

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Greenville County
Hon. G. Edward Welmaker, Circuit Court Judge

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SEP 28 2013

S.C. Supreme Court

The State,

Petitioner,

v.

Gregg Gerald Henkel,

Respondent.

APPENDIX

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Appeal From Greenville County
Hon. G. Edward Welmaker, Circuit Court Judge

The State,

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v.

Gregg Gerald Henkel,

Respondent.

PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record,

C. Rauch Wise, Esquire
305 Main Street
Greenwood, SC 29646

I further certify that all parties required by Rule to be served have been served.

This 20th day of September, 2013.

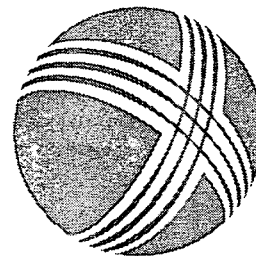


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STATE OF SOUTH CAROLINA

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Certiorari to the Court of Appeals
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
G. Edward Welmaker, Circuit Court Judge

Case No. 2009-GS-23-02593
Appellate Case Tracking No. 2011-184986

The State of South Carolina, ... Respondent,

v

Gregg Gerald Henkel, ... Appellant.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
DRIVING UNDER THE INFLUENCE

At a Court of General Sessions, convened on
County present upon their oath:

the Grand Jurors of Greenville

MAY 12 2009

That GREGG GERARD HENKEL did in Greenville County, on or about the 19th day of January 2008, drive a motor vehicle while under the influence of alcohol, or other drug or substance or combination of alcohol, other drug and/or substance which caused impairment to the extent that the defendant's faculties to drive were materially and appreciably impaired; such not being the first offense within a period of ten (10) years including and immediately preceding the foregoing date. This is in violation of §36-5-2930 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

WITNESSES

W. **4**

S. C. Highway Patrol

1/19/2008

ARREST WARRANT NUMBER

D005494

ACQUITTED BY

FOREMAN GRAND JURY

VERDICT

Smith

Supervisor of Criminal Justice

Gregg Gerard Henkel

W. M. W. Smith 4-10-2011
W. M. W. Smith 4-10-2011

DOCKET NO. 2009-GS-23-

K05

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

MAY TERM 2009

2-4-11 THE STATE

vs.

GUILTY
GREGG GERARD HENKEL

2983

2981

Indictment for

DRIVING UNDER THE INFLUENCE

VIOLATION § 55-05-2930

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
GENERAL SESSIONS COURT

G. EDWARD WELMAKER, THIRTEENTH JUDICIAL CIRCUIT

2009-GS-23-02593

STATE OF SOUTH CAROLINA.....RESPONDENT,

v.

GREGG GERALD HENKEL.....APPELLANT,

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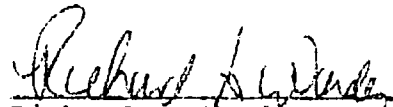
FEB 08 2011

NOTICE OF INTENT TO APPEAL

SC Court of Appeals

Gregg Gerald Henkel appeals his conviction and sentence in the above case. The sentence was imposed by the Honorable G. Edward Welmaker, on February 4, 2011.

Respectfully Submitted



Richard H. Warder
Attorney At Law
15 Primrose Street
P.O. Box 26133
Greenville, South Carolina

February 7, 2011

Other counsel of record:

Katryan Bevis Salisbury
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Greenville, South Carolina 29601

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF GENERAL SESSIONS

2009-GS-23-2593

STATE OF SOUTH CAROLINA,)

vs.)

GREGG GERARD HENKEL,
DEFENDANT.)

TRANSCRIPT OF RECORD

ORIGINAL

February 3 and 4, 2011
Greenville, South Carolina

B E F O R E:

THE HONORABLE G. EDWARD WELMAKER, JUDGE, and a jury.

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

KATRYNA B. SALISBURY, ESQ.
Assistant Solicitor

RICHARD H. WARDER, ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(SW) - Denotes State's Witness
 (DW) - Denotes Defense Witness
 (IC) - Denotes In Camera

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All Exhibits were retained by the Clerk of Court for Greenville County.

PROCEEDINGS

1
2 THE COURT: Are we ready for our jury to come up? Do
3 we have them all here?

4 THE CLERK: Yes, sir.

5 THE COURT: Bring the jury up, please. And we'll see
6 if we can't go ahead and get a jury selected.

7 THE CLERK: Yes, sir.

8 (WHEREUPON, a brief break was taken.)

9 (WHEREUPON, the jury panel entered the courtroom.)

10 THE COURT: Good morning, ladies and gentlemen -- or
11 good afternoon now. We're, now, in need of your services
12 to select a jury in the trial of the next case. We have
13 an indictment before me. That indictment sets forth that
14 here in Greenville County, back in January of 2008, around
15 the 19th of January, that Mr. Gregg Gerald Henkel was
16 operating a motor vehicle while under the influence of
17 alcohol or drugs such as to materially and appreciably
18 impair his ability to operate that motor vehicle.

19 Mr. Henkel has entered a plea of not guilty to that
20 charge. By doing so, that places the burden on the State
21 of South Carolina to prove his guilt of this offense
22 beyond a reasonable doubt. Everybody is presumed to be
23 innocent for any charge brought against him until -- or
24 her until the facts are proven by the State beyond a
25 reasonable doubt.

11

1 We need to select a panel of jurors to hear this case
2 who will be fair and impartial to both the State of South
3 Carolina, and to the Defendant in this case. While you're
4 qualified to serve as a juror this week, I need to ask you
5 additional questions to determine your eligibility to
6 serve on this particular case.

7 JURY QUALIFICATION

8 THE COURT: Is there any member of the jury panel who
9 has any prior knowledge -- I've read you the basic facts
10 about -- or allegations about this particular matter. Is
11 there anybody on the jury panel who has any prior
12 knowledge from any source, from the news media, from
13 discussions with anybody in social activities, or
14 otherwise about this particular incident? If you have
15 prior knowledge, I'd appreciate you standing at this time,
16 from whatever source.

17 (There was no response.)

18 THE COURT: Thank you.

19 There's no response.

20 Is there any member of the jury panel related by
21 blood or marriage to Mr. Gregg Gerard Henkel? If so,
22 would you, please, stand.

23 (There was no response.)

24 THE COURT: Does any member of the jury panel have a
25 close business, a social, or a personal relationship with

12

1 Mr. Henkel? If so, would you, please, stand.

2 (There was no response.)

3 THE COURT: Thank you.

4 There is no response.

5 There are witnesses who may be called upon to testify

6 in this case. I'm going to recite those names to you.

7 I'll ask you some follow-up questions. Potential

8 witnesses -- not all of these may be called, of course,

9 but some may: Lillie Chastain; Joanie McMillan; from the

10 South Carolina Highway Patrol will be Sergeant Wesley

11 Hiott; Harold Hamilton, who formerly worked with the

12 Simpsonville Police Department; from the Mauldin Police

13 Department is Officer David Terry; and, also, an employee

14 at the Greenville Hospital System is Gabrielle Bramblett.

15 Is there any member of the jury panel related by blood or

16 marriage to any of these potential witnesses? If so,

17 please, stand.

18 Yes, ma'am. Your name, please?

19 JUROR #41, EVELYN CASE: My name is Evelyn Case.

20 I used to work with Gabrielle at the Greenville

21 Hospital System in the ER.

22 THE COURT: How long ago was it that you worked with

23 her?

24 JUROR #41, EVELYN CASE: I left in 2007.

25 THE COURT: Okay. The fact that you know her and

13

1 have worked with her in the past, would that effect your
2 ability to be a fair juror in this case? In other words,
3 she may testify, and other witnesses will testify, the
4 fact that she is one of the witnesses and you've known her
5 in the past, would that interfere with your ability to be
6 a fair juror in this case?

7 JUROR #41, EVELYN CASE: No, sir.

8 THE COURT: You could be fair to both sides?

9 JUROR #41, EVELYN CASE: Yes, sir.

10 THE COURT: To the State and to the Defendant?

11 JUROR #41, EVELYN CASE: Yes, sir.

12 THE COURT: Thank you for sharing that information
13 with us.

14 You are not related to this witness?

15 JUROR #41, EVELYN CASE: No, sir.

16 THE COURT: Is there any member of the panel who has
17 a close business, a social, or a personal relationship
18 with any of these potential witnesses? If so, would you
19 please stand?

20 (There was no response.)

21 THE COURT: Thank you.

22 There is no response.

23 Is there any member of the jury panel who is a
24 contributing member of any organization whose primary
25 concern is that of the promotion of law enforcement, or

14

1 victims rights, such as the Sheriff's Association, PARR,
2 CAVE, SADD, MADD, any organization that its primary
3 concern is the promotion of law enforcement or victim's
4 rights? Would you, please, stand if you're a contributor
5 to those organizations.

6 (There was no response.)

7 THE COURT: Thank you.

8 There is no response.

9 Is there any member of the jury panel or a member of
10 your immediate family who is involved in law enforcement
11 in any way? If so, would you, please, stand? You or a
12 member of your immediate family?

13 Yes, sir. Your name?

14 JUROR #274, STEPHEN RUEFF: Steve Rueff.

15 THE COURT: All right, sir. And what relative do you
16 have --

17 JUROR #274, STEPHEN RUEFF: My aunt is a sheriff in
18 Jupiter, Florida.

19 THE COURT: In Florida?

20 JUROR #274, STEPHEN RUEFF: Yes.

21 THE COURT: If you'd remain standing.

22 Your name, please, sir?

23 JUROR #145, SAMUEL KIRKMAN: Samuel Kirkman.

24 My father is retired from Anderson County and
25 Greenville City. And I think he's a constable.

15

1 THE COURT: All right. He was a -- he retired as a
2 constable, or he is a constable now?

3 JUROR #145, SAMUEL KIRKMAN: I think he is a
4 constable now, but he is retired.

5 THE COURT: All right. Thank you.

6 If you'd remain standing, please.

7 Your name, please?

8 JUROR #229, DELOTTIE SMALLWOOD: Delottie Smallwood.

9 My son is -- he's a highway patrolman. He works with
10 the transport police out of Anderson and Greenville
11 County.

12 THE COURT: All right. Thank you.

13 Those of you who are standing, the fact that you have
14 a relative in law enforcement either in South Carolina, or
15 retired, or outside of South Carolina, if you were
16 selected to be a juror in this case, that association with
17 a relative who's in law enforcement, would that interfere
18 with your ability to be a fair juror?

19 In other words, we want to select jurors who can sit
20 in that jury box, and listen to the evidence, listen to
21 the testimony given and weigh the evidence, listen to the
22 law that I give you, and make a decision on that and that
23 alone, not on relationships or other matters. If those of
24 you standing believe that this relationship with your
25 loved ones would interfere with that ability, would you,

16

1 please, remain standing? Otherwise, you may be seated.

2 (WHEREUPON, all the standing jurors were seated.)

3 THE COURT: Thank you.

4 Let the record reflect that all the jurors have been
5 seated.

6 Is there any member of the jury panel who has
7 expressed or formed an opinion in any way about the facts
8 in this case? If so, would you, please, stand?

9 (There was no response.)

10 THE COURT: Is there any member of the jury panel
11 aware of any bias or prejudice that would interfere with
12 your ability to be a fair juror in this case? If so,
13 would you, please, stand?

14 (There was no response.)

15 THE COURT: Thank you.

16 There's no response.

17 Is there any member of the jury panel who has a moral
18 or a religious belief against the use of any alcohol or
19 drugs to such an extent that that belief would interfere
20 with your ability to be a fair juror in this case? If so,
21 would you, please, stand?

22 (There was no response.)

23 THE COURT: Thank you.

24 There's no response.

25 Is there any member of the jury panel or a member of

17

1 your immediate family who has ever been the victim of an
2 automobile accident which injuries are -- or an automobile
3 accident with or without injuries in which alcohol was the
4 subject of that accident, or drugs? If so, would you,
5 please, stand? If you or a member of your family have
6 been involved in an automobile accident that was drug or
7 alcohol related.

8 Yes, sir. Your name, please?

9 JUROR #25, WILLIAM BOYKINS: William Boykins.

10 THE COURT: All right. Mr. Boykins, was it you or a
11 member of your family?

12 JUROR #25, WILLIAM BOYKINS: My sister.

13 THE COURT: And how long ago was that?

14 JUROR #25, WILLIAM BOYKINS: 2002.

15 She got killed by a tractor-trailer.

16 THE COURT: 2002?

17 JUROR #25, WILLIAM BOYKINS: Yes, sir.

18 THE COURT: All right. Sir, if you'd remain standing
19 just a moment.

20 Yes, sir. Your name, please?

21 JUROR #218, REGINALD SEAWRIGHT: Reginald Seawright.

22 THE COURT: All right. Sir, was it you or a
23 relative?

24 JUROR #218, REGINALD SEAWRIGHT: It was me. I had a
25 motorcycle accident.

18

1 THE COURT: And how long ago was that?

2 JUROR #218, REGINALD SEAWRIGHT: In '09.

3 THE COURT: All right. Those of you who are standing
4 and alcohol was related in that accident or drugs, the
5 fact that you've been involved in those accidents, one
6 more recent than the other, would that interfere with your
7 ability to be a fair juror?

8 JUROR #25, WILLIAM BOYKINS: No, sir.

9 JUROR #218, REGINALD SEAWRIGHT: No, sir.

10 THE COURT: In other words, if in any way, you think
11 that would effect your ability, you could be excused from
12 this case. The State of South Carolina and the Defendant,
13 they deserve to have fair jurors, and that's their desire.

14 Do you believe you could be fair to the State, you
15 could be fair to the Defendant, and, if called upon to
16 serve as a juror, make a decision that's based on the
17 facts and the law of this case, and that alone? If you
18 believe for any reason you could not be fair, please,
19 remain standing. Otherwise, you may be seated, if you
20 feel you could be fair.

21 (WHEREUPON, Juror #218, Reginald Seawright, was
22 seated.)

23 THE COURT: Thank you for your candor, sir.

24 Your name again, please?

25 JUROR #25, WILLIAM BOYKINS: William Boykins.

19

1 THE COURT: I'll excuse you from the trial of this
2 case. If you'd just be seated just for a moment. You
3 don't need to respond to the rest of my questions,
4 Mr. Boykins.

5 At this time, I'm going to ask the attorneys, if you
6 would, please, stand and introduce yourselves to the jury.

7 Ms. Salisbury.

8 MS. SALISBURY: Good afternoon, ladies and gentlemen.

9 My name is Katryna Salisbury. I'm an Assistant
10 Solicitor here in Greenville County. I prosecute cases on
11 behalf of Greenville County.

12 THE COURT: Thank you.

13 Mr. Warder.

14 MR. WARDER: My name is Richard Warder. I practice
15 here in Greenville, South Carolina. It's my privilege
16 today to be representing Mr. Henkel.

17 THE COURT: Thank you, sir.

18 Is there any member of the jury panel related by
19 blood or marriage to either of these attorneys? If so,
20 would you, please, stand?

21 (There was no response.)

22 THE COURT: Is there any member of the jury panel
23 that has a social, or a business, or a personal
24 relationship in any way with either of these attorneys?
25 If so, would you, please, stand?

20

1 (There was no response.)

2 THE COURT: Is there any member of the jury panel
3 that has ever been involved in any litigation in which
4 either of these attorneys represented you or represented
5 the opposing side? If so, would you, please, stand?

6 (There was no response.)

7 THE COURT: Thank you.

8 There's no response.

9 Is there any member of the jury panel or a member of
10 your immediate family in any way affiliated with the
11 Solicitor's Office in Greenville County or Pickens County,
12 the Thirteenth Circuit, or has a relative that works
13 there, or have a personal acquaintance or a relationship
14 with the Solicitor or any of the staff there? If so,
15 would you, please, stand?

16 (There was no response.)

17 THE COURT: Thank you.

18 There's no response.

19 I emphasized to you, ladies and gentlemen, the
20 importance of a fair trial to both the State and to the
21 Defendant. Is there any member of the jury panel aware of
22 any reason whatsoever that, in this case, you could not be
23 a fair juror and render a verdict that would speak the
24 truth solely on the law that I give you, and the evidence
25 that you hear, and that alone? If for any reason, you

21

1 believe you could not be a fair juror, would you, please
2 stand?

3 Yes, sir. You don't -- your name, please?

4 JUROR #219, GLOVER SEWELL: Glover Sewell.

5 THE COURT: And what's -- you don't believe you could
6 be a fair juror?

7 JUROR #219, GLOVER SEWELL: No.

8 I think the --

9 THE COURT: Well, I don't need to hear your reason.
10 right now.

11 JUROR #219, GLOVER SEWELL: Okay.

12 THE COURT: Actually, if you'll come forward, please.
13 I'd like to talk to you up here.

14 (WHEREUPON, a side bar was held with the attorneys,
15 Juror #219, Glover Sewell, and the Court.)

16 THE COURT: Yes, sir.

17 You weren't able to serve yesterday either; right?

18 JUROR #219, GLOVER SEWELL: Yeah.

19 THE COURT: And what's your problem?

20 JUROR #219, GLOVER SEWELL: Well, I was convicted of
21 DUI in '99. And I don't think the laws are --

22 THE COURT: And what about yesterday?

23 JUROR #219, GLOVER SEWELL: Oh, yesterday, I have
24 property in Pendleton. And some metal was stolen. They
25 came in through the roof.

22

1 THE COURT: I'm going to let you stay with us today.

2 And I'm going to excuse you from the trial of this
3 case. Okay. If you'll just stay, I'm going to let you
4 observe the trial. So I'm going to excuse you from the
5 trial of this case. But just stay and observe the trial.

6 (WHEREUPON, the sidebar was concluded.)

7 THE COURT: I'm going to excuse this juror from the
8 trial of this case.

9 Any other questions from the State?

10 MS. SALISBURY: Nothing from the State, Judge.

11 THE COURT: From the Defense?

12 MR. WARDER: No, Your Honor.

13 THE COURT: All right. Let's select a jury.

14 JURY SELECTION

15 THE CLERK: When I call your name, please, stand in
16 place and wait for further instructions.

17 Juror 280, Thomas Suttle.

18 (Thomas Suttle, a white male, stood.)

19 THE CLERK: What says the State?

20 MS. SALISBURY: Please present Mr. Suttle.

21 THE CLERK: What says the Defendant?

22 MR. WARDER: Please excuse the juror from the trial
23 of this matter.

24 THE CLERK: Sir, you may be seated. You've been
25 excused from the trial of this case.

23

1 Juror 267, Renada Woods.

2 (Renada Woods, a black female, stood.)

3 THE CLERK: What says the State?

4 MS. SALISBURY: Please present Ms. Woods.

5 THE CLERK: What says the Defendant?

6 MR. WARDER: Please swear the juror.

7 THE CLERK: Ms. Woods, please, bring your things and
8 have a seat in the jury box.

9 Juror 185, Brandon Nelson.

10 (Brandon Nelson, a white male, stood.)

11 THE CLERK: What says the State?

12 MS. SALISBURY: Please present Mr. Nelson.

13 THE CLERK: What says the Defense?

14 MR. WARDER: Please swear the juror.

15 THE CLERK: Sir, please, come have a seat in the jury
16 box.

17 Juror 276, William Fuller.

18 (William Fuller, a white male, stood.)

19 THE CLERK: What says the State?

20 MS. SALISBURY: Please present Mr. Fuller.

21 THE CLERK: What says the Defendant?

22 MR. WARDER: Please swear the juror.

23 THE CLERK: Sir, please, come have a seat in the jury
24 box.

25 Juror 147, Holly Krook.

24

1 (Holly Krook, a white female, stood.)

2 MS. SALISBURY: Please excuse Ms. Krook.

3 THE CLERK: You may be seated. You have been excused
4 from this case.

5 Juror 169, Brittany McMillian.

6 (Brittany McMillian, a white female, stood.)

7 THE CLERK: What says the State?

8 MS. SALISBURY: Please present Ms. McMillian.

9 THE CLERK: What says the Defendant?

10 MR. WARDER: Please swear Ms. McMillian.

11 THE CLERK: Ma'am, please, come have a seat in the
12 jury box.

13 Juror 37, Fedra Campbell.

14 (Fedra Campbell, a white female, stood.)

15 THE CLERK: What says the State?

16 MS. SALISBURY: Please present Ms. Campbell.

17 THE CLERK: What says the Defendant?

18 MR. WARDER: Please swear Ms. Campbell.

19 THE CLERK: Ms. Campbell, please, come have a seat in
20 the jury box.

21 Juror 174, Regina Miller.

22 MS. SALISBURY: Please --

23 THE CLERK: What says the State?

24 MS. SALISBURY: I'm sorry.

25 Please present Ms. Miller.

25

1 THE CLERK: What says the Defendant?

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

4 THE CLERK: You may be seated. You have been excused
5 from this case.

6 Juror 165, Joshua McClurg.

7 (Joshua McClurg, a white male, stood.)

8 THE CLERK: What says the State?

9 MS. SALISBURY: Please present Mr. McClurg.

10 THE CLERK: What says the Defendant?

11 MR. WARDER: Please swear the juror.

12 THE CLERK: Sir, please, come have a seat in the jury
13 box.

14 Juror 115, Genevieve Holliday.

15 (Genevieve Holliday, a black female, stood.)

16 MS. SALISBURY: Please present Ms. Holliday.

17 THE CLERK: What says the Defendant?

18 MR. WARDER: Please swear Ms. Holliday.

19 THE CLERK: Ms. Holliday, please, come have a seat in
20 the jury box.

21 Juror #2, Kelly Adams.

22 (Kelly Adams, a white female, stood.)

23 THE CLERK: What says the State?

24 MS. SALISBURY: Please present Ms. Adams.

25 THE CLERK: What says the Defendant?

26

1 MR. WARDER: Please swear Ms. Adams.

2 THE CLERK: Ms. Adams, please, have a seat in the
3 jury box.

4 Juror 156, Joel Lyda.

5 (Joel Lyda, a white male, stood.)

6 THE CLERK: What says the State?

7 MS. SALISBURY: Please present Mr. Lyda.

8 THE CLERK: What says the Defendant?

9 MR. WARDER: Please swear Mr. Lyda.

10 THE CLERK: Mr. Lyda, please, have a seat in the jury
11 box.

12 Juror 105, Allison Hart.

13 (Allison Hart, a white female, stood.)

14 THE CLERK: What says the State?

15 MS. SALISBURY: Please present Ms. Hart.

16 MR. WARDER: What was the number?

17 THE CLERK: Juror 105.

18 What says the Defendant?

19 MR. WARDER: Please excuse the juror from the trial
20 of this matter.

21 THE CLERK: You may be seated. You have been excused
22 from the trial of this case.

23 Juror 102, Charles Harrell.

24 (Charles Harrell, a white male, stood.)

25 THE CLERK: What says the State?

27

1 MS. SALISBURY: Please excuse Mr. Harrell.

2 THE CLERK: Mr. Harrell, you may be seated. You have
3 been excused from this case.

4 Juror 229, Delottie Smallwood.

5 (Delottie Smallwood, a white female, stood.)

6 THE CLERK: What says the State?

7 MS. SALISBURY: Please present Ms. Smallwood.

8 THE CLERK: What says the Defendant?

9 MR. WARDER: Please excuse the juror from the trial
10 of this case.

11 THE CLERK: Ma'am, you may be seated. You have been
12 excused from this case.

13 Juror 162, Cheryl Marsh.

14 (Cheryl Marsh, a white female, stood.)

15 THE CLERK: What says the State?

16 MS. SALISBURY: Please present Ms. Marsh.

17 THE CLERK: What says the Defendant?

18 MR. WARDER: Please swear Ms. Marsh.

19 THE CLERK: Ms. Marsh, please, come have a seat in
20 the jury box.

21 Juror 279, Jonathan Summers.

22 (Jonathan Summers, a white male, stood.)

23 THE CLERK: What says the State?

24 MS. SALISBURY: Please present Mr. Summers.

25 THE CLERK: What says the Defendant?

1 MR. WARDER: Please swear the juror.

2 THE CLERK: Mr. Summers, please, come have a seat in
3 the jury box.

4 Juror 274, Stephen Rueff.

5 (Stephen Rueff, a white male, stood.)

6 THE CLERK: What says the State?

7 MS. SALISBURY: Please present Mr. Rueff.

8 THE CLERK: What says the Defendant?

9 MR. WARDER: Please excuse the juror from the trial
10 of this matter.

11 THE CLERK: You may be seated. You have been excused
12 from the trial of this case.

13 Juror 128, Michelle Inzerillo.

14 (Michelle Inzerillo, a white female, stood.)

15 THE CLERK: What says the State?

16 MS. SALISBURY: Please present Ms. Inzerillo.

17 THE CLERK: What says the Defendant?

18 MR. WARDER: Please swear Ms. Inzerillo.

19 THE CLERK: Ma'am, please, come have a seat in the
20 jury box.

21 For our alternate, Juror 257, John Welsh.

22 (John Welsh, a white male, stood.)

23 THE CLERK: What says the State?

24 MS. SALISBURY: Please present Mr. Welsh.

25 THE CLERK: What says the Defendant?

29

1 MR. WARDER: Please excuse the juror from the trial
2 of this matter.

3 THE CLERK: Sir, you may be seated. You have been
4 excused from the case.

5 Juror 256, Tony Waddell.

6 (Tony Waddell, a white male, stood.)

7 THE CLERK: What says the State?

8 MS. SALISBURY: Please present Mr. Waddell.

9 THE CLERK: What says the Defendant?

10 MR. WARDER: Please swear Mr. Waddell.

11 THE CLERK: Sir, please, come have a seat in the jury
12 box.

13 THE COURT: Are there any matters we need to take
14 care of as far as the selection of the jury in this case?
15 Anything from the State?

