

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable G.D. Morgan, Jr., Circuit Court Judge

STEPHENO ALSTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001011

APPENDIX

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,)
)
 PLAINTIFF,)
)
 -VS-)
)
 STEPHENO ALSTON,)
)
 DEFENDANT.)
 _____)

2011-GS-42-03090

TRANSCRIPT OF RECORD

MARCH 18 - 20, 2013
SPARTANBURG, SOUTH CAROLINA

BEFORE:

THE HONORABLE J. DERHAM COLE

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

J. EDWARD HUNTER, ASSISTANT SOLICITOR

ATTORNEY FOR DEFENDANT:

ANDREW J. JOHNSTON, ESQUIRE

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
S-1	Cocaine -----	8	227
S-2	CD of Traffic Stop -----	8	173
S-3	Photo -----	8	X
S-4	Photo -----	8	171
S-5	Photo -----	8	190
S-6	Photo -----	8	X
S-7	Photo -----	8	X
S-8	Photo -----	8	X
S-9	Photo -----	8	X
S-10	Photo -----	8	164
S-11	Photo -----	8	171
S-12	Photo -----	8	X
S-13	Knife in Sheath -----	8	186
S-14	Enterprise Rental Contract -----	8	168
S-15	Walgreens Receipt -----	14	X

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
D-1	Copy of Warning -----	46	X
C-1	Redacted CD of Traffic Stop ----	273	

Spartanburg County Courthouse

RANDOM STRIKE SHEET

JUDGE NAME :

TRIAL TYPE : Criminal

PANEL ID : 11-3090

COURTROOM WA

State v. Stephano Alston

DESCRIPTION : State-VS-Stepheno Alston

Sorted by: Random Nbr

Trial

NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
✓1 Haddy, Tracy R	70	W	F	()	()	()	WF
5X 2 Ballew, Christi H	10	W	F	()	()	()	WF
✓3 Middleton-Shippy, Corey M	114	B	M	()	()	()	BM
✓4 Moon, Heath T	119	W	M	()	()	()	WM
✓5 Poteat, Joshua L	132	W	M	()	()	()	WM
6X 6 Rhodes, Carl E Jr.	138	W	M	()	()	()	WM
✓7 Martin, Cassandra T	107	W	F	()	()	()	WF
✓8 Casey, Serena K	158	W	F	()	()	()	WF
✓9 Skinner, Stephanie M	152	W	F	()	()	()	WF
✓10 Brown, Tracy S	19	W	F	()	()	()	st# ~~WF~~ WF
6X 11 Gosnell, Elizabeth C	62	W	F	()	()	()	WF
6X 12 Roberson, Peggy D	142	W	F	()	()	()	WF
6X 13 Howard, Mark E	81	W	M	()	()	()	WM
✓14 Johnson, Judith L (F)	89	W	F	()	()	()	WF
✓15 Hall, Alison F	195	W	F	()	()	()	WF
✓16 Lawing, Erin H	197	W	F	()	()	()	WF
✓17 Currin, Trent W	37	W	M	()	()	()	WM
6X 18 Reese, Edward L	136	B	M	()	()	()	BM
✓19 Galloway, John (A)	51	W	M	()	()	()	WM
20 Holder, Deana A	78	W	F	()	()	()	
21 Johnson, Leslie B	90	W	F	()	()	()	
22 Wilson, Michael G	187	W	M	()	()	()	
Atkins, Angela E	7	W	F	()	()	()	
24 Cartee, Kimberly H	27	W	F	()	()	()	

Spartanburg County Courthouse
RANDOM STRIKE SHEET

7

JUDGE NAME :

TRIAL TYPE : Criminal

PANEL ID : 11-3090

COURTROOM WA

DESCRIPTION : State-VS-Stepheno Alston

Sorted by: Random Nbr

Trial

NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
1 Haddy, Tracy R	70	W	F	()	()	()	
2 Middleton-Shippy, Corey M	114	B	M	()	()	()	
3 Moon, Heath T	119	W	M	()	()	()	
4 Poteat, Joshua L	132	W	M	()	()	()	
5 Martin, Cassandra T	107	W	F	()	()	()	
6 Casey, Serena K	158	W	F	()	()	()	
7 Skinner, Stephanie M	152	W	F	()	()	()	
8 Brown, Tracy S	19	W	F	()	()	()	
9 Johnson, Judith L	89	W	F	()	()	()	
10 Hall, Alison F	195	W	F	()	()	()	
11 Lawing, Erin H	197	W	F	()	()	()	
12 Currin, Trent W	37	W	M	()	()	()	
13 Galloway, John	51	W	M	()	()	()	

Total Number of Jurors:

13

**** END OF REPORT ****

1 **THE COURT:** Are y'all ready to pick?

2 **MR. JOHNSTON:** Yes, sir. I'm just getting in line

3 here.

4 (Whereupon a bench conference was held off the record)

5 (Whereupon court was in recess at 11:46 AM)

6 (Whereupon court resumed at 12:35 PM)

7 (Pause)

8 **THE COURT:** Let me ask y'all to step up here for a

9 minute.

10 (Whereupon a bench conference was held off the record)

11 (Whereupon State's exhibits 1 - 14 were marked for

12 identification)

13 **THE COURT:** The first case for trial is the State

14 versus Stepheno Alston.

15 **MR. HUNTER:** I believe it's Stepheno. That's how he

16 pronounces it on the video.

17 **THE COURT:** All right. Mr. Hunter, you're here on

18 behalf of the State?

19 **MR. HUNTER:** (Affirmative nod).

20 **THE COURT:** Mr. Johnston, you represent the Defendant?

21 **MR. JOHNSTON:** Yes, sir, I do.

22 **THE COURT:** Is the Defendant present?

23 **MR. JOHNSTON:** No, sir.

24 **THE COURT:** Do you know where he is?

25 **MR. JOHNSTON:** No, sir. I can report to you that he

1 was present here earlier, and as recently as, I want to say,
2 11:30, 12:00, something like that, I'm not sure exactly what
3 time it was.

4 **THE COURT:** Was the gentleman seated at the table with
5 you when the case was first - - when the Court was first
6 notified the case was for trial, was that gentleman seated
7 at the table with you Mr. Alston?

8 **MR. JOHNSTON:** It was, sir.

9 **THE COURT:** Okay. And he's not present now?

10 **MR. JOHNSTON:** No, sir, Your Honor. We - - I was
11 outside speaking with him as to the possibility of entering
12 a guilty plea and when I returned, after I came back into
13 the courtroom to take up some matters with the Court and
14 when I'd went back outside, he had gone.

15 **THE COURT:** And did you tell him to stay, that the case
16 was being called for trial?

17 **MR. JOHNSTON:** I did not tell him that specifically,
18 Your Honor, but I believe it was implicit what was
19 happening.

20 **THE COURT:** Well, did you tell him he could leave to go
21 to lunch or anything such as that?

22 **MR. JOHNSTON:** Absolutely not.

23 **THE COURT:** Did he indicate to you in any way that he
24 was - - needed to leave or could he leave?

25 **MR. JOHNSTON:** He did not make a request that could he

1 leave for the purposes of eating or any other legitimate
2 excuse that could possibly occur in a situation like that.

3 **THE COURT:** All right. And - - -

4 **MR. JOHNSTON:** He left without explanation.

5 **THE COURT:** And you had - - you had informed him that
6 his case was being called for trial this morning?

7 **MR. JOHNSTON:** Yes, sir.

8 **THE COURT:** And when was he first informed of that
9 fact?

10 **MR. JOHNSTON:** Well, I - - -

11 **THE COURT:** By you?

12 **MR. JOHNSTON:** I spoke with him on the telephone last
13 week, Your Honor, and told him he was very high on the
14 docket.

15 **THE COURT:** And you talked to him today - - -

16 **MR. JOHNSTON:** Yes, sir.

17 **THE COURT:** - - - about his case was, in fact, up for
18 trial, first up?

19 **MR. JOHNSTON:** Yes, sir.

20 **THE COURT:** And he was, in fact, - - and he was, in
21 fact, present and understood that his case was being called
22 for trial?

23 **MR. JOHNSTON:** I believe, yes, sir.

24 **THE COURT:** Okay. And - - well, it was either being
25 called for trial or being called for disposition by way of a

1 guilty plea if he preferred?

2 **MR. JOHNSTON:** Yes, sir.

3 **THE COURT:** You talked to him about the trial and about
4 pleading guilty?

5 **MR. JOHNSTON:** Yes. Yes, sir.

6 **THE COURT:** Okay.

7 **MR. JOHNSTON:** Absolutely.

8 **THE COURT:** So y'all were prepared and ready to proceed
9 with the trial of the case in the event he did not wish to
10 enter a plea of guilty?

11 **MR. JOHNSTON:** Yes, sir.

12 **THE COURT:** Okay. I also have before me the bail
13 proceeding form signed by Judge Smith, dated March 28th of
14 2011. It appears that the Defendant, Stepheno Alston, was
15 released from custody on March the 29th of 2011. It was
16 secured by a professional bondsman.

17 In the bail proceeding form Mr. Alston signed a
18 paragraph in a provision form wherein he acknowledged that
19 he understood if he violated any condition of the bond order
20 that a warrant for his arrest would be issued, that he
21 understood that if he failed to - - and that it was
22 explained to him that if he failed to appear before the
23 court as required that a warrant would be issued for his
24 arrest, and that he understood and had been informed that he
25 had a right and an obligation to be present at trial, and in

1 the event he failed to attend the court for the trial of the
2 case that the trial would proceed in his absence. And that
3 acknowledgment was dated and it was signed by the Defendant.

4 And, Mr. Johnston, have you or has someone notified Mr.
5 Stribling, who's the surety, of the need for Mr. Alston's
6 presence here today?

7 **MR. JOHNSTON:** Your Honor, Mr. Hunter told me that he
8 had attempted to reach Mr. Stribling by telephone after it
9 became apparent that Mr. Alston was not going to be
10 appearing.

11 **THE COURT:** Okay. Mr. Hunter.

12 **MR. HUNTER:** Your Honor, after Mr. Johnston explained
13 to me that Mr. Alston had left the courthouse or believed
14 that he had left the courthouse, we called Mr. Stribling. I
15 personally left a message on his phone instructing Renee
16 Poole of our office, who is an administrative assistant
17 dealing with bond estreatments, who has better knowledge of
18 the bondsman to call. And just received an email that Mr.
19 Stribling has been notified that his client has absconded
20 and is currently looking for him.

21 **THE COURT:** Okay. Do we have any pretrial matters we
22 need to address?

23 **MR. HUNTER:** Nothing from the State.

24 **MR. JOHNSTON:** Your Honor, we have a motion to
25 suppress.

1 **THE COURT:** Okay. Mr. Bogan, would you call Stepheno
2 Alston's name outside, please.

3 (Pause)

4 **THE BAILIFF:** No response, Judge.

5 **THE COURT:** All right. There being no response to the
6 name of Mr. Alston being called, I'll ask the clerk to issue
7 a bench warrant for the arrest of Mr. Alston. All right.

8 With respect to the motion to suppress, what's the
9 first evidence that the State would offer to present?

10 **MR. HUNTER:** The evidence would be the testimony of
11 Donnie Gilbert. And he is the person who made the traffic
12 stop on Mr. Alston. We would have the video of the traffic
13 stop. I believe his motion to suppress is based on an
14 unlawful detention on the side of the road.

15 **THE COURT:** And how long do you anticipate the
16 testimony to take to accomplish?

17 **MR. HUNTER:** The video's about thirty minutes long.
18 The testimony on the State's behalf, between twenty and
19 thirty minutes. However, we could -- if the Defense would
20 stipulate, we can put the video into evidence and allow you
21 to watch it in your chambers, if you'd like.

22 **THE COURT:** All right. Well, it's lunchtime. Let's
23 just recess for lunch and we'll begin with the presentation
24 of evidence at 2:30 this afternoon. All right. Court is in
25 recess until 2:30.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

14

1 (Whereupon court was in recess at 12:57 PM)

2 (Whereupon State's exhibit 15 was marked for
3 identification)

4 (Whereupon court resumed at 2:36 PM)

5 **THE COURT:** All right. Y'all ready to proceed?

6 **MR. HUNTER:** Yes, Your Honor.

7 **THE COURT:** Okay.

8 **MR. JOHNSTON:** Yes, sir.

9 **MR. HUNTER:** The State would call Donnie Gilbert to the
10 stand.

11 **Donnie Gilbert,** being
12 duly sworn testified as follows:

13 **MADAME CLERK:** Thank you. Please be seated.

14 **Direct Examination by Mr. Hunter:**

15 Q. Can you please state your full name for the record.

16 A. Donnie Leland Gilbert.

17 Q. And how are you employed?

18 A. I work for the Spartanburg County Sheriff's Office.

19 Q. And how long have you been in law enforcement?

20 A. I was hired by the South Carolina Highway Patrol in
21 July of 1999.

22 Q. And give a brief overview from '99 until March 28, 2011
23 of your employment.

24 A. In July of '99 I attended the South Carolina Highway
25 Patrol's basic academy. Graduated from there in December of

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

15

1 '99, was assigned to Richland County, which is the Greater
2 Columbia area from December of '99 until August of 2004.
3 What I did there is I just basically worked the road for the
4 Highway Patrol working wrecks and enforcing traffic laws.

5 In August of 2004 I transferred from Richland County to
6 the Aggressive Criminal Enforcement Team for the Department
7 of Public Safety and the Highway Patrol. I was assigned to
8 the Midstate Team, which was covered by I-20, I-77 and I-26
9 as a K-9 officer.

10 In March of 2005 I transferred within the Aggressive
11 Criminal Enforcement Team to the Upstate Team, which covered
12 the thirteen areas or thirteen counties in the upstate as a
13 K-9 officer there as well.

14 In September of 2009 I transferred from the Aggressive
15 Criminal Enforcement Team to Spartanburg County for the
16 Highway Patrol. And in January of 2010 I left the Highway
17 Patrol completely and came to work at the Spartanburg County
18 Sheriff's Office where I was assigned to the traffic
19 division and have been there since.

20 Q. What are your duties at the Spartanburg County
21 Sheriff's Office?

22 A. Under the traffic division, to enforce traffic laws of
23 this State.

24 Q. Are you on a specific team?

25 A. Yes, sir.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

16

1 Q. And what is that team?

2 A. That is called the Interstate Criminal Enforcement
3 Team.

4 Q. What's the purpose of that team?

5 A. To eliminate criminal activity from any roadway that I
6 patrol at that time.

7 Q. And what type of criminal activity are you talking
8 about?

9 A. Criminal activity could consist of anything from
10 kidnapping, child rapists, murderers, money launderers, drug
11 traffickers, gun traffickers, metal thieves, pretty much
12 anything that you can insert into that sentence that is a
13 crime. And that's about it.

14 Q. Would it also include traffic laws?

15 A. Yes, sir, enforcing traffic laws of this State.

16 Q. Okay. What type of specific training have you had in
17 reference to enforcement of the traffic laws and
18 interdiction in this State?

19 A. I have had somewhere between five hundred and six
20 hundred hours of interdiction training through the National
21 Criminal Enforcement Association and also Desert Snow. What
22 this training consists of is usually - - if it's a week
23 long, it'll be a four-day class. The training in that
24 consists of covering many areas of locating, detecting
25 hidden compartments in vehicles, roadside interviews.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

17

1 What they will do is they will take vehicles that is
2 found that other people have found throughout this nation
3 hidden compartments in. They will put you through a
4 scenario to use that training and let you search that
5 vehicle at the end of that training. It covers bus
6 interdiction. It covers interdiction from the sky. Some
7 classes I've had as far as marine interdiction, too.

8 Q. All right. We've both used the word interdiction.

9 What does that mean?

10 A. To impede.

11 Q. And specifically with your criminal enforcement - - -

12 A. Yes, sir. To stop the flow of criminal activity.

13 Q. Okay. Were you employed by the Spartanburg County
14 Sheriff's Office on March 28, 2011?

15 A. Yes, sir.

16 Q. And what were you doing that day?

17 A. I was monitoring traffic on Interstate 85.

18 Q. Where exactly?

19 A. Should've been somewhere around the 71 mile marker.

20 Q. Okay.

21 A. On the northbound side.

22 Q. Explain exactly where your car was situated.

23 A. Where I was sitting is on the northbound side just
24 north of where 26 - - where 85 crosses over 26.

25 Q. Now is this business 85 or ...

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

18

1 A. This is Interstate 85, yes, sir.

2 Q. Okay.

3 A. Where I was sitting is if you're on 26 going west
4 towards - - -

5 Q. Going towards - - -

6 A. Towards Inman, towards Asheville. If you get onto 85
7 north - - -

8 Q. Going towards Charlotte?

9 A. Yes, sir. Going towards Charlotte. I'm at that
10 intersection where that ramp runs into Interstate 85.

11 Q. Which way were you facing?

12 A. I was sitting sideways on the northbound side.

13 Q. What did you observe?

14 A. I observed a Hyundai Santa Fe pass my location and
15 failed to maintain its lane of travel.

16 Q. And when you say failed to maintain its lane of travel,
17 what do you mean?

18 A. Basically after it passed me, the Hyundai, let's see,
19 it was traveling in the middle lane, and where I was sitting
20 is a three lane interstate on the northbound side and three
21 lanes on the southbound side. It was traveling in the
22 middle lane.

23 And after it passed me its left side tire struck the
24 dotted line that divides the middle lane, which it was
25 traveling in, and the fast lane, which would've been to its

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

19

1 left. Then it drifted back into the middle of that middle
2 lane. And it did that several times in the time that it
3 took me to catch up to the vehicle.

4 Q. And is this location in Spartanburg County?

5 A. Yes, sir, it is.

6 Q. And what did you do once you noticed this traffic
7 violation?

8 A. Once I caught up to the vehicle I activated my blue
9 lights to signal him to pull over to the right emergency
10 shoulder, which he did.

11 Q. And can you identify the person who was driving that
12 vehicle?

13 A. I identified him by a driver's license at that time.

14 Q. Have you seen him this morning?

15 A. Yes, sir.

16 Q. And was he in this courtroom before we began this?

17 A. Yes, sir, he was.

18 Q. Okay. Have you seen State's exhibit 2?

19 A. Yes, sir, I have.

20 **MR. HUNTER:** Your Honor, at this time I'd seek to admit
21 State's exhibit 2 for the purpose of this hearing only.

22 **MR. JOHNSTON:** Without objection.

23 **THE COURT:** It's admitted.

24 (Whereupon State's exhibit 2 was admitted into evidence
25 for this hearing)

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

20

1 Q. This State's exhibit 2, is this the in-dash or video
2 camera from your vehicle?

3 A. Yes, sir, it is.

4 Q. Showing this traffic stop?

5 A. Yes, sir.

6 Q. And that's the vehicle in front of you?

7 A. Correct.

8 Q. I'm going to let it play for a few minutes and just
9 sort of watch it until about the two minute mark.

10 (Whereupon the video was played)

11 Q. That's the first two minutes and thirty seconds of that
12 traffic stop, correct?

13 A. Yes, sir.

14 Q. And before you pulled the vehicle over and exited your
15 vehicle you call in the tag. Why do you do that?

16 A. That's procedure for stopping a vehicle - - -

17 Q. Okay.

18 A. - - - with the Sheriff's Office.

19 Q. All right. And then you approach the vehicle and touch
20 the vehicle. Why do you do that?

21 A. It's basically just in case the vehicle drives away or
22 in case there's a shooting incident, something of that
23 nature, I can transfer my fingerprints from me to that
24 vehicle so in a future reference or a future case that the
25 investigators needed to - - to check and make sure that

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

21

1 that's the vehicle that I did stop, they can fingerprint it
2 and prove that it is.

3 Q. When you first approached the vehicle what's the first
4 thing you noticed?

5 A. The first thing I noticed was in the rear cargo area
6 there was some luggage covered up by a blanket. When I got
7 up there to the passenger's window, I noticed that the
8 driver was a black male. And he immediately asked me
9 basically why he was being stopped.

10 Q. I'm going to show you what's been premarked as State's
11 exhibit 10. Do you recognize this?

12 A. Yes, sir.

13 Q. What is it?

14 A. That is going to be what was located in the rear cargo
15 area of the vehicle. It was covered up by a black and white
16 blanket or a black, and white and gray blanket.

17 Q. Does that picture fairly and accurately depict what you
18 remember seeing that day?

19 A. Yes, sir.

20 **MR. HUNTER:** Your Honor, at this time the State would
21 move State's exhibit 10 into evidence for the purposes of
22 this hearing.

23 **MR. JOHNSTON:** Without objection, Your Honor.

24 **THE COURT:** It's admitted.

25 (Whereupon State's exhibit 10 was admitted into

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

22

1 evidence for this hearing)

2 Q. You said he asked why he was stopped. Is that normal?

3 A. Not necessarily. It's not consistent with the innocent
4 motoring public. Ninety-nine percent of the time they will
5 let -- they will let me explain why, basically get to that
6 point.

7 Q. Okay.

8 A. Number one, what I like to do is to figure out who they
9 are first, get their license. That way I can address them
10 respectfully by their last name or their first name, either
11 one. Then I will explain why I stopped them.

12 Q. Okay. And who was the driver identified as?

13 A. Mr. Stepheno J. Alston from Rome, Georgia.

14 Q. And you asked him where Rome, Georgia is, correct?

15 A. I believe I did, yes, sir.

16 Q. And why did you ask him that?

17 A. Number one, I wanted to see if what he was going to
18 tell me would be what I thought was correct, which I knew
19 from training and experience Rome, Georgia is south of
20 Atlanta, near the Forest Park area.

21 Q. Did the fact that he was from near Atlanta cause any
22 concern for you?

23 A. Yes, sir. Me being involved in the interdiction
24 community, Atlanta is a major hub for criminal activity in
25 the southeast.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

23

1 Q. Okay. And what about the fact that he was on I-85, did
2 that cause any concern?

3 A. Well, yes, sir. Again, me being involved in the
4 interdiction community, Interstate 85 is a major criminal
5 activity corridor connecting Atlanta to many routes to the
6 south and to the north of that.

7 Q. Did you ask him for his paperwork?

8 A. Yes, sir, I did.

9 Q. License, registration?

10 A. I asked him for his license. And then once I figured
11 out who he was I explained why I stopped him. And then I
12 believe I asked him for the paperwork to the vehicle at that
13 time. And he produced a rental contract.

14 Q. Let me show you what's been premarked as State's
15 exhibit 14. Do you recognize that?

16 A. Yes, sir, I do.

17 Q. How do you - - -

18 A. That's going to be - - -

19 Q. - - - recognize that?

20 A. That's going to be the rental contract that Mr. Alston
21 had in his possession that day.

22 Q. Is that the exact rental contract that he gave you?

23 A. Yes, sir.

24 **MR. HUNTER:** Your Honor, at this time the State would
25 offer State's exhibit 14 for the purposes of this hearing.

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24

1 **MR. JOHNSTON:** No objection.

2 **THE COURT:** It's admitted.

3 (Whereupon State's exhibit 14 was admitted into
4 evidence for this hearing)

5 Q. Now you sit at the car for a good thirty seconds after
6 he hands it to you. Why are you doing that?

7 A. What I'm doing is I'm looking at the rental contract.
8 The rental contract can give you a lot of information
9 without even having to ask anyone anything about it. It
10 gives you the information as far as where it was rented and
11 when - - -

12 Q. Okay. Where was it rented?

13 A. This one's going to be rented on the Harris Parkway,
14 Cartersville, Georgia on the - - -

15 Q. Is that also in the Atlanta area?

16 A. Yes, sir.

17 Q. What other type of information can you learn from that?

18 A. It'll also tell you when it was rented, which was, in
19 this case, March the 26th of 2011 at 11:21 AM. It will also
20 tell you when it's due back and where.

21 Q. March 26th, 2011, what day was that?

22 A. That would've been a Saturday, which would've been two
23 days before the stop.

24 Q. And so this stop happened on a Monday?

25 A. Correct. Yes, sir.

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25

1 Q. Approximately around 1:00, give or take - - -

2 A. Yes, sir.

3 Q. - - - in the afternoon? Okay. What other information
4 can you learn?

5 A. It'll also cover when it's due back and where it's due
6 back. And ninety-nine percent of the time it's going to be
7 due back where it's rented and which is consistent with this
8 case here.

9 It also tells you who rented the vehicle, who's also an
10 additional driver on the vehicle. And these rental
11 agreements with Enterprise will also tell you where that
12 vehicle is allowed to be operated.

13 Q. And who rented this vehicle?

14 A. By the way this one here, the rental agreement, it's
15 Tomeka Harris.

16 Q. Okay. Was there anybody in the vehicle other than Mr.
17 Alston?

18 A. No, sir.

19 Q. All right. And what raised your suspicion about the
20 fact that it was a third-party vehicle without the third
21 party present in the vehicle?

22 A. Well, in my training and experience, that is very
23 common when it comes to criminal activity. They will have a
24 third-party rental in their possession. That way if they
25 are involved in criminal activity they're not in their

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1 vehicle. So that vehicle won't get seized when they get
2 caught.

3 There's also something else that brings - - throws a
4 red flag with me is that it's rented by a female. In my
5 training and experience, again, and through the classes and
6 the training that I've been through, a lot of your criminal
7 organizations will rent a vehicle in a woman's name for the
8 simple fact that law enforcement does not - - they are not
9 threatened by a woman. They don't recognize criminal
10 activity with a female. At least that's what the drug
11 trafficking organizations think.

12 Q. Also you mentioned that it tells where this vehicle's
13 allowed to be operated.

14 A. Yes, sir.

15 Q. Does this rental agreement have those states?

16 A. Yes, sir. This one states that it's allowed to operate
17 in Georgia, Tennessee, Kentucky, Virginia and West Virginia
18 and those states only. One, two, three, four, five states
19 in all.

20 Q. And, of course, where is this vehicle located at this
21 time when you stopped it?

22 A. We're in Spartanburg County here in South Carolina when
23 I stopped him, which that's not on the rental agreement as
24 the state that it's allowed to be operated in.

25 Q. You also asked him about the no smoking and no pet hair

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1 down at the bottom. Why are you asking him about that?

2 A. At the time Mr. - - I distinctly remember Mr. Alston
3 watching me and trying to figure out what I'm doing. And
4 what I'm doing at that point in time, I don't know how long
5 it took me, maybe ten to fifteen seconds, I'm looking at all
6 the information that this rental agreement tells me.

7 And I don't want to tip him off to what I've already
8 saw that causes concerns to begin with. And instead of
9 letting him know what I'm looking at, I'll refer to the no
10 smoking and no pet hair down at the bottom that's stamped on
11 there real big to make him think that that's what I'm
12 looking at as well.

13 Q. Did you notice anything about the keys in the vehicle?

14 A. Yes, sir. There was a rental key in the - - I'm sorry.
15 There was a key in the ignition that is consistent with the
16 car being a rental, just one key. And on the keyring there
17 was two house keys on the keyring, which is very odd. I
18 mean, - - -

19 Q. Why is that odd?

20 A. - - - you don't see that. Anytime somebody rents a
21 vehicle, in my training and experience and in the fourteen
22 years of being involved in law enforcement, you don't see
23 other people took or take their house keys and put on the
24 keyring for the rental. To us, and in my training and
25 experience, they're trying to personalize the vehicle.

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1 Q. What did you notice about the driver's side door?

2 A. When Mr. Alston got out, when I asked him to exit the
3 vehicle and meet me back at the patrol car I noticed that
4 there was an air freshener in the driver's door pocket,
5 which is located right close to where his legs would be.
6 And I noticed that it was one of those old mushroom
7 household air fresheners like your mom used to get when you
8 were a child back in the 80s.

9 Q. Let me show you what's been premarked as State's
10 exhibit 11 and 4. Do you recognize those pictures?

11 A. Yes, sir.

12 Q. How do you recognize those pictures?

13 A. The first one's going to be just a picture of the
14 interior.

15 Q. When you say the first one, identify it - - -

16 A. Okay. That's State's exhibit 11. It's going to be
17 just an overall picture of the interior with the bookbag in
18 the right floorboard, the drinks in the center console and
19 what appears to be a Crown Royal bag in the middle console.

20 And State's exhibit 4 shows fully the mushroom air
21 freshener that I'm referring to.

22 Q. All right. Do those pictures fairly and accurately
23 depict the scene as you remember them?

24 A. Yes, sir, it does.

25 **MR. HUNTER:** Your Honor, at this time the State would

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1 offer State's exhibit 4 and 11 into evidence for the
2 purposes of this hearing.

3 **MR. JOHNSTON:** No objection.

4 **THE COURT:** They're admitted.

5 (Whereupon State's exhibits 4 and 11 were admitted into
6 evidence for this hearing)

7 Q. State's exhibit 11, would that be best described as the
8 view that you had when you first approached the vehicle?

9 A. Yes, sir.

10 Q. When did you notice the air freshener?

11 A. When he got out. You could actually see it peeking up
12 -- he was in the way. I couldn't see it.

13 Q. When you first -- when you first observed him because
14 his leg was in the way, you can't see the air freshener?

15 A. No, sir. I didn't see that until he actually exited
16 the car. I actually waited, I don't know, a couple of
17 seconds after he had gotten out and I could see it at that
18 point. To me, that's also odd because in a rental vehicle
19 you just don't see people go straight to a store and buy an
20 air freshener and put in a rental vehicle if it's not yours.

21 Q. Now, why would an air freshener raise your suspicion?

22 A. It could be used as a masking agent to hide odors of
23 other things, which could be drugs, could be anything that
24 he's trying to hide that he doesn't want you to smell.

25 Q. Now, have you seen that in your training, your

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1 experience, and learned that through your training?

2 A. Absolutely.

3 Q. Let me play a little more of the video.

4 (Whereupon the video was played)

5 Q. Now, in that short little clip you'd gone back to the
6 vehicle and you asked him about his license. Why did you do
7 that?

8 A. Number one, to see if his license is suspended, if he's
9 had any suspensions in the past with it.

10 Q. Okay. Had you - - did you run his license at that
11 point?

12 A. I waited - - I think it's going to be just a couple of
13 more minutes or a couple more seconds, I'm not sure exactly
14 when it is in the stop that I run his license.

15 Q. Okay. And you asked him who rented the vehicle?

16 A. Yes, sir. He - - -

17 Q. What did he tell you?

18 A. He told me that it was Tomeka Harris, which matched
19 what was on the rental agreement by - - a letter off, but he
20 basically told me exactly who rented the vehicle.

21 Q. Okay.

22 A. But I think that was his girlfriend, is what he told
23 me.

24 Q. Did you ask him where he was going?

25 A. Yes, sir. He stated that he was going to pick his mom

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1 up in New Jersey. And I think I asked - - -

2 Q. Now, why would that raise your suspicion in this case?

3 A. That's also another state that's not listed on the
4 rental agreement to where he advised Enterprise where he was
5 going.

6 Q. So - - -

7 A. Again, we're in two different - - we're in South
8 Carolina that's not listed on the rental contract and his
9 destination's also not listed on it either.

10 Another thing that raised a big red flag with me is why
11 he's putting the states on here like Georgia, Tennessee,
12 Kentucky, West Virginia and Virginia. In my mind that
13 automatically makes me think that from the beginning of the
14 trip he was trying to avoid Interstate 85.

15 Q. Did you ask him where he was going?

16 A. Yes, sir.

17 Q. And what he was going to do there?

18 A. Yes, sir. He advised that he was going to pick up his
19 mother in New Jersey. And I believe I asked him what part
20 of New Jersey. And I believe it was Newark. That's exactly
21 where he was going.

22 Q. Did he say why he was going to pick up his mother?

23 A. He told me that, quoting him, he was going to stay
24 there about a week or so and that his mom was depressed and
25 that he was going to bring her home for Mother's Day and

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1 all.

2 And, again, another red flag to me is we're in March,
3 we're at the end of March, and Mother's Day isn't until May,
4 which is another month and a half. So, you know, to me
5 that's raising another red flag. You've got Mother's Day,
6 an event that's a month and a half away.

7 Q. Now, approximately how far away is this stop hour-wise
8 from Atlanta, Georgia?

9 A. I guess you're looking at about two and a half hours.

10 Q. Okay. And this vehicle rental was for how many days?

11 A. I believe a week. I believe seven days.

12 Q. Okay. And this is a Monday. So this is the third day
13 of the rental?

14 A. Yes, sir.

15 Q. Is it a little odd where he's going and the time he's
16 taking to get there?

17 A. Yes, sir.

18 Q. And why?

19 A. You're asking - - it's a little odd on the simple fact
20 of the matter that he's going to Newark, New Jersey and he's
21 already on the third day of the rental. He stated to me
22 that he was going to stay about a week or so and that would
23 put him having to be back in Atlanta or in Cartersville
24 where the vehicle was rented the Saturday after.

25 Q. Okay.

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1 A. So the length of stay is where I was going with that.

2 Q. So according to him he had to get up there and pick his
3 mother up and turn right around and come back?

4 A. Correct. Yes, sir. And he was originally from
5 Georgia, I think, is another thing we covered in that
6 conversation.

7 Q. Originally from New Jersey? Lives in Georgia?

8 A. Yes, sir. I'm sorry. He's from Georgia and originally
9 from New Jersey.

10 Q. Let me ask you one final question. We see your hand
11 here in the video, your right hand, are you right handed?

12 A. Yes, sir.

13 Q. And what are you doing right there?

14 A. I'm starting to begin to write a warning for the
15 violation that he was stopped for.

16 Q. Okay.

17 (Whereupon the video was played)

18 Q. What were you doing just then?

19 A. I was checking his license through dispatch, the status
20 of his license.

21 Q. Okay. And at this point we're five minutes and forty-
22 one seconds into the traffic stop?

23 A. Yes, sir.

24 Q. It's kind of hard to see - - -

25 A. Yes, sir.

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1 Q. - - - the bottom there, but I believe it's five ...

2 A. If you say so, I'll agree with that.

3 Q. If we can pull that back for a second so you can see.

4 If you'll look down by your hand. Still can't see it.

5 That's what it is, not showing a thing. But it's five

6 minutes and forty-one seconds into the traffic stop?

7 A. Okay. Yes, sir.

8 Q. And approximately two minutes - - three minutes since

9 he's come back to your vehicle?

10 A. Yes, sir.

11 Q. Okay. Why did you ask him about his license being

12 suspended?

13 A. The second time?

14 Q. Yes.

15 A. Is that what you're referring to?

16 Q. Right before you ran the license.

17 A. I wanted to see if he was going to tell me the truth

18 about whether it had been suspended or not. And when it

19 came back - - he advised me that he had been arrested for

20 DUI several years ago, that it had been suspended then.

21 That was a different answer than what he had given me

22 initially when I asked him - - when I first got him out of

23 the vehicle I asked him if he had any problems with his

24 license, and he said no.

25 Q. What's the typical time on checking the license through

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1 dispatch?

2 A. It depends on how busy they are. Typical time, I don't
3 know. It just - - it varies.

4 Q. Would it take a little longer for an out-of-state
5 license as opposed to a South Carolina license?

6 A. It just depends on how long or if the files are slow
7 coming back from Georgia.

8 Q. Okay.

9 (Whereupon the video was played)

10 Q. Who were you talking to at that point?

11 A. I believe at that point in time I'm calling Deputy
12 Carraway, who's a teammate on the Ice Team with me.

13 Q. I believe the response came back, I haven't picked up
14 the package yet. What does that mean?

15 A. Yes, sir. We had just eaten lunch, and Deputy Carraway
16 was in a spare car. He didn't have his K-9 with him at the
17 time. So after we got done eating lunch he was going to go
18 to the house and pick up a dog, and then we were going to
19 come to work. And what he means by that is - - when he says
20 package, he's just trying to tell me that he hasn't made it
21 to the house yet to pick up a dog.

22 (Whereupon the video was played)

23 Q. Now, eleven minutes and eleven seconds into the traffic
24 stop at the time of this pause. After you call in his
25 license what did he do?

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1 A. When I checked his license I went back to my vehicle
2 and called - - and talked to Jason there for a second or
3 Deputy Carraway, and asked where he was to figure out if he
4 was close to me or not. And once I figured out that he had
5 to go to his house to pick up his dog and then come back, I
6 went ahead and switched to channel 1 to see if anybody on
7 uniform patrol was close to me at that point in time.

8 Q. Was anybody close to you?

9 A. They had somebody coming to me, but I think it was - -
10 they didn't say how long it was going to be, but he wasn't
11 necessarily in the same area as me.

12 Q. Now, I noticed you holding his license. Is there
13 anything interesting you found about his license?

14 A. It was a paper license.

15 Q. Well, explain what you mean by a paper license.

16 A. It wasn't laminated and it wasn't a license like what
17 we normally get when we go to the DMV.

18 Q. So it's not something you had seen very much of?

19 A. No, sir.

20 Q. Did that - - -

21 A. It's not something you - - -

22 Q. - - - raise your suspicion at all?

23 A. - - - run into a lot. Well, yes, sir. It's kind of
24 odd, but I never asked him about it. He went ahead and
25 offered to me when he saw me trying to figure out what was

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1 going on with it, he went ahead and explained to me that
2 they gave him a paper license until he got it renewed. And
3 he did that without me even asking him about it.

4 Q. It looks like in those two minutes that we just watched
5 -- who's making the conversation at this point? Are you
6 asking him questions or is he asking you questions?

7 A. He's kind of covering some things with me, especially
8 with his license. I asked him, let's see, I asked him if
9 anybody had had access to the rental since he rented it.
10 And he basically told me, he says, I have no idea. And that
11 again raises a red flag with me because if my girlfriend and
12 I are going to rent a vehicle, I'm going to make sure that
13 nobody else has access to it besides us.

14 Q. But you asked him again, didn't you, if anybody had had
15 access to the vehicle?

16 A. Yes, sir.

17 Q. Well, what did he state at that point?

18 A. He said, nah, you don't let anybody use those cars
19 nowadays.

20 Q. And what did that statement mean to you?

21 A. That's odd because to me he understands why I'm asking
22 that question. Because, number one, I want to see if
23 anybody else has had access to the car besides him because
24 next what I'm going to do is try to ask him if everything in
25 there belongs to him, if there's anything in the vehicle

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1 that's not his.

2 And to me, you know, what that does is it gives him a
3 chance to distance himself from the vehicle. He doesn't do
4 that at this time. But he -- the answer lets me know that
5 it's a little odd for me -- for him to answer in that way
6 because he's aware of why I'm asking that question.

7 Q. He then starts talking about his kids. How did that
8 conversation come about?

9 A. He stated he had to -- well, I asked him what he did
10 for a living. And he said he's got a clothing store in
11 Rome. He stated he had to make a living somehow, he had six
12 kids to feed. And then I just asked him how old they were.
13 And he gave me ages of seven kids.

14 Q. What were the ages he gave you?

15 A. As you can hear on the tape it was thirteen, fourteen,
16 ten, five, four, three and the little one's about six
17 months.

18 Q. And so -- --

19 A. And when he started -- --

20 Q. He told you he had six kids, -- --

21 A. Right.

22 Q. -- -- and gave you seven ages. What does that mean to
23 you?

24 A. He's not keeping up with -- it's the stress of the
25 situation. He's not even being able to keep up with how old

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1 the kids are and how many he's got.

2 Q. Okay.

3 A. And, plus, the way he answered it to me, he just kind
4 of rattled it off a little bit there, you know, in the
5 monotone answer and the rhythm he had thirteen, fourteen,
6 ten, five, four, and he hesitated a little between ten and
7 five like he's trying to think about this for a little bit.

8 And that's not something - - when you ask me how old my
9 children are or stepchildren, I can look at you straight and
10 tell you fourteen and sixteen. I don't have to think about
11 it. So to me, that's odd.

12 (Whereupon the video was played)

13 Q. You're about to start asking for consent. I'm going to
14 go ahead and stop it right there just to finish this
15 portion.

16 About sixteen minutes into the traffic stop at this
17 point. You've already talked about kids, what he did for a
18 living. At this point he starts talking about his mother.
19 What do y'all discuss?

20 A. He basically told me that he's just going to go up
21 there and check on her, that she's - - I asked if she was in
22 bad health. And - - well, first of all, I asked him, you
23 know, how long he planned on staying again. And he advised
24 somewhere around a week, yeah, something like that, just
25 whenever she gets ready to leave, when I get rested up.

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1 And when I asked him if his mother was in bad health,
2 because he had alluded to that earlier in the conversation,
3 well, she don't tell nobody, but it seems bad. I don't know
4 what's wrong with her. I figured I would go up there and
5 see what's going on.

6 Q. Did you specifically ask if he was going to stay until
7 Monday?

8 A. Yes, sir.

9 Q. And what was his answer to that?

10 A. Yeah, something like that, just whenever she gets ready
11 to leave, when I get rested up. That's what he told me.

12 Q. And he had already told you he was going up there to
13 bring her home for Mother's Day?

14 A. Yes, sir. And I had already noticed - - -

15 Q. From New Jersey?

16 A. I'm sorry. Yes, sir.

17 Q. And the state was not on the rental contract?

18 A. Correct.

19 Q. On Monday when the car was already due back on the
20 Saturday before?

21 A. Two days prior, yes, sir.

22 Q. It seems you're talking to dispatch or someone on the
23 radio. What are y'all discussing? Are you waiting for
24 someone to arrive at this point?

25 A. At this point I'm waiting on somebody to get there.

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1 Q. Okay. And why are you doing that?

2 A. What I -- and the reason I do that is because I've
3 been in a shooting. I've been shot doing this for a living.
4 I've done got to the point to where I'm not going to ask for
5 consent until I actually get somebody else there with me for
6 the simple fact that a lot of times things start getting a
7 lot -- a little tense and people start figuring out what's
8 actually going on when you start asking for consent to
9 search.

10 And that's going to be the time that foot chases occur,
11 shootings occur and things of that nature. So the best
12 thing for me to do safety-wise, officer safety-wise is just
13 wait until somebody else gets there.

14 Q. Okay. But at this point you believe you're going to
15 ask him to search the vehicle?

16 A. Yes, sir.

17 Q. You're going to ask him for consent to search the
18 vehicle?

19 A. Yes, sir.

20 Q. And you have a K-9 on the way?

21 A. Yes, sir.

22 (Whereupon the video was played)

23 Q. Can you briefly explain what that whole conversation
24 was about?

25 A. I basically asked him, number one, if there was

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1 anything in the vehicle that he wasn't responsible for or
2 that he was not responsible for. He basically stalled for a
3 second and asked - - said, excuse me, answering a question
4 with a question. It's giving him time to come up with an
5 answer. I had to ask him again, and he told me no.

6 I then asked for consent to search the vehicle. And
7 instead of answering the question, which I encounter
8 sometimes, Mr. Alston explained, I'm just trying to figure
9 all - - what all this is about. I advised him that I'm just
10 asking a question. He said, I mean, yeah, you can search
11 it, quoting him.

12 Q. But at that point you don't go search it. Why?

13 A. No, sir. He then said, and I'm asking you why you want
14 to search the vehicle? And I explained to him I'm not going
15 to answer that until everything's done. When everything's
16 done I will give him the time to explain everything to him
17 if that's what he wants.

18 Q. Did you ever give him - - did you ever tell him that he
19 had the right to refuse?

20 A. Yes, sir. That's where I was going with this. I
21 explained to him that, number one, he's got the right to
22 refuse and he's also got the right to give consent. And he
23 can do either.

24 And he asked me, he said, I have the right to refuse?
25 And I nodded my head, yes. And then he said, then go ahead

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1 as he pointed to the vehicle. And he again inquired - - -

2 Q. At that point was that a clear answer to you?

3 A. He'd already told me yes.

4 Q. Okay.

5 A. He had already told me yeah.

6 Q. Okay.

7 A. And then when I - - -

8 Q. But you're - - why are you continuing? Are you trying

9 to make sure - - -

10 **MR. JOHNSTON:** Your Honor, I object to leading the
11 witness.

12 **THE COURT:** Don't lead.

13 A. Well, I'll explain it to you this way. I needed a yes
14 or no answer. And that's where I'm going with this, I'm
15 trying to get him to give me a yes or no answer.

16 Q. Okay. After you explained the right to refuse, what do
17 you ask next?

18 A. To make sure that he understands what I'm doing. He's
19 wanting to try to - - he says I didn't do anything wrong. I
20 ask a yes or no answer, that's what I'm asking. And he says
21 yes.

22 Q. Okay. And that's when you start heading towards the
23 car here?

24 A. Yes, sir.

25 Q. Was anybody on the scene at this time?

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1 A. First Sergeant Barnett from the uniform patrol.

2 Q. Okay. But he's back behind the scene?

3 A. He's nowhere near us at all.

4 Q. Okay. Obviously we can see from the video it's

5 approximately 1:12 in the afternoon, somewhere around there,

6 if the video is correct - - -

7 A. Yes, sir.

8 Q. - - - time-wise? Dark outside?

9 A. No, sir, it's lit. It's daylight.

10 Q. Okay. And have you pulled your weapon at any point?

11 A. No, sir.

12 Q. And do you - - felt like you've coerced him at any

13 point for this consent?

14 A. No, sir.

15 Q. Did he seem to have the education in order to

16 understand what you were asking him?

17 A. Yes, sir.

18 Q. This video's going to go on for a while while you're

19 searching the vehicle. Does anybody else come and help you

20 search the vehicle?

21 (Whereupon the video was played)

22 A. Captain Hollifield - - -

23 **MADAME COURT REPORTER:** I can't hear.

24 (Whereupon the video continued playing)

25 **MR. HUNTER:** Your Honor, may we approach?

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1 **THE COURT:** Before you do that, let me say, I don't
2 know what his last answer was because you turned that video
3 on before he could respond, and he responded while it was
4 going. And the court reporter nor I could understand it.
5 So - - -

6 **MR. HUNTER:** I apologize. I'll ask it again.

7 Q. Did anybody else come and search the vehicle with you?

8 A. Yes, sir. Captain Hollifield and Deputy Carraway
9 arrived at the scene shortly thereafter and assisted as
10 well.

11 **MR. HUNTER:** May we approach?

12 **THE COURT:** Yes.

13 (Whereupon a bench conference was held off the record)

14 Q. Did at any time between when you start searching the
15 vehicle and when the cocaine was located under the driver's
16 column, did Mr. Alston ever tell you or anybody else around
17 him that he withdrew consent?

18 A. No, sir.

19 Q. Now, I believe we went over briefly at the beginning,
20 but when you first approached the car you saw luggage
21 covered by a blanket, is that correct?

22 A. Correct.

23 Q. Why did that raise your suspicions?

24 A. That's not common with the motoring public that I come
25 into contact with every day. You just don't see that. You

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1 don't see the people to actually take the time to cover it
2 with a blanket. They put their luggage in there and go.

3 Q. Please answer any questions Mr. Johnston might have for
4 you.

5 A. Yes, sir.

6 **MR. JOHNSTON:** Your Honor would it be possible for us
7 to take a brief restroom break?

8 **THE COURT:** Yeah. We'll take a ten minute recess.

9 **MR. JOHNSTON:** Thank you, sir.

10 **THE COURT:** Step down, but don't discuss your testimony
11 during the break.

12 A. Thank you, sir.

13 **THE COURT:** We'll be at ease ten minutes.

14 (Whereupon court was in recess at 3:32 PM)

15 (Whereupon court resumed at 3:39 PM)

16 **THE COURT:** You can take your seat.

17 (Whereupon Defendant's exhibit 1 was marked for
18 identification)

19 **MR. JOHNSTON:** May I proceed, Your Honor?

20 **THE COURT:** You may.

21 **Cross Examination by Mr. Johnston:**

22 Q. Officer Gilbert, showing you what has been marked for
23 identification as Defendant's exhibit number 1.

24 A. Yes, sir.

25 Q. I'm not really concerned about this half of it. The

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1 way this was provided to me in discovery, there's more than
2 one thing on this page. I'm really only concerned with the
3 item that appears all the way on the right as you would look
4 at it.

5 A. Yes, sir.

6 Q. Okay? Can you tell me what that photocopy - - what
7 that is a photocopy of there all the way on the right?

8 A. Mr. Johnston, that's going to be a photocopy of the
9 warning.

10 Q. Of the warning?

11 A. Yes, sir.

12 Q. In this case?

13 A. Yes, sir.

14 Q. And does that appear to be a completed copy of the
15 warning?

16 A. Yes, sir.

17 Q. Okay.

18 **MR. JOHNSTON:** Your Honor, at this time we would offer
19 it into evidence.

20 **MR. HUNTER:** No objection.

21 **THE COURT:** It's admitted.

22 (Whereupon Defendant's exhibit 1 was admitted into
23 evidence for this hearing)

24 Q. And you did have the opportunity to complete that
25 warning?

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1 A. Correct.

2 Q. That is it in its entirety completely filled out?

3 A. Yes, sir.

4 Q. Do you have like a carbon? Is that the way that works?

5 A. What do you mean? You talking about what's underneath
6 it?

7 Q. Yes, sir.

8 A. Yes, sir.

9 Q. So when you write that out you have a blue ticket for
10 the violator, right?

11 A. Correct. Yes, sir.

12 Q. Not a blue ticket, but a blue warning?

13 A. Correct.

14 Q. Then you have a copy for yourself?

15 A. Yes, sir.

16 Q. And if it's a real citation, you have a copy for the
17 court?

18 A. Correct.

19 Q. With a warning, is there a copy for the court or - - -

20 A. There's a copy that we turn into records.

21 Q. Turn into records, okay. And you cited him in that
22 warning for failing to maintain the lane?

23 A. Correct.

24 Q. I want to ask you again about what it was that Mr.

25 Alston did that you perceived to be failing to maintain his

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1 lane.

2 A. Okay.

3 Q. I believe you testified that he drove on the line. Is
4 that what you said?

5 A. Struck.

6 Q. That he struck the line?

7 A. Correct.

8 Q. And I assume from the way you characterize that that he
9 did not cross that line?

10 A. Well, a lot of times what happens is -- I'm not going
11 to say that he crossed it until the complete tire goes
12 across that white line.

13 Q. Yes, sir.

14 A. Now, when I say struck, what I would mean by that is
15 that tire could have covered that whole line, but it didn't
16 go all the way across it. But it did make contact with that
17 line and then drift back into the middle of that lane.

18 Q. All right. So what I'm hearing you say is Mr. Alston
19 never crossed that line, he -- what was the word that you
20 used?

21 A. Struck.

22 Q. Struck it.

23 A. Yes, sir.

24 Q. He rode on top of it?

25 A. Correct.

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1 Q. Okay. And then went back into his own line?

2 A. Correct. Yes, sir.

3 Q. Which, of course, is proper driving to - - -

4 A. Well, to me, that's drifting. That's a sign of
5 somebody that either could be sleepy, - - -

6 Q. Okay.

7 A. - - - they could be - - have a - - they could be having
8 a medical condition, they could be under the influence of
9 any alcohol or drugs, they could be on the phone. We don't
10 know, but he's got to operate that in due regard to the
11 safety of the others around him as well.

12 Q. So putting himself back in his own lane properly is
13 suspicious?

14 A. No, sir.

15 Q. So the only problem you have with his driving was
16 striking the middle line?

17 A. Well, he's operating in the middle of that lane when he
18 passes me.

19 Q. Right.

20 A. After he passes me - - -

21 Q. Where he's supposed to be?

22 A. Correct. Yes, sir.

23 Q. Right?

24 A. After he passes me he swerves to the left and strikes
25 that white line.

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1 Q. Okay.

2 A. And then swerves to the right into the middle of the
3 middle lane again. And another thing that it brings to my
4 attention is what I find in training and experience is the
5 common traveling public is looking back at me, okay?

6 Q. Yes, sir.

7 A. When they do that they will swerve one way or the
8 other. They're basically concerned of my presence for some
9 reason or another.

10 Q. And you're driving a marked vehicle, is that right?

11 A. No, sir.

12 Q. You're not driving a marked vehicle?

13 A. No, sir.

14 Q. What are you driving?

15 A. It's an unmarked Dodge Charger. Well, I'm sorry. At
16 this point in time it's an unmarked Chevrolet Tahoe.

17 Q. Okay. An unmarked Chevrolet Tahoe. Okay. So you say
18 that the motoring public usually observes you?

19 A. Yes, sir.

20 Q. And observes you because you're a police officer?

21 A. The way I'm sitting at that point in time, yes, sir.

22 Q. Of course, you weren't driving a marked vehicle.

23 A. When you say observe, what do you mean?

24 Q. I'm sorry, say again, please.

25 A. When you say observed, what do you mean by that?

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1 Q. Looked.

2 A. I guess you could say that, yeah. Yes, sir.

3 Q. If you weren't in a marked car the motoring public
4 wouldn't necessarily know you were a police officer, would
5 they?

6 A. Not necessarily. A lot of people are smarter than what
7 you give them credit for.

8 Q. Well, I understand that, but - - -

9 A. The way I'm sitting would let people know that that's
10 just not an innocent person sitting on the side of the
11 interstate.

12 Q. Okay. But again, it was unmarked?

13 A. Correct. Yes, sir.

14 Q. And so in this situation you would have expected what?

15 A. For him to drive into the middle of his lane the whole
16 time.

17 Q. Okay.

18 A. To stay in the center-most portion of that lane.

19 Q. You were on Mr. Alston's right, am I correct?

20 A. Yes, sir.

21 Q. When he drifted did he drift left or right?

22 A. Can I refer to - - -

23 Q. Absolutely.

24 A. Okay. He failed to maintain his lane striking the
25 dotted line between the middle lane and the fast lane, which

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1 would be to his left.

2 Q. All right. So he goes to his left?

3 A. Yes, sir.

4 Q. That's further away from you, isn't it?

5 A. I would agree with that, yes, sir. You also have to
6 take into consideration the way the curve goes after he
7 passes me as well.

8 Q. I'm sorry, say that again, please.

9 A. I said you have to take into consideration the way the
10 curve goes after he passes me because when he goes by me
11 there's a curve to the left.

12 Q. Okay.

13 A. So he's turning to his left after he passes me as well.

14 Q. All right. You initiated an official stop with your
15 blue lights, is that correct?

16 A. Yes, sir.

17 Q. Mr. Alston pulled over, correct?

18 A. Yes, sir.

19 Q. And you approached him on the passenger's side?

20 A. Correct.

21 Q. Why did you approach on the passenger's side instead of
22 the driver's side?

23 A. Well, it's safer that side. It's definitely safer that
24 way. The way we've been trained - - I like to do a
25 passenger-side approach. It gives me a bigger view of

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1 everything that's going on in the vehicle.

2 And also safety-wise, I don't know the percentage, but
3 I would figure say eighty, eighty-five percent of the public
4 is right-handed. If a person wants to shoot me or draw a
5 weapon at some point in time, if I approach on the driver's
6 side, it is much easier for a person just to lay back and
7 have that gun ready to go as I'm sitting there at the
8 driver's window.

9 When I approach the passenger's vehicle, excuse me, the
10 passenger's side, he has to come across and actually go
11 across his body and draw that gun. And it gives me a little
12 bit extra time to get away, to create some distance.

13 Q. All right, sir.

14 A. It gives me the ability to see a lot more in the
15 vehicle. It gives me the ability to surprise them a little
16 bit, so to speak, because the public is expecting me to come
17 up on that left side.

18 Q. That's right. The public - - because many law
19 enforcement agencies, maybe even most law enforcement
20 agencies, an officer making a routine traffic stop is going
21 to approach on the driver's side, is that correct?

22 A. I can't testify to that because there's nothing being
23 routine about a traffic stop.

24 Q. Okay. Well, - - -

25 A. Second of all, I can't testify to what they've been

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1 trained to do. I can only testify to what I've been trained
2 to do.

3 Q. All right. Well, you do know that officers approach on
4 the driver's side a lot of times, don't you?

5 A. If that's what they prefer, yes, sir.

6 Q. Okay. Now, the advantage to you of approaching on the
7 passenger's side is, among other things, you get a good
8 clear view of what's going on inside the car, right?

9 A. Correct.

10 Q. An unobstructed view as opposed to looking in from the
11 driver's side where you're having to peer over the door, so
12 to speak, right?

13 A. Yes, sir.

14 Q. So you got a good long look into that vehicle from that
15 passenger's side view?

16 A. Explain long.

17 Q. Well, you didn't see any guns, right?

18 A. No, sir.

19 Q. You didn't see any other weapons?

20 A. No, sir.

21 Q. You didn't see - - -

22 A. Doesn't mean they're not hid somewhere.

23 Q. Oh, I understand that.

24 A. There was no weapons seen in plain view.

25 Q. Okay. And you can even sniff inside that car from that

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1 vantage point, can't you?

2 A. Yes, sir.

3 Q. You didn't smell any alcohol?

4 A. Not at the time, no, sir.

5 Q. Well, did you later?

6 A. No, sir. I'm sorry.

7 Q. You didn't smell any marijuana?

8 A. No, sir.

9 Q. Does cocaine even have an odor?

10 A. Yes, sir.

11 Q. Do you know what it smells like?

12 A. Like cocaine.

13 Q. Okay. Was there anything in the more general world
14 that might give me an idea of what the cocaine-like smell
15 would be?

16 A. No, sir. I can't compare it to anything else other
17 than itself.

18 Q. Okay. Well, is it fair to say that cocaine doesn't
19 have a strong, loud odor like marijuana?

20 A. It's not fair to say, no, sir.

21 Q. It's not?

22 A. If you know what you're smelling. Depends on the
23 volume and how long it's been there.

24 Q. Okay.

25 A. So depending on -- if you're asking how easy it would

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1 be to smell cocaine.

2 Q. Yes, sir.

3 A. It also depends on how it's packaged and things of that
4 nature, too.

5 Q. You didn't smell any though, did you?

6 A. No, sir.

7 Q. All right. Now, there were no other occupants of this
8 vehicle other than Mr. Alston?

9 A. Correct. Yes, sir.

10 Q. Okay. So one of the things that I understand officers
11 will do is if there's more than one person in the car, that
12 they will separate the occupants of the vehicle and see if
13 there are conflicting stories often.

14 A. Some do that, yes, sir.

15 Q. All right. You couldn't do that in this case because
16 there was only one person there.

17 A. Correct. That would apply to this stop. There's only
18 one person in the vehicle.

19 Q. Okay. Now, you asked for the Defendant's driver's
20 license, am I correct?

21 A. Yes, sir.

22 Q. He provided them to you.

23 A. Correct.

24 Q. You were a bit disturbed because they were paper?

25 A. Yes, sir. He explained that away later on in the stop.

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1 Q. Okay. He produced the rental agreement, correct?

2 A. Yes, sir.

3 Q. And that rental agreement - - showing you now what has
4 been admitted as State's exhibit number 14, that is the
5 rental agreement, is it not, sir?

6 A. Yes, sir.

7 Q. Did the license plate on the Hyundai in this case, did
8 that license plate match up with the information in State's
9 exhibit 14?

10 A. It's not listed on there, no, sir.

11 Q. Okay. Was there a registration in the vehicle?

12 A. No, sir. He didn't give one, and I didn't ask. I
13 asked for the paperwork to the vehicle, and he produced
14 that.

15 Q. He didn't give one, you didn't ask?

16 A. No, sir.

17 Q. Sometimes that's something police ask for?

18 A. If it's not a rental vehicle, yes, sir.

19 Q. Okay.

20 A. If it's a privately owned vehicle.

21 Q. All right. Did you call the tag in?

22 A. Yes, sir.

23 Q. To dispatch?

24 A. Correct.

25 Q. And they indicated it was clear?

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1 A. Yes, sir.

2 Q. Driver's license, you called that into dispatch?

3 A. Correct.

4 Q. They indicated it was clear?

5 A. Yes, sir.

6 Q. At that point you had satisfied yourself that there
7 were no criminal violations as far as his driver's license,
8 as far as the registration of the motor vehicle, am I
9 correct, sir?

10 A. What do you mean?

11 Q. Well, - - -

12 A. You're asking had I seen any indicators of criminal
13 activity?

14 Q. No, sir.

15 A. Okay.

16 Q. We'll get to that.

17 A. Okay. Sorry.

18 Q. No, I'm asking after you did the things that we just
19 talked about, after you looked at the paperwork, looked at
20 his license, called in the tag, called in his license, you
21 had no other issues with either his license or the
22 registration, everything was clear?

23 A. Everything was clear on his license, and the tag came
24 back to that vehicle.

25 Q. All right. And you did that, you found that

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1 information out before you wrote the citation in Defendant's
2 exhibit number 1?

3 A. No, sir.

4 Q. Or while you were doing it?

5 A. While.

6 Q. Okay. Is it fair to say that you have completed the
7 citation or that you had not completed the citation until
8 you had confirmed this information that we're speaking of,
9 that he had a license, the license was clear, and that the
10 tag was appropriate and that he had a rental agreement? You
11 did not finish writing that citation until after you had
12 confirmed that all of those things were in order?

13 A. That'd be correct.

14 Q. Fair to say?

15 A. Correct.

16 Q. All right. Normally you like to have for your
17 situation an officer with a dog within a relatively short
18 distance of you?

19 A. There's a member of the team that has one, yes, sir.

20 Q. And a dog's a very useful thing?

21 A. Correct. But he's not necessary.

22 Q. Yes, sir. But he is necessary if the subject does not
23 -- does not give consent? You still have some options if
24 you have a dog, am I correct?

25 A. Yes, sir.

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1 Q. And the option would be, even if the person says, the
2 subject, I decline to give you consent, you can have your
3 fellow officer conduct what is known in the trade as a free-
4 air-sniff?

5 A. Correct.

6 Q. Basically, the free-air-sniff is he just - - and you
7 don't need consent for a free-air-sniff, right?

8 A. Correct.

9 Q. The other officer will walk the dog around and if the
10 dog hits, that is a legal basis to search the car?

11 A. Correct.

12 Q. In this situation, though, we had a little unexpected
13 situation because the officer with the dog wasn't
14 immediately available with the dog?

15 A. That's fair to say, yes, sir.

16 Q. Okay.

17 A. That's correct.

18 Q. And, moreover, I believe you indicated that it is not
19 your practice and it's probably not a safe thing to do to
20 ask for consent to search when you're the only officer on-
21 scene?

22 A. Correct.

23 Q. Am I right?

24 A. (Affirmative nod).

25 Q. Because it is at that point that the subject often

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1 realizes that he's in trouble?

2 A. I wouldn't say trouble.

3 Q. Well, - - -

4 A. If he's involved in criminal activity, I'd think that's
5 when he starts realizing things aren't going to go well.

6 Q. He's realizing he's going to get caught, right? Well,
7 isn't that why you bring the other officer in? Isn't that
8 what you said?

9 A. Yes, sir.

10 Q. You bring the other officer in because at that point
11 when you start asking for consent the subject's going to
12 know the jig is up, so to speak, and you want to have
13 another officer there?

14 A. For officer safety purposes I feel like it's best for
15 me and my situation, - - -

16 Q. Yes, sir.

17 A. - - - by what I've been through in the past, - - -

18 Q. Yes, sir.

19 A. - - - fights, shootings, things of that nature, it's
20 best to have someone else there - - -

21 Q. Yes, sir.

22 A. - - - when you ask for consent.

23 Q. And that's sort of the key point, the key point in the
24 scenario - - -

25 A. Correct.

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1 Q. - - - when you need the other officer there. You don't
2 need another officer there to ask the guy to step out of his
3 car and show you his paperwork, you don't need another
4 officer for that.

5 A. No, sir.

6 Q. Because you didn't have one, right?

7 A. Correct.

8 Q. It's only when you ask for consent, that's when you
9 need the other officer's presence?

10 A. It depends on how one person conducts it. Other people
11 may do it something different than what I do.

12 Q. I'm asking about you.

13 A. At times - - -

14 Q. That's what you said you do.

15 A. Correct. At times I love to have somebody else there
16 if they're available.

17 Q. Right. In this case, though, you're standing there,
18 you've checked out all of the stuff on the subject that
19 we've been over and you've written Defendant's exhibit
20 number 1, but you don't have an officer there, you don't
21 have another officer there, do you?

22 A. When are you referring to?

23 Q. You did the things, you've called in the license,
24 checked it out, we've confirmed that. You write out the
25 citation, or not the citation, but the warning.

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1 A. This warning here was not completed until someone else
2 got there.

3 Q. Okay.

4 A. If that's what you - - I'm not following where you're
5 going.

6 Q. Okay. Well, that actually helps me to understand what
7 I'm going to ask you then. You had not completed the
8 warning before the other officer arrived on the scene,
9 correct?

10 A. Correct.

11 Q. When did you give out the citation? When did you give
12 that to the - - to Mr. Alston?

13 A. I don't believe I ever did.

14 Q. You never gave it to him?

15 A. No, sir. I never returned any of his articles to him,
16 nor did I return the warning to him.

17 Q. But you did complete it?

18 A. When someone else got there, yes.

19 Q. Okay. All right. Did you complete it before you asked
20 for consent?

21 A. At this point in time, I don't know. I can't tell you
22 one way or the other because I don't remember.

23 Q. All right. Well, was there any reason that you
24 couldn't have completed it? This is a pretty simple form,
25 isn't it? Wouldn't you agree with me about that?

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1 A. Sure.

2 Q. It's hardly one of those complex accident reports or
3 something like that that you had to fill out as a highway
4 patrolman?

5 A. Correct.

6 Q. That'd take a long time.

7 A. (Affirmative nod).

8 Q. And, in fact, this is even much simpler than a uniform
9 traffic ticket, isn't it?

10 A. Yes, there's not as much to fill out if that's what
11 you're - - -

12 Q. Because with the traffic tickets you've got to figure
13 out court and all that kind of stuff. Basically there's not
14 much information on there that you have to fill out, is
15 there?

16 A. No, sir. For officer safety purposes, while I'm
17 filling that out, - - -

18 Q. Yes, sir.

19 A. - - - it's a lot harder to do on the side of the road.
20 It's easier to do if I'm sitting behind a desk talking to
21 somebody when I don't have the safety issue, when I don't
22 have - - -

23 Q. I understand.

24 A. - - - that subject engaging me in conversation. When
25 he's answering questions and I want to see his response, I

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1 look up. I want to pay attention to how he answers my
2 questions or how he's engaging me in conversation. Is he
3 making eye contact with me? Is the stress of his body
4 leaking out some way or another? Things of that nature.

5 Q. All right.

6 A. So ...

7 Q. And while you are filling this out you're doing those
8 things, aren't you?

9 A. One would think so, yes, sir.

10 Q. Okay.

11 A. Absolutely.

12 Q. And you, in fact, were asking him or you continued to
13 ask him questions while you were filling it out?

14 A. Correct.

15 Q. You're sure that it was completed as the other officer
16 arrived on the scene? Am I correct with that?

17 A. I would think so, yes, sir.

18 Q. Was there any doubt about it?

19 A. Mr. Johnston, I would most likely wait until that
20 officer got there to complete that warning.

21 Q. Okay. Well, when the officer got there did you
22 complete it?

23 A. I would assume I did.

24 Q. All right. And you don't ask for consent until the
25 other officer's there, right?

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1 A. Correct. Yes, sir.

2 Q. So we can conclude from that that you had completed the
3 warning/citation before the other officer - - before you
4 asked for consent?

5 A. I don't know.

6 Q. Well, - - -

7 A. Most of the time what I will do is go ahead and ask for
8 consent before this is completed, but there are times that I
9 will ask for consent as soon as I finish writing everything
10 on there.

11 Q. What did you do in this case?

12 A. It's not on camera, so I really don't know. If we can
13 watch the tape to try to figure that out, that's fine with
14 me, but at this point in time I can't tell you one way or
15 the other.

16 Q. All right. You did tell me, though, that you completed
17 the citation after the other officer arrived? You did tell
18 - - -

19 A. Yes.

20 Q. - - - me that? And you did tell me that you waited
21 until the other officer arrived before you asked for
22 consent?

23 A. Correct.

24 Q. So, therefore, we know that you completed it before you
25 asked for consent?

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1 A. Not necessarily.

2 Q. Well, - - -

3 A. I could have asked for consent as he was rolling up.

4 Q. Okay. Well, let's use a fancy word, contemporaneously,
5 at the same time. So either before or at the same time,
6 contemporaneously. Is that fair to say?

7 A. Mr. Johnston, I don't know.

8 Q. Well, it's no later than at the same time, is it?

9 A. I can't tell you. I don't know. For this particular
10 instance I can't tell you one way or the other because I
11 don't remember.

12 Q. All right. All right. When you had completed the
13 citation, the warning citation, did you give it to Mr.
14 Alston?

15 A. No, sir.

16 Q. Did you tell Mr. Alston before you asked for consent
17 that he was free to go?

18 A. No, sir.

19 Q. And, again, another marked police officer had come on
20 the scene at about this time, am I correct?

21 A. Correct. I believe Ohio versus Robinette addresses
22 that as well.

23 Q. All right. Well, - - -

24 A. We don't have to advise him that he's free to go.

25 Q. I'm not getting into the law with you, I'm just trying

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1 to figure out the facts.

2 A. I'm sorry.

3 Q. I mean, I don't mind if you comment on it, but I'm just
4 trying to determine the facts right now. Okay. So you
5 didn't tell him he had the right to leave because you're not
6 required to?

7 A. In my judgment he's not free to leave as it is.

8 Q. All right. He wasn't free to leave?

9 A. No, sir.

10 Q. Even though you had checked out all of his paperwork
11 and the license and all of that, and even though you had
12 written a citation, he wasn't free to leave?

13 A. No, sir.

14 Q. Okay. Would you be in any way surprised if by the way
15 you were acting towards him that that's what he believed,
16 too, that he didn't have the right to leave?

17 A. I can't tell you what he's thinking.

18 Q. Yes, sir.

19 A. I have no idea.

20 Q. All right. Well, if you were in his place, do you
21 think you would have had a right to leave?

22 A. I don't know, I've never been in that position.

23 Q. Well, just put yourself there for a second.

24 A. I can't testify to one way or the other because I don't
25 know.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. Okay.

2 A. I can't testify for him.

3 Q. All right. Well, again, you didn't tell him he could
4 leave, and a second police officer had arrived on the scene?

5 A. That is correct.

6 Q. Am I correct?

7 A. Yes, sir. And I distinctly remember First Sergeant
8 Barnett staying away from us.

9 Q. All right, sir. Well, he did come on the scene where
10 he could help you if you had any trouble, - - -

11 A. That is correct.

12 Q. - - - right?

13 A. Yes, sir. He drove up on the scene.

14 Q. Okay.

15 A. He parked behind me.

16 Q. But he let you handle it? He - - -

17 A. Yes, sir.

18 Q. - - - was letting you handle the situation, okay?

19 A. Yes, sir.

20 Q. But surely anybody would have seen the second officer
21 come?

22 A. I don't know. A lot of times - - -

23 Q. You saw him?

24 A. - - - Mr. Alston - - yes, sir, and that's because I'm
25 facing that way.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. All right.

2 A. Mr. Alston had his back turned to him the whole time.

3 Q. Okay. After the other officer rolled up and you
4 finished the citation, but not given it to him, you
5 basically went straight into the consent, asking for consent
6 to search? Am I correct?

7 A. Yes, sir.

8 Q. Do you remember what you said?

9 A. My report says I asked for consent to search the
10 vehicle. And common practice in my - - -

11 Q. Please, go ahead.

12 A. - - - is may I search your vehicle or can I search your
13 vehicle?

14 Q. Okay. So is the report consistent with your own
15 recollection?

16 A. What do you mean? Is it exactly how I asked the
17 question?

18 Q. Not necessarily exactly, but close to it.

19 A. I would say so.

20 Q. Okay.

21 A. It states I ask for consent to search the vehicle.

22 Q. All right. And what did he say?

23 A. Says he's just trying to figure out what this is all
24 about.

25 Q. He said, I'm just trying to figure out what this is all

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 about?

