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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

The Honorable John C. Hayes, III, Presiding Judge

Trial Court Case No. 2014CP4601548
Appellate Court Case No.: 2014-002312

RECEIVED

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SC Court of Appeals

THE STATE

Respondent,

v.

Richard Alan Wells,

Appellant.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
State of South Carolina,)
Respondent,)
v.)
Richard Alan Wells,)
Appellant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-46-1548

ORDER DENYING APPEAL

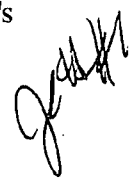
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CLERK OF COURT
YORK COUNTY, SC

Appearance for Appellant: Paul L. Reeves
Appearance for Respondent: Stephany Ann Wood
Trial Judge: Honorable Mandrile H. Young, Magistrate

This matter came before this Court pursuant to an appeal by the Richard Alan Wells ("Appellant") from his conviction of Driving Under the Influence First Offense less than .10 ("DUI 1st"). The trial judge, the Honorable Mandrile H. Young, convicted and sentenced the Appellant on April 30, 2014, in the Rock Hill Municipal Court. This Court heard this appeal on September 3, 2014. After review of the Appellant's appeal and the arguments of counsel I find the following:

FACTS

On October 5, 2013, Deputy J. Osborne of the York County Sheriff's Department arrested for the Appellant for DUI and open container. The video recording from the arresting officer's video camera was working properly at all times relevant. The video recording showed the officer activate his blue lights to initiate the traffic stop. The Appellant pulled from the traveled portion of the highway into a parking lot. The officer also pulled into the parking lot. The video continued to show the arresting officer approach the Appellant's vehicle. After this contact with the Appellant, the officer moved his vehicle to the traveled portion of the highway. The officer's



videotape did not record the Appellant for approximately four (4) minutes and thirty (30) seconds. During a portion of this time, the officer and the Appellant were in their respective vehicles. After several minutes, per the audio portion of the video, the officer approaches and orders the Appellant from the vehicle. They walk together to the traveled portion of the highway where video again records the Appellant. The video does not capture the Appellant exiting his vehicle and walking with the officer. The Honorable Mandrile H. Young found that "conduct" only applied to the field sobriety test, *Miranda* rights, and the arrest.

At trial, the Appellant attempted to demonstrate that the training of law enforcement officers in the detection of impairment, as shown by the South Carolina Justice Academy taken by the National Highway Traffic Safety Administration, showed the Appellant exiting the vehicle was critical conduct as defined by *State v. Murphy*, 392 S.C. 626, 709 S.E. 2d 685 (Ct. App. 2011). The State made a hearsay objection to this evidence, and the trial judge granted the State's objection. The trial court tried and convicted the Appellant April 30, 2014.

LEGAL ANALYSIS

1. The provisions of South Carolina Code Ann. § 56-5-2953(A), as amended in 2009, states in pertinent part that a person charged with driving under the influence must have their conduct recorded at the incident site as follows:

(A) A person who violated Section 56-5-930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and breath test site recorded.

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

- (i) not begin later than the activation of the officer's blue lights;
- (ii) include any field sobriety test administered; and
- (iii) include the arrest of a person for a violation Section 56-5-2930 or

56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and to show the person being advised of his *Miranda*¹ rights.

In construing the terms of a statute, the primary rule of statutory construction is that a statute should be construed to give effect to the intent of the Legislature. *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). A Court should not attempt to derive the intent of the Legislature when the statutory language is clear and unambiguous. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011). Thus, in interpreting a statute, a Court should give words their plain and ordinary meaning, and not resort to forced construction that would limit or expand the statute in question. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001).

It is arguable that the statutory language is ambiguous because the statute does not specifically state or define what is required in the recording of the field sobriety test. To the extent there is any ambiguity in the statute, the Court looks to any evidence of the Legislature's intent in enacting the statute. Prior to the 2009 amendments, Section 56-5-2953(A)(1), with respect to the recording of any field sobriety testing, only required that the "conduct" of the suspect-driver be recorded at the incident site. Under the former provisions of Section 56-5-2953(A)(1), the Court of Appeals held, in *Murphy v. State*, 392 S.C. 628, 709 S.E. 2d 685 (Ct. App. 2011), that although a suspect-driver's feet could not be seen during the "walk and turn" test, the video recording requirements complied with 56-5-2953. In *Murphy*, the video recording

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

at the incident site only showed the suspect-driver doing the "walk and turn" test from the knees or waistline upwards. *Id.* The Court explained:

While certainly an individual's performance on such tests would be part and parcel of his or her "conduct" at the incident site, as mentioned, an unbroken recording of the tests is not necessary to capture conduct. Therefore, the recording need not display all field sobriety tests provided it captures the accused conduct.⁴

However, footnote 4 provides as follows:

As amended in 2009, the current version of Section 56-5-2953 expressly requires the recording of field sobriety tests. See S.C. Code Ann. §56-5-2953(A)(1)(a)(ii) (sup. 2010). (The video recording at the incident site must...include any field sobriety test administered."). We note that the Legislature's amendment of the plain language of the statute to require the recording of field sobriety tests further bolsters our position that the plain language of the prior versions, in effect at the time of this action, did not require recording of all tests.

The obvious importance of the above quote from *Murphy* is that if the complete recording of a person's *performance* of any field sobriety test was not required under the former statute, it is now required under the amended statute. The 2009 amendment specifically provides for the recording of any field sobriety test, which goes beyond the former requirement of merely recording a person's conduct. Had the Legislature only intended that there be a recording of a person doing a field sobriety test, without there being any way to determine the person's performance on the test, as in *Murphy*, there would have been no need to amend the statute. The Legislature enacted the 2009 amendments, and it must be presumed that the Legislature did not intend for the amendments to be futile or meaningless. *State v. Long*, 363 S.C. 360, 610 S.E. 2d 809 (2005); *State v. Sweat*, 379 S.C. 367, 665 S.E. 2d 645 (Ct. App 2008). The South Carolina Court of Appeals explains that "because of the purpose of the videotaping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless." *State v. Gordon*, 408 S.C. 536, 543, 759 S.E.2d 755, 758 (Ct. App. 2014).

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2. The video recording of South Carolina Code Ann. § 56-5-2953(a) are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). When a prosecuting agency fails to comply with video recording provisions of S.C. Code Ann. § 56-5-2953(A), the appropriate remedy is the dismissal of the case against the Defendant. *City of Rock Hill v. Suchenski* 374 S.C. 12, 646 S.E. 2d 879 (2007); *State v. Johnson* 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). In *Town of Mt. Pleasant*, the South Carolina Supreme Court returned to the *Suchenski* decision and reiterated that the un-excused noncompliance with the South Carolina Code Ann. § 56-5-2953 mandates the dismissal of DUI charge. In *Town of Mt. Pleasant* the Court states:

As evidenced by this Court's decision in *Suchenski*, the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provision of Section 56-5-2953. Notably, the Legislature specifically provided for dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. *Id.* Section 56-5-2953(B) ("Failure by the arresting officer to produce the videotapes required by this section is not alone grounds for dismissal of any charge made pursuant to Section 56-5-2953...if (certain exceptions are met). The term "dismissal" is significant as it explicitly designated a sanction for an agency's failure to adhere to the requirements of Section 56-5-2953.

Furthermore, it is instructive that the Legislature has not mandated videotaping in any other criminal contest. Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provision of Section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.

Thus, we hold that dismissal is the appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in *Suchenski*.

JOHN H. H.

Likewise, the decisions of the South Carolina Court of Appeals have been consistent with *Suchenski*.²

3. In the present case, the State complied with the videotaping requirements of Section 56-5-2953. The statute is very specific as to when the driver-suspect's conduct must be performed, that is "not begin later than the activation of the officer's blue lights; include any field sobriety test administered; and include the arrest of a person for a violation Section 56-5-2930 or 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and to show the person being advised of his Miranda rights."

In this case, the Appellant's conduct was recorded at all times required by Section 56-5-2953. The Appellant was not recorded while he was in his vehicle and as he exited his vehicle to walk to the field sobriety test site. This case can be distinguished from cases involving the officer's failure to record part of a sobriety test, or administering the breath test. Here, the Appellant's performance in the sobriety test was recorded, and recording this conduct satisfies the recording requirements of Section 56-5-2953.

4. In this case, the video recording was produced and therefore Section 56-5-2953(B) it is not implicated.

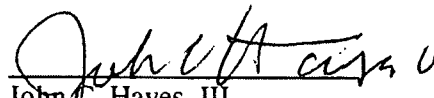
5. The trial court properly granting the State's hearsay objection regarding the admissibility of training manual. Hearsay is an out of court statement proving the matter

² See *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001) (officer violated Section 56-5-2953(A)(2), when he failed to capture the administration of the breath test to the Defendant on videotape, when the first breath test machine was not working, and the officer moved the Defendant to another machine in the same room but failed to activate the videotape for a second machine in the same room; although the officer could be seen on the video made from the first machine which was left on the entire time, and the Defendant could be heard, the Defendant himself could not be seen; case should have been dismissed); *Murray v. State*, 392 S.C. 626, 709 S.E. 2d 685 (2011) (the remedy for noncompliance with Section 56-5-2953 is dismissal of the case, not mere suppression of evidence).

asserted. The training manual by the South Carolina Justice Academy taken by the National Highway Traffic Safety Administration was produced by a third party. Thus, it was an out of court statement which attempted to prove the matter asserted, that is that the Appellant exiting the vehicle is "critical conduct." Therefore, the trial judge properly granted the State's hearsay objection. Additionally, a training manual cannot trump a statute. The statute at issue clearly sets forth what is required to be videotaped.

IT IS THEREFORE ORDERED, that based upon the above the Court DENIES the Appellant's appeal and his trial court conviction of DUI 1st is upheld.

AND IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge #7

September 11, 2014
York, South Carolina

STATE OF SOUTH CAROLINA
UNIFORM TRAFFIC TICKET

CITY OF <u>York</u>		VERSUS	
FIRST NAME <u>Richard</u>	MIDDLE NAME <u>Alan</u>	LAST NAME <u>Wells</u>	
STREET AND NO. <u>2315 N. Roosevelt Blvd</u>	CITY <u>Key West</u>	STATE <u>FL</u>	ZIP CODE <u>33040</u>
STATE LICENSED <u>FL</u>	DRIVER'S LICENSE NO. <u>[REDACTED]</u>	CDL ☐ YES ☒ NO	DRI. LIC. CLASS <u>E</u>
VEH. LIC. NO. <u>[REDACTED]</u>	STATE <u>NC</u>	MAKE OF VEH <u>Ford</u>	YEAR <u>06</u>
CONV. VEH. <u>(AUTO)</u>	HAZ. MT. <u>[REDACTED]</u>	MOPED <u>[REDACTED]</u>	MTRCYCL <u>[REDACTED]</u>
OTHER <u>[REDACTED]</u>			
YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT:			
NAME OF TRIAL COURT <u>DUI Court</u>		STREET AND NO. <u>5295 Cherry Rd</u>	
DATE <u>12/13/2013</u>	TIME OF TRIAL <u>8AM</u>	CITY <u>Rock Hill</u>	STATE <u>SC</u>
VIOLATION - COURT APPEARANCE REQUIRED (YES/NO) <u>Driving Under Influence 1st</u>		VIOLATION SECTION NO. <u>56-5-2930</u>	
OWNER OF VEHICLE <u>SAME</u>		DATE OF ARREST <u>10/05/2013</u>	
ADDRESS OF OWNER		DATE OF VIOLATION <u>10/05/2013</u>	

BAIL DEPOSITED <u>CASH</u>	NAME OF ARRESTING OFFICER <u>Osborne</u>	RANK <u>MD</u>																								
PRESENT THIS SUMMONS TO THE TRIAL COURT SHOWN ABOVE		DOCKET NO.																								
Be sure you understand from the arresting officer the exact time and before whom you are to appear. IF THIS TICKET IS WRITTEN FOR A TRAFFIC VIOLATION AND YOU FORFEIT BAIL, PLEAD GUILTY OR NOLO CONTENDERE, OR ARE CONVICTED AFTER A TRIAL, THIS VIOLATION WILL BE PLACED AGAINST YOUR DRIVING RECORD, OR FORWARDED TO YOUR HOME STATE. FAILURE TO COMPLY WITH THE TERMS OF THIS SUMMONS MAY RESULT IN THE SUSPENSION OF YOUR DRIVERS LICENSE BY YOUR HOME STATE. YOU ARE REQUIRED BY LAW TO APPEAR IN COURT FOR CERTAIN OFFENSES.		COUNTY <u>York</u> BADGE <u>02485</u> TROOP <u>3</u> DAY <table border="1"> <tr> <td>D</td><td>S</td><td>M</td><td>T</td><td>W</td><td>T</td><td>F</td><td>S</td> </tr> <tr> <td>1</td><td>2</td><td>3</td><td>4</td><td>5</td><td>6</td><td>7</td><td>8</td> </tr> </table> TIME OF VIOLATION <u>1:15</u> A.M. / P.M. WEATHER <u>DR</u> DISTANCE IN FEET FROM INTERSECTION OF <u>Old York Rd</u> <u>Hands Mill Hwy</u> MILES <table border="1"> <tr> <td>N</td><td>E</td><td>S</td><td>W</td> </tr> <tr> <td>1</td><td>2</td><td>3</td><td>4</td> </tr> </table> HWY NO. <u>161</u> CITY Lat Long OFFENSE CODE <u>99</u> B.A. LEVEL <u>Refused</u> <u>70409 GM</u>	D	S	M	T	W	T	F	S	1	2	3	4	5	6	7	8	N	E	S	W	1	2	3	4
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SEE IMPORTANT INFORMATION ON THE REVERSE SIDE OF THIS TICKET																										

VIOLATOR'S COPY

STATE OF SOUTH CAROLINA
YORK COUNTY
IN THE MAGISTRATE'S COURT
TICKET NO: 70409GM

STATE OF SOUTH CAROLINA
v.
RICHARD WELLS

FACTS

On October 5, 2013, Richard Wells was arrested for driving under the influence by Deputy J. Osborne of the York County Sheriff's Department. The video recording from the arresting officer's video camera was working properly at all times relevant. The video recording showed the arresting officer activate his blue lights to initiate the traffic stop. Upon activation of the blue lights, Wells immediately applied his brakes and placed his left turn signal in the "on" position. Wells pulled from the traveled portion of the roadway into a parking lot. Wells stopped his vehicle and opened the driver's side door and remained in the vehicle. The officer had pulled his car into the parking lot and placed the car behind and to the left of Wells' truck.

The video continued to record the arresting officer approach Wells vehicle. The arresting officer made contact with Wells who was seated in his vehicle. He verified Wells' driver's license and registration. After asking Wells several questions, the arresting officer returns to his car. He then moves his patrol car from the parking lot to the traveled portion of the highway. Per the time counter on the officer's recording, Wells is not on the video for approximately four (4) minutes and thirty (30) seconds. During this sequence of time, the arresting officer is in his car and Wells remains in his car. After a several minutes, per the audio portion of the video, the arresting officer approaches Wells truck. He talks with Wells. He then orders Wells from the

vehicle and they walk together to the traveled portion of the highway where Wells is again seen on the video. The video does not capture the very critical sequence of events, where among other things, Wells exits his vehicle. Wells' conduct, his coordination, his control over his motor skills necessary to exit the vehicle, his demeanor, and the manner in which he responded to the officer's commands are not recorded.

The sequence of events not recorded are critical in demonstrating and preserving Wells' conduct, as required by S.C. Code Ann. §56-5-2953 (1976, as amended). The detection process by law enforcement for DUI, as evidenced by the training manual from the National Highway Traffic Safety Administration, is divided into three phases. Phase one is the vehicle in motion, phase two is personal contact, and phase three is the pre-arrest screening.¹ The first phase begins when the officer's attention is drawn to the suspected violator as he drives.² The second phase includes the officer's face to face meeting with the suspect *and* observations by the officer of the suspect's exit from the vehicle and how he walks away from the vehicle.³ Per the training for competency in administering standardized field sobriety test, one of the task of the arresting officer is to "observe the driver's exit and walk from the vehicle."⁴ Wells' conduct at the time of his interaction with the arresting officer is crucial. The sequence of these events is not captured by the video.

A. The State has failed to comply with S.C. Code Ann. §56-5-2953

S.C. Code Ann. §56-5-2953 controls the what must be recorded at the incident site. This section states as follows:

¹ DUI DETECTION AND STANDARDIZED FIELD SOBRIETY TEST training manual at p.IV-2

² *Id* p.IV-1

³ *Id* p.IV-3

⁴ *Id* p.IV-4 and p.IV-5

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

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

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

(i) not begin later than the activation of the officer's blue lights;

(ii) include any field sobriety tests administered; and

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

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal quotation marks omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (internal quotation marks omitted). "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,], the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (first alteration by court) (internal quotation marks omitted); see also *State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used."). "However, penal statutes will be strictly construed against the state." *Elwell*, 403 S.C. at 612, 743 S.E.2d at 806.

"If the statute is ambiguous, however, courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose,

design, and policy of the lawmakers." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant*, 393 S.C. at 342, 713 S.E.2d at 283. "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Id.* (internal quotation marks omitted). "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *Id.* at 342-43, 713 S.E.2d at 283.

Here the video fails to record Wells' conduct as he exits the vehicle. The statute requires that the conduct of the accused must be recorded. Wells position is bolstered by the holding in *State v. Murphy*, 392 S.C. 626, 709 S.E.2d 685; (Ct. App. 2011). While the *Murphy* case dealt with §56-5-2953 prior to the amendment which required videotaping of the sobriety test, the decision specifically discussed the meaning of "conduct" as contemplated by this section. In *Murphy*, the video captured the accused from the knees up and did not present a full view of the her as she performed sobriety test. The Court held as follows:

the statute only requires her "conduct" be recorded. ***Conduct is generally defined as one's behavior, action, or demeanor.*** The Oxford Dictionary 158 (2d ed. 2001). Failure of the video to maintain a full view of the accused for the duration of a field sobriety test in which she is made to walk a line, for instance, does not fail to display her behavior, demeanor, and general state.

Murphy at 631 (emphasis added).

In *State v. Gordon*, S.C. App. *Lexus* 89, filed on April 23, 2014, the Court of Appeals found that "[B]y requiring a enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provision of section 56-5-2953, and, in turn, promulgated a severe sanction for noncompliance. *Gordon* at 10, quoting *Town of Mt.*

Pleasant, 393 S.C. 332, 349, 713 S.E.2d 278, 286 ((2011)). The Court also opined that “because of the purpose of the videotaping to create direct evidence of the arrest, if the actual test cannot be seen on the recording, the requirement is pointless.” *Gordon* at 11.

Here, Wells is completely off camera for more almost four minutes and thirty seconds. During this period of time, he performed critical task in existing and walking from his vehicle. His behavior, actions, and demeanor as he exited the vehicle is extremely important to this case. At no fault of the Wells or the video equipment, these important cues and/or the lack thereof were not recorded.

Moreover, the HGN test conducted by the arresting officer is not captured in the video. While the video records the arresting officer standing in close proximity to Wells, the video does not show Wells’ response to the officer’s motions and actions. All that can be viewed is the officer making ambiguous motions with his arm. The arresting officer’s video does not show the HGN test in any manner and is therefore violative of §56-5-2952 and *Gordon*.

The State has failed to comply with the statutory requirements of §56-5-2953 because Wells conduct was not recorded. *Id.* Therefore, the case against Wells must be dismissed. *The City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879, (2007). In *Suchenski*, the court considered a fact situation where only a portion of the video of the incident scene was produced by the arresting officer. *Suchenski* at 879. The South Carolina Supreme Court held that the dismissal of a case is the appropriate remedy where there is a violation of §56-5-2953 subsection (A) that is not mitigated by subsection (B) exceptions. *Id.*

B. Wells' conduct not recorded is exculpatory and was not preserved by the arresting officer.

In *State v. Jackson*, 302 S.C. 313 (S.C. 1990), the defendant was prosecuted for DUI after the videotape of his arrest was destroyed. Jackson contends that it was a violation of his due process rights to prosecute him after evidence was destroyed. His argument is based upon the principle that defendants are to be given a meaningful opportunity to present a complete defense. The *Jackson* discussed that to protect this right, the United States Supreme Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193, 1203 (1982). In this regard, defendants have the right to request and obtain from the prosecution evidence that is material to the guilt of the defendant or relevant to the punishment to be imposed. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Even absent a request, prosecutors have a constitutional duty to give the defendant exculpatory evidence which would raise a reasonable doubt about his guilt. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

In *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), the Supreme Court held that the State's failure to retain breath samples for the defendants in a DUI case was not a due process violation. The Court reasoned that the officers were acting in good faith and in accord with their normal practice when the breath samples were destroyed. The Court also found that the defendant failed to prove that the evidence was "material," which means that the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

The *Jackson* Court held that the destruction of the video tape deprived the accused of his due process rights. The Court held:

In the case at bar, the videotape was clearly "material". The exculpatory value was apparent before its destruction because one assistant solicitor was willing to drop the charges because of it. In addition, Jackson had no other evidence and could not obtain evidence of comparable value. Although the destruction of the tape was explained to the jury, the value of the tape could not be replaced.

Jackson at 316.

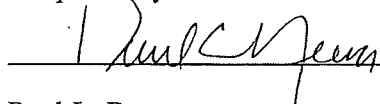
In this case, the officer did not destroy the video; however, he made a conscience decision to not record Wells exit from his vehicle. The video camera was working. The arresting officer, because of his extensive training about the cues provided by a person accused of DUI, knew of the critical importance of the cues and/or the lack thereof, associated with an objective video of Wells' exiting his vehicle. While having such knowledge, the arresting officer failed to preserve the evidence by videotaping the exit.

The officer's notes fail to mention any problems Wells had with existing the vehicle. Given the thoroughness of the arresting officer's other notes regarding signs of impairment, the lack of notes clearly indicate Wells exhibited no cues of impairment. An objective video of the officer's interaction with Wells, as Wells exiting his vehicle, would have been the best evidence to exculpate Wells. The video was not taken when the means to do so was within the authority and control of the arresting officer. The absence of the video leaves no objective evidence of this important sequence. The *Jackson* Court found that "the value of the tape could not be replaced." This Court should find the same.

CONCLUSION

The arresting officer had a working video camera that failed to capture the conduct of the accused at the scene. He did not comply with S.C. Code Ann. §56-5-2953 when he failed, without reason, to video the conduct of Wells during the traffic stop. Pursuant to *Suchenski*, the Court must dismiss the charge of driving under the influence. The arresting officer failed to preserve exculpatory evidence critical to Wells case. Pursuant to *Jackson*, the arresting officer failed to preserve exculpatory evidence when he knew or should have known that the evidence was material, exculpatory in nature and had the means to prevent the loss of the evidence. For the forgoing reason, this case must be dismissed.

Respectfully Submitted:



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April 29th, 2014

Columbia, South Carolina

1 STATE OF SOUTH CAROLINA IN THE MAGISTRATES COURT
2 COUNTY OF YORK TICKET NO. 70409 GM
3

4 STATE OF SOUTH CAROLINA,)
5 PLAINTIFF,)
6 VS.) JURY TRIAL
7 RICHARD WELLS,)
8 DEFENDANT.)
9 _____)

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 Hearing held before the Honorable Mandrile H.
Young, at the Moss Justice Center, 1675-3C York
Highway, York, South Carolina, on the 14th day of
April, 2014, scheduled for 10:00 a.m.

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1 Proceedings

2 THE COURT: Let's hear this
3 motion.

4 MS. WOOD: Your Honor, we received
5 a copy of it at the same time that you did, but
6 we're perfectly fine with working with it.

7 THE COURT: Okay. Fine. Okay. So
8 I've read it and I'd like to give you the
9 opportunity to talk to me about it, okay? All
10 right. Sir?

11 MR. REEVES: Your Honor, if it
12 please the Court, the counter on the audio tape,
13 from those two videotapes I received, indicates
14 that from two minutes and 11 seconds after
15 1:00 a.m. until six minutes and 38 seconds after
16 1:00 a.m., the video does not capture Mr. Wells or
17 anything except the roadway. That was brought
18 about by, when Mr. Osborne -- Deputy Osborne,
19 activated the blue lights, Mr. Wells put on his
20 brake lights, blinker and pulled into a parking
21 lot.

22 Mr. Osborne pulled in behind him as
23 you would -- as you've probably seen in many other
24 videos, his car was behind Mr. Wells' truck and to
25 the left, and it does appropriately videotape

1 Officer Osborne approaching the vehicle, having
2 interaction with Mr. Wells, the exchange of
3 license, registration, a few preliminary questions
4 about what you've had to drink. Mr. Wells says,
5 not much. And then Mr. Osborne comes back to his
6 car and moves it into the travel portion of the
7 highway where it remains for four-and-a-half
8 minutes.

9 Your Honor, I will concede that if
10 that's all that happened and if Mr. Osborne had
11 started the videotape when he approached Mr. Wells
12 again, maybe we could argue that as somewhat
13 harmless. Although, the statute says that the
14 accused's conduct must be videotaped from the
15 point the blue lights are activated until he is
16 placed, or she is placed under arrest.

17 Your Honor, the Murphy case in
18 which I cited, I've got a copy of it here, defines
19 conduct and it's defined in the brief that I've
20 submitted to you, and it talks about that the
21 conduct is generally defined as one's behavior,
22 actions and demeanor -- or demeanor. And in that
23 case, your Honor, that case was decided
24 pre-sobriety test requirements on the videotape.
25 In that case, there was partial view of the

1 defendant but not a full view. Here, we have no
2 view.

3 Your Honor, as I understand it, one
4 of the things that police officers, such as Deputy
5 Osborne, who are very well trained in this, the
6 thing they look for are cues. Those are cues
7 about driving, there are cues about their first
8 contact with the accused, and then there are cues
9 about the sobriety test. Again, the cues, one of
10 them specifically mentioned in the NHTSA Training
11 Manual which is conformed to our training manual
12 here --

13 MS. WOOD: Your Honor, I'm going to
14 object to him actually bringing in the NHTSA
15 training manual because he doesn't have his
16 training manual with him, he hasn't provided us a
17 copy of what he's talking about.

18 Do you want to hand up the manual?
19 Can I look at the manual? Deputy Osborne, is this
20 your manual that you use?

21 DEPUTY OSBORNE: I don't see the
22 revision date on here. The actual entire NHTSA
23 standard and IACP were revised as of January of
24 2014 of this year. This is 2006, so --

25 MS. WOOD: Your Honor, we've got an

1 out-of-date NHTSA manual and nobody here from
2 NHTSA to testify as to the standards and --

3 THE COURT: Okay. So the Court
4 will sustain the objection. If you would
5 continue, sir.

6 MR. REEVES: Your Honor, I would
7 point out in the manual I do have, and I'll
8 identify it for the Court's purposes, is from the
9 South Carolina Criminal Justice Training Academy
10 dated 2006.

11 THE COURT: Okay.

12 MR. REEVES: The amendment that
13 Officer Osborne just mentioned took place after
14 this event which was October of 2013. I would
15 assume that if Officer Osborne testified
16 truthfully on the stand, he would tell me that
17 some of the cues he looks for, your Honor, is how
18 the defendant exits the vehicle, how the
19 defendant --

20 MS. WOOD: And I'm going to object
21 to using the NHTSA standards again.

22 THE COURT: Okay. Okay. The Court
23 will sustain. So if you would continue, sir,
24 without referring to the NHTSA standards at this
25 point.

1 MR. REEVES: The conduct of the
2 defendant coming out of the car is critical based
3 on what the officer is looking for, given his
4 notes, okay?

5 THE COURT: Okay.

6 MR. REEVES: That was not recorded.
7 Therefore, the State cannot indicate on the
8 videotape that they videotaped fully and
9 completely the conduct of Mr. Wells, okay? I
10 still believe that the statute itself defines
11 conduct or defines the time of the conduct should
12 be recorded and it was not.

13 There's another point to this, too,
14 your Honor. In Gordon, which is a recent case
15 from last week, I believe, it talked about, if the
16 videotape doesn't capture what the statute
17 indicates it should, then it is pointless. And,
18 your Honor, the question that I have here is, when
19 is the State going to decide how much is enough or
20 how little is too much? Because if you start
21 getting four minutes here and three minutes there,
22 the statute is violated and it becomes a useless
23 and pointless endeavor. They have to videotape
24 the conduct.

25 Again, if it was just him sitting

1 in his truck, your Honor, I could see where we all
2 might say, Mr. Reeves, you're splitting hairs and
3 being, you know, too fine. Of course, now, the
4 statute is supposed to be strictly construed, your
5 Honor, as you well know. But, again, his conduct
6 of getting out of the car which I submit is
7 important and critical.

8 Your Honor, there's a second reason
9 that the videotape is violative of Mr. Wells' due
10 process and that is this: Officer Osborne's notes
11 indicate all of his assessments of Mr. Wells'
12 evidence of impairment, what he did when he did
13 the test, how he talked, how his -- what his
14 demeanor was. In this case, your Honor, there are
15 no notes in Officer Osborne -- in his report about
16 the exit from the vehicle. And this important
17 thing that's also not captured on the videotape is
18 Mr. Wells walking from his car to where the
19 videotape -- where you could see it on videotape.

