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SUPERIOR COURT OF CHATHAM COUNTY
EASTERN JUDICIAL CIRCUIT OF GEORGIA

STATE OF GEORGIA)
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vs.)
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FABIAN KEITH NOTTO)

CASE NO. CR13-2673-J4
POSS/DELIVERY OF C/S WITH
INTENT TO DISTRIBUTE (2);
POSS MARIJUANA WITH INTENT
TO DISTRIBUTE

Transcript of the proceedings heard during the **MOTION HEARING** in the above-styled case at the Chatham County Courthouse, Savannah, Georgia, on the 8th of February, 2016, before **The Honorable Timothy R. Walmsley, Judge**, Superior Court, Eastern Judicial Circuit, State of Georgia.

APPEARANCES:

For the State: **JEREMIAH JOHNSON**
Assistant District Attorney
Savannah, Georgia

For the Defense: **LARRY CHISHOLM**
Attorney at Law
Savannah, Georgia

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1 (NOTE: Defendant entered. Off the record.)

2 THE COURT: All right. We're on on the State of
3 Georgia versus -- is it Notto?

4 THE DEFENDANT: Notto.

5 THE COURT: -- Notto, CR13-2673. There had been a
6 request for an evidentiary hearing that was filed, which
7 does list the motions that are currently pending from the
8 Defense. And I'm going to go ahead and address those on
9 the record, but I do want to address first, sort of out of
10 order, the motion for reconsideration of Defendant's
11 motion to suppress, just so that there is no confusion
12 about it.

13 This case was transferred to me as an OFD case. What
14 that means is that effective January 1st, the case is no
15 longer Judge Abbot's case, it's my case. There was a
16 motion to suppress filed and ruled on prior to January
17 1st, and there was a motion for consideration filed by the
18 Defendant after January 1st, which went to me initially.
19 Pursuant to the Court's protocol for the Major Crimes and
20 other felony divisions, decisions that were rendered by a
21 Judge are their decisions. And so, if there is a request
22 to reconsider, then those matters go back to the Judge
23 that made the original ruling.

24 So I'm entering an order today, just in case we need
25 to make sure that the formalities are followed that

1 transfers the limited issue of the motion for
2 reconsideration to Judge Abbot. Everything else remains
3 the jurisdiction of this Court. So that's in the record,
4 which I think, then, addresses Number Three on Mr.
5 Chisolm's list of motions.

6 MR. CHISOLM: I have one question.

7 THE COURT: Yes?

8 MR. CHISOLM: You do have a pretrial scheduling order
9 in connection with this case and I'm wondering how that
10 piece being lifted out of it affects, if it does at all,
11 the scheduling order.

12 THE COURT: Yeah. Well, without knowing how -- my
13 position on the scheduling order is the scheduling order
14 should establish a frame work. And in this case, if I'm
15 remembering the right case, it being the only case there
16 were some items that needed to be produced in discovery,
17 we needed to get the case moving along and that's why I
18 put that discovery order in place, along with other
19 reasons. But the idea, again, is to create a frame work.
20 For good cause shown, I'll deviate from the deadlines. I
21 mean if there is needs to change some of the deadlines in
22 order to make it fit more into this case, then I'll go
23 ahead and do that.

24 I don't know what the issues are yet, but what I do
25 ask Counsel is if there is an issue with a deadline in the

1 existing scheduling order, let me know what the issue is
2 far enough in advance where it doesn't become a problem
3 and we'll see what we can address.

4 MR. CHISOLM: And I will point out for the record and
5 for the Court's convenience that the Defendant was
6 arrested in October of 2013, and this case has been before
7 the Court literally since 2013. So -- (pause)

8 THE COURT: Well, and I don't know exactly what my
9 reputation is, but I would like to believe it is that if I
10 had my hands on a file, I will move it along diligently.
11 I won't expedite it and we're not going to tread on
12 anybody's rights, but we will go ahead and move the case.
13 So, again, the scheduling order should put us on that
14 path. Hopefully it does.

15 Judge Abbot has a limited portion of the case. I
16 have the rest and we'll address the motions today.

17 MR. CHISOLM: Thank you.

18 THE COURT: All right. The motions that I've got,
19 then, I've got a motion Denno, or not a motion Denno, a
20 Jackson-Denno motion, a motion to suppress statements of
21 the Defendant. There is a response in opposition to the
22 State's motion to introduce evidence of other crimes,
23 wrongs, and acts as a 404(b) on behalf of the State. And
24 then there's this motion for a reconsideration of the
25 motion to suppress. Again, Judge Abbot is going to

1 address that issue. There's a motion to compel or to
2 provide discovery, which has come up before. I thought
3 that the scheduling order probably addressed that and I'll
4 address whatever I need to. And then there's an
5 opposition to the State's notice of intent to impeach with
6 prior convictions. Those are the matters I have listed on
7 the request for evidentiary hearing from the State. Any
8 additional matters?

9 MR. JOHNSON: Not from the State, Your Honor.

10 THE COURT: All right. Mr. Chisolm, any additional
11 matters?

12 MR. CHISOLM: Yes, sir. There was a question raised
13 by the State about the Defendant producing a copy of a CD
14 that we were able to get through a subpoena that involved
15 transmissions by law enforcement officers that provided
16 the basis for my motion for reconsideration. So just on
17 the record, I am producing that to the State, but I would
18 point out to the Court, and just for the record, that this
19 is something that really was in the possession of the
20 police and, therefore, in the possession of the State.
21 But just out of -- for the convenience of the Court and to
22 expedite things, I am presenting now a copy. And I filed
23 a notice of non-production with the Court.

24 Also, I've had a bit of an accident myself in that
25 there was a CD that contained the statement of my -- the

1 statement of my Defendant that was a part of the
2 statements that were made by my client to the police, when
3 at some point, kept going in and out of the courthouse or
4 going into the jail, my CD was wiped. So I don't have the
5 ability if that becomes necessary today to impeach the
6 officer with that evidence. I don't think that that's
7 going to be necessary. And the State has also agreed to
8 provide a copy of that to me as well, but I just wanted
9 the Court to be aware that I do not have that today and I
10 hope that that's not going to be an issue. I don't think
11 that it will be.

12 THE COURT: Okay. The statement that's addressed in
13 the Jackson-Denno, is that a video and audio statement?

14 MR. JOHNSON: I believe it's an audio.

15 THE COURT: Just audio?

16 MR. CHISOLM: That was a video.

17 MR. JOHNSON: It was a video?

18 MR. CHISOLM: But there is also an assertion or
19 allegation by the police officer that there were
20 additional statements made after the video was turned off
21 and I'm not sure if we're addressing that today or not,
22 but I mean --

23 MR. JOHNSON: I mean I --

24 MR. CHISOLM: -- I don't see a problem with the
25 motion.

1 MR. JOHNSON: -- was -- today I just assumed that we
2 would address the voluntariness of it, whether he knew and
3 understood his rights, basically, you know --

4 THE COURT: A Jackson-Denno is --

5 MR. JOHNSON: -- a straight Jackson-Denno.

6 THE COURT: Okay.

7 MR. CHISOLM: As to the -- we'll go ahead.

8 MR. JOHNSON: Yeah, sure.

9 THE COURT: And I'll tell you how I have proceeded
10 before with these videos and audios. Depending on what
11 y'all feel you need to present here today, and I'm not
12 limiting evidence in any way, but if we don't need to play
13 it today, what I would suggest or what I would be open to
14 would be a stipulation that whatever is the statement, the
15 recorded statement, be made and the statement, which would
16 give the Court, then, the opportunity to go and take a
17 look at it when I have an opportunity to sit down and
18 actually either watch it or listen to it, taking into
19 consideration the arguments that are made during this
20 hearing. If there is no objection doing it that way, I'm
21 happy to do it that way. That also saves a lot of time
22 for everybody. Okay? I understand where we are, though.

23 Why don't we go ahead and let's start off, then, with
24 the Jackson-Denno?

25 MR. JOHNSON: The State would call Chase Cogswell

1 (phonetic).

2 (NOTE: Witness sworn.)

3 CHASE COGSWELL, HAVING BEEN DULY SWORN, WAS CALLED AS A WITNESS
4 BY THE STATE AND TESTIFIED AS FOLLOWS:

5 DIRECT EXAMINATION BY MR. JOHNSON:

6 Q Would you please state your name for the record?

7 A Chase Cogswell.

8 Q Will you please spell your last name?

9 A C-O-G-S-W-E-L-L.

10 Q And how are you employed?

11 A I work for the Savannah-Chatham Police. I'm with the
12 U.S. Marshal's Fugitive Task Force. I was at CNT at the time
13 of this incident.

14 Q Okay. And how long -- are you POST certified?

15 A Yes, I am.

16 Q And how long have you been POST-certified?

17 A Since 2010.

18 Q And has all your time in the Police Force been here
19 in Chatham County?

20 A Yes.

21 Q Were you working in that capacity on the 8th day of
22 October, 2013, and is that the day that you interviewed Mr.
23 Notto?