2 A. (Affirmative nod).

3 Q. Okay. What did you say then?

4 A. I just advised him that I was asking a question.

5 Q. I'm just asking a question, all right. What happened
6 next?

7 A. And then he says, I mean, yeah, you can search it.

8 Q. I mean, yeah, you can search it. And, in fact, if my
9 recollection of the video is correct, you commence to
10 walking on over to the car when he said that.

11 A. At one point in time, I do, yes, sir.

12 Q. All right. But then you - - -

13 A. Not at that point in time.

14 Q. Okay. Did you do it - - did some other exchange occur
15 between you?

16 A. I believe he asked, and I'm asking you why you want to
17 search the vehicle?

18 Q. Okay.

19 A. And I explained to him that I would explain that to him
20 when everything was done if he wanted - - -

21 Q. I'll explain that later is basically what you said?

22 A. Yes, sir.

23 Q. Okay. So then you commence to walking over to - - am I
24 right?

25 A. I'll give you that, but I don't know exactly when it

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 was during this - - -

2 Q. Okay.

3 A. - - - during everything that happened here.

4 Q. All right. Well, the point of - - the reason I'm
5 asking is not so much to learn it at the exact chronology of
6 it. What I'm interested in is you walked toward his car and
7 then you stopped, you turned around and came back because
8 you weren't sure he had given you consent.

9 A. No. I was sure. I wanted to make sure that he
10 understood what was happening.

11 Q. Okay.

12 A. He had already gave me consent once.

13 Q. Okay. Well, you wanted to confirm - - -

14 A. I wanted to make sure that he understood what was going
15 on.

16 Q. Okay.

17 A. And I had not at that point in time told him that he
18 had the right to refuse. So that's what I went back and
19 advised him.

20 Q. All right.

21 A. If I'm not mistaken. We can watch the video again, but
22 at that point in time that's when I went back and said, you
23 do have the right to refuse, but you also have the right to
24 give consent.

25 Q. All right.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. And then he goes into he didn't do anything wrong or,
2 I'm sorry, he, again, when I advised that he had the right
3 to refuse, he says, pointing to his car, then go ahead as if
4 to give consent.

5 Q. All right.

6 A. But it still wasn't a yes or no answer.

7 Q. All right, sir.

8 A. What I wanted was a yes or no answer. And eventually
9 we got to that.

10 Q. All right. And what specifically did he say?

11 A. Yeah, go ahead and search the car.

12 Q. Now, at an earlier time in this exchange when you were
13 asking for consent isn't it true that Mr. Alston replied
14 when you were asking him for consent that you said that he
15 said, quote, nah, I'm not giving you consent, you the one
16 giving consent?

17 A. Yes, sir.

18 Q. Did he say that?

19 A. Um-hum (Affirmative).

20 Q. Now, up to the point that you had asked, that you asked
21 for consent, you had not seen any drugs?

22 A. No, sir.

23 Q. You had not smelled any drugs?

24 A. No, sir.

25 Q. You had not smelled any alcohol?

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. No, sir.

2 Q. You had not seen any weapons?

3 A. Correct.

4 Q. You had fully checked out a documented driver's license
5 history, the fact that he had one, the tag was clear and he
6 had a rental agreement, correct?

7 A. Yes, sir.

8 Q. The reason you asked him for consent to search were
9 things you had observed, am I correct?

10 A. Yes, sir.

11 Q. You became suspicious of him, right?

12 A. Yes, sir.

13 Q. Okay. You were suspicious of him because of where he
14 started from, correct?

15 A. What do you mean?

16 Q. You were suspicious - - -

17 A. You talking about the beginning of the trip?

18 Q. I'm sorry, go ahead.

19 A. You're talking about the beginning of the trip?

20 Q. Yes, sir.

21 A. Is that what you mean? I noted that is near Atlanta.
22 And Atlanta is a hub for criminal activity in the southeast.

23 Q. Okay.

24 A. It's the leading hub for criminal activity just about
25 in the nation.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. Okay.

2 A. It's the second.

3 Q. What's the first?

4 A. I have no idea.

5 Q. You don't know the first?

6 A. It's got to be somewhere out west.

7 Q. Okay. Well, how about Newark, New Jersey?

8 A. What about it?

9 Q. Is that a hub?

10 A. It's a - - -

11 Q. It's near New York. Is that a hub?

12 A. I don't know how close to New York it is.

13 Q. Okay. Well, it's close. Is New York a hub of criminal
14 activity?

15 A. Certain parts of New York, yes, sir.

16 Q. Okay. So New York City is a hub of criminal activity,
17 right?

18 A. It would be safe to say. Every big city has a drug
19 problem.

20 Q. And - - -

21 A. Would you be safe to say that?

22 Q. Every big city's got a drug problem.

23 A. The one thing about it, though, is New Jersey is not on
24 the rental agreement either.

25 Q. Okay. Well, I understand that. We're going to get to

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 that, but right now I'm just talking about those hubs.

2 Charlotte a hub?

3 A. I would consider it so, yes, sir. Raleigh, Greensboro,
4 Charlotte.

5 Q. Raleigh, Greensboro, Charlotte, all hubs of criminal
6 activity in the southeast, correct?

7 A. Yes, sir.

8 Q. And if he'd continued on up I-85 he'd have run into
9 Charlotte, wouldn't he?

10 A. Yes, sir.

11 Q. And might have gone on up to - - where are the other
12 places? Raleigh, and what was the other place?

13 A. Greensboro.

14 Q. Greensboro. All those up - - they're all on 85, aren't
15 they?

16 A. Correct.

17 Q. Okay. Is there any large city in the United States
18 that is not a hub of criminal activity?

19 A. I can't testify to that because I - - -

20 Q. Okay.

21 A. - - - I don't work those areas.

22 Q. Well, you don't work Atlanta either.

23 A. I agree with you, yes, sir.

24 Q. So is it fair to say that - - you mentioned earlier
25 that most big cities got a drug problem.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. Correct.

2 Q. That makes them a potential to be a hub, doesn't it?

3 A. Atlanta has a lot more ability to be a criminal
4 activity hub because it has the interstate systems leaving
5 there going every direction. It's a very large city that
6 has access to all points of direction from there.

7 Q. Spartanburg's just like that, isn't it? Spartanburg's
8 got 85 going one way and 26 going another way.

9 A. Oh, - - -

10 Q. In fact, you ever heard the name Hub City?

11 A. Sure.

12 Q. And what is Hub City?

13 A. It's been referred to as Spartanburg, but I don't know
14 what it means.

15 Q. Okay. Well, I don't either. But it certainly has
16 those transportation advantages that you were talking about
17 that Atlanta does.

18 A. I wouldn't compare Spartanburg being the volume of
19 criminal activity that's in Atlanta.

20 Q. Oh, I know. I understand that. For one thing, it's
21 not as big. What I'm asking about is you had indicated that
22 Atlanta had the potential to be this hub because of the
23 transportation, the access to the major interstate highways.
24 I was merely pointing out that Spartanburg has those same
25 advantages.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. Correct. Through my training and experience we haven't
2 found a lot of criminal activity leaving Spartanburg or
3 coming to Spartanburg - - -

4 Q. Yes, sir.

5 A. - - - working 85.

6 Q. There's a lot of it here, though, isn't it?

7 A. I would agree with you there, yes, sir.

8 Q. Okay. Now, you found the states on here, on the rental
9 agreement, State's exhibit number 14, you found that to be
10 significant as forming part of your suspicion, am I correct?

11 A. Yes, sir.

12 Q. Show me on here where it talks about the states you can
13 go in.

14 A. Right here.

15 Q. Okay. Georgia, Tennessee, Kentucky, Virginia and West
16 Virginia. And you found that to be significant, why?

17 A. Because, number one, he's in South Carolina. It's not
18 on the rental agreement.

19 Q. Yes, sir.

20 A. Number two, he's going to New Jersey, which also isn't
21 on the rental agreement. And the first thing that would pop
22 into my mind, if somebody's involved in criminal activity,
23 they're well aware that Interstate 85 is patrolled by many
24 interdiction units. The first thing - - -

25 Q. Well, why do they go - - -

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. - - - that popped in my mind - - -

2 Q. Why do they go on it then?

3 A. I don't know, sir. I'd have to ask him.

4 Q. If they know that it's heavily patrolled and
5 interdicted such that they draw up their rental agreements
6 to avoid it, you're saying that because of that, the fact
7 that they're then on 85 supports that they must be
8 trafficking drugs?

9 A. No, sir.

10 Q. Okay. Isn't it possible that someone else is the
11 person who got this vehicle, isn't it? Mr. Alston didn't
12 rent the vehicle, did he?

13 A. Correct.

14 Q. Somebody else rented the vehicle.

15 A. Correct.

16 Q. Isn't it certainly possible that the person who rented
17 the vehicle either wasn't sure what Mr. Alston's travel
18 plans were or that Mr. Alston's travel plans changed
19 thereafter? Isn't that certainly possible?

20 A. Anything's possible, Mr. Johnston.

21 Q. Okay.

22 A. We're talking about things that we don't know about.

23 Q. Yes, sir.

24 A. It's also possible that he could have had a pound and a
25 half of cocaine in the vehicle, too.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. But you didn't know about it until you looked in there,
2 did you?

3 A. Correct.

4 Q. You know, they teach you about - - you've been to these
5 classes, they teach you about nervousness, don't they?

6 A. Sure.

7 Q. That's something you're supposed to look for.

8 A. Correct.

9 Q. In fact, I've seen these reports where officers try and
10 get objective signs of nervousness such as that they say
11 they saw the carotid artery pulsating or something like
12 that, that the person was profusely sweating even though it
13 was a cold day. Are you familiar with those sorts of
14 things?

15 A. Sure.

16 Q. You didn't write those down in this case, did you?

17 A. No, sir.

18 Q. You never even wrote down that he was nervous, did you?

19 A. I referred to stress in certain situations, but, no,
20 sir.

21 Q. You never wrote down he was nervous?

22 A. Sure, I agree with that.

23 Q. Much less, you never wrote down that he was very
24 nervous?

25 A. Correct.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. Much less, you never wrote down that you saw symptoms
2 of nervousness like the carotid artery or sweating on a cold
3 day. You didn't write any of that down, did you?

4 A. No, sir. But that could also point to the fact that
5 he's a very - - cool under stress. He could be very good at
6 what he does.

7 Q. Okay. So if you're nervous, that might mean you're a
8 drug trafficker, but if you're not nervous, it just means
9 you're cool.

10 A. No, sir, I wouldn't - - you're saying that if he's
11 nervous that means he's a drug trafficker. No, sir.

12 Q. Well, wouldn't it be - - -

13 A. He would be under stress for some situation or another.
14 We don't know that.

15 Q. Okay. Well, certainly it would heighten your - -
16 that's one of the things you're looking for, you're taught
17 to look for is the nervousness on the part of the driver,
18 isn't it?

19 A. The way that stress would leave one person's body, yes,
20 sir.

21 Q. And we didn't have any of that here?

22 A. No, sir.

23 Q. So there's two possible explanations for a person in
24 that situation. One, they're cool under pressure or, two,
25 they have nothing to be nervous about, right?

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. Anything's possible. We've covered that before.

2 Q. Okay. Two house keys attached to the rental keyring,
3 isn't there an innocent explanation for that, that he just
4 put his keys on there so he wouldn't have two sets of keys
5 to keep up with?

6 A. If you say so.

7 Q. No, I'm asking you.

8 A. No, sir. I've never seen that before.

9 Q. You've never seen it before?

10 A. Fourteen years of law enforcement, no, sir.

11 Q. All right. Mushroom air freshener placed in the
12 driver's door, that's an indicator?

13 A. When piled on top of everything else, yes, sir. When
14 you take everything in the totality of the circumstances,
15 yes.

16 Q. Okay.

17 A. By itself, it means nothing.

18 Q. All right.

19 A. But when you start putting the indicators together, it
20 means something to me.

21 Q. What's the strongest indicator to you in this case?

22 A. Can't put emphasis on one over the other. It's the
23 totality of the circumstances.

24 Q. What's the strongest three?

25 A. Sir?

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. What's the strongest three?

2 A. I can't put emphasis on one over the other. As I say,
3 it's the totality of the circumstances.

4 Q. All right. So one not anymore important than another,
5 correct?

6 A. Yes.

7 Q. At the time you asked for consent what serious crime
8 did you believe Mr. Alston had committed?

9 A. I believed he was involved in criminal activity.

10 Q. That wasn't my question. My question was at the time
11 you asked for consent what serious crime did you believe Mr.
12 Alston had committed?

13 A. And, again, I'll answer it the same. He was involved
14 in criminal activity.

15 Q. Okay. Well, tell me the specific nature of the
16 criminal activity that you knew at that time that he was
17 involved in.

18 A. Again, he was involved in criminal activity.

19 Q. I know, but I'm asking you about the nature of the
20 criminal activity.

21 A. I don't know until I search the vehicle what he's
22 involved in.

23 Q. Okay. So is it fair to say that you did not know that
24 you did not have a suspicion that a specific crime had been
25 committed by Mr. Alston?

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. With the totality of the circumstances I believed Mr.
2 Alston was involved with criminal activity.

3 Q. Yeah, but if you can't tell me what crime it was you
4 believed he had committed.

5 A. I can't tell the future, Mr. Johnston.

6 Q. Yes, sir, I know. But it's important for the courts to
7 look at what you knew at that time. So what I'm asking you
8 is what serious crime did you believe Mr. Alston had
9 committed at the time you asked for consent?

10 A. And, again, Mr. Johnston, he was involved in criminal
11 activity.

12 Q. All right. I take it from your answer, you correct me
13 if I'm wrong, that you cannot tell me what specific crime it
14 was.

15 A. He could have been involved in murder. He could have
16 been involved in metal thieves. He could've been involved
17 in any crime whatsoever. We don't know yet.

18 Q. All right.

19 A. With the totality of the circumstances, I firmly
20 believed he was involved in criminal activity.

21 Q. But you don't have any more or you did not at that time
22 have any more information that he had committed a murder
23 versus that he was involved in stealing metals, is that what
24 you said?

25 A. Yes, sir.

DONNIE GILBERT - REDIRECT EXAMINATION BY MR. HUNTER

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1 Q. Stealing metals or money laundering?

2 A. Correct.

3 Q. Please answer any other questions.

4 MR. HUNTER: Briefly.

5 **Redirect Examination by Mr. Hunter:**

6 Q. Mr. Johnston asked about a change of travel plans, that
7 Mr. Alston could have changed his travel plans without
8 knowledge of that third-party who rented the vehicle, is
9 that what he asked you?

10 A. I believe so, yes, sir.

11 Q. Okay. And in your time speaking with Mr. Alston on the
12 stand or on the side of the road did you ask him about a
13 Honda Cube?

14 A. Yes, sir.

15 Q. And why did you ask him about that?

16 A. It's the top left corner of the rental agreement, it
17 states that they got a Nissan Cube. It even gives the tag
18 number to it originally.

19 Q. Okay. And what was his response to that question?

20 A. They had to take it back. I don't remember the reason
21 that he gave. But they took it back and actually got the
22 Santa Fe instead.

23 Q. During your discussion did it seem that Mr. Alston was
24 present when this vehicle - - this rental vehicle was
25 rented?

DONNIE GILBERT - REDIRECT EXAMINATION BY MR. HUNTER

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1 A. I don't know. I don't know. During our conversation I
2 don't remember if he said anything to that effect or not.

3 Q. Well, would you normally rent a vehicle - - -

4 **MR. JOHNSTON:** Your Honor, he's asking for speculation.

5 **THE COURT:** Sustained.

6 Q. Did you ask him if he was present when the vehicle was
7 rented?

8 A. No, sir.

9 Q. Did he ever tell you that me and her rented the
10 vehicle?

11 A. I'd have to watch the tape again because I do know that
12 he was aware that the other vehicle was taken back. And I
13 don't know if he gave me a reason or not. But I'd have to
14 watch the tape again just to make sure.

15 Q. Okay. And Mr. Johnston spoke about Atlanta being a hub
16 of criminal activity, did he not?

17 A. Yes, sir.

18 Q. In your training - - what did you learn - - what do you
19 specifically learn in your training about major hubs of
20 criminal activity?

21 A. We go over a lot of things as far as trends, what
22 cities are more likely to be hubs for criminal activity than
23 others. Especially - - with where we work, Atlanta's the
24 number one city that we need to be looking for.

25 Q. And does Atlanta have an international airport?

DONNIE GILBERT - REDIRECT EXAMINATION BY MR. HUNTER

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1 A. Yes.

2 Q. And has at least three interstates coming out of it?

3 MR. JOHNSTON: Your Honor, object to leading.

4 Q. How many interstates does Atlanta have coming out of
5 it?

6 A. 85, 75, right off the top of my head, I think, 65, I-20
7 and I believe that's about it.

8 Q. You talked about the mushroom air freshener. Was that
9 the smell of the air freshener?

10 A. No, sir.

11 Q. Okay.

12 A. It's the shape.

13 Q. Okay.

14 A. The reason that's odd to me is that you just don't see
15 rental vehicles with air fresheners in them. That's not
16 something that people go automatically rent a vehicle and
17 then just go put an air freshener in there.

18 Q. And in your experience have you seen that type of air
19 freshener in a rental vehicle?

20 A. No, sir.

21 Q. In your experience where do you see that type of air
22 freshener?

23 A. The first thing that came to my mind is that's the kind
24 that my mom bought when I was a child to put on top of the
25 toilet. I thought that was odd because you just don't see

1 that kind of air freshener in a vehicle.

2 Q. Okay. Please answer any questions Mr. Johnston may
3 have.

4 MR. JOHNSTON: I don't have anything else, Your Honor.

5 THE COURT: Okay. You can step down. What else, Mr.
6 Hunter?

7 MR. HUNTER: That's it from the State, Your Honor, as
8 far as this motion.

9 THE COURT: All right. Mr. Johnston.

10 MR. JOHNSTON: Your Honor, we'd move to suppress.

11 THE COURT: I know it.

12 MR. JOHNSTON: I'm sorry, Your Honor.

13 THE COURT: Would you like to - - -

14 MR. JOHNSTON: Do you want me to go - - -

15 THE COURT: - - - try to state your position?

16 MR. JOHNSTON: Yes, sir, Your Honor. First of all, I

17 have some concern about the initial reason for the stop.

18 The officer stated that the vehicle being driven by Mr.

19 Alston never crossed the dotted line, but he used the word

20 struck, that had struck it and then it went back into his

21 lane, which would've been the proper thing to do.

22 The movement of the vehicle was to the left and away

23 from the officer who says he's parked on the right. And

24 then Mr. - - also, what I'm saying is I think it very

25 possible that Mr. Alston was moving away from the officer to

1 allow maximum distance between him and the vehicle on the
2 road, and then after it passed that the vehicle moved over
3 back where it was supposed to be. So I have some concern as
4 to whether or not - - and I would argue to the Court that
5 that was not a sufficient basis for the stop.

6 Moving forward from that issue, Your Honor, it would be
7 our position that there was no valid consent in this case,
8 that regardless of the words that were actually spoken by
9 Mr. Alston, and I think that there's some reason to believe
10 that it really wasn't clear that he was, in fact, giving
11 consent, the officer comes back at one point to confirm it.
12 There's also an unequivocal statement by Mr. Alston that I'm
13 not giving consent, you're giving consent.

14 But again, be that as it may, if there was, in fact, a
15 valid consent, it was obtained by prolonged detention. That
16 consent is not vitiated by an illegal seizure.

17 Your Honor, the cases, I think, are clear. I'm going
18 to hand them up to you, the ones that I've collected. That
19 would be State versus Pichardo, State versus Williams, State
20 versus Tindall, that an officer has the right after a valid
21 traffic stop to check the person's identity, to check that
22 they have a driver's license, to confirm with dispatch that
23 that license is good, to check the registration and make
24 sure it's proper if he chooses to do that.

25 In this particular case the officer chose not to do

1 that. That the officer also has the right to make sure that
2 the tag is appropriate, the tag is not stolen, that it
3 matches the vehicle that it's tagged up to, which the
4 officer did all of that in this case. But the - - and the
5 officer had begun to write a warning, but the officer did
6 not give the warning to Mr. Alston, we would argue, because
7 the officer was stalling for time to allow another officer
8 to come on the scene.

9 There is no clear delineation between the end of the
10 stop and the request for consent. They run completely into
11 one another. The officer never says, okay, I've checked you
12 out, here's your citation, you can leave. Oh, and by the
13 way, do you mind if I search your car? There is no such
14 demarcation between those two things in this case.

15 Your Honor, it is our position that Mr. Alston was
16 illegally seized at that point because the purpose of the
17 stop had been fulfilled. As I said earlier, all of the
18 things that the officer's entitled to do had been done and
19 the officer had begun to write the warning citation with
20 that very little bit of information that it requires.

21 So we move from a situation where he doesn't have
22 anything left to do with the traffic stop and he begins to
23 conduct a narcotics investigation. But he's conducting that
24 narcotics investigation without reasonable articulable
25 suspicion.

1 Mr. Alston was not free to go per the officer. And I
2 think the officer concedes that Mr. Alston would have known
3 that he wasn't free to leave. The fact that another officer
4 had come on the scene, the fact that he'd been pulled over
5 with a blue light, the fact that the officer was uniform,
6 has his guns, gun with him, I think that Mr. Alston is at
7 that point seized. And I would argue to the Court that
8 based on the cases that that seizure, that second seizure
9 was in violation of the Fourth Amendment because it was
10 without probable cause and without reasonable articulable
11 suspicion.

12 Some of the very factors that the officer talked about
13 in this case were essentially debunked by our South Carolina
14 Supreme Court in the case of State versus Tindall. In that
15 case the court found that the officer's testimony about
16 driving a rental car and that there was also testimony in
17 there about the drug hub.

18 And in that case the court seemed less than impressed
19 by the fact that the officer testified in addition to, I
20 believe, Durham, which is where the defendant in that case
21 was going, that also Greenville, Charlotte, Jacksonville,
22 Raleigh, Spartanburg and Oconee counties were also areas of
23 drug activity.

24 Basically, Your Honor, I would argue that wherever
25 you're coming from apparently is a drug hub. And the fact

1 that the Defendant in this case lived in Rome, Georgia,
2 which is supposed to be near Atlanta, is not sufficient
3 reasonable articulable suspicion to detain Mr. Alston
4 further.

5 As I understand the ultimate question in this case is
6 that after the purpose of the stop has been fulfilled, that
7 unless the officer has reasonable articulable suspicion that
8 a serious crime has been committed by the Defendant, he is
9 required to allow the Defendant to leave. In this case I
10 asked specifically what specific crime it was that the
11 officer suspected? The officer gave me a very generalized
12 response of, well, I believe he was involved in criminal
13 activity.

14 He was unable to articulate any specific crime or any
15 specific criminal activity that the Defendant was involved
16 in. He said it could have been murder, it could've been
17 metals thieving or it could've been money laundering. He
18 didn't have anymore evidence of that, of any of those three
19 things than any other crime. And based on the totality of
20 the circumstances, Your Honor, we would argue that the drugs
21 which were seized should be suppressed.

22 **THE COURT:** Mr. Hunter.

23 **MR. HUNTER:** Your Honor, I believe I heard three
24 different arguments. I'll start with the first one that the
25 traffic stop was not made - - -

1 **MR. JOHNSTON:** We're just hoping one of them might
2 work.

3 **MR. HUNTER:** The traffic stop was not made with
4 probable cause on the failure to maintain lane. I'd like to
5 pass up State v. Vinson. It's a recent Court of Appeals
6 case out of South Carolina dealing with this issue of
7 failing to maintain lane.

8 In this case I believe the vehicle in Vinson did cross
9 over the yellow line. However, - - and in that case there
10 was also a few other jurisdictions that the attorney in that
11 case presented to the court as to why that did not violate
12 the statute at hand and that the - - the statute at hand, I
13 believe, states that someone must maintain their lane as
14 nearly as practicable. If striking the marker in the lane
15 - - and I believe Deputy Gilbert said he did it multiple
16 times.

17 The Court of Appeals points out in their footnotes at
18 the bottom of number three that the interpretation that
19 someone could be driving while hitting the lane marker - -
20 well, in this case we're on a three lane road going one way.
21 There's no vehicles coming towards him except on the other
22 side of the median.

23 However, driving on a two lane road where there's one
24 lane marker, it's absurd to believe that both people could
25 be traveling inside their own lane while also touching the

1 lane marker because eventually they would hit each other if
2 they were going in opposite directions. So just striking
3 the lane, I'd argue, is a violation of that statute and did
4 give reason for Deputy Gilbert to pull the vehicle over.

5 I'll first start with the -- I'll next go to the
6 unlawful detention. He stated the State v. Tindall case,
7 the State v., excuse me, all the State cases that say the
8 reasonable suspicion was lacking in those stops. There are
9 also cases that say the exact opposite, State v. Provet, US
10 v. Branch, US v. Sokolow, US v. Mason. Those are all Fourth
11 Circuit cases, Your Honor.

12 And what we're looking at is whether this officer had
13 reasonable articulable suspicion to detain this person
14 farther than the initial traffic stop. The initial traffic
15 stop was for the failure to maintain lane.

16 And what did Deputy Gilbert learn in those moments
17 during the execution of that traffic stop? When he first
18 approached the vehicle, Your Honor, and this is all learned
19 within two minutes and thirty seconds of the traffic stop,
20 the beginning. He sees the bags in the backseat that are
21 covered by a blanket. He's asked defensively by the driver
22 when he approaches the car why he's being stopped without
23 him ever saying anything.

24 There's two house keys attached to the rental, which is
25 -- the way he testified, he hasn't seen that in fourteen

1 years. It's a rental vehicle where you normally don't have
2 your house keys attached to that rental vehicle.

3 It's being operated outside the states that's
4 specifically stated on the contract, that they can only be
5 in Georgia, Tennessee, Kentucky, West Virginia and Virginia.
6 He's right now traveling in South Carolina, not on the
7 rental contract. He says he's going to New Jersey. Also
8 not on the rental contract. It's rented by a third person
9 who he says is his girlfriend, who is not present in the
10 vehicle.

11 And as Mr. Alston is exiting the vehicle and he opens
12 the door he sees an air freshener in the vehicle. Air
13 fresheners in US v. Branch, Your Honor, is one of the
14 indicators that allow an officer to have reasonable
15 suspicion to detain a person further to gain consent or to
16 have a dog come and do an open-air-sniff as Mr. Johnston
17 stated.

18 He also talks to him about the length of the trip. In
19 multiple of these cases a traffic stop doesn't have to be
20 specifically license, registration, write the ticket, on
21 your way. An officer is allowed to have minimal contact and
22 can discuss items as they relate to the traffic stop or
23 items that don't relate to the traffic stop as long as they
24 are minimized.

25 In this case they talk about the trip, that he's going

1 to see his mother. The contract was started on Saturday,
2 March 26th. It's due back a week later. We're now here on
3 Monday in South Carolina, he's making a trip to New Jersey
4 to see his sick mother. He states that when asked are you
5 coming back on Monday, he says, yeah, something like that,
6 after I get up there, rest and she's ready to go. His
7 travel plans don't match with the rental contract that he
8 has. And that raises the suspicion of the officer.

9 The officer is - - was hired in 1999 by the Highway
10 Patrol, works interstates, roads doing traffic enforcement
11 laws and has done that for, up until this point, at least
12 twelve years. He's been on the Ace Team, which is concerned
13 with highway interdiction, criminal activity going through
14 the highways. He's had a K-9. He's well versed in the laws
15 and the indicators. He's had over five hundred to six
16 hundred hours of training and experience in this field.

17 And some of these cases that I'm going to talk about
18 giving deference to the training and experience of the
19 officer. And he testified that all of these items along
20 with the six kids that he says he has, but yet he gives
21 names for seven. He did say he didn't see any nervousness,
22 but that shows nervousness right there. He has - - he says
23 he has six kids because he has lots of mouths to feed, but
24 yet when asked the age, he gives you seven ages.

25 Now, on a lot of these cases, hub of criminal activity

1 comes up, Atlanta being a source city. Some of those cases,
2 don't put too much deference in them, some of them do.

3 You have United States v. Mason, which is a case, I
4 believe, out of Georgia where an officer is stopping
5 somebody coming out of Atlanta. He testifies that at that
6 point that's the third biggest city for drug distribution.
7 In that case they found that that was a factor that the
8 officer could take into consideration in determining whether
9 he had reasonable articulable suspicion to keep the driver
10 there to ask to search or continuing an investigation.

11 When you look at all of these factors including I-85
12 being a known criminal corridor, Atlanta being a source city
13 for drugs, the air freshener, the discrepancies between his
14 answers and the rental contract, the luggage, the keys on
15 the keyring, and the third-party rental, it would be our
16 argument at that point that he did have reasonable
17 articulable suspicion to keep Mr. Alston there to ask for
18 consent.

19 He then argues that the consent wasn't voluntary. For
20 consent to be good is a question of fact to be given to you,
21 Judge, that consent must be freely and voluntarily given
22 without coercion or duress. You've seen the video. It's
23 the middle of the day. There's one officer present when
24 they first start this.

25 Another officer does arrive, however, stays away from

1 the scene. We don't know and testimony wasn't given whether
2 Mr. Alston knew that the other officer was here or not. The
3 only testimony we have is that the other officer stayed back
4 from the scene and Mr. Alston's back was turned to that
5 officer.

6 Deputy Gilbert asks him for consent to search the
7 vehicle. And that's when Mr. Alston asked -- he's trying
8 to figure out what all this is about. He then says, yeah,
9 you can search it. So at that point he does give consent.

10 However, Deputy Gilbert knows that Mr. Alston may or
11 may not know what he has just done. So he continues to ask
12 him. Said, no, I'm asking if you're giving consent and then
13 explains that he has the right to refuse consent. He has
14 the right to give it or to refuse it. That's when Mr.
15 Alston says, I have the right to refuse, and then states
16 again, then go ahead.

17 Mr. Alston then inquires again why Gilbert wants to
18 search the car. And Gilbert -- Deputy Gilbert explains
19 that he's going to tell him all that when he's done. He's
20 not going to go ahead and tell him right now, here, I have
21 all these indicators of criminal activity, let me search
22 your car. At that point Mr. Alston may say no. He's just
23 going to let him know at the end why he wanted to search the
24 car.

25 At that point he's -- that's when he says the sentence

1 that Mr. Johnston is enamored with that, nah, I'm not giving
2 consent, you're the one giving consent. And so Deputy
3 Gilbert realizes at this point that he doesn't understand
4 what he's doing.

5 So he wants to ask him a straight yes or no question.
6 Yes or no, can I search your car, at which point he says,
7 yes, yeah, go ahead and search the car. And at that point
8 the car is searched and the cocaine is found.

9 Your Honor, we believe that the traffic stop was
10 reasonable, that he had probable cause that a traffic
11 violation occurred, that he had reasonable articulable
12 suspicion to detain Mr. Alston there farther than the actual
13 traffic stop for the failure to maintain, and that consent
14 was voluntarily given by Mr. Alston, and that the drugs
15 should not be suppressed.

16 **MR. JOHNSTON:** Your Honor, if I could, I'd just like to
17 hand up the cases that I made reference to earlier. And I
18 provided the solicitor with a copy of them. Those being
19 State v. Williams, State versus Pichardo and State versus
20 Tindall.

21 **THE COURT:** Anything else?

22 **MR. JOHNSTON:** No, sir.

23 **THE COURT:** All right. I'll review the cases and rule
24 on the matter in the morning.

25 **MR. JOHNSTON:** Thank you, Your Honor. What time shall

1 we be here in the morning?

2 **THE COURT:** 9:30.

3 **MR. JOHNSTON:** Yes, sir. Thank you.

4 **THE COURT:** Court's in recess until 9:30 in the
5 morning.

6 (Whereupon court was in recess at 4:55 PM)

1 **TUESDAY, MARCH 19, 2013:**

2 (Whereupon court resumed at 9:38 AM)

3 **THE COURT:** We're back on the record in the matter of
4 the State versus Stepheno Alston. Mr. Johnston, have you
5 heard any further about your client, whether or not he
6 intends to appear and participate in the trial of his case?

7 **MR. JOHNSTON:** Your Honor, I have received no word from
8 him whatsoever. I did have my staff attempt to phone him
9 yesterday at the numbers that we have, but we were not able
10 to reach him.

11 **THE COURT:** And we've heard nothing further from his
12 surety?

13 **MR. HUNTER:** I have heard nothing from his surety, Your
14 Honor.

15 **THE COURT:** Okay. Well, based upon our discussion
16 yesterday I do find that the Defendant has been properly
17 noticed as to the fact that his case is to be called for
18 trial this week.

19 I also further find that he was actually notified to be
20 here yesterday and, in fact, was present here yesterday with
21 counsel for the beginning of his trial and that he left
22 without instruction from the Court or from counsel to remain
23 and left without providing any notice of his intent to
24 engage in some authorized activity and has failed to return
25 to court with knowledge that his case is scheduled to begin.

1 And I also find that he has previously received notice
2 by the bail proceeding form that he received notice of his
3 right to be present at the trial of his case and that he was
4 also notified by that bail proceeding form that he would be
5 tried in his absence in the event that he failed to appear.
6 So I find that the Defendant has received notice, that he's
7 failed to appear and, therefore, he has knowingly and
8 voluntarily waived his right to be present at the trial of
9 his case.

10 Now, with regard to the motion to suppress, I find that
11 the stop made by the officer was pursuant to a valid traffic
12 stop, that it was based upon probable cause, that the
13 detention resulting from that stop was based upon the
14 totality of the circumstances as presented by the evidence
15 in this case, was reasonable under the Fourth Amendment and
16 that the search made of the vehicle which resulted in the
17 seizure of evidence to be used in the trial against him was
18 based upon consent and in this case with actual knowledge of
19 his right to refuse consent. All right. And, therefore,
20 the motion to suppress is denied. All right.

21 Anything else we need to address before the jury is
22 brought around?

23 **MR. HUNTER:** Nothing from the State, Your Honor.

24 **THE COURT:** All right. Bring the jury around, please.

25 **MR. JOHNSTON:** Your Honor, I would like to address

1 a - - -

2 **THE COURT:** Excuse me.

3 **MR. JOHNSTON:** - - - couple of evidentiary issues.

4 It's fine for us to go ahead and strike the jury, but I do
5 want to address a couple of evidentiary issues before we
6 actually begin the trial.

7 **THE COURT:** Okay. All right. Bring the panel around.

8 (Pause)

9 (Whereupon the jury panel entered the courtroom at 9:45
10 AM)

11 (Whereupon a bench conference was held off the record
12 in the presence of the jury panel, but out of their hearing)

13 **THE COURT:** Are all the seats full?

14 **THE BAILIFF:** Pretty much. We only got - - -

15 **THE COURT:** All right. Well, just get those that won't
16 fit, get their numbers and take them back to the jury
17 assembly room.

18 (Pause)

19 **THE COURT:** Good morning, ladies and gentlemen of the
20 jury panel. We are ready to begin with jury selection in
21 the first case that's going to require some of your
22 participation. And the title of the case is the State
23 versus Stepheno Alston.

24 Mr. Alston has been accused by the State through the
25 Prosecutor's Office of having committed the crime of

1 trafficking in cocaine. The State alleges that on or about
2 March the 28th of 2011 that the Defendant did traffic in a
3 quantity of more than four hundred (400) grams of cocaine in
4 violation of a particular statute.

5 Now, as to those allegations and as to that charge the
6 Defendant has entered a plea of not guilty. And a plea of
7 not guilty places upon the State, because they brought the
8 accusation, to establish the Defendant's guilt beyond a
9 reasonable doubt.

10 The State has to prove all of the allegations that they
11 have set forth in the indictment. They have to prove each
12 of the essential elements that makes up the crime that has
13 been alleged against the Defendant and, therefore, as I say,
14 the burden is upon the State to establish the Defendant's
15 guilt to the satisfaction of twelve jurors beyond a
16 reasonable doubt before any verdict of guilty could be
17 returned.

18 Now, before we begin with the actual selection process
19 I've got some questions that I'm going to ask you. And the
20 purpose of the questions is to determine whether or not
21 there is some reason why any one of you jurors should not be
22 selected to participate in the trial of this particular
23 case. And so as these questions are asked, should they
24 apply to you and you need to respond, I would simply ask
25 that you please stand, and I will address those matters with

1 you individually.

2 Now, the first thing I'm going to do is introduce some
3 people to you. And these are the people that are
4 participating or involved in the trial of this case. That
5 includes the Defendant, that includes the witnesses, that
6 includes the lawyers involved in the case.

7 And I need to find out if you have any connection with
8 any of these people. Are you related to them by blood or
9 marriage? Do you have any personal or social connection or
10 relationship with them? Do you work with them? Do you go
11 to school with them? Do you go to church with them? Do you
12 have any connection whatsoever? And once we make that
13 determination, we'll determine if you should serve as a
14 juror in this particular case.

15 Now, as I've told you, the Defendant, the person who is
16 accused of having committed this crime of trafficking in
17 cocaine is Stepheno Alston. Mr. Alston is not present at
18 the trial of this case, but the law provides and the
19 criminal practice Rules of Court provide that a person may
20 be tried in his absence in the event that he is noticed or
21 put on notice that his case is going to be tried this week,
22 and if he fails to attend the trial, then he can be tried in
23 his absence so long as he understands that he can be tried
24 in his absence if he fails to attend.

25 But I've already made that determination. It's a

1 proper case for the Defendant to be tried in his absence.

2 And, therefore, you're not to attach any significance to the
3 fact that the Defendant is not present.

4 Any person who is accused of a crime is always presumed
5 to be innocent of the charge. And the burden is on the
6 State, as I have already told you, to convince a jury beyond
7 a reasonable doubt that that person is guilty.

8 And in some cases you have trials where the defendant
9 is present, but the defendant does not testify and doesn't
10 call any witness. And that's because the burden is not on a
11 defendant to prove that he or she is not guilty or to prove
12 that he or she is innocent because in some cases that might
13 not be possible.

14 The burden is on the State to establish a defendant's
15 guilt beyond a reasonable doubt because they've made the
16 accusation. And, therefore, you are not to attach any
17 significance to the fact that the Defendant is not present
18 and you're not to consider that in any way in the event that
19 you are selected to participate in the course of this trial.

20 But the Defendant, the person who is accused, as I have
21 told you, is Stepheno Alston. Mr. Alston is a black male.
22 He's 5'7" tall, weighs 220 pounds. He's thirty-nine years
23 of age. And he resides at ■ Springdale Drive in Rome,
24 Georgia.

25 Representing Mr. Alston is Andrew Johnston. Mr.

1 Johnston is Mr. Alston's lawyer. He'll be representing him
2 in the course of this trial.

3 Presenting the case on behalf of the State is Eddie
4 Hunter. He's an assistant circuit solicitor for the Seventh
5 Judicial Circuit.

6 Potential witnesses to be called during the trial of
7 this case include Donnie Gilbert from the Spartanburg County
8 Sheriff's Department, Randy Hollifield with the Spartanburg
9 County Sheriff's Department, Robert Rosenberg with the
10 Spartanburg County Sheriff's Department and Beth Stuart with
11 the Spartanburg County Sheriff's Department. Beth Stuart is
12 not present, but she's employed as a chemist and a drug
13 analyst for the Spartanburg County Sheriff's Department.
14 Are there any other potential witnesses?

15 **MR. HUNTER:** None from the State, Your Honor.

16 **THE COURT:** All right. Does any juror know anybody
17 who's just been identified? That includes the Defendant,
18 the potential witnesses and the lawyers in the case. And I
19 also need to know if you know anybody else who's not in
20 court, who hasn't been identified, but is employed in the
21 Spartanburg County Sheriff's Department or also employed in
22 the Spartanburg Solicitor's Office, the Seventh Judicial
23 Circuit Solicitor's Office. If so, please stand. All
24 right.

25 I'm going to start on my right. I'll work to my left.

1 And I'll go front to back. If you'll give me your name and
2 your number, please, ma'am.

3 **JUROR:** Elizabeth Gosnell, 62.

4 **THE COURT:** And how does that question relate to you?

5 **MS. GOSNELL:** Mr. Hollifield is a good friend of my son
6 and we work together. And my son is a reserve police
7 officer.

8 **THE COURT:** Okay. And would any of those facts have
9 any bearing upon your decision in this case if you were
10 called upon to serve?

11 **MS. GOSNELL:** I don't think so.

12 **THE COURT:** All right. Thank you. You may be seated.
13 Yes, ma'am.

14 **JUROR:** Denise Dover-Williams, number 44. My daughter
15 is a nurse at the county jail.

16 **THE COURT:** And would that have any bearing upon your
17 decision in the case?

18 **MS. DOVER-WILLIAMS:** No, sir.

19 **THE COURT:** Thank you. Be seated. Yes, sir.

20 **JUROR:** My name is Keith Haynes. That's H-a-y-n-e-s,
21 number 74. My nephew is employed by the Spartanburg County
22 Sheriff's Department.

23 **THE COURT:** And would that have any bearing upon your
24 decision in this case?

25 **MR. HAYNES:** Not in this case.

1 **THE COURT:** Thank you. Be seated. Yes sir.

2 **JUROR:** Mark Howard, juror 81. I work with them daily.

3 **THE COURT:** Them, you're referring to the Sheriff's
4 Department officers?

5 **MR. HOWARD:** Yes, sir.

6 **THE COURT:** And would that have any bearing upon your
7 decision in the case?

8 **MR. HOWARD:** No, sir.

9 **THE COURT:** Thank you. You can be seated. Yes, sir.

10 **JUROR:** My name is Bryan Callicott, number 20. And I
11 used to know a Spartanburg County deputy.

12 **THE COURT:** And would that have any bearing upon your
13 decision?

14 **MR. CALLICOTT:** No, sir.

15 **THE COURT:** Thank you. You can be seated. Yes, ma'am.

16 **JUROR:** Martha Crowder, juror 36. And I have cousins
17 with the Spartanburg County Sheriff's Department.

18 **THE COURT:** Would that have any bearing upon your
19 decision?

20 **MS. CROWDER:** No, it wouldn't.

21 **THE COURT:** All right. Yes, ma'am.

22 **JUROR:** I'm good friends with Robert Rosen - -
23 Rosenberg. And also I do know a lot of the County sheriffs
24 from when I was a police officer.

25 **THE COURT:** And your juror number?

1 **JUROR:** 196.

2 **THE COURT:** And would those facts have any bearing upon
3 your decision?

4 **MS. VESS:** No, sir.

5 **THE COURT:** Thank you. Be seated. Yes, sir.

6 **JUROR:** Number 24. My niece and nephew are employed
7 with Spartanburg County.

8 **THE COURT:** Did you say you had a nephew employed with
9 Spartanburg County?

10 **MR. CANTRELL:** Nephew and my -- his wife.

11 **THE COURT:** Employed by the Sheriff's Department?

12 **MR. CANTRELL:** Yes, sir.

13 **THE COURT:** All right. And would those connections
14 have any bearing upon your decision?

15 **MR. CANTRELL:** No.

16 **THE COURT:** Thank you. Be seated. Anyone else - - -

17 **MR. JOHNSTON:** Can counsel approach just a moment?

18 **THE COURT:** Okay.

19 (Whereupon a bench conference was held off the record
20 in the presence of the jury panel, but out of their hearing)

21 **THE COURT:** Ladies and gentlemen, as I told you, the
22 Defendant is charged with trafficking in cocaine. It
23 occurred on March the 28th of 2011.

24 The State alleges that this event occurred on that date
25 on interstate I-85 wherein Officer Gilbert made a traffic

1 stop and pursuant to that stop searched the vehicle, found
2 some - - what they contend was cocaine and placed the
3 Defendant under arrest.

4 Does any juror believe you may have heard something
5 about this case? Do you think you have any knowledge about
6 the case or information about the case that you received
7 from any source whatsoever? If so, please stand.

8 (No response)

9 **THE COURT:** Is there anything about the nature of the
10 case itself, that is, what the State accuses the Defendant
11 of having done, is there anything about the nature of the
12 case itself that would prevent any juror from being able to
13 be fair and impartial if you were called upon to serve as a
14 juror in this particular case? If so, please stand.

15 (No response)

16 **THE COURT:** Does any juror have an opinion about the
17 use, possession, abuse of any type of drug that would
18 prevent you from being able to be fair and impartial to both
19 sides if you were called upon to serve as a juror? In other
20 words, would your judgment be impaired because of your
21 opinion that you might have in that respect? If so, please
22 stand. All right. And your name and number, please, ma'am.

23 **JUROR:** Ashley Hiott, juror number 77.

24 **THE COURT:** 77?

25 **MS. HIOTT:** Um-hum (affirmative).

1 **THE COURT:** And you have an opinion about the subject-
2 matter that you believe would impair your judgment in the
3 case?

4 **MS. HIOTT:** I do.

5 **THE COURT:** All right. Then juror 77 will be excused
6 from service in this case, but don't leave quite yet.
7 Anyone else?

8 (No response)

9 **THE COURT:** Does any juror know of any reason
10 whatsoever why you think you could not be fair and impartial
11 if you were called upon to serve as a juror in the case
12 based upon those involved in it, based upon the allegations
13 made or any other consideration? Do you have any reason
14 whatsoever why you think you could not be fair and impartial
15 in this particular case? If so, please stand.

16 (No response)

17 **THE COURT:** All right. No juror has responded. Any
18 other questions requested by the State?

19 **MR. HUNTER:** I believe specifically number five on our
20 requested voir dire, Your Honor.

21 **THE COURT:** Has any juror or any member of your
22 immediate family, and let me define an immediate family
23 member as a parent, a spouse, a child or a sibling, have you
24 or any members of your immediate family ever been involved
25 in a case, a criminal case that was prosecuted by the

1 Seventh Judicial Circuit Solicitor's Office? Were you
2 involved in any way in any case prosecuted by the Seventh
3 Judicial Circuit Solicitor's Office? If so, please stand.
4 All right.

5 Juror 77 has already been excused. So you won't need
6 to respond any further. And tell me your name and number,
7 please, ma'am.

8 **JUROR:** Amy Gilstrap, 58.

9 **THE COURT:** 58. And was it you or a family member that
10 was involved in a case?

11 **MS. GILSTRAP:** Family member.

12 **THE COURT:** And would that fact have any bearing upon
13 your decision in the case?

14 **MS. GILSTRAP:** No.

15 **THE COURT:** Thank you. Be seated. Yes, sir.

16 **JUROR:** Juror 23, Stephen Cannon.

17 **THE COURT:** And was it you or a family member?

18 **MR. CANNON:** Family member.

19 **THE COURT:** And would that have any bearing upon your
20 decision in this case?

21 **MR. CANNON:** Yes, sir.

22 **THE COURT:** All right. Juror number 23 is excused from
23 service in the case, but don't leave yet. Yes, ma'am.

24 **JUROR:** Martha Crowder, juror 36.

25 **THE COURT:** And was it you or a family member?

1 **MS. CROWDER:** Family member.

2 **THE COURT:** And would that have any bearing upon your
3 decision in this case?

4 **MS. CROWDER:** No.

5 **THE COURT:** Thank you. Be seated. Yes, ma'am.

6 **JUROR:** Christi Ballew, juror 10. My son - - -

7 **THE COURT:** Was it you or a family member?

8 **MS. BALLEW:** My son.

9 **THE COURT:** And would that have any bearing upon your
10 decision in the case?

11 **MS. BALLEW:** No, sir.

12 **THE COURT:** Thank you. Be seated. Yes, ma'am.

13 **JUROR:** I was going to ask you to repeat the question.

14 **THE COURT:** Okay. The question is have you or any
15 member of your immediate family ever been involved in a case
16 that was being handled by the Seventh Judicial Circuit
17 Solicitor's Office? All right. Yes, sir.

18 **JUROR:** Joey Perry, 129.

19 **THE COURT:** And was it you or a family member?

20 **MR. PERRY:** Family member.

21 **THE COURT:** And would that have any bearing upon your
22 decision in this case?

23 **MR. PERRY:** No.

24 **THE COURT:** Thank you. You may be seated. Anyone
25 else?

1 (No response)

2 **THE COURT:** Any other questions?

3 **MR. HUNTER:** None from the State.

4 **THE COURT:** Wait a minute, I've got one more. Yes,
5 ma'am.

6 **JUROR:** I'm not sure, but - - -

7 **THE COURT:** Well, tell me what your name and number is,
8 please.

9 **JUROR:** Huh?

10 **THE COURT:** Would you give me your juror number,
11 please?

12 **JUROR:** 82.

13 **THE COURT:** And was it you or a family member that had
14 a case handled by the Circuit Solicitor's Office?

15 **MS. HUCKABY:** A family member.

16 **THE COURT:** And would that fact have any bearing upon
17 your decision in this case?

18 **MS. HUCKABY:** No.

19 **THE COURT:** Thank you. Be seated. Anyone else?

20 (No response)

21 **THE COURT:** Any other questions requested by the
22 Defendant?

23 **MR. JOHNSTON:** No, Your Honor.

24 **THE COURT:** All right. Draw us a jury, please, ma'am.
25 The way a jury is selected, it's different in civil court

1 than it is criminal court. And we don't have a civil court
2 this week. So you won't be exposed to that particular
3 method.

4 But the computer selects a list, and it's just drawn
5 randomly from your names. And once that list is prepared,
6 your name will be called. You'll be called one at a time as
7 it appears on the list. You'll be asked to come forward.

8 You just come towards me. You'll see where the desks
9 are, where the lawyers are seated. Come towards me about
10 two paces past those desks, turn and face your fellow
11 jurors.

12 Each side has the opportunity to have you excused from
13 serving in the case or to have you seated for service in the
14 case. If either side asks that you be excused from serving
15 in the case, you just go back and have a seat where you are
16 now.

17 If both agree to have you seated for service in the
18 case, you'll be having a seat in that jury box to your right
19 and to my left. So if you'll simply come forward as your
20 name is called, you'll be instructed if you're to be excused
21 or seated for service in the case.

22 (Pause)

23 **MADAME CLERK:** Juror 70, Tracy Haddy.

24 (Whereupon Tracy Haddy, a white female, came forward)

25 **MADAME CLERK:** What says the State?

1 **MR. HUNTER:** Please present this juror.

2 **MADAME CLERK:** What says the Defense?

3 **MR. JOHNSTON:** Please swear Ms. Haddy.

4 **MADAME CLERK:** Juror 10, Christi Ballew.

5 (Whereupon Christi Ballew, a white female, came
6 forward)

7 **MADAME CLERK:** What says the State?

8 **MR. HUNTER:** Please excuse this juror.

9 **MADAME CLERK:** Juror 114, Corey Middleton-Shippy.

10 (Whereupon Corey Middleton-Shippy, a black male, came
11 forward)

12 **MADAME CLERK:** What says the State?

13 **MR. HUNTER:** Please present this juror.

14 **MADAME CLERK:** What says the Defense?

15 **MR. JOHNSTON:** Please swear Mr. Middleton-Shippy.

16 **MADAME CLERK:** Juror 119, Heath Moon.

17 (Whereupon Heath Moon, a white male, came forward)

18 **MADAME CLERK:** What says the State?

19 **MR. HUNTER:** Please present this juror.

20 **MADAME CLERK:** What says the Defense?

21 **MR. JOHNSTON:** Please swear Mr. Moon.

22 **MADAME CLERK:** Juror 132, Joshua Poteat.

23 (Whereupon Joshua Poteat, a white male, came forward)

24 **MADAME CLERK:** What says the State?

25 **MR. HUNTER:** Please present this juror.

1 **MADAME CLERK:** What says the Defense?

2 **MR. JOHNSTON:** Please swear Mr. Poteat.

3 **MADAME CLERK:** Juror 138, Carl Rhodes, Jr.

4 (Whereupon Carl Rhodes, Jr., a white male, came
5 forward)

6 **MADAME CLERK:** What says the State?

7 **MR. HUNTER:** Please present this juror.

8 **MADAME CLERK:** What says the Defense?

9 **MR. JOHNSTON:** Please excuse him from this case.

10 **MADAME CLERK:** Juror 107, Cassandra Martin.

11 (Whereupon Cassandra Martin, a white female, came
12 forward)

13 **MADAME CLERK:** What says the State?

14 **MR. HUNTER:** Please present this juror.

15 **MADAME CLERK:** What says the Defense?

16 **MR. JOHNSTON:** Please swear Ms. Martin.

17 **MADAME CLERK:** Juror 158, Serena Casey.

18 (Whereupon Serena Casey, a white female, came forward)

19 **MR. HUNTER:** Excuse me, Madame Clerk, what number did
20 you say?

21 **MADAME CLERK:** 158. What says the State?

22 **MR. HUNTER:** Please present this juror.

23 **MADAME CLERK:** What says the Defense?

24 **MR. JOHNSTON:** Please swear Ms. Casey.

25 **MADAME CLERK:** Juror 152, Stephanie Skinner.

1 (Whereupon Stephanie Skinner, a white female, came
2 forward)

3 **MADAME CLERK:** What says the State?

4 **MR. HUNTER:** Please present this juror.

5 **MADAME CLERK:** What says the Defense?

6 **MR. JOHNSTON:** Please swear Ms. Skinner.

7 **MADAME CLERK:** Juror 19, Tracy Brown.

8 (Whereupon Tracy Brown, a white female, came forward)

9 **MADAME CLERK:** What says the State?

10 **MR. HUNTER:** Please present this juror.

11 **MADAME CLERK:** What says the Defense?

12 **MR. JOHNSTON:** Please swear Ms. Brown.

13 **MADAME CLERK:** Juror 62, Elizabeth Gosnell.

14 (Whereupon Elizabeth Gosnell, a white female, came
15 forward)

16 **MADAME CLERK:** What says the State?

17 **MR. HUNTER:** Please present this juror.

18 **MADAME CLERK:** What says the Defense?

19 **MR. JOHNSTON:** Please excuse her in this case.

20 **MADAME CLERK:** Juror 142, Peggy Roberson.

21 (Whereupon Peggy Roberson, a white female, came
22 forward)

23 **MADAME CLERK:** What says the State?

24 **MR. HUNTER:** Please present this juror.

25 **MADAME CLERK:** What says the Defense?

1 **MR. JOHNSTON:** Please excuse her in this case.

2 **MADAME CLERK:** Juror 81, Mark Howard.

3 (Whereupon Mark Howard, a white male, came forward)

4 **MADAME CLERK:** What says the State?

5 **MR. HUNTER:** Please present this juror.

6 **MADAME CLERK:** What says the Defense?

7 **MR. JOHNSTON:** Please excuse him in this case.

8 **MADAME CLERK:** Juror 89, Judith Johnson.

9 (Whereupon Judith Johnson, a white female, came
10 forward)

11 **MADAME CLERK:** What says the State?

12 **MR. HUNTER:** Please present this juror.

13 **MADAME CLERK:** What says the Defense?

14 **MR. JOHNSTON:** Please swear Ms. Johnson.

15 **MADAME CLERK:** Juror 195, Alison Hall.

16 (Whereupon Alison Hall, a white female, came forward)

17 **MADAME CLERK:** What says the State?

18 **MR. HUNTER:** Please present this juror.

19 **MADAME CLERK:** What says the Defense?

20 **MR. JOHNSTON:** Please swear Ms. Hall.

21 **MADAME CLERK:** Juror 197, Erin Lawing.

22 (Whereupon Erin Lawing, a white female, came forward)

23 **MADAME CLERK:** What says the State?

24 **MR. HUNTER:** Please present this juror.

25 **MADAME CLERK:** What says the Defense?

1 **MR. JOHNSTON:** Please swear Ms. Lawing.

2 **MADAME CLERK:** Juror 37, Trent Currin.

3 (Whereupon Trent Currin, a white male, came forward)

4 **MADAME CLERK:** What says the State?

5 **MR. HUNTER:** Please present this juror.

6 **MADAME CLERK:** What says the Defense?

7 **MR. JOHNSTON:** Please swear Mr. Currin.

8 **MADAME CLERK:** And for the alternate, juror 136, Edward
9 Reese.

10 (Whereupon Edward Reese, a black male, came forward)

11 **MADAME CLERK:** What says the State?

12 **MR. HUNTER:** Please excuse this juror.

13 **MADAME CLERK:** Juror 51, John Galloway.

14 (Whereupon John Galloway, a white male, came forward)

15 **MADAME CLERK:** What says the State?

16 **MR. HUNTER:** Please present this juror.

17 **MADAME CLERK:** What says the Defense?

18 **MR. JOHNSTON:** Please swear Mr. Galloway.

19 **THE COURT:** Those who have been selected, I'll ask you
20 to please go with the bailiff to a jury room, and I'll bring
21 you back in just a few minutes to begin with the trial of
22 the case.

23 (Whereupon the jury exited the courtroom at 10:13 AM)

24 **THE COURT:** Are there any matters to be addressed
25 regarding jury selection by the State?

1 **MR. HUNTER:** None from the State, Your Honor.

2 **THE COURT:** By the Defendant?

3 **MR. JOHNSTON:** No, Your Honor.

4 **THE COURT:** All right. Ladies and gentlemen, I
5 understand they're going to select a jury next door. So if
6 you'll please go right next door with the bailiff, you might
7 be called upon to serve over there. But thank you for your
8 participation.

9 (Whereupon the remaining jurors exited the courtroom)

10 **MR. JOHNSTON:** May we approach, Your Honor?

11 **THE COURT:** Yes.

12 (Whereupon a bench conference was held off the record)

13 **THE COURT:** All right. Mr. Johnston, any matters we
14 need to address before we begin?

15 **MR. JOHNSTON:** No, Your Honor. I do think it
16 noteworthy that I should put something on the record. You
17 and I - - I don't know if Mr. Hunter got it as well, but you
18 and I both received an email from Ms. Parish of the Clerk's
19 Office..

20 And she reports to us that the bondsman for Mr. Alston
21 has apparently spoken with him this morning, and that he is
22 headed down to where Mr. Alston is at this time to pick him
23 up and try to bring him for court. I would respectfully,
24 based on that information, ask that this case be continued
25 until we see if he's actually going to appear.

1 **THE COURT:** Well, when will we know?

2 **MR. JOHNSTON:** I don't know, Your Honor.

3 **THE COURT:** Me neither.

4 **MR. JOHNSTON:** Yes, sir. I understand - - -

5 **THE COURT:** What the note says or the email - - now,
6 this is an email from Ms. Parish, but - - -

7 **MR. JOHNSTON:** Yes, sir.

8 **THE COURT:** So she's apparently - - I'm only assuming
9 from that she's talked to Mr. Stribling. But what it says
10 is Mr. Stribling has talked to Mr. Alston this morning, but
11 it doesn't say that he's just going to get him. It says he
12 is going to find him.

13 **MR. JOHNSTON:** Yes, sir.

14 **THE COURT:** Which tells me that while he's talked to
15 him, Mr. Alston must not have indicated that he was on his
16 way to the courthouse. So I don't know that waiting is
17 going to be of any benefit to the Court or to Mr. Alston or
18 to you.

19 **MR. JOHNSTON:** I understand, Your Honor. I just felt
20 that I should put that on the record.

21 **THE COURT:** Okay. What other - - what's the State's
22 position? Does the State have a position?

23 **MR. HUNTER:** Your Honor, Mr. Alston was here yesterday.
24 If he wanted to be here at court, he could have been here
25 this morning. He has - - and I think - - I agree with you,

1 Your Honor, that while the bondsman may have spoken to him,
2 he still doesn't have him in his custody and is bringing him
3 here. And until such time as we know that, we would ask to
4 go forward with his trial.

5 **THE COURT:** Okay. All right. Mr. Johnston, what did
6 you have to address?

7 **MR. JOHNSTON:** Your Honor, although yesterday was the
8 suppression hearing strictly you did hear certain evidence
9 that I think would -- is essentially what you would have
10 heard in a Jackson v. Denno hearing.

11 There are a number of statements elicited by police
12 questioning from Mr. Alston on the roadside. And those are
13 -- a number of those statements are incriminating. This
14 was not a routine traffic stop or at least it converted from
15 a routine traffic stop to a full-blown investigation.

16 The officer testified that Mr. Alston was not free to
17 go. I believe the officer also indicated that it wouldn't
18 surprise him if Mr. Alston also believed he was not free to
19 go. And he also testified that he certainly did not tell
20 Mr. Alston that he was, in fact, free to go.

21 So, Your Honor, we would argue that that at some point
22 became custodial interrogation. As you heard from the tape,
23 there were no Miranda rights administered at any point or at
24 least not in the point that I'm talking about. There may
25 have been later on, but prior to the eliciting of these

1 incriminating responses. So, therefore, Your Honor, we
2 would argue that those should be excluded under Miranda.

3 **THE COURT:** Mr. Hunter.

4 **MR. HUNTER:** Can I have which specific statements he's
5 speaking of?

6 **MR. JOHNSTON:** Well, all of the statements, Your Honor,
7 where he discusses where he's going, where he's been, all of
8 the quote, unquote conflicting statements, the statements
9 specifically when he's asked has anyone else - - I don't
10 remember the exact words of it, but something to the effect
11 that has anyone else had access to this vehicle other than
12 you? I think that certainly elicited an incriminating
13 response.

14 **THE COURT:** Is everything in the vehicle yours?

15 **MR. JOHNSTON:** Yes, sir.

16 **THE COURT:** Any others you can think of?

17 **MR. JOHNSTON:** Not that I can think of right now, Your
18 Honor. Basically, I don't think the State needs to
19 introduce any of that information to show its case. I mean,
20 I really think the video in its entirety is not necessary
21 for them to prove their case. They can attempt to prove
22 their case through the officer's testimony saying he pulled
23 the gentleman over, he got consent to search and this is
24 what he found.

25 If we start - - if we allow this interplay between the

1 officer and Mr. Alston to come into evidence, I think that
2 is not appropriate. And I think it would violate Mr.
3 Alston's right to silence and right to counsel.

4 **MR. HUNTER:** Your Honor, under Mr. Johnston's argument
5 any conversation between Deputy Gilbert and Mr. Alston would
6 be deemed custodial interrogation and not be allowed to
7 enter it. That means any time an officer stops someone, any
8 conversation, asking them for their license, the response
9 would be inadmissible.

10 In this case it's a pure traffic stop. Mr. Gilbert
11 stops him, there's some conversation about the license,
12 where he's going, where it's from, which is all allowed
13 under the law. And we believe that all the statements
14 should come in and they were not subject to Miranda at the
15 time.

16 **THE COURT:** Well, what about the statements about is
17 everything -- has anyone else had access to the car? And
18 is everything in the car, does it belong to you? How does
19 that relate to a warning for striking the lane marker?

20 **MR. HUNTER:** Your Honor, at that time he doesn't have
21 probable cause to believe that Mr. Alston has -- he's
22 simply looking for reasonable suspicion to see if there's
23 any other criminal activity out there. It's just a small
24 conversation, something he normally asks --

25 **THE COURT:** Well, does it matter -- does it matter --

1 does the length of the conversation matter when it comes to
2 the voluntariness of it or your right to have Miranda
3 warnings given? I mean, because under that theory you could
4 say did you kill the man? And if he said yes, you would
5 just say, well, that was just a short conversation.

6 **MR. HUNTER:** I think it's just a factor to look at,
7 Your Honor. It's not the factor or the determining factor.
8 I just -- the State does not believe that he was in custody
9 at this time and that Miranda warnings are not -- not have
10 to be issued to the Defendant.

11 **MR. JOHNSTON:** Well, again, Your Honor, the officer
12 testified that Mr. Alston, at least at some point, was not
13 free to leave. And that is, of course, in its essence, what
14 custodial detention is.

15 **THE COURT:** Well, no, you're not correct on that, Mr.
16 Johnston. Custodial detention is what a reasonable person
17 in the position of the Defendant would believe. The fact
18 that the officer made a decision that he was not going to
19 let Mr. Alston leave doesn't mean that Mr. Alston thought he
20 could not leave.

21 Based upon the video and based upon the evidence
22 presented, it would appear that while the officer may have
23 been fishing for information, it was, up until the search
24 revealing unlawful drugs, was a simple traffic stop. I
25 mean, it was a, I mean, there may have been some ulterior

1 motive that you believe the officer had, but that really
2 doesn't matter so long as there is probable cause for the
3 stop and that whatever's conducted during the course of that
4 stop is appropriate to the stop.

5 I'm not satisfied that a reasonable person in the
6 position of Mr. Alston would believe that he was not free to
7 leave any more than any other person would who gets pulled
8 over by a police officer during the course of a traffic
9 stop, but that doesn't - - but every person who's pulled
10 over is not in custody for purposes of Miranda. And so the
11 question becomes would a reasonable person in Mr. Alston's
12 position believe that he was in custody?

13 And in this case he was standing on the side of the
14 road. He was not placed in handcuffs, he was not placed
15 under arrest, he was not told he was not free to leave and
16 he was not even placed - - as I recall, I don't think he was
17 even placed - - he was even placed in the patrol car until
18 after his actual arrest.

19 **MR. JOHNSTON:** Well, Your Honor, I do agree with you,
20 the standard is what would a reasonable person believe, but
21 I would respectfully disagree that there is a requirement of
22 being in custody. I think the standard is custodial
23 detention - - custodial detention being less confining than
24 actual custody.

25 And I would argue to the Court that not too long after

1 he's asked to exit the vehicle, a reasonable person under
2 the circumstances that Mr. Alston faced would not have
3 believed he was free to go. And with him being in custodial
4 detention, and with these responses being elicited from
5 police questioning without Miranda warnings, we would argue
6 they should be suppressed.

7 **THE COURT:** Well, what's the case - - is it the
8 Pennsylvania case - - -

9 **MR. JOHNSTON:** Pennsylvania versus Bruder, Your Honor.

10 **THE COURT:** - - - with the traffic stop? Yeah, the
11 traffic stop. And, obviously, I think everybody understands
12 that if you get pulled over and the officer asks you to step
13 out of a car and asks for your driver's license and starts
14 asking you questions that you're not free to leave, but that
15 doesn't mean that you're in custody. For purposes of
16 Miranda there's certain questions that an officer's entitled
17 to ask - - -

18 **MR. JOHNSTON:** Yes, sir, Your Honor.

19 **THE COURT:** - - - pursuant to a traffic stop.

20 I am a bit concerned about the questions that relate to
21 does everything in the car belong to you and has anybody had
22 access to the car? I'm not certain how that relates to an
23 ordinary traffic stop, Mr. Hunter.

24 You know, certain questions can be asked like where
25 have you been, where are you going, is your driver's license

1 valid, things like that that occur all the time in a traffic
2 stop. But ordinarily I don't think in a traffic stop, at
3 least under the Fourth Amendment, you have a right to ask
4 somebody if or it would be appropriate to the purpose for
5 which the Defendant was stopped, is everything in the car
6 yours, has anyone had access to it? I mean, he's not
7 boarding an airplane, he's just driving a vehicle down the
8 road.

9 **MR. HUNTER:** Well, the reason he asked that, Your
10 Honor, is he sees on the rental agreement that this is - -
11 Mr. Alston is not the one who rented the car. Mr. Alston is
12 listed as a driver of the car, however, the third - - the
13 person, the Tomeka or Tomesha Harris that has rented the car
14 is not in the vehicle. I think - - -

15 **THE COURT:** Well, no, those are appropriate questions,
16 I mean, about, you know, is it your vehicle, did you rent
17 it? I mean, those are appropriate during a traffic stop,
18 but I'm not sure what's relevant - - I'm not sure why it's
19 relevant to the traffic stop as to if anything in the
20 vehicle belongs to somebody else. Help me with that.

21 **MR. HUNTER:** Well, because there is - - if we look at
22 it as a registration vehicle, it is someone else's vehicle,
23 Your Honor.

24 **THE COURT:** So?

25 **MR. HUNTER:** It's rented under Ms. Harris' name.

1 **THE COURT:** I understand. But what does that have to
2 do with the contents of the vehicle? Any relationship to
3 the stop for striking the - - -

4 **MR. HUNTER:** As far as striking the lane, no, Your
5 Honor.

6 **THE COURT:** That's what I'm thinking. All right. I'm
7 going to grant the Defendant's request to exclude the
8 questions that relate to whether or not anything in the
9 vehicle belongs to the Defendant or belongs to someone else
10 or everything in the vehicle is his.

11 I'm going to exclude that testimony simply because I
12 don't think it's - - well, I tell you what I am going to do.
13 I'm troubled by that, I will say this. But I don't want to
14 be incorrect so far as what's allowed by Pennsylvania versus
15 Bruder in that regard. So if you want to get that case and
16 have a look at it and y'all talk about it, we'll be happy to
17 ...

18 **MR. JOHNSTON:** All right, sir. Thank you, Your Honor.
19 Your Honor, the next issue concerns finding a knife in the
20 car. The solicitor has the knife itself. He also has a
21 couple of photographs of the knife.

22 We would argue that introduction - - that introduction
23 of photographs of the knife and the fact that the knife was
24 found would be more prejudicial than probative in this
25 situation.

1 **THE COURT:** Well, now, he's not charged with possession
2 of the knife in the commission of a violent crime, is he?

3 **MR. HUNTER:** He is not, your honor.

4 **THE COURT:** Yeah.

5 **MR. HUNTER:** However, we would argue, Your Honor, due
6 to the fact that there are four hundred and thirty-seven
7 (437) grams of cocaine found underneath the steering column
8 - - he actually makes a statement on the side of the road
9 that he keeps the knife there for protection when he stops
10 and rests. But due to the nexus between guns or not - -
11 weapons and drugs, that the knife would show knowledge that
12 the cocaine is present in the vehicle, Your Honor.

13 **MR. JOHNSTON:** Your Honor, we would also move to
14 exclude that statement under the theory that I argued to you
15 earlier about it being obtained through custodial
16 interrogation without Miranda.

17 **THE COURT:** I don't recall that evidence being
18 presented during the - - -

19 **MR. JOHNSTON:** I don't believe it was.

20 **THE COURT:** - - - motion.

21 **MR. HUNTER:** He makes the statement on video, Your
22 Honor, which can be heard.

23 **THE COURT:** Okay. Well, what about the knife? What
24 were the circumstances of the knife being found and
25 confiscated?

1 **MR. HUNTER:** I believe it was when he did the Terry
2 frisk of the Defendant. He asked if he had any weapons. He
3 said he keeps a knife up in front of the car for protection.
4 And then the knife was found during the search of the
5 vehicle, Your Honor.

6 **THE COURT:** Well, what kind of knife was it?

7 **MR. HUNTER:** Further, Your Honor, if you look at the
8 tip of it, there also appears to be a white powder substance
9 on it.

10 **MR. JOHNSTON:** Well, Your Honor, - - -

11 **THE COURT:** Well, I don't think I'm qualified to make
12 that determination. Although I often do make those
13 determinations during the course of a trial, I don't think I
14 can testify in front of the jury or make that decision based
15 upon what you're telling me.

16 **MR. JOHNSTON:** Your Honor, if there's a way - - -

17 **THE COURT:** Now, is Ms. Stuart going to testify that
18 there's some white powder on - - -

19 **MR. HUNTER:** Ms. Stuart's not going to testify that
20 there's - - testify that any white powder's been tested.

21 **THE COURT:** What about Mr. Hollifield, is he going to?

22 **MR. HUNTER:** Your Honor, the jury can just look and see
23 that there is a white substance on the tip of this knife.

24 **THE COURT:** And what would - - what would be the
25 importance of that to them?

1 **MR. HUNTER:** Again, to show knowledge of the cocaine,
2 Your Honor.

3 **THE COURT:** How would that show knowledge of the
4 cocaine?

5 **MR. HUNTER:** He has - - he had this knife in his
6 possession and there appear to be a white powder substance.
7 We can't say that it is cocaine.

8 **THE COURT:** Well, why can't we?

9 **MR. HUNTER:** Because we don't have it tested.