20 Your Honor, as you well know, the
21 demeanor and conduct of the defendant and how he
22 controls his motor skills, whether he stumbles or
23 stammers or cannot walk straight or cannot walk
24 without assistance, again, is a critical piece of
25 evidence that the jury ought to be able to see,

1 whether it be good or bad. That's why we have a
2 video statute. Here, none of that is captured on
3 the videotape, your Honor.

4 Again, if that conduct was
5 supportive of Mr. Wells' contention of, I'm not
6 impaired, Officer Osborne knew or should have
7 known that that conduct would be important for
8 someone to assess, for someone to view, but he
9 chose not to videotape that. The videotape was
10 working. He made the conscious decision to move
11 the car, for whatever reason, and put Mr. Wells in
12 the travel portion of the highway to do the
13 sobriety test.

14 Again, that information should have
15 been preserved for him to use, if not -- if the
16 State can use it. He has the opportunity, your
17 Honor, to depend on the officer to preserve
18 relevant evidence that is exculpatory in nature.
19 Now, in the Jackson case, it was said if you don't
20 preserve the evidence, then the case should be
21 dismissed. And I would offer this as additional
22 grounds.

23 And, thirdly, your Honor, as to the
24 HGN test, which I'll go ahead and cover now, you
25 cannot see the test at all. All you can see is

1 Officer Osborne standing in close proximity to
2 Mr. Wells. I do not know the distance, your
3 Honor, but it is not close and you cannot make out
4 anything of Mr. Wells' response to that videotape.

5 You see a side view of his face,
6 you cannot see his eyes or the motions that
7 Trooper Osborne noted in his record as to what
8 Mr. Wells did or did not do in response to the HGN
9 test. I would argue that the failure to be able
10 to see that on the videotape, again, is violative
11 of 56-5-2953.

12 Your Honor, I have the cases if you
13 wish to have them, but that is Mr. Wells' motion.
14 I would make the written motion part of the record
15 for this purpose, your Honor.

16 THE COURT: Thank you. Ms. Wood?

17 MS. WOOD: Just beg your pardon,
18 your Honor.

19 THE COURT: Sure.

20 MS. WOOD: Your Honor, I just want
21 to address one of these motions at a time and to
22 do that, I would like to go ahead and just give
23 you as much information as I can. Before I make
24 my argument, I'd like to proffer Deputy Osborne's
25 testimony and let you watch the video before I

1 make my argument, if that's okay.

2 THE COURT: That's fine. Any
3 objections from the defense?

4 MR. REEVES: No, sir, your Honor.

5 THE COURT: Thank you.

6 MS. WOOD: Your Honor, at this
7 time, the State calls Deputy John Osborne.

8 THE COURT: Deputy, if you would,
9 please, sir.

10 DEPUTY OSBORNE: Yes, sir.

11 Whereupon:

12 Deputy Jonathan Osborne, having
13 been duly sworn and cautioned to speak the
14 truth, the whole truth and nothing but the
15 truth, testified as follows:

16 DIRECT EXAMINATION

17 BY MS. WOOD:

18 Q. Deputy Osborne, we're going to move
19 right to the specific motion in this case, you
20 know. We know that you were working on October
21 5th, 2013 in York County. We know what area you
22 were working. We're just going to go straight to
23 the video and the initiation of a traffic stop of
24 Mr. Wells.

25 Deputy Osborne, do you remember where

1 you stopped Mr. Wells?

2 A. I do.

3 Q. Okay. Where did you stop him?

4 A. It was on Old York Highway in the
5 AmbuStar parking lot, which is a convalescent
6 transporting medical unit.

7 Q. And what is particular about that
8 parking lot, the AmbUstar parking lot?

9 A. When I stopped Mr. Wells, he had turned
10 into that parking lot. And that parking lot is a
11 gravel parking lot, for one, and on the entrance
12 of where we actually pulled into is a grade as you
13 pull in and the entrance to that parking lot right
14 there is broke up pretty bad was from the gravel
15 and the different vehicles coming in and out of
16 that parking lot.

17 Q. Okay. Did you happen to move your
18 vehicle after you initially spoke with Mr. Wells?

19 A. I did.

20 Q. Why did you move your vehicle?

21 A. After speaking to Mr. Wells, I felt that
22 I needed to conduct further investigation in a DUI
23 investigation stop. For field sobriety test
24 purposes, I backed my vehicle out and put the
25 vehicle so that we would be on a concrete, flat,

1 level surface versus the broken up gravel parking
2 lot.

3 Q. And why is that important?

4 A. Because the defendant should be asked to
5 perform the task on a flat level surface, because
6 there are several tests that will be offered that
7 are actually balancing and having to walk. So for
8 the safety of the defendant as well as how I was
9 properly trained, I just backed up to make sure
10 that the surface was adequate for the defendant to
11 be able to perform those tasks.

12 Q. And why put in -- why didn't you just
13 pull your camera out of your car and follow the
14 defendant around?

15 A. Because the camera is permanently
16 mounted into our vehicles. Our camera is mounted
17 to the actual visor to a metal bracket. It's
18 virtually impossible to pull it off and try to
19 maneuver it around as a camera crew or something
20 like that.

21 Q. Okay. And so you moved your vehicle,
22 from what you're saying, so that you could put it
23 in position to properly videotape the field
24 sobriety test, correct?

25 A. That is correct.

1 Q. Okay. And did you properly videotape
2 all of the field sobriety tests in this case?

3 A. I did. After I moved my car into
4 position, I had ran some data on my computer. And
5 after running the data on my computer and getting
6 the responses back from NCIC and DMV, I then asked
7 Mr. Wells if he would step out of the vehicle and
8 step over into the front of my video camera to
9 offer a field sobriety test.

10 Q. Is this something you normally do?

11 A. Yes.

12 Q. Okay. Is this something that -- how
13 many times out of ten would you reposition your
14 vehicle to get a better view for the defendant and
15 for the defendant to begin?

16 A. It would all depend upon where the
17 defendant actually stopped and the conditions of
18 the roadway where the actual traffic stop takes
19 place. If the traffic stop takes place in a lane
20 of travel out of the roadway, then, no, I would
21 not maneuver my car or move it because I would be
22 in a safe environment to be able to perform my
23 task.

24 But if it was in a position to where the
25 ground is unlevel, it's broken up, you know, the

1 terrain does not meet a flat, level surface, then
2 I would back that car up to be able to try to get
3 the defendant a flat, level surface to offer those
4 tests.

5 Q. And in your report and from your
6 observation, did the defendant do anything when he
7 was getting out of the car to show impairment?

8 A. No, ma'am. I did not note anything in
9 my report to that. If it's not noted in the
10 report, then, no, I did not.

11 Q. Okay.

12 MS. WOOD: And, Mr. Reeves, you
13 have a copy of this report. Do you need to
14 see this?

15 MR. REEVES: I don't.

16 BY MS. WOOD:

17 Q. Deputy Osborne, could you please read
18 from your report as you wrote it from the time
19 that you stopped the defendant to after you moved
20 your cars. Just stop when you know that that
21 information is complete.

22 A. So when I actually activated my blue
23 lights?

24 Q. Right.

25 A. I activated blue lights and stopped the

1 vehicle. The vehicle turned into a gravel parking
2 lot and the driver threw open the side door, the
3 driver's side door. I approached the vehicle,
4 spoke with the driver, Wells. He appeared to have
5 a dazed appearance and was looking around and
6 appeared intoxicated. I advised Wells that he was
7 being stopped because he could not maintain his
8 lane.

9 Q. And, Deputy Osborne --

10 A. Yes?

11 Q. -- really quick. All of that stuff was
12 in front of your car and while he was in his car
13 as normal, correct?

14 A. That is correct.

15 Q. Okay. And keep going.

16 A. Well, he stated he was lost. I could
17 smell a strong odor of an alcoholic beverage
18 coming from the vehicle and asked Wells how much
19 he had been drinking, and he said he was coming
20 from the Luke Bryan concert in Columbia and he had
21 not had much to drink, and he had been drinking
22 earlier. I backed my patrol car into the roadway
23 to offer Wells a field sobriety test.

24 Q. And, Deputy Osborne, all of his
25 statements are on your video that he made to you,

1 correct?

2 A. That is correct.

3 Q. Your audio was working that night,
4 correct?

5 A. That is correct.

6 Q. Okay. Now, after you backed your car
7 up, keep going.

8 A. I had Wells get out of the truck and
9 walked him in front of my video camera. I asked
10 Wells if he had any physical defects and he stated
11 he did not. I could smell a strong odor of a
12 alcoholic beverage, what smelled like liquor,
13 coming from his breath when he would speak.

14 I offered Wells a Horizontal Gaze
15 Nystagmus. Do you want me to go into --

16 Q. No. That's fine. Thank you. Now, did
17 you note in your report that he stumbled when he
18 was getting out of his vehicle?

19 A. No, ma'am.

20 Q. Did you note in your report that he fell
21 down while he was getting out of his vehicle?

22 A. No, ma'am. Undoubtedly, he did not
23 appear to have any indications of impairment
24 between his truck and walking in front of my
25 camera because it was not noted in the report.

1 Q. So you don't plan on testifying today at
2 all that he did anything wrong while exiting his
3 vehicle? That is not on camera?

4 A. No, ma'am, I am not.

5 Q. Okay. Now, why do you move your camera?
6 Why do you move your car before you perform field
7 sobriety tests?

8 A. Again, to give the defendant a flat,
9 level, hard surface to be able to actually perform
10 those tests.

11 Q. Why couldn't you just leave your car
12 where it was and take the defendant over to the
13 side of the road to offer him the test?

14 A. Because I was trying to be in compliance
15 with the video statute as far as the DUI law.

16 Q. Thank you. I have nothing further.
17 Please answer any questions Mr. Wells might
18 have -- or Mr. Reeves.

19 CROSS-EXAMINATION

20 BY MR. REEVES:

21 Q. Deputy Osborne, good morning.

22 A. How are you doing, sir?

23 Q. Would you agree that the definition of
24 conduct as set forth by Webster's is generally
25 defined as one's behavior, action or demeanor? Do

1 you agree with that?

2 A. Yes, sir.

3 Q. Would you also agree that Mr. Wells'
4 actions to remove himself from the truck onto the
5 ground would be actions taken by him; is that
6 correct?

7 A. Yes, sir. By him, yes, sir.

8 Q. Would you also agree that him getting
9 out of his truck would have been evidence of his
10 demeanor at the time he got out of the truck?

11 A. I could agree with that, yes.

12 Q. Would you also agree that Mr. Wells
13 getting out of his truck would have indicated his
14 behavior? Whether he did it well or not well,
15 that would have been indicative to his behavior;
16 is that correct?

17 A. That is to his behavior, yes, sir.

18 Q. All right. But that was not videotaped;
19 is that correct?

20 A. No, sir, it was not.

21 Q. You told the Solicitor that you didn't
22 have a camera crew there so you couldn't -- you
23 were somewhat limited; is that correct?

24 A. That is correct.

25 Q. You actually had a third-party there.

1 There was a constable who had a gun on his belt
2 with you at the time, didn't you?

3 A. That is correct.

4 Q. All right. And, also, your camera will
5 swivel, will it not?

6 A. My camera doesn't swivel.

7 Q. It does not swivel?

8 A. No, sir. They've got it so it has to
9 stay straight ahead.

10 Q. All right. You answered Ms. Woods'
11 question about that your notes did not note any of
12 the cues that would indicate impairment from
13 Mr. Wells exiting the vehicle and walking to where
14 he was seen on the videotape; do you agree with
15 that?

16 A. I agree with that, yes, sir.

17 Q. Would you agree, though -- would you
18 agree that your training that you've had and that
19 you teach, I believe --

20 A. Yes.

21 Q. -- where you tell officers that the
22 accused's actions as he exits, or as she exits the
23 vehicle is a cue that can be considered in their
24 determination of whether or not to continue an
25 investigation for driving under the influence?

1 A. Yes, sir. It can be, yes, sir.

2 Q. Would you also agree that the
3 defendant's conduct getting out of the vehicle, if
4 it is as good you said it was, ought to be
5 evidence that's preserved because it is important
6 in the determination of sobriety? Isn't that
7 correct?

8 A. To a certain degree, yes, sir.

9 Q. All right. And if we should preserve
10 that evidence, would you agree with this, that had
11 you not moved your car, your field of video that
12 began initially when you got there, had you not
13 moved your car, would have shown Mr. Wells exiting
14 the vehicle if that's when you chose to get him
15 out of the vehicle?

16 A. I could have got him out of the car and
17 it would have been there, but he would have still
18 been off videotape when I backed it up to try to
19 do the field sobriety test. It's going to be
20 impossible to keep it the way that the stop
21 actually was conducted to have the entire 100
22 percent of it -- of him being on video the entire
23 time because I'm going to have to move the car to
24 be able to offer him a field sobriety.

25 Q. And, you know, Deputy, I understand your

1 predicament there.

2 A. Uh-huh.

3 Q. But, again, my question was, had you
4 chosen to leave your vehicle at least in the
5 position it was in until you removed Mr. Wells
6 from the truck, you could have videotaped him
7 getting out of the truck; is that correct?

8 A. Yes, sir. You might be able to see
9 that.

10 Q. Would you also agree that the person
11 with you who was armed and who I think you said is
12 a constable; is that correct?

13 A. Yes, sir.

14 Q. He would have been able to secure
15 Mr. Wells' position no matter where you put him if
16 you needed to move your car and your camera while
17 you did that; is that correct?

18 A. He is a backup unit. He was on the
19 passenger side dealing with the passenger,
20 watching the passenger side of that vehicle. So
21 he could not come from the point that he was at to
22 do anything with Mr. Wells. Mr. Wells was my
23 focus. We had another person in the vehicle and
24 so he was to watch the passenger. That is his --
25 he is the backup unit there and he is to secure

1 passengers.

2 Q. Right. But he also came and got back in
3 the car with you during that four-and-a-half
4 minutes because you were talking to him on the
5 audio. So he wasn't securing the passenger at
6 that point, was he?

7 A. There was also a narcotics officer that
8 showed up on scene, sir. There was a third
9 narcotics unit that stopped that you actually see
10 walk up as well, when I go to arrest Mr. Wells,
11 wearing -- or had a beard and everything. So
12 there was an additional unit there as well, so
13 there were three officers.

14 Q. Does your report indicate the three
15 officers being there?

16 A. Not to my knowledge, no, sir. I don't
17 even think I show the constable as being there.

18 Q. So you had two other people -- okay.
19 Would you also agree that the statute requires you
20 to videotape the conduct of the defendant from the
21 time the blue light gets on or activated until the
22 defendant is arrested?

23 A. That's what the statute says, yes.

24 Q. And you have testified that you did not
25 get that conduct, at least him getting out of the

1 vehicle, on your videotape, did you?

2 A. I did not.

3 Q. All right. And it was not because your
4 videotape was not working. It is the position of
5 your vehicle; is that correct?

6 A. That is correct.

7 Q. All right. Deputy Wells (sic), Ms. Wood
8 had objected to some references to the NHTSA --
9 but let me just ask you this. Do you agree with
10 this statement? In Phase II, your first task is
11 to observe and interview the driver face to face?

12 A. Yes, sir.

13 Q. Based on this observation, you must
14 decide whether there is sufficient cause to
15 instruct the driver to step to the vehicle for
16 further investigation?

17 A. Yes, sir.

18 Q. You're also aware that your second task
19 is to observe the driver's exit and walk from the
20 vehicle, correct?

21 A. That is correct.

22 Q. So before you moved your vehicle and
23 took the videotape to different location, you knew
24 those were cues that either demonstrates sobriety
25 or demonstrate the lack of sobriety?

1 A. Yes, sir.

2 Q. And those are important to you and any
3 other officer as you go through those three phases
4 of investigating a driving under the influence
5 charge; is that correct?

6 A. Yes, sir.

7 Q. Officer Osborne, would you agree that in
8 any case, the video is worth much more than
9 anybody's verbal testimony?

10 A. Not necessarily, no, sir. I would not
11 agree with that.

12 Q. Okay. Would you agree with the
13 statement, a picture is worth a thousand words?

14 A. I would agree with that, yes, sir.

15 Q. You also would agree that the video is
16 objective in that it shows whatever happened,
17 regardless of who talks about it or who -- you
18 can't spin the video, would you agree with that?

19 A. Yes, sir.

20 Q. Okay.

21 MR. REEVES: Your Honor, I believe
22 it's appropriate Ms. Wood not go into the HGN
23 test. I'll hold my questions for that until she
24 gets to that point, unless the Court wishes
25 otherwise.

1 MS. WOOD: I'd like to handle just
2 one motion at a time, if that's okay.

3 MR. REEVES: Okay. That's cool.

4 THE COURT: That's fine. We will
5 handle it as you go through the different points.
6 Now, with that, also for the Court's purposes,
7 I'll have more clarity on the issue so we will do
8 that (inaudible). Thank you.

9 BY MR. REEVES:

10 Q. Deputy Osborne, just a few more
11 questions.

12 A. Yes.

13 Q. What I read to you was from a training
14 manual. And regardless of when it came about, do
15 you agree, though, that those are still the same
16 standards and instructions and observations that a
17 law enforcement investigator should use in the
18 detection of driving under the influence?

19 A. Off of what you read to me, it sounds
20 correct, yes.

21 Q. Okay. And would you agree with me that
22 if Mr. Wells' conduct of getting out of the car
23 was not recorded, that that is violative of 29 --
24 excuse me -- 56-5-2953 because you did not
25 videotape that?

1 MS. WOOD: I'm going to object,
2 your Honor. He's asking Deputy Osborne to make
3 the decision we're asking you to make.

4 THE COURT: Sustained. I would
5 rephrase that to make your point, Mr. Reeves.
6 BY MR. REEVES.

7 Q. Would you agree with me that there is
8 conduct that is important to Mr. Wells' case
9 missing from the videotape?

10 A. Not necessarily, no, sir.

11 Q. Would you agree with me that cues where
12 there's an indication of sobriety or a lack
13 thereof are missing from the videotape?

14 A. I'm not sure. Can you rephrase that
15 question?

16 Q. I will. I will. You agreed with me a
17 while ago that the officer should come face to
18 face, observe the demeanor of the person and
19 observe him exiting the vehicle and walking from
20 the vehicle; do you agree with that?

21 A. Yes, sir.

22 Q. Those are important cues in the
23 determination of sobriety?

24 A. Could be, yes, sir.

25 Q. All right. Would you agree that those

1 important cues in the determination of sobriety
2 regarding the actions and demeanor of Mr. Wells
3 were not recorded?

4 A. I agree with that.

5 Q. Thank you.

6 MS. WOOD: I have just one, your
7 Honor.

8 REDIRECT EXAMINATION

9 BY MS. WOOD:

10 Q. Deputy Osborne, was there anything to
11 indicate, were there any clues to indicate that he
12 was impaired as he stepped out of the vehicle?

13 A. No, ma'am.

14 Q. So there were -- so, in this case, there
15 were no important clues missing from this
16 videotape, correct?

17 A. No, ma'am.

18 Q. Thank you.

19 MR. REEVES: One follow-up.

20 RECROSS-EXAMINATION

21 BY MR. REEVES:

22 Q. The important cues that are missing from
23 the videotape, Deputy Osborne, would you agree,
24 are the fact that Mr. Wells exhibited sobriety as
25 he got out of the vehicle; is that correct?

1 A. He had no clues of impairment when he
2 exited the vehicle.

3 Q. Okay. So that means he was --

4 MS. WOOD: Objection. Objection to
5 wanting him to determine if he was sober getting
6 out of the vehicle. That's to be determined.

7 MR. REEVES: Let me rephrase the
8 question, your Honor, please.

9 THE COURT: Sustained.
10 BY MR. REEVES.

11 Q. Would you agree with me that a
12 fact-finder or judge should be able to see the
13 lack of those cues on Mr. Wells when he exited the
14 vehicle?

15 MS. WOOD: And objection. It's
16 calling for speculation on whether a fact-finder
17 or a judge can see these clues.

18 THE COURT: Mr. Reeves, I sustain
19 that as well. You are going to have to phrase
20 your question in a way that is a direct --
21 specifically, this: Very direct with the officer
22 to be able to answer it based on his personal
23 knowledge or what's actually being testified to
24 will be answered with regard to your question on
25 his summary or what he saw at the scene.

1 MR. REEVES: Okay. Your Honor, I
2 note my objection to that being a proper question
3 for the record, please.

4 THE COURT: Okay. All right.

5 BY MR. REEVES:

6 Q. Trooper Osborne -- or, I'm sorry, Deputy
7 Osborne, would you agree with me that as a
8 well-trained police officer, it is your job to
9 collect the evidence at the scene of any crime,
10 regardless of who it helps or hurts?

11 A. Absolutely.

12 Q. Would you agree that a well-trained
13 police officer would preserve that evidence so
14 that the evidence would be available to whomever
15 to review as whoever might make a determination
16 about the value of that evidence and how it might
17 be used?

18 A. To a certain degree, yes, sir.

19 Q. All right. And would you agree that a
20 well-trained police officer, in preserving that
21 evidence, will present that evidence -- or
22 preserve it and present it in a way that does not
23 either help or hurt anybody? It's just, you
24 collect the evidence and you let someone else
25 determine whether it's important and how it's

1 used; is that correct?

2 A. Normally, yes, sir.

3 Q. All right. In this case, we do not have
4 important evidence of Mr. Wells exiting the
5 vehicle, do we?

6 A. I'm not sure why we don't have -- I
7 mean, I want you to rephrase that. I don't
8 understand.

9 Q. Okay. Ms. Wood -- and, again, I'm doing
10 a very poor job so it's not your fault. Forgive
11 me. Ms. Wood asked you a while ago about, since
12 there were no notes in your report, that
13 apparently Mr. Wells didn't exhibit sobriety --
14 excuse me -- didn't exhibit any cues that would
15 impact his sobriety? He didn't show impairment?

16 A. That's correct.

17 Q. Would you agree that it would have been
18 better if that would have been captured on
19 videotape?

20 A. Not necessarily, no, sir. You've got my
21 testimony that I will be giving in court.

22 Q. Are you familiar with the statute that
23 talks about videotaping conduct?

24 A. I am.

25 Q. It doesn't differentiate between good

1 conduct and bad conduct and worthless conduct or
2 unworthless conduct, does it?

3 A. No, sir. It's just conduct.

4 Q. Thank you.

5 MR. REEVES: Thank you. That's
6 all I have.

7 THE COURT: Thank you, Mr. Reeves.

8 MS. WOOD: I'm done with all my
9 questions. I'm just ready to argue, your Honor.

10 THE COURT: Okay.

11 MS. WOOD: And, your Honor, I
12 didn't put the video in through Deputy Osborne,
13 but you are more than welcome to -- I'll play the
14 video for you at any time if you'd like to see the
15 portion that Mr. Wells is speaking of.

16 THE COURT: I will hear the
17 argument first and if I need to do that, I'll let
18 you all know, okay?.

19 MS. WOOD: Okay. Your Honor, what
20 this boils down to is -- and, Deputy Osborne, you
21 can step down, if that's okay with your Honor.

22 THE COURT: Actually, I may have a
23 couple of questions for him.

24 MS. WOOD: Okay.

25 THE COURT: So if you would stay

1 here for a minute, if you will.

2 MS. WOOD: Okay. I apologize.

3 Your Honor, what this boils down to is, Deputy
4 Osborne conducted a traffic stop. In order for
5 Deputy Osborne to properly capture all the field
6 sobriety tests on camera, he repositioned his
7 vehicle, which is normal.

8 Nine times out of ten, police
9 officers reposition their vehicles so that they
10 can capture all of the field sobriety and so that
11 they can comply with the statute, which is exactly
12 what Deputy Osborne was doing here. If he had
13 allowed Mr. Wells to do the field sobriety where
14 his car was positioned, it would have been unfair
15 for Mr. Wells. He would have been on gravel and
16 he would have been on a grade.

17 He put him on a flat, dry, clear
18 surface to give him the best chance to perform the
19 field sobriety test. The cases that Mr. Wells
20 handed up -- and I would like to point out in
21 Mr. Wells' motion, on the first page, Mr. -- I'm
22 sorry -- Mr. Reeves' motion, Mr. Reeves
23 stipulates, the video recording from the arresting
24 officer's video camera was working properly, at
25 all times relevant. It captured everything.

1 The statute, 56-5-2953, says, a
2 person who violates Section 56-5-2930 and
3 56-5-2933 or 56-5-2945 must have his conduct,
4 incident site and breath test site video recorded.
5 The video recording at the incident site must not
6 begin later than the activation of the officer's
7 blue lights, check -- start trying the activation
8 of Deputy Osborne's blue lights -- include any
9 field sobriety test administered, check, and
10 include the arrest of a person for violation of
11 Section 56-5-2930 and so on. Everything that is
12 required by the statute is on camera. That is all
13 that is required.

14 Mr. Reeves brought in State v.
15 Murphy. State v. Murphy is a conduct case, your
16 Honor. State v. Murphy doesn't have anything to
17 do with this person gets out of their car and
18 they're on camera while the deputy repositions his
19 vehicle. That case actually has to do with the
20 person's feet being off camera. And in that case,
21 it says, you don't have to record every part of
22 every field sobriety test. I mean, Murphy is
23 clear. Not every single portion of everything has
24 to be recorded, just the defendant's conduct.

25 The defendant's conduct was

1 recorded in this case. It was recorded. You can
2 hear him. Conduct involves more than just being
3 seen, your Honor. Conduct involves the statements
4 that he had with the deputy, it involves all of
5 his field sobriety tests, you know. It doesn't
6 involve every little piece of every test.

7 The conduct was all recorded, your
8 Honor. Everything that is required by the statute
9 was recorded, your Honor. And if Mr. Reeves is
10 trying to say that there is something exculpatory
11 that was not recorded, he is wrong. There has not
12 been anything said that Mr. Wells stumbled when he
13 got out of his vehicle. There's nothing to be
14 said that Mr. Wells gave any indication that he
15 was under the influence or gave any indication of
16 impairment while he was stepping out of his
17 vehicle. And if he had and Deputy Osborne had put
18 that in his incident report, then I can understand
19 if Deputy Osborne said, he stumbled while he was
20 getting out of the vehicle, puts that in his
21 incident report and then we don't have that
22 recorded, I can understand why that would be so
23 important for that to be recorded.

24 But, if not, Deputy Osborne plans
25 to sit there and testify that he was fine getting

1 out of his vehicle. He plans to testify that he
2 didn't have any indications of impairment when he
3 was getting out of his vehicle. So we're not
4 putting up any evidence to say otherwise to make
5 this is a portion of exculpatory evidence that was
6 not provided to the defense.

7 Every piece of evidence that the
8 State plans to provide during this trial was
9 provided to Mr. Reeves. And if you're looking at
10 the Murphy case, if you'd go to page 76, you know,
11 the second paragraph down -- the Gordon case. I'm
12 sorry. The Gordon case. The Gordon case goes on
13 to describe Murphy. And it says, although Murphy
14 holds that only the conduct must be recorded,
15 Murphy was based on a prior version of the statute
16 which is not of the specific language regarding
17 the test being reported.

18 The current portion of the statute
19 states, the video recording of the incident was
20 like, must include any field sobriety tests.
21 These are all about field sobriety tests, your
22 Honor. All of these cases are about field
23 sobriety tests.

24 THE COURT: Which page were you on,
25 Ms. Wood?

1 MS. WOOD: I'm sorry. I'm on page
2 76, the second paragraph down.

3 THE COURT: Thank you. Okay.
4 Continue, please.

5 MS. WOOD: It says, because of the
6 purpose of the videotaping to create direct
7 evidence of the arrest, if the actual test cannot
8 be seen on the recording, the requirement is
9 pointless. All of the tests -- all of the tests
10 can be seen on the recording, your Honor.

11 This is a silly matter of the
12 officer repositioning his vehicle to comply with
13 the statute and to give the defendant every
14 opportunity to pass those tests and to not
15 handicap him in a gravel parking lot. Everything
16 that's required in Gordon and everything that's
17 required in Murphy is present on this video, your
18 Honor.

19 It's ludicrous. It's ludicrous.
20 And I'll tell you, it's not what the Legislature
21 intended, it's not what the courts intended. It's
22 ludicrous to say that while he's repositioning his
23 vehicle for four minutes -- and I've asked him,
24 why did it take you four minutes? Because I was
25 running his rap and doing this and that. He

1 wasn't speaking to him.

2 Mr. Wells was sitting in his car or
3 standing outside of his vehicle. I believe he was
4 sitting in his car while he was running his raps.
5 There's nothing missing from that four minutes
6 that could affect this case negatively or
7 positively for the State or for the defendant in
8 any way.

9 This is four minutes while Deputy
10 Osborne repositions his car. I don't think it's
11 the intent of the Legislature or the courts to
12 say, this Court must throw out this case because
13 this little portion was missing from the video,
14 when it's not even, as Mr. Reeves points out, it's
15 not even a relevant portion. All relevant
16 portions have been recorded.

