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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

ADDIE THILAVANH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000993

APPENDIX

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INDEX

INDEX.....	i
GUILTY PLEA TRANSCRIPT	1
APPLICATION FOR POST-CONVICTION RELIEF	22
RETURN	36
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	41
POST-CONVICTION RELIEF HEARING TRANSCRIPT	43
APPLICANT'S EXHIBITS 1 - 7	107
ORDER OF DISMISSAL	128
INDICTMENT	139

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS

3 The State,)
4 -vs-) TRANSCRIPT OF RECORD
5 Addie Thilavanh,) 2010-GS-42-6712
6 Defendant.) August 10, 2011
7) Spartanburg, South Carolina
8
9

10 B E F O R E:

11 J. MARK HAYES, II, JUDGE
12
13

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

15 BARRY JOE BARNETTE, ESQUIRE
16 Attorney for the State

17 RICHARD WHELCHER, ESQUIRE
18 Attorney for the Defendant
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22 Linda D. Moffitt
23 Circuit Court Reporter
24
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7
8
9
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11
12
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15
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17
18
19
20
21
22
23
24
25

INDEX

Guilty plea -- page 4.

Defendant sworn -- page 4.

1	<u>EXHIBITS</u>		
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u> <u>EV.</u>
3	S-1	General sessions report	4
4	S-2	Affidavit	4
5	S-3	Toxicology report	4
6	S-4	Report of Dr. John David Wren	4
7	S-5	MAIT team report	4

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1 (General sessions report marked State's Exhibit No. 1;
2 affidavit marked State's Exhibit No. 2; toxicology report
3 marked State's Exhibit No. 3; report of Dr. John David Wren
4 marked State's Exhibit No. 4; MAIT team report marked
5 State's Exhibit No. 5.)

6 MR. BARNETTE: May it please the Court, Your Honor.

7 This is the case of State vs. Addie Thilavanh, Your
8 Honor. He is pleading guilty to the following indictment:
9 10-GS-42-6712.

10 Your Honor, he is pleading to count one of the
11 indictment called death -- felony D.U.I. with death, Your
12 Honor, as a straight-up plea. Count two once the plea is
13 done, reckless homicide, will be dismissed.

14 Your Honor, he is represented by Mr. Dick Welchel.
15 It has been true billed by the grand jury.

16 Your Honor, I do have five exhibits I shared with the
17 defense I'll be handing up with the plea at the appropriate
18 time, Your Honor.

19 THE COURT: You are Mr. Thilavanh.

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Sir, please raise your right hand and
22 allow the clerk of court the opportunity to swear you in.

23 (Whereupon, the defendant was duly sworn.)

24 THE COURT: Sir, is it your intent to enter a plea
25 today to felony driving under the influence resulting in

1 death?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. Sir, I need to let you know
4 that we are making a recording of everything that happens
5 here.

6 This lady over to my right is a court reporter. So
7 when you speak, please speak up loud enough so that both
8 she and I can hear you. And if ever during this process
9 you can't hear me, let me know, and I'll speak up as well.
10 okay?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Thank you. How old are you?

13 THE DEFENDANT: I am 49 years old.

14 THE COURT: How far did you go in school?

15 THE DEFENDANT: I was in the 11th grade. I was only
16 school like four months, you know. When I first came here
17 I was 18 and --

18 THE COURT REPORTER: Excuse me. I don't understand
19 what he is saying.

20 MR. WHELCHER: Do you need for him to slow down or to
21 speak up?

22 THE COURT REPORTER: Both.

23 MR. WHELCHER: Do you hear that, Addie? She needs for
24 you to slow down and to speak up louder.

25 THE DEFENDANT: So when I first came to the United

1 states I was 18 years old, and I don't speak their language
2 or anything. And they put me on the 11th grade. I was in
3 there maybe four or five months, and I quit.

4 THE COURT: Did you do any school after the 11th grade
5 like technical school?

6 THE DEFENDANT: No, sir.

7 THE COURT: All right. Are you married, single,
8 divorced or widowed?

9 THE DEFENDANT: I am married.

10 THE COURT: Do you have children?

11 THE DEFENDANT: Not -- not by this wife, but I have
12 one daughter.

13 THE COURT: How old is your daughter?

14 THE DEFENDANT: Is about 32.

15 THE COURT: Did you -- prior to your arrest on this
16 charge did you have a job outside the home?

17 THE DEFENDANT: No, sir. I was -- I guess I was on
18 unemployment benefit.

19 THE COURT: When you worked, what type of work did you
20 do?

21 THE DEFENDANT: I do electronic and machine operator.

22 THE COURT: Electronic and what?

23 THE DEFENDANT: Machine operator?

24 THE COURT: A machine operator. Ever serve in the
25 military?

1 THE DEFENDANT: No, sir.

2 THE COURT: On this particular charge how long have
3 you been in jail?

4 THE DEFENDANT: Almost 11 months.

5 THE COURT: Sir, within the last 24 hours have you
6 consumed any type of substance that is adversely or
7 negatively affecting your ability to understand what we are
8 doing today?

9 THE DEFENDANT: No, sir.

10 THE COURT: Have you ever been treated for any type of
11 substance abuse or any drug problem or alcohol problem?

12 THE DEFENDANT: No, sir.

13 THE COURT: Are you satisfied with the work that your
14 lawyer has done for you?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Has anybody come to you and threatened you
17 in any way, or have they made you any promises in order to
18 get you to make the decision to enter this plea today?

19 THE DEFENDANT: No, sir.

20 THE COURT: The decision to enter this plea is a free
21 and voluntarily decision on your part?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Sir, I need for you to understand that
24 under the law you are presumed innocent of this charge, and
25 you do have a right to have a jury trial on this charge.

1 At any jury trial that would take place it would be
2 the state that has the burden of proof. And they would
3 have to convince all 12 members of a jury that you are, in
4 fact, guilty beyond a reasonable doubt of this charge.

5 Now, in order to enter this plea today you have to
6 give up your right to that jury trial on this charge. Do
7 you wish to give up your right to that jury trial on this
8 charge?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Sir, there are other very important
11 constitutional rights that you are entitled to but that you
12 have to give up in order to enter this plea.

13 You have to give up your right to confront and
14 cross-examine the state's witnesses. You also have to give
15 up your right to present evidence that you or your lawyer
16 may feel would establish a defense to this charge, and you
17 have to give up your right of subpoena and you also have to
18 give up your right to remain silent.

19 Do you understand all of those rights?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And do you wish to give up all of those
22 rights and go forward with this plea?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: All right, sir. If you would, please
25 listen to the solicitor. He is going to give us the facts

1 behind this case. And when he is finished I will have some
2 more questions for you.

3 MR. BARNETTE: May it please the Court, Your Honor.

4 This occurred on September 19th of 2010, Your Honor,
5 approximately 7:45 p.m. It happened on Cedar Springs Drive
6 near Condren Avenue here in Spartanburg County, Your Honor.

7 Trooper Seifort was called to the scene, Your Honor.
8 It was found in the case that Cory Cole was walking along
9 the side of the road there, Your Honor.

10 The defendant was driving a vehicle. It was a 1992
11 4-door Toyota, green in color, Your Honor. Hit the --
12 Mr. Cole as he was walking down the road, Your Honor. He
13 appeared to be off the road, Your Honor, with the shattered
14 windshield on the side of the road, Your Honor.

15 There was witnesses to it, Your Honor. The witnesses
16 said that basically the defendant had ran into him at the
17 time, Your Honor.

18 When the trooper arrived there, Your Honor, he began
19 field sobriety tests to determine if he was under the
20 influence of alcohol, Your Honor. The defendant also
21 admitted he had consumed three beers in an hour timeframe
22 before that, Your Honor.

23 He was taken for a blood test at Spartanburg Regional,
24 Your Honor. His blood was alcohol was a .23, Your Honor,
25 in this case, and he was charged with felony D.U.I. death,

1 Your Honor.

2 I do have State's Exhibit 1 which is an incident
3 report that was done by Trooper Seal. It consists of four
4 pages.

5 State's Exhibit 2, Your Honor, statements that was
6 taken from witnesses at the scene -- Josh Greensleft [sic],
7 Kevin Jolly, Your Honor, as well as Lyle Jolly, Your Honor.
8 All three consists of -- each statement, the first two, are
9 one page, and the second one is two pages. I've included
10 that in State's Exhibit No. 2.

11 State's Exhibit 3, Your Honor, is a SLED toxicology
12 report that shows the blood alcohol of the defendant being
13 .230. It consists of two pages.

14 State's Exhibit 4, Your Honor, is a copy of the
15 coroner's finding of the cause of death of Mr. Cole, as
16 well as the autopsy that was done by Dr. David Wren. It
17 consists of seven pages total in State's Exhibit No. 4,
18 Your Honor.

19 State's Exhibit 5 is a copy of the MAIT team report
20 that was done showing what happened in the accident, Your
21 Honor. They also have a diagram and a picture of the point
22 of impact in this case, Your Honor, showing where the
23 impact occurred and where the car and the body of Mr. Cole
24 wound up after the impact.

25 Your Honor, I would like to make those part of the

1 record and part of the facts in this case to supplement
2 what I gave to the Court, Your Honor. And I have shared
3 that with the defense, Your Honor.

4 THE COURT: Were you able to hear the solicitor when
5 he told me these facts?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Do you believe that as he stated the facts
8 to me that he is substantially correct?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: All right. Give me just a moment, sir.

11 (Pause.)

12 THE COURT: Range of sentencing is?

13 MR. BARNETTE: One to 25 years, Your Honor.

14 THE COURT: And, sir, do you understand that this
15 particular charge that you are pleading to today carries a
16 sentence from one to 25 years in the Department of
17 Corrections?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Sir, do you also understand that this
20 particular charge is classified as a serious offense under
21 the law?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And you have been able to talk to your
24 lawyer as to the consequences and ramifications of this
25 offense being classified as a serious offense?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And with that understanding of the
3 consequences and ramifications of the classification of
4 serious, as well as the possible sentence that I could
5 impose today, you still wish to enter this plea?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Are you, in fact, guilty of felony driving
8 under the influence resulting in death?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Have you been able to hear all of my
11 questions?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: And have all of your answers been truthful
14 and honest?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Discovery has been shared with the
17 defense?

18 MR. BARNETTE: Yes, sir.

19 THE COURT: Prior record?

20 MR. BARNETTE: None, Your Honor.

21 THE COURT: Did -- do we have anyone want -- wish to
22 address the Court on behalf of the victim?

23 MR. BARNETTE: Yes, sir. If I could first, if
24 everybody would stand on behalf of Mr. Cole here today.
25 They are on the front row, Your Honor.

1 Thank y'all.

2 I just wanted to make sure everybody -- a couple of
3 them would like to speak, Your Honor. Officer Weinstein
4 [sic] of the highway patrol is also here on behalf of the
5 patrol. Trooper Seifort couldn't be here today, so he is
6 here on behalf of the highway patrol also.

7 Your Honor, I believe Vickie Sandiford would like to
8 address the Court first, Your Honor.

9 THE COURT: Ma'am, if you would, we are making a
10 recording of everything that happens. So when you speak,
11 speak up loud enough so that both the court reporter and I
12 can hear you. And just start by giving us your full name
13 if you would.

14 VICKIE SANDIFORD: My name is Vickie Sandiford.

15 THE COURT: Yes, ma'am.

16 VICKIE SANDIFORD: I am Cory's aunt. And I just want
17 to tell you what an impact this gentleman has had on our
18 lives.

19 It happened like two houses from my mother, so my
20 75-year-old mother and 93-year-old dad have to walk out
21 that door every day and see where this happened because of
22 the choice that he made.

23 I turn up my street. I have to pass it every day.

24 A mother is not supposed to outlive her children. My
25 sister is having a very, very hard time with it. We are a

1 very family-oriented family. We do birthdays, all of the
2 holidays together. We eat together every Sunday.

3 And next Saturday he would have been the best man at
4 his brother's wedding. And now we're going to have to use
5 a picture because of the decisions he decided to make in
6 drinking and driving. And I just ask that you give him
7 the -- I just can't begin to tell you. I know, you know,
8 it's hurt, but he took away a very, very, very important
9 part of our lives.

10 THE COURT: Thank you, ma'am.

11 MR. BARNETTE: Your Honor, Rick Cole would like to
12 address the Court at this time.

13 RICK COLE: Judge Hayes, I am Cory's dad, Rick.

14 The easiest way I can describe what the last 11 months
15 have been for this family is a nightmare. As Vickie said,
16 he made a bad choice.

17 The grateful part I am for the whole thing, there was
18 three witnesses that he left the scene, and the witnesses
19 brought him back before the highway patrolman got there.
20 Had it not been for that, as most cases I see or work in
21 the field, you never find who the person was that hit them.

22 As far as this, yeah, the family had to incur a bunch
23 of expense probably in the neighborhood of \$10,000.
24 Personally, I was the one that went back in the morgue to
25 identify Cory. The trauma the kid suffered -- I would not

1 let any other family member go back there and picture that.
2 And, you know, I'm not looking for sympathy for me. I was
3 looking out for the family. I see it too many times out in
4 the field. All I ask is the maximum sentence with no
5 chance of parole or early release, whatever they consider
6 it now.

7 THE COURT: Thank you, sir.

8 MR. BARNETTE: Your Honor, one other note. I think
9 all of the family has spoken.

10 Talking about the expense or whatever, I have a --
11 from the Thompson and Denton Law Firm, Your Honor, their
12 medical bills are approximately \$10,000. But I don't think
13 they are interested in restitution from what they told me.
14 But I will -- I'll do that verification. Thank you, Your
15 Honor.

16 THE COURT: Yes, sir, Mr. Wheelchel.

17 MR. WHELCHER: Your Honor has been handed up five
18 exhibits that essentially detail a day in the life of
19 Mr. Cole and Mr. Thilavanh, a day in the life of both of
20 these gentlemen that they tragically coincided with each
21 other.

22 In the times that I have talked to Addie Thilavanh
23 about this, Your Honor, the most recent being right before
24 we came into this courtroom -- the last time I talked with
25 him before we came into this courtroom we were discussing

1 this case, he cried, Your Honor.

2 And looking around this courtroom with the exception
3 of one individual here, I believe I've been practicing law
4 both as a former prosecutor and private practitioner and
5 now public defender longer than anybody in this courtroom.
6 And I believe I can judge sincerity. I don't believe those
7 tears are because he's concerned about what his sentence
8 might be.

9 He's going to talk to the Court before this plea is
10 over with, Your Honor. He asks that he be able to do that,
11 and I told him he would be able to. But he asked before I
12 told him how the process worked.

13 He understands completely. Well, he can't understand
14 completely because it's not his son or brother or loved
15 one. None of us can. However, he is truly sorry for the
16 mistake he made that day. It was and still is a tragedy.

17 I can remember when I was growing up every time I left
18 the house the final words from my mother were always the
19 same. Be careful. It used to irritate me until I became
20 that parent myself and found myself parroting those exact
21 words.

22 I have myself five children. I understand the fear,
23 the absolute fear, that something like this happens to your
24 child.

25 And the gentleman was right. People are not supposed

1 to outlive their children regardless of how old their
2 children get.

3 As I said before, it is tragic. And Addie Thilavanh
4 knows that. He recognizes that and did not want to put
5 this family through a trial. He knows he made a mistake.
6 He will admit that to the Court. A huge mistake.

7 But before the Court passes sentence, Your Honor, you
8 have before you the tragic details of one day in my
9 client's life.

10 I'd like to tell you a little bit more about Addie
11 Thilavanh, how and what brought him to this country.

12 The Communists came to his home in Laos when he was
13 17.

14 Right, Addie?

15 THE DEFENDANT: Yes, sir.

16 MR. WHELCHEL: They took his father.

17 He was the oldest. He was still in school at the
18 time, and he knew that he needed to do something to take
19 care of his family the best he could, so he did.

20 He swam the Mekong River from Laos to Thailand at the
21 age of 17. It's about a mile. He swam the river to escape
22 the Communist. He stayed in a refugee camp in Thailand for
23 a year and finally made it to the United States, Your
24 Honor.

25 He's already told you that when he arrived in Portland

1 he had very little formal education. But he got a job. He
2 got some on-the-job training and worked at Xerox for nine
3 years before he was laid off in the Portland area. He got
4 another job in electronic assembly also in Portland, Your
5 Honor, after the Xerox job fell through.

6 In 1995 he became a United States citizen. And but
7 for the economic problems this country and the world has
8 had recently would probably still be in Portland, Oregon.
9 But what happened was those jobs dried up. He became
10 homeless living in the street and under bridges.

11 A friend of his contacted him and said come to
12 Baltimore, I can get you a job, and he made his way to
13 Baltimore.

14 When he arrived in Baltimore the job was as a
15 dishwasher, and he took it. And he did the best he could
16 in Baltimore.

17 He left Baltimore and ended up in Spartanburg, got a
18 job as a cook at the Bangkok café through a temporary
19 agency here in Spartanburg and later got a job at Echo Star
20 and was working there until a medical condition, Your
21 Honor.

22 He has a problem with his liver and thyroid. At one
23 point he was down to 89 pounds. Could not afford the
24 medicine that he has to take for that condition, Your
25 Honor.

1 At the time that this tragic incident took place he
2 was unemployed and living with his wife.

3 The day that this happened he had been drinking. It
4 was a weekend. He and his wife planned to work in the yard
5 the next day. He had no plans whatsoever to drive an
6 automobile.

7 His wife had got called into work, and he was asked to
8 take his step-grandson to the temple. Excuse me. The
9 Laotian temple is right down the street from where this
10 happened. He lived about a half a mile from where this
11 happened, from the Laotian temple.

12 He had had too much to drink and he made a decision to
13 drive, Your Honor, and that's what brought us here today.

14 He is, as I said earlier, I believe truly repentant
15 and remorseful and has asked for the opportunity to
16 apologize to the family and to speak to the court.

17 He and I both know. We all know that that will not
18 bring back their loved one. But I would ask the court to
19 let Mr. Thilavanh speak now.

20 THE COURT: Sir, do you agree with what your lawyer
21 just told me?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: All right. Sir, is there anything that
24 you would like to say or want me to know or consider?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: I'll be more than happy to hear from you.

2 THE DEFENDANT: Yes, sir.

3 I want to apologize to all the family and friend. I
4 am really, really sorry and knowing destroyed your family
5 and mine. I wish I can take it all back. And I hope some
6 day that y'all forgive me, you know. And ask the Court to,
7 you know, have mercy on me.

8 THE COURT: Thank you, sir.

9 I find that there is a substantial factual basis for
10 the plea. I find that the defendant's decision to enter
11 the plea has been made freely, voluntarily, knowingly and
12 intellectually by him.

13 I find that he has received the services from a very
14 competent and able legal counsel, services that he has
15 indicated to the Court that he is satisfied and that he has
16 relied on in reaching the decisions that he's made.
17 Therefore, I will accept the plea.

18 I have reviewed the exhibits, States 1 through 5,
19 which are -- which will be a part of the record of this
20 case.

21 The Sentence of the Court is that the defendant will
22 be confined to the state department of corrections for a
23 period of 20 years. He will receive credit for the 11
24 months that he has already served. Good luck to you, sir.

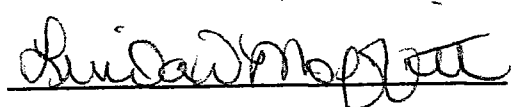
25 END OF REQUESTED TRANSCRIPT OF RECORD

CERTIFICATE

I, the undersigned Linda D. Moffitt, official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 10th day of August 2011.

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

March 21, 2013



Linda D. Moffitt
Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA

County of SpartanburgAddie Thilavanh # 347337
Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2012-CP-42-4713

APPLICATION FOR
POST-CONVICTION RELIEFINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention SCDC at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, S.C. 29669
2. Name and location of Court which imposed sentence General Session Court for Spartanburg County
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-GS-42-06712 (DuI causing Death)
 - (b) _____

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- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 10, 2011 - Twenty years
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ☒
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
- Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal was denied
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. February 3, 2012
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A

M. HOPKINS

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- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of trial Counsel
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) _____
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(c) the disposition thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. N/A

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16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Exclusively PCR grounds
 (b) u
 (c) u

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes
 (b) your trial, if any? yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Richard H. Wheelchel, Assistance Public Defender,
366 N. Church Street, Suite 3000, Spartanburg S.C. 29303
 ii. Robert M. Dudek, Chief Appellate Defender, 1330 Lady Street,
Suite 401, Columbia, S.C. 29211-3332
 iii.
 (b) the proceedings at which each such attorney represented you:
 i. Trial/guilty plea
 ii. Direct Appeal
 iii.

