

21861

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APR 24 2015

SC Court of Appeals

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge
App. Case No. 2014-000632

THE STATE

Respondent,

v.

KYLIE NILSON

Appellant.

RECORD ON APPEAL

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2011-03-21-27

The Supreme Court of South Carolina

RE: Disposition of Driving Under the Influence and Driving with an Unlawful Alcohol Concentration Cases in the Horry County Magistrate and Municipal Courts within Horry County

ORDER

I FIND THAT the prompt and efficient disposition of driving under the influence (DUI) and driving with an unlawful alcohol concentration (DUAC) cases in the magistrate and municipal courts requires that cases, jury and non-jury, be called for trial

I FURTHER FIND THAT as of March 18, 2011, there were 44,962 criminal cases, to include traffic, pending in the Magistrate and Municipal Courts of Horry County. Of those pending criminal cases, one-thousand five-hundred forty-five (1,545) are DUI and DUAC cases and have been pending in the Magistrate and Municipal Courts of Horry County for more than sixty (60) days in regards to non-jury cases, and for more than one-hundred twenty (120) days in regards to jury cases. Therefore, the Magistrate and Municipal Courts of Horry County may be in non-compliance with the Order of the Chief Justice dated February 14, 2011

I FURTHER FIND THAT the Chief Summary Court Judge for Administrative Purposes is empowered, by Order of the Chief Justice dated December 30, 2010, to set terms of criminal court when such terms are necessary for the disposition of cases within the jurisdiction of the magistrate court, and to assign cases to any magistrate of the county. Now, therefore,

IT IS ORDERED that the Horry County Chief Summary Court Judge for Administrative Purposes, who is empowered to set terms of court and assign cases to any magistrate in the county, shall set for trial or cause to be set for trial by other magistrates in Horry County, the DUI and DUAC cases set forth on the original list to this Order and made a part hereof, within one-hundred twenty (120) days of the date of this Order. No case shall be continued except for good and sufficient cause set forth in writing and approved by the Chief Summary Court Judge for Administrative Purposes.

IT IS FURTHER ORDERED that the Chief Summary Court Judge for Administrative Purposes shall forward to each Chief Administrative Municipal Court Judge within that County and indicated on the attached list those DUI and DUAC cases pending in those

courts. Those Chief Administrative Municipal Court Judges shall set for trial or cause to be set for trial by other Municipal Court Judges those DUI and DUAC cases set forth on the attached list within one-hundred twenty days (120) of the date of this Order. No case shall be continued except for good and sufficient cause set forth in writing and approved by the Chief Administrative Municipal Court Judge.

IT IS FURTHER ORDERED that Chief Summary Court Judge for Administrative Purposes and the Chief Administrative Municipal Court Judges shall forward to the Office of South Carolina Court Administration a report showing compliance or substantial compliance with the provisions of this Order within one-hundred twenty-five (125)

s/Jean Hoefer Toal

The Honorable Jean Hoefer Toal
Chief Justice

March 21, 2011
Columbia, South Carolina

STATE OF SOUTH CAROLINA) IN THE SUMMARY COURT
) MAGISTRATE'S CRIMINAL APPEAL
COUNTY OF HORRY) Ticket #. F 408081
) CHARGE: DUAC
) COMMON PLEAS: 13-26-CP-6943

THE STATE OF SOUTH CAROLINA)

-VS-

Kylie Lauren Nilson)
C/O Attorney M. Gregory McCollum)
516 29th Avenue N.)
Myrtle Beach, SC 29577)

ANSWER TO CRIMINAL APPEAL

FILED
CLERK COURT
13 NOV 27 AM 8:28
HORRY COUNTY

THIS MATTER comes before the Court pursuant to an Appeal filed by the Defendant, **KYLIE LAUREN NILSON**, by and through her Attorney, **M. Gregory McCollum**, Myrtle Beach, S.C. Said Appeal was filed with the office of the Clerk of Court for Horry County on **October 18, 2013**.

The Appeal further comes pursuant to a (scheduled) first appearance by the arresting officer at Central Traffic Court on January 10, 2012. The defendant was cited and charged with **DUAC** on **December 4, 2011**. Attorney M Gregory McCollum was retained as Counsel, and on January 9, 2012, requested a Jury Trial in his letter of representation . The case was transferred to Jury Court

The case was most recently placed on the Jury Court Roster for the week of **October 7 - 11, 2013 @ the Olin I. Blanton Building, Myrtle Beach, S.C.** Prior to this term of Court, several continuances had been granted, (Three (3) for the State, and two (2) for the Defense) thus the court denied any further continuances by either party.

Present at the day-certain trial on October 8, 2013 for the State was Deputy Solicitor Austin Thomas. State's witnesses, Trooper W. Wilkes, arresting officer, State Trooper C. D. Weldon, and Brett Baker of SLED were also present. Attorney M. Gregory McCollum was present for defendant Kylie Lauren Nilson; however, she was not present.

The Court heard Motions during the pre-trial period @ 8:30 A.M. in Chambers. Such motion(s) were later made a part of the record in the courtroom. Such motions became Defense's grounds for Appeal, and will be later addressed in this Answer.

The Jury was selected and sworn, pursuant to Defense's request. They were excused from the Courtroom. The Court heard Defense's motions, heard in-camera testimony regarding the motions, and ruled on each. As the trial was recorded, a copy of the taped proceedings is made a part of this Court's *Answer to Appeal*. Any transcribed record will be provided by the Appellant, pursuant to Order of Judge Steven John (copy attached).

The Jury was invited into courtroom where opening statements were given by both Attorneys. The State proceeded; the Court swore all testifying witnesses. Trooper W. Wilkes, Trooper C. D. Weldon, and Brett Baker (SLED) were the State's witnesses. Cross examination was rendered by Attorney McCollum as to each of the State's witnesses. The Court received the following exhibits, made a part of this Answer.

State's exhibit # 1	Roadside Video
State's exhibit # 2	B. A. Test Results
State's exhibit # 3	B. A. Room Video

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The Defense put forth no testimony. The Defense renewed its earlier motions for dismissal; however, the court's previous rulings stood.

Closing statements were heard from the State and Defense Attorneys. The law, along with the Court's jury instructions were given. The Court instructed, among other things, that though the Defendant was not present, such could not be held against her and no discussion should be given to that matter. They were reminded of welcoming remarks on Monday during the qualification process, where it was pointed out that it was the State's burden to prove all 'charged persons' (here Kylie L. Nilson) guilty beyond a reasonable doubt.

A Guilty verdict to DUAC was returned by the Jury. In phase two of the bifurcated trial, the Jury further found the defendant was: Guilty of DUAC at least ten one-hundredths (.10) of one percent but less than sixteen one-hundredths (.16) of one percent. This court now addresses the defendant's grounds for Appeal.

1) Denying Defense motion for Continuance:

The date of offense/age of case was December 11, 2011. The case had been continued three times for the State and two for the Defense. Pursuant to Chief Justice Toal's Order as to cases over one (1) year old, that motion was denied. File records showed that the Defendant, along with her attorney had been properly notified, she had appeared at previous terms of court, thus the trial would go forward, in that notice of trial in absentia had been given within the notices to she and her attorney.

2) *Denying Defense motion for dismissal due to the State's failure to comply with the video taping of the incident site as required by 56-5-2953, S. C. Code of Laws, 1976 (as amended).*

The Court ruled that 56-5-2953 had been complied with in that Trooper Weldon, the arresting officer *did* video the incident once on site. The Defense's position, in argument, was that Trooper Wilkes should have videoed the driving of the defendant. Testimony was that Trooper Wilkes, an off-duty officer at the time, was following the defendant on Highway 501 East. She seemed to be having some driving problems, running on and off the road. He followed her (with no blue lights) until he later stopped her, inquiring if there were problems. Upon inquiry, he smelled the high and obvious odor of alcohol, called for an on-duty trooper Trooper C. D. Weldon appeared and took over. Weldon's undertaking provided a video taping of all actions, to include Miranda rights, field sobriety test, and the arrest. The State's position (looking at case law in Landis) was that Wilkes acted the same as the transport officer who investigated and waited for an arresting officer to arrive.

3) Denying Defense motion for dismissal due to the State's failure to comply with Section 56-5-2953, S.C. Code of Laws, 1976 (as amended) which requires the arresting officer to produce a sworn affidavit explaining the reason for not producing a video tape of the stop.

This court ruled that the arresting Officer *was* Trooper C. D. Weldon, and he did not need to produce a sworn affidavit because he, upon arrival, immediately started recordation. He did inquire with Wilkes as to whether he had videoed, so that he (Weldon) could have it as a part of his evidence and case notes. Wilkes, though an important core witness, was not the arresting officer.¹

4) *Denying defense motion to exclude evidence the Defendant had taken prescription medication, Xanax, prior to driving since the Defendant was tried for Driving With an Unlawful Alcohol Concentration:*

This Court ruled that though this was not a DUI case, there would be no prejudicial affect in allowing that part of the video where Xanax was discussed. One purpose (the state's argument as well) would be to show the defendant's conduct, particularly insofar as her response to the field sobriety test. The Court denied the exclusion of such discussions.

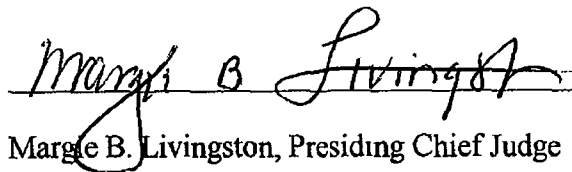
5) *Denying the defense motion to dismiss the charge or suppress the data master result of .16 based upon the state's failure to prove the test was administered within two (2) hours of the arrest and violation of the DUAC statute as required:*

This Court ruled that testimony through Troopers Wilkes and Weldon showed that upon Weldon's receiving the call, a/k/a "start time" of 2:15, and his arrival on scene at 2:28, the rendering of FST, arrest and taking the defendant to the B.A. site (03:02) was well within the two-hour statutory requirement. State's exhibit # 2--the B A analysis test report (which shows these times) further supported the court's ruling.

The case was properly and fairly heard, giving opportunity for both parties to be heard. The Jury heard both sides, took sufficient time to deliberate, and brought back a verdict in accordance with the testimony, exhibits, the law, and the Court's instructions. The Jury had one question during deliberation (reduced to writing - enclosed). With all parties present, the jury was told they could hear the testimony again, or remember the testimony as each of them recalled it, along with the exhibits in their possession. Lastly they were told it would be improper for the Court to comment.

After receiving the Jury's verdict of Guilty, and their finding as to BA reading, the Court sentenced the defendant to pay a fine of \$1229.50 or the service of 30 days, issuing a Bench warrant for show cause as to why the Court should not have such sentence carried out

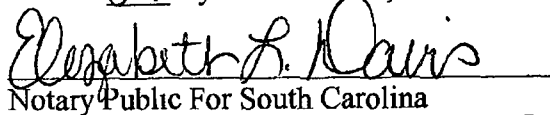
NOW this Court requests the higher Court to dismiss defendant's Appeal, with prejudice, as the defendant's motions requesting dismissal and the court's rulings to said motions are not sufficient to dismiss the case or request a new trial.


Marge B. Livingston, Presiding Chief Judge

Central Civil & Criminal Traffic & Jury Court

Myrtle Beach, South Carolina

Sworn to and subscribed before
me this 27 day of November, 2013


Notary Public For South Carolina

My commission expires: 5-2-2023

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)



ORIGINAL

State of South Carolina,)
)
)

Plaintiff,)
)
)

vs.)

CASE NO:
F408081HP

Kylie Lauren Nilson,)
)
)

Respondent.)

**THE HEARING HELD BEFORE THE
HONORABLE MARGIE BELLAMY LIVINGSTON,
CENTRAL JURY COURT FOR
HORRY COUNTY, SOUTH CAROLINA**

Tuesday, October 8, 2013

The following is the hearing held before
The Honorable Margie Bellamy Livingston,
Central Jury Court for Horry County, at the
Olin Blanton Building, located at 1201 21st
Avenue, Myrtle Beach, South Carolina, on
Tuesday, October 8, 2013.

Sharon Brock Court Reporting

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APPEARANCES:

FOR THE PLAINTIFF:

Austin Thomas, Esquire
Horry County Solicitor's Office
1310 Second Avenue
Conway, South Carolina 29526

FOR THE DEFENDANT:

N. Gregory McCollum, Esquire
MCCOLLUM LAW FIRM
21st Avenue
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1 The Court: We're going to let the
2 record reflect that today is Tuesday.
3 It is October 8, 2013, day 2, Central
4 Jury Court, Olin I. Blanton Building,
5 Myrtle Beach, South Carolina. Thank
6 you for your patients.

7 Again, we have gone
8 through the dockets and have ended up
9 with one case for the day. So six of
10 you are going to be very, very lucky,
11 perhaps seven. So I would ask these
12 folks, please, kindly step down, forget
13 that jury panel and then the rest of
14 you will be happy to know that we
15 worked out everything on the docket.
16 We're sorry that it took so long, but
17 the last case was a victim case and, of
18 course, under the law we have to hear
19 both sides and it was very contiguous
20 so we were able to diffuse that one.
21 You do not have to hear it.

22 However, Solicitor
23 Thomas tells me that you do have one
24 matter for trial today and, Solicitor,
25 that case is the State of South

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1 Carolina versus, I believe, Kylie
2 Lauren Nilson.

3 Mr. Thomas: Yes, Your Honor.

4 The Court: Thank you. Ladies and
5 gentlemen of the jury panel, Ms. Nilson
6 is represented by Attorney Greg
7 McCollum of our Horry County Bar.
8 Attorney McCollum, please stand,
9 introduce yourself, your firm, your
10 client, though in absence, and any
11 other witnesses for the defense.

12 Mr. McCollum: May it please the
13 Court, Your Honor?

14 The Court: Yes, sir.

15 Mr. McCollum: My name is Greg
16 McCollum. I'm a lawyer. I practice
17 here in Myrtle Beach. Really office is
18 not too far from here. It's on 29th
19 Avenue. I represent Kylie Nilson who's
20 charged with the offense of driving
21 with an unlawful alcohol concentration.
22 She's not here today. I think partly
23 that may be my fault. Also here with
24 me is my wife, Sara McCollum, who also
25 works in my office and has worked with

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1 me for some time. So the potential
2 witnesses are Sarah regarding the issue
3 with Ms. Nilson not being here, because
4 we, obviously, want her here. It's my
5 understanding, she wants to be here.
6 But we notified her late, I would say,
7 and she's in California. She's been
8 here before. So that's an issue that
9 whoever is selected on the jury, I'm
10 going to ask for you not to hold that
11 against her because, obviously, we're
12 here and you are here. So that's an
13 important issue for us. But we thank
14 you. I appreciate the opportunity to
15 introduce myself, Your Honor.

16 The Court: Thank you. That
17 matter, of course, will be one of the
18 final instructions from the Court to
19 you that cannot be held against her
20 and, again, we'll explain why at the
21 appropriate time. Now, first question
22 is, is there any member of the jury
23 panel related by blood, by marriage or
24 otherwise to Attorney McCollum or have
25 you been represented in the past or

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1 even currently by Attorney McCollum?
2 Anyone related to him first, blood,
3 marriage?

4 (No response).

5 The Court: Have you been
6 represented in the past by he or his
7 firm?

8 (No response).

9 The Court: Thank you for very
10 much. The State of South Carolina
11 represented by -- and let me ask this,
12 anyone know of his client, have any
13 connection with Kylie Lauren Nilson?
14 At the time, Ms. Nilson showed an
15 address as -- and I don't know what
16 makes me think I can read that, but
17 anyway, 15 -- Solicitor, would you look
18 at your address and just give me that,
19 please?

20 Mr. Thomas: It looks like the
21 address I have, Your Honor, is 10
22 Wooded Run Drive, Dillsburg,
23 Pennsylvania.

24 The Court: All right. Thank you.
25 Just for caution, anyone know Ms.

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1 Nilson at that address, Pennsylvania?

2 (No response).

3 The Court: Thank you very much.

4 Then the State of South Carolina is
5 represented by Solicitor Austin Thomas,
6 who's going to stand, reintroduce
7 himself. I don't think I made the
8 introductions on yesterday. So,
9 Solicitor, will introduce yourself and
10 we'll determine if anyone loves you.

11 Mr. Thomas: My name is Austin
12 Thomas. I'm the Assistant Solicitor
13 here in Horry County. And the State's
14 witnesses today will be Brett Baker,
15 SLED; and, Trooper Wilkes, and also
16 Trooper Weldon, from highway patrol.

17 The Court: Thank you. Any of the
18 troopers or Mr. Baker present? All
19 right. He did introduce them. They
20 will be here for trial but any member
21 of the jury panel related by blood,
22 marriage, otherwise knowing Attorney
23 Thomas?

24 (No response).

25 The Court: Thank you. You heard

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1 his witnesses Baker, from SLED; Wilkes,
2 from the highway patrol; and there was
3 one other, Solicitor?

4 Mr. Thomas: Trooper Weldon from
5 highway patrol.

6 The Court: Trooper Weldon. Anyone
7 have any connections with any of them?
8 (No response).

9 The Court: None are responding.
10 Further voir dire questions from State
11 or Defense?

12 Mr. Thomas: None from State, Your
13 Honor.

14 Mr. McCollum: Not from the Defense,
15 Your Honor.

16 The Court: Okay. So were you
17 provided, Mr. McCollum, with the
18 matters of driving ---

19 Mr. McCollum: The jury information?

20 The Court: The jury information?

21 Mr. McCollum: I have, Your Honor.

22 The Court: All right. Then we're
23 ready for our jury panel. Thank you,
24 Ms. Jessica Barrett.

25 *****OFF THE RECORD*****

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1 (ON THE RECORD.)

2 The Court: Let the record reflect
3 that we are in the courtroom in the
4 matter of State versus Nilson. The
5 jury has been selected but is out of
6 the courtroom. Present for the State
7 of South Carolina, again, is Solicitor
8 Thomas, and for the Defense, attorney
9 Greg McCollum. Pretrial matters before
10 we bring the jury out?

11 Mr. McCollum: May it please The
12 Court, Your Honor?

13 The Court: Yes, sir.

14 Mr. McCollum: I think there's an
15 issue as to the initial stop and then
16 the subsequent arrest of Ms. Nilson.
17 At this time, Your Honor, would you
18 prefer that the jury be sworn or
19 unsworn? Or does it matter?

20 The Court: It doesn't matter to
21 The Court. I'm ready to go forward
22 either way.

23 Mr. Thomas: The State has no
24 position, Your Honor.

25 Mr. McCollum: We'd like, I know it's

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1 a little cumbersome, but to swear the
2 jury and then just send them back, and
3 then at that time, I'd like to call, I
4 think it's Trooper Wilkes, as a witness
5 regarding the issue before The Court.

6 The Court: In-Camera? Thank You.
7 Madam Clerk, if you could have the jury
8 in?

9 *****OFF THE RECORD*****

10 (ON THE RECORD)

11 The Court: Thank you, jury, for
12 your patience, and I'll ask that you
13 keep that with you throughout this
14 matter that is before us, and you'll
15 see why I say that in just a few
16 moments. But for matters of need, let
17 me appoint a foreperson, Mr. Meyers,
18 you're sitting in seat number one, I
19 believe. For the record, I'll go ahead
20 and appoint you for the sake of where
21 you are. Appointed as foreperson means
22 that he will be your spokesperson when
23 the case goes to you for such
24 deliberation in your jury room, and he
25 will bring back to The Court what the

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1 six of you say as your verdict.

2 There is no rhyme or reason in
3 how The Court selects a foreperson. I
4 usually use the simple approach, and
5 don't y'all tell the rest of them, that
6 whoever lands in that first seat, it's
7 easier for me, to appoint you as
8 foreperson. You all can do this, you
9 will just be the leader of the pack,
10 making sure, there are other things,
11 that your jury panel stays together at
12 all times, making sure that you see
13 that their needs are met, and that you
14 will not discuss the matter until it's
15 heard in full. Thank you for assuming
16 that role, Mr. Meyers.

17 Now, would you all stand,
18 raising your right hand to receive
19 oath. I will say, that you have equal
20 standing on the jury. Again, he is
21 just your spokesperson. I love telling
22 the story about my little grandson that
23 -- children, when I have them all
24 together, they go, "You ain't the boss
25 of me." So, he ain't the boss of you.

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1 He's just going to be your
2 spokesperson. Thank you so much. Do
3 you swear or affirm that you will well
4 and truly try the issues during the
5 State of South Carolina and Defendant,
6 who is not at bar, but that you will
7 take, listen to the testimony from the
8 witness stand, take the law as The
9 Court gives it to you, and that y'all
10 will bring back a verdict that speaks
11 the truth, according to that law and
12 testimony, so help you God?

13 The Jury: (All answer
14 affirmatively).

15 The Court: Thank you very much.
16 Now before you, -- this is a test.
17 You're going to go back to your jury
18 room, and if -- please remain there
19 until I send you back -- send for you.
20 Thank you so much.

21 *****OFF THE RECORD*****

22 (ON THE RECORD)

23 The Court: All right. Now, that
24 the jury has been sworn, is out of the
25 courtroom, now for those matters, and,

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1 of course, we'll go into, as I
2 understand it, in-camera hearing, to
3 where witnesses are to be heard ---
4 Mr. McCollum: Yes, ma'am.
5 The Court: --- regarding motions?
6 Mr. McCollum: Yeah.
7 The Court: Thank you. Let the
8 record so reflect, you may?
9 Mr. McCollum: Your Honor, at this
10 time, the Defense would call Trooper
11 Wilkes.
12 The Court: Thank you. Let the
13 record reflect that Trooper Wilkes has
14 been called to the witness stand.
15 Thank you.
16 TROOPER WILKES, AFTER HAVING BEEN CALLED TO
17 THE STAND AND DULY SWORN, TESTIFIED AS
18 FOLLOWS:
19 **DIRECT EXAMINATION**
20 **BY MR. MCCOLLUM:**
21 MR. MCCOLLUM: MAY IT PLEASE THE
22 COURT?
23 THE COURT: YES.
24 Q: How are you doing today, Trooper?
25 A: Good, Sir, how are you?

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1 Q: I'm good, thank you. And you were -- you
2 made the stop on a Kylie Nilson back on,
3 let's see, December 4th of 2011?

4 A: Yes, sir.

5 Q: Do you remember that?

6 A: Yes, sir.

7 Q: Okay. Now, at that time, December 4th of
8 2011, you were employed as, with the
9 South Carolina Highway Patrol?

10 A: Yes, sir, I was.

11 Q: And how long have you been a State
12 Trooper?

13 A: At that time, it would be 15 years.

14 Q: Fifteen?

15 A: Yes, sir.

16 Q: Okay. Were you assigned to the Horry
17 County area at that time?

18 A: Yes, sir, I was.

19 Q: Are you still assigned to this area?

20 A: Yes, I am.

21 Q: Okay. On that particular day, did you
22 have an occasion to pull Ms. Nilson over?

23 A: Yes, sir, I did,

24 Q: And when you pulled her over, were you
25 driving your State Patrol car?

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1 A: Yes, sir, I was.

2 Q: And, at that time, were you on duty?

3 A: No, I was not.

4 Q: Were you in uniform?

5 A: I, I was in the training, which is the
6 polo shirt, BDU pants. I had my jacket
7 on because it was cold that night.

8 Q: And do you remember --

9 MR. MCCOLLUM: MAY I APPROACH, YOUR
10 HONOR?

11 THE COURT: YOU MAY.

12 Q: I just want to hand you the ticket
13 number. I don't see, you don't have any
14 notes with you, ticket number F408081.

15 A: I don't, I didn't write the ticket.

16 Q: Okay. Well, can you testify, from
17 memory, as to what time it was when you
18 pulled Ms. Nilson over?

19 A: I don't remember. I know it was early in
20 the morning.

21 Q: And do you know -- Well, when you first
22 observed Ms. Nilson, do you know where
23 you were in terms of what street you were
24 on and what direction you were traveling?

25 A: I was, I -- we were actually, I pulled up

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1 behind her at the, we were on 501,
2 southbound, at the turn light going to
3 the, going towards Gardner Lacy Road.
4 And we were stopped at the red light, and
5 the light turned green, I was behind her,
6 just, I take that way, I live, at that
7 time, I was living on Carolina Forest
8 Boulevard, I was taking Postal Way, and
9 she made her right turn onto Postal Way.
10 She kind of took a wide right turn. I
11 stayed behind her and she kind of drifted
12 off to the road -- the road's curvy, she
13 drifted off the road in the curve, pulled
14 back onto the road, kept straight and I
15 then, you know, called it on the radio
16 saying I might possibly have a call 1055
17 driver in front of me if anybody was
18 close.

19 We kept going around Postal Way.
20 As we got in the straightaway she ran off
21 the road again, just felt there was a
22 need to go ahead and pull her over just
23 to see what was going on. At that point,
24 I went up to the vehicle. I identified
25 myself, told her I was off duty, was she

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1 okay. And I, I could smell the alcohol
2 coming from the vehicle at that time.
3 She gave me her driver's license, and
4 there was a passenger with her, and they
5 said they had come from a party. At that
6 time I just told them to stand tight, I'm
7 getting another trooper up here. I went
8 back to the vehicle and called, and I
9 believe it was Trooper Weldon that
10 answered and said he was on his way to
11 me.

12 Q: So, you were traveling, I guess, what we
13 call east, but, say east, or southbound,
14 on Highway 501?

15 A: Yes, sir.

16 Q: And then you turned left onto Gardner
17 Lacy Road off of 501?

18 A: Yes, sir.

19 Q: Right? And then you drive down and then
20 you cross over some railroad tracks
21 there?

22 A: Yes, sir.

23 Q: And then you can turn right, and you did
24 turn right, on Postal Way?

25 A: Yes, sir.

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1 Q: Correct?
2 A: Yes, sir.
3 Q: And Postal Way connects Gardner Lacy to,
4 is it Carolina Forest Boulevard?
5 A: Yes, sir.
6 Q: And that's where the Kroger Shopping
7 Center and all that stuff is, right?
8 A: Yes, sir.
9 Q: Okay. Do you know about how far it is
10 from, say, 501 where you turned left
11 until you went down Gardner Lacy, turned
12 right onto Postal Way to where you had,
13 Ms. Nilson's vehicle had come to a stop?
14 A: Maybe a quarter of a mile.
15 Q: All right.
16 A: I don't know exactly.
17 Q: Did she -- She traveled past the high
18 school?
19 A: Yes, sir.
20 Q: And she traveled toward Carolina Forest
21 Boulevard?
22 A: Yes, sir. It's a straightaway right
23 after you do all the curves, it's a
24 straightaway.
25 Q: And how far, how close did she get to

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1 Carolina Forest Boulevard before she came
2 to a stop?
3 A: I would have to, there -- it's right in
4 the middle of that long stretch.
5 Q: All right. Now, had you finished working
6 a shift?
7 A: No, I was actually off. I had, I had to
8 go home for a family emergency. I got
9 called in the middle of the night and I
10 had a family emergency, and I was on my
11 way back home.
12 Q: Okay. But there's no question you were
13 driving your marked patrol car?
14 A: Yes, sir.
15 Q: And that patrol car is equipped with blue
16 lights, right?
17 A: Yes, sir.
18 Q: And it's equipped with a videotaping
19 device, right?
20 A: Yes, sir.
21 Q: When you pulled Ms. Nilson over, did you
22 activate the blue lights?
23 A: I did, sir.
24 Q: Now, when you activate the blue lights,
25 it's my understanding, and correct me if

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1 I'm wrong, when you activate the blue
2 lights, at that time, the video camera
3 comes on automatically, right?

4 A: It does. However, in this situation, I'm
5 in an older vehicle, and you have to
6 manually turn the camera on, which I was
7 off duty and it was not turned on.

8 Q: All right. So when you -- And at some
9 point, to pull her over, it was necessary
10 to activate the blue lights, right?

11 A: Yes, sir.

12 Q: All right. Now, did you make a -- Is
13 this something that just was, was
14 happenstance in terms of the video, or
15 did you make a conscience decision not to
16 turn the video on, or is it just
17 something that you failed to do?

18 A: I just did not do it. I just got out of
19 the car and just talked to her.

20 Q: All right. And had you been on duty and
21 on patrol, at what point would you have
22 turned the video camera on as you
23 followed her?

24 A: Or I could -- tour of duty, once I get in
25 my vehicle I turn everything on at that

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1 time.

2 Q: So if you had been on duty, your video
3 camera would have been running?

4 A: Yes, sir.

5 Q: You just have it running all of the time?

6 A: Yes, sir.

7 Q: Okay. And so, in that situation, she
8 would have been on videotape shortly
9 after turning off of 501?

10 A: Well, usually if I see someone doing
11 something, like she was doing, running
12 off of the road, I would, initially, I
13 would call it in and then once I turned
14 the blue lights on to stop them the
15 camera activates and turns on itself.
16 The monitor's always on, but the camera
17 activates once the blue lights are turned
18 on.

19 Q: And at some point, then, you turned on
20 your blue lights and stopped her car,
21 right?

22 A: Yes, sir.

23 Q: And, after you did that, you got out of
24 your car and approached her car, right?

25 A: Yes, sir.

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1 Q: And did you ask her for her license and
2 registration?

3 A: Yes, sir, I did.

4 Q: And you said that, at that time -- So,
5 did you physically get her license and
6 registration?

7 A: I got her license and she didn't have --
8 she never did pull out the registration.

9 Q: So you took her driver's license?

10 A: Yes, sir.

11 Q: Did you stand at the car and talk to her
12 for some time?

13 A: Briefly, just asking her was she okay and
14 where they were headed to, and she told
15 me, she said they had taken a friend
16 home, if I, I recall correctly, and, I
17 said, because I smelled the alcohol, and
18 I, I immediately just said, "Okay, well
19 just sit tight for a moment and I'll get
20 another trooper up here to talk to you."
21 And I just backed off until Trooper
22 Weldon got there.

23 Q: And there was a passenger in the front
24 seat, right?

25 A: She was on the right hand, to my

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1 recollection ---

2 Q: Then at that point, you walked back to
3 your patrol car, sat in your patrol car
4 with her driver's license, correct?

5 A: Yes, I did.

6 Q: And then you called in to dispatch to see
7 if there was an on duty trooper who could
8 come to the scene?

9 A: Yes, sir.

10 Q: And, do you know what time you made that
11 call, and I know this was nearly two
12 years ago?

13 A: I don't recall. I know it was after
14 midnight.

15 Q: All right. And the trooper that
16 responded was Trooper Weldon?

17 A: Yes, sir.

18 Q: Who's present in the courtroom, right?

19 A: Yes, sir.

20 Q: And do you know, or have any way of
21 knowing, where Trooper Weldon was when he
22 received the call from dispatch?

23 A: No, sir, I don't recall.

24 Q: Did dispatch give you any kind of
25 estimated time of arrival of how long it

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1 was going to be for somebody to arrive?

2 A: No, sir. I believe Trooper Weldon called
3 me on the radio and said he was on his
4 way.

5 Q: All right. Now, going back to that time,
6 you don't know what time it was, right?

7 A: I don't remember.

8 Q: You don't know what time Trooper Weldon
9 arrived, correct?

10 A: It was shortly, maybe within ten minutes
11 of the stop.

12 Q: Okay. So, Trooper -- You sat there
13 behind the car that you had stopped,
14 correct?

15 A: Yes, sir.

16 Q: For maybe ten minutes?

17 A: Yes, sir.

18 Q: All right. Do you know, could it have
19 been more than ten minutes?

20 A: It was probably, probably about ten
21 minutes. It was right after I called him
22 and he said he'd be on his way and I sat
23 there for just a few minutes and then he
24 pulled up coming from the other
25 direction, I guess from Carolina Forest,

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1 and then turned around and came behind
2 her because I was far enough back from
3 her vehicle he pulled right in front of
4 me.

5 Q: When Trooper Weldon arrived, now he was
6 on duty, correct?

7 A: Yes, sir.

8 Q: And he was driving a marked patrol car,
9 right?

10 A: Yes, sir.

11 Q: And he parked between your car and the
12 car that you had stopped?

13 A: Yes, sir.

14 Q: And he got out of his car and you had
15 some conversation with him, right?

16 A: Yes, sir. I remember telling him the
17 reason why I stopped them and I gave the
18 license to him and told him I smelled
19 alcohol.

20 Q: And Trooper Weldon asked you, "Do you
21 have videotape running," and you
22 responded negative?

23 A: Yes, sir.

24 Q: Right?

25 A: Yes, sir.

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1 Q: Okay. And then you stayed on the scene
2 as Trooper Weldon performed his duties in
3 examining the driver, correct?

4 A: Yes, sir. I stood by the vehicle on the
5 passenger side just to keep an eye on
6 him, just watched him the whole time.

7 Q: All right. Now, so, clearly, for our
8 purposes here today, no video was
9 recorded, right?

10 A: Not from this stop.

11 Q: All right. And had you not been off
12 duty, clearly you would have made a video
13 ---

14 A: Yes, sir.

15 Q: --- correct? And if you had made a
16 video, you'd have brought it here today,
17 correct?

18 A: Yes, sir. Correct.

19 Q: Now, to your -- Have you written an
20 affidavit or produced an affidavit as to
21 why the vehicle was stopped and you did
22 not produce a video?