24 A Yes.

25 Q All right. Would you please tell us about the

1 circumstances surrounding that interview?

2 A It was conducted at CNT Headquarters. He was read
3 his rights. He seemed to totally understand his rights. He
4 confirmed that he did understand his rights and it was an audio
5 and video-recorded interview and -- (pause)

6 Q Okay. Well, he was arrested earlier that day;
7 correct?

8 A Yes.

9 Q Did you go to the scene of that arrest?

10 A Yes, I did.

11 Q And was he -- he was placed into custody at that
12 scene?

13 A Yes.

14 Q Who transported him to CNT?

15 A I believe it was the Metro Patrol Unit.

16 Q And you weren't wearing the uniform, were you?

17 A No, I wasn't.

18 Q You weren't in a marked squad car?

19 A No.

20 Q Did you identify yourself to Mr. Notto as a police
21 officer?

22 A Yes, I did. I didn't make the initial contact
23 with him, March -- Metro Patrol units did.

24 Q Okay.

25 A I came up after he was already placed in custody and

1 introduced myself to him.

2 Q So once he's placed in custody, you approached him
3 and you identified yourself?

4 A Yes.

5 Q All right. And was it requested that he go to CNT as
6 opposed to the CCDC? How did he end up -- I guess what I'm
7 asking: How did he end up at CNT for an interview as opposed
8 to the Chatham County Detention Center?

9 A That's where we conduct our interviews, because there
10 is audio and video recording capabilities, and I wanted to
11 speak with him about what had happened that day.

12 Q And what kind of a room? Did you take him into a
13 room?

14 A Yes.

15 Q And could you describe that room? Just it's a larger
16 room, is it cramped, confined, are there bars on the window or
17 it just a normal --

18 A No, just a normal room with a door and I believe some
19 table and some chairs.

20 Q Oh, so it's like a conference room?

21 A Yes.

22 Q All right. And you read him his right -- you told us
23 that you read him his rights. What rights are those?

24 A I don't have the rights form with me. I can go
25 through and guess, but when I do it, I just read directly off

1 the paper so that there is no question.

2 Q All right. Well --

3 A Do you want me to go ahead --

4 Q Well, have you -- you have done it before; correct?

5 A I've done it a lot of times, yes, sir.

6 Q All right. Well, let's go from your memory as best
7 you can.

8 A Okay. You have the right to remain silent. Anything
9 you say can and will be used against you in a court of law.
10 You have the right to an attorney. If you cannot afford an
11 attorney, one will be appointed to you. You have the right to
12 refuse, to stop answering questions at any time, once you've
13 already begun as well.

14 Q All right.

15 A And I ask: Do you understand these rights as they
16 were read to you?

17 Q And he signs that an initials it?

18 A Yes.

19 Q Did he appear to be intoxicated?

20 A No.

21 Q All right. Did you have access to his information so
22 far as how old he is?

23 A Yes.

24 Q And he's an adult?

25 A Yes, he is.

1 Q Given the records that you had access to, was he --
2 had he ever had prior interaction with the police?

3 A Yes, he had.

4 Q He had prior felony convictions?

5 A Yes.

6 Q All right. And did he agree to speak with you?

7 A He did.

8 Q All right. There is a co-defendant, a Mr. Johnson,
9 did he agree to speak with you?

10 A He did not. He went through, I read him his rights,
11 he also signed the form, but he refused to speak with me.

12 Q And you immediately terminated that interview of him?

13 A Yes.

14 Q Okay. So as far as you know, all the statements
15 being made appeared to be voluntary and he understood that he
16 could stop speaking to you at any time if he wished?

17 A Yes.

18 Q Okay. And you indicated that this was vol -- or that
19 this was audio and video recorded?

20 A Correct.

21 Q Were all of the statements that Mr. Notto made that
22 day audio and video recorded?

23 A No, sir.

24 Q All right. Could you tell us about how that
25 occurred?

1 A Yeah. After I originally stopped speaking with him,
2 I felt like the interview was over. He denied any knowledge of
3 any drugs. He said, "If there was anything found, it must have
4 been planted there," and he said that he didn't know anything
5 about drug-dealing, didn't know about the scale that was in the
6 vehicle that he uses. He -- I left. I said, "Okay. The
7 interview is over," and went and shut off the DVD player and
8 was calling him a ride to the jail, and he called out to me
9 from in the interview room. I went back to him to see -- to
10 see what he needed and he said that he is one of the main
11 Molly, which is the drug that we found on him, distributors in
12 the area. He expressed an interest in working with me in order
13 to help to mitigate his charges. He basically said that he's
14 -- he's the main guy, he goes to Atlanta and gets seven ounces
15 of Molly at the time and brings it back.

16 Q What was the time period in between when you
17 terminated the interview and he called you back into the room?

18 A Minutes, not long.

19 MR. CHISOLM: You said minutes?

20 A Yes.

21 Q And when you were going back into that room, did you
22 anticipate that he was going to make any type of confession or
23 admissions?

24 A No. People would regularly call us back because they
25 need to use the bathroom or want a drink of water. So I was

1 just going to see. I figured it was just some kind of human
2 need and not what I heard.

3 MR. JOHNSON: All right. That's all the questions I
4 have at this time, Your Honor.

5 THE COURT: Mr. Chisolm?

6 CROSS EXAMINATION BY MR. CHISOLM:

7 Q Directing your attention back to when this initiated,
8 you said you just came up on the scene after he was taken into
9 custody, but that's not correct. You were also involved in
10 searching his vehicle; isn't that correct?

11 A Yes.

12 Q And you were also involved in retrieving evidence on
13 the scene; isn't that correct?

14 A Some of the evidence in the vehicle, the officers had
15 already gotten the narcotics off of it.

16 Q Okay. And isn't it true that he was on the scene
17 sitting in the vehicle for quite some time before he was taken
18 down to Headquarters? Isn't that correct?

19 A Sitting in the police vehicle?

20 Q Correct.

21 A I'm not sure exactly how long it was. It wasn't --
22 it wasn't a extremely extended amount of time, a matter of, I
23 would say, maybe ten minutes, guessing from my memory.

24 Q And he was taken into custody and essentially
25 arrested immediately after being taken out of the vehicle;

1 isn't that correct?

2 A Yes.

3 Q And so when you got over to CNT Headquarters, how
4 long did you have to wait until he actually arrived at CNT?

5 A I -- it wasn't long. I don't -- I don't recall the
6 amount of minutes, but it wasn't long; minutes.

7 Q And then once you -- he got there, did he immediately
8 go into the room or was there some time for you all to prepare
9 for the interview and all of that?

10 A Just enough time for me to get a DVD and a rights
11 form prepared.

12 Q Okay. Now, is it true that you spoke to Mr. Johnson
13 before you spoke to Mr. Notto?

14 A I don't recall who I spoke to first, but that
15 interview was very short.

16 Q And so Mr. Notto was waiting in the interview room
17 during that time period while you were interviewing him or --

18 A I -- I can check my report and see if I notate which
19 one I interviewed first. Do you want me to do that, because I
20 don't remember. (Reviewed document.) Yeah, it looks like Mr.
21 Johnson was first, the way my report is written. So, yes,
22 correct.

23 Q Now, you indicated that you advised him of his
24 Constitutional rights by a form. And did you maintain that
25 form?

1 A Yes.

2 Q And he signed indicating that he understood it?

3 A Yes, sir.

4 Q And after that statement that was recorded, you
5 indicated that you -- did you immediately leave the room?

6 A Yes. When -- once the interview, I thought the
7 interview was finished, I left the room and went to turn off
8 the DVD.

9 Q Okay. And where was the mechanism that controlled
10 the on and off for the DVD?

11 A It's about fifteen feet away, down the hall --

12 Q Okay.

13 A -- in another room.

14 Q Okay. And so after you -- the first interview was
15 over, you had the opportunity to turn the video back on; isn't
16 that true?

17 A Well, he started speaking with me, so I would have --
18 it -- I could have left and gone and gotten a new DVD, because
19 once we finish with one DVD, there is a process so that it will
20 play on all DVD players. So I would have had to go across to
21 another building, get a new DVD and then -- and then come back
22 over. Yes, I could have done that, but I didn't. I just -- he
23 wanted to speak with me and so I spoke with him then.

24 Q Okay. And then once you ascertained that he wanted
25 to, according to you, speak to him about -- speak to you about

1 the facts of the case or had more information about the facts
2 of the case, you could have turned the DVD back on, couldn't
3 you?