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19. State clearly the relief you seek in filing this application:

That my Conviction and Sentence be reversed for a
new trial

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Spartanburg)

I, Addie Thilovanah # 347337, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

A. Thilovanah

SWORN to and subscribed before me this 29th
day of October, 2012.

Stewart McQuinn (S.S.)
Notary Public

My Commission Expires: January 7, 2016

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2012-CP-42-21713

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Addie Thilavannah #347337, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Addie Thilavannah

Applicant

SWORN or affirmed to and subscribed before me this

9th day of October, 2012

James T. McClintock
Notary Public

My Commission Expires: January 2, 2016

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

2012-CP-42-41713

Date: 1/8, 12

Hon. Hon. M. Hope Blackley
Clark of Court, Spartanburg County
Post Office Box 3483
Spartanburg, SC 29304-3483

RE: Addie Thilavanh, SCDC No. 347337 v. State

Dear Clerk:

Enclosed please find the original Memorandum of Law in Support of the Application for Post-Conviction Relief and Post-Conviction Application for filing with your office. Also, I have enclosed a self-addressed envelope for return to me clock-stamped copies of these documents for my records.

Sincerely,

's'

A. Thilavanh
Addie Thilavanh #347337
Perry Correctional Inst.
430 Oaklawn Road-244/113
Pelzer, S.C. 29569

cc: Applicant's file

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M. HOPE BLACKLEY

2012-CP-42-4713

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Case No.: _____

Addie Thilavanh,
SCDC No. 347337,

Applicant,

MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR POST-CONVICTION
RELIEF

v.

State of South Carolina,

Respondent.

COME NOW, the Applicant, Addie Thilavanh #347337, presents the Memorandum of Law in Support of Application for Post-Conviction Relief (PCR) and would show the following unto the Court.

STATEMENT OF THE CASE

The Applicant was indicted by the Spartanburg County Grand Jury for Felony DUI-Death and Reckless Homicide in Indictment No. 12-GS-42-6712 during the November 24, 2010, term of General Sessions Court. On August 10, 2011, he went to trial before the Honorable J. Mark Hayes, II, Judge. He was represented by Richard M. Whelchel, Esquire. He pled guilty to Felony DUI-Death, and Judge Hayes sentenced him to twenty (20) years in prison. The Reckless Homicide offense was not prosed by the State. A timely notice of appeal was filed on applicant's behalf.

The applicant was represented on appeal by Robert M. Dudek, Chief Appellate Defender. On February 3, 2012, the South Carolina Court of Appeals dismissed the Applicant's appeal and petition for rehearing in unpublished opinions.

The Applicant now files the following PCR action challenging his conviction and sentence.

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ARGUMENT

10(a)-11(a) The Applicant was denied the right to effective assistance of trial counsel by counsel's failure to move to quash his indictment that failed to sufficiently state his Felony DUI-Death offense.

To establish claim of ineffective assistance of trial counsel, a PCR applicant must show that counsel's performance was deficient and that, but for counsel's error(s), there is a reasonable probability that the results of the proceedings would have been different; in such context, "reasonable probability" is one that is sufficient to undermine confidence in the outcome. *German v. State*, 479 S.E.2d 697 (S.C. 1996).

In this case, the Applicant was indicted for a Felony DUI-Death offense that charged his offense, in relevant part, as follows:

That Addie Thilavanh, did in Spartanburg County on or about September 19, 2010, drive a motor vehicle while under the influence of alcohol and drugs, or a combination of alcohol and drugs, and violated an act forbidden by law or neglected any duty imposed by law in driving of the vehicle...Which proximately caused death to Corey Daniel Cole, in violation of 55-5-2945 (A)(2), of THE CODE OF LAW OF SOUTH CAROLINA, (1976)...

As a matter of law, the Applicant contends that the charging terms of his indictment was insufficient to charge him with a Felony DUI-Death offense since it failed to include the element of "material and appreciable impaired." The Legislature intended to make "material and appreciable impairment" an element of substantive offense of operating a motor vehicle under the influence, rather than an element of proof to be adduced at trial. *State v. Knuckles*, 560 S.E.2d 426 (S.C. App. 2002).

Moreover, a circuit court does not have subject-matter jurisdiction to hear a guilty plea unless: (1) there has been an indictment which "sufficiently states the offense"; (2) there has been a waiver of indictment; or (3) the charge is a lesser included offense of the crime charged in the indictment. *Knuckles*, *infra*. The corpus delicti of driving under the influence (DUI) based upon alcohol is: (1) driving a motor vehicle; (2) within the State; (3) while under the influence of alcohol to the extent that the person's faculties to drive are "material and appreciable impaired". *State v. Russell*, 546 S.E.2d 202 (S.C.App. 2001).

Turning to the standard of judicial review of Applicant's ineffective assistance of counsel claim, he submits that given the Legislative intent the Court's interpretation of this intent, his counsel rendered ineffective assistance by failing to inform him of the defect in the indictment and to move to

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quash the indictment that would have resulted in a different outcome as he would not have pled guilty to a defective indictment. Accord Garnan, supra; Strickland v. Washington, 104 S.Ct. 2052 (1984).

10(b)-11(b) The Applicant was denied the right to effective assistance of trial counsel by counsel's failure to obtain an interpreter for the Applicant.

To establish claim of ineffective assistance of counsel, applicant for PCR must prove that counsel's performance was deficient and that deficient performance prejudiced his case. Satterwhite v. State, 491 S.E.2d 709 (S.C. 1997).

It should particularly be noted in this case that the Applicant is of Laotian descent with a limited understanding of the English language, and especially so regarding legal jargon. Accordingly, on August 17, 2010, the date of Applicant's Felony DUI-Death offense, the arresting officer denoted in his Incident Report that he read the Applicant his Miranda rights with the assistance of an interpreter, Ms. Ladda Kayavongsa, an approved interpreter by the Seven Circuit Solicitor's office.

Notwithstanding, during applicant's guilty plea, his counsel failed to request the assistance of an approved interpreter to assist Applicant with his defense. In Yoko Via Walton v. Chong Olanik Alkila Chong, 664 S.E.2d 497 (S.C. 2003), the Court held that whenever a party to a legal proceeding does not sufficiently speak (or understand) the English language, the court may appoint a qualified interpreter if the court finds that it is necessary for the fulfillment of justice. The court further held that before denying the assistance of an interpreter, a court must first make a finding on the record that the waiver of a qualified interpreter is in the best interest of the party or justice.

In this case, it was obvious from a review of the arresting officer's Incident Report that the Applicant needed the assistance of a qualified interpreter to serve the best interest of justice. Therefore, counsel's failure to request the assistance of a qualified interpreter to assist the Applicant in his fundamental right to defend himself was ineffective assistance of counsel that was per se prejudicial. Satterwhite, supra, Strickland, supra.

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10(c)-(11(c)) The Applicant was denied the right to effective assistance of trial counsel by counsel's failure to move to suppress applicant's blood test evidence when the State failed to provide a proper chain of custody for its admission.

To establish claim of ineffective assistance of counsel, an applicant must show that counsel's representation fell below objective standard of reasonableness and that, but for counsel's error, there is a reasonable probability that results of trial would have been different. Gater v. State, 479 S.E.2d 344 (S.C. 1991).

The arresting officer stated in his Incident Report that he transported the Applicant to the Spartanburg Regional Medical Center to acquire a blood sample from him. This was the only test conducted by the arresting officer. Consequently, the State failed to provide the defense a proper chain of custody for introduction of its blood evidence against the applicant to prove that he had been driving under the influence at the time of the victim's death. The corpus delicti of a charge of driving under the influence is as follows: (1) driving a vehicle, (2) within the state of South Carolina, (3) while under the influence of intoxicating liquors, drugs, or other substance of like character. State v. Osborne, 467 S.E.2d 454 (S.C.App. 1995).

Under 555-5-2950(d) of the Implied Consent Statute, "a person required to submit to test by arresting officer must be provided with written report including time of arrest, time of test, and results of test before any trial or other proceeding in which the results of the test are used as evidence". Chain of custody requires that where analyzed substance has passed through several hands, evidence must not leave it to conjecture as to who had substance and what was done with it between taking and analysis. Party offering evidence is required to establish complete chain of custody, tracing possession from time specimen is taken to final analysis; identity of person who had handle evidence must be established. Cribb, 426 S.E.2d 306 (S.C. 1992).

While counsel did show the Applicant a computerized result of his "blood alcohol level" prior to his trial, the applicant nevertheless submits that counsel failed to provide him with any chain of custody for this evidence for which he was charged. Therefore, the applicant contends that counsel's failure to the State's failure to produce a proper chain of custody for his defense was ineffective assistance of counsel that was per se prejudicial as there was a reasonable probability of a different outcome absent the state's blood analysis of his blood. Gater, Supra, Strickland, supra.

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HOPKINS BACKLIX

19(d)-11(d) The Applicant's guilty plea was not knowingly and voluntarily entered based on his trial counsel's failure to properly inform him of the State's statutory errors and the law in relation to the errors.

A counsel's failure to advise a defendant of statutory errors by the State is ineffective assistance of trial counsel. Franklin v. Catoe, 552 S.E.2d 781 (S.C. 2001).

In this case involving a DUI-Death incident, the arresting officer stated in his report that as a result of Applicant's failure of a field sobriety test he placed him under arrest for DUI. He further stated in the report that due to the seriousness of the collision and the high probability of a serious injury to the victim that he transported applicant to the Spartanburg Regional Medical Center to acquire a blood sample from him. He finally stated in the report that after blood sample was taken from Applicant that he was taken to the Spartanburg County Detention Facility.

The Applicant contends that the procedures employed by the arresting officer violated statutory requirements of S756-5-2045 inasmuch as the officer failed to conduct any video taping at the incident site or the breath testing site. The officer also violated the statutory requirements of S56-5-2050 inasmuch as the officer failed to inform the applicant, in writing, that he did not have to take any test, but that the refusal may result in loss of driving privilege for ninety (90) days, and that his refusal may be used against him in a court proceeding.

As a threshold matter, the arresting officer totally failed to comply with, or inform Applicant of, any statutory requirements during his arrest or collection of his blood sample for use as evidence to support his "DUI-Death" offense. Thus, the Applicant contends that he was never informed of the waiver of his statutory rights by neither his counsel or the court during his guilty plea proceedings. As a result, he submits that his plea was not knowingly and voluntarily entered with a full understanding of the law in relation to the facts of his case. A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record at hearing of guilty plea, and may be accomplished by colloquy between court and defendant, between court and defense counsel, or both. Brannon v. State, 548 S.E.2d 866 (S.C. 2001).

In this case the record is silent as to the court of his counsel informing him of the waiver of his statutory rights; thus, counsel's failure in this case was ineffective assistance that was per se prejudicial. See Franklin, Boydin v. Alabama, 89 S.Ct. 1709 (1969) (holding that a court cannot assume a valid waiver from a silent record).

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The Applicant was denied the right to a fair trial by the State's Brady violation in failing to disclose the results of the accident investigation by the Multi-Disciplinary Accident Investigation Team (MAIT Team).

In Applicant's case, the arresting officer stated in his written report that following applicant's DUI-Death incident he contacted the MAIT Team to process the accident scene. However, the results of the MAIT Team's investigation was never disclosed to the Applicant prior to his guilty plea.

The Applicant contends that the accident victim's toxicology report showed that he was under the influence of marijuana and prescription drugs at the time of the accident. He further contends that the arresting officer's written report denoted that applicant had contended that the accident victim had been walking in the middle of the road when he was hit by applicant's car. As the MAIT Team's investigation could have confirmed that the victim had been, in fact, walking in the middle of the road, it could have proved that the victim was contributorily negligent to cause the accident.

By a similar reasoning, absent any other traffic violation other than his DUI offense, the MAIT Team's investigation could have shown that the victim contributory negligence of walking in the middle of the road was the actual cause of the accident rather than his DUI offense. As this was a factual matter for consideration by a jury that could have created a reasonable doubt as to applicant's DUI-Death offense, there was a reasonable probability that a jury could have found applicant not guilty; in addition, had the applicant had this report he would not have pled guilty and would have went to trial.

Trial court finding in PCR proceeding that prosecution violated Brady v. Maryland, 93 S.Ct. 1174 (1973) requirements of failing to disclose evidence that was material to the applicant's guilt or innocence requires finding that prosecutor committed misconduct. Gibson v. State, 514 S.E.2d 320 (S.C. 1999).

WHEREFORE, for the foregoing reason, the Applicant pray the Honorable Court reversed his conviction and sentence and remand the case for a new trial.

Respectfully Submitted,

's' A. Thilavanh
Aidiz Thilavanh #347337
Parry Correctional Inst.
430 Oaklawn Road-244 1113
Palzer, S.C. 29660

Date: 11/8/12, 2012

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HOPE BLACKLEY

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Addie Thilavanh, #347337,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2012-CP-42-4713

RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed November 13, 2012, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the November 2010 term of the Spartanburg County Grand Jury for felony DUI – death and reckless homicide (2012-GS-42-7712, count 1 and count 2). The Applicant was represented by Richard Whelchel, Esquire. On December 5, 2011, the Applicant pled to felony DUI – death¹. The Applicant was sentenced by the Honorable J. Mark Hayes II to twenty (20) years imprisonment.

The Applicant filed a timely Notice of Appeal. The South Carolina Court of Appeals dismissed the Applicant's appeal for failure to show any issue ruled upon by the trial court on November 23, 2011. The Court also construed several filings as a Petition for Rehearing, which they also denied on February 3, 2012. The Remittitur was returned on October 31, 2012.

¹ The charge of reckless homicide was *not* prossed.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness

under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the allegation of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General

By: AL R. WHITE

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

Feb. 28, 2014

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

)

IN THE COURT OF COMMON PLEAS
TH JUDICIAL CIRCUIT

Addie Thilavanh,

$$\left. \begin{array}{l} \text{---} \\ \text{---} \end{array} \right\}$$

-CP-

Applicant,

))

 V_{α}

))

CERTIFICATE OF SERVICE BY MAIL

State of South Carolina,

)

Respondent.

)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Respondent's Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Christopher D. Brough, Esquire
The Brough Law Firm
175 Magnolia Street, Suite 202
Spartanburg, South Carolina 29306

Anne Miller

Anne A. Mueller
Legal Assistant for the Respondent

DATED this 28th day of February, 2014.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

Addie Thilavanh, #347337,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
Respondent.)

AMENDED APPLICATION FOR
 POST CONVICTION RELIEF

Case No.: 2012-CP-42-4713

The Applicant, by and through his undersigned attorney, amends his Application for Post-Conviction Relief as follows:

1. Anything not specifically amended by this filing is incorporated herein as if restated verbatim.
2. Paragraph 10 and 11 are amended to add the following facts to support Applicant's grounds:

(a) Ineffective Assistance of Counsel – The Applicant's trial counsel failed to advise

Applicant that Applicant could have made a motion to dismiss his Felony DUI charge pursuant to S.C. Code Ann. §56-5-2953 in that the State failed to produce an incident site videotape showing the following: the Defendant performing the field sobriety tests administered by Trooper Seibel, the Defendant being arrested, and the Defendant being advised of his Miranda rights.

(b) Ineffective Assistance of Counsel – The Applicant's trial counsel failed to exercise

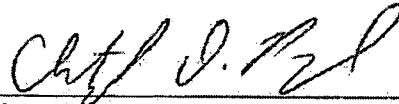
due diligence in the representation of the Applicant in that the Applicant's counsel failed to investigate and pursue the Applicant's contention that the victim who was

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under the influence of marijuana stepped into the roadway in front of the Applicant's vehicle and thereby caused the accident.

- (c) Involuntary Guilty Plea – Applicant's plea of guilty was not freely and voluntarily given due to the failure of trial counsel to advise the applicant of those items listed above herein.

Respectfully submitted,



Christopher D. Brough, Esq.
THE BROUGH LAW FIRM
175 Magnolia Street, Suite 202
Spartanburg, South Carolina 29306

March 20, 2014

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L. BLANCHLEY

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) COURT OF COMMON PLEAS NONJURY

3
4 ADDIE THILAVANH,)
5 APPLICANT,)
6 VS.)
7 STATE OF SOUTH CAROLINA,)
8 RESPONDENT.)

TRANSCRIPT
OF
RECORD
2012-CP-42-4713

9
10 September 18th, 2014
11 Spartanburg, South Carolina
12

13 B E F O R E:

14 THE HONORABLE ROGER L. COUCH, Judge.

15
16 A P P E A R A N C E S:

17 CHRISTOPHER D. BROUGH
18 ESQ.
Attorney for the Applicant

19 J. CLAYTON MITCHELL
20 ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

21

22

23

24

25

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

1	<u>I N D E X O F W I T N E S S E S</u>	
2	<u>WITNESSES</u>	<u>PAGE</u>
3		
4	ADDIE THILAVANH	
5	Direct examination by Mr. Brough	5
6	Cross-examination by Mr. Mitchell	10
7	Redirect examination by Mr. Brough	17
8	JOSH SIEBEL	
9	Direct examination by Mr. Brough	18
10	Cross-examination by Mr. Mitchell	30
11	Redirect examination by Mr. Brough	38
12	RICHARD WHELCHER	
13	Direct examination by Mr. Brough	41
14	Cross-examination by Mr. Mitchell	48
15	Redirect examination by Mr. Brough	54
16	Recross examination by Mr. Mitchell	57
17		
18	Closing by Mr. Brough	60
19	Closing by Mr. Mitchell	61
20	Closing by Mr. Brough	62
21	Certificate	64
22		
23		
24		
25		

E X H I B I T S

<u>NOS.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
<u>Applicant's Exhibits</u>			
A-1	Affidavit	24	25
A-2	Affidavit	26	45
A-3	Affidavit	26	45
A-4	Affidavit	26	45
A-5	Affidavit	26	46
A-6	SC Code of Laws	43	
A-7	Mt. Pleasant Case	55	

P R O C E E D I N G S

THE COURT: All right. The State may call the next case.

MR. MITCHELL: Your Honor, this case is Addie Thilavanh versus the State of South Carolina. Docket Number 2012-CP-42-4713.

Applicant was indicted at the November 2010 term by the Spartanburg County Grand Jury for Felony DUI where death results, and that's Indictment Number 2012-GS-42-7712. Applicant was represented by Mr. Richard Welchel.

On December 5th, 2011, Applicant pled guilty to Felony DUI where death results, and as a result, a reckless homicide charge, which was Count Two in that indictment, was not proessed. Applicant was sentenced by the Honorable J. Mark Hayes to 20 years imprisonment. Applicant filed, filed a timely notice of appeal. The Court of Appeals dismissed that appeal. The remittitur was sent back down in October 31st, 2012.

Applicant filed this application for post-conviction relief on November 13th, 2012. Mr. Thilavanh is present represented by counsel here today and I'll turn it over to him.

THE COURT: Mr. Brough, you ready to proceed?

MR. BROUGH: Yes, I am, Your Honor.

Addie Thilavanh - Direct examination
by Mr. Brough

1 THE COURT: All right. You may call your first
2 witness.

3 MR. BROUGH: Thank you.

4 We would call Addie Thilavanh to the stand.

5 THE COURT: sir, if you'll come forward to the witness
6 stand to my left please.

7 (Witness complies.)

8 THE COURT: sir, if you'll place your left-hand on the
9 Bible. Raise your right.

10 THE WITNESS: Yes, sir.

11 THE COURT: Yes, sir.

12 ADDIE THILAVANH, being first duly
13 sworn, testified as follows:

14 THE COURT: Have a seat please.

15 (Witness complies.)

16 THE COURT: State your name for me, sir.

17 THE WITNESS: My name is Addie Thilavanh.

18 THE COURT: Thank you.

19 Mr. Brough, your witness.

20 MR. BROUGH: Thank you, Your Honor.

21 May it please the Court.

22 THE COURT: Yes, sir.

23 DIRECT EXAMINATION

24 BY MR. BROUGH:

25 Q Mr. Thilavanh, were you represented in this case at the

Addie Thilavanh - Direct examination
by Mr. Brough

1 trial level by Richard Welchel, sir?

2 A Yes.

3 Q If you could please speak up?

4 A Yes.

5 Q Thank you.

6 And during the course of his representation with you,
7 did he discuss with you, as to the Felony DUI charge, that
8 it was subject to a mandatory videotaping provision?

9 A No, he didn't say anything about --.

10 Q Not at all?

11 A Not at all.

12 Q Okay. So were you not aware then that the -- there's a
13 required to be a video from the incident scene, scene -- the
14 place where it took place?