10 **THE COURT:** Well, why wouldn't you if you believe
11 that's the case? That's what you want the jury to believe.
12 So why wouldn't you test it?

13 **MR. HUNTER:** I didn't realize there was a white powder
14 substance until yesterday when I was looking at the
15 pictures.

16 **THE COURT:** Well, that might be a problem now, now that
17 we've been passing it around.

18 **MR. HUNTER:** It's also - - you can see it in the
19 pictures taken that day as well, Your Honor.

20 **THE COURT:** See the white powder on it?

21 **MR. HUNTER:** May I approach?

22 **THE COURT:** Yeah, sure. I'm at a loss to understand
23 why we wouldn't have that tested if we believed that to be
24 cocaine and connect it to the drugs that are going to be
25 offered into evidence.

1 (Pause)

2 **THE COURT:** Is every case always a continuing
3 investigation?

4 **MR. HUNTER:** Seems that way.

5 **MR. JOHNSTON:** Looks to me like there's a white powder
6 substance there, too.

7 **THE COURT:** A lot of it.

8 **MR. JOHNSTON:** A lot of it.

9 (Whereupon a bench conference was held off the record)

10 **THE COURT:** And the knife was found where?

11 **MR. HUNTER:** Give me a second, Your Honor. A black
12 handled knife found in the middle console, Your Honor. It
13 was found in the middle console.

14 **THE COURT:** All right. I'll allow it.

15 **MR. HUNTER:** I will - - we won't talk about the white
16 powder substance on the edge of the - - -

17 **THE COURT:** Yeah, I don't - - I recommend that you not
18 do that, too, seeing as how you haven't taken the
19 opportunity to see what it is.

20 **MR. JOHNSTON:** I was going to object to that based upon
21 their representation that they - - -

22 **MR. HUNTER:** We'll stipulate to that.

23 **MR. JOHNSTON:** - - - that they - - -

24 **THE COURT:** What?

25 **MR. HUNTER:** That we won't go into that subject.

1 **MR. JOHNSTON:** We'll accept their stipulation.

2 **THE COURT:** Well, that's not really a stipulation. A
3 stipulation is an agreement of fact to present to the jury.
4 Y'all are just in agreement that you're not going to
5 introduce evidence of it.

6 **MR. HUNTER:** Yes, sir.

7 **MR. JOHNSTON:** We'll accept that, too.

8 **THE COURT:** You're not going to comment upon it. Okay.

9 **MR. JOHNSTON:** The third matter, Your Honor, is just
10 really sort of a matter for me. Obviously, I wish to
11 preserve the record in this case for a potential appeal for
12 my client, the central issue, of course, being the finding
13 of the drugs.

14 So I would ask the Court to recognize a continuing
15 objection to the officers when they begin to discuss the
16 finding of the drugs. I would make an objection and make
17 reference to the matters that we discussed pretrial and then
18 ask you to note the continuing objection from that point
19 forward until the drugs actually are introduced into
20 evidence, which I believe would probably be done during the
21 testimony of the chemist.

22 **THE COURT:** Well, certainly to the extent that I am
23 permitted to do that, I'm happy to. I mean, my ruling, and
24 it's a final ruling, although it was based upon an in limine
25 examination, is that the motion to suppress is denied. And

1 so the - - -

2 **MR. JOHNSTON:** Yes, sir.

3 **THE COURT:** - - - substance, assuming that it will be
4 identified as cocaine, will be admitted into evidence over
5 your objection.

6 **MR. JOHNSTON:** Yes, sir.

7 **THE COURT:** All right. Y'all have a look at the
8 Pennsylvania versus Bruder case, and we'll discuss it.

9 (Pause)

10 **MR. JOHNSTON:** Your Honor, may I comment on something
11 I've found?

12 **THE COURT:** You may.

13 **MR. JOHNSTON:** Your Honor, I would refer the Court to
14 the case of State v. Easler. That is a South Carolina - - -

15 **THE COURT:** I just read it.

16 **MR. JOHNSTON:** Yes, sir. Which comments on the
17 interpretation of Pennsylvania v. Bruder and Berkemer versus
18 McCarty. This case involved not a - - something - - a
19 situation that the court, the South Carolina Supreme Court
20 determined was not a routine traffic stop because the
21 officers had been advised there'd been an accident and that
22 someone had left the scene and they were looking for that
23 individual based on a description given by two eyewitnesses.
24 They also - - the Supreme Court also disagreed with the
25 Court of Appeals' conclusion that the defendant in this

1 case, Easler, was not subjected to, quote, interrogation.
2 The court defines interrogation as either express
3 questioning or its function of the equivalent. It includes
4 words or actions on the part of police that police should
5 know are reasonably likely to elicit an incriminating
6 response.

7 The court did say that because the investigation - -
8 just because the investigation had focused on the suspect,
9 it did not trigger the need for Miranda warnings unless he's
10 in custody. And the court went on to determine that in the
11 totality of the circumstances in that particular case that
12 Mr. Easler was not in custody at the time of the
13 interrogation.

14 I would argue that the facts here are different, but I
15 think this does give us a helpful definition of the term
16 interrogation. I think that is exactly what the officer was
17 doing in this case. He was trying to elicit an
18 incriminating response. He's trying to wall-off the
19 Defendant from being able to argue I didn't know the drugs
20 were in my car. That's the reason the question was asked.

21 It has nothing to do with investigating whether there
22 are drugs in the car. It is a question that is lodged to
23 cut off a defense. Do you - - has anyone else been in
24 contact with your car? Do you accept responsibility for the
25 contents of your car? Those were most likely to eliminate

1 -- to elicit, rather, an incriminating response.

2 **THE COURT:** Mr. Hunter, you want to respond?

3 **MR. HUNTER:** Your Honor, I also found a case in
4 reference to the Pennsylvania. The Pennsylvania case just
5 seems to state that a routine -- a traffic stop does not
6 put someone in custody for the issue of Miranda. And in
7 looking at US v. Mason, which is a case I cited yesterday in
8 response to our reasonable suspicion argument, it's a United
9 States Court of Appeals case out of the Fourth Circuit from
10 2010.

11 And in that case, Your Honor, if I may just read from
12 it. There is no support in Fourth Amendment jurisprudence
13 for the notion that questioning unrelated to the purpose of
14 the traffic stop requires reasonable suspicion provided that
15 the questioning occurs within the time-frame reasonably
16 necessary to effectuate the traffic stop. Unrelated
17 questioning -- --

18 **THE COURT:** Excuse me. Is that -- repeat that for me.

19 **MR. HUNTER:** There is no support in Fourth Amendment
20 jurisprudence for the notion that questioning unrelated to
21 the purpose of the traffic stop requires reasonable
22 suspicion provided that the questioning occurs within the
23 time-frame reasonably necessary to effectuate the traffic
24 stop.

25 **THE COURT:** Okay.

1 **MR. HUNTER:** An officer's questions or actions during
2 the course of a traffic stop or any other legal detention
3 need not solely and exclusively focus on the purpose of that
4 detention.

5 Your Honor, and while that goes into the reasonable
6 suspicion argument, a lawful roadside stop begins when a
7 vehicle is pulled over for the investigation of a traffic
8 violation. The temporary seizure of a driver and passengers
9 ordinarily continues and remains reasonable through the
10 duration of the stop.

11 An officer's inquiries into matters unrelated to the
12 justification for the traffic stop, this court has made
13 plain and do not convert the encounter into something other
14 than a lawful seizure so long as those inquiries do not
15 necessarily or measurably extend the duration of the traffic
16 stop. As long as Officer Gilbert is acting within the time-
17 frame of a reasonable traffic stop, Your Honor, he's -- the
18 Defendant's not in custody for the purposes of Miranda.

19 He is -- and, in fact, I think we heard the testimony
20 that while the officer did not believe he was free to go,
21 Mr. Alston was stationed -- he was outside the vehicle with
22 his back turned towards the other officer. They -- he had
23 started writing the warning ticket. He -- Mr. Alston was
24 not here to testify. We heard no testimony from the Defense
25 that at any time he felt like he was not free to go or that

1 it was reasonable for him to believe that he was not free to
2 go.

3 Your Honor, and these - - in the State v. Easler case
4 we have an accident. The officer knows that there's an
5 accident. There's no reason to believe that he had been - -
6 committed any crime. Just like this cocaine, there's no
7 reason to believe - - probable cause to believe that he has
8 committed the crime of trafficking cocaine.

9 We just have reasonable suspicion at this time. I
10 believe the questioning was normal in the routine traffic
11 stop, he was not in custody, and the statement should be
12 allowed in.

13 **MR. JOHNSTON:** Well, Your Honor, I have had the
14 pleasure of being stopped for speeding before. And I have
15 never had an officer ask me are you responsible for
16 everything in your car? And - - -

17 **THE COURT:** Have you ever had one ask you if he could
18 search it?

19 **MR. JOHNSTON:** No, sir, I haven't.

20 **THE COURT:** Well, there you go.

21 **MR. HUNTER:** I've had every single traffic stop.

22 **MR. JOHNSTON:** Well, you must be - - -

23 **THE COURT:** But it happens - - -

24 **MR. JOHNSTON:** - - - more suspicious than I am.

25 **THE COURT:** It happens routinely.

1 **MR. JOHNSTON:** All right, sir. Well, perhaps I've just
2 been spared that particular thing. But in any event, it
3 strikes me that as anyone knows, the elements of a drug
4 crime are usually going to involve possession and knowledge.
5 Those questions that we've been talking about here today are
6 geared totally towards getting the elements of knowledge and
7 elements of knowing possession.

8 **THE COURT:** Okay. Now, I have had a chance to scan
9 Berkemer and Pennsylvania versus Bruder. And I've read
10 State versus Easler. And I do find under the facts of our
11 case that the -- an objectively reasonable person would not
12 believe that he was in custody and, therefore, subject to
13 and in-custodial interrogation.

14 Therefore, Miranda warnings were not required and that
15 the questions that were asked were -- while the officer may
16 have been fishing for information, it appears that they were
17 reasonable considering the fact that it was not the
18 Defendant's vehicle or at least it was -- there was an
19 indication from the rental contract that the vehicle
20 belonged to someone else.

21 And the officer was simply engaging in questioning in
22 order to determine, I guess, the appropriateness or it
23 appears the appropriateness of the Defendant being in
24 possession of the vehicle. And so I find that Miranda was
25 not required.

1 And there's no evidence in this case - - and I've, of
2 course, viewed the video as you have. There's no evidence
3 in this case that there was any atmosphere of police
4 coercion or threatening of the Defendant that would
5 intimidate him into responding to questions. And since
6 there's no coercion, there's no threats, it appears to be a
7 routine traffic stop situation. Then I find that the
8 statements made by the Defendant were freely and voluntarily
9 made and not the product of any inappropriate police
10 conduct. All right. Anything else?

11 **MR. JOHNSTON:** Your Honor, there was also some
12 questioning about a previous DUI. We would move to exclude
13 that.

14 **THE COURT:** You agree, Mr. Hunter?

15 **MR. HUNTER:** Your Honor, there was questioning about
16 whether his license had been suspended. And the Defendant
17 does state that it had been suspended for a DUI.

18 **THE COURT:** But he has - - the license he had was a
19 valid license?

20 **MR. HUNTER:** That's correct.

21 **THE COURT:** It was not currently suspended?

22 **MR. HUNTER:** No, Your Honor.

23 **THE COURT:** Okay. Any reference to suspension or
24 driving under the influence should be excluded unless you
25 have a good reason why you think it ought to be admitted.

1 **MR. HUNTER:** No. My only question is it is on the
2 video, Your Honor.

3 **THE COURT:** Well, you'll have to get your technical
4 assistant to redact it.

5 **MR. HUNTER:** Okay. That may take a little bit of time.

6 **THE COURT:** Well, I imagine it would take a little bit
7 of time.

8 **MR. HUNTER:** Okay.

9 **THE COURT:** All right. Any other matters we need to
10 address, Mr. Johnston?

11 **MR. JOHNSTON:** No, Your Honor.

12 **THE COURT:** When you going to show the video?

13 **MR. HUNTER:** I was going to show it during his
14 testimony, which is the first officer.

15 **THE COURT:** Do you know where it is in the video that
16 -- do you have it marked where that question and response
17 was given?

18 **MR. HUNTER:** I know it's around the seven to nine
19 minute mark, Your Honor.

20 **THE COURT:** Well, let's see if you can -- let's see if
21 you can find it. Go ahead and turn the video on and see if
22 you can find it and mark it. And you can turn the sound off
23 during that portion. And then before the video goes back to
24 the jury, your technical expert can redact that portion.

25 (Pause)

1 **MR. JOHNSTON:** Your Honor, may I take a quick bathroom
2 break while he's doing that?

3 **THE COURT:** (Affirmative nod).

4 **MR. JOHNSTON:** Thank you, sir.

5 (Whereupon court was in recess at 10:59 AM)

6 (Whereupon court resumed at 11:09 AM)

7 **THE COURT:** Any others we need to fix?

8 **MR. JOHNSTON:** I don't think so, Your Honor.

9 **THE COURT:** All right. Are we ready for the jury?

10 **MR. JOHNSTON:** Defense is ready.

11 **MR. HUNTER:** State's ready.

12 **THE COURT:** All right. Bring them in. Ask Ms.
13 Johnson, juror 89, to take the Foreperson's seat.

14 (Whereupon the jury entered the courtroom at 11:12 AM)

15 **THE COURT:** All right. Ladies and gentlemen, thank you
16 for your patience. We are ready to begin with the trial of
17 the case for which each of you have been selected.

18 And, Ms. Johnson, I'm going to ask you to serve as the
19 Foreperson of the jury. And you're not going to get paid
20 anymore, but you've got three duties that none of the other
21 jurors will have.

22 Number one, you're going to be asked to serve as the
23 spokesperson for the jury. And that just means if something
24 comes up during the course of the trial that needs to be
25 brought to my attention, you or a fellow juror has some

1 difficulty, problem, or question, you let me know either
2 directly or through the bailiff, and I'll address those
3 issues or answer those questions.

4 Secondly, you're going to be called upon to preside
5 over jury deliberations in the jury room when that time
6 comes. And that, of course, won't be until the end of the
7 trial after all the evidence has been received and I've
8 instructed you on the law that's applicable in this case.
9 But when you do go back to begin your deliberations, you
10 will preside over that process in the jury room simply to
11 ensure that those deliberations are carried out in some
12 orderly fashion.

13 And, thirdly, you're going to actually write the
14 decision of the jury, whatever that decision might be.
15 You'll do that on the verdict form that I'll provide you at
16 the trial's conclusion on which you will indicate the jury's
17 unanimous decision in this case.

18 Now, the Foreperson has those specific duties that I've
19 just indicated. That doesn't mean that she's anymore
20 important than any of you other jurors. And that's because
21 the decision of a jury is the unanimous consensus opinion of
22 all twelve jurors.

23 And so each of you will have an equal say and an equal
24 vote in what the ultimate decision in this case is going to
25 be. Someone simply has to be delegated those

1 responsibilities that I have just indicated.

2 And I have delegated those to Ms. Johnson in appointing
3 her as the Foreperson. But all of you jurors are equally
4 important so far as the ultimate decision in the case is
5 concerned because, as I've stated, your decision has to be
6 unanimous, all twelve of you must be in agreement.

7 Now, Mr. Galloway, you've been selected as an alternate
8 juror. And your function is to take the place of one of
9 these original twelve if during this trial one of them
10 cannot continue to serve for some reason. And if one is
11 called away because of an illness or an emergency and can't
12 continue, then you would take that person's place. In that
13 event, you would become the twelfth juror.

14 If, however, when the time does come for deliberations
15 the original twelve are able to participate, your service
16 ends. You don't participate any further. And that's
17 because the decision of a jury is that of twelve. And no
18 more than twelve are permitted to engage in the deliberation
19 process.

20 But it is important that you pay just as careful
21 attention as we ask of all of the jurors in the case because
22 it does occur from time to time for one reason or another
23 one of these twelve may be unable to continue. In that
24 event, you become the twelfth.

25 So we appreciate your participation as an alternate

1 juror just as we appreciate the participation of each of you
2 jurors who have been selected for the purpose of deciding
3 the verdict in this particular case. You may swear the
4 panel.

5 **MADAME CLERK:** Please stand and raise your right hands.
6 You solemnly swear or affirm in the case about to be tried
7 to truly try the issues joined in this case and render a
8 true verdict according to the law and evidence so help you
9 God?

10 **THE JURY:** I do.

11 **MADAME CLERK:** Thank you. You may be seated.

12 **THE COURT:** Now, ladies and gentlemen, as you know, you
13 have been selected to decide the verdict in the case of the
14 State versus Stepheno Alston. As you also have been told,
15 Mr. Alston is charged, he's accused by the prosecutor of
16 having committed the crime of trafficking in cocaine.

17 And the charge making that allegation is set forth in
18 the indictment. That's that document that I referred to
19 prior to your selection. The indictment alleges that on or
20 about March the 28th of 2011 that Mr. Alston did have in his
21 actual or constructive possession more than four hundred
22 (400) grams of cocaine in violation of a particular section
23 of law.

24 The indictment itself is not evidence in the case,
25 doesn't prove anything, doesn't establish anything. It's

1 not evidence, as I say. It's simply the means by which any
2 person accused of a crime is brought into this court and is
3 formally put on notice as to what crime the State claims
4 they committed.

5 The indictment will be in the jury room because it is
6 used as the verdict form, Madame Forelady. But other than
7 serving as the verdict form, the indictment serves no
8 purpose so far as you twelve jurors are concerned.

9 Now, as to the charge contained in that indictment the
10 Defendant has entered a plea of not guilty. And a plea of
11 not guilty places upon the State the burden of proving the
12 allegations that they have made by way of the indictment,
13 the burden of proving each of the essential elements that
14 makes up the crime of trafficking in cocaine in an amount
15 greater than four hundred (400) grams. And, therefore, the
16 burden is upon the State to establish the Defendant's guilt
17 to the satisfaction of you twelve jurors beyond a reasonable
18 doubt before any verdict of guilty could be returned.

19 Every person who's accused of a crime, and it doesn't
20 matter how serious the offense might be for which that
21 person stands charged, every person accused of a crime is
22 presumed to be innocent of the charge. That presumption of
23 innocence remains with any defendant as it does with this
24 Defendant from the time that he is placed under arrest and
25 throughout the course of the criminal process and even

1 throughout the course of the actual trial in the case. That
2 presumption of innocence will be with this Defendant even at
3 the time that you go back to begin with your deliberations
4 at this trial's conclusion.

5 And that presumption of innocence will be with him in
6 the jury room. And it'll be with him forever unless you
7 twelve jurors determine that he's no longer entitled to that
8 presumption of innocence.

9 In other words, after you have carefully considered all
10 the evidence in the case and from that evidence you have
11 decided what you believe to be the true facts as they relate
12 to these allegations, and after deciding those facts you
13 apply the law that I will have provided you, if you twelve
14 jurors unanimously determine that his guilt has been proven
15 beyond a reasonable doubt, then he would no longer be
16 entitled to that presumption of innocence. But it's only
17 if, unless and until you are satisfied of his guilt beyond a
18 reasonable doubt that the presumption of innocence would no
19 longer be applicable.

20 The way the trial will proceed is that in a moment the
21 lawyers are going to address you in what are called opening
22 statements. There are two occasions in the trial of the
23 case where lawyers are permitted to address the jury, and
24 that is at the beginning of the trial before any evidence
25 has been introduced, then again at the conclusion of the

1 trial after all the evidence has been received.

2 But keep in mind that the lawyers' statements are not
3 to be considered by you as any evidence upon which you will
4 base your decision. And that's because the lawyers don't
5 know anything about this case of their own personal
6 knowledge or perception like witnesses will be testifying
7 to.

8 The lawyers aren't going to take the witness stand,
9 they're not going to be placed under oath, they will not be
10 subjected to direct and cross examination like each of the
11 witnesses will be. And so what the lawyers tell you in
12 their statements is not to be considered by you as any
13 evidence upon which you will base your decision. But you
14 should listen to what the lawyers have to say because their
15 statements do serve a purpose.

16 The opening statements will serve to provide you with a
17 basic understanding as to what this case is about from both
18 the perspective of the State and of the Defendant so that
19 you'll have some context in which to place the evidence that
20 we will be receiving shortly thereafter.

21 The closing statements occur after all of the evidence
22 has been received. And again, while those statements are
23 not evidence, it does afford the lawyers an opportunity to
24 discuss with you the evidence that you have seen and heard
25 during the course of the trial.

1 And through that discussion each will have an
2 opportunity to try to persuade you or to convince you that
3 the evidence in the case does or does not support a
4 particular decision. And it's in between the opening and
5 the closing statements accomplished by the lawyers that we
6 actually receive the evidence upon which you will make your
7 determination of fact and base your decision.

8 As you've been told, the State has the burden of proof.
9 The State has to establish the Defendant's guilt beyond a
10 reasonable doubt before you could find a -- make a finding
11 of a verdict of guilty. And, therefore, the State will go
12 forward first in its presentation of evidence because they
13 have the burden of proof.

14 Once the State has concluded with its presentation, a
15 defendant in an ordinary trial has the right to testify,
16 call witnesses, produce evidence if he or she wishes to do
17 so. But understand that a defendant is never under any
18 obligation to take the witness stand and testify.

19 A defendant never has to call a witness. A defendant
20 never has to produce evidence because the burden is not upon
21 a defendant to prove that he or she is not guilty or to
22 prove that he or she is innocent because in some cases that
23 might not even be a possibility. The burden is always upon
24 the State because they've made the accusation to prove the
25 Defendant's guilt beyond a reasonable doubt.

1 And, therefore, you could never draw any conclusion or
2 draw any inference from the fact that a defendant does not
3 testify or present evidence. And you may not draw any
4 conclusion, nor may you draw any inference from the fact
5 that the Defendant is not present during the trial of this
6 case.

7 As I say, the burden is not upon him to establish his
8 innocence, the burden is on the State to establish his
9 guilt. And, therefore, you are not to reach any conclusion
10 or draw any inference from the fact that the Defendant is
11 not present during the course of the trial. He is still
12 entitled to the same fair trial that you would give to
13 someone who is present.

14 After all of the evidence has been received and you
15 hear the final summations of the lawyers, I will then
16 instruct you on the law that's applicable in the criminal
17 cases generally and in this type of case particularly. And
18 then you'll be asked to go back and begin with your
19 deliberations.

20 Through that process you're simply going to be called
21 upon through the exercise of good judgment and common sense
22 conscientiously applied to the testimony and evidence in the
23 case to decide the facts, then apply the law and arrive at a
24 fair and just decision, whatever that decision may be.

25 So I do want to thank you in advance for your

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1 participation as well as for your careful attention. I
2 would ask that you please give the lawyers your attention
3 now as they give you their opening statements.

4 And let me say one other thing, too. As you - - as the
5 evidence and the witnesses are called to the stand and
6 evidence is being received, you're never to start making up
7 your minds or formulating your opinions as to what you think
8 the ultimate outcome should be until all of the evidence has
9 been received, until I've instructed you on the law and
10 until you've been asked to begin deliberations.

11 That's the process that is designed for you twelve
12 jurors to arrive at a fair and just decision in the case.
13 So please give the lawyers your attention now as they give
14 you their opening statements. Mr. Hunter.

15 **MR. HUNTER:** Thank you, Your Honor. May it please the
16 Court. You're here today on a case of trafficking in
17 cocaine over four hundred (400) grams, Stepheno Alston.
18 It's a car stop case.

19 On March 28th, 2011 Deputy Gilbert with the Spartanburg
20 County Sheriff's Office was positioned on the exit ramp,
21 excuse me, entrance ramp on 85 where 26 comes into 85 around
22 exit 70, 71. His car is sideways facing the lanes. He's
23 looking northbound going towards Charlotte, towards
24 Cherokee, towards Gaffney.

25 He sees a brown Hyundai Santa Fe vehicle passing him.

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1 He's going around a little curve and notices the vehicle
2 hits the lane dividers a few times, decides to pull him over
3 for a traffic stop.

4 Driving that car is Stepheno Alston. Mr. Alston is in
5 a rental vehicle out of Georgia. Mr. Alston is from
6 Georgia. And you'll hear that Mr. Alston stepped out of the
7 vehicle and came back toward Deputy Gilbert's vehicle. They
8 had a conversation for a while. Deputy Gilbert will ask for
9 consent to search his vehicle. Mr. Alston gives consent to
10 search the vehicle.

11 Deputy, excuse me, Captain Hollifield arrives on the
12 scene, helps Deputy Gilbert search that vehicle. And the
13 evidence will show that in a void underneath the steering
14 column was over four hundred (400) grams of cocaine.

15 Now, you will hear the definition of trafficking
16 cocaine, you'll hear the definition of reasonable doubt, of
17 innocent until proven guilty, presumption of innocence.

18 We have the burden to prove this case. I gladly accept
19 that burden. And over today, hopefully just today, I'm
20 going to prove this case for you. When I stand up here
21 again, I'll be asking you to come back with a guilty
22 verdict. Thank you.

23 **THE COURT:** Mr. Johnston.

24 **MR. JOHNSTON:** May it please the Court, Madame
25 Forelady, ladies and gentlemen of the jury. First of all,

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1 let me address something head on here, and that is the fact
2 that the Defendant is not present in this case.

3 In that chair over there where -- his place next to
4 me, there's no one sitting in it. And I just want to tell
5 you that that doesn't change anything about what we're going
6 to do in this case from any other case when there's a
7 defendant who is sitting with me at the trial of his case.
8 In this particular situation, that chair, if you think of it
9 as a symbol of a person charged with a crime, has the same
10 rights that a human being would have seated there charged
11 with a crime.

12 And most importantly, ladies and gentlemen, that empty
13 chair is in view with perhaps the most precious right that
14 any of us had if we were to be charged with a crime, and
15 that is that we are presumed innocent and that the State,
16 the gentleman seated over here at the other table, has the
17 complete burden of proving the Defendant's guilt beyond any
18 reasonable doubt. And that is, ladies and gentlemen, the
19 highest burden that we have in the legal proceedings, the
20 requirement of proof beyond any reasonable doubt.

21 This is a car stop. The evidence is going to show that
22 Mr. Alston was driving a motor vehicle through Spartanburg
23 County and that he was stopped by Deputy Gilbert of the
24 Spartanburg County Sheriff's Office. The evidence is also
25 going to show the very large amount of cocaine was found in

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1 that vehicle.

2 But, ladies and gentlemen, that doesn't end the inquiry
3 there. In order to prove guilt beyond a reasonable doubt in
4 a drug case such as this, I believe the Court will tell you
5 that the State has to prove each and every element of the
6 crime, again, beyond any reasonable doubt.

7 Two of the elements here that I submit to you the State
8 will not be able to establish beyond a reasonable doubt are
9 possession and knowledge. I submit to you, ladies and
10 gentlemen, that the State has to prove those two elements in
11 order to establish guilt in this case and that they will not
12 be able to do so beyond any reasonable doubt. Therefore, at
13 the conclusion of this case, I will be asking you on behalf
14 of Mr. Alston to find him not guilty. Thank you.

15 **THE COURT:** Mr. Hunter.

16 **MR. HUNTER:** Your Honor, at this time the State would
17 call Master Deputy Donnie Gilbert.

18 **DONNIE GILBERT,** being
19 duly sworn testifies as follows:

20 **MADAME CLERK:** Thank you. You may be seated.

21 **Direct Examination by Mr. Hunter:**

22 Q. Mr. Gilbert, please give your full name for the record.

23 A. Donnie Leland Gilbert.

24 Q. How are you employed?

25 A. I work for the Spartanburg County Sheriff's Office.

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1 Q. And how long have you been with the Spartanburg County
2 Sheriff's Office?

3 A. I joined the Spartanburg County Sheriff's Office in
4 January of 2010.

5 Q. And how long have you been in law enforcement?

6 A. I joined the South Carolina Highway Patrol in July of
7 1999.

8 Q. Briefly go over your law enforcement experience from
9 1999 until the March 28th, 2011 stop.

10 A. Okay. July of '99 I was hired by the South Carolina
11 Highway Patrol, attended the Academy in Columbia, graduated
12 there in December of '99, and I was assigned to Richland
13 County to work the road there all the way up until August of
14 2004. Now, what I did there is just basically working your
15 wrecks, enforcing traffic laws of our State on - - in the
16 greater Columbia area.

17 At which point in time in August of 2004 I transferred
18 within the South Carolina Highway Patrol to the Aggressive
19 Criminal Enforcement Team as a K-9 handler. I was appointed
20 to the Midstate Team, which covers I-20, I-77 and I-26 in
21 the Midlands region. And in March of 2005 I was transferred
22 within the Aggressive Criminal Enforcement Team to the
23 upstate region, which covers thirteen counties in the
24 upstate including all the counties which Interstate 85 runs
25 through.

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1 I was a K-9 handler for that team and stayed there
2 until August or September of 2009 at which point in time I
3 joined or transferred within the South Carolina Highway
4 Patrol to work the road in Spartanburg County and stayed
5 there until January of 2010 when I joined the Spartanburg
6 County Sheriff's Office.

7 Q. And briefly explain what the purpose of the Ace Team is
8 as opposed to just normal troopers.

9 A. The purpose of the ACE Team is to eliminate criminal
10 activity from the roadways that you patrol at that time. We
11 basically monitored the interstate systems basically to
12 eliminate criminal activity, as I said before, to look for
13 indicators of criminal activity, to try to decide if
14 someone's involved in criminal activity and to try to stop
15 them from carrying that through.

16 Q. And what team are you currently on in the Sheriff's
17 Office?

18 A. I am assigned to the Interstate Criminal Enforcement
19 Team.

20 Q. And is that similar to the Ace Team for the Highway
21 Patrol?

22 A. Yes, sir, it's pretty much the same thing.

23 Q. What were you doing on March 28th, 2011?

24 A. I was patrolling Spartanburg County and monitoring
25 traffic on Interstate 85.

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1 Q. Where were you located?

2 A. If you're on 26 heading towards Inman, actually where
3 you would exit from 26 to get onto 85 north, which would
4 take you to Gaffney, I'm sitting there as the exit ramp
5 merges into Interstate 85.

6 Q. And how are you positioned?

7 A. I sit sideways on the interstate, basically, let's see,
8 perpendicular to the traffic that's passing me.

9 Q. Okay. So your driver's side is facing southbound and
10 your passenger's side is facing northbound?

11 A. Correct.

12 Q. Okay. What did you observe that day?

13 A. What I saw then was a brownish green in color Hyundai
14 Santa Fe passed my location in the middle lane. Now, where
15 I'm sitting is there's three lanes traveling towards Gaffney
16 and there's going to be three lanes traveling towards
17 Greenville.

18 When this vehicle passed me he was in the middle lane.
19 What I noticed and what popped out to me to begin with is
20 after he passed me there's a curve to his left. When he
21 goes through that curve his left side tires come over and
22 strike the dotted line that divides the fast lane and the
23 middle lane in which he's traveling in, at which point in
24 time he swerves back into the middle of the middle lane.

25 What that shows me is there's a chance he could be

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1 under the influence of alcohol, there's a chance he could
2 have a medical condition. We don't know until we actually
3 get up there and talk to him. There's also a chance that
4 he's worried about my presence on the interstate, the stress
5 of what's going on then could cause him to do that.

6 He then merges or swerves back into the middle of that
7 lane and continues northbound. What I do is I go ahead and
8 pull out and try to run the vehicle down. And in the
9 process of me catching up to the vehicle, he's did this
10 several other times.

11 Q. Okay. And where - - did you initiate your blue lights?

12 A. Somewhere around the 73 mile marker, which is right
13 after your exit for 176.

14 Q. And did he pull over?

15 A. Yes, sir.

16 Q. And exactly what - - what County are you in at this
17 point?

18 A. I'm in Spartanburg County.

19 Q. Okay. What did you do next?

20 A. I approached the vehicle that Mr. Alston was driving on
21 the passenger's side.

22 Q. Okay. Who was in the vehicle?

23 A. There was only one person in the vehicle and that was
24 Mr. Alston.

25 Q. And how did you know it was Mr. Alston?

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1 A. He produced a Georgia driver's license that identified
2 him as a Stepheno J. Alston from Rome, Georgia.

3 Q. What did you first observe when you approached the
4 vehicle?

5 A. The first thing I noticed is when I approached the rear
6 of the vehicle the luggage or what I thought was luggage was
7 covered by a gray, white, and black blanket, which is odd to
8 me because a lot of times in a vehicle that somebody's going
9 to put their luggage in, they're not going to take the time
10 to cover it up.

11 I got to the passenger's side, started talking to Mr.
12 Alston a little bit. And I also noticed that there were two
13 house keys - - -

14 Q. If you could hold on a second.

15 A. Oh, okay. Sorry.

16 Q. Let me show you what's been premarked as State's
17 exhibit 10. Do you recognize that photo?

18 A. Yes, sir.

19 Q. And how do you recognize that photo?

20 A. That's going to be the rear cargo area of the vehicle
21 that Mr. Alston was driving.

22 Q. Does that fairly and accurately depict the scene as you
23 remember it today?

24 A. Yes, sir.

25 Q. Or that day?

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1 A. Yes, sir, it does.

2 **MR. HUNTER:** Your Honor, at this time the State would
3 offer State's exhibit 10 into evidence.

4 **MR. JOHNSTON:** I just want to examine it one moment,
5 Your Honor.

6 (Pause)

7 **MR. JOHNSTON:** No objection.

8 **THE COURT:** It's admitted.

9 (Whereupon State's exhibit 10 was admitted into
10 evidence)

11 Q. Now, you started talking about keys. What were you
12 going into there?

13 A. Also, let me refer to the luggage being covered up as
14 well. Through the thousands of traffic stops that I've done
15 in the fourteen years that I've been employed with law
16 enforcement, you normally don't see that. That is not
17 something that's normal with the traveling public that you
18 see every day.

19 As far as when I got to the passenger's side, I noticed
20 that - - a lot of times when you rent a vehicle, they're
21 only going to give you the one key for the rental vehicle.
22 Very, very rarely, and I've never seen this before in my law
23 enforcement career, will someone else put a personal key on
24 the keyring for the rental car.

25 A lot of times - - what that tells me in training and

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1 experience with all of the classes that I've been to as
2 well, people will try to personalize a rental car to make it
3 look like theirs, to make - - where you're not going to know
4 if it's a rental car or not until you actually ask for the
5 paperwork, something to that nature.

6 He has put two house keys on the keyring to make you
7 think maybe this is going to be his vehicle. And that's
8 something else that throws up a red flag to me. You don't
9 see that. That is not normal with the common traveling
10 public that I come into contact with every day.

11 Q. Now, that's something I failed to mention. Through
12 your eleven years what type of training and experience have
13 you had in regards to criminal enforcement?

14 A. As far as being involved in, hundreds of felony arrests
15 for criminal activity in the Midlands Team and the Upstate
16 Team or the ACE Team and which also includes the Ice Team
17 with the Sheriff's Office, I've probably made somewhere
18 around fifty to seventy-five felony arrests myself doing the
19 same thing.

20 As far as training, there is such a thing as called the
21 National Criminal Enforcement Association. And there is
22 such a thing as called Desert Snow. What they do is they
23 will put on thirty-two hour classes, which is four days that
24 you will attend throughout this nation with instructors
25 throughout this nation that show you the trends.

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1 They actually teach you how to locate and find hidden
2 compartments within vehicles. They put you through the
3 process of actually training you through the scenarios that
4 they have been through on the side of the interstate. They
5 teach you roadside interviews. They teach you pretty much
6 anything and everything about how to detect criminal
7 activity from that point.

8 Starting in 2004 is when I started going to that type
9 training. Since then I've accrued somewhere between five
10 hundred and six hundred hours of training towards that.

11 Q. In fact, did you recently go to one of those?

12 A. Yes, sir. I attended the National Criminal Enforcement
13 Association's winter conference in Tulsa, Oklahoma last
14 week.

15 Q. And have we ever had that conference in Spartanburg?

16 A. Yes, sir. It was located here in Spartanburg in 2011.
17 It was a four day class there as well.

18 Q. Is that just prior to the stop?

19 A. Yes, sir.

20 Q. Now, you go up to the vehicle, you notice the luggage
21 and the keys. What do you do next?

22 A. I believe I ask Mr. Alston for the paperwork for the
23 vehicle. And he produces a rental agreement at that point
24 in time.

25 When he produces that I immediately notice - - what

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1 I'll do is I'll take about ten seconds, ten to fifteen
2 seconds to go over that rental agreement because it gives me
3 a lot of information.

4 It tells me who rented the vehicle. It tells me when
5 they rented it, where they rented it, when it's due back, if
6 they have to put gas in it. It tells you all kinds of
7 things as far as how long they rented it and also the states
8 that they're allowed to operate that vehicle in.

9 Q. Let me show you what has been premarked as State's
10 exhibit 14. Do you recognize that item?

11 A. Yes, sir, I do.

12 Q. And how do you recognize that item?

13 A. That is going to be the rental agreement that Mr.
14 Alston produced that day for the vehicle that he was
15 driving.

16 Q. Is that the exact rental agreement he handed you?

17 A. Yes, sir.

18 Q. Is that in the same or substantially the same condition
19 as you found it?

20 A. Correct. Yes, sir, it is.

21 Q. Did you actually talk to Mr. Alston about that
22 agreement?

23 A. I did.

24 Q. Through the course of the traffic stop?

25 A. Yes, sir.

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1 Q. And some of the items that were on that traffic stop he
2 agreed to or he admitted including who rented the vehicle?

3 A. Yes, sir.

4 Q. Okay.

5 MR. HUNTER: Your Honor, at this time the State would
6 offer State's exhibit 14 into evidence.

7 MR. JOHNSTON: Without objection.

8 THE COURT: It's admitted.

9 (Whereupon State's exhibit 14 was admitted into
10 evidence)

11 Q. I'm going to let you keep it for a second. I'm going
12 to ask a few questions about it. Now, you're standing at
13 the car and you're reading this information?

14 A. Yes, sir.

15 Q. Okay. What stuck out to you?

16 A. Immediately I noticed that it was rented by someone
17 else, a female by the name of Tomesha Harris. And it was
18 rented two days prior to the stop.

19 Q. Okay. Hold on a second. Was there anybody else
20 present in this vehicle?

21 A. No, sir, there was not.

22 Q. Through your conversation with Mr. Alston did you learn
23 who Ms. Harris was?

24 A. I believe it - - yes, sir. It was - - he admitted that
25 that's his girlfriend.

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1 Q. What else?

2 A. Also Enterprise will put on the rental agreement
3 exactly what states that this person is supposed to be
4 traveling through. The states that or rented here - - and
5 it'll actually say under permission granted to operate the
6 vehicle only in the state of rental and the following
7 states; Georgia, Tennessee, Kentucky, Virginia and West
8 Virginia.

9 Now, what stuck out to me is, number one, South
10 Carolina is not on there, okay. Why? Why did he not tell
11 them that that's where he's traveling to?

12 **MR. JOHNSTON:** Well, Your Honor, I would object. He
13 just said that someone else, a female was the one who rented
14 the car. Now he's saying that Mr. Alston should have told
15 them that.

16 **THE COURT:** Well, you'll be able to cross examine him
17 on it.

18 Q. All right. So he's handed you the contract, you're
19 reading it. We'll actually see here in a second. We can
20 stop with the contract for a second. Was there anything
21 else you noticed?

22 A. Well, and another thing - - -

23 Q. Outside the contract?

24 A. Sir?

25 Q. Other than the - - outside the rental agreement was

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1 there anything else you noticed when you first approached
2 the vehicle?

3 A. Uh ...

4 Q. Did you ever ask him outside the vehicle?

5 A. Yes, sir.

6 Q. And was there anything you noticed when he stepped
7 outside - - -

8 A. When he exited the vehicle - - what happens is - - what
9 I'm going to do is just sit at the passenger's window just
10 for second as he exits, as he gets out. As he shuts the
11 door I can see an air freshener in the door pocket of the
12 driver's door there.

13 And what it is is it's one of those old household air
14 fresheners that looks like a - - it's shaped like a
15 mushroom. I don't know if anybody here was raised in the
16 80s like me, but it resembles one of those mushroom air
17 fresheners that your parents would buy and put in the
18 bathroom or something. It's not something you normally see
19 in a car.

20 Q. Let me show you what's been premarked as State's
21 exhibits 4 and 11. Do you recognize those items?

22 A. Yes, sir, I do.

23 Q. And how do you recognize those items?

24 A. It's going to be pictures of the interior of the
25 vehicle as we - - as it depicts as what it was when we stop

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1 Mr. Alston. And also this picture here is going to be the
2 picture of the air freshener that I spoke about earlier.

3 Q. And do they fairly and accurately depict the scene as
4 you remember it that day?

5 A. Yes, sir.

6 MR. HUNTER: Your Honor, at this time the State would
7 offer State's exhibit 4 and - - -

8 MR. JOHNSTON: No objection, Your Honor.

9 MR. HUNTER: - - - 11 into evidence.

10 MR. JOHNSTON: No objection to that either.

11 THE COURT: They're admitted.

12 (Whereupon State's exhibits 4 and 11 were admitted into
13 evidence)

14 Q. Briefly describe State's exhibit 11 to the jury.

15 A. That's going to be the picture of the interior of the
16 vehicle. It's got a bookbag in the right front floorboard,
17 a Crown Royal bag in the middle console with two drinks and
18 a phone charger.

19 Q. Okay.

20 A. It's actually got a phone sitting in the middle
21 console.

22 Q. Where is that view from?

23 A. It's going to be from the passenger's window.

24 Q. Is that the view that you had when you first approached
25 the vehicle?

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1 A. Yes, sir. Actually, this is going to be with the
2 passenger's door open.

3 Q. Okay. Now, in that view would you be able to see
4 what's in the driver's door panel with someone sitting in
5 the vehicle, - - -

6 A. No, sir.

7 Q. - - - at the driver's seat?

8 A. No, sir.

9 Q. However, with that picture what can you see in the
10 driver's door panel?

11 A. You can see the tip - - the top of the air freshener,
12 but with a person sitting in there, you're not going to be
13 able to see it.

14 Q. However, on State's exhibit 4, what do you see there?

15 A. It's going to be a better view of the air freshener
16 that I spoke about earlier.

17 Q. Okay. Is that where the air freshener was located?

18 A. Yes, sir.

19 Q. Could you see that air freshener when you opened the
20 door?

21 A. Yes, sir.

22 Q. And as we see from these pictures, this isn't air
23 freshener that you normally see in a vehicle like the
24 palmetto tree or a tree hanging from the rearview mirror, is
25 it?

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1 A. No, sir. And what's odd to me about that is the kind
2 of motoring public that I come into contact with every day
3 with rental vehicles, they don't have air fresheners in
4 them.

5 Q. Let me show you now what's been premarked State's
6 exhibit 2. Do you recognize that item?

7 A. Yes, sir, I do. It's going to be the DVD that we made
8 a copy of the stop.

9 Q. Have you been able to review that video?

10 A. Yes, sir.

11 Q. Does it fairly and accurately depict the scene as you
12 remember it?

13 A. Yes, sir, it does.

14 **MR. HUNTER:** Your Honor, at this time the State would
15 offer State's exhibit 2 into evidence.

16 **MR. JOHNSTON:** Your Honor, we would call the Court's
17 attention to the arguments that were made in pretrial
18 motions concerning some of the material that is on that
19 video. So to that extent, we would object.

20 **THE COURT:** It's admitted over objection.

21 (Whereupon State's exhibit 2 was admitted into
22 evidence)

23 (Whereupon the video was played for the jury)

24 Q. That's the first two minutes and forty-three seconds of
25 the traffic stop. When you approached the vehicle you put

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1 your hand on it. Why do you do that?

2 A. Basically to transfer my fingerprints to the vehicle
3 itself just in case there's a shooting, just in case I'm
4 incapacitated and he drives away. It gives the
5 investigators a way to tell that that's the vehicle that I
6 stopped.

7 Q. Okay. We also saw you standing there for a while when
8 he opened the door. Why did you do that?

9 A. I basically wanted to get a better look to everything
10 that's inside the vehicle. And also that's when I noticed
11 the air freshener itself, too.

12 Q. Now why is an air freshener important to you?

13 A. To me, what we're trained - - it's to cover an odor
14 that he's trying to hide, basically for that reason there.
15 It can be used as a masking agent. You don't see normally
16 somebody rent a vehicle and then go straight to Western Auto
17 and buy an air freshener to stick in there. It's just not
18 something you see with the common motoring public.

19 Q. I want to go back to the rental agreement. In speaking
20 with Mr. Alston, where did he rent the vehicle?

21 A. The vehicle was rented in Cartersville, Georgia on
22 March 26th of 2011 at 11:21 AM.

23 Q. Where is that located?

24 A. Cartersville is going to be in the Atlanta area.

25 Q. All right. And what day was March 28th, 2011?

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1 A. It'd be a Monday.

2 Q. And he rented it on a Saturday, it's now Monday in
3 South Carolina?

4 A. Correct.

5 Q. You've already mentioned the states and he's in South
6 Carolina. And who rented the vehicle?

7 A. It turned out to be a young lady by the name of Tomesha
8 Harris, who turned out to be his girlfriend. What stands
9 out to me with that is a lot of times people will use a
10 third-party to rent a vehicle. That way they're not - - -

11 **MR. JOHNSTON:** Your Honor, I would object to that.

12 That calls for speculation.

13 **THE COURT:** Sustained.

14 Q. Is there anything else odd on the registration or the
15 rental agreement that you remember seeing?

16 A. Yes, sir. To show the states that he's told the people
17 that he's driving to, that he's allowed to operate the
18 vehicle in.

19 Q. When is that car due back?

20 A. It's going to be due back on April the 2nd, 2011 at
21 11:30, which is right at a week, seven days from the day
22 that he rented the vehicle.

23 (Whereupon the video was played for the jury)

24 Q. In those next couple of minutes you start asking him
25 about his travel plans. Where does he state he's going?

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1 A. He told me that he was actually going to Newark, New
2 Jersey.

3 Q. And who lived in Newark, New Jersey?

4 A. His mom lived there. And the reason that he was going
5 up there was because - - he basically stated that she was
6 depressed and says he's going to bring her home for Mother's
7 Day and all that.

8 Q. Was New Jersey on the rental contract?

9 A. No, sir, it was not.

10 Q. Okay. It's March 28th. When is Mother's Day in 2011?

11 A. Mother's Day is going be in about a month and a half.
12 It's going to be in May.

13 Q. And - - -

14 A. So that kind of sticks out to me a little bit.

15 Q. How long does he say he's going to stay?

16 A. A week. A week or so is what his words were.

17 Q. And we're on the northbound side in South Carolina.
18 And he's from Georgia?

19 A. Correct. Yes, sir.

20 Q. And he's going to stay in New Jersey a week or so?

21 A. Correct.

22 Q. When is the rental contract due back?

23 A. It's due back the Saturday following. That basically
24 tells me that the travel plans doesn't match the rental
25 agreement itself.

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1 Q. Did you call in his license to dispatch?

2 A. Yes, sir.

3 Q. It came back clear?

4 A. Yes, sir, it did.

5 Q. Where was he originally from?

6 A. Somewhere in New Jersey, I believe. It's what he told
7 me. He now lives in Georgia, but he was originally from
8 Jersey.

9 Q. I'm going to go ahead and fast-forward through a little
10 bit of this.

11 (Whereupon the video was played for the jury)

12 Q. Just one brief question. Who were you talking to right
13 there?

14 A. I went to sit down in my patrol vehicle, and I'm
15 actually calling my teammate on the Ice Team, who is the K-9
16 handler for us at that time.

17 Q. What was his - - -

18 A. Deputy Carraway is his name.

19 Q. Okay. Is he the one who said package?

20 A. Yes, sir. He's basically explaining to me - - what we
21 did is we just got done eating lunch. I went ahead and went
22 back to work. Jason had to - - Deputy Carraway had to go
23 home and pick up the actual K-9 that we use for our team.

24 And what he's telling me there is he hasn't made it to
25 the house yet to go ahead and pick him up and bring him

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1 back. So I know he's not -- he hasn't even made it to the
2 house yet. He lives on the south side of the county. So
3 it's going to be a little while before he gets to me.

4 (Whereupon the video was played for the jury)

5 Q. Just briefly right there, what are you doing with your
6 right hand?

7 A. I'm actually writing a warning.

8 Q. So you're not writing him a ticket at this point,
9 you're going to write him a warning for the -- for what?

10 A. For failure to maintain his lane of travel.

11 Q. Okay.

12 A. And, no, it's not a ticket.

13 Q. What did you -- what did he ask you?

14 A. He actually asked me what I'm writing him a ticket for.

15 Q. Is that the first time he had questioned you?

16 A. Yes, sir.

17 Q. Did he question you when you approached the vehicle?

18 A. Yes, sir. Well, he also questioned me about why I
19 stopped him immediately before I could ever get his license
20 or anything like that. To me that's being a little
21 defensive.

22 He's not even giving me a chance to explain anything to
23 him yet, which is -- normally what I like to do is to get
24 somebody's license so I can address them by their last name.
25 It'd be a little more respectful than -- the way I would

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1 want to be treated, too.

2 Q. What did you - - what did you then next ask him?

3 A. I asked him if everything in the vehicle belonged to
4 him, if everything in there he was responsible for.

5 **MR. JOHNSTON:** Your Honor, please note our objection
6 concerning that matter.

7 **THE COURT:** Your exception is noted.

8 A. He told me, yes, everything in the vehicle belonged to
9 him. I also asked him if anybody else had had access to the
10 car besides him. And he said he had no idea.

11 Q. Okay. And when he said no idea what did you then ask?

12 A. I asked him if - - I asked him again - - basically
13 asked him if anyone else had had access to it. And his
14 answer to me was, nah, - - -

15 Q. Well, hold on a second. I haven't gotten to that part
16 yet.

17 A. Okay.

18 Q. Did you ask him if anybody rented the vehicle or been
19 in the vehicle since they rented it?

20 A. Yes, sir.

21 Q. Do remember what his response was?

22 A. I have no idea.

23 Q. Well, after that? Would you like me to play the video
24 again?

25 A. Please.

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1 Q. We'll go back a little bit. I know it's a little hard
2 to hear sometimes.

3 A. I'm hard of hearing anyway.

4 Q. Bear with me for a second, it looks like the computer
5 is frozen.

6 (Pause)

7 (Whereupon the video was played for the jury)

8 Q. When did he say he had rented the vehicle?

9 A. Saturday.

10 Q. And then when you said - - what did he say next?

11 A. I can't tell exactly what that - - I can't tell. My
12 hearing's not the best in the world and the mike's kind of
13 muffled, too. I can't exactly tell what he said. Did he
14 say we? It's what it sounds like to me.

15 Q. I might have to stop pausing this thing. I'm going to
16 try a different program.

17 (Pause)

18 (Whereupon the video was played for the jury)

19 Q. What are y'all talking about right there?

20 A. Mr. Alston produced to me - - his license is actually a
21 paper license. What - - I was sitting back trying to
22 dissect exactly what - - everything about it. And I think
23 he basically saw me trying to study the thing, and he wanted
24 to try to put any fears that I had about his license away.

25 Q. There was nothing wrong with - - -

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- 1 A. No, sir.
- 2 Q. - - - his paper license other than - - -
- 3 A. No, sir. He explained to me that that's what they gave
- 4 him when he went to the DMV.
- 5 Q. Okay. When you say paper license, what do you mean?
- 6 A. It's actually a piece of paper. It's folded, but it's
- 7 - - -
- 8 Q. In comparison to our driver's license?
- 9 A. Right. Ours is laminated, his is not.
- 10 (Whereupon the video was played for the jury)
- 11 Q. Y'all start talking about what he does for a living.
- 12 What did he state he'd do?
- 13 A. That he sells clothes.
- 14 Q. And then what did y'all start talking about?
- 15 A. I asked him - - basically he stated that he had six
- 16 kids to feed. So I asked him the ages of the children. And
- 17 he had stated he had six kids. And when he told me the
- 18 ages, he actually gave me seven.
- 19 Q. And what were the ages he gave you?
- 20 A. Thirteen, fourteen, ten, five, four, three and the
- 21 little one's about six months.
- 22 Q. So he tells you he has how many kids?
- 23 A. He says he has six kids to feed, but he gives me the
- 24 ages of seven.
- 25 (Whereupon the video was played for the jury)

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1 Q. Again, you ask him about his trip. What did he say?

2 A. I asked him if he was going to stay up there until
3 about Monday. And he said, yeah, something like that, just
4 whenever she gets ready to leave, when I get rested up.
5 That's going to be -- that's going to be his answer.

6 Q. Okay. And you -- you assumed he was talking about who
7 at that point?

8 A. His mom.

9 Q. Okay.

10 (Whereupon the video was played for the jury)

11 Q. Now, at this point you've run the license, you've run
12 the vehicle check. Who was that that you were just speaking
13 to?

14 A. Captain Hollifield.

15 Q. What did he ask?

16 A. He asked me if there was anybody out with me yet.

17 Q. Okay. What did you tell him?

18 A. I told him no.

19 Q. Okay.

20 (Whereupon the video was played for the jury)

21 Q. Go back a little bit to this part. I think we were
22 skipping over where I was -- the program was freezing up.
23 But just in that part of the video, what were y'all talking
24 about? I know it's a little hard to --

25 A. I actually saw where they had actually rented a Nissan

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1 Cube before they actually got the Hyundai Santa Fe. And I
2 asked him about that. And his answer to me, well, we rented
3 it, but I didn't want that. So actually what they did is
4 they went back and actually exchanged vehicles and got the
5 Hyundai Santa Fe instead of using the Nissan Cube.

6 Q. If you'll just watch this portion of the video real
7 quick.

8 (Whereupon the video was played for the jury)

9 Q. Right there, what was he saying?

10 A. I asked him - - we pointed out that she's got him
11 listed as an additional driver on the rental agreement. And
12 I had asked him has anyone else had access to the vehicle
13 besides them. And he told me, nah, you don't let anybody
14 use those cars these days or nowadays.

15 Q. And you asked him again later in the video we just
16 watched previously again, correct?

17 A. Yes, sir.

18 Q. And what was his answer at that point?

19 A. That no one else had used the vehicle.

20 (Whereupon the video was played for the jury)

21 Q. What did you ask him at that point?

22 A. At that point in time I asked for consent to search the
23 vehicle.

24 Q. And what was - - -

25 A. And - - -

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1 Q. - - - his initial response?

2 A. - - - let me back up - - -

3 Q. Okay.

4 A. - - - just a second because I didn't cover something
5 that I feel like I should have. Basically when I asked Mr.
6 Alston does everything in the vehicle belong to him, his
7 answer was yes, that he was responsible for everything, that
8 no one else had had access to the vehicle and that there was
9 nothing illegal or harmful in the vehicle at that time. He
10 advised me that the only weapon that he had was a small
11 knife that was in the front of the vehicle for protection.

12 Q. I'm glad you brought that up.

13 A. I also asked him if there was anything in the - - -

14 Q. Hold on one second. I'll show you what's been
15 premarked as State's exhibit 13. If you'd look inside that
16 bag. Now, just for the jury's - - that bag was not found in
17 the vehicle?

18 A. No, sir, that's something that I put it in as evidence.

19 Q. State's exhibit 13, do you recognize that item?

20 A. Yes, sir.

21 Q. How do you recognize that item?

22 A. It's going to be the knife that was found in the middle
23 console.

24 Q. Is it in the same or substantially same condition as
25 when it was located - - -

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1 A. Yes, sir.

2 Q. - - - in the vehicle?

3 A. Yes, sir.

4 Q. And where was it located?

5 A. If I'm not mistaken it was found in the middle console.

6 And I believe Captain Hollifield was the one that located
7 it.

8 MR. HUNTER: Your Honor, at this time the State would
9 offer State's exhibit 13 into evidence.

10 MR. JOHNSTON: Your Honor, we would renew our previous
11 objection concerning that item.

12 THE COURT: Let me see y'all just a minute.

13 (Whereupon a bench conference was held off the record
14 in the presence of the jury, but out of their hearing)

15 Q. Who actually found the knife?

16 A. If I'm not mistaken, Captain Hollifield was the one
17 that found it.

18 Q. Okay.

19 A. I didn't refer to it in the report as who found the
20 knife.

21 Q. Okay. But who did you receive it from?

22 A. I believe Captain Hollifield.

23 Q. Did you put it into evidence?

24 A. Yes, sir.

25 MR. HUNTER: Again, the State would offer State's

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1 exhibit 13 into evidence.

2 **THE COURT:** Its admitted - - -

3 **MR. JOHNSTON:** The same objection.

4 **THE COURT:** - - - over objection.

5 (Whereupon State's exhibit 13 was admitted into
6 evidence)

7 Q. Please describe this item.

8 A. It's going to be a black handled knife - - -

9 **THE COURT:** We need the lights on, please.

10 A. - - - with a double serrated blade.

11 **THE COURT:** Mr. Bogan, we need the lights on.

12 (Pause)

13 Q. When you asked him for consent to search the car, what
14 did he say?

15 A. His exact words were I'm just trying to figure out what
16 all this is about.

17 Q. What did you then advise him?

18 A. I just told him that I was asking a question. And then
19 he - - he looked at me and said, I mean, yeah, you can
20 search it.

21 Q. Okay.

22 (Whereupon the video was played for the jury)

23 Q. Briefly go over that exchange with Mr. Alston.

24 A. Basically he was trying to figure out why I was asking
25 for consent to search the vehicle. And I explained to him I

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1 just needed a yes or no answer.

2 At the end of the conversation -- before that I had
3 explained to him, Mr. Alston, you have the right to refuse
4 consent to search the vehicle. And he asked me, he said, I
5 have the right to refuse? And I said, yes. He said, then
6 go ahead.

7 At which point in time I started to walk towards the
8 vehicle. And I wanted to make sure that clearly I had a yes
9 or no answer. So I came back and basically wanted to make
10 sure that he understood that he's giving me consent to
11 search. And I asked him that again.

12 And he basically comes out and says, nah, I'm not
13 giving you consent, you're the one giving consent. And I
14 explained to him, no, that's not the case here. I can wait
15 on one of my teammates that has a K-9 if that's what you
16 want to do. I need a yes or no answer. And he come out and
17 said, yeah, go ahead and search the car.

18 Q. Okay. At that point you go and search the vehicle?

19 A. Yes, sir.

20 (Whereupon the video was played for the jury)

21 Q. Who is that with you in the video?

22 A. That's going to be Captain Hollifield.

23 Q. Is there anybody else on the scene with you at the
24 beginning of the traffic stop?

25 A. At the beginning, you're asking?

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1 Q. At the beginning of the - - -

2 A. No, sir.

3 Q. - - -traffic stop?

4 A. No, sir. Captain Hollifield arrives about the same
5 time that you see him on the video. Before that, right
6 about the time I'm asking for consent to search the vehicle,
7 First Sergeant Travis Barnett arrives on the scene as well.

8 Q. Okay. So when we first see you searching the vehicle
9 you're searching the cargo area?

10 A. Yes, sir.

11 Q. Your back is turned, however, there's another officer
12 there?

13 A. Yes, sir. He's going to be actually standing behind
14 Mr. Alston.

15 Q. And how have you learned to search a vehicle?

16 A. There's going to be a systematic approach that I take.
17 My preferred method - - a lot of other people may do it
18 something completely different than I. But I'll go to the
19 rear cargo area first, search all the luggage. Then I'm
20 going to search the natural voids, especially it being a
21 rental. You want to look in the natural voids, things of
22 that nature.

23 You're not really looking for the hidden compartments
24 because they don't have the car long enough to actually put
25 a hidden compartment in it. Although, that has been done.

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1 That's just not something I'm focusing on here.

2 What I will do then is get -- eliminate the luggage,
3 eliminate the rear cargo area and the natural voids there.
4 I'll go to the passenger's side rear seat, and then I'll go
5 to the passenger's side front seat and work my way around
6 and then eliminate all the natural voids -- any contents
7 the car has at that time. And just what you're doing is
8 just a systematic approach to work your way around to where
9 you've covered the whole car.

10 Captain Hollifield shows up and actually assists and
11 gets to the area where the white powdery substance is found.
12 And there is a natural void between -- let's say you have a
13 tilt steering in this vehicle here. When you put the tilt
14 steering up, there's a void there between the steering
15 column and the actual plastic molding piece that holds that
16 steering column in place.

17 You can actually see there's a space there that you can
18 see through. And that's where this package was stuffed.
19 It's actually two packages. Captain Hollifield actually saw
20 that --

21 Q. Hold on a second, Deputy Gilbert.

22 **MR. HUNTER:** May we approach, Your Honor?

23 (Whereupon a bench conference was held off the record
24 in the presence of the jury, but out of their hearing)

25 Q. I'm going to show you what's been premarked State's

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1 exhibit 5. You talked a little bit about the void. Do you
2 recognize this picture?

3 A. Yes, sir. That's going to be the actual picture of the
4 vehicle that Mr. Alston was driving that day.

5 Q. And how do you recognize that picture?

6 A. I'm the one that took it.

7 Q. Does it fairly and accurately depict the scene as you
8 remember it that day?

9 A. Yes, sir.

10 **MR. HUNTER:** At this time the State would offer State's
11 exhibit 5 into evidence.

12 **MR. JOHNSTON:** Without objection, Your Honor.

13 **THE COURT:** It's admitted.

14 (Whereupon State's exhibit 5 was admitted into
15 evidence)

16 Q. Briefly describe what it shows.

17 A. It's going to show the actual natural void that I spoke
18 about earlier.

19 Q. If you could, step out and just show them where you're
20 talking about.

21 A. It's actually going to be the void here between the
22 steering wheel column and the plastic piece that holds the
23 steering wheel column in place. It's actually going to be
24 right there.

25 Q. Come down and show these members.

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1 A. It's going to be right here. There's actually a
2 natural void between the two, the steering column and the
3 plastic trimming piece that holds that in place.

4 Q. Thank you. Now for the good stuff. Let me show you
5 what's been premarked as State's exhibit 1. Do you
6 recognize that item?

7 A. Yes, sir, I do.

8 Q. How do you recognize that item?

9 A. That's going to be the two packages that were hidden
10 below the steering wheel.

11 Q. Okay. Who actually located those items?

12 A. Captain Hollifield.

13 Q. However, did he take possession of them?

14 A. No, sir.

15 Q. Who took possession of them?

16 A. I did.

17 Q. Okay. What is it packaged in?

18 A. It's going to be packaged in a - - vacuum sealed bags.
19 One of them's in a vacuum sealed bag and the other one, I
20 think, was in a - - I think it was in a vacuum sealed bag as
21 well.

22 Q. Are they in the same substantial - - same condition as
23 when you found them?

24 A. Yes, sir.

25 Q. What did you do with them?

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1 A. I put them in evidence.

2 Q. Okay. Well, explain that process for us.

3 A. What I did is took possession of the white powdery
4 substance here, transported Mr. Alston to jail, took him - -
5 booked him in, went to the office, filled out the proper
6 paperwork and put this into evidence, which is - - we have
7 an evidence room at the Sheriff's Office who takes
8 possession of any evidence that you have at that point in
9 time..

10 Q. Okay. And did you follow that process?

11 A. Yes, sir.

12 Q. And where did you place this evidence?

13 A. I filled out the proper paperwork and gave it to the
14 evidence room technician.

15 Q. What is the evidence drop-box?

16 A. It's going to be in the Sheriff's Office back there in
17 front of the evidence room.

18 Q. Would you please explain what it is.

19 A. That's going to be a drop-box that we actually put
20 things in if the evidence room is not open.

21 Q. Did you do that in this case?

22 A. Yes, sir.

23 Q. And briefly just explain what the process of the drop-
24 box is.

25 A. It's actually - - you're going to fill out the forms

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1 that you have to fill out. It keeps me from having to take
2 it home basically is what it's doing. It's keeping
3 possession of this until the evidence technicians come to
4 work the next morning and get it out. It's keeping me from
5 having to take it to the house.

6 Q. Once you put it in the drop-box can you or other
7 officers, not the evidence technician, but any other
8 officers get to that evidence?

9 A. No, sir.

10 Q. And what date did you do this?

11 A. It would be the same day as the stop.

12 Q. Okay. Please answer any questions Mr. Johnston may
13 have for you.

14 **Cross Examination by Mr. Johnston:**

15 Q. Sergeant Gilbert, State's exhibit 14, tell me what that
16 is again.

17 A. That's going to be the rental agreement that Mr. Alston
18 had for the vehicle he was driving.

19 Q. Who rented the vehicle according to that agreement?

20 A. This is going to be Ms. Harris.

21 Q. And you learned that Ms. Harris was Mr. Alston's
22 girlfriend or that's what he said?

23 A. That is correct, sir.

24 Q. You don't know Ms. Harris, do you?

25 A. No, sir, I sure don't.

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1 Q. You don't know whether or not Mr. Alston was present at
2 the time this agreement was prepared, do you?

3 A. I can't prove that, but I can also fall back on what he
4 said during the stop itself.

5 Q. Okay. Did he say he was there when this agreement was
6 prepared?

7 A. Something he did say that I caught onto just a second
8 ago was when I asked him about the Nissan Cube, he said, we
9 rented it, but I didn't want that. So he inferred that they
10 took it back.

11 Q. He said that we rented the Nissan Cube.

12 A. Correct.

13 Q. Did he say that we rented the Hyundai?

14 A. He said, I didn't want that, so they took it back.

15 Q. Did he say we rented the Hyundai?

16 A. No, sir.

17 Q. His name does not appear, other than as an additional
18 driver on that vehicle, does it?

19 A. No, sir. What I've also learned in training and
20 experience is that a person will use a third-party to rent a
21 vehicle - - -

22 MR. JOHNSTON: Your Honor.

23 THE COURT: Be sure you respond to the question, it's
24 not a narrative.

25 A. Yes, sir.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 **MR. JOHNSTON:** I would move to strike that as being
2 non-responsive.

3 **THE COURT:** All right. The last response is stricken.
4 The jury is asked to disregard it. It's not responsive to a
5 question.

6 Q. You carefully searched the luggage that was in the
7 vehicle, did you not?

8 A. Yes, sir.

9 Q. The luggage that is at least depicted under a blanket
10 in State's exhibit number 10, am I correct?

11 A. Correct.

12 Q. What kind of luggage was up underneath that blanket?

13 A. I'll have to watch the tape again. It looked like it
14 was a couple of suitcases, a bag or two.

15 Q. Okay. Well, I'm not interested enough in it to -- for
16 you watch the tape again. I'm just sort of -- are you
17 fairly confident it was a couple of suitcases?

18 A. Looked like it was a couple of bags, yes, sir.

19 Q. All right. Bags, you mean suitcase-type bags, -- --

20 A. Yes, sir.

21 Q. -- -- not garbage bags or -- --

22 A. Correct. Clothing.

23 Q. -- -- trashbags or something like that, am I correct?

24 A. Yes, sir.

25 Q. You went through those suitcases, those pieces of

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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- 1 luggage, correct?
- 2 A. That is correct.
- 3 Q. You found no drugs - - -
- 4 A. No, sir.
- 5 Q. - - - in that luggage, correct?
- 6 A. That is correct, yes, sir.
- 7 Q. That was stowed under this blanket, am I correct?
- 8 A. Yes, sir.
- 9 Q. Do you know who put the other keys on the rental car
- 10 key?
- 11 A. No, sir, I don't. I could speculate if you want me to.
- 12 Q. That won't be necessary, but I appreciate the offer.
- 13 Do you know who put the air freshener in the vehicle?
- 14 A. I sure don't, no, sir.
- 15 Q. Did you have the air freshener tested for fingerprints?
- 16 A. No, sir.
- 17 Q. That could have told us who put it there, couldn't it?
- 18 A. Yes, sir.
- 19 Q. How much money did Mr. Alston have on his person?
- 20 A. Mr. Johnston, with all due respect, I don't think I
- 21 have anything as far as the money notated in the report. I
- 22 don't know if he had any or not.
- 23 Q. All right. Well, would it be fair to say that if he'd
- 24 had something other than a few dollars, something like that
- 25 that you would have noted it on your report?

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1 A. Yes, sir.

2 Q. And, in fact, the Sheriff's Office would probably have
3 seized it?

4 A. Depending on the amount, yes, sir.

5 Q. If it was a significant amount of money?

6 A. Correct.

7 Q. So may I infer from the fact that you didn't note it,
8 that Mr. Alston had no significant amount of money?

9 A. I would agree with that, yes, sir.

10 Q. What exactly did you ask Mr. Alston about his children?

11 A. He had stated that he had six mouths to feed. And I
12 asked him the ages of it - - the ages of the children.

13 Q. All right. Did you specify children versus
14 stepchildren versus other children who might reside in his
15 household?

16 A. I sure didn't. I didn't hear that part. As far as I
17 know I didn't.

18 Q. All right. So when he first or when he told you the
19 number of six and then he gave you seven ages, it's
20 certainly possible he could have been talking about
21 stepchild or other child that lives in the home with him?

22 A. It's also possible that he was under some stress, too.

23 Q. Okay. Well, it is possible that he was talking about
24 stepchildren or other children that he might be responsible
25 for. That is possible, isn't it?

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1 A. It's also possible that he was under a certain amount
2 of stress that would have caused him to give the wrong
3 number of ages to it as well.

4 Q. Okay. I've read a lot of these kind of reports before,
5 officers making cases of this kind. And one of the things
6 that I noticed that officers often write in their reports is
7 that the subject, the driver, or the passenger, whoever it
8 may be was extremely nervous.

9 A. Some officers would notate that, yes, sir.

10 Q. You would note that if that were the case, wouldn't
11 you?

12 A. Correct.

13 Q. Is it fair to say that the word nervous does not appear
14 in your report?

15 A. I've referred to stress several times, but nervousness,
16 no, sir.

17 Q. So the word nervous does not appear?

18 A. No, sir, it does not.

19 Q. Certainly the term extremely nervous does not appear?

20 A. No, sir.

21 Q. Mr. Alston was cooperative with you, wasn't he?

22 A. Yes, sir.

23 Q. You asked him to step from the vehicle and he did so,
24 correct?

25 A. That is right, yes, sir.

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1 Q. You asked him to produce certain indicia of his right
2 to drive the car, his license, the rental agreement. He did
3 all that, didn't he?

4 A. That is correct, yes, sir.

5 Q. He didn't try to run away from you?

6 A. No, sir.

7 Q. He didn't refuse to stop when you put the blue light on
8 him, did he?

9 A. No, sir.

10 Q. And he gave you consent to search the vehicle, right?

11 A. Yes, sir.

12 Q. He gave you consent to search the vehicle even after
13 you told him you had a right to refuse, am I correct?

14 A. That is correct, yes, sir.

15 Q. We know that at least one other person had access to
16 this vehicle, don't we?

17 A. He didn't say. I asked him if anyone else had access
18 to the vehicle and he says, I have no idea. And then after
19 I asked him again, nah, you don't let nobody use those cars
20 nowadays.

21 Q. Does he - - -

22 A. Referring to who rented it, yes. Ms. Harris had access
23 to it. Was that her last name?

24 Q. It was.

25 A. Yes, sir.

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1 Q. So we - - -

2 A. You would assume she did. You could speculate that if
3 you want.

4 Q. All right. Well, she certainly had the legal right,
5 didn't she?

6 A. I would - - I would think so, yes, sir.

7 Q. All right. And usually when a person rents a car, they
8 give the keys to whom? The person on the rental agreement?

9 A. You could speculate that, yes, sir. Obviously she did
10 because Mr. Alston's in the vehicle.

11 Q. Sir?

12 A. I said obviously she did because he's the one actually
13 in the vehicle.

14 Q. Okay. Well, I'm talking about from the beginning, the
15 person who rented it was Tomeka Harris. She would have been
16 the person to have gotten the keys at least from the start?