23 A: No, sir. The only thing I did was a
24 statement to Trooper Weldon about this.

25 Q: Okay. Thank you, sir, I appreciate it.

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1 The Court: Solicitor, anything?
2 Mr. Thomas: Nothing from the State,
3 Your Honor.
4 The Court: Thank you. You may
5 step down, Trooper Wilkes. Further
6 witnesses, Mr. McCollum?
7 Mr. McCollum: Your Honor, on this
8 particular issue I don't intend to call
9 anymore witnesses.
10 The Court: All right, it's a new
11 motion.
12 Mr. McCollum: Your Honor, if I may
13 hand this up. I know Your Honor's
14 familiar with it, as is Mr. Thomas.
15 This is just the 56-5-2953. And then I
16 think The Court's very familiar with
17 this, and I'll read it into the record.
18 According to 56-5-2953, which is
19 incident site and breath test video
20 recording, subsection A says, "A person
21 who violates Section," and in this case
22 I think it's 2933, "must have his
23 conduct at the incident site and the
24 breath test site recorded." And then
25 subsection (1)(a) says, "The video

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1 recording at the incident site must not
2 begin later than the activation of the
3 officer's blue lights."

4 In addition, Your Honor, the
5 other language talks about different
6 types of stops, and it says that the --
7 that action can be excused depending on
8 different types of stops if the officer
9 submits an affidavit explaining the non
10 -- the reason for not videotaping.

11 I think it's important, Your
12 Honor, or instructive that it, it's got
13 to begin not later than the activation
14 of the officer's blue lights. That's
15 something that is, occurs in every
16 case, because that's how people get
17 pulled over, you know, they don't,
18 typically they're not yelling out the
19 car window with a bullhorn or something
20 like that. They're turning on the blue
21 lights.

22 In this particular case, for
23 whatever reason, a South Carolina
24 Highway Patrolman drove behind her,
25 followed her, because he was off duty,

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1 did not turn on the camera and did not
2 record this as is required to be done,
3 even though, even at that point, after
4 he activates the blue lights, he still
5 doesn't turn it on. There's really no
6 reason not to.

7 Now, in terms of the case law,
8 there are different cases that I can
9 cite, Your Honor. This Greer versus
10 Humble, which is 402 South Carolina
11 609; State versus Henkel, which is 404
12 South Carolina 626. There's also a
13 case, I'm sure Your Honor is familiar
14 with, which is City of Rock Hill versus
15 Suchenski, which is 374 South Carolina
16 12; and also the case of Mt. Pleasant
17 versus Roberts, which is 393 South
18 Carolina 332.

19 Those cases, Your Honor, deal in
20 different ways with either failure to
21 videotape or a failure to produce an
22 affidavit. And the courts say that,
23 you know, this is a very strict
24 requirement. They talk about that, you
25 know, there's no law saying that in a

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1 homicide or a serious felony case, that
2 a videotape has to be made of a
3 defendant's statement or confession.
4 As Your Honor knows, these laws are
5 amended, you know, repeatedly. Like,
6 for instance, in the, in one of the
7 cases there's an argument that the
8 persons, that you couldn't see the
9 complete person as they performed the
10 sobriety test, and in that case a court
11 ruled, "Well, you know, it just says
12 you have to show the conduct." But
13 shortly after that case, the
14 legislature amended the law to say that
15 you have to show the field sobriety
16 test.

17 These are very strict, statutory
18 requirements which, in the past, did
19 not exist, but they exist, and the
20 courts seem to be, follow them in
21 construing them in a very strict way.
22 For example, in the Mt. Pleasant case,
23 Mt. Pleasant just didn't have video
24 equipment, and they would submit an
25 affidavit saying that they're not

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1 equipped, and then the court struck
2 that down saying that was unreasonable,
3 they had time to comply with the law.

4 In all of these cases -- In one
5 of these cases the, there was a wreck.
6 They located the defendant later. Part
7 of the, the discussion with him was on
8 the audiotape, part was on videotape,
9 but it didn't show the, the reading of
10 Miranda on video, even though it could
11 be heard on audio.

12 In another case there was, there
13 was a video ran out, the tape ran out.
14 In all these cases the courts have
15 strictly construed the statute of
16 saying that it has to be strictly
17 followed. In any of those cases,
18 there's not any case that I'm aware of
19 where there was a lapse in the
20 videotaping or a failure to videotape
21 where at, at the very least the
22 government or the prosecution didn't at
23 least submit and affidavit.

24 I don't think that there's any
25 -- I don't think there's any way that

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1 the non-videotaping can survive without
2 the affidavit. I think you have to
3 have the affidavit to even have the
4 argument in court.

5 The other thing, Your Honor, the
6 Suchenski case states clearly that if,
7 in these particular cases, if there is
8 a remedy, because in some of these
9 cases the defense argued for
10 suppression, other cases they argued
11 for dismissal, but the court says that,
12 based on the statute and the intent and
13 the strict construction of the statute,
14 that if there is a remedy, the remedy
15 is dismissal, and we would move before
16 The Court for dismissal saying that
17 clearly this section 56-5-2953 was not
18 complied with in this particular case.

19 The Court: Thank you, Mr.

20 McCollum, Solicitor?

21 Mr. Thomas: Your Honor, The State's
22 position is that the statute was fully
23 complied with. And if Your Honor would
24 like, we can call up Trooper Weldon,
25 but this videotaping requirement

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1 applies to the arresting officer. The
2 State v Landis is very similar to this
3 circumstance. In that case, there was
4 a state transport officer. He pulled
5 over someone suspected, or, I guess,
6 had violated some traffic law or either
7 under suspension of DUI, and the court
8 held the truck, or held in that case,
9 that the State Trooper that came by
10 after this arrestee was already taken
11 out the car in that instance. Here the
12 arrestee was never asked out of the
13 car. In that instance he was asked out
14 of the car. The Trooper in this case
15 was the one that made the arrest, and
16 the court held that that Trooper was
17 the one that needed to, to comply with
18 this affidavit requirement.

19 Now, in this case, we have, we
20 complied with the video statute, or
21 video recording statute. Trooper
22 Weldon comes on the scene, asks the
23 Defendant out of the car. Everything
24 that's required by the statute, all
25 field sobriety tests, Miranda, the

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1 probable cause determination, all of
2 that is on the video, Your Honor, and
3 that's, as the arresting officer, of
4 course, we can ask them up to the
5 stand, but Trooper Weldon was the
6 officer who asked the Defendant out of
7 the car, put her through the field
8 sobriety test battery, arrested her,
9 placed her in his car, took her to the
10 video room where he asked her to
11 provide a breath sample and she did.

12 The Court: Thank You.

13 Mr. Thomas: Now ---

14 The Court: I will hear from the
15 attorney, McCollum, but the case that
16 you're, was it State versus ---

17 Mr. Thomas: This is State v Landis,
18 that is 362 ---

19 The Court: Oh, Landis.

20 Mr. Thomas: --- South Carolina 97.
21 That's a 2004 Court of Appeals case,
22 Your Honor.

23 The Court: All right. And you
24 have benefit of that. But, before I
25 hear your argument, let me continue on

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1 the in-camera hearing and pick up from
2 where Wilkes then gets to Weldon and go
3 from there. Go ahead and call your
4 witness. That will assist The Court, I
5 believe, in my ruling.

6 Mr. Thomas: Thank you. Your Honor,
7 The State calls Trooper Weldon.

8 The Court: Let the record reflect
9 that Trooper C.D. Weldon is being
10 called to the stand. Thank you.

11 TROOPER C.D. WELDON, AFTER HAVING BEEN CALLED
12 TO THE STAND AND DULY SWORN, TESTIFIED AS
13 FOLLOWS:

14 **DIRECT EXAMINATION**

15 **BY MR. THOMAS:**

16 Q: Please state your name and occupation for
17 The Court.

18 A: Christopher Weldon, Highway Patrol.

19 Q: Were you employed with the Highway Patrol
20 on December 4th, 2011?

21 A: Yes, I was.

22 Q: And what were your duties that night?

23 A: To enforce traffic laws and work
24 collision on the road, ---

25 Q: Did you have an occasion to come in

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1 contact with a Kylie Nilson that night?

2 A: I did.

3 Q: How did that come about?

4 A: One of the patrolmen, Trooper Wilkes,
5 advised, through radio, that he was, had
6 a possible 1055 and we -- I heard it and
7 I started making my way to him. He then
8 advised further what he had and I made my
9 way to his location to assist.

10 Q: Now, did you activate blue lights in this
11 instance?

12 A: I did.

13 Q: And when did your camera turn on?

14 A: The vehicle that I was equipped with, at
15 that time, had a newer camera system, I
16 believe to where if I activated my lights
17 it backed up, and I continued traveling
18 down the road to get to the incident
19 location.

20 Q: So, to clarify, your camera actually came
21 on before you even activated the blue
22 lights?

23 A: It's on, but when I activate the blue
24 lights it, it goes back X amount of
25 seconds or however, whatever it was set

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1 for to record. It records me driving to
2 the scene and then you see my lights come
3 on and then I ---

4 Q: And I know this is a 2011 case, but can
5 you give a timeframe as far as from the
6 time that you got the call from Trooper
7 Wilkes to the time you arrived on the
8 scene?

9 A: I, I don't think it was more than ten
10 minutes. I'm -- you know, I mean that
11 was a couple of years ago, so it's -- I
12 knew I had to have been in the area to
13 get to him.

14 Q: Okay. And now, you're pulling up to the
15 scene, can you kind of walk, walk the
16 court through what happens as you pull
17 up? You see ---

18 A: Trooper Wilkes.

19 Q: --- Trooper Wilkes's blue lights?

20 A: I see Trooper Wilkes's blue lights and I
21 see the, the Defendant's vehicle there.
22 I then position my vehicle so that when I
23 make the approach everything's on camera.

24 Q: Okay. So now what all did you get on
25 camera?

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1 A: I come on camera driving to the scene,
2 located the stop, Trooper Wilkes's blue
3 lights on. I then turn around because I
4 was going the opposite way they are
5 facing. I position my vehicle, talked to
6 Trooper Wilkes about what the initial
7 reason was for the stop, and then I go
8 approach the vehicle, talk with the
9 Defendant, have her step out, issue a
10 Miranda and complete field sobriety tests
11 and then place her under arrest and place
12 her in the patrol unit.

13 Mr. Thomas: That's all. Nothing
14 further from The State of this witness,
15 Your Honor.

16 The Court: Mr. McCollum, anything?

17 **CROSS EXAMINATION**

18 **BY MR. MCCOLLUM:**

19 Q: There's no question but that had you
20 pulled Ms. Nilson over, you would have
21 videotaped from the moment that you
22 activated the blue lights, right?

23 A: The camera that I, that I had, yes, it
24 would automatically have initiated, would
25 be set up for that.

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1 Q: Okay. And, in terms of the time it took
2 you to get there -- this happened in
3 December 2011, right?

4 A: Yes, sir.

5 Q: And how many car stops do you typically
6 make in say a week of working?

7 A: It's -- I, I have no -- I -- It's, it's
8 ---

9 Q: Like four or five a night?

10 A: No, sir.

11 Q: Fewer or more?

12 A: More.

13 Q: So ten or twelve a night?

14 A: Maybe.

15 Q: And the shift is how long, is it eight
16 ---

17 A: Twelve, twelve hours.

18 Q: Twelve hours?

19 A: Yes.

20 Q: And so you typically work, what, about 48
21 weeks a year?

22 A: Whatever it equates to without time off,
23 I guess.

24 Q: All right. Good. Have two weeks'
25 vacation?

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1 A: Two weeks.

2 Q: All right. And so over the course of
3 about 22 months or so you've made, what,
4 I don't know, maybe hundreds if not
5 thousands of car stops?

6 A: Yes, sir.

7 Q: All right. And in terms of remembering
8 how long it took to get there, you're
9 saying it took about ten minutes, right?

10 A: I'm, I'm saying it couldn't be more than
11 ten minutes because I, I don't believe I
12 was -- we have other units working, so I
13 probably was the closest one, so, if
14 anywhere on 501 or, you know, Carolina
15 Forest is not that far, but I, I don't
16 think I would have been coming from
17 Garden City if that's what you're asking.

18 Q: Right. But you don't know where you were
19 coming from, right?

20 A: Nope, I don't remember, no, sir.

21 Q: It's almost unreasonable to ask you to
22 remember back that far on that case,
23 right?

24 A: Like I said, I couldn't have been more
25 than ten minutes. I don't know if it was

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1 any further or any less, but that's just
2 ---
3 Q: Now, do you know, do you remember what
4 case you made before you responded to Ms.
5 Nilson?
6 A: No, sir.
7 Q: Do you know if you made a traffic ticket
8 or a DUI stop or something like that?
9 A: No, sir, I don't.
10 Q: Do you know if you were coming from the
11 jail?
12 A: I cannot recall, no, sir.
13 Q: All right. Do you know what cases you
14 made after you stopped Ms. Nilson?
15 A: No, sir.
16 Q: All right. And so do you know what time
17 Ms. Nilson was driving that night?
18 A: Do I know what time she was driving?
19 Q: Yes, sir.
20 A: From on the paperwork there it would, it
21 would let me know that, I guess.
22 Q: Well you -- Somebody wrote on the
23 paperwork, "Time of violation 2:28,"
24 right?
25 A: Without looking at the paperwork I'm not

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1 ---

2 Mr. Thomas: May I approach, Your
3 Honor?

4 The Court: You may.

5 A: Yes, sir, 2:28 is when the, would be the
6 round about time that either I received
7 it or I arrived on the scene or that I
8 placed her under arrest.

9 Q: So 2:28 may be the time that you received
10 the call, correct?

11 A: With the -- is what, is what the
12 paperwork says, yes, sir.

13 Q: All right. And, but 2:28 could be the
14 time that you arrived on the scene,
15 right?

16 A: That's what time I have down for the
17 arrest time and for the violation time.

18 Q: All right. Is it possible that she was
19 pulled over at 1:30 a.m.?

20 A: I responded when Trooper Wilkes called
21 for me.

22 Q: So, but sitting here today and trying to
23 be fair, she -- you don't know what time
24 she was pulled over, right?

25 A: I know that I was responded to Trooper

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1 Wilkes, and I cannot recall what time it
2 was. I have on here that it was 2:28 for
3 the arrest time and the offense time, so.
4 As for when she was initially stopped by
5 Trooper Wilkes and I cannot.

6 Q: Now, you gave her the opportunity to take
7 the breath test?

8 A: I did, sir.

9 Q: Let me hand you -- I think I -- I think
10 you were holding page two of this report,
11 so in fairness I'll give it back to you.
12 If you can look at page one of 34 and let
13 me ask you; that's your report, right?

14 A: Yes, sir.

15 Q: Okay. Now, that doesn't say 2:28. That
16 says 2:15.

17 A: It says the start time was 2:15.

18 Q: 2:15. So that's the start time. What
19 does that mean?

20 A: The start time would, would be either
21 when the call came in or, or when I
22 arrived on the scene.

23 Q: All right. So it could be that you
24 arrived on the scene at 2:15?

25 A: Or that I got the call at 2:15 and made

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1 my arrest time at 2:28.

2 Q: So it's fair to say we don't know what
3 time you received the call, right?

4 A: If it's 2:15, the -- well, that's a 13
5 minute difference there, so it's either
6 he called in at 2:15 or I arrived on the
7 scene at 2:15 and initiated, conducted my
8 business with Ms. Nilson.

9 Q: Okay. But in fairness here, you got some
10 times in your report, and you don't know
11 exactly what they mean, right?

12 A: Two years ago, I mean, it's -- there --
13 The start time is either when it happens
14 or when I arrived on the scene. Like --
15 or whatever dispatchers give to me. It's
16 a, collisions, you know, it's when
17 they're dispatched to you then you arrive
18 on the scene. But for responding to
19 something I, from two years ago, I, I
20 can't tell you that that was the time
21 that I received it or the time I arrived
22 on the scene.

23 Q: Well, is there some training or some
24 definition somewhere of what start time
25 is? In other words, is start time the

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1 time you start working on the case or is
2 start time the time of the, the guess of
3 the time of the incident?

4 A: I would say that, I write down the start
5 time when I'm going somewhere as when, if
6 I respond to, to something. Start time
7 would be if I'm behind a possible 1055
8 driver and I activate my blue lights.
9 You know, when I start watching them I'm,
10 this is what time I called the traffic
11 stop out and all the other stuff.

12 Q: All right.

13 A: So. But that's, from two years ago I,
14 you know, I don't even, that's a
15 different format than what I'm putting it
16 out, putting them on now.

17 Q: Was the format changed because of the
18 confusion about when the start time
19 actually was?

20 A: No.

21 Q: All right. Now, when you arrived on the
22 scene, you asked Trooper Wilkes, right,
23 you asked him if he had his video on,
24 right?

25 A: I did.

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1 Q: All right. He responded negative?

2 A: Correct.

3 Q: Why did you ask him if he was running
4 video?

5 A: Just, if he did, so I could have a copy
6 of it.

7 Q: Okay. And then did you expect him to be
8 running a video?

9 A: If I had expected it I probably would've
10 asked him if he had it on.

11 Q: But you -- Yeah, and you did ask him,
12 right?

13 A: To, yeah, just to see if he did or
14 didn't. That's just, that's what I would
15 ask probably anybody, would you have
16 anything recorded?

17 Q: Because if it were on, you would bring it
18 to court, right?

19 A: Correct, yes, sir.

20 Q: Okay. And there's no question but that
21 video was not running?

22 A: Correct.

23 Q: But there's no reason why it could not
24 have been running, correct?

25 A: I -- I mean he's off duty, so I don't

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1 know, but.

2 Q: I understand. And you're not aware of

3 any affidavit that you've prepared ---

4 A: No, sir.

5 Q: --- or anyone else prepared?

6 A: No, sir.

7 Q: To explain that he was off duty, right?

8 A: No, sir.

9 Q: Okay. Thank you, sir.

10 A: Yes, sir.

11 Mr. McCollum: That's all I have for

12 him, Your Honor.

13 The Court: Anything else,

14 Solicitor?

15 Mr. Thomas: Just briefly.

16 **RE-DIRECT EXAMINATION**

17 **BY MR. THOMAS:**

18 Q: If there was a video of the traffic stop,

19 that would be something that you would be

20 expected to produce in discovery,

21 correct?

22 A: Correct.

23 Q: And if there was such a video and you

24 didn't produce it, you'd be possibly

25 withholding discovery?

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1 A: Correct.

2 Mr. Thomas: That's all the State
3 has.

4 The Court: You may step down.
5 Now, further argument?

6 Mr. Thomas: Your Honor, I think the
7 State v Landis case is very instructive
8 as far as who it is that's required to
9 comply with this videotaping statute.
10 It's the arresting officer, and the
11 case makes that clear. And it goes to,
12 and I can get you a copy of the case if
13 you want, but in that case, and it's
14 probably best just to argue on the
15 facts of that case ---

16 Mr. McCollum: Your Honor, I'm sorry
17 to interrupt, can I get a site for
18 Landis, just so we can pull it up here?

19 Mr. Thomas: It is 362 South
20 Carolina 97. It's a 2004, South
21 Carolina Court of Appeals opinion.

22 Mr. McCollum: 362-97. Thank you.

23 The Court: And, Solicitor, would,
24 is that Mr. McCollum brought up, a
25 video or affidavit, your argument would

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1 be the same that he was not the
2 arresting officer so he didn't ---
3 Mr. Thomas: That's correct.
4 The Court: --- have to produce a
5 affidavit?
6 Mr. Thomas: If he were -- That's
7 correct, Your Honor.
8 The Court: All right. Thank You.
9 Mr. Thomas: And if Trooper Weldon
10 did not produce a video, he would have to
11 produce the affidavit, or, there's also
12 the totality of circumstances exception
13 under that second part of that statute as
14 well. And in these cases they cite,
15 Suchenski and that line of case, none of
16 those deal with that exception part of
17 the statute because that wasn't preserved
18 on appeal. They only deal with the
19 videotaping requirement. In this case we
20 argue that the requirement was met. I
21 think State v Landis is very instructive
22 as far as who the arresting officer is,
23 and he must comply with this videotaping
24 requirement. So I think we fully
25 complied with it. The State would argue

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1 that, if for some reason Your Honor
2 didn't agree that, in this circumstance
3 we have the off duty officer who did make
4 the stop here in court today, that this
5 would fall into that last totality of
6 circumstances exception with the
7 videotaping statute, Your Honor.

8 The Court: Thank You. Now, Mr.
9 McCollum?

10 Mr. McCollum: Your Honor, I can't
11 pull the case up. May I just have a
12 moment to look at it?

13 Mr. Thomas: Yeah, take a look at
14 mine.

15 The Court: Let's go ahead and make
16 us both a copy. I don't have mine
17 either. I had a notebook of all of the
18 case law.

19 Mr. Thomas: I've got some writing
20 on it. I don't think anything
21 prejudicial or anything like that. Do
22 you want to look at it and ---

23 Mr. McCollum: Okay. That's fine.

24 The Court: Thank You, Madam Clerk.
25 We'll be giving a moment for that.

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*****OFF THE RECORD*****

(ON THE RECORD)

The Court: All right. Are the parties ready now?

Mr. Thomas: The State is, Your Honor.

Mr. McCollum: May it please the Court? Your Honor, I understand The State's argument on Landis. And there's, you know, there's different cases on arrest, you know, what is an arrest, who is the arresting officer, how long does an arrest take, when does it end, when does it start. And I understand that argument. And whoever the arresting officer is, the issue in this case is that there's no affidavit.

Now, clearly the statute requires an affidavit, and case, after case, after case, supports that proposition. Now, in Landis, in the case cited, this 2004 Court of Appeals case, it says, on page -- I'm not sure what page we're on here -- but the end of the case after the court says,

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1 "Arresting officer." Let's see, it's
2 one, two, three, four, five, page six,
3 I guess, in the middle, under that long
4 quote that's single spaced. The case
5 says, "In accordance with section 56-5-
6 2953 subsection B, Trooper Davis
7 prepared a sworn affidavit certifying
8 that his videotape equipment was
9 inoperable at the time of the arrest."
10 They went through some questions and
11 answers. Question was, "Was your car
12 equipped with video at this time?

13 "It was, but it was inoperable."

14 "In pursuant to section 56-5-
15 2953, did you sign an affidavit for
16 failure to produce a videotape
17 indicating that it was inoperable?"

18 And the answer is, "Yes, I did."

19 And then they go through that
20 even more. Then The Court says, "In
21 further refutation of the Landis
22 argument, The Court discloses that not
23 only was Landis counsel in possession
24 of the affidavit, but The Court
25 accepted counsel's request, to place

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1 the affidavit into evidence.

2 So, part of the argument here,

3 which I think is very important, which

4 I don't think there's any way to

5 refute, is that failure to comply with

6 56-5-2953 has to be done with an

7 affidavit, and if -- we don't have an

8 affidavit here -- regardless of who the

9 arresting officer is. And we don't

10 know how long, we don't know what time

11 the incident occurred. We don't know

12 how long the vehicle was on the side of

13 the road. The officers were trying to

14 remember, and it's understandable, I

15 mean, they're human, you know, they

16 work hard, they make a lot of cases,

17 they do their jobs, they try to do

18 their best. This is, you know, the

19 case is old, and that's no fault of

20 theirs. But if she weren't -- she were

21 stopped at 1:30 or 1:35, the test

22 wouldn't even be admitted, because

23 there would be more than two hours.

24 So, if we had the videotape or had

25 something like that, that issue would

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1 be settled because we would know the
2 time and we could watch the video, even
3 if it weren't time stamped correctly,
4 to have some idea of how much time
5 we're talking about. In all due
6 respect, the officers just can't tell
7 us that. That's part of the reason for
8 the video, and the State has gone to
9 great lengths to require it. They've
10 made, they've carved out some
11 exceptions, but all the exceptions
12 start and end with the affidavit,
13 which, clearly, we don't have.

14 The Court: Thank you. Solicitor?

15 Mr. Thomas: Your Honor, I
16 respectfully disagree with opposing
17 counsel on this. First off, the
18 affidavit requirement is an exception
19 to not complying with the videotape
20 requirement which we maintain that we
21 did. Note in this Landis case, it's
22 the State Trooper in this Landis case
23 that arrived on the scene subsequent to
24 this transport officer, very similar to
25 the facts in our case where we have

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1 Trooper Wilkes off duty making a stop,
2 assisting with a stop, and then Trooper
3 Weldon coming and asking the Defendant
4 out the car so we can go through the
5 battery of field sobriety tests making
6 the actual arrest and so on.

7 So, if anyone would have had to
8 comply with this affidavit requirement,
9 or this, it's really an exception to
10 the videotaping requirement, it would
11 have been Trooper Weldon. In this
12 case, we provide, he provided a video
13 that meets all of the statutory
14 requirements.

15 As far as the time of the
16 arrest, there's testimony from both
17 Trooper Wilkes and Trooper Weldon that
18 it was about ten minutes from the time
19 Trooper Wilkes called him to the time
20 he arrived on the scene. The time of
21 arrest, I don't believe, is in dispute.
22 That was on the form. And that says,
23 the time of the arrest where you have
24 to meet, get within that two hour
25 window as far as the breath test. It's

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1 not the time you're pulled over, it's
2 the time of the actual arrest.

3 I guess, the videotaping, the
4 affidavit is not a requirement, it's
5 just, again, if you don't meet the
6 requirements of the videotaping
7 statute, it's a way you can still
8 comply with the statute. It's an
9 escape valve, if you will.

10 Now, also, in that section B,
11 there's the totality of the
12 circumstances type exception where you
13 don't even need to provide an
14 affidavit. It's not, you don't have to
15 have an affidavit if you don't have
16 that video. You're well within your
17 discretion to say, "Due to the totality
18 of the circumstances, we didn't need an
19 affidavit in this case."

20 Again, in this case, the State
21 says that we submitted a video that
22 complies fully with this videotaping
23 statute.

24 The Court: Thank you very much.

25 Both of you I'll hear further before I

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1 make my ruling if need be.

2 Mr. McCollum: Your Honor, I just,
3 before you rule, I would just like to
4 hand up this Greer versus Humble case.
5 I think it's, I mean it's just, I think
6 it's pretty clear in the State. The
7 case sets it over and over that there
8 has to be an affidavit.

9 Mr. Thomas: Your Honor, If I may
10 respond, this is just another case
11 where there's not a video tape that
12 meets the requirements of the
13 videotaping statute. I believe what
14 the Court of Appeals said in this
15 opinion was that the, this is one of
16 those form affidavits that basically
17 says it was, the videotape wasn't
18 operating at the time of the arrest or
19 the incident, and they said that was
20 not enough. The new statute, this
21 deals with the new statute which was
22 amended in 2009, and in that new
23 statute there's language in the statute
24 that says, "Which reasonable efforts."
25 The State attempted to comply

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1 with the video -- with this affidavit
2 exception to the videotape requirement.
3 The judge ruled that they did not
4 comply with it because they did not go
5 into which reasonable efforts were
6 made. And that's a new statute.
7 That's the new statute that has the,
8 "Which reasonable efforts," language in
9 it, Your Honor.

10 Mr. McCollum: And, Your Honor, I
11 agree with what he's saying, that
12 that's, that case talks about that the
13 affidavit was deficient. And I
14 remember a time, when I first started,
15 Jim Dunn used to have me go research
16 things that were so plain on their
17 face, I couldn't find an answer to it
18 because they have never been contested
19 or decided otherwise. So, my point in
20 handing that up is it gives the
21 language. I understand that the case,
22 that affidavit was deficient because
23 the affidavit requirements changed. So
24 you have cases where there is an
25 affidavit, but it's not good enough

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1 because it's deficient. And what I'm
2 saying is I'm backing up to square one,
3 as so to speak, to say we don't --
4 we're not examining the sufficiency of
5 the affidavit. I'm saying there isn't
6 one.

7 The Court: Thank you. And thank
8 y'all for arguing that. We're going to
9 make a decision here and now from them,
10 and the motion before The Court is for
11 dismissal and that there was no video
12 or no affidavit. The Solicitor has
13 handed up State v Landis and Mr.
14 McCollum has handed up City of Greer.
15 So, The Court having kind of had some
16 experience in this type motion before,
17 is going to rule as such, taking in to
18 consideration the totality of what
19 happened on that date. I heard
20 testimony from the, from Trooper Wilkes
21 who's going home, lives in the same
22 area, states where he was coming from.
23 He was dressed in training gear. He
24 sees this vehicle, follows it, because
25 he lives in the area. He -- The

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1 vehicle turns off 501 on to Gardner
2 Lacy and then right on Postal Way, and
3 from there he sees issues and, of
4 course, knowing that he is not on duty
5 calls for an officer that is on duty.
6 Then we pick up to hear from Trooper
7 Weldon and what he did. When he comes
8 on scene he does have an affidavit. It
9 does not have on it what Trooper sees,
10 but then, again, I believe Landis is
11 more on point, and none of them are
12 ever on point, because I think you have
13 to look at intent of what the
14 legislatures rule and why these laws
15 are in, or are what they are. In this,
16 the holding was that, and I'm going to
17 improvise here by putting in the off
18 duty trooper. It was the State Trooper
19 Weldon, not Wilkes who had to meet the
20 statutory requirement the incident be
21 videotaped at the incident site. And,
22 of course, his position is, Weldon,
23 that, when I got onsite, it, I do have
24 a video. The holding goes on to say
25 that it, not that it was inoperable,

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1 but that it was not an issue in
2 determining whether or not the officer
3 complied with the requirement that he
4 submit such an affidavit, his position,
5 and I believe as The Court, that I have
6 a video so the affidavit isn't
7 required, and even so, it's not an
8 issue here for The Court to, to -- or I
9 believe that the jury should worry
10 about, because, again, the totality of
11 the circumstances are that one officer
12 sees the committing. He's not on duty.
13 He does not tape it. He is a witness
14 in this case. It is such that it can
15 go before the jury and let the jury
16 then decide, again, that this motion
17 come before me for dismissal. The
18 Court is going to respectfully deny and
19 note for the record that it rules with
20 Landis in this particular matter.
21 Thank you. Anything else in motions?
22 Mr. McCollum: Your Honor, the only
23 other thing is there's some, there's
24 some issues on the video where some
25 statements are made by, I guess it's

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1 Trooper Weldon, that I think are
2 objectionable. But that's later in the
3 case, and I don't know how you want to
4 handle that.

5 The Court: Let's go ahead and talk
6 about it now and even see it if we need
7 to, that we have the video present and
8 ready to go.

9 Mr. McCollum: There's, when he reads
10 the implied consent warnings in the
11 beginning, he says, "You have a right
12 to an affirmative test," I think is
13 pretty clear that that's objectionable.
14 At the, at the end when the reading
15 comes back is .16. He asks her,
16 because there's some statements she had
17 made, "Do you want to recant? You blew
18 a .16." And he says, "You blew a .16.
19 That's two times the legal limit." We
20 object to that.

21 Also, I think there was some
22 evidence in here that the, he asks her
23 about if she's taking any prescriptions
24 or any medicine or anything like that.
25 I think there was, and I don't see it

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1 right here, but I think there's
2 something in there which says that she
3 had taken a prescription for some type
4 of medication, possibly maybe Xanax or
5 something like that. We would ask to
6 exclude that. Yeah, in the video, it
7 says, "Not supposed to mix with Xanax."
8 You know, if it were a DUI, maybe,
9 maybe that would be relevant. The
10 State's charged him with a driving with
11 a ---

12 The Court: You're saying because
13 it's a DUAC ---

14 Mr. McCollum: --- an unlawful alcohol
15 concentration. So we would move to
16 exclude that.

17 The Court: So what you're saying
18 is because of the DUAC and all that has
19 to be shown is the reading, more or
20 less, that that should be redacted?

21 Mr. McCollum: Right. Yes, ma'am.

22 The Court: Solicitor, your
23 position?

24 Mr. Thomas: Your Honor, I think it
25 should be able to come in. I agree

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1 that it doesn't come in to play because
2 it's, as far as the actual charge, but
3 Defense's entitled, under the statute,
4 as well as the prosecution, to play the
5 roadside videotape, all the field
6 sobriety tests. It's clearly relevant
7 as to her performance on those tests,
8 and also her conduct because she's
9 videotaping the statute, so, are meant
10 to capture. I'm not going to use it in
11 closing or opening, it doesn't, you
12 know, the elements of DUAC, it's about
13 your alcohol concentration. It's not
14 about what drugs are in your system,
15 but I think that, in this case, it may,
16 it may sort of help explain to the jury
17 maybe why, maybe her calm demeanor and
18 some other, just her conduct. I think
19 it helps, gives a better picture to the
20 jury as far as her conduct.

21 The Court: Thank you. Further?

22 Mr. McCollum: But that, I think I've
23 stated it clearly, Your Honor. I don't
24 have anything else to add.

25 The Court: All right. I -- I'm

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1 going to allow it. It's a part of the
2 taping. I don't think it's something
3 that would, would be prejudicial. So
4 I'm going to allow it to stay.

5 Mr. McCollum: So, you're saying that
6 it is not prejudicial?

7 The Court: I don't think it is.

8 Mr. McCollum: Okay.

9 The Court: This, the -- the -- It
10 is the videotape. It is what happened.
11 And if you can give me something that
12 shows me that it is prejudicial.

13 Mr. McCollum: Your Honor, as a
14 starting point, just because it's on
15 the videotape doesn't mean it's
16 admissible, okay.

17 The Court: Yes, I know. But can
18 you show me why that would be
19 prejudicial to her?

20 Mr. McCollum: Well, because it's
21 evidence of, that she's driving under
22 the influence. Okay? If she's under
23 the -- She could have not had anything
24 to drink and be under the influence of
25 prescription medication that she's

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1 taking lawfully. That's part of the
2 DUI statute, and it specifically says
3 that. In this case, the State has
4 elected to charge her with an entirely
5 different section, which is Driving
6 with an Unlawful Alcohol Concentration.