15 A No, until I was in the --.

16 Q Up---

17 A -- Perry. I -- until I discover -- you know, I didn't
18 discover it until I went and was in the Perry.

19 Q Okay. And, in, in your case, sir, was there ever such
20 a video that was provided?

21 A No, sir.

22 Q Did your lawyer discuss with you the potential option
23 of making a motion to have the Felony DUI charge dismissed
24 based on the State's failure to produce a copy of that
25 video?

Addie Thilavanh - Direct examination
by Mr. Brough

1 A He never talked to me anything about a case of the --
2 before the car -- that he came and see me, he just tell me
3 that it's nothing can do for me and then he told me that I
4 don't want to take this to the trial or he can do it. Just
5 take me in front of the judge and my case, and I said, you
6 know, I don't know anything about the law, and I don't know
7 anything about the Court proceedings and, you know, I did
8 say yeah.

9 Q Did he go over the discovery that was provided with
10 you?

11 A No, he -- no. Yeah, he let me look at my blood and
12 alcohol level and then let me look at that autopsy of the
13 victim. That's about it.

14 Q And when he let you look at that, in those documents,
15 did it indicate that the victim was impaired?

16 A Yeah, I look at it -- the victim intoxicated. I mean
17 intoxication part and it was a -- under the influence of the
18 marijuana or all the kind of drug, you know. All kind. I
19 mean whole bunch of drug in his system.

20 Q Okay. And what was your position as to how the
21 accident occurred, sir?

22 A Well, I saw him walk up the road, and then, when I got
23 close to him, he looked up at me like, you know, like he
24 seemed -- like he know me and so I don't just okay, you
25 know, I don't pay no attention, and he walk, walk right in

Addie Thilavanh - Direct examination
by Mr. Brough

1 into me, and that's when he got hit by the side of my car.

2 Q Okay. When, when you saw him, was he on the side of
3 the road?

4 A Not really. He's not on the side of the -- I mean
5 he's, he's kind of like, you know, it's not on the middle of
6 the road, but it's not on the side. It's right, you know,
7 it's, it's more road.

8 Q Okay.

9 A When I got close to him, he just, you know, looked up
10 and just walk right into me like, you know, I don't know
11 what he was thinking.

12 Q So when you say he walked into you, are you saying that
13 he stepped out in front of your moving vehicle --

14 A Yes.

15 Q -- knowing it was coming?

16 A Yes.

17 Q Okay. And did you discuss that with Mr. Welchel?

18 A No, it never come up. He never asked. He never, you
19 know. See he just let me look at the copy of that, you
20 know, and he said okay and he just left.

21 Q Do you think that the fact that the victim stepped out
22 in front of your moving vehicle knowing it was moving was
23 potentially a defense you could of used at trial?

24 A Huh?

25 Q Do you think that the victim intentionally stepping out

Addie Thilavanh - Direct examination
by Mr. Brough

1 in front of your vehicle would of been a defense you could
2 of used at trial?

3 A Yes. Sure. At first I don't even want to plead guilty
4 at all.

5 Q Okay.

6 A But he, you know, he's my lawyer. He never said
7 anything about it.

8 Q Well, you said you didn't want to plead.

9 why did you plead, sir?

10 A Because I didn't think I was drunk, you know, drunk at
11 all that day. I only drink like four, five beer.

12 Q Okay.

13 A I wasn't, you know, swerving or speeding or anything.
14 Even the arresting officer said so, that I was not speeding.

15 Q Okay. And, and the arresting officer, do you see him
16 in the courtroom here today?

17 A Well, I don't recognize him. It's been quite a long
18 time.

19 Q Okay. Fair enough.

20 If you had known that you potentially had a defense
21 where the Felony DUI charge could of been dismissed, would
22 you have gone to trial?

23 A I would.

24 Q Please answer any of Ms. White's questions.

25 THE COURT: You may cross-examine.

Addie Thilavanh - Cross-examination
By Mr. Mitchell

1 CROSS-EXAMINATION

2 BY MR. MITCHELL:

3 Q Good morning.

4 A Good morning.

5 Q Now, you were charged with Felony DUI where death
6 results?

7 A Yes.

8 Q Isn't that right?

9 And then you pled guilty in August of 2011?

10 A That's right.

11 Q And at that plea hearing you admitted your guilt,
12 right?

13 A Plea hearing, so my lawyer, he just waived it. I mean
14 my counsel.

15 Q I'm sorry.

16 Can you repeat that?

17 A Oh, that the plea hearing?

18 Q Right.

19 A Mr. Welchel, the trial counsel, he waiving it.

20 Q Okay. But that was your decision to waive it?

21 A Hell no. No, I'm sorry. No, that---

22 Q You stood before the Court and said that you waived
23 your Constitutional rights to a jury trial, to remain silent
24 at the plea hearing?

25 A No, I don't think so.

Addie Thilavanh - Cross-examination
By Mr. Mitchell

1 MR. MITCHELL: Your Honor, I point you out to Page 7
2 and 8 of the guilty plea transcript.

3 THE COURT: I'm there.

4 Q You also agreed with the facts as the solicitor stated
5 them, isn't that right, that you were driving, that you hit
6 the victim?

7 A Yes.

8 Q And that you were under the influence of alcohol?

9 A I, I, I didn't say that.

10 Q You agreed with -- your blood alcohol test came back at
11 .23, isn't that right?

12 A Yes, but I, I didn't know, you know. I wasn't, I
13 wasn't at the cook out the night before the accident. I
14 was -- been drinking a lot that night. So I---

15 Q But you drank that day too, right?

16 A Yeah, I drink like a four, five -- four beer --

17 Q And you were -- and when you got tested---

18 A -- in one hour timeframe.

19 Q And when you got tested, it was -- your blood alcohol
20 level was .23, right?

21 A That's right.

22 Q Now, the judge advised you of the potential sentence
23 here, right?

24 He told you he could sentence you up to 25 years?

25 A I didn't, I didn't recall that.

Addie Thilavanh - Cross-examination
By Mr. Mitchell

- 1 Q You don't recall that?
- 2 A Oh, he say he just give me 20 years.
- 3 Q Right. Right.
- 4 But he said he could sentence you up to 25 years, isn't
- 5 that right?
- 6 A I, I didn't -- I don't know. I don't remember that.
- 7 Q Okay.
- 8 A I didn't recall that.
- 9 Q Now, you stated to the plea judge that you had received
- 10 discovery in the case?
- 11 A No.
- 12 Q You didn't receive discovery in the case?
- 13 A No.
- 14 MR. MITCHELL: Your Honor, I point you to Page 12.
- 15 THE COURT: All right. Let me go there.
- 16 Q You also stated that you were satisfied with your
- 17 lawyer?
- 18 A No.
- 19 Q You did say that at the plea hearing?
- 20 A No.
- 21 MR. MITCHELL: Your Honor, I want to point---
- 22 A Ask me. I wanted to fire him.
- 23 Q You told the judge you wanted to fire him at the guilty
- 24 plea hearing?
- 25 A No, I didn't say that. I didn't say that either.

Addie Thilavanh - Cross-examination
By Mr. Mitchell

1 Q You, you told the judge you were satisfied with your
2 lawyer's services?

3 A No, I didn't say that.

4 MR. MITCHELL: Your Honor, I point you to Page 7.

5 THE COURT: You can approach the witness and show him
6 the transcript if you'd like. I think it's been provided to
7 him; but apparently he hasn't read it.

8 MR. MITCHELL: May I approach?

9 THE COURT: You may.

10 Q I'm gonna read this right here.

11 A Okay.

12 Q It goes:

13 The Court: Are you satisfied with the work that your
14 lawyer has done for you?

15 The Defendant: You. You say yes, sir.

16 A I don't.

17 Q Do you recall that?

18 A I don't recall that.

19 Q Now, you stated that the officer said you were not
20 speeding?

21 A Yeah, he said that.

22 Q When did he say that?

23 A After the witness that came and then the witness said
24 that when I turned the headlights on and he -- they asking
25 the officer, the officer why I didn't turn my headlights on.

Addie Thilavanh - Cross-examination
By Mr. Mitchell

1 The officer said it's still light out, and then he said I
2 was not speeding. That speed is not effective.

3 Q Now, you didn't stop right when you hit the victim, did
4 you?

5 A I stopped right away.

6 Q You stopped right then when he---

7 A Yeah.

8 Q When you hit him, you pulled over immediately?

9 A Yeah, and -- yeah. Yes.

10 Q They weren't witnesses chasing you trying to bring you
11 back to the scene?

12 A No. Yeah, I say I hit the, I hit the man without the
13 braking until I hit him. Then I hit him. After I hit him
14 then I stopped, you know, I stopped the car. Then I was
15 thought at first, you know.

16 Q Right.

17 A And then when, when I come to my senses.

18 Q How long, how long was that?

19 How long did it take you to stop?

20 A It's, it's about less than a minute.

21 Q But you kept going a little bit?

22 You didn't stop immediately, did you?

23 A No, I didn't, I didn't keep on going. I stopped the
24 car. Then my car's in the road and the, you know, it's in
25 the middle of the road. So I just back it up and where the

Addie Thilavanh - Cross-examination
By Mr. Mitchell

1 body, where---

2 Q Right.

3 A ---you know, and I backed the car up, and then the, the
4 witness say I tried to run, but it wasn't a run.

5 Q Okay.

6 A Why don't I just, you know, step on the car forward to
7 my home?

8 I only lived less than the half, half mile from my
9 house. So I just go in my garage and close the door if I
10 wanted to run.

11 Q Okay. I understand.

12 You're -- you said your lawyer did not go over the
13 statute with you?

14 A Hu huh. (Negative).

15 Q He didn't talk to you about the charge at all?

16 A Nope.

17 Q Did you know what you were being charged with?

18 You knew what you were being charged with, isn't that
19 right?

20 A I know I been charged with the DUI.

21 Q Right.

22 And you knew that was -- and you told the Court you
23 understood the charge?

24 A Yeah.

25 Q You told---

Addie Thilavanh - Cross-examination
By Mr. Mitchell

- 1 A DUI.
- 2 Q You told the Court you understood the potential
- 3 sentence?
- 4 A That's what I understand.
- 5 Q I'm sorry?
- 6 A That's what I understand, DUI.
- 7 Q Okay. But you -- and you understood the sentence---
- 8 A Because---
- 9 Q ---that goes along with that?
- 10 A Huh?
- 11 Q You understood the potential sentence that goes along
- 12 with that?
- 13 A No, I don't know that.
- 14 Q Well, the judge told you that, isn't that right?
- 15 A I don't remember.
- 16 Q Okay.
- 17 MR. MITCHELL: One second, Your Honor.
- 18 THE COURT: Yes, sir.
- 19 (Pause.)
- 20 Q When you pled guilty you swore to tell the truth at
- 21 your plea hearing?
- 22 Isn't that right?
- 23 A Yes.
- 24 Q And you were just sworn just now also, right?
- 25 A Right.

Addie Thilavanh - Cross-examination
By Mr. Mitchell

1 Q So you're telling the truth in both hearings?

2 A That's right.

3 MR. MITCHELL: Okay. No further questions.

4 MR. BROUGH: Just briefly on redirect, Your Honor.

5 THE COURT: Yes, sir, Mr. Brough.

6 REDIRECT EXAMINATION

7 BY MR. BROUGH:

8 Q Mr. Thilavanh?

9 A Yes.

10 Q It's been your testimony you were not aware of the
11 videotaping requirements on the Felony DUI statute at the
12 time that you entered your plea, correct?

13 A Correct.

14 Q Okay. Now that you are aware of it, would it be fair
15 to say that you no longer feel that you received adequate
16 counsel?

17 A That's right.

18 Q Thank you, sir.

19 THE COURT: Wish to recross?

20 MR. MITCHELL: No further questions. Thank you.

21 THE COURT: All right. You may step down, sir.

22 THE WITNESS: Thank you.

23 THE COURT: Applicant may call its next witness.

24 MR. BROUGH: Call Joshua Siebel of the Highway Patrol,
25 Your Honor.

Josh Siebel - Direct examination
by Mr. Brough

1 THE COURT: Come forward, sir, and be sworn. Over here
2 to my left, sir.

3 (Witness complies.)

4 JOSH SIEBEL, being first duly
5 sworn, testified as follows:

6 THE COURT: Have a seat.

7 (Witness complies.)

8 THE COURT: State your name please.

9 THE WITNESS: Trooper Josh Siebel, South Carolina
10 Highway Patrol.

11 THE COURT: You may proceed, Mr. Brough.

12 MR. BROUGH: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 DIRECT EXAMINATION

15 BY MR. BROUGH:

16 Q Trooper Siebel, were you involved in the primary
17 officer, investigating officer, involved in the incident
18 that resulted in a Felony DUI charge against Mr. Thilavanh?

19 A Yes, sir.

20 Q Okay. If you could, sir, could you please tell me what
21 you did when you got out to the scene and how you arrived on
22 the scene?

23 A Generally these kind of calls come from our dispatch.
24 would be South Carolina Highway Patrol's dispatch, specific
25 dispatch.

Josh Siebel - Direct examination
by Mr. Brough

1 where I patrol is Spartanburg County. Exact details
2 are kind of fuzzy. How they generally come out, normally
3 they just tell us it's a wreck with injuries. That's
4 normally just how they just come out.

5 They'll give me the road name. I go to that general
6 location cause sometimes what they give us is, is generally
7 in the, you know, general vicinity, but sometimes it's exact
8 and sometimes it's not. I don't specifically recall which
9 roads I took to get there.

10 Q Okay.

11 A I can't say exactly where I started from and exactly
12 which exact roads I took all the way there, but I did arrive
13 at the scene.

14 Q Okay.

15 A As recollection comes, once I got to the scene, there
16 was several EMS vehicles, fire department, law enforcement
17 already there. I was---

18 Q And---

19 A Law enforcement got there about the same time. Nobody
20 was specifically there ahead of one of another except for
21 emergency services as far as fire department, EMS.

22 Q Okay. And, and when you arrived on scene, did you
23 encounter Mr. Thilavanh on the scene?

24 A Yes, sir, I did.

25 Q Okay. And, and, at some point, did you make a

Josh Siebel - Direct examination
by Mr. Brough

1 determination that this might be an alcohol related
2 collision?

3 A Yes, sir.

4 Q Okay. Would it be fair to say that you made that
5 decision somewhat early on?

6 A I mean in general. I mean I, I knew they was there.
7 Generally normal practice is I try to talk to witnesses
8 beforehand cause some -- a lot of times witnesses have a
9 habit of disappearing or, or relocating cause normally, once
10 they see blue lights, they figure okay, everything's okay,
11 and they disappear.

12 So generally I try, make it a good practice, try to get
13 as many witnesses as I can before they leave, and generally
14 everyone's got their own point of view of where they're at.
15 So everything looks maybe a little bit different to them.

16 So try to just -- as -- make as much sense of it as you
17 can. But generally the general consensus is normally the
18 same. Everyone pretty much responded the same way, that --
19 I'm gonna say his last name, Mr. Thilavanh, I'm gonna
20 pronounce it wrong, was traveling up the road and struck a
21 gentleman that was walking along the roadside.

22 Q And you---

23 A Everyone has different little specific details.

24 Q And when you encountered Mr. Thilavanh, would it be
25 fair to say that he was mobile at the time that you

Josh Siebel - Direct examination
by Mr. Brough

1 encountered him?

2 A He was outside of his vehicle, yes.

3 Q Okay. So he was able to move around and get from place
4 to place?

5 A Well, he really wasn't doing a whole lot of moving. I
6 mean he was there and there was some other people around
7 him.

8 Q Well---

9 A There was---

10 Q Was he able to walk?

11 A Was he -- excuse me?

12 Q Was he able to walk?

13 A I'm, I'm assuming, yes.

14 Q Okay. Well, let me ask you this.

15 Did you perform field sobriety tests on Mr. Thilavanh
16 on site?

17 A Yes, as good as I could, yes, sir.

18 Q Okay. And the, the test that you performed, which
19 tests were they?

20 A Just the standard field sobriety tests. As far as I
21 recall, I tried to do as best I could. There's -- there was
22 kind of a slight language barrier.

23 Q Okay.

24 A There was a, a young lady there who identified herself
25 as -- I don't have her name. I don't have the reports

Josh Siebel - Direct examination
by Mr. Brough

1 specifically in front of me of what her exact name was. But
2 advised me that she was on the list for the solicitor's
3 office as a certified -- someone who's able to speak his
4 language, and I tried to coordinate with her as best as I
5 could with the circumstances that I had to perform as good a
6 field sobriety as I could.

7 Q Okay. And the, the standardized field sobriety test
8 that you're referring to, and correct me if I'm wrong, but
9 do they consist of a battery of three tests---

10 A That---

11 Q ---being horizontal gaze nystagmus test, the walk and
12 turn test, which is a series of nine heel to toe steps, a
13 turn and nine heel to toe steps back, and one legged stand
14 test?

15 A That is correct.

16 Q Okay. So if someone is able to perform the walk and
17 turn test, would it be fair to say they're able to walk from
18 place to place?

19 A Depends on your---

20 MR. MITCHELL: Objection. Speculation.

21 MR. BROUGH: Your Honor, I don't think that calls for
22 anything that---

23 THE COURT: I overrule the objection. He can answer
24 it, whether he believes that reaches that level or not.

25 A It -- well, I would, I would just put it to you this

Josh Siebel - Direct examination
by Mr. Brough

1 way. Given my prior history and experience dealing with
2 people who are possibly under the influence of anything,
3 your definition of walk and walk properly or correctly or
4 able to do it safely is very vague. Someone may be able to
5 walk forward, but they're tilted way to the left or tilted
6 way to the right and they stumbled. Technically I guess you
7 could say they're walking, but you also say they're walking,
8 stumbling, almost falling over at the same time. So I think
9 that's a little vague.

10 Q well, would be -- my, my -- I guess my question is
11 well -- whether you can consider a walk or not, could he
12 walk or stumble to a situation where he would be in front of
13 your police vehicle?

14 A With some assistance, probably so, yes.

15 Q Okay. And was your vehicle equipped with an in-car
16 camera at the time, sir?

17 A I believe it was.

18 Q Okay. And did you ever start a recording at any point
19 in time during this stop?

20 A It would have -- if it was operational at the time, it
21 would have been. Back then we would of been using the VHS
22 systems, which were prone to working and not working.
23 There -- sometimes there's an issue that we never even would
24 of known, yes or no. I would -- I -- if I knew for sure I
25 would -- I'd love to answer your question correctly. They

Josh Siebel - Direct examination
by Mr. Brough

1 should have been. Let me just put it that way.

2 Q And, and do you know if that was ever produced to the
3 solicitor's office?

4 A If there was one it would of been produced as part of
5 discovery motions. If it was inoperable or, for some
6 reason, there was some kind of issue with the videotape,
7 either being malfunctioned with the tape itself or the
8 system itself, generally some form of affidavit is gonna be
9 submitted or provided.

10 MR. BROUGH: Have this marked as Applicant's 1 for ID.

11 (WHEREUPON, an affidavit was marked as Applicant's
12 Exhibit No. 1 for identification purposes only at this
13 time.)

14 Q Trooper Siebel, I want to approach you with what's been
15 marked as Applicant's Exhibit 1 for identification purposes.

16 Could you identify that document for me?

17 A This is an affidavit for failure to produce a videotape
18 at the breath site.

19 Q Okay. And does it bare your signature?

20 A It does.

21 Q Okay. And when you're referring to a failure to video
22 affidavit, is that the, the format of such an affidavit in
23 there?

24 A Yes, for the breath site---

25 Q Okay.

Josh Siebel - Direct examination
by Mr. Brough

1 A ---report, that is correct.

2 Q And that's for the breath site and not for the incident
3 site, correct?

4 A Yeah, this specific one right here is mainly for the
5 breath site.

6 MR. BROUGH: Okay. Like to move this into evidence as
7 Applicant's 1.

8 THE COURT: Any objection?

9 MR. MITCHELL: No objection.

10 THE COURT: Without objection it will be received as
11 marked.

12 (WHEREUPON, Applicant's Exhibit No. 1 was received into
13 evidence at this time.)

14 Q Okay. Now, do you recall signing such an affidavit for
15 the incident site video?

16 A I don't specifically recall.

17 Q Okay. Would you agree with me that you did not execute
18 such an affidavit?

19 A Without ever specifically recalling one way or the
20 other, I couldn't say yes or no.

21 Q Okay. Do you recall, with any degree of specificity,
22 ever actually physically walking a copy of your in-car video
23 to the Solicitor's Office?