4 A If I had walked to the other building, gotten a new
5 DVD and come back, yes. It's not as simple as just go in there
6 and pushing the button, but yes, I could have -- I could --

7 Q You still --

8 A -- have gone and gotten a new one, yes.

9 Q You still had the other DVD, didn't you?

10 A I'm sorry?

11 Q You still had the other DVD, didn't you?

12 A The original one that we still have?

13 Q Yeah.

14 A Yes.

15 Q And then you could have put that in, couldn't you?

16 A No, I couldn't. You can't use the same one. The way
17 our recording system is, you have to use -- once you turn it
18 off, you have to put in a new DVD or it will -- it will mess it
19 up and it won't play on all DVD players.

20 Q Or you can take the same one and put it back in and
21 it will record again; correct?

22 A The same DVD?

23 Q Uh-huh.

24 A No.

25 Q All right. You indicated that there was some

1 discussion about him being used as a C.I. Did you ever sign
2 him up or present him with any sort of paperwork to suggest
3 that, you know, he would provide information to you?

4 A No, sir.

5 Q And so there is nothing to corroborate that this
6 alleged second statement took place other than your own
7 testimony here today?

8 A I would have to speak with Agent Cour. I don't know
9 if he was in the room. Or you can watch the interview taking
10 place on a screen. I don't know if he was in there or not.
11 I'd have to speak to him.

12 Q How is his name spelled?

13 A Cour, C-O-U-R.

14 Q Okay. And you did not indicate anywhere in your
15 police report that there was an Agent Cour anywhere around when
16 this took place; isn't that true?

17 A I did indicate that. His name is in my report.

18 Q In the report that you submitted on October 8th?

19 A Let me find where it was. (Reviewed document)

20 (Reading) Agents Cour, Clayton and I set up for stationary
21 surveillance at 1903 Archer Street. That's the -- that's when
22 the case began, on October 8th.

23 Q Yeah, but I'm specifically speaking in reference to
24 the interview of my client.

25 A I -- I did not put an update and say Agent Cour

1 observed the interview. That's -- I'm not sure if he was there
2 or not. I'd have to speak to him.

3 Q Were there any other agents present during the
4 interview?

5 A I -- I don't know, sir. I didn't indicate it in my
6 report. Nobody was present with me in the room, but we -- we
7 generally have an agent in the -- in the other room so they can
8 observe what's taking place, but I didn't notate it in my
9 report.

10 Q So it would be pretty significant, according to you,
11 you said my client indicated to you that he was going back and
12 forth to Atlanta and he was some sort of leader or something
13 like that, and that would not be important enough for other
14 officers to write a report or to record or anything like that?

15 A I wish it had been recorded, but it wasn't. So --

16 Q And --

17 A -- but the circumstances dictated that it didn't get
18 recorded, unfortunately.

19 Q And you had no interest in using him to get higher
20 objectives as far drug trafficking or sales or anything like
21 that is concerned?

22 A No, sir. Based on the situation, it would have been
23 difficult to work with him.

24 Q And how long did he remain in the room after the
25 initial DVD was turned off?

1 A Are we talking about --

2 Q In the interview room --

3 A Yeah.

4 Q -- where -- after the first interview, how long did
5 he remain after that?

6 A Well, long enough for me to go in and speak with him
7 at that time and then for the paddy wagon to come and pick him
8 up. I don't know the exact amount of time.

9 Q At any point, was there any discussion about him
10 having a lawyer, particularly since you were talk -- you say
11 you were talking to him about potentially being used as a C.I.
12 or informant or something like that? That usually requires
13 some sort of representation. Was there discussion about a
14 lawyer?

15 A No, sir. That's totally up to the client if they
16 want representation, or the suspect, rather.

17 Q Well, do you have authority on your own to make those
18 decisions without talking to an Assistant D.A. and the Defense
19 Attorney?

20 A No, but I have the decision to not move forward with
21 somebody at all if I believe that they shouldn't be used as an
22 informant. I have the decision -- I have the authority to make
23 that, but before I actually start working with somebody, I
24 consult with the Assistant District Attorney.

25 MR. CHISOLM: I have no further questions.

1 THE COURT: Any Redirect?

2 MR. JOHNSON: Just very briefly.

3 REDIRECT EXAMINATION BY MR. JOHNSON:

4 Q I don't even know that it's pertinent, but do you
5 have familiarity with DVDs and burning information to DVDs?

6 A Yes.

7 Q And you know there are DVDs that are writeable and
8 then DVDs that are re-writable --

9 A Yes.

10 Q -- one only being able to be used once before it
11 closes out the information and one that can either have
12 information added to it or which can be written over?

13 A Yes.

14 Q Did you make him aware of the nature of the charges
15 that he might be facing?

16 A Yes.

17 MR. JOHNSON: And that's all the questions that I
18 have.

19 THE COURT: Anything else?

20 MR. CHISOLM: Nothing from me.

21 THE COURT: Thank you. You may step down.

22 THE WITNESS: Thank you, Your Honor.

23 THE COURT: Any additional evidence on the motion to
24 suppress statements?

25 MR. JOHNSON: No, Your Honor.

1 THE COURT: All right. From an evidentiary
2 standpoint on the Jackson-Denno, Mr. Chisolm, anything?

3 MR. CHISOLM: Nothing further, Your Honor.

4 THE COURT: All right. As to how the Court would
5 proceed on the motion to suppress statements, does either
6 party want any additional time to provide cases to the
7 Court? If not, I'll just take the matter as ripe and get
8 an order out.

9 MR. CHISOLM: On, I'm sorry, on the Jackson-Denno?

10 THE COURT: On the Jackson-Denno.

11 MR. JOHNSON: No, Your Honor.

12 THE COURT: All right. That is the first motion I
13 have here. Let's see. I've also got a 404(b).

14 MR. CHISOLM: Your Honor, I'm sorry. I do. May I
15 ask the Court for a couple of days just to review the DVD
16 just to -- once it's provided to me? And I'll certainly
17 let your office know as soon as I've had an opportunity to
18 do that.

19 THE COURT: All right. If we could maybe check back
20 in ten days and let me know where we are, just so I know
21 when the matter is actually ripe? Because the way I'm
22 going to note it here is there's going to be an open item.
23 Until I hear back that there's nothing else the Court
24 needs to expect, I won't know to get an order out.

25 MR. CHISOLM: Thank you, sir.

1 THE COURT: All right. I've got a 404(b). It's the
2 State's motion?

3 MR. JOHNSON: Yes, Your Honor. We have two previous
4 convictions that we believe should be admissible as 404(b)
5 for the purpose of intent. Mr. Notto is charged with a
6 possession of a controlled substance with intent to
7 distribute as well as possession of marijuana with intent
8 to distribute. He has a CR09-0506, possession of a
9 controlled substance, of which he was convict -- the
10 arrest date was March 18, 2005. He was convicted on
11 October 8th, 2009.

12 Let's briefly go over the facts of that. That was an
13 Officer or a Trooper Strickland, who was on 516 westbound,
14 and Mr. Notto was pulled over in a Buick LeSabre doing
15 seventy-five in a fifty-five. The nuts and bolts of it is
16 basically when he got pulled over, he ran his license.
17 His license was suspended. He pulled him out of the car.
18 He searched him incident of arrest -- incident to the
19 arrest where he was driving on a suspended license. He
20 had a bag of a white powdery substance in his breast
21 pocket, which weighed at 10.24 grams and tested positive
22 for cocaine.

23 And, Your Honor, the State would point to U.S. v.
24 Butler of the Eleventh Circuit, that basically, you know,
25 held that: (Reading) We conclude that the logical

1 extension of our current jurisprudence is to admit
2 evidence of prior personal drug use to prove intent in a
3 subsequent prosecution of distribution of narcotics. I
4 mean, additionally, just the fact that he would get a
5 simple possession of a controlled substance on 10.24
6 grams. It's interesting, to say the least.

7 Your Honor, the second is a sale of a controlled
8 substance and a possession with intent to distribute a
9 controlled substance. That is from June 29th, 1996, and
10 again on July 2nd, 1996, and that was CR96-1893, for which
11 he pled guilty on April 14th, 1997. Essentially, agents
12 with CNT got a call from the C.I., who indicated they were
13 able to purchase narcotics from an individual that was
14 known as Big Dude in the Liberty City area. They, on that
15 first date of June 29th, 1996, basically had the C.I.
16 place a phone call to the individual that they knew as Big
17 Dude at that time and later learned to be named Fabian
18 Keith Notto, went and, you know, purchased crack cocaine
19 at that time, I believe it was four or five rocks, using
20 the C.I. They gave the C.I. money, went and watched, you
21 know, searched him, and watched him go to the house. He
22 came out and provided the rock cocaine as well as a pager
23 number to a C -- or to one of the agents, Agent Toff
24 (phonetic), who is still with Savannah-Chatham Metro
25 Police Department.

1 Some days later, Sergeant Toff made use of that pager
2 number and paged Mr. Notto and Notto called him back.
3 They set up to another sale of cocaine, at which time they
4 went -- I guess Agent Notto -- or Agent Toff went and made
5 the transaction with Mr. Notto. The takedown was given.
6 Mr. Notto was found in possession of the prerecorded funds
7 as well as an additional amount of controlled substance,
8 which resulted in the sale of controlled substance as well
9 as the possession with intent because he had the --
10 actually there was substance on him at that time.