7 The Court: So that is specific to
8 alcohol. You don't see that Xanax or
9 anything else should come in, is your
10 argument?

11 Mr. McCollum: Yeah, I mean, if she
12 had -- If there was -- If they had
13 extreme or strong evidence that she was
14 under the, grossly intoxicated as a
15 result of taking prescription
16 medications or non prescription
17 medications. But her blood alcohol
18 level was under .08. I think the State
19 would be facing a directed verdict of
20 not guilty. So, you know, they, for
21 whatever reason, they made the election
22 to charge her with Driving Under the
23 Alcohol Concentration statute, versus
24 the DUI statute. At least, in my mind,
25 it's pretty clear that it relates only

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1 to alcohol. So, you know, that's the
2 motion before The Court and that's the
3 basis of it.

4 The Court: All right. Solicitor,
5 he has a point. You could have
6 elected, you did for DUAC, so.

7 Mr. Thomas: Your Honor, again, I
8 think this goes to her conduct during
9 these field sobriety tests and her
10 overall demeanor, which is, I think it
11 just explains her conduct in this case.
12 I still, I don't see how it's
13 prejudicial if, if the Defense would
14 like an instruction, some sort of jury
15 instruction that said that this has
16 nothing that -- I mean, I think that
17 the instruction for DUAC takes care of
18 that in and of itself. That it's
19 driving with an unlawful alcohol
20 concentration, driving in South
21 Carolina while your blood alcohol
22 concentration is .0 -- or eight one
23 hundredths of a percent or higher. The
24 State's not going to argue that that
25 affected her blood alcohol

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1 concentration.

2 The Court: I'm going to allow it,
3 Mr. McCollum. I don't see the
4 prejudicial effect. And he's not going
5 to argue it, he just believes it
6 strengthens his side to show the
7 entire, overall of what happened on the
8 video. All right. Anything else?

9 Mr. McCollum: The other things, just
10 some things I've already raised, Your
11 Honor, just the officer's comments
12 that, and there again, "Three beers
13 you're not supposed to mix with Xanax,"
14 is my understanding, Your Honor's going
15 to allow that. And then he says, "When
16 did you last take a Xanax", is my
17 understanding Your Honor's going to
18 allow that.

19 The Court: Okay.

20 Mr. McCollum: Also, Your Honor, him
21 saying that, "You blew two times the
22 legal limit." We object to that.

23 The Court: Solicitor?

24 Mr. Thomas: Your Honor, I don't see
25 a problem with that, but I believe

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1 that's right after the actual, we've
2 gotten the BA result. If Defense
3 Counsel would like me to turn off the
4 video right after we get the result and
5 prior to that comment, that's fine with
6 me and I'll do that. We can stipulate
7 to that.

8 The Court: I haven't seen it, so
9 with both of you having watched it, is
10 that sufficient, Mr. McCollum?

11 Mr. McCollum: Yeah, clearly, I mean,
12 if they, if that, the parts that I am
13 objecting to are not played, obviously,
14 then that would satisfy the objection
15 that it be redacted or not be put
16 before the jury.

17 Mr. Thomas: This is the twice the
18 legal limit comment after the BA
19 result. I think, under the judge's
20 previous ruling, the, "When's the last
21 time you've taken Xanax?" I think
22 that's relevant on -- and, also, this
23 comes into play because of where the
24 officer has to take, you know, she's on
25 certain medications, they have to go

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1 straight to J. Reuben Long where they
2 have the medical staff. Of course, in
3 this case, I think it's relevant
4 because the statute, even though this
5 is all about driving with unlawful
6 blood alcohol concentration, the
7 statute allows all this evidence in as
8 far as the field sobriety test, you
9 either corroborate or their doubt -- or
10 cast doubt upon the results of this BA
11 test, and I think that that helps
12 explain her conduct and the field
13 sobriety test. So I think that if that
14 stuff comes in, then I think those
15 statements need to come in.

16 Now, the State doesn't have a
17 problem with, if they don't want to, if
18 we don't want to play any of the
19 roadside video, we can, we can just put
20 the officers on there and testify as to
21 the stop and this and that. I don't
22 like to do that because I think it's
23 good for the jury to see the
24 videotaping statute, and that's the
25 reason why our legislatures mandated

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1 it, but if you want to stipulate as to
2 that, I don't necessarily have a
3 problem with as long as the jury knows
4 that was a stipulation between the
5 State and opposing counsel. That would
6 wipe out all of the statements.

7 Mr. McCollum: So, so he's proposing
8 that we not show the roadside video?
9 Is also, are you including the BA video
10 as well?

11 Mr. Thomas: Well, this is a DUAC.
12 I would like to show that. I would
13 really just like to show the whole, put
14 the whole thing in front of a jury. I
15 think that's the reason for the
16 statute, is to put, put the videotape
17 in front of the jury. I would feel
18 more comfortable in doing that. I
19 don't want to look like I'm hiding
20 something from the jury.

21 Mr. McCollum: You know, Your Honor.
22 One of the things that strikes me here
23 is that the Solicitor stated that the
24 field sobriety tests are admissible.
25 And, I don't know if they're admissible

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1 or not? The, the statute says that
2 they have the right to challenge
3 certain factors including whether or
4 not the person was lawfully arrested or
5 detained, the period of time between
6 arresting and testing, whether the
7 person was given a written copy of the
8 implied consent rights, whether the
9 person consented to take the test, and
10 then the blood alcohol concentration,
11 and whether the person was qualified
12 and whether the machine was working
13 properly. And then, you know,
14 independent tests -- the amount of
15 alcohol evidence of the person's
16 driving, and then the evidence of field
17 sobriety tests. But I'm not, I don't
18 know who is able to introduce that. It
19 may, it almost seems like that's their,
20 that evidence that the defense could
21 present to rebut or not. I'm not, I'm
22 not clear on that.

23 Mr. Thomas: Your Honor ---

24 The Court: And I'm not going to
25 tell him how to try it.

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1 Mr. Thomas: Your Honor, I believe
2 it's evidence that the State can
3 proffer to corroborate the BA results.

4 The Court: All right.

5 Mr. Thomas: And that's how it's
6 used.

7 The Court: This is going to be my
8 ruling then, with the matters that have
9 been brought to The Court within your
10 motion. I'm going to respectfully
11 deny. And then all matters regarding
12 the video will be shown.

13 Mr. Thomas: Thank you, Your Honor.
14 And the State will, will turn the BA
15 off before the "twice the legal limit"
16 comment.

17 Mr. McCollum: All right.

18 Mr. Thomas: Just out of fear that
19 maybe that's a statement of law or
20 something.

21 Mr. McCollum: And what about the
22 independent tests, Your Honor. Is that
23 ---

24 The Court: How -- What he says?

25 Mr. McCollum: It's just part of the

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1 implied consent warning. They advise
2 everybody they have a right to get an
3 independent test, and then the case law
4 says that that's not admissible against
5 the person because their failure to get
6 an independent test, that could,
7 somehow, work against them.

8 The Court: Well, but it is what is
9 recorded in the implied consent?

10 Mr. McCollum: It's in the form that
11 they read. It's on the tape. I think
12 there's clear case law on that that
13 says that if they ask for it to be
14 excluded it has to be excluded, and so
15 I'm making that request at this time.

16 The Court: And solicitor?

17 Mr. Thomas: Your Honor, if Defense
18 counsel does stipulate the implied
19 consent, that proper implied consent
20 was given, then the State does need to
21 redact a little portion on the implied
22 consent form that says you're able to
23 get another test. I'm paraphrasing.
24 And then, also, the portion on the
25 videotape that talks about that.

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1 The Court: All right.
2 Mr. Thomas: The State is fine with
3 doing that.
4 The Court: All right. Then can we
5 do that before we bring the jury out,
6 because, again, my position is that I
7 don't want to be sending them in and
8 out once we get started.
9 Mr. Thomas: Yes, Your Honor, I'll
10 take care of that right now, find where
11 on that videotape it says that.
12 The Court: While he's doing that,
13 Mr. McCollum, any other motions?
14 Mr. McCollum: (No audible response).
15 *****OFF THE RECORD*****
16 (ON THE RECORD)
17 Mr. Thomas: All right, Your Honor,
18 I think we've, I've got the necessary
19 portion of the video that needs to be
20 redacted written down. So I'll just
21 mute it as published to the jury.
22 The Court: And on the document,
23 you plan to enter it as an exhibit?
24 Mr. Thomas: Since implied consent
25 is stipulated to in this case, I won't

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1 even enter that document into evidence.

2 The Court: All right. Mr.

3 McCollum, anything further?

4 Mr. McCollum: I'm sorry?

5 The Court: Anything further? He

6 does not plan to enter the document.

7 Mr. McCollum: Okay. I think that's

8 fine, Your Honor.

9 The Court: All right. I'll ask

10 the clerk to inquire that I'm looking

11 at the time of the jury, whether they

12 want to get started or take a lunch

13 hour? She'll be back momentarily.

14 *****OFF THE RECORD*****

15 (ON THE RECORD)

16 Mr. McCollum: Your Honor, while we're

17 sitting here, I think there's one other

18 thing I should raise.

19 The Court: Okay.

20 Mr. McCollum: May it please The

21 Court?

22 The Court: Yes, sir.

23 Mr. McCollum: In looking at these

24 cases, the laws, you know, continue to

25 change. And so one of the things I've

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1 started doing is going through, if you
2 go on Case Maker you can actually
3 archive it and you can get the specific
4 law for the incident. So like in this
5 particular act, and this is section 56-
6 5-2952, which is incident site and
7 videotape breath -- video -- incident
8 site recording and breath test site
9 recording. There's case law that said
10 that the videotaping was improper
11 because you couldn't see the person
12 completely in the videotape. In other
13 words, if you could -- you couldn't see
14 them walking the line from the knees
15 down. And part of those objections
16 also indicated that you couldn't see
17 the administration of the horizontal
18 gaze nystagmus, because the person is
19 facing away from the camera. And in
20 that particular case, what happened
21 was, the way the law read, it said that
22 it did not have to include the field
23 sobriety tests, and the State won the
24 case, because they said the statute
25 required a videotaping of the

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1 Defendant's conduct. So they said that
2 was the Defendant's conduct, so that
3 fact that the person was facing away
4 from the camera and those things were
5 not relevant.

6 Well, then what happened is they
7 amended the statute so that subsection
8 A(1), small letter double I, they put
9 in there, "include any field sobriety
10 tests administered." Now, in this
11 particular case, there might be a
12 slight issue as to viewing the
13 Defendant's feet. I think you can see
14 them in there. But clearly, with the
15 horizontal gaze nystagmus, the officer
16 turns her away from the camera, and so
17 I think I need to raise this issue
18 because the statute requires now, it's
19 been changed, as of the 2011 act, and
20 it's still the law as far as I know,
21 requires the inclusion of field
22 sobriety tests. So, I raise that, that
23 turning away from the camera doesn't
24 comply with the statute as it's been
25 amended.

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1 The Court: And you're stating, the
2 both of you, that that is what is on
3 this video?

4 Mr. McCollum: Yes.

5 The Court: Okay.

6 Mr. Thomas: Yeah, Your Honor, on
7 this -- Well, first off, I -- we see
8 the Defendant's feet, I think, during
9 the walk and turn, and also the one leg
10 stand. I will say that her back is to
11 the camera because it's to the back of
12 the police car, the cruiser that has
13 the lights on, since it's being done
14 right on the side of the road, actual
15 walk and turn is done on the, you know,
16 the white fog line on the side of a two
17 lane road. So the lights had to be on.
18 So what Trooper Weldon did, is had the
19 Defendant stand with her back to those
20 blue lights so they wouldn't affect her
21 in HGN. They are both on camera. You
22 can see the tests on camera. If she
23 was facing the camera, you wouldn't be
24 able to see nystagmus in her eyes
25 anyway. We don't have too many times

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1 really ---

2 The Court: And those are issues
3 that you can address in either direct
4 or cross examination. So the, the
5 short of it is, I'm going to allow it,
6 certainly, and then give you latitude
7 to question. All right.

8 They would like to go to lunch.
9 And I vote that's the fair thing. They
10 have been here all morning and they're
11 not, responsible for what we have to
12 do, and I don't want y'all to feel
13 guilty about that either, but let's all
14 go to lunch.

15 *******OFF THE RECORD*******

16 **(ON THE RECORD)**

17 The Court: Thank you. All parties
18 in the courtroom, any matters before we
19 bring the jury out?

20 Mr. Thomas: Nothing from the State,
21 Your Honor.

22 Mr. McCollum: Not from the Defense,
23 Your Honor.

24 The Court: Thank you. Madam
25 Clerk?

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1 (JURY ENTERS)

2 The Court: Thank you very much,
3 jury panel. Hopefully you had a
4 pleasant lunch as we did. We are ready
5 to go forth now. You have already been
6 sworn and, of course, your oath was
7 that you will well and truly try the
8 issues joined between the State of
9 South Carolina and Ms. Nilson, though
10 she's not here.

11 Just a little bit on that for
12 now. Take no thought to it because her
13 attorney is here and representing on
14 her behalf. If she were sitting there,
15 she doesn't have to do anything because
16 of this reason. This week, you as
17 judges of the facts are to look at
18 holding the State of South Carolina
19 responsible to proving to you beyond a
20 reasonable doubt that she committed the
21 offense of driving with an unlawful
22 alcohol concentration. That is the
23 State of South Carolina's burden, so
24 then the Defendant does not have to
25 prove anything. So, again, I'll give

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1 you further instructions as to that at
2 the end of the case as to your
3 consideration of that in the jury room,
4 but remembering that. We'll reiterate
5 that again, but in beginning a trial,
6 we begin by letting you hear from the
7 key parties in the case. In this
8 matter, then, that will be the State of
9 South Carolina through Solicitor
10 Thomas, and Mr. McCollum as attorney
11 for the Defendant. They will come to
12 you with what we call opening
13 statements. Opening statements are a
14 shorter version of what they plan to
15 show you without testimony. They will
16 do that through their statement to you,
17 and we're going to ask the Solicitor if
18 he will be making an opening statement
19 at this time.

20 Mr. Thomas: Very briefly, Your
21 Honor.

22 The Court: Yes, sir.

23 Mr. Thomas: May it please The
24 Court?

25 The Court: Yes, sir.

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1 Mr. Thomas: Ladies and gentlemen of
2 the jury, I, first off, thank y'all for
3 being patient with us this morning.
4 With that in mind, I'll try to be very
5 brief in this opening.

6 The Defendant is charged today
7 with driving with unlawful alcohol
8 concentration. As the judge stated, as
9 the prosecuting attorney for the State,
10 I carry that burden of proving that to
11 you beyond a reasonable doubt. Now,
12 the elements of driving with an
13 unlawful alcohol concentration are kind
14 of self explanatory. Driving in the
15 motor vehicle in South Carolina when
16 your blood alcohol concentration level
17 is eight one hundredths of one percent
18 or higher, so those are the two
19 elements we have to prove in this case.
20 And the way I'm going to do that is I'm
21 going to call to the witness stand
22 Trooper Wilkes, who actually made the
23 stop in this case while he was off
24 duty, and Trooper Weldon, who actually
25 came in, asked the Defendant out her

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1 car, put her through the field sobriety
2 tests that you see on TV, placed her
3 under arrest, went to a BA room where
4 she provided a breath sample. In this
5 case that breath sample was .16, which
6 is twice the legal limit in South
7 Carolina.

8 We're also going to have Brett
9 Baker who's going to explain to you a
10 little bit about the DataMaster
11 Machine. That's the machine that the
12 Defendant provided the breath sample
13 on. So I just ask that you pay
14 attention a little bit longer. This is
15 an important case for South Carolina,
16 and I know it's an important case for
17 the Defendant as well. Thank you.

18 The Court: Thank you, and Attorney
19 McCollum?

20 Mr. McCollum: May it please The
21 Court?

22 The Court: Yes, sir.

23 Mr. McCollum: Ladies and gentlemen,
24 good afternoon. I had an opportunity
25 to introduce myself to you this

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1 morning. My name is Greg McCollum, and
2 I'm here on behalf of Kylie Nilson.
3 Now, if the, during what we call the
4 jury voir dire, I explained that,
5 though some mishaps, really, in my
6 office, which I take responsibility
7 for, she's not present here today. We
8 made motions to continue the case.
9 Part of the judge's duty and job is to
10 rule on those motions. Many times
11 those rulings are made. Sometimes
12 they're made in my favor. Sometimes
13 they are made against me. Whatever
14 those rulings are, whether I agree with
15 them or not, our process is such that,
16 in order to have order in life, and
17 part of the court system is to have
18 civil order, and that's what we have,
19 we accept those rulings. You know, I
20 don't pitch a fit, okay? Or go out of
21 my way to show my displeasure when it
22 doesn't go my way, okay? I accept The
23 Court's rulings as they're intended, as
24 the rule of law, I try to show dignity
25 and respect to the tribunal or to The

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1 Court, and that's what I'm here to do
2 today.

3 Now, having said that, Kylie
4 Nilson is charged with driving with an
5 unlawful alcohol concentration. Now,
6 that's similar to DUI, but perhaps a
7 little bit different. In some states,
8 they have laws, as I understand it,
9 where if you are charged with an
10 offense and you take a breath test and
11 you blow a certain reading, that's
12 what's called a per se offense. In
13 other words, you wouldn't necessarily
14 have a right to a jury trial. You may
15 lose your driver's license, your
16 license may be suspended. You may have
17 to go to drug and alcohol classes and
18 things like that, but you wouldn't face
19 what we call any criminal penalties,
20 okay?

21 Now, criminal penalty is if, not
22 that your license is taken from you,
23 but that you're subject to go to jail.
24 You're subject to incarceration.
25 You're subject to paying a high fine or

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1 something like that. That's a criminal
2 penalty. Okay? And so, if a person's
3 convicted of driving under the
4 influence, and, depending on what their
5 -- what you find their breath test
6 reading to be if they're found guilty
7 of unlawfully driving under the
8 influence, then they're subject to
9 criminal penalties.

10 Now, you as a jury, you don't
11 impose penalties. You don't impose
12 sentences. You're the finders of fact.
13 You simply decide, is this person
14 guilty or not guilty. If you find a
15 person guilty, say, of driving under
16 the influence, then it's up to Her
17 Honor, or the judge, whoever's the
18 presiding judge in that case, to
19 determine if somebody's going to go to
20 jail, or if they're not going to go to
21 jail, or if they're going to be allowed
22 to pay a fine and those things.

23 Now, that's the thing about our,
24 what we call D-U-A-C Law, or sometimes
25 people call it the DUAC, which is

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1 Driving With Unlawful Alcohol
2 Concentration. I guess it's so, it's a
3 lot to say, so it gets shortened with
4 the prosecutors and other people, and
5 the lawyers sometimes call it DUAC, and
6 that's what we have here is a DUAC or a
7 D-U-A-C. But I'm here to tell you that
8 the D-U-A-C is a criminal charge, just
9 like the D-U-I charge. And so it's
10 defended in much the same ways, where
11 we say that, no, she's not guilty of
12 driving with an unlawful alcohol
13 concentration, because from observing
14 her and watching her and seeing the
15 State's evidence or the lack of
16 evidence, it's not consistent. In
17 other words, the underlying reason for
18 the D-U-A-C law is that if you blow a
19 certain level, or if you're accused of
20 blowing a certain level, that you're
21 unfit to drive. In other words, you're
22 impaired. It's just another way of
23 saying that.

24 Now, we also, we also have in
25 this State, in addition to the law of

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1 D-U-I and the law of D-U-A-C, we also
2 have the administrator suspension, or
3 the administrative action, which takes
4 place in a case if somebody is arrested
5 and charged with D-U-I, or arrested and
6 charged with D-U-A-C and they refuse to
7 take the breath test, then their
8 license is suspended on the spot and
9 they have a right to go have a hearing.
10 If a person is arrested and takes the
11 breath test but blows over .15, that
12 person's license is taken on the spot
13 and they have a right to request a
14 hearing.

15 Now that really is a per se kind
16 of law. That really is a law where
17 there's not a lot to contest in there
18 because you don't, there are no
19 criminal penalties. It's just a
20 question of can you have a driver's
21 license or not? So we are in criminal
22 court, even though this is not called a
23 D-U-I.

24 Now, one of the things that the
25 State is required to prove in this case

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1 is that the individual, Kylie Nilson,
2 was lawfully stopped or detained. And
3 as we drive our cars on the highways
4 here in Horry County or South Carolina,
5 or really anywhere in the country,
6 there's, we're not supposed to be able
7 to be stopped for no reason. There's
8 got to be a reason for the stop. It
9 cannot be random. It has to be
10 something that the officer's able to
11 testify to, to explain the probable
12 cause, which is a legal term, or the
13 reasonable suspicion, which is a legal
14 term, to justify the stop.

15 Now, also is an issue in this
16 case that will be before you, the law,
17 and we'll go through this, clearly
18 states that when you're about to be
19 stopped, when the State Trooper or the
20 police officer, whoever that may be,
21 intends to stop you, they must activate
22 a video camera. We have some of the
23 most expensive videotaping laws
24 regarding these charges probably in the
25 country. And the evidence here is, I

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1 expect you'll hear testimony from
2 Trooper Wilkes who was off duty, that
3 he stopped Kylie Nilson for what we
4 call bad driving. But for whatever
5 reason, he didn't videotape it as the
6 law requires. And that's an issue in
7 the case.

8 The other issue in the case is
9 just whether or not she's impaired. In
10 other words, is she, is there clear
11 evidence, is there evidence beyond a
12 reasonable doubt that she shouldn't be
13 driving because she's, it's not safe
14 for her to drive.

15 These are the issues that you'll
16 be hearing in this case. I simply ask
17 you, at this point, to keep an open
18 mind, realize that the Defendant, Kylie
19 Nilson, is not here to prove her
20 innocence. She doesn't have to prove
21 anything. She doesn't have to present
22 proof. The State has the burden of
23 proof, and they must convince each and
24 every one of you beyond a reasonable
25 doubt that she's guilty.

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1 If for whatever reason, through
2 lack of evidence or through the actions
3 of the State, or whatever you look at,
4 if any one of those things causes any
5 one of you to have a doubt about that
6 or to hesitate to act or to have some
7 concern about it, then under your oath
8 as jurors, you have an obligation to
9 find her not guilty because this is a
10 criminal offense. So, thank you, thank
11 you very much. I appreciate you being
12 here. We thank you for being here.

13 And finally, let me say this.
14 I've been doing this for some time, say
15 20, 23, 25 years, something like that.
16 And prior to defending people, I worked
17 for, probably, five and a half years or
18 so as a prosecutor, and prosecuted
19 pretty serious crimes, assault, sexual
20 assaults, murder, everything you can
21 think of, and that was in criminal
22 court, you know, General Sessions Court
23 in Conway. And after I had done that
24 for a number of years, they were
25 forming this Court, and I had the

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1 opportunity to come here and help form
2 this Court and sit right there and be
3 the prosecutor. And one of the things
4 that quickly became apparent to me when
5 I left felony criminal court and came
6 here, was that the majority of the
7 people that I was prosecuting in this
8 room, in this courthouse, were good
9 people. They weren't what I would
10 consider criminals at all. They were
11 people who, for whatever reason, made a
12 bad decision, did something that was
13 perhaps foolish, careless, which caused
14 them to be arrested. But even people
15 that we tried and convicted many times
16 were people who showed a great deal of
17 remorse, were very sorry, were law
18 abiding citizens, and whether they were
19 convicted or not, probably, in many
20 cases, would never have put themselves
21 in a position to be charged again,
22 because they learned a valuable lesson
23 from being pulled over at night, on the
24 side of the road, asked to perform
25 tests, taken into custody, handcuffed,

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1 had their car towed, transported to
2 some jail that the person's never been
3 to, never been in jail before, held in
4 jail for some period of time to then go
5 and have a bond hearing and then post
6 bond and then get out and do all that.
7 That's, that, in and of itself, may be
8 a greater punishment than a conviction.
9 And so, and that's a real part of the
10 cases, and that's something that, that
11 is just a -- that struck me when I
12 first started prosecuting DUIs at that
13 time.

14 So, again, thank you. I ask you
15 to listen carefully to the evidence.
16 At the conclusion of the case here
17 today, we'll finish the case today,
18 I'll come back and ask you to find
19 Kylie Nilson not guilty of driving with
20 an unlawful alcohol concentration.
21 Thank you.

22 The Court: We thank the attorneys
23 for their opening statements. Again,
24 we believe that, though that is not
25 fact, that is their positions with who

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1 they represent as to how they feel, and
2 hope that you will feel at the end of
3 the case. You will gather your
4 feelings, nonetheless, from the
5 testimony that's going to be presented
6 to you now from the witness stand as we
7 are getting ready to go into the trial
8 of the case. Since the solicitor has
9 the burden of proving this to you
10 beyond a reasonable doubt, he will go
11 first in presenting. The Defense has a
12 right to cross-examine any witness and
13 we'll ask the solicitor to call his
14 first witness. Thank you.

15 Mr. Thomas: May it please The
16 Court, Your Honor?

17 The Court: Yes, sir.

18 Mr. Thomas: The State will call
19 Trooper Wilkes to the stand.

20 The Court: And Trooper Wilkes is
21 being called to the stand as the first
22 witness in this case. Thank you,
23 Trooper Wilkes.

24 TROOPER WILKES, AFTER HAVING BEEN CALLED TO
25 THE STAND AND DULY SWORN, TESTIFIED AS

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1 FOLLOWS:

2 **Trooper Wilkes - Direct Examination by Mr. Thomas**
3 **DIRECT EXAMINATION**

4 **BY MR. THOMAS:**

5 Q: Trooper Wilkes, if you would, will you
6 please, and I guess I've already said in
7 question, state your name and also your
8 occupation to the jury?

9 A: My name is Wilbert C. Wilkes, Trooper
10 with the South Carolina Highway Patrol
11 assigned to Horry County.

12 Q: How long have you worked for the highway
13 patrol?

14 A: Right at 16 years now.

15 Q: Okay. Were you employed with the highway
16 patrol on December 4th, 2011?

17 A: I was.

18 Q: Now, on that same day, did you come into
19 contact with a Kylie Nilson?

20 A: Yes, I did.

21 Q: Can you sort of explain that? How you
22 came into contact with her, to the jury?

23 A: Yes, it was a little bit after midnight.
24 I responded to my parents' house in
25 Conway due to a family emergency. I was
 actually on my way back home, traveling

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1 south on 501, turn, make a left turn onto
2 Gardner Lacy Road. The light was red. I
3 was stopped behind a red Volkswagen, a
4 Volkswagen Bug, the newer model. The
5 light turned green. We both made a left,
6 as I was headed back to my house on
7 Carolina Forest Boulevard. I noticed
8 that the vehicle drifted off the right
9 side of the road just slightly, then came
10 back onto the roadway. We then made a
11 right turn on Postal Way, and the vehicle
12 made sort of a wide right turn which
13 crossed the double line. I then called
14 on the radio, to dispatch, and told them
15 that I might possibly be behind an
16 intoxicated driver at the time if they
17 had anybody close to the location. I
18 kept going around a few other curves on
19 Postal Way. She ran off the road
20 slightly again. I then went ahead and
21 activated my blue lights and pulled her
22 over to initiate the traffic stop. I
23 walked up to the driver's side of the
24 vehicle, identified myself as being an
25 off duty trooper. I was in uniform, the

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1 training uniform that we wear, which is a
2 Polo shirt, grey Polo shirt and BD pants
3 and I had my jacket on. And I asked her
4 for her driver's license and the reason
5 why I had stopped her. She had said that
6 she was taking her friend home from a
7 party, and I could smell the scent of, an
8 odor of alcohol coming from the vehicle.
9 I then told her, if she'd just hang
10 tight, just wait there for a few minutes,
11 I was going to get another trooper to
12 stand by suspecting that she might be
13 under the influence of alcohol. At that
14 time, I told dispatch the exact location,
15 and Trooper Weldon called on the radio
16 and said he was on his way to me, and I
17 just stood by until he got there.

18 Q: Okay. So to clarify, you were off duty?

19 A: Yes.

20 Q: Now, you mentioned something about
21 driving, driving off the road several
22 times, off to the right, going over the
23 double lines. Now, is that a traffic
24 offense?

25 A: It is. You're supposed to keep the

1 vehicle within the parameters of your
2 lane properly. And I just wanted to make
3 sure she, to check on her make sure she
4 was okay, or what might be the case of
5 why she was doing that. You know, I kept
6 a good, safe distance behind her to
7 observe her.

8 Q: Okay. Do you know about how long you
9 were following her?

10 A: Probably, it might have been maybe a
11 minute, if that, or less than that.

12 Q: So you observed all of those ---

13 A: Yes, sir.

14 Q: That kind of driving, that driving within
15 that period of time?

16 A: Yes, sir.

17 Q: Okay. Now, did you ever ask Ms. Nilson
18 out of the car?

19 A: No, I didn't.

20 Q: Okay. So, you stated earlier that you
21 contacted Highway Patrol to get someone
22 on duty there. Do you have an estimate
23 about how long it was as far as when you
24 stopped Ms. Nilson initially to when
25 Highway, when support came, when another

1 Highway Patrolman came on the scene?

2 A: It was, roughly, probably around ten
3 minutes or so.

4 Q: Okay.

5 A: Because I immediately, I notified
6 dispatch, so, always do that making sure
7 that they know I'm off duty, number one,
8 for policy and to send somebody for the,
9 a situation like that.

10 Q: Okay. Now, how long did you stay once
11 Trooper Weldon arrived on the scene?

12 A: I stayed until he made his arrest, and I
13 stood by with the, the passenger who was
14 in the vehicle, I stood to that side of
15 the, the passenger side of her car with
16 him while Trooper Weldon talked to Ms.
17 Nilson, and I waited until he secured her
18 and basically told me I was okay, I was
19 clear to leave, make sure he was all
20 right for officer safety reasons.

21 MR. THOMAS: THAT'S ALL THE STATE
22 HAS FOR RIGHT NOW, YOUR
23 HONOR.

24 THE COURT: OKAY. CROSS-EXAMINE?

25 MR. MCCOLLUM: MAY IT PLEASE THE

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1 COURT?

2 THE COURT: YES, SIR.

3 **Trooper Wilkes - Cross Examination by Mr. McCollum**
4 **CROSS EXAMINATION**

5 **BY MR. MCCOLLUM:**

6 Q: Trooper Wilkes, how are you this
7 afternoon?

8 A: Good, sir.

9 Q: So you've been a South Carolina State
10 Trooper for about 15 years?

11 A: Sixteen this year, 17 in January.

12 Q: And on this particular evening, you were
13 off duty?

14 A: Yes, sir.

15 Q: Okay. And so you lived somewhere in the
16 Carolina Forest area?

17 A: At that time.

18 Q: And then you say you went to Conway to
19 your parents' house, right?

20 A: Yes, sir.

21 Q: For some type of family emergency; is
22 that correct?

23 A: Yes, sir.

24 Q: Okay. And that was before midnight, or
25 after midnight?

A: That would have been before midnight when

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1 I went there.

2 Q: Now, do you know what time it was when
3 you left your house to go to your
4 parents' house?

5 A: Not exactly, I don't remember.

6 Q: Well, do you remember looking at the
7 clock to see what time it was?

8 A: It was, I know right before midnight.

9 Q: Okay. And I'm not trying to be difficult
10 here, but you know it was before
11 midnight, and this was in December of
12 2011, right?

13 A: Yes, sir.

14 Q: So how do you know it was before
15 midnight?

16 A: I just remember, from memory, that I got
17 a call from my mom that I needed to come
18 home and I remember looking at the clock
19 and it was sometime, it was around
20 eleven, and I remember leaving the house
21 and trying to get over there quick.

22 Q: So you remember, when you got a call from
23 your mom, you remember looking at the
24 clock?

25 A: I looked at the phone.

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1 Q: But there's a clock in there, right?

2 A: Yes, sir.

3 Q: And isn't it true that most of us cannot
4 tell what time it is without looking at a
5 clock or a watch or something, right?

6 A: Yes, sir.

7 Q: Okay. And how long does it take you to
8 get from where you live to your parents'
9 house?

10 A: Probably about 15 minutes.

11 Q: Okay. And do you know how long you were
12 there before you left to come back home?

13 A: It was probably over two -- I would say,
14 for a while.

15 Q: So, you know, there's a big difference
16 between an hour and two hours, right?

17 A: Yes, sir.

18 Q: So, from your response, is it safe to say
19 that you don't know how long it was? It
20 may have been one hour, it may have been
21 two hours, it might have been longer?

22 A: I definitely can say it was over an hour.
23 I know that much, because I was there
24 quite a while. I know that.

25 Q: All right. And when you left your

1 parents' house, did you remember looking
2 at a clock or a watch to see what time it
3 was when you were leaving?

4 A: No, I don't.

5 Q: Now, when you drive to your parents'
6 house, from your house in Carolina Forest
7 to their house in Conway, it's about a 15
8 minute drive, right?

9 A: Yes, sir.

10 Q: And when you were finished pulling over
11 Ms. Kylie Nilson, were you halfway home,
12 or three fourths of the way home?

13 A: Probably about three fourths of the way
14 home.

15 Q: Okay. So that would have been, say,
16 about 12 minutes, right?

17 A: I guess so.

18 Q: Okay. So, if you left your house around
19 eleven, did you leave your house around
20 eleven?

21 A: I don't remember.

22 Q: Might have been at eleven?

23 A: It was probably after that time, because
24 I remember, vaguely remember that around
25 it was, around eleven o'clock when I

1 looked at the clock, the time, I don't
2 remember exactly, specific time, but I
3 know it was after eleven.

