

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

R. Scott Sprouse, Circuit Court Judge

MAR 18 2016

SC SUPREME COURT

WILBUR SUMMERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001864

APPENDIX

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STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

COUNTY OF SPARTANBURG

2006-GS-42-0740

THE STATE OF SOUTH CAROLINA

-VS-

WILBUR XAVIER CASTRO SUMMERS,

Defendant.

TRANSCRIPT OF RECORD

November 14, 15, 16, 2006
Spartanburg, South Carolina

Ordered: March 7, 2007
Delivered: September 5, 2007

B E F O R E:

THE HONORABLE LEE S. ALFORD, Presiding Judge, and a jury.

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

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5 - (RLS Customer Order)	50	54
6 - (Self-Storage Rental Agreement)	50	54
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8 - (Color Photograph)	50	54
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State's Exhibits:	Marked:	Received:
19 - (Color Photograph)	50	54
20 - (Color Photograph)	50	54
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Reporter's Note: This transcript contains quoted material. Such material is reproduced as read or quoted by the speaker.

1 November 15, 2006

10:15 a.m.

2 (Off-the-Record Comments)

3 MR. TREJO: Your Honor, I would ask to sequester the
4 witnesses.

5 THE COURT: Does the Defense have any witnesses?

6 MR. TREJO: No.

7 THE COURT: And you want to sequester the witnesses?

8 MR. TREJO: Sequester, Your Honor, yes.

9 THE COURT: Solicitor?

10 MS. GANSS: The state has no issue with that. We just
11 have them in here for introductory purposes, when they're
12 introduced to the jury. And, then, afterwards --

13 THE COURT: Well, we'll actually get started with the
14 opening statements, and then, we'll break for lunch.

15 MS. GANSS: Thank you, Your Honor.

16 THE COURT: Of course, I -- I don't think I have
17 witnesses from you, but sequestration applies equally across
18 the board.

19 MR. TREJO: Yes, sir. I ---

20 THE COURT: So, you have to understand that, if you
21 change your mind and decide to call witnesses, they shouldn't
22 be in the courtroom while testimony.

23 MR. TREJO: We'll do that, Your Honor, but we won't be
24 calling any.

25 (Brief Pause)

1 (Off-the-Record Discussion)

2 THE COURT: We're about ready -- are you about ready to
3 proceed then --

4 MS. GANSS: The State is Your Honor.

5 THE COURT: --- in regards to the jury?

6 MS. GANSS: Yes.

7 MR. TREJO: We're fine.

8 THE COURT: And, then, we'll put everything else on the
9 record after that ---

10 MS. GANSS: Yes, Your Honor.

11 THE COURT: -- so, they can leave? All right. Let me
12 ask you, the interpreter for this morning is Myra Bedella
13 (phonetic); is that right?

14 THE INTERPRETER: Yes, sir.

15 THE COURT: That's you, ma'am?

16 THE INTERPRETER: (Nods affirmatively).

17 THE COURT: Okay. We need to swear her, please, ma'am.

18 Madam Clerk, have you got an oath, or do you want me to do it?

19 MADAM CLERK: Yes, sir.

20 THE COURT: Go ahead.

21 (Whereupon, the Interpreter was placed under oath.)

22 THE COURT: Counsel, the -- the other interpreter that
23 will be used name is Gerald Riveria (phonetic); is that
24 correct, Gerald Riveria?

25 MR. TREJO: I believe is Richard -- it's Richard

1 Riveria, Your Honor.

2 MS. BEDELLA: Yeah, I'm sorry.

3 (Off-the-record comments regarding interpreter's name.)

4 (Brief Pause)

5 THE COURT: Well, let me -- let me explain a couple of
6 things to you before we actually get started with the case.

7 When -- I think some judges do it a little bit
8 differently -- ma'am, you probably need to be interpreting
9 for him while I'm -- I'm talking, so, we'll be sure he
10 understands. But mostly -- mostly I'm talking to the
11 attorneys at this point.

12 (Interpreter speaks in Spanish to the Defendant.)

13 THE COURT: When we bring the jury in, and we go through
14 selecting the jury or voir dire, I will call the attorneys'
15 names and I'll also call the Defendant's name.

16 And, when I call his name, I ask that he stand along with
17 you all, so, the jury can see who he is. All judges don't do
18 it the same way, but -- but I'll do it that way. And -- so, I
19 just wanted you to be aware of that before we -- we get to
20 that point:

21 Any other potential witnesses, who are here, when your
22 name is called, you can stand briefly, so, the jury can see
23 who you are, as well we here. Some, obviously, would not be
24 here, but -- okay.

25 One other thing is that I don't like to embarrass any

1 jurors, and nor do I want to get information from them that I
2 don't want to come out to the whole jury panel, so, what I
3 will do is, as to each of the two requests, by the Defense of
4 voir dire, and also all of the State's requested voir dire, I
5 will bring the juror down front and get their responses on the
6 record and invite the attorneys to come next to the court
7 reporter here to hear their responses, but I'm going to get
8 their responses down here. And we can do it in a little more
9 privacy that way. Okay.

10 All right. Anything else before we actually get started
11 then?

12 MS. GANSS: Your Honor, yes.

13 (Brief Pause)

14 (Off-the-record comments regarding moving the projector
15 to another location.)

16 MS. GANSS: May I approach?

17 THE COURT: Yes, ma'am.

18 MS. GANSS: Thank you.

19 (Whereupon, a bench conference was had with all attorneys
20 present.)

21 THE COURT: All right. If we can get the jury, please?

22 (Off-the-Record Comments regarding where the jurors would
23 be questioned privately.)

24 (The bailiff steps out to summon the jury panel.)

25 (The jury panel entered at 10:24 a.m.)

1 VOIR DIRE 10:26 A.M.

2 THE COURT: Good morning, ladies and gentlemen of the
3 jury panel. If you would, give me your attention, please.
4 And let me begin by apologizing for keeping you sitting in the
5 jury room this morning.

6 Matters came up that we had to take up this morning
7 before we could get started with the trial of this case. I
8 didn't realize that, or I would have had you come in later
9 this morning than -- than nine o'clock (9:00). So, again, I
10 apologize for that and I appreciate your patience.

11 We are now ready to go into a trial in the matter of The
12 State of South Carolina v. Wilbur Xavier Castro Summers. The
13 State charges Mr. Summers with the offense of trafficking in
14 marijuana in an amount more than two thousand (2,000) pounds.

15 The State is represented in this case by Assistant
16 Solicitor Sarah Ganss and Derrick Bulsa. Counsel, would you,
17 please, stand and face the jury panel?

18 (Mr. Bulsa and Ms. Ganss stand as requested.)

19 THE COURT: Thank you. And you may be seated.

20 (Mr. Bulsa and Ms. Ganss sit as requested.)

21 THE COURT: Is anyone on the jury panel related, by
22 blood or marriage, friends with, or have any other type of
23 social, business, or professional relationship with either
24 Sarah Ganss or Derrick Bulsa? If so, please, stand.

25 (No Response)

1 THE COURT: Is anyone on the jury panel related, by
2 blood or marriage, friends with, or have any other type of
3 social, business, or professional relationship with anyone who
4 works in the Seventh Circuit Solicitor's Office? If so,
5 please, stand.

6 (No Response)

7 THE COURT: The Defendant in this case, Mr. Summers, is
8 represented by Pat Anderson and also, George P. Trejo.
9 Counsel, if you would, please, stand and ask the Defendant to
10 stand.

11 (Ms. Anderson, Mr. Trejo, and Mr. Summers stand as
12 requested.)

13 THE COURT: Thank you. You may be seated.

14 (Ms. Anderson, Mr. Trejo, and Mr. Summers sit as
15 requested.)

16 THE COURT: Is anyone on the jury panel related, by
17 blood or marriage, friends with, or have any other type of
18 social or business or professional relationship with Wilbur
19 Xavier Castro Summers? If so, please, stand.

20 (No Response)

21 UNIDENTIFIED FEMALE: I know Ms. Bedella.

22 THE COURT: Okay. I'll -- I'll -- I'll get to that.
23 Thank you. I'll get to that momentarily. Thank you. Any --
24 any one else?

25 (No Response)

1 THE COURT: Is anyone on the jury panel related, by
2 blood or marriage, friends with, or have any other type
3 social, business, or professional relationship with; that is,
4 to say currently or formerly represented by, or any other type
5 of relationship, to either Pat Anderson or George Trejo? If
6 so, please, stand.

7 (Potential juror stands in response.)

8 THE COURT: Yes, ma'am, please, give us your name and
9 number?

10 POTENTIAL JUROR: One, sixty-five (165). My name is
11 Jane Dickerson, and my father was an attorney for Abernathy
12 (phonetic) and I know Ms. Anderson from ---

13 THE COURT: All right. Let me ask you whether that
14 relationship, ma'am, would interfere in any way with your
15 ability to give both the State and the Defendant a fair and
16 impartial trial in this matter?

17 POTENTIAL JUROR: No, sir, I don't think so.

18 THE COURT: All right. Thank you, ma'am. You may be
19 seated. Anyone else?

20 (No Response)

21 (Brief Pause)

22 THE COURT: All right. Ladies and gentlemen of the jury
23 panel, I'm going to go through a list of potential witnesses
24 in this case. All of these witnesses may not be called, but
25 they may be called.

1 What I'm going to ask you to do is, when I call the
2 witness' name, if you're related, by blood or marriage,
3 friends with, or have any other type of social, business, or
4 professional relationship, with any of these named potential
5 witnesses, when I call their names, I would ask that you,
6 please, stand.

7 If the witnesses happen to be present in the courtroom,
8 they can stand, so, the jury can see who you are by — by
9 appearance.

10 Agent Paul Criswell, spelled C-r-I-s-w-e-l-l.

11 (Not Present)

12 THE COURT: Robert Yarborough.

13 (Mr. Yarborough stands.)

14 THE COURT: And this is Mr. Yarborough down front.
15 Thank you, you may be seated.

16 (Mr. Yarborough sits as requested.)

17 THE COURT: Investigator — Investigator Meagan Woody with
18 the Spartanburg County Sheriff's Office.

19 (Ms. Woody stands.)

20 THE COURT: This is she down front.

21 (Ms. Woody sits.)

22 THE COURT: Agent James Tucker with the Immigration and
23 Customs Enforcement Office.

24 (Not Present)

25 THE COURT: Investigator Matt Hutchins with the

1 Spartanburg County Sheriff's Office.

2 (Not Present)

3 THE COURT: James Armstrong with the Greenville County
4 Sheriff's Office.

5 (Potential juror stands in response.)

6 THE COURT: Yes, ma'am, give us your name and number,
7 please, ma'am.

8 POTENTIAL JUROR: I'm number five (5), Cynthia Bates.

9 THE COURT: Yes, ma'am?

10 POTENTIAL JUROR: And I am friends with Matt Hutchins.

11 THE COURT: Okay. Ma'am, let me ask you, if he were to
12 be called as a witness in this case, for either side, if that
13 would interfere, in any way, with your ability to give both
14 the State and the Defendant a fair and impartial trial in this
15 case?

16 POTENTIAL JUROR: No.

17 THE COURT: And let me ask you specifically, ma'am, have
18 you discussed this case at all with Mr. Hutchins?

19 POTENTIAL JUROR: No. He's was -- he is a former
20 employee of where I work.

21 THE COURT: Oh, I got you.

22 POTENTIAL JUROR: So, we very rarely talk.

23 THE COURT: All right. Thank you, ma'am, you may be
24 seated.

25 (Potential juror sits as requested.)

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1 THE COURT: Deputy Margaret Greer with the Spartanburg
2 County Sheriff's Office.

3 (Not Present)

4 THE COURT: Lieutenant Brian Duncan with the Spartanburg
5 County Sheriff's Office.

6 (Not Present)

7 THE COURT: Investigation Chris Raymond with the
8 Spartanburg County's Sheriff's Office.

9 (Not Present)

10 THE COURT: Agent Cory Grubbs with Immigration and
11 Customs Enforcement.

12 (Mr. Grubbs stands.)

13 THE COURT: This is Mr. Grubbs down in front here.
14 Thank you. You may be seated, sir.

15 (Mr. Grubbs sits as requested.)

16 THE COURT: Agent Clarence Nichols with -- from
17 Spartanburg.

18 (Not Present)

19 THE COURT: Agent Al Pleasant from Columbia.

20 (Not Present)

21 THE COURT: Shirley Brown from Spartanburg.

22 (Not Present)

23 THE COURT: Agent Jeff Ryan who is from -- this is
24 Officer -- this is Agent Ryan.

25 (Mr. Ryan stands)

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

2 (Mr. Ryan sits as requested.)

3 THE COURT: Ladies and gentlemen of the jury panel, we
4 will be using two interpreters in this case. This morning
5 Myra Bedella is the interpreter. Please, stand, ma'am, so,
6 they can see who you are.

7 (Ms. Bedella stands as requested.)

8 THE COURT: Thank you. You may be seated.

9 (Ms. Bedella sits as requested.)

10 THE COURT: And also this afternoon and, for the balance
11 of -- of the trial, we'll be using Richard Riveria. Let me
12 ask you whether there is any member of the jury panel who is
13 related, by blood or marriage, friends with, or have any other
14 type of social, business, or professional relationship with
15 either Myra Bedella or Richard Riveria. If so, please, stand.
16 And ma'am, if you'll stand. Give us your name and number,
17 please.

18 POTENTIAL JUROR: Judy Jordan, seventy-three (73).

19 THE COURT: And how do you know Ms. Bedella?

20 POTENTIAL JUROR: She was my neighbor at one time.

21 THE COURT: All right. Ma'am, is there anything about
22 that relationship, the fact that she serves as an official
23 court reporter -- excuse me, court interpreter, would that
24 interfere, in any way, or would that relationship interfere in
25 any way with your ability to be fair to both sides?

1 POTENTIAL JUROR: No, sir.

2 THE COURT: Thank you, ma'am. You may be seated.

3 (Potential jurors sits as requested.)

4 THE COURT: Anyone else?

5 (No Response)

6 (Brief Pause)

7 THE COURT: Ladies and gentlemen of the jury panel, I'm
8 going to ask you several questions now, and what I'm going to
9 ask you to do is listen carefully as I go through these
10 questions.

11 If you think one or more of these questions may apply to
12 you, or you need to respond to one or more of these questions,
13 I would ask you to wait until I have completed all of the
14 questions.

15 And, then, if you need to respond, to one or more of
16 these questions, we'll bring you down front and get your
17 responses down front next to the court reporter here one at a
18 time. And we can do that with a little more privacy down
19 front.

20 Here are the questions: Does any member of the jury
21 panel believe that any illegal narcotic drug should be
22 legalized for any reason?

23 (Brief Pause)

24 THE COURT: Has any juror had some type of professional
25 or personal experience dealing with persons who use illegal

1 narcotic drugs? Has any member of the jury panel, or a member
2 of your family, been arrested or convicted of a drug offense?

3 (Brief Pause)

4 THE COURT: Has any member of the jury panel, or a
5 member of your family, had any — any kind of experience with
6 a police officer, state trooper, federal agent, or state or
7 federal law enforcement agency?

8 Does any member of the jury panel, or a member of your
9 family, ever been prosecuted by, or currently have a case
10 pending, within the Seventh Judicial Circuit Solicitor's
11 Office?

12 The Defendant in this case, Mr. Summers, will be
13 utilizing a court interpreter throughout this trial. He has a
14 right to have an interpreter and to interpret the proceedings.
15 Does this fact cause you any concern about your fairness and
16 impartiality in this case?

17 Has any member of the jury panel ever had a positive or a
18 negative experience with a person who you believed to be
19 Hispanic?

20 Those are the questions. Now, ladies and gentlemen, if
21 you need to respond, to one or more of these questions, what
22 I'll ask you to do now is come to the center aisle and come
23 down front one at a time and we'll get your response. And
24 Counsel is invited down front.

25 (Attorneys step forward.)

1 (Off-the-Record Comments)

2 THE COURT: Okay. We're ready. Yes, sir?

3 BAILIFF: Juror number sixty-nine (69).

4 THE COURT: Come forward. If you would, please, give us
5 your name for the record.

6 POTENTIAL JUROR: David Johnson.

7 THE COURT: Yes, sir, Mr. Johnson?

8 POTENTIAL JUROR: My grandfather and my uncle were both
9 arrested for drug offenses.

10 THE COURT: Okay.

11 BAILIFF: Order, please. Order, please.

12 THE COURT: Is there anything about your experience in
13 that regard that would interfere, in any way, with your
14 ability to give both the State and the Defendant a fair and
15 impartial trial in this case?

16 POTENTIAL JUROR: No.

17 THE COURT: Okay. Thank you, sir. You may return to
18 your seat.

19 BAILIFF: Number twenty-four (24).

20 THE COURT: Yes, ma'am, give us your name, please, for
21 the record.

22 POTENTIAL JUROR: Ann Compton.

23 THE COURT: Yes, ma'am, Ms. Compton?

24 POTENTIAL JUROR: I have a couple of cousins that have
25 been arrested on charges that but not in my family that I'm in

1 close contact with. But I do know it happened.

2 THE COURT: Let me ask you whether there is anything about
3 those experience with your cousins that would interfere, in any
4 way, with your ability to give both the State and the Defendant a
5 fair and impartial trial?

6 POTENTIAL JUROR: Absolutely not.

7 THE COURT: Thank you. You may return to your seat.

8 BAILIFF: Number one sixty-six (166).

9 THE COURT: Yes, ma'am. Please, give us your name for the
10 record?

11 POTENTIAL JUROR: Tina Stevens.

12 THE COURT: Yes, Ms. Stevens? Yes, ma'am?

13 POTENTIAL JUROR: I have several employees and I have a
14 close relationship with them.

15 THE COURT: Let me ask -- ask you, if there is anything
16 about your experiences in that regard that would interfere, in
17 any way, with your ability to give both the State and the
18 Defendant a fair and impartial trial in this case?

19 POTENTIAL JUROR: No.

20 THE COURT: Thank you, ma'am. You may return to your seat.

21 BAILIFF: Number sixty-four (64).

22 THE COURT: Please, give us your name for the record?

23 POTENTIAL JUROR: James Howell.

24 THE COURT: Yes, sir?

25 POTENTIAL JUROR: I have -- one of my grandfather, brother,

1 and cousin was arrested and served time for marijuana
2 trafficking.

3 THE COURT: Let me ask you whether there is anything about
4 your experience in that regard that would interfere, in any way,
5 with your ability to give both the State and the Defendant a fair
6 and impartial trial in this case?

7 POTENTIAL JUROR: No, sir.

8 THE COURT: Thank you, sir. You may return to your seat.

9 BAILIFF: Number one fifty-eight (158).

10 THE COURT: Please, give us your name for the record.

11 POTENTIAL JUROR: Andrey Wyatt.

12 THE COURT: Yes, Ms. Wyatt?

13 POTENTIAL JUROR: Well, I might not have understood the
14 fourth question. Can you -- can you tell me, please?

15 THE COURT: Which question was that?

16 POTENTIAL JUROR: My son is now incarcerated and it might
17 been through the Public Defenders' Office. I can't remember all
18 their names, so whatever ---

19 THE COURT: Okay. Let me ask you if there's anything about
20 your experience in that regard, with your son, would interfere in
21 any way with your ability to give both the State and the
22 Defendant a fair and impartial trial in this case?

23 POTENTIAL JUROR: No, sir.

24 THE COURT: Thank you.

25 BAILIFF: Number five, zero five (5).

1 THE COURT: Would you give us your name for the record,
2 please?

3 POTENTIAL JUROR: Cynthia Bates.

4 THE COURT: Yes, ma'am?

5 POTENTIAL JUROR: I just wanted -- felt like I needed to
6 let you know that a good friend, a man that I'm dating, is a
7 captain of SLED.

8 THE COURT: He's a captain of SLED?

9 POTENTIAL JUROR: A captain of SLED, and I just wanted to
10 make sure...

11 THE COURT: Let me ask you, you haven't talked to him about
12 this case?

13 POTENTIAL JUROR: No, sir.

14 THE COURT: Is there anything about that relationship that
15 would interfere, in any way, with your ability to give both the
16 State and the Defendant a fair and impartial trial?

17 POTENTIAL JUROR: Not at all, not at all.

18 THE COURT: Thank you, ma'am.

19 BAILIFF: Number one seventy (170), one seven zero.

20 THE COURT: Give us your name for the record, please?

21 POTENTIAL JUROR: Lawrence Dawson.

22 THE COURT: Yes, sir, Mr. Dawson?

23 POTENTIAL JUROR: Two -- there two questions I have to say
24 yes to. My younger brother was convicted of some drug charge.
25 And he's been on probation for ten (10) years. And I don't know

1 which drugs it was. And I married into a Hispanic family. My
2 wife is Hispanic.

3 THE COURT: All right. Let me ask you, sir, rather there
4 is there's anything about your relationship with your brother,
5 and any other family members, that would interfere in any way
6 with your ability to give both the State and the Defendant a fair
7 and impartial trial in this instance?

8 POTENTIAL JUROR: I don't think so.

9 THE COURT: I have to have a more definitive answer, either
10 yes or no. Think about it for a minute.

11 POTENTIAL JUROR: Nothing that would prevent me from being
12 fair and impartial.

13 THE COURT: Thank you, sir. You may return to your seat.
14 Thank you.

15 BAILIFF: Number ninety-seven (97), ninety-seven.

16 THE COURT: Give us your name for the record.

17 POTENTIAL JUROR: Timothy Monahan.

18 THE COURT: Yes, sir, Mr. Monahan?

19 POTENTIAL JUROR: I'm a lawyer, and I started out my career
20 in Oregon for about twenty years. I've been a criminal defense
21 lawyer for about ten and a half years. And, in a lot of those
22 cases, clients were involved in drugs.

23 THE COURT: Let me ask you whether there's anything about
24 your experiences, in that regard, that would interfere, in any
25 way, with your ability to give both the State and the Defendant a

1 fair and impartial trial in this case?

2 POTENTIAL JUROR: No.

3 THE COURT: Thank you. You may return to your seat. Thank
4 you.

5 BAILIFF: Number one, twenty (120), one, two, zero.

6 THE COURT: Give us your name for the record.

7 POTENTIAL JUROR: Clyde Sims.

8 THE COURT: Yes, sir?

9 POTENTIAL JUROR: I have a son who is deceased, but he was
10 convicted of a drug offense. And I have a son that's living that
11 was convicted in this county.

12 THE COURT: Let me ask you whether there's anything about
13 your experience, in that regard, that would interfere, in any
14 way, with your ability to give both the State and the Defendant a
15 fair and impartial trial in this case?

16 POTENTIAL JUROR: No, sir. No, it wouldn't.

17 THE COURT: Thank you, sir. You may return to your seat.

18 BAILIFF: Number one, fifty-three (153), one, five, three
19 (153).

20 THE COURT: Give us your name for the record.

21 POTENTIAL JUROR: Kimby Walker.

22 THE COURT: Yes, ma'am?

23 POTENTIAL JUROR: My brother is in jail on a drug charge.

24 THE COURT: Is there anything about your experience, in
25 that regard, that would interfere, in any way, with your ability

1 to give both the State and the Defendant a fair and impartial
2 trial?

3 POTENTIAL JUROR: (Shakes head negatively.)

4 THE COURT: You have to speak.

5 POTENTIAL JUROR: No.

6 THE COURT: Thank you, ma'am. You may return to your seat.

7 BAILIFF: One, sixty-four (164).

8 THE COURT: Please, ma'am, give name for the record.

9 POTENTIAL JUROR: Sandra Barton.

10 THE COURT: Yes, ma'am, Ms. Barton?

11 POTENTIAL JUROR: I work in the medical field with patients
12 with cancer and have seen the benefit of the controlled use of --
13 the controlled use of marijuana has on these patients.

14 THE COURT: So, they're using marijuana; is that what
15 you're saying?

16 POTENTIAL JUROR: Yes, sir.

17 THE COURT: For medical purposes?

18 POTENTIAL JUROR: Yes, sir.

19 THE COURT: Let me ask you, would anything about that
20 would interfere, in any way, with your ability to give both the
21 State and the Defendant a fair and impartial trial in this case?

22 POTENTIAL JUROR: No.

23 THE COURT: Thank you, ma'am. You may return to your seat.

24 BAILIFF: Number forty-one (41).

25 THE COURT: Give us your name, please, for the record.

1 POTENTIAL JUROR: Rosa Fowler.

2 THE COURT: Yes, ma'am, Ms. Fowler?

3 POTENTIAL JUROR: My daughter is involved -- I guess deals
4 with drugs.

5 THE COURT: Well, let me ask you, was she prosecuted on
6 this -

7 POTENTIAL JUROR: Uh-huh (affirmative).

8 THE COURT: Let me ask you whether there's anything about
9 your experiences, in that regard, that would interfere, in any
10 way, with your ability to give both the State and the Defendant a
11 fair and impartial trial in this case?

12 POTENTIAL JUROR: Huh-uh (negative).

13 THE COURT: Thank you. You may return to your seat.

14 BAILIFF: One, sixty-nine (169).

15 THE COURT: Give us your name for the record, please.

16 POTENTIAL JUROR: Kathy Mabry.

17 THE COURT: Yes, ma'am?

18 POTENTIAL JUROR: Okay. I know my daughter was going to
19 have a charge of possession of drug paraphernalia. I don't know
20 what happened to it. She hasn't lived with us for years.
21 But, she had a baby that I have custody of. The father of the
22 baby is in prison for felony DUI where he killed a baby.

23 THE COURT: Okay. Let me ask you whether there's anything
24 about your experiences, in that regard, that would interfere, in
25 any way, with your ability to give both the State and the

1 Defendant a fair and impartial trial in this case?

2 POTENTIAL JUROR: No, sir.

3 THE COURT: Thank you, ma'am. You may return to your seat.

4 BAILIFF: Number seventy-six (76).

5 THE COURT: Give us your name for the record, sir.

6 POTENTIAL JUROR: My name is Robert Laskowski.

7 THE COURT: Yes, sir?

8 POTENTIAL JUROR: About a relationship, I know someone from
9 Mexico. I had a woman from Mexico that I had a relationship
10 with. You also mentioned an law enforcement agency. My fiancée
11 is on a COBRA team. I don't know if that makes a difference.

12 THE COURT: Okay. You haven't discussed this case with
13 her?

14 POTENTIAL JUROR: Oh, no.

15 THE COURT: All right. Let me ask you whether there's
16 anything about your fiancée being in ---

17 POTENTIAL JUROR: It's HASMAT (phonetic).

18 THE COURT: Okay. Is there anything about your experience
19 and your relationship, that would interfere, in any way, with
20 your ability to give both the State and the Defendant a fair and
21 impartial trial?

22 POTENTIAL JUROR: I don't believe so.

23 THE COURT: I need a more definitive answer, yes or no.

24 POTENTIAL JUROR: No.

25 THE COURT: Thank you. You may return to your seat.

1 BAILIFF: Number one, seventy-one. (171).

2 THE COURT: Please, give us your name for the record.

3 POTENTIAL JUROR: Joy Cannon.

4 THE COURT: Yes, ma'am, Ms. Cannon?

5 POTENTIAL JUROR: My son, he is sixteen and he's been in
6 drug rehab recently, and I don't know...

7 THE COURT: Well, let me ask you, is there anything about
8 your experience that would interfere, in any way, with your
9 ability to give both the State and the Defendant a fair and
10 impartial trial?

11 POTENTIAL JUROR: No, no, sir.

12 THE COURT: Thank you. You may return to your seat.

13 BAILIFF: Number one, fifty-six (156).

14 THE COURT: Please, give us your name for the record.

15 POTENTIAL JUROR: Gloria Cook.

16 THE COURT: Yes, ma'am, Ms. Cook?

17 POTENTIAL JUROR: My sister passed away as a result of --
18 of -- of a drug overdose. She passed away.

19 THE COURT: Is there anything about your experience, in
20 that regard, that would interfere in any way with your ability to
21 give both the State and the Defendant a fair and impartial trial
22 in this case?

23 POTENTIAL JUROR: I don't believe so.

24 THE COURT: I need a more definitive answer, yes or no?

25 POTENTIAL JUROR: No, it would not affect my ability.

1 THE COURT: I'm sorry?

2 POTENTIAL JUROR: It would not affect my ability.

3 THE COURT: All right. Thank you, ma'am. You may return
4 to your seat.

5 BAILIFF: Number thirty (30).

6 THE COURT: Please, give us your name for the record.

7 POTENTIAL JUROR: Michael Decato.

8 THE COURT: Yes, sir?

9 POTENTIAL JUROR: I had a former friend that abused illegal
10 substances.

11 THE COURT: Let me ask you, is there anything about your
12 experiences, in that regard, that would interfere, in any way,
13 with your ability to give both the State and the Defendant a fair
14 and impartial trial in this case?

15 POTENTIAL JUROR: No, sir.

16 THE COURT: Thank you, sir. You may return to your seat.

17 BAILIFF: One, zero, six; one oh six (106).

18 THE COURT: Please, give us your name for the record.

19 POTENTIAL JUROR: Shaunnita Peak.

20 THE COURT: Yes, ma'am?

21 POTENTIAL JUROR: I have a cousin, a first cousin, that was
22 killed drug related. I have a cousin that's serving time of
23 fifteen (15) years for a crack charge. My ex-boyfriend was a
24 drug addict.

25 THE COURT: Let me ask whether your experiences, in that

1 regard, would interfere in any way, with your ability to give
2 both the State and the Defendant a fair and impartial trial in
3 this case?

4 POTENTIAL JUROR: No, no, not necessarily, but I don't feel
5 like marijuana is a real bad drug.

6 THE COURT: You don't think drugs such as marijuana is a
7 bad drug?

8 POTENTIAL JUROR: No.

9 THE COURT: All right. Let me ask you, again, then, would
10 that belief and your experiences would interfere in any way with
11 your ability to give both the State ---

12 POTENTIAL JUROR: No.

13 THE COURT: --- and the Defendant a fair and impartial
14 trial in this case?

15 POTENTIAL JUROR: No.

16 THE COURT: Thank you, ma'am. You may return to your seat.
17 Thank you.

18 (Court returns to bench.)

19 MR. TREJO: Thank you, Your Honor.

20 MS. GANSS: Thank you.

21 (Attorneys return to their seats.)

22 THE COURT: Thank you for your patience, ladies and
23 gentlemen. Just a few more questions.

24 Has any member of the jury panel had any prior knowledge
25 about this case from any source before coming here to court

1 today, or for that matter, since you've been in court today? If
2 so, please, stand.

3 (No Response)

4 THE COURT: Has any member of the jury panel formed or
5 expressed an opinion as to the guilt or innocence of the
6 Defendant, Wilbur Xavier Castro Summers? If so, please, stand.

7 (No Response)

8 THE COURT: Is any member of the jury panel conscious of
9 any interest, bias, or prejudice for or against the Defendant,
10 Wilbur Xavier Castro Summers? If so, please, stand.

11 (No Response)

12 THE COURT: Can each member of the jury panel give both the
13 State and the Defendant a fair and impartial trial in this case?
14 If not, please, stand.

15 (No Response)

16 THE COURT: Does any member of the jury panel know, of any
17 reason whatsoever, why he or she should not serve as a juror in
18 this particular case? If so, please, stand.

19 (No Response)

20 THE COURT: Any additional questions requested of the jury
21 panel from the State?

22 MS. GANSS: No, Your Honor. Thank you.

23 THE COURT: From the Defense?

24 MR. TREJO: No, Your Honor.

25 THE COURT: Okay. Madam Clerk, please, give us a jury.

1 MADAM CLERK: As I call your name and number, please, come
2 forward.

3 (Loud buzzing is heard in the courtroom.)

4 THE COURT: How about checking on the source of that. We
5 can't put up with that.

6 (Bailiff steps out.)

7 (Off-the-Record comments regarding noise in courtroom.)

8 (Jury selection began at 10:54 a.m.)

9 MADAM CLERK: Juror number 160, Jamie Jordan.

10 MR. BULSA: Come forward, please.

11 (Potential juror steps forward.)

12 MADAM CLERK: What says the State?

13 MS. GANSS: Please, present the juror.

14 MS. ANDERSON: I couldn't hear you.

15 COURT REPORTER: I couldn't hear you.

16 MS. GANSS: Please, present the juror.

17 MADAM CLERK: What says Defense?

18 MS. ANDERSON: Seat the juror.

19 THE COURT: We'll hold off a minute till we get control of
20 the source of the noise.

21 (Brief Pause)

22 THE COURT: Let's -- let's proceed.

23 MADAM CLERK: Juror number 43, Richard A. Garcia.

24 (Potential juror steps forward.)

25 MADAM CLERK: What says the State?

1 MS. GANSS: Please, present the juror.
2 MADAM CLERK: What says Defense?
3 MS. ANDERSON: Seat the juror.
4 MADAM CLERK: Juror number 76, Robert L. Laskowski.
5 (Potential juror steps forward.)
6 MADAM CLERK: What says the State?
7 MS. GANSS: Please, present the juror.
8 MADAM CLERK: What says Defense?
9 MS. ANDERSON: Seat the juror.
10 MADAM CLERK: Juror number 24, Ann W. Compton.
11 (Potential juror steps forward.)
12 MADAM CLERK: What says the State?
13 MS. GANSS: Please, present the juror.
14 MADAM CLERK: What says Defense?
15 MS. ANDERSON: Excuse the juror.
16 MADAM CLERK: Juror number 81, Jurandel L. Lincoln.
17 MS. ANDERSON: I'm sorry, what was the number?
18 MADAM CLERK: Eighty-one (81).
19 (Potential juror steps forward.)
20 MADAM CLERK: What says the State?
21 MS. GANSS: Please, excuse this juror.
22 MADAM CLERK: Juror number 137, Howard J. Vaughan, Jr.
23 MR. TREJO: What was that number? I'm sorry.
24 MADAM CLERK: One thirty-seven (137).
25 MR. TREJO: Thank you.

1 (Potential juror steps forward.)
2 MADAM CLERK: What says the State?
3 MS. GANSS: Please, present the juror.
4 MADAM CLERK: What says Defense?
5 MS. ANDERSON: Excuse the juror.
6 MADAM CLERK: Juror number 157, Benjamin H. Fowler.
7 (Potential juror steps forward.)
8 MADAM CLERK: What says the State?
9 MS. GANSS: Please, present the juror.
10 MADAM CLERK: What says Defense?
11 MS. ANDERSON: Excuse the juror.
12 MADAM CLERK: Juror number 57, James R. Hannon.
13 (Potential juror steps forward.)
14 MADAM CLERK: What says the State?
15 MS. GANSS: Please, present the juror.
16 MADAM CLERK: What says Defense?
17 MS. ANDERSON: Seat the juror.
18 MADAM CLERK: Juror number 41, Rosa M. Fowler.
19 (Potential juror steps forward.)
20 MADAM CLERK: What says the State?
21 MS. GANSS: Please, excuse the juror.
22 MADAM CLERK: Juror number 144, Wallace F. White.
23 (Potential juror steps forward.)
24 MADAM CLERK: What says the State?
25 MS. GANSS: Please, present the juror.

1 MADAM CLERK: What says Defense?
2 MS. ANDERSON: Excuse the juror.
3 MADAM CLERK: Juror number 170, Lawrence W. Dawson.
4 (Potential juror steps forward.)
5 MADAM CLERK: What says the State?
6 MS. GANSS: Please, excuse the juror.
7 MADAM CLERK: Juror number 29, Jack B. Davis.
8 (Potential juror steps forward.)
9 MADAM CLERK: What says the State?
10 MS. GANSS: Please, present the juror.
11 MADAM CLERK: What says Defense?
12 MS. ANDERSON: Excuse the juror.
13 MADAM CLERK: Juror number 153, Kimby T. Walker.
14 (Potential juror steps forward.)
15 MADAM CLERK: What says the State?
16 MS. GANSS: Please, present the juror.
17 MADAM CLERK: What says Defense?
18 MS. ANDERSON: Seat the juror.
19 MADAM CLERK: Juror number 167, Jennifer C. Evington.
20 (Potential juror steps forward.)
21 MADAM CLERK: What says the State?
22 MS. GANSS: Please, present the juror.
23 MADAM CLERK: What says Defense?
24 MS. ANDERSON: Seat the juror.
25 MADAM CLERK: Juror number 82, Marisa K. Lindsey.

1 (Potential juror steps forward.)
2 MADAM CLERK: What says the State?
3 MS. GANSS: Please, present the juror.
4 MADAM CLERK: What says Defense?
5 MS. ANDERSON: Seat the juror.
6 MADAM CLERK: Juror number 5, Cynthia G. Bates.
7 (Potential juror steps forward.)
8 MADAM CLERK: What says the State?
9 MS. GANSS: Please, present the juror.
10 MADAM CLERK: What says Defense?
11 MS. ANDERSON: I would ask to be excused -- excuse me -- I
12 would ask that she be excused for cause.
13 THE COURT: All right. Approach just a minute.
14 (Whereupon, a bench conference was had with all attorneys
15 present.)
16 THE COURT: The motion is denied.
17 MS. ANDERSON: Thank you, Your Honor.
18 MADAM CLERK: Juror number 169, Kathy R. Mabry.
19 (Potential juror steps forward.)
20 MADAM CLERK: What says the State?
21 MS. GANSS: Please, present the juror.
22 MADAM CLERK: What says Defense?
23 MS. ANDERSON: Seat the juror.
24 MADAM CLERK: Juror number 97, Timothy J. Monahan.
25 (Potential juror steps forward.)

1 MADAM CLERK: What says the State?
2 MS. GANSS: Please, excuse the juror.
3 MADAM CLERK: Juror number 58, Angela M. Harper.
4 (Potential juror steps forward.)
5 MADAM CLERK: What says the State?
6 MS. GANSS: Please, present the juror.
7 MADAM CLERK: What says Defense?
8 MS. ANDERSON: Seat the juror.
9 MADAM CLERK: Juror number 21, Joe M. Childers.
10 (Potential juror steps forward.)
11 MADAM CLERK: What says the State?
12 MS. GANSS: Please, present the juror.
13 MADAM CLERK: What says Defense?
14 MS. ANDERSON: Seat the juror.
15 MADAM CLERK: Juror number 66, Vera A. Hull.
16 (Potential juror steps forward.)
17 MADAM CLERK: What says the State?
18 MS. GANSS: Please, present the juror.
19 MADAM CLERK: What says Defense?
20 MS. ANDERSON: Seat the juror.
21 THE COURT: Seat the alternate, one alternate.
22 MADAM CLERK: Juror number 16, Daniel L. Bryant.
23 (Potential juror steps forward.)
24 MADAM CLERK: What says the State?
25 MS. GANSS: Please, present the juror.

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1 MADAM CLERK: What says Defense?

2 MS. ANDERSON: Seat the juror.

3 (Jury selection concluded at 11:26 a.m.)

4 THE COURT: Any questions concerning the selection
5 process from the State?

6 MS. GANSS: None from the State, Your Honor.

7 THE COURT: From the Defense?

8 MR. TREJO: No, Your Honor.

9 THE COURT: Ladies and gentlemen of the jury panel, who
10 were not selected for this particular case, I'm going to
11 excuse you at this time and ask you to call in tonight after
12 six o'clock (6:00). And you will get a voice mail at that
13 time telling you when to report back or call back as the case
14 may be.

15 Please, enjoy the balance of the day. And I -- let me
16 express my appreciation, again, for your patience. You're
17 free to go at this time. Thank you.

18 (The remaining jury panel exited the courtroom at 11:09
19 a.m.)

20 THE COURT: The clerk will, please, swear the jury
21 panel.

22 (The jury was impaneled at 11:11 a.m.)

23 (Brief Pause)

24 INITIAL INSTRUCTION 11:27 A.M.

25 THE COURT: Ladies and gentlemen of the jury panel, if

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1 you'll give me your attention, please. I want to give you
2 what I call a preliminary instruction. This is as to the
3 format of a trial and what to expect as we go through the
4 trial.

5 And I suspect that most of you have not served on a jury
6 in General Sessions Court -- on Circuit Court, before, and
7 hopefully, this information will make you feel a little more
8 comfortable in these unfamiliar surroundings.

9 The first thing that will happen, after I have completed
10 this instruction to you, is that the attorney for the State,
11 who is an assistant solicitor, will make an opening statement
12 to you. And, then, an attorney for the Defendant will have
13 the same opportunity to address you in an opening statement.

14 Now, these opening statements, by the attorneys, are not
15 evidence. But you should pay close attention because they're
16 in essence going to identify to you what they perceive or say
17 that the issues in the case are.

18 After they have made their opening statements to you,
19 then, the State will proceed by presenting the testimony and
20 the evidence that they want you to consider. The reason the
21 State goes first is that the State has the burden of proof in
22 this case.

23 There is no burden of proof upon the Defendant to prove
24 his innocence. The burden of proof is upon the State of South
25 Carolina to prove the charge against this defendant, by

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1 evidence that satisfies you, the jury, beyond a reasonable
2 doubt, before you can return a verdict of guilty. If the
3 State fails to meet that burden of proof, then, your verdict
4 must be not guilty.

5 After the Assistant Solicitor has presented you the
6 evidence they want you to consider on behalf of the State,
7 then, the same opportunity will be afforded to the Defense.
8 The Defendant may, but is not required, to present any
9 testimony or evidence because the State has the burden of
10 proving the Defendant guilty beyond a reasonable doubt.

11 The Defendant does not have to prove he is innocent. He
12 is presumed innocent, and that presumption stays with him
13 throughout the trial and may only be removed if the State
14 meets its burden of proving the guilt of the Defendant beyond
15 a reasonable doubt.

16 Now, what is evidence? Evidence is sworn testimony you
17 will hear from the witness stand to my left, exhibits admitted
18 into the record, for your consideration, by me, the presiding
19 judge, and any stipulation of fact by counsel.

20 If Counsel enter into a stipulation of fact, that will be
21 made known to you and you can consider that stipulation of
22 fact, along with all the other testimony and evidence and give
23 it such weight as you deem appropriate, once you begin your
24 deliberations.

25 Now, exhibits may take many forms; such as documents,

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1 pictures, video tape, maps, diagrams, and so forth.
2 Stipulations, again, are agreements of facts by the attorneys.
3 If the attorneys entered into a stipulation, again, that will
4 be made known to you.

5 Sworn testimony, exhibits, and stipulations are the only
6 evidence you may consider in your deliberations of the
7 innocence or the guilt of the Defendant. You may not consider
8 anything you heard from any other source about this case in
9 making your decision because that is not evidence.

10 After you have heard all the evidence, then, the
11 attorneys for the State and the Defendant, will, once again,
12 appear before you and make what we call closing arguments.
13 And we call them arguments because the attorneys are allowed,
14 at that time, to argue their positions and will attempt to
15 persuade you as to their view or position as to the facts.

16 When you have heard final arguments from Counsel, I will,
17 then, charge you, which simply means to instruct you, as to
18 the law that applies to the issues in this case. You will,
19 then, retire to the jury room to deliberate and reach your
20 verdict.

21 Now, that's how a case is tried in General Sessions
22 Court, whether it be this case or any other case. Some cases
23 take a half a day or a day; some cases take weeks. But the
24 same format applies in every case.

25 As the trial judge, I have three functions to perform

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1 during the trial. I am the presiding officer and therefore
2 see that the trial is run in an orderly manner. And I decide,
3 based on Rules of Civil and Criminal Procedure, whether
4 testimony and exhibits are admissible into evidence for your
5 consideration. And, at the conclusion of the trial, I
6 instruct you as to the law you must apply to the facts in this
7 case in reaching your verdict.

8 You, ladies and gentlemen, are also judges in this case.
9 You are the judges of the facts. In other words, you
10 determine the truth of the facts in this case.

11 Under our Constitution, I'm not permitted, as the judge
12 of the law, to have an opinion about the facts. So, I do not
13 get into whether I believe a witness or not.

14 That is not my function. I'm not even permitted to
15 express an opinion, if I had one, as to the facts in this
16 case. So, you, the jurors, determine what is the truth of the
17 facts.

18 Now, I do not permit jurors to take notes during the
19 trial because it is my experience that, while writing notes,
20 you may miss something very important for you to hear. And
21 you may fail to observe a witness when testifying.

22 It is important that you pay careful attention to all
23 testimony and introduction of evidence since you must judge
24 the credibility or believability of the witnesses and the
25 weight to give all evidence introduced in this case in

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1 determining the truth of the facts.

2 Now, during the trial, the attorneys may object to the
3 admissible of certain testimony or other evidence. I will
4 either sustain the objection, which means I agree, and the
5 testimony or evidence may not be made part of the record for
6 your consideration.

7 Or I will overrule the objection, which means as the
8 judge of the law, I have determined that it is admissible, as
9 part of the record, for your consideration.

10 The mere fact that I have admitted it does not mean that
11 you must believe it or disbelieve it. I have simply
12 determined that it is admissible under our Rules. And it is
13 up to you, then, to believe it or disbelieve it and to assign
14 such weight to it as you deem appropriate.

15 At the conclusion of the trial, when we send you to the
16 jury room, every exhibit that is admitted into evidence will
17 be sent to the jury room for you to examine further and to
18 consider.

19 I remind you that one of the most important aspects of
20 your duty as a jury lies essentially in the oath that you have
21 just taken to well and truly try this case and to determine
22 the truth of the facts in this case. That oath, once again,
23 in a very essential way, says that you are the sole judges of
24 the facts in this case.

25 As jurors in this case, it will be your exclusive duty to

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1 determine the facts in this matter, through your evaluation of
2 the evidence that was received, during the course of this
3 trial, and to give such evidence whatever value, weight, or
4 effect as you deem appropriate, with the goal of reaching the
5 truth in this matter.

6 In doing so, you will have fulfilled your obligations as
7 jurors, and that is, to give both the State and the Defendant,
8 a fair and impartial trial in this matter.

9 To the charge in this case, the Defendant has entered a
10 plea of not guilty. The plea of not guilty, then, places upon
11 the State of South Carolina the burden of proof in this case.

12 Under our Constitution, a per — a person charged with a
13 criminal offense is presumed innocent. The Defendant does not
14 have to prove he did not commit crime. The State of South
15 Carolina is required to prove the charge made against the
16 Defendant by evidence that satisfies you of his guilt beyond a
17 reasonable doubt.

18 Ladies and gentlemen, whatever your verdict in this case,
19 it must be your unanimous verdict. All twelve (12) of you
20 must agree on the verdict, which the foreperson will be
21 authorized to write for the jury.

22 Ladies and gentlemen, you're not to discuss this case, at
23 any time during the trial, until I tell you, and that will not
24 occur until you have received all of the evidence and I have
25 instructed you upon the law.

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1 You should not discuss the case among yourselves, and you
2 should not discuss it with your family, friends, or anyone
3 else you might see on a break from court. Well, you might
4 say, "Well, what's wrong with us discussing the case as we go
5 along?" What's wrong with discussing the case, if someone
6 finds out your on a jury and they want to know something about
7 the case, what's wrong with discussing it with them?

8 The problem with discussing the case among yourselves or
9 with anyone else, including family and friends, is, once you
10 begin discussing the case, you start forming opinions.

11 And you wouldn't be fair, to both the State and the
12 Defendant, in this case, if you didn't wait till you've heard
13 all the testimony and evidence and I've instructed you upon
14 the law that applies before you start forming opinions.

15 Until then, you should wait till you have all the
16 information you need before you start forming opinions in this
17 case; keep an open mind throughout the trial.

18 Now, if anyone -- if you should overhear the parties or
19 attorneys or witnesses talking about the case, outside of the
20 courtroom, you should not listen and move away from them.

21 If anyone should deliberately try to discuss the case
22 with you, you should not discuss it with them, but leave and
23 report that attempt to me, through the bailiff or the clerk of
24 court's office, giving the best description you can of that
25 person. And I will deal appropriately with that person.

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1 No one should try to discuss the case with you. If you
2 do, I certainly want to be made aware of it.

3 If there should be any media coverage of this trial, and
4 I do not know whether there will be media coverage, but if
5 there should be, please, do not read, listen to, or watch any
6 media account of this trial until after the trial is over.

7 If there should be any media coverage of this trial, and
8 someone wants to save it for you, until after the trial is
9 over, you're welcome to read, listen to, or watch any media
10 account after the trial is over and the verdict is in.

11 But, it is very important that you not read, listen to,
12 or watch any media account of this trial, or talk to anybody
13 about the trial, until after the trial is over.

14 You need to make your decisions solely on the sworn
15 testimony and evidence that comes in during the course of this
16 trial and not from any other source of information.

17 I'm concerned about your comfort and your ability to see
18 and hear the testimony and evidence, so, you can properly do
19 your job. I try to take a break about every hour and a half.

20 If you need a break, before the time a break is taken,
21 please, raise your right hand and let me know. And you'll
22 know I'll take a break as quickly after that as I can.

23 If you cannot see or hear something you need to hear or
24 see, during the course of the trial, please, do not hesitate
25 to raise your right hand and let me know. And I'll make sure

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1 you're able to hear or see, so, you can properly do your job.

2 If you have something -- well, let me move on from that.

3 If you wish to communicate with the Court, other than needing
4 a break, or the inability to see or hear, please, write the
5 message down on a tablet provided for you back in the jury
6 room. Give that to the bailiff, and the bailiff will bring it
7 to me.

8 And I'll probably correspond in like manner, or I'll
9 bring you back out in the courtroom and respond, as the case
10 may be. That's how we should communicate you now having been
11 sworn as jurors in this case.

12 Now, I want to explain the role of the alternate, Mr.
13 Bryant. You're the alternate in this case. Your role is the
14 same as the first twelve (12) jurors chosen, and that is to
15 listen carefully to the testimony and the evidence, so, you'll
16 be in a position to deliberate and help reach a verdict in
17 this case because, if for any reason an emergency should
18 develop with regard to one of the first twelve jurors chosen,
19 and we had to excuse that juror, you would automatically fill
20 in for the missing juror. And you could not do that if you
21 hadn't listened carefully to the testimony and evidence in the
22 case.

23 We ask that the alternate keep the same seat throughout
24 the trial, so, sir, if you will, please, keep that same seat.
25 I'm going to ask Juror Number 21, Joe M. Childers -- Mr.

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1 Childers, I'm going to ask you to serve as foreperson of the
2 jury. I'll explain the role of the foreperson.

3 The foreperson is asked to be spokesperson for the jury
4 back to the Court. So, if there's a matter that needs to come
5 to the attention of the Court from the jury, I'll ask you to
6 write it down on a message -- the message down on a tablet
7 provided for you in the jury room and give that to the
8 bailiff.

9 We also ask that the foreperson serve as moderator once
10 we've reached the deliberating stage of the trial to maintain
11 some order in those deliberations and make sure everyone is
12 allowed to participate and be heard in deliberations. And,
13 then, finally, once a unanimous verdict is reached, by the
14 jury, to record that verdict on the verdict form, which will
15 be provided to you and explained to you, at the appropriate
16 time, at the conclusion of the trial.

17 The primary role of the foreperson is the same as every
18 other juror, and that is to listen carefully to the testimony
19 and evidence, so, you'll be in a position to deliberate and
20 help reach a verdict in this case.

21 Now, we ask that the foreperson keep the same seat, which
22 will be the first seat on the front row, throughout the trial.
23 And you can make that change when we go out and come back in.
24 The bailiff will show you where to sit.

25 We ask that the alternate and foreperson keep the same

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1 seats. All of the other seats are interchangeable, so, it
2 really doesn't matter where you sit except for those two.

3 Thank you, ladies and gentlemen, for your kind attention.
4 Hopefully, this information will be helpful to you. Counsel,
5 we'll take a short break at this time and allow everyone to
6 refresh themselves.

7 MR. TREJO: May -- may we approach prior to the break,
8 Your Honor?

9 THE COURT: Yes, sir.

10 (Whereupon, a bench conference was had with all attorneys
11 present.)

12 THE COURT: All right. Mr. Foreman and ladies and
13 gentlemen of the jury, we still have some matters we need to
14 take up, which will take us a little bit of time. And we just
15 discussed that.

16 And what we decided to do is, I'm going to go ahead and
17 excuse you at this time until two o'clock (2:00). And,
18 meantime, you should get lunch during -- during the break.
19 And there's no sense of you sitting in the jury room while
20 we're doing things out here.

21 So -- so, we're going to send you to lunch and ask you be
22 back in the jury room, then, ready at two o'clock (2:00) to go
23 at that time.

24 I remind you, again, please, don't discuss the case among
25 yourselves or with anybody else during the lunch break.

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1 Please, enjoy your lunch and be back at 2:00. Thank you.

2 (The jury exited the courtroom at 11:30 a.m.)

3 THE COURT: Counsel, do you want to go ahead and take a
4 short break, or do you want to go ahead and put whatever you
5 need to put on the record? And I realize you're going to mark
6 some things, and we can do that.

7 MS. GANSS: I just wanted to go ahead and get everything
8 marked and get it to the court reporter. That's all I wanted
9 to do.

10 THE COURT: All right. Why don't we do that? Let's
11 take about ---

12 MR. TREJO: I have some motions.

13 THE COURT: Okay. We'll take -- you go ahead and do
14 that. Just let me know when you get everything done and
15 you're ready to go. Just let me know in chambers, and I'll
16 come back.

17 MS. GANSS: Thank you, Your Honor.

18 THE COURT: All right. Thank you.

19 (Whereupon, a recess was taken from 11:31 a.m. till 12:01
20 p.m.)

21 (Whereupon, State's Exhibit Numbers 1 through 24 were
22 marked for identification.)

23 THE COURT: All right. Counsel, are there any matters
24 we need to take up now, then, out of the presence of the jury?

25 MS. GANSS: Yes, Your Honor. The State would like to

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1 put on the record what we discussed in chambers earlier this
2 morning.

3 Number one, Defense counsel and the State have -- you
4 know, now that everything is has already marked for the
5 record; there are a number of exhibits.

6 And I will pull those quickly, but I think Defense
7 counsel is going to stipulate to the foundation and -- and
8 whatnot, and so -- and so -- and go ahead and stipulate to
9 those. So, those will be entered into evidence. We would
10 like to read off those numbers. And we can take a look at
11 that right now if the judge would like.

12 The other thing that the State would like on the record
13 are what we discussed about co-defendants and the disposition
14 of their cases not being relevant to this one, unless the
15 Court -- the State understands if we would open that door;
16 but, barring that, nothing about co-defendants.

17 The other thing we discussed back there was the Jackson
18 v. Denno hearing. There is a statement in this issue -- in
19 this case. And Defense counsel, I think, is going to enter
20 the transcript from the previous trial.

21 That was my understanding and allow us to go ahead with
22 the statement at trial. And, of course, at that time, the
23 State would also lay the foundation for that statement that it
24 would be voluntary and whatnot.

25 But the statement we would like to deal with. I think

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1 he's agreed with the co-defendants and then, of course, any
2 exhibits and whatnot that the Defense is going to stipulate
3 to.

4 THE COURT: Counsel?

5 MR. TREJO: Yes, Your Honor. What Counsel just
6 indicated to the Court is accurate. We did purchase a
7 transcript of ---

8 (Brief Pause while court reporter coughs.)

9 MR. TREJO: Okay. We purchased the transcript of
10 Special Agent Cory Grubbs' testimony concerning the Jackson v.
11 Denno hearing. And it actually starts on page 80 and goes on
12 for oh, the next twenty (20) or thirty (30) pages. And we'll
13 -- we'll simply make a copy of that and have it admitted as an
14 exhibit.

15 THE COURT: All right. That'll -- that'll be a Court
16 Exhibit and -- and the Court will simply adopt the ruling of
17 the Court insofar as the admissibility of it.

18 (Whereupon, Court's Exhibit Number 1 was marked and
19 admitted into evidence.)

20 MR. TREJO: All right. And then, we'll preserve all the
21 issues that we raised at that time.

22 THE COURT: Yes, sir.

23 MR. TREJO: And we will refrain commenting, on the other
24 five (5) previous co-defendants, and the disposition of their
25 case in federal court and the failure to file in state court

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1 -- or actually, the dismissal their cases in State Court as
2 well subsequently.

3 The -- Counsel has agreed not to attempt to introduce
4 into evidence the bill of lading and the manifest as well.
5 The -- the State -- we ask the Court to prevent the State -- I
6 believe the Court ruled in our favor, against the State ---

7 (Brief pause while Court reporter coughs.)

8 (Off-the-Record Comments)

9 MR. TREJO: --- to prevent the State from allowing Agent
10 Yarborough to testify concerning alleged involvement, by Mr.
11 Summers, in a drug investigation approximately one year prior
12 to his arrest. And, as I understand, that will be excluded.

13 We objected, to the introduction of my client's use of a
14 false social security number, in order to obtain a business
15 license for the ceramics store. My understanding is that the
16 issue will depend on the facts and circumstances presented at
17 trial by the State. And we'll need to raise the appropriate
18 objection at that time. And that should be it, Your Honor.

19 (Off-the-Record Discussion)

20 MS. GANSS: If the Defense would just like to approach
21 maybe and look at these ---

22 MR. TREJO: Sure.

23 MS. GANSS: --- and see which ones we're stipulating to,
24 and we can call those out for the record, if it is, indeed,
25 all of them.

1 THE COURT: Ms. Anderson, do you want to approach just a
2 minute too?

3 MS. ANDERSON: I'm sorry.

4 THE COURT: And I want to tell you something.

5 (The attorneys checked the exhibits that the parties
6 stipulated to admitting into evidence.)

7 (Off-the-Record Comments)

8 THE COURT: All right. Anything else we need to --

9 MR. TREJO: Your Honor, we had the opportunity to read
10 and review the -- what has been marked as identification 1
11 through 24 by the Prosecution, and the Defense will stipulate
12 to the admissibility of each of those exhibits.

13 THE COURT: All right. They will be admitted then.

14 MS. GANSS: Thank you.

15 (Whereupon, State's Exhibit Numbers 1 through 24 were
16 admitted into evidence by stipulation of the parties.)

17 THE COURT: We need to -- I think -- I don't think we've
18 sworn the -- the interpreter, this interpreter. And we need
19 to -- to do that, please.

20 (Whereupon, Mr. Riveria, was duly sworn to interpret the
21 proceedings.)

22 (Off-the-Record Comments concerning the interpreter's
23 oath.)

24 THE COURT: All right. Anything else, Counsel?

25 MS. GANSS: No, Your Honor. Thank you very much.

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1 THE COURT: From the Defense, anything?

2 MR. TREJO: That's all.

3 THE COURT: All right. Then, we'll go ahead and get
4 some lunch. And what I would like to do is try to get
5 started, then, promptly at 2:00. And, of course, we'll start
6 with opening statements at two o'clock (2:00) and try to get
7 started and get as much done as we can today. Thank -- thank
8 everybody for your cooperation and working together on this so
9 far. Thank you.

10 (Whereupon, a lunch recess was taken from 12:15 p.m. till
11 2:00 p.m.)

12 THE COURT: Thank you. Please, be seated.

13 (Brief Pause)

14 MS. GANSS: Your Honor?

15 THE COURT: Yes, ma'am?

16 MS. GANSS: Your Honor, yor the record, Defense counsel
17 I think has stipulated to -- we've also gotten exhibit --
18 State's Exhibit 25, which is the bail of marijuana, if you
19 will. The agent -- we're hoping to get to that agent today
20 who will be able to testify about that.

21 THE COURT: Okay.

22 MS. GANSS: One other thing that I think we're going to
23 have marked is a retail license, which will be Plaintiff's
24 [sic] Number 26. And I think -- it's my understanding Defense
25 counsel is going to stipulate to that as well.

1 MR. TREJO: That's correct, Your Honor.

2 (Whereupon, State's Exhibit Numbers 25 and 26 were marked
3 for identification and admitted into evidence by stipulation
4 of the parties.)

5 MS. GANSS: And ---

6 (Off-the-Record Comments)

7 MS. GANSS: --- just for the Court's information, Your
8 Honor, the State is prepared with opening statements. And our
9 first witness will be the individual from the Department of
10 Revenue, the one that we told you about in chambers that we
11 needed a court order to get her essential testimony.

12 THE COURT: All right. Do we need to do that in camera,
13 or we'll just do it before the jury, directing her to give
14 that information? It doesn't matter to me.

15 MS. GANSS: Judge, I'm fine doing it in camera.

16 MR. TREJO: Your Honor, one second -

17 MS. GANSS: Okay.

18 MR. TREJO: And the reason I interrupt, and I didn't
19 understand what the Court was inquiring, I'm attempting to
20 hear over here to see how -- how the interpretation is going,
21 and it's not going well. It's not verbatim, by any stretch of
22 the imagination, and it's not even being paraphrased
23 accurately at this point.

24 (Off-the-Record Discussion)

25 MR. TREJO: And I mean no disrespect to the gentleman

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1 interpreter, it's just that -- but my client is facing, in
2 this particular case, a number of years if he's convicted, and
3 it's quite serious.

4 And he's well aware that he's looking at twenty-five (25)
5 years in custody. And given that, I think it's extremely
6 important that he fully understands everything being said from
7 this point forward, to assist in his defense, as he did at the
8 previous trial.

9 THE COURT: All right. Let me ask this, and I
10 understand what you're saying, and I don't disagree with what
11 you're saying. I'm just wondering, if we can arrange some
12 kind of a accommodation, if the interpreter can maybe pick it
13 up a little bit on what he's -- what's he's providing and that
14 you could supplement anything you -- you think you need do to.
15 But you can't do it while he's doing, but later maybe.

16 MR. TREJO: And I can't do that because, then, I would
17 be focusing over here and not focusing on what -- on what I
18 should be, Your Honor.

19 THE COURT: I understand.

20 MR. TREJO: And even though Ms. Anderson assisted, in
21 the jury selection, I will be doing everything and all the ---

22 THE COURT: All right. I understand. I understand
23 that.

24 (Brief Pause)

25 THE COURT: Well, I don't know what else to do except

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1 maybe try to get the other interpreter.

2 MS. GANSS: Well, what we can do is let me make that
3 phone call, to John — John Morton, we'll call him right at
4 this moment, Your Honor.

5 THE COURT: All right. Why — why don't we do that.

6 MS. GANSS: All right.

7 THE COURT: Go and ahead see -- see if we can get him,
8 and tell him we -- it's kind of an emergency and we need him
9 if he can come.

10 (Off-the-Record Comments)

11 (Ms. Ganss makes phone call to Mr. Morton.)

12 MS. GANSS: Your Honor, may we approach?

13 THE COURT: Yes, ma'am.

14 (Whereupon, a bench conference was had with all attorneys
15 present.)

16 (Off-the-record comments regarding using an interpreter
17 from the solicitor's office.)

18 THE COURT: We're going to have to tell the jury
19 something. Let me just go back and speak to them and tell
20 them that we had trouble getting an interpreter here.

21 MS. GANSS: Thank you, Your Honor.

22 THE COURT: They're probably tired of hearing my
23 excuses, but...

24 MS. ANDERSON: Your Honor, do you have a problem with
25 Mr. Riveria leaving at this time?

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1 THE COURT: No.

2 MS. ANDERSON: Okay.

3 THE COURT: Since he's not -- we're not going to be able
4 to use him.

5 (Continued Off-the-Record discussion regarding Mr.
6 Riveria leaving.)

7 THE COURT: Let me just go tell the jury that they're
8 going to be at ease.

9 (Court at ease from 2:17 p.m. till 3:08 p.m. until Mr.
10 Morton arrives)

11 BAILIFF: Thank you. You may be seated.

12 (Brief Pause)

13 THE COURT: All right. Counsel, are we ready to go?

14 MR. TREJO: I think so, Your Honor, but we have a
15 problem with the interpreter...

16 THE COURT: How is that?

17 (Laughter)

18 THE COURT: I started to say it's about in line. I'm
19 going to tell you with the Defendant getting his third lawyer
20 [sic] this is going to be it.

21 (Continued Off-the-Record Comments)

22 THE COURT: No, I was going to suggest, though, that he
23 -- I don't think he can translate every single word, but he's
24 got to do the best he can. And what I would suggest is they
25 get as close as possible to each other and he can kind of talk

1 in a very low voice because he can't interfere with the jury,
2 so...

3 MR. TREJO: I think he's doing great, Your Honor.

4 THE COURT: All right. Good deal. All right. Has he
5 been sworn, please, ma'am?

6 MADAM CLERK: No, sir, not yet.

7 THE COURT: Okay. We'll give you our super dooper oath
8 we've put together.

9 (Whereupon, Mr. John Morton, was sworn as the
10 interpreter.)

11 THE COURT: All right. If we're ready to proceed, then,
12 we'll bring the jury in and get started with opening
13 statements.

14 MS. GANSS: Yes, Your Honor.

15 THE COURT: All right, please, bring them in.

16 (The bailiff steps out to summon the jury.)

17 (The jury entered the courtroom at 3:12 p.m.)

18 THE COURT: Good afternoon, Mr. Foreman, ladies and
19 gentlemen of the jury. I certainly appreciate your patience.
20 We're ready now to actually to get started with the trial.

21 I ask that you listen attentively now as Counsel address
22 you in opening statements.

23 (Ms. Ganss opening statement began at 3:13 p.m.)

24 MS. GANSS: May it please the Court and opposing
25 counsel?

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1 THE COURT: Solicitor?

2 MS. GANSS: Good afternoon. And thank you for waiting
3 so patiently. I apologize we've got on a slow start here.
4 But I want to make it clear to you right off the bat what this
5 case is about.

6 (Ms. Ganss retrieves State's Exhibit and shows to the
7 jury.)

8 MS. GANSS: This case, if you will, is about a hundred
9 and twenty (120) of these. This is what you call a brick, a
10 rock of marijuana. And this case is about two thousand, two
11 hundred and sixty-seven (2,267) pounds of marijuana brought
12 right in here into Spartanburg, South Carolina.