16 MS. SALISBURY: Nothing from the State, Judge.

17 THE COURT: From the Defense?

18 MR. WARDER: No, Your Honor.

19 THE COURT: Ladies and gentlemen who were not
20 selected, I can excuse you at this time. If you would,
21 please, just go back down to your assembly room, there
22 will be instructions for you there.

23 Thank you very much for being here today.

24 (WHEREUPON, the remaining jury panel members exited
25 the courtroom.)

30

1 THE COURT: Ladies and gentlemen, you've seen the
2 process by which you were selected to serve as a jury in
3 this case. I'm well aware of the inconvenience that this
4 is for you, but we're going to proceed with this trial.
5 And, unfortunately, we're not going to be able to start
6 now. I have another jury out that I need to take care of
7 some issues with that jury. And we're going to be running
8 into lunchtime.

9 So I'm going to excuse you now before we, actually,
10 start the trial of the case. If you would, be back at
11 2:00, we'll be ready to start then with the testimony. I
12 believe we'll have time to take care of the matters we
13 need to take care of and still get a bite to eat ourselves
14 before we're ready to start back. I'll give you some
15 preliminary remarks then to let you know about your
16 services and explain the process to you, when we'll be
17 taking breaks and so forth.

18 Let me remind you that it's very important, you've
19 been selected, and it would be improper for you to be in
20 any way discussing this case with anyone while you're out.
21 You, obviously, have family members who are interested in
22 what you're doing this week, and did you get picked for a
23 jury, and what's it about, and those kind of things.
24 You'll have an opportunity to share with your loved ones
25 when the case is over what you heard and what happened.

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1 But while the case is in progress and now that we've
2 selected you, it would be improper for you to be
3 discussing anything about the case with anyone. Don't let
4 anyone discuss it with you. I would not suspect in any
5 way that someone would approach you while you're out for
6 lunch and want to share information or ask you questions.
7 But if that were to happen, please, explain to that
8 individual that you are a juror and you can't be talking
9 about the case. If that person persists, then, if
10 possible, get the name of that individual and excuse
11 yourself as soon as possible and get that name back to us,
12 and we'll take care of that, I assure you. But I would
13 not expect anything like that to happen.

14 I just want you to understand the necessity of --
15 based upon the questions I've asked you, the responses
16 you've made, we're going to have a trial in this matter
17 based upon what takes place in this courtroom and not
18 anywhere else. It would be improper for you to try to do
19 any kind of investigation about the case or anything of
20 that nature while you're out and about.

21 As you come back, you may pass the attorneys in the
22 hallway or the elevator. And if they seem a little
23 unfriendly toward you, it's not their nature to be
24 unfriendly, but with their training, they want to, also,
25 make sure the purity of the process is maintained. And

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1 they want to avoid any appearance of any impropriety, even
2 though you might be having a conversation about a cold
3 front moving in, or a ball game, or something else. So if
4 they seem like they're avoiding you, it's their training.
5 They want to make sure that no one has any appearance of
6 any impropriety that they're talking with a juror. So,
7 certainly, you would not hold that against them, I'm sure,
8 as you see them out and about, perhaps, at lunch or even
9 in the courthouse here.

10 We'll be ready to begin the case, hopefully, at 2:00,
11 or as soon thereafter as we possibly can. If you'll go
12 now with Ms. Fryer, she'll explain to you where you're to
13 come back when you -- report back. And I'll see you at
14 2:00. We'll begin the trial at that time.

15 (WHEREUPON, the jury was excused from open court at
16 approximately 12:49 p.m.)

17 THE COURT: All right. I understand that y'all might
18 have some evidence that y'all needed to review.
19 Hopefully, that will give you enough time during the lunch
20 hour. We're going to get a verdict from our other jury,
21 and then we'll be ready to start this case at 2:00.

22 (WHEREUPON, a lunch break was taken.)

23 (WHEREUPON, State's Exhibit Nos. 1, 2, 3, 4 and 5
24 were marked for identification only.)

25 THE COURT: Is everybody ready to proceed?

33

1 Anything from the State?

2 MS. SALISBURY: Nothing from the State, Judge.

3 THE COURT: From the Defense?

4 MOTIONS

5 MR. WARDER: Your Honor, based on the tape, I'm going
6 to move to make a motion to dismiss this case for the
7 failure of the State to comply with 56-5-2953.

8 Your Honor, factually, what happened in this case is
9 that my client was found at the scene of an accident. And
10 an ambulance had been called. And he was in the back of
11 the ambulance being evaluated.

12 And the highway patrolman officer arrived upon the
13 scene and got my client out of the ambulance and performed
14 some field sobriety tests on him. He performed the
15 nystagmus gaze test -- or the gaze nystagmus test, had him
16 say his ABC's, then took him into custody, placed him in
17 the patrol car, focused the camera on his face, and read
18 him his rights. And, sometime later, he gave him another
19 ABC test.

20 And had he complied with the statute, he would have
21 had to read him his Miranda rights on the camera prior to
22 the beginning of any field sobriety tests or questioning.
23 Those tests would have had to have been on the tape in a
24 video form. The tapes -- the tests are on the sound track
25 only, and that does not comply with the requirements that

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1 a video be made. Therefore, the State has failed to
2 comply with the statute.

3 THE COURT: 56-5 what?

4 MR. WARDER: 56-5-2953.

5 THE COURT: 2953. Okay.

6 MR. WARDER: Yes, sir.

7 Your Honor, that statute provides that while the --
8 if it's not -- if a video is not made and an affidavit is
9 not filed, then, of course, the Court has no alternative
10 but to dismiss it. And, in this case, I would submit to
11 you that because the field sobriety tests were made prior
12 to Miranda, not on video, that, under Section B, it should
13 be dismissed.

14 And, Your Honor, I would cite to you -- just a
15 minute. I apologize. The case of the City of Rock Hill
16 v. Suchenski at 646 S.E.2nd 879, under headnote 5 of that
17 case.

18 THE COURT: All right. Solicitor, I'll be glad to
19 hear your response to the motion, particularly in light of
20 the Rock Hill case.

21 MS. SALISBURY: Sure, Judge.

22 With regard to the City of Rock Hill v. Suchenski,
23 it's the State's position that that case simply isn't
24 controlling for a huge reason and a reason that the
25 statute has distinguished, that being that the

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1 circumstances of this particular arrest did not involve a
2 traffic stop. That's the critical component of
3 distinction in the statute.

4 I would direct Your Honor's attention to Section B.
5 It's a large subsection of 56-5-2953. But the part that's
6 relevant in our case begins, "In circumstances including,
7 but not limited to roadblocks, traffic accident
8 investigations, and citizen arrests where an arrest has
9 been made and the video recording equipment has not been
10 activated by blue lights, the failure of the arresting
11 officer to produce the video recordings required by this
12 section is not alone a ground for dismissal. However, as
13 soon as video recording is practicable in these
14 circumstances, video recording must begin and conform with
15 the provisions of the section."

16 So, Your Honor, it's the State's position that in
17 this incident, since we're not dealing with a traffic
18 stop, but instead an investigation -- and I know that Your
19 Honor will hear this as the trial plays out, but the short
20 version of the facts are that this Defendant is alleged to
21 have wrecked his vehicle and fled the scene on foot.

22 So even when highway patrol arrived and, ultimately,
23 interacted with the Defendant, this had been some four
24 hours after the collision had, actually, occurred. By the
25 time highway patrol was able to locate this Defendant, who

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1 was wandering in the interstate, they performed -- Trooper
2 Hiott's testimony would be that he advised the Defendant
3 of his Miranda rights in the back of the ambulance, and
4 performed the horizontal gaze nystagmus test in the back
5 of the ambulance only when it was acceptable for the
6 trooper -- it's my understanding that Trooper Hiott would
7 testify that once he learned that the Defendant was not
8 going to be transported for medical treatment, that's when
9 he was removed from the ambulance and placed in the patrol
10 car.

11 And it is correct and true that the trooper performed
12 two field sobriety tests, one of which is not on camera.
13 But the recording, instead, began as soon as was
14 practicable, which was when the Defendant was removed from
15 the ambulance and placed in the vicinity of the patrol car
16 and when the trooper's video recording system was
17 activated.

18 Because we're not dealing with a traffic stop. The
19 blue lights were not activated -- the camera was not
20 activated simultaneously with the blue lights as is
21 customary with a traffic stop. Instead, the trooper had
22 to manually begin the recording of the tape, which he did
23 as soon as it was practicable.

24 So, in that respect, Your Honor, it's the State's
25 position that the State has produced a videotape that is

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1 in legitimate compliance with the requirements of
2 56-5-2953. And I think the Trooper's testimony would
3 support that, if you're inclined to ask him any questions
4 about what he did.

5 THE COURT: What part of the -- there is a video?

6 MS. SALISBURY: Yes, Judge.

7 THE COURT: And what does it include?

8 MS. SALISBURY: The video begins with the trooper
9 speaking with the Defendant outside the patrol car. The
10 Defendant is heard describing some of the injuries that he
11 sustained -- or alleges to have sustained in the wreck.

12 THE COURT: Is this at the scene of the accident?

13 MS. SALISBURY: It is close to the scene of the
14 accident, yes, Judge, where they found the Defendant in
15 the roadway. I don't believe that the Defendant was near
16 his car when officers located him. And by the time they
17 did locate him, the truck had already been towed. So it
18 wasn't so much of an accident scene as it existed anymore.
19 It was simply where they interacted with him some few
20 hours later.

21 THE COURT: What about that, Mr. Warder, this being
22 an accident investigation, rather than a traffic stop?
23 Does that have an exception for that in the code?

24 MR. WARDER: Your Honor, this is a case where it's
25 not an accident investigation in the classical sense.

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1 THE COURT: Is it a traffic stop in any way?

2 MR. WARDER: No. It's not a traffic stop.

3 It's an officer -- second officer coming to the scene
4 and making the determination. Your Honor, nothing in that
5 would alleviate the duty to have began making the video of
6 the Defendant. The blue lights are running when the video
7 comes on. The Defendant is right by the patrol car. They
8 choose not to put him in front of the camera, but to take
9 the test to the side and not use it.

10 Your Honor, there was absolutely no reason that they
11 didn't take him -- it wasn't a case where there was an
12 investigation and they come up on a defendant and he's
13 being treated and not up walking around. He's not taken
14 to the hospital. He's taken to the jail by the highway
15 patrolman.

16 THE COURT: All right. Any other motions?

17 MR. WARDER: No, Your Honor.

18 Some of the facts that the State alleged, we would
19 dispute. We, certainly, would dispute that he was given
20 the test in the ambulance. He was given the test out on
21 the -- standing where -- beside the patrol car, rather
22 than in front of it or in the camera range.

23 THE COURT: Well, I could, certainly, hear -- I guess
24 we've got several officers listed. And I could hear all
25 their testimony as to this in-camera, and make a ruling.

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1 But I think the most expedient way to do it is I'll take
2 your motion under advisement and hear the testimony
3 develop. If the State finds it unnecessary in the
4 presentation of their case before the jury to not ask
5 questions relating to the statute and why the video wasn't
6 working and so forth, then I'll try to be alert to that
7 myself and call for a break and ask the questions outside
8 of their presence.

9 But I think I would -- we're probably going to have
10 to see the video. And I'm going to have to have the facts
11 to really know -- since the statute gives the exception --
12 and I'm aware of the Rock Hill case. I'm going to have to
13 have some more information and whether I think it would be
14 efficient for us to get that information as the trial
15 progresses. I'm not ruling against you at this stage,
16 Mr. Warder. I'm seriously taking that under advisement.
17 And if the facts develop such that I believe the statute
18 has been violated, then we'll, certainly, re-address your
19 motion for the dismissal.

20 Any other motions, Mr. Warder?

21 MR. WARDER: Your Honor, with regard to the tape that
22 we reviewed, the -- I don't think that any of the
23 questions asked on the tape are admissible. And all the
24 testimony on the tape, the officer relates that he has --
25 says he has witnesses that are going to testify to certain

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1 I thank you very much.

2 THE COURT: Solicitor, you may call your first
3 witness.

4 MS. SALISBURY: Thank you.

5 The State calls Ms. Lillie Chastain.

6 Ms. Chastain, please, come around and be sworn.

7 THE CLERK: Ma'am, if you'll pause at the end of the
8 bench right here. Please place your left hand on the
9 Bible and raise your right hand.

10 WHEREUPON,

11 LILLIE MAY CHASTAIN,
12 after first having been duly sworn, testified as follows:

13 THE CLERK: Thank you.

14 Please be seated.

15 Please state your full name for the record.

16 THE WITNESS: Lillie May Chastain.

17 THE CLERK: Thank you.

18 DIRECT EXAMINATION

19 BY MS. SALISBURY:

20 Q Ms. Chastain, thank you very much for being here
21 today.

22 I'm standing way back here so I can make sure that I
23 hear you. Because if I can hear you, then, hopefully, all
24 the members of the jury can, too.

25 A Okay.

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1 Q Well, I'll start off by asking you just a little bit
2 about yourself. Where do you live?

3 A I live in Fountain Inn.

4 Q Okay. How long have you lived there?

5 A Practically all my life.

6 Q Do you know Greenville well?

7 A Yes.

8 Q Do you work?

9 A No. I'm disabled.

10 Q Okay. Well, good. Well, I'll jump right into it.
11 Basically, do you remember the events of January 19th,
12 2008, and why we're here today?

13 A Yes, I do.

14 Q Well, can you tell the jury a little bit about what
15 you were doing that night and how you got involved in this
16 whole scene?

17 A Okay. Well, I was at a convention. My husband is a
18 DJ. He DJ'd an NA convention that night. So around about
19 1:00 or so, me, and my daughter, and her two kids, we was
20 leaving. Because we had already packed up everything.
21 And so I just told him I was going to go on so I could go
22 home and go to bed.

23 So when I was getting ready to come off the on ramp,
24 you know, I looked back to see, you know, any on-traffic
25 coming. And, when I looked back, I said, Oh, my God, this

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1 person is driving crazy. So I waited for that person to
2 get in front of me before I got off the on ramp.

3 Q Okay. Let me stop you right there and ask you a few
4 more questions so that everybody understands what we're
5 dealing with.

6 A Okay.

7 Q You said 1:00. After midnight in the morning?

8 A Yes.

9 Q Okay. So is it pitch dark outside?

10 A Yes, it is.

11 Q Now, you mentioned the on ramp. From which direction
12 were you coming? Which on ramp?

13 A I was getting off Roper Mountain going south towards
14 Simpsonville. And, when I looked back, I saw this truck.
15 And it was like driving kind of crazy, and swerving in the
16 road. And I wanted to wait for him to go by, or her, or
17 whoever to go by before I decided to get on 385 going
18 southbound. And, once they got by me, then I looked and
19 I'm like -- I called my husband. And he said, Well, dial
20 911. So I dialed 911. And I was telling them how he was
21 driving.

22 Q Well, what did you see? How was he driving?

23 A He was like in and out of lanes. And he almost hit
24 this car. And then we -- after we passed over the first
25 bridge that goes to Woodruff Road, we was coming down.

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1 And there was another car, and he almost hit it. I
2 said -- so when I dialed 911, I said, Y'all need to come
3 quick. He's going to kill somebody.

4 And so the officer -- well, the lady was asking me,
5 she said, Well, let me talk to a police officer, you know,
6 whoever to come out. And so she said, Can you stay on the
7 line?

8 And I said, Yeah. I'm not going nowhere.

9 And when he got ready to hit another car, I said, Oh,
10 my God. It just scared me so bad. He was running off --
11 weaving off the road. And by the time we got up to the
12 bridge part, it was like -- I guess he couldn't make it
13 because of the curve and the bridge.

14 And when he got to the bridge, it was like he just
15 hit the wire thing in the middle of the bridge. And, when
16 he hit it, he flipped. And his lights was like facing me.
17 And then he went into the ditch. And, when he got in the
18 ditch, he got up and got out of the window, the door, or
19 something that was open. And he ran across the other side
20 and hit -- and jumped over that fence.

21 Q Okay. Let me ask you a few questions about all that.

22 A Okay.

23 Q He -- so while -- you're on the phone with 911?

24 A Yes.

25 Q And are you describing to them everything you're

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1 seeing?

2 A Yes, I am.

3 Q So did you see how the Defendant -- well, let me ask
4 you this. Did the Defendant wreck -- which direction off
5 of the road? How does the curve turn?

6 A The curve was going like to the left. And I -- it's
7 kind of a sharp curve. And if you don't be careful, you
8 know, you can just flip over. And when he was going into
9 the curve, he hit the thing. Because I guess he
10 overcorrected himself, and that's what caused him to flip.
11 And he went into that ditch. And when he went into the
12 ditch, me and my daughter both seen him get up out of the
13 truck and take off running.

14 Q So you recall seeing him on his feet running?

15 A Yes.

16 Q Do you remember what he was wearing?

17 A All I could see was a white shirt.

18 Q Okay.

19 A And I don't know the pants or what color they were,
20 or whatever, but I could see a white shirt. And he ran
21 over. And then when he got over to the other road, he
22 went over the fence. And I couldn't see him any more.

23 Q Well, what kind of fence are we talking about?

24 A It's a fence, I guess, taking from -- it's in
25 industrial places in -- over the fence. And I guess they

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1 just blocked that for their privacy, you know. And when
2 he went over the fence, I didn't know where he went.

3 Q Is it like a chain-link fence, a wood fence?

4 A Well, I know the top part had some barbwire or
5 something on it. So he could have snagged himself or
6 whatever.

7 Q Did you tell -- I know you were driving at this
8 point, but do you remember how tall -- was it a tall
9 fence?

10 A It was kind of tall. It wasn't real, real tall, but
11 it was kind of tall. I guess it depends on where you're
12 at, you know. In a car, some fences don't look as tall as
13 what they really are, because you're not right there at
14 the fence.

15 Q Okay. Well, then, so you saw the wreck and you're
16 describing to 911 what happened. What did you do?

17 A Well, they wanted me to stay, so I stayed. I went
18 all the way down to the ramp and got off. And I turned
19 around. And, when I turned around, I went back over to
20 the side where the accident was. And I stayed there. And
21 the police officer came and was asking me questions.

22 Q Okay. Now, tell me, were you -- I know you were
23 traveling behind the Defendant, but were you able to see
24 any objects in the roadway or any obstructions?

25 A No. There wasn't anything there.

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1 Q Was it raining that night?

2 A No, it wasn't.

3 Q Okay. So you testified you were able to pull over,
4 and you waited for the police to come?

5 A Yes, I did.

6 Q Did you talk to police that night about what you saw?

7 A Yes, I did.

8 Q Did you tell them about the erratic driving that you
9 saw?

10 A Yes, very erratic.

11 Q Well, what happened next?

12 A Well, we was out there a while. And it was cold. So
13 I sat in the car for a while. And, you know, he wanted to
14 talk to me some more about what was going on. They was
15 trying to see could they locate the guy that was in the
16 accident. And I guess they went where the fence was and
17 was asking about the -- you know, what happened. And so I
18 was just telling them what was going on. I don't know
19 nothing else.

20 Q Did you see police trying to search for him?

21 A Yeah.

22 Q Were they looking to find where he might be?

23 A Yes.

24 Q But you had told them that he ran?

25 A All I knew is he just went and jumped over that.

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1 fence. I didn't know if he lived down that way or what.
2 I just know he just jumped over that fence where the
3 industrial places was.

4 Q Well, did you have any other involvement in the case,
5 besides what you did that night?

6 A No.

7 MS. SALISBURY: All right. Well, thank you,
8 Ms. Chastain.

9 If you will, answer any questions Mr. Warder may have
10 for you, please.

11 THE WITNESS: Okay.

12 THE COURT: You may cross-examine the witness,
13 Mr. Warder.

14 MR. WARDER: Thank you, sir.

15 CROSS-EXAMINATION

16 BY MR. WARDER:

17 Q Ms. Chastain, when you came to the intersection of
18 Roper Mountain Road and I-85, which --

19 A 385.

20 Q 385. Which way were you coming from?

21 A I was coming from the Embassy Suites off of Roper
22 Mountain Road. And I was going on 385 south.

23 Q So, as you come from the Embassy Suites, that would
24 have been a right-hand turn for you onto the ramp?

25 A Yes.

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1 Q Okay. And, as I remember, when you come down from
2 the Embassy Suites, there's a stop sign right there -- I
3 mean, a stoplight right there at Woodruff Road, at the
4 corner of Woodruff Road and Roper Mountain?

5 A A stoplight? Yes, the stoplight is on Roper
6 Mountain.

7 Q Okay. And then you would have went up past the
8 Waffle House and made your right-hand turn; is that right?

9 A Yes. Roper Mountain Road, you're saying, yes.

10 Q Okay. And, of course, you can't see traffic coming
11 up 385 until you get up to where the turn is, because
12 there's a hotel right on the other side of the road there?

13 A I wasn't on that road. He was on 385. He wasn't on
14 that road.

15 Q Yes, ma'am. He was on 385?

16 A Yes.

17 Q A little lower than Roper Mountain where you make
18 your turn. Roper Mountain goes over 385?

19 A Yes.

20 Q Okay. And when was the first time you caught a
21 vision of his car?

22 A What do you mean the "car"?

23 Q The car you said was driving erratic. You didn't get
24 on the highway --

25 A I saw a truck. I didn't see a car.

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1 Q I'm sorry. A truck. When was the first time you saw
2 this truck?

3 A When I came up to 385, before I got off on the on
4 ramp -- the off ramp, whatever you call it, then I seen
5 the truck. And I'm like, Oh, I'm not going to go out
6 there until he passes me.

7 Q So you had already turned and started down the ramp
8 to get on --

9 A Yeah, 385.

10 Q Now, did you see it in your mirror, or did you see it
11 out the window?

12 A No. I always look out my window. I don't look
13 through my mirror.

14 Q And how close was the truck to you when you saw it?

15 A It was about three, four cars back.

16 Q Okay. And did you stop and wait, or did you just
17 stay in that merge lane?

18 A No. I stopped when I seen him.

19 Q Did you stop before you got on 385?

20 A Yeah. I had to stop before I got on 385. I was
21 going down, and I was like -- I was going to yield off.
22 But once I looked out my window back some, I seen the
23 truck. That's when I stopped.

24 Q Okay. Now, how far did you let the truck get ahead
25 before you came out in the highway?

50

1 A Probably about four or five cars.

2 Q Okay. Now, did you have -- was the truck traveling
3 fast, or did you have to accelerate to get --

4 A No. I didn't accelerate. It was driving kind of
5 like -- it was like the speed limit.

6 Q Okay. And I believe the speed limit is about 55?

7 A Yes, it is.

8 Q Okay. Now, you followed it over the first bridge
9 there at -- and that would have been where 385 would have
10 went over I-85; is that right?

11 A Yes.

12 Q Okay. And it was still about four or five car
13 lengths ahead of you?

14 A Well, I got -- yeah, about four or five.

15 Q Okay. And you would have went down and, I guess,
16 passed the Mauldin Road exit, and then passed the Bridges
17 Road exit?

18 A Yes.

19 Q And then I believe the next exit would have been --

20 A Simpsonville.

21 Q The one --

22 A 31.

23 Q -- that goes to Simpsonville?

24 A Exit 31.

25 Q Kind of Laurens Road extension, or whatever they call

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1 that?

2 A Yes.

3 Q Okay. And then you would have started up the hill
4 where 385 goes back over and around?

5 A 276, it goes over. I think that's -- it goes over
6 276.

7 Q Okay. And where was it that this truck -- was that
8 the bridge that the truck hit something on?

9 A That's the bridge where he lost control trying to go
10 around the curve. And when he went around -- when he was
11 trying to go around the curve, he must have went too far.
12 And he hit the rail thing in the middle. Well, it's not a
13 rail. It's like a wire. The wire that they separate the
14 roads from. And that's when he went over in there.

15 And when he hit it, I guess it just bounced the truck
16 and it caused it to flip. And then, when it flipped, it
17 was facing me and went into the ditch. And, when he went
18 into the ditch, that's when he got up out of the truck and
19 got out and ran. He was not ejected. He got up out of
20 the truck.

21 Q Was the -- and I think --

22 A I slowed down. I slowed down, because I seen him
23 trying -- getting ready to hit something. That's why I
24 slowed down so -- you know, because I didn't want the
25 truck to hit me.

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1 Q Okay. It was the cable barrier thing he hit?

2 A Yes, exactly.

3 Q And that was on the -- separates the two lanes?

4 A Yes.

5 Q So he would have hit something when he was in the
6 inside lane; is that right, the lane closest to the
7 median?

8 A What do you mean "hit something"? He hit the --

9 Q Barrier?

10 A Yeah, yeah.

11 Q And he was in that lane closest to the median, as
12 opposed to the outside lane?

13 A No. He wasn't in the inside lane. He was on the
14 outside lane trying to get -- then that's when he went
15 into the inside lane and hit the barrier.

16 Q Okay. So he -- your testimony is he hit something on
17 the outside, and then crossed into the inside?

18 A No. I didn't say that. He went in trying to go into
19 the curve. And when he went into the curve -- and I guess
20 he was going to try to overcorrect and go into the inside
21 lane to try to keep his balance. But when he went in, he
22 went in too far and he went on into the barrier.

23 Q Okay.

24 A And that's when he flipped.

25 Q Where did it flip at? Did it flip on the highway?

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1 A Yeah. When he hit, it bounced back, flipped, and
2 went over back into the -- in the ditch on the right side.

3 Q Okay. So it would have struck the barrier on the
4 inside in the median, and it would have went back across
5 the highway. Is that what you're telling us?