4 Q: So then if you, it was around eleven or
5 after eleven, and you were there for one
6 hour or one hour and fifteen minutes or
7 one hour and a half, you would have been
8 leaving there, leaving your parents house
9 around, it could have been as early as
10 12:30, right?

11 A: That's possible,

12 Q: And if you were leaving your house as
13 early as 12:30 and it takes less than 15
14 minutes to get back, you could have
15 stopped Ms. Nilson sometime between 12:30
16 and 1:30, right?

17 A: Like I said, I don't remember exactly
18 what time it was that I stopped her.

19 Q: So it could have been, could have been
20 12:30, could have been later?

21 A: Yes, sir.

22 Q: Okay. Because, sitting here today, being
23 fair to you, it's not easy to remember
24 these exact times when you did the things
25 that you did, right?

1 A: Yes, sir.

2 Q: I mean, clearly, if the situation were
3 reversed and you were asking me what I
4 was doing on December the 4th of 2011, I
5 probably wouldn't even be able to tell
6 you, right?

7 A: Yes, sir.

8 Q: The only way you know about this is
9 because somebody got arrested and there
10 was some police report, right?

11 A: Yes, sir.

12 Q: Is that fair?

13 A: Yes, sir.

14 Q: All right. Now, in terms of the facts of
15 the case of what happened, in 15 years
16 with the Highway Patrol, you made DUI
17 stops, right?

18 A: Yes, sir.

19 Q: And you've made car stops, right?

20 A: Yes, sir.

21 Q: And you've written people tickets before,
22 right?

23 A: Yes, sir.

24 Q: And in the course of, say, a normal work
25 week, when you're working the shift,

1 about how many people would you stop on a
2 particular shift just, and I know that it
3 varies, but just in general, is it
4 usually one or two people or is it five
5 or ten, or 20?

6 A: Probably ten, ten to 20.

7 Q: Okay. So if you stop, and normally do
8 you work about, what do you work, like
9 three 12 hour shifts a week or four 12
10 hour shifts?

11 A: It, it varies at times, but it's 12 hour
12 shifts.

13 Q: And is it usually about 40 hours a week
14 or a little longer?

15 A: It's, it's 40 hours a week.

16 Q: So if you're making ten or 12 stops a
17 night and you're working four days, I
18 mean, that's about 40, right?

19 A: Yes, sir.

20 Q: So then in a month or four weeks, that's
21 160, right?

22 A: Yes, sir.

23 Q: And then that's, do the math here, 12
24 times 160, that's over like 1500 or
25 something like that, right?

1 A: Something ---

2 Q: Have I lost you? And there's no way to
3 remember all those stops, right?

4 A: See, it depends on the ones that stick
5 out. Sometimes you do remember others
6 and some that are different than ---

7 Q: Like some of them stick out, right?

8 A: Yes, sir.

9 Q: And that's when people exhibit extreme
10 behavior, right?

11 A: At times, you know, depends on the
12 behavior or the situation. This one in
13 particular I remember because of that
14 night, the situation that happened.

15 Q: You just remember because you were off
16 duty, right?

17 A: Yes, sir.

18 Q: Now, you said that you were wearing your
19 training uniform, did you wear your
20 training uniform because you were going
21 to be driving the State Patrol car?

22 A: Yes, sir.

23 Q: Because you're not supposed to drive the
24 State Patrol car unless you're in some
25 kind of uniform, right?

1 A: Yes, sir, the proper uniform, according
2 to policy.

3 Q: Because it would be odd for one of us to
4 look over in a State Patrol car and see
5 somebody wearing just street clothes
6 driving it, right?

7 A: Yes, sir.

8 Q: In fact, if we saw that, we might call
9 911 because we might think that the
10 vehicle had been stolen or something,
11 right?

12 A: It's possible, sir.

13 Q: All right. So, given the fact that you
14 were in uniform, in the State Patrol
15 vehicle, if you had elected to, and I'm
16 not saying you should or you shouldn't,
17 but had you elected to, you could have
18 made the case against Ms. Nilson, right?

19 A: I could have, but we're not supposed to
20 because of the fact that I was not on
21 duty at that time and I was off duty at,
22 wasn't, I was actually supposed to go to
23 work the next morning, so, I chose to
24 call another officer there as we're
25 required to in the policy so that someone

1 else could effectively deal with the
2 situation.

3 Q: Now, your patrol car is what we call a
4 marked patrol car, right?

5 A: Yes, sir.

6 Q: And by that it has the insignia on the
7 side, right?

8 A: Yes, sir.

9 Q: It's got the blue stripes down it, right?

10 A: Yes, sir.

11 Q: It's got the light bar with the blue
12 lights on top, right?

13 A: Yes, sir.

14 Q: And it's equipped with all of this
15 standard equipment that a State Patrol
16 car is supposed to have, right?

17 A: Yes, sir.

18 Q: And part of that equipment is what we,
19 what we call a dash camera or a dash
20 board or windshield video camera, right?

21 A: Yes, sir.

22 Q: And that's standard equipment, right?

23 A: Yes, sir.

24 Q: And that's required to be in all patrol
25 cars, right?

1 A: It is now, sir.

2 Q: And it was at that time, too, right?

3 A: (Inaudible response.)

4 Q: And there's no question that your car had
5 one, right?

6 A: Yes, sir.

7 Q: And when you turn that camera on, you're
8 able to record the behavior of the car in
9 front of you, right?

10 A: Yes, sir.

11 Q: And when you are going to stop a car for
12 suspicion of DUI or suspicion of
13 anything, you turn that camera on, right?

14 A: Mine, unfortunately, is an older camera
15 and at that night it wasn't on because I
16 was off duty, and you actually have to
17 manually turn the switch on to activate
18 it to turn the actual camera system on.
19 But normally when you turn the blue
20 lights on, it then activates the
21 recording system. At that time, it
22 wasn't.

23 Q: Now, when you're driving the car and you
24 want to videotape what's in front of you,
25 it's just a matter of literally flipping

1 a switch, right?

2 A: Yes, sir.

3 Q: Pushing a button or -- do you push a
4 button or flip a switch?

5 A: Well, at first you have to turn it on, in
6 that case, then you just hit the record
7 button.

8 Q: All right. And that's something you've
9 done a thousand times, right?

10 A: Probably so, yes, sir.

11 Q: Okay. And your testimony is that you
12 were on Highway 501 at Gardner Lacy Road,
13 right?

14 A: Yes, sir.

15 Q: And Highway 501 is, technically is
16 northbound and southbound, right?

17 A: Yes, sir.

18 Q: And southbound is toward Myrtle Beach,
19 right?

20 A: Yes, sir.

21 Q: So you were southbound on 501 from Conway
22 in the left turn lane waiting to turn
23 left onto Gardner Lacy Road, right?

24 A: Yes, sir.

25 Q: And Gardner Lacy Road is a road that goes

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1 what we call north, okay, but it's
2 actually west -- no east, it's actually
3 east, right? But in any event, it
4 intersects with a road called Postal Way,
5 which goes just past Carolina Forest High
6 School, right?

7 A: Yes, sir.

8 Q: Okay. And so, and now, in fact, that's a
9 shortcut to get over to Carolina Forest
10 Boulevard, or it seems like one, right?

11 A: Yes, sir.

12 Q: All right. And so, when you were at the
13 stoplight, was it your intention to turn
14 left and go that way?

15 A: Yes, it was.

16 Q: And that had nothing to do with Kylie
17 Nilson?

18 A: No, sir, not at all.

19 Q: Then at some point you were driving
20 behind her vehicle, right?

21 A: Yes, sir.

22 Q: And you had, testimony was that, I
23 believe, that at one point she made what
24 you considered kind of a wide turn.

25 A: When she turned onto Postal Way, she made

1 the right turn, and she went into the
2 oncoming traffic lane, just over the
3 double yellow line. Her front tires,
4 the, her left side tires went on the side
5 of the yellow line.

6 Q: And so that's what she did, her car tires
7 went over the yellow line?

8 A: Yes, sir.

9 Q: Either on the center line or on the right
10 side?

11 A: The center, when she made the right turn,
12 just across that.

13 Q: All right. And had you been on duty
14 would you have recorded that?

15 A: Yes, sir.

16 Q: All right. So there's no question but
17 that, and recording, at least at the
18 point where you turn the blue lights on,
19 that's legally required, right?

20 A: Yes, sir.

21 Q: Correct?

22 A: Yes, sir.

23 Q: I mean, there's no question about that,
24 but that the law, which you're familiar
25 with, right?

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1 A: Yes, sir.

2 Q: You've been trained with it backward and
3 forward, right?

4 A: Yes, sir.

5 Q: And you've testified in court before,
6 right?

7 A: Yes, sir.

8 Q: Okay. And it's safe to say that you know
9 what you're doing, right?

10 A: Yes, sir.

11 Q: And there's no question but the
12 videotaping is required at the very
13 latest, not later than activation of the
14 officer's blue lights, right?

15 A: Yes, sir.

16 MR. THOMAS: YOUR HONOR, I WOULD
17 OBJECT. WE'RE STARTING
18 TO GET INTO ISSUES OF
19 LAW THAT HAVE BEEN
20 RULED UPON BY YOU
21 ALREADY IN PRETRIAL
22 MOTIONS. I THINK ANY
23 TESTIMONY IS TO FORMER
24 QUESTIONS FROM OPPOSING
25 COUNSEL AND FROM THE

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1 OFFICER, THAT IMPEDES
2 UPON YOUR PROWESS AS
3 THE JUDGE OF LAW IN
4 THIS CASE, AND I WOULD
5 OBJECT ON THAT BASIS,
6 YOUR HONOR.
7 THE COURT: CARE TO BE HEARD?
8 MR. MCCOLLUM: YOUR HONOR WE HAVE, YOU
9 KNOW, ON MOST ISSUES,
10 EVEN THE MOST
11 FUNDAMENTAL OF RIGHTS,
12 I THINK THAT,
13 REGARDLESS OF THE
14 COURTS RULINGS, I DO IT
15 MANY TIMES, THOSE ARE
16 ALSO QUESTIONS FOR THE
17 JURY. THAT'S MY
18 INTENTION OF RAISING
19 IT.
20 THE COURT: NO, SIR, NOT FOR THE
21 LAW. MEMBERS OF THE
22 JURY PANEL, I'LL
23 CORRECT IT THIS WAY,
24 MOST OF THE THINGS THAT
25 CAME UP AS MOTION, YOU

1 DID NOT HEAR BUT THE
2 COURT HAS RULED UPON
3 THEM, THEREFORE I'M
4 GOING TO REQUIRE MR.
5 MCCOLLUM TO MOVE ON
6 INTO THE FACTS RATHER
7 THAN THE LAW. AND YOU
8 DID ASK HIM ABOUT THE
9 LAW AND WHAT WAS
10 REQUIRED, AND THE
11 COURT'S ALREADY HEARD
12 IT AND RULED ON IT.
13 LET'S GO FORWARD.
14 THANK YOU.

15 **MR. MCCOLLUM CONTINUES:**

16 Q: So, you followed the vehicle from near
17 501 down to Postal Way, right?

18 A: Yes, sir, to about halfway down Postal
19 Way.

20 Q: And then, her vehicle, your testimony is
21 that she turned toward the coast or
22 toward the beach, turned right onto
23 Postal Way, right?

24 A: Yes, sir.

25 Q: And that you continued to follow her,

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1 right?

2 A: Yes, sir, which is actually the same way
3 I take to go home, the direction.

4 Q: Okay. And then she traveled some
5 distance down Postal Way, right?

6 A: Yes, sir.

7 Q: And after you go around that curve,
8 there's a high school on the left, right?

9 A: Yes, sir.

10 Q: She went around the curve, as she went
11 past that high school, right?

12 A: Yes, sir.

13 Q: But sometime before getting to Carolina
14 Forest Boulevard you made a decision to
15 pull her over?

16 A: She had, right before it goes straight,
17 there's another curve, and as she made
18 that curve, if I recollect correctly, she
19 went over the fog line slightly and back
20 on the road. At that time I decided to
21 go ahead and initiate the traffic stop.

22 Q: Now when you say that she went over the,
23 what do you call it, the fault line?

24 A: The fog line.

25 Q: The fog line, I'm sorry.

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1 A: The white line.

2 Q: Okay. So you're not saying that she ran
3 off the road, you're saying that she went
4 over that line on the side of the road
5 called the fog line?

6 A: Yes, sir, she drifted to the right.

7 Q: All right. And, during this period of
8 time, you were driving a marked patrol
9 car and you were following her, right?

10 A: That's true.

11 Q: Yes?

12 A: I was behind her that, like I said,
13 that's the way I go home, so, I was
14 actually behind her ---

15 Q: I'm not accusing you of anything, I'm
16 just saying you were following her in a
17 marked patrol car, right?

18 A: Yes, sir.

19 Q: Okay. And, as you follow a car in a
20 marked patrol car, sometimes people look
21 in the mirror, right?

22 A: Yes, sir.

23 Q: I mean, if, if -- have you ever been
24 pulled over?

25 A: Yes, sir.

1 Q: You've been stopped by law enforcement?
2 A: Yes, sir.
3 Q: All right. And if they're driving behind
4 you, would you look in the rearview
5 mirror?
6 A: Yes, sir.
7 Q: Okay. And did it make you nervous when
8 you get pulled over?
9 A: Not anymore.
10 Q: Not anymore?
11 A: Huh-uh (negative response).
12 Q: Okay. But for somebody who is not a
13 South Carolina Highway Patrolman like me
14 or anybody else, it's reasonable for us
15 to get nervous, right?
16 A: Yes, sir.
17 Q: And if I'm, if I or Kylie Nilson or
18 anybody's driving along and looking in
19 the rearview mirror we may swerve a
20 little bit, right?
21 A: It's possible.
22 Q: Fair enough. So then at some point you
23 activated your blue lights, right?
24 A: Yes, sir.
25 Q: Ms. Nilson, the driver of the vehicle,

1 stopped driving, right?

2 A: Yes, sir. She pulled to the right side

3 of the road.

4 Q: She pulled over like she's supposed to,

5 right?

6 A: Yes, sir.

7 Q: And she didn't pull over in such a way

8 that you had to move the vehicle because

9 she parked it in an unsafe way, right?

10 A: No, sir.

11 Q: So she pulled over in response to your

12 blue light, right?

13 A: Yes, sir.

14 Q: Okay. And still at this point you still

15 made a conscious decision or for whatever

16 reason, still did not turn on the video

17 camera, right?

18 A: No, sir.

19 Q: All right. Now at that point now you

20 know that you've left your parents' house

21 in Conway and you know that you've

22 stopped her but you don't know, we don't

23 know what time it is, right?

24 A: No, sir, not at that time.

25 Q: Okay. And then knowing you were off duty

1 -- you did get out of your car and go
2 talk to her in her car, right?

3 A: Yes, sir.

4 Q: And you went up and you got her driver's
5 license, right?

6 A: Yes, sir.

7 Q: And then you went back to your car and
8 either before getting her driver's
9 license or after, you called it in,
10 right?

11 A: I called in initially to dispatch to let
12 them know I was making a traffic stop.

13 Q: Okay. And you don't know what time you
14 called in to dispatch, right?

15 A: No, sir. Not offhand.

16 Q: And there's nobody here to your knowledge
17 from dispatch with a time record to show
18 us when you called it in, right?

19 A: No, sir.

20 Q: That's a fair statement, right?

21 A: Yes, sir.

22 Q: So really sitting here me, you, the
23 judge, Trooper Weldon, Austin Thomas,
24 none of us know exactly what time it was,
25 do we?

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1 A: Not exactly, no, sir.

2 Q: Because none of us could know when you
3 stopped the car, right?

4 A: Not definitely the time, sir.

5 Q: While Trooper Weldon may know how long it
6 took him to get there, he doesn't know
7 what time you stopped the car, right?

8 A: It's when I called it.

9 Q: Now at that point, you went and got the
10 driver's license from Kylie Nilson,
11 right?

12 A: Yes, sir.

13 Q: You said you smelled alcohol, right?

14 A: Yes, sir.

15 Q: Now there were two people in the car,
16 right?

17 A: Yes, sir.

18 Q: There was a passenger, a male ---

19 A: Yes, sir.

20 Q: --- in the front passenger seat, right?

21 A: Yes, sir.

22 Q: Okay. Now at that time you went back and
23 sat in your car and waited?

24 A: Yes, sir.

25 Q: Okay. And then at some point Trooper

1 Weldon shows up, right?

2 A: Yes, sir.

3 Q: All right. And at that point I assume
4 you instructed Kylie Nilson to stay there
5 and wait, right?

6 A: Before he arrived, Trooper Weldon arrived
7 at the scene after I retrieved her
8 license and smelt the alcohol, that's
9 when I told her to just wait patiently
10 for a few minutes and I'd go back and get
11 another trooper here to talk to her.

12 Q: Okay. And then when Trooper Weldon
13 arrived, his video is activated and he
14 ask you on the video if you're running
15 video and you say negative, right?

16 A: Yes, sir.

17 Q: All right. Then you stayed through the
18 entire arrest and then went home after
19 that?

20 A: Yes, sir. I stayed a few minutes after
21 that.

22 Q: Okay. But you didn't participate in it
23 beyond that point?

24 A: No, sir.

25 Q: Okay. Now you, yourself, through your

1 duties as a patrol have arrested people,
2 charged people with driving under the
3 influence, right?

4 A: Yes, sir.

5 Q: And that's part of your job, right?

6 A: Yes, sir.

7 Q: And have you arrested somebody and
8 charged them with driving with an
9 unlawful alcohol concentration?

10 A: No, sir.

11 Q: All right. How many -- and I know, I
12 know that you don't have an exact number
13 to these questions, but I just mean in
14 general terms, how many DUI cases that
15 are arrest do you think you've made over
16 your career? Well, let me back up a
17 little bit. Let's say on a, just kind of
18 an average -- well, forget the career.
19 Let's say how many DUI cases do you think
20 you make in a year, give or take?

21 A: I'd say twenty or more.

22 Q: Twenty or more DUIs in a year?

23 A: Yes, sir.

24 Q: So two or three hundred DUIs over the
25 course of your career. You've never

1 charged somebody with driving with an
2 unlawful alcohol concentration?

3 A: No, sir.

4 Q: All right. So you've never testified in
5 a DUAC trial as well, right?

6 A: No, sir.

7 Q: All right. Now I just have one more
8 question about the video tape and the
9 lack of it. Was that a -- if you know,
10 was that a conscious decision that you
11 made or was that just happenstance or you
12 just, just you were off duty so you just
13 didn't think to flick it on?

14 A: I would just say it was happenstance. I
15 was just trying to get out of the car and
16 go up there and talk to her.

17 Q: Okay.

18 A: Make sure she was okay.

19 Q: But clearly if the video had been made,
20 then we would be able to see video
21 evidence of the so called bad driving,
22 right?

23 A: Yes, sir.

24 Q: Right?

25 A: Yes, sir.

1 Q: And sometimes bad driving is very bad,
2 right?

3 A: Yes, sir.

4 Q: And sometimes bad driving is somewhat
5 minimal, right?

6 A: Yes, sir.

7 Q: And pulling somebody over is not
8 necessarily the same as the person being
9 guilty, right?

10 A: Yes, sir.

11 Q: And you, yourself in fairness have made
12 cases before where people pled not guilty
13 and they were found not guilty, right?

14 A: Yes, sir.

15 Q: So even you would not say that just
16 because you testify or just because you
17 charge somebody, that they're necessarily
18 guilty, right?

19 A: That's not for me to answer.

20 Q: All right. Thank you, sir.

21 THE COURT: RE-DIRECT?

22 MR. THOMAS: VERY BRIEFLY, YOUR
23 HONOR.

24 **Trooper Wilkes - Re-Direct Examination by Mr. Thomas**
RE-DIRECT EXAMINATION

25 **BY MR. THOMAS:**

1 Q: You may have testified to this before but
2 how long do you estimate from the time
3 you pulled Ms. Nilson over, activated
4 blue lights, from the time Trooper Weldon
5 arrived, what do you estimate that time
6 period to be?

7 A: As I stated before, probably within ten
8 minutes or so. It was very briefly. As
9 soon as I called it in, he responded on
10 the radio, "I'll get right to you." And
11 I sat there and waited a few minutes and
12 he pulled up.

13 Q: And now your testimony is clear that you
14 don't know exact times, it's just a case
15 that's about two years old now. Have you
16 seen any sort of video recording or
17 anything involving this stop?

18 A: I watched the video earlier just to look
19 at it, just to refresh my memory what
20 kind of vehicle, or what color vehicle
21 she was in.

22 Q: Did that refresh your memory at all as
23 far as the happenings of that night?

24 A: It didn't ---

25 Q: And also to be clear, how many traffic

1 violations did you witness for that
2 minute period as your testimony was that
3 you were behind Ms. Nilson?

4 A: If I wanted to guess maybe it was about
5 three that I can remember.

6 Q: And which one -- you pulled her on which
7 one then?

8 A: Third one.

9 Q: That's all from the State, Your Honor.

10 THE COURT: ANYMORE MATTERS, MR.
11 MCCOLLUM?

12 MR. MCCOLLUM: NO, YOUR HONOR. NO
13 MORE QUESTIONS.

14 THE COURT: THANK YOU.

15 MR. THOMAS: YOUR HONOR, MAY THIS
16 WITNESS BE EXCUSED AND
17 RELEASED FROM HIS
18 SUBPOENA?

19 MR. MCCOLLUM: I HAVE NO OBJECTION,
20 YOUR HONOR.

21 THE COURT: NONE FROM THE COURT.
22 THANK YOU, TROOPER
23 WILKES. YOU ARE
24 EXCUSED. THE STATE MAY
25 CALL IT'S NEXT WITNESS.

1 MR. THOMAS: THANK YOU, YOUR HONOR.
2 MAY IT PLEASE THE
3 COURT, THE STATE CALLS
4 TROOPER WELDON TO THE
5 STAND.

6 THE COURT: THE RECORD SHOULD
7 REFLECT THAT TROOPER
8 C.D. WELDON IS TAKING
9 THE STAND. THANK YOU,
10 TROOPER.

11 TROOPER C.D. WELDON, AFTER HAVING BEEN CALLED
12 TO THE STAND AND DULY SWORN, TESTIFIED AS
13 FOLLOWS:

14 THE COURT: I WAS LOOKING FOR YOUR
15 TITLE, IT IS TROOPER,
16 LANCE CORPORAL?

17 TROOPER WELDON: YES, MA'AM.

18 THE COURT: THANK YOU..

19 **Trooper Weldon - Direct Examination by Mr. Thomas**
DIRECT EXAMINATION

20 **BY MR. THOMAS:**

21 Q: All right. Trooper Weldon, will you
22 please explain to the jury your
23 occupation and also any training you've
24 received? Will you just give them a
25 summary?

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1 A: My name is Christopher Weldon,
2 Christopher D. Weldon. I've been with
3 the Highway Patrol since 2008, prior to
4 that North Myrtle Beach from '05 to '08
5 and Conway City in 2004. From the
6 highway patrol we get extensive training
7 on how to investigate collisions, advance
8 collision investigation, reconstruction;
9 we also get DUI training, standardized
10 field sobriety test, things of that
11 nature.

12 Q: Any other training as far as any
13 DataMaster? Does that ring a bell?

14 A: Yes. We're all trained in the DataMaster
15 operation. That means if we make a DUI
16 case, we take somebody to the DataMaster
17 room and go over some forms with them and
18 ask them do they want to provide a breath
19 sample. We have to have the
20 certification in order to run that
21 machine.

22 Q: Who provides that certification?

23 A: We get that at the Criminal Justice
24 Academy.

25 Q: Now were you working for highway patrol

1 back on December 4, 2011?

2 A: Yes, I was.

3 Q: Do you recall your duties?

4 A: Normal patrol, responding to any
5 collisions that might happen on the
6 highway, look for, night shift or day
7 shift, you look for impaired drivers and
8 just enforce traffic laws on the highway
9 so everybody is safe.

10 Q: Did you have any occasion to come into
11 contact with Ms. Kylie Nilson that
12 morning?

13 A: I did. While on patrol in Horry County,
14 Trooper Wilkes came on the radio and I --
15 he said he needed a trooper. I took down
16 his location and then from there came in
17 contact with Ms. Nilson.

18 Q: And where was this?

19 A: On Coastal Way in between Garner Lacy and
20 Carolina Forest Boulevard.

21 Q: And just to put on the record, what
22 county is that?

23 A: It's in Horry County.

24 Q: Okay. Now can you kindly walk the jury
25 through from the time you arrived on that

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1 scene until the time you go make contact
2 with the Defendant initially?
3 A: When I got the call, I couldn't have been
4 more than ten minutes away from them
5 because I got there and my camera
6 activates when -- before I hit -- when I
7 hit my blue lights, in that particular
8 model vehicle that camera system, it
9 backs up, so when you see me arrive on
10 scene, I turn my car around because I
11 came the opposite direction that they
12 were facing. I positioned my patrol
13 vehicle, got out of the patrol vehicle.
14 I talked to Trooper Wilkes. Asked him if
15 he had his camera going, which he stated,
16 "No." And then I went ahead and he
17 handed me her license and I went and
18 started speaking with her about what was
19 going on.
20 Q: What if anything did you notice about Ms.
21 Nilson?
22 A: Sir?
23 Q: What if anything did you notice about Ms.
24 Nilson when you talked to her?
25 A: What I noticed? There was an odor of

1 alcohol about the person.

2 Q: Okay. So after you noticed this, what
3 did you do next?

4 A: She exited the vehicle and I then asked
5 her a few questions and then we read
6 Miranda and field sobriety.

7 Q: Okay. Now can you explain a little bit
8 to me and the jury what this field
9 sobriety, what these field sobriety test
10 consist of?

11 A: It's, it's a divided attention test.
12 First one is going to consist of a HGM,
13 horizontal gaze nystagmus. We're looking
14 for clues and how those clues of any
15 level of intoxication that someone might
16 have or consumed some kind of alcohol.
17 The next one is a nine step walk and
18 turn. They're set in a prescribed manner
19 and as they stay in that manner while we
20 give instructions. After we give
21 instructions, they then attempt that
22 field sobriety test. And then the last
23 one is the one leg walk -- one leg stand
24 where they're asked to put one foot about
25 six inches off the ground with their foot

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1 straight and to count out loud in a
2 prescribed manner, 1,001; 1,002.

3 Q: Okay. Let's go back to the horizontal
4 nystagmus test. Could you explain to the
5 jury what you're looking for in that
6 test?

7 A: I'm looking for any kind of involuntary
8 eye movement or jerking that can be
9 caused by alcohol and/or prescription or
10 a combination of the two, shouldn't
11 drive.

12 Q: Was that present in this case?

13 A: Yes, it was.

14 Q: All right. Now you had Ms. Nilson
15 perform all three of these standardized
16 field sobriety test, correct?

17 A: Yes, I did.

18 Q: Okay. How was her performance on -- what
19 test do you ask them to perform next?

20 We've gone over HGM. What after the HGM?

21 A: HGM and then you have the nine step walk
22 and turn and then it's the one leg stand.
23 They're done in that order otherwise they
24 wouldn't be standardized.

25 Q: Did Ms. Nilson perform the nine step walk

1 and turn?

2 A: She did.

3 Q: How was her performance on that test?

4 A: I don't believe I recall that she stood
5 in the prescribed manner but she took the
6 incorrect number of steps down and each
7 step was with a pause. It needs to be
8 done one right after the other. They
9 don't need to stop when they're walking.

10 Q: What's the next test?

11 A: One leg stand.

12 Q: How did she perform on that?

13 A: She put her foot down.

14 Q: How many times? Do you recall?

15 A: I don't recall.

16 Q: Did you make any video of this stop and
17 these test?

18 A: As I said earlier, the video was started
19 prior to my arrival. You can actually
20 see me pull up and everything was
21 recorded.

22 Q: Okay.

23 MR. THOMAS: YOUR HONOR, MAY I
24 APPROACH THE BENCH?

25 THE COURT: YOU MAY.

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1 MR. THOMAS: APPROACH THE WITNESS
2 STAND RATHER.
3 Q: Do you recognize this disc?
4 A: Yes, I do.
5 Q: What's that?
6 A: It's the roadside and the transport
7 presentation of Ms. Nilson.
8 Q: Have you had a chance to review this
9 disc?
10 A: Yes, I have.
11 Q: Is it accurate depiction of what happened
12 that evening ---
13 A: Yes, sir.
14 Q: --- early morning?
15 MR. THOMAS: YOUR HONOR, THE STATE
16 WOULD MOVE TO ENTER IN
17 THIS ROADSIDE VIDEO
18 INTO EVIDENCE AS
19 STATE'S EXHIBIT NUMBER
20 1.
21 THE COURT: ANY OBJECTION FROM THE
22 DEFENSE?
23 MR. MCCOLLUM: YOUR HONOR, JUST THE
24 THINGS THAT I RAISED
25 EARLIER THAT YOUR HONOR

1 RULED ON.
2 THE COURT: NOTED MOTION FOR THE
3 RECORD AND THE COURT'S
4 RULE IN THERE, TOO.
5 THIS WILL BE STATE'S
6 EXHIBIT NUMBER 1. IT
7 IS THE ROADSIDE VIDEO
8 AND MEMBERS OF THE JURY
9 PANEL -- AND SOLICITOR,
10 I'M SURE YOU'LL BE
11 ASKING TO PUBLISH.

12 **STATE'S EXHIBIT NUMBER 1**
13 **ADMITTED INTO EVIDENCE.**

14 MR. THOMAS: YES, YOUR HONOR.
15 THE COURT: YOU WILL BE WATCHING
16 THE VIDEO. I'LL TELL
17 JURORS YOU'RE GOING TO
18 THE MOVIES, JUST NO
19 POPCORN OR SODA. ALL
20 RIGHT. THANK YOU.
21 GIVE ATTENTION TO THE
22 SAME. IF YOU'RE HAVING
23 ANY PROBLEMS HEARING OR
24 SEEING, PLEASE LET THE
25 SOLICITOR KNOW.

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1 TROOPER WELDON, YOU MAY
2 STEP DOWN TO POSITION
3 YOURSELF TO SEE THE
4 VIDEO AND, LIKEWISE, TO
5 THE DEFENSE.

6 (Video is played for the jury.)

7 Mr. Thomas: Your Honor, that's all
8 the State wishes to show at this time, of
9 course, it's in evidence, so it will be
10 available to the jury to review in full
11 effect if they choose to do so.

12 The Court: Thank you. The record
13 reflecting the conclusion of the roadside
14 video. Noted objection, earlier the Courts'
15 ruling. Thank you. Continuing.

16 Q: All right, Trooper Weldon, so we've just
17 seen the video you produced on this stop.
18 And the video concludes, we all saw, with
19 Ms. Nilson in your car, placed under arrest
20 for suspicion of driving under the influence
21 at that time. Can you explain to the jury
22 what happens after that?

23 A: After we advise somebody they're placed
24 under arrest for DUI, they're handcuffed,
25 read Miranda, and placed in the patrol

1 vehicle. We will transport them to a breath
2 testing site, which there are several in the
3 county. I believe on this one, we went to
4 Conway City Annex, at the breath testing
5 site there, in the City of Conway.

6 Q: Okay. What happens once you get there?
7 What's the next step in the process?

8 A: The next step in the process is we'll go in
9 to the DataMaster room, where it can be
10 video recorded. We go over -- the machine
11 is there, the DataMaster machine, enter a
12 pass code for the machine. It prints off
13 implied consent forms. Those forms are then
14 read verbatim and one is handed to the
15 subject and then they're asked to sign that.
16 They can either sign it or not. Just as
17 long as they get their copy. We observe
18 them for twenty minutes, so that we let any
19 kind of residual alcohol escape from their
20 mouth. After that twenty minute observation
21 period is up, the machine will tell me that
22 because it is counting down. Then I enter
23 the information and all that stuff. The
24 machine counts down and then it lets me know
25 they need to provide a sample. And they

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1 have "X" amount of time to provide it, a
2 breath sample. And once they provide that
3 sample, the machine does its thing and it
4 gives me a reading and then that form prints
5 out, of course, they get a copy of that as
6 well, and I get a copy of it and they're
7 asked to sign as well.

8 Q: Just to back up a bit, can you explain to
9 the jury, just in layman's terms, what the
10 DataMaster machine is? What does it test?

11 A: It's a breath testing machine so, testing
12 the breath for any alcohol.

13 Q: Did Ms. Nilson take the test in this case?

14 A: Yes, she did.

15 Q: Okay. Was there -- Did anything -- Does the
16 machine -- Can you walk us through just a
17 little bit? I hate to keep asking
18 questions. But just from the time she's
19 offered the test to the time the test is
20 concluded. Sort of what the machine is
21 doing and what the processes are. I know
22 you've mentioned implied consent, but the
23 machine itself. Could you explain that a
24 little bit to us? I'm sorry for the broad
25 question.

1 A: No. The machine does a series of checks and
2 balances on itself prior to having somebody
3 provide a breath sample, to make sure it's
4 functioning properly. If it's not, it gives
5 us a status code or error code and then we
6 have a procedure on how to handle that as
7 well.

8 Q: Now is anything else produced after a breath
9 sample is given and the machine calculates a
10 BA level, a BAC level, does the machine
11 anything else?

12 A: It prints out the results.

13 MR. THOMAS: YOUR HONOR, MAY I
14 APPROACH THE ---

15 THE COURT: YOU MAY.

16 Q: Recognize this?

17 A: Yes, I do.

18 Q: What's that?

19 A: It's the printout with Ms. Nilson's
20 information and my information as the
21 arresting officer, operator's initials, and
22 myself and also the subject's blood alcohol
23 test results.