13 Today is November 14th. Almost a year ago -- let me take
14 you back to November 16th, two thousand and five (2005), almost
15 a year ago, that's when a tractor-trailer is going to make its
16 way across the Mexican-Texas border.

17 And you're going to hear from some agents, out there on
18 that border; they're going to be from Laredo, and they're
19 going to tell you how this tractor-trailer crossed the border.

20 And they're going to talk about how, when this tractor-
21 trailer crossed, something alerted authorities, "Something is
22 amiss on this truck." And they're going to look in that truck
23 and they're going to find what tested positive for marijuana.

24 That tractor-trailer is, then, going to be guarded by law
25 enforcement. That tractor-trailer is, then, going to be

1 driven, by law enforcement, to its destination, which was
2 right here in Spartanburg, South Carolina.

3 What that's called -- and officers will explain it to you
4 -- it's called a controlled delivery. They got this truck, at
5 the border, watched it, and they found out who the cargo was
6 supposed to ultimately go to, who that shipment was supposed
7 to ultimately become in the hands of.

8 And that person is the Defendant, right over here
9 (indicating), Wilbur Castro Summers. He was to receive -- to
10 receive the cargo, the shipment, on that tractor-trailer.

11 Officers are going to testify how they drove that
12 tractor-trailer here to Spartanburg, South Carolina. And they
13 drove that tractor-trailer to complete the delivery to the
14 Defendant.

15 You will see, on video, where the Defendant signed that
16 he is, indeed, taking control and custody of the cargo on that
17 tractor-trailer.

18 There's going to be some interesting things in this case.
19 You're going to hear where the delivery, the ultimate
20 delivery, is. It's going to be at a restaurant, Nacho's. And
21 the reason that's important is because the way this marijuana
22 is packaged (indicating).

23 This marijuana, which you will hear testimony about, has
24 a street value here in Spartanburg, South Carolina, of
25 somewhere between one and a half and two million dollars.

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1 It's going to be hidden in that tractor-trailer.

2 (Ms. Ganss retrieves and shows to jury State's Exhibit.)

3 It's going to be hidden in these clay pots. It's pretty
4 heavy. And you'll get to see these clay pots, a hundred and
5 twenty (120) of these and it'll be hidden in them.

6 And that ship -- that truck actually, with that shipment,
7 is going to make its destination to Nacho's Restaurant right
8 here in Spartanburg, South Carolina, where the Defendant, Mr.
9 Castro Summers, is going to sign for it.

10 And Mr. Summers, you're going to see on video, will begin
11 to unload that shipment. And he does it at a restaurant, and
12 you'll see, on this video, they'll start to pack it up.

13 You'll hear testimony they're going to put it in a Budget
14 rental truck the Defendant rented that day. You will hear
15 that they will take it to a storage area the Defendant rented
16 that day.

17 You will hear that they will drive -- the Defendant that
18 is -- will drive to a mobile home that day, the day of the
19 incident, November 16th, two thousand and five (2005). And
20 what is happening, when this delivery comes, because it is a
21 controlled delivery, you will hear from officers as they
22 discuss how in these pots, this clay pottery, is unloaded; how
23 these officers, then, when they see what they believe is
24 marijuana being unloaded, from this tractor-trailer, and
25 driven to other locations, they say, "We've got to get it."

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1 And they go in and they seize the shipment. And that's
2 how we have it, and that's how we're here today.

3 That's not all the case. You're going to hear about a
4 statement the Defendant gives. And the statement you're going
5 to hear from the Defendant -- better than I'll give it to you
6 right now, but I'll give it to you in shorthand, the Defendant
7 says, to the officers, "You know, I was at Nacho's one day,
8 and a stranger came up to me and gave me two thousand dollars
9 (\$2,000) to go into the pottery business with him.

10 "I took that two thousand dollars (\$2,000) and I set up
11 this pottery business." He talks about how long he's been
12 here. And, then, he says, when asked about the shipment and
13 the contents, "If I tell you the truth, they will kill my
14 family in Mexico." You're going to hear about that statement.

15 You're going to hear from witnesses that talk about
16 marijuana and how this transportation process worked. They're
17 going to talk about the packaging and the clay pottery.
18 You're going to hear a lot about how this marijuana made its
19 way here.

20 I want you to, throughout the trial, if you will, follow
21 this pottery, from its beginning in Mexico, to its discovery
22 here in Spartanburg. I want you to follow the trail of this
23 marijuana and follow it keeping in mind that there's a value
24 associated with drugs.

25 And I want you to follow both that clay pottery and that

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1 marijuana with your common sense. The Judge will tell you, at
2 the end of this trial, to listen to and just use and apply the
3 evidence or the facts that are presented in this courtroom.

4 But no one will ever tell you to leave your common sense
5 outside. Bring your common sense into this case, listen to
6 all the testimony. You will review all of the evidence as it
7 is admitted, published to you, and you will apply your common
8 sense to that evidence.

9 And what does it tell you? What's going on here? Is
10 this a clay pottery business? Maybe. Is it a legitimate
11 business or is a business that helped bring over two thousand
12 (2,000) pounds of marijuana into Spartanburg, South Carolina?

13 I want to thank you right now for your attention. And,
14 again, I want to thank you for your patience. And, please,
15 again, hang onto that common sense. Thank you.

16 (Ms. Ganss' opening statement concluded at 3:19 p.m.)

17 (Mr. Trejo's opening statement began at 3:20 p.m.)

18 THE COURT: Counsel?

19 MR. TREJO: Yes, sir.

20 MR. TREJO: May it please the Court?

21 THE COURT: Yes, sir.

22 MR. TREJO: Counsel, members of the jury, again, my name
23 is George Trejo, and I represent Mr. Summers in this -- in
24 this case.

25 As Counsel emphasized, you use your common sense in all

1 respects of this case. If life were a novel, things would
2 always make sense. But life isn't a novel. And what at first
3 glance appears to be one way does not always make sense in
4 life; only in books and only in movies.

5 I would like to start off by thanking each and every one
6 of you, for your openness and your honesty, during the voir
7 dire process, and the questioning and the answering when each
8 of you came up, those of you who wanted to disclose items; you
9 came up and you shared with us private matters, because
10 through that process, both sides were able to -- to determine
11 the cream of the crop; the best of you that all came in this
12 morning to sit in judgement in this particular kind of a case.

13 And the only way our system of justice continues to be
14 the very best, in the entire world, is by having individuals
15 such as yourselves, individuals from a vast array of
16 backgrounds, life experiences, values, to come and sit in
17 judgement upon another individual in the community.

18 During the course of this case, you'll see a number of
19 witnesses come up here (indicating) and sit down and testify.
20 You'll also hear about stipulations that we have entered into.
21 And a stipulation is simply a -- an agreement to avoid calling
22 unnecessary witnesses. We're stipulating; we're agreeing that
23 certain facts are true.

24 And you'll hear a lot of those stipulations, and a lot of
25 foundation on testimony, and a lot of exhibits coming in that

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1 have already been admitted through agreement of the parties
2 here.

3 The Prosecution will be calling witnesses to begin. And
4 they will be doing direct examination. Everything that comes
5 in on direct are facts that you should consider.

6 Once they've completed direct examination, I'll get up
7 and question the witness. That's called cross examination.
8 You consider those responses too. And there will be an
9 opportunity for redirect and recross.

10 And you consider the -- the entire testimony and you
11 consider all of the facts and circumstances that are presented
12 to you. And you ultimately determine not simply the fact that
13 something was said, and therefore is true. You ultimately
14 determine whether or not particular facts have been proven by
15 the highest standard of law, and that being beyond a
16 reasonable doubt.

17 And the issue -- as the Court indicated to you earlier,
18 this is our opportunity to explain to you what is the issue in
19 this case. You'll hear a lot of testimony in this case about
20 a hundred and twenty (120) of these packages (indicating).

21 You'll hear officers come in and testify about the street
22 value of -- of the marijuana. And you'll hear about their --
23 their expertise involving drug trafficking in the community
24 and things of that nature. But bottom line, this case boils
25 down to one issue, and that's whether or not there exists

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1 proof, beyond a reasonable doubt, that Wilbur Summers knew he
2 was receiving marijuana. Did he know he was receiving
3 marijuana?

4 (Mr. Trejo retrieves State's Exhibit and shows to jury.)

5 MR. TREJO: Now, you'll hear testimony about a hundred
6 and twenty (120) of these bricks or whatever; bundles,
7 packages of marijuana, roughly twenty (20) or so pounds each.
8 But, you'll also hear testimony about how these items were
9 packaged and the manner in which they were received here in
10 this community. And the manner in which Wilbur Summers
11 received them.

12 It wasn't merely a hundred and twenty (120) of these
13 packages in this (indicating). The evidence and the testimony
14 in this case will establish that yes, there were roughly a
15 hundred and twenty (120) of these packages, in these types of
16 containers, but these containers were not in this condition
17 (indicating).

18 This container has no drain bowl on the bottom, none
19 whatsoever, like a typical plant container would have. There
20 is no hole on the bottom for water to drain out.

21 The top of this container was not open and broken as you
22 see here. The top of this container was sealed completely
23 shut with a -- with a thin layer of a tar-like substance. For
24 a lack of a better term, I'll call it a tar-like substance.

25 So, when you saw this container, it was completely

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1 sealed. And despite the fact that -- that there will be
2 testimony of around a hundred and twenty (120) of these
3 (indicating), there was no odor of marijuana coming from the
4 truck, none whatsoever.

5 You'll be given the opportunity to see a DVD that will be
6 played for you later on today hopefully, and you'll see law
7 enforcement officers, after the fact, going through
8 everything. You'll see them, prior to the arrest, dealing
9 with Wilbur Summers.

10 But, more importantly, you'll see, in the photographs,
11 and if not in the video itself, where these containers were
12 located. These containers were located, in the back of a
13 tractor-trailer rig, those big giant semi-trucks that we see
14 down on the freeway.

15 It was roughly about from that wall right there
16 (indicating), all the way back to the back door and roughly
17 the width of a typical highway lane. The rear of the door is
18 over there by the exit sign.

19 These hundred and twenty (120) containers were not the
20 only items inside that tractor-trailer rig. You'll see, in
21 the interior of the -- of the trailer itself that there were
22 hundreds upon hundreds of ceramic pottery. One hundred and
23 twenty (120) of them contained marijuana; not all of them.

24 But these particular ones that contained the marijuana,
25 if we can visualize the trailer going all the way back and the

1 width and that being the rear of the trailer (indicating),
2 these hundred and twenty (120) were located over here
3 (indicating), toward the front.

4 At no point -- the evidence will show, during the course
5 of this case, that at no point, during the unloading of the
6 ceramic pots -- of ceramic pots that were being unloaded from
7 the rear of the trailer, at no point did Wilbur Summers, or
8 anyone else there that was assisting him in unloading the
9 ceramic pots, ever handle a single pot that contained
10 marijuana.

11 You'll see, and the evidence will establish, that they
12 traveled, from that location, and they parked near the
13 restaurant. Why? Because there was plenty of room for that
14 large fifty-some odd foot tractor-trailer rig to park there,
15 not in front of the store.

16 They, then, set out to receive the -- the ceramic pots,
17 not in front of the storage unit, where the ceramic pots were
18 being stored, or the residence where some of them were taken.

19 But you'll have an opportunity -- and see, this is where
20 I guess the credibility of witnesses becomes an issue and you,
21 as the triers of fact, get to make that ultimate
22 determination. You'll get to see the demeanor of Wilbur
23 Summers when that tractor-trailer rig arrives at that scene.

24 You'll get to see the demeanor of Wilbur Summers when the
25 pots are being unloaded. And you can decide for yourselves

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1 whether or not that demeanor reflects someone who is just come
2 into possession of one to two million dollars' worth of
3 marijuana. And you make that call. That's why you are the
4 trier of fact.

5 You'll also hear, during the course of this case, the
6 various types of resources that law enforcement has available
7 to it in investigating these -- these cases.

8 And Counsel -- and Counsel has talked to you a little bit
9 about what the evidence will show how the tractor-trailer was
10 brought from the border in Texas, Laredo, Texas.

11 But it wasn't brought over by -- from there by drug
12 traffickers. Law enforcement agents drove it over from there.
13 An undercover agent brought it over from there, an undercover
14 agent who is qualified and has the appropriate license to
15 operate a tractor-trailer rig on our highways.

16 He drove it over here to deliver it to -- to the
17 location. And that occurred five (5) days prior to the arrest
18 of Mr. Summers. And, during those five (5) days, what
19 additional evidence was obtained to establish that Wilbur
20 Summers was involved in the receipt of that marijuana?

21 The different types of resources that law enforcement has
22 available to it will include one party consent recorded calls,
23 meaning as long as only one person, an -- an -- someone who is
24 working undercover, someone who is an informant, as long as
25 one person gives permission to record a telephone call, with a

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1 suspect, the law permits that telephone call to be recorded.
2 There are no calls involving Wilbur Summers between November
3 11th and November 16th.

4 Undercover purchases, the use of confidential informants,
5 trap and trace on telephone calls, to see the -- to see each
6 and every call being made from a residence and to see every
7 call that's being received into the residence. That's a trap
8 and trace.

9 Surveillance of -- of where an individual lives, pole
10 cameras to -- to take video twenty-four (24) hours a day, wire
11 taps, subpoena powers; you'll hear about those subpoena
12 powers. And, more significantly than just a period of time,
13 from November 11th to November 16th, is the entire year that has
14 transpired since then as well.

15 Take into account all of that because your ultimate
16 determination on this case can be based not only on the
17 evidence presented to you, but also on the lack of evidence
18 presented to you.

19 The statement of the Defendant, Counsel indicated to you
20 that, during the course of this case, you'll hear about a
21 statement the Defendant made following his arrest. And yes,
22 he did make a statement. And we expect that the evidence will
23 establish, under the testimony of Agent Cory Grubbs, that --
24 that under the sworn testimony of Cory Grubbs, that Wilbur
25 Summers didn't want to disclose the identity of the person

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1 that offered to have him set up a pottery/ceramic business
2 here in this area because one, he had now learned that the
3 pottery had marijuana.

4 And, by disclosing that individual's name, he would put
5 his family in jeopardy because he had now learned. Not that
6 he had known the marijuana was coming beforehand, but the
7 evidence will show that he has now learned, since his arrest,
8 that the individual he was to go into business with, in the
9 ceramic business, had actually sent marijuana in that truck,
10 inside of the pots; not all of the pots, but some of the pots.

11 And, therefore, by disclosing the individual's name, who
12 he was going to go into business with, he would jeopardize his
13 family's lives in Mexico. That's the context of the
14 statement.

15 In any event, ladies and gentlemen, that's -- that's what
16 we -- we feel the evidence will -- will -- will be presented
17 to you in this case. And, again, it comes down to the issue
18 that's where you should focus -- we submit to you that you
19 should focus your attention on during the course of this case,
20 whether or not -- not only merely the evidence being produced,
21 but whether or not the Prosecution is producing enough
22 evidence to prove to you, beyond a reasonable doubt, that
23 Wilbur Summers knew he was receiving marijuana.

24 And, if your answer is yes, they had proof beyond a
25 reasonable doubt, that fact, well, then, you're going to

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1 convict my client. But, if your answer is, "I have a
2 reasonable doubt as to whether or not Wilbur knew he was
3 receiving marijuana," then, the answer and the only verdict is
4 not guilty.

5 And, at the close of the case, I'll argue to you the
6 reasons why we submit the only appropriate verdict in this
7 case is not guilty. Thank you.

8 (Mr. Trejo's opening statement concluded at 3:35 p.m.)

9 MS. GANSS: We call Shirley Brown to the stand.

10 THE COURT: Would Counsel approach just a minute?

11 (Whereupon, a bench conference was had with the
12 attorneys, except Mr. Bulsa, present.)

13 (Whereupon,

14 SHIRLEY BROWN

15 having been first duly sworn, testified as follows:)

16 THE COURT: Ms. Foreman, ladies and gentlemen of the
17 jury, there is a matter I need to take up with counsel at this
18 time out of your presence. So, I'm going to ask you to retire
19 to the jury room for a brief time. We'll just be a few
20 minutes.

21 (The jury exited the courtroom at 3:37 p.m.)

22 THE COURT: Let's briefly get into what you're going to
23 ask her. We'll go ahead and do it in camera, out of the
24 presence of the jury, and let me see exactly where you're
25 going with this.

PAMELA FAUCETTE, CVR, 864-574-9534 or 336-260-2864

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- 1 MS. GANSS: Thank you, Your Honor. And just, at this
2 time, unless you direct me otherwise, I was just --
3 DIRECT EXAMINATION by MS. GANSS: 3:36 P.M.
4 Q. I'll briefly ask her to, please, state your name and let
5 the Judge know who you are.
6 A. Okay. Shirley Brown, with the South Carolina Department
7 of Revenue.
8 Q. And for whom do you work and what do you do?
9 A. I'm a revenue officer for -- out of the Greenville
10 office. I'm in compliance and also enforcement.
11 Q. Okay. And do you -- do you, or your office -- all right,
12 do we go to your office, the Department of Revenue, if someone
13 wants to get to a business license?
14 A. That is correct.
15 Q. Okay. And what do you need? Do you need a Social
16 Security number to apply for a business license?
17 A. You do.
18 Q. Was there a Social Security -- was there a business
19 license given, for a Clay and Ceramic Pottery, also Castro --
20 Castro Summers, Wilbur Castro Summers?
21 A. Yes, there was.
22 Q. What date was that license issued?
23 A. November the 1st, two thousand and five (2005).
24 Q. And what Social Security number was get -- was given to
25 secure that license?

1 A. That's protected under our privacy.

2 THE COURT: Ma'am, the Court will direct you to reveal
3 that ---

4 A. Okay.

5 THE COURT: --- based on to answer the question.

6 A. It's
7

8 Q. Oh, I do -- I want to ask you -- I would ask too, I'd
9 like to show you what has been stipulated to as State's
10 Exhibit Number 26. Do you recognize this?

11 A. Yes, that is a State of South Carolina retail license.

12 Q. I know this is a copy. Does it accurately reflect the
13 business license that was secured by Clay and Ceramic Pottery,
14 also Wilbur Caster -- Castro Summers?

15 A. Yes, it does. It is the same number that's on our
16 registration. It is the same name and -- and the address and
17 the location is the same.

18 Q. And could you, please, inform the Court what addresses
19 are on that business license?

20 A. It shows the physical address as
21 Spartanburg. It shows the -- the mailing address as
22 , Campobello, South Carolina.

23 Q. And, when you say physical address, what do you mean?

24 A. That's where the loc -- the business should be located.

25 Q. Okay. All right. And, then, I also want to ask you, do

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1 you have any records, of your own, aside from the business
2 license, that you keep that let you know where a business
3 location or a mailing location may be?

4 A. Yes. We -- we -- I brought a copy of our registration
5 showing the same information.

6 Q. Okay. And can you tell the judge what this is, what this
7 entails?

8 A. This is just the -- the basic information that the client
9 or tax payer supplies us when they are going to make retail
10 sales to the State of South Carolina. It basically shows his
11 name, the d/b/a, the physical location, Social Security
12 number, phone numbers, and that sort of thing.

13 Q. Do you have any other addresses on that that were
14 different from the business license?

15 A. I do. I see that, at one time, the mailing address was
16 changed to in Inman, South Carolina. And I
17 also see where that we sent some mail to another address that
18 was returned.

19 Q. Okay. What was that other address?

20 A. , Spartanburg.

21 Q. And what is the purpose of a business license?

22 A. If you have a tangible item for resale to collect sales
23 tax to remit to us.

24 MS. GANSS: And then, just at this time, Your Honor, the
25 State would move to introduce this into evidence as a record,

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1 an accurate business record, from the Department of Revenue,
2 reflecting what they have in their computer.

3 MR. TREJO: Is that another one that we haven't seen
4 yet?

5 MS. GANSS: This is one that you have not. She brought
6 it with her. This is ---

7 MR. TREJO: Well, Your Honor ---

8 THE COURT: I'm not admitting it at this point. I'm
9 going to give you a chance to look at it and see.

10 MS. GANSS: Okay. That has the Social Security number
11 on it that we had to get from the Court.

12 MR. TREJO: Well, I guess my -- my concern, Your Honor,
13 with this line of questioning and the late production of
14 documents, is there's a manner and mechanism for the State to
15 have obtained these items, in advance of trial, by motioning
16 the Court for an order directing a subpoena to be issued.

17 THE COURT: And I understand that. And it could have
18 been done ahead of time; no question about that. But go ahead
19 and look at it, Counsel.

20 MR. TREJO: Okay.

21 THE COURT: I'll give you an opportunity to look at it.
22 If you need a few minutes to do that, I'll -- I'll give you an
23 opportunity to do that.

24 (Off-the-Record Discussion)

25 MR. TREJO: May I ask the witness a question, Your

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1 Honor?

2 THE COURT: Yes, sir.

3 CROSS EXAMINATION by MR. TREJO:

3:44 P.M.

4 Q. Ma'am ---

5 MR. TREJO: And may I approach, Your Honor?

6 THE COURT: Yes, sir.

7 Q. (By Mr. Trejo) Besides this document, there's --
8 apparently you brought a -- a file of documents with you. And
9 because of the necessity, for an order from the Court, you
10 couldn't disclose the information in there beforehand,
11 correct?

12 A. Correct.

13 Q. What other items do you have in there?

14 A. It's just basically a copy of what you have. It's the
15 phone numbers of the people that are subpoena and my subpoena
16 from the Court.

17 Q. Can I see it?

18 A. Uh-huh (affirmative).

19 (Document handed to Mr. Trejo.)

20 (Brief pause while Mr. Trejo reviews document.)

21 Q. Okay. Did you -- you said , that mail
22 was returned?

23 A. Uh-huh (affirmative).

24 Q. Do you have that there that was returned?

25 (Brief pause while witness reviews documents.)

1 A. It just says it's -- it's a bad mailing address.

2 Q. That, "-----" is a bad address, change to
3 match," what does that mean?

4 A. The income tax screen, the prior income tax he had filed
5 at the -- the ----- address in Inman.

6 Q. Uh-huh (affirmative). And that's what that "IIT" means?

7 A. Individual Income Tax.

8 Q. And mail code for the ---

9 A. That means that they re -- "yes" means that they re-mail
10 the license to this new -- or a correction to that address,
11 the Inman address.

12 Q. And on this document you have here is different than the
13 one ---

14 A. That is just our note screen.

15 Q. May --- may I see that one, please?

16 (Witness retrieves document and hands to Mr. Trejo.)

17 Q. Thank you.

18 A. And that's just a copy of the income tax showing that
19 address.

20 Q. Now, when you say income tax, you -- according to this
21 document here, it shows that in two thousand and two (2002)
22 and two thousand and three (2003), Wilbur Summers filed an
23 income tax return under this Social Security number?

24 A. That's correct.

25 MR. TREJO: All right. Okay. Now, we can -- if we can

1 get all of this in, then, we're all right, Your Honor. Should
2 I give them back to her or ---

3 THE COURT: Yes, sir.

4 MR. TREJO: I'd like this marked if you're not going to
5 use them.

6 MS. GANSS: Pardon?

7 MR. TREJO: I want these in if you're not going to use
8 them.

9 MS. GANSS: Okay.

10 (Off-the-Record Discussion)

11 THE COURT: They'll have to make copies. I don't know
12 if she brought copies or not.

13 A. No, I did not.

14 THE COURT: You probably want to turn over to her the
15 file copies.

16 MS. GANSS: Yes, sir.

17 (Off-the-Record Discussion)

18 MR. TREJO: Just for the Court's information, the
19 was actually the residence of my client at the
20 time of his arrest.

21 (Brief Pause)

22 MS. GANSS: Well, the State will go along with this one
23 (indicating), but it's not the State's intention to introduce
24 this other document, just this one here. We will introduce
25 this one..

1 MR. TREJO: Maybe we should mark it, so, we know which
2 "this one," and "this one" ---

3 MS. GANSS: Yes.

4 MR. TREJO: ---- reflect.

5 THE COURT: Well, these are the original copies she's
6 got to keep for their file. So, if you all want to make
7 copies of them, you can mark copies of them. But ---

8 MS. GANSS: Do you want a moment and make copies?

9 THE COURT: We can -- if there is some way she can mark
10 them without putting ---

11 MR. TREJO: On the back?

12 THE COURT: --- something on the -- on the front of
13 them, yeah. We're not going to -- I'm not going to take her
14 original records. And, so, but we can make copies of them.
15 And we'll use copies.

16 MS. GANSS: Okay. Well, we can -- we can run upstairs
17 and make copies real quick. Would you like that done right
18 now?

19 THE COURT: All right. Well, it doesn't matter. But,
20 let's -- let's go and identify them. We -- let's go ahead and
21 get this out of the way.

22 MS. GANSS: Okay.

23 MR. TREJO: May I say something, Your Honor?

24 THE COURT: Yes, sir?

25 MR. TREJO: These look like they're just print-out

1 copies, not original documents. It may be that the witness
2 doesn't need these back.

3 THE COURT: Is that true?

4 A. I can print them again, yes.

5 THE COURT: All right. Well, let's just go ahead and
6 use them then. I just didn't want to take their permanent
7 records, so...

8 MR. TREJO: Okay.

9 MS. GANSS: Again, the State will stipulate to the ---

10 Q. (By Ms. Ganss) And what is it that you call this, pray
11 tell?

12 A. That's our retail registration screen for the business
13 tax payer's registration.

14 MS. GANSS: Okay. So, just this tax payer's
15 registration screen. But we aren't and are not introducing
16 the -- the income tax report?

17 Q. Or what do you call this?

18 A. He has -- this is just a note screen of -- of what has
19 happened since the license has been issued.

20 Q. Okay.

21 A. And the one underneath it is just his -- his individual
22 income tax showing this address, and they haven't filed since
23 two thousand and three (2003).

24 Q. Okay.

25 A. Yeah, two thousand, three (2003) income tax with the

1 State of South Carolina.

2 Q. Okay. So, this is about income tax (indicating) and this
3 one ---

4 A. It's the note screen that goes along -- along with the
5 registration that you have.

6 MS. GANSS: Oh, okay. All right. Well, the State is
7 simply seeking to introduce this document (indicating). We
8 will not be introducing these documents (indicating)..

9 MR. TREJO: I will seek to introduce these documents
10 (indicating), Your Honor.

11 THE COURT: Well, I think, if it bears on the Social
12 Security number, which is the primary reason that you're
13 calling this witness and introducing the record, I certainly
14 am going to allow him to ----

15 MS. GANSS: That's fine.

16 THE COURT: ---- introduce these other records with
17 regard to that Social Security number.

18 MS. GANSS: That's fine.

19 THE COURT: I think they're entitled to do that.
20 They're coming in.

21 MR. TREJO: Do you have any objection if I do it on
22 cross, so, that the witness doesn't have to return?

23 MS. GANSS: Umm...

24 MR. TREJO: Or we can ask her to return at the close of
25 the State's case ---

1 MS. GANSS: Yes, I'd like it done that way.

2 MR. TREJO: Okay. So, we'll just -- we'll just let the
3 Court allow us the discretion to have it ---

4 THE COURT: Well, I would point out to you, if you
5 introduce them, Counsel, it would be an introduction of
6 evidence; you understand that and the implications of that?

7 MR. TREJO: I'm sorry?

8 THE COURT: You introduce evidence -- if you introduce
9 them, then, you're introducing evidence.

10 MR. TREJO: Yeah.

11 THE COURT: You understand that?

12 MR. TREJO: Yeah.

13 THE COURT: All right, sir.

14 MR. TREJO: All right. Thank you. And the only -- the
15 only question that I have, Your Honor, was if I can do so on
16 cross, without having the witness ---

17 THE COURT: Well, I don't see why he can't do that.

18 MS. GANSS: I'll let him do it on cross. I'm fine with
19 that.

20 THE COURT: Yeah. I mean ---

21 MS. GANSS: That'll be fine.

22 THE COURT: --- they're still introducing it, even
23 though it's not on cross.

24 MS. GANSS: That's fine on cross.

25 THE COURT: All right. Anything else, then?

1 MS. GANSS: No, Your Honor. That would be all -

2 THE COURT: Okay.

3 MS. GANSS: -- that we would -

4 THE COURT: Well, Counsel, I'm -- I'm going to -- if

5 you're still objecting -- I don't know if you're still

6 objecting since you have it as a ---

7 MR. TREJO: No, Your Honor.

8 THE COURT: You're not objecting?

9 MR. TREJO: No.

10 THE COURT: All right, sir. Then, she'll be able to

11 testify concerning that without objection.

12 MS. GANSS: Thank you.

13 THE COURT: All right. All right. Have you got them --

14 you can pre-mark them, if you want to, while the jury is

15 coming back in.

16 MS. GANSS: Mine is pre-marked.

17 THE COURT: Okay. The Court reporter has to do that;

18 please, sir.

19 (Whereupon, State's Exhibit Number 27 was marked for

20 identification.)

21 (Whereupon, Defendant's Exhibit Number 1 was marked for

22 identification.)

23 MR. TREJO: Well, one -- one question, Your Honor. If I

24 don't introduce this exhibit, I can still elicit it on cross

25 examination, the information, and thereby not waive my right

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1 to close last?

2 (Brief Pause)

3 THE COURT: Well, again, I think you may still be
4 introducing evidence if you go into some other thing. They're
5 going to object to it otherwise. I mean ---

6 MR. TREJO: I know -

7 THE COURT: --- because it's not something --- it's not
8 relevant to their case. And, so, you know... All right.

9 Please, bring the jury in, sir.

10 (The bailiff steps out to summon the jury.)

11 (The jury entered the courtroom at 3:54 p.m.)

12 (Off-the-Record Comments regarding Chief Justice
13 Littlejohn, who entered the courtroom.)

14 THE COURT: All right, Counsel, I think we need to --
15 we're ready to proceed. I don't if the witness is sworn yet,
16 is she, Madam Clerk?

17 MADAM CLERK: (Nods affirmatively).

18 THE COURT: She was?

19 MADAM CLERK: Yes, sir.

20 THE COURT: We're ready to proceed, then.

21 MS. GANSS: Thank you, Your Honor.

22 DIRECT EXAMINATION by MS. GANSS:

3:55 P.M.

23 Q. Ms. Brown, please, state your full name for the jury.

24 A. Shirley Brown.

25 Q. And, please, tell the jury what it is that you do, where

1 you're employed?

2 A. The South Carolina Department of Revenue. I'm a revenue
3 officer and I handle enforcement with -- with the State of
4 South Carolina.

5 Q. And, as a revenue officer, with the Department of Revenue
6 for the State of South Carolina, are part of your duties to
7 take business licenses or fill out the forms for business
8 licenses?

9 A. Yes.

10 Q. Okay. What is a business license?

11 A. It's a retail license that enables you to buy a tangible
12 item at wholesale and resale it and collect sales tax and
13 remit it to the State of South Carolina.

14 Q. And what, if someone comes in to get a business license,
15 do they to -- do they have to present certain information?

16 A. Yes.

17 Q. Do they have to present a Social Security number?

18 A. Yes.

19 Q. I'll show you State's -- what's been marked and
20 stipulated to as State's Exhibit Number 26 and is in evidence.
21 Can you tell us what this is?

22 A. This is a copy of a retail license for the State of South
23 Carolina.

24 Q. Okay. And ask -- let me check with ---

25 MS. GANSS: Was this one stipulated to? Is this one in

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1 evidence?

2 MR. TREJO: Yes. No objection, Your Honor.

3 THE COURT: Admitted without objection.

4 (Whereupon, State's Exhibit Number 26 was admitted into
5 evidence by stipulation of the parties.)

6 MS. GANSS: Thank you.

7 Q. (By Ms. Ganss) And this particular retail license, that
8 you have here, what is that -- what business is that a retail
9 license for?

10 A. It's for Wilbur Castro Summers and Ceramic Pottery.

11 Q. Okay. And are there any addresses -- addresses or
12 whatnot on that retail license?

13 A. Yes. There's the physical location of the business and
14 the mailing address of the tax payer.

15 Q. And what is the physical location on that retail license?

16 A. , Spartanburg, South Carolina.

17 Q. And what is the mailing address?

18 A. Drive, Campobello, South Carolina.

19 Q. Okay. When was that license issued?

20 A. November 1st, two thousand and five (2005), and that date
21 is printed on the license.

22 Q. Okay. And what Social Security number was used to get
23 that business license?

24 THE WITNESS: Do I have to answer that, Your Honor?

25 THE COURT: Yes, ma'am, please, answer.

1 A.

2).

3 Q. All right. I'm going to show you what's been marked --
4 and I think, at this point, it's for identification purposes
5 only, unless -- pardon?

6 MR. TREJO: Which one is it?

7 MS. GANSS: This is State's Exhibit Number 27.

8 MR. TREJO: Well, this one is ---

9 MS. GANSS: Stipulated to?

10 MR. TREJO: Yes.

11 MS. GANSS: Thank you.

12 (Whereupon, State's Exhibit Number 27 was admitted into
13 evidence by stipulation of the parties.)

14 Q. (By Ms. Ganss) This would be State's Exhibit Number 27,
15 which has been stipulated to by Defense Counsel. Could you,
16 please, explain to the jury what that is?

17 A. This is our -- a copy of our registration screen that
18 basically has the same information as the retail license,
19 showing the tax payer's name, the doing business as, which is
20 Clay and Ceramic Pottery, the date it was issued, and the
21 Social Security number.

22 Q. Okay. And I'll show you -- we're going to ---

23 MS. GANSS: Permission to publish to the jury, Your
24 Honor.

25 THE COURT: Yes, ma'am.

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1 MS. GANSS: Thank you.

2 (Off-the-Record Comments)

3 (Projector turned on.)

4 Q. And if you can have this pointer.

5 (Pointer handed to witness.)

6 Q. While we're waiting for that to come up, let me show you,
7 again, State's Exhibit 27. Are there any other addresses on
8 that bit of information?

9 A. There is, his mailing address.

10 Q. And what mailing address do you have on that?

11 A. , Inman, South
12 Carolina.

13 Q. Inman. And, again, what is this document?

14 A. This is simply our registration screen, where -- when a
15 public assistance officer enters the information off the
16 application that's been submitted by the tax payer.

17 Q. Okay. Let's see here. Are we ready?

18 (Off-the-Record Comments)

19 (State's Exhibit Number 26 was shown on overhead.)

20 Q. And first explain -- using your pointer, to the jury,
21 just, again, a business license --

22 (Brief Pause)

23 Q. What is this telling us (indicating)?

24 (Off-the-record discussion regarding the laser pointer.)

25 A. Okay.

1 Q. Okay. What is that telling us?

2 A. Okay. This tells us that this is the owner's name
3 (indicating) and the business address. And, of course, you
4 can see that it's Wilbur Castro. And we always put the last
5 name first.

6 This is the physical address (indicating) for the
7 business, the location. And that's where the business should
8 be located, the

9 Q. Okay.

10 A. This is the doing -- doing business as, or what name he's
11 -- he's actually doing business as, "Clay and Ceramic
12 Pottery." And then, this should have the name. See, right
13 here (indicating) it says, "Trade Name and Mailing Address,"
14 so, lots of times that is a duplicate address.

15 Q. I got it. And, then, the numbers to the far right?

16 A. Okay. This is the actual number that the State assigns
17 to the tax payer when the license is issued. And this "042"
18 simply tells me that it was in Spartanburg County.

19 And then, the last number should pertain to that
20 individual. This tells me (indicating) that -- this is just a
21 code telling us what kind of business it is. It's a state
22 code.

23 And this (indicating) tells us the effective date, and
24 you'll see it's November 1st, two thousand, five (2005).
25 That's the date it opened.

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1 Q. And this is not the original business license, is it?

2 A. No. That was just a -- a copy of it, a copy of the
3 screen.

4 Q. And what is a business person supposed to do with the
5 original?

6 A. It should be on display at the business, so, that if I,
7 as a revenue officer, or any other revenue officer walked into
8 the business, they can see the license.

9 Q. Okay. And that was State's Exhibit Number 26. I'm going
10 also put here on the screen now, this other exhibit you talked
11 about, State's Exhibit Number 27.

12 (State's Exhibit Number 27 shown on overhead.)

13 A. Uh-huh (affirmative).

14 Q. And can you tell us what we're supposed to learn from
15 this?

16 A. Okay. As you will see, it's the same number that was on
17 the license you gave me, because I confirmed that a minute
18 ago.

19 Again, it tells the owners's name, just the -- the type
20 of business, saying that he is one owner, sole proprietor; the
21 physical location of the business, Fairforest Road; the
22 mailing address that you and I just went over, and that's in
23 Spartanburg County.

24 It opened on November 1st, two thousand, five (2005). And
25 right here (indicating) is his Social Security number again.

1 And it said it was closed on November 1st, two thousand, five
2 (2005).

3 (Brief Pause)

4 MS. GANSS: Thank you so much.

5 THE WITNESS: Uh-huh (affirmative).

6 MS. GANSS: Please, answer any questions that Mr. Trejo
7 may have.

8 THE COURT: Counsel?

9 CROSS EXAMINATION by MR. TREJO:

4:02 P.M.

10 Q. Good afternoon, ma'am.

11 A. Good afternoon.

12 Q. Now, the -- the Prosecution has admitted into evidence
13 Exhibit Numbers 26 and 27. Exhibit Number 27, the business
14 tax payer's registration printout, would you tell the jury how
15 you -- how you came about that?

16 A. I went into our computer and printed it off this morning
17 or yesterday.

18 Q. Okay. And, when you say you went to "our computer," what
19 does that mean?

20 A. The South Carolina Department of Revenue. I went into
21 the main frame, put his Social Security number in and pulled
22 up the account.

23 Q. Okay. And when you -- you go into the computer, at the
24 Department of Revenue, and you would plug in the Social
25 Security number, the first thing that comes up is that the

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- 1 note screen?
- 2 A. No, it's the registration screen.
- 3 Q. The registration? And, then, right behind the
- 4 registration, is that when the note screen appears?
- 5 A. Yes, you can look at the notes.
- 6 Q. All right.
- 7 A. Anyone at the Department of Revenue can look at it.
- 8 Q. Okay. And the note screen is kept, within the same area
- 9 or the same file, of the computer as the registration?
- 10 A. Yes.
- 11 Q. And, so, when you went into the rec -- and located the
- 12 registration information, you also, on your own initiative,
- 13 went in and looked at the note screen, correct?
- 14 A. Yes.
- 15 Q. I didn't ask you to do that?
- 16 A. No.
- 17 Q. Okay. You and I have never met prior to this afternoon,
- 18 correct?
- 19 A. Yes.
- 20 Q. And, when you went into the note screen, you printed it
- 21 out?
- 22 A. Uh-huh (affirmative), yes.
- 23 Q. A two-page document?
- 24 A. Yes.
- 25 Q. And that note screen is kept, in the regular course of

1 business, there with the Department of Revenue, correct?

2 A. Yes, sir.

3 Q. I'm handing you what's been marked, for identification,
4 as Defendant's Number 1.

5 (Defendant's Number 1 handed to witness.)

6 Q. Do you recognize that two-page document?

7 A. Yes, I do.

8 Q. And would you -- would you tell the jury what it is?

9 A. It's a copy of an individual income tax showing Wilbur
10 Castro's name and Social Security number.

11 Q. But, it's -- it's part of the note screen, correct?

12 A. No. It's a separate ---

13 Q. It's a another document within that same ---

14 A. Yes.

15 Q. --- area of the computer?

16 A. Right.

17 Q. Okay. And attached to that page is the note screen?

18 A. That's correct.

19 Q. Okay. And all -- and both of those pages actually came
20 from the Department of Revenue in South Carolina computer?

21 A. Yes.

22 MR. TREJO: Okay. We move for the admission of
23 identification number 1.

24 MS. GANSS: No objection.

25 THE COURT: Admitted without objection.

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1 (Whereupon, Defendant's Exhibit Number 1 was admitted
2 into evidence without objection.)

3 MR. TREJO: Permission to publish?

4 THE COURT: Yes, sir, you may publish it.

5 MR. TREJO: Thank you.

6 (Defendant's Number 1 shown on overhead.)

7 Q. (By Mr. Trejo) Okay. This is the tax payer individual
8 income inquiry, correct?

9 A. Let me see. Yes.

10 Q. I'm sorry. All right. Now, and it shows it's for Wilbur
11 Castro, correct?

12 A. That's right.

13 Q. And it shows the Social Security number that you read out
14 earlier of , correct?

15 A. Right.

16 Q. And it also shows, although it's not that -- at least,
17 according to this -- this printout, that Mr. Wilbur Castro
18 filed 1040 income tax returns in two thousand and two (2002)
19 and two thousand and three (2003), correct?

20 A. That's correct.

21 Q. And he filed those returns under that same Social
22 Security number, correct?

23 A. Correct.

24 Q. And you don't know how much those were for, the tax
25 returns?

1 A. I beg your pardon?

2 Q. You don't know how much the tax returns, the -- the net
3 income or the gross income?

4 A. No.

5 Q. That's not on this document, correct?

6 A. No.

7 Q. Now, the note screen, that's also on the Department of
8 Revenue computer, you printed this out November the 9th,
9 correct?

10 A. That's correct.

11 Q. At about 5:00 p.m. or so?

12 A. That's correct.

13 Q. Working overtime?

14 A. That's correct.

15 Q. Okay. Now, according to this, the tax paper -- the tax
16 payer stated that he did not file a return in two thousand and
17 four (2004) because he was in Mexico that year?

18 A. That's correct.

19 Q. Okay. And the two thousand and three (2003) tax return
20 was filed with the Greenville office?

21 A. That's correct, and that's one of the ones that it is
22 showing.

23 Q. Okay. But here, the is that address
24 changed to match --

25 A. The income tax, correct, the individual income tax is

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1 what the "IIT" stands for.

2 Q. That -- that information did not come from Wilbur,
3 though, correct?

4 A. Evidentially, he had some mail returned from the post
5 office, so, it was remailed to the address showing on the
6 income tax.

7 Q. Now, when you say evidentially he had mail returned from
8 the post office, are you sure about that?

9 A. Well, that would be my assumption by the note. ---

10 Q. Okay.

11 A. --- of the mail being returned.

12 Q. So, you're assuming that, but you're not -- you're not
13 sure that that's accurate, correct?

14 A. That's what we put on it when it happens. That's
15 standard.

16 Q. That's -- that's a standard operating procedure within
17 the Department of Revenue, correct?

18 A. That's correct.

19 Q. But, if I were to tell you that, at the time of his
20 arrest, Mr. Summers was actually living at

21 ---

22 A. Well, he may have been living there, but lots of times
23 they don't get mail at their house.

24 Q. Okay. Okay. And prior -- do you know when that date was
25 entered?

1 A. Yes. If you'll look about six -- go up -- it's March 6,
2 two thousand and six (2006).

3 Q. Okay.

4 A. That was added.

5 Q. Okay. So, the mail was returned roughly around March of
6 two thousand and six (2006)?

7 A. I can't answer that because I didn't put the note on the
8 screen.

9 Q. Okay. Does the document show us when the Highland Hills
10 address is -- became a bad address?

11 A. That note says March 6th, two thousand, six (2006), so,
12 you would have to ask the person that put the note.

13 Q. Okay. So, as far as this note screen is concerned, back
14 in November of two thousand and five (2005), the
15 Hills address was a perfectly valid address, according to
16 this?

17 A. Yes.

18 MR. TREJO: Okay. Now -- all right. Thank you, ma'am.
19 That's all I have.

20 (Brief Pause)

21 MS. GANSS: Redirect.

22 THE COURT: Yes, ma'am.

23 REDIRECT EXAMINATION by MS. GANSS:

4:11 P.M.

24 Q. Some things, if you would, please, point out for me.

25 This -- we'll start with the first form.

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1 THE COURT: Please, refer to it by exhibit number for
2 the record --

3 MS. GANSS: Oh, I'm sorry about that, Your Honor. Thank
4 you.

5 Q. (By Ms. Ganss) Defendant's Exhibit 1, what address is on
6 -- this is the -- this one is for his tax, correct?

7 A. His individual income tax, yes.

8 Q. Individual income tax, and what address is on this form?

9 A.

10 Q. And what are those numbers there (indicating)?

11 A. Which ones are you pointing?

12 Q. I'm sorry (indicating)?

13 A. That's -- that's a document locating the numbers. That's
14 a number that the -- the Department of Revenue stamps on each
15 letter or check or whatever comes in through us.

16 Q. Okay. And, when I go to the second page, of Defendant's
17 Exhibit 1, and how is this -- this is -- what is this page,
18 again? This is a --

19 A. That's just a note screen. You'll see at the top where
20 it says, "Business Tax Payer Registration."

21 Q. Okay.

22 A. Anything that are added to whatever tax payer's account.

23 Q. And, then, this is the business -- would this be the
24 business tax payer registration screen with ---

25 A. Yes.

1 Q. --- Clay and Ceramic Pottery?

2 A. Yes. That actually should go with the -- the first -- a
3 copy of the registration. It would not be attached to the
4 income tax screen.

5 Q. I see. And what is the address that we have on this one?

6 A. That's the one that we had the physical address as
7 , with the mailing address, the Inman.

8 Q. Which is...?

9 A. The same that was on the income tax,
10 Inman.

11 Q. Well, what was this ? Is that just ---

12 A. That was the way the original license evidentially was
13 applied for, as the mailing address, because, on the copy of
14 the license, you have that was showing as the mailing address
15 of the tax payer.

16 Q. Okay. And that license, the business license?

17 A. Right, uh-huh (affirmative).

18 MS. GANSS: Okay. Thank you very much, Ms. Brown.

19 MR. TREJO: Okay. Just a couple of questions.

20 CROSS EXAMINATION by MR. TREJO: 4:14 P.M.

21 Q. All right. The address, as listed here, the

22 9 ---

23 A. Uh-huh (affirmative), yes.

24 Q. Okay. That address is as of March of two thousand and
25 six (2006), correct, because that's when it was changed to the

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1

2 A. Well, that was the address that was showing on the income
3 tax that was filed in two thousand, three (2003).

4 Q. Okay.

5 A. But it was changed on the -- the registration in two
6 thousand, six (2006), yes.

7 Q. Now, in two thousand and three (2003), what does it show
8 that it was -- the two thousand and three (2003) tax return
9 have that address?

10 A. What do you mean?

11 Q. As opposed to the ---?

12 A. If you had a copy, I could show it to you.

13 (Mr. Trejo retrieves document and shows to witness.)

14 Q. This one?

15 A. Yes, the ---

16 Q. Right, the 9 as of what date?

17 (Exhibit shown to the witness.)

18 A. That was in two thousand and three (2003), so, the last
19 year ---

20 Q. Why does it say that?

21 A. Because you only have a return for two thousand three
22 (2003) and two thousand and two (2002). We don't have it ---

23 Q. All right.

24 A. --- since he was in Mexico.

25 Q. And the is actually Nacho's Restaurant,

1 correct?

2 A. I have no idea.

3 Q. Oh, you don't deal with that?

4 A. No, sir.

5 Q. Okay. So, the , in two thousand and three
6 (2003), at some point prior to two thousand and six (2006), it
7 was actually And, then, as of March of
8 two thousand and six (2006), it became the
9 again?

10 A. That's correct.

11 MR. TREJO: Okay. All right. Thank you.

12 THE COURT: Thank you, ma'am, you may stand down.

13 MS. GANSS: Your Honor, we would ask that this witness
14 be excused.

15 THE COURT: Any objection, Counsel?

16 MR. TREJO: No, Your Honor.

17 THE COURT: Thank you for coming, ma'am. You may be
18 excused at this time.

19 (The witness stepped down from the witness stand and was
20 excused at 4:16 p.m.)

21 MS. GANSS: The State calls Agent Jeff Ryan to the
22 stand, Your Honor.

23 (Agent Ryan summoned and stepped forward to be sworn.)

24 (Whereupon,

25 AGENT JEFF RYAN

1 Border Protection.

2 So, Immigration — ICE is the investigation aspect of the
3 DHS, Department of Homeland Security. And we do all the
4 immigration — the investigations for Immigration —

5 MR. TREJO: Objection, Your Honor, to the relevancy to
6 this particular case.

7 Q. I guess ---

8 A. Okay.

9 Q. --- just ---

10 THE COURT: Hold on. Counsel approach just a minute.

11 (Whereupon, a bench conference was had with all
12 attorneys, except Mr. Bulsa, present.)

13 Q. (By Ms. Ganss) Okay. Now, let's see if we can clarify
14 this.

15 MR. TREJO: Well, objection, leading.

16 MS. GANSS: Okay. I apologize. Withdrawn.

17 THE COURT: I don't think she's gotten there yet. Go
18 ahead, Counsel.

19 Q. (By Ms. Ganss) Simply put, you work for...?

20 A. ICE, U.S. Customs.

21 Q. Now, could you, please, tell the jury where you worked on
22 -- in November of two thousand and five (2005)?

23 A. In November of two thousand and five (2005), I was
24 assigned to the Assistant Special Agent in Charge Office for
25 ICE in Laredo, Texas.

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1 Q. And where in Texas is Laredo?

2 A. Laredo is approximately two (2) hours or a hundred and
3 forty (140) miles due south of San Antonio on the southern
4 border of Mexico and the United States. The sister city is
5 Nuevo Laredo, which is the -- the Mexico City right next to
6 Laredo and Laredo is two (2) hours north of Corpus Christi.
7 So, it's right on the border, pretty far down south Texas.

8 Q. Okay. And, as an agent for ICE, in November of two
9 thousand, five (2005), what were your duties?

10 A. My duties, at that time, consisted of conducting
11 investigations, regarding drugs and money laundering, both
12 self generated or we responded to requests for assistance by
13 the -- the inspectors at the ports of entry.

14 And there are four (4) ports of -- there's one point of
15 entry, but there are four (4) bridges. Two (2) of them
16 primarily just vehicle traffic, personal vehicles. And one
17 bridge is primarily truck traffic, where they had thousands
18 upon thousands of tractor-trailers coming through each day.

19 And there's a fourth bridge that is a mix of both, but it
20 has very -- it's twenty miles north of the city and it has
21 very limited use by -- by the people from Laredo or Nuevo
22 Laredo.

23 Q. Okay. So, for someone who's never been to Texas, are you
24 saying between -- there's only four ways you can get -- is it
25 fair to say that there are only four ways you can get between

1 Mexico and Texas? Is that what you mean by the four points --
2 points of entry?

3 A. In the Laredo area, there's four (4) ways to get across.
4 I know there's four (4) bridges. The other cities have
5 bridges up and down the -- the border, in other cities, with
6 points -- ports of entry. But, in this specific town of
7 Laredo, there are only four (4) points of entry.

8 Q. Okay. So, in November of two thousand and five (2005),
9 were you called to one of those ports of entry?

10 A. Yes, ma'am, I was. On November the 11th, I was acting as
11 the duty agent where we receive calls, from the local police,
12 citizens logging complaints, and customs and border
13 protection.

14 Q. And could you speak up just a little bit?

15 A. Yeah, sorry.

16 Q. I think they're having trouble hearing you back here.

17 A. On that night, or that day of November 11th, I received a
18 call from Customs and Border Protection inspectors, at the
19 World Trade Bridge, which is a commercial entry point, in
20 Laredo, Texas. They asked for my assistance because they had
21 a tractor-trailer, at the port of entry, that they needed
22 assistance on with the investigation.

23 Q. All right.

24 A. After receiving that phone call, I went out to the -- the
25 bridge, spoke to the inspectors that were involved that day

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1 working the port. And -- and I discovered, through interviews
2 with them, that they had a tractor-trailer that came across
3 from Mexico into the U.S. Customs Port of Entry.

4 The -- the driver of the truck presented the proper
5 documentation to enter the United States. The -- the Customs
6 inspectors there ---

7 MR. TREJO: Your Honor, objection, narrative. I think
8 that's a narrative response. There's no question.

9 THE COURT: All right. Let's do it through question and
10 answer. But, I'll allow you a little leeway there. Go ahead.

11 MS. GANSS: Thank you. Thank you.

12 Q. (By Ms. Ganss) So, you're called to this port of entry?

13 A. Yes.

14 Q. And are you, at this time, working with other law
15 enforcement members?

16 A. Yes. We were working with the Custom and Border
17 Protection inspectors at the port of entry.

18 Q. Okay.

19 A. As well as several other agents from my office.

20 Q. And what did you discover as a result of that work?

21 A. As a result of that work, we discovered that a tractor-
22 trailer loaded with ceramic pottery had made entry into the
23 U.S. at this -- the U.S. customs port of entry. The driver of
24 that tractor-trailer presented the proper documentation to
25 bring the truck into the United States.

1 While at the primary inspection booth, the tractor-
2 trailer was referred to the secondary inspection area ---

3 MR. TREJO: Well, I'll object, Your Honor, as hearsay.

4 THE COURT: Well, he can -- all right. He can testify
5 as to what he knows of his knowledge, but not as to what
6 somebody else has told him. But he can testify as to what he
7 did and what he observed.

8 MS. GANSS: Thank you, Your Honor.

9 Q. (By Ms. Ganss) What do you know, from your own personal
10 knowledge, about this tractor-trailer that had entered this
11 port?

12 A. When I responded to the port of entry, I viewed a -- a
13 nitrous gamma x-ray (phonetic) of the tractor-trailer that
14 contained ---

15 MR. TREJO: Object, Your Honor, lack of foundation and
16 calls for a expert opinion on a gamma. And lack of notice as
17 well.

18 THE COURT: Counsel approach just a minute.

19 (Whereupon, a bench conference was had with all attorneys
20 present.)

21 Q. (By Ms. Ganss) Agent Ryan, in your work as an agent for
22 ICE -- and how long did you say you were with ICE?

23 A. Three and a half (3 1/2) years. This January it will be
24 four (4).

25 Q. And before that?

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1 A. Four and a half (4 1/2) years with Border Patrol.

2 Q. In your time with Border Patrol and ICE, have you viewed
3 gamma rays?

4 A. Yes, I have. I have -- I have with ICE on other
5 occasions involving tractor-trailers. They have taken gamma
6 x-rays of trucks. We've also brought trucks in from outside
7 to have gamma rays -- them shoot the gamma ray through it to
8 inspect it.

9 And they have a -- a booth that we can go in and watch
10 them do it. And they also print out a hard copy, just a eight
11 by ten, a regular -- a regular sheet of paper that shows you a
12 picture of the -- of the tractor.

13 Most of the times, either when it had or did not have
14 anything in it, the inspectors sat down and explained to us
15 exactly what we are looking for or looking at. And -- and
16 indicated it showed as -- what the indicators were that they
17 had.

18 Q. All right. Let me ask you to just back up here a bit.
19 How many gamma rays -- let me ask you this: In your job, with
20 Border Patrol and ICE, have you worked with gamma ray
21 machines?

22 A. I have worked with them.

23 Q. Okay. Have you viewed gamma ray x-rays?

24 A. Yes, I have.

25 Q. How many gamma ray x-rays, over the course of your Border

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1 Patrol and Ice time, have you viewed?

2 A. Approximately fifty (50) or so.

3 Q. Okay.

4 A. Without having an exact number.

5 Q. Okay. And what type -- again, briefly, if you could,
6 describe for us now; you did some, but what type of training?
7 Is it on-the-job training that you have with gamma rays? What
8 type of training ---

9 A. The -- the gamma ray training that -- when we first
10 arrived at our office, at -- at ports of entry to work with
11 the inspectors to better understand a little bit better their
12 job; theirs is a little more technical with the different
13 aspects of their job.

14 One day we sat up there with the -- the -- the certified
15 gamma ray readers, the inspectors who are certified who sit in
16 the booth. And the trucks just roll up, underneath a shed,
17 and the gamma ray machine just runs down the side of the truck
18 and takes a picture of the whole truck. And, then, it's
19 projected onto their -- their computer screen inside.

20 And they manipulate the picture to add contrast color,
21 so, that they have a better view of it. And, then, they make
22 a determination whether the cargo needs to have further
23 inspection because there's an anomaly or not.

24 Q. Okay.

25 A. They're the ones that do that when we go down there.

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1 Q. Well, let me ask you: In your experience, with gamma
2 rays, and you say you've viewed about ---

3 A. Well, fifty (50) or so.

4 Q. --- fifty, have you been shown what to look for?

5 A. Yes. Without getting too far into it, each different
6 kind of commodity; ceramic pottery, copper, steel, vegetables,
7 they all have a distinctive image. And, when -- when the
8 inspectors look at those images and they see something either
9 too dark or mis-shaped or not -- not the normal ---

10 Q. Uh-huh (affirmative).

11 A. --- they call it an anomaly. And they circle it or
12 highlight it or annotate it. And they -- they print it out
13 and send it over to the dock to be further inspected.

14 Q. And is it fair to say you've been where the gamma ray has
15 been taken? Not necessarily in this case, but at any time ---

16 A. Yes. I have been in the booth where they've taken it
17 before and I've actually walked one or two of them over to the
18 -- there's a dock that's about a hundred and fifty (150) yards
19 to the north or the east of -- of this gamma ray machine, in a
20 secured lot, and the truck is moved over to the dock where
21 they can open the back doors and inspect all the cargo, take
22 it off and get a better visual of what's inside that truck.

23 Q. And do you feel, based on your experience and training
24 and exposure to gamma rays, are you comfortable reading gamma
25 rays?

1 A. Yes.

2 MR. TREJO: Objection, Your Honor, what the witness
3 feels is irrelevant.

4 THE COURT: (Nods affirmatively.)

5 Q. (By Ms. Ganss) Do you know what to look for in a gamma
6 ray?

7 A. Yes, I do.

8 Q. And do you confer with others when you review gamma rays?

9 A. Yes. When we review the gamma rays, we -- we review them
10 amongst ourselves, the data and, as well with the inspectors,
11 who have that technical expertise.

12 Q. And did you do that with the gamma ray in this case?

13 A. Yes, I did.

14 Q. And what was -- was there a consensus about this gamma
15 ray?

16 MR. TREJO: Objection, a consensus is irrelevant and
17 based on hearsay as well.

18 THE COURT: I sustain the objection as to hearsay.

19 Q. (By Ms. Ganss) Did you come to an opinion about the gamma
20 ray?

21 MR. TREJO: Objection, foundation.

22 Q. (By Ms. Ganss) Based on your experience, having reviewed
23 over fifty (50) gamma rays, what did this gamma ray -- what
24 did you learn from this gamma ray?

25 MR. TREJO: Same objection, Your Honor.

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1 THE COURT: All right.

2 MS. GANSS: One moment, please, Your Honor.

3 (Brief Pause)

4 MS. GANSS: Did you want me to rephrase, Your Honor?

5 THE COURT: Well, no. I'm going to sustain the
6 objection that was made. I -- I think you need to -- to lay a
7 complete foundation for his testimony with regard to the gamma
8 ray.

9 MS. GANSS: All right. Just one moment, please.

10 THE COURT: Yes, ma'am.

11 (Off-the-Record Discussion)

12 MS. GANSS: May we approach, Your Honor?

13 THE COURT: Yes.

14 (Whereupon, a bench conference was had with all attorneys
15 present.)

16 Q. (By Ms. Ganss) These gamma ray machines that we've been
17 talking about, do you know if they check every truck that
18 comes across?

19 A. No, not every check -- not every truck that comes through
20 the port of entry is -- is inspected in that manner.

21 Q. The fifty-some gamma rays that you've viewed, how many of
22 those bore fruit?

23 A. Under half. I mean, I couldn't tell you exactly, but out
24 of the ones we saw, when we were down there, on random days
25 looking at them, a lot of them were negative.

1 Q. Okay.

2 A. When we went down there on a case, and --- and were shown
3 one, or viewed one that day, most of them --- the reason we
4 were there was to look at that x-ray to find out what that
5 was.

6 Q. So, what do you mean, look at the x-ray and find out what
7 that was? What did you do?

8 A. What we did ---

9 MR. TREJO: Objection to the extent it's not based on
10 his own personal knowledge versus what someone told him, Your
11 Honor.

12 THE COURT: Well, I'll overrule the objection at this
13 point. I'm --- I'll let you go a little further with it.

14 Q. (By Ms. Ganss) What -- what did you do, when you just
15 said that you viewed -- and just you -- that you viewed an x-
16 ray and compared it to the truck?

17 A. We would look at the x-ray to see what kind of anomaly it
18 was, what the image showed, where it showed; if there was
19 something they believed should not be in that container.

20 And, then, we would open the doors ---

21 MR. TREJO: Objection and move to strike what they
22 believed.

23 Q. (By Ms. Ganss) And I guess that's the question.

24 THE COURT: Sustained.

25 Q. (By Ms. Ganss) That's the question, just let me clarify.

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1 What did you do at the time, extract "we" and "they," when you
2 viewed it?

3 A. I looked at the x-ray that's called an anomaly, from
4 there, I would go outside, open the container, and look inside
5 to see what was in there.

6 On certain times, there happened to be drugs. Other
7 times, it was nothing, but the way the gamma ray looked at the
8 -- the commodity, the way it was packaged.

9 Sometimes, the inspectors took precautions and sent it
10 because they thought that it may be an anomaly and it turned
11 out to -- to just be the way it was read. It was just wrong.

12 Q. When you said fifty -- what was it, fifty (50) percent?

13 A. I would -- it would be less than fifty (50) percent.

14 Q. Less than fifty (50) percent did what?

15 A. Less than fifty (50) percent would have a positive result
16 for having an anomaly that turned out to be either narcotics
17 or some other kind of -- another kind of contraband that was
18 prohibited from being entered into the United States.

19 Or it would be something -- a commercial good that wasn't
20 on the man -- the -- the documents. So, the documents may say
21 it had broccoli, but it -- it had charcoal instead. And it
22 became a tax issue for the persons at customs. So, that was
23 part of it.

24 Q. So, would it be fair to say that you have read gamma
25 rays ---

1 MR. TREJO: Your Honor, I would object, "is it fair to
2 say..." is a leading question.

3 THE COURT: Sustain the objection, Counsel.

4 (Brief Pause)

5 Q. (By Ms. Ganss) The gamma rays that turned out to be
6 nothing illegal, not -- as you described, not drugs, were you
7 able to explain, give an explanation for the anomaly that you
8 read on the gamma ray?

9 MR. TREJO: Well, objection, lack of foundation and
10 assumes facts not in evidence as to the particular question.
11 That he actually personally did this versus --

12 THE COURT: Well, that's what she asked, Counsel. I'm
13 going to allow the question and answer if he can answer it.

14 Q. (By Ms. Ganss) Okay. You said you -- you've read gamma
15 rays?

16 A. Yes.

17 Q. Okay. Under fifty (50) percent of those bore fruit?

18 A. Uh-huh (affirmative).

19 (Brief Pause)

20 Q. So, when you read -- I guess my question is, since more
21 than fifty (50) percent didn't bear fruit, can you read a
22 gamma ray correctly?

23 A. Yes.

24 MR. TREJO: Objection, Your Honor.

25 THE COURT: Sustained.

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1 MR. TREJO: And move to strike.

2 THE COURT: Motion to strike granted.

3 MS. GANSS: One moment, please, Your Honor.

4 (Brief Pause)

5 Q. (By Ms. Ganss) These gamma rays, the fifty-some that you
6 read ---

7 A. Yes.

8 Q. --- were there reliable indicators -

9 MR. TREJO: Objection.

10 Q. --- to you?

11 MR. TREJO: Objection.

12 THE COURT: Well, sustained, Counsel.

13 (Brief Pause)

14 Q. (By Ms. Ganss) Stepping away -- stepping away from the
15 gamma ray for a moment ---

16 A. Okay.

17 Q. --- okay? What, if anything, else in your investigation,
18 of the tractor-trailer we're talking about in this case, did
19 you learn?

20 A. Upon arriving at the port of entry where the trailer was
21 at, I reviewed some documents and determined that the -- the
22 cargo was ceramic pottery destined for South Carolina. The
23 individual who was to receive that -- that pottery was named
24 Wilbur -- Wilbur Xavier Castro Summers, doing business as Clay
25 and Ceramic Pottery in South Carolina.

1 From there ---

2 Q. Well, let me ask you ---

3 MR. TREJO: Well, I'm going to object and move to
4 strike, hearsay, for the basis of his knowledge, of this.

5 THE COURT: Overruled.

6 Q. (By Ms. Ganss) Let me ask you -- and, again, what you
7 learned, about the tractor-trailer at the port of entry, aside
8 from the gamma ray. Did you observe anything else about the
9 truck?

10 A. I learned from the -- the custom inspectors who are right
11 here to -- told me ---

12 MR. TREJO: Objection.

13 Q. Well, let me ---

14 A. I learned through their inter -- interviewing him ---

15 MR. TREJO: Objection.

16 Q. Let me ask -

17 THE COURT: Well, sustained.

18 A. Okay.

19 Q. (By Ms. Ganss) You cannot tell us what you heard or what
20 other people told you. So, just as part of your
21 investigation, when you worked with other law enforcement at
22 the port of entry, what did you learn?

23 A. I learned that that tractor-trailer contained marijuana.

24 MR. TREJO: Objection, lack of foundation of his
25 learning other than being told.

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1 Q. Please, tell us ---

2 THE COURT: He -- he can testify to what he knows of his
3 own knowledge, Counsel, what he observed and what he knows
4 from his own knowledge, not what he received from somebody
5 else. Okay.

6 MS. GANSS: Thank you, Your Honor.

7 Q. (By Ms. Ganss) What did you observe, if anything, about
8 the tractor-trailer when you were there?

9 A. I observed the tractor-trailer was parked at the dock and
10 was being inspected by U.S. Customs and Border Protection
11 officers who believed that the trailer contained marijuana.