24 A Generally that practice -- sometimes, yes, we do it and
25 sometimes we don't.

Josh Siebel - Direct examination
by Mr. Brough

1 Q Okay.

2 A But then we could have or may not have. It's not a --
3 if we send a case file to the Solicitor's Office, generally
4 everything's included in one, one pass and one turn.

5 MR. BROUGH: Let's mark this 2, 3, 4, and 5.

6 (WHEREUPON, four affidavits were marked as Applicant's
7 Exhibit Nos. 2 through 5 for identification purposes only at
8 this time.)

9 Q I'm gonna show you what's been marked as Applicant's
10 Exhibit 2 through 5. I believe Applicant's 5 is just an
11 additional -- it is what would be behind Applicant's 4.

12 But if you would identify -- would it be fair to say
13 those are affidavits of discovery production?

14 A Yes, sir.

15 Q Okay. And are those affidavits that were, were
16 essentially signed by the Solicitor's Office or purport to
17 come from there?

18 A Yeah, these look like the forms that they would use.

19 MR. MITCHELL: Objection, Your Honor. I don't think he
20 can authenticate files from the Solicitor's Office. I don't
21 think he's ever seen those. These are---

22 THE COURT: I'll sustain the objection unless he's
23 somehow participated in their production.

24 MR. BROUGH: That'd be fine, Your Honor.

25 Q In reviewing those documents, sir, is there anywhere in

Josh Siebel - Direct examination
by Mr. Brough

1 any of those documents where it indicates that a in-car
2 video was produced?

3 A In these ones I have in front of me, there's nothing
4 that specifically says in-car video.

5 Q And you don't---

6 A All it says -- oh, I'm sorry. Go ahead.

7 Q And you don't have any specific recollection of an
8 in-car video being produced in this case, is that correct?

9 A Not that I recall.

10 Q Okay. As a part of your training, are you aware that
11 the failure to produce such a video, unless there's a
12 statutorily recognizable excuse to do so, is grounds for
13 dismissal?

14 MR. MITCHELL: Objection. That's calling for a legal
15 conclusion.

16 MR. BROUGH: I believe that they're trained in how to
17 properly prepare DUI cases. He's an officer with the
18 Highway Patrol.

19 THE COURT: I'll ask you to ask, first of all, for a
20 foundation for his knowledge.

21 MR. BROUGH: Certainly.

22 THE COURT: Then maybe we can get to the final
23 question.

24 MR. BROUGH: Yes, sir.

25 Q Trooper Siebel, have you had any experience and

Josh Siebel - Direct examination
by Mr. Brough

1 training in the Highway Patrol as to DUI cases, sir?

2 A Yes, sir.

3 Q Okay. Could you please detail that training for me,
4 sir?

5 A Generally the DUI -- generally the DUI laws are pretty
6 much the main focus as far as the requirements of the law.
7 There's not a specific training per se as getting into
8 detail of the specific SLED policies because that doesn't
9 specific pertain to us. So a lot of that is kind of vague
10 and comes to a lot of question there.

11 Generally our -- our specific training is how to detect
12 DUIs and how to apply the law itself. Not specifically all
13 the three or four pages of extra information that comes
14 along with that law that may be cited. That's not
15 specifically gone over in every detail.

16 Q As part of your training, does that training include
17 how best to preserve evidence for DUI prosecution?

18 A In generality, yes.

19 Q Okay. And as -- is part of that preservation of the
20 evidence, detail, making sure that you properly record field
21 sobriety tests, arrests, Miranda?

22 A In general, yes, but there's a lot of issues, which is
23 why we always come to the videotape things at DUI trials.
24 Yes, you do have to record, but there's nothing
25 specifically -- you don't go to videotaping school or

Josh Siebel - Direct examination
by Mr. Brough

1 cinematography. That's not our job function.

2 Q All right.

3 A It is mentioned in the law that it has to be
4 videotaped, but we don't specifically go and this is how you
5 videotape. It's you show up, and as far as our knowledge
6 is, as long as the videotape is recording at the time of our
7 blue lights, that's as far as we actually specifically go as
8 far as videotaping.

9 Q So you, so you are aware that you are required to
10 record?

11 A That is correct.

12 Q Okay. And, and as part of -- would it be fair to say
13 that you interact a good bit with the solicitor's office as
14 part of your job?

15 A When needs be, that is correct.

16 Q Okay. Well, they prosecute a lot of cases you make.
17 Would that be accurate?

18 A DUI cases, yes, sir.

19 Q Okay. And in doing so, if they're prosecuting a case
20 of yours, do you understand that you have an obligation to
21 turn over the evidence to them, correct?

22 A That is correct.

23 Q Okay. And you don't recall specifically turning over a
24 copy of your in-car video to them in this case, do you?

25 A I can not recall if I specifically did or did not.

Josh Siebel - Direct examination
by Mr. Brough

1 Q All right. Thank you.

2 No further questions.

3 THE COURT: Mr. Mitchell, your witness.

4 MR. MITCHELL: Thank you.

5 CROSS-EXAMINATION

6 BY MR. MITCHELL:

7 Q Morning.

8 A Good morning.

9 Q Now, this incident happened in September of 2010, isn't
10 that right?

11 A I believe so. Somewhere around in there, yes, sir.

12 Q So if your memory's a little fuzzy it's probably
13 because of the length and time?

14 I mean it's about four years from when the incident
15 actually occurred?

16 A That would be correct.

17 Q Do you remember specifically how you got the call?

18 A Not specifically, but it had to come through dispatch.
19 There's, there's just---

20 Q So it would of come through dispatch and you wouldn't
21 of gotten a call saying that there's an injury on road --
22 whatever highway it was, whatever road it was?

23 Isn't that right?

24 A That is correct. Generally when it's dispatched it
25 will just say a wreck with injuries.

Josh Siebel - Cross-examination
by Mr. Mitchell

1 Q So you would of gotten---

2 A They're not generally---

3 Q I'm sorry.

4 A ---gonna go into much detail.

5 Q Okay. So you would of known that there was a wreck
6 with serious, serious injuries, right?

7 A That is correct.

8 Q You wouldn't know much of the specifics about what had
9 happened unless dispatch had told you something, right?

10 A Yeah, it'd have to be something kind of unusual for
11 them to come back over the radio, advise me something else.

12 Q Okay. Now, when you got -- you weren't the first to
13 arrive, were you?

14 A As far as?

15 Q Like as far as law enforcement or emergency EMS.

16 A No, EMS had got there prior to us, and I believe the
17 fire department was also there.

18 Q Okay. So EMS is there, the fire department's there --

19 A Yes, sir.

20 Q -- and you pull up?

21 So there's quite a scene going on really?

22 A That is correct.

23 Q Okay. So you testified that Mr. Thilavanh, Thilavanh,
24 I'm not sure if I'm pronouncing that right, so I apologize,
25 but Mr. Thilavanh, he was there when you arrived on the

Josh Siebel - Cross-examination
by Mr. Mitchell

- 1 scene?
- 2 A He was.
- 3 Q But he was pulled over to the side of the incident?
- 4 A Yes.
- 5 Q So, he was there.
- 6 There were -- how many witnesses were there?
- 7 Do you remember?
- 8 A I can't specifically recall. For some reason, three
- 9 jumps---
- 10 Q Yeah.
- 11 A ---out of my mind. Three.
- 12 Q So there could be three witnesses there, EMS, fire
- 13 department, you.
- 14 Did any other troopers arrive on the scene at that
- 15 point?
- 16 A I believe I might of had one follow shortly behind me.
- 17 Q Okay.
- 18 A I'm, I'm fairly certain that more showed up afterwards
- 19 just because---
- 20 Q Traffic control?
- 21 A Yeah, we've got a lot of issues---
- 22 Q You---
- 23 A ---as far as traffic control, preserving the scene
- 24 and---
- 25 Q You don't want to have another incident happen because

Josh Siebel - Cross-examination
by Mr. Mitchell

1 of this incident---

2 A Well---

3 Q ---as a pile up effect, right?

4 A Yes, sir, that would be correct.

5 Q Now, Mr. Thilavanh, you -- let me rephrase that.

6 He -- you did a field sobriety test on the Applicant
7 here today?

8 A Yes, sir.

9 Q And he -- did he pass that test?

10 A No, sir.

11 Q So, from there, you go from the scene. He fails the
12 test. Then he goes to the medical center where his blood is
13 drawn.

14 Isn't that right?

15 A That is correct.

16 Q And when they drew his blood, his blood alcohol level
17 was .23?

18 A After the results came back, yes.

19 Q Right.

20 A That was the result.

21 Q That wouldn't be immediate?

22 A No, sir.

23 Q Correct.

24 A That does take time, yes.

25 Q Now, as you testified just a minute ago, you are

Josh Siebel - Cross-examination
by Mr. Mitchell

1 familiar with the procedures and you're trained generally in
2 how to handle DUI cases, right?

3 A That is correct.

4 Q I mean it's not a specific class training on this is
5 how you do DUI videotaping?

6 There's, you know, other important factor at issue,
7 right?

8 A That is correct.

9 Q I mean people's health and harm that could be caused to
10 other people?

11 A That is correct. They, they -- we understand what the,
12 what the law says as far as videotaping, which I -- you
13 know, I'm just speculating why there are exemptions to the
14 law.

15 Q Right. Right.

16 A Especially at the collision scene to preserve,
17 preserve -- preservation of the scene and other people's
18 health are paramount to videotaping.

19 Q And you're, you're aware -- you know about -- you're
20 aware of the requirement to file an affidavit if you do not
21 have video recordings of certain times of the sobriety test
22 or the initial pull up.

23 Isn't that right?

24 A That is correct.

25 Q So there's a form -- is it a form that you fill out?

Josh Siebel - Cross-examination
by Mr. Mitchell

- 1 A Yes, sir, generally there's a -- I don't know who
2 creates these forms, but there is a form that we use as a---
3 Q So it's kind of a standard form you fill out and check
4 this is why videotape was not provided because so, so, so?
5 Isn't that right?
6 A That is correct.
7 Q Okay. Now, you filled out one of those affidavits in
8 this case?
9 A I did fill out one.
10 Q Okay. And you checked the exigent circumstances box,
11 correct?
12 A I, I believe so.
13 Q Let me take a look.
14 Can I approach?
15 THE COURT: You may.
16 A I don't know if I still have it.
17 Okay. Yes.
18 MR. MITCHELL: Your Honor, I think you have it. Oh,
19 there it is.
20 All right. I'm showing you Applicant's Exhibit 1 and
21 it states that you checked exigent circumstances existed or
22 other valid reasons based on the totality of the
23 circumstances and these are outlined below.
24 Did I read that correctly?
25 A Yes, sir, that is correct.

Josh Siebel - Cross-examination
by Mr. Mitchell

1 Q Okay. There we go.

2 So, in that affidavit, you state that there's exigent
3 circumstances at the scene and that's why the videotape was
4 not provided?

5 A If there's -- we'll do an affidavit anytime that
6 there's, for some issue, whatever the issue that may be with
7 the videotape is.

8 Q Right.

9 And this is back in the VHS days.

10 So this was---

11 A Yeah.

12 Q It could be hit or miss on?

13 A That would be very much correct.

14 Q Right.

15 One second, Your Honor.

16 THE COURT: Yes.

17 (Pause.)

18 Q Did you ever state that the Applicant was not speeding?

19 A No, sir, I -- under no circumstances would I never
20 advise anybody, especially in a very serious collision,
21 whether speed was ever involved or not because that's,
22 that's pure speculation.

23 Q So there's no testimony that you gave a, at a guilty
24 plea hearing, saying that he was not speeding, anything
25 along those lines?

Josh Siebel - Cross-examination
by Mr. Mitchell

1 A No, sir, absolutely not.

2 Q Okay. Now, a witness at the scene, they told you that
3 Mr. Thilavanh had not stopped immediately, is that right?

4 A That, that was what was relayed to me, yes, sir.

5 Q So he did not stop immediately after he hit the victim?

6 A That -- that's what I was advised, yes, sir.

7 Q And then he came back, is that -- or he stopped further
8 ahead?

9 A The exact details of how these---

10 Q Okay.

11 A ---specified it -- basically the interpretation that I
12 got is that, after the initial impact, he kept going some
13 distance.

14 MR. BROUGH: Your Honor, I'm gonna object. This is all
15 hearsay. This is what he was told by a third party witness.
16 He wasn't present at that time. He couldn't possibly know
17 that from his own personal knowledge.

18 MR. MITCHELL: I mean if he remembers what the --.

19 THE COURT: I think he can state what conclusions he
20 came to himself as a result of his investigation. I would
21 rather he not quote what people told him. But if he would
22 like to state what conclusions he reached once he completed
23 his investigations, that's not hearsay. That's his
24 conclusions.

25 Q So let me rephrase the question.

Josh Siebel - Cross-examination
by Mr. Mitchell

1 So you concluded that Mr. Thilavanh did not stop
2 immediately upon striking the victim?

3 A That would be correct.

4 MR. MITCHELL: Okay. No further questions.

5 THE COURT: Mr. Brough.

6 MR. BROUGH: Thank you, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. BROUGH:

9 Q Now, Trooper Siebel, when you, when you arrived on
10 scene, I know that you were asked about other law
11 enforcement vehicles, a number of other folks being there.

12 But you did testify earlier that Mr. Thilavanh was
13 mobile and able to be moved, correct?

14 A That is correct.

15 Q Okay. And, and you also testified that you know, as
16 part of your training, that you're suppose to record the
17 field sobriety tests, correct?

18 A That is correct.

19 Q Okay. And, in this situation, your -- you can't, with
20 any definitive answer, tell me that you either recorded
21 those or you gave them to the Solicitor's Office, correct?

22 A That is correct.

23 Q And I believe you also testified that, when you arrived
24 on scene, you did make a determination, before those tests
25 were done, that it was an alcohol related collision and

Josh Siebel - Redirect examination
by Mr. Brough

1 possible DUI, correct?

2 MR. MITCHELL: Objection. Asked and answered.

3 THE COURT: Well, I'm gonna -- it may have, but I'll
4 let him ask, ask the question.

5 THE WITNESS: Okay.

6 THE COURT: You may proceed.

7 A Can you please repeat that please?

8 Q And, and when you got there, you did make a
9 determination that it was an alcohol related collision prior
10 to Mr. Thilavanh being asked to do the field sobriety tests,
11 correct?

12 A In a sense, yes.

13 Q Okay. And there's nothing that could have -- there's
14 nothing that would of prevented you, to your knowledge, from
15 actually recording those tests, correct?

16 A Well, there again, I take issue with that. If -- I
17 could of put my patrol vehicle anywhere to secure the scene.
18 That could of been on a side street to keep traffic from
19 coming down there. My exact placement on the vehicle,
20 that's a -- there's no telling.

21 Q But other than the placement of your vehicle?

22 A Well, I could of been blocking a road and my video
23 camera could of been pointed towards someone's house.

24 Q But you did testify Mr. Thilavanh was mobile?

25 A That is correct.

Josh Siebel - Redirect examination
by Mr. Brough

1 Q So he could of been moved in front of whichever way
2 that camera was pointing?

3 A Not necessarily. If I pointed directly towards
4 someone's fence, I can't exactly put him in front of
5 someone's fence.

6 Q You can move that camera, can't you?

7 I mean you can turn it?

8 A It's gonna be obscured.

9 Q Y'all flip it around and show the person being
10 transported to jail a good bit, don't you, on DUI's?

11 A Yes, sir---

12 Q Okay. So you can move the---

13 A ---but it would also be obscured.

14 Q ---the camera around?

15 A You can move the camera around.

16 Q And you can move Mr. Thilavanh around?

17 A That is correct.

18 Q All right. Thank you.

19 No further questions.

20 THE COURT: Anything else, Mr. Mitchell?

21 MR. MITCHELL: No further questions.

22 THE COURT: You may step down, sir.

23 Any objection to the witness being excused?

24 MR. BROUGH: No, we would ask that he be excused. It's
25 my understanding he might have Court downstairs, Your Honor.

Richard Wheelchel - Direct examination
by Mr. Brough

1 THE COURT: All right.

2 THE WITNESS: Sorry.

3 THE COURT: You may go.

4 THE WITNESS: Thank you, sir.

5 THE COURT: But leave those documents that have been
6 marked. Thank you, sir.

7 All right. Applicant may call its next witness.

8 MR. BROUGH: Call Richard Wheelchel, Your Honor.

9 THE COURT: Come forward, sir, and be sworn.

10 Place your left-hand on the Bible and raise your right.

11 RICHARD WHELCHER, being first duly
12 sworn, testified as follows:

13 THE COURT: Have a seat please.

14 (Witness complies.)

15 THE COURT: If you would, state your name.

16 THE WITNESS: Richard Wheelchel.

17 THE COURT: Thank you.

18 Mr. Brough, your witness.

19 MR. BROUGH: Thank you, Your Honor.

20 May it please the Court?

21 THE COURT: Yes, sir.

22 DIRECT EXAMINATION

23 BY MR. BROUGH:

24 Q Mr. Wheelchel, do you remember representing the

25 Applicant, Addie Thilavanh, in this case, sir?

Richard Whelchel - Direct examination
by Mr. Brough

1 A I do.

2 Q And, if you could, tell me what he was charged with,
3 sir?

4 A Felony DUI with death and a reckless homicide.

5 Q Okay. And the Felony DUI charge, would that be fair to
6 say that's under South Carolina Code of Law 56-5-2945, sir?

7 A Yes, sir.

8 Q Okay. And that's the controlling statute that lays out
9 what the State has to prove beyond a reasonable doubt and
10 what the penalties are?

11 A Yes, sir.

12 Q Okay. Is it, is it your understanding that a person
13 charged with that, there's a separate videotaping
14 requirement as to both the incident site and breath testing
15 site for people charged with Felony DUI?

16 A Yes.

17 Q Okay. And if the State does not -- well, tell me,
18 first of all, what that videotaping requirement includes if
19 you could?

20 what does the State have to record?

21 A They have to record the person's action at the scene --

22 Q Okay.

23 A -- with their videorecorder to include, at this time, I
24 think it includes the Miranda rights and things of that
25 nature.

Richard Whelchel - Direct examination
by Mr. Brough

1 Q Okay. And does it also include the field sobriety
2 tests, sir?

3 A Yes, sir.

4 Q Okay. And the failure to do that, absent an excuse
5 under the second section of the statute, would result in
6 dismissal of the case, is that correct?

7 A Can result in dismissal, yes, sir.

8 Q Okay. And would it be fair to say that there is an
9 exception for accidents?

10 A Yes, sir.

11 Q Okay. And, in an accident, you don't necessarily have
12 to submit an affidavit, is that correct?

13 A I don't, I don't think so, yes, sir.

14 Q Okay. But that as soon as videotaping is practical to
15 start that it's suppose to start?

16 would that be a fair interpretation?

17 A Yes, sir.

18 Q Okay. Okay. If I can, I'm gonna hand you this.

19 I'll have this marked just for ID as Applicant's 6.

20 (WHEREUPON, the Code of Laws was marked as Applicant's
21 Exhibit No. 6 for identification purposes only at this
22 time.)

23 Q I show you what's been marked for ID as Applicant's 6.

24 Is that just a copy of the statute under 56-5-2953,
25 sir?

Richard Welchel - Direct examination
by Mr. Brough

1 A Yes, sir.

2 Q Okay. Now, in this case, you filed a motion for
3 discovery in this case, sir?

4 A Yes, sir.

5 Q Okay. And you do that in every case I'm assuming?

6 A Yes, sir.

7 Q And when you filed that motion, when the State responds
8 to that motion, do they give you anything by which to keep
9 track of what they've given you?

10 They give you a affidavit detailing what they've
11 provided to you?

12 A They give you a coversheet --

13 Q Okay.

14 A -- that they fill out.

15 Q All right. And I'm gonna show you Applicant's Exhibits
16 marked for ID 2, 3, and 4.

17 A You want me to look at 5 too?

18 I have that one.

19 Q Well, just, if you could, just 2 through 4. Put 5
20 aside for a minute.

21 A Okay.

22 Q Would it, would it be fair to say that those are the
23 coversheets that you're referring to detailing what had been
24 provided to you?

25 A They look like the ones that would be in my file and

Richard Whelchel - Direct examination
by Mr. Brough

1 they have Mr. Thilavanh's name on them, yes, sir.

2 MR. BROUGH: Okay. At this time we'd move Applicant's
3 2 through 4 into evidence.

4 THE COURT: Any objection?

5 MR. MITCHELL: No objection.

6 THE COURT: Without objection they'll be received into
7 evidence as marked.

8 (WHEREUPON, Applicant's Exhibit Nos. 2 through 4 were
9 received into evidence at this time.)

