or required of the State of South
21 Carolina to support him -- uh -- when -- when a seven-
22 year sentence would be sufficient -- uh -- it would allow
23 him to be deported more quickly and the ends of justice
24 would be served.

25 And I would submit --

1 THE COURT:

2 What would --

3 DEFENSE COUNSEL:

4 It's a legitimate consideration --

5 THE COURT:

6 Yeah. Mr. --

7 DEFENSE COUNSEL:

8 -- by The Court.

9 THE COURT:

10 Mr. Diggs, you know, I look at
11 this case as a whole.

12 And what we have here are multiple
13 charges and multiple pending charges.

14 It's not a matter of -- of -- of a
15 single charge, an isolated incident.

16 We have all of these multiple
17 charges which the State -- And I anticipated that the
18 State would probably dismiss the other charges -- uh --
19 if an appropriate sentence was -- was given.

20 Uh -- I certainly don't penalize
21 anybody from going to trial. Uh -- But acceptance of
22 responsibility is, I believe, a valid -- uh --
23 consideration for The Court.

24 In this case, there was just
25 overwhelming evidence to -- a 10 minute -- uh -- uh --

1 period of deliberations by the jury -- uh -- videotapes
2 with all sorts of incriminating -- uh -- statements on
3 it.

4 Uh -- Visually, you can see him
5 counting out money.

6 We -- You can hear -- hear as they
7 weigh -- uh -- the -- the drugs.

8 Uh -- Everyone is very, very,
9 casual -- uh -- in -- in this -- uh -- this tape. And
10 the tape went on for quite some time.

11 Uh -- But if we -- if we look at
12 -- at the totality of the facts surrounding this -- this
13 situation, what does it -- what message does it say --
14 send?

15 What -- What does it say if a
16 Defendant gets the benefit of a minimum mandatory
17 sentence -- uh -- in a case where there are multiple
18 charges and overwhelming evidence.

19 All those things give me some
20 concern.

21 I believe that I -- I gave him
22 sort of a midrange sentence.

23 I -- I took into consideration the
24 fact -- uh -- that he was here legally.

25 And I took it into consideration.

1 the fact that -- I think you mentioned to me that -- uh
2 -- he might be facing deportation.

3 Uh -- You know, I -- I was aware
4 of those. It didn't make me give him a higher or lower
5 sentence.

6 But -- uh -- But I believe that
7 this sentence is appropriate. And that -- uh -- I would
8 -- uh -- respectfully deny your motion.

9 Now, I am con -- interested in the
10 fact as to whether or not the State does intend to nolle-
11 pross the other charges?

12 MS. LANDRUM:

13 Uh -- Your Honor, according to Mr.
14 Graustein's notes, he stated -- and he -- he drew his own
15 words:

16 Uh -- Castro currently has five
17 trafficking and distribution charges pending.

18 The State is inclined to dismiss,
19 nolle-pross, these charges, given sentence of 15 years.

20 THE COURT:

21 There's certainly been no effort
22 to -- uh -- to go forward with those case?

23 MS. LANDRUM:

24 That's correct, Your Honor.

25 THE COURT:

1 I'm going to deny your motion.

2 Thank you, Mr. Diggs.

3 MS. LANDRUM:

4 Thank you, Your Honor.

5 THE COURT:

6 All right.

7 DEFENSE COUNSEL:

8 Your Honor, thank you for hearing

9 us.

10 THE COURT:

11 All right. Delighted to have

12 heard you, Mr. Diggs; always. Okay.

13 WHEREUPON: There being nothing
14 further in this matter, these proceedings were closed on
15 June 17th, 2010 at 10:45 AM.

16

17

18

19

20

21

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23

24

25

CERTIFICATE

I, THE UNDERSIGNED, H. EUGENE BUCKNER, CVR, OFFICIAL COURT REPORTER IN AND FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE RECORDED ON THE 17TH DAY OF JUNE, 2010; AND THAT THE FOREGOING IS TO THE BEST OF MY ABILITY AN ACCURATE TRANSCRIPTION OF SAID PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL NOR SOLICITOR TO ANY OF THE PARTIES IN THE FOREGOING PROCEEDINGS, NOR INTERESTED IN THE EVENT OF THE CAUSE.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL
THIS 2ND DAY OF OCTOBER, 2010.

H. Eugene Buckner

H. EUGENE BUCKNER, CVR
OFFICIAL COURT REPORTER AT LARGE
15TH JUDICIAL DISTRICT, CONWAY, S.C.

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Nelson Hercules Castro, SCDC #340257)
 (Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

13 1591
APPLICATION FOR

POST-CONVICTION REVIEW

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lee Correctional Institution, Bishopville, South Carolina
2. Name and location of Court which imposed sentence General Sessions, Conway, SC
3. Name(s) of co-defendant(s) (if any) Genaro Bustos-Bustos and Mr. Penelosa
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-GS-26-0455
 - (b) N/A
 - (c) N/A
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 08, 2010 -- 15 years
 - (b) N/A

(c) N/A

6. Check whether a finding of guilty was made:

(a) after a plea of guilty N/A

(b) after a plea of not guilty Guilty Verdict by Jury.

(c) after a plea of nolo contendere N/A

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's Court of Appeals

ii. The Court of General Sessions

iii. _____

(b) the result in each such Court to which you appealed:

i. AFFIRMED

ii. Motion Denied

iii. N/A

(c) the date of each such result:

i. June 1, 2012

ii. June 17, 2010

iii. N/A

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

i. Unpublished Opinion No. 2012-UP-378

ii. None Known

iii. N/A

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) N/A

(c) N/A

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

(a) Ineffective Assistance of Trial Counsel

(b) Judicial Misconduct

(c) Prosecutorial Misconduct

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

(a) Did not object ^{nor investigate} as necessary to preserve viable issues for review.

(b) Court abused it's discretionary authority.

(c) Knowingly allowed tainted evidence to be admitted.

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

(a) any petition in a State Court under South Carolina Law? No

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

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

(d) any other petitions, motions or applications in this or any other Court? Yes

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. Reconsideration of Sentencing

ii. N/A

iii. N/A

iv. N/A

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

i. Court of General Sessions, County of Horry, Conway, South Carolina

ii. N/A

iii. N/A

iv. N/A

(c) the disposition thereof:

i. Motion Denied

ii. N/A

iii. N/A

- iv. N/A
- (d) the date of each such disposition:
 - i. June 17, 2010
 - ii. N/A
 - iii. N/A
 - iv. N/A
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. None Known
 - ii. N/A
 - iii. N/A
 - iv. N/A

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

No

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

- (a) which grounds have been presented:
 - i. N/A
 - ii. N/A
 - iii. N/A
- (b) the proceedings in which each ground was raised:
 - i. N/A
 - ii. N/A
 - iii. N/A

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) N/A
- (c) N/A

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

- (a) your arraignment and plea? N/A
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

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

- (a) the name and address of each attorney who represented you:
 - i. William I. Diggs, 1700 N. Oak St., Myrtle Beach, South Carolina
 - ii. Kathrine H. Hudgins, P. O. Box 11589, Columbia, South Carolina
 - iii. William I. Diggs, 1700 N. Oak St., Myrtle Beach, South Carolina
- (b) the proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Court of Appeals
 - iii. Motion for Reconsideration of Sentencing

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

Remand back to the lower court for a new trial.