12 MR. TREJO: Objection.

13 THE COURT: Sustained. Counsel, he -- he can testify
14 what he saw and observed, okay? And what was going on. He
15 can testify to what he observed.

16 Q. (By Ms. Ganss) Please, don't tell us what other
17 people ---

18 A. Okay.

19 Q. --- said or believed, just what you know from seeing and
20 observing about that tractor-trailer at Customs -- or, I
21 guess, at that port of entry.

22 A. Okay.

23 Q. What did your investigation -- when you joined the
24 others, what did you observe?

25 A. When I arrived, I observed Custom and Border Protection

1 processing the seizure of a trailer.

2 Q. Okay. All right. And what is typically done -- or do
3 you know what is done when Customs seizes a trailer?

4 A. Typically, there are several -- several steps or tools
5 that they use in order to process it. One involves a gamma x-
6 ray.

7 One involves a -- a canine that sniffs the trailer, and
8 other tools involve them actually drilling into the trailer,
9 into the commodity, you know, in a -- an obscure location as
10 to not alert anybody to them going into -- into the -- the
11 front door, putting a hole in the door.

12 Q. And, to your knowledge, was -- to your knowledge, was a
13 --- and leaving the gamma ray aside, was a canine search done
14 of this truck?

15 A. Yes, there was.

16 Q. To your knowledge, was a -- was this truck drilled?

17 A. Yes, it was.

18 Q. Okay. What do you know about that canine search?

19 MR. TREJO: Objection, foundation.

20 THE COURT: Lay your foundation.

21 (Brief Pause)

22 MS. GANSS: One moment, please.

23 (Off-the-Record Discussion)

24 Q. (By Ms. Ganss) From your knowledge, Customs would do one
25 of these three things. Did you see the canine search?

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1 A. I did not see the canine search.

2 Q. Okay. Did you see this truck drilled?

3 A. I did not see the truck drilled.

4 Q. Okay. Did you see this truck, in any way, or any part of
5 it, after it was drilled?

6 A. I saw the trailer at the -- at the -- the Customs yard
7 there.

8 Q. Okay. At some point, did you take the truck into your
9 custody?

10 A. Yes.

11 Q. Okay. And what happened when you took the truck into
12 your custody?

13 A. After we took the truck, into our custody, we -- we spoke
14 to -- myself and my supervisor went to interview the freight
15 forwarding company.

16 Q. When you took this truck into your custody, where did you
17 take this truck?

18 A. This truck was secured in Customs yard and -- and it was
19 maintained there under surveillance by law enforcement until
20 we -- we moved it.

21 Q. Well, is this customs yard at the port of entry?

22 A. Yes. It is the same port of entry. The -- the trailer
23 was maintained there. It's -- it's a secured open facility
24 with an approximately eight foot chain link fence all the way
25 around it. It's a pretty large facility and there's, at any

1 given time, forty (40) to fifty (50) inspectors working there
2 that maintain surveillance, you know, of -- of the whole
3 property.

4 That particular tractor was backed up against the loading
5 dock, and it had a -- not a guard, but an inspector who sat in
6 the booth and kind of monitored and watched that trailer for
7 that -- for the time that it was in our custody.

8 Q. So, while it is in your custody, what do you do?

9 A. While the trailer is in our custody, myself and my group
10 supervisor went and spoke with the freight forwarding company.

11 MR. TREJO: Objection.

12 MS. GANSS: Well --

13 MR. TREJO: Hearsay.

14 MS. GANSS: He hasn't said ---

15 THE COURT: All right. If -- if he's going to answer
16 what they said to him, it would be hearsay, Counsel. It's not
17 there yet. Please, proceed.

18 MR. TREJO: All right. Yes, Your Honor.

19 Q. (By Ms. Ganss) Now, who did you say you and your
20 supervisor spoke with?

21 A. Like I said, the freight forwarding company and they're
22 responsible.

23 Q. What is a freight forwarding company?

24 A. A -- a freight forwarding company is -- is a -- it's a
25 generic term, but there are specific companies. But the

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1 freight forwarding industry helps to transfer commercial goods
2 from outside the United States to the United States.

3 In this case, it was from Nuevo Laredo, Mexico to the
4 port of Entry in Laredo, Texas. And, from there, it was going
5 to be transferred to a U.S. transportation company to be
6 shipped.

7 Q. So, I'm still unclear. Freight forwarders ---

8 A. The freight forwarding company helps to facilitate the
9 documentary requirements that the company needs to provide in
10 order to -- to enter the shipment, into the United States, as
11 well as the logistics of -- of actually providing a driver
12 that can go -- that can work both in the United States and
13 Mexico to transfer ---

14 Q. What company? What company? I don't understand what
15 you're saying. What company?

16 A. The -- the freight forwarding industry.

17 Q. Well, you said the freight forwarding helps the company.
18 What company?

19 A. Oh, okay. Helps the -- the company that owns the -- the
20 material that is being entered into the United States.

21 Q. Okay. Would -- so, you contacted the freight forwarder?

22 A. Correct.

23 Q. And does the freight forwarder work with -- who does the
24 freight forwarder work with again?

25 A. The freight forwarder works with the -- the company that

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1 is sending the freight across the border. They -- they work
2 both ways.

3 Q. Okay. That was my question.

4 A. They go back and forth, to and from the United States.

5 Q. Okay. So ---

6 A. Their whole job is to make sure that whatever commodity
7 it is gets across the border, as fast as it can, without being
8 stopped for failure to file the correct paperwork.

9 Q. And do you know, then, where -- do you know where this
10 truck was ultimately supposed to go?

11 MR. TREJO: Objection, hearsay.

12 Q. (By Ms. Ganss) Okay. I'm going to show you right now
13 what has been stipulated to as State's Exhibit Number 5. Let
14 me show you this item.

15 (Exhibit shown to witness.)

16 Q. Do you recognize it?

17 A. Yes.

18 Q. What is it?

19 A. The custom -- the customer order sheet from RLS
20 Transportation.

21 Q. All right. What is RLS?

22 A. RLS was the United States -- they were the U.S. carrier
23 that was going to transport the ceramic pottery from Laredo,
24 Texas to South Carolina, to Drive,
25 Campobello, South Carolina.

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1 Q. All right. But, before we make that leap, was RLS
2 dealing with this tractor truck that you had in your custody?

3 A. They were going to if all went according to a -- a free
4 exit. That trailer was going to be dropped at the RLS yard.

5 Q. Okay.

6 A. Prior to us intercepting it.

7 MS. GANSS: Permission to publish to the jury, Your
8 Honor?

9 THE COURT: (Nods affirmatively.) Yes.

10 MS. GANSS: Thank you.

11 Q. (By Ms. Ganss) I'll put up here this RLS document.

12 (State's Exhibit Number 5 on overhead.)

13 Q. Now, what is this? And you just have to press that down
14 to make that pointer work, okay?

15 A. Okay.

16 Q. All right. What does this document tell us?

17 A. At the top, it has the letters of the company, "RLS." In
18 the middle ---

19 THE COURT: You can stand down if it's easier, sir.
20 Just speak loud enough for everybody to hear you, please.

21 A. Okay.

22 (Witness steps down from the witness stand.)

23 Q. Okay. And let me show you, again, how this pointer
24 works. Just press that red button.

25 A. Press this red button here? Okay.

1 Q. Thank you.

2 A. Up there at the top it says, "RLS." That was the -- the
3 transportation company in the U.S. that was going to transfer
4 it from Laredo, Texas north to -- can you go down some more.

5 Q. Tell us what you know. Okay.

6 A. On the bottom, just below here (indicating), it has the
7 address in South Carolina.

8 Q. Oh, I apologize. I'm sorry. Okay.

9 (Portion of the document showed on overhead.)

10 A. This was the third leg of the trip, where it was
11 destined ---

12 Q. Okay.

13 A. --- 310 Boom Town Road (phonetic), which was the location
14 we went to in Laredo where this company was located and spoke
15 to them.

16 They were to receive it there. And then, they were going
17 to take it to Clay and Ceramic Pottery on
18 Drive, in Campobello, South Carolina.

19 Q. All right. Okay. Thank you. You can take your seat.

20 A. Okay.

21 (The witness returned to the witness stand.)

22 Q. How do you know that this document deals with -- well,
23 let's just see here what it says.

24 (Brief Pause)

25 Q. What does this tell us right here (indicating)?

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1 A. That's who RLS is going to be billing for the shipment.

2 Q. Okay. Aurora Garcia (phonetic) or is it Garcia Aurora
3 (phonetic)?

4 A. I'm not sure of the -- the name. I think the actual
5 company is Cargo Masters I want to say.

6 Q. Okay.

7 A. In Monterey, Nuevo -- Nuevo Laredo (phonetic).

8 Q. All right. And what does this section here (indicating)
9 tell us?

10 A. I believe the first leg -- leg one is where the trailer
11 was initially dropped. And that one indicates there that it
12 was in Tonalá (phonetic), and that's Jalisco -- Tonalá is in
13 Jalisco, Mexico (phonetic).

14 Q. Okay. To...?

15 A. It says it's to RLS International Transport on Broom Town
16 Road (phonetic).

17 Q. Broom Town Road? Now, where is this? That was after
18 Mexico and this is Broom Town Road, Laredo, is the port of
19 entry where this truck went through?

20 A. It's a port of entry would be Laredo as well, yes.

21 Q. Okay. All right. And, then, we come down. That's the
22 first leg, from Mexico to Laredo?

23 A. Yes.

24 Q. And, then, what is leg two?

25 A. Leg two -- it's to and from the same person.

1 Q. Okay.

2 A. From our interview with -- my interview with Ms. Senorita
3 Gonzales (phonetic) ---

4 MR. TREJO: Objection.

5 Q. Don't tell us, please. Don't repeat what somebody told
6 you. Just what do you know?

7 A. Okay. I know that that truck was to be transloaded at
8 that location, taken from the ---

9 MR. TREJO: Well, objection, no foundation. How does he
10 know this, Your Honor?

11 THE COURT: Well, he can testify as to what the document
12 shows that's in evidence. But he can't testify anything he
13 doesn't know of, of his own knowledge or what somebody ---

14 Q. (By Ms. Ganss) So, what does this leg here tell you?

15 A. That tells me that leg two is from RLS to RLS.

16 Q. Okay. All right. And what does leg three tell you?

17 A. Leg three indicates that the trailer, from 312 Broom Town,
18 Road, is to be transferred to Clay and Ceramic Pottery at
19 Drive in Campobello, South Carolina.

20 Q. And does this entire document refer to one shipment or
21 one truck?

22 A. It refers to the trailer, the shipment and the trailer.

23 Q. Okay. So, the trailer, you don't mean the -- just for
24 me, someone unfamiliar with trucks. What type of trailer are
25 we talking about, the truck?

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1 A. The fifty-three foot (53') normal trailer you would see
2 behind a tractor on a highway.

3 Q. Okay. Are those 18-wheeler trailers?

4 A. For another term, yes.

5 (Brief Pause)

6 Q. We've seen the RLS. What -- you took this truck into
7 your -- this trailer into your custody. What did you do while
8 it was in your custody?

9 A. While it was in our custody, I interviewed the freight
10 forwarder and I also interviewed the employees at RLS.

11 Q. Okay. And what did you decide to do with this trailer?

12 A. After speaking with the company, we -- I decided to
13 initiate a controlled delivery of the tractor, the contents
14 inside the trailer, using that box trailer, to deliver it from
15 Laredo, Texas to the -- to the ultimate destination of
16 Drive.

17 Q. Okay. And let me back up. When this tractor-trailer
18 came, into the port of entry -- is the port of entry a law
19 enforcement area?

20 A. The port of entry is a secure government facility that is
21 -- has 24-hour security provided by Customs. It's alarmed.
22 The fencing has green mesh on it, so, you cannot see in to see
23 what's inside.

24 Q. And you took this tractor-trailer, in your custody,
25 that's where you took it?

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1 A. The tractor was removed from that yard when we initiated
2 our controlled delivery. It was, then, removed from there by
3 two undercover agents posing as truck drivers and had an
4 escort of approximately three (3) to four (4) vehicles with
5 two men in each unit.

6 Q. Okay.

7 MS. GANSS: Just one moment, please. Your Honor, may we
8 approach?

9 THE COURT: Yes, ma'am.

10 (Whereupon, a bench conference was had with all attorneys
11 present.)

12 Q. (By Ms. Ganss) Agent Ryan, this tractor-trailer that was,
13 in the port of entry, and that you take into your custody for
14 this controlled delivery, at any time, did anyone load
15 anything on it?

16 A. No.

17 Q. At any time, did anyone take anything off of this
18 tractor-trailer?

19 (Brief Pause)

20 A. No.

21 Q. Okay. At any time, did you yourself get at look inside
22 the tractor-trailer?

23 A. By the time I arrived at -- at the port, it was already
24 sealed back up.

25 Q. So, when you say sealed back up, what, to your knowledge,

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1 had been done to the tractor-trailer?

2 A. To my knowledge, when I arrived and the doors were
3 already -- were sealed back up, the trailer had had a full
4 inspection by Customs officers, and the -- the process of
5 seizing the commodity and the trailer, along with whatever
6 else was inside, had already begun. And we started to
7 initiate our end of the investigation.

8 Q. Okay. So, did you ever see any of the pottery -- any
9 pottery in the tractor-trailer?

10 A. No.

11 Q. Did you ever see any marijuana in this tractor-trailer?

12 A. No, I did not.

13 Q. Did you ever open the trailer?

14 A. I did not.

15 Q. Was the trailer locked when you got to it?

16 A. The trailer was closed. But I did not know if there was
17 any locks on it. They -- they don't usually lock it. They
18 put a seal on it, and I don't know if there was a seal at that
19 time.

20 Q. And what do you mean a seal?

21 A. A seal is a -- almost like a zip lock or zip tie made of
22 metal that is a one-time use. It's got a serial number on it,
23 and you place it over a -- a locking mechanism, on the door
24 handle.

25 And that's to ensure that, when you put that seal on

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1 wherever it arrives, they can check it, the -- the manifest or
2 documents to -- to confirm that that seal was on there when it
3 left whatever yard it left. It's kind of a security measure.

4 Q. Okay. And, when the truck was turned over to you, was it
5 ever unsealed?

6 A. No.

7 MS. GANSS: One moment, Your Honor.

8 (Brief Pause)

9 MS. GANSS: No more questions, Agent Ryan. Please,
10 answer anything that Mr. Trejo may have.

11 CROSS EXAMINATION by MR. TREJO:

5:07 P.M.

12 Q. Hello, Special Agent.

13 A. Good Afternoon.

14 Q. All right. So, according to Government Exhibit Number 5,
15 yeah, Aurora Garcia was the owner of this -- the contents of
16 the trailer, correct?

17 A. No. The -- the --

18 Q. That's where it originated from, correct?

19 A. --- the work done -- the work by this company was going
20 to be paid from ---

21 Q. Aurora Garcia?

22 A. Yes.

23 Q. "Bill To," correct?

24 A. Yes.

25 Q. Who do you specifically bill? The owner of the product,

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1 correct?

2 A. Well, this is a service provided by a business.

3 Q. Who owned the trailer according to this (indicating)?

4 Where did the trailer originate?

5 A. The trailer originated in Tonalá.

6 Q. So, Madra Gerreria (phonetic) is the owner?

7 A. That's where it originated. I don't know if they're the
8 owner of the trailer.

9 Q. Well, say the shipment got lost, the ceramics got lost,
10 on the Mexico side, who would have a right to make a claim?

11 A. I don't know on the Mexican side.

12 Q. You don't — you're not familiar with how this works
13 then?

14 A. I'm not familiar with — with Mexican law enforcement and
15 how they make claims.

16 Q. Well, it's not Mexican law enforcement, but you testified
17 about how you were familiar these forms and documents, the
18 transporting of goods and products from and to Mexico. Are —
19 are you not fully familiar with that process, then?

20 A. I'm not familiar with who would make a claim in Mexico,
21 no.

22 Q. Okay. And, again, I'll ask you, considering this
23 document, who is the owner of the products in Mexico?

24 A. According to my interview with ---

25 Q. No, according to the document.

1 A. Okay. By the document, I do not know who the owner of
2 the product is in Mexico.

3 Q. Okay. All right. Leg number one though, Jalisco
4 (phonetic), you testified it was Jalisco, J.L. Are you
5 familiar with that abbreviation?

6 A. Yes.

7 Q. "JL" stands for Jalisco, correct?

8 A. Yes.

9 Q. Do you what the initials "JC" stand for?

10 A. No, I do not.

11 Q. Okay. Are you aware where Tonalá (phonetic) is located?

12 A. Jalisco.

13 Q. Okay. Are you saying "JC" is Jalisco, when you just
14 testified JR is Jalisco?

15 A. I do not know the -- the abbreviation of JC.

16 Q. Okay. Are you sure that Tonalá is Jalisco?

17 A. I am certain from the documents that they -- the company
18 provided.

19 Q. Now, did you contact anyone there in Tonalá?

20 A. No, I did not.

21 Q. Did you conduct any investigation whatsoever in Tonalá?

22 A. No, I did not.

23 Q. Now, you're aware that ICE and the DEA and other branches
24 of the Department of Justice have satellite offices in
25 Jalisco, Mexico, correct?

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1 A. I believe ICE has an officer there. I'm not sure about
2 DHEC.

3 Q. All right. But ICE has an office there. ICE has offices
4 literally all over the world?

5 A. Yes, correct.

6 Q. And in particular ICE has a number of offices
7 throughout Mexico, correct?

8 A. They do have offices in Mexico.

9 Q. And at times the special agents located here in the
10 United States contact the special agents located in the branch
11 offices or the affiliate offices in Mexico for assistance,
12 correct?

13 A. Yes.

14 Q. And they contact them for assistance in -- in helping
15 them conduct a variety of means of investigative techniques,
16 correct?

17 A. Yes, sir.

18 Q. And the investigative techniques that are available to
19 ICE here, in the United States; include conducting one-party
20 consent recorded calls, correct?

21 A. Yes.

22 Q. Also, undercover purchases of contraband, correct?

23 A. Yes.

24 Q. The use of confidential informants, correct?

25 A. Correct.

1 Q. The use of a trap and trace devices on telephones?

2 A. With the court orders?

3 Q. Yes.

4 A. Correct.

5 Q. Trap and trace, that's a means of -- of determining each
6 and every phone call that a particular, for example,
7 residential home phone makes out, correct?

8 A. Yes, sir.

9 Q. As well as -- as obtaining the number for each and every
10 call that the phone, the residential phone, receives, correct?

11 A. According to the wire -- or the recorder. I'm sorry.

12 Q. Yeah, but that's -- that's basically trap and trace?

13 A. Yes, yes.

14 Q. Outgoing and incoming are trapped and traced?

15 A. Yes.

16 Q. And also conducting surveillance, correct?

17 A. Correct.

18 Q. And you're familiar with pole cameras that are used at
19 times, correct?

20 A. Yes, I am.

21 Q. And a pole cameras are actually cameras that are located
22 outside a business or a residence and are placed literally on
23 top of a pole or in a tree and face down directed toward a
24 particular location, correct?

25 A. Yes.

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1 Q. And they operate twenty-four, seven (24/7)?

2 A. Correct.

3 Q. Twenty-four, seven (24/7) meaning twenty-four hours a
4 day, seven days a week, correct?

5 A. Yes, sir.

6 Q. And they're played back on a special machine, correct? I
7 mean, they don't play back on a typical DVD player?

8 A. I don't know how the -- the technical part works. But I
9 know you have a tape of three or four hours at a time.

10 Q. All right. But you -- you got those types of
11 investigative techniques. And you've got GPS devices,
12 correct?

13 A. There are some.

14 Q. And surveillance -- and, when we're talking about
15 surveillance, we're talking about not just very looking at a
16 residence, but literally having the ability to surveille an
17 individual, follow an individual for a day or two, correct?

18 A. Yes.

19 Q. And, in this particular case -- well, strike that for
20 now. You also can conduct wire taps with the appropriate
21 court order?

22 A. Yes, sir.

23 Q. Financial analysis?

24 A. Yes, sir.

25 Q. A financial analysis is a means of investigating a

1 particular individual by researching their financial assets
2 and comparing their assets to their income, right?

3 A. Correct.

4 Q. And, then, you're able to determine whether or not a
5 person is living outside of their means, correct?

6 A. Yes, sir.

7 Q. For example, a person who is making millions of dollars
8 off of drugs, who -- who only claims that he's five or ten
9 thousand dollars or twenty thousand dollars a year in income,
10 and has a million dollar home, that would be somebody -- that
11 would be some red flags in your expert opinion, right?

12 A. Yes, that could be some.

13 Q. Because that person would be living outside of their
14 means, correct?

15 A. Yes, sir.

16 Q. Okay. Subpoena power, you also have the use of
17 administrative subpoena, correct?

18 A. Yes, sir.

19 Q. And a subpoena is to go out and obtain information and
20 records and documents from a variety of agencies, correct?

21 A. Yes, sir.

22 Q. And separate and apart from administrative subpoenas, you
23 also have the ability to seek a court order to obtain other
24 information that you just can't get with an administrative
25 subpoena, correct?

- 1 A. Correct.
- 2 Q. And you can -- you can -- you can provide undercover
3 agents to work, in a particular case, correct?
- 4 A. Yes.
- 5 Q. Now, in this particular case, the tractor-trailer was
6 seized on November the 11th?
- 7 A. The trailer cargo was seized on November 11th, yes.
- 8 Q. Okay. And the trailer, just to give us an example, a
9 rough example of the size and magnitude of this particular
10 trailer, would it be fair to say, if we -- we looked at that
11 wall behind you ---
- 12 A. Right.
- 13 Q. --- and the size of the trailer was -- would practically
14 extend to the exit doors over here (indicating)?
- 15 A. Ummm...
- 16 Q. Roughly?
- 17 A. I don't know how big the courtroom is, but it's fifty-
18 three feet (53') long.
- 19 Q. Approximately that?
- 20 A. Maybe just a few feet before the -- the door.
- 21 Q. Okay.
- 22 A. Maybe to where you are now.
- 23 Q. Okay. So, right here (indicating)?
- 24 A. Yeah.
- 25 Q. All right. And it was about how many feet wide?

- 1 A. Seven (7) or eight -- eight (8) feet wide.
- 2 Q. Okay. Maybe a little bit wider than this right here
- 3 (indicating), right in there somewhere, huh?
- 4 A. Yeah, more or less.
- 5 Q. All right. Now, are those as big as they get, those
- 6 trailers?
- 7 A. I think there are a few a little bit bigger, but they're
- 8 not very common.
- 9 Q. All right.
- 10 A. These -- these are pretty much the biggest trailer you
- 11 can get.
- 12 Q. All right. Okay. And, in this particular case, once the
- 13 decision was made to travel from Laredo, Texas ---
- 14 A. Yes, sir.
- 15 Q. --- to Spartanburg, there were approximately ten (10)
- 16 agents that accompanied the trailer from Texas?
- 17 A. Correct.
- 18 Q. Okay. So, there were four (4) vehicles with two (2)
- 19 agents in each vehicle, plus, the two (2) that were driving
- 20 the trailer?
- 21 A. Yes.
- 22 Q. So, you actually had ten (10). So, there was
- 23 substantial man power involved?
- 24 A. Yes, sir.
- 25 Q. Because of all the agents that came up with the trailer

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1 were men?

2 A. I don't know if they were all male or if there were
3 females involved as well. I did not make the trip on this
4 delivery, so, I don't know.

5 Q. Oh, you didn't come along?

6 A. I didn't come on this particular delivery, so, I don't
7 know.

8 Q. So, then -- let's -- let's -- let's stop for a moment.
9 November 11th, what time was the seizure made roughly?

10 A. Approximately 1:30, two o'clock (2:00).

11 Q. In the afternoon?

12 A. Yeah, in the afternoon.

13 Q. Okay. So, you had half of the day on November the 11th,
14 and you have all the 12th and all the 13th and all the 14th, all
15 the 15th, and half of the day on the 16th?

16 A. Yes.

17 Q. So, roughly around five (5) days or so, give or take half
18 a day, right?

19 A. Correct.

20 Q. And during -- and during those five days or so, ICE and
21 other law enforcement agencies had the opportunity to conduct
22 whatever additional investigative techniques that it desired
23 to concerning Wilbur Summers, correct?

24 A. Yes.

25 MR. TREJO: Thank you, sir. That's all I have.

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1 MS. GANSS: No more questions for this witness.

2 THE COURT: Thank you, sir. You may stand down, sir.

3 (The witness stepped down from the witness stand at 5:19
4 p.m.)

5 MS. GANSS: We would request that Agent Ryan be excused.

6 MR. TREJO: No objection, Your Honor.

7 THE COURT: Thank you for coming, sir. You may be
8 excused at this time.

9 THE WITNESS: Thank you, Your Honor.

10 (Whereupon, the witness was excused.)

11 THE COURT: All right. Counsel, I think we'll go ahead
12 and recess for the afternoon before we start another witness.
13 It's about twenty (20) after 5:00 by the courtroom clock.

14 Mr. Foreman, ladies and gentlemen of the jury, we're
15 going to go ahead and recess for the evening. I would remind
16 you, as you leave, not to discuss the case among yourselves or
17 with anybody else that you might see on the overnight recess.

18 If they ask you, you know, what you're involved in, you
19 can tell them you're involved in a drug case, and that's about
20 it. Don't talk to anybody about the case.

21 If there should be any media coverage of this trial,
22 please, do not read, listen to, or watch any media account of
23 this trial. It's very important for you to decide the case
24 based on the sworn testimony and evidence that comes in, not
25 from any other source.

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1 Again, if someone wanted to save it for you, until after
2 the trial, that's fine. If I should find out, in the morning,
3 there has been some media coverage of this trial, I may very
4 well ask you, if you've read, listened to, or watched that
5 media account. And, if you have to answer that you have, it's
6 going to cause us a problem in the case.

7 So, please, again, do not read, listen to, or watch any
8 media account of it until the trial is over. All right.
9 Please, have a pleasant night tonight. I'm going to ask you
10 to be back in the jury room in the morning.

11 I've got a matter that I've got to take up in the
12 morning. So, I'm going to ask you to come back in about 9:45.
13 That will keep you sitting the least time possible while I
14 take up the other matter in the morning. Again, have a
15 pleasant night and I'll see you in the morning at 9:45.

16 (The jury was excused for the day and exited the
17 courtroom at 5:21 p.m.)

18 THE COURT: Anything out of the presence of the jury
19 from either side?

20 (Both the State and Defense Counsel shook their heads in
21 the negative.)

22 THE COURT: I have a plea that I -- I promised to take
23 up tomorrow with -- with an adjoining county and another
24 county. They're coming here and we're going to finish that
25 up. So, it'll be about at least 9:45 before we ever get

1 started thereabouts. So, you need not be here until then.
2 All right, except the court reporter. We need you at 9:30.
3 Okay.

4 MR. BULSA: May I approach on something?

5 THE COURT: Yes, sir.

6 MR. TREJO: May we approach too?

7 MR. BULSA: No, this is on another matter.

8 (Off-the-Record Comments)

9 (Court adjourned for the day at 5:23 p.m.)

10 (Other matters were heard beginning at 9:59 a.m.)

11 (The Wilbur Summers' trial reconvened on November 15,
12 2007 at 10:41 a.m.)

13 BAILIFF: All rise.

14 THE COURT: Keep your seats, please.

15 MS. GANSS: Your Honor, may we approach?

16 THE COURT: Yes, ma'am.

17 MS. GANSS: Thank you.

18 (Whereupon, a bench conference was had with all attorneys
19 present.)

20 (Off-the-Record Discussion)

21 (State's Exhibits Numbers 28 through 34 were marked for
22 identification and admitted into evidence by stipulation of
23 the parties.)

24 THE COURT: All right. Let's bring the jury in.

25 (Bailiff stepped out to summon the jury.)

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1 (The jury entered the courtroom at 10:43 a.m.)

2 THE COURT: Good morning, Mr. Foreman, ladies and
3 gentlemen of the jury. I'll have to start off, as I have been
4 with you all, all the way through this trial thus far,
5 apologizing for the delay in keeping you back in the jury room
6 this long.

7 We had agreed to take up some matters this morning, and
8 that was the only time that everybody could be available in
9 other cases. And we did those and they took more time than I
10 thought, but they were very important. And, I, again,
11 appreciate your patience.

12 We're ready now to resume with the trial. Is Counsel
13 ready to proceed?

14 MS. GANSS: Yes, sir, Your Honor.

15 THE COURT: Please, call your next witness.

16 MS. GANSS: Thank you. The State calls to the stand
17 Agent Robert Yarborough.

18 (Agent Yarborough summoned and steps forward to be
19 sworn.)

20 (Whereupon,

21 AGENT ROBERT YARBOROUGH

22 having been first duly sworn, testified as follows:)

23 DIRECT EXAMINATION by MS. GANSS: 10:44 A.M.

24 Q. Agent Yarborough, please, introduce yourself to the jury.

25 A. My name is Robert Yarborough. I'm a senior special agent

1 with Immigration Customs Enforcement in Eagle Pass, Texas.

2 Q. And, please, briefly tell us your background, education,
3 and training?

4 A. For the past six and a half (6 ½) years, I've been a
5 special agent, in the United States Government, for the
6 Department of Homeland Security under Immigration Customs
7 Enforcement.

8 Prior to the inception of that agency, the division, I
9 worked as a special agent for the United States Custom
10 Service. For approximately six and a half (6 ½) years I've
11 been spent testifying and developing cases for federal court.

12 Prior to that, I spent three plus years as a canine
13 enforcement officer, for the United States Custom Service,
14 serving on the Texas/Mexican border, utilizing a drug dog for
15 the -- to find drugs.

16 Prior to my three plus years as a canine officer, I spent
17 four years with the naval -- the navy -- the United States
18 Naval Service, and I was a technological technician. And my
19 duties were to intercept and collect intelligence of narcotic
20 trafficking in Central and South America.

21 Q. In your current position, as a special agent with ICE,
22 what are your duties now?

23 A. My duties now are to gather and investigate crimes that
24 are prosecuted, under federal guidelines through my agency;
25 stemming from inter -- international narcotic smuggling, money

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1 laundering, alien smuggling, child pornography, commercial
2 fraud, and strategic investigations.

3 Q. Over the course, of your six and a half years with ICE,
4 and before that as a special agent with Customs and three
5 years as a canine ---

6 MR. TREJO: Objection to the form of the -- to the form
7 of the question, just recapping testimony, Your Honor.

8 THE COURT: Go ahead. You may proceed.

9 MS. GANSS: Thank you, Your Honor.

10 Q. Over the course of all your experience, how many drug
11 cases have you made?

12 A. Several hundred.

13 Q. Okay. How many of those drug cases have you testified in
14 a court?

15 A. Numerous. All -- almost all of them.

16 Q. Okay. And tell us exactly what you do when you say you
17 investigate drug trafficking.

18 A. Either you develop through sources of information or you
19 develop a case through databases, other agencies that we have
20 liaisons with, the FBI or DEA (phonetic), and through this
21 information, we set up surveillance.

22 We pull database records, grand jury subpoenas for bank
23 accounts. With all this information, we -- we gather evidence
24 to proceed to either see if there's a crime and basically the
25 narcotic smuggling.

PAMELA FAUCETTE, CVR, 864-574-9534 or 336-260-2864

1 Through the sources a lot of times we lock down or we'll
2 arrest people for possession or possession with intent to
3 distribute, transportation of narcotics come into the country
4 from Mexico, because along the Texas/Mexico border, all the
5 narcotic investigations I deal with are from Mexico from
6 Texas.

7 Q. Okay. Typically, I guess, do you ever do any
8 infiltration or undercover buys?

9 A. Yes. For the last approximately four (4) years I've
10 worked in an undercover capacity as a commercial truck driver.
11 A lot of times I'm either introduced, through a source of
12 information or through a cartel or an organization to help
13 facilitate the narcotic smuggling.

14 Q. Okay. Do you do controlled deliveries?

15 A. Yes.

16 Q. What is a controlled delivery?

17 A. A controlled delivery is when we intercept -- I said "we"
18 as an agency, ICE, intercepts a load of narcotics. The -- the
19 amounts vary, depending on what you intercept, what you seize.

20 At that point, a controlled delivery is when we take the
21 amount of narcotics and we take it from point "A" where we
22 intercepted it to its end destination to where it was intended
23 to go.

24 At that point, and throughout the entire journey or trip,
25 the narcotics are kept under constant surveillance by law

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1 enforcement officials.

2 Q. Are you familiar with how items are packaged and sealed
3 in these deliveries?

4 A. Yes.

5 Q. How is it that you know how items are sealed, or
6 narcotics in particular, are sealed through these deliveries?

7 MR. TREJO: Objection, overly broad and therefore
8 renders -- renders it irrelevant as to this case.

9 THE COURT: Overruled. Proceed.

10 A. I've been involved, with a number of organizations in the
11 past, or I've dealt with a number of cases with the packaging
12 of narcotics, from marijuana, cocaine, and heroin.

13 A lot of times, smaller amounts in vehicles will be
14 packaged in a way that keeps from -- either people detecting
15 or canines detecting the smell or sight of the marijuana or
16 other narcotics.

17 I've seen them use plastic wrap, heat sealed material,
18 masking agents such as mustard, coffee grinds, dryer sheets,
19 brown shipping tape in all manners of packaging to pack the
20 marijuana in a way, so, they can be transported from one point
21 to another.

22 Q. Are you familiar with the cost of narcotics?

23 A. Yes.

24 Q. How so?

25 A. I've been involved, with the cost of narcotics, as far as

PAMELA FAUCETTE, CVR, 864-574-9534 or 336-260-2864

1 distribution, and as -- and as an undercover manner, as well
2 as the cost of narcotic in particular places.

3 We developed the cost of narcotics on as -- it's a
4 constantly rotating number, depending the supply and demand,
5 depending on where you're buying narcotic, whether it be in
6 Mexico, on the Texas/Mexican border, or other southern border
7 of the United States, as well as up in the interior of the
8 United States such as Chicago, South Carolina, and New York
9 City.

10 Q. When you were working with your canine, what did you
11 learn from that in terms of searching and locating drugs and
12 narcotics?

13 MR. TREJO: Objection, irrelevant.

14 THE COURT: Rephrase, Counsel.

15 Q. (By Ms. Ganss) Have you testified in court before about
16 investigations you participated in with your canine?

17 A. Yes.

18 Q. Have you testified in court before about controlled
19 deliveries you've participated in?

20 A. Yes.

21 Q. Have you testified in court before, as an expert in this
22 international trafficking, if you would, of narcotics?

23 A. Yes.

24 Q. Have you testified in a South Carolina Court as an expert
25 in international trafficking of narcotics?

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1 MR. TREJO: Your Honor, that's -- that's irrelevant,
2 unless it's other cases outside of this one.

3 THE COURT: Well, I would agree with that. You want to
4 rephrase it, Counsel?

5 Q. (By Ms. Ganss) Just in -- well, let me back up. So, have
6 you testified or been qualified as an expert, in a court of
7 law, about international drug trafficking?

8 A. Yes.

9 Q. How many times?

10 A. A handful.

11 MS. GANSS: At this time, Your Honor, the State would
12 like to have Agent Yarbrough qualified as an -- liked to have
13 him as an expert in the area of trafficking in narcotics,
14 international drug trafficking.

15 MR. TREJO: Well, Your Honor, I don't think that's an
16 appropriate decision to be made at this time. Depending upon
17 the opinions that are sought from this witness, an appropriate
18 objection can be made.

19 THE COURT: Well, I -- I think you need to -- it's
20 pretty broad what you're asking for him to be qualified as an
21 expert in. If you want to ask him some additional questions,
22 to make that determination, or if you want to make it more
23 specific on how you want him qualified as an expert, in what
24 -- what areas, I'll -- you know, I'll allow you to go there.

25 MS. GANSS: All right. Thank you, Your Honor.

1 Q. (By Ms. Ganss) Let's leave this, then, for the moment,
2 and talk about the incident in question. Where were you
3 working back on November -- in the month of November of two
4 thousand, five (2005)?

5 A Eagle Pass, Texas.

6 Q. Okay. And what were your duties in November of two
7 thousand and five (2005)?

8 A. In reference to this case, I was called by agents out of
9 Laredo, Texas that they had intercepted a commercial vehicle
10 that was believed to have marijuana. And I was called and
11 contacted to work in capacity as an undercover truck driver.

12 Q. And, so, what did you do?

13 A. After being called and contacted, I responded to Laredo,
14 Texas, hooked up my tractor-trailer -- my tractor to the
15 trailer that had clay pottery and marijuana and proceeded to
16 drive to South Carolina.

17 Q. Why did you drive to South Carolina?

18 A. The shipment of clay pottery and marijuana was destined
19 for South Carolina, for Campobello, South Carolina.

20 Q. Okay. I'm going to show you what's been stipulated to
21 and marked as State's Exhibit Number 28.

22 (Witness shown exhibit.)

23 Q. Do you recognize that exhibit?

24 A. Yes, ma'am.

25 Q. What is it?

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1 A. A straight bill of lading.

2 Q. And what is a bill of lading?

3 A. A bill of lading represents what's on the commercial
4 trailer.

5 Q. Okay.

6 A. And not only does it state what you're hauling, in a
7 commercial trailer, but where, you know, it's going.

8 MS. GANSS: Permission to publish to the jury, Your
9 Honor.

10 THE COURT: You may publish.

11 Q. And, if you would, just, please, press that button, just
12 so, we can see it.

13 (State's Exhibit Number 28 on overhead.)

14 Q. Where does this tell you that information that you told
15 us about? Where's it's coming from or it's going to?

16 A. Well, it's coming out of Laredo, Texas. And the signee
17 or ship to was Campobello, South Carolina.

18 Q. Okay. And we notice some handwriting over here
19 (indicating) to the right ---

20 A. Correct.

21 Q. --- of the Clay and Ceramic Pottery. If you could,
22 explain that to the jury.

23 A. Once I arrived in -- in the South Carolina area, I was
24 instructed that the location to drop the trailer had been
25 changed. And I was instructed to this address,

1 9, in "I" "comma (,)" South Carolina; that was my abbreviation
2 for Inman, South Carolina.

3 Q. All right. And did you also go to ?

4 A. Yes, I did.

5 Q. And what is that?

6 A. It is a establishment, it's a restaurant. The name of
7 the restaurant is Nacho's Restaurant.

8 Q. Okay. Thank you. Let me show you -- what happened once
9 you arrived at Nacho's Restaurant with the shipment?

10 A. Once I arrived, on that piece of paper, there was a
11 contact. I went into the establishment, into Nacho's
12 Restaurant, and I asked for Mr. Summers. At which time, I was
13 told that he did not work there.

14 MR. TREJO: Objection, hearsay.

15 THE COURT: All right. I'm not sure what his response
16 would be, but I sustain the objection. I'm not sure what he's
17 going to respond.

18 Q. What happened when you arrived? Who arrived to -- who
19 did you meet with to deliver the shipment?

20 A. Ultimately, I was met by Mr. Summers at that location,
21

22 Q. Okay. And what happened when -- would you, please, point
23 out Mr. Summers to the jury?

24 A. Sure. Mr. Summers is over there (indicating), the young
25 man in his twenties with the black hair and medium complexion

1 skin.

2 Q. Okay.

3 (Mr. Summers stands.)

4 A. The man standing up right now.

5 Q. What happened when you met Mr. Summers that day?

6 A. I told him I had a shipment that was -- had his name on
7 it, on a bill of lading, and I needed to drop the shipment
8 off, to deliver it to him.

9 Q. Now, when you dropped off a shipment, did -- what did Mr.
10 Wilbur do when he received that shipment -- Mr. Summers? I
11 apologize.

12 A. Mr. Summers, I asked him where he wanted to drop the
13 shipment, and he told me, at that point in time, that we were
14 going to drop the shipment to the back side of Nacho's
15 Restaurant.

16 Q. Did he sign for the shipment?

17 A. Yes, he did.

18 Q. Okay. The -- is that the signature he gave you
19 (indicating)?

20 A. Right there (indicating) I had him sign for the shipment.

21 Q. So, what happened after he signed for the shipment?

22 A. After he signed for the shipment, he instructed me to
23 pull the commercial vehicle around to the back side to
24 offload. At which time, he started to unload the merchandise
25 from the tractor-trailer into the rental vehicle that he was

1 driving.

2 Q. Okay. And were you there the entire time while the items
3 were being unloaded?

4 A. Nearly the entire time, yes.

5 Q. Okay. I'm going to show you some pictures and have you
6 tell the jury what they are.

7 (State's Exhibit 16 shown on overhead.)

8 Q. What's this?

9 A. This is the trailer and tractor that I arrived in South
10 Carolina from Laredo, Texas in.

11 Q. Okay. What is this?

12 (State's Exhibit 18 shown on overhead.)

13 A. This here is the Mexican license plate that was attached
14 to the commercial trailer.

15 Q. Okay.

16 (State's Exhibit 9 shown on overhead.)

17 Q. And to get a feel for where this is. This the front of
18 eighty fifty — what is picture?

19 A. This is Nacho's Restaurant in Inman, South Carolina,
20 where I arrived with the shipment.

21 THE COURT: Counsel, I'm going to get you, if you don't
22 mind, to refer to these by exhibit number to start, so, that
23 the record, you know, will reflect that.

24 MS. GANSS: I apologize for that, Your Honor. That was
25 State's Exhibit Number 9, and the truck that he identified was

1 State's Exhibit Number 16. And the license plate was State's
2 Exhibit Number 18.

3 Q. (By Ms. Ganss) I'm going to show you what's been marked
4 as State's Exhibit Number 14.

5 (State's Exhibit 14 shown on overhead.)

6 Q. Would you, please, describe for the jury what this is?

7 A. This photo here represents the area where I backed up the
8 18-wheeler, behind Nacho's Restaurant, and it's just the area
9 that we unloaded the clay pottery off of.

10 Q. And that is just another...?

11 (State's Exhibit 13 shown on overhead.)

12 A. This photo is an additional shot, from a different angle,
13 the back side of Nacho's Restaurant and the 18-wheeler and
14 trailer that was holding the clay pottery and marijuana.

15 THE COURT: Exhibit Number, Counsel?

16 MS. GANSS: And that was State's Exhibit Number 13.

17 Q. (By Ms. Ganss) And I'll show you --

18 (State's Exhibit shown on overhead.)

19 Q. When you arrived and the Defendant arrived, what was his
20 demeanor?

21 A. To me, Mr. Summers was excited to receive the shipment.

22 Q. Okay. And I needed to ask you, what day did you arrive
23 to deliver this shipment? Do you remember; do you recall?

24 A. The day that we unloaded the 18-wheeler was on November
25 16th, two thousand, five (2005).

1 Q. Okay. How long had you been making this trek from
2 Laredo, Texas to Spartanburg, South Carolina?

3 A. It took me approximately two (2) days ---

4 Q. Okay.

5 A. --- to drive it.

6 Q. All right. Did you do all the driving by yourself?

7 A. No, ma'am. I had an additional agent that is a certified
8 commercial driver. We took turns back and forth to haul the
9 rig up here.

10 Q. And, when you made this drive, was it just you and the
11 other agent?

12 A. No, ma'am. There were several other federal agents from
13 Laredo, Texas; that were escorting the tractor-trailer. They
14 were driving smaller vehicles.

15 Q. Okay. Was this vehicle secured at all times?

16 A. Yes, ma'am. We had constant surveillance as to -- with
17 myself and the other federal agent that was the driver, as
18 well as other agents that were following us in a regular four-
19 wheel vehicles.

20 And we also, at the point we stopped overnight, on the
21 journey, we had other federal agents watch the vehicle
22 constantly overnight while we -- while we rested.

23 Q. Now, when you're driving this vehicle, up to South
24 Carolina, did you stop anywhere along the way?

25 A. Sure, for gas.

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1 Q. Did you have to make any other stops? Do trucks have to
2 make any stops on the road?

3 A. Yes. We had to -- through the journey, I went through a
4 number of scale houses, commercial vehicle scale houses. At
5 which point in time, highway patrol, in the individual states,
6 check the vehicles for their weight to make sure they're in
7 compliance within DOT measures, as well as for any other
8 outstanding paperwork and logs which they need to inspect.

9 Q. And was the weight of this truck in compliance?

10 A. No, it was not. The weight of the vehicle was
11 approximately three thousand (3,000) pounds -

12 MR. TREJO: Objection. It's irrelevant.

13 THE COURT: Well, what's the relevancy of this? Where
14 are you going with it?

15 MS. GANSS: It's going to go -- it's the State's
16 position that there was more in this truck than just a number
17 of pots, the additional weight of the marijuana.

18 THE COURT: Well, I'll allow it. Go ahead.

19 MS. GANSS: Thank you.

20 Q. (By Ms. Ganss) Okay. Did you share that concern with the
21 Defendant, the weight of the truck, when you arrived?

22 A. I believe, when I asked Mr. Summers ---

23 MR. TREJO: Objection. That's irrelevant.

24 THE COURT: Overruled. You may ask.

25 Q. (By Ms. Ganss) Did you share information about the weight

1 of the truck with the Defendant?

2 A. Yes, I did. I told him that we were overweight on the
3 vehicle.

4 Q. And what was -- did he have any reaction or response?

5 A. He seemed genuinely excited.

6 Q. Okay. Right now, what I would like to do -- when you do
7 a controlled delivery, is it recorded in any fashion, the
8 delivery? Were you wired?

9 A. I was wired, once I met Mr. Summers at Nacho's
10 Restaurant, yes.

11 Q. And, please, tell the jury how were you wired?

12 A. With an audio and video camera.

13 Q. Okay. I'd like to show you what's been marked State's
14 Exhibits 1, 2, 3, and 4. Do you know what they are?

15 (Exhibits shown to witness.)

16 A. Those are disks that represent the audio and video from
17 the wire that I was wearing.

18 Q. Okay. And have you viewed these disks?

19 A. Yes, I have.

20 MS. GANSS: Okay. At this time, Your Honor, we would
21 like to publish these to the jury.

22 THE COURT: They have been admitted. You may publish,
23 yes, ma'am.

24 MS. GANSS: Thank you.

25 Q. (By Ms. Ganss) Can you tell us the starting point of

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1 this video is going be? Is it at Nacho's?

2 A. Yes, it is.

3 (Brief pause while projector set up.)

4 (Video and audio began playing at 11:03 a.m.)

5 MR. TREJO: Your Honor, can we pause it and approach the
6 bench?

7 THE COURT: Pause it, please.

8 (The video was stopped at 11:14 a.m. and a bench
9 conference was had with all attorneys present except Mr.
10 Bulsa.)

11 (The audio was cut off and the video began playing at
12 11:15 a.m.)

13 Q. Please, tell the jury where this video is located on you,
14 the camera?

15 A. On my chest.

16 Q. On your chest? And, if you would, where you were when
17 that video was that they were watching?

18 A. Inside Nacho's Restaurant.

19 Q. Okay. And who was your video on and who you were talking
20 to? Who is that person?

21 A. Nacho.

22 Q. Okay. And now where are you?

23 A. Going back to the 18-wheeler at this point.

24 Q. Okay.

25 (Video continues playing.)

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1 Q. And tell the jury, please, while they're watching this,
2 what time of day this is occurring?

3 A. Before lunch.

4 Q. Thank you.

5 (Video playing with audio again at 11:19 a.m.)

6 (Video concluded at 11:34 a.m. and video number two began
7 at 11:36 a.m.)

8 MR. TREJO: Your Honor, again ---

9 MS. GANSS: Your Honor, may we approach?

10 (Video number 2 stopped at 11:48 a.m.)

11 THE COURT: Yes, ma'am.

12 (Whereupon, a bench conference was had with all attorneys
13 present.)

14 THE COURT: Mr. Foreman, ladies and gentlemen of the
15 jury, there's a matter I need to take up with counsel out of
16 your presence at this time. I'll ask you to retire to the
17 jury room. You may refresh yourselves during this break,
18 please. Thank you.

19 (The jury exited the courtroom at 11:49 a.m.)

20 THE COURT: All right. Counsel, let's address the issue
21 Defense Counsel has raised concerning the State -- the CDs are
22 already into evidence. They were stipulated and put in -- put
23 into evidence.

24 So, they're already into evidence. The Court allowed the
25 State to publish the contents of the CDs. Defense Counsel,

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1 then, while they were being played, asked to approach --
2 approach the bench and discuss some of the statements that
3 were being made on there that they were objecting to some of
4 the statements being made by the agents and officers that are
5 State's witnesses who were involved in delivering and being
6 involved in the investigation of the marijuana in this case.

7 And his objection was that some of these conversations
8 that occurred, before the actual delivery was made to the
9 Defendant, before the Defendant was even involved in it, some
10 of that was self serving and conversations back and forth
11 between the agents and those investigating.

12 And some of that could be self serving and -- and it's
13 not relevant to the case and shouldn't come in and would be
14 prejudicial to the Defendant.

15 The State agreed not to -- to include it and to go ahead
16 and mute it, as to the sound portions, while that was going
17 on. Then, the State cut the -- put the video -- put the sound
18 back on the video, once it got to the fact that the Defendant
19 was there and participating.

20 And, now, the State -- I mean, the Defense objects to the
21 conversation that was going on, or planned conversation
22 between the Defendant and other people who were there and
23 objects to that, saying first of all, it's hearsay what
24 somebody else may have said. And I don't agree with that.
25 And I think that's clearly erroneous.

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1 I think conversations by the Defendant, with these other
2 people, and with him present and participating in the
3 conversations himself, they are not hearsay, because he was
4 there.

5 And he was present and he was engaged in the
6 conversation, along with the investigating officer, who is
7 testifying here. They were all present. And, so, it's
8 clearly not hearsay.

9 And now, there are other objections which can be raised,
10 and I'm willing to listen to any other objections, but I don't
11 see a conversation, between the Defendant and other people who
12 were there, that he was working with, or whatever their
13 relationship was, whether they work for him there at the
14 restaurant or whether they just worked for him period or he
15 was just involved with them and knew them. Or they were going
16 to be involved in unloading and transporting the -- the
17 ceramic goods.

18 Then -- and that was done in the presence of the agent.
19 I don't see that that is hearsay at all. And those are
20 statements made in -- in the presence of the Defendant. And
21 he was engaged in those conversations. So, I don't see it as
22 hearsay.

23 If you have another basis, for objecting to it, I'm
24 willing to listen to you. The objection that was made the
25 main concern was that, first of all, these are co-

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1 conspirators.

2 This is the first the Court has heard about the --
3 anybody else on the tape being co-conspirators. I know
4 nothing about that. None of that has been broached with the
5 Court prior to just now.

6 And so, I don't know of any -- any questions concerning
7 whether these are co-conspirators or not. So, you'll have to
8 inform the Court about that. I don't know.

9 I would -- then, the question is as to being a Spanish
10 speaking person on the jury. Now, I don't know how the
11 Defense knows that he's a Spanish speaking person unless
12 they've had some conversation with him.

13 I don't know how they know he's a Spanish speaking
14 person. Maybe you can tell me that, Counsel. How do you know
15 he's a Spanish speaking person?

16 MR. TREJO: I -- I don't know that for a fact, Your
17 Honor. I don't know Mr. Garcia's background --

18 THE COURT: You represented it to the Court that he was.

19 MR. TREJO: Right. He's an Hispanic individual, Mr.
20 Garcia. He appears to me to be of Hispanic origin. And --

21 THE COURT: So?

22 MR. TREJO: --- and -- well, most of the Hispanics that
23 I know, Your Honor, speak some Spanish if not fluent in
24 Spanish.

25 In that regard, my concern, to protect my client's

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1 rights, perhaps one way of dealing with it is to have the
2 Court inquire of the juror to see if, in fact, he does speak
3 Spanish. If he does not speak Spanish, then, the issue
4 becomes moot.

5 THE COURT: Well, the other concern was with Counsel
6 that, if he speaks Spanish, and understands Spanish well
7 enough that he may interpret these conversations and he may
8 interpret them for the balance of the jury. And the objection
9 was made as to that.

10 I could instruct him and inquire of him whether he speaks
11 Spanish, and if so, instruct him not to discuss what might be
12 said in Spanish or interpret for the jury.

13 MR. TREJO: But, you know, Your Honor, realistically, in
14 this day and age, Caucasians can speak Spanish, can speak
15 Spanish quite fluently. There could be a number of other
16 individuals on this jury that speak Spanish.

17 THE COURT: Fine. Then, they can interpret it for
18 themselves, Counsel. What's wrong with that?

19 MR. TREJO: That's what is inappropriate. That's why,
20 when a witness testifies, in Spanish, and a court interpreter
21 translates the Spanish language into English for the jury, the
22 jury is instructed to rely upon the Court's interpreter's
23 interpretation and not their own interpretation.

24 THE COURT: Well, if -- if those persons on the jury
25 cannot speak or understand, then, they can't speak or

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1 understand Spanish. If they can, well enough to -- to
2 understand it, and it's being presented to them ---

3 MR. TREJO: They're obligated to rely upon the court
4 interpreter's interpretation of the Spanish language and not
5 their own.

6 There's a U.S. Supreme Court decision on that, that --
7 because this is relied upon in federal courts across the
8 country, Your Honor, the interpretation.

9 THE COURT: Well, I think that's true where clearly it's
10 going to take an interpretation of the jury to understand
11 what's being said. And I think that the State is -- according
12 to their position -- and you can correct me if I'm wrong --
13 their position is not to have the -- what the -- the gist of
14 the conversation, or the content of the conversation, made to
15 the jury, but just so the jury can see, by his demeanor and
16 direction, who was in charge and who was directing the show.

17 MR. TREJO: Exactly, right.

18 THE COURT: As opposed to the conversation itself.
19 According to them, they're offering it for that purpose -- or
20 it's not being offered for that purpose. They didn't expect
21 that a person on the jury would understand Spanish well enough
22 to -- to interpret it or understand exactly what was being
23 said.

24 MR. TREJO: Right. And they're relying upon the
25 interaction between my client and the other individuals there.

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1 And the interactions can be deciphered from the physical
2 directions among the individuals that are at the scene.

3 In order to determine, from the spoken words, between the
4 other individuals, one must know precisely what is being said
5 in order to rely upon that, the -- the -- the inflection and
6 the articulation and the emotion behind the spoken language,
7 and the cultural differences between the two.

8 Your Honor, there is a variety of nuances that go in
9 behind the spoken words in Spanish, spoken words in English,
10 spoken words from an Mexican national, spoken words from an
11 individuals from different regions across this country.

12 And, in that regard, to rely upon the unknown translation
13 of the spoken word, between these Mexican individuals, I think
14 allows the jury to go out and speculate needlessly. And I
15 think it would be inappropriate for the State to argue that or
16 based upon their interaction, or based -- based upon the
17 interaction of what was really spoken between one another, you
18 can tell that Wilbur was the leader.

19 THE COURT: Well, I -- I think there is some -- some
20 basis for that argument, Counsel. If you're saying, if you
21 show the video, just without the audio, you can see exactly
22 what's going on.

23 But, if you're going to -- if -- if he is going to be
24 speaking, and you don't know what's being said, how could you
25 determine that he was in charge?

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1 MR. BULSA: Well, I think the sound and the inflection,
2 how he is talking to these individuals can be interpreted that
3 he's the leader. And we feel, going in and out with the
4 sound, is more disruptive to the jury. And just the mere
5 picture itself -- yes, a picture is worth a thousand words,
6 but the sound also helps the jury understand the context of
7 what's on these videos.

8 And, as far as I'm concerned, they're in evidence and we
9 want to publish them to the jury.

10 (Brief Pause)

11 THE COURT: Let me -- let me ask about this, and we're
12 still exploring it at this point. If this point had been
13 raised, by the Defense, before the trial maybe we could have
14 looked at and maybe get some of this transcribed into English
15 and agree on -- on a translation to be published to the jury.
16 But it's too late to do that now. We can't adjourn the trial
17 I think and do that.

18 What about the possibility of having the interpreter here
19 interpret it as we go through for the jury in English?

20 MR. TREJO: Then, the issue becomes what -- what this
21 interpreter -- it would be our position that my client's
22 statement can be interpreted, and that's not at issue.

23 But, certainly the other statements, of the other
24 individuals, we would submit, should not be interpreted.
25 There's no basis for their introduction.

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1 But my client -- we have no objection to my client's
2 statement being interpreted.

3 (Brief Pause)

4 MR. TREJO: And, quite frankly, there's -- there's not
5 many -- there's many in Spanish, but the rest of them are in
6 English.

7 (Off-the-Record Discussion)

8 MR. TREJO: And, Your Honor, in speaking -- I'm sorry,
9 in speaking to the interpreter, he indicated that the sound is
10 so bad that he would almost need a transcript to do it
11 accurately.

12 MR. BULSA: Well, if the sound is so bad for the
13 interpreter, how can we expect anybody else to understand what
14 is it?

15 MR. TREJO: Well, that's the problem. You pick up bits
16 and pieces, and that's the issue. You get a little bit here
17 and a little bit there and you don't get the -- the accurate
18 picture and the jury can be misled.

19 MR. BULSA: Your Honor, we're not offering the words.
20 We're offering the acts and the sounds, the inflections, to
21 show who is in charge.

22 Your Honor could instruct the jury that, if you speak
23 Spanish, don't consider what's being said because the sound is
24 so bad; don't take that into consideration, just take it at
25 face value for the sound itself. We have no problem with

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1 that.

2 MR. TREJO: If you're offering the words, then, exclude
3 the words.

4 THE COURT: All right. Counsel, I'm going to -- you
5 know, I'm going to act out of an abundance of caution here.
6 I'm concerned about it, and I -- the thing is that, of course,
7 they agreed to have them come in and I agree with that.

8 But he's raising an issue now, and to the credit of the
9 Defense, they have stipulated to quite a bit here, to try to
10 speed up the trial, and eliminate some of the witnesses and
11 make it easier to get in.

12 And, in doing so, then, they realized, as we go through
13 the trial -- I don't know what happened in the previous trial.
14 What happened in the previous trial with regard to that issue?
15 Not that I'm bound by it, but ---

16 MR. BULSA: There was no objection, Your Honor.

17 THE COURT: Huh?

18 MR. BULSA: There was no objection, Your Honor.

19 MR. TREJO: Well, the sound was off.

20 THE COURT: Was any audio put in?

21 MR. BULSA: Yeah. It was played --

22 MR. TREJO: The entire audio was not, not everything.
23 That is our recollection.

24 MS. ANDERSON: Well, sir, I don't remember. But I
25 thought we kept everything out except Wilbur's statement.

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- 1 MR. BULSA: The whole thing was played with sound.
- 2 THE COURT: The whole thing was played previously?
- 3 MR. BULSA: I don't believe it was played the whole
- 4 entire -- whether we played all of it. We started with a
- 5 portion, and then, we backed it up and played it all.
- 6 THE COURT: Well, Counsel, then, if you were put on
- 7 notice at the previous trial -- not that I'm bound by that
- 8 necessarily, but if you didn't make any objection to it
- 9 before, and it was played. And you came in and stipulated to
- 10 it this time ---
- 11 MR. TREJO: Well, I guess that's the issue. It's not
- 12 our recollection that it was played.
- 13 THE COURT: Well, have you got anything to show me
- 14 otherwise? They're all positive that it ---
- 15 MR. TREJO: Well, they don't have anything to show it
- 16 that it was. And we're positive that it wasn't.
- 17 THE COURT: Well... You got anything showing any
- 18 objection that was made as to the audio before?
- 19 MR. TREJO: Your Honor, I've purchased, on behalf of my
- 20 client, portions of the transcript, of the three law
- 21 enforcement witnesses that the State ---
- 22 THE COURT: You don't have all of it?
- 23 MR. TREJO: Not that portion, no. We didn't buy the
- 24 whole trial.
- 25 (Brief Pause)

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1 MS. ANDERSON: Your Honor, in looking at the transcript,
2 what happened before was a agent narrated the video. This is
3 -- "video continue playing," "This is the Budget truck that
4 was used to offload the tractor-trailer to transport it to the
5 storage area. At this point, I had stepped back to the
6 tractor-trailer to talk to other agents."

7 "Video continues playing." "Or -- or it appears I had
8 just gone to check the doors and lock them." "Video continues
9 playing."

10 "This, again, is Mr. Summers transporting the pottery
11 from the tractor-trailer to the Budget rental truck."
12 "Video continues playing." If -- but there -- if you wanted
13 to look at this, there is a narrative ---

14 THE COURT: Well, I mean, is there any specific
15 objection to the video while it's being played or any request
16 for the audio not to be played or any ---

17 MS. ANDERSON: No. The way it looks is that ---

18 (Off-the-Record discussion between the Court and the
19 court reporter regarding the tapes.)

20 MS. ANDERSON: The only thing I can tell from this is,
21 "video continues playing," and the agent says, "I had moved
22 the tractor-trailer to the front of the establishment." "At
23 this time, I was waiting for Mr. Summers to show up."

24 MR. TREJO: Maybe -- maybe this is a way to resolve the
25 issue to the satisfaction of both sides. If the -- if we

1 agree to the entire audio being played, for the interactions
2 taking place, between my client and the other Spanish speaking
3 individuals, to the -- a cautionary instruction that the jury
4 is not to interpret the Spanish language.

5 And two, that the State is not offering it based upon the
6 contents or the inflection of the conversation, that
7 therefore, Wilbur was behind this and the leader of the
8 individuals.

9 THE COURT: All right. Let's -- let's see about that.
10 If they're precluded from argument, that just knocks it out
11 for them basically. I would say perhaps -- and I'm not going
12 to speak for you; I'll let you speak for yourselves,
13 Solicitors.

14 But, if they were able to argue that we submit, that
15 based on what's going on or you can see that he was in charge,
16 or something like that, I mean, they certainly, if they're
17 convinced you're doing that ---

18 MR. TREJO: Well, just not based upon the inflection and
19 the Spanish language and things like that.

20 THE COURT: All right.

21 MR. TREJO: They can argue whatever --

22 THE COURT: Based on -- based on what was on the tape
23 and what was going on at that time, that you could argue that
24 he was in charge and directing people around or that --
25 whatever, without actually getting into noticing the

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1 inflection in his voice.

2 MS. GANSS: It's the State's position that the audio is
3 not that good. So, I'm -- I'm happy to argue you see by his
4 actions, you see how he's ---

5 THE COURT: See who is in charge, if that's your
6 argument.

7 MS. GANSS: How he's excited, how -- stuff like that. I
8 don't even think I argued last time, I had nothing about what
9 he said because the audio is so bad. And I don't see myself
10 using the word, "inflection" in my closing.

11 THE COURT: All right. Well ---

12 MR. TREJO: Well, we don't won't to get hurt by
13 inflection -

14 MS. GANSS: Right.

15 MR. TREJO: --- but, if you're going to -- you
16 understand what I mean.

17 MS. GANSS: Well, he's excited and you will see he --
18 you see he's excited ---

19 MR. TREJO: Right.

20 MS. GANSS: --- and you see that from his actions. I
21 mean --

22 THE COURT: Well, you can argue what -- based on his
23 actions.

24 MS. GANSS: Yes, I can ---

25 THE COURT: All right. You can argue based on that.

1 MS. GANSS: Yes.

2 THE COURT: What I will instruct the jury, then, is that
3 -- that the video is not of the best -- that the video is not
4 -- I'm not going to say it's not a good quality; I think it is
5 a good quality for what we usually see.

6 What I would tell them is that everything is not clear
7 and they're to disregard what is actually being said or trying
8 to interpret what's being said.

9 And, if there's anybody that speaks Spanish on there,
10 they're not to interpret what's being said for anybody else.
11 And really -- and not to interpret for themselves really
12 what's on there. Okay? Will that satisfy you?

13 MR. TREJO: Yes, Your Honor.

14 MR. BULSA: As long as that is only for the Spanish
15 conversations.

16 THE COURT: Absolutely in Spanish and I make that clear.

17 MR. BULSA: Thank you, Your Honor.

18 THE COURT: But, I said anybody that speaks Spanish and
19 I understand --

20 MR. TREJO: English and everything, Your Honor.

21 THE COURT: What we want to do is be sure on the
22 argument. But I have to allow them some leeway. They just
23 can't get into arguing that, based on the conversation and the
24 inflections and that of the conversation.

25 But you can argue his emotions, what he was doing; who

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1 seemed to be in charge; that he was excited about getting it.
2 That kind of stuff that's obvious from looking at the tape,
3 you can argue, would be prohibited from that. Okay? And,
4 then, we'll just play the tape.

5 MR. BULSA: Except those conversations in English?

6 THE COURT: Absolutely, of course. Of course. I'll
7 make that clear.

8 MR. BULSA: Thank you.

9 THE COURT: Okay. All right. Let's bring the jury
10 back, please, sir.

11 (The bailiff steps out to summon the jury.)

12 (The jury entered the courtroom at 12:12 p.m.)

13 THE COURT: Mr. Foreman, ladies and gentlemen of the
14 jury, I want to give you this explanatory instruction to you
15 and instruct you to do as follows:

16 There are parts of the audio that are not real clear,
17 which is not uncommon in these kind of videos as I understand
18 it.

19 What I will instruct you is, if there's -- with regard to
20 the Spanish speaking portion, or those portions which are in
21 Spanish language, those conversations or statements that are
22 in Spanish, that you -- if you have some knowledge of Spanish,
23 that you not try to interpret what's being said in those
24 conversations. All of it is not -- in other words, all of the
25 -- of what's being said was not clearly audible.

1 What I ask you to do is not try to interpret that. And
2 if -- and if there is anybody on the jury who speaks or
3 understands the Spanish language, please, do not try to
4 interpret this tape or use your own interpretation of that,
5 insofar as Spanish only.