17 THE COURT: Thank you.
18 Mr. Reeves?

19 MR. REEVES: Your Honor, with all
20 due respect, I'll pose this question. The officer
21 has admitted that conduct, which either indicates
22 sobriety or lack thereof, is not recorded. I
23 appreciate Ms. Wood trying to make it into, well,
24 practically, we couldn't do it.

25 There were two other officers

1 there, your Honor, who could have assisted in the
2 alignment and relocation and the security of
3 Mr. Wells and/or his passenger. Mr. Wells could
4 have been placed in Mr. Osborne's car while he
5 moved it. He could have recorded him taking him
6 to his car.

7 Your Honor, also, the State refuses
8 to understand that while Mr. Osborne's notes don't
9 reflect any bad conduct or cues, the reason the
10 Legislature passed this law was to capture the
11 scene whether it be good or bad. Officer Osborne
12 agreed with me that the videotape is supposed to
13 capture conduct. He did admit, I didn't capture
14 the conduct. So I guess my -- I don't know how we
15 get around that. The statute does not make
16 examples of, well, in case of this situation you
17 don't capture conduct -- it doesn't say that. And
18 it's supposed to be strictly construed.

19 The exculpable evidence, your
20 Honor, is this. If a juror sees the sobriety
21 test, as Ms. Wood mentioned, are captured on the
22 video and cannot see Mr. Wells doing other things,
23 such as walking -- because she talks about how
24 it's no big deal, it's ludicrous, it's silly.
25 It's not silly if you're the guy who has to get

1 out of the car and walk 25 or 30 feet which is not
2 on videotape when the State says it should be on
3 videotape. That's not silly at all. The statute
4 is clear. He's admitted it's been violated. I
5 think the Court should dismiss the case.

6 THE COURT: Thank you.

7 MS. WOOD: Your Honor, this is
8 ludicrous, this is silly. And I don't have an
9 order in front of me, but this exact motion did
10 come before Judge Alford in a very similar case
11 where the person was off video.

12 MR. REEVES: I object. I don't
13 know what she's -- I would object. Unless there's
14 an opinion or something, I would object to --

15 MS. WOOD: Well, there's not going
16 to be an opinion when they rule for the State.

17 MR. REEVES: Ms. Wood, I will
18 sustain that objection. I want to ask you to only
19 speak to the information that you've provided to
20 this Court in this matter.

21 MS. WOOD: Thank you, your Honor.

22 THE COURT: Thank you.

23 MS. WOOD: So this is ludicrous and
24 this is a silly motion, your Honor. The
25 conduct -- which Murphy requires -- the conduct is

1 recorded during the entire video. To say that we
2 need to strictly construe the statute is what I'm
3 doing. The statute doesn't say, activation of
4 blue lights, and then when the officer repositions
5 his car he must keep the camera -- the camera must
6 be in the defendant's face the entire time, the
7 camera must watch and capture the defendant
8 walking from his car to the place of the field
9 sobriety.

10 The statute -- if we're strictly
11 construing that the statute does not state that
12 that particular portion has to be recorded, the
13 statute specifically says field sobriety. We
14 could not have complied with the statute if we had
15 not repositioned our car.

16 Repositioning our car,
17 repositioning the patrol vehicle is, nine times
18 out of ten, exactly what the officers do. They
19 all reposition their car in order to strictly
20 comply with the statute, your Honor. And I think
21 if you have a chance to watch the video, you will
22 see this is not something that's out of the norm.
23 This is just -- and I'm not refusing to understand
24 anything, your Honor. I appreciate Mr. Reeves',
25 you know, spirit to come up here and fight like a

1 tiger for his client. I appreciate that.

2 But the State is saying that we've
3 complied, your Honor. We've complied and there's
4 nothing -- there's no Supreme Court case, there's
5 no Court of Appeals case that he's brought in here
6 that says not videotaping while you're
7 repositioning the car calls for dismissal of a
8 case, your Honor. Those cases all say, not
9 complying with the video recording statute
10 requires dismissal of the case. And in order to
11 comply with the statute, you've got to have
12 activation of blue lights, which we have.

13 His camera was recording the entire
14 time, your Honor. It was recording from the time
15 he activated it till the time that he arrested her
16 and took her -- and stopped at the Moss Justice
17 Center. He had the field sobriety test and had
18 the arrest. We have every element of the
19 videotaping -- video recording statute that is
20 required by law on this video and, your Honor,
21 there's absolutely no reason to dismiss this case.
22 And that's the State's position.

23 THE COURT: All right. Thank you.
24 I'm sorry. Mr. Reeves, is there anything else
25 before I start asking clarifications for the

1 Court?

2 MR. REEVES: Not at this time,
3 thank you.

4 THE COURT: Thank you. Officer
5 Osborne, typically, when you are -- from your
6 experience, what happens on a, I guess I would
7 say, happens on a traffic stop when this sort of
8 thing happens as far as needing to reposition the
9 vehicle? I guess that's a two-pronged question.
10 Number one, how common is it that you do have to
11 reposition your vehicle on such a stop?

12 DEPUTY OSBORNE: I probably have to
13 reposition my car -- I check my car -- I
14 specifically do DUI enforcement. So if I stop a
15 car, I actually go back to my car before I'll
16 bring a field test, run all valid information to
17 find out what type of person I've been with and
18 then I actually -- I check the monitor and then
19 back the patrol car up to make sure that I've got
20 adequate distance between me and the suspect
21 vehicle. That's even if I'm on a paved road or a
22 straight-ahead whatever.

23 THE COURT: So you check the
24 monitor so that you could have the, I would say --
25 I'm going to use the term field of view, meaning

1 the incident location where you're allowed to pick
2 up any such property, right?

3 DEPUTY OSBORNE: In a field
4 sobriety, yes.

5 THE COURT: Okay. Okay. All
6 right. And the second question would be, is
7 there -- is there an actual -- in this particular
8 recording, because I haven't seen it, I just want
9 to clarify that the recording is still going,
10 correct? It's still recording. It's just the --
11 what's being recorded is what's the issue, right?
12 In regards to your field of view not adequately
13 showing, according to the defense, the actual
14 defendant getting from the vehicle to where you
15 are?

16 DEPUTY OSBORNE: Yes, sir.

17 THE COURT: Okay.

18 DEPUTY OSBORNE: When we stop the
19 vehicle, the vehicle turns into a parking lot and
20 I am sitting at a -- I'm kind of at a left angle
21 over at the driver's side and my car is facing the
22 driver's door of the truck. So when we first stop
23 the truck in the parking lot, which was gravel on
24 a grade, you could see the entire thing. I go
25 back to my car and back up --

1 THE COURT: Okay. But my question
2 is, I just want to make sure that I understood you
3 properly earlier when you said, when we were
4 talking about the four minutes, it's not that the
5 four minutes is missing. The four minutes -- the
6 video camera is still actively recording the
7 scene, correct?

8 DEPUTY OSBORNE: Yes, sir,
9 absolutely.

10 THE COURT: Okay. All right.
11 That's what I needed to hear.

12 DEPUTY OSBORNE: Yes.

13 THE COURT: All right. Thank you.
14 You may step down now, sir.

15 DEPUTY OSBORNE: Yes, sir.

16 THE COURT: All right. Give me a
17 moment and let me read the cases. I do have the
18 cases we referred to. I was reading the rap
19 sheets last week and I actually did have the Wood
20 case so I'm pretty familiar with that. And I do
21 have Murphy. So let me read what the Court of
22 Appeals have said about those cases and I will be
23 right back with you, okay? Give me a moment.

24 (Recess)

25 THE COURT: All right. I'm ready

1 to make my ruling on the motion. Based on the
2 information I have with the interpretations that
3 I've got and after reading the Murphy case, as
4 well as the Gordon case and the actual statute and
5 what the actual intent of the Legislature was when
6 they enacted this, I do dismiss the motion to
7 dismiss or decline the motion to dismiss the case,
8 so we will proceed forward, okay?

9 MS. WOOD: Thank you, your Honor.

10 MR. HODGE: Your Honor, I have one
11 matter to put on the record before the jury comes
12 in. Throughout the video, there are going to be
13 redactions where I've redacted out hearsay from
14 the other officers.

15 I just wanted to make everyone
16 aware of that. And I have also redacted
17 statements from the video of the defendant's wife
18 as the officer speaks to her as to the alcohol in
19 the car and their going to the concert, and I just
20 wanted to make everyone aware of that. And also
21 request that instruction be given during
22 instructions that the jury is not to use the fact
23 that there are redactions in the video one way or
24 another.

25 THE COURT: Mr. Reeves, do you have

1 any objection to this?

2 MR. REEVES: I don't disagree with
3 that. (Inaudible).

4 MR. HODGE: Yeah. There's some
5 portions of the video of the wife --

6 MR. REEVES: Were the other guys
7 still in there?

8 MR. HODGE: Yes. Yes. I redacted
9 that out, yes.

10 MR. REEVES: Your Honor, I don't
11 disagree with that.

12 THE COURT: All right. Thank you.
13 So the Court will note that. And just -- in my
14 final instructions, remind me to give that
15 instruction. I'm going to note it here. But just
16 in case I forget or I don't see my note, then --

17 MR. REEVES: Yes, sir.

18 THE COURT: Ms. Ford, do you have a
19 post-it note for me that I can use to give myself
20 a note here before we continue?

21 Okay. So what I've done is, there
22 is going to be, for both of you, so you as well as
23 the State, Mr. Wells, what I've done is, since I
24 have to in my final instructions give that
25 instruction regarding the actual refusal and

1 that's not being used either way, one way or the
2 other, I will also add that in at that particular
3 portion. Does that sound sufficient for
4 everyone?

5 MR. REEVES: That's fine.

6 MS. WOOD: All right.

7 THE COURT: Okay. Sounds good.
8 Then we will proceed.

9 (Discussion off the record)

10 (Jury enters courtroom)

11 CLERK: All rise for the jury.

12 THE COURT: You all can be seated.
13 Thank you. All right. Good morning. Thank you
14 all for waiting patiently for us. My name is
15 Judge Young. I'll be with you during this
16 process. First, Ms. Amanda -- is it Lewis?

17 MS. LEWIS: Yes.

18 THE COURT: And, Kevin Johnson?

19 MR. JOHNSON: Yes.

20 THE COURT: You all are dismissed.
21 Thank you for your time this morning.

22 MR. JOHNSON: Thank you.

23 THE COURT: You're welcome. The
24 first order of business is to make sure I swear
25 you all in, so we will do that now. I would ask

1 that you all -- well, we don't have six Bibles so
2 I'm just going to have you all swear or affirm.
3 So if you would, just listen to the oath and agree
4 or -- well, hopefully, you don't disagree. But,
5 certainly, just listen to the oath and then we
6 will accept your answer at that point.

7 Do you solemnly swear or affirm
8 that you will well and truly try the issues
9 before the State of South Carolina and the
10 defendant and give a true verdict according
11 to the law and the evidence presented, so
12 help you God?

13 (Response)

14 THE COURT: Okay. Thank you. I
15 appreciate that. What I will say now is just
16 going to serve as an introduction to the trial of
17 this case. These remarks are not a charge on the
18 law of this case. I will instruct you on the law
19 applicable to this case at the end of the trial
20 before you retire to consider your verdict.

21 This is merely an explanation of
22 the procedure that we'll follow, that we will
23 follow in the trial of this case so that you may
24 be better -- you may have a better understanding
25 of what's going on and what's happening. You're

1 not to take any notes during the trial.

2 The defendant is charged with
3 tickets filed in this court with the crime of
4 driving under the influence, first offense, and an
5 open container, the others of which will be
6 explained to you later. The tickets are simply
7 the means by which the case is brought to court
8 and it is not, in any intent, evidence of any
9 allegations it contains.

10 The defendant has pled not guilty
11 to these charges. The State, therefore, has the
12 burden of proving to the elements of the charge
13 beyond a reasonable doubt and it will be your
14 duty, ladies and gentlemen, to decide whether the
15 State has met that burden.

16 Your purpose as jurors is to find
17 and determine the facts. The facts. You are the
18 sole judge of the facts, of the facts. If at any
19 time I make any comment regarding the facts, you
20 must disregard it. You are to determine the facts
21 from the testimony you hear and the other evidence
22 introduced in court. It is up to you to determine
23 the inference which you will feel proper -- which
24 may be properly drawn from such evidence.

25 Until I tell you that you may begin

1 to deliberate, you must not discuss this case with
2 anyone, including your fellow jurors. The
3 attorneys and the parties in this case have been
4 advised that they are not to talk to you at all.
5 If you see anyone involved in the case and they
6 don't even say hello to you, they're not being
7 unfriendly, they're simply following the
8 instructions of the Court.

9 It is important that you keep an
10 open mind and not decide any issue in the case
11 until all evidence has been presented, the parties
12 have made their closing arguments and I have
13 instructed you on the laws in this case. In just
14 a moment, the Solicitor will make what is called
15 an opening statement in which the Solicitor will
16 explain to you the issues of the case or, at
17 least, what the Solicitor thinks the issues are in
18 this case.

19 The attorney for the defendant may
20 also make an opening statement, although they're
21 not required to do so. What the attorneys tell
22 you during their opening statements is not
23 evidence in this case and is only their contention
24 as to what the issues are. The evidence in this
25 case will be presented to you by the testimony of

1 sworn witnesses from the witness stand and/or by
2 exhibits that may be introduced into evidence.

3 Mr. Salvadore -- is it Swadreda?

4 MR. SWADREDA: Swadreda, yes.

5 THE COURT: Swadreda? I apologize.

6 Ms. Floyd has very fancy handwriting. One more
7 time your last name?

8 MR. SWADREDA: Swadreda.

9 THE COURT: Mr. Swadreda, you are
10 my foreman, okay?

11 MR. SWADREDA: Okay.

12 THE COURT: It is your avid duty,
13 Mr. Swadreda, Mr. Foreperson now, to preside in
14 the jury room and to be the jury's spokesperson in
15 court. It will be also your duty to write the
16 verdict. But I will give you further instructions
17 at the conclusion of the case.

18 Is the State ready to present its
19 case?

20 MR. HODGE: Yes, your Honor.

21 THE COURT: Okay.

22 MR. HODGE: May it please the
23 court.

24 THE COURT: Yes.

25 MR. HODGE: Driving home from a

1 country music concert at one o'clock in the
2 morning in a truck full of empty glasses, a large
3 bottle of vodka rolling around in the floor board,
4 weaving within his lane of traffic, driving over
5 the centerline into the median, that's how
6 officers found Mr. Wells back in October.

7 My name is Matthew Hodge. I work
8 for the York County Solicitor's Office and I
9 represent the State of South Carolina and I
10 represent its interest in prosecuting drunk
11 drivers. And it's my job here today to prove to
12 you all beyond a reasonable doubt that Mr. Wells
13 is guilty of driving under the influence and
14 guilty of having an open container of liquor in
15 his vehicle.

16 In a nutshell, DUI law in South
17 Carolina states that it is unlawful to drive a
18 motor vehicle while under the influence of alcohol
19 to the extent that your abilities to drive are
20 materially and appreciably impaired.

21 Now, what does that mean? That
22 basically means that alcohol is affecting your
23 system in a significant way. That doesn't mean
24 that you have to be falling down drunk. It only
25 means that alcohol is affecting you in a way that

1 you should not be driving. It's having an effect
2 on you that has impaired your abilities to drive
3 as a safe driver in the state. And to prove that
4 Richard Wells was impaired to the point that he
5 should not have been driving that night, I will
6 offer evidence to you in court with testimony from
7 Mr. Osborne, who was the arresting officer that
8 night. I'll also present to you the video that
9 his car took during that night.

10 The evidence is going to show you
11 that Richard Wells was driving poorly, he admits
12 to drinking a few drinks that night. It will show
13 that he smelled of alcohol, he failed his field
14 sobriety tests, and then he refused to provide a
15 breath sample to what you might have heard
16 referred to as a breathalyzer machine.

17 Your job here today is the most
18 important job in the courtroom. Your job is to
19 find the facts, apply the law to those facts as
20 the judge explains the law to you. And after you
21 combine the facts and the law, you will render a
22 verdict. You will tell us if Mr. Wells is guilty
23 of driving under the influence and you will tell
24 us if he is guilty of driving with an open
25 container of liquor in his car.

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1 I would ask that you pay close
2 attention to the evidence that you're going to
3 hear today and I would ask you also to use your
4 common sense throughout the testimony or
5 throughout the arguments of counsel.

6 Now, I would remind you today to
7 use your common sense as you walk through that
8 door. I think it's very important to use your
9 common sense during this trial. And I would ask
10 that at the conclusion of this trial, that you
11 find Mr. Wells guilty if that's what the evidence
12 shows to you. And I ask that you hand down a
13 verdict that tells him that he had no business
14 behind the wheel of a car that night in the state
15 that he was in. Thank you.

16 THE COURT: Mr. Reeves?

17 MR. REEVES: If it please the
18 Court, your Honor.

19 THE COURT: Yes, sir.

20 MR. REEVES: Good morning, ladies
21 and gentlemen of the jury. Thank you for your
22 time. I know that Monday you were here for a long
23 time and people were telling you to go here and
24 there and now you're in here again this morning
25 and had to wait a little while. I'm sorry that it

1 has to take place. It's just unavoidable
2 sometimes. But I appreciate your service because
3 without you, we couldn't get any of this done.
4 Because you just heard from the State there's all
5 but, from their point, there's no controversy
6 here. But there really is.

7 Let me ask you just to remember a
8 few things in this case. Number one, Mr. Wells,
9 Rick Wells who's seated over there, he doesn't
10 have any burden of proof. He doesn't even have to
11 testify, if you will. The State of South Carolina
12 has the burden of proof to remove every reasonable
13 doubt from your consideration. Probably guilty is
14 not good enough. Maybe guilty is not good enough.
15 The way things look is not good enough. You have
16 to demonstrate, the State does, that the standard
17 is beyond a reasonable doubt. And at the end of
18 this case, if you have a circumstance where you
19 think, you know, I'm just not sure about that,
20 then you must acquit or find Rick Wells not
21 guilty.

22 Now, I want to make sure, though,
23 that you understand that you are the sole judge of
24 the evidence in this case. And just a moment ago,
25 the State said, you know, you're going to find him

1 guilty at the end of this case. Well, let me just
2 hold on just a minute. First of all, would you
3 wait until the end of the case before you make
4 your mind up, please? The State will go first,
5 we'll go second.

6 The second thing I'd like to ask
7 you to remember is this. In our system of
8 justice, which is not perfect but it's the best
9 thing in the world, and if you determine that,
10 based on the facts, that Rick Wells is not guilty,
11 then the State doesn't lose, they win, because
12 we're both seeking a true verdict in this case.

13 I want to tell you now that Rick
14 Wells, in his presentation, and even in the
15 presentation of the State, will allow me to make
16 this determination, the State will be unable to
17 rule out another reason for Mr. Wells' driving
18 other than him being intoxicated. Also, when you
19 see this video, the videotape of the sobriety
20 test, I want you to look very closely because
21 those sobriety tests will demonstrate objectively
22 that Rick Wells is not impaired. Those tests are
23 on video and you can see them.

24 Finally, Rick Wells will testify
25 and tell you what happened that night. And I want

1 you to listen closely to the details because I
2 think you're going to hear consistent testimony
3 that will show to you the State cannot rule out
4 that Rick Wells is not guilty of driving while
5 impaired.

6 I appreciate very much your time.
7 I'd just ask that you pay attention as we go
8 along. We'll try to move it along as
9 expeditiously as we can within the rules we've got
10 to work for, and I'm just very glad you're here.
11 Thank you, very much.

12 MS. WOOD: Judge, may we approach?

13 THE COURT: Please.

14 (Bench conference)

15 THE COURT: Okay. All right.
16 Thank you. Jurors, it is brought to my attention
17 that we are at the noon hour, or close to it, and
18 I am used to not eating, so it's just what I do.
19 However, I do want to be courteous to you all, so
20 do you all want to eat any time soon or would you
21 like to continue? No pressure. Just whatever
22 you -- your pleasure is.

23 UNIDENTIFIED FEMALE: How long is
24 any time soon?

25 THE COURT: That's a good question.

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1 Probably about an hour-and-a-half to two hours,
2 would be probably the first actual clean break we
3 could do so that we could get a chance to have the
4 first witness called, that witness would then be
5 cross-examined and for me to have a recess in the
6 middle so we won't have anything lingering as we
7 break.

8 UNIDENTIFIED FEMALE: Yes. I'm
9 fine.

10 THE COURT: You're fine? Okay.
11 Great. We will continue. Are you ready to call
12 your first witness?

13 MS. WOOD: Yes, sir. Thank you.

14 MR. HODGE: Yes, your Honor. The
15 State calls John Osborne to the stand.

16 Whereupon:

17 Jonathan Osborne, having been duly
18 cautioned to speak the truth, the whole truth
19 and nothing but the truth, testified as
20 follows:

21 DIRECT EXAMINATION

22 BY MR. HODGE:

23 Q. Good afternoon, I guess at this time,
24 Mr. Osborne. Could you state your name for the
25 record?

1 A. My name is Jonathan Osborne.

2 Q. And where are you employed?

3 A. I'm employed with the York County
4 Sheriff's Office.

5 Q. And what do you do for York County
6 Sheriff's Office?

7 A. I'm assigned to the DUI Enforcement Unit
8 for the York County Sheriff's Office.

9 Q. And what are your duties and
10 responsibilities in that role?

11 A. Being assigned to the DUI Enforcement
12 Unit, I am actually responsible for looking for
13 alcohol and drug-impaired drivers and -- in an
14 attempt to get those off the roadways. Also, my
15 focus is on aggressive driving as well.

16 Q. And how long have you been employed by
17 York County Sheriff's Office?

18 A. I've been employed with the York County
19 Sheriff's Office since 2005. Prior to that, I was
20 with the City of York Police Department and also
21 with the university police department. I've been
22 in law enforcement here in York County since
23 1997.

24 Q. And what sort of training have you had
25 in regards to DUI detection?

1 A. I am certified in DUI detection from
2 everything from speed measuring device, instructor
3 certification, breath examination or Data Master
4 certification, standardized field sobriety testing
5 and DUI detection. I'm also an instructor in that
6 area, certified by NHTSA.

7 I am a drug recognition expert which I'm
8 qualified in looking for impairment on alcohol and
9 drug-impaired drivers. I'm also a drug
10 recognition expert instructor where I travel
11 around the states qualifying officers and
12 certifying them in alcohol and drug impairment as
13 well, and as a course manager for IACP as well as
14 NHTSA in DUI detection and alcohol and drug
15 impairment.

16 Q. Now, I'd like to move on to what we're
17 here about today. Did you arrest Richard Wells
18 for driving under the influence on October 5th,
19 2013?

20 A. I did.

21 Q. And do you recognize him in court?

22 A. I do.

23 Q. Could you please point him out to us?

24 A. That would be the defendant.

25 MR. HODGE: Let the record reflect

1 that Officer Osborne just pointed out Mr. Wells.

2 BY MR. HODGE:

3 Q. And was he the driver of the vehicle?

4 A. He was.

5 Q. Was anyone else in the vehicle?

6 A. Yes.

7 Q. Who was that?

8 A. I believe Mr. Wells stated that was his
9 wife.

10 Q. And where were you when you stopped
11 Richard Wells?

12 A. I was in the Newport area in Rock Hill,
13 South Carolina, County of York.

14 Q. And what time was it approximately when
15 you stopped him?

16 A. Approximately -- it would have been
17 probably around sometime one o'clock in the
18 morning.

19 Q. And why did you stop Mr. Wells?

20 A. I observed a vehicle traveling, coming
21 into Newport from Celanese. The vehicle was
22 unable to maintain its lane.

23 Q. Now, is your patrol car equipped with a
24 video recording cam assistant?

25 A. It is.

1 Q. And was it equipped with one on the date
2 in question?

3 A. It was.

4 Q. How does it work?

5 A. It is a digital recording system. It
6 either is activated -- I have a body mic that I
7 wear on my body that I can activate it from there.
8 I can -- when I cut on my blue lights, I can
9 activate it and it automatically comes on. Or I
10 can actually push record and it will start
11 recording.

12 Q. And was that recording system in working
13 order that night?

14 A. It was.

15 Q. Mr. Osborne, I'm going to hand you
16 what's been previously marked for identification
17 purposes as State's Exhibit number 1. Do you
18 recognize that?

19 A. Yes, sir.

20 Q. And have you watched what's on that DVD
21 prior to trial today?

22 A. I have, yes, sir.

23 Q. And what's on that DVD?

24 A. This is going to be a DVD of the actual
25 stop and arrest of Mr. Wells on that night.

1 Q. And does that video, what's on the DVD
2 fairly and accurately reflect the defendant's
3 conditions of that night?

4 A. It does, yes, sir.

5 MR. HODGE: Your Honor, at this
6 time, we would offer this into evidence as State's
7 Exhibit number 1.

8 THE COURT: Thank you.

9 MR. REEVES: No objection.

10 THE COURT: Thank you, Mr. Reeves.

11 (State's Exhibit No. 1, Video, was
12 admitted into evidence.)

13 MR. HODGE: Your Honor, permission
14 to publish?

15 THE COURT: Yes.

16 (Video played)

17 MR. HODGE: Your Honor, I would
18 just like to pause it here before we go any
19 further.

20 BY MR. HODGE:

21 Q. First of all, why would you back up your
22 car into the road?

23 A. Due to where that vehicle actually
24 pulled in and stopped, that parking lot is a
25 gravel parking lot. As you could tell, as we

1 pulled in it, it was a little uneven. Also, the
2 grade in the parking lot is gravel, so I actually
3 backed out. Knowing that I was going to be
4 offering a field sobriety test at this point, so I
5 backed out to give the defendant the ability to
6 have a hard, level, flat surface to be able to
7 conduct a field sobriety test on.

8 Q. Are you trained and certified to
9 administer field sobriety tests?

10 A. I am, sir.

11 Q. And what training and certifications
12 have you gone through for those field sobriety
13 tests?

14 A. I am a actual instructor in DUI
15 detection and standardized field sobriety tests,
16 as well as a drug recognition expert instructor
17 and a course manager in field sobriety.

18 Q. And do you administer field sobriety
19 tests on every person that you stop?

20 A. No, sir, I do not.

21 Q. And why did you choose to administer a
22 test on this defendant?

23 A. So far, due to the totality of, A, the
24 driving that I saw. And then after approaching
25 the vehicle, speaking with Mr. Wells, I could

1 smell a strong odor of alcoholic beverage coming
2 from the vehicle, as well as Mr. Wells had
3 admitted to drinking that night.

4 Q. Okay. And before this, the people that
5 you had administered field sobriety tests to, did
6 you arrest all those people for DUI?

7 A. Absolutely not.

8 Q. And what are field sobriety tests,
9 generally speaking?

10 A. They are a battery of tests that have
11 been studied and researched ever since the '70s.
12 They are looking for indications of impairment,
13 from everything from the eyes all the way through
14 divided attention tasks.

15 Q. Okay. Here in a little bit on the
16 video, you're going to be offering some tests.
17 What is the first test that you're going to give
18 him here on the video?

19 A. The first test that I'll be offering
20 will be the horizontal gaze nystagmus test.

21 Q. And what is horizontal gaze nystagmus?

22 A. Nystagmus is the natural jerking of the
23 eye. Everybody has nystagmus in their eyes but
24 alcohol and drugs actually enhance it to where you
25 can see it. And so, basically, you have a person

1 look at a stimulus. The stimulus I used this
2 particular night is my finger. I had Mr. Wells
3 watch my finger and I moved my finger from left to
4 right in a horizontal fashion and I'm looking for
5 some indications.

6 There are three validated clues of
7 impairment that we look for during the horizontal
8 gaze nystagmus. One is the lack of smooth
9 pursuit. As I'm moving my finger back and forth,
10 the eyes should look like a marble rolling across
11 a glass, a piece of glass, just smooth. If they
12 have lack of smooth pursuit, it would be more like
13 -- I would be looking for, it would look like a
14 windshield wiper going across a dry windshield as
15 it jumps.

16 Then the second indication I would be
17 looking for is a distinct and sustained nystagmus
18 at a maximum deviation. I bring the eyes all the
19 way out as far as they will possibly go so that
20 you can't see the white of the eye anymore and I
21 hold it in that position for a minimum of four
22 seconds to see if the eye has a continuous jumping
23 or nystagmus during that process.

24 The third indication is an onset of
25 nystagmus prior to 45 degrees. As I'm coming from

1 the nose back out to the shoulders, at about a 45
2 degree angle if I start to see a nystagmus, then
3 it's present prior to getting to that angle, then
4 there is an indication that the person is possibly
5 under the influence of either alcohol and/or
6 drugs.