24 Q: This was produced after she provided a
25 sample and came back with results?

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1 A: Yes.

2 Q: What's the result on that sheet?

3 A: It says subject sampled .16.

4 Q: Your Honor, may I introduced this into
5 evidence, as well Your Honor?

6 THE COURT: THANK YOU.

7 MR. MCCOLLUM: YOUR HONOR, FOR THE
8 RECORD THE DEFENSE
9 OBJECTS.

10 THE COURT: THE DEFENDANT DOES
11 OBJECT, THE COURT
12 OVERRULES AND ENTERS
13 THE DOCUMENT AS STATE'S
14 EXHIBIT NUMBER TWO, THE
15 BREATHALYZER RESULT
16 PORT, PRINTOUT. MR.
17 FOREMAN, THESE DOCUMENT
18 WILL ACCOMPANY YOU INTO
19 YOUR JURY ROOM PER THE
20 INSTRUCTION LATER.
21 THANK YOU.

22 **STATE'S EXHIBIT NUMBER 2**

23 **ADMITTED INTO EVIDENCE.**

24 Q: Now you mentioned that everything in the BA
25 room was being recorded, was there a video

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1 produced of this process? The implied
2 consent and the process of providing the
3 breath sample?

4 A: Yes, it was. It was recorded and the print
5 out has a code on the bottom of it where you
6 can go online and review the video
7 downloaded to your disc.

8 Q: Were you able to review that video?

9 A: No, sir.

10 MR. THOMAS: YOUR HONOR, THE STATE
11 AT THIS TIME TO ENTER
12 IN THE BA VIDEO.

13 THE COURT: SAME OBJECTION FROM THE
14 DEFENSE, HOWEVER THE
15 COURT ADMITS AS NUMBER
16 3 STATE'S EXHIBIT D
17 NOW, BA ROOM VIDEO,
18 AGAIN FOR YOUR VIEWING.
19 NUMBER THREE. NOW
20 MARK?

21 MR. THOMAS: THANK YOU, YOUR HONOR.
22 PERMISSION TO PUBLISH?

23 THE COURT: YOU MAY. AGAIN
24 TROOPER, YOU MAY STEP
25 DOWN. SECOND PART, IN

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1 THE THEATER.

2 STATE'S EXHIBIT NUMBER 3

3 ADMITTED INTO EVIDENCE.

4 (Video is played for the jury).

5 THE COURT: THANK YOU. LET THE
6 RECORD REFLECT THE
7 CONCLUSION OF THE BA
8 ROOM VIDEO. AGAIN, ALL
9 NOTED OBJECTIONS TO THE
10 RECORD, THE COURT'S
11 EARLIER RULING TO THOSE
12 THAT CAME BY WAY OF
13 MOTION. CONTINUING,
14 SOLICITOR.

15 CONTINUATION

16 BY MR. THOMAS:

17 Q: What was the results, again, of the BA
18 test?

19 A: (Inaudible).

20 Q: And what's the legal limit in South
21 Carolina?

22 A: .08.

23 MR. THOMAS: NOTHING FURTHER FROM
24 THE STATE AT THIS TIME.
25 PLEASE ANSWER THAT THE

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1 DEFENSE COUNSEL HAS.
2 THE COURT: THANK YOU. CROSS,
3 ATTORNEY?
4 MR. MCCOLLUM: MAY IT PLEASE THE
5 COURT?
6 THE COURT: YES, SIR.
7 **Trooper Weldon - Cross Examination by Mr. McCollum**
8 **CROSS EXAMINATION**
9 **BY MR. MCCOLLUM:**
10 Q: How are you doing, Trooper Weldon?
11 A: Good, sir. How are you?
12 Q: I'm very well. Thank you. Now in a DUI
13 case, to make a DUI case, basically you
14 have a situation where you observe bad
15 driving, right?
16 A: Yes, sir.
17 Q: And then you do the analysis or the field
18 sobriety test, that right?
19 A: Yes, sir.
20 Q: You try to make a determination and then
21 the third part is you offer the person a
22 breath test, that right?
23 A: Correct.
24 Q: All right. In this particular case, you,
25 yourself did not observe any bad driving,
right?

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1 A: Correct.

2 Q: So sitting here today, even though it's
3 your case and you're the arresting
4 officer, you can't give us the benefit of
5 any testimony about how Kylie Nilson was
6 driving, right?

7 A: Correct.

8 Q: In fact, other than finding her in a
9 parked car, other than that, from your
10 observations, you can't even testify that
11 she had driven the car, right?

12 A: I was going on the other Trooper's
13 testimony.

14 Q: Yes, I understand.

15 A: 32609

16 Q: But in most cases, you, yourself, make
17 those observations, right?

18 A: Correct.

19 Q: And in those cases, you've been trained
20 to follow proper procedure and the law,
21 right?

22 A: Yes, sir.

23 Q: And so certainly when you are behind
24 somebody, you turn on the video camera
25 and then we get the benefit of some of

1 the driving, right?

2 A: Correct.

3 Q: Okay. Now in this case, for example, we
4 don't have it, right?

5 A: Correct.

6 Q: Now the way the video camera works is,
7 let's say that I'm driving a car in front
8 of your patrol car and we're driving
9 along highway 501 and then all of a
10 sudden I run a red light and swerve off
11 the road and come back on the road, at
12 that point, even though happened already,
13 if you turn on your video camera, the way
14 that it's designed it backs up about
15 fifteen or twenty seconds in time, right?

16 A: That's, that's the newer system. The
17 older system that some of the cars still
18 have, that does not have that backup
19 feature.

20 Q: But your camera has that now, right?

21 A: Not the car I'm driving now. That
22 vehicle that, with the camera that you
23 saw that backed up, that vehicle was
24 equipped with that newer camera system.

25 Q: All right. So the one that you were

1 driving that night, for example when you
2 turn on the video, it takes us back in
3 time to where you were driving on 501?

4 A: Correct. Correct.

5 Q: Okay. That's the feature so that if
6 you're behind somebody and you see
7 something strange, you missed it but with
8 this camera system, when you turn it on
9 it backs up and it has that, it had
10 actually recorded that, right?

11 A: Yes, like disregarding traffic signage or
12 stop light or something.

13 Q: All right. Now in this particular case
14 you arrived at the scene because you were
15 called to go there, right?

16 A: Correct, yes, I was.

17 Q: And you don't -- prior to that, you
18 didn't know Kylie Nilson, right?

19 A: No, I did not.

20 Q: And you don't have any reason to have
21 anything against her, right?

22 A: No, sir.

23 Q: Okay. And as far as you know from your
24 interaction with her that night, she's a
25 nice person, right?

1 A: Seemed so.

2 Q: Okay. She didn't cause any trouble or
3 problem for you, right?

4 A: No, sir.

5 Q: And when you stopped her on the side of
6 the road, the reason primarily that you
7 were giving the field sobriety test, is
8 because Troop Wilkes had called you to
9 the scene, right?

10 A: Correct.

11 Q: Okay. So there was no reason once you
12 got to the scene to say, "Well, I'm not
13 going to give her any field sobriety
14 test," because you felt like that was
15 your role and that was what you were
16 supposed to do, right?

17 A: Based on what Officer did what he did and
18 I went ahead and conducted business as
19 usual.

20 Q: All right. Now the one of the test that
21 you asked Ms. Nilson is what we call,
22 well, do you call it heel to toe?

23 A: The nine, the nine step return?

24 Q: Return. What do you call it walk and
25 turn? And the walk and turn is the

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1 person supposed to stand with one foot in
2 front of the other, right?

3 A: Heel to toe, their arms down by their
4 side.

5 Q: So they're supposed to actually have your
6 heel and toe touching, right?

7 A: Correct.

8 Q: Okay. And put your hands down by your
9 side, right?

10 A: Yes, sir.

11 Q: And in fact, the way you give this test,
12 you want the person to stand like this
13 while you're giving the directions,
14 right?

15 A: While giving the instructions, yes.

16 Q: Okay. But this is not the way people
17 normally stand, right?

18 A: That's how the test is administered
19 because that's how it's standardizes. If
20 you stand just like that.

21 Q: I know that but you don't normally see
22 people standing like this, right?

23 A: No, sir.

24 Q: Because the way God made us, we stand
25 with our feet like this, like shoulder

1 width, right?

2 A: Correct.

3 Q: Okay. So is it harder or easier, is it
4 harder to stand like this while you're
5 getting instructions?

6 A: Sir, I give the instructions and I'm in
7 that position while I'm talking to them
8 and then I demonstrate the test and turn
9 around and come back.

10 Q: Yes. Listen, I'm not questioning your
11 ability or how you give the instructions.
12 Okay?

13 A: Right.

14 Q: Please understand that. But Ms. Nilson
15 is asked to stand like this while she is
16 listening to your instructions, right?

17 A: Yes, sir. It's a divided attention test.

18 Q: Divided attention. And then she is
19 instructed to walk on the line, counting
20 out loud, right?

21 A: In the prescribed manner, yes, sir.

22 Q: Touching heel to toe, right?

23 A: Yes, sir.

24 Q: And she's supposed to count out to nine,
25 right?

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1 A: Correct, sir.

2 Q: And she counted to ten, right?

3 A: Correct, sir.

4 Q: All right. Now at that point, did you
5 consider that she had failed that test?

6 A: She did not perform the test that I had
7 instructed her. I don't look at it as a
8 pass/fail. There are requirements and if
9 you don't do the test as instructed, the
10 things we're looking for, then we go on
11 to the next test.

12 Q: Okay. So if she goes ten steps instead
13 of nine, do you consider that a failure?

14 A: I look at the whole test in general, not
15 just them taking ten steps one way.

16 Q: All right. Now it's reasonable to think
17 that somebody who's out on the side of
18 the road doing this stuff on the side of
19 the road at night, would be nervous,
20 right?

21 A: Yes, sir.

22 Q: Okay. Have you ever been pulled over?

23 A: Yes, sir.

24 Q: Were you nervous?

25 A: I'm still nervous when I get pulled over.

1 Q: Me, too. So there's no question about
2 that somebody could be nervous, right?
3 A: Correct, sir.
4 Q: And she's a young woman and prior to
5 that, you don't know her, she doesn't
6 know you, right?
7 A: No, sir.
8 Q: And you're in a uniform and you seem,
9 you're doing your job but she doesn't
10 know if you're a nice person and she
11 doesn't know really what's going to
12 happen next, right?
13 A: Correct, sir.
14 Q: I mean, you and I, we've been in and out
15 of these jails as part of what we do all
16 the time, right?
17 A: Yes, sir.
18 Q: But normal people, regular people really
19 most of them never even been inside a
20 jail, right?
21 A: Correct, sir.
22 Q: So she's doing this on that painted line,
23 right?
24 A: Yes, sir.
25 Q: And you picked the painted line so there

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1 would be line to walk, right?
2 A: Yes, sir.
3 Q: But that painted line is elevated a
4 little bit, isn't that right?
5 A: I don't recall, sir.
6 Q: It doesn't have a little bit of a, a
7 little hump to it, just based on that
8 substance that it's made out of?
9 A: I am aware of it.
10 Q: All right. The shoes that she had on,
11 they had some heel to them?
12 A: I don't recall.
13 Q: Okay. Based on her walking that heel to
14 toe, would you conclude from that that
15 she was driving under the influence?
16 A: Based on the one test?
17 Q: Yes, sir.
18 A: I look at all of it together as one
19 thing.
20 Q: So, no?
21 A: No.
22 Q: Based on her doing the heel to toe walk,
23 even though she didn't do it perfectly,
24 you would not consider her to be under
25 the influence on that test, right?

1 A: That test has -- you look at all three
2 test together not just one individual
3 test.

4 Q: All right. Now, in terms of the other
5 test that you gave her which was the,
6 what I call the one leg stand.

7 A: One leg stand.

8 Q: Okay. And in that situation, you put
9 your hands by your side, right?

10 A: Touching your sides. You don't want them
11 more than six inches away from your
12 person, sir.

13 Q: All right. Then you pick one foot to
14 raise, right?

15 A: Which ever foot you want to, yes, sir.

16 Q: Okay. Then you're supposed to point your
17 toe, right?

18 A: You want it about six inches off the
19 ground, pointing your toe out and looking
20 at your toe, not looking at me or anybody
21 else, and you've got to count out loud,
22 1,001; 1,002.

23 Q: Okay. And you tell the person, in this
24 case in particular, you tell Ms. Nilson,
25 "Start counting, hold your foot in this

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1 position and count until I tell you to
2 stop." Right?

3 A: Correct.

4 Q: She doesn't know if she's going to count
5 to three or ten or thirty or she has no
6 idea, right?

7 A: Until we tell them to stop.

8 Q: Okay. Some people ask them to do it for
9 ten count, some people fifteen, some
10 people thirty. Is that standardized?

11 A: Twenty, sir.

12 Q: Twenty?

13 A: (Inaudible response).

14 Q: Okay. So if she had counted to twenty
15 without putting her foot down, you would
16 have told her to stop?

17 A: If she had counted to twenty?

18 Q: Yes.

19 A: If she had kept her foot straight?

20 Q: Yes.

21 A: If she made it to twenty, put her foot
22 down.

23 Q: Okay. And how many times have you done
24 this? In other words, how many times
25 have you demonstrated it?

1 A: Many times.
2 Q: All right. Hundreds, right?
3 A: Yes, sir.
4 Q: Thousand maybe?
5 A: No, sir.
6 Q: Just hundreds?
7 A: Yes.
8 Q: Are you pretty athletic?
9 A: Not -- I wear these cowboy boots all the
10 time, so that's what I ---
11 Q: But did you play sports when you were in
12 school?
13 A: Yes, sir.
14 Q: Okay. What sports did you play?
15 A: Baseball and basketball.
16 Q: And do you still play some sports?
17 A: No. Rarely.
18 Q: Do you workout and exercise?
19 A: Yes, sir.
20 Q: Okay. Do you consider yourself to be
21 someone who is physically fit?
22 A: Borderline.
23 Q: Okay. Now in doing this, it makes a
24 different as to whether you tighten up
25 your glut muscles or your behind right

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1 there, whether you hold yourself that way
2 with your core versus if you try to
3 balance on your ankle, right?

4 A: I have no idea, sir.

5 Q: Well, when you do it, do you tighten up
6 your mid-section right here to hold it
7 out?

8 A: I have -- I don't know if I've ever
9 really focused on what muscle I'm using
10 to perform a test to show somebody.

11 Q: It makes a difference, right?

12 A: I, like I said, I've never focused on
13 that. I just raise a foot, explain it to
14 them.

15 Q: Now clearly somebody who's driving a
16 vehicle is not expecting to do that,
17 right?

18 A: I would think not, no, sir.

19 Q: A person stopped who is being asked to do
20 these things on the spot, they don't know
21 what's coming next, right?

22 A: Correct, sir.

23 Q: Okay. So they're just following along
24 trying to figure out what's going on,
25 right?

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1 A: Yes, sir.

2 Q: And in this particular case, it's last at
3 night, right?

4 A: Yes, sir.

5 Q: Or early morning hours, right?

6 A: (Inaudible response).

7 Q: There are some cars that are going by,
8 right?

9 A: Maybe one or two might have driven by.

10 Q: Okay. And anybody that drives by would
11 see Kylie Nilson or anybody else out
12 there with the blue lights on, right?

13 A: Correct, sir.

14 Q: And that concerns people, people may get
15 worried or embarrassed about that, right?

16 A: Yes, sir.

17 Q: Okay. Now when you were doing this, I
18 think at some point you said that you
19 were -- that she was under arrest for
20 driving under the influence, right?

21 A: Correct, sir.

22 Q: All right. But she was never charged
23 with driving under the influence, right?

24 A: She was charged with DUAC.

25 Q: And you made the decision to charge her

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1 with DUAC?

2 A: Yes, sir.

3 Q: Did you discuss that with anybody else?

4 A: I don't believe so.

5 Q: About how many DUI arrest have you made,
6 just estimating?

7 A: Over a hundred.

8 Q: Okay. What about DUAC, have you made a
9 lot of those cases?

10 A: Several.

11 Q: Okay. And what goes into the decision to
12 charge Kylie Nilson with DUAC versus DUI?
13 What was the determination, the
14 determining factor for you?

15 A: Well, DUAC instead over a DUI?

16 Q: Yes.

17 A: The other trooper had stopped her for the
18 offense and he was going to be able to
19 testify so I went ahead and charged her
20 with driving with an unlawful alcohol
21 concentration.

22 Q: Is that because you didn't observe any
23 bad driving?

24 A: Yes, sir.

25 Q: Okay. Now in terms of her behavior, she

1 -- when you asked her to do something,
2 she understood what you were talking
3 about, right?

4 A: Yes, sir.

5 Q: So if you asked her to do something she
6 understood it, right?

7 A: Yes, sir.

8 Q: And then in response to that, she would
9 do what you asked her to do, right?

10 A: She attempted each test, yes, sir.

11 Q: Okay. So in other words, if you ask her
12 to get out of the car, she got out of the
13 car, right?

14 A: Yes, sir.

15 Q: If you ask her to stand in a particular
16 spot, she stood in a particular spot,
17 right?

18 A: She was very cooperative, yes, sir.

19 Q: If you asked her to do the walk and
20 turns, she attempted to do the walk and
21 turn, right?

22 A: Yes, sir.

23 Q: Okay. You asked her to turn around and
24 face your patrol car, she did that,
25 right?

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1 A: Correct, sir.

2 Q: Okay. And there were a lot of things
3 that she didn't do, right? So in terms
4 of, in car stops you've made, DUI cases
5 you've made, DUAC cases, some people are
6 belligerent, right?

7 A: Some people are, yes, sir.

8 Q: Some people are mouthy or however you
9 want to describe it or talk, right?

10 A: Uh-huh (affirmative response).

11 Q: Some people have like wild mood swings,
12 right?

13 A: Everyone is different, sir, yes.

14 Q: Some people will be laughing one minute
15 and crying and sobbing the next, right?

16 A: Correct, sir.

17 Q: Some people fall down, right?

18 A: Yes, sir.

19 Q: Some people can't get out of the car
20 without falling down, right?

21 A: Yes, sir.

22 Q: Some people get sick in the patrol car,
23 right?

24 A: Yes, sir.

25 Q: Some people urinate in the patrol car,

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1 right?

2 A: Yes, sir.

3 Q: Some people call you a nasty name, right?

4 A: Yes, sir.

5 Q: All right. Some people you ask them
6 where they're going, they don't know
7 where they're going, right?

8 A: Yes, sir.

9 Q: Some times you might ask somebody for
10 their driver's license and they hand you
11 a power bill or something like that,
12 right?

13 A: Correct, sir.

14 Q: And in those situations, you see that as
15 evidence that the person is intoxicated,
16 right?

17 A: Yes, sir.

18 Q: Okay. Now the things that I just
19 described, none of that existed with the
20 arrest of Kylie Nilson, right?

21 A: Like I said, she was very cooperative.

22 Q: She's very cooperative, very polite, very
23 responsive, right?

24 A: Yes, sir.

25 Q: Okay. Now, and you appreciate that,

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1 right?

2 A: Yes, sir.

3 Q: I mean, you're doing your job you
4 appreciate somebody who is responsive and
5 polite and courtesy?

6 A: Yes, sir.

7 Q: Okay. Now in terms of -- at some point
8 you took her into the substation or the
9 place where the breath test was offered
10 in Conway and she was seated in front of
11 you, right?

12 A: Yes, sir.

13 Q: And you actually gave her the form, the
14 implied consent form, and she held it,
15 right?

16 A: Uh-huh (affirmative response).

17 Q: And in that situation, she's sitting in
18 there, it's three o'clock in the morning,
19 right?

20 A: Yes, sir.

21 Q: She's seated in there in front of you,
22 right?

23 A: Uh-huh (affirmative response).

24 Q: Now she has her hands cuffed together,
25 right?

1 A: Yes, sir.

2 Q: Now she takes that form, turns the form
3 around, straightens it out a little bit
4 and sits there and reads it for about
5 two, two and half minutes. Do you
6 remember that?

7 A: We just watched it, yes, sir.

8 Q: During that period of time, she sits
9 upright, correct?

10 A: Uh-huh (affirmative response).

11 Q: She's sitting there politely reading that
12 form, right?

13 A: Yes, sir.

14 Q: And then at that point she flips it over,
15 folds it up and holds onto it all while
16 she's handcuffed, right?

17 A: Yes, sir.

18 Q: And she didn't drop it at all, right?

19 A: No, sir.

20 Q: And she didn't ask you five or ten times
21 what it was, right?

22 A: Correct.

23 Q: And she didn't fall out of the chair or
24 anything like that, right?

25 A: No, sir.

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1 Q: Okay. Now in terms of -- and along that
2 same line, too, at some point, I mean,
3 the two of you beyond the case had this
4 kind of back and forth, coherent, polite
5 conversation, right?

6 A: Yes, sir.

7 Q: About the contacts, right?

8 A: Yes. I make people nervous so you try to
9 make people at ease when they're in a
10 stressful situation, so.

11 Q: So she's under arrest for driving with a
12 unlawful alcohol concentration and you're
13 sitting there and you're talking to her
14 about the use of contact lens, right?

15 A: Uh-huh (affirmative response).

16 Q: And in that conversation you would say
17 something to her, right?

18 A: Yes, sir.

19 Q: She would listen to you and then she
20 would say something back in response,
21 right?

22 A: Yes, sir.

23 Q: And that conversation went back and forth
24 about the contact lens in a completely
25 normal coherent ordinary fashion, right?

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1 A: Yes, sir.

2 Q: And then you also described to her,
3 apparently, that you had had at some
4 previous time laser surgery on your eye,
5 right?

6 A: Yes, sir.

7 Q: And you and she discussed that as well,
8 right?

9 A: Yes, sir.

10 Q: Okay. And she knew what you were talking
11 about, right?

12 A: Yes, sir.

13 Q: And she knew where she was, right?

14 A: I don't know if she ever said she knew
15 where she was at.

16 Q: But she wasn't confused, I mean, she was
17 situated as to the space that she was at
18 with you and acting appropriately, right?

19 A: Yes, sir.

20 Q: Okay. And then -- you have been around a
21 lot of people through your job, you've
22 been around a lot of intoxicated people,
23 right?

24 A: Yes, sir.

25 Q: And clearly if you were looking at a

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1 spectrum of, you know, the more
2 intoxicated or what we call a drunk
3 driver versus the person who is, is, is,
4 there's not as much evidence against them
5 that they're guilty -- I mean, she's more
6 on the not guilty spectrum than on the
7 extreme guilt side, right?

8 MR. THOMAS: YOUR HONOR, I ALSO
9 OBJECT TO THE FORM OF
10 THAT QUESTION. THAT'S
11 A QUESTION FOR THE JURY
12 IN THIS CASE TO PONDER
13 IF THAT.

14 MR. MCCOLLUM: IT'S GOING JUST A
15 LITTLE TOO GOOD, JUDGE.

16 THE COURT: DO YOU FEEL YOU CAN
17 ANSWER THAT, TROOPER?

18 TROOPER WELDON: NO.

19 THE COURT: ALL RIGHT. THEN WE'RE
20 GOOD. HE'S GOING ON.
21 HE CAN'T ANSWER IT.

22 Q: All right. Do you think this is a strong
23 case or a weak case?

24 A: I believe it's a strong case.

25 Q: Okay. Now you've testified here in the

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1 case, right?

2 A: Yes, sir.

3 Q: And you made the case, right?

4 A: Yes, sir.

5 Q: And that's your job is to go out and make
6 cases, right?

7 A: My job is to enforce traffic laws and
8 make sure the roads are safe for
9 everybody that ---

10 Q: Clearly, clearly. And in this particular
11 case -- well, let me just ask you this
12 and maybe I shouldn't do this, but have
13 you ever testified in a DUI or a DUAC
14 that the person was not impaired?

15 A: To what I considered to be impaired?

16 Q: Yes, sir.

17 A: No, sir.

18 Q: But there have been cases that you had
19 that came to court where you testified
20 the person was impaired or driving with
21 an unlawful alcohol concentration, there
22 have been actual cases you made doing
23 your job, you made those cases but then
24 when they were presented to a jury, the
25 jury disagreed with you and thought they

1 were not guilty, correct?

2 A: I haven't had that many jury trials, sir.

3 Q: Okay. So you've never had a jury find
4 somebody not guilty that you had charged?

5 And if you don't know, I mean, you know,

6 ---

7 A: I don't recall, but ---

8 Q: Okay. I'm almost finished. If she,
9 Kylie Nilson, has the legal right or
10 ability to refuse to take the breath
11 test, right?

12 A: Yes, sir.

13 Q: If she refused to take the breath test
14 then you could not charge her with a
15 DUAC, could you?

16 A: No, sir.

17 Q: Then you would have to charge her with
18 DUI, right?

19 A: Yes, sir.

20 Q: And then the only evidence you would have
21 besides -- because you wouldn't have the
22 breath test, the only evidence you would
23 have is what that little bit of evidence
24 on the side of the road, right?

25 A: Trooper Wilkes would have testified, too.

1 Q: The driving and the touching of fog line,
2 right?

3 A: What his testimony was.

4 Q: And then your video of her having done
5 those ---

6 A: Perform those sobriety test.

7 Q: --- sobriety test? That would be all the
8 evidence ---

9 MR. THOMAS: I'LL OBJECT AGAIN.
10 THIS -- TROOPER WELDON,
11 MAKES THE CASE, THE
12 STATE COLLECTS EVIDENCE
13 AND I PRESENT TO THE
14 JURY THE EVIDENCE, THE
15 ADMISSIBLE EVIDENCE I
16 CHOOSE. WE'RE GETTING
17 INTO SORT OF QUESTIONS
18 OF LAW AS TO WHAT'S
19 ADMISSIBLE AND WHAT'S
20 NOT ADMISSIBLE AND I
21 THINK THAT'S SORT OF
22 SEEMS THE SCOPE OF WHAT
23 CROSS SHOULD BE. A
24 REFUSAL, FOR EXAMPLE,
25 IS ADMISSIBLE INTO

1 EVIDENCE.
2 THE COURT: ALL RIGHT. SIR, I WILL
3 SEE WHERE YOU ARE
4 GOING, MR. MCCOLLUM,
5 BUT WE WON'T ---
6 MR. MCCOLLUM: I THINK I'M ALREADY
7 THERE, YOUR HONOR. I
8 DON'T THINK I'M GOING
9 ANY FURTHER.
10 THE COURT: THANK YOU.
11 Q: So other than the SLED testimony about
12 the workings of the machine, this is all
13 of the evidence that the State has to
14 present against Kylie Nilson, right? I
15 mean, well, let me rephrase that. I
16 withdraw that.
17 THE COURT: THANK YOU.
18 Q: On this case you were called to the
19 scene, right?
20 A: Yes, sir.
21 Q: And you did your job as you thought you
22 were supposed to do, right?
23 A: Correct, sir.
24 Q: Okay. And it doesn't affect you one way
25 or the other whether or not Ms. Nilson is

1 convicted or not, right?
2 A: Does it affect me?
3 Q: Yes.
4 A: My job is to keep people safe, sir. If
5 this is part of it, then that's part of
6 it.
7 Q: All right. Thank you.
8 A: Yes, sir.
9 Q: Thank you, sir.
10 THE COURT: THANK YOU. SOLICITOR?
11 MR. THOMAS: JUST BRIEFLY.
12 THE COURT: RE-DIRECT?
13 **Trooper Weldon - Re-Direct Examination by Mr. Thomas**
14 **RE-DIRECT EXAMINATION**
15 **BY MR. THOMAS:**
16 Q: Defense counsel made a big deal about the
17 defendant's demeanor, which that's on the
18 video. Was there anything that gave you
19 some insight as to why her demeanor was
20 maybe what it was?
21 A: Did she take any kind of ---
22 MR. MCCOLLUM: YOUR HONOR, I'M GOING
23 TO OBJECT TO THIS BASED
24 ON THE DISCUSSIONS WE
25 HAD EARLIER.
MR. THOMAS: YOUR HONOR, DEFENSE

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COUNSEL OPENED THE DOOR
AND IT'S ADMISSIBLE PER
YOUR RULING ANYWAY,
YOUR HONOR.
THE COURT: THANK YOU, MR. FOREMAN
AND MEMBERS OF THE JURY
IT WOULD BE A GOOD TIME
FOR YOU TO GET SOME
WATER AND TAKE A BREAK.
WE'VE BEEN GOING SINCE
ABOUT 1:40 SO I'M GOING
TO EXCUSE YOU TO YOUR
JURY ROOM. ANYONE NEED
WATER BEFORE YOU GO IN?
ALL RIGHT. THANK YOU.
JUST LET ME KNOW AND
THE CLERK CAN BRING YOU
SOME BACK. ANYONE
CARING FOR SOME? OKAY.
ANYBODY ELSE? WE'VE
GOT ONE, TWO -- ALL
RIGHT, WE'LL BRING SIX
BACK. THANK YOU.

(Jury exits the courtroom.)

The Court: Jury out of the courtroom and

1 again, broaching the matter of the
2 Xanax, I'm assuming?
3 Mr. McCollum: You, Your Honor, that's
4 where I think he's going.
5 The Court: Solicitor, you believe
6 he has opened the door by, through?
7 Mr. Thomas: Your Honor, I believe
8 that it is admissible per your ruling
9 earlier and that he also has opened the
10 door. This is exactly the reason why
11 this was relevant in the first place.
12 Talking about her demeanor on field
13 sobriety, if you recall the motion
14 earlier, that's exactly why I argue
15 that it should be allowed in.
16 The Court: Thank you. Mr.
17 McCollum?
18 Mr. McCollum: Your Honor, maybe I'm
19 missing something. I would think that
20 evidence that she had taken Xanax or
21 something like that would tend to show
22 that she was intoxicated from the use
23 of taking a prescription drug or
24 narcotic or whatever it is. So my
25 point is that, it's not relevant to

1 driving with an unlawful alcohol
2 concentration. The solicitor seems to
3 be intimating that, I guess that I'm
4 not looking at it like he is, is that
5 that's why she's calm because she's
6 taken that prescription. I don't think
7 it's relevant because it would go to
8 her being intoxicated for something
9 other than alcohol. She's not charged
10 with driving under the influence of
11 alcohol and/or drugs, so that's where
12 the basis for my objection, Your Honor.

13 The Court: I would agree with you,
14 she's not charged with DUI, but what,
15 from his position, what he's saying,
16 that was her state, how she carried
17 herself and that may have some
18 indication as to why she was as calm as
19 she was as I understand it.

20 Mr. McCollum: Your Honor, if Your
21 Honor rules for the State in this case,
22 then that will be 100 percent rulings
23 for the State. That cannot possibly be
24 what I'm supposed to get here today.
25 Okay. That would be a complete goose

1 egg skunk.

2 Mr. Thomas: Your Honor, when you're
3 right, you're right.

4 The Court: You've got the video
5 there. They've seen the video, they
6 see how calm she is, you want to show
7 her that's what this is about.

8 Mr. McCollum: It's already in
9 evidence, Your Honor, the State made
10 his own DVD, it's in evidence. the
11 jury is welcome to watch the old video.
12 I can comment on this in closing.

13 The Court: I don't think you
14 should go in to it any deeper than the
15 question and getting the answer, but I
16 think he has the latitude to us.

17 Mr. McCollum: I just think it's --
18 the more he rides that and the more he
19 gets into it, the more I think he's
20 getting away from what she's charged
21 with. Okay? If she's charged with
22 DUI, it wouldn't even have to be any
23 alcohol, but she's not charged with
24 DUI. She's charged with driving with
25 an unlawful alcohol concentration.

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1 There's nothing in that statute ---
2 The Court: Which could come from
3 ---
4 Mr. McCollum: --- which doesn't deal
5 with anything else, it's just alcohol.
6 The Court: I understand.
7 Mr. Thomas: Your Honor, he's spent
8 about five minutes on cross about her
9 demeanor and how she wasn't acting
10 belligerent.
11 The Court: I understand. So it's
12 an action anyway that's on the video
13 that shown. I'm going to allow it. In
14 that statute, I've been looking at it.
15 While they're out we can talk, 29.33.
16 I always get the attorneys position if
17 I charge what the law says, we could
18 stop at -- Are you looking at it 29.33?
19 We could stop at a person who violates
20 the revisions of this section -- let me
21 just read it. "It is unlawful for a
22 person to drive a mobile vehicle within
23 this state while he is," and I'll say
24 or her, "alcohol concentration is eight
25 one hundredths of one percent or more.

1 A person who violates the provisions of
2 this section is guilty of the offense
3 of driving with an unlawful alcohol
4 concentration period." That's the law,
5 but it goes on to say, and it gives
6 that, you know, this more or less
7 solicitor elects and that they can't be
8 charged with both and that if they go
9 to trial they can look at blah, blah,
10 blah, blah, eight through. Do the
11 attorneys see the court stopping at
12 first paragraph or reading the entire
13 statute? I'll do either.

14 Mr. Thomas: Your Honor, I think the
15 law is the law, the second part of the
16 statute goes into what can be
17 introduced at trial, but as far as the
18 law of driving with an unlawful alcohol
19 concentration, it is what it is.
20 Driving in the State of South Carolina
21 while under the influence of alcohol or
22 to the extent that your blood alcohol
23 level is a .08 of one percent or eight
24 one hundredths of one percent or
25 higher. That is the driving with the

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1 unlawful alcohol concentration statute,
2 Your Honor.

3 The Court: Mr. McCollum, for your
4 benefit other defense attorneys have
5 asked me to charge a person who
6 violates the provisions of this section
7 is entitled to a jury trial and is
8 afforded the right to challenge certain
9 things. These factors include, but are
10 not limited to one through, do you wish
11 that charge?

12 Mr. McCollum: Now, Judge, given the
13 history of this case, this short case,
14 if I ask for it and he objects, am I
15 going to get it?

16 The Court: Sure.

17 Mr. McCollum: Well, I'd like the
18 charge starting with the language Your
19 Honor was reading, "I" a person charged
20 with going through is afforded the
21 right to challenge certain factors,
22 including these factors and each one.
23 I think that that's the case that they
24 have to prove.

25 The Court: All right. I will

1 allow you to be heard, but when that
2 comes up, it's just justifying
3 basically why he's chosen to go with
4 the DUAC. I'll hear you.

5 Mr. McCollum: Thank you Your Honor.

6 The Court: I've read it, the
7 entire thing.

8 Mr. Thomas: Your Honor, I don't
9 have a problem with the whole statute
10 being read, I just want to make sure
11 the jury understands what the offense
12 is. It's driving in the State of south
13 Carolina while your blood alcohol level
14 is eight one hundredths of one percent
15 or higher. That is the offense code.

16 The Court: All right, thank you.

17 Mr. Thomas: The other part of the
18 statute deals with what's admissible in
19 the court because maybe these other
20 things wouldn't be relevant if that
21 part of the statute wasn't in there,
22 which is why that's in the statute, but
23 if the Defense council wants that read,
24 that's fine, I just want, and I'll try
25 to talk about it a little bit here in

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1 closing. That we're here today -- this
2 case has really been tried a lot like a
3 DUI case, it is a DUAC case. I just
4 want to make sure that they understand
5 the elements of the crime.

6 The Court: I will then for that
7 purpose, I'll read the whole thing.

8 Mr. McCollum: Thank you, Your Honor.

9 I appreciate that very much.

10 (Jury enters the courtroom).

11 THE COURT: RECORD REFLECTING THE
12 JURY HAS RETURNED.
13 THANK YOU MR. FOREMAN
14 AND MEMBERS OF THE
15 JURY. WE ARE
16 CONTINUING. THANK YOU
17 SOLICITOR, I BELIEVE
18 YOU WERE AT REDIRECT?

19 MR. THOMAS: YES, YOUR HONOR.

20 THE COURT: THANK YOU.

21 Q: Before we took a break, a little bit
22 about the Defendant's demeanor. I asked
23 the question if there is anything you
24 came across during your DUI investigation
25 that gave you any insight as to maybe why

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1 her demeanor was as you testified that it
2 was.

3 A: I believe she said she had taken a Xanax.

4 Q: Have you ever had any DUI investigations
5 where a suspect had taken Xanax before?

6 A: Yes, sir.

7 Q: How was their demeanor usually?

8 A: Pretty relaxed.

9 Q: Do you know anything about the drug
10 Xanax?

11 A: Not enough to sit here and talk to you
12 about it.

13 Q: The Defense counselor also asked about
14 whether you'd ever testified that someone
15 was not impaired and that the risk of
16 getting into something that this is and
17 this isn't even a DUI case, where
18 impairment is an issue. Have you ever
19 decided not to arrest somebody because
20 you decide that they weren't impaired if
21 it was a DUI arrest?

22 A: Yes, sir.

23 Q: Have you ever had discussions with me,
24 even after you made an arrest, where we
25 may be, we mutually decided that the DUI

1 was not a proper charge and we shouldn't
2 go forward on that charge?

3 A: Yes.

4 Q: Your Honor, that's all the State has of
5 this witness.

6 THE COURT: ARE THOSE FAIR, MR.
7 MCCOLLUM?

8 MR. MCCOLLUM: I'M THINKING. YOUR
9 HONOR, MAYBE I TOOK US
10 THERE, BUT IT'S ALMOST
11 BORDERLINE UNFAIR FOR
12 ME TO ASK HIM THIS.

13 **Trooper Weldon - Re-Cross Examination by Mr. McCollum**
14 **RE-CROSS EXAMINATION**

15 **BY MR. MCCOLLUM:**

16 Q: But in response to the prosecutor's
17 question. If you could answer, and I
18 don't know maybe you can't, if the
19 solicitor had made a decision to reduce
20 the charges, would you have strongly or
21 vehemently opposed that decision?

22 A: It's always been my perspective that I
23 make the charges and let the solicitor
24 handle everything else afterwards.

25 Q: I respect that. So if the Solicitor had
 made a decision not to prosecute as we're

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1 here today, you wouldn't have had a
2 strong objection to that?

3 A: I'm the arresting officer, his job is to
4 prosecute the case as he sees something
5 that, you know, either way, that's his
6 duty.

7 Q: So is it fair to say that you don't have
8 any real strong feelings one way or the
9 other? If that's not a fair statement,
10 say it's not.

11 A: Sir, it's my job to get these people off
12 the road.

13 Q: That's fair enough.

14 MR. MCCOLLUM: NO MORE QUESTIONS, YOUR
15 HONOR.

16 THE COURT: YOU MAY STEP DOWN. THE
17 STATE MAY CALL ITS NEXT
18 WITNESS.

19 MR. THOMAS: YOUR HONOR, THE STATE
20 WOULD LIKE TO CALL ITS
21 LAST WITNESS, BRETT
22 BAKER.

23 THE COURT: THANK YOU.

24 BRETT BAKER, AFTER HAVING BEEN CALLED TO
25 THE STAND AND DULY SWORN, TESTIFIED AS

1 FOLLOWS:

2 THE COURT: SOLICITOR THOMAS, I
3 HOPE YOU WILL HAVE HIM
4 REPEAT HIS NAME AGAIN
5 FOR THE RECORD AND FOR
6 THE SAKE OF THE JURY.

7 MR. THOMAS: YES, YOUR HONOR.
8 **Donald Brett Baker - Direct Examination by Mr. Thomas**
 DIRECT EXAMINATION

9 **BY MR. THOMAS:**

10 Q: For the record, please state your name
11 and also your occupation.

12 A: Sure. My name is Donald Brett, last name
13 is Baker, B-A-K-E-R. Work at the South
14 Carolina Law Enforcement Division,
15 commonly known by the acronym SLED. More
16 specifically I work in the Implied
17 Consent Department at SLED.

18 Q: How long have you worked there, the
19 Implied Consent Department?

20 A: Well, first of all, let me tell you what
21 the Implied Consent Department is.

22 Q: Thank you.

23 A: The Implied Consent Department is at the
24 Department of SLED which is kind of
25 unique. We regulate breath alcohol

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1 testing for the State of South Carolina.
2 That is what the law is, the implied
3 consent. In other words, if a person
4 drives a motor vehicle in the State of
5 South Carolina, your consent is implied.
6 You have implied your consent to be
7 tested. We're the department which
8 regulates that test. Currently, I'm in
9 my 22nd year at SLED. I started in '92.
10 Worked there about until '96 and then
11 Implied Consent Department helped usher
12 us out of the old breathalyzer 900, which
13 was the old technology that was around
14 from the 40s, 30s into a computerized
15 system which is the BAC DataMaster. I
16 left in '96 and spent roughly eight years
17 in crime scene and arson investigation.
18 A little bit in arson investigation work
19 but, again, mostly in crime scene doing,
20 blood splatter, fingerprint, tire tread,
21 footwear investigations. Then they
22 needed some help to kind of usher back
23 into the second generation which is the
24 BAC DataMaster and I helped usher in that
25 that era. So I've been back for about

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1 ten years in this position. So for a
2 total of about 22 years with SLED.

3 Q: Can you tell the jury briefly about your
4 educational background?

5 A: Sure. I graduated from Western Carolina
6 University with a Bachelor of Science
7 degree in criminal justice. Went to the,
8 you know, hired by SLED, went to the
9 criminal justice academy had the police
10 training doing all of those same things.
11 You know, again, part of my job besides
12 monitoring and maintaining equipment, the
13 data base where all the data comes in,
14 pursuit to certain statutes that we have
15 to comply to. And staying abreast of
16 current literature. You know, I go to
17 International Association of Chemical
18 Testing meetings. Again, I've went to
19 Dr. Borkenstein, who is actually the
20 inventor of the original breathalyzer.
21 That's Indiana University Action, Law and
22 Action Program. I did that in the mid
23 '90s. I actually got to study under the
24 original inventor of the first
25 breathalyzer, of course, he's since

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1 deceased now. But so there's many other
2 courses and things that I can get into.
3 You know, there's not an education you
4 get in college for breath alcohol
5 testing. It's kind of quasi or borders
6 many disciplines or sub-disciplines, you
7 know, chemistry, biology, physiology,
8 electronics. It's kind of all wrapped
9 into this. Most of your training is on
10 the job training, it's specialized
11 training in the courses that you go to.
12 Again, I am trained and certified by the
13 factory National Patent Analytical
14 Systems to work on any of their equipment
15 that they have that's sold in South
16 Carolina.

17 Q: So who issues that certification?

18 A: Well, I am a trained and certified breath
19 alcohol operator for South Carolina.
20 It's kind strange because SLED must
21 approve the training that the officers
22 get at the academy, so I actually help
23 write policy and procedures that the
24 officers must follow that the academy
25 teaches them and I go take the course,

1 too, because I have to go through the
2 same training that I set up for anybody
3 else. That being said, I don't run DUI
4 test for that's kind of, you know, fox
5 watching the hen house kind of thing. We
6 prefer not to arrest people that we're
7 the governing agency over what must be
8 done. But I am trained, certified in how
9 to run test. I am trained and certified
10 in standardized field sobriety field
11 testing. Again, my training is more in
12 the specialty of breath alcohol testing
13 and the biology, the physiology and how
14 that reacts and the instrument works to
15 measure a person's breath alcohol.

16 Q: Have you ever been qualified, testified
17 in court as an expert in alcohol breath
18 testing?

19 A: Yes, sir, many times.

20 Q: About how many times? Can you guess for
21 me?

22 A: Probably somewhere in the neighborhood of
23 sixty times.

24 MR. THOMAS: YOUR HONOR, AT THIS
25 TIME THE STATE WOULD

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1 MOVE TO HAVE MR. BAKER
2 QUALIFIED AS AN EXPERT
3 IN ALCOHOL BREATH
4 TESTING.
5 THE COURT: FROM THE DEFENSE?
6 MR. MCCOLLUM: NO OBJECTION, YOUR
7 HONOR.
8 THE COURT: WITHOUT OBJECTION THE
9 COURT GRANTS THAT MR.
10 BAKER IS, THE MOTION IS
11 FOR THAT'S HE'S AN
12 EXPERT WITNESS IN HIS
13 FIELD AS PURSUANT TO
14 THE TESTIMONY.
15 MR. THOMAS: CORRECT, YOUR HONOR.
16 THE COURT: IN HIS SPECIFIC?
17 MR. THOMAS: THE STATE IS REQUESTING
18 THAT HE BE QUALIFIED AS
19 AN EXPERT IN ALCOHOL
20 BREATH TESTING.
21 THE COURT: THANK YOU. IN ALCOHOL
22 BREATH TESTING, HE IS
23 QUALIFIED THEN AS AN
24 EXPERT WITNESS BASED ON
25 HIS TESTIMONY. THANK

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1 YOU, MOVING FORWARD.

2 Q: Mr. Baker, can you give a very, very
3 abbreviated explanation as far as how the
4 DataMaster machine works for us that have
5 no idea?

6 A: Sure. It works on the principle that's
7 called infrared spectroscopy. A big
8 word. Basically what that is the
9 absorption of infrared light. Every
10 compound chemical known to man will
11 absorb infrared light in specific wave
12 length. So in other words, if you admit
13 a certain wave length, this chemical will
14 absorb some of the light. We look at the
15 wave lengths that is specific for ethyl
16 alcohol, that's drinking alcohol. We
17 utilize two wave lengths. We know the
18 amount light being admitted so if you
19 have alcohol on your breath and you blow
20 in there, that alcohol will absorb some
21 of the light so you have less light being
22 admitted and that is equated to a breath
23 alcohol concentration. So what a
24 operator, when an operator runs a test
25 it's pretty simple on it. In the old

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1 days, they had to turn knobs and dials
2 and get, you know, center things. It
3 took a lot of manipulation and knowledge
4 on the operator's standpoint. And that's
5 on the original 900 Breathalyzer. But
6 with the current ones because of
7 technology and computerization or the
8 modernization or ushering in computers
9 and programming, we took all of that out
10 of their hands. So we utilize a known
11 scientific principle, infrared
12 absorption, and we built computer
13 programs around it or the National
14 Analytical did with our guidance and how
15 we wanted it constructed to meet our
16 statutory regulations or our laws. So
17 operator comes in, he hits a button
18 basically what type test. There's about
19 nine different test you can run in the
20 State of South Carolina. Everything from
21 DUI, felony DUI, boating under the
22 influence, flying under the influence,
23 felony boating under the influence,
24 shooting under the influence, CDL
25 violation, and then what we call a non-

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1 implied consent violation. That's
2 anything else that's not covered by
3 statute. So they go in and press a
4 button. When they press that button,
5 depending on what type test it is, it
6 spits out the forms and the things they
7 must read to the person being tested to
8 tell them what their rights and how the
9 test is going to proceed. Once they do
10 that, they basically, they enter their
11 data entry operator. You enter your
12 name, you enter their name, the
13 instrument shuts down for twenty minutes
14 prior to the subject test. Even though
15 it is the longest portion of the video
16 and the most boring, it is actually the
17 most important portion of any test. That
18 twenty minute observation period is what
19 we refer to as a deprivation period.
20 During that period, if you have a
21 personal camera, again the operator does
22 not allow them to put anything in their
23 mouth that could interfere with the test.
24 What could you put in your mouth? Well,
25 specific for ethyl alcohol, which means

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1 you shouldn't be able to put anything in
2 your mouth that contain alcohol, alcohol
3 laced candy, anything else. So during
4 that twenty minutes they observe them.
5 They're able to do paperwork. The
6 instrument again, once they've entered
7 the data, the instrument shuts down. It
8 knows when to wake up and times up, after
9 twenty minutes, then it does its self
10 check. By statute it checks a simulator
11 or a known solution. That little humming
12 and carrying on noise that you hear, is
13 actually when it's checking, again, a
14 simulator. A simulator is an alcohol
15 based water solution, it has alcohol and
16 solution, water in it. It's testing the
17 vapor, so by statute a simulator has to
18 be conducted prior to every subject test.
19 Again, a simulator simulates a known
20 person's alcohol concentration. In other
21 words, how do you know what eight is?
22 Well, we have a simulator solution of 08,
23 so we test the vapor and it has to come
24 back being an 08 within a specific range
25 of five percent, 076384. So the

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1 instrument is checking a known, "Hey, we
2 want -- the legal limit is 08." Let's
3 check an 08 to make sure we're reading an
4 08 properly." It does that and if it
5 passes, it will continue with the test.
6 At this point, it will come to a point
7 where you see the operator put on a
8 breath tube or a mouth piece on a clean
9 sterilized piece of plastic for each
10 individual, put it on there. Ask them to
11 give a continuous breath sound. The
12 person provides a continuous breath
13 sound, of at least a liter and a half in
14 a level alcohol slope. Which means, they
15 expel at least a liter and a half of air
16 in their lungs continuous sample. And it
17 goes up to some alcohol level. It can be
18 zero, it can be a 16 and if it levels off
19 at that and they stop blowing, accept the
20 sample. Prints the results, here we are
21 today. So again, complicated but not
22 totally complicated. I tried to make it
23 as simple as you can.

24 Q: Infrared lights and that stuff?

25 A: Yes.

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1 Q: Have you had the occasion to look over
2 this particular machine and this
3 particular breath sample given, those
4 materials?

5 A: Yes, sir. Pursuant to statute, you know
6 we've got a register statute which
7 requires us to maintain a data base of
8 all test, all malfunctions, complaints,
9 problems with the device. I've looked
10 over the records, I see nothing to cause
11 me any concerns leading up to this test
12 or after this test. As well, I've looked
13 at the video, as requested by you, to
14 determine if the operator followed proper
15 procedures when conducting the test.

16 Q: In your expert opinion, was the machine
17 in proper working order at the time of
18 the test?

19 A: Absolutely, yes, sir.

20 Q: How do you know that?

21 A: Again, several reasons. It's got many
22 checks and balances, again, but one of
23 the primary things that you see that it
24 past checking the number which is 076 to
25 084. So it checked the number, a vapor

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1 concentration and it read -- I have a
2 copy of the report here, it read 08, it
3 read exactly what the target value is.
4 So that is the primary thing that lets me
5 know again that it's working properly and
6 again, within the testing procedure,
7 there's types of errors you can get.
8 With experience to error, I've helped
9 design the instrument that it would have
10 voided the test at that particular spot
11 and report what the error is. So the
12 fact that it didn't abort the test, means
13 it's a good test.

14 Q: In your expert opinion, were the correct
15 chemical used?

16 A: Yes. We, we supply the chemicals or the
17 solution or the known standard and we buy
18 it from an independent laboratory where
19 it's NITS tested, it means it's tested
20 and is traceability back to weights and
21 standards and all this stuff that the
22 federal government stuff looks for. But,
23 yes, we provide those standards that are
24 supplied to the sites. We've got roughly
25 one hundred sixty-five sites around the

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1 State. One hundred sixty-eight
2 instruments and one hundred sixteen
3 sites, I believe, around the State. So
4 we supply those, so, yes, the correct
5 chemicals were used.

6 Q: In your expert opinion, was it
7 administered by Trooper Weldon in the
8 proper manner?

9 A: Yes, sir. After viewing the video and
10 prior to that I actually viewed the video
11 of did he follow proper procedures in
12 advisement of the individual as well as
13 conducting the test.

14 Q: So in your expert opinion the .16 test
15 result, was it a good result?

16 A: Yes, sir. It is a true and valid result.
17 Again, the fact that she had a the twenty
18 minutes where there was no contamination
19 or anything else, it was a good test.

20 Q: Thank you. Please answer any questions
21 Defense Counsel has.

22 THE COURT: THANK YOU. ATTORNEY
23 MCCOLLUM?

24 MR. MCCOLLUM: MAY IT PLEASE THE
25 COURT?

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1 THE COURT: YES, SIR.
2 Donald Brett Baker - Cross Examination by Mr. McCollum
CROSS EXAMINATION

3 BY MR. MCCOLLUM:

4 Q: Now, you're familiar with the law of DUI
5 or driving under the influence, right?

6 A: Yes, sir.

7 Q: If a person is driving under the
8 influence, the purpose of the DataMaster
9 is to measure their blood alcohol, right?

10 A: No, sir. DataMaster measures your breath
11 alcohol concentration, not your blood
12 alcohol, your breath alcohol
13 concentration.

14 Q: But the defense of DUI or the level that
15 ultimately is the target that the law is
16 looking for is actually the blood alcohol
17 level, right?

18 A: No, sir. I believe chapter 73 of state
19 rules and regulations specifies that we
20 will report the results in breath alcohol
21 concentration which were used to
22 scientifically accepted 2100 to one
23 ratio, and I think that's what you're
24 trying to get to, but, so, no. What we
25 report in is what the law tells us to

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1 report the results in. But we report as
2 a breath alcohol concentration.

3 Q: So you're not familiar with the law or
4 the statute that talks about a person's
5 blood alcohol level? In other words,
6 they've got alcohol in their blood that
7 impairs them. You're not familiar with
8 that?

9 A: Well, sir, if you've a specific portion
10 of the statute, I would be happy to look
11 at it. I don't remember it referring to
12 blood alcohol concentration.

13 Q: Have you ever known the situation where
14 someone was taken to the hospital and
15 blood was drawn?

16 A: Correct.

17 Q: Are you familiar with the difference
18 between blood being drawn at the hospital
19 versus it being -- or not drawn but
20 tested at the hospital versus being
21 tested at SLED headquarters? Do you have
22 any information on that?

23 A: Again, I don't work in our toxic. I am
24 familiar with blood alcohol testing, just
25 because of my association. I work in the

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1 breath alcohol section of SLED not the
2 toxicology. Toxicology deals with blood
3 and other bodily fluids to test for
4 intoxicants, you know, death
5 investigation, other things that would be
6 found in blood. That is different --
7 they use head space guess from
8 (inaudible) different testing, a
9 different science than breath alcohol
10 testing.

11 Q: Well, if a person had alcohol on their
12 breath, in other words, they had drank
13 alcohol, swished it around their mouth,
14 done this over and over and over, and
15 then it was determined they had breath
16 alcohol, that would not be the same thing
17 as being impaired or driving under the
18 influence with having alcohol in your
19 bloodstream, would it?

20 A: You wouldn't -- a person swishing alcohol
21 in their mouth, provided that you wait
22 the twenty minutes prior to testing them,
23 there would be no residual alcohol left
24 in their mouth, so you wouldn't get a
25 reading. Again, you have twenty minute

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1 observation period that must be adhered
2 to. So that's breath alcohol testing.
3 I'm not sure where you're trying to go.
4 I'm trying to be as helpful as I can,
5 but.

6 Q: Isn't the basis for testing the breath,
7 isn't that a substitute for a blood test?

8 A: No, sir. Original testing is done on
9 breath. It later -- you try to correlate
10 it back to what it was in the blood. And
11 I think I may -- give me a little leeway,
12 what happens when a person ingests
13 alcohol, about five percent absorption
14 takes place in the mouth, esophagus and
15 stomach. But 95 percent of the
16 absorption takes place in the intestines.
17 From there through simple diffusion into
18 the blood system, alcohol gets into the
19 blood. When you breath out in your lungs
20 carbon dioxide, you take in oxygen.
21 Okay? So when the blood is being
22 circulated to come back to be
23 reoxygenated in the lungs, if you give
24 off carbon dioxide, any other volatile in
25 your blood, alcohol being a volatile,

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1 give you a quick science there, volatile,
2 anything that evaporates at normal
3 pressures and normal temperatures.
4 That's why you walk into a room or come
5 up to a person you smell alcohol on their
6 breath. It's evaporating, it's a
7 volatile. Any volatile in the blood when
8 you're giving off carbon dioxide will be
9 given off in the lungs. That's what
10 we're checking for. He asked them to
11 blow into the instrument we're checking
12 because we know that the alcohol given
13 off from the blood will be given off in a
14 predictable manner in a predictable
15 matter. See we're checking the breath to
16 see what's in the blood, we're checking
17 for one chemical. That's ethyl alcohol,
18 that's drinking alcohol.

19 Q: So you're checking the breath to see
20 what's in the blood?

21 A: Correct.

22 Q: Because what's important is what's in the
23 bloodstream, not what's in the breath,
24 right?

25 A: No, I'm sorry. I would disagree with

1 you. The breath is a representation of
2 what's in the blood and you would like to
3 test arterial blood but you can't take it
4 out of the neck going to the brain. The
5 closest thing is once blood is being
6 reoxygenated, that goes immediately
7 through the other side heart to the
8 brain. That is the closed you're going
9 to get what alcohol or what effects are
10 going in dealing with the biology,
11 physiology of alcohol. But, yes, breath
12 alcohol is a true measurement of what's
13 in the blood. So one is not better than
14 the other. They're just two different
15 techniques of measuring most persons, you
16 know, I can't speak to what -- why they
17 do it one way? I would assume because
18 it's a less intrusive for basic means of
19 testing. They could take you in to get
20 blood every time. That would require
21 people being stuck with needles. Blowing
22 into an instrument is non-intrusive, non-
23 evasive. So we test in this state breath
24 alcohol first if the person is believed
25 to be under the influence of alcohol

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1 and/or drugs. You must first be offered
2 a breath test. So breath is a viable
3 true means of testing.

4 Q: But ultimately despite all that, what
5 you're getting to is a person's blood
6 alcohol, right?

7 A: No, sir. It is referenced back to the
8 blood alcohol but that wasn't the
9 original goal. You're testing the breath
10 alcohol. And if I may one second, when
11 studies were done early on impairment,
12 they compared it to breath alcohol. They
13 didn't compare it the blood alcohol. It
14 wasn't until later people wanted to know
15 what was in the blood as it relates to
16 the breath. And then people come up with
17 these ratios and things of this nature.
18 Again, breath alcohol is a viable, a
19 separate distinct test in the blood.

20 Q: And in terms of that, is there a
21 different procedure depending on a
22 person's, say, age?

23 A: For breath alcohol test?

24 Q: Yes.

25 A: No, sir. There's no age limit. There's

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1 been some studies that could indicate the
2 liter and a half could be but, you know,
3 persons with COPD, there's all kinds of
4 studies. But currently we just try to
5 get a liter and a half continuous air
6 with a stable alcohol slope. Once it's
7 gets and reaches a peak, this instrument
8 as you blow into it, it's reading your
9 breath four times a second. So it's
10 reading it. It's waiting for it to go up
11 and reach a maximum and it levels off and
12 when they stop blowing, if they're blown
13 a liter and a half, we assume that we're
14 at the air, the deep lung air, where that
15 exchange is occurring so accept the
16 sample but again, as long as a person is
17 blowing a liter and a half, so there is
18 no age requirement. If they couldn't
19 provide it, then that may be a reason
20 based on law they could go get blood at
21 that time, if they couldn't provide a
22 sample.

23 Q: So a person say fifty years old versus
24 somebody who's eighteen, they do same
25 procedure, they blow into the same

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1 machine, right?

2 A: Same machine, yes.

3 Q: The person who weighs a hundred and five
4 pounds versus a person that weighs two
5 hundred and fifty pounds, they blow in
6 the same machine, right?

7 A: Absolutely. They blow into the same
8 machine.

9 Q: Men, women, everybody is treated equally,
10 right?

11 A: Everybody is treated equally as far as
12 the way they blow, that is correct.

13 Q: The theory is that there is different
14 levels of alcohol in different parts of
15 the lung, right? There's most
16 concentrated alcohol in certain parts of
17 the lungs versus other parts, right?

18 A: No, sir. Natural to believe or the
19 science suggest or it's proven, that's a
20 safer, better word, if you have a 20
21 minute observation period, nobody is
22 allowed to ingest anything, through
23 normal breathing patterns, your upper
24 respiratory system will contain less
25 alcohol than the deep lung air or what

1 they refer to in the science, the thelor
2 air. Because that's the little sacs that
3 look like little cauliflower down there.
4 That's where, that's what's come around,
5 you're giving off oxygen, I mean, giving
6 off carbon dioxide, taking in oxygen.
7 That is the truest as to what's in the
8 blood. So what should happen, and that's
9 why the instrument reads it, is a person
10 blows it should be lower concentration,
11 because it's reading upper respiratory
12 air, as it gets to deep lung air it
13 should reach a maximum. As it gets to a
14 maximum it levels off. So the deep lung
15 air, yes, kind of is predictable should
16 be higher than the upper respiratory
17 system.

18 Q: Then the air goes into a chamber inside
19 the DataMaster, right?

20 A: That's correct

21 Q: And then within the DataMaster there is a
22 ray of light, correct?

23 A: That's correct.

24 Q: A light being shine in the DataMaster and
25 it's, I think goes through a chamber and

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1 is reflected off of mirrors?

2 A: That's correct.

3 Q: And as the light reflects back and forth
4 across these mirrors, a measurement is
5 made to determine how much light is
6 refracted or blocked and then from that a
7 determination is made how much alcohol is
8 in that chamber, right?

9 A: Yeah, you're real close. It's basically.

10 Q: And then from that a ratio has been
11 determined, and correct me if I'm wrong,
12 that within correlate that to blood
13 alcohol?

14 A: Right. And I'll try to be as general as
15 I can. The correlation that people like
16 to talk about is what's referred to as
17 2100 to one. For every 2100 parts of
18 alcohol in the blood, one can be given
19 off into the air. Or you can do it the
20 other way, every milliliter here, 21 is
21 given off. It's a ratio. So what
22 happens, for every 2100 molecules, if you
23 want to say, of alcohol in the blood,
24 ones given off every breath. That is a
25 ratio that is used by science. It is a

1 ratio. A generalization of the
2 population. People like to argue, "Well,
3 it's different for different people in
4 the population." Well, like any other
5 science, when drug testing or
6 pharmacology studies are being done, what
7 do they do? They come in and they test
8 the population and they find out, "All
9 right. Here's the outliers." Kind of a
10 bell shaped curve if you're doing a
11 grading. Where do most of the population
12 fall? Well, most of the population falls
13 about 20, 2380. Well, they moved the
14 ration to 2100 to one to accompus more of
15 the population. It is a scientifically
16 accepted ratio to convert from blood to
17 breath or breath to blood and it is used
18 in our state, primarily because chapter
19 73, rules and regulations say this is
20 what will be used.

21 Q: Now you yourself, you're saying a number
22 of breath test that resulted in a video
23 taken for court, right?

24 A: Absolutely.

25 Q: You sat through many, many of these

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1 videos where somebody had taken a breath
2 test, right?

3 A: Yes.

4 Q: There are cases where someone blows what
5 we consider a low reading but appears
6 grossly intoxicated, right?

7 A: Yes.

8 Q: And then there are other cases where
9 somebody blows what would be considered a
10 high reading yet they appear not to be
11 intoxicated, right?

12 A: Well, they -- right. To the outward
13 appearance you don't see the
14 intoxication. And again, that's what we
15 refer to as tolerance versus
16 intoxication. It depends on a person's
17 history, drinking history; how much they
18 drink; how often they drink; how long
19 they've been drinking. Those persons may
20 look good at high levels and then if you
21 have a first time, inexperienced drinker
22 at low levels, I've seen them throwing
23 up, falling out. So, yeah, that's kind
24 of what we refer to as tolerance.

25 Q: So to explain the disparity between

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1 behavior being inconsistent based on the
2 level of the reading of the DataMaster,
3 you explain that as the person's
4 tolerance?

5 A: Not totally tolerance. Some of it you've
6 just got mean people that show up and
7 want to fight you no matter what, so
8 those aggressive outwards people could be
9 something else other than tolerance. You
10 know, again, the purpose of the
11 DataMaster is a confirmation test for an
12 officer who makes a subjective
13 determination on the roadside. Here's a
14 car weaving, comes off the road and it's
15 back on the road. It does it multiple
16 times. You stop them, you might smell a
17 little alcohol. You put them through a
18 battery of standardized field sobriety.
19 Are they under the influence? I believe
20 they're under the influence. You take
21 them in, you put them on the instrument.
22 The instrument either confirms your
23 suspicions or refutes your suspicions of
24 that there is alcohol being the issue.
25 Again, the reason for a person's behavior

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1 can be tolerance, it's one factor, but
2 there's many other factors. It could be
3 contributed to a person's docile or
4 hostile demeanor.

5 Q: But in terms of just being uncoordinated
6 and grossly intoxicated, you have seen
7 situations where somebody had a low
8 reading but appeared grossly intoxicated,
9 right?

10 A: Yes, sir.

11 Q: You have seen situations where somebody
12 had what we consider a high reading and
13 they seemed okay, right?

14 A: They seemed to the outward appearance to
15 be normal, correct. I'll give you that.

16 Q: Now you've testified in courts in South
17 Carolina some 60 times?

18 A: Roughly, approximately 60 times. There's
19 many times I go and things are worked out
20 because I showed, but actual testimony
21 would be around that number.

22 Q: You have been qualified as an expert in
23 your field, right?

24 A: Yes, sir.

25 Q: Now, in terms of your education and

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1 experience, you have a degree, a bachelor
2 degree in criminal justice from, I think,
3 Western Carolina, right?

4 A: That's correct.

5 Q: So what type of courses did you take in
6 terms of earning that degree to become an
7 expert? Did you take biology courses?

8 A: There are biology courses I took, I'm
9 sure, I can remember, they were high
10 school course. There were science
11 courses that I took. The majority, as I
12 said earlier, didn't come from my
13 formalized training in college. The
14 majority of the biology, physiology and
15 the chemistry and the makeup of alcohol
16 came after being employed at SLED and
17 being sent to specialized training such
18 as Dr. Borkenstein's alcohol Law and
19 Action at Indiana University. That's the
20 premier one. That's a week long course
21 at Indiana but there's other, you know,
22 in-house training, studying that we do.
23 There's no specific portion I can point
24 to you that makes me an expert in breath
25 alcohol testing.

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1 Q: But in terms of you don't have an
2 extensive education in biology, right?

3 A: No.

4 Q: You don't have education in chemistry,
5 right?

6 A: No, sir.

7 Q: You don't have an education in physics,
8 right?

9 A: No, sir.

10 Q: The courses that you take pursuant to
11 your training and I understand how this
12 works, but the courses that you take,
13 many of those courses are taught by the
14 companies and the people that created the
15 equipment, right?

16 A: I would say many of them would be fair.
17 There's other courses that I've gone to
18 that are, again, studying and in-house
19 stuff that you do, you research as you
20 would, you know, law cases or what have
21 you, that's out there. But most of -- if
22 you want to know how instruments work you
23 go to the person that's building the
24 instrument, correct.

25 Q: So, for instance, what's the name of the

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1 company that built and sells the
2 DataMaster?
3 A: That's National Patent Analytical Systems.
4 Q: That's a private company, right?
5 A: Well, yeah. They were recently bought by
6 Intox. They're actually owned by another
7 company but they are privately held owned
8 company.
9 Q: That's a big nationwide company, right?
10 A: Well, they, they sell nationwide, worldwide.
11 They sell instruments overseas, but, yeah,
12 they're based out of Mansfield, Ohio.
13 Q: So they build these instruments that states
14 buy, right?
15 A: Correct.
16 Q: Then they provide training on the instruments,
17 right?
18 A: Correct.
19 Q: And they provide data showing that these
20 instruments, in their opinion or they have
21 scientific evidence, that these instruments
22 work, right?
23 A: No. That's not the only reason we buy it
24 because they say it works.
25 Q: I understand.