11 I mean, basically, this all goes to intent. He's
12 pled not guilty in this case, which merely places intent
13 into the forefront of the question the jury is going to
14 have ask. I believe that the sale of controlled
15 substances is so similar that it really speaks to that
16 question of intent when you have -- well, basically what
17 you have is a possession of a large number of narcotics on
18 his person, showing that he did have intent to distribute
19 those.

20 I believe the argument that came forth that I saw
21 was, essentially, that they were too old. There is no
22 ten-year prohibition. That's on impeachment. Basically,
23 it would just go to the Court to look at the different
24 factors as to how relevant it is, whether the conduct can
25 be proven, which of course we have certified copies, and

1 whether it is going to be more probative than prejudicial,
2 which I believe it is.

3 THE COURT: Mr. Chisolm?

4 MR. CHISOLM: I'm just, to correct the record -- of
5 the Defendant's response in connection with the age of the
6 prior convictions, was filed in connection with the
7 impeachment notice and not in connection with the 404(b),
8 but he does raise an interesting point, but I'll look into
9 that in a moment. But the first thing that I'd like to
10 say is that this motion or this notice has been pending
11 for quite some time, and the Defendant has been quite
12 specific in asking for evidence to be presented to the
13 Court and not just recitation of facts based on
14 assumptions by the State in terms of what the evidence
15 would be.

16 And there has been a scheduling order in place as far
17 as this case is concerned and there has not been any sort
18 of response that has been given in writing in connection
19 with its objection to the motion to introduce evidence of
20 similar wrongs. We have not been provided with any police
21 reports or witness lists in connection with those similar
22 wrongs.

23 And there is nothing in front of the Court today
24 other than assertions by the State about what it expects
25 to show as opposed to having any real evidence. But the

1 burden that the State has is to show why this evidence is
2 relevant, and I will speak in reference to the one case in
3 which he cited from 1996. That is about twenty years old
4 and there is an issue of whether or not that the probative
5 value of something that happened twenty years ago is --
6 outweighs the prejudicial value of bringing in this, my
7 client's past. I think that places more of a burden on
8 the State to show specific reasons why this particular
9 evidence would be relevant and germane to this particular
10 case and would outweigh the prejudicial effect that
11 putting that particular evidence into this case would have
12 as to my client. There has been no specific similarity
13 between that particular incident and this incident that
14 places -- that makes the fact that that incident that took
15 place twenty years ago tends to show that something
16 happened in this case twenty years later. And there's not
17 been any statement as to similarity and other indicia of
18 reliable reasons why that evidence should be placed in
19 this particular case.

20 I'd also point out in terms of lack of similarity,
21 none of the prior two cases, whether or not it's the
22 twenty-year old case or the more recent case, involves
23 Molly or MDNA or anything that is associated or
24 attributable to this particular case. And that's clearly
25 a lack of similarity when you talk about a significant

1 difference in terms of the type of drug that was allegedly
2 found in this case versus the drugs that were a part of
3 the Defendant's prior convictions.

4 I would also point out that there is no evidence that
5 my client was selling anything in this particular case.
6 And one of the cases that he referenced had to do with
7 sale. This case is simply a traffic stop where the police
8 came up to his truck and allegedly pulled him out of the
9 vehicle and then found a bag of MD -- a bag of bath salts
10 and marijuana allegedly at his feet at the vehicle. So
11 there's not a question about intending to do anything with
12 the vehicle that has to -- that these prior convictions
13 tend to show or to establish. And the issue is whether or
14 not the client essentially possessed the substance in
15 question at the time in question. And there's not a whole
16 lot of probative value that can be gained from going back
17 twenty years in one case and then going back to another
18 cocaine case to determine whether or not -- what my client
19 was going to do or not going to do as it pertains to
20 October 8th, 2013.

21 So, essentially, the Defendant's argument is that the
22 State has not met its burden as to show that there was
23 sufficient similarities between the prior incidences to
24 the current incidences to assure the Court that there is
25 sufficient probative value to outweigh the prejudice as

1 far as these two prior convictions are concerned. And the
2 State has not met its burden with stating with specificity
3 which evidence or how this evidence pertains, and then the
4 State has not provided the real hard core evidence to the
5 Court in terms of the testimony and the exact statement of
6 these witnesses, not even tendered any sort of reports or
7 anything to the Court. It's just rank arguments made by
8 Counsel as to what the circumstances of those cases are.

9 And then, to make it worse, the Defendant had not
10 been placed on any notice as to the specifics of those
11 incidences prior to the hearing today. So the State has
12 not met its burden, Your Honor.

13 MR. JOHNSON: Your Honor, the specifics are in the
14 discovery that has been provided to Counsel. That gives
15 the notice of motion to introduce evidence. Otherwise, it
16 wouldn't even have known to file anything against them.

17 There is also copies of the convictions that are in
18 the discovery that has been provided. Obviously, on the
19 day, as we reach a closer date, we will be providing
20 certified copies of those convictions, which I believe the
21 prong is to whether or not there will be sufficient
22 evidence to lay the foundation that that conduct actually
23 occurred and we will be calling those witnesses, which
24 have been named in the notice to introduce evidence of
25 other crimes involved.

1 I would additionally point to the United States. v.
2 Lampley (phonetic) as far as passage of time goes as well
3 as the nature of the particular controlled substance
4 involved. In that case, it revolved around cocaine
5 distribution where they allowed in -- and I think that
6 occurred like in the early nineties -- and they allowed in
7 evidence that he had been distributing marijuana with one
8 of the co-defendants in the 1970s.

9 THE COURT: All right. I'm trying to find the notice
10 that came out. My position on notice with regard to
11 404(b) cases that are -- they basically say that a proffer
12 is sufficient, and I think that it's true, depending on
13 the complexity and the detail that the Court needs to get
14 into when evaluating the 404(b) evidence. It's not clear
15 to me what has been produced other than it's been produced
16 in discovery. Did the notice actually say, "Here is what
17 we are going to be producing"?

18 MR. JOHNSON: Yes, Your Honor.

19 THE COURT: When was it filed? Again, this is a new
20 file to me, so I just don't know where it is. What was
21 the date?

22 MR. JOHNSON: It was filed on March 13 of 2014.

23 THE COURT: Okay. I haven't gotten back that far,
24 which explains it. It's buried in, maybe -- all right.
25 It's in the demand for -- it's March 13, 2014. It's just

1 in the system as State's Demand For Discovery. So it's
2 included in there.

3 MR. CHISOLM: Your Honor, and perhaps the Court is
4 looking at something different than what I was provided by
5 prior Counsel, and that could be the discrepancy, but in
6 the items that were provided to me, there is certified
7 copies of convictions, but there are no police reports,
8 there is no list of witnesses, nothing that indicates the
9 circumstances of the actual incidents themselves other
10 than the copies of convictions, which would have no
11 factual basis for what happened. It would just have the
12 fact that the person was convicted of those particular
13 charges.

14 THE COURT: Okay. Does anybody have it? Is there a
15 copy of it?

16 MR. JOHNSON: I think I have a copy. I mean if we
17 provide -- I mean I'm happy to --

18 THE COURT: It's, well, though, if it's --

19 MR. CHISOLM: (Inaudible)

20 MR. JOHNSON: -- produce another copy to them.

21 THE COURT: -- in the discovery, it's in the
22 discovery. I mean if it's there, it's there. If it's
23 part of the record, that's my question, is I need to take
24 a look at it. So it's in that discovery disclosure --

25 MR. JOHNSON: Yes, sir.

1 THE COURT: -- from March of 2014?

2 MR. JOHNSON: Yes, sir.

3 THE COURT: How far into it?

4 MR. JOHNSON: (Reviewed document) I have it on Page
5 9.

6 THE COURT: Okay.

7 MR. JOHNSON: Eleven, Page 11.

8 THE COURT: I've got it. There is a notice of
9 motion. I think there is a motion to introduce evidence
10 of other crimes, wrongs or acts. (Pause) I've got
11 3/18/05, Conviction CR09-0506. (Pause)

12 So what is the State intending to introduce, just the
13 certified conviction?

14 MR. JOHNSON: Oh, no. We'd certainly be bringing
15 Sergeant Toff. We would bring Sergeant Toff and Trooper
16 Strickland.

17 THE COURT: Okay. So those individuals who are -- is
18 Strickland even listed here? Strickland is. So I can see
19 Toff and Strickland.

20 MR. JOHNSON: Sergeant Toff, and Sergeant Toff is
21 like the in charge of property over at SCMPD now. So he
22 is available.

23 THE COURT: All right. I'll go ahead and take a look
24 at what is there, now that I've found the notice. And
25 these are older convictions and that is not dispositive of

1 the issue, but it may have some bearing on the Court's
2 determination of probative value. Now, wrapped into that
3 is intent, and we are talking about a specific crime,
4 which I think at least for 404(b) purposes, does cover
5 quite a bit. There are a number of cases out there
6 addressing specific intent crimes and how they are
7 supposed to be evaluated, at least Eleventh Circuit cases
8 that are out there. So I am going to start there, but I
9 do have some question on whether that's enough to actually
10 get us back to these older convictions. So that's the
11 issue I'm going to evaluate.

12 It appears that in the discovery from 2014, at least
13 those witnesses Toff and Strickland are in there. If the
14 State intends to call any additional witnesses, I do ask
15 that that notice be supplemented at least ten days prior
16 to trial.

17 MR. JOHNSON: And I would just point out on the CR09
18 and the 2005, he was -- he didn't get out of prison until
19 2013. I mean --

20 THE COURT: Well, I --

21 MR. JOHNSON: -- some of the age of that, I mean, it
22 has, I feel like is less relevant that he even had the
23 capacity to commit any new crimes or --

24 THE COURT: Yeah, the age again, and that's the same
25 evaluation as it would be under the prejudice side and

1 impeachment, but it is something I think this Court needs
2 to take a look at now.

3 MR. JOHNSON: (Inaudible)

4 THE COURT: Again, I don't think it's dispositive.
5 My point is simply the intent issue, specific intent may
6 override everything and that could answer the question for
7 me. I don't know. And whether or not in the context of
8 the drug cases, whether or not these are close enough to
9 get the State to where it wants to be. I also need to
10 take a look at that.

11 I'll take the matter under advisement and get a
12 ruling out, but I am going to order that at least ten days
13 prior to trial that the notice be supplemented with any
14 witnesses beyond Strickland and Toff that the State would
15 intend to present in order to put up this evidence if the
16 Court permits it.

17 Okay. Any questions on that from the State?

18 MR. JOHNSON: No, Your Honor.

19 THE COURT: From the Defense?

20 MR. CHISOLM: Your Honor, do we have the opportunity
21 to provide a memo to the Court if --

22 THE COURT: Why don't we go ahead and do this? Sure.
23 Let's go twenty days and twenty days, okay? Twenty days
24 for the -- well, technically, it's the State's motion. If
25 the State wishes to present any additional argument to the

1 Court within twenty days and then the Defense would have
2 twenty days after that to go ahead and respond.

3 MR. JOHNSON: Yes, sir.

4 THE COURT: Okay. All right. Motion for
5 reconsideration, I'm going to go ahead and file with the
6 Clerk the order transferring the motion for
7 reconsideration to Judge Abbot, and it's right there.
8 There is a motion to compel to provide certain discovery
9 and I was, if I'm remembering this case correctly, there
10 had been an announcement at a prior, maybe back in
11 January, that there was a motion to compel out there. Was
12 that this case?

13 MR. CHISOLM: Yes, it was.

14 THE COURT: And I put the scheduling order --

15 MR. CHISOLM: It was.

16 THE COURT: -- in place hopefully to address whatever
17 the discovery issues were.

18 MR. CHISOLM: That's correct.

19 THE COURT: So do I still have issues I need to
20 address with regard to the motion to compel?

21 MR. CHISOLM: Yes, we've not been provided with
22 anything. And after we filed the motions to compel under
23 the prior Prosecutor, not the current Assistant District
24 Attorney, then that could be part of the problem in this
25 case. There has been a lot of turn-over in terms of who

1 has been representing the State. But on October 27th, we
2 filed a statement as clarifying what we were missing
3 because there was some question by the State in terms of
4 what it was that we didn't have and we didn't get a
5 response to that. There is one error in that document. I
6 did say that we -- I meant to say "did not disclose the
7 identity of the informant," and so that's still an issue
8 that's on the table as well. But we've received nothing
9 from the State in response to any of these.

10 THE COURT: Okay. Let me back up. I thought we had
11 put a scheduling order in place with this case.

12 MR. CHISOLM: I have a copy of one that was filed on
13 January 6th.

14 THE COURT: Okay. That's good. I just don't see it
15 in my file.

16 MR. JOHNSON: The scheduling order says provide
17 discovery and my understanding is that that's been done.
18 I don't have the things he's asking for.

19 THE COURT: Okay. Well, and that would be a separate
20 issue. I mean certain information and Brady material and
21 other matters that the State would have over. If
22 something doesn't exist, then it doesn't exist. Or if
23 it's not in possession of the State, then the State
24 doesn't have to turn it over. So what are we actually
25 talking about?

1 MR. CHISOLM: Just going through my document, then we
2 can -- there were a number of reports, police reports, in
3 reference to co-defendant and alleged co-conspirators as
4 far as this case is concerned, that I did Open Records
5 request asking the various law agencies to turn over those
6 reports. They provided partial summaries of the
7 investigations, but they would not turn over the reports
8 pertinent to any co-defendants under the argument that
9 those were pending investigations and we weren't entitled
10 to that information. And it has been asserted, and we
11 discovered this, after the motion to suppress hearing was
12 filed, that there were assertions made in the media by the
13 Counter Narcotics Team that this was a larger
14 investigation and that there were other parties who were
15 arrested on the same day or the next day. That will be
16 Frank Notto and two other suspects who are allegedly a
17 part of this conspiracy or ring that was taken down by
18 CNT.

19 So those police reports would clearly be under the
20 control of the State insofar as those are investigative
21 reports that are in the hands of the police, over which
22 the case law clearly indicates that the police reports
23 that are in their possession is imputed to the State and
24 the State has the ability to get those reports and to turn
25 them over and that has not been done.

1 MR. JOHNSON: Your Honor, my understanding through
2 talking with officers and agents is that there are no co-
3 defendants other than the Mr. Wesley Johnson. His brother
4 was arrested and a female along that time, but my
5 understanding is that was all circumstance. If there was
6 a provable conspiracy, they certainly would have been
7 charged that way.

8 And I think you have Mr. Harley under subpoena and I
9 think he's the one that should come and speak to whether
10 that press release is indicative of facts or more
11 indicative of something that makes good press.

12 THE COURT: All right. It's, to me, it appears to be
13 a relevance issue. Now, it's not the first time that the
14 Court has tried to work through something like this, and I
15 guess what it comes down to is what does it take for the
16 State or what is necessary for the State to provide, given
17 the context of what is alleged against this particular
18 defendant.

19 And I've got the brief that's been filed. Do I need
20 to take any evidence or is it just the arguments based on
21 what's presented in the motion to compel? I've got the
22 most recent one being September 22nd.

23 MR. JOHNSON: The individual that wrote the press
24 release, if that's all pertinent, is under subpoena by Mr.
25 Chisolm and is sitting out in the hall. So I mean I'm

1 happy for him to come explain himself.

2 MR. CHISOLM: In reference to your question about the
3 motions to compel, there was one on the 16th of July,
4 there was one on the 28th of July, and there was one on
5 September 22nd, so there are three of them.

6 And, yes, we did subpoena the officer who released
7 the press release in connection with the whole issue of
8 who else may have been involved in this investigation.

9 I think one of the -- the key point here is that
10 there was an informant or possibly more than one informant
11 that apparently initiated this investigation. It didn't
12 just start on the day that my client was arrested. And
13 that was sort of the assumption that everyone was working
14 under until, as we got into the case, we started finding
15 out that there was more involved as far as his is
16 concerned and possibly a two or three-day investigation
17 and not just a one-day vehicle followed, that the first
18 informant gave information August 30th, and this incident
19 took place on October 8th, and it was as a result of the
20 information that started coming to the police on August
21 30th that they decided to go to my client's residence on
22 October 8th. And we're just sort of finding out about all
23 of that and the defendant would like the opportunity to
24 review that evidence to see if it does have relevancy as
25 to what happened and whether or not this was a conceptual

1 stop.

2 We've already heard from the testimony of Officer
3 Cogswell that in his initial statement in the CNT Office
4 was that that was not his drugs, that they were planted on
5 him and that this situation was a lot larger than what was
6 happening in the room. And that seed is already in this
7 case and there's going to be discussion about, then, the
8 police receiving information and going to my client's
9 residence on October 8th. So it would be my client is
10 entitled to the opportunity of a thorough and shifting
11 Cross-examination as to why did they go to my client's
12 residence, what was going on, what was this investigation
13 all about, is this an opportunity that perhaps the police
14 have overreached as far as what has happened or made up
15 some of the circumstances, even, that took place as far as
16 this case is concerned, or have not been honest with the
17 Court in prior testimony as far as what took place, as far
18 as the suppression issues in this case.

19 THE COURT: Well, let me just make sure I understand,
20 and I'll tell you where I'm coming from on it. There is
21 information that needs to be provided within reciprocal
22 discovery. They bring in material and other matters
23 directly related to the prosecution of the defendant. And
24 then there are matters that may be, whether that be
25 through Open Records Act requests or subpoenas, be brought

1 in, which may not be technically discovery material. And
2 I can't quite figure out whether this is information --
3 and you'd indicated there was an Open Records Act request.
4 If the City or, I guess, Metro has not complied with an
5 Open Records Act request --

6 MR. CHISOLM: Both the City as well as the CNT.

7 THE COURT: -- then there are remedies for that. And
8 we don't reach the second prong of that, which is items
9 under subpoena, which would then require either a response
10 through documents or a motion in the court. So what I'm
11 not clear on is whether or not this is a discovery issue,
12 a motion to compel discovery issue, or whether or not this
13 is just additional information you are seeking as part of
14 the defense that isn't technically or doesn't technically
15 fall under the discovery burden of the State and the
16 prosecution of this particular charge. I say that, I can
17 go back through and try to work that out. There may be
18 other methods to get the issue before the Court, separate
19 from just claiming there is a discovery issue.

20 I understand what you're saying. What I'm prepared
21 to do is to go ahead and put together an order that
22 outlines what I believe is material that should be turned
23 over as part of reciprocal discovery. That's what I'm
24 faced with here. And, again, that's going to be Brady
25 material and other limited material. And I think there's

1 a number of cases with the -- that's ordered together
2 before that has to be turned over and would be a violation
3 if it was not turned over. There may be other ways to
4 unpeel the onion, I guess is what I'm saying.

5 MR. CHISOLM: Well, if we could, the Defense would
6 like the opportunity to call Agent Harley to the stand.
7 There is some evidence that he has in his possession that
8 I would like to offer to the Court that -- for the Court's
9 consideration as it's making that review as it pertains to
10 the reports that I believe are associated to this
11 investigation.

12 In regard to the information that we've requested in
13 connection with Officer Castro and impeachable information
14 that may be available, which would also be information
15 that would be covered by Brady v. Maryland, it's my
16 understanding, actually, just before walking into court
17 today, there was a witness that we excused, Officer Larry,
18 who was involved in Internal Affairs. He was excused on
19 Friday by voice mail, so he just called to confirm just as
20 I was about to come in here that he got the message, but
21 he also indicated that there were additional reports and
22 there were audio tapes of Officer Castro doing -- during
23 that investigation that I haven't seen and have not been
24 turned over to me. The relevance to that is that the
25 Internal Affairs investigation involving Officer Castro

1 was within thirty days of the arrest of my client, in
2 which it was alleged that he was hiding stuff in his
3 reports and that -- and had not been truthful and an
4 official investigation, as far as SCMPD is concerned, and
5 that's very concerning and very relevant. And that
6 information was not turned over. And now it's my
7 understanding that there may even be additional
8 information and we've been requesting that information for
9 months now, and it has not been turned over to us.

10 So that's a separate issue from the issue of the
11 reports as being discovery. This is information that we
12 allege that could be Brady v. Maryland information as it
13 pertains to potential impeachment of Officer Castro with
14 prior bad acts and a bad act that was around the same time
15 as my client's arrest. And Officer Castro is the central
16 officer who allegedly saw the traffic violation that
17 caused the arrest of my client on October 8th. And so
18 that would be an additional issue outside of just the
19 police reports that were not provided pertinent to my Open
20 Records requests and my subpoenas.

21 THE COURT: All right. I think we've probably gone
22 back and forth. I understand. Why don't we do this,
23 let's go ahead and get the evidence in? That's what the
24 purpose of today's hearing is, so let's go ahead and get
25 that in and see where this leads. All right.

1 (NOTE: Witness sworn.)

2 AGENT GENE HARLEY, HAVING BEEN PREVIOUSLY SWORN, WAS CALLED AS
3 A WITNESS BY THE DEFENSE AND TESTIFIED AS FOLLOWS:

4 DIRECT EXAMINATION BY MR. CHISOLM:

5 Q Sir, state your name for the record.

6 A Yes, sir. It's Gene Harley.

7 Q Would you spell your last name?

8 A H-A-R-L-E-Y.

9 Q And where are you employed?

10 A I'm employed by the Chatham County Sheriff's Office.

11 Q And directing your attention back to October 2013,
12 where were you employed or assigned at that time?

13 A I was assigned to the Chatham-Savannah Counter
14 Narcotics Team.

15 Q And what did you do there at the time?

16 A At that time I was there as an agent as well as, I
17 believe, a public information officer.

18 Q In connection with your duties as a public
19 information officer, did you prepare and release a press
20 release in connection with an investigation involving Fabian
21 Notto, Frank Notto, a Mr. Beauvian (phonetic) and a Mr. Baxter?

22 A I did.

23 Q Do you have that document with you, the press
24 release?

25 A I have a copy of the press release that I issued,

1 yes, sir.

2 Q Can I see it?

3 A (Tendered)

4 MR. CHISOLM: Would you mark this?

5 (NOTE: Defendant's Exhibit 1 was marked for the purposes
6 of identification.)

7 Q Also, as a result of that press release, there was an
8 article in the "Savannah Morning News" that was listed, posted
9 on October 14, 2013; is that correct?

10 A That is correct.

11 Q And the title of that article was "Savannah Chatham
12 Narcotics Agents Dismantle Alleged Drug Distribution Ring"; is
13 that correct?

14 A It's actually "Chatham Savannah Narcotics Agents
15 Dismantle Alleged Drug Distribution Ring."

16 Q Okay. And basically that newspaper article is a
17 direct result of the press release that you released to the
18 media and to the public on that day; is that correct?

19 A Their summary of it, yes, sir.

20 Q Okay.

21 MR. CHISOLM: And, Your Honor, at this time the State
22 -- excuse me, the Defendant -- that's a flashback -- the
23 Defendant would like to offer into evidence Defendant's
24 Exhibit Number 1.

25 THE COURT: Which would be what?

1 MR. CHISOLM: This is the press release that the
2 officer just identified as being the press release that he
3 released on the day in question.

4 THE COURT: Okay. Any objection?

5 MR. JOHNSON: No objection, Your Honor.

6 THE COURT: It's admitted.

7 Q In that press release, you indicated that CNT took
8 down a distribution ring; is that correct?

9 A I believe that's worded in there, yes, sir.

10 Q A drug ring, correct.

11 A I'm sorry.

12 Q I'm sorry.

13 A I said I believe that's worded in there, correct.

14 Q And on October 8th, you indicated that Fabian Notto
15 was arrested; is that correct?

16 A I don't have a press release in front of me. I need
17 to -- I'd like to see it to be able to -- (pause)

18 Q Well, I don't have the -- (tendered).

19 A (Examined document) Yes, sir.

20 Q Okay. And how did you compile that information
21 that's included in the press release?

22 A I -- I cannot say with a hundred percent certainty
23 how I did it for this particular press release. I can tell you
24 that in most cases involving the press releases that I took
25 part of, I would speak with the agent in charge of it, and/or

1 supervisor, kind of get a summary of the facts behind the case
2 and then complete a statement from there.

3 Q Okay. And in this particular situation, you
4 indicated that this was a -- that there were several informants
5 that initiated this investigation; is that correct?

6 A (Reviewed document) I don't believe I ever used the
7 word "informant" at all in the press release, sir.

8 Q How did the information -- how was the information
9 then provided to CNT about how this took place?

10 A I couldn't testify to that. Again, I -- I had
11 nothing to do with the investigation itself, with this
12 particular investigation.

13 Q But in your press release, how did you indicate that
14 it initiated?

15 A Again, I only speak to the agent or agents involved
16 and/or supervisor. I can't recall exactly who I spoke to
17 regarding this particular press release.

18 Q Okay. And my question was: Does your press release
19 not indicate how narcotics agents began the investigation
20 involving the brothers?

21 A (Reviewed document) It just said that after
22 receiving information that -- to quote it: (Reading) After
23 receiving information that two brothers, Fabian Notto and Frank
24 Notto, III, were selling various controlled substances
25 throughout Chatham County and enlisting help from others to

1 distribute their drugs.

2 Q And then Fabian Notto was arrested on October 8th; is
3 that correct?

4 A That is correct.

5 Q And Larry Beauvian was arrested on October 8th; is
6 that correct?

7 A (Reviewing document) Yes, sir. It would appear so.

8 Q And Sharron Baxter (phonetic) was arrested on October
9 9th?

10 A That is correct.

11 Q And Frank Notto, although there was an arrest warrant
12 issued for him on the 8th or the 9th, he was arrested shortly
13 thereafter; is that correct?

14 A Somewhere around that time, yes, sir.

15 Q And the substance of your press release is that this
16 was a ring and this was a joint investigation and operation;
17 isn't that correct?

18 A That is correct.

19 MR. CHISOLM: No further questions.

20 CROSS-EXAMINATION BY MR. JOHNSON:

21 Q How did you say you compiled the information that you
22 placed into this?

23 A Again, I cannot say specifically who I spoke to
24 regarding this particular press release, but traditionally when
25 going about getting press releases together, I speak to an

1 agent or agents involved and sometimes the supervisors if I,
2 myself, do not have direct knowledge of it.

3 Q So you essentially have no direct knowledge as to
4 whether the investigations that occurred were separate
5 investigations who netted individuals that may or may not be
6 connected, but were certainly related to some of the --

7 A That is correct.

8 Q -- (inaudible) or whether it was all one
9 investigation which netted all the individuals; correct?

10 A That's correct. I have no direct knowledge regarding
11 the actual investigation concerning this press release.

12 Q Do you have any recollection as to which one it may
13 be?

14 A No, sir.

15 MR. JOHNSON: No further questions.

16 THE COURT: Mr. Chisolm?

17 REDIRECT EXAMINATION BY MR. CHISOLM:

18 Q It is your responsibility to provide information to
19 the press and to the community that's truthful; is that
20 correct?

21 A That is correct.

22 Q Okay. And as a part of your duties that -- you did
23 look at the reports or talk to the officers to verify that the
24 information that you received was as accurate as you could get;
25 is that correct?

1 A That is correct.

2 MR. CHISOLM: No further questions.

3 THE COURT: Anything?

4 MR. JOHNSON: I have a rebuttal witness, but I have
5 no further questions.

6 THE COURT: All right. Thank you. You may step
7 down.

8 THE WITNESS: Thank you.

9 MR. CHISOLM: I have no further witnesses.

10 MR. JOHNSON: Your Honor, if I may, I'd recall Chase
11 Cogswell to the stand.

12 THE COURT: Agent Cogswell, you are under oath.

13 THE WITNESS: Sir?

14 THE COURT: You are under oath.

15 THE WITNESS: Yes, sir.

16 AGENT CHASE COGSWELL, HAVING BEEN PREVIOUSLY SWORN, WAS CALLED

17 AS A REBUTTAL WITNESS BY THE STATE AND TESTIFIED AS FOLLOWS:

18 FURTHER DIRECT EXAMINATION BY MR. JOHNSON:

19 Q Agent Cogswell, would you just tell us how this
20 investigation into Fabian Notto arose?

21 A Yes, sir. I received information from an individual
22 who told me that Fabian Notto gave his -- they provided his
23 name, where he lived, what kind of vehicle he drove, what kind
24 of drugs he trafficked, the method in which he trafficked. And
25 the specificity of the information and the inside knowledge led

1 me to go and initiate the investigation. It seemed to be the
2 truth.

3 Q When you say "initiate investigation," what did you
4 do?

5 A I parked down the street from his house.

6 Q Was that on a public road?

7 A Yes.

8 Q Did you use any type of sophisticated,
9 scientifically, technologically-enhanced methods of observing
10 him?

11 A No, sir.

12 Q Okay. And what did you see?

13 A I saw him exit the house that was described and get
14 into the truck that was described and drive away.

15 Q Did you ever investigate Frank Notto?

16 A No, I didn't.

17 Q Did you ever investigate any of the other individuals
18 that were just named?

19 A Not as --

20 Q Even though --

21 A Not as --

22 Q -- (inaudible)?

23 A -- part of this case, no.

24 Q And so the individual, I mean as far as you know, the
25 individuals were arrested in a similar, you know, in this time

1 span, you know, within days of each other or was that just mere
2 happenstance as far as you know?

3 A Yes.

4 Q And you didn't communicate to any other agents -- I
5 mean you didn't receive any information on Frank Notto, did
6 you, or --

7 A No, I didn't.

8 Q -- (inaudible)? Did you receive any information on
9 any other individual other than Fabian --

10 A No.

11 Q -- Notto?

12 A That was it.

13 Q And so you had no contacts, no involvement in
14 anything that they have netted Frank and the other individuals
15 that were just named?

16 A Correct.

17 Q All right. Did you ever get -- procure a search
18 warrant for Fabian Notto's house prior to his arrest?

19 A No.

20 Q Did you ever utilize the information that you
21 received in any type of affidavit?

22 A No.

23 MR. JOHNSON: No further questions.

24 THE COURT: Mr. Chisolm?

25 RE-CROSS EXAMINATION BY MR. CHISOLM:

1 Q Now, when you say that you received information from
2 someone, isn't it true that you received that information on
3 August 30th?

4 A I believe that was the day. Let me check my report.
5 (Reviewed document) Yes, that's right.

6 Q And then you are saying as a result of that
7 information on October 8th, you made the decision to go to his
8 residence and that was the only information that you had about
9 Mr. Notto?

10 A Yes, what I was given on the 30th is what I was
11 working off of on the 8th of October.

12 Q How did you come in contact with the person who gave
13 you the information that initiated you going to his residence?

14 A That person got pulled over by Savannah Metro Police
15 and expressed an interest in cooperating with Narcotics
16 investigators. So I went and met with him.

17 Q And did he -- you went and met with him?

18 A I -- he -- he came to the office.

19 Q And did you take a statement from him?

20 A I wrote down what he told me, but I didn't take a
21 sworn statement or anything of that sort.

22 Q And where are those notes now?

23 A I have no idea.

24 Q Was that person signed up as an official informant as
25 far as CNT is concerned at that time?

1 A No.

2 Q Did you receive any other information or do any other
3 surveillance between the 30th of August and October 8th, which
4 is more than a month?

5 A I didn't do any other surveillance. I wish I could
6 have gotten on it sooner, but we were very busy at the time,
7 but I did corroborate the information that was given to me.
8 That's what made me actually initiate the investigation.

9 We regularly would receive information and I -- I
10 corroborate as much as possible to eliminate stuff that's not
11 worth looking at. The information provided by that individual
12 a hundred percent of it was found to be totally accurate.

13 Q What do you mean that you corroborated that
14 information?

15 A Well, I was given Mr. Notto's name, what kind of
16 vehicle he drove, which was confirmed because it was a very
17 specific vehicle, and he was in that. I was told that he had
18 just gotten out of prison, which was found to be true. Let's
19 see. I believe it was in my report what I -- what I was told
20 about that. (Reviewed document) It was stated that Notto
21 lives at 1903 Archer Street, which is where he walked out of,
22 drives a newer model silver Toyota Tundra, which is what he got
23 into, and from then on, the Narcotics investigation began.

24 Q Did you have discussions with any other agents about
25 that information between the 30th and the 8th?

1 A I don't recall.

2 Q You don't recall whether or not -- isn't it protocol
3 at CNT that you have to review that information with at least a
4 supervisor?

5 A No.

6 Q So you initiated this investigation without any sort
7 of communication with your supervisor?

8 A Right. I would imagine I probably told somebody what
9 I was doing, but I can't -- I can't recall exactly who I told
10 what I was doing during those thirty-five days.

11 Q Okay. Now, as a result of your receiving that
12 information and going to the house, you followed him to -- Mr.
13 Notto, my client -- to the Montgomery Street (inaudible);
14 correct?

15 A Yes.

16 Q And then once you observed him there, you put out a
17 call to the Savannah-Chatham Metro Police Department that there
18 was a vehicle problem; isn't that correct?

19 A That there was a what?

20 Q That you needed help following the vehicle?

21 A Yes.

22 Q And then, as a result of your call, more than five
23 officers became involved in a multi-vehicle follow of my
24 client; isn't that correct?

25 A I can check my report and see how many it was. It

1 was mainly myself and Officer Castro, but I can check and see
2 if I named others. Would you like me to do that?

3 Q Sure.

4 A Okay. (Reviewed document) All right. It was myself
5 and Officer Castro were the unmarked vehicles.

6 Q And there were other vehicles that were shadowing and
7 running parallel to how Mr. Notto was traveling; isn't that
8 correct?

9 A Yes. In marked police cars, yes.

10 Q And literally who you contacted was the Crime
11 Suppression Unit of the Savannah-Chatham Police Department and
12 asked them to engage in a vehicle follow; isn't that correct?

13 A Yes.

14 Q Okay. And so what information did you give them
15 about this investigation that initiated a five or more -- five-
16 car vehicle follow?

17 A Well, it was following -- following a vehicle through
18 town is pretty difficult, as you might imagine, and there were
19 only two unmarked vehicles and that, provided with there were
20 two men in the car, that provided three uniformed officers --
21 I believe it one two-officer unit and one single-officer unit
22 -- to make sure that they could handle the situation safely and
23 would actually pull the vehicle over. As far as what
24 information I provided specifically, I don't recall exactly
25 what I told them, but they know that I work for CNT, so I'm

1 sure they knew it was a drug case.

2 Q Did you talk to a supervisor?

3 A I don't recall.

4 Q In the radio traffic, you get off of the radio. You
5 all of a sudden start talking by telephone and whatever
6 information you transferred about the case is not on the radio,
7 it's by telephone. Why did you switch to telephone?

8 A Specifically that day, I could not tell you why I
9 did, but I know that sometimes it's difficult to juggle a CNT
10 radio, which is on its own frequency and the other radio. A
11 lot of times, there's phone calls coming in. It's a lot to
12 manage. And so sometimes it's just easier to do it that way.

13 MR. JOHNSON: Your Honor, could we just keep it
14 relevant to the motion that we're exploring, again, which
15 I guess is whether or not we have to turn over the C.I.,
16 whether that's somehow going to be Brady material.

17 MR. CHISOLM: And it's not just the C.I., but it's
18 also that --

19 MR. JOHNSON: Well, it's only the C.I.

20 MR. CHISOLM: -- (inaudible) also the police report
21 just says here with the arrest of (inaudible).

22 THE COURT: Well, yeah. My understanding is the
23 questions that were brought is the investigation, is that
24 even relevant, and where do we go with the scope of the
25 investigation if it is, in fact, relevant. We are getting

1 into areas, though, that are more discovery depositions
2 than actually the issue before the Court. So let's go
3 ahead and narrow our scope back down.

4 Q (By Chisolm) So after my client was arrested, did
5 you provide or have any discussions with any supervisors at CNT
6 about the circumstances of the arrest of Fabian Notto?

7 A I do not specifically recall. I probably told my
8 supervisor that he was in custody, but I -- I couldn't a
9 hundred percent say that I notified a supervisor at that point.

10 Q Aren't you aware that as a result of that
11 information, they then went to the residence of Frank Notto?

12 A No, that didn't happen.

13 Q Okay. You are saying that it did not happen that
14 that night that they, the CNT agents, after this incident took
15 place, went to the residence of Frank Notto?

16 A You said that as a result of my case, that's how I
17 understood what you said, that was a result of my case that
18 they dealt with Frank Notto, which is not the case. My agents
19 did go to Fabian Notto's house since he was on a Fourth
20 Amendment Waiver, to search his residence, but my case did not
21 cause Frank Notto's case.

22 Q Well, you had information, the original information
23 that you received, was that Frank and Fabian were involved with
24 possibly selling drugs in Chatham County; correct?

25 A Is that in my police report?

1 Q That's what you testified to a little while ago.

2 A Okay. I don't I said that, but I'll check my report.
3 (Reviewed document) All they told me about was that person,
4 that cooperating defendant, told me about Fabian Notto and his
5 activities.

6 Q If -- I'm sorry. He didn't tell you anything about
7 Frank?

8 A That person told me about Fabian, correct.

9 Q And so there were no discussions at all about Frank
10 between the 30th and the 8th; is that what you said?

11 A Yes.

12 Q And are you familiar with the fact that shortly after
13 your arrest of Fabian, CNT made the decision to go to the
14 residence of Frank; is that correct?

15 A I knew that there was -- that something happened with
16 Frank and he got in trouble. Yes, I'm aware of that. I don't
17 know if it was at his residence or the exact details. I wasn't
18 on that case.

19 Q Where there is a -- when this incident was assigned
20 numbers and reports were put together, isn't it normal
21 procedure when they are associated defendants for those cases
22 to be -- those case reports to be filed together?

23 A If it's co-defendants, generally yes, they are under
24 one case number.

25 MR. CHISOLM: I have no further questions.

1 MR. JOHNSON: I'm sure that's clear. I think that
2 everything is clear, Your Honor.

3 THE COURT: Thank you. You may step down.

4 THE WITNESS: Thank you, sir.

5 THE COURT: All right. Any additional evidence from
6 the State?

7 MR. JOHNSON: No, Your Honor.

8 THE COURT: All right. That is under advisement on
9 the discovery issue.

10 The last matter I have as I understand it, then, is
11 this notice of intent to impeach with prior convictions.
12 The State has a notice of intent and the Defendant is
13 objecting to it. Why don't we just go ahead, Mr. Johnson
14 and outline what the State's intent is and --

15 MR. JOHNSON: I will waive that, Your Honor. I think
16 the real issue is the 404(b)s and, you know, the question
17 is will they pass muster on the 404(b)s and if that is a
18 different analysis than the impeachment materials, so I
19 would agree that they probably are -- well, actually, only
20 to -- the only one I would waive on all of them except the
21 CR -- the 2009 conviction, which obviously is within ten
22 years of a felony. And, you know, that's based on the
23 date of conviction or the release of the witness from the
24 confinement because that would either be in 2013 or 2009.
25 So I think, obviously, that clearly is in play, but I

1 would waive the right to --

2 THE COURT: Waive the remainder.

3 MR. JOHNSON: -- (inaudible) on the others.

4 THE COURT: With that being the case, Mr. Chisolm?

5 MR. CHISOLM: I'm sorry?

6 THE COURT: On the impeachment issue, I understand
7 the State would not intend to proceed on any conviction
8 other than the 2009 conviction with regard to impeachment.
9 Is there anything from the Defense on that?

10 MR. CHISOLM: Nothing from the Defense on that, Your
11 Honor.

12 THE COURT: All right. The --

13 MR. CHISOLM: Just for clarification, you are talking
14 about the three prior convictions, CR96-1893, CR09-2109
15 and CR09-0145? Is that what the Court has?

16 THE COURT: And I don't have it in front of me. I
17 just wanted to make sure I've got, when I look back at it,
18 what I will see is that the State is not intending to move
19 forward on anything except the 2009 conviction --

20 MR. CHISOLM: I've got you.

21 THE COURT: -- or whatever is in the record, and
22 that's --

23 MR. CHISOLM: Correct.

24 THE COURT: -- what I have.

25 MR. JOHNSON: Correct, Your Honor.

1 THE COURT: All right. I believe, at least based on
2 the notice that I received for an evidentiary hearing,
3 those are all the matters for both the State and the
4 Defendant. Is there anything else from the State?

5 MR. JOHNSON: I have nothing else, Your Honor.

6 THE COURT: All right. Mr. Chisolm, from the
7 Defense?

8 MR. CHISOLM: Your Honor, I'm assuming, then, since
9 we've not had any response from the State as well, and
10 according to the scheduling order, we are past the time
11 for responses, and that being the State has no objection
12 to the Defendant's intent to impeach Mr. Castro as to his
13 Internal Affairs finding, so I'm assuming that's waived by
14 the State at this point; is that correct?

15 MR. JOHNSON: Well, I agree that it's probative. So
16 I mean not that I'm --

17 THE COURT: Okay. What I'd like to do, if and when
18 this goes to trial, I would like to know a little bit more
19 about that before we get too deeply into it in the
20 evidence itself. I don't expect a proffer, but I'd like
21 to, if there's -- we need to come back to it, maybe as a
22 preliminary matter prior to trial, I just want to make
23 sure I understand exactly what is going to be proffered.
24 I think the issue and certain parts of it can be presented
25 to the jury, but there may be limited parts of it that may

1 not. I want to make sure that's clear on the record
2 before we get started if the case goes to trial.

3 MR. CHISOLM: Provided that I get the information
4 that I'm seeking from the -- from Savannah-Chatham in a
5 timely basis, I can provide to the Court a written proffer
6 and you can make a determination about that before we even
7 get down that road.

8 THE COURT: Yeah. Or, even better, the two of you
9 can maybe get together and figure out if there is a
10 dispute as to what would be properly evidence at trial,
11 and then if there's a dispute, just bring me the dispute
12 and I'll try to address whatever the difference of
13 agreement is.

14 MR. CHISOLM: I'm fine with that, Judge.

15 MR. JOHNSON: And, Your Honor, will there be an order
16 coming out? I guess, so it's --

17 THE COURT: I've got --

18 MR. JOHNSON: -- what we've done today is you're
19 going to figure out what should be provided as far as
20 Frank and those guys and -- (pause)

21 THE COURT: Just so we are clear on the record, I've
22 got a Jackson-Denno that I am going to wait until I get
23 notice from Mr. Chisolm on as far as the tape itself,
24 whether there is anything else that is going to be
25 presented by way of brief to the Court.

1 I've got a 404(b) under advisement. The parties have
2 twenty days -- I'm sorry. The State has twenty days from
3 today's date to supplement the record with any brief that
4 you desire. The Defense would then have twenty days after
5 that to supplement.

6 I've got this issue of what is complete discovery in
7 the case, which I'll get an order out. As far as I'm
8 concerned, that's ripe.

9 And with regard to the notice of intent to use prior
10 convictions, we've resolved that with the State only going
11 to present the 2009 conviction at trial.

12 MR. JOHNSON: Yes, sir.

13 THE COURT: All right. We are done. Thank you.

14 WHEREUPON, THIS PROCEEDING WAS CONCLUDED.

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C E R T I F I C A T E

I, PATRICIA K. THOMAS, do hereby certify that the foregoing sixty-five (65) pages of typewritten material were taken down by me and transcribed by me and that the same is a true, correct, and complete transcript of the proceedings as stated in the caption.

I further certify that I am neither kin nor counsel to any of the parties hereto and that I have no interest whatsoever in the outcome of said proceedings.

SO WITNESS my hand and seal this 15th day of March, 2016.

Patricia K. Thomas

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