6 A Well, he flipped back over into the highway into the
7 ditch.

8 Q And it ended up in the ditch. Did you stop in the
9 roadway there?

10 A I had to stop.

11 Q Okay.

12 A I had to stop. I mean, I didn't want to go into the
13 accident.

14 Q Okay. When you stopped, was -- the car, I take it,
15 he was in -- was already in the ditch?

16 A Yeah. When he was in the ditch, I stopped. And then
17 I just slowed down, went on, and started back up and went
18 on down. I didn't want to just stay there. Because I
19 didn't know who was in the truck or what might happen. I
20 had my daughter and my grandbabies in there --

21 Q Certainly.

22 A -- and I wasn't going to stop right there where he
23 was.

24 Q Where did you stop at in relation --

25 A I stopped down the hill.

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1 Q And so you looked back at it?

2 A Yes.

3 Q Okay. And did you look back in your mirror back
4 through the back window, if you can remember?

5 A I looked back like this.

6 Q Okay.

7 A Once I stopped.

8 Q And is that when you saw the person climb out?

9 A Yeah. I seen them climb out, and went over the road,
10 and then went over the fence. He went over -- it's
11 another little road that comes down that you can get on
12 the highway, on 385. And he went over that road and over
13 the fence.

14 Q Okay. Now, that fence is a chain-link fence?

15 A Yes.

16 Q Okay. It's got barbed wire on top?

17 A Uh-huh.

18 Q Did he just jump over it, or how did he do that?

19 A Well, the part I saw was he was going over the barb
20 wire part. So I don't know. I guess he had to climb up
21 some to get over that part.

22 Q Okay. Now, you said that the person you saw had a
23 white shirt?

24 A Uh-huh.

25 Q And that's what really stood out in the night and all

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1 the blackness out there was that white shirt?

2 A Yeah. They got out of the truck and went over the
3 fence.

4 Q Could you tell whether it was a shirt, or a sweater,
5 or a jacket?

6 A I couldn't really tell.

7 Q So it could have been any of those?

8 A Uh-huh.

9 Q And how long did that take from the time the truck
10 stopped to when the person went over the fence, or
11 whatever it was?

12 A It wasn't long. It wasn't but a few minutes.

13 Q A few minutes? Were you still sitting there a few
14 minutes --

15 A Or a few seconds. Yeah, I sat there.

16 Q Okay. And then, as I understand it, you drove down
17 to Georgia Road; is that right?

18 A Yes.

19 Q You went up over the bridge at Georgia Road, and then
20 come back up --

21 A Yes.

22 Q -- like you were going to Greenville?

23 A Uh-huh.

24 Q And you stopped somewhere up there?

25 A I went over to the bridge. After I got off the road,

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1 I went over to the next exit, which is -- you can get off
2 at the Simpsonville exit. And I went back on 385 going
3 south, and then I stopped.

4 Q Okay.

5 A Because the officer wanted me to come back.

6 Q So you were on the phone, and they told you to come
7 back?

8 A Yes.

9 Q Okay. And anything else you did about this?

10 A No. I just talked to the officer.

11 Q And how long did you stay there that night and do
12 that?

13 A It could have been about an hour.

14 Q You were there an hour?

15 A Or not quite an hour.

16 Q You told me you observed the officers looking around
17 searching. Where were they searching at?

18 A Well, the truck, over the fence. And I think a
19 couple of them left to go somewhere. I don't know if they
20 knew where he lived or what.

21 Q So they were searching on the other side of this
22 fence you saw; is that right?

23 A Excuse me?

24 Q They were searching on the other side of this fence
25 where he went over?

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1 A Yes.

2 Q Okay. You told them that place, and then they went
3 on the inside and looked around?

4 A I assumed they did.

5 Q Well, did you see that?

6 A Yeah. I seen them looking, uh-huh.

7 Q Is that the big area they searched?

8 A Well, really, once I sat down in the car, I did not
9 know where all they searched.

10 MR. WARDER: Okay. Thank you.

11 THE WITNESS: You're welcome.

12 THE COURT: Any redirect?

13 MS. SALISBURY: Just one question, Judge.

14 REDIRECT EXAMINATION

15 BY MS. SALISBURY:

16 Q Ms. Chastain, I just want to clarify about exactly
17 how this wreck happened. Is it your testimony that the
18 Defendant, first, left the side of the roadway, the inside
19 lane, the left lane, struck the median, and then turning,
20 flipping, however, ended up wrecking on the right side of
21 the roadway?

22 A Yes.

23 Q Is that what you observed?

24 A Yes.

25 Q Now, when you -- how long between the time the car

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1 ended -- stopped flipping around, flipping over itself,
2 how long did you stop and watch before you saw the
3 Defendant climb out of the car?

4 A Well, once I got down and was at the hill, then he
5 came out of the truck.

6 Q Okay.

7 A So it wasn't like it was five minutes. It was maybe
8 a minute.

9 MS. SALISBURY: Okay. Well, thank you. Thank you
10 very much.

11 Judge, I don't have any additional questions.

12 THE COURT: Okay.

13 MR. WARDER: May it please the Court.

14 I have one follow-up.

15 THE COURT: Yes, sir.

16 RECROSS-EXAMINATION

17 BY MR. WARDER:

18 Q The Solicitor asked you if you saw the Defendant get
19 out of the truck. Did you recognize the man you saw get
20 out of the truck?

21 A No. I couldn't recognize him.

22 Q Could you see his face or anything?

23 A I just know it was a white man.

24 Q Okay. It was a white male?

25 A Uh-huh.

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1 Q With a white sweater on, or white shirt, or white
2 something?

3 A Something white on, yes.

4 Q Okay. And when she said, Did you recognize the
5 Defendant, you don't know whether it was him or not,
6 because you can't recognize him; is that right?

7 A That's true.

8 MR. WARDER: Thank you.

9 THE COURT: All right. Thank you, ma'am.
10 You may step down.

11 MS. SALISBURY: Judge, may Ms. Chastain be excused
12 from her subpoena?

13 THE COURT: Is there any objection to this witness
14 being excused?

15 MR. WARDER: No, Your Honor, there isn't.

16 THE COURT: Thank you, ma'am.

17 You may be excused.

18 Thank you very much for coming, ma'am.

19 MS. SALISBURY: Your Honor, the State would call
20 Sergeant Wesley Hiott.

21 THE CLERK: Sir, please, come around and place your
22 left hand on the Bible and raise your right hand.

23 WHEREUPON,

24 WESLEY M. HIOTT,

25 after first having been duly sworn, testified as follows:

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1 THE CLERK: Thank you.

2 Please be seated.

3 Please state your full name for the record.

4 THE WITNESS: Wesley M. Hiott.

5 DIRECT EXAMINATION

6 BY MS. SALISBURY:

7 Q Sergeant Hiott, where do you work?

8 A I work in Greenville County for the State of South
9 Carolina.

10 Q For which agency?

11 A The South Carolina Highway Patrol.

12 Q And how long have you been with the highway patrol?

13 A I'm working on my 21st year.

14 Q Now, what are your general duties and
15 responsibilities as patrol?

16 A At the time, I was a shift supervisor over a shift.
17 Now, I'm assistant to the post commander over our post.

18 Q Trooper, have you had any special training with
19 regard to the detection of impaired drivers?

20 A I had been to an advanced DUI detention test prior --
21 several years before that.

22 Q Is there any other DUI training that the patrol puts
23 on for its troopers, aside from that advanced training?

24 A We have some seminars and stuff that we go to, that
25 we've been to as far as training.

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1 Q Now, I realize it's been a long time, but over the
2 course of your career, approximately how many DUI's do you
3 think you've investigated?

4 A I couldn't -- hundreds, at least, hundreds.

5 Q All right. Well, do you recall if you were on patrol
6 during -- just after midnight on January 19th, 2008?

7 A Yes, I was.

8 Q What was your general area of patrol?

9 A Basically, as a supervisor, I go anywhere I want to
10 go in the county. But, on that particular night, we were
11 really busy. And the dispatch gave out a call that we had
12 a caller behind a possible intoxicated driver on 385.

13 I was in the -- not real close to the area, but I was
14 close by. And I told her I would start heading that way
15 to see if I could possibly get to the possible intoxicated
16 driver.

17 Q Well, where did you go?

18 A I proceeded down 385, told the dispatcher to keep the
19 caller on the line through radio communications. The
20 dispatcher said the possible vehicle almost wrecked
21 several times. I told her just to keep the caller on the
22 line. And, eventually, the dispatcher said the vehicle
23 had wrecked at Sandy Springs Road off 385.

24 Q Trooper, if you would, I'm going to ask you to step
25 down from the witness stand real quick.

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1 A (Witness complied.)

2 Q I'm going to show you what's been marked as State's
3 Exhibit No. 1, and ask you if you recognize the area
4 that's depicted in this photograph. Do you recognize that
5 area?

6 A Yes, I do.

7 Q What are we looking at?

8 A This is -- let me look at it the right way. This is
9 385 coming from Greenville right here. I don't know if
10 anybody is familiar with the area, but this used to be the
11 Ford dealership -- the Chevrolet dealership in
12 Simpsonville right there. It's closed down right now. I
13 think that's the -- I can't remember what that -- that's
14 Kemet right here. And I'm not sure what this business is
15 right here.

16 This is 276 where it splits off right there coming
17 out of Simpsonville. If you stay on it, you'll go into
18 Mauldin. And you've got the Southern Connector that
19 branches off to the left right there.

20 Q Well, Sergeant, let me ask you, is this an accurate
21 depiction of the area that's depicted?

22 A Yes, it is.

23 MS. SALISBURY: Your Honor, at this time, the State
24 moves State's Exhibit No. 1 into evidence.

25 THE COURT: Any objection?

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1 MR. WARDER: No, Your Honor.

2 THE COURT: Without objection, State's Exhibit No. 1
3 is in evidence.

4 MS. SALISBURY: Thank you, Judge.

5 (WHEREUPON, State's Exhibit No. 1 was admitted into
6 evidence.)

7 BY MS. SALISBURY:

8 Q Sergeant, if you could, show the area to which you
9 responded. Where did you learn that this collision had
10 taken place?

11 A Right around in this area right in here. This would
12 be coming out of the way the Defendant would have been
13 traveling. And the vehicle came to a rest in this area
14 right here.

15 Q All right. I think that's all I need from this right
16 now. If you would, you can hop back on the witness stand.

17 A (Witness complied.)

18 Q Now, when you arrived on the scene, that Sandy
19 Springs area that you just showed the jury, what did you
20 see?

21 A There was a pickup truck overturned in between the --
22 it was in between the area where I showed you. You've got
23 a ramp that comes from Mauldin on this side of the
24 roadway. And there's a grassy area between there. The
25 pickup truck was overturned in between that area right in

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1 there. There was EMS, fire department, and Simpsonville
2 PD was on the scene. Just a bunch of emergency vehicles.

3 Q Well, what did you do?

4 A I got out and talked to everybody. Also, the witness.
5 that just left -- I can't remember her name -- was still
6 there. I talked with her, asked her, you know, what she
7 saw. Basically, she told me she had followed the vehicle
8 from Roper Mountain Road all over the roadway, and it
9 about hit several cars. She said she saw the Defendant
10 get out of the car after it wrecked, run across that paved
11 section that comes out of Mauldin, and jump over a fence.

12 At that time, the fire department, EMS, the other
13 police officers, we looked around the vehicle, and looked
14 into some of the wooded area to see if somebody else may
15 have been in the car. Because lots of times when they
16 overturn like that, you know, someone can be ejected. We
17 didn't find anyone. Myself -- we had notified the county,
18 the Sheriff's Department, also, to help us, since she said
19 he had jumped the fence, go over to that industrial area
20 over there and look for the subject. Maybe he was laying
21 over there hurt, maybe he was still running, or whatever.
22 We searched that area for 15 or 20 minutes.

23 I, also, ran the tag on the car, which came back to
24 an apartment complex in Simpsonville, which is -- you've
25 got West Georgia Road exit, the next exit, and then the

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1 next exit down is Fairview Road. These apartments are
2 located on Fairview Road behind the Burger King there on
3 Fairview Road. I don't know if you're familiar with that.
4 Myself -- I didn't know the code to get into the gate.
5 It's a gated community. Myself and a couple of
6 Simpsonville police officers went down to the address
7 where this subject lived thinking -- I knew he didn't have
8 time to get there on foot. I thought he may have caught a
9 ride with somebody, and somebody may have took him home.

10 We went to his apartment. When we walked up to the
11 door, there was a -- right at his front door, there was a
12 pile of throw up where somebody had thrown up right there
13 at the front door. That made me believe that somebody may
14 have brought him home, and he got sick before he went in
15 the house. We knocked on the door, beat on the door. We
16 went around to the windows, beat on the windows.
17 nobody -- we stayed there probably 10 or 15 minutes
18 beating on the doors, beating on the windows. Nobody came
19 to the door.

20 In the meantime, I had called for a wrecker. And I
21 think a couple other -- I think another trooper came up to
22 the scene and waited on the wrecker. And we got the car
23 towed.

24 Q Well, back at the scene, how many people -- you said
25 you showed up and there was EMS, there's fire, there's a

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1 few people from Simpsonville. How many people are
2 assisting you in this search for the driver of this car?

3 A Just to guesstimate, there was probably three or four
4 Simpsonville officers that were helping me search, you
5 know, the vicinity. Probably -- I don't know how many
6 sheriff deputies. I passed a couple with their spotlights
7 on looking in the woods and stuff, four or five. The fire
8 department and EMS didn't go outside the wreck scene to
9 help look for anybody. They stayed at the wreck scene.
10 Once they figured out they didn't have a patient, they all
11 left.

12 Q Well, once you decided that you weren't going to be
13 able to find the driver of this car, what did you do?

14 A Well, I, basically, just got the general information
15 for my report. And I cleared the scene, everybody cleared
16 the scene. And I went about my normal duties.

17 Q Now, at some point -- well, tell me this, about what
18 time do you think you left the scene, finished whatever
19 search, whatever investigation you could do with what you
20 had? When do you think you left?

21 A Probably 2:30, 3:00, somewhere in there probably.

22 Q Well, did you, at some other point, get any other
23 information about this wreck?

24 A No, just from the witness. And then later, I got a
25 call from dispatch. I think it was probably 4:30, 5:00.

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1 I don't remember the exact time. I got a call from
2 dispatch saying a Simpsonville police officer was out with
3 the driver of my vehicle and said he was wandering in the
4 roadway on 385. So, at that point, I proceeded back to
5 the scene.

6 Q What did you do when you got there?

7 A I got to the scene, and the police officer was there.
8 EMS was there. The Defendant was in the back of an EMS
9 vehicle and was talking to them. I guess they were
10 checking him out.

11 Q Well, did you talk to him at that point?

12 A I got in the back of the ambulance. The EMS was
13 telling me that he didn't want to go to the hospital.
14 And, at that point where I had some bright lights, I mean,
15 I did the nystagmus test in there so I could see his eyes
16 in the ambulance.

17 Q Well, let me stop you right there. What is the
18 nystagmus test?

19 A Well, first of all, when I got in the ambulance and I
20 determined that he was under the influence, I did read him
21 his Miranda rights in the back of the ambulance before I
22 gave him the sobriety test. I gave him that one test.

23 It's a test where you can hold your finger up or a
24 pencil or pen, any pointed object up in front of your
25 face, ask them to follow it with their eyes without moving

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1 their head like this right here. If they've got a jerking
2 motion in their eyes, eyes tend to jerk, it's an indicator
3 they've got alcohol in their system.

4 Q So what's the purpose of the test?

5 A Just an indicator of alcohol and if they can follow
6 your commands.

7 Q Now, why did you offer him the test? What made you
8 think that alcohol was even an issue?

9 A Well, when I opened up the back of the ambulance, I
10 could tell alcohol was an issue, because I could smell it.
11 From doing that for so many years, if you just hold your
12 finger up and their eyes start jerking, that tends to be a
13 high level of alcohol in their system. But if you get
14 over to the side and it takes it a while to start jerking
15 or how much it jerks, from my number of DUI arrests, I can
16 usually tell how intoxicated they are by the amount of
17 jerking in their eyes.

18 Q So did you form a conclusion from that particular
19 field sobriety test about whether alcohol was in the
20 Defendant's system?

21 A Yes, I did. At that point, after that, I knew he
22 wasn't going to the hospital. So I took him out of the
23 back of the ambulance and took him over to the side of my
24 car where I was going -- I asked him if he was hurt. And
25 he said his leg was hurt. So I didn't offer him any kind

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1 of balance test, or walking test, or anything like that.
2 I just asked him to say his ABC's.

3 At that time, when I got close to my car where my
4 camera would pick up, I did cut on my camera and captured
5 the audio part of the ABC's on my video port.

6 Q Well, based on how the Defendant said his ABC's, what
7 were your conclusions based on that sobriety test?

8 A He didn't even halfway get them right on the ABC's.

9 Q Now, you mentioned that he had a leg injury. Why did
10 you choose just to perform those two tests?

11 A Well, if he had a leg injury, there was no point in
12 trying to give him any kind of balance test.

13 Q Now, did the Defendant indicate to you that he had
14 been the driver of the car that was now no longer at the
15 scene?

16 A Yes, he did. He told me that he had been laying out
17 there -- that he had been ejected out of the car, and he
18 had been laying out in the grass, and he woke up and that
19 he was trying to flag down cars.

20 Q Well, what did you elect to do? After you spoke with
21 him, after you formed the conclusions that alcohol was
22 present, after you conducted these field sobriety tests,
23 what did you do?

24 A I placed him under arrest, put handcuffs on him,
25 which is policy. We transport in the front seat of our

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1 cars, because we don't have cages. I put him in the front
2 seat of my car. I got him in there, turned the camera on
3 him where you could see his face.

4 I read him his Miranda rights again. And that's what
5 we call a DUI advisement. It's something we have to do
6 before we offer any tests. And we do that in the car.

7 Q Now, at any point while you were speaking with the
8 Defendant, did he indicate to you that he wanted medical
9 treatment, that he wanted to go to the hospital?

10 A No. I had already witnessed him in the ambulance
11 saying he didn't want to go to the hospital. So they have
12 to sign a waiver. But, before he could sign the waiver, I
13 had already put the handcuffs on him. And they came back
14 to my car with the waiver. So I signed it for him where
15 he stated he didn't want to go.

16 Q Now, if you recall, what was the temperature like
17 that night?

18 A It was January, so it was kind of chilly.

19 Q Was it raining outside? Was it snowing?

20 A No, it was clear.

21 Q Now, you've mentioned a couple of times that you have
22 a video camera in your patrol car?

23 A I do.

24 Q Was it working properly that night?

25 A Yes, it was.

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1 Q What about your microphone, was it working properly
2 that night?

3 A Yes, it was.

4 Q I'm going to show you State's Exhibit No. 2, and I'm
5 going to ask you if you recognize this item?

6 A It's a video, duplicated video from my in-car.

7 Q Have you had an opportunity to look at it?

8 A Yes, I have.

9 Q Is it an accurate recording of the events as reported
10 from your in-car camera on the night of this arrest?

11 A Yes, it is.

12 MS. SALISBURY: Your Honor, the State moves State's
13 Exhibit No. 2 into evidence.

14 THE COURT: Any objection to State's Exhibit No. 2?

15 MR. WARDER: Your Honor --

16 THE COURT: Previous objection?

17 MR. WARDER: Previous objection.

18 THE COURT: All right, sir. Over your objection.

19 (WHEREUPON, State's Exhibit No. 2 was admitted into
20 evidence.)

21 MS. SALISBURY: Your Honor, may we approach briefly?

22 THE COURT: Yes, ma'am.

23 (WHEREUPON, a bench conference was held.)

24 THE COURT: Mr. Foreman, and, ladies and gentlemen,
25 the exhibit is being admitted over the objection of the

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1 Defendant. There's portions of the video that are muted.
2 The evidence that's being offered is only that that you
3 hear the sound for when there's speaking going on. That's
4 the evidence that you'll have to consider. You're not to
5 consider any of the matters that you can't hear. That's,
6 basically, not in evidence, even though it's part of the
7 video.

8 BY MS. SALISBURY:

9 Q Trooper, if you would, reach up there and pull down
10 that screen for me.

11 A (Witness complied.)

12 Do you want me to move? Do you think I'll be in the
13 way?

14 Q That should be fine.

15 (WHEREUPON, State's Exhibit No. 2 was played in open
16 court.)

17 BY MS. SALISBURY:

18 Q Now, Trooper, what are we looking at right there at
19 the end of the video. What's happening right there at the
20 end?

21 A We're pulling up to the back door of the jail, the
22 little fenced area.

23 Q Now, what happens after this video stops? What do
24 you do?

25 A I take him out of the car. We go into a -- the

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1 detention center. We walk in. It's a place about the
2 size of that little square there. There's a door here.
3 There's a door there. It's kind of like a secured area.
4 One door opens, one door closes, and then another one will
5 open. You go in there and there's four -- everybody
6 that goes in that gets arrested goes through those
7 doors.

8 Also, in that room, once you go through that second
9 door, there's a breathalyzer room where we, actually, give
10 the breath test at.

11 Q Did you make it inside?

12 A We did make it through the second door. And then the
13 breath test had their own door where you go in there. And
14 when we got into the main area before you go into the
15 breath test area, the Defendant started breathing real
16 hard and said he couldn't breath, that his ribs were
17 broke. And he fell down in the floor.

18 At that point, with him acting like he was acting, I
19 took the handcuffs off of him and told him just to lay
20 there on the floor. I called EMS. EMS came and got him
21 from the detention center.

22 Q Now, I believe you testified earlier that EMS was on
23 the scene when the Defendant was arrested?

24 A Right, he was. He didn't want to go to the hospital
25 then.

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1 Q But once you got to the jail, he decided he wanted to
2 go to the hospital?

3 A When it was time to go take the Datamaster test, or
4 the breath test, before we got in the room is when he
5 started complaining that he couldn't breathe with his ribs
6 hurting.

7 Q So what did you do?

8 A I'm not going to deny anybody medical care. I called
9 EMS. They transported him to the hospital. I followed
10 behind in my patrol car. Since I couldn't give him a
11 breath test at the hospital, I was going to offer him a
12 blood test for the testing of his alcohol level.

13 Q I'm going to show you State's Exhibit No. 3. Do you
14 recognize this form?

15 A Yeah. This is a form that's made by SLED, which is
16 the South Carolina Law Enforcement Division, who controls
17 all the blood collection, breathalyzers, and everything.
18 They developed that form.

19 MR. WARDER: No objection, Your Honor.

20 MS. SALISBURY: I hadn't offered it just yet, but the
21 State plans to offer State's Exhibit No. 3 into evidence,
22 Judge.

23 THE COURT: Without objection, State's Exhibit No. 3
24 is admitted into evidence and may be published.

25 MS. SALISBURY: Thank you, Judge.

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1 (WHEREUPON, State's Exhibit No. 3 was admitted into
2 evidence.)

3 BY MS. SALISBURY:

4 Q Do you recognize this form as the form that you
5 filled out with respect to this Defendant's arrest?

6 A Yes, I do.

7 Q What's the purpose of this form?

8 A It gets -- it's basic information, his name, my name.
9 It's -- if you've got different tests that you can draw,
10 urine tests, what he's under arrest for, if he's under
11 arrest for DUI, felony DUI, whatever. If you're
12 requesting a blood sample, a urine sample.

13 Also, there's places in there for the hospital
14 personnel to fill out how they drew the sample. Also, if
15 they authorize that he was not able to go for a
16 breathalyzer test, he was under medical care.

17 Q Now, Trooper, explain to me again, why fill out this
18 form, instead of offering the Defendant a breath sample?

19 A Well, since I -- since he was hurt and had to go to
20 the hospital, we couldn't offer him a breath sample.

21 Q All right. So did you receive information from the
22 hospital staff that the Defendant could not offer a breath
23 sample?

24 A Yes, I did.

25 Q Did you, at that point, request a blood sample from

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1 the Defendant?

2 A Yes, I did.

3 Q Okay. Did the Defendant agree to give you a blood
4 sample?

5 A Well, I read him his implied consent, something that
6 we have to read prior to a breath test, urine test, any
7 kind of test. It's implied consent. We have to read that
8 to him, which I did read it to him. I gave him a copy in
9 writing.

10 After I read it to him, I asked him if he understood
11 it, which he did. He did understand it. He wasn't able
12 to sign it, at that time, because he was on a stretcher.
13 But I did give him a copy of it.

14 Q I'm going to show you State's Exhibit No. 4. Do you
15 recognize that form?

16 A That's the form that I read to him, the top portion
17 of it. I've got an "X" across the bottom portion, because
18 that portion did not apply to him.

19 MS. SALISBURY: Your Honor, at this point, the State
20 offers State's Exhibit No. 4 into evidence as well.

21 MR. WARDER: Without objection.

22 THE COURT: Without objection, State's Exhibit No. 4
23 may be admitted.

24 (WHEREUPON, State's Exhibit No. 4 was admitted into
25 evidence.)

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1 BY MS. SALISBURY:

2 Q So, Sergeant, just to make sure I understand, when
3 you learned that the Defendant was receiving medical
4 treatment at the hospital or was, at least, being seen by
5 medical personnel there, you elected to ask the Defendant
6 to provide a blood sample?

7 A Yes, I did.

8 Q And before asking him to provide a blood sample, you
9 read to him the rights on State's Exhibit No. 4?

10 A Yes, I did.

11 Q Okay. Now, after you did that, did you ask the
12 Defendant to provide a blood sample?

13 A Yes, I did.

14 Q Did he?

15 A No. He refused to give me a blood sample.

16 Q Okay. Now, did -- I want you to take a look, again,
17 at State's Exhibit No. 3. This is the blood collection
18 report. There's some notations on the bottom. And I kind
19 of just want to ask you to explain what those are. Is
20 that normal notations? Why is that writing at the bottom?
21 First, is that your writing?