6 Now, of course, English -- what is spoken in English on
7 this tape, of course, you're allowed to hear and interpret for
8 yourselves on -- on that.

9 And, if there's anybody who is on the jury who -- who has
10 a good working knowledge of Spanish, and -- and might
11 understand more than somebody else about it, I would ask that
12 juror not to discuss the Spanish portions of the tape with any
13 other members of the jury or try to interpret that for other
14 members of the jury. That's very important.

15 Does everybody understand that? If you do, raise your
16 hand. If you want me to clear it ---

17 (Jurors raise their hands.)

18 THE COURT: Okay. Everybody raises their hand. I think
19 they understand it well enough. Does that satisfy counsel on
20 both sides?

21 MS. GANSS: Yes, Your Honor. Thank you.

22 MR. TREJO: Yes, Your Honor.

23 THE COURT: All right. We'll proceed then.

24 (Video begins playing again, with the audio, at 12:15
25 p.m.)

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1 (Video concluded at 12:39 p.m.)

2 MS. GANSS: Your Honor, may we approach?

3 THE COURT: Yes, ma'am.

4 (Whereupon, a bench conference was had with all attorneys
5 present.)

6 THE COURT: Mr. Foreman, ladies and gentlemen of the
7 jury, we have a couple of more things to do, so, we're going
8 to go ahead and take a break, at this time, for lunch. It's
9 about -- by the courtroom clock, it's twenty (20) minutes till
10 1:00.

11 I'm going to ask you to be back in the jury room ready to
12 go at fifteen (15) minutes till 2:00. That's about an hour
13 and five minutes and that should give everybody plenty of time
14 to get lunch and get back.

15 Of course, during the lunch break, please, don't discuss
16 the case among yourselves or with anyone else you might see
17 during the lunch break. Enjoy your lunch and be back at
18 quarter till 2:00.

19 (The jury exited the courtroom at 12:41 p.m.)

20 THE COURT: Let me explain to Mr. Yarborough. You can
21 stand down during, of course, lunch break for that. You --
22 for the purpose of your testimony, though, it's the same as
23 though you were still on the stand testifying.

24 So, therefore, you cannot discuss the case with attorneys
25 or anyone else. You can talk to them about other things, the

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1 weather outside, but, please, do not discuss the case with the
2 attorneys or anyone else during the lunch break. Do you
3 understand what I'm saying?

4 THE WITNESS: Yes, Your Honor.

5 THE COURT: All right, sir. And, then, we'll resume and
6 you'll be back on the stand at -- at 1:45. Thank you.

7 MS. GANSS: Thank you, Your Honor.

8 (Whereupon, a lunch break was taken from 12:43 p.m. till
9 1:43 p.m.)

10 (Off-the-Record Comments)

11 (Agent Yarborough returns to the stand.)

12 THE COURT: All right. Is Counsel ready to proceed?

13 MS. GANSS: Yes, Your Honor, the State is.

14 THE COURT: Mr. Yarborough, of course, you remain under
15 oath, sir. Please, bring the jury in, sir.

16 (The bailiff steps out to summon the jury.)

17 (The jury entered the courtroom at 1:48 p.m.)

18 THE COURT: Good afternoon, Mr. Foreman, ladies and
19 gentlemen of the jury. I hope you enjoyed your lunch today.
20 We're ready, now, to resume with the trial. Counsel, please,
21 proceed.

22 MS. GANSS: Okay. We will begin with the video.

23 CONTINUED DIRECT EXAMINATION by MS. GANSS: 1:49 P.M.

24 Q. (By Ms. Ganss) And is this -- are we still on the scene,
25 Agent Yarborough, at Nacho's? When we get this up, are we

1 still at the same location?

2 A. Yes.

3 Q. Okay. Thank you.

4 (Video number 3 begins playing at 1:50 p.m.)

5 (Video number 3 concluded at 2:00 p.m. and then, video
6 number 4 began playing.)

7 (Video Number 4 concluded at 2:26 p.m.)

8 Q. (By Ms. Ganss) Agent Yarborough, I want to show you
9 what's been previously marked State's Exhibit Number 29. And,
10 could you tell us, what is this?

11 (State's Number 29 on overhead.)

12 A. Mr. Summers signing the bill of lading.

13 Q. Okay. Now, I want to show you what has been marked and
14 stipulated to as State's Exhibit Number 30.

15 (State's Number 30 on overhead.)

16 Q. What was this?

17 A. That was myself cutting the seal after we arrived with
18 Mr. Summers.

19 Q. Okay. Thank you.

20 (State's Number 13 shown on overhead.)

21 Q. I show you also what's been marked State's Exhibit 13.
22 And where is the tractor-trailer -- well, tell us what this
23 picture is, please?

24 A. This is the tractor and trailer that was full of pottery
25 parked behind Nacho's Restaurant.

1 Q. Okay. Now, we've heard, over the course of yesterday and
2 today, about a business location.

3 A. Uh-huh (affirmative).

4 Q. And I'm going to show you what's been marked State's
5 Exhibit Number 26.

6 (State's Number 26 shown on overhead.)

7 Q. Do you see the two addresses up there?

8 A. Yes.

9 Q. Okay. Have you, since this incident, been to
10

11 (Brief Pause)

12 A. Not that I recall.

13 Q. Okay. And maybe I can clarify.

14 (Brief Pause)

15 Q. Let me show you what's been marked State's Exhibit Number
16 6 for a storage facility.

17 (State's Number 6 shown on overhead.)

18 Q. Have you been to , a storage facility,
19 since this incident?

20 A. Yes.

21 Q. Okay. The tractor-trailer that you were driving, would
22 your tractor-trailer have -- would you have been able to get
23 your tractor-trailer into that storage facility area?

24 A. Yes.

25 Q. Would you, please, describe that storage facility area at

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1 in Inman, South Carolina, to the jury? What it
2 was like.

3 A. From going out and viewing the storage facility in
4 question, the storage facility was enclosed by a chain link
5 fence, in which the storage facilities were metal structures,
6 set in rows for people to rent to store their personal items
7 in.

8 Q. Okay. I'm going to show you, again, what's been marked
9 State's Exhibit Number 9.

10 (State's Number 9 shown on overhead.)

11 Q. And this is a picture of what?

12 A. The front of Nacho's Restaurant.

13 Q. And notice that address. Was the restaurant -- in what
14 proximity was the restaurant from that storage unit you just
15 described?

16 A. Less than a mile.

17 (Brief Pause)

18 Q. Okay. Since this incident, have you been to the location
19 where this pottery business was supposed to be?

20 A. Yes.

21 Q. Okay. Can you describe that location to the jury, the
22 location where this pottery business was to be?

23 MR. TREJO: Well, Your Honor, since this incident is
24 irrelevant.

25 THE COURT: I'm not sure of the objection. Overrule the

1 objection. You may proceed.

2 MS. GANSS: Thank you.

3 Q. (By Ms. Ganss) Can you, please -- well, let me ask you
4 this: Since you've been, to that store location, could your
5 18-wheeler tractor had gone to that location?

6 A. Yes.

7 Q. Okay. And, now, please, describe that store front
8 location where the ceramic pottery was supposed to be -- the
9 store was to be.

10 A. The store was an empty shell of a -- approximately -- I
11 cannot be exact -- roughly sixteen (16) by sixteen (16) foot
12 in diameter of the store. It was a glass front window. And
13 it was behind a bakery, off of a highway, in the county here.

14 Q. Could you, please, describe the parking area around that
15 store front?

16 A. Once you pull off the main highway, near the business
17 that was -- was to be, you had to pull around a dirt curb
18 behind the bakery and proceed down a -- an unpaved road for
19 approximately a couple -- well, maybe a hundred yards or so.

20 Down there, there was a turnaround where you could come
21 back up and out the dirt road again.

22 Q. In this video, we saw an unloading. At the store front,
23 you just described for the jury, could that have taken place
24 at the store front?

25 A. Yes.

1 Q. You mentioned ---

2 MS. GANSS: One moment, please, Your Honor.

3 (Brief Pause)

4 Q. (By Ms. Ganss) I want to ask you now -- a little change
5 in direction -- opposing Counsel mentioned, in his opening ---

6 MR. TREJO: Well, objection, Your Honor. That's not an
7 appropriate question.

8 THE COURT: I sustain in that form, Counsel. I sustain
9 the objection.

10 MS. GANSS: All right. Thank you, Your Honor.

11 Q. (By Ms. Ganss) In your job, do you have techniques
12 available to help you investigate narcotics trafficking?

13 A. Yes.

14 Q. Were one of those available be a trap and trace?

15 A. Yes.

16 Q. And what is a trap and trace?

17 A. A trap and trace is a technique after a court order has
18 been signed. It's a electronic device hooked up to a
19 telephone to store all the incoming and outgoing calls from
20 that telephone.

21 Q. Okay. All right. Did you do a trap and trace in this
22 incident -- instance?

23 A. Myself, no.

24 Q. Why not?

25 A. Trap and trace are usually for long-term investigations

1 versus a controlled delivery that took place in this instance.
2 In a trap and trace, once you receive the number, first of
3 all, you have to get the court order written and signed by a
4 judge.

5 Once it's signed by a judge, then, the equipment has to
6 be in place. Once that equipment is in place and those
7 numbers are retrieved, of all the outgoing and incoming calls,
8 then, the agents still have to send subpoenas to the
9 subscribers for those phone numbers in order to receive the
10 information about the subscriber.

11 From that point, analysis of those phone numbers still
12 needs to take place in order to identify co-conspirators in a
13 criminal organization.

14 Q. Did you have that kind of time, in this instance, with
15 this controlled delivery?

16 A. No.

17 Q. Okay. Do you have the ability to do wire tapping?

18 A. Yes.

19 Q. Did you do wire taps in this instance?

20 A. No.

21 Q. Why not?

22 A. A wire tap, again, is a technique used by agents in order
23 to retrieve like ongoing information. It could be, for
24 example, email. It could be verbal communications on a
25 telephone.

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1 In order to get a wire tap approved, an agent or agents
2 have to be, and define on an affidavit, show probable cause
3 why a judge should sign off on an agency intercepting people's
4 telephonic or email conversations.

5 And, again, this is a time-consuming process because,
6 once the order is signed -- before the order is signed by a --
7 a federal judge, it has to go all the way up to Washington,
8 D.C., both to the federal op -- my federal agency is ICE, as
9 well as the Department of Justice, to be signed off by
10 District judges at that high of level.

11 Then, it, again, mark down that order, the equipment gets
12 put in place and it still takes time in order to intercept
13 those communications and have everything in play.

14 Q. And how much time did you have to execute this controlled
15 delivery?

16 A. From the time that I took the -- hooked up to the trailer
17 full of pottery and narcotics, to the time I delivered, was
18 less than three (3) days.

19 Q. What about -- can you set up a pole cam?

20 A. Yes.

21 Q. What is a pole cam?

22 A. A pole cam is an audio device -- it's a video -- excuse
23 me, it's a video device. It's much like putting a box up on a
24 telephone pole in order to retrieve all the video for a
25 particular area. And it's referred to as a skill watch

1 device.

2 But, in order to do that, they're very expensive and it
3 still takes time to have to put those in place. And, before
4 you put those in place, you have to know the exact location of
5 the criminal activity taking place.

6 Q. And were you able to do one in this case?

7 A. Myself, no.

8 Q. Okay. Did you have the time to do one?

9 A. Possibly.

10 Q. Did you know your final destination?

11 A. It changed the morning that I arrived at the Nacho's
12 Restaurant.

13 Q. Can you do fin -- a financial analysis of people?

14 A. Yes.

15 Q. Did you do one in this case?

16 A. No, ma'am.

17 Q. Okay. Why not?

18 A. It takes time and effort.

19 Q. Did you have the time?

20 A. No.

21 Q. Okay. Let's see here, a controlled delivery, what's its
22 purpose? What is the purpose of a controlled delivery?

23 A. A controlled delivery is further our investigation to
24 identify all conspirators and co-conspirators known and
25 unknown, to gather evidence for successful prosecutions.

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1 Q. Okay.

2 MR. TREJO: I'll move to strike that last portion of
3 that response. It offers a legal conclusion, one for the jury
4 to make the determination.

5 THE COURT: Overruled.

6 Q. (By Ms. Ganss) How many controlled deliveries did you say
7 earlier you ---

8 MR. TREJO: Well, objection, cumulative.

9 THE COURT: I didn't get the question. I'm sorry, would
10 you ask him again?

11 MS. GANSS: I was going to ask him again. Thank you.

12 THE COURT: Go ahead.

13 Q. I can't remember, how many controlled deliveries you have
14 participated in?

15 A. Many.

16 MR. TREJO: Your Honor, the witness knows better than to
17 respond before the Court rules. I'd ask you to instruct him
18 not to do that in the future.

19 THE COURT: If there has been a motion made, please,
20 don't -- refrain from answering till the Court has an
21 opportunity to rule on the motion.

22 I don't -- I don't know where you're going with this or
23 whether it's relevant or not. Where -- where are you going
24 with this, Counsel?

25 MS. GANSS: I was going to ask him about packaging in

1 the controlled deliveries in which he has participated in.

2 THE COURT: All right. I'll allow that. Go ahead.

3 MS. GANSS: Thank you.

4 Q. (By Ms. Ganss) So, how many controlled deliveries have
5 you participated in?

6 A. Many.

7 Q. Okay. And, over the course of the controlled deliveries,
8 how have drugs, in your experience, been packaged?

9 MR. TREJO: Asked and answered, at the very beginning,
10 Your Honor, by this witness.

11 THE COURT: Overruled. Please, proceed.

12 A. Drugs have been packaged in a number of ways. I've found
13 them in steel boxes.

14 Q. Okay.

15 A. I've been involved when they were in plastic wrap,
16 shipping tape, masking agents, concealed and non-concealed.

17 MS. GANSS: One moment, Your Honor, please.

18 (Brief Pause)

19 Q. (By Ms. Ganss) This packaging that you just described,
20 what its purpose?

21 A. In this case, the plastic wrap was a way to keep the
22 narcotics together, as well as some of the -- to also elim --
23 to cut down on the odor it would eliminate -- or emit, and to
24 further conceal itself from law enforcement.

25 Q. And, in your experience -- well, I should show -- I'll go

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1 ahead and show you what's been marked State's Exhibit Number
2 32.

3 (State's Number 32 shown on overhead.)

4 Q. And we see a picture -- can you describe what this is to
5 the jury, please?

6 A. This was one of the pots, pieces of pottery that were on
7 -- that was in the trailer. On top is a sealant to disguise
8 the narcotics that are concealed within that piece of pottery.

9 Q. Okay. Thank you.

10 MS. GANSS: Beg the Court's indulgence one moment, Your
11 Honor.

12 (Brief Pause)

13 MS. GANSS: Agent Yarborough, please, answer any
14 questions Mr. Trejo may have for you. Thank you.

15 CROSS EXAMINATION by MR. TREJO:

2:44 P.M.

16 Q. So, ah, Agent, it takes a long time to do a financial
17 analysis; is that your testimony?

18 A. Normally, yes.

19 Q. And, in this particular case, you didn't have enough time
20 to do one, correct?

21 A. Myself personally, no.

22 Q. You had about a year. And, when we asked you, you
23 personally, you're not -- you are not the only agent at ICE,
24 correct?

25 A. Correct.

1 Q. And, in fact, your testimony earlier is that ICE works
2 with other law enforcement agencies, including the FBI and the
3 DEA, as well as other law enforcement agencies throughout the
4 company, correct?

5 A. Yes, sir.

6 Q. So, when you're going to conduct surveillance or conduct
7 additional investigation on a suspect, you don't do it
8 yourself personally every time, do you?

9 A. No, sir.

10 Q. You rely upon these outside agencies, don't you?

11 A. On a number of occasions, yes.

12 Q. And, in a case like this, involving an individual such as
13 Wilbur Summers, and assuming that he resided here in this area
14 for a couple of years, do you think a -- approximately one
15 year is adequate time to conduct a financial investigation?

16 A. It can be, yes.

17 Q. What do you mean can be? Well, is there any doubt in
18 your mind as to whether or not that's adequate time to conduct
19 a financial analysis on an individual?

20 A. It depends on the magnitude of the organization.

21 Q. No, I'm talking about the individual. I'm not talking
22 about any organization. Why did you throw out organization
23 right now, when I asked individual? Why did you throw out
24 organization?

25 A. Because financial investigation is usually not on one

1 particular person.

2 Q. What did I ask you though? I asked you to do it on one
3 particular person, and whether or not one year was adequate
4 time, right?

5 A. Okay.

6 Q. Is one year adequate time to conduct a financial analysis
7 on one individual?

8 A. Yes.

9 Q. Why didn't you do one in this case?

10 A. First of all, when Ms. Ganss asked me, from the time I
11 picked up the load, till the time I got here, it was only five
12 (5) days. It was not a full year. . .

13 Q. I'm -- I'm talking about the year; I didn't ask you about
14 five days. I said why not, during the course of this past
15 entire year, wasn't one done?

16 A. I was not the case agent and I cannot answer that.

17 Q. Okay. But, in your professional opinion, there was
18 adequate time to conduct one, correct?

19 A. On one person?

20 Q. On one person. That's all I'm asking you about, Wilbur
21 Summers.

22 A. Yes.

23 Q. In fact, there was some financial information that law
24 enforcement had obtained about Mr. Summers, correct?

25 A. I'm not sure of what you're looking at.

1 (Document shown to witness.)

2 Q. That he filed tax returns in two thousand and two (2002),
3 two thousand and three (2003).

4 A. I've never seen that form.

5 Q. You didn't do an adequate investigation? Is that why you
6 didn't see the form?

7 A. No, sir, that's not it at all.

8 Q. Do you turn a blind eye to evidence that doesn't support
9 your case? Is that why you didn't look at this form?

10 THE COURT: You can ask this quick question -- this
11 witness questions, but you're not going to argue with him or
12 insinuate anything. So, ask him questions and let him answer.

13 MR. TREJO: All right.

14 Q. (By Mr. Trejo) Well, that's important information, isn't
15 it, sir?

16 THE COURT: But, don't -- don't suggest an answer to
17 him. Ask the question and let him answer it, sir.

18 MR. TREJO: Your Honor, at ---

19 THE COURT: I've ruled, Counsel.

20 MR. TREJO: I would like to put something on the record.

21 THE COURT: I've ruled, Counsel. Proceed. You can put
22 it on at the next break.

23 MR. TREJO: All right. Well, I am concerned about the
24 cross examination.

25 THE COURT: Ask a question. Ask him a question. You

1 know how to cross examine, Counsel.

2 MR. TREJO: Right. And cross examination ---

3 THE COURT: Ask him a question and let him answer it.

4 MR. TREJO: --- is an answer in a question of yes or no.

5 THE COURT: Ask him a question and let him answer. It
6 doesn't have to be yes or no. But you don't tell him what the
7 answer is before you ask him. Just go ahead and ask him the
8 question.

9 (Brief Pause)

10 Q. (By Mr. Trejo) The other types of investigative
11 techniques that you can perform, or your agency can perform,
12 let's talk about those for a moment, okay?

13 A. Yes.

14 Q. First off, there's databases, correct?

15 A. Yes, sir.

16 Q. And the databases are linked up amongst the federal
17 investigations -- among the federal law enforcement agencies,
18 correct?

19 A. Yes and no.

20 Q. Now ---

21 A. NADIS (phonetic) is a DEA database.

22 Q. Okay. But you have access to the data, don't you?

23 A. No, sir.

24 Q. You can't call DEA?

25 A. Oh, I can, yes.

1 Q. And, in that sense, you have access to NADIS, don't you?

2 MS. GANSS: Objection, Your Honor, relevance.

3 THE COURT: I'll let him answer this question. Go
4 ahead.

5 A. Yes, I can contact someone.

6 Q. You can contact DEA and obtain any information that they
7 have on any individual you want to look up, correct?

8 A. I can ask for it, yes, sir.

9 Q. And you can do the same thing with the FBI, correct?

10 A. Yes.

11 Q. You can do the same thing within Customs, correct?

12 A. Yes.

13 Q. Within Immigration?

14 A. Yes.

15 Q. And within any federal law enforcement agency, correct?

16 A. Yes.

17 Q. And they'll provide you information and assistance that
18 they have consistently throughout the path, correct?

19 A. If they can.

20 Q. And separate and apart, from the federal law enforcement
21 agencies, you also have access to state law enforcement
22 agencies, correct?

23 A. Yes.

24 Q. And they too have been cooperative with you in the past
25 in providing you information on individuals, correct?

1 A. Yes.

2 Q. Now, on direct examination, you talked about grand jury
3 subpoena powers that you have, correct?

4 A. Yes, sir.

5 Q. Would you explain to the jury what that is?

6 A. Grand jury subpoena information is secret information
7 that will assist you on a case. And this matter could be, if
8 you were trying to obtain somebody's bank records.

9 Only a grand jury subpoena has the authority to give you
10 a subpoena, in order to go to a person's bank account, in
11 order to pull their financial records.

12 Q. Only a grand jury subpoena?

13 A. There are other subpoenas, but that is the one normally
14 used.

15 Q. Well, when you just said, "only grand jury subpoenas,"
16 That's not accurate, is it?

17 A. You can get other subpoenas, yes.

18 Q. Right. Because you can subpoena bank records through
19 other means, correct?

20 A. Yes.

21 Q. Okay. All right, then. And, in terms of working
22 undercover, you -- you can send people undercover whether
23 they're undercover agents or private citizens, correct?

24 A. Can you define in what manner?

25 Q. To -- to work undercover in an undercover capacity?

1 A. Yes.

2 Q. To targets?

3 A. Yes.

4 Q. Okay. Trap and trace, you -- you talked about how you
5 have to install the equipment, but law enforcement doesn't
6 install that equipment, correct? It's the phone company that
7 -- that operates the trap and trace device for law
8 enforcement?

9 A. They turn the software on.

10 Q. Right. And, in that regard, the phone companies
11 consistently cooperate with law enforcement in doing so, don't
12 they?

13 A. With a court order.

14 Q. Yeah. But, I mean, it's -- it's not a highly unusual
15 procedure, for a phone company to do a trap and trace, because
16 they're done throughout the country, aren't they?

17 A. Yes, they are.

18 Q. And, in your experience, somebody -- you talked about how
19 they used in other types of cases, but there's no limitation
20 on utilizing trap and trace devices, on a short-term case
21 versus a conspiracy that lasts several years, correct?

22 A. Yes, it's the same information and the same concept.

23 Q. Right. But, I mean, there's no limitation, based upon
24 your training and experience, that says, "Well, this case only
25 involves a seizure of one vehicle, therefore, we cannot use

1 trap and trace." That's -- that's not true, correct?

2 A. No.

3 Q. You -- you did, in fact, have that available to you if
4 you had wanted to pursue it, correct?

5 A. Yes.

6 Q. Okay. And, when we talk, in terms of how much time you
7 have to work with, to do these different types of
8 investigative techniques, on direct examination, the time
9 frame was limited to a three to five day period, correct?

10 A. Yes.

11 Q. But you also had all the time, from the initial date back
12 in November of two thousand and five (2005), all the way up
13 until today, to -- to -- produce evidence, correct?

14 A. Yes.

15 Q. Okay. All right. So, all of these investigative
16 techniques were not limited to that three or five day period,
17 right?

18 A. Not necessarily.

19 Q. Right. Because you could have utilized them during the
20 course of the entire path here?

21 A. As long as a judge continues to sign an extension, right.

22 Q. For certain things, yes, but, others -- other -- other
23 techniques, you don't need the judge's permission, right?

24 A. Correct.

25 Q. And so, for even the techniques that you were going to

1 rely upon, that you could have utilized, during the course of
2 the past year, there were a number of them that did not
3 require any type of judicial authorization, right?

4 A. Yes.

5 Q. Okay. Now, is Nacho's Restaurant?

6 A. Yes, sir.

7 Q. Did you see the driver's license for Mr. Summers?

8 A. (No Response)

9 Q. Are you aware that the driver's license of Mr. Summers
10 had a expiration at the time of his arrest?

11 A. No, sir, I wasn't.

12 Q. Okay. And you don't know whether that was a South
13 Carolina or a North Carolina?

14 A. No, sir.

15 Q. Did you ever speak to anybody -- well, strike that.
16 Let's talk about that storage -- the storage facility, the one
17 at -- at ?

18 A. Yes, sir.

19 (State's Number 6 shown on overhead.)

20 Q. Okay. This is the one has the address up there,
21 that Secured South Storage unit. This unit that
22 was rented, by Mr. Summers, was a ten (10) foot by sixteen
23 (16) foot unit, correct?

24 A. Well, I'm not sure of the exact size.

25 Q. Okay. Did you inquire at -- at the storage unit?

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1 A. No, sir, I didn't.

2 Q. Don't you think that would have been an appropriate
3 investigation to go and see where the items, the ceramic
4 items, were being taken to?

5 A. I looked at the storage facility, but I did not look at
6 the inside of the unit itself.

7 Q. So, you don't know which one he was -- he was -- he was
8 renting?

9 A. No, sir.

10 Q. I just -- I just -- what I did here, sir, was I simply
11 flipped over the -- the top white portion of Exhibit Number 6,
12 so, that we could see the front of it.

13 A. Okay.

14 Q. Right here (indicating), ten (10) by fifteen (15)
15 precise?

16 A. Okay.

17 Q. Do you have any in -- and this -- and this was stipulated
18 to, by the prosecution, the size being ten (10) feet by
19 fifteen (15) feet.

20 A ten (10) foot by fifteen (15) foot storage unit, would
21 that have been adequate to secure the entire contents of the
22 ceramic pottery in that trailer?

23 A. No, sir.

24 Q. Not even about a fourth, correct?

25 A. Correct.

1 Q. So, did you know that was the only unit available at the
2 time?

3 A. No, sir.

4 Q. So, to your knowledge, no one went, over to the storage
5 unit, to conduct an investigation as to whether or not there
6 were any other units available, correct?

7 A. I have no knowledge of that.

8 (Brief Pause)

9 Q. The -- Highland Hills Drive address,
10 that turned out to be Wilbur Summers' residence, correct?

11 A. I'm not sure. All I know was a Campobello address at
12 was the original destination for the merchandise.

13 Q. And you didn't know -- you don't know whether or not
14 that's where he lives?

15 A. I didn't know at the time, no, sir.

16 Q. Did you know a search of that residence took place?

17 A. I did not assist in that search.

18 Q. Did you know a search of that residence took place at
19 Drive?

20 A. I know that some agents went by there, yes.

21 Q. So, you knew it was a residence?

22 A. No, I did not.

23 Q. Well, what did you know about agents going by that
24 particular address?

25 A. When I -- after the arrest of Mr. Summers were made, I

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1 heard there were agents out and around the county in different
2 areas.

3 Q. Okay. And this happened to be one of them,

4 Drive?

5 A. I could say yes, but I'm not for sure because I wasn't
6 there.

7 Q. Now, will you tell the jury -- isn't it true, sir, that
8 each and every one of the ceramic (indicating) -- what do you
9 call this, a pot or what is it?

10 A. I would call it a clay pot.

11 Q. Okay. Since it was square, I wasn't sure if it's still a
12 pot. Okay. And this -- this is Number 24.

13 (Mr. Trejo picks up State's Number 24.)

14 Q. All of the marijuana were located, within the interior of
15 clay pots identical to this particular exhibit, Number 24,
16 correct?

17 A. I believe so. I remember them all being square.

18 Q. They're all square and they also had a similar logo on
19 the side?

20 A. I'm not sure if they all had the same logo.

21 Q. And, would you tell the jury, how many of these pots
22 (indicating), that are contained in Exhibit Number -- similar
23 to Exhibit Number 24, that had the marijuana inside like
24 that ---

25 (Mr. Trejo places marijuana in clay pot.)

1 Q. --- did Wilbur Summers handle, in your presence, when the
2 items were being unloaded from the trailer?

3 A. None to my knowledge.

4 Q. Was even a single one of these pots unloaded, by any of
5 the individuals depicted, in the video, that we watched for
6 the last couple of hours?

7 A. I don't believe so.

8 Q. Each and every one of these hundred and twenty (120) or
9 so pots remained inside the trailer, didn't they?

10 A. Yes, sir.

11 Q. And you did your best with that camera that you had here
12 on your chest, but I want to show you Exhibit Number 34.

13 (State's Number 34 shown on overhead.)

14 Q. And that -- that is a true and accurate depiction of the
15 interior of that fifty-two foot (52') trailer, correct?

16 A. They look similar, yes.

17 Q. Well, one of the law enforcement officers took a picture,
18 right?

19 A. Say that again.

20 Q. One of the law enforcement officers at the scene took
21 this photograph, right?

22 A. I would believe so.

23 Q. Is there any reason for you to testify that this is not a
24 true and accurate depiction of the way the pots appeared when
25 they were being unloaded?

1 A. From what I can remember, from over a year ago, the pots
2 had cardboard in between them.

3 Q. Well, there's cardboard in between them.

4 A. They were different sizes. They were the -- the round
5 pots and such. They also had plastic wrap around them, where
6 those I don't see it.

7 Q. Well, this photograph -- well, let me ---

8 MR. TREJO: May I approach the witness, Your Honor?

9 THE COURT: Yes.

10 Q. (By Mr. Trejo) Why don't you look at this photograph a
11 little closer. Maybe it will help refresh your memory. It
12 might be the angle of the screen.

13 (State's Number 34 handed to witness.)

14 Q. Do you see plastic wrap on those pots now?

15 A. Yes, I do.

16 Q. Do you see the cardboard in that picture now?

17 A. Yes, sir.

18 Q. Okay. Does that help refresh your memory?

19 A. It looks like the same.

20 Q. All right. Now, the distance, the approximate distance,
21 between this and this (demonstrates), these steel -- what do
22 they call them? What do you want to call them?

23 A. Supports.

24 Q. Steele supports? Okay, sir, metal supports, is roughly
25 about five (5) foot?

1 A. I would say three (3) to four (4).

2 Q. Okay. Three (3) to four (4) feet? At the time, that the
3 -- my client was arrested, the -- he was only -- they only
4 removed approximately walking, in from the rear of the trailer
5 to a depth of about three or four supports, right?

6 A. I know it wasn't very far. I can't be exact on how many
7 supports.

8 Q. Approximately? If the entire trailer is fifty-two feet
9 (52') long, how much -- how many feet of ceramic pottery had
10 been removed from the rear of the trailer, approximately?

11 A. All the way to the floor?

12 Q. Yeah.

13 A. I would guess eight (8) to ten (10) feet.

14 Q. Okay.

15 A. That was totally clear, from the back of the pottery to
16 the back of the doors.

17 Q. All right. And, then, if the trailer is fifty-two feet
18 (52') long, would that be approximately from where you're
19 sitting to roughly about here (demonstrates)?

20 A. Further.

21 Q. Further? All right. All the way to the door?

22 A. At least.

23 Q. At least? Okay. At least to here (demonstrates). So,
24 when -- when you testified that the amount of ceramic pottery
25 that had been removed, from the rear of the trailer -- and,

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1 again, this is the door?

2 A. Okay.

3 Q. They had only worked their way to about right here

4 (indicating), correct?

5 A. More or less, yes.

6 Q. Roughly -- roughly?

7 A. Right, to the -- to where the pottery was off the floor,

8 but, as you can see through the video ---

9 Q. Some was off the top?

10 A. Some of it was coming off the top.

11 Q. All right. Okay. So, roughly to the floor to here

12 (indicating), and, then, a couple of rows on the top, maybe

13 about to here (indicating) roughly?

14 A. Roughly.

15 Q. And all the marijuana was subsequently located way over

16 here (indicating), wasn't it?

17 A. Well, the marijuana was located in the pots.

18 Q. But where were the pots located inside the trailer?

19 A. They were on the bottom level and they were from the back

20 tires to the front of the wall -- the front wall of the

21 trailer.

22 Q. And where would that be roughly? Tell me where.

23 A. It would be where I'm sitting to where you -- two (2) or

24 three (3) rows back over there (indicating).

25 Q. Okay. And which side?

- 1 A. It would have been the entire bottom floor.
- 2 Q. The entire bottom floor just covered with it, or just one
- 3 side?
- 4 A. I believe it was right down the middle.
- 5 Q. Right down the middle? Okay. So, it wasn't the entire
- 6 bottom floor, but just more or less a row down the center?
- 7 A. From my understanding, yes.
- 8 Q. Did you see it? When you say your understanding, I --
- 9 I'm just wondering if you actually know or you understood it
- 10 from somebody else telling you.
- 11 A. I was instructed, by the case agent, as well as viewing a
- 12 gamma ray photo.
- 13 Q. Well, no, I'm talking about here (indicating) as it's
- 14 seen of it being unloaded.
- 15 A. My -- it was told to me later on that it was down the
- 16 middle of the truck.
- 17 Q. Okay. Okay. But, you personally didn't see it?
- 18 A. I personally was not there when they did it.
- 19 Q. All right, fine. That's fine. Now, at one point, in the
- 20 DVD video, we see the small Budget rental truck.
- 21 A. Yes, sir.
- 22 Q. Being loaded?
- 23 A. Yes, sir.
- 24 Q. But we don't -- we don't -- we don't see a truck driven
- 25 away, but in another scene, we all of a sudden see a white

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1 van?

2 A. Correct.

3 Q. Obviously, the Budget truck left the area, correct?

4 A. Yes, sir.

5 Q. And that went -- do you know where that went?

6 A. No, sir.

7 Q. Okay. Do you know where the van went?

8 A. No, sir.

9 Q. Okay. But each of these -- in this -- in this Exhibit

10 Number 34, are layers of cardboard, correct?

11 A. Yes, sir.

12 Q. How many pieces of -- of pottery, ceramic pottery, would
13 you estimate was contained in that entire fifty-two foot (52')
14 trailer?

15 A. Over a thousand (1,000) pieces.

16 Q. And, when you say over a thousand (1,000), maybe even two
17 thousand (2,000)?

18 A. No, sir.

19 Q. Over a thousand (1,000) though?

20 A. Yes, sir.

21 Q. Okay. And this is Number 17, with another view of the
22 interior of the trailer.

23 (State's Number 17 shown on overhead.)

24 Q. And that's the way you saw it as they were unloading it?

25 A. Yes, sir.

- 1 Q. All right. From when -- from when the -- the gentlemen
2 first commenced unloading the trailer, approximately what time
3 was it, roughly?
- 4 A. Shortly before lunch, eleven-ish (11:00-ish).
- 5 Q. Okay. And approximately what time was Mr. Summers
6 arrested there at the scene?
- 7 A. From the best I recall, after twelve (12:00), maybe ---
- 8 Q. Only an hour?
- 9 A. Between twelve (12:00) and one (1:00).
- 10 Q. Only an hour or ---
- 11 A. Because I remember going to the restaurant and there
12 being a lunch crowd there.
- 13 Q. But you think it was only one to two hours, and that was
14 it?
- 15 A. Well, probably closer to two (2) hours or so.
- 16 Q. No more than two (2)?
- 17 A. I couldn't be exact.
- 18 Q. It was not like three (3) or four (4), no way?
- 19 A. No, sir, because I don't remember arriving at Nacho's
20 until maybe twenty (20) till eleven (11:00) that morning.
- 21 Q. And the only reason I ask you that, too, is because, as
22 we saw in the video, we never saw Mr. Summers get arrested in
23 the video.
- 24 A. No, sir.
- 25 Q. But it started to get dark.

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1 A. It was just cloudy that day.

2 Q. Okay.

3 (Brief Pause)

4 Q. Now, you were there actually -- well, if we stop to think
5 about the amount of time that we started to watch the video,
6 you were there throughout the entire time the video was being
7 taken?

8 A. Yes, sir.

9 Q. And even more?

10 A. Yes, sir.

11 Q. From the point that the video stopped, until Mr. Summers
12 was arrested, how much time elapsed approximately?

13 A. Thirty (30) minutes.

14 Q. Okay. And why wasn't that videoed?

15 A. Because I was not in the presence of them unloading the
16 trailer.

17 Q. You left?

18 A. I went inside the restaurant.

19 Q. Because you went to eat?

20 A. Yes, sir.

21 Q. Okay. Okay. So, you were there a couple of hours?

22 A. Yes, sir.

23 Q. All right. And that's an estimate of the time?

24 A. Yes, it is.

25 Q. And you were -- you were joking around with the guys at

- 1 the time?
- 2 A. Yes.
- 3 Q. All right. And they were joking back with you?
- 4 A. Yes.
- 5 Q. You were never offered any marijuana by anyone, were you?
- 6 A. No, sir.
- 7 Q. You never heard anyone discuss marijuana?
- 8 A. No, sir.
- 9 Q. None of the individuals there appeared to be under the
- 10 influence of marijuana?
- 11 A. No, sir.
- 12 Q. And you testified, on direct examination, that, in your
- 13 words, Mr. Summers was genuinely excited upon receiving the
- 14 ceramic goods. Do you remember saying that?
- 15 A. Yes, sir.
- 16 Q. Can you tell me what the difference would be, between
- 17 being genuinely excited about receiving the goods, versus
- 18 being shocked at receiving more goods than he expected?
- 19 A. I don't know that I could tell you a difference.
- 20 Q. So, basically, you -- you can't tell the jury that he was
- 21 genuinely excited, over receiving the goods, or merely
- 22 surprised at receiving such an extraordinary number of goods?
- 23 A. There's a difference between surprise and shock.
- 24 Q. But you really couldn't tell because you really didn't
- 25 know Mr. Summers before?

1 A. I had never met him.

2 Q. All right. And you really don't know for certain what
3 the -- what the true reaction was, do you?

4 A. I just know that his eyes widened and he expressed
5 great ---

6 Q. And his -- his eyes widened and he had that expression,
7 when the lid went up, or the doors came open, and he saw a
8 whole trailer full, correct?

9 A. What I was referring to was when he heard the amount of
10 weight that was on the trailer.

11 Q. Forty thousand (40,000) pounds, forty thousand (40,000)
12 pounds of shock, right?

13 A. Yes.

14 Q. Surprise?

15 A. Yes.

16 (Brief Pause)

17 Q. Did -- did you have the phone number to contact Wilbur?

18 A. Yes, sir. There was a number on that bill of lading.

19 Q. Okay.

20 (Mr. Trejo retrieves State's Number 28.)

21 Q. Okay. I'm going to show you Page 2 of Exhibit Number 28,
22 okay?

23 A. Yeah.

24 (State's Number 28 shown on overhead.)

25 Q. Is that the number you used to contact Mr. Summers?

1 A. If you could, turn it back to the first page, I could
2 tell you.

3 Q. Oh, okay. Sorry.

4 (First page of State's Number 28 on overhead.)

5 A. I called one number, and it was on the first page.

6 Q. Was it the top part, because the whole thing doesn't fit
7 in here. I'm showing you this part. You tell me when to
8 stop, okay?

9 A. The number right next to Mr. Summers' name there.

10 Q. Where? Oh -- oh, okay, okay. I see it.

11 A. Right there.

12 Q. I see it. Right here (indicating)?

13 A. Yes, sir.

14 Q. That's the number that you used to contact Mr. Summers?

15 A. Yes, it is.

16 Q. And the bill of lading, where was the bill of lading
17 found, inside the tractor-trailer, when it was seized in
18 Texas, right?

19 A. I don't know where the bill of lading when they seized
20 the truck.

21 Q. But it was in the truck? I mean, that's how they knew to
22 transport the goods from Texas to South Carolina, right?

23 A. I'm sure.

24 Q. And you had possession of the bill of lading when you
25 arrived in South Carolina, correct?

1 A. Yes, sir.

2 Q. Because you -- as depicted in the video, you went like
3 this (demonstrates) and then, you told Mr. Summers, "Here,
4 sign here." And that's when he signed the bill of lading as
5 depicted in Exhibit 29 ---

6 A. Yes, sir.

7 Q. --- correct? And he did that because you told him to,
8 "sign here"?

9 A. Yes, sir.

10 Q. He didn't say, "Where is the bill of lading, so, I can
11 sign it," right?

12 A. No, sir.

13 Q. Okay. So, the bill of lading was in your possession, and
14 therefore, Wilbur Summers' phone number was in your
15 possession, correct?

16 A. Yes, sir.

17 Q. Therefore, it was clearly possible to obtain a subpoena,
18 for all of Wilbur Summers' phone records, prior to your
19 arrival here in South Carolina, correct?

20 A. Starting from the time of the turnaround from a provider,
21 yes.

22 Q. Not of the individuals who were on the phone -- I mean,
23 Wilbur Summers wasn't the only one on the phone?

24 A. Correct.

25 Q. And, when I say individuals, the other people that were

- 1 helping him unload the trailer, right?
- 2 A. Yes, sir.
- 3 Q. And Wilbur told you, "I got to call some friends to help
- 4 me"?
- 5 A. Yes.
- 6 Q. And that's why, over time -- over the course of say the
- 7 first hour or so, one buddy showed up. Another buddy showed
- 8 up, and a couple of more showed up. And ultimately around
- 9 five (5) or six (6) guys showed up?
- 10 A. Yes.
- 11 Q. And, then, that's how they started the conveyor of
- 12 unloading the ceramic goods?
- 13 A. Yes.
- 14 Q. And the disposition of the individuals, while they were
- 15 unloading the goods, was somewhat jovial immediately?
- 16 A. Yes, sir.
- 17 Q. To the point where it was obvious to you that they were
- 18 getting tired?
- 19 A. They were wearing down.
- 20 Q. They were wearing down because they slowed down, lifting
- 21 and they couldn't carry them, and they started dragging things
- 22 and stuff, correct?
- 23 A. Yes, sir.
- 24 Q. But, at times they were whistling and singing?
- 25 A. Yes, sir.

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1 Q. Following Mr. Summers' arrest, his telephone -- the cell
2 phone that he had, on his side, and he ultimately -- at one
3 point, he put it in his pocket, that was seized from him,
4 because that's the normal course of -- of business for law
5 enforcement, correct?

6 A. Yes, sir.

7 Q. So, law enforcement had access to all the phone numbers
8 that he had called, correct?

9 A. With the -- either consent or a search warrant, yes.

10 Q. Right. Right, consent. Mr. Summers actually gave
11 consent to search the truck, the van, and his residence,
12 correct?

13 A. I'm unaware of that.

14 Q. Okay. All right. Consent to search his telephone?

15 A. I'm still unaware of that.

16 Q. Okay. Okay. But, even -- assuming, for a moment that
17 there was no consent to search the cell phone, again, that's
18 something that law enforcement can simply subpoena records
19 from say, for example, Nextel or Verizon or ---

20 A. Yes, sir.

21 Q. --- Sprint and obtain all the calls that were received
22 and all the calls that were made from that particular phone?

23 A. Yes, sir.

24 Q. Okay. Did Wilbur Summers ever attempt to contact you
25 while you were driving the tractor-trailer from Texas to South

- 1 Carolina?
- 2 A. No, sir.
- 3 Q. Now, we talked about the size of the storage unit being
- 4 ten (10) by sixteen (16).
- 5 A. Fifteen (15).
- 6 Q. Ten (10) by fifteen (15), sorry. The size of the store,
- 7 the store front, where the ceramic goods were going to be
- 8 sold ---
- 9 A. Yes, sir.
- 10 Q. --- that too was -- was a small store front, correct?
- 11 A. Yes, it was.
- 12 Q. The size, of a store front, given the magnitude of
- 13 ceramic goods here would have been for display and the items
- 14 that were sold were going to be kept in storage, correct?
- 15 That would be consistent with that type of an operation?
- 16 A. Yes, to have some in the store front and some in storage.
- 17 Q. Right. And based upon your experience, that's not
- 18 atypical, correct?
- 19 A. It is.
- 20 Q. To have some -- some in the store and then, have some
- 21 more in storage?
- 22 A. From where I'm from, yes, sir.
- 23 Q. Well, when -- when you have a small store front, and it's
- 24 cheaper to pay storage than your store front space, wouldn't
- 25 it make sense to do it that way?

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1 A. I've seen it where they've had some in the store front
2 and some in storage.

3 Q. Okay. Okay. All right. You've seen it both ways?

4 A. Yes, sir.

5 Q. But the storage space -- the storage place -- the store,
6 where it's located, it's a small storage facility, isn't it?

7 A. I'd probably say roughly a hundred (100) units.

8 Q. Okay. A hundred (100) units and fenced in?

9 A. Correct.

10 Q. And, when you say a hundred units, would you describe for
11 the jury, we're talking how many rows?

12 A. I'm not sure of the exact number of rows.

13 Q. Rough -- rough estimate.

14 A. Six (6) to eight (8) rows.

15 Q. Okay. Six (6) to eight (8) rows, so, say roughly, if
16 it's eight (8) rows, there's twelve (12) -- twelve (12) units
17 per row?

18 A. That would make ninety-six (96).

19 Q. Ninety-six (96), roughly a hundred (100)?

20 A. Yes, sir.

21 Q. Close enough for estimation purposes?

22 A. Yes, sir.

23 Q. All right. But the eight (8) rows would actually --
24 there would actually be one (1) row -- and front and back
25 though, right?

- 1 A. It can be.
- 2 Q. Were they like that? I'm not sure. If you could, tell
- 3 the jury, please?
- 4 A. I do remember seeing, on some rows, there were double
- 5 doors.
- 6 Q. Double doors? Double doors meaning there's an entrance
- 7 — there's a front door to the storage on this side
- 8 (indicating) and a front door to the storage on this side
- 9 (indicating) ---
- 10 A. Yes, sir.
- 11 Q. --- correct? So, this row, assuming again we have twelve
- 12 (12) per row, would have twenty-four (24), twelve on this ---
- 13 A. Yes, sir.
- 14 Q. --- side and twelve (12) on this side (indicating),
- 15 right?
- 16 A. Yes, sir.
- 17 Q. So, we would have four (4) of those, correct?
- 18 A. Four what?
- 19 Q. Four (4) of twenty-four (24)?
- 20 A. You could, yes.
- 21 Q. Well ---
- 22 A. I did not check every row.
- 23 Q. All right. But, bottom line, this was -- this was a very
- 24 small storage facility compared to most?
- 25 A. Yes.

1 Q. Okay. And right there adjacent, to the storage facility,
2 were other businesses, correct? A bakery? Do you remember
3 the bakery?

4 A. To the store front?

5 Q. Uh-huh (affirmative).

6 A. Yes, sir.

7 Q. Okay. And it -- it -- it would not have been the easiest
8 thing to do to drive that fifty-two (52') tractor-trailer rig
9 into this particular storage unit; isn't that true?

10 A. The storage unit or store front?

11 Q. The storage unit, where the storage unit is, to -- to
12 literally drive right up to where the storage unit is located
13 and unload the ceramic goods there; that's not possible?

14 A. It's possible. You would just have to be careful how you
15 drive it.

16 Q. But, it's tight -- it's very tight; would you agree with
17 me?

18 A. Yes, it is tight.

19 Q. Okay. All right.

20 (Brief Pause)

21 Q. Now, the -- the storage unit is relatively close to
22 Nacho's, correct?

23 A. Yes, sir, it is.

24 Q. And Mr. Summers' residence is also relatively close to
25 that area as well?

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1 A. Within a few miles I believe.

2 Q. Okay. Do you know where his residence is located?

3 A. I don't know the name of the street, no, sir.

4 Q. You don't?

5 A. Not that I recall, no, sir.

6 MR. TREJO: All right. Thank you.

7 MS. GANSS: No more questions for this witness.

8 THE COURT: Thank you, sir. You may stand down, sir.

9 THE WITNESS: Thank you.

10 (The witness stepped down from the witness stand at 3:23
11 p.m.)

12 THE COURT: All right. I believe we have been at it
13 just about an hour and a half. So, we'll go ahead and take a
14 short recess at this time. You may be excused.

15 (The courtroom spectators stand to exit.)

16 THE COURT: Hold -- hold on. I'll excuse the jury. Mr.
17 Foreman, ladies and gentlemen of the jury, we'll take a short
18 recess at this time. You may refresh yourselves during the
19 break. Thank you.

20 (The jury exited the courtroom at 3:24 p.m.)

21 THE COURT: Now, let's go back on the record for just a
22 minute. I'll be glad to hear from Counsel if he wants to be
23 heard. But, let me tell you this before you get started.

24 You had -- you and I both know, from the State, who keeps
25 financial records or whatever -- or business records, would

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1 not release those records until the Court directed them to.

2 So, those records were not made available to the State.

3 They did not see them until the witness got here, and
4 neither did the Defense. And the Court was well aware of that
5 because we discussed that before the trial started.

6 Those records were not available until then. So, when it
7 was made available, when she got on the stand and testified --
8 Ms. Brown I believe -- when she got on the stand and
9 testified, she -- the question was raised about the business
10 license. And you asked to see the balance of her file on
11 cross examination. And you discovered those in there,
12 Counsel.

13 Until, then, to my knowledge, the State did not know that
14 the Defendant, Mr. Summers, had filed tax returns in two
15 thousand, two (2002); two thousand, three (2003), with them
16 and they had them on record. They had -- they had no
17 knowledge of that.

18 And, obviously, the agent didn't have knowledge of that.
19 And there was testifying -- Mr. Yarborough, wouldn't -- did
20 not know that. I'm not saying he couldn't have found them,
21 perhaps, if he had done something about it, but -- but he
22 didn't have knowledge of it.

23 And you knew he probably didn't have knowledge of it.
24 And he told you he didn't. And I -- I pre -- and I assumed
25 you meant to go -- ask him some questions about, "Why didn't

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1 you check on these records," but you didn't do that. You
2 accused him of deliberately withholding evidence that was
3 favorable to the State. You accused him of misconduct and
4 fraud.

5 MR. TREJO: No, no, no -

6 THE COURT: Yes, you did.

7 MR. TREJO: No, no, no, no.

8 THE COURT: And, when I stopped you, you argued with the
9 Court.

10 MR. TREJO: No.

11 THE COURT: And not only did you do that, Counsel, you
12 did it in a high-pitched voice, higher than -- much higher
13 than the normal voice. You did it in a high-pitched voice,
14 accused him -- you might not have said, "I accuse you," you
15 said, "Why did you withhold these records?" And "Why would
16 you withhold these records that are favorable?"

17 MR. TREJO: Not withhold I didn't say ---

18 THE COURT: That's what you said, Counsel.

19 MR. TREJO: Well, we can -- we can look back at the
20 record ---

21 THE COURT: Well, it was something to that effect. It
22 might have been a different word, but that was ---

23 MR. TREJO: It was different. It wasn't ---

24 THE COURT: That was the effect of it, "Why did you
25 withhold -- "Why would you withhold information ----

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1 MR. TREJO: No, no ---

2 THE COURT: --- that was favorable to the Defense?"

3 MR. TREJO: I never said that.

4 THE COURT: When you said -- you implied that, if you
5 didn't say it.

6 MR. TREJO: The record will ---

7 THE COURT: And you didn't say -- don't. If you argue
8 with me one more time, it's going to cost you in your
9 pocketbook; do you understand? Do not argue with the Court.
10 That's the second mistake you made.

11 You start arguing with me here before the jury about it.
12 And you did it before I could even finish ruling. You started
13 arguing with me about my ruling.

14 Now, if you want to make a motion, at that point, to have
15 the jury go out, and for that purpose, that's fine. But you
16 didn't do that.

17 And I'm trying to explain to you, whether you realized it
18 or not, you appliedly and accused this witness. And you
19 didn't ask him a question that he could answer. He couldn't
20 answer that question.

21 You supplied the answer, "Why are you deliberately
22 withholding information that was favorable to the Defense,"
23 accusing him of fraud before the jury -- before the jury and
24 deliberately withholding evidence, when you know he didn't
25 have any information.

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1 I'm not saying he couldn't have got it, if he had made a
2 big investigation of it, if he wanted to do it; that's up to
3 them, whether they think they have enough evidence to go to
4 trial without doing more.

5 But, the fact of the matter is, he didn't do it. You
6 could have asked him why he didn't do it, but that's not what
7 you asked. You asked him why he would deliberately withhold
8 evidence that was favorable to the Defense.

9 That's accusing him of unethical and fraudulent conduct,
10 Counsel, and I stopped you. And you argued with me before I
11 could even finish what I was trying to say; you started
12 arguing with me about it.

13 Now, I -- I think that's improper. That's the reason I
14 stopped you. When you started your cross examination back,
15 you did it properly. It was -- everything went smoothly. But
16 I'm explaining to you why. Whether you realize it or not,
17 that was the implication, okay?

18 And so, you can approach the bench, but to stand out
19 here, in a high-pitched voice, and start arguing and cutting
20 the Court off and arguing with me, in front of the jury, is
21 not appropriate any more than it's appropriate to accuse
22 somebody of fraud when you know -- and unethical conduct, when
23 you know -- have every reason to believe there is no unethical
24 or fraudulent conduct on behalf of the witness.

25 That's improper, and you knew it was improper. All

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1 right. Now, put whatever you want to on the record.

2 MR. TREJO: Your Honor, the -- the Court's perception
3 that I deliberately accused -- or that I accused this witness
4 of deliberately withholding evidence or accused him of fraud,
5 I think the record will speak for itself. But that certainly
6 -- those words did not come out of my mouth.

7 THE COURT: But the implication was there whether the
8 exact words were exact; that's the only implication you could
9 draw.

10 MR. TREJO: Secondly, the exception I took, and the
11 manner in which I took it, was inappropriate. The exception I
12 took with the Court was the Court's comments to me that I
13 could not suggest the answer, to the witness in my question,
14 but the very first rule of cross examination is to control the
15 witness ---

16 THE COURT: That's not -- that's not what I meant to
17 say. And you're right that I didn't express that right. But,
18 I didn't want to say before the jury, "You're accusing this
19 witness of fraudulent conduct." I didn't want to say that in
20 front of the jury.

21 MR. TREJO: Okay.

22 THE COURT: So, I just said, "You're suggesting an
23 answer to him before you're asking him."

24 MR. TREJO: Okay.

25 THE COURT: You weren't asking him a question, in other

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1 words, you were telling him.

2 And -- and there is a -- but you're not allowed to do
3 that cross examination. You can ask -- ask a question which
4 it does not have to be answered "yes," or "no," but you can't
5 tell him and say, "This is your answer." Now, that's not
6 proper cross examination either.

7 MR. TREJO: Right. But to control him to make sure that
8 he gives me an "yes," or "no" response and not give him a
9 open-ended question, that's the very premise of cross
10 examination.

11 THE COURT: Counsel, I -- I never saw any evading on his
12 part. I thought he was very straight forward in his answers.
13 If I thought he was evading you, I would have given you even
14 more leeway to keep him from doing that and let you control
15 the cross examination. But, he never tried to do that.

16 MR. TREJO: And that's why when -- when the Court made
17 that comment to me, I -- I stopped. And, I did, at that
18 point, say, "May we -- may approach? I need to make a
19 record," because I was somewhat dumbfounded if I could not
20 proceed on cross examination in that fashion.

21 THE COURT: Well, I ---

22 MR. TREJO: So, when I went ahead and proceeded, I said,
23 "Well, if I get scolded, I get scolded --

24 THE COURT: Yeah.

25 MR. TREJO: --- but fortunately, I did it okay after

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1 that -

2 THE COURT: Well, you did -- you did it properly and I
3 certainly -- there was certainly no problem with it. It went
4 smoothly and you went through it.

5 I even allowed you a little leeway. I might have stood
6 up and objected to a couple of those questions, if I had been
7 on the other side, but that's their responsibility, not mine.

8 All right. Thank you.

9 MR. TREJO: Thank you, Your Honor.

10 THE COURT: We'll take a short break.

11 MS. GANSS: Thank you, Your Honor.

12 (Whereupon, a recess was taken from 3:31 p.m. till 3:45
13 p.m.)

14 (Off-the-record discussion concerning the number of
15 witnesses to be called.)

16 THE COURT: Is Counsel ready to proceed?

17 MS. GANSS: The State is ready.

18 THE COURT: Is the Defense ready?

19 MR. TREJO: Yes.

20 THE COURT: All right. Please, bring them in.

21 (The bailiff steps out to summon the jury.)

22 (The jury enters the courtroom at 3:49 p.m.)

23 THE COURT: All right. Counsel, ready to proceed?

24 MS. GANSS: Thank you, Your Honor. The State calls
25 Agent Paul Criswell to the stand.

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1 (Agent Criswell steps forward to be sworn.)

2 (Whereupon,

3 AGENT PAUL CRISWELL

4 having been first duly sworn, testified as follows:)

5 DIRECT EXAMINATION by MS. GANSS:

3:50 P.M.

6 Q. Agent Criswell, please, introduce yourself to the jury
7 and let them know where you work and live.

8 A. I am Special Agent Paul Criswell, with the Department of
9 Homeland Security, Immigration and Customs Enforcement, office
10 of investigations, currently assigned to the office and
11 resident agent in charge, Greenville, South Carolina.

12 Q. Okay. And, in your capacity there, what do your duties
13 entail?

14 A. Investigation of violations of the U.S. Code Title 8,
15 Title 18, Title 21, and Title 31.

16 Q. Okay.

17 A. Mainly dealing with the illegal movement or the illegal
18 contraband across the United States border and persons
19 crossing the border.

20 Q. Okay. And how long have you been so employed?

21 A. Roughly three months -- three and a half (3 1/2) -- three
22 and a half (3 1/2) years.

23 Q. At this time, I would like to show you -- well, let me
24 ask you first: What were your duties about a year ago,
25 November of two thousand and five (2005)?

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1 A. I was case agent on the controlled delivery in question.

2 Q. Okay. And, as case agent, what were you charged with?

3 A. Basically, organizing our work force so to speak or
4 transporters. I was in charge of bringing together all the
5 local assets, state and local assets; officers, local
6 officers, and also the liaison between and also prep the --
7 the delivery point.

8 Q. Okay.

9 A. Basically doing surveillance on the actual delivery point
10 and I believe the subject's house, the subject's residence,
11 and gather information on him.

12 Q. Okay. And just tell this jury how -- how -- from the
13 beginning, how it got where you were -- how did you hear about
14 the Defendant?

15 A. November the 11th, I was contacted by Special Agent Mike
16 Drawing (phonetic), with the ASAP (phonetic), Laredo, Texas
17 office.

18 Q. Okay.

19 A. He advised me that they had -- or seized -- the
20 inspectors had stopped the tractor-trailer inbound from Mexico
21 headed to an address in Inman, South Carolina. And they had
22 discovered what they believed to be a large quantity of
23 marijuana on the tractor-trailer.

24 Q. So, what was your -- what were you suppose to do?

25 A. Advise my first line supervisor of the situation and

1 basically sit back and wait till we got confirmation that
2 ASAP, Laredo, was bringing up the actual load of marijuana.

3 Q. Did you know when that delivery date was going to be?

4 A. We knew it would be around either November 15th or 16th.

5 Q. Okay. What happened then?

6 A. Basically, we -- myself, and a couple of other agents in
7 my office, conducted surveillance on known address of the
8 subject we were advised that ---

9 MS. GANSS: And I'm sorry. Could you speak up just a
10 little bit. I'm having a little trouble hearing you.

11 A. Myself and agents from my office conducted surveillance
12 on the individual we believed to be the ultimate consignee of
13 the shipment, Mr. Summers.

14 Q. Okay.

15 A. Also, basically we gathered as much information as we
16 could on -- on him.

17 Q. And what information were you able to develop about the
18 Defendant, Mr. Summers?

19 A. His current residence -- residence, his place of
20 business. Also, we were able to get tag numbers, license tag
21 numbers, from a vehicle. And we were able to drop or serve
22 subpoenas for phone numbers that we had been supplied by ASAP
23 in Laredo as being contact numbers for Mr. Summers.

24 Q. Okay. Let's talk about those things then. And speak up
25 just a little bit, if you would, for us here. The residence,

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1 what is -- what address did you find to be the Defendant's
2 residence?

3 A. Campobello

4 Road ---

5 Q. All right.

6 A. --- or excuse me, Campobello, South Carolina.

7 Q. All right. And you mentioned a business. Where was that
8 business located?

9 A. Road,
10 Spartanburg.

11 Q. Please, describe, for the jury, your -- what that
12 business looked like when you viewed it.

13 A. The business was located behind what they call a -- a
14 tienda, which is a small Spanish store. It was located down
15 behind the actual tienda, and it was identified as Acapulco
16 Café.

17 There's a small -- or, excuse me, a -- a pull around or a
18 driveway, circular driveway, right in behind the Acapulco
19 Café, and there's a strand of stores behind it -- or store
20 fronts, approximately three (3), tied together. And -- and
21 the business was identified as Clay and Ceramic Pottery was
22 located in those businesses.

23 Q. Did you -- and when did you look at this pottery
24 business? Was it before November 16th, two thousand and five
25 (2005)?

- 1 A. Yes. It was on November the 13th.
- 2 Q. Okay. And, when you looked in this store, what did you
3 see inside the store itself?
- 4 A. A vacant store front.
- 5 Q. Was -- was there a cash register in it?
- 6 A. Not that was visible to me.
- 7 Q. Shelving?
- 8 A. There was one small bench out the -- sort of more like a
9 counter at one end.
- 10 Q. Okay. Anything else inside this building?
- 11 A. Nothing that was visible to me.
- 12 Q. Could you describe the approximate size of the -- or the
13 square footage of the building?
- 14 A. Approximately eight hundred (800) to a thousand (1,000)
15 square foot if that.
- 16 Q. Was there -- what was the parking like outside of this
17 store front?
- 18 A. It was a small parking area for a night club that was
19 also located behind Acapulco Café and was directly next door
20 to the strand of stores which had Clay and Ceramic Pottery
21 business located.
- 22 Q. Was there room to get a tractor-trailer in there?
- 23 A. Yes, ma'am.
- 24 Q. Have you been out to that store front subsequent to this
25 incident?

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1 A. Yes, ma'am.

2 Q. Did you see any other tractor-trailers out there?

3 A. I saw approximately two (2) tractor-trailers.

4 Q. So, please, describe -- oh, we talked about -- you said
5 something about phone records and subpoenas. Please, tell the
6 jury what you're talking with that.

7 A. We were supplied with a phone number that the Laredo
8 field office was able to gather, for the contact number for
9 Mr. Summers, and we issued a subpoena to the -- the service
10 -- service provider of the phone.

11 The subsequent return for the information on this -- the
12 phone service revealed that the phone had been actually
13 transferred to a different service provider.

14 Q. So, what does that mean?

15 A. Basically, the service provider that we contacted
16 initially no longer held that phone or at least serviced that
17 phone. It had been transferred over to a different provider.

18 Q. So, please, describe for the jury, then, what you did
19 actually on November 16th, two thousand, five (2005).

20 A. Approx ---

21 Q. I'm sorry. I'm going to interrupt. Can you speak closer
22 into that microphone? I think the Defense is having
23 difficulty hearing you.

24 A. I'm a low talker. I'm sorry.

25 Q. I know.

1 A. At approximately 10:30, on November 16th, we initiated
2 surveillance of the -- the target location, which, then, we
3 basically discovered was the Nacho's Mexican Restaurant.

4 Q. Okay.

5 A. Located at -- --, Inman, South Carolina.

6 Approximately 10:30, the tractor-trailer containing marijuana
7 arrived at the target location, which was Nacho's Mexican
8 Restaurant.

9 Q. And how do you know all of this?

10 A. We were advised by the Laredo field office the night
11 prior, on the 15th, that the location of the delivery would be
12 Nacho's Mexican Restaurant.

13 Q. Were you there when the tractor-trailer arrived that
14 morning?

15 A. Yes, ma'am, I was.

16 Q. Okay. And what was your role while you were there?

17 A. I was the surveillance team leader, as -- and also being
18 the case agent. And I was what we call the -- the eyeball for
19 the parking lot of Nacho's Mexican Restaurant, the front
20 parking lot. And I was able to surveille the front parking
21 lot and any vehicles going in and out of the parking lot.

22 Q. Okay. And, did you -- let's see, I'm going to show you
23 what's been marked State's Exhibit Number 21 I believe.

24 (State's Number 21 on overhead.)

25 Q. Did you happen to see -- and I'll also show you -- this

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1 one might be better -- State's Exhibit Number 20, this silver
2 vehicle?

3 A. Yes, ma'am.

4 Q. What was that vehicle doing that day?

5 A. Said vehicle arrived at the target location shortly after
6 the arrival of the tractor-trailer. We observed the tag
7 number as being , which came back registered to Mr.
8 Summers.

9 (State's Number 20 on overhead.)

10 Q. Okay. Is that the tag number you're talking about?

11 A. Yes.

12 Q. Thank you. Was that car -- what was that car doing that
13 day?

14 A. We observed it on -- or, excuse me, I observed it on a
15 number of occasions traveling north and south on Highway 9.
16 And what I estimated to believe counter surveillance --

17 MR. TREJO: Objection on the speculation.

18 THE COURT: Sustain the objection, Counsel.

19 Q. (By Ms. Ganss) So, you're watching that car. What --
20 what -- what happened?

21 A. Shortly, after the arrival of the silver Ford Escort, I
22 observed the arrival of a Budget rental truck. The Budget
23 rental truck was observed by surveillance teams pulling up to
24 the back of the tractor-trailer in the back parking lot of
25 Nacho's Mexican Restaurant.

1 Q. And what you could see?

2 A. I could only see the Budget rental truck pulling into the
3 front parking lot. I could not surveille anything going on in
4 the back area of the parking lot.

5 Q. So, how long were you there watching?

6 A. Approximately two and a half (2 1/2) to three (3) hours.

7 Q. And what changed or what -- what followed?

8 A. Surveillance teams observed a white passenger van arrive
9 up, to the target location, and travel, to the back area of
10 Nacho's Mexican Restaurant, and pull to the rear and pull
11 behind the tractor-trailer.