7 The next step would be looking for
8 vertical gaze nystagmus where I move the stimulus
9 in an upward motion. If, say, the vertical gaze
10 nystagmus is present, this is an indication of a
11 high dose of alcohol --

12 MR. REEVES: Objection, your Honor.
13 I object to the quantification.

14 THE COURT: Sustained. Officer,
15 only speak to the actual specifics of what it is.

16 THE WITNESS: Yes, sir.

17 THE COURT: Thank you.

18 THE WITNESS: Yes, sir.

19 BY MR. HODGE:

20 Q. And let me follow up. So is horizontal
21 gaze nystagmus an exact science?

22 A. No, sir.

23 Q. And does it alone tell you if someone is
24 materially impaired?

25 A. No, sir, it does not.

1 Q. What does it indicate to you?

2 A. That there is a presence of alcohol
3 and/or drugs in their body.

4 Q. And did you administer this horizontal
5 gaze nystagmus test to the defendant?

6 A. I did.

7 Q. And did you administer them as you were
8 trained to do?

9 A. I did, sir.

10 Q. I want to resume the video so we can
11 watch that happen.

12 (Video played)

13 BY MR. HODGE:

14 Q. Now, Deputy Osborne, during that test,
15 what did you observe from the defendant in his
16 eyes?

17 A. There are three validated clues that I
18 explained earlier for an indication of impairment.
19 There's a total of six that can be seen due to
20 assessing two eyes. Mr. Wells had all six
21 indicators of impairment in his eyes at that
22 point.

23 Q. Okay. And what did that indicate to
24 you?

25 A. That there was definitely a presence of

1 alcoholic beverage that had been consumed on
2 Mr. Wells.

3 Q. Okay. I want to move on now to the next
4 step, the next test that you did, the one leg --
5 or, excuse me. The walk and turn test. Is that
6 the second test that you administered?

7 A. It is, yes, sir.

8 Q. And what is that test?

9 A. The walk and turn is a divided attention
10 test. It is basically a two-part test. You have
11 an instruction phase and then you have a
12 walking-counting stage where you're actually --
13 you're giving instructions to see if they can
14 process it mentally and then actually perform the
15 task physically.

16 I had Mr. Wells stand with his right
17 foot in front of his left, arms down by his side
18 and stay in that position until further
19 instructions. And then I asked Mr. Wells if he
20 would take nine heel to toe steps down the line,
21 turn in a prescribed manner by leaving his front
22 foot on the line, taking a series of small steps
23 and turning around, and then take nine heel to toe
24 steps back down the line.

25 I asked him to look at his feet, count

1 each step out loud, keep his arms down by his side
2 and once he starts, don't stop till he finishes.

3 Q. And you call that a divided attention
4 test? What does that mean exactly?

5 A. It basically sees -- it is to see if you
6 can process the instructions mentally and then
7 perform the task physically. When we drive a
8 vehicle, that is a divided attention task as well
9 and these actual tests are to see if you are able
10 to divide your attention in a manner that you
11 would have to do to be able to operate a vehicle.

12 Q. So their performance of the test
13 correlates to how well they can operate a
14 vehicle?

15 A. Yes, sir.

16 Q. Okay. Did you administer the walk and
17 turn test on the defendant?

18 A. I did.

19 Q. Did you administer it as you were
20 trained to do so?

21 A. I did.

22 MR. HODGE: I would like to publish
23 that portion of the video.

24 (Video played)

25 BY MR. HODGE:

1 Q. Right there. What did you observe
2 during that test?

3 A. Initially, Mr. Wells appeared to have
4 trouble maintaining his balance during the
5 instruction phase. During the first nine steps,
6 Mr. Wells missed his heel to toe several times
7 during the process, using the arms for balance.

8 He stopped at the actual turn during --
9 watching it, it appears that he took too many
10 steps. Then he makes his turn and he comes back,
11 again missing heel to toe and stepping off line
12 coming back.

13 Q. Okay. During that test, it appears he
14 had to ask you several times to repeat the
15 instructions. What does that indicate to you when
16 a defendant has to ask you to repeatedly explain
17 the test to them?

18 A. That appeared to me to be an indication
19 of impairment as well, that I had to continuously
20 give the instructions over and over and over
21 again. That's not something that I normally have
22 to do.

23 Q. Okay. And what is the third test that
24 you administered in this case?

25 A. The one-leg stand, sir.

1 Q. What is the one-leg stand test?

2 A. It is a divided attention task as well.
3 There's an instruction phase and there is a
4 counting and balancing stage. For that particular
5 test, the subject is asked to stand with his feet
6 together, arms down by his side, don't do anything
7 else until instructed.

8 Then with either leg of his choosing, he
9 can raise it approximately six inches off the
10 ground, keeping the foot parallel to the ground,
11 leg straight, arms down by his side, looking at
12 the foot and counting 1,001, 1,002, and so on
13 until asked to stop. It is a timed task and it
14 lasts usually for 30 seconds, and I offered that
15 test to Mr. Wells that night.

16 Q. Did you administer that test to
17 Mr. Wells as you were trained to do?

18 A. Yes, sir, I did.

19 Q. Okay. I'm going to play that portion of
20 the video now.

21 (Video played)

22 MR. HODGE: We'll pause there
23 before the arrest.

24 BY MR. HODGE:

25 Q. During that one-leg stand test, what did

1 **you observe?**

2 A. I observed that Mr. Wells put his foot
3 down, I believe twice during the process. And
4 upon watching the video and using a -- using his
5 arms for balance, as well as he had a continuous
6 sway through the entire process.

7 Q. Okay. And what did that indicate to
8 you?

9 A. Again, that indicated that I saw signs
10 of impairment during that process.

11 Q. Okay. And after that final field
12 sobriety test, what did you do with Mr. Wells?

13 A. At that time, I placed him under arrest
14 for driving under the influence and I placed him
15 in handcuffs, I read him his Miranda rights, as
16 well as his implied consent advisement, and then I
17 placed him into my patrol car after removing his
18 property from his pockets and turning it over to
19 his wife.

20 Q. Okay. And were those field sobriety
21 tests the sole basis for why you arrested
22 Mr. Wells that night?

23 A. No, sir. The reason Mr. Wells was
24 arrested was the totality of everything from the
25 driving that I had seen prior to stopping him.

1 Upon the approach in my -- the appearance of
2 Mr. Wells during -- while talking to him. The
3 fact that he had a strong odor of alcoholic
4 beverage coming from the vehicle at the time of
5 talking with him, he admitted that he had been
6 drinking that night. The field sobriety test gave
7 clear indications of impairment that validated
8 clues that I was looking for.

9 During the test, when Mr. Wells also
10 would speak to me during the field sobriety test,
11 he had a strong odor of alcoholic beverage coming
12 from his breath. Due to the totality of all those
13 things, I placed Mr. Wells under arrest for
14 driving under the influence.

15 Q. Okay. I would now like to play the
16 portion of the video where you actually arrest Mr.
17 Wells.

18 A. Yes, sir.

19 (Video played)

20 MR. HODGE: I'm going to pause
21 again here.

22 BY MR. HODGE:

23 Q. First of all, who's the other individual
24 in the video there that you can see?

25 A. That particular night, I had a State

1 constable, which is similar to a reserve officer.
2 They don't get paid to come out, but they come out
3 and they'll ride with us and assist us in any way
4 that they can. And, also, the plain-clothed
5 officer that was on scene was Logan McGarrity,
6 which is a drug enforcement officer. He's an
7 undercover police officer.

8 Q. Okay. And after you placed Mr. Wells
9 under arrest and you put him in the back of your
10 car, what did you do next?

11 A. After he was seat belted in, then I went
12 over to actually speak with his wife because he
13 had initially asked that his wife be able to drive
14 the truck so that we wouldn't have to tow the
15 truck. I went over and spoke to the wife.

16 Upon speaking with is wife, I asked
17 her if she had been drinking. She had been
18 drinking earlier. So I offered her a horizontal
19 gaze nystagmus to see if she was in any condition
20 to be able to operate the vehicle as well. So I
21 bring her over to the front of the patrol car and
22 offer her a field sobriety, or a horizontal gaze
23 nystagmus.

24 Upon seeing what I saw in her eyes, I
25 didn't feel it was appropriate to continue past

1 into any other walk or turn or one-leg stand. I
2 made the decision at that point she was not in a
3 position to drive as well so I -- we had the
4 vehicle towed.

5 Q. Okay. And after you -- and we'll see
6 here in a minute -- after you walk her back to the
7 truck, did you notice anything inside the truck?

8 A. Yes, sir. On walking her back to the
9 truck, she wanted to go get her phone to be able
10 to call someone to come pick her up. And so we
11 were trying to make arrangements for that and we
12 were also trying to figure out if we could make
13 arrangements for someone to come and get the
14 truck.

15 She went back to the passenger side of
16 the vehicle and she was seen leaning up into the
17 seat with the doors open on the vehicle. With the
18 doors open on the vehicle in plain view, there was
19 cups and glasses all over the inside of the truck
20 and there was a brown paper bag containing a
21 bottle and where I was standing at, it appeared
22 that it was a liquor bottle.

23 I had asked at that point if it was a --
24 any open containers in the vehicle. Initially,
25 she stated there was not. And when I questioned

1 the bottle, that's when she stated it was an open
2 container. And I recovered a bottle of Pinnacle
3 Vodka that had the seal broken on it from the
4 floor board of the passenger side of the vehicle
5 and removed it and walked over in front of my car
6 and identified what I had located inside the
7 vehicle on videotape.

8 Q. Okay. Could you just -- you talked
9 about empty glasses in the truck. Could you be a
10 little more descriptive as to those glasses?

11 A. There was actually the, I call them
12 liquor glasses, inside the truck. And there was
13 also some like plastic-type cups in the vehicle as
14 well.

15 Q. Okay. And after you acquired the bottle
16 of vodka, what did you do with that bottle?

17 A. I took it in front of the video camera
18 and identified that that was what I had taken out
19 of the vehicle on video. The York County
20 Sheriff's Office, they don't want alcohol or beer
21 placed into evidence due to the seals being broken
22 and making a mess in the evidence locker, drop
23 boxes and stuff like that. So they merely want us
24 to either identify and log it through video or
25 take a picture of it, either one. I utilized my

1 in-car video camera so that it would all be
2 associated with (inaudible).

3 Q. Okay. Where did you ultimately place
4 that liquor?

5 A. After I went to the video and identified
6 it on video, I went back to the vehicle and I
7 opened up a cooler which was in the back of the
8 truck, and that's where I placed that bottle of
9 liquor was in that cooler.

10 Q. Okay. And did you ultimately have to
11 end up towing the vehicle?

12 A. I did.

13 Q. Okay. I would now like to play the
14 portion of the video as you bring out the
15 defendant's wife and you find the alcohol.

16 A. Yes, sir.

17 (Video played)

18 BY MR. HODGE:

19 Q. Mr. Osborne, I'm going to fast forward
20 this video and I'm just going to show the moment
21 when you come out with the alcohol.

22 (Video played)

23 MS. WOOD: Your Honor, may we have
24 a five-minute recess?

25 THE COURT: Sure. The court is in

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1 recess for five minutes.

2 CLERK: All rise for the jury.

3 (Jury exits courtroom)

4 MR. REEVES: I would renew the
5 motion to dismiss on the issue of the videotape.
6 Based on the officer's testimony, it was possible
7 that he could have backed his car up further and
8 caught the truck (inaudible) to refute some of the
9 argument they made by, hey, we don't have any
10 choice on what we're doing. Not that I think
11 that's applicable anyway, but he did say, I could
12 have moved it back. I'm not sure how far, but I
13 could have moved it back.

14 Also, your Honor, as I think I'm
15 required to do, I think taking the evidence in the
16 light that's favorable to the defense or the
17 State, they have not met the burden of proof.
18 And, in fact, the officer has testified that there
19 are other credible theoretical alternatives that
20 could have contributed to the driving and,
21 therefore, I would make the motion to dismiss for
22 lack of -- for not being able to meet the
23 standard.

24 THE COURT: Thank you.

25 MR. HODGE: Your Honor, first is

1 the record that we believe that the Court's ruling
2 is correct as to the video issue under the
3 statute, under the case law. It is not required
4 that that portion of the video be recorded. And
5 as to the motion for a directed verdict, rule
6 19(a) states, the defense is entitled to directed
7 verdict if (inaudible) evidence tending to prove
8 the charge of in the indictment.

9 Your Honor, we've heard -- we've
10 had sufficient evidence to prove the allegations
11 here of driving under the influence and an open
12 container in the vehicle.

13 THE COURT: All right. Thank you.
14 Give me a moment, Mr. Reeves.

15 MR. REEVES: Your Honor, while
16 you're looking at that, I just want to make sure
17 I -- I don't know if I said this earlier, but I
18 would rely on the arguments set forth in the brief
19 that you have.

20 THE COURT: Okay. Thank you. All
21 right. The Court will deny the motion to your
22 dismissal for a directed verdict and we'll
23 continue on.

24 MS. WOOD: Thank you, your Honor.

25 THE COURT: I am now ready for the

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1 jury. Thank you.

2 (Jury enters courtroom)

3 BAILIFF: All rise.

4 THE COURT: You may be seated.

5 Thank you. Mr. Reeves?

6 MR. REEVES: We're ready, your
7 Honor. I call Richard Wells to the stand,
8 please.

9 THE COURT: Mr. Wells, if you
10 would, let me swear you in, sir.

11 MR. WELLS: Sure.

12 Whereupon:

13 Richard A. Wells, having been duly
14 sworn and cautioned to speak the truth, the
15 whole truth and nothing but the truth,
16 testified as follows:

17 DIRECT EXAMINATION

18 BY MR. REEVES:

19 Q. Mr. Wells, could you tell the jury your
20 full name, please?

21 A. Richard Allen Wells.

22 Q. What do you go by?

23 A. Rick.

24 Q. And where do you live today?

25 A. I live in Key West, Florida.

1 Q. And are you married?

2 A. Yes, I am.

3 Q. Who are you married to?

4 A. Joell Wells.

5 Q. Is she here today?

6 A. Yes, she is.

7 Q. And where does she live?

8 A. Kings Mountain, North Carolina.

9 Q. Would you explain why you have two
10 homes?

11 A. Well, we've been married going on two
12 years and I have a senior daughter and -- she's a
13 senior in high school and I had to remain in Key
14 West until she graduates from college -- I mean,
15 high school in about four weeks. I do not intend
16 to move so I wanted my wife here in Kings
17 Mountain.

18 Q. Okay. How often do you come to Kings
19 Mountain, North Carolina?

20 A. I try to do it at least once a month.

21 Q. What is your occupation? What do you do
22 for a living?

23 A. I'm a ship's agent. That means I manage
24 port operations in the port of Key West,
25 coordinating the comings and goings of large

1 vessels, providing services and goods to them and
2 arranging customs processing, port security and
3 basically solving problems for them.

4 Q. How long have you been doing that?

5 A. 28 years.

6 Q. Okay. And what is your educational
7 background, Rick?

8 A. I have a Bachelor of Fine Arts with a
9 journalism minor. I specialize in photography.

10 Q. Before you went to work as a ship's
11 agent for the port of Key West, did you practice
12 in journalism?

13 A. Yes, I did. For ten years, I was a
14 newspaper photographer and an editor, and then I
15 was hired by the Associated Press and I was a
16 photo journalist in Washington, D.C.

17 Q. And were you assigned at one time to the
18 White House?

19 A. Yes, I was. I was an editor and a
20 photographer for the White House, yes.

21 Q. Okay. Rick, when you came to have your
22 contact with Deputy Osborne on October 5th, where
23 were you coming from?

24 A. My wife and I had gone to a concert, a
25 Luke Bryan concert southeast of Columbia, South

1 Carolina. It's called Luke Bryan Farms where it
2 held a benefit for American farmers.

3 Q. And do you know the location of the
4 concert? I mean, was it a venue or was it just
5 out in the --

6 A. It was in a big hay field. It was about
7 a thousand acre farm and they set up a stage and
8 parked a lot of cars. There were about 15,000
9 people there.

10 Q. How did you get to the concert?

11 A. We drove from Kings Mountain. My wife
12 drove.

13 Q. Okay. And what were you driving? What
14 did she drive down there?

15 A. It was an F-150 pickup truck.

16 Q. And what is that -- what is the use of
17 that pickup truck for?

18 A. We use it primarily for hauling horses,
19 hauling a horse trailer and a farm truck, you
20 know, going to pick up hay and things like that.

21 Q. Okay. Do you know which route she took
22 to get to Gaston, South Carolina?

23 A. Yes. You know, we took I-77. I know
24 how to get to Columbia. I just don't know the
25 back way to get there. Through York County to

1 King Mountain is a lot of roads.

2 Q. Could you speak up just a little bit?

3 A. Sure.

4 Q. What time did you get to the concert?

5 A. Approximately 5:00 p.m.

6 Q. What time was it supposed to start?

7 A. About 7:00.

8 Q. And this was a general admission concert
9 where everybody kind of goes in and finds their
10 own spot?

11 A. Yes. On the way down there, they had
12 redirected traffic beyond the concert so you had
13 to go down I-26 and come back. But when we got
14 there, there were five to 6,000 cars so we had to
15 work our way in there. And, yeah, everyone's just
16 milling around. It's general admission, a big
17 stage, people going every which way.

18 Q. Did you have anything to drink before
19 you went into the concert?

20 A. Yes, I did. As I told Officer -- or
21 Deputy Osborne.

22 Q. Okay. And did your wife have something
23 to drink before you went into the concert?

24 A. She did as well.

25 Q. Was there drinking in the concert?

1 A. No. They didn't allow any food or
2 beverage inside.

3 Q. Okay. Did you purchase any beverages
4 inside the concert?

5 A. No. I don't even know if they sold it.

6 Q. Okay. Do you know how many drinks you
7 had before you went in the concert?

8 A. Three drinks.

9 Q. And what time would have been your last
10 drink, approximately?

11 A. 7:00 p.m.

12 Q. Okay. Did you have anything to drink
13 after 7:00 p.m.?

14 A. Did not.

15 Q. Okay. You've heard the description by
16 Deputy Osborne about the strong odor of alcohol in
17 the vehicle. Was there a strong odor of alcohol
18 in the vehicle?

19 A. I don't believe so.

20 Q. Had anybody spilled anything in the
21 vehicle?

22 A. Not to my knowledge.

23 Q. Okay. Had anybody, to your knowledge,
24 drank anything in the vehicle from the time you
25 left the concert until Deputy Osborne pulled you

1 over?

2 A. Absolutely not.

3 Q. Today -- well, first of all, when Deputy
4 Osborne pointed out the Pinnacle bottle, did you
5 remember it being in the cab compartment?

6 A. I did not.

7 Q. Did you use it at all while it was in
8 the cab compartment?

9 A. No. That's not my style.

10 Q. Okay. But, today, because it's in the
11 cab compartment, are you taking responsibility for
12 that?

13 A. It was there.

14 Q. Okay.

15 A. I fully knew it.

16 Q. It was open?

17 A. It had a cap on it. It wasn't open but
18 I guess they call that an open container.

19 Q. All right. Had the vodka that had been
20 used out of that container all been used and
21 consumed before 7:00 p.m.?

22 A. Yes.

23 Q. And how much vodka had been consumed out
24 of the Pinnacle bottle?

25 A. Twelve ounces.

1 Q. All right. And out of that twelve
2 ounces, roughly when you pour a drink, do you know
3 how many ounces you use generally?

4 A. About two ounces.

5 Q. Okay. And did you and your wife share
6 the drinks equally at the concert?

7 A. Yes. We sat and watched the people come
8 to the concert. There was all kinds of
9 entertainment in the parking lot so we sat there
10 in our chairs. Once we were ready to go into the
11 venue, we put everything away. And, obviously,
12 we -- it's a pickup truck. I didn't want to leave
13 things in the back, so everything that we could,
14 we put inside and that's where I made my mistake
15 with the open container.

16 Q. Okay. And you heard Officer Osborne on
17 the tape talking about all these glasses and
18 whatnot. Would you explain what was in the
19 truck?

20 A. The only glass that I know about is a --
21 and it's still there -- it's a truck that I don't
22 drive a lot. I moved to Key West and it stays
23 here. There's an antique juice glass in the door
24 on the passenger side. It's been there about five
25 years. And it's very small. I got it at a yard

1 sale. It matches a set of other glasses we have.

2 Q. Okay. Were there other glasses in the
3 truck, to your knowledge?

4 A. Not that I'm aware of.

5 Q. Okay. And, again, did you drink
6 anything in the truck on the way back to
7 Columbia?

8 A. I did not.

9 Q. Did you drive the entire way from
10 Columbia to where Deputy Osborne pulled you over?

11 A. I did not.

12 Q. How far did your -- well, did your wife
13 drive?

14 A. She did.

15 Q. How far did she drive?

16 A. She left the concert which is southeast
17 of Columbia, as I said, and she drove to -- up 77
18 up -- I-26 and then to 77 and get off at an exit
19 and told me she was too tired to drive. And I
20 said, well, I'll be glad to take over. And I got
21 back on the road.

22 Q. Okay. Did she, before you do anything,
23 to provide you an aid to get back to Kings
24 Mountain?

25 A. Yeah. She -- since I don't know the

1 way, she set her I-phone on an app called
2 MapQuest. You plug in your address, it says home
3 and it takes you home. And, actually, you put it
4 in your cupholder right there where the gear shift
5 is and I headed home.

6 Q. Okay. Did she go to sleep?

7 A. She went in the backseat and went to
8 sleep, yes.

9 Q. All right. When did you wake her up?

10 A. There was a point that -- I stopped for
11 gas, by the way. I had -- I filled up with gas
12 and then I took off again and I realized that
13 something was wrong. Because when I looked at the
14 application, it says I was an hour-and-a-half from
15 home. And the little bit I do know about where we
16 were, I know it wasn't an hour-and-a-half from
17 home. So I was -- I thought I was taking the
18 wrong direction.

19 Q. Okay.

20 A. And that's when I -- I reached back to
21 try to ask her to help me.

22 Q. Did she wake up?

23 A. She did.

24 Q. All right. And did you -- what did you
25 tell her?

1 A. I said, you're going to help me here.
2 I'm lost, you know. I've been driving forever and
3 I'm not getting any closer to home. And she said,
4 well, I set the -- I set the thing for you.
5 You've got to listen to it. And I said, I am, you
6 know. We need to get this straight, you know.

7 Q. And were you driving while this
8 conversation took place?

9 A. Yes, I was.

10 Q. And were you -- did your attention --
11 did you ever move your attention away from the
12 roadway to either the phone or your wife?

13 A. The phone.

14 Q. Okay. How often did you do that?

15 A. You know, I was getting a little
16 frustrated because, number one, it's really dark
17 out on the road and I'm not familiar with it, so I
18 think about every 30 seconds I would say, you
19 know, help me out here, help me out here. And I
20 looked down at my phone and that's -- it's hard to
21 drive looking at your phone.

22 Q. Did you know, when you saw the video of
23 your driving, did you remember or do you recall
24 driving like that?

25 A. No. I, personally, don't believe it was

1 that poor driving (inaudible). So that's why I --
2 I believe I was reaching back to try to discuss
3 this thing with her and had one arm on the -- one
4 hand on the wheel and one hand towards her. And,
5 no, I thought I was driving just fine. I felt
6 really great.

7 Q. Okay. Was any -- what caused you to
8 make the maneuvers that the videotape shows?

9 A. Well, I kept -- again, I kept looking
10 down at my phone and I -- if she had been sitting
11 next to me, it would have been a whole lot easier.
12 But, you know, she had worked since, you know,
13 seven in the morning and she was tired. And I --
14 so I said, just go in the backseat and go to
15 sleep, I'll take it from here. But that's --
16 every time I did that, I'm sure, you know, I maybe
17 moved in my lane. I don't believe I was all over
18 the road.

19 Q. But do you believe the video is
20 accurate, though?

21 A. Of course. (Inaudible).

22 Q. But you were never in the median
23 together?

24 A. No.

25 Q. Okay. Do you recall going through

1 several traffic lights?

2 A. I do.

3 Q. And would you describe how you went
4 through those traffic lights?

5 A. Just normal driving. I mean, I was
6 just, you know -- I have been driving for a long
7 time. I just did what you do.

8 Q. Okay. Did you have to stop at one of
9 the traffic lights?

10 A. I did.

11 Q. Did you do that perfectly?

12 A. It looked like it to me.

13 Q. Okay. Did you realize -- well, since
14 this incident, have you looked at and become
15 familiar with the literature on distracted
16 driving?

17 A. I have.

18 Q. All right. Before that, had you
19 realized how far you can travel in a very short
20 period of time, not paying attention?

21 A. No. I heard it as you discussed it
22 today.

23 Q. Was that safe for you to do?

24 A. No. I mean, I tell my daughter not to
25 do it, but, then, here, I go and do it, you know.

1 Q. Was any of the driving that was on that
2 video caused by alcohol?

3 A. No.

4 Q. Did you have anything to drink when you
5 took the wheel, while you were in the vehicle?

6 A. No.

7 Q. Okay. When the arresting officer
8 activated his blue lights -- first of all, did you
9 know he was behind you before that happened?

10 A. I didn't. I was busy with other stuff.

11 Q. Okay. And when the blue lights were
12 activated, what did you do?

13 A. I did what I should do, which is, as I
14 found a good place to get off the road, I put on
15 my blinker and got there.

16 Q. Okay. When you got to the -- came to a
17 stop that night, the video shows you opening your
18 door. Why did you do that?

19 A. You know, I'm from a small town and
20 that's what we do. And I've been driving for
21 40-some years and -- when I started driving -- and
22 I haven't been pulled over in 25 years, I don't
23 believe. But when I started driving, that's what
24 you did. You usually get out and go sit in the
25 police car with the deputy or the officer.

1 That's -- I'm just not used to being pulled over.
2 So that's what I did. In fact, I understand that
3 it might have been threatening in some way.

4 Q. Was it your intent to threaten anybody?

5 A. Absolutely not.

6 Q. Did you get out of the car?

7 A. No.

8 Q. Okay. When the officer, or Deputy
9 Osborne came to the car, where was the cell phone
10 you were using?

11 A. It was in the cupholder.

12 Q. And do you know if it was displayed or
13 not displayed? What I mean by that, was the
14 screen on or off?

15 A. When that app is on, the screen is
16 always displayed. So I had it fully still on the
17 phone.

18 Q. The deputy asked you, first of all, for
19 your driver's license. Did you have that
20 available?

21 A. I did. I pulled it out of my wallet.

22 Q. Okay. And he also -- did you ask
23 permission to get your registration card?

24 A. I did.

25 Q. Did you have any trouble with those two

1 things?

2 A. No. It was easy.

3 Q. What did you tell him about being lost?

4 A. Well, I mean, it's very simple. He
5 approached the car and I just said -- I believe
6 you can hear it -- I'm lost, Officer. And he --
7 well, first, he said I'm all over the road and I
8 didn't -- I didn't agree with him and I think I
9 said something to that effect. And then I said,
10 I'm just lost. I'm looking at my phone. My
11 wife's in the backseat, talking.

12 Q. And she was awake at that point; is that
13 correct?

14 A. Yeah. I had woken her up a few minutes
15 before.

16 Q. Okay. And whatever you said is on the
17 videotape; is that correct?

18 A. Yes.

19 Q. Okay. We'll come back to that in just a
20 minute.

21 A. Okay.

22 Q. After Officer -- Deputy Osborne asked
23 you for the information, license and registration
24 and you told him, I'm lost, looking at MapQuest,
25 did he make any effort to follow up on your

1 explanation as to why you might have been driving
2 in a manner that caught his attention?

3 A. He did not.

4 Q. Did he ever follow up on that?

5 A. No.

6 Q. Did you speak with him again about the
7 issue of using your phone and/or MapQuest on being
8 lost?

9 A. I did when I -- after I was placed under
10 arrest.

11 Q. And where were you when you made that
12 statement?

13 A. The backseat.

14 Q. And what did you tell him?

15 A. I told him, I said, you know, I was just
16 lost and I was looking at MapQuest and I, you
17 know --

18 Q. Okay.

19 A. I don't know what else to say.

20 Q. All right. You were on the video for
21 about four minutes and 30 seconds; do you recall
22 that?

23 A. At the time, I didn't know that. I
24 don't how that works, but I've seen some
25 (inaudible) and I see that now.

1 Q. Okay. Did you have any difficulty
2 getting out of your truck?

3 A. Not at all.

4 Q. Did you have any difficulty walking when
5 the deputy told you to walk?

6 A. No.

7 Q. Did he have to help you in any way?

8 A. No.

9 Q. Did you attempt to follow his
10 instructions?

11 A. I believe I tried following every one of
12 his instructions.

13 Q. All right. Rick, when you were going to
14 where the deputy told you to walk, what was your
15 feeling about being in that area?

16 A. Well, the first thing, I made a special
17 point in trying to find a safe place to get off
18 the road and now I'm back in the road. And I
19 didn't want to verbalize that because, you know,
20 I'm somewhat intimidated at this point. But I
21 didn't like the fact that traffic was right behind
22 me. And so I -- but I didn't question him, you
23 know. He's in charge.

24 Q. Okay. Could you tell what you did or
25 did not do during the HGN test that you heard

1 talked about today?

2 A. I had no clue what he'd be looking for.
3 I'd never -- I'd never done this before. I'd
4 never seen one and never got -- I just was trying
5 to do what he asked me to.

6 Q. Okay. When you did the walk and turn
7 test, Deputy Osborne said you asked him a lot of
8 questions and he was -- he had a response that he
9 couldn't believe that you didn't understand what
10 he said. Why did you ask questions?