10 Q All right. Mr. Whelchel, in looking through
11 Applicant's 2, 3, and 4, is there any, any markings on any
12 of there indicating that an in-car video was produced, sir?

13 A No, sir.

14 Q Do you---

15 A Not on, not on No. 2, not on No. 3, and No. 4 says
16 failure to video affidavit.

17 Q Okay. And on No. 4, on the failure to video affidavit,
18 is this the document, to the best of your recollection, that
19 was provided behind that on the one page as Applicant's 5?

20 A Yes, sir.

21 MR. BROUGH: Okay. And we move Applicant's 5 into
22 evidence.

23 THE COURT: Any objection?

24 MR. MITCHELL: No objection.

25 THE COURT: Without objection it will be received as

Richard Welch - Direct examination
by Mr. Brough

1 marked.

2 (WHEREUPON, Applicant's Exhibit No. 5 was received into
3 evidence at this time.)

4 THE COURT: You may proceed.

5 Q Okay. And, and just in order to be clear, on
6 Applicant's 4, the failure to video affidavit, you testified
7 that Applicant's 5 was that failure to video affidavit that
8 was attached to Applicant's 4 when you received it?

9 A Say that again. I'm sorry.

10 Q Okay. Applicant's 4 had -- you said had a failure to
11 video affidavit that was disclosed to you?

12 A Yes, sir.

13 Q And Applicant's 5 is that failure to video affidavit --

14 A Yes, sir.

15 Q -- correct?

16 And Applicant's 5 deals with the breath testing site,
17 correct?

18 A It does.

19 Q Okay. So that does not relate to the incident site at
20 all?

21 A No, sir.

22 Q Okay. At any point in time do you recall receiving an
23 in-car video in this case?

24 A No, sir.

25 Q Do you recall receiving a failure to video affidavit

Richard Whelchel - Direct examination
by Mr. Brough

- 1 relating to the incident site video?
- 2 A No, sir.
- 3 Q Okay.
- 4 A There may be one in my file, but I don't, I don't
- 5 recall it.
- 6 Q Okay. Do you, do you---
- 7 A I don't, I don't think there is one.
- 8 Q You don't think there is one?
- 9 A I'm sure there's not one.
- 10 Q Okay. Now, were you present during Trooper Siebel's
- 11 testimony?
- 12 A Yes, sir.
- 13 Q Okay. In light of hearing his testimony that
- 14 Mr. Thilavanh was mobile, could have been moved, and that he
- 15 could have recorded those tests, do you believe that the
- 16 state was in violation of 56-5-2953 relating to the ability
- 17 to provide a copy of the incident site video recording, the
- 18 field sobriety tests, arrest, and Miranda?
- 19 A I think that would be an issue for the judge at the
- 20 time.
- 21 Q Okay.
- 22 A I knew that there wasn't a video --
- 23 Q Okay.
- 24 A -- and I talked to Mr. Thilavanh about there not being
- 25 a video.

Richard Whelchel - Direct examination
by Mr. Brough

1 Q Okay.

2 A And I told him that there was a motion that we could
3 file in this case based on there not being a video.

4 Q Okay. If you filed that motion and that motion was
5 successful, what would of happened to the Felony DUI case?

6 A It would have been dismissed I believe.

7 MR. BROUGH: Okay. No further questions.

8 THE COURT: Mr. Mitchell, your witness.

9 CROSS-EXAMINATION

10 BY MR. MITCHELL:

11 Q Morning, Mr. Whelchel.

12 A Morning.

13 Q Do you recall becoming involved in Mr. Thilavanh's
14 case?

15 A Yes, sir.

16 Q Have you gone over your file and have you reviewed your
17 file?

18 A Yes, sir.

19 Q Now, you went over the charges with him, that he was
20 charged with --

21 A Yes, I did.

22 Q -- as I assume you would with every client?

23 Did you explain what the State would have to prove in
24 order to convict him?

25 A Yes, sir.

Richard Whelchel - Cross-examination
by Mr. Mitchell

1 Q Did you advise him -- you advised him of the potential
2 penalties in the case?

3 A I did.

4 Q That he could face 25 years?

5 A Yes.

6 Q And Judge Cole or the plea judge also advised him of
7 that?

8 A He did.

9 Q Now, you made a discovery motion in this case, isn't
10 that right?

11 A Yes.

12 Q And included in that discovery that you received from
13 the State was the affidavit explaining why there was no
14 video recording of the sobriety tests?

15 A Yes, at the breath site.

16 Q Okay. At the breath site. Right.

17 And you went over this with the Applicant?

18 A Yes, sir.

19 Q And he understood that you could file a motion to
20 dismiss the case based on failure to have a video recording?
21 Isn't that right?

22 A Yes.

23 Q You've handled DUI cases before in the past, haven't
24 you?

25 A Yes.

Richard Welchel - Cross-examination
by Mr. Mitchell

1 Q Have you -- you've dealt with DUI cases resulting in
2 death also?

3 A Yes, sir.

4 Q Okay. Now, the State's evidence was fairly
5 overwhelming in this case?

6 There was no qualm about whether he had hit the victim,
7 isn't that right?

8 A There was never any question as far as I was concerned
9 about this case being a guilty plea.

10 Q So it was a -- you, you didn't entertain the thought of
11 taking this to trial?

12 A No, sir.

13 Q You thought this was a straight plea the entire way
14 through?

15 A Mr. Thilavanh made that clear.

16 Q That was -- I'm sorry. Go ahead.

17 A When I go and talk to a client I tell them about their
18 right to a trial and what happens at a trial and especially
19 somebody like Mr. Thilavanh who is not native to this
20 country, but later became a citizen. I tell them what
21 happens at a trial, what the procedures are, who has to go
22 first, and who has the burden of proof. There was never any
23 question, from the beginning of my representation to the
24 end, that Mr. Thilavanh did not want a trial.

25 Q So you believed all along that it was in his best

Richard Whelchel - Cross-examination
by Mr. Mitchell

1 interest to plead guilty?

2 A Yes, sir.

3 Q And that would be -- that would show the Court that
4 he's admitted his culpability in the case, and that would
5 hope -- you would hope for a lesser sentence because of
6 that?

7 A Yes, I mean you can see that in the -- in what I told
8 the Court. There was never, from the beginning of my
9 representation to the end, a situation like there are in
10 some clients that I have represented and represent that want
11 me to find a way out or tell me some story that is not
12 believable and doesn't jive with any of the facts as would
13 be presented by the State.

14 During my investigation I talked to Mr. Thilavanh. He
15 was up-front about what he had done and how he felt sorry
16 about it, and I told him that we had this opportunity and it
17 may or may not work, but it will ultimately be up to a judge
18 to decide and possibly would be appealed if it went our way,
19 that I'm sure the State would appeal it.

20 It was his decision to plead guilty and I agreed with
21 the decision. I told him about what I thought about the
22 strength of the case. I contacted that witness, I don't
23 remember his name now, but the fellow that was driving the
24 car in front of Mr. Thilavanh's --

25 Q Okay.

Richard Wheelchel - Cross-examination
by Mr. Mitchell

1 A -- and had, had avoided the fellow that was the victim
2 that was walking on the side of the street. I contacted
3 him. He wouldn't let me talk to the sons or he got mad when
4 I talked to the sons, I can't remember which, but he was
5 very adamant and would have made a very good witness for the
6 State, but bad witness for us.

7 Q So, in your opinion, he would of most likely been
8 convicted at trial?

9 A Yes, sir.

10 Q And you advised him about the issue of the videotaping?

11 A I told him that there was a problem there and there was
12 a motion we could make, and it might end up with the case
13 being dismissed, and it might not end up with the case being
14 dismissed, that I couldn't tell him which way it was gonna
15 go, that that was ultimately up to a judge, and possibly up
16 to an appellate panel after that.

17 Q So he made the decision, that you agreed with, not to
18 file that motion and to go ahead and plead guilty?

19 A Yes, sir.

20 Q Now, to the -- back to the videotape, you, you saw that
21 affidavit and you saw that it was marked exigent
22 circumstances.

23 Did you think that was an appropriate, appropriate
24 reason for the videotape not to be available to you?

25 A Yes, and I thought it would be, would be handled that

Richard Whelchel - Cross-examination
by Mr. Mitchell

1 way or that it would be ruled that way by the Court.

2 Q So you thought it was likely that the Court would rule
3 that the affidavit explaining that there was exigent
4 circumstances with EMS, fire, and witnesses, other troopers,
5 a pretty bad scene, that would of been a valid reason to
6 excuse the videotaping requirement?

7 A Yes, sir, I use to be a solicitor and I understand how,
8 how they respond to a scene where a, where a death is
9 involved and their priority is the preservation of whatever
10 persons are there and the scene itself.

11 Q Now, to the, to the statute, it's not an automatic
12 dismissal of the case if there's no affidavit?

13 A No, sir, I don't believe so.

14 Q It says, I think multiple times, that it's not alone a
15 ground for dismissal?

16 A No, sir.

17 Q And it also -- and the statute also says that the Court
18 can take into consideration the totality of the
19 circumstances?

20 A Yes, sir.

21 Q And that's -- plays into the exigent circumstances
22 obviously, right?

23 A Yes, sir.

24 MR. MITCHELL: One second.

25 THE COURT: Yes, sir.

Richard Welchel - Cross-examination
by Mr. Mitchell

1 (Pause.)

2 MR. MITCHELL: No other questions.

3 THE COURT: You may redirect, Mr. Brough, Mr. Brough.

4 MR. BROUGH: Thank you, Your Honor.

5 May it please the Court?

6 THE COURT: Yes, sir.

7 REDIRECT EXAMINATION

8 BY MR. BROUGH:

9 Q Mr. Welchel, the affidavit that Mr. Mitchell was
10 referring to that you were talking about about exigent
11 circumstances --

12 A No. 5.

13 Q -- No. 5.

14 A Yes, sir.

15 Q If you could please read on Applicant's 5 what those
16 exigent circumstances were listed as?

17 A Mr. Thilavanh was transported to Spartanburg Regional
18 Medical Center for a blood test ergo there is not a video of
19 the breath site.

20 Q Okay. So that affidavit actually only specifically
21 deals with the breath site?

22 A Yes.

23 Q Doesn't deal with the incident --

24 A Yes, sir.

25 Q -- the one we're talking about?

Richard Welchel - Redirect examination
by Mr. Brough

1 A Yes, sir.

2 Q Correct?

3 A Yes.

4 Q Are you familiar with the case of the Town of Mt.
5 Pleasant versus Treva Roberts, sir, 2001 South Carolina
6 Supreme Court case?

7 A Is that the cameras in the --

8 Q Yes, in, in---

9 A -- cameras in the cars case --

10 Q Yes, sir, and I believe---

11 A ---in Mt. Pleasant?

12 Q In that case, is it your understanding that failure to
13 comply with the videotaping statute results, results in a
14 per se dismissal of a DUI case?

15 A It did in those cases because they didn't have cameras
16 and didn't make efforts to have cameras.

17 Q I'm gonna show you if I can -- let me just have it
18 marked for ID as Applicant's 6.

19 THE COURT REPORTER: Seven.

20 MR. BROUGH: Seven.

21 (WHEREUPON, the case was marked as Applicant's Exhibit
22 No. 7 for identification purposes only at this time.)

23 Q I show you Applicant's 7.

24 Do you agree with me that's the case we were referring
25 to, sir?

Richard Whelchel - Redirect examination
by Mr. Brough

1 A Yes, sir.

2 Q Okay. If I could direct your attention to the second
3 to last page of Applicant's 7 on the printout, the last
4 paragraph, I believe, approach, on the right.

5 If you could read that language for me, sir?

6 A The last paragraph?

7 Q Yes, sir.

8 A As evidenced by this Court's decision in Suchenski, the
9 Legislature clearly intended for per se dismissal in the
10 event a law enforcement agency violates the mandatory
11 provision of Section 56-5-2953.

12 Q Okay.

13 A No.

14 Q That's far enough.

15 A Okay.

16 Q Okay. So were you aware of that case at the time that
17 you were representing Mr. Thilavanh?

18 A I believe so.

19 Q Okay. And it's correct Mr. Thilavanh got 20 years in
20 prison on the Felony DUI charge?

21 A Yes, sir.

22 Q Okay. And the maximum sentence on that is 25 years?

23 A Yes, sir.

24 Q And had the Court ruled in your favor on the motion, it
25 would of been an outright dismissal, correct?

Richard Welchel - Redirect examination
by Mr. Brough

1 A I assume so, yes.

2 Q All right. Thank you.

3 No further questions.

4 THE COURT: Mr. Mitchell, you may recross.

5 MR. MITCHELL: Yes, briefly.

6 RE CROSS EXAMINATION

7 BY MR. MITCHELL:

8 Q That Town of Mt. Pleasant case, that came out
9 July 2011, isn't that right?

10 A It did.

11 Q The incident occurred September 2010?

12 A Yes.

13 Q And then to the statute, at the very end of the
14 statute, it states that, and I'm gonna read directly from
15 it, nor do the provisions of this section prohibit the
16 person from offering evidence relating to the arresting law
17 enforcement officer's failure to produce the video
18 recording.

19 So even if he didn't specifically write out exigent
20 circumstances with the scene, he could of been later called
21 to testify to that effect.

22 Isn't that right?

23 A Yes.

24 MR. MITCHELL: Okay. No further questions.

25 THE COURT: Mr. Brough.

1 MR. BROUGH: Briefly for the record, Your Honor.

2 I'd like to point out that the transcript on the plea
3 record took place on August the 10th, 2011, which was
4 after the decision in the Mt. Pleasant case, just for the
5 record, Your Honor.

6 THE COURT: Well, okay. Thank you.

7 MR. BROUGH: Thank you, Your Honor. That's the
8 Applicant's case.

9 THE COURT: You may step down.

10 Applicant have any other witnesses?

11 MR. BROUGH: No, Your Honor. That's our showing.

12 THE COURT: State wish to call any witnesses?

13 MR. MITCHELL: No, Your Honor.

14 THE COURT: All right. Hear from you, Mr. Brough.

15 MR. BROUGH: Yes, sir.

16 THE COURT: Mr. Brough, I have not pulled out the
17 statute. Just for my edification because I will read it, is
18 there any timeframe or time requirements of when the
19 affidavit has to be produced?

20 MR. BROUGH: No, Your Honor. There is no timeframe as
21 to when the affidavit has to be produced.

22 THE COURT: It would just be -- have to be produced at
23 or before a hearing on a motion to dismiss?

24 In other words, it could be produced once the motion
25 was made?

1 MR. BROUGH: That's correct, Your Honor. The only
2 thing I would indicate is, is that under our case management
3 system, that I'm sure Your Honor is aware, that discovery is
4 required to be provided to the defense by the time of the
5 initial appearance.

6 THE COURT: And that is---

7 MR. BROUGH: If not, it could---

8 THE COURT: That's---

9 MR. BROUGH: ---be subject to a---

10 THE COURT: That's continuing requirements. The
11 affidavit didn't exist, you can't produce it.

12 What I'm just asking, isn't it possible that an
13 affidavit could be produced at or during the hearing on the
14 motion to dismiss?

15 It wouldn't violate the statute. If it didn't exist
16 before it was produced, it wouldn't of had to been produced.

17 MR. BROUGH: Your Honor, I guess my concern is, is that
18 based on the trooper's testimony, it seems like there might
19 of been a video that wasn't produced as well. So I mean I
20 don't know if it's a situation---

21 THE COURT: I don't know if I heard that. But that's
22 for the proof. I'll take a look at that.

23 MR. BROUGH: Yes, sir.

24 THE COURT: But I just was trying to -- I had not read
25 the statute, and, as I recall, there was not a requirement

1 in the statute as to when that affidavit had to be produced,
2 and my understanding is it could be produced up to or at the
3 hearing on the question of any motion filed concerning it.

4 MR. BROUGH: I, I would agree that it could be provided
5 if there was a statutorily legitimate reason, which would,
6 we would argue, that was not based on the trooper's
7 testimony.

8 THE COURT: Okay. Well, I, I understand that's your
9 argument, argument then.

10 MR. BROUGH: Yes, sir.

11 THE COURT: I didn't meant to cut you short on the
12 remainder of your argument.

13 Anything else you want to make the Court aware of?

14 MR. BROUGH: Your Honor, that would be our showing.

15 It would be our position that the, the failure to make
16 the motion to dismiss, based upon the trooper's testimony,
17 what could happen, is essentially per se unreasonable and
18 not something that could of been considered trial strategy
19 in this case. I mean it's a situation between a case going
20 away completely versus a situation where you're pleading to
21 something that carries up to 25 years.

22 Clearly my client testified he was not aware of the
23 videotaping provisions. I don't know---

24 THE COURT: There's a, there's a split on the testimony
25 on that.

1 MR. BROUGH: There is a split on the testimony, but
2 given the, the complicated nature of the DUI provisions that
3 are out there and the law, I think there's a number of
4 attorneys that need refreshment on it. To hold him to be
5 aware of that on his own---

6 THE COURT: Well, it's---

7 MR. BROUGH: ---I think is unreasonable.

8 THE COURT: It is an evolving and ever changing area of
9 the law.

10 MR. BROUGH: Yes, Your Honor. Yes, sir.

11 THE COURT: All right.

12 Yes, sir.

13 MR. MITCHELL: Your Honor, it's our position that the
14 Applicant is not met his burden of proof here. I think
15 counsel accurately represented -- accurately advised
16 Applicant of the applicable law at the time.

17 I think there's some credibility issues on Applicant's
18 case with what he testified today and what he discussed with
19 his attorney at that time. I think that the officer could
20 of always been called back like he just mentioned. He could
21 of been called back and that's straight from that last line
22 of the statute, that he could of come and testified to all
23 of the exigent circumstances.

24 I don't think there was any testimony that there was a
25 video recording of the sobriety test, that he did not say

1 that in his testimony here today. I think, even if you did
2 find error, there would be no prejudice as totality of the
3 circumstance was legitimate and reason not to make that
4 motion to dismiss. I'd say there's overwhelming evidence of
5 guilt, and the blood alcohol level of the witnesses on the
6 scene, his running from the scene initially even though he
7 did come back, I think that all goes towards guilt and we
8 believe that the conviction should be -- that the Applicant
9 is not entitled to a new trial.

10 THE COURT: All right. Thank you very much. I'll take
11 the matter under advisement.

12 MR. BROUGH: Your Honor, may I respond just briefly to
13 his argument just for the record?

14 THE COURT: Yes, sir, certainly.

15 MR. BROUGH: As to the exigent circumstances, it would
16 be our position that Trooper Siebel did testify that Mr.
17 Thilavanh was mobile. Whether he could walk or stumble I
18 think was an issue, but that he was mobile, could be moved,
19 that the camera could of been moved.

20 So, in light of any layout of the wreck scene, it was a
21 situation which he could have been put in front of that
22 camera. He had no testimony as to whether or not the camera
23 was not working and any efforts made to maintain it nor did
24 he have any information about any other circumstance such as
25 my client needing emergency medical treatment. In fact, he

1 was on the scene.

2 So I don't think any of those statutory exceptions
3 applies. I just wanted to make that clear.

4 THE COURT: I understand that's your argument.

5 MR. BROUGH: Yes, sir.

6 THE COURT: Okay. Thank you.

7

8 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 18th day of September, 2014.

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

June 10th, 2015



PAMELA E. GREEN, Court Reporter



**SOUTH CAROLINA LAW ENFORCEMENT DIVISION
AFFIDAVIT FOR FAILURE TO PRODUCE A
BREATH SITE VIDEO RECORDING**



I. I hereby certify that I cannot produce a video recording from the breath test site because:

- ☐ At the time of the person's arrest or probable cause determination, the video recording equipment or breath test device at the breath test site was in an inoperable condition and reasonable efforts have been made to maintain the equipment in an operable condition; and, there was no other operable breath test facility available in the county. Operable breath test facility means a site with both an operable breath test device and operable video recording equipment.
- ☐ The person needed emergency medical treatment.
- ☒ Exigent circumstances existed or other valid reasons based on the totality of the circumstances existed and are outlined below.

Mr. Thilavank was transported to Spartanburg Regional Medical Center for a blood test, ergo there is not a video of the breath site.

NOTE: Only complete this section if you are able to video record the test but are unable to video record the 20-minute waiting period.