12 Q. Then, what?

13 A. Surveillance teams were advised by the UC (phonetic)
14 agents that the actual clay articles, the pottery on the
15 tractor-trailer, were being trans-loaded from the tractor-
16 trailer to the passenger van and the Budget rental van.

17 Q. Okay. I'm going to show you what's been marked State's
18 Exhibit Number 10.

19 (State's Number 10 on overhead.)

20 Q. And tell us what this picture shows.

21 A. This picture shows the Budget rental van.

22 Q. Okay. Outside of...?

23 A. Nacho's Mexican Restaurant.

24 Q. Let's see, so, we've got a van, a Budget -- well, what
25 happened -- how long did this trans-loading continue?

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1 A. Approximately thirty (30) to forty-five (45) minutes.

2 Q. Then, what?

3 A. Surveillance teams observed the Budget rental van and the
4 white passenger van traveling in tandem north on Highway 9.

5 Surveillance teams followed the Budget rental van and the
6 passenger van to a storage facility, identified as Secured
7 Storage facility, which is located at Inman,
8 South Carolina.

9 Q. Do you know how far this Secured Storage facility is from
10 Nacho's?

11 A. Approximately point eight (.8) miles.

12 Q. Let's see here. I'm going to show you what's been
13 entered into evidence as State's Exhibit Number 6.

14 (State's Number 6 on overhead.)

15 Q. Can you tell us what that is?

16 A. Yes, ma'am. This is the rental agreement for the Secured
17 Self Storage rental space -- excuse me, storage space.

18 Q. And is there a signature on it for --

19 A. Yes, ma'am.

20 Q. Who rented that self-storage space?

21 MR. TREJO: Objection, Your Honor, cumulative.

22 THE COURT: Overruled. Proceed.

23 Q. (By Ms. Ganss) Whose signature on it as having rented it?

24 A. Wilbur Xavier, also Wilbur Xavier Castro Summers.

25 Q. Okay.. Thank you. And, so, what happened after you --

1 you're watching two vehicles traveling in tandem. What --

2 what goes on next?

3 A. Surveillance teams observed the -- the white van, the
4 passenger van, and the Budget rental truck back up to a
5 storage unit, labeled H-19, and the articles, being the clay
6 articles, being transferred into the storage facility from the
7 trucks.

8 Q. And, as you -- then -- then what?

9 A. We observed -- excuse me, surveillance teams observed the
10 silver Ford Escort, identified as being Mr. Summers',
11 traveling north on Highway 9 to the Secured self-storage
12 facility.

13 Q. Okay. And how long did you continue watching this?

14 A. Approximately thirty-five (35) minutes.

15 Q. Then what?

16 A. Surveillance teams observed the Budget rental van and the
17 white passenger van traveling south and returning to Nacho's
18 Mexican Restaurant in tandem.

19 Q. Okay. Go ahead.

20 A. Shortly after that, surveillance teams observed the
21 silver Ford Escort return to Nach -- Nacho's Mexican
22 Restaurant. At that point, we were advised that the shipment
23 had already -- or excuse me, the white passenger van and the
24 Budget rental truck pulled back around, to the rear of Nacho's
25 Mexican Restaurant. And the trans-loading of the clay

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1 articles continued, from the tractor-trailer, to the rental
2 van and the Budget Rental truck.

3 Q. Okay. At any time, do you know was a load of this taken
4 to the store front?

5 A. No, ma'am, no.

6 Q. So, more trans-loading takes place, then, what?

7 A. Shortly afterwards, surveillance teams were advised that
8 the UC agent had been advised to go inside to Nacho's Mexican
9 Restaurant to have lunch. The ---

10 Q. And when you say, "UC agent" ----

11 MR. TREJO: Your Honor, I'm going to object to the
12 continued introduction of hearsay unless it's his personal
13 knowledge.

14 THE COURT: And I -- I sustain the objection as to
15 hearsay and what was instructed. He can testify as to -- to
16 what he knows of his own or what he saw on his own.

17 MS. GANSS: Thank you, Your Honor.

18 Q. (By Ms. Ganss) So, what did you do then?

19 A. Surveillance teams observed the white passenger van and
20 the Budget Rental truck --

21 MR. TREJO: Well, objection and move to strike. Lack of
22 foundation as to personal knowledge, "surveillance teams
23 observed."

24 THE COURT: Sustained, Counsel.

25 Q. (By Ms. Ganss) What did you do?

1 A. I observed the white passenger van and the Budget rental
2 truck depart from Nacho's Mexican Restaurant and travel north
3 on Highway 9. Surveillance teams were, then, dispatched to
4 follow the two vehicles in question.

5 Q. Why?

6 MR. TREJO: Objection, motive is irrelevant.

7 THE COURT: Sustained, Counsel. Rephrase if you wish.

8 Q. (By Ms. Ganss) What happened then?

9 A. Surveillance teams observed the white passenger van and
10 the Budget rental truck proceed past the Self Storage facility
11 and proceed to a location that we were not familiar with.

12 Q. And, since the vehicles were going somewhere else, what
13 did you do?

14 A. We decided or the order was given to go ahead and conduct
15 a take down of the per -- or excuse me, the -- the tractor-
16 trailer in the parking lot of Nacho's Mexican Restaurant.

17 Q. Okay. And so, what happened as a result of that take-
18 down?

19 A. Mr. Summers was arrested.

20 Q. All right. What, if anything, did you find on Mr.
21 Summers as a result of that arrest?

22 A. The standard personal effects; driver's license,
23 billfold, a couple of cell phones.

24 Q. Two (2) cell phones?

25 A. Two (2) cell phones on his person, yes, ma'am.

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1 Q. I'm going to show you what's been marked State's Exhibit.

2 19.

3 (State's Number 19 shown on overhead.)

4 Q. Can you tell us what this is?

5 A. Yes, ma'am. That's a cell phone that was found inside
6 the silver Ford Escort registered to Mr. Summers and a -- a
7 padlock as well.

8 Q. All right. Was this phone different from the two that
9 you mentioned you found on his person?

10 A. Yes, ma'am.

11 (Brief Pause)

12 Q. Did you see the marijuana that was found on this tractor-
13 trailer?

14 A. After it was busted, the clay pottery, yes.

15 Q. Did you find any marijuana in the storage unit?

16 A. No, ma'am.

17 Q. Okay. And do you know the ultimate location the other
18 vehicles were going to when they drove past the storage unit?

19 A. --

20 Q. Did you find any marijuana --

21 A. -- Campobello.

22 Q. I'm sorry. Did you find any marijuana there?

23 A. No, ma'am.

24 Q. So, where was all the marijuana?

25 A. Still located on the tractor-trailer.

1 Q. Why, then --

2 THE COURT: Excuse me just a minute. Let the court
3 reporter catch -- catch her breath.

4 MS. GANSS: Oh, I'm so sorry.

5 (Court reporter coughing.)

6 (Off-the-Record Comments)

7 THE COURT: All right.

8 Q. (By Ms. Ganss) Why did you do -- why didn't you wait
9 until all that pottery was taken off the tractor-trailer? Why
10 did you do the take down when you did?

11 A. Through the agency's policy, we're not allowed to have
12 narcotics, which is under our control at the time, basically
13 be released from our control and lose actual control of that
14 and go to locations that we're not familiar with and end up
15 losing control of the narcotics and lose it all together.

16 We felt that -- excuse me -- I felt that we were getting
17 to that point where we might lose the actual control over the
18 narcotics. And the decision was made to take everything down.

19 Q. Well, were you there alone?

20 A. No, ma'am.

21 Q. How many law enforcement officers did you have helping
22 you?

23 A. Approximately twenty-five (25) officers and agents..

24 Q. Okay. Were they all doing what you were doing, watching?

25 A. Some were.

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1 Q. Okay. So -- and, I guess to clarify for the jury, why
2 did you feel you were losing control?

3 MR. TREJO: Objection, irrelevant at this juncture.

4 THE COURT: Well, I -- I think he's answered that
5 question, Solicitor. So, please -- please, move on.

6 MS. GANSS: Thank you, Your Honor.

7 Q. (By Ms. Ganss) In your job currently, are you able to
8 order I guess what's called a trap and trace?

9 A. Yes, ma'am, I am.

10 Q. Did you order one in this case?

11 A. No, ma'am.

12 Q. Why not?

13 A. Normally, a controlled delivery is a very time sensitive
14 matter. In incidents where a controlled delivery conducted
15 and the actual load itself sits in one location, for a long
16 period of time, that would have been a viable option. But, in
17 this case, we -- or I deemed it not a viable option.

18 Q. Okay. What about wire taps. Can you get wire taps?

19 A. In the time frame that we had, no, ma'am.

20 Q. Okay.

21 A. Not in my experience.

22 Q. What about a pole cam, can you order a pole cam?

23 A. Yes, ma'am, I can.

24 Q. Did you do one in this case?

25 A. No, ma'am, I did not.

1 Q. Why not?

2 A. We had a location change on where the actual -- or
3 tractor-trailer load was going to the night before the
4 delivery. There's a limited number of assets in the area as
5 far as pole cammers go. At that time, I did not have access
6 to any of them.

7 Q. Okay.

8 MS. GANSS: Beg the Court's indulgence for just a
9 moment, Your Honor.

10 (Brief Pause)

11 MS. GANSS: I have no more questions for this witness.
12 Thank you. Please, answer any questions Mr. Trejo may have.

13 CROSS EXAMINATION by MR. TREJO:

4:14 P.M.

14 Q. Good afternoon.

15 A. Good afternoon.

16 Q. The -- the lock that's depicted in Exhibit 19 --

17 A. Yes, sir.

18 Q. --- that's consistent with a lock that the storage
19 facilities sell to individuals who rent storage lockers, isn't
20 it?

21 A. Yes, sir.

22 Q. Okay. The -- early on, in your testimony, you indicated
23 that you relied upon the subpoena power to obtain phone
24 records?

25 A. Yes, sir.

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1 Q. Would you explain to the jury, please, how easy it is to
2 issue a subpoena?

3 A. In these cases, I -- I do have the power to issue a
4 subpoena. It's approved by my what we call a special agent-
5 in-charge, which is supervisor over a three -- offices located
6 within a three-state area.

7 Q. Okay. And, when you say you have the power,
8 procedurally, what -- what does it take?

9 A. Basically, filling in the information, on the subpoena
10 itself, and sending it to wherever you're sending it.

11 Q. Basically, it's -- it's in your computer, a pre-printed
12 form?

13 A. Yes, sir.

14 Q. And you just fill in the agency where you want it sent
15 to?

16 A. Yes, sir.

17 Q. For example, a phone company?

18 A. Yes, sir.

19 Q. A utility company?

20 A. Yes, sir.

21 Q. A place of business, any one of a variety of businesses
22 and entities, correct?

23 A. Correct.

24 Q. And, then, after you fill out where you're sending it to,
25 then, there's another section that you fill in what it is that

- 1 you really want from them?
- 2 A. Yes, sir, correct.
- 3 Q. And, once you give it to them, you can request that they
- 4 provide you the information being sought on an expedited
- 5 basis, correct?
- 6 A. Yes, sir.
- 7 Q. And, because you are, with a federal law enforcement
- 8 agency, it's been your experience that these entities
- 9 typically cooperate to the best of their ability?
- 10 A. Yes, sir.
- 11 Q. And, if you tell them you want this information
- 12 expedited, they give it to you expedited?
- 13 A. On some incidences, yes, sir.
- 14 Q. On most of them?
- 15 A. Most of them, yes, sir.
- 16 Q. The occasional ones they don't do it on an expedited
- 17 basis?
- 18 A. Mostly, whenever you have an enforcement action
- 19 pending ---
- 20 Q. Right.
- 21 A. --- then, they will get back to you as quickly as
- 22 possible.
- 23 Q. Okay. But, in this particular case, you -- you issued
- 24 subpoenas to get phone records?
- 25 A. Subscriber information.

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1 Q. Subscriber information. And, when you say that they --
2 that there was some change in the information that you
3 obtained?

4 A. Not really a change in information, the actual I guess
5 the phone number of that -- of the number that we were looking
6 for information on, had been transferred over to a different
7 phone company. So...

8 Q. Sort of like if you have a -- a phone number with Verizon
9 and you're able to switch that same phone number over to
10 Nextel or some other ---

11 A. Yes.

12 Q. But, in any event, it's fair to say that you were not
13 necessarily limited, in the number of subpoenas, that could
14 have been issued in this particular case?

15 A. Correct.

16 Q. And the subpoena power that you had was not limited, to
17 the period of time from November the 11th, two thousand and
18 five (2005) to November 16th, two thousand and five (2005),
19 correct?

20 A. Correct.

21 Q. You could have continued to issue subpoenas up until now?

22 A. Correct.

23 Q. Okay. Did you issue any subpoenas to obtain any type of
24 financial information concerning my client?

25 A. No, sir, I did not.

1 Q. One of the areas -- one of the businesses that you could
2 have issued an subpoena to would have been credit reporting
3 agencies, correct?

4 A. Correct.

5 Q. And, in the past, you have done that in other cases?

6 A. Yes, sir, I have.

7 Q. And that would have allowed you, to make a determination,
8 as to whether or not the individual has outstanding debts or
9 whether or not he has -- he or she has any outstanding credit,
10 paid off loans, et cetera?

11 A. Yes, sir, through the issue of a grand jury subpoena.

12 Q. Mortgages on property et cetera, correct?

13 A. Yes, sir.

14 Q. In this particular case, the only real asset that you
15 found that belonged to Mr. Summers was a -- the Ford Escort?

16 A. Correct.

17 Q. And what year was that Ford Escort approximately? Do you
18 remember?

19 A. I don't remember off the top of my head.

20 Q. Well, can you -- can you tell the jury, please -- if you
21 want, I'll show you the picture, but if it's not necessary,
22 if you can just let them know the approximate value of that
23 vehicle?

24 A. I'm sorry?

25 Q. I'm sorry, the -- the approximate value of that vehicle

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1 in your estimation?

2 A. In my estimation, maybe three thousand dollars (\$3,000).

3 Q. Okay. Based upon your training and experience, an
4 individual with a three thousand dollar (\$3,000) vehicle, does
5 not cause a red flag to go up that someone is living outside
6 of their means, correct?

7 A. I don't necessarily based it upon that.

8 Q. When you went over to -- to -- well, just a second --
9 you were the case agent in this case?

10 A. Yes, sir.

11 Q. Meaning you were responsible for delegating assignments
12 to other individuals ---

13 A. Yes, sir.

14 Q. --- other law enforcement officers involved in this case?

15 A. Yes, sir.

16 Q. Including searches and -- and what have you, correct?

17 A. If it arose, yes, sir.

18 Q. In this particular case, there was a consent search of my
19 client's residence?

20 A. Correct.

21 Q. A consent search of his vehicle?

22 A. Correct.

23 Q. A consent search of the rental truck that he had rented?

24 A. Yes, sir.

25 Q. A consent search of the storage unit?

1 A. Yes, sir.

2 Q. And, in any of those locations, where consent was given
3 to -- for a search, was any contraband found?

4 A. No, sir.

5 Q. And when I say "contraband," no marijuana?

6 A. No, sir.

7 Q. No proceeds of any drug transaction?

8 A. No, sir.

9 Q. No drug ledgers?

10 A. No, sir.

11 Q. And drug ledgers would be locations and numbers
12 indicating money received, money owed from sales of narcotics?

13 A. Yes, sir.

14 Q. Nothing like that?

15 A. No, sir.

16 Q. Anything, during the course of those searches, of those
17 vehicles or those residences or those storage units, that gave
18 you any indication that Wilbur Summers was involved in
19 narcotics trafficking?

20 A. No, sir.

21 Q. All right. Now, I want to -- I want to go over to the --
22 the business. When you say that you looked into the -- the
23 business, and saw approximately eight hundred (800) square
24 foot building, you couldn't see everything that was inside,
25 could you?

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1 A. I could see through the front windows. The front is a --
2 a glass front. I was able to see as far in as I possibly
3 could with my eyes.

4 Q. But, when you're looking in -- say we were looking back
5 eight hundred (800) square feet right there in the back of the
6 courtroom. And, as you're looking back, you're not able to
7 see the entire interior of -- of the -- of the store, correct?

8 A. Correct.

9 Q. There are portions of the store that weren't visible to
10 you, correct? .

11 A. Correct.

12 Q. So, in those portions that weren't visible to you, did
13 you subsequently learn that there was a computer, printer,
14 signs, and chairs there?

15 A. I did not observe any, no, sir.

16 Q. Afterwards when you gained access to it?

17 A. We never -- there was no consent search or search of the
18 actual facility.

19 Q. You didn't -- you didn't search that facility?

20 A. No, sir.

21 Q. And the reason you didn't search the facility is because
22 no one ever went inside the facility where all the ceramic
23 pots were being unloaded?

24 A. There were no ceramic pots offloaded there at the
25 business location.

1 Q. Right. And, when you said there was no consent to search
2 that location, consent was never requested to search that
3 location?

4 A. Correct.

5 Q. Okay. So, it wasn't a matter my -- Mr. Summers saying,
6 "No consent. Don't search there"?

7 A. Correct.

8 Q. And it was just a -- a decision on law enforcement's part
9 that, "You know, we don't feel it's necessary to search that
10 location," correct?

11 A. Correct.

12 (Brief Pause)

13 Q. And you talked a little bit about the observing that took
14 place. From the time that the -- the -- when you talk about
15 the UC agent ---

16 A. Yes, sir.

17 Q. --- that's the undercover agent that drove the c
18 trailer ---

19 A. Yes, sir.

20 Q. --- from Texas here to South Carolina, correct?

21 A. Correct.

22 Q. Okay. But the CU -- from the time that the CU agent
23 arrived there, at Nacho's Restaurant, until Mr. Summers was
24 actually arrested, how much time went by would you say
25 approximately?

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1 A. Two and -- approximately two and a half (2 ½) to three
2 (3) hours.

3 Q. Two and a half (2 ½) to three (3) hours?

4 A. Until the actual -- till the whole ---

5 Q. Bust?

6 A. The whole bust basically, yes, sir.

7 Q. Now, you've -- you've testified that no items, no ceramic
8 pots, had -- had been unloaded, at the store front, at the
9 9133 address?

10 A. Yes, sir.

11 Q. But, the -- the storage unit itself had not yet been
12 filled to capacity with ceramics, correct?

13 A. Well, it was -- it was getting there. You could have
14 stacked things on top of it, yes, sir.

15 Q. Yeah, but there was still a little bit more room left
16 there before another location had to be sought, in order to
17 continue to unload the items, correct?

18 A. Correct.

19 (Brief Pause)

20 Q. Now, this -- this concept of agency policy, that the
21 marijuana could not be released to other locations, let's talk
22 briefly about that. That's -- that's merely a policy decision
23 and not a law, correct?

24 A. Correct.

25 Q. And, in that regard, there's discretion, correct?

1 A. Correct.

2 Q. And the discretion that exists is the discretion to
3 determine whether or not your -- you or the agency is going to
4 continue to a law -- allow suspects to unload items that, at
5 that point, you know contain marijuana, correct?

6 A. Correct.

7 Q. And, after waiting approximately two and a half (2 ½) to
8 three (3) hours, you could have waited a little longer until
9 the actual marijuana was being unloaded, correct?

10 A. At the time, once the vehicle or the box truck and the
11 passenger van proceeded past Secured -- or Secured Self
12 Storage and proceeded to a location, at that time, we did not
13 know where it was going.

14 Like I said, it was determined to actually take
15 everything down because we were not sure. On the actual
16 surveillance points, we didn't know if we were actually going
17 to burn our surveillance, or at least make ourselves
18 detectable.

19 Q. Now, when you say it proceeded past the self storage,
20 what proceeded past the self storage?

21 A. The Budget rental van ----

22 Q. The rental van and it was full?

23 A. And the passenger van.

24 Q. Right. And they -- they were full at that time?

25 A. Yes, sir.

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1 Q. And, at that point, the officer involved knew that the
2 marijuana had not been unloaded, correct?

3 A. We did not know.

4 Q. I see. Okay. But, when it proceeded past the storage
5 -- the storage facility, that's on the way to Mr. Summers'
6 residence?

7 A. At the time, we didn't know that was a way to Mr.
8 Summers' residence.

9 Q. Well, you knew his residence before making -- did you
10 know ---

11 A. Yes, sir.

12 Q. --- his residence?

13 A. Yes, sir.

14 Q. And you were aware of his residence shortly after the
15 tractor-trailer was seized in Texas, correct?

16 A. Yes, sir.

17 Q. Because of the documentation that was found inside,
18 correct?

19 A. Yes, sir.

20 Q. So, when you say you didn't know that his residence was
21 up a little past the storage facility, that's not necessarily
22 entirely accurate?

23 A. I knew it was within -- within the area, but the loc --
24 the direction that they were going and the route they were
25 taking, I was not familiar with.

- 1 Q. You weren't sure?
- 2 A. I was not sure of the route that they were taking and
- 3 neither were the agents that were following the vehicle.
- 4 Q. And the business location, was that also out toward that
- 5 direction?
- 6 A. The store front?
- 7 Q. Yeah.
- 8 A. No, sir.
- 9 Q. That was in a totally different direction?
- 10 A. Yes, sir.
- 11 Q. Twenty-five (25) officers were involved?
- 12 A. Yes, sir.
- 13 Q. Now, when we -- when you say twenty-five (25) officers,
- 14 do those include or exclude the ten (10) officers that came
- 15 with the tractor-trailer from Texas?
- 16 A. That includes those agents.
- 17 Q. Okay. So, we have those ten federal agents from Texas,
- 18 plus, an additional fifteen (15) law enforcement officers from
- 19 this area?
- 20 A. I believe it was eight (8) agents from Texas.
- 21 Q. Eight (8)?
- 22 A. Eight (8), yes, sir.
- 23 Q. Weren't there two (2) in each car and there were four (4)
- 24 cars, two (2) in each car, plus the two (2) inside of the
- 25 tractor-trailer?

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1 A. Actually, yes, you are correct. You're counting the
2 actual UC drivers, yes, sir.

3 Q. Okay. Well, that gentlemen over there -- so, does that
4 mean there were even more agents involved over here?

5 A. I'm sorry?

6 Q. Does that mean there was maybe twenty-seven (27) and not
7 twenty-five (25), since you're only counting eight (8) from
8 Texas before?

9 A. No, sir, it was twenty-five (25).

10 Q. All right.

11 A. I had them listed separately on the outside.

12 Q. All right. And the -- the fifteen that were involved
13 here in this area, when did their involvement commence?

14 A. I'd say on November 14th was the actual --

15 Q. Approximately two (2) days before the arrival of the ---

16 A. Yes.

17 Q. --- the tractor-trailer?

18 A. Yes, sir.

19 Q. Okay. And you assigned various tasks to each of those
20 respective fifteen (15) law enforcement officers from this
21 area?

22 A. Yes, sir.

23 Q. And would you, please, explain to the jury some of the
24 tasks that you assigned to those other law enforcement
25 officers?

1 A. We had a number of marked units in the area, as well, for
2 canine support. I would say approximately six (6) South
3 Carolina State transport police officers.

4 We also had individuals from the Spartanburg County
5 Narcotics -- Vice and Narcotics unit, and also agents from my
6 office.

7 Q. What did you have them do?

8 A. We had the -- what's called the uniformed units in and
9 around the area. But, with a marked unit, you don't want it
10 to stand out too much, so, we had them pulled back from the
11 area a good ways. They were there to offer support to us once
12 the actual take down commenced.

13 The vice and narcotic units individuals were in vehicles
14 with agents from my office to assist in case we started moving
15 to different areas. They have a better understanding of the
16 area seeing that they do cover that part of the county.

17 Q. And were you the only one doing administrative type of --
18 of things, in conjunction with your other duties?

19 A. No, sir. There was my supervisor as well.

20 Q. Okay. And what type of administrative types of functions
21 was he performing?

22 A. He was assisting in the conducting of the surveillance.
23 I guess he was what you would call a co-team leader. He also
24 was part of the take down as the veh -- at the Budget rental
25 truck and the passenger van proceeded to

1 Q. As case agent, do you have any evidence that you can
2 present to the jury that would establish that Wilbur Summers
3 was living outside of his means?

4 A. No, sir.

5 MR. TREJO: Thank you, sir.

6 (Brief Pause)

7 MS. GANSS: Beg the Court's indulgence just one
8 moment ---

9 THE COURT: Yes, ma'am.

10 MS. GANSS: --- Your Honor.

11 (Brief Pause)

12 REDIRECT EXAMINATION by MS. GANSS:

4:32 P.M.

13 Q. Agent Criswell, is your -- it your decision to take the
14 take down. Why -- why did you stop the van?

15 A. We were advised that there were -- as we understood,
16 there were clay articles there on the van, the Budget rental
17 truck. We were not aware -- we did not know where marijuana
18 or clay articles containing marijuana were on those two
19 vehicles or not.

20 Q. Did you thought -- did you think there might be marijuana
21 on the van?

22 A. Yes, ma'am.

23 Q. And on the Budget rental truck?

24 A. Yes, ma'am.

25 Q. And some still on the tractor-trailer?

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1 A. Yes, ma'am.

2 MS. GANSS: Thank you.

3 THE COURT: Thank you, sir. You may stand down, sir.

4 (The witness stepped down from the witness stand at 4:34
5 p.m.)

6 MS. GANSS: Your Honor, we would ask that Agent Criswell
7 be excused.

8 MR. TREJO: No objection, Your Honor.

9 THE COURT: Well, thank you for coming, sir. You may be
10 excused at this time.

11 (Whereupon, the witness was excused.)

12 MS. GANSS: The State calls Cory Grubbs to the stand.

13 (Mr. Grubbs steps forward to be sworn.)

14 (Whereupon,

15 AGENT CORY GRUBBS

16 having been first duly sworn, testified as follows:)

17 DIRECT EXAMINATION by MS. GANSS: 4:34 P.M.

18 Q. Agent Grubbs, please, introduce yourself to the jury.

19 A. Good afternoon. My name is Cory Grubbs.

20 Q. Tell us where do you work and for whom?

21 A. Okay. I'm a special agent with Immigration and Customs
22 Enforcement in Laredo, Texas. I've been working there for
23 approximately two (2) years. And, prior to that, I was a
24 border patrol agent also in Laredo, Texas, for about six and a
25 half (6 ½) years.

PAMELA FAUCETTE, CVR, 864-574-9534 or 336-260-2864

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1 Q. And what are your current duties?

2 A. My duties right now, as a special agent, I'm assigned to
3 a narcotics group that basically I investigate narcotic
4 seizures, when they're apprehended at one of the -- a port of
5 entry at the international bridges that are in Laredo, Texas.

6 Q. And were you involved in a controlled delivery on
7 November -- in -- in November of two thousand and five (2005)?

8 A. Yes, I was.

9 Q. And what was your role in that controlled delivery?

10 A. I assisted in several ways. I helped drive the tractor-
11 trailer here to Spartanburg. I assisted with the arrests and
12 also with the interviews of the subjects.

13 Q. Okay. Let's talk about, when you spoke -- did you
14 interview the Defendant, Wilbur Castro Summers?

15 A. Yes, I did.

16 Q. Was he in custody when you interviewed him?

17 A. Yes, he was.

18 Q. Did you Mirandize the Defendant?

19 A. Yes, I did.

20 Q. Did you have him sign a pre-interrogation waiver form?

21 A. Yes, he did.

22 Q. Do you know -- well, let me ask you this: When you
23 interviewed -- when you interviewed the Defendant, did he
24 appear under the influence of anything?

25 A. No, he did not appear to be so.

1 Q. Okay. Did you read him his rights?

2 A. Yes, I did.

3 Q. Okay. We have an interpreter here. What language did
4 you read the Defendant his rights in, English or Spanish?

5 A. I read him his rights in the Spanish language.

6 Q. Okay. What -- do you speak Spanish proficiently?

7 A. Yes, I do.

8 Q. Okay. What is your background in terms of speaking
9 Spanish?

10 A. I grew up in the Republic of Panama. I spoke some
11 Spanish there. As a border patrol agent, the Border Patrol
12 Academy has intensive Spanish classes.

13 Also, on a daily basis, I speak Spanish performing my
14 duties as a special agent on the border there. Also, my wife,
15 she does not speak English. She speaks Spanish, so, at home I
16 speak Spanish also.

17 Q. Okay. I'm going to show you what's been marked -- it's
18 under here -- State's Exhibit Number 3.

19 (State's Number 3 on overhead.)

20 Q. And I'll show you the whole form at first. Is -- is this
21 form you had -- what is this form?

22 A. This is his Mir -- the statement of Miranda rights in the
23 Spanish language.

24 Q. Could you tell us what those rights are?

25 A. Okay. At the top there it says, "Declaration of Rights."

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1 It says, "Before we ask you any questions, you -- you have --
2 you should know your rights."

3 "You have the right to remain silent. Anything you say
4 can be used against you in a -- in a court or any other
5 proceeding.

6 "You have the right to consult with an attorney before
7 you make any statement or declaration..."

8 MR. TREJO: Your Honor, if I -- if I may. I have a copy
9 I could hand the witness ---

10 MS. GANSS: Oh, super.

11 (Document handed to the witness.)

12 A. Thank you. "You have the right to have a -- an attorney
13 present with you during interrogation. If you cannot pay for
14 an attorney, one will be appointed to you before making --
15 before -- before we -- we ask any questions to you if you
16 wish.

17 "If you have -- if you decide, to respond to our
18 questions right now, you retain the right to stop the
19 questioning, at any moment, and -- you have the right to stop
20 questioning, at any moment, or stop the interrogation with the
21 purpose of consulting an attorney."

22 Q. Okay. And is that what this part (indicating) of the
23 document reads?

24 A. Yes, it does.

25 Q. And what is this telling us down here (indicating)?

1 A. This is a -- it says, "Renunciation of Rights." It
2 starts off saying, "These rights have been read and -- and
3 explained of -- this declaration, and I understand --
4 completely understand these rights.

5 "I renounce these rights freely and voluntarily without
6 being threatened or intimidated or without any promise of
7 compensation or any immunity."

8 It go -- it goes on to say, "I was detained at 1300 hours
9 on the sixteenth of November, two thousand, five (2005). And
10 I signed this document at 1655 hours on the sixteenth of
11 November, two thousand, five (2005)."

12 Q. And you witnessed the Defendant signing it?

13 A. Yes, I did.

14 Q. Okay. When you went over these rights with the
15 Defendant, did you threaten him in any way?

16 A. No, I did not.

17 Q. Coerce -- coerce him in any way to make a statement?

18 A. No, I did not.

19 Q. Make any promises to him in exchange for his statement?

20 A. No, I did not.

21 Q. Did the Defendant, in your opinion, make this statement
22 -- give you this statement voluntarily?

23 A. Yes, he did.

24 Q. And freely?

25 A. Yes.

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1 Q. Did the Defendant, after signing that document, then,
2 give you a statement?

3 A. Yes, he did.

4 Q. Please, tell this jury what that statement was.

5 A. Okay. Mr. Castro said that he was originally from
6 Sonoma, Mexico. He has lived here in the United States for
7 approximately two (2) years.

8 He stated that at Nacho's Restaurant here, in the
9 Spartanburg area, he met an unknown Mexican male who wished
10 for him to open a pottery business on his behalf.

11 This unknown Mexican male gave him approximately two
12 thousand dollars (\$2,000) to start the business and obtain a
13 -- a location for the business. Mr. Castro also said that he
14 had never met this male, this unknown male, prior to this
15 occasion.

16 He also said this was the first time he was receiving
17 pottery for this -- for this male. And he was surprised to
18 see how much it actually was. He didn't think it was going to
19 be that much pottery when it arrived.

20 Mr. Castro also stated that, if he told the truth, they
21 would kill his family in Mexico.

22 (Brief Pause)

23 MS. GANSS: Beg the Court's indulgence just one moment,
24 Your Honor.

25 (Brief Pause)

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1 Q. Agent Grubbs, when you were interviewing the Defendant,
2 at any time, did he speak to you in English?

3 A. I think he -- yeah, he did speak a little English. But,
4 for the most part, the conversation was in Spanish.

5 MS. GANSS: Thank you. I have no more questions.

6 Please, answer any questions the Defense has.

7 THE WITNESS: Yes, sir [sic].

8 CROSS EXAMINATION by MR. TREJO:

4:44 P.M.

9 Q. Hi, Special Agent.

10 A. Hello.

11 Q. Let's see, so, my client bottom line he is -- it would
12 appear to you that his primary language was Spanish?

13 A. Yes, sir, it was.

14 Q. He spoke broken English, but felt more comfortable
15 speaking in Spanish?

16 A. He requested the rights in Spanish.

17 Q. All right. And, talking about the rights, before you
18 even read the rights, you just have a basic conversation with
19 -- with the individual because you want to make sure that he's
20 not under the influence and is coherent and understands what's
21 going on?

22 A. Yes.

23 Q. That's part of your responsibility, correct?

24 A. Yes.

25 Q. And -- and you take your responsibility serious, correct?

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1 A. Yes.

2 Q. In that regard, you want to make sure, absolutely
3 certain, that the individual you are about to question fully
4 understands each and every one of these important rights?

5 A. Yes.

6 Q. And you want to make sure that, if that person decides to
7 answer your questions, that he or she is making a knowing,
8 intelligent, and voluntary waiver?

9 A. Yes.

10 Q. On each of the rights, correct?

11 A. Yes.

12 Q. And, in this particular case, when you -- when you're
13 having this conversation with Mr. Summers, he was very
14 cooperative, correct?

15 A. Yes, he was.

16 Q. He wasn't obnoxious or sarcastic by any stretch of the
17 imagination?

18 A. No.

19 Q. And you posed questions to him and -- and he responded,
20 correct?

21 A. Yes.

22 Q. And, when you went over the rights with him, it was your
23 perception that Mr. Summers fully understood each and every
24 one of them, correct?

25 A. Yes, by signing the form, he was stating that he

1 understood his rights.

2 Q. But, I mean, even without signing the form, before you
3 even asked him to sign the form, you personally felt
4 comfortable that my client understood each right?

5 A. Yes.

6 Q. And, had you -- had you had any doubt, in that regard,
7 you wouldn't have questioned him, right?

8 A. No.

9 Q. So, when it came down to it, bottom line, Mr. Summers
10 knew he had the right to shut up and not say anything, right?

11 A. Yes.

12 Q. But he, without any coercion or threats or promises, or
13 anything like that, he decided to voluntarily give up that
14 right and talk to you?

15 A. Yes.

16 Q. And he did so, right?

17 A. Yes.

18 Q. And he could have just said, "I don't want to talk to
19 you. I'm staying quiet, and that's all there is to it,"
20 right?

21 A. He eventually did say that.

22 Q. Right. But, I mean, he could have said that right at the
23 beginning?

24 A. Yes.

25 Q. Right? And if he would have said, "You know what, I

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1 don't want to talk to you. I want a lawyer," what would you
2 have done?

3 A. Well, he did say that.

4 Q. No, no, but I mean, in the beginning, before -- before he
5 answered any of your questions, if he would have -- if Mr.
6 Summers would have told you, "Agent, I don't want to talk to
7 you, I want a lawyer," would you have continued to question
8 him?

9 A. No, I would not have.

10 Q. No. You would have stopped right then, right?

11 A. Yes.

12 Q. But, he didn't. He went ahead and answered your
13 questions, right?

14 A. Up to a point.

15 Q. Right. Up to a point, and we'll get to that point in a
16 moment.

17 A. Okay.

18 Q. But -- but what you're testifying to thus far, about his
19 statement, he waived his right to -- to be quiet and talked to
20 you, right?

21 A. Yes.

22 Q. Okay. Now, when he talked to you, he told you that his
23 family is from Sonoma, Mexico, right?

24 A. Yes.

25 Q. And that he lived here, in -- in this area, for

1 approximately two (2) years, right?

2 A. Yes.

3 Q. And ---

4 A. And he said in the United States.

5 Q. And when you -- when you -- when you testified that he
6 had met an unknown male, you subsequently determined that the
7 un -- unknown male was actually a male that he did not want to
8 name, correct?

9 A. Yes, later on.

10 Q. Yeah.

11 A. Like when he ---

12 Q. When he made the statement about his -- what could happen
13 to this family, you -- you determined -- you deduced from
14 there that the previously unknown male was actually someone he
15 did not want to name for fear of reprisal to his family,
16 correct?

17 A. He -- later on, yes, he did say that he did not tell the
18 truth, but I did not know, if the truth was about the unknown
19 male, or what the truth was about.

20 Q. All right. Isn't it true, sir, that what he told you was
21 he didn't want to disclose the identity of the person that
22 offered to have him set up a pottery ceramic business here in
23 this area because he had now learned that the pottery had
24 marijuana. And, by disclosing that individual's name, it
25 would put his family in jeopardy?

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1 A. Yes.

2 Q. That's what he said, right?

3 A. Yes.

4 Q. Because the fear that he had for his family came about
5 after he learned, Mr. Summers learned, the pottery had
6 marijuana, right?

7 A. I -- I can't determine when he became fearful for his
8 family, but ---

9 Q. Well, as far as not wanting to disclose the identity? Do
10 you recall previously being asked the following question under
11 oath, and providing the following answer: Quote, "That he
12 didn't want to discharge -- disclose the identity of the
13 person who agreed to -- that offered to have him set up a
14 pottery ceramic business here in this area because one, he had
15 now learned that the pottery had marijuana, and by disclosing
16 that individual's name, he would put his family in jeopardy;
17 isn't that right?" And your response was, "yes."

18 A. Yes.

19 Q. Do you recall that?

20 A. Yes.

21 MR. TREJO: Thank you, sir.

22 THE WITNESS: You're welcome.

23 MS. GANSS: Nothing further.

24 THE COURT: Thank you, sir. You may stand down.

25 MS. GANSS: We would ask that Agent Grubbs be excused,

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1 Your Honor.

2 MR. TREJO: No objection, Your Honor.

3 THE COURT: Thank you for coming, sir. You may be
4 excused at this time.

5 (The witness stepped down from the witness stand and was
6 excused at 4:50 p.m.)

7 THE WITNESS: Thank you.

8 MS. GANSS: Thank you.

9 (Brief Pause)

10 MS. GANSS: The State calls Investigator Matt Hutchins
11 to the stand. Matt Hutchins.

12 (Investigator Hutchins summoned and steps forward to be
13 sworn.)

14 (Whereupon,

15 INVESTIGATOR MATT HUTCHINS

16 having been first duly sworn, testified as follows:)

17 DIRECT EXAMINATION by MS. GANSS: 4:52 P.M.

18 Q. Investigator Hutchins, please, introduce yourself to the
19 jury.

20 A. I'm Investigator Matt Hutchins.

21 Q. And tell them for whom you work and how long.

22 A. I work for the Spartanburg County Sheriff's Office. I'm
23 assigned to the Narcotic and Vice Unit. And I've been with
24 the sheriff's office now four (4) years, and been in law
25 enforcement eight (8).

PAMELA FAUCETTE, CVR, 864-574-9534 or 336-260-2864

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1 Q. And how long have you been in the narcotics unit?

2 A. I've been in narcotics three (3) years.

3 Q. And what do your duties include in the narcotics unit?

4 A. I investigate narcotic complaints, make narcotic cases
5 anywhere, from the street level narcotics to the drug
6 organizations and cartels, also the vice unit, assigned to
7 work in vice and organized crime.

8 Q. When you say you made cases, does that mean that you --
9 at the street level, you buy and sell narcotics on the street?

10 A. Yes. That's pretty much daily activities, making
11 narcotic buys, doing investigations, learning the drug trends,
12 the drug trade, things of that nature.

13 Q. And about how many sales or purchases have you
14 participated in?

15 A. Hundreds.

16 Q. Okay. Do you have to know the street value of drugs to
17 conduct those purchases?

18 A. Yes, I do.

19 Q. Okay. In this case, we have two thousand, two hundred
20 and sixty-seven (2,267) pounds of marijuana. Could you,
21 please, tell this jury the street value, in Spartanburg, South
22 Carolina, of two thousand, two hundred and sixty-seven (2,267)
23 pounds of marijuana.

24 Could you, please, tell this jury the street value, in
25 Spartanburg, South Carolina, of two thousand, two hundred and

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1 sixty-seven (2,267) pounds of marijuana?

2 MR. TREJO: Object to the form of the question. I think
3 it was relevant a year ago as -- versus today.

4 THE COURT: That point is well made. Would you like to
5 rephrase, you may. You -- you need to point to the point in
6 time that you're referring to in your question, Counsel.

7 MS. GANSS: Thank you.

8 Q. (By Ms. Ganss) Let's go back then a year. This time a
9 year ago -- and actually, what a year ago was the street value
10 for one pound of marijuana?

11 A. Marijuana prices here in this area has remained fairly
12 consistent for about the past a year and a half (1 ½) or two
13 (2) years. A pound of marijuana, for the region we're in, is
14 going between six to eight hundred dollars.

15 And that has been consistent for a year and a half (1 ½)
16 to two (2) years per pound, depending on quality and, of
17 course, amount bought.

18 Q. Okay. So, if it's between six and eight hundred per
19 pound, do you have a value, in Spartanburg, South Carolina,
20 for two thousand, two hundred and sixty-seven (2,267) pounds
21 of marijuana back in November of two thousand, five (2005)?

22 A. At the six to eight hundred dollar range, which we've
23 been seeing for a year and a half (1 ½), two (2) years now, I
24 believe that would come up to about one point three to one
25 point seven million dollars.

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1 Q. Okay.

2 (Brief Pause)

3 MS. GANSS: Beg the Court's indulgence one moment, Your
4 Honor.

5 (Brief Pause)

6 Q. (By Ms. Ganss) And, in your job, do you make trafficking
7 cases?

8 A. I do.

9 Q. Okay. How much marijuana do you have to have to be
10 charged with trafficking in Spartanburg, South Carolina?

11 MR. TREJO: Objection, Your Honor, it calls for a legal
12 conclusion, a matter of law.

13 THE COURT: Overruled. You may -- you may answer, if
14 you know, of your own knowledge.

15 A. In the state of South Carolina, the trafficking laws for
16 marijuana is ten (10) pounds or greater.

17 Q. At this point, I'd like to show you ---

18 (Whereupon, State's Exhibit Number 35 was marked for
19 identification.)

20 Q. I'm going to show you what's been marked, for
21 identification purposes only, State's Exhibit Number 35.

22 (Off-the-Record Comments)

23 Q. Okay. I'll show it to you first, Investigator Hutchins,
24 what I've got there.

25 (Document shown to witness and then, placed on overhead.)

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1 Q. Okay. Would you, please, describe -- describe for the
2 jury ---

3 THE COURT: He can -- he can stand down if it's going to
4 be easier to do it than look up.

5 MS. GANSS: Oh, that would be -

6 THE COURT: Just, please, sir, speak loud enough for
7 everybody in the courtroom to hear you, please ---

8 MS. GANSS: Thank you, Your Honor.

9 THE COURT: --- without the microphone.

10 (The witness steps down from the witness stand.)

11 MS. GANSS: And I'm going to hand you this pointer. And
12 you just have to push that red button.

13 Q. (By Ms. Ganss) And can you let the jury know what we're
14 looking at? Would you do that, please?

15 A. It looks to be a map of Spartanburg County.

16 Q. What are those three (3) locations?

17 A.. That would be locations in reference to this incident.

18 That would be , Nacho's Restaurant, where the
19 marijuana was delivered in the tractor-trailer (indicating).

20 That would be at (indicating), would be
21 the storage warehouses, the mini-warehouses, where the clay
22 pottery was being transported. And that would be

23 Drive (indicating), which is the residence where also
24 items were transported..

25 Q. And ---

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1 MR. TREJO: What was the last part? I didn't hear.

2 A. Items were transported to.

3 MR. TREJO: Your Honor, I would move to strike, lack of
4 foundation and no facts in evidence.

5 THE COURT: I sustain -- sustain the objection.

6 Q. (By Ms. Ganss) All right. Just, if you would -- and I'm
7 looking for -- and where are we now (indicating)?

8 A. That would be , the Acapulco Bakery.

9 THE COURT: I'm sorry, I didn't hear that myself. Would
10 you speak up just a little bit, sir?

11 A. 9133 Fairforest Road would be Acapulco Bakery.

12 MS. GANSS: Okay. Thank you.

13 (Off-the-Record Comments)

14 (Witness returned to the witness stand.)

15 Q. Were you at Nacho's on November 16th two thousand and five
16 (2005)?

17 A. I was.

18 Q. Okay. So, were you able to -- what did you do? What was
19 your role while you were there?

20 A. I was initially, on the surveillance of the load, at that
21 point, helped secure the subjects.

22 Q. Okay. Just now, did you -- have you been to these
23 specific locations?

24 A. Yes, ma'am.

25 Q. Okay. Can you tell the jury the approximate distance

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1 from all of them?

2 A. The distance from -- to Nacho's Restaurant on Highway 9,
3 to the self-storage location, is less than mile, probably more
4 like a half mile. There to the Highland Hills would be two
5 (2) miles, three (3) miles I'd say.

6 Q. Okay. And back -- is it across? Is it on the other side
7 of I-85?

8 A. It's north of 85.

9 Q. Okay. How far to get to this ceramic clay pottery store?

10 A. From Nacho's, it would be eight (8) or ten (10) miles.

11 MS. GANSS: Thank you, Investigator Hutchins. No more
12 questions. Please, answer any questions that Mr. Trejo has.

13 CROSS EXAMINATION by MR. TREJO:

5:01 P.M.

14 Q. Hi.

15 A. Hey.

16 Q. The marijuana, it -- it varies in price depending upon
17 the quality, right?

18 A. It does.

19 Q. Because, I mean, there's some marijuana that just
20 outrageously priced and you can pay thousands of dollars a
21 pound, isn't there?

22 A. That is correct.

23 Q. And there's also marijuana that's low grade that's a
24 couple of hundred, three hundred dollars (\$300) a pound, isn't
25 there?

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1 A. It's my experience, I have yet around this area to see
2 marijuana for three hundred (\$300) a pound.

3 Q. Okay. Well, based upon your experience, though, this --
4 this marijuana, the prices are giving are here, but, if you're
5 going down and you're purchasing it down in Texas, the value
6 is -- is a lot lower, isn't it?

7 A. That is correct.

8 Q. And down there you can get poor grade marijuana for two
9 (\$200) or three hundred dollars (\$300) a pound; is that right?

10 A. That's -- I have heard three hundred (\$300) a pound down
11 in Texas, yes, sir.

12 Q. And you don't know the quality of the marijuana?

13 A. I -- I do not.

14 Q. And you don't whether this is high grade, low grade,
15 medium grade?

16 A. I do not.

17 Q. Okay. Okay. The -- right here (indicating) -- actually,
18 I want to talk about this area (indicating).

19 You said you've been out here to these locations. This
20 , Acapulco Bakery, also known as Ceramic
21 Clay and Pottery. There's no bakery there, right?

22 A. There is -- in the complex, there's like a -- I want to
23 say like a panaderia --

24 Q. A panaderia, right?

25 A. Yeah.

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1 Q. Mexican sweet bread?

2 A. That's correct.

3 Q. All right. In fact, that whole area right there is ---
4 there's a -- there's a large Hispanic population, correct?

5 A. In that vicinity, yes.

6 Q. In that vicinity. And where this -- this store, Ceramic
7 Clay and Pottery is located, there are a lot of Hispanic
8 businesses?

9 A. In that -- in that ---

10 Q. That general vicinity?

11 A. Yes.

12 Q. And, therefore, if you're going to sale Mexican ceramic
13 clay and pottery, that would be a prime location, wouldn't it
14 be?

15 A. There's Hispanic retail stores in that area.

16 Q. Yeah. So, if you want to go buy Hispanic goods, you go
17 to the Spanish community? It's a little more likely you'll
18 find the stuff there, right?

19 A. That would make sense.

20 Q. All right. You know you said that stuff was being
21 unloaded at the Highland Hills Drive. That's not accurate, is
22 it?

23 A. Well, the -- the items in question, what I observed, was
24 vehicles from Nacho's to the self-storage ----

25 Q. Right.

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1 A. --- location.

2 Q. Right. There was nothing -- there was nothing unloaded
3 at the Highland Hills Drive?

4 A. When I went by there was previous to this instance,
5 looking at the address.

6 Q. Yeah.

7 A. I do know there was vehicles had been seen, but, as far
8 as actually items ---

9 Q. No? Vehicles were seen at that residence. Is that a
10 crime?

11 A. No, sir.

12 Q. All right. The Defendant's vehicle was seen at that
13 residence, right?

14 A. To be honest with you, I just know vehicles. I'm not
15 sure whose.

16 Q. But there was no -- no contraband seen at that residence,
17 correct?

18 A. Not by me.

19 Q. Okay. And there was no contraband seized from that
20 residence either, was there?

21 A. Not by me.

22 Q. Or anyone else that you know of?

23 A. To my knowledge, no.

24 Q. Okay. All right. And you didn't see anyone unload
25 anything at that residence, did you?

PAMELA FAUCETTE, CVR, 864-574-9534 or 336-260-2864

1 A. I didn't, no, sir.

2 MR. TREJO: Okay. All right. Thank you, sir. That's
3 all I have.

4 MS. GANSS: No more questions for Investigator Hutchins.

5 THE COURT: You may stand down, sir.

6 MS. GANSS: We would ask that he be excused, Your Honor.

7 MR. TREJO: No problem, Your Honor.

8 THE COURT: Thank you for coming. You may be excused at
9 this time.

10 (The witness stepped down from the witness stand and was
11 excused at 5:05 p.m.)

12 MS. GANSS: Your Honor, may we approach?

13 THE COURT: Yes, ma'am.

14 MS. GANSS: Thank you.

15 (Whereupon, a bench conference was had with all attorneys
16 present except Mr. Bulsa.)

17 THE COURT: All right. Counsel -- Counsel approach just
18 a minute again.

19 (Whereupon, a bench conference was had with all attorneys
20 present except Mr. Bulsa.)

21 THE COURT: Mr. Foreman, ladies and gentlemen of the
22 jury, we're going to go ahead and recess for the evening.
23 It's ten minutes after 5:00 at this time.

24 So, I'm going to -- we're going to go ahead and adjourn
25 for the evening. On the overnight recess, let me remind you

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1 not to discuss the case among yourselves or with anyone else
2 you might see on the break from court.

3 If there should be any media coverage of the trial, I
4 remind you not to read, listen to, or watch any media account
5 of the trial until after the trial is over.

6 If someone wanted to save it for you, you're welcome to
7 read, listen to, or watch it when the case is over and the
8 verdict is in. You're welcome to read, listen to, and watch
9 any account then.

10 Please, have a pleasant night tonight. And I'm going to
11 ask you to be back in the jury room, in the morning, at 9:30.
12 I don't believe I've got anything else to do before we get
13 started, so, hopefully, we'll get started promptly at 9:30.

14 And I thank you ladies and gentlemen. You're free to go
15 at this time.

16 (The jury exited the courtroom at 5:12 p.m.)

17 THE COURT: All right, Counsel, I'll hear you now with
18 regard to your -- your proposed testimony, with regard to the
19 Social Security number, used by the Defendant.

20 MR. BULSA: Yes, sir. I was not at the bar, but I do
21 understand the Court is inclined not to allow that
22 information.

23 Your Honor, it's the State's position that that
24 fraudulent, use of a Social Security number, commits --
25 commits a fraud against the government of the State of South

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1 Carolina. And it supports our argument that the business was
2 a front for drug trafficking.

3 We feel that the use and theft of somebody else's Social
4 Security card and number — not card, but number certainly
5 supports our argument and should be allowed into evidence, so,
6 we can infer to the jury that this was a false business, a
7 fake business;

8 He had no intention of — well, actually, he may have
9 been selling the pottery, but he was opening it up merely to
10 sell the drugs.

11 I understand at the bar there was some discussion because
12 he used it in the past. Your Honor, just because he
13 fraudulently used it in the past should not be held against
14 the State because he used it again.

15 And it -- to me it's unreasonable to say because he used
16 it and he did not have the right to use it in the past,
17 therefore, State, you can't use it because he didn't have the
18 right to use it now.

19 Your Honor, I don't -- that, to me, is just unreasonable,
20 and the State should not be prejudiced by that.

21 THE COURT: All right. Well, Counsel, if that's your
22 only argument, the problem is, of course, the Defense objects
23 to the use of it. And -- and you made this in pretrial, and I
24 told you I'll wait and see; let's see what the evidence is
25 going to show.

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1 They're arguing under 402 and 403, particularly on 403,
2 that it shouldn't come in. And really 402 is applicable as
3 well I think, but 403 in particular.

4 And the problem I have, with admitting it is, I think it
5 comes in, if -- let's say somebody is out there driving under
6 the influence. It doesn't matter if they don't have a
7 driver's license, okay?

8 And it would be irrelevant if they don't have a driver's
9 license, whether they're guilty of driving under the influence
10 or not.

11 In this case, your argument is very well founded, and I
12 would certainly allow that in provided the only time this
13 number had been used was to try to start a business; he's
14 using it for this particular business.

15 Then, I could say, "Look, there the jury could infer from
16 that that this was only a front; it was not a legitimate
17 business. He never intended to -- to start a legitimate
18 business because he -- you know, he even used a fake Social
19 Security number in order to do it."

20 The problem -- that's fine. If we were there, I would
21 rule with the State and say you're entitled to bring it in
22 because the jury could infer from that, that it was -- that it
23 was just a front, just this -- that the whole business was a
24 front.

25 But I can't do that, in this case, because we've got

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1 proof that he got a business license, I guess in two thousand,
2 two (2002), or maybe it was two thousand, four (2004). In any
3 event, he got a business license sub -- at least a couple of
4 years before this for the business, I guess the Nacho's
5 business. And he got a business license, correct?

6 MR. BULSA: That was income tax I believe.

7 THE COURT: Well, he got a business license too, didn't
8 he?

9 MR. BULSA: No, sir. He used ---

10 THE COURT: Isn't that right?

11 MR. BULSA: He used it for -- for income tax purpose.

12 THE COURT: He did not have a business license for
13 Nacho's?

14 MR. BULSA: No, sir.

15 MS. GANSS: No, Your Honor.

16 MR. BULSA: This was the first business license he was
17 trying to obtain.

18 (Brief Pause)

19 MR. TREJO: He had only used the -- he had only used the
20 Social Security number on prior occasions to file his 1040 tax
21 returns in two thousand, two (2002) and two thousand, three
22 (2003).

23 He -- he actually -- it not in the record, but he used
24 the Social Security number when he worked for two years for
25 Nacho's.

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1 (Brief Pause)

2 THE COURT: So, he didn't own the Nacho's business?

3 MR. TREJO: No, no.

4 THE COURT: He just worked there?

5 MR. TREJO: Yeah, he was merely employed there, Your
6 Honor. He didn't -- he didn't own it and he didn't obtain a
7 business license there.

8 But I think one other significant fact for the Court to
9 consider is the State concession that he was inclined to sell
10 pottery with this business license for the fact that he
11 obtained a business license, through the use of a Social
12 Security number that didn't belong to him, is not the
13 controlling issue.

14 THE COURT: Well, it's not controlling. The only
15 question is whether it's relevant evidence that's probative
16 evidence for the State.

17 And that's the question on this issue because I thought
18 somehow -- I thought he had a business license for Nacho's and
19 it had been existence for some time.

20 But, if that's not the case, the only time he used that
21 fake Social Security number is to file a tax return in two
22 thousand, two (2002) and two thousand, three (2003). We don't
23 know what happened after two thousand, three (2003).

24 MR. TREJO: Well, yeah, we do. In two thousand, four
25 (2004), the exhibit indicates that he went to Mexico for that

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1 year.

2 THE COURT: What exhibit?

3 MR. TREJO: I'll get it. It's one -- two page one that
4 we -- that we --

5 MR. BULSA: The note screen -- the note screen, Your
6 Honor. But, he left the country and came back and used the
7 fake number he had to try to set up a false business.

8 And, in fact, for that matter, Your Honor, we can infer
9 that, while he was in Mexico, he was setting this up.

10 MR. TREJO: You can't infer anything like that. There's
11 no facts in evidence of that.

12 MR. BULSA: The fact that he was in Mexico for two
13 thousand and four (2004).

14 MR. TREJO: Well, anybody that goes back to Mexico does
15 so to deal drugs? That's ridiculous to infer that.

16 MR. BULSA: Well...

17 (Mr. Trejo retrieves exhibit.)

18 MR. TREJO: It's Defendant's Exhibit Number 1. It's the
19 taxpayer -

20 (Document handed up to the Court.)

21 (Brief Pause)

22 THE COURT: I know he stated that. I know he stated
23 that to somebody. I'm saying what proof does he have of where
24 he really was? And I know that's his statement ---

25 MR. TREJO: There's nothing to the contrary --

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1 THE COURT: --- but he's not testifying in this case.

2 MR. TREJO: No, but there's -- well, there's nothing to
3 contradict that. And this is the evidence -- it's the only
4 evidence before the jury, and ---

5 THE COURT: That's what he told somebody, him, what he
6 told somebody.

7 MR. TREJO: And the State didn't produce any evidence to
8 the contrary. This evidence -- actually, the introduction of
9 this evidence is significant because it also denies us the
10 right to close final, and we knew that when we introduced it.

11 But, had the State felt that this was erroneous, they
12 could have easily produced evidence to -- to contradict this.

13 (Brief Pause)

14 THE COURT: And that's -- so, that's a statement he
15 gave, then, to the State Revenue Department for why he didn't
16 file a tax return in two thousand, four (2004).

17 He told them, "I didn't file a tax return because I
18 wasn't here. I was in Mexico." And that's -- that's the only
19 thing we have on that ---

20 MR. TREJO: Right.

21 THE COURT: --- where he was from two thousand, three
22 (2003) until two thousand, six (2006), correct?

23 MR. TREJO: Well, actually --

24 MR. BULSA: Two thousand, five (2005).

25 MR. TREJO: --- in two thousand, five (2005) is when you

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1 filed his two thousand, four (2004) return.

2 THE COURT: He filed a return in two thousand, five
3 (2005)?

4 MR. TREJO: Well, you know, the way you're always a year
5 behind on the taxes.

6 THE COURT: Well, the only two returns that I knew that
7 they testified -- and I may be wrong -- was two thousand, two
8 and two thousand, three (2003).

9 MR. TREJO: Right. But you file two thousand and two
10 (2002) in two thousand and three (2003).

11 THE COURT: And two thousand, three (2003) in two
12 thousand, four (2004)?

13 MR. TREJO: In '04, yeah.

14 THE COURT: Yeah. In early two thousand, four (2004).
15 But, now, he wasn't ---

16 MR. TREJO: Yeah, but in two thousand, five (2005), you
17 don't file one for two thousand, four (2004) if you're not
18 here. That's all I'm saying.

19 THE COURT: Well, we've got two thousand, six (2006) we
20 don't have anything ---

21 MR. TREJO: Well, he was in jail all of two thousand and
22 five (2005).

23 THE COURT: Well, he hasn't filed a return.

24 MR. TREJO: Right.

25 THE COURT: I'm saying that he had filed one for -- for

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1 two thousand, five, correct?

2 MS. GANSS: No.

3 MR. TREJO: Because -- because he's been locked up.

4 MR. BULSA: He didn't file one for two thousand, four
5 (2004) either.

6 MS. ANDERSON: But he was locked up.

7 THE COURT: Not in two thousand, four (2004) he wasn't
8 locked up.

9 MR. TREJO: No, in two thousand and four (2004) is when
10 he wasn't here. So, he filed the two thousand and four (2004)
11 return in two thousand and five (2005) when he was here.

12 THE COURT: So, he didn't file one in two thousand, five
13 (2005)?

14 MR. TREJO: Right, correct.

15 THE COURT: For two thousand and four (2004)?

16 MR. TREJO: Well, there's no -- no --

17 THE COURT: He's filed two tax returns, one for two
18 thousand, two (2002) and one in two thousand, three (2003).
19 Admittedly, he filed between January -- by April the 15th of
20 the next year for the previous year. But there is nothing for
21 two thousand, four (2004) or two thousand, five (2005).

22 MR. TREJO: Well, there was no income for two thousand
23 and four (2004), is what the record so far reflects.

24 THE COURT: Well, that's -- that's what he says to them.
25 The reason he didn't file a return is he wasn't here.

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1 (Brief Pause)

2 THE COURT: Can I see that again, please, that exhibit?

3 (Document handed up to the Court.)

4 (Pause while Court reviews document.)

5 MR. TREJO: At the appropriate time, if I could just be
6 heard on 403.

7 (Brief Pause)

8 THE COURT: One thing, I don't think this was --
9 although it's in the record -- I think this was put on the
10 record, and I'm trying to understand this. It says -- and I'm
11 referring on the record to Defendant's Exhibit Number 1, the
12 second page of it.

13 It says that, "The phone number showing in BTR" -- I'm
14 not sure what -- what that is, business -- maybe it's known as
15 the business license -- and it gives that number, --
16 "...was out of order, went to the address showing business --
17 showing in BTR 22406 and building was empty with a for sale
18 sign on it.

19 "Somebody called the business -- on business -- called on
20 business next door, Barry's Hair Express (phonetic), and their
21 bookkeeper called me back saying they discussed three
22 different businesses with them that we show open license and
23 never filed." And that was probably since he got -- okay.

24 "He said this tax payer -- this TP" -- or whatever it is
25 -- never opened." Do you now what that means?

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1 MR. TREJO: His tax payer number never opened -- the
2 business never opened; all the ceramics were seized.

3 THE COURT: So, it was -- it was never open, this
4 business?

5 MR. TREJO: Right.

6 THE COURT: This business we're talking about, this
7 pottery business?

8 MR. BULSA: No, sir, he was arrested. He applied -- he
9 tried to get it November 1st and he was arrested two weeks
10 later.

11 THE COURT: Oh, okay. But this says -- on 2/24/06 is
12 when they went looking and the business --

13 MR. BULSA: Judge, this is an '05 case. They hadn't
14 received any notice of the business, so, they went out to
15 investigate and they saw there was no business there.

16 MR. TREJO: If my recollection is right, the license
17 wasn't applied for until at least in November --

18 MR. BULSA: Yes, that's right.

19 MR. TREJO: --- of '05.

20 MS. ANDERSON: November 1st.

21 MR. TREJO: So, Your Honor, when we look at it, in terms
22 of the 403, and we get past the relevancy issue, bottom line
23 and get to the nitty gritty of it, and what is it for? What's
24 is it really being -- being used for?

25 It's being used to try and put to the minds of the jury

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1 that -- that my client is undocumented, an illegal alien,
2 thereby prejudicing his rights to a fair trial.

3 I could certainly see it is being introduced if he took
4 the stand and testified, but outside of that, even if there is
5 some basis for bringing it in under 402, it should be excluded
6 under 403.

7 MR. BULSA: Your Honor, we have no intention of
8 inferring that he's illegal. The intention we intend to use
9 this is for as we stated. He used the false Social Security
10 number to open a business as a front to sell marijuana here in
11 Spartanburg County.

12 THE COURT: Well, Counsel, if I'm going to err, I'm
13 going to err on the side of caution. I'm not letting it in.

14 I just -- I have some problems with it because, whether
15 he tried to open a business with a false Social Security
16 number or not, has nothing to do with whether he intended to
17 illegal -- illegally traffic in -- in drugs or not.

18 And I -- and, again, I would point to the fact that this
19 same Social Security number, which could be attributed to him,
20 was used in two thousand, two (2002) and two thousand, three
21 (2003), when he was working. He filed tax returns under those
22 numbers, and with that -- with that Social Security number.

23 Now, if he hadn't done that, I would let it in. But --
24 so, but I -- I -- in the balancing test under 403, it could be
25 inferred from that, that if he didn't use a proper Social

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1 Security number and used an improper Social Security number,
2 that he didn't have a legal Social Security number, and
3 therefore, wasn't legally here in this country.

4 And, if that could -- could be inferred by the jury, it
5 would be prejudicial to him. And I'm -- I -- I just think the
6 danger of unfair prejudice outweighs the probative value for
7 the State, and I'm -- I'm not going to let it in.

8 I think if you need to convict him, you need to convict
9 him on the basis of that he, in fact, intended and was
10 involved in drug trafficking and not because he used a illegal
11 -- un -- unauthorized Social Security number, which he had
12 already been using, at least four (4) years before this and
13 filed tax returns in -- in that number.

14 If the only time this number showed up was, when he tried
15 to start this business, I would give the State -- I would say
16 it was more probative than prejudicial. But, under the facts
17 that have been presented to me, I think it's more prejudicial
18 than probative and I'm not going to allow you to get it in.

19 MR. BULSA: May I be heard just on one other matter now,
20 Your Honor?

21 THE COURT: Yes, sir. Yes, sir.

22 MR. BULSA: I want to make a motion in limine to
23 preclude Defense counsel from claiming that this Defendant was
24 opening a legitimate business to sell pottery because it's
25 clear he was using fraudulent information to obtain that

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1 business license. And, therefore, it would not be a legal
2 business.

3 MR. TREJO: I can just say he was opening a business
4 because that's what the evidence says. I don't have to argue
5 legal, illegal, or otherwise, because that's the business.

6 THE COURT: Well ---

7 MR. TREJO: Because that's what the evidence is thus far
8 from their witnesses, Ceramic Pottery. And they -- they put
9 the business license in and they called ---

10 MR. BULSA: We put the business license in to show that
11 it was a fraudulent business and the Court is not now allowing
12 us to go ---

13 MR. TREJO: No witness testified it was a fraudulent
14 business.

15 MR. BULSA: That's what the fraudulent Social Security
16 number would show, Your Honor.

17 THE COURT: Well, I -- let -- let me say this: I
18 understand why the State wants it in. What I would caution
19 the Defense is you can't have your cake and eat it too.