11 A. Well, a lot of people tell me I ask too
12 many questions. I talk too much. But I like
13 things -- I like to get things right. When I --
14 in my previous career, that's what I did. If I
15 got it wrong, I got it really wrong. And I wanted
16 to do what he asked and follow his -- I wanted to
17 get it right, so I just -- I guess, I asked too
18 many times. And I guess -- one time, I believe he
19 laughed at me because -- and that kind of, you
20 know -- and then I realized I was -- I should just
21 try to do the best I could and quit asking
22 questions.

23 Q. On the walk and turn test, you stepped
24 off the line one time; is that correct?

25 A. I'd have to look at it, but I thought I

1 did a pretty good job considering I was very
2 nervous, number one. Any time you're on the side
3 of the road with an officer giving you orders,
4 it's intimidating. So I was nervous.

5 I was wearing boots that I don't -- you
6 know, we went to a farm concert and what do you
7 do? You wear cowboy boots. I don't wear them in
8 Key West, you know. I'm more often more apt to
9 wear flip-flops when I'm not working, but -- so I
10 think that contributed to me being unable to keep
11 a straight line. I don't believe I could do it
12 right here if I was wearing those boots. But
13 that's what you wear at a Luke Bryan concert.

14 MR. REEVES: May I approach, your
15 Honor?

16 THE COURT: Sure.

17 BY MR. REEVES:

18 Q. Do you recognize these?

19 A. Yeah. Those are the ones I wore that
20 night and I haven't worn them since.

21 THE COURT: Mr. Reeves -- excuse
22 me. I'd like a point of clarification. Will you
23 just reference that with the State before you --

24 MR. REEVES: Sure.

25 THE COURT: Thank you.

1 MR. REEVES: Sure.

2 MS. WOOD: Your Honor, may we
3 approach?

4 THE COURT: Yes.

5 (Bench conference)

6 THE COURT: All right. Thank you.

7 Continue, Mr. Reeves.

8 BY MR. REEVES:

9 Q. Are these the boots you had on?

10 A. They are.

11 Q. All right. Now, you hadn't worn these
12 much before you wore them that night?

13 A. I wear them on airplanes because they're
14 easy to take on and off when I'm coming and going.
15 But I don't wear them in Key West.

16 Q. Okay.

17 A. They are excellent for keeping your
18 heel -- I mean, keeping your foot in a stirrup,
19 but I'm not a -- I'm not a real rider. I just --
20 that's what they're made for.

21 Q. Okay. Did those shoes cause you any
22 difficulty in doing the sobriety test Deputy
23 Osborne asked you to do?

24 A. They did and I said as much.

25 Q. Did you put your foot down during the

1 straight-leg raise test as Officer Osborne
2 indicated?

3 A. I don't believe I did.

4 Q. I'm sorry?

5 A. I don't believe I did.

6 Q. Okay. I can see it moved, but do you
7 recall it touching the ground?

8 A. I don't.

9 Q. Do you recall what number you counted to
10 during the straight-leg raise test?

11 A. A little past 23 when he stopped me.

12 Q. Okay. And were you still compliant, in
13 your opinion, in an appropriate manner with that
14 test when he asked you to stop?

15 A. Yes. I could have gone farther. I
16 thought I did quite well.

17 Q. At the point that you were arrested and
18 taken to the car, did you need any help getting
19 there with your hands behind your back?

20 A. No, I didn't.

21 Q. Now, when you were taken to the
22 detention center, again on the way over there did
23 you discuss the issue about the use of your cell
24 phone?

25 A. Actually, it was before we even pulled

1 out. They hadn't taken my wife or my truck away
2 yet.

3 Q. In your presence, had Deputy Osborne
4 asked your wife about the issue of the cell phone
5 and the use of the application?

6 A. Did he ask my wife?

7 Q. In your presence, did he talk to your
8 wife about that?

9 A. He did not in my presence, no.

10 Q. All right. When you got to the
11 detention center, Deputy Osborne testified a
12 moment ago that you did not show any signs of
13 impairment there. Did you understand those
14 documents that he went over with you, which are
15 State's 3, 4 and 5, I believe --

16 A. Did I understand them?

17 Q. Yes.

18 A. Yes. I read them and understood.

19 Q. Did you ask him questions about those?

20 A. I asked a lot of questions.

21 Q. All right. And you've heard them make
22 several comments, the State make several comments
23 about the fact that you didn't take the Data
24 Master test. Would you tell the jury why you
25 didn't take the Data Master test?

1 A. Well, first of all, I intended to. I
2 complied with everything that Deputy Osborne asked
3 of me that night. I mean, that's just what I do.
4 And when I went into the room, you know,
5 there's -- you're in there a long time and -- it
6 seems like a long time. And I asked him, I said,
7 do you mind if I ask you some questions? He said,
8 no, I'll answer -- I'll answer them to the best of
9 my ability. I said, great, thank you. And I
10 said, well, what happens after this? And he says,
11 well, we're going to go -- we're going to process
12 you in.

13 So, at this point, I believe I could
14 pass this test and -- because I hadn't had a drink
15 in hours. But now I'm realizing that it doesn't
16 matter if I pass the test because I'm still going
17 to jail. And then there was -- I was still on the
18 fence because, you know, I respect law
19 enforcement. I try to do what they ask of me,
20 okay?

21 I said, well, can you tell me how this
22 machine works? I've never seen one. Because it's
23 an unusual machine. It's got bubbles and kind of
24 a fish bowl looking thing on there and a keyboard
25 and he's pushing buttons. And so he says, well,

1 at the end of this 20-minute period after we do
2 some testing of the machine, I'm going to offer
3 you this hose and I'm going to put it -- I
4 specifically remember him saying, I'm going to put
5 a sterile mouthpiece on it and I'll hand it to you
6 and then you can either do the test or not do the
7 test. And if you decide to try to trick the
8 machine by not blowing in it, then that's a
9 failure as well.

10 So I told him, if I do it, I'm going to
11 do it. And he says to me, so after you do that,
12 if everything's working correctly, it'll tell me
13 your blood alcohol level and then we'll be done.
14 And it just didn't sit right with me, if
15 everything's working correctly.

16 I'd already messed up with technology
17 one time that night. I already know I'm going to
18 jail and I just didn't -- I didn't see the point.
19 So I -- when the alarm went off after a few
20 minutes, I just told him -- I think I told him I
21 decline.

22 Q. Mr. Wells, were you impaired that
23 night?

24 A. I was not, absolutely not.

25 Q. Had the drinks that you had had five

1 hours before he pulled you over caused you to have
2 any impairment in your ability to drive your
3 vehicle?

4 A. Not at all.

5 Q. Did you tell Deputy Osborne that you
6 didn't think you were impaired?

7 A. I -- I don't know if I did or not. I
8 mean, I -- we talked a lot. I couldn't say for
9 that -- I couldn't say a hundred percent on that.
10 I told him why I was driving poorly, if I was.

11 Q. Okay. The drink that you all were using
12 was vodka; is that correct?

13 A. Correct.

14 Q. Does it have a strong odor?

15 A. Not like -- I don't believe it does.
16 It's not like a whiskey or anything like that or,
17 you know, a beer.

18 Q. Would Officer -- or Deputy Osborne have
19 smelled alcohol on your breath?

20 A. No.

21 MR. REEVES: May I have a minute,
22 please, your Honor, please?

23 THE COURT: Sure.

24 MR. REEVES: That's all I have,
25 your Honor. Thank you.

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1 THE COURT: Thank you.

2 CROSS-EXAMINATION

3 BY MR. HODGE:

4 Q. Mr. Wells, you testified that you were
5 having alcohol at the concert that night?

6 A. Prior to the concert.

7 Q. You hadn't had anything to drink since
8 about five o'clock that night? You said the
9 concert started at seven?

10 A. We arrived at five in the parking lot.
11 The concert started at seven. So in the parking
12 lot is where we had drinks.

13 Q. Okay. You had testified that you said
14 that you put all the alcohol back into the truck
15 before the concert started; is that right?

16 A. We put a lot of things in the truck
17 because we were afraid people would, you know,
18 take things out of the back. But I don't know
19 what you -- I mean, I already admitted that the
20 bottle was on the floor board so that's where we
21 put it.

22 Q. Right. But didn't you also testify that
23 you began to put back all the alcohol back into
24 the back of the truck but you had forgotten that
25 vodka; is that what you testified to?

1 A. I don't understand. I'm sorry.

2 Q. Did you testify earlier here today that
3 you placed alcohol back into the back of the truck
4 in a cooler and other items back into the back of
5 the truck, but you had forgotten about that
6 vodka?

7 A. No. I think I said that. But,
8 obviously, we had put it in there after -- I mean,
9 before we went to the concert and forgot to take
10 it out and put it in the back when we headed
11 home.

12 Q. And by it, are you referring to the
13 vodka?

14 A. Yes.

15 Q. And only vodka?

16 A. Yes.

17 Q. No other drinks?

18 A. Correct.

19 Q. There were no other drinks in the cooler
20 in the back of the truck?

21 A. Not that I -- not that I'm aware of.

22 Q. Okay. And you admit that you take
23 responsibility for that open container of vodka in
24 your truck?

25 A. I do.

1 Q. Are you guilty of having an open
2 container of liquor in your vehicle? I would ask
3 that you not look to your attorney and answer the
4 question.

5 MR. REEVES: Your Honor, I object
6 to the colloquial of the Solicitor as to what
7 he's doing. Just ask the questions, please.

8 THE COURT: That will be -- go
9 ahead. I'll listen to you.

10 MR. HODGE: Your Honor, when I ask
11 you a question, we don't like witnesses to
12 look at their attorney before answering that
13 question.

14 MR. REEVES: Your Honor, I object.
15 Nobody has said he tried to look at me to
16 answer his question. I resent that, your
17 Honor.

18 THE COURT: Okay.

19 MR. REEVES: I take exception to
20 that.

21 THE COURT: The Court takes note of
22 that. So what we will do is, we will sustain
23 the objection and we will ask that the
24 witness look straight ahead and try your best
25 to, I guess, look neutral while answering

1 your questions. And I would ask that the
2 State stick to a line of questioning that
3 only allows the witness to answer for himself
4 and not try to lose him in any way.

5 MR. HODGE: Absolutely, your
6 Honor.

7 THE COURT: Thank you.

8 MR. HODGE: Absolutely, your
9 Honor.

10 BY MR. HODGE:

11 Q. You testified that you had 12 ounces of
12 alcohol to drink that night?

13 A. I did not. I said there was --

14 Q. I'm sorry. I stand corrected. I stated
15 that wrong. That's wrong. You said that you and
16 your wife had 12 ounces of alcohol that night.

17 A. I said it was 12 ounces out of the
18 bottle and so you can --

19 Q. Okay. So 12 ounces of alcohol out of
20 that bottle of vodka?

21 A. Yes.

22 Q. Okay. How are you sure that it was 12
23 ounces of vodka?

24 A. Because I went and got an empty bottle
25 and matched it to the videotape of Deputy Osborne

1 holding it up to the exact line. Then I filled it
2 with water and poured it out, drew a line, and
3 then I filled it back up to the very top of the
4 bottle and I measured it in a beaker. Because I
5 wanted to see what was out of the bottle. And I
6 have the exact bottle here today.

7 Q. Okay. What's the size of that bottle?

8 A. It's one of the large bottles. I guess
9 1.75 liter.

10 Q. 1.75 liter of -- to match the 1.75 liter
11 bottle of vodka that you had in your car?

12 A. Yes, sir.

13 Q. Okay. And so after the fact, you
14 determined that it must have been 12 ounces that
15 you drank, you and your wife drank out of that
16 bottle of vodka?

17 A. (No audible response).

18 Q. Okay.

19 A. It wasn't any more.

20 Q. Okay. Now, you're saying that you only
21 had that 12 ounces, you and your wife, out of that
22 bottle of vodka and that was sometime around seven
23 o'clock when the concert began. You would have
24 ceased drinking, is your testimony, or that you
25 ceased drinking at seven o'clock?

1 A. Yes.

2 Q. And, yet, now at one o'clock before you
3 determined whether or not you were going to
4 provide a breath sample, you determined that you
5 were not going to provide a breath sample even
6 though you hadn't had a drink since, as you say,
7 since seven o'clock?

8 A. I explained to you why I made the
9 decision. Should I do it again?

10 Q. Sure.

11 A. I asked Officer Osborne what happens
12 after we did the test. I intended to do the test.
13 This is the first time I've ever seen one of these
14 machines or been in a position like this. And
15 when he said I was going to be processed in no
16 matter what, it seemed pointless. And then he
17 also said, if the machine's working right, we'll
18 get a blood sample, a blood alcohol sample from
19 you. And that's on the tape.

20 Q. Okay. Did he also tell you during that,
21 that if you refused the breath test, that your
22 privilege to drive in South Carolina will be
23 suspended for six months?

24 A. He did.

25 Q. And you still refused?

1 A. Yes, I did.

2 Q. Did he tell you also that it was
3 possible that you would also lose your privilege
4 to drive in Florida as a result?

5 A. I asked him and he said he did not know.
6 He said, if there were -- if Florida was part of
7 some consortium or combine or something like that.
8 And I -- so I had -- I fully figured that Florida
9 had the same, you know -- it's not that far away.
10 It's a modern state. I figured it would have the
11 same sort of laws.

12 Q. So, from that, you believed that your
13 privilege to drive in Florida was going to be
14 suspended? Since it's a modern state, it seems
15 like it would be in this compact of South
16 Carolina, you believed that your privilege to
17 drive would be suspended for six months --

18 A. I wasn't sure. But I relied on Deputy
19 Osborne when he told me he wasn't sure. And I
20 know that he is an expert at this. He told me
21 he'd been doing it for 17 years. I figured he'd
22 know that answer. And so I -- I just -- somehow,
23 I felt that I was going to jail and it was
24 pointless.

25 Q. Okay. Mr. Wells, I would like now to

1 have you look at the implied consent form that we
2 earlier entered into evidence.

3 A. Okay.

4 Q. I believe that's Exhibit number 4 or 3.

5 THE COURT: It's 3.

6 BY MR. HODGE:

7 Q. Mr. Wells, could you look at that here
8 for a second for us? Is that your signature there
9 at the bottom?

10 A. It sure is.

11 Q. Can you please read that document out to
12 us?

13 A. The entire thing?

14 Q. (No audible response).

15 A. Okay.

16 MR. REEVES: Your Honor, I object
17 to that.

18 THE COURT: On what grounds?

19 MR. REEVES: It's in evidence.
20 It's in evidence already. This will be
21 again.

22 MR. HODGE: Your Honor, it's not
23 been published. The jury doesn't know what's
24 on that document. I would like the defendant
25 to read it as is.

1 THE COURT: Okay. Mr. Reeves?

2 MR. REEVES: Your Honor, the
3 document is going to be in evidence, but the
4 evidence speaks for itself. And, also, your
5 Honor, I think this is drawing attention to
6 an improper circumstance that the State is
7 trying to do. This question has been asked
8 and answered, whether he understood his
9 rights and he said he did.

10 THE COURT: Does the State have
11 anything else before I start on the
12 objection?

13 MR. HODGE: Your Honor, we have the
14 right to cross-examine him as to his
15 statement as to the reasons why he refused
16 the breath test. He's not been able to
17 highlight certain areas of that implied
18 consent form and I would like to do that with
19 this witness.

20 THE COURT: I'll allow it.
21 Continue, please.

22 BY MR. HODGE:

23 Q. Would you please read it into evidence?

24 A. Sure. A, will test the video recorder.
25 If the answer is yes, start here. Inform subject

1 of video recording. If answer is no, start here.
2 Inform subject of type samples requested. Breath
3 is circled, blood and urine is not, are not.

4 B, provide subject with a written copy
5 of the following advisement and read the
6 advisement to the subject: You are under arrest
7 for driving under the influence, DUI, Section
8 56-5-2930, South Carolina Code of Laws, 1976, as
9 amended. The arresting officer has directed the
10 samples be taken for alcohol and/or drug testing.
11 The samples will be taken and tested according to
12 Section 56-5-2950 and SCLE -- SLED policies.

13 You do not have to take this test or
14 give the samples, but if you refuse to submit to
15 the test, your privilege to drive in South
16 Carolina must be suspended for denial for at least
17 six months and your refusal may be used against
18 you in court.

19 If you take the test or give the samples
20 and have an alcohol concentration of eight
21 one-hundredths of one percent or more, you may
22 instead be charged with driving with unlawful
23 alcohol concentration, DUAC, Section 56-5-2933.
24 If you have an alcohol concentration of 15
25 one-hundredths of one percent or more, your

1 privilege to drive in South Carolina must be
2 suspended for at least one month.

3 You have the right to have a qualified
4 person of your own choosing conduct additional
5 independent tests at your expense and the officer,
6 upon request, must provide you with further
7 assistance. You have the right to request an
8 administrative hearing within 30 days with the
9 issuance of notice of suspension. If you do not
10 request an administrative hearing or your
11 suspension is upheld at the administrative
12 hearing, you must enroll in an alcohol and drug
13 safety intervention program.

14 If applicable, conform to the following
15 procedures. Check subject's mouth and remove any
16 foreign material. It's not required if a refusal
17 has occurred.

18 Q. Okay. I'm going to go ahead and cut you
19 off there.

20 A. Okay.

21 Q. I just wanted to point out here this
22 hyphen. I believe it's the fifth hyphen. If you
23 take test and give samples and have an alcohol
24 concentration of eight one-hundredths of one
25 percent or more, you may instead be charged --

1 well, I'm sorry.

2 MR. HODGE: I'm reading it from the
3 wrong one, your Honor.

4 BY MR. HODGE:

5 Q. It's the one after that. If you have an
6 alcohol concentration of 15 one-hundredths of one
7 percent or more, your privilege to drive in South
8 Carolina must be suspended for one month.

9 Now, the way that I read that and the
10 way that the officer read it to you in the same
11 form that you signed, if you were to blow between
12 .08 and .15, there would be no suspension.

13 A. I didn't understand that, I guess.

14 Q. Okay.

15 A. That doesn't sound logical, but --

16 Q. Okay. So this form is telling you that
17 if you refuse, your privilege to drive is going to
18 be suspended for six months. And if you do in
19 fact blow and you blew between .08 and you blew
20 between .15, you would have no suspension.

21 A. Okay.

22 Q. Your privilege to drive would not be
23 suspended, but over that it would be suspended.

24 A. I see. But it doesn't take away the
25 fact that he told me I was going to jail no matter

1 what and that's all I heard. I figured -- if
2 you'd like, if I could go on?

3 Q. Yes, sir.

4 A. I figured when I walked in there, if I
5 blew perfectly, I was going home. I could call my
6 wife and she could come and pick me up. But he
7 told me otherwise.

8 Q. Okay. I'll go ahead and take that back
9 from you.

10 A. Here you go.

11 Q. Mr. Wells, you testified that you do not
12 know whether you told Deputy Osborne if you were
13 impaired or not; is that correct?

14 A. Can you say it again, please?

15 Q. You testified earlier on direct when
16 asked by your defense attorney, did you tell
17 Deputy Osborne that you were impaired?

18 MR. REEVES: Objection. That's not
19 what I asked him, your Honor. I asked him
20 did he tell him that he was not impaired.

21 THE WITNESS: That's right.

22 THE COURT: Sustained.

23 BY MR. HODGE:

24 Q. But you do recall whether or not you
25 told Officer Osborne that you were not impaired?

1 A. I have no idea. I don't recall.

2 Q. You testified that you told Deputy
3 Osborne you were hooking up your phone?

4 A. Not hooking up my phone.

5 Q. Well, what did you tell him?

6 A. I said, I'm lost.

7 Q. Okay.

8 A. And I've been trying to find out why,
9 find out by looking at my phone with MapQuest.
10 Not hooking it up. My wife turned it on for me
11 when she handed over the vehicle to me.

12 Q. Okay. Did you ever reference the cell
13 phone to Deputy Osborne for, as you said, for
14 MapQuest?

15 A. I'm sorry. Again, I don't understand.

16 Q. Did you tell Deputy Osborne that you
17 were looking at a cell phone or did you tell
18 Deputy Osborne that you were looking at MapQuest?

19 A. I told him twice. I might have told him
20 cell phone one time and MapQuest the other.

21 Q. Okay.

22 MR. HODGE: I beg the Court's
23 indulgence.

24 THE COURT: Sure.

25 MR. HODGE: Nothing further from

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1 the State.

2 THE COURT: Thank you.

3 Mr. Reeves?

4 MR. REEVES: One question.

5 REDIRECT EXAMINATION

6 BY MR. REEVES:

7 Q. Your Florida license was never
8 suspended, was it?

9 A. It was not.

10 Q. Thank you.

11 MR. HODGE: One follow-up, your
12 Honor.

13 THE COURT: Sure.

14 RECROSS-EXAMINATION

15 BY MR. HODGE:

16 Q. Do you still live in Florida?

17 A. I do.

18 Q. And your wife still lives in North
19 Carolina?

20 A. For another four weeks.

21 Q. So you still have to do a lot of
22 traveling between Florida and North Carolina?

23 A. I do a lot of flying.

24 Q. Okay. So you wouldn't have to worry
25 about avoiding South Carolina if you were driving

1 from Florida to North Carolina?

2 A. Well, and also it's a lot faster.

3 Q. Okay. Again, you do not know whether
4 your Florida license is going to be suspended as a
5 result of that (inaudible), do you?

6 A. I do not.

7 Q. All right.

8 MR. HODGE: Nothing further.

9 THE COURT: Thank you.

10 MR. REEVES: I call Joell Wells.

11 THE COURT: Well, first, Mr. Wells,
12 you are excused.

13 MR. WELLS: I'm sorry. Did I --

14 THE COURT: That's fine. It's just
15 a formality, but I do like to speak for the
16 Court. So you are excused. That's fine.
17 And, Mrs. Wells, if you would please raise
18 your hand and place your hand on the Bible,
19 please.

20 Whereupon:

21 Joell Wells, having been cautioned
22 to speak the truth, the whole truth and
23 nothing but the truth, testified as follows:

24 THE COURT: Mr. Reeves?

25 MR. REEVES: If it please the

1 Court. Your Honor, I apologize. I just told him
2 to come down. I didn't --

3 THE COURT: I understand.

4 MR. REEVES: We're not trying to be
5 disrespectful.

6 THE COURT: I understand.

7 DIRECT EXAMINATION

8 BY MR. REEVES:

9 Q. Mrs. Wells, would you state your name,
10 please?

11 A. Joell Wells.

12 Q. And where do you live today?

13 A. I live in Kings Mountain, North
14 Carolina.

15 Q. And what do you do for a living?

16 A. I'm a patient care and treatment
17 coordinator for a pediatric dental and
18 orthodontist practice.

19 Q. Where is that located?

20 A. Charlotte.

21 Q. Okay. And are you married to Richard
22 Wells?

23 A. I am.

24 Q. How long have you been married?

25 A. A year-and-a-half, almost two years.

1 Q. Okay. Do you all have separate
2 residences right now?

3 A. Currently, we do.

4 Q. Okay. And is that situation going to
5 change at some point in the future?

6 A. It will, when Rachel graduates from high
7 school which is in four weeks.

8 Q. Okay.

9 A. He's got a business there in Key West.
10 I'm sure my husband will still have to travel from
11 time to time, but he'll be permanent here.

12 Q. Okay. On the night that is the big
13 question here, did you drive to Gaston, South
14 Carolina for the concert?

15 A. I did.

16 Q. And was there any reason you drove or
17 you just got the short end of the straw?

18 A. No. I usually do the driving because
19 Rick's not as familiar with our back roads in the
20 Carolinas as I am. So, of course, I had a back
21 way to get us to 77 and then we jumped on the
22 interstate and went 77 to 26 going to Gaston.

23 Q. Okay.

24 A. And the back roads again because of the
25 interstate had some issues. They took us off the

1 interstate and back on some country roads, back to
2 the concert venue.

3 Q. Okay.

4 A. So I said, I'll do the driving.

5 Q. Did you and Mr. Wells have something to
6 drink at the concert?

7 A. We did.

8 Q. And how would you describe the amounts
9 each of you had?

10 A. Minimal. We got there about five so we
11 finally get there earlier than anticipated. And
12 the concert started at seven, so from five to
13 seven, we had, I think, Bojangle's and three vodka
14 drinks.

15 Q. Okay. Did both of you have three vodka
16 drinks?

17 A. We did.

18 Q. All right. You heard the testimony that
19 Mr. Wells testified a moment ago about the bottle
20 and trying to measure what -- did you participate
21 in that?

22 A. Yes.

23 Q. Okay. And did you attempt to accurately
24 measure what had been removed from the bottle the
25 night that Deputy Osborne showed it?

1 A. We did.

2 Q. And was that amount consistent with what
3 your recollection was about how much each of you
4 had to drink?

5 A. Absolutely.

6 Q. All right. And was anybody impaired?

7 A. No.

8 Q. You drove from the concert to
9 somewhere --

10 A. Yeah. I went 26 to 77. I thought I
11 could go all the way home but I was just worn slap
12 out from working all day long, so Rick said he
13 would drive because I was tired.

14 Q. Okay. When that suggestion came up, did
15 you then -- what did you do with the cell phone?

16 A. Then I told him, let me plug in the home
17 address. But what I didn't do was turn the volume
18 up on my phone. So even though I had it plugged
19 in, the address, there was no voice direction. So
20 he was having to look over at it, which I was not
21 aware of because I crawled in the backseat and
22 went to sleep. And then when he woke me up, I
23 realized he didn't have it on -- we didn't have it
24 loud enough so he couldn't hear the exit to get
25 off of 77 so he went further on 77 than

1 anticipated by me.

2 Q. Okay. Now, where in the sequence of
3 events did you become awake?

4 A. It was before Officer Osborne pulled us
5 over, Rick had woke me up and said that it was
6 still telling him an hour-and-a-half to get to the
7 home and that didn't seem right to him because we
8 were only an hour and 45 minutes when he started
9 and he'd been driving for 30 minutes, 40 minutes
10 or so. So he felt uncomfortable with what I'd put
11 in. He was concerned that I put in my work
12 address and I was going to take us to Charlotte.

13 So he woke me up and said, can you
14 please mess with the phone and see why the
15 MapQuest hasn't gotten us there. And where are
16 we, you know? Look around and see if anything
17 looks familiar. It says we're on 161 which is a
18 road that does go by our residence, but about 40
19 miles, 50 miles from our residence.

20 Q. Okay. How was the cell phone handled
21 between you and him at that point?

22 A. When he woke me up, it was still sitting
23 in the cupholder. And I reached over between the
24 two seats in the front and pulled it back to the
25 back where I could see it, reprogrammed our

1 address and it continued to send us on 161 north.

2 Q. Okay. Did Mr. Wells become in
3 possession of the phone after you reprogrammed
4 it?

5 A. No.

6 Q. And so what was he doing at that point
7 when you had the phone?

8 A. Just discussing with me, how could it
9 still be saying that would be the time? If we've
10 already been driving this long, it was only
11 supposed to be two-and-a-half hours total and
12 we've already been on the road for over an hour
13 and it's still saying another hour and 45
14 minutes.

15 Q. Was he looking back at you?

16 A. Yes. Because I was in the backseat. So
17 if he's conversing, he would turn over his
18 shoulder to look at me when talking.

19 Q. Okay. And was he having to go back
20 between the phone pages, the navigation, back and
21 forth?

22 A. Well, I kept closing it and re-opening
23 it, the application. Because, again, I kept
24 thinking MapQuest was hung up on something, that
25 it had our point somewhere else and it didn't

1 understand my current location.

2 Q. All right. And before you had the
3 phone, he had the phone; is that correct?

4 A. Correct.

5 Q. All right. Were you awake when the blue
6 lights came on?

7 A. Yes.

8 Q. Okay. And before that when you were at
9 the exit wherever you transferred the driver, or
10 where you stopped driving and he started driving,
11 did you have any concerns based on what you had
12 observed from the time you left the concert, from
13 that point, about Mr. Wells' sobriety or his
14 ability to operate the motor vehicle?

15 A. Not at all, no.

16 Q. Would you let him drive if there had
17 been a problem?

18 A. If I felt he was impaired, I would not
19 have let him drive.

20 Q. When you -- were you able to see the
21 sobriety test from where you were sitting?

22 A. No.

23 Q. Okay. Did Officer Osborne ask you about
24 the issue with being lost or anything connected
25 with that?

1 A. He didn't seem concerned that we seemed
2 lost and we were looking for assistance. But at
3 this point when I thought he pulled us over, I
4 thought this was the best thing that could happen.
5 Somebody is going to tell us where we are in
6 relation to Kings Mountain and what part of 161 am
7 I on. I'm not familiar with that part of 161. So
8 when I was awakened, I honestly was no help at all
9 and nor did I feel I could trust the MapQuest.

10 So when you see a police officer, you
11 think, yah, someone is going to give us some
12 assistance and tell us, oh, you want to go north
13 on this road another five miles and then you'll
14 see some familiar landmarks. But that was not the
15 case.

16 Q. Did a law enforcement officer or, at
17 least, someone who looked like a law enforcement
18 officer talk with you that night?