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

No

STATE OF SOUTH CAROLINA

County of Lee

VERIFICATION

1591

I, Nelson H. Castro, 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.

Nelson Castro

Mr. Nelson H. Castro, #340257
Lee C.I. - Kershaw N.
990 Wisacky Highway
Bishopville, SC 29010-1775

SWORN to and subscribed before me this 11
day of March, 2013.

Mamie L. White (L.S.)
Notary Public

My Commission Expires:

3/8/2020

HORRY COUNTY
13 MAR 18 AM 10:18
MELANIE HUGGINS-WARD
CLERK OF COURT

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

13

1591

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

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

Nelson Castro
Applicant

Mr. Nelson H. Castro, #340257
Lee C.I. - Kershaw N. 2226
990 Wisacky Highway
Bishopville, SC 29010-1775

SWORN or affirmed to and subscribed before me this
1st day of March, 2013.

Mamie Wilson
Notary Public

My Commission Expires: 3/8/2020

Horry County
 13 MAR 18 AM 10:18
 MELANIE HUGGINS-WARD
 CLERK OF COURT

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

IN THE COURT OF CIVIL PROCEDURE

13

1591

NELSON H. CASTRO, SCDC #340257)

APPLICANT,)

Vs.)

STATE OF SOUTH CAROLINA)

RESPONDENT.)

A F F I D A V I T
O F
S E R V I C E

The undersigned Applicant, pro se, HEREBY CERTIFIES that he did serve the following document: Application for Post-Conviction Relief, in the above captioned action upon Alan Wilson, Attorney General, by mailing same to the last known address clearly shown below.

Dated this 15 day of March, 2013.

Office of the Attorney General
Attn: Mr. Alan Wilson
P. O. Box 11549
Columbia, SC 29211

HORRY COUNTY
13 MAR 18 AM 10:18
MELANIE HUGGINS-WARD
CLERK OF COURT

Sincerely,

S/ Nelson Castro
Mr. Nelson H. Castro, #340257
Lee C.I. - Kershaw N. 2226
990 Wisacky Highway
Bishopville, SC 29010-1775

SWORN TO BEFORE ME this 13 day
of March, 2013

Diana Sines (L.S.)

Notary Public for South Carolina

My Commission Expires:

11 4, 2015.

Nelson H. Castro, #340257
Lee C.I. - Kershaw N. 2226
990 Wisacky Highway
Bishopville, SC 29010

February 25, 2013

CLERK OF COURT
Horry County
P. O. Box 677
Conway, SC 29528-0677

HORRY COUNTY
13 MAR 18 AM 10:18
MELANIE HUBBINS-WARD
CLERK OF COURT

RE: Filing of PCR Application

Dear Clerk of Court:

Please find enclosed an original and (1) copy of the completed and signed application for post-conviction relief that I ask that you file with your office pursuant to Rule 5(e), 71.1(c), SCRCP, and S.C. Code Ann. § 17-27-40 (1976 and Rev. 2003).

Please remit to me a completed clock date stamped file copy of the same for my records.... Thank You!!

Sincerely submitted,

Nelson H. Castro
Mr. Nelson H. Castro

cc Attorney Generals Office
Legal File

TLS/tls

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Nelson H. Castro, # 350257,

Case No. 2013-CP-26-1591

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

The Respondent, making its Return to the Application for Post-Conviction Relief filed March 18, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In January 2010, the Horry County Grand Jury indicted Applicant for trafficking cocaine, 28-100 grams (2010-GS-26-445). William I. Diggs, Esquire, represented Applicant. On April 8, 2010, a jury found Applicant guilty as indicted. The Honorable Larry B. Hyman, Jr. sentenced Applicant to fifteen (15) years. Applicant made a motion to reconsider the sentence, which was heard on June 17, 2010. Judge Hyman denied the motion on August 5, 2010.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 20, 2012. State v. Castro, Op. No. 2012-UP-378 (S.C. Ct. App. filed June 20, 2012). The remittitur was returned to the circuit court on July 6, 2012.

Attached to this Return and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, the post-trial motion transcript, and Applicant's appellate records. Any records not attached will be forwarded upon receipt. The State reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. "Ineffective Assistance of Trial Counsel"
 - a. "Did not object nor investigate as necessary to preserve viable issues for review."
2. "Judicial Misconduct"
 - a. "Court abused it's discretionary authority."
3. "Prosecutorial Misconduct"
 - a. "Knowingly allowed tainted evidence to be admitted."

Any claims not specifically enumerated in the Application or amendments thereto will be opposed by the State at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

III.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

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

IV.

Applicant also alleges prosecutorial misconduct and an abuse of judicial discretion. These issues are not properly raised in post-conviction relief. Rather, these allegations are direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised these issues on appeal. The failure to do so has waived these allegations as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989). Furthermore, the Court of Appeals addressed allegations of abuse of judicial discretion in Applicant's direct appeal.

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 State requests that an evidentiary hearing be held on those allegations so requiring one, and that all other allegations be dismissed.

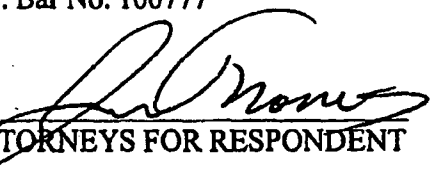
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

Sept 19, 2013

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

NELSON H. CASTRO, #350257

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2013-CP-26-1591

AFFIDAVIT OF SERVICE BY MAIL

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

Daniel A. Selwa, II, Esquire
 1053 London St., Suite A
 Myrtle Beach, SC 29577

DATED this 20th day of September, 2013.


 Norma Bigbee, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY) CASE NO.: 2013-CP-26-01591

NELSON H. CASTRO,)
)
 APPLICANT,)
)
VS.)
)
STATE OF SOUTH CAROLINA,)
)
 RESPONDENT.)

POST CONVICTION RELIEF HEARING

held before the Honorable Kristi L. Harrington
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Horry County Courthouse
Conway, South Carolina
on August 27, 2014, Commencing at 9:36 a.m.