20 MR. TREJO: Yes, sir.

21 THE COURT: And, so, you're not going to be able to
22 argue to them this is a legitimate business man ---

23 MR. TREJO: Oh, no.

24 THE COURT: --- who was just opening up a legitimate
25 business and -- and for a proper purpose. Now, you can argue

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1 -- argue certainly that he was opening a business and was
2 going to sell pottery and the evidence indicates that.

3 And they can turn around and argue the facts that this
4 was an empty building, with absolutely nothing in it, and
5 there was nothing ever delivered in it.

6 I mean, so, this is just a question you can argue to the
7 jury on the facts. And, so -- but I'm -- I'm going to stay
8 away from that issue.

9 I -- I -- I'm balancing it out, and I just -- the balance
10 comes down on the side of more prejudicial than probative.
11 And I'm just not going to let it in. I certainly understand
12 you want it in, but I'm not allowing it in.

13 MR. BULSA: All right, sir.

14 THE COURT: But you can't argue anything to the
15 contrary.

16 MR. TREJO: I wasn't planning to, no, no.

17 THE COURT: If -- if you do, you know, then, the
18 Court --

19 MR. TREJO: I'll get scolded.

20 THE COURT: Huh? You're going to be in ---

21 MR. TREJO: I'll get scolded.

22 THE COURT: It'll be more than that.

23 MR. BULSA: Well, Your Honor, the argument is that his
24 client is going, to claim that he was opening a business, if
25 you read his statement. There's no other evidence that that

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1 was a legal business; that that was a business to sell
2 pottery.

3 THE COURT: Counsel, I don't -- what I would say to you
4 is, I think, because he used that Social Security number
5 before, and filed tax returns in that Social Security number,
6 it's hard to say that the Social Security number was part of
7 the proof that he -- that it was a front.

8 If he only used it, for the purpose of this business, I
9 would say yes, it's evidence the jury could infer that it was
10 a front. But I -- I can't say that where he used it before.

11 And they've got a record of him using down there. And
12 they've got his name and his tax return and et cetera. So, I
13 -- so, I can't say that.

14 And that being true, then, on appeal an appellate Court
15 might well look at this and say, "Look, that's more
16 prejudicial than probative and he shouldn't have allowed it
17 in. It's -- it's prejudicial error."

18 And I -- and looking at it, in that light, I -- I
19 certainly think they could reach that conclusion. And I'm not
20 going to let it in. Okay?

21 MR. BULSA: That's fine. And I've left that argument,
22 even though it perplexes the State that he can use it just
23 because he was successful in the past in using it.

24 He committed a fraud in the past, and he's now going to
25 be allowed to commit a fraud at this time. My argument now is

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1 that, this was not a business, and he should not be allowed to
2 argue that it is a business.

3 THE COURT: Well, are you going to bring the proper
4 revenue people who issue -- issued these things and let them
5 come in here and explain why they issued a business license to
6 somebody without checking their Social Security number or
7 their proper business tax payer number for tax purposes?

8 Do you want to bring them in here and let them explain
9 that?

10 MR. BULSA: Yes, sir.

11 THE COURT: You had her in here.

12 MR. BULSA: We've got those questions for her, Your
13 Honor.

14 THE COURT: Yes, sir. I mean, you know, the problem is
15 that he was allowed to do it before and he was allowed to do
16 it now. And -- and -- and I'm saying that is not dispositive
17 on the issue of what he -- whether he intended to traffic in
18 the drugs or not or whether he was really was going to sell
19 pottery there or not.

20 That's not dispositive of it. If he used this notice --
21 this number solely, at this particular time, to get the
22 business license, I would let it in, okay? But he used it
23 before.

24 And who is to say they asked him for his Social Security
25 number in starting his business -- to get a business license,

1 and he had used it before for tax returns and filed tax
2 returns. Certainly, they had addresses and phone numbers for
3 him, and they certainly knew where to reach him.

4 And, so, you know, I can't say that, just because he used
5 that number again, with the State, that it was a front for a
6 business. It may have been, but I -- I can't -- I certainly
7 think that there are other explanations other than that. And
8 I'm just not going to allow you to go there.

9 It's just you've got to use the balancing test, under
10 403, and I'm using it and I can't justify letting it in. It's
11 simple as that. All right.

12 MR. TREJO: Your Honor, one -- one last matter. We've
13 provided the State, with a copy of the transcript, which was -
14 - I don't know what number exhibit we called it, but Madam
15 Court Reporter received this into evidence for the Court's
16 record only, on the Jackson v. Denno.

17 THE COURT: Yeah, it's here. She has it here. It's
18 Court Exhibit Number 1.

19 MR. TREJO: All right. I just wanted to make it a part
20 of the verbal record.

21 THE COURT: Yes, sir.

22 MR. TREJO: Okay. Thank you.

23 THE COURT: All right. And, of course, I read that, and
24 I think the trial Court in that case properly let the
25 statements in obviously. And there's nothing I've heard today

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1 that countered that, and I think he made the right decision.

2 And I still -- and I would adopt that. I would have
3 reached the same conclusion and allowed it in by the
4 preponderance of the evidence.

5 All right. The State is going to rest when we bring the
6 jury back in the morning. And the Defense will rest and you
7 need to do that on the record.

8 MR. TREJO: And we'll just -- you know, if the Court
9 will allow me, I'll just make our -- our motion to dismiss for
10 insufficient evidence at this time.

11 THE COURT: I'll allow you to do that. All we need to
12 do is get it on the record.

13 MR. TREJO: So -- so, we're making our motion to dismiss
14 based upon insufficient evidence, the -- the lack of knowledge
15 element in this particular case. And we feel that that has
16 been proven.

17 THE COURT: All right. Thank you. And the State need
18 not respond. If you want to put something on the record you
19 can.

20 MR. BULSA: No, sir.

21 THE COURT: I'll address it, then. I would point out to
22 you, Counsel, there are several different ways that you can
23 traffic drugs. One of them is conspiracy.

24 And certainly, the jury could infer -- another one is
25 bring into this State a certain amount of drugs, or bring in

1 drugs for the purpose of selling them.

2 And the jury could infer, from the evidence, that this
3 shipment, that was shipped to him and came to his address --
4 it was in the bill of lading and came to him and he signed for
5 them. And -- and the drugs were delivered there and found
6 there and he received them and took them off.

7 They could infer from that fact alone number one, that it
8 is possible that there was a conspiracy between him and
9 somebody else for them to be delivered there. Second, they
10 could conclude that he brought them into the State; he was
11 part of bringing them into the state or did bring them into
12 the state.

13 And, finally, when he was there taking possession of
14 these, they could certainly -- the jury could infer that he
15 was -- was, in fact, taking possession of this entire amount
16 when he signed that bill of lading and agreed to take them.
17 So -- so, he could be possession of it.

18 It's a jury issue as to whether he actually knew the
19 drugs were there or was involved in it in any way or -- or
20 not. That's -- that's a matter for the jury. All right. So,
21 I deny your motion.

22 MR. TREJO: Thank you, Your Honor.

23 MS. GANSS: Thank you, Your Honor.

24 THE COURT: Now, bring the Defendant around. I need to
25 question him under oath about his right to testify or not

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1 testify. Of course, we'll need the interpreter.

2 (Off-the-Record Comments)

3 (Mr. Summers and the interpreter step around for
4 questioning.)

5 THE COURT: All right, sir, you're Wilbur Xavier Castro
6 Summers?

7 (Interpreter speaks in Spanish to the Defendant.)

8 THE INTERPRETER: Yes.

9 THE COURT: All right. Mr. Summers, please, raise your
10 right hand.

11 (Interpreter speaks in Spanish to the Defendant.)

12 THE COURT: Do you solemnly swear or affirm --

13 (Interpreter speaks in Spanish to the Defendant.)

14 THE DEFENDANT: Yes.

15 THE COURT: -- that the testimony you're about to give
16 the Court today ---

17 (Interpreter speaks in Spanish to the Defendant.)

18 THE COURT: -- will be the truth, nothing but the truth,
19 so help you?

20 (Interpreter speaks in Spanish to the Defendant.)

21 THE DEFENDANT: Si.

22 THE INTERPRETER: Yes.

23 THE COURT: Now, we've -- we've reached the stage of
24 your trial where you may present your defense.

25 (Interpreter speaks in Spanish to the Defendant.)

1 THE COURT: You have the right to testify on your own
2 behalf.

3 (Interpreter speaks in Spanish to the Defendant.)

4 THE COURT: However, no one can make you testify.

5 (Interpreter speaks in Spanish to the Defendant.)

6 THE COURT: In the event, you have a record ---

7 (Interpreter speaks in Spanish to the Defendant.)

8 THE COURT: --- for any conviction involving dishonesty
9 or false statement ----

10 (Interpreter speaks in Spanish to the Defendant.)

11 THE COURT: --- or for a crime punishable by
12 imprisonment of more than one year -

13 (Interpreter speaks in Spanish to the Defendant.)

14 THE COURT: --- and this Court determines that the
15 probative value of admitting this evidence -

16 (Interpreter speaks in Spanish to the Defendant.)

17 THE COURT: --- outweighs its prejudicial effect to
18 you ---

19 (Interpreter speaks in Spanish to the Defendant.)

20 THE COURT: --- the solicitor will be able to introduce,
21 this record -

22 (Interpreter speaks in Spanish to the Defendant.)

23 THE COURT: --- for impeachment purposes to attack your
24 credibility or honesty.

25 (Interpreter speaks in Spanish to the Defendant.)

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1 THE COURT: If you elect not to take the stand ---

2 (Interpreter speaks in Spanish to the Defendant.)

3 THE COURT: --- I will charge the jury ---

4 (Interpreter speaks in Spanish to the Defendant.)

5 THE COURT: --- that they are not to give the fact that
6 you did not testify ---

7 (Interpreter speaks in Spanish to the Defendant.)

8 THE COURT: --- any consideration whatsoever.

9 (Interpreter speaks in Spanish to the Defendant.)

10 THE COURT: And there is to be absolutely no prejudice
11 to you -

12 (Interpreter speaks in Spanish to the Defendant.)

13 THE COURT: --- because you did not testify.

14 (Interpreter speaks in Spanish to the Defendant.)

15 THE COURT: It is left entirely up to you whether or not
16 you testify.

17 (Interpreter speaks in Spanish to the Defendant.)

18 THE COURT: You may talk with your attorney ---

19 (Interpreter speaks in Spanish to the Defendant.)

20 THE COURT: --- your family, friends, or anyone else.

21 (Interpreter speaks in Spanish to the Defendant.)

22 THE COURT: But the ultimate decision is left entirely
23 up to you.

24 (Interpreter speaks in Spanish to the Defendant.)

25 THE COURT: Do you understand it is your decision

1 whether you will or will not testify?

2 (Interpreter speaks in Spanish to the Defendant.)

3 (Defendant speaks in Spanish to the Interpreter.)

4 THE INTERPRETER: Yes, I understand.

5 THE COURT: Have you discussed the advantages and

6 disadvantages of testifying with your attorneys?

7 (Interpreter speaks in Spanish to the Defendant.)

8 THE INTERPRETER: Yes.

9 THE COURT: Do you wish to testify?

10 (Interpreter speaks in Spanish to the Defendant.)

11 THE DEFENDANT: No.

12 THE INTERPRETER: No.

13 THE COURT: Is that your decision?

14 (Interpreter speaks in Spanish to the Defendant.)

15 THE INTERPRETER: Yes.

16 THE COURT: All right. Thank you.

17 (Mr. Summers and interpreter return to their seats.)

18 THE COURT: All right, Counsel, let's do this. It's

19 getting kind of late, but, if you can, meet with me for about

20 five or ten minutes. Let's run over the charge.

21 I think it's not complicated, but, if you'll meet with me

22 in chambers, for just about five minutes or so and let me run

23 through the charge with you.

24 (Off-the-Record Comments)

25 (Whereupon, Court was adjourned for the day at 5:38 p.m.)

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1 (Court reconvened at 9:40 a.m. on November 16, 2007.)

2 THE COURT: All right, Counsel, we're ready to resume.
3 We had a charge conference yesterday afternoon, late yesterday
4 afternoon, and one of the -- my charge on trafficking includes
5 an explanation of possession, which is, you know, actual --
6 actual or constructive possession.

7 It also includes an explanation of what a conspiracy is.
8 Most people wouldn't understand what a conspiracy is. So, it
9 includes that.

10 Now, there's a question whether -- when I went over that
11 with Counsel, Defense Counsel, indicated they would take
12 exception to charging on conspiracy as it relates to the
13 trafficking charge. Is that correct, Counsel?

14 MR. TREJO: That's correct, Your Honor.

15 THE COURT: All right. Now, let me -- and I told you,
16 when we left yesterday, I was inclined to charge it because I
17 think it applies to this case. But, then, I told you I would
18 give it some thought and -- and let you know this morning.

19 And I have given it some thought overnight. And let
20 me -- it's kind of a detailed explanation, in this case, but
21 what we have in this case, if you look at it both the State
22 and the Defense are entitled to their theory of the case.

23 And, if there's any evidence on the record to support, or
24 from which the jury could infer evidence which supports that
25 particular theory, I'm required to charge the jury as to those

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1 transported from Mexico into South Carolina; to be in
2 possession of, the Defendant signed for these goods and
3 obstinately was in possession of whatever was there.

4 And they were being shipped to him specifically, by the
5 bill of lading, and he signed for them and took possession.
6 So, the possession obviously is an issue or -- or something
7 the State is entitled to rely on. Bringing into the State is
8 an issue upon which they -- or can rely; also to conspire.

9 I would suggest to you that having two thousand (2,000)
10 pounds of marijuana coming in from Mexico, to the Defendant,
11 and him signing for it, requires more than one person to do
12 all that.

13 So, there had to be -- if, in fact, he knew the drugs
14 were there, and that's going to be the issue -- if he knew
15 they were there, obviously, it took two or more people to put
16 this -- these goods there and get them there to him. And --
17 and for him to receive them.

18 Obviously, it was -- he couldn't have done it all by
19 himself. It could only be done through essentially a
20 conspiracy.

21 Secondly, other things supporting the State's position,
22 as to the conspiracy, is he -- by the records that were put
23 in, he filed income tax returns for the state in this location
24 where this whole took place.

25 He was there working and filed income tax returns for two

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1 particular — the law that applies to those particular
2 theories.

3 In this case, what we have is the Defendant — that there
4 was -- there were over two thousand (2,000) pounds of
5 marijuana included, in some ceramic goods, a whole truckload
6 of ceramic goods, a tractor-trailer load, which were sent to
7 the Defendant in this case.

8 It was sent to him at his address. And he signed for
9 those -- and I'm going by what's on the record now -- he
10 signed the -- a receipt for those goods that were on the truck
11 and started to -- to -- transfer the goods onto other vehicles
12 and transport them to other locations.

13 So, he had signed the bill of lading or whatever,
14 receipting for those goods and was taking possession of those
15 goods. He, therefore, was charged with being in -- or
16 trafficking in those goods.

17 Now, if you look at the trafficking statute, it reads as
18 follows: "It's illegal to knowingly sell, manufacture,
19 cultivate, deliver, purchase, or bring into this State or to
20 provide financial assistance or otherwise aid, abet, attempt,
21 or conspire to sell, manufacture, cultivate, deliver, or
22 purchase or bring into this State or to be in actual or
23 constructive possession..." of whatever amount of marijuana.

24 In this case, looking at it, the State has presented a
25 case, as to bringing into the State, because the goods were

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1 thousand, two (2002), two thousand, three (2003). Then, there
2 was no tax returns filed after that.

3 When the -- when the state tax agency inquired of him as
4 to why he didn't file a tax return in two thousand, four
5 (2004), he indicated to them -- according to their notes, he
6 told them he had gone back to Mexico and was in Mexico in two
7 thousand, four (2004). And that's the reason he didn't file a
8 tax return.

9 Now, at some point, I don't know exactly when he came
10 back from Mexico if he went to Mexico, I -- we only have his
11 statement, which was not under oath obviously, a statement
12 made to -- but it is uncontradicted, on the record, that he
13 went to Mexico.

14 We don't know when -- if, in fact, he went to Mexico, as
15 he stated, we don't know when he came back. But we know -- I
16 think it's in March of two thousand, six (2006) -- or is it
17 two thousand, five (2005), that he told -- that, when he was
18 contacted by the state revenue office, he -- and he told, when
19 they questioned him about why he didn't file a tax return --
20 was that in two thousand, five (2005) or two thousand, six
21 (2006)?

22 (Brief pause while attorneys check exhibits.)

23 (Off-the-Record Comments)

24 MR. TREJO: It doesn't say, Your Honor.

25 THE COURT: So, was the first contact with them when he

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1 applied for a business license or was it before that? Do you
2 know?

3 MS. GANSS: What I know about those dates, he applied
4 for the business license on November 1st, two thousand, five
5 (2005). And, then -

6 THE COURT: Oh, it was two thousand, five (2005)?

7 MS. GANSS: That's when he applies for the business
8 license -

9 THE COURT: Okay. Okay. I ---

10 MS. GANSS: --- that day.

11 THE COURT: All right. I thought he did that in two
12 thousand, six (2006).

13 MS. GANSS: No, he applied for the business license ---

14 MR. TREJO: He was already in jail.

15 MS. GANSS: --- November 1st, two thousand and five
16 (2005). And he was arrested November 16th, two thousand and
17 five (2005).

18 And, then, in February, someone from the Department of
19 Revenue ---

20 THE COURT: Okay. All right.

21 MS. GANSS: --- goes out to the scene.

22 THE COURT: Yeah, I got my years mixed up. It's two
23 thousand, six is -- nothing happened in two thousand and six
24 (2006)?

25 MS. GANSS: That's correct, Your Honor.

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1 THE COURT: He's been in jail that time. All right. I
2 got you. I'm confused by that.

3 In any event, in two thousand, five (2005), then, he
4 applied for a business license with the state. So, he was
5 definitely here then.

6 Now, obviously, the jury -- and -- and these drugs were
7 shipped to him. You got to remember they were shipped to him
8 and he signed for them.

9 Now, the jury could infer that, during the time he was in
10 Mexico, that this arrangement was made. They certainly could
11 -- that's an inference they may or may not make from the
12 evidence.

13 But there's no proof of that. But they could infer, if
14 they believed he was involved in this drug transaction, that
15 -- that he was there and -- and the arrangements were made.
16 while he was there because he was gone during the year two
17 thousand, four (2004) and applied for this license in two
18 thousand, five (2005).

19 Now, secondly -- so -- so, that's a possibility. Second,
20 though, and more important than that, is he signed for the
21 goods and received them. And he didn't ship them, obviously,
22 to himself. So, somebody had to do that. But he received
23 them.

24 Secondly, as the Defense has very ably pointed out,
25 through the testimony on cross examination, this Defendant has

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1 no assets. The only thing he had was an automobile worth
2 about three thousand dollars (\$3,000). He was an employee of
3 a restaurant.

4 And, so, he had no funds, obviously. There's no -- based
5 on what the Defense has brought out, he had no funds for which
6 to buy marijuana or to be in -- or to -- to -- there's no
7 evidence he was actually selling the marijuana and had monies
8 on him.

9 There's no evidence he had the financial ability to bring
10 this kind of marijuana into this country. So, he had to have
11 some help in order to do that, if he was involved in it, or he
12 had to be helping somebody else through a business here.

13 Now -- and, then, the question is raised, certainly that
14 -- that the jury could question whether somebody in Mexico
15 would ship one point three to one point seven million dollars'
16 worth of marijuana to somebody who didn't have no knowledge of
17 it and was not involved in it.

18 And they would trust him enough with that kind of
19 marijuana, even knowing it wasn't even -- that it was there;
20 not even knowing that it was there, ship it to him and let him
21 take possession of it, and not know it was there, whether they
22 would do that or not, whether that's reasonable. Maybe -- you
23 know, you can prove a conspiracy or trafficking by
24 circumstantial evidence.

25 And that's one of the things the jury considers, is it

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1 reasonable that somebody would send one point three to one
2 point seven million dollars' worth of marijuana to him and he
3 not even know he had it in his possession and trust him to do
4 whatever he wanted to with it.

5 There was nobody -- no proof that anybody was here to
6 supervise it or to make sure what happened to it; there's no
7 evidence of that. So, it's left entirely up to him. Is that
8 reasonable that he was not involved in that or had knowledge
9 the drugs were there? That's a question for the jury to
10 determine.

11 But, I'm just saying that I think that the Court should
12 charge conspiracy because obviously, there is evidence on the
13 record, from which the jury could infer that there was a
14 conspiracy.

15 All right. Now, is there any other matter we need to
16 take up before I bring the jury back?

17 MR. TREJO: May I just be heard on that, Your Honor?

18 THE COURT: No, you may not.

19 MR. TREJO: I would make my record for the Court of
20 Appeals, Your Honor.

21 THE COURT: Oh, you mean, whether I should charge it or
22 not?

23 MR. TREJO: Yes.

24 THE COURT: Go right ahead.

25 MR. TREJO: Thank you, Your Honor.

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1 THE COURT: But I'm not the jury; don't argue your case.

2 MR. TREJO: No, no, no, no, no.

3 THE COURT: All right, sir.

4 MR. TREJO: Just a legal argument.

5 THE COURT: All right, sir.

6 MR. TREJO: And what I would like ----

7 THE COURT: Well, back up. There's one other thing I
8 want to put on there I forgot about that I wanted to put on
9 the....

10 The only thing that we have, on whether he had knowledge
11 that these drugs were there, other than the receipt for them
12 and receiving them in the containers, is his self-serving
13 exculpatory statement to the police because he made a
14 statement to the police that he didn't know the marijuana was
15 in there. That's the statement he made to the police.

16 He didn't know the drugs were in there. And that he made
17 a deal with somebody -- gave him two thousand dollars (\$2,000)
18 to set up a pottery business, but he didn't know the marijuana
19 was there.

20 And they asked him, "Well, who was this person you made
21 the deal with," and he wouldn't give them the names. But what
22 I'm saying to you is, this is purely a self-serving
23 exculpatory statement because, if the jury believes that,
24 then, they have to find him not guilty.

25 But he wouldn't give them any more statement. That's the

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1 only statement he gave them was a self -- it's not an
2 admission of guilt. It's a self -- an exculpatory self-
3 serving statement tending to exonerate him if the jury
4 believes it.

5 So, that's all they have as to whether he had knowledge
6 there were drugs in there or not. All right. Go ahead.

7 MR. TREJO: Your Honor, with regard to the Court's
8 decision to instruct on conspiracy, as noted, we take an
9 exception with that. And it's our contention that the
10 statute, as written, under the facts and circumstances of the
11 evidence presented in this trial, it would be overly broad to
12 include the conspiracy portion.

13 The analysis the Court underwent moments ago concerning
14 that he took possession of the drugs, and therefore, there had
15 to have been an agreement with somebody in order to have
16 obtained the drugs.

17 That, in fact, applies to any situation where anyone
18 obtains any amount of drugs. Obviously, it has to come from
19 somebody.

20 And under -- under -- I don't have the U.S. Supreme Court
21 decision, but there is a Supreme Court decision that indicates
22 a single act does not necessarily make a conspiracy.

23 THE COURT: I agree. There's nothing necessarily he --
24 he's a conspirator. There's nothing necessarily, but you've
25 got to look, at the evidence and inferences that could be

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1 drawn from them, in the light most favorable to the State,
2 because that's their position. Okay? Go ahead.

3 MR. TREJO: I understand that, Your Honor. And, in that
4 regard, the theory throughout the entire trial, from the
5 State, has been that my client was taking possession of the
6 drugs. And given the quantity, had the obvious intent to
7 distribute them because he couldn't -

8 THE COURT: Well, they're not required to prove he
9 intended to distribute them.

10 MR. TREJO: Right.

11 THE COURT: All he has to do is possess them.

12 MR. TREJO: Right. Well — right.

13 THE COURT: or conspire to possess them.

14 MR. TREJO: That's right because, under South Carolina
15 law, ten (10) pounds has, by law, been determined to be a
16 trafficking amount.

17 THE COURT: Just possession, simple possession.

18 MR. TREJO: And, obviously, a trafficking amount is
19 intent to distribute and not for personal use, once it's over
20 ten (10) pounds is all I'm saying.

21 THE COURT: Well, I mean, trafficking, in South
22 Carolina, if you possess ten (10) pounds or more, you don't
23 have to prove anything else other than the person possessed
24 that ten (10) pounds.

25 And, if they conspired with somebody else, to possess the

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1 ten pounds, you don't even have to prove they possessed it;
2 only that they conspired to possess it. All right?

3 MR. TREJO: But, at one point during the trial, Your
4 Honor, I suggested the statements of co-conspirators, and the
5 Court acknowledged, at that point, there was no evidence of
6 any conspiracy. And, therefore, there was no evidence of co-
7 conspirators' statements.

8 THE COURT: Oh, I didn't say -- I didn't acknowledge
9 that there was no evidence of a co-conspirator.

10 MR. TREJO: You said there was no evidence ---

11 THE COURT: I said there was nobody -- you were talking
12 about a co-conspirators, and I said, "I don't know anything
13 about co-conspirators; nobody has been -- no one else has been
14 -- has brought, to the attention of the Court, as been charged
15 with being involved in this drug." I don't know about any co-
16 conspirators --

17 MR. TREJO: Right.

18 THE COURT: --- that have been charged. But that
19 doesn't mean -- I didn't make a finding there was no evidence
20 of a conspiracy.

21 MR. TREJO: Well, Your Honor, in any event, for the
22 reasons I've stated, I will take exception to the inclusion of
23 the conspiracy portion of the trafficking statute in this
24 case.

25 THE COURT: All right, sir. And that's -- let me say,

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1 that's part of my usual charge where there is some evidence or
2 inferences from the evidence which could be drawn of a
3 conspiracy. And that's my normal charge as to -- to -- to
4 explain possession and conspiracy to the jury because the jury
5 -- most wouldn't understand those two terms in general
6 happenstance. So -- all right.

7 MR. TREJO: And one last inquiry, Your Honor, as just a
8 matter of procedure. I wanted to confirm with the Court that,
9 despite our not requesting the State to open on the law, the
10 Defense still -- still has the discretion to explain to the
11 jury that we anticipate the law that they will receive from
12 the Court to be as follows, and then, argue the facts.

13 THE COURT: Yes, sir.

14 MR. TREJO: Thank you, Your Honor.

15 THE COURT: You have the right -- and, when you present
16 your argument, to anticipate the other arguments or to -- to
17 -- or to go over the law as you understand it to the jury.
18 Certainly, you have that right.

19 Okay. And to -- and to anticipate what their arguments
20 might be, certainly, you -- you can do that. It's got to be
21 based on the record obviously. All right. Thank you.

22 Anything else that we need to clear up before we get
23 started?

24 MR. TREJO: Thank you.

25 MS. GANSS: No, Your Honor.

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1 THE COURT: All right. When they come in, I'll remind
2 you that we still have -- the State has not rested. We -- the
3 motions have been made and considered timely made, when they
4 were made, but we -- the State will still need to rest. And,
5 then, the Defense will also rest on the record before the
6 jury.

7 And I'll instruct them, then, that we're -- that
8 concludes the taking of testimony and other evidence and we're
9 going into final argument.

10 Yes, sir. All right, please, bring them in.

11 (The bailiff steps out to summon the jury.)

12 (The jury entered the courtroom at 10:00 a.m.)

13 THE COURT: Good morning, Mr. Foreman, ladies and
14 gentlemen of the jury. I hope you had a pleasant night and
15 survived the rain and the wind last night. It looks pretty
16 with the sun out today though.

17 We're ready to resume with the trial at this time.
18 Counsel, ready to proceed?

19 MS. GANSS: Yes, Your Honor. And, at this time, the
20 State would rest.

21 THE COURT: All right.

22 MR. TREJO: Yes, sir, we're ready to proceed. And the
23 Defense will rest at this time.

24 THE COURT: All right. Mr. Foreman, ladies and
25 gentlemen of the jury, this concludes all the taking of

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1 testimony and evidence in the case. We have yet remaining
2 final arguments of counsel and my instruction to you, with
3 regard to the law, that applies to the issues in this case.

4 I'll ask that you listen attentively now as counsel
5 address you in final argument. Counsel, ready to proceed.

6 (Mr. Trejo's closing argument began at 10:02 a.m.)

7 MR. TREJO: May it please the Court?

8 THE COURT: Yes, sir.

9 MR. TREJO: Counsel? Members of the jury, in my -- good
10 morning first off.

11 (Responses of "good morning" heard.)

12 MR. TREJO: In my -- my opening statement -- actually,
13 let me start by -- by -- by telling -- by saying something.
14 This system of justice that we have is -- is adversarial in
15 nature.

16 You've got one side fighting for one side and you've got
17 another side fighting for the other side. And each of us do
18 our best to fight as hard as we can for our respective sides.

19 But, the one thing and -- and, you know, sometimes I --
20 may be there is some perception that I fight too hard. But,
21 my obligation is to fight as hard as I can for my client. And
22 I always do that.

23 And, if anything I did, during the course of this trial,
24 offended anyone, I apologize. But I ask that you don't hold
25 that against my client in analyzing the evidence and the facts

1 and circumstances of the case.

2 The -- the opening statement that I started this trial
3 with, I explained at the offset that the issue here, for you
4 to decide, was whether or not the prosecution could prove,
5 beyond a reasonable doubt, that Wilbur Summers had knowledge
6 that he was receiving marijuana; that he had knowledge that he
7 was receiving marijuana.

8 Now, I know at times it might have gotten to be somewhat
9 laborious and -- and like thoughts might have been going
10 through your heads of, "Why is he going through all of these
11 resources? We've heard enough of that."

12 But I -- I also tried to explain, in the opening
13 statement, how your ultimate decision in this case is -- is
14 based, not only from the evidence that you -- you heard coming
15 from the -- the witness stand, in terms of the various
16 exhibits, the various photographs, the various documents, but
17 your ultimate decision, in this case, is also based upon the
18 lack of evidence -- the lack of evidence.

19 And that's why, with the witnesses, I went through and I
20 asked about the ICE resources, the DEA resources, the -- the
21 resources that the federal law enforcement agencies have. And
22 basically, these -- these are the -- the ones that we went
23 through.

24 About the one -- the one-party consent recorded calls,
25 how they can have somebody make a -- a call who -- who was

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1 like an informant. And, with that informant's permission,
2 they could have recorded calls involving Wilbur.

3 And we knew that, ever since that tractor-trailer rig was
4 seized in Texas, they had Wilbur's phone number. Why?
5 Because a special agent testified that he was able to call
6 Wilbur, once he got here to South Carolina, because it was on
7 the bill of lading; the phone number was on the bill of
8 lading. They had that.

9 And we know, through Agent Criswell, that they were able
10 to subpoena those records, the telephone records, of -- of
11 Wilbur Summers. And despite the -- the somewhat of a battle
12 that was going on about -- about the ability to subpoena
13 records, Special Agent Criswell testified yesterday it's not
14 that hard.

15 "I fill in the name of the business entity or -- or
16 person that I want to subpoena records from, on the pre-
17 printed form, and I ask them what I want. And they give it to
18 me. And they can give this information and documents to me on
19 an expedited basis if I request."

20 But, you know, he didn't even need an expedited basis in
21 this case because they had over a year or approximately a
22 year. It's not just a matter of that period of time from
23 November 11th to November 16th, it's -- of two thousand and five
24 (2005). It's that period of time from November 11th two
25 thousand and five (2005) up until today, or up until the trial

1 of the matter.

2 They had all that time. And they all that time to rely
3 upon a variety of resources. And despite that ability, to
4 rely upon the variety of resources, federal resources, this is
5 all you got. This is what you've got, what was presented to
6 you and nothing more.

7 There was no evidence of Wilbur trafficking in drugs or
8 were found at his residence. There was no evidence of drug
9 trafficking and found in his vehicle.

10 The financial analysis, well, at first one of the agents
11 testified, "Well, that takes a long time to do." A year was
12 plenty of time to do one.

13 And, in this particular case, the only asset presented to
14 you, that was owned by Wilbur Summers, was a vehicle with an
15 approximate value of three thousand dollars (\$3,000). Does
16 that show indicia of someone who is trafficking in, as the
17 State indicated to you, one point six or one point seven
18 million dollars? I would submit to you that it doesn't.
19 That's not a major trafficker.

20 Two thousand -- more than two thousand (2,000) pounds of
21 marijuana, that's major trafficking. Is there evidence that
22 Wilbur being a major trafficker? No.

23 You saw -- you know, you -- you -- you saw his reaction.
24 You saw that he was excited where -- when the ceramic pottery
25 he was expecting -- you saw his reaction when the door was

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1 open. It was like, "Whoa, that's a lot of stuff." Shock,
2 surprise, whatever you want to call it, yeah.

3 But, then, consider -- and consider the way he -- he
4 reacted, from that point forward, after seeing that the
5 pottery -- now, if he was there, in anticipation of receiving
6 over two thousand (2,000) pounds of marijuana, what would be
7 the natural thing to do?

8 To have others helping you do this, or to do it yourself?
9 Conducting what law enforcement does, surveillance. "Is
10 anybody coming? Is anybody watching us? Who has seen us
11 unload this stuff?"

12 Nobody was doing that. They were merely doing the job of
13 unloading the ceramic pottery, from one truck to another, to
14 take it to the various locations where it was there.

15 They had the storage facility, so, he was going to fit
16 what he could. They had the store, and it was going to fit
17 what it could.

18 But, during the course of unloading this pottery, at no
19 point in time, was there any evidence -- and you saw the
20 process -- of any of those individuals, Wilbur or anyone else,
21 looking and searching through those -- those ceramic
22 potteries, all a variety of different ones, looking through
23 them. "Does this one have weed? Is the weed in here? Oh,
24 yeah, we have to put this one over to the side because it has
25 marijuana in it." Nothing like that.

1 Things like that, things like cracking one or two open,
2 saying, "Is there -- is there marijuana inside of this
3 particular pot," and then, seeing a bundle like this
4 (indicating) -- without opening the bundle, but seeing this
5 bundle, that would be a type of circumstantial evidence that
6 you can rely upon in order to infer that he had knowledge.

7 But, when you're closely examine the conduct, on that
8 particular day, there's not sufficient evidence to establish,
9 beyond a reasonable doubt, that he knew there was marijuana in
10 the ceramics.

11 The -- the other reasons why -- the lack of -- of
12 evidence that he was involved, in the trafficking, there's no
13 evidence he was living outside his means. There's no evidence
14 from his residence, no evidence from his car. No calls
15 concerning marijuana.

16 You heard about the subpoena being made on his cellular
17 telephone. Agent Criswell talked about that yesterday. Well,
18 think about we had twenty-five (25) law enforcement officers
19 involved in this investigation. Ten (10) of them being from
20 the federal system; fifteen (15) being from the state system.
21 There was going to be a phone record analysis.

22 Why else do you subpoena the phone records, other than to
23 conduct an analysis. And had there been proof, that Wilbur
24 was contacting some individual concerning this, trying to make
25 contact, in those days while the shipment was being arrived,

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1 of marijuana, in the days preceding that, contacting Mexico,
2 saying, "Okay. The weed is coming," and a number
3 consistently called, that evidence would have been presented
4 to you. That evidence would have been presented to you.

5 But, again, that goes back to base your decision upon the
6 evidence and the lack of evidence. And, in this particular
7 case, despite the fact that the -- the telephone records were
8 subpoena and analyzed -- you don't just get the records and
9 just leave them alone. They were analyzed. They were
10 analyzed.

11 I argue to you they were analyzed, but there was a lack
12 of evidence, from that telephone call analysis, to
13 substantiate a claim that Wilbur was somehow connected with
14 another individual and was anticipating over approximately a
15 ton of marijuana in the pottery.

16 While they're unloading the mari -- unloading the
17 pottery, the ceramic pottery, there's no statement concerning
18 marijuana.

19 What else? You know, bottom line, you -- you could sort
20 of feel it inside. It's like, "You need something more.
21 Something is missing in order to -- to bring that connection
22 that Wilbur was trafficking." You know, you -- you -- you
23 sort of feel, "Well, maybe he was involved. He could have
24 been involved, but -- but it doesn't -- it doesn't feel
25 right."

1 And why doesn't it feel right? Because the evidence is
2 lacking.

3 Now, it's important to talk -- to keep in mind that we
4 didn't call any -- any witnesses. We introduced the one
5 record, through the one witness, concerning the tax returns
6 that he filed in two thousand, two (2002), and two thousand
7 and three (2003), but we didn't -- we didn't -- we didn't call
8 any witnesses.

9 And it's -- it's important to remember, that we don't
10 have a burden to prove anything. A person accused of a crime,
11 anywhere in the country, state court, federal court, has no
12 burden to produce anything.

13 And a person accused, a defendant, does not have to
14 testify. You heard what he would have said. You heard his
15 testimony through Special Agent Grubbs. But, he does not have
16 to testify, and the fact that he did not testify cannot be
17 used against him.

18 And what does that mean? That means, during the course
19 of the deliberation process, it would be inappropriate to say,
20 "Well, you know what, he should have gotten up on the stand
21 and said -- he should have testified. He should have said
22 this, and he should have done that, et cetera." Because,
23 then, you're shifting the burden to the accused.

24 And you can't do that because the burden always remains
25 with the prosecution; always remains with the prosecution.

1 And, if you shift that burden, during the deliberation
2 process, what you're doing is you're -- you're attacking our
3 system of justice at the very core.

4 And, if you think about our system of justice, you know,
5 the -- it gets criticized constantly, whether it's a verdict
6 in a civil case or whether it is an acquittal, in a criminal
7 case; the media hypes it up and it's criticized.

8 But, when you hear people being critical, of our system
9 of justice, be it the civil or the criminal justice system,
10 ask them what country has a better system. This is it.

11 This is the finest system of justice in the entire world.
12 It's not perfect, but this is the finest system of justice in
13 the entire world.

14 And the way it -- it continues to -- to be that way is by
15 accepting the law, as the Court will instruct you upon, and by
16 making -- by bringing twelve (12) members of the community,
17 twelve (12) strangers, from a variety of different
18 backgrounds, a variety of different life experiences, with a
19 variety of different perceptions, because we all see things
20 differently.

21 We all feel things differently. One thing that can
22 affect somebody in one way will affect another person in
23 another way.

24 But the beauty of our system is that we bring twelve (12)
25 strangers to collectively come together to see if -- not --

1 not a majority rules, but to see whether or not twelve
2 individuals can make twelve (12) individual decisions to
3 render a unanimous verdict.

4 Everybody has -- has -- has -- it's -- it's not a matter
5 of -- of following the leader; it's a matter of making your
6 own personal decision, your own personal choice.

7 Consider what everybody else thinks, but the only way our
8 system of justice continues to -- to thrive and continues to
9 be the best system in the world is if it is twelve (12)
10 independent minds who ultimately render a verdict if they can.

11 Unanimous verdicts, that's hard. But, ultimately,
12 whether it's to convict, or whether it's to acquit, it has to
13 be unanimous.

14 Now, with regard to the law, we've heard how the accused,
15 the Defendant Wilbur Summers, is presumed innocent; the
16 presumption of innocence. And, in that regard, the
17 presumption of innocence, a person is presumed innocent.

18 So, if you have a scale of justice, and there was no
19 presumption, the scales would start out even. But they don't
20 in a criminal case. Why? Because there is the presumption of
21 innocence; that the accused is presumed innocent. Then, it's
22 through the production of evidence that the scale move. They
23 move.

24 Now, how far does the scale have to move in order to
25 convict? I can't tell you. But we -- we can do a comparison.

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1 We can do a comparison, and we -- we can do the comparison by
2 examining the different standards of proof involving evidence
3 that we have in our -- in our -- in our system of justice.

4 The standard of justice -- the standard of proof that we
5 have, in this particular case, is the highest standard, under
6 the law, and that's proof beyond a reasonable doubt. We've
7 heard that so many times.

8 The level of proof, if there's no evidence, a scintilla
9 of evidence, or particular levels of evidence, different
10 levels of truth. Reasonable suspicion, probable cause,
11 preponderance, clear and convincing evidence, all of those
12 standards below beyond a reasonable doubt compel the verdict
13 of not guilty.

14 It's only if you can establish, beyond a reasonable
15 doubt, that Wilbur knew he was receiving marijuana that you
16 can convict him. Anything less than that, and it's a not
17 guilty verdict because it doesn't rise to that highest
18 standard of proof.

19 Now, you say, "Okay. That helps a little bit, but what
20 -- what else is there that -- that you can compare it to?"
21 Well, we know we have criminal cases and we know we have civil
22 cases.

23 The level of proof in a civil case, we anticipate that
24 the -- the Court will instruct you on that, and you'll --
25 you'll learn that the level of proof in a 0- in a civil case

1 is on a more probable than not basis, more probably true than
2 not.

3 And what does that mean? Getting back to the scale of
4 justice again, more probably true than not means just a slight
5 tipping of the scales, anything more than fifty (50) percent
6 is more probably true than not; more probably true than not,
7 just a slight tipping.

8 And there's no presumption in a civil case. So, we start
9 out here (demonstrates). And, a slight tipping, and the case
10 is established in a civil matter in a more -- by a
11 preponderance of the evidence or a more probably than not
12 basis.

13 Then, when we compare them, you've got the civil, more
14 probable than not, but the criminal case is beyond a
15 reasonable doubt. The civil case is slightly more than fifty
16 (50) percent. The criminal case, the highest standard in the
17 law. Civil case, there's no presumption; criminal case, there
18 is a presumption.

19 You say, "All right. But, what does that mean?"
20 "Probably," "probably," "more probable than not." Well, in
21 terms of articulating that, what it means is that, if, after
22 evaluating all the evidence in this case, both the evidence
23 that was presented and taking into account the lack of
24 evidence, and you're able to say he might be guilty. You have
25 to find him not guilty.

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1 Might doesn't rise to the level of proof beyond a
2 reasonable doubt. Might doesn't even reach the standards of a
3 civil case. If you get to could be guilty, no.

4 If you sit here and say, "Well, you know what, after
5 considering everything that we've heard in this case, after
6 all the evidence and the stipulations that have been
7 presented, Wilbur could be guilty." That requires a not
8 guilty verdict.

9 If you go, "Well, maybe he's guilty." Again, maybe
10 doesn't rise to the level of proof, beyond a reasonable doubt,
11 and that requires a not guilty verdict.

12 Possibly guilty, if he's possibly involved in this
13 trafficking offense, possibly; not guilty. And, then, say you
14 even go as far as saying, "We, the jury, after considering all
15 the evidence in this case, believe that Wilbur Xavier Summers
16 Castro is probably guilty, probably." Probably only gets to
17 the civil standard.

18 If as far as you can go is probably, the verdict is not
19 guilty, because you're not getting to the point where you're
20 saying, "Wilbur Castro Summers, we believe that there has been
21 sufficient evidence to prove, beyond a reasonable doubt, the
22 highest standard in law, that you are guilty. And, therefore,
23 we find you not guilty [sic]."

24 (Brief Pause)

25 MR. TREJO: The -- criminal culpability, we anticipate

1 you -- you'll being instructed that Wilbur had adequate
2 knowledge, knowledge that he was promoting or facilitating a
3 crime. The mere presence or mere association with others is
4 not enough.

5 But, knowledge that he was promoting or facilitating a
6 crime, well, that gets back to, again, the -- the issue in the
7 case, the issue that we explained in at opening statement, the
8 issue that I explained, in the very beginning of the closing
9 argument, whether or not there's sufficient proof, proof
10 beyond a reasonable doubt, that Wilbur had knowledge that he
11 was receiving the marijuana, the knowledge.

12 And, again, we -- we respectfully submit to you that
13 there simply hasn't been adequate proof that he had knowledge;
14 that he might have had knowledge, he could have had knowledge,
15 maybe he had knowledge, possibly had knowledge. Or, if you go
16 to that he probably had knowledge, all of those require not
17 guilty verdicts.

18 And your ultimate decision in this case can -- can simply
19 be stated, "We, the jury, find that there simply has been
20 insuff -- insufficient evidence produced in this case to
21 prove, beyond a reasonable doubt, that Wilbur had knowledge.
22 And, therefore, our verdict is not guilty."

23 You know, the -- the circumstantial evidence, you'll will
24 be instructed on circumstantial evidence. The mere fact that
25 Wilbur and others were unloading ceramic pottery, from the

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1 trailer, I submit to you is insufficient; insufficient
2 evidence that he had knowledge that any of those ceramic pots
3 had marijuana.

4 There needed to be additional factors, circumstantial
5 factors, in order to reach the conclusion that he had
6 knowledge.

7 And what type of additional circumstantial factors would
8 have been present in order to -- to start to get that level?
9 One of them would have been if -- if, in fact, if throughout
10 that trailer the odor of marijuana was present.

11 Well, if they opened the door to that trailer and they're
12 unloading the pots, and it literally -- there's literally a
13 wrench of marijuana odor emitting from that trailer, well,
14 that's circumstantial evidence that the person knew there was
15 marijuana somewhere in there and they're participating in it.

16 But, in this particular case, there's no evidence that
17 there was any odor coming from -- from that truck, trailer.
18 And why? Because the pots were sealed, completely sealed. A
19 hundred percent sealed. There was simply -- there was no odor
20 emitting from there, and no marijuana odor coming from there.

21 You'll have the chance to examine all of these exhibits,
22 and even with this one (picks up marijuana), if you get up
23 real close to it, you can smell the marijuana. But it's
24 sealed pretty tight.

25 But, don't forget, this isn't the condition it was in

1 inside the tractor-trailer. It was inside of this pot
2 (indicating) and it was covered and sealed with like a thin
3 tar-like substance on top. And, therefore, no odor was
4 coming.

5 So, when you get these items back, into the jury room,
6 and you -- you smell it, don't think that smell was in the
7 back of the trailer because it wasn't. There was no odor of
8 any marijuana; again, lack of evidence produced, lack of
9 circumstantial evidence produced.

10 Now, getting back to that, circumstantial evidence. The
11 mere unloading of the pots, that's not enough. If they had
12 been odor, an additional circumstantial fact.

13 If they had been examining the ceramic items, looking
14 inside, looking through the plastic wrappers that were around
15 them, as -- as each one was unloaded, circumstantial. "Why are
16 you looking inside the pottery? What are you looking for
17 inside the pots? What are you searching for?" Circumstantial
18 evidence.

19 But that circumstantial evidence did not exist -- exist.
20 Why? Because they weren't looking for weed. They didn't know
21 that the marijuana was there.

22 Had that fact been presented to you, of course, the
23 argument could have been made, "Well, even though we -- we
24 don't have actual proof that he was -- that he knew marijuana
25 was inside the pots, why was he looking inside of each pot?

1 What was he looking for?"

2 The pots that had the ceramic, were they looking inside
3 of them? Not a single time. They were being unloaded,
4 transferred, unloaded, transferred, unloaded, transferred.
5 Again, even the circumstantial evidence in this case is
6 lacking.

7 (Brief Pause)

8 MR. TREJO: The -- Wilbur's statement, we anticipate the
9 prosecution arguing that Wilbur's statement established that
10 he had knowledge that he was receiving marijuana. But, again,
11 if you recall, in the prosecution's opening statement to you,
12 it indicated that he was -- had made a statement, and the
13 inference there was that he had knowledge before --
14 beforehand.

15 But, then, in my opening statement, I explained to you
16 the context of that statement and what we anticipated Special
17 Agent Cory Grubbs testifying to at trial. And -- and Special
18 Agent Cory Grubbs did, in fact, acknowledge that, when he was
19 under oath previously, he was asked the following question and
20 his response was yes, that -- and this is Wilbur -- "That he
21 didn't want to disclose the identity of the person, that
22 offered to have him set up a pottery ceramic business here in
23 this area because one, he had now learned that the pottery had
24 marijuana. And by disclosing that individual's name, he would
25 put his family in jeopardy; isn't that right?" "Yes."

1 That he had now learned. You see, this post-arrest
2 statement, the statement is given, made, and the statement was
3 made despite the fact that he didn't have to make a statement.
4 He could have said nothing, and nothing would have -- could
5 have been inferred against him for exercising his right to
6 remain silent. It wouldn't even have been commented on.

7 But he waived his right. He said, "You know what? I'll
8 talk to you." And here, "I don't want to tell you the
9 person's name." Why? "Because now that I've learned that it
10 wasn't ceramics that I was -- just ceramics that I was
11 receiving here and helping this individual start a business,
12 but there was actually over two thousand pounds of marijuana,
13 if I disclose that person's name, my family in Mexico will be
14 put in jeopardy."

15 And, of course, it's a million dollars' or more worth of
16 marijuana. Who is not going to be afraid of a million dollar
17 drug dealer, especially Wilbur? What -- what have you heard
18 about Wilbur?

19 He's not a trafficker. He says, "No. I'm not going to
20 tell you the person's name because now that I learned that the
21 mari -- that the pottery had marijuana, something could happen
22 to my family in Mexico."

23 (Document shown on overhead.)

24 MR. TREJO: You know, the -- guilt -- in fact, this
25 should be guilt versus not guilty. Guilt versus not guilty.

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1 And why did I scratch out "innocence" right now? Because
2 you're not here to determine whether or not Wilbur is
3 innocent.

4 Anybody accused of a crime and goes to trial, that would
5 be an impossible burden, an impossible feat, to try and prove
6 a person is innocent. That would also be shifting the burden
7 of proof to have someone prove their innocence.

8 The only issue here is whether or not sufficient proof
9 has been presented to you to establish, beyond a reasonable
10 doubt, the highest standard of the law, that Wilbur Summers is
11 guilty.

12 Now, when you have one reasonable interpretation of the
13 evidence that points to guilt, and based upon whatever the --
14 the State is going to get up and argue, and you consider their
15 argument and you say, "Okay. You know what? We consider that
16 that might be a reasonable interpretation of the evidence.
17 That might be a reasonable interpretation of the evidence."

18 Then, you consider the argument and the evidence, as I
19 have explained them to you, and you say, "You know, that also
20 might be a reasonable interpretation of the evidence."

21 So, now, you have two different reasonable
22 interpretations of the evidence. When you have two
23 interpretations of the evidence, because of the presumption of
24 innocence, you must adopt the interpretation that -- that
25 points to a not guilty verdict and not a guilty verdict.

1 Where there are two interpretations of the evidence,
2 then, you -- you adopt the one that points to a not guilty
3 verdict.

4 Now, it all -- it all -- it all gets back to -- to this;
5 whether after considering everything, if you're still saying,
6 "maybe," "might be," "could be," "possibly," "probably," but
7 it doesn't reach the highest level as required our system of
8 justice.

9 You know, this is always the hardest part, because, you
10 know, I take good notes and you get as prepared as you can to
11 try and explain everything, and then, you realize that, okay,
12 you went through everything and you still want to try and say
13 more because, once I sit down, that's it. I have -- I won't
14 have another opportunity to -- to address you and to argue or
15 do anything else other than to sit there.

16 So, I simply ask you, once you get back, and you commence
17 your deliberation, be sure that -- that each and every one of
18 the jurors has the opportunity to provide their input.

19 There's a lot of different personalities. Some people
20 are -- are more introverted; some people are more extroverts.
21 Some people have difficulty talking in group settings.

22 Accommodate everyone, whatever needs they have, in order
23 to allow them to share, because only through that process,
24 will we be able to continue to maintain the best system of
25 justice in the entire world.

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1 And only through -- through all of you working together,
2 in an effort to try and reach a unanimous verdict, can our
3 system continue to work.

4 And, after considering everything, I would respectfully
5 submit to you that your verdict in this case should ultimately
6 be that, "We, the jury, having considered all the evidence in
7 this case, and the lack of evidence, have determined that the
8 prosecution has failed to prove, beyond a reasonable doubt,
9 that Wilbur Castro Xavier Summers has knowledge he was
10 receiving marijuana. And, therefore, we find him not guilty."
11 Thank you.

12 (Mr. Trejo's closing argument concluded at 10:35 a.m.)

13 (Brief Pause)

14 THE COURT: Solicitor?

15 MS. GANSS: Thank you, Your Honor.

16 (Ms. Ganss' closing argument began at 10:36 a.m.)

17 (Off-the-Record Comments regarding using the podium.)

18 MS. GANSS: Your Honor, opposing counsel, and member of
19 the jury. Forget about the smell. When you get back to your
20 jury room, pick it up. Think about what -- now, we didn't
21 have any testimony about how much this bale (indicating)
22 weighs, this one in particular.

23 But we know we have over two thousand (2,000) pounds of
24 marijuana. Pick this one up. (Picks up marijuana.) Let's say
25 it's ten (10) pounds. What did Investigator Matt Hutchins

1 tell you? A pound of marijuana, in Spartanburg, South
2 Carolina, a year ago goes for what? Six (\$600) to eight
3 hundred dollars (\$800). Six hundred (\$600) to eight hundred
4 dollars (\$800) a pound.

5 Let's say this is ten (10) pounds. What am I holding in
6 my hand? Six thousand dollars (\$6,000) to eight thousand
7 dollars' (\$8,000) worth of merchandise.

8 This might be twenty (20) pounds, double that. Sixteen
9 thousand dollars (\$16,000) for twenty (20) pounds a year ago.
10 Think of all of that. Think weight. Always remember what
11 Investigator Matt Hutchins told you.

12 At the beginning of this case, during my opening, I told
13 you or asked you, if you would follow the pottery, and follow
14 the marijuana. That's where the money is.

15 That's where the business is. You've heard that phrase,
16 "Follow the money." That's where it is, it's in the
17 marijuana. It's over two thousand (2,000) pounds of this
18 (indicating).

19 (Off-the-Record Comments regarding Power Point
20 presentation.)

21 MS. GANSS: I want to go through some of the testimony
22 -- thank you.

23 (Document shown on overhead.)

24 MS. GANSS: You heard Agent Yarborough tell you, to
25 avoid detection crossing the border, narcotics are often

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1 sealed in containers, like the ones we have here (indicating),
2 this (picks up pottery).

3 Pick this up too when you get back there. It is heavy.
4 Huge, and this marijuana (indicating) fit nicely in it. And
5 it wasn't in this condition, like Mr. Trejo said. It's
6 sealed, with a tar-like substance, to hide any smell.

7 So, forget the smell. And this stuff came from across
8 the border. And you heard Agent Ryan, Jeff Ryan, he told you,
9 when it crossed the border, from Mexico into Laredo, it came
10 to a port of entry and was secured, right there, right then,
11 secured.

12 And, then, it's escorted all the way to a controlled
13 delivery up to Spartanburg, South Carolina, right here. How
14 many agents followed it? Two drove, eight followed, ten
15 people. It's guarded, it's secured; met by fifteen (15) other
16 agents here in Spartanburg, South Carolina. This is a serious
17 shipment, over two thousand (2,000) pounds. Remember the
18 money, remember what the real business is.

19 We have had, in this case, a lot of evidence stipulated
20 to. I just want to briefly go over that before I go any
21 further. The Defendant is charged with trafficking in
22 marijuana. The State bears the burden of proving his guilt.

23 And we welcome that burden. I'm going to tell you right
24 now why we welcome that burden. I have to prove it was Wilbur
25 Xavier Castro Summers.

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1 He's been identified in Court, in this court, as the man
2 who received that shipment. I've got a name. Here in
3 Spartanburg County. We went over these locations where this
4 shipment came. It's here in this county, on November 16th, two
5 thousand and five (2005), a year ago today. I've got that.

6 I have to prove he knowingly did something that follows.
7 And we're going to come back to knowing it. And we're going
8 to spend some time on knowingly. But he either delivered --
9 we've been talking about a delivery, a shipment, right,
10 brought into this State. It began in Mexico and ended here,
11 right here in South Carolina;

12 Or he did otherwise aid, abet, attempt, or conspire with
13 someone, to deliver this shipment, to bring into South
14 Carolina, this marijuana. Or he knowingly -- and, again,
15 we're coming back to knowingly -- actively or constructively
16 possessed.

17 You saw that video. He took possession, actual
18 possession of that shipment, actual possession of the
19 marijuana in those clay pots in that shipment. He signed that
20 bill of lading. He was actively in control, actually in
21 possession.

22 He was also constructively in possession. He had
23 dominion and control over the shipment. He rented the Budget
24 rental car. He rented the self-storage unit. He was the one
25 who was saying where this was going.

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1 He's in control. He actually possessed those -- those
2 pots and that marijuana. And he constructively possessed it.
3 He had them.

4 Or -- I think I need to push this up -- he attempted to
5 become in actual or constructive possession. Hey, he was.
6 Forget that. Of more than two thousand pounds of marijuana.

7 I think we have an actual number. Our actual number --
8 and look at it ---

9 (Document shown on overhead.)

10 MS. GANSS: Look at all this evidence when you go back
11 there. Two thousand, two hundred and sixty-seven (2,267)
12 pounds of marijuana. That's extra two hundred and sixty-seven
13 pounds; do the math. That's a lot of money, between six
14 (\$600) and eight hundred dollars (\$800) a pound, and you've
15 got an extra two hundred and sixty-seven. That's big.

16 So, we welcome this burden because we've got him. We
17 even have knowingly. And I'm going to take you through that.
18 But, before I do, let's talk about what opposing counsel
19 touched on.

20 They bear the burden of proving the Defendant guilty
21 beyond a reasonable doubt. What is reasonable doubt? It's
22 not beyond any and all. So, what is it? Ask yourself what's
23 reasonable? What happened?

24 And like I asked you, at the opening of this trial,
25 please, use your common sense. Do not leave it at the gate;

1 bring it in, use it. Your life experience, what you've been
2 taught, what you've learned, what you've experienced, now more
3 than ever, you need to apply it. Use your common sense, and
4 you'll be able to figure out what really happened.

5 I want to begin -- and we're talking about knowingly now,
6 because we've got the rest - with the Defendant's statement.
7 And let's do some background with this statement because
8 opposing Counsel went to great lengths and links to get from
9 -- remember it was Agent Cory Grubbs, how was this translated.
10 It was in Spanish, right, and you would never, Agent Grubbs,
11 have taken -- have taken the Defendant's statement unless you
12 were comfortable, clearly comfortable, with the fact that the
13 Defendant understood what you were saying and what he was
14 saying and everybody was clear with the language, right?

15 That's what opposing counsel got out of Agent Grubbs,
16 "You were comfortable with what the Defendant was telling you.
17 You wouldn't have taken the statement had you not been
18 comfortable that each one of you understood the other."

19 There was no mistake about what was said at that
20 interview. So, let's look at it.

21 (Document shown on overhead.)

22 MS. GANSS: Now, there's a lot -- can you reduce that.
23 Maybe we can get all on there and see if we can still see it.

24 (Document on overhead is reduced.)

25 MS. GANSS: Good, right there. Now, I'm going to read

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1 you the whole statement and we're going to see what's the
2 juicy part and what's -- what's not very important and what
3 works.

4 The Defendant said ~~this is~~ according to Agent Grubbs --
5 he was originally from Sonoma, Mexico. He lived in the United
6 States for about two years.

7 He had previously met an unknown male from Mexico at
8 Nacho's Mexican Restaurant. This unknown Mexican asked the
9 Defendant to open a pottery business on his behalf. The
10 unknown Mexican male gave the Defendant approximately two
11 thousand dollars (\$2,000) to start the business.

12 The Defendant stated he had never met the unknown Mexican
13 male -- I apologize for that mistake -- before this meeting.
14 The Defendant stated this was the first load of pottery he
15 received from the unknown Mexican male. The Defendant also
16 stated that his family in Mexico would be killed if he told
17 the truth.

18 Now, at first glance, and I'll concede this, that last
19 statement, that last sentence, it just bites out at you. "The
20 Defendant also stated his family in Mexico would be killed if
21 he told the truth."

22 Pretty powerful. It's the State's position that it's a
23 tortured interpretation of this statement to say that the
24 Defendant, after being arrested, after being in custody
25 suddenly realizes, "Oh, my goodness, the man I got in this

1 pottery business with is sending up marijuana."

2 We believe that's a tortured interpretation of that
3 statement. The statement really, using your common sense, he
4 says, "If I tell you the truth, they'll kill my family in
5 Mexico," because he knows what the truth is. He knows
6 marijuana was in that shipment.

7 But, hold that aside because that's not the important
8 part of this case. That's secondary. It's really not -- it's
9 not as powerful as it appears to be at first.

10 Look at the other part, and this is where your common
11 sense is going to tell you that man (indicating) knew. What's
12 the story about this pottery business?

13 He's in a restaurant, an unknown male comes up to him,
14 someone he has never met before, and says, "Hey, let me give
15 you two thousand dollars (\$2,000) and open a pottery business
16 with me. I need you to open up a store front."

17 Why? That happens when? Never. It never happens
18 because it never happened here. Never.

19 Now, think about all your times in restaurants. Think
20 about all your experiences with strangers. In this world,
21 does anybody go up to a stranger and give them two thousand
22 dollars (\$2,000) to start a business? Never. This doesn't
23 happen because it didn't happen here.

24 The Defendant knew what he was doing when he opened this
25 pottery business because it's open. We're going to talk about

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1 the store front, but it's a front. It's a front for the real
2 shipment, the shipment (tapping on marijuana) Wilbur Summers
3 knows is coming. The shipment of real value, one point three
4 to one point eight million dollars. Follow that money.

5 This is the critical part of the statement. His story
6 about how someone came up to him and gave him money. Never
7 happened.

8 (Document shown on overhead.)

9 MS. GANSS: Now, I want to get into the facts. Again --
10 can you blow that one up, please. I apologize for all these
11 different sizes. Oh, we've been talking about a lot of paper
12 during this trial. Look at it closely, please, I beg of you.

13 We've got oh, let's see here -- I don't even think I put
14 them all up there.

15 (Document shown on overhead.)

16 MS. GANSS: We have the self-storage unit, and look at
17 this address, , and it's signed by the
18 Defendant. He got that storage unit. Opposing counsel
19 stipulated to that one.

20 RLS, that was the transfer sheet and let's see what we
21 have on this.

22 (Document shown on overhead.)

23 MS. GANSS: Oh, going to shipment,
24 Drive, Campobello.

25 We have a Budget rental truck agreement. There's an

1 address, "Wilbur Clay and Ceramic Pottery, 9133..." -- this
2 one says Road.

3 You heard testimony from Shirley Brown, with the
4 Department of Revenue. There's a retail license that says,
5 "Castro, Wilbur, Road, Spartanburg, South
6 Carolina"; "Clay and Ceramic Pottery, 1 Drive,
7 Campobello; South Carolina."

8 (Document shown on overhead.)

9 MS. GANSS: On the bill of lading -- and this is what
10 the undercover driver had in his possession when he was
11 driving this tractor-trailer to Spartanburg, South Carolina.
12 The first place he thinks he's going, because it's printed on
13 here, " Drive."

14 And notice this is handwritten, changed later, "Deliver
15 That's Nacho's Restaurant. We're going to
16 talk about that. All these addresses, all these places,
17 because there's not a pottery business. It's a front.

18 Let's go to the arrival of the shipment. And I think I
19 just touched on that, but there's one thing I need to add.
20 Oops (drops document and it's retrieved.) Thank you.

21 It's going to arrive -- a year ago today ironically.
22 Originally, it's sent to go to Drive. The
23 destination changed to in Inman, Nacho's
24 Restaurant.

25 Now, again, how do we know the Defendant knew about this

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1 shipment coming and he changed it? Because we saw that video.
2 I apologize for that video, and I'm going to talk to you about
3 that video some more and tell you why we showed it.

4 He saw, and you saw it here, on that video, Wilbur
5 Summers is the one the undercover was waiting for. And Wilbur
6 Summers walked up, arrived, he took control of that shipment
7 because he knew he had changed the location from
8 , which was the address on the business license. He
9 changed it not to 9133 store front place; he changed it to a
10 Mexican Restaurant. That's bizarre. He was the one who met
11 the undercover. There's not really a pottery business.

12 Now, we've arrived and let's talk about this unloading or
13 transloading as I think the agents referred to it.

14 And this told you that's bizarre, at Nacho's, and that's
15 where they're going to do this unloading of pottery; not at
16 the store front at 9133, not at the storage unit, and not at
17 . They're doing it at a restaurant. What's
18 that about?

19 Take a closer look like we did at the statement. What
20 time of day did the undercover tell you they did this
21 shipment? Right before the lunch hour, right? Right then.

22 Now, what do you have when you have a lunch hour?
23 People, other people out and about. Now, let's look, if we
24 can, and take a couple of these pictures.

25 (Document shown on overhead.)

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1 MS. GANSS: These are the ones I want to talk about.
2 Nacho's, we showed you. Let's see here -- this was the front
3 of the restaurant, a big sign. Okay?

4 But look at these exhibits and these pictures. Here's
5 one.

6 (Document shown on overhead.)

7 MS. GANSS: It doesn't look like they're in the front.
8 It's right there in the back. Take a look at another one.

9 (Document shown on overhead.)

10 MS. GANSS: It looks to me like the undercover agent
11 drove that tractor-trailer to the back. It looks to me like
12 that tractor-trailer is in the back of Nacho's. And that
13 makes sense.

14 Think about that. It's lunch hour, busy, people are
15 going to be up front. And you know they're getting a shipment
16 for one point eight million dollars' worth of marijuana.

17 You're going to have to call and get some help to unload
18 this; not quite sure where this marijuana in with this
19 pottery, and what if some breaks. Someone to help you unload
20 and find out.

21 Do I want to be alone at the storage unit with some
22 people? This is big money we're talking about; not legit, not
23 legal. Do I want to be laid away at when I
24 accept this delivery? I don't know.