II. I hereby certify that I cannot produce a video recording of the person's conduct during the 20-minute pre-test waiting period because it was physically impossible due to the circumstances outlined below:

Addie Thilavank
Subject's Name

South Carolina Highway Patrol
Arresting Agency

5744774
Ticket/Case Number

J.M. Seibel
Arresting Officer's Name (Print)

J.M. Seibel
Arresting Officer's Signature

8-7-11
Date of Signature

STATE OF SOUTH CAROLINA)
County of *Spartanburg*)

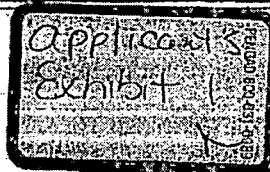
Sworn to and subscribed to me this *8* day of *August*, 20*11*

Wendy A. Howell
Notary Public for South Carolina

Wendy Howell
Notary Name (Print)

8-8-12
My commission expires

SLED Forensic Form # FCS 019, January 2005





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AFFIDAVIT FOR FAILURE TO PRODUCE A
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Addie Thilavanh
Subject's Name

South Carolina Highway Patrol
Arresting Agency

E-744774
Ticket/Case Number

J.M. Seibel
Arresting Officer's Name (Print)

J.M. Seibel
Arresting Officer's Signature

8-7-11
Date of Signature

STATE OF SOUTH CAROLINA)

County of Spartanburg

Sworn to and subscribed to me this 8 day of August, 2011

Wendy A. Howell
Notary Public for South Carolina

Wendy Howell
Notary Name (Print)

8-8-12
My commission expires

STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

COUNTY OF SPARTANBURG)

SEVENTH JUDICIAL CIRCUIT

INDICTMENT NOS: 10.6712

WARRANT NOS: E-744774

THE STATE OF SOUTH CAROLINA)

AFFIDAVIT OF SERVICE

v.)

DISCOVERY MATERIAL

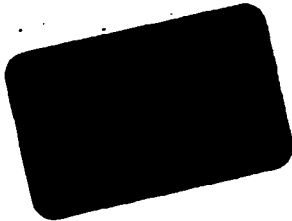
(ADDITIONAL)

ADDIE THILAVANH,)
_____)

PERSONALLY APPEARED BEFORE ME the undersigned deponent who being duly sworn, says that she copied/served the following materials on the defense:

One (1) CD containing Additional Discovery dated 07/19/2011- 246 pages
Crime Scene/Autopsy Photos (152 pages)
Coroner's File/Autopsy Report - (94 pages)
Dispatch Recordings from EMS, File, Sheriff, Telephone, as well as dispatch reports

I, Richard Whelchel, attorney for the defendant(s) or his/her designee, have reviewed copies of the above-referenced documents and accept them as the response to the Rule 5/Brady Motion in this matter.



Seventh Circuit Solicitor's Office

Defense Attorney or Designee

7-20-11

Sworn to before me this _____
 day of _____, 20____.

Notary Public for South Carolina

My Commission Expires: _____

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

The State of South Carolina,)
v.)
Addie Thilavanh)
Defendant.)

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

BJB

AFFIDAVIT OF DISCOVERY

Indictment No(s):

Warrant No(s):

10.6712

E744774

PERSONALLY APPEARED BEFORE ME, the undersigned deponent who being duly sworn, says that he/she copied the following materials and provided same to the Defendant's attorney of record by:

☒ HARD COPY; ☐ ELECTRONICALLY (e-mail); ☐ MEDIA (CD, DVD)

DOCUMENT	Page No.	DOCUMENT	Page No.
☐ Warrant(s) or Ticket(s)		☐ Forensic Report(s) (ID Reports)	
☐ Incident Report(s)		☐ Evidence Sheet(s)	
☐ Investigation Report(s)		☐ Photograph(s)	
☐ Supplemental Report(s)		☐ Line-up(s)	
☐ Waiver of Rights Form(s)		☐ Video/DVD	
☐ Voluntary Statement(s)		☐ SLED Request Form(s)	
☐ Witnesses Written Statement(s)		☐ Bond Sheet	
☐ Defendant's NCIC (Rap)		☐ Hospital Records	
☐ Consent to Search Form(s)		☐ EMS Records	
☐ Search Warrant and Return		☐ Mug Shot	
☐ Drug Report(s)		☐ Driver Records	
☐ SLED Lab Report(s)		☐ Affidavit of Photograph Identification	
☐ Booking Report(s)			
☐ Solicitor's Reciprocal Rule 5			

☒ Other

MAIT report pgs 1-11

TOTAL COPIED/NUMBERED: 11

DATED: 2-7-11

I, Richard Whelchel, attorney for the Defendant(s) or his/her designee, have reviewed the above-referenced Affidavit and/or documents and accept them as the response to the Rule 5/Brady Motion in this matter. I also accept service of the Solicitor's Reciprocal Rule 5.

Signed/Accepted this 7 day of FEB, 2011.

Donald S. Hays
Attorney or Designee

Wendy A. Howell
SOLICITOR'S OFFICE

SWORN to before me this _____ day

of _____, 20____

Notary Public for South Carolina
My commission expires: _____



STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

The State of South Carolina,

AFFIDAVIT OF DISCOVERY

Indictment No(s): 10.6712, 10.6712A

Warrant No(s): E-744774

^{v.}
Iddie Thilavanh

Defendant.

PERSONALLY APPEARED BEFORE ME, the undersigned deponent who being duly sworn, says that he/she copied the following materials and provided same to the Defendant's attorney of record by:

☒ HARD COPY; ☐ ELECTRONICALLY (e-mail); ☐ MEDIA (CD, DVD)

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☐ Defendant's NCIC (Rap)			
☐ Consent to Search Form(s)			
☐ Search Warrant and Return			
☐ Drug Report(s)			
☐ SLED Lab Report(s)			
☐ Hospital Lab Report(s)			
☐ Solicitor's Reciprocal Rule 5			

☒ Other

Failure to Video Affidavit - pg.

TOTAL COPIED/NUMBERED: 1 DATED: 8-8-11

I, R. Whelchel, attorney for the Defendant(s) or his/her designee, have reviewed the above-referenced Affidavit and/or documents and accept them as the response to the Rule 5/Brady Motion in this matter. I also accept service of the Solicitor's Reciprocal Rule 5.

Signed/Accepted this 9 day of Aug, 2011

Donald E. Hest
Attorney or Designee

CBoone / BTB
SOLICITOR'S OFFICE

SWORN to before me this 8 day

of Qua, 2011.

Aditya B Bhowmik

Notary Public for South Carolina

My commission expires 1-3-2010



**SOUTH CAROLINA LAW ENFORCEMENT DIVISION
AFFIDAVIT FOR FAILURE TO PRODUCE A
BREATH SITE VIDEO RECORDING**



I. I hereby certify that I cannot produce a video recording from the breath test site because:

- ☐ At the time of the person's arrest or probable cause determination, the video recording equipment or breath test device at the breath test site was in an inoperable condition and reasonable efforts have been made to maintain the equipment in an operable condition; and, there was no other operable breath test facility available in the county. Operable breath test facility means a site with both an operable breath test device and operable video recording equipment.
- ☐ The person needed emergency medical treatment.
- ☒ Exigent circumstances existed or other valid reasons based on the totality of the circumstances existed and are outlined below.

Mr. Thilavank was transported to Spartanburg Regional Medical Center for a blood test, ergo there is not a video of the breath site.

NOTE: Only complete this section if you are able to video record the test but are unable to video record the 20-minute waiting period.

II. I hereby certify that I cannot produce a video recording of the person's conduct during the 20-minute pre-test waiting period because it was physically impossible due to the circumstances outlined below:

Addie Thilavank
Subject's Name

South Carolina Highway Patrol
Arresting Agency

E-744774
Ticket/Case Number

J.M. Seibel
Arresting Officer's Name (Print)

J.M. Seibel
Arresting Officer's Signature

8-7-11
Date of Signature

STATE OF SOUTH CAROLINA
County of Spartanburg

Sworn to and subscribed to me this 8 day of August, 2011

Wendy A. Howell
Notary Public for South Carolina

Wendy Howell
Notary Name (Print)



8-8-12
My commission expires



LEXSTAT S.C. CODE SECTION 56-5-2953

SOUTH CAROLINA CODE OF LAWS ANNOTATED BY LEXISNEXIS(R)

*** This document is current through all legislation enacted in the 2010 session ***

*** The most current annotation is dated March 16, 2011 ***

TITLE 56. MOTOR VEHICLES
CHAPTER 5. UNIFORM ACT REGULATING TRAFFIC ON HIGHWAYS
ARTICLE 23. RECKLESS HOMICIDE; RECKLESS DRIVING; DRIVING WHILE UNDER THE INFLUENCE OF
INTOXICATING LIQUOR, DRUGS OR NARCOTICS

GO TO SOUTH CAROLINA ARCHIVE DIRECTORY

S.C. Code Ann. § 56-5-2953 (2010)

§ 56-5-2953. Incident site and breath test site video recording.

(A) A person who violates *Section 56-5-2930*, *56-5-2933*, or *56-5-2945* must have his conduct at the incident site and the breath test site video recorded.

(1)(a) The video recording at the incident site must:

- (i) not begin later than the activation of the officer's blue lights;
- (ii) include any field sobriety tests administered; and

(iii) include the arrest of a person for a violation of *Section 56-5-2930* or *Section 56-5-2933*, or a probable cause determination in that the person violated *Section 56-5-2945*, and show the person being advised of his Miranda rights.

(b) A refusal to take a field sobriety test does not constitute disobeying a police command.

(2) The video recording at the breath test site must:

(a) include the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test;

(b) include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test; and

(c) also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period.

(3) The video recordings of the incident site and of the breath test site are admissible pursuant to the South Carolina Rules of Evidence in a criminal, administrative, or civil proceeding by any party to the action.

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of *Section 56-5-2930*, *56-5-2933*, or *56-5-2945*. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to *Section 56-5-2930*, *56-5-2933*, or *56-5-2945* if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road

blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

(C) A video recording must not be disposed of in any manner except for its transfer to a master recording for consolidation purposes until the results of any legal proceeding in which it may be involved are finally determined.

(D) SLED is responsible for purchasing, maintaining, and supplying all necessary video recording equipment for use at the breath test sites. SLED also is responsible for monitoring all breath test sites to ensure the proper maintenance of video recording equipment. The Department of Public Safety is responsible for purchasing, maintaining, and supplying all videotaping equipment for use in all law enforcement vehicles used for traffic enforcement. The Department of Public Safety also is responsible for monitoring all law enforcement vehicles used for traffic enforcement to ensure proper maintenance of video recording equipment.

(E) Beginning one month from the effective date of this section, all of the funds received in accordance with *Section 14-1-208(C)(9)* must be expended by SLED to equip all breath test sites with video recording devices and supplies. Once all breath test sites have been equipped fully with video recording devices and supplies, eighty-seven and one-half percent of the funds received in accordance with *Section 14-1-208(C)(9)* must be expended by the Department of Public Safety to purchase, maintain, and supply video recording equipment for vehicles used for traffic enforcement. The remaining twelve and one-half percent of the funds received in accordance with *Section 14-1-208(C)(9)* must be expended by SLED to purchase, maintain, and supply video recording equipment for the breath test sites. Funds must be distributed by the State Treasurer to the Department of Public Safety and SLED on a monthly basis. The Department of Public Safety and SLED are authorized to carry forward any unexpended funds received in accordance with *Section 14-1-208(C)(9)* as of June thirtieth of each year and to expend these carried forward funds for the purchase, maintenance, and supply of video recording equipment. The Department of Public Safety and SLED must report the revenue received under this section and the expenditures for which the revenue was used as required in the department's and SLED's annual appropriation request to the General Assembly.

(F) The Department of Public Safety and SLED must promulgate regulations necessary to implement the provisions of this section.

(G) The provisions contained in *Section 56-5-2953(A)*, (B), and (C) take effect for each law enforcement vehicle used for traffic enforcement once the law enforcement vehicle is equipped with a video recording device. The provisions contained in *Section 56-5-2953(A)*, (B), and (C) take effect for a breath test site once the breath test site is equipped with a video recording device.

HISTORY: 1998 Act No. 434, § 9; 2000 Act No. 390, § 23; 2003 Act No. 61, § 8; 2008 Act No. 201, § 11, eff February 10, 2009.

NOTES: Effect of Amendment

The 2008 amendment rewrote subsection (A) and substituted "video recording" for "videotape", "videotapes", and "videotaping" throughout.

NOTES:

LexisNexis (R) Notes:

CROSS REFERENCES.--Additional assessment, municipal court; remittance; disposition; annual audits, see *S.C. Code Ann. § 14-1-208*.

Suspension of license or permit or denial of issuance of license or permit to persons under the age of twenty-one who drive motor vehicles with certain amount of alcohol concentration, see *S.C. Code Ann. § 56-1-286*.

Driving with an unlawful alcohol concentration, see *S.C. Code Ann. § 56-5-2933*.

Implied consent to testing for alcohol or drugs; procedures; inference of DUI, see *S.C. Code Ann. § 56-5-2950*.

Incident site and breath site videotaping; admissibility as evidence; purchase and maintenance of videotaping equipment, see *S.C. Code Ann. § 56-5-2953*.

CASE NOTES

1. State trooper was the arresting officer because the trooper personally observed defendant's driving prior to a traffic stop, arrived at the scene simultaneously with a state transport officer who initiated the stop of defendant, pulled in behind the transport officer and approached just after defendant was removed from his vehicle, and, moreover, the trooper conducted the field sobriety test, determined defendant was impaired, and placed him under arrest for DUI. Thus, the trooper was the arresting officer responsible for meeting the statutory videotaping requirements of *S.C. Code § 56-5-2953(A)*. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503, 2004 S.C. App. LEXIS 345 (S.C. Ct. App. 2004).

2. Statutory requirements of *S.C. Code § 56-5-2953(B)* were satisfied where a state trooper, who arrested defendant for DUI, prepared an a sworn and certified affidavit that his videotaping equipment was not operating at the time of defendant's arrest, despite reasonable steps taken to repair it; testified at trial as to the preparation of the affidavit; and defense counsel used the affidavit in cross-examining the trooper. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503, 2004 S.C. App. LEXIS 345 (S.C. Ct. App. 2004).

3. Magistrate's refusal to dismiss a driving under influence case on the basis of the State's failure to provide defendant with a videotape of defendant's breath alcohol analysis test under *S.C. Code Ann. § 56-5-2953(B)* was proper, as the State met its obligation to produce and the "datamaster" ticket in the record showed the video was online and that defendant had access. *State v. Branham*, 2011 S.C. App. LEXIS 31 (Mar. 2, 2011).

4. In a case in which respondent's municipal court conviction for driving with an unlawful alcohol concentration was reversed by the circuit court based on the city's failure to comply with the videotaping requirements of *S.C. Code Ann. § 56-5-2953*, because the city did not seek a postjudgment ruling from the circuit court on the exceptions to the videotaping requirement in *§ 56-5-2953(B)*, this precluded further review of the applicability of the *§ 56-5-2953(B)* exceptions. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879, 2007 S.C. LEXIS 253 (S.C. 2007).

5. Trial court erred in suppressing defendant's breath test results, after officers gave defendant the implied consent warnings for felony driving under the influence but did not advise defendant of his right to refuse the breath test, because the trial court erred in reasoning the right of refusal to a breath test remained applicable in felony driving under the influence cases despite the enactment of *S.C. Code Ann. § 56-5-2946*. *State v. Cuevas*, 365 S.C. 198, 616 S.E.2d 718, 2005 S.C. App. LEXIS 149 (S.C. Ct. App. 2005).

6. State trooper was the arresting officer because the trooper personally observed defendant's driving prior to a traffic stop, arrived at the scene simultaneously with a state transport officer who initiated the stop of defendant, pulled in behind the transport officer and approached just after defendant was removed from his vehicle, and, moreover, the trooper conducted the field sobriety test, determined defendant was impaired, and placed him under arrest for DUI. Thus, the trooper was the arresting officer responsible for meeting the statutory videotaping requirements of *S.C. Code § 56-5-2953(A)*. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503, 2004 S.C. App. LEXIS 345 (S.C. Ct. App. 2004).

S.C. Code Ann. § 56-5-2953

7. Statutory requirements of S.C. Code § 56-5-2953(B) were satisfied where a state trooper, who arrested defendant for DUI, prepared an a sworn and certified affidavit that his videotaping equipment was not operating at the time of defendant's arrest, despite reasonable steps taken to repair it; testified at trial as to the preparation of the affidavit; and defense counsel used the affidavit in cross-examining the trooper. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503, 2004 S.C. App. LEXIS 345 (S.C. Ct. App. 2004).

8. Magistrate's refusal to dismiss a driving under influence case on the basis of the State's failure to provide defendant with a videotape of defendant's breath alcohol analysis test under S.C. Code Ann. § 56-5-2953(B) was proper, as the State met its obligation to produce and the "datamaster" ticket in the record showed the video was online and that defendant had access. *State v. Branham*, 2011 S.C. App. LEXIS 31 (Mar. 2, 2011).

9. Trial court erred in suppressing defendant's breath test results, after officers gave defendant the implied consent warnings for felony driving under the influence but did not advise defendant of his right to refuse the breath test, because the trial court erred in reasoning the right of refusal to a breath test remained applicable in felony driving under the influence cases despite the enactment of S.C. Code Ann. § 56-5-2946. *State v. Cuevas*, 365 S.C. 198, 616 S.E.2d 718, 2005 S.C. App. LEXIS 149 (S.C. Ct. App. 2005).

10. Trial court erred in suppressing defendant's breath test results, after officers gave defendant the implied consent warnings for felony driving under the influence but did not advise defendant of his right to refuse the breath test, because the trial court erred in reasoning the right of refusal to a breath test remained applicable in felony driving under the influence cases despite the enactment of S.C. Code Ann. § 56-5-2946. *State v. Cuevas*, 365 S.C. 198, 616 S.E.2d 718, 2005 S.C. App. LEXIS 149 (S.C. Ct. App. 2005).

OPINIONS OF ATTORNEY GENERAL

1. S.C. Code Ann. § 56-5-2953, [NO NUMBER IN ORIGINAL], 2003 S.C. AG LEXIS 49.



1 of 100 DOCUMENTS



Cited

As of: Jan 12, 2012

The Town of Mt. Pleasant, Appellant, v. Treva Roberts, Respondent.

Opinion No. 27005

SUPREME COURT OF SOUTH CAROLINA

393 S.C. 332; 713 S.E.2d 278; 2011 S.C. LEXIS 218

June 7, 2011, Heard

July 11, 2011, Filed

PRIOR HISTORY: [***1]

Appeal From Charleston County. J. C. Nicholson, Jr.,
Circuit Court Judge.

DISPOSITION: AFFIRMED AS MODIFIED.**CASE SUMMARY:**

PROCEDURAL POSTURE: Appellant town sought review of an order of the Charleston County Circuit Court (South Carolina), reversing and dismissing respondent motorist's conviction for driving under the influence (DUI), in violation of *S.C. Code Ann. § 56-5-2930* (2006), on the ground that the arresting officer's vehicle was not equipped with a video camera pursuant to *S.C. Code Ann. § 56-5-2953* (2006).

OVERVIEW: An officer observed the motorist driving erratically, conducted a traffic stop, and administered three field sobriety tests. The motorist was then arrested. There was no video recording of the initial traffic stop, field sobriety tests, or the arrest as neither the arrest officer nor the backup officer's vehicle was equipped with a video camera as required under *§ 56-5-2953*. Because the motorist timely served her notice of appeal on the municipal court, she met the procedural requirements of *S.C. Code Ann. § 14-25-95*; her failure to obtain a bond or pay the court ordered fine did not divest the circuit court of appellate jurisdiction obtained pursuant to *S.C. Code Ann. § 14-5-340* and *S.C. Const. art. V, § 11*. As to

the merits, the town's prolonged failure to equip its patrol vehicles with video cameras defeated the intent of the legislature; therefore, the town was not able to avoid its statutorily-created obligation to produce a videotape by repeatedly relying on *S.C. Code Ann. § 56-5-2953(G)*. Because the town failed to establish any statutory exception to excuse its noncompliance, the circuit court judge correctly reversed the motorist's DUI conviction and dismissed the charge.

OUTCOME: The court modified the judgment, and affirmed the judgment as modified.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures Evidence > Demonstrative Evidence > Visual Formats
[HN1] See *S.C. Code Ann. § 56-5-2953(A)(1)* (2006).

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures Evidence > Demonstrative Evidence > Visual Formats
[HN2] See *S.C. Code Ann. § 56-5-2953(G)*.

393 S.C. 332, *; 713 S.E.2d 278, **;
2011 S.C. LEXIS 218, ***

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures Evidence > Demonstrative Evidence > Visual Formats
[HN3] See S.C. Code Ann. § 56-5-2953(D).