SUSAN "MIA" PERRON, CVR-CM-M
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
Charleston, South Carolina 29417-1865
1-706-231-6028

APPEARANCES OF COUNSEL

FOR THE APPLICANT: Daniel A. Selwa, II, Esquire
Attorney at Law
1053 London Street, Suite A
Myrtle Beach, South Carolina 29577

FOR THE RESPONDENT: Joshua Thomas, Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

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EXHIBITS

[None]

Nelson Castro v. State of South Carolina
Post Conviction Relief Hearing
August 27, 2014

PROCEEDINGS

1

2

THE COURT: Are you Nelson Castro, sir?

3

MR. CASTRO: Yes. Yes.

4

THE COURT: You are Nelson Castro?

5

MR. CASTRO: Yes.

6

THE COURT: Mr. Selwa, you represent Mr. Castro?

7

MR. SELWA: I am.

8

Can I have one second, Your Honor? I --

9

THE COURT: Take all the time you need.

10

[Off the record momentarily]

11

MR. SELWA: Your Honor, my client wants to talk
to me for one minute.

12

13

THE COURT: All right. Do you need to go back
in that room or --

14

15

MR. SELWA: I think so.

16

17

THE COURT: -- do you wish for me to leave the
bench? What is easier for you?

18

19

MR. SELWA: Let me just take him back there real
quick.

20

THE COURT: All right. Thank you.

21

22

[Whereupon, a recess is taken from 9:37 a.m. to
10:02 a.m.]

23

THE COURT: Are you Nelson Castro?

24

MR. CASTRO: Yes.

25

THE COURT: Do you need any additional time to

Nelson Castro v. State of South Carolina
Post Conviction Relief Hearing
August 27, 2014

1 meet with Mr. Selwa?

2 MR. CASTRO: I already did. I wanted to talk to
3 you for one second.

4 THE COURT: Just one second?

5 All right. Mr. Castro, that's not necessarily
6 how this is going to work. I'm going to go ahead and
7 place you under oath.

8 MS. PARNELL: Please swear Mr. Castro.

9 THE CLERK OF COURT: If you would raise your
10 right hand and place your left hand on the Bible.

11 [Whereupon, Mr. Castro is duly sworn by the
12 clerk of court as follows: do you solemnly swear that
13 the testimony you are about to give the Court in this
14 case will be the truth, the whole truth, and nothing
15 but the truth, so help you God]

16 MR. CASTRO: [Indicates affirmatively]

17 THE COURT: Mr. Castro, you are here today for
18 an application for post conviction relief; is that
19 correct?

20 MR. CASTRO: Yes.

21 THE COURT: You were indicted in January 2010
22 and Judge Hyman sentenced you pursuant to a guilty
23 verdict on March 14th, 2012, for fifteen years. And
24 you are represented today by Mr. Selwa. Is that
25 correct?

Nelson Castro v. State of South Carolina
Post Conviction Relief Hearing
August 27, 2014

1 MR. CASTRO: Yes.

2 THE COURT: Do you need any additional time to
3 meet with him?

4 MR. CASTRO: I already -- I already talked to
5 him.

6 THE COURT: So you do not need to meet with him
7 any further?

8 MR. CASTRO: No.

9 THE COURT: And you wish to go forward on your
10 application here today?

11 MR. CASTRO: No.

12 THE COURT: No, you do not?

13 MR. CASTRO: No.

14 THE COURT: Mr. Selwa, have you discussed with
15 him withdrawing his application?

16 MR. SELWA: Yes, Your Honor.

17 And maybe I just need some clarification for the
18 record. That was my intentional -- or that was my --
19 what I thought the situation was going to be, that
20 Mr. Castro was going to withdraw but I just spoke with
21 him and I thought that he did not want to withdraw.
22 So I'm not sure how we want to proceed. I know that
23 he told you that he doesn't want to go forward. But I
24 do also know that he wanted to talk to you some.
25 Something --

Nelson Castro v. State of South Carolina
Post Conviction Relief Hearing
August 27, 2014

1 THE COURT: Mr. Castro, what do you want to do
2 here today? Are you prepared to go forward or --

3 MR. CASTRO: No.

4 THE COURT: -- do you wish to withdraw your
5 application?

6 MR. CASTRO: No, I don't wish to withdraw.

7 THE COURT: Well, you've got to pick one or the
8 other.

9 MR. CASTRO: I need to know -- I need to know if
10 I can have a different lawyer because I only seen see
11 him one time. I only seen him one time five or six
12 months ago.

13 THE COURT: How many times do you think you need
14 to see him, Mr. Castro?

15 MR. CASTRO: I told him -- he told me he was
16 going to do some research on my case, but I never
17 heard anything back.

18 THE COURT: Mr. Selwa, are you prepared to go
19 forward here today?

20 MR. SELWA: Yes, Your Honor.

21 But, honestly, I was under the impression that
22 it was a withdrawal. I had that written in my notes.

23 I did follow up on some research, but that was
24 unfruitful, and did some things that Mr. Castro asked
25 me to do and --

Nelson Castro v. State of South Carolina
Post Conviction Relief Hearing
August 27, 2014

1 THE COURT: Do you think you need some
2 additional time, Mr. Selwa?

3 MR. SELWA: I guess it depends on what
4 Mr. Castro wishes to do. If he wants to go forward, I
5 need to readdress with him which issues he wishes to
6 proceed with because it was my impression that he
7 wanted to withdraw.

8 THE COURT: Mr. Castro, you're here today on --
9 we're all ready to hear your case, so tell me what you
10 want to do.

11 MR. CASTRO: Well, I was telling my lawyer that
12 the lawyer that took me to trial, he had told me that
13 my charges -- charge was being dismissed before I went
14 to trial and because there was a violation on the
15 fourth amendment by sending the guy inside my house
16 with wires on him without warrants.

17 THE COURT: I don't need to hear the facts. I
18 just need to know what you're going to do here today.

19 MR. CASTRO: Well, I don't --

20 THE COURT: You can either go forward or you can
21 withdraw or we can discuss passing this case to the
22 end of the docket or to Friday. So we're going to
23 hear your case this week.

24 MR. CASTRO: I don't want to withdraw it, ma'am.

25 THE COURT: So you don't want to withdraw. Are

Nelson Castro v. State of South Carolina
Post Conviction Relief Hearing
August 27, 2014

1 you comfortable going forward at this time with Mr.
2 Selwa?