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1 A: Well SLED -- you kind of asked me a question,
2 I think it would be fair to make sure that you
3 understand we don't just buy any piece of
4 equipment because of affiliations or somebody
5 says it's work. One of the reasons we buy
6 based on our own policies and procedures. We
7 won't buy any piece of equipment that hadn't
8 been certified by NHTSA, National Highway
9 Traffic Safety Administration. It's a federal
10 branch of the government that test breath
11 alcohol equipment and they put it on what's
12 referred to as the Federal Register. They put
13 it in the conforming products list. So in
14 other words, states who don't do their own
15 independent testing, we did our own
16 independent testing prior to buying the
17 DataMaster, prior to buying the DMT, but we
18 also won't purchase anything that's not been
19 tested and proven to be of evidentiary or
20 courtroom value type equipment. So this
21 instrument has been tested extensively by many
22 persons in science as well as the federal
23 government before we purchased it.
24 Q: Now along those lines, you're what we call a
25 SLED agent, right?

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1 A: Yes, sir. I work at SLED.

2 Q: Do you have the normal things of being a law
3 enforcement officer, like a badge, commission
4 to arrest ---

5 A: Yes, sir.

6 Q: --- able to carry a firearm ---

7 A: That's correct.

8 Q: --- all of that? And essentially everybody at
9 SLED has that, right?

10 A: Correct. We do have some class I, class III
11 officers. There's a little difference between
12 a class I and III, but, yeah, I'm considered a
13 class I officer. I have a badge, arrest
14 powers, you know, issued a take home vehicle,
15 that kind of thing, blue light, siren, what
16 have you.

17 Q: So in terms of SLED being the forensic
18 body that these determinations, that's
19 not an independent scientific body.
20 That's actually a law enforcement agency,
21 right?

22 A: SLED was given statutory authority by the
23 legislature to make these decisions. So
24 for whatever reason, now, I can get into
25 all of the history. I've studied it all.

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1 Again, it was around 1969 when the
2 Implied Consent law was passed and at
3 that time the legislature said, "We want
4 to give it to SLED." North Carolina
5 Department of Health handles it. Why
6 they give it SLED? I wasn't, you know,
7 '69, I wasn't here. So, but statute to
8 statute says SLED will do it. Now I
9 think SLED is an independent agency. We
10 may be a law enforcement agency but the
11 forensic science division is not
12 affiliated with the highway patrol.
13 We're not affiliated with Horry County or
14 any other entity. We were tasked with a
15 duty to ensure that proper equipment is
16 out there for the person being tested as
17 well as the person doing to testing. So
18 that's my job to make sure that there is
19 a proper piece of equipment provided for
20 the State.

21 Q: Now I think you mentioned North Carolina.

22 A: Yes, sir.

23 Q: Who does their blood alcohol or breath
24 testing?

25 A: Breath testing is handled by the

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1 Department of Health.

2 Q: Their Department of Health which is not a
3 law enforcement agency, right?

4 A: That's correct.

5 Q: Now in terms of the test sample, are you
6 familiar with states that have a person
7 submit more than one breath sample?

8 A: Yes, sir. I am very familiar.

9 Q: Are you familiar with the scientific
10 principle that to be scientifically valid
11 in terms of repetitive testing that the
12 ideal scientific test would have you
13 would give three samples?

14 A: No. I'm not familiar with that at all.
15 I'm not trying to be mean. I just don't
16 agree with that. I wouldn't be familiar
17 with that, not three samples.

18 Q: Are you familiar with the fact that blood
19 alcohol at the moment of testing is
20 either rising or falling?

21 A: Sir, yes, I've very familiar with the
22 absorption distribution and elimination
23 of alcohol by the body. So, yes, during
24 the absorption phase, alcohol is rising.
25 As you're absorbing alcohol, as you're

1 drinking, as soon as you stop drinking
2 you have distribution and then if you
3 don't drink anymore you will have
4 elimination over time.

5 Q: So would you agree that two samples would
6 be more accurate than one?

7 A: I would not agree that it would be more
8 accurate. As again, I said I know that
9 most people or many people use duplicate
10 sampling in their routines.

11 Q: Are you familiar with fact that if you
12 take a spot sample and you take two
13 samples or three sample, that there's
14 going to be possibly spiking and falling
15 within minutes of each other? Are you
16 familiar with that?

17 A: Generally not. Most persons that we
18 probably deal with, from the time that
19 they're arrested, you go through the
20 testing procedure, they're well in the
21 elimination phase.

22 Q: Well, I know that's always the
23 assumption. But are you also familiar
24 with the effect of adrenaline and those
25 properties which occur when someone is

1 put in that position where they have that
2 fight or flight reaction?

3 A: I'm not familiar with where you're trying
4 to go with the adrenaline, no.

5 Q: Are you familiar with the concept that
6 when your body is put in that fight or
7 flight situation, where you experience
8 adrenaline, fear, that the glycogen or
9 fluid in your blood is absorbed into your
10 muscles to give you strength and the
11 ability to react? Are you familiar with
12 that?

13 A: No. I'm not familiar with that argument,
14 no, sir.

15 Q: And are you familiar with the fact that,
16 for example alcohol has an infinity for
17 water?

18 A: I'm very familiar with, again, the
19 absorption of alcohol, blood tissues and,
20 again, why men and women and versus
21 drinking and the alcohol gets, has an
22 infinity for water.

23 Q: So you're not familiar with the concept
24 that as alcohol is pulled out of the
25 blood stream with the water and the

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1 glycogen, the fluid, and then when the
2 thing passes it's dumped back into the
3 bloodstream and that could cause a blood
4 alcohol to spike, you're not familiar
5 with that?

6 A: I have never heard that, no, sir.

7 Q: Never in 23 years never heard that?

8 A: No, sir. That's a new one. That's good.

9 Q: You like that.

10 A: That's good.

11 Q: But you never studied that, right?

12 A: No. I've not, I've not read any
13 articles, any scientific peer review
14 articles that would be put out by any
15 reputable entity stating that glycogen
16 being drawn out and dropped back in and
17 fight/flight syndrome affecting blood
18 alcohol readings, no, sir, or breath
19 alcohol readings as it relates to blood.

20 Q: So your role here today is a legal
21 requirement that the State offer evidence
22 that the machine is working properly,
23 right?

24 A: My role here today is to provide
25 testimony if called. I don't think that

1 because of the charge it is a necessary
2 evil to have me arrive here today to
3 testify or prove the instruments working
4 properly. I was asked to be here. Other
5 than roughly, I don't -- the assistant
6 solicitor here called me a couple of
7 weeks ago and said, "Hey. Got a case
8 coming up, we'd like for you to come
9 testify."

10 I said, "Yes, sir. I'll be there.
11 That's part of my duties."

12 Q: Now you identify the particular breath
13 machine by its serial number, right?

14 A: That's correct.

15 Q: Do you know the serial number of this
16 machine?

17 A: 1030107 I believe or I'd have to look
18 again. I don't remember. Yes, 1030107,
19 that's the Conway Police Department or
20 substation, they called it.

21 Q: And do you know the age of that machine?

22 A: That, that instrument was put in service
23 in 2009 when the legal requirements
24 changed and we switched to the new
25 DataMaster, correct.

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1 Q: Okay. And you routinely in your job look
2 at data where you examine machine errors,
3 right?

4 A: Yes, what we refer to as status codes.

5 Q: Okay. You know and you worked with
6 someone who is now retired name Andy
7 Jordan, right?

8 A: Correct. I worked with Andy Jordan in
9 '92.

10 Q: Are you -- were you part of the -- do you
11 remember, I assume you worked there long
12 enough, that those status codes used to
13 be called error codes?

14 A: Right. We changed the wording
15 specifically for the defense community to
16 make them feel better so we wouldn't have
17 confusion. You can call it the status.
18 You can call error. You know, if we
19 build into the instrument sucking outside
20 room air through the breath tube the
21 person blows through, we say bring in
22 outside room air to clean the sample
23 chamber where it's going to take place,
24 if someone blocks that breath tube you
25 get a pump error or a status code of a

1 pump failure. It's looking for air. Is
2 it an error or is a failure, a status
3 that we created? So we create -- we
4 said, "Hey, check this to make sure it's
5 working. Check this to make sure it's
6 working. Check this." We took out the
7 connotation that error was leaving with
8 the persons because it's not necessarily
9 an error. It could be a status. The
10 status is at this point there's no air
11 coming through. At this point the filter
12 is not engaged. You know, it's a matter
13 of semantics but, again, we did it just
14 to try to clarify things.

15 Q: So who changed it from error to status,
16 it was you and Andy Jordan?

17 A: And Corbett Lewis along with the
18 manufacturers again.

19 Q: So you and Corbett and Andy Jordan, who
20 work at SLED, along with the manufacturer
21 had a meeting and decided to rename the
22 error codes to status codes?

23 A: No, sir. It was nothing like that.
24 Again, -- it's going to be a long day.
25 We at SLED in the early '90s, there was

1 no statutory regulations to even keep
2 zero data. Okay? Nothing. When the
3 technology presented itself from the late
4 '80s into early '90s, computer processors
5 and what have you, and the storing of
6 data, we said let's keep it. From a
7 strictly unbiased standpoint of a person
8 who is supposed to regulate what's going
9 on out there, I need to know what's going
10 on out there, so let's keep the
11 information. Let's house it. Along with
12 that, we started keeping it and we even
13 created a website, when that technology
14 came along, to provide it to the defense
15 community as well as the prosecution free
16 of charge because we didn't feel it was
17 fair for y'all to have to send in a
18 freedom of information and have to pay
19 for the defense of, of the person being
20 accused. So we decided to keep this
21 information. We decided how it was going
22 to look. So, yes, it was not like a
23 conspiracy to sit around and how we're
24 going to change the data and sit around
25 with people. But we changed things. I

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1 changed the website in five years ago to
2 what it looks like now a little bit.
3 I'll change it again in another couple
4 years, but, yes, we created the data base
5 to look the way it looks and the wording
6 that's there.

7 Q: So just to clarify that, there's no
8 question but that you just changed the
9 wording from error to status?

10 A: Yes, sir.

11 Q: Thank you.

12 MR. MCCOLLUM: YOUR HONOR, THANK YOU.
13 THANK YOU, SIR. I
14 APPRECIATE. I DON'T
15 HAVE ANY MORE QUESTIONS
16 AT THIS TIME.

17 THE COURT: ANYTHING ELSE,
18 SOLICITOR, OF YOUR
19 WITNESS?

20 MR. THOMAS: YOUR HONOR, THE STATE
21 IS ABOUT SCIENCED OUT.
22 THE STATE WILL REST AT
23 THIS TIME.

24 THE COURT: THANK YOU. YOU MAY
25 STEP DOWN.

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1 MR. THOMAS: MAY MR. BAKER BE
2 RELEASED FROM HIS
3 SUBPOENA?
4 THE COURT: ANY OBJECTION AT THIS
5 POINT?
6 MR. MCCOLLUM: NO OBJECTION FROM THE
7 DEFENSE, YOUR HONOR.
8 THE COURT: MR. BAKER, THANK YOU
9 FOR COMING TO THE COURT
10 TODAY.
11 MR. BAKER: THANK YOU, YOUR HONOR.
12 THE COURT: FURTHER WITNESSES FOR
13 THE STATE?
14 MR. THOMAS: NOTHING FURTHER FROM
15 THE STATE. THE STATE
16 WILL REST AT THIS TIME.
17 THE COURT: THANK YOU. MR.
18 FOREMAN, MEMBERS OF THE
19 JURY PANEL, BRIEF
20 RECESS. THANK YOU VERY
21 MUCH. NO DISCUSSION.
22 THE CASE IS NOT OVER.
23 THANK YOU.
24 (The jury is dismissed.)
25 The Court: Jury is out of the

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1 courtroom. The State has rested.

2 Matters for the record.

3 Mr. McCollum:: May it please the
4 court?

5 The Court: Yes, sir.

6 Mr. McCollum: Your Honor, at this
7 time, the Defendant would renew all
8 objections previously made that were
9 sustained or overruled, actually
10 overruled by the court, we would renew
11 those objections at this time. Ask The
12 Court to reconsider those. Also, Your
13 Honor, at this time, we would move for
14 The Court to direct a verdict of not
15 guilty as to the charge of DUAC.

16 The Court: Solicitor, response if
17 need be?

18 Mr. Thomas: Your Honor, I ask that
19 you just go on with your earlier
20 rulings as far as the DV Motion goes, I
21 think there is plenty of evidence on
22 record as far as evidence that the
23 elements of driving with unlawful
24 alcohol concentration is evidence that
25 driving in South Carolina while under

1 the influence or not under the
2 influence, Your Honor, I'm sorry.
3 While her blood alcohol concentration
4 with an eight hundred of percent of one
5 percent or higher, Your Honor.
6 The Court: Thank you. Motion
7 before The Court number one to renew
8 earlier objections that the Defense
9 earlier motions that the Defendant
10 entered and The Court's ruling that
11 they be taken, that they be
12 reconsidered by the Defense, The
13 Court's ruling, of course, will be that
14 the record will reflect what those
15 motions are and The Court's rulings and
16 that they will stand. Secondly, he has
17 a motion for directed verdict. The
18 court also believes that there is ample
19 testimony and evidence in record
20 through the testimony of Troopers
21 Wilkes, Weldon and Donald Baker,
22 SLED, along with the exhibits,
23 State's 1, 2, and 3 for this jury to
24 make a determination of guilt to the
25 charge of DUAC. Therefore, that

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1 motion is respectfully denied. We'll
2 go into the charging then and as I
3 understand it, we'll go with the entire
4 statute as noted. I'll give them what
5 The Court thinks is the law and I will
6 go on and say that the statute further
7 says in this section and read all of
8 it.

9 Mr. McCollum: What's the charge going
10 to consist of? I understand the DUAC
11 charge.

12 The Court: I'm not going to do the
13 DUI general charge. I'm just going to
14 stick with this, which is to give them
15 the basics, my general -- their, the
16 right of the Defendant to a trial that
17 they cannot hold against the Defendant.
18 That the Defendant is not here or did
19 not put a case. That it is the burden
20 of the State of South Carolina to prove
21 its case beyond a reasonable doubt.
22 What is a reasonable doubt and then go
23 into the law.

24 Mr. McCollum: Are you going to give
25 any kind of law as to expert testimony?

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1 The Court: I can.
2 Mr. McCollum: Are you going to give
3 any kind of charge as to witness -- do
4 you give a charge as to witnesses that
5 they can accept all of what a witness
6 says or afford ---
7 The Court: Certainly.
8 Mr. McCollum: You give that charge?
9 The Court: Yes.
10 Mr. Thomas: Your Honor, when you
11 get to the charge on beyond a
12 reasonable doubt, are you going to
13 explain the elements that I have to
14 prove beyond a reasonable?
15 The Court: Yes, if we're totally
16 the charge and that is only, of course,
17 I'll be reading the entire thing, and I
18 believe what that says is that simply
19 what the law says, is that, a person --
20 it is unlawful for a person to drive a
21 motor vehicle in this state while his
22 alcohol, his or her, alcohol
23 concentration is eight one hundredths
24 of one percent or more. I don't think
25 I need to go any further into that

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1 because the statute does it, it just
2 provides for what else the Defendant
3 can do if going to trial or whatever to
4 require you to do.

5 Mr. Thomas: Okay. Thank you, Your
6 Honor.

7 The Court: All right. Anything
8 else or anything? Of course, I guess I
9 should have asked Mr. McCollum will
10 there be any testimony?

11 Mr. McCollum: I'm not planning on
12 calling anybody, Your Honor. I
13 understand, you're going to charge the
14 statute.

15 The Court: Yeah

16 Mr. McCollum: I don't think I have
17 anything else, Your Honor.

18 The Court: I think I need a break
19 this time. I drank two bottles of water
20 and that's all I'm going to say about
21 that.

22 ******OFF THE RECORD******

23 **(ON THE RECORD) .**

24 The Court: All right, Ms. Lisa, I
25 believe we are ready. Who goes first?

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1 Mr. McCollum: I believe that would be
2 me, Your Honor.

3 The Court: You get the last.
4 Thank you, Mr. Foreman, members of the
5 jury panel, as you left, the State has
6 rested. That means all testimony is in
7 from their point of view. However, while
8 you were out I entertained motions for
9 the record as well as determining from
10 the Defense that there will be no
11 showing. We will go then as that has
12 ended the case into closing statement,
13 because you will remember that each
14 attorney came before you in the beginning
15 with an opening statement. We believe
16 that was an overview of what was to come
17 and now you've heard the case and now
18 they are going to come back to you with a
19 summarization or a wrap up, again from
20 their perspective as to how they believe
21 should vote in the case. Give them your
22 attention and then I will give you
23 closing remarks in the law and the case
24 will be yours. Thank you, very much.

25 Mr. McCollum: Your Honor, just

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1 briefly, just a matter of form. At this
2 time, the Defense rests and we renew all
3 motions and objections previously made.

4 The Court: Thank you. And the
5 record notes the same as we had done, but
6 for your purposes, he has done it in your
7 presence again the defense rests as well.
8 Thank you. Closing statements?

9 Mr. Thomas: May it please the court
10 Your Honor.

11 The Court: Thank you, Attorney,
12 our Solicitor Attorney.

13 Mr. Thomas: Thank y'all for
14 sticking with us during this. I know
15 it's been a long day, like I said
16 earlier, it is an important case in South
17 Carolina and also to the Defendant. All
18 the evidence is in, y'all've seen all the
19 evidence. What I say to you now is not
20 evidence, what the Defense counsel will
21 say to you later is not evidence in this
22 case, y'all've seen all the evidence.
23 I'm not going to be longwinded here,
24 y'all've been here long enough, but I do
25 want to kind of narrow in on the law of

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1 this case about the issue in this case.
2 This is driving with an unlawful alcohol
3 concentration. The elements that I need
4 to prove to you beyond a reasonable doubt
5 is that it was driving in South Carolina
6 while their alcohol concentration was
7 eight-one hundredths, one percent or
8 higher. You've seen the tests that said
9 that your alcohol concentration was twice
10 the legal limit. You've seen the field
11 sobriety tests, and Defense counsel, you
12 know, got into some detail in those,
13 which it's his job to do. He's a good
14 attorney, He's going to represent is
15 client to the fullest. But the issue
16 here was whether she was driving a
17 vehicle in South Carolina, with an
18 unlawful alcohol concentration. All
19 these other tests, all these other this
20 and that, that sort of, you can look at
21 that and sort of corroborate the tests or
22 say well that test is way off. I mean,
23 you saw the field sobriety test. You
24 can't really see the extra unit on the
25 camera, you kind of have to listen to

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1 officers testimony as far as that goes.
2 You saw the walk and turn, it wasn't
3 terrible, I'll admit that right now,
4 there were a few missteps, but it wasn't
5 that bad, I've seen a lot worse. You saw
6 the one leg stand, now that wasn't any
7 good, if you had a problem with that one.
8 But his officer is trained to detect
9 these things under the totality of
10 circumstances he placed her under arrest,
11 took her to the BA room where she
12 provided a sample of the .16. And now I
13 have Brett Baker come and I'm not
14 required to have him come. I did because
15 this is a driving with unlawful alcohol
16 concentration tests, so half of my case
17 is the fact that her alcohol
18 concentration was over a certain level.
19 So I wanted him to come in and explain a
20 little bit about this DataMaster machine
21 because I don't understand the dag-gum
22 thing and I don't know that I still
23 really understand it. I might be more
24 for with all the infrareds and all that
25 stuff but I wanted y'all to know to get

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1 an idea of the machine, since that is a
2 big part of our case today. I hate to
3 sit down because the Defense council is
4 going to get up here and I'm going to
5 want to say something to rebut this and
6 rebut that. All the evidence is before
7 you. I just ask that you look at the
8 evidence and apply it to the law that the
9 judge gives you. And I thank y'all again
10 for sticking with us today.

11 The Court: Thank you, Solicitor,
12 Mr. McCollum.

13 Mr. McCollum: May I please The Court?

14 The Court: Yes.

15 Mr. McCollum: For your sake,
16 thankfully there are rules that we have
17 to go by so that we can't just keep
18 talking back and forth. We have a period
19 of time where we have to say it and then
20 whatever we forget to say that's just on
21 us, it's too bad, you don't have to sit
22 here and bare with us over and over and
23 over. Now, thank you very much. I know
24 you didn't volunteer to be here today.
25 You didn't want probably to serve on this

1 jury, but you've agreed to do so. It's
2 an important duty that you provide as a
3 citizen. It's extremely important and
4 for years I was in court, and I would
5 hear judges say that it was the most
6 important thing people did, you know,
7 short of military service or military
8 service in time of war. I've heard that
9 so many times and I heard it every Monday
10 morning, and it just kind of went in one
11 ear and out the other so to speak. Then
12 finally though, after doing this for some
13 time, it finally dawned on me how
14 important that was because in a republic
15 or democratic society it's the one thing
16 that's very crucial to our way of life.
17 Because when we go vote and sometimes you
18 feel like your vote is not that
19 significant or that you're just one of
20 thousands or hundreds or millions, it can
21 be frustrating, but this is a situation
22 where our democracy and our government is
23 set up so that we cannot, as long as we
24 follow our constitution, we can never
25 devolve into a police state or into

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1 something other than what we have.

2 Rights are important, sometimes people
3 don't think they're important, but it's a
4 fundamental right and it requires the
5 citizens, just like in a citizens militia
6 or something like that, it requires you
7 to come in here. We don't have a three
8 judge panel or we don't have professional
9 judges or jurors or anything like that.
10 We have you, people from the community, a
11 jury of your peers. That's very
12 important, we're very grateful to have
13 you here.

14 What do we have here? You've got a
15 situation where an off-duty trooper pulls
16 over this young lady and said that she
17 turned wide a little bit and then touched
18 or crossed what they called the fog line.
19 In other words, that little white line on
20 the right side of the road. Not that she
21 drove off the road and hit a tree and the
22 car was smoking. Not that she lost
23 control of the car. Not that she even
24 went off the road so much that the wheel
25 dropped off the side of the road and she

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1 kind of tried to correct it and over
2 steer it and the car spun or something
3 like that. There's no evidence that
4 she's driving really erratically, she's
5 just driving a long and he said she
6 touched the line or crossed the line a
7 little bit. That's it, she took a wide
8 turn. You know, it's pretty normal, to
9 take a wide turn, it happens all the
10 time. I find myself every time I'm going
11 home, turning on Woodside thinking I'm
12 taking a wide turn. Okay. It's just
13 what happens sometimes. Now, it's
14 important that I say under the law that's
15 supposed to be recorded, so you can see
16 that, we don't have that. That's missing
17 from the case and I submit to you that
18 should be part of the case. The other
19 thing is, then she's taken from the car,
20 they're on the side of the road, she's
21 meek, she's humble, she's obedient, she's
22 compliant, and she does everything that
23 they're supposed to do. Well, in terms
24 of the field sobriety test, if they're
25 not relevant, why do we have them? We

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1 have them because. it's part of the case
2 and if you have any question about these
3 tests, I encourage you, during your
4 deliberations or at some point, try some
5 of these things and it's difficult to do.
6 And it's difficult to do in your living
7 room, it's more difficult to do when you
8 know if you don't do it right, you're
9 going to be handcuffed, and taken to
10 jail. That is really disturbing to
11 people. It's very frightening. I've
12 been to all the jails. I've been in them
13 over and over and over. I've never been
14 in the jail, subject to arrest, I hope I
15 never am, but I know where it is. I know
16 the people that work there. I know what
17 it looks like. I have a general idea of
18 where they would put me and when I'd get
19 out. But normal people, law abiding
20 people, they don't know that. So at the
21 side of the road there, these things are
22 going through somebody's head. They're
23 not going to know what happened to me.
24 People aren't going to know where I am.
25 Where's my car going? Did I leave

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1 anything in the trunk? Who's going to
2 have my purse? Who's going to have my
3 phone? I don't remember my friends phone
4 number because it's all in my phone.
5 This is what you're thinking about. This
6 is what a person is going through and I
7 submit that that makes it difficult. I
8 also submit that these divided attention
9 tests are difficult to do period. Now,
10 what's the other thing, now Judge
11 Livingston will read the law to you. We
12 have to find Kylie Nilson guilty or not
13 guilty when you look at, was there a
14 basis for the arrest? Now, the trooper,
15 the first trooper I think is Wilkes, I
16 apologize, Trooper Wilkes, he has
17 testimony. But it's not supported by any
18 video evidence, which I submit is
19 supposed to be. Then you have the
20 situation of she submits to the tests.
21 Now, if she just says, "Look, I'm sorry.
22 I'm not going to take the tests." She
23 couldn't even be charged with this
24 offense, and it's a criminal offense.
25 But for whatever reason, because it's a

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1 weak case because they couldn't make a
2 DUI case with this evidence, so maybe
3 they elected to charge her with DUAC.
4 Trooper Weldon, who is a fine fellow, he
5 said, "Well, it was because I didn't see
6 her driving, so I charged her with that."
7 So now you look at, was the breath test,
8 was it given within two hours? Was it?
9 She took the breath test, I think it was
10 around 3:30. Trooper Wilkes testified
11 that when he left his parents house, he
12 doesn't know what time it is. He went
13 over there around 11, he got back
14 sometime after that. He could have been
15 off by that as much as an hour. Well, if
16 the test is it at, if she takes the test
17 at 3:25 a.m., he pulled her over at say
18 before 1:25 then it's not within two
19 hours. Now Trooper Weldon says, "Well I
20 don't know, this is what I put in the
21 report, I don't think I was that long, I
22 don't remember where I was." Trooper
23 Wilkes just says he doesn't know when it
24 was. Now, that's not Kylie Nilson's
25 responsibility or problem. They could

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1 have brought in somebody from dispatch,
2 they could have brought in another
3 witness because they had the burden of
4 proof to say, "Well, wait a minute, this
5 is when that call came in, clearly this
6 test was offered within two hours." The
7 other thing you look at is, was the test
8 performed properly and was the machine
9 working properly. Now I don't know about
10 you, but I don't feel a great deal of
11 satisfaction or security based on SLED
12 agent Baker's testimony. It seems like
13 there's kind of an agenda there and you
14 have somebody -- and I don't -- as a
15 lawyer it's my job to cross examine
16 people and I want to do it effectively,
17 but I don't want to be rude or unduly
18 harsh, but honestly you have a situation
19 where his education is criminal justice.
20 Something the course you take to become a
21 law enforcement officer, without any
22 other coursework, he then becomes an
23 expert in physics and chemistry and
24 testifies to these things. Even he
25 admits that a lot of his education came

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1 about as a result of the manufacturer of
2 the equipment, who does millions if not
3 billions of dollars worth of business and
4 its competitive. Because if I own this
5 machine and I want to sell it worldwide
6 or throughout the country, I have to have
7 people pick my machine and there's
8 another maker over here that says pick my
9 machine. Once those decisions are made,
10 that's very big business and they
11 certainly spend the time and effort to
12 train people like Agent Baker. The other
13 thing is, you know, should the forensics
14 lab even be a part of law enforcement?
15 If we're talking about a scientific
16 community, it seems like clearly it
17 should be based in science. It should be
18 a scientific entity, like maybe the
19 University. Maybe the Department of
20 Chemistry and Physics, maybe a separate
21 entity. Maybe like in North Carolina,
22 the Department of Health and Human
23 Services. The Health Department will
24 determine this health issue or this
25 scientific issue. I'm not saying there's

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1 something wrong with SLED or something to
2 that degree, but it is a law enforcement
3 issue. He's got a gun, he's got a badge,
4 he can arrest one of us, he has that
5 power. He comes in to support the team
6 and say the machine's working. But
7 really, he never really testified. He
8 said that he looked at it and the machine
9 worked properly and they did the right
10 procedure. He didn't show any data, he
11 didn't show any documentation, he didn't
12 have one piece of evidence or chart or
13 anything to show you why it worked. He
14 just gave an overall explanation and
15 talked about how he was in it from the
16 ground up. Now he did admit, that he and
17 this other person, Andy Jordan, who I
18 just know from going to school, that they
19 got together and said these aren't error
20 codes anymore, we renamed them. That's
21 kind of clubbing really. To have a bunch
22 of people or small group of people just
23 make this up as they go along. Now the
24 reason I bring that up is because this
25 one of the things that you look at. Now

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1 he also admitted, gratefully, that this
2 machine that they say is accurate that
3 accurately it reflects your blood
4 alcohol. I don't know why I had so much
5 trouble getting him to that, but
6 ultimately he admitted they measure your
7 breath to say what's in your blood
8 because that's important. But he
9 admitted to seeing what we've all seen
10 which is somebody blows low, and they're
11 drunk, highly intoxicated and somebody
12 blows what they say is high, and the
13 person seems okay. I submit to you
14 that's what you have here. You have what
15 we call a very weak DUI case; it's being
16 tried as a DUAC. She does appear
17 intoxicated, but they're saying that,
18 "Well, she blew high so therefore she's
19 guilty." I just would tell you, part of
20 the law is proportionality and
21 reasonableness. She's not guilty of DUI,
22 she's not even charged with DUI. I
23 submit to you that she's not guilty of
24 driving under an unlawful alcohol
25 concentration because their case is

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1 fought with one thing that contradicts
2 the other. They must prove this beyond a
3 reasonable doubt. The State has the
4 burden of proof. Thank you. I know
5 we've been here, I know everybody is
6 ready to go home, I know I am. Thank you
7 very much for your patience, I appreciate
8 your service. Thank you for listening to
9 the case. And I trust that when you have
10 time to deliberate that each and every
11 one of you will look at this and reach a
12 verdict of not guilty so that you will
13 end this criminal charge for the young
14 lady, Kylie Nilson. Thank you.

15 The Court: Thanking the parties
16 for their part in what they have done to
17 bring this case to you, Mr. Foreman and
18 members of the jury, and again to thank
19 each of you for your patience and for
20 your listening skills that you applied to
21 this matter for it is one of importance.

22 Now, Kylie Nilson does not sit at
23 that table, but she's innocent wherever
24 she is. Our law and our constitution
25 provides that when a person is charged

1 with a criminal offense has that against
2 them and asks for a jury trial, they are
3 innocent until proven guilty by the
4 bringing party and the bringing party
5 here represent is the State of South
6 Carolina, who has to prove to you beyond
7 a reasonable doubt that the Defendant is
8 guilty of the charge. I charge you now,
9 Mr. Foreman and you in particular, in
10 that you are the lead person in
11 discussions and your deliberations, is do
12 not get hung up in your jury room, "Well,
13 she must be because she ain't here and I
14 wonder why she ain't here." Don't even
15 discuss it. Again, the burden this week,
16 not only in this case, but all cases that
17 you will sit as a juror on is to
18 determine whether or not the State of
19 South Carolina has satisfied you beyond a
20 reasonable doubt.

21 Now what is a reasonable doubt?
22 Under the law, I am charged to tell you
23 that a reasonable doubt is the kind of
24 doubt that would cause a reasonable
25 person to hesitate to act and I believe

1 that's y'all. You're the reasonable
2 persons here, or at least the ones that
3 count because this case is in your hands
4 now. Question, do I individually and
5 collectively as a group have to hesitate
6 to act in order to determine whether
7 Kylie Nilson was guilty of driving with
8 an unlawful alcohol concentration. if
9 you have to hesitate to act, that is
10 you've heard all the testimony, you have
11 the exhibits before you, you've heard the
12 opening and the closing statements and
13 each person's testimony, that of Wilkes
14 and Weldon and Baker and all of this and
15 I have heard your law judge, and I just
16 can't make up my mind and I just can't go
17 forward, I can't act. Then you might
18 have a reasonable doubt and that's why we
19 have a jury. In your jury room, you
20 along with all others will discuss what
21 your doubts are. You together will
22 determine whether they are reasonable or
23 cause you as a group to hesitate to act.
24 What the law says about reasonable doubt
25 also is that you should be left firmly

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1 convinced after the Solicitor's showing.
2 Now, are you firmly convinced even when
3 there might be doubt? I can throw up one
4 doubt, you weren't there. You heard the
5 testimony of Wilkes, you heard the
6 testimony of Weldon, and Baker and again
7 you are now these finders of the facts.
8 You weren't there. But is that enough
9 reason to cause you to hesitate to act?
10 Again, that's for you and your jury in
11 your jury room. But I don't know
12 anything in the world that we can prove
13 beyond every doubt and that is not our
14 law. Our law is beyond a reasonable
15 doubt. When you cannot make a decision
16 after you've heard it all, and again in
17 your jury room you will thrash that out,
18 but I tell people and jurors, in
19 particular, if you feel your doubt is
20 reasonable and you cannot act, after
21 talking to your jury members and
22 deliberate in your jury room, then you
23 hold to what your belief is, but again
24 what we are looking for here on behalf of
25 Kylie Nilson and the State of South

1 Carolina, is a verdict that will speak
2 the truth. You are six people that were
3 chosen of no particular cause, other than
4 the questions that you gave. And again
5 these parties believed that you could
6 bring about an end to this particular
7 matter. Whatever your verdict is, it has
8 to be unanimous, all six of you have to
9 agree, and that's why we have
10 deliberations discussions in your jury
11 room. Whatever your verdict is, no one
12 is going to question that, but again the
13 question, do I have to hesitate to act?
14 Am I firmly convinced? Members of the
15 jury panel, let's get to the law in the
16 particular case.

17 The law here under the charge
18 driving with an unlawful alcohol
19 concentration is this; 'It is unlawful
20 for a person to drive a vehicle within
21 this state while his,' of course we would
22 say her here because it's a female,
23 'while his or her alcohol concentration
24 is eight-one-hundredths of one percent or
25 more period.' That's the law. This

1 statute goes on to say, 'a person who
2 violates the provisions of this section
3 is guilty of the offense of driving with
4 an unlawful alcohol concentration.'
5 Reading on it says, 'a person may be
6 charged for a violation of section 56-5-
7 2930,' that's DUI, 'but prosecuted
8 pursuant to this particular section,
9 that's 2933, DUAC or driving with an
10 unlawful alcohol concentration, if the
11 original testing of the persons breath or
12 collection of other bodily fluids was
13 performed within two hours of the time or
14 arrest and articulable suspicion existed
15 to justify that traffic stop. This
16 section does not apply to cases arising
17 out of a stop at a traffic roadblock or
18 drivers license check point, a person
19 shall not be prosecuted for both, a
20 violation for DUI and DUAC at the same
21 time.' Here, a solicitor has to elect
22 how he wants to go forth with this trial.
23 The law says of this statute says, 'a
24 person who violates a provision of this
25 section is entitled to a jury trial' and

1 we are here today 'and they are afforded
2 the right to challenge certain factors
3 including, but not limited to these
4 things; number one, whether or not the
5 person was lawfully arrested or detained;
6 number two, whether or not articulable
7 suspicion existed to justify the stop;
8 number three, the period of time between
9 the arrest and the testing; number four,
10 whether or not the person was advised in
11 writing of the rights enumerated in
12 section 2950; and of course whether or
13 not, number five, the person consented to
14 the taking of a test pursuant to this
15 particular section of the law.' I
16 deviate from here to tell you that we
17 have testimony from the operator of a
18 DataMaster, which is a breath testing
19 device, designed to measure a person's
20 alcohol concentration. Don't let it
21 concern you whether or not those test
22 results from that test may be used in
23 court in an alleged case of this nature,
24 our law says, yes, those results may be
25 used if the required showing is made.

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1 Now, this does not mean that you must
2 believe the results of the test, but it
3 means that you have the right to consider
4 this test along with all of the evidence
5 that's been presented in this case in
6 determining the guilt or innocence of Ms.
7 Nilson.

8 Going on, this law says that,
9 'whether the person consented to taking
10 the breath test pursuant to this section
11 and the reported alcohol concentration
12 was at the time of testing eight one
13 hundredths of one percent or more; B,
14 that the individual who administered the
15 test or took samples, was qualified to do
16 this; number C, that these tests
17 administered and the samples obtained,
18 were conducted pursuant to section 56-5-
19 2950 and a doctor pursuant to section,
20 2951 and 53, and that the machine was
21 working properly. Nothing contained in
22 this subject prohibits the introduction
23 of number one, the results of any
24 additional tests of the person's breath
25 or other bodily fluids, any evidence that

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1 may corroborate or question the validity
2 of the breath or bodily fluid test
3 result. Including, but not limited to
4 the evidence of a field sobriety test,
5 evidence of the amount of alcohol
6 consumed by the person, and evidence of
7 the persons driving. A video tape of the
8 persons conduct at the incident site and
9 breath site, taken pursuant to the
10 particular sections mentioned, 53, which
11 is subject to redaction under the South
12 Carolina rules of evidence or any other
13 evidence of the state of a person's
14 faculties to drive which would call in to
15 question the results of that breath or
16 bodily fluid test. Now, at trial, a
17 person charged with the violation of this
18 section is entitled again to a jury
19 instruction stating that the factors
20 innumerate above and' this is very
21 important, 'the totality of the evidence
22 produced at trial may be used by you the
23 jury to determine guilt or innocence. A
24 person charged again with violation of
25 this section, must be given notice of

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1 intent to prosecute under the provisions
2 of this section at least fourteen days
3 before his or her trial day.' It goes
4 back to the solicitor and his election
5 for what he elects because he can't try
6 under both things, he has to let the
7 defense attorney know within fourteen
8 days what his plans are. Of course, we
9 wouldn't be here if that hadn't happened.

10 Now, the law, I understand and I
11 know we don't always agree with it, but
12 ladies and gentlemen it is what it is and
13 again your oath was that you would be
14 guided by that law, along with everything
15 else in this trial. You see, I believe
16 that somebody said here, and I believe it
17 was Weldon, that I do my job and, of
18 course, then whatever the solicitor
19 determines, he is the solicitor, I have
20 done my job more or less on the road. I
21 bring that to your mind only to say this,
22 if you for some reason thought that the
23 court, that is me, had some feeling about
24 this case one way or the other, please
25 set that aside. I'm not allowed to.

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1 Y'all have the hard job this week, you
2 are the judges of the facts. You're not
3 wearing this black robe or one, but if I
4 had 150, every one of you would have one.
5 The reason is because you are judges this
6 week, again I don't make light of it, you
7 are judges this week because what you are
8 doing is judging the facts, of what's
9 testified to when one gets up here and
10 raised their hand to tell the truth, the
11 whole truth, and nothing but the truth.

12 And let's talk about that a minute.
13 Do you have to believe what Weldon said?
14 No, the rules say you can believe a part
15 of what a witness says, none of what a
16 witness says, a little bit, and I don't
17 believe this and I don't believe that.
18 Your good common sense and your judgment,
19 remember because I told you yesterday or
20 Monday, boy, the week is going fast, that
21 we need you to bring that in here.
22 Because what you have to rule upon in
23 cases of this nature is credibility and
24 believability. Now, I'm not suggesting
25 that Weldon or Wilkes or Baker came in

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1 and told you something untrue, that's not
2 for me to say. I'd be getting over in
3 your business then. My job is the law
4 and of course, I'm no great authority on
5 the law, a motion is made, objections are
6 made, and my rulings to them, you
7 shouldn't draw anything other than she is
8 ruling for what she believes the law
9 represents. If one of these parties
10 disagrees with that, they have another
11 method to go through to challenge me.
12 But, again, it is what you say when it
13 comes from this testimony you heard from
14 the witness stand, believe in what you
15 will of it. My daddy said credibility
16 is, when you meet somebody you've never
17 met them before, you're talking on a
18 subject, the subject here today is Ms.
19 Nilson, and whether or not she was guilty
20 of driving with an unlawful alcohol
21 concentration. He says while you're
22 talking to that person, and you were
23 today, you just didn't open your mouth,
24 but you were listening at the testimony
25 and you got a gut feeling as they were

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1 testifying. Again, you will discuss that
2 in your jury room. Now, don't get turned
3 over about the law. The attorneys are
4 well trained, I've learned so much from
5 them, but the law comes from The Court.
6 Once I've ruled, as Greg says, and I say,
7 Greg, because we call each other first
8 name basis, you know, Attorney McCollum
9 says, he ain't going to argue with that
10 because there's another way for him to
11 go. If he wants to argue with that, he
12 tries to be humble and he takes that
13 ruling, whether he agrees with it or not,
14 so don't get mixed up back there with, he
15 said the law, the law comes from The
16 Court, or she said the law said, the law
17 comes from The Court and I have given you
18 the law as it is applicable to this case.
19 Motions have been heard, the rulings have
20 been made, final. Don't like it, there's
21 another way. So don't get hooked up on
22 that, get hooked up on your listening
23 skills which you've given and these
24 parties thank you so much. Ms. Nilson is
25 not here, but again I'm sure if she were

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1 she would thank you, too. She still may
2 not take that witness stand. Again,
3 don't bother yourself with that because
4 under our constitution she doesn't have
5 to. Nobody can prove themselves innocent
6 and they don't have to. The burden is
7 upon the State of South Carolina to do
8 what it has to do to convince you beyond
9 a reasonable doubt that the Defendant was
10 guilty of the offense. Again, she
11 wouldn't have had to say a word. Mr.
12 Foreman, again, do not get hooked up on
13 that, you take that law as it was given
14 to you, apply it to what you heard,
15 totally. Don't get hung up on one issue
16 because you've got to look at it as a
17 whole and then make your ruling guilty or
18 not.

19 I prepared for you a jury verdict
20 form and you will get to take it with you
21 in the jury room most of these exhibits
22 and I say that because two of them I will
23 not send in with you. However, they're
24 here and they are in the records so they
25 are for you, but there's no need for you

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1 taking these videos back there because
2 you'd have to have the machine and know
3 how to start it and stop it and if your
4 skills are like mine with computers, et
5 cetera, good luck to you. We won't send
6 that in, we'll put the work back on the
7 brining party. If you want to see these
8 videos again, roadside and breath room,
9 you can do that simply by the asking.
10 We'll plug it up, bring you back out, and
11 you'll go to the movies again and watch
12 any part or all of it if you want to.
13 Again, to the other exhibit which was the
14 breath test analysis record, it can go in
15 with you.

16 Thank you very much again for what
17 you have done. If I have omitted
18 something that I was supposed to charge
19 and one of them was expert testimony.
20 They would have told me, "Judge," of
21 course they're supposed to. I do recall
22 that we talked about whether I would
23 charge expert testimony. This is
24 basically what the law says about expert
25 testimony. That when one makes a motion

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1 for The Court to rule one as an expert,
2 that The Court can, provided certain
3 things are met. Those certain things,
4 what is their education, what is their
5 experience, what have they done in terms
6 of study in that particular area or
7 field? Were there any publications of
8 articles or books written or anything of
9 that nature? Taken into consideration
10 when the right showing is made by the
11 party making that motion and here it was
12 the State of South Carolina. As to Mr.
13 Baker, I agreed he was an expert in his
14 field. Now you are pretty well experts
15 too probably in your field. He didn't
16 write any articles or any books or
17 anything, but he told me through my
18 listening was that there was some 22
19 years of experience, he stopped at one
20 point and went to somewhere else and came
21 back. He had additional training other
22 than, he's a class one officer, just like
23 he is, but that he additionally has had
24 training within that field of the
25 DataMasters and their working procedures,

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1 concentration levels, et cetera. I
2 submitted, with no objection made by the
3 defense, that he was an expert in his
4 field. So again, expert witness
5 testimony is allowed and again I did
6 classify as such based on those things.

7 Now, I turn the case over to you.
8 I'm going to send you into your jury
9 room. Do not begin any deliberations,
10 I'm going to either bring you right back
11 out for a further charge in case I still
12 have forgotten something else or I will
13 send the form into you then you may begin
14 your deliberations. I will send it along
15 with the one exhibit your remembering
16 that the others are here and for your
17 benefit. I excuse you now to the jury
18 room. Thanks.

19 (Jury is exits the courtroom).

20 The Court: In charge of the law,
21 any jury instructions given, any
22 exceptions or additions?

23 Mr. Thomas: Nothing from the state,
24 your honor.

25 The Court: From the defense?

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1 Mr. McCollum: Your honor, I think
2 that they'll be able to decide the case.
3 It was something that I'm not asking for
4 a re-charge or correction or anything,
5 but there was a statement that your honor
6 made look at the total circumstances and
7 don't get hung up on one little thing.
8 If we had a different kind of case, I
9 might ask for a charge saying if there is
10 a reasonable doubt, if there is a issue
11 or reasonable doubt, it must be resolved
12 in favor of the defendant in terms of not
13 guilty. I don't -- I'm not objecting,
14 I'm just making an observation.

15 The Court: No, I think that's a fair one.
16 Generally, I do that one.

17 Mr. McCollum: I mean, the idea don't
18 get hung up on something is just concerns
19 me a little bit going forward in the
20 future.

21 The Court: All I was saying there is look at
22 the totality of the circumstances, but I
23 will bring them out and say that, if
24 there is a reasonable doubt that cannot
25 be resolved then doubt in any case is to

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1 be given to the defendant.

2 Mr. McCollum: I'm not asking. It's
3 going on 6:00, they've been in here, in
4 this courtroom almost all day. I don't
5 think the case is dependent on one small
6 charge like that. I think that hopefully
7 we're going to have a verdict here fairly
8 quickly. I don't have a request for a
9 further charge.

10 The Court: Solicitor.

11 MR. THOMAS: I AGREE WITH NO FURTHER
12 CHARGES YOUR HONOR. I
13 THINK IT WAS COVERED.

14 ******OFF THE RECORD******

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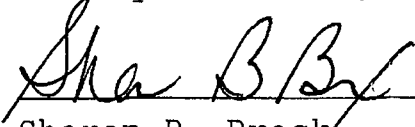
CERTIFICATE

This is to certify that the foregoing transcript of the hearing held before The Honorable Margie Bellamy Livingston, consisting of **TWO HUNDRED SEVENTY-THREE (273)** pages is a true and correct transcript of the recording of the testimony given at said hearing.

I further certify that I am neither employed by nor related to any of the parties in this matter nor their counsel; nor do I have any interest, financial or otherwise, in the outcome of the same.

 **ORIGINAL**

IN WITNESS WHEREOF I have hereunto set my hand and seal this **21st** day of **APRIL, 2015**.



Sharon B. Brock
Verbatim Court Reporter
Notary in and for the
State of South Carolina
My Commission Expires:
5/31/2021

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1 State of South Carolina

2 County of Horry

3

4

5 The State of South Carolina, Transcript of Record
Plaintiffs 2013-CP-0006943

6 vs.

7 Kylie Lauren Nilson, March 12, 2014
Defendant Conway, S.C.

8

9

10

11

12

13 BEFORE THE HONORABLE Benjamin H. Culbertson, Judge.

14

15

16

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

18 Mr. Austin Thomas
Assistant Solicitor for the State

19

20 Mr. Greg McCollum,
Attorney for Defendant

21

22

23 Margaret T. Sullivan,
Court Reporter

24

25

1 THE COURT: The next motion is
2 2013-CP 26-06943. Kylie Nilson versus the State
3 of South Carolina. According to my roster, the
4 matter is before the court on an appeal from
5 Magistrate Court. Please give the Court Reporter
6 your name and who you represent.

7 MR. THOMAS: Austin Thomas for the State.

8 MR. MCCULLUM: My name is Greg McCullum on
9 behalf of the appellate Kylie Nilson.

10 THE COURT: Mr. McCollum, let me hear from
11 you.

12 MR. MCCOLLUM: Your Honor, we filed a
13 memorandum in this. I think the case got set
14 earlier by -- in front of another judge. And we
15 had sent it specifically before time, I believe.
16 Is it in the file? Do you have it, Your Honor?

17 THE COURT: Yes, it sure is. I got it.
18 It was filed February 10th.

19 MR. MCCULLUM: Yes, sir, Your Honor.

20 THE COURT: I got it.

21 MR. MCCULLUM: May it Please the Court,
22 Your Honor.

23 THE COURT: Yes, sir.

24 MR. MCCULLUM: Kylie Nilson was arrested
25 and charged with driving under unlawful alcohol

1 concentration. Her case was set for a jury trial,
2 and she was tried in her absence. I think it
3 October 8th 2013, following her arrest December
4 4th 2011.

5 Essentially, Your Honor, there are three
6 motions. One has to do with the case not being
7 continued by the trial court. I have some
8 specific reasons I would like to go into there.
9 The other one is failure of the arresting or the
10 officer who stopped her to activate the video
11 camera, or to provide an affidavit in court.

12 The other basis, Your Honor, is that,
13 evidence was presented over defense objection at
14 trial; that she had testified or given the
15 evidence in the BA room; that she had taken a
16 Xanax, which is a narcotic. And the objection is
17 that since she was being charged with driving with
18 an unlawful alcohol concentration as opposed to
19 driving under the influence of either alcohol and
20 or drugs or prescription drugs; that that would be
21 inadmissible.

22 THE COURT: Was this a jury trial?

23 MR. MCCOLLUM: Yes, sir.

24 THE COURT: Okay. Go ahead.

25 MR. MCCOLLUM: And the court denied the

1 motion. And the defense argued that, you know,
2 that was the state's election, you know, to charge
3 her and try her with the unlawful alcohol
4 concentration. But if I might, Your Honor, the
5 issue of the continuance, we believe is a -- comes
6 in the arena there of State vs. Langford.

7 It's not really my practice to ask for
8 continuances in court. We generally are ready for
9 trial. And the only reason we asked the case be
10 continued is because Ms. Nilson had moved to
11 California. My office did not notify her based on
12 some breakdowns in my office, because of some
13 staff changes. And so we asked for the
14 continuance.

15 But what we think is important is that,
16 the judge ruled that based on what she determined
17 called Chief Justice Toal's order, that a party is
18 only entitled to, I think, one continuance for
19 state and defense. That's generally what they
20 try to do. Now Ms. Nilson appeared in court prior
21 to moving. She was in court for trial on
22 July 18th 2012. She was also in court August 15th
23 2012. She was also in court January 7th 2013.
24 And all three times the case was continued by the
25 state. The case was continued for the defense

1 twice on August 8th of 2013, September 8th, 2013,
2 because I was her lawyer, and I was in General
3 Sessions Court and unable to appear.

4 Now what this says specifically at issue
5 is which the appellate believes is significant,
6 are the occurrences of practices where cases are
7 not called because it's inconvenient for the state
8 to go forward. As in this case since she was
9 charged with DUAC, it's necessary for the state to
10 present an expert from sled to establish that the
11 data master was working properly. Sometimes those
12 witnesses are unavailable. And that was the case
13 here.

14 So as a result there was period of
15 8 months when her case was not on the docket. The
16 docket usually runs for jury trials in Myrtle
17 Beach once a month. So our point in the appeal;
18 is that, the state got eight continuances because
19 it's up to them to put the case on the docket. So
20 that's not before the court. Anytime the state
21 wants a continuance, all they have to do is not
22 put it on the docket.

23 THE COURT: Even on Magistrate's Court?
24 They didn't put it on the docket in Magistrate
25 Court?

1 MR. MCCULLUM: It's my understanding, Your
2 Honor. It wasn't on the docket. Okay. And the
3 reason it wasn't on the docket is because the
4 state was evaluating the case and whether to offer
5 a plea bargain and because they had to arrange for
6 the sled witnesses to come down and that sort of
7 thing. So the first part of that is that we think
8 that based on Langford, where the court ruled that
9 Section, I think it's 1-7-330 South Carolina Code
10 of Laws, which best to control of the criminal
11 docket and the circuit solicitor was ruled
12 unconstitutional by State vs. Langford, which I
13 know Your Honor is very familiar with that, 235
14 S.E. 2d., 471.

15 So we just think that that's an issue,
16 because the only reason we wanted a continuance,
17 we were ready three other times. The only times
18 we wanted a continuance was because the defendant
19 wasn't there. She had moved, there was no way we
20 could get her there, okay. In addition, the lower
21 court ruled that the court was basically bound by
22 Justice Toal's order which is Number 2011-3-21-27,
23 regarding disposition of criminal summary court
24 cases. It specified that no case shall be
25 continued that is older than a year. But what the

1 order really says; is that, in any case in which a
2 jury trial has been requested, it shall be set
3 from the time that the paper is returned to the
4 court. The charging paper has got to be set
5 within 120 days. And Ms. Nilson's initial jury
6 trial roster was scheduled initially June
7 19th 2012, which is 160 days after the jury trial
8 request had been made. So if anything, if you
9 were going to go -- if the court was going to
10 follow that order, it would seem that the state
11 was in violation by not complying and setting the
12 case within the 120 days. But under -- and that's
13 part of the argument.

14 Now and that's the end of my showing on
15 the continuance issue, Your Honor. So I don't
16 know if you want to take these one at a time or me
17 to just keep going?

18 THE COURT: Go ahead. Let me hear.

19 MR. MCCULLUM: Okay. The other issue,
20 Your Honor, was a failure of the state to comply
21 with the statute which requires the videotaping.
22 As Your Honor is aware 56-5 -- 56-5-2953 incident
23 site and breath test video recording, the statute
24 says a person who violates section, and this is
25 basically the DUI or DUA sections, must have his

1 conduct at the site of video recording. The video
2 recording of the site must not begin later than
3 the activation of the officer's blue lights. This
4 was not done. The reason it was not done is
5 because Trooper Wilkes who is a 15 veteran of the
6 highway patrol, was off duty. He had said he had
7 gone to a family emergency at the Conway Hospital.
8 He drove his marked patrol car and on the way
9 back, late at night, he observed Ms. Nilson.
10 Thought that she was driving erratically.
11 Followed her for some distance; testified as to
12 the erratic driving. Activated the blue lights
13 and pulled her over. At that point, he got out
14 the car, went up, questioned her; talked to her,
15 made a determination that she was going to be at
16 least investigated for DUI. Went back to his
17 patrol car. And then radioed the dispatcher to
18 send an on duty highway patrolman.

19 There is some question about the time.
20 How much time transpired. And that came up in the
21 trial, because we were arguing that the test has
22 to be given within two hours. And they were --
23 they couldn't establish the time. And one of the
24 reasons we couldn't establish the time is because
25 the trooper that stopped her didn't activate the

1 recording equipment, so we didn't know how long
2 that lasted. That was an issue in the case.
3 Their argument was that well he called it in
4 fairly quickly, and the trooper got there within a
5 reasonable period of time.

6 THE COURT: So there was any video at all?

7 MR. MCCOLLUM: There was video when the
8 second officer got there.

9 THE COURT: Okay. All Right.

10 MR. MCCOLLUM: When the second officer got
11 there, he pulled, they switch places. And then
12 they have a conversation. Then the second officer
13 begins the DUI investigation. Now from our point
14 of view there, the statute requires that the
15 videotape be turned on.

16 In most of these cases are cars when you
17 activate the blue lights, the video comes on
18 automatically and you have to turn it off or leave
19 it on. The trooper testified that in his case,
20 you have to turn it on. He didn't really indicate
21 why he didn't turn it on. And what we argued at
22 trial was that was necessary to comply with the
23 statute because it was a traffic stop. The second
24 part of that argument is that the exception to
25 that was it's a car stop. It's not an accident

1 investigation. It's not, you know, that type of
2 thing. It's a car stop, so it's required.

3 So our argument was that well even if that
4 is somehow okay, they at least are arrived by the
5 statute to produce an affidavit. And Subsection B
6 of this statute I cited 56-5-2953 says, failure by
7 the arresting office to produce a video recording
8 required, etc., is not alone ground for dismissal,
9 (if) the officer submits a sworn affidavit
10 certifying basically that the equipment wouldn't
11 work and they had tried to repair it. So---

12 THE COURT: Okay. In this one he is not
13 saying that the equipment wasn't working. He is
14 just saying because he wasn't on duty, he never
15 turned on his video, and because he summoned
16 someone else, it was their responsibility.

17 MR. MCCOLLUM: Yeah, they just never
18 produced the affidavit.

19 THE COURT: I got you.

20 MR. MCCOLLUM: And admitted that they had
21 make a videotape even though it was a traffic
22 stop. And then finally, Your Honor,---

23 THE COURT: So the officer that
24 actually -- that was off duty, that effectuated
25 the stop because she was driving erratically,

1 never recorded anything.

2 MR. MCCOLLUM: Never recorded anything.
3 And but he testified that she driving erratically
4 as he followed her, and that's why he pulled her.

5 THE COURT: And he pulled her over by
6 activating his blue lights.

7 MR. MCCOLLUM: Yes, in a marked patrol
8 car.

9 THE COURT: I got you, go ahead.

10 MR. MCCOLLUM: Finally, Your Honor, the
11 state elected I think the trooper charged her with
12 DUAC, driving with an unlawful alcohol
13 concentration. Did not charge her with DUI, which
14 be I believe clearly, you know, DUI is under the
15 influence of alcohol or and or drugs. They could
16 street drugs. They could be prescription drugs.
17 And if she was on trial for DUI, driving under the
18 influence, then clearly if there was evidence
19 that she had consumed alcohol or consumed
20 narcotics that would affect her, clearly that
21 would be admissible.

22 Just as clearly we believe that if she is
23 not on trial for DUI, but just for on trial for
24 driving with unlawful alcohol concentration, which
25 is much easier for the state to prove. They only

1 have to prove the machine works. There was
2 probable cause for the stop, and that the reading
3 was above the so called legal limit. That's all
4 they have to show. So it's a lower standard for
5 the state. So we clearly objected to the
6 introduction that she had taken Xanax. We don't
7 think it's proper. We think it's prejudicial.
8 And we think that that was improper and could --
9 and affected the jury's evaluation of the case.

10 THE COURT: Thank you. Mr. Thomas.

11 MR. THOMAS: Yes, Your Honor. I'll just
12 start with the grounds dealing with the
13 continuance there. Of course, Your Honor knows
14 it's an abuse of discretion standard. I think
15 that's clear on the record. The fact that they
16 are granted two continuances. As far as this
17 whole notion of the state essentially has
18 8 continuances, because they had placed on the
19 docket. I disagree with No. 8, but beyond that,
20 that was never raised at the trial court level.
21 It's just now raised in appeal. So it's not
22 preserved before this court. It's something that
23 should have been raised in front of the judge at
24 that time.

25 THE COURT: Okay.

1 MR. MCCOLLUM: The next one, Your Honor, I
2 believe was the motion of dismissal based on the
3 videotaping in the statute. Your Honor, there is
4 a case that's directly on point here, the State
5 vs. Landis. It's the one I argued at the trial
6 court level. I'll pass up a copy for Your Honor
7 and also defense counsel. May I approach. Your
8 Honor, in this case, the state transport officer
9 activated his blue lights and pulled over a driver
10 for driving erratically. A state highway
11 patrolman pulled in behind him. The state
12 transport officer asked the defendant out of their
13 vehicle. And at that time, the highway patrolman
14 came over once defendant was already out of their
15 vehicle. And went through the whole battery of
16 field sobriety tests and continued the DUI
17 investigation.

18 Your Honor, the issues on appeal in that
19 case were that, in this case neither party
20 provided a videotape. The issue was who needed to
21 provide or an affidavit and we would videotape.
22 And in that case the court said that it was the
23 arresting officer and they decided that was the
24 highway patrolman who conducted the field
25 sobriety, who actually physically placed the

1 person in handcuffs and placed them under arrest.
2 The other issue in that case was whether the
3 affidavit was sufficient. And in that case, he
4 provided an affidavit saying that this own video,
5 this is the highway patrolman. His own video
6 equipment was not in proper working condition.

7 The court goes on to find that that was
8 sufficient. He didn't have to provide any
9 information as far as the transport officer who
10 made the initial stop, who also didn't provide a
11 videotape in that case. And when you read the
12 sections together videotape statute exception,
13 Section (b) and 1, it's clear that the officer
14 referred to in Section 1 is the arresting officer.
15 And that's basically what that case stands for,
16 Your Honor.

17 The judge ruled at the trial level that
18 the statute was complied with, because the
19 arresting officer who she determined to be Trooper
20 Weldon, the second trooper to arrive on the scene,
21 provided a videotape that contained -- that
22 started that activation of his blue lights,
23 contained all field sobriety, contained miranda,
24 contained the arrests, everything required by the
25 statute.

1 Your Honor, the defendants or defendant
2 appellant's reading of the statute would be --
3 would cause, I guess, would make whoever that
4 arresting officer is, have to turn in an affidavit
5 attesting to or really the affidavit just
6 contained hearsay as to why someone else was not
7 able to provide an affidavit. The third issue,
8 Your honor, on appeal was the Xanax that -- the
9 statement of Xanax coming in at trial.

10 Your Honor, defense counsel objected on
11 the basis of relevance. And this clearly relevant
12 in this case, because the Do Act statute is not a
13 true per se statute. If you post -- the state and
14 the defendant has the right to put in these
15 videotapes. And it's inside videotape, the BA
16 videotape, to examine the conduct of the
17 defendant. And I think her admission of taking
18 Xanax is clearly something that would affect her
19 conduct, which is clearly an issue at trial.
20 That's where it is relevant. There was no
21 objection made as far as, there is never a
22 403 analysis asked for. There is never an
23 objection made as far as it being unduly
24 prejudicial. So that is not before this court
25 today.

1 THE COURT: Wait a minute. So there was
2 no objection at trial to the Xanax? The 403
3 objection?

4 MR. MCCOLLUM: We objected. Because we
5 said that it was improper and irrelevant evidence
6 because it was an abuse of alcohol.

7 THE COURT: Okay.

8 MR. THOMAS: Your Honor, there was an
9 objection based on relevance.

10 THE COURT: Well I mean the statute does
11 say that it is based purely on alcohol content;
12 right?

13 MR. THOMAS: That's right. But both the
14 state and the defendant have the right to put
15 these videotapes into evidence to challenge that
16 content, whatever that alcohol concentration is
17 found to be. The jury can come back and say,
18 well, you know, we looked at this videotape and
19 she looked fine on this videotape.

20 THE COURT: Oh, yeah. I mean---

21 MR. THOMAS: We're not going to believe
22 what that.

23 THE COURT: Exactly. And the state could
24 put in the video content to say she was not okay.
25 But still I don't see where the Xanax, say putting

1 it in, that she had taken Xanax.

2 MR. THOMAS: Your Honor, I think it is
3 relevant to her conduct on camera. You know, if
4 you saw the videotape, it affects her conduct on
5 camera.

6 THE COURT: Yeah, but the state's
7 argument, was the state taking the position that
8 her conduct was the result of Xanax or was the
9 result of consuming alcohol?

10 MR. THOMAS: Oh, I think her conduct was
11 clearly the result of both. I think anything you
12 ingest is going to affect your conduct.

13 THE COURT: Exactly. But to violate this
14 statute, you can't convict somebody of violating
15 this statute simply because they have taken Xanax.

16 MR. THOMAS: No, Your Honor. And that's
17 not -- the charges dealt solely with alcohol.

18 THE COURT: Right.

19 MR. THOMAS: When the jury was charged,
20 that's the instruction they are given.

21 THE COURT: Okay. Thank you. Anything in
22 reply?

23 MR. MCCOLLUM: Yes, sir. Just briefly.
24 The Landis argument, that's in page 5 of the
25 memorandum. Just a couple of points in the

1 middle. One is, that was a state transport
2 officer. And he and the state trooper arrived
3 simultaneously at the same time. So there was
4 really no gap. In addition to that, the officer
5 did in fact supply an affidavit saying that the
6 video equipment on that transport vehicle wasn't
7 working, I believe. And also, Your Honor, that
8 was 2004. There are other cases out there. You
9 know, you have got the City of Mount Pleasant,
10 which never got videotaping equipment. And they
11 always said they didn't have to do it, but they
12 didn't have it. And then the court finally just
13 said, that's ridiculous. You know, it has been 10
14 years. You have got to get the equipment.

15 There seemed to be a little bit more
16 leniency, you know, in 2004 than 2014. This
17 statute has been in effect for a long time now.
18 And then the legislature and the courts have been
19 very diligent in creating a standard and upholding
20 it.

21 THE COURT: Now how did the evidence that
22 she ingested Xanax? How did that come in? That
23 was through the officer's testimony or during the
24 admission she made on the video or what?

25 MR. MCCOLLUM: I think it was the

1 admission she made while she was in the BA room
2 dealing with the trooper, answering his questions.
3 And trying to explain her conduct, I guess is the
4 best way. He may have asked her. I don't know
5 specifically, Your Honor.

6 THE COURT: Okay. But it wasn't as a
7 result of an officer taking the stand saying she
8 admitted that she had taken Xanax. It was by
9 showing the video to the jury. And under the -- I
10 guess what I am saying is the fact that she had
11 taken Xanax, was presented to the jury through an
12 officer's testimony saying she admitted that, or
13 was that presented to the jury through her
14 admission on a video that was required by law?

15 MR. MCCOLLUM: Your Honor, I know it was
16 on the videotape that was introduced over
17 objection. I honestly cannot remember whether the
18 trooper testified to it as well.

19 THE COURT: Okay.

20 MR. MCCOLLUM: And I can't remember
21 exactly whether or not the state alluded to it in
22 closing argument.

23 THE COURT: Okay.

24 MR. THOMAS: Your Honor, briefly. If
25 may---

1 THE COURT: That's all right. I am going
2 to go ahead and affirm the decision of the
3 magistrate. I think the Landis case, you know, it
4 is within the discretion. I am going to
5 continue -- I am not reversing it, but the failure
6 to grant a continuance given the age of the case,
7 I think that was within the magistrate's
8 discretion. I think Landis is controlling on the
9 video; that the arresting officer is the one has
10 to do his video camera. And on the Xanax, I was
11 getting ready to reverse it, because I think it is
12 improper if the officer had gotten up and said,
13 oh, yeah, by the way, she had taken Xanax.
14 Because that's clearly prejudicial to the jury.
15 But if this was case where they have to video it,
16 and during the course of the video she states, I
17 have taken Xanax. I don't know that that is
18 reversible error. So I think that just presenting
19 the video that they are entitled to that. so I am
20 going to affirm the magistrate's decision.

21 --End of Requested Transcript of Record--

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24

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C-E-R-T-I-F-I-C-A-T-E

I, Margaret T. Sullivan, Court Reporter, for the Third 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 Common Pleas Nonjury Court on March 12, 2014, in Horry County, Conway, South Carolina.

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

5/28/14
DATE

Margaret T. Sullivan
COURT REPORTER
My Commission expires: 9/7/2021

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal is in full compliance with Rule 209 and contains all material proposed to be included by any of the parties and not any other material.

April 22, 2015



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge
App. Case No. 2014-000632

THE STATE.....RESPONDENT

V.

KYLIE NILSON.....APPELLANT

PROOF OF SERVICE

The undersigned attorney hereby certifies that on April 23, 2015 a true copy of Appellant's Record on Appeal in the above referenced case has been served upon:

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PROOF OF SERVICE

The undersigned attorney hereby certifies that on April 23, 2015 a true copy of Appellant's Record on Appeal in the above referenced case has been served upon:

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