

VOLUME III OF III

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER DOUGLAS BARCLAY,

APPELLANT

APPELLATE CASE NO. 2012-212639

RECORD ON APPEAL

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SC Court of Appeals

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THE FOLLOWING IS ON FILE WITH THIS COURT:
DEFENSE COUNSEL’S VIDEO RECORDING OF APPELLANT AT HOSPITAL

1 MR. MASON: The witness on that is going to be his
2 cousin who has the detailed knowledge. I still have to
3 establish through another witness that this actually
4 happened.

5 THE COURT: The accident is really peripheral.
6 The issue is whether -- the accident in and of itself
7 is not habit, it would not be admissible for that
8 purpose. The issue is whether you have a witness that
9 can establish that he routinely did something. This
10 witness can't establish that he routinely did
11 something. Whether he was afraid, it doesn't matter
12 what the cause of the fear was, you have to
13 establish by habit that he had this habit. This
14 witness cannot establish that.

15 MR. MASON: Right, but what happens is, after
16 he at night ran his car into a tree on the right side
17 of this road he then communicates in detail and in
18 observable manner to his cousin who knows him quite
19 well --

20 THE COURT: Then that is the person you say can
21 establish he has a habit, not one incident.

22 MR. MASON: But a routine course of behavior that
23 arose --

24 THE COURT: It doesn't matter what it arose
25 out of. The issue is if he had a habit, not what it

1 arose out of.

2 MR. MASON: Somebody, you know, there is some
3 places people just don't go because something bad
4 happened there.

5 THE COURT: It doesn't matter, the issue is habit,
6 the issue is not why. It doesn't matter what caused
7 the habit, the point is that he has a habit. That is
8 what is relevant and germane, not how he had it or why.
9 I could hate speeders because one hit me and it caused
10 me a lot of issues, it doesn't matter what precipitated
11 my fear, it is that I have a fear of it and because of
12 that fear I do something a certain way all the time by
13 routine, instinctively from that point. It doesn't
14 matter what causes it.

15 MR. MASON: We've got the other testimony of Mr.
16 Davilla the only reason he took that road is because he
17 wanted to get home faster.

18 THE COURT: I don't think that is his testimony.
19 We would have to go back and look at the transcript.

20 MR. MASON: He turned on Point of Pines to get
21 home faster.

22 MR. VOIGHT: That is not --

23 THE COURT: I don't believe that was the
24 testimony.

25 MR. VOIGHT: That was asked and it was

1 contradicted.

2 MR. MASON: Well, he said it on direct and then on
3 cross.

4 THE COURT: I don't believe he did. I would have
5 to, you know, you all's memory, you are advocates, your
6 memory is skewed, you don't have real good memory, that
7 is why I miss my realtime, so I can look it up and see
8 exactly what was said. I make notes but nonetheless I
9 rely on my memory and I have one of those memories that
10 when I hear something I remember it
11 forever, it doesn't leave me, I know it.

12 But nonetheless, I will go back and read the
13 transcript because the way you hear things, some of us
14 hear things the way we want to. Just like, it may not
15 be the best example but when you go to the doctor you
16 should always take somebody with you because sometimes
17 you hear what you want to hear, you don't hear what the
18 doctor says, especially bad news, you always hear the
19 best of what it is that you're listening to. That is
20 human nature, it is not right or wrong, it is just
21 human nature. I would have to rely on the transcript.
22 I do not recall that from his testimony. You were not
23 able to establish habit evidence of the decedent
24 because he said he worked with him, he worked with him,
25 their work history together was sporadic, he did not

1 ride with him every day although they did live in the
2 same trailer together, he indicated that some days he
3 worked other places, they both worked, they tried to
4 work every day but they worked in different places, he
5 did not ride with him every day, so he could not
6 establish habit. You may be able to establish it
7 through his cousin and I don't really know, I have not
8 heard the testimony yet but the issue becomes not if he
9 had an accident on this road and that that accident is
10 what precipitated his fear. A lot of people have a
11 fear of night driving that have never had an accident,
12 they just don't trust their eyesight and some people
13 with perfect eyesight can't drive at night for whatever
14 reason, it is just a proclivity they have that they
15 don't like driving at night. I have several friends
16 that have to get in before a certain time, they don't
17 like driving at night. It may be an irrational fear
18 but nevertheless it is the way they feel, I know that
19 about them and I know without fail and I'm not going to
20 ask them to do certain things, especially as the season
21 progresses, at 5:30 there is no point in me calling
22 them --

23 MR. MASON: You go get them.

24 THE COURT: -- to meet me anywhere because they
25 say, "You know I don't drive at night." That's a

1 habit, that is something you can count on and they do
2 it all the time, instinctively. That is the way the
3 case law has articulated it. But it really becomes an
4 annulity why he felt that way. The issue is if you can
5 establish through this witness he had a fear of driving
6 on that road or that he never took this route, it
7 doesn't really matter what the reason is, the point
8 is that he knew him well enough and sufficiently
9 enough to say that this is the way that he did things
10 and he did it that way all the time.

11 MR. MASON: The problem with it, Your Honor, like
12 any piece of evidence, to get to a certain point you've
13 got to piece it together, sometimes it's through a
14 number of different witnesses, and in this situation
15 when I --

16 THE COURT: It has to be relevant, it has to make
17 some issue of consequence more or less probable, and at
18 this point to introduce it really rises to the level of
19 character and not habit.

20 MR. MASON: The problem is when I bring Mr.
21 Licona in he might say, "I didn't actually see him
22 wreck against that tree."

23 THE COURT: It doesn't matter, you don't have to
24 ask him about a wreck. What you're going to ask him is
25 what is his course of conduct with his cousin, how

1 often did he ride with him, "What were the habits he
2 exhibited in that vehicle, did you ever ride with him
3 at night?"

4 "Well, no, he didn't like to drive at night." Can he
5 say that with certainty? Just like with my friend,
6 there are certain folks there is no need to call them
7 at 5:30 and say meet me for dinner, you just know that
8 about them. The same thing with him. In other words,
9 "We lived in the same house, I drove with him every
10 day, he hated this road, he didn't like to drive on it
11 and he took it as a matter of last resort and he hated
12 driving at night." That is habit and you can establish
13 that through a course of conduct, which is this person
14 did it all the time. You have to establish this person
15 had a sufficient relationship with him to know that.

16 In other words, if I carpool with somebody every
17 day from work I'm going to know their driving habits,
18 I'm going to know whether they speed, whether they
19 drive too slow, whether they brake, you know, they
20 anticipate braking, whether they clutch the steering
21 wheel, whether they have certain proclivities by
22 driving. You know that by virtue of the fact you were
23 usually with them and see that, but him simply having
24 an accident in and of itself, isolated, where this
25 person cannot relate that he had a course of conduct

1 with him such that he knew that it impaired his ability
2 to do some things is character evidence and it is more
3 prejudicial than probative and it does not make any
4 fact in this case more or less probable. I think based
5 on what you just said to me, you can establish habit
6 evidence through his cousin if he had sufficient
7 contact with him, or anybody else who rode in the car
8 with him.

9 MR. MASON: I understand, Your Honor. Can I make
10 a brief real quick proffer?

11 THE COURT: Absolutely.

12 MR. MASON: Thank you, Your Honor.

13 MR. MASON: May it please the Court.

14 THE COURT: Yes, you may proceed.

15 BY MR. MASON:

16 Q Mr. Sanders, describe the incident that you
17 witnessed.

18 A Well, as I was saying, I was heading north on
19 174 when I was run off the road by the man and I
20 turned around to make sure he was going to make it to
21 wherever he was going and he turned left on Point of
22 Pines Road and by the time I got to him he had
23 already run off the right side of the road into the
24 tree.

25 Q And where was that?

1 A That was going into the first curve on the road,
2 right about a little church.

3 Q And was that on or about February 25th, 2007?

4 A Yes, sir.

5 Q And did you go up to the car?

6 A I went up to the car.

7 Q What did you do when you got to the car?

8 A I saw that he was unconscious and I called 911 for
9 ambulance help.

10 Q Was that person that was unconscious in that
11 vehicle, was it Alvaro Antonio Garcia?

12 A Yes, sir.

13 Q And with regard to Mr. Garcia, did you then know
14 him from that date forward?

15 A Yes, sir.

16 Q Okay. And knowing him from that date forward, do
17 you know whether you saw him driving after that?

18 A I did.

19 Q Okay. And do you know what road he lived on? In
20 other words, what street he lived on?

21 A I believe he lived on Clark Road but I'm not sure.

22 Q Let me ask you this. Is Big Creek Road off of
23 Clark Road?

24 A Yes, it is.

25 Q Okay. Is it like a little jog in that road,

1 intersection off Clark Road?

2 A Yes, right there at the intersection of Indigo
3 Hill Road and Clark Road.

4 Q You described yourself as having traveled on Point
5 of Pines Road every day?

6 A Yes, sir.

7 Q Okay. Now, is this a small island? I mean, do
8 you know the cars that pass by you one way or the
9 other?

10 A Yes, sir.

11 Q Okay. And knowing that, after this accident when
12 Mr. Garcia wrecked his car into the tree, do you recall
13 seeing Mr. Garcia use that road, or did he avoid that
14 road after that?

15 A I still saw him use that road.

16 Q And with regard to that, were there other
17 occasions in which you observed his driving?

18 A Yes, sir.

19 Q Okay. And what was his driving habit with regard
20 to speeders and the use of that road?

21 A His driving habit with regard to speeders and the
22 use of that road, he would speed down it, and it is not
23 a road you should speed down. I mean, the markings on
24 it, the lines, they are not fresh paint, it is hard to
25 see on that road.

1 Q What is the condition of the asphalt?

2 A The asphalt, there is some dips in the road and a
3 few potholes. If you hit it going fast, you know, you
4 can lose control of the car.

5 Q And where is it you're coming from on these
6 occasions you say that you saw Mr. Garcia driving fast
7 on this road, what would be the occasion to bring you
8 into that area?

9 A Going fishing on my family's property.

10 Q Is your family's property Wes Bank's property?

11 A Yes, sir.

12 Q Okay. So, if you were going from Wes Bank's to
13 the restaurant, during the time you were the manager
14 would that, would that route have occasion to take you
15 on Point of Pines Road?

16 A Yes, sir.

17 Q Okay. Now, what time is it, if you're going to
18 open up the restaurant, what time is it? You said
19 you were the manager, right?

20 A Yes, sir.

21 Q Okay. So if you're performing managerial duties
22 what time are you getting there in the afternoon?

23 A In the afternoon I would get there about 4:00,
24 4:30.

25 Q And you would have occasion to see Mr. Garcia

- 1 driving by?
- 2 A Yes, sir.
- 3 Q Now, on those occasions, again, I'm not just
- 4 talking once or twice, can you give me an idea how many
- 5 occasions it is that we're talking about?
- 6 A I didn't really notice all of them but quite a
- 7 few.
- 8 Q Well, let me just ask it this way. Was it one of
- 9 these things where it was frequent, or infrequent?
- 10 A Infrequent.
- 11 Q Now, when you would see him did he have, do you
- 12 recall whether he had passengers in the car or was he
- 13 alone?
- 14 A Most of the times he would have passengers in the
- 15 car.
- 16 Q And did you ever have occasion to know Jose Santos
- 17 Davilla, the passenger that was in his car at the time
- 18 of the accident?
- 19 A No, sir.
- 20 Q But you personally witnessed the February 25th,
- 21 2007, collision?
- 22 A Yes, sir.
- 23 Q And was that collision at nighttime?
- 24 A Yes, sir.
- 25 Q And approximately how many feet away is it from

1 the location of the collision in which Mr. Garcia
2 actually died?

3 A I would estimate five to six hundred feet.

4 Q And do you know that distance as having seen the
5 first collision and also having seen, I guess you would
6 say, the roadside markings of some sort that indicate
7 that is where the accident occurred?

8 A Yes, sir.

9 MR. MASON: Your Honor, thank you.

10 THE COURT: Further questions of the witness on
11 the proffer?

12 MR. VOIGHT: No.

13 THE COURT: Any further argument from the State
14 regarding this testimony?

15 MR. VOIGHT: I don't believe it is any more
16 admissible than when we started his testimony. I still
17 think it seems to undermine the habit evidence, in
18 fact.

19 THE COURT: Yes. After hearing the witness'
20 testimony I stand by my original ruling, it is not
21 relevant. The time of the accident is extremely remote
22 from the time of this incident. In addition, he is not
23 familiar with -- well, he is somewhat familiar with it
24 but I think what is even more dispositive on the issue,
25 it is more prejudicial than probative, it is not

1 relevant, does not serve to prove any fact or
2 consequences in this case that makes it more or
3 less probable.

4 In addition to that, what is most dispositive as
5 to habit evidence, he testified he infrequently saw the
6 defendant exhibiting this behavior, and of course to
7 qualify as a habit it has to be more than infrequent.
8 Habit has to be frequent, has to be second nature, has
9 to be something the person does all the time with some
10 predictability, almost to the point of not giving it
11 any thought and it being second nature.

12 There is really no, in terms of scope, it is not
13 established within the time frame of this accident that
14 he saw the defendant speeding. In addition
15 to that, he did not indicate that he saw him every day.
16 And in addition to the speeding testimony, there is no
17 allegation, no testimony, in fact the record is void of
18 any testimony that speed was a factor in this accident.
19 In fact, it is the exact opposite, speeding was not an
20 issue, they both were traveling below the speed limit
21 and the factor of consequence in terms of this collision
22 was the impact of the collision, the size of the
23 vehicles but not the speed.

24 So, the proffer will stand, the objection is
25 sustained and we'll move forward with the next witness.

1 Sir, thank you so much.

2 MR. MASON: Your Honor, I do have, I wanted to ask
3 him --

4 THE COURT: You had some other questions?

5 MR. MASON: Just about the condition of Point of
6 Pines Road.

7 THE COURT: That's fine.

8 MR. MASON: And I well be done.

9 THE COURT: Please bring in the jury.

10 (The jury returned to the courtroom p.m.).

11 BAILIFF: All present, Your Honor.

12 THE COURT: You may be seated.

13 Ladies and gentlemen, we appreciate your
14 patience. We disposed of that matter of law.

15 MR. MASON: Thank you, Your Honor.

16 BY MR. MASON:

17 Q Mr. Sanders, describe the condition of Point of
18 Pines Road.

19 A It's been a while since it has been resurfaced
20 and it has also been a while since the markings on
21 the road were repainted. The markings are dark and
22 there is some noticeable dips in the road.

23 Q Describe the tree cover.

24 A The tree covering is like driving through an oaken
25 tunnel.

1 Q Oaken tunnel?

2 A You know, oaken.

3 Q What is your practice for driving on that road?

4 A I always drive slow because I never know what is
5 going to happen or who I'm going to meet on it.

6 MR. MASON: Thank you.

7 THE COURT: Any questions for the witness?

8 MR. VOIGT: Yes, Your Honor.

9 THE COURT: You may proceed.

10 CROSS EXAMINATION BY MR. VOIGT:

11 Q Let me see if I've got this straight. You were
12 the general manager for 19 years at the Old Post
13 Restaurant?

14 A Yes, sir.

15 Q What were some of the things you did at the Old
16 Post Restaurant in that 19 years or so? You weren't
17 always the general manager, were you?

18 A I was a busboy for the first six months and
19 circumstances right after it opened led me to being the
20 general manager.

21 Q Did you ever tend bar there?

22 A No, sir.

23 Q Okay. You had other people do that there?

24 A Yes, sir.

25 Q Do you know Walter Douglas Barclay?

1 A Yes, sir.

2 Q And how long have you been knowing Mr Barclay?

3 A My now ex-wife built a house next to his house in

4 1990 -- no, excuse me, 2000.

5 Q Do you call him Douglas Barclay or another name?

6 A I call him Otis.

7 Q Are you related to Billy Sanders?

8 A Yes.

9 Q Is that your brother?

10 A Yes, sir.

11 Q Is he friendly with Mr. Barclay as well?

12 A As far as I know he is but I have been out of

13 contact with him for about four years now.

14 Q Okay. Were you the one who began to call him Otis

15 or did you pick that up somewhere else?

16 A Do what?

17 Q Were you the first one who began to call Mr.

18 Barclay Otis or had you picked that up from somewhere

19 else?

20 A No, I picked that up from somewhere else.

21 Q Do you know why he's called Otis?

22 A No, sir.

23 MR. VOIGT: That's all.

24 THE COURT: Any redirect?

25 REDIRECT EXAMINATION BY MR. MASON:

1 Q Do you know whether he has been called Otis since
2 he was ten years old?

3 MS. KINZELER: Objection.

4 THE COURT: Basis of the objection?

5 MR. VOIGT: Lack of evidence.

6 THE COURT: Basically you need to rephrase the
7 question to the best of his knowledge.

8 BY MR. MASON:

9 Q To the best of your knowledge do you know
10 whether Mr. Barclay's --

11 THE COURT: That is still leading. You need to
12 ask him a direct question.

13 Q Do you know how Mr. Barclay got the name Otis?

14 A No, sir.

15 Q And do you assign any bad connotation to the name
16 Otis?

17 A No.

18 MR. MASON: Thank you.

19 THE COURT: Any objection to the witness being
20 excused, from the State?

21 MR. VOIGT: No, Your Honor.

22 THE COURT: From the defense?

23 MR. MASON: No.

24 THE COURT: Sir, you're excused. Have a good
25 day.

1 (Witness excused)

2 THE COURT: Who is your next witness?

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1 JOE MURRAY, after being first duly sworn, testified as
2 follows:

3 THE CLERK: PLease state your full name and spell
4 your last name.

5 THE WITNESS: My name is Joe Murray, my last name
6 is spelled M-u-r-r-a-y.

7 THE COURT: You may proceed.

8 DIRECT EXAMINATION BY MR. MASON:

9 Q Good afternoon, Mr. Murray. Do you know Jose
10 Santos Davilla?

11 A Yes, sir.

12 Q How long have you known him?

13 A I would say a year, year and a half approximately.

14 Q Okay. During that time have you had occasion to
15 speak with him?

16 A Many times.

17 Q Okay. And can you give me an idea like how many
18 times you and he have spoke, roughly?

19 A Between one and 200.

20 Q And have you worked with him as well?

21 A Yes.

22 Q Okay. And when you speak to him what language
23 does he speak to you?

24 A English.

25 Q Do you speak Spanish?

1 A No. I don't think that I do. The Mexicans think,
2 excuse me, the Spanish speaking people think that I do
3 because I know probably 25 words but, no, I don't speak
4 Spanish, in my opinion.

5 Q And what is the speed in which Mr. Davilla can
6 speak English?

7 MS. KINZELER: Objection.

8 THE COURT: Basis?

9 MS. KINZELER: Relevance.

10 THE COURT: It goes to credibility, overruled.

11 BY MR. MASON:

12 Q In other words, is he a fast talking English
13 speaker or slow or what?

14 A He speaks normally most of the time. However,
15 there are times when he gets excited, and I will give
16 some examples, if he calls me on the phone and he needs
17 something he will go into a rather rapid mode of speech
18 where his English is perfect but his pronunciation is
19 a little lacking and my brain can't catch up with him
20 so I have to have him slow down.

21 Q Have you ever been unable to communicate with him
22 with him speaking and you listening?

23 A Yes.

24 Q Okay. And do you slow him down on those
25 occasions?

1 A When I have to, yes.

2 Q And once you slow him down from fast talking --

3 MS. KINZELER: Objection.

4 THE COURT: Basis?

5 MS. KINZELER: Leading.

6 THE COURT: Sustained, leading.

7 Q Do you ask him to slow down?

8 A Yes.

9 Q Okay. And when you ask him to slow down what,
10 what then develops with the conversation?

11 A I can understand him perfectly. My problem is the
12 pronunciation of his words, I cannot synthesize that
13 information fast enough to figure out what words he's
14 saying when he's talking fast. As I told you on the
15 phone, the only thing I can compare him to is a
16 foreigner, he talks really fast in English but the
17 pronunciation, I cannot grasp and I tell him to slow
18 down and then I can communicate with him perfectly.

19 MR. MASON: Thank you, Mr. Murray, that's all the
20 questions I have.

21 THE COURT: Any questions for the witness,
22 from the State?

23 MS. KINZELER: I don't have anything. Thank
24 you.

25 THE COURT: Any objection to the witness being

1 excused, from the State?

2 MR. VOIGT: No, ma'am.

3 THE COURT: From the defense?

4 MR. MASON: No, Your Honor.

5 THE COURT: Sir, you're excused.

6 THE WITNESS: Thank you, ma'am.

7 THE COURT: You're welcome, sir,

8 (Witness excused).

9 MR. MASON: Your Honor, may we have a five minute
10 break?

11 THE COURT: Approach.

12 (Unrecorded bench conference).

13 THE COURT: Ladies and gentlemen, I apologize.
14 I'm not going to give you a cigarette break, I have
15 fallen on my sword, but you're going to be done a
16 little early today. That will give you, and again, if
17 I have to keep you very long I will do that as well but
18 I think we have three short witnesses and then we're
19 going to, I'm going to discuss scheduling with the
20 attorneys and I will let you know how we will be
21 proceeding on tomorrow.

22 The defense may proceed.

23 MR. MASON: Your Honor, at this point in time we
24 call Melody Bailey.

25

1 MELODY BAILEY, after being first duly sworn, testified
2 as follows:

3 THE CLERK: Please state your full name and spell
4 your last name.

5 THE WITNESS: My name is Melody K. Bailey,
6 B-a-i-l-e-y.

7 THE COURT: You may proceed.

8 DIRECT EXAMINATION BY MR. MASON:

9 Q Miss Bailey, where are you employed?

10 A Habitat for Humanity.

11 Q What do you do?

12 A I manage the restore.

13 Q Did you come here today to testify?

14 A Yes, sir.

15 Q Just give me a short rundown of what you do at
16 Habitat for Humanity.

17 A I coordinate pick-ups of donations of items from
18 individual donors and business donors, and we do those
19 pickups, we are open 9:00 to 5:00 Monday through
20 Saturday, and we take those funds and build homes for
21 families who deserve decent housing. Our restore funds
22 about five to seven houses a year.

23 Q Do you provide similar charitable work on Edisto
24 Island?

25 A I do.

1 Q Tell me about that.

2 A If there are events and there is leftover food I
3 always take it home, will take it to the migrant camps.
4 If the migrant camps aren't open I take it to one of
5 the local churches and have it passed around so that it
6 will not be thrown away but it goes to people who are
7 in need. Thanksgiving and Christmas I always use my
8 free Piggly Wiggly turkeys and package together dinner
9 and have the local reverends pass those out to families
10 that they have on their list, and the same thing with
11 Christmas trees, et cetera.

12 Q In the course of this work did you have occasion
13 to meet Jose Santos Davilla?

14 A Yes, sir.

15 Q Tell me a little bit about that.

16 A I met a bunch of the immigrants that are on my
17 island and they have come to know me and my truck as
18 I'm pulling up, I have food, and they speak to me on
19 occasion and have asked me on occasion about housing
20 and different other charitable things that can be done.

21 Q Now, did you have occasion to talk with Mr.
22 Davilla about the accident involving Mr. Barclay?

23 A Yes, sir.

24 MR. VOIGT: Objection, hearsay.

25 THE COURT: Basis?

1 MR. VOIGT: Hearsay.

2 THE COURT: I'm sorry, I apologize. She did
3 not say -- well, approach.

4 (Unrecorded bench conference).

5 BY MR. MASON:

6 Q Miss Bailey, did you have occasion to meet with
7 Jose Santos Davilla on or about October 7th, 2010?

8 A Yes.

9 Q Okay.

10 MR. MASON: Your Honor, may I approach?

11 THE COURT: You may.

12 Q Were you a witness on the document marked as
13 Defendant's Exhibit Number 7?

14 A Yes, sir.

15 Q And you recognize your name on there?

16 A Yes, sir.

17 Q Okay. Were you physically present the evening
18 that Mr. Davilla signed this affidavit?

19 A Yes, sir.

20 Q Who else was present with Mr. Davilla?

21 A There was a gentleman who said he was his cousin
22 and another gentleman that I don't believe they
23 referenced who, what his relationship was.

24 Q Okay. On that evening did you speak to Mr.
25 Davilla?

1 A Yes, sir.

2 Q Okay. What language did you speak to Mr Davilla?

3 A English.

4 Q Okay. Do you speak Spanish?

5 A No, sir.

6 Q Okay. Did Mr. Davilla appear to understand what
7 you were saying?

8 A Yes, sir.

9 Q Now, directing your attention to another day. In
10 August of 2011 did you have occasion to speak with Jose
11 Santos Davilla?

12 Q Yes, sir.

13 Q Okay. Tell me on what day.

14 A August 31st.

15 Q Okay. Tell me where.

16 A At the Horizon gas station. They have numbers but
17 the Horizon when you go onto Edisto Island.

18 Q Okay. And while you were at the Horizon gas
19 station what happened?

20 A I was at the Horizon, I was waiting in line to
21 make a purchase and Jose Davilla was there and I said
22 hello and he said hello.

23 MR. VOIGT: Objection, hearsay.

24 THE COURT: Sustained, hearsay.

25 MR. MASON: Your Honor, we may need to make

1 a proffer.

2 THE COURT: You need to proceed with your
3 questioning.

4 MR. MASON: Thank you, Your Honor.

5 BY MR. MASON:

6 Q Without regard to what he said, did he ask to
7 speak with you?

8 A Yes.

9 Q Okay. And where did you and he go when he made
10 that request?

11 A We went toward the back of the store.

12 Q Okay. And did you have a conversation there with
13 Mr. Davilla?

14 A Yes, I did.

15 Q Without telling me the words Mr. Davilla spoke,
16 tell me what the substance or the nature or subject of
17 that conversation was.

18 A The subject of it --

19 MR. VOIGHT: Objection.

20 THE COURT: Sustained, hearsay. Approach.
21 (Unrecorded bench conference).

22 THE COURT: You may proceed.

23 MR. MASON: Thank you.

24 THE COURT: You're welcome.

25 BY MR. MASON:

1 Q Now, when you were in the area of the store that
2 you went away with Mr. Davilla what did he say to you?

3 A He said that he wanted to talk to me because he
4 had been approached by two ladies and a law officer who
5 said that if he did not come to court and testify that
6 the accident was Mr. Barclay's fault that he would go
7 to jail. He said he did not know what to do about
8 that, that he did not want to come to court and
9 testify, could I help him.

10 Q And did he seek you out?

11 A Yes, sir.

12 Q Were you there -- what were you buying there that
13 day?

14 A I'm sure I was picking up milk and a diet Pepsi.
15 I hate going to the grocery store on the Island so I
16 stop there and pay the extra to go straight home.

17 Q Can you describe the look on his face during the
18 course of this conversation?

19 MR. VOIGT: Objection, hearsay.

20 THE COURT: She can describe what she sees as long
21 as it is based on her rational perception. She can't
22 speculate as to what it meant.

23 A I perceived that he --

24 THE COURT: No, ma'am. You need to rephrase the
25 question.

1 Q Describe specifically what you saw, without
2 interpreting.

3 A He looked like he had been working all day and
4 was tired and obviously stopping to pick up whatever he
5 was purchasing that evening but he looked like he had
6 been working all day and he had his truck and mower in
7 the parking lot to the right of the gas station like
8 people park their boats, if you're familiar with that
9 gas station.

10 Q Had he driven there in a vehicle?

11 A His pickup truck and his trailer with his mower
12 were there.

13 Q Have you seen him driving around the island?

14 MR. VOIGT: Objection.

15 THE COURT: Basis?

16 MR. VOIGHT: Relevance. We have been over this.

17 THE COURT: First of all, it's relevant if you can
18 connect it.

19 MR. MASON: Thank you, Your Honor.

20 BY MR. MASON:

21 Q With regard to Mr. Davilla, do you know whether or
22 not he drives around?

23 A Yes, sir.

24 MR. VOIGT: Objection.

25 THE COURT: Basis?

1 MR. VOIGT: Relevance.

2 THE COURT: It goes to credibility.

3 Q And does he -- tell me about what you know about
4 that.

5 THE COURT: Have her testify as to time and place.
6 She can't make a broad statement.

7 MR. MASON: I understand.

8 BY MR. MASON:

9 Q The time frame from December of 2008, up until
10 right now, and whatever you know about that time frame
11 parameter, what can you tell me about Mr. Davilla's
12 driving?

13 MR. VOIGT: Objection to the form of the question.

14 THE COURT: Sustained.

15 Q Do you know whether Mr. Davilla drives?

16 A Yes, sir.

17 Q How do you know?

18 A I have seen him driving his pickup truck with a
19 trailer and whatever the expensive lawnmower things
20 that swirl around, on the back of it.

21 MR. MASON: Thank you. Please answer any
22 questions the State may have.

23 THE COURT: Any questions for the witness?

24 MR. VOIGT: Yes, Your Honor.

25 THE COURT: You may proceed.

1 CROSS EXAMINATION BY MR. VOIGT:

2 Q Miss Bailey, how long have you known Otis?

3 A I have been on the Island seventeen years, I may
4 have known him ten or so.

5 Q Do you consider yourself friendly with Otis?

6 A As friendly as anybody else I see once a month or
7 so. I work in town so I very rarely see anybody on the
8 Island.

9 Q In the seventeen years you have lived on Edisto
10 Island or in that area how many legal affidavits have
11 you signed or had signed on behalf of people?

12 A I believe it would be three, it might be four.

13 Q Were they all, did they all have criminal case
14 headings?

15 A No, sir, not all of them.

16 Q Is that something you would do for somebody you
17 see occasionally?

18 A Yes, sir.

19 Q Okay.

20 A I was asked to witness a paper.

21 Q Who asked you to witness a paper, who was that
22 person?

23 A I believe it was Mr. Mason that asked me to
24 witness that paper.

25 Q Okay. So, Mr. Mason -- to the best of your

1 knowledge did Mr. Mason draw up this piece of paper?

2 I'm specifically referring to what has been marked as
3 Defendant's Exhibit 7, something you have identified
4 before.

5 A You're asking --

6 Q To the best of your knowledge did Mr. Mason create
7 that piece of paper?

8 A Yes, sir.

9 Q Okay. And the words on the piece of paper, on
10 Defendant's 7, those aren't Jose Davilla's words, are
11 they? Take a look at it because this is something --

12 MR. VOIGT: May I approach, Your Honor?

13 THE COURT: You may.

14 Q That is something you witnessed, okay. You
15 have talked to Jose a good bit, right? Does anything
16 on page one of two sound like it came out of the mouth
17 of Jose Davilla?

18 A Yes, sir. He speaks good English.

19 Q So he would say stuff like I'm competent to make
20 this affidavit?

21 A That sounds just like something Jose would say.

22 MR. MASON: Objection, argumentive, Your Honor.

23 THE COURT: Overruled.

24 A He speaks good English when I have spoken with
25 him. I have no reason to assume that he doesn't have

1 this type of vocabulary.

2 Q Did anybody read this to him when you were out
3 there?

4 A He read it.

5 Q Did you drive out there to have him sign it?

6 A I was in a vehicle that was driven out there.

7 Q You didn't even drive yourself, you were driven
8 there by somebody?

9 A Yes.

10 Q Okay. Who drove you out there?

11 A Mark Mason.

12 Q Okay. So, who else was in the car with you and
13 Mr. Mason?

14 A A young lady named Jennifer.

15 Q Would it be this young lady right here?
16 Stand up.

17 A I believe so.

18 Q Okay. So, the three of you drove out to talk to
19 Jose?

20 A Yes, sir.

21 Q Did Jose know who this young lady was?

22 A No, sir.

23 Q So, he didn't know who she was. Did Mr. Mason
24 approach and talk with Jose at that time?

25 A Yes, sir.

- 1 Q Okay. Was Bubba Unger present with you?
- 2 A No, sir.
- 3 Q Do you know who that is?
- 4 A Yes, sir.
- 5 Q Do you believe that Mr. Davilla trusted you?
- 6 A Yes, sir, especially with him coming to me on
- 7 August 31st, I have to guess that he does trust me.
- 8 Q Okay. And what year August 31st was that, that
- 9 you remember that conversation?
- 10 A August 31st of this year is when he approached me
- 11 in the Horizon.
- 12 Q Okay. And did he trust you on October 7th, 2010?
- 13 A That would be an assumption but I would have to
- 14 assume so.
- 15 Q In fact you were brought out there since he
- 16 trusted you, right?
- 17 A I don't think that's the case.
- 18 Q In your personal knowledge are you aware of any
- 19 trust he may have had with Mark Mason?
- 20 A No, sir.
- 21 Q Are you aware of any trust he would have had with
- 22 this young lady back here who you --
- 23 A No, sir.
- 24 Q So, the only person in that car that had built up
- 25 any trust with him, had built up any trust in the Latin

1 community would have been you, right?

2 A Yes.

3 Q And that is why you were there, right, you were
4 there to play on his trust, weren't you?

5 A No, sir.

6 Q As a matter of fact that is exactly what you did,
7 didn't you?

8 A No, sir.

9 MR. MASON: Objection, argumentative.

10 THE COURT: Overruled, it goes to credibility.

11 Q You work with that community, you have made
12 inroads in that community, have done good things in
13 that community but you're the face of the Anglo-Eisto
14 to that community, isn't that true?

15 A There is many faces of Anglo-Edisto to that
16 community. I'm just one component.

17 Q But you allowed yourself to be used on October 7th
18 to get Jose to sign a piece of paper he couldn't read?

19 A No, sir.

20 Q Didn't read?

21 A No, sir.

22 Q Isn't it true that on October 31st of this
23 year I asked you who those people were that were with
24 you when he signed that piece of paper?

25 A No, sir. And we haven't reached October 31st of

1 this year, it was August 31st and you did not ask me
2 who those people were.

3 Q I never inquired to you at any time either on
4 October 7th, 2010, or August 31st, 2011, who those
5 people were with you when you came out in that car
6 to talk to him that day?

7 A No, sir.

8 Q Now, this piece of paper that is marked as
9 Defense Exhibit 7 --

10 A Yes, sir.

11 Q -- a couple things it doesn't say, right? It
12 doesn't say that Walter Barclay didn't cause the
13 accident, does it? That's not something Jose Davilla
14 testified to, is it?

15 A Not on this paper.

16 Q And it doesn't say that Walter Barclay wasn't
17 legally drunk when he struck that car, does it?

18 A No, sir.

19 Q Because those would be untruths, wouldn't they?

20 A According to what Mr. Davilla told me --

21 MR. VOIGT: Thank you.

22 MR. MASON: She was finishing her answer, Your
23 Honor.

24 A Yes, according to what Mr. Davilla told me he did
25 not want to testify that the accident was not Mr.

1 Barclay's fault, he did not feel it was Mr Barclay's
2 fault and he wanted to know what I could do to help him
3 because they had threatened to put him in jail if he
4 did not appear and testify to that.

5 THE COURT: Any others questions of the witness?

6 Q Isn't it true that on December 9th, 2008, Mr.
7 Mason named you as an agent to retrieve the Chevrolet
8 pickup truck that was involved in the accident the day
9 before?

10 A I would have to see that. I don't recall that.

11 MR. VOIGT: May I approach? I will mark it for
12 identification purposes.

13 THE COURT: Marked for ID?

14 (Power of Attorney marked State's Exhibit Number.
15 21 for Identification).

16 BY MR. VOIGT:

17 Q Is that true, is that accurate?

18 A Apparently, if this paper is correct, yes.

19 Q So isn't it true the day after the accident you
20 were already involved with Mr. Mason on behalf of Mr.
21 Barclay?

22 MR. MASON: Objection, Your Honor.

23 THE COURT: Basis?

24 MR. MASON: It mischaracterized the document.

25 THE COURT: I don't want speaking objections.

1 MR. MASON: Objection.

2 THE COURT: Overruled. I'm going to give him
3 some latitude. You may proceed.

4 THE WITNESS: The question, please.

5 BY MR. VOIGT:

6 Q A day after the accident isn't it true that you
7 had been contacted by Mr. Mason to work on Mr.
8 Barclay's behalf involving some part of this accident?

9 A I don't recall that paper but it would not be the
10 first time people have called and asked me, because of
11 my traveling, to assist with numerous things.

12 Q Okay. Who is Richard Rybill?

13 A Who is Richard Rybill?

14 Q Yes.

15 A He's the gentleman sitting on the back row.

16 Q And he is somebody also sits here associated with
17 Mr. Mason or associated with you, I don't know?

18 A We all are associated with each other, we live on
19 a small island. I mean, there is twelve hundred
20 residents.

21 Q When were you first contacted by Mr. Mason to
22 assist him in this case? Was it on December 9th, the
23 day after the accident?

24 A Apparently, from looking at that, yes.

25 Q So, from the very beginning you have been involved

1 with Douglas Barclay and his defense throughout all
2 your proceedings with Mr. Davilla?

3 A No.

4 Q On the day after the accident you were asked to
5 assist Mr. Barclay, is that correct?

6 A Yes, according to the date on that.

7 Q And on October 7th, 2010, you were asked again to
8 assist Mr. Barclay and you were driven there by Mr.
9 Mason?

10 A Yes.

11 Q And here on October 28th you're here to assist Mr.
12 Barclay again. Correct?

13 A No. I'm here to attest to what Mr. Davilla told
14 me about his fear of going to jail if he did not appear
15 and testify that the accident was Mr Barclay's fault.

16 Q That's not contained in any affidavit, is it,
17 you're making that up now, aren't you?

18 A No, sir, I am not.

19 Q If that is what Mr. Davilla said, some lawyer,
20 some clever lawyer surely would have put that on
21 Defense Exhibit 7, wouldn't they?

22 A Defense Exhibit 7 was way before Mr. Davilla
23 approached me. He approached me on August 31st, 2011,
24 of this year.

25 Q There is no other affidavit, is there?

1 A I would have no way of knowing that.

2 Q And you didn't memorialize that anywhere, did you,
3 you didn't write it down?

4 A He asked me would I contact Mr. Mason and see if
5 anything could be done to help him from going to jail.

6 Q Because you're Mr. Mason's agent, right?

7 A No, sir.

8 Q You act as his agent capacity from time to time,
9 he asks you to?

10 A I don't answer to them. I do things for a lot of
11 people. It doesn't make me their agent. Mr. Davilla
12 asked me to contact Mr. Mason to see if there was any
13 way he could not testify and keep from going to jail.

14 Q You don't know that anybody ever threatened anyone
15 with going to jail, do you, from your own personal
16 knowledge?

17 A Just from what Mr. Davilla told me.

18 Q From your own personal knowledge you don't know
19 that anyone threatened Mr. Davilla with any sort of
20 jail, do you?

21 A I consider personal knowledge what Mr. Davilla
22 told me.

23 Q You have never witnessed any agents of the State
24 or the Solicitor's office or any law enforcement agency
25 threaten Jose Davilla with any sort of legal action or

1 anything, have you?

2 A No, sir, I have never witnessed that.

3 Q You have never heard it, never seen it, never
4 touched it, never tasted it, right, not from your
5 personal experience?

6 A No, but from my personal conversation with Mr.
7 Davilla.

8 Q From what you would like us to believe was
9 conversation with Mr. Davilla?

10 A Sir, I placed my hand on the Bible.

11 MR. VOIGT: Thank you very much.

12 THE COURT: Any redirect?

13 MR. MASON: Yes, your Honor.

14 THE COURT: You may proceed.

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1 REDIRECT EXAMINATION BY MR. MASON:

2 Q When you were talking to Mr. Davilla did he make
3 any mention of a gun?

4 A Yes.

5 Q Tell the ladies and gentlemen about that?

6 MR. VOIGT: Objection, beyond the scope.

7 THE COURT: Approach.

8 (Unrecorded bench conference).

9 THE COURT: Proceed, sustained.

10 BY MR. MASON:

11 Q In the conversation you have had with Mr. Davilla
12 did he say anything about a gun?

13 A Yes, sir.

14 MS. KINZELER: Objection.

15 THE COURT: I sustained the objection, Mr.

16 Mason, move on, outside the scope of redirect and
17 outside the scope of the rules establishing a prior
18 inconsistent statement. You did not ask that witness
19 or give him an opportunity to respond or admit or deny
20 the statement.

21 Next question.

22 MR. MASON: Could we approach?

23 THE COURT: Next question.

24 MR. MASON: Yes, Your Honor.

25 BY MR. MASON:

- 1 Q You were shown a document by the prosecutor?
- 2 A Uh-huh (Affirmative).
- 3 Q He tried to indicate this document came from me.
- 4 Do you recognize that Rebecca Borders' handwriting is
- 5 on that document?
- 6 A Actually I do, yes, sir.
- 7 Q Okay. So, is this Dr. Borders giving you
- 8 permission to go get belongings out of the truck after
- 9 this accident?
- 10 A That would be correct, that is Rebecca Borders.
- 11 Q Okay. Do you know Dr. Borders, do you help
- 12 Dr. Borders?
- 13 A I know Dr. Borders, she has treated my grandmother
- 14 and great grandmother before, myself, my daughter and
- 15 my father, and I have helped her chase down a mule that
- 16 got loose in the neighborhood one time.
- 17 Q Okay. And when her husband was in this terrible
- 18 accident did you help her with regard to the vehicle
- 19 that was destroyed?
- 20 A Yes, as I would help anybody in our community.
- 21 Q Anything nefarious about that?
- 22 A Not at all. I did the same thing when Patty
- 23 McTier was killed on 174, her family requested that we
- 24 go retrieve the vehicle.
- 25 Q Now, you were asked some questions about this

1 affidavit?

2 A Yes, sir.

3 Q Now, was it explained to Mr. Davilla?

4 MR. VOIGT: Objection, hearsay.

5 A I read it.

6 THE COURT: Ma'am, there's an objection, hold on.

7 THE WITNESS: I'm sorry.

8 THE COURT: It's been asked and answered, she
9 indicated she read it. That question has already been
10 asked.

11 The next question.

12 BY MR. MASON:

13 Q Now, has there been, each time he has approached
14 you about this has he ever indicated to you that he
15 knew how the accident happened?

16 MR. VOIGT: Objection, leading.

17 THE COURT: Sustained, leading.

18 Q The Solicitor has accused you of misleading
19 someone. Did you mislead anyone?

20 A Absolutely not.

21 MR. VOIGT: Thank you.

22 THE COURT: Any objection to the witness being
23 excused, from the State?

24 MR. VOIGT: No, Your Honor.

25 THE COURT: From the defense, any objection

1 to the witness being excused?

2 MR. MASON: No, Your HOnor.

3 THE COURT: Ma'am, you're excused.

4 (Witness excused).

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1 BRIAN WOODS, after being first duly sworn, testified as
2 follows:

3 THE CLERK: State your name and spell your last
4 name.

5 THE WITNESS: MY name is Brian Woods.

6 THE COURT: YOU may proceed.

7 DIRECT EXAMINATION BY MR. MASON:

8 Q Good afternoon, Mr. Woods.

9 A Hi.

10 Q Where do you live?

11 A I live [REDACTED], Walterboro, South
12 Carolina.

13 Q In December, 2008, where did you live?

14 A [REDACTED], Edisto Island.

15 Q Who did you live there with?

16 A My father.

17 Q What is your father's name?

18 A Ray woods.

19 Q And what type of work were you doing at that
20 time?

21 A Construction.

22 Q Okay. Do you recall the day of December 8th,
23 2008?

24 A Sir?

25 Q Do you recall the day -- let me refer to it this

1 way. Do you recall coming up on an accident?

2 A Yes.

3 Q Okay. And tell me about how you came up on an
4 accident on Point of Pines Road.

5 A Me and my father just went to our house and then
6 when we were leaving out of Point of Pines Road headed
7 toward 174 we came upon a truck and a car that had just
8 had an accident in the middle of the road and we both
9 got out, called 911, to assist, tried to assist anybody
10 that needed help.

11 Q You and your dad were the first two people to get
12 to the scene?

13 A Yes, sir. We just went down our road, down Point
14 of Pines Road and we weren't at our house probably
15 three or four minutes and by the time we left out the
16 accident was in the road.

17 Q Okay. And was anybody else there when you and
18 your dad arrived?

19 A No, sir.

20 Q Okay. And tell me what you did, what you did when
21 you got out of the truck.

22 A Got out of the truck, I walked up to the truck as
23 my father was walking up to the car and as I was
24 pulling my phone out of my pocket I noticed that the
25 truck, Mr. Doug Barclay, we call him, and as I was

1 helping him out of the truck I was on the phone with
2 911 and trying to help at the same time.

3 Q Okay. Did you observe what your dad did during
4 that same time?

5 A Well, the only time I glanced over there I glanced
6 that he was helping Jose out of the car, out of the
7 passenger window of the car.

8 Q Okay. Now, did you have a truck with you that
9 day, the truck you and your dad were driving?

10 A I did not have a truck. He had his truck and,
11 yes, I was riding passenger with him.

12 Q Okay. And did you at any point in time drive
13 that -- what type truck is it?

14 A It's a '95 Nissan pickup truck.

15 Q What color is it?

16 A It is a white truck.

17 Q And is it a Nissan smaller size white truck?

18 A Yes, sir.

19 Q And did you ever drive that to the end of Point of
20 Pines Road?

21 A Yes, sir. After I helped Mr. Barclay out of
22 the truck, seen he was safe and sat down on the
23 ground, I went, I took my father's truck to the
24 beginning of Point of Pines Road to make sure that EMS
25 did not miss the turn and got to the accident as quick

1 as possible.

2 Q Okay. And when you were there and you checked on
3 Mr. Barclay how did he appear?

4 A He appeared like he had just been in a terrible
5 accident.

6 Q Did he appear to be under the influence of
7 alcohol?

8 MS. KINZELER: Objection.

9 THE COURT: Basis?

10 MS. KINZELER: Leading.

11 THE COURT: Sustained, leading.

12 BY MR. MASON:

13 Q How was his speech, how was he talking?

14 A His speech was, you know, he was concerned about
15 what had just happened and he seemed like, seemed to
16 have a coherent conversation with me. Every time I
17 asked him a question he answered it correctly, he knew
18 where he was and he was really worried about his dog
19 that must have fled the scene.

20 Q Did you come to believe his dog was in the
21 vehicle with him?

22 MR. VOIGT: Objection.

23 THE COURT: Basis?

24 MS. KINZELER: Leading.

25 THE COURT: Sustained, leading.

1 BY MR. MASON:

2 Q What do you know, if anything, about the dog?

3 A I don't know nothing about the dog. By the time
4 we had gotten there there was no dog to be found
5 anywhere.

6 Q Okay. And did you --

7 A After he, I'm sorry, I will go ahead and finish.
8 After he sat down on the ground I drove the truck to
9 the end of the road and then the ambulance came.

10 Q Did you ever observe Mr. Barclay to be yelling --
11 MS. KINZELER: Objection.

12 THE COURT: Sustained, leading.

13 Q Did you ever see anybody yelling or screaming?

14 MS. KINZELER: Objection, leading.

15 THE COURT: Sustained. Ask a direct question.

16 Q Did you ever hear anything inappropriate at the
17 scene?

18 MR. VOIGT: Objection.

19 THE COURT: Sustained, leading. Rephrase it.

20 You're not asking a direct question.

21 Q Anybody yelling at the scene?

22 MR. VOIGT: Objection.

23 THE COURT: Sustained, leading. Rephrase.

24 Q Were you able to hear through your senses of your
25 ears what was taking place at the scene?

1 A Yes, sir.

2 Q What did you hear in regard to what took place?

3 Did you hear anything?

4 MR. VOIGT: Objection.

5 Q Anything inappropriate?

6 THE COURT: Basis?

7 MS. KINZELER: Leading.

8 A How say?

9 THE COURT: Sir, there is an objection. Ask

10 direct questions that do not suggest the answer.

11 Q With regard to your sense of hearing what did

12 you hear at the scene?

13 A Me and my father called 911 and Otis asking about

14 his dog, I mean, not much, it wasn't like Jose and Otis

15 were arguing or anything.

16 Q Okay. Did you have occasion to talk with Jose?

17 A No, sir, I sure didn't.

18 Q Did you see him out of the car?

19 A Yes, sir.

20 Q Okay. Describe whether, what his position was,

21 standing, sitting?

22 A After my father helped him out of the vehicle and

23 right as I was getting in the truck to go to get the

24 paramedic at the end of the road I seen my father sit

25 him down on the ground just like I sat Otis down up

1 against the back of the tire. As soon as he sat down
2 he was trying to get back up and he stood back up and
3 he was holding on to his side.

4 Q Now, did you give your information to the police
5 at the scene?

6 A I give them my name and my address.

7 Q Okay. And do you recall whether on October 7th of
8 2011 somebody came to talk with you about this case,
9 from the Solicitor's office, policeman or investigator,
10 maybe this man right here?

11 A Yes, sir.

12 Q Okay. Was it on October 7, 2011, that this man
13 came to see you?

14 A I talked to him October 6th.

15 Q October 6th, okay.

16 A All I did was give him my name and phone number
17 and stuff.

18 Q Was that the first time that any representative of
19 the State came to interview you about this accident?

20 A Yes, sir.

21 Q As a result of that did you prepare a written
22 statement

23 MR. VOIGT: Objection.

24 THE COURT: Basis?

25 MS. KINZELER: Hearsay.

1 THE COURT: It would be hearsay and also leading.
2 Proceed. Rephrase.
3 BY MR. MASON:
4 Q Can you just give me in detail, in your own words,
5 the best you can describe it, how Doug Barclay
6 appeared?
7 MR. VOIGT: Objection.
8 Q When you had him out of the truck.
9 THE COURT: Basis?
10 MS. KINZELER: Asked and answered.
11 THE COURT: It has been asked and answered,
12 rephrase it.
13 Q Did you get a chance also help Doug Barclay out of
14 the car, to get close to him?
15 MR. VOIGT: Objection.
16 THE COURT: Basis?
17 MS. KINZELER: Leading and asked and answered.
18 THE COURT: Leading and asked and answered, I
19 sustain.
20 BY MR. MASON:
21 Q How close were you to Doug Barclay when you helped
22 him out of the truck?
23 A I had him by the hand, I helped him out of the
24 truck.
25 Q All right. Did you physically come in contact

1 with him?

2 A Yes.

3 Q Okay. And did you recognize him as somebody who
4 lived on the Island?

5 A Yes sir.

6 Q Did you try to call Dr. Borders?

7 A I believe that was my father.

8 MR. MASON: Thank you.

9 THE COURT: Any questions of this witness?

10 MR. VOIGT: Yes, ma'am.

11 THE COURT: You may proceed.

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- 1 CROSS EXAMINATION BY MS. KINZELER:
- 2 Q Mr. Woods, you were one of the first people on the
3 scene, is that right?
- 4 A Yes.
- 5 Q And you said the whole time -- when did you leave?
- 6 A After I give my name and my address to the officer
7 that arrived there. I don't know how long it was, at
8 least an hour or so.
- 9 Q You were there when EMS got there?
- 10 A Yes.
- 11 Q You were there when the fire department got there?
- 12 A First responders, yes.
- 13 Q You were there when the deputy sheriff got there?
- 14 A Yes.
- 15 Q Isn't it true you told Deputy Brinson you were
16 just looking for Otis' dog?
- 17 A No.
- 18 Q Didn't Deputy Brinson hlep you try to look for the
19 dog?
- 20 A No.
- 21 Q You never told Deputy Brinson anything about Mr.
22 Barclay appearing not to be under the influence, you
23 never told him that?
- 24 A No, ma'am.
- 25 Q You never told any deputy there, did you?

1 A Ma'am?

2 Q You never told any deputy there that Mr. Barclay
3 was sober?

4 A No, ma'am.

5 Q You never told any EMS workers?

6 A No, ma'am.

7 Q You never told any of the firemen?

8 A Nobody asked.

9 Q And you never told anybody since then until today?

10 A Yes.

11 MS. KINZELER: That's all I have.

12 THE COURT: Any redirect?

13 MR. MASON: Yes.

14 THE COURT: You may proceed.

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1 REDIRECT EXAMINATION BY MR. MASON:

2 Q You were just asked those questions by Assistant
3 Solicitor Kinzeler. Did anybody ever ask you the
4 question, any of the law enforcement people ever ask
5 you the question about Mr. Barclay appeared to be
6 intoxicated?

7 A No, sir, I don't recall.

8 MR. MASON: Thank you.

9 THE COURT: Any objection to the witness being
10 excused, from the State.

11 MR. VOIGT: No, ma'am.

12 THE COURT: FFrom the defense?

13 MR. MASON: No, Your Honor.

14 THE COURT: Sir, you're excused.

15 (Witness excused).
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1 LLOYD RAY WOODS, SR., after being first duly sworn,
2 testified as follows:

3 THE CLERK: Please state your full name and spell
4 your last name.

5 THE WITNESS: My name is Lloyd Ray Woods,
6 Sr., W-o-o-d-s.

7 DIRECT EXAMINATION BY MR. MASON:

8 Q Where do you live?

9 A [REDACTED].

10 Q How long have you live at that address?

11 A Right now, about four years.

12 Q What do you do for a living?

13 A I do construction work.

14 Q On December 8, 2008, were you living at that
15 address?

16 A Yes, sir.

17 Q And tell me what took place on that day.

18 A On the road?

19 Q Yes.

20 A My son and I was coming to my house to pick up a
21 chain for a friend of mine was in the ditch, he was in
22 a field stuck, we went down the road, went in my
23 driveway, pulled around the house, got the chain and
24 come back and on the way back we saw the accident.

25 Q What did you do?

1 A Well, I got out of the vehicle and we were sort of
2 panicking, I told Brian, I said, "Brian, go to the
3 truck," I went to the Geo, little green car, and looked
4 in there and I recognized Jose and I helped him get
5 out. And it smelled, I mean, it was, whatever he was,
6 I mean, it smelled like alcohol everywhere.

7 My son helped Otis get out. He couldn't get the
8 driver's door open, so he jerked the handle off, then
9 he went around. I helped Jose get out and he couldn't
10 get completely out of the truck, I mean the car, so I
11 kept pulling on it. Once I got him out I made him sit
12 down.

13 Brian had already gotten Otis out. Brian came
14 back to me, I said, "Brian, take the truck," you know,
15 we were trying to call 911 at the same time on the cell
16 phone, I went around the vehicle to the driver and
17 I got 911 on the phone and they took and tried, they
18 tried to tell me to see if I could stop the blood.
19 There wasn't no stopping the bleeding, he was in bad
20 shape, and Brian took my truck and went to the head of
21 the road to meet EMS, I stayed there with Otis, tried
22 to mak Otis sit down, he was looking for cigarettes and
23 his dog, and he kept walking around, I couldn't get him
24 to sit down, and EMS come up there, Otis kept walking
25 around, I told Otis sit down, I mean, I got aggravated

1 with him, and from there on we, I mean EMS and all
2 started taking over and all. The man from EMS had
3 those gloves on and I did help take the packages, tear
4 them apart.

5 Q What packages?

6 A The bandages for Otis' head. He was bleeding on
7 his head, stuff like that, you know, he was coherent,
8 he could, he was looking for a cigarette more than
9 anything, and his dog.

10 Q Did you help bandage his head?

11 A Yes, I tore those packages open, where the guy was
12 sticking them on there, putting things on his head and
13 stuff.

14 Q How long did you stay by Otis' side?

15 A Probably five minutes or more.

16 Q Okay.

17 A Then he was worried about his wife, he asked me to
18 check on his wife, somebody had called his wife and
19 all, which once EMS guy had him under control, I went
20 and talked to Rebecca to see if she wanted me to follow
21 him to the hospital because they had started moving
22 Otis inside the EMS. And Jose, he was still walking
23 around, he walked into the EMS, you know, they seemed
24 like they didn't care nothing about him.

25 Q How did he appear to you, Jose?

1 A Jose was dellusional, he smelled like he was
2 drinking, I mean, he's a friend of mine but he had beer
3 in the vehicle, he was looking for his cell phone.
4 When he got out he was looking for the cell phone and
5 the cell phone was there in the seat and the beer was
6 down in the floorboard.

7 Q Did you actually smell alcohol on Mr. Davilla?

8 A I smelled alcohol in the car and everything else.

9 Q Okay. Now, with regard to Doug, did you get close
10 to Doug?

11 A Yes. I mean, yes, I mean, I was three feet away
12 from him, at the most.

13 Q How did he appear?

14 A I didn't smell no alcohol on Doug. I mean, he
15 appeared, I mean like somebody got there been, you
16 know, knocked around. He wasn't, I mean, he was, he
17 had gotten in an accident, he was looking for a
18 cigarette, he was shaking, he was worried about his
19 dog.

20 Q And are you sure about whether Mr.?

21 MR. VOIGT: Objection.

22 THE COURT: I need to hear the whole question.

23 Q Let me re-ask it. Was any firefighter on the
24 scene when Mr. Davilla was got out of the car?

25 A There was nobody there. The only person that got

1 there before the fire fighters, Erica, she's a young
2 girl that I knew, and then the hunter come out of the
3 woods after that. It was nobody there when I got him
4 completely out of there, there was nobody there for a
5 while, two or three minutes.

6 Q Now, were you approached by an investigator from
7 the Soclicitor's office on or about October 6, 2011?

8 A Yes, sir.

9 Q And during that time did he have anyone with him
10 in the car?

11 A Yes, sir. Jose was in the back seat of his
12 vehicle and he came to me and my son and we were
13 working on my truck in my yard and he asked me if I
14 could talk.

15 MR. VOIGT: Objection.

16 THE COURT: Basis?

17 MR. VOIGT: Hearsay.

18 THE COURT: Sustained.

19 BY MR. MASON:

20 Q Without regard to that --

21 A What does that mean?

22 Q They objected, you can't answer, is what the
23 judge said.

24 THE WITNESS: Can I say something?

25 THE COURT: No, sir. There is not a

1 question.

2 THE WITNESS: Thank you.

3 THE COURT: You're welcome, sir.

4 BY MR. MASON:

5 Q You were asked -- was that the first time any
6 law enforcement person had come to interview you
7 about this accident?

8 A Yes, sir, and I mean, this is over two years. I
9 don't understand why it took so long, and then to
10 want to know what took place.

11 Q You know what took place?

12 A Yes, sir, I was there.

13 Q And have you told the jury about it today?

14 A Yes, sir.

15 MR. MASON: Thank you. Please answer any
16 questions the Solicitor has

17 MR. VOIGT: Nothing from the State, Your Honor.

18 THE COURT: Any objection to the witness being
19 excused, from the State?

20 MS. KINZELER: No, ma'am.

21 THE COURT: From the defense?

22 MR. MASON: No, Your Honor.

23 THE COURT: Could counsel approach for a
24 minute?

25 (Unrecorded bench conference).

1 THE COURT: Sir, you're excused.

2 THE WITNESS: Thank you, ma'am.

3 THE COURT: You're welcome, sir.

4 (Witness excused).

5 THE COURT: Madam Forelady and ladies and
6 gentlemen of the jury, we're going to take advantage of
7 this break in the testimony to take our evening recess.
8 Also due to some logistical sort of quandries that we
9 have run into, instead of having you all here for just
10 a few hours tomorrow, possibly only a couple hours and
11 then letting you go, I have decided, with the input of
12 the attorneys, to allow you all to have tomorrow free
13 to go to work, do what you need to do, attend to
14 your responsibilities. We will finish all, it is
15 anticipated we will finish all the witnesses on Monday,
16 possibly have closing argument and instruction on
17 Monday, depending on how our time goes, but if we can't
18 close and charge before 3:00 o'clock, then we will do
19 that on Tuesday morning.

20 And I know it is a very hard concept sometimes to
21 understand but there are some matters of law that we
22 have to deal with and usually closing argument in and
23 of themselves, I usually give lawyers an hour. We
24 figure if, having been a lawyer, it is just, having
25 said it once, having said it twice is better, it is one

1 of those things about lawyers, you know, we talk for a
2 living. I like to err on the side of more time than
3 less time but generally the closing argument and
4 instruction portion of a trial takes, I usually give
5 each side an hour, my instruction is usually somewhere
6 from 15 to 20 minutes, or 30 minutes sometime depending
7 on the complexity of what we're dealing with.

8 So, by the time you do all that it will take you,
9 if you get it at 3:00 o'clock it would take you well
10 beyond 5:00 and I just don't think that would be fair
11 to you all and instead it is better for you all to
12 start fresh with closing argument and instruction so
13 we'll sort of play all that by ear on Monday, and again
14 give you all, instead of having you come and go, give
15 you all an opportunity, if you would like to go to work
16 tomorrow or attend to any of your personal needs or
17 otherwise, and I think at the latest we will be dealing
18 with this on Tuesday, and I give that to you all for
19 purposes of your scheduling and planning purposes.

20 You all have been incredibly patient with us this
21 week, I'm going to have goodies for you next week. My
22 secretary commented, because our office is right
23 nextdoor, you all are just the happiest, she said,
24 "They are just having the best time." So we appreciate
25 that you all have been so incredibly patient with us

1 and you all, again, the process is almost mystical, but
2 so you know, we worked on matters of law two days
3 before starting this case to make it go more quickly
4 without having to send you in and out. We dealt with a
5 lot of the matters of law in this case on Thursday and
6 Friday, actually full days, full Thursday and Friday to
7 try to minimize your inconvenience. But again we truly
8 appreciate your patience, you have been incredibly
9 generous with us. We know jury service is a sacrifice
10 to you. I think I speak genuinely on behalf of the
11 defense and the State, I couldn't do what we do, we
12 hold trials in Charleston, just so you know, our
13 circuit is one of the biggest circuits, our circuit is
14 one of the busiest, I feel very secure in saying thank
15 you on behalf of the State for your time and your
16 attention. You all have been timely, you have been
17 attentive and we truly appreciate your commitment to
18 the process.

19 I hope you all have a wonderful weekend, we will
20 see you on Monday morning at 9:30. If you will, leave
21 your note pad in your seat and during this break please
22 do not discuss the case among yourselves or with anyone
23 else. I know it might be simple to make some comment
24 about what you heard but that requires you to process
25 that information and it really is a deliberative

1 process so please do not engage in any of that type
2 behavior. Don't do any independent research on the
3 internet.

4 I saw a reporter from the Post and Courier but I
5 don't think there are any media reports about this case
6 and probably won't be any until the conclusion of the
7 case but out of an abundance of precaution if there are
8 any please guard yourselves from reading, watching or
9 listening to any of those reports. Also please do not
10 discuss your jury service on any social networking
11 site. Again innocent comments can be misinterpreted
12 and when you return to the courthouse on Monday morning
13 please don't have any conversation with anyone in or
14 about the courthouse.

15 See you all 9:30 on Monday. You will come
16 directly to your jury room. Thank you again for your
17 patience.

18 (The jury was excused from the courtroom.).

19 THE COURT: You may take your seats. Now, as I
20 understand it, on Monday you will be calling the
21 following witnesses, Mr. Mason. Miss Borders, or Dr.
22 Borders, I'm sorry for overlooking her title.

23 MR. MASON: Your Honor, the scheduled witnesses
24 are --

25 THE COURT: Tell me, I'm doing it for number, not

1 personality. I have Dr. Borders, Erica Gatch, David
2 Watson, Ronald Hargrave, M.D., who I assume is your
3 expert, I understand you're going to provide certain
4 information to the State according to what area you are
5 going to seek to qualify him in.

6 MR. MASON: Yes, we'll provide it.

7 THE COURT: Pedro Maurillo Perez.

8 MR. MASON: He will not be called.

9 THE COURT: Jose Licona.

10 MR. MASON: That is a decision to be made.

11 THE COURT: And other than that, your client.

12 MR. MASON: Possibly.

13 THE COURT: Well, worse case scenario.

14 MR. MASON: Yes.

15 THE COURT: Those witnesses will take us
16 through the day and then we'll, if you all have any
17 proposed charges for me on Monday morning, again please
18 don't spend a lot of extra time on them unless you
19 really feel the need to, and then we will do the charge
20 conference after, if there is no rebuttal testimony,
21 and there may well be some, but if there is we'll take
22 that up, but I think that's the case we're looking at.

23 All right, see you all 9:30 Monday morning.

24 (Recessed at 5:17 p.m., October 27, 2011).

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4 I, the undersigned Henry P. Young, Official Court
5 Reporter for the 15th Judicial Circuit of the State of
6 South Carolina, do hereby certify that the foregoing is
7 a true, accurate and complete transcript of record of
8 all the proceedings had and evidence introduced in the
9 trial of the captioned case in the Circuit Court for
10 Charleston County, South Carolina, on the 27th day of
11 October, 2011.

12 I do further certify that I am neither of kin,
13 counsel nor interest to any party hereto.

14 December 28, 2012

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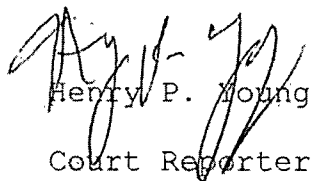
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Henry P. Young
Court Reporter

1 STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS
2011-GS-10-02817

2 COUNTY OF CHARLESTON

3

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5 STATE OF SOUTH CAROLINA,)

6)

- vs -)

7)

8 WALTER DOUGLAS BARCLAY,)

9)

Defendant.)

10

October 24-31 2011
November 1, 2011

11

B E F O R E:

12

HONORABLE DEADRA L. JEFFERSON

13

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

15

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18

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Henry P. Young
Court Reporter

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21

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VOLUME V of V

23

October 31/November 1, 2011

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1 (Resumed 9:55 a.m., October 31, 2011).

2 THE COURT: Is the State ready to proceed?

3 MS. KINZELER: Yes, Your Honor.

4 THE COURT: Is the defense ready to proceed?

5 MR. MASON: Yes, Your Honor. We have one matter
6 we would like to take up with the Court, though.

7 THE COURT: Okay.

8 MR. MASON: We had requested, now that many of the
9 witnesses have testified, for Investigator David
10 Watson's records.

11 THE COURT: Can you be more specific?

12 MR. MASON: We believe that he interviewed a
13 number of the witnesses that have testified.

14 THE COURT: That would be work product. How would
15 you be entitled to it?

16 MR. MASON: Under Brady.

17 THE COURT: It would be work product.

18 MR. MASON: It would be potentially exculpatory.

19 THE COURT: What does the State say?

20 MS. KINZELER: Your Honor, he doesn't have any of
21 the information Mr. Mason asked from me for the first
22 time five minutes ago, and it is work product and
23 absolutely nothing exculpatory. Most of the witnesses
24 David has spoken with have contacted him, not us
25 contacting them. He doesn't have notes of those

1 conversations. And we showed Mr. Mason what we do
2 have, which is a file folder with a jacket with phone
3 numbers on it, of the witnesses. That is the extent of
4 what we have.

5 THE COURT: Yes, sir.

6 MR. MASON: That is the representation of what
7 they have?

8 THE COURT: That is her representation and I
9 believe Miss Kinzeler as an officer of the court that
10 is what it is but if it is work product, he's their
11 agent, so you wouldn't be entitled to it.

12 Is the State ready to proceed?

13 MS. KINZELER: Yes, Your Honor.

14 THE COURT: Is the defense ready to proceed?

15 MR. MASON: Yes, Your Honor.

16 THE COURT: Okay, please bring in the jury for me.

17 (The jury returned to the courtroom.).

18 THE COURT: Who is your first witness, Mr. Mason?

19 MR. MASON: Erica Gatch, Your Honor.

20 MS. KINZELER: Your Honor, I request that any
21 witness that is present in the courtroom be
22 sequestered.

23 THE COURT: Are there any witnesses present you
24 intend to call, Mr. Mason?

25 MR. MASON: No.

1 BAILIFF: The jury is all present, Your Honor.

2 THE COURT: You may be seated.

3 Ladies and Gentlemen, I hope you all had a
4 pleasant weekend. We will now resume with presentation
5 of the defense's case. I would ask you give the
6 attorneys your undivided attention.

7 You may proceed.

8 MR. MASON: Your Honor, we would call Erica Gatch
9 to the witness stand.

10 THE COURT: The witness can come forward and be
11 sworn.

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1 ERICA GATCH, after being first duly sworn, testified as
2 follows:

3 THE CLERK: Please state your full name and spell
4 your last name.

5 THE WITNESS: My name is Erica Gatch, G-a-t-c-h.

6 THE COURT: Ma'am, if you could speak directly
7 into the micraphone for me.

8 THE WITNESS: My name is Erica Gatch, last name is
9 spelled G-a-t-c-h.

10 THE COURT: Thank you.

11 You may proceed.

12 DIRECT EXAMINATION BY MR. MASON:

13 Q Miss Gatch, where do you presently live?

14 A I presently live at Gentile Road on Edisto Island.

15 Q What do you do for a living?

16 A I clean houses.

17 Q Do you have any children?

18 A Yes, sir.

19 Q How many?

20 A One.

21 Q And how how long have you lived on Edisto Island?

22 A Pretty much all my life.

23 Q Okay. And how long is that?

24 A I'm 28 now, so probably since I was ten years old.

25 Q Okay. Have you held other jobs on the island?

1 A Yes, sir.

2 Q What another types of jobs?

3 A At Enterprise Bank, I was a bank teller.

4 Q And have you ever lived at a different address
5 than where you currently live?

6 A Yes, sir.

7 Q Okay, and do you recall where it was you were
8 living on or about December 8th of 2008?

9 A At [REDACTED] on Edisto.

10 Q Just describe how you would get from 174 to that
11 location.

12 A You could turn down Point of Pines Road and then
13 go down and take a left onto Clark Road, around to my
14 house.

15 Q Okay. How long have you lived at that address, or
16 how long did you live at that address?

17 A For about three years.

18 Q Now, I want to focus your attention on December 8,
19 2008. Do you recall what you did that day?

20 A I went to work cleaning houses and I was coming
21 home late and turned on Point of Pines Road and came up
22 on an accident.

23 Q And when you came upon the accident on your way
24 home from work what did you see?

25 A One fire truck and one police officer and there

1 were a pickup truck and a car that had been in an
2 accident.

3 Q Okay. And what did you do or where did you stand?

4 A I got out of my car and I was about six to eight
5 foot from the fire truck where a gentleman was sitting
6 on the side by the fire truck.

7 Q Can you identify the gentleman that was by the
8 side of the fire truck, in the courtroom?

9 A Yes, sir.

10 Q Okay, where is he?

11 A Right there.

12 Q Okay. And did you have an opportunity to observe
13 him from where you were?

14 A So, so. I never spoke with him.

15 Q How many feet were you from him?

16 A I would say probably six to eight feet.

17 Q Okay. And tell me what you observed during that
18 time in terms of his behavior.

19 A I never saw him walk or speak or anything of that
20 nature.

21 Q Okay. Did you hear anything come from his voice?

22 A No, sir.

23 Q Okay. And while you were there what did you do?
24 Did you do anything?

25 A I spoke with Brian Woods who was there and I used

1 his cell phone to try and call Rebecca Borders to get
2 in touch with her to let her know that there had been
3 an accident, and I could not get in touch with her so I
4 called my friend Ashley Cutler and she left her home
5 and went to Dr. Borders' house and got her to come to
6 the scene.

7 Q Okay. And how long did you remain at the scene?

8 A I stayed there until after they had Otis in the
9 ambulance and the ambulance pulled off.

10 Q Okay. And during that time did you see or hear
11 him do anything that sticks out in your mind?

12 A No, sir.

13 Q Do you recall -- do you know Deputy Luckadoo?

14 A Yes.

15 Q Okay. Do you recall anything about Deputy
16 Luckadoo at the scene?

17 A I believe that he pulled up right behind me.

18 Q How is it you would know Deputy Luckadoo?

19 A When I was a bank teller he would come to the
20 drive-through at the bank.

21 Q Okay, and where you were standing in relation to
22 Mr. Barclay, you have described that location, did you
23 see Deputy Luckadoo in that same location?

24 A Not at the time. Like I said, I had turned around
25 and called to get hold of Dr. Borders.

1 Q Did you smell anything?

2 A No, sir.

3 Q Now, living on Point of Pines Road for this three
4 year period, did you ever have occasion to pass, going
5 back and forth, pass Doug Barclay?

6 A Yes, sir.

7 Q Tell me about that.

8 A I never saw him drive erratic, he always was a
9 slow driver, we always waved.

10 Q You waved?

11 A We waved as we would pass by.

12 Q All right. And how did you know Mr. Barclay?

13 A Also from coming to the drive-through at the bank.

14 Q And on those occasions how did he appear to you?

15 A He was always nice and courteous.

16 MR. MASON: Please answer any questions that the
17 prosecutor may have for you.

18 THE COURT: Any questions for the witness?

19 MS. KINZELER: No, ma'am.

20 THE COURT: Any objection to the witness being
21 excused, from the State?

22 MS. KINZELER: No, ma'am.

23 THE COURT: From the defense?

24 MR. MASON: No, Your Honor.

25 THE COURT: Ma'am, you're excused.

1 (Witness excused).

2 THE COURT: You may call your next witness.

3 MR. MASON: Your Honor, we would call Ronald P.

4 Hargrave, M.D.

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1 RONALD P. HARGRAVE, after being first duly sworn,
2 testified as follows:

3 THE CLERK: State your full name, spell your last
4 name.

5 THE WITNESS: Ronald Hargrave, H-a-r-g-r-a-v-e.

6 THE COURT: You may proceed.

7 DIRECT EXAMINATION BY MR. MASON:

8 Q Dr. Hargrave, where do you live?

9 A In Mt. Pleasant.

10 Q What do you do for a living?

11 A I'm a physician.

12 Q How long have you been a physician?

13 A Since 1984.

14 Q Where did you go to medical school?

15 A University of North Carolina Chapel Hill.

16 Q And can you tell me a little bit about first of
17 all your professional education?

18 A I finished medical school in '84 and went to
19 Columbia, South Carolina and trained in emergency
20 medicine at Richland Memorial Hospital, finished there
21 in 1987.

22 THE COURT: Doctor, I need you to speak into the
23 mike for me more.

24 REBECCA BORDERS: I'm sorry.

25 THE COURT: That's okay.

1 You may proceed.

2 BY MR. MASON:

3 Q Where did you attend undergraduate?

4 A At the University of North Carolina Chapel Hill.

5 Q What was your degree?

6 A Bachelor's Degree in chemistry.

7 Q Okay. After finishing medical school, tell me
8 about the practice that you have been involved with.

9 A Mostly, since I trained in emergency medicine,
10 most of my work has been in emergency medicine.
11 Recently, well, about ten or eleven years ago I started
12 doing exams for the FAA, medical exams.

13 Q What is the FAA?

14 A I'm sorry, Federal Aviation Administration.

15 Q Okay. And who is it that you examine?

16 A Pilots.

17 Q And why do you examine pilots?

18 A Pilots are required to get a periodic medical exam
19 to determine their medical fitness for flying.

20 Q Okay. And what is your role in that process?

21 A I'm what is called an AME, aviation medical
22 examiner, and I examine those pilots for their physical
23 abilities to pilot an aircraft.

24 Q After that examination that you perform on the
25 pilot what type opinion do you render?

1 A Whether they are fit to fly an airplane or not,
2 medically fit.

3 Q Okay. And do you follow the guidelines and rules
4 in doing that?

5 A Yes, sir.

6 Q Now, in addition to that experience what other
7 positions have you held at various hospitals?

8 A I'm currently the medical director for the EMS
9 system in Orangeburg, South Carolina. I'm also the
10 medical director for a community home health, hospice
11 agency in Orangeburg. I have been the medical director
12 for several EMS systems. I was the EMS director in Rock
13 Hill and most recently the EMS director in Orangeburg.

14 Q Have you ever held the position of a staff
15 physician at any hospitals?

16 A Pretty much all hospitals I have been on the staff
17 at, yes, sir.

18 Q Okay. And could you just tell me what some of
19 those hospitals are?

20 A I have been on the staff at Orangeburg, at Roper,
21 at Aiken, Rock Hill, Walterboro, Orangeburg, if I
22 didn't say it. Several of the hospitals around the
23 State.

24 Q And what certifications do you have?

25 A Probably most importantly I'm Board certified by

1 the American Board of Emergency Physicians and I'm also
2 considered a Fellow of the American College of
3 Emergency Physicians, as well as a few other things
4 other than just practicing medicine.

5 Q Have you received any awards and honors?

6 A I was elected Phi Beta Kappa, Phi Beta Sigma in
7 college, both honor societies.

8 Q Have you served on the medical disciplinary
9 commission for the State of South Carolina?

10 A Yes.

11 A Yes, sir, two terms on the medical disciplinary
12 commission and I served a term on the board of medical
13 examiners as well.

14 Q Have you ever, did you ever hold any professional
15 society membership?

16 A I am a member of the American College of Emergency
17 Physicians, I'm also a member of the National
18 Association for Hospice, and I'm not sure what else.

19 MR. MASON: Your Honor, I would tender Dr.
20 Hargrave to the Court as an expert in, expert medical
21 doctor in the specialty of emergency medicine.

22 THE COURT: Any questions or objections?

23 MR. VOIGHT: May I take a few questions?

24 THE COURT: You may. You may proceed.

25

1 BY MR. VOIGHT:

2 Q Doctor, have you ever been qualified in a court of
3 law to testify as to emergency medicine?

4 A Yes.

5 Q Procedures and practices?

6 A Yes, sir.

7 Q And have you ever been consulted by attorneys for
8 that purpose as well, to render some sort of
9 consultation regarding emergency medical procedures and
10 practices that have occurred?

11 A Yes, sir.

12 Q And approximately how many times have you rendered
13 such consultations?

14 A I think it has been two or three.

15 Q Approximately how many times have you testified in
16 court as an expert?

17 A The same, two or three.

18 Q And when you testify in court isn't it true that
19 you're testifying about a standard of care rendered at
20 a particular emergency room or doctor's office?

21 MR. MASON: Objection, outside the scope.

22 THE COURT: I'll give him a little latitude.

23 You may answer the question.

24 A Could you repeat it, please?

25 Q When you're forming your expert opinion as to

1 emergency medicine isn't it true that you're
2 performing, that you're forming an opinion concerning
3 the standard of care given at a particular emergency
4 room or by a particular medical staff?

5 A I just form an opinion on whatever the question is
6 at hand, I'm not sure really if it speaks to standard
7 of care.

8 Q Did you review medical records of Alvero Garcia?

9 MR. MASON: Objection to scope.

10 THE COURT: Sustained.

11 MR. VOIGHT: Thank you.

12 THE COURT: You're welcome. Any objections or
13 further questions on voir dire as to his
14 qualifications?

15 MR. VOIGHT: I think that's all I have at this
16 point.

17 THE COURT: Any objection to him being admitted as
18 an expert in emergency medical treatment?

19 MR. VOIGHT: No, but I may have a motion, depending
20 on the next couple questions.

21 THE COURT: Okay. We'll take it up at that time.

22 MR. VOIGHT: Thank you very much.

23 THE COURT: The expert is submitted without an
24 objection. You may proceed.

25

1 BY MR. MASON:

2 Q Dr. Hargrave, tell the jury how you became
3 involved in this case.

4 A I received a call from you asking if I would
5 review some medical records and render an opinion.

6 Q Okay. And have you reviewed some medical records?

7 A Yes, sir. I reviewed some medical records and a
8 video tape.

9 Q Tell me about what it is that you reviewed
10 specifically.

11 A I reviewed the EMS run sheets, I reviewed the
12 emergency room department records of Mr. Walter
13 Barclay.

14 Q Did you -- do you know Mr. Barclay?

15 A No, sir.

16 Q Continue on, tell me what you reviewed, please.

17 A The EMS run reports, all the hospital records. He
18 had two times he went to the emergency department.

19 Q On what days?

20 A 8 December --

21 Q What year?

22 A I'm sorry, 2008.

23 Q Okay. All right, tell me what else you reviewed.

24 A And there were some, there was also included some
25 testimony I guess at a preliminary hearing that I

1 reviewed, of one of the law enforcement officers, I
2 think. I have also got a statement from a couple
3 people attesting to his, to his appearance at the scene
4 and the video of the patient.

5 MR. VOIGT: Your Honor, objection.

6 THE COURT: Basis?

7 MR. VOIGT: Hearsay.

8 THE COURT: Let me hear the question.

9 MR. MASON: The question is what have you
10 reviewed.

11 THE COURT: Repeat the question.

12 BY MR. MASON:

13 Q When the objection was made you had said you
14 reviewed a video. Where was that?

15 A A video at the emergency department.

16 Q On what day?

17 A 8 December, 2008.

18 Q Now, tell me about, in review of Mr. Barclay's
19 medical records were you able to determine anything
20 about his medical condition?

21 A What I reviewed, clearly he was in an accident,
22 sustained a laceration to his scalp and was transported
23 to the emergency department where he had lots of tests
24 and laceration sewn up and was discharged. It was
25 pretty clear to me that he was very stable throughout

1 the whole ordeal and from all the records that I
2 reviewed it does not appear he was impaired by any
3 substance.

4 MS. KINZELER: Objection.

5 THE COURT: Basis?

6 MR. VOIGT: Beyond the scope of this expert's
7 qualifications.

8 THE COURT: All right, ladies and gentlemen, I
9 have a matter to take up outside your presence. During
10 the break please do not discuss the case, please leave
11 your note pads in your seat. It should be brief.

12 (Jury excused from the courtroom).

13 THE COURT: Tell me your objection.

14 MR. VOIGT: Thank you, Your Honor. I guess at
15 this time I would make a motion in limine to go along
16 with this objection. This doctor is an expert in the
17 field of emergency room medicine. He can testify to
18 the treatment Mr. Barclay received, the injuries
19 sustained, the properness of the treatment that he
20 received and comment on how those injuries might have
21 affected his status or appearance.

22 However, I believe it is outside of what would be
23 helpful to the jury to have this doctor opine as to one
24 of the ultimate, ultimate facts in this matter, of
25 whether or not Mr. Barclay was impaired or intoxicated.

1 I believe that is a legal definition, not a medical
2 definition. I believe that he doesn't have, there has
3 been no foundation that he would have the requisite
4 knowledge. I don't believe review of a medical record
5 would establish a foundation.

6 THE COURT: They talk about perception, they
7 describe what they rationally perceived. Is that
8 admissible under the rules of evidence? Now, when you
9 ask the question you don't need to regurgitate to the
10 the Court what the rules are, I'm well aware of the
11 rules. The question is a very simple one. You are
12 required to establish, one, the foundation for the
13 opinion and that he is within that expertise, and if
14 there are no DNA results, there is plenty of case law
15 says medical experts can opine when a BAC record is in
16 the record, the level is in the record. If not, can
17 you tell me the foundation for his opinion?

18 MR. MASON: The foundation, he reviewed all the
19 medical records, he looked at the video tape of the
20 person at the time, he also reviewed the State's BAC
21 level, he has the actual test report. And his
22 testimony --

23 THE COURT: I would agree his testimony would be
24 based upon the BAC result, because as an emergency room
25 physician he can opine within a reasonable degree of

1 medical certainty. It would be had he had anything to
2 drink, what the status of his diagnosis and prognosis
3 was, if he had an injury, what his condition was, which
4 he has already testified to, he was in a stable
5 condition. Now if he's going to testify about BA
6 level, whether he was impaired, he should have had some
7 training in that. You have to establish he has had
8 that requisite training and is able to render that
9 opinion, okay?

10 Now, the other witnesses saw Mr. Barclay, they
11 testified as to what they rationally perceived at the
12 actual time of the accident, they are entitled to
13 testify to that. None of them have said they felt he
14 was impaired, they have testified he had a strong odor
15 of alcohol, he was disoriented, disheveled, no one said
16 he was impaired. The toxicologist did not testify he
17 was impaired. She testified within a reasonable, that
18 a BA level would reflect a certain type of behavior,
19 she never said Mr. Barclay exhibited that behavior, she
20 said based on medical training or toxicology training
21 these are the type symptoms that would be exhibited and
22 they would vary based on the person and their
23 tolerance, their alcohol tolerance. So you're going to
24 have to confine it within the ambit of his experience,
25 confine the opinion. You may proceed along those lines

1 but you still will have to establish the requisite
2 foundation for the testimony.

3 Are we ready to proceed?

4 MR. MASON: Yes, Your Honor.

5 THE COURT: And an expert can testify as to the
6 ultimate issue, that is not the point.

7 MR. VOIGT: I understand. I believe with the
8 proper foundation I think would be how I would qualify
9 it.

10 THE COURT: Yes.

11 Please bring in the jury.

12 (The jury returned to the courtroom).

13 BAILIFF: All the jurors are present, Your Honor.

14 THE COURT: You may be seated.

15 You may proceed.

16 MR. MASON: Thank you.

17 BY MR. MASON:

18 Q Dr. Hargrave, did you also review the result of a
19 blood alcohol test?

20 A I did.

21 Q Can you locate that?

22 A Yes, sir. All right.

23 Q All right. What incident date does it state?

24 A 12/9/08.

25 Q Okay. And what is the reading on that?

1 A 0.208.

2 Q Okay. And is that part of the materials you were
3 provided?

4 A Yes, sir.

5 Q Okay. Now I want to focus your attention back on
6 the medical records. Can you review for me what
7 neurological or other diagnostic tests Mr. Barclay had
8 and what the results of those tests were?

9 A Sure. Beginning at the scene when the EMS
10 assessed him, they took vital signs which were all
11 within normal, they documented that on several
12 occasions that his pupils were equal and reactive, they
13 documented that he was alert, they documented that his
14 central nervous system was intact, they assessed a
15 Glasgow coma score.

16 Q What is that, please?

17 A Which is related to verbal response, motor
18 response, scored upon how well they perform, and he
19 scored the best score of all the scores.

20 They continued to document that his level of
21 consciousness was alert times three, which is person,
22 place and time. Again, they continued to document that
23 his pupils were normal in size and normal reaction.
24 And they transported him to the emergency department.

25 Q Let me, before we get to the emergency department,

1 how was he placed into the ambulance?

2 A He was strapped down to a back board, full spine
3 board to protect him from any sort of neck or spine
4 injuries.

5 Q Describe briefly that process.

6 A It's a full length six foot board in which they
7 are laid on their back and have some sort of
8 stabilizing blocks put around their neck and then their
9 head strapped down and they have straps placed across
10 their chest and waist and extremities to keep him from
11 moving.

12 Q Now, in your practice and those 25, almost 25
13 years of practice of emergency medicine have you had
14 the opportunity to treat patients who were impaired or
15 under the influence?

16 A Thousands.

17 Q Now, you discussed Mr. Barclay's various vital
18 signs in the ambulance. Can you compare the vital
19 signs that you gleaned from the medical record with
20 what you would expect to see of somebody who was
21 impaired?

22 A Someone who is significantly impaired, alcohol is
23 a depressant and so you might expect their pulse to be
24 lower, their blood pressure to be lower, certainly
25 their pupils would not be equal and reactive like that,

1 the EMS assessment that he was alert and cooperative,
2 just none of that is consistent with someone who is
3 significantly impaired.

4 Q Is any of it consistent in any way with somebody
5 who is materially and appreciably impaired?

6 A Not that I can tell by review of all these
7 records.

8 Q Okay. Now, when he gets to the hospital, can you
9 tell me in a medical way what is Mr. Barclay's
10 condition?

11 MR. VOIGT: Objection to the form of that
12 question.

13 THE COURT: Sustained. Rephrase.

14 Q What was Mr. Barclay's, what do the records
15 indicate was Mr. Barclay's medical condition when he
16 got to the hospital?

17 A Again they assessed his vital signs and they were
18 all normal and stable, they addressed his level of
19 consciousness, which they put as normal, they
20 documented that he was, again, alert and oriented times
21 three, that he was cooperative and that he remained on
22 the back board.

23 Q How does the back board normally affect a patient?

24 A In my experience, and again I have taken care of
25 thousands of people who have come in on back boards,

1 you're strapped down, you can't move, and in virtually
2 every, and this man was on a back board for a long
3 time, I think it was 90 minutes, and it has been my
4 experience someone who is impaired by alcohol does not
5 tolerate that very well for a couple different reasons.
6 One is someone who is significantly impaired just
7 doesn't want to be tied down. The second is more of a
8 physiological reason, and that is someone who has had a
9 significant amount to drink has to urinate. It is a
10 natural process, alcohol inhibits the antidiuretic
11 hormone that causes the making of urine, and so someone
12 who has had a significant amount to drink would be
13 making urine like crazy, and I can't remember exactly
14 how old the patient is, but someone who is 50 years old
15 doesn't tolerate a full bladder very well.

16 Q Does that get worse as they get older?

17 A Yes. The urgency to get up and urinate, in
18 someone who has had a significant amount to drink, I
19 have seen people rip the board off, rip their stuff off
20 regardless of what they were told, they ripped this off
21 to stand up to go urinate.

22 Q Now, did you review the medical record to
23 determine Mr. Barclay's urination output?

24 A I did.

25 Q Tell me about it..

1 A He had a good nurse, he documents very well. He
2 had 800 cc's of urine output which is exactly the same
3 amount of i.v. fluids he had in, so he had 800 cc's in,
4 800 cc's out, which again in my experience with someone
5 who has had a lot to drink they will be making gallons
6 of urine. You can hardly find them sometimes because
7 they are always in the bathroom.

8 Q Now, do you have any rules about documentation of
9 medical records in the ER?

10 A There is the cardinal rule that if it's not, if
11 you don't document you didn't do it, so if it is not
12 written down you didn't do it, and that's the rule,
13 what we live by in the ER.

14 Q Now, on those occasions when you have treated a
15 patient that you believed was materially and
16 appreciably impaired have you documented it?

17 A Absolutely. You have to, you have to put --

18 Q Why is that something you would document?

19 A Just in this day and age you have to put down
20 everything you see about the patient, whether they
21 appeared slurred speech or glassy eyes or bloodshot
22 eyes, their ability to walk a straight line, all those,
23 particularly some of the subtle neurological tests, for
24 example, the walking in a straight line is a cerebellar
25 function. The cerebellum is the first part of the

1 brain to be affected by alcohol. That is the basis for
2 the field sobriety test by the law enforcement, finger
3 to nose and walking a straight line, they are all
4 cerebellar tests to assess your cerebellar impairment
5 by alcohol.

6 Q Do the medical records indicate how Mr. Barclay
7 left the emergency department?

8 A It did. He was discharged on his own accord to
9 walk out of the emergency department, which again in my
10 experience if either myself or the nurse would have
11 suspected this man was significantly impaired there is
12 no way we would have let him walk out under his own
13 power. He would have been wheelchaired to whatever
14 vehicle he was getting in, he would have been a fall
15 risk, someone who is that impaired would certainly be a
16 fall risk and they would take great precaution to make
17 sure he got out of the department, into however he's
18 leaving, without causing a problem.

19 Q Now, you have referenced blood pressure. How does
20 alcohol affect blood pressure?

21 A In significant amounts alcohol can lower the blood
22 pressure.

23 Q Okay. With regard to Mr. Barclay's blood pressure
24 what did you find?

25 A It was always in the 140's. I mean, it was always

1 pretty normal.

2 Q Are there other of Mr. Barclay's vital signs that
3 you glean from medical records that you could compare
4 to somebody who was materially and appreciably impaired
5 by alcohol?

6 A Pretty much all of them, respiratory rate --

7 Q Tell me how that --

8 A Let me get to it real quick. The blood pressure
9 was always in sort of normal, maybe elevated amounts,
10 the pulse was always in a regular range, the
11 respirations were in the regular range and all of
12 those, with significant impairment you would expect
13 them to be out of normal range.

14 Q Any other matters you can point out that relate to
15 vital signs of Mr. Barclay' condition?

16 A The other vital sign that we sometimes see is the
17 O2 stat and in the ER they documented it was 97 or a
18 hundred percent, so that's another indication that his
19 breathing was regular, he was oxygenating fine. That's
20 not to be expected if he was hypoventilating from being
21 significantly impaired.

22 Q Now, refer to page 34 of the --

23 MR. VOIGT: Objection.

24 THE COURT: Basis?

25 MR. VOIGT: I have no idea what page number 34 is.

1 BY MR. MASON:

2 Q It appears that a full screening was done of Mr.
3 Barclay?

4 A Yes, sir.

5 Q And what does it indicate?

6 A The nurses checked no fall risk.

7 Q Is there another choice dealing with drug or
8 alcohol concentration?

9 A Yes, it is.

10 Q Is that checked?

11 A No, sir, it's not.

12 Q Now, as part of examining a patient do you come
13 into physical presence of the patient?

14 A Yes, sir.

15 Q And tell me about that process, how you actually
16 put your hands on the patient?

17 A To do a thorough exam you have to be standing very
18 close because you would be looking at their pupils, you
19 would look in their ears, in their mouth, you're going
20 to be almost face to face with these people.

21 Q Is the lighting good?

22 A Good lighting. To make sure you don't miss
23 anything, you want to make sure that you basically
24 examine everything. You can't do that from across the
25 room, so you will examine their scalp, look in their

1 ears, look up their nose, look down their throat, you
2 will touch all their, palpate everything to see if
3 there is any evidence of trauma, but you're up close
4 and personal with these people.

5 Q And how would somebody, how does somebody who is
6 materially and appreciably impaired, how are they
7 affected by pain?

8 A Frequently people who have significant impairment
9 don't appreciate pain as well as someone who is not, it
10 dulls their sensation.

11 Q You testified to treating thousands of patients
12 you believed were materially and appreciably impaired.
13 Do you order any blood work on those patients?

14 A If I think they are impaired I do.

15 Q Why would a doctor do that?

16 A Again, because of their decreased pain threshold
17 they can't sometimes describe what hurts, where it
18 hurts. I had a specific case come to mind, a fellow
19 came in, this was at East Cooper, who was significantly
20 impaired and I went in and assessed him and it clearly
21 appeared that he was significantly impaired, he had
22 slurred speech and so forth, and I asked him if he hurt
23 anywhere and he goes, "I don't hurt anywhere, I just
24 want to go home," and so I ordered some blood work to
25 see, and sure enough, he was significantly impaired,

1 which prompted me to do some further testing, and he
2 ended up having a broken neck but couldn't feel it, the
3 pain, he was neurologically, at least sensation wise,
4 he could feel me touching him but he didn't recognize
5 he had a broken neck, it didn't hurt.

6 Q What about with regard to prescription of medicine
7 for somebody who is materially impaired?

8 A Again, if I have the suspicion someone is
9 significantly impaired it would clearly guide my
10 prescription of discharge pain medicine to that person.
11 I certainly wouldn't want to add another central
12 nervous system depressant on top of a significant
13 amount of impairment.

14 Q Now, you have testified that you saw a video.?

15 MR. VOIGT: Objection.

16 THE COURT: Basis?

17 MR. VOIGT: Hearsay.

18 THE COURT: An expert can rely on hearsay. He can
19 use it as foundation for his opinion.

20 MR. MASON: My question is not what Mr. Barclay
21 said.

22 THE COURT: Restate the question.

23 BY MR. MASON:

24 Q Did you rely on your review of the video tape in
25 assessing your opinion about Mr. Barclay?

1 A Yes, sir. Relying on what I saw in the video
2 tape, again it did not appear that he was significantly
3 impaired. His appearance was not consistent with
4 significant impairment. His appearance reflected no,
5 actually no bloodshot eyes, he was lucid, he was
6 oriented, he was cooperative, he did not slur his
7 speech, he performed simple tasks without any errors.
8 My assessment of what I saw was this was a man who was
9 not impaired.

10 Q Based on everything you reviewed do you have an
11 opinion to a reason degree of medical certainty more
12 probably than not as to whether Mr. Barclay was
13 materially and appreciately impaired by alcohol on
14 December 8th, 2008?

15 A It is my opinion after review of these medical
16 records and that video tape that he was not
17 appreciably, he was not impaired. The findings that I
18 read and saw are absolutely inconsistent with the blood
19 test that is reviewed, they are just not consistent.

20 Q Have you had situations in your medical practice
21 where test results are not consistent with what you
22 see?

23 A Absolutely. Another cardinal rule for the ER,
24 treat the patient, not the test. If I walked into a
25 room and looked at the monitor and the person was flat

1 lining I certainly wouldn't throw the paddles on him
2 and shock him before I looked to see if he was
3 disconncted from the monitor. The same with blood
4 tests, I can't tell you how many times a night we get
5 back results that we say, no, this is not consistent
6 with what this person looks like, do it over,
7 particularly potassium is a great example. I just
8 practiced the last nine years in Orangeburg, a lot of
9 kidney disease, people come back with potassium of six,
10 seven, eight, which is clearly a medical emergency.
11 Relying solely on that first test I would be initiating
12 some emergency treatment to bring that potassium down,
13 but I can't tell you how many times I would have been
14 left with egg on my face if I had not repeated the
15 test. You repeat the test, draw a second sample, you
16 can't use the same sample, that is a bad sample, draw
17 another sample, repeat it, nine times out of ten it's
18 normal.

19 MR. MASON: Please answer any questions the
20 prosecutor would have.

21 THE WITNESS: Yes, sir.

22 THE COURT: Questions for the witness?

23 MR. VOIGT: Just a few.

24 THE COURT: You may proceed.

25 MR. VOIGT: Thank you.

1 CROSS EXAMINATION BY MR. VOIGT:

2 Q Doctor, I appreciate you coming down. Now, you
3 reviewed a lot of records in this case and you
4 testified you reviewed a video tape and you reviewed
5 lab reports that indicated a blood sample was drawn, is
6 that correct?

7 A Yes, sir.

8 Q And there is no reason for you to believe that
9 those lab results are inaccurate, is there?

10 A I'm confused, maybe you can enlighten me, why he
11 was in the ER on the 8th but this sample said it was
12 the 9th. That concerns me. That's another reason I
13 put less stock in the blood test than his clinical
14 appearance.

15 Q So, it concerns you that a sample was placed into
16 a sheriff's department evidence locker the day after it
17 was taken, therefore it invalidates the blood draw
18 taken the day before, is that your concern?

19 A It concerns me that the date that the patient was
20 treated and the date on the blood sample are not the
21 same. If you tell me that it was placed in somebody's
22 locker, that concerns me even more, since it should
23 have been refrigerated.

24 Q A refrigerated locker, would that alleviate some of
25 that concern?

1 A You said it got put in there the next day?

2 Q It got entered into the computer the next day.

3 A Oh. The test concerns me. We shouldn't handle
4 the specimen that loosely.

5 Q Is there anything you reviewed that indicates that
6 specimen was handled in anything other than a proper
7 manner?

8 A The fact it's labeled with a wrong date.

9 Q In the medical record you looked at is there any
10 reason to doubt that blood draw was taken on the 8th,
11 the day of the accident?

12 A There is nothing for me, I can read in the record
13 that a blood draw was drawn, yes.

14 Q The blood draw we're talking about that shows more
15 than twice the legal limit of alcohol was done at
16 MUSC's emergency room on the 8th, do you doubt that's
17 right?

18 A Well, I can't -- now you're talking about two
19 different things, you're talking about what I read in
20 the record as something happened on the 8th, and you're
21 tying it to something that is labeled the 9th, and I
22 won't swear to that.

23 Q But you have testified that the date of the 9th is
24 what concerns you?

25 A Yes, sir.

1 Q You have also testified from the medical record
2 you reviewed a blood draw was taken on the 8th?

3 A Yes.

4 Q You have no reason to doubt the blood draw taken
5 on the 8th is in fact what was tested showing the blood
6 alcohol .208 or whatever?

7 A I can't testify to that.

8 Q And you don't have any problem with the process
9 and procedures at the SLED lab when they tested, that
10 is beyond your expertise?

11 A Yes.

12 Q As a matter of fact you take that number at face
13 value, don't you?

14 A If it's consistent with the appearance of the
15 patient. Physicians treat live humans and rely on
16 tests to confirm. I frequently, again, like I said, I
17 have to redo tests because it just doesn't add up.

18 Q I'm speaking -- you talked a little bit about your
19 concern as an emergency room physician in prescribing
20 drugs, pain medications to people, specially those in
21 an impaired state because you don't want to add another
22 level of impairment or you don't want a drug
23 interaction with the alcohol. Is that true?

24 A Yes, sir.

25 Q And this must have happened in all your time in

1 the emergency room, there are times when you release
2 persons to the custody of officers and they are going
3 basically from the hospital to jail?

4 A Yes, sir.

5 Q In those cases you don't prescribe anything at
6 all, do you?

7 A Actually I do.

8 Q Do you? And with the anticipation that
9 prescription is going to be handled by jail personnel?

10 A Correct.

11 Q Do you know anything was prescribed in this
12 particular case?

13 A That is a question I do not recall.

14 Q Now, I believe that Mr. Mason directed you to page
15 34, okay?

16 A Yes, sir.

17 Q And that is, that is an MUSC record, that is the
18 second time that he went to the hospital. Isn't that
19 right? You're talking about a fall assessment. I
20 believe page 34 is what Mr. Mason referenced.

21 A No, it's the same visit -- no, wait a minute.
22 Right, same visit.

23 Q We're talking about the second visit to the
24 hospital. Do you know the reason why he was in the
25 hospital the second time he fell and hit his head?

1 A Right.

2 Q They are doing a fall -- falling and hitting your
3 head, that is something that an intoxicated person
4 could do, right?

5 A It's possible.

6 Q It's possible, that is not necessarily meaning
7 they all fall down but that is something that could
8 have happened?

9 A These records reflect he fell asleep.

10 Q That he was sitting down and fell asleep and fell
11 over?

12 A Yes.

13 Q That perhaps is even more likely, then, that
14 impaired and intoxicated people fall asleep fairly
15 easily in unusual circumstance?

16 A I fall asleep many times.

17 Q I'm saying intoxicated, impaired people can fall
18 asleep in unlikely circumstances, isn't that correct?

19 A Yes, sir.

20 Q And they do fall asleep and fall down and hit
21 their head, that is something that could happen?

22 A Uh-huh.

23 Q And these records that you, that don't indicate
24 alcohol, he is no longer a fall risk, this is
25 significantly removed from the time frame of the actual

1 accident, isn't it, six and a half, seven hours later,
2 right?

3 A Uh-huh.

4 Q This is common sense, I know you know this, but
5 isn't it true that your level of impairment,
6 intoxication, when you don't receive any more ethal
7 alcohol, is going to decrease over time, most people
8 have the ability to metabolize that?

9 A Yes.

10 Q So it's much less likely you're going to exhibit
11 the symptoms of alcohol use six and a half, seven hours
12 after you last possibly ingested something, isn't that
13 true?

14 A Uh-huh.

15 Q And for some experienced drinkers they may appear
16 completely normal by that time, isn't that true?

17 A It's possible.

18 Q And you reviewed records from the initial, the
19 initial emergency personnel records, right, the first
20 responders, the guys in the ambulance that showed up,
21 you reviewed those records to come to your opinion,
22 right?

23 A Yes, sir.

24 Q And each of those records, they note ethal
25 alcohol. Correct?

1 A Yes.

2 Q So that the people who were actually there on the
3 scene at 6:30, 7:00 o'clock at night on Point of Pines
4 Road observed with their senses and noted in their
5 records the presence of alcohol about the person of Mr.
6 Barclay?

7 A Uh-huh.

8 Q That is an important observation, that is
9 something they should have known, isn't it?

10 A Yes, sir.

11 Q And that gives you, I mean, that is information
12 that you can use as a treating physician when you get
13 him into the emergency room and that you can use as an
14 expert later on to come to your conclusions, and you
15 also reviewed the medical records from the first visit,
16 we're talking about two visits, now, the medical
17 records from the first visit, and those also indicate
18 ethal alcohol use, they note little boxes and make
19 little notations, and that's proper, isn't it?

20 A I lost you, I'm sorry.

21 Q You reviewed those medical records from the first
22 visit to the ER, and those ER records also indicate the
23 smell and presence of alcohol about the person of Mr.
24 Barclay?

25 A Yes, sir.

1 Q And that is important to know, isn't it?

2 A True.

3 Q Okay. And you testified that you are, as a Fellow
4 or a member of the American College of Emergency
5 Physicians --

6 A Yes.

7 Q -- and do you know what their policy is about
8 reporting on potentially impaired drivers, do you know
9 what their stated policy is?

10 A I don't know the policy statement.

11 Q So you don't know that they warn physicians to be
12 very careful about patients, protect the privacy of
13 their clients?

14 A No.

15 Q And do you know the policy of the American College
16 of Emergency Physicians concerning video taping,
17 specifically with cell phones, in an ER?

18 A No.

19 Q Do you know that they discourage that?

20 A I can't testify to any of their policy statement.

21 Q But that is an organization to which you belong?

22 A Yes.

23 Q And you receive their newsletters?

24 MR. MASON: Object to lack of foundation.

25 THE COURT: Overruled.

1 Q You receive their newsletters and you don't know
2 if they have got, whatever they do, mailing list,
3 whatever?

4 A Yes.

5 Q And that that is one, there are two or three major
6 organizations that govern certification and
7 qualification of emergency room physicians and they are
8 one of them and you can't tell if they are better or
9 worse, they are all about the same, is that about
10 right?

11 A Uh-huh.

12 Q Now, we have ER records indicating alcohol use.
13 Did you review, let me, did you review any of the
14 statements of any of the emergency room personnel or
15 firefighters or EMS workers to prepare your expert
16 testimony?

17 A Yes, sir.

18 Q Did you review witnesses or the statements of
19 witnesses that were provided to you by Mr. Mason?

20 A Yes, sir.

21 Q And in the statements of the firefighters or EMS
22 workers were those just basically what was in their
23 reports?

24 A Yes, sir.

25 Q Okay. So there was nothing independent of their

1 reports, no summaries of potential testimony, no
2 interview notes or anything like that, it was purely
3 what they had placed into their records?

4 A Yes, sir.

5 Q And those are the records that we indicated showed
6 alcohol use by Mr. Barclay or some sort of association
7 of alcohol with Mr. Barclay?

8 A Yes.

9 Q From the earliest that these people came into
10 contact with him?

11 A Yes, sir.

12 Q And so your understanding was that the very first
13 trained personnel who came into contact with Mr.
14 Barclay indicated the presence of alcohol about this
15 person? It says ETOH. I didn't mean to throw you a
16 curve ball.

17 A I have been in the same sort of situation. As a
18 doctor I find it interesting he talked about his person
19 and clothing but nowhere do they say it was on his
20 breath. That was a little concern.

21 Q And when you ingest large quantities of alcohol,
22 you know this as an expert, don't you, doesn't some of
23 it come out the pores of your skin?

24 A Over time.

25 Q Over time, so over time you can, you're almost

1 like a sponge, if you were to have pores getting rid of
2 the alcohol within your system you would omit the odor
3 of alcohol, wouldn't you?

4 A I'm not sure it comes out to that extent.

5 Q You have been in the ER where you have been able
6 to smell somebody from this distance away. True?

7 A Yes.

8 Q You have been in the ER where you have been able
9 to smell somebody from this distance away?

10 A I'm not sure of that.

11 Q Somewhere between there and here you may not be
12 able to tell?

13 A Uh-huh.

14 Q Okay. But it's safe to say you can be farther
15 than an arm's length away from somebody and be able to
16 detect the odor of alcohol?

17 A Possibly.

18 Q And in a small confined space where there isn't a
19 lot of air circulation eventually that odor would build
20 up, wouldn't it, it could?

21 A Uh-huh.

22 Q Perhaps beyond your expertise?

23 MR. MASON: I want to make sure he had a chance to
24 answer the question.

25 A Could.

1 Q At 6:30, 7:00 o'clock, 8:00 o'clock, 9:00 o'clock
 2 we have medical professionals noting the presence of
 3 alcohol around Mr. Barclay and they are doing that in
 4 the process of treating Mr. Barclay and the process of
 5 interacting with Mr. Barclay for the purpose of
 6 rendering medical assistance to Mr. Barclay, isn't that
 7 true?

8 A Yes, sir.

9 Q And at some time in that first hospital visit
 10 blood was drawn from Mr. Barclay?

11 A Yes, sir.

12 Q Okay.

13 A Approximately 10:00 o'clock.

14 Q Excuse me?

15 A Approximately 10:00 o'clock, 2150, I think, almost
 16 2200 hours.

17 Q And that is based on your recollection of the
 18 records that you reviewed?

19 A No, it is based on this piece of paper right here.

20 Q May I ask what you're looking at?

21 A Sorry, the nurse's notes. The nurse says 2150
 22 legal blood drawn, so almost 10:00 o'clock p.m.

23 Q And that is 2150, we're talking perhaps as much as
 24 three to three and a half hours after the accident?

25 A Uh-huh.

1 Q You testified that you reviewed the video tape?

2 A Yes, sir.

3 Q Isn't it true that the only indication of time on
4 that video tape reflects a time of 12:35?

5 A Yes.

6 Q So, more than two and a half hours after the blood
7 draw and perhaps as much as six and a half to seven
8 hours after the initial observations of trained
9 emergency personnel?

10 A Yes.

11 Q And in six and a half to seven hours a lot of
12 changes can happen in the appearance and demeanor of
13 people who ingest alcohol, isn't that true?

14 A That's correct.

15 Q Substantial changes?

16 A It depends.

17 Q Isn't it true in six and a half to seven hours
18 bloodshot eyes can become less bloodshot or not
19 bloodshot at all?

20 A I think it takes longer than that.

21 Q What do you base that opinion on?

22 A Personal experience.

23 Q There is nothing in your expertise that would
24 enable you to render expert opinion on the rate at
25 which bloodshot eyes dissipate?

1 A I'm not sure there is any control studies.

2 Q That is just Ronald Hargrave's opinion?

3 A I see patients in the ER 24 hours after they have
4 been on a binge and they still have bloodshot eyes.

5 Q But that is perhaps true, that might be different
6 levels of intoxication, could it not? We're not
7 talking about you don't know at any point, do you,
8 what, how much or when Walter Barclay may have ingested
9 alcohol?

10 A I know nothing about it.

11 Q So you can't compare them to your binge patient in
12 any real way?

13 A No.

14 Q And isn't it true that in six and a half to seven
15 hours speech that was slurred can become more clear?

16 A Again, if I say something you're just going to
17 tell me I don't have any grounds for that, so if you
18 say so.

19 Q Well, I don't want you just to agree with me
20 because I say it. I mean, you've got 25 years of
21 medical experience.

22 A But you discount me if I say something you don't
23 like.

24 THE COURT: Just answer the question yes or no and
25 then you may explain your answer.

1 A Yes, sir.

2 THE COURT: You may proceed.

3 MR. VOIGT: Thank you very much, Your Honor.

4 BY MR. VOIGT:

5 Q In your 25 years of emergency room experience and
6 your experience as a doctor you have had to go through
7 special training, you have had, you belong to all the
8 right organizations, qualified by all the right people,
9 and isn't it true that in six and a half to seven hours
10 slurred speech, a symptom of impairment for
11 intoxication, can become less pronounced or even
12 disappear entirely?

13 A It depends on where you started from. Six hours,
14 if you're talking a six hour interval, six or ten hours
15 after the drink, sure, that would make a difference.
16 If that six hour interval is immediately following the
17 drinking, I don't think it is going to make that much
18 difference.

19 Q We don't know, we really don't know when the
20 drinking may have started or stopped on Mr. Barclay,
21 not from the records you looked at?

22 A No.

23 Q So when we talk about six or seven hours, it could
24 have been longer, could it not?

25 A Uh-huh.

1 MR. VOIGT: I'm almost through.

2 Your Honor, I don't have anything else at this
3 time.

4 THE COURT: Redirect?

5 MR. MASON: Yes, Your Honor.

6 THE COURT: You may proceed.

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1 REDIRECT EXAMINATION BY MR. MASON:

2 Q Dr. Hargrave, you were asked some questions by the
3 prosecutor about refrigeration of blood samples. Why
4 is it important that blood samples be refrigerated?

5 A They need to be refrigerated quickly after they
6 are drawn because the blood starts to degrade.

7 Q What happens when the blood degrades?

8 A It messes up the result.

9 MR. VOIGT: Objection.

10 THE COURT: Basis?

11 MR. VOIGT: Beyond the scope.

12 THE COURT: Sustained.

13 Ladies and gentlemen, you will disregard the last
14 question and the last answer and give it absolutely no
15 consideration in your deliberations.

16 You may proceed.

17 BY MR. MASON:

18 Q Now, you were asked about whether Mr. Barclay's
19 emergency room records indicated ETOH. Do you recall
20 that?

21 MR. MASON: Your Honor, may I approach?

22 THE COURT: You may.

23 BY MR. MASON:

24 Q With regard to the emergency room records of Mr.
25 Barclay, is there a place to check ETOH?

1 A Yes, sir.

2 Q Is it checked?

3 A No, sir.

4 Q And with regard to a doctor, do you sometimes
5 indicate how many minutes the patient has been in your
6 personal care?

7 A Yes, sir.

8 Q And is it indicated how long the doctor that
9 didn't check ETOH was in Mr. Barclay's personal
10 presence?

11 A 60 minutes.

12 MR. MASON: No further questions.

13 THE COURT: Any objection to the witness being
14 excused, from the State?

15 MR. VOIGT: No, Your Honor.

16 THE COURT: The defense?

17 MR. MASON: No, Your Honor.

18 THE COURT: Sir, you're excused.

19 (Witness excused).

20 THE COURT: We'll take advantage of this break in
21 testimony and give you a mid morning recess. During
22 the break please do not discuss the case and please
23 leave your notes in your seat.

24 (Jury excused from the courtroom).

25 THE COURT: We'll be out about 15 minutes. That

1 is how long it is going to take them to get downstairs
2 and get back up.

3 MR. MASON: Thank you.

4 THE COURT: You're welcome, enjoy your break.

5 (Recessed at 11:15 a.m.).

6 (Resumed at 11:47 a.m.).

7 THE COURT: All right, the jury is back from their
8 smoke break. Are you ready to proceed?

9 MS. KINZELER: Yes, Your Honor.

10 THE COURT: Okay.

11 Are you ready to proceed?

12 MR. MASON: Yes, Your Honor.

13 THE COURT: Who is your next witness?

14 MR. MASON: We have a matter we need to take up
15 with the Court.

16 THE COURT: Okay.

17 MR. MASON: If you will recall, at the beginning
18 of the defense case you gave Mr. Barclay some
19 information about his right to testify and of course we
20 have been working with him since that time and we get
21 back to the legal situation as to whether or not as a
22 matter of law driving under the influence first offense
23 is a lesser included offense of felony DUI, not whether
24 you're going to charge it but whether as a matter of
25 law it is. We have been unable to determine other than

1 read cases that talk about what is a lesser included
2 offense. Your Honor pointed out --

3 THE COURT: Let me ask a question. On this list
4 of witnesses here, do you plan to call any of these
5 other witnesses?

6 MR. MASON: No, Your Honor.

7 THE COURT: Okay. So, let me deal with that.
8 You're not calling Dr. Borders?

9 MR. MASON: Correct.

10 THE COURT: Or David Watson?

11 MR. MASON: Correct.

12 THE COURT: Jose Licon?

13 MR. MASON: Correct.

14 THE COURT: All right. Now, the last witness then
15 would be your client?

16 MR. MASON: Correct.

17 THE COURT: If he decides to testify.

18 MR. MASON: Correct.

19 THE COURT: Bear with me just one second. I
20 think, then, let me ask the State, there are two
21 different issues we're talking about. One is whether
22 under the classic definition and analysis of lesser
23 included offense, whether DUI would be a lesser
24 included offense. The second issue is whether it be
25 applicable in this case, so there are two different

1 issues, so I want to be clear. Does the State in
2 theory have any opposition to Mr. Mason's argument that
3 DUI is a lesser included of felony DUI, under the
4 elements test?

5 MS. KINZELER: Your Honor, I don't necessarily
6 disagree that it could be considered a lesser included
7 but I would disagree it applies in this case.

8 THE COURT: I haven't asked the second question.

9 MS. KINZELER: I don't necessarily disagree just
10 on the basis of the elements test, if the Court would
11 charge it as a lesser included in certain
12 circumstances, yes.

13 THE COURT: Bear with me one moment.

14 MS. KINZELER: Your Honor, I do have a brief. I
15 don't know that it actually would meet the same
16 elements test, considering the punishment changes for a
17 regular DUI from a felony DUI.

18 THE COURT: I don't think the courts consider
19 punishment in the lesser included analysis, but only
20 looks at the elements themselves, and punishment is not
21 an element.

22 MS. KINZELER: I don't know unless we assume it is
23 incorporated in DUI.

24 THE COURT: It is, actually the felony DUI
25 instruction is the exact same as DUI, the only

1 difference is you have proximate cause.

2 MS. KINZELER: Correct.

3 THE COURT: That is really -- and actually I think
4 that is the only one.

5 MS. KINZELER: And the death or great bodily
6 injury.

7 THE COURT: Well, it is all encompassed in felony
8 DUI, if it encompasses both, use both, if it is one or
9 the other you only instruct great bodily injury or
10 death because the statute, under the felony DUI
11 statute, for felony DUI the State has to prove that the
12 driver was under the influence, that he was driving the
13 vehicle, that he was sufficiently under the influence
14 to impair his ability to drive with the reasonable care
15 as a reasonably prudent person would drive.

16 On the other hand, the fact that the defendant
17 sometime prior to the incident drank an alcoholic
18 beverage, the State then has to prove beyond a
19 reasonable doubt that while driving the defendant did
20 an act forbidden by law or neglected a duty imposed by
21 law, which in this case is proper lookout, keeping his
22 vehicle under control and the statutory duty of keeping
23 his car in his lane, which is what you all allege as a
24 violation, and then you would have to prove proximate
25 cause. In other words, that his actions were an

1 immediate and sufficient cause of the accident and
2 caused death and/or injury and that of course there
3 could be more than one act, you know, of two people
4 combining together to cause the injury, concurrent
5 causes.

6 Then you go into, you know, really all this is
7 negligence, a case of negligence, which deals with
8 basically if a person who died or was injured, just
9 because they couldn't be cured if they died doesn't
10 mean that was not a positive injury and then you have a
11 definition of great bodily injury and of course then an
12 inference on the alcohol test, and 56-529-33 which
13 deals with the inference on driving under the
14 influence.

15 And to prove DUI, bear with me, I thought I had
16 already printed this, I apologize. The State has to
17 prove the defendant was driving the motor vehicle while
18 under the influence of alcohol or drugs or other
19 substance to the extent the defendant's faculties to
20 drive were materially and appreciably impaired, and
21 then it has the same definition, the State must prove
22 beyond a reasonable doubt that the defendant was
23 sufficiently under the influence to impair his ability
24 to drive with reasonable care, with due regard for
25 others and himself, or a reasonably prudent person

1 would drive. It is not necessary to show the defendant
2 was passed out or intoxicated, is really the exact
3 language, the same inference, which is 56-529-50(B),
4 which is eight-tenths of one percent. In other words,
5 that the alcohol concentration was eight-tenths of one
6 percent, the jury can infer the defendant was
7 materially impaired. So, actually the only difference
8 between the two is that one uses the proximate cause
9 language, which is just basically DUI plus negligence.

10 Looking at whether something is a lesser included
11 offense, the test to avoid is whether the greater of
12 the two offenses includes all the elements of the
13 lesser offense. If the lesser offense includes an
14 element which is not, which is not included in the
15 greater offense, then the lesser offense is not
16 included in the greater offense, just a convoluted way
17 to saying the greater offense has to have all the
18 elements. I think that is the classic elements test,
19 although there are no cases on point that deal with it
20 or ever did an analysis of the issue. I think on a
21 boilerplate definition of lesser included offense that
22 DUI would be a lesser included, however whether it is
23 applicable in the case and whether it will be
24 instructed is a whole another issue.

25 Is there any exception from the State?

1 MS. KINZELER: No, ma'am.

2 THE COURT: From the defense?

3 MR. MASON: No, Your Honor. That would be your
4 ruling?

5 THE COURT: Yes.

6 MR. MASON: Thank you.

7 THE COURT: I'm not telling you I'm going to
8 charge it.

9 MR. MASON: I understand. May I have five
10 minutes, Your Honor?

11 THE COURT: Uh-huh.

12 MR. MASON: Thank you.

13 THE COURT: I need to continue questioning your
14 client, so go ahead and finish that up.

15 (Recessed at 12:14 p.m).

16 (Resumed at 12:21 p.m).

17 THE COURT: Sir, I remind you you're still under
18 oath and I need you to stand before me. State your
19 name for the record.

20 THE DEFENDANT: Walter Douglas Barclay.

21 THE COURT: Mr. Barclay, I explained to you
22 certain of your rights the other day. Do you recall
23 that?

24 THE DEFENDANT: Yes.

25 THE COURT: Do you have any questions regarding

1 those rights?

2 THE DEFENDANT: No, ma'am.

3 THE COURT: Have you had a full opportunity to
4 discuss with your lawyer whether you should or should
5 not testify?

6 THE DEFENDANT: I have.

7 THE COURT: Sir, do you need to speak with him any
8 further at this time?

9 THE DEFENDANT: No.

10 THE COURT: Sir, do you wish to testify?

11 THE DEFENDANT: No, I do not.

12 THE COURT: Now, does the State have any rebuttal
13 witnesses, we'll get to motions in a second, does the
14 State have may rebuttal witness?

15 MS. KINZELER: No, ma'am.

16 THE COURT: Did you all provide the Court with any
17 proposed charges?

18 MS. KINZELER: Your Honor, we're fine with the
19 charges you indicated you have prepared.

20 THE COURT: The defense has rested. Are there any
21 motions?

22 MR. MASON: Yes, Your Honor.

23 THE COURT: You may proceed.

24 MR. MASON: Your Honor, our first motion relates
25 to the directed verdict on the indictment which alleges

1 great bodily injury.

2 THE COURT: I don't need you to re-argue it. You
3 just need to -- what is the word I'm looking for?

4 MR. MASON: I renew that motion.

5 THE COURT: Okay.

6 Anything further from the State on that motion?

7 MS. KINZELER: No, ma'am.

8 THE COURT: The Court stands by its earlier ruling
9 regarding that. I went back and reviewed the
10 testimony, Mr. Davilla testified as to his injuries and
11 the nature of them and the intense pain he was
12 experiencing regarding them and that was supported by
13 medical testimony as well. That motion is denied based
14 on the Court's previous ruling.

15 Next?

16 MR. MASON: Your Honor, our other motion was to
17 strike the allegation of recklessness from the case,
18 from the indictment.

19 THE COURT: You don't have to redo it, re-argue
20 it. Just renew it.

21 Anything further from the State regarding that
22 motion?

23 MS. KINZELER: No, ma'am.

24 THE COURT: The Court denies the motion based on
25 previous ruling.

1 MR. MASON: The other motion is to delete any
2 reference to drugs from the alcohol or drugs portion.

3 THE COURT: That is the same motion you made
4 before, correct?

5 MR. MASON: Right.

6 THE COURT: Anything further from the State?

7 MS. KINZELER: No, ma'am.

8 THE COURT: The motion is denied based on the
9 Court's previous ruling.

10 MR. MASON: Those are all the defendant's motions.

11 THE COURT: Okay. The motions are denied based on
12 the Court's previous ruling and the State's previous
13 argument.

14 MR. MASON: Your Honor, I believe the State has
15 said they weren't proceeding on recklessness, so I
16 don't recall whether you ruled that would be included,
17 and also on the drugs, there is no evidence of any
18 drugs.

19 THE COURT: The indictment is a notice document,
20 that is the whole purpose of those, to put you on
21 notice as to what charges you have to defend, so that
22 has no bearing on what the Court is going to instruct.
23 The Court instructs based on the evidence, the facts
24 that have been produced in terms of evidence, that
25 being witness testimony and exhibits that have been

1 introduced into the record.

2 All right, what I think I'm going to do is -- let
3 me ask another question. Does the State plan to open
4 and close on argument?

5 MS. KINZELER: No, ma'am, we'll just close.

6 THE COURT: You all are going to waive opening?
7 And how long does the State think its argument will be?

8 MS. KINZELER: Your Honor, I'm a fast talker so I
9 would hope maybe 30 to 40 minutes unless Mr. Young
10 gives me the sign tells me to slow down.

11 THE COURT: How long will your argument be, Mr.
12 Mason?

13 MR. MASON: About two hours, Your Honor.

14 THE COURT: Closing argument?

15 MR. MASON: Yes, Your Honor.

16 THE COURT: I hate to interfere with what you may
17 have determined on closing argument but I will tell you
18 based on comments and experience of juries, their
19 maximum attention is fifteen minutes. You may want to
20 reconsider that. I don't normally limit argument but I
21 can tell you if it wanes on I'm going to interrupt you,
22 if I feel like you're starting to repeat yourself or
23 losing the jury I'm going to stop you. You might want
24 to, I won't tell you how to try your case but I will
25 tell you based on experience that is a long time to ask

1 people to pay attention, especially if it is not
2 something new being introduced, which I will leave that
3 to your discretion. I don't want you to feel
4 blindsided but if I feel that the jury is not paying
5 attention or if you start repeating yourself I do
6 reserve the right to limit you.

7 Has the court reporter been given all the evidence
8 back?

9 MS. KINZELER: There is a stack up here, I can
10 sort it out.

11 THE COURT: I need you all to go through it and
12 make sure that everything is there that is supposed to
13 be there.

14 Yes, sir?

15 MR. MASON: Your Honor, if it please the Court,
16 would you be able to advise us of your schedule? We do
17 have a couple people we wanted to be here for the
18 closing argument, we need to get a call out to them.

19 THE COURT: We're going to deal with that in just
20 a minute.

21 MR. MASON: Thank you.

22 THE COURT: What I'm going to do, I'm going to let
23 the jury go until 2:15, then we'll do charge conference
24 and proceed.

25 Is that acceptable to the State?

1 MS. KINZELER: Yes, ma'am.

2 THE COURT: To the defendant?

3 MR. MASON: Yes, ma'am. So, that would have us
4 starting closing argument around what time?

5 THE COURT: 2:15.

6 MR. MASON: Okay.

7 MS. KINZELER: Should we come earlier for the
8 charge conference?

9 THE COURT: We're going to do the charge
10 conference now. That's why I'm going to let the jury
11 go.

12 MR. MASON: Your Honor, could we have the Court's
13 indulgence just one second?

14 THE COURT: I'm going to gauge the time. I will
15 make a decision, after your argument, as to whether
16 I'll instruct before they go home. I'm not going to
17 hold them hostage here and keep them here inordinately
18 late, beyond 5:00 or 5:30. I normally would give them
19 the opportunity to go home at 6:00 o'clock anyway. Our
20 only option is pizza, dietary restrictions if there are
21 any diabetics or otherwise, so --

22 Okay, please bring in the jury for me.

23 I'll give you the ability to rest in the presence
24 of the jury, Mr. Mason.

25 MR. MASON: Thank you.

1 THE COURT: You're welcome.

2 Was that all the evidence?

3 MS. KINZELER: It's right there.

4 (The jury returned to the courtroom).

5 BAILIFF: All the jurors are present, Your Honor.

6 THE COURT: Thank you.

7 You may be seated.

8 Ladies and gentlemen, I would ask you give the

9 attorneys your attention.

10 Mr. Mason, you may proceed.

11 MR. MASON: Your Honor, the defense rests.

12 THE COURT: Does the State have any rebuttal
13 witnesses?

14 MS. KINZELER: No, ma'am.

15 THE COURT: Does the State rest?

16 MS. KINZELER: Yes, ma'am.

17 THE COURT: Madam Forelady, ladies and gentlemen,
18 we have now reached the stage of the trial where we
19 will have closing argument and instruction. However,
20 there are some matters while you have been waiting
21 which we have been dealing with matters of law but we
22 have some other matters of law we need to take up, so
23 rather than have you wait while we do that I'm going to
24 send you all to lunch until 2:15. During the break
25 please do not discuss the case. While you have heard

1 all the evidence, you have not heard the parties'
2 closing argument nor have you heard the Court's
3 instruction on the law, so it is absolutely imperative
4 you make no determination and you maintain your
5 impartiality until the process has been completed,
6 until you have been released to deliberate regarding
7 this case.

8 We have so appreciated your patience. I hope you
9 have a good lunch, I hope it's not raining, I don't
10 remember what the percentage was forecast, the whether
11 has changed so drastically, but I hope you all have a
12 good lunch and if you would return directly to your
13 jury room at 2:15.

14 Again don't have any contact with anyone in or
15 about the courthouse, do any research of any type or
16 allow yourself to be exposed to any media coverage.
17 Have a great lunch recess, we'll see you at 2:15.

18 (The jury was excused from the courtroom).

19 THE COURT: You may be seated.

20 I will give the jury a general instruction
21 regarding their responsibility and my responsibility,
22 how to judge credibility, the believability.

23 I will give them a general instruction regarding
24 direct and circumstantial evidence.

25 I will give them a general instruction that the

1 charges in the indictment are not evidence.

2 I will give the charge on reasonable doubt. I
3 will then instruct regarding the defendant's failure to
4 testify, which I think we all know what that is, that
5 it cannot be held against him, the State has the burden
6 of proof.

7 I will instruct the elements of driving under the
8 influence, which I have already pretty much articulated
9 for you all. Excuse me. Under the statute regarding
10 what the State has to prove regarding that while
11 driving the defendant did an act forbidden by law or
12 neglected a duty imposed by law, I will instruct the
13 following, which is 56-5-1900, driving on a road which
14 was laned for traffic, Subsection A, which provides
15 whenever any roadway has been divided into two or more
16 clearly marked lanes for traffic the following rules in
17 addition to others consistent herewith shall apply. A
18 vehicle shall be driven as nearly as practicable
19 entirely within a single lane and shall not be moved
20 from the lane until the driver has first ascertained
21 that such movement can be made with safety.

22 In addition to that I will instruct the common law
23 duty, which is duty to keep a proper lookout and duty
24 to keep vehicle under control, which is the driver of
25 course has the duty to keep their vehicle under control

1 and to keep a proper lookout, has a duty to look out
2 for other vehicles on the highways, that requires the
3 driver to watch attentively so they are able to see a
4 person or object on the highway. In addition to that,
5 drivers of an automobile have the duty to keep the
6 automobile under proper control so that the driver is
7 able to slow down, stop or turn the automobile to avoid
8 colliding with other vehicles, pedestrians or objects
9 lawfully upon the road.

10 I will then continue with the instructions, the
11 next element the State would have to prove beyond a
12 reasonable doubt would be proximate cause, which the
13 Court has addressed with you all several times. As
14 well as the egg shell part of it which I have also made
15 you aware of several times regarding the person could
16 have been made better if their health had been
17 different or if there is some indication about medical
18 procedures that did not effectively treat the person or
19 otherwise, that that would not be a defense unless they
20 proved that was in fact what caused the person's death
21 or great bodily injury. I'll instruct great bodily
22 injury.

23 I will then instruct 56-5-29, Subsection B, which
24 is the .08 inference, which is the amount of alcohol in
25 the defendant's blood at the time of the alleged

1 violation as shown by chemical analysis of the
2 defendant's breath or other bodily fluid may be
3 considered by you in deciding whether the defendant was
4 under the influence. If the alcohol concentration was
5 eight one-hundredths of one percent or more it may be
6 inferred that the defendant was under the influence.
7 This inference is simply an evidentiary fact to be
8 considered by you along with the other evidence in the
9 case, give it the weight, the value and weight you
10 think it should receive.

11 I will then instruct that the defendant is
12 charged with multiple indictments, they are two
13 separate indictments, two separate offenses, that he
14 has to be proven guilty beyond a reasonable doubt on
15 them separately, uninfluenced by their decision as to
16 any other indictment. Then instruct them on the form
17 of the verdict.

18 I have numbered the defense's requests to charge.
19 Sudden emergency is number one, I will not be
20 instructing that. There is no factual support for that
21 instruction, there has been no testimony a sudden
22 emergency was created.

23 Defendant not testifying is number two. I was
24 going to give my standard instruction on that.

25 Reasonable doubt, number three, is my standard

1 instruction.

2 Permissive inference, I'm going to use my standard
3 instruction, which I have numbered as your number four.

4 Number five is felony driving under the influence,
5 I will instruct.

6 Number six as to presumption of innocence, I will
7 use my standard instructions.

8 I will have these marked as a court's exhibit.

9 Any exception to the charges, from the State?

10 MS. KINZELER: No, ma'am.

11 THE COURT: From the defense?

12 MR. MASON: Your Honor, we take exception to the
13 Court's refusal to charge DUI first offense.

14 THE COURT: There is no testimony, you haven't
15 requested it and there is no support for it in the
16 record that he was simply driving under the influence.
17 If he had testified it might have been but I don't know
18 what his testimony would have elicited but at this
19 point the only testimony in the record is that he was
20 driving, he was significantly impaired, that he crossed
21 the centerline and caused death and great bodily injury
22 to Mr. Davilla and Mr. Garcia. It is simply not
23 factually supported by the record.

24 I will note your exception.

25 MR. MASON: I want to be clear we have requested

1 it.

2 THE COURT: It has no factual support for it in
3 the record.

4 I note your exception.

5 MR. MASON: We would incorporate our memorandum of
6 law, without belaboring it.

7 We except, we had requested that the court delete
8 any reference from the DUI charge to drugs. There is
9 no evidence of drugs in this case. The statute refers
10 to alcohol or drugs or combination.

11 THE COURT: Any exception to that?

12 MS. KINZELER: No, ma'am.

13 THE COURT: Then I will redact that wherever it is
14 mentioned. Only one place.

15 MR. MASON: We object to any charge of common law
16 duty. One item that was alleged in the acts forbidden
17 by law, and that was crossing the centerline, the State
18 did not request the additional common law duty. The
19 Court, I believe, proposed them, we have no notice that
20 he was going to be accused of any act or anything other
21 than --

22 THE COURT: The statute charges simple negligence,
23 basically, so all duties that would have been supported
24 by the facts are appropriately instructed. The common
25 law duty is really no different than you have a duty to

1 keep your vehicle under control, that if that was
2 impaired by alcohol, then that is a violation of the
3 statute. And that is basically what the State has
4 propounded by the evidence they have presented, however
5 I will ask does the State have any exception to simply
6 the statute being charged, which is 56-5-1900?

7 MS. KINZELER: Your Honor, I request we charge as
8 indicted.

9 THE COURT: I will think about it over lunch. I
10 think that that I'm required to charge the law as it is
11 supported by the facts. The State is required to prove
12 beyond a reasonable doubt that while driving the
13 defendant did an act forbidden by law or neglected a
14 duty imposed by law, and at that time the Court is
15 required to instruct any act forbidden by law or any
16 neglected duty, so actually both of those things are
17 neglect of duty and a violation, one being a common law
18 duty and one being a statutory duty, but either way it
19 is crossing the centerline.

20 MR. MASON: There has been no testimony about
21 failure to keep a proper lookout, failing to keep the
22 vehicle under control, failure to watch attentatively,
23 failure to slow down or stop, in fact speed was not a
24 factor.

25 THE COURT: I didn't say anything about slowing

1 down or any speed. He could be going slow and fail to
2 keep a proper lookout. The genesis of it is you're
3 required to keep your vehicle under control and keep it
4 in its lane and that is basically what the instruction
5 says.

6 I'll note your exception for the record.

7 MR. MASON: Your Honor, we object to the egg shell
8 charge. This isn't a case where somebody had botched
9 medical care, there is no evidence in the case about
10 that, that would simply allow the jury to get into a
11 matter that really wasn't tried before the Court. I
12 know there is some cases where people allege that
13 somebody died or was injured, that wouldn't have been
14 injured if they had been different with their health
15 but we don't have that issue in this case.

16 THE COURT: You know, I thought about that as I
17 was preparing my charge. I had a case one time where a
18 lady died as a result of an accident, she was diabetic,
19 she had to be put on a respirator and eventually died,
20 that was a defense, she was frail, and I thought about
21 it after I was reading through it over the weekend,
22 really it is not factually applicable so I was inclined
23 to remove it. Any exception to that?

24 MS. KINZELER: No, ma'am.

25 THE COURT: Ill remove it.

1 MS. KINZELER: In the context of the defense not
2 arguing.

3 THE COURT: If you open the door, I'm going to put
4 you on notice, I put both sides on notice if you start
5 talking about stuff that we have either not discussed
6 in charge conference or I have redacted from an
7 instruction I reserve the right to address it. You
8 raise it before the jury, I'm going to address it, so I
9 don't want that to come as a surprise to you, if you
10 start raising things that are not addressed in my
11 instruction I'm going to, then I'm going to add to my
12 instructions because I can't leave it lingering in the
13 air without them having a benchmark to deal with it.

14 MR. MASON: Your Honor, we respectfully submit the
15 jury could disregard the testimony of Officer Brinson
16 and also not find Mr. Burrell to be credible and if
17 that were the case, as to how the accident happened,
18 they could certainly determine it was the deceased's
19 fault, which is the whole basis for us having included
20 the lesser included offense of first offense DUI.

21 THE COURT: There is no testimony that he was
22 simply drinking. The only testimony in this record is
23 that he registered .20, which is actually twice -- the
24 testimony was more than .20. Was my memory accurate?

25 MS. KINZELER: More than two and a half times.

1 THE COURT: Actually I said two times, when I did
2 my math it was more than two times. That is the only
3 evidence in the record regarding his blood alcohol
4 concentration. There is no evidence of a simple DUI.
5 Well, let me think about that for a minute. I will
6 think about it but I don't think the facts support it.

7 MR. MASON: Will you let me know before I have to
8 argue when we get back because we think that they could
9 find the accident wasn't his fault and still convict
10 him of DUI and that we're entitled to that.

11 THE COURT: The only evidence in the record
12 irregardless of the blood alcohol concentration is that
13 point of contact was where he crossed the centerline,
14 so there really, factually as the case stands there is
15 no other evidence objectively. That being -- I don't
16 know, I've got to think about it.

17 MR. MASON: Your Honor, we did get a copy of the
18 transcript from the court reporter, of the testimony
19 and I would like to direct the Court to some specific
20 pages of the two officers.

21 THE COURT: I have already read it over the
22 weekend.

23 MR. MASON: You're way ahead of me.

24 THE COURT: I like to be prepared but I also take
25 my notes plus I have one of those memories once I hear

1 it, but I usually go back and read it just to make sure
2 I'm accurate but I will think about it over the lunch
3 break.

4 MR. MASON: Thank you.

5 THE COURT: I'll mull it over in my head.

6 MR. MASON: Thank you, Your Honor.

7 MS. KINZELER: I have a brief answer.

8 THE COURT: Go right ahead -- well, actually do
9 you have any other objections to the instructions?

10 MR. MASON: Your Honor, the last, again I guess I
11 asked for the charge and you denied it, I don't need to
12 except, but we asked for a little more description of
13 the inference than perhaps --

14 THE COURT: Your charge is inadmissible comment on
15 the facts and my charge is an objective statement of
16 the law, it reflects the case law. I'm going to give
17 them a material statement of the law, and yours I think
18 crosses the line in terms of being an inadmissible
19 comment and asks me basically to tell the jury
20 something I don't think I should tell them.

21 MR. MASON: Are you going --

22 THE COURT: I have marked it as an exhibit but I'm
23 going to use my standard instruction.

24 MR. MASON: I understand, Your Honor, you're going
25 to tell them that the weight of the evidence includes

1 the ability to disregard scientific tests?

2 THE COURT: Actually I'm glad you said that. I'm
3 going to give them a general instruction on expert
4 witness testimony but I'm not going to tell them, it is
5 up to them to look at the record in its totality, you
6 can argue that if you want to, whether there is a
7 factual basis in the record for the opinion or
8 otherwise. If there is a factual basis they can draw
9 an inference or not draw an inference, they are the
10 fact finder.

11 I'm going to give them an expert instruction
12 regarding expert witness testimony, they can, if they
13 feel it is it outweighed by other evidence in the
14 record they can do that. Jurors give great amount of
15 weight to what the judge says and I'm not going to
16 cross that province and step back in a fact finding
17 hat. I was a fact finder for five and a half years and
18 I know when I'm crossing into that arena, which is
19 their province, fact finding, so I'm not going to make
20 any inadmissible comments. I generally instruct case
21 law and what the statute says, I stick with that. I
22 only charge the holding of the cases, so I'm going to
23 stick to that, it is tried and true, I have confidence
24 in it and it is real straightforward, the jury will
25 understand that.

1 I have marked your request, I'll note your
2 exception for the record.

3 MR. MASON: Thank you.

4 THE COURT: Any other exceptions to the charge,
5 from the defense?

6 MR. MASON: No, Your Honor.

7 THE COURT: Any argument regarding the defense's
8 request for lesser included of DUI?

9 MS. KINZELER: Yes, ma'am. Briefly, Your Honor,
10 we discussed earlier that perhaps in certain cases it
11 would be a lesser included. In this case, however, I
12 don't believe the facts at all support it. It has to
13 be supported by the facts in order to be charged.

14 In this case if the jurors were to not believe the
15 State's witnesses, and with the defense witnesses, all
16 the defense witnesses testified about all these people
17 said he wasn't impaired, but you can't then as a
18 defendant ask for an instruction for just DUI if the
19 record supports a finding of not that. If you instruct
20 DUI as a lesser included the record would have to
21 support it. Basically where there is no evidence the
22 defendant committed the lesser rather than the greater
23 offense it is inappropriate to offer that charge. That
24 is our position, Your Honor, there is no evidence to
25 support it. There is nothing in the record to support

1 that, he is either guilty of felony DUI or is not
2 guilty.

3 THE COURT: I think that is pretty much right.
4 Now, I doubt my opinion will wane over the luncheon
5 recess but I will think about it some more and let you
6 know after lunch.

7 MR. MASON: Your Honor, there is a recent case
8 that we didn't cite, October 3rd, 2011, in which our
9 court, Supreme Court cited the U.S. Supreme Court case
10 of Beck versus Alabana for the proposition that the
11 failure to give the jury a third option --

12 THE COURT: I'm familiar with the case and it
13 doesn't say anything new. It simply says when a lesser
14 included is supported by the facts the court can always
15 instruct it. Charges have to be factually supported,
16 and at this point I'm just not certain it is factually
17 supported in the record but I will think about it over
18 lunch.

19 MR. MASON: Thank you.

20 THE COURT: I'll note your exception for the
21 record in the event I don't instruct it.

22 Anything else before we break for lunch? From the
23 State?

24 MS. KINZELER: No, ma'am.

25 THE COURT: From the defense?

1 MR. MASON: No, Your Honor.

2 THE COURT: You all have a good lunch, I'll see
3 you at 2:15.

4 (Recessed at 1:05 p.m.).

5 (Resumed at 2:25 p.m.).

6 THE COURT: You may be seated.

7 I thought about the defendant's request for lesser
8 included of DUI. After giving it further contemplation
9 I'm still of the opinion it is not factually supported
10 by the record. If I follow the defense's logic
11 regarding the lesser included offense, that being that
12 the jury could conceivably disregard the testimony of
13 Deputy Brinson and that of Mr. Davilla, if they were in
14 fact to believe that, then he would be not guilty
15 because they then would be disbelieving he was the
16 proximate cause of the accident and therefore the
17 appropriate verdict would be not guilty because the
18 State would have failed beyond a reasonable doubt to
19 prove that element, that being proximate cause, and the
20 Court stands by its previous ruling and I will instruct
21 that he is either guilty of driving under the
22 influence, one, resulting in death or resulting in
23 great bodily injury, or not guilty.

24 Do you all want to look at the form of the
25 verdict?

1 MS. KINZELER: Yes.

2 MR. MASON: May I speak, Your Honor?

3 THE COURT: Yes.

4 MR. MASON: We would object to the inclusion of
5 the indictment because it includes the words reckless
6 driving, which are no longer --

7 THE COURT: I'm going to instruct the jury that is
8 what the indictment is, is simply a document by which
9 the case is brought before the court but technically
10 these verdict forms make it easier for them. Really
11 the indictment is supposed to go to the jury, they are
12 supposed to write guilty or not guilty on it.

13 I note your exception for the record, I'm going
14 to instruct them what an indictment is, it is not
15 evidence, if they need it, it is merely a notice
16 document, merely just the way a case is brought before
17 the court and they are not to draw any inferences from
18 any of the allegations that may or may not be contained
19 in it.

20 MR. MASON: We object to the proposed form of
21 verdict.

22 THE COURT: I'll note your objection. I will
23 stand by the previous ruling, I will give that
24 instruction. Until recently, we just started doing
25 verdict forms, the indictment always went back to the

1 jury, that is why there is a place on there for them to
2 write guilty or not guilty and they could sign it.
3 Sometimes that could be a confusing concept for them,
4 not being familiar with legal, forms of legal
5 documents, so we do verdict forms and attach those to
6 the indictment to make it easier and then we have a
7 foreperson sign them at the conclusion of the case but
8 I will give an instruction that instructs them that a
9 verdict, that an indictment is merely a notice document
10 by which the process is brought into court and is not
11 evidence of any of the allegations that it may or may
12 not contain. So I will note that and not find it is
13 prejudicial to the defendant in this way. It will be
14 fully explained to the jury, they will know exactly
15 what an indictment is.

16 Now, as I indicated, I am also going to give a
17 general instruction on expert witness testimony which
18 is given after the general instruction on how they are
19 to judge witness credibility and believability and
20 before direct and circumstantial evidence.

21 And after looking, I'm also going to instruct the
22 common law duty to keep your vehicle under control and
23 56-5-1900.

24 Is the State ready to proceed?

25 MS. KINZELER: Judge, can you say that one more

1 time?

2 THE COURT: I'm going to instruct on keeping
3 vehicle under control, a driver has a duty to keep
4 their automobile under proper control so they are able
5 to slow down, stop or turn the automobile to avoid
6 colliding with other vehicles, pedestrians and objects
7 on -- the more I think about that, I'm not sure --

8 MS. KINZELER: I think proper lookout might be --

9 THE COURT: No, I don't think either one of them
10 are applicable, and I thought about it some more, I'm
11 just going to charge the statute which says he has the
12 duty to keep his vehicle under proper control within
13 his lane, which really accomplishes both of,
14 encompasses both those common law duties.

15 Okay, ready to proceed for the State?

16 MS. KINZELER: Yes, ma'am.

17 THE COURT: From the defense?

18 MS. KINZELER: Your Honor, I have one brief
19 matter, if I may. Throughout this trial Mr. Mason has
20 referenced and attempted to get into evidence certain
21 things about prior bad acts, the wreck with the tree
22 and reckless driving. I just don't want to be in a
23 position I have to object during his closing.

24 THE COURT: I would instruct all of you that if
25 you need to make an objection you better make it

1 because if you don't it's not preserved and I'm not
2 going to rule after the fact, after argument is over
3 because I'm not going to remember, that is unfair to
4 me, and I will take it up at at that time. I think
5 everyone is clear, you only argue what is in the
6 record.

7 MS. KINZELER: Thank you, Your Honor.

8 THE COURT: You're only allowed to argue evidence
9 in the record. Is everyone clear about that?

10 MS. KINZELER: Yes, ma'am.

11 MR. MASON: Yes, Your Honor.

12 THE COURT: Please bring in the jury.

13 (The jury returned to the courtroom).

14 BAILIFF: All the jury is present, Your Honor.

15 THE COURT: You may be seated.

16 Ladies and gentlemen, I hope you enjoyed the lunch
17 recess. Both the State and defense has rested their
18 case. We have now reached the stage of the trial where
19 we have closing argument and instruction. You will
20 hear from the defense, followed by the State, then you
21 will hear the Court's instruction. I will gauge how
22 long we're taking and we'll take breaks at the
23 appropriate time, I will gauge how often you all need
24 to have a break so you do not get unduly fatigued
25 during this process.

1 Also bailiffs should be instructed no one, there
2 is to be no movement during this courtroom during
3 argument or the Court's instructions. If there is I
4 will handle it. So, everybody needs to keep their
5 seat. It is very distracting to the jury when there is
6 movement in the courtroom during argument and it is
7 also discourteous to counsel.

8 Ladies and gentlemen, I would ask that you give
9 the attorneys your undivided attention.

10 You may proceed when you're ready, Mr. Mason.

11 MR. MASON: May it please the Court.

12 THE COURT: Yes, sir.

13 MR. MASON: Prosecutors.

14 Ladies and gentlemen of the jury, at the beginning
15 of this case I told you that in order to convict Doug
16 Barclay of felony driving under the influence the State
17 had to prove beyond a reasonable doubt that he caused
18 this accident and that he was materially and
19 appreciably impaired. Mr. Barclay did not cause this
20 accident, he was not materially and appreciably
21 impaired, it is our position that the State has not
22 carried its burden of proof in this case.

23 The State's burden of proof in this case is the
24 highest burden of proof that is known to the law. The
25 reason for this is that this is a criminal case and Mr.

1 Barclay's liberty is at stake. The burden of proof is
2 not met by Deputy Brinson testifying about what he
3 thinks he knows based on assumptions. It is burden of
4 proof, it is not what the State thinks happened, it's
5 what they can prove to you happened beyond a reasonable
6 doubt. Deputy Brinson's opinions are not fact, they
7 are opinions. Opinions are subject to interpretation,
8 opinions are subject to criticism.

9 You are entitled as the fact finders to form your
10 own opinion of the same facts that Deputy Brinson
11 determined. You are entitled as the finders of fact to
12 disregard opinions if they do not match up 100 percent
13 with your interpretation of the facts as you find them.
14 If a fact leads you to a different conclusion or raises
15 a question about Deputy Brinson's opinion, then you
16 have doubt as to the opinion of Deputy Brinson.

17 Just as I'm an advocate for my client, Deputy
18 Brinson is an advocate for the State's case. He made
19 an assumption and now he wants to convince you his
20 assumption is correct. The State has made a charge and
21 now he wants to convict Doug Barclay.

22 Deputy Brinson and Burrell had already decided how
23 this accident happened by the time they arrived at the
24 hospital. You heard Deputy Burrell testify that he
25 told Doug he had been in a crash and that Doug had

1 killed someone, not that there had been an accident and
2 somebody had died. He was much more specific than
3 that. Before pen had even been put to paper, before
4 the measurements they gathered at the scene had been
5 critically analyzed, before taking witness statements
6 from anyone about anything, Deputy Brinson and Deputy
7 Burrell told Mr. Barclay he killed someone. Within
8 hours the State's police agents made up their minds and
9 were proceeding on a course to prove to you what they
10 felt to be true but what they believed is not fact, it
11 is opinion. It is not what you think you know, it is
12 what you can prove beyond a reasonable doubt.

13 I like to think there might be life somewhere out
14 there in this galaxy based on all the circumstances
15 like vastness of space, possibility of water in the
16 form of ice on Mars, based on meticulous theoretical
17 calculations by very smart astrophysists and similarly
18 sized planets, but that doesn't mean life exists on
19 another planet. We still have no proof this is a fact.
20 It remains an opinion, a mere belief, no matter how
21 much we want to believe.

22 Of all the witnesses who testified in this trial,
23 there were two did not, but they are in fact the most
24 powerful and convincing witnesses of all. They should
25 be called in every trial, the names of common sense and

1 human nature. To forget your common sense and human
2 nature would be a dereliction of your duty as jurors
3 and you should give great weight to each of them and
4 they can tell you how this case was handled by the
5 police investigating the case, from the first officer
6 on the scene, to the last person at STED.

7 It's human nature to make a mistake, we all do it.
8 But the prudent person learns from their mistakes. The
9 State makes the rules and the procedures and it must
10 follow the rules. So when they admit to violating
11 their own procedures that is a big deal, it's not a
12 little deal, especially in a case where they seek to
13 put a man in prison. Mistakes are fatal to the State's
14 case. This case is about jumping to conclusions,
15 making mistakes, relying on assumptions and violating
16 procedures.

17 Deputy Brinson formed his opinion about how this
18 accident happened based on what he investigated but he
19 only looked at what he wanted to look at and it is not
20 as if he weighed and disregarded some of the
21 information he gathered. Now, what has happened and
22 what the testimony showed is that rather than do a full
23 and thorough investigation he gathered what he thought
24 he needed to prove this preformed belief, his
25 preconceived notion in order to fit that into the facts

1 and when they don't fit it is easier to ignore the
2 facts than change the preconceptions. The police had
3 to solve this case and it was easier to charge Doug
4 than do a thorough investigation.

5 What Deputy Brinson didn't do is why you must
6 doubt his opinion. He failed to gather some critical
7 information. He testified he did not take witness
8 statements because there were no witnesses. When I
9 reminded him that Mr. Davilla was on the scene of the
10 accident he tried to draw a distinction between Mr.
11 Davilla being a witnesses and a passenger in the
12 accident. When I reminded him he took down Brian
13 Woods' name and contact information he indicated to me
14 Brian Woods' only involvement was to look for a dog and
15 that he never contacted Brian Woods for a statement.

16 I want to review some of the testimony with you.
17 The State called St. Paul firefighter Michael Sanders.
18 He testified that he was the first person to the scene
19 and that no one else was at the scene. You know that
20 is not true because the uncontroverted testimony of
21 both Brian and Ray Woods was that they were the first
22 at the scene.

23 How do you test the veracity of this? Brian Woods
24 testified that he drove his father's small white pickup
25 truck to the end of Point of Pines Road to meet

1 emergency responders to direct them to the accident
2 site. Sanders confirmed this when he testified that
3 the vehicle he was riding in stopped and conversed
4 briefly with a man in a small white truck.

5 Sanders claims that when he got to the Geo that
6 Jose Davilla was still in the passenger seat. You know
7 this is not true because the uncontroverted testimony
8 of Ray Woods is that before his son Brian drove up to
9 meet emergency responders Ray Woods had helped Mr.
10 Davilla out of the Geo. Moreover, Mr. Davilla
11 testified people passing by on the street saw the
12 accident and stopped to help. He described these
13 people as, quote, "A young guy maybe 18 years old and
14 an old man 50, I think it was a son and a father, they
15 helped me with my arm get out of the vehicle."

16 Now, Michael Sanders came in here and he testified
17 that he witnessed Doug being very loud and very angry.
18 He never wrote this down but related it after he was
19 contacted by the prosecutor's office.

20 You heard from Louis Sease, Erica Gatch, Brian
21 Woods and Ray Woods. Not one of them testified that
22 Doug was anything but calm at the accident scene.
23 Unbelievably, after never having spoken to anyone
24 about this accident, Michael Sanders comes out of the
25 woodwork and testified for the State that it was Mr.

1 Sanders who helped Mr. Davilla out of the car. Who do
2 you believe, the person who actually helped Mr.
3 Davilla, the person that was actually helped, or the
4 person who wants to come across as a hero? I think you
5 know the answer to that question. I respectfully
6 suggest that Michael Sanders is not to be believed and
7 you should disregard his testimony.

8 Brian Woods lived on Edisto Island with his
9 father, on Point of Pines Road, at the time of this
10 accident. Brian and his father were the first to
11 arrive at the scene. Brian Woods walked up to the
12 truck, helped Doug out of the truck, saw he was safe,
13 sat him on the ground, drove his white truck to the end
14 of Point of Pines Road to make sure EMS did not miss
15 the turn.

16 He testified about Doug's appearance. I quote.
17 He testified that Doug appeared like he had just been
18 in a terrible accident. Doug was concerned about what
19 just happened, he had a coherent conversation with
20 Doug. "Every time I asked Doug a question Doug
21 answered correctly, he knew where he was, he knew he
22 had been in an accident."

23 Now compare and contrast this with the testimony
24 of Deputy Burrell who testified that when he spoke with
25 Doug at MUSC four hours after the collision and told

1 Doug he had been in a crash Doug said, "I haven't been
2 in a GD crash." Compare and contrast that with the
3 testimony of Deputy Luckadoo who said he recalled Doug
4 saying he was not in a wreck. Doug knew there had been
5 an accident from the moment it happened.

6 Brian Woods testified he gave his contact
7 information to the police at the scene, he gave his
8 name and address. No one spoke to Brian Woods from the
9 prosecution until October 6, 2011. The State did not
10 call him as a witness. His testimony does not support
11 the State's efforts to convict Doug Barclay. He was a
12 witness that the State should have called but did not.
13 He had evidence that the State should have presented
14 but it did not.

15 Ray Woods testified that he felt he had helped
16 Jose Davilla get out of the Geo, this was confirmed by
17 Mr. Davilla. Ray Woods testified that he was at the
18 Geo, quote, it smelled like alcohol everywhere. Ray
19 Woods testified that Jose Davilla kept walking around,
20 Ray could not get him to sit down. Ray testified that
21 Jose Davilla smelled like he had been drinking. He
22 testified that he was three feet away from Doug Barclay
23 and Doug Barclay appeared like someone who had been
24 knocked around in an accident. He was looking for a
25 cigarette and shaking.

1 Ray testified that the hunter got there before the
2 firefighters. He was a witness that the State should
3 have called but did not. He had evidence that the
4 State should have presented but did not.

5 Louis Sease doesn't know anybody connected with
6 this case whatsoever, he is a totally independent
7 witness, lives on Young Island, married, retired
8 Prudential Insurance agent, avid deer hunter, hunting
9 on Point of Pines Road on the day of the accident. Mr.
10 Sease testified he did not hear any yelling or
11 screaming. He testified he saw Doug, he testified Doug
12 appeared to have been in an auto accident, Doug was
13 standing upright, Doug did not seem to be unsteady on
14 his feet. Mr. Sease did not see anything that led him
15 to believe that Doug had been drinking. Again, he was
16 a witness that the State should have called but did
17 not. He had evidence the State should have presented
18 but did not. I presented that evidence to you.

19 Erica Gatch. She testified this morning that she
20 lived on Clark Road and was on the way to clean houses
21 when this accident happened. She got within five or
22 six feet of Doug, she stayed at the scene, she assisted
23 in calling Rebecca Borders, Doug's wife, to let her
24 know Doug had been in an accident. What is the
25 rational thing a right thinking person does when they

1 are in a accident? They get somebody to tell a family
2 member. It would be totally inconsistent with what the
3 State wants you to believe, which is that Doug didn't
4 even know he had been in an accident. He knew who his
5 loved ones were, he knew where they were located and he
6 knew how to get in touch with them and he asked that
7 they be contacted.

8 Erica Gatch also related something and that is
9 that in the three years that she lived on this road,
10 that Doug was a slow driver and that he passed her and
11 waved at her for three years. Again, this is where
12 Doug works on a farm, has animals, feeds the animals
13 twice a day, went back and forth on this road for ten
14 years.

15 The State would like you to believe that all of a
16 sudden on December 8th, 2008, Doug Barclay threw
17 caution to the wind and somehow converted from his
18 normally slow driver that waves at people on this
19 country road, to something else. I submit to you that
20 this at the time was a 57 year old man, now a 60 year
21 old man who had never been in trouble a day before in
22 his life, who enjoyed this low country ride on the way
23 home.

24 Deputy Luckadoo testified, he was the first law
25 enforcement officer on the scene. He testified he

1 doesn't recall anyone being there except fire and
2 ambulance. He testified, this is important, there were
3 no civilians on the scene. He went so far as to say no
4 one could access the scene due to fire and EMS. You
5 know this is not true because you heard from Ray Woods,
6 Brian Woods, Louis Sease, Erica Gatch, all civilians at
7 the scene. And Jose Davilla said there was civilians
8 at the scene.

9 Deputy Luckadoo testified that while he did not
10 speak to Doug, he was able to observe him. Based on
11 his observations he testified that from five feet away
12 he could smell alcohol, that Doug's speech was slurred
13 and Doug was incoherent. So the seed was scattered.

14 Brian Woods, first person on the scene with Doug,
15 said he carried on a coherent conversation with Doug,
16 Doug knew he had been in an accident, Doug answered
17 every question correctly.

18 You heard testimony from EMS paramedics Benjamin
19 Troup, that was the EMS paramedic who attended to Doug
20 Barclay. He testified that Doug was bleeding from the
21 bandage on his head, that Doug was oriented to person,
22 place and event and that he did that test with Doug
23 every 15 minutes from the time he was first with Doug
24 at the scene, all the way until the ambulance got to
25 the medical university. He testified that he was

1 thirty some inches away from Doug on a bench in the
2 ambulance the entire trip. Doug was on a paraspine
3 board, he was cooperative, no indication from Benjamin
4 Troup that Doug was materially and appreciably impaired
5 from the consumption of alcohol.

6 MUSC ER nurse Heath testified that Doug had a
7 three inch laceration on his head and that Doug was
8 cooperative.

9 Deputy Martin indicated in his testimony that Doug
10 had a gash on the back of his head.

11 Deputy Luckadoo, Charleston County Sheriff's
12 office deputy that had gathered evidence for Deputy
13 Brinson before he arrived testified that Doug had a,
14 quote, scratch on his head. Scratch. Who do you want
15 to believe? You need to recognize this as the
16 beginning of a consistent thing with the Charleston
17 County Sheriff's office, beginning with Luckadoo, which
18 persisted to this day in an effort to prove their
19 incorrect theory that Doug Barclay caused this accident
20 and that Doug Barclay was materially and appreciably
21 impaired by alcohol. The theme is to convict Doug even
22 if they have to stretch the truth and manipulate the
23 facts in their favor or even violate procedure.

24 As we go through the testimony you can't help but
25 notice that the observations of regular people and

1 medical personnel differ greatly from the observations
2 of law enforcement. Let me give you an example.
3 Regular people, coherent conversation with the first
4 persons on the scene, according to good Samaritans,
5 medical persons.

6 According to law enforcement we have an incoherent
7 person who testified he, who stated he did not know he
8 was in an accident. One inconsistency, law enforcement
9 has testified in this case that no people other than
10 law enforcement and emergency people were on the scene.
11 This is not true. However, it is necessary for law
12 enforcement to convince you of this if they are to
13 convince you of their case. The purpose of their
14 incredible effort to control information is because
15 these people, these regular people and medical
16 personnel contradict law enforcement's version of
17 events every step of the way.

18 Deputy Brinson. Deputy Brinson was not on duty on
19 December 8, 2008. He received a call to respond to a
20 fatal accident on Edisto Island. He drove from
21 Summerville to Edisto Island. That trip took about an
22 hour and 15 minutes. By the time he got to the scene
23 the only witnesses to the accident, Jose Davilla and
24 Doug Barclay, had been taken to MUSC for medical
25 treatment.

1 When Deputy Brinson got to the scene he learned
2 there were two vehicles in a collision, the first
3 person he talked to was Deputy Luckadoo, the deputy who
4 testified that Doug had a scrape on his head. It was
5 Deputy Luckadoo that told Deputy Brinson there was
6 alcohol involved, so the seed was planted. At this
7 point Deputy Brinson had an automobile collision on a
8 dark rural road, a human being who had died,
9 allegations of alcohol. The seed began to grow as he
10 looked for evidence to support his preconceived notion
11 that the accident was caused by the driver of the truck
12 and that the accident was caused by somebody who was
13 materially and appreciably impaired by alcohol.

14 He had to gather evidence of two things to build
15 his case. One, that he caused the accident. Two, that
16 Doug was materially and appreciably impaired by
17 alcohol. Without either of these elements he did not
18 have a case, so what did he do? Deputy Herman Martin
19 was dispatched to MUSC to meet Doug. By about 8:30
20 p.m. it was determined Doug would be charged with
21 felony DUI. Deputy Martin was with Doug at MUSC for 45
22 minutes. During this time what did deputy Martin say?
23 Deputy Martin said Doug was cooperative, Doug was not
24 screaming or yelling, Doug seemed to understand a
25 series of complicated legal rights which were explained

1 to him by Deputy Martin.

2 According to Deputy Martin Doug's conduct at MUSC
3 was in every way appropriate. Deputy Martin did not
4 tell Doug anyone had died in the accident. Deputy
5 Martin's testimony does not support the conclusion Doug
6 was materially and appreciably impaired by alcohol when
7 he was in MUSC. Deputy Martin did not testify he
8 believed Doug was under the influence. That's very
9 significant. A member of law enforcement came in here
10 and with his colleague sitting at counsel table, at the
11 prosecutors' table, he came in and told you the truth.

12 Back at the accident scene Deputies Brinson and
13 Burrell were marking the scene with orange paint. They
14 painted places on the ground which they thought
15 represented marks made by the vehicles during the
16 collision. Deputy Brinson testified that he was taught
17 the investigation of an accident must be as thorough as
18 any criminal investigation. He also agreed that like a
19 criminal investigator, he had to seek out and evaluate
20 all available pertinent facts. However, when he was
21 asked about jumping to snap judgment his testimony was,
22 "I couldn't say that." When asked if he was taught to
23 never form a conclusion regarding the cause and
24 circumstances of the accident until all the facts had
25 been properly evaluated he replied, "They taught us how

1 to investigate accidents."

2 Well, what did he say? Deputy Brinson testified
3 that one of the things he was taught to do was to mark
4 and match the gouge marks in the road with the portion
5 of the vehicle that caused the gouge marks and that one
6 way to do that was to photograph and inspect the
7 undercarriage of the vehicle as it is placed on the tow
8 truck. He admitted that no photographs of either
9 vehicle's undercarriage was taken. He admitted that no
10 matching marks to specific vehicle or vehicle component
11 took place.

12 Deputy Brinson testified there was no scale
13 drawing. He admitted that scale drawings will locate
14 not only the vehicles at their time of rest but any
15 other marks in the road, gouge marks, scrapes, debris,
16 that it is part of an accident reconstruction. Scale
17 drawing was not done in this case, they did not bother
18 to match the parts of the vehicle with different marks
19 in the roadway. Deputy Burrell testified that in most
20 fatality cases they prepare scale drawings.

21 They estimated speed. Speed of the Geo was
22 estimated at 34, 35 miles per hour and the speed of the
23 truck was estimated at 40 miles an hour. Deputy
24 Brinson testified that the truck flipped over two or
25 three times before it got to it's final resting

1 position. An accident reconstruction, which is a
2 science, two or three times is not scientific.

3 Deputy Brinson testified that he recorded the rear
4 track, in other words, the width of the rear of the
5 Chevrolet truck to be ten foot nine inches wide.
6 Deputy Burrell confirmed during his testimony that
7 would be wider than the lane itself.

8 Deputy Brinson did not do a crush analysis to
9 determine the point of impact. He testified he was not
10 trained to do crush analysis. If you don't know how
11 far the vehicles crush together how do you know the
12 point where they first impacted, because vehicles
13 impact and crush together before they reach what is
14 called maximum engagement. This can be six to ten feet
15 away from maximum engagement and I submit to you a case
16 of a foot or two feet one way or the other makes a big
17 difference. They never painted or marked in the
18 roadway the initial point of contact. This is because
19 they never located the initial point of contact in the
20 roadway.

21 The collision is what is called an offset frontal
22 collision. A head-on collision would be just that,
23 head-on. Offset frontal collision is driver side to
24 driver side, it is not head-on, it is offset. They did
25 not determine the geometry of the collision to

1 determine how the violent forces of the collision would
2 cause these vehicle to move to their final resting
3 position.

4 In a violent crash you need testimony, in a
5 violent crash, as this was, you heard testimony that
6 any type of movement is possible. Deputies Brinson and
7 Burrell incorrectly identified the eastbound and
8 westbound lane despite the fact that they both admitted
9 that the uniform traffic collision manual calls for
10 them to use the actual compass direction of travel.

11 Some of their other measurements were tied to
12 their incorrect compass directions. They gave you no
13 information, this is important, from which you could go
14 back into that jury room, take out a pad and a piece of
15 paper and scientifically and mathmatically determine
16 precisely how this accident happened or precisely where
17 the vehicles were in the 200 feet before collision or
18 at the initial point of contact.

19 Now, you're allowed to look at anything you want
20 to look at that goes on in this courtroom while
21 testimony is going on in front of you. Perhaps some of
22 you noticed Deputy Brinson giving hand signals to
23 Deputy Burrell while he testified. Did he want to
24 convict Doug Barclay that badly?

25 Now, they identified markings in Doug's lane of

1 travel which, depending upon which truck tire caused
2 the mark, indicated Doug's truck was in its own lane.
3 I would like to show you that. Now, if you look at
4 this, this is marks, they go like this. This is where
5 the law enforcement painted the marks, they go from
6 this location in Doug's lane, all the way to where the
7 front left driver's side tire of the Geo is. Again,
8 I'm sorry, of the truck. Watch my finger.

9 Now, I asked Deputy Burrell, "When you
10 photographed the tires, can you show me which tires
11 made that mark?" He said first of all that would have
12 to be made by a tire. I asked him whether if a tire is
13 skipping along the road like that would you expect it
14 to gouge the asphalt, and I showed him this picture.
15 He said that a tire, a tire wouldn't cause that, he
16 said that had to be caused by some scraping.

17 That picture is the driver's side tire of the
18 truck. Again, these gentlemen were not at the scene of
19 the accident. They go down there and they locate marks
20 in the road. This is a big truck, if there was a
21 collision that occurred in Doug's lane that then caused
22 his truck to get out of control, to skid like this and
23 end up where it is, and to scrape its tire along in its
24 own lane to point of time of rest, why isn't that as
25 logical an explanation about how this accident happened

1 as the assumptions and guesswork of Deputy Brinson?

2 Now, you will also recall that Deputy Brinson
3 testified there was no braking before this accident and
4 you remember he did two things, he showed you that if
5 there is braking or downward forces you can have a V,
6 where the vehicle goes down into a V. He also said
7 where there is no braking there can be uplift, okay, so
8 it is certainly logical that this accident, initial
9 point of contact was in Doug Barclay's lane of travel,
10 that the much heavier truck caused the Geo to move,
11 forced it back in the direction in which it was coming
12 from and the Geo landed, made whatever marks it made,
13 the truck traveled on in its own lane until it skidded
14 out of control and came to final rest just like I
15 showed you in that picture.

16 Now, let me tell you one of the things totally
17 inconsistent with how Deputy Brinson claims this
18 accident happened. If, where I showed you on that
19 picture, if I can put it up one more time, please, if
20 this mark is the right rear, is the rear truck tire,
21 driver's side rear truck tire, right rear truck, then
22 there is no way this would have been an offset frontal
23 collision, it would have been a dead head-on collision
24 because if that is how it occurred the entirety of Mr.
25 Barclay's vehicle would have had to be in the other

1 lane.

2 We know by looking at the pictures of the accident
3 that this was not a head-on collision. It was, as I
4 stated, an offset frontal collision where only a small
5 portion of the front of Mr. Barclay's vehicle, the Geo
6 collided with a small portion of the front part of Mr.
7 Barclay's vehicle. If it was a head-on collision you
8 would see damage in the center and on the passenger
9 side of the Geo. You only see the offset damage and
10 this is why it's totally consistent that this is the
11 left rear tire of the truck, that the truck went just
12 like this, that the Geo hit and was lifted up in some
13 way. I mean, these vehicles are coming toward each
14 other, they are closing the gap, remember, at 102 feet
15 per second.

16 Deputy Brinson agreed it would be impossible for
17 him to determine precisely where either vehicle was in
18 the roadway within 300 feet of where there is a mark in
19 the road because if the vehicles do not leave skid
20 marks, they are just riding over asphalt and that there
21 was no braking and that if either driver steered prior
22 to the wreck it would not leave a mark in the road.
23 Steering is an evasive maneuver, as is braking.

24 Deputy Brinson testified he did not know whether
25 or not Mr. Garcia's vehicle came into Mr. Barclay's

1 lane at some point before they collided. They did not
2 rule out that Mr. Garcia, an inexperienced, unlicensed
3 driver caused this accident. This is precisely why the
4 State needed to get the testimony of Jose Davilla,
5 testimony it took them over two and a half years to
6 procure.

7 Deputy Brinson was asked if any movements of the
8 vehicles are possible because you have speed, you have
9 momentum, all these things going on, that essentially
10 makes anything possible. That was his testimony,
11 anything is possible. If the State cannot prove to you
12 exactly what happened in this accident they have failed
13 to carry their burden of proof. It is their
14 responsibility to show you how the accident happened.

15 Now, Deputy Brinson testified that people who have
16 information about how an accident happens must be
17 identified and questioned for the purpose of obtaining
18 witness statements, preferably written statements. The
19 passenger is a witness. Neither Deputy Brinson or
20 Deputy Burrell obtained a statement from Mr. Davilla,
21 they said it was because they couldn't locate him, not
22 withstanding Mr. Davilla was upstairs at MUSC at the
23 same time the deputies were at MUSC to meet with Mr.
24 Barclay.

25 Now, when I asked Deputy Brinson whether he

1 determined whether Mr. Garcia had a South Carolina
2 driving license he indicated first he didn't determine
3 that. Well, in a similar traffic ticket situation what
4 is the first thing a police officer says to you, or
5 does in any case? They get a license and registration.
6 After much questioning Deputy Brinson acknowledged Mr.
7 Garcia didn't have a driver's license, he had a Florida
8 identification. Deputy Burrell checked to see if Mr.
9 Garcia had a South Carolina drivers license, Mr. Garcia
10 did not. If Mr. Garcia was not legally operating his
11 motor vehicle at the time of this collision this
12 accident would have never happened.

13 There are too many indefinite factors to permit a
14 conclusion to be reached after the fact. This case
15 represents an unsuccessful attempt to reconstruct what
16 happened by persons who were not there and who want to
17 base their opinion on the position of the cars after
18 they came to rest. Because there is no evidence of the
19 movement of the vehicle before the collision the State
20 has been unable to carry its burden of proof, so they
21 tried to get Jose Davilla to testify. I submit to you
22 the reason it took two years and ten months to bring
23 this case to trial is a lack of evidence.

24 Let's talk about Mr. Davilla. Jose Davilla is not
25 a credible witness. I recognize as I stand here that

1 you fully expect me to take that position. You expect
2 me to call in question everything Mr. Davilla said.
3 Rather than me doing that let me point out to you the
4 things he said and let you draw your own conclusion
5 about whether he is to be believed.

6 It is Mr. Davilla's testimony that the State
7 relies upon to send Mr. Barclay to prison. You know it
8 has been our position from the moment I first stood up
9 and spoke to you at the beginning of this trial that
10 Doug did not cross the center line and did not cause
11 this accident. The State wants you to believe Mr.
12 Davilla. If you do not believe Mr. Davilla you cannot
13 convict.

14 Officer Brinson testified that Mr. Davilla was
15 involved in an accident, would have loved to have had
16 his side of the story. What did Mr. Davilla say? He
17 testified that a police officer at the scene asked him
18 what happened in the accident. Mr. Davilla testified,
19 told him not that he did not know but, rather, and I
20 quote, "I told him I can't explain it to you because I
21 can't breathe." Compare that to the testimony of the
22 EMS medic who treated Jose Davilla at the scene, Joshua
23 Sims.

24 Joshua Sims recorded in his report which he
25 prepared immediately after the accident, and I quote,

1 "The patient is alert to person, place and time but is
2 unable to recall the events immediately prior to or
3 after the event." And then you recall when the
4 prosecutor asked Mr. Davilla, or Mr. Sims, I'm sorry,
5 "Can you clarify to the jury was it his inability to
6 remember or could he just not articulate it to you?"
7 Paramedic Sims' response was it to was an inability to
8 remember.

9 Remember what Mr. Davilla testified? A police
10 officer asked him what happened in the accident. "He
11 told him, "I can't explain it to you because I can't
12 breathe." He had enough breath to speak ten words,
13 none of those words were, "That man came in my lane,"
14 none of those words were, "That man crossed the center
15 line." The ten words he claims to have spoken were, "I
16 can't explain it to you because I can't breathe."

17 Mr. Davilla also told you he had a conversation
18 immediately after the accident with his boss George
19 Dossett on the cell telephone. He said, Mr. Davilla
20 said, and I quote, "I did not speak," and this
21 conversation was in English, you recall Mr. Dossett
22 does not speak Spanish, "I did not speak very long, I
23 just talked to my boss, I explained to him that we had
24 had an accident there by the old post office." Now,
25 this was before the paramedics arrived.

1 Other witnesses have testified Mr. Davilla was
2 walking around the scene using his cell phone. Mr.
3 Davilla testified that during this conversation with
4 Mr. Dossett, he said, quote, "I needed to explain to my
5 boss what had happened but I did not do it well because
6 he said where, and I tried to explain it to him, but he
7 went to another place, another post office, there is
8 two of them."

9 Mr. Davilla claims not to have had enough breath
10 to tell medic Joshua Sims that he, what had apparently
11 happened, although he had enough breath to have a
12 conversation with his boss and to answer properly every
13 other question put to him by medic Sims. I submit to
14 you that Mr. Davilla's statement recorded by Joshua
15 Sims that he did not know how the accident happened is
16 true. I submit to you that his testimony in this court
17 about how the accident happened is a recent fabrication
18 designed to please the prosecution, of whom Mr. Davilla
19 is a friend. In fact, when you consider Mr. Davilla's
20 testimony as a whole it is not credible. He testified
21 on direct, "We went on that street to get home faster."
22 And I asked him on cross examination, "Did you testify
23 that on December 8th you took that Point of Pines Road
24 to get home faster?" He responded, "No, I never said
25 it."

1 Another example. Mr. Davilla testified, "We saw
2 there was a light that lit up the street and my friend
3 asked me what is that, why is the street, why is the
4 street lit up? I told him I don't know and suddenly we
5 saw a gray truck." They apparently, according to the
6 testimony, see a truck coming, had a conversation to
7 that. Well, that is not credible. This would have
8 occurred before they had this conversation. At the
9 speed they were traveling they would have traveled a
10 couple hundred feet in the time it would have taken to
11 even ask and respond to such questions.

12 For example, Mr. Davilla testified he does not
13 have a driver's license. He also testified he drives
14 right to the store like a block to buy something in an
15 emergency. Melody Bailey testified she has seen Jose
16 Davilla driving his pickup truck with a trailer and a
17 lawnmower on it. You cannot believe Mr. Davilla, he is
18 not credible.

19 Another example. Mr. Davilla told you that he
20 dranked one beer at his cousin Jose Licon's house
21 before this accident. This was the Bud Light beer can
22 found in the passenger side of the Geo. Jose Davilla
23 first testified he drank the beer inside the house,
24 then he testified he drank the beer outside the house,
25 then he testified that he took it in the car and did

1 not want to throw it on the street because he could get
2 a ticket for littering. You have to ask yourself is
3 this a credible explanation of how the beer got in his
4 car. I submit he took one for the road and made up an
5 elaborate story so he would not get in trouble.

6 Another example. Jose Davilla testified that as
7 they approached the curve where the accident happened
8 the headlights of the truck were in his eyes. Despite
9 that fact and despite his questionable explanation for
10 why he did not tell Medic Sims what happened in the
11 accident, Mr. Davilla now wants you to believe his
12 testimony that he was able to position the truck in his
13 lane in the split second before an offset frontal
14 collision occurred. His testimony on this issue is not
15 credible. Think about this. The lights from Doug's
16 truck would also be in Mr. Davilla's eyes if Mr. Garcia
17 had drifted across the center line.

18 Ladies and gentlemen, think about Mr. Davilla's
19 predicament. He did not know how the accident
20 happened. His friend had died, he is not from this
21 country. Maybe he is suspicious of and fears the
22 police, maybe he goes to great length to avoid
23 contacting them.

24 On October 7th, 2010, Mr. Davilla gave a truthful
25 and sworn statement called an affidavit that he did not

1 want to be a witness. The prosecutor pointed out while
2 waving around the affidavit that it does not say that
3 the accident was not Doug Barclay's fault. The reason
4 that that statement is not in the affidavit is because
5 Mr. Davilla could not say one way or the other how the
6 accident happened. The affidavit is correct and
7 truthful, it does not state Mr. Davilla knows things
8 which he does not know. He is not a witness if he does
9 not know how the accident happened. The affidavit
10 states that he does not want to be a witness in a
11 criminal case where someone could go to prison, which
12 makes perfect sense, given the fact that Mr. Davilla
13 did not know how the accident happened.

14 Over two years go by from the date of this
15 affidavit, I'm sorry, a year goes by from the date of
16 this affidavit and that is when Mr. Davilla is
17 approached by the representatives of the prosecution
18 and he is told he has to come testify, his friend has
19 died, he has to come testify. But the fact remains he
20 does not know how the accident happened. It will not
21 help the prosecution if Mr. Davilla tells the truth
22 that he does not know how the accident happened. I
23 doubt that anybody from the prosecutor's office asked
24 Mr. Davilla to tell a lie but consider whether Mr.
25 Davilla thought something bad would happen to him if he

1 did not cooperate with law enforcement. Do you think
2 that Mr. Davilla thought if he did not do what law
3 enforcement wanted to do he would be arrested? What we
4 do know is that Mr. Davilla testified he talked to his
5 friend Joe Murray, Mr. Murray was in the Army, in
6 authority there, and Mr. Davilla asked Mr. Murray,
7 quote, what could happen if Mr. Davilla did not come
8 testify. You can find from this that Mr. Davilla was
9 obviously concerned about what would happen if he did
10 not testify. Why did he ask Joe Murray what would
11 happen if he did not testify unless he was concerned
12 about the consequences of not doing so? He didn't ask
13 Joe Murray for directions to the courthouse, he was
14 asking what would happen if he did not come to court.
15 I submit to you that Mr. Davilla thought that he would
16 be in trouble if he did not testify against Mr. Barclay
17 and this is true whether or not a representative of law
18 enforcement expressly told Mr. Davilla he would be
19 arrested if he did not testify.

20 Over two years after the accident law enforcement
21 drove Mr. Davilla around in an unmarked police car,
22 taking pictures, going to visit witnesses, witnesses
23 they had not met with for two years and the State did
24 not call in this case, like Brian Woods. After being
25 approached by law enforcement Mr. Davilla told Melody

1 Bailey, the witness who is the manager for Habitat for
2 Humanity, that Mr. Davilla thought he would be arrested
3 if he did not testify against Mr. Barclay. This took
4 place in the Horizon convenience store, Mr. Davilla
5 sought out Melody Bailey and told her this.

6 In this case the State must explain away Mr.
7 Davilla's statement to Paramedic Sims. The prosecution
8 wants you to believe there must have been some language
9 barrier involved in Mr. Davilla's inability to recall
10 what happened before, during or after the accident. If
11 they cannot get you to believe that Mr. Davilla really
12 knew how the accident happened but he could not
13 communicate it because of a language barrier Mr.
14 Davilla's testimony that he, quote, now knows how the
15 accident happened is not believable. The law does not
16 allow you to send a man to prison based on his
17 testimony.

18 MS. KINZELER: Objection, Your Honor.

19 THE COURT: Sustained. Ladies and gentlemen, you
20 are to disregard Mr. Mason's last comment. You are to
21 give absolutely no consideration to it in your
22 deliberations. Punishment is not a, is not for your
23 consideration.

24 Go ahead.

25 MR. MASON: The State knows it cannot prove its

1 case unless it can explain away the fact that Mr.
2 Davilla did not know what happened before, during or
3 after the accident. Mr. Davilla is not a limited
4 English proficient individual, he speaks and
5 understands English. You heard Mr. Murray tell you
6 that. There is no language barrier which prevented Mr.
7 Davilla from receiving medical care, no language
8 barrier which prevented Mr. Davilla from calling his
9 boss, he has lived in this country for 28 years,
10 residing in California, Florida and South Carolina. He
11 drives a car, rents a home, operates a business,
12 operates an automobile, speaks English. No language
13 barrier has prevented him from doing all these things
14 and more importantly than that Medic Sims, the person
15 who talked to him and said there was, the person who
16 talked to him said there was no language barrier.

17 You recall that Medic Sims also worked in southern
18 California where he provided paramedic services to the
19 Spanish speaking community in that area. The State
20 would want you to believe that a language barrier
21 prevented Mr. Davilla from explaining to paramedic Sims
22 what happened.

23 Charles Sease. He was familiar with the saying in
24 the medical profession if you don't document you didn't
25 do. He testified he made contemporaneous notes at the

1 time and these were undoubtedly his best recollection
2 of what occurred. Summoning up memories from several
3 months ago in a period of only a few hours, memories
4 fade, then what may have happened or things that may
5 have happened another way creep into a vague
6 recollection, the mind may fill in the gaps with things
7 to make the rest of the story make more sense. You
8 have to decide whether to trust a three year old vague
9 recollection or a medical note written down at the
10 exact time something happened. I submit to you that
11 the medical note is the best way to ascertain the
12 truth. For example, although he told you he tried to
13 document everything that happened in the ER, after
14 years had passed and undoubtedly many patients have
15 gone through the ER and cared for by Nurse Heath, and
16 after being told by the prosecution this case was
17 coming up for trial and after admitting that he had
18 only reviewed his chart, had not reviewed his chart in
19 quite some time, Nurse Heath recalled something that
20 wasn't written in his chart and that was, and I quote,
21 Doug did not appear to be too awful concerned.

22 If he truly thought that at the time why didn't he
23 document it? He said that Doug struck him as
24 intoxicated. If he thought that at the time why
25 didn't he document it? He said the officers assisted

1 in walking Doug out. If that really happened he did
2 not document that. He referred to his notes numerous
3 times during his testimony. If he had thought that
4 Doug was impaired he should have documented it. If he
5 thought that Doug was acting in any way unusual he
6 should have documented it.

7 It is common knowledge that different people
8 viewing the same exact event will notice different
9 things according to where their interest lies and this
10 is what is called bias. Bias is the inclination to
11 present or hold partial perspective at the expense of
12 other valid alternatives. That concept is shown very
13 clearly by comparing the testimony of police officers
14 who are trying to convict Doug, with the testimony of
15 Nurse Heath, a witness with no dog in the fight. Heath
16 has no stake in the outcome of this trial. He has no
17 reason to embellish his story, Heath does not have the
18 bias of a charging police officer.

19 Burrell said his speech was slurred in the ER,
20 Heath did not document his speech was slurred. Burrell
21 said Doug's eyes were extremely bloodshot in the ER.
22 Heath did not document Doug's eyes were bloodshot. He
23 clearly checked Doug's eyes because you recall he
24 testified that his left and right pupils were a three
25 on the size scale and were equal and reactive. He

1 didn't document it, he didn't have to.

2 Burrell stated that Doug's clothes were
3 disheveled. Heath testified that it would be a fair
4 statement Doug looked rough, just having been in a
5 serious auto collision, and that he had his clothes cut
6 off and was wearing paper hospital smocks. These were
7 clothes that looked disheveled according to Burrell's
8 testimony.

9 Brinson testified when he got to the ER Doug was
10 sluggish. Heath did not note that Doug was sluggish,
11 he noted that Doug was cooperative, alert and oriented
12 to person and place and he didn't document it. It
13 didn't happen. Brinson testified when he arrived at
14 the ER Doug had an obvious odor of alcohol about him.
15 however he did not document any smell of alcohol on
16 him. This was a man who knew he was giving specific
17 blood samples for a specific purpose. Charles Heath is
18 no dummy, I think you would agree if he smelled alcohol
19 under this circumstances he would have noted it. He
20 didn't document it.

21 Brinson testified while they didn't have to keep
22 their hands on him, Brinson and Burrell helped Doug to
23 the car. Heath reported Doug was ambulatory, walking
24 under his own power to the car. The expert testified.
25 He testified, "If I thought he needed help we would

1 have shipped him out of the ER in a wheelchair."

2 After he had asserted his right to counsel, after
3 he had asserted his right to remain silent, they
4 testified that Doug had fallen asleep, you will
5 remember his testimony, or passed out and then when
6 Doug awoke that Doug began a spontaneous conversation
7 with Burrell wherein Doug allegedly admitted he had,
8 quote, some beers at his farm.

9 Because Doug had asserted his right to counsel and
10 his right to remain silent the police were not allowed
11 to initiate any questioning of him. They are smarter,
12 they know the only way they can tell a jury about
13 something a person purportedly says after they have
14 been given their Miranda right is to fabricate a
15 spontaneous conversation started by the accused as if
16 he waived his right to remain silent. What better way
17 to concoct a story than the person they are accusing of
18 being drunk, quote, passed out, fell asleep, all of a
19 sudden woke up, waived his right to be silent. The
20 only problem with this is that Heath did not document
21 anywhere that Doug either passed out or fell asleep as
22 suggested by the police.

23 Heath testified that he checked Doug's vital signs
24 every five minutes while he was there and noted each
25 time that Doug was oriented to person, place and time.

1 While it is certainly possible to check someone's
2 vitals even if they are passed out or asleep, Heath
3 testified that you could not be alert and oriented if
4 you are passed out or asleep. If you didn't document
5 it, it didn't happen.

6 Investigator Kathy Kjellman. She testified she
7 failed to secure possession of the blood evidence,
8 evidence of alcohol in the Geo, admitted evidence was
9 evidence. She took some pictures and the main thing
10 she told you is that the legal procedure the Charleston
11 County Sheriff's office is bound by law to follow is
12 that you do not throw out, dispose of or destroy
13 evidence in a pending case. She admitted that on July
14 14th, 2010, that one of the prosecuting officers in
15 this case, Deputy Burrell, instructed her to destroy
16 the evidence in this case. A violation of Charleston
17 County Sheriff's office policy. Are they really going
18 to get to the point in this country where a jury is
19 going to convict a man where the police have admitted
20 to destroying evidence?

21 Now, one of the things she photographed was the
22 Jim Beam bottle in the woods. She didn't subject it to
23 fingerprint analysis. When we asked to do that it had
24 already been destroyed. She did not say that the
25 bottle came from Doug's car. And as you know, you

1 touch glass or touch the screen of your cell phone or
2 something it leaves a fingerprint. It wouldn't have
3 probably mattered anyway because there is evidence this
4 bottle found in the woods, you will recall, had dirt
5 and dust on it but it would have been available for the
6 jury to look at had it not been one of the pieces of
7 evidence that was destroyed by the State.

8 Kathy Kjellman also testified that Charleston
9 County policy requires blood be refrigerated and that
10 it is important in felony cases for her to properly
11 record information related to the case. She testified
12 that Charleston County Sheriff's office policy requires
13 that when she receives a blood sample she is supposed
14 to write down the date and time she receives it because
15 then we would know that at a certain time she got it
16 and it was refrigerated. She admitted that she did not
17 write down the date and time she received the blood
18 evidence in this case. She admitted that she logged it
19 in at 10:40 a.m. on December 9th, 2009. That's twelve
20 hours after the blood was taken. There is just no
21 testimony by Brinson what time he gave it to Kjellman,
22 there is no testimony by Kjellman about what time she
23 got it from Brinson. The only evidence is it was drawn
24 at 9:50 and logged in at the Charleston County
25 Sheriff's office evidence compound at 10:40 a.m. and 13

1 seconds on December the 9th, 2009. That is more than
2 twelve hours after it was drawn by Heath.

3 Now, do you recall what her explanation was? "I
4 didn't write it downR because there was nowhere to
5 write it down." The Charleston County Sheriff's office
6 evidence compound is in a metal building, there are six
7 computer terminals in that building, 30 feet away is
8 where the refrigerator is located. There are plenty of
9 pieces of paper in that evidence compound, including
10 but not limited to supplemental incident reports,
11 various forms the police officers use, maybe even
12 sticky notes you can put on your computer. Didn't
13 write it down because there was no paper, no where to
14 write it down. Close enough to government work in the
15 handling of blood evidence in a criminal case does not
16 get it.

17 What other evidence did you hear about the
18 importance of refrigeration of blood? Investigator
19 Brent Roy testified you would never leave blood
20 evidence unrefrigerated for twelve hours. Deputy
21 Martin testified he would never leave blood evidence
22 unrefrigerated for twelve hours, this would violate the
23 policy, the rules of the Charleston County Sheriff's
24 office in the handling of blood evidence. Kjellman
25 testified it was important to refrigerate blood

1 evidence, she testified she's required to record the
2 day and time of the blood evidence by policy. Brandon
3 Williams with SLED, he testified it is important to
4 refrigerate blood evidence. Shana Sorrells testified
5 it is important to refrigerate blood evidence. She
6 testified that yeast and bacteria which is in the blood
7 can ferment and cause alcohol, false alcohol readings
8 in the blood where there is no alcohol in the blood.

9 The State has failed to establish to you that the
10 blood evidence was refrigerated between 10:00 p.m. on
11 12/8/08 and 10:40 a.m. on 12/9/08. There is a very
12 particular form, there is a piece of paper you can
13 write this stuff down on. This is an exhibit that was
14 received into evidence, you will have it back in the
15 jury room, it shows that Herman Martin got the blood
16 from Charles Sease on 12/8/08, 2200, that is 10:00
17 o'clock, but who received it from Martin and who
18 received it from that person. You will note there is a
19 date and time block to fill in on both of those blocks,
20 it is not filled in in it's location. The State has to
21 prove to you beyond a reasonable doubt that they
22 properly handled the blood evidence which they are
23 trying to use to convict Mr. Barclay.

24 Let's say you went grocery shopping and you bought
25 some milk for your children's cereal and when you were

1 taking the groceries out of your car you accidentally
2 left the milk in the trunk and if you came back twelve
3 hours later and discovered that the milk was in your
4 trunk I bet you would throw it away. It might be
5 spoiled, you would not take the chance.

6 I respectfully submit that you should throw out
7 and disregard the blood test in this case because the
8 State has failed to prove beyond a reasonable doubt
9 that the blood was refrigerated twelve hours between
10 when they obtained it and when it was logged into the
11 Charleston County Sheriff's office evidence system and
12 placed in the refrigerator. The State's rules and
13 procedures require they document refrigeration of blood
14 samples and they failed to do it. Kjellman did not
15 write it down because there no place to write it down?
16 I say hogwash.

17 In this case there are four errors in the blood
18 testing process. The first was probably the most
19 important of all. The test results are totally
20 inconsistent with the expert medical testimony in the
21 record about how Doug appeared.

22 What do we know? Dr. Ronald Hargrave, M.D., for
23 25 years has been a Board certified emergency medical
24 doctor, worked in numerous hospitals around this state,
25 he had the ability to review all of Mr. Barclay's

1 medical records. Even more importantly than that, he
2 got the opportunity to review a video tape of Mr.
3 Barclay on the night of his accident, a video tape from
4 the hospital. I don't know if any of you noticed how,
5 after the word video came up, that the demeanor and
6 testimony of Deputy Burrell changed. I submit to you
7 that in many DUI cases, many, many DUI cases, most DUI
8 cases there is a video tape and the reason the officers
9 say they didn't make the video tape in this case is
10 because of Mr. Barclay's medical condition, he needed
11 medical care. They didn't make one, notwithstanding
12 they stood out front and smoked a cigarette with him,
13 where they had a video camera in their patrol car,
14 right before they placed him under arrest, but
15 notwithstanding that, they didn't make a video tape.
16 You have a medical doctor who reviewed a video tape of
17 Mr. Barclay and the medical record, vital signs, blood
18 pressure, amount of urination, all the things that he
19 testified to, all those medical facts, none of them are
20 consistent with a blood alcohol reading of .208.

21 How many drinks do you think somebody would have
22 to drink to have that kind of reading? If they dranked
23 that many drinks wouldn't they have to go to the
24 bathroom? I mean, just common sense kind of stuff.
25 You would expect to see, we're not just talking about a

1 fine line here, you recall the toxicologist testifying
 2 about the things you would expect to see, stupor, black
 3 out, inability to have a memory. I went over with him
 4 all those things. None of these medical witnesses,
 5 none of the lay witnesses testified that any of those
 6 things were present in Mr. Barclay.

7 And finally at the end of the case a medical
 8 expert came in here, took the witness stand, swore to
 9 tell the truth as a witness, testified that the alcohol
 10 test result is totally inconsistent with all the
 11 medical evidence and pictures of Mr. Barclay. The
 12 video tape. You heard the saying that a picture is
 13 worth a thousand words. You know why we have the video
 14 tapes in most DUI case? I'll tell you why.

15 MS. KINZELER: Objection.

16 THE COURT: Basis?

17 MS. KINZELER: Pitting.

18 THE COURT: Overruled. Are you sure there is not
 19 another basis for the objection?

20 MS. KINZELER: Fact not in evidence.

21 THE COURT: Approach.

22 (Unrecorded bench conference).

23 THE COURT: The objection is sustained.

24 MR. MASON: Now, the next problem with the blood
 25 test is this. You heard everybody from SLED that came

1 in here, they testified that our laboratory information
2 software system, that our policy requires, I quote, all
3 movement of evidence must be recorded in LIMS. That
4 is, every time they take evidence in or out of the
5 refrigerator it's got to be recorded in the laboratory
6 information system software.

7 You will recall the testimony of Patricia Crooks,
8 the nice lady, 27 year SLED veteran. She only had the
9 evidence in this case for less than a minute, I think
10 it was 50 some odd seconds, yet she properly recorded
11 her handling of the evidence in LIMS. In this case the
12 testimony is that there is a 20 day gap in which this
13 evidence is being handled, from January 9th of 2009 --
14 I'm sorry, between January 7th, 2009, and January 27th
15 of 2009, this evidence is being in and out of the
16 refrigerator and there is no entry whatsoever in LIMS.

17 Now, this document is State's Exhibit, I'm sorry,
18 Defendant's Exhibit Number 9 and you will see where at
19 the bottom it says last modified January 9th, 2009, at
20 5:08. Now, do you see on there where it says sample
21 number 12 and the case ending in 249? The reason this
22 is important is the testimony in the record is that the
23 aloquotes, they don't test the blood that comes in in
24 the tube, they take the blood out of the tube and they
25 put it in little vials and they write on these little

1 vials with a Sharpe and we have to depend on the lab
2 worker taking the right vial and putting it in the
3 right place on the machine so that the right little
4 portion of somebody's blood is what actually gets
5 tested in the machine. What this document shows is
6 that there is an entry relating to Mr. Barclay's blood
7 sample that is not recorded in LIMS, that occurs on a
8 date before they say they even created the aloquote.
9 They say they created it on January 13th, 2009, so why
10 is it that on January 9th of 2009 there is an entry
11 relating to a blood sample that hasn't even yet been
12 aloquoted, it hasn't been created. They want to tell
13 you that is a mistake, that is some kind of Hewlett
14 Packard software glitch. This is too serious a case to
15 make decisions about was this some software glitch, or
16 some more serious problem.

17 Now, you will recall, highly unusual, but you will
18 recall that it was the defendant who actually moved
19 into evidence in this case the blood test result.
20 Throughout this case you have heard the testimony that
21 the incident date relating to Mr. Barclay's accident is
22 December 8, 2008, not December 9, 2008. The very
23 report that SLED prepared does not have the correct
24 date on it. It does not pertain to the incident date
25 of December 8th, 2008. Again, an important matter,

1 mistakes.

2 Miss Sorrells testified that when blood is not
3 refrigerated it can ferment, give false positive
4 readings.

5 Now, with regard to the consistency of testimony,
6 I told you that the blood test result is totally
7 inconsistent with Mr. Barclay's behavior. If that test
8 result were correct you would expect to see severe
9 motor impairment, staggering, slurred speech, impaired
10 mental thought process, impaired mental judgment,
11 impaired coordination, dazed, confused and otherwise
12 disoriented, you would expect to see a person who
13 couldn't express pain. Nurse Heath saw none of those
14 things. Dr. Hargrave saw none of those things. Deputy
15 Martin saw none of those things. Ray Woods saw none of
16 those things. Brian Woods saw none of those things.
17 Louis Sease saw none of those things. Erica Gatch saw
18 none of those things. Benjamin Troup saw one of those
19 things. The only people who claim to have seen any of
20 those signs were Deputies Luckadoo, Burrell and
21 Brinson. Inconsistencies created with failure to
22 refrigerate the blood causes you to disregard the
23 result of the blood test. It is within your province
24 as jurors to decide what weight to give the evidence
25 and it allows you to disregard the blood evidence.

1 Further, the judge is going to charge you that a
2 reading of .08 or more only gives rise to an inference
3 that the person was under the influence but that you
4 should look at all the other evidence to determine what
5 weight to give to that blood alcohol test reading, so
6 even though you have got the results, even if you
7 decide not to throw it out, you still have to reconcile
8 that test result with the actual testimony of the
9 witnesses as to Mr. Barclay's behavior. Under the law
10 you can't simply go back into that jury room and say
11 over a .08, case closed, end of inquiry. You have got
12 to make a determination as to whether or not you think
13 the evidence in the record as a whole shows that Mr.
14 Barclay was materially and appreciably impaired by
15 alcohol. It is not against the law to have a drink and
16 drive. What is against the law is to be materially and
17 appreciably impaired by alcohol such that you can't
18 safely operate your vehicle.

19 Now, as I stated, Mr. Barclay did not cause this
20 accident, he was not under the influence, not
21 materially and appreciably impaired. He is charged
22 with two counts of felony DUI. One of those counts
23 relates to the death of Mr. Garcia and the other one is
24 based on what is claimed to have been great bodily
25 injury caused to Jose Davilla. I submit to you he is

1 not guilty of either of those charges but I need to
2 address to you, as Doug's lawyer, one other issue
3 relating, that is different relating to Mr. Davilla's
4 charge than it is relating to the other one.

5 Now, the State in Mr. Davilla's case must prove
6 beyond a reasonable doubt that Mr. Davilla actually
7 sustained great bodily injury. It is not enough that
8 Mr. Davilla could have sustained great bodily injury,
9 there must be medical proof that Mr. Davilla actually
10 sustained great bodily injury. The testimony is that
11 Mr. Davilla fortunately was only in the hospital for a
12 day and a half and that he got out after that and that
13 was essentially the end of medical treatment that he
14 had. The testimony in the record is they launched the
15 helicopter but didn't know if anyone would need it.
16 The decision to launch the helicopter was because it
17 was a head-on collision and someone was dead and there
18 were category two injuries to Mr. Davilla that could be
19 life threatening.

20 You heard from Joshua Sims who medically treated
21 Mr. Davilla. He testified that he suspected broken
22 ribs and possibly a hemo or pneumothorax. He also said
23 without an x-ray it cannot be said whether or not Mr.
24 Davilla had a hemo or pneumothorax. Mr. Sims also told
25 you that the decision to send Mr. Davilla in a

1 helicopter was determined not only because of his
2 injuries, but because of the distance from Edisto
3 Island to uptown Charleston. He needs to recognize, at
4 this point Mr. Sims made an initial assumption about
5 Mr. Davilla's injuries in the few minutes he was with
6 him and you did not hear testimony from a single
7 emergency room physician, nurse or x-ray technician or
8 anybody else that Mr. Davilla was actually diagnosed
9 with a life threatening condition. The paramedic acts
10 quickly and thinks the worst, they don't have time to
11 diagnose, that is a doctor's job. They think the
12 worst.

13 There are plenty of doctors at MUSC who could have
14 been called to testify about what actually happened to
15 Mr. Davilla. The judge will charge you that an element
16 of felony DUI with great bodily injury is that there
17 must be great bodily injury, and great bodily injury is
18 an injury which actually creates a substantial risk of
19 death. No medical testimony that Mr. Davilla actually
20 suffered great bodily injury that created a substantial
21 risk.

22 Ladies and gentlemen, after we're done speaking
23 the Court is going to tell you about the most important
24 constitutional right any citizen charged with
25 wrongdoing by the State has, and this is the 5th

1 Amendment right to remain silent if accused of a crime.
2 The State must prove the accused is guilty, it is not
3 the other way around. The accused does not have to
4 prove his innocence. Accordingly, Doug is not required
5 to take the stand under the Constitution of the United
6 States.

7 The 5th Amendment also says that the fact that
8 Doug does not testify cannot be considered by you in
9 any way and that you will not take his silence into
10 account in determining his fate. I'm sure each of you
11 will ask yourself the question, if you have not
12 already, why shouldn't a person charged with a crime
13 and who is innocent not take the stand and testify, I
14 would want to. Perhaps you would, it seems
15 counter-intuitive, it seems illogical, it does not make
16 sense.

17 Let me tell you why Doug chose not to testify.
18 Understand the 5th Amendment, why the 5th Amendment
19 exists. You need to understand why our founders gave
20 us these protections. Our founders knew that something
21 happens to a person who is charged with a crime, it is
22 a horror, a living horror to be charged and be
23 innocent. The accused cannot defend himself, he
24 believes he must cry out his innocence but he realizes
25 if he protests too much you might not believe him. If

1 he gets angry he may be perceived as guilty. If he
2 forgets a fact under the heat of trial he may be
3 perceived as guilty. People often do not believe an
4 accused who testifies. Guilty or not, a defendant is
5 clearly biased in favor of self preservation. The
6 stakes are too high. In this situation it would be
7 easy for a jury to assume that the accused will say
8 anything to avoid conviction. Because of that there is
9 the risk the jury may think that the accused is not
10 only guilty as charged, but a liar as well. In this
11 situation a jury could conclude the defendant is simply
12 someone who would take an oath and perjure himself to
13 escape conviction. For this reason nothing he says on
14 the witness stand would be believed. Our founders
15 realized that when they drafted the 5th Amendment that
16 says the defendant has the right to remain silent and
17 this cannot be used against him in a court of Law.

18 Consider the fact Doug is not a lawyer, he is a 60
19 year old farmer. He is not schooled with dealing with
20 the rights like the prosecutor over there who would
21 love nothing more than to bombard him with clever
22 questions designed not to elicit the truth but, rather,
23 to confuse the facts, to make him trip over his own
24 words or doubt his memory and make him appear guilty.
25 You saw that happen on Thursday of last week when Mr.

1 Voigt was questioning Melody Bailey, Melody Bailey, the
2 lady who works for Habitat for Humanity. His
3 cross-examination proceeded very calmly and methodical
4 until he was unable to get the answer he wanted.
5 Although Miss Bailey was testifying truthfully, Mr.
6 Voight raised his tone, took an offensive posture and
7 pointed and yelled and accused Miss Bailey in an
8 attempt to shake her certainty about what was told her,
9 what Mr. Davilla told her. How could Doug protest his
10 innocence on that stand and ever compete with
11 prosecutors who were skilled in the business of
12 cross-examination? It is for these reasons that the
13 founders of our constitution protected us all with the
14 5th Amendment. For all these reasons I decided as his
15 lawyer that it is best for Doug to let me speak for him
16 the best I can. At least this way the contest will be
17 fair.

18 In any event, the State has failed to prove his
19 case. What is there for him to rebut? No one can
20 rebut a guess, no one can prove a negative, no one can
21 excuse the State's failure to follow their own
22 procedures in the case.

23 Why did our founders protect us from reasonable
24 doubt? Why should we trust the prosecutors? Why
25 should we demand they prove their case beyond a

1 reasonable doubt? I suppose lawyers in the days when
2 the Constitution was formed were as zealous as we are
3 today. Prosecutors have their job, they want to win,
4 as we do, they want to convict. Our founders knew from
5 their own unhappy experiences that prosecutors have all
6 the power and that an innocent accused can never prove
7 the negative. Few of us can ever prove innocence.

8 How many of you have watched the prosecutors in
9 this case take innocent acts and turn them into evil
10 acts? For example, they described Doug's appearance in
11 a paper hospital gown as having disheveled clothing.

12 The law requires the prosecution to prove its case
13 by hard, indisputable facts and prove not just one fact
14 or a dozen, but prove all of the facts so that if a
15 reasonable doubt remains, simply put, you cannot guess
16 about convicting Doug.

17 The concept of reasonable doubt also protects
18 jurors. Suppose a juror has to go home wondering if he
19 or she was right voting for conviction. Each juror has
20 the ability to stop the conviction because the verdict
21 has to be unanimous. What if the juror tosses and
22 turns in the night, not quite sure of the evidence, not
23 quite sure the defendant is guilty, the juror lies
24 there staring at the ceiling thinking I could have
25 stopped this, maybe I should have, what if the State is

1 just too powerful? The protection of reasonable doubt
2 is not just for Doug, it protects each of you. We're
3 men and woman with souls and consciences but what if
4 you were pressured by the prosecution to convict Doug
5 and when you got home you began to worry about what you
6 had done, lying awake at night concerned about your
7 decision, you're worried that you have convicted an
8 innocent man. The rule of reasonable doubt protects
9 you, you have a right not to be concerned about your
10 decision, it must be clear to you so that all worry
11 about whether you were right has been removed by the
12 evidence. That is why reasonable doubt is not only to
13 protect the accused, but to protect you as well.

14 We have all heard people say, especially around
15 election time, I'm only one person, I don't have any
16 power, how can I change things? We have all been
17 raised since we were little kids to believe that others
18 have power over our lives. That power is vested in our
19 parent, our teacher, our boss, our politicians, courts,
20 police, everyone has power but we as individuals do
21 not. Truthfully, this type of thinking also strips us
22 of our person, our individuality. The country was
23 founded on the principle that each of us has great
24 power not only over our own lives but over the lives of
25 others and I can think of no better example of the

1 power of an individual in America than one who serves
2 on a jury.

3 Your verdict must be unanimous, each of you must
4 agree. To say it another way, that is a human power
5 vested in each of you because when any one of you say
6 no, I do not agree, that will stop it. Any one of you
7 individually can stop it, that is your power. To put
8 it another way, what happens to Doug is your personal
9 responsibility, not the jury's --

10 MS. KINZELER: Objection, Your Honor.

11 THE COURT: Sustained. Any further reference to
12 punishment is unacceptable, Mr. Mason.

13 Ladies and gentlemen, I again instruct you that
14 any reference to potential punishment, you disregard
15 it, you are to give it absolutely no consideration, it
16 is not to be discussed in any manner whatsoever in your
17 deliberations.

18 You may continue.

19 MR. MASON: Whether or not Doug is convicted is
20 each of you's personal responsibility, not the
21 responsibility of the jury as a whole, but the
22 responsibility of each of you individually. The most
23 beautiful thing about the American jury system is it
24 honors each of you as individuals. So, though you are
25 a member of a group, this jury, you are respected

1 individually.

2 Some of you may be more outspoken than others,
3 even more argumentative than others, we expect that,
4 but the mere fact that some may be more expressive does
5 not mean you have more power. Each of you has the same
6 power, the power to save Doug from conviction.

7 MS. KINZELER: Objection.

8 THE COURT: Basis?

9 MS. KINZELER: Punishment, Your Honor.

10 THE COURT: Sustained. Make no further reference
11 to punishment.

12 Ladies and gentlemen, you are to disregard that
13 last comment, you are to give it no consideration in
14 your deliberations whatsoever.

15 MR. MASON: Each of you have the power not to
16 convict. It is for you as an individual to decide how
17 you vote. Of course it is your duty, as the Court will
18 instruct you, to listen to and consider the position of
19 your fellow jurors but you are not required by law to
20 relinquish your individual belief. What you believe
21 about the facts of this case is yours and yours alone,
22 this is your power, your right, your duty to determine
23 the facts for yourself as an individual. Each of you
24 can stand alone if you believe you're right and if you
25 do believe you are right about your conclusion, about

1 this cases it is your duty to do so. It is for this
2 reason that I place Doug in your hands, not in the
3 hands of all of you, but in the hand of each of you
4 individually. You have the power, each of you, a power
5 separate from anyone else's power. Each of you have
6 more power than the prosecutor. Each of you have more
7 power than the judge. It is you who will decide this
8 case. Doug is the one who is powerless, he is in each
9 of your hands, each of your individual hands.

10 Now, you're probably glad my time is nearly up. I
11 hope I haven't unduly frustrated you with my persistent
12 examination or my zeal in representing Doug Barclay. I
13 have to admit, though, I do talk quite a bit. I have
14 nnever been comfortable talking about things that can
15 affect another human with complacement. I take my job
16 very seriously, I have tried to do my very best this
17 week and last week to represent my client in this very
18 important matter, the most important matter in his
19 life.

20 The judge told you at the beginning of this case
21 that the action of the Court and the lawyers, that you
22 are to look past that and look for the facts. So, I
23 will ask you if you found me in any way over broad or
24 annoying I sincerely ask that you hold your perception
25 of my actions, not hold your perception against my

1 client, find the truth.

2 We have been in this courtroom for five days now
3 and for you this case is only five days long but for
4 Mr. Barclay he has been living this case every day for
5 the last two years and ten months. He has been accused
6 of something he did not do, he did not cause the
7 accident, he was not materially and appreciably
8 impaired. Because of that it has been two years and
9 ten months of bearing the weight of these actions and
10 he awaited the coming of this day. While we awaited
11 for this day with fear and crepitation and had many
12 sleepless nights over its arrival, Doug has also looked
13 forward to it. This is the day he will be judged, this
14 is the day he has hoped and prayed for you will take a
15 critical look at the State's case and decide that they
16 have wrongfully accused him of causing this automobile
17 collision. This is the day it's hoped you will finally
18 approach the case in the way the police did not, with
19 an open mind, aware of all the facts. Doug Barclay has
20 waited two years and ten months for this. This is his
21 day in court. Two weeks from now you will go back to
22 your family, your jobs, this case will slip into the
23 recesses of your mind, eventually you will forget about
24 it. Deputy Brinson will be back to his duties as a
25 sheriff's deputy, the prosecutor will put the file in a

1 box for storage and will have moved on to the next
2 case, the Court will have started a new trial and the
3 process will begin again with the bailiffs, the court
4 reporter and the clerk of court staff, I along with the
5 other lawyers and my staff in my office will be
6 handling different matters for clients. All of this
7 will happen but what you cannot forget, even though
8 this case is almost over for you, it is what you do
9 when you go back to your jury room, the decisions you
10 make will have lasting and indelible marks on the
11 balance of Mr. Barclay's life. Your decision about
12 this evidence and this case will be with him for the
13 rest of his life. You have an awesome responsibility
14 to pass judgment on the future of another human being.
15 You cannot and I know you will not take that lightly.

16 The judge will help you discharge that
17 responsibility when she tells you in this case as in
18 any case the burden rests upon the State to prove Mr.
19 Barclay guilty. They must prove every element of the
20 offense and all the facts they rely upon beyond a
21 reasonable doubt. I submit to you they failed to carry
22 that burden and I respectfully request that you return
23 a verdict of not guilty. I trust you will make the
24 right decision.

25 Thank you.

1 THE COURT: Madam Forelady, ladies and gentlemen,
2 I'm going to give you a restroom break. During the
3 break please do not discuss the case. Please leave
4 your note pad at your seat. Go with the bailiff,
5 please.

6 (The jury was excused from the courtroom).

7 THE COURT: You all may be seated.

8 It was my oversight during the charge conference
9 to state I would be giving instructions regarding the
10 statement of the defendant which deals with Miranda and
11 the fact that the Court has admitted the statement
12 preliminarily but it is up to the State to prove that
13 the defendant actually made the statement beyond a
14 reasonable doubt and it is up to them to decide whether
15 the statements were actually made and what value they
16 would give the statement.

17 In addition to that, based on the argument of
18 defense counsel I will be instructing the jury they are
19 not to consider any potential punishment whatsoever in
20 determining the guilt or innocence of the defendant.
21 That it is inappropriate for them to consider it and it
22 is not to be discussed in any manner whatsoever in the
23 jury room.

24 We'll take a break.

25 MR. MASON: I would take exception to that last

1 ruling.

2 THE COURT: You can take exception but state law
3 is on point it is not for the jury to determine and is
4 not appropriate or dispositive of guilt or innocence,
5 it is within the prerogative of the Court whether he
6 gets one day or twenty years.

7 We'll stand in recess for about ten minutes.

8 (Recessed at 4:19 p.m)

9 (Resumed at 4:31 p.m).

10 THE COURT: Is the State ready to proceed?

11 MS. KINZELER: Yes, ma'am.

12 THE COURT: Is the defense ready to proceed?

13 MR. MASON: Yes, Your Honor.

14 THE COURT: Please bring in the jury.

15 (The jury returned to the courtroom).

16 BAILIFF: All jurors are present, Your Honor.

17 THE COURT: You may be seated.

18 Ladies and gentlemen, I hope you enjoyed your
19 break.

20 We will now resume with the State's closing
21 argument.

22 You may proceed.

23 MS. KINZELER: May it please the Court.

24 THE COURT: Yes, ma'am, you may proceed.

25 MS. KINZELER: Thank you.

1 Ladies and gentlemen, when we first started this
2 trial I told you December 8th, 2008, is a day most
3 people don't remember. But Mr. Davilla remembers and
4 so so does Mr. Garcia's wife and kids. I also.

5 MR. VOIGT: You to pay attention to what you hear
6 from that witness stand and to what you don't hear. I
7 told you to listen to what promises were made in
8 opening statement and what promises would be broken
9 throughout the trial.

10 Everything we said in opening statements that we
11 did, the argument we're making right now, that is not
12 evidence. The judge is going tell you more about
13 evidence, but the evidence in this case came right
14 there from that witness stand. It wasn't anything I
15 said, any question I asked, anything they said, any
16 question they asked. It came from right here from the
17 witnesses and the exhibits you're going to have to take
18 back to the jury room with you.

19 And as we talk about evidence, there is two kinds
20 of evidence, physical evidence and testimonial
21 evidence. I'm going to start with the physical
22 evidence in this case because it is to the point.
23 Physical evidence doesn't have friends, it doesn't have
24 memory problems, it is not subject to manipulation or
25 interpretation. It simply is the facts, as true today

1 as it would have been three years ago.

2 And in this case you've got physical evidence that
3 is very important, the road markings and those blood
4 test result. You've got a lot of testimonial evidence
5 that goes along with it to corroborate it, depending on
6 the witness. That physical evidence --

7 I wish this thing, this things is blocking my
8 photo.

9 Physical evidence, this is the road as it looked
10 that night, final resting position of the cars. Here
11 are the markings from the Geo, the markings from the
12 Silverado, the clearly marked yellow double line. This
13 is what it looked like that night, the photos taken
14 from that night, it shows it marked exactly as it
15 appeared when this wreck occurred.

16 Point of maximum engagement, the gouge marks you
17 were told about. You can see for yourself right there,
18 plain as day that is where the wreck happened, that is
19 where the Geo was driving in its lane. You can see
20 this line, this post impact skid mark from the
21 passenger side of that Geo, from where it starts, to
22 where it stopped. It cannot be disputed that this is
23 where the wreck occurred. This wreck brought the Geo
24 to a dead halt and flipped it in that direction and you
25 don't need anything to interpret it. You can see it

1 with your bare naked eye.

2 This is what the Geo looked like after the wreck,
3 the whole driver's side is missing from this car, that
4 is why we're in agreement it was an offset head-on.
5 This is how Mr. Garcia died. And you can see again
6 that post impact skid mark, exactly where the car was
7 at the time the collision occurred and how it was
8 brought to a halt and pushed backward to its final
9 resting position right here.

10 This is the defendant's truck. You have seen this
11 picture a lot, here is the asphalt. Left front tire,
12 that is the driver side front tire, the asphalt from
13 his car spinning, and then skidding down in its own
14 lane after the collision, and these are the side flip
15 marks from that car, from this truck, flipping in its
16 own lane and from the right rear tire that we talked
17 about so much in this case.

18 This is the physical evidence, this is what it
19 looked like, it is all mapped out by Deputy Brinson and
20 Deputy Burrell for you all. It doesn't lie, doesn't
21 have an enemy, doesn't have any friends, this is what
22 it is right here.

23 This is more difficult to see. Here is the point
24 of maximum engagement we were talking about before,
25 with the orange circle. Right rear, truck making this

1 path. It took hitting the Geo in its own lane to get
2 this Silverado back into his own lane. If the right
3 rear tire is here and it flips, this truck flipped and
4 makes all these marks with the hubcap and the side of
5 the truck, you saw on that passenger side door, where
6 do you think the driver's side of this truck is? It's
7 in the lane of the Geo, and when it strikes the Geo
8 right here, point of maximum engagement in the area of
9 impact, it starts to flip the truck, it goes through
10 that driver's side like I just showed you on that Geo,
11 starts to flip and ends up back in its lane. It want
12 there when it hit the Geo, it took hitting the Geo to
13 get it back to where it belonged in its own lane.

14 You heard from Deputy Brinson, heard a lot from
15 Deputy Brinson. He's an expert in traffic fatality
16 investigation, he is not a reconstructionist, there was
17 no reconstruction. Why wasn't there reconstruction?
18 There wasn't one needed. It was all right there, it
19 was as clear for them that night as it was for you just
20 now from those photos. The evidence is the cause of
21 this collision was that the defendant crossed over that
22 double standard yellow line and hit the Geo in its lane
23 of traffic.

24 We talked about maximum engagement. It is
25 physically impossible for this wreck to have occurred

1 in the lane of the truck when the point of maximum
2 engagement is right here, and how do you know that?
3 Deputy Brinson told you in this case the point of first
4 touch occurred within one-thousandth of a second before
5 maximum engagement. That yellow circle, that orange
6 circle you saw here, area of impact, maximum
7 engagement. This is where the wreck occurred, this is
8 the physical facts, not subject to manipulation or
9 memory loss or friends at all.

10 How does speed matter in this case? He told you
11 it doesn't. It wouldn't have mattered if both of those
12 cars were both going 20 miles an hour when they hit,
13 they would have hit at 40 miles an hour. It was the
14 defendant crossing the center line in conjunction with
15 the size difference in those cars that caused this
16 collision, because he crossed the center line. And the
17 condition of the car didn't contribute, nothing
18 contributed to this wreck apart from the defendant
19 crossing that double standard yellow line, the road he
20 acknowledges he drives every day.

21 So, we know how the wreck happened, we know how it
22 happened. Why? Why did it happen? Here is your first
23 clue, the cooler and Bud Light cans, these Budweiser
24 cans, six of them in the cooler from the defendant's
25 truck. It didn't come from that Geo, they couldn't

1 even get the driver out of that have car without
2 cutting it apart. It came from the defendant's truck.
3 He packed the cooler to go to work at the farm for the
4 day, he's got six beers left and they are all full, of
5 course, but he's on his way home and he managed to kill
6 somebody along the way.

7 What other physical evidence do you have? Those
8 road markings. Now we're going to get into why this
9 happened. The blood result, the .208. You have heard
10 from everybody that handled the evidence and we're
11 going through it a little bit more in a minute but it
12 is undisputed at this point that the defendant's blood
13 alcohol content when his blood was drawn at 9:50 p.m.,
14 four hours after the wreck, was at .208, sample type,
15 blood, Barclay, Walter Douglas, that's the defendant.

16 And what about this incident date? We'll get to
17 that in a minute. But the defendant goes to jail, goes
18 back to the hospital, gets booked into the jail after
19 midnight, it's 12/9/08, which Deputy Kjellman put that
20 blood in the refrigerator, she doesn't type it in until
21 the next morning, he wants you to believe that this is
22 the most critical thing on earth, this incident date,
23 because if this incident date doesn't reflect what he
24 wants it to, then the whole thing must be wrong. That
25 is not so. Blood result, .208. That is not disputed.

1 Chain of custody, we talked a little bit about
2 that. You heard from a lot eyewitnesses and all you
3 heard from them you may not have understood so much why
4 they were testifying or what the point was but I hope
5 now it has sort of all come together.

6 This is what the law says about chain of custody.
7 we have to present the people who handle it between the
8 time it was taken from the defendant and the time it
9 was analyzed, in this case on January 13th, 2009. What
10 did they do with it? You heard from all these people.
11 Chuck Heath the nurse took it from the defendant's arm.
12 He put it in two vials, he took a strip and sealed it,
13 marked the defendant's name, the date of the incident,
14 12/8/08, and the time it was taken, 2150 or 9:50 p.m.,
15 Brinson was the arresting officer on the label, then he
16 seals it and it goes into this box where it's secure,
17 these vials aren't juggled around, they are all
18 together. And he gives it to Deputy Martin and Deputy
19 Martin seals it. And this paper they showed you, the
20 Defendant's Exhibit Number 8, you will have this back
21 there with you, this paper, it goes inside the box, no
22 wonder nobody signed it. After that it goes inside
23 that sealed box that wasn't opened again until the date
24 Miss Sorrells tested this blood at SLED.

25 Deputy Martin sealed the box, it had the sealed

1 vials in it, nobody has messed with it, nobody had
2 access to it, nobody switched it for anybody else, and
3 gives it to Deputy Brinson. Deputy Brinson takes it
4 with him to the jail where he is booking in the
5 defendant.

6 Investigator Kjellman told you she met them at the
7 jail and got the evidence from Deputy Brinson still
8 sealed. She put in her report she put it in the
9 refrigerator. Mr. Mason talked about the time. She
10 told you they put it in the refrigerator ASAP, which is
11 what they did in this case. Where is the evidence that
12 this didn't go in the refrigerator until twelve hours
13 later? It is not there, it's imaginary. It came from
14 Mr. Mason's questions on cross-examination. We all
15 know she didn't type it into the sheriff's office
16 evidence system until the next morning. That is not
17 evidence of it having been twelve hours in December, 52
18 degree weather, which is like a refrigerator anyway, it
19 is not like Investigator Kjellman took it back to her
20 house. She told us she put it in the fridge ASAP, and
21 we all know, even according to Mr. Mason, that fridge
22 is 30 feet from the sallyport. There is no evidence
23 she didn't put it in there until twelve hours later.

24 Investigator Roy did tell you he, he took it out
25 of the fridge Kjellman put it, filled out the paperwork

1 and drove it up to SLED and it was still sealed and
2 nobody had touched it, it wasn't anybody else's blood,
3 and he gave it to Doris Yarborough and when Doris got
4 it it was still sealed, she opened up the heat sealed
5 tamper proof bag and now it's sealed for the third
6 time, put her initials on it, put the date, 1/7/09, and
7 she put it in the refrigerator there at SLED, she walks
8 it into the SLED secure location. You have to have
9 badges to even get in there. And Brandon Williams
10 comes to get whatever toxicology he has to do that day,
11 gets it from Patricia Crooks, she takes it out of the
12 fridge, swipes her card, types in her password, logs it
13 in to her and then to Brandon and Brandon walks it
14 upstairs to toxicology, sealed in the heat sealed bag,
15 still in the box, still in the sealed box, tamper proof
16 bag. Anybody been there they would know when they saw
17 it, tamper proof bag for that reason.

18 Then Brandon Williams takes it from Pat, he's a
19 forensic technician, he walks it up to SLED toxicology
20 and puts it on the shelf for Shana Sorrells, in the
21 refrigerator. No one else has access to it and it
22 stays in this fridge until Shana Sorrells tests it,
23 which she makes those samples called aloquats. Nobody
24 touched the blood until Shana Sorrells opened the heat
25 sealed tamper proof bag, cut open the box, opened the

1 vial and made the aloquot.

2 You heard from every single one of these people.
3 It is not open for debate as to what happened to this
4 evidence or who had it. They had it and they told you
5 what they did with it, they gave it to each other and
6 it ended up in the right place for her to test.

7 And it might be a good place for me to mention now
8 that this form the defense showed you, this one,
9 January 9, '09, Brandon Williams told you what this
10 form is, Shana Sorrells told you what this form is.
11 The fact that the defendant doesn't understand what the
12 form is or doesn't want to believe what the form is
13 doesn't change what the evidence is in this case.

14 Brandon Williams told you he enters a sequence, he
15 doesn't handle the evidence, didn't even handle that
16 bag when he put it in there on the sequence. He typed
17 in a sequence in the Hewlett Packard software, the
18 sequence has a new run for the test of those aloquats
19 that the toxicologist is about to do and he pushes save
20 on January 9th, '09. That is what that last modified
21 means, he didn't touch the blood, he didn't run a test,
22 he didn't do anything. Then he goes and enters another
23 sequence later but he doesn't save it at that point, so
24 he has a printed paper that says January 9th.

25 There is no mystery about what was done on the

1 9th. You heard from everybody that tested the
2 evidence, nothing was done on the 9th, nothing was done
3 until January 13th when Shana Sorrells tested this
4 blood. From the 7th to the 13th it sat in the fridge,
5 on her shelf. What happened after the 13th doesn't
6 really particular matter because once this result
7 comes in on the 13th that's it. We're not here to
8 enter blood, we're here to talk about the result.

9 Nonetheless, this 20 day gap that the defense has
10 enjoyed talking about with you all, there actually
11 isn't an entry for 20 days doesn't mean there is a gap
12 or something happened. It means nothing happened, it
13 stayed in Shana Sorrells' custody the whole time.
14 There wouldn't be an entry for the 20 days when the
15 custody hadn't changed, it hadn't moved, it hadn't done
16 anything apparent from her testing it, which neither
17 the law nor SLED policy required her to type in the
18 magical software every time she uses a vial or
19 something from the tray for confirmatory test. Those
20 are questions and arguments made by the defense. SLED
21 policy doesn't require that and the law doesn't require
22 that.

23 What did Shana tell you? She is a SLED expert in
24 forensic toxicology. How do you know this is not
25 messed up or jumbled up with anybody else or its own

1 sample? Quality control and checks and balances, she
2 told you about it. They run two tests, two vials in a
3 confirmatory test to make sure they got it right. The
4 lab number, they all match, so 12/9/08 it had the right
5 lab number, it has the right victim, the right
6 defendant, the sample is marked Walter Douglas Barclay,
7 there is no mystery here, the result is .208. It is
8 very common for people to call .08 a legal limit.
9 Actually .08 is the beginning of the illegal limit. At
10 .08 you're under the influence according to statute so
11 I guess the legal limit would be .07, if you want to
12 think about it like that. That is why I put that in
13 parenthesis, two and a half times the illegal limit, to
14 kind of emphasize it all. That's what you would see
15 with a teenager who had just started college and was
16 introduced to alcohol and decided to go binge drinking.
17 It wouldn't be the same for an adult or experienced
18 drinker. But the bottom line, the central nervous
19 system, it is a depressant in every system. You
20 develop coping mechanisms as you do it more often or as
21 an adult, it doesn't affect it, you are just better
22 hiding it. It slows reaction time. You heard from
23 Deputy Brinson, average reaction time is 1.46 seconds,
24 slower for someone impaired. No one thinks this
25 collision happened in the lane of the Geo but the

1 driver who had been drinking, who did have reaction
2 time to get back in his own lane until it was too late.

3 And how do you know these witnesses didn't come in
4 here and make up a bunch of stuff, at least not from
5 the State, how you do you know that? Their testimony
6 corroborates everything in their report. They indicate
7 they were actually there that night, what they saw, and
8 it corroborates the physical evidence we just talked
9 about, road markings and the car and the alcohol at the
10 scene and the blood result.

11 Michael Sanders, he was at the scene in six
12 minutes, I know Mr. Mason went over this for you a
13 little bit, I won't relate the behavior, he smelled
14 alcohol. Debra Winn, the Lieutenant, she smelled
15 alcohol coming from his breath while she was talking to
16 him. "Is there anyone I can call for you, sir?" "Call
17 my wife." In the back of the ambulance she can
18 distinctly smell it coming from his breath.

19 Jose, he is short of breath, he is airlifted with
20 life threatening injuries.

21 Something important to note about Michael Sanders.
22 He told you all he saw were people there, he can't
23 remember exactly what they looked like, how many there
24 were, which he didn't lie to you, he told you somebody
25 met him at the end of road and led him back down to

1 where the accident happened. He also told you Jose got
2 himself out of that car. Michael Sanders was going to
3 help him out and Jose sees the airbag powder and smoke
4 and thinks the car is on fire, gets out the window
5 himself, doesn't wait for somebody to pull him. What
6 did he tell you? "No, it was after I got out of the
7 car Ray Woods grabbed my arm." You all can remember
8 what was testified to, you don't need me to tell it to
9 you verbatim from the transcript.

10 And Chuck Heath smelled alcohol coming from the
11 person. The observation he made from the person and
12 his condition, the observation he made that night while
13 treating the defendant while in the back of the
14 ambulance, within an hour or less of anything
15 happening, no underlying head injury, no laceration, in
16 a particularly good mood. That is pretty consistent
17 with someone who has been drinking, they don't really
18 comprehend what happened nor do they comprehend their
19 pain if they are feeling any at all.

20 Deputy Luckadoo, he told him he was coming from
21 174 but we know he was going to 174.

22 Jose, which goes to Jose's credibility, it was
23 attacked profusely before, saw the defendant in their
24 lane, saw the defendant pass out behind the wheel right
25 after this accident happened. He couldn't talk much

1 because he couldn't breathe and for goodness sake he
2 had had a beer. I don't care if he had had one Bud
3 Light, here is what you need to remember, one Bud Light
4 and sat here and told you he had one Bud Light. Bottom
5 lime, he didn't lie, he sat here and told you he had
6 that Bud Light. He doesn't remember, he couldn't
7 remember anything else. He wasn't drunk, he wasn't
8 driving the Geo, he told you all about that Bud Light,
9 the same Bud Light that the officer managed to find,
10 despite the allegations police do such terrible work.

11 Inability to immediately recall is not uncommon.
12 I told you all it is not uncommon after you have been
13 in a major accident to not immediately recall exactly
14 what happened right then but by the time you get to the
15 hospital, which I suspect as long as it was in this
16 case, driving from Edisto to MUSC, to recall the events
17 you couldn't recall earlier by the time you get to the
18 doctor, to recall what happened, "Well, I was driving
19 down the road and blah, blah, blah," not uncommon, it
20 is actually very common.

21 And here is what is even more important. Jose
22 didn't tell you he couldn't remember. Jose said, "I
23 can't talk, I can't breathe." He wanted to call his
24 boss. To him his boss is like family. Those exact
25 words, he had a blank stare, he couldn't remember but

1 he could later.

2 The defendant told the nurse he had a couple beers
3 earlier that day and Chuck Heath said he didn't seem
4 too concerned, and this is important, he stood out,
5 these are medical people, they are making reports for
6 diagnosis and injuries and things that are wrong, they
7 are not cops, they are not there to write an incident
8 report. In the nurse's note when there are other
9 things to write, test results and all the things you
10 all have been hearing about, he said he stood out,
11 Chuck Heath remembers this defendant.

12 Sergeant Burrell, he also told, the defendant also
13 told Sergeant Burrell he had had a couple. He recalled
14 his slurred speech, he was jovial.

15 Let me explain something. It is obvious he was in
16 a crash, it is obvious at some point he was aware he
17 was in a crash because he asked for someone to call his
18 wife. A sign of impairment, a sign of intoxication
19 when you have a short term memory problem which you
20 cannot remember what you have already said, you get
21 repetitive, when you can't recall things that have just
22 been explained to you. So the defendant has said
23 repeatedly throughout the night, from right after it
24 happened, through the hospital, that, "I hadn't been in
25 a wreck," or couldn't remember having been in a wreck.

1 That is consistent with someone who is impaired. How
2 do you not comprehend what just happened, how do you
3 not get that?

4 And when he talked to Sergeant Burrell, they are
5 sitting there filling out paper work and he
6 spontaneously starts the conversation with people in
7 the room and Burrell says, "You don't even remember
8 where you were earlier?" Trying to jog his memory,
9 trying to help him figure it because he can't recall
10 being in this wreck, "I was out there feeding my
11 mules." He said, "Have you been drinking," but at this
12 point it is pretty obvious he has been, "Yes, I had a
13 couple beers at the farm." Nobody beat that out of
14 him, nobody made it up.

15 And he told the nurse the same thing. Dr.
16 Batalis, he was the guy that did the autopsy, came in
17 here from MUSC. Died from multiple force, nothing else
18 wrong, didn't have a heart attack before this wreck,
19 hadn't been smoking anything, hadn't been snorting
20 anything, he had been at work all day, otherwise
21 healthy.

22 The judge is going to instruct you in a little bit
23 more detail on the law regarding felony DUI with death
24 and great bodily injury, great bodily injury for Jose.
25 But these are the elements that I'm required to prove

1 to you beyond a reasonable doubt, that the defendant
2 was driving under the influence, he did an act
3 forbidden by law or neglected a duty imposed by law.
4 That means, for instance, in this case the law imposes
5 a duty on you to stay in your own lane, or do an act
6 forbidden by law, in this case the best example,
7 neglect of a duty imposed by law, stay in your own
8 lane, don't get out of your lane until you know it is
9 safe. The double yellow line says stay in this lane
10 and don't get over.

11 Which acts of negligence causes death or great
12 bodily injury to another? I drew them up. When
13 someone is under the influence. Here is what the law
14 says about that. It's not drunk driving, it is not
15 having a glass of wine with dinner, now I'm going to
16 drive myself home. A person can be driving under the
17 influence without being drunk, passed out or even
18 intoxicated. Here is the question for you in
19 determining whether he was under the influence. Could
20 he operate the car with reasonable care like a prudent
21 person would? And there are lots of signs that you
22 have throughout the course of this testimony as to the
23 condition of the driver, the defendant, at the time he
24 was operating this vehicle.

25 How do you know he was under the influence? Here

1 is your big indicator right here, number one, his blood
2 alcohol content two and a half times the legal limit,
3 or the illegal limit, however you want to call it. All
4 the witnesses that we know aren't friends with him,
5 don't know him from Adam and whose only job it is to
6 get out there at the scene, you had the people there
7 are hurt, including the defendant, and figure out what
8 happened, remembers it the same way, he smelled like
9 it, he talked like it, his eyes are bloodshot, he
10 passes out, his behavior, he can't drive in his own
11 lane, short term memory problem. And perhaps even a
12 bigger point, in criminal cases the law requires pretty
13 much everything beyond a reasonable doubt, beyond a
14 reasonable doubt. There is a reason for that and I'm
15 all for it. There are very few circumstances where the
16 law in criminal cases allow you --

17 MR. MASON: Your Honor, objection.

18 THE COURT: Basis?

19 MR. MASON: It says presumption, that is not
20 correct. I object to the screen, would ask she take it
21 down, please, Your Honor.

22 THE COURT: I want to see how she's going to argue
23 it.

24 MR. MASON: Thank you Your Honor.

25 THE COURT: Subject to, I want to hear how she's

1 going to argue it. Overruled.

2 MS. KINZELER: This is the statute pertaining to
3 presumption in DUI cases.

4 MR. MASON: Objection, Your Honor.

5 MS. KINZELER: Your Honor --

6 THE COURT: Approach, please.

7 (Unrecorded bench conference).

8 THE COURT: Proceed.

9 MS. KINZELER: Thank you. The law in DUI cases
10 allows you, to use a bad worded word, presumption, it
11 is not a presumption, in cases like this, in a criminal
12 case the standard is always beyond a reasonable doubt
13 and it still is in this case, that if someone's blood
14 alcohol content is .08 or higher you are allowed to,
15 you're not required to but you may infer, not presume,
16 infer that the defendant was driving under the
17 influence. And that is important because we have to
18 prove our case beyond a reasonable doubt, but in this
19 case if someone is a .08 or higher you're allowed to
20 consider that, to draw an inference, if you deem it
21 appropriate, that he was under the influence.

22 The second element, neglected a duty imposed by
23 law. It's that simple. Double yellow line and he
24 crossed it and there is nothing in the record, there is
25 no evidence whatsoever that this case happened any

1 other way. It is right here plain as day, physical
2 evidence, no memory problem, friends, no bias, there it
3 is, crossed the center line, did not stay in his own
4 lane. That is the duty he neglected, that is imposed
5 by law, stay in your own lane.

6 Proximate cause. The next two kind of work in
7 conjunction so I'll address them together. A
8 defendant, the judge will explain to you more
9 thoroughly on the law regarding proximate cause, that
10 it may be regarded as approximate cause if it's a
11 contributing cause of the death of the deceased or also
12 here the injury sustained by Jose. It is not like the
13 ambulance crashed on the way to MUSC and that is how he
14 died. It is not like he was injured during the air
15 lifting and that is how Jose got injured. You know it
16 it is the defendant's act that caused the death and
17 injury sustained in this wreck, death or great bodily
18 injury to another, there is no other way he died.

19 Jose, the law says with regard to great bodily
20 injury, that Jose, great bodily injury is injury that
21 creates a substantial risk of death. The fact that the
22 EMS were able to get him to MUSC in time and he showed
23 up today in this case, he is okay, doesn't take away
24 the criminal responsibility of putting him in that
25 circumstance to begin with. He was air lifted because

1 he had life threatening injuries, his exact words,
2 advanced life support. The fact he ended up being okay
3 is great but it doesn't mean he didn't sustain great
4 bodily injury, which are injuries causing substantial
5 risk of death.

6 There were two people went to the hospital that
7 night, one went by air, it was Jose because they
8 couldn't wait an hour and something it would take to
9 get the ambulance there. This was urgent. You heard
10 this from the horse's mouth, they said, "This guy needs
11 to be air lifted right now." You don't need all those
12 people to explain to you what was happening when these
13 injuries occurred.

14 So, what is the defense trying to do here? We
15 have this evidence, clear road, straight to the right,
16 true verdict of guilty in this case. They want to
17 blame the police, blame me, and blame the victim and
18 blame Mr. Voight. This isn't evidence and it doesn't
19 work. Blame the police, blame me for preparing
20 witnesses, for talking to them. I talked to a whole
21 bunch of people that didn't remember anything and I
22 wasn't going to bore you with their testimony but the
23 ones I brought in here, they know, they remembered it
24 and they have documentation and that is why they
25 remember it. Blame the police because they made a

1 mistake with compass direction? I don't know how many
2 times it needs to be explained any further there is a
3 difference between compass direction and street
4 direction. They didn't make a mistake, they put the
5 collision diagram upside down on the report somewhere
6 but it doesn't change anything about how this case
7 happened, how this wreck happened. They are human,
8 they are not infallible but they didn't make a mistake
9 in this case when it comes to who caused this wreck.

10 Deputy Kjellman put it in the fridge, there is no
11 doubt she put it in the fridge, she didn't put it under
12 her pillow. Blame the prosecutfor for speaking with
13 her witnesses? I need to know what everybody knows.
14 Blame the victim? Their theory is this is the victim's
15 fault somehow and there is no evidence of that, there
16 is no evidence he went into the defendant's lane. It's
17 not because the police did a sloppy job. It is because
18 the marks in the road are clear as to why it happened.
19 You don't need to reconstruct something when it is all
20 right there.

21 Blame the victim Jose. The defense brought in
22 several witnesses, a couple of them were to talk about
23 the defendant right after this wreck occurred and a
24 couple of them were brought here to tell you Jose is a
25 liar, he really speaks English. They told you he

1 speaks English. If you all were listening, and I'm
2 sure you were, he talks English, he can understand in
3 English, he can respond in English, then starts to
4 answer in Spanish because it's familiar to him. He
5 lived in California where people speak Spanish quite a
6 bit, not like he should magically become fluent in
7 English. They told you he knows words in English, like
8 Joe Murray. And here is what is undisputed. Certainly
9 he doesn't read English, he doesn't read English. So,
10 blame the victim, he's at fault and Jose is a liar, who
11 they say appeared voluntarily. He was here every day
12 waiting to testify because his friend died in this
13 wreck. Nobody had to make him come. Nobody threatened
14 him, he told you the truth. He knows what he said, and
15 that is all it is. Even though he didn't want to be a
16 witness in October, 2010, when the defense got this
17 affidavit from him, he didn't mind being here, has come
18 each day and I felt bad for him, it had to be the third
19 or fourth day and if Mr. Garcia could be here he would
20 testify, too.

21 And SLED, because Miss Sorrells didn't document
22 LIMS every time this little sample moved, she told you
23 she had it.

24 From the many witnesses we brought in, the facts
25 and the law that apply to this case leads to one

1 conclusion, the right one and true one, and I'll go
2 through the witnesses briefly.

3 Barbara Jones, friend with these guys for ten plus
4 years, talked to the defendant for two minutes, if
5 that.

6 Erica Gatch, she's six or eight feet away, didn't
7 see or do anything except call the defendant's wife for
8 him.

9 The Woods, the Woods' testimony, he and his family
10 have been out there for ages as has the defendant.
11 These people are from the same area, they know each
12 other and when you determine the credibility of a
13 witness you have to think about their opportunity to
14 observe, was it a couple minutes, ten feet away, what
15 was their opportunity to observe, were they helping
16 Jose, running to the end of the road, not spending all
17 ten minutes with the defendant, to have a coherent
18 conversation that, by the way, consists of where are my
19 cigarettes, where is my dog and where is my wife.
20 There is not some irate conversation. He would know
21 the alcohol contempt was .20. Why then couldn't his
22 friend perceive it? Friends see other friends in rose
23 colored glasses. They could perceive it, they put the
24 wrong colored classes on, they remember how they
25 remember it, they testified to their memory, with the

1 rose colored glasses. They would have to take the
2 glasses off to tell you how it happened. That is not
3 going to happen, they are friends.

4 They are keeping everybody out of the crime scene,
5 nobody can touch anything, and they rope it off. Sure,
6 there were people there but they are not trespassing
7 around the scene. You heard them explain to you, "I
8 would be in so much trouble if I let some civilian
9 touch a thing."

10 You all evaluate their credibility and opportunity
11 to observe, motive, bias, the ability to perceive,
12 maybe, but they didn't talk to the police, they were
13 there ten minutes except for the Woods, the Woods gave
14 his number to Deputy Brinson, he helped him find his
15 dog, he helped him try to find his dog. I asked Brian
16 Woods did you tell him anything you testified to here
17 today, no. Did you tell him about the defendant's dog.
18 No. Then why did you give him your number? Surely he
19 said something, and Brinson doesn't remember it being
20 anything other than about the dog. He didn't talk to
21 him about anything about finding the dog, and when you
22 take all the distractions out, don't get side tracked
23 because the evidence still clearly points in one
24 direction, and it is not my job to convict innocent
25 people of crimes, it is my job to evaluate a case and

1 all the evidence in a case and present it to you all so
2 you all can tell us what really happened, you're the
3 fact finders.

4 I'm almost done, I realize it is getting late.
5 Adding up the facts, physical evidence, no friends, no
6 bias, no memory problems, no physical evidence, he
7 crossed the center line, it can't be disputed and
8 hasn't been.

9 Physical evidence. The defendant's blood alcohol
10 content was .20. We can make up all the excuses in the
11 world through argument and cross-examination. The
12 bottom line is there is no evidence at all this is
13 anything less than a hundred percent accurate and true,
14 nobody switched the blood, nobody dropped the vial,
15 nobody opened it, nobody left it out in 90 degree heat
16 in December, nobody did these things. A great theory,
17 they are not supported by the evidence.

18 Slurred speech, short term memory, behavior,
19 witness testimony, you heard it from right here, from
20 everybody who knows and was there and they are are not
21 friends. They know him now, they might know him now
22 from being a patient. He admitted he had been
23 drinking, not just to Burrell, he told the nurse the
24 same thing he told Burrell, "I had some beers at the
25 farm while feeding my mules," passed out behind the

1 wheel, at the hospital, at the sallyport. How do you
2 think he ended up back at MUSC again? He was sitting
3 on that bench and passed out and fell. He didn't fall
4 while he was walking, he couldn't even sit there
5 without passing out.

6 Mr. Garcia died, Jose received life threatening
7 injuries and lived and that is a good thing but it
8 doesn't take away the criminal responsibility for what
9 happened that caused him to be air lifted to the
10 University.

11 I leave you with this, ladies and gentlemen, this
12 is the truth, verdict means truth, speak the truth.
13 Your verdict should speak the truth, that the defendant
14 is guilty of felony DUI for the death of Mr. Garcia and
15 guilty of great bodily injury, felony DUI, for the
16 injuries to Jose.

17 And I'm going to leave you all with this. This
18 case is about accountability, it is about holding
19 someone accountable for the choices they made that day.
20 You make a choice each day and you are always held
21 accountable, good or bad, and Mr. Garcia died and Jose
22 almost died. This isn't about whether you're a
23 waitress or a lawyer or a carpenter or a bartender, if
24 you're rich, poor, black, white, hispanic, it doesn't
25 matter, it doesn't matter whether you're a good person

1 or bad person, what you do for a living or how much
2 money you have or what you drive or who your friends
3 are, the bottom line is the law applies the same to
4 everyone and the truth in this case is one truth, one
5 just truth, and that is that he's guilty of both of
6 these charges.

7 Thank you.

8 THE COURT: Madam Forelady, ladies and gentlemen,
9 we're going to take advantage of this break and we're
10 going to take our evening recess. I have made the
11 decision that my charge or instruction is about thirty
12 minutes and that would take us then almost to a quarter
13 of 6:00 and that we would have you deliberating after
14 6:00 o'clock and I just don't think that is fair to you
15 all, especially in light of it being the dinner hour
16 and otherwise, so we'll resume in the morning at 9:30
17 with the Court's instruction.

18 I need to advise you and I need to instruct you to
19 strictly adhere here to these instructions. There
20 should be absolutely no discussion about this case
21 among yourselves or with anyone else. While you've
22 heard all the evidence and the closing argument, you
23 have not yet heard the Court's instructions on the law.
24 It is absolutely essential at this juncture of the case
25 that you follow those instructions. Even an innocent

1 conversation would require you to process what you have
2 heard and to draw conclusions based upon it and that by
3 its very nature are deliberations, and you are required
4 to deliberate only once you have heard the Court's
5 instructions and even then you are only allowed to
6 deliberate amongst your twelve in the jury room in the
7 privacy and sanctity of that deliberative process, so I
8 would ask you strictly adhere to those instructions.

9 Also please do not allow yourselves to be exposed
10 to any media coverage. If there are any reports from
11 the newspaper, television or radio please do not watch
12 or listen to any of these reports. In addition, please
13 don't do any independent research of any type on the
14 internet. As I have explained to you, you are the fact
15 finders in this case and it is absolutely essential
16 that you make a decision based solely on the testimony
17 that you have heard from the lips of the sworn
18 witnesses and the other evidence that has been
19 introduced in this case.

20 When you return to the courthouse please come
21 directly to your jury room and have no contact or
22 conversation with anyone. Again, at this late juncture
23 in the case we would not want an innocent conversation
24 to be observed and misinterpreted. Also please do not
25 discuss your jury service in any manner whatsoever on

1 any social network. As I have already explained, an
2 innocent comment could be so very easily
3 misinterpreted.

4 We appreciate your patience, you all have been so
5 very kind and generous with your time with us. If you
6 would leave your note pad in your seat I will safeguard
7 those during the recess and we'll resume promptly at
8 9:30 with the Court's instructions. Have a good
9 evening and we'll see you all at 9:30.

10 (The jury was excused from the courtroom).

11 THE COURT: Anything before we adjourn, from the
12 State?

13 MS. KINZELER: No, ma'am.

14 THE COURT: The defense?

15 MR. MASON: No, Your Honor.

16 THE COURT: Mr. Barclay, I neglected to do this, I
17 apologize, I need to advise you, sir, if you fail to
18 appear that the Court will continue the trial in your
19 absence and if convicted you will be sentenced. That
20 sentence will be placed under seal and a bench warrant
21 will be issued for your arrest. Do you understand
22 that?

23 THE DEFENDANT: I understand.

24 THE COURT: Thank you, sir. Have a good evening.
25 See you all at 9:30.

1 MS. KINZELER: Thank you.

2 (Recessed at 5:20 p.m, October 31, 2011).

3 (Reconvened at 9:52 a.m., November 1, 2011).

4 THE COURT: Please bring the jury.

5 (The jury returned to the courtroom).

6 BAILIFF: The jury is present, Your Honor.

7 THE COURT: You may be seated.

8 Good morning, ladies and gentlemen. I hope that
9 you all had a pleasant and restful evening.

10 As you know, we have already completed the closing
11 argument and we have reached the stage of the trial
12 where you will hear the Court's instructions on the
13 law.

14 During this trial, ladies and gentlemen, you and I
15 have certain duties to perform. As the trial judge it
16 is my responsibility to pass upon or rule upon the
17 admissibility of evidence offered during this trial and
18 also to preside over the trial of this case. You are
19 to consider only the competent evidence that is before
20 you and you are to disregard and disabuse from your
21 mind any testimony or argument or otherwise that has
22 been stricken from the record in this case during the
23 process of the trial, if there has been any. You are
24 to consider only the testimony which has been presented
25 from the witness stand, together with the exhibits

1 which have been made a part of the record in this case.

2 I have the additional duty, ladies and gentlemen,
3 to charge or instruct you on the law applicable to this
4 case. As the presiding judge I'm the sole judge of the
5 law and it is your duty as jurors to accept and apply
6 the law as I now state it to you. If you have a
7 preconceived idea as to what the law is or what the law
8 ought to be in a case or in this case and it should not
9 agree with what I now tell you the law is you are
10 obligated under the oath which you have taken to
11 abandon this preconception on your part because you are
12 sworn to accept the law and apply the law precisely as
13 I now state it to you.

14 In every case tried in this court before a jury
15 the jury becomes the sole and exclusive judges of the
16 facts. You the jury are the judges of the facts in
17 this case. This Court is the judge of the law. The
18 Constitution of our state has declared that a trial
19 judge shall not intimate, state, comment upon or make
20 any statement to a trial jury about the facts in a
21 case. Since you the jury are the sole judges of the
22 facts in this case, you are not to infer anything from
23 what I said to you during the progress of this trial in
24 ruling upon the admissibility of evidence or otherwise
25 or anything that I now state to you during the course

1 of this instruction that I have any opinion about the
2 facts. The law does not permit me to have an opinion
3 about the facts. This is a matter solely for you the
4 jury to determine.

5 As jurors, then, it is your duty, as I have
6 instructed you, to determine the effect, the value, the
7 weight and the truth of the evidence presented during
8 this trial. Necessarily, you must assess the
9 credibility of witnesses who have testified in this
10 case. Credibility is simply a legalistic term meaning
11 believability. It becomes your duty as jurors to
12 analyze and to evaluate the evidence and determine that
13 evidence which convinces you of its truth.

14 In determining the credibility of witnesses some
15 of the things you may consider in determining whether
16 you believe a witness' testimony about a particular
17 matter include what was the manner and appearance of
18 the witness who testified, was he or she
19 straightforward or hesitant in answering, was the
20 testimony of a witness consistent or inconsistent, how
21 did the witness come to know the facts that he or she
22 testified to or what was his or her ability to know
23 these facts, is there some reason a witness would want
24 to give testimony which would help or hurt one side or
25 the other. In other words, was the witness biased or

1 prejudiced and was the testimony of a witness
2 strengthened or weakened by other testimony or
3 evidence.

4 Additionally, in determining questions of
5 credibility or believability of witnesses who have
6 testified you may believe one witness as against
7 several witnesses or several witnesses as against one
8 witness, you may believe a part of the testimony of a
9 witness and reject the remaining part of the testimony
10 of that same witness. If you have a good and sound
11 reason you may believe the testimony of a witness in
12 its entirety or reject the testimony of a witness in
13 its entirety. You may consider whether a witness has
14 exhibited to you any interest, any bias, any prejudice
15 or other motive in the case. You may consider the
16 demeanor of the witness, that is the manner and
17 appearance of the witness, from the witness stand. You
18 may believe as much or as little of each witness'
19 testimony as you think appropriate. Ladies and
20 gentlemen, you have but one objective through this
21 process, to seek the truth, regardless of its source.

22 Our rules of evidence ordinarily do not permit
23 witnesses to testify to opinions or conclusions. An
24 exception to this rule exists for witnesses we call
25 expert witnesses. A witness who by education, training

1 and experience has become an expert in some art,
2 science, profession or calling may state an opinion as
3 to relevant and material matters in which the witness
4 claims to be an expert and may also state the reasons
5 for the opinion. You should consider any expert
6 opinion received in evidence in this case like any
7 other evidence, give it the weight you think it
8 deserves. If you decide that the opinion of an expert
9 witness is not based on sufficient education and
10 experience or if you conclude that the reasons given in
11 support of the opinion are not sound or that the
12 opinion is outweighed by other evidence you may
13 disregard the opinion entirely. An expert witness'
14 testimony is to be given no greater weight than that of
15 other witnesses simply because the witness is an
16 expert. Further, you are not required to accept an
17 expert's opinion even though it is not contradicted.

18 A statement is alleged to have been made by the
19 defendant which has been admitted into evidence in this
20 case. While the Court has determined that the
21 statement is admissible, I instruct you that you make
22 the ultimate decision of whether or not the defendant
23 made the statement. If the defendant did make the
24 statement you must determine whether the statement was
25 made by the defendant voluntarily and of his own free

1 will. This means that the statement was not caused by
2 pressure, force, fear, threat, coercion, intimidation
3 or by hope or promise of leniency or a reward of any
4 kind. In determining whether the statement was
5 voluntary you should consider both the characteristics
6 of the defendant and the details of the questioning.
7 Some of the factors that you must consider are the age
8 of the defendant, the defendant's education or lack of
9 education, the defendant's mental ability or capacity,
10 the defendant's IQ or intelligence, the defendant's
11 background and environment, the place and length of the
12 detention, the nature of the questioning and the advice
13 or lack thereof to the defendant of his constitutional
14 rights, including but not limited to the right to
15 remain silent, that any statement can be used against
16 him in a court of law, the right to have a lawyer
17 present, that if he could not afford a lawyer a lawyer
18 would be appointed to represent him without any cost
19 and that he can stop making a statement at anytime.
20 You must carefully consider all the surrounding
21 circumstances before you give any weight to an alleged
22 statement.

23 The State has the burden of proving beyond a
24 reasonable doubt that the alleged statement was
25 voluntary. If you determine it was you may give the

1 statement any further consideration that you deem
2 proper. You must decide what weight, if any, should be
3 given to an alleged statement. If you determine the
4 alleged statement was not the free and voluntarily
5 statement of the defendant you should not consider the
6 statement at all.

7 Ladies and gentlemen, there are two types of
8 evidence which are presented during any trial, direct
9 evidence and circumstantial evidence. Direct evidence
10 is the testimony of a person who asserts or claims to
11 have actual knowledge of a fact, such as an eyewitness.
12 Circumstantial evidence is proof of a chain of facts
13 and circumstances indicating the existence of a fact.
14 The law makes absolutely no distinction between the
15 weight or value to be given to either direct or
16 circumstantial evidence nor is a greater degree of
17 certainty required of circumstantial evidence than of
18 direct evidence.

19 You should weigh all the evidence in this case.
20 After weighing all the evidence if you are not
21 convinced of the guilt of the defendant beyond a
22 reasonable doubt you must find the defendant not
23 guilty. Conversely, if you're convinced of the guilt
24 of the defendant beyond a reasonable doubt then you
25 must find him guilty.

1 Ladies and gentlemen, I instruct you that the fact
2 that the defendant was arrested, charged and indicted
3 in this case is not evidence in this case and cannot be
4 considered by you as evidence of guilt in this case nor
5 does it create any presumption or inference of guilt.
6 This documentation, ladies and gentlemen, are simply
7 the formal written instruments which contain the charge
8 or charges made against the defendant. They serve as
9 the formal document by which the case is processed or
10 brought into this court.

11 The defendant has pled not guilty to the
12 indictment. That plea casts the burden on the State to
13 prove the defendant guilty because a person charged
14 with committing a criminal offense in South Carolina is
15 never required to prove himself innocent. I instruct
16 you, Madam Forelady and ladies and gentlemen of the
17 jury, that it is a Cardinal and important rule of the
18 law of evidence that a defendant in a criminal trial,
19 no matter what the seriousness of the charge or charges
20 made against him may be will always be presumed to be
21 innocent of the crime for which he is indicted unless
22 his guilt has been proven by evidence satisfying you of
23 that guilt beyond a reasonable doubt. This presumption
24 of innocence does not cease when you retire to
25 deliberate but it accompanies the defendant from the

1 time of his appearance, throughout the trial, until you
2 reach a verdict based upon evidence satisfying you
3 beyond a reasonable doubt. Our Supreme Court has said
4 that the presumption of innocence is like a robe of
5 righteousness placed about the shoulders of the
6 defendant and it remains with him and assigns him to
7 that class of innocence until that presumptive robe of
8 righteousness has been stripped from his person by
9 evidence satisfying you of that guilt beyond a
10 reasonable doubt.

11 Madam Forelady, ladies and gentlemen, the
12 presumption of innocence is not mere legal theory, not
13 just a legal phrase. It is a substantial right to
14 which every defendant is entitled unless you the jury
15 are satisfied from the evidence of his guilt beyond a
16 reasonable doubt.

17 The State has the burden of proving the defendant
18 guilty beyond a reasonable doubt. Some of you may have
19 served as jurors in civil cases where you are told that
20 it is only necessary to prove that a fact is more
21 likely true than not true, such as by the greater
22 weight or the preponderance of the evidence. In
23 criminal cases the State's proof must be more powerful
24 than that. It must be beyond a reasonable doubt.

25 Proof beyond reasonable doubt is proof that leaves

1 you firmly convinced of the Defendant's guilt. There
2 are very few things in this world that we know with
3 absolute certainty and in criminal cases the law does
4 not require proof that overcomes every possible doubt.
5 If based on your consideration of the evidence you are
6 firmly convinced that the defendant is guilty of the
7 crime charged you must find the defendant guilty. If
8 on the other hand you think there is a real possibility
9 that the defendant is not guilty you must give him the
10 benefit of that doubt and find him not guilty.

11 I instruct you and emphasize that the fact that
12 the defendant did not testify is not a factor to be
13 considered by you in any way in your deliberation and
14 in your consideration on the issue of the guilt or
15 innocence of the defendant. It must not be considered
16 by you in any manner whatsoever. A defendant has the
17 constitutional right to remain silent and the assertion
18 of this right must not be considered by you in your
19 deliberation. I repeat, under your oath you are to
20 draw no conclusion whatsoever from the fact that the
21 defendant in this case did not testify. The fact that
22 this defendant did not testify should not even be
23 discussed in the jury room. The burden of proof, as I
24 have stated to you, is on the State. The defendant is
25 not required to prove his innocence. The burden of

1 proof remains on the State to prove guilt beyond a
2 reasonable doubt.

3 The defendant is charged with felony driving under
4 the influence. The State must first prove beyond a
5 reasonable doubt that the defendant drove a vehicle
6 while under the influence of alcohol. Driving a motor
7 vehicle means that the vehicle was in motion. This may
8 be proven by direct or circumstantial evidence. A
9 movement of the vehicle might occur without any
10 affirmative act by a driver or in fact by any person.
11 If a vehicle is moved by some power beyond the control
12 of the defendant or by accident this would not be
13 driving. The State must prove beyond a reasonable
14 doubt that the defendant was sufficiently under the
15 influence to impair his ability to drive with
16 reasonable care with due regard for others and himself
17 or as a reasonably prudent person would drive. It is
18 not necessary to show that the defendant was in a
19 helpless condition, passed out or even intoxicated. On
20 the other hand, the fact that the defendant at some
21 time prior to this incident drank an alcoholic
22 beverage does not prove that the defendant was driving
23 under the influence.

24 Next, the State must prove beyond a reasonable
25 doubt that while driving the defendant did an act

1 forbidden by law or neglected a duty imposed by law.
2 In that regard I instruct you, ladies and gentlemen,
3 that pursuant to South Carolina Code 56-5-1900, driving
4 on the road laned for traffic, that each driver has the
5 duty, whenever any roadway has been divided into two or
6 more clearly marked lanes for traffic, the following
7 rules in addition to all others consistent herewith
8 shall apply. A vehicle shall be driven as near as
9 practicable entirely within a single lane and shall not
10 be moved from the lane until the driver has first
11 ascertained that such movement can be made with safety.

12 Finally, the State must prove beyond a reasonable
13 doubt that the act or negligence of the defendant
14 proximately caused great bodily injury and/or death to
15 another person. Proximate cause is the direct cause,
16 it is the immediate cause, it is the sufficient cause,
17 it is that cause without which the injuries and/or
18 death of the victim would not have resulted. There
19 must be a chain of causation from the time the, from
20 the time of the injury inflicted by the defendant,
21 until the time of the victim's death. Proximate cause
22 does not necessarily mean that it occurred immediately
23 prior to death.

24 There may be more than one proximate cause. The
25 act of two or more persons may combine together to be a

1 proximate cause of injury and death of a person. The
2 defendant's act may be regarded as the proximate cause
3 if it is a contributing cause of injury to and death of
4 the victim. The fact that other causes also contribute
5 to the injury and/or death of the victim does not
6 relieve the defendant from responsibility. The
7 defendant's act need not be the sole cause of the
8 injury and/or death but must be a proximate cause
9 contributing to the injury and/or death of the victim.

10 I further instruct you that great bodily injury
11 means bodily injury which creates a substantial risk of
12 death or which causes serious permanent disfigurement
13 or extended loss or impairment of the function of any
14 bodily member or organ.

15 I further instruct you ladies and gentlemen that
16 the amount of alcohol in the defendant's blood at the
17 time of the violation as shown by chemical analysis of
18 the defendant's breath or other bodily fluids may be
19 considered by you in deciding whether the defendant was
20 under the influence. If the alcohol concentration was
21 eight one-hundredths of one percent or more it may be
22 inferred that the defendant was under the influence.
23 This inference, ladies and gentlemen, is simply an
24 evidentiary fact to be considered by you along with the
25 other evidence in the case and you may give it the

1 effect, value and weight you decide it should receive.

2 The indictments in this case allege several
3 different offenses against the defendant and they are
4 as follows. Indictment 2011-GS-10-2817, felony driving
5 under the influence, and indictment 2011-GS-10-2848,
6 felony driving under the influence. Ladies and
7 gentlemen, each indictment charges a separate and
8 distinct offense. You must decide each indictment
9 separately on the evidence and the law applicable to
10 it, uninfluenced by your decision as to any other
11 indictment. The defendant may be convicted or
12 acquitted on any or all of the offenses charged. You
13 will be asked to write a separate verdict of guilty or
14 not guilty for each indictment.

15 I further instruct you, ladies and gentlemen, that
16 in determining the guilt or innocence of the defendant
17 you cannot consider any possible or potential penalty
18 for any particular crime. The punishment for a crime
19 is a matter of law for the Court to determine and
20 should never be considered by you in any manner
21 whatsoever in arriving at a fair and impartial verdict
22 as to the guilt or innocence of the defendant. You are
23 not to draw any conclusions or inferences in your
24 deliberations regarding this instruction, however the
25 potential for penalty or guilt should not be discussed

1 in any manner whatsoever during the course of your
2 deliberations.

3 Ladies and gentlemen, there are two possible
4 verdicts for each indictment. There is absolutely no
5 significance whatsoever to the order in which I state
6 the potential verdict, it is simply that one must be
7 stated first, and you don't have to try to write these
8 down because they will go into the jury room with you
9 and they are as follows.

10 As to indictment 2011-GS-10-2817 we the jury by
11 unanimous consent find the defendant guilty of felony
12 driving under the influence resulting in great bodily
13 injury, or not guilty.

14 And as to indictment 2011-GS-10-2848, we the jury
15 by unanimous consent find the defendant guilty of
16 felony driving under the influence resulting in death,
17 or not guilty.

18 Ladies and gentlemen, again I emphasize there is
19 absolutely no significance whatsoever to the order in
20 which I state these potential verdicts. It is simply
21 that one must be stated first.

22 In order for you to reach a verdict your agreement
23 or your verdict must be unanimous, which means all
24 twelve of you must agree in order to reach a verdict.

25 Madam Forelady, it is your responsibility to fill

1 out the verdict form. It is also your responsibility
2 to write out any questions the jury may have during
3 deliberations and also it is your responsibility once
4 the verdict form, once the jury reaches a unanimous
5 verdict and you filled out the verdict form and signed
6 it and dated it that you knock on the door and advise
7 the bailiffs that the jury has reached a verdict.

8 Again, ladies and gentlemen, if you have any
9 questions during deliberation please note there will be
10 a delay in our response. That is because there is a
11 procedure we have to follow in answering your
12 questions, so if you have a question please don't think
13 that we're ignoring you, we're simply following that
14 procedure.

15 And I also will tell you in advance I'm going to
16 be picking some juries this morning so that may also
17 result in a little delay in me responding to you, so
18 please know if you have a question we're not ignoring
19 you, we're following that procedure and maybe some
20 other proceedings may also be causing some delay.

21 Again, ladies and gentlemen, I instruct you that
22 your verdict must be a unanimous one, which means all
23 twelve of you must agree in order for you to reach a
24 verdict.

25 I'm going to ask you to return to your jury room

1 but I'm going to ask that you not begin your
2 deliberations, and leave your note pad in your seat,
3 there are some matters of law I need to take up with
4 the attorneys that may require further instructions or
5 clarification of an instruction. However, if there is
6 no further instructions we will send in your note books
7 and the evidence and at that time we will excuse the
8 alternate and you all will be allowed to begin your
9 deliberations.

10 If you would go with the bailiff, please.

11 (The jury was excused at 10:15 a.m.).

12 THE COURT: You may be seated.

13 Any exceptions to the charge, from the State?

14 MS. KINZELER: No, Your Honor.

15 THE COURT: Any exceptions from the defense?

16 MR. MASON: Yes, Your Honor. With all due
17 respect, you didn't advise the jury that the State has
18 to prove beyond a reasonable doubt that the defendant
19 was materially and appreciably impaired. I did not
20 hear those words used whatsoever in the charge. I
21 think that is clearly a part of the law. I argued
22 throughout my closing that the burden of proof, that
23 the words under the influence mean the defendant is
24 materially and appreciably impaired, and so we think
25 the jury needs to be brought back out so the Court can

1 describe the words materially and appreciably impaired
2 as being the definition of what it means to be under
3 the influence.

4 Also with regard to the inference --

5 THE COURT: Hold on.

6 MR. MASON: I'm sorry.

7 THE COURT: In response to that, he was charged
8 with felony DUI, those terms are not in that statute,
9 therefore not applicable. Our instructions include the
10 language of the statute and that statute does not
11 include materially and substantially impaired. That
12 isn't in the DUI statute, not in the felony DUI.

13 MR. MASON: Your Honor, as we tried this case we
14 have gone through the fact that the felony DUI statute
15 incorporates the inferences that are contained in the
16 regular DUI statute, which incorporates the words under
17 the --

18 THE COURT: It really doesn't, and I'm required to
19 instruct the statute and that is what I have
20 instructed. I have given an analysis that DUI could be
21 a lesser included but the more I think of it now, they
22 don't include those same terms and it may well not be,
23 that is probably why there is no case law on it making
24 it a lesser included offense.

25 I stand by my instructions. I will note your

1 exception for the record.

2 Any others?

3 MR. MASON: You also throughout the trial, when
4 you have told us what the instructions would be, the
5 words materially and appreciably impaired --

6 THE COURT: I have never read that to you, I have
7 never used those terms. I read to you the DUI
8 instructions when we were dealing with the lesser
9 included offense in the discussions, I have read the
10 same instruction every time we have had the discussion
11 the entire time because I start my charge before the
12 case is even started, so I have had this with me and I
13 have made reference to it the entire time and while we
14 may have had some discussion about materially and
15 appreciably impaired, I have never told you I was going
16 to instruct that.

17 MR. MASON: And I don't believe also, Your Honor,
18 that you charged the complete statutory language about
19 the ability of the jury to deal with the inference, and
20 so that is another basis for our objection to the
21 charge. Also we would incorporate all our prior
22 objections to the charge, and that will be the failure
23 to charge sudden emergency, Your Honor, and again I
24 know the Court doesn't want me to belabor each of the
25 other points that we made in the charge conference.

1 THE COURT: The charge conference can serve as
2 argument.

3 MR. MASON: Thank you.

4 THE COURT: There is absolutely no evidence of
5 sudden emergency, there is no testimony to support that
6 sudden emergency was created by some other factor in
7 this accident. The Court is required to charge on the
8 facts that have been presented at trial, there are no
9 facts of sudden emergency.

10 MR. MASON: And also the failure to charge on the
11 lesser included offense.

12 Those are the items, Your Honor. We respectfully
13 believe the words materially and appreciably impaired
14 needs to be told to the jury.

15 THE COURT: Now that I have heard that argument I
16 have changed my opinion about whether it is a lesser
17 included, I don't think it is, because DUI, the felony
18 DUI statute does not use the terms materially and
19 appreciably impaired, so it really does not contain the
20 elements of the greater offense.

21 MR. MASON: The felony DUI statute, Your Honor,
22 also doesn't incorporate the presumptions -- not the
23 presumptions, I'm sorry, I misspoke, the felony DUI
24 statute also does not include the inference which the
25 Court charged. The Court went --

1 THE COURT: The inference deals with a violation
2 of the law or neglect of a duty imposed by law, that is
3 always appropriately charged, otherwise the jury would
4 not know how to deal with how they are to handle the
5 blood alcohol evidence. That violation of that is a
6 violation of a duty or a standard or a statute, so it
7 is appropriately instructed. The jury would not know
8 how to interpret that evidence, they are instructed
9 they don't have to give it any weight, they can decide
10 whatever effect, value, weight to give that evidence,
11 but it is concrete black letter precedent that if
12 you're driving with more than a .08 concentration of
13 alcohol that there is an inference that you are under
14 the influence and that is appropriately instructed and
15 the Court stands by that instruction and the more --
16 what I'm going to do, this made me think a little more,
17 that is probably why there has never been requested or
18 instructed or challenged at an appellate level
19 regarding lesser included offenses, it doesn't include
20 the same language, although we use the same sort of
21 materials interchangeably in instructions but the DUI
22 instruction does include the terms materially and
23 appreciably impaired because that is in the statute.
24 The DUI felony statute does not include that language.

25 MR. MASON: Your Honor, in State versus Grampus,

1 the felony DUI requires proof that the defendant was
2 under the influence of alcohol. That definition is
3 clearly materially and appreciably impaired. Soon
4 after its passage in 1983 the South Carolina Supreme
5 Court recognized in crystal clear language that Section
6 56-5-2945 driving under the influence as an element in
7 the case of State versus Bonniford, Your Honor, 318
8 Southeast 2D 567, 1984.

9 THE COURT: The Court stands by its -- does the
10 State want to respond?

11 MS. KINZELER: If I may, Your Honor, I disagree
12 with with Mr. Mason's position. As an additional note,
13 even if what he said were accurate, that the felony DUI
14 statute were to perhaps incorporate it, the law still
15 defines impairment, as to whether or not -- the Court's
16 instruction would still be correct.

17 THE COURT: The Court is required to charge
18 applicable law based on the facts and statutes. We
19 have many cases that they've admonished judges not to
20 go outside the actual language of the statute,
21 especially where that language is clear and
22 unambiguous. 56-5-2945 clearly states that a person
23 who while under the influence of alcohol, drugs or the
24 combination of alcohol and drugs drives a motor vehicle
25 and while driving a motor vehicle does any act

1 forbidden by law or neglects any duty imposed by law in
2 driving the motor vehicle, which acts or negligence
3 proximately cause great bodily injury or death to a
4 person other than himself is guilty of the offense of
5 felony driving under the influence and upon conviction
6 must be punished, and then it goes into the mandatory
7 penalties for the conviction of that offense, and
8 Subsection D, as the Court instructed, as used in this
9 section, great bodily injury means bodily injury which
10 creates a substantial risk of death or which causes
11 serious permanent disfigurement or protracted loss or
12 impairment of the function of any body member or organ,
13 and then the rest of the statute deals with the
14 suspension of the driver's license in conjunction with
15 a conviction as well as the fines that may be assessed
16 regarding certain other conditions of the statute.

17 I didn't ask you to speak. Have a seat. I have
18 already heard all the argument I'm going to entertain
19 and the rules are very clear once the Court has ruled
20 there is to be no further argument unless the Court
21 asks for it.

22 In contrast, while operating a motor vehicle while
23 under the influence of alcohol or drugs, it provides it
24 is unlawful for a person to drive a motor vehicle in
25 this state while under the influence of alcohol to the

1 extent that the person's faculties to drive a motor
2 vehicle are materially and appreciably impaired. Under
3 the influence of any drugs, any other drug or
4 combination of other drugs or substances which cause
5 impairment to the extent that the person's faculties to
6 drive a motor vehicle are materially and appreciably
7 impaired or under the combination, combined influence
8 of alcohol and any other drug or drugs or substance
9 which cause impairment to the extent that the person's
10 faculties to drive a motor vehicle are materially and
11 appreciably impaired, a person who violates, and it
12 goes into the violation section. Our case law is very
13 clear that the Court is required to instruct the
14 language of the statute, it is not for the Court to
15 embellish, to create its own terms. The Court's job is
16 to instruct the law as the Legislature has mandated it
17 and there are several cases on point that deal with
18 that and admonish trial judges that they are to
19 instruct the exact language from the statute and those
20 cases interpreting that language. The terms materially
21 ly and appreciably impaired are not within the felony
22 DUI statute, that means 56-5-2545. The Court has
23 instructed the exact language from that statute as well
24 as the cases interpreting certain provisions of that
25 statute and the Court stands by its instruction.

1 As regards the instruction on the inference, it is
2 not appropriate for the Court to leave any matter that
3 the jury has to interpret without instruction.
4 56-5-2950(B) applies to both statutes because it deals
5 with testing and the inference from that testing, it is
6 not limited to testing for DUI, it is applicable to any
7 offense which could involve drinking, including
8 reckless homicide, reckless driving, driving while
9 under the influence of drugs or narcotics, so it is
10 appropriately instructed so that the jury can know how
11 to interpret those results. It is not appropriate for
12 a jury to have information as a fact finder and not
13 know what inferences or law they are to apply in
14 interpreting those inferences, and again the Court has
15 instructed the jury that they do not, it is simply an
16 evidentiary fact to be considered by them, along with
17 other evidence, and it is for them to give it the
18 effect, value and weight they think it should, it
19 should be given. The fact that it is simply an
20 inference, like I think other inferences, they can
21 disregard it if they want to, they can regard it if
22 they want to, they can give it any weight they think it
23 deserves, especially in light of the testimony of those
24 who indicate they feel the result is wrong and that it
25 shouldn't be given any weight at all. The Court stands

1 by its instructions.

2 I need you all to go through the evidence and make
3 sure it is all there so it can go back to the jury.

4 Mr. Robinson, you can go ahead and collect the
5 notebooks. Take the alternate notebook, put it on that
6 banister for me, please.

7 Is all the evidence in place, from the State?

8 MS. KINZELER: Pardon?

9 THE COURT: Is all the evidence admitted in place
10 on the table?

11 MS. KINZELER: Yes, ma'am.

12 THE COURT: And from the defense?

13 MR. MASON: Yes, Your Honor.

14 THE COURT: Okay. Mr. Robinson, you can go ahead
15 and collect the evidence. Do we have anything that
16 requires gloves or anything? It doesn't look like we
17 do. Do you need help carrying it? You can go get the
18 alternate for me so they can be excused.

19 The record should reflect the jury began its
20 deliberations at 10:28.

21 Anything from further from the State?

22 MS. KINZELER: No, ma'am

23 THE COURT: From the defense?

24 MR. MASON: No, Your Honor.

25 THE COURT: You all stick close.

1 (Recessed at 10:31 a.m.).

2 (Resumed at 11:15 a.m.).

3 THE COURT: The jury has sent a note, "Can the
4 Court define great bodily injury?" In response to that
5 note I would instruct the statute, which is
6 56-5-2945(B), which is great bodily injury means bodily
7 injury which creates a substantial risk of death or
8 which causes serious permanent disfigurement or
9 extended loss or impairment of function of any body
10 member or organ.

11 Any exception from the State?

12 MS. KINZELER: No, ma'am.

13 THE COURT: From the defense?

14 MR. MASON: No, Your Honor.

15 THE COURT: And they are bringing the jury right
16 now.

17 (The jury returned to the courtroom at 11:16 a.m.)

18 THE COURT: You may be seated.

19 Ladies and gentlemen, in response to your note,
20 "Can the Court please define great bodily injury and
21 the definition or meaning of the word great great with
22 regard to bodily injury." In response to that note I
23 instruct you as follows. Great bodily injury means
24 bodily injury which creates a substantial risk of death
25 or which causes serious permanent disfigurement or

1 extended loss or impairment of the function of any
2 bodily member or organ.

3 That would conclude that additional instruction in
4 response to your note. If you need anything further
5 please do not hesitate to let us know. I'm going to
6 send someone in to make some inquiry of you about lunch
7 and what she is going to tell you, if you want lunch we
8 can order it, it will probably at this point take an
9 hour for it to arrive, we would ask them to have it
10 here by noon but they probably wouldn't get it to us
11 until about 12:15 or so, so she will be in shortly and
12 then after that you can go downstairs and take a smoke
13 break, okay?

14 Would you go with the bailiff for me, please.

15 (The jury was excused from the courtroom at 11:18
16 a.m.).

17 THE COURT: You may be seated. Any comment from
18 the State?

19 MS. KINZELER: No, ma'am.

20 THE COURT: From the defendant?

21 MR. MASON: No, Your Honor.

22 THE COURT: We'll wait to hear from the jury.

23 (Recessed at 11:19 a.m.).

24 (Resumed at 12:55 p.m.).

25 THE COURT: We have a note from the jury and that

1 note reads as follows. "May the jury please have the
2 definition written on paper as read by the Honorable
3 Deidra Jefferson in regard to, quote, great bodily
4 injury, end quote. Thank you."

5 My response to them would be ladies and gentlemen
6 of the jury our procedure does not allow for copy of
7 the jury charge instructions to be given to you. If
8 there is any instruction you would like given again or
9 the entire instruction I will accommodate your request.

10 Any exception from the State?

11 MS. KINZELER: No, ma'am.

12 THE COURT: From the defense?

13 MR. MASON: No, Your Honor.

14 THE COURT: Thank you. I would simply attach that
15 to this note and have it marked as a Court's exhibit
16 and instruct them to maintain this note so it will
17 remain part of the record.

18 Any exception from the State?

19 MS. KINZELER: No, ma'am.

20 THE COURT: The defense?

21 MR. MASON: No, Your Honor.

22 THE COURT: All right, we'll wait to hear from the
23 jury.

24 (Recessed at 12:59 p.m.).

25 (Resumed at 1:08 p.m.). They sent me a note,

1 "Thank you four your response. We do not, underlined,
2 do not need clarification. Could we go for a break?"

3 I will let them eat their lunch.

4 MR. MASON: We'll be at ease for 30 minutes?

5 THE COURT: Yes. Be where you can come back
6 quickly in case they need something, they will take 15
7 or 20 minutes to eat and then come back if they have
8 any questions, you know.

9 (Recessed at 1:10 p.m.).

10 (Resumed at 2:17 p.m.).

11 THE COURT: You may be seated.

12 Are they ready? Oh, you've got them, I apologize.

13 THE BAILIFF: Bring them in?

14 THE COURT: Yes.

15 (The jury returned to the courtroom at 2:20 p.m.).

16 THE BAILIFF: The jury is present, Your Honor.

17 THE COURT: Where is the alternate?

18 THE BAILIFF: The alternate is in the back.

19 THE COURT: Madam Forelady, is it correct the jury
20 has reached a verdict?

21 JUROR: Yes, sir.

22 THE COURT: If you would give the verdict form to
23 the bailiff for me, please.

24 If the defendant would rise for publication of the
25 verdict.

1 THE CLERK: State of South Carolina vs. Walter
2 Douglas Barclay, Indictment Number 2011-GS-10-2817,
3 felony DUI resulting in great bodily injury, we the
4 jury by unanimous consent find the defendant not
5 guilty.

6 As to Indictment 2011-GS-10-2848, felony DUI
7 resulting in death, we the jury by unanimous consent
8 find the defendant guilty.

9 Ladies and gentlemen of the jury, if this is your
10 verdict please raise your right hand.

11 THE COURT: Do you request a poll, from the State?

12 MS. KINZELER: No, ma'am.

13 THE COURT: From the defense.

14 MR. MASON: Yes, Your Honor.

15 THE COURT: Madam Clerk, if you will proceed with
16 polling the jury.

17 THE CLERK: Juror number 18, Louise Birdwell. Is
18 this your verdict?

19 JUROR: Yes.

20 THE CLERK: Is it still your verdict?

21 JUROR: Yes.

22 THE CLERK: Number 15, Dwayne Bennett. Is this
23 your verdict?

24 JUROR: Yes.

25 THE CLERK: Is it still your verdict?

1 JUROR: Yes.

2 THE CLERK: Juror number 2, Charlene Atkins. Is

3 this your verdict?

4 JUROR: Yes.

5 THE CLERK: Is this still your verdict?

6 JUROR: Yes.

7 THE CLERK: Juror number 284, James Wessel, Jr.?

8 JUROR: Yes.

9 THE CLERK: Is this your verdict?

10 JUROR: Yes.

11 THE CLERK: Is this still your verdict?

12 JUROR: Yes.

13 THE CLERK: Juror number 105, Gene Gibbs.

14 JUROR: Yes

15 THE CLERK: Is this your verdict?

16 JUROR: Yes.

17 THE CLERK: Is it still your verdict?

18 JUROR: Yes.

19 THE CLERK: Juror number 94, Margaret Fralin?

20 JUROR: Yes.

21 THE CLERK: Is this your verdict?

22 JUROR: Yes.

23 THE CLERK: Is it still your verdict?

24 JUROR: Yes.

25 THE CLERK: Juror number 48, Margaret Combee. Is

1 this your verdict?

2 JUROR: Yes.

3 THE CLERK: Is it still your verdict?

4 JUROR: Yes.

5 THE CLERK: Juror number 153, Laura Klein. Is
6 this your verdict?

7 JUROR: Yes.

8 THE CLERK: Is it still your verdict?

9 JUROR: Yes.

10 THE CLERK: Juror number 148, David Karinshak?

11 JUROR: Yes.

12 THE CLERK: Is this your verdict?

13 JUROR: Yes

14 THE CLERK: Is it still your verdict?

15 JUROR: Yes.

16 THE CLERK: Juror number 271, Adam Tittle?

17 JUROR: Yes.

18 THE CLERK: Is this your verdict?

19 JUROR: Yes.

20 THE CLERK: Is it still your verdict?

21 JUROR: Yes.

22 THE CLERK: Juror number 168, Patricia Macfarland.

23 Is this your verdict?

24 JUROR: Yes.

25 THE CLERK: Is it still your verdict?

1 JUROR: Yes.

2 THE CLERK: And juror number 243, Stephnie Shahid.

3 Is this your verdict?

4 JUROR: Yes.

5 THE CLERK: Is it still your verdict?

6 JUROR: Yes.

7 THE CLERK: Your Honor, the jury has been polled,
8 the verdict stands.

9 THE COURT: Thank you.

10 You may take your seat.

11 Madam Forelady, ladies and gentlemen, we thank you
12 for your time and attention to this case on behalf of
13 the State and defendant and defense counsel. We know
14 jury service has been a tremendous sacrifice both to
15 your personal and professional lives and what we pay
16 you is not nearly a reflection of how greatly we value
17 your service.

18 Just so that you know, we hold court probably,
19 except for the holidays, we hold court every week in
20 Charleston County, not just Circuit Court, but we hold
21 simultaneous terms of Family Court, not to mention the
22 Master in Equity holds court, the probate judge is
23 holding court and in addition to that we generally run
24 four trial courts just in Circuit Court itself during
25 any given term of court, so we probably hold jury

1 trials, out of the 52 weeks of the year, probably 48
2 weeks.

3 So, I just give you that as a benchmark for you to
4 know how very valuable you are to us and we could not
5 perform our service as we do without you all being
6 willing to donate your time to us.

7 You are welcome to discuss this case if you would
8 like but by the same token you do not have to discuss
9 this case. If someone should persist in trying to
10 speak with you and it makes you uncomfortable please
11 contact the clerk's office so that we can take the
12 appropriate action to protect your privacy.

13 You all are excused, you may stay if you would
14 like for sentencing. if anyone wishes to do that
15 please let the bailiffs know and we will bring you back
16 into the courtroom for that purpose.

17 We'll destroy your notes and if you need a work
18 excuse today please let us know. I think they have to
19 go downstairs to get that, you can get those
20 immediately on the Circuit Court side of the Clerk's
21 office. Any of the deputy clerks at those windows can
22 provide you with one, otherwise we will mail those to
23 you along with your check.

24 Madam Forelady, when the remainder are excused, if
25 you could step to the bannister in the back we need you

1 to sign the indictment.

2 Ladies and gentlemen, you are excused with the
3 thanks of the Court.

4 (Jury excused from the courtroom).

5 THE COURT: Any post trial motions from the State?

6 MS. KINZELER: No, ma'am.

7 THE COURT: From the defense?

8 MR. MASON: Your Honor, we would renew all our
9 motions, directed verdict, incorporate all arguments
10 previously made, Your Honor.

11 With regard to sentencing, we would make a post
12 trial motion for a pre-sentence investigation report
13 and ask that Mr. Barclay be allowed to remain on bail
14 pending sentencing so we could provide information to
15 the Court which would be relevant to the issue of
16 sentencing, additional information about the defendant
17 and also I believe in this case as will be pertinent as
18 well, input from the one victim. There is, there are
19 some family members on Edisto Island, particularly Jose
20 Licona who is a cousin and really probably the only
21 family member that is actually in the state and has
22 remained active in regard to what has taken place. We
23 would really like the Court to hear from him. I can
24 represent to the Court that I have spoken with him, he
25 has been kind enough to remain in contact with me

1 voluntarily and I have had communications with him that
2 I think would be beneficial to the Court to consider in
3 regards to this matter.

4 Also, I mean, as you can see from the presence of
5 people here in this courtroom today, there are many
6 people who we would like the Court to hear from on Mr.
7 Barclay's behalf and we think that would assist the
8 Court in making its decision in regard to a just
9 sentence.

10 Also from a pre-sentencing standpoint, if the
11 Department of Probation, Pardon and Parole was not
12 going to participate in that we would engage probably
13 Dr. Wade to present something to the Court to the
14 extent that any of that information might be helpful on
15 the issue of sentencing, so whatever your decision
16 might be on that matter, then we can either proceed as
17 you would indicate, Your Honor.

18 THE COURT: Would the State like to respond?

19 MS. KINZELER: Your Honor, I oppose that.

20 THE COURT: Well, you need to address his post
21 trial motions first.

22 MS. KINZELER: I'm sorry. I rest on the argument
23 previously made by the State at both directed verdict
24 stages throughout the trial. I don't have anything
25 further to add with regard to post trial motions.

1 THE COURT: Okay. The Court would stand by its
2 previous rulings.

3 Now, next dealing with the request for pretrial
4 sentencing report or evaluation?

5 MS. KINZELER: I think that is completely
6 unnecessary in this case, Your Honor, I oppose it
7 vigorously, and with regard to Jose Licon, he has
8 communicated with Investigator Watson but he is not
9 happy with the contact that Mr. Mason's firm has had
10 with him in that he wants to see justice done. He is
11 aware sentencing would likely be today and he is not
12 here and he is okay, he defers to Your Honor. I have a
13 statement from the victim from the great bodily injury
14 case and Jose Davilla, Your Honor, wants justice done
15 but he's not adamant about being here or he would be
16 here right now and I don't think that we need to wait
17 for him. And I don't believe that a pre-sentence
18 investigation is necessary. It is fairly clear what
19 the penalty carries, there are more than sufficient
20 number of people here to speak for the defendant.

21 I don't have anything else to add, Your Honor, I
22 think it is a completely unnecessary request.

23 THE COURT: Okay. With regard to post trial
24 motions, those being renewed, et cetera, those are
25 denied, the Court stands by its earlier ruling

1 regarding those and will not go back and try to rehash
2 those, I think they are well preserved for the record.

3 As regards to the victim, by statute he is
4 entitled to be here. However that onus is on the State
5 to assure his appearance. You communicated with him
6 through the victim witness advocate and they have, they
7 have indicated to the Court that Mr. Licon, that is
8 Mr. Santos' only --

9 MS. KINZELER: Mr. Garcia.

10 THE COURT: Mr. Garcia, I apologize. That is Mr.
11 Garcia's only relative who is here in the State. Is
12 that correct?

13 MS. KINZELER: That is my understanding, Your
14 Honor.

15 THE COURT: And he does not wish to be present, is
16 that also correct?

17 MS. KINZELER: Yes, ma'am.

18 THE COURT: And he has deferred to the Court's
19 authority in terms of sentencing and defers to the
20 Court's discretion and he does not take a position. Is
21 that correct?

22 MS. KINZELER: Your Honor, the only position he
23 took is he wants to see justice done, he wants to see
24 the defendant pay for what he did and he defers to you
25 with regard to particular numbers and he is okay with

1 you deciding that without him being here.

2 THE COURT: You said you had a statement from Mr.
3 Davilla?

4 MS. KINZELER: I do. David spoke with Mr. Davilla
5 this morning and if I may just read it to the Court.

6 THE COURT: I'll let you do that at the
7 appropriate time.

8 MS. KINZELER: Okay.

9 THE COURT: Now, as regards to the, delaying the
10 proceedings for the purpose of the victims being
11 present, as I have indicated, the statute does allow
12 anyone who would be considered a victim of a crime to
13 be present at all relevant junctures of the proceedings
14 and to ensure their appearance. However, where a
15 victim has indicated that they do not wish to be
16 present there is no purpose in the Court delaying the
17 proceeding.

18 As regards the pre-sentencing report, that is most
19 often done in the federal courts. As you all know,
20 offenses are disposed of generally by guilty plea, the
21 defendant remains out not on bond but subject to the
22 federal probation office until that federal
23 pre-sentencing report is done and then sentencing is
24 done pursuant to guidelines, which is very different
25 from state court where sentencing is done

1 simultaneously with a conviction or a guilty plea.
2 There is a provision in the statute for post trial
3 sentencing reports but that is only applicable to
4 youthful offenders. I have never exercised it. I
5 don't see a particular need for it in this case. I do
6 not discern at this point it would be particularly
7 helpful to the Court in sentencing.

8 However, Mr. Mason, if you wish to have your
9 client evaluated by Dr. Wade, I guess I'm at a bit of a
10 loss why you would not have done it to this point or
11 prior to trial in terms of you wanting to submit that
12 for purposes of mitigation, but if you would like to
13 have him evaluated post sentence that's fine, if you
14 want to file a motion for reconsideration of sentence,
15 have the Court consider that, that also is fine but I
16 will not delay the proceeding for that purpose.

17 If you have relatives of the defendant present,
18 certainly the Court will be glad to hear from them but
19 I do not see that as a bar or reason to delay the
20 proceedings either. And I'm not aware of anything that
21 provides for a defendant, once convicted, to remain out
22 post verdict to delay sentencing, so the Court will do
23 as it always does and impose sentence at the conclusion
24 of trial or the adjudication of guilt by the way of
25 guilty plea.

1 Does the State have a sentencing sheet?

2 MS. KINZELER: Yes, ma'am.

3 THE COURT: Yes, sir?

4 MR. MASON: Your Honor, with that being your
5 ruling, we're prepared to be heard with the people we
6 have and the information we would like to present to
7 the Court.

8 THE COURT: Is the State ready to proceed?

9 MS. KINZELER: Yes, ma'am.

10 THE COURT: Is the defense ready to proceed?

11 MR. MASON: Yes, Your Honor.

12 THE COURT: You may proceed with sentencing.

13 MS. KINZELER: Your Honor, I will go ahead and
14 present the statement from Jose he gave this morning.
15 These were David's notes from his conversation this
16 morning.

17 "On November 1st, 2011, at approximately 9:00 a.m.
18 I made contact with Mr. Davilla, I asked him if he
19 wanted to be in court when a verdict is reached and
20 make an impact statement. He stated the following to
21 me. He was mentally and physically exhausted by the
22 trial, he is now glad that the trial is over and he now
23 truly believes in our justice system but he is very
24 much saddened by the loss of his friend and not a day
25 goes by he doesn't remember him because they both

1 worked at the same job site and he has occasion to go
2 to the same job site. It caused him a lot of pain and
3 that he will never forget that night because he lost a
4 good friend and he almost surely thought he was also
5 going to die. He would like the judge to know he truly
6 believes in the Court and that she will make the right
7 decision when it comes to handing down any punishment."

8 That was from the passenger in the car that night.

9 In addition, if I may, Your Honor?

10 THE COURT: Yes, ma'am.

11 MS. KINZELER: It has been stated by the defense
12 to me prior to trial a few times both verbally and in
13 writing there are no clamoring victims in this case and
14 I submit that that is actually very inaccurate. In
15 addition to Jose Davilla, Jose Licano, in addition to
16 the deceased Alvero Antonio Garcia, there is a wife and
17 three kids at home in Mexico he was supporting when
18 this happened and I don't think the fact they can't be
19 here means there aren't any clamoring victims. In
20 addition, Your Honor, he doesn't really have any prior
21 convictions to speak of. He does have an old 1994
22 arrest for DUI, illegal possession of liquor.

23 In speaking with witnesses to prepare for this
24 trial, they remember a lot about this defendant in
25 particular for obvious reasons given, what we presented

1 as evidence in the case but for additional reasons that
2 weren't appropriate in front of a jury as far as
3 evidence goes as to whether or not he committed the
4 offenses that were charged, and the witnesses I spoke
5 with, particularly Nurse Heath, by example, remembers
6 him from that night particularly, in addition to the
7 obvious reasons, because of his lack of remorse. Most
8 of these witnesses used that word when they described
9 what they recall about this event, just the sheer
10 unremorsefulness of what happened. In addition, Jose
11 did tell us, Jose Davilla, the other victim, in short,
12 Your Honor, it wasn't a one time thing, it had happened
13 before, Jose believes it has happened before, not
14 necessarily the death and injuries, but the drinking
15 and driving. This wasn't a one time thing. It wasn't
16 a one time 19 year old making a mistake kind of case,
17 it was an accident waiting to happen and I just, I know
18 that the Court is going to hear from several people
19 about what a good person he is and I'm sure to those
20 people that is true and I'm sure he is a good person
21 but there is another side to Mr. Barclay I don't know
22 if they know and without repeating the exact words I
23 would ask Your Honor take into consideration the
24 statements that didn't come out in front of the jury
25 the firemen heard that night. Those statements came,

1 and his filter may have been lowered by being
2 intoxicated, but he feels the way he does about a
3 particular group, what he says, it wasn't just because
4 he was drunk, and since then when Jose has seen him at
5 the store in the daytime buying beer or whatever Jose
6 had told us that he looks at him and says, "You killed
7 my friend and you still drink and drive," and he looks
8 at him in return as though he doesn't care, it is
9 almost as though it shouldn't matter because they were
10 Hispanic or whether or not they were here illegally,
11 and I would just like for the Court to have a very
12 honest view of both sides of what we're presenting here
13 today. It wasn't a one time mistake, it goes lot
14 deeper than that and that is the other side of the
15 defendant that we became aware of in preparing for
16 trial.

17 That being said, Your Honor, I think that, I do
18 realize his age, that there was one not guilty and one
19 guilty, I do think anything less than ten years would
20 not be justice. I would shoot for closer to fifteen
21 but I think ten to fifteen years would be most
22 appropriate. It does carry up to 25 years. I do think
23 that the way it happened and what happened and the way
24 this man died and the way Jose almost died, I think all
25 these things definitely support at least a ten if not

1 fifteen year sentence, certainly not the minimum.

2 Thank you.

3 THE COURT: You're welcome. Anything further from
4 the State? Anyone else wish to be heard? You have
5 already read Mr. Garcia's, I mean Mr. Davilla's
6 statement, and Mr. Licona is his cousin residing here
7 in the state and you have made us aware of his
8 statement as well. Is that correct?

9 MS. KINZELER: Yes, ma'am.

10 THE COURT: Okay. And while I am, I have a great
11 deal of empathy regarding Mr. Davilla's injuries, the
12 record should be clear the defendant was exonerated of
13 the charges so while I have empathy for his injuries I
14 cannot take those into consideration in sentencing but
15 I can take into account the effect of the loss of his
16 friend.

17 I will be glad to hear from the defense.

18 MR. MASON: Thank you. Your Honor, may I
19 approach?

20 THE COURT: Yes, sir.

21 MR. MASON: We have 15 character statements that I
22 previously provided to the Solicitor's office and I
23 would just like to present them to the Court and review
24 them quickly with you, Your Honor.

25 Your Honor --

1 THE COURT: I will go over them now and put them
2 in the file.

3 MR. MASON: Then what I would like to do, Your
4 Honor, the witnesses that I have, that you're going to
5 read these statements, I would like to have those
6 witnesses share some information with the Court.

7 THE COURT: The same people that have written
8 statements?

9 MR. MASON: No.

10 THE COURT: Different individuals?

11 MR. MASON: Yes.

12 THE COURT: Okay, you may proceed.

13 MR. MASON: The first person would be Rebecca
14 Borders. May she approach?

15 THE COURT: She can stay where she is, for
16 security purposes.

17 Ma'am, if you would state your full name for the
18 record.

19 REBECCA BORDERS: Rebecca Jean Borders.

20 THE COURT: And if you could spell your last name
21 for the court reporter.

22 REBECCA BORDERS: B-o-r-d-e-r-s.

23 THE COURT: Yes, ma'am, I will be glad to hear
24 from you.

25 REBECCA BORDERS: I would like to --

1 THE COURT: I'm going to need you to speak up for
2 us so the court reporter can hear you.

3 REBECCA BORDERS: Doug Barclay is a good man, he
4 is very kind, he is always willing to help anyone with
5 anything, never meant any harm and I will be very
6 unhappy to see his life become a tragedy along with it.

7 MR. MASON: We would also like for you to hear
8 from Marie Dorn.

9 THE COURT: Yes, ma'am, tell us your name.

10 MARIE DORN: Marie Dorn.

11 THE COURT: Spell your last name.

12 MARIE DORN: D-o-r-n.

13 THE COURT: Than you, ma'am. Yes, ma'am?

14 MARIE DORN: I have been a friend of Otis for
15 about 20 years, I have known him and loved him from the
16 very beginning. He is a gentleman, he's an honest man,
17 he gives to the community, just the backbone of
18 stability for the people he associates with. His wife
19 is the island physician. As a married couple they are
20 absolutely indispensable one without the other.

21 Thank you.

22 THE COURT: You're welcome.

23 MR. MASON: Your Honor, we would like for you to
24 hear from John Sanders.

25 THE COURT: Yes, sir.

1 JOHN SANDERS: Yes, ma'am, I'm John Sanders.

2 THE COURT: We have to make sure we have it
3 accurate. Spell your last name for the court reporter.

4 JOHN SANDERS: S-a-n-d-e-r-s.

5 THE COURT: Yes, sir.

6 JOHN SANDERS: Otis, Doug, has been like a father
7 to my children, a brother to me, he is always there
8 when people need him. He is one of the first people
9 people turn to when they need extra help and it will be
10 a shame this accident will just destroy his life like
11 this. We just need him around.

12 Thank you.

13 THE COURT: You're welcome, sir.

14 MR. MASON: Your Honor, the statements that we
15 provided to the Court, and again I'm not going to
16 review them because I know you're going to read them,
17 are from Harry Bowman, M.D., who is the orthopaedic
18 doctor who is the athletic doctor for the Clemson
19 football team, Lieutenant Dwight Kennerly who is with
20 the South Carolina Highway Patrol, John Rogers who is a
21 state representative from Marlboro County, Delton
22 Powers, who is an attorney from Marlboro County, and
23 various other business leaders, including Mr. Hamrick,
24 and we just ask the Court to take those into
25 consideration before passing sentence.

1 In addition, we dispute, without getting into
2 detail, we dispute some of the representations made to
3 the Court by the Assistant Solicitor with regard to
4 statements that were said to be made by Doug Barclay in
5 which it's claimed that he said some things that were
6 racially derogatory towards Hispanics. That is just
7 not in his character. I think it could be attested to
8 by these statements we provided to the Court.

9 Also this information about other events or
10 conduct since this accident. The fact remains that he
11 has no prior criminal record, and then, you know, he
12 has conducted himself every day of his life, with the
13 exception of what he has been found guilty for on
14 December 8th, 2008, in an understanding manner and the
15 record speaks to that and we would just ask the Court
16 to pass a sentence that allows him to be a contributing
17 member of society at some point. We believe that a
18 sentence that, certainly there will have to be some
19 time in which he would be incarcerated, but some other
20 sentence that allows him to be either under house
21 arrest or to serve his incarceration sentence some way
22 other than being in jail for what in essence would be
23 the rest of his life. A 60 year old man, you know,
24 life expectancy of a 60 year old man who is living this
25 point in time, I hadn't checked the tables --

1 THE COURT: I think another 17 years.

2 MR. MASON: Right.

3 THE COURT: The life expectancy table doesn't
4 matter.

5 MR. MASON: He has maybe more, maybe less. We
6 would ask the Court to take that into account in
7 passing sentence.

8 Thank you.

9 THE COURT: You're welcome.

10 Mr. Barclay, is there anything you would like to
11 state for the record on your own behalf?

12 THE DEFENDANT: Your Honor --

13 THE COURT: Yes, sir?

14 THE DEFENDANT: -- I have lived with this remorse
15 for almost three years now and I find it disconcerting,
16 some of the comments that the Solicitor made, because I
17 know I didn't make those statements.

18 THE COURT: I'm sorry, I didn't hear the last?

19 THE DEFENDANT: I know I did not make those
20 statements. I have always tried to be a good person,
21 assist my friends, assist anybody, really for that
22 matter. This trial has been a shocking education for
23 me. I have never been involved in any kind of criminal
24 case. I feel -- I was involved in an accident but it
25 was not my fault, so with that said, obviously the jury

1 didn't feel that way, so I don't know what else to say
2 to you but I apologize. I thank the jurors for their
3 time, they've been considerate, I'm just sorry this
4 whole incident happened and I hope the Garcias and
5 Davillas will get over it.

6 That's about all I have to say. Thank you, Judge,
7 for your time.

8 THE COURT: Thank you, sir.

9 Anything further, Mr. Mason?

10 MR. MASON: No, Your Honor.

11 THE COURT: Anything further from the State?

12 MS. KINZELER: No, Your Honor.

13 THE COURT: Was the victim reimbursed for any
14 expenses? Did the insurance company pay any claims in
15 this case?

16 MR. MASON: The estate of Mr. Garcia's estate was
17 paid a hundred thousand dollars by AIG Insurance
18 Company in a settlement that did not involve any
19 litigation. It was voluntary payment and obviously
20 that settled any and all claims that would relate to
21 Mr. Garcia. Mr. Davilla received approximately -- I'm
22 sorry, Mr. Garcia's family received 150 because it was
23 also \$50,000 in property damage coverage, so the
24 company paid both aspects of that coverage.

25 As to Mr. Davilla, because of his situation, the

1 nature of the injuries, he received I believe it was
2 \$90,000 was the gross settlement that he received and
3 he as well signed a release representing he had been
4 fully paid for his monetary claim.

5 THE COURT: It went to the family?

6 MR. MASON: Yes. There is a probate court file
7 opened up in this Court that was handled properly.

8 THE COURT: That went to the heirs?

9 MR. MASON: Yes, properly distributed.

10 MS. KINZELER: Your Honor, if I may briefly, that
11 is not what the victim's family got.

12 THE COURT: I know the lawyer has to be paid, the
13 medical bills have to be paid.

14 MS. KINZELER: I just wanted to make sure.

15 THE COURT: So probably after it all was said and
16 done, I don't have my calculator but they probably
17 netted about 20, 25 thousand dollars.

18 THE COURT: What was Mr. Garcia's age at the time
19 of his death?

20 MS. KINZELER: Your Honor, I believe he was about
21 45. About 45, Your Honor.

22 THE COURT: For the record, Mr. Barclay's life
23 expectancy is 20.64 years, I was wrong. I was close
24 but not accurate.

25 Felony DUI resulting in death carries a maximum

1 penalty of 25 years and maximum fine is \$25,000, it is
2 also classified as serious. I'm sure you've already
3 explained to your client that is the way he will serve
4 his time. South Carolina law says you will have to
5 serve 85 percent of your sentence prior to being
6 eligible for parole.

7 Mr. Barclay, if you would stand, please, at this
8 time.

9 It is unfortunate that this event occurred and it
10 shows how quickly something can happen in a split
11 second. It is unfortunate that the life of Mr. Garcia
12 and Mr. Barclay have been affected so profoundly by
13 this incident but it is not lost on this Court. While
14 I have read all of the character references, and they
15 come from some very exceptional people throughout the
16 State, many of whom I'm familiar with and probably
17 through my travels through the State holding court may
18 well have met, but having read their glowing references
19 of Mr. Barclay I have no doubt of what they perceive of
20 his character, I have no reason to question that.

21 However, it cannot be lost on this Court that a life
22 was lost and that a person died as a result of this
23 incident and that cannot be minimized.

24 This Court does not take into consideration
25 anything that happened to Mr. Davilla because he was

1 exonerated of that charge and I have already stated
2 that on the record. The Court will not take that into
3 consideration in sentencing.

4 Mr. Barclay, the Court finds it appropriate you be
5 sentenced to the Department of Corrections for a period
6 of twelve years. You will get credit for any time you
7 have served, that is to be calculated and applied by
8 the Department of Corrections. I'm ordering that you
9 have access to the ATU, which is the alcohol treatment
10 unit, if it is available to you.

11 Anything further for the record, from the State?

12 MS. KINZELER: No, ma'am.

13 THE COURT: From the defendant?

14 MR. MASON: No, Your Honor.

15 THE COURT: Thank you all very much. Have a good
16 day.

17 (Hearing concluded).

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3 I, the undersigned Henry P. Young, Official Court
4 Reporter for the 15th Judicial Circuit of the State of
5 South Carolina, do hereby certify that the foregoing is
6 a true, accurate excerpt of the proceedings had in the
7 trial of the captioned case in the Circuit Court for
8 Charleston County, South Carolina, October 24 through
9 November 1, 2011.

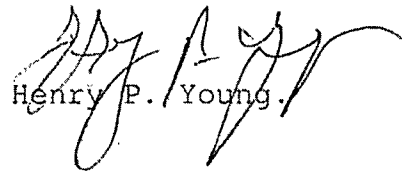
10 I do further certify that I am neither of kin, k
11 counsel, nor interest to any party herein.

12

June 2, 2012

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Henry P. Young.

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FILED

STATE OF SOUTH CAROLINA } IN THE COURT OF GENERAL SESSIONS
 2011 NOV 10 PM 3:17 } FOR THE NINTH JUDICIAL CIRCUIT
 COUNTY OF CHARLESTON } INDICTMENT NUMBER: 2011-GS-10-2848

JULIE J. ARMSTRONG
 CLERK OF COURT
 STATE OF SOUTH CAROLINA

vs.

WALTER DOUGLAS BARCLAY,

Defendant.

DEFENDANT'S POST-TRIAL MOTION

NOW COMES Defendant Walter Douglas Barclay, by and through his undersigned attorneys, and he hereby moves this Honorable Court, pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure, for a post-trial review of the sentence imposed by the Court, and, for a new trial, upon the grounds set forth herein:

1. Defendant, through his counsel, requested that the sentencing which took place on November 1, 2011 be delayed in order to allow the Court to hear from the victims, and, so that Defendant could present additional information to the Court bearing upon sentencing. The Court proceeded with sentencing but indicated it would receive and consider additional information by way of a post-trial motion.

2. South Carolina Constitution, Art. I, §24 preserves and protects rights of victims of crime to justice and due process. A victim is a person who suffers direct financial harm as the result of the commission of a crime. *Id.* at (C)(2). The term "victim" includes the person's spouse and children. *Id.* Victims of crime have a right to receive prompt and full restitution from the person convicted of the criminal conduct which caused the victim's loss or injury. *Id.* at (B)(9).

3. Victims of crime have the right to be informed of any proceeding when any post-

conviction action is being considered. *Id.* at (B)(10).

4. Antonio Alvaro Garcia, deceased, died as a result of the accident of December 8, 2008. He is survived by a wife, Gregoria Hilario Calixto, and four (4) children, Alvaro Antonio Calixto, Istanislao Antonio Calixto, Jackeline Antonio Calixto and Cruz Alberto Antonio Calixto, all of whom reside in Mexico.

5. As a result of their foreign residence, the decedent's wife and children were not present and otherwise were not available to be heard on the issue of sentencing. Rather, at the time of initial sentencing the Court considered the interest of the victims by way of a statement related to the Court by a cousin of the deceased, Mr. Jose Licon, and a statement from a good friend of the deceased, Mr. Jose Davila, both of whom reside on Edisto Island, South Carolina.

6. Prior to the filing of this post-trial motion Defendant's counsel communicated with Mr. Jose Licon to advise that Defendant was seeking a post-trial modification of his sentence and to determine if Mr. Jose Licon wished to communicate directly with the victims—Mr. Garcia's wife and children—to determine if the victims wished to be heard or wished to take a position in connection with this Motion which seeks a post-trial modification of Defendant's sentence.

7. Defendant is a sixty (60) year old man with no prior criminal record. By all accounts, Defendant was an outstanding citizen in the local community. He is not a danger to the community. He stands convicted of Felony DUI causing the death of Antonio Alvaro Garcia. He has been sentenced as a violent offender to twelve (12) years in prison. His incarceration serves as punishment. He cannot contribute to society while incarcerated, nor can he earn an income from which to make restitution to the victims. A sentence which provides for punishment, rehabilitation and restitution would serve the interests of justice. Further, in the sentencing phase of these

proceedings it was represented to the Court that at some point following the accident Defendant had stated that Defendant did not care that he had killed decedent, and, further that Defendant had made racial slurs about the victims. Defendant did not make these statements. The Court should have determined whether in fact these statements were made and if not made the Court should not have considered said statements in sentencing Defendant.

8. Defendant's attorney has been advised by Mr. Jose Licona that the victims support a modification of Defendant's sentence along the following lines:

(a) Defendant be sentenced to seven (7) years in prison, suspended upon service of three (3) years, and payment of the court-ordered restitution on the terms set forth below.

(b) Defendant be ordered to make restitution in the form of payments to the children of Antonio Alvaro Garcia to allow them to obtain a higher education, to wit:

Commencing upon Defendant's release from prison Defendant shall pay \$7,000 per year, per child, for a period of four (4) years, as court-ordered restitution (\$112,000 total).

(c) In the event Defendant fails to timely pay the said court-ordered restitution, Defendant's probation shall be revoked and he shall serve the remainder of his sentence.

(d) Defendant's driver's license shall be suspended as set forth in S.C. Code Ann. §56-5-2945 (1976, as amended).

(e) Defendant shall receive alcohol counseling and treatment as determined by the South Carolina Department of Probation, Parole and Pardon Services.

9. Defendant requests a modification of his sentence to contain the terms set forth in Paragraph 8 (a) through (e) above.

10. This Court should conduct a hearing to determine whether the interests of justice and

those of the victims would be served by a modification of Defendant's sentence that includes the restitution component suggested herein. At said hearing, the Court should hear from the victims of the crime, or their duly appointed representatives, as to their position in this matter.

11. Defendant hereby moves this Court for a new trial based upon those errors of law asserted by Defendant during the trial of this matter, including but not limited to, the following:

(a) The trial court erred in failing to charge the jury that in order to convict Defendant of Felony DUI the State had to prove beyond a reasonable doubt that the Defendant was "under the influence of alcohol to the extent the person's faculties to drive are materially and appreciably impaired . . ." and that the alcohol must "cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired." In the reported Felony DUI case of *State v. Martin*, 392 S.C. 508, 706 S.E.2d 40 (Ct. App. 2011), which this Court presided over at the trial level, this Court gave such a charge to the jury, as appears from a portion of the trial transcript attached as Exhibit "A" hereto. As a matter of law, Defendant was entitled to this same charge. Accordingly, Defendant should be granted a new trial.

(b) The trial court erred in the failing to charge the jury on the lesser included offense of Driving Under the Influence, First Offense.

(c) The trial court erred in failing to exclude evidence of the Jim Beam bottle found in the woods near the scene of the accident which evidence was improperly destroyed by the Charleston County Sheriffs' Office before trial because had the evidence not been improperly destroyed the jury could have observed that the Jim Beam bottle had dirt and dust on it, thus concluding that it did not belong to Defendant, and/or that it had not been freshly consumed. Alternatively, had the bottle not been destroyed and been available for Defendant's expert to test, a fingerprint analysis of the bottle

could have established that Defendant's fingerprints were not on the bottle. The trial court erred in allowing Investigator Kjellman to speculate that the bottle, that was found in the woods, came from Defendant's truck.

(d) The trial court erred in allowing EMT Joshua Sims, a non-expert, to give speculative opinion testimony as to whether alleged eyewitness Jose Davila would be able to remember how the accident happened when Mr. Davila stated to EMT Sims immediately following the accident that he did not know how the accident happened. This was an improper, speculative opinion rendered by a lay person. It was a medical opinion outside of the scope of knowledge of EMT Sims and amounted to pure speculation.

(e) The trial court erred in failing to grant Defendant a mistrial or give a curative instruction when the State referred to a "civil settlement" while questioning witness Jose Davila notwithstanding that the introduction of evidence of any civil settlement had been specifically excluded from presentation to the jury in connection with a pre-trial motion *in limine*.

(f) The trial court erred in failing to strike a juror for cause who was a member of MADD and who had lost a son in a drunk driving accident.

(g) The trial court erred in failing to strike a juror for cause whose father and brother worked for the Charleston County Sheriff's Office, the law enforcement agency which was prosecuting the charges against Defendant.

(h) The trial court erred in failing to exclude evidence of Alvaro Garcia's post mortem blood test as the blood was not sent to SLED for testing as required by statute and further the State was not able to establish a chain of custody for the blood sample.

(i) The trial court erred in failing to exclude evidence of the blood test performed on

Defendant on the grounds that the State was unable to establish the chain of custody for the blood sample or the internal laboratory chain of custody on the aliquots which were tested, and, further because the blood test results did not relate to the incident of December 8, 2008.

(j) The trial court erred in failing to allow the video recording of the Defendant at the hospital on the night of the accident to be used as impeachment evidence as it contradicted the testimony of Deputies Brinson and Burrell as to Defendant's appearance and as to whether Defendant then knew how the accident happened.

(k) The trial court erred in failing to give the jury a curative instruction when the assistant solicitor incorrectly referred to the evidentiary inference set forth in the DUI statute as a presumption and displayed this incorrect statement of law to the jury on a PowerPoint slide during the State's closing argument.

(l) The trial court erred in failing to charge the jury on sudden emergency in that if a sudden emergency existed Defendant would have been justified in taking action to avoid a collision, including leaving his lane of travel.

(m) The trial court erred in allowing Deputies Brinson and Burrell to render expert opinions as to how the accident happened, the speed of the vehicles, the path of travel of the vehicles, and other aspects of how the accident happened, when they were not qualified to give such expert testimony, and where they had not performed a reconstruction of the accident, thus making the testimony unreliable.

WHEREFORE, Defendant prays that this Honorable Court hold a hearing upon Defendant's Post-Trial Motion to determine whether Defendant's sentence should be modified and to determine whether Defendant should be granted a new trial as requested herein, and, for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

THE MASON LAW FIRM, P.A.

BY: 

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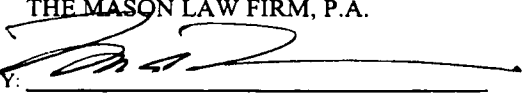
Attorneys for the Defendant

Mount Pleasant, South Carolina
November 10, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the pleading or paper to which this certificate is affixed was served upon the party(ies) to this action by hand, or by depositing a copy of the same in the U.S. Mail, first class postage pre-paid and addressed to the proper attorney(s) of record for such other party(ies) on this, the 10th day of November, 2011, in Charleston, South Carolina.

THE MASON LAW FIRM, P.A.

BY: 

FILED
 2011 NOV 10 PM 3:17
 JULIE J. ADAMS-TRONG
 CLERK OF COURT
 BY: _____

EXHIBIT A

Excerpt of Jury Charge from
State v. Martin, 392 S.C. 508, 706 S.E.2d 40 (Ct. App. 2011)

1 I have been up here a long time I know it. I
2 know you are tired. I'm going to sit down. I want
3 you to remember what we are trying. If I leave
4 nothing with you today, what are we trying? A felony
5 DUI death related. Death related. Not hurt, not
6 bound up bad, death related. I thank you.

7 THE COURT: Madam Forelady, ladies and
8 gentlemen, your lunch is here so I'm going to let you
9 all go eat. During the break do not discuss the case
10 in any manner whatsoever. Leave your notepads in
11 your seats and once you all have completed eating,
12 then I will give you instructions. Because I would
13 imagine you all are hungry.

14 You want me to go ahead and give you the
15 instructions before you eat or do you all want to
16 eat? By a show of hands who wants to eat?

17 would you all prefer to press forward? I'll
18 defer to your desires. Everybody good? Nobody needs
19 to go to the restroom?

20 Okay. Then we will continue. I thought you
21 all might be hungry so I was going to give you that
22 option.

23 During this trial, ladies and gentlemen, you
24 and I have certain duties to perform. As the trial
25 Judge it is my responsibility to preside over the

1 trial of this case, I also have the duty to rule upon
2 or pass upon the admissability of the evidence
3 offered during this trial. You are to consider only
4 the competent evidence before you, and you are to
5 disregard and disabuse from your mind any testimony
6 that I have ordered stricken from the record during
7 the progress of this trial if there have been any.

8 You are to consider only the testimony which
9 has been presented from this witness stand together
10 with any exhibits which have been made a part of the
11 record in this case.

12 I have the additional duty to charge or
13 instruct you on the law applicable to this case. As
14 the presiding Judge I am the sole Judge of the law,
15 and it is your duty as jurors to accept and apply the
16 law as I now state it to you. If you have a
17 preconceived idea as to what the law is or what the
18 law ought to be in a case, or in this case, and it
19 should not now agree with what I now tell you the law
20 is, you are obligated under the oath which you have
21 taken to abandon this preconception on your part
22 because you are sworn to accept the law and apply the
23 law precisely as I now state it to you.

24 In every case tried in this court before a
25 jury, the jury becomes the sole and exclusive judges

1 of the facts. You, the jury, are the judges of the
2 facts in this case. This Court is the judge of the
3 law. The constitution of our state has declared that
4 a trial judge shall not intimate, state, comment
5 upon, or make any statement to a trial jury about the
6 facts in a case.

7 Since you the jury are the sole finders of the
8 facts in this case, you are not to infer anything
9 from what I have said during the progress of this
10 trial in ruling upon the admissability of evidence or
11 otherwise, or anything that I now say to you during
12 the course of this instruction that I have any
13 opinion about the facts in this case. The law does
14 not permit me to have an opinion about the facts.
15 This is a matter solely for you the jury to
16 determine.

17 As jurors then it is your duty, as I have
18 instructed you, to determine the effect, the value,
19 the weight of the evidence, and the truth of the
20 evidence presented during this trial. Necessarily
21 you must assess the credibility of witnesses who have
22 testified in this case. Credibility is simply a
23 legalistic term meaning the believability of each
24 witness who has testified. It becomes your duty as
25 jurors to evaluate and to analysis the evidence and

1 determine that evidence which convinces you of its
2 truth.

3 I instruct you that in determining the
4 question of the credibility or believability of
5 witnesses who have testified in this case you may
6 believe one witness as against several witnesses, or
7 several witnesses as against one witness. You may
8 believe a part of the testimony of a witness and
9 reject the remaining part of the testimony of that
10 same witness.

11 If you have a good and sound reason you may
12 believe the testimony of a witness in its entirety,
13 or reject the testimony of a witness in its entirety.
14 You may consider whether or not any witness has
15 exhibited to you any interest, any bias, any
16 prejudice or other motive in this case. You may
17 consider the demeanor of a witness, that is the
18 appearance and manner of the witness from the witness
19 stand. You can believe as much or as little of each
20 witness's testimony as you think proper.

21 Throughout this process, ladies and gentlemen,
22 you have but one objective, to seek the truth
23 regardless of its source. I instruct you that a
24 person who has a past criminal record is competent to
25 testify during a trial. A past record does not

1 affect the ability of that witness to testify, the
2 past record may be considered -- only be considered
3 by you, if at all, in determining the witness's
4 believability. Remember, ladies and gentlemen, you
5 are the sole judges of the facts in this case. And
6 of the believability of any and all of the witnesses.

7 I further instruct you that the rules of
8 evidence ordinarily do not permit witnesses to
9 testify to opinions or conclusions. An exception to
10 this rule exists for witnesses we call expert
11 witnesses. A witness who by education and experience
12 has become an expert in some art, science, profession
13 or calling may state an opinion as to relevant and
14 material matters in which the witness has claimed to
15 be an expert, and may also state the reasons for that
16 opinion.

17 You should consider any expert opinion
18 received in evidence in this case like any other
19 evidence. Give it the weight you think it deserves.
20 If you decide that the opinion of an expert witness
21 is not based on sufficient education and experience,
22 or if you conclude that the reasons given in support
23 of the opinion are not sound, or that the opinion is
24 outweighed by other evidence, you may disregard the
25 opinion entirely.

1 An expert witness's testimony is to be given
2 no greater weight than that of other witnesses simply
3 because the witness is an expert. Further, you are
4 not required to accept an expert's opinion even
5 though it is not contradicted.

6 Ladies and gentlemen, there are two types of
7 evidence which are generally presented during a
8 trial; direct evidence and circumstantial evidence.
9 Direct evidence is the testimony of a person who
10 asserts or claims to have actual knowledge of a fact
11 such as an eyewitness.

12 Circumstantial evidence is proof of a chain of
13 facts and circumstances indicating the existence of a
14 fact. The law makes absolutely no distinction
15 between the weight or value to be given to either
16 direct or circumstantial evidence. Nor is a greater
17 degree of certainty required of circumstantial
18 evidence than of direct evidence.

19 Ladies and gentlemen, you should weigh all of
20 the evidence. After weighing all of the evidence if
21 you are not convinced of the guilt of the defendant
22 beyond a reasonable doubt you must find the defendant
23 not guilty. Conversely, if you are convinced of the
24 guilt of the defendant beyond a reasonable doubt,
25 then you must find him guilty.

1 Ladies and gentlemen, there are statements
2 alleged to have been made by the defendant. These
3 statements have been admitted into evidence in this
4 case. While the Court has determined that the
5 statements are admissible, I instruct you that you
6 make the ultimate decision of whether or not the
7 defendant made the statement. If the defendant did
8 make the statement, you must determine whether the
9 statement was made by the defendant voluntarily and
10 of his own free will.

11 This means that the statement was not caused
12 by pressure, force, fear, threats, coercion or
13 intimidation, or by hope or a promise of leniency or
14 a reward of any kind. In determining whether the
15 statement was voluntary, you should consider both the
16 characteristics of the defendant and the details of
17 the questioning.

18 Some of the factors you must consider are the
19 age of the defendant; the defendant's education or
20 lack of education; the defendant's mental ability or
21 capacity; the defendant's IQ or intelligence; the
22 defendant's background or environment; the place and
23 length of detention; the nature of the questioning;
24 and the advise or lack thereof to the defendant of
25 his constitutional rights, including but not limited

1 to the right to remain silent, that any statement
2 could be used against him in a court of law, the
3 right to have a lawyer present, that if he could not
4 afford a lawyer a lawyer would be appoint to
5 represent him without any cost, and that he could
6 stop making a statement at any time.

7 You must carefully consider all of the
8 surrounding circumstances before you give any weight
9 to an alleged statement. The state has the burden of
10 proving beyond a reasonable doubt that the alleged
11 statement was voluntary. If you determine it was,
12 you may give the statement any further consideration
13 that you deem proper. You must decide what weight,
14 if any, should be given to the alleged statement.

15 If you determine the alleged statement was not
16 the free and voluntary statement of the defendant,
17 you should not consider the statement at all.

18 Ladies and gentlemen, I instruct you that the
19 fact that the defendant was arrested, charged and
20 indicted is not evidence in this case and cannot be
21 considered by you as evidence of guilt in this case,
22 nor does it create any presumption or inference of
23 guilt. This documentation is simply the formal
24 instrument which contains the charge or charges made
25 against the defendant. It serves as a formal

1 document by which the case is processed or brought
2 through this court.

3 The defendant has pled not guilty to the
4 indictment. And that plea casts the burden on the
5 state to prove the defendant guilty. Because a
6 person charged with committing a criminal offense in
7 South Carolina is never required to prove himself
8 innocent.

9 I instruct you, Madam Forelady, and ladies and
10 gentlemen of the jury, that it is a cardinal and
11 important rule of the law of evidence that the
12 defendant in a criminal trial, no matter what the
13 seriousness of the charge made against him may be,
14 will always be presumed to be innocent of the crime
15 for which he is indicted unless his guilt has been
16 proven by evidence satisfying you of that guilt
17 beyond a reasonable doubt.

18 This presumption of innocence does not cease
19 when you retire to deliberate, but it accompanies the
20 defendant from the time of his appearance throughout
21 the trial until you reach a verdict satisfying you
22 beyond a reasonable doubt.

23 Our Supreme Court has said that the
24 presumption of innocence is like a robe of
25 righteousness placed about the shoulders of the

1 defendant, and it remains with him and assigns him to
2 that class, the innocent, until that presumptive robe
3 of righteousness has been stripped from his person by
4 evidence satisfying you of that guilt beyond a
5 reasonable doubt.

6 Madam forelady, ladies and gentlemen, the
7 presumption of innocence is not mere legal theory.
8 It is a substantial right, and it is not just a legal
9 phrase. It is a substantial right to which every
10 defendant is entitled to unless you the jury are
11 satisfied of the evidence of his guilt beyond a
12 reasonable doubt.

13 I instruct you, ladies and gentlemen, and
14 emphasize that the fact that the defendant did not
15 testify is not a factor to be considered by you in
16 any way in your deliberation of this case, and in
17 your consideration on the question of the guilt or
18 innocence of the defendant.

19 It must not be considered by you in any manner
20 whatsoever. A defendant has the constitutional right
21 to remain silent, and the assertion of this right
22 must not be considered by you in your deliberations.
23 I repeat, under your oath you are to draw no
24 conclusion whatsoever from the fact that the
25 defendant in this case did not testify. And I

1 emphasize again that the fact that this defendant did
2 not testify should not be discussed in any manner
3 whatsoever during your deliberations in the jury
4 room. And if it is discussed, the foreperson is
5 strictly instructed to report that to the Court
6 immediately. The burden of proof as
7 I have stated to you is on the state. The defendant
8 is not required to prove himself innocent. The
9 burden of proof remains on the state to prove guilt
10 beyond a reasonable doubt.

11 You may ask, what is a reasonable doubt in the
12 law? The state has the burden of proving the
13 defendant guilty beyond a reasonable doubt. Some of
14 you may have served as jurors in civil cases where
15 you were told it is only necessary to prove that a
16 fact is more likely true than not true. And in
17 criminal cases the state's proof must be more
18 powerful than that, it must be beyond a reasonable
19 doubt.

20 Proof beyond a reasonable doubt is proof that
21 leaves you firmly convinced of the defendant's guilt.
22 There are very few things in this world that we know
23 with absolute certainty. And in criminal cases the
24 law does not require proof that overcomes every
25 possible doubt. If based on your consideration of

1 the evidence you are firmly convinced that the
2 defendant is guilty of the crime charged, you must
3 find him guilty. If, on the other hand, you think
4 there is a real possibility that he is not guilty,
5 you must give him the benefit of that doubt and find
6 him not guilty.

7 Ladies and gentlemen, the defendant is charged
8 with felony driving under the influence. The state
9 must first prove beyond a reasonable doubt that the
10 defendant drove a vehicle while under the influence
11 of alcohol and/or drugs.

12 Driving a motor vehicle means that the vehicle
13 was in motion. This may be proven by direct or
14 circumstantial evidence. A movement of the vehicle
15 might occur without any affirmative act by a driver
16 or in fact by any other person. If a vehicle is
17 moved by some power beyond the control of the
18 defendant or by accident, this would not be driving.

19 The state must prove beyond a reasonable doubt
20 that the defendant was sufficiently under the
21 influence to impair his ability to drive with
22 reasonable care, with due regard for others and
23 himself, or as a reasonably prudent person would
24 drive. It is not necessary to show that the
25 defendant was in a helpless condition, passed out or

1 even intoxicated. On the other hand the fact that
2 the defendant at some time prior to this incident
3 drank an alcoholic beverage or took a drug does not
4 prove that the defendant was driving under the
5 influence.

6 The amount of alcohol in the defendant's blood
7 at the time of the alleged violation, as shown by
8 chemical analysis of the defendant's breath or other
9 bodily fluids, may be considered by you in deciding
10 whether the defendant was under the influence. If
11 the alcohol concentration was eight one-hundredths of
12 one percent or more, it may be inferred that the
13 defendant was under the influence.

14 This inference is simply an evidentiary fact
15 to be considered by you along with the other evidence
16 in the case. And you may give it the weight you
17 decide it should receive.

18 Next the state must prove beyond a reasonable
19 doubt that while driving the defendant did an act
20 forbidden by law or neglected a duty imposed by law.
21 I instruct you that 56-5-2930, operating a motor
22 vehicle while under the influence of alcohol or drugs
23 provides as follows: It is unlawful for a person to
24 drive a motor vehicle within this state while, one,
25 under the influence of alcohol to the extent that the

1 person's faculties to drive are materially and
2 appreciably impaired; two, under the influence of any
3 other drug or a combination of other drugs or
4 substances which cause impairment to the extent that
5 the person's faculties to drive are materially and
6 appreciably impaired; or three, under the combined
7 influence of alcohol and any other drug or drugs or
8 substances which cause impairment to the extent that
9 the person's faculties to drive are materially and
10 appreciably altered.

11 I further instruct you that code section
12 56-5-1520 entitled, general rules as to maximum speed
13 limits, lower speeds may be required provided as
14 follows: A person shall not drive a vehicle on a
15 highway at a speed greater than is reasonable and
16 prudent under the conditions, and having regard to
17 the actual and potential hazards then existing.
18 Speeds must be so controlled to avoid colliding with
19 a person, vehicle or other conveyance on or entering
20 a highway in compliance with legal requirement, and
21 the duty of a person to use care.

22 It further provides that a person shall not
23 drive a vehicle on a highway at a speed in excess of
24 these maximum limits.

25 Finally the state must prove beyond a

1 reasonable doubt that the act or negligent -- that
2 the act or neglect of the defendant proximately
3 caused death to another person. Proximate cause is
4 the direct cause, it is the immediate cause, it is
5 the efficient cause. It is that cause without which
6 the death of the victim would not have resulted.

7 There must be a chain of causation from the
8 time of the injury inflicted by the defendant until
9 the time of the victim's death. Proximate cause does
10 not necessarily mean that it occurred immediately
11 prior to the death. There may be more than one
12 proximate cause. The act of two or more persons may
13 combine together to be a proximate cause of the death
14 of a person.

15 The defendant's act may be regarded as the
16 proximate cause if it is a contributing cause to the
17 death of the victim. The fact that other causes also
18 contribute to the death of the victim does not
19 relieve the defendant from responsibility. The
20 defendant's acts need not be the sole cause of the
21 death, but must be a proximate cause contributing to
22 the death of the victim.

23 It is not a defense to show that the victim
24 might have recovered had she been treated according
25 to the most approved surgical or medical standards,

1 or as a reasonably prudent doctor would have treated
2 in the case, or even by showing that the treatment
3 was negligent.

4 If however the death was caused not by the
5 wound or the injury that the victim had, but was
6 caused by the gross erroneous willful, deliberate
7 treatment, the defendant would not be liable. In
8 other words, negligence on the part of someone else
9 would not relieve the defendant from liability if the
10 injury was the proximate cause of the victim's death.

11 However, gross negligence or intentional
12 activity on the part of the practitioner would
13 relieve the defendant of liability. The propriety of
14 the medical procedure is an integral question in
15 determining causation.

16 Ladies and gentlemen, I further instruct you
17 that code section 56-5-2953, which is incident site
18 and breath side videotaping, provides as follows: A
19 person who violates section 56-5-2930, 56-5-2933 or
20 56-5-2945 must have his conduct at the incident site
21 and the breath test side videotaped. The videotaping
22 at the incident site must begin not later than the
23 activation of the officer's blue lights, and conclude
24 after the arrest of the person for a violation, or a
25 probable cause determination that the person violated

1 section 56-5-2945, and include the person being
2 advised of his Miranda rights before any field
3 sobriety tests are administered if the tests are
4 administered.

5 subsection B provides as follows: Failure by
6 the arresting officer to produce videotapes required
7 by this section is not alone a ground for dismissal
8 of any charges made, or if the arresting officer
9 submits a sworn affidavit certifying that the
10 videotape equipment at the time of the arrest,
11 probable cause determination, or breath test device
12 was in an inoperable condition, stating reasonable
13 efforts have been made to maintain the equipment in
14 an operable condition, and certifying that there was
15 no other operable breath tests facility available in
16 the county.

17 Ladies and gentlemen, there are two possible
18 verdicts in this case. And they are as follows --
19 and you don't have to write them down, this certainly
20 will go into the jury room with you.

21 we, the jury, by unanimous consent find the
22 defendant guilty of felony DUI resulting in death, or
23 not guilty. Again there is no significance
24 whatsoever to the order in which I state these
25 verdicts, it's simply that one must stated first and

1 so forth.

2 Ladies and gentlemen, your verdict must be a
3 unanimous one, which means that all 12 of you must
4 agree in order to reach a verdict. Madam Forelady,
5 it will be your responsibility to fill out the
6 verdict form once the jury has reached a verdict. It
7 will also be your responsibility to knock on the door
8 and advise the bailiffs once the jury has reached a
9 verdict.

10 Also, if the jury has any questions during
11 deliberations it is your responsibility to write
12 those questions out, and again knock on the door and
13 advise the bailiff that the jury has a question.

14 Ladies and gentlemen, if you have any
15 questions during deliberations, I will tell up front
16 there will be a delay in our responding. That is
17 because there is a procedure that we have to follow
18 in answering your questions. So please know if you
19 have a question we are not ignoring you, we are
20 simply adhering to that procedure.

21 I'm going to ask that you return to your jury
22 room while I take up some matters of law with the
23 attorneys that might require further instructions, or
24 an additional instruction or clarification of an
25 instruction. However, if there is no further

1 instruction we will send in the evidence as well as
2 your notepads and at that time you will be allowed to
3 begin your deliberations.

4 so if you would go with the bailiffs. Again,
5 please don't begin your deliberations and leave your
6 notepads in your seats.

7 (Whereupon, the jurors exit the courtroom.)

8 THE COURT: Are there any exceptions to the
9 charges from the state?

10 MR. STUMBO: No exceptions from the state.

11 THE COURT: From the defense?

12 MR. WILLIAMS: None by the defense.

13 THE COURT: Now there is one thing I neglected
14 to do in my haste, which is no one's fault but my
15 own, I took an exhibit under advisement, that being
16 the breath analyzer person's report, and in the
17 interest of time I did not hear argument on the
18 objection, and I took it under advisement. I had it
19 marked for ID only and I intended to deal with that
20 before closing and charge but we just had too much
21 going on and I just remembered that I did not do it.

22 I believe Mr. Williams' argument was that it
23 was hearsay and my response was that he created it.

24 MR. WILLIAMS: And could I expand upon that?

25 THE COURT: Yeah.

1 MR. WILLIAMS: As I recall his testimony he
2 said that it incorporated his findings in the report,
3 but he did not testify that he did the report.

4 THE COURT: I thought he did testify he did
5 the report. But in any event he is an expert, it's a
6 report he relied -- wasn't he qualified?

7 MR. STUMBO: Yes, he was. He was qualified as
8 an expert in forensic toxicology.

9 MR. WILLIAMS: He did.

10 THE COURT: That would make it admissible.
11 But based on my recollection of the testimony that
12 was a report that he prepared in the ordinary course
13 of business as part of his duties as a forensic
14 analyst. And certainly it's a complete reflection of
15 what he testified to. There are no extraneous or
16 subjective comments on the form. It's a straight
17 report data. And I think certainly it would be
18 admissible.

19 I just didn't take the time -- because I would
20 have had to send the jury out to do the argument and
21 so I just continued with the trial. And we finished
22 so late last night I did not take it up because I
23 did not want to hold you all any longer. I think
24 certainly it is admissible, and I would mark it
25 state's next in line set for ID.

1 Is there anything else we need to take up
2 before we send in the notebooks and the evidence to
3 the jury from the state?

4 MR. STUMBO: Nothing from the state, Your
5 Honor.

6 THE COURT: From the defense?

7 MR. WILLIAMS: Not from the defense.

8 THE COURT: And certainly your contemporaneous
9 objection to it is preserved for the record.

10 The record should reflect the jury
11 deliberations have begun at 2:04. I will have them
12 take in the verdict forms as well as the evidence and
13 their notepads. They have begun to eat their lunch,
14 I have a jury coming at 2:00. I would ask that you
15 all go get yourself some lunch, but leave cell phone
16 numbers. Take this opportunity to eat. Thank you.

17 (Whereupon, a recess was taken.)

18 THE COURT: Now as a preliminary matter I have
19 been advised that the jury has reached a verdict. I
20 know that this is an emotionally charged matter with
21 the death of an individual involved, as well as a
22 trial, as well as the defendant's family being
23 present in the gallery.

24 I need to strongly admonish both families that
25 I expect the decorum of this courtroom to be

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November 10, 2011

BY HAND DELIVERY

Jennifer A. Kinzeler, Esquire
 CHARLESTON COUNTY SOLICITOR'S OFFICE
 101 Meeting Street, 4th Floor
 Charleston, South Carolina 29401

RE: **State of South Carolina vs. Walter Douglas Barclay**

Case Number: 2011-GS-10-2848

MLF File Number: 08-082

FILED
 2011 NOV 10 PM 3:18
 JULIE M. BROWN
 CLERK OF COURT
 BY _____

Dear Jennifer:

I hope you are doing well and that you got some rest after our marathon trial.

Enclosed please find a filed copy of Defendant's Post-Trial Motion.

With kind regards, I am

Very truly yours,


 THE MASON LAW FIRM, P.A.
 Mark A. Mason

MAM:mm

Enclosure as stated

RECEIVED

NOV 10 2011



FILED

STATE OF SOUTH CAROLINA) AM 11:08 THE COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON) DISTRICT FOR THE NINTH JUDICIAL CIRCUIT

CLERK OF COURT

State of South Carolina

BY

Indictment No.: 2011GS1002848

vs.

Walter D. Barclay

State's Response to Defendant's Motion for
Reconsideration of Sentence

The State has been served with a copy of the Defendant's Motion for Reconsideration of the sentence imposed by this Court, and for a new trial.

The State files this Response and, pursuant to Rule 29, SCRCrimP., the State respectfully requests that this Court summarily deny the Defendant's Motion for Reconsideration without a hearing.

PROCEDURAL HISTORY

Defendant Walter Barclay was charged with Felony DUI with Death, and Felony DUI with Great Bodily Injury, arising from a December 8, 2008 head on collision Barclay caused. Alvaro Garcia, the driver of the car Barclay hit, was killed and the passenger, Jose Davila, was injured.

On November 1, 2011 the Defendant was convicted by a jury of Felony DUI with Death for the death of Alvaro Garcia, and acquitted of Felony DUI with Great Bodily Injury.¹ Sentencing occurred on the same date, after both parties were given an opportunity to be heard.

¹ This court heard pre-trial motions for two days on October 20-21, with the trial beginning Monday, October 24th.

Jose Licona (cousin of deceased victim Garcia) told the State's investigator prior to trial that he would keep the family in Mexico informed with respect to the proceedings. The State verified for the court at sentencing that Licona was the only known relative of the deceased living in the U.S. that could be reached, and that the deceased's wife and children lived in Mexico. The State presented statements from Jose Davila (passenger) and Licona, neither of whom wished to be present at sentencing. Both of them indicated they believed the Defendant should pay for what he did, but deferred to the Court with respect to sentencing. This Court also heard from three individuals who spoke on the Defendant's behalf during sentencing, in addition to reviewing the thirteen character reference letters submitted on his behalf.

This court sentenced the Defendant to a twelve (12) year prison term.² The Defendant then filed the instant post-trial motion to modify his twelve (12) year sentence and motion for new trial on Thursday, November 10, 2011.

FACTS

At approximately 6:00 p.m., December 8, 2008, the Defendant drove his Chevy Silverado down Pointe of Pines Road from his family farm toward his house on Lachicotte St. a few miles away. At the same time, victim Alvaro Garcia was driving his Geo Prizm down Pointe of Pines Rd. in the opposite direction on his way home from work with his passenger, Jose Davila. As the two cars approached each other, the Defendant failed to negotiate a slight curve on Pointe of Pines Rd., crossing the double yellow line and traveling into Garcia's lane where he struck the Geo off-set head on, killing Garcia within seconds. The victim's car was brought to a halt upon impact before spinning to its final resting position, and the Defendant's truck flipped and slid down the road to its final resting position. Garcia was declared dead on scene, Davila was

airlifted to MUSC with what EMS believed to be possible life threatening injuries, and the Defendant was transported by ambulance from the scene to MUSC. According to the autopsy, the victim died of full body blunt force trauma as a result of the collision. Injuries included skull fractures, blood in his brain, fractured thyroid cartilage, blood in abdomen, several ribs fractures, and numerous tears and bruises to internal organs – any one of which alone would have been fatal. In reaching his conclusion regarding means and manner of death, the forensic pathologist also ruled out any other contributing factors, finding that the victim had no pre-existing health conditions that could have contributed to his death and finding that the victim had no substances (drugs or alcohol) in his body at the time of the collision.

The State presented testimony from eighteen witnesses, nine³ of which had direct contact with the Defendant that night and offered testimony at trial regarding their personal observations of the Defendant. Testimony from witnesses who observed him at the scene established that, within minutes of the collision, the Defendant was leaning against his truck, that he was loud, pointing, shouting, smelled strongly of alcohol, had slurred speech, seemed “carefree,” and appeared to be incoherent as he continued to state he “had not been in a wreck.” In addition, evidence of alcohol was present at the scene, consisting of a cooler, Budweiser beer cans, and a Jim Beam bottle.

Witness testimony also included the Defendant’s admissions to both Sgt. Burrell and the treating R.N. at MUSC (Chuck Heath, RN) that he had been drinking at his farm that day. Sgt. Burrell, Deputy Brinson, Deputy Martin, and Nurse Heath testified regarding their personal observations of and interactions with the Defendant at the hospital on the first trip

² A conviction for Felony DUI With Death carries 1-25 years imprisonment *and* a minimum \$10,100 fine, up to \$25,100. S.C. Code Ann. 56-5-2945(A)(2). In addition to the twelve years, the court also imposed the minimum \$10,100 fine.

(approximately 7:30-10:50 p.m.) and second trip (approximately 11:15-12:00 a.m.). Their testimony established with respect to the first trip that the Defendant smelled of alcohol at the hospital, that he had blood shot eyes and slurred speech, and appeared intoxicated. They described his attitude as boisterous and jovial and noted he still could not recall what happened and continued to state he had not been in a wreck. Testimony also established that the defendant fell from a sitting position hitting his head on the concrete wall behind him while he was being booked in the sally port of the jail, resulting in the second trip to MUSC. All together, the Defendant's injuries were limited to the gash on his head that was stapled and/or stitched together during his first trip to MUSC.

The Defendant's blood alcohol content was a .20. The State presented all chain witnesses who testified as to their respective handling of the Defendant's blood sample including the forensic toxicologist, Shana Sorrells, who ultimately tested the Defendant's sample. Sorrells confirmed the results and testified as to an average person's level of impairment at a .20.

Further, Deputy Brinson⁴ determined through his investigation that the lane of impact was the Geo's lane, and that the cause of the collision was the Defendant's crossing of the double yellow line into the oncoming lane where he collided off-set head on with the Geo. He identified the point of maximum engagement, determined initial point of impact to be within an inch of maximum engagement, identified the striations in the Defendant's lane as marks made by Defendant's truck as it rolled (back into its lane, after colliding with the Geo), and identified the post-impact skid mark made by the passenger side of the Geo. Deputy Brinson's testimony and

³ Michael Sanders (SPFD), Lt. Winn (Charleston County EMS), Ben Throop (Charleston County EMS), Deputies Luckadoo, Brinson, Burrell, and Martin (CCSO), Chuck Heath, RN, Jose Davila (passenger of Geo).

⁴ Deputy Brinson, a member of the fatality team for CCSO, was qualified as an expert in traffic fatality investigation based on this education, training and experience which included a three part 5-6 week fatality investigation course for which he received certification in traffic fatality investigation in addition to having significant experience in traffic fatality investigations having done approximately 25-30 fatality investigations at the time of this incident.

conclusions were corroborated by physical evidence at the scene, documented in photographs entered as evidence, and published for the jury in the State's case. These findings were also corroborated by Davila's testimony that he observed the Defendant travel into their lane as they approached one another immediately before the collision occurred.

The Defendant's prior record is comprised of a 1994 arrest for Driving Under the Influence and Illegal Possession of Liquor, although no disposition is indicated, and it appears the DUI arrest was expunged at some point following the Defendant's arrest in the instant case.

ANALYSIS

I. Defendant's Motion to Modify the twelve (12) year sentence

In the first part of his post-trial motion, the Defendant requests modification of his twelve (12) year sentence. The authority to change a sentence rests solely within the discretion of the sentencing judge. State v. Warren, 392 S.C. 235, 708 S.E.2d 234 (Ct. App. 2011); State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). The State respectfully submits that this Court's sentence is appropriate under the facts of this case.

In support of his motion to modify his sentence, the Defendant first reasserts the contentions he presented at sentencing concerning his age and character. He does not present any new information that would necessitate further inquiry.

The only new assertion the Defendant makes is that he contacted the deceased victim's wife and children, through Licon, to relate his proposed sentence modification to them and obtain their consent. In relevant part, counsel proposes the following sentence modification in his post-trial motion:

"8. Defendant's attorney has been advised by Mr. Licon that the victims support a modification of Defendant's sentence along the following lines:

(a) Defendant be sentenced to seven (7) years in prison, suspended upon service of three (3) years, and payment of court-ordered restitution on the terms set forth below.

(b) Defendant be ordered to make restitution in the form of payments to the children of Antonio Alvaro Garcia to allow them to obtain a higher education, to wit:

Commencing upon Defendant's release from prison Defendant shall pay \$7,000 per year, per child, for a period of four (4) years, as court-ordered restitution (\$112,000) total.

(c) In the event the Defendant fails to timely pay the said court-ordered restitution, Defendant's probation shall be revoked and he shall serve the remainder of his [seven] year sentence."⁵

In sum, counsel offered the victim's family \$112,000 in exchange for their consent to a reduced sentence. The State respectfully submits the court should deny the Defendant's motion.

First, this Court already considered whether to order restitution during sentencing as evidenced by the court's inquiry regarding civil recovery for the family of the deceased. As stated at sentencing, the family received approximately \$140,000 (approximately \$86,000 after costs and attorneys' fees). This court did not order any restitution, since it has already been covered by the civil judgment.

Second, the Defendant's proposed restitution is not "restitution" within the meaning of S.C. Code Ann. §16-3-1110(12)(a), which governs restitution in criminal cases. The statute defines "restitution" as follows:

"Restitution" means payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender's criminal conduct. It includes, but is not limited to:

(i) medical and psychological counseling expenses;

(ii) specific damages and economic losses;

⁵ He also proposes in subsection (d) that the defendant's license be suspended, although license suspension is a consequence of his conviction regardless of sentence, and in subsection (e) that the defendant receive alcohol treatment through SCDPPPS, although the court already ordered such treatment through the ATU at SCDC.

- (iii) funeral expenses and related costs;
- (iv) vehicle impoundment fees;
- (v) child care costs; and
- (vi) transportation related to a victim's participation in the criminal justice process.

Restitution does not include awards for pain and suffering, wrongful death, emotional distress, or loss of consortium."

The Defendant's proposed payment of \$112,000 for higher education for the victim's children is not restitution.

Third, this proposed payment is contrary to the position Defendant took in written correspondence with the State prior to trial. In a letter to the State dated February 22, 2011, the Defendant wrote that he believed a plea of guilty to reckless homicide with a negotiated sentence of probation was warranted because, in relevant part, "the civil aspect of the case has been settled and as such restitution has been made to the alleged victim." See Attached Letter From Defense Counsel to State dated February 22, 2011.

A. Rule 8.4(e) of Rule 407, SCRPC

Finally, counsel's proposed sentence modification (offering the victim's family money in exchange for their consent to a reduced sentence) may violate the professional and ethical rules of conduct. While more than one of the Rules of Professional Conduct may be implicated, Rule 8.4(e) prohibits a lawyer from engaging "in conduct that is prejudicial to the administration of justice." While there is little South Carolina case law addressing ethical implications of the *specific* issue in the instant case regarding an attorney offering money to a victim in exchange for consent to a reduced sentence, our case law does address attorneys offering money to victim-witnesses in exchange for dropping criminal charges.

With respect to South Carolina case law, the instant case closely resembles those cases in which our Supreme Court has imposed sanctions for attorney misconduct when attorneys in criminal matters offer victim-witnesses money in exchange for dropping criminal charges against a client. For example, in Matter of Gaines, 293 S.C. 314, 360 S.E.2d 313 (1987), the attorney and one of his employees or agents contacted a witness in a criminal matter and offered her money to get her to drop the criminal charges against one of his clients.⁶ The Hearing Panel (for the Commission on Lawyer Conduct) found that the attorney's actions were "improper and constituted misconduct." Id. At 315. The Court agreed and suspended the attorney from the practice of law indefinitely.⁷

Similarly, in In Re Yarborough, the attorney was convicted of obstruction of justice and placed on interim suspension for contacting his client's girlfriend to see if she would agree to drop stalking and burglary charges against his client in exchange for \$500. In re Yarborough, 326 S.C. 62, 483 S.E.2d 473 (1997); In re Yarborough, 348 S.C. 243, 559 S.E.2d 836 (2002)(addressing multiple allegations of misconduct including the attempt to pay-off the victim addressed in the 1997 case, and finding that the attorney's conduct was prejudicial to the administration of justice).

The Supreme Court of Florida addressed a nearly identical issue to the case at bar. In The Florida Bar v. Machin, 635 So.2d 938 (1994), the defendant was charged with murdering Samuel Sierra and kidnapping Sierra's pregnant girlfriend, Susan Schultz. Prior to the sentencing hearing, counsel for the defendant (Machin) offered (on behalf his client) to set up a trust fund for the victims' unborn child in amounts up to \$30,000 – but only if Schultz and

⁶ The complaint against Gaines raised two additional allegations of misconduct involving a forged signature on a form submitted to the court and failure to properly and timely account for client funds – neither of which are present in the instant case.

Sierra's family agreed not to speak "in aggravation at defendant's sentencing." The Court specifically opined that "a lawyer who tries to buy a victim's silence at sentencing prejudices the administration of justice." *Id.* The Court also noted that the attorney committed misconduct in attempting to buy the victims' silence even though the family rejected the offer and the sentencing proceedings were not affected by the offer. *Id.* (specifically finding "it is the mere attempt to influence the sentencing determination by buying the silence of the victim's family that prejudices the administration of justice."). The Court further cautioned that, under this theory, a wealthy defendant would be allowed to buy silence and thereby gain a chance at a lesser sentence than that received by one unable to pay for silence." *Id.*

It appears that the same reasoning would apply to the facts in the instant case, where counsel's monetary offer was made in an unbridled attempt to influence the victim's family's position as to the defendant's sentence. This conduct may violate Rule 8.4(e) prohibiting an attorney from engaging in conduct that is prejudicial to the administration of justice. Regardless of whether the victim's family in the instant case consents to counsel's proposed sentence modification, counsel's suggested modification would have the precise effect that the Florida Supreme Court cautioned against: allowing defendants who can afford it to obtain a reduced sentence in exchange for money, ultimately receiving a lesser sentence than one who cannot afford to offer money to influence or change a sentencing determination.

While counsel's conduct in the instant case is not identical to Gaines and Yarborough, the reasoning is the same where our Supreme Court has recognized that an attorney's attempt to influence a victim's position regarding a client's criminal charges by offering the victim money is prejudicial to the administration of justice in violation of Rule 8.4 of the South Carolina Rules

⁷ Gaines' disbarment (as opposed to a less severe sanction such as public reprimand or temporary suspension) likely resulted in part because Gaines had been sanctioned previously for unrelated misconduct.

of Professional Conduct and may constitute attorney misconduct. That conclusion is further supported by the fact that a neighboring state court and state bar agree, as evidenced by the Machin opinion from the Florida Supreme Court.

B. Rule 7(a) of Rule 413: Grounds for discipline

In addition, counsel's proposed sentence modification may also be a violation of: Rule 7(a)(1), RLDE, of Rule 413, SCACR (violating the Rules of Professional Conduct) and 7(a)(5), RLDE (engaging in conduct tending to pollute the administration of justice or bring the courts or legal profession into disrepute or conduct demonstrating an unfitness to practice law). Specifically, pursuant to Rule 7(a)(5), when a lawyer engages "in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute," that conduct is a ground for discipline. See Yarborough, 348 S.C. at 250. Prior to his client being tried, convicted, and sentenced to twelve (12) years in prison, counsel took the position that the defendant should received a negotiated sentence of probation in part because the victim's family was made whole with the civil settlement, negating any need for further restitution. Now, counsel proposes a pay-off to the victim's family under the guise of "restitution." As the Rule 8.4(e) analysis indicates, a defense request for a reduction in prison sentence based solely on a defendant's ability to pay pollutes the administration of justice. Defense Counsel seeks a remedy that is not contemplated by state statute (S.C. Code Ann. §16-3-1110).

In sum, the only new information Defendant presents in his motion to reconsider the twelve (12) year sentence that was not presented at sentencing is that he has offered the victim's family money in exchange for their consent to a significantly reduced sentence. This is legally insufficient.

II. Defendant's Motion for New Trial

Defendant also asserts he is entitled to a new trial based on several alleged errors of law. These allegations were adequately addressed and properly ruled upon during pre-trial motions and again during trial. For this reason, Defendant's motion for new trial should be denied.

The only new issue Defendant raises is a transcript excerpt from the trial of Conrad Martin for Felony DUI, a case over which this Court also presided. Defendant asserts that the Court gave a different instruction in the Martin case than the Court did in this case and, "as a matter of law," the Court should have used the same language in both.

First, the Court of Appeals in Martin addressed two issues that had nothing to do with jury instructions (the issues on appeal were whether the trial court erred in admitted expert testimony and whether the trial court erred in failing to grant the defendant's motion for directed verdict). Therefore, the case is of no precedential value to the instant case.

Second, the Court's instruction in this case was proper, and a new trial on this ground is unwarranted. Our courts have repeatedly held that the trial court must charge the jury with the *substance* of the law, rather than any particular verbiage. State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003)(emphasis added); State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002); Keaton ex. rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999). A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. Adkins, 353 at 318; Keaton, 334 S.C. at 497-498. In the present case, the court's instruction concerning the elements of Felony DUI adequately covered the law. Our courts have repeatedly found that the relevant definition of the law in DUI cases is whether a driver is unable to operate a vehicle with reasonable care or as a reasonable, prudent person would. State v. Caldwell, 231 S.C. 184, 98 S.E.2d 259 (1957); Dixon v. Weir Fuel Co., 251 S.C.

74, 160 S.E.2d 194 (196); State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998). This Court's jury instruction adequately and accurately charged the jury with the elements of Felony DUI, and the particular verbiage used by this court in a prior Felony DUI trial (Defendant's Exhibit A) is in no way binding, nor is it in an error "as a matter of law" as asserted by the Defendant.

CONCLUSION

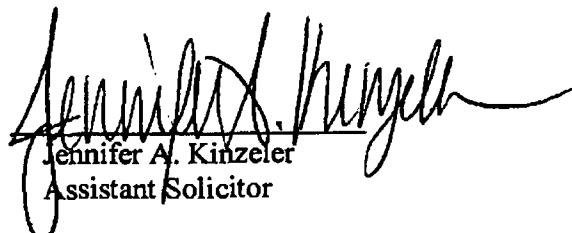
The Defendant is requesting sentence modification and/or a new trial without providing any new, meritorious grounds – that is, he is asking the trial court to “do over what it thought it had already done correctly.” State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718 (2001).

Pursuant to Rule 29, SCRCrimP., the State respectfully requests that this Court summarily deny the Defendant's Motion for Reconsideration without a hearing. If this Court does not summarily deny the Defendant's Motion, the State respectfully requests 10 days notice of the hearing so that the victims and necessary parties can be notified and scheduled to appear if able. The State also requests that the Defendant be compelled to outline the specific bases supporting his Motion at least 10 days before any scheduled hearing.

Respectfully submitted,

Scarlett A. Wilson
Solicitor, Ninth Judicial Circuit

By:


Jennifer A. Kinzeler
Assistant Solicitor

FILED
2011 DEC 21 AM 11:08
CLERK OF COURT
BY [Signature]

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February 22, 2011

BY HAND-DELIVERY

Jennifer Shealy, Esquire
CHARLESTON COUNTY SOLICITOR'S OFFICE
101 Meeting Street, 4th Floor
Charleston, South Carolina 29401

RE: State of South Carolina vs. Walter Douglas Barclay

Dear Jennifer:

Thank you for taking the time to meet with me back in October to discuss certain aspects of the above-referenced felony DUI charge which at present is set for trial the week of March 14, 2011.

I promised you in our initial meeting that I would provide you with certain information for your consideration in your review of this matter.

Specifically, we believe there are five (5) key points that make this case appropriate for the negotiated plea arrangement proposed herein.

(1) The collision resulted from an accident which was not proximately caused by Mr. Barclay having committed any act forbidden by law or neglect of any duty imposed by law in the driving of the motor vehicle. The accident occurred on a narrow, rural, poorly marked, two lane road, at night. Mr. Barclay was driving under the speed limit, with his lights on. There is a genuine issue of fact as to how the accident occurred. There are no independent eye witnesses. Jose Santos Davila, the passenger in the decedent's vehicle, has provided an affidavit which states that he does not wish to participate as a witness or otherwise in the criminal prosecution of Mr. Barclay for the accident, and the reason for this is that the collision was not caused by any criminal conduct of Mr. Barclay.

(2) The civil aspect of the case has been settled and as such restitution has been made to the alleged victim. No victim is clamoring for Mr. Barclay to be prosecuted as a result of the accident.

February 22, 2011

Page 2

(3) Respectfully, we believe the blood sample taken from Mr. Barclay was illegally obtained and as such the blood test results would be suppressed. Specifically, S.C. Code Ann. §56-5-2950 (B) provides that:

No tests may be administered or samples obtained unless, upon activation of the video recording equipment, and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed . . . [of the matters set forth on the Advisement of Implied Consent Rights, Bates Stamped JKS10].

Officer Brinson's name is printed on and Officer Brinson signed the Advisement of Implied Consent Rights form as the officer who gave Mr. Barclay the advisement of rights. The form is not dated, nor is the time filled in on the appropriate line of the form. It is undisputed that Officer Brinson was not present at 2150 when the blood sample was obtained from Mr. Barclay at MUSC.¹ It is undisputed that Mr. Barclay's blood sample was obtained prior to him having received a written copy of, or having been verbally informed of, the matters set forth on the Advisement of Implied Consent Rights form. Thus, in accordance with the statute, Mr. Barclay's blood sample was illegally obtained.

S.C. Code Ann. §56-5-2950 (A) provides that "blood . . . samples must be obtained and handled in accordance with procedures approved by SLED." In April of 2005 SLED mandated the use of the form entitled Advisement of Implied Consent Rights in order to comply with S.C. Code Ann. §56-5-2950 (B). It is clear from the facts that S.C. Code Ann. §56-5-2950 (B) was violated. This statutory provision goes to the fairness of the procedure. As such, we believe that the trial judge would be required by law to suppress the results of blood test performed upon the sample illegally obtained from Mr. Barclay.

We have additional bases upon which we believe the blood test results would not be admissible in evidence but since the sample itself was unlawfully obtained it is not necessary for me to address those bases with you at this time. In addition, we have witnesses, which include a nurse and a doctor, who were the last persons to speak to or see Mr. Barclay before the accident, who will testify he was not under the influence.

(4) There will be evidence presented that alcohol (Bud Light) was being consumed in the GEO Prizm at the time of the collision. This evidence will be in the form of the photographs taken by forensic services (copies enclosed) as well as the testimony of witnesses. This fact negatively impacts the prosecution of the case and we believe raises further doubt as to the cause of the collision.

(5) Mr. Barclay is a 59 year old man with no prior criminal record. His 10 year driving

¹ We have provided a packet of documents which contains the evidence that Deputy William Brinson was not present at MUSC when the blood sample was obtained from Mr. Barclay.

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history reflects no driving infractions. I have enclosed thirteen (13) character references on Mr. Barclay, which evidence that he is a kind, responsible, upstanding citizen, and they include:

(a) Delton Powers, Jr., an attorney, who states "I know him as a generous, hardworking, good man."

(b) Dr. Larry Bowman, an orthopaedic surgeon, who states "[i]n short, Doug is a steady, caring, creative, faithful friend to me and my family, and the people of Edisto whose lives he has enriched."

(c) John Hamrick, a real estate agent, who states Doug "is the kind of person who calls friends during inclement weather to ask what he might do to help prevent damage to personal structures."

(d) Joseph Breeden, Jr., Vice President of Carolina Bank, states "Mr. Barclay is a very kind, considerate and compassionate person, especially as it relates to his relationships with the residents of the community in which he lives."

(e) John Rogers, an attorney, states "Doug has always been loyal to his friends..."

(f) John Sanders states "I can't think of anyones lives around here [Edisto Island] that hasn't been touched by his kindness."

(g) Genevieve Smith states "[h]e has been and is a loyal and devoted friend to me, my family and our community."

(h) E.C. Carson states "I can confirm Mr. Barclay is a man of integrity, dedicated to his family, loyal to his friends, and possesses a very strong work ethic."

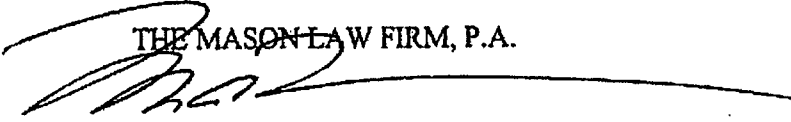
We would recommend that Mr. Barclay plead guilty to the charge of reckless homicide with a negotiated sentence of probation.

We would greatly appreciate the opportunity to meet with you briefly on Wednesday as both sides are presently devoting substantial time and resources to preparation for the March 14th trial and if there is a basis to resolve this matter by a plea agreement we submit that now is the time to do so.

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With kind regards, I am

Very truly yours,


THE MASON LAW FIRM, P.A.

Mark A. Mason

MAM:mm

Enclosures as stated

CC: Jennifer S. Selan, Esquire
Michael Sahn, Assistant Solicitor
Mr. Walter D. Barclay

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
 COUNTY OF CHARLESTON)
 2012 JUL 18 PM 3:05)
 JULIE J. ANDERSON)
 CLERK OF COURT)

STATE OF SOUTH CAROLINA

BY _____

Plaintiff,

vs.

WALTER DOUGLAS BARCLAY,

Defendant.

)
) **ORDER DENYING DEFENDANT'S**
) **POST-TRIAL MOTION**
)
)
)
)
)

Date of Trial:	October 24–November 1, 2011
Presiding Judge:	Deadra L. Jefferson
Assistant Solicitor:	Jennifer Kinzeler, Esq. Greg Voigt, Esq.
Defendant's Attorney:	Mark A. Mason, Esq. Anthony Forsberg, Esq.
Court Reporter:	Henry Young

THIS MATTER is before the Court on the Defendant's Post-Trial Motion filed November 10, 2011 in which the Defendant moves, pursuant to Rule 29, SCRCrimP, for a post-trial review of the sentence imposed and for a new trial. The State's Response to Defendant's Motion was filed December 21, 2011.¹ The Defendant was indicted by the Charleston County Grand Jury on April 4, 2011 for one count of Felony Driving Under the Influence ("DUI") resulting in death (2011-GS-10-2848) and one count of Felony Driving Under the Influence resulting in great bodily injury (2010-GS-10-2817). The Defendant's case was called before this Court on October 24, 2011.² The Defendant was present and represented by Mark A. Mason, Esq. and Anthony Forsberg, Esq. Assistant Solicitor Jennifer Kinzeler, Esq. and Greg Voigt,

¹ The issuance of this Order was delayed for receipt of the trial transcript.

² The Court heard pre-trial motions for two full days on October 20–21, 2011.

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Esq. were present for the State of South Carolina. On November 1, 2011, the jury found the Defendant guilty of Felony DUI resulting in death and not guilty of Felony DUI resulting in great bodily injury. The offense of Felony DUI resulting in death carries a penalty range of a minimum one (1) year and a maximum twenty-five (25) years and a fine ranging from ten thousand one hundred and 00/100 (\$10,100) dollars to twenty-five thousand one hundred and 00/100 (\$25,100) dollars pursuant to S.C. Code Ann. § 56-5-2945(A)(2). A part of the mandatory sentence required to be imposed by Section 56-5-2945 must not be suspended, and probation must not be granted for any portion. The offense of Felony DUI resulting in death is classified as violent and serious.

This Court sentenced the Defendant to the State Department of Corrections for a period of twelve (12) years and imposed the minimum fine of ten thousand one hundred and 00/100 (\$10,100) dollars suspended upon the service of twelve (12) years. The Court gave the Defendant credit for time served pursuant to S.C. Code Ann. § 24-13-40 to be calculated and applied by the State Department of Corrections. The Court further ordered the Alcohol Treatment Unit (ATU) if available.

MOTION FOR RECONSIDERATION OF SENTENCE

On November 1, 2011, the Defendant was convicted by jury of Felony DUI resulting in death. Defendant, through counsel, requested that sentencing be deferred to allow the victims the opportunity to be heard and so the Defendant could present a pre-sentencing investigation report. The State took the position that a sentencing report was unwarranted. Being that no South Carolina statute or case law exists permitting a pre-trial sentencing report or investigation under these circumstances, the Court denied the Defendant's request on this basis.³ Moreover,

³ Pursuant to S.C. Code Ann. § 24-23-120, "A Judge of the Court of General Sessions who has reason to believe a defendant suffers from a mental disorder, retardation, or substantial handicap, shall order a presentence investigation

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there were a significant amount of people present in the courtroom on the Defendant's behalf, and the Defendant had approximately thirteen (13) character statements prepared for the Court to consider.

As for the victims being present, the State represented to the Court that Jose Licon, cousin of the deceased victim, informed its investigator he was unhappy with the contact made by Defendant's counsel. Mr. Licon was the only family member of the victim living in the United States, but he informed the State's investigator prior to trial that he would keep the victim's family in Mexico informed of the proceedings. Mr. Licon was not adamant about being present for sentencing and informed the State he deferred to the Court in respect to sentencing. Mr. Licon indicated he only wanted justice served. The Court also considered a letter written by Jose Davilla, friend of the deceased, who also indicated he only wanted justice served but deferred to the Court in respect to sentencing. Mr. Davilla did not wish to be present at sentencing.⁴ Considering the positions of Mr. Licon and Mr. Davilla, the Court denied the Defendant's request on the basis that the victims were not present.⁵ The Court proceeded with sentencing on November 1, 2011, allowing both parties the opportunity to be heard.

The Defendant advised Mr. Licon of this post-trial motion to determine if he wished to communicate with the deceased's wife and four (4) children to determine if they wished to be heard or take a position on the Defendant's sentence. By way of this post-trial motion, the Defendant contends Mr. Licon advised counsel the deceased's wife and children support a

to be completed and submitted to the Court." There being no showing the Defendant had a lack of mental capacity, he had no statutory right to a pre-sentencing investigation. Additionally, there is no indication that any additional mitigation, not already available, would have been produced by the Defendant as a result of a pre-sentence report.

⁴ Mr. Jose Davilla is also the victim in the accident alleged to have received great bodily injury. Due to the not guilty verdict on Indictment No. 2011-GS-10-2817, Felony DUI resulting in great bodily injury, the Court did not take Mr. Davilla's injuries into consideration when sentencing.

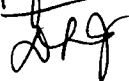
⁵ The deceased's wife and children live in Mexico. Due to their immigration status, it was unlikely they could be present for sentencing regardless of delay. Moreover, Mr. Licon advised the State's investigator he would keep the family informed of the proceedings, and Mr. Licon deferred to the Court in regards to sentencing.

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modification of Defendant's sentence to seven (7) years, suspended upon service of three (3) years, and payment of court-ordered restitution. According to the Defendant, the deceased's family concurs with the Defendant being ordered to make restitution payments to the deceased's children, to obtain a higher education, in the amount of Seven Thousand and 00/100 (\$7,000.00) Dollars per year, per child, for a period of four (4) years commencing upon Defendant's release. The total amount of restitution to be paid to the victim's family would be One Hundred Twelve Thousand and 00/100 (\$112,000.00) Dollars. The deceased's family also purportedly agrees the Defendant's driver's license shall be suspended pursuant to S.C. Code Ann. § 56-5-2945, and the Defendant shall receive alcohol counseling and treatment.

The State takes the position the Court's sentence is appropriate under the facts. Further, the State contends the Defendant does not present any new information that would necessitate further inquiry, other than the assertion the Defendant's counsel contacted the deceased victim's family to relate the proposed sentence modification contingent on certain financial payments to them. The State contends the proposed payment of \$112,000.00 for higher education for the victim's children is not "restitution" pursuant to S.C. Code Ann. § 16-3-1110(12)(a), is contrary to the Defendant's position prior to trial, and constitutes a violation of Rule 8.4(e), RPC, Rule 407, SCACR and Rule 7(a)(1) and 7(a)(5), RLDE, Rule 413, SCACR.⁶ Specifically, the State contends Defendant's counsel's proposed sentence modification violates the Rules of Professional Conduct in that his conduct was prejudicial to the administration of justice and may constitute attorney misconduct. See Rule 8.4(e), RPC, Rule 407, SCACR (It is professional misconduct for an attorney to engage in conduct that is prejudicial to the administration of justice.). The State further contends counsel's proposed sentence modification may be a

⁶ "The sole authority to discipline attorneys and decide appropriate sanctions after a thorough review of the record rests with th[e] [Supreme] Court." In re Poff, 394 S.C. 37, 714 S.E.2d 313 (2011).

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violation of Rule 7(a)(1), RLDE, Rule 413, SCACR (It shall be a ground for discipline for a lawyer to violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5), RLDE, Rule 413, SCACR (It shall be a ground for discipline to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law). The State contends that prior to his client being tried, convicted, and sentenced to twelve (12) years in prison, counsel took the position that the Defendant should receive a negotiated sentence of probation in part because the victim's family was made whole with the civil settlement, negating any need for further restitution. However, counsel now proposes a sentence modification contingent on certain financial payments to the victim's family under the guise of "restitution" which is prejudicial to the administration of justice.

"The authority to change a sentence rests solely and exclusively within the discretion of the sentencing judge." State v. Warren, 392 S.C. 235, 237–38, 708 S.E.2d 234, 235 (Ct. App. 2011) (citing State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981)). "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). The South Carolina Supreme Court has held, "it is proper for the trial judge, in open court, in the presence of the defendant, to inquire into any relevant facts in aggravation or mitigation of punishment." State v. Cantrell, 250 S.C. 376, 379, 158 S.E.2d 189, 191 (1967).

As argued in mitigation by the Defendant, the Court does not doubt the Defendant is a gifted trim carpenter viewed as a kind man and an outstanding citizen in the Edisto Island community. The State alluded to racial comments made by the Defendant about the victims. The record is void of evidence that such comments were made, and, therefore, were not considered by the Court in sentencing. The Defendant addressed the Court and stated he lived with remorse but still contends the accident was not his fault. Considering the Defendant's good character and reputation in his community, as well as other mitigation presented, it yet cannot be ignored that a life was lost.

A review of published Felony DUI cases shows that the sentence complained of herein is not disproportionate. See State v. Martin, 391 S.C. 508, 706 S.E.2d 40 (Ct. App. 2011) (fifteen years for felony DUI resulting in death); State v. Dantonio, 376 S.C. 594, 658 S.E.2d 337 (Ct. App. 2008) (seventeen years concurrent for two felony DUI charges); State v. Rickard, 371 S.C. 295, 638 S.E.2d 72 (Ct. App. 2006) (twenty-two years for felony DUI resulting in death and fifteen years for felony DUI resulting in great bodily injury); State v. Campbell, 361 S.C. 529, 605 S.E.2d 576 (Ct. App. 2004) (six years where defendant pled guilty to felony DUI resulting in death of a passenger in defendant's vehicle); State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996) (twenty-five years for felony DUI resulting in death and fifteen years, consecutive, for felony DUI resulting in great bodily injury); and State v. White, 311 S.C. 289, 428 S.E.2d 740 (Ct. App. 1993) (twenty-one years for felony DUI resulting in death).

As for the recommended payments to the deceased victim's children for higher education, the Court agrees with the State that such payments do not constitute "restitution" under S.C. Code Ann. § 16-3-1110(12)(a). Pursuant to state statute,

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"Restitution" means payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender's criminal conduct. It includes, but is not limited to:

- (i) medical and psychological counseling expenses;
- (ii) specific damages and economic losses;
- (iii) funeral expenses and related costs;
- (iv) vehicle impoundment fees;
- (v) child care costs; and
- (vi) transportation related to a victim's participation in the criminal justice process.

Restitution does not include awards for pain and suffering, wrongful death, emotional distress, or loss of consortium.

Restitution orders do not limit any civil claims a crime victim may file.

S.C. Code Ann. § 16-3-1110(12)(a). Based on this statutory definition, the defendant's proposed payment of \$112,000.00 for higher education for the victim's children does not constitute restitution.⁷ Further, during sentencing the Court inquired into the civil recovery for the victim's family. It was represented to the Court that Mr. Garcia's family received approximately One Hundred Forty Thousand and 00/100 (\$140,000.00) Dollars which was decreased after deducting costs and attorneys' fees. Any recovery for actual damages due to wrongful death was covered by the civil settlement. This Court did not order restitution, as it was represented that no restitution was outstanding or requested. Moreover, the State supplemented the record with a

⁷ Arguably restitution encompasses specific damages and economic losses due to the loss of Mr. Garcia. However, these elements are generally compensated for as an element of actual damages which the deceased's family received as a result of the settlement of the civil claims. As presented in this Motion it would more appropriately be interpreted as elements of damages due to pain and suffering, wrongful death, and emotional distress. All of these elements are specifically excluded by the plain and ordinary language of the statute.

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letter dated February 22, 2011 from Defendant's counsel in which counsel states, "The civil aspect of the case has been settled and as such restitution has been made to the alleged victim."

Defendant also proposes his driver's license should be suspended pursuant to S.C. Code Ann. § 56-5-2945, and the Defendant shall receive alcohol counseling and treatment. Pursuant to S.C. Code Ann. § 56-5-2945, "The Department of Motor Vehicles must suspend the driver's license of a person who is convicted [of Felony DUI] . . . for a period to include a period of incarceration plus . . . five years when a death occurs." Therefore, the Defendant's license will be suspended, regardless of the Court's Order, as a consequence of his conviction. As for alcohol counseling and treatment, the Court previously ordered the Alcohol Treatment Unit if available at the South Carolina Department of Corrections. Thus, the Court's Order does not need to be modified in this regard.

The Court finds the Defendant has outlined no sound reason for this Court to alter its sentence. The Defense Motion does not raise any issue supporting resentencing. The Defendant was properly sentenced on November 1, 2011 pursuant to S.C. Code Ann. § 56-5-2945. To allow a modification of sentence as proposed by the Defendant based on substantial monetary payments tendered to the deceased's family would be a perversion of the system, contrary to the public interests and would allow the perception that sentence modifications can be purchased by a Defendant of substantial financial means. It would in effect cast a pall on the integrity of the system of justice counsel and the Court are sworn to uphold. Further, the Court deems the sentence ordered is appropriate under the facts of this case. Having fully considered the Defendant's Post-Trial Motion for reconsideration of sentence and the State's Response thereto, as well as having fully reviewed the record and the various interests balanced by the Court at the

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time of the ruling, the Post-Trial Motion for Reconsideration of Sentence is hereby **DENIED** pursuant to Rule 29, SCRCrimP.⁸

MOTION FOR NEW TRIAL

The Defendant further, by way of this post-trial motion, moves this Court for a new trial based upon the following errors of law asserted by the Defendant prior to trial and during the course of trial.

“It is well settled that the grant or refusal of a new trial is within the discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of that discretion.” State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007); see also State v. Prince, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993). In criminal cases, the appellate court sits to review errors of law only. An abuse of discretion occurs when the trial court’s ruling is based on an error of law or the ruling is without evidentiary support. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). “However, when there is competent evidence to sustain the jury’s verdict, the judge may not substitute his judgment for that of the jury.” Prince, 316 S.C. at 63, 447 S.E.2d at 181.

- a) **The Defendant asserts the trial court erred in failing to charge the jury that in order to convict Defendant of Felony DUI, the State had to prove beyond a reasonable doubt the Defendant was “under the influence of alcohol to the extent the person’s faculties to drive are materially and appreciably impaired ...”**

The Court instructed the jury on the elements of Felony DUI pursuant to S.C. Code Ann. § 56-5-2945 which provides,

A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which

⁸ This motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 29, SCRCrimP.

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act or neglect proximately causes great bodily injury or death to a person other than himself, is guilty of the offense of felony driving under the influence

S.C. Code Ann. § 56-5-2945(A) (2008). During charge conference the State took no exception to the Court's proposed charges, while the Defendant took exception to the Court's refusal to instruct DUI, 1st offense. After the Court's instruction, the Defendant took exception that the Court did not instruct the jury that the State has to prove beyond a reasonable doubt that the Defendant was materially and appreciably impaired. The Defendant requested the Court to describe the words materially and appreciably impaired as being the definition of what it means to be under the influence. The terms "materially and appreciably impaired" derive from the DUI statute, S.C. Code Ann. § 56-3-2930 (A) (It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired . . ."). However, this language is not included in the elements of Felony DUI pursuant to statute, Section 56-5-2945(A), and, under the facts of this case, the Court declined to instruct this language. The Court found no factual support in record that the Defendant was simply driving under the influence, as the uncontroverted testimony showed he was driving, he was significantly impaired (blood alcohol level .208), he crossed the centerline, and he caused the death and great bodily injury to Mr. Davilla and Mr. Garcia. Defendant's exception was noted for the record. The Defendant argues the Court instructed such language in a prior Felony DUI case it presided over (State v. Martin, 391 S.C. 508, 706 S.E.2d 40 (Ct. App. 2011)), and, therefore, should have been instructed in this case. (State v. Martin Trial Tr. 601:18-602:2.)⁹

⁹ The Court does not recall the specific facts in the Martin case and whether the parties requested and consented to the use of this language in the instruction. Nor was this brought to the attention of the Court during charge conference.

First, the issues on appeal in the case of State v. Martin were two-fold: (1) whether the trial court erred in allowing opinion testimony from a witness, which fell outside the realm of his qualifications as a forensic toxicologist, and (2) whether the trial court erred in declining to direct a verdict on felony driving under the influence resulting in death. Neither of the issues on appeal involved the jury instructions.

“The evidence presented at trial determines the charged jury instruction. The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict.” State v. Burton, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002) (internal citation and quotation marks omitted); see also State v. Dantonio, 376 S.C. 594, 608, 658 S.E.2d 337, 344 (Ct. App. 2008). “The trial judge is required to charge only the current and correct law of South Carolina.” Johnson v. Horry County Solid Waste Auth., 389 S.C. 528, 538, 698 S.E.2d 835, 840 (Ct. App. 2010).

In reviewing jury charges for an alleged error, the appellate court must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error.

Id. (internal quotation marks omitted). Based on the facts of this case, the Court did not find it necessary to instruct the jury on S.C. Code Ann. § 56-5-2930, Operating a Motor Vehicle while under the Influence of Alcohol or Drugs.

State v. Grampus is the leading case in South Carolina setting forth the elements of felony driving under the influence. 288 S.C. 395, 343 S.E.2d 26 (1986) abrogated on other grounds by State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). A felony driving under the influence charge requires proof of three elements: (1) the actor drives a vehicle while under the influence of alcohol or drugs; (2) the actor does an act forbidden by law or neglects a duty imposed by law; and (3) the act or neglect proximately causes great bodily harm or death to another person. Id. at 397, 343 S.E.2d at 27.

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In addition, section 56-5-2950(b)(3) of the South Carolina Code of Laws (Supp.2006) provides in the criminal prosecution of a violation under section 56-5-2945, an alcohol concentration of eight one-hundredths of one percent or more, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the inference the person was under the influence of alcohol.

State v. Dantonio, 376 S.C. 594, 604, 658 S.E.2d 337, 342–43 (Ct. App. 2008). Neither the court in Grampus nor the court in Dantonio referred to the DUI statute or the terms “materially and appreciably impaired” when discussing the elements of felony DUI. In Dantonio, the South Carolina Court of Appeals found the State satisfied the elements in Section 56-5-2945(A) in that the defendant was driving a vehicle which struck the victim, his blood alcohol concentration suggested he was under the influence, he drove in excess of 80 mph in a 55 mph zone—an act forbidden by law, and but for his speeding the collision would not have occurred. Id. at 604, 658 S.E.2d at 343.

This Court instructed the jury on the elements of S.C. Code Ann. § 56-4-2945, as discussed in Grampus and Dantonio, namely that the State must prove beyond a reasonable doubt that (a) the Defendant was driving under the influence, (b) while driving, the Defendant did an act forbidden by law, and (c) that negligent act caused the death of the victim. The Court finds it instructive that neither the supreme court nor court of appeals mentioned the language in the DUI statute when discussing the elements of Felony DUI in Grampus and Dantonio. However, our state’s appellate courts have not mentioned the DUI statute in the context of proving the elements of Felony DUI under S.C. Code Ann. § 56-5-2945. In regards to the “act forbidden by law,” the Court instructed the jury on S.C. Code Ann. § 56-5-1900 “Driving on Roadways Laned for Traffic,” as there was evidence the accident was caused by the Defendant when he crossed over the center line and into the victim’s lane of traffic. The Court further instructed the jury on proximate cause. Precisely, the Court instructed,

The Defendant is charged with felony driving under the influence. The State must first prove beyond a reasonable doubt that the Defendant drove a vehicle while under the influence of alcohol.

Driving a motor vehicle means that the vehicle was in motion. This may be proved by direct or circumstantial evidence.

A movement of the vehicle might occur without any affirmative act by a driver or, in fact, by any person. If a vehicle is moved by some power beyond the control of the Defendant, or by accident, this would not be driving.

The State must prove beyond a reasonable doubt that the defendant was sufficiently under the influence to impair his ability to drive with reasonable care, with due regard for others and himself, or as a reasonably prudent person would drive. It is not necessary to show that the Defendant was in a helpless condition, passed out, or even intoxicated. On the other hand, the fact that the Defendant, at some time prior to this incident, drank an alcoholic beverage does not prove that the Defendant was driving under the influence.

Next, the State must prove beyond a reasonable doubt that, while driving, the Defendant did an act forbidden by law or neglected a duty imposed by law.

In that regard, I instruct you ladies and gentlemen that pursuant to S.C. Code § 56-5-1900, driving on the road laned for traffic, that each driver has the duty, whenever any roadway has been divided into two or more clearly marked lanes for traffic, the following rules in addition to all others consistent herewith shall apply. A vehicle shall be driven as near as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety.

Finally, the State must prove beyond a reasonable doubt that the act or neglect of the defendant proximately caused great bodily injury or death to another person.

Proximate cause is the direct cause; it is the immediate cause; it is the sufficient cause; it is that cause without which the injuries and/or death of the victim would not have resulted.

There must be a chain of causation from the time of the injury inflicted by the defendant until the time of the victim's death. Proximate cause does not necessarily mean that it occurred immediately prior to death.

There may be more than one proximate cause. The acts of two or more persons may combine together to be a proximate cause of injury and death of a person. The Defendant's act may be regarded as the proximate cause if it is a contributing cause of injury to and death of the victim. The fact that other causes also

contribute to the injury and/or death of the victim does not relieve the Defendant from responsibility. The Defendant's act need not be the sole cause of the injury and/or death, but must be a proximate cause contributing to the injury and/or death of the victim.

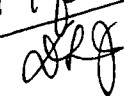
I further instruct you that great bodily injury means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or extended loss or impairment of the function of any bodily member or organ.

The Court further instructed the jury regarding the inferences from the results of blood alcohol tests pursuant to S.C. Code Ann. § 56-5-2950(b). Specifically, the Court instructed,

[T]he amount of alcohol in the Defendant's blood at the time of the alleged violation, as shown by chemical analysis of the Defendant's breath or other bodily fluids, may be considered by you in deciding whether the Defendant was under the influence.

If the alcohol concentration was eight one-hundredths of one percent or more, it may be inferred that the Defendant was under the influence. This inference, ladies and gentlemen, is simply an evidentiary fact to be considered by you, along with the other evidence in the case, and you may give it the effect, value and weight you decide it should receive.

The record reflects the Defendant was driving the vehicle which struck the victims. Shana Sorrells, a forensic toxicologist with SLED, testified that the result of the Defendant's Blood Alcohol Concentration (BAC) test indicated 0.208 which suggest he was driving under the influence. The evidence also shows that the Defendant crossed over the center line into the victim's lane of traffic when the incident occurred—an act forbidden by law. The State also provided evidence to prove that but for the Defendant's act of crossing over the center line, the accident would not have occurred. As the court of appeals found in Dantonio, this Court finds the State satisfied the elements of S.C. Code Ann. § 56-5-2945. Based on the facts of this case, and considering the Court's jury charge as a whole, the Court finds no error in failing to charge the jury the State must prove beyond a reasonable doubt the Defendant was "materially and appreciably impaired" pursuant to S.C. Code Ann. § 56-5-2930. Although articulated

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differently, the charge given essentially parallels the language in the DUI statute and has the same connotation as “materially and appreciably impaired.” Specifically the Court instructed that the State was required to prove beyond a reasonable doubt that the Defendant drove a vehicle while under the influence of alcohol and that the Defendant was sufficiently under the influence to impair his ability to drive with reasonable care, with due regard for others and himself, or as a reasonably prudent person would drive.

b) The Defendant asserts the Court erred in failing to charge the jury on the lesser included offense of Driving Under the Influence, First Offense.

On October 24, 2011, the Defendant filed a pre-trial motion to charge DUI, first offense as a lesser included offense of Felony DUI. The Defendant also took exception to the Court’s refusal to instruct DUI, 1st after charge conference and later renewed his motion after the Court’s instruction on the law. “The test for determining when a crime is a lesser included offense of the crime charged is whether the greater of the two offenses includes all the elements of the lesser offense. If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater.” Hope v. State, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997). The State did not disagree that DUI could be charged as a lesser included offense based on the elements test but disagreed it factually applies in this case.

The Defendant suggested, in its motion, the Court should charge S.C. Code Ann. §56-5-2930 “Operating Motor Vehicle While Under Influence of Alcohol or Drugs” as a lesser included offense. This section provides in relevant part,

It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, or under the combined influence of alcohol and any other drug or drugs or substances which cause

impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired. A person who violates the provisions of this section is guilty of the offense of driving under the influence . . .

S.C. Code Ann. § 56-5-2930(A) (2008). Under S.C. Code Ann. § 56-5-2945, Felony DUI resulting in death, the State must prove beyond a reasonable doubt (a) the Defendant was driving under the influence, (b) while driving, the Defendant did an act forbidden by law, and (c) that negligent act proximately caused the death or great bodily injury to another person. The State contended that if the jury disbelieved the State's witnesses and, rather, believed the defense's witnesses, who testified the Defendant was not impaired, the Defendant cannot then ask for an instruction for only DUI where the record does not support it—either the Defendant is guilty of felony DUI or not guilty. The Court agreed with the State but took the lunch recess to ponder the issue. After the lunch recess, the Court ruled that instructing DUI as a lesser included offense was not factually supported by the record. If the jury were to disbelieve the testimony of Deputy Brinson and Mr. Davilla, as proposed by the defense, the Defendant would be not guilty because they would essentially be finding Defendant was not impaired while driving a vehicle, did not cross the center line, was not the cause of the accident which resulted in great bodily injury and or death and therefore was not the proximate cause of the accident. Additionally, after hearing closing argument, the Court changed its opinion as to whether the offense of DUI was a lesser included offense under the elements test. Under S.C. Code Ann. § 56-5-2930 the State must prove the Defendant was under the influence of alcohol or any other drug to the extent his faculties to drive a motor vehicle were “materially and appreciably impaired.” Under the elements test, the greater of the two offenses must include all elements of the lesser offense. Section 56-5-2945 does not include the language “materially and appreciably impaired,” as it only requires the State to prove the Defendant was “driving under the influence.” Therefore, the

offense of DUI does not pass the elements test, as the greater of the two offenses does not include all of the elements of the lesser offense. The Court stands by its previous ruling that DUI is not a lesser include offense of Felony DUI; therefore, the Court did not err in failing to instruct S.C. Code Ann. § 56-5-2930 as a lesser included offense. Further, even if DUI were a lesser included offense of Felony DUI such an instruction was not factually supported by the evidence presented in the present case.

c) The Defendant alleges the Court erred in failing to exclude evidence of a Jim Beam bottle found near the scene of the accident which was destroyed by the Charleston County Sherriff's Office prior to trial.

Prior to trial, on October 20, 2011, the Defendant filed a Motion in Limine to Suppress Evidence Relating to Jim Beam Bottle Found Somewhere in the Woods and Said Evidence Was Destroyed by State Before Trial. This motion was heard and denied prior to trial on October 20, 2011. A contemporaneous objection was made by the Defendant during the testimony of Investigator Kathy Kjellman on October 25, 2011, and the Court overruled the motion based on relevance, spoliation, and weight.

Investigator Kjellman arrived on the scene, collected evidence, and took photographs of the scene. One of the items collected and photographed was a Jim Beam bottle. Investigator Kjellman testified the bottle was found approximately ten (10) feet from a cooler that was also found. She further testified the bottle had dirt and dust on the outside and appeared to have been recently thrown in the area where it was found. These items were collected and photographed immediately after the incident, December 8, 2008. On July 14, 2010, Investigator Kjellman destroyed the physical evidence collected at the scene at the direction of Deputy Michael Burrell. Investigator Kjellman testified, based on years of experience lifting prints, that no tests were performed on the Jim Beam bottle, because it was unlikely latent prints would have been obtained due to the fact the bottle had dirt and dust on its exterior.

The State sought to introduce the photograph of the scene which included the Jim Beam bottle among other items, and the Court allowed it because it was relevant to show items thrown from the Defendant's vehicle and the scene as it existed immediately after the incident which tended to show alcohol was involved in the accident. The Defendant argued the photo should be excluded because the actual bottle was destroyed prior to performing a fingerprint analysis.¹⁰ The Defendant further argued the bottle was destroyed in bad faith and possessed an exculpatory value.

The Charleston County Sheriff's Office Policy and Procedure Manual provides in Procedure 9-01 (I) Final Disposition of Property, "Forensic Services is responsible for the prompt, authorized disposal of property within 90 days *after legal requirements have been met.*" (emphasis added). Here, the evidence was kept for a year and a half prior to disposal, and, prior to disposal, the Sheriff's Office determined latent prints could not be lifted. The Court noted on the record that when the Sheriff's Office determined latent prints could not be lifted, the legal requirements had been met; therefore, the evidence was not destroyed in bad faith. Further, during the pre-trial conference, the Court noted the Defendant could still argue spoliation of the evidence which comes down to the weight of the evidence and not admissibility. The Court further noted that whether the evidence could have been exculpatory was very speculative given the unlikelihood that prints could have been lifted from the bottle. However, whether the bottle had any exculpatory value is also a weight issue for the jury to determine.

The Defendant argues the Court erred in allowing Investigator Kjellman to speculate the bottle came from the Defendant's truck. Investigator Kjellman testified the Defendant's truck was in terrible condition, and the victim's Geo was completely demolished. She testified the

¹⁰ The Court noted on the record that Defendant's counsel began representation on December 8, 2008 but did not request a fingerprint analysis of the Jim Beam bottle until after the evidence was destroyed on July 14, 2010.

inside of the Geo smelled of antifreeze and engine oil. She further testified she did not inventory the Geo but merely took photographs of the vehicle. Investigator Kjellman was properly allowed to testify on where the evidence came from based on her years of law enforcement experience, her rational perception, and investigation of the scene. The issue comes down to witness credibility and believability. It is the duty of the jury to analyze and to evaluate the evidence and determine which evidence convinces them of its truth. The jury was given the standard jury instruction on witness credibility and believability. The jury was instructed it may believe one witness over several witnesses or several witnesses over one witness; it may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness; it may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety; it may consider whether any witness has exhibited any interest, bias, prejudice, or other motive in this case; and it may also consider the appearance and manner of a witness while on the witness stand. Accordingly, the Court stands by its previous ruling.

d) The Defendant alleges the Court erred in allowing EMT Joshua Sims to opine whether Jose Davilla would be able to remember how the accident happened when he stated to Sims immediately following the accident that he did not know how the accident occurred.

The Defendant filed a pre-trial motion on October 20, 2011 to exclude the speculative testimony about subsequent recall. The Court denied the motion on October 20, 2011 finding that as long as the testimony was based on the witness' rational perception it could be included. The Court also noted it was a weight issue for the jury to determine. The Defendant made a contemporaneous objection during the testimony of Joshua Sims who testified on behalf of the State on October 25, 2011. Joshua Sims is a Charleston County EMT who was dispatched to the scene of the accident. Mr. Sims testified he had worked approximately ten (10) years as a paramedic. Mr. Sims testified he primarily cared for Jose Davilla, who was a passenger in the deceased victim's vehicle. He testified Mr. Davilla was alert to person, place, and time but was

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unable to recall the accident and the events prior to the accident. Mr. Sims was questioned by the State as to the significance of recall immediately after an accident. He stated it was not uncommon to not recall the details of a traumatic event but be able to recall the entire event fifteen (15) minutes later without any problem.

The Defendant contends Mr. Sims testimony was the improper, speculative opinion rendered by a lay person because it was a medical opinion outside the scope of Mr. Sims's knowledge. This Court overruled the Defendant's motion and hereby stands by its previous ruling.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE; State v. Burton, 342 S.C. 500, 509, 537 S.E.2d 291, 296 (Ct. App. 2000) ("Lay witnesses are permitted to offer opinion testimony when such testimony is rationally related to the witness's perception, does not require special knowledge, and may assist the jury's understanding of the witness's testimony."), overruled on other grounds by, 352 S.C. 203, 573 S.E.2d 802 (2002).

Mr. Sims testified his testimony was based on his ten (10) years of experience as a paramedic responding to accidents involving trauma, as well as his training in trauma kinetics. The Court finds Mr. Sims's testimony was based on his rational perception as he rendered medical care to Mr. Davilla, was helpful to understand his testimony regarding Mr. Davilla's recollection of the accident, and does not require special knowledge, skill or experience; therefore, the Court hereby stands by its previous ruling.

- e) **The Defendant contends the Court erred in failing to grant Defendant a mistrial or give a curative instruction when the State referred to a “civil settlement” while questioning Jose Davilla.**

The Defendant filed a pre-trial motion on October 20, 2011 to exclude evidence related to settlement of any insurance claim arising from the accident. During a pre-trial hearing on October 20, 2011, the State represented to the Court it did not plan to introduce such evidence in its case in chief, and, thus, the issue was moot. During cross-examination, Defendant's counsel questioned Jose Davilla about a sworn statement he signed in which he said he did not wish to participate as a witness or otherwise in the criminal prosecution of the Defendant. Mr. Davilla admitted signing the document but testified he was lied to and did not understand what he was signing because everything was in English. On re-direct, Mr. Davilla testified he signed the statement because he was told he had to. He further testified he thought the papers were sent from Bubba Unger, Esquire's office for him to sign.¹¹ The Assistant Solicitor asked Mr. Davilla if he thought he was not going to get paid in his “civil suit?” Defendant's counsel objected on the basis of the prior ruling under Rule 403, SCRE. Outside the presence of the jury, the State represented to the Court it sought to ask Mr. Davilla if he signed the statement because he was afraid he would not get paid in the civil suit. Defendant's counsel stated Mr. Unger gave him permission to speak with Mr. Davilla after Mr. Unger obtained permission from Mr. Davilla to do so. The Court stated the Defendant opened the door by asking Mr. Davilla about the sworn statement; therefore, the State is allowed to go into the underlying basis as to why he signed the document and whether he was misled into signing it. The Court found the issues to be whether Mr. Davilla was misled, whether the witnesses were from his attorney's office, and whether he thought he was being placed in an adverse position by not signing the document. The statement was signed in the presence of Defendant's counsel, an associate of Defendant's counsel, Jose

¹¹ Bubba Unger, Esq. represented Mr. Davilla in the civil suit regarding this accident.

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Licon, and Melody Bailey. The Court clarified the State could not go into the civil settlement, which was resolved by the Defendant's pre-trial motion, but the State could inquire as to why Mr. Davilla signed the document and what his perception was when it was signed. Further, the Court found this line of questioning related to witness credibility. When re-direct resumed in the presence of the jury, Mr. Davilla testified he thought the papers were from his lawyer or someone arranging something with the ambulance. Mr. Davilla felt he was misled. Mr. Davilla verified he testified at trial voluntarily. Mr. Davilla did not testify regarding the details of any insurance settlement.

"Generally, the existence of insurance should not be brought to the attention of the jury." Sarvis v. Register, 288 S.C. 236, 238, 341 S.E.2d 791, 792 (1986). "However, if insurance is mentioned, the party moving for the mistrial has the burden of showing not only error but prejudice." Id. "The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. . . . A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." State v. White, 371 S.C. 439, 443-44, 639 S.E.2d 160, 162 (Ct. App. 2006). Here, the Defendant opened the door on cross-examination, by questioning Mr. Davilla about the sworn statement in which he said he did not wish to participate as a witness in the Defendant's criminal prosecution. Thus, as articulated by the Court during the trial, the State had the right to inquire as to why he signed the document and whether he was misled in any way. Moreover, the Defendant failed to show that he was prejudiced by the inadvertent use of the word "civil suit." Accordingly, the Court denied the Defendant's motion for a mistrial and hereby stands by its ruling.

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“A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.” White, 371 S.C. at 445, 639 S.E.2d at 163. “If the trial judge sustains a timely objection to evidence and gives the jury a curative instruction that it be disregarded, the error is deemed to have been cured by the instruction.” Id. Accordingly, an error must have been made to warrant giving the jury a curative instruction to disregard the evidence, and not to consider it for any purpose during deliberations. Finding no error, the Court denied a curative instruction would be warranted in this setting. The Court hereby stands by its previous ruling.

f) The Defendant contends the Court erred in failing to strike a juror for cause who was a member of Mothers Against Drunk Driving (MADD) and who had lost a son in a drunk driving accident.

During voir dire, the Court asked if there is any member of the jury panel who is a member of, or contributor to, any group which has as its primary concern the promotion of law enforcement or victim’s rights including, but not limited to, MADD, Students Against Driving Driving, or Citizens Against Violent Crime. Juror 37 indicated she volunteered with MADD from 1987 to 1988. The juror was asked whether, based on her involvement, she felt she could render a fair and impartial verdict in this case. The juror indicated she could be fair and impartial despite her brief involvement with MADD. The panel was also asked whether any member of the jury panel had a moral opposition to the consumption of alcohol. Juror 37 indicated she had a son who was killed by a drunk driver in 1987. The juror was asked again whether, based on this experience, she felt she could render a fair and impartial verdict in this case based solely on the evidence presented and the law as instructed by the Court. The juror indicated she could be fair and impartial despite the circumstances of her son’s death.

Pursuant to S.C. Code Ann. § 14-7-1110, the State and the Defendant are entitled to peremptory challenges not exceeding five (5). The Defendant used its fifth peremptory challenge to strike juror 37. With all peremptory strikes exhausted, the Defendant requested juror 37 be struck for cause on the basis her son was killed by a drunk driver. The Court denied the request because the juror indicated she could be fair and impartial.

To safeguard a litigant's right to an impartial jury, "prospective jurors must be excused for cause when either an automatic disqualification applies to the juror or when the trial court determines that the juror cannot be fair and impartial." Burke v. AnMed Health, 393 S.C. 48, 53, 710 S.E.2d 84, 86 (Ct. App. 2011). South Carolina courts "have hardly ever recognized an automatic disqualification," and they have not done so under these circumstances. The determining factor in this circumstance is whether the juror can be fair and impartial. After juror 37 indicated she was a former MADD volunteer and her son was killed by a drunk driver, the Court inquired whether, as a result of these experiences, she could render a fair and impartial verdict in this case solely on the facts as presented and the law as the Court would instruct. The juror indicated she could be fair and impartial after both inquiries. Finding the juror could be fair and impartial, the Court had no basis to strike the juror for cause.

- g) The Defendant contends the Court erred in failing to strike a juror for cause whose father and brother worked for the Charleston County Sheriff's Office, the law enforcement agency prosecuting the charges against Defendant.**

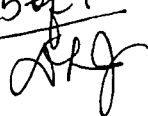
During voir dire, the Court asked the jury panel whether they had any family members who were currently or formally employed as a member of law enforcement. Juror number 271 indicated his father and brother worked for the Charleston County Sheriff's Office. The Court asked the juror whether he could render a fair and impartial verdict in this case. The juror

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indicated “yes,” meaning he felt he could remain fair and impartial despite his family members’ employment with the Charleston County Sheriff’s Office.

Pursuant to S.C. Code Ann. § 14-7-1110, the State and the Defendant are entitled to peremptory challenges not exceeding five (5). The Defendant used his peremptory challenges to strike jurors 90, 127, 272, 107, and 37. After the Defendant exhausted all of his peremptory challenges, juror 271 was called. The Defendant requested the juror be struck for cause on the basis he advised the Court he had two (2) family members employed by the Charleston County Sheriff’s Office. The Court denied the Defendant’s request, because the juror indicated he could be fair and impartial, could render a decision based on the evidence and law, and the juror did not respond as knowing any of the potential witnesses named from the Charleston County Sheriff’s Office. Further, his family members were not involved in the investigation, and the juror had no personal knowledge of the facts and circumstances of the case.

“Solely because a juror is related by blood or marriage to a police officer or deputy sheriff does not automatically disqualify the juror under Section 14-7-1020 of the 1976 South Carolina Code.” State v. Gulledge, 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1982); see also State v. Cook, 204 S.C. 295, 28 S.E.2d 842 (1944) (relationship of a juror to one of the sheriff’s force would not be ground for disqualification). “However, the juror may be prejudiced, biased, or interested in the action for some other reason, . . . and, depending upon the facts and circumstances, subject to challenge for cause or the exercise of a peremptory challenge.” Gulledge, 277 S.C. at 370, 287 S.E.2d at 489–90. Here, the fact juror 271 indicated his father and brother worked for the Charleston County Sheriff’s Office does not automatically disqualify him as a juror, especially in light of the fact the juror indicated he could be fair and impartial. Moreover, the Court called out the names of all potential witnesses, which included several

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members of the Charleston County Sheriff's Office, and juror 271 did not indicate he was related to or had a close personal or social relationship with any of the potential witnesses. The Court finds the juror was not prejudiced, biased, or interested in the action for any reason; thus, there was no basis to strike the juror for cause.

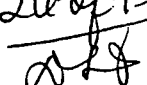
h) The Defendant contends the Court erred in failing to exclude evidence of the Decedent's post mortem blood test because the blood test was not sent to SLED and the State could not establish a chain of custody for the blood sample.

The Defendant filed a motion on October 26, 2011 to exclude the introduction of evidence relating to the results of the Decedent's blood test. The Defendant raised his motion after the State called the pathologist, Dr. Nicholas Batalis. The matter was taken up by the Court outside the presence of the jury.¹² The Defendant first contends the Decedent's blood test should be excluded because it was not sent to SLED as required by S.C. Code Ann. § 17-7-80 but was rather sent to an independent laboratory in Pennsylvania called NMS Labs.

Every coroner or other official responsible for performing the duties of coroner shall examine the body within eight hours of death of any driver and any pedestrian, sixteen years old or older, who dies within four hours of a motor vehicle accident . . . and take or cause to have taken by a qualified person such blood or other fluids of the victim as are necessary to a determination of the presence and percentages of alcohol or drugs. Such blood or other fluids shall be forwarded to the South Carolina Law Enforcement Division within five days after the accident in accordance with procedures established by the Law Enforcement Division.

S.C. Code Ann. § 17-7-80. The State represented to the Court that only one county, which uses MUSC to perform autopsies, sends blood samples to SLED for forensic toxicology services. The other 13-14 counties that use MUSC to perform autopsies send samples to NMS Labs for

¹² The Court heard argument on the Defendant's Motion to Exclude Introduction of Evidence Relating to Results of Blood Test Upon Decedent Alvaro Antonio Garcia outside the presence of the jury on October 26, 2011. The motion was taken under advisement, and the State called its next witness. The Court returned to the matter and rendered its ruling on the morning of October 27, 2011 prior to State calling Dr. Nicholas Batalis.

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forensic toxicology services due to speed and accuracy. The Court found for the record that Section 17-7-80 is not applicable to the forensic pathologist, for he was not employed as the coroner and he was not an employee of the coroner's office. Further, a forensic pathologist is not an "other official" as contemplated by Section 17-7-80. Dr. Batalis was acting independently as an employee of MUSC for the sole forensic purpose of performing an autopsy.¹³ Therefore, the Court stands by its previous ruling in that the blood sample of the Decedent should not be excluded for the pathologist's failure to send the sample to SLED within five (5) days after the incident.

The Defendant also contends the evidence related to the blood test should be excluded because the State cannot produce the chain of custody. The doctor testified the Decedent's blood was taken to determine the cause and manner of death and to rule out other causes of death. The State indicated Dr. Batalis could testify as to the internal chain at MUSC and could corroborate that he sent the blood sample to NMS Labs for testing. Dr. Batalis testified blood was drawn from the victim on December 8, 2008 and an autopsy was performed on December 9, 2008. Dr. Batalis could not testify as to the specific date he sent the blood sample to NMS Labs or the specific tests performed and movement of the sample at NMS Labs, but he did have a report from NMS Labs, signed by Joseph N. Corvo on December 13, 2008, detailing a chain number, test results and analysis that he could rely upon. However, the Defendant chose to not cross-examine this witness.

In State v. Mullins, 331 S.C. 501, 489 S.E.2d 923 (1997), the supreme court articulates the statutory power given to the coroner is plenary authority to investigate the cause and manner of death. Id. at 503, 489 S.E.2d at 924. This authority does not extend to obtain a blood sample from a live suspect in a Felony DUI case. Id. This substantiates the underlying principle that

¹³ The sole purpose of the testing was to determine the mode and manner of death.

samples from live suspects are subject to certain constitutional protections while those of a victim are not.

Further, South Carolina law dictates that unless a blood alcohol level test is conducted for medical purposes, the result of the test is not reliable unless the proponent can demonstrate a chain of custody. Jamison v. Morris, 385 S.C. 215, 228, 684 S.E.2d 168, 175 (2009). The toxicology samples in this case taken from the Decedent Alvaro Garcia were conducted for medical diagnostic purposes and were relied on by the forensic pathologist to establish the mode and manner of death and not for the purposes of litigation. The State was not seeking to admit the report but only the results as the underlying basis of the pathologist's testimony as to the cause of death. "Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party offering such items into evidence must establish a chain of custody as far as practicable." See State v. Glenn, 328 S.C. 300, 305, 492 S.E.2d 393, 395 (Ct. App. 1997).

"Medical records are admitted routinely as business records. . . . The trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment." Ex Parte DHEC, 350 S.C. 243, 565 S.E.2d 293 (2002). The toxicology results obtained by the forensic pathologist are admissible as business records, under the business records exception to the hearsay rule, without chain of custody, because the toxicology results were obtained for medical diagnostic purposes. The results and relevant medical information are considered trustworthy without a chain of custody, as such results have an indicia of reliability. Such records are admitted routinely as the trustworthiness of such records are presumed based on the fact they were relied on for diagnostic purposes and were taken in a neutral setting. The Court notes there are no discrepancies apparent on the face of the record.

The test samples were taken by the MUSC forensic pathologist for medical purposes for determining the cause of death and were not relied on for litigation; thus, the samples were not sought in an investigative posture as those of the Defendant. The purpose of chain of custody for a person charged with a criminal offense is to protect the preservation of evidence that potentially cannot be retested which requires the indicia of reliability provided by a chain of custody. Generally, a chain of custody is required where the results are sought to establish criminal or civil liability (i.e., DUI, Wrongful Death). The Court made these aforementioned findings of fact and conclusions of law on the record during trial and hereby stands by its previous ruling.

- i) **The Defendant contends the Court erred in failing to exclude evidence of the blood test performed on the Defendant because the State was unable to establish the chain of custody for the blood sample or the internal laboratory chain of custody on the aliquots tested, and because the results did not relate to the incident of December 8, 2008.**

The Defendant filed a Motion in Limine to Suppress Results of Blood Alcohol Test Because of Failure of State to Establish Chain of Custody on October 20, 2011. The motion was addressed prior to trial on October 20–21, 2011 at which time the Court heard testimony of Lieutenant Joseph Leatherman, lab information management systems administrator with SLED, Shana Sorrells, forensic toxicologist with SLED, and Wendy Carroll Bell, head of the toxicology department at SLED. The Court denied the motion on October 21, 2011.

[A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. . . . Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis. . . . Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is

complete. . . . In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the [substance] was not established at least as far as practicable.

State v. Hatcher, 392 S.C. 86, 91–92, 708 S.E.2d 750, 753 (2011) (internal quotation marks and citations omitted). “[W]here there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility.” State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). Applying this rule to the case at hand, the Court finds no missing link in the chain of custody.

The record reflects the Defendant’s blood was drawn at the Medical University of South Carolina (MUSC) by Charles R. Heath, RN who testified he sealed the tube with red tape and delivered it to Deputy Herman Martin. While Heath could not recall what time the blood was drawn, the hospital medical documents indicated it was drawn at approximately 9:50 p.m. on the night of the incident. While the paperwork as to who received the sample from Deputy Martin and what time it was handed over was not filled out, Deputy Martin testified he turned over the blood kit to Deputy William Brinson, and, likewise, Deputy Brinson testified he received the blood kit from Deputy Martin once he arrived at MUSC on the night of the incident. Investigator Kathy Kjellman testified she received the sealed blood kit from Deputy Brinson which she placed in the refrigerator in the evidence room at the Charleston County Sheriff’s Office. Investigator Kjellman testified she did not record the exact date and time she received the blood kit from Deputy Brinson, but she logged the blood kit into the Sherriff’s Office system on December 9, 2008 at approximately 10:40 a.m. Investigator Kjellman clarified that from the time she received it from Deputy Brinson until she logged in the kit, no one else had custody or control of the blood kit, and the blood kit was already sealed at the time she received it. Investigator Brent Roy testified he retrieved the blood kit from the refrigerator in the evidence

compound and transported the kit to SLED on January 7, 2009 in his assigned county vehicle. Upon arriving at SLED, Investigator Roy testified he logged in the blood kit with Doris Yarborough and signed indicating he relinquished the kit to SLED.

Doris Yarborough, forensic technician with SLED, verified the Defendant's blood kit was presented to her by Investigator Brent Roy with the Charleston County Sheriff's Office on January 7, 2009. Her records indicated the blood kit was logged into her system on January 7, 2009 at 12:44 p.m., and at 1:11 p.m. she transferred the blood kit to the intake refrigerator. She further testified each piece of evidence is given a lab number, and any movement is tracked electronically by the lab number. Patricia Crooks, forensic technician in the evidence control department at SLED, testified she retrieved the blood kit from the refrigerator on January 7, 2009 at 3:55 PM and gave the kit to Brandon Williams. Ms. Crooks testified the blood kit was in her custody less than one minute during which time she did not open the pouch or tamper with the evidence. Brandon Williams, forensic technician in the toxicology department at SLED, testified he received the blood kit from Pat Crooks on January 7, 2009 in a heat sealed pouch which had no appearance of tampering. He testified he took the blood kit to his department on the fourth floor and placed it in the toxicology refrigerator. Mr. Williams testified he scanned the evidence into the refrigerator by a bar code, and he verified only the toxicology department has access to this refrigerator. Mr. Williams further testified Shana Sorrells was the next person to take custody of the blood kit. Mr. Williams also testified he interacted with the evidence on January 14, 2009 to perform confirmatory tests. These confirmatory tests were performed after the quantitative tests and consisted merely of entering data—no evidence was ever handled while performing the confirmatory tests. On February 3, 2009, Mr. Williams placed the evidence in a hold bin for six (6) months according to SLED policy. On cross examination, Mr. Williams

verified the SLED records indicated "last modified" on January 9, 2009 at 5:08 p.m., but on re-direct he clarified that this date does not pertain to any testing.

Shana Sorrells,¹⁴ forensic toxicologist with SLED, was admitted, subject to the Defendant's objection, as an expert in forensic toxicology. Ms. Sorrells testified she created a "run list," tested the evidence, and created aliquots on January 13, 2009. She testified once an aliquot is created, it means an analysis has been performed. She further testified she has to create an aliquot to test a sample; however, an aliquot is considered the same sample, rather than a new sample, and is used as a control to verify the results. She testified it is not SLED's policy to place bar codes on aliquots. After taking the evidence required to perform the tests, she placed the remaining evidence in a heat sealed bag and placed it back in the refrigerator. She further testified no entries were made in the SLED computer system between January 7, 2009 and January 27, 2009, but the evidence continued to be in her custody and control until the case was written up. She testified as long as she is actively working on a case, the evidence is in her custody and control. She further testified it is SLED's policy to record person to person transfers of the evidence; it is not SLED policy to track movement in and out of a departmental refrigerator.

Ms. Sorrells verified "last modified" means last saved. She clarified they do not go by the last modified date but rather go by the date evidence is acquired. Here, the date acquired was January 14, 2009. Wendy Bell¹⁵ verified during her pretrial testimony that the "last modified" date means the date saved which is an unfortunate computer glitch beyond their control. Ms.

¹⁴ Ms. Sorrells testified she is a forensic toxicologist at SLED with whom she was been employed for five years. She possesses a Bachelor of Science in Chemistry and a Master of Science in Analytical Chemistry. She testified she participated in a two-year internal training program at SLED and takes two alcohol and two drug proficiency tests per year. Ms. Sorrells testified she has been qualified as an expert in the area of forensic toxicology approximately twelve times.

¹⁵ Wendy Bell testified she is the chief toxicologist and toxicology department head at SLED.

Sorrells testified the case was written up on January 27, 2009. She further testified once a case is written up, evidence is placed in a long term storage bin.

The Court found the State established a complete chain of custody identifying all of those who handled the blood sample as far as practicable. Every individual who had custody and control of the blood kit testified at trial. Thus, the State has not left it to conjecture as to who had it and what was done with it between the taking and the analysis. See State v. Priester, 301 S.C. 165, 391 S.E.2d 227 (1990) (finding chain of custody sufficient where each person who handled the blood sample testified at trial). The record reflects no evidence of tampering or evidence that the blood test results did not relate to the incident on December 8, 2008. At most, there were a few weak links in the chain. Investigator Kjellman testified she did not log the blood kit into the Charleston County Sheriff's Department computer system until December 9, 2008, but clarified that from the time she received it from Deputy Brinson until she logged in the kit, no one else had custody or control of the blood kit. There is no indication from the record the blood kit was tampered with or moved until Investigator Brent Roy retrieved the blood kit from the refrigerator and transported to SLED on January 7, 2009. Further, Shana Sorrells testified the aliquots created were not given a separate bar code, and no entries were made in the SLED computer system between January 7, 2009 and January 27, 2009. However, Ms. Sorrells testified the evidence continued to be in her custody and control from the time she received it until the case was written up. Further, Ms. Sorrells explained an aliquot is not considered a new sample and is used as a control to verify the results. She also testified it is not SLED's policy to place bar codes on aliquots, nor is it SLED's policy to track movement in and out of a departmental refrigerator. The Court finds the chain of custody was sufficiently established and hereby stands by its previous ruling and denies the Defendant's motion on this ground.

- j) **The Defendant contends the Court erred in failing to allow the video recording of the Defendant at the hospital on the night of the accident to be used as impeachment evidence.**

At trial, during the cross-examination of Sergeant Burrell, the Defendant sought to introduce a video recording taken of the Defendant at the hospital on the night of the accident to be used as impeachment. The Defendant contended the recording contradicts the testimony of Deputy Brinson and Sergeant Burrell as to the Defendant's appearance and as to whether the Defendant knew how the accident happened. The Court took a short recess to allow the State the opportunity to review the tape with Defendant's counsel. The State objected to Defendant being allowed to introduce the video recording on the basis that it was a prior consistent statement, and the recording took place after the Defendant fell at the jail and was taken to the hospital for the second time that evening almost two hours after being discharged.

Rule 901(a), SCRE provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Court viewed and listened to the video recording, and it is clear the person questioning the Defendant in the video is Defendant's counsel, Mark Mason, Esq. The Court instructed Defendant's counsel he would need an alternate method to authenticate the video to avoid making himself a witness at trial. The information obtained in the video could have been elicited from the Defendant but the Defendant chose to exercise his right to remain silent and did not testify at trial. Further, the video illustrates an attorney-client conversation; therefore, it would not be an admission against interest.¹⁶

¹⁶ No indication was made to the Court that anyone other than the Defendant and his counsel were present during the video interview. The video itself did not portray a third party or third party's voice.

The Court asked the State whether it would consent to showing the video without the audio, but the State objected on the aforementioned basis. Based on the timing of the video, this Court finds the video, without audio, would have been misleading to the jury. The accident occurred on December 8, 2008 at approximately 6:00 PM. The record reflects Deputy Brinson and Sergeant Burrell arrived at MUSC at approximately 10:02 PM. Deputy Brinson testified when he arrived at MUSC the Defendant had slurred speech, blood shot eyes, and denied being in an accident. He further testified that when Defendant's counsel arrived at the hospital, the Defendant had already passed out at this point, and he did not say anything else to the Defendant after counsel arrived. Sergeant Burrell testified he observed the Defendant in the hospital while Deputy Brinson completed the paperwork. Sergeant Burrell described the Defendant's demeanor as jovial, slurred speech, disheveled clothing, and blood shot eyes. When the Defendant woke up and asked what happened, Sergeant Burrell informed the Defendant he was in a car accident and someone died. Sergeant Burrell testified the Defendant denied being in an accident and denied that someone died as a result. The Defendant stated he was at his family farm earlier in the evening and admitted to having a few alcoholic drinks. The record reflects Deputy Brinson and Sergeant Burrell left MUSC with the Defendant at approximately 10:44 PM. Deputy Brinson testified the Defendant was taken to the detention center, and while they were filling out paperwork, the Defendant fell off a picnic bench and hit his head. They had to transport the Defendant back to the hospital where they arrived at approximately 12:40 AM. There is a clock in the video that reflects the interview took place at 12:36 AM. Therefore, over two (2) and a half hours passed between Deputy Brinson and Sergeant Burrell's original observations of the Defendant and the interview on the video recording. Due to the fact the interview occurred during the Defendant's second trip to the hospital, the video is not relevant. Rule 402, SCRE;

Judy v. Judy, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct. App. 2009) (Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears.). The distinction is that the video was not taken contemporaneous to the detectives' original observations; therefore, the Defendant was attempting to impeach the detectives' testimony from observations taken at a totally different timeframe. Therefore, the video does not make it more or less probable that Deputy Brinson and Sergeant Burrell's testimony, regarding the Defendants affect in the hospital two and a half hours prior to the video interview, is contradicted. Moreover, the evidence is more prejudicial than probative, and its probative value is outweighed by its potential to mislead the jury. Rule 403, SCRE. Therefore, the Court stands by its earlier ruling and denies the motion.

k) The Defendant contends the Court erred in failing to give the jury a curative instruction when the Assistant Solicitor referred to the evidentiary inference set forth in the DUI statute as a presumption and displayed this information to the jury on a PowerPoint slide during the State's closing argument.

During the State's closing argument, the Assistant Solicitor used PowerPoint as a visual aid. The presentation contained a slide that referenced the inference set forth in the DUI statute, S.C. Code Ann. § 56-5-2950, as a "presumption." The Defendant made a contemporaneous objection, and a bench conference was held. The Defendant also renewed his objection at the end of the Court's instructions to the jury. During the bench conference, the Court sustained the objection and instructed the word "presumption" was an incorrect statement of the law. As a result the State removed the slide from the jury's view and corrected its prior misstatement. During the Court's closing instruction, the Court instructed the jury on the inference of Driving Under the Influence pursuant to S.C. Code Ann. § 56-5-2950. Specifically, the Court instructed that if the alcohol concentration was eight one-hundredths of one percent or more, it may be inferred that the defendant was under the influence of alcohol. The Court further instructed this

inference is simply an evidentiary fact to be considered by the jury, along with the other evidence in the case, and the jury may give it the weight it decides it should receive. Additionally, the Court instructed the jury that it is to only consider the testimony which has been presented from the witness stand together with any exhibits which have been made a part of the record. The Court further instructed that it is the sole judge of the law, and it is the jury's duty to accept and apply the law as the Court states.

"A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." White, 371 S.C. at 445, 639 S.E.2d at 163. "If the trial judge sustains a timely objection to evidence and gives the jury a curative instruction that it be disregarded, the error is deemed to have been cured by the instruction." Id. Though the Court did not give a "curative" instruction to disregard the Solicitor's statement and slide referencing "presumption," the Court's standard instruction on the inference of driving under the influence, as well as the standard instruction on a jury's duty to only consider the evidence presented and to apply the law as the Court instructs, cured any error made by the State's PowerPoint slide. In effect the Court gave a "curative" instruction. To state the same concept twice would have been redundant. In addition, it should not be discounted that the Court ruled, the slide was removed, and the Solicitor corrected her misstatement. Moreover, a solicitor's statement of the law during closing argument is not considered "evidence," and the jury was clearly instructed it was to only consider the law as instructed by the Court. Therefore, the Court stands by its previous instruction.

1) The Defendant contends the Court erred in failing to charge the jury on sudden emergency.

Prior to closing arguments, the Court held a charge conference at which time the Defendant requested the Court instruct the jury on sudden emergency. The Defendant renewed

this request at the end of the Court's instructions to the jury. Specifically, the Defendant requested the jury be instructed that if a sudden emergency existed, the Defendant would have been justified in taking actions to avoid a collision, including leaving his lane of travel.

"The law to be charged must be determined from the evidence presented at trial." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. . . . Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." Id.

The Court stands by its previous ruling that the evidence presented at trial did not warrant an instruction on sudden emergency. The record reflects no evidence of any condition that would constitute a sudden emergency which would have caused the Defendant to cross the center line and collide with the Decedent's vehicle. Therefore, the Court's refusal to charge sudden emergency was neither erroneous nor prejudicial to the Defendant.

m) The Defendant contends the Court erred in allowing Deputy Brinson and Sergeant Burrell to render expert opinions as to how the accident happened, the speed of the vehicles, the path of travel, and other aspects of the how the accident happened.

The Defendant contends Deputy Brinson and Sergeant Burrell were not qualified to give expert testimony as to how the accident happened, the speed of the vehicles, the path of travel, and other aspects of the how the accident happened, particularly where they had not performed a reconstruction of the accident.

Qualification of a witness as an expert rests in the sound discretion of the trial judge. His decision will not be disturbed on appeal absent a showing of abuse. There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good

judgment and common knowledge. There is no exact requirement concerning how knowledge or skill must be acquired.

State v. Goode, 305 S.C. 176, 177–78, 406 S.E.2d 391, 392–93 (Ct. App. 1991) (internal citations omitted). “Generally, defects in the amount and quality of an expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility.”

State v. Morris, 376 S.C. 189, 203, 656 S.E.2d 359, 367 (2008).

Deputy Brinson testified he is a member of the fatality team with the Charleston County Sheriff's Department. He began working with the North Charleston Police Department in 1999 and has been with the Charleston County Sheriff's Department since 2003. Deputy Brinson testified he went through six (6) weeks of accident reconstruction training with the South Carolina Criminal Justice Academy. He testified he received training in the three (3) phases of traffic collisions. He further testified he is certified in traffic collision investigation and fatality investigation and worked between thirty (30) and forty (40) fatalities prior to December 2008. Deputy Brinson testified he has never been qualified to testify as an expert. The State offered Deputy Brinson as an expert in traffic fatality and investigation. The Defendant objected based on the reliability of the science used by the Deputy rather than his qualifications. The Defendant argued Deputy Brinson's testimony was unreliable because he did not locate the point of impact or perform an actual reconstruction of the accident. The Court found Deputy Brinson qualified and admitted him as an expert subject to the Defendant's objection. See State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) (finding that when a proper foundation is established, an analysis regarding scientific reliability is not warranted if expert testimony is based on specialized skill or knowledge rather than on scientific techniques); see also Risher v. South Carolina Dep't of Health and Environmental Control, 393 S.C. 198, 205, 712 S.E.2d 428, 432 (2011) (“To be competent to testify as an expert, a witness must have acquired by reason of

study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.” (citing Rule 702, SCRE)).

In Goode, an officer was qualified to testify as an expert on the question of “point of impact” based on his training and practical experience in determining point of impact in accident investigations. 305 S.C. at 178, 406 S.E.2d at 393. The officer in that case had twelve weeks training in the South Carolina Highway Department Academy including specific training on determining point of impact in accident investigation, one week on the road training, and was a state trooper with four to five months experience at the time of the accident. Id. The court found that he could testify on the issue of point of impact in light of his training and experience which could provide guidance and assistance to the jury. Id. The officer testified he observed a gouge mark in the victim’s lane of traffic which indicated the collision occurred in the victim’s lane. Id. at 177, 406 S.E.2d at 392.

The Court found Deputy Brinson’s testimony, regarding his specialized knowledge gained in traffic collision and fatality investigation as a result of his prior education, training and substantial work experience, established the proper foundation for admitting his opinion as to traffic fatality and investigation. The Court further found he acquired by study and practical experience the knowledge of traffic fatality and accident investigation as would enable him to give guidance and assistance to the jury. Deputy Brinson testified he could determine the maximum point of engagement based on the marks on the road found in the victim’s lane. He testified that it was impossible for the accident to have occurred in the Defendant’s lane because there were no marks or scuffs to indicate point of impact anywhere other than in the victim’s lane where the marks were found. Based on the methodology used and the findings of the court

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[Signature]

of appeals in Goode, the Court finds Deputy Brinson's methodology to be reliable. Moreover, the Defendant's objections go the weight of the evidence and not admissibility. Therefore, the Defendant's motion was denied. As for the failure to perform an actual accident reconstruction, Deputy Brinson testified a standard scale reconstruction was not performed because it did not pertain to this type of accident. He clarified that a standard scale reconstruction drawing is not necessary on every fatality and accident investigation. The Court stands by its previous ruling.

Sergeant Burrell testified he has worked for the Charleston County Sheriff's Office for fourteen (14) years and worked in the traffic division in December 2008. Prior to moving to South Carolina, he was a police officer in upstate New York. Upon joining the Charleston County Sheriff's Office, Burrell worked road patrol for a year and a half and was then selected for the traffic unit where he was employed as a motor officer for twelve years. He testified he received training through the South Carolina Criminal Justice Academy. Specifically, he received nine (9) weeks of basic police officer training and completed the traffic safety officer program. The traffic safety officer program consisted of two weeks at-scene collision investigation, two weeks of technical investigation, and one week of reconstruction training. Sergeant Burrell is certified as a traffic safety officer. He testified he had worked over twenty-five (25) fatalities prior to December 2008. The State did not offer Sergeant Burrell as an expert witness.

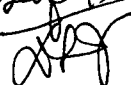
Sergeant Burrell testified he assisted Deputy Brinson in marking the scene with spray paint. He helped to determine the path of travel of both vehicles, final resting place of both vehicles, gouge marks from vehicle contact, and maximum engagement of both vehicles. The State presented photographs depicting the markings in the roadway and asked Burrell to explain what each photograph depicted. The Defendant objected, and the Court overruled on the basis

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that the question did not require expert witness testimony. When Burrell pointed out the path of travel of the Defendant's truck, the Defendant objected on the basis of speculation and Rules 701 and 702, SCRE. The objection was overruled, and the Court explained that Burrell was not providing an opinion but was rather testifying as to what he saw during the course of investigating the accident. The Court further articulated Burrell's testimony was based on his rational perception while assisting in the investigation of this incident, as well as his training and experience in the area of traffic safety. Moreover, Burrell's testimony fell under the duties and responsibilities of the Sheriff's Office. When Sergeant Burrell was asked to opine as to maximum engagement, the Defendant objected based on Rules 701 and 702, SCRE. The Court sustained the objection, ruling that no opinions were to be elicited until the witness was qualified as an expert. Sergeant Burrell was never qualified as an expert, but the Court found, and stands by its previous ruling, that all of the witness' lay opinions provided were based on his rational perception of the investigation. See Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.")

All findings of fact and conclusions of law made by the Court contemporaneously for the record are fully incorporated in this Order by reference. Having fully considered the Defendant's Post-Trial Motion for a New Trial and the State's Reply thereto, as well as having fully reviewed the record and the various interests balanced by the Court at the time of the ruling, the Post-Trial Motion for New Trial is hereby **DENIED** pursuant to Rule 29, SCRCrimP.¹⁷

¹⁷ This motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 29, SCRCrimP.

420413


IT IS SO ORDERED.

July 18, 2012
Charleston, South Carolina

A. L. Jefferson
The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

FILED
2012 JUL 18 PM 3:51
JULIE S. HARRIS, CLERK OF COURT

BY _____

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**CHARLESTON COUNTY SHERIFF'S OFFICE
AFFIDAVIT FOR FAILURE TO PRODUCE VIDEO
RECORDING**

(Incident Site)

Case Number: 2008-025736-B

I hereby affirm that I cannot produce a video recording from the vehicle I was operating because:

- A. ☐ At the time of the defendant's arrest the vehicle I was operating had not yet been equipped with a video recording device and therefore pursuant to § 56-5-2953, the video recording requirement regarding vehicles is not applicable.
- B. ☐ At the time of the defendant's arrest or probable cause determination, the video recording equipment in the vehicle I was operating was in an inoperable condition and reasonable efforts had been made to maintain the equipment in an operable condition.
- C. ☒ It was physically impossible to produce a video recording (from the vehicle I was operating), of the defendant at the time of the arrest or probable cause determination because:
- ☒ the defendant needed emergency medical treatment; or
- ☐ exigent circumstances existed which are outlined below:
- D. ☐ Other valid reasons existed for failing to produce the video recording based on the totality of the circumstances. These reasons are outlined below:

W.E.B. Jr 9754

Signature of Deputy & Badge #

9-15-11

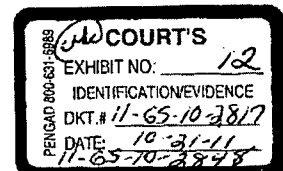
Date

State of South Carolina
County of Charleston

Sworn to and subscribed before me this 16 day of September, 20 11

Michael B. Ringey Notary Public for the State of South Carolina.
My Commission Expires

My commission expires: December 12, 2013



**CHARLESTON COUNTY SHERIFF'S OFFICE
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Signature of Deputy & Badge #

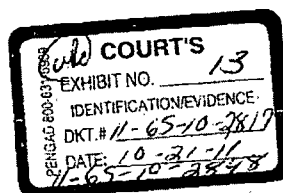
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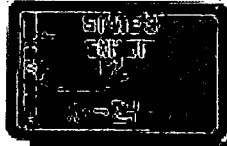
My commission expires: December 12, 2013



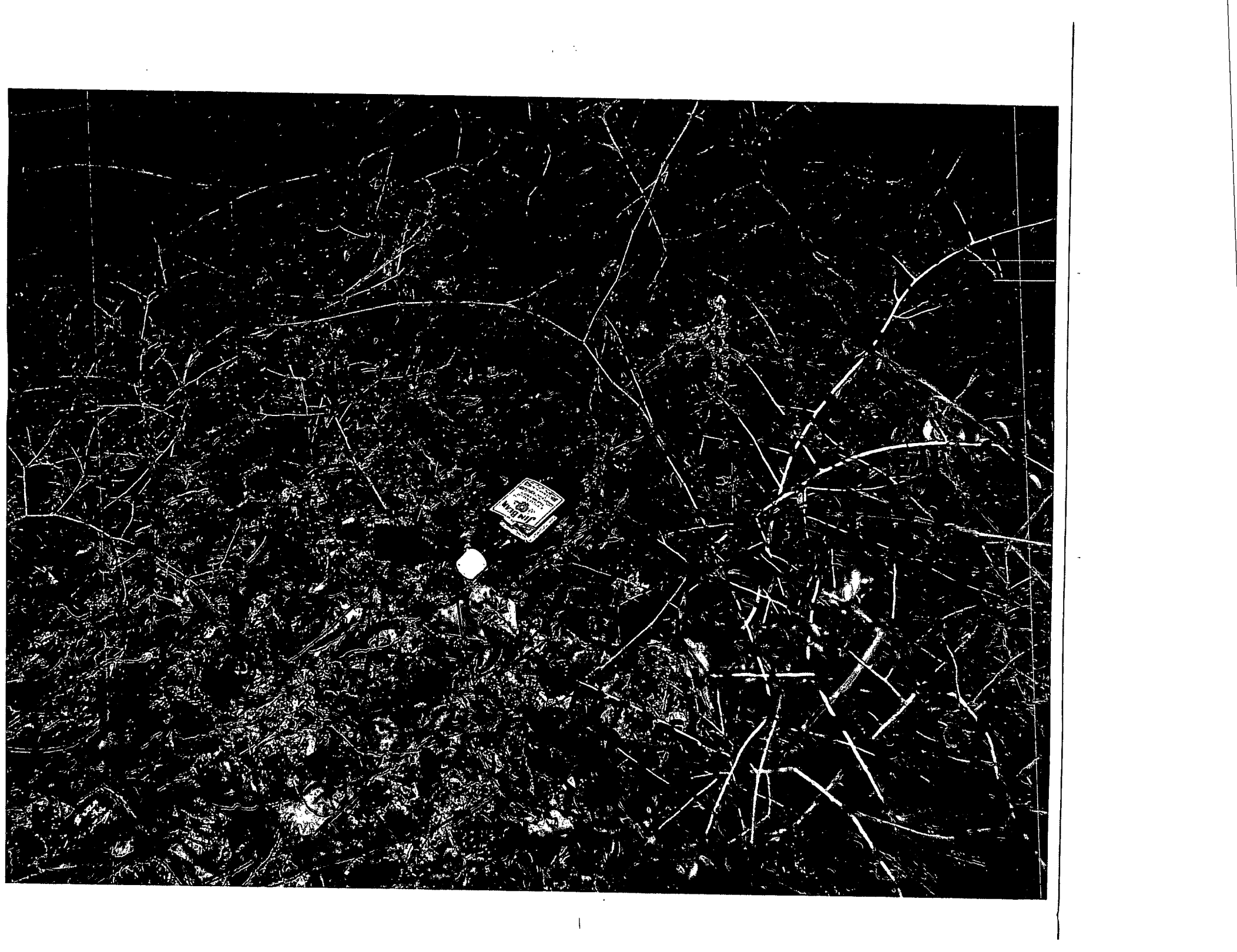
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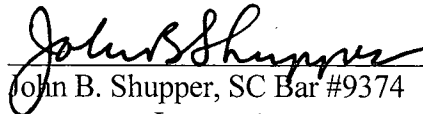




CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with 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."

November 20th, 2013

A handwritten signature in black ink, appearing to read "John B. Shupper", is written over a horizontal line.

John B. Shupper, SC Bar #9374

Attorney at Law

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Columbia, SC 29290

(803) 606-7859

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER DOUGLAS BARCLAY,

APPELLANT

Appellate Case No. 2012-212639

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of November, 2013.



John B. Shupper, SC Bar #9374
Attorney at Law
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RECEIVED

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SC Court of Appeals