3 MR. CASTRO: Okay.

4 THE COURT: Yes?

5 MR. CASTRO: Yes.

6 THE COURT: Mr. Selwa, are you comfortable -- I
7 know that you had believed that this was going to be a
8 withdrawal. Are you comfortable going forward at this
9 time? I can pass you to the end of the docket today,
10 we can move it to Georgetown tomorrow, or we can come
11 back and do this on Friday. Those are your options.

12 MR. SELWA: Your Honor, I probably need a couple
13 of minutes to speak with him to figure out where we're
14 going, so today would be fine.

15 THE COURT: Mr. Thomas, were there any charges
16 dismissed pursuant to this?

17 MR. THOMAS: Beg the Court's indulgence for one
18 second.

19 THE COURT: I don't show that any were, but that
20 does not --

21 MR. SELWA: I think there were, Your Honor. I
22 think there were four counts.

23 THE COURT: And he was only found guilty on one?
24 Or they only went forward on one?

25 MR. THOMAS: From my understanding, Your Honor,

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1 I think this might have been the only count. If there
2 was something else, it was not indicted.

3 THE COURT: The judge -- you were sentenced --
4 this is punishable from seven to twenty-five years; is
5 that correct?

6 MR. THOMAS: That's correct, Your Honor.

7 MR. SELWA: Yes, Your Honor.

8 THE COURT: And so Judge Hyman sentenced you to
9 fifteen years in the Department of Corrections. You
10 understand, Mr. Castro, should I grant this motion for
11 a PCR, that does not mean that you get to walk out
12 today. It simply means that this case will be heard
13 again and you will be facing up to twenty-five years
14 in the Department of Corrections. Do you understand
15 that, sir?

16 MR. CASTRO: Yes, I do.

17 THE COURT: Knowing that, I'm going to allow you
18 to meet with your attorney. We'll get to your case
19 sometime today. All right? Thank you, Mr. Castro.

20 [Whereupon, a recess is taken from 10:09 a.m. to
21 11:23 a.m.]

22 THE COURT: All right. Mr. Castro, I believe
23 that we had placed you under oath.

24 Have you had enough time to meet with Mr. Selwa?

25 MR. CASTRO: Yes.

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1 THE COURT: And what are we going to do here.
2 today?

3 MR. CASTRO: Talk about my post conviction
4 relief.

5 THE COURT: You wish to go forward on your
6 application?

7 MR. CASTRO: Yes.

8 THE COURT: Mr. Selwa, are you prepared to go
9 forward today?

10 MR. SELWA: Yes, Your Honor.

11 THE COURT: And who is our witness?

12 MR. SELWA: Mr. Castro and Mr. Diggs.

13 Your Honor, though, I think there was about six
14 or seven charges that were pending.

15 THE COURT: Mr. Thomas needs to -- I'm going to
16 allow him to get caught back up.

17 MR. THOMAS: I'm sorry, Your Honor.

18 THE COURT: Counsel, just approach for just a
19 moment.

20 [Whereupon, an off-the-record bench conference
21 is held]

22 THE COURT: We're going to take just a short
23 break, give Mr. Castro -- and let me know. You had
24 mentioned something about charges. We'll take about
25 five minutes. All right? Thank you.

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1 [Whereupon, a recess is taken from 11:26 a.m. to
2 11:38 a.m.]

3 THE COURT: All right. What are we going
4 forward on here today?

5 MR. SELWA: Your Honor, my client would like to
6 assert some ineffective assistance of counsel claims.

7 THE COURT: Is that what you're prepared to go
8 forward here today?

9 MR. SELWA: Yes, Your Honor.

10 MR. THOMAS: Yes, Your Honor.

11 THE COURT: All right. Call your first witness.

12 MR. SELWA: Your Honor, I would call Nelson
13 Castro to the stand.

14 MR. SELWA: Your Honor, I'm not sure --

15 THE COURT: He was sworn previously.

16 MR. SELWA: Yeah. I'm not sure we went over --
17 because he has -- he actually does have like seven or
18 eight pending charges that can come back and I just
19 want to make sure that he's aware of that.

20 THE COURT: Sir, you were sentenced on a
21 trafficking charge to fifteen years. You understand
22 that that potential sentence in and of itself is seven
23 to twenty-five, so should I grant your motion for post
24 conviction relief it would go back and you would be
25 facing a potential of twenty-five years. Do you

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1 understand that?

2 MR. CASTRO: Yes.

3 THE COURT: Knowing that, do you still wish to
4 go forward here today?

5 MR. CASTRO: Yes.

6 THE COURT: And what were the other -- you had
7 other charges that were dismissed?

8 MR. CASTRO: I had five charges of trafficking,
9 14 grams. And this other one right here, that's six
10 all together. That's six.

11 THE COURT: So you had a total of six?

12 MR. CASTRO: Yes.

13 THE COURT: And the State only went forward on
14 one?

15 MR. CASTRO: Yes.

16 THE COURT: And pursuant to this guilty verdict,
17 they dismissed the other five?

18 MR. CASTRO: Yes. They dismissed the other five
19 after I was convicted.

20 THE COURT: So pursuant to that guilty verdict,
21 charges were dismissed. So those charges could be
22 reinstated if I grant your motion for post conviction
23 relief, and you go back to the beginning. Do you
24 understand that?

25 MR. CASTRO: Yes.

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1 THE COURT: So you are facing -- were they all
2 seven to twenty-five, counsel?

3 MR. SELWA: I think so. They were all --

4 MR. CASTRO: No. 14 grams on each. There's --
5 one is 70 grams and four charges of 14 grams.

6 THE COURT: I'm talking years, not grams.

7 So you understand that you could be facing the
8 potential of 200 years?

9 MR. CASTRO: Yes.

10 THE COURT: Knowing that, do you still wish to
11 go forward here today?

12 MR. CASTRO: Yes, because the charges are 2007.
13 The guy who was buying drugs from me, he was -- while
14 he was setting me up -- while he was buying drugs from
15 me, he was selling me drugs outside the setup when
16 police were not around.

17 THE COURT: I don't know anything about any
18 other charges, but what I'm telling you is that you do
19 not walk out today. Do you understand that?

20 MR. CASTRO: Yes.

21 THE COURT: And pursuant to the guilty verdict,
22 your other charges were dismissed. Whether or not
23 they have merit is of no moment to me. You need to
24 understand that you would be facing those charges as
25 if they were not dismissed. Do you understand that?

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1 MR. CASTRO: Yes.

2 THE COURT: And so based upon my quick
3 calculation, you would be facing a potential of about
4 200 years.

5 MR. SELWA: And, Your Honor, I think there is a
6 detainer and I think after the sentence, if I'm not
7 mixing this up with another case, I think he's
8 scheduled to be deported.