17 A. I don't know.

18 Q. Well, - - -

19 A. If he's - - if he's listed as the additional driver - -
20 I don't know who they gave the keys to. They could have
21 gave it to him. He could have been there with her. We
22 could speculate that as well.

23 Q. Of course we don't know that?

24 A. We have no idea.

25 Q. I want to show you State's exhibit 1. Do you smell any

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1 odor associated with that? Sniff that for me.

2 A. No, sir.

3 Q. Air freshener wouldn't be much help for that, would it?

4 A. Not at that time, no, sir.

5 Q. Okay.

6 A. There's no odor from that to hide.

7 Q. Right.

8 A. You can't -- I can't smell it, no, sir.

9 Q. I couldn't smell it either. Now, it is admittedly
10 inside the bag, but --

11 A. Correct.

12 Q. In fact, it was in two bags, wasn't it?

13 A. I believe so.

14 Q. What happened when you submitted those bags to the --
15 for fingerprint analysis? What did you learn from that?

16 A. Mr. Johnston, with all due respect, I don't know if I
17 asked for the packages to be fingerprinted or not. I felt
18 like the facts of the case that I had at the time were
19 strong enough --

20 Q. Hang on a minute.

21 A. -- to keep from having --

22 Q. Hang on a minute.

23 A. -- to get them fingerprinted.

24 Q. Hang on a minute. I'm not asking for your personal
25 opinions or anything like that.

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1 A. Yes, sir.

2 Q. What I asked you for was what did the analysis for
3 fingerprints that you requested show?

4 A. I don't think we had that.

5 Q. Okay. Did you request that these bags be examined for
6 fingerprints?

7 A. No, sir.

8 Q. All right. You do have folks at the Sheriff's Office
9 who know how to fingerprint things?

10 A. That is correct, yes, sir.

11 Q. And when Mr. Alston was arrested you know as part of
12 the booking process they would take his fingerprints,
13 wouldn't they?

14 A. Yes, sir.

15 Q. All right. That's routine, right?

16 A. I would assume so. I don't work at the jail, so ...

17 Q. Okay. All right. That's - - now, if you had submitted
18 this for fingerprint analysis and there had been
19 fingerprints on it, you have someone there at the Sheriff's
20 Office who could have compared any prints that were on those
21 bags with Mr. Alston's fingerprints that were produced in
22 the booking process?

23 A. Well, you said a key word there, if, if there was
24 fingerprints on the package itself. And also in training
25 and experience - - -

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- 1 Q. Okay. Well, - - -
- 2 A. - - - I have found out that - - -
- 3 Q. Hang on - - -
- 4 **MR. HUNTER:** Allow him to finish his answer.
- 5 **MR. JOHNSTON:** Your Honor, - - -
- 6 A. If you would allow me - - -
- 7 **MR. JOHNSTON:** - - - his answer may be - - -
- 8 A. - - - to explain what my - - -
- 9 **MR. JOHNSTON:** - - - inadmissible.
- 10 A. - - - education has taught me.
- 11 **THE COURT:** All right. Just a minute, just a minute.
- 12 Ask your question and just be sure you're responsive to the
- 13 question. Ask the question again.
- 14 **MR. JOHNSTON:** I don't think I was asking a question.
- 15 I think he was volunteering an answer.
- 16 **THE COURT:** Okay.
- 17 **MR. JOHNSTON:** So I don't - - -
- 18 **THE COURT:** Just ask a question then.
- 19 **MR. JOHNSTON:** All right, sir, I will.
- 20 **THE COURT:** He's not volunteering an answer now.
- 21 **MR. JOHNSTON:** Yes, sir. Thank you.
- 22 Q. State's exhibit 1, the two bags of cocaine, were hidden
- 23 from view, were they not?
- 24 A. Yes, sir, they were.
- 25 Q. You walked to the passenger's side of this vehicle when

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1 you first stopped him, didn't you?

2 A. Yes, sir.

3 Q. You looked into that vehicle.

4 A. I had a fairly good view of what was inside the vehicle
5 at that time, yes, sir.

6 Q. Then after you got consent to search, you actually
7 searched the vehicle?

8 A. Yes, sir.

9 Q. But you didn't immediately see State's exhibit 1, did
10 you?

11 A. That is correct, yes, sir.

12 Q. Because it was hidden, - - -

13 A. Yes, sir.

14 Q. - - - am I correct?

15 A. Yes, sir. If I was driving with cocaine in the
16 vehicle, I'd hide it, too.

17 Q. Okay. Well, if you were driving in the car and you
18 didn't know it was there, one of the ways you wouldn't know
19 it was there is because you didn't see it.

20 A. We could presume that, but I can also say that if I sat
21 in the driver's seat it was fairly easy - - easy to see.
22 That's how Mr. Hollifield or Captain Hollifield found it.

23 Q. Okay. Well, you're saying that - - -

24 A. He didn't manipulate it - - well, I'll let him tell you
25 that.

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1 Q. All right.

2 A. Sorry.

3 Q. Do you know whether or not it was a hidden compartment
4 or it was a hidden void area, was it not?

5 A. A natural void, yes, sir.

6 Q. Okay. You looked in the window and you didn't see it.

7 A. No, sir. It's kind of hard to see from the passenger's
8 side.

9 Q. Okay.

10 A. The angle that I was looking at.

11 Q. Well, it wouldn't do it any -- do me any good to hide
12 it if you could see it easy, would it?

13 A. I -- I can speculate, if you want me to.

14 Q. I think we've had enough of that. Please answer any
15 other questions.

16 **Redirect Examination by Mr. Hunter:**

17 Q. What type of packaging was this in when it was located?

18 A. Vacuum sealed bags.

19 Q. What is a vacuum sealed bag?

20 A. To the best of my knowledge what they do is they
21 actually take the vacuum seal -- it's a food saver bag for
22 what people would take meat, things of that nature, package
23 the meat in, seal it to the best of their ability to
24 preserve that meat. And that's what they did with this
25 here.

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1 Q. In your training and experience have you ever located
2 this amount of drugs or somewhere around this amount of
3 drugs in vehicles?

4 A. Yes, sir.

5 Q. Okay. And how are they usually packaged?

6 A. Usually in vacuum sealed bags. A lot of times they
7 would take duct tape, other things, they will take mustard,
8 coffee grounds, anything they can to wrap that stuff in, put
9 duct tape on it, they will layer it three and four different
10 times with three or four different layers of things.

11 Q. Specifically on plastic bags have you had success in
12 getting fingerprints off of - - -

13 **MR. JOHNSTON:** Your Honor, I would object to that.
14 He's not a fingerprint evaluator. If he's the person who
15 actually does the examination, that question might be
16 relevant.

17 **MR. HUNTER:** Your Honor, I believe Mr. Johnston went
18 into this asking if he knew the results of the fingerprint
19 analysis.

20 **THE COURT:** Well, he asked - - he asked if there had
21 been - - if they had been submitted or if he asked them to
22 be submitted for fingerprint analysis, and he said not. So
23 ...

24 Q. Have you ever submitted items like this for fingerprint
25 analysis?

DONNIE GILBERT - REDIRECT EXAMINATION BY MR. HUNTER

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1 A. Yes, sir.

2 Q. What were the results - - -

3 MR. JOHNSTON: Your Honor, I would object to that on
4 the grounds of relevance.

5 THE COURT: Sustained.

6 Q. When someone - - he also asked who rented the vehicle.
7 Why is it interesting to you that a third-party rented the
8 vehicle?

9 A. Through my training and experience - - -

10 MR. JOHNSTON: Your Honor, I would - - -

11 A. - - - what we do is - - -

12 MR. JOHNSTON: I would object to that that it calls for
13 speculation.

14 THE COURT: Overruled.

15 A. Through my training and experience what we've been
16 taught and also through the cases that I've made over the
17 past eight years of doing this is people will take a third-
18 party, let them go rent the vehicle and they'll take
19 possession of that vehicle and drive it to wherever they
20 need to go.

21 The reason - - what really stood out to me on this was
22 that it was a female. What we have been taught and what I
23 have seen in the past, I have had a lot of success with is
24 officers will not take a female and associate that with
25 criminal activity. They are not threatened by a female

DONNIE GILBERT - REDIRECT EXAMINATION BY MR. HUNTER

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1 being involved in criminal activity. That's why they'll put
2 it in a female's name. They will take the time to register
3 a vehicle in a female's name just for that specific purpose.

4 Q. We're aware of your training and experience. How long
5 were you a K-9 officer?

6 A. From 2004 until 2009.

7 Q. And what is the purpose of a K-9?

8 A. It is for a free-air K-9 sniff.

9 Q. Okay.

10 A. What that is is we basically just take the dog, present
11 the vehicle to him, and if he alerts to the presence of the
12 odor of illegal narcotics or drug tainted odor, that gives
13 us probable cause to search the car with or without that
14 person's consent.

15 Q. Does cocaine have a smell?

16 A. Yes, sir.

17 Q. And is that smell easily identifiable by a human?

18 A. Depending on the volume of cocaine and also the length
19 of time that it has been in one place. It would take a lot
20 for you to be able to smell it.

21 Q. What about marijuana?

22 A. Yes, marijuana has a smell as well.

23 Q. Would it be easier to detect marijuana or cocaine?

24 A. In my training and experience it's a lot easier to
25 detect marijuana just by the smell.

DONNIE GILBERT - RECROSS EXAMINATION BY MR. JOHNSTON

209

1 Q. No further questions.

2 **Recross Examination by Mr. Johnston:**

3 Q. How do you know the third-party wasn't just his
4 girlfriend?

5 A. Well, sir, I - - -

6 Q. You don't know that.

7 A. I can't prove it.

8 Q. You don't - - -

9 A. I can speculate.

10 Q. You don't know that, do you?

11 A. No, sir.

12 Q. She could very well just be his girlfriend?

13 A. Yes, sir.

14 Q. But while we're on the subject of those, what did you
15 call them, criminal - - criminal organizations, is that what
16 you called them?

17 A. Is that what I said, Mr. Johnston?

18 Q. I can't remember the - - criminal people.

19 A. I'll give you that. Go ahead.

20 Q. Criminals. Okay. Do you know what a mule is?

21 A. Yes, sir, I sure do.

22 Q. What's a mule?

23 A. A mule is someone that will be hired to run drugs from
24 or run drugs, guns, money from one point to another. And he
25 will be paid for that trip.

DONNIE GILBERT - RE-REDIRECT EXAMINATION BY MR. HUNTER

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1 That's how a criminal organization refers to the person
2 that is transporting their goods. He may not even be told
3 what he's transporting, but he is aware that he is driving a
4 vehicle that contains something. He may not know what, from
5 point A to point B. And he will - - he will be paid for
6 that as well.

7 Q. Let me ask you to repeat part of what you said.

8 A. I can repeat that. He may not know what's actually in
9 that vehicle.

10 Q. That was the part. Please answer any other questions.

11 **Re-redirect Examination by Mr. Hunter:**

12 Q. However, that mule does know - - -

13 **MR. JOHNSTON:** Your Honor, this is re-re - - -

14 **THE COURT:** Yeah, I know.

15 **MR. JOHNSTON:** - - - direct.

16 **THE COURT:** Thank you for telling me.

17 **MR. JOHNSTON:** Yes, sir. Thank you.

18 Q. However, that mule does know he is involved - - -

19 **MR. JOHNSTON:** Your Honor, - - -

20 A. Yes, sir, absolutely. He - - he does know that he's
21 involved in criminal activity and he is getting paid for the
22 duty that he's doing.

23 Q. Thank you.

24 **MR. JOHNSTON:** I don't have any further questions.

25 **THE COURT:** You may step down.

1 A. Thank you, Your Honor.

2 **THE COURT:** We're going to break for lunch. Let me
3 caution you that you're not ever allowed to discuss the case
4 while the case is in progress, only during jury
5 deliberations at the trial's conclusion. So during the
6 lunch recess don't talk about the case with anybody, not
7 even among yourselves. Have a good lunch. Please report to
8 your jury room at 2:15, 2:15 this afternoon.

9 (Whereupon the jury exited the courtroom at 1:00 PM)

10 **THE COURT:** Court is in recess until 2:15.

11 (Whereupon court was in recess at 1:03 PM)

12 (Whereupon court resumed at 2:23 PM)

13 **THE COURT:** Are we ready for the jury?

14 **MR. JOHNSTON:** The Defense is ready.

15 **MR. HUNTER:** The State's ready, Your Honor.

16 **THE COURT:** Okay. Bring them in.

17 (Whereupon the jury entered the courtroom at 2:24 PM)

18 **THE COURT:** All right. Good afternoon, ladies and
19 gentlemen. We're going to continue with the State's
20 presentation of evidence.

21 **MR. HUNTER:** Your Honor, at this time the State would
22 call Captain Randy Hollifield.

23 **Randy Hollifield,** being
24 duly sworn testifies as follows:

25 **MADAME CLERK:** Thank you. You may be seated.

RANDY HOLLIFIELD - DIRECT EXAMINATION BY MR. HUNTER

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1 Direct Examination by Mr. Hunter:

2 Q. Please state your full name.

3 A. Randy Edward Hollifield.

4 Q. And are you currently employed by the Spartanburg
5 County Sheriff's Office?

6 A. Yes, sir, I am.

7 Q. How long have you been employed by the Spartanburg
8 County - - -

9 A. Thirty-one years.

10 Q. Give a brief overview of your thirty-one years. You
11 don't have to go into great detail.

12 A. First started out in narcotics back in the early 80s.
13 Since then I was in traffic, warrant detail, court detail,
14 basically then became captain over special services. And
15 that's where I am right now.

16 Q. Were you a captain on March 28th, 2011?

17 A. Yes, sir.

18 Q. And what are your duties as it refers to the Ice Team?

19 A. I am actually - - traffic division is actually under
20 me, which is - - Ice is part of traffic division. There's
21 actually two parts of traffic. You have the part that does
22 DUI, DUI detection and then you have those that work the
23 interstate. Both of those are under me. A lot of times I
24 get out - - try to get out of the office as much as I can
25 and get out and do drug interdiction with the guys out on

RANDY HOLLIFIELD - DIRECT EXAMINATION BY MR. HUNTER

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1 the interstate.

2 Q. What type of training have you received as regards to
3 searching vehicles?

4 A. Basically just about the same as Officer Gilbert. I
5 have been through NCA conference. There are different
6 schools that you can actually go to. What the schools are
7 set up for are to actually have compartments where you
8 actually have to search a vehicle.

9 They don't tell you where the compartment's at. You
10 actually have to find the compartment. You have to look for
11 different indicators inside the car that would lead you to a
12 compartment where there'd be a natural void that the
13 manufacturer makes or something that is done after somebody
14 gets a car.

15 Q. Okay. And on March 28th did you help Deputy Gilbert
16 search a vehicle?

17 A. Yes, sir, I did.

18 Q. And that's the vehicle we saw on the video camera
19 earlier?

20 A. Yes, sir, it was.

21 Q. Okay. Where did you begin your search?

22 A. I actually - - as you could tell by the video, I
23 actually went up to find out where Donnie had actually been,
24 where he was at. And so I went actually to the passenger's
25 side of the vehicle.

RANDY HOLLIFIELD - DIRECT EXAMINATION BY MR. HUNTER

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1 Q. Okay. What did you find in the middle console?

2 A. When I first started - - basically when I - - when I
3 start a search I look - - I try to look for the obvious. I
4 try to look down the side of the seats, floorboard, anything
5 that I can actually see right off the bat.

6 Opened up or actually when I got in the car, didn't see
7 anything actually down beside the seats. There was a bag
8 down in the floorboard. Actually raised the center console
9 up where I located a knife in a sheath that was inside the
10 console.

11 Q. What did you do with that knife?

12 A. I actually laid it in the seat.

13 Q. All right. Did you hand it to Deputy Gilbert at some
14 time?

15 A. At some time later he actually got the knife.

16 Q. Okay. And that's the knife that's in the brown paper
17 bag that's already been admitted into evidence?

18 A. That is correct.

19 Q. Okay. Did you continue searching the vehicle?

20 A. Yes, I did.

21 Q. And where did you go after that?

22 A. What actually happened was while I was looking in the
23 glove compartment I actually, just by the way I was inside
24 the car, I looked to the right and just basically scanning
25 around the bottom of the dash, and I could see where the

RANDY HOLLIFIELD - DIRECT EXAMINATION BY MR. HUNTER

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1 steering wheel actually goes down into - - into the console,
2 I mean, into the dash, there's an opening. When I looked
3 over there I could see what appeared to be some kind of
4 plastic that was sort of shoved up next to where the hole
5 should've been. And that's what actually drew my attention
6 to it.

7 I actually finished the search and actually got back
8 out of the car. You actually see - - or what you actually
9 see me do is what I go back and get. I actually go back and
10 get a flashlight because what happens a lot of times when
11 people hide things in cars they tend to set it up to where
12 you're not able to get to it very easily.

13 A lot of times they put fish hooks, they put all kind
14 of things up in there so when you reach up in there it's
15 sort of like booby trapped. So actually what I did, I went
16 back to get a flashlight so I'd be able to look to see if
17 there was anything - - that I was actually going to grab
18 anything if I stuck my hand up and under there.

19 Q. Let me show you what's been marked as State's exhibit
20 5. And if you could, step off the witness stand for a
21 second and just let Mr. Johnston take his place.

22 A. Okay.

23 Q. Where exactly are you talking about?

24 A. If you're looking from the passenger's side across, you
25 can see this section that's right in here. I could actually

RANDY HOLLIFIELD - CROSS EXAMINATION BY MR. JOHNSTON

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1 see the plastic bag inside this hole right here. That's
2 where I could actually see it at.

3 Q. And that's when you went back to get your flashlight?

4 A. Right here. Yes, sir.

5 Q. When you went back to the driver's side of the vehicle
6 what did you discover?

7 A. I could see a plastic bag up inside the hole. And it
8 appeared to have some kind of white, looking like a block of
9 powder.

10 Q. Let me show you what's been premarked State's exhibit

11 1. Do you recognize that item?

12 A. Yes, sir, I do.

13 Q. And how do you recognize that item?

14 A. This is the - - well, by looking at what's written on
15 here, and the date and when it was actually done, this would
16 be the cocaine or the white powder that was located under
17 the dash that I called Donnie's attention to.

18 Q. Did you actually take control of that substance?

19 A. No, sir.

20 Q. Okay. Who actually took control of that substance?

21 A. Deputy Gilbert.

22 Q. Please answer any questions Mr. Johnston may have.

23 A. Yes, sir.

24 **Cross Examination by Mr. Johnston:**

25 Q. You first begin by looking for the obvious.

RANDY HOLLIFIELD - CROSS EXAMINATION BY MR. JOHNSTON

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- 1 A. Yes, sir.
- 2 Q. And when you looked for the obvious you didn't find any
- 3 drugs, did you?
- 4 A. You talking about just as far as laying out?
- 5 Q. Yes.
- 6 A. No, sir. No, sir, did not.
- 7 Q. The next obvious part - - the next most obvious thing
- 8 being by the seats, under the seats, in the pockets?
- 9 A. Yes, sir.
- 10 Q. That'd be the next most obvious - - -
- 11 A. Sure. Absolutely.
- 12 Q. Then we'd move to the good hiding places, right?
- 13 A. Well, if it was a good hiding place, I'd never found
- 14 it.
- 15 Q. Okay. Well, you were looking for it?
- 16 A. Absolutely, I was.
- 17 Q. All right. So it was a better hiding place than the
- 18 glove box, wasn't it?
- 19 A. Well, sure, I guess so. Yes, sir.
- 20 Q. It was better - - it's a better hiding place than up
- 21 under the driver's seat?
- 22 A. Yes, sir, because I'm going to find it real easy.
- 23 Q. Okay. It's obvious someone was trying to hide it?
- 24 A. Somebody put it there.
- 25 Q. Yeah.

ROBERT ROSENBERG - DIRECT EXAMINATION BY MR. HUNTER

218

1 A. Yes, sir.

2 Q. It just didn't fall there?

3 A. No, sir.

4 Q. Okay. Please answer any other questions.

5 A. Yes, sir.

6 **MR. HUNTER:** No further questions.

7 **THE COURT:** Okay. You may step down.

8 A. Thank you, sir.

9 **MR. HUNTER:** Your Honor, may Captain Hollifield be
10 excused?

11 **THE COURT:** He may - - -

12 **MR. JOHNSTON:** We have no objection.

13 A. Thank you, sir.

14 **THE COURT:** Thank you.

15 **MR. HUNTER:** The State would call Robert Rosenberg.

16 **Robert Rosenberg,** being
17 duly sworn testifies as follows:

18 **MADAME CLERK:** Thank you. You may be seated.

19 **Direct Examination by Mr. Hunter:**

20 Q. I'm going to try to stand at this microphone so
21 everybody can hear me. Please state your name for the
22 record.

23 A. I'm Robert Rosenberg.

24 Q. Are you employed by the Spartanburg County Sheriff's
25 Office?

ROBERT ROSENBERG - DIRECT EXAMINATION BY MR. HUNTER

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1 A. Yes, sir, I am.

2 Q. How are you employed?

3 A. I'm currently assigned as an evidence custodian.

4 Q. And how long have you been with the Sheriff's Office?

5 A. Twenty-nine years, approaching thirty.

6 Q. Okay. And how long have you been an evidence
7 custodian?

8 A. Probably for the last ten.

9 Q. Were you an evidence custodian during the time of March
10 2011?

11 A. Yes, sir.

12 Q. Okay. What are the specific duties of an evidence
13 custodian?

14 A. What we're to do is when the evidence is collected on a
15 crime scene, they bring it to us, we catalog it, store it.
16 We store it for different things, like money goes in a
17 vault. We have a drug room that we put drugs in that are
18 picked up by the chemist, test, they bring it back to us,
19 and we file it in our drug room we keep in the storage
20 facility.

21 Q. Were you working during March 28th, March 29th of 2011
22 in the evidence custodian office?

23 A. Yes, sir.

24 Q. And did you receive the package that's in front of you,
25 State's exhibit 1?

ROBERT ROSENBERG - DIRECT EXAMINATION BY MR. HUNTER

220

1 A. Yes, sir.

2 Q. And how do you know that?

3 A. Because I received a chain, part of a chain that comes
4 in the envelope, a brown envelope. There'll be three sheets
5 of paper with it. And I received it that day. I filled out
6 a corresponding chain to go with it. It's not in this
7 plastic, but the blue plastic is this, in our brown envelope
8 with the three sheets of paper.

9 Q. And when did you receive that package?

10 A. March 28th, 2011.

11 Q. And is it in the same or substantially same, and I know
12 you said the packaging's a little different, but is it - - -

13 A. It's basically the same. The only thing that's added
14 is the sealed vacuum-type bag on the outside. We received
15 it in a brown envelope. This blue envelope here actually is
16 folded up and it drops down to here and it all slides down
17 in the brown envelope, and we receive the brown envelope.

18 Q. What did you do with that package?

19 A. I processed it. It is a sealed package. All we do is
20 fill out a sheet of paper or a form, I put the subject's
21 name on it, put the case number on it, and then I put it in
22 our drug room.

23 Q. Does it appear to have been tampered with - - -

24 A. No, sir.

25 Q. - - - since you've touched it?

MARY ELIZABETH STUART - DIRECT EXAMINATION BY MR. HUNTER

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1 A. No, sir.

2 Q. Okay. Please answer any questions Mr. Johnston may
3 have for you.

4 **MR. JOHNSTON:** I have no questions for this gentleman
5 and no objection to him being excused.

6 **THE COURT:** You may step down.

7 **MR. HUNTER:** The State would call Beth Stuart.

8 **Mary Elizabeth Stuart,**
9 being duly sworn testifies as follows:

10 **MADAME CLERK:** Thank you. You may be seated.

11 **Direct Examination by Mr. Hunter:**

12 Q. Please state your full name, please.

13 A. Mary Elizabeth Stuart.

14 Q. Are you currently employed by the Spartanburg County
15 Sheriff's Office?

16 A. I am.

17 Q. How are you currently employed?

18 A. I'm actually a school resource officer currently.

19 Q. Okay. However, how long have you been with the
20 Sheriff's Office?

21 A. Almost ten years.

22 Q. Okay. And how did you first get hired on at the
23 Sheriff's Office?

24 A. As a forensic chemist?

25 Q. Okay. Do you have an undergraduate degree?

MARY ELIZABETH STUART - DIRECT EXAMINATION BY MR. HUNTER

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1 A. I do. I have a bachelor of science in chemistry and a
2 bachelor of science in biochemistry both from the College of
3 Charleston.

4 Q. Do you have a master's degree?

5 A. I do. I have a master's degree in chemistry from the
6 University of South Carolina.

7 Q. What type of training have you received in regards to
8 the chemical testing of controlled substances?

9 A. Sure. I'm certified in drug analysis. I've also been
10 to the DEA, which is our federal government school for
11 forensic chemists. I have been to the DEA school on
12 clandestine laboratories. I have been to numerous agilent
13 classes, which is the makers of our instrumentation within
14 our lab. Have to do forty hours of continuing training
15 every year.

16 I have - - I'm also a member of the Clandestine Lab
17 Investigating Chemists International Association. I still
18 am currently. I also am still currently certified by the
19 American Board of Criminalistics, which is a national agency
20 that certifies forensic chemists. I'm certified in all
21 areas of forensic science.

22 Q. How many hours of annual training did you have in
23 regards to testing controlled substances?

24 A. Forty. And I'm maintaining those.

25 Q. Every year since you've been hired?

MARY ELIZABETH STUART - DIRECT EXAMINATION BY MR. HUNTER

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1 A. Yes.

2 Q. Okay. Approximately how many substance have you - -
3 substances have you tested in your career as a chemist?

4 A. By last count right before I switched positions, I was
5 near three thousand.

6 Q. Okay. How many times have you come into court and
7 testified as an expert?

8 A. Thirty-five.

9 **MR. HUNTER:** Your Honor, at this time the State would
10 offer Beth Stuart as an expert in chemical analysis of
11 controlled substances.

12 **MR. JOHNSTON:** Your Honor, we believe she's qualified
13 to offer her opinion.

14 **THE COURT:** All right. She is so qualified.

15 Q. Take a look at State's exhibit 1 that's up there by
16 you.

17 A. Sure.

18 Q. Do you recognize that package?

19 A. I do. And I recognize it because it has my initials
20 and the date and the letters OK on the bag inside and also
21 in the seal in the bag.

22 Q. And when did you receive that bag?

23 A. I received it on March the 29th of 2011.

24 Q. And where would you have gotten that from?

25 A. From the drug room in the evidence room.

MARY ELIZABETH STUART - DIRECT EXAMINATION BY MR. HUNTER

224

1 Q. Explain what the drug room is, specifically.

2 A. Basically after they log it into the evidence room,
3 they have a room that's secure where they go and stack all
4 the drugs. And we'll go in there and pick up the drugs for
5 testing. So I'd go in there and get them.

6 Q. Okay. Did you do that that day?

7 A. I did.

8 Q. What type of bag is - - why is it in a different bag?

9 Mr. Rosenberg - - -

10 A. Oh, sure.

11 Q. - - - said it was in a different bag.

12 A. Originally they come in the blue bag you see inside.

13 And that's called a BEST bag, which stands for best evidence
14 sample testing.

15 And basically because in the lab we receive drugs from
16 anybody in Spartanburg County, all the city agencies, the
17 county agency, the state agencies, any federal agency that
18 did something in Spartanburg County. So there were numerous
19 agencies bringing us drugs, we need a uniform way for
20 everyone to bring drugs into us. And that's what the BEST
21 bag was, a way that everyone could bring them in the same to
22 us.

23 The BEST bags are not tamper-proof. I mean, if you cut
24 it, you can get into it. But it's tamper evident, so that
25 if you tried to rip the sides, the lines would be distorted.

MARY ELIZABETH STUART - DIRECT EXAMINATION BY MR. HUNTER

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1 And once it's sealed, you'd literally have to cut it, use a
2 knife to get it open.

3 It's originally in that packaging. After I test it,
4 obviously, the bag's been cut open. So I re-put everything
5 in this heat sealed bag you see and put my initials in the
6 seal.

7 Q. And when you received that BEST bag, what was in it?

8 A. The BEST bag had two heat sealed bags of white powdered
9 substance inside.

10 Q. Had it been evident that anybody had tampered with it
11 before you received it?

12 A. No. When we go into the drug room to pick up a drug,
13 we will pull the BEST bag out of the brown envelope that the
14 evidence officer was telling you about and look and make
15 sure it hasn't been tampered with. Then it comes back into
16 the lab with us and goes into a vault until we get a chance
17 to test it.

18 When we pull it out for testing, again, I would look at
19 it again and just make sure it's not open, the seal's not
20 broken or anything. And actually I put my initials, the
21 date I test it and the letters OK. And that lets me know
22 that before I ever cut it open it was okay and it was still
23 sealed before I ever cut it open.

24 Q. Okay. Please briefly explain your testing procedures
25 in the lab.

MARY ELIZABETH STUART - DIRECT EXAMINATION BY MR. HUNTER

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1 A. Sure. When a white powder substance comes into the lab
2 we have a two-step process test that we do. One is a color
3 change process in which we would drop a chemical on it and
4 it would give us a color change. This is just an indicator
5 of what the drug might be. It gives us an idea of where we
6 go next.

7 At that point we do an instrumental test. It's called
8 a gas chromatograph-mass spectrometer. And then that gives
9 us data, which is a fingerprint of the compound that we use.
10 We also then weigh the substance.

11 Q. And in regards to this substance did you do the first
12 test?

13 A. I did.

14 Q. And what was the result of that test?

15 A. The field test field tested positive for cocaine. And
16 then I went ahead and did the instrumental test also. And
17 it found it to be cocaine.

18 Q. Did you then weigh the package?

19 A. I did.

20 Q. And what was the weight?

21 A. Four hundred and thirty-four point zero four (434.04)
22 grams.

23 Q. So in your expert opinion what is inside that package?

24 A. Cocaine at four hundred and thirty-four point zero four
25 (434.04) grams.

MARY ELIZABETH STUART - CROSS EXAMINATION BY MR. JOHNSTON

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1 **MR. HUNTER:** Your Honor, at this time the State would
2 offer State's exhibit 1 into evidence.

3 **MR. JOHNSTON:** Your Honor, we would interpose an
4 objection along the same lines of what we argued in the
5 pretrial motions at this time.

6 **THE COURT:** All right. The objection is noted and
7 overruled.

8 (Whereupon State's exhibit 1 was admitted into
9 evidence)

10 Q. Please answer any questions Mr. Johnston may have for
11 you.

12 **Cross Examination by Mr. Johnston:**

13 Q. Okay. Now, State's exhibit number 1, when you got it,
14 - - -

15 A. Yes, sir.

16 Q. - - - was it inside two - - tell me about these bags
17 again. I'm a little bit confused.

18 A. It was - - each was inside a heat sealed bag.

19 Q. Each?

20 A. There were two packages - - -

21 Q. Two packages?

22 A. - - - in heat sealed bags. And then both heat sealed
23 bags were down inside the blue BEST bag.

24 Q. So apparently there were two separate packages seized,
25 if you will, is that right?

MARY ELIZABETH STUART - CROSS EXAMINATION BY MR. JOHNSTON

228

1 A. Yes, sir. There were two heat sealed bags down inside
2 the blue BEST bag. So, yes, two packages.

3 Q. Okay. Did you test both of them?

4 A. I did, yes, sir.

5 Q. All right. And were your results the same?

6 A. Yes, sir, they were.

7 Q. Okay. I don't have any further questions.

8 **MR. HUNTER:** May Ms. Stuart be excused?

9 **THE COURT:** You may step down. You may also be
10 excused.

11 **MR. JOHNSTON:** No objection.

12 **MR. HUNTER:** Your Honor, at this time the State would
13 rest.

14 **THE COURT:** All right. Ladies and gentlemen, that is
15 all of the testimony and evidence to be offered by the
16 State. Before we go any further, I've got some matters I'll
17 need to address with the lawyers. So I would ask you to
18 please go to your jury room and don't yet begin discussing
19 the case. I'll bring you back shortly to conclude.

20 (Whereupon the jury exited the courtroom at 2:44 PM)

21 **THE COURT:** All right. Any motions or other matters to
22 address?

23 **MR. JOHNSTON:** Yes, sir, Your Honor, the Defense has
24 some motions. May I have the indictment? Thank you, sir.
25 Your Honor, we would move for a directed verdict at

1 least as to some of the allegations in the indictment there
2 having been no evidence whatsoever presented about these
3 particular acts. As the Court well knows, there are many
4 different ways in which one could potentially traffic in
5 drugs. And it looks to me like they basically just listed
6 all of those things in the indictment from an abundance of
7 caution or whatever.

8 In any event, Your Honor, there are certain things that
9 there have been no evidence presented about. And we would
10 move for a directed verdict of acquittal on those things.
11 The first would be sell, the second, manufacturer, the
12 third, cultivate, the fourth, deliver, provide financial
13 assistance or otherwise aid, abet, attempt or conspire to
14 sell, manufacturer, cultivate, deliver. We would argue that
15 as to all of those points there has been no evidence
16 whatsoever presented.

17 **THE COURT:** What about purchase?

18 **MR. JOHNSTON:** Well, I don't think there's been any
19 evidence that there was a purchase.

20 **THE COURT:** Well, I know, but you didn't tell me to
21 delete that.

22 **MR. JOHNSTON:** Oh, I'm sorry. Yes, please delete
23 purchase. Thank you, for - - that's part of our argument,
24 too, yes, sir.

25 And I don't know if - - I don't remember whether Your

1 Honor submits the indictment or not to the jury.

2 **THE COURT:** I do.

3 **MR. JOHNSTON:** If you do submit the indictment and you
4 were to grant my motion, I would ask that those items or
5 those acts be deleted or redacted from the indictment.

6 **THE COURT:** All right. Mr. Hunter.

7 **MR. HUNTER:** While I agree with Mr. Johnston that the
8 evidence that we presented, I will be going into this at
9 closing, those specific verbs -- the indictment is just a
10 notice document to provide notice to Mr. Alston what he's
11 being charged with. And that's just the plain language of
12 the statute. In your instruction to the jury the plain
13 language is going to be given. And just deleting verbs out
14 of the indictment, I don't know if that's a proper motion.

15 **THE COURT:** Well, sure it is. You've made an
16 allegation that there's no evidence to support. And that's
17 why it's subject to being stricken or amended.

18 **MR. HUNTER:** As far as -- everything -- I agree the
19 manufacturing --

20 **THE COURT:** What would be left would be bringing into
21 the State or knowingly in constructive possession.

22 **MR. JOHNSTON:** Yes, sir, that would be our position.

23 **THE COURT:** No allegation of actual possession, is
24 there?

25 **MR. HUNTER:** No, Your Honor.

1 **THE COURT:** All right. So I'll - - the two specific
2 allegations that are pertinent that are contained in the
3 statute are that he did bring into the State or did
4 knowingly have in his constructive possession, - - -

5 **MR. HUNTER:** There's also the - - -

6 **THE COURT:** - - - cocaine.

7 **MR. HUNTER:** He omitted the aid or abet. That language
8 is also included, I believe, as well. The aid or abet would
9 go towards those verbs. If I may see the indictment.

10 **THE COURT:** Well, yeah, you can look at it. Well,
11 she's making a copy of it, but there's no aiding and
12 abetting, necessarily.

13 **MR. JOHNSTON:** I don't think there was any evidence of
14 aiding and - - -

15 **THE COURT:** Yeah.

16 **MR. JOHNSTON:** - - - abetting admitted, Your Honor, or
17 presented.

18 **MR. HUNTER:** However, he did ask questions regarding
19 whether someone else had access to the vehicle.

20 **THE COURT:** That's true.

21 **MR. HUNTER:** I think that would go to maybe towards
22 aiding and abetting. That's not the theory we're going to
23 argue before the jury, however, - - -

24 **THE COURT:** Well, I don't think there is any evidence
25 of any aiding and abetting. Somebody could have access to

1 the vehicle, but that wouldn't mean they were aiding and
2 abetting. I mean, if there was somebody else sitting at the
3 table who was not in that vehicle that day, you don't think
4 you could overcome a motion of a directed verdict, do you?

5 **MR. HUNTER:** No, Your Honor.

6 **THE COURT:** Okay.

7 (Pause)

8 **THE COURT:** All right. Y'all look at this and see if
9 it should not be amended to reflect what's highlighted.

10 **MR. JOHNSTON:** That's satisfactory with the Defense,
11 Your Honor.

12 **MR. HUNTER:** The State as well.

13 **THE COURT:** All right. Mr. Hunter, you going to get
14 somebody to redact that indictment?

15 **MR. HUNTER:** Yes, Your Honor. I also need to check on
16 the video. It was in the process of being done.

17 **THE COURT:** All right. We'll take ten minutes.

18 **MR. HUNTER:** Thank you.

19 **THE COURT:** Before we do that, let's do one other
20 thing. Do y'all have any requests for jury instructions?

21 **MR. JOHNSTON:** Mere presence, Your Honor.

22 **THE COURT:** Okay.

23 **MR. HUNTER:** Just your normal drug jury instructions,
24 Your Honor.

25 **THE COURT:** All right. Take ten minutes.

1 (Whereupon court was in recess at 2:53 PM)

2 (whereupon court resumed at 3:08 PM)

3 **THE COURT:** All right. Ready for the jury?

4 **MR. JOHNSTON:** Yes, sir.

5 **THE COURT:** Okay. Bring them in.

6 **MR. HUNTER:** Yes, sir. Just briefly, it'll take two
7 seconds. The video is not complete yet, however, I've
8 spoken to Mr. Johnston. I don't plan to use it during
9 closing. And it should be completed by the time we finish
10 closing to go back to the jury.

11 **MR. JOHNSTON:** I don't either.

12 **THE COURT:** Okay. Mr. Johnston, would you like for the
13 record to reflect that your motions have been renewed and
14 denied by the Court?

15 **MR. JOHNSTON:** Yes, sir. And, Your Honor, shall I rest
16 - - -

17 (Whereupon the jury entered the courtroom at 3:09 PM)

18 **THE COURT:** Does the State have any additional evidence
19 to offer, Mr. Hunter?

20 **MR. HUNTER:** No, Your Honor.

21 **THE COURT:** Mr. Johnston, do you have any additional
22 evidence to offer?

23 **MR. JOHNSTON:** No, Your Honor. The Defense rests.

24 **THE COURT:** All right. Ladies and gentlemen, that's
25 all the evidence. What remains to be done are the lawyers'

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1 final summations, after which I'll instruct you on the law.
2 Then you can begin with your deliberations. So please give
3 the lawyers your attention now as they give you their final
4 summations.

5 **MR. HUNTER:** Thank you, Your Honor. May it please the
6 Court.

7 **THE COURT:** Mr. Hunter.

8 **MR. HUNTER:** Over four hundred and thirty (430) grams
9 of cocaine, that's a lot. When I came up here before you, I
10 said we'd gladly take the burden, the burden of proof beyond
11 a reasonable doubt that Stepheno Alston knowingly brought
12 into this State or knowingly and constructively possessed
13 more than four hundred (400) grams of cocaine.

14 I want to talk to you a little bit about what
15 constructive possession is. There's two forms of
16 possession. There's actual and constructive possession.
17 We're not arguing actual possession here, but it'll help to
18 understand what constructive possession is.

19 I have my car keys in my pocket. They're in my actual
20 possession right here. I know where they are. I can
21 control the disposition of them right here. I have a
22 computer in my office. It's not on me, but I know where it
23 is. And I'm the one that controls the use of it. I have
24 constructive possession of that computer.

25 Now, in this case we also have bringing into this

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1 State. Mr. Alston, when talking to Donnie Gilbert on the
2 side of the street, said he was coming from Georgia. Where
3 was he stopped? The State of South Carolina.

4 Mr. Johnston brought up something in his opening that
5 we couldn't prove possession or knowledge. He seemed to be
6 questioning Mr. Gilbert about a mule, a mule would have
7 knowledge of the cocaine.

8 This is the chance where you get to use your common
9 sense, you get to use your education, you get to use your
10 mental faculties, you get to listen to the evidence that
11 every officer testified to, you get to watch the video. And
12 the video will be available to you back in the jury room
13 when you begin your deliberations.

14 You'll be able to decide whether Mr. Alston was just a
15 blind mule who had no clue what was going on or if he was
16 trafficking in cocaine over four hundred (400) grams. And
17 how do you decide that? You use your common sense. You
18 look at the factors. You look at the evidence. You look at
19 the direct and circumstantial evidence.

20 When he's pulled over by Deputy Gilbert he immediately
21 gets defensive about why he's pulled over. He has a rental
22 agreement. In that rental agreement it's rented not by Mr.
23 Alston, but by a third-party who he says is his girlfriend.

24 That rental agreement says that car's only supposed to
25 be operated in Georgia, Tennessee, Kentucky, West Virginia

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1 and Virginia. Where's he going? He's in South Carolina.
2 That's not on the rental agreement. He's headed to New
3 Jersey. That's not on the rental agreement. The first car
4 that they got, the Nissan Cube, he didn't like that. He
5 wanted a different car. What does that say about his
6 knowledge?

7 And he gets out and starts talking to Deputy Gilbert.
8 He asked about his job. He runs a clothing store in Rome.
9 Talks about how he has mouths to feed, six of them, six
10 mouths to feed. When asked the age, seven ages. And you
11 can watch the video. You actually can hear the pause,
12 thirteen, ten, and five, oh, and the little one's six
13 months. Seven ages. He's stressed on the side of the road
14 because he has four hundred (400) grams of cocaine in his
15 vehicle.

16 Asked him if he has any weapons in his vehicle. He
17 responds he has a knife. He keeps it for protection. I'm
18 traveling from Georgia to New Jersey to see my mother, what
19 do you need protection from? The little console, very
20 easily reachable. Nothing illegal to having it in the
21 middle console, a knife, gun. So what do you need
22 protection for? What does your common sense tell you?

23 You heard the testimony about the air freshener.
24 Deputy Gilbert called it a mushroom air freshener. That's
25 not to say - - I don't think I've ever heard of an air

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1 freshener that smelled like mushrooms, but it's just the
2 shape, the type that you would normally see on the back of a
3 toilet. Not the pine tag that's hanging from the back of a
4 rearview mirror. What's the purpose of an air freshener?

5 Now we heard that that - - the cocaine was hidden. It
6 wasn't in a place you would normally find something. You
7 couldn't really see it when you looked in the vehicle.
8 That's pretty out in the open, though, isn't it? You'd
9 notice that.

10 Well, what's an air freshener used for? That's where
11 you get to use your common sense. What do you need an air
12 freshener for? I mean, you could be going to New Jersey and
13 you just want to keep the car smelling nice. It could be
14 because you don't want to have someone to smell the cocaine
15 or much less a K-9.

16 You get to look at all the facts that were presented
17 here. You get to listen to all the officers' testimony.
18 You have listened to it. You can listen to it again if you
19 want to. You get to watch the video. You get to look at
20 the cocaine. You get to look over the rental agreement.
21 You get to see all this stuff.

22 You've already seen it. You can see it again back in
23 the jury room if you'd like. You get to decide whether he
24 was just a blind mule or if he knew that cocaine was in
25 there. We're not talking about a small size bag of cocaine.

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1 It's a large amount. What does your common sense tell you?

2 When you go to the airport, when you're at the ticket
3 counter, they ask you have you received any baggage, any
4 cases that someone else has provided you? You know why they
5 do that. Has anyone given you anything to carry on that you
6 didn't bring yourself? This is where you use your common
7 sense.

8 Captain Hollifield in looking on the passenger's side
9 could see there was a little void there, something that
10 shouldn't be there. What did he see? Two plastic bags,
11 four hundred and thirty-four (434) grams of cocaine.

12 The last thing I want to talk about is this trip. The
13 car was rented on Saturday. It's due back on Saturday.
14 It's going to New Jersey. I've already said it's not on the
15 rental contract.

16 Going to see his mother to bring her back for Mother's
17 Day. We're talking about on March 28th. Ten days from now
18 he's, you know, it's 2013, he's going to bring back his mom
19 for Mother's Day. That's another whole month, the second
20 Sunday of May. Six weeks, and he's just now starting his
21 trip.

22 Rome, it's not that far out of Atlanta. Most of y'all
23 know where Atlanta is. He's going to travel to New Jersey,
24 stay up there for a couple of day's rest and come back. You
25 get to look at all these factors. Circumstantial evidence

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1 that he knew what was going on that day.

2 I urge you to watch the video, look at the evidence and
3 come back and find Mr. Alston guilty. Four hundred and
4 thirty-four (434) grams of cocaine, not a small amount.
5 You're not going to put that on the side of your seat for
6 everybody to look at. It's why he had the knife there.
7 Four hundred and thirty-four (434) grams of cocaine, guilty.
8 Thank you.

9 **THE COURT:** Mr. Johnston.

10 **MR. JOHNSTON:** May it please the Court, Madame
11 Forelady, ladies and gentlemen of the jury. This hasn't
12 been a particularly long case, but I want you to think that
13 by virtue of the fact that it's taken less than a day to
14 complete it that that in any way diminishes the seriousness
15 of your task for you to decide whether or not one of your
16 fellow citizens has been proven guilty beyond any reasonable
17 doubt of a serious crime.

18 But I think it is indicative that this case boils down
19 to basically only a couple of issues. Sometimes in a
20 criminal case there might be many, many different things
21 that a jury would need to resolve and consider. In this
22 case, I submit to you that it boils down to one word, and
23 that word is knowledge, knowledge, knowing. Has the State
24 proven beyond a reasonable doubt that Stepheno Alston knew
25 this amount of cocaine was in his vehicle or at least the

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1 vehicle that he was driving? I submit to you they have not.

2 There are two possible other explanations here. The
3 first is it was placed there without his knowledge. Have
4 they presented a single witness who says that they know Mr.
5 Alston knew that was in the car or that Mr. Alston admitted
6 that he knew those drugs were in his car? I put it to you
7 they have not.

8 This cocaine was not in the form that we see it now,
9 best as I can tell. You see, part of this is in a hard
10 brick form, a brick just like a brick that you put in, you
11 know, that you use for building materials. It's compressed.
12 Part of it is compressed and part of it is broken up.

13 There hasn't been any testimony specifically about
14 this, but I submit to you that it's certainly possible that
15 all of the cocaine was compressed into two tiny bricks.
16 Remember that there has been testimony that the cocaine was
17 placed inside one of these food storage bags, these vacuum
18 sealed bag things that you see on TV, but instead of it
19 being your leftover beef stew, it's drugs.

20 But in any event, when that vacuum seal bites down on
21 whatever's inside of it, that reduces volume. When the
22 volume is reduced, the size is reduced making it a much
23 tinier package to hide. So when you're considering this,
24 don't think of it this way, think of it as two compressed
25 bricks in food storage bags.

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1 The second explanation, and this was provided by the
2 investigating officer in this case who testified from his
3 experience there are people who are known in the drug trade
4 as mules. A mule is a person who carries just like an
5 animal. If you use a real mule, a real mule's kind of on
6 the dumb side, kind of stubborn and it basically only does
7 when it gets whacked and it's told to move. And it doesn't
8 make decisions on its own. It basically is directed by
9 others.

10 Now, the officer goes on to say, well, they always
11 know. Even if you're a mule, they always know. And you're
12 going to get paid for being a mule. Of course, there's no
13 evidence in this case that Mr. Alston was going to get paid,
14 no evidence whatsoever.

15 I submit to you that there is nothing in this case but
16 suspicion, conjecture and assumption. Suspicion, conjecture
17 and assumption. Ladies and gentlemen, a jury verdict of
18 guilty in any event can certainly not be based upon any of
19 those three things. A jury verdict of guilty must be based
20 on evidence. It must be based upon proof beyond any
21 reasonable doubt.

22 Now, there are two theories that the State has for
23 stating that Mr. Alston's guilty. The first is that he
24 brought drugs into the State. The second is that they were
25 in his constructive possession. Those are the only two

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1 theories. Both, ladies and gentlemen, require a knowledge.
2 It is not guilty bringing into the State, it is not guilty
3 of possession unless there is also knowledge of the nature
4 and character of the substance, again, of which there has
5 been no evidence in this case.

6 The drugs could not be seen in the car. They were
7 hidden as is shown in State's exhibit number 5. They were
8 hidden. I submit to you that it's very possible that a
9 person could travel a significant distance in this vehicle
10 and not know those drugs were in there. Cocaine apparently
11 has no smell, at least no smell to the human being. You try
12 to smell it, you don't smell it.

13 They talked about an air freshener. Who put the air
14 freshener in there? There was no evidence of who did that.
15 Perhaps we could have had some evidence of that had they
16 bothered to do one of the most basic law enforcement
17 functions, which is to take fingerprints. They didn't do
18 that in this case. The police not doing something can
19 constitute reasonable doubt, ladies and gentlemen.

20 There were no drugs in the luggage. Now, the officer
21 seemed very intrigued by the fact that the suitcases were
22 covered up with a blanket. And he said the motoring public
23 usually doesn't do that. Suspicion, conjecture, assumption.
24 But we do know this, he looked in the bags, there was
25 nothing in there. There were no drugs, no money, no guns.

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1 Now, they talk about this knife. Big drug dealer
2 carries a knife. This is the kind of knife kids carry. The
3 kind of knife - - I don't mean little kids, I mean high
4 school kids, young kids, people that are going to go
5 hunting, whatever. It's certainly not a semiautomatic
6 pistol. It's certainly not a submachine gun. It's
7 certainly not an assault weapon. It's not any of those
8 things.

9 As far as protection is concerned, I think it's
10 entirely or I submit to you it's entirely consistent with
11 someone who just feels more comfortable having a knife with
12 them than somebody who's really worried about taking on some
13 serious bad people because I don't know about you, but I
14 don't think you'd want to take on any serious bad people
15 with this knife. Suspicion, conjecture, assumption.

16 Traveling plans, I have never heard so much material
17 about travel plans. Oh, his travel plans didn't match up.
18 He was going to different states than what's on this rental
19 agreement. He was in South Carolina instead of Kentucky.
20 He was in South Carolina instead of Kentucky.

21 He was going to stay with his mom longer than what this
22 rental agreement provided for. So, therefore, he must be a
23 drug dealer, a big-time drug dealer because he wasn't in
24 Kentucky, because he was going to stay with his mom longer
25 than the rental agreement called for.

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1 The only problem with that theory is he's not the
2 person that rented the car. The person that rented the car
3 is Tomeka Harris. Is it certainly possible that his travel
4 plans changed after she rented the car? I submit to you it
5 is. And that that being evidence that he's a drug dealer, I
6 submit to you it fails.

7 He didn't act consistently with a person who felt he
8 was in immediate jeopardy. The officer concedes that in his
9 detailed report that he wrote about this incident the word
10 nervous doesn't appear. He's suspicious because the man's
11 got a blanket on his luggage, but he apparently is not
12 concerned with the fact the man isn't nervous. He's not
13 concerned with the fact that the man isn't very nervous,
14 sweating, suffering. He's not concerned with that.

15 What he is concerned with apparently is some type of
16 census problem with the number of kids. Ladies and
17 gentlemen, I put it to you that it's very common, and I see
18 this all the time, I ask, do you have kids? The person will
19 say, yeah, I've got three. But then they'll go on and say,
20 but, yeah, but my significant other, my wife, my husband,
21 whatever, yeah, they've got one or they've got two and they
22 throw that in. So I submit to you that that is certainly no
23 evidence that he's a drug dealer because he doesn't
24 specifically recite the ages of the children the way that
25 they think you should.

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1 And, ladies and gentlemen, the most valuable piece of
2 evidence that we could have had in this case that could have
3 cleared up this entire controversy wasn't even asked for.
4 Two bags, two bags, fingerprints? Nah, we didn't ask for
5 that. We assumed, we conjectured, we suspected, we didn't
6 need no fingerprints. Again, ladies and gentlemen, the
7 absence of evidence, that certainly can be reasonable doubt.

8 And of all the things they talked about that Mr. Alston
9 said, they never said, Stepheno, what's the story on this
10 Coke? What's the story on this? They never said that they
11 asked him that or more importantly what he said in response.

12 **MR. HUNTER:** Your Honor, may we approach on this?

13 **THE COURT:** Okay.

14 (Whereupon a bench conference was held off the record
15 in the presence of the jury, but out of their hearing)

16 **THE COURT:** You may proceed.

17 **MR. JOHNSTON:** Thank you, Your Honor. Mr. Alston was
18 cooperative. He didn't try to run, didn't try to drive
19 away. He stayed there, talked to the officers. He answered
20 the myriad of questions that were posed to him in exact
21 detail. And he was overall cooperative.

22 And then it boils down to this. The officer asks him,
23 may I search your car? Stepheno says, I just want to know
24 what this is all about. I just want to know what this is
25 all about. Then he says, okay, you can search. And then he

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1 says or the officer says, you've got a right to refuse.

2 Stepheno still says, you can go ahead and search.

3 Ladies and gentlemen, I submit to you that that is not
4 the response of a person who has knowledge of four hundred
5 (400) grams of cocaine in the car. I submit to you that is
6 the assertion of a person who has nothing to fear. And if
7 he has nothing to fear, he doesn't know. And if he has no
8 knowledge, he's not guilty. And that's what I ask you to
9 find, I ask you to find him not guilty.

10 **THE COURT:** Madame Forelady, ladies and gentlemen
11 of the jury, you, of course, have heard and seen all of the
12 evidence in the case. And now you've heard the final
13 summations of the lawyers. And, therefore, it now becomes
14 my duty and obligation to instruct you on the law that's
15 applicable in this case.

16 And then you'll be asked to go back in to begin with
17 your deliberations. And through that process you'll examine
18 the evidence, decide the facts, apply the law and arrive at
19 a fair and just decision, whatever that decision might be.
20 It is your exclusive duty to determine what the facts are.

21 You do that through your own common sense, examination
22 and evaluation of all of the testimony and the other
23 evidence received during the course of this trial. You
24 twelve jurors alone will decide what weight, value and
25 effect to give to any particular witness' testimony or other

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1 evidence in the case. Your sole objective is to simply
2 fairly determine the facts, apply the law and arrive at a
3 fair and just decision in the case, whatever that decision
4 might be.

5 Now, as you know, the Defendant was charged with
6 trafficking in cocaine. The allegations setting forth that
7 charge are contained in that document that I referred to
8 prior to and after your selection, that is the indictment.
9 But as I've told you, the indictment, while it will be in
10 the jury room to serve as the verdict form, it serves no
11 other purpose so far as you jurors are concerned. It's not
12 proof of anything. It doesn't establish anything. And it's
13 not evidence of anything in the case.

14 But as to the charge contained in that indictment the
15 Defendant has entered a plea of not guilty. And as I've
16 told you, that plea of not guilty has placed upon the State
17 the burden of proving the allegations that they have made
18 against the Defendant, the burden of proving each of the
19 essential elements that constitutes the crime alleged
20 against the Defendant. And, therefore, the burden is upon
21 the State to establish his guilt to your satisfaction beyond
22 a reasonable doubt before any verdict of guilty could be
23 returned.

24 The burden is never upon a defendant to prove that he
25 or she is not guilty or to prove that he or she is innocent

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1 because in some cases that might not be possible. As I've
2 said, the burden is always on the State, because they made
3 the charge, to prove his guilt beyond a reasonable doubt.

4 It is a vital, important and cardinal rule of law that
5 every defendant in a criminal trial, no matter how serious
6 might be the offense for which that person stands charged, a
7 defendant is always presumed innocent of the charge. That
8 presumption of innocence remains with any defendant as it
9 does with this Defendant from the time that he is placed
10 under arrest and throughout the course of the criminal
11 process and even throughout the course of the actual trial
12 on the case.

13 As I've told you, that presumption of innocence will be
14 with Mr. Alston even as you go back to begin with your
15 deliberations after I provide you this instruction. And
16 that presumption of innocence will be with him in that jury
17 room and it'll be with him forever unless you twelve jurors
18 determine that he's no longer entitled to the presumption of
19 innocence.

20 In other words, after you've carefully considered all
21 of the evidence in the case and from that evidence you
22 determine what you believe to be the true facts as they
23 relate to these allegations, and once you decide those
24 facts, you apply the law that I will have provided you, if
25 you twelve jurors unanimously determine that his guilt has

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1 been proven beyond a reasonable doubt, then he would no
2 longer be entitled to that presumption of innocence. But
3 it's only if, unless and until you are satisfied of his
4 guilt beyond a reasonable doubt that the presumption of
5 innocence would no longer be applicable.

6 Now, while the State does have the burden of proving
7 the Defendant's guilt beyond a reasonable doubt, that
8 doesn't mean that they have to prove his guilt beyond all
9 doubt or beyond any possible doubt, but it does require the
10 State to prove his guilt to your satisfaction beyond a
11 reasonable doubt. And the term reasonable doubt should be
12 given its plain and ordinary meaning. A reasonable doubt is
13 the kind of doubt that would cause a reasonable person to
14 hesitate to act upon the information provided.

15 And a defendant in a criminal trial is entitled to any
16 reasonable doubt that arises from the evidence or lack of
17 evidence in a case. And if upon any factual issue essential
18 to a finding of a verdict of guilty you have some reasonable
19 doubt as to how that issue should be resolved, it would be
20 your duty to resolve that reasonable doubt in favor of the
21 Defendant.

22 And, therefore, if upon your consideration of the whole
23 case you have a reasonable doubt as to his guilt, it is your
24 duty to resolve that doubt in his favor and to return a
25 verdict of not guilty. And on the other hand, after you've

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1 carefully considered all the evidence in the case, and
2 decided the facts, and applied the law, if you have no
3 reasonable doubt as to his guilt, then it would be your
4 corresponding duty to find him guilty where you have been
5 convinced of that guilt beyond a reasonable doubt.

6 The same law that provides that you are the judges of
7 the facts also provides that I am the judge of the law.
8 That simply means that nobody's going to tell you how to
9 arrive at your determination of fact in this case. You do
10 that as I've already stated, through the exercise of good
11 judgment and common sense, conscientiously applied to the
12 testimony and evidence received during the course of the
13 trial.

14 You must, however, under your oath as a juror accept
15 the law as I provide it to you as being the law that you are
16 to apply in the case. In other words, you're not to concern
17 yourself with what you thought the law was before you came
18 to serve as a juror this week or what you think the law
19 ought to be.

20 You must, under your oath as a juror, accept the law as
21 I provide it to you as being the law that you are to apply
22 in the case. And then you simply take that law and you
23 apply it to the facts as you twelve jurors determine those
24 facts to be based upon your common sense, examination of the
25 evidence in the case.

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1 Because you are the sole judges of the facts you are,
2 therefore, necessarily the sole judges of the credibility or
3 believability of each witness that has testified. And,
4 therefore, you may believe as much or as little of what a
5 witness has testified to as you deem as appropriate. But
6 there are a number of factors which you should take into
7 account in arriving at your assessment as to a witness'
8 credibility.

9 You should consider the demeanor of the witness, that
10 is how the witness appeared to you when the witness
11 testified from the witness stand. Was the witness
12 straightforward in responding to questions? Or was the
13 witness hesitant or evasive in responding to questions that
14 were asked of the witness? Simply put, did the witness
15 appear to you to be telling the truth and to have knowledge
16 of the facts to which that witness has testified?

17 You should also consider whether or not the testimony
18 of the witness is consistent or is it inconsistent with that
19 witness' own testimony or with other testimony or other
20 evidence received during the trial? You should also
21 consider how the witness came to know the facts to which a
22 witness has testified.

23 In other words, what was their opportunity and ability
24 to perceive the existence of those facts which they have
25 testified by having previously used their senses? And then

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1 what is that witness' ability to be able to come into court
2 and to accurately recollect to you as to what they have
3 previously perceived?

4 You should also consider any bias, or prejudice or
5 interest that a witness might have in the outcome of a case.
6 In other words, do you find some reason that a particular
7 witness would testify one way or another to help or hurt one
8 side or the other?

9 And you may consider any interest that a witness might
10 have in the outcome, if you determine that a witness does
11 have such an interest and you find that that interest would
12 bear upon that particular witness' credibility. You may
13 also consider whether or not the testimony of a witness is
14 strengthened or is it weakened by other testimony or other
15 evidence received during the course of the trial.

16 Now, you as the finders of the fact and you as the
17 judges of the credibility of each witness are permitted to
18 believe as much or as little of what a witness has testified
19 to as you deem is appropriate. And, therefore, you may
20 believe everything that a witness testified to, you may
21 choose to believe none of it. You may believe one portion
22 of a witness' testimony and reject some other portion of
23 that same witness' testimony.

24 You may believe one as opposed to several in a given
25 case or several as opposed to one. But whatever your good

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1 judgment and common sense tells you is the most believable
2 and credible testimony is the testimony you should accept.
3 And you should reject any testimony that you find not to be
4 credible or believable.

5 Now, while there are various forms of evidence such as
6 testimony, such as photographs, documents, charts, and other
7 types of physical exhibits, there are really only two types
8 of evidence. And the two types of evidence are direct
9 evidence and circumstantial evidence.

10 Now, direct evidence is the testimony of a person who
11 testifies from actual knowledge of that fact. It is
12 testimony by a person who has perceived the existence of
13 some fact by means of his or her senses and then they come
14 into court and they testify as to what they have previously
15 perceived.

16 Circumstantial evidence, on the other hand, is the
17 proof of some other fact or a set of facts, which taken
18 either singly or collectively, may prove the existence of a
19 fact in question as a necessary consequence, that is,
20 through an inference. And an inference is simply a
21 deduction of fact that may logically and reasonably be drawn
22 from the proof of some other fact or set of facts. In other
23 words, it's not a fact proven by the direct testimony of a
24 person based upon their personal perception, but it is a
25 conclusion which might reasonably be drawn from the proof of

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1 some other fact or facts.

2 In other words, you may infer that a particular event
3 occurred or that a particular fact exists based upon the
4 proof of sufficient factual circumstances which would
5 reasonably warrant your arriving at a particular conclusion.
6 The law, however, makes absolutely no distinction between
7 the weight or value to be given to direct evidence as
8 opposed to circumstantial evidence, nor is a greater degree
9 of certainty required of circumstantial evidence as opposed
10 to direct evidence.

11 Whatever the type of evidence used to prove any fact in
12 issue, you should consider all of the evidence presented
13 during the trial of the case. And after carefully
14 considering all that evidence in your minds, if you are not
15 convinced of the guilt of the Defendant beyond a reasonable
16 doubt, then it would be your duty to resolve that doubt in
17 his favor and return a verdict of not guilty.

18 Now, as you know, the Defendant is charged with a crime
19 of trafficking in cocaine. That's a statutory offense. And
20 that just means that the Legislature has codified it in the
21 written form. The Legislature meets every year from January
22 to June. They're meeting right now.

23 When they meet they pass a number of laws, and rules,
24 and regulations that govern our conduct in a variety of
25 ways. Some of those statutes are criminal penalty statutes.

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1 And that just means they define what a criminal offense is.
2 And if you are found to have engaged in conduct which is
3 prohibited by that statute, then that subjects you to some
4 form of punishment or penalty.

5 Please understand, however, that you are never to be
6 concerned with punishment or penalty. That's not something
7 that a jury decides. Your sole obligation and duty in this
8 case is to determine whether or not the Defendant's guilt
9 has been proven beyond a reasonable doubt as to the crime
10 alleged. And you do that without consideration of any
11 consequence to your decision by way of any punishment that
12 might be imposed.

13 But the statutory provision that the State alleges the
14 Defendant has violated is set for in section 44-53-370 of
15 the Code of Laws. And that particular code section provides
16 that any person who knowingly sells, manufactures,
17 cultivates, delivers, purchases, or brings into the State,
18 or who provides financial assistance, or otherwise aides,
19 abets, attempts, or conspires to sell, manufacture,
20 cultivate, deliver, purchase, or bring into this State, or
21 who is knowingly in actual or constructive possession, or
22 who knowingly attempts to become in actual or constructive
23 possession of ten grams or more of cocaine or any mixtures
24 of cocaine is guilty of the crime of trafficking in cocaine.

25 Now, in this particular case the State is alleging that

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1 the Defendant did commit the crime of trafficking in cocaine
2 in that he did bring into this State and/or he did have in
3 his constructive possession a quantity of four hundred (400)
4 grams or more of cocaine. And, therefore, before the
5 Defendant can be found guilty of trafficking in cocaine in
6 this case the evidence must convince you beyond a reasonable
7 doubt that the Defendant knowingly brought into this State
8 or did knowingly have in his constructive possession a
9 quantity of four hundred (400) grams or more of cocaine.

10 And cocaine is classified in a separate code section as
11 a schedule II narcotic drug and, therefore, is a controlled
12 substance under the law. And the weight of any controlled
13 substance includes the weight of the substance in its pure
14 form as well as any compound or any mixture containing the
15 substance.

16 Before the Defendant may be found guilty of a crime
17 involving the unlawful possession of cocaine by constructive
18 possession it must be proven beyond a reasonable doubt that
19 the Defendant did knowingly and intentionally have in his
20 constructive possession four hundred (400) grams or more of
21 cocaine.

22 Knowingly is defined as having knowledge of the fact.
23 It is an act which is done willfully, purposefully and
24 consciously. Intentionally is defined as purposefully, that
25 is by aim or design and not by accident, mistake or

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1 inadvertence.

2 Constructive possession of a substance occurs when a
3 person, although not in actual physical custody of the
4 substance, exercises dominion and control over the substance
5 or has the right to exercise dominion and control over the
6 substance. A person has possession of the substance within
7 the meaning of the law when he has both the ability and the
8 intent to control the disposition or use of the substance.
9 And the act of possession as well as the fact of knowledge
10 and/or intent may be proven by circumstantial evidence as
11 well as direct evidence or by a combination of both types of
12 evidence.

13 And you are permitted to infer the act of possession of
14 the substance as well as the existence of knowledge or
15 intent from evidence of acts, declarations or conduct of the
16 person charged with possession as well as any other
17 circumstances established by the evidence in this case from
18 which any such reasonable inference may be made in light of
19 all the evidence in the case and in the exercise of good
20 judgment and common sense.

21 You are, however, instructed that proof of mere
22 presence of the Defendant at or near a location where a
23 substance is found is not sufficient by itself to prove the
24 Defendant guilty of the crime of unlawful possession of that
25 substance. A defendant's mere presence where an item is

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1 located, even with knowledge of its presence, is not
2 sufficient standing alone to prove the crime of unlawful
3 possession. It must be further proven that the Defendant
4 intended to exercise dominion and control over the substance
5 and had the ability and the intent to control the use or
6 disposition of the substance.

7 If after your review of the evidence in this case you
8 determine that the State has only proven that the Defendant
9 was merely present at or near a place where cocaine was
10 located, but has failed to prove that the Defendant did
11 bring that cocaine into the State or did constructively
12 possess that cocaine beyond a reasonable doubt, then you
13 must find the Defendant not guilty.

14 And on the other hand, after you have reviewed all the
15 evidence in the case if you determine that the State has
16 proven beyond a reasonable doubt that the Defendant did
17 bring into this State or did have in his actual, excuse me,
18 did have in his constructive possession a quantity of four
19 hundred (400) grams or more of cocaine, then it would be
20 your corresponding duty to find him guilty.

21 I further instruct you and I emphasize to you that the
22 fact that a defendant during the trial of a criminal case
23 does not take the witness stand and testify during the trial
24 or the fact that he is not present at the trial of his case
25 is not a fact which may be considered by you in any way

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1 during your deliberations, nor in your determination as to
2 whether or not his guilt has been proven beyond a reasonable
3 doubt.

4 As I've already stated, the burden is on the State,
5 because they brought the charge, to prove the Defendant
6 guilty beyond a reasonable doubt. The burden is never upon
7 a defendant to prove that he is not guilty or to prove that
8 he is innocent because in some cases that might not be
9 possible.

10 You may not permit such a fact to weigh in the
11 slightest degree against this Defendant. You are not to
12 draw any inference, nor reach any conclusion from the fact
13 that the Defendant was not present during the trial of this
14 case, nor may that fact even be discussed by you while you
15 are engaged in your deliberations in the jury room.

16 Now, Madame Forelady and ladies and gentlemen of the
17 jury, I am not in any way concerned with what your decision
18 is, but you are instructed that your decision must be
19 unanimous. All twelve of you must be in agreement before
20 any verdict may be rendered and returned to court.

21 Madame Forelady, you will have in the jury room along
22 with the exhibits which have been introduced into evidence,
23 you'll have the indictment which serves as the verdict form.
24 On the back of the indictment you'll see the word verdict.
25 It is beneath that word that you will indicate the jury's

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1 unanimous decision.

2 In this case you have two potential verdict forms.

3 Those forms are guilty and not guilty. So whatever that

4 decision is, insert it in that space provided beneath the

5 word verdict, sign your name as the Foreperson. You're the

6 only juror that needs to sign the verdict form. There's

7 also a place for you to place the appropriate date.

8 If at any time during your deliberations you have a

9 question about evidence or you wonder if there's something

10 else out there that you can have or you think of something

11 that you'd like to have and you wonder if it exists and can

12 you have it, the answer is you can't have it even if it does

13 exist because all the evidence has been presented that's

14 going to be presented. The evidence is closed. So even if

15 something is out there that might assist you, you can't have

16 it. So don't inquire about that.

17 If you have a question about testimony of a witness, I

18 can bring you back into the courtroom to have a witness'

19 testimony replayed in whole or in part. I don't have

20 transcripts of the testimony, but if you want to hear a

21 particular witness' testimony we heard, I can bring you back

22 into the courtroom for that purpose. You'll just need to

23 let me know.

24 If at any time you have a question about the law that

25 you are to apply, I am always permitted to answer those

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1 questions. So should you have a question about the law, you
2 need to have a re-instruction, you need to have an
3 explanation or clarification, you let me know and I'll be
4 happy to provide you with that re-instruction, explanation
5 or clarification.

6 I don't know if we have any smokers on the jury. If we
7 do, you're not permitted to smoke in the jury room. You
8 have to go outside in order to accomplish that purpose. But
9 if you want to, let the bailiff know, and he'll take those
10 smokers outside to accomplish that purpose. You are
11 instructed, however, that the deliberations have to stop and
12 deliberations may only be engaged in when all twelve jurors
13 are present so that all twelve may participate.

14 The exhibits will be going back with you into the jury
15 room. The videotape which was played for you will also be
16 provided. And you will also have a computer so if you want
17 to look at it again, you're welcome to do that.

18 And, Madame Forelady, if at any time you ever have a
19 matter that needs to be addressed to me, if you'll simply
20 write it on a piece of paper, give it to the bailiff, he'll
21 provide it to me, and I'll respond to those issues or answer
22 those questions.

23 Once you have decided the case and you've reached a
24 decision, and I've told you you are to indicate the decision
25 on the back of the indictment, when you come back into the

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1 courtroom you hold on to the indictment. The bailiff may
2 take up the evidence, but you will hold on to the verdict
3 form, and I'll receive that from you after you have come
4 back into the courtroom and been seated with your fellow
5 jurors.

6 Also, there is an item which has been introduced into
7 evidence and it's in a sealed container. I prefer that you
8 never open a concealed - - a sealed container. However,
9 it's your prerogative to do so. But if you want to do that
10 or you need to do that, you let me know because I'll need to
11 make other arrangements and talk to you about that. So
12 don't open any sealed container without discussing that with
13 me first. All right.

14 With the exception of Mr. Galloway, I'll ask the twelve
15 primary jurors to retire to your jury room. Mr. Galloway
16 will remain with me. The twelve primary jurors, retire to
17 your jury room, but do not begin deliberations until I send
18 you word to do so.