22 A Yes. That is my writing. On the way to the
23 hospital -- I mean, on the way to the detention center
24 from the scene, if you caught that part of the video about
25 me asking him if he was taking any medication, and he said

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1 that he was. At that time, I didn't ask him what type of
2 medication he was taking. But I asked him if it was okay
3 to mix it with alcohol, which he said it was.

4 When I was at the hospital waiting to be seen, I
5 asked him, you know, what kind of medication he was on.
6 And he told me that he was taking Paxil and Tramadol,
7 which I -- I think that's how you pronounce that.. And I
8 wrote that at the bottom of this blood collection report
9 here.

10 Q Okay. Well, how long were you at the hospital?

11 A I think we were there a couple of hours. I think
12 they did some X-rays and stuff to make sure he was okay to
13 transport back to the detention center.

14 Q Did you transport him back to the jail?

15 A Yes, I did.

16 Q I would like you to take a look at State's Exhibit
17 No. 5. Do you recognize this photograph?

18 A Yes, I do. That's the Defendant.

19 Q Is that an accurate depiction of how the Defendant
20 appeared by the time that you took him back to the jail
21 that night?

22 A Yes. That's probably an hour or so afterwards,
23 because they had already dressed him out in the orange
24 jumpsuit.

25 MS. SALISBURY: Your Honor, the State offers State's

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1 Exhibit No. 5 into evidence.

2 THE COURT: Any objection?

3 MR. WARDER: No objection, Your Honor.

4 THE COURT: Without objection, State's Exhibit No. 5
5 is admitted into evidence.

6 (WHEREUPON, State's Exhibit No. 5 was admitted into
7 evidence.)

8 BY MS. SALISBURY:

9 Q So, Trooper, how long would you estimate between the
10 time that you transported the Defendant to the jail
11 initially, followed the ambulance to the hospital, waited
12 while he received whatever treatment they gave him, and
13 then returned him to the jail, about how much time had
14 elapsed from the time of his arrest?

15 A About five hours, probably, four and a half, five
16 hours.

17 Q Okay. Now, based upon your experience and training
18 and your interactions with the Defendant that night, did
19 you form an opinion as to whether this Defendant was
20 impaired even when you were interacting with him?

21 A Yes, I did. From what the witnesses said about how
22 he was driving, from his appearance and his demeanor, and
23 his smell of alcohol, and just his general appearance and
24 everything after I arrested him, I felt like that he was
25 grossly intoxicated. He -- like I said, he just smelled

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1 strong. His words were slurred. You can see that on the
2 video.

3 And then when we get to the jail, he doesn't complain
4 about any chest hurting or anything on the way to the
5 jail, you can see that. When he gets to the jail, he
6 falls on the floor saying his chest hurts when it's time
7 to take the breathalyzer.

8 MS. SALISBURY: All right. Trooper, if you would,
9 answer any questions Mr. Warder may have for you.

10 THE COURT: This might be a good time for us to take
11 a short break.

12 Mr. Foreman, and, ladies and gentlemen, I'll let you
13 go back to your jury room before we start the
14 cross-examination of this witness.

15 Let me remind you again not to discuss the case with
16 one another. We'll call you back in just a few moments
17 after we take a short break.

18 (WHEREUPON, the jury was excused from open court at
19 approximately 4:01 p.m.)

20 THE COURT: All right. While the jury is out, I just
21 need to ask a few questions of the officer concerning the
22 matter that the Defendant raised in this motion. I don't
23 know whether --

24 Are y'all okay for me to ask a few questions now?

25 And then, Mr. Warder, are you ready to proceed?

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1 I just want to ask him a few questions. You'll have
2 a right to ask him questions as well as to this issue on
3 your motion for the dismissal.

4 MR. WARDER: Whichever you prefer.

5 THE COURT: Well, I didn't know if anybody needed a
6 break. We've been going a long while, but I'm doing okay.

7 Officer Hiott, I just need to ask you a few questions
8 about the videotape to know when you turned it on.

9 As I understand, when you got the call from
10 Simpsonville, you immediately proceeded back to the scene.
11 How far was where you were located from the place that the
12 truck was towed? How much -- what was the distance from
13 when you first saw the Defendant from where the truck was
14 wrecked?

15 THE WITNESS: Let me clarify that to make sure.
16 Where I made the arrest and where they had him at, how far
17 was that from --

18 THE COURT: From where the truck landed?

19 THE WITNESS: I can probably show you on that --
20 well, it's further down the road from what's on that
21 picture right there.

22 THE COURT: Let me look at that.

23 Ms. Salisbury, if you could, just bring it up here
24 and let me --

25 MS. SALISBURY: You know, Judge, I have some smaller

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1 versions that are a little bit more --

2 THE COURT: Are they the same thing?

3 MS. SALISBURY: Yes, Judge.

4 THE COURT: All right.

5 MS. SALISBURY: I, also, have a larger version, an
6 aerial photograph that may be useful for the purposes of
7 this motion, if you're inclined to --

8 THE COURT: Again, Mr. Warder --

9 Make sure everybody can hear you when you're telling
10 me this, Mr. Hiott.

11 THE WITNESS: This is, basically, where the wreck
12 happened in this area right here. They found him down
13 here. It may have been right in this area. It could have
14 been back towards Simpsonville in the roadway, walking in
15 the road in the lane of travel. So that's a pretty
16 good -- I mean --

17 THE COURT: Would that be two-tenths of a mile?

18 THE WITNESS: Probably two, three-tenths of a mile.

19 THE COURT: Three-tenths of a mile?

20 THE WITNESS: Yes, sir.

21 THE COURT: Okay. You can have a seat.

22 And, basically, this was some three and a half, four
23 hours later?

24 THE WITNESS: Approximately, after the accident
25 happened, yes, sir.

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1 THE COURT: When you arrived, were you in the
2 southbound lane of 385 when you approached the Defendant?

3 THE WITNESS: Yes, we were.

4 THE COURT: Were your blue lights activated?

5 THE WITNESS: I'm pretty sure that I -- we've got a
6 switch where we can cut on our front or our back lights.
7 I think you can tell by the video that just my back lights
8 were on. The camera doesn't come on until you cut the
9 front on. There was several Simpsonville cars --
10 vehicles. I don't know if the fire department came back
11 out. But it was a pretty big scene, again, for the second
12 time.

13 THE COURT: And the first time you saw him, he was in
14 the back of the EMS vehicle?

15 THE WITNESS: Yes, sir.

16 THE COURT: Was he laying down? Sitting up? What
17 was he --

18 THE WITNESS: He was sitting on -- there's a bench
19 inside there, and he was sitting on the bench.

20 THE COURT: He was sitting on it?

21 THE WITNESS: Correct.

22 THE COURT: How far was the EMS vehicle from where
23 your vehicle was parked?

24 THE WITNESS: It was behind -- I'm pretty sure it was
25 behind my vehicle. Because when the camera came on, there

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1 was nothing in front of me. I don't know exactly how far.

2 THE COURT: Were there other cars in between yours
3 and --

4 THE WITNESS: Yeah. I went around them so I could
5 get me a good safe place to park. I got in front of the
6 scene. My car was a semi-marked car. So I wanted to be
7 behind the big vehicles so I wouldn't get hit again.

8 THE COURT: Other than the horizontal gaze nystagmus
9 test, was there any other test done in the back of the EMS
10 vehicle?

11 THE WITNESS: No, sir.

12 THE COURT: When you placed him in -- were any tests
13 given before he was placed inside your vehicle? The
14 ABC --

15 THE WITNESS: The ABC's, that was right after I cut
16 on my camera when I got close to my car.

17 THE COURT: That was -- the first ABC was on camera?

18 THE WITNESS: Yes, sir.

19 THE COURT: There was not an ABC test done before
20 that?

21 THE WITNESS: No, sir.

22 THE COURT: All right. Mr. Warder, any questions you
23 want to ask, or Ms. Salisbury?

24 I'll let you ask questions of this witness. Again,
25 this is on that one issue that we had on the motion to

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1 dismiss. Certainly, you have your cross-examination of
2 the witness available in front of the jury, Mr. Warder.

3 CROSS-EXAMINATION

4 BY MR. WARDER:

5 Q Officer Hiott, in this regard, your vehicle wouldn't
6 have been right next to the EMS vehicle?

7 A No. Like I said, I'm a semi-marked car. And I've
8 got vehicles with lights on top of them, more lights. And
9 I like to get in front of them so I'm not at the back of
10 traffic where I could possibly get hit by another car. So
11 I pulled around the scene.

12 Q How far in feet would that have been?

13 A I have no idea. I couldn't tell you.

14 Q Now, my client walked fine to your car?

15 A He said he hurt his leg, but he was walking.

16 Q He was ambulatory, walked right over there?

17 A Yeah. I wouldn't say he walked fine, but he was
18 walking.

19 Q Your car had its blue lights on when we see it in the
20 video, didn't it?

21 A I think it just had the back lights on. Because the
22 front wasn't --

23 Q Well, are they blue?

24 A Yes, they are.

25 Q And the camera was activated and working?

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1 A Right.

2 Q And are you telling us you didn't give him an ABC
3 test before you put him in the car?

4 A Yes, I did.

5 Q Okay. And that's recorded on the thing?

6 A That's correct.

7 Q And that was after he was out of the ambulance?

8 A That's correct.

9 Q And next to your car?

10 A That's correct.

11 Q And at the time you were giving him that test right
12 next to your car, your camera in the front was running and
13 your blue lights were on?

14 A That's correct.

15 Q And, on the thing, you ask him about his leg and
16 stuff. And that was when he was right next to the car?

17 A That's correct.

18 Q Okay. And, also, on the tape is part of the
19 horizontal gaze nystagmus test. And were there one of
20 those given right next to the car, too?

21 A No.

22 Q You didn't give him two of those?

23 A No, sir.

24 Q Okay. There's no delay on the tape between the
25 conversation about the horizontal gaze nystagmus test, and

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1 the conversation about the hurt leg, and the conversation
2 about the ABC's, which would indicate to me they were all
3 given simultaneously, because there's no break in the
4 conversation. Are you telling us that you gave him the
5 horizontal gaze nystagmus test in the ambulance, walked
6 over to your car and gave the rest of them without a break
7 in the conversation?

8 A I really didn't follow you there with all that you
9 were saying.

10 Q Okay. I'm saying that there would have been a break
11 in the conversation between the horizontal gaze nystagmus
12 test and the time you got him over next to your car to
13 give the ABC test, there would have been a period of time
14 that elapsed?

15 A Well, I can tell you I gave the nystagmus test in
16 there, the ABC's beside the car. Whether there was a
17 break or not, that's the way it was done.

18 Q Okay. There was absolutely nothing about his medical
19 condition that you couldn't have put him up in front of
20 the car where the camera would have shown on him when you
21 did that, is there?

22 A The ABC's?

23 Q Yeah.

24 A No.

25 Q And there's really nothing about his medical

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1 condition that you couldn't have walked him over there
2 before doing the nystagmus test, is there?

3 A Well, he was in the back of the ambulance. I thought
4 he may have been going with the ambulance, you know. And
5 it was better lighting in there.

6 Q Well, is it better than your headlights?

7 A Oh, yeah. It's like me sitting right here.

8 Q Okay. And can you tell me why if the -- I mean, if
9 the -- pardon me. Let me strike that question and say one
10 that makes sense.

11 Can you tell me why the conversation from the
12 nystagmus test would be recorded from the ambulance to
13 your car, and the giving of the Miranda rights in the
14 ambulance wouldn't have made it to the car? Why would the
15 transmission of the nystagmus go farther than the
16 transmission that's not there of --

17 A I don't think that the nystagmus test was on the
18 video. If they were -- being inside the ambulance that
19 far away, it can pick up off and on. But I don't think
20 they were on the video. I can't recall. I don't think
21 they were.

22 Q But we're sure that the rights weren't on it?

23 A I know they weren't on it.

24 MR. WARDER: That's all the questions I'd have.

25 THE COURT: Any questions, Solicitor?

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1 MS. SALISBURY: Very briefly.

2 REDIRECT EXAMINATION

3 BY MS. SALISBURY:

4 Q Trooper, what do you have to do to manually activate
5 your in-car camera when it is not automatically triggered
6 by the activation of your blue lights?

7 A You can cut it on from in the car, or you can cut it
8 on from your belt.

9 Q Which one did you do?

10 A I think I cut it on from my belt.

11 Q Did you activate your in-car camera as soon as it was
12 practicable?

13 A Yes, I did.

14 MS. SALISBURY: All right. Judge, I don't have any
15 other questions.

16 THE COURT: Thank you.

17 You may step down --

18 MR. WARDER: Just one --

19 THE COURT: Do you have a question? A follow-up?

20 MR. WARDER: A follow-up one.

21 RE CROSS-EXAMINATION

22 BY MR. WARDER:

23 Q In fact, your video was running when all this was
24 going on, it was just focused on the road, wasn't it?

25 A I don't think it was on the whole time, no.

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1 Q Well --

2 A I don't think it was on until I got him right to the
3 side of my car is when it came on.

4 Q Okay. If on my copy of the tape, the nystagmus test
5 is on the -- I'll tell you it is.

6 A Okay.

7 Q That would mean the video had to be on, wouldn't it?

8 A Yes, sir.

9 Q When the nystagmus test was given?

10 A Right.

11 MR. WARDER: Thank you.

12 THE COURT: Yes, ma'am.

13 MS. SALISBURY: Judge, I'm confused. The State's
14 copy of the in-car camera doesn't include the horizontal
15 gaze nystagmus. I don't know what this video is or why
16 this field sobriety test appears on this recording but not
17 mine.

18 THE COURT: When you say the "video," are you
19 saying -- do you mean audio, or are you saying --

20 Is it shown on your tape, Mr. Warder?

21 MR. WARDER: No. It's not shown. None of this is
22 shown. It's heard on the video.

23 THE COURT: There's an audio tape that's --

24 MR. WARDER: It's part of my discovery.

25 THE COURT: -- that sounds as if he is giving the

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1 horizontal gaze test?

2 MR. WARDER: Yeah. He's saying, Look at my --

3 THE COURT: Pen and follow this, and so forth?

4 MR. WARDER: Yes.

5 THE COURT: It's on your tape?

6 MR. WARDER: Some of that.

7 THE COURT: It's not on the State's tape?

8 MR. WARDER: Well, they furnished mine.

9 THE COURT: Well, we'll let them have the discovery,
10 too.

11 Officer Hiott, you can step down.

12 Let me remind you, during the break, you should not
13 be discussing your testimony with anyone.

14 And we'll take a short break.

15 THE WITNESS: Okay.

16 THE COURT: All right. Let's all take about a
17 five-minute break.

18 And you've got how many more witnesses?

19 MS. SALISBURY: Three, Judge. I expect each to be
20 fairly brief.

21 THE COURT: Okay. Well, maybe we can still shoot to
22 get the State's case in today, if we can.

23 MS. SALISBURY: Thank you, Judge.

24 THE COURT: Let's take about a 10-minute break.

25 (WHEREUPON, a break was taken.)

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1 THE COURT: All right. If the jury is ready, you can
2 have them come in.

3 (WHEREUPON, the jury came into open court at
4 approximately 4:34 p.m.)

5 THE COURT: Mr. Warder, you may cross-examine the
6 witness.

7 MR. WARDER: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. WARDER:

10 Q Officer Hlott, we've introduced into evidence this
11 form. You're familiar with that?

12 A Yes, sir.

13 Q And it appears to be several sheets of it. Is that a
14 form that comes in multiple copies and you just tear them
15 out?

16 A Yes, sir. It's four -- there's four copies on here.

17 Q Okay. What's the distribution of the four copies?

18 A The white is the arresting officer, the canary is the
19 hospital, pink is the subject, and gold is SLED.

20 Q Okay. What order are they put in? Do you know?

21 A In that order, white, canary, pink, and goldenrod.

22 Q Okay. So the first one is the white one, and that
23 stays with the officer?

24 A That's correct.

25 Q And the next one, the very next one, of course, is

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1 the Defendant's copy?

2 A No. The next one is the hospital.

3 Q The hospital copy?

4 A Right. Then the Defendant, and then SLED.

5 Q And the SLED is still attached to that; is that
6 right?

7 A No. In fact, the canary -- that's the canary there.

8 Q Okay. Whose is that?

9 A That's the hospital copy. But it was not given to
10 them, because they didn't take a blood sample. So this
11 was just documentation.

12 Q Now, the Defendant is given a copy just exactly like
13 that?

14 A That's correct.

15 Q And, in this case, you would have gave it to him and
16 it would have went back to the jail with him. Is that
17 what happened?

18 A That's correct, with all his paperwork that I gave
19 him that night.

20 Q And nothing would happen -- you wouldn't alter it or
21 change it after you gave it to him?

22 A Not unless I forgot to put maybe a -- sometimes, I
23 might forget to put the ticket number on it, or a date, or
24 something that I'm -- that I forgot to put on it.
25 Sometimes, I may alter my copy.

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1 Q Okay. So you might change it, a date or something on
2 it; is that right?

3 A If I see I left something out on it on my copy, yeah,
4 I'll fill it in.

5 Q But all the important stuff, you put on all the
6 copies?

7 A I assume so. If you're saying --

8 Q Well, where it says in big letters "Refused," you'd,
9 certainly, put that on his copy, wouldn't you?

10 A I could have and -- I mean, I don't know if I did or
11 not.

12 Q They're carbons, aren't they, supposed to be?

13 A Right. Like I say, I could have put something -- you
14 know, you don't even really have to put "Refused" on
15 there. I just wrote it on there for the reason I didn't
16 have a --

17 Q So that's kind of something extra you put on there --

18 A For my notes of why I didn't check any of this stuff.

19 Q Is that the Defendant's copy?

20 A Yes, it is.

21 Q Did you put "Refused" on his?

22 A No, I didn't.

23 Q So that must have been that your copy and all the
24 others were done sometime later than the Defendant's,
25 wouldn't you think?

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1 A Yeah. It's not required to even put refused on
2 there, but I --

3 Q Well, I know it. But it had to be altered sometime
4 after he got his?

5 A Oh, yes.

6 Q And do you know how much later it was that you
7 altered it?

8 A No, sir, I don't.

9 Q You said that you signed the Defendant out of EMS?

10 A Right. He stated he didn't want to go to the
11 hospital. And I got him out of the back of the ambulance.
12 He was already handcuffed. And I was not going to
13 unhandcuff him, so I signed for him. Because I heard him
14 verbally tell them he didn't want to go to the hospital.
15 So I can sign as a witness, yes.

16 Q Well, what did the blank say? Did it say for his
17 name, or the officer's name, or whose name --

18 A I can't recall. I don't have that form with me.

19 Q Were you mad when you were out there?

20 A No. I do this every day. If I was mad, I wouldn't
21 do this job.

22 Q Okay. You weren't mad at him and wanting to get him
23 on to the jailhouse, were you?

24 A No.

25 Q But is there any reason why you couldn't have took

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1 his hand out and let him sign his own name?

2 A Once we get them handcuffed, we usually don't
3 unhandcuff them unless they're in need of medical care
4 like he was at the jail when I took the handcuffs off of
5 him while he was laying on the floor.

6 Q Okay. Now, you took him to the jail that night and
7 he went back -- I mean, you took him to the jail -- to the
8 hospital when?

9 A No. I didn't take him to the hospital. EMS took him
10 to the hospital.

11 Q You followed him to the hospital?

12 A I followed him, correct.

13 Q And then did you take him back to the jail?

14 A Yes, I did.

15 Q So then you took him back to the jail again. Did he
16 go back to hospital, or do you know, again?

17 A After I took him back to the jail again and released
18 him to the jail's custody?

19 Q Yes, sir.

20 A No. Once he's in their custody, if something happens
21 to one of them up there, they don't notify us.

22 Q Well, do you know when -- how about -- if the same
23 injuries would send him back, would you be notified?

24 A No.

25 Q In other words, if they had to go treat his broken

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1 ribs or punctured lung, would you know about that?

2 A No, I wouldn't. Once we put them -- take them back
3 to the jail, like I said, there was another place like
4 this. Once they go on the other side of the door and we
5 take the handcuffs off, if something happens to them, the
6 jail takes care of it. And they wouldn't call us. I
7 wouldn't have known.

8 Q Okay. What was the temperature like that night?

9 A I don't remember the exact -- if it was below
10 freezing. But it was January, so I'm sure it was cool.

11 Q Do you remember what my client was wearing when he
12 was in your car?

13 A No, I don't.

14 Q Do you remember the color of the shirt?

15 A No, I don't.

16 Q Did he have a black shirt on? Does that refresh your
17 memory?

18 A I don't remember. I think, from looking at the
19 video, it was a dark-colored shirt, possibly.

20 Q Okay. It wasn't a white shirt?

21 A No.

22 MR. WARDER: Thank you.

23 THE COURT: Any redirect?

24 MS. SALISBURY: Nothing from the State, Judge.

25 THE COURT: Thank you, Officer Hiott.

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1 You may step down.

2 Solicitor, you may call your next witness.

3 MS. SALISBURY: Thank you, Your Honor.

4 The State calls Officer David Terry.

5 Officer Terry, if you'll come around and be sworn.

6 THE CLERK: Sir, if you'll raise your right hand and
7 place your left hand on the Bible.

8 WHEREUPON,

9 CHARLES DAVID TERRY, JR.,

10 after first having been duly sworn, testified as follows:

11 THE CLERK: Thank you.

12 Please be seated.

13 Please state your full name for the record.

14 THE WITNESS: Charles David Terry, Jr.

15 THE CLERK: Thank you.

16 DIRECT EXAMINATION

17 BY MS. SALISBURY:

18 Q Officer Terry, where do you work?

19 A I, currently, work at the Mauldin Police Department.

20 Q And how long have you been with Mauldin?

21 A Close to two years now.

22 Q All right. Were you working with Mauldin in January
23 of 2008?

24 A No. I was working with the Simpsonville Police
25 Department.

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1 Q And how long had you been with Simpsonville -- or how
2 long were you with Simpsonville?

3 A I was with them from June or March, 2004, to until I
4 went to the Mauldin Police Department, so roughly five
5 years.

6 Q All right. While you were at Simpsonville, what were
7 some of your general duties and responsibilities?

8 A I started out on general patrol answering 911 calls.
9 And I, eventually, went and specialized in traffic
10 enforcement and looking for impaired drivers.

11 Q All right. And, at the time of this incident, had
12 you changed from general patrol to selective enforcement
13 of traffic crimes?

14 A That's correct. I was, currently, assigned with
15 traffic enforcement for the Simpsonville police.

16 Q So do you recall being dispatched to a collision in
17 January of 2008, January 19th, 2008?

18 A I recall going to the area initially. Dispatch
19 advised units that there was a possible DUI on 385
20 southbound coming towards Simpsonville. And we were
21 prepared to get it as soon as it came into the city limits
22 of Simpsonville.

23 Q Did you -- when you heard that call, did you head
24 toward that direction?

25 A Yes. We went towards that direction. And while we

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1 were prepared to intercept it, we were informed that it
2 crashed just outside the city limits, and that the person
3 had possibly fled on foot. So we began to just assist
4 highway patrol, which was going to investigate the crash,
5 at that point, since it was outside the City of
6 Simpsonville. We were going to assist the highway patrol
7 locate a potential suspect that fled the scene.

8 Q So you went to the scene of where the collision had
9 occurred?

10 A I went to the area and tried to look for anybody that
11 might have been fleeing the scene.

12 Q Now, if you could, I'm going to show you State's
13 Exhibit No. 1. And, if you would, step down from there.

14 A (Witness complied.)

15 Q And I'll ask you to show the jury -- give them a
16 better idea of precisely where you were looking when you
17 arrived to try and locate the driver of this car, or
18 anybody involved in this collision.

19 A Okay. The information that I had was the collision
20 was on 385 southbound near the area of Sandy Springs,
21 which is the road that's going to be -- that's the
22 railroad tracks just before Sandy Springs Road. That's
23 276 going in towards Mauldin. It was in this general area
24 right here. You have 385 southbound right there. The
25 collision was in this general area, from what I

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1 understood. And the information that was given to me was
2 the suspect traveled in this general direction, possibly
3 in this area.

4 So this is Neely Ferry Road. And this is, I
5 believe -- I can't remember the name of this road,
6 possibly, North Grandview Drive outside the city of
7 Simpsonville. This is the area I was looking for the
8 suspect right here, including this business here, and on
9 this Frontage Road here just seeing if there was anybody
10 that didn't seem to belong in the area that could have
11 been involved in that collision.

12 Q So, instead of going to the crash site, you were
13 looking for somebody on foot?

14 A That's right.

15 Q All right. You can have a seat.

16 A (Witness complied.)

17 Q Were you ever able to locate anybody?

18 A No, I did not.

19 Q How long do you think you searched?

20 A I was out there for about an hour while the highway
21 patrol investigated the wreck. And I just drove around
22 the area just looking for anybody that seemed suspicious
23 or that didn't belong there.

24 Q Well, after you didn't find anybody, did you,
25 eventually, give up looking?

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1 A Yes.

2 Q What did you do after that?

3 A I just resumed my normal duties for the night, which
4 was traffic enforcement, just help look for speeders, or
5 drunk drivers, or whatever.

6 Q Do you remember ever hearing any more information
7 about this wreck, or the person involved in the wreck?

8 A A short period later, a matter of a few hours,
9 dispatch advised us that there was a person on 385
10 southbound walking on the interstate within the travel
11 lanes. So connecting the two dots of that call earlier
12 and this call, I suspected it could be involved.