9 MR. CASTRO: Yes.

10 THE COURT: So do you understand what's going to
11 happen here? I do not want -- I'm not concerned about
12 the federal detainer at this point of my analysis.
13 But do you understand what would happen here on the
14 State charges?

15 MR. CASTRO: I do.

16 THE COURT: And you still wish to go forward?

17 MR. CASTRO: Yes.

18 THE COURT: All right. I think he's been well
19 advised.

20 MR. SELWA: Thank you, Your Honor.

21 THE COURT: Thank you.

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Nelson Castro
Direct Examination by Mr. Selwa
August 27, 2014

NELSON CASTRO,

Having Been Previously Sworn,
was Examined and Testified as Follows:

DIRECT EXAMINATION

BY MR. SELWA:

Q. Mr. Castro, you were represented by Mr. William Diggs; correct?

A. Yes.

Q. And he put on a trial for you; is that right?

A. Yes.

Q. And what was the outcome of that trial?

A. Huh?

Q. What was the outcome of that trial?

A. I was found guilty.

Q. And how many years did you get?

A. I got fifteen.

Q. And today you're here for a post conviction relief. In your application you're alleging that Mr. Diggs was ineffective; is that correct?

A. Yes.

Q. Would you please articulate for the Court the reasons why you feel Mr. Diggs was ineffective?

A. Well, at sentencing when I was -- I was sentenced to fifteen years, he failed to object because I was punished for exercising my right to a trial. Since I

Nelson Castro
Direct Examination by Mr. Selwa
August 27, 2014

1 was offered for seven years, I got extra years for going
2 to trial and I was exercising my right to a trial then.

3 And, also, his paralegal told me before I went
4 to trial that those charges should have been dismissed
5 because the police did not had a warrant to send a
6 confidential informant inside my house with wires on him
7 to videotape me and audiotape me because that's the same
8 as sending a police officer inside my house to do a search
9 without a warrant.

10 Q. So let me back this up. You said that you had
11 an offer of seven years? Is that what you said?

12 A. Yes, I did.

13 Q. And you decided to exercise your constitutional
14 rights to a trial and got more than seven years and feel
15 that -- how did Mr. Diggs' representation fall below the
16 standard in that sense?

17 A. Because my appellate lawyer, the one that did my
18 direct appeal, he or she send a brief -- he sent a brief
19 saying that my lawyer failed to object at the end of the
20 sentencing and that I was being punished for exercising my
21 right to a trial and the Attorney General did not --
22 couldn't review the argument because my lawyer did not
23 object at the end of sentencing. They couldn't review
24 that.

25 Q. Are you saying that he raised a motion, a

Nelson Castro
Direct Examination by Mr. Selwa
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1 directed verdict motion?

2 A. No. He did not object at sentencing when I was
3 being sentenced to fifteen years.

4 Q. He didn't object to that and make an argument --

5 A. Yes.

6 Q. -- based on the fact --

7 A. Yes.

8 So my appellate lawyer told -- said that the
9 Attorney General couldn't review it because my lawyer did
10 not say anything or did not argue about it.

11 Q. So you're saying that Mr. Diggs did not preserve
12 your record --

13 A. Yes. Yes.

14 Q. -- so you could address that issue on appeal?

15 A. On my direct appeal. And it was not reviewed.

16 Q. Do you feel that you would have won that appeal?

17 A. Well, I don't know. I don't know. But I -- it
18 just -- it was never reviewed.

19 Q. How else was Mr. Diggs ineffective for you?

20 A. That was it. It just --

21 Q. Just the failure to object at the --

22 A. To the fifteen years.

23 Q. -- fifteen years?

24 A. Yes, so it could have been reviewed on my direct
25 appeal.

Nelson Castro
Direct Examination by Mr. Selwa
August 27, 2014

1 Q. Did he explain the offer to you?

2 A. Yes, he did. He did.

3 But like I say, his paralegal told me before
4 then that the charge should have been dismissed because it
5 was a violation on the fourth amendment. So I felt like I
6 should have went -- I should have went to trial and try to
7 win. I thought I was going to win because she had said
8 that.

9 Q. Do you have any other complaints against
10 Mr. Diggs and his --

11 A. No.

12 Q. -- counsel to you?

13 MR. SELWA: No further questions. Please answer
14 any questions the attorney general would have.

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Nelson Castro
Cross-Examination by Mr. Thomas
August 27, 2014

CROSS-EXAMINATION

1
2 BY MR. THOMAS:

3 Q. Mr. Castro, how many meetings did you have with
4 Mr. Diggs? Not with his paralegal, but with Mr. Diggs.

5 A. Mr. Diggs I can't remember. But I had one with
6 him and a solicitor in here. And let's see. I had one --
7 about like three.

8 Q. And during those meetings, did you have a chance
9 to go over with him the evidence the State was going to
10 use against you?

11 A. Well, I didn't get my -- I didn't get to see my
12 evidence, the two thousand -- the one I'm convicted of,
13 the 2009 charge, I did not see the evidence until I came
14 into trial.

15 Q. Right. You didn't see the drugs until you got
16 to trial.

17 A. No. I didn't see the evidence. I didn't see
18 the videotape until I got here. The one on -- the charges
19 -- the evidence of 2007, I seem them in 2009 after I was
20 arrested for that 2009 charge.

21 Q. But we're not here on that one, so let me just
22 ask it to you this way. Did he tell you the State had a
23 video?

24 A. Huh?

25 Q. He told you the State had a video of you?

Nelson Castro
Cross-Examination by Mr. Thomas
August 27, 2014

1 A. Well, I didn't know -- well, he told me he had
2 seen the video. Yes. He told me he had seen the video.
3 But I didn't get to see it until I was already in court.
4 I was already in trial.

5 Q. You had an opportunity to tell him what happened
6 that day?

7 A. What happened what day?

8 Q. You told Mr. Diggs what happened the day you
9 were arrested?

10 A. I don't know. I don't remember. What happened
11 when I was arrested? Yes, I did tell him -- I did tell
12 him about one of the officers. I can't remember his name.
13 But he came to my door saying that neighbors had
14 complained about so much traffic coming in and out of my
15 house. And he asked me if I sold drugs, and I said no.
16 He asked me if I had some drugs in the house and I said I
17 had a little bit of marijuana. And he told me he wanted
18 to see it. It tell him go -- I'll be right back, I'm
19 going to go get them. I went to the kitchen. By the time
20 I got to the kitchen, everybody was in my house already.
21 Everybody be in my house already and they were already
22 searching my house. And then they asked me to sign the
23 what do you call it? consent to search? But they were
24 already looking around my house. They were already inside
25 my house. But --

Nelson Castro
Cross-Examination by Mr. Thomas
August 27, 2014

1 Q. But you did sign the consent to search?

2 A. Yes, I did sign it. I did sign it. But they
3 were already -- they were already searching my house
4 anyways.

5 Q. And you said that you thought the case -- why
6 did you think the case was going to get dismissed?

7 A. Because his paralegal had told me that there was
8 a violation of the fourth amendment by sending the guy
9 inside my house without a warrant.