25 Do I want to be up, at that store front, at 9133? All of

1 those locations, the undercover testified, he could have
2 driven that tractor-trailer to each one of them.

3 But the location for the shipment changed to Nacho's
4 because this was not a bizarre place, but the perfect place.
5 Nothing could go too wrong; you got other people around.
6 It's perfect. The ceramic pottery business was a front.

7 (Document shown on overhead.)

8 I put this up here just to remind you. And, again, it's
9 really what we were talking about. Investigator Matt
10 Hutchins, he told you how the marijuana, six to eight hundred
11 bucks a pound, and we've got two thousand, two hundred and
12 sixty-seven (2,267) pounds. Look at the value of that.

13 I only focus on this because the average working person
14 -- I want to put this in perspective -- in his lifetime, his
15 or her, will never see that amount of money. That's a ---

16 MR. TREJO: Your Honor, I believe this is improper
17 argument and objection.

18 THE COURT: Overruled. Please, proceed. Continue,
19 Counsel.

20 MS. GANSS: Thank you, Your Honor.

21 MR. TREJO: I would like to reserve a motion, Your
22 Honor.

23 THE COURT: Noted for the record. Proceed, Counsel.

24 MS. GANSS: Thank you, Your Honor. Look closely at
25 where this delivery occurred, in the back of Nacho's, some

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1 privacy for them to unload. But, you're not alone. And we
2 got this shipment here. And that's what I mean, but, if
3 something went wrong, they're okay.

4 Remember what we're talking about here, trafficking in
5 marijuana; not a joint. We're talking about over two thousand
6 pounds, serious money. That pottery business was a front.

7 Now, we have to talk about law enforcement here. No
8 marijuana was discovered anywhere but the tractor-trailer. We
9 know that. We heard the testimony.

10 It was not found in the storage unit. It was not found
11 at . It's not found at .

12 It's still all on the tractor-trailer because it hadn't been
13 unloaded yet before officers when in and did their take down.

14 Why didn't they wait? Why didn't they just wait?
15 Because they have a policy; Agent Criswell talked about that.
16 And that policy is don't let dope go. And these officers did
17 a good job. From Mexico to Spartanburg, this isn't out on the
18 street.

19 They could have waited. But, as he told you, that agent
20 is out. The van, the Budget rental truck started to go beyond
21 the storage unit. And, when it did that, the officer made a
22 call, we're strapping thin.

23 We're doing surveillance at Nacho's. We're watching the
24 storage unit. We've got undercovers. We don't want to burn.
25 If we go forward, we go forward for good. And they make that

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1 call and they did. And it was a good call. They got all that
2 marijuana.

3 The Defendant is arrested. Let's talk about that.
4 Opposing counsel made a big deal that the Defendant had a car,
5 wasn't a big person living in a mansion.

6 And they hadn't done any financial analysis and
7 discovered a huge bank account or anything like that. Showed
8 he was just working at Nacho's in two thousand, two (2002) and
9 two thousand, three (2003); filed an income tax return;
10 driving a silver Ford Escort, maybe worth three thousand
11 dollars (\$3,000).

12 What is he doing with two cell phones on his person and
13 one in the car? He's bringing in a shipment of marijuana.

14 There's something else I want to address that came out at
15 trial. The Defendant gave consent to search his residence,
16 , after his arrest, right? Cooperative.
17 The Defendant gave consent to search the storage unit.
18 Cooperative.

19 Why? Because this is a big shipment. This is a big
20 deal. And he has an out, the pottery business. It's a front
21 that makes this shipment work. That pottery business was a
22 front.

23 Here's something else about that pottery business: The
24 Defendant got the business license for this Ceramic Clay and
25 Pottery business on November 1st, two thousand and five (2005).

1 This shipment came two weeks later.

2 November 1st, two thousand and five (2005), and then,
3 there's a shipment. How convenient, when he gets this pottery
4 business up and going, it's ready. It's there as a front for
5 this marijuana.

6 Tell me where is shipment two, shipment three. If this
7 is a legitimate business, it would have been going for awhile.
8 Boom. Get that business license and here comes that marijuana
9 because the pottery business is a front for this real business
10 of marijuana.

11 Oh, one other thing I want to point out about that store
12 front and the pottery business is just a front. Agent Paul
13 Criswell went there before November 16th, two thousand and five
14 (2005), and he told you what he saw inside that store front.

15 And what did he tell you he saw? Nothing. Not a cash
16 register, not shelves, nothing. No business is going to be
17 conducted there. They didn't even unload there.

18 I want to talk to you about that video. That's all I got
19 to say about it right here, one word on a typed up sheet.
20 That video was long and arduous, at parts boring. But I wrote
21 it down on there because I wanted you to know this isn't CSI.
22 And this is not Law and Order. And, when I sit down, I don't
23 expect you to have a verdict after a commercial break.

24 That's not how the real world works. You saw how the
25 real world works, and you had to sit through it. You had to

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1 sit through it for the past three days.

2 And I mention that because I want to talk about all these
3 techniques that Defense Counsel said law enforcement should
4 use. You should do this. You should do that. You should do
5 pole cams. You should go out there and x, y, z.

6 And law enforcement gave you their straightforward
7 answer: There wasn't time, or they would have done it. There
8 wasn't time. This was a controlled delivery, a shipment due.
9 A business had been set up, the shipment was gone.

10 (Brief Pause)

11 I want to come back to your common sense. In your common
12 sense, no one anywhere in the world sends one point three to
13 one point seven million dollars' worth of anything to someone
14 who doesn't know it's coming.

15 I got a niece, for her birthday, I send her five bucks
16 and a card. I call her before I send it out and say, "Look
17 for that card." And I call her when I think she's gotten it,
18 "Did you get that card?" That's the real world.

19 No one just ad hoc sends one point three to one point
20 seven million dollars' worth of anything to someone who
21 doesn't know it's coming. The Defendant knew and prepared.

22 Opposing counsel talked about inferring knowledge from
23 circumstances, and you can. I've been in this courtroom
24 before you were brought in every day.

25 You've exited before I leave. Before I'm -- yeah, that's

1 right. You exit before I leave every day. Throughout the
2 three days of this trial, that box has been sitting right
3 there (indicating).

4 MR. TREJO: Your Honor, I will object. That's not been
5 introduced into evidence.

6 THE COURT: All right. Stay within the record, Counsel.
7 I know you're using that as an example, but stay within the
8 record, please, ma'am.

9 MS. GANSS: Okay. Thank you, Your Honor. You can infer
10 knowledge from circumstances. And I'll say that you can. In
11 this case, we saw the Defendant go take that shipment. And he
12 signed for it. He had that location changed to Nacho's.

13 He's the one who is going to give a statement, not "My
14 family is going to be killed, if I tell the truth," but, "Oh,
15 a strange man came up to me in a restaurant and gave me two
16 thousand dollars (\$2,000) to start a pottery business."

17 What's that statement? All of that is circumstantial
18 evidence that the Defendant knew.

19 (Document shown on overhead.)

20 MS. GANSS: I'd like to summarize here, just really
21 knowledge, what we're talking about. How do you know the
22 Defendant knew?

23 Number one, no one sends one point three to one point
24 seven million dollars' worth of anyone -- anything to someone
25 who doesn't know it's coming. At that level, you're not

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1 merely present when you receive it; you're involved. Common
2 sense tells you that.

3 The location of the unloading, we've been through that.
4 It was at Nacho's. Look at the other choices he had;
5 , tractor-trailer could have gone there; the
6 storage unit, the tractor-trailer could have gone there;
7 , the original shipping place, the tractor-
8 trailer could have gone there.

9 Why change? Nacho's was a great location. We've been
10 through this. Common sense tells you so.

11 The store front, not a business. It's a front. No cash
12 register, no shelves, nothing. Common sense tells you it's a
13 front.

14 The business license conveniently gotten before this
15 shipment, no pottery existed on its own. It was a front for
16 the real business of marijuana. Common sense.

17 And his statement, we've talked about that statement over
18 and over. Common sense. No one is coming up and getting --
19 giving him two thousand dollars (\$2,000) and saying, "Go into
20 the pottery business with me."

21 If you believe there was a valid pottery business, you
22 have to buy that statement; that a strange man came up to him,
23 in a restaurant, and gave him two thousand dollars (\$2,000).

24 And all I'm asking you to do is apply your common sense
25 to that statement. And, if you do, I am confident you will

JURY CHARGE

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1 find the Defendant, Wilbur Xavier Castro Summers, guilty of
2 trafficking in marijuana over two thousand (2,000) pounds.

3 You've been extremely attentive throughout this trial.
4 And I just want to say thank you.

5 (Ms. Ganss closing argument concluded at 11:11 a.m.)

6 (Brief Pause)

7 JURY CHARGE 11:12 A.M.

8 THE COURT: Ms. Foreman, ladies and gentlemen -- excuse
9 me -- Mr. Foreman, ladies and gentlemen of the jury, that
10 concludes final arguments of counsel. It's now time for me to
11 charge you; that is, to instruct you with regard to the law
12 that applies to the issues in this case.

13 The State charges the Defendant, Wilbur Xavier Castro
14 Summers, with the offense of trafficking in marijuana in an
15 amount more than two thousand (2,000) pounds. To this charge,
16 the Defendant has pled not guilty, which, then, places upon
17 the State the burden of proving the Defendant guilty.

18 A person charged, with committing a criminal offense in
19 South Carolina, is never required to prove himself innocent.
20 I charge you that it is a vital and important rule of law that
21 a defendant, in a criminal trial, no matter how great or
22 serious may be the offense for which he is charged, must
23 always be presumed innocent until his guilt has been proved
24 beyond a reasonable doubt.

25 This presumption of innocence remains with the defendant

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1 at all times, throughout the trial. And it is only removed
2 when and if the State has proved guilt beyond a reasonable
3 doubt. For it is your solemn duty, ladies and gentlemen, if
4 not clearly convinced of guilt, beyond every reasonable doubt
5 to the contrary, to find the Defendant not guilty.

6 Mr. Foremen, ladies and gentlemen of the jury, I instruct
7 you and emphasize to you that the fact that a defendant does
8 not testify, in his own behalf in a criminal trial, is not a
9 factor to be considered by you in any way in your
10 deliberations.

11 You must not consider the fact that the defendant has
12 chosen not to testify when you determine the guilt or
13 innocence of the defendant. It must not be considered by you
14 in any matter whatsoever, either against or for the defendant.

15 A defendant has the Constitutional Right to remain
16 silent. The assertion of that Constitutional Right cannot and
17 must not be considered by you in your deliberations. Under
18 your oath, then, you're to reach no inference and draw no
19 conclusion whatsoever from the fact that the defendant did not
20 testify.

21 The fact that the defendant did not testify should not
22 even be discussed in your jury room. The burden of proof, as
23 I have stated to you, is upon the State; it is not the burden
24 of the accused to prove his innocence. The burden of proof
25 remains upon the State to prove guilt beyond every reasonable

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1 doubt.

2 Again, I emphasize the fact the defendant did not testify
3 is not a factor to be considered by you, in determining the
4 guilt or non guilt of the defendant, or in any other aspect of
5 your deliberations.

6 The State has the burden of proving the defendant guilty
7 beyond a reasonable doubt. And what is a reasonable doubt?
8 Some of you may have served as jurors in civil cases where you
9 were told it is only necessary to prove a fact is more likely
10 true than not, such as by the greater weight or preponderance
11 of the evidence.

12 However, in criminal cases, the State's proof must be
13 more powerful than that. It must be beyond a reasonable
14 doubt.

15 Now, ladies and gentlemen proof, beyond a reasonable
16 doubt, is proof that leaves you firmly convinced of the
17 Defendant's guilt. There are very few things in this world
18 that we know with absolute certainty. And, in criminal cases,
19 the law does not require proof that overcomes every possible
20 doubt.

21 A reasonable doubt may also be described as the kind of
22 doubt that would cause a reasonable person to hesitate to act.
23 If you have such a doubt, as to the guilt of the defendant,
24 then, he would be entitled to a verdict of not guilty.

25 Reasonable doubt may arise from evidence which is in the

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1 case, or from the absence or lack of evidence in the case.
2 If, based on your consideration of the evidence, you're firmly
3 convinced that the defendant is guilty, of the crime charged,
4 you must find him guilty.

5 If, on the other hand, you think there is a real
6 possibility that he is not guilty, you must give him the
7 benefit of the doubt and find him not guilty. You alone must
8 make the determination of whether or not reasonable doubt
9 exists as to the guilt of the defendant.

10 Mr. Foreman, ladies and gentlemen of the jury, there are
11 two types of evidence which are generally presented during a
12 trial. There is direct evidence and circumstantial evidence.

13 Direct evidence is the testimony of a person who asserts
14 or claims to have actual knowledge of a fact such as an eye
15 witness. Circumstantial evidence is proof of a chain of facts
16 and circumstances indicating the existence of a fact.

17 The law makes absolutely no distinction, between the
18 weight or value to be given to either direct or circumstantial
19 evidence, nor is a greater degree of certainty required of
20 circumstantial evidence than of direct evidence.

21 You should weigh all the evidence in the case. After
22 weighing all the evidence, if you're not convinced of the
23 guilt of the defendant, beyond a reasonable doubt, you must
24 find the defendant not guilty.

25 Mr. Foreman, ladies and gentlemen of the jury, under the

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1 Constitution of South Carolina, you are the finders of facts
2 in this case. I do not have the right to pass upon the facts
3 or even to express any opinion I might have as to the facts;
4 nor may I suggest, in any way, what I may think about the
5 guilt or innocence of the Defendant.

6 You should form no opinion in that regard to anything I
7 may have said or any ruling I have made during the course of
8 the trial.

9 As the sole judges of the facts in this case, you are
10 also necessarily the sole judges of the credibility or
11 believability, of each of the witnesses that have testified,
12 during the course of the trial.

13 Now, there are a number of factors which you may
14 consider, in arriving at your assessment, as to a particular
15 witness' credibility or believability. Some factors I'm going
16 to list for you, and should you think of other factors that
17 you believe also ought to be considered, when you go back into
18 your jury room, on the question of credibility, then, you
19 should consider those factors as well.

20 But you may consider the demeanor of the witness from the
21 witness stand. What was that witness' manner of appearance?
22 Was the witness straightforward in answering questions, or
23 hesitant in responding to questions?

24 Simply put, do you believe the witness was telling the
25 truth or not telling the truth? Do you believe the witness

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1 knew of what that witness testified or did not know of what
2 that witness testified.

3 You may consider whether or not the testimony of a
4 witness is consistent or inconsistent with that witness' own
5 testimony or with other testimony or evidence presented during
6 the course of the trial.

7 You may also consider how the -- the witness came to know
8 the facts to which he or she testified. You may consider the
9 opportunity that a witness had to observe or hear; that is, to
10 perceive the existence of a fact by means of their senses.

11 You may also consider whether or not a witness is biased
12 or prejudiced. That simply means do you find that a
13 particular witness had some reason to come into court and
14 testify one way or another to help or hurt one side or the
15 other.

16 You may also consider whether or not the testimony of a
17 witness was strengthened or weakened by other testimony or
18 other evidence presented during the course of the trial.

19 Now, you as the finders of the facts in this case, and
20 you as the judges of the credibility or believability of each
21 of the witnesses that have testified, may believe as much or
22 as little of what a witness testifies to as you deem
23 appropriate.

24 You believe all of what a witness says. You may believe
25 none of what a witness says, or you may believe only part of

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1 what a witness says.

2 Mr. Foreman, ladies and gentlemen of the jury, the same
3 Constitution that makes you the finders of the facts makes me
4 the sole and only instructor in the law. You must accept as
5 correct the law that I charge and apply to the law the
6 evidence as you find it and reach your verdict. Put aside any
7 conceptions you may have had as to the law before coming here
8 today and accept the law as I instruct it to be.

9 You, for purposes of your duty as jurors today, should
10 not be concerned about what the law ought to be, but what I
11 charge you the law is now in this State.

12 Mr. Foreman, ladies and gentlemen of the jury, I charge
13 you with regard to criminal intent. Criminal intent is a
14 necessary element of each crime that must be proved, by the
15 State, beyond a reasonable doubt.

16 Criminal intent is always a matter that must be
17 determined by the jury from the circumstances surrounding the
18 situation. There is no way to prove intent to a mathematical
19 certainty. There is no way medical science can dissect a
20 person's brain and determine what he had in mind.

21 So, the law says that criminal intent may be inferred
22 from the circumstances shown to have existed. This is how the
23 jury makes a determination whether or not the elements
24 requiring intent was present.

25 Criminal intent is a state of mind, which operated

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1 jointly with an act, is the commission of a crime. Criminal
2 intent is a mental state, a conscious wrongdoing. So, it is
3 up to you, the jury, to determine what the Defendant intended
4 to do based on the circumstances shown to have existed.

5 I tell you that the State must prove criminal intent,
6 beyond a reasonable doubt, just as the State must prove every
7 element beyond a reasonable doubt.

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

13 While the State may prove motive, it is not necessary
14 that the State do so. However, the State must prove intent.

15 Mr. Foreman, ladies and gentlemen of the jury, I charge
16 you now with the specific law as to the charge against the
17 Defendant in this case.

18 I would tell you that you're not going to have these
19 instructions written down for you back in the jury room. So,
20 you're going to have to follow your collective memories as to
21 what I instruct you the law is.

22 However, once you begin your deliberations, if you're
23 still not sure about what the law is, or need to be re-
24 instructed on any part of the law, or all of it for that
25 matter, if you will, let me know by means of the bailiff --

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1 and I'll go over that with you in a minute — I'll bring you
2 back out in the courtroom and re-instruct you on any part of
3 the law that you're not sure about or need further instruction
4 of the law. But, I would ask you now to listen attentively as
5 I go through the law as to the charge.

6 Again, the State charges the Defendant in this case with
7 trafficking in marijuana in an amount more than two thousand
8 (2,000) pounds in violation of South Carolina Code of Laws
9 Section 44-53-370, Subsection (e)(1), (a)(1), 1976 as amended.

10 Section 44-53-370 (e)(1), (a)(1) provides that it is
11 illegal to knowingly sell, manufacture, cultivate, deliver,
12 purchase, or bring into this State or to provide financial
13 assistance or otherwise aid, abet, attempt, or conspire to
14 sell, manufacture, cultivate, deliver, purchase, or bring into
15 this State or to be in actual or constructive possession of
16 two thousand (2,000) pounds — more than two thousand (2,000)
17 pounds of marijuana.

18 Marijuana is defined as a controlled substance under
19 South Carolina Code of Laws Section 44-53-110 and Section 44-
20 53-190. With a charge of trafficking, the State must prove,
21 beyond a reasonable doubt, that the amount of marijuana
22 involved was more than two thousand (2,000) pounds.

23 I'm now going to explain to you some terms included
24 within Section 44-53-370(e)(1)(a)(1). First, as to
25 possession.

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1 To prove possession, the State must prove, beyond a
2 reasonable doubt, that the Defendant had both the power and
3 the intent to control the disposition or use of the marijuana.
4 Possession may be either actual or constructive.

5 Actual possession means that the marijuana was in the
6 actual physical custody of the Defendant. Constructive
7 possession means that the Defendant had dominion and control
8 or the right to exercise dominion or control, over either the
9 marijuana itself, or the property on which the marijuana was
10 found.

11 Mere presence at the scene where the drugs were found is
12 not enough to prove possession. Actual knowledge of the
13 presence of the marijuana is strong evidence of the
14 Defendant's intent to control its disposition or use.

15 The Defendant's knowledge and possession may be inferred
16 when a substance is found on the property under the
17 Defendant's control; however, this inference is simply an
18 evidentiary fact to be taken into consideration by you, along
19 with the other evidence in the case, and to be given the
20 weight you decide it should have.

21 In other words, it is a permissive inference, one that
22 you may or may not make based on your view of the evidence.
23 Possession does not have to be exclusive. Two or more persons
24 may have joint possession of a drug.

25 Under Section 44-53-370(e)(1)(a)(1), it is illegal to

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1 conspire to sell, manufacture, cultivate, deliver, purchase,
2 or bring marijuana into this State. Now, what do we mean by
3 the term, "conspire"?

4 Conspiracy involves the agreement, of two or more
5 persons, to unit for the purpose of committing a criminal act.
6 There are two basic components to a conspiracy.

7 First, there must be two or more persons. Second, there
8 must be a shared single criminal objective, not just similar
9 or parallel objectives between similarly situated people.

10 In other words, there must be proof that the individuals
11 intended to act together, for their shared mutual benefit,
12 within the scope of the conspiracy charge. It is not
13 necessary that the individuals to the conspiracy enter into an
14 expressed or formal agreement or that they put their plan or
15 the details of the plan into writing. It may be shown by
16 circumstantial evidence.

17 Nor is it necessary that the conspiracy is successful in
18 carrying out its purpose; only that the conspiracy was
19 actually formed and the individual was an active party to it.

20 Once a conspiracy is shown to have exist, the acts and
21 declarations of any conspirator made, during the existence of
22 the conspiracy, and in furtherance of the conspiracy, are to
23 be -- deemed to be the acts and/or declarations of every other
24 conspirator.

25 Mr. Foreman, ladies and gentlemen of the jury, nothing

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1 that I may have said or done, during the course of this trial,
2 has been in any way intended to express or suggest a view of
3 the case or an opinion as to the facts, the weight of the
4 evidence or the credibility of the witnesses. If any of my
5 actions or words have seemed to so indicate, you will
6 disregard such and form your own opinions as to these matters.

7 You have been selected, as fair and impartial jurors,
8 sworn to impartially try and determine the facts of this case.
9 And, when you comply with your oath to do so, then, no one
10 will have a right to criticize your verdict and you will have
11 fully discharged your duty as jurors.

12 You are to decide this case, according to the testimony
13 that you have heard from the lips of the sworn witnesses,
14 along with other evidence introduced during the course of the
15 trial. I charge you that, as jurors, you must decide the
16 issues in this proceeding without bias and without prejudice
17 to any party.

18 You cannot allow yourself to be governed by sympathy, by
19 prejudice, by passion, by public opinion, or any other
20 arbitrary factor. Both the State and the Defendant have the
21 right to expect that each of you will carefully and
22 impartially consider all of the evidence in the case and that
23 you will follow the law as I have explained it to you.

24 Mr. Foreman, ladies and gentlemen of the jury, whatever
25 your verdict in this case, it must be your unanimous verdict.

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1 All twelve (12) jurors must agree on the verdict, which the
2 foreperson will be authorized to write for the jury.

3 Now, Mr. Foreman, I charge you that, once you begin your
4 deliberations, that you maintain some order in those
5 deliberations; that everyone be given an opportunity to
6 participate in those deliberations.

7 If, for any reason, any members of the jury panel take a
8 break, from the deliberations, all should take a break. By
9 that I mean all twelve (12) jurors should be present and
10 deliberating when deliberations are going on.

11 Now, Mr. Foreman, I have prepared for your use in the
12 jury room on -- a verdict form. On the verdict form, there
13 appear two possible verdicts.

14 The first possible verdict, on the jury form is -- I
15 mean, on the verdict form, is "We, the jury, find the
16 Defendant Wilbur Xavier Castro Summers guilty of trafficking
17 in marijuana in an amount more than two thousand (2,000)
18 pounds."

19 The second possible verdict that appears on the verdict
20 form is, "We, the jury, find the Defendant, Wilbur Xavier
21 Castro Summers, not guilty." Now, Mr. Foreman, ladies and
22 gentlemen of the jury, in preparing the verdict form, I have
23 to put the possible verdicts on the form in some order. I do
24 it the same way every time.

25 The order in which the possible verdicts appear means

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1 absolutely nothing and you should infer nothing from it. What
2 you should do is deliberate.

3 Mr. Foreman, once the jury has reached an unanimous
4 verdict, you'll simply, then, go to the verdict form, find the
5 verdict on the verdict form, which corresponds to the verdict
6 reached by the jury, put a check mark in the blank beside that
7 particular verdict and sign your name on the line above the
8 words, "foreperson's signature," and date it. Then, knock on
9 the door and let the bailiff know you have reached a verdict
10 and I will bring you back out in the courtroom to receive that
11 verdict.

12 Now, I'm going to ask, if you will, at this time, to
13 retire to the jury room, but do not yet begin your
14 deliberations. I have to give counsel an opportunity to
15 request additional instructions on the law.

16 If additional instructions are requested, and I deem
17 additional instructions necessary, I will bring you back out
18 and give you those additional instructions. It follows, then,
19 that you should not begin deliberating until we make sure all
20 deliber -- all instructions are completed.

21 If no additional instructions are necessary, I will send
22 you, by means of the bailiff, all exhibits which have been
23 admitted into evidence, along with the verdict form and
24 instructions to begin deliberating. Please, do not begin
25 deliberating until you get that instruction.

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1 I believe, insofar as these CDs are concerned, we'll
2 probably have to bring you back out and replay those if you
3 need those to view those. So, upon your request, we can — we
4 can do that. I don't believe we have the ability to do that
5 in the jury room. But, we can bring you out in the courtroom
6 and let you view that upon your request.

7 Now, please, retire the jury room, all except the
8 alternate. Sir, I'll ask you, at this time, not to go into
9 the jury room but wait just outside the courtroom door for
10 further instructions.

11 (The jury exited the courtroom at 11:36 a.m.)

12 THE COURT: Exceptions or additional requests for charge
13 from the State?

14 MS. GANSS: None for the State, Your Honor.

15 THE COURT: From the Defense?

16 MR. TREJO: None, Your Honor. However, I do have a
17 motion I'd like to make at this time.

18 THE COURT: All right. Yes, sir.

19 MR. TREJO: Your Honor, we would make a motion for a
20 mistrial based upon our perception of prosecutorial
21 misconduct. Throughout the course of this trial, and during
22 the closing argument, Counsel introduced evidence and argued
23 the value of the marijuana.

24 And we understand that's totally permissible. But, we
25 believe that, during her closing argument, she crossed the

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1 line when she argued to the jury that the average poor person
2 won't see this amount of money in their lifetime.

3 That argument, Your Honor, overstepped the bounds of
4 proper argument in that the only purpose behind that argument
5 is to play to -- to the passions and prejudices of the jury.

6 And the Court overruled our objection, and in the
7 alternative to a mistrial, we would ask that the jury be
8 brought back in and a cautionary instruction be given to them
9 indicating to them that it was misconduct for the State to
10 argue that the average person will never see that amount of
11 money in their lifetime. And they're not to be swayed by
12 their passions or prejudices in rendering a verdict.

13 THE COURT: Well, I think I've done that already with
14 the instruction not to consider passion or prejudice.

15 The reason I overruled your objection is that -- is
16 because it's just argument. And she can say the average --
17 she submits that the average person wouldn't receive --
18 wouldn't see that kind of money in their lifetime. And that's
19 just argument. The jury knows whether they'll see that kind
20 of money or not. They know what their finances are.

21 It's just argument. It's, I submit to you, in -- in a
22 comparison of value to the marijuana, it's -- it's trying to
23 get some idea of the comparison of money to the marijuana, the
24 value of mari -- to the -- to the money that an average person
25 will see, and then, in relation to the Defendant I think.

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1 I -- I would be willing to do this, and I would be
2 willing to bring the jury back out and instruct them, with
3 regard to that, if you -- if you wish me to do so.

4 We can bring them out. I'm not going to tell the jury
5 that -- that the solicitor committed misconduct. And I
6 absolutely think that's incorrect, and I don't see any basis
7 for misconduct on behalf of the solicitor or prosecutor.

8 But I would be willing to bring them back and tell them
9 they can consider that statement by the solicitor only insofar
10 as -- or -- or consider that in their knowledge and -- and
11 what have you, something to that effect, if you want me to do
12 that. I'll give them that instruction.

13 MR. TREJO: To -- to consider the argument that the --
14 whether or not the average person would --

15 THE COURT: Use your own common sense, and that's just
16 argument and use your own common sense?

17 MR. TREJO: I don't think that would be an appropriate
18 cautionary instruction.

19 THE COURT: All right. Tell me what you think is
20 appropriate.

21 MR. TREJO: I -- I think it would be appropriate to
22 instruct them that they should not consider that argument, in
23 any manner whatsoever, in rendering their verdict.

24 THE COURT: All right. I -- I don't think I have a
25 problem with that either. Please, bring the jury back.

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1 (The jury entered the courtroom at 11:38 a.m.)

2 THE COURT: Where is the alternate?

3 BAILIFF: Huh?

4 THE COURT: Where is the alternate? He's still on the
5 jury until I excuse him.

6 BAILIFF: Yes, sir.

7 (The alternate returned to the courtroom at 11:39 a.m.)

8 THE COURT: Mr. Foreman, ladies and gentlemen of the
9 jury, just one short clarification to your instruction to you
10 [sic].

11 The Solicitor made a statement to you in final argument
12 that she submitted an average person would not see one point
13 three or one point seven million dollars in a lifetime.

14 I instruct you to disregard that statement or argument by
15 the Solicitor; give it no consideration whatsoever in your
16 deliberations. Thank you.

17 With that additional instruction, please, retire to the
18 jury room and wait until you get further instructions. Thank
19 you. All except for the alternate. Sir, please, wait
20 outside.

21 (The jury exited the courtroom at 11:39 a.m.)

22 THE COURT: All right. Any other exceptions or
23 requests?

24 MR. TREJO: No, Your Honor. Thank you. I appreciate
25 it.

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1 THE COURT: You're welcome. All right. Please,
2 Counsel, I would ask you to come up and go over with the court
3 reporter and make sure only those exhibits that were actually
4 admitted into evidence go back to the jury.

5 (Whereupon, Counsel checked the exhibits with the court
6 reporter.)

7 (All exhibits except State's Exhibit Number 35, which was
8 not admitted, were sent back to the jury.)

9 (Off-the-Record Comments)

10 THE COURT: Okay. Take them back to the jury and tell
11 them to start deliberating.

12 (The alternate stepped back into the courtroom at 11:47
13 a.m.)

14 THE COURT: As it turns out, we made it all the way
15 through the trial without an emergency developing with regard
16 to one of the first twelve (12) jurors.

17 POTENTIAL JUROR: All right.

18 THE COURT: So, it will not be necessary for you to
19 participate in deliberations.

20 POTENTIAL JUROR: Okay.

21 THE COURT: I'm going to excuse you at this time. We're
22 going to start another trial this afternoon, but I'm going to
23 excuse you. We've got enough jurors and you've been here most
24 of the week.

25 POTENTIAL JUROR: Okay.

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1 THE COURT: So, I'm going to excuse you at this time.
2 We have enough jurors. But I can include you, if you want to
3 be included, but -- or I can excuse you, whatever you prefer.

4 We have another jury panel coming back at one o'clock
5 (1:00), so, if you want to be with that panel and have a
6 chance to be chosen on another case, you can stay. Or, if you
7 wish to be excuse, I --

8 POTENTIAL JUROR: Well, I could ---

9 THE COURT: Do you want to stay?

10 POTENTIAL JUROR: --- stay, yes.

11 THE COURT: All right. Why don't you, then, go ahead
12 and get you some lunch and be back in the jury assembly room
13 at 1:00. That's when the rest of them are --

14 POTENTIAL JUROR: Okay.

15 THE COURT: And you'll be in the full panel when they
16 come back out.

17 POTENTIAL JUROR: All -- all right. Thank you.

18 THE COURT: All right. Thank you for your service thus
19 far this week.

20 (The alternate was excused at 11:48 a.m.)

21 (The jury began deliberating at 11:55 a.m.)

22 (Other matters were heard while the jury was
23 deliberating.)

24 (The jury requested the testimony of Special Agent Cory
25 Grubbs to be played back.)

1 (An off-the-Record Discussion regarding the quality of
2 the tape out of the jury's presence.)

3 (Another matter was heard before the jury was brought
4 back into the courtroom.)

5 (The jury entered the courtroom at 1:42 p.m.)

6 THE COURT: Mr. Foreman, ladies and gentlemen of the
7 jury, I got your note that you wanted to see Agent Grubbs'
8 interrogation of Wilbur Summers. And, of course, what we've
9 got is his testimony. And we'll replay that to you.

10 It's probably not of the perfect quality. So, I'll ask
11 you to listen very carefully and ask everybody else to remain
12 silent while we re-play the testimony.

13 I don't -- I don't know if you need to translate this
14 frankly. We're just replaying testimony that's already been
15 in that you've already translated. It's just replaying a
16 tape.

17 The attorney is sitting here and she's going to hear it.
18 If she see a problem, she'll let us know. But it's going to
19 be hard to hear anyway, and if you're interpreting, you're
20 just re-interpreting what you've already interpreted for him.

21 THE INTERPRETER: Yes, sir.

22 THE COURT: And so, that's just going to make more
23 background noise. So, all right.

24 (Whereupon, the testimony of Special Agent Cory Grubbs
25 was played to the jury, from the back-up tape, but the sound

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1 quality was not good.)

2 (Off-the-Record Discussion regarding quality of the play
3 back.)

4 THE COURT: She has the mike and she talks into a thing,
5 and that's one thing. But, then, it's also being taped.
6 We're playing back for you tape. The problem is, it turned
7 out not to be as good a quality. And so -- and so, obviously,
8 I think you had difficulty understanding, as did I.

9 What she's going to try to do, the court reporter is
10 going to try -- try a different method with it -- with it to
11 see if we can make it clearer.

12 So, I'm going to ask you to retire back to the jury room
13 briefly while she tries to experiment with this and see if she
14 can find -- if we can find it better -- a better way to
15 present it, we'll bring you back in.

16 But, meanwhile -- meanwhile, you can resume your
17 deliberations. If we find a better way to play for you, we'll
18 bring you back in, okay?

19 (The jury exited the courtroom at 2:03 p.m.)

20 (Off-the-Record Discussion regarding playing the
21 testimony of Special Agent Cory Grubbs using the primary tape.
22 Judge Alford sent a note to the jury regarding whether or not
23 they wanted to hear the tape again.)

24 MS. ANDERSON: And, Your Honor, I felt I was sitting in
25 between the interpreter and -- and everyone was speaking

1 Spanish. I couldn't understand a word.

2 THE COURT: It did sound a little bit like a foreign
3 language.

4 (Court reporter replays the primary tape to find the
5 testimony of Agent Grubbs.)

6 (Off-the-Record Comments)

7 THE COURT: Well, what do you want me to do if they
8 don't want to hear it? Make them come back and hear it?

9 MS. ANDERSON: I don't know. I mean, I kind of hate
10 them not hearing it again if they could hear it clearly.

11 THE COURT: Well, I'm sending a note asking them do they
12 want me to play it for them, telling them we've got a -- that
13 we have good quality.

14 MS. ANDERSON: I guess my fear is if they heard enough
15 on that one, if they heard -- I guess, if they hear the whole
16 thing, yes, sir.

17 THE COURT: Oh, you just want to get the cross in there.
18 I understand where you are.

19 MS. ANDERSON: Well, I --- .

20 THE COURT: Well, that's not -- it's up to them to
21 decide what they want to hear and what they don't want to hear
22 and whether they need it or not. And I've had them requested
23 it and then, cancel it before I ever played anything.

24 And I understand your concern is that they might have
25 heard some, but didn't hear all of it. So, I don't think it

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1 was intelligible at all. But, I'm not -- you know, I
2 understand what you're saying; you want the cross played where
3 he specifically asked him about what he testified to in the
4 other trial.

5 MS. ANDERSON: Yes, sir.

6 THE COURT: I know what you want. But, you know, if
7 they -- if they don't want to hear it, you know, they don't
8 want to hear it I guess.

9 I tell you what do, let's bring them back in as a
10 precautionary measure.

11 MS. ANDERSON: Thank you, Your Honor.

12 (The jury entered the courtroom again at 2:17 p.m.)

13 (Court's Exhibit Number 2 was marked and admitted into
14 evidence.)

15 THE COURT: Mr. Foreman, ladies and gentlemen of the
16 jury, after I sent you back, and we -- the Court reporter
17 experimented and she found it at different speed and the
18 quality of the tape is very good, so, you can hear very
19 clearly.

20 And -- and, so, I asked the bailiff to have you come back
21 in, so, we can play the tape over to you at good quality; you
22 can hear it very well. So, the question is, the concern is
23 and the impression may be that you need to hear it now. But
24 the concern is you might have heard bits and pieces of it, but
25 not all of it, and perhaps you need to hear it all.

1 So, we're going to go ahead and play it at this time, so,
2 you can hear it. Go ahead.

3 (The testimony of Special Agent Cory Grubbs was replayed
4 using the primary tape.)

5 THE COURT: Mr. Foreman, ladies and gentlemen of the
6 jury, you may retire now back to the jury room and resume your
7 deliberations.

8 (The jury exited the courtroom at 2:35 p.m.)

9 THE COURT: All right, we'll be at ease.

10 (Off-the-Record Comments)

11 (The verdict was reached at 3:30 p.m.)

12 (The jury entered the courtroom at 3:38 p.m.)

13 THE COURT: Mr. Foreman, have you and the jury reached
14 an unanimous verdict in this case?

15 MR. CHILDERS: Yes, sir, we have.

16 THE COURT: Would you, please, hand the verdict form up
17 to the bailiff?

18 (The verdict form was handed to the bailiff, who, in
19 turn, handed it to the Court.)

20 THE COURT: Madam Clerk, publish the verdict, please.

21 (The verdict was handed to the clerk for publishing.)

22 MADAM CLERK: In the Court of General Sessions, County
23 of Spartanburg, State of South Carolina versus Wilbur Xavier
24 Castro Summers, we, the jury, find the Defendant, Wilbur
25 Xavier Castro Summers, guilty of trafficking in marijuana in

VERDICT

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1 an amount of more than two thousand (2,000) pounds. It is
2 signed by the foreperson and dated today's date.

3 Ladies and gentlemen of the jury, if this is your
4 verdict, and still your verdict, please, raise your right
5 hand.

6 (All right hands raised.)

7 MADAM CLERK: So say you all.

8 THE COURT: Let the record reflect that all jurors
9 raised their right hand. Any questions -- any questions of
10 the jury panel from the State?

11 MR. BULSA: No, sir.

12 THE COURT: From the Defense?

13 MS. ANDERSON: I'd like for you to poll the jury,
14 please.

15 THE COURT: Please, ma'am, if you'll poll the jury.

16 MADAM CLERK: Ladies and gentlemen of the jury, I will
17 pose a question to you, after which I will ask you to stand
18 individually and answer. My question being, "Is this your
19 verdict and still your verdict."

20 Juror Number 160, Jamie Jordan?

21 MS. JORDAN: Yes.

22 MADAM CLERK: Juror Number 43, Richard Garcia?

23 MR. GARCIA: Yes.

24 MADAM CLERK: Juror Number 76, Robert Laskowski?

25 MR. LASKOWSKI: Yes, it is.

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1 MADAM CLERK: Juror Number 57, James Hammon?
2 MR. HAMMON: Yes, it is.
3 MADAM CLERK: Juror number 153, Kimby Walker?
4 MS. WALKER: Yes, it is.
5 MADAM CLERK: Juror Number 167, Jennifer Errington?
6 MS. ERRINGTON: Yes, it is.
7 MADAM CLERK: Juror Number 82, Mellissa Lindsey?
8 MS. LINDSEY: Yes.
9 MADAM CLERK: Juror Number 5, Cynthia Bates?
10 MS. BATES: Yes.
11 MADAM CLERK: Juror Number 169, Kathy Mabry?
12 MS. MABRY: Yes.
13 MADAM CLERK: Juror Number 58, Angela Harper?
14 MS. HARPER: Yes.
15 MADAM CLERK: Juror Number 21, Joe Childers?
16 MR. CHILDERS: Yes.
17 MADAM CLERK: And juror number 66, Vera Hull?
18 MS. HULL: Yes.
19 MADAM CLERK: Your Honor, the jury has been polled.
20 THE COURT: Any additional questions of the jury venire?
21 MS. ANDERSON: No, sir.
22 THE COURT: Ladies and gentlemen of the jury panel --
23 Mr. Foreman, ladies and gentlemen, this will conclude your
24 service on this particular case. It will also conclude your
25 service for the week. We have plenty of work to do, but we

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1 will not need a jury for the balance of the week, not have
2 time to start another trial.

3 (Continued Off-the-Record Discussion regarding the
4 jurors' service.)

5 (The foreman stepped forward and signed the indictment as
6 requested by the Court.)

7 (The jury exited the courtroom at 3:38 p.m.)

8 THE COURT: I'll be glad to hear you on any motions you
9 wish to make at this time if there are any.

10 MS. ANDERSON: Your Honor, first of all, I would ask
11 could my client be un-handcuffed right this moment. I wasn't
12 quite sure why he was handcuffed in the middle of the verdict
13 being read.

14 THE COURT: Well, I -- I perhaps wouldn't have done
15 that, but you can't say there was any prejudice. But, no ---

16 MS. ANDERSON: I understand that, but --

17 THE COURT: I'm -- I'm going to -- I'll leave that up to
18 -- I'll leave that up to security.

19 MS. ANDERSON: I need to get him to sign some things is
20 the problem.

21 THE COURT: All right. Well, if you can un-cuff him
22 long enough to sign something, we'll -- we'll do that.

23 (Deputy takes handcuffs off Mr. Summers.)

24 MS. ANDERSON: Okay. Your Honor, I would make a motion
25 for a new trial at this time. I believe that we were

1 prejudiced, by the fact that we could not bring up certain
2 things in the trial, that we were limited before we started
3 about other members of the crew that unloaded the truck being
4 arrested.

5 THE COURT: Well, I'll tell you -- let me just answer
6 these as you go.

7 MS. ANDERSON: Okay.

8 THE COURT: Absolutely no basis for that. I mean, you
9 didn't make that motion to me. You didn't ask that anybody
10 else be allowed to testify or be made party to this.

11 MS. ANDERSON: Well ---

12 THE COURT: You didn't object to going forward without
13 anybody else being made a party to it. And, so, obviously, I
14 had no basis ----

15 MS. ANDERSON: Well --

16 THE COURT: --- or no idea even to -- to rule on that.
17 So, certainly, that -- that can't be a basis for a new trial.
18 But, go ahead.

19 MS. ANDERSON: Well -- well, on that certain point.
20 They made a motion in limine that the fact that the other
21 people unloading the truck, we could not mention that they
22 were arrested ---

23 THE COURT: Well, you all agreed to that. How could you
24 be prejudiced by that? You certainly didn't ask me to allow
25 you to go into that. And so, you know, that's -- but, at any

MOTIONS & MATTERS

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1 rate, go on to your next ground.

2 (Brief Pause)

3 MS. ANDERSON: Again, I would renew the motion, as far
4 as his -- although we allowed -- you allowed the Jackson v.
5 Denno motion to be put into evidence, I would, again, renew
6 the motion as to whether or not that was voluntary.

7 THE COURT: All right. That motion is noted for the
8 record. I certainly made -- the previous -- both parties
9 agreed that we would just put in the transcript the Defendant
10 obtained as to the prior trial, as to the Jackson v. Denno
11 hearing, that was held rather than to repeat that in this one.

12 And the Court adopted the ruling of the Court there and I
13 think that was an appropriate ruling. And I still think it is
14 an appropriate ruling.

15 Certainly, by the preponderance of the evidence, that
16 statement was freely and voluntary and there's absolutely no
17 basis to believe otherwise. As a matter of fact, it was
18 purely a self-servicing exculpatory statement anyway for him,
19 and it was to his advantage to come in.

20 But certainly I think it was freely and voluntarily made
21 understand the circumstances. What else?

22 MS. ANDERSON: That would be all.

23 THE COURT: All right. I note the motion for a new
24 trial be -- is -- is denied. All right. Please, ma'am, if
25 you've got the sentencing sheet ready, you all, please, come

SENTENCING

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1 around for sentencing.

2 MS. ANDERSON: May I have him sign it?

3 THE COURT: Yes, ma'am, you may.

4 (Brief Pause while Mr. Summers signs document.)

5 (Mr. Summers and Ms. Anderson step forward for
6 sentencing.)

7 MS. GANSS: May I approach, Your Honor?

8 THE COURT: Yes, ma'am.

9 (Documents handed up to the Court.)

10 (Brief Pause)

11 THE COURT: All right. Anything the State wishes to
12 present to the Court with regard to the Defendant?

13 MS. GANSS: No, Your Honor.

14 THE COURT: There is a mandatory minimum sentence of
15 twenty-five (25) years as I understand it. So, is there
16 anything else that you wish to tell me?

17 MS. GANSS: No, Your Honor. Thank you.

18 THE COURT: All right, Counsel, I'll hear from you, if
19 there's anything you would like to say.

20 MS. ANDERSON: Well, Your Honor, as you understand, I
21 believe it's a mandatory twenty-five (25) year sentence.

22 Unfortunately, Mr. Summers is only twenty-five (25) years
23 old, and his wife just had a baby during the middle of all of
24 this.

25 But I — I really mean, I guess, that you go by the

SENTENCING

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1 sentence that is given. There's nothing much I can ask. He
2 will not be financially able to pay the fine. I believe
3 that's mandatory also or it is?

4 MS. GANSS: It is, twenty-five (25) years.

5 MS. ANDERSON: And fifty thousand dollars (\$50,000).

6 Although we both know he's not financially able to pay it.

7 THE COURT: I think it's a waste of time, but I'm not
8 the legislature ---

9 MS. ANDERSON: Yes, sir, yes, sir.

10 THE COURT: --- who makes these laws and makes the
11 requirement. Certainly, I don't think he has the ability, or
12 will have the ability to pay it.

13 MS. ANDERSON: No, sir.

14 THE COURT: All right. Anything else you wish to say?

15 MS. ANDERSON: No, sir.

16 THE COURT: Mr. Summers, anything you wish to say to the
17 Court?

18 (Interpreter speaks in Spanish to the Defendant.)

19 THE DEFENDANT: No.

20 THE INTERPRETER: No.

21 THE COURT: Well, you know, Mr. Summers, you know, based
22 on the evidence, I certainly don't think you were a major
23 player in this thing. But I think the jury's verdict is
24 supported, by the evidence in the case, that you were involved
25 in it.

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1 I certainly don't think you were the big fish in it, but
2 you don't have to be a big fish when it comes to trafficking.
3 All you have to do is conspire or be in possession of these
4 drugs is sufficient. And, so -- so, that's -- that's where
5 you are.

6 Case number 2006-GS-42-740, Wilbur Xavier Castro Summers,
7 having been found guilty, by a jury of trafficking in
8 marijuana, in an amount more than two thousand (2,000) pounds,
9 the sentence of the Court is he be committed to the State
10 Department of Corrections for a determinate term of twenty-
11 five (25) years and pay a fine of fifty thousand dollars
12 (\$50,000).

13 He's given credit for all jail time he has served on this
14 charge. Good luck to you, sir.

15 MS. ANDERSON: Thank you.

16 MS. GANSS: Thank you, Your Honor.

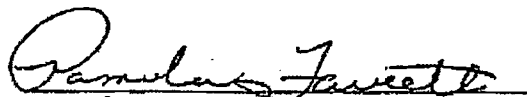
17 (Whereupon, the proceeding concluded at 3:50 p.m.)
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

I, the undersigned **PAMELA FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 396, were transcribed by me and represent a complete and accurate transcription of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

September 2, 2007



Pamela Faucette
Official Court Reporter
Seventh Judicial Circuit

RECEIVED

MAY 13 2008

STATE OF SOUTH CAROLINA

ATTORNEY GENERALS
OFFICE

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILBUR XAVIER CASTRO SUMMERS,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the trial court err in charging the jury on conspiracy to distribute drugs when the evidence did not support the conspiracy charge?

STATEMENT OF THE CASE

On February 27, 2006, the Spartanburg County Grand Jury indicted Wilbur Xavier Castro Summers on the charge of trafficking in marijuana. On November 14-16, 2006, Summers proceeded to trial before the Honorable Lee S. Alford and a jury. Summers was represented by George Paul Trejo, Jr., Esquire and Patricia Anderson, Esquire. The jury returned a verdict of guilty as charged. Judge Alford sentenced Summers to twenty-five years and \$50,000 fine. Summers' attorney filed a notice of intent to appeal on November 22, 2006. This appeal follows.

ARGUMENT

The trial court erred in charging the jury on conspiracy to distribute drugs when the evidence did not support the conspiracy charge.

In November 2005, a tractor-trailer truck loaded with clay pots or pottery crossed the border from Mexico into the United States at the Texas border. Marijuana was discovered on the truck by drug enforcements agents. Law enforcement took control of the truck and accompanied it to its destination as a controlled delivery (undercover) to Spartanburg, South Carolina. When the truck arrived in Spartanburg at Nachos Restaurant, Wilbur Summers signed for the delivery of the cargo. Law enforcement seized the shipment and arrested Summers and charged him with trafficking in marijuana over two thousand pounds. ROA p. 5, line 8 – p. 8, line 2.

At the beginning of the trial as a pretrial motion, the State put on the record as discussed in chambers, that no mention would be made of any co-defendants and the disposition of their cases because their cases were not relevant to Summers' case. The defense agreed to refrain from commenting on the other co-defendants. ROA p. 1, line 23 – p. 2, line 16, p. 3, lines 23-24. No co-defendants testified and defense counsel did not call any witnesses. ROA p. 206, lines 19 – 24.

At the charge conference on November 15, 2006, defense counsel told the judge that they would take exception to (object) to the judge charging the jury on conspiracy as it related to the trafficking charge. ROA p. 193, lines 2 – 14. The judge then went into a lengthy explanation as to why he believed that the conspiracy charge was appropriate. Basically, the judge said that Summers could not have brought two thousand pounds of marijuana into the United States by himself. Summers filed tax returns in 2002 and 2003

and then returned to Mexico until 2005 when he returned to the United States. The judge said the jury could infer that Summers made the arrangements while he was in Mexico.

ROA p. 193, line 2 – p. 197, line 25. The judge said:

The jury could infer that during the time he was in Mexico that this arrangement was made. They certainly could --- that's an inference they may or may not make from the evidence. But there's no proof of that. -----

Now, secondly, and more important than that, is he signed for the goods and received them. And he didn't ship them, obviously, to himself. So, somebody had to do that.

ROA p. 198, lines 3 – 23.

The judge acknowledged that the main issue for the jury was if Summers had knowledge that the drugs were there. ROA p. 195, lines 13 – 15. Defense counsel had pointed out in his opening statement that there were hundreds and hundreds of clay pottery pots and that only 120 of them contained marijuana. ROA p. 13, lines 10 – 23.

The judge, as part of his explanation for the conspiracy charge, acknowledged that Summers had given a statement to the police that he did not know the marijuana was in the pots. The judge said that the jury could believe Summers' statement wherein he said someone gave him two thousand dollars to set up a pottery business and that he did not know the drugs were there. Summers would not give the name of the person because he feared for his family since the drugs were found. His family was still in Mexico. ROA p. 201, lines 10 – 24.

Defense counsel told the judge again after the judge's explanation, that he still objected or took exception to the instruction to the jury on conspiracy. Counsel said that would be overly broad because the facts did not support the conspiracy charge. Counsel said:

The analysis the Court underwent moments ago concerning that he (Summers) took possession of the drugs, and therefore there had to have been an agreement with somebody in order to have obtained the drugs. That, in fact, applies to any situation where anyone obtains any amount of drugs. Obviously, it has to come from somebody.

ROA p. 202, lines 7 – 19.

The judge then said:

I agree. There's nothing necessarily he---he's a conspirator. ~~There's nothing necessarily, but you've got to look at the evidence and inferences that could be drawn from them, in the light most favorable to the State, because that's their position.~~

ROA p. 202, line 23 – p. 203, line 2.

The judge finally said:

All right, sir. And that's—let me say, that's part of my usual charge where there is some evidence or inferences from the evidence which could be drawn of a conspiracy. And that's my normal charge as to explain possession and conspiracy to the jury because most wouldn't understand those two terms in general happenstance.

ROA p. 204, line 25 – p. 205, line 6.

The judge did charge the jury on the law of conspiracy. As part of the charge, the judge said:

First, there must be two or more persons. Second, there must be a single criminal objective, not just similar or parallel objectives between similarly situated people. In other words, there must be proof that the individuals intended to act together, for their shared mutual benefit within the scope of the conspiracy charge. It is not necessary that the individuals to the conspiracy enter into an expressed or formal agreement or that they put their plan into writing. It may be shown by circumstantial evidence.

ROA p. 257, lines 7–16.

Generally, trial judge is required to charge only the current and correct law of South Carolina. State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003). In reviewing jury charges for error, Court of Appeals must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. Id. at 318 citing State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986) and Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App. 2000).

A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct.App. 2006). A jury charge which is

substantially correct and covers the law does not require reversal; to warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005).

In criminal conspiracy, the agreement is the gravamen of the offense. S.C. Code Sec. 16-17-410 (1976); State v. Vasquez, 341 S.C. 648, 535 S.E.2d 465 (Ct.App. 2000). A criminal conspiracy thus consists of a combination between two or more persons for the purpose of accomplishing an unlawful objective, or a lawful objective by unlawful means. S.C. Code Sec. 16-17-410 (1976).

Offense of conspiracy requires proof that people intended to act together for their shared mutual benefit within scope of conspiracy charged. State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993). To prove conspiracy, it is sufficient to show that each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe his own benefits were dependent upon the success of the entire venture. State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct.App. 2005). Evidence of direct contact or an

explicit agreement between the defendants need not be shown in order to prove conspiracy.
Id. at 896.

The focus is on the sufficiency of the evidence of an agreement between the alleged conspirators and not on the alleged common object. State v. Mouton, 326 S.C. 199, 206, 485 S.E.2d 918 (1997). What is needed is proof they intended to act together for their shared mutual benefit within the scope of the conspiracy charged. State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct.App. 2001). In State v. James, 321 S.C. 75, 472 S.E.2d 38 (Ct.App. 1996), the Court of Appeals ruled that proof of a buyer/seller relationship, without more, is inadequate to tie defendant to a larger conspiracy as is mere association with members of

conspiracy, because guilt remains individual and personal and is not a matter of mass application; however, agreement to distribute drugs can sometimes be rationally inferred from frequent contacts among defendants and from their joint appearances at transactions and negotiations.

In Goldsmith v. Witkowski, (C. A. 4 (S.C.) 1992) 981 F.2d 697, the United States Court of Appeals, Fourth Circuit, ruled that there was not sufficient evidence of a conspiracy where the defendant was found in an apartment where drugs were located. The Court said that it was true that the jury could have inferred the accused's knowledge of the drugs; however, such a conclusion that the accused was part of a conspiracy to distribute marijuana or cocaine requires bridging an evidentiary gap with rank speculation. The Court said that the State had presented no evidence of a conspiracy.

There was no evidence presented during the trial of any other persons or defendants or conspirators involved in the distribution of the marijuana. The DEA agent testified that they did not trace any telephone calls for Summers which is their usual procedure used to

identify co-conspirators nor they do any wire tapping. ROA p. 99, lines 2 - 20. The State admitted in pretrial that the cases of the co-defendants were not relevant to Summers' case; the State did not present any co-conspirators or co-defendants as witnesses. The judge himself admitted that there was no proof of co-conspirators but that the jury would have to infer that evidence.

The judge was making the inference that there was a conspiracy because he said Summers could not have done this alone. However, the law says that just a buyer/seller relationship is not sufficient to prove a conspiracy. Summers could have easily made the arrangements while he was in Mexico to have the clay pots shipped to him.

Although the judge admitted there was no proof of co-conspirators, in his charge to the jury on conspiracy, he said proof is required. He contradicted himself. The law says that the focus is on the agreement and there was no evidence presented during the trial of any agreement. Although the case of State v. Crocker, *supra*, held that no contact between the co-conspirators was needed to show the conspiracy, the same case held that it was sufficient that each defendant knew about the agreement. In Summers' case, there was no evidence of a co-conspirator.

The circumstantial evidence was not sufficient to prove an agreement between co-conspirators because of hundreds of clay pots, only 120 of them contained marijuana.

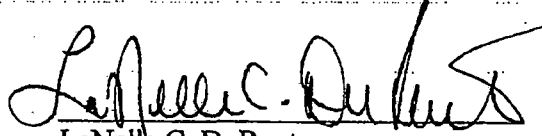
The trial judge was wrong to charge the jury on conspiracy because the evidence presented at trial did not rise to the level of any degree of proof. Summers was prejudiced by the charge because it is highly probable that the jury convicted him on the conspiracy charge.

For the foregoing reasons, the conviction and sentence should be vacated.

CONCLUSION

Based on the foregoing reasons, the conviction and sentence should be vacated.

Respectfully submitted,



LaNelle C. DuRant

Appellate Defender

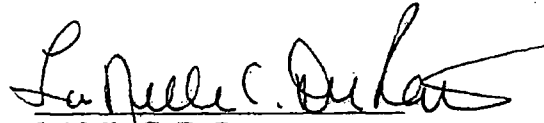
ATTORNEY FOR APPELLANT

This 12th day of May, 2008.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

May 12, 2008



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

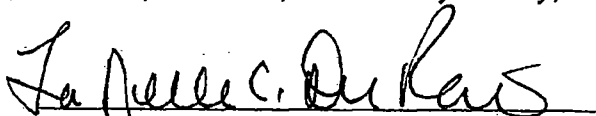
V.

WILBUR XAVIER CASTRO SUMMERS,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark Rapoport, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of May, 2008.



LaNelle C. DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of May, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 19, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Spartanburg County
Lee S. Alford, Circuit Court Judge

THE STATE,

Respondent,

VS.

WILBUR XAVIER CASTRO SUMMERS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in charging conspiracy to traffic marijuana in his general instructions on trafficking?

STATEMENT OF THE CASE

Respondent concurs with the procedural Statement of the Case of Appellant Wilbur
Xavier Summers.

STATEMENT OF FACTS

On November 1, 2005, Summers obtained a retail business license for "Clay and Ceramic Pottery," located at 9133 Fairforest Road, in Spartanburg. The business mailing address listed on the license was _____, in Campobello. (R. 19-26, 34; State's Exhibit 26).¹ Summers listed _____, in Inman, as his personal mailing address. (R. 23).

On November 11, 2005, Immigration and Customs Enforcement (ICE) agents detained a tractor-trailer at a commercial entry point in Laredo, Texas, on the border with Mexico. During routine inspection, ICE agents discovered the tractor-trailer, with a point-of-origin in Mexico, was loaded with ceramic pots which contained marijuana. The bill of lading (State's Exhibit 28) indicated the cargo was destined for Summers, doing business as Clay and Ceramic Pottery at _____. (R. 40-43, 51-54, 59-61, 83-85).

ICE decided to conduct a "controlled delivery" of the tractor-trailer to its intended destination. (R. 79-80). ICE agents then drove the tractor-trailer to South Carolina. (R. 83). During the two-day trip, the tractor-trailer was under constant surveillance by numerous agents accompanying the shipment. (R. 89-90, 150, 164-66).

Agent Robert Yarborough drove the tractor-trailer to South Carolina. He testified the location of the drop was changed once he arrived in South Carolina. He was instructed to drive to _____. (R. 84-85). Yarborough testified there was a Nacho's Restaurant at that location. (R. 85). Nacho's is about "eight (8) to ten (10) miles" from Summers' business address. (R. 186).

¹All Exhibits referred to herein are in the possession of this Court.

Yarborough then met with Summers to deliver his shipment. Summers signed for the shipment² and told Yarborough to drop it at the back side of the restaurant. (R. 85-86). Yarborough recalled Summers "seemed genuinely excited" about the arrival of his shipment. (R. 91). Yarborough wore a body wire and the entire transaction was recorded. (See State's Exhibits 1-4). (R. 91-92).

Agent Paul Criswell was part of the surveillance team. He also investigated Summers before the arrival of the shipment in South Carolina. (R. 136-38)³ Criswell testified the business at 9133 Fairforest Road was in a strand of stores behind "a small Spanish store."

He looked inside the business and noticed it was vacant except for a small bench. It was "[a]pproximately eight hundred (800) to a thousand (1000) square foot if that." (R. 139-40). Agent Yarborough also described the business as an "empty shell." (R. 97). There was a small parking area behind the tienda which was directly adjacent to the business. There was sufficient parking for a tractor-trailer to unload a shipment. (R. 97, 140-41).

Criswell testified the tractor-trailer arrived at Nacho's on the morning of November 16. (R. 141-42). Shortly thereafter, Summers drove up in his car. A Budget rental truck and a van also arrived at the location and parked next to the tractor-trailer at the rear of the restaurant. Summers and the other drivers then offloaded ceramic pots into the truck and the van. (R. 86, 142-45). Agent Yarborough testified that around five or six other individuals

²State's Exhibit 29 is a video still-photograph showing Summers signing the bill of lading for the contents of the tractor-trailer.

³Because of the time constraints and the necessity of a court order, the agents were unable to obtain a trap and trace for Summers' telephones. (R. 98-99). The agents also did not attempt to conduct wire-taps, because it is a time-consuming process and they had to deliver the shipment in just a few days. (R. 99-100).

arrived and helped Summers off-load the tractor-trailer. (R. 128-29).

Agent Criswell testified that after about forty-five minutes, the truck and van left the lot and traveled together on Highway 9 to a storage facility approximately .8 miles away. Summers also drove to the storage facility. (R. 145-46). The ceramic pots were removed from the vehicles and put into the storage facility. (R. 145-46). The storage facility was rented by Summers. (R. 113, 145; State's Exhibit 6). There was sufficient room at the storage facility to unload a tractor-trailer at that location. (R. 95).

After they were finished, Summers, the truck, and the van returned to Nacho's, where additional ceramic pots were offloaded into the truck and the van. (R. 146-47). After the truck and van left Nacho's once again, they traveled in another direction on Highway 9. Because the agents were unsure about the destination of the vehicles and they were concerned about the security of the operation, the vehicles were stopped. The agents then arrested Summers at the tractor-trailer. (R. 148). At the time of his arrest, Summers was in possession of two cell phones. (R. 148-49).

Criswell testified that no marijuana was found in the ceramic pots delivered to the storage facility. (R. 149). He explained the marijuana was seized from the pots while still inside the tractor-trailer, because they moved in to arrest the individuals before all the pots could be removed. (R. 149-50, 162). Agent Yarborough testified the pots containing the marijuana were at the bottom level, toward the back wall of the tractor-trailer. (R. 120-21). He estimated there were "over a thousand (1000) pieces" inside the tractor-trailer when it arrived at Nacho's. (R. 122). The agents seized a total of 2,267 pounds of marijuana, valued at between \$1.3 and 1.7 million, from inside the ceramic pots in the tractor-trailer. (R. 180-

82). Criswell estimated the time of the operation, from the arrival of the tractor-trailer at Nacho's until Summers' arrest, was about two-and-a-half to three hours. (R. 160-61).

After his arrest, Summers agreed to give a statement to the agents. (R. 169-73). Summers told them that he was from Sonoma, Mexico, and he had lived in the United States for about two years. Summers claimed he met an unknown Mexican individual at Nacho's who he never met before. Summers said the individual wanted him to open a pottery business on his behalf and gave him \$2,000 to start the business. Summers alleged this was the first shipment of pottery received by him for this individual, and he was surprised at the size of the shipment when it arrived. Summers also claimed that, if he told the truth, his family in Mexico would be murdered. (R. 173).

South Carolina tax records showed that Summers filed tax returns for 2002 and 2003. Summers was in Mexico in 2004 and did not file a tax return for that year. (R. 29-30, 33-35).

ARGUMENT

The trial judge did not err in charging conspiracy to traffic marijuana in his general instructions on trafficking. (Summers' Issue).

Summers was charged with trafficking in marijuana, to wit: that he did "knowingly sell, manufacture, cultivate, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase or bring into this State, or did knowingly actually or constructively possess or did knowingly attempt to become in actual or constructive possession of more than (2000) two thousand pounds of Marijuana . . ." (R. 261-62).

The testimony showed that ICE agents intercepted the tractor-trailer at the United States-Mexico border. The tractor-trailer contained a shipment of marijuana-laden pots, originating in Mexico and destined for Summers in South Carolina. The shipment was driven by ICE agents to another location, not Summers' place of business, where Summers signed the bill of lading for the goods. Summers and other individuals then offloaded the pots into other vehicles, one of which was rented by Summers. They then transported some of the pots to a nearby storage facility, which was also rented by Summers. Summers and these individuals were arrested before all the pots could be removed. After his arrest, Summers admitted to the police that an unknown man had offered to set him up in the pottery business and had fronted him the money.

At the conclusion of the evidence, defense counsel objected to a jury instruction on conspiracy as it related to the trafficking charge, because the facts did not support a conspiracy charge. (R. 193-206). The trial judge disagreed, and he charged the jury

accordingly. (R. 256-57).

On appeal, Summers argues the trial judge erred in charging the jury on conspiracy to traffic marijuana, because there was no evidence of any agreement among any other persons or co-conspirators involved in the trafficking. His argument is without merit.

A. The evidence supported conspiracy to traffic marijuana

"The law to be charged is determined by the evidence presented at trial." State v. White, 361 S.C. 407, 605 S.E.2d 540, 542 (2004); accord State v. Gourdine, 322 S.C. 396,

472 S.E.2d 241 (1996); State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (Ct. App. 2004). If there is any evidence to support a jury charge, the trial judge must give it. State v. Burris, 334 S.C. 256, 513 S.E.2d 104, 108 (1999). An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion. Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000); State v. Williams, 367 S.C. 192, 624 S.E.2d 443 (Ct. App. 2005).