13 So we went to the area. And myself and another
14 officer did arrive on the scene. And we met with
15 Mr. Henkel.

16 Q So where was Mr. Henkel when you, actually, showed up
17 on the interstate?

18 A Me and another officer showed up at relatively the
19 same time. He was on the interstate. I didn't see him in
20 the lane of travel. I believe another officer got there
21 just prior to me and met with him.

22 But we were blocking -- there's three lanes that I
23 recall. We were blocking the -- well, there could be four
24 at this point. We were blocking the far right lane. And,
25 usually, when the officer pulls up and he's going to block

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1 the lanes because there's something obstructing it --

2 Q Okay. Well, what -- since the Defendant was there,
3 did you speak with him? Did you interact with him? What
4 did you do?

5 A Yes, I did. I met with Mr. Henkel. And, you know, I
6 just asked him some general questions about what he was
7 doing, if he remembered a wreck, or anything like that. I
8 don't recall exactly what he said. He eluded to having a
9 wreck, and he's been there in that area the whole time,
10 and he didn't leave is what he eluded to.

11 But while talking with him, he was, obviously,
12 intoxicated. I smelled the obvious odor of an alcoholic
13 beverage. With my experience of dealing with intoxicated
14 people, he was definitely intoxicated. I could go even as
15 far as to say he was drunk. Having dealt with DUI's
16 before, you -- there's a level of impairment that we
17 arrest people at. You can be impaired and get a DUI,
18 whereas Mr. Henkel, in my opinion, was to a higher level.
19 And he was, what I felt, drunk just by interacting with
20 him.

21 Q Okay. What else did you notice about him?

22 A His hair seemed disheveled, kind of -- he was slumped
23 over, kind of slurring his speech while talking with him.
24 Another issue we wanted to make sure of was to rule out
25 any medical issues.

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1 So I can't remember if first responders arrived. But
2 I do know EMS did arrive. And we just wanted to make sure
3 that anything -- that he didn't have any medical issues.

4 Q Now, I believe you mentioned that you -- did you say
5 that you responded pretty soon to the initial report of
6 the wreck?

7 A Yes. I mean, once the call came out, I went directly
8 to the area and started looking around the area when they
9 gave the area that they believed he went to.

10 Q Do you know how long it would have been between the
11 time that the wreck was reported and the time that you
12 were interacting with him, and detecting all these things
13 about him?

14 A Between the time the wreck happened and the time that
15 I interacted with him, a matter of a few hours, I believe.
16 It was two, three hours, possibly.

17 Q Okay. Now, how long did you stay on scene that time
18 after you spoke with the Defendant?

19 A I stayed on scene until the trooper arrested him and
20 took him away. I stood out there, more or less, just to
21 make sure he didn't flee, or run, or fight, or anything
22 like that.

23 We, you know, usually want to -- if we have a person
24 that's intoxicated, sometimes they may act irrational and
25 start a fight. I'm not saying that he would have, but we

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1 just want to be sure. So we just stay on the scene and
2 make sure. And we assist the trooper with anything else
3 he may need.

4 Q Okay. Well, after you left, did you have any other
5 involvement in the case?

6 A No.

7 MS. SALISBURY: All right. Officer, answer any
8 questions Mr. Warder may have for you, please.

9 CROSS-EXAMINATION

10 BY MR. WARDER:

11 Q Officer, with Mr. Henkel, did you see him outside the
12 squad car when he was doing the field sobriety tests?

13 A I tried walking around with the trooper while he was
14 with Mr. Henkel.

15 Q Okay. Well, were you standing out there when he had
16 him do the ABC's?

17 A I probably was. I do believe I was standing out
18 there.

19 Q Okay. And that was at the back of the car?

20 A At one point, he was inside the ambulance. The
21 trooper, I believe, spoke with him in the ambulance. I
22 don't know what all he did in the ambulance with the
23 trooper. Then the trooper escorted him to the patrol car.
24 I remember we were on the side of the patrol car, and he
25 talked to him a little further.

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1 Q Okay. And that's where he did the ABC's?

2 A I believe he did.

3 Q Okay. And as for -- the nystagmus test, that was
4 done just before the ABC's?

5 A I don't know. I wasn't watching the trooper in the
6 ambulance, and if he did them in there or not. I don't
7 know.

8 Q Well, if he did them beside the car, were you
9 watching him?

10 A Yeah. I was standing out there for his safety.

11 Q Well, did you see that?

12 A To tell you the truth, I don't really recall if he
13 did it beside the patrol car or not. I can't remember
14 exactly.

15 Q Now, the blue lights were on on the patrol car?

16 A Well, I had my patrol car blue lights on. Do you
17 mean the trooper's?

18 Q The trooper's.

19 A He had his rear lights on.

20 Q Okay. Headlights still on?

21 A I'm not sure. I don't know if he turned his park
22 lights on only, or if he left his headlights on.

23 Q Well, the video we saw, there was all lights out in
24 front of his car. Would that have been -- how about the
25 lights up above, were they on? They call them take-down

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1 lights, or something like that.

2 A His car didn't have a light bar.

3 Q Okay.

4 A He just had interior blue lights.

5 Q So if it was lights ahead, it was the headlights?

6 A Any flashing lights, do you mean?

7 Q Well, I guess -- you said the back flashing lights
8 were on, didn't you?

9 A Yes, sir.

10 Q And if there was light ahead in that video, it would
11 have been the headlights?

12 A It would be -- I mean, there was several cars out
13 there. I mean, I didn't look at his headlights. I don't
14 remember.

15 Q Okay. How far did Mr. Henkel have to walk when he
16 walked from the ambulance? Was there a car between them?

17 A I'm not -- I don't remember exactly where the
18 ambulance and his car was. I mean, we were all bunched
19 together. So maybe it was two car lengths, two, three car
20 lengths. They were all mostly together.

21 Q Okay. I hate to get you -- would you mind coming
22 down here once again for us?

23 A Sure.

24 Q Let me get the easel here. Now, when you were out
25 the first time, can you point to us where the vehicle was?

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1 A Mr. Henkel's truck?

2 Q Yeah. The vehicle that was wrecked.

3 A I never responded to the actual accident scene.

4 However, when I was in the area here, I saw, you know, the
5 activity was in this general area.

6 Q You don't know then exactly where the vehicle was on
7 that?

8 A I do know it was just in this general area. I
9 couldn't pinpoint exactly.

10 Q Okay. When you first encountered Mr. Henkel, can you
11 tell us where he was?

12 A When I first encountered him, he was -- it's going to
13 be probably in this general area down around here. I do
14 remember it's past where the merge is. It's down here on
15 southbound 385.

16 Q Okay. And you told us you searched down in here?

17 A Yes, sir. I just searched around Frontage Road, and
18 these businesses right here, and, you know, just the
19 general area around.

20 Q Okay. How about the stuff up in here?

21 A I didn't search there.

22 Q Were you looking for a man that was ambulatory and
23 walking around, or were you looking for an unconscious
24 person laying on the ground?

25 A Well, I was looking for both. I didn't want to rule

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1 out someone that could have been injured. So I was trying
2 to check -- my car wasn't equipped with a spotlight, but I
3 was using a flashlight the best I could.

4 Q When you saying "using a flashlight," were you
5 driving by and shining? Was that how you were doing it?

6 A Yes, sir.

7 Q Okay. So the range of a flashlight, I understand,
8 isn't as good as search lights?

9 A No, it's not.

10 Q And when you were down here searching, that was the
11 same thing, you were driving up and down the streets
12 shining your flashlight out the window?

13 A That's correct.

14 Q Okay. When the ambulance and everything -- where was
15 it parked? Was it on this?

16 A Yeah. There's my car, another officer's patrol car,
17 and the ambulance. I can't remember if there were fire
18 trucks that came out there, also. We were all bunched
19 together blocking maybe one or two lanes down there.

20 MR. WARDER: Okay. Thank you very much.

21 THE WITNESS: Yes, sir.

22 MR. WARDER: That's all the questions I have, Your
23 Honor.

24 THE COURT: Any redirect examination?

25 MS. SALISBURY: Nothing from the State, Judge.

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1 THE COURT: Thank you, Officer Terry.

2 You may step down.

3 You may call your next witness.

4 MS. SALISBURY: Thank you.

5 The State calls Harold Hamilton to the stand.

6 THE CLERK: Sir, come around and place your left hand
7 on the Bible and raise your right hand.

8 WHEREUPON,

9 HAROLD JAMES HAMILTON,

10 after first having been duly sworn, testified as follows:

11 THE CLERK: Thank you.

12 Please be seated.

13 Please state your full name for the record.

14 THE WITNESS: Harold James Hamilton.

15 DIRECT EXAMINATION

16 BY MS. SALISBURY:

17 Q Mr. Hamilton, where are you working these days?

18 A I am a retired police officer.

19 Q From which agency are you retired?

20 A From the Simpsonville Police Department.

21 Q All right. How long were you with the Simpsonville
22 Police Department?

23 A Eight years.

24 Q All right. Were you working for Simpsonville in
25 January of 2008?

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1 A Yes, ma'am.

2 Q What were your -- what was your general job
3 description? What were your duties at that point?

4 A I was a corporal on the night shift over the shift
5 road patrol.

6 Q And what were you required to do in that position?

7 A I was pretty much supervising the road and, also,
8 carrying out duties as general patrol.

9 Q All right. Well, how did you become involved in this
10 incident on January 19th?

11 A Well, the dispatch come out as far as the possible
12 intoxicated driver headed toward the city, so I headed in
13 that general direction. And before I could get to the
14 interstate, it was reported that the car had left the
15 highway prior to entering the city limits.

16 Q So where did you go? Since there was no longer an
17 incoming driver into Simpsonville, what did you do?

18 A Well, I continued over into that direction. And I
19 got on the Frontage Road, North Grandview. And I was just
20 kind of easing up that way to see if I could be of
21 assistance. Because that would give me close access to
22 Sandy Springs Road where I would be able to come in from
23 behind. And I just continued regular patrol.

24 Q Now, you mentioned that the site of this wreck -- or
25 where it was reported that the wreck occurred was outside

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1 of the Simpsonville city limits?

2 A Yes, ma'am.

3 Q But you were going to help search anyway?

4 A Yes, ma'am. I was going in that general direction.
5 And where it was located, I was still within the city
6 limits.

7 Q Now, even though you were outside the city limits,
8 are you still inside Greenville County where all this is
9 going on?

10 A Yes, ma'am.

11 Q Well, if you would, Mr. Hamilton, step down here. I
12 want you to show the jury, just like the other witnesses,
13 where you assisted in this investigation on State's
14 Exhibit No. 1.

15 THE COURT: Mr. Hamilton, before you testify, let me
16 make sure you speak loudly enough so the jury can hear
17 you, and the court reporter needs to pick up what you have
18 to say as well. Just make sure you project your voice.

19 THE WITNESS: I'm sorry. It's past my nap time, Your
20 Honor.

21 Okay. This is the North Grandview area here. And I
22 believe this is Blakely or Neely Ferry. I'm not sure
23 which one it is. But, anyway, it's 385 southbound.

24 I came across West Georgia Road, which is further off
25 your map. And I turned down Blakely. And once you get

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1 down so far, you can turn and go down to the North
2 Grandview area. And I started down that area.

3 Now, I knew there was another officer up in that
4 area. So once I came up, I swung up and went back up. I
5 continued riding in my patrol at that time, because I
6 didn't know anything else about the accident.

7 BY MS. SALISBURY:

8 Q So, instead of conducting a thorough, exhaustive
9 search, you just rode by?

10 A Right. At that time, I didn't know that somebody was
11 on foot.

12 Q All right. Well, you can have a seat.

13 A (Witness complied.)

14 Q Now, I assume that since you said you resumed your
15 regular business, your regular patrol that night that you
16 did not end up locating anybody?

17 A Not at that time. I did later on, though.

18 Q Well, tell us about that. What did you, ultimately,
19 come across?

20 A Okay. I was -- I heard dispatch come out that some
21 citizens had called in and reported a male walking
22 northbound in the southbound lane of 385 attempting to
23 flag down vehicles. So I proceeded to that area.

24 And I came down southbound 385 right before you get
25 to the West Georgia Road exit. And I noticed a white male

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1 walking in the middle of the interstate with his arms, you
2 know, trying to flag me down. And once I got close enough
3 to see, he was -- you know, if I had been traveling at a
4 regular speed, I might have run over him, because I could
5 not see him.

6 But once I got close enough to him, I activated all
7 my lights, called dispatch, and I exited my vehicle. And
8 then another vehicle pulled up behind me. And that's when
9 I approached Mr. Henkel, which I didn't know who it was at
10 the time.

11 Q Okay. How many -- at the point where you, actually,
12 saw him standing in the road, how many lanes wide is
13 southbound 385?

14 A Well, it's three lanes. And where 276 comes in and
15 exits to West Georgia Road, it is an exit lane, also. So
16 I believe it could be classified as four lanes.

17 Q In which of those four lanes was he standing?

18 A I believe he was in the second lane, which was right
19 off the exit lane. Okay. I don't know if they're
20 classifying that as a lane or not, because it is an on
21 ramp, and an off ramp.

22 Q Okay. But not in the emergency lane, actually, in
23 the roadway?

24 A He was walking right down the middle, what we would
25 refer to as the number two lane.

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1 Q And what time of the day are we talking about? Do
2 you recall what time?

3 A It was early in the morning. I'd venture to say
4 around 4:00, 4:30, somewhere in that particular area.

5 Q Okay. Well, what happened when you approached the
6 Defendant? What did you do?

7 A Okay. He was talking to me kind of, you know, in a
8 loud voice trying to get my attention. And, as I was
9 approaching him, he was telling me he needed help. And I
10 asked him what was going on. And he said that he was
11 hurt, he needed help.

12 So I went up and I asked him, you know, I said,
13 What's your name? So he told me his name was Henkel. I
14 can't remember if he told me his first name or not. I
15 think he just said Henkel. And, at that time, it dawned
16 on me that this was the gentleman that was involved in the
17 accident that they were looking for earlier.

18 So, as I started walking back towards the car, I did
19 notice that he was unsteady on his feet. I didn't know if
20 he was sick, if he was intoxicated, if he was on drugs, or
21 what. I just knew he was not in good health. And it was
22 chilly. So he told me he was cold and he needed help. So
23 I told him that I was going to let him sit in the back of
24 my patrol car until I could get him help.

25 So when he came up, I got him and sat him in the back

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1 of my car. I talked to him a little bit, and asked him,
2 you know, what happened. He said he had wrecked his
3 truck, and he was trying to find his truck. And I did ask
4 him where he wrecked it. And he said, Somewhere along
5 here. And he just kind of -- you know, somewhere along
6 here. I did show you where I located him, which was
7 just -- you know, less than a half a mile from the
8 accident scene.

9 Q Okay. So you placed him in the back of your patrol
10 car. What did you do after that?

11 A Well, I did explain to him that I was going to put
12 him in the back of my car for his safety and mine. And I
13 told him, It's warm in the back of my car. So he was
14 happy to get in my car. And I did notice that he was
15 confused -- okay -- like he didn't know where he was at.
16 Okay. So I did ask him how long he had been out there.
17 He said he had been out there for hours trying to find his
18 car.

19 So I sat him down and let dispatch notify the highway
20 patrol that, you know, the subject they were looking for
21 was in my vehicle. And I called for first responders to
22 come and give him medical attention, if he needed it.

23 Q Okay. Do you recall whether you smelled alcohol,
24 anything, or noted anything regarding whether the
25 Defendant might be impaired?

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1 A Well, I did notice that he was very unsteady on his
2 feet. And that was the reason I placed him in my car, so
3 he wouldn't wander into another lane and get hit by a
4 vehicle. So I was having a hard time understanding him.
5 Okay. So we kind of talked slow.

6 And he had on a pair of jeans that I noticed -- I
7 can't remember if it was the right or left leg had a tear
8 in it. Okay. And I did, you know, look at it pretty
9 close as we was walking back to the car. And I did come
10 to the conclusion that it was a tear that would be
11 consistent with trying to climb over a fence and getting
12 caught on a sharp object, whether climbing over or walking
13 by. Okay. And I went ahead and just shut my door,
14 mainly, so he could get warm.

15 Q So you called EMS. You told us that you contacted
16 dispatch and said that this is the person they're looking
17 for, and had EMS respond. Did you wait until EMS arrived
18 on scene?

19 A Yes. I kept him in the back of my car. And when
20 EMS -- I don't know if it was EMS or first responders.
21 But they did get on the scene. And they got him out of
22 the vehicle. They talked to him and they carried him over
23 to the ambulance.

24 Q And how much longer did you stay on scene that day?

25 A I stayed until the scene was complete. I was one of

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1 the last vehicles to leave the area.

2 Q Okay. Did you form an opinion, based on your
3 interaction with the Defendant, whether it appeared to you
4 that he was impaired?

5 A Well, with the way he was walking so unsteady on his
6 feet and with the slurred voice that he had, I knew he was
7 under the influence of something, whether it was alcohol,
8 drugs, or what I could not tell. I did not get close
9 enough to his face to where I could smell any type of
10 alcohol. Because I'll just -- you know, I kind of keep a
11 distance to where you can still grab them, but keep a
12 little distance in case they decide to get hostile, or
13 close enough to where in case they decide they want to
14 run, you don't have to go but a couple of steps.

15 MS. SALISBURY: All right. Well, thank you.

16 Answer any questions Mr. Warder may have for you.

17 CROSS-EXAMINATION

18 BY MR. WARDER:

19 Q Officer, no question he was trying to flag you down?

20 A No.

21 Q He was trying to get you to stop and help him?

22 A Yes. I don't believe he was aware of the fact that I
23 was a police officer. Because when I was going down the
24 road looking, there was no vehicles in front of me. I had
25 my bright lights on. Okay. And, as I got a little bit

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1 closer, I could see him. So I put my take-downs on and
2 turned on all my blue lights.

3 Q Well, he still wanted you to stop when you got your
4 take-down lights on him?

5 A Oh, I think he was happy to see me.

6 Q Yes, sir. And you told us on direct examination that
7 you might have run over him had you not been knowing he
8 was there?

9 A Had I not been paying attention and been an average
10 driver on the road, driving the speed limit going down the
11 interstate that night, I believe I probably would have run
12 over him.

13 Q He had all black clothing on?

14 A He was dressed in dark clothes. Okay. I know he had
15 on a dark jacket and jeans.

16 Q No white shirt, sweater, coat?

17 A I didn't notice any, because I didn't look that
18 close. I was more concerned about getting him out of the
19 interstate and into my vehicle.

20 Q Well, as soon as you stopped the car, he wasn't hard
21 to get out, because he was happy to get in?

22 A Oh, yes. He was more than happy. Because I did tell
23 him I was sitting him in the back of my car so he could
24 get warm. Okay. And that's what he wanted.

25 Q He told you he had been out there for hours?

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1 A. Yes.

2 Q. Did he look like a man that had been out there for
3 hours?

4 A. Well, no, not really. Because had I been out there
5 for hours, I would have had on a heavier coat.

6 Q. You would have been more prepared before you got out
7 there is what you're telling me?

8 A. That is correct.

9 Q. He was thoroughly cold?

10 A. He said he was cold. And I had no reason to doubt
11 him.

12 Q. And you didn't doubt him?

13 A. No. I had no reason to.

14 Q. Okay. Now, you told us about the tear. Where was
15 that at on his pant leg?

16 A. If you don't mind?

17 Q. No.

18 A. It was right in one of these two areas here, right
19 below the pocket on his jeans, if I'm not mistaken.

20 Q. Both sides?

21 A. Just one side. I'm sorry. Just on one side. And I
22 can't remember which one it was.

23 Q. Now, you said that was consistent with climbing over
24 a fence, but not walking by and getting it picked on
25 something else?

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1 A No, sir. What I said was it was consistent with
2 climbing over a fence and getting snagged on something, or
3 walking by and getting snagged on something.

4 Q Well, how about getting thrown out of your truck and
5 getting snagged on something?

6 A No, sir. He would have had more -- I believe he
7 would have had more injuries that would be apparent.

8 Q Okay. So I understand -- you're not telling me you
9 can tell a difference between a snag from a fence from
10 every other snag in the world on your pants, are you?

11 A It was 4:00 in the morning.

12 Q Well, at 4:00, can you tell the difference from
13 whether I snagged my pants on a fence or anything else
14 just by looking at my pants?

15 A If you come within my light, pretty much.

16 Q Okay. Now -- and that's just as honest as everything
17 else you said?

18 A Like I said, that was my professional opinion. It
19 appeared to be consistent with that type of damage.

20 Q Okay. And I believe you did tell us you didn't smell
21 anything on him?

22 A I didn't get close to his face.

23 Q Well, you got in the same car with him --

24 A No, sir.

25 Q And you never -- you didn't get in the car with him?

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1 A No, sir.

2 Q You stood outside?

3 A I placed him in the back seat of my vehicle and got
4 him in and shut the door.

5 Q Okay. And what did you do, stand outside?

6 A I talked to another officer for a couple of minutes
7 and first responders showed up -- or the ambulance,
8 whichever one it was.

9 Q Now, you were the first officer there, weren't you?

10 A Yes, sir.

11 Q And you got him in the car before anybody else was
12 there?

13 A No, sir. I was going to the car when the other
14 officer arrived.

15 Q And, anyway, in your interaction with putting him in
16 the car and opening the door and closing the door for him,
17 you didn't smell anything?

18 A I don't remember smelling anything.

19 MR. WARDER: Thank you.

20 THE COURT: Any redirect, Solicitor?

21 MS. SALISBURY: No, Judge.

22 THE COURT: Thank you, sir.

23 You may step down.

24 MS. SALISBURY: Your Honor, may these officers be
25 excused from their subpoena?

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1 MR. WARDER: I have no objection.

2 THE COURT: Without objection, the officers may be
3 excused.

4 You may call your next witness.

5 MS. SALISBURY: Thank you, Judge.

6 The State calls Ms. Gabrielle Bramblett.

7 THE CLERK: Place your left hand on the Bible and
8 raise your right hand.

9 WHEREUPON,

10 GABRIELLE BRAMBLETT,
11 after first having been duly sworn, testified as follows:

12 THE CLERK: Thank you.

13 You may be seated.

14 Please state your name for the record.

15 THE WITNESS: My name is Gabrielle Bramblett.

16 DIRECT EXAMINATION

17 BY MS. SALISBURY:

18 Q Ms. Bramblett, where are you employed?

19 A At Greenville Memorial in the emergency room.

20 Q And what are some of your duties at the hospital?

21 A Well, now, I'm just a staff RN. At that time, I was
22 a supervisor there.

23 Q All right. Over the course of your service as a
24 supervisor, did you ever have an occasion to interact with
25 law enforcement with regards to DUI investigations?

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1 A Lots of times.

2 Q Okay. How often would you estimate that you've been
3 called on from law enforcement to draw a blood or urine
4 sample from someone who's been transported to the hospital
5 during a DUI investigation?

6 A I can't count. I mean, it happens -- especially at
7 night, during the night shift, it happens very frequently.

8 Q So are you familiar with the procedure by which those
9 samples are to be drawn?

10 A Yes.

11 Q Okay. Do you remember whether you were working the
12 night of January -- or the early morning hours of January
13 the 19th?

14 A No.

15 Q Well, I'm going to show you State's Exhibit No. 3,
16 and ask you if you recognize this document? Do you
17 recognize your signature on that document?

18 A I do.

19 Q Now, can you describe for the jury, basically, what
20 the purpose of that form is, what it means to the
21 hospital, and what your role is as it relates to that
22 form?

23 A It's the legal document that the police officer gives
24 to us to fill out as a record of drawing the blood.

25 Q Okay. Well, what happens when a particular patient

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1 in the hospital is the subject of a DUI investigation?

2 How does that play out?

3 A We don't have anything to do with the whole DUI
4 investigation. So when the officer would be with the
5 patient when they request the sample, usually, the other
6 nurses don't want to come to court, so they call the
7 supervisor.

8 So I would come in and, at that time, draw their
9 blood using a Betadine prep, and just drawing the one tube
10 of blood and giving it to the officer, and labeling it,
11 and handing it over to him with the chain of custody.

12 Q Okay. Are you there to give an opinion as medical
13 personnel whether the person is able to be transported to
14 give a breath sample, as opposed to receiving medical
15 treatment, and a blood sample is the only appropriate --

16 A Well, once they come to the hospital, they can't --
17 we don't do breathalyzers. So we're sort of like the
18 go-to people, because we draw the blood. So we can't do
19 breathalyzers. But if they're getting medical care, then
20 it's implied that they were unable to get a breath sample.

21 Q Okay. Well, how does an officer make you aware -- or
22 whichever attending nurse, what happens so that you
23 understand that a blood sample or a urine sample is going
24 to be requested in a particular case?

25 A He just tells the nurse that was taking care of the

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1 patient that we need to obtain a blood sample. And they
2 would call me. And I would come and draw the blood.

3 Q Okay. Do you know whether you make it a practice or
4 whether you even remember, in this case, waiting to see if
5 the officer spoke with the Defendant, asked him any
6 questions, advised him of anything?

7 A No. I wasn't -- I don't think I was his nurse. So I
8 wouldn't have been involved in the room and in his
9 treatment. So I don't really remember.

10 Q Okay. Now, based on -- I know you mentioned you
11 don't remember this case, specifically. But, based on the
12 fact that you filled out that form, what is the
13 significance of your signature on that form in terms of
14 whether a blood sample was taken, or what happened as a
15 result of his visit in the hospital?

16 A Well, I'm saying I was the one that drew the blood
17 and gave it to the officer.

18 Q Okay. Do you remember whether that form -- or do you
19 know whether that form indicates that a blood sample was
20 drawn?