10 Q. Did Mr. Diggs explain to you what was meant by
11 that violation of the fourth amendment? Did you have that
12 conversation with him, too?

13 A. What you -- what did you say? Say it again.

14 Q. The paralegal told you there was a problem with
15 the fourth amendment.

16 A. Yes.

17 Q. Did Mr. Diggs tell you there was a problem with
18 the fourth amendment?

19 A. He didn't really -- he didn't say nothing to me.
20 His paralegal did.

21 MR. THOMAS: Thank you, Mr. Castro.

22 THE COURT: Mr. Selwa?

23 MR. SELWA: No -- excuse me, Your Honor. No
24 redirect.

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

Nelson Castro
Cross-Examination by Mr. Thomas
August 27, 2014

1 [Whereupon, Mr. Castro is excused and exits the
2 witness stand]

3 THE COURT: Call your next witness.

4 MR. SELWA: No further witnesses, Your Honor.

5 THE COURT: Preserving all motions and matters.
6 Mr. Thomas, do you have any witnesses?

7 MR. THOMAS: The State would call Mr. Diggs to
8 the stand.

9 THE COURT: Mr. Diggs, please come forward and
10 be sworn.

11 [Whereupon, Mr. Diggs comes forward]

12 THE CLERK OF COURT: If you would raise your
13 right hand, place your left hand on the Bible.

14 [Whereupon, Mr. Diggs is duly sworn by the clerk
15 of court as follows: do you solemnly swear that the
16 testimony you're about to give the Court in this case
17 will be the truth, the whole truth, and nothing but
18 the truth, so help you God]

19 THE WITNESS: I do.

20 THE CLERK OF COURT: Please be seated.

21 [Whereupon, Mr. Diggs takes the witness stand]

22 THE CLERK OF COURT: Please state your name and
23 spell your last name --

24 THE WITNESS: William --

25 THE CLERK OF COURT: -- for the record.

Nelson Castro
Cross-Examination by Mr. Thomas
August 27, 2014

1 THE WITNESS: William Isaac Diggs. D-I-G-G-S.

2 MR. THOMAS: Good morning, Mr. Diggs, for a
3 couple of minutes.

4 THE WITNESS: Good morning.
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William Diggs
Direct Examination by Mr. Thomas
August 27, 2014

WILLIAM DIGGS,

Having Been First Duly Sworn,
was Examined and Testified as Follows:

DIRECT EXAMINATION

BY MR. THOMAS:

Q. Could you just give us a little brief background
on your experience in practicing law?

A. I was sworn in in 1980, in North Carolina and
South Carolina, and I've been in practice since that time.
I was chief attorney of the Office of Appellate Defense,
however, from 1984 to 1989. And since that time, since
'89, I've been in private practice here in Horry County.

Q. And how did you become involved in Mr. Castro's
case?

A. I think someone that we mutually knew
recommended me to him and we met and undertook
representation of him.

Q. And I'm assuming after you did that, you filed
the standard Rule 5 Brady motions?

A. Yes.

Q. Could you briefly give us an overview of what
the State's evidence was against --

A. They had a number of videos. The undercover
informant was wired both with video and audio mechanisms
so that, you know, there was video and audio of this

William Diggs
Direct Examination by Mr. Thomas
August 27, 2014

1 particular offense.

2 Q. Did you have an opportunity -- well, how many
3 meetings did you have?

4 A. Well, I remember having a lot. Now, it may
5 be -- I'm not going to say Mr. Castro's wrong. But he was
6 out on bond. He lived here in Horry County in Myrtle
7 Beach, so he would come by -- I remember he would come by
8 quite frequently and we would talk about the case. He was
9 certainly free to come and go. And I remember pleading
10 with him to please take this offer because I felt like we
11 would probably lose if we went to trial. And there were
12 so many charges pending against him that he was going to
13 go -- you know, he was going to be convicted at some
14 point. But, you know, I recall him being pretty steady.
15 He never wavered, really. It was, I want to go to trial.
16 And so he did not take the offer.

17 Q. And just -- you were retained on all the charges
18 he had pending?

19 A. Yes.

20 Q. What kind of conversations did you have with him
21 about the video specifically? Did you get a chance to
22 show that to him?

23 A. Yeah. I don't know why he wouldn't have seen
24 it, but I had an opportunity to.

25 Q. And regarding the fourth amendment argument, did

William Diggs
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1 you -- what were your conversations with him about the
2 fourth amendment issue?

3 A. I don't recall any specific conversations with
4 him. I mean, you know, it such a devastating, from our
5 perspective, piece of evidence. You know, you want to try
6 to keep that out of -- from, you know, being presented in
7 front of the jury. And we did object to it and argued
8 that it was basically the same thing as sending in, you
9 know, an undercover police officer. I felt like it was a
10 decent issue.

11 I did a good bit of research on it, and
12 surprisingly, you know, there wasn't a lot of case law
13 about it that I recall. I have some cases from around the
14 country with similar kinds of issues. But I thought it
15 was a decent issue and we made the motion to suppress that
16 evidence but it was overruled and --

17 Q. Did you ever --

18 A. -- the video was played in the presence of the
19 jury.

20 Q. Did you ever promise him that the case was going
21 to get dismissed because of that video?

22 A. No. And I don't think he testified to that,
23 either. I think he said my paralegal did. But I'm
24 certainly not aware of her telling him that.

25 Now, you know, there could have been a

William Diggs
Direct Examination by Mr. Thomas
August 27, 2014

1 conversation, well, our only hope is to try to suppress
2 the video. But there never would have been, I don't
3 think, a statement -- and, you know, I'm not calling him a
4 liar. I'm just saying I don't think there ever would have
5 been a statement from my paralegal that we would win that
6 issue.

7 And she's -- you know, she's not just a
8 paralegal. She's from Albania and she is a licensed
9 attorney in Albania. And at that time she had been in the
10 office for about ten years. So I just -- that would be
11 unusual.

12 Q. I know you made a motion to reconsider the
13 sentence.

14 A. Right.

15 Q. Why did you not raise any of those eighth
16 amendment issues about --

17 A. I didn't know -- we did argue the sentencing
18 issue post-trial. Okay? We actually had a hearing and
19 argued that. I was begging the judge, in effect, to give
20 him the minimum because the legislature had said, look,
21 this is enough.