19 (Whereupon the jury exited the courtroom at 4:00 PM)

20 **THE COURT:** Mr. Galloway, as you know, you can't
21 participate in jury deliberations because these twelve are
22 able to do that. So that's going to conclude your service
23 in the trial of this case. But I do want to thank you for
24 your participation and the time and the attention that you
25 devoted to it. If you'll call back after 6:00 this evening

1 to that number that you have, you'll receive further
2 reporting information for tomorrow.

3 **MR. GALLOWAY:** All right, sir.

4 **THE COURT:** Okay.

5 **MR. GALLOWAY:** After six?

6 **THE COURT:** After six. Thank you.

7 **MR. GALLOWAY:** Thank you, sir. I appreciate it.

8 **THE COURT:** Go with - - Mr. Galloway, go this way,
9 please, sir. They've got to check you out through the jury
10 assembly room.

11 **MR. GALLOWAY:** All right, sir.

12 (Pause)

13 **THE COURT:** Any exceptions or requests for additions to
14 the instructions by the State?

15 **MR. HUNTER:** Nothing from the State.

16 **THE COURT:** By the Defendant?

17 **MR. JOHNSTON:** Your Honor, if you're going to allow
18 them to have a computer back there, I would request that it
19 be either internet deactivated or - - -

20 **THE COURT:** It is.

21 **MR. JOHNSTON:** - - - instructed not to check around or
22 anything else on the computer.

23 **THE COURT:** Well, I have already some time ago made
24 those arrangements.

25 **MR. JOHNSTON:** Yes, sir.

1 **THE COURT:** The computer that goes back with the jury
2 can't do anything but play a video and there's nothing else
3 on it.

4 **MR. JOHNSTON:** All right, sir.

5 **THE COURT:** True, Mr. Hunter?

6 **MR. HUNTER:** This computer, you cannot get on the
7 internet.

8 **MR. JOHNSTON:** That's fine. I didn't realize that you
9 had already - - -

10 **THE COURT:** There's not supposed to be anything else on
11 it either. It's supposed to be blank.

12 **MR. HUNTER:** Well, there's the players that you can
13 play it.

14 **THE COURT:** Oh, sure. Yeah, yeah.

15 **MR. HUNTER:** There's no - - our prosecutor system's not
16 on here.

17 **THE COURT:** Right. Right. There's nothing they can
18 look at except the video.

19 **MR. HUNTER:** Correct.

20 **MR. JOHNSTON:** That's entirely satisfactory to me.
21 Your Honor, one point I am concerned about, it doesn't have
22 anything to do with request for additions, it does have to
23 do with what's on that video. I thought that the only thing
24 that was going back and what was actually on the video was
25 what was played in court. Apparently there's some other - -

1 during our little sidebar, there's some other material on
2 there.

3 **THE COURT:** Well, let me say this. I understood that
4 the video was going back in its entirety except for what we
5 had agreed upon to be redacted. I know that the entire
6 video was not played during the motion to suppress, but that
7 was because y'all both agreed that I didn't need to see the
8 whole video. But I thought the video was being introduced
9 in its entirety except that which had been requested to be
10 redacted.

11 We had a sidebar and apparently there's some
12 discussion, I mean, an inquiry after drugs were found.
13 There was a discussion or a question of the -- I mean, I
14 haven't seen it. So I don't know. But there was a question
15 asked of the Defendant about whose cocaine was it?

16 **MR. HUNTER:** After his Miranda warnings then he's asked
17 about the two bags of cocaine. And - - -

18 **THE COURT:** Okay. So after they discover the cocaine
19 - - -

20 **MR. HUNTER:** He's arrested - - -

21 **THE COURT:** - - - subsequent to that he's placed under
22 arrest and then they advise him of his rights?

23 **MR. HUNTER:** And then they ask him about the cocaine.

24 **THE COURT:** Right.

25 **MR. HUNTER:** And I'll make sure that part of the - - -

1 **THE COURT:** Well, I'm talking about once you get to the
2 point where they - - immediately prior to them advising him
3 of his Miranda warnings, that's where the video stops.

4 **MR. HUNTER:** And I - - -

5 **THE COURT:** Miranda warnings and everything subsequent
6 to that should not be on the video.

7 **MR. HUNTER:** That's what Deputy Gilbert went up to our
8 office right here to make sure the person who's making the
9 video that Miranda warnings from before Miranda warnings
10 were given on should be off the video.

11 **THE COURT:** All right. Now, Mr. Johnston, does that
12 take care of - - -

13 **MR. JOHNSTON:** That addresses my concern.

14 **THE COURT:** - - - any concern you have? Okay.

15 **MR. JOHNSTON:** Thank you.

16 **MR. HUNTER:** I'll go upstairs and bring it down and
17 we'll go over it with Mr. Johnston real quick just to make
18 sure everything - - -

19 **THE COURT:** Okay. That's good. All right. We'll be
20 at ease while y'all do that. All right. Let me ask y'all
21 to verify the other exhibits so they can go ahead and start.

22 (Pause)

23 (Whereupon the jury began deliberations at 4:06 PM and
24 court was in recess at 4:06 PM)

25 (Whereupon court resumed at 5:03 PM)

VERDICT OF THE JURY

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1 **THE COURT:** The video is not ready yet, is it?

2 **MR. HUNTER:** It is not, Your Honor.

3 **THE COURT:** Okay. The jury's reached a verdict. Are
4 we ready to receive it?

5 **MR. JOHNSTON:** The Defense is ready.

6 **MR. HUNTER:** The State's ready.

7 **THE COURT:** Okay. Bring them in.

8 (Whereupon the jury entered the courtroom at 5:03 PM)

9 **THE COURT:** Madame Forelady, have you and your fellow
10 jurors reached a unanimous decision?

11 **MADAME FORELADY:** Yes, we have.

12 **THE COURT:** Have you reflected that on the indictment
13 as requested?

14 **MADAME FORELADY:** Yes, I have.

15 **THE COURT:** Did you sign it and date it?

16 **MADAME FORELADY:** Yes, I did.

17 **THE COURT:** If you'll please hand that up by way of the
18 bailiff. All right. You may publish the verdict.

19 **MADAME CLERK:** Case number 2011-GS-42-3090, the State
20 versus Stepheno Alston, the verdict is guilty, signed by the
21 Foreperson, dated March the 19th of 2013. Ladies and
22 gentlemen of the jury, is this your verdict and still your
23 verdict? If so, please raise your right hand.

24 (Whereupon all jurors raised their right hands)

25 **MADAME CLERK:** So say you all.

VERDICT OF THE JURY

1 **THE COURT:** All jurors have responded in the
2 affirmative. Are there any other matters we need to address
3 with the jury present?

4 **MR. JOHNSTON:** Not from the Defense.

5 **MR. HUNTER:** Not from the State, Your Honor.

6 **THE COURT:** All right. Thank you, ladies and
7 gentlemen. That concludes your service for the trial of
8 this case. If you call back after 6:00 tonight you'll find
9 out what time you need to report tomorrow. Thank you again
10 for your participation. Have a good evening.

11 (Whereupon the jury exited the courtroom at 5:05 PM)

12 **MR. JOHNSTON:** Your Honor, I have one final matter
13 whenever you get ready.

14 **THE COURT:** What kind of matters could you have now?

15 **MR. JOHNSTON:** After you complete sentencing, I was
16 going to make a motion to be relieved as counsel.

17 **THE COURT:** Would you like to tell me something that
18 might impact my decision on sentencing?

19 **MR. JOHNSTON:** Your Honor, let me look to see what - -
20 it really doesn't - - I believe it's mandatory, Your Honor.

21 **MR. HUNTER:** Twenty-five to thirty with a two hundred
22 thousand dollar (\$200,000) fine.

23 **THE COURT:** Yeah, it's twenty-five to thirty - - -

24 **MR. JOHNSTON:** The twenty-five is mandatory, the thirty
25 is not.

1 **THE COURT:** Yeah, I've got some discretion between
2 twenty-five to thirty.

3 **MR. JOHNSTON:** Yes, sir. We would ask you to exercise
4 that discretion in favor of leniency.

5 **THE COURT:** Who's got the sheet? Sentencing sheet?

6 **MR. HUNTER:** I didn't know if we needed it for a trial
7 in absence. I didn't - - -

8 **THE COURT:** Oh yeah, I've got to - - -

9 **MR. HUNTER:** - - - I'll ask - - seal the sentence.

10 **THE COURT:** I do a sealed sentence, yeah.

11 **MR. HUNTER:** I'll go ahead and grab the sentencing
12 sheet.

13 **THE COURT:** You got it with you?

14 **MR. HUNTER:** No, it's sitting on top of my desk, Your
15 Honor.

16 **THE COURT:** All right. Let's get it.

17 (Pause)

18 **MR. JOHNSTON:** The other thing is, Your Honor, I know
19 that when the sentence is opened and in the event it is
20 opened that counsel has the opportunity to argue for - - -

21 **THE COURT:** Leniency again?

22 **MR. JOHNSTON:** Yes, sir.

23 **THE COURT:** Well, that probably won't be necessary.

24 (Pause)

25 **THE COURT:** Okay. The deed's been done. Court's in

1 recess until 9:30 in the morning.

2 **MR. JOHNSTON:** Your Honor, did you have a chance to
3 think about my motion to be relieved?

4 **THE COURT:** I did think about it.

5 **MR. JOHNSTON:** I guess your silence means it's not
6 going to be granted?

7 (Pause)

8 **MR. JOHNSTON:** If the Court doesn't think it's
9 appropriate that - - -

10 **THE COURT:** You got a contract with him?

11 **MR. JOHNSTON:** A contract?

12 **THE COURT:** Was your contract just for the trial?

13 **MR. JOHNSTON:** Yes, sir, but there - - I am contracted
14 for the trial. But there's going to be another proceeding
15 here that's going to be - - in the event he's apprehended
16 and brought before the Court, there's going to be another
17 sentencing, and then there will have to be - - someone will
18 have to file his notice of appeal.

19 **THE COURT:** Well, I know. Well, who would ordinarily
20 do that?

21 **MR. JOHNSTON:** Me.

22 **THE COURT:** Well, so why do you want to shirk that
23 responsibility?

24 **MR. JOHNSTON:** I'm not shirking it, I just - - -

25 **THE COURT:** Well, why are you trying to get out? If he

1 were here would you be making that motion?

2 MR. JOHNSTON: No, sir, absolutely not.

3 THE COURT: Well, then why are you making it now?

4 MR. JOHNSTON: Because I feel by the fact that he
5 didn't appear, circumstances under which he didn't appear

6 - - -

7 THE COURT: He breached his contract?

8 MR. JOHNSTON: No, sir. Evidence that the relationship
9 of trust and confidence that should exist between attorney
10 and client do not exist.

11 THE COURT: Oh, I'm satisfied that he had the most
12 confidence in you. I don't think he had confidence in the
13 jury.

14 MR. JOHNSTON: Yes, sir. Well, that's fine.

15 THE COURT: Okay. I'm going to deny it, but you may,
16 you know, you can make that at the time of sentencing.

17 MR. JOHNSTON: All right, sir.

18 THE COURT: Or once he's been - - once he's been
19 apprehended, assuming that he will be, - - -

20 MR. JOHNSTON: Yes, sir.

21 THE COURT: - - - you can file that motion then.

22 Whether he's been sentenced or not, once he's been picked
23 up, you can file that motion.

24 MR. JOHNSTON: I'll do that. Thank you, sir.

25 THE COURT: Okay. Court's in recess until 9:30 in the

1 morning.

2 (Whereupon court was in recess at 5:15 PM)

1 **Wednesday, March 20, 2013:**

2 (Whereupon court resumed at 10:11 AM)

3 (Whereupon Court's exhibit 1 was marked)

4 **THE COURT:** We're back on the record in the case of the
5 State versus Stepheno Alston, which was tried yesterday.
6 The State showed for the benefit of the jury a video of the
7 traffic stop conducted by Officer Gilbert when he stopped
8 the Defendant's vehicle. The video was shown to the jury,
9 but only a portion of the video was shown. Portions that
10 were objected to by the Defense were not shown to the jury
11 or at least the audio portion that was objected to was
12 silenced.

13 **MR. HUNTER:** It was fast-forwarded, Your Honor.

14 **THE COURT:** It was fast-forwarded so that that portion
15 was not played for the jury. The State was going to redact
16 the video so that it could go back when the jury went back
17 to deliberate. That redaction was not accomplished while
18 the jury was deliberating.

19 And so the videotape that was shown during the trial
20 was not actually given to the jury during their
21 deliberations. So they were not exposed to anything that
22 had been objected to by the Defense during the course of the
23 trial that related to the video. The redaction was
24 accomplished, but the redaction was not accomplished until
25 after the jury had reached its decision.

1 And so while there is a video that has been marked as a
2 Court's exhibit and it was shown or at least portions of it
3 were shown to the jury during the course of the trial, the
4 video was not sent back with the jury during their
5 deliberations. And so, therefore, they were not exposed to
6 the portions that were objected to by the Defense. Is that
7 a fair statement, Mr. Hunter?

8 **MR. HUNTER:** I'd also like to note that the jury was
9 told that if they wished to watch the video they could come
10 out from their deliberations and watch it in the courtroom,
11 however, they chose not to.

12 **THE COURT:** That's true.

13 **MR. JOHNSTON:** Yes, Your Honor, that is a correct
14 statement of the occurrence and facts.

15 **THE COURT:** Okay.

16 **MR. HUNTER:** The video was State's exhibit 2 and the
17 Court's exhibit is Court's exhibit 1. Court's exhibit 1 is
18 the redacted version of the video.

19 **THE COURT:** Okay. But that's never been seen by
20 anyone.

21 **MR. JOHNSTON:** But it is an accurate reflection of what
22 they saw and what the Court saw for the suppression motion.
23 So we think it appropriate that it be made part of the
24 record.

25 **THE COURT:** Okay. All right. Thank you.

1 **MR. JOHNSTON:** Thank you, your honor.

2 THE COURT: Thank you.

3 (Hearing ended at 10:14 AM)

4 (End of Requested Transcript of Record)

1

Certificate of Reporter

2 I, the undersigned, Susan W. Hudgins, Official Court
3 Reporter for the Seventh Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all the
6 proceedings had and evidence introduced in the trial/hearing
7 of the captioned case, relative to appeal, in the Circuit
8 Court for Spartanburg County, South Carolina, on the 18th -
9 20th day of March 2013.

10 I do further certify that I am neither of kin, counsel,
11 nor interest to any party hereto.

12

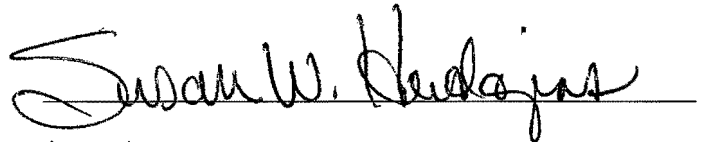
January 11, 2014

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A handwritten signature in cursive script, reading "Susan W. Hudgins", written over a horizontal line.

Circuit Court Reporter

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

3 The State,)
4 -vs-) TRANSCRIPT OF RECORD
5) 2011-GS-42-3090
6)
7) September 19, 2013
8) Spartanburg, South Carolina
9)
10)

11 B E F O R E:

12 HONORABLE J. DERHAM COLE, JUDGE
13
14

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

16 JAMES EDWARD HUNTER, ESQUIRE
17 Attorney for the State

18 ANDREW J. JOHNSTON, ESQUIRE
19 Attorney for the Defendant
20
21
22

23 Linda D. Moffitt
24 Circuit Court Reporter
25

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INDEX

Sentence -- page 3.

No sworn testimony; no exhibits entered into evidence.

Sentence

1 (Proceedings September 19, 2013)

2 THE COURT: All right. We're here in the matter of
3 the State vs. Stepheno Austin.

4 Mr. Johnston, you represent Mr. Austin.

5 MR. JOHNSTON: Yes, sir.

6 THE COURT: Mr. Hunter is here on behalf of the state.

7 This is a -- we're here for the purpose of imposing a
8 sentence. The defendant was tried in his absence
9 March 19th of 2013.

10 Okay. Mr. Johnston, anything you want to tell me by
11 chance?

12 MR. JOHNSTON: Yes, sir, Your Honor. I know that you
13 imposed sentence at the time as is required by law, and
14 that sentence is sealed, but you do have the option to look
15 at the sentence again today as he stands before you.

16 I just would like to tell you a few things about him.
17 He is 40 years of age. He is engaged. He has seven
18 children ages 20, 17, 14, seven, five, four and three. The
19 three youngest children reside with him and his fiancé.

20 He is a resident of Rome, Georgia, and has lived there
21 almost all of his life.

22 He went to the 11th grade in school. He does not have
23 a G.E.D. His most recent employment was that he owned his
24 own clothing store, and he operated that for about five or
25 six years.

Sentence

1 He does have a prior record, but it appears to me he
2 doesn't have any convictions since 1995. It's a little
3 difficult for me to interpret because it's out of state,
4 and it doesn't look like he's had any drug convictions
5 since 1994.

6 THE COURT: Where was Mr. Austin apprehended?

7 MR. JOHNSTON: At his home.

8 THE COURT: Well, I don't have the indictment before
9 me, but I do have the sentencing sheet. But as I
10 understand it, he was convicted of trafficking in 400 grams
11 or more of cocaine.

12 MR. HUNTER: That's correct, Your Honor.

13 THE COURT: It has a mandatory minimum sentence. You
14 know that.

15 MR. JOHNSTON: Yes, sir. And I've explained that to
16 him.

17 THE COURT: Yeah. All right. Anything else you need
18 to tell me?

19 MR. HUNTER: Nothing, Your Honor.

20 THE COURT: All right. On Indictment 2011-3090,
21 having been convicted by a jury of trafficking in 400 grams
22 or more of cocaine, the sentence imposed was that you be
23 confined to the South Carolina Department of Corrections
24 for a period of 25 years and pay a fine of \$200,000.

25 Mr. Alston, you have a right to appeal the verdict of

Sentence

1 the jury and the Sentence of the Court. You must file your
2 notice of intention to appeal those decisions within ten
3 days of today's date.

4 MR. JOHNSTON: And I will undertake to do that, to
5 file the initial paperwork, Your Honor, and then I will
6 turn it over to either retained counsel or to appellate
7 defense. I've provided him information about that process.

8 THE COURT: Okay. Thank you.

9 THE DEFENDANT: Do I get to say anything?

10 THE COURT: Well, you can if you want to. What do you
11 want to say?

12 THE DEFENDANT: That I just wanted to let you know the
13 only reason why I didn't show up because I've been having
14 problems with my lawyer ever since the day I hired him.
15 Other than that I would have been here.

16 THE COURT: Okay. Thank you.

17 END OF REQUESTED TRANSCRIPT OF RECORD

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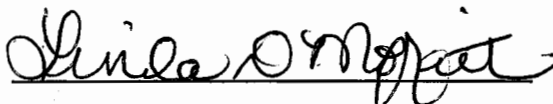
Certificate

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 19th day of September 2013.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

October 21, 2013

A handwritten signature in cursive script, appearing to read "Linda D. Moffitt", written over a horizontal line.

Linda D. Moffitt
Circuit Court Reporter

WITNESSES

SPTBG CO SHERIFF'S OFFICE

NOTED

CHECKED WARRANTS

CHECKED RETURN

ANGELINE AND

THE LAST JURY

ARREST WARRANT NUMBER

M753164

ACTION OF GRAND JURY

JUN 17 2011

True Bill

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO.

11-GS-42-3090

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

JUN 20 2011

TERM

THE STATE

vs.

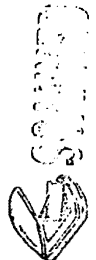
STEPHENO ALSTON

Indictment for

TRAFFICKING IN COCAINE

SC Code: 44-53-370

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 JUN 21 PM 4:57
M. HOPE BLACKLEY



STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

INDICTMENT

JUN 17 2011

At a Court of General Sessions, convened on _____, the
 Grand Jurors of Spartanburg County present upon their oath:

TRAFFICKING IN COCAINE

That Stepheno Alston did in Spartanburg County on or about March 28, 2011, 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 (400) four hundred grams of Cocaine, a schedule II controlled substance, in violation of §44-53-370, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 ASSISTANT SOLICITOR

RECEIVED COPY
 CLERK OF COURT
 SPARTANBURG COUNTY
 BY  D.C.
 DATED 6/17/11

Y OF SPARTANBURG
VS.
Stepheno Alston
A:
ace: BLACK Sex: M Age: 39
OB: SS:
ddress:
ity, State, Zip:
L#: SID#:

INDICTMENT/CASE#: 2011GS4203090 285
A/W#: M753164
Date of Offense: 3/28/2011
S.C. Code § : 44-53-0370(e)
CDR Code #: 0281

SENTENCE SHEET

CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
Disposition of the said indictment comes now the Defendant who was
O: Drugs / Trafficking in cocaine, 400 g or more (25-30 & \$200K)

☐ CONVICTED OF or ☒ PLEADS

n violation of § 44-53-0370(e) of the S.C. Code of Laws, bearing CDR Code # 0281
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ § 17-25-45
w/minor 1st or Lewd Act)

he charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)
he plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
TEST: 7226 77517
JUNTER, JAMES EDWAR SC Bar# Defendant Attorney for Defendant SC Bar# 03064

HEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
or a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed years
nd/or to pay a fine of \$ 200,000; provided that upon the service of days/months/years and/or payment
f\$; plus costs and assessments as applicable*, the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
robation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
y the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-13

ursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
omestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
otal: \$ plus 20% fee: \$
ayment Terms:
☐ Set by SCDPPPS

PTUP days/hours Public Service Employment

ecipient:

Fine:		\$ 200,000.00
14-1-206 (Assessments 107.5 %)		\$ 315,000.00
14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
14-1-211(A)(2) (DUI Surcharge)	\$100	\$
56-5-2995 (DUI Assessment)	\$12	\$
56-1-286 (DUI Breath Test)	\$25	\$
roviso 47.9 (Public Def/Prob)	\$500	\$
14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
14-1-213 (Drug Court Surcharge)	\$150	\$ 150.00
50-21-114 (BUI Breath Test Fee)	\$50	\$
56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
roviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
% to County (if paid in installments)		\$ 12,458.40
OTAL		\$ 427,738.40

Obtain GED ☐
Attend Voc. Rehab. or Job Corp. ☐
May serve W/E beginning
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

lark of Court/ Deputy Clerk
ourt Reporter:
CCA/217 (03/2011)

Presiding Judge
Judge Code:
Sentence Date:

Sentence Published 9/19/13

CLERK OF COURT
SPARTANBURG COUNTY
S.C.
DATED 9/23/13

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHENO JEMAIN ALSTON,

PETITIONER.

APPELLATE CASE NO. 2015-002134

BRIEF OF PETITIONER

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ARGUMENTS

1.

The Court of Appeals erred in holding the trial judge properly denied Petitioner’s motion to suppress the evidence found in his vehicle where the officer did not have reasonable suspicion Petitioner was involved in criminal activity or probable cause to stop Petitioner’s car for a traffic violation. 12

2.

The Court of Appeals erred in finding the trial judge properly denied Petitioner’s motion to suppress the evidence found in his vehicle where the officer’s continued detention of Petitioner exceeded the scope of the traffic stop and constituted a second seizure for purposes of the Fourth Amendment and where the officer did not have reasonable and articulable suspicion of a serious crime or Petitioner’s consent to extend the stop. 18

3.

The Court of Appeals erred by holding the trial judge properly denied Petitioner's motion to suppress the evidence found in his vehicle where Petitioner's consent to search was not freely and voluntarily given, and even if it was freely and voluntarily given, was invalid as an exploitation of an unlawful detention.....26

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ISSUES PRESENTED

1.

Did the Court of Appeals err by holding the trial judge properly denied Petitioner's motion to suppress the evidence found in his vehicle where the officer did not have reasonable suspicion Petitioner was involved in criminal activity or probable cause to stop Petitioner's car for a traffic violation?

2.

Did the Court of Appeals err by holding the trial judge properly denied Petitioner's motion to suppress the evidence found in his vehicle where the officer's continued detention of Petitioner exceeded the scope of the traffic stop and constituted a second seizure for purposes of the Fourth Amendment and where the officer did not have reasonable and articulable suspicion of a serious crime or Petitioner's consent to extend the stop?

3.

Did the Court of Appeals err by holding the trial judge properly denied Petitioner's motion to suppress the evidence found in his vehicle where Petitioner's consent to search was not freely and voluntarily given, and even if it was freely and voluntarily given, was invalid as an exploitation of an unlawful detention?

STATEMENT

A Spartanburg County Grand Jury indicted Petitioner on June 20, 2011 for trafficking in cocaine. R. 211-212. His case was called to trial on March 18, 2013 before the Honorable J. Derham Cole, and a jury. R. 1. Petitioner was tried in his absence after he did not appear for trial. R. 6, ll. 20-25; R. 97, l. 3 – 98, l. 9. Assistant Solicitor J. Edward Hunter represented the state, and Andrew J. Johnston represented Petitioner. R. 1.

On March 19, 2013, the jury found Petitioner guilty. R. 202, ll. 19-25. The sealed sentence was opened on September 19, 2013. R. 203. Judge Cole sentenced Petitioner to twenty-five years imprisonment and a \$200,000 fine. R. 206, ll. 20-24.

The Court of Appeals affirmed Petitioner's conviction and sentence on July 29, 2015. State v. Alston, 2015-UP-381 (S.C. Ct. App. filed July 29, 2015); App. 1-8. Petitioner filed a Petition for Rehearing on August 13, 2015. App. 9-21. On September 15, 2015, the Court of Appeals denied the Petition for Rehearing. App. 22.

Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals with this Court on October 26, 2015. The state filed a Return on November 24, 2015. By order dated July 18, 2016, this Court granted certiorari to review the Court of Appeals' decision.

This Brief of Petitioner follows.

Motion to Suppress

Petitioner moved pretrial to suppress the cocaine seized from his vehicle in violation of his Fourth Amendment rights. R. 7, ll. 24-25. In response to Petitioner's motion, the state called Deputy Donnie Gilbert of the Spartanburg County Sheriff's Office to testify *in camera*. During Gilbert's testimony, the state also played the audio and video recording of the traffic stop from

Gilbert's in-car camera. R. 14, l. 18 – 15, l. 13; R. 25, ll. 3-4; R. 30, l. 9; R. 30, l. 22; R. 34, l. 12; R. 36, l. 22; R. 39, l. 21-24.

A. Testimony

On Monday, March 28, 2011, Deputy Gilbert was “monitoring traffic on Interstate 85” in Spartanburg County. R. 12, ll. 13-17. He was parked perpendicular to traffic on the northbound side of the interstate when he “observed a Hyundai Santa Fe pass [his] location and failed to maintain its lane of travel.” Gilbert claimed, “[A]fter it passed by me its left side tire struck the dotted line that divides the middle lane, which it was traveling in, and the fast lane, which would've been to its left. Then it drifted back into the middle of that middle lane.” He later clarified, “Now, when I say struck, what I would mean by that is that tire could have covered that whole line, but it didn't go all the way across it. But it did make contact with that line and then drift back into the middle of that lane.” Gilbert admitted Petitioner never crossed the dotted line. Petitioner merely “rode on top of it.” R. 43, l. 21 – 45, l. 2.

Due to this perceived traffic violation, Gilbert pursued the vehicle and, once he caught up to it, activated his blue lights. The driver immediately pulled over to the “emergency shoulder” on the right side of the road. R. 12, l. 22 – 14, l. 10.

As he approached the car, “the first thing [Gilbert] noticed was in the rear cargo area there was some luggage covered up by a blanket.” R. 16, ll. 3-6. Gilbert claimed, “That's not common with the motoring public that I come into contact with every day. You just don't see that. You don't see the people to actually take the time to cover it with a blanket. They put their luggage in there and go.” R. 40, l. 19 – 41, l. 2.

After noticing the luggage, Gilbert walked to the passenger side window and the driver, who was later identified as Petitioner, immediately asked him “why he was being stopped.” R. 16, ll. 5-

9. Gilbert claimed Petitioner's question was not "normal." He said, "It's not consistent with the innocent motoring public. Ninety-nine percent of the time [motorists] will let - - they will let me explain why, basically get to that point." R. 17, ll. 2-6.

After obtaining Petitioner's driver's license, Gilbert learned Petitioner's identity and that he was from Rome, Georgia, which the officer maintained was south of Atlanta.¹ The fact that Petitioner was from an area near Atlanta caused Gilbert some concern. He explained, "Me being involved in the interdiction community, Atlanta is a major hub for criminal activity in the southeast." Moreover, the fact that Petitioner was traveling on Interstate 85 also caused Gilbert some concern. He said, "Again, me being involved in the interdiction community, Interstate 85 is a major criminal activity corridor connecting Atlanta to many routes to the south and to the north of that." R. 17, l. 8 – 18, l. 6.

When Gilbert asked Petitioner for the paperwork for the car, Petitioner produced a rental contract. R. 18, ll. 10-13. Gilbert learned from the contract that the car was rented in Cartersville, Georgia, which is also in the Atlanta area. The car was rented on Saturday, March 26, 2011, which was two days before the stop, to a Tomeka Harris.² Gilbert claimed the fact that the vehicle was rented to a third party raised his suspicion because "in [his] training and experience, that is very common when it comes to criminal activity. They will have a third-party rental in their possession. That way if they are involved in criminal activity they're not in their vehicle. So that vehicle won't get seized when they get caught." R. 20, l. 13 – 21, l. 2. Gilbert also said he thought it was suspicious the car was rented in a woman's name because "a lot of your criminal organizations will rent a vehicle in a woman's name for the simple fact that law enforcement does not - - they are not

¹ Rome, Georgia is actually northwest of Atlanta.

² This person is also referred to as Tomesha Harris in other places in the record.

threatened by a woman. They don't recognize criminal activity with a female. At least that's what the drug trafficking organizations think." R. 21, ll. 3-11.

According to Gilbert, the rental contract indicated the car was only allowed to be operated in five states: Georgia, Tennessee, Kentucky, Virginia, and West Virginia. Since Petitioner was stopped in South Carolina, he was driving in a state that was not listed on the rental contract as a place where he was permitted to travel. R. 21, ll. 12-24. Gilbert said, "Another thing that raised a big flag with me is why he's putting the states on here like Georgia, Tennessee, Kentucky, West Virginia, and Virginia. In my mind that automatically makes me think that from the beginning of the trip he was trying to avoid Interstate 85." R. 26, ll. 10-14.

Gilbert also claimed, "There was a key in the ignition that is consistent with the car being a rental, just one key. And on the key ring there was two house keys on the key ring, which is very odd. I mean, you don't see that. Anytime somebody rents a vehicle, in my training and experience and in the fourteen years of being involved in law enforcement, you don't see other people took or take their house keys and put [them] on the key ring for the rental. To us, in my training and experience, they're trying to personalize the vehicle." R. 22, ll. 13-25.

Gilbert eventually asked Petitioner to get out of the car and stand near his patrol vehicle. As Petitioner did so, Gilbert noticed an air freshener in the "driver's door pocket." Gilbert said, "To me, that's also odd because in a rental vehicle you just don't see people go straight to a store and buy an air freshener and put it in a rental vehicle if it's not yours." He claimed an air freshener "could be used as a masking agent to hide odors of other things, which could be drugs, could be

anything that he's trying to hide that he doesn't want you to smell.”³ R. 23, l. 1 – 24, l. 24.

When questioned by Gilbert, Petitioner told him that Tomeka Harris was his girlfriend. Petitioner also explained he was traveling to Newark, New Jersey to pick up his mother and bring her back to Georgia for Mother's Day. Gilbert said this was “another red flag” since New Jersey was another state not listed on the rental agreement and because Mother's Day was not until May and this was the end of March. R. 25, l. 15 – 27, l. 6. Petitioner later told Gilbert he was concerned about his mother's health and was afraid she was not being honest about her condition so “[he] figured [he] would go up there and see what's going on.” R. 35, ll. 1-5.

When Gilbert asked Petitioner how long he planned on staying in New Jersey, Petitioner “advised somewhere around a week, yeah, something like that, just whenever [his mother] gets ready to leave, when [Petitioner] get[s] rested up.” Gilbert said he specifically asked Petitioner if he was going to stay in New Jersey until the following Monday and Petitioner said, “Yeah, something like that . . .” Gilbert noted the rental vehicle was due back the upcoming Saturday, which was two days before Petitioner said he expected to head back to Georgia. R. 34, l. 20 – 35, l. 21; R. 27, l. 10 – 28, l. 1.

While Gilbert was writing Petitioner a warning ticket for failure to maintain a lane, the officer asked Petitioner what he did for a living. Gilbert testified Petitioner told him he owned a clothing store in Rome, Georgia, and that “he had to make a living somehow, he had six kids to feed.” Gilbert asked Petitioner how old his children were and Petitioner allegedly gave the ages of seven kids. When asked by the solicitor what this meant to him, Gilbert testified, “He's not keeping

³ While Gilbert claimed during the suppression hearing that cocaine has an odor depending on its volume and the way it is packaged, he admitted he did not smell any cocaine that day. R. 51, l. 9 – 52, l. 6. He later admitted during his trial testimony that he could not smell any odor coming from the four hundred and thirty-four grams of cocaine present in the courtroom. R. 144, l. 25 – 145, l. 13; R. 169, ll. 21-22.

up with - - it's the stress of the situation. He's not even being able to keep up with how old the kids are and how many he's got." R. 33, l. 7 – 34, l. 11.

After Gilbert checked Petitioner's license, he went back to his vehicle and called Deputy Jason Carraway. Gilbert said he was trying "to figure out if [Carraway] was close to [him] or not." However, Carraway told Gilbert "that he had to go to his house to pick up his [drug] dog and then come back." Since Carraway would not be able to arrive at the scene with his drug dog for some time, Gilbert explained, "I went ahead and switched to channel 1 to see if anybody on uniform patrol was close to me at that point in time." Gilbert said, "They had somebody coming to me, but I think it was - - they didn't say how long it was going to be, but [the person coming] wasn't necessarily in the same area as me." R. 31, ll. 1-11.

Gilbert continued to wait for another law enforcement officer to arrive at the scene. He knew he was going to ask Petitioner for consent to search his vehicle, but he explained, "I've done got to the point to where I'm not going to ask for consent until I actually get somebody else there with me for the simple fact that a lot of times things start getting a lot - - a little tense and people start figuring out what's actually going on when you start asking for consent to search." R. 35, l. 22 – 36, l. 21.

About sixteen minutes and thirty seconds into the traffic stop, and after "First Sergeant Barnett from the uniform patrol" arrived on scene, Gilbert asked Petitioner for consent to search his car. R. 38, l. 25 – 39, l. 1. Gilbert testified, "I then asked for consent to search the vehicle. And instead of answering the question, which I encounter sometimes," Petitioner said he was "just trying to figure out what this is all about." Gilbert "advised him that I'm just asking a question." Petitioner then asked Gilbert "why you want to search the vehicle? And [Gilbert] explained to him I'm not going to answer that until everything's done." At some point, according to Gilbert,

Petitioner eventually told Gilbert he could search the car. As Gilbert began to approach the car, he hesitated and walked back to Petitioner. He claimed he told Petitioner he could refuse consent, but Petitioner allegedly told Gilbert again that he could search the car. However, Petitioner did say at one point that “I’m not giving you consent, you the one giving consent.” Petitioner also repeatedly asked Gilbert why he wanted to search the car. R. 37, l. 6 – 38, l. 21; R. 66, l. 3 – 69, l. 17.

With the assistance of Captain Hollifield and Deputy Carraway, who by then had arrived at the scene, Gilbert searched the car. R. 40, ll. 7-10. The officers discovered cocaine in the steering column. R. 156, l. 21 – 159, l. 21.

On cross-examination, Gilbert conceded that when he first approached the passenger window, he did not see any guns or any other weapons nor did he smell alcohol, marijuana, or cocaine. R. 50, l. 14 – 52, l. 6. He admitted he called both the tag for the vehicle and Petitioner’s driver’s license into dispatch and both came back “clear.” Gilbert said, “Everything was clear on his license, and the tag came back to that vehicle.” R. 53, l. 21 – 54, l. 24. He learned this information from dispatch while he was writing Petitioner a warning for failure to maintain a lane. R. 54, l. 25 – 55, l. 5.

While Gilbert claimed he could not remember when he completed the warning, he admitted he never gave the warning to Petitioner nor did he return Petitioner’s license and paperwork before he asked for consent to search. Significantly, Gilbert acknowledged the warning form was very simple and required very little information to complete. R. 59, l. 1 – 60, l. 11; R. 61, l. 12 – 63, l. 15.

Additionally, Gilbert admitted he did not inform Petitioner that he was free to leave before he asked for consent to search the car. He said, “In my judgment [Petitioner was] not free to leave as it is.” Gilbert clarified that, even though he had checked Petitioner’s license and paperwork,

which both came back clear, and had written Petitioner a warning, he did not think Petitioner was free to leave. R. 63, l. 16 – 64, l. 13. While Gilbert refused to speculate whether Petitioner believed at that point that he was free to leave, he did admit that a second uniformed officer had arrived on scene and parked behind Gilbert's patrol car by the time he asked Petitioner for consent to search. R. 64, l. 14 – 65, l. 15.

Gilbert again conceded that at the time he asked for consent to search, he had not seen or smelled any drugs or alcohol nor had he seen any weapons. He also confirmed he had checked Petitioner's license, the vehicle tag, and the rental agreement, and all were valid. Gilbert claimed he ultimately asked Petitioner for consent to search the car after he had observed behavior he found to be suspicious and after noting that Petitioner was traveling from the Atlanta area on Interstate 85. R. 69, l. 20 – 70, l. 25.

B. Arguments by Counsel

After Gilbert finished testifying, defense counsel told the court he had "some concern about the initial reason for the stop." He said, "The officer stated that the vehicle being driven by Mr. Alston [Petitioner] never crossed the dotted line, but he used the word struck, that [the car] had struck [the line] and then it went back into his lane, which would've been the proper thing to do." Defense counsel argued this was not a "sufficient basis for the stop." R. 84, l. 16 – 85, l. 5.

Counsel also argued there was no valid consent to search the vehicle. He pointed out that Petitioner unequivocally stated, "I'm not giving consent, you're giving consent." However, counsel argued that "if there was, in fact, a valid consent, it was obtained by prolonged detention." He asserted that after the officer determined Petitioner had a valid license and that the vehicle tag was clear, he wrote Petitioner a warning. R. 85, l. 6 – 86, l. 5. He continued:

[B]ut the officer did not give the warning to Mr. Alston, we would argue, because **the officer was stalling for time to allow another officer to come on the scene.**

There is no clear delineation between the end of the stop and the request for consent. They run completely into one another. The officer never says, okay, I've checked you out, here's your citation, you can leave. Oh, and by the way, do you mind if I search your car? There is no such demarcation between those two things in this case.

Your honor, it is our position that **Mr. Alston was illegally seized at that point because the purpose of the stop had been fulfilled.** As I said earlier, all of the things that the officer's entitled to do had been done and the officer had begun to write the warning citation with that very little bit of information that it requires.

So we move from a situation where he doesn't have anything left to do with the traffic stop and he begins to conduct a narcotics investigation. But **he's conducting that narcotics investigation without reasonable articulable suspicion.**

Mr. Alston was not free to go per the officer. And I think the officer concedes that Mr. Alston would have known that he wasn't free to leave. The fact that another officer had come on the scene, the fact that he'd been pulled over with a blue light, the fact that the officer was [in] uniform, has his guns, gun with him, I think that Mr. Alston is at that point seized. And I would argue to the court that based on the cases that that seizure, **that second seizure was in violation of the Fourth Amendment because it was without probable cause and without reasonable articulable suspicion.**

R. 86, l. 5 – 87, l. 11 (emphasis added).

In response, the solicitor argued the officer had probable cause that a traffic violation had occurred, had reasonable articulable suspicion to detain Petitioner longer than necessary to issue the warning ticket, and that Petitioner had voluntarily consented to the search. Therefore, the state concluded the cocaine should not be suppressed. R. 95, ll. 9-15. The solicitor claimed Gilbert had reasonable articulable suspicion to prolong the stop because of a multitude of factors, including (1) Interstate 85 is a "known criminal corridor;" (2) Atlanta is a "source city for drugs;" (3) the discrepancies between Petitioner's answers and the rental agreement; (4) the luggage was covered

by a blanket; (5) the additional keys on the key ring; (6) the air freshener found in the car; and (7) the third party rental. R. 90, l. 12 - 93, l. 18.

C. Court's Ruling

The trial court ultimately ruled, "I find that the stop made by the officer was pursuant to a valid traffic stop, that it was based upon probable cause, that the detention resulting from that stop was, based upon the totality of the circumstances as presented by the evidence in this case, was reasonable under the Fourth Amendment and that the search made of the vehicle which resulted in the seizure of evidence to be used in the trial against him was based upon consent and in this case with actual acknowledge of his right to refuse consent. All right. And, therefore, the motion to suppress is denied." R. 98, ll. 10-20.

ARGUMENT

1.

The Court of Appeals erred in holding the trial judge properly denied Petitioner’s motion to suppress the evidence found in his vehicle where the officer did not have reasonable suspicion Petitioner was involved in criminal activity or probable cause to stop Petitioner’s car for a traffic violation.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV; Mapp v. Ohio, 367 U.S. 643 (1961). A traffic stop constitutes a Fourth Amendment seizure and, therefore, must be reasonable under the circumstances. State v. Vinson, 400 S.C. 347, 351, 734 S.E.2d 182, 184 (Ct. App. 2012) (internal citations omitted). “Reasonableness is measured in objective terms by examining the totality of circumstances.” Id., at 352, 734 S.E.2d at 184 (quoting State v. Pichardo, 367 S.C. 84, 101, 623 S.E.2d 840, 849 (2005)) (internal quotation marks omitted). “A traffic stop is not unreasonable if conducted with probable cause to believe a traffic violation had occurred, or when the officer has reasonable suspicion the occupants are involved in criminal activity.” Vinson, 400 S.C. at 352, 734 S.E.2d at 184 (citing State v. Burgess, 394 S.C. 407, 412, 714 S.E.2d 917, 919 (Ct. App. 2011)); Whren v. United States, 517 U.S. 806, 810 (1996) (“As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”). “Moreover, a police officer’s subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” Vinson, 400 S.C. at 352, 734 S.E.2d at 184 (quoting State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009)) (internal quotation marks omitted).

Here, Deputy Gilbert illegally seized Petitioner in violation of the Fourth Amendment because he did not have reasonable suspicion Petitioner was involved in criminal activity or probable cause to stop Petitioner's car for a traffic violation. Gilbert claimed he stopped Petitioner's car for failure to maintain a lane. He asserted during the suppression hearing that, before he pulled Petitioner over, Petitioner's left tire "struck" the dotted line dividing the middle lane and the fast lane. He said, "Now, when I say struck, what I would mean by that is that tire could have covered that whole line, but it didn't go all the way across it. But it did make contact with that line and then drift back into the middle of that lane." Gilbert admitted Petitioner never crossed the dotted line. Petitioner merely "rode on top of it." R. 43, l. 21 – 45, l. 2. There was no evidence presented that Petitioner's actions endangered other individuals or vehicles on the roadway.

The written warning completed by Gilbert during the traffic stop also indicated the "nature of contact" was "fail to maintain lane." R. 210. (Defendant's Exhibit No. 1). Presumably, although not explicitly stated during trial, Petitioner was stopped and later warned for allegedly violating S.C. Code Ann. § 56-5-1900, which states in relevant part: "Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply: (a) A vehicle shall be driven *as nearly as practicable* entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that *such movement can be made with safety*." (emphasis added)

In his argument at trial, the solicitor cited State v. Vinson, 400 S.C. 347, 351, 734 S.E.2d 182, 184 (Ct. App. 2012) in support of his position that Gilbert had probable cause to stop Petitioner's vehicle for failure to maintain his lane. Based on the Court of Appeals' holding in Vinson, the solicitor argued that "just striking the lane . . . is a violation of that statute and did

give reason for Deputy Gilbert to pull the vehicle over.” R. 89, l. 3 – 90, l. 4. Based on his reliance on Vinson, it is clear the statute the solicitor was referring to was S.C. Code Ann. § 56-5-1900.

However, Vinson is factually different from this case. In Vinson, the defendant was traveling on a two-lane roadway in which traffic was moving in opposite directions in each lane. The two lanes of travel were divided by two solid yellow lines indicating that passing was prohibited. The defendant was stopped for allegedly striking the double yellow lines. Vinson, 400 S.C. at 349, 734 S.E.2d at 183. In its opinion, the Court of Appeals maintained that, under the plain language of § 56-5-1900, a driver must maintain his vehicle “entirely within a single lane” unless “it is not practicable or the driver can safely change lanes.” The court held the officer was justified in stopping Vinson for a perceived violation of § 56-5-1900 because “Vinson’s front *tire crossed into the area between the double yellow lines that separated opposing lanes of traffic in a ‘no passing’ zone*” and because it was practicable for Vinson to remain within his lane of traffic. Id. at 353, 734 S.E.2d at 185 (emphasis added).

In this case, Petitioner was traveling on Interstate 85, which has six lanes of traffic: three lanes traveling northbound and three lanes traveling southbound divided by a median. R. 13, ll. 18-22. Petitioner was traveling northbound in the middle lane and allegedly “struck” the white dotted line dividing the middle lane in which he was traveling and the far left lane or “fast lane.” Again, Petitioner never crossed the dotted line. He merely rode on top of it. R. 13, l. 16 – 14, l. 3; R. 43, l. 21 – 45, l. 2. This action is not a violation of § 56-5-1900. Driving within one’s lane of travel and merely striking the dotted line dividing two lanes traveling in the same direction qualifies as driving “*as nearly as practicable entirely within a single lane.*” See State v. Prado, 145 Wash. App. 646, 649, 186 P.3d 1186, 1187 (2008) (holding “the Legislature’s use of the

language ‘as nearly as practicable’ demonstrates a recognition that brief incursions over the lane lines will happen” and a “vehicle crossing over the line for one second by two tire widths on an exit lane does not justify a belief that the vehicle was operated unlawfully.”); see also United States v. Colin, 314 F.3d 439, 444 (9th Cir. 2002) (“Touching a dividing line, even if a small portion of the body of the car veers into a neighboring lane, satisfies the statute's requirement that a driver drive as ‘*nearly as practical* entirely within a single lane.’”) (emphasis in original).

Moreover, the statute permits a driver to move from the lane in which he is traveling when “such movement can be made with safety.” There was no testimony that another vehicle was traveling in the far left lane or that it would have been unsafe at the time Petitioner allegedly struck the white dotted line for him to change lanes. There was also no evidence presented that Petitioner’s actions endangered other individuals or vehicles on the roadway. Because Petitioner could have legally and safely changed lanes at the time he allegedly struck the white dotted line dividing the middle lane and the far left lane, Petitioner did not violate § 56-5-1900. See Hernandez v. Texas, 983 S.W.2d 867, 868-871 (Tex. Ct. App. 1998) (holding a single instance of crossing a lane dividing line by eighteen to twenty-four inches into a lane of traffic traveling the same direction when the movement is not shown to be unsafe or dangerous does not give an officer a reasonable basis for suspecting that the defendant had committed a criminal traffic offense); see also Texas v. Cerny, 28 S.W.3d 796, 800-801 (Tex. Ct. App. 2000) (holding weaving within one’s own lane of travel when there is no evidence such actions were unsafe did not support reasonable suspicion that the defendant had committed a criminal traffic violation).

Additionally, the Court of Appeals incorrectly held Gilbert had reasonable suspicion to support a brief investigatory stop because he allegedly observed Petitioner drifting *within his own lane of travel*. There was no testimony or evidence that Petitioner was weaving between

lanes or drifting between two lanes of traffic that would lead one to believe he was under the influence as Gilbert suggested. Petitioner was merely moving within his own lane of travel. Vehicles every day on the roadway move slightly from side to side within their own lane of travel. This is a common occurrence that does not rise to reasonable suspicion sufficient to warrant a traffic stop. See People v. Culcross, 184 Misc.2d 67, 68-69, 706 N.Y.S.2d 605, 607 (Co. Ct. 2000) (“The officer's testimony did not provide a sufficient basis for reasonable suspicion that criminal activity was afoot. The officer testified that the ‘swerving’ she observed was confined to Defendant–Appellant's own lane. Staying within both the speed limit and one’s own lane of travel with nothing more does not justify an investigatory stop of a vehicle. *It is not uncommon for a driver to weave to some extent within his lane, even when operating his car while not under the influence of drugs or alcohol.*”) (emphasis added); see also United States v. Lyons, 7 F.3d 973, 976 (10th Cir.1993), *overruled on other grounds by* United States v. Botero–Ospina, 71 F.3d 783, 786-787 (10th Cir.1995) (“[I]f failure to follow a perfect vector down the highway or keeping one’s eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy.”); see also State v. Neal, 159 Idaho 439, 443, 362 P.3d 514, 518 (2015) (holding that driving onto but not across the line marking the right side of the lane of travel twice is not sufficient to arouse reasonable suspicion of driving under the influence since such action falls within “the broad range of what can be described as normal driving behavior.”); see also State v. Binette, 33 S.W.3d 215, 219-220 (Tenn.2000) (occasional drifting from the center of the lane did not amount to reasonable suspicion). Moreover, the traffic stop occurred during the early afternoon hours when it is unlikely to find a driver under the influence. Therefore, the Court of Appeals incorrectly concluded Gilbert had reasonable suspicion to stop Petitioner.

Because Deputy Gilbert had neither reasonable suspicion Petitioner was involved in criminal activity or probable cause that he committed a traffic violation, the trial court erred in denying Petitioner's motion to suppress the cocaine found in his vehicle. See Wong Sun v. United States, 371 U.S. 471, 484 (1963) (The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine.).

2.

The Court of Appeals erred in finding the trial judge properly denied Petitioner's motion to suppress the evidence found in his vehicle where the officer's continued detention of Petitioner exceeded the scope of the traffic stop and constituted a second seizure for purposes of the Fourth Amendment and where the officer did not have reasonable and articulable suspicion of a serious crime or Petitioner's consent to extend the stop.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV; Mapp, 367 U.S. 643. “[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable.” Wilson v. Arkansas, 514 U.S. 927, 931 (1995). “Thus, the Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention.” Pichardo, 367 S.C. at 97, 623 S.E.2d at 847 (citing United States v. Mendenhall, 446 U.S. 544 (1980)).

A. Deputy Gilbert's continued detention of Petitioner exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment.

“The officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning.” Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 (citing Ferris v. State, 355 Md. 356, 735 A.2d 491 (1991)). “Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention.” Id.; see Rodriguez v. United States, ___ U.S. ___, 135 S.Ct. 1609, 1612 (2015) (quoting Illinois v. Caballes, 543 U.S. 405 (2005)) (“We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-

observed traffic violation, therefore, ‘become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission’ of issuing a ticket for the violation.”); see also State v. Tindall, 388 S.C. 518, 522-523, 698 S.E.2d 203, 205-206 (2010) (finding “the officer’s continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment”); see also United States v. Jones, 234 F.3d 234, 241 (5th Cir. 2000) (“The basis for the stop was essentially completed when the dispatcher notified the officers about the defendants’ clean records, three minutes before the officers sought consent to search the vehicle. Accordingly, the officers should have ended the detention and allowed the defendants to leave. And the failure to release the defendants violated the Fourth Amendment.”).

As the Court of Appeals correctly held, Deputy Gilbert exceeded the scope of the traffic stop when he continued to question Petitioner for approximately a minute and a half after he learned from dispatch that Petitioner’s license and rental contract were valid and after he had completed the warning citation because the purpose of the traffic stop had already been accomplished. See Tindall, 388 S.C. at 522, 698 S.E.2d at 205 (finding the purpose of the traffic stop was accomplished when the dispatcher reported no problems with Tindall’s license and vehicle, and the only remaining task was the issuance of the warning, and a continued detention occurred when the officer questioned Tindall for several minutes after the purpose of the stop was accomplished); see also Rodriguez, __ U.S. __, 135 S.Ct. at 1614 (holding “[a]uthority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.”)

The recording of the traffic stop in this case shows Gilbert had completed the warning approximately fifteen minutes and ten seconds into the traffic stop. State’s Exhibit No. 2 (DVD of Traffic Stop). At this time, one can clearly see Gilbert put away his pen, rip off the warning

from his pad, and place the warning in his right hand. State's Exhibit No. 2 (DVD of Traffic Stop). After this is completed, instead of giving Petitioner the warning and returning his license and rental agreement, Gilbert continued to ask Petitioner questions unrelated to the purpose of the traffic stop. Specifically, Gilbert asked Petitioner whether the rental company had originally given Petitioner a Nissan Cube, which the rental agreement indicated, and whether everything in the car belonged to Petitioner. State's Exhibit No. 2 (DVD of Traffic Stop).

The record reveals that in asking these questions Gilbert was purposefully prolonging the stop in order to allow enough time for a second officer to arrive. Gilbert admitted he was "waiting on somebody to get there" and that his purpose of asking Petitioner additional questions after he had completed the warning was to stall in order to allow enough time for a second officer to arrive. R. 35, l. 22 – 37, l. 5. He testified he planned to ask Petitioner for consent to search his car, but, because asking for consent sometimes causes tension, he did not want to ask for consent until a second officer arrived. R. 36, ll. 1-16. The record also shows Gilbert was purposefully prolonging the stop to allow enough time for Deputy Carraway to go home, pick up his drug dog, and travel to the scene. Gilbert asserted he had "a K-9 on the way." R. 35, l. 22 – 36, l. 21; R. 56, l. 12 – 58, l. 16. This is also why Gilbert took longer than necessary to complete the warning, which even Gilbert conceded required very little information and effort to complete. R. 59, l. 23 – 60, l. 16.

Furthermore, it is undisputed that Petitioner was seized and not free to leave at the time Gilbert asked for consent. When he finally asked for consent, a second officer had arrived and Gilbert had not returned Petitioner's driver's license or the rental agreement. A reasonable person in this situation would not have felt free to leave. Accordingly, Gilbert's "continued detention of [Petitioner] exceeded the scope of the traffic stop and constituted a seizure for the

purposes of the Fourth Amendment” because a reasonable person in Petitioner’s position “would not have felt free to terminate the encounter.” See Tindall, 388 S.C. at 522-523, 698 S.E.2d at 205-206 (citing Florida v. Bostick, 501 U.S. 429, 434 (1991)); see also Arizona v. Johnson, 555 U.S. 323 (2009); see also United States v. Sullivan, 138 F.3d 126, 132 (4th Cir. 1998).

B. Deputy Gilbert did not have reasonable and articulable suspicion of a serious crime when he chose not to conclude the traffic stop.

Despite correctly holding that Deputy Gilbert exceeded the scope of the initial traffic stop, the Court of Appeals incorrectly held there was evidence to support the trial court’s *presumed* finding that Deputy Gilbert had an objectively reasonable and articulable suspicion that illegal activity was occurring to justify the continued detention. App. 7.

“Lengthening the detention for further questioning beyond that related to the initial stop is permissible in two circumstances. First, the officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring. Second, further questioning unrelated to the initial stop is permissible if the initial detention has become a consensual encounter.” Pichardo, 367 S.C. at 99, 623 S.E.2d at 848 (quoting United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998)); see United States v. Brugal, 209 F.3d 353, 358 (4th Cir. 2000) (finding “[t]he Terry reasonable suspicion standard required an officer to have a reasonable suspicion that criminal activity is afoot before he may . . . continue to seize a person following the conclusion of the purposes of a valid stop”); see also Rodriguez, __ U.S. __, 135 S.Ct. at 1616 (holding even a *de minimis* extension of a traffic stop is unconstitutional absent reasonable suspicion). The state has the burden to articulate facts, which are sufficient to support an officer’s reasonable suspicion that criminal activity has occurred or is occurring. See State v. Butler, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000); see also Tindall, 388 S.C. at 527, 698 S.E.2d at 208 (“[T]he nature of the reasonableness inquiry [in determining

the existence of reasonable suspicion] is highly fact-specific”).

Reasonable suspicion requires “‘a particularized and objective basis’ that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). Reasonable suspicion also requires “something more than an inchoate and unparticularized suspicion or hunch.” Lesley, 326 S.C. at 644, 486 S.E.2d at 277 (citing Butler, 343 S.C. at 202, 539 S.E.2d at 416). “In determining whether reasonable suspicion exists, the totality of the circumstances—the whole picture—must be considered.” State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (quoting Cortez, 449 U.S. at 417).

In State v. Burgess, 394 S.C. 407, 415, 714 S.E.2d 917, 921 (2011), this Court recognized the same concerns as the Fourth Circuit Court of Appeals in United States v. Foster, 634 F.3d 243, 248 (4th Cir.2011):

We are mindful of concerns regarding the State “**using whatever facts are present, no matter how innocent, as indicia of suspicious activity**” and that the State “**must do more than simply label a behavior as ‘suspicious’ to make it so.**” The State must “be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.”

(internal citation omitted) (emphasis added).

The Fourth Circuit also emphasized in Foster:

We are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception. Although these matters generally only come before this Court where a police seizure uncovers some wrongdoing, we would be remiss if we did not acknowledge that **the exclusionary rule is our sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful**

seizure of anyone—whether he or she is one of the most affluent or most vulnerable members of our community.

Foster, 634 F.3d at 248-249 (emphasis added) (citing Terry v. Ohio, 392 U.S. 1, 12-13 (1968) (finding “Courts which sit under our Constitution cannot and will not be made party to lawless invasion of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”)).

First, it must be noted that the trial court merely found that, “based upon the totality of the circumstances,” “the detention resulting from” the “valid traffic stop” was “reasonable under the Fourth Amendment.” R. 98, ll. 10-15. The court never specifically found that Deputy Gilbert had an objectively reasonable and articulable suspicion that illegal activity was occurring when he continued to detain Petitioner beyond the purpose of the traffic stop. The court also failed to provide *any reasoning whatsoever* for its finding that the stop was reasonable. This makes it difficult to assess whether there is evidence to support the trial court’s ruling. See State v. Moore, 415 S.C. 245, 781 S.E.2d 897 (2016).

In holding that Deputy Gilbert had an objectively reasonable and articulable suspicion that illegal activity was occurring, the Court of Appeals cited to Gilbert’s testimony where he described the various factors he observed that allegedly raised his suspicion, including (1) Petitioner’s luggage was covered by a blanket; (2) Petitioner asked why he was being stopped as soon as Gilbert approached his car; (3) Petitioner was from Rome, Georgia, near Atlanta, which is a “major hub for criminal activity in the southeast;” (4) Petitioner was driving on Interstate 85, which is “a major criminal activity corridor;” (5) the car was rented in the name of a third party who was not present; (6) the car was rented in a woman’s name; (7) the car was being driven in South Carolina, a state not permitted under the rental contract; (8) there was an air freshener in the car; (9) Petitioner put his house keys on the key ring for the rental car which Gilbert said

indicated he was trying to personalize the vehicle; (10) Petitioner's travel plans did not comply with the rental agreement because he was not permitted to drive in New Jersey and would not be able to return the car on time; (11) Petitioner said he was going to pick up his mother for Mother's Day, which was a month and a half away; and (12) Petitioner said he had six children but listed the ages of seven children. App. 6.

When considering the totality of the circumstances, these facts are insufficient to support Gilbert's suspicion that illegal activity was occurring. Gilbert essentially characterized *everything* he observed during the traffic stop as suspicious and twisted trivial and mundane facts into indicia of criminal activity. When looked at objectively, all of these factors *when viewed as a whole* are entirely innocent and would not lead an objective detached person to think Petitioner was involved in criminal activity. See United States v. Foreman, 369 F.3d. 776, 781 (4th Cir. 2004) (finding "[t]he articulated factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied").

Gilbert apparently hoped the sheer number of observations he listed would satisfy the reasonable suspicion standard. Furthermore, Gilbert relied heavily on his subjective speculation in finding reasonable suspicion, instead of objective facts, as required. See Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. Notably, Gilbert testified he did not see or smell any drugs or alcohol nor did he see any weapons. R. 69, l. 20 – 70, l. 12. He also testified that Petitioner did not appear to be nervous. R. 76, l. 4 – 77, l. 22.

The Court of Appeals should have held there was no evidence to support the trial court's presumed finding that Deputy Gilbert had reasonable and articulable suspicion of a serious crime when he chose to exceed the scope of the traffic stop and asked Petitioner for consent to search his car. Again, the sheer number of factors listed by the officer does not amount to reasonable

and articulable suspicion. Additionally, the traffic stop never became a “consensual encounter” for it is undisputed that Petitioner did not consent to the continued detention beyond the scope of the initial traffic stop. See Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. Consequently, the continued detention of Petitioner was illegal and the evidence seized during the search of his vehicle should have been suppressed. See Wong Sun, 371 U.S. at 484 (The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine.).

3.

The Court of Appeals erred by holding the trial judge properly denied Petitioner's motion to suppress the evidence found in his vehicle where Petitioner's consent to search was not freely and voluntarily given, and even if it was freely and voluntarily given, was invalid as an exploitation of an unlawful detention.

“Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention.” Tindall, 388 S.C. at 523-524, 698 S.E.2d at 206 (quoting State v. Adams, 377 S.C. 334, 339, 659 S.E.2d 272, 275 (Ct. App. 2008)).

“[A] traffic stop, or pre-existing seizure, ‘enhance[s] the coercive nature of the situation and the efficacy of the other factors in pointing toward the restriction’ of liberty. Such a situation, therefore, is ‘markedly different from that of a person passing by or approached by law enforcement officers on the street, in a public place, or inside the terminal of a common carrier.’” State v. Williams, 351 S.C. 591, 601, 571 S.E.2d 703, 708-709 (Ct. App. 2002) (quoting Ferris v. State, 355 Md. 356, 735 A.2d, 491, 502 (1999)).

Here, any consent Petitioner may have given was not voluntary. When asked for consent to search his car, Petitioner, who was on the side of the road after a lengthy traffic stop, stated he was “just trying to figure what all this is about” and “I didn’t do anything wrong.” R. 38, l. 19; R. 66, ll. 21-24. Petitioner also stated, “[N]ah, I’m not giving you consent, you the one giving consent.” R. 69, ll. 12-19. These statements, along with the fact that a second uniformed officer had arrived by the time this discussion occurred and that Gilbert had not returned Petitioner’s license and rental agreement or given Petitioner the warning citation, show Petitioner did not

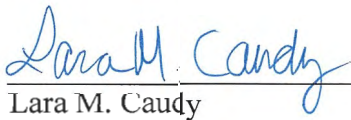
freely and voluntarily consent to the search. See State v. Provet, 405 S.C 101, 114, 747 S.E.2d 453, 460 (2013) (affirming the lower court's finding that the defendant's consent to search his vehicle was voluntary where the officer *had returned his driver's license and vehicle registration and had issued a warning citation*).

However, even if Petitioner had voluntarily consented to the search of his car, the consent was invalid as "an exploitation of the unlawful detention" since Gilbert did not have reasonable articulable suspicion to prolong the traffic stop. Tindall, 388 S.C. at 523-524, 698 S.E.2d at 206 (internal citation and quotation marks omitted). Therefore, the evidence seized from Petitioner's car should have been suppressed and the Court of Appeals erred by holding there was evidence to support the trial court's ruling.

CONCLUSION

Based on the foregoing argument, this Court should hold (1) there was no evidence to support the trial court's ruling, (2) that the evidence found after Petitioner was unlawfully seized should have been suppressed, and (3) reverse Petitioner's conviction and sentence.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

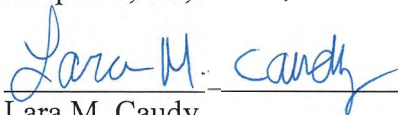
V.

STEPHENO JEMAIN ALSTON,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Stepheno Jemain Alston, #357159 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC, 29010, this 17th day of August, 2016.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of August, 2016.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2015-002134

THE STATE,

Respondent,

vs.

STEPHENO JEMAIN ALSTON,

Petitioner.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals correctly affirmed the trial judge's denial of Alston's motion to suppress the large quantity of cocaine found hidden inside of his rental vehicle because, under the totality of the circumstances, the law enforcement officer who conducted the stop of Alston's rental vehicle possessed both reasonable suspicion and probable cause to conduct a traffic stop after directly observing Alston drift back and forth and fail to maintain his lane of travel while driving down the interstate, observed numerous indicators of criminal activity during the course of the stop that justified an extension of the stop and led the officer to reasonably and correctly suspect Alston was involved in criminal activity, and validly searched the rental vehicle after Alston freely and voluntarily provided him with consent to conduct a search three separate times.

STATEMENT OF THE CASE

In March of 2011, Petitioner Stepheno Jemain Alston was arrested after a large quantity of cocaine was discovered in his rental vehicle during a traffic stop. In June of 2011, the Spartanburg County Grand jury indicted Alston for one count of trafficking in cocaine in an amount greater than four hundred grams. On March 18, 2013, the solicitor called Alston's case to trial before a jury in the Spartanburg County Court of General Sessions with the Honorable J. Derham Cole, circuit court judge, presiding. Alston was not present at that time, and the trial proceeded forward in his absence. At the conclusion of trial, the jury convicted Alston as indicted. Following the verdict, the trial judge sentenced Alston and sealed the sentence. Subsequently, Alston was apprehended, and, on September 19, 2013, a sentencing hearing was conducted in the Spartanburg County Court of General Sessions. During the hearing, the trial judge unsealed Alston's sentence and imposed a twenty-five-year term of imprisonment along with a \$200,000 fine. Alston then timely filed and perfected an appeal.

Subsequently, on appeal, the Court of Appeals issued an unpublished opinion in which it unanimously affirmed Alston's conviction. State v. Alston, Op. No. 2015-UP-381 (S.C. Ct. App. filed July 29, 2015). Thereafter, Alston petitioned the Court of Appeals for rehearing, and the petition was denied. Alston then filed a petition for a writ of certiorari in the Supreme Court, and that petition was granted on July 18, 2016.

STATEMENT OF FACTS

Shortly before 1:00 p.m. on March 28, 2011, Master Deputy Donnie Gilbert of the Spartanburg County Sheriff's Office was monitoring traffic on Interstate 85 when he observed the driver of a brownish-green Hyundai Santa Fe with a Georgia license tag travelling in the middle lane of the three-lane highway.¹ (R. pp. 12-13; pp. 104-105; State's Ex. # 2 (Recording of Traffic Stop)). When the vehicle passed by his location, its driver drove onto the dotted line dividing the middle lane from the far left lane before swerving back into the vehicle's lane of travel. (R. p. 13; pp. 44-45; p. 105). In response, Deputy Gilbert began pursuing the vehicle in order to initiate a traffic stop and observed its driver "drift" onto the dotted dividing line several more times. (R. pp. 13-14; 105-106). Deputy Gilbert then moved into position behind the vehicle and activated his patrol vehicle's blue lights, and the driver of the vehicle quickly pulled over to the side of the roadway. (R. p. 14; p. 106).

Thereafter, at approximately 12:54 p.m., Deputy Gilbert approached the vehicle from the passenger side and immediately noticed the luggage stowed in the back of the vehicle had been covered with a blanket, which the officer perceived to be suspicious as he had not typically seen covered luggage in the "thousands" of routine traffic stops he had conducted during his lengthy law enforcement career.² (R. pp. 9-10; p. 16; pp. 40-41; pp. 103-104; pp. 107-108; State's Ex. # 2). He further noticed multiple personal keys had been placed on the rental company key ring

¹ During trial, Deputy Gilbert noted Interstate 85 was a major crime corridor that connected Atlanta, Georgia, to the northern part of the United States. (R. p. 18).

² Regarding his law enforcement background, Deputy Gilbert recounted during trial he had been working in law enforcement for nearly thirteen years at the time of the traffic stop, had worked as a member of the South Carolina Highway Patrol for nearly twelve years, and had been a member of teams performing criminal interdiction on roadways for nearly six years at both the South Carolina Highway Patrol and Spartanburg County Sheriff's Office. (R. pp. 9-12; pp. 103-104). Furthermore, Deputy Gilbert noted he had received approximately 500 to 600 hours of criminal interdiction training during his career, including in regard to the subjects of detecting hidden vehicle compartments and conducting roadside interviews, he had personally conducted "thousands" of traffic stops, and had been involved in "hundreds" of felony arrests while working on the criminal interdiction teams. (R. p. 11; pp. 108-110).

associated with the vehicle, which the officer perceived to be abnormal and recognized through his training and experience as a tactic designed to “personalize” the vehicle in an effort to mask the fact it was a rental. (R. p. 22; pp. 108-109).

After approaching the vehicle, Deputy Gilbert made contact with the driver and lone occupant of the vehicle, Petitioner Stepheno Jemain Alston. (R. p. 16; p. 122). When he did so, Alston immediately asked him why he was stopped in a defensive manner, which the officer also perceived to be abnormal in light of the fact the vast majority of people he had stopped waited for him to explain the basis for the stop. (R. pp. 16-17; p. 112; p. 122; State’s Ex. # 2). Deputy Gilbert then asked Alston for his driver’s license, and Alston provided the officer with a license indicating he was from Rome, Georgia, which Deputy Gilbert knew was located in close proximity to Atlanta, Georgia, a major hub of criminal activity. (R. p. 17; p. 70; p. 107). Immediately after that, Deputy Gilbert asked Alston if he had had anything to drink and explained he stopped his vehicle because he had observed him hit the dotted dividing lane with his tires several times. (R. p. 18; State’s Ex. # 2). The officer then asked Alston for the paperwork associated with the vehicle, and Alston quickly provided a rental agreement to Deputy Gilbert. (R. p. 18; State’s Ex. # 2). Upon receiving the rental agreement, Deputy Gilbert reviewed it and noticed the vehicle was rented by a third-party female renter two days earlier in Cartersville, Georgia, Alston was listed as an authorized driver of the vehicle, no smoking was permitted in the vehicle, and the vehicle was only authorized to be driven in Georgia, Tennessee, Kentucky, Virginia, and West Virginia.³ (R. pp. 20-21; p. 74; pp. 112-113; pp. 118-119; p. 209). Based on the facts he knew through his training and experience third-party rentals were commonly associated with criminal activity and female renters were frequently used by criminal

³ During trial, Deputy Gilbert explained the specific states listed on the rental agreement raised a “big red flag” for him because it appeared “from the beginning of the trip [Alston] was trying to avoid Interstate 85.” (R. p. 26).

organizations in an effort to allay law enforcement suspicions coupled with the fact the rental vehicle was not authorized to be driven in South Carolina, Deputy Gilbert became more concerned and suspicious. (R. pp. 20-22; p. 113; pp. 151-152). The officer then asked Alston to step out of the vehicle just over two minutes after initiating the stop. (State's Ex. # 2).

When Alston exited the rental vehicle, Deputy Gilbert noticed a residential air freshener had been stowed in the vehicle's driver side door pocket, which was suspicious to the officer based on the facts it was an air freshener designed for a home instead of a vehicle, it was unusual for air fresheners to be placed in rental vehicles, and he was aware through his training and experience air fresheners were commonly used to mask odors, including the odor of drugs.⁴ (R. pp. 23-25; pp. 83-84; p. 114; pp. 117-118). The officer then asked Alston about the rental agreement, spoke with him about his travel plans, and asked him about the status of the license while preparing a warning citation.⁵⁶ (R. pp. 25-26; State's Ex. # 2). Additionally, Deputy Gilbert called Alston's license information into dispatch, and dispatch reported Alston's license was valid roughly six minutes into the stop. (R. p. 54; State's Ex. # 2).

During Deputy Gilbert's conversation with Alston, Alston reported he had left Georgia that morning for Newark, New Jersey, was travelling there to bring his depressed mother home for Mother's Day, and intended to stay in New Jersey for "about a week or so." (R. pp. 25-27; p. 120; p. 126; State's Ex. # 2). However, the officer perceived Alston's responses to be a "red flag" as Alston's reported travel plans were not consistent with the length of the rental period, Mother's Day was roughly a month and a half away, and the rental agreement did not authorize

⁴ Notably, during the traffic stop, Alston denied being a smoker. (State's Ex. # 2).

⁵ Based on the recording of the stop and the officer's testimony during trial, Deputy Gilbert began preparing the warning citation roughly four to five minutes after stopping Alston's rental vehicle. (R. p. 28; State's Ex. # 2).

⁶ Initially, Alston stated he had not had any problems with his license but later admitted it had previously been suspended for driving under the influence. (R. p. 29).

travel to New Jersey.⁷ (R. pp. 26-27; pp. 34-35). Deputy Gilbert then continued to question Alston while preparing the warning ticket, and, during the questioning, Alston acknowledged he was responsible for everything in the vehicle after initially stalling and stating he had no idea whether anyone else had access to the rental vehicle, which Deputy Gilbert perceived to be another “red flag.”⁸ (R. p. 32; pp. 36-37; p. 61; p. 123; pp. 127-128; State’s Ex. # 2).

Furthermore, Alston claimed he worked at a clothing store to support his six children before providing the ages of seven children, which further raised the officer’s suspicions based on Alston’s stressed manner of delivery and the inconsistency of Alston’s statements.⁹ (R. pp. 33-34; p. 125; State’s Ex. # 2).

Based on the factors he had observed while preparing the warning ticket, Deputy Gilbert decided to ask Alston for consent to search the vehicle and did so roughly sixteen minutes into the stop after another officer arrived at that location and just after he finished preparing the warning citation.¹⁰ (R. pp. 35-37; p. 66; p. 70; pp. 127-132; State’s Ex. # 2). In response to the request, Alston indicated he was “just trying to figure out what all this [was] about,” and the officer informed Alston he was simply asking a question. (R. p. 37; p. 130; State’s Ex. # 2). At that point, Alston informed the officer he could search the vehicle. (R. p. 37; p. 130; State’s Ex. # 2). Deputy Gilbert then explained to Alston he could refuse to provide consent, and Alston

⁷ Based on the terms of the rental agreement, Alston was authorized to possess the vehicle for a period of only seven days, and he was already on the third day of the rental period at the time of the stop. (R. p. 27; p. 209).

⁸ While speaking with the officer, Alston also commented you should not let anyone use your vehicle “nowadays.” (State’s Ex. # 2).

⁹ Notably, the ages – fourteen years, thirteen years, ten years, five years, four years, three years, and six month – Alston listed for his children during the traffic stop were not fully consistent with the ages – twenty years, seventeen years, fourteen years, seven years, five years, four years, and three years – reported by defense counsel during the sentencing hearing, which was conducted roughly two and a half years after the stop. (R. p. 33; p. 125; p. 205).

¹⁰ While asking Alston for consent, Deputy Gilbert did not take any actions to coerce Alston into providing consent he did not draw his service weapon, he did not tell Alston he was not free to leave, and no other officers were in Alston’s immediate vicinity at that time. (R. pp. 38-39; State’s Ex. # 2). However, Deputy Gilbert admittedly did not expressly inform Alston he was free to leave before asking for consent to search. (R. pp. 63-64).

again affirmed the officer could search the vehicle. (R. pp. 37-38; pp. 130-131; State's Ex. # 2). After Alston had twice provided consent, Deputy Gilbert moved towards the vehicle, but he elected to return to Alston and ensure he clearly was providing consent for the search. (R. p. 38; p. 131; State's Ex. # 2). During their ensuing conversation, Alston indicated the officer was the one providing consent as opposed to himself, and Deputy Gilbert quickly confirmed that statement was incorrect. (R. p. 38; p. 69; p. 131; State's Ex. # 2). The officer then again asked for consent to search, and Alston once again clearly affirmed the officer was permitted to search the vehicle. (R. p. 38; p. 131; State's Ex. # 2).

Once he was certain he had Alston's consent, Deputy Gilbert began searching the rental vehicle and started his search with the covered luggage stowed in the vehicle's rear area. (R. p. 39; pp. 132-133; State's Ex. # 2). As he was conducting the search, Captain Randy Hollifield of the Spartanburg County Sheriff's Office arrived at the scene and began assisting with the search, and, shortly thereafter, the captain located two vacuum-sealed packages containing a white powdery substance hidden in a space near the steering column of the vehicle. (R. p. 40; pp. 133-134; pp. 155-160; State's Ex. # 2). Alston was then quickly placed under arrest, and the white powdery substance found in the rental vehicle was later confirmed to be over four hundred grams of cocaine. (R. p. 136; p. 169).

Subsequently, Alston was indicted for trafficking in cocaine, and he proceeded to trial. (R. pp. 211-212). However, Alston was not present at the time of trial, and the trial proceeded forward in his absence. (R. pp. 6-7). At the outset of the trial in absentia, defense counsel moved to suppress the cocaine discovered during the search of the rental vehicle Alston was driving at the time of the traffic stop, and the trial judge conducted an in limine hearing on the matter. (R. pp. 7-9).

During the hearing, Deputy Gilbert recounted the circumstances of the traffic stop he conducted on the date of the incident and identified the factors he observed during the course of the stop that correctly led him to believe Alston was engaged in criminal activity. (R. pp. 9-84). He further detailed his extensive training and experience that enabled him to identify the suspicious indicators of criminal activity during the stop. (R. pp. 9-12).

Following the presentation of Deputy Gilbert's testimony, defense counsel argued the incriminating evidence discovered during the course of the traffic stop should be suppressed because there was allegedly no valid basis for the traffic stop in light of the fact Alston did not actually cross the dotted dividing line prior to the initiation of the stop. (R. pp. 84-85). Additionally, defense counsel contended the officer illegally extended the traffic stop to conduct a narcotics investigation without reasonable articulable suspicion of criminal activity and asserted the officer stalled to allow another officer to arrive on the scene instead of issuing the warning citation. (R. pp. 85-87). Furthermore, defense counsel maintained Alston's consent was not valid and was the product of an illegally prolonged detention. (R. p. 85).

In rebuttal, the solicitor initially asserted the traffic stop was proper and supported by probable cause based on the testimony establishing the officer initiated the traffic stop after observing Alston strike the dotted dividing lane, which was evidence Alston was guilty of failing to maintain his lane of travel. (R. pp. 89-90). Additionally, the solicitor argued the officer possessed reasonable articulable suspicion of criminal activity to detain Alston during the stop based on the numerous indicators of criminal activity he observed coupled with his extensive law enforcement training and experience. (R. pp. 90-93). Furthermore, the solicitor asserted Alston freely and voluntarily provided consent to search the rental vehicle and noted Deputy Gilbert expressly advised Alston he had a right to refuse consent after asking for it. (R. pp. 93-95).

After considering the arguments of counsel, the trial judge elected to take the matter under advisement overnight before ultimately denying the suppression motion when the trial resumed the following morning. (R. pp. 95-98). In denying the motion, the trial judge found the initial traffic stop was valid and supported by probable cause, the detention of Alston was reasonable under the totality of the circumstances, and the search of the rental vehicle was properly conducted with Alston's consent.¹¹ (R. p. 98).

Thereafter, during trial, Deputy Gilbert and Captain Hollifield testified for the State about the events of March 28, 2011, including in regard to their discovery of over four hundred grams of cocaine hidden inside of Alston's rental vehicle. (R. pp. 102-160). In addition to that testimony, Mary Elizabeth Stuart, an officer who formerly served as a forensic chemist for the Spartanburg County Sheriff's Office and was an expert in the chemical analysis of controlled substances, testified about her analysis of the substance recovered during the stop of Alston's rental vehicle, confirmed it was cocaine, and noted it weighed 434.04 grams. (R. pp. 164-169). Alston's cocaine was then admitted into evidence over defense counsel's objection. (R. p. 170).

Subsequently, at the conclusion of trial, the jury convicted Alston as indicted. (R. p. 202). Following the verdict, the trial judge sentenced Alston and sealed the sentence, and Alston ultimately received a twenty-five year term of imprisonment along with a \$200,000 fine when he was eventually apprehended several months later. (R. pp. 205-206). Alston then timely appealed his conviction. (App'x p. 1).

¹¹ Specifically, the trial judge ruled: "[W]ith regard to the motion to suppress, I find that the stop made by the officer was pursuant to a valid traffic stop, that it was based upon probable cause, that the detention resulting from that stop was based upon the totality of the circumstances as presented by the evidence in this case, was reasonable under the Fourth Amendment and that the search made of the vehicle which resulted in the seizure of evidence to be used in the trial against him was based upon consent and in this case with actual knowledge of his right to refuse consent. All right. And, therefore, the motion to suppress is denied." (R. p. 98).

On appeal, the Court of Appeals unanimously affirmed Alston's conviction. (App'x pp. 1-2). In affirming, the Court first determined Deputy Gilbert had probable cause to initiate the traffic stop after Alston's vehicle struck the dotted dividing line along with reasonable suspicion to initiate the stop based on the fact Alston's "drifting" in his lane of travel made it reasonable to believe he was potentially impaired while driving. (App'x pp. 2-4). Additionally, the Court held Deputy Gilbert extended the duration of the traffic stop by continuing to question Alston after completing the purpose of the stop but found the extension of the stop was proper based on the reasonable articulable indicators of criminal activity the officer observed during the course of the stop, which included the following facts: (1) the luggage stowed in Alston's vehicle had been covered with a blanket; (2) Alston defensively asked why he was stopped at the beginning of the stop; (3) Alston was travelling from an area near Atlanta, a known hub of criminal activity; (4) Alston was travelling on Interstate 85, a major crime corridor; (5) the rental vehicle had been rented by third-party; (6) the rental vehicle had been rented by a female renter; (7) Alston was driving the vehicle in South Carolina even though it was not permitted to be driven there; (8) Alston put an air freshener in the rental vehicle; (9) Alston placed his house keys on the rental key ring; (10) Alston's travel plans were inconsistent with the terms of the rental agreement in regard to both destination and length of the planned travel; (11) Alston claimed he was picking his mother up for Mother's Day despite the fact it was roughly a month and a half away; and (12) Alston claimed to have six children but provided the ages of seven. (App'x pp. 5-7). Finally, the Court determined the search of the vehicle was validly conducted with Alston's consent, which was freely and voluntarily provided. (App'x pp. 7-8).

ARGUMENT

The Court of Appeals correctly affirmed the trial judge's denial of Alston's motion to suppress the large quantity of cocaine found hidden inside of his rental vehicle because, under the totality of the circumstances, the law enforcement officer who conducted the stop of Alston's rental vehicle possessed both reasonable suspicion and probable cause to conduct a traffic stop after directly observing Alston drift back and forth and fail to maintain his lane of travel while driving down the interstate, observed numerous indicators of criminal activity during the course of the stop that justified an extension of the stop and led the officer to reasonably and correctly suspect Alston was involved in criminal activity, and validly searched the rental vehicle after Alston freely and voluntarily provided him with consent to conduct a search three separate times.

Alston contends the Court of Appeals committed reversible error by affirming the trial judge's denial of his motion to suppress the evidence discovered during a stop of the rental vehicle he was driving along a South Carolina roadway. In support of that contention, Alston maintains the officer who conducted the stop allegedly had no reasonable suspicion or probable cause to justify the stop of the rental vehicle, the officer did not possess the reasonable suspicion necessary to justify an extension of the stop, and the officer's search of the rental vehicle was conducted without valid consent. Contrary to Alston's contentions, the officer obtained reasonable suspicion and probable cause to initiate a stop of Alston's rental vehicle after he observed the vehicle drift within its own lane of travel, drive onto a dotted dividing line, and fail to remain within its lane of travel as far as practicable under the circumstances. Then, during the course of the traffic stop, the officer observed numerous indicators of criminal activity, including the fact the luggage in the rear of the rental vehicle had been covered, the presence of a residential air freshener in the rental vehicle, the fact the rental vehicle was rented by a female third-party, the fact Alston was travelling on a known crime corridor from a known crime hub, Alston's defensive response to the traffic stop, Alston's stressed response to a question asked of him during the course of the stop, and the inconsistency of Alston's reported travel plans with the rental agreement, that warranted an extension of the stop. Thereafter, the officer sought

consent for a search from Alston, and Alston freely and voluntarily provided the officer with such consent, which led to the discovery of Alston's hidden stash of cocaine. Because the initial stop was proper, any extension of the stop that occurred was supported by reasonable suspicion, and the search the led to the discovery of the drugs was conducted with valid consent, the trial judge properly denied Alston's suppression motion, and the Court of Appeals correctly affirmed the trial judge's ruling in light of the fact it was fully supported by the evidence presented during trial. Alston's conviction and the decision of the Court of Appeals should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence supporting the ruling. See State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) ("[A]ppellate courts must affirm if there is any evidence to support the trial court's ruling."); State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) (" 'When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.' " (citation omitted)). Critically, the appellate court will not reverse merely because it would have reached a

different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009); see Khingratsaiphon, 352 S.C. at 70, 572 S.E.2d at 459 (“In State v. Brockman, . . . [w]e concluded the appellate court would not review the trial judge’s ultimate determination de novo but, rather, would apply a deferential standard of review.”).

ANALYSIS

A. Propriety of the Initial Traffic Stop

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. Significantly, based on the plain language of that constitutional provision, the touchstone of the Fourth Amendment is reasonableness. See Florida v. Jimeno, 500 U.S. 248, 250 (1991) (“The touchstone of the Fourth Amendment is reasonableness.”). As a result, only unreasonable searches and seizures are constitutionally prohibited, and law enforcement officers are not required to be perfect or mistake-free in order to be in compliance with the constitutional requirements regarding searches and seizures. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) (“It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]”); see also Heien v. North Carolina, __ U.S. __, 135 S. Ct. 530, 536 (2014) (“To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them ‘fair leeway for enforcing the law in the community’s protection.’ ” (citation omitted)).

Pursuant to the Fourth Amendment, “[a] police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of

probable cause for arrest, that the person is involved in criminal activity.” State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999); see State v. Robinson, 306 S.C. 399, 402, 412 S.E.2d 411, 413 (1991) (“To justify a brief stop and detention, the police officer must have a reasonable suspicion that the person has been involved in criminal activity.”); see also United States v. Sokolow, 490 U.S. 1, 7 (1989) (“[T]he police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause.” (citation omitted)). The reasonableness of a stop or detention “is measured in objective terms by examining the totality of the circumstances.” Ohio v. Robinette, 519 U.S. 33, 39 (1996).

For Fourth Amendment purposes, a traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). While the Fourth Amendment requires a stop to be reasonable under the circumstances, the initiation of an automobile stop is reasonable per se when either probable cause exists to believe a traffic violation has occurred or reasonable suspicion exists to believe the occupants of the vehicle are involved in criminal activity. See Knight v. State, 284 S.C. 138, 141, 325 S.E.2d 535, 537 (1985) (“[A] police officer may stop an automobile and briefly detain its occupants, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity.”); State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002) (“Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se.”); see also Whren v. United States, 517 U.S. 806, 810 (1996) (“An automobile stop is thus subject to the constitutional imperative that it not be ‘unreasonable’ under the circumstances. As a general

mater, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”).

Reasonable suspicion consists of “ ‘a particularized and objective basis’ that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). “Reasonable suspicion ‘is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.’ ” State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). “In this highly fact-specific inquiry, reasonable suspicion ‘is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.’ ” State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting Foreman, 369 F.3d at 781), cert. dismissed as improvidently granted, 401 S.C. 264, 737 S.E.2d 480 (2012). The reasonable suspicion standard “is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]” Illinois v. Wardlow, 528 U.S. 119, 123 (2000). “Reasonable suspicion is more than a general hunch but less than what is required for probable cause.” State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (“Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch.”).

Likewise, “probable cause is a flexible, common-sense standard.” Texas v. Brown, 460 U.S. 730, 741 (1983). “The very term itself, ‘probable cause,’ does not import absolute certainty.” In re Care and Treatment of Brown v. State, 372 S.C. 611, 619, 643 S.E.2d 118, 122

(Ct. App. 2007). The probable cause standard merely requires that the facts and circumstances available to the officer at the time of a stop would warrant a reasonably cautious person in the same situation to believe an offense has been committed and the person stopped committed it. See id. at 619-620, 643 S.E.2d at 122 (instructing probable cause only requires that the facts available to an officer would warrant a man of reasonable caution in the belief an offense has been committed and the accused committed it); see also Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992) (“Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise.”). Importantly, the probable cause standard does **not** demand any showing the officer’s belief was correct or more likely true than false. Brown, 460 U.S. at 742. “Probable cause may be found somewhere between suspicion and sufficient evidence to convict.” Blassingame, 338 S.C. at 250, 525 S.E.2d at 540.

In the case sub judice, Deputy Gilbert possessed reasonable suspicion to initiate an investigatory stop of Alston’s vehicle after he observed Alston “drift” in his lane of travel and drive onto the dotted line dividing Alston’s lane of travel from another traffic lane on several different occasions before activating his patrol vehicle’s blue lights. Significantly, the officer possessed reasonable suspicion because Alston’s “drifting” within his lane reasonably led the officer to suspect Alston could have been impaired or driving under the influence, which provided Deputy Gilbert with a valid basis upon which to initiate a traffic stop.¹² See Heien, 135 S. Ct. at 536 (“[T]o justify [a traffic stop], officers need only ‘reasonable suspicion’ – that is, ‘a particularized and objective basis for suspecting the particular person stopped’ of breaking the

¹² Notably, Deputy Gilbert clearly expressed his concern about Alston’s possible impairment at the very outset of the traffic stop by quickly asking Alston whether he had had anything to drink. (State’s Ex. # 2).

law.” (citation omitted)); see also People v. Loucks, 135 Ill. App. 3d 530, 533, 481 N.E.2d 1086, 1087 (Ill. App. Ct. 1985) (“Weaving within the lane of traffic in which a vehicle is traveling provides a sufficient basis for an investigatory stop of a motor vehicle, and in the instant case the evidence was undisputed that the vehicle the defendant was driving was weaving within its own lane of travel continuously for a distance of about two blocks. Such erratic driving provided Officer Cassidy with articulable facts that there was a substantial possibility that the defendant had committed, was committing, or was about to commit an offense. The undisputed evidence showed that Officer Cassidy had sufficient basis for making an investigative stop of the defendant’s motor vehicle.”); State v. Ellanson, 293 Minn. 490, 491, 198 N.W.2d 136, 137 (Minn. 1972) (holding an officer had the right to stop Ellanson in order to investigate the cause of his unusual driving where the officer observed Ellanson’s weaving within his own lane of travel); State v. Dorendorf, 359 N.W.2d 115, 117 (N.D. 1984) (“[A] vehicle’s weaving within its own lane of traffic may be caused by a number of reasons, among them: 1) the driver is tired, 2) the vehicle has equipment problems, or 3) the driver is under the influence of alcohol. The officers stopped Dorendorf to determine exactly what was causing the vehicle to weave. . . . We conclude that the circumstances in the instant case justified the initial stop of Dorendorf.”); State v. Lange, 255 N.W.2d 59, 63 (N.D. 1977) (“Although Lange places great emphasis on the fact that his vehicle did not at any time cross the center line, we do not think a police officer who has been alerted to a possible DWI suspect and who observes the vehicle wandering in its lane of traffic need wait for the driver to commit a traffic offense or become involved in an accident before he has probable cause to stop the vehicle.”); State v. Bailey, 51 Or. App. 173, 175, 624 P.2d 663, 664 (Or. Ct. App. 1981) (“We now hold . . . that the observation of a vehicle weaving within its own lane for a substantial distance gives rise to probable cause to believe that the

driver is driving under the influence of intoxicants and justifies a stop for further investigation.”); Leming v. State, 493 S.W.3d 552, 560-561 (Tex. Crim. App. 2016) (“Failing to stay entirely within a single lane is not an offense if it is prudent to deviate to some degree to avoid colliding with an unexpected fallen branch or a cyclist who has strayed from his bike lane. But indiscriminate and purposeless swerving is its own actionable offense under Section 545.060, regardless of whether the particular circumstances permit such deviation to occur without endangering anyone. . . . [The officer] knew from personal observation that [Leming] had several times at least come very *close* to entering the adjacent lane – even if he could not quite tell whether [Leming] had actually entered it – and he knew that [another driver] had also observed the Jeep to be ‘swerving’ even before [the officer] arrived on the scene. This was sufficient information to justify a temporary detention to investigate whether [Leming] had actually failed at some point to remain in his dedicated lane of traffic as far it was practical to do so under the circumstances. It matters not whether that failure was unsafe.”).

Moreover, notwithstanding the fact the stop was valid in light of the fact the officer possessed reasonable suspicion, Deputy Gilbert also had probable cause to stop Alston for a traffic violation. Significantly, pursuant to S.C. Code Ann. § 56-5-1900(a), a driver driving on a roadway in South Carolina that is divided into two or more clearly marked traffic lanes shall drive his or her vehicle “as nearly as practicable entirely within a single lane and shall not [move the vehicle] from the lane until the driver has first ascertained that such movement can be made with safety.” Importantly, the term “practicable” has been defined as “reasonably capable of being accomplished” or “feasible.” BLACK’S LAW DICTIONARY 1291 (9th ed. 2009); see generally State v. Bolin, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008) (indicating a statute’s words must be given their plain and ordinary meaning without resorting to subtle or forced construction

in order to limit or expand the statute's operation). Before initiating the traffic stop of Alston's vehicle, Deputy Gilbert observed Alston "drift" outside of his lane when Alston drove onto the dotted dividing line, which clearly was **not** a part of Alston's lane of travel as the line's express purpose was to divide his lane from the one next to it and the line itself certainly could not be a part of two separate lanes simultaneously. See Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ("[A] court must reject a statute's interpretation leading to absurd results not intended by the Legislature."); see also S.C. Code Ann. § 56-5-430 ("The entire width **between boundary lines** of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel is a '*street*' or '*highway*.' " (emphasis added)). At that time, there were no road conditions or exigent circumstances making it unfeasible or impracticable for Alston to operate his vehicle entirely within his own lane of travel, and Alston never even suggested to the officer there was something that caused him to drift onto the dividing line when informed of the basis for the stop. (State's Ex. # 2). Under those circumstances, Alston failed to maintain his vehicle within a single lane as nearly as practicable and, thus, was guilty of committing a traffic violation, which provided Deputy Gilbert with a valid probable cause basis for initiating the traffic stop.¹³ See State v. Vinson, 400 S.C. 347,

¹³ In arguing to the contrary on appeal, Alston contends his act of driving onto the dotted dividing line did not constitute a traffic violation because he was statutorily permitted to change lanes when such a movement could be made with safety and it was safe for him to change lanes at the time he admittedly drove onto the dividing line. (App. Br. p. 15). Importantly though, that particular argument was **not** raised to the trial judge and, thus, cannot properly be raised or considered for the first time on appeal. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing a party cannot properly raise one argument in support of an issue at trial and then raise a different argument in support of the issue on appeal); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal."); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (recognizing the requirements of issue preservation in South Carolina are designed "to enable the lower court to rule properly after it considered all relevant facts, law, and arguments" (emphasis added)). However, even assuming that argument was somehow properly preserved for appellate review, it would not establish Alston's act of driving onto the dividing line was legal and permissible because Alston did not drive onto the divided lane while in the process of **moving from his lane** of travel and, instead, simply drove onto the dotted line while failing to maintain

353-354, 734 S.E.2d 182, 185 (Ct. App. 2012) (“The plain language of section 56-5-1900 requires a driver to maintain his vehicle ‘entirely within a single lane’ and excuses this mandate only when it is not practicable or the driver can safely change lanes. Trooper Horne testified Vinson’s front tire crossed into the area between the double yellow lines that separated opposing lanes of traffic in a ‘no passing’ zone. This action, in and of itself, is a violation of the statute. Furthermore, Trooper Horne stated there were no other cars on the road during that time that would have prompted Vinson’s decision to cross the center line. Because it was practicable to remain within his lane of traffic, we find Trooper Horne had the requisite reasonable suspicion to pull Vinson’s vehicle over for a violation of section 56-5-1900.”); see also People v. Smith, 172 Ill. 2d 289, 296-297, 665 N.E.2d 1215, 1218-1219 (Ill. 1996) (“The plain language of the statute establishes two separate requirements for lane usage. First, a motorist must drive a vehicle as nearly as practicable entirely within one lane. Second, a motorist may not move a vehicle from a lane of traffic until the motorist has determined that the movement can be safely made. It follows that when a motorist crosses over a lane line and is not driving as nearly as practicable within one lane, the motorist has violated the statute. Once Officer Charles saw defendant cross over a lane line and drive in two lanes of traffic, Officer Charles had probable cause to arrest defendant for a violation of the Code. Thus, Officer Charles’ stop of defendant was proper.” (citation omitted)); State v. Hodge, 147 Ohio App. 3d 550, 558, 771 N.E.2d 331, 338 (Ohio Ct. App. 2002) (“The legislature did not intend for a motorist to be punished when road debris or a parked vehicle makes it necessary to travel outside the lane. Nor, we are quite certain, did the legislature intend this statute to punish motorists for traveling outside their lane to avoid striking

his own lane – which he eventually returned to – as nearly as practicable under the circumstances. See S.C. Code Ann. § 56-5-1900(a) (“A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety.” (emphasis added)).

a child or animal. We are equally certain the legislature did not intend the statute to give motorists the *option* of staying within the lane at their choosing. Common sense dictates that the statute is designed to keep travelers, both in vehicles and pedestrians, safe. The logical conclusion is that the legislature intended only special circumstances to be valid reasons to leave a lane, not mere inattentiveness or carelessness. To believe that the statute was intended to allow motorists the option of when they will or will not abide by the lane requirement is simply not reasonable.”); State v. McBroom, 179 Or. App. 120, 124-125, 39 P.3d 226, 228-229 (Or. Ct. App. 2002) (interpreting a statute requiring drivers to operate their vehicles as nearly as practicable entirely within a single lane as requiring drivers to stay within the lines marking a lane, instructing the legislature “did not intend to permit opposing motorists to vie for control of the center dividing line[,]” and holding it was reasonable for the officer to believe McBroom violated the statute where there was nothing in the record suggesting McBroom “failed to stay within his lane because he was responding to an apparent hazard or because he had some other valid reason for leaving his lane”).

Because Deputy Gilbert possessed reasonable suspicion to believe Alston was engaged in criminal activity and probable cause to believe Alston had committed a traffic violation, Deputy Gilbert’s stop of Alston’s rental vehicle was entirely proper and constitutionally reasonable.¹⁴ See Vinson, 400 S.C. at 352, 734 S.E.2d at 184 (“A traffic stop is not unreasonable if conducted with probable cause to believe a traffic violation has occurred, or when the officer has a reasonable suspicion the occupants are involved in criminal activity.”); see also Foster, 269

¹⁴ Moreover, even assuming Deputy Gilbert’s determination Alston committed a traffic violation by failing to maintain his lane of travel was somehow incorrect, the traffic stop of Alston’s rental vehicle would have nonetheless been entirely reasonable and proper because it was objectively reasonable for the officer to believe Alston’s actions constituted a violation of South Carolina law based on the plain language of the Section 56-5-1900(a). See Heien, 135 S. Ct. at 540 (“It was . . . objectively reasonable for an officer in Sergeant Darisse’s position to think that Heien’s faulty right brake light was a violation of North Carolina law. And because the mistake of law was reasonable, there was reasonable suspicion justifying the stop.”).

S.C. at 378, 237 S.E.2d at 591 (“It is only unreasonable searches and seizures that are prohibited.”). Therefore, the trial judge committed no error in finding the initial stop to be valid, and the Court of Appeals properly affirmed the trial judge’s ruling on appeal. See State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013) (“South Carolina appellate courts review Fourth Amendment determinations under a clear error standard. We affirm if there is any evidence to support the trial court’s ruling.” (citations omitted)); State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (“When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.”). Alston’s conviction and the decision of the Court of Appeals should be affirmed.

B. Propriety of the Extension of the Stop

A lawful traffic stop begins at the point an officer stops a vehicle to investigate a traffic violation and “ordinarily continues, and remains reasonable, for the duration of the stop.” Arizona v. Johnson, 555 U.S. 323, 333 (2009). Once a lawful traffic stop is initiated, an officer may order the driver and any passengers out of the vehicle pending completion of the stop and “may request a driver’s license and vehicle registration, run a computer check, and issue a citation.” State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)); see Maryland v. Wilson, 519 U.S. 408, 415 (1997) (“[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”). “Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave.” Johnson, 555 U.S. at 333.

During the course of the stop, an officer can inquire into matters unrelated to the initial justification for the stop without converting the stop into something other than a lawful seizure

so long as the unrelated questioning does not **measurably** extend the duration of the stop. *Id.*; see *Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609, 1614 (2015) (“An officer . . . may conduct certain unrelated checks during an otherwise lawful traffic stop.”); see also *Muehler v. Mena*, 544 U.S. 93, 100-101 (2005) (instructing additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). Such an investigatory traffic stop must be temporary and last no longer than necessary to effectuate its purpose. *Pichardo*, 367 S.C. at 98, 623 S.E.2d at 848; see *Rodriguez*, 135 S. Ct. at 1614 (“Authority for the seizure . . . ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.”); see also *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008) (“The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose.”).

Even if a traffic stop is initially lawful, the detention “can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission.” *Illinois v. Caballes*, 543 U.S. 405, 407 (2005); see *Pichardo*, 367 S.C. at 98, 623 S.E.2d at 848 (“Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention.”). However, a further detention extending the scope of a traffic stop beyond its original purpose is not automatically unconstitutional. *Pichardo*, 367 S.C. at 99, 623 S.E.2d at 848. Instead, continued questioning beyond the duration of an initial traffic stop is lawful and permissible where: (1) the officer has a **reasonable articulable suspicion** of other illegal activity; or (2) the traffic stop becomes a consensual encounter. *Id.*

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. *Id.* at 104, 623 S.E.2d at 85. In reviewing the totality of the circumstances,

the individual factors of the traffic stop must not be considered piecemeal or in isolation. See Branch, 537 F.3d at 337 (“Courts must look at the ‘cumulative information available’ to the officer . . . and not find a stop unjustified based merely on a ‘piecemeal refutation of each individual’ fact and inference[.]” (citations omitted)). Instead, all of the circumstances of the stop, including the officer’s own experience and specialized training, must be considered as a whole to determine whether the officer’s actions were reasonable in light of all of the information available to him at the time. See United States v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) (“[J]ust as one corner of a picture might not reveal the picture’s subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion.”); see also United States v. Arvizu, 534 U.S. 266, 273 (2002) (“[W]e have said repeatedly that [reviewing courts] must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing. The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’ ” (citations omitted)). “In applying the concept of reasonable suspicion to the various facts of a case, ‘[i]t is the entire mosaic that counts, not single tiles.’ ” Wallace, 392 S.C. at 52, 707 S.E.2d at 453 (quoting United States v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988)). Thus, the presence of several factors seemingly consistent with innocent travel can establish reasonable suspicion when viewed together in totality. Sokolow, 490 U.S. at 9.

Over the course of the last several years, appellate courts in South Carolina have addressed what constitutes reasonable suspicion of criminal activity in the context of a traffic stop in a number of different cases. In State v. Tindall, 379 S.C. 304, 307, 665 S.E.2d 188, 190

(Ct. App. 2008), Tindall was stopped by law enforcement for speeding, swerving, and driving too closely. Shortly thereafter, Tindall was given a warning ticket, but officers continued to question him. Id. Approximately fifteen to twenty minutes into the stop, Tindall consented to a search of the vehicle and cocaine was discovered. Id. Subsequently, the trial court denied Tindall's motion to suppress the narcotics as the product of an illegal detention and search, and the Court of Appeals affirmed. Id. at 311, 665 S.E.2d at 192. In affirming the denial of the suppression motion, the Court ruled the initial traffic stop ended when Tindall's license was returned and he was issued a warning. Id. However, the Court determined the officer had a reasonable suspicion of criminal activity warranting Tindall's further detention based on the existence of the following indicators: (1) Tindall was nervous even after receiving a warning; (2) Tindall was driving a rental car he had not rented; (3) Tindall was only driving one way; (4) Tindall's planned driving time was approximately eighteen hours in one day; and (5) the cities involved in the trip were known "drug hubs." Id. Subsequently though, in a sharply-divided opinion, this Court reversed the decisions of the trial judge and the Court of Appeals. State v. Tindall, 388 S.C. 518, 520, 698 S.E.2d 203, 204 (2010). In reversing, a majority of this Court determined the officer completed the initial purpose of the traffic stop when he informed Tindall he would issue a warning ticket and learned from dispatch Tindall's license and registration were problem-free. Id. at 522, 698 S.E.2d at 205. The majority further concluded the information available to the officer at that time was not sufficient to constitute a reasonable suspicion of criminal activity. Id. at 523, 698 S.E.2d at 206. Thus, the majority held "the continued detention was illegal and the drugs discovered during the search of the vehicle must be suppressed." Id.

Conversely, in State v. Provet, a law enforcement officer stopped Provet for driving and equipment infractions on Interstate 85 in Greenville County. Id., 391 S.C. at 496, 706 S.E.2d at 514. During the course of the stop, the officer observed several signs of nervousness displayed by Provet, including shaking hands and accelerated breathing. Id. The officer asked Provet several questions about where he was coming from and the purpose of his trip, and Provet provided seemingly deceptive responses. Id. at 497, 706 S.E.2d at 514. The officer additionally observed several air fresheners, numerous fast food bags, a cell phone, and some receipts in Provet's car. Id. at 497, 706 S.E.2d at 515. Based on his experience and observations, the officer believed Provet was involved in criminal activity. Id. Subsequently, after issuing a warning ticket, the officer immediately asked Provet if he had anything illegal in the car and asked for consent to search. Id. at 497-498, 607 S.E.2d at 514. Provet consented and then fled when the officer attempted to remove a fast food bag from the car filled with cocaine. Id. at 498, 706 S.E.2d at 515. During trial, Provet moved to suppress the cocaine as the product of an illegal search, and the trial judge denied the motion, finding the officer had a reasonable suspicion of criminal activity justifying an extension of the traffic stop. Id. On appeal, the Court of Appeals affirmed. Id. at 496, 706 S.E.2d at 514. Regarding the initial detention, the Court found the stop was proper as the officer's questioning was tangentially related to the traffic stop. Id. at 499, 706 S.E.2d at 516. The Court further found the questioning did not unreasonably extend the traffic stop because the officer had not completed the initial purpose of the stop and the stop was only eleven minutes long. Id. at 499-500, 706 S.E.2d at 516. Regarding the extension of the traffic stop after the warning was issued, the Court determined the officer possessed reasonable suspicion to extend the stop based on the presence of the following factors: (1) Provet's nervous behavior; (2) the fact third-party vehicle registration is common in drug

trafficking; (3) Provet's inconsistent or deceptive responses to several questions; (4) the presence of numerous fast food bags, a cell phone, and some receipts; and (5) the presence of numerous air fresheners. Id. at 504-505, 706 S.E.2d at 518-519. Based on those factors coupled with the officer's considerable experience, the Court concluded the trial court did not err in finding an extension of the stop was justified under the circumstances. Id. at 506, 706 S.E.2d at 519-520. Thereafter, on certiorari, this Court affirmed, finding "[t]he Court of Appeals correctly affirmed the trial court's findings that the traffic stop was not unlawfully extended, that [the officer] had reasonable suspicion for an additional seizure, and that [Provet]'s consent to search the vehicle was voluntary." Provet, 405 S.C. at 114, 747 S.E.2d at 406.

Similarly, in State v. Wallace, Wallace was stopped on Interstate 85 for committing a traffic violation.¹⁵ Id., 392 S.C. at 50, 707 S.E.2d at 452. During the stop, the officer took twelve minutes to complete the purpose of the stop and issued Wallace a citation. Id. However, based on his observations during the stop, the officer continued to question Wallace after issuing the citation and requested consent to search the vehicle. Id. Wallace refused consent, and the officer walked a drug-detection dog around the vehicle. Id. The dog alerted on Wallace's car, and a substantial quantity of cocaine was discovered inside. Id. During trial, Wallace moved to suppress the drugs found in his vehicle, and the trial judge denied the motion. Id. On appeal, the Court of Appeals affirmed the trial judge's ruling. Id. In affirming, the Court determined the following factors observed by the officer during the traffic stop established a reasonable articulable suspicion to extend the duration of the stop: (1) Wallace abnormally braked after the officer initiated the stop; (2) Wallace fumbled with his paperwork for an unusually long period of time; (3) the passenger stared straight ahead and did not acknowledge the officer; (4) Wallace

¹⁵ Notably, this Court initially granted certiorari in Wallace's case but ultimately dismissed certiorari as improvidently granted. Wallace, 401 S.C. at 265, 737 S.E.2d at 480.

and the passenger provided inconsistent responses about the trip; (5) Wallace became increasingly nervous throughout the stop; (6) an unknown car pulled up behind Wallace's vehicle for several minutes during the stop; (7) Wallace's cell phone rang during the stop; (8) the officer knew drug dealers frequently use decoy cars and communicate via cell phones; (9) the passenger would not look at the officer while they were talking; (10) the passenger was sweating and visibly nervous on a mild day; (11) Wallace changed his story after the officer spoke with his passenger; (12) the car was owned by a third-party, which is common in drug cases; (13) Interstate 85 is a known drug corridor; and (14) Atlanta is a known drug hub. Id. at 55, 707 S.E.2d at 455. While noting none of the factors taken in isolation established a reasonable articulable suspicion of criminal activity, the Court held the presence of all of the factors together established a reasonable suspicion when examined in totality as required. Id.

Most recently, in State v. Moore, 404 S.C. 634, 637, 746 S.E.2d 352, 353 (Ct. App. 2013), Moore was stopped on Interstate 85 in Spartanburg County for speeding and failing to maintain his lane. After the officer initiated his blue lights, Moore activated his left turn signal and then his right turn signal and took longer than the average motorist to pull over, which the officer perceived as suspicious factors. Id. at 637, 746 S.E.2d at 353-354. Additionally, during the stop, Moore forgot to turn off his turn signal, was talking on the phone when the officer approached, displayed signs of excessive nervousness, admitted to having a few alcoholic beverages, and was driving in a rental vehicle. Id. at 638, 746 S.E.2d at 354. Furthermore, when Moore exited the vehicle during the stop, he brought his cell phone, which the officer perceived to be suspicious, and lit a cigarette, which the officer perceived as a sign he was trying to calm his nerves. Id. As the stop continued, the officer discovered Moore was carrying a large quantity of money despite the fact he claimed to be unemployed, Moore was travelling from a

suburb of Atlanta, Moore's claimed travel plans were to visit a grandmother in North Carolina in the middle of the night, and the rental vehicle had been rented by a third party. Id. at 638-639, 746 S.E.2d at 354. Based on the indicators of criminal activity he had observed during the stop, the officer unsuccessfully sought consent to search from Moore and detained him until a drug-detection dog could be brought to the scene. Id. at 639, 746 S.E.2d at 354. Ultimately, the dog alerted on Moore's vehicle, a search of the vehicle resulted in the discovery of crack cocaine and other incriminating evidence, and Moore was placed under arrest. Id. Thereafter, during trial, Moore moved to suppress the crack cocaine as the product of an illegal search, and the trial judge denied the motion, finding the officer had a reasonable suspicion of criminal activity justifying an extension of the traffic stop. Id. at 639-640, 746 S.E.2d at 355. Subsequently, on appeal, the Court of Appeals reversed the trial judge's ruling in a divided opinion after finding the factors observed by the officer were not sufficient to establish a reasonable articulable suspicion of criminal activity and support the extension of the traffic stop. Id. at 644, 746 S.E.2d at 357. However, on certiorari, this Court unanimously reversed the decision of the Court of Appeals. Moore, 415 S.C. at 248, 781 S.E.2d at 898. In reversing, this Court found the majority of the Court of Appeals misapplied the appropriate standard of review by "reweigh[ing] the facts and substitut[ing] its de novo judgment." Id. at 253, 781 S.E.2d at 901. Properly applying the standard of review, this Court found the factors observed by the officer, which included the large quantity of cash, the unusual itinerary, the fact the rental vehicle was rented by a third-party, and Moore's excessive nervousness, supported a finding of reasonable suspicion when considered in totality along with the officer's extensive experience as a law enforcement officer. Id. at 253-255, 781 S.E.2d at 901-902.

In the case at bar, Deputy Gilbert observed numerous indicators of criminal activity during the course of the traffic stop before he extended the duration and scope of the stop. Just like the officers in Wallace, Provet, and Moore, Deputy Gilbert detected multiple suspicious signs of criminal activity during the course of the traffic stop before he had sufficient time to complete the traffic stop and issue a citation. After observing those indicators, the officer elected to continue questioning Alston until another officer arrived on the scene and requested consent for a search after completing the purpose of the initial stop. As the officer's observations during the stop established a reasonable articulable suspicion of criminal activity, the officer's decision to extend the stop was reasonable and justified under the totality of the circumstances.

Specifically, from the outset of the traffic stop, Deputy Gilbert observed several suspicious factors of criminal activity, including the facts Alston covered his luggage with a blanket in the rear of the vehicle, Alston placed his personal keys on the rental key ring, and Alston immediately asked him why he was stopped before giving him a chance to explain himself. Additionally, the officer discovered Alston's rental vehicle had been rented by a third-party, the third-party renter was a female, Alston was travelling on a known crime corridor from a known crime hub, Alston was travelling in a state he was not authorized to operate the rental vehicle in to a state he was also not authorized to operate the vehicle in, Alston had obtained authorization only to drive in states that suggested he was trying to avoid travelling on Interstate 85, Alston had placed a residential air freshener in the rental vehicle despite the fact he claimed not to smoke and the rental vehicle's rental terms expressly forbid smoking, and Alston was initially deceptive about whether his driver's license had ever been suspended in the past. See Wallace, 392 S.C. at 55, 707 S.E.2d at 455 (finding third-party vehicle ownership, Atlanta's status as a known drug hub, and Interstate 85's status as a known drug corridor to be relevant

factors in establishing a reasonable articulable suspicion of drug activity); Provet, 391 S.C. at 504, 706 S.E.2d at 518 (considering the fact third-party vehicle ownership is commonly connected with drug trafficking and the presence of numerous air fresheners in finding the officer had reasonable suspicion to extend a traffic stop); see generally Branch, 537 F.3d at 336 (“[I]f the driver obstructs the police officer’s efforts in any way – for example, by providing inaccurate information – a longer traffic stop would not be unreasonable.”). Furthermore, while Deputy Gilbert was completing the warning citation, the officer spoke with Alston, who provided confusing travel plans that appeared illogical to the officer and that were inconsistent with the express terms of the rental agreement in several respects, and Alston also provided an inconsistent response regarding his children that suggested he was stressed. See Moore, 415 S.C. at 253-254, 781 S.E.2d at 901-902 (recognizing illogical travel plans and nervousness can be relevant factors in a reasonable suspicion analysis). Based on all of those factors, Deputy Gilbert decided to further detain Alston after completing the purpose of the stop, which was completed in a reasonable length of time, and his decision to extend the stop was fully supported by reasonable suspicion under the totality of the circumstances. See United States v. Sharpe, 470 U.S. 675, 683 (1985) (finding a twenty-minute detention during an investigatory traffic stop was objectively reasonable); see also Branch, 537 F.3d at 338 (“We begin with the basic fact that much of Branch’s 30-minute detention was justified by the ‘ordinary inquiries incident’ to a routine traffic stop.” (citations omitted)); United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) (finding a fifteen-minute traffic stop to be reasonable); see generally Rodriguez, 135 S. Ct. at 1616 (recognizing reasonable suspicion is necessary to prolong a traffic stop beyond the amount of time reasonably required to complete the purpose of the stop); cf. Provet, 391 S.C. at 504, 706 S.E.2d at 518 (“Conversely, Owens’ series of questions and observations occurred prior

to the conclusion of the traffic stop because Owens was waiting to hear from dispatch regarding Provet's license and registration and a warning citation had yet to be issued.”).

Based on the indicators of criminal activity observed by the officer coupled with the officer's extensive experience in conducting traffic stops and conducting criminal interdiction along South Carolina roadways, the trial judge properly concluded any extension of the stop was supported by reasonable articulable suspicion. See Ornelas v. United States, 517 U.S. 690, 700 (1996) (“[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists. . . . An appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable.”); Cortez, 449 U.S. at 418 (“[A] trained officer draws inferences and makes deductions – inferences and deductions that might well elude an untrained person.”). Although some of the factors observed by the officer were potentially consistent with innocent travel, all of the factors taken together established a reasonable articulable suspicion Alston was involved in criminal activity. See Sokolow, 490 U.S. at 10 (“[I]nnocent behavior will frequently provide the basis for a showing of probable cause, and . . . in making a determination of probable cause the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts. That principle applies equally well to the reasonable suspicion inquiry.” (internal quotation marks and brackets from original omitted)); Moore, 415 S.C. at 255, 781 S.E.2d at 902 (“While each of the factors considered by the trial judge would be, standing alone, insufficient to support a finding of reasonable suspicion, we find that the totality of factors in this case is sufficient to support the trial court's finding in light of our deferential standard of review.”); see generally Robinson v. State, 407 S.C. 169, 184, 754 S.E.2d 862, 870, n. 9 (2014) (“[T]he facts and inferences relied on by the officer must be articulable, not necessarily

articulated.”). As a result, the trial judge – just like the trial judges in Wallace, Provet, and Moore – properly denied Alston’s suppression motion, and the Court of Appeals properly affirmed the trial judge’s ruling in light of the appropriate deferential standard of review. See Wright, 391 S.C. at 442, 706 S.E.2d at 326 (instructing “an appellate court must affirm if there is any evidence to support the ruling” in a case involving a Fourth Amendment issue); Provet, 391 S.C. at 506, 706 S.E.2d at 520 (“[W]e conclude the trial court did not err in finding reasonable suspicion existed to further detain Provet because there is evidence in the record to support the trial court’s ruling.”); see also Moore, 415 S.C. at 253, 781 S.E.2d at 901 (rejecting an analysis in which an appellate court reweighed the facts and substituted its own de novo judgment when considering whether an extension of a traffic stop was supported by reasonable articulable suspicion on criminal activity); cf. State v. Jones, 364 S.C. 51, 59, 610 S.E.2d 846, 850 (Ct. App. 2005) (“In the case at hand, there is evidence to support the trial judge’s findings and we cannot say his findings are clearly erroneous. We therefore find no abuse of discretion.”). Alston’s conviction and the decision of the Court of Appeals should be affirmed.

C. Propriety of the Search Conducted During the Stop

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. For purposes of the Fourth Amendment, a search occurs when “an expectation of privacy that society is prepared to consider reasonable is infringed.” United States v. Jacobsen, 466 U.S. 109, 113 (1984). Generally speaking, any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment’s warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). However, “warrantless searches are

allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement.” Kentucky v. King, 563 U.S. 452, 462 (2011).

South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) the search incident to lawful arrest exception; (2) the hot pursuit exception; (3) the stop and frisk exception; (4) the automobile exception; (5) the plain view exception; (6) the consent exception; and (7) the abandonment exception. State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012). Pursuant to the various accepted exceptions to the warrant requirement, a warrantless search or seizure will generally withstand constitutional scrutiny so long as the circumstances establish the existence of an exception along with the existence of probable cause. State v. Bultron, 318 S.C. 323, 331-332, 457 S.E.2d 616, 621 (Ct. App. 1995).

One of the recognized exceptions to the warrant requirement is the consent exception. See Birchfield v. North Dakota, ___ U.S. ___, 136 S. Ct. 2160, 2185 (2016) (“It is well established that a search is reasonable when the subject consents[.]”). Pursuant to the consent exception, an officer can validly conduct a warrantless search of a constitutionally-protected area when he or she receives consent from an individual with authority or apparent authority to grant such consent and the consent is provided freely and voluntarily. See State v. Adams, 377 S.C. 334, 339, 659 S.E.2d 272, 275 (Ct. App. 2008) (holding warrantless searches and seizures are constitutionally permissible when conducted under the authority of **voluntary** consent); see also State v. Laux, 344 S.C. 374, 377, 544 S.E.2d 276, 277 (2001) (recognizing consent may be valid if the person granting consent reasonably appeared to have the apparent authority to grant the consent). Factors to consider when determining whether consent was validly provided include the characteristics of the individual providing consent, which include the individual’s age,

maturity, education, intelligence, and experience, and the conditions under which the consent was granted, which include the conduct of the officer asking for consent, the number of officers present, and the duration of the encounter. United States v. Boone, 245 F.3d 352, 361-362 (4th Cir. 2001). Importantly though, “when an officer asks for consent to search *after* an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention.” Pichardo, 367 S.C. at 105, 623 S.E.2d at 851. Significantly, the State bears the burden of establishing the voluntariness of consent, and the issue of whether consent was freely and voluntarily given is a question of fact to be determined from the totality of the circumstances. Id.

In Alston’s case, Deputy Gilbert possessed reasonable suspicion of criminal activity – for all the reasons previously mentioned – at the time he requested permission to search Alston’s rental vehicle. See Boone, 245 F.3d at 362 (“If individual voluntarily consents to a search while justifiably detained on reasonable suspicion, the products of the search are admissible.”); cf. Willard, 374 S.C. at 136, 647 S.E.2d at 256 (“We likewise find the search was not an exploitation of an unlawful detention. As previously discussed, we find reasonable suspicion existed to make the stop and detention. Furthermore, although Willard allegedly noticed the officers’ guns when first surrounded, there is no evidence of any threat of force against Willard once he had exited his vehicle. Nor is there evidence of coercion or promises made.”). Thus, Alston’s consent to the search was not the invalid product of an unlawful detention.

Moreover, Alston provided consent to Deputy Gilbert in a free and voluntary manner. Notably, establishing the voluntariness of Alston’s consent, Alston appeared to be of a sufficient age, maturity, and intellect to provide consent, and his previous license suspension for driving under the influence established he had prior experience with law enforcement and the criminal

justice system. Likewise, Alston had only been detained for roughly sixteen minutes at the time Deputy Gilbert asked for consent, and Deputy Gilbert did not undertake any coercive or threatening actions, such as pulling out his service weapon, in order to obtain Alston's consent. See State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (2003) ("Custody alone . . . is not enough in itself to demonstrate a coerced consent to search."). Instead, Deputy Gilbert expressly explained to Alston he had a right **not** to provide consent if he chose not to do so, he made sure Alston was consenting to a search by checking with him – and obtaining consent from him – on three separate occasions, and he quickly corrected Alston when Alston incorrectly stated the officer was the one providing the consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) ("While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent." (emphasis added)); see also United States v. Stinson, 468 F. App'x 285, 291 (4th Cir. 2012) ("[T]he test for determining the voluntariness of consent is not whether an individual is free to leave, but whether a person felt free to refuse permission to search."). Furthermore, only one other officer was present on the scene at the time Alston thrice provided consent for the search, and nothing suggests the additional officer's presence did anything to coerce or threaten Alston into providing the consent.¹⁶ Under those circumstances, Alston's consent – which was provided after he was expressly advised of his right to refuse to provide it – was freely and voluntarily given, and the trial judge committed no error in finding that consent to be valid. Cf. Mattison, 352 S.C. at 585, 575 S.E.2d at 856 ("No evidence indicates Mattison gave consent while incompetent. Moreover, the record reveals no overt act, threat of force, or other form of coercion. Mattison claims the fact that he was 'surrounded' by a drug dog and four police

¹⁶ Notably, based on Deputy Gilbert's unrefuted testimony, the other officer who arrived before Deputy Gilbert asked for consent "stay[ed] away from" them and was behind Alston, which meant he was out of Alston's view. (R. pp. 65-66).

officers with squad cars flashing blue lights demonstrated a 'show of force' that indicates coercion. This argument lacks merit, as their presence was necessary at a crime scene. Thus, we cannot say as a matter of law that this activity constituted coercion, because the drug dog was instrumental in finding drugs in the car and the multiplicity of suspects warranted the plethora of law enforcement officers.”).

Because Alston provided consent freely and voluntarily on multiple occasions and because that consent was not the invalid product of an unlawful detention, the officers’ consensual search of the rental vehicle was constitutionally permissible. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999) (“The constitutional immunity from unreasonable searches and seizures may be waived by valid consent.”). As a result, the trial judge properly exercised his discretion and denied the suppression motion, and the Court of Appeals correctly affirmed the trial judge’s ruling as there was nothing establishing the trial judge abused his broad discretion on the matter. See Mattison, 352 S.C. at 584, 575 S.E.2d at 856 (“A trial judge’s conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion.”). Alston’s conviction and the decision of the Court of Appeals should be affirmed.

CONCLUSION

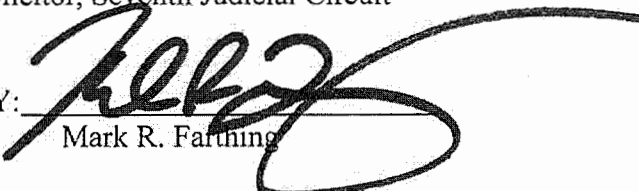
For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals and the judgment and conviction of the trial court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 17, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2015-002134

THE STATE,

Respondent,

vs.

STEPHENO JEMAIN ALSTON,

Petitioner.

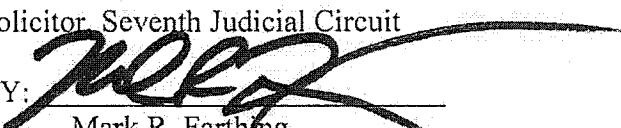
CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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THE STATE,

Respondent,

vs.

STEPHENO JEMAIN ALSTON,

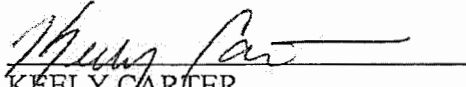
Petitioner.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Brief of Respondent on Petitioner by sending two copies of the same to:

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 17th day of October, 2016.



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Stepheno Jemain Alston, Petitioner.

Appellate Case No. 2015-002134

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 27774
Heard December 14, 2016 – Filed March 7, 2018

AFFIRMED AS MODIFIED

Appellate Defender Lara Mary Caudy, of Columbia, for
Petitioner.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia; and Solicitor Barry Joe Barnette, of
Spartanburg, all for Respondent.

CHIEF JUSTICE BEATTY: Stepheno Jemain Alston was tried *in absentia* and convicted by a jury of trafficking in cocaine. The trial judge sentenced Alston to twenty-five years' imprisonment. On appeal, the Court of Appeals affirmed Alston's conviction and sentence. *State v. Alston*, Op. No. 2015-UP-381 (S.C. Ct. App. filed July 29, 2015). In so ruling, the Court of Appeals upheld the trial judge's denial of Alston's motion to suppress evidence found in his vehicle following a traffic stop. Specifically, the Court of Appeals agreed with the trial judge that: (1) the arresting officer had (a) probable cause to stop Alston's vehicle for a violation of South Carolina's failure to maintain a lane statute¹ and (b) reasonable suspicion to support a brief investigatory detention; (2) the officer had reasonable suspicion that illegal activity was occurring to justify extending the duration of the traffic stop; and (3) Alston voluntarily gave his consent to the officer to search his vehicle. This Court granted Alston's petition for a writ of certiorari to review the decision of the Court of Appeals. We affirm as modified.

I. Factual / Procedural History

On March 28, 2011, Deputy Donnie Gilbert, employed with the Interstate Criminal Enforcement Team of the Spartanburg County Sheriff's Office, was monitoring traffic on northbound Interstate 85. At approximately 1:00 p.m., Deputy Gilbert observed a green Hyundai Santa Fe pass him while continuing to strike the dotted lines of its lane of travel. According to Deputy Gilbert, the vehicle was traveling in the middle lane of the three-lane interstate. He further explained that:

[the vehicle's] left side tire struck the dotted line that divides the middle lane, which [the vehicle] was traveling in, and the fast lane, which would've been to [the vehicle's] left. Then [the vehicle] drifted back

¹ Section 56-5-1900 provides in relevant part:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety.

into the middle of that middle lane. And [the vehicle] did that several times in the time that it took me to catch up to the vehicle.

Based on this observation, Deputy Gilbert pursued the vehicle and initiated a traffic stop. At this time, Deputy Gilbert activated his in-dash video camera and called in the license plate number of the vehicle to the Sheriff's Office.

Deputy Gilbert testified that, as he approached the vehicle, he noticed what appeared to be luggage covered by a blanket in the rear cargo area of the small SUV. Deputy Gilbert further stated that when he approached the passenger side window, the driver immediately asked him why he was being stopped. Deputy Gilbert then requested the driver's license, which identified the driver as Alston who resided in Rome, Georgia. In the audio recording, Deputy Gilbert can be heard explaining to Alston that he observed Alston's vehicle drift "several times" and then asking Alston whether he was under the influence of any drugs or alcohol or was too tired to drive. Deputy Gilbert explained that it was his responsibility to ensure that Alston was not under the influence of anything.

When Deputy Gilbert requested the vehicle's paperwork, Alston produced a rental agreement in the name of Tamisha Harris, Alston's girlfriend. The agreement indicated that Harris had rented the vehicle in Cartersville, Georgia, an area outside of Atlanta, on March 26, 2011, and was required to return it on April 2, 2011. According to the terms of the agreement, the vehicle was authorized to be operated only in Georgia, Tennessee, Kentucky, Virginia, and West Virginia.²

Approximately two minutes later, Deputy Gilbert asked Alston to exit the vehicle. As Alston complied, Deputy Gilbert noticed a "household air freshener" in the driver's door pocket. When Deputy Gilbert questioned Alston about his travel plans, Alston relayed that he was on his way to New Jersey to visit his mother and bring her back to Georgia for Mother's Day. Alston also told Deputy Gilbert he was concerned for his mother's health and wanted to check on her, and planned to stay in New Jersey for about a week. Deputy Gilbert testified he specifically asked Alston if he planned to stay in New Jersey until the following Monday, April 2, 2011, the date the vehicle was to be returned, and Alston replied in the affirmative.

Deputy Gilbert continued to question Alston while he contacted the Spartanburg County Sheriff's Office to run a check on Alston's license.

² The agreement also indicates that Harris paid \$10 a day to authorize another driver, which she identified as Alston.

Approximately six and a half minutes after the traffic stop, Deputy Gilbert entered his patrol car and placed a call to request that the K-9 unit be brought to the site of the traffic stop. Shortly thereafter, Deputy Gilbert exited the patrol car and began writing a warning citation.

While writing the warning and waiting for a response on the license check, Deputy Gilbert questioned Alston further about his family and employment. Alston told Deputy Gilbert that he owned a clothing store in Rome, Georgia, and he had six children. Deputy Gilbert testified that, when asked how old his children were, Alston recited seven numbers.³ Deputy Gilbert further stated Alston initially claimed his license had never been suspended, however, after dispatch indicated to the contrary, Alston admitted it had previously been suspended. Approximately fourteen minutes into the traffic stop, Deputy Gilbert was able to confirm that Alston's license was valid and there were no issues with the vehicle's paperwork or tag.

During the course of the stop, Deputy Gilbert managed to call for a backup officer; however, dispatch informed him that the officer "wasn't necessarily in the same area as [Deputy Gilbert]." Deputy Gilbert testified he intended to ask Alston for consent to search the vehicle but waited, for safety reasons, until another officer arrived at the scene. Approximately fifteen minutes after the traffic stop, the video recording shows that Deputy Gilbert completed the warning and pulled the paper off of a pad.⁴

Shortly thereafter, Deputy Gilbert asked Alston for consent to search the vehicle. Alston replied, "I'm just trying to figure all - - what all this is about." In response, Deputy Gilbert advised he was simply asking a question, at which point Alston said "I mean, yeah, you can search it." Deputy Gilbert further testified that he advised Alston of his right to refuse consent, but Alston had "already told [him] 'yes'." The search of the vehicle yielded 434 grams of cocaine hidden in the steering column.⁵

³ During the sentencing hearing, Alston's counsel informed the trial judge that Alston has seven children.

⁴ Deputy Gilbert never gave Alston the warning or returned his paperwork.

⁵ In addition to luggage, a backpack, and some other items, the officers discovered a knife in the center console of the vehicle.

Subsequently, a Spartanburg County grand jury indicted Alston for trafficking in cocaine. A jury tried Alston *in absentia*. At the beginning of the trial, Alston's counsel moved to suppress the evidence.

During the pre-trial hearing, Deputy Gilbert recounted the details of the traffic stop and explained that, based on his more than eleven years' experience, the following factors provided him with reasonable suspicion that Alston was involved in criminal activity: (1) Alston's luggage was covered by a blanket, which suggested an intent to divert attention to the luggage and away from the steering column; (2) Alston, unlike ninety-nine percent of other drivers who are pulled over, immediately asked why he was being stopped rather than wait for the officer's explanation; (3) Alston was from outside of Atlanta, a "major hub for criminal activity in the southeast"; (4) Alston was driving on Interstate 85, which is "a major criminal activity corridor connecting Atlanta to many routes to the south and to the north"; (5) the vehicle was rented to a third party who was not present; (6) the vehicle was rented to a female, which is common for "drug trafficking organizations" because they do not think that law enforcement "recognize[s] criminal activity with a female"; (7) the vehicle was being driven in South Carolina and Alston stated he was driving to New Jersey, yet neither were identified as authorized states on the rental agreement; (8) Alston had a "household air freshener" in the vehicle, which can be "used as a masking agent to hide odors of other things, which could be drugs"; (9) house keys were placed on the rental key ring, which may have been an attempt to "personalize the vehicle"; (10) Alston's stated travel plans did not comport with the terms of the rental agreement as he would be arriving in Georgia after the vehicle was due; (11) Alston stated he intended to pick up his mother for Mother's Day, but Mother's Day, was a month and a half away; and (12) Alston stated he had six children but gave the ages for seven children when asked.

After Deputy Gilbert's testimony, Alston's counsel moved to suppress the evidence. As a threshold matter, counsel argued the initial stop was invalid because Alston was merely trying to allow maximum distance between himself and the officer's parked vehicle on the side of the road. Counsel then asserted that Deputy Gilbert lacked reasonable suspicion to extend the traffic stop beyond the time necessary to write the warning citation and, as a result, the vehicle and Alston were illegally seized in violation of the Fourth Amendment. Counsel also noted that Deputy Gilbert "was unable to articulate any specific crime or any specific criminal activity that [Alston] was involved in." Further, counsel maintained that "there was no valid consent" and even if there was consent, "it was obtained by prolonged detention."

The trial judge took the motion under advisement to review the recording of the traffic stop. The next day, the judge denied Alston's motion to suppress, ruling:

I find that the stop made by the officer was pursuant to a valid traffic stop, that it was based on probable cause, that the detention resulting from that stop was based upon the totality of the circumstances as presented by the evidence in this case, was reasonable under the Fourth Amendment and that the search made of the vehicle which resulted in the seizure of evidence to be used in the trial against him was based upon consent and in this case with actual knowledge of his right to refuse consent.

Ultimately, the jury convicted Alston of trafficking in cocaine. Six months later, the trial judge opened the sealed sentence and sentenced Alston to twenty-five years' imprisonment.

Alston appealed his conviction and sentence to the Court of Appeals. The Court of Appeals affirmed, concluding that: (1) Deputy Gilbert had probable cause to stop Alston's vehicle for a violation of South Carolina's failure to maintain a lane statute, reasoning that "a lane of travel constitutes the area between the boundary lines" and, thus, driving on a lane line is a sufficient basis for a traffic stop; (2) Deputy Gilbert had reasonable suspicion to warrant a traffic stop based on his testimony that he observed Alston's vehicle "drifting" and his inquiry at the scene of whether Alston was driving under the influence; (3) Deputy Gilbert's continued questioning of Alston exceeded the scope of the initial traffic stop, however, the extended duration was permissible because Deputy Gilbert had an objectively reasonable and articulable suspicion that illegal activity was occurring; and (4) Alston freely and voluntarily consented to the search. *State v. Alston*, Op. No. 2015-UP-381 (S.C. Ct. App. filed July 29, 2015).

After the Court of Appeals denied Alston's petition for rehearing, this Court granted Alston's petition for a writ of certiorari to review the decision of the Court of Appeals.

II. Standard of Review

"On appeal from a motion to suppress on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse only if there is clear error." *Robinson v. State*, 407 S.C. 169, 180-81, 754 S.E.2d 862, 868 (2014), *cert. denied*, ___ U.S. ___, 134 S. Ct. 2888, 189 L. Ed. 2d 845 (2014). "However, this

deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

III. Discussion

A. Propriety of the Traffic Stop

Alston asserts the Court of Appeals erred in affirming the trial judge's denial of his motion to suppress. Initially, Alston contends Deputy Gilbert did not have probable cause to stop Alston's vehicle for a traffic violation or have reasonable suspicion that Alston was involved in criminal activity. Alston maintains that "merely striking the dotted line dividing two lanes traveling in the same direction" did not constitute a violation of section 56-5-1900 of the South Carolina Code as this action qualified as driving "nearly as practicable entirely within a single lane." Further, Alston claims that, because it was not unsafe for him to change lanes at the time of the incident, his actions did not violate section 56-5-1900.

Additionally, Alston asserts that Deputy Gilbert did not have reasonable suspicion to support a brief investigatory stop solely based on his observation that Alston was drifting within his own lane of travel. Because there was no evidence that Alston's vehicle was weaving or drifting between two lanes of traffic, Alston claims that his manner of driving could not give rise to reasonable suspicion sufficient to warrant a traffic stop for driving under the influence.

Alternatively, even if the initial stop was proper, Alston maintains that Deputy Gilbert impermissibly exceeded the scope of the traffic stop as he had neither (1) a reasonable and articulable suspicion of illegal activity to warrant the continued detention nor (2) Alston's consent.

The Fourth Amendment to the United States Constitution grants citizens the right to be secure against unreasonable searches and seizures. U.S. Const. amend. IV. However, a police officer may "stop and briefly detain a person for investigative purposes" if he "has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

"The Fourth Amendment requires that an officer making an automobile stop have probable cause or reasonable suspicion that the person has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal activity." 22

C.J.S. *Criminal Procedure & Rights of Accused* § 89, at 389 (2016). "When a peace officer observes any type of traffic offense, the violation establishes both probable cause to stop the vehicle and reasonable suspicion to investigate." *Id.*

"Temporary detention of an individual in the course of a routine traffic stop constitutes a Fourth Amendment seizure, but where probable cause exists to believe that a traffic violation has occurred, such a seizure is reasonable per se." *Tindall*, 388 S.C. at 521, 698 S.E.2d at 205. "In carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." *Id.* (citing *United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir. 1998)). "The officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning." *State v. Pichardo*, 367 S.C. 84, 98, 623 S.E.2d 840, 848 (Ct. App. 2005). "Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention." *Id.*; see *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) ("Authority for the seizure . . . ends when tasks tied to the traffic infraction are--or reasonably should have been--completed.").

"However, once the underlying basis for the initial traffic stop has concluded, it does not automatically follow that any further detention for questioning is unconstitutional." *State v. Moore*, 415 S.C. 245, 252, 781 S.E.2d 897, 901 (2016) (citation and internal quotation marks omitted). "Lengthening the detention for further questioning beyond that related to the initial stop is acceptable in two situations: (1) the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring; or (2) the initial detention has become a consensual encounter." *State v. Provet*, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011), *aff'd*, 405 S.C. 101, 747 S.E.2d 453 (2013); see *Moore*, 415 S.C. at 252, 781 S.E.2d at 901 ("The officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring." (citation and internal quotation marks omitted)).

In *Provet*, this Court enunciated the test for determining whether reasonable suspicion exists in the context of a traffic stop, stating "[t]he test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant." *State v. Provet*, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (citing *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)). Further, this Court has emphasized that "[c]ourts must give due weight to common sense judgments reached by officers in light of their experience and training." *Moore*, 415

S.C. at 252-53, 781 S.E.2d at 901 (citation and internal quotation marks omitted). Additionally, "in evaluating whether an officer possesses reasonable suspicion, this Court must consider the totality of the circumstances--the whole picture." *Id.* at 253, 781 S.E.2d at 901 (citation and internal quotation marks omitted).

As will be discussed, we conclude that, depending on the totality of the circumstances, a motorist who is observed repeatedly weaving within the lane of travel and striking the dotted lines marking this lane may be subject to a traffic stop.

We find this construction comports with the intent of the Legislature to ensure highway safety and the requirement that criminal statutes be construed against the State and in favor of the defendant. *See State v. Baucom*, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."); *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002) (construing criminal statute strictly against the State and in favor of the defendant).

Cognizant of the rules of statutory construction, we find the text of section 56-5-1900 creates two separate offenses as it mandates that: (1) a motorist drive as "nearly as practicable within a single lane"; and (2) if the motorist departs from the lane of travel, it must be done only when it is safe to do so. In the instant case, we are concerned with the first part of the statute as this was the only basis presented in Alston's motion to suppress. *See State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003) (recognizing that an appellate court will not consider issues unless they were raised to and ruled upon in the trial court).

In defining what conduct constitutes a violation of section 56-5-1900, we must parse the initial text of the statute: (1) "entirely within a single lane", and (2) "as nearly as practicable." Although the Legislature prefaced section 56-5-1900 with the word "shall," thus making it mandatory, the phrase "as nearly as practicable" eliminates a finding that this is a strict liability offense. In other words, a motorist's breach of the dividing lines does not necessarily equate to a violation of the statute. *See People v. Chavez-Barragan*, 365 P.3d 981, 984-85 (Colo. 2016) (construing phrase "as nearly as practicable" in a statute similarly worded to section 56-5-1900 and stating that "what is 'practicable' in any given situation depends on the circumstances"); *State v. Prado*, 186 P.3d 1186, 1187 (Wash. Ct. App. 2008) (interpreting phrase "as nearly as practicable" in a statute similarly worded to section 56-5-1900 and concluding that legislature's use of this language "demonstrates a

recognition that brief incursions over the lane lines will happen"); *Dods v. State*, 240 P.3d 1208, 1212 (Wyo. 2010) (analyzing a statute similarly worded to section 56-5-1900 and stating, "when an officer merely observes someone drive a vehicle outside the marked lane, he does not automatically have probable cause to stop that person for a traffic violation. The use of the phrase 'as nearly as practicable' in the statute precludes such absolute standards and requires a fact-specific inquiry to assess whether an officer has probable cause to believe that a violation has occurred").

Thus, the implementation of the statute requires a balance between a motorist's rights and an officer's discretion to assess traffic violations and ensure public safety. As stated by the Supreme Court of Tennessee when it analyzed a statute similarly worded to section 56-5-1900:

an individual's constitutional rights against unreasonable seizures must be balanced against the public interest of police officers enforcing traffic statutes designed to ensure the safety of the motoring public, pedestrians, and property. While minor traffic infractions may lead to the commendable discovery of an intoxicated motorist, we are cognizant that there are many distractions in today's driving environment that may divert a sober motorist's attention and cause her to momentarily and inadvertently leave her lane of travel. . . . Commentators have cautioned that allowing police officers to stop motorists for de minimis driving anomalies creates a "stop at will" environment at complete odds with the Fourth Amendment.

State v. Smith, 484 S.W.3d 393, 411 (Tenn. 2016) (citation omitted).

Applying the above-outlined principles to the facts of the instant case, we find that Deputy Gilbert had probable cause to stop Alston to determine if he was impaired as he observed Alston's vehicle drifting several times and striking the dividing lines of the lane of travel several times. Consequently, we agree with the Court of Appeals that the initial traffic stop was valid.

B. Extension of the Traffic Stop

Having determined the traffic stop was valid, the question becomes whether Deputy Gilbert extended the detention beyond the purpose of the initial stop. We agree with the Court of Appeals that Deputy Gilbert's questioning exceeded the scope of the initial traffic stop. Approximately fourteen minutes into the traffic stop, Deputy Gilbert received confirmation from the Spartanburg County dispatch that

Alston's license and the vehicle's registration were valid. Further, Deputy Gilbert gave no indication that he believed Alston was driving under the influence as he found it unnecessary to conduct any field sobriety tests. At approximately fifteen minutes into the traffic stop, Deputy Gilbert completed the warning. At that point, the purpose of the traffic stop had been fulfilled. Yet, Deputy Gilbert did not present Alston with the warning and never returned his license or the vehicle's registration. Instead, he continued to question Alston prior to asking for consent to search the vehicle. As found by the Court of Appeals, this continued questioning exceeded the scope of the initial traffic stop.

Thus, we must next analyze whether: (1) Deputy Gilbert had an objectively reasonable and articulable suspicion illegal activity had occurred or was occurring to extend the duration of the stop; or (2) the detention became a consensual encounter.

Given the trial judge's general ruling, it is difficult to ascertain what evidentiary factors formed the basis of the decision. As a result, we have concentrated on those identified by Deputy Gilbert during the pre-trial hearing on the motion to suppress.

Mindful of our deferential standard of review, we must affirm as there is evidence to support the trial judge's ruling. *See Moore*, 415 S.C. at 251, 781 S.E.2d at 900 (identifying the standard of review on appeals from a motion to suppress based on Fourth Amendment grounds and stating, "appellate courts must affirm if there is any evidence to support the trial court's ruling"). While we may have decided the motion to suppress differently than the trial judge, our standard of review prohibits this Court from doing so. *See id.* ("The clear error standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." (internal quotation marks and citation omitted)). Instead, we must, like the trial judge, give due weight to Deputy Gilbert's eleven years of experience and training and defer to his common sense judgments as to why certain observations made him suspicious.

We preface our analysis by noting that Deputy Gilbert testified he was employed with the South Carolina Highway Patrol in July 1999 and began working with the Aggressive Criminal Enforcement Team for the Department of Public Safety and Highway Patrol in 2004. In 2010, Deputy Gilbert transferred to the Spartanburg County Sheriff's Office and was assigned to the Interstate Criminal Enforcement Team. In this capacity, Deputy Gilbert received specific training from

the National Criminal Enforcement Association regarding "locating, detecting hidden compartments in vehicles, [and conducting] roadside interviews."

Based on his extensive experience and training, Deputy Gilbert explained why he believed Alston was engaged in criminal activity. We find the following explanations support the trial judge's ruling. Deputy Gilbert identified several inconsistencies in Alston's stated travel plans and the terms of the rental agreement. According to the terms of the agreement, the vehicle was authorized to be operated only in Georgia, Tennessee, Kentucky, Virginia, and West Virginia. Despite these restrictions, Alston was stopped while driving in South Carolina on his way to visit his mother in New Jersey. Alston also indicated that he intended to stay in New Jersey for "about a week," until Monday, April 2, 2011, the date the vehicle was to be returned to a location outside of Atlanta. Alston's claim that he intended to bring his mother back with him for Mother's Day, which is in May, raised "another red flag" for Deputy Gilbert since that holiday was a month and a half away.

While Alston's unusual travel plans and deviations from the rental agreement provide evidence of reasonable suspicion, we question how other seemingly innocuous factors identified by Deputy Gilbert justified extending the traffic stop. Even though Deputy Gilbert believed Alston succumbed to the stress of the situation when he stated he had six children but gave the ages for seven children, this fact is of no consequence as most people are stressed to some extent by an extended traffic stop.

Deputy Gilbert also relied on the fact that he observed Alston driving on Interstate 85, which he characterized as a "major hub for criminal activity in the southeast." Although this factor referenced criminal activity, we are unpersuaded that traveling on Interstate 85 is indicative of one involved in criminal activity given "the number of persons using the interstate highways as drug corridors pales in comparison to the number of innocent travelers on those roads." *United States v. Williams*, 808 F.3d 238, 247 (4th Cir. 2015).

The next set of factors relied on by Deputy Gilbert arose out of observations he made when he approached Alston's parked vehicle. The first of these factors is the fact that Alston's luggage was covered by a blanket, which Deputy Gilbert believed suggested "an intent to divert attention to the luggage and away from the steering column." We question the import of this factor as many innocent travelers

conceal their luggage as a theft deterrent.⁶ The second factor was Alston's immediate questioning of Deputy Gilbert as to why he had been stopped. We fail to see the connection, and Deputy Gilbert offered none, as to how such an inquiry is indicative of criminal activity. The third factor was the presence of a "household air freshener," which Deputy Gilbert believed could be used to mask "odors of other things, which could be drugs." Even accepting the premise that air fresheners have been used to mask the odor of drugs, we decline to see the significance of this factor as innocent car owners routinely use air fresheners to mask "odors of other things" such as those emanating from eating in a vehicle.

Additionally, Deputy Gilbert ascertained that Alston's residence was outside of Atlanta, which he characterized as "a major hub for criminal activity in the southeast." While some drug traffickers may hail from this area, the majority of residents do not engage in criminal activity. Next, Alston's use of a car that was rented to a third party, who is female, is of limited value to the reasonable-suspicion evaluation as "the overwhelming majority of rental car drivers on our nation's highways are innocent travelers with entirely legitimate purposes." *Williams*, 808 F.3d at 247. Further, the fact that Alston's girlfriend rented the vehicle and paid for Alston to be an authorized driver is not inherently suspicious as couples who travel often engage in this practice. Also, we are not persuaded by the general assertion that drug traffickers commonly use a female to enter into a rental agreement because law enforcement is less likely to suspect a female of criminal activity. Were we to accept Deputy Gilbert's proposition, then we would necessarily accept the illogical inference that only males engage in criminal activity. A rented car is a rented car. The gender of the renter is irrelevant especially when the driver of the rented vehicle is an authorized driver. Finally, Deputy Gilbert's reliance on the inclusion of personal keys on the rental car key ring is of limited value given Deputy Gilbert offered no connection, and we discern none, as to how this innocent act is indicative of criminal activity.

Nevertheless, because there is evidence to support the trial judge's determination that Deputy Gilbert had reasonable suspicion of criminal activity to extend the scope of the stop beyond its initial purpose, we must affirm as did the Court of Appeals.

⁶ Notably, apparently recognizing this common practice, most car manufacturers are now equipping hatch-back vehicles with retractable shields for this very purpose.

C. Consent to Search

Finally, Alston claims the warrantless search was unreasonable because he did not voluntarily consent to Deputy Gilbert's request to search the vehicle. In support of this claim, Alston identifies several statements he made in response to the request to search, which were recorded during the traffic stop. Specifically, Alston explains that when Deputy Gilbert asked for consent to search the vehicle, he responded that he was "just trying to figure what all this is about" and that he "didn't do anything wrong." Alston emphasizes that he told Deputy Gilbert, "[N]ah, I'm not giving you consent, you the one giving consent." Alston further notes that Deputy Gilbert never returned his license and rental agreement and failed to give him the citation for the traffic violation. Alston also points out that a second law enforcement officer was present during the discussion regarding consent.

In reviewing the trial judge's findings of fact regarding the voluntariness of Alston's consent, we apply a deferential standard of review. *Provet*, 405 S.C. at 113, 747 S.E.2d at 460. "The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge." *State v. Mattison*, 352 S.C. 577, 584-85, 575 S.E.2d 852, 856 (Ct. App. 2003).

"A warrantless search is reasonable within the meaning of the Fourth Amendment when voluntary consent is given for the search." *Provet*, 405 S.C. at 113, 747 S.E.2d at 460. "The existence of voluntary consent is determined from the totality of the circumstances." *Id.* "When the defendant disputes the voluntariness of his consent, the burden is on the State to prove the consent was voluntary." *Id.* "A consent to search procured during an unlawful stop is invalid unless such consent is both voluntary *and* not an exploitation of the unlawful stop." *Id.* at 114, 747 S.E.2d at 460 (citation and internal quotation marks omitted).

Having found the detention lawful, our remaining question is limited to determining whether there is evidence to support the trial judge's finding that Alston voluntarily consented to the warrantless search.

During the suppression hearing, Deputy Gilbert acknowledged the statements relied on by Alston. However, he expressly testified that Alston gave him consent to search the vehicle. Deputy Gilbert stated that, after he told Alston that he could refuse to give consent, Alston responded "then go ahead" and pointed to the car. Deputy Gilbert further testified that, in an effort to get a "yes" or "no" answer from Alston, he explained this right. According to Deputy Gilbert, Alston responded "yes" after receiving this explanation. Deputy Gilbert denied coercing Alston or

producing his weapon during the encounter. Deputy Gilbert also maintained that Alston never withdrew his consent.

Because Alston's statements conflicted with Deputy Gilbert's testimony, it was within the province of the trial judge, as the trier of fact, to determine this issue of credibility. Considering the totality of the circumstances, we conclude there is evidence in the record to support the trial judge's finding that Alston voluntarily consented to the warrantless search.

IV. Conclusion

Based on our rules of statutory construction, we hold the offense of failure to maintain a lane is not a strict liability offense. As a result, an officer must consider all relevant circumstances in deciding whether to stop a vehicle for a violation of this statute. Applying this interpretation to the facts of the instant case, we conclude there is evidence to support the trial judge's finding that the initial traffic stop was valid. Further, we find there is evidence to support the trial judge's determination that Deputy Gilbert had reasonable suspicion of criminal activity to extend the scope of the stop beyond its initial purpose and that Alston voluntarily consented to the warrantless search. Therefore, while we agree with the result reached by the Court of Appeals, we modify its analysis regarding the interpretation of section 56-5-1900 and the basis for which Deputy Gilbert had reasonable suspicion to extend the duration of the traffic stop. Accordingly, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

HEARN, J., concurs. FEW, J., concurring in a separate opinion in which KITTREDGE, J., concurs. Acting Justice Costa M. Pleicones, concurring in result only.

JUSTICE FEW: I concur in all sections of the majority opinion except section III.B. As to that section, I agree with the result reached by the majority because there is ample evidence to support the trial court's finding that Deputy Gilbert had reasonable suspicion Alston was engaged in criminal activity, and thus the extended detention was reasonable under the Fourth Amendment. *See State v. Moore*, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (holding "appellate courts must affirm if there is any evidence to support the trial court's ruling").

I disagree, however, with the majority's concern as to "how other seemingly innocuous factors identified by Deputy Gilbert justified extending the traffic stop." In most cases, none of the individual observations an officer makes will justify reasonable suspicion. In this case, as the majority points out, Deputy Gilbert identified at least twelve individual facts that caused him to suspect Alston was engaged in criminal activity. Some of those facts are almost meaningless even when considered as part of the totality of the circumstances, and none of them would independently support reasonable suspicion to extend the traffic stop. As we have repeatedly held, however, we should not focus on any one factor, but we must consider the totality of the circumstances observed by the officer. *See, e.g., Moore*, 415 S.C. at 253, 781 S.E.2d at 901 (stating "this Court must 'consider 'the totality of the circumstances—the whole picture'" (quoting *United States v. Sokolow*, 490 U.S. 1, 8, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989))); *State v. Taylor*, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013) ("Courts must look at the cumulative information available to the officer [] and not find a stop unjustified based merely on a 'piecemeal refutation of each individual fact and inference.'" (quoting *United States v. Branch*, 537 F.3d 328, 337 (4th Cir. 2008))).

The majority discounts, for example, the fact Alston told Deputy Gilbert he had six children, and then recited the ages of seven children. Alston gave Deputy Gilbert inconsistent information on a subject anybody ought to be able to speak consistently about—the number and ages of his children. Based in part on that inconsistency, Deputy Gilbert reached the conclusion Alston was feeling "the stress of the situation." The inconsistency alone would not support a finding of reasonable suspicion, but the majority is incorrect to say "this fact is of no consequence." Alston's inability to recite the correct number of his children in a stressful situation is suspicious.

I also disagree with the majority's criticism of Deputy Gilbert's reliance on the facts Alston was from near Atlanta, he was driving a car rented by a third person who was not in the car, and the person who did rent the car was female. The majority states these facts are "not inherently suspicious." Even if the majority was correct, however, its statement would be of minimal importance. Our standard of review requires us to consider the facts in light of the *officer's* explanation as to why *he* thought they were significant, and why they made *him* suspicious. See *United States v. McCoy*, 513 F.3d 405, 411 (4th Cir. 2008) (stating "the Supreme Court has often counseled lower courts to give 'due weight' to the factual inferences drawn by police officers as they investigate crime, for the reasonable suspicion analysis is by its nature 'officer-centered'" (citations omitted)). None of these facts by themselves could support a finding of reasonable suspicion, but Deputy Gilbert explained why he thought each of them had some significance.

This point is illustrated by Deputy Gilbert's reliance on the fact the car was rented by a female who was not in the car. Deputy Gilbert testified he learned "through the classes and the training that I've been through, a lot of your criminal organizations will rent a vehicle in a woman's name for the simple fact that law enforcement does not -- they are not threatened by a woman." Rejecting what Deputy Gilbert learned in his professional training, the majority states, "Were we to accept Deputy Gilbert's proposition, then we would necessarily accept the illogical inference that only males engage in criminal activity." This criticism is based on a misapplication of our standard of review, and misses the significance of Deputy Gilbert's testimony on this subject. When law enforcement officers are trained to consider a certain fact to be important in the officer's attempts to deal with crime on the streets, it is not appropriate for judges to sit in our easy chairs in our secure offices and simply disagree. See *State v. Morris*, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) (repeating the Supreme Court of the United States' skepticism of the capacity of "legal technicians" to understand reasonable suspicion (quoting *United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004), which cited *Ornelas v. United States*, 517 U.S. 690, 695-96, 116 S. Ct. 1657, 1661, 134 L. Ed. 2d 911, 918 (1996))). Deputy Gilbert testified he was trained to consider the fact a car was rented in the name of a female to be one fact indicative of drug trafficking because that is a trick drug traffickers use to avoid detection. Describing the possibility this trick might fool a police officer, Deputy Gilbert testified, "At least that's what the drug

trafficking organizations think." If the inference criticized by the majority is "illogical," Deputy Gilbert explained that it is an illogical inference drawn by drug traffickers.

For the reasons explained, I vote to **AFFIRM** Alston's conviction for trafficking in cocaine.

KITTREDGE, J., concurs.

RECEIVED
MAR 09 2018
APPELLATE DEFENSE

FORM 5

STATE OF SOUTH CAROLINA)

County of Spartanburg)Stepheno Alston #357159)

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

v.)

State of South Carolina)

Respondent)

IN THE COURT OF COMMON PLEAS

2018 CP 42 03680

APPLICATION FOR

POST-CONVICTION RELIEF

M. HEPE BLACKLEY

2018 OCT 22 PM 3:20

CLERK OF COURT
SPARTANBURG COUNTYINSTRUCTIONS - 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 Heber C.I. P.O. Box 205 Ridgeway
S.C. 29472
2. Name and location of Court which imposed sentence Court of General
Sessions Seventh Judicial Circuit, Spartanburg Co. S.C.
3. Name(s) of co-defendant(s) (if any) n/a
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011-GS-42-03090 SC Code Ann sec 44-53-375 (Trafficking)
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) Sentenced Sealed 3/20/13 and pronounced on 9/19/13
- (b) Twenty-five years imprisonment and 200,000.00 fine
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X (Jury Trial)
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. United States Supreme Court
- (b) the result in each such Court to which you appealed:
- i. South Carolina Appeals Court Affirmed
- ii. South Carolina Supreme Court Affirmed
- iii. ~~Not decided yet~~ Affirmed
- (c) the date of each such result:
- i. July 29 2015
- ii. SC Supreme Court March 8 2018
- iii. US Supreme Court Oct 1 2018
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2015 WL 4550441 / 2015-002134
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) n/n
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) See attached pages 3-1 thru 3-18
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See attached pages 3-1 thru 3-18
- (b) _____
- (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. n/a
- iii. n/a
- iv. n/a
- (b) the name and location of the Court in which each was filed:
- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

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M. HOPE BLACKLEY
STATE OF SOUTH CAROLINA
SOUTH CAROLINA COURT

(c) the disposition thereof:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

(d) the date of each such disposition:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

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

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

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

no

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

(a) which grounds have been presented:

- i. n/a
- ii. n/a
- iii. n/a

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

- i. n/a
- ii. n/a
- iii. n/a

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 NO HOPE BLAUNLEY

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) All grounds for relief set forth above are properly
 (b) presented in this initial post-conviction filing
 (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?
NO

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 M. HOPE BLACKLEY
 CLERK OF COURT
 SPARTANBURG COUNTY

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. Andrew J Johnston Esquire
Spartanburg SC 29306
 ii. Lara M Caudy, Esquire
SC Appellate Defender, Columbia SC 29211
 iii. Blume Norris & Franklin - Best LLC
Columbia, South Carolina 29201
 (b) the proceedings at which each such attorney represented you:
 i. Trial and sentencing
 ii. Appeal court, Supreme court
 iii. United States Supreme court

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

(A) order respondent to Answer Petition (B) Allow Applicant
45 days to file-reply (C) Appoint counsel and conduct
evidentiary hearing (D) Vacate conviction and sentence

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

NO

STATE OF SOUTH CAROLINA)

County of Spartanburg)

VERIFICATION

I, Stephen Aiston, 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.

Stephen Aiston

SWORN to and subscribed before me this 11th
day of October, 2018.

Ludham Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

2018 OCT 22 PM 3:22
M. HOPE BLACKLEY
CLERK OF COURT
SOUTH CAROLINA
SPARTANBURG COUNTY

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

I, Stepheno Alston, 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.

Stepheno Alston
Applicant

SWORN or affirmed to and subscribed before me this

16th day of October, 2018.

Ludrean Bryant
Notary Public

My Commission Expires: May 26, 2020

2018 OCT 22 PM 3:23
 M. HOPE BLACKLEY

Alston v. State, PCR Application

Attached Page 3-1

10. GROUNDS FOR RELIEF

10(a). Applicant was deprived Effective Assistance of Counsel as guaranteed by the Sixth Amendment of the United States Constitution, applicable to the State of South Carolina by and through the 14th Amendment, US Const.; South Carolina State Constitution Article I, Section 3; Strickland v. Washington, 466 US 668 (1984); Sanchez v State 569 SE 2d 363 (SC 2002).

10(b). Applicant was deprived effective assistance of appellate counsel as guaranteed by Fifth and Sixth Amendments to the United States Constitution, applicable to the State of South Carolina by and through the 14th Amendment, US Const.; South Carolina State Constitution Article I, Section 3; Evitts v Lucey, 469 US 387 (1985); Bell v Jarvis, 190 F 3d 432 (4th Cir 1999).

10(c). Applicant was deprived of his right to present at all critical stages of criminal proceedings as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, applicable to the State of South Carolina by and through the 14th Amendment, US Const.; South Carolina State Constitution Article I, Section 3, 14; State v Fairey, 646 SE 2d 445 (SC 2007).

11. SUPPORTING FACTS

11(a)(1). Applicant was deprived effective assistance of counsel when trial counsel failed to adequately and properly apprise/advise the Applicant with regards to pretrial, trial and other court proceedings related to Applicant's criminal charges.

Specifically, Applicant alleges, and will prove given fact development proceedings, that attorney Andrew Johnston failed to inform the Applicant that his criminal case would be called for trial on March 18, 2013. As a result of counsel's failure to apprise Applicant about criminal court proceedings/scheduling, the Applicant believed that he could depart the courthouse on March 18, 2013, and return at a later date. However, unknown to the Applicant, the Prosecutor called Applicant's case to be heard and a motion in limine (suppression hearing) was called for disposition in Applicant's absence- resulting in a bench warrant

being issued for Applicant on March 18, 2013. Consequently, the Applicant's case was tried in absentia the following days and ultimately Applicant was convicted and a 25-year term of imprisonment imposed under seal on March 20, 2013.

Prior to March 18, 2013, (date bench warrant issued) the Applicant had faithfully maintained communications with attorney Johnston, his bail bondsman, and never missed a scheduled court appearance. (1) On March 18, 2013, the Applicant appeared at General Sessions roll-call like he had done numerous times previously. Typically, when the Applicant arrived at the Courthouse for roll-call he would meet with attorney Johnston, touch base on case and Applicant would ultimately depart courthouse and return to Rome, Georgia. Nothing appeared to insinuate otherwise on the morning of March 18, 2013.

From the beginning of case, it had been both Applicant and counsels understanding that Applicant would either enter into plea negotiations and eventually plead guilty to a charge for reduced sentence if counsel was not successful with pending motion to suppress evidence seized during traffic stop and search of Applicants rental vehicle. Applicant was led to believe by attorney Johnston that the suppression hearing would be conducted prior to and separate from and trial or guilty plea hearing being commenced. And that counsel was confident that a plea agreement would be reached in Applicants case.

On the morning of March 18, 2013 Applicant came to South Carolina from Rome, Ga as he did for almost 2 years not missing one day. After roll-call, Andrew Johnston asked Applicant to meet him in his office. Applicant complied and waited for Mr. Johnston for an hour. Applicant was tired and hungry from the trip. Andrew finally arrived to his office only to tell Applicant to follow him.

Once in the courthouse, Johnston directed Applicant to wait in the hall while Johnston went into the courtroom. After about 10 minutes, Johnston returned to the hall way and asked Applicant to have a seat on a bench. He then informed applicant that the prosecutor offered another plea of 15 years, which Applicant declined to accept. Johnston's response to Applicant was, "okay, I am not the one that has to do the time, you do." and walked off. Applicant assumed that was it. Had Andrew Johnston communicated better with Applicant he would have known that the courts decided to have his trial at the last minute and there is no way Applicant would have left. Andrew Johnston said that he tried to contact Applicant and Applicant is not saying that he didn't, but the calls never came through (signal has the tendency to drop depending on where you are).

None the less, Andrew Johnston had almost 2 years to prepare for that day to ask any and all questions possible and to inform Applicant of the process as well as the way the courts work. This was Applicants first time ever going through the trial process, this is why Andrew Johnston was hired, to advise and to teach Applicant what was going on and to learn everything he needed to know about Applicants case. But he did not. Andrew Johnston chose to proceed with Applicant case without having complete knowledge of everything he needed to know about Applicants case. Andrew Johnston failed to communicate with Applicant properly and because of that they were on two separate pages, which led Andrew Johnston to proceed with Applicant case without him and because of this Applicant has 25 years to do instead of the plea he asked for.

Applicant now alleges that attorney Andrew Johnston failed to inform/advise Applicant that his criminal case would be called for final disposition on March 18, 2013, and allowed the Applicant to believe that he (Applicant) could leave the courthouse after speaking with counsel that morning. As a consequence of counsels deficient performance in this regard the Applicant was tried in absentia, depriving him of numerous substantive and procedural due process rights guaranteed by the United States Constitution, South Carolina state Constitution, and Statutorial provisions.

11.(a)(2) Applicant was deprived effective assistance of counsel when attorney Johnston failed to properly object, preserve for appellate review and address the courts decision to proceed with Applicants criminal case in absence of the Applicant. Consequently, as a result of counsels deficient performance, the Applicant was tried in his absence and deprived of his constitutional right to be present at critical criminal proceedings.

Subsequent to Applicants discussion with attorney Johnston on the morning of March 18, 2013, the prosecutor called applicants case before the Circuit Court (Hon. J. Cole). The Applicant had previously departed the courthouse returning home to Georgia. Upon calling the Applicants case the following colloquy ensued before the Court, attorney Johnston and the prosecutor:

Court: *Okay. And {Defendant counsels inconclusive responses, the 's} not present now?*

Counsel: *No, sir. Your Honor, we— I was outside speaking with him {Defendant} as to the possibility of entering a guilty plea and when I returned, after I came back into the courtroom to take up some matters with the court and when I'd went back outside, he had gone.*

Court: *And did you tell him to stay, that the case was being called for trial?*

Counsel: *I did not tell him that specifically, your honor, but I believe it was implicit that was happening.*

(Tr Vol 3/18/13, pp 9, lns 9-19)

Although the Court further attempted to nail-down whether Applicant was specifically informed by counsel that his case was being tried on that day, attorney Johnston remained elusive and ambiguous as to whether Applicant was in fact advised that his case was going to be tried at that time, and concluded that "I believe, yes, sir." (Id, TR pp 10, ln 23)

Despite counsels inconclusive responses, the Court went on to find that Applicant had been informed as to impending trial and knowingly failed to appear (Id Tr pp 11-12).

Applicant contends that counsel should have, but did not, request a continuance of the proceedings at that juncture to allow counsel to contact Applicant and have him appear before the Court. Counsel knew, or should have known--based on previous occasions and talking with Applicant that day-- that Applicant had left the courthouse headed back to Georgia.

It is apparent from the colloquy conducted between the Court and the counsel that attorney Johnston was not sure about informing Applicant that his (Applicant's) case would in fact be tried that day. Counsel stated that it was "implicit" that Applicants case would be called for trial that day (Tr p 9, ln 18). However, on the contrary, it was explicit that the case would not be tried (or guilty plea entered) that day, and counsel did not inform Applicant to remain at the courthouse "specifically" or otherwise (Id pp 9, ln 17).

Had counsel requested a continuance on March 18, 2013, and explained to the Court that there may have been a misunderstanding between the Applicant and counsel regarding Applicants continued attendance, there is a reasonable probability that the Court would have granted a continuance, allowing for contact with Applicant and averting a bench warrant and Applicants trial in absentia. cf, Morris v State, 639 SE 2d 53, 54-55 (s Ct Sup 2006) (Counsel ineffective for not requesting continuance before having defendant tried in absentia). Apparently, weary of being held responsible for Applicants non-attendance, counsel suggested that Applicant knew that his case was ripe for trial on March 18, 2013, and wilfully

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 M. HOPKINS
 CLERK OF COURT
 SUPERIOR COURT

absconded--which Applicant vehemently denies doing.

This case clearly shows that Applicant had been faithfully in attendance at all courthouse proceedings for the 23 months his case was pending (See footnote #1, above), and counsels failure to request a continuance in this instance amounts to deficient performance which substantially prejudiced the Applicants criminal proceedings.

On March 18, 2013, at approximately 1 PM the Court instructed Bailiff Bogan to go outside the courthouse and summon the Applicant by name (Tr pg 13, lns 1-3). Upon return the bailiff indicated that there was no response by Applicant. Consequently, a bench warrant was issued and Applicants case proceeded in his absence (in absentia).

Conspicuously absent at this juncture of the proceedings is any objection by defense counsel with respect to the Applicant being tried in absentia. Not only did counsel shift the blame for Applicants absence to Applicant and fail to request a continuance, counsel failed to make any record objecting to Applicants trial proceeding in his absence. Counsels complete failure to object to the courts ruling to proceed with Applicants trial in absentia clearly amounts to deficient performance. Moreover, counsels failure to lodge objections/argue against Applicants trial in absentia substantially prejudiced Applicants criminal proceedings inasmuch as the Applicant was deprived of his fundamental Constitutional right to be present at his criminal trial proceedings, and this issue was not preserved by counsel for appellate review.

Additionally, Applicant would argue that a pretrial hearing in limin is not a defendants criminal trial as defined by Rule 16, SCRCrimP, allowing for a defendants trial in absentia under specific circumstances. Consequently, the trial court erred, and attorney Johnston was ineffective for not preserving issue, when the court failed to comply with procedures related to Applicants trial in absentia on March 19, 2013, the date Applicants trial actually began with drawing of and answering-in of petit jury (Tr pp 192-123).

The applicants trial by jury did not commence on March 18, 2013, the day Applicants suppression hearing was conducted, instead the court held a motion hearing to rule on Applicants motion to suppress. After the court held the suppression hearing on March 18, 2013, the Applicants jury trial commenced the following day on March 19, 2013. At no time did the court instruct Bailiff to summon the Applicant prior to trial on March 19, 2013, nor did the court make the necessary factual findings and legal conclusions required to try a defendant in absentia. See State v Jackson, 341 SE 2d 375 (SC Sup Ct 1981); Rule 16, SCRCrimP.

Although there was some discussion among attorneys and the Court about Applicants possible whereabouts and his apparent communications with bail bondsman, the trial court failed to make the requisite factual determination and/or otherwise comply with law/rules governing trials in absentia, Jackson, supra. Notably, counsel did request a continuation at this point on March 19, 2013; however, that was an exercises in futility since the court had previously issued a bench warrant for Applicants arrest and decided to try Applicant in his absence. At no time, did counsel object to the courts determination that a motion in limin represents the beginning of defendants criminal jury trial, per se. Consequently, the Applicants criminal proceedings were manifestly prejudiced.

11 (a)(3) Applicant alleges that trial counsel was ineffective for failing to object and/or preserve for appellate review the trial courts impermissive amendment to indictment.

At the close of the prosecutions case defense counsel moved for direct verdict arguing that the prosecution had failed to prove all elements of charges as alleged in the indictment against Applicant (Tr pp 229-30). In response to defense counsels argument, the trial court directed the prosecution to

amend/redact the indictment to remove all means of violating trafficking statute except those elements related to weight of controlled substance and the bringing into state clause (id p231-32).

Counsel should have objected to the trial courts amendment of indictment which prejudiced Applicants criminal proceedings by broadening the reach of indictment and removing elements of offense as originally charged by the grand jury. cf, Bailey v State, 709 SE 2d 671 (SC 2011); State v Guthrie, 572 SE 2d 309 (SC 2002).

11(a)(4) Applicant alleges that trial counsel was ineffective for failing to object and/or preserve for appellate review the trial courts failure to ensure that all the trial court evidence went into the jury room with jurors during their deliberation process.

During the trial the Applicants traffic stop/search video was introduced as evidence. This particular video evidence portrayed scenes that Applicant contends were favorable to his defense. When it was time for the jury to begin its deliberation the videotaped evidence was supposed to go back with the deliberating jury, however, due to an oversight on the part of the prosecutor, the videotaped evidence was not with the deliberating jury. (Tr pp 273).

11(b)(1) Applicant alleges that appellate counsel was ineffective for not briefing and presenting to the South Carolina Court of Appeals trial error issues that were preserved for appellate review or warranted appellate court consideration as plain error analysis.

In particular, Applicant would cite the following issues not briefed or argued on direct appeal:

1. Whether the trial court erred when it denied counsels request for continuance of trial on March 19, 2013, and proceeded to try Applicant in absentia?

2. Whether the trial court erred in its determination that Applicant had wilfully and knowingly waived his right to be present at trial and tried Applicant in absentia?

Finally, Applicant would allege that appellate counsel failed to effectively identify, present and argue facts and case law to support the issues presented on appeal (ie, illegal traffic stop and seizure of drugs). There were facts established as part of the record on appeal that appellate counsel failed to adequately present and argue.

11(c)(1)

Applicant would reallege and state as supporting facts those set forth above in section 11(b)(1) (2), "SUPPORTING FACTS".

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HOPE BLAUGLEY
CLERK OF COURT
Spartanburg County

1st Amended Issue

1. Ineffective for not being diligent and thorough in his research in having all the facts of Applicants case and information that was critical to Applicants suppression hearing. Andrew Johnston couldn't have reviewed the Discovery Package, had he done so he would have seen that applicant s traffic stop was called in at 13:05 and was cleared at 13:10. At this point Applicant was clear to go, but instead of returning applicants paperwork and have Applicant sign the warning ticket, Officer Gilbert put it in his pocket (warning ticket) and continued to question Applicant and then called for backup at 13:12. At this time Applicant was seized and without probable cause. The exclusionary rule forbids this and it triggered Applicants Fourth Amendment rights to be free from unreasonable search and seizures. Andrew Johnston never pushed for an answer to find out why Officer never completed the traffic stop which was initiated, its purpose in the first place and to clearly define the officers job. An officer may engage in certain safety measures during a traffic stop such as inspecting drivers license and license to operate the vehicle, has insurance and whether driver has outstanding warrants. Officer may also engage in other investigative techniques unrelated to traffic infraction as long as the activity does not prolong that roadside detention, which it did and well beyond the time it took to fill out the warning citation and get it signed. The United States Supreme Court has recently clarified that extending a stop even a de minimis length of time violates the Fourth Amendment Rodriguez v United States 135 S Ct 1609 (2015). When Officer Gilbert decided not to return Applicants license and rental agreement and placed warning citation in his pocket, he was plainly trying to extend the traffic stop and his actions were very coercive.

2nd Amendment Issue

1. Ineffective assistance of counsel for not proving to the court that there was no way possible the Applicants consent was voluntary and it was Applicants Due Process right to make the state show that his consent was actually voluntary. Applicant contends that Andrew Johnston shouldnt have had any problems showing the state that Applicant consent was involuntary because at the time of request Applicant was seized, Officer never returned Applicants license or rental agreement and Officer placed unsigned warning citation in his pocket to stop applicant from leaving and to control Applicants movements. This was a coercive action by the officer. Andrew Johnston should have shown in this situation that the officer had no evidence of criminal activity and no probable cause to detain. The State tried to justify the unlawful detention by means of a consent, which was only given by means of duress and submission to a claim of lawful authority.

2. Applicant contends that in this case the state attempts to justify a search on the basis of consent. The Fourth and Fourteenth Amendment and Applicants Due Process rights require that it demonstrates that the consent was in fact voluntarily given and not the result of duress or coercion express or implied. The Constitution requires the sacrifice of neither security nor liberty.

The Due Process clause does not mandate that the police forgo all questioning or that they be given carte blanche to extract what they can. The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: The test of voluntariness.

3rd Amendment Issue

1. Ineffective assistance of counsel for not bringing plea agreement to Applicant attention which was offered on Thursday, November 1, 2012 at 1:33pm. Applicant was aware of a plea in the range of 7 - 25 years but was not advised of a plea in the range of/ or a negotiated 12 years. A plea was what Andrew Johnston was asked to get only if he felt that the case could not be won. Applicant would like to question why he was not made aware of a 12 year plea and now has a 25 year mandatory sentence.

CLERK OF COURT
STANTBORG COURT
2018 OCT 22 PM 3:22
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
Stepheno Alston,	)	
S.C.D.C. No. 357159,	)	Case No.: 2018-CP-42-03680
Applicant,	)	
v.	)	RETURN
State of South Carolina;	)	(Counsel Appointed)
Respondent.	)	

In response to the application for post-conviction relief filed by Stepheno Alston (Applicant) on October 22, 2018, Respondent would show this Court:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the June 2011 term of the Spartanburg County Grand Jury for trafficking in cocaine (2011-GS-42-03090). Andrew J. Johnston, Esq. represented Applicant, and J. Edward Hunter, Esq., of the Seventh Circuit Solicitor's Office, prosecuted the case. On March 18, 2013, a trial proceeded in Applicant's absence before the Honorable J. Derham Cole and a jury. The jury found Applicant guilty as indicted on March 19, 2013. Judge Cole at that time sealed sentence to be imposed at a later date. On September 19, 2013, Applicant appeared before Judge Cole for imposition of the sentence. Judge Cole sentenced Applicant to imprisonment for a term of 25 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Lara M. Caudy, Esq., who raised the following issues:

1. Did the court err by denying Appellant's motion to suppress evidence found in his vehicle where the officer did not have reasonable suspicion or probable

cause to stop Appellant's car for a traffic violation thereby illegally seizing Appellant in violation of the Fourth Amendment?

2. Did the court err by denying Appellant's motion to suppress evidence found in his vehicle where the officer's continued detention of Appellant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment and where the officer did not have reasonable and articulable suspicion of a serious crime nor Appellant's consent to detain him beyond the scope of the traffic stop?
3. Did the court err by denying Appellant's motion to suppress evidence found in his vehicle where Appellant's consent to search was not freely and voluntarily given, and even if it was freely and voluntarily given, was invalid as an exploitation of an unlawful detention?

The parties proceeded to oral arguments on May 6, 2015. Applicant was represented by appellate counsel Caudy, and Christina C. Bigelow, of the South Carolina Attorney General's Office, represented Respondent. By unpublished opinion decided July 29, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Alston, Op. No. 2015-UP-381 (S.C. Ct. App. filed July 29, 2015). Applicant petitioned for rehearing, which was denied by order filed September 15, 2015.

On October 26, 2015, Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari on all three issues. The State filed its Return on November 24, 2015. The Supreme Court of South Carolina granted certiorari by order dated July 18, 2016. The parties proceeded to oral arguments on December 14, 2016. Applicant was again represented by appellate counsel Caudy, and Mark R. Farthing, Esq., of the South Carolina Attorney General's Office, represented Respondent. By opinion issued March 7, 2018, the Supreme Court affirmed the Court of Appeals opinion as modified. State v. Alston, 422 S.C. 270, 811 S.E.2d 747 (2018). The Remittitur was issued on March 27, 2018.

Applicant thereafter filed a petition for writ of certiorari in the Supreme Court of the United States. The Supreme Court denied certiorari on October 1, 2018.

II. STATEMENT OF THE FACTS

The Traffic Stop

Shortly before 1:00 p.m. on March 28, 2011, Master Deputy Donnie Gilbert of the Spartanburg County Sheriff's Office was monitoring traffic on Interstate 85 when he observed the driver of a brownish-green Hyundai Santa Fe with a Georgia license tag travelling in the middle lane of the three-lane highway. (Tr. 17-18; Tr. 160-61; State's Ex. #2 (Recording of Traffic Stop)). When the vehicle passed by his location, its driver drove onto the dotted line dividing the middle lane from the far left lane before swerving back into the vehicle's lane of travel. (Tr. 18-19; Tr. 49-50; Tr. 161-62). In response, Deputy Gilbert began pursuing the vehicle in order to initiate a traffic stop and observed its driver "drift" onto the dotted dividing line several more times. (Tr. 18-19; Tr. 161-62). Deputy Gilbert then moved into position behind the vehicle and activated his patrol vehicle's blue lights, and the driver of the vehicle quickly pulled over to the side of the roadway. (Tr. 19, ll. 6-10; Tr. 162, ll. 11-15).

Thereafter, at approximately 12:54 p.m., Deputy Gilbert approached the vehicle from the passenger side and immediately noticed the luggage stowed in the back of the vehicle had been covered with a blanket, which the officer perceived to be suspicious as he had not typically seen covered luggage in the "thousands" of routine traffic stops he had conducted during his lengthy law enforcement career. (Tr. 14-15; Tr. 21, ll. 3-16; Tr. 45-46; Tr. 159-60; Tr. 163-64; State's Ex. #2). He further noticed multiple personal keys had been placed on the rental company key ring associated with the vehicle, which the officer perceived to be abnormal and recognized

through his training and experience as a tactic designed to "personalize" the vehicle in an effort to mask the fact it was a rental. (Tr. 27, ll. 13-25; Tr. 164-65).

After approaching the vehicle, Deputy Gilbert made contact with the driver and lone occupant of the vehicle, Applicant. (Tr. 21, ll. 3-9; Tr. 178). When he did so, Applicant immediately asked him why he was stopped in a defensive manner, which the officer also perceived to be abnormal in light of the fact the vast majority of people he had stopped waited for him to explain the basis for the stop. (Tr. 16-17; Tr. 112; Tr. 122; State's Ex. #2). Deputy Gilbert then asked Applicant for his driver's license, and Applicant provided the officer with a license indicating he was from Rome, Georgia, which Deputy Gilbert knew was located in close proximity to Atlanta, Georgia, a major hub of criminal activity. (Tr. 22, ll. 12-25; Tr. 75-76; Tr. 163, ll. 1-2). Immediately after that, Deputy Gilbert asked Applicant if he had had anything to drink and explained he stopped his vehicle because he had observed him hit the dotted dividing lane with his tires several times. (Tr. 23; State's Ex. #2). The officer then asked Applicant for the paperwork associated with the vehicle, and Applicant quickly provided a rental agreement to Deputy Gilbert. Id. Upon receiving the rental agreement, deputy Gilbert reviewed it and noticed the vehicle was rented by a third-party female renter two days earlier in Cartersville, Georgia, Applicant was listed as an authorized driver of the vehicle, no smoking was permitted in the vehicle, and the vehicle was only authorized to be driven in Georgia, Tennessee, Kentucky, Virginia, and West Virginia. (Tr. 25-26; Tr. 79; Tr. 168-69; Tr. 174-75; State's Ex. 14). Based on the facts he knew through his training and experience third-party rentals were commonly associated with criminal activity and female renters were frequently used by criminal organizations in an effort to allay law enforcement suspicions coupled with the fact the rental vehicle was not authorized to be driven in South Carolina, Deputy Gilbert became more

concerned and suspicious. (Tr. 25-27; Tr. 169; Tr. 207-08). The officer then asked Applicant to step out of the vehicle just over two minutes after initiating the stop. (State's Ex. #2).

When Applicant exited the rental vehicle, Deputy Gilbert noticed a residential air freshener had been stowed in the vehicle's driver side door pocket, which was suspicious to the officer based on the facts it was an air freshener designed for a home instead of a vehicle, it was unusual for air fresheners to be placed in rental vehicles, and he was aware through his training and experience air fresheners were commonly used to mask odors, including the odor of drugs. (Tr. 28-30; Tr. 88-89; Tr. 170; Tr. 173-74). The officer then asked Applicant about the rental agreement, spoke with him about his travel plans, and asked him about the status of the license while preparing a warning citation. (Tr. 30-31; State's Ex. #2). Additionally, Deputy Gilbert called Applicant's license information into dispatch, and dispatch reported Applicant's license was valid roughly six minutes into the stop. (Tr. 59; State's Ex. #2).

During Deputy Gilbert's conversation with Applicant, Applicant reported he had left Georgia that morning for Newark, New Jersey, was travelling there to bring his depressed mother home for Mother's Day, and intended to stay in New Jersey for "about a week or so." (Tr. 30-32; Tr. 176; Tr. 182; State's Ex. #2). However, the officer perceived Applicant's responses to be a "red flag" as Applicant's reported travel plans were not consistent with the length of the rental period, Mother's Day was roughly a month and a half away, and the rental agreement did not authorize travel to New Jersey. (Tr. 31-32; Tr. 39-40). Deputy Gilbert then continued to question Applicant while preparing the warning ticket and, during the questioning, Applicant acknowledged he was responsible for everything in the vehicle after initially stalling and stating he had no idea whether anyone else had access to the rental vehicle, which Deputy Gilbert perceived to be another "red flag." (Tr. 37; Tr. 41-42; Tr. 66; Tr. 179; Tr. 183-84; State's

Ex. #2). Furthermore, Applicant claimed he worked at a clothing store to support his six children before providing the ages of seven children, which further raised the officer's suspicions based on Applicant's stressed manner of delivery and the inconsistency of Applicant's statements. (Tr. 38-39; Tr. 181; State's Ex. #2).

Based on the factors he had observed while preparing the warning ticket, Deputy Gilbert decided to ask Applicant for consent to search the vehicle and did so roughly sixteen minutes into the stop after another officer arrived at that location and just after he finished preparing the warning citation. (Tr. 40-42; Tr. 71; Tr. 75; Tr. 183-88; State's Ex. #2). In response to the request, Applicant indicated he was "just trying to figure out what this [was] about," and the officer informed Applicant he was simply asking a question. (Tr. 42; Tr. 186; State's Ex. #2). At that point, Applicant informed the officer he could search the vehicle. *Id.* Deputy Gilbert then explained to Applicant he could refuse to provide consent, and Applicant again affirmed the officer could search the vehicle. (Tr. 42-43; Tr. 186-87; State's Ex. #2). After Applicant had twice provided consent, Deputy Gilbert moved towards the vehicle, but he elected to return to Applicant and ensure he was providing consent for the search. (Tr. 43; Tr. 187; State's Ex. #2). During their ensuing conversation, Alston indicated the officer was the one providing consent as opposed to himself, and Deputy Gilbert quickly replied that statement was incorrect. (Tr. 43; Tr. 74; Tr. 187; State's Ex. #2). The officer then again asked for consent to search, and Applicant once again clearly affirmed the officer was permitted to search the vehicle. (Tr. 43; Tr. 187; State's Ex. #2).

Once he was certain he had Applicant's consent, Deputy Gilbert began searching the rental vehicle and started his search with the covered luggage stowed in the vehicle's rear area. (Tr. 44; Tr. 188-19; State's Ex. #2). As he was conducting the search, Captain Randy Hollifield

of the Spartanburg County Sheriff's Office arrived at the scene and began assisting with the search and, shortly thereafter, the captain located two vacuum-sealed packages containing a white powder substance hidden in a space near the steering column of the vehicle. (Tr. 45; Tr. 189-90; Tr. 212-17; State's Ex. #2). Applicant was then quickly placed under arrest, and the white powdery substance found in the rental vehicle was later confirmed to be over four hundred grams of cocaine. (Tr. 192; Tr. 226).

Applicant's Absence from Trial

Applicant's trial was called on March 18, 2013. (Tr. 8, ll. 13-14). Applicant was not present. (Tr. 8, ll. 20-23). Upon inquiry by the Court, Counsel reported "that he was present here earlier, and as recently as, I want to say, 11:30, 12:00, something like that, I'm not sure exactly what time it was." (Tr. 8-9). The Court observed Applicant had been seated with Counsel when the Court was notified the case was for trial. (Tr. 9, ll. 4-8). Counsel further explained he had been speaking with Applicant outside of the courtroom about possibly pleading guilty; Counsel attended to matters within the courtroom, and when he went back outside found Applicant was gone. (Tr. 9, ll. 9-14). The Court inquired as to Applicant's notice of trial:

THE COURT: And did you tell him to stay, that the case was being called for trial?

MR. JOHNSTON: I did not tell him that specifically, Your Honor, but I believe it was implicit what was happening.

...

THE COURT: And you had - - you had informed him that his case was being called for trial this morning?

MR. JOHNSTON: Yes, sir.

THE COURT: And when was he first informed of that fact?

MR. JOHNSTON: Well, I - - -

THE COURT: By you?

MR. JOHNSTON: I spoke with him on the telephone last week, Your Honor, and told him he was very high on the docket.

THE COURT: And you talked to him today - - -

MR. JOHNSTON: Yes, sir.

THE COURT: - - - about his case was, in fact, up for trial, first up?

MR. JOHNSTON: Yes, sir.

THE COURT: And he was, in fact, - - and he was, in fact, present and understood that his case was being called for trial?

MR. JOHNSTON: I believe, yes, sir.

THE COURT: Okay. And - - well, it was either being called for trial or being called for disposition by way of a guilty plea if he preferred?

MR. JOHNSTON: Yes, sir.

THE COURT: You talked to him about the trial and about pleading guilty?

MR. JOHNSTON: Yes. Yes, sir.

THE COURT: Okay.

MR. JOHNSTON: Absolutely.

THE COURT: So y'all were prepared and ready to proceed with the trial of the case in the event he did not wish to enter a plea of guilty?

MR. JOHNSTON: Yes, sir.

(Tr. 9-11). The trial court thereafter noted Applicant was informed that if he failed to attend the court for trial that trial would proceed in his absence. (Tr. 11-12). At the trial court's instruction, the bailiff called Applicant's name outside the courtroom and thereafter reported there was no response. (Tr. 13, ll. 1-4). Judge Cole then issued a bench warrant for Applicant's arrest. (Tr. 13, ll. 5-7). Trial in absentia proceeded thereafter.

III. CURRENT APPLICATION

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons (excerpts verbatim):

1. Ineffective assistance of trial counsel, in that:
 - a. "Applicant was deprived effective assistance of counsel when trial counsel failed to adequately and properly apprise/advise the Applicant with regards to pretrial, trial and other court proceedings related to Applicant's criminal charges."
 - i. "Specifically, Applicant alleges, and will prove given fact development proceedings, that attorney Andrew Johnston failed to inform the Applicant that his criminal case would be called for trial on March 18, 2013. As a result of counsel's failure to apprise Applicant about criminal court proceedings/scheduling, the Applicant believed that he could depart the courthouse on March 18, 2013, and return at a later date."
 - ii. "From the beginning of the case, it had been both Applicant and counsels understanding that Applicant would either enter into plea negotiations and eventually plead guilty to a charge for reduced sentence if counsel was not successful with pending motion to suppress evidence seized during traffic stop and search of Applicants rental vehicle. Applicant was led to believe by attorney Johnston that the suppression hearing would be conducted prior to and separate from and trial or guilty plea hearing being commenced. And that counsel was confident that a plea agreement would be reached in Applicants case."
 - b. "Applicant was deprived effective assistance of counsel when attorney Johnston failed to properly object, preserve for appellate review and address the courts decision to proceed with Applicants criminal case in absence of the Applicant. Consequently, as a result of counsels deficient performance, the Applicant was tried in his absence and deprived of his constitutional right to be present at critical criminal proceedings."
 - i. "Applicant contends that counsel should have, but did not, request a continuance of the proceedings at that juncture to allow counsel to contact Applicant and have him appear before the Court. Counsel knew, or should have known—based on previous occasions and talking with Applicant that day—that Applicant had left the courthouse headed back to Georgia."

- ii. "Although there was some discussion among attorneys and the Court about Applicants possible whereabouts and his apparent communications with bail bondsman, the trial court failed to make the requisite factual determination and/or otherwise comply with law/rules governing trials in absentia. [State v. Jackson, 228 S.C. 94, 341 S.E.2d 375 (1986)]. Notably, counsel did request a continuation at this point on March 19, 2013; however, that was an exercise in futility since the court had previously issued a bench warrant for Applicant's arrest and decided to try Applicant in his absence. At no time did counsel object to the courts determination that a motion in limine represents the beginning of defendants jury trial, per se. Consequently, the Applicants criminal proceedings were manifestly prejudiced."
- c. "Applicant alleges that trial counsel was ineffective for failing to object and/or preserve for appellate review the trial courts impermissive amendment to indictment."
 - i. "At the close of the prosecutions case defense counsel moved for directed verdict arguing that the prosecution had failed to prove all elements of charges as alleged in the indictment against Applicant (Tr. 229-30). In response to defense counsels argument, the trial court directed the prosecution to amend/redact the indictment to remove all means of violating trafficking statute except those elements related to weight of controlled substance and the bringing into state clause (id p231-32)."
 - ii. "Counsel should have objected to the trial courts amendment of indictment which prejudiced Applicants criminal proceedings by broadening the reach of indictment and removing elements of offense as originally charged by grand jury. [Cf. Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011); State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (Ct. App. 2002)]."
- d. "Applicant alleges that trial counsel was ineffective for failing to object and/or preserve for appellate review the trial courts failure to ensure that all the trial court evidence went into the jury room with jurors during their deliberation process."
 - i. "During the Applicant's traffic stop/search video was introduced as evidence. This particular video evidence portrayed scenes that Applicant contends were favorable to his defense. When it was time for the jury to begin its deliberation the videotaped evidence was supposed to go back with the deliberating jury, however, due

- to an oversight on the part of the prosecutor, the videotaped evidence was not with the deliberating jury. (Tr. pp 273).
- e. "Ineffective for not being diligent and thorough in his research in having all the facts of Applicants case and information that was critical to Applicants suppression hearing."
 - i. "Andrew Johnston couldn't have reviewed the Discovery Package, had he done so he would have seen that applicant's traffic stop was called in at 13:05 and was cleared at 13:10. At this point Applicant was clear to go, but instead of returning applicants paperwork and have Applicant sign the warning ticket, Officer Gilbert put it in his pocket (warning ticket) and continued to question Applicant and then called for backup at 13:12. At this time Applicant was seized and without probable cause. The exclusionary rule forbids this and it triggered Applicants Fourth Amendment rights to be free from unreasonable search and seizures. Andrew Johnston never pushed for an answer to find out why Officer never completed the traffic stop which was initiated, its purpose in the first place and to clearly define the officers job."
 - f. "Ineffective assistance of counsel for not proving to the court that there was no way possible the Applicant's consent was voluntary and it was Applicants Due Process right to make the state show that his consent was actually voluntary."
 - g. "Ineffective assistance of counsel for not bringing plea agreement to Applicant attention which was offered on Thursday, November 1, 2012 at 1:33 pm. Applicant was aware of a plea in the range of 7-25 years but was not advised of a plea in the range of/ or a negotiated 12 years. A plea was what Andrew Johnston was asked to get only if he felt that the case could not be won. Applicant would like to question why he was not made aware of a 12 year plea and now has a 25 year sentence."
2. Ineffective assistance of appellate counsel, in that:
- a. "Applicant alleges appellate counsel was ineffective for not briefing and presenting to the South Carolina Court of Appeals trial error issues that were preserved for appellate review or warranted appellate court consideration as plain error analysis. In particular, Applicant would cite the following issues not briefed or argued on direct appeal:"
 - i. "Whether the trial court erred when it denied counsels request for a continuance of trial on March 19, 2013, and proceeded to try Applicant in absentia?"

- ii. "Whether the trial court erred in its determination that Applicant had willfully and knowingly waived his right to be present at trial and tried Applicant in absentia?"
 - b. "Finally, Applicant would allege that appellate counsel failed to effectively identify, present and argue facts and case law to support the issues presented on appeal (ie, illegal traffic stop and seizure of drugs). There were facts established as part of the record on appeal that appellate counsel failed to adequately present and argue."
3. "Applicant was deprived of his right to be present at all critical stages of criminal proceedings as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, applicable to the State of South Carolina by and through the 14th Amendment, US Const.; South Carolina State Constitution Article I, Section 3, 14; State v. Fahey, 646 S.E.2d 445 (SC 2007).
 - a. "Applicant would reallege and state as supporting facts those set forth above[.]"

Applicant requests relief as follows:

- "(A) order respondent to answer petition (B) Allow Applicant 45 days to file reply (C) Appoint Counsel and conduct evidentiary hearing (D) Vacate Conviction and Sentence"

Attached to and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial and sentencing transcripts, Applicant's appellate records, and the current application for relief. Not attached but incorporated by reference are those exhibits introduced at trial and on file with the Spartanburg County Clerk of Court (listed at Tr. 4-5). Respondent reserves the right to amend this Return upon receipt of relevant information.

IV. RESPONSE TO CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Ineffective Assistance of Trial Counsel, Generally

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of

counsel as a ground for relief, Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel’s performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Trial in Absentia

“It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence.” State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010); see also Rule 16, SCRCrimP (“Except in cases

wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.”) “A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the defendant in his absence.” Ravenell, 387 S.C. at 455, 692 S.E.2d at 557-58. “[N]otice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial.” Id., 387 S.C. at 456, 692 S.E.2d at 558. “Further, a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear.” Id. “The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice.” Id.

Where a defense counsel is faced with the prospect of proceeding with a trial *in absentia*, he or she may be professionally obliged to both move for a continuance *and* object to proceeding *in absentia*. See Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006) (finding ineffectiveness where counsel failed to move for a continuance when defendant signed a sentencing sheet to plead guilty to a lesser-included offense and then left the courthouse). To show prejudice from counsel’s failure to move for a continuance, an applicant must show the trial court’s denial of the motion would have amounted to an abuse of discretion, and that the additional time would have changed the ultimate result; Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 370 (1997) (in the context of a competency evaluation); cf. Early v. State, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016) (citing Morris, 371 S.C. at 283, 639 S.E.2d at 56) (“To prove prejudice resulting from

counsel's failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court's denial of the motion would have amounted to an abuse of discretion.").

The record demonstrates Applicant was present at the courthouse and either did or should have known that his trial was set to proceed that day. Counsel informed the trial court Applicant was aware he was not only on the trial docket, but very high on that docket. The Court observed Applicant was warned about the possibility of a trial *in absentia* in his bond paperwork. Applicant knew he was facing trial, knew the strength of the case against him, and absconded. He cannot now, after being captured, sentenced, and having exhausted his rights to a direct appeal, credibly craft a narrative to try and fit his own effort to obstruct the processes of justice into the more understandable facts of Morris.

Amendment of the Indictment

"Amendments to an indictment are permissible if: (1) they do not change the nature of the offense; (2) the charge is a lesser included offense of the crime charged in the indictment; or (3) the defendant waives presentment to the grand jury and pleads guilty." State v. Sosbee, 371 S.C. 104, 637 S.E.2d 571 (Ct. App. 2006); see also S.C. Code Ann. § 17-19-100 ("If . . . (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged.") "After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended, unless such amendment shall operate as a surprise to the

defendant, in which case the defendant shall be entitled, upon demand, to a continuance of the cause.” S.C. Code Ann. § 17-19-100.

Applicant misrepresents the nature of the “changes” to the indictment occurring at the close of evidence. Counsel moved for a directed verdict as to particular acts alleged in the indictment providing for alternative theories of Applicant’s guilt. Counsel prevailed upon that motion, and the indictment submitted to the jury was redacted of theories for which no evidence was presented.

Failure to Prepare

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54; 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Applicant cannot show what, if anything, Counsel would have discovered had he spent more time in preparation for trial, nor can Applicant show anything sufficient to show that a different outcome would have resulted at trial. Applicant’s meticulous picking at the facts presented at trial and in the evidence has already been thoroughly covered at trial and on appeal.

Failure to Communicate Plea Offer

The right to the effective assistance of counsel extends to the plea bargaining process. Davie v. State, 381 S.C. 602, 607, 675 S.E.2d 416, 419 (2009) (abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)). Consequently, defense attorneys have a constitutional duty to communicate formal, favorable plea offers from the prosecution to their clients. Missouri v. Frye, 566 U.S. 134, 145 (2012); Bell v. State, 410 S.C. 436, 765 S.E.2d 4 (Ct. App. 2014); see also Lafler v. Cooper, 566 U.S. 156, 169-70 (2012) (rejecting proposition that a fair trial wipes clean any deficient performance by defense counsel during plea bargaining). To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, "defendants must demonstrate a probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." Frye, 566 U.S. at 147. "Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it[.]" Id. "[I]t is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Id.

Respondent is presently without knowledge or information sufficient to form a belief as to the actual existence of the purported offer, whether it was communicated to Applicant, and whether it was rejected by Applicant. See Rule 8, SCRCP (effectively a denial of the allegation). However, the plea terms indicated by Applicant (12 years negotiated) are, on their face, not clearly superior to the terms of a recommended range that he rejected (7 to 25 year range). Therefore, Applicant cannot meet his burden of showing he would have clearly accepted such an offer or that it would have resulted in a superior outcome compared to the offer he rejected.

Conclusion and Action Requested

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V. RESPONSE TO CLAIM OF INEFFECTIVE APPELLATE COUNSEL

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .")).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective

assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Applicant's proposed issues are clearly not superior to those which were actually raised by Appellate Counsel in the Court of Appeals and later the Supreme Court, where a published opinion was ultimately issued. Nonetheless, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that the record does not conclusively refute.

Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue.

See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI. ASSERTION OF RIGHTS TO NOTICE OF AMENDMENTS, EXPERTS

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing.

Any claims not specifically laid out in this PCR application or in amendments *will be opposed by the State at an evidentiary hearing* pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCF; Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017). All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCF. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCF.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests

that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VII. GENERAL DENIAL

Respondent denies each allegation not expressly admitted, qualified, or explained.

VIII. CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of trial and appellate counsels.

Respectfully submitted,

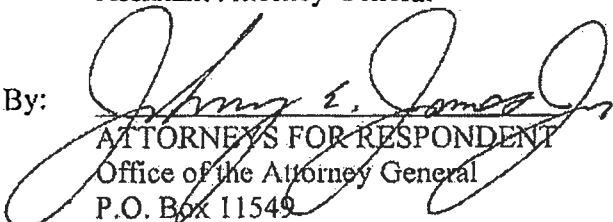
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

25 Feb., 2019

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

2018-CP-42-3680

STEPHENO ALSTON, #357159,

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

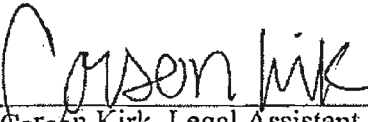
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Rodney Wade Richey, Esquire
Richey & Richey, PA
Post Office Box 10916
Greenville, South Carolina 29603-0916

DATED this the 25th day of February, 2019.


Carson Kirk, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
STEPHENO ALSTON,	)	AMENDED APPLICATION
APPLICANT.	)	
v.	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	CASE # 2018-CP-42--3680
RESPONDENT.	)	

This matter comes before the Court by way of application of post conviction relief filed October 22, 2018, alleging ineffective assistance of trial counsel. A Return was made on February 25, 2019. To supplement the allegations of the original application, the Applicant adds the following allegations:

I. Ineffective assistance of trial counsel for

(a) failure to move to suppress the evidence based on both the 4th Amendment of the US Constitution's prohibition against unreasonable search and seizure without a search warrant supported by probable cause and Article I, Sec. 10 of the S.C. Constitution prohibition against unreasonable search and seizure without a search warrant supported by probable cause "and unreasonable invasions of privacy";

(b) failing to argue that the communications report shows purpose of the stop was completed at minute eight before officer Gilbert had established many of the facts he cited to support the basis for his suspicion of criminal activity to justify his extending the scope of the stop beyond its initial purpose. The timeline of the stop shows the car registration and Alston's driver's license cleared around six (6) minutes after the initial stop at which point officer Gilbert calls for "non-priority" backup. See Spartanburg Communications Report. By around eight (8) minutes into the stop you can see on the video that the warning ticket is filled out which shows

the purpose of the stop is complete at that point. See State's Exhibit #2, DVD, at 1:03:03.

Because counsel failed to argue this point, the Court's reasoning was based on the false narrative that the purpose of the stop was completed fourteen (14) minutes into the stop when officer Gilbert tears the long completed ticket off of the pad upon the approach of the backup unit.

(c) failing to argue that the pat down and continued questioning of Mr. Alston after the warning ticket and the purpose of the stop were completed was an nonconsensual unconstitutional extension of the duration of the stop. Officer Gilbert testified that he never returned the Applicant's license or gave him the warning ticket and conceded that Mr. Alston was not free to leave during this time before the officer requested consent to search the vehicle.(R. p. 69, l. 13).

(d) failing to argue that if officer Gilbert truly had a reasonable suspicion of a serious crime, he would have requested a priority backup unit which he specifically did not.

(e) failing to argue that officer Gilbert violated S.C. Code Section 56-7-35 by not giving the warning ticket to the Applicant at the time of the stop.

(f) failing to argue that the warning ticket was discoverable exculpatory evidence in the Applicants case that the State failed to produce in violation of *Brady* and Rule 5.

(g) failing to request continuance after a bench warrant was issued in the case or object to a trial in absence arguing that his ability to effectively try the case hinged on Mr. Alston's presence and that given the serious nature of the charge with its mandatory sentence fundamental fairness and due process required allowing a continuance. R. p.12 & 102.

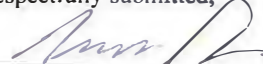
(h) failing to convey plea offer of a negotiated twelve years.

2. Ineffective assistance of appellate counsel failing to argue that the video and transcript show purpose of the stop was completed at minute eight before officer Gilbert had

established many of the facts he cited to support the basis for his suspicion of criminal activity to justify his extending the scope of the stop beyond its initial purpose. The timeline of the stop shows the car registration and Alston's driver's license cleared around six (6) minutes after the initial stop at which point officer Gilbert calls for "non-priority" backup. See Spartanburg Communications Report. By around eight (8) minutes into the stop you can see on the video that the warning ticket is filled out which shows the purpose of the stop is complete at that point. See State's Exhibit #2, DVD, at 1:03:03 & Tr. Transc p . 175 & pp. 182-4. Because appellate counsel failed to make these arguments, the Court's reasoning was based on the false narrative that the purpose of the stop was not completed until fourteen (14) minutes into the stop when officer Gilbert tears the long completed ticket off of the pad upon the approach of the backup unit.

3. Violations of Due Process rights guaranteed by the Fifth, and Fourteenth Amendments of the Constitution of the United States & Art. I Sec.3 of the South Carolina Constitution amounting to the denial of a fair trial. *See State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (S.C. 2012)

Respectfully submitted,


 Susannah Ross
 Attorney for the Applicant
 330 E. Coffee St.
 Greenville, SC 29601
 (864) 242-0029

CLERK OF COURT
 SPARTANBURG COUNTY
 J. W. COX

2021 JUL 26 AM 9:54

FILED

Greenville, South Carolina
 This 20 day of July, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
STEPHENO ALSTON,	)	AFFIDAVIT OF SERVICE
APPLICANT.	)	
v.	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	CASE # 2018-CP-42--3680
RESPONDENT.	)	

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Amended Application** in the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Office of Attorney General Alan Wilson
P.O. Box 11549
Columbia, SC 29211


Attorney for Applicant

This 22 day of July, 2021

FILED
2021 JUL 26 AM 9:54
CLERK OF COURT
SPARTANBURG COUNTY
AMY VY COX

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
STEPHENO ALSTON,	)	SECOND
APPLICANT.	)	AMENDED APPLICATION
v.	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	
RESPONDENT.	)	CASE # 2018-CP-42--3680
_____	)	

This matter comes before the Court by way of application of post conviction relief filed October 22, 2018, alleging ineffective assistance of trial counsel. A Return was made on February 25, 2019. To supplement the allegations of the original application, the Applicant adds the following allegations:

1. Ineffective assistance of trial counsel for

(a) failure to prepare a pretrial memorandum and move to suppress the evidence based on both the 4th Amendment of the US Constitution's prohibition against unreasonable search and seizure without a search warrant supported by probable cause and Article I, Sec. 10 of the S.C. Constitution prohibition against unreasonable search and seizure without a search warrant supported by probable cause "and unreasonable invasions of privacy";

(b) failing to argue that the communications report shows purpose of the stop was completed at minute eight before officer Gilbert had established many of the facts he cited to support the basis for his suspicion of criminal activity to justify his extending the scope of the stop beyond its initial purpose. The timeline of the stop shows the car registration and Alston's driver's license cleared around six (6) minutes after the initial stop at which point officer Gilbert calls for "non-priority" backup. See Spartanburg Communications Report. By around eight (8) minutes into the stop you can see on the video that the warning ticket is filled out which shows

95:51:51 01/01/2019

the purpose of the stop is complete at that point. See State's Exhibit #2, DVD, at 1:03:03.

Because counsel failed to argue this point, the Court's reasoning was based on the false narrative that the purpose of the stop was completed fourteen (14) minutes into the stop when officer Gilbert tears the long completed ticket off of the pad upon the approach of the backup unit.

(c) failing to argue that the pat down and continued questioning of Mr. Alston after the warning ticket and the purpose of the stop were completed was an nonconsensual unconstitutional extension of the duration of the stop. Officer Gilbert testified that he never returned the Applicant's license or gave him the warning ticket and conceded that Mr. Alston was not free to leave during this time before the officer requested consent to search the vehicle.(R. p. 69, l. 13).

(d) failing to argue that if officer Gilbert truly had a reasonable suspicion of a serious crime, he would have requested a priority backup unit which he specifically did not.

(e) failing to argue that officer Gilbert violated S.C. Code Section 56-7-35 by not giving the warning ticket to the Applicant at the time of the stop.

(f) failing to argue that the warning ticket was discoverable exculpatory evidence in the Applicants case that the State failed to produce in violation of *Brady* and Rule 5.

(g) failing to request continuance after a bench warrant was issued in the case or object to a trial in absence arguing that his ability to effectively try the case hinged on Mr. Alston's presence and that given the serious nature of the charge with its mandatory sentence fundamental fairness and due process required allowing a continuance. R. p.12 & 102.

2. Ineffective assistance of appellate counsel for:

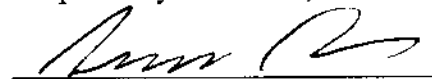
(a) failing to argue that the video and transcript show purpose of the stop was completed at minute eight before officer Gilbert had established many of the facts he cited to

support the basis for his suspicion of criminal activity to justify his extending the scope of the stop beyond its initial purpose. The timeline of the stop shows the car registration and Alston's driver's license cleared around six (6) minutes after the initial stop at which point officer Gilbert calls for "non-priority" backup. See Spartanburg Communications Report. By around eight (8) minutes into the stop you can see on the video that the warning ticket is filled out which shows the purpose of the stop is complete at that point. See State's Exhibit #2, DVD, at 1:03:03 & Tr. Transc p . 175 & pp. 182-4. Because appellate counsel failed to make these arguments, the Court's reasoning was based on the false narrative that the purpose of the stop was not completed until fourteen (14) minutes into the stop when officer Gilbert tears the long completed ticket off of the pad upon the approach of the backup unit.

(b) failing to argue the holding in Rodriguez v. United States that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures which was decided April 21, 2015, before the Applicant's case was heard. Rodriguez v. United States, 135 S. Ct. 1609, 191 L. Ed. 2d 492, 575 U.S. 348 (2015)

3. Violations of Due Process rights guaranteed by the Fifth, and Fourteenth Amendments of the Constitution of the United States & Art. I Sec.3 of the South Carolina Constitution amounting to the denial of a fair trial. *See State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (S.C. 2012).

Respectfully submitted,



Susannah Ross
Attorney for the Applicant
330 E. Coffee St,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This 15 day of April, 2021

SEARCHED
SERIALIZED
INDEXED
FILED
APR 15 2021
CLERK OF COURT
JULIA A. HARRIS
1500 N. MAIN ST.
GREENVILLE, SC 29601
864.242.7300

STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG	)	2018-CP-42-03680
	)	
	)	
	)	
	)	
STEPHENO ALSTON,	)	
	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
THE STATE OF SOUTH CAROLINA,	)	
DEFENDANT.	)	
	)	

April 20, 2022
Columbia, South Carolina

B E F O R E:

THE HONORABLE G.D. MORGAN JR., JUDGE.

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

CHELSEY MARTO, ESQ.
Assistant Attorney General

SUSANNAH ROSS, ESQ.
Attorney for the Applicant

AMBER PAYNE, CVR
Circuit Court Reporter

I N D E X

(SW) - Denotes State's Witness
 (AW) - Denotes Applicant's Witness

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NO. DESCRIPTION

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P R O C E E D I N G S

(Whereupon, the hearing began at
10:53 a.m.)

THE COURT: All right. Now, "Alston vs. the State,"
2018-CP-42-3680. Are we ready to proceed?

MS. MARTO: Yes, Your Honor.

THE COURT: All right.

MS. ROSS: Yes, Your Honor.

THE COURT: All right. I'll hear from you.

MS. MARTO: May it please the Court. Applicant is
confined in the South Carolina Department of
Corrections pursuant to orders of commitment from
the Spartanburg County Clerk of Court. Applicant
was indicted June 2011 for trafficking in cocaine.

He was represented by Mr. Andrew Johnston, and
J. Edward Hunter of the 7th Circuit Solicitor's
Office prosecuted the case. On March 18th, 2013, a
trial proceeded in applicant's absence before the
Honorable J. Derham Cole and a jury. The jury found
Applicant guilty as indicted on March 19th, 2013,
and Judge Cole, at that time, sealed the sentence to
be imposed at a later date.

September 19th, 2013, Applicant appeared before
Judge Cole for imposition of the sentence. Judge
Cole sentenced Applicant to imprisonment for 25

1 years. Applicant filed a timely notice of appeal,
2 and a direct appeal was perfected by Ms. Lara Caudy.
3 The parties proceeded to oral arguments May 6th,
4 2015. Applicant was represented by Appellate
5 Counsel Caudy, and Christina Bigelow, of the South
6 Carolina Attorney General's Office, represented
7 Respondent.

8 By unpublished opinion, decided July 29th,
9 2015, South Carolina Court of Appeals affirmed the
10 conviction. Applicant petitioned for a rehearing,
11 and this was denied by order filed September 15th,
12 2015.

13 October 26th, 2015, Applicant petitioned the
14 Supreme Court of South Carolina. The State filed
15 its return November 24th, 2015. The Supreme Court
16 of South Carolina granted cert by order dated July
17 18th, 2016. The parties proceeded to oral arguments
18 December 14th, 2016. Applicant was, again,
19 represented by Ms. Caudy, and Mark Farthing of the
20 South Carolina Attorney General's Office represented
21 Respondent.

22 By opinion, issued March 7th, 2018, the Supreme
23 Court affirmed the Court of Appeals's opinion as
24 modified, and the remittitur was issued March 27th,
25 2018. Applicant filed a petition for writ of cert

1 in the Supreme Court of the United States, and they
2 denied cert on October 1st, 2018.

3 Now, this PCR application was filed October
4 22nd, 2018, and the State made their return February
5 25th, 2019. With that, I'll turn it over to Ms.
6 Ross.

7 THE COURT: All right. Ms. Ross?

8 MS. ROSS: Thank you, Your Honor. May it please the
9 Court. I filed an amended application, but I just
10 wanted to include Mr. Alston's issues, as well. You
11 can imagine it's been a real roller coaster for him,
12 a very close search and seizure case. But there
13 were other issues, as well, trial and absence.

14 In my amended application -- I believe I did a
15 second amended application that I passed up there
16 for you. The issues are that -- the failure to
17 argue and suppression of Fourth Amendment and
18 Article 1, Section 10. You could read them if you'd
19 prefer. Failing to argue that the communications
20 report shows the purpose of the stop was completed
21 at Minute 8 before Officer Gilbert has established
22 many facts that he cited to support the basis for
23 his suspicion of criminal activity to justify
24 extending the scope of the stop beyond its initial
25 purpose. But if you read the appellate opinions and

1 Supreme Court opinion, they list different factors
2 that supposedly gave rise to probable cause in this
3 case. So they're listing these factors. Many of
4 these factors came out in what I would call just a
5 stalling technique of Officer Gilbert to extend the
6 -- the stop. And that was the whole appellate
7 issue, as well.

8 We would argue that if you look at the -- the
9 actual tape, along with the CAD report, it shows
10 that the license came back valid at Minute 8, not at
11 Minute -- around 14. That was the whole basis of
12 the appellate argument and the suppression argument
13 at trial.

14 Am I -- am I making myself clear? I'm sorry.

15 THE COURT: Yeah. You are.

16 MS. ROSS: Now, the -- the next allegation is
17 failure to argue that the pat down and continuing
18 questioning of Mr. Alston was a nonconsensual,
19 unconstitutional extension of the stop. Officer
20 Gilbert, himself, testified he never returned the
21 applicant's license or gave him the warning ticket
22 and stated that he was not free to leave. So it was
23 -- if Officer Gilbert's opinion is the applicant's
24 not free to leave, he is in detention being
25 questioned.

1 "D," was failing to argue that Officer Gilbert
2 -- that if Officer Gilbert truly had a reasonable
3 suspicion of a serious crime, he wouldn't have -- he
4 would have requested a priority backup, which he
5 specifically did not. He requested nonpriority
6 backup.

7 Failing to argue that Officer Gilbert violated
8 S.C. Code 56.735 by not giving the warning ticket to
9 the applicant at the time of the stop. The -- this
10 F section that I put in there is nonapplicable.
11 Actually, the ticket was given to the defense
12 attorney and made Defendant's Exhibit 1. So we
13 waive that allegation.

14 "G," failing to request a continuance after the
15 bench warrant was issued in the case or object to a
16 trial in absentia. And -- and he failed to argue --
17 I often will argue truly for a trial in absentia
18 that I can't effectively represent a client without
19 that client there. This case hinged often on the
20 consent that was given, whether a consent to search
21 was given, and, certainly, that would've been an
22 important issue for Mr. Alston to testify about.
23 What -- what was his intent? Was there consent?
24 And that's -- I cited the record, Pages 12 and 102.

25 "H," I think I omitted that one. There

1 -- the plea was negotiated. I -- I mean, the
2 negotiated plea offer was given to the applicant, so
3 if that allegation's there, it should be waived.
4 Then there's ineffective assistance of appellate
5 counsel. And there it is just, basically, conceding
6 that Minute 14 was when the -- the stop was
7 completed, when in fact, if you look at the -- the
8 recording of the stop, you can see the fully filled
9 out ticket blows up into the dash cam; and you can
10 see that fully completed ticket that the officer has
11 done. And, therefore, the whole sort of basis of
12 the -- the whole timeline for the appeal, we'd
13 argue, was off. And at this point, I would just go
14 ahead and call Mr. Alston to the stand --

15 THE COURT: All right.

16 MS. ROSS: -- and present some testimony.

17 THE COURT: All right. Mr. Alston, come up here and
18 be sworn.

19 (WHEREUPON, the applicant was sworn.)

20 **DIRECT EXAMINATION OF STEPHENO ALSTON**

21 BY MS. ROSS:

22 Q Okay. Mr. Alston, just briefly, can you give a brief
23 description of what -- what happened in your case? We've
24 heard a lot already.

25 A It was --

1 THE COURT: If you --

2 THE APPLICANT: -- March 28 --

3 THE COURT: If you want to, you can take that mask
4 down, so the court reporter can understand you, and
5 we can all hear you.

6 A It was March 28, 2011. I was pulled over by Spartanburg
7 County Sheriff's Office, Donnie Gilbert. The
8 communication sheet say I was caught -- that it was
9 called in -- that the stop was called in at 1:05 for
10 failure to maintain my lane, which was, basically,
11 weaving within my lane. Officer Gilbert was the -- the
12 only officer on the scene at that time.

13 Q Do you recall weaving?

14 A Yeah. A little bit, which gave him probable cause to
15 pull me over.

16 Q Okay.

17 A I remember asking him -- I remember him asking for my
18 license and registration. I provided him with everything
19 he needed to complete the traffic stop, and, yet, it was
20 never completed. I found out later that the operator had
21 cleared Applicant at five minutes later. The next thing
22 I remember, Officer Gilbert putting Applicant's warning
23 ticket and paperwork in his pocket, and the traffic stop
24 turned into a drug investigation which lasted until 2:52.

25 Q Okay. Now, you weren't there for your trial, right?

1 A No.

2 Q What happened? Why weren't you there?

3 A I believe it was just a miscommunication problem.

4 Q All right. And --

5 A Because I -- I wasn't called to go -- come up there for
6 roll call. I wasn't called to come for trial.

7 Q And you've alleged in effect, -- do you think it would've
8 helped if you could have been at your trial?

9 A I mean, I'm pretty sure it would have because a lot -- a
10 lot of things that I -- I could've put on record was not
11 put on record.

12 Q Now, you've alleged ineffective assistance of counsel.
13 About that, what things should you -- what should've been
14 put on the record?

15 A You want to know why I'm filing ineffective assistance of
16 counsel?

17 Q Well, let's start there.

18 A Well, I'm filing ineffective assistance of
19 counsel --

20 THE COURT: Can you lean up on -- closer --

21 THE APPLICANT: Okay.

22 THE COURT: -- to the microphone, please, sir?

23 A I'm filing ineffective assistance of counsel to argue
24 that my due process rights were prejudiced due to the
25 trial counsel not applying any legal authority to

1 Applicant's issues that should've been brought to the
2 Court's attention. I have three issues that are claimed
3 -- that are -- that are claims of deficient performance
4 by trial counsel. And one issue I'm claiming is
5 deficient performance on appellate counsel.

6 Q What are the three issues on trial counsel?

7 A Ineffective assistance of failing to argue motion to
8 suppress evidence properly. Not --

9 THE COURT REPORTER: (To the applicant) Hold --
10 hold on. Hold on.

11 THE COURT: Need to talk --

12 THE COURT REPORTER: Can you slow down?

13 THE COURT: -- a little bit slower.

14 THE APPLICANT: Okay. Sorry.

15 THE COURT: She's got to take down everything you
16 say --

17 THE APPLICANT: Okay.

18 THE COURT: -- okay?

19 THE APPLICANT: Okay. I'm sorry.

20 THE COURT: So if you'd slow down --

21 THE APPLICANT: I'm just trying to --

22 THE COURT: -- a little bit.

23 THE APPLICANT: -- get everything in.

24 THE COURT REPORTER: Can you start over with that
25 list, please?

1 A Ineffective assistance for failing to argue motion to
2 suppress evidence properly, Issue 1. Not submitting or
3 reviewing a communication sheet that would've got
4 timeline straight which was crucial to applicant
5 suppression hearing -- I mean, suppression motion.

6 Q Hold on right there. Is this what you're talking about
7 (indicates)?

8 A Yes. "B," not a --

9 THE COURT: Hold on. Hold on just a second.

10 THE APPLICANT: Oh, okay.

11 THE COURT: Hold on just a second.

12 MS. ROSS: I'd offer this as Applicant's Exhibit 1.

13 MS. MARTO: No objection.

14 THE COURT: All right. Admitted without objection.

15 And for the record, what is it?

16 (WHEREUPON, the CAD report, it is entered into
17 evidence as Applicant's Exhibit No. 1.)

18 MS. ROSS: It's the CAD report.

19 THE COURT: CAD report, okay.

20 Q Is this what you're talking about?

21 A Yes.

22 Q So you feel your lawyer was ineffective for not putting
23 this into evidence?

24 A Yes.

25 Q And why is it important?

1 A Because it would've showed the time line that I was
2 actually -- that he actually called the stop in at 1:05
3 and not 14 minutes later.

4 Q Now, tell me briefly about the time line. There's a
5 video and then the CAD report and then the incident
6 report. They don't show the same times, do they?

7 A No. They don't show the same times.

8 Q But at -- what time was it, or do you even know?

9 A I mean, I actually don't know. Only thing I -- how I
10 found out is just by getting a motion of discovery and
11 just going through the evidence.

12 Q Okay. So you admit it's pretty confusing to read it.

13 A I mean, it really is, but it's not. I mean, if he
14 would've went through the paperwork, he would've seen it
15 itself as -- as I found it.

16 Q Okay. And what's that second issue?

17 A The second issue is not applying the legal authority to
18 Officer's (as spoken) Gilbert's violation of 56.735,
19 which I think you had already touched. You can see Trial
20 Transcript Page 64, Line 11 through 15.

21 Q I'm just gonna show it to you right there. Sixty-four,
22 11 through 15. What's going on?

23 THE COURT: You say 54 or 64?

24 THE APPLICANT: 56.735.

25 MS. ROSS: Page 64.

1 THE COURT: The page. The page.

2 THE APPLICANT: Sixty-four. Oh, excuse me.

3 Q Line 11 through 15, you said?

4 A Eleven through 15.

5 Q Okay. What's going on there?

6 A It says, "When did you give out the citation? When did
7 you give -- give that to Mr. Alston?"

8 I guess the answer was, "I don't believe I ever
9 did."

10 Q And you feel your lawyer was ineffective for failing to
11 argue, and that was --

12 A Yes. Because he never gave me -- he never gave me a
13 citation, the purpose of him pulling me over. That was
14 the whole purpose, the traffic violation.

15 Q And do you recognize this (indicating)?

16 A That supposed to be the warning ticket.

17 Q All right. And what does it say there?

18 A "Exhibit 1."

19 Q All right. So that's the ticket that you never saw?

20 A I never saw that, no.

21 Q When was the first time you saw that ticket?

22 A When Rodney Richey got it for me. That's my prior PCR
23 attorney.

24 Q Okay.

25 A Which I asked for it. I've been locked up nine years,

1 and I didn't see it until last year.

2 Q Never saw it in your discovery?

3 A Never saw it, no. It wasn't in my discovery.

4 Q You think maybe he put it into evidence so it wasn't a
5 copy -- wasn't in discovery?

6 A I don't know.

7 MS. ROSS: Okay. I'd offer this as Applicant's
8 Exhibit 2.

9 MS. MARTO: No objection.

10 THE COURT: All right. Admitted without objection.
11 And for the record, what is it?

12 MS. ROSS: It is the citation given to Mr. Alston on
13 March 28th. It says at 13:11. Doesn't have a year.

14 (WHEREUPON, the citation, it is entered into
15 evidence as Applicant's Exhibit No. 2.)

16 Q Okay. Next?

17 A Seizure of applicant was unlawful, and no reasonable
18 suspicion claimed that Officer Gilbert stated created
19 probable cause.

20 Q Do you feel your trial attorney did not effectively argue
21 that?

22 A I don't think he argued that enough. I mean, because
23 that made me think. He claimed there's reasonably
24 suspicious was none of it -- didn't none of it equal
25 probable cause for him to extend that stop. It was just

1 stuff he just was naming off just to create reasonable
2 suspicion.

3 Q Okay. And those are your three issues on trial counsel?

4 A No. That's just --

5 Q Okay.

6 A That's just under that one issue. And then I got
7 stopped; prolonged beyond the time necessary to
8 effectuate the purpose of the stop.

9 Q Okay.

10 A Used to go --

11 THE COURT: (To the applicant) Slow down a little
12 bit and speak a little bit --

13 THE APPLICANT: Oh.

14 THE COURT: -- louder.

15 A That stop was prolonged -- my stop was prolonged beyond
16 the time necessary to effectuate the purpose of the stop
17 and was used to go on a fishing expedition that was not
18 tailored to its underlying justifications. See Trial
19 Transcript 84, Line 15 through 25, and 85, Line 3 through
20 18.

21 Q Okay. One second. Let's talk about what those pages
22 say. Eighty-four, 15 to 25. What does that say? Let's
23 put it on the record.

24 A It was, basically, just stating that -- let me see.

25 Q Eighty-four, Line --

1 A Fifteen through -- 15 through -- 15 through -- to --
2 okay. It says, "Okay. Well, tell me the specific nature
3 of the criminal activity that you knew at the time that
4 Mr. Alston was involved in."

5 "Again, he was involved in criminal activity."

6 "I know, but I'm asking the nature of the -- the
7 criminal activity."

8 "I don't know until I searched -- search the
9 vehicle."

10 Q Okay. And then what was the other one -- page you had?
11 Eighty-five, Line 3?

12 A Eighty-five, 3 through 18. It's pretty much summing up
13 the same thing.

14 Q Okay. And it's even in the front --

15 A That Officer Gilbert didn't -- didn't actually -- he
16 wasn't able to point to anything criminal, period. He
17 just went off a hunch.

18 Q Okay. Now, at this point, I think -- would you like to
19 watch the video?

20 A No. I don't have to watch it.

21 Q Well, we're gonna have to put it in the record at some
22 point --

23 A Okay.

24 Q -- to watch the video, so --

25 A All right.

1 Q Just -- would you like --

2 A I mean, yes. If you -- you need to.

3 THE COURT REPORTER: I -- I can't hear. Can you
4 speak up?

5 THE APPLICANT: Oh, I was telling her yes, if she
6 need to.

7 MS. ROSS: Judge, this is State's Exhibit 2 that was
8 put in at the trial.

9 THE COURT: Okay.

10 MS. ROSS: And we'd offer it as Applicant's Exhibit
11 3.

12 THE COURT: Any objection?

13 MS. MARTO: No objection.

14 THE COURT: All right. Admitted without objection.

15 (WHEREUPON, the video, it is entered into
16 evidence as Applicant's Exhibit No. 3.)

17 MS. ROSS: And it's long, but I think for the
18 purposes of this hearing, only about the first 15
19 minutes are relevant.

20 THE COURT: All right.

21 MR. HUNTER: Your Honor, it will show on your TV if
22 you just turn it on.

23 (WHEREUPON, Applicant's Exhibit No. 3 was
24 played in open court.)

25 MR. HUNTER: Is that not turning it on?

1 MS. MARTO: (Inaudible.)

2 MS. ROSS: Okay. I'm trying to pause it back here,
3 and I couldn't do it very well.

4 Q Now, can you see him there filling out the ticket? Is
5 that what your recollection of what was happening?

6 A I really -- I really can't tell by this -- by that angle
7 right there, but I would assume that's what he was doing.

8 Q Okay. And do you recall those questions being asked at
9 all?

10 A Yes.

11 MS. ROSS: Judge, I'm gonna hand you the exhibit so
12 you can follow in the CAD report. It's very hard
13 with the time all being different, and then there's
14 a part that I'm gonna stop on as we go along.

15 (WHEREUPON, Applicant's Exhibit No. 3 continued
16 to be played in open court.)

17 Q Okay. Right about then, do you hear him talking about
18 what your license report came back as -- your driver's
19 license? Did you hear her say "Stephano," and report to
20 the officer?

21 A Yes.

22 Q And that was a report about, I'm assuming, your driver's
23 license, right?

24 A Yes.

25 (WHEREUPON, Applicant's Exhibit No. 3 continued

1 to be played in open court.)

2 Q So did you hear him say something about, "I haven't
3 picked a package up?"

4 A Yes.

5 Q Okay. That's about seven minutes in. Does that sound
6 right, or did you see when it started?

7 A (No response.)

8 THE COURT REPORTER: I didn't hear the answer.

9 THE APPLICANT: Oh, I'd -- I would assume so.

10 (WHEREUPON, Applicant's Exhibit No. 3 continued to
11 be played in open court.)

12 Q Okay. My timing was bad. I was trying to stop it right
13 as that ticket blew up. Did you see the ticket blow up?

14 A Yes.

15 Q And he had just asked you what year your car was. Is that
16 correct?

17 A Yes. He should've already knew that from the paperwork.

18 Q Now, at that point, was that ticket filled out
19 completely? You're asking him about the ticket.

20 A Yes. I mean, everything -- I mean, it wasn't nothing but
21 checking a box.

22 Q All right.

23 A That's all it was.

24 Q And did you see a copy of the ticket?

25 A (No response.)

1 Q And here's a copy of the ticket.

2 A Uh-huh.

3 Q In your recollection of what you saw there, was that
4 ticket fulled out -- filled out completely?

5 A I mean, I'm pretty sure it was. At that time, the
6 traffic stop was over with.

7 Q But he didn't stop questioning you, did he?

8 A No. He continued to question me, and that was after I
9 was cleared to go.

10 Q Now, that was just about maybe six or seven minutes in,
11 correct?

12 A (No response.)

13 Q Scratch that. Never mind that. From your seat, you
14 can't tell.

15 (WHEREUPON, Applicant's Exhibit No. 3 continued to
16 be played in open court.)

17 Q Okay. Now, just looking at that, you made some
18 allegations that the stop was a fishing expedition and
19 your constitutional rights were violated.

20 A Yes.

21 Q Can you just briefly outline there what you see going on?

22 A I actually just see them stalling for time. I mean, the
23 -- the operator had already cleared me to go. But, yet,
24 and he still -- he's -- he just held me there until
25 another officer arrived. But by that video, you really

1 can't see everything that was going on. But, you know, I
2 kept telling him I wanted to know what he wanted -- what
3 -- why he wanted to search the car; what was the reason.

4 Q And --

5 A I knew everything -- I knew my license, everything, was
6 valid, so he had no reason to continue that.

7 Q And just looking at the CAD report, where does it say
8 your license was valid?

9 A At minute ten on the second
10 page.

11 Q And where does it say the registration was valid?

12 A Everything was right there. Everything was valid. Same
13 page, on -- on the second page.

14 Q Okay.

15 A And going down.

16 Q And all that was around --

17 A Yeah. See --

18 Q I don't even think it was a --

19 A About minute ten -- about -- about minute ten.

20 Q Okay.

21 A Let me see.

22 Q Would it surprise you if it was around minute six?

23 A Well, yeah. Well, you know, you -- you looking at it,
24 and that's why I was saying I'm trying to figure out, you
25 know, there's so many different --

1 Q It's -- it's --
2 A -- timelines --
3 Q -- 13:10 but --
4 A Yeah. Thirteen --
5 Q -- the stop started --
6 A -- ten, but it started --
7 Q -- at --
8 A -- 1:05.
9 THE COURT REPORTER: I'm sorry. One at a time,
10 please, sir?
11 Q What's the -- the time that --
12 A It started 13:05.
13 Q And then when was everything cleared?
14 A Everything cleared at 13:10.
15 Q And that was in regular time?
16 A Basically, about five minutes.
17 Q And then all that questioning after that --
18 A Yeah.
19 Q -- was after that?
20 A That was just --
21 Q So -- so when he's asking --
22 A -- how long --
23 Q -- your suspensions and everything, that prior
24 suspensions, he already knew your --
25 A He already my --

1 Q -- license was valid?

2 A -- knew my license was valid.

3 Q How about when he's asking about prior arrest?

4 A He already knew my -- my license was valid.

5 Q When he's asking about your kids?

6 A He already knew my license was valid.

7 Q All that stuff about -- let's see. Going back. The

8 amount of gas in the car? How much it holds?

9 A Yeah. All of that. Yeah. That was just stalling.

10 MS. ROSS: And if I haven't offered the DVD into

11 evidence, I'd offer it at this time. I believe I

12 have.

13 MS. MARTO: No objection.

14 Q Is there anything else you'd like to add?

15 A Not with that issue, no.

16 Q Okay. Let's hear the next issue.

17 A Second issue is, "Ineffective -- ineffective assistance

18 for not making the State prove that the consent was

19 voluntary. Consent to search was invalid due to it being

20 a product of an unlawful detention -- continued

21 detention."

22 Q Next?

23 A Then you go to the next issue. That was it for that

24 issue.

25 Q Okay.

1 A You want me to go to the next issue?

2 Q Yes, sir.

3 A All right. Issue 3. "Ineffective assistance for not
4 objecting to the State, amended my indictment, which was
5 A, no notice of the changes. B, not asking the court to
6 dismiss or -- or for a lesser charge because the State
7 could not prove all the elements of my indictment. C,
8 trial counsel allowed the amendment of my indictment
9 prejudice applicant -- proceeding by broadening the reach
10 of my indictment by removing elements of the offense as
11 originally charged by the Grand Jury."

12 Q Okay. Next one.

13 A Issue four. Was this -- you had already touched on this
14 one, but it's, "Ineffective assistance of appellate
15 counsel, failed to follow up and brief 'Rodriguez vs.
16 United States,' which would square up my case and opinion
17 handed down while my writ was pending. Applicant was
18 prejudiced by this error and, also, the counsel by the --
19 counsel not asking the courts to take judicial notice to
20 the above case."

21 Q Now, were you able to watch oral argument in that case?

22 A No. My girlfriend, she had went.

23 Q Okay. Anything else?

24 A No. That -- that was it; the only thing I wanted to
25 bring up.

1 MS. ROSS: That's all I have, Your Honor.

2 THE COURT: All right. Cross?

3 MS. MARTO: Yes, Your Honor.

4 CROSS-EXAMINATION OF STEPHENO ALSTON

5 BY MS. MARTO:

6 Q Good afternoon, sir.

7 A Good afternoon.

8 Q (Inaudible.) So what happened concerning docket call?
9 You appeared and then you left for your trial?

10 A Yes. I -- when I -- when I was told to come to South
11 Carolina -- because I'm from Georgia, I mean, it was
12 basically for roll call. I didn't know I was going to
13 trial.

14 Q Did Mr. --

15 A So it was just -- I mean, he -- he said he mentioned it,
16 but he didn't spascifas -- sacrifically (as spoken) say
17 that it was gonna be that day, which it could've been the
18 next day. I don't know. All I -- the only thing I
19 remember, him -- me and him talking about a plea deal.
20 He offered me a plea deal, 15 years. I told him I didn't
21 want it. He walked off. He said something about, well,
22 I'm the one that gotta do the time. He walked off. I
23 left. I didn't -- I didn't know the trial was -- I mean,
24 plus it was pretty much -- it was almost afternoon, so I
25 knew it couldn't have been no trial going on that day.

1 Q Did Mr. Johnston tell you you could leave the courthouse?

2 A I mean, no. He didn't specifically say I could leave,
3 but I figured the conversation was over when he walked
4 off.

5 Q Did he state that all proceedings for that day were over?

6 A I mean, only thing I -- the only thing I remember is like
7 I said, was just the roll call. That's the only thing I
8 came for.

9 Q But he didn't tell you that you were done for that
10 afternoon?

11 A Only thing I came for was roll call.

12 Q Now, do you recall what factors they considered when
13 prolonging the stop of the vehicle?

14 A I remember a couple of them. Extra keys on my key ring.

15 Q What keys did they belong to?

16 A My house keys.

17 Q And what car was it? Was it your personal car?

18 A It was a rental car.

19 Q Okay.

20 A I mean, what's -- where's -- what's criminal about that?

21 Q Why did you put house keys on the --

22 A I mean, I didn't wanna keep up with two sets of keys.

23 Q Okay. What's the next factor?

24 A My -- my luggage covered up with a blanket.

25 Q Okay. Did you give an explanation to the officer when he

1 asked about that?

2 A I mean, he never asked me about that.

3 Q Never asked. Okay. What's the next factor?

4 A I guess, it says something about the rental grievances.
5 Something about I was traveling on -- I was traveling
6 through -- I -- I was supposed to be in Virginia, but --
7 actually, when I -- when I rented the car, I told them I
8 was going to New Jersey. So I don't -- I -- I think they
9 just started that where they started putting on certain
10 areas where you can travel, but I didn't know it at the
11 time.

12 Q And South Carolina wasn't listed on that, correct?

13 A I mean, South Carolina wasn't listed.

14 Q Okay.

15 A No. But I did tell them I was going to New Jersey, so I
16 don't know how -- when -- when I did see the paperwork,
17 it said something about Kentucky and West Virginia and
18 all that. I didn't know where that came from.

19 Q Okay. Was the rental agreement made out in your name?

20 A It was -- I was the authorized driver, yes.

21 Q Was it made out to you or your girlfriend?

22 A My girlfriend rented the car, but I was an authorized
23 driver.

24 Q Okay. Do you recall any other factors?

25 A The air freshener. That's about it, but he didn't see

1 that until I opened the door.

2 Q What about the air freshener?

3 A I mean, he just -- he said -- he said he seen it in the -
4 - in the door.

5 Q Did you place it in there?

6 A No. I know it was already in there, I guess, because the
7 car had just came in when I rented it. See, I had
8 ordered another car, which was a Cube. I think it was a
9 Nissan, Cube, but something was wrong with it, so I took
10 it back. I believe that's how all that paperwork got
11 switched up and messed up.

12 Q Now, when you were stopped, what did you first ask the
13 officer?

14 A I asked him why was -- why was I being stopped because I
15 knew I didn't break the law. Weaving within my lane is
16 not against the law. I -- I did not break the law
17 because I never -- I just bumped the line. I just bumped
18 it. I didn't cross it. But he's still just going to
19 say, for the -- for the record, it was just permissible
20 for him to still pull me over to investigate me, to see
21 if I've been drinking or anything such and such as that.

22 Q And where were you driving from that day?

23 A I was coming from Georgia.

24 Q What part of Georgia?

25 A Atlanta, Georgia. From that area, yeah.

- 1 Q And you were driving up to New Jersey?
- 2 A Yeah. Pretty much. That's where I was going,
3 eventually.
- 4 Q Okay. Who were you gonna visit in New Jersey?
- 5 A My mother.
- 6 Q For what purpose?
- 7 A I mean, because I wanted to see my mother.
- 8 Q Did you tell the officer that you were gonna visit for
9 Mother's Day?
- 10 A Yeah. I -- I think so. I don't really remember. That
11 was 11 years ago.
- 12 Q Okay. And do you recall what month the stop occurred in?
- 13 A March the 3rd -- March the 28th, 2011.
- 14 Q So were you planning on renting a vehicle for several
15 months or --
- 16 A I mean, you know, it's easy to just get on the phone and
17 tell them that you want to extend the contract. I mean,
18 that's -- it's nothing big.
- 19 Q But the purpose for you renting the vehicle is to visit
20 your mother, correct?
- 21 A The purpose of me renting the vehicle is because I wanted
22 a vehicle.
- 23 Q Okay. And how long did you have the initial agreement
24 for?
- 25 A I -- at the time, I think it was a week. But like I say,

1 you can call -- you know, when you rent a car, you can
2 call and extend it --

3 Q But if --

4 A -- any time you want to.

5 Q If you knew you were gonna extend it by several months,
6 why didn't you state that initially?

7 A (No response.)

8 Q Now, the officer questioned you about your kids, correct?

9 A I mean, all -- what -- what that have to do with my --
10 the traffic stop?

11 Q Well, how many kids --

12 A. That still don't have --

13 Q -- did you say you had?

14 A -- anything to do with the traffic stop.

15 Q Sir, please answer my question. How many kids did you
16 say you had?

17 A At the time, I had seven.

18 Q That's --

19 A Well, six.

20 Q Did you tell the officer you had six kids?

21 A I don't remember tell you the truth.

22 Q And do you remember if you gave seven names?

23 A I don't remember.

24 Q You don't remember?

25 A So that's criminal?

1 Q Now --

2 A To extend the stop. So that's criminal to -- for me to

3 say that I got more kids than what I have?

4 Q Sir, I'm the -- with all due respect, I'm the one asking

5 the questions. And did you review discovery with counsel

6 prior to the trial?

7 A No. I reviewed discovery by myself.

8 Q Okay. But he gave you a copy of all of the discovery?

9 A Not everything.

10 Q What did he give you?

11 A I mean, I -- I got everything except for the -- the

12 traffic ticket.

13 Q So he gave you --

14 A I mean the citation.

15 Q -- everything except for that one sheet?

16 A Yeah. The -- the citation.

17 Q Do you know why?

18 A That's the only thing I don't remember being in there.

19 Q Do you know why he gave -- he didn't give that to you?

20 A I have no idea.

21 Q Did you see --

22 A Actually, I ordered the motion of discovery twice, so it

23 wasn't in the second one, either.

24 Q Did you see the officer filling out the warning when you

25 were there?

1 A I don't know. He was doing a lot of stuff. I really
2 don't remember.

3 Q So you really don't remember when he finished writing the
4 warning; is that correct?

5 A I mean, no. I just remember him putting the paperwork in
6 his pocket.

7 Q And when did he do that?

8 A Sometime during the stop.

9 Q Was it --

10 A I don't -- I don't --

11 Q -- before the other officer arrived?

12 A Only way I knew what was going on is actually when I
13 reviewed the videotape.

14 Q Okay. So do you recall if he finished ripping up and
15 putting the paperwork in his pocket several minutes after
16 he finished drafting the warning, or was that all
17 connected?

18 A Ma'am, I don't know what he was doing. I couldn't see
19 from -- from where I was standing.

20 Q Why did you give him consent to search the car?

21 A I mean, because by show of authority, he was all in my
22 face. You -- you didn't see that?

23 Q Okay. So you were just intimidated by him?

24 A I was intimidated.

25 Q Why didn't you ask for a copy of the warning when you saw

1 him filling it out?

2 A I did when we got to the County, when he tried to get me
3 to sign it.

4 Q So you did -- and he didn't give you a copy?

5 A Oh, he -- I wasn't gonna sign it at that time because he
6 didn't give it to me at the time of the traffic stop.

7 Q So you never signed the warning?

8 A He never gave it to me until we got to the County when
9 they was arresting me. When they was taking me in to
10 book me. That's when he tried to come back behind the
11 other wall and give me the ticket and get me to sign it.
12 And I told him I wasn't signing it at that time. And he
13 -- he caught a attitude and walked off.

14 Q So he offered you the ticket; you refused the ticket --

15 A This was at the jailhouse, not on -- on the -
16 on -- at the traffic stop at that time.

17 Q But you're saying you never saw the warning, so I'm kinda
18 confused.

19 A I never seen -- what I'm saying is I never seen it
20 because he didn't give it to me at the time of the
21 traffic stop. He had it in his pocket. He must have
22 realized he still had it when we got to the jailhouse.

23 Q Okay.

24 A. And so the traffic stop wasn't completed if he never gave
25 it to me. So he tried to clean it up and give it to me

1 later on that day, which almost was almost -- almost two
2 hours later.

3 MS. MARTO: One moment, Your Honor.

4 Q Now, did the officer ever give you any indication he
5 didn't think your driver's license was valid?

6 A I mean, he never let me go.

7 Q Do you think that he maybe stopped you for a reason other
8 than an issue concerning your driver's license?

9 A I have no idea what he was thinking at the time, ma'am.

10 Q Okay. But you think that he could've held you for a
11 reason after your driver's license popped up as valid?

12 A I mean, from what -- from what we just seen, I don't see
13 the reason why he -- he extended the stop, no.

14 MS. MARTO: One moment, Your Honor. No further
15 questions, Your Honor.

16 THE COURT: All right. (To Ms. Ross) Any redirect?

17 MS. ROSS: Just briefly.

18 **REDIRECT EXAMINATION OF STEPHENO ALSTON**

19 BY MS. ROSS:

20 Q Mr. Alston, you said you were intimidated. How many
21 times did he ask again when you would say no, whether he
22 could --

23 A I --

24 Q -- search your car?

25 A From what I seen -- just refreshing my memory. It looked

1 like he came back three times, and the last time when he
2 came back, he came back aggressively. And was like --
3 like he basically like, "You gonna" -- like I'm gonna
4 give him consent to search the car.

5 Q Okay. And then on Page 69, Line 7, what did he say
6 during your trial about his position on whether you were
7 in custodial custody or not?

8 A What -- what line?

9 Q Line 69 (as spoken), and Line 7.

10 A Line 69, Line 7. "In my judgment -- in my judgment, he's
11 not free to go."

12 Q Did you feel like you were free to go?

13 A No.

14 MS. ROSS: (To the Court) Nothing further.

15 THE COURT: All right.

16 MS. MARTO: No questions, Your Honor.

17 THE COURT: All right. (To the applicant) You may
18 step down.

19 (WHEREUPON, the applicant was excused.)

20 THE APPLICANT: (To Ms. Ross) Is that mine right
21 there?

22 MS. ROSS: Oh.

23 THE COURT REPORTER: (To Ms. Ross) Sorry about
24 that.

25 THE COURT: All right. Any --

1 MS. ROSS: (To the Court) There's -- there's your
2 copy of the CAD report.

3 THE COURT: That's mine?

4 MS. ROSS: But you've got the exhibit as well.

5 THE COURT: Okay. Thank you. All right. (To Ms.
6 Ross) Call your next witness.

7 MS. ROSS: The applicant doesn't have any other
8 witnesses.

9 THE COURT: All right.

10 MS. MARTO: Your Honor, we would call Andrew
11 Johnston to the stand, please.

12 THE COURT: All right. Mr. Johnston?

13 (WHEREUPON, the witness was sworn.)

14 **DIRECT EXAMINATION OF ANDREW JOHNSTON, ESQ.**

15 BY MS. MARTO:

16 Q Good afternoon, sir.

17 A Afternoon.

18 Q Sir, you represented Mr. Alston concerning this case,
19 correct?

20 A That is correct.

21 Q When did you take on the case? What stage of the
22 process?

23 A The beginning -- the beginning. On -- my introductory
24 notes are dated 4/4/11. I don't know the date of the
25 arrest off the top of my head, but I think that shows --

1 I think that's probably fairly close to the time of
2 arrest.

3 Q How many times did y'all meet about this case?

4 A Several times. I -- I will say that he resided in
5 Georgia, and so it was more difficult to just have him
6 come by and talk than it would be if he were local. But
7 we did talk in the office, and we did talk by telephone
8 on several occasions.

9 Q Okay. And what did you all discuss?

10 A We discussed the discovery. We discussed the concept of
11 the suppression and the theories behind it and the
12 potential penalties for conviction if he were convicted,
13 and also offers that came from the solicitor's office.

14 Q Now, did you show him a full copy of the discovery as you
15 received it. Do you recall?

16 A I cannot -- I can't remember that. My practice is this:
17 I go over. When the client is in the office with me, or
18 if he's in jail and I'm meeting him in jail, is I go
19 through the discovery page by page and discuss it. That
20 way, I'm getting a -- a knowledge of what's going on and
21 the client is getting a knowledge of what's going on.
22 That is my practice. Now, sometimes additional discovery
23 rolls in later, and I have to get the client in and do
24 the same thing. I don't generally give the client a copy
25 of the discovery before trial unless requested to do so.

1 If I'm requested to do so, I'm more than happy to do
2 that.

3 Q Is there a particular reason why you don't typically give
4 it to individuals or no?

5 A Well, for one thing, it does -- if you -- if there's a
6 lot of discovery, it does take some effort behind that to
7 do that. And if they don't ask for it, I figure that
8 they're happy with us reviewing it together.

9 Q Do you recall if there was any specific reason why you
10 wouldn't have shown them the warning ticket?

11 A No. Absolutely not.

12 Q Okay. Now, what would --

13 A Unless I -- unless I didn't have it, which I -- I -- as I
14 sit here now, I don't know whether I did or not. I
15 assume that I must have, but that would be the only
16 reason I would not have given it to him or shown it to
17 him is because I didn't have it.

18 Q Do you recall if you entered it during the motion of --
19 or motion to suppress hearing at the beginning of the
20 trial?

21 A No. I don't recall, but I'm -- I'm certainly happy to
22 attempt to refresh my memory if you have the record --
23 have it in the record.

24 Q Yes. One moment. If you -- sir, do you have a copy of
25 the transcript before you?

1 A I -- I do, I'm -- but I'm on the record on appeal, so
2 when -- when you talk about pagination, we'll need to
3 make sure which pagination you're using.

4 Q On the actual trial transcript.

5 A All right. What page?

6 Q It would be beginning of -- or end of Page 46, starting
7 with Line 17, and then going on to Page 47, Line 11.

8 A Okay. Page 46, Line 11?

9 Q Page 46, 17.

10 A "Whereupon, Defendant's Exhibit 1 was marked for
11 identification." So --

12 Q In the --

13 A So I assume that Defendant's Exhibit 1 is the ticket in
14 question -- or the warning ticket in question; is that
15 correct?

16 Q Yes, sir. And then on Page 47, Line 8.

17 A All right. "Based upon that, it appears that" --and then
18 I see it -- it goes down where there's a discussion of
19 what it is. And, yes. It's a photocopy of the warning.

20 Q Now --

21 A And I -- and I did offer it into evidence based upon the
22 transcript.

23 Q Thank you, sir. Now, what was your general theory when
24 it came to the motion to suppress hearing?

25 A That this was an illegal stop. I've had a lot of

1 experience with this sort of case. This is very
2 different from where just a police officer notices some
3 sort of infraction and pulls the person over so that they
4 can enforce the traffic laws. This -- Officer Gilbert,
5 belonged to a particular unit, I -- I want to say they
6 call themselves the "I.C.E Unit." And I don't remember
7 exactly what the acronym stands for, "Interstate Crime"
8 or something like that. But, basically, this guy was out
9 on the road on 85 because they perceived that I-85 is a
10 drug corridor between Atlanta and Charlotte. And in my
11 experience, cars which have out-of-state rental -- or
12 out-of-state license plates are very subject to a
13 pretextual stop. And I think that this whole discussion
14 about the lane and whatnot, that -- that was a pretextual
15 stop, because he saw the guy was out of Georgia. And
16 then when he learns it's a rental car, the game was on
17 then. That he intended to search the car as soon as he
18 found that out. And -- and I believe that that -- that's
19 what occurred.

20 Q So was your argument, essentially, he was on a fishing
21 expedition?

22 A Yes. But I did flower it -- did flower it up a bit.
23 I -- I argued that what he had articulated as the basis
24 for the stop was insufficient. That it didn't -- that
25 what he had said the defendant had done in his driving

1 was not a violation of law, and, therefore, it was an
2 illegal stop from the get-go. That was point one. Point
3 two, was that this was a prolonged detention -- a
4 prolonged and illegal detention not based upon probable
5 cause, and that the purported consent was obtained
6 through the prolonged detention. And that the subsequent
7 search of the vehicle was unconstitutional, and that,
8 therefore, the -- the drugs should have been suppressed.
9 And I think they should have been suppressed. I -- I
10 think the case was -- with all due respect to the courts
11 that had reviewed it, that it was wrongly decided.

12 Q And, now, what did the circuit court find when it came to
13 at the pretrial?

14 A They found that -- the judge found that the stop was
15 legal and that the search was legal.

16 Q Okay. And what factors did they find specifically
17 regarding the prolonged stop? Do you recall?

18 A If -- you're gonna -- if I'm gonna have to give you
19 specific factors, you're gonna have to help me with page
20 number.

21 Q Okay. Do you just recall anything that they took under
22 consideration when reaching that judgment?

23 A Well, I -- it -- it -- I -- I mean, the judge found that
24 the weaving in the road was sufficient as -- as a -- as a
25 reasonable basis to stop -- stop him. That they violated

1 the state statute. I believe he said that. And that he
2 found that -- I -- I can't remember now if he said that -
3 - that the -- that a search was voluntary or not. I
4 can't remember. But, basically, he said it wasn't a
5 prolonged detention because the officer had met the tasks
6 of having elicited sufficient information, that it moved
7 it from the vicinity of a mere hunch into enough grounds
8 to detain. But to specifically articulate the judge's
9 ruling, I would have to -- I'd have to look at what he
10 announced. He did announce it in court.

11 Q Yeah.

12 MS. MARTO: One moment, Your Honor.

13 THE COURT: Take your time.

14 Q Sir, if you look at page -- I believe he issued his
15 ruling on Page 103 of the trial transcript, starting with
16 Line 10.

17 A Yeah. Yes, ma'am. "Now, with regard to the motion to
18 suppress, I find that the stop made by the officer was
19 pursuant to a valid traffic stop, that it was based upon
20 probable cause, that the detention that resulted from
21 that stop was based upon the totality of the
22 circumstances as presented by the evidence in this case
23 was reasonable under the Fourth Amendment and that the
24 search made of the vehicle, which resulted in the seizure
25 of evidence to be used in the trial against him, was

1 based upon consent and in this case with actual knowledge
2 of his right to refuse consent." So, basically, he made
3 a legal ruling. He did not really flesh it out with
4 addressing the particular facts of the questions that
5 the officer had put to Mr. Alston or anything like that.
6 But he does cover all of the legal points.

7 Q Was it your understanding, by totality of the
8 circumstances, he was talking about the factors Mr.
9 Alston testified to, such as the rental agreement?

10 A Well, yeah. Among others, yes.

11 Q Now, do you recall if your argument hinged upon a
12 specific timeline like by the minute, or if it was a more
13 broad strokes argument concerning when the warning was
14 written, when he was, you know, held, when they called
15 for backup, and when the consent to search the car was?
16 Do you recall?

17 A Well, first, I would say this. I would say that the
18 officer made it as difficult as possible for the court to
19 determine when the purpose of the stop had been achieved
20 because that is, as I understand it, the analysis.

21 If a person is detained after the purpose of the
22 stop has been achieved, then anything that occurs after
23 that is a -- is as a result of a prolonged detention and
24 that it constitutes a second stop. So I was just -- I
25 hadn't seen the video in many years. Watching it again

1 today, I -- it -- it refreshed my memory about some of my
2 conclusions about what was going on. It appeared to me
3 that the officer was stalling and that he continued to
4 like -- in -- he had the ticket mostly filled out, but he
5 goes back, and he like writes something on there, makes a
6 little mark or something. And then in a couple of
7 minutes later, he goes back and makes a little mark or
8 something like that. That, to me, is he's clearly
9 extending the stop because he doesn't want to reach the
10 point at which the purpose of the stop would've been
11 achieved, which in this case, the purpose of the stop
12 would have been to have made his initial investigation,
13 determined that the driver was proceeding legally, and
14 then issue a warning ticket. Or if he desired, he
15 could've issued him an actual traffic ticket. But what
16 he does is uses the process -- instead of just writing
17 the ticket, he uses it as a process to start asking all
18 of these questions, which, according to him, eliminate or
19 -- or produce incriminating responses.

20 I look back through my argument, and I don't see
21 that I made an -- made -- that I used specifically the
22 point at which he had obtained the validity of the
23 driver's license information. I don't see that I made
24 reference to that. And I'll have to yield to someone's
25 greater knowledge of the record than -- than mine right

1 now as to what the officer's testimony was about. At
2 what time did he receive the information that the license
3 was valid?

4 I did see an offhand reference there that Officer
5 Gilbert testified something about, "Well, it takes a long
6 time to get -- get driver's information from Georgia," or
7 something like that. But, to me, I was focusing on the
8 point at which the traffic ticket was finished. But
9 because Gilbert was, in my opinion, intentionally drawing
10 that process out so he could try to obtain more
11 incriminating information, that I didn't specifically
12 make an argument about timing because he never gave him
13 the warning ticket. He never gave it to him. So if -- I
14 think he avoided bringing the stop to its ultimate
15 conclusion by stalling.

16 Q Okay. So because of your opinion that he was stalling,
17 did it look like, based upon the video, he finished
18 filling out the warning ticket right before the search?

19 A Well, I'm not sure, because as I said, he seemed to have
20 filled out the balance of the ticket, but he kept going
21 back and making little marks on it to give the impression
22 that he was still working on it.

23 Q Okay. And is it fair to say that different individuals
24 could come to different conclusions as to when the stop
25 officially -- or the purpose of the stop officially

1 concluded?

2 A Well, under the circumstances here, yes. But I think
3 that that should've been balanced by the fact -- I -- I
4 think there should've been a -- a further step in the
5 analysis. That if the officer intentionally delays
6 bringing the stop to its ultimate conclusion, that that
7 has to be considered in the analysis. And that's not
8 really articulated anymore -- anywhere in the case law.
9 That would've been something an additional step outward.
10 But I think that that's what definitely occurred here.

11 I have had the occasion to get a traffic ticket or
12 two in my time. And what happens is they come up, they
13 make some general inquiries, they ask for my
14 documentation, they go back to their car, they sit down,
15 they write the ticket, they bring it back to me, and they
16 give it to me, which is the complete opposite of what
17 happens here.

18 Q And, now, depending upon whether you think that the
19 warning ticket was -- like the bulk of the warning ticket
20 was filled out at minute eight, and then that's what
21 ended the purpose of the stop, or, you know, as you said,
22 he made a little mark at the 14-minute mark.
23 Effectively, what we're talking about is a six-minute
24 difference, correct?

25 A Yes. But the six-minute difference is significant.

1 Q Now, concerning Mr. Alston's failure to appear at trial,
2 did you ever tell him that he could leave after the --
3 the docket call?

4 A No, ma'am.

5 Q What were your discussions after the docket call
6 concerning that?

7 A I don't know that we had a docket call that day. You
8 know, we've -- we've done this different ways over my
9 career. He was number one on the trial docket from my
10 recollection. And I was confident that if he did not
11 plead, that the case was going to trial. He was not
12 summoned over here just to show his face for a roll call.
13 He was number one on the trial docket.

14 Q And did you communicate that to Mr. Alston?

15 A Yes.

16 Q Okay. Do you have any idea why he left?

17 A I guess he was scared.

18 Q Did you try to get a continuance of the trial?

19 A Once the judge heard that he had been here and left, that
20 was the end of it.

21 Q And there would've been no way, at that point, to get the
22 judge to continue the case that -- so he could appear,
23 correct?

24 A Not in my opinion. I -- I can tell you that trials in
25 the absence are -- are not common in this circuit because

1 you often get into these issues about, "Was the person
2 notified? Did they understand?" that sort of thing. If
3 he had just not shown up, I don't think he would have
4 been tried in his absence. I don't think the judge
5 would've done that. I think he would've ordered a -- a
6 bench warrant to be issued. And that when the defendant
7 was arrested, his case would've been dealt with. But
8 because the judge knew that he had been here and then
9 chose to leave, I think the judge felt that there was no
10 question that he knew that there was a trial going --
11 that he was there for trial.

12 Now, whether or not he understood the concept of
13 could he be tried in the absence, I have -- I can't say
14 about that. There are some letters in my file. I don't
15 know if I make reference to that specifically in my
16 letters to him. I do know that from time to time when I
17 send out letters notifying people for trial, I do say
18 that if you don't appear, you can get a bench warrant --
19 or a bench warrant may be issued for you, or you may be
20 tried in your absence. But I'd have to review my file
21 and see -- see specifically what was said to him about
22 that. The -- I -- and -- and I would not have given
23 those letters to the court unless ordered to.

24 The judge went off on, I believe, the bond papers;
25 that he looked at the bond, and the bond indicated a -- a

1 clause in there that says, "If you don't appear for
2 trial, you can be tried in the absence."

3 Now, I can tell you from many experiences over the
4 past that people don't understand all of the stuff
5 contained in a bond paper. So what he knew and
6 recognized about being tried in the absence, I can't say.
7 He may have been on notice, but whether or not he really
8 knew or understood that concept, I can't say. I've never
9 practiced anywhere but South Carolina, but my impression
10 is that we're one of the few states that allow it.

11 Q Now, at the pretrial hearing, did you argue that if the
12 officer did have reasonable suspicion, he would've
13 requested a priority backup when he did not? Do you
14 recall?

15 A I can't recall whether I argued that or not. Do you have
16 a page number for me on that?

17 Q One of the allegations is failure to argue at that point.

18 A Okay.

19 Q But --

20 A I don't remember whether I did or not. And in all
21 honesty, I don't know I ever thought about that. I'm not
22 sure that I'm even familiar with the concept of a
23 priority backup versus a backup. I mean, I know that if
24 an officer is, you know, fighting somebody or something
25 like that, they have some -- something that they send out

1 of a high priority. But just because they want
2 assistance in searching somebody, I don't know what --
3 I'm not familiar with this concept of priority backup.
4 So I would guess that I did not argue it.

5 Q Okay. And there's no indication that this stop devolved
6 into anything violent, correct?

7 A Oh, no.

8 Q Do you think that that would've changed the results of
9 the motion to suppress hearing if you argued priority
10 versus general?

11 A I think it could've been a decent argument. But, again,
12 I would have to say that I'm not familiar with what their
13 practices on that particular point.

14 Q Okay. Now, is it your opinion that South Carolina Code
15 Section 56.7.35 was violated by the officer not giving a
16 warning ticket to Applicant?

17 A Well, as I sit here now, I do not know what that statute
18 says --

19 Q Okay.

20 A -- but I can tell you that he didn't give it to him.
21 Apparently, I have no reason to question what Mr. Alston
22 said about the ticket, and I didn't see him on the video
23 giving the ticket, so I'll go with that. But -- but the
24 question then would become, what effect -- what is the
25 net result of not giving him the ticket? And -- so

1 while, yes, it may have been a violation of that statute,
2 how it would've caused the -- how it would've affected
3 the perception of the legality of the stop, I can't say.
4 I tend to think it would not have affected it at all.

5 MS. MARTO: One moment, Your Honor.

6 Q And it was your argument that it was a prolonged stop,
7 correct?

8 A A prolonged detention, yes.

9 Q Okay. And the issue wasn't that you didn't make --

10 A That was one -- one of the arguments. Excuse me, I
11 didn't mean to interrupt you, but --

12 Q Uh-huh.

13 A -- that was -- I would say that was the main one. But
14 there were other arguments, as well.

15 Q Okay. And it's your understanding that it wasn't an
16 issue of you not arguing it, but the court disagreeing
17 with you?

18 A Most certainly.

19 Q Yeah.

20 A Now, how well I argued it and if I brought up every
21 significant point, I -- I can't say. That would be for
22 others to judge. But I certainly argued it. And I felt,
23 at the time, that I had done my best to cover the record
24 and to cross-examine thoroughly and marshal all of the
25 arguments in Mr. Alston's favor.

1 Q And not only did the Circuit Court disagree with you, but
2 the Court of Appeals and the State Supreme Court
3 affirmed, correct?

4 A Yes.

5 Q And do you recall if the court, at the start of trial,
6 ever put on the record findings concerning Mr. Alston
7 appearing at court and then leaving?

8 A I remember that well because I was hoping he would forget
9 to do it.

10 Q Okay. Thank you, sir.

11 MS. MARTO: (To the Court) No further questions.

12 THE COURT: All right. (To Ms. Ross) Cross?

13 MS. ROSS: Thank you, Your Honor. May it please the
14 Court.

15 **CROSS-EXAMINATION OF ANDREW JOHNSTON, ESQ.**

16 BY MS. ROSS:

17 Q Okay. I'm just gonna jump around a little bit, but --

18 A Yes, ma'am.

19 Q -- since I'm looking at his findings -- on Page 103, the
20 judge's findings -- 103 --

21 A Yes, ma'am.

22 Q -- Line 10.

23 A I have it. Line 10.

24 Q Okay. He never cites unreasonable invasion of privacy
25 under South Carolina, Article 1, Section 10, as far as

1 the stop?

2 A No. He -- he doesn't. And I --

3 Q And --

4 A And I can't remember if I argued that in addition to the
5 Fourth Amendment or not.

6 Q And I'd point you to Page 89 to 93. It was your
7 argument. And if I said I'd read it, and you -- I didn't
8 see that mentioned. That's --

9 A I'll take -- I won't question it. I won't question it.
10 I will say that I'm familiar with that concept --

11 Q Yes.

12 A -- that South Carolina has a specific provision granting
13 a right to privacy, unlike the United States
14 Constitution, and it could have been a useful argument.

15 Q Thank you. Just looking at Page 91, Line 15. At this
16 point, you --

17 A Okay. Is this me talking?

18 Q Yes. What do you say?

19 A "Your Honor, it is our position that Mr. Alston was
20 illegally seized at that point because the purpose of the
21 stop had been fulfilled."

22 Q And what point was that?

23 A I don't -- well, I'd -- I --

24 Q I might have to go back.

25 A -- I don't know. We -- you --

1 Q On Page 91, Line 4, you sort of talked about the officer
2 began to write a warning.

3 A Right. But the officer did not give the warning to Mr.
4 Alston, we would argue, because the officer was stalling
5 for time to allow another officer to come on the scene,
6 which was reaffirmed by my view of the video today after
7 all of these years.

8 Q And did -- did you ever -- do you recognize this?

9 A I recognize -- yes. I know the type of document this is,
10 and that it is involving Mr. Alston's case.

11 Q Did you ever offer that as an exhibit in the trial?

12 A No. I did not.

13 Q Did you ever use that document to argue that the purpose
14 of the stop was complete much earlier than the assumption
15 when he tears it off and puts it in his pocket?

16 A No. I did not.

17 Q And the issue is not when a police officer tears the
18 ticket off, but it's when the purpose of the stop is
19 complete; is that correct?

20 A Yes. It's when the purpose of the stop is complete. But
21 I think there is some ambiguity in what makes something
22 complete. What makes the stop complete.

23 Q All right. And -- and in that, if you just read the
24 first and second page, how does it report as far as the
25 registration and driver's license?

1 A This is a -- a CAD, computer-assisted dispatch. So what
2 it is is recording the communications between the officer
3 and the dispatch. And it very conveniently has the
4 specific times where the information conveyed is listed
5 as having been conveyed. So they're talking here about
6 the title on the vehicle. That it comes -- comes -- that
7 the owner of the vehicle comes back to Enterprise Rental
8 Car. There is -- at some point here, where it says,
9 "Driver's license is valid." If you can point that out
10 to me, that would be helpful, but --okay. "Driver's
11 license noncommercial status valid." That is conveyed to
12 the officer at 13:10:42, which the case is called in at
13 13:05.

14 Q And that -- are you familiar with what the timing the --
15 the Court of Appeals picks up to argue that the -- the
16 purpose of the stop is over?

17 A I have to admit, I really didn't study the Court of
18 Appeals's opinion, but I did study the Supreme Court's
19 opinion about it.

20 Q Do you recall there?

21 A Yes. They seemed to make a determination -- I -- I don't
22 need that. They seemed to make a determination that the
23 purpose of the stop was completed at 14 minute -- at the
24 14-minute mark.

25 Q And because that -- would you agree that because that CAD

1 report wasn't in evidence, there was nothing to go
2 against that determination?

3 A Well, this -- this is what I would say. First of all, I
4 don't remember what Gilbert said -- what the officer
5 said, what time he received the information showing the
6 validity of Mr. Alston's license. Can you assist me with
7 that?

8 Q I cannot. I would have to go back through --

9 A Okay.

10 Q -- the transcript myself. I believe -- would it surprise
11 you that it -- he doesn't seem to say that there's ever a
12 time that the purpose of the stop is over until that --

13 A No.

14 Q -- second police officer arrives?

15 A No. No. That certainly would not surprise me. But what
16 I'm getting at is, did he equivocate -- I know he
17 equivocates on when the purpose of the stop is finished.
18 But did he equivocate on when he got the validity of --
19 of Mr. Alston's credentials, his license? If he
20 equivocated on that point or if he said it occurred at a
21 time different than what was in the CAD, then I should
22 have crossed him with that CAD and introduced that CAD.

23 Q Okay.

24 A If he admitted what he -- that there was no controversy
25 about that, then it wouldn't have been necessary for me

1 to do that. But, again, as I mentioned to you a moment
2 ago, I cannot tell you what he said at the time.

3 I remember reading somewhere in the transcript where
4 he said it was taking a long time because it was out of
5 state. It was out of state license information. But as
6 far as timing, what specifically he said, I -- I can't
7 remember as I sit here. But if he did not provide -- if
8 -- if he testified differently than what's on the CAD
9 report, I clearly should have crossed him with it and
10 introduced it.

11 But I will say that I don't think that determines
12 necessarily the whole question that when he gets -- that
13 just because he has the validity of the driver's license,
14 that's not immediately the end of the stop. He's
15 supposed to then write the ticket and then give it to the
16 guy. At that point, that's when the purpose of the stop
17 is fulfilled. But Gilbert, as -- as I've already said,
18 in my opinion, was stalling to try to extend that point.
19 I'm sure Gilbert knows that that was -- that's when the
20 purpose of the stop ends, too, and that he purposefully
21 delayed that. And it's all there on the video for -- for
22 one to see.

23 Q Thank you. I just refer you then to Page 19. This is a
24 whole different topic.

25 A Okay.

1 Q Line 6. This is Officer Gilbert.

2 A All right. Let me -- let me get there.

3 Q Okay.

4 A Okay. Page 19, I'm with you.

5 Q Okay. And -- and he just says, "What did you do once you
6 noticed this violation?"

7 And he said, "Once I caught up to the vehicle, I
8 activated my blue lights."

9 A Yes, ma'am.

10 Q Now, a big issue on appeal was whether his pull was based
11 on a large concern about driving under the influence.

12 A Yes.

13 Q Would that surprise you that the weaving in the lane or
14 hitting --

15 A It would not surprise me that he would use that as a part
16 of his pretextual analysis for the stop, yes. It
17 doesn't --

18 Q And just going --

19 A -- surprise me.

20 Q -- from that, did you ever ask him, "Why does it -- why
21 didn't you put on your blue light and just start that
22 video recording the moment you saw that weaving if you're
23 trying to prove a DUI as an officer would do if he saw
24 bad driving"?

25 A Well, I've seen a -- I've handled a lot of DUIs, and that

1 particular action did not seem -- doesn't seem suspicious
2 to me that he was doing anything intentionally with that
3 particular point. The -- the other thing is, as I
4 understand it, there is a delay between the time that the
5 officer turns on his blue lights and the camera coming
6 on. So the fact that not all of the person's driving is
7 captured on the -- on video is -- is not necessarily
8 uncommon.

9 Q Okay. So that's why you didn't feel it was necessary to
10 -- to question that, because you saw how the video just
11 starts as he's already --

12 A Yes.

13 Q -- pulling over.

14 A Yes. Most often what they -- in -- in a DUI case, the
15 investigation really begins once they get the guy pulled
16 over. They go back and they testify, you know, "This was
17 the reason I pulled him over." Which did -- doesn't
18 necessarily have to be for bad driving. It could be
19 taillight out, which is not indicative of drunk driving
20 behavior, but it is a reason to pull you over. The real
21 investigation with a DUI starts with questioning, the
22 smell, field sobriety tests, the arrest, the offering of
23 the breath test, etc.

24 Q Okay. Just going through what we've answered. Going
25 back to the CAD report. This has been out and answered.

1 But just --

2 THE COURT: Quickly, let me ask a quick question,
3 Ms. Ross.

4 MS. ROSS: Yes.

5 THE COURT: How much longer? Just so we can take a
6 little short restroom break. (To the court
7 reporter) Is that what you need?

8 MS. ROSS: Okay.

9 THE COURT: Just a little short restroom break,
10 okay?

11 MS. ROSS: Sure. I've-- I've got maybe two more
12 questions of this witness.

13 THE COURT: Okay. (To the court reporter) That
14 okay?

15 THE COURT REPORTER: Yeah. I'm okay. All right.

16 MS. ROSS: (To the court reporter) Sure? I mean, I
17 can --

18 THE COURT: Yeah.

19 Q So just going back on the -- the CAD report.

20 A Yes, ma'am.

21 Q You saw how it was called in -- he called for backup as
22 "nonpriority."

23 A Yes. And -- and, again, I don't know the significance of
24 that. That's a point. I will look at that in the
25 future. But --

1 Q Would you -- would you agree you could've just argued
2 that if that officer truly believed a serious crime was
3 being committed, he would have called for priority
4 backup? That would be a potential jury argument?

5 A Yes. I -- I could've argued it. But, again, I don't
6 know exactly what their policy is about when they're
7 allowed to call for priority versus nonpriority. I -- I
8 just don't know that, and I'll have to concede that that
9 particular point did not enter my mind.

10 Q All right. And as far as the -- the trial in absence.

11 A Yes.

12 Q You've -- you basically answered this already, but your
13 testimony is that you didn't feel that it would've made a
14 difference to tell the judge that you needed your client
15 with you to try the case?

16 A No. In -- in retrospect, I -- I probably should have,
17 but at the time, it seemed like that was -- it was a
18 foregone conclusion of what was gonna happen.

19 Q But you agreed that having a client next to you makes the
20 trial go better? Usually?

21 A For the most part. Unless you've got an identity
22 question. In -- in that case, it could be very useful
23 not to have him there.

24 Q Okay. Thank you.

25 MS. ROSS: I beg the Court's indulgence. That's all

1 I have. Nothing further.

2 THE COURT: All right. (To the State) Redirect?

3 MS. MARTO: Brief, Your Honor.

4 **REDIRECT EXAMINATION OF ANDREW JOHNSTON, ESQ.**

5 BY MS. MARTO:

6 Q Now, from my understanding of the CAD report, it shows
7 when the license came back as valid, not when the warning
8 was fully completed, correct?

9 A Oh, yes. Because you can see that in the video. It --
10 the CAD says six minutes is when he gets the driver's
11 license back, but when he finishes writing the ticket --
12 although, again, there's several minutes of just outright
13 stalling, in my opinion, comes a few minutes later. And
14 that seemed to be what the Supreme Court determined, that
15 it was at -- that it was at that point, the 14-minute
16 mark, when the purpose of the stop had been completed.

17 Q And you did argue in closing at the pretrial hearings
18 that you thought the officer was stalling, correct?

19 A Yes.

20 Q Okay. And so you -- concerning the priority backup,
21 beyond violence, you didn't see anything in the video or
22 in conversations with Mr. Alston indicating there was any
23 type of a true emergency, correct?

24 A Well, no. Again, that's really not a concept that I'm
25 familiar with. I'm not familiar with what their policies

25 (WHEREUPON, the witness was excused.)

1 THE COURT: Let's take a short restroom break, and
2 then I'm gonna obviously finish the hearing.

3 (To the State) We have -- you have another
4 witness, right?

5 MS. MARTO: Yes, Your Honor. Is it okay if Mr.
6 Johnston's excused?

7 THE COURT: Yes. He is excused.

8 MR. JOHNSTON: Thank you, Your Honor.

9 THE COURT: Yes, sir. Good to see you. All right.
10 Let's take short restroom break.

11 (Off the record from 1:02 p.m. until 1:09 p.m.)

12 THE BAILIFF: Remain seated and come to order.

13 THE COURT: Ms. Caudy, we're waiting on Ms. Marto.
14 That's why we're waiting here just for a minute.

15 All right. (To the State) Ready to proceed?

16 All right. Ms. Marto, your next witness?

17 MS. MARTO: Yes, Your Honor. The State would call
18 Ms. Lara Caudy, please. One moment, Your Honor.
19 Let me bring my stuff over there.

20 THE COURT REPORTER: Do you want me to go ahead and
21 administer the oath?

22 THE COURT: Yeah. Go ahead while she's doing that,
23 yeah.

24 THE CLERK: She'll be able to hear you
25 without --

1 THE COURT REPORTER: Ms. Caudy, can you hear me?
2 Ms. Caudy, can you hear me? I'm the court reporter.
3 MS. CAUDY: (No response.)
4 THE CLERK: You know --
5 THE COURT REPORTER: Ms. Caudy, can you hear me?
6 THE CLERK: Ms. Marto, the -- the --
7 THE COURT REPORTER: I can go over there.
8 THE CLERK: We can't -- we can't hear her anymore.
9 So I'm not sure if maybe that was affected when you
10 played the --
11 MS. MARTO: Can you try again?
12 MS. CAUDY: I can hear you perfectly.
13 THE CLERK: Okay.
14 THE COURT REPORTER: Okay. Ms. Caudy, you can hear
15 me?
16 MS. MARTO: Can you hear the court reporter?
17 MS. CAUDY: I can, yes.
18 THE COURT REPORTER: Okay.
19 MS. CAUDY: She's not as loud.
20 THE COURT REPORTER: Okay.
21 (WHEREUPON, the witness was sworn.)
22 **DIRECT EXAMINATION OF LARA CAUDY, ESQ.**
23 BY MS. MARTO:
24 Q Now, Ms. Caudy, you handled this case on appeal, correct?
25 A Yes. That's correct.

1 Q And you were the only attorney to represent him on both
2 the Court of Appeals and the Supreme Court, correct?

3 A That's correct.

4 Q Okay. Now, can you describe a little bit your process
5 when it comes to determining what issues to raise and
6 what to brief?

7 A Sure. When I'm first assigned the case, I order all the
8 trial exhibits, and then I ultimately read the transcript
9 from, you know, front to back. I summarize the
10 transcript as I'm reading it. I make a separate list of
11 all motions and objections that were raised during the
12 course of the trial, and then I ultimately go through
13 those motions and objections and research them and decide
14 which issues to raise on appeal.

15 Q And -- and what issues did you decide to raise in this
16 case?

17 A The Fourth Amendment issues regarding the extension of
18 the -- the traffic stop, the reason -- the initial reason
19 for the stopping the vehicle, and the lack of voluntary
20 consent.

21 Q Now -- and what were the results of the issues raised on
22 appeal?

23 A The Court of Appeals held oral argument and then
24 ultimately affirmed they found that the reason for the
25 traffic stop was -- was valid, that the officer had

1 reasonable suspicion to prolong the stop, and that Mr.
2 Alston voluntarily consented. The Supreme Court granted
3 cert and, likewise, after oral argument held affirmed the
4 Court of Appeals was in reasoning.

5 Q Now, you did argue that the stop was prolonged, correct?

6 A That is correct. I argued that the officer prolonged the
7 traffic stop without reasonable suspicion in violation of
8 Mr. Alston's Fourth Amendment rights.

9 Q Okay. And was part of that argument that you thought he
10 was essentially stalling?

11 A That's correct, yes. In order to wait for -- I -- I
12 think the -- Deputy Gilbert makes reference to a
13 "package," which I believe is the drug dog. So I -- I
14 think he was prolonging the stop in order for his partner
15 to arrive on scene with the drug dog.

16 Q And do you recall whether you made any reference to like
17 specific minutes or if it was just a general argument?

18 A No. I definitely referenced specific minutes of the
19 traffic stop.

20 Q And when did you state that the purpose of the stop was
21 complete?

22 A I believe in my brief of petitioner, which was filed with
23 the Supreme Court, I argued somewhere around the 15-
24 minute mark.

25 Q Okay. And was that your determination that the purpose

1 of the stop did end up at 15 minutes?

2 A At the time, yes. I watched the video over and over
3 again, and I believe -- based on my recollection -- it's
4 been years upon years that I've watched that video
5 thoroughly, but I believe based on what I saw in the
6 video at the time, and that might've been when he ripped
7 it off. But that was my determination of when the -- the
8 traffic ticket was -- the warning was completed.

9 Q Okay. Now, did you argue pursuant to "Rodriguez vs.
10 United States" that the police stop exceeded the time you
11 needed to handle the matter?

12 A I did. I sent over supplemental authorities to the Court
13 of Appeals on May 1st, which was a few days prior to the
14 oral argument held before the Court of Appeals. And I
15 believe "Rodriguez" came out April 21st of 2015, and I
16 sent it over on May 1st of 2015, to the Court of Appeals,
17 since my brief had already been filed. So I think we did
18 -- based on my memory -- again, I don't have a great
19 memory, but I do believe we discussed "Rodriguez" during
20 the Court of Appeals oral argument. And then I did cite
21 it in my cert petition to the Supreme Court and brief
22 petitioner before the Supreme Court. -

23 Q And then, again, the Court of Appeals, even with a
24 supplemental authority, decided to affirm the
25 convictions, correct?

1 A That's correct. I mean, the court held that the traffic
2 stop was prolonged, but that the officer had reasonable
3 suspicion in order to prolong the stop.

4 MS. MARTO: I have no further questions, Your Honor.

5 THE COURT: All right. (To Ms. Ross) Cross?

6 CROSS-EXAMINATION OF LARA CAUDY, ESQ.

7 BY MS. ROSS:

8 Q Hi, there. Thank you for being here. Now, as far as --
9 as your timeline, were you basing that timeline on the
10 transcript that you were reviewing in the video?

11 A I honestly don't recall. I haven't read the transcript
12 in years. I assume it was based on what occurred in the
13 transcript and, obviously, the video, which, again, I
14 watched over and over and over again.

15 Q Now, did you ever have any -- did you ever have any
16 exhibit of the CAD report or anything like that? The CAD
17 report?

18 A I did not, no.

19 Q If that report showed that the -- the registration and
20 license were validated around minute seven or eight
21 instead of minute 14 or 15, would that made any
22 difference in your argument?

23 A Yes. It would have. I would've argued that the purpose
24 of the stop ended around eight minutes as opposed to the
25 15-minute mark, which is what I argued in my brief.

1 Q And -- and the -- and the court did find there was about
2 one minute of detention beyond the -- the scope where
3 they said that they already had reasonable suspicion by
4 that point; is that correct?

5 A Which court? The Court of Appeals or the Supreme Court?

6 Q I think the Supreme Court.

7 A I -- I think the Supreme -- yes. I think that's correct.

8 Q So it just been -- would it have been helpful to your
9 argument if you could've backed that timeline up about
10 six or seven minutes?

11 A It would have. That way, everything that occurred
12 between, you know, the eight-minute mark and the -- the
13 15-minute mark, it couldn't have been used to establish
14 reasonable suspicion.

15 Q Thank you. Let me grab a note. And I'm not sure if you
16 recall, but after that time, there was questions about
17 the rental agreement and the girlfriend and the
18 discussions about how many children, and more discussion
19 on where he was going. Were those things part of the
20 basis that the Supreme Court found probable cause to
21 extend the service?

22 A They were certainly reasons that the officer cited as
23 grounds for reasonable suspicion as to why he thought
24 there was criminal afoot -- criminal activity afoot.
25 Certainly, there were reasons that the Court of Appeals

1 relied on. My recollection of the Supreme Court's
2 opinion, which I skimmed earlier this morning, they seem
3 to discredit a lot of that reasoning, and they rely on
4 the -- the inconsistent travel plans as the reasoning for
5 reasonable suspicion.

6 Q All right. And they -- I've seen the oral -- oral
7 argument. They also did not find validity in the
8 argument that a covering of the trunk was suspicious or
9 renting a vehicle by a woman was suspicious. And -- and
10 they really wrote off a lot of those bases (as spoken)
11 that Officer Gilbert outlined, didn't they?

12 A That's correct. I mean, they discredited most of it. I
13 mean, the fact that he was coming from Atlanta, the fact
14 that he was on I-85, the fact that it was a rental car,
15 the fact that it was rented by a third party. They
16 discredited most of it. I think what the -- the Supreme
17 Court hinged on was, one, the standard of review, which
18 basically was whether there was any evidence to support
19 the trial judge's findings. And it is -- it -- it
20 concluded that there was reasonable suspicion because of
21 the inconsistent travel plans as far as he was traveling
22 to see his mother in New Jersey for Mother's Day, where,
23 you know, this was the end of March and Mother's Day was
24 the beginning of May, and the states that were listed on
25 the rental agreement.