21 A Uh-huh, a blood sample was drawn.

22 Q Okay. Do you, specifically, recall collecting a
23 sample in this case?

24 A I don't remember collecting one in this case. It
25 says there that he refused, so I don't --

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1 Q Okay. So, in normal practice, once you become
2 involved and once you interact with an individual and the
3 officer indicates to you that someone is being
4 investigated as part of a DUI, it's your practice to come
5 into the room and take the blood sample?

6 A Right.

7 Q So if your signature is on that form, that means that
8 you're the person that would have taken the sample, had
9 one been drawn?

10 A Right.

11 Q Okay. But you can't remember whether a sample was
12 taken in this particular case?

13 A No. And, actually, looking at it, I signed this
14 part. And then I'm, also, to sign that part. So, I mean,
15 it says "Refused." So I guess I didn't draw it. I don't
16 remember.

17 Q Okay. No. That's fine. That's fine.

18 Did you -- after your involvement at this level with
19 the blood collection, do you have any other involvement in
20 the investigation of a case?

21 A No.

22 Q Do you remember whether you had any specific
23 involvement in the investigation of this case?

24 A I did not.

25 MS. SALISBURY: Okay. That's fine. Answer any

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1 questions Mr. Warder may have for you.

2 THE COURT: Any questions?

3 CROSS-EXAMINATION

4 BY MR. WARDER:

5 Q You don't really make a determination that the person
6 is physically unable to give blood?

7 A I'm just the blood collector.

8 Q That's right. And so when they come to collect it,
9 you're just the person that goes in and draws it?

10 A No. I'm the person who goes in and draws it once the
11 officer requests it.

12 Q Yes. Okay. And when you draw it, you then put
13 your initials on -- or your name, you sign that sheet of
14 paper?

15 A Right.

16 Q And if your signature is on that sheet of paper, that
17 means blood was taken?

18 A Well, I signed that part, and then it says he
19 refused. I don't -- the whole thing should be filled
20 out.

21 MR. WARDER: I would like to have this marked.

22 THE COURT: For identification purposes, it will be
23 Defendant's Exhibit No. 1.

24 (WHEREUPON, Defendant's Exhibit No. 1 was marked for
25 identification only.)

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1 BY MR. WARDER:

2 Q If the sheet looked like this, instead of that, that
3 would indicate you took a blood sample?

4 A Well, it's not completed.

5 Q What would that indicate?

6 A To complete it, I would have to mark there, print,
7 and then sign on the second one.

8 Q Okay. Can you tell from that sheet whether it was
9 drawn or not drawn?

10 A I would say it was not drawn, because I would have
11 filled out the sheet.

12 MR. WARDER: Okay. Thank you.

13 THE COURT: Any redirect?

14 MS. SALISBURY: Just briefly to clarify, Judge.

15 REDIRECT EXAMINATION

16 BY MS. SALISBURY:

17 Q I just want to make sure we all understand what's
18 going on with this magic piece of paper. If you draw a
19 blood sample, would you fill out and sign the rest of the
20 form?

21 A Yes.

22 Q So if you didn't sign and fill out the rest of the
23 form, would it mean that there was no blood sample taken?

24 A That's what I would assume, yes. Refused.

25 MS. SALISBURY: I don't have any other questions,

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1 Judge.

2 THE COURT: Thank you, ma'am.

3 You may step down.

4 Any objection to this witness being excused?

5 MR. WARDER: No.

6 THE COURT: Thank you.

7 You may be excused.

8 The State may call its next witness.

9 MS. SALISBURY: Your Honor, the State rests.

10 THE COURT: Mr. Foreman, and, ladies and gentlemen,
11 the State has concluded its case. It might be a good time
12 for the jury to rest as well. We're going to break for
13 the evening. We've got a few more matters we need to take
14 care of here, but you don't need to be involved in those.

15 Obviously, you haven't heard all of the case.
16 Certainly, you haven't heard my instruction on the law. I
17 told you earlier today that while we're involved in a
18 case, it would be improper for you to be discussing it
19 with anyone. In spite of the inquiry that I'm sure loved
20 ones and curious family members will have of you, please,
21 explain to your loved ones and friends that you may see
22 that you can fill them in in great detail about your
23 experience as a juror once this case is over. They can
24 just hold off, that you will -- that you've made a
25 commitment to the State of South Carolina and to

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1 Mr. Henkel, in this case, that you're going to make a
2 decision on the evidence that's presented here, and the
3 law that I give you, and not anything that anyone else has
4 to say to you.

5 It's very important that you understand the purity of
6 this process and that the commitment you've made is a
7 vital commitment to both sides. I say this to you not in
8 any way by temptation, but to let you know the importance
9 of you not doing any kind of independent research.

10 We're curious by nature and folks want to ride by the
11 scene, particularly, if it's on your way home and check
12 everything out, and pull over, and look around and see how
13 far things are, get on the Internet and check things out,
14 or look up some words, see what archives you can find.
15 That would be highly improper, ladies and gentlemen.

16 Our Chief Justice has issued an order that all trial
17 judges are to instruct a jury who are involved in a case
18 that that would be against the Court rules and against my
19 instruction to you for you to do any kind of independent
20 investigation. These attorneys are going to present
21 everything before you by way of their questions, and
22 otherwise, that you're going to need to decide this case.
23 You, certainly, don't need any other information. You,
24 certainly, don't need any input from anyone else. Please
25 bear that in mind, and remember the oath that you have

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1 taken.

2 We're going to be ready to start back at 9:00 in the
3 morning. If you'll be back in your jury room then, we'll
4 be ready to complete the case tomorrow. And I look
5 forward to seeing you then.

6 Have a good evening, ladies and gentlemen. I'll see
7 you back tomorrow at 9:00.

8 Everyone else, please, remain seated while the jury
9 exits.

10 (WHEREUPON, the jury was excused from open court at
11 approximately 5:24 p.m.)

12 THE COURT: Are there any matters we need to take
13 care of before I have an opportunity to talk to the
14 Defendant, and let him know about his rights under the
15 Constitution, and testifying, and otherwise?

16 Any other matters from the State?

17 MS. SALISBURY: Nothing from the State, Judge.

18 THE COURT: From the Defense?

19 MR. WARDER: No, Your Honor, except for one. I guess
20 I need to clarify where we are on my client and tonight.

21 THE COURT: Okay. We'll, certainly, do that.

22 Does the State have any position on whether the
23 Defendant is incarcerated overnight?

24 MS. SALISBURY: Given that we're mid-trial, Judge,
25 it's the State's position that it's appropriate for the

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1 Defendant to be taken into custody.

2 MR. WARDER: Judge, in response to that -- and I
3 understand. This case is three years old. My client has
4 never missed a court appearance, never -- been here every
5 time he's supposed to, done everything he's supposed to.
6 He's on bond. Tomorrow is his most important day.

7 THE COURT: Well, he's not on bond anymore.

8 MR. WARDER: He was on bond when he came here.

9 THE COURT: Yes, sir.

10 MR. WARDER: And tomorrow is his most important day.
11 I would ask you to -- I think the chances of him not
12 appearing are very remote. And I would like him to be
13 able to go home, and dress, and look good tomorrow.

14 THE COURT: I understand that.

15 Is there anything else we need to talk about, other
16 than whether or not he's in confinement tonight?

17 MR. WARDER: I don't think so at this time.

18 THE COURT: I, certainly, need to probably put on the
19 record, I'm sure for the benefit of you, I've heard the
20 testimony as to your motion, Mr. Warder, on the statutory
21 law on 56-5-2953 --

22 MR. WARDER: Your Honor?

23 THE COURT: Yes, sir.

24 MR. WARDER: Are you going to rule on that now?

25 THE COURT: Yes, sir.

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1 I'll be glad to hear from you, if you have any other
2 matters, or I'll be glad to delay, if you want me to.

3 MR. WARDER: I have a tape that I've not been able to
4 authenticate and put in, but I want to put it in the
5 record.

6 THE COURT: Well, if I need to look at that, I'll
7 just delay. We can do that first thing in the morning.
8 You can -- or if you can review the tape and let me see
9 it, that might very well help me, or if you want to offer
10 it now, I'll try to look at it tonight. I don't want
11 to --

12 MR. WARDER: Well, I'd, certainly, be glad to offer
13 it, because I need it in the record.

14 THE COURT: Has the State seen it?

15 MS. SALISBURY: No, Judge.

16 I don't know what it is.

17 MR. WARDER: Well, they furnished it for discovery.

18 THE COURT: Okay.

19 MR. WARDER: It's the tape they sent me of --

20 THE COURT: Maybe the two of you could review it
21 tonight. Because, certainly, she needs to have a view of
22 it to respond to any arguments you make about it. Rather
23 than putting it into the record tonight, maybe we can wait
24 until first thing in the morning. And I'll rule on this
25 issue first thing in the morning after -- if you want to

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1 put any evidence in relating to that as far as the tape,
2 I'll be glad to review it in the morning, if we need to.

3 MR. WARDER: Okay.

4 THE COURT: But I think for the purposes of the
5 State, they, certainly, need to have -- rather than us --
6 you presenting it in the morning, and then they've not had
7 a chance to look at it. You and I looking at it, that
8 would, certainly, be unfair for the State to try to
9 propose an argument on that without having viewed it.
10 We'll cross that bridge in the morning.

11 Mr. Henkel, if you would, come forward with your
12 attorney, please. I need to go over some matters with
13 you. If you'll just stand there at the podium.

14 If you would, raise your right hand.

15 WHEREUPON,

16 GREGG GERARD HENKEL;
17 after first having been duly sworn, testified as follows:

18 THE COURT: We've reached the stage in the trial
19 where you have a right to present a defense. And I'm sure
20 you've had a chance many times to talk with your attorney
21 about this particular moment that we're at now, as far as
22 your right to testify and put evidence up. I want to make
23 sure, in my own mind, that you understand those rights,
24 and not just through the discussions you've had with your
25 attorney.

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1 The Constitution of South Carolina and the
2 Constitution of the United States of America gives all of
3 us certain rights. And among those is the right to not
4 incriminate yourself. The Fifth Amendment to the United
5 States Constitution says that no person shall be compelled
6 in any criminal case to be a witness against himself.

7 Obviously, that means you can't be required to testify in
8 this case. You have a right to testify, if you choose to,
9 but nobody can make you testify. It's a personal right
10 that you enjoy, and nobody can waive that right but you.

11 You may make the choice to testify in the case. And,
12 if you do so, you'd be subject to the same rules that
13 govern any other witness that testified. You can be
14 examined and cross-examined on any relevant issue in the
15 case. In addition, if you have convictions that involve
16 dishonesty, or false statements, or crimes punishable by
17 imprisonment for more than one year, and the Court
18 determines that the probative value of admitting that
19 evidence outweighs any prejudicial effect to you, then the
20 Solicitor would be able to attack your credibility by
21 introducing those prior records against you.

22 Now, a decision to testify on your part must be
23 voluntarily made by you, intelligently made, and freely
24 made by you with the knowledge of the protections that you
25 enjoy under the Fifth Amendment and with the knowledge of

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1 the consequences that will occur if you decide to testify.
2 Whether to testify or not to testify is left entirely up
3 to you.

4 If you choose not to testify, I'll instruct the jury
5 that they cannot give the fact that you chose not to
6 testify any consideration whatsoever in their
7 deliberations. I'll tell them they can't even talk about
8 the fact that you chose not to testify. You can talk with
9 your attorney. You'll, certainly, have further time to
10 talk with your attorney. You can talk with friends,
11 family, anyone else.

12 But, ultimately, Mr. Henkel, that decision is going
13 to be yours and yours alone as to whether to testify.

14 Do you understand what I've explained to you?

15 DEFENDANT HENKEL: Yes, Your Honor.

16 THE COURT: Do you have any questions of me?

17 DEFENDANT HENKEL: Not at this point.

18 THE COURT: I'll, certainly, not require you to make
19 that commitment tonight. You may already have an opinion
20 tonight of whether you want to testify or not. But I'll,
21 certainly, let you sleep on it as well.

22 Thank you.

23 You can return to your seat.

24 DEFENDANT HENKEL: Thank you.

25 THE COURT: Mr. Warder, as far as your request for

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1 your client remaining out of jail, we've tried cases -- I
2 don't know if this has come up before where you've been a
3 part, but my policy is always that once the jury is sworn,
4 the Defendant is in custody. The exceptions to that is I
5 will, certainly, consider the State's position, if they
6 have a compelling reason, or really feel like it's fair
7 for the Defendant to remain out of custody. Or the other
8 alternative is whoever is on the bond to begin with is
9 still -- appears in Court and is willing to continue on
10 that bond in spite of the fact that they're off the bond,
11 if there's a reaffirmation in open court, then, certainly,
12 we'll consider that as well. Otherwise, I do not allow
13 the Defendant to be out. That's the standard I have.

14 And I've been stung too many times otherwise, even
15 though I have assurances. And the most recent sting was
16 this morning when the Defendant did not show up for the
17 trial going on.

18 So I respectfully deny your motion. Certainly, the
19 folks in law enforcement will work with you in any way
20 they can to make sure he's clean shaven and has his proper
21 clothing. I'm sure that you can get that to him so he can
22 be as presentable as he wants to be in the morning.

23 So I'll deny your motion to leave him out, unless
24 there's a bond that's available.

25 All right. We'll be ready to start back at 9:00. We

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1 may be a little delayed. If y'all would make sure that
2 is -- what needs to be done on that.

3 See you back at 9:00 in the morning.

4 (WHEREUPON, the proceedings were concluded at
5 approximately 5:35 p.m., to be reconvened on
6 Friday, February 4, 2011.

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1 FRIDAY, FEBRUARY 4, 2011

2 THE COURT: Mr. Warder, do you have any -- did y'all
3 work anything out on the conflicting videos?

4 MR. WARDER: Yes, sir.

5 I'd really like to know where the video that the
6 State introduced began. And I'm not techie enough to put
7 it in the machine and make the -- and I'd ask if the
8 State -- if somebody can put it in and show us where the
9 one in evidence began.

10 THE COURT: Can you do that?

11 MS. SALISBURY: Well, sure, Judge.

12 I can tell you, though, that it begins about -- it's
13 the same visual. But instead of including any discussion
14 of the horizontal gaze nystagmus, it begins with the
15 trooper asking the Defendant about his leg injury. It's
16 the exact same recording. It's just apparent that my
17 production from our record copy begins a few seconds after
18 this one. I'd be happy to show it to Your Honor so that
19 you can --

20 THE COURT: Do you concede that?

21 MR. WARDER: I think the leg was about the spot.

22 THE COURT: All right.

23 MOTIONS

24 MR. WARDER: Then I'd like to introduce into
25 evidence, for the purposes of this motion, the video that

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1 I was furnished in part of my discovery.

2 THE COURT: And we'll do that and make that a Court's
3 Exhibit for now.

4 MR. WARDER: Yes, sir.

5 THE COURT: It's in the machine?

6 MR. WARDER: Yes, sir.

7 THE COURT: We'll note it's a Court's Exhibit now.
8 Is there anything else you need to note right now?

9 MR. WARDER: No, sir.

10 Can you rewind it?

11 MR. WARDER: Your Honor, I'm going to show you the
12 video. And as near as I can, the video begins at 4:19:06.
13 And I think that's at 4:00 a.m., 19 minutes past the hour,
14 and 6 seconds. And the first thing that happens is the
15 nystagmus horizontal gaze test is given. At 29 seconds
16 past, in the area of 29 and 33 seconds, there's some
17 discussion about a leg injury, or his leg having a sprain.
18 And then the --

19 THE COURT: What time was that?

20 MR. WARDER: It's about 33.

21 THE COURT: 4:33, plus or minus?

22 MR. WARDER: 4:20:33 is what I can figure out. 4:00,
23 20 minutes past, 33 seconds.

24 THE COURT: 4:20:33. Okay.

25 MR. WARDER: At 4:20:40 seconds past, the ABC test

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1 begins. Then at 52 seconds past, my client is arrested.

2 THE COURT: Wait a minute, Mr. Warder.

3 I want to make sure I'm getting seconds right and
4 minutes right. You had 4:19, basically, was the
5 horizontal gaze test, 4:20 and a half -- 4:20:33 was the
6 discussion about the leg?

7 MR. WARDER: And that would be incorrect. I said
8 that wrong, Your Honor. It would be 4:19:33.

9 THE COURT: 4:19:33.

10 All right. And then at 4:40 was the ABC test?

11 MR. WARDER: It would be 4:19:40, the ABC test was
12 going. We're still in 19.

13 THE COURT: We're still in 19.

14 All right. So all three that you've mentioned are at
15 4:19?

16 MR. WARDER: Yes.

17 THE COURT: Okay.

18 MR. WARDER: And at 4:19:52, he was arrested.

19 THE COURT: All right, sir.

20 MR. WARDER: And then it would flip over to 20
21 minutes after the hour. And at 20 minutes and 20 seconds,
22 they're discussing blood tests. And at 4:20:32, the
23 arrest is complete. They've now taken him and put him in
24 the car and closed the door. The whole thing from the
25 first of the nystagmus horizontal gaze test to the closing

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1 of the door on the squad car would last a minute and 26
2 seconds.

3 Okay. And I'd like to now play that tape for you.

4 THE COURT: All right. Before I see this tape, do
5 you assert there's any differences other than the --
6 you're talking about playing from 4:19 to 4:20, or the
7 whole tape?

8 MR. WARDER: I'm proposing, Your Honor, for the
9 period -- for the purposes of the motion, I would play
10 from 4:19:06 to 4:20:32, a minute and 26 seconds for you.

11 THE COURT: All right, sir. I'll watch that.

12 (WHEREUPON, a portion of the video tape was played in
13 open court.)

14 MR. WARDER: And I'd move this into evidence.

15 THE COURT: Okay. That will be Court's Exhibit
16 No. 1. I don't know if you want to introduce it to the
17 jury later. You would, certainly, have an opportunity, if
18 you wanted to introduce it before the jury. That would be
19 up to you. But, for now, it's Court's Exhibit No. 1.

20 (WHEREUPON, Court's Exhibit No. 1 was marked for
21 identification and admitted into evidence.)

22 MR. WARDER: Your Honor, I would, also, like to pass
23 up a copy of the affidavit. I believe it's the affidavit
24 that's spoken of in the statute. And I think this is a
25 SLED copy. I confess it came from Ronnie Cole's

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1 materials. Most of those are SLED copies.

2 THE COURT: That's a blank affidavit?

3 MR. WARDER: It's an affidavit, failure to produce a
4 videotape.

5 THE COURT: All right.

6 MR. WARDER: And, Your Honor, my reading of the
7 statute is that the State is required to produce an
8 affidavit in two instances. And I believe that to be
9 covered in 56-5-2953, Section B.

10 And the first one is that the failure of the officer
11 to produce the videotapes required is not alone grounds
12 for dismissal if the officer could submit a sworn
13 affidavit saying that the equipment wasn't -- was
14 inoperable, and reasonable efforts have been done to
15 maintain it. It was in inoperable condition, and there
16 was no other facilities available.

17 And it then says in the other instance, he could
18 submit a sworn affidavit certifying that it was physically
19 impossible to produce the video, because the person needed
20 emergent medical treatment, exigent circumstances,
21 included but not limited to -- and I would submit in every
22 case an affidavit would have to be submitted. That it
23 would be an affidavit or a sworn statement. One of those
24 would have to be before the Court could consider the other
25 circumstances.

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1 And the affidavit form, Your Honor, has a reason for
2 based on the totality of the circumstances in portion D of
3 the affidavit, which would have to be filed and set out.
4 And then the Court could consider the totality of the
5 circumstances. But, however, in all circumstances, as
6 soon as it was practical, the Defendant would then be put
7 in front of the video camera. So in no circumstances
8 could they just stand by and do things if it was practical
9 to put him in front of a video camera.

10 Now, the bottom section says nothing prohibits the
11 Court from considering other valid reasons, based upon the
12 totality of the circumstances. But those would have to be
13 set forth in the affidavit. And it makes sense so that
14 the Defendant and, certainly, his counsel and stuff would
15 have notice of any circumstances, what they were, and
16 could be prepared to meet those.

17 Now, just because there's an accident investigation
18 doesn't mean that it doesn't have to have the affidavit.
19 All that would happen if there was an accident
20 investigation resulting from a roadblock, or a citizens
21 arrest, or whether the arrest had been made and the video
22 equipment not activated. And that's what they're really
23 talking about there, Your Honor. If there was some kind
24 of investigation where there was a search for the person,
25 where if the person wasn't there and he was arrested by

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1 some other officer, some other place, or a citizens arrest
2 was made, that they didn't have to make it until, of
3 course, it would be immediately practical to make that.
4 Because it says on all circumstances, they have to make it
5 whenever it's -- as soon as they can.

6 Now, this officer arrived on the -- by the facts, the
7 Defendant was seated in an ambulance right next to where
8 he parked his car. He said -- the officer testified that
9 there might have been one car in between. I submit to you
10 that when you listen to the tape and the period on the
11 tape, he's put in that car and the door is closed in one
12 continuous thing. It's an unbroken train of events.

13 We're here to decide, I think, partly whether or not
14 this man was in some condition that he couldn't have been
15 given the test, the nystagmus test in front of the video,
16 where he couldn't have been given the ABC's in front of
17 it. The officer testified he gave him a Miranda in the
18 ambulance and immediately gave him the nystagmus test.
19 There's no Miranda on any tape, and it's required to be on
20 the tape. The one I've got and the one the Solicitor has,
21 neither one has it.

22 THE COURT: I thought I heard a Miranda warning
23 somewhere along the way yesterday.

24 MR. WARDER: You did hear a Miranda warning. You
25 hear a Miranda warning, Your Honor, after my client is put

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1 in the car and the field sobriety tests have already been
2 given, which is in violation of the statute. The statute
3 requires that it be given before any field sobriety tests.

4 THE COURT: The officer testified he did, but you're
5 saying it was not on tape before the ABC's?

6 MR. WARDER: Yes, sir. I recall that to be his oral
7 testimony. And he says it took place at someplace
8 separate. He says -- and the officer admits that the
9 ABC's were given right by the car. I submit to you that
10 this tape shows that it was all given at the same
11 location, which was right by the car. There was another
12 officer that testified he remembered, at least, part of it
13 being given next to the car standing beside the car.

14 I submit on both grounds -- on the grounds that
15 there's no affidavit, the Defendant is entitled to have
16 this case dismissed. And I submit to you, because in this
17 minute and 22 seconds that they're all given, he was right
18 by the car. From the time the last test was given of the
19 ABC's and he was arrested, a total of 40 seconds elapses
20 before he's put in the car and the door is closed.

21 Now, that, certainly, had to be practical to put him
22 on the video. Because all of that time that all of this
23 is happening, it's caught on the recorder that is
24 associated with the video camera that's running in front
25 of the car. We can see on the tape the video equipment

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1 was working. And it's running at the very instant he's
2 doing it. But the statute doesn't require an audio
3 recording. It requires a video recording.

4 And there's a case in South Carolina where the audio
5 didn't work and the video did, and the Court said in that
6 case, a video is all that's required. And so, obviously,
7 it's not satisfied by the audio. Video is all that's
8 mentioned in the statute. And they had to put him where a
9 video was. And if the State was going to rely upon some
10 totality of the circumstances, they had to include it in
11 the affidavit, because an affidavit is required in both
12 parts.

13 And I would submit to you that from looking at the
14 tape, the lapse -- the shortness of the lapse of time, the
15 closeness, obviously, to the car, that this is a case
16 where the Defendant is entitled to a verdict for the
17 failure to follow the statute, failure to put him in front
18 of the video. And, certainly, there's no reason to
19 believe that he couldn't have in the same short period of
20 time been put in front of the camera.

21 Thank you.

22 I think that's all I have.

23 THE COURT: Thank you.

24 I'll be glad to hear from the State.

25 MS. SALISBURY: Thank you, Judge.

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1 There's a whole host of points that I think I need to
2 touch on, and a lot of the stuff, I think, is all jumbled
3 together. So let me see if I can try and sort it out one
4 piece at a time.

5 I think the first issue that we need to discuss is
6 this affidavit -- or perspective affidavit for failure to
7 produce a video. The State produced a video. The trooper
8 recorded an in-car video. I can't imagine the
9 circumstances why we would need to fill out an affidavit
10 discussing our failure to produce a video when we've done
11 that. So I'm not sure that I agree with Mr. Warder that
12 this document is of some material significance to either
13 this motion, or to the case in general when there is a
14 video recording of the incident site.

15 So, with that out of the way, I think that the
16 relevant portion of the statute is not what Mr. Warder
17 read to you about the circumstances of submitting a sworn
18 affidavit and the provisions of the statute that, clearly,
19 relate back to a traffic stop. The relevant portion of
20 this statute is the part -- the portion of Subsection B
21 that talks about accident investigations, because that's
22 precisely what we're dealing with. An accident
23 investigation is a little bit different --

24 THE COURT: Well, let me go back to the video now.
25 So you're saying the statute would be met if the video is

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1 running and showing the highway, but not showing anything
2 that the officer is doing with the Defendant?

3 MS. SALISBURY: Not necessarily in the
4 circumstances --

5 THE COURT: That makes a video?

6 MS. SALISBURY: I'm sorry to interrupt you, Judge.

7 But it would be my reading of the statute, if we were
8 dealing with a traffic stop, that this would be a wildly
9 different argument. It would be a different set of
10 circumstances. The statute says, Officers, when you are
11 dealing with a traffic stop, you have to meet these four
12 requirements and your in-car video has to capture these
13 things. That's what the legislature has described that
14 officers in the State are required to do when we're
15 dealing with a traffic stop.