22 You know, they approved a seven-year minimum, so
23 there wouldn't be anything wrong with imposing a seven-
24 year minimum in this case. He was a young man. And it
25 was kind of unfair, you know, the way they just kept

William Diggs
Direct Examination by Mr. Thomas
August 27, 2014

1 sending the same guy. You know, like he would go in one
2 day and do a drug deal, go back the next day and do
3 another one. I mean, just the same thing over and over
4 and over.

5 And so -- but I didn't think that he got -- that
6 Nelson was punished because of going to trial. It didn't
7 strike me that way. In fact, Judge -- I think the judge,
8 before the trial started, had said, look, I would be
9 inclined to give you the minimum now but, you know, after
10 I go through the case and we hear the evidence and
11 everything, you know, I can't guarantee you that it's
12 going to be the same thing, I might well give you more
13 time. So it just never struck me that we were -- that
14 Nelson was going to be punished because we went to trial,
15 and so I didn't raise it in that context.

16 MR. THOMAS: Thank you, Mr. Diggs. I'll let you
17 answer any questions counsel has.

18 THE COURT: Mr. Selwa.
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William Diggs
Cross-Examination by Mr. Selwa
August 27, 2014

CROSS-EXAMINATION

BY MR. SELWA:

Q. Mr. Diggs, had you objected to that, would he have been able to address that on appeal?

A. The punishment for going to trial?

Q. Yes.

A. Yeah, I -- yeah.

Q. I'm sorry?

A. Yes. It would have been preserved. It could have been pursued.

Q. And it wasn't though; right?

A. Right.

MR. SELWA: Okay. No further questions.

THE COURT: Was there anything in the record that indicated to you that Judge Hyman punished him for going to trial?

THE WITNESS: Well, I didn't -- believe me, you know, if I had felt that, I would have argued that. But I didn't perceive it to be -- you know, being a retaliatory act on the judge's part because we went through the motions -- you know, filing the motion, setting up a hearing on it, actually argued, you know, the sentencing issue in front of the judge.

THE COURT: So the seven was offered and was rejected by --

William Diggs
Cross-Examination by Mr. Selwa
August 27, 2014

1 THE WITNESS: Right.

2 THE COURT: -- Mr. Castro --

3 THE WITNESS: Right.

4 THE COURT: -- correct?

5 THE WITNESS: Yes. And the judge said, you
6 know, before the trial started that in the event of a
7 conviction, he might not be inclined to impose the
8 minimum sentence at that time. I mean, I did not
9 perceive it to be a retaliatory kind of thinking on
10 the part of the judge. I would have raised that
11 issue, had it struck me in that way. And maybe it
12 looks different, you know, just reading from the
13 record. It's kind of --

14 THE COURT: I just didn't know --

15 THE WITNESS: -- odd to hear me saying that now
16 but --

17 THE COURT: Well, my reading of the transcript
18 did not give me that flavor, so I just wanted to make
19 sure that I wasn't missing something. You were there.
20 So thank you.

21 THE WITNESS: I did not perceive it to be that.

22 THE COURT: Mr. Thomas?

23 MR. THOMAS: Just one question.

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William Diggs
Redirect Examination by Mr. Thomas
August 27, 2014

REDIRECT EXAMINATION

BY MR. THOMAS:

Q. Was the seven -- was that a negotiation or a recommendation or was it straight up?

A. It was such that on that charge I think that was a minimum. And I think that he would -- the State would --

See, they had already offered us three, but they wouldn't go back to that by the time we got to the trial. But I feel certain they would have said seven. You know, they wouldn't have stood silent had the judge given him more. You see? Okay.

THE COURT: Mr. Selwa?

MR. SELWA: No redirect.

THE COURT: Thank you. You may step down.

Thank you so much.

THE WITNESS: Thank you.

[Whereupon, Mr. Diggs is excused and exits the witness stand]

THE COURT: Mr. Castro, just to be clear, I did some better calculations. It wasn't 200. It was 165 years, just to be clear, not 200. I just wanted you to know that it's accurate.

Call your next witness.

MR. THOMAS: The State rests, Your Honor.

William Diggs
Redirect Examination by Mr. Thomas
August 27, 2014

1 THE COURT: Okay. Any rebuttal?

2 MR. SELWA: No rebuttal, Your Honor.

3 THE COURT: I'll be happy to hear from you on
4 argument.

5 MR. SELWA: Your Honor, Mr. Castro just feels
6 like he would have had the opportunity to make that an
7 appellate issue but wasn't able to. He feels that he
8 may have been able to possibly get it overturned on
9 that and wishes to have you grant his PCR today so
10 that he can have that opportunity to appeal the issue.

11 THE COURT: Mr. Selwa, you did explain to your
12 client -- and I know that I did -- but prior to coming
13 in today, that fifteen is clearly squarely within what
14 the legislature has imposed upon a possible range of
15 punishment?

16 MR. SELWA: Yes, Your Honor, I have.

17 THE COURT: Is there anything in the transcript
18 that you can point me to -- I'm going to allow you
19 proposed orders -- but that you can point me to that
20 indicates that Judge Hyman acted with anything other
21 than sentencing within those statutory guidelines?

22 MR. SELWA: I cannot.

23 THE COURT: Is there any statement or anything
24 in the transcript, or anywhere else, that would
25 indicate that he was punishing Mr. Castro for

William Diggs
Redirect Examination by Mr. Thomas
August 27, 2014

1 exercising his constitutional rights?

2 MR. SELWA: No, Your Honor. And I didn't feel
3 that way.

4 THE COURT: Have you explained to your client
5 that sometimes one of the dangers of going to trial is
6 actually hearing and seeing the video and so as the
7 evidence unfolds, then it becomes more evident as to
8 what has transpired throughout the transaction of
9 trafficking cocaine?

10 MR. SELWA: More or less. I didn't put it
11 exactly like that, but, yes.

12 THE COURT: Thank you.

13 MR. SELWA: I explained everything to him.

14 THE COURT: All right. Thank you.

15 MR. SELWA: Thank you.

16 MR. THOMAS: Nothing from the State, Your Honor.

17 THE COURT: I'm going accept proposed orders.

18 And, again, we're just going to keep that September
19 15th date at 9:00 a.m. And I'll take the matter under
20 advisement.

21 Mr. Castro, good luck to you. Thank you.

22 [HEARING CONCLUDES AT 12:05 P.M.]

23

24

25

William Diggs
Redirect Examination by Mr. Thomas
August 27, 2014

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the PCR hearing held before the Honorable Kristi L. Harrington, on August 27, 2014.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 21st day of February, 2015.