Criminal Law & Procedure > Appeals > Procedures > Notice of Appeal Criminal Law & Procedure > Appeals > Right to Appeal > General Overview
[HN4] See S.C. Code Ann. § 14-25-95 (Supp. 2010).

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures Evidence > Demonstrative Evidence > Visual Formats
[HNS] See S.C. Code Ann. § 56-5-2953(B).

Criminal Law & Procedure > Appeals > Standards of Review > General Overview
[HN6] In criminal appeals from a municipal court, the circuit court does not conduct a de novo review; rather, it reviews the case for preserved errors raised to it by an appropriate exception. Therefore, an appellate court's scope of review is limited to correcting the circuit court's order for errors of law.

Governments > Legislation > Interpretation
[HN7] The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant. However, all rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. In ascertaining legislative intent, a court should not focus on any single section or provision but should consider the language of the statute as a whole. Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.

Governments > Legislation > Interpretation
[HN8] If a statute is ambiguous, courts must construe the terms of the statute. A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. In interpreting a statute, the language of the statute must be

read in a sense that harmonizes with its subject matter and accords with its general purpose. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Jurisdiction
[HN9] The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of appellate jurisdiction over the case, but it does not affect the court's subject matter jurisdiction.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Jurisdiction
[HN10] Pursuant to S.C. Code Ann. § 14-5-340 (1977), circuit judges may hear appeals from magistrates' courts and municipal courts to the court of general sessions and the court of common pleas, upon notice as required by law being given for the hearing of such appeals. Pursuant to S.C. Const. art. V, § 11, the circuit court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law.

Criminal Law & Procedure > Appeals > Procedures > Notice of Appeal Criminal Law & Procedure > Appeals > Procedures > Time Limitations
[HN11] Pursuant to S.C. Code Ann. § 14-25-95, a part is required to file a notice of appeal with the municipal court within ten days after sentence is passed or judgment rendered, or the appeal is considered waived. § 14-25-95. A party who fails to timely appeal or take any other timely action necessary to correct an error is procedurally barred from contesting the validity of the conviction.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Jurisdiction Criminal Law & Procedure > Appeals > Procedures > General Overview
[HN12] These two bond provisions of S.C. Code Ann. § 14-25-95 do not implicate jurisdiction as there is no temporal restriction in that sentence of the statute. Instead,

393 S.C. 332, *; 713 S.E.2d 278, **;
2011 S.C. LEXIS 218, ***

these provisions serve the purpose of insuring that an appellant will appear for the hearing before the circuit court. If an appellant fails to comply with these provisions, the municipality may issue a bench warrant to address any delinquency on the part of the appellant.

Civil Procedure > Justiciability > Mootness > General Overview

[HN13] A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. This is true when some event occurs making it impossible for the reviewing court to grant effectual relief.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures

Evidence > Demonstrative Evidence > Visual Formats

[HN14] The plain language of S.C. Code Ann. § 56-5-2953(B) (2006) provides that the failure to produce videotapes is a ground for dismissal if no exceptions apply. The videotaping provisions of § 56-5-2953 are mandatory and not optional. Subsection 56-5-2953(B) outlines several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements. Noncompliance is excusable: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances. Courts strictly construe § 56-5-2953 and find that a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a driving under the influence case.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures

Evidence > Demonstrative Evidence > Visual Formats

[HN15] A town's protracted failure to equip its patrol vehicles with video cameras, despite its priority ranking, defeats the intent of the Legislature and violates the statutorily-created obligation to videotape driving under the influence arrests under S.C. Code Ann. § 56-5-2953. Accordingly, the town should be able to continually evade its duty by relying on § 56-5-2953(G). Thus, the town's

failure to equip its patrol vehicles does not negate the application of the statutory exceptions in § 56-5-2953(B).

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > Blood Alcohol & Field Sobriety > Procedures

Evidence > Demonstrative Evidence > Visual Formats

[HN16] The South Carolina Legislature clearly intended for a per se dismissal of a driving under the influence (DUI) charge in the event a law enforcement agency violates the mandatory provisions of S.C. Code Ann. § 56-5-2953. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest, § 56-5-2953(B). The term "dismissal" is significant as it explicitly designates a sanction for an agency's failure to adhere to the requirements of § 56-5-2953. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of § 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance. Subsection 56-5-2953(G) is still viable and must be read in conjunction with § 56-5-2953(B) as these exceptions, under the appropriate factual circumstances, could operate to excuse a law enforcement agency's noncompliance due to the failure to equip a patrol vehicle with a video camera.

COUNSEL: Charles Mac Gibson, Jr., of Charleston, and Ira A. Grossman, of Mt. Pleasant, for Appellant.

Diedreich P. von Lehe, III, of Charleston, for Respondent.

JUDGES: JUSTICE BEATTY. TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

OPINION BY: BEATTY

OPINION

[*335] [*279] JUSTICE BEATTY: The Town of Mount Pleasant ("Town") appeals the circuit court's order reversing and dismissing Treva Roberts's municipal court conviction for driving under the influence ("DUI"). [*336] on the ground the arresting officer's vehicle was not equipped with a video camera pursuant to section 56-5-2953 of the South Carolina Code.¹ The Town contends [*280] the circuit court erred in: (1) ruling on the appeal as it was divested of appellate jurisdiction given Roberts failed to obtain a bond or pay her court-ordered fine prior to initiating her appeal; and (2) "narrowly construing" section 56-5-2953 to require the reversal of Roberts's DUI conviction and dismissal of the charge. We affirm as modified.

393 S.C. 332, *; 713 S.E.2d 278, **;
2011 S.C. LEXIS 218, ***

- 1 *S.C. Code Ann. § 56-5-2930* (2006).
- 2 *Section 56-5-2953* provides in relevant part:

[HN1] (A) A person who violates *Section 56-5-2930*, *56-5-2933*, or *56-5-2945* must have his conduct at [***2] the incident site and the breath test site videotaped.

(1) The videotaping at the incident site must:

(a)
begin
not
later
than
the
activation
of
the
officer's
blue
lights
and
conclude
after
the
arrest
of
the
person
for a
violation
of
Section 56-5-2930
, *56-*

5-2933
, or a
probable
cause
determination
that
the
person
violated
Section 56-5-2945
; and

(b)
include
the
person
being
advised
of
his
Miranda
rights
before
any
field
sobriety
tests
are
administered
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393 S.C. 332, *; 713 S.E.2d 278, **;
2011 S.C. LEXIS 218, ***

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At the time of the Defendant's arrest the vehicle I was operating had not been equipped with a videotaping device and therefore pursuant to Section 18 of Senate Bill 174 of 1998,⁵ [***4] the videotaping requirement regarding vehicles is not applicable.

S.C. Code Ann. § 56-5-2953 (2006). This section was amended effective February 10, 2009. Act No. 201, 2008 S.C. Acts 1682-85. Accordingly, we have cited to the 2006 Code as the amended statute is not applicable to the instant case.

I. Factual/Procedural History

On November 11, 2007, at approximately 1:00 a.m., Officer Bruce Burbage of the Town of Mount Pleasant's Police Department conducted a traffic stop of Roberts after observing her driving erratically. As a result of his initial observations, Officer Burbage conducted three field sobriety tests, on which he noted Roberts "performed pretty poorly."

Subsequently, Officer Burbage arrested Roberts for DUI and transported her to the Mount Pleasant Police Department [***3] where Roberts was offered, but refused, a breathalyzer test. There was no recording of the initial traffic stop, field sobriety tests, or the arrest as neither Officer Burbage's vehicle nor the backup officer's was equipped with a video camera.³

3 At the time of Roberts's arrest, the "best case scenario" was that only two of the Town's twelve police department vehicles on patrol that night were camera-equipped. According to the annual inventory records of the South Carolina Department of Public Safety, the Town in 2007 had a total of seven in-car camera systems, of which one was acquired in 2001 and the remaining six in 2002.

[*337] In response to Roberts's discovery motions,⁴ which included a request for production of the incident site videotape, the Town's prosecutor forwarded an "Affidavit for Failure to Produce Videotape" executed by Officer Burbage on October 16, 2009. The affidavit, a form generated by the Town, included a "checked" box that stated:

4 *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); Rule 5, SCRCrimP.

5 Section 18 provides in relevant part:

The provisions in Section 56-5-2953(A), (B), and (C) take effect for each law enforcement vehicle used for traffic enforcement as soon as the law enforcement vehicle used for traffic enforcement is equipped with a videotaping device.

Act No. 434, 1998 S.C. Acts 3236.

On October 30, 2009, a municipal court judge conducted a jury trial on Roberts's DUI charge. Prior to trial, Roberts moved to dismiss the charge based on Officer Burbage's failure to videotape the entire arrest pursuant to section 56-5-2953. Roberts asserted that section 56-5-2953 conferred upon her a statutory right to have the roadside arrest videotaped. Because Officer Burbage failed to comply with the statutorily-mandated procedure, Roberts claimed this violation warranted the dismissal of her DUI charge. The motion to dismiss was denied.

The Town relied on subsection (G) of the statute for the proposition that the videotaping requirement took effect only "once the law enforcement vehicle is equipped with a videotaping device."⁶ Because Officer Burbage's vehicle [***5] was not [*338] equipped with a video camera, the Town argued that the videotaping provisions of section 56-5-2953 were inapplicable and, thus, the failure to videotape [***281] Roberts's arrest did not warrant the dismissal of the DUI charge.⁷

6 Subsection (G) provides in pertinent part:

[HN2] The provisions contained in Section 56-5-2953(A), (B), and (C) take effect for each law enforcement vehicle used for traffic

393 S.C. 332, *; 713 S.E.2d 278, **;
2011 S.C. LEXIS 218, ***

enforcement once the law enforcement vehicle is equipped with a videotaping device.

Id. § 56-5-2953(G).

7 As will be discussed, this argument would be valid but for the Town's obvious intentional efforts to avoid complying with *section 56-5-2953*.

In support of her motion, Roberts called several law enforcement officers from Charleston, Berkeley, and Dorchester counties in an attempt to establish that the Town had fewer video cameras than other municipalities despite the Town's significantly higher number of DUI arrests.⁸ Given these statistics, Roberts argued that the Town had willfully avoided complying with the 1998 statute as it had not requested from the South Carolina Department of Public Safety (DPS) additional video cameras in response to the increasing number of DUI arrests. Roberts also offered [***6] evidence that the Town was financially able to purchase additional video cameras, but had chosen not to do so.⁹

8 According to records produced by the South Carolina Law Enforcement Division (SLED), the Town made 2,796 DUI arrests between 1998 and 2008. Based on these arrest records, the Town ranked first out of all municipalities for total DUI arrests. The Department of Public Safety used these statistics to determine the priority for issuing additional video cameras; thus, law enforcement agencies with the "highest ranking" for DUI arrests received priority in terms of the issuance of additional video cameras.

Despite these statistics, several nearby municipalities with fewer DUI arrests had received more video cameras from DPS than the Town, for example: (1) the City of Folly Beach made 162 DUI arrests and received 6 cameras; (2) the Town of Moncks Corner made 198 DUI arrests and received 13 cameras; and (3) the City of the Isle of Palms made 339 DUI arrests and received 13 cameras.

9 Roberts offered evidence that the Town had recently expended: (1) \$65,145 for the replacement of a "Town of Mt. Pleasant" sign at the Long Point Road Exit of I-526 East; (2) \$100,000 for a marketing firm's [***7] development of a new Town slogan and logo; (3) \$1,328,064.70 for the renovation of the "Farmer's Market" on Coleman Boulevard; and (4) \$6,000,000 for a parcel of property known as the "O.K. Tire Store," which was intended to be developed into a park.

The Town countered Roberts's arguments by claiming that DPS was solely responsible for providing the video cameras and, thus, the Town did not have a duty to request or [*339] purchase additional cameras in order to comply with the statute.¹⁰

10 In support of its claim, the Town referenced *subsection (D) of section 56-5-2953*, which states in relevant part:

[HN3] The Department of Public Safety is responsible for purchasing, maintaining, and supplying all videotaping equipment for use in all law enforcement vehicles used for traffic enforcement. The Department of Public Safety also is responsible for monitoring all law enforcement vehicles used for traffic enforcement to ensure proper maintenance of videotaping equipment.

Id. § 56-5-2953(D).

At the conclusion of the pre-trial hearing, the municipal court judge denied Roberts's motion to dismiss based on a "strict interpretation" of *section 56-5-2953*. In his written return, the judge concluded that "there [***8] is no requirement that the Town of Mount Pleasant obtain any video cameras and that the statute only provides what the Town must do once they get the video cameras on board." Further, the judge ruled that "*Section 56-5-2953(G)* indicated that the other provisions of [the statute] take effect . . . once the vehicle is equipped with a [videotaping] device."

Roberts was convicted and appealed her conviction to the circuit court, arguing the municipal court judge erred in denying her motion to dismiss the charge based upon the Town's failure to comply with the "mandatory" videotaping provisions of *section 56-5-2953*.

The Town moved to dismiss the appeal for lack of jurisdiction based on Roberts's failure to obtain a bond or pay the court-ordered fine prior to initiating the appeal. The Town contended the circuit court was without jurisdiction to rule on the appeal given Roberts did not comply with the procedural requirements of *section 14-25-95* of the South Carolina Code," which governs appeals from municipal court to circuit court.

11 *Section 14-25-95* provides:

[HN4] Any party shall have the right to appeal from the sentence

393 S.C. 332, *; 713 S.E.2d 278, **;
2011 S.C. LEXIS 218, ***

or judgment of the municipal court to the Court of Common Pleas of the county [***9] in which the trial is held. Notice of intention to appeal, setting forth the grounds for appeal, must be given in writing and served on the municipal judge or the clerk of the municipal court within ten days after sentence is passed or judgment rendered, or the appeal is considered waived. The party appealing shall enter into a bond, payable to the municipality, to appear and defend the appeal at the next term of the Court of Common Pleas or shall pay the fine assessed.

S.C. Code Ann. § 14-25-95 (Supp. 2010).

[**282] [***340] The circuit court judge issued a written order in which it reversed Roberts's DUI conviction and dismissed the charge. The judge initially determined that it had "subject matter jurisdiction" to hear the appeal. In so ruling, the judge found jurisdiction was vested in the circuit court when Roberts timely filed and served her notice of appeal as required by *section 14-25-95*. The judge further concluded that Roberts's "non-entry into a bond and non-payment of the fine assessed [did] not deprive [the court] of the subject matter jurisdiction." Additionally, the judge held that all issues with respect to the non-entry into a bond or non-payment of the fine were moot as Roberts had [***10] appeared at the hearing and paid her fine the day of the hearing.

As to the merits of Roberts's appeal, the judge specifically found that the videotaping requirements of *section 56-5-2953* were mandatory based on this Court's decision in *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007).¹² Interpreting *subsection (G)* of the statute, the judge concluded that this provision was "merely to provide a reasonable grace period for law enforcement agencies to equip their vehicles with video recording devices." The judge explained that to construe *subsection (G)* as proposed by the Town would permit law enforcement agencies to "successfully circumvent [the statute's videotaping requirements] *ad infinitum*" by not requesting video cameras from DPS.

¹² *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007) ("Section 56-5-2953 commands the arresting officer to videotape the individual during a DUI arrest.").

The judge also ruled that the Town's failure to produce a videotape of Roberts's conduct at the incident site

was not "excused" as none of the enumerated exceptions in *subsection (B) of section 56-5-2953* were satisfied.

13 *Id.* § 56-5-2953(B) [HN5] ("Failure by the [***11] arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to *Section 56-5-2930*, *56-5-2933*, or *56-5-2945* if [certain exceptions are met])."

[*341] The judge concluded that the Town's failure to comply with the videotaping requirements a decade after the enactment of *section 56-5-2953* was "unreasonable" and constituted a violation of the statute that warranted the reversal of Roberts's conviction and the dismissal of the DUI charge.

The Town appealed the circuit court's order to the Court of Appeals. This Court certified the case from the Court of Appeals pursuant to Rule 204(b), SCACR.

II. Discussion

A. Standard of Review

[HN6] "In criminal appeals from a municipal court, the circuit court does not conduct a *de novo* review; rather, it reviews the case for preserved errors raised to it by an appropriate exception." *City of Cayce v. Norfolk S. Ry. Co.*, 391 S.C. 395, 399, 706 S.E.2d 6, 8 (2011); see S.C. Code Ann. § 14-25-105 (Supp. 2010) ("There shall be no trial *de novo* on any appeal from a municipal court."). "Therefore, our scope of review is limited to correcting the circuit court's order for errors of law." *Suchenski*, 374 S.C. at 15, 646 S.E.2d at 880.

B. [***12] Appellate Jurisdiction

As a threshold matter, we must address the Town's jurisdictional challenge as any defect in the circuit court's appellate jurisdiction would necessarily affect this Court's jurisdiction to rule on the Town's appeal.

The Town asserts the circuit court judge erred in characterizing its jurisdictional challenge as one that implicated subject matter jurisdiction rather than appellate jurisdiction. The Town avers the circuit court judge did not have appellate jurisdiction to rule on Roberts's appeal given Roberts failed to either pay the court-ordered fine or obtain a bond prior to initiating her appeal to the circuit court. Under the Town's interpretation of *section 14-25-95*, the circuit court could only be vested with appellate jurisdiction [***283] if one of the above-listed prerequisites was satisfied.

Because our analysis of this issue and the Town's second issue is dependent upon our evaluation of the applicable [*342] statutes, we begin with an overview

393 S.C. 332, *; 713 S.E.2d 278, **;
2011 S.C. LEXIS 218, ***

of this state's well-established rules of statutory construction.

1.

[HN7] "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). [***13] When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant. *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). However, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (citation omitted).

In ascertaining legislative intent, "a court should not focus on any single section or provision but should consider the language of the statute as a whole." *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

[HN8] If the statute is ambiguous, however, courts must construe the terms of the statute. *Lester v. S.C. Workers' Comp. Comm'n*, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). [***14] "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006). In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

"Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993). Courts will reject a [*343] statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

2.

As an initial matter, we agree with the Town's argument that the circuit court judge erred in classifying the

jurisdictional challenge as one of subject matter jurisdiction. See *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 83 n.5, 529 S.E.2d 6, 8 n.5 (2000) [***15] ([HN9] "The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of 'appellate' jurisdiction over the case, but it does not affect the court's subject matter jurisdiction."); see also *State v. Brown*, 358 S.C. 382, 596 S.E.2d 39 (2004) (recognizing that failure to timely appeal a conviction from magistrate court does not implicate subject matter jurisdiction).

Clearly, the circuit court had subject matter jurisdiction to hear and determine Roberts's appeal from her municipal court conviction as the Legislature has specifically authorized it to do so. See *S.C. Code Ann. § 14-5-340* (1977) ([HN10] "Circuit judges may hear appeals from magistrates' courts and municipal courts to the court of general sessions and the court of common pleas, upon notice as required by law being given for the hearing of such appeals."); *S.C. Const. art. V, § 11* ("The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law.").

As for the circuit court's appellate jurisdiction, we [***16] find that Roberts properly met [***284] the prerequisites of section 14-25-95. [HN11] Pursuant to this Code section, Roberts was required to file her notice of appeal with the municipal court "within ten days after sentence is passed or judgment rendered, or the appeal is considered waived." *Id.* § 14-25-95. There is no dispute that Roberts timely filed her appeal with the municipal court. Having met this procedural prerequisite, the circuit court was vested with appellate jurisdiction to determine [*344] Roberts's appeal. Cf. *Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 224, 634 S.E.2d 59, 61 (Ct. App. 2006) ("A party who fails to timely appeal or take any other timely action necessary to correct an error is procedurally barred from contesting the validity of the conviction.").

Unlike the Town, we do not believe the circuit court was divested of appellate jurisdiction because Roberts failed to obtain a bond or pay her court-ordered fine prior to filing her notice of appeal with the municipal court. [HN12] These two provisions of section 14-25-95 do not implicate jurisdiction as there is no temporal restriction in that sentence of the statute. Instead, these provisions serve the purpose of insuring that an [***17] appellant will appear for the hearing before the circuit court. If an appellant fails to comply with these provisions, the municipality may issue a bench warrant to address any delinquency on the part of the appellant.

393 S.C. 332, *; 713 S.E.2d 278, **;
2011 S.C. LEXIS 218, ***

Finally, we note that Roberts appeared at the hearing and paid her fine; therefore, any related issue is moot. See *Linda Mc Company, Inc. v. Shore*, 390 S.C. 543, 557, 703 S.E.2d 499, 506 (2010) ([HN13] "A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. This is true when some event occurs making it impossible for the reviewing Court to grant effectual relief." (citations omitted)).