16 THE COURT: So your argument, first of all, is that
17 there is a video. But, secondly, that you don't really
18 need to have the video if it's an automobile accident
19 investigation?

20 MS. SALISBURY: Not that there doesn't need to be a
21 video, but the legislature has said that in the
22 circumstances of a traffic accident, we understand that
23 it's not the same, that the camera doesn't flip on when
24 the blue lights come on. That when you're dealing with a
25 traffic stop, the video should begin as soon as it is

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1 practicable. As soon as the officer can do whatever it is
2 he does, flip a switch, push a button, whatever it is,
3 that should begin as soon as it is practicable.

4 Because in the circumstances of a traffic stop -- in
5 this case, we're dealing with a subject who's fled the
6 scene. We're dealing with a subject who's injured. We're
7 dealing with a subject who may or may not be mid-transit
8 to the hospital. And the legislature, apparently,
9 appreciates that distinction. That when we're -- that in
10 the instance of a traffic stop, a controlled situation,
11 that the officer can collect himself, position the camera,
12 play movie director, and, actually, capture in a
13 controlled and meaningful way the field sobriety tests,
14 the proper steps that we want them to go through. Then
15 the officer should do that when the officer does have
16 control. But in the circumstance of an accident, the
17 trooper -- the officer doesn't have that control over the
18 scene. The officer is expected to do what the law
19 requires him to do and activate the video as soon as he
20 can.

21 So as it relates to the affidavit, the State has
22 produced a video. There's no need for an affidavit. We
23 have a video of the incident scene. Is it a perfect
24 recording? Of course not. But the trooper testified that
25 he began that recording as soon as he could have.

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1 And, honestly, Judge, I think this video is even a
2 better illustration of the unusual circumstances of that
3 night. I wish the jury had seen this version of the tape,
4 because they can hear the Defendant having trouble
5 following the officer's directions. It's apparent the
6 officer says to him, Open your eyes, follow my pen. I
7 wish the jury could hear that, but --

8 THE COURT: Why was that not on the one that --

9 MS. SALISBURY: Your Honor, I can't explain that.

10 I guess there's a difference in the video once it
11 gets transferred from VHS form to a digital format on our
12 computer system. But the first few seconds of the tape
13 weren't included. That's my fault. I'll check -- it's a
14 lesson learned the hard way, I suppose.

15 But for purposes of this motion, I think it makes the
16 State's position even stronger in the sense that the video
17 recording began as soon as the trooper could flip that
18 button, whatever it was, activate it from his belt or flip
19 the switch in the car. As soon as he could get that video
20 started, he did.

21 Now, whether he performed the horizontal gaze
22 nystagmus with the assistance of ambulance lights, or
23 whether he did it by the road side physically beside his
24 patrol car is insignificant, in my opinion. Because the
25 recording began as soon as he gathered control of the

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1 scene and was able to do those things that the law
2 requires him to do.

3 So I would say, Judge, that the State has done
4 precisely what the statute requires of us, which is to
5 begin the video recording as soon as it was practical.
6 That's exactly what's happened. That's exactly the
7 recording that the jury had seen and that the State
8 produced to the Defense. I don't believe there's any
9 basis for the Defendant's motion, Judge.

10 THE COURT: Okay.

11 MR. WARDER: Your Honor?

12 THE COURT: Yes, sir.

13 MR. WARDER: Just very briefly.

14 The statute talks about the video as required by this
15 section. And the video that would be required by this
16 section would be a video that met the conditions set forth
17 in Subsection A, which provided what must be in the video.
18 So that's the kind of video that's produced. And if that
19 kind of video is not produced, an affidavit must be.

20 The Solicitor is arguing, of course, that he did it
21 as soon as practical, he did the steps. But the statute,
22 specifically, provides that one of the steps that he must
23 do is give the Miranda rights on the video.

24 Now, as for the position that this is a video of the
25 events, that's just not true. A video or an audio is not

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1 required. A video of the events would be the Defendant
2 doing something in front of the camera that the jury could
3 see.

4 The reason that a video was needed was the arguments
5 and fear that officers were exaggerating how people did on
6 field sobriety tests. That's the reason it's there. And
7 the video is what's important. It's not the fact that an
8 audio runs with it and there's something on it. The video
9 is what's required, and that was never done.

10 Thank you.

11 THE COURT: All right. I've studied the statute and
12 weighed your argument, Mr. Warder, and I'll try not to --
13 I'll try to succinctly list the reasons that I am making
14 this ruling. I always like to try to not say too much,
15 but, at least, give the appellate courts an idea of what
16 was going on here or, at least, my thought process so they
17 can tell me how faulty my thought process is if they
18 desire to.

19 I'm not convinced that a reading of the statute, in
20 spite of your excellent argument and maybe even Mr. Cole's
21 position, that the affidavit requirement carries over to
22 the exception for the automobile accident, and the other
23 exceptions that were given. I go back even further that
24 neither of you have addressed does the statute apply at
25 all? Because is this the incident that it's referring to?

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1 Is the incident what happened at 1:00, or is the incident
2 what happened at 4:30?

3 I know that when legislation is created, you think of
4 the typical DUI, or traffic stop, and everything is
5 happening at one time. Here, we have a four-hour delay.
6 So I raise that question in my own mind. But I'm assuming
7 the legislature -- for the purposes of my ruling that
8 the -- that it was an incident at 4:30 that the statute is
9 applicable to.

10 As I understood the testimony that I heard, the
11 officer was parked in front of the other emergency
12 vehicles, other cars. He didn't know how many were
13 between. So, as I see your video and the other that the
14 State has presented, obviously, we're seeing the road,
15 385. And everything, as I understand the testimony --
16 and, please, correct me if I'm wrong -- was happening
17 behind the camera.

18 The officer testified the practicality -- that he
19 activated the video and the audio as soon as practical.
20 And, of course, not just on his testimony, but I'm trying
21 to weigh the totality of what all was going on. So he
22 gets to the scene, he goes to the ambulance. I, also,
23 have to weigh what I think is the intent.

24 And, Mr. Warder, you hit on quite a bit, that a jury
25 deserves to have a video of the incident so that they can

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1 see better and determine the sobriety. The tests that
2 were given in this case, the horizontal gaze nystagmus
3 test and reciting the ABC's, are tests that don't cry out
4 for video representation. They cry out for audio
5 representation on the ABC's. But I don't know that, in my
6 experience as a lawyer and a judge, I've ever seen a video
7 of a horizontal gaze test where a juror or anyone viewing
8 it could, actually, see eyes jumping. I've never seen a
9 camera that close. You can see the process, but you can't
10 really see the eyes.

11 So I think because of the tests that were given and
12 because of the leg injury, there weren't any toe to heel,
13 or standing on one leg, or anything like that. I think
14 the video has met the requirements of the law.

15 And, certainly, you can, I guess, make your argument
16 that it all happened outside of the car because of the
17 time frame. But, in the other respect, I think the time
18 frame shows the practicality of getting it operating
19 fairly soon, or as soon as possible.

20 So I think based on the totality and the way I view
21 the law and the evidence that I've heard that I must
22 respectfully deny your motion to dismiss the case,
23 Mr. Warder. You've, certainly, made a fine argument on
24 that, though. And it causes pause reading this statute
25 that was worked out in our legislature. It gives us all

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1 some pause just to understand the meaning. But that's the
2 way I view the meaning of the statute.

3 Are we ready to proceed now?

4 MS. SALISBURY: The State is ready, Judge.

5 MR. WARDER: Can I have the affidavit that I passed
6 up and make it a part of the -- a Court's Exhibit in my
7 motion?

8 THE COURT: I wrote on it. I don't know if you want
9 to get another one or not. I wrote from Ronnie Cole's
10 book. Do you still want that to be a part, or do you want
11 to reproduce it? Because that's what you told me it was
12 from.

13 MR. WARDER: Yes, sir.

14 THE COURT: If you don't mind that being part of it,
15 we'll make that Court Exhibit No. 2.

16 (WHEREUPON, Court's Exhibit No. 2 was marked for
17 identification and admitted into evidence.)

18 THE COURT: We didn't take time yesterday to settle
19 the record. I want to make sure that Mr. Henkel has made
20 a knowing decision whether or not to testify.

21 Are there any impeachable offenses that the State
22 intends to use against Mr. Henkel, if he does choose to
23 testify?

24 MS. SALISBURY: Your Honor, the State plans to
25 introduce a 2003 conviction for attempted burglary in the

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1 THE COURT: If you would, please, hand the verdict
2 form to the bailiff.

3 All right. Madam Clerk, you may publish the verdict.

4 VERDICT

5 THE CLERK: Your Honor, in the case of
6 2009-GS-23-2593, the State of South Carolina v. Gregg
7 Gerard Henkel, we, the jury, unanimously find the
8 Defendant, Gregg Gerard Henkel, as to the charge of
9 driving under the influence, guilty.

10 This is signed by our Foreman, Mr. Fuller.

11 Ladies and gentlemen, if you agree this is the
12 verdict you reached in your deliberation room, would you,
13 please, raise your right hand.

14 (WHEREUPON, all jurors raised their hands.)

15 THE CLERK: Thank you.

16 THE COURT: Is there any matters we need to take care
17 of with this jury before they're discharged in this case?

18 MS. SALISBURY: Nothing from the State, Judge.

19 MR. WARDER: Nothing from the Defendant, Your Honor.

20 THE COURT: Mr. Foreman, and, ladies and gentlemen,
21 thank you very much for serving as a juror on this case.

22 It's Friday. Your jury service is over for the week.
23 I've been honored to have an opportunity to serve with
24 you. You've been a conscientious group. And I appreciate
25 the way you've paid attention and listened. And I've been

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1 THE COURT: Well, I, certainly, would not in any way
2 punish you for having a trial. That's your right. I have
3 to go on the fact that maybe you had a bad go, but this is
4 a bad, bad situation --

5 DEFENDANT HENKEL: Yes, it is.

6 THE COURT: -- the evidence shows you were in that
7 night.

8 DEFENDANT HENKEL: I agree, Your Honor.

9 THE COURT: Public safety is -- that's not the thing
10 to do.

11 SENTENCE

12 THE COURT: All right. I'm -- this is
13 2009-GS-23-2593, the sentence of the Court is that the
14 Defendant be committed to the State Department of
15 Corrections for a period of three years, provided,
16 however, upon the service of three months. The balance is
17 suspended and he's placed on probation for 30 months.
18 Condition of the probation is to perform 180 hours of
19 public service employment and substance abuse counseling,
20 as deemed necessary. Random alcohol and drug testing.
21 There's to be no operation of a motor vehicle without a
22 valid driver's license. Probation will include electronic
23 monitoring for the first 12 months of the probation.

24 I wish you the best, sir.

25 *****END OF TRANSCRIPT OF RECORD*****

THE STATE OF SOUTH CAROLINA

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IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions

G. Edward Welmaker, Circuit Court Judge

Case No. 2009-GS-23-02593

The State of South Carolina, ... Respondent,

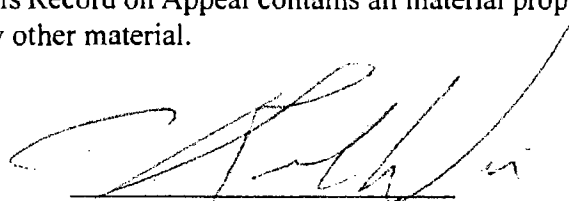
v

Gregg Gerald Henkel, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

October 16th, 2012



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
G. Edward Welmaker, Circuit Court Judge

Case No. 2009-GS-23-02593

The State of South Carolina, ... Respondent,

v

Gregg Gerald Henkel, ... Appellant.

FINAL BRIEF

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Statement of Issues Presented

Did the trial court err in failing to dismiss the indictment against Gregg Henkel on the ground that the officer failed to comply with the mandatory requirements of S.C. Code § 56-5-2953 that both *Miranda* warnings and the field sobriety test be recorded at the scene when Gregg Henkel was arrested?

Statement of the Case*Facts of Case*

About 1 a.m. on the morning of January 19, 2008, Ms. Lillie Chastain called 911 to report that a truck was driving erratically on Interstate 385 near Roper Mountain Road in Greenville County. Rec. on App. at 39, ll 23-25 to 40, ll 1-21. After she called 911, she followed the truck until it ran off the road and wrecked near the intersection of Highway 276 near Simpsonville. Rec. on App. at 41, ll 8-19. She observed the truck flip over and a person in a white shirt get out of the truck and jump over a fence near the scene. Rec. on App. at 42, ll 6-22. She was not able to identify the defendant as the person she observed getting out of the truck. At the request of the 911 operator, she returned to the scene and met the investigating officer. Rec. on App. at 53, ll 19-25 to 54, ll 1-5.

Several law enforcement officers searched the area where the truck left the road but did not find the driver. Rec. on App. at 62, ll 12-22. Officer Wesley Hiott, the arresting officer, went to the residence listed for the owner of the truck. He found no one at home. Rec. on App. at 63, ll 10-19. After he was not able to locate the driver of the truck, Mr. Hoitt cleared the scene and resumed his normal patrol. Rec. on App. at 64, ll 12-16.

Later, after 4 a.m., Officer Hoitt received a call that the possible driver of the truck had been located on Interstate 385. Rec. on App. at 64, ll 22-25 to 65, ll 1-5. When he arrived at the scene he found Gregg Henkel, the defendant, in an ambulance being examined by EMS. Rec. on App. at 65, ll 7-10. He was informed that Mr. Henkel did not wish to go to the hospital. After he was told that Mr. Henkel did not wish to go to the hospital, Officer Hoitt activated his video camera and microphone by the remote control on his belt. Rec. on App. at

87, ll 4-13. He then, according to his testimony, in the back of the ambulance gave Mr. Henkel his Miranda warning and administered a horizontal gaze nystagmus test.¹ The Miranda warning was not on the video. See Court's Exhibit 1.

Immediately after the ABC test, Mr. Henkel was arrested and placed in the patrol car. While in the patrol car, he was again given his Miranda warnings. He was also told he would be required to take a breath test and the consequences of refusing such a test.

After a trial by a jury, Mr. Henkel was convicted of driving under the influence and sentenced to three years suspended upon the service of 3 months and 30 months probation.

Procedural Facts

Prior to the start of the trial, defense counsel moved to dismiss the charge on the ground that no field sobriety test was video taped as required by S. C. Code § 56-2953.² The trial court reserved ruling on the motion until all the testimony relevant to this issue was presented. Rec. on App. at 37, ll 9-19. At the conclusion of the relevant testimony, defense counsel renewed his motion to dismiss on the failure of the state to comply with the statute. No affidavit was presented by the state explaining why a proper video was not produced. This was due, at least in part, because a video tape was in fact produced. At this point defense counsel also included as a basis for dismissal the failure of the video to include the reading of the

¹ State's exhibit 2 is the redacted version of the roadside video. It begins at 4:19:24 and does not contain the audio of the horizontal gaze nystagmus test. Court's exhibit 1, which is the video provided to defense counsel in discovery, has the video starting right before the HGN test was administered. Neither test is shown on the video as required by the statute. Nor are the *Miranda* warnings given on either tape as required by the statute.

² As this case arose before February 10, 2009, the older version of S.C. Code § 56-5-2953 applies. The major difference that affects this case is the requirement under the old law that the *Miranda* warning be on the video tape.

Miranda rights as required by the statute. Rec. on App. at 16-21.

The trial judge denied the motion to dismiss based upon the fact that “the horizontal gaze nystagmus test and reciting the ABC’s, are tests that don’t cry out for video representation. They cry out for audio representation.” Rec. on App. at 155, ll 2-5. He further based his ruling upon the “totality,” but failed to state what other factors he considered. Rec. on App. at 155, ll 168, l 20.

The defendant timely filed the notice of appeal on February 7, 2011.

Argument

Did the trial court err in failing to dismiss the indictment against Gregg Henkel on the ground that the officer failed to comply with the mandatory requirements of S.C. Code § 56-5-2953 that both *Miranda* warnings and the field sobriety test be recorded at the scene when Gregg Henkel was arrested?

In *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007) and *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011) the South Carolina Supreme Court concluded that the dismissal of the charges is a proper remedy when the state fails to comply with the provisions of S. C. Code § 56-5-2953, the statute involving the mandatory video taping of the incident site. The statute requires that the video taping begin with activation of the blue lights. Here the officer had his blue lights activated but did not begin the video recording until he elected to activate the video tape from his belt when he first started talking to Mr. Henkel. The video equipment was operable. The State failed to produce a video tape that complied with the statute.

The exceptions in Subsection B of the statute do not excuse the state in this case from producing a video of the field sobriety tests given by the officer. First, Subsection B does not apply until the state has produced an affidavit, prior to trial, as to why the required conduct was not video taped. As the statute says that the failure to produce the video is not a ground for dismissal only when the arresting officer "submits a sworn affidavit certifying that it was physically impossible to produce the videotape because the person needed emergency treatment, or exigent circumstances existed." S.C. Code § 56-5-2953 (B). Had the state produced an affidavit, then the state could have argued that exigent circumstances existed. The defendant

would then have known what exigent circumstances existed so he would have been prepared to counter the argument.

Subsection B also has another exception that does not apply. When the video taping is not activated by the blue light, such as an investigation of a traffic accident, the video taping must begin "as soon as practicable." Once begun, however the video must "conform with the provisions of this section." *Id.*

First one can argue that the video tape did not begin "as soon as practicable" as required by the statute.³ The video taping did not begin until the officer elected for it to begin, after he gave the *Miranda* warnings. The officer decided not to activate the video during the initial *Miranda* warnings. The officer elected to begin the video when he started performing the HGN test. If the officer could start the video tape at the time of the HGN test, then obviously it was practicable to start it a few seconds earlier when the *Miranda* rights were given. And the officer elected not to perform the HGN test on the video as required by the statute. At the time the officer performed the HGN test he knew that Mr. Henkel was not going to the hospital and that he would be released to the officer's custody. The officer then elected not to have Mr. Henkel in front of his patrol car when he administered the ABC test. Thus, the officer elected to have a video that did not conform with the mandatory provisions of the statute.

Compliance with the statute would not have been unduly burdensome to the state. Once the officer knew Mr. Henkel was not going to the hospital, he was required by the statute to simply move Mr. Henkel in front of his patrol car to read Mr. Henkel his *Miranda* rights, to

³ Even if the video began as soon as practicable as required by the statute, the video still does not show the field sobriety tests as required by the statute.

perform the HGN and to perform the ABC test. The trial judge decided that because the HGN and ABC's tests are verbal tests then a video was not required. First, the statute does not so provide. All field sobriety tests must be video taped. Secondly, unless the HGN test is administered correctly, its reliability is questionable. Had the test been on the video, then defense counsel would have been in a position to argue as to whether all the necessary steps were in fact performed. He could have made a reasonable determination as to whether the stimulus was the proper distance from the eyes and whether the officer tracked the stimulus to the 45° angle as required. In fact Court's exhibit 1 raises a serious question as to whether the HGN was properly performed. From listening to the video, the HGN test only took 21 seconds. The checklist for the National Highway Traffic Safety Administration states that the minimum time required to perform the HGN test is 56 seconds. *See, Checklist for Horizontal Gaze Nystagmus Test*, <http://www.ohiopd.com/nhtsaChecklist.pdf> (Visited November 19, 2011). In addition, if the ABC test had been administered on the video, the jury would have had the opportunity to observe Mr. Henkel standing in front of the camera to determine if he were unsteady on his feet or otherwise appeared to be intoxicated. As a result of the failure of the officer to comply with the statute, the jury only saw Mr. Henkel when he was seated in the officer's patrol car.

Suchenski said "[T]he statute in this case provides for dismissal of the charges when the statute is inexcusably violated." *Id.* at 16, 646 S.E.2d at 881. In this case no affidavit as to the failure to produce a video was submitted for the simple reason a video was in fact produced. The officer in this case simply elected not to comply with the statute. The only remedy is a dismissal of the charges. This holding was recently re-affirmed in the *Town of Mt. Pleasant* decision. There the Court held "By requiring a law enforcement agency to videotape a DUI arrest,

the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.” *Id.* at 349, 713 S.E.2d at 286.

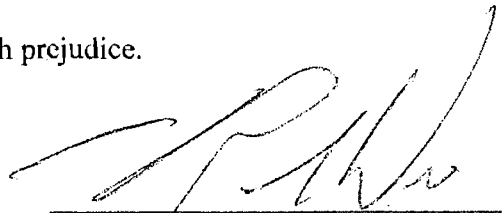
In a driving under the influence case the state has many advantages. If a defendant blows over .08, the jury is instructed that they may infer the defendant was under the influence. If a defendant blows over .08 the state may elect to charge the defendant with driving with unlawful alcohol concentration and not be required to prove the defendant is materially and appreciably impaired thus making their burden much easier. They only have to prove that the defendant did in fact blow .08 or greater. Even proving bad driving is not required. If a defendant refuses to submit to the test, the state may comment on that fact to the jury.

To help level the playing field and to help improve the quality of the conviction, the legislature simply required that the activities of the defendant at the time of the arrest be video taped. The legislature found this burden was not unduly burdensome. They even gave the local governments time to equip their police cars with cameras. *See, Town of Mt. Pleasant, supra.* The legislature gave broad discretion to the courts in the event the video taping equipment failed to function. They recognized that under some circumstances it may not be practicable to immediately start the video tape. But they found that once the officer is able to video tape the defendant, the “videotaping must begin and conform with the provisions of this section.” S.C. Code § 56-5-2953(B). Here the officer recognized his obligation to begin video taping but did not recognize his obligation to video tape in compliance with the statute.

CONCLUSION

For the foregoing reasons the conviction of Gregg Henkel should be reversed and remanded with instruction to dismiss the indictment with prejudice.

November 5, 2012



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case Tracking No. 2011-184986

The State,

Respondent,

vs.

Gregg Gerard Henkel,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly denied the motion to dismiss because the officer complied with section 56-5-2953 to the extent possible during the traffic accident investigation.

STATEMENT OF THE CASE

In the early morning hours of January 19, 2008, Appellant was involved in a single car automobile accident. Appellant was indicted in 2009 on charges of driving under the influence by the Greenville County Grand Jury. He proceeded to trial February 3 and 4, 2011, before the Honorable G. Edward Welmaker and a jury. The jury found him guilty as indicted and Judge Welmaker sentenced him to three years in prison, suspended on service of three months and thirty months probation. He was ordered to perform 180 hours of public service and undergo substance abuse counseling as needed.

ARGUMENT

- I. **The trial court properly denied the motion to dismiss because the officer complied with section 56-5-2953 to the extent possible during the traffic accident investigation.**

Appellant contends the trial court erred in failing to dismiss this case because the State failed to comply with section 56-5-2953 of the South Carolina Code (Supp. 2008). This case involves the investigation of an automobile accident and not a traffic stop for driving under the influence. As a result, the videotape offered complied with the requirements of section 56-5-2953 and specifically 56-5-2953(B).

In the instant case, the State presented an eye witness to the Appellant's accident. She testified he was swerving and "driving kind of crazy." (T.54; R. 40). The eyewitness testified she dialed 911 to report the driver and that she stayed on the phone with 911 while watching the driver of the vehicle swerve and nearly hit other vehicles. (T.54-55; R. 40-41). She testified Appellant hit a bridge, and flipped. She testified the car went into the ditch. Afterwards, she testified the driver climbed out and ran across to the other side of the road and jumped a fence. (T.55; R. 41). The eyewitness relayed what she saw to 911, returned to the accident scene, and provided the information to the police when they arrived. (T.55; 57-58; R. 41; 43-44).

Sergeant Hiott with the South Carolina Highway Patrol arrived on scene of the overturned pickup truck. (T.75; R. 61). He testified he talked to the eyewitness and she relayed the events to him. He proceeded to organize a group to search the area for Appellant and after about 20 minutes could not locate him. (T.76; 78; R. 62; 64). The accident occurred a little after 1:00am.

Sergeant Hiott later responded to a dispatch call indicating the possible driver of the overturned truck was located wandering the roadway on Interstate 385. Sergeant Hiott arrived and Appellant was in the back of the ambulance talking to the emergency medical personnel. (T.79; R. 65). Sergeant Hiott got into the ambulance to talk with Appellant and the EMS. He testified when he got into the ambulance, he could smell the alcohol. (T.80; R. 66). He indicated he read Appellant his Miranda rights in the back of the ambulance before performing any tests. He then performed a horizontal gaze nystagmus test (HGN). (T.79-80; R. 65-66). During this time, he remotely activated his camera from a switch on his belt. After performing the HGN, he moved Appellant to the side of his car and had Appellant recite his ABCs which is very clearly recorded on the video. (T.81; Court's Exhibit 1 on file with the Court; R. 67). Sergeant Hiott did not offer Appellant any walking or balancing tests because Appellant indicated his leg hurt. (T.80-81; R. 66-67). Appellant was placed in Sergeant Hiott's car and the camera was turned to record Appellant. Prior to turning the camera, it was aimed out the front of the vehicle which showed the interstate ahead because Sergeant Hiott had to pull to the front of the line of emergency vehicles in order to stop. (T.97; R. 83).

The trial court questioned Sergeant Hiott regarding his activating the camera. Sergeant Hiott indicated he only turned on his back blue lights, which does not activate the camera automatically. (T.95; R. 81). He indicated there were several Simpsonville police cars as well as the EMS and possible the fire department on scene. (T.95; R.81). Sergeant Hiott indicated the EMS vehicle may have been right behind him in the line of vehicles. (T.95-96; R. 81-82). Sergeant Hiott testified he activated the camera by his belt remote as soon as practicable. (T.101; R. 87).

The trial court considered whether the State presented a video pursuant to section 56-5-2953. The court found Sergeant Hiott initiated the recording as soon as practicable as required by the statute. Further, he found even though the videotape did not record a view of Appellant performing the HGN test and the ABC test, the video needs to contain Appellant's conduct and the video had the audio which was the relevant and important aspect of both tests. (T.166-168; R. 152-154).

Section 56-5-2953 provides in relevant part:

(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site videotaped.

(1) The videotaping at the incident site must:

(a) begin not later than the activation of the officer's blue lights and conclude after the arrest of the person for a violation of Section 56-5-2930, 56-5-2933, or a probable cause determination that the person violated Section 56-5-2945; and

(b) include the person being advised of his Miranda rights before any field sobriety tests are administered, if the tests are administered.

S.C. Code Ann. § 56-5-2953 (2006).¹

Subsection B of the statute provides:

Further, in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason

¹ This section was amended effective February 10, 2009. Act No. 201, 2008 S.C. Acts 1682-85. Accordingly, the 2006 Code is cited because Appellant's offense occurred in 2008 and Appellant has conceded the amended statute is not applicable to the instant case.

for the failure to produce the videotape based upon the totality of the circumstances. . . .

S.C. Code Ann. § 56-5-2953(B) (2006). As a result of subsection B, the officer does not have to produce a videotape containing all aspects of the incident site and the defendant's conduct at the incident site, but must only produce one beginning as soon as practicable. Further, the trial court is specifically allowed to consider any other valid reason for the failure to produce a videotape in full compliance with subsection A based on a totality of the circumstances.

This court analyzed the requirement under subsection A that the videotape contain the defendant's conduct in Murphy v. State, 392 S.C. 626, 631, 709 S.E.2d 685, 688 (Ct. App. 2011). In Murphy, the defendant was given the HGN and a walk the line test. The defendant was videotaped from essentially the knees up, and in portions only displayed half her body as she walked to the limit of the camera's field of view. Further the HGN was conducted at the location she completed the walking test "on the fringe of the dashboard camera's field of view" and with her back to the camera. The court found:

[N]othing in the plain language of the statute indicates that an accused remain in full view of the camera for the duration of the encounter. Rather, the statute only requires her "conduct" be recorded. Conduct is generally defined as one's behavior, action, or demeanor. The Oxford Dictionary 158 (2d ed. 2001). Failure of the video to maintain a full view of the accused for the duration of a field sobriety test in which she is made to walk a line, for instance, does not fail to display her behavior, demeanor, and general state. Thus, an accused need not remain in full view of the camera at all times in order for the recording to capture her conduct.

Id.

Sergeant Hiott clearly initiated the camera as soon as practicable. He arrived at a scene with multiple vehicles already there, including an ambulance. He pulled in front out of concern for being hit because he was only a semi-marked car and wanted to be in front of the other vehicles which had full lights. Further, he had to verify Appellant's condition as well as make a determination of whether he believed Appellant was intoxicated, thus triggering consideration of the DUI statute. Sergeant Hiott entered the ambulance, made the determination Appellant was intoxicated and was refusing medical treatment, triggered his camera, conducted the tests he believed were appropriate, and produced a videotape of Appellant's conduct which complied with section 56-5-2953.

In this particular accident investigation, the officer used two tests, the HGN, and a recitation of the ABC's test. Appellant's appearance on camera was not necessary to a recording of his conduct during either of these tests. As the trial court indicated, the tests "cry out for audio." The relevant conduct is the officer having to repeatedly instruct Appellant to open his eyes and how to perform the HGN test and then Appellant's inability to repeat his ABC's. Appellant's conduct at the incident site is documented by the videotape and is sufficient, especially as the trial court found, in light of the totality of the circumstances of this case. As a result, the trial court properly refused to suppress the videotape and properly refused to dismiss the case.

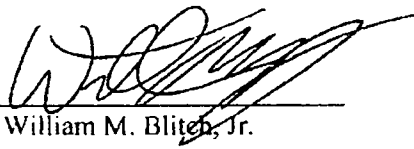
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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November 9, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case Tracking No. 2011-184986

The State,

Respondent,

vs.

Gregg Gerard Henkel,

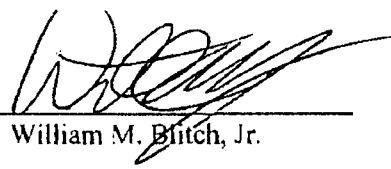
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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November 9, 2012

STATE OF SOUTH CAROLINA
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Appeal from Greenville County
Honorable G. Edward Welmaker, Circuit Court Judge
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The State,

Respondent,

vs.

Gregg Gerard Henkel,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 9th day of November, 2012.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
G. Edward Welmaker, Circuit Court Judge

Case No. 2009-GS-23-02593

The State of South Carolina, ... Respondent,

v

Gregg Gerald Henkel, ... Appellant.

FINAL REPLY BRIEF

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Argument

Did the trial court err in failing to dismiss the indictment against Gregg Henkel on the ground that the officer failed to comply with the mandatory requirements of S.C. Code § 56-5-2953 that both *Miranda* warnings and the field sobriety test be recorded at the scene when Greg Henkel was arrested?

The state has not disputed that an affidavit was not submitted in this case. Nor has the state argued that the requirement to submit an affidavit does not apply to this case. Thus, under the statute applicable to this case, the failure to properly conduct the required video taping alone is not ground for dismissal only "if the arresting officer submits a sworn affidavit certifying . . . "that it was physically impossible to produce the video tape because the person needed emergency medical treatment or exigent circumstances existed." S. C. Code § 56-5-2953 (B) The statute then provides that even under the circumstances of an accident investigation, "as soon as videotaping is practicable . . . videotaping *must* begin and conform with the provisions of this section." *Id.* (Emphasis added) Thus, the only question as to whether the videotaping complied with the statute is whether the officer began the taping as soon as practicable.

The state noted that the *Miranda* warnings were given in the patrol car after the defendant had been given the HGN test in the ambulance. But this does not comply with the statute. The plain wording of the statute is that the *Miranda* warnings must be given before the field sobriety tests. The statute provides "The videotaping at the incident site *must*: . . . (b) include the person being advised of his *Miranda* rights *before* any field sobriety tests are administered" S. C. Code § 56-5-2953(1) (b) (emphasis added). The officer is not required

to give an HGN or other field sobriety test. The statute, however, mandates that the officer give the *Miranda* warnings at the scene and before any field. He has no discretion on that issue.

The officer testified that he gave the *Miranda* warning before the HGN test but he did not record the warning as required. The question, therefore, is did he begin the recording as soon as practicable. The sole basis the state uses to conclude that the video taping began as soon as practicable is that the officer testified to that fact. But the facts prove the officer wrong. He had the ability to turn on the recording equipment anytime after he left his vehicle upon arriving at the scene. An argument could be made that it was not practicable to turn on the recording device when he went to the ambulance to check on Mr. Henkel as he did not know Mr. Henkel's condition and whether he was going to the hospital. But once the officer determined that Mr. Henkel was not going to the hospital and he suspected him of driving under the influence, it was practicable for him to turn on the recording equipment and the law required him to do so. It was practicable for him to take Mr. Henkel in front of the patrol car to conduct the HGN test on video. As noted in the opening brief, the officer elected to turn on the video recorder after he allegedly administered the *Miranda* warnings. Obviously it was practicable to turn on the video recorder a few seconds earlier. The officer elected not to comply with the statute.

The state further argues that the *Miranda* warnings and the HGN test are tests that "cry out for audio." The simple answer is that the requirement of the statute says otherwise. The statute requires that both be on the video. When the statute requires that the field sobriety test be recorded on the video, this requirement simply cannot be met by an audio recording of the HGN test.

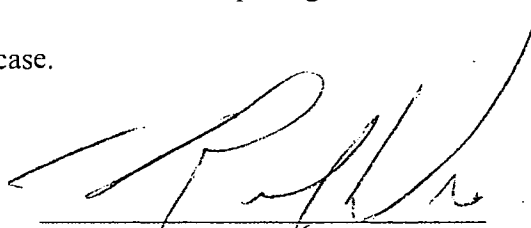
The state is not aided by *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (2011).

The most that can be said about the *Murphy* case is that the requirement of video taping the conduct is that all the conduct need not be recorded. The language in *Murphy* supports Mr. Henkel. In the case, this court said "Therefore, in regard to what must be recorded, the plain language of the statute is not violated as long as the recording captures (1) the accused's conduct and (2) Miranda warnings prior to field sobriety tests, if such tests occur. *Murphy* does not allege the video fails to capture her being advised of Miranda, but only that the statute requires that she remain in full view and record all field sobriety tests." *Id.* at 631, 709 S.E.2d at 688. *Murphy* states that the statute requires that the *Miranda* warnings must be on the video and before any field sobriety test. As the South Carolina Supreme Court said "dismissal of the DUAC charge is an appropriate remedy provided by § 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions." *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007). In this case, the state has not established that the exceptions in subsection B apply.

CONCLUSION

For the forgoing reasons and for the reasons set forth in the opening brief, this matter should be reversed with directions to dismiss the case.

November 5, 2012



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Gregg Gerald Henkel, Appellant.

Appellate Case No. 2011-184986

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5159
Heard March 6, 2013 – Filed July 10, 2013

REVERSED

C. Rauch Wise, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
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LOCKEMY, J.: Gregg Henkel argues the trial court erred in denying his motion to dismiss his indictment for driving under the influence (DUI). Henkel contends the South Carolina Highway Patrol (SHP) failed to comply with section 56-5-2953 of the South Carolina Code (2006), which requires the arresting officer to provide videotaping of the defendant's conduct at the incident site. We reverse.

FACTS/PROCEDURAL BACKGROUND

Around 1:00 a.m. on January 19, 2008, Lillie Chastain called 911 and reported a motorist driving a truck erratically on I-385 in Greenville County. Chastain followed the truck until it hit a bridge and overturned into a ditch. She observed the driver get out of the truck and jump over a fence. Sergeant Wesley Hiott of the SCHP arrived on the scene and organized a search for the driver. Officers were unable to locate the driver, and the scene was cleared.

Around 4:00 or 5:00 a.m., Sergeant Hiott responded to a call indicating the possible driver of the truck had been located on I-385. When he arrived on the scene, Sergeant Hiott pulled his patrol car to the front of the line of emergency vehicles on the side of the interstate. Thereafter, Sergeant Hiott found Henkel being examined by EMS in an ambulance behind his patrol car. Sergeant Hiott got into the ambulance with Henkel and could smell alcohol. Sergeant Hiott read Henkel his *Miranda* rights and performed a horizontal gaze nystagmus (HGN) test inside the ambulance. After performing the HGN test, Sergeant Hiott concluded Henkel was under the influence and moved him from inside the ambulance to the side of his patrol car. There, Sergeant Hiott had Henkel recite his ABCs.¹ Henkel failed the ABC test and admitted to Sergeant Hiott he was the driver of the wrecked truck. Henkel was arrested and placed in Sergeant Hiott's patrol car. Once inside the patrol car, Sergeant Hiott turned the dashboard video camera to face Henkel and read him his *Miranda* rights again.

Henkel was indicted for DUI and a trial was held in February 2011. Prior to trial, Henkel moved to dismiss the indictment on the ground that neither the field sobriety tests nor the initial *Miranda* warning were videotaped as required by section 56-5-2953 of the South Carolina Code. The trial court reserved ruling on the motion until all of the testimony was presented.

Sergeant Hiott testified he activated the patrol car's video camera and his microphone by the remote control on his belt. The record indicates this occurred after Sergeant Hiott read Henkel his *Miranda* rights in the ambulance but before he administered the HGN test. Sergeant Hiott testified he activated the camera as soon as it was practicable. Two versions of the videotape from the incident site were admitted into evidence. In the defense's version (Court's Exhibit 1), the videotape includes audio of the HGN and ABC tests but does not include video

¹ Sergeant Hiott did not have Henkel perform any walking or balancing tests because Henkel indicated his leg was injured.

because these tests were not administered in front of Sergeant Hiott's patrol car where the video camera was aimed. The State's version (State's Exhibit 2) of the videotape is nearly identical to Court's Exhibit 1 but does not begin until after the HGN test. Thus, the videotapes in evidence do not include any video or audio of the initial *Miranda* warning, or any video of the HGN or ABC tests.

At the conclusion of the testimony, Henkel renewed his motion to dismiss. The trial court denied Henkel's motion based on "the totality . . . [of] the evidence." The trial court noted Sergeant Hiott testified he activated the video camera as soon as practicable. The trial court further found the HGN and ABC tests "don't cry out for video representation . . . [t]hey cry out for audio representation on the ABCs." Based on the tests given, the trial court determined the videotape "met the requirements of the law."

The jury found Henkel guilty of DUI, and he was sentenced to three years in prison suspended upon the service of three months and thirty months of probation. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "This [c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (citing *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

LAW/ANALYSIS

Henkel argues the trial court erred in denying his motion to dismiss his DUI indictment because the State failed to produce a videotape that complied with section 56-5-2953 of the South Carolina Code. The State contends Sergeant Hiott activated the video camera as soon as practicable, and the videotape, while capturing only audio of the field sobriety tests, was sufficient to show Henkel's conduct at the incident site. We reverse the trial court's decision.

I. Applicable Law

Subsection 56-5-2953(A) provides:

(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site videotaped.

(1) The videotaping at the incident site must:

(a) begin not later than the activation of the officer's blue lights and conclude after the arrest of the person for a violation of Section 56-5-2930, 56-5-2933, or a probable cause determination that the person violated Section 56-5-2945; and

(b) include the person being advised of his *Miranda* rights before any field sobriety tests are administered, if the tests are administered.

S.C. Code Ann. § 56-5-2953(A) (2006).² Subsection (B) of section 56-5-2953 outlines several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements. Pursuant to subsection 56-5-2953(B),

[f]ailure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal . . . if the arresting officer submits a sworn affidavit certifying that the videotape equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the videotape because the person needed emergency medical treatment, or exigent circumstances existed. Further, in circumstances including, but not limited to, road blocks, traffic accident investigations,

² Section 56-5-2953 was amended effective February 10, 2009. *See* Act No. 201, 2008 S.C. Acts 1682-85. The amended statute is not applicable to Henkel's January 19, 2008 arrest.

and citizens' arrests, where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the videotape.

S.C. Code Ann. § 56-5-2953(B).

"Our appellate courts have strictly construed section 56-5-2953 and found that a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a DUI case." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011) (citing *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding that "dismissal of the DUAC charge is an appropriate remedy provided by section 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions"); *Murphy v. State*, 392 S.C. 626, 630, 709 S.E.2d 685, 687 (Ct. App. 2011) (recognizing the State's noncompliance with section 56-5-2953, which is not mitigated by a statutory exception, warrants dismissal)). "[T]he Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953." *Id.* at 348, 713 S.E.2d at 286.

II. Analysis

Subsection 56-5-2953(A)(1) requires that a person who drives under the influence must have his conduct at the incident site videotaped. Under subsection 56-5-2953(A)(1)(a), the videotaping must "begin not later than the activation of the officer's blue lights." Sergeant Hiott testified his patrol car was equipped with front and rear blue lights, which could be activated independently of each other, but the car's video camera turns on only when the front blue lights are activated. When he arrived at the scene, Sergeant Hiott activated only his rear blue lights. Because the event that subsection 56-5-2953(A)(1)(a) sets as the latest point in

time when videotaping must begin—activation of the front blue lights that turn on the camera—never occurred, the failure to videotape the *Miranda* warnings did not violate subsection 56-5-2953(A)(1).

Subsection 56-5-2953(B) (2006) provides that "in circumstances including, but not limited to . . . traffic accident investigations, . . . where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal." The next sentence of subsection (B) qualifies that provision with two requirements: "However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section."

This is a case in which the videotaping equipment was not activated by blue lights. The trial court made a factual finding that Sergeant Hiott activated his patrol car's video as soon as practicable. There is evidence to support this finding, and under our standard of review, we are bound by it. However, the requirement in subsection 56-5-2953(B) that the videotaping "conform with the provisions of this section" refers back to subsection (A). Subsection 56-5-2953(A)(1)(b) requires that the videotaping at the incident site "include the person being advised of his *Miranda* rights before any field sobriety tests are administered, if the tests are administered." Sergeant Hiott performed field sobriety tests after he started videotaping. Because the videotape did not include him giving Henkel *Miranda* warnings, it did not conform to the provisions of section 56-5-2953. Therefore, the trial court was required to dismiss the charge,³ and it erred by not doing so.

REVERSED.

FEW, C.J., concurs.

GEATHERS, J., dissenting: For the following reasons, I would affirm Appellant's conviction for DUI.

I agree with the majority's analysis that a key determination in this case is whether the officer activated his patrol car's video recording equipment as soon as was practicable, such that the officer's delay in initiating the recording (non-compliance

³ Because the omission of the *Miranda* warnings requires dismissal, it is not necessary for us to consider the significance of the alleged failure to videotape Henkel's conduct.

with subsection 56-5-2953(A)) was excused pursuant to an exception within subsection 56-5-2953(B). However, I disagree with the majority's conclusion that when this exception is invoked that an officer must still strictly comply with subsection (A). To so construe the exception would effectively eviscerate it. *See State v. Hercheck*, Op. No. 27258 (S.C. Sup. Ct. filed May 29, 2013) (Shearouse Adv. Sh. No. 24 at 46) ("[E]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction" (citation omitted)). Further, the majority's interpretation disregards the plain meaning of subsection (B). In my view of the terms of this provision, when the exception is properly invoked an officer must, *from that point forward*, comply with all applicable recording requirements. *See* § 56-5-2953(B) ("[A]s soon as is practicable in these circumstances, videotaping must begin and conform with the provisions of this section." (emphases added)). Accordingly, the initiation of the videotaping and conformance must each begin as soon as is practicable. *Id.* In the instant matter, it was not practicable for the officer to capture video evidence of Appellant receiving his initial *Miranda* warning or performing the HGN or ABC tests while Appellant was inside the ambulance.

Additionally, I believe that a complete recording of events "at the incident site," as required by subsection (A), was excused due to the "totality of the circumstances" exception within subsection (B). *See* § 56-5-2953(A) (requiring "videotaping at the incident site"); § 56-5-2953(B) (providing that "[n]othing in this section prohibits the court from considering *any other valid reason* for the failure to produce the videotape based upon the *totality of the circumstances*." (emphases added)). Notably, this case did not involve a typical DUI investigation and subsequent arrest at or near the site of a traffic stop. Instead, this case involved a report of an erratic driver, the erratic driver's collision with a bridge and overturning of his vehicle, and his subsequent fleeing on foot and jumping a fence. Thus, when the officer first encountered the suspect *four hours after the accident, inside of an ambulance*, and after the suspect had *wandered down the middle of the highway back toward* the site of the wreck that was cleared hours earlier, the totality of these circumstances did not require video recording, at least not as contemplated by subsection (A) for a typical DUI stop and investigation.

Accordingly, the totality of the circumstances did not require a video recording in strict compliance with subsection (A). Here, the produced video recording still began as soon as was practicable and included audio of the HGN and ABC tests. Thus, in light of subsection (B) and the totality of the circumstances, the produced recording was sufficient.

For these reasons, I respectfully dissent.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Greenville County
Hon. G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2011-184986

The State,

Respondent,

v.

Gregg Gerald Henkel,

Appellant.

PETITION FOR REHEARING

On July 10, 2013, this Court reversed the trial court's decision admitting the videotape of the incident scene and not dismissing the case. This Court misapprehended or overlooked the plain meaning of the exceptions found in subsection B of section 56-5-2953 of the South Carolina Code. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the videotape admissible and met the requirements of section 56-5-2953, and affirm Appellant's conviction and sentence.

First, this case involves the investigation of a traffic accident and not a traffic stop for driving under the influence. As a result, the provisions of section 56-5-2953(B) are clearly implicated. The subsection provides:

Further, in circumstances including, . . . traffic accident investigations, . . . where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for

dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section.

S.C. Code Ann. § 56-5-2953(B)(Supp. 2006).

“The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature.” State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)). “The legislature’s intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute’s operation.” State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted).

The trial court properly found, and this Court agreed, the videotaping began as soon as practicable. The majority, however, maintains the officer must start over the requirements of subsection A which include the advisement of Miranda rights and the conducting of the field sobriety tests in order to properly conform with the provisions of the section as required. The majority’s interpretation re-writes the requirements of subsection B of the statute. City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) (“Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature’s language.”).

The statute is worded such that the phrase as soon as videotaping in practicable applies to both when the videotaping must “begin” and when it must “conform” to the requirements of the statute. The clear unambiguous reading is that the conformity must

begin at that point, and, from that point forward, comply with the remaining videotaping requirements set forth in subsection A. The majority's reading of the statute leads to the absurd result that an officer, as in the case *sub judice*, must re-do actions already performed prior to the ability to practicably turn on the videotaping. See State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005) ("The legislature is presumed to intend that its statutes accomplish something."); Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (finding courts will reject an interpretation of a statute leading to an absurd result clearly unintended by the legislature); State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011) ("The statute must be interpreted with realistic circumstances and rationales in mind.").

In this case, the officer provided the Miranda rights in the back of the ambulance while he was attempting to ascertain the extent of Appellant's injury and whether he intended to seek medical treatment. Upon learning he did not intend to seek medical treatment, the officer began the field sobriety tests as he was also initiating the camera by remote. There is no contention the officer failed to provide Miranda warnings, only that they were not recorded on camera. However, to require the officer to go back and redo the warnings once he is within range of his camera "effectively eviscerates" the exception as the dissent correctly points out. The exception should be read to require conformity to being as soon as practicable and the officer in this case met that requirement.

Further, the majority of this Court overlooked the remainder of the exceptions included in subsection B. The subsection also provides:

Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances. . . .

S.C. Code Ann. § 56-5-2953(B) (2006). As the dissent correctly points out, and the majority fails to address, the totality of the circumstances indicate the officer reasonably complied with the requirements of the section.

This case began when an eyewitness saw Appellant swerving and "driving kind of crazy." (T.54; R. 40). The eyewitness dialed 911 to report the driver and stayed on the phone with 911 while watching the driver of the vehicle swerve and nearly hit other vehicles. (T.54-55; R. 40-41). Appellant hit a bridge, and flipped his vehicle. Appellant climbed out of the vehicle, ran across to the other side of the road, and jumped a fence attempting to flee the scene. (T.55; R. 41). The eyewitness relayed what she saw to 911, returned to the accident scene, and provided the information to the police when they arrived. (T.55; 57-58; R. 41; 43-44).

Sergeant Hiott with the South Carolina Highway Patrol arrived on scene of the overturned pickup truck. (T.75; R. 61). He talked to the eyewitness and she relayed the events to him. He proceeded to organize a group to search the area for Appellant and after about 20 minutes could not locate him. (T.76; 78; R. 62; 64). The accident occurred a little after 1:00am.

Sergeant Hiott later responded to a dispatch call indicating the possible driver of the overturned truck was located wandering the roadway on Interstate 385. The driver was in the back of an ambulance with the officer arrived. Sergeant Hiott arrived at a scene with multiple vehicles already there, including an ambulance. He pulled in front of all vehicles out of concern for being hit by oncoming traffic because he was only a semi-marked car and wanted to be in front of the other vehicles which had full lights. Further, he had to verify Appellant's condition, as well as make a determination of whether he

believed Appellant was intoxicated, thus triggering consideration of the DUI statute. Sergeant Hiott got into the ambulance to talk with Appellant and the EMS. He testified when he got into the ambulance, he could smell the alcohol. (T.80; R. 66). Sergeant Hiott made the determination Appellant was intoxicated and was refusing medical treatment, provided appropriate Miranda warnings which have not been contested on appeal, triggered his camera, conducted the tests he believed were appropriate, and produced a videotape of Appellant's conduct which began as soon as practicable and included everything done at the site from that moment forward. Under the totality of the circumstances, the trial court properly admitted the videotape and refused to dismiss the case.

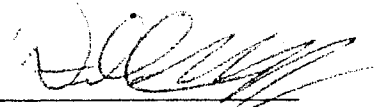
CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court correctly admitted the videotape of the incident scene and properly refused to dismiss the case.

Respectfully submitted,

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Attorney General

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ATTORNEYS FOR RESPONDENT

July 24, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Hon. G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2011-184986

The State,

Respondent,

v.

Gregg Gerald Henkel,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, SC 29646

I further certify that all parties required by Rule to be served have been served.
This 24th day of July, 2013.

Ellen R. DuBois
ELLEN R. DuBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The South Carolina Court of Appeals

The State, Respondent,

WD

v.

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Gregg Gerald Henkel, Appellant.

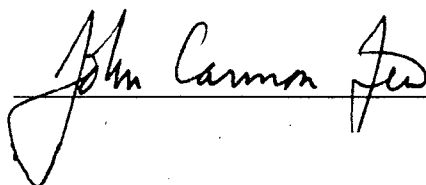
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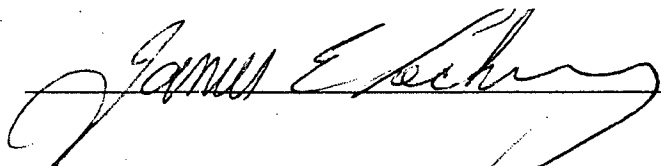
Appellate Case No. 2011-184986

ATTORNEY GENERALS
OFFICE

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

Columbia, South Carolina

*I vote to grant the petition
for rehearing.*

cc:

C. Rauch Wise

William M. Blitch, Jr.



FILED

August 22, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
Certiorari to the Court of Appeals
Appeal From Greenville County
Hon. G. Edward Welmaker, Circuit Court Judge

The State,

Petitioner,

v.

Gregg Gerald Henkel,

Respondent.

PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record,

C. Rauch Wise, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 20th day of September, 2013.



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