Mia Perron, CVR-CM-M
Circuit Court Reporter
9th Judicial Circuit

MIA PERRON, CVR-CM-M

indicted. The Honorable Larry B. Hyman, Jr. sentenced Applicant to fifteen (15) years. Applicant made a Motion to Reconsider the Sentence, which was heard on June 17, 2010. Judge Hyman denied the motion on August 5, 2010.

Applicant filed a timely notice of appeal, and Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense, represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 20, 2012. *State v. Castro*, Op. No. 2012-UP-378 (S.C. Ct. App. filed June 20, 2012). The remittitur was returned to the circuit court on July 6, 2012.

ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
 - a. "Did not object nor investigate as necessary to preserve viable issues for review."
2. "Judicial Misconduct"
 - a. "Court abused its discretionary authority."
3. "Prosecutorial Misconduct"
 - a. "Knowingly allowed tainted evidence to be admitted."

At the evidentiary hearing, Applicant proceeded on only an allegation of ineffective assistance of trial counsel for failing to object to his sentence on Eighth Amendment grounds.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Applicant testified he had five trafficking charges dismissed. He alleged he was punished for exercising his right to trial. Applicant admitted he declined a seven year plea offer. He testified his

attorney did not object to a violation of his constitutional right to a trial, and the appellate court ruled the issue was not preserved for review. Applicant did admit he did not know if he would have prevailed on appeal even if the issue had been properly preserved. Applicant also admitted he met with trial counsel at least three times prior to trial, reviewed some of the evidence, and explained his version of events the night he was arrested.

Trial counsel testified he has been practicing law since 1980, and was chief appellate defender for a number of years. He testified he had a lot of meetings with Applicant, and reviewed the State's evidence. Trial counsel testified he urged Applicant to accept the State's offer, but Applicant declined. Trial counsel recalled Judge Hyman indicating the seven years was not guaranteed after evidence was presented at trial. Trial counsel also testified he made a post-trial Motion to Reconsider the Sentence, but that it was not based on Eighth Amendment grounds. Trial counsel testified he did not believe Judge Hyman's sentence was a punishment for going to trial. He further stated that he would have objected if he thought the sentence was punishment for going to trial, but nothing in Judge Hyman's demeanor or comments indicated the sentence was retaliatory in nature.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* at 442, 334 S.E.2d at 814 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Id.* (citing *Strickland*, 466 U.S. at 687; *Turner v. Bass*,

753 F.2d 342 (4th Cir. 1985); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. *Id.* Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625.

The Court finds Applicant failed to meet his burden of proving trial counsel ineffective for failing to object to the sentence on Eighth Amendment grounds. Trial counsel did not believe Judge Hyman was punishing Applicant for exercising his right to a jury trial. Although trial counsel filed a Motion to Reconsider the Sentence, he did not believe the sentence was retaliatory in any sense. The argument underlying the Motion to Reconsider was that trial counsel believed the sentence was too harsh based on the facts of the case. The Court finds credible trial counsel's testimony that he would have objected if he sensed Judge Hyman was punishing Applicant for going to trial. The Court finds trial counsel articulated a valid strategic reason for not asserting an Eighth Amendment objection. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992))).

The Court also finds Applicant has failed to demonstrate he would have received a different sentence if such an objection had been made. Judge Hyman articulated that his sentence was based on a number of factors. First, Applicant was facing numerous other drug charges. (June 17, 2010 Post-trial Tr. p. 14, lines 12-19) Second, overwhelming evidence pointed to Applicant's guilt. (June 17, 2010 Post-trial Tr. p. 14, line 24-p. 15, line 10). Judge Hyman also took into consideration Applicant's immigration status. (June 17, 2010 Post-trial Tr. p. 15, lines 23-24). Therefore, the Court finds Applicant has not demonstrated Judge Hyman punished him in any way for exercising his right to a jury trial. Applicant has not shown he was prejudiced by trial counsel's decision to not assert an Eighth Amendment objection.

CONCLUSION

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

IT IS THEREFORE ORDERED THAT the Application for Post-Conviction Relief is denied and dismissed with prejudice; and

IT IS FURTHER ORDERED THAT Applicant be remanded to the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 8th day of October, 2014.

Charles, South Carolina

THE HONORABLE KRISTIEA HARRINGTON
Presiding Judge

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

NELSON H. CASTRO, #350257

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

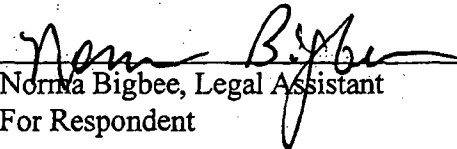
2013-CP-26-1591

AFFIDAVIT OF SERVICE BY MAIL

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

Daniel A. Selwa, II, Esquire
1053 London St., Suite A
Myrtle Beach, SC 29577

DATED this 8TH day of December, 2014.


Norma Bigbee, Legal Assistant
For Respondent

WITNESSES

Joe Necessary 15th Circuit Drug Enforcement Unit

DOCKET NO. 2010-GS-26- 445

The State of South Carolina

County of Horry

Scott A. Graustein 09H03565

COURT OF GENERAL SESSIONS

JANUARY, 2010 TERM

ARREST WARRANT NUMBER

J323654
CDR: 2359 44-53-0370(e)(2)(b)1
DOA: 8/28/2009

THE STATE

VS.

Nelson Hercules Castro **H/ M**
166 Tibton Circle
Myrtle Beach, SC 29577
DOB: 1981-05-28
SSN: 657108145

ATTORNEY: Floyd, W. Thomas

VERDICT

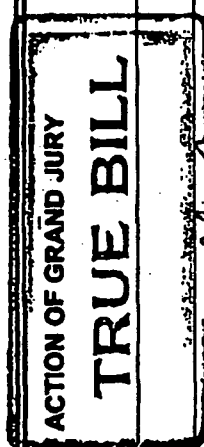
Indictment for

TRAFFICKING COCAINE (28-100 GRAMS)

J. Gregory Hembree, Solicitor

Foreperson of Petit Jury
Date:

ORIGINAL



STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on JANUARY 21, 2010, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING COCAINE (28 - 100 GRAMS)

CDR: 2359 44-53-0370(e)(2)(b)(1)

That **Nelson Hercules Castro** did in Horry County on or about August 28, 2009, knowingly sell, deliver, purchase or bring in this State, or aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession, or attempted to become in actual or constructive possession of a quantity of Cocaine in an amount of more than twenty-eight (28) grams, but less than one-hundred (100) grams, same being a controlled substance all within the meaning of Section 44-53-370, et. seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized, and being in violation of section 44-53-370(e)(2)(b), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

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


J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR