THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Deadra L. Jefferson, Circuit Court Judge

Case No. 2011-GS-10-2848

The State, Respondent,

v.

Walter Douglas Barclay, Appellant.

NOTICE OF APPEAL

Walter Douglas Barclay appeals his conviction and sentence in this case. The sentence was imposed by the Honorable Deadra L. Jefferson on November 1, 2011. This appeal is taken from the order of the Honorable Deadra L. Jefferson, dated July 18, 2012, which denied motions for reconsideration of sentence and for a new trial pursuant to Rule 29(a), SCRCrP. Appellant received written notice of entry of this order on July 24, 2012.

August 1, 2012

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Attorney for Appellant

Other Counsel of Record:
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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Jennifer Kinezeler, Esquire, and Greg Voigt, Esquire, Assistant Solicitor's for the Ninth Circuit, by depositing a copy of it in the United States Mail, postage prepaid, on August 1, 2012 to the Ninth Circuit Solicitor's Office, 101 Meeting Street, Suite 400, Charleston, South Carolina, 29401. Another copy was sent this date to Defendant's attorney of record, Mark A. Mason, Esquire, Mason Law Firm, PA, Post Office Box 1271, Mount Pleasant, South Carolina 29464, by depositing a copy of it in the United States Mail, postage prepaid, on August 1, 2012.

August 1, 2012

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August 1, 2012
Corrected

Jennifer Kinzeler, Esq.
Greg Voigt, Esq.
Assistant Solicitors
Ninth Judicial Circuit
101 Meeting Street, Suite 400
Charleston, South Carolina 29401

RE: State v. Walter Douglas Barclay
Case No. 2011-GS-10-2848

Dear Ms. Kinzeler and Mr. Voigt:

Enclosed please find a copy of the Notice of Appeal and Proof of Service in the above case.

Sincerely,

John B. Shupper
Attorney at Law
Post Office Box 90623
Columbia, South Carolina 29290
(803) 606-7859
Attorney for Appellant

cc: Hon. Julie Armstrong, Clerk of Court for Charleston
Hon. Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals
Mark A. Mason, Esquire, Defendant's Trial Counsel

JOHN B. SHUPPER
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August 2, 2012
Corrected

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201 BY HAND DELIVERY

RE: State v. Walter Douglas Barclay
Case No.: 2011-GS-10-2848

Dear Ms. Kitchings:

Yesterday I mailed copies of the attached documents that include notice of appeal, proof of service and cover letters to Assistant Solicitors Jennifer Kinzeler and Greg Voigt of the Ninth Circuit Solicitor's Office, Defendant's trial counsel, Mark Mason, and the Honorable Julie J. Armstrong, Charleston County Clerk of Court.

Thereafter I discovered that the cover letters erroneously listed the Case Number as "2011-GS-10-**2448**" instead of "2011-GS-10-**2848**". (Bold added) I sent the attached facsimile transmissions to Assistant Solicitor Kinzeler and the Charleston Clerk of Court, Honorable Julie J. Armstrong, last night so they would be on notice of the mailing and of the erroneous Case Number on their letters.

Please find attached for filing:

(1) Original proof of service of the notice of appeal on the respondents.

(2) A copy of the order and judgment which are to be challenged on appeal.

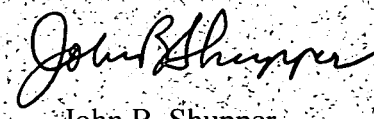
(3) Copies of facsimiles to Assistant Solicitors Kinzeler and the Charleston Clerk of Court notifying them of the erroneous case number on the cover letters.

(4) Corrected cover letters to Assistant Solicitors (Kinzeler and Voigt) and the Honorable Julie J. Armstrong, Charleston County Clerk of Court.

Would you please be so kind as to "date stamp" the attached copies for my records?

Thank you for your cooperation in this matter. Please contact me if you have any questions.

Sincerely,



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Defendant's Trial Counsel

FILED

2012 JUL 18 PM 3:

JULIE J. ARMSTRONG
CLERK OF COURT

BY _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Indictment No.: 2011-GS-10-2848
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	**ORDER DENYING DEFENDANT'S POST-TRIAL MOTION**
	)	
vs.	)	
	)	
WALTER DOUGLAS BARCLAY,	)	
Defendant.	)	
	)	
	)	

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.

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

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 Licona, cousin of the deceased victim, informed its investigator he was unhappy with the contact made by Defendant's counsel. Mr. Licona 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. Licona was not adamant about being present for sentencing and informed the State he deferred to the Court in respect to sentencing. Mr. Licona 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. Licona 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. Licona 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. Licona advised counsel the deceased's wife and children support a

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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 irregardless of delay. Moreover, Mr. Licona advised the State's investigator he would keep the family informed of the proceedings, and Mr. Licona deferred to the Court in regards to sentencing.

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).

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.21d 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.

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.

> 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.

> 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

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.

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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 Sherriff'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 July14, 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

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.

Licona, 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.

"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.

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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 Sherriff'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

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.

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

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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 Bell[15] 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 Sherriff'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.

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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;

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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

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.

4-20-13

IT IS SO ORDERED.

D. L. Jefferson

The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

July 18, 2012
Charleston, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF GENERAL SESSIONS OF THE NINTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA Plaintiff,	)	
VS.	)	VERDICT FORM
WALTER DOUGLAS BARCLAY, Defendant.	)	

AS TO INDICTMENT NO.: 2011-GS-10-2848:

We, the jury, by unanimous consent find the Defendant:

_X_ Guilty of Felony Driving Under the Influence – Resulting in Death.

_____ Not Guilty.

Please sign and date.

_____
Foreperson

November 1st, 2011

Please let the bailiffs know when you have finished your deliberations.

JKS20081207287

WITNESSES

WILLIAM BRINSON
Charleston County Sheriff

AGENCY CASE NUMBER

2008025736B

ARREST WARRANT NUMBER

DIRIND1375

DATE OF ARREST

April 4, 2011

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: APR 04 2011

VERDICT Guilty

Foreperson of Petit Jury *Date:* 11.1.2011

INDICT

DOCKET NO. 2011GS1002848

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

WALTER DOUGLAS BARCLAY
DOB: 1951-05-29
W/M

Indictment for

Felony DUI

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on April 4, 2011 the Grand Jurors of Charleston County present upon their oath:

Felony DUI

That in Charleston County, South Carolina, on or about December 8, 2008, while driving a vehicle under the influence of alcohol, drugs or both alcohol and drugs, the Defendant, WALTER DOUGLAS BARCLAY did an act forbidden by law or neglected a duty imposed by law in driving of said vehicle, to wit: crossing the center line and/or reckless driving, and such act proximately caused death to Alvaro Garcia; all in violation of Section 56-5-2945, Code of Laws of South Carolina, (1976, as amended).

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

JENNIFER KNEECE SHEALY
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Charleston)
STATE VS.)
Walter Douglas Barclay)
AKA:)
Race: Sex: M Age: 60)
DOB: 05-29-1951 SS#: 147-44-1450)
Address:)
City,State,Zip:)
DL#: 5203602 SID#: SC00984189)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS1002848
A/W#: DIRIND1375
Date of Offense: 4/4/2011
S.C. Code § : 56-05-2945(A)(1)
CDR Code #: 0406

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐PLEADS
TO: DUI / Felony driving under the influence, great bodily injury results

in violation of § 56-05-2945(A)(1) of the S.C. Code of Laws, bearing CDR Code # 0406
☐ NON-VIOLENT ☐ VIOLENT ☐SERIOUS ☐MOST SERIOUS ☐Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐§17-25-45

The charge is: ☒ As Indicted, ☐Lesser Included Offense, ☐Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Kinzeler, Jennifer	[illegible]			
	SC Bar#	Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 12 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐**RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____
ATM is available

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

VACATED 11/2/11

Clerk of Court/ Deputy Clerk Whitney Hopkins
Court Reporter: Nancy Ellis
Presiding Judge A.C. Jefferson
Judge Code: 216
Sentence Date: 1/1/11

SCCA/217 (03/2011)

STATE OF SOUTH CAROLINA)
COUNTY OF Charleston)
STATE VS.)
Walter Douglas Barclay)
AKA:)
Race: WHITE Sex: M Age: 60)
DOB: 05-29-1951 SS#: 147-44-1450)
Address:)
City,State,Zip:)
DL#: 5203602 SID#: SC00984189)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS1002848
A/W#: DIRIND1375
Date of Offense: 4/4/2011
S.C. Code § : 56-05-2945(A)(2)
CDR Code #: 0395

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS
TO: DUI / Felony driving under the influence, death results (.10 law)

in violation of § 56-05-2945(A)(2) of the S.C. Code of Laws, bearing CDR Code # 0395
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☐ As Indicted. ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Kinzeler, Jennifer	75184			
	SC Bar#	Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of 12 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ 10,100 — ; provided that upon the service of 12 days/months/years and/or payment of $ _____ ; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
_____
Recipient: _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____
ATR if available

*Fine:	1,100.00	$ ~~1,100.00~~ wp	
§ 14-1-206 (Assessments 107.5 %)		$ 1,182.50 wp	
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ ~~100.00~~ wp	100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$ ~~100.00~~ wp	
§ 56-5-2995 (DUI Assessment)	$12	$ ~~12.00~~ wp	
§ 56-1-286 (DUI Breath Test)	$25	$	
Proviso 47.9 (Public Def/Prob)	$500	$	
§ 14-1-212 (Law Enforce. Funding)	$25	$ ~~25.00~~ wp	25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$	
§ 50-21-114(BUI Breath Test Fee)	$50	$	
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$	
Proviso 90.5 (SCCJA Surcharge)	$5	$ ~~5.00~~ wp	5.00
3% to County (if paid in installments)		$ ~~75.24~~ wp	3.90
TOTAL		$ ~~2,100.24~~ wp	133.90

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Whitney Hoskins
Court Reporter: Henry Young
SCCA/217 (03/2011)

Presiding Judge DCL Jeffcoat
Judge Code: 2428
Sentence Date: 11/1/11

STATE OF SOUTH CAROLINA)
COUNTY OF Charleston)
STATE VS.)
Walter Douglas Barclay)
AKA:)
Race: Sex: M Age: 60)
DOB: 05-29-1951 SS#: 147-44-1450)
Address:)
City,State,Zip:)
DL#: 5203602 SID#: SC00984189)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS1002848
A/W#: DIRIND1375
Date of Offense: 4/4/2011
S.C. Code § : 56-05-2945(A)(1)
CDR Code #: 0406

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐PLEADS
TO: DUI / Felony driving under the influence, great bodily injury results

in violation of § 56-05-2945(A)(1) of the S.C. Code of Laws, bearing CDR Code # 0406
☐ NON-VIOLENT ☐ VIOLENT ☐SERIOUS ☐MOST SERIOUS ☐Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐§17-25-45

The charge is: ☒ As Indicted, ☐Lesser Included Offense, ☐Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Kinzelet, Jennifer	SC Bar#	Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 12 days/months/years or, ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐**RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
_____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: ATU is available

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Whitney Hopkins
Court Reporter: Penny Epting
Presiding Judge A.C. Jefferson
Judge Code: 218
Sentence Date: 1/1/11

SCCA/217 (03/2011)