C. Reversal of DUI conviction/Dismissal of DUI charge

Having found that the circuit court was vested with appellate jurisdiction, we must next decide whether the Town's violation of the videotaping provisions of section 56-5-2953 warranted the reversal of Roberts's DUI conviction and the dismissal of the charge.

Although this is the specific question presented, we believe there is a more fundamental question to consider in analyzing section 56-5-2953: if the Legislature imposes a statutory obligation on the State to create evidence and provides [***18] a sanction for inexcusable noncompliance, does the State's failure to do so necessarily warrant a per se dismissal of the accused's case?

Up until this point, our appellate courts have affirmatively answered this question when a law enforcement agency inexcusably [*345] failed to videotape a DUI arrest with an existing video camera. In the instant case, the Town failed to create a videotape of Roberts's DUI arrest because the patrol vehicle had never been equipped with a video camera.

The Town argues the circuit court judge erred in construing section 56-5-2953 to require the dismissal of Roberts's DUI charge on the basis that the arresting officer's vehicle was not equipped with a video camera.

Applying the rules of statutory construction, the Town maintains that in promulgating section 56-5-2953 the Legislature clearly provided for instances where an incident site videotape would not be available as demonstrated by certain statutory exceptions.¹⁴ Furthermore, because the Legislature mandated in subsection (D) that DPS would supply the video cameras, the Town claims that it was not obligated to purchase or request additional videotape equipment; thus, its failure to equip Officer Burbage's [***19] vehicle with a camera rendered the mandatory provisions of section 56-5-2953 inapplicable pursuant to subsection (G).

¹⁴ See, e.g., *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004) (recognizing that law enforcement agency's failure to videotape a DUI arrest was excusable as the arresting officer sub-

mitted an affidavit that certified the videotape machine was inoperable at the time of the arrest).

The key case in the analysis of this issue is *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007). In *Suchenski*, the defendant was convicted in municipal court for driving with an unlawful alcohol concentration [**285] (DUAC). *Id.* at 14, 646 S.E.2d at 879. On appeal, the circuit court reversed the conviction based on the City of Rock Hill's failure to videotape the defendant's entire arrest as the arresting officer's camera "ran out of tape." *Id.* The circuit court did not address whether the arresting officer's failure to comply with section 56-5-2953 was excused pursuant to an exception in subsection (B) of the statute. *Id.* at 14, 646 S.E.2d at 880.

This Court affirmed the circuit court's decision. In so ruling, we found that any argument concerning the exceptions for noncompliance [***20] in section 56-5-2953(B) was not preserved as the circuit court had not ruled on this issue and the City of Rock Hill had not sought a post-judgment ruling regarding [*346] this issue. *Id.* at 16, 646 S.E.2d at 880. We also rejected the City of Rock Hill's contention that a violation of the videotaping statute should not result in dismissal of a charge if there was no showing of prejudice to the defendant. *Id.* at 16, 646 S.E.2d at 881. We found [HN14] the plain language of the statute provided that the "failure to produce videotapes would be a ground for dismissal if no exceptions apply." *Id.*

Although the decision in *Suchenski* indisputably established that the videotaping provisions of section 56-5-2953 are mandatory and not optional, we did not address whether the failure to comply with the statute could be excusable if the law enforcement vehicle was never equipped with a camera. Specifically, we were not required to assess the import of subsection (G) with respect to the statutory exceptions of subsection (B).

Subsection (B) of section 56-5-2953 outlines several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements. Noncompliance is excusable: (1) if the arresting [***21] officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances.

Our appellate courts have strictly construed section 56-5-2953 and found that a law enforcement agency's

393 S.C. 332, *; 713 S.E.2d 278, **;
2011 S.C. LEXIS 218, ***

failure to comply with these provisions is fatal to the prosecution of a DUI case. See *Suchenski*; 374 S.C. at 17, 646 S.E.2d at 881 (holding that "dismissal of the DUAC charge is an appropriate remedy provided by section 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions"); *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (S.C. Ct. App. filed 2011) (Shearouse Adv. Sh. No. 13 at 49) (recognizing the State's noncompliance with section 56-5-2953, which is not mitigated by a statutory exception, warranted dismissal; [***22] holding that video complied with section 56-5-2953(A) even though it did not capture a continuous full view of the accused at the incident site (citing *Suchenski*)).

[*347] Although our appellate courts have acknowledged these statutory "escape valves," they have so far considered their application only where a law enforcement agency failed to create a video recording of the DUI arrest because the video camera malfunctioned. Our courts, however, have not analyzed whether these exceptions apply where the law enforcement vehicle has never been equipped with a video camera as in the instant case.

Taking into consideration the purpose of section 56-5-2953, which is to create direct evidence of a DUI arrest, we find [HN15] the Town's protracted failure to equip its patrol vehicles with video cameras, despite its "priority" ranking, defeats the intent of the Legislature and violates the statutorily-created obligation to videotape DUI arrests. Accordingly, we do not believe that the Town should be able to continually evade its duty by relying on subsection (G) of section 56-5-2953. Thus, we hold that the Town's failure to equip its patrol vehicles does not negate the application of the statutory exceptions [***23] in subsection (B).

Under the specific facts of this case, we find the Town failed to satisfy any of the above-outlined statutory exceptions. Significantly, [***286] the Town conceded in municipal court and before the circuit court that the initial three exceptions did not apply and could not justify its failure to videotape Roberts's DUI arrest.

Thus, the only feasible exception is that there was a "valid reason" for the Town's failure to comply with the mandatory videotaping requirements. Although the Town did not explicitly reference this provision, it argued that Officer Burbage's patrol vehicle was not equipped with a video camera because DPS had not supplied the Town with a sufficient number of cameras and the Town was not obligated to expend funds to purchase the cameras.

As we interpret the circuit court judge's order, we do not discern a ruling that the Town was obligated to purchase the cameras with its own funds. Instead, the circuit

court judge imposed an obligation on the Town to request additional video cameras given the Town's "high ranking" for DUI arrests as compared to other municipalities.

[*348] Consequently, the question becomes whether the Town's failure to request additional video [***24] cameras constituted a "valid reason for the failure to produce the videotape based upon the totality of the circumstances." *Id.* § 56-5-2953(B). We find the Town's explanation is disingenuous given its significantly higher number of DUI arrests as compared to smaller municipalities.¹⁵ Moreover, the Town's interpretation of subsection (G) is nonsensical as the requirements of section 56-5-2953 could be circumvented in perpetuity if a law enforcement agency purposefully does not request additional video cameras.

15 It is interesting to note that the Town requested fifty additional cameras in May 2009 apparently after recognizing that its failure to videotape DUI arrests may severely impact the prosecution of its pending DUI cases. The Town's request was in response to a DPS survey, dated April 28, 2009, that stated in part, "The Department is glad to announce that the original requests have been fulfilled, and we have officially awarded over 3200 camera systems."

Admittedly, the Legislature was silent with respect to a time requirement for when vehicles must be equipped with video cameras. However, applying the rules of statutory construction, we find the Town's interpretation would defeat [***25] the legislative intent of section 56-5-2953 and the overall DUI reform enacted in 1998.

Finding that neither subsection (G) nor the statutory exceptions in subsection (B) excuse the Town's noncompliance with section 56-5-2953, the question becomes whether the failure to videotape a DUI arrest warrants a per se dismissal of the DUI case or whether, as the Town contends, the accused must establish that he or she was prejudiced.

As evidenced by this Court's decision in *Suchenski*, [HN16] the Legislature clearly intended for a per se dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. *Id.* § 56-5-2953(B) ("Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930 . . . if [certain exceptions are met]."). The term "dismissal" is significant as it explicitly [*349]

393 S.C. 332, *; 713 S.E.2d 278, **;
2011 S.C. LEXIS 218, ***

designates a sanction for an agency's failure to adhere to the requirements of *section 56-5-2953*.

Furthermore, [***26] it is instructive that the Legislature has not mandated videotaping in any other criminal context. Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of *section 56-5-2953* and, in turn, promulgated a severe sanction for noncompliance.

Thus, we hold that dismissal is the appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in *Suchenski*.

Our decision should in no way be construed as eradicating *subsection (G) of section 56-5-2953*. Instead, we emphasize that *subsection (G)* is still viable and must be read [**287] in conjunction with *subsection (B)* as these exceptions, under the appropriate factual circumstances, could operate to excuse a law enforcement agency's noncompliance due to the failure to equip a patrol vehicle with a video camera. For example, we can conceive of a scenario where a law enforcement agency establishes a "valid reason" for failing to create a video of the incident site by offering documentation that, [***27]

despite concerted efforts to request video cameras, it has not been supplied with the cameras from DPS.

III. Conclusion

In conclusion, the circuit court judge erred in classifying the Town's jurisdictional challenge as one involving subject matter jurisdiction. Because Roberts timely served her notice of appeal on the municipal court, she met the procedural requirements of *section 14-25-95*; thus, her failure to obtain a bond or pay the court-ordered fine did not divest the circuit court of appellate jurisdiction.

As to the merits, we find the Town's prolonged failure to equip its patrol vehicles with video cameras defeats the intent of the Legislature; therefore, the Town should not be able to avoid its statutorily-created obligation to produce a videotape by repeatedly relying on *subsection (G) of section 56-5-2953*. Because the Town failed to establish any statutory exception [**350] to excuse its noncompliance, we hold the circuit court judge correctly reversed Roberts's DUI conviction and dismissed the charge. Accordingly, we affirm as modified the decision of the circuit court judge.

AFFIRMED AS MODIFIED.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Addie Thilavanh, #347337,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2012-CP-42-4713

ORDER OF DISMISSAL

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This matter comes before this Court by way of an application for post-conviction relief filed November 12, 2012. Respondent filed its Return on March 3, 2014. Applicant filed an amended application on March 21, 2014. A hearing was convened at the Spartanburg County Courthouse on September 19, 2014, at which time Applicant was present in court and represented by Christopher D. Brough, Esquire. J. Clayton Mitchell of the South Carolina Attorney General's Office represented Respondent. Applicant testified on his own behalf. Also testifying was Applicant's plea counsel, Richard H. Whelchel, Esquire, and Trooper J.M. Seibel. The Court had before it the Spartanburg County Clerk of Court records; Applicant's South Carolina Department of Corrections records, the PCR application, Respondent's Return, Applicant's appellate records, and the guilty plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the November 2010 term of the Spartanburg County Grand Jury for felony DUI – death and reckless homicide (2012-GS-42-7712, count 1 and count 2). Applicant was represented by

Counsel Whelchel. On December 5, 2011, Applicant pleaded guilty to felony DUI – death¹. Applicant was sentenced by the Honorable J. Mark Hayes II to twenty (20) years' imprisonment.

Applicant filed a timely Notice of Appeal. The South Carolina Court of Appeals dismissed Applicant's appeal for failure to show any issue ruled upon by the trial court on November 23, 2011. The Court also construed several filings as a Petition for Rehearing, which they also denied on February 3, 2012. The Remittitur was returned on October 31, 2012.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in failing to move to dismiss the felony DUI charge pursuant to S.C. Code Ann. § 56-5-2953.
2. Ineffective assistance of counsel in failing to investigate and pursue Applicant's contention that the victim stepped into the roadway in front of Applicant's vehicle and thus caused the accident.
3. Involuntary guilty plea.

II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

Applicant's Testimony

Applicant testified he pled guilty to felony driving under the influence and was sentenced to twenty years' imprisonment. Applicant testified the victim was impaired and walked right in the road. Applicant proclaimed he was not drunk despite registering a .23 blood alcohol level after a blood test was conducted at Spartanburg Regional Medical Center. Applicant testified there was no video taken from the scene of him performing field sobriety acts. Applicant took issue with the three eyewitness statements admitted at the guilty plea hearing ultimately disagreeing with their accounts of the incident.

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¹ The charge of reckless homicide was *not* proessed.

Trooper J.M. Seibel's Testimony

Trooper Seibel testified he was the primary investigating officer of the incident. He testified he received the call that there had been a serious accident. He testified he arrived to a chaotic scene where several Emergency Medical Service (EMS) personnel had already arrived. Trooper Seibel testified EMS was dealing with what at that time was a potential fatality. Numerous firefighters were on the scene assisting EMS and other troopers. Trooper Seibel testified that the scene had not been secured as many eyewitnesses had pulled off of the road directly after the incident to provide help. He also testified that traffic from the adjacent road was still flowing which was a safety concern.

Trooper Seibel testified he made the determination that the incident was alcohol related after his discussions with the eyewitnesses and his interactions with Applicant. He testified he performed a field sobriety test at what he determined was a safe location near the accident. Trooper Seibel testified he did not record the field sobriety tests because he believed valid exigent circumstances existed to excuse him from the recording requirement. He testified he submitted an affidavit where he stated that exigent circumstances existed and explained that Applicant was transported to Spartanburg Regional Medical Center for blood alcohol testing. Trooper Seibel also testified his video recording equipment was not operational at the time of this incident.

Counsel Richard H. Whelchel's Testimony

Counsel testified he represented Applicant on the charges currently before the Court. Counsel testified he was appointed to represent Applicant through his position with the Seventh Circuit Public Defender's Office. Counsel testified he reviewed the discovery with Applicant and discussed the lack of a video capturing Applicant's field sobriety tests. Counsel testified he

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thoroughly advised Applicant of the strength of a motion to dismiss the charges and ultimately decided not to file this motion as it was unlikely to be successful. Counsel testified it was likely the trial court would find that exigent circumstances existed and that the charges would not be dropped because the trooper would likely be free from his requirement to produce a video recording of the field sobriety tests.

III. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

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been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the appellate records, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Failure to Move for Dismissal of Charges

Applicant alleges Counsel was ineffective in failing to move for dismissal of the below DUI charge because the responding officer did not videotape Applicant's arrest. Applicant argues that even though Trooper Seibel submitted an affidavit justifying his failure to produce a video recording, Counsel was deficient in failing to move to dismiss the charges. The plain text of the statute at the time Applicant was charged is as follows:

Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to

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Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

S.C. Code Ann. § 56-5-2953 (emphasis added).

This Court finds Trooper Seibel's testimony credible and persuasive. Trooper Seibel testified he believed exigent circumstances existed and excused his use of the video recording requirement. Trooper Seibel described a hectic scene as the victim was severely injured and was being examined by medical personnel, several eyewitnesses had stopped to offer help, several EMS personnel and fire fighters were on the scene, all while traffic was still running. This Court finds Applicant has failed to meet his burden in proving Counsel was ineffective in failing to move to dismiss the charges. Counsel's testimony that he chose not to challenge the charges because the affidavit was likely to excuse the absence of a video recording is a valid strategic decision. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

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This Court further finds Applicant failed to meet his burden of proof in establishing that had Counsel moved to dismiss the felony DUI charge, that the motion would have been granted. This Court finds a motion to dismiss the charges would have been denied because numerous exigent circumstances existed. It is also of significant note that Trooper Seibel testified his video recording equipment was not operational at the time of the incident. This Court finds Trooper Seibel's testimony credible and convincing. The trial court would also have viewed the situation based upon the totality of the circumstances. See S.C. Code Ann. § 56-5-2953 (providing nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape *based upon the totality of the circumstances.*") (emphasis added). This allegation is denied and dismissed with prejudice.

Failure to Investigate

This Court finds Applicant failed to meet his burden to prove that counsel's performance was either deficient or ineffective for failing to investigate Applicant's claim that the victim caused the accident. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 395 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). In light of Counsel's credible testimony that he evaluated and apprised Applicant on the matter, Applicant has produced no reliable testimony that would even remotely diminish his culpability in the felony driving under the influence charge. Regardless, the allegation rests entirely on speculation. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Applicant failed to present any evidence that the victim was

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at fault other than his own self-serving, non-credible testimony. This Court finds all the evidence before it supports the State's contention that Applicant was clearly at fault, tested well over the legal alcohol limit to drive, and was therefore responsible for the death of the victim. Thus, this allegation is readily denied and dismissed.

Involuntary Guilty Plea

Applicant argues he did not plead guilty knowingly and voluntarily. This Court finds otherwise and concludes that Applicant's guilty plea was entered freely and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 41 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975):

Applicant vaguely claims he did not plead guilty voluntarily because he was not aware he could challenge the charges and move for them to be dismissed. This Court finds this contention

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meritless. This Court finds the record reflects Applicant was fully advised that he was pleading guilty and therefore waiving any challenges to the evidence against him. The plea court's very thorough colloquy with Applicant demonstrates that he understood the consequences of pleading guilty. This Court finds very credible Counsel's testimony regarding his preparation and advice concerning the case. The record reflects Applicant admitted his guilt to the plea court. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Notably the South Carolina Supreme Court has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Id (citations omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id (citing Rice, 401 S.C. at 332, 737 S.E.2d at 486). Therefore, this Court finds the plea judge correctly found Applicant's plea was freely, voluntarily, and intelligently made. This allegation is denied and dismissed with prejudice.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

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SPARTANBURGH COUNTY
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J. HOPE BLACKLEY

V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

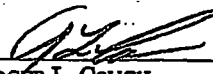
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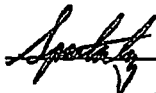
IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 23rd day of April, 2015.



ROGER L. COUCH
Presiding Judge


_____, South Carolina

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SPARTANBURG COUNTY
2015 APR 23 PM 3:22
M. HOPE BLACKLEY

DOCKET NO. -

10-GS-42-6712(A)

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 24 2010

TERM

THE STATE

VS.

Addie Thilavanh

COUNT TWO - RECKLESS HOMICIDE - NP - the Defendant pled to
Count One to Felony DUI (Death) in front of Judge Mark Hayes
on 8/10/2011. He received a twenty (20) year jail sentence on
the Felony DUI (Death) charge. -
Benny Bonetta - 8/10/2011.

Indictment for

COUNT ONE-CAUSING DEATH BY OPERATING
VEHICLE WHILE UNDER THE INFLUENCE OF
DRUGS OR ALCOHOL (FELONY DUI - DEATH)
COUNT TWO-RECKLESS HOMICIDE

SC Code: 56-5-2945, 56-05-2910

CDR Code: 0395, 3097

Class FEL-B, FEL-E

WITNESSES

SCHP

1. SENTENCE MADE

2. REPORT ENDED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND
FINE CARD MADE

ARREST WARRANT NUMBER

8. TRAFFIC VIOLATION COPY

Count One - 10/11/11

Court Two-direct Indictment

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: NOV 24 2010

VERDICT

Foreperson of Petit Jury
Date:

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2010 DEC -2 PM 1:47

M. HOPE BLACKLEY

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SPARTANBURG COUNTY
2011 AUG 11 PM 2:27
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

NOV 24 2010

At a Court of General Sessions, convened on _____ the

Grand Jurors of Spartanburg County present upon their oath:

COUNT ONE - FELONY DUI - DEATH

That Addie Thilavanh, did in Spartanburg County on or about September 19, 2010, drive a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs, and violated an act forbidden by law or neglected any duty imposed by law in the driving of the vehicle, to-wit:

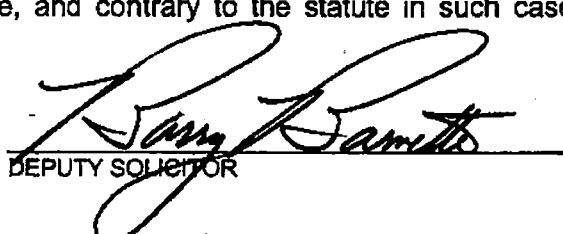
- (1) Failure to maintain proper control of vehicle, and/or
- (2) Driver's failure to exercise due care and/or
- (3) Driving too fast for conditions (Section 56-5-1520) subsection (a); and/or
- (4) Restriction on Speeding (Article II, §56); and/or
- (5) Driving Left of Center (Sections 56-5-1810 and 56-5-1880) and/or
- (6) Failure of driving on roadway laned for traffic (Section 56-5-1900).
- (7) Failure to follow right of way restrictions (Article 17, Section 56) and/or
- (8) Failure to maintain a proper lookout for other traffic and/or pedestrians.

Which proximately caused death to Corey Daniel Cole, in violation of §56-05-2945 (A) (2), of *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

COUNT TWO - RECKLESS HOMICIDE

That Addie Thilavanh did in Spartanburg County on or about September 19, 2010, drive a motor vehicle in reckless disregard for the safety of others and such driving proximately caused the death of Corey Daniel Cole, in violation of Section 56-5-2910, *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.


DEPUTY SOLICITOR