A conspiracy is a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or unlawful means an object that is neither criminal nor unlawful. State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). It may be proven by the specific overt acts done in furtherance of the conspiracy, but the gravamen of the offense of conspiracy is the agreement, combination, or mutual understanding. Id.; State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993). In fact, under South Carolina law, a conspiracy does not require overt acts; the substantive crimes committed in furtherance of the conspiracy simply constitute circumstantial evidence of the existence of the conspiracy, its object, and scope. Wilson, 433 S.E.2d at 868; State v. Oliver,

275 S.C. 79, 267 S.E.2d 529, 530 (1980); see also State v. Hightower, 221 S.C. 91, 69 S.E.2d 323, 367 (1952)[holding although the offense of conspiracy may be complete without proof of overt acts, such "acts may nevertheless be shown, since from them an inference may be drawn as to the existence and object of the conspiracy. It sometimes happens that the conspiracy can be proved in no other way"].

In proving a conspiracy, the State need not show direct contact or explicit agreement between the participants allegedly involved. It is sufficient to show that each participant knew or had reason to know of the scope of the conspiracy, and that each participant had reason to believe his own benefits were dependent upon the success of the entire venture.

State v. Barroso, 320 S.C. 1, 462 S.E.2d 862 (Ct. App. 1995).

Further, because it takes at least two persons to enter into an agreement, there must be at least two members of a conspiracy. State v. Crawford, 362 S.C. 627, 608 S.E.2d 886, 891 (Ct. App. 2005)[citing State v. Jackson, 7 S.C. (7 Rich.) 283 (1876)]. "Yet they need not all be indicted or named. Indeed, an indictment charging that the named defendant and 'other persons unknown . . . did . . . conspire' was approved in Hightower. Id. [citing Hightower, 69 S.E.2d at 366]. In Hightower, there was "ample evidence that the conspirators, though unknown, did exist." Id.

Once a conspiracy has been established, evidence establishing beyond a reasonable doubt the connection of a defendant to the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy. State v. Horne, 324 S.C. 372, 478 S.E.2d 289, 294 (Ct. App. 1996)[citing State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838, 843 (1981)].

In the instant case, Summers' scheme would not have worked had he not been planning with other individuals, albeit unknown, with an agreement. The delivery of the marijuana could not have been accomplished if Summers and others had not been participating together to smuggle it into South Carolina. The evidence did not show Summers' role was limited to that of a buyer-seller relationship with others, as his active role is procuring the delivery into Spartanburg County from Mexico of more than two thousand pounds of marijuana in the tractor-trailer, the establishment of the phoney business, and his role in the storage of the marijuana constituted evidence from which a jury could reasonably conclude Summers agreed or had an understanding to traffic marijuana for the mutual benefit of himself and others. Summers was also present with others at the unloading site when the marijuana arrived. Although the parties agreed before trial that no mention would be made of any co-defendants or the disposition of their cases, the existence of other co-conspirators in the chain of the delivery of the marijuana to South Carolina was shown, and the evidence was sufficient to demonstrate Summers acted in concert with others to traffic in marijuana.

Summers' arguments to the contrary, including the absence of wire taps, traces, or other evidence of a conspiracy, were matters properly left to the weight of the evidence at trial rather than the existence of a conspiracy as a matter of law.⁴

Accordingly, the trial judge did not err by instructing the jury on conspiracy to traffic marijuana.

⁴As previously noted, the ICE agents explained there was no time in their investigation to lawfully obtain wire taps or to trace any telephone communications between Summers and others involved in the conspiracy.

B. Harmless error

Assuming the trial judge erred in submitting conspiracy to the jury in his general instructions explaining trafficking in marijuana, Summers suffered no prejudice. See State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150, 151 (1985) ["Whether an error is harmless depends on the particular circumstances of the case"]; State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007) [prejudice to the defendant's case is a prerequisite to reversal of a verdict due to an erroneous jury charge].

Here, the shipment on the tractor-trailer was allegedly destined for Summers' business, only about two weeks after he obtained a business license. The address for the shipment, however, was not the actual location of the business. Instead, the tractor-trailer was directed to a restaurant parking lot. Summers' business was merely a front. The building itself was empty. When the pots arrived in the tractor-trailer, Summers signed the bill of lading. Some of the pots were then unloaded into a van and a rental truck, which he rented. Summers then offloaded the pots and, together with other individuals, drove them to a storage facility also rented by him. Summers' activities that day were videotaped. He was arrested at the tractor-trailer, where the pots of marijuana were seized in the back of the trailer. Under these facts, Summers was undeniably in actual and/or constructive possession of more than two thousand pounds of marijuana hidden inside the pots on the tractor-trailer.⁵

⁵The State also notes that in his statement to the police after his arrest, Summers admitted his knowledge of the shipment. Summers claimed, however, that an unknown Mexican male approached him at Nacho's and gave him money to open the pottery business. The tractor-trailer was his first shipment from Mexico. Summers then alleged that if he told the police the truth, his family would be killed. Summers' knowledge of the shipment, therefore, clearly established his possession of the marijuana to support his conviction for trafficking. See State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630, 631 (1987) [holding the defendant's actual

Most important, Summers raises no contention to the contrary on appeal.⁶ See State v. Adams, 291 S.C. 132, 352 S.E.2d 483, 486 (1987)[holding a defendant's knowledge and possession may be inferred if the substance was found on premises under his control]; State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637, 639 (Ct. App. 1999)[possession is shown when a defendant has dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it].

Accordingly, any error resulting from the charge is harmless beyond a reasonable doubt, as the jury would necessarily have found trafficking in marijuana. See State v.

Bennett, 328 S.C. 251, 493 S.E.2d 845, 851 (1997)[holding where it was undisputed the victim was stabbed some 70-75 times with a Phillips head screwdriver, any error resulting from the charge regarding the use of hands or fists as a deadly weapon during an armed robbery was harmless beyond a reasonable doubt, as the jury would necessarily have found armed robbery from the use of the Phillips head screwdriver]; see also Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992)[error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained]; State v. Kinner, 301 S.C. 209, 391 S.E.2d 251 (1990)[holding a faulty jury instruction was harmless where there was overwhelming evidence of guilt]; State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003)[holding

knowledge of the presence of the drugs is strong evidence of intent to control its disposition or use].

⁶This is understandable, since defense counsel failed to move for a directed verdict of acquittal at trial. (R. 206-07). See State v. Bailey, 298 S.C. 1, 377 S.E.2d 581, 584 (1989)[holding the failure to move for a directed verdict at trial precludes appellate review]; see also State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970)[holding issues not raised to the trial judge in support of the directed verdict motion are not preserved for appellate review].

an insubstantial error not affecting the result of the trial is harmless where guilt is conclusively proven by competent evidence such that no other rational conclusion can be reached].

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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Chief Deputy Attorney General

SALLEY W. ELLIOTT
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ATTORNEYS FOR RESPONDENT

May 12, 2008

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Spartanburg County
Lee S. Alford, Circuit Court Judge

THE STATE,

Respondent,

VS.

WILBUR XAVIER CASTRO SUMMERS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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ATTORNEYS FOR RESPONDENT

May 12, 2008

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Spartanburg County
Lee S. Alford, Circuit Court Judge

THE STATE,

Respondent,

vs.

WILBUR XAVIER CASTRO SUMMERS,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing three copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, LaNelle C. DuRant, Assistant Appellate Defender, S.C. Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 12th day of May, 2008.

Ellen R. DuBois

ELLEN R. DUBOIS

Legal Assistant

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Wilbur Xavier Castro
Summers,

Appellant.

Appeal From Spartanburg County
Lee S. Alford, Circuit Court Judge

Unpublished Opinion No. 2009-UP-138
Submitted March 2, 2009 – Filed March 10, 2009

AFFIRMED

Appellate Defender LaNelle C. DuRant, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W. Elliott,

Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

PER CURIAM: Wilbur Xavier Castro Summers appeals his conviction and sentence for trafficking in marijuana, arguing the trial court erred in instructing the jury on conspiracy because the evidence did not support a conspiracy charge. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities: Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472-73 (2004) (holding a trial court is required to charge only the current and correct law of South Carolina); State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (explaining jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error); State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004) (stating the law to be charged to the jury is determined by the evidence presented at trial, and if any evidence supports a jury charge, the trial court should grant the request).

AFFIRMED.

SHORT, THOMAS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

MAR 26 2009

ATTORNEY GENERALS
OFFICE

THE STATE,

RESPONDENT,

V.

WILBUR XAVIER CASTRO-SUMMERS,

APPELLANT

Appeal from Spartanburg County

Lee S. Alford, Circuit Court Judge

Opinion No. 2009-UP-138

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on March 10, 2009. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following.

Appellant argued on appeal that the trial court erred in instructing the jury on conspiracy because the evidence did not support a conspiracy charge. Summers was convicted of trafficking in marijuana and received a twenty-five year sentence.

The Court of Appeals ruled that the trial court should charge only the current law in South Carolina; that jury instructions should be considered as a whole; and that the law to be charged is determined by the evidence presented at trial.

In a conspiracy charge, the focus is on the sufficiency of the evidence of an agreement between the alleged conspirators and not on the alleged common object. State v. Mouton, 326 S.C. 199, 206, 485 S.E.2d 918 (1997). What is needed is proof the defendant and others intended to act together for their shared mutual benefit within the scope of the conspiracy charged. State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001).

In State v. James, 321 S.C. 75, 472 S.E.2d 38 (Ct. App. 1996), the Court of Appeals ruled that proof of a buyer/seller relationship, without more, is inadequate to tie defendant to a larger conspiracy, as is mere association with members of conspiracy, because guilt remains individual and personal and is not a matter of mass application; however, an agreement to distribute drugs can sometimes be rationally inferred from frequent contacts among defendants and from their joint appearances at transactions and negotiations.

In Goldsmith v. Witkowski, 981 F.2d 697, (4th Cir. 1992) Court of Appeals, ruled that there was not sufficient evidence of a conspiracy where the defendant was found in an apartment where drugs were located. The Court said that it was true that the jury could have inferred the accused's knowledge of the drugs; however, such a conclusion that the accused was part of a conspiracy to distribute marijuana or cocaine requires bridging an evidentiary gap with rank speculation. The Court said that the State had presented no evidence of a conspiracy.

There was no evidence presented during the trial of any other persons or defendants or conspirators involved in the distribution of the marijuana. The DEA agent testified that they did not trace any telephone calls for Summers which is their usual procedure used to identify co-

conspirators nor they do any wire tapping. ROA p. 99, lines 2 – 20. The State admitted in pretrial that the cases of the co-defendants were not relevant to Summers' case; the State did not present any co-conspirators or co-defendants as witnesses. The judge himself admitted that there was no proof of co-conspirators but that the jury would have to infer that evidence.

The judge was making an inference that there was a conspiracy because he said Summers could not have done this alone. However, the law says that a mere buyer/seller relationship is not sufficient to prove a conspiracy.

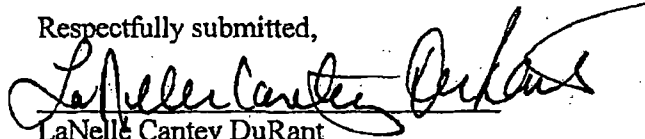
Although the judge admitted there was no proof of co-conspirators, in his charge to the jury on conspiracy, he said proof is required. He contradicted himself. The law says that the focus is on the agreement and there was no evidence presented during the trial of any agreement. Although the case of State v. Crocker, supra, held that no contact between the co-conspirators was needed to show the conspiracy, the same case held that it was sufficient that each defendant knew about the agreement. In Summers' case, there was no evidence of a co-conspirator.

The circumstantial evidence was not sufficient to prove an agreement between co-conspirators because of hundreds of clay pots, only 120 of them contained marijuana.

The trial judge erred by charging the jury on conspiracy because the evidence presented at trial did not rise to the level of any degree of proof. Summers was prejudiced by the charge because it is highly probable that the jury convicted him because of the conspiracy instruction.

THEREFORE, appellant respectfully urges the Court to reconsider its ruling and reverse the order of the trial court.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

This 25th day of March, 2009.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

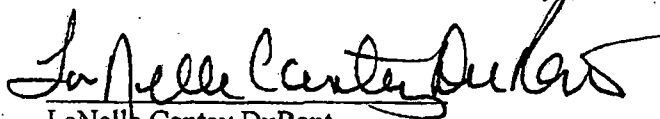
V.

WILBUR XAVIER CASTRO SUMMERS,

APPELLANT

CERTIFICATE OF SERVICE

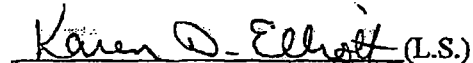
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Norman Mark Rapoport, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 25th day of March, 2009.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 25th day
of March, 2009.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 19, 2017.

The South Carolina Court of Appeals

The State,

Respondent,

v.

Wilbur Xavier Castro Summers,

Appellant.

The Honorable Lee S. Alford
Spartanburg County
Trial Court Case No. 2006-GS-42-00740

ORDER DENYING PETITION FOR REHEARING

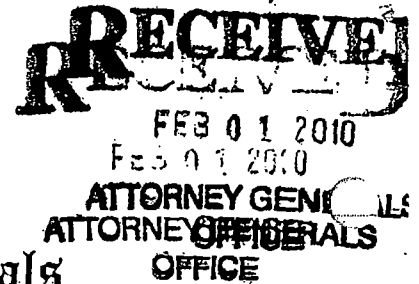
PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

Paul E. Shortz J.
Paul W. Thomas J.
John D. Sullivan J.

May 4 _____, 2009

cc: Appellate Defender LaNeile C. DuRant
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Senior Assistant Attorney General Norman Mark Rapoport
Harold W. Gowdy, III, Esquire



The South Carolina Court of Appeals

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MF-File

January 29, 2010

REMITTITUR

The Honorable Marcus W. Kitchens
PO Box 3483
180 Magnolia Street
Spartanburg, SC 29304-3483

Re: The State v. Summers, Wilbur Xavier
2006-GS-42-00740

Dear Ms. Kitchens:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

The exhibits being returned are: State's Exhibits 8-21, 31-34 (Photographs), State's Exhibits 1-4 (Compact Disks), State's Exhibits 29-30 (Video Stills), State's Exhibit 5 (Customer Order), State's Exhibit 6 (Self-Storage Rental Agreement), State's Exhibit 7 (Truck Rental Agreement), State's Exhibit 22 (Ab Report), State's Exhibit 26 (Retail License), State's Exhibit 28 (Bill of Lading), and State's Exhibit 35 (Map). Please sign attached copy of this letter and return to acknowledge receipt of these items.

Sincerely,

Tanya A. Gee
Acting Clerk of Court

TAG/lm

cc: Appellate Defender LaNelle C. DuRant

Appellate Defender LaNelle Cantey DuRant
Page Two
January 22, 2010

cc: The Honorable Harold W. Gowdy, III
✓ Assistant Attorney General Mark Farthing
The Honorable Marcus W. Kitchens
The Honorable Tanya Gee

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Lee S. Alford, Circuit Court Judge

Opinion No. 2009-UP-138 (S.C. Ct. App. filed 3/10/2009)
06-GS-42-740

THE STATE,

RESPONDENT,

V.

WILBUR XAVIER CASTRO SUMMERS,

PETITIONER

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Did the Court of Appeals err in affirming the trial court in instructing the jury on conspiracy to distribute drugs when the evidence did not support the conspiracy charge?

STATEMENT

On February 27, 2006, the Spartanburg County Grand Jury indicted Wilbur Xavier Castro Summers on the charge of trafficking in marijuana. On November 14-16, 2006, Summers proceeded to trial before the Honorable Lee S. Alford and a jury. Summers was represented by George Paul Trejo, Jr., Esquire and Patricia Anderson, Esquire. The jury returned a verdict of guilty as charged. Judge Alford sentenced Summers to twenty-five years and \$50,000 fine. Summers' attorney filed a notice of intent to appeal on November 22, 2006. The Court of Appeals affirmed the conviction in an unpublished opinion filed March 10, 2009. State v. Summers, 2009-UP-138 (Ct. App. filed March 10, 2009). Appellate counsel filed a petition for rehearing on March 24, 2009. The Court of Appeals issued an order on May 4, 2009 denying the petition. This petition follows.

ARGUMENT

The trial court erred in charging the jury on conspiracy to distribute drugs when the evidence did not support the conspiracy charge.

In November 2005, a tractor-trailer truck loaded with clay pots or pottery crossed the border from Mexico into the United States at the Texas border. Marijuana was discovered on the truck by drug enforcements agents. Law enforcement took control of the truck and accompanied it to its destination as a controlled delivery (undercover) to Spartanburg, South Carolina. When the truck arrived in Spartanburg at Nachos Restaurant, Wilbur Summers signed for the delivery of the cargo.

~~Law enforcement seized the shipment and arrested Summers and charged him with trafficking in marijuana over two thousand pounds. ROA p. 5, line 8 – p. 8, line 2.~~

At the beginning of the trial, as a pretrial motion, the State put on the record as discussed in chambers, that no mention would be made of any co-defendants and the disposition of their cases because their cases were not relevant to Summers' case. The defense agreed to refrain from commenting on the other co-defendants. ROA p. 1, line 23 – p. 2, line 16, p. 3, lines 23-24. No co-defendants testified and defense counsel did not call any witnesses. ROA p. 206, lines 19 – 24.

At the charge conference on November 15, 2006, defense counsel told the judge that they would take exception to (object) to the judge charging the jury on conspiracy as it related to the trafficking charge. ROA p. 193, lines 2 – 14. The judge then went into a lengthy explanation as to why he believed that the conspiracy charge was appropriate. Basically, the judge said that Summers could not have brought two thousand pounds of marijuana into the United States by himself. Summers filed tax returns in 2002 and 2003 and then returned to Mexico until 2005 when he

returned to the United States. The judge said the jury could infer that Summers made the arrangements while he was in Mexico. ROA p. 193, line 2 – p. 197, line 25. The judge said:

The jury could infer that during the time he was in Mexico that this arrangement was made. They certainly could ---that's an inference they may or may not make from the evidence. But there's no proof of that. -----

Now, secondly, and more important than that, is he signed for the goods and received them. And he didn't ship them, obviously, to himself. So, somebody had to do that.

ROA p. 198, lines 3 – 23.

The judge acknowledged that the main issue for the jury was if Summers had knowledge that the drugs were there. ROA p. 195, lines 13 – 15. Defense counsel had pointed out in his opening statement that there were hundreds and hundreds of clay pottery pots and that only 120 of them contained marijuana. ROA p. 13, lines 10 – 23.

The judge, as part of his explanation for the conspiracy charge, acknowledged that Summers had given a statement to the police that he did not know the marijuana was in the pots. The judge said that the jury could believe Summers' statement wherein he said someone gave him two thousand dollars to set up a pottery business and that he did not know the drugs were there. Summers would not give the name of the person because he feared for his family since the drugs were found. His family was still in Mexico. ROA p. 201, lines 10 – 24.

Defense counsel told the judge again after this discussion, that he still objected or took exception to the instruction to the jury on conspiracy. Counsel said that would be overly broad because the facts did not support the conspiracy charge. Counsel said:

The analysis the Court underwent moments ago concerning that he (Summers) took possession of the drugs, and therefore there had to have been an agreement with somebody in order to have obtained the

drugs. That, in fact, applies to any situation where anyone obtains any amount of drugs. Obviously, it has to come from somebody.

ROA p. 202, lines 7 – 19.

The judge then said:

I agree. There's nothing necessarily he---he's a conspirator. There's nothing necessarily, but you've got to look at the evidence and inferences that could be drawn from them, in the light most favorable to the State, because that's their position.

ROA p. 202, line 23 – p. 203, line 2.

The judge finally said:

All right, sir. And that's—let me say, that's part of my usual charge where there is some evidence or inferences from the evidence which could be drawn of a conspiracy. And that's my normal charge as to explain possession and conspiracy to the jury because most wouldn't understand those two terms in general happenstance.

ROA p. 204, line 25 – p. 205, line 6.

The judge did charge the jury on the law of conspiracy. As part of the charge, the judge said:

First, there must be two or more persons. Second, there must be a single criminal objective, not just similar or parallel objectives between similarly situated people.

In other words, there must be proof that the individuals intended to act together, for their shared mutual benefit within the scope of the conspiracy charge. It is not necessary that the individuals to the conspiracy enter into an expressed or formal agreement or that they put their plan into writing. It may be shown by circumstantial evidence.

ROA p. 257, lines 7 – 16.

The Court of Appeals ruled in Summers' case that the trial court should charge only the current law in South Carolina; that jury instructions should be considered as a whole; and that the law to be charged is determined by the evidence presented at trial. The Court of Appeals affirmed the trial court on these issues. State v. Summers, 2009-UP-138 (Ct. App. March 10, 2009).

Generally, trial judge is required to charge only the current and correct law of South Carolina. State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003). In reviewing jury charges for error, Court of Appeals must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. Id. at 318 citing State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986) and Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App. 2000). A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case: State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct.App. 2006). A jury charge which is substantially correct and covers the law does not require reversal; to warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005).

In criminal conspiracy, the agreement is the gravamen of the offense. S.C. Code Sec. 16-17-410 (1976); State v. Vasquez, 341 S.C. 648, 535 S.E.2d 465 (Ct.App. 2000). A criminal conspiracy thus consists of a combination between two or more persons for the purpose of accomplishing an unlawful objective, or a lawful objective by unlawful means. S.C. Code Sec. 16-17-410 (1976).

Offense of conspiracy requires proof that people intended to act together for their shared mutual benefit within scope of conspiracy charged. State v. Gunn, 313 S.C. 124, 437 S.E.2d 75

(1993). To prove conspiracy, it is sufficient to show that each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe his own benefits were dependent upon the success of the entire venture. State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct.App. 2005). Evidence of direct contact or an explicit agreement between the defendants need not be shown in order to prove conspiracy. Id. at 896.

The focus is on the sufficiency of the evidence of an agreement between the alleged conspirators and not on the alleged common object. State v. Mouton, 326 S.C. 199, 206, 485 S.E.2d 918 (1997). What is needed is proof they intended to act together for their shared mutual benefit within the scope of the conspiracy charged. State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct.App. 2001).

In State v. James, 321 S.C. 75, 472 S.E.2d 38 (Ct.App. 1996), the Court of Appeals ruled that proof of a buyer/seller relationship, without more, is inadequate to tie defendant to a larger conspiracy as is mere association with members of conspiracy, because guilt remains individual and personal and is not a matter of mass application; however, agreement to distribute drugs can sometimes be rationally inferred from frequent contacts among defendants and from their joint appearances at transactions and negotiations.

In Goldsmith v. Witkowski, 981 F.2d 697 (C. A. 4 (S.C.) 1992) the United States Court of Appeals, Fourth Circuit, ruled that there was not sufficient evidence of a conspiracy where the defendant was found in an apartment where drugs were located. The Court said that it was true that the jury could have inferred the accused's knowledge of the drugs; however, such a conclusion that the accused was part of a conspiracy to distribute marijuana or cocaine requires bridging an

evidentiary gap with rank speculation. The Court said that the State had presented no evidence of a conspiracy.

In State v. Raphael Hernandez, Honorio Guerrero, and Alfredo Avila-Arijona, Op. No. 26654 (filed May 26, 2009), the South Carolina Supreme Court ruled that there was not sufficient evidence to show that the three petitioners, who were convicted of trafficking marijuana, had knowledge of the contents of the tractor trailer. The petitioners were in a Ryder truck which was meeting a tractor-trailer truck as part of an alleged "controlled delivery" to receive furniture which contained 900 pounds of concealed marijuana. The Supreme Court that the state failed to present evidence such as acts, declarations, or specific conduct to show that the petitioners had knowledge of the drugs.

There was no evidence presented during the trial of any other persons or defendants or conspirators involved in the distribution of the marijuana. The DEA agent testified that they did not trace any telephone calls for Summers which is their usual procedure used to identify co-conspirators nor they do any wire tapping. ROA p. 99, lines 2 - 20. The State admitted in pretrial that the cases of the co-defendants were not relevant to Summers' case; the State did not present any co-conspirators or co-defendants as witnesses. The judge himself admitted that there was no proof of co-conspirators but that the jury would have to infer that evidence.

The judge was making the inference that there was a conspiracy because he said Summers could not have done this alone. However, the law says that just a buyer/seller relationship is not sufficient to prove a conspiracy.

Although the judge admitted there was no proof of co-conspirators, in his charge to the jury on conspiracy, he said proof is required. He contradicted himself. The law says that the focus is on

the agreement and there was no evidence presented during the trial of any agreement. Although the case of State v. Crocker, supra, held that no contact between the co-conspirators was needed to show the conspiracy, the same case held that it was sufficient that each defendant knew about the agreement. In Summers' case, there was no evidence of a co-conspirator.

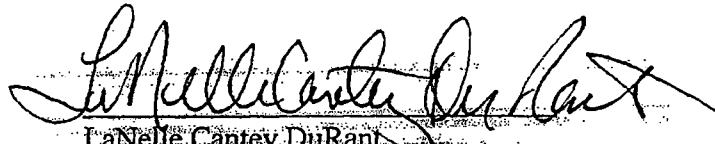
The circumstantial evidence was not sufficient to prove an agreement between co-conspirators because of hundreds of clay pots, only 120 of them contained marijuana.

The trial judge was wrong to charge the jury on conspiracy because the evidence presented at trial did not rise to the level of any degree of proof. Summers was prejudiced by the charge because there is a reasonable probability that the jury convicted him on the conspiracy charge because the jury had to believe the conspiracy charge in order to convict him on the trafficking offense. Therefore, the instruction by the judge on conspiracy was prejudicial to Summers.

CONCLUSION

Based on the above, certiorari should be granted and the order of the Court of Appeals reversed.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of June, 2009.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Lee S. Alford, Circuit Court Judge

Opinion No. 2009-UP-138 (S.C. Ct. App. filed 3/10/2009)
06-GS-42-740

THE STATE,

RESPONDENT,

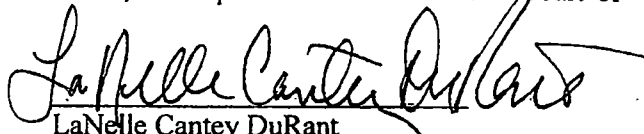
V.

WILBUR XAVIER CASTRO SUMMERS,

PETITIONER

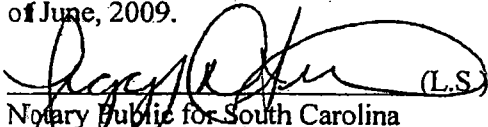
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Norman Mark Rapoport, Esquire at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201; Wilbur Summers #318793 at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210; and upon the South Carolina Court of Appeals, this 3rd day of June, 2009.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of June, 2009.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

Appeal From Spartanburg County
Lee S. Alford, Circuit Court Judge

THE STATE,

Respondent,

vs.

WILBUR XAVIER CASTRO SUMMERS,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

Did the trial judge err in charging conspiracy to traffick marijuana in his general instructions on trafficking?

STATEMENT

A. Procedural history

Petitioner Wilbur Xavier Castro Summers was tried and convicted in Spartanburg County, before the Honorable Lee S. Alford, and a jury, for trafficking in marijuana. An appeal was perfected. The Court of Appeals affirmed the conviction. State V. Summers, Op. No. 2009-UP-138 (S.C. Ct. App., filed March 10, 2009). (App. 1-2). A petition for rehearing was denied on May 4, 2009. (App. 7).

B. Relevant facts

On November 1, 2005, Summers obtained a retail business license for "Clay and Ceramic Pottery," located at _____, in Spartanburg. The business mailing address listed on the license was _____, in Campobello. (R. 19-26, 34; State's Exhibit 26).¹ Summers listed _____ 9, in Inman, as his personal mailing address. (R. 23).

On November 11, 2005, Immigration and Customs Enforcement (ICE) agents detained a tractor-trailer at a commercial entry point in Laredo, Texas, on the border with Mexico. During routine inspection, ICE agents discovered the tractor-trailer, with a point-of-origin in Mexico, was loaded with ceramic pots which contained marijuana. The bill of lading (State's Exhibit 28) indicated the cargo was destined for Summers, doing business as Clay and Ceramic Pottery at _____. (R. 40-43, 51-54, 59-61, 83-85).

ICE decided to conduct a "controlled delivery" of the tractor-trailer to its intended destination. (R. 79-80). ICE agents then drove the tractor-trailer to South Carolina. (R. 83).

¹All Exhibits referred to herein are in the possession of this Court.

During the two-day trip, the tractor-trailer was under constant surveillance by numerous agents who accompanied the shipment. (R. 89-90, 150, 164-66).

Agent Robert Yarborough drove the tractor-trailer to South Carolina. He testified the location of the drop was changed once he arrived in South Carolina. He was instructed to drive to . (R. 84-85). Yarborough testified there was a Nacho's Restaurant at that location. (R. 85). Nacho's is about "eight (8) to ten (10) miles" from Summers' business address. (R. 186).

Yarborough then met with Summers to deliver his shipment. Summers signed for the shipment² and told Yarborough to drop it at the back side of the restaurant. (R. 85-86). Yarborough recalled Summers "seemed genuinely excited" about the arrival of his shipment. (R. 91). Yarborough wore a body wire and the entire transaction was recorded. (See State's Exhibits 1-4). (R. 91-92).

Agent Paul Criswell was part of the surveillance team. He also investigated Summers before the arrival of the shipment in South Carolina. (R. 136-38).³ Criswell testified the business at was in a strand of stores behind "a small Spanish store." He looked inside the business and noticed it was vacant except for a small bench. It was "[a]pproximately eight hundred (800) to a thousand (1000) square foot if that." (R. 139-40). Agent Yarborough also described the business as an "empty shell." (R. 97). There was a

²State's Exhibit 29 is a video still-photograph showing Summers signing the bill of lading for the contents of the tractor-trailer.

³Because of the time constraints and the necessity of a court order, the agents were unable to obtain a trap and trace for Summers' telephones. (R. 98-99). The agents also did not attempt to conduct wire-taps, because it is a time-consuming process and they had to deliver the shipment in just a few days. (R. 99-100).

small parking area behind the tienda which was directly adjacent to the business. There was sufficient parking for a tractor-trailer to unload a shipment. (R. 97, 140-41).

Criswell testified the tractor-trailer arrived at Nacho's on the morning of November 16. (R. 141-42). Shortly thereafter, Summers drove up in his car. A Budget rental truck and a van also arrived at the location and parked next to the tractor-trailer at the rear of the restaurant. Summers and the other drivers then offloaded ceramic pots into the truck and the van. (R. 86, 142-45). Agent Yarborough testified that around five or six other individuals arrived and helped Summers off-load the tractor-trailer. (R. 128-29).

Agent Criswell testified that after about forty-five minutes, the truck and van left the lot and traveled together on Highway 9 to a storage facility approximately .8 miles away. Summers also drove to the storage facility. (R. 145-46). The ceramic pots were removed from the vehicles and put into the storage facility. (R. 145-46). The storage facility was rented by Summers. (R. 113, 145; State's Exhibit 6). There was sufficient room at the storage facility to unload a tractor-trailer at that location. (R. 95).

After they were finished, Summers, the truck, and the van returned to Nacho's, where additional ceramic pots were offloaded into the truck and the van. (R. 146-47). After the truck and van left Nacho's once again, they traveled in another direction on Highway 9. Because the agents were unsure about the destination of the vehicles and they were concerned about the security of the operation, the vehicles were stopped. The agents then arrested Summers at the tractor-trailer. (R. 148). At the time of his arrest, Summers was in possession of two cell phones. (R. 148-49).

Criswell testified that no marijuana was found in the ceramic pots delivered to the

storage facility. (R. 149). He explained the marijuana was seized from the pots while still inside the tractor-trailer, because they moved in to arrest the individuals before all the pots could be removed. (R. 149-50, 162). Agent Yarborough testified the pots containing the marijuana were at the bottom level, toward the back wall of the tractor-trailer. (R. 120-21). He estimated there were "over a thousand (1000) pieces" inside the tractor-trailer when it arrived at Nacho's. (R. 122). The agents seized a total of 2,267 pounds of marijuana, valued at between \$1.3 and 1.7 million, from inside the ceramic pots in the tractor-trailer. (R. 180-82). Criswell estimated the time of the operation, from the arrival of the tractor-trailer at Nacho's until Summers' arrest, was about two-and-a-half to three hours. (R. 160-61).

After his arrest, Summers agreed to give a statement to the agents. (R. 169-73). Summers told them that he was from Sonoma, Mexico, and he had lived in the United States for about two years. Summers claimed he met an unknown Mexican individual at Nacho's who he never met before. Summers said the individual wanted him to open a pottery business on his behalf and gave him \$2,000 to start the business. Summers alleged this was the first shipment of pottery received by him for this individual, and he was surprised at the size of the shipment when it arrived. Summers also claimed that, if he told the truth, his family in Mexico would be murdered. (R. 173).

South Carolina tax records showed that Summers filed tax returns for 2002 and 2003. Summers was in Mexico in 2004 and did not file a tax return for that year. (R. 29-30, 33-35).

ARGUMENT

The trial judge did not err in charging conspiracy to traffick marijuana in his general instructions on trafficking.

Summers was charged with trafficking in marijuana, to wit: that he did "knowingly sell, manufacture, cultivate, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase or bring into this State, or did knowingly actually or constructively possess or did knowingly attempt to become in actual or constructive possession of more than (2000) two thousand pounds of Marijuana . . ." (R. 261-62).

The testimony showed that ICE agents intercepted the tractor-trailer at the United States-Mexico border. The tractor-trailer contained a shipment of marijuana-laden pots, originating in Mexico and destined for Summers in South Carolina. The shipment was driven by ICE agents to another location, not Summers' place of business, where Summers signed the bill of lading for the goods. Summers and other individuals then offloaded the pots into other vehicles, one of which was rented by Summers. They then transported some of the pots to a nearby storage facility, which was also rented by Summers. Summers and these individuals were arrested before all the pots could be removed. After his arrest, Summers admitted to the police that an unknown man had offered to set him up in the pottery business and had fronted him the money.

At the conclusion of the evidence, defense counsel objected to a jury instruction on conspiracy as it related to the trafficking charge, because the facts did not support a conspiracy charge. (R. 193-206). The trial judge disagreed, and he charged the jury

accordingly. (R. 256-57).

Summers argues the trial judge erred in charging the jury on conspiracy as an element of trafficking in marijuana, because there was no evidence of any agreement among any other persons or co-conspirators involved in the trafficking.⁴

A. The evidence of the conspiracy to traffick marijuana

"The law to be charged is determined by the evidence presented at trial." State v. White, 361 S.C. 407, 605 S.E.2d 540, 542 (2004); accord State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996); State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (Ct. App. 2004). If there is any evidence to support a jury charge, the trial judge must give it. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104, 108 (1999). An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion. Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000); State v. Williams, 367 S.C. 192, 624 S.E.2d 443 (Ct. App. 2005).

A conspiracy is a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or unlawful means an object that is neither criminal nor unlawful. State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). It may be proven by the specific overt acts done in furtherance of the conspiracy, but the gravamen of the offense of conspiracy is the agreement, combination, or mutual understanding. Id.; State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993). In fact, under

⁴In the heading of his Argument, Summers incorrectly states: "[t]he trial judge erred in charging the jury on conspiracy to distribute drugs when the evidence did not support the conspiracy charge." (Petition at 4). The record, however, clearly shows the trial judge charged the jury on conspiracy in context of the trafficking statute. (R. 256-57).

South Carolina law, a conspiracy does not require overt acts; the substantive crimes committed in furtherance of the conspiracy simply constitute circumstantial evidence of the existence of the conspiracy, its object, and scope. Wilson, 433 S.E.2d at 868; State v. Oliver, 275 S.C. 79, 267 S.E.2d 529, 530 (1980); see also State v. Hightower, 221 S.C. 91, 69 S.E.2d 323, 367 (1952)[holding although the offense of conspiracy may be complete without proof of overt acts, such "acts may nevertheless be shown, since from them an inference may be drawn as to the existence and object of the conspiracy. It sometimes happens that the conspiracy can be proved in no other way"].

In proving a conspiracy, the State need not show direct contact or explicit agreement between the participants allegedly involved. It is sufficient to show that each participant knew or had reason to know of the scope of the conspiracy, and that each participant had reason to believe his own benefits were dependent upon the success of the entire venture. State v. Barroso, 320 S.C. 1, 462 S.E.2d 862 (Ct. App. 1995).

Further, because it takes at least two persons to enter into an agreement, there must be at least two members of a conspiracy. State v. Crawford, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005)[citing State v. Jackson, 7 S.C. (7 Rich.) 283 (1876)]. "Yet they need not all be indicted or named. Indeed, an indictment charging that the named defendant and 'other persons unknown . . . did . . . conspire' was approved in Hightower. Crawford, 608 S.E.2d at 891 [citing Hightower, 69 S.E.2d at 366]. In Hightower, there was "ample evidence that the conspirators, though unknown, did exist." Id.

Once a conspiracy has been established, evidence establishing beyond a reasonable doubt the connection of a defendant to the conspiracy, even though the connection is slight,

is sufficient to convict him with knowing participation in the conspiracy. State v. Horne, 324 S.C. 372, 478 S.E.2d 289, 294 (Ct. App. 1996)[citing State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838, 843 (1981)].

Summers' reliance on this Court's recent decision in State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009)(a directed verdict case) is totally misplaced. In Hernandez, federal agents discovered a tractor-trailer at the Texas border with furniture that concealed 900 pounds of marijuana. The furniture was destined for a business in South Carolina. The shipment was seized and an undercover agent drove the truck to the business. The agent was greeted by three individuals in a car, who directed the agent to another location. The same individuals arrived at the other location, along with the defendants in a Ryder truck. One of the individuals in the car directed the agent to follow him in the truck, while one of the other individuals spoke with the defendants who remained inside the Ryder truck. The three vehicles then formed a caravan with the car leading, followed by the Ryder truck, and the tractor-trailer in the rear. The caravan continued down a dirt road, until the tractor-trailer and the Ryder truck got stuck in the mud. At this point, the police arrested only the defendants, because the individuals in the car managed to drive away. They were never apprehended. Id., 677 S.E.2d at 604.

This Court held there was insufficient evidence to convict the defendants for trafficking in marijuana, because the evidence failed to show they had knowledge of the contents of the tractor-trailer. There was no evidence connecting the defendants to the tractor-trailer or to its intended destination. This Court concluded the evidence regarding the rental of the Ryder truck by the defendants, the fact they conversed with one of the

individuals from the car before they caravanned down the rural dirt road, and the undercover agent's testimony that large drug transactions are handled by parties who are aware of what transpires, merely demonstrated an inference or suspicion of guilt and was not substantial circumstantial evidence of knowledge. Id., 677 S.E.2d at 605-06.

In the present case, however, the evidence showed Summers' active participation in the delivery of the contents of the tractor-trailer through the establishment of the phoney business and his role in the storage of the pots. This constituted evidence from which a jury could reasonably conclude Summers agreed or had an understanding to traffick marijuana for the mutual benefit of himself and others. Summers signed the bill of lading for the pots. He further assisted with other individuals at the unloading site when the marijuana arrived and pots from the tractor-trailer were offloaded. Although the parties agreed before trial that no mention would be made of any co-defendants or the disposition of their cases, the existence of these other co-conspirators in the chain of the delivery of the marijuana to South Carolina was fully shown. Finally, the State notes that in his statement to the police after his arrest, Summers admitted his knowledge of the shipment. Summers claimed, however, that an unknown Mexican male approached him at Nacho's and gave him money to open the pottery business. The tractor-trailer was his first shipment from Mexico. Summers then alleged that if he told the police the name of the man, his family would be killed. Thus, the evidence was reasonably sufficient to demonstrate Summers acted in concert with others, albeit unknown, to traffic in marijuana, and that he had possession and knowledge of the contents of the tractor-trailer, to submit the conspiracy to the jury for its consideration.

Summers' arguments to the contrary, including the absence of wire taps, traces,⁵ or other evidence of a conspiracy, were matters properly left to the weight of the evidence at trial rather than the existence of a conspiracy. Accordingly, the trial judge in this case did not err by instructing the jury on conspiracy in context of the trafficking in marijuana charge.

B. Harmless error

Assuming the trial judge erred in the submission of conspiracy to the jury in his general instructions that explained trafficking in marijuana, Summers suffered no prejudice.

See State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150, 151 (1985)[“Whether an error is harmless depends on the particular circumstances of the case”]; State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007)[prejudice to the defendant’s case is a prerequisite to reversal of a verdict due to an erroneous jury charge].

Here, the shipment on the tractor-trailer was allegedly destined for Summers’ business, only about two weeks after he obtained a business license. The address for the shipment, however, was not the actual location of the business. Instead, the tractor-trailer was directed to a restaurant parking lot. Summers’ business was merely a front. The building itself was empty. When the pots arrived in the tractor-trailer, Summers signed the bill of lading. Some of the pots were then unloaded by him into a van and a rental truck, which Summers rented. After Summers offloaded the pots, he and other individuals drove them to a storage facility also rented by Summers. His activities that day were videotaped. Summers

⁵As previously noted, the ICE agents explained they had no time to lawfully obtain wire taps or to trace any telephone communications between Summers and others involved in the conspiracy.

was then arrested at the tractor-trailer, where pots of marijuana were seized in the back of the trailer. Thus unlike the defendants in Hernandez, who arrived at the location of the tractor-trailer in a separate Ryder truck and merely conversed with one of the individuals in another car before following it down the road, Summers was unquestionably in actual and/or constructive possession of the more than two thousand pounds of marijuana hidden inside the pots on the tractor-trailer. Summers signed for the contents of the tractor-trailer, and he then offloaded and moved the pots before his arrest.⁶ Most important to the issue of sufficient evidence for the trafficking conviction, Summers raises no contention to the contrary on

certiorari.⁷ See State v. Adams, 291 S.C. 132, 352 S.E.2d 483, 486 (1987)[holding a defendant's knowledge and possession may be inferred if the substance was found on premises under his control]; State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637, 639 (Ct. App. 1999)[possession is shown when a defendant has dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it].

Accordingly, any error resulting from the charge on conspiracy is harmless beyond a reasonable doubt, as the evidence overwhelmingly supported the trafficking in marijuana conviction. See State v. Bennett, 328 S.C. 251, 493 S.E.2d 845, 851 (1997)[holding where

⁶In a statement to the police after his arrest, Summers admitted knowledge of the shipment. Summers alleged, however, that his family would be killed if he told the police who set him up in the business.

⁷This is quite understandable, since defense counsel failed to move for a directed verdict of acquittal at trial. (R. 206-07). See State v. Bailey, 298 S.C. 1, 377 S.E.2d 581, 584 (1989)[holding the failure to move for a directed verdict at trial precludes appellate review of the sufficiency of the evidence]; see also State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970)[holding issues not raised to the trial judge in support of the directed verdict motion are not preserved for appellate review].

it was undisputed the victim was stabbed some 70-75 times with a Phillips head screwdriver, any error resulting from the charge regarding the use of hands or fists as a deadly weapon during an armed robbery was harmless beyond a reasonable doubt, as the jury would necessarily have found armed robbery from the use of the Phillips head screwdriver]; see also Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992)[error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained]; State v. Kinner, 301 S.C. 209, 391 S.E.2d 251 (1990) [holding a faulty jury instruction was harmless where there was overwhelming evidence of guilt]; State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003)[holding an insubstantial error not affecting the result of the trial is harmless where guilt is conclusively proven by competent evidence such that no other rational conclusion can be reached].

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

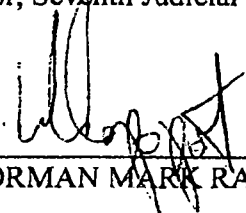
HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

HAROLD W. GOWDY, III
Solicitor, Seventh Judicial Circuit

BY: 

NORMAN MARK RAPOPORT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 3, 2009

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

Appeal From Spartanburg County
Lee S. Alford, Circuit Court Judge

THE STATE,

Respondent,

VS.

WILBUR XAVIER CASTRO SUMMERS,

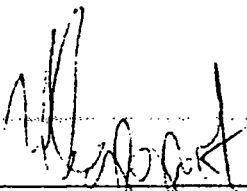
Petitioner.

PROOF OF SERVICE

I, Norman Mark Rapoport, certify that I have served the within Return to Petition for Writ of Certiorari on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, LaNelle Cantey DuRant, Appellate Defender, S.C. Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of August, 2009.


NORMAN MARK RAPOPORT
Senior Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



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Received
1/25/10

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

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FAX (803) 734-1499

January 22, 2010

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JAN 29 2010

**ATTORNEY GENERALS
OFFICE**

Appellate Defender LaNelle Cantey DuRant
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Summers, Wilbur Xavier
2006-GS-42-00740

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of
Certiorari Denied.

s/ Jean H. Toal C.J.

For the Court

January 22, 2010."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

CLERK

DES/dmh

FORM 5

STATE OF SOUTH CAROLINA)

County of Spartanburg)Wilbur Summers #318793)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2010-CP-42-6SD3

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lieber Corr. Inst. P.O. Box 205, Ridgeville
South Carolina, 29472
2. Name and location of Court which imposed sentence Spartanburg County,
Court of General Sessions
3. Name(s) of co-defendant(s) (if any) none
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2006-GS-42-0740 (trafficking marijuana)
(b) _____

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- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
November 16, 2006 (25 years)
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty trial by jury
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. Supreme Court of South Carolina
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. affirmed conviction and sentence
- ii. same as above
- iii. _____
- (c) the date of each such result:
- i. unknown
- ii. January 22, 2010
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. unknown
- ii. unknown
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) n/a
- (b) _____

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- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ineffective assistance of counsel;
- (b) denial of Due Process, 6th & 14th Amendment U.S.
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) see attached issues and memorandum of law
- (b) same as above
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. n/a
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. n/a
- ii. _____
- iii. _____
- iv. _____

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(c) the disposition thereof:

- i. n/a
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. n/a
- ii. _____
- iii. _____
- iv. _____

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

- i. n/a
- ii. _____
- iii. _____
- iv. _____

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

first filing of post conviction relief

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

(a) which grounds have been presented:

- i. n/a
- ii. _____
- iii. _____

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

- i. n/a
- ii. _____
- iii. _____

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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) first filing of post conviction relief

(b) _____

(c) _____

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

(a) your arraignment and plea? _____

(b) your trial, if any? yes

(c) your sentencing? 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. George Trejo, Esquire, & Patricia Anderson, Esquire

Spartanburg County Bar

ii.

same as above

iii.

LaNelle G. Durant, Esquire

SC. Office of Appellate Defense

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

i. trial & sentencing

ii.

iii.

appeal

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

~~vacate sentence and conviction and remand for new trial~~

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

~~no~~

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Dorchseter)

I, Wilbur Summers, 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.

Wilbur Xavier Summers

SWORN to and subscribed before me this 24th day of December, 2010

Sylvia Jones (L.S.)
Notary Public

My Commission Expires: 1/24/2018

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M. HOPE BLACKLEY

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

I, Wilbur Summers, 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.

Wilbur Summers
Applicant

SWORN or affirmed to and subscribed before me this

7th day of December, 2010.

Sylvia Jones
Notary Public

My Commission Expires:

1/24/2013

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

Indict.No. 2006-GS-42-0740

Wilbur Summers -- Petitioner,

-Vs-

State of South Carolina -- Respondent,

MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR POST CONVICTION RELIEF
PURSUANT TO S.C.CODE ANN. §§ 17-27-20 through 160

Respectfully Submitted,

/s/ Wilbur Xavier Summers

Wilbur Summers

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Constitutional Provisions Involved

Fifth Amendment U.S. Constitution;

Sixth Amendment U.S. Constitution;

Fourteenth Amendment U.S. Constitution

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS
)

~~2018-3F-42~~ 6503

Wilbur Summers,

Petitioner,

-v-

State of South Carolina

Respondent,

) MEMORANDUM OF LAW IN SUPPORT OF
) APPLICATION FOR POST CONVICTION
) PURSUANT TO S.C.CODE ANN. §§
17-27-20 through 17-27-160

COMES NOW, Wilbur Summers, pro-se, herein after Petitioner seeking relief in this Honorable Court pursuant to S.C.Code Ann. §§ 17-27-20 through 160; claiming that his rights were violated during trial in a number of ways including but not limited to his Sixth Amendment right to the effective assistance of counsel as well as his Fourteenth Amendment right to due process of law as is protected under the United States Constitution.

Through the issues presented and citations of authorities relied on, Petitioner will show unto this Court his entitlement to the requested relief sought herein.

Respectfully Submitted,

/s/ Wilbur Xavier Summers

Wilbur Summers

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ISSUE (A) WAS APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO APPRISE THE COURT OF THE STATE'S ERRONEOUS MANIPULATION OF THE FACTS PRESENTED BY THE STATE IN THEIR INITIAL BRIEF?

FACTS

Petitioner asserts that he was denied the effective assistance of appellate counsel when appellate counsel failed to apprise the Court of the State's erroneous factual presentation of the facts on appeal. Petitioner asserts that during trial the following colloquy was recorded:

Q. When he made the statement about his -- what could happen to his family, you -- you determined -- you deduced from there that the previously unknown male was actually someone he did not want to name for fear of reprisal to his family, correct?

A. He -- later on, yes, he did say he did not tell the truth, but I did not know, if the truth was about the unknown male, or what the truth was about.

Q. All right. Isn't it true, sir, that what he told you was that he didn't want to disclose the identity of the person that offered to have him set up a pottery ceramic business here in this area because he had now learned that the pottery had marijuana. And, by disclosing that individual's name, it would put his family in jeopardy?

A. Yes

Q. That's what he said, right?

A. Yes

Q. Because the fear that he had for his family came about after he learned, Mr. Summers learned, the pottery had marijuana, right?

A. Yes

See [Tr.p.274, L.20-25, p.275, L.1-20].

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As is seen above when Petitioner was initially arrested he was interviewed at length. Petitioner told the Police he was suppose to receive a "shipment of clay pottery from an individual from Mexico to start a pottery business. Yet, once he (Petitioner) learned from the Police that the pottery shipment contained marijuana encased in some of the pottery he (Petitioner) could not reveal the identity of the individual with whom he was to start the pottery business otherwise his family would suffer severe detriment in Mexico. Petitioner did acknowledge he was to receive a shipment of [clay pottery], but that clay pottery was all he was to receive. Petitioner had no knowledge of the marijuana that was encased in some of the pottery.

On direct appeal the State filed their initial brief making the following unsupported factual claim in the brief to the Court as was recorded:

The State also notes that in his statement to the police after his arrest, Summers admitted his knowledge of the shipment. Summers claimed, however, that an unknown Mexican male approached him at Nacho's and gave him money to open a pottery business. The tractor-trailer was his first shipment from Mexico. Summers then alleged if he told the police the truth, his family would be killed. Summer's knowledge of the shipment, therefore, clearly established his possession of the marijuana to support his conviction for trafficking. (State's Brief on Appeal page 11).

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DISCUSSION

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.E.2d 82 (1985) (to be effective appellate counsel must give assistance of such quality as to make the appellate proceeding fair), accord Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990).

In deciding a claim of ineffective assistance of counsel, the focus is on "fundamental fairness of the proceeding whose result is being challenged". Strickland v. Washington, 466 U.S. 668, 685, 696, 104 S.Ct. 2052, 2063, 2069, 80 L.E.2d 674, 692, 699 (1984). First, the burden of proof is upon the Petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under professional norms. Second, the Petitioner must prove that he was prejudiced by such deficiencies to the extent there being a reasonable probability that but for counsel's errors the result of the proceeding would have been different.

In Evitts v. Lucey, supra, the Court held the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. Id 105 S.Ct. 833-843. In short, the promise of Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.E.2d 811 (1963), that a criminal defendant has a right to counsel on appeal -- like -- the promise of Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.E.2d 799 (1963) that a criminal

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defendant has a right to counsel at trial -- would be a futile gesture unless it comprehended the right to the effective assistance of counsel on appeal as well.

Just as a transcript may by rule or custom be a prerequisite to appellate review, the services of a lawyer will for virtually every layman be necessary to present on appeal in a form suitable for appellate consideration on the merits. See Griffin v. Illinois, 351 U.S. at 20, 76 S.Ct. at 591. Nonetheless, if a state has created appellate courts as a integral part of the system for finally adjudicating the guilt or innocence of a defendant. Griffin v. Illinois, 351 U.S. at 18, the procedures used in deciding appeals must comport with the demands of the Due Process Clause and Equal Protection Clauses of the Constitution. Although an attorney need not advance every argument, regardless of merit, the attorney must be available in preparing and submitting a brief to the appellate court. Swenson v. Bolser, 386 U.S. 258, 87 S.Ct. 996 (1967)(per curiam), and must play the role of an active advocate rather than a mere friend of the court assisting in a detached evaluation of the appellant's claims. See Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), also Entsminger v. Iowa, 386 U.S. 748, 87 S.Ct. 1402 (1967).

In the instant case a stringent review of the State's brief reveals an erroneous manipulation of the facts presented by the State on appeal. Appellate Counsel allowed the Respondent to mislead the Court into believing that Petitioner "admitted he knew there was a shipment of marijuana coming." Furthermore, the

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Respondent mislead the Court by cherry picking the facts surrounding the actual statement Petitioner made to the Police. This surely lead the Court to believe that Petitioner knew there was not only a shipment of marijuana, but also if Petitioner told the truth, i.e. "about the marijuana his family would be killed." To the contrary, Officer Grubs' testimony on cross-examination reveals the truth of the matter, yet appellate counsel allowed the State to rely on an unsupported factual presentation to the Court.

Had appellate counsel filed a reply brief there is more than a reasonable likelihood the result of the appeal would have been different.

For the aforementioned reasons, Petitioner will forever pray that this Court will grant the requested relief of a new trial.

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ISSUE (B) WAS COUNSEL INEFFECTIVE FOR FAILING TO MOTION THE COURT FOR A DIRECTED VERDICT OF ACQUITTAL AT THE END OF THE TRIAL BASED ON THE STATE'S FAILURE TO PROVE ACTUAL OR CONSTRUCTIVE OF POSSESSION OF THE MARIJUANA FILLED CLAY POTTERY SINCE PETITIONER NEVER HAD ACTUAL OR CONSTRUCTIVE POSSESSION OF THE MARIJUANA FILLED POTTERY?

FACTS

In the instant matter the shipment of clay pottery on the tractor-trailer was [allegedly] destined for Petitioner's business. The address for the shipment however was [not] the actual location of Petitioner's business. Instead the tractor-trailer was directed to a restaurant parking lot.

When the pottery arrived in the tractor-trailer, Petitioner was [allegedly] to have signed the bill of lading. Most of the clay pots were unloaded into a van and rental truck. Petitioner was to have unloaded the clay pots along with other individuals and drove the pottery to a storage facility that was rented by Petitioner. It should be noted that none of the pottery that was unloaded into the van and rental truck contained any of the marijuana in question. (emphasis supplied).

The pottery containing the marijuana was never remov[ed] from the tractor-trailer. Instead the clay pottery filled with marijuana was always and completely at all times under the "Officer's" possession, control and constructive dominion.

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raises a suspicion that the accused is guilty. State v. Ballenger, ___ S.C. ___, 454 S.E.2d 355 (Ct.App.1996). In South Carolina, it is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. A material variance between the charge and the proof entitled the defendant to a directed verdict. State v. Gunn, ___ S.C. ___, 437 S.E.2d 75 (1993).

In the instant case the Court could not rule on a motion that was not made by counsel at the closing of evidence. As this Court is well aware, Courts are like well behaved children, they do not answer questions not asked. (emphasis supplied). Clearly, if counsel had moved for a directed verdict there is a reasonable likelihood the trial court would have granted the motion in Petitioner's favor. Furthermore, had counsel of moved for a directed verdict based on the State failure to prove actual or constructive possession there is a reasonable likelihood the result of the appeal would have been different. Petitioner asserts that he was denied the effective assistance of trial counsel when counsel failed to move for a directed verdict at the end of the trial.

For the aforementioned reasons, Petitioner respectfully asks this Court will grant the requested relief of a new trial.

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ISSUE (C) WAS COUNSEL INEFFECTIVE FOR FAILING TO RETAIN AND CALL A HANDWRITING EXPERT TO DETERMINE AND CHALLENGE WHETHER OR NOT PETITIONER ACTUALLY SIGNED THE WAIVER OF RIGHTS FORM?

FACTS

Petitioner asserts that he was denied his Sixth Amendment right to the effective assistance of counsel when counsel failed to retain and call a handwriting expert to challenge the State's assertion that Petitioner signed the waiver form and gave an incriminating statement.

During trial the State called Agent Cory Grubbs ("Grubbs"), who testified that he is a special agent with Immigration and Customs Enforcement in Laredo Texas. (Tr.p.264, L.21-22).

Grubbs further testified that he read Petitioner his Miranda warnings, and subsequently Petitioner [allegedly] signed waiver of his rights and made an incriminating statement to Grubbs.

Petitioner asserts that he advised [both] counsels that he never [signed] any form waiving any rights.

Petitioner asserts that he was denied the effective assistance of counsel when counsel failed to retain and call a handwriting expert to challenge Grubbs' testimony.

This was all the more damaging as during the State's opening summation to the jury, the Solicitor [told] the jury about the alleged post-arrest [alleged] voluntary statement that Petitioner was allegedly to have given. This allowed Grubbs to tailor his testimony. During cross-examination Grubbs gave the exact

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mirrored testimony as presented by the Solicitor. (Tr.p.269, L.20-21). Again counsel failed to at least lodge an objection to the damaging testimony that excluded critical testimony in regards to the post-arrest statement. The testimony was placed before the jury to prove the truth of the matter asserted.

During cross-examination Grubbs was questioned regarding the post-arrest statement. Grubbs simply quoted his previous testimony, that it wasn't until Petitioner had learned the pottery contained marijuana that he was not being truthful about the identity of the unknown male, and that if he told the truth about the identity of the unknown male, they would kill his family in Mexico. Grubbs admitted that that was his complete testimony. (Tr.p.274, L.20-25, p.275, L.22). Counsel further failed to object an move for a mistrial base on the previous statement made by the Solicitor in her opening summation to the jury, and that Grubbs' testimony on direct examination both excluded testimony that Petitioner did not give the alleged post-arrest statement, until after, he learned that the shipment of pottery contained marijuana. The jury could have reasonably inferred from this testimony that Petitioner knew he was receiving marijuana and was admitting that he was guilty, but was quiet to protect his family.

Grubbs was allowed to testify that he advised Petitioner of his rights "in spanish", and that Petitioner chose to proceed in making a voluntary statement, thereby waiving his right to remain silent. (Tr.p.266, L.1-25, p.269, L.1-3).

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Petitioner asserts that prior to trial he informed both trial counsel that he [did not] sign any form waiving his rights. He informed counsels that that was not his handwriting on the Declaration of Rights document, and counsels both failed to challenge the "forged signature".

Counsels should have retained and called a handwriting expert to challenge the signature on the waiver form, and as a result of counsels failure to do so, the form was placed before the jury as a voluntary statement, unchallenged by counsels.

The Sixth and Fourteenth Amendments of the United States Constitution compel every state to provide legal counsel to indigent criminal defendants and in addition, require states to provide appropriate but not unlimited services of experts necessary to a meaningful defense. See Ake v. Oklahoma, 470 U.S. 68 (1985). Indeed, this Court has addressed this issue in the case of Bailey v. State, by stating:

...."Thus, although the State is not required to provide the indigent defendant with unlimited funding, it must insure that the defendant has competent counsel and the services of experts necessary to a meaningful defense: "We recognized long ago that mere access to the courthouse door does not by itself assure a proper functioning of the adversarial process, and that a criminal trial is unfundamentally fair if the State proceeds against an indigent defendant without making certain that he has access to raw materials integral to the building of an effective defense."

....[The Court] has often reaffirmed that fundamental fairness entitles indigent defendants to an adequate opportunity to

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present their claims fairly within the adversary system." See Bailey v. State, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992)(quoting Ake supra).

Here counsels failure to retain and call a handwriting expert denied Petitioner any meaningful adversarial testing. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel and as a result he was denied his Fourteenth Amendment right to a fair trial.

For the aforementioned reasons, Petitioner respectfully prays this Court will grant the requested of a new trial.

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ISSUE (D) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S JURY INSTRUCTIONS THAT IMPERMISSIBLY COMMENTED UPON THE FACTS OF THE CASE THAT WAS TO BE DETERMINED BY THE JURY?

FACTS

During closing argument to the jury the Solicitor made the following argument to the jury; as recorded:

Ms. Ganss: You can infer knowledge from circumstances. And I'll say that you can. In this case, we saw the defendant go take the shipment. And he singed for it. He had the location changed to Nacho's. He is the one who is giving the statement, not "My family is going to be killed, if I tell the truth," but, "Oh a strange man came up to me in a restaurant and gave me two thousand dollars (\$2,000) to start a pottery business." What's that statement? All of that is circumstantial evidence that the Defendant knew.

I'd like to summarize here, just really knowledge, what were talking about. How do you know the Defendant knew? Number one, no one sends one point three to one point seven million dollars' worth of anyone -- anything to someone who doesn't know it's coming. At that level, you're not merely present when you receive it; you're involved. Common sense tells you that. [Tr.p.362, L.9-25, p.363, L.1-2].

The store front, not a business. It's a front. No cash register, no shelves, nothing. Common sense tells you its a front. The business license conveniently gotten before this shipment, no pottery existed on it's own. It was a front for the real business of marijuana. Common sense.

And his statement, we've talked about that statement over and over. Common sense. No one is coming up and getting -- giving him two thousand dollars (\$2,000) and saying, "Go into the pottery business with me." [Tr.p.363, L.11-20].

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Coming directly after the State's closing the Trial Judge made the following statement to the jury during jury instructions; as was recorded:

Actual knowledge of the presence of the marijuana is strong evidence of the Defendant's intent to control its disposition or use.

The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control... [Tr.p.373, L.12-16].

Petitioner asserts that the instructions given by the trial court only served the State's assertion that simply because Petitioner made a statement to the police and that he had just obtained a business license then Petitioner had actual "knowledge" that marijuana was in [some] of the clay pots.

DISCUSSION

Petitioner asserts the direct comment made by the Trial Court during jury instructions directly referred to the facts of the Petitioner's case as presented by the Prosecution's just closing argument. This comment created, in effect, an impermissible judicial comment on the facts of the case that prematurely directed a verdict for the State.

Judicial comments on the facts of a case is prohibited in South Carolina. See South Carolina Constitution Article 5, §17. A trial judge may not instruct the jury regarding what weight should be given certain evidence or even that certain evidence is

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or is not entitled to consideration from them. As the South Carolina Supreme Court said in State v. Hartley, 414 S.E.2d 182 at 183:

A judge shall not charge in respect to matter of fact, but shall declare the law. State v. Bagwell, 23 S.E.2d 244 (1942)(A judge cannot express in his charge, or intimate any opinion as to the weight or sufficiency of testimony without violating the prohibition of the Constitution as to charging on the facts). 75 A Am. Jur.2d Trial §1203, at 693 (1991)(The trial court may not instruct the jury what weight should be given [to the evidence], or even that any particular evidence is or is not entitled to receive weight or consideration from them). State v. Edwards, 120 S.E. 490 (1923)(wherein our Supreme Court held the absence of motive is a mere circumstance to be considered by the jury and rejected an instruction that the absence of motive may raise a reasonable doubt as to the defendant's guilt it was a charge on the facts).

In the case at bar the Court charged the jury that knowledge of the presence of marijuana is strong evidence of the Defendant's [intent] to control its disposition or use. This comment concurred with the State's articulated theory that Petitioner had knowledge that there was marijuana in some of the clay pots simply because Petitioner obtained a business license. (emphasis supplied). This comment by the trial court simply reiterated points stressed in the State's just finished closing argument to the jury.

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This comment would lead a reasonable juror to assume that Petitioner had knowledge of the marijuana simply because he was present while unloading the clay pots; obtained a business license and gave the Police a statement. This comment could only be reasonably interpreted as a judicial endorsement of the prosecutions argument. Proving actual knowledge was critical to the State's case against Petitioner. Since the Court's charge impermissibly skewed the jury's consideration of the facts regarding these issues, Petitioner was prejudiced by the error, and counsel was ineffective for failing to object to the improper comment made by the trial Court during jury instructions.

Petitioner further asserts that his due process rights to a fair trial were violated by the comments of the trial judge. For through the doctrine of substantive due process, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. Whitney v. California, 47 S.Ct. 641 (1927).

The threshold question is whether the comments by the trial court were sufficiently conscience-shocking as to implicate substantive due process protections. Petitioner contends, there were; because the trial court acted intentionally, for purposes that only served the prosecution. Here the issue asserted is one protected by the due process clause, when its violation by the court served a compelling interest, which amounted to abuse of power sufficient to shock the judicial conscience. Lewis v. County of Sacramento, 118 S.Ct. at 1717-18.

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Petitioner asserts that the direct comment made by the trial court was a direct violation of his rights to a fair trial, and that the only purpose served by this was to direct a verdict for the state. Counsel was ineffective for failing to object and ask for a curative instructions. Here counsel's failure to preserve a meritorious issue for appeal fell below the objective standard of reasonableness and amounted to a deficient performance. As there is a reasonable probability that but for this deficiency the results of the trial could have been different.

Counsel's failure to object and preserve the issue for appeal, did amount to a deficient performance that fell below the standard for trial attorneys in a criminal trial, as there is a reasonable probability that but for this error the results of the trial and appeal would have been different, that is a deficiency that undermines confidence in the outcome.

For the aforementioned reasons, Petitioner respectfully prays this Court will grant the requested relief of a new trial.

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CONCLUSION

WHEREFORE, Petitioner believes through the issues presented, citations of authorities relied on that he has shown unto this Honorable Court his entitlement to the requested relief of a new trial.

For the requested relief, Petitioner will forever pray.

Respectfully Submitted,

/s/ Wilbur Xavier Summers

Wilbur Summers

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