19 A. Yes.

20 Q. And did you tell him about what you just
21 said?

22 A. Yes.

23 Q. What did you tell him?

24 A. I told him exactly what had happened,
25 that we'd gone to a venue and we were on our way

1 home. I just let my husband take over the driving
2 because I was worn out and we are now lost. And
3 where are we exactly? And he -- what's the name
4 of that little town that starts with a N? I don't
5 know.

6 But the little town he named, I was
7 like, I don't even know where that's at and we
8 were way off range, you know. Is that anywhere
9 near Fort Mill? I know Fort Mill. Is that
10 anywhere near Lancaster, you know? And we were
11 somewhere in between all those places but nowhere
12 I knew. But he listened to what I had to say
13 about being lost and my husband not being from
14 here and that I usually do the driving.

15 Q. During that conversation, was Deputy
16 Osborne dealing with your husband?

17 A. Yes. He was not near me.

18 Q. Okay. Do you know if that particular
19 officer told Officer Osborne in your presence what
20 you had told him?

21 A. He did not.

22 Q. Did Officer Osborne, after he finished
23 with your husband, you and him had a conversation;
24 is that correct? Let me rephrase that.

25 Did Officer Osborne come to your car at

1 some point?

2 A. Yes.

3 Q. Okay. And did he ask you some
4 questions?

5 A. No. He just informed me that he was
6 placing my husband under arrest.

7 Q. Okay. Did you know or did you recall --
8 let me ask you this. Was there any attempt on
9 your part to hide the vodka?

10 A. We didn't hide anything because we
11 didn't know we had anything in the front of the
12 truck.

13 Q. Okay. Why not? Why did you not know
14 that?

15 A. Because when it was time for the concert
16 to start, we just threw everything into the front
17 of the truck. It's a two-door pickup truck. So
18 we just threw everything in instead of leaving it
19 in the bed of truck for fear that people would,
20 you know, rip you off. You just take your
21 coolers, take your things.

22 So we threw everything in the car, in
23 the truck and I guess one of us put the bottle of
24 vodka in the front seat, you know, just throwing
25 everything in. We had blankets, we had coolers,

1 we had Bojangle boxes, you know, we just tossed it
2 all in there. And I didn't recall doing it. It
3 probably was me, but I didn't recall throwing that
4 bottle in there. But if we had realized it, we
5 wouldn't have left it in there.

6 Q. Okay. Was there any other alcohol in
7 the car?

8 A. No.

9 Q. All right. Was there alcohol in the
10 back of the car?

11 A. Not that I'm aware of.

12 Q. Was there a cooler in the back?

13 A. There was a cooler with ice.

14 Q. All right. Were there some cups in that
15 cooler?

16 A. Yes. Little glass cups that I keep in
17 the cooler.

18 Q. All right. You heard the testimony
19 about there being glasses or cups in the cab. Did
20 anybody consume any alcohol through any mechanism
21 on the way back from the concert?

22 A. No, sir.

23 Q. Okay. Did anybody spill anything or
24 provide any way that a strong odor of alcohol
25 would be in the car?

1 A. No.

2 Q. When you met with Officer Osborne at the
3 car and he took the vodka out, did you remain in
4 the car?

5 A. Yes.

6 Q. All right. And you left to go be taken
7 to meet a friend to get home; is that correct?

8 A. Correct.

9 Q. All right. And, again, no one talked to
10 you about another cause for the erratic driving?

11 A. No.

12 Q. Okay. Was Rick Wells impaired that
13 night?

14 A. No, Rick was not.

15 Q. You saw the video today.

16 A. Uh-huh.

17 Q. How does that video compare to Rick
18 Wells on any other day?

19 A. He was just himself, which is
20 inquisitive, childlike almost, sweet, and looking
21 for direction, literally.

22 Q. Did he have on those cowboy boots that
23 we were talking about a minute ago?

24 A. Yes.

25 Q. Is that something he normally wears?

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1 A. No.

2 Q. Okay. Thank you, Mrs. Wells.

3 MR. HODGE: Briefly, your Honor?

4 THE COURT: Sure.

5 CROSS-EXAMINATION

6 BY MR. HODGE:

7 Q. Mrs. Wells, were you tailgating at the
8 concert that night?

9 A. Describe tailgating.

10 Q. Hanging out in the truck. You said that
11 you were there between five and seven before the
12 concert drinking alcohol. Is that accurate?

13 A. We had our dinner there between five and
14 seven. We had a -- we drink and we people watch.

15 Q. Okay. Were you drinking straight vodka
16 that night?

17 A. No, sir.

18 Q. What were you mixing it with, then?

19 A. Orange juice and cranberry juice.

20 Q. Orange juice?

21 A. (No audible response).

22 Q. Were you drinking that orange juice and
23 vodka out of the juice glasses that were found in
24 the front of the car?

25 A. Yes.

1 Q. Okay. So you were drinking vodka and
2 orange juice out of the juice glasses that were
3 found in front of the truck?

4 A. Let me take that back. The glasses we
5 were drinking out of were in our cooler.

6 Q. Okay.

7 A. The juice glass that Officer Osborne was
8 referring to is an antique glass that's dingy,
9 dirty looking and it just happened to be still in
10 this car and it's been in there for years. And it
11 did not have any alcohol. You can go pick it up
12 today. There's no alcohol in it.

13 Q. So the juice glasses that you were
14 drinking from were in the cooler?

15 A. In the cooler.

16 Q. Okay. And you testified whenever the
17 concert began, you gathered up everything and you
18 just threw it in the front of the truck; is that
19 right?

20 A. Yeah.

21 Q. But not those liquor glasses, not those
22 juice glasses?

23 A. Those juice glasses got thrown in the
24 cooler.

25 Q. In the cooler? So you threw everything

1 into the front of the car, but those juice glasses
2 you had put back in the cooler but not the vodka?

3 A. Right. The vodka got thrown in the
4 front passenger seat in the floor board.

5 Q. All right. Do you love your husband?

6 A. Yeah, of course.

7 Q. You don't want to see anything bad
8 happen to him?

9 A. Well, who would? It's your husband.

10 MR. HODGE: I beg the Court's
11 indulgence.

12 THE COURT: Sure.

13 BY MR. HODGE:

14 Q. Mrs. Wells, are you trained in alcohol
15 detection?

16 A. Was I trained in alcohol detection?

17 Q. Yes, ma'am.

18 A. No.

19 Q. So you're not an expert on the subject?

20 A. No.

21 Q. Okay. Whenever you left that concert,
22 it was decided that you would be driving home
23 initially?

24 A. Yes.

25 Q. Okay.

1 MR. HODGE: Nothing further.

2 THE COURT: Mr. Reeves?

3 RECROSS-EXAMINATION

4 BY MR. REEVES:

5 Q. Do you have enough common sense in your
6 everyday experience to determine when someone is
7 likely impaired because of alcohol?

8 A. Yes. I have tons of common sense.

9 Q. Okay. And the fact that you're not
10 specially trained in impairment, did you see
11 anything your husband exhibited that night on the
12 way back that would lead you to believe or lead
13 you to have been concerned that he was impaired?

14 A. Not a bit.

15 MR. REEVES: Thank you, sir.

16 That's all I have.

17 THE COURT: Anything else?

18 MR. HODGE: Nothing further.

19 THE COURT: Mrs. Wells, you're
20 excused. Thank you.

21 MR. REEVES: I have one final
22 witness which will be very brief.

23 THE COURT: Okay.

24 MR. REEVES: I call Mr. Bowers.

25 THE COURT: I'm sorry, Mr. Reeves.

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1 Mr. Bowers?

2 MR. REEVES: Yes, Bowers. I'm
3 sorry.

4 THE COURT: Okay.

5 Whereupon:

6 Dennis Bowers, having been
7 cautioned to speak the truth, the whole truth
8 and nothing but the truth, testified as
9 follows:

10 DIRECT EXAMINATION

11 BY MR. REEVES:

12 Q. Mr. Bowers, what is your full name?

13 A. Dennis Bowers.

14 Q. And where do you live?

15 A. Lancaster, South Carolina.

16 Q. How do you know Rick Wells?

17 A. I've been knowing Rick several years.

18 We met through our daughters, through a riding
19 camp in the mountains.

20 Q. Okay. And have you been in the
21 courtroom all day today?

22 A. I have.

23 Q. Did you see the video?

24 A. I did.

25 Q. Have you been able to see Rick Wells in

1 various and sundry conditions? I mean, like
2 working, playing, whatever. Have you been able to
3 observe him over these past few years?

4 A. I have.

5 Q. Do you think you know him pretty well?

6 A. Pretty well.

7 Q. All right. On that video, would you
8 describe how that person on the video meshes up
9 with or compares to the Rick Wells of any other
10 time you've ever seen him?

11 A. It looks like Rick Wells to me.

12 Q. Okay. Did he exhibit anything on that
13 video that was abnormal or unusual to you?

14 A. Not to me.

15 Q. Did he appear to be impaired in that
16 video?

17 A. Not to me.

18 Q. Okay. Thank you, very much.

19 A. You're welcome.

20 MR. HODGE: Nothing from the
21 State.

22 THE COURT: Mr. Bowers, you're
23 excused. Thank you.

24 MR. BOWERS: Thank you.

25 THE COURT: Mr. Reeves?

1 MR. REEVES: Your Honor, that would
2 be the case for Mr. Wells.

3 THE COURT: Thank you.

4 MR. HODGE: Nothing further from
5 the State.

6 THE COURT: All right. Are we
7 prepared for closing?

8 MR. HODGE: The State is ready to
9 proceed, your Honor.

10 MR. REEVES: I'm sorry, your
11 Honor? I'm sorry?

12 THE COURT: Are we prepared for
13 closing arguments?

14 MR. REEVES: Yes, sir.

15 THE COURT: Mr. Reeves? Closing
16 arguments?

17 MR. REEVES: I'm so sorry, your
18 Honor. I thought they would go first. I'm
19 sorry.

20 MS. WOOD: Your Honor, the rules
21 require the defense goes first --

22 THE COURT: I'm aware.

23 MR. REEVES: I'm very sorry. Thank
24 you, very much for you attention, ladies and
25 gentlemen. I appreciate you listening to this

1 case and hearing the evidence.

2 I want to talk with you about a
3 couple of things that I think are important. I
4 mentioned to you beforehand when we first started
5 that it was my belief that the State could not
6 rule out another theory that had credibility that
7 would explain the driving. And Deputy Osborne
8 candidly admitted that distracted driving can
9 exhibit the same factors and the same
10 circumstances that driving while impaired could
11 exhibit, including failure to maintain your lane
12 and maybe crossing over the centerline. And he
13 also admitted that there was no difference in
14 those two, at least when you watch someone drive.

15 I asked the question of Deputy
16 Osborne about why there was no follow-up with
17 that. And he said, I chose the DUI route. Which
18 comes as no surprise because that's what he does.
19 And I would submit to you, folks, that no matter
20 what had been going on in that car, no matter what
21 story had been told, no matter what evidence would
22 have been in that car, it would not have made any
23 difference because he was there to stop him for
24 driving under the influence because he says so
25 when he gets to the car.

1 He radioes in, I'm stopping this
2 vehicle for suspicion. He pulls the car over, he
3 goes up, he spends maybe 20 seconds, if that long,
4 and he says, this guy's impaired. Now, he has a
5 right to give his opinion, but I want to ask you
6 about this. He's never met Richard Wells before
7 in his life and everything that he's cuing on is
8 because of this. He made an assumption of driving
9 under DUI, so, therefore, everything after that
10 would have been in conjunction with Richard Wells'
11 driving under the influence. He did not care to
12 look into the other situation.

13 Now, there was an interesting
14 question a while ago about why did, you know,
15 about Mr. Wells, did you ever talk about the cell
16 phone. I want you to listen to the video at one
17 o'clock, because that time is 1:07:29. 1:07:29.
18 And he asked the question because the officer is
19 at the door and he asks this question. And I
20 apologize. It's actually one minute and 30 --
21 one a.m., 30 seconds.

22 He says, I'm lost, we are looking
23 at MapQuest. And Deputy Osborne said, I don't
24 recall if he said that or not. And I think that's
25 fair to tell him because Deputy Osborne did not

1 care about anything else other than proving that
2 Mr. Wells was under the influence.

3 Now, I don't fault him for that.
4 I'm not here to say that's a bad thing. I'm just
5 simply here to point out that Deputy Osborne's
6 opinions and all of his evidence was cued toward
7 what? Demonstrating that Richard Wells was
8 impaired. Something else he said in response to
9 one of my questions when I said, you know,
10 everything in your report was geared to
11 demonstrate impairment. There's nothing in there
12 to demonstrate lack of. And he said, there could
13 have been thousands of things to demonstrate lack
14 of impairment.

15 Well, don't you think that's
16 important? I mean, shouldn't that be important to
17 him? Shouldn't, if he had to write a book, he had
18 to write a book? Somebody's liberty is at stake
19 here, folks, and it's not a time to say, well,
20 that's just too much stuff.

21 Also, Deputy Osborne candidly
22 admitted that if he was driving because he looked
23 at a cell phone or talking to his wife who was
24 using the cell phone, that that distracted driving
25 might prove to be a logical explanation for why he

1 was driving that way. And he said, I can't rule
2 that out. He didn't want to say that but I give
3 him credit. He says, I can't rule that out. And
4 I'm going to tell you about a reasonable doubt is
5 this. The standard of proof for the State of
6 South Carolina in this case is it's beyond a
7 reasonable doubt. And If I can present this fact
8 to you, we don't have to prove any of those
9 facts.

10 The fact that Rick Wells didn't go,
11 hey, Officer, look at my cell phone, look at my
12 cell phone, Rick Wells was under a little bit of
13 stress of the situation. But think about this.
14 The officer comes to the car. Within five to ten
15 seconds, the officer comes to the car. Rick Wells
16 says, I'm lost, we're looking at MapQuest. He
17 didn't have time to think up some elaborate
18 scheme. He didn't have time to make up a bogus
19 explanation or a bogus response. That was his
20 first response, folks.

21 There's no time to even -- It's
22 almost like, you know, just utter it right there,
23 and that's the truth. Deputy Osborne who --
24 folks, nobody can fault law enforcement for
25 attempting to make our highways safe. I'm not

1 here to argue that.

2 But what I am here to ask you to
3 consider is this. When the State has the burden
4 of proof beyond a reasonable doubt, if there is an
5 alternative theory or story or piece of evidence
6 that interlocks the chain of the circumstantial
7 case the State has, then the case law says you
8 have to find him not guilty, because the State
9 must maintain a theory that is uninterrupted in
10 its connection between one dot and the other. And
11 when Deputy Osborne admits there's an alternative
12 out there that may make some sense that he can't
13 rule out, then I submit to you that we have
14 created a reasonable doubt. And when I say we, I
15 didn't bring that testimony here. That came
16 directly from the prosecuting officer's mouth. I
17 can't pull it up.

18 He also said that people get
19 nervous when they do those tests. I'm going to
20 tell you something, folks. We don't do one-leg
21 stand tests. We don't do heel to toe tests often,
22 if ever. And I also think it's interesting,
23 we're talking, these guys are having to come up
24 with an imaginary line in which they're going to
25 walk on.

1 There, again, I don't believe that
2 Rick Wells' story is so far fetched you think,
3 that guy just made that up. He came up with it
4 pretty quick and he didn't make it up. He said
5 that he was walking in his cowboy boots. And I'm
6 going to tell you something, folks. I don't know
7 if you call a walk and turn an athletic event or
8 athletic maneuver. I don't know if you'd call
9 holding your leg up, you know, for 25 -- is an
10 athletic maneuver.

11 But I do know this. Athletes don't
12 wear cowboy boots. There's a reason that you
13 don't wear that kind of shoe when you're trying to
14 do things that require some coordination.
15 Mr. Wells said they're great for riding horses.
16 They're not real good for doing other things such
17 as, in the midst of a stressful situation, trying
18 to maintain balance.

19 But in that vein, let me ask you to
20 consider this. You're going to have the videotape
21 in your room. And I know that if you're like most
22 people with human nature, you're going to say, I
23 don't want to go through that thing again.

24 But, folks, after Mr. Wells is
25 taken to the roadway, he spends nearly two minutes

1 standing, I believe -- look at the video -- just
2 like this for two minutes. No swaying, nothing.
3 On the walk and turn test, according to the video,
4 and you can look it, my notes indicate he stepped
5 off one time. So out of 18 steps, he misses one
6 time. That's 92 percent. (Inaudible). Is
7 perfection required? Absolutely not. Does that
8 raise a reasonable doubt in your mind about his
9 sobriety or see his impairment?

10 On the straight leg raising test,
11 folks, again, look at the video, I don't see where
12 his foot comes down and he does drop it. It
13 doesn't come down and he keeps on counting. After
14 that, he's arrested. Should you compare that to
15 the driving? There's clearly some lane
16 interference when they cross the centerline, but
17 there's never -- Deputy Osborne said he was in the
18 median. Look at the video and see if you see
19 that. Please, look at the video. It's not
20 there.

21 He does not speak, no erratic
22 stopping and starting, no swerving (inaudible) see
23 in the lane change. He negotiates traffic lights.
24 He had driven for 10 to 15 to 30 minutes before
25 that with no indication that there was anything

1 wrong. When he became lost, he got distracted, he
2 drove poorly, he was unsafe. (Inaudible).

3 But can you rule out the fact that
4 it was not caused by distracted driving? There's
5 been no testimony to disallow that. And I wish so
6 much that Officer -- or Deputy Osborne had picked
7 up that phone so that when he came up here to talk
8 to you about all the evidence he had, he could
9 say, you know, I did look at the phone. Heck, it
10 would have been good if he'd have said, there was
11 nothing on that phone, that's a bunch of malarkey.
12 He can't say it.

13 I'm not holding Deputy Osborne to
14 some standard that is way above what's reasonable.
15 He just said at the very beginning, a well-trained
16 police officer captures and collects all the
17 evidence. In this case, he only captures the
18 evidence that was detrimental to Mr. Wells'
19 (inaudible).

20 Now, the State has asked a lot of
21 questions concerning the refusal and (inaudible)
22 asked that and brought it up. I'm going to say
23 this, though. You judge those sobriety tests and
24 see what happens. When he did pretty well on the
25 sobriety test, he still got arrested. As he

1 testified, there was no -- it was pointless at
2 that point. Nothing was going to happen to help
3 him. Nothing was going to happen that was going
4 to change it, he was still going to jail. Is that
5 not a legitimate reason?

6 Couple that with if the machine is
7 working. Now, I don't know about you, but in our
8 culture, technology is huge. But when it breaks,
9 things just go awry. But this machine is supposed
10 to be able to tell us that it works and tell us
11 when it doesn't work. I'm a little bit suspicious
12 of a machine that tells you that.

13 Now, at the conclusion, I'm not
14 going to have the last word. The State will get
15 up and they will make their argument. At the very
16 beginning, remember, the prosecutor told you,
17 we're going to show you he was impaired. He was
18 materially and appreciably impaired. He has yet
19 to rule out the stagger. He has yet to rule out
20 the other reasons for any problems in that
21 sobriety test because there weren't any. I
22 submit, that is reasonable doubt and it cannot be
23 refuted. It cannot be refuted.

24 Now, here's the great news. These
25 folks don't give the last word, you do. You six

1 people will make a decision based on the evidence
2 and you will determine whether or not the State
3 has removed every reasonable doubt regardless of
4 whether that doubt is big or small or even
5 minuscule. Probability is not good enough. Most
6 likely is not good enough. But reasonable doubt
7 is a substantial standard that must be met on all
8 fours.

9 Now, Rick Wells is guilty of an
10 open container only. He's guilty. He confided
11 this, but you know that. I would ask you, though,
12 as you consider this evidence carefully, no matter
13 what the prosecutor tells you in just a minute, I
14 want you to think about this. Nobody ruled out
15 the other hypothesis, the other event. Nobody
16 ruled out why there might have been some issues on
17 the sobriety test. In fact, Deputy Osborne
18 admitted that to you. He's the State's case.
19 When he admits that, that creates the reasonable
20 doubt.

21 Now, I will ask you to do this. If
22 you would (inaudible), there are three verdicts,
23 guilty, not guilty and not proven guilty. In this
24 country 200 and some years ago, we combined those
25 last two of not proven guilty and not guilty to

1 one, not guilty.

2 I realize that drinking and driving
3 is a hot-blooded issue. I realize that drinking
4 and driving is something that we all can be
5 concerned about. But in this courtroom today, the
6 sole issue before you is this. Because it is not
7 against the law to drink and drive in this state.
8 It only becomes illegal when someone is materially
9 and appreciably impaired through alcohol. This is
10 not the case, folks.

11 While we hand over the proof, I
12 think that the State has failed to rule out those
13 three things I've asked you to remember. And I'll
14 ask you to, after you consult with each other, to
15 find Mr. Wells not guilty. And I appreciate so
16 much your time.

17 THE COURT: Thank you, Mr. Reeves.

18 MR. HODGE: May it please the
19 Court.

20 THE COURT: Yes.

21 MR. HODGE: Earlier today, I told
22 you all that your role here today was the most
23 important role here. You're here to find out the
24 facts and tell us what those facts are when you
25 get back in the jury room. You're going to apply

1 those facts to the law and then you're going to
2 tell us what the verdict is. And verdict is a
3 Latin word. It comes from veridic, it means to
4 speak the truth. You're going to speak the truth
5 to us. Tell us if Mr. Wells is guilty of driving
6 under the influence, and as he's admitted today,
7 guilty of driving with an open container of liquor
8 in his car.

9 I want to start off with the law
10 portion. In South Carolina, the driving under the
11 influence law simply states that it is illegal to
12 drive a motor vehicle while under the influence of
13 alcohol to the extent that one's faculties to
14 drive are materially and appreciably impaired.

15 Now, what do we mean by materially
16 and appreciably impaired? Now, it's true that it
17 is not illegal to drink an alcoholic beverage and
18 drive, as the defense has pointed out to you. But
19 it is illegal when you drink enough that your
20 abilities to drive are substantially impaired.
21 That doesn't mean that you have to be falling down
22 cartoon drunk, looking insane on a field sobriety
23 test. You only have to be drunk enough to the
24 point that your abilities to drive are
25 significantly impaired to the point that you

1 should not have been out on the road that night
2 driving a car.

3 I will now move on to the evidence
4 in this case. We have the evidence of a bad
5 driver. Mr. Wells crossed the centerline several
6 times and, here, he's driving to the median. You
7 heard evidence in the testimony of Deputy Osborne.
8 You heard that he is an expert. Well, you heard
9 of his years of experience in DUI detection and
10 you heard that not only does he have all the
11 proper training, he's the one who gives the
12 training. He's actually training other officers
13 on how to do field sobriety tests.

14 You also heard that he observed
15 erratic driving. You saw the erratic driving.
16 Now he has a reason to pull over Mr. Wells. You
17 also heard that he smelled alcohol on Richard
18 Wells. The defense has said that he didn't smell
19 alcohol on Mr. Wells. But I submit to you that
20 Deputy Osborne was not lying on the stand when he
21 testified that he smelled alcohol in the vehicle.
22 The defense's witnesses testified there was no
23 spilled alcohol in the vehicle. So it could not
24 have been spilled alcohol that they smelled in the
25 vehicle, it was the alcohol that was coming off to

1 Mr. -- excuse me -- coming off of Mr. Wells'
2 breath.

3 You also heard him talk about field
4 sobriety tests and why they're important and what
5 they look for. You heard him speak as to the
6 horizontal gaze nystagmus test and what that looks
7 for, looking for the lack of smooth pursuit in the
8 eye whenever the eye follows the stimulus of the
9 officer's finger, the involuntary twitching of the
10 eyes, the twitching at 45 degrees whenever he held
11 his finger out. You heard that that exhibits a
12 presence of alcohol.

13 After the trial today, you try this
14 out. It's really -- it's something whenever you
15 do this to someone who's drinking alcohol. If you
16 try this out, you'll see that their eyes will
17 jerk, kind of like a windshield wiper on a dry
18 windshield is going to skip rather than having one
19 continuous, flowing movement. And you heard
20 Deputy Osborne testify that he witnessed that in
21 the eyes of the defendant.

22 Now, how did Mr. Wells do in his
23 field sobriety test? He didn't do that well. I
24 beg the Court's indulgence. I realize now that I
25 didn't have the audio on in this -- on this video.

1 He didn't do that well. He
2 stumbled through his field sobriety test, he's
3 having to ask the officer repeatedly how to do
4 these tests. He is trying his best to do these
5 tests as well as he can but the alcohol in his
6 system is betraying him. He is trying his
7 darnedest to get this right and he's asking
8 several questions, he wants to get it right, but
9 that alcohol in his system isn't allowing him to
10 do so. And you'll see that in the videos.

11 Now I want to talk about the walk
12 and turn test. You heard that it was a divided
13 attention test. What that means is, it tests your
14 ability to divide your attention. And you heard
15 and you know through your own common sense that
16 driving is a divided attention activity. You're
17 having to do various things in the car. You're
18 watching the road, you're dealing with whatever is
19 going on in the car, you might be looking at your
20 cell phone while you're driving in the car. And
21 alcohol is going to affect your ability to divide
22 your attention, the ability to divide your
23 attention between several different things going
24 on in the vehicle and you still drive your car
25 well.

1 Now, I'm going to play you a clip
2 from that walk and turn video.

3 MR. REEVES: Your Honor, I have an
4 objection to one of the -- he says he nearly falls
5 over during the instructions. That is not in
6 evidence, your Honor. I object to that.

7 MR. HODGE: Your Honor, I can play
8 that video. I'll strike it if the Court wants me
9 to strike it, but we can play the video to what
10 I'm referring to.

11 MR. REEVES: I don't mind the
12 video. Well, I object to that characterization.
13 The video is what it is.

14 THE COURT: The Court will sustain
15 the objection.

16 MR. HODGE: I'll strike that and
17 let the video speak for itself.

18 THE COURT: Thank you.

19 MR. HODGE: Let's watch this video.
20 I'll ask that you look at it. What you're going
21 to see in this video is that Mr. Wells is going to
22 miscount the steps. He's going to begin to count
23 too quickly as he begins to do the walk and turn
24 test, he's going to wobble throughout the test,
25 he's going to -- when he turns around, he forgets

1 the instructions, despite the fact that Officer
2 Osborne has repeatedly told him how to do these
3 tests beforehand.

4 I counted several questions. He
5 asked him, do you want me to go that way? Do you
6 want me to go this way? And do you want me to
7 turn around and go that way? I think what we're
8 doing is going this way and then going back that
9 way? Not going backwards? Should I count them?
10 Then I turn around; is that right? Towards your
11 car?

12 That's what made Deputy Osborne
13 (inaudible). In his experience, that many
14 questions, it would be kind of surprising if you
15 were asked to repeat the questions that many
16 times. So I'm going to play a little segment of
17 the video.

18 (Video played)

19 MR. HODGE: Now, going onto the
20 one-legged stand test. You heard that it's also a
21 divided attention test and, again, Mr. Wells has
22 to repeatedly ask Deputy Osborne questions about
23 that test. I'm going to play a clip of that. I
24 think that during that, you're going to see that
25 he's going to begin counting before he lifts his

1 foot as instructed, even though he's been told
2 numerous times how to apply it with the
3 instructions.

4 He does not lift his foot as high
5 and he is instructed to do so. He has to keep his
6 foot parallel with the ground as he was instructed
7 to do so. And he is going to drop his foot twice.
8 He's going to drop his foot once at count seven.
9 It's a little hard to see because his foot isn't
10 as high as it should be, but you can watch him as
11 he shifts his weight as his heel touches the
12 ground. He is also again going to drop his foot
13 at count 25. He's going to stop counting one, one
14 thousand between the counts as he was instructed
15 to do.

16 (Video played)

17 MR. HODGE: You also heard evidence
18 of his impairment in terms of the refusal of the
19 breath test. I want you to ask yourselves, why
20 did Mr. Wells refuse that test?

21 Now, he has every right to refuse.
22 The law states that he has the right to refuse.
23 The law also states that I have the right to tell
24 you that he refused and to use that as evidence
25 against him during his trial. It also points out

1 that there is an automatic suspension for refusal
2 and he knew that. He knew that this law, that he
3 knew that his license was going to be suspended in
4 South Carolina.

5 Deputy Osborne doesn't know the
6 laws of Florida. He can't tell you about the laws
7 of Florida. But Mr. Wells believed that it was
8 certainly possible that his license to drive in
9 Florida would be refused. And he does a lot of
10 traveling. He has to travel from Florida up to
11 North Carolina to see his wife and he's going to
12 have to avoid South Carolina during that route,
13 all because he refused the breath test.

14 I submit to you that only someone
15 concerned about blowing over the limit would
16 refuse.

17 MR. REEVES: I object to that
18 statement. That is impermissible in the law.

19 MR. HODGE: Your Honor --

20 THE COURT: Sustained on that. And
21 you would be, too. Make sure when you state your
22 opinions of the facts, that you don't give direct
23 conclusions based on the actual, what you think
24 the witness would --

25 MR. HODGE: Your Honor, may I argue

1 the point?

2 THE COURT: Sure.

3 MR. HODGE: Not to disagree with
4 your Honor, but there is law on point that states
5 that it's permissible for the Solicitor to argue
6 that even higher than this, that only a drunk
7 person would refuse a breath sample.

8 MR. REEVES: I object to that, your
9 Honor.

10 THE COURT: Well, the Court would
11 note your argument, but we will sustain the
12 objection.

13 MR. HODGE: Your Honor, we'd like
14 to take short recess outside the presence of the
15 jury so we can get that case all together for you,
16 your Honor.

17 THE COURT: Mr. Reeves, any
18 objection?

19 MR. REEVES: No, sir.

20 THE COURT: We'll take a short
21 recess. Officer, if you would, lead the jury out,
22 please.

23 (Jury exits courtroom)

24 THE COURT: You all may be seated.
25 Thank you.

1 MR. HODGE: Your Honor, I think
2 it's the State v. Miller. It's 257 SC 213. Your
3 Honor, here's that case we referenced.

4 THE COURT: Thank you.

5 MR. HODGE: We're giving another
6 copy to Mr. Reeves. Your Honor, if I may?

7 THE COURT: One moment. Does
8 everybody have their copy?

9 MR. REEVES: I do, your Honor.
10 Thank you.

11 THE COURT: Okay. Continue,
12 please.

13 MR. HODGE: Thank you, your Honor.
14 It's early on in the opinion under the heading
15 opinion. It has the facts of the case where it
16 states that the officer was permitted, over
17 defense objection, and states to the jury during a
18 summation argument that only a drunk man refused
19 to have -- well, would have refused to submit to
20 the breathalyzer test and had the defendant been
21 sober, he would not have so refused.

22 And also in a paragraph of the
23 decision, it says, we find no merit in the claim
24 that the prosecutor's summation on the point
25 exceeded fair comment. We agree that other

1 inferences could reasonably be drawn from
2 appellant's refusal to take the test. But these,
3 the appellant was free to urge upon the jury. And
4 that's a Supreme Court decision, your Honor.

5 THE COURT: I can see. Thank you.
6 Mr. Reeves, I could see no other counterpoint to
7 the summation on this case which would -- the
8 Court would have to bend to that, obviously.

9 MR. REEVES: Your Honor, this case
10 was even prior to the implied consent statute in
11 the rules and regulations (inaudible). That was
12 not even in the law in 1971, your Honor.

13 THE COURT: I understand. I'm
14 thinking of all the cases I have here, and I have
15 a book of them, trying to see the counterpoint of
16 this and to anticipate your objection, obviously,
17 for allowing it. Mr. Reeves, if you could state
18 your points again, please.

19 MR. REEVES: I'm sorry, your Honor.
20 I couldn't hear you.

21 THE COURT: If you could just state
22 your points again, please.

23 MR. REEVES: Your Honor, the State,
24 or the Solicitor concerning the quantitative of --
25 the numbers and how that relates to whether he's

1 impaired or not is improper. I think he now wants
2 to say that a drunk man, that only a drunk man
3 would not take the test.

4 I object to that on the prejudicial
5 effect that that outweighs any probative value of
6 any evidence that was -- the State has asked a
7 number of questions submitted so they can seek
8 significance evidence about the implied consent
9 and they've had their fair share. I object as it
10 being prejudicial.

11 THE COURT: Thank you.

12 MR. HODGE: Your Honor, the Supreme
13 Court disagrees with Mr. Reeves. This is very
14 on-point here. It says that during the summation,
15 the State argued that only a drunk man would
16 refuse. The Supreme Court concluded that there
17 was nothing wrong with that. And as to the
18 implied consent statute not being in existence
19 yet, I have a history at 56-5-29-50, the implied
20 consent section as it was in existence or, at
21 least, in some form in 1962 in the code under
22 46-344. And I believe this is on-point, your
23 Honor.

24 THE COURT: Mr. Reeves, I -- as
25 much as I would like to interject my own personal

1 interpretation here, I am inclined to, given this
2 information, to allow the point to be included in
3 the summation.

4 MR. REEVES: Okay.

5 THE COURT: So your objection is
6 overruled. Thank you so much.

7 MR. HODGE: Thank you, your Honor.

8 THE COURT: Continue, please.

9 MR. HODGE: We're ready to bring
10 the jury back in.

11 THE COURT: Hold on one second.

12 (Discussion off the record)

13 THE COURT: All right. Thank you
14 all for your patience. Mr. Reeves, you had a
15 point you wanted to --

16 MR. REEVES: I was going to ask
17 you, before you give the charge, would we have a
18 moment to go over that charge and look at it?
19 That's all.

20 THE COURT: Sure. Do you want to
21 do that now?

22 MR. REEVES: I'm happy to do it,
23 sir, if you are.

24 THE COURT: Is there any
25 objection?

1 MR. HODGE: Your Honor, I would
2 prefer to finish my closing before we review --

3 MR. REEVES: That's fair. That's
4 fair.

5 THE COURT: That's fine.

6 MR. HODGE: We're ready for the
7 jury, your Honor.

8 THE COURT: Okay. Thank you.
9 Mr. Reeves, just remind me, just in case I go into
10 my normal trial rotation here.

11 MR. REEVES: I will, your Honor.

12 THE COURT: Okay. Thank you.

13 MR. HODGE: Why don't we go ahead
14 and get that, Exhibit 1, the video, so all of the
15 exhibits are together.

16 THE COURT: Thank you.

17 (Jury returns to courtroom)

18 BAILIFF: All rise.

19 THE COURT: Thank you. You all may
20 be seated, please.

21 MR. HODGE: Ladies and gentlemen,
22 as I was saying, only someone concerned about
23 blowing over the limit would refuse the breath
24 test. I submit that he was worried that he was
25 impaired and he did not want to risk blowing. And

1 as you heard on that informed consent printout,
2 even if he had blown and blew over a 15, his
3 license to drive in South Carolina would only have
4 been suspended for one month and he, instead,
5 decided to refuse to blow and had his license
6 suspended for six months.

7 You also heard about the alcohol in
8 the truck. You heard that there were several
9 empty glasses in the truck. That's what Deputy
10 Osborne testified to. And you saw a large open
11 container of Pinnacle vodka in the floor board.
12 You also heard Deputy Osborne in the video, or you
13 will hear it in the video when you watch it later,
14 that he saw a flask in the truck.

15 You'll also hear whenever he goes
16 back to take back that vodka, I'm going to put
17 this with the rest of the liquor in the cooler.
18 And you can actually hear the clinging of the
19 glasses together as he puts that liquor back in
20 the truck.

21 Now, this is kind of a non-issue at
22 this point because, today, the defendant has
23 admitted he's guilty of an open container of
24 liquor. But the law basically states that it's
25 unlawful to transport a motor vehicle with liquor

1 where the cap or seal that's been open or broken.
2 There are exceptions but none of those exceptions
3 apply.

4 Taken all of that together, the
5 totality of the circumstances in this case, the
6 evidence in this case as we've presented to you,
7 is bad driving. Mr. Wells crossed the centerline
8 several times, he's driving into the median. He's
9 driving at one o'clock in the morning. There was
10 an odor of alcohol on his breath and the defense
11 witnesses stated that that odor could not have
12 come from any spilled alcohol in the truck.

13 The defendant admits to having a
14 few drinks at the concert. You heard about the
15 eye test, the results of that test, and that it
16 indicated the presence of alcohol in Mr. Wells'
17 system. (Inaudible) and we'll let the video speak
18 for itself as to that. And you saw the video
19 during the instructions in that first initial clip
20 that I showed you as he's standing there,
21 listening to the instructions of the officer, and
22 then later again as he began his walk and turn
23 test.

24 He had to continue asking the
25 officer to explain the instructions, repeatedly.

1 And, yet, having repeatedly asked the questions
2 and had the answers given back to him, he,
3 nevertheless, could not follow the instructions as
4 given. He refused to give a breath sample. His
5 license to drive is suspended as a result. Empty
6 glasses in the truck, a large open container of
7 vodka in the truck.

8 Now, I had asked you at the
9 beginning of the trial to use your common sense.
10 The defense today has tried to attribute all of
11 this evidence, the totality of all of this
12 evidence, to nerves, an I-phone and some cowboy
13 boots. This is the result of nerves, an I-phone
14 and cowboy boots. That is (inaudible).

15 The defense also pokes holes in the
16 fact that Deputy Osborne didn't note every single
17 time, every single thing that he saw that would
18 work against him here. Deputy Osborne wasn't out
19 there to give out gold stars to everything that
20 Mr. Wells did or did not show apparently.

21 He didn't write in his report that
22 he seems to be well dressed, that he seems to be
23 stopping at red lights (inaudible). He's not
24 handing out gold stars for everything little
25 thing. And as he would say, it would take an

1 entire book to say all the things that was going
2 on that didn't necessarily point to being
3 impaired.

4 In his testimony of the cell phone,
5 this is the first time that we've heard about the
6 cell phone. The defense wanted, as soon as Deputy
7 Osborne heard about this MapQuest, to
8 automatically go down this rabbit trail of a cell
9 phone. You can listen to the audio and you will
10 not hear any talk about a cell phone. If it is in
11 there, I missed it. There's talk about MapQuest.
12 And when I think of MapQuest, I think of printed
13 out directions. And so this story of the cell
14 phone being the explanation for his poor driving,
15 we didn't hear about that until today. And even
16 so, even if he was driving poorly because he was
17 using his cell phone, that doesn't necessarily
18 mean that he wasn't also impaired as he was, as
19 all the evidence is pointing out to.

20 Driving is a divided attention
21 activity and alcohol affects it. And alcohol can
22 affect you and your ability to divide your
23 attention between your cell phone and the road and
24 your driving. And we saw evidence of that as he
25 was crossing over the centerline. And with all

1 that considered, that leads us to the verdict. I
2 ask that you return a verdict of guilty as to
3 driving under the influence and, of course, is
4 guilty of driving with an open container of
5 liquor.

6 I ask that you to send a message to
7 the defendant that that night after the concert
8 when he got in that car and he chose to drive,
9 that he had no business getting behind the wheel
10 of that car in the state that he was in with all
11 the alcohol that he had had that night. Thank
12 you.

13 THE COURT: Thank you. I only have
14 one copy so if you all would, I guess, have you
15 all approach, please. It is my intent to read the
16 following instructions and you guys can read
17 through that and you can add what you all feel you
18 need to add.

19 All right. Ladies and gentlemen of
20 the jury, I'm now going to give you your final
21 instructions on the matter. I'd ask that you pay
22 careful attention to the words that I am reading
23 and if you have any questions once you retire, you
24 can certainly make that -- or make the Court aware
25 of those and we will try to offer clarification.

1 Ladies and gentleman of the jury,
2 you have listened to proceedings and -- you have
3 listened to the proceedings and the evidence in
4 this case. It is now my duty to instruct you as
5 to the law which applies to the facts in this
6 case.

7 To the charge of driving under the
8 influence, first offense, and an open container
9 which at this point is moot, the defendant has
10 entered a plea of not guilty. Under our system of
11 justice, a person charged with a communicable
12 offense is never required to prove himself
13 innocent if -- because that might be impossible.
14 The law never imposes upon the defendant in a
15 criminal case the burden of calling any witnesses
16 or producing any evidence, because the burden is
17 upon the State to prove the guilt of the defendant
18 beyond a reasonable doubt.

19 The laws of the State of South
20 Carolina do not permit you to comment on the facts
21 in this case. You, as the jurors, are the sole
22 judges of the facts in this case. However, it is
23 my duty to give you the law and you must accept
24 and apply the law as I give it to you and be
25 guided thereby with your consideration and in your

1 deliberation upon the evidence in the case.

2 Not only are you the sole judges of
3 facts in this case, but you, as the jury, are the
4 sole and exclusive judges of the effect and value
5 of the evidence in this case, as well as the
6 credibility of all witnesses who have testified in
7 the case. It is for you to determine which
8 witnesses or witnesses -- which witness or
9 witnesses are recalling and truthfully relating
10 what transpired at the time of the alleged
11 commission of a crime as described here today.

12 To weigh the evidence, you must
13 consider the credibility of the witnesses. You
14 will apply the test of truthfulness which you are
15 accustomed to applying in daily lives. You may
16 consider the matter of testifying, the appearance
17 of the witness upon the witness stand, the
18 reasonableness of testimony, the opportunity the
19 witness has to see or hear, accuracy of memory,
20 intelligence, interest and bias, if any, together
21 with all the facts and circumstances surrounding
22 the testimony.

23 You are the sole judges of facts.
24 The credibility of the witnesses and the weight of
25 the evidence, you may believe or disbelieve all or

1 any part of the testimony of any witness. It is
2 your province to determine what testimony is
3 worthy of belief and what testimony is not worthy
4 of belief according to the weight you assign the
5 testimony of each witness.

6 Now, when it comes to the actual
7 evidence in this case, there are two types of
8 evidence which are generally presented through a
9 trial, direct evidence and circumstantial
10 evidence. Direct evidence is the testimony of a
11 person who asserts or claims to have an actual
12 knowledge of fact, such as an eyewitness.
13 Circumstantial evidence is proof of (inaudible)
14 facts and circumstances indicating the existence
15 of a fact.

16 The law makes absolutely no
17 distinction between the weight or the value to be
18 given to each, to either direct or circumstantial
19 evidence. Nor is a greater degree of certainty
20 required of circumstantial evidence than of direct
21 evidence. You should weigh all this evidence in
22 this case. After weighing all the evidence, you
23 are -- if you are not convinced of the guilt of
24 the defendant beyond a reasonable doubt, you must
25 find the defendant not guilty.

1 I'm going to give you another
2 instruction as to the evidence as well. There are
3 two types of evidence which are genuinely -- or
4 generally presented through a trial, direct
5 evidence and circumstantial evidence.

6 Direct evidence directly proves the
7 existence of a fact and does not require
8 deduction. Circumstantial evidence is proof of a
9 chain of facts and circumstances indicating the
10 existence of a fact. It is necessary that every
11 circumstance relied upon by the State be proven
12 beyond a reasonable doubt and that all of the
13 circumstances so proven be consistent with each
14 other and taken together point conclusively to the
15 guilt of the accused to the exclusion of every
16 other reasonable hypothesis.

17 It is not sufficient that they
18 create a probability, though a strong one. And
19 if, assuming them to be true, they may be
20 accounted upon, any reasonable hypothesis which
21 does not include the guilt of the accused, the
22 proof has failed.

23 Crimes may be proven by
24 circumstantial evidence. The law makes no
25 distinction between the weight or the value you

1 give to either direct or circumstantial evidence.
2 However, the extent the State allows on
3 circumstantial evidence, of all the circumstances
4 must be consistent with each other and when taken
5 together, point conclusively to the guilt of the
6 accused beyond a reasonable doubt. If these
7 circumstances merely portray the defendant's
8 behavior as suspicious, the proof has failed.

9 The State has the burden of proving
10 the defendant guilty beyond a reasonable doubt.
11 This burden rests with the State regardless of
12 whether the State relies on direct evidence,
13 circumstantial evidence or some combination of the
14 two.

15 The presumption of innocence. The
16 law does not require any defendant to prove him or
17 herself innocent of a crime. On the contrary, the
18 law requires the State to establish the
19 defendant's guilt by legal evidence beyond a
20 reasonable doubt. The law presumes the defendant
21 to be innocent of the charge made against him in
22 the arrest warrant until his guilt has been proven
23 beyond a reasonable doubt.

24 The burden of overcoming his
25 presumption of innocence is based upon the State

1 and rests upon the State throughout the trial
2 until the State has satisfied you by evidence of
3 the defendant's guilt beyond a reasonable doubt.

4 The State must present evidence
5 beyond a reasonable doubt of each and every
6 element for the offense. The defendant is
7 entitled to any reasonable doubt arising in the
8 whole case or arising of any defenses that may
9 have been established by the defendant. The
10 evidence must show more than just suspicion of
11 guilt to find the defendant guilty.

12 To find the defendant guilty, you
13 must determine that he is guilty beyond a
14 reasonable doubt. A reasonable doubt. What is
15 reasonable doubt? A reasonable doubt is the kind
16 of doubt that would cause a reasonable person to
17 hesitate to act. Stated another way, proof beyond
18 a reasonable doubt is a proof the leaves you
19 firmly convinced of the defendant's guilt.

20 There are very few things in the
21 world that we know with absolute certainty. In
22 criminal cases, the law does not require that
23 proof will (inaudible) every possible doubt. If,
24 based on your consideration of the evidence, you
25 are firmly convinced that the defendant is guilty

1 of the crime charged, you must find the defendant
2 guilty. If, on the other hand, you think that
3 this is -- there is a real possibility that the
4 defendant is not guilty, you must give the
5 defendant the benefit of the doubt and find him
6 not guilty.

7 Failure of the defendant to
8 testify. In this case he did, so I'm going to
9 skip over that portion.

10 The elements of the offense. The
11 defendant is charged by the State of South
12 Carolina under the assigned tickets that you have
13 been -- that have been published at the beginning
14 of this trial. In having violated Section
15 56-5-2930, again, we are not going to instruct on
16 the open container at that point -- at this point
17 as this is a moot concern here.

18 Now, let me give you the offense
19 itself again, and that is driving under the
20 influence, first offense, the elements of that
21 particular crime. The State charges the defendant
22 with driving a motor vehicle within the state
23 while under the influence, Section 56-5-2930 of
24 the South Carolina Code of Laws. That law says
25 it's unlawful for a person to drive a motor

1 vehicle while under the influence of alcohol or
2 drugs or a combination, thereof, if that person's
3 mental and physical faculties to drive a vehicle
4 while materially or appreciably impaired.

5 This section reads as follows: It
6 is unlawful for a person to drive a motor vehicle
7 within the state of South Carolina while they
8 allow the influence of -- while under the
9 influence of alcohol to the extent the person's
10 faculties to drive are materially and appreciably
11 impaired.

12 Number two, the influence of any
13 other drug or a combination of the drugs or
14 substances which cause impairment to the extent
15 that the person's faculties to drive are
16 materially and appreciably impaired. Or, three,
17 combining alcohol or drugs or drugs or substances
18 which cause impairment to the extent that the
19 person's faculties to drive are materially and
20 appreciably impaired.

21 Faculties must include both mental
22 and physical faculties. The offense is exactly
23 the same, whether the person's -- whether the
24 driver's condition results from the ingesting of
25 alcohol or drugs or both of them.

1 The State must prove two elements
2 beyond a reasonable doubt. Number one, that the
3 defendant's mental and physical faculties to drive
4 were materially and appreciably impaired by the
5 consumption of alcohol, drugs and/or both. And,
6 number two, that the defendant was driving a motor
7 vehicle while under the influence.

8 A person is under the influence
9 within the meaning of the statute only when the
10 driver has ingested sufficient quantities of
11 alcohol or drugs to both materially and
12 appreciably impair the person's mental and
13 physical faculties to drive. The mere proof that
14 the defendant had to have at some time previous to
15 the arrest ingested alcohol or drugs or both is
16 not sufficient in and of itself to establish a
17 violation.

18 The State must prove beyond a
19 reasonable doubt that the defendant was driving a
20 motor vehicle while under the influence. This
21 requires more than just sitting behind the
22 steering wheel of an automobile. To constitute
23 the offense, the law requires that the vehicle be
24 in motion while the defendant is driving it.

25 A fair trial. Members of the jury,

1 this trial is very important to both the State and
2 the defendant and you, who are exploring to see
3 both sides, have a fair and impartial trial. You
4 are not to be governed by sympathy, prejudice or
5 public opinion. It is especially important that
6 you perform your duties diligently and
7 conscientiously, for ordinarily, there is no means
8 of correcting an erroneous determination of facts
9 by a jury.

10 On the other hand, with a legal
11 emphasis, I charge you that the law, as I have
12 explained it to you, is the only law of governance
13 and it's your duty to accept it and follow it,
14 even if you disagree with it.

15 In determining the facts of this
16 case, you should treat the evidence as any
17 reasonable person would treat any question
18 presented to him or her. Use your common sense.
19 Consider the evidence in the case for only those
20 purposes for -- which have been admitted and give
21 a reasonable and fair instruction, join such
22 reasonable inferences as you feel are justified in
23 light of your experiences.

24 If the State has proven the
25 defendant to be guilty beyond a reasonable doubt,

1 say so. On the other hand, if the State has
2 failed to prove the defendant guilty beyond a
3 reasonable doubt, say so. It is your duty to
4 write a verdict that speaks the truth. When you
5 have done that, you have completely discharged
6 your duties as jurors in this case and you are not
7 answerable to any person, whatever your verdict
8 may be.

9 Because in this case we do have a
10 refusal, I'm also going to instruct on how to --
11 I'm going to instruct you on that refusal.

12 In this case, there is testimony
13 that the defendant refused to take the
14 breathalyzer test when it was offered to him under
15 the lawful -- under lawful conditions. It was the
16 right of the defendant to refuse, but it's also
17 the right of the State to tell you through proper
18 testimony, which was done, that he did refuse.

19 You may give whatever weight you
20 wish to the fact -- to that fact in your
21 deliberations as to the defendant's guilt or
22 innocence. And, also, on the actual videotape,
23 you will note that there was a redacting in sound
24 in certain parts. And, again, I'd ask that you
25 also don't -- you weigh that as fairly as possible

1 when it comes to your consideration for the
2 verdict here, that redaction when you didn't hear
3 anything on the videotape.

4 Lastly, a unanimous verdict. The
5 law of this state requires that a jury verdict be
6 unanimous, which means that all jurors must agree.
7 The only two forms of the verdict are guilty and
8 not guilty.

9 Mr. Foreperson, once the jury
10 reaches a verdict, write their verdict on the
11 verdict sheet and sign underneath the verdict to
12 signify that what you have written is the verdict
13 of all jurors. Then notify me when you have
14 reached that verdict.

15 So I've just been told that you
16 guys will have access to look at the DVD, but if
17 you all need to review that, then we will clear
18 the courtroom for you to have the actual access to
19 do that.

20 MR. HODGE: Your Honor, we would
21 also have a laptop we can provide to them.

22 THE COURT: Oh, that would be
23 great. That would be awesome if that would be
24 happening.

25 MR. HODGE: I might be wrong about

1 that, but I'm pretty sure that we do.

2 THE COURT: Well, if you do, then
3 we will make sure that you guys have the necessary
4 machinery to view the DVD, whatever that may be.

5 Okay. Bailiff, if you would, have
6 the jury escorted out, please. This court will
7 stand in recess until we hear the verdict.

8 MR. HODGE: Your Honor, we do have
9 one issue. I'll wait for the jury to leave.

10 THE COURT: Okay.

11 (Jury exits courtroom)

12 THE COURT: Yes?

13 MR. HODGE: Judge, I was going to
14 point out the fact that you said that the open
15 container of liquor was a moot issue.
16 Technically, it isn't. He's not pled guilty to
17 that. It's still an open container. I had been
18 informed by Stephanie here that she spoke about it
19 with Mr. Reeves and he's not contesting that.

20 THE COURT: Okay. Well, I
21 apologize for that. I just -- given the --

22 MR. REEVES: He's admitted it on
23 the stand.

24 THE COURT: Yeah. Given the
25 testimony, I took that liberty. But I shouldn't

1 have in that light, so I apologize.

2 MS. WOOD: That's okay. He said
3 he's not going to contest it and he's admitting
4 it.

5 THE COURT: Okay. Well, thank you
6 for that, Ms. Wood. I appreciate it.

7 MR. REEVES: Another thing, your
8 Honor, I don't know that I may have misheard you
9 and I don't mean to keep you any longer --

10 THE COURT: No, you're fine. It's
11 fine.

12 MR. REEVES: Your Honor, in your
13 charge, you said that, in talking about the
14 implied consent -- excuse me -- the refusal --

15 THE COURT: Yes.

16 MR. REEVES: -- that he has a right
17 to not take the test and the State has a right to
18 talk about it or present evidence, appropriate
19 evidence which they have done. And I was a little
20 bit concerned about that being a charge on the
21 facts or a comment on the evidence they
22 presented.

23 THE COURT: Well, let me read it
24 again, just so we have clarification.

25 MR. REEVES: Okay. Because I might

1 BAILIFF: Rise for the jury.

2 (Jury returns to courtroom)

3 THE COURT: Thank you. You may all
4 be seated.

5 Mr. Foreman, has the jury reached a
6 verdict?

7 MR. FOREMAN: Yes, we have, your
8 Honor.

9 THE COURT: All right. Well, may
10 we hear it, please? On count one, driving under
11 the influence, first offense, the jury finds the
12 defendant guilty. And also on count two, an open
13 container, the jury finds the defendant guilty as
14 charged.

15 Ladies and gentlemen of the jury,
16 thank you for your services, we appreciate it.
17 And that concludes today's case. Thank you.

18 (Jury excused)

19 THE COURT: You all aren't waiting
20 for dismissal, are you?

21 MS. WOOD: I'm sorry?

22 THE COURT: Are you just waiting
23 for dismissal or court adjournment?

24 MS. WOOD: Your Honor, we're
25 waiting for sentencing, and we just wanted to add

1 that he has no prior record so we're not asking
2 for jail time or anything.

3 THE COURT: Okay. All right.

4 MR. REEVES: Your Honor, he did
5 spend almost 24 hours in jail the night of his --
6 the day -- the night or day of his arrest. So he
7 has no prior record and we did enter an admission
8 to plea about the open containers.

9 THE COURT: Sure.

10 MS. WOOD: Your Honor, I mean, if
11 it's fine with the Court, I mean, he did admit to
12 the open container so we're fine with the time
13 served on the open container and the fine on the
14 DUI will be 997.

15 THE COURT: That's correct. That's
16 what I have. So, Mr. Wells, I apologize. I got
17 so caught up in actually signing off your tickets,
18 I didn't even tell you what your actual conditions
19 were.

20 On the open container, as stated
21 earlier, we will -- we will take the
22 recommendation from the State and it will be time
23 served. For that, we'll give you the time you
24 spent, the 24-hour time you served in jail for
25 that particular misdemeanor. And on the actual

1 driving under the influence, first offense, with
2 no BL level to assess, the assessment is \$997 and
3 that'll be the order of the Court, okay? Thank
4 you. Thank you, Mr. Reeves.

5 MR. REEVES: Your Honor, who does
6 he pay that to?

7 THE COURT: He will pay that to the
8 DUI court and we can give him the information
9 before you all leave.

10 MR. REEVES: Great.

11 THE COURT: Thank you.

12 MS. WOOD: How long does he have to
13 pay that, your Honor?

14 THE COURT: How much time do you
15 need, Mr. Wells, to pay that, sir?

16 MR. WELLS: A couple of weeks would
17 be nice.

18 THE COURT: Okay. We'll give you a
19 month to pay it.

20 MR. WELLS: That's fine.

21 THE COURT: 30 days. That's the
22 order of the Court. That is to pay.

23 MS. WOOD: Thank you, your Honor.

24 (End of Recording)
25

1 CERTIFICATE OF REPORTER
2

3 I, Laura S. DeCillis, Certified Court
4 Reporter and Notary Public in and for the State of
5 South Carolina at Large, do hereby certify:

6 That the foregoing transcript of said
7 jury trial was produced from a DVD, and that all
8 audible testimony was transcribed by me to the
9 best of my ability.

10 I further certify that I am neither
11 related to nor counsel for any party to the cause
12 pending or interested in the events thereof.

13 I further certify that the original of
14 said transcript shall be hereafter sealed and
15 delivered to PAUL L. REEVES, ESQUIRE, Reeves Law
16 Firm, LLC, 1527 Blanding Street, Columbia, South
17 Carolina, 29201.

18 Witness my hand, I have hereunto affixed
19 my official seal this 31st day of October 2014, at
20 Columbia, Richland County, South Carolina.

21
22
23
24
25
Laura S. DeCillis

Laura S. DeCillis
Certified Court Reporter
State of South Carolina at Large
My Commission expires
August 10, 2015

STATE OF SOUTH CAROLINA

COUNTY OF YORK

STATE OF SOUTH CAROLINA

Plaintiff(s)

vs.

RICHARD WELLS

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014 - CP - 46 - 01548

(Please Print)

Submitted By: Paul L. Reeves

Address: Post Office Box 11126
Columbia, SC 29211

SC Bar #: 4671

Telephone #: 803.929.0001

Fax #: 803.929.0927

Other:

E-mail: Paul@PLRLAWFIRM.COM

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|---|---|--|
| Contracts | Torts - Professional Malpractice | Torts - Personal Injury | Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Assault/Slander/Libel (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☐ Motor Vehicle Accident (320) | ☐ Foreclosure (420) |
| ☐ General (130) | ☐ Notice/ File Med Mal (230) | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☐ Breach of Contract (140) | ☐ Other (299) | ☐ Products Liability (340) | ☐ Partition (440) |
| ☐ Other (199) | | ☐ Personal Injury (350) | ☐ Possession (450) |
| | | ☐ Wrongful Death (360) | ☐ Building Code Violation (460) |
| | | ☐ Other (399) | ☐ Other (499) |

- | | | | |
|--|--|---|---|
| Inmate Petitions | Judgments/Settlements | Administrative Law/Relief | Appeals |
| ☐ PCR (500) | ☐ Death Settlement (700) | ☐ Reinstate Driver's License (800) | ☐ Arbitration (900) |
| ☐ Sexual Predator (510) | ☐ Foreign Judgment (710) | ☐ Judicial Review (810) | ☐ Magistrate-Civil (910) |
| ☐ Mandamus (520) | ☐ Magistrate's Judgment (720) | ☐ Relief (820) | ☒ Magistrate-Criminal (920) |
| ☐ Habeas Corpus (530) | ☐ Minor Settlement (730) | ☐ Permanent Injunction (830) | ☐ Municipal (930) |
| ☐ Other (599) | ☐ Transcript Judgment (740) | ☐ Forfeiture (840) | ☐ Probate Court (940) |
| | ☐ Lis Pendens (750) | ☐ Other (899) | ☐ SCDOT (950) |
| | ☐ Other (799) | | ☐ Worker's Comp (960) |
| | | | ☐ Zoning Board (970) |
| | | | ☐ Administrative Law Judge (980) |
| | | | ☐ Public Service Commission (990) |
| | | | ☐ Employment Security Comm (991) |
| | | | ☐ Other (999) |
-
- | | |
|--|---|
| Special/Complex /Other | |
| ☐ Environmental (600) | ☐ Pharmaceuticals (630) |
| ☐ Automobile Arb. (610) | ☐ Unfair Trade Practices (640) |
| ☐ Medical (620) | ☐ Out-of State Depositions (650) |
| ☐ Other (699) | |

Submitting Party Signature:

Paul L. Reeves

Date:

5-8-14

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Common Pleas

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
) CA#: 2014CP4601548
 COUNTY OF YORK)
 STATE OF SOUTH CAROLINA,)
)
 VS.)
)
 RICHARD WELLS.)
 _____)

FILED-RECEIVED
 2014 MAY - 15 PM 4:23
 CLERK OF COURT
 C.C.P. & G.S.
 YORK COUNTY, SC

NOTICE OF APPEAL TO THE CIRCUIT COURT

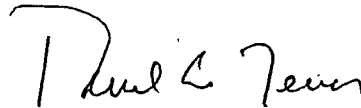
Richard Wells appeals from the verdict and the decision of the Magistrate's Court for ticket number 70409GM, on April 30, 2014, in York County, South Carolina.

Pursuant to S.C. Code Ann. §18-3-10, §18-3-30, and §22-3-1000, Appellant states the following grounds for his appeal:

1. The Magistrate erred when he failed to grant Appellant's motion to dismiss the case in favor of the Appellant because the State failed comply with S.C. Code Ann. §56-5-2953 due to the failure of the incident scene video to capture the conduct of the Appellant;
2. The Magistrate erred when he failed to grant Appellant's motion to dismiss the case in favor of the Appellant because the State failed to comply with S.C. Code Ann. §56-5-2953 due to the failure of the incident scene video to capture over four minutes of the Appellant at the scene of the arrest;
3. The Magistrate erred when he failed to grant Appellant's motion to dismiss the case in favor of Appellant because the State failed to comply with S.C. Code Ann. §56-5-2953 due to the failure of the video to adequately capture the horizontal gaze nystagmus test provided by the arresting officer;
4. The Magistrate erred when he failed to grant Appellant's motion to dismiss the case in favor of the Appellant because the State failed to preserve exculpatory evidence from the incident scene when the arresting officer consciously failed to video critical, favorable conduct on the part of the Appellant;

5. The Magistrate erred when he failed to grant Appellant's motion to dismiss the case at the close of the State's case based upon the failure of the State to comply with S.C. Code Ann. §56-5-2953, when the officer testified he could have captured the conduct of the Appellant when he repositioned the patrol car but chose not to do so;
6. The Magistrate erred when he failed to grant Appellant's motion to dismiss the case at the close of the State's case based upon the failure of the State to preserve exculpatory evidence when the arresting officer did not video the conduct of the Appellant;
7. The Magistrate erred when he failed to grant Appellant's motion to dismiss the case at the close of the State's case based upon the failure of the State to comply with S.C. Code Ann. §56-5-2953, when the arresting officer testified that he consciously failed to capture on video the Appellant's "conduct" as defined in *State v. Murphy*, 392 S.C. 626, 709 S.E.2d 685; (Ct. App. 2011);
8. The Magistrate erred when he failed to grant Appellant's motion to dismiss the case at the close of the State's case based upon the failure of the State to comply with S.C. Code Ann. §56-5-2953, when the arresting officer testified that he consciously failed to capture on video the Appellant's "conduct" as defined in *State v. Gordon*, , S.C. App. *Lexus* 89, filed on April 23, 2014.

Respectfully submitted,



Paul L. Reeves, S.C. Bar. No. 4671
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May 8, 2014
Columbia, South Carolina

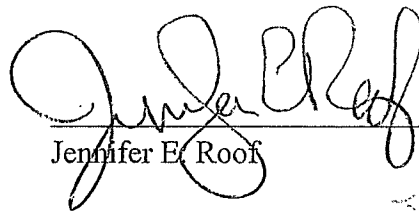
Certificate of Service

I certify that I have served the Notice of Appeal upon the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on May 9, 2014, to the Counsel of Record, as listed below:

Stephanie Ann Wood, Esquire
 Sixteenth Circuit Solicitor's Office
 1675 York Highway, Ste 1A
 York, SC 29745-7495

And, I certify that I have served the Notice of Appeal upon the Magistrate's Court by depositing a copy of it in the United States Mail, postage prepaid, on August 20, 2013, as listed below:

The Honorable Mandrile H. Young
 Moss Justice Center
 1675-1D York Highway
 York, SC 29745-7423



 Jennifer E. Roof

2014 MAY -9 PM 4:23
 CLERK OF COURT
 YORK COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF YORK

STATE OF SOUTH CAROLINA

Plaintiff/Appellant

State of South Carolina

VS.

Richard Alan Wells

Defendant/Respondent

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO. 2014-CP-46-1548

RETURN TO APPEAL

Objection and Trial Date

Presiding Judge

Plaintiff

Appearing for the Defense

April 30, 2014

Mandrite H. Young

State of South Carolina

Richard Alan Wells

Paul L. Reeves, Esq.

2014 JUL 24 AM 8:05
CLERK
YORK COUNTY, SC

On April 30, 2014, The State of South Carolina (plaintiff) brought a case forth in the York County Magistrate's DUI Court in York County, South Carolina on Mr. Richard Alan Wells for ticket # 70409GM, Driving Under the Influence less than .10 (1st Offense). The defendant appealed based on his belief that the court erred in not issuing a directed verdict of not guilty for his case because he believes the State did not comply with S.C. Code Ann. 56-05-2953.

The statute states that a person who violates Section 56-05-2930 must have his conduct at the incident site and the breath test site recorded. Subsection (1)(a) then states that the video recording at the incident site must:

1. Not begin later than the activation of the officer's blue light.
2. Include any field sobriety tests administered, and
3. Include the arrest of a person for a violation of Section 56-05-2930 or Section 56-05-2933, or a probable cause determination in that the person violated Section 56-05-2945, and show the person being advised of his/her Miranda rights.

The defendant hinges his argument on his interpretation of the definition of the noun form of the word conduct and the Legislative intent with the choice of its usage. Conduct, as defined by Webster's Dictionary, means personal behavior; a way of acting; bearing or deportment. The Court believes its important to note that the most commonly associated synonyms for conduct is demeanor, comportment, and actions.

In review of Section 56-05-2953, the Court believes that the Legislature further qualified its use of noun form of conduct by specifically stating the items to be included in the video recording at the incident site. Per the statute, a person must have his/her conduct at the incident site recorded while performing field sobriety tests, and while being arrested for a violation of Section 56-05-2930.

The Court believes the arresting officer, Deputy Osbourne of the York County Sheriff's Office, met both requirements listed in the statute. At the incident site, both the field sobriety tests and the arrest and mirandizing of the defendant were recorded as required by the statute. The time that lapsed on the video in which the defendant was not able to be seen, did not include any "conduct" required to be recorded per Section 56-05-2953. The Court believes that if the legislative intent was to have a video recording of the incident from blue light until the end of the interaction, the court believes the "conduct" of the defendant in the patrol car after the arrest would have been included in the requirements, and it was not. In addition, the defendant's act of sitting in his vehicle unseen while the video recording captured the scene doesn't violate the section as it is not required to capture the defendant's conduct when no field sobriety tests are being administered, the defendant was not being arrested and mirandized, nor were they at the breath test site.

The defendant cites *State v. Elwell*, 403 SC 606, 612, 743 S.E. 2d 802, 806 (2013) and the court agrees. While the court agrees, it is important to acknowledge that the Legislature qualified what conduct was to be recorded, a) The conduct during any field sobriety tests administered, and b) any arrest and mirandizing of a person for a violation of Section 29-05-2930 or 2933.

The defendant cites *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) which states that any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of law. It also states that in interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Again, the court agrees, but believes the above has no bearing or weight here as the Legislature, in clear and concise language, went on to "qualify" what conduct needed to be recorded on video.

The defendant cites *State v. Murphy*, 392 S.C. 626, 709 S.E.2d 685; (Ct App. 2011) which dealt with 56-05-2953 prior to the amendment which requires videotaping, and discusses video of a field sobriety test that doesn't include the defendant's entire body. This is not the issue at hand, and the court believes it has no bearing as the sobriety tests in this case were properly recorded, a fact not disputed by the defendant. The defendant references the case specifically to highlight the noun form of the word "conduct" and its definition. The court agrees and accepts the definition as cited.

The defendant references *State v. Gordon*, S.C. App. Lexus 89, *The City of Rock Hill v. Suchenski* 374 S.C. 12, 646 S.E.2d 879, (2007), and *State v. Jackson* 302 S.C. 313 (S.C. 1990) with regard to the videotaping of the arrest of a person in violation of 56-05-2930. The Court, again, believes that none of these cases have any bearing here as completed sobriety test were administered and properly recorded, and the arrest of the defendant was properly recorded as required by the statute. No part of the tape was destroyed, withheld, not able to be produced, nor was any portion of the videotape missing.

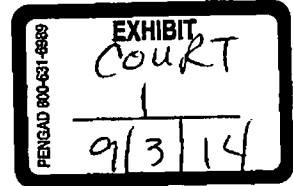
The Court believes that in this case, the state met the statutory requirements set forth by 56-05-2953, and it was correct in not dismissing this case or issuing a directed verdict of not guilty because of an alleged non-compliance with Section 56-05-2953, by the State. The officer videotaped the field sobriety tests administered on the defendant, and the arrest and mirandizing of the defendant, whom a jury of his peers found in violation of Section 56-05-2930, and guilty of Driving Under the Influence less than .10 1st Offense based on the evidence and testimony presented to the court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mandrile H. Young", followed by a long horizontal flourish line.

Mandrile H. Young, MS, BCMJ, BA
York County Magistrate

STATE OF SOUTH CAROLINA)
v.)
RICHARD WELLS)



PROCEDURAL HISTORY

On October 5, 2013, Richard Wells was charged with driving under the influence (Ticket #70409GM) and open container. Wells requested a jury trial. On April 30, 2014, Richard Wells was tried before a jury for driving under influence in York County, South Carolina. Mandrile H. Young, Magistrate Judge for York County presided over the trial.

Prior to opening statements, Wells presented a written motion and argument seeking to dismiss the case against him based upon the State's failure to comply with S.C. Code Ann. §56-5-2953 (1976, as amended), as the video failed to capture four minutes and thirty seconds of Wells conduct at the incident scene. The Court denied the motion to dismiss. The trial proceeded to a jury verdict of guilty on the charge of the driving under the influence. Wells did not contest the open container charge and pled guilty to this charge. This appeal followed.

FACTUAL BACKGROUND

The ~~case came about on October 5, 2013, when~~ Wells was arrested for driving under the influence and open container by Deputy J. Osborne of the York County Sheriff's Department. The video recording from the arresting officer's video camera was working properly at all times relevant. The video recording showed the arresting officer activate his blue lights to initiate the

traffic stop. Upon activation of the blue lights, Wells immediately applied his brakes and placed his left turn signal in the "on" position. Wells pulled from the traveled portion of the roadway into a parking lot. Wells stopped his vehicle and opened the driver's side door and remained in the vehicle. The officer had pulled his car into the parking lot and placed the car behind and to the left of Wells' truck.

The video continued to record the arresting officer approach Wells vehicle. The arresting officer made contact with Wells who was seated in his vehicle. He verified Wells' driver's license and registration. After asking Wells several questions, the arresting officer returns to his car. He then moves his patrol car from the parking lot to the traveled portion of the highway.¹ Per the time counter on the officer's recording, Wells is not on the video for approximately four (4) minutes and thirty (30) seconds. During a portion of this sequence of time, the arresting officer is in his car and Wells remains in his car. After a several minutes, per the audio portion of the video, the arresting officer approaches Wells truck. He talks with Wells. He then orders Wells from the vehicle and they walk together to the traveled portion of the highway where Wells is again seen on the video. The video does not capture the very critical sequence of events, where among other things, Wells exits his vehicle. Wells' conduct, his coordination, his control over his motor skills necessary to exit the vehicle, his demeanor, and the manner in which he responded to the officer's commands are not recorded.

The sequence of events not recorded are critical in demonstrating and preserving Wells' conduct, as required by S.C. Code Ann. §56-5-2953 (1976, as amended). Wells attempted to demonstrate that the training of law enforcement officers in the detection of impairment as

¹ The arresting officer claimed that it would have been impossible to video Wells and repositions his vehicle at the same time. This is simply not true. The officer could have ordered Wells from his vehicle before he moved the police car. The arresting officer had another law enforcement officer with him who could have easily assisted with positioning Wells so as to capture the relevant conduct on video. He chose to do neither.

shown by the South Carolina Criminal Justice Academy taken from the National Highway Traffic Safety Administration showed that Wells exiting the vehicle was critical conduct as defined by *State v. Murphy*, 392 S.C. 626, 709 S.E.2d 685; (Ct. App. 2011). The State objected claiming hearsay. The Court granted the State's objection. However, the arresting officer, called to the stand during the motions hearing, admitted that the following information from the training manual was true and accurate:

- He agreed that he is trained in the detection for impairment was and that this part of the investigation is divided into three phases.
- He admitted that phase one is the vehicle in motion, phase two is personal contact, and phase three is the pre-arrest screening.²
- The arresting officer agreed that the first phase begins when the officer's attention is drawn to the suspected violator as he drives.³
- The second phase includes the officer's face to face meeting with the suspect *and* observations by the officer of the suspect's exit from the vehicle and how he walks away from the vehicle.⁴
- Per the training for competency in administering standardized field sobriety test, one of the task of the arresting officer is to "observe the driver's exit and walk from the vehicle."⁵

² DUI DETECTION AND STANDARDIZED FIELD SOBRIETY TEST training manual at p.IV-2

³ *Id* p.IV-1

⁴ *Id* p.IV-3

⁵ *Id* p.IV-4 and p.IV-5

- Most importantly, when the arresting officer was read the definition of “conduct” from *Murphy*, he agreed that Wells actions in exiting the vehicle and walking to the spot where he was picked up by the video was indeed conduct and that such conduct was critical to the arresting officer’s assessment of Wells sobriety.
- The events of Wells exiting the vehicle and walking were not captured on the video.

After hearing the testimony of the arresting officer, the Trial Judge denied the motion finding that the sequence of events not captured on video was not “conduct” as defined by S.C. Code Ann. §56-5-2953.

At the trial below, the Magistrate Judge found that "conduct" only applied to the sobriety test, Miranda and the arrest. (Return to Appeal p.2). Further, the Magistrate Judge’s interpretation of §56-5-2953 is in error in that he determined that the video does not have to include conduct unless field sobriety test are being administered, an arrest is taking place and where Miranda is being offered (Return to Appeal p.2). Thirdly, the Magistrate Judge determined that the subsections of §56-5-2953 “qualified” the word conduct and limited what conduct was to be recorded (Return to Appeal p.2). These conclusions torture the statute and are erroneous in light of the plain meaning of the wording in §56-5-2953.

The Magistrate Court ignored the testimony of the arresting officer where he admitted that the actions of Wells not captured on video was “conduct” as contemplated by *Murphy*. He failed to acknowledge what the arresting officer admitted regarding the fact that he did not videotape the exiting of the vehicle and Wells walking away from the vehicle.

A. The State has failed to comply with S.C. Code Ann. §56-5-2953

S.C. Code Ann. §56-5-2953 controls the what must be recorded at the incident site. This section states as follows:

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

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

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

(i) not begin later than the activation of the officer's blue lights;

(ii) include any field sobriety tests administered; and

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

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal quotation marks omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (internal quotation marks omitted). "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,], the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (first alteration by court) (internal quotation marks omitted); see also *State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used."). "However, penal statutes will be strictly construed against the state." *Elwell*, 403 S.C. at 612, 743 S.E.2d at 806.

"If the statute is ambiguous, however, courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant*, 393 S.C. at 342, 713 S.E.2d at 283. "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Id.* (internal quotation marks omitted). "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *Id.* at 342-43, 713 S.E.2d at 283.

The arresting officer admitted that Wells' actions not recorded were "conduct" as defined by *Murphy*. The video fails to record Wells' conduct as he exits the vehicle. The statute requires that the conduct of the accused must be recorded. Wells' position is bolstered by the holding in *State v. Murphy*, 392 S.C. 626, 709 S.E.2d 685; (Ct. App. 2011). While the *Murphy* case dealt with §56-5-2953 prior to the amendment which required videotaping of the sobriety test, the decision specifically discussed the meaning of "conduct" as contemplated by this section. In *Murphy*, the video captured the accused from the knees up and did not present a full view of the her as she performed sobriety test. The Court held as follows:

the statute only requires her "conduct" be recorded. ***Conduct is generally defined as one's behavior, action, or demeanor.*** The Oxford Dictionary 158 (2d ed. 2001). Failure of the video to maintain a full view of the accused for the duration of a field sobriety test in which she is made to walk a line, for instance, does not fail to display her behavior, demeanor, and general state.

Murphy at 631 (emphasis added).

In *State v. Gordon*, S.C. App. *Lexus* 89, filed on April 23, 2014, the Court of Appeals found that “[B]y requiring a enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provision of section 56-5-2953, and, in turn, promulgated a severe sanction for noncompliance. *Gordon* at 10, quoting *Town of Mt. Pleasant*, 393 S.C. 332, 349, 713 S.E.2d 278, 286 ((2011)). The Court also opined that “because of the purpose of the videotaping to create direct evidence of the arrest, if the actual test cannot be seen on the recording, the requirement is pointless.” *Gordon* at 11.

Here, Wells is completely off camera for more almost four minutes and thirty seconds. During this period of time, he performed critical task in existing and walking from his vehicle. His behavior, actions, and demeanor as he exited the vehicle is extremely important to this case. At no fault of the Wells or the video equipment, these important cues and/or the lack thereof were not recorded.

Moreover, the HGN test conducted by the arresting officer is not captured in the video. While the video records the arresting officer standing in close proximity to Wells, the video does not show Wells’ response to the officer’s motions and actions. All that can be viewed is the officer making ambiguous motions with his arm. The arresting officer’s video does not show the HGN test in any manner and is therefore violative of §56-5-2952 and *Gordon*.

The State has failed to comply with the statutory requirements of §56-5-2953 because Wells conduct was not recorded. *Id.* Therefore, the case against Wells must be dismissed. *The City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879, (2007). In *Suchenski*, the court considered a fact situation where only a portion of the video of the incident scene was produced by the arresting officer. *Suchenski* at 879. The South Carolina Supreme Court held that the dismissal of

means that the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

The *Jackson* Court held that the destruction of the video tape deprived the accused of his due process rights. The Court held:

In the case at bar, the videotape was clearly "material". The exculpatory value was apparent before its destruction because one assistant solicitor was willing to drop the charges because of it. In addition, Jackson had no other evidence and could not obtain evidence of comparable value. Although the destruction of the tape was explained to the jury, the value of the tape could not be replaced.

Jackson at 316.

In this case, the officer did not destroy the video; however, he made a conscience decision to not record Wells exit from his vehicle. The video camera was working. The arresting officer, because of his extensive training about the cues provided by a person accused of DUI, knew of the critical importance of the cues and/or the lack thereof, associated with an objective video of Wells' exiting his vehicle. While having such knowledge, the arresting officer failed to preserve the evidence by videotaping the exit.

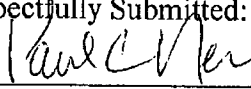
The officer's notes fail to mention any problems Wells had with existing the vehicle. Given the thoroughness of the arresting officer's other notes regarding signs of impairment, the lack of notes clearly indicate Wells exhibited no cues of impairment. An objective video of the officer's interaction with Wells, as Wells exiting his vehicle, would have been the best evidence to exculpate Wells. The video was not taken when the means to do so was within the authority and control of the arresting officer. The absence of the video leaves no objective evidence of this important sequence. The *Jackson* Court found that "the value of the tape could not be replaced." This Court should find the same.

The Magistrate Judge did not take the time to address this issue in his Return to Appeal. Obviously, the trial court erred when this issue was completely omitted from the Return.

CONCLUSION

The arresting officer had a working video camera that failed to capture the conduct of the accused at the scene. He did not comply with S.C. Code Ann. §56-5-2953 when he failed, without reason, to video the conduct of Wells during the traffic stop. Pursuant to *Suchenski*, this Court must overturn the verdict rendered below on the charge of driving under the influence. Second, the arresting officer failed to preserve exculpatory evidence critical to Wells case. Pursuant to *Jackson*, the arresting officer failed to preserve exculpatory evidence when he knew or should have known that the evidence was material, exculpatory in nature and had the means to prevent the loss of the evidence. For the forgoing reason, this verdict must be overturned.

Respectfully Submitted:



Paul L. Reeves

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September 2, 2014

Columbia, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-46-1548

STATE OF SOUTH CAROLINA)
vs.) TRANSCRIPT OF RECORD
RICHARD WELLS)

SEPTEMBER 3, 2014
YORK, SOUTH CAROLINA

BEFORE THE HONORABLE JOHN C. HAYES, III

APPEARANCES:

AARON HAYES, Assistant Solicitor
ROCK HILL, SOUTH CAROLINA

ATTORNEY FOR THE PLAINTIFF

PAUL L. REEVES, ESQUIRE
COLUMBIA, SOUTH CAROLINA

ATTORNEY FOR THE DEFENDANT

SHIRLEY BROOM
16TH Circuit Court Reporter

I-N-D-E-X

WITNESSES:

NO TESTIMONY TAKEN

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
P-1	MEMOS SUBMITTED BY PAUL REEVES		4

1 THE COURT - All right, next we've got Mr. Reeves
2 on a Magistrate's appeal. Appreciate everybody's patience.

3 (WHEREUPON, DOCUMENT MARKED AS COURT'S EXHIBIT
4 1.)

5 THE COURT - All right, this is a Magistrate's --
6 appeal from the Magistrate's Court. The appeal -- incident
7 cite video. All right.

8 MR. REEVES - I didn't want to change it --

9 THE COURT - All right, let's see what happened
10 this time.

11 MR. REEVES - Judge, if it please the Court, you
12 mentioned something just a moment about -- we've heard
13 about Gordon and all these other cases -- I will try to get
14 to the point on this case, and I don't want to waive
15 anything though in case it goes up further, but I have a
16 submitted a brief that outlines the arguments --

17 THE COURT - It's part of the record.

18 MR. REEVES - -- but, Your Honor, this is what
19 happened in this case. Procedurally, Richard Wells was
20 arrested by Officer Osborne of the York County Sheriff's
21 Department, and it started with when he initiated his blue
22 lights, Mr. Wells pulled off the roadway into a parking
23 lot. The officer positioned his car where you could see
24 the -- Mr. Wells' vehicle. You could even see sort of the
25 side where he would eventually open the door, the driver's

1 door. Your Honor, in this case the officer approaches Mr.
2 Wells' car initially, gets ID information, license,
3 insurance, talked to him for just a minute, does sort of a
4 cursory inspection of his truck bed and then comes back to
5 his car, the patrol car. He has another officer with him,
6 or a constable, and there's at least one and maybe two
7 other police officers to come during this time-frame;
8 that's important for a reason I'll get to in just a minute.
9 The officer at that point, Your Honor, chooses to back his
10 car up into the travel portion of the highway and park it
11 there, leaving Mr. Wells off camera for four and a half
12 minutes. Now, Your Honor, the statute -- and you've heard
13 this all day long -- talks about requiring the incident
14 site video to capture the conduct of the accused. Your
15 Honor, I would probably not have as strong an argument if
16 it was just Mr. Wells sitting in his car while the officer
17 finds his place to do the sobriety test, but in this case,
18 Your Honor, during part of that four minutes and thirty
19 seconds where Mr. Wells is not on video, the officer is
20 seen and heard to exit his vehicle, he walks in front of
21 the camera and then walks off camera to Mr. Wells' vehicle
22 which is about 30 feet away, according to Mr. Wells. The
23 officer gets to the car -- excuse me, Mr. Wells' vehicle --
24 - and said get out of the car. Mr. Wells complies, and you
25 can hear this, but you cannot see it; and then you hear him

1 say, "well, come with me, we're going to tests or some
2 exercise." And then Mr. Wells appears on video in the
3 travel portion of the roadway where the officer's car is
4 pointed down the lane. Your Honor, the reason that this is
5 important is the statute requires the officer to capture
6 the conduct at the scene - and, Your Honor, you've already
7 it today -- Murphy defines conduct as demeanor, actions and
8 presentment; that's what Murphy said. When I filed this
9 motion, Your Honor, after the jury was sworn but before we
10 started, and the officer was called to the stand, and
11 here's what he said, he admitted that there's three phases
12 to his investigation. There's the driving phase, the face-
13 to-face phase and then there's the pre-arrest screening or
14 sobriety test. He told me, Your Honor, and in front of the
15 Magistrate Judge said, "Mr. Wells action of getting out of
16 the vehicle and walking is part of what I look for to
17 determine sobriety." And I asked him, -- and I gave him
18 the definition, Your Honor, from Murphy of what conduct
19 was, and I said, "Officer Osborne, is that conduct?" He
20 said, "yes, it's conduct." And it's important to me,
21 because that's where I determine -- part of where I
22 determine whether or not the accused is -- has any sobriety
23 issues. And so, Your Honor, I did move to dismiss based on
24 the fact that the video-tape did not capture conduct which
25 was admitted to by the officer, and the Judge denied the

1 motion. We go through the trial; I make the appropriate
2 motions at the end of the State's case and at the -- and
3 all -- I mean, excuse me, the general (sic), and the Court
4 denied the motion. Your Honor, in the Return the
5 Magistrate Judge had an interesting view of what conduct
6 was. In his Return he said conduct was only these things,
7 sobriety test, Miranda and arrest and did not include
8 anything else, which is a torturous view of 56-5-2953.
9 That's on page 2 of the Return, Your Honor, I think in
10 paragraph 2 of the Magistrate Judge's Return, which is
11 clearly not what the statute said. It's interesting, Your
12 Honor, in the Return the Magistrate's Judge defined conduct
13 as -- well, guess what, just like what Murphy said. Your
14 Honor, even without the officer's admissions that what Mr.
15 Wells did when he exited the vehicle was conduct, demeanor,
16 actions and presentment as defined by Murphy is exactly
17 what we're trying to capture here and should've been
18 captured, which was not captured, because it's very
19 critical, according to the officer, that he look at and
20 view carefully what the accused does when he gets out of
21 the car and walks. Your Honor, I also want to make sure
22 the Court understands that officer moving his car was a
23 voluntary action and there were certainly a number of ways
24 he could've maintained the video of Mr. Wells, especially
25 when Mr. Wells exited the vehicle. Your Honor, also an

1 additional grounds that I raised at the Trial Court level
2 was that the evidence of Mr. Wells getting out of his
3 vehicle and walking would've been exculpatory, because it
4 showed him -- it would've shown him doing so without effect
5 or without impairment, and Your Honor, as you well know,
6 the -- I think it's State vs. Jackson I cited in the brief
7 -- that talks about -- and how to determine when evidence
8 is exculpatory and when it might be a violation of due
9 process if that evidence is not presented, and certainly,
10 Your Honor, the video-tape or the video recording of him
11 exiting the vehicle would be material; it would've been
12 exculpatory as testified by Mr. Wells, and also, Your
13 Honor, there's no other way -- there's no other comparable
14 evidence to present. You've heard the expression, "a
15 picture's worth a thousand words" and that's what we've
16 been talking about all day today. And, Your Honor, also,
17 as an additional grounds, in the HGN test which you can
18 observe on the video, -- now, Your Honor, I'm going to tell
19 you up front, so you - we might be able to dismiss with
20 this agreement -- you can certainly see the test going on,
21 but what you see is a bunch of motions. You can't make out
22 anything about what they're doing. He is so far down the
23 road from the video camera that you see some movement, but
24 you don't see anything else. Now, I know what the Court
25 and I know what the other cases have said, so that might

1 not be a very strong argument; I can see that, but there's
2 certainly no way to tell what was going on at that point.
3 Your Honor, again, I would, for the record, state my
4 grounds that are set forth in the brief, but the bottom
5 line is, we have material conduct which the officer admits
6 is important and critical; it was not video-taped.
7 Regardless of what the Magistrate Judge interprets 56-5-
8 2953, it says that the incident sight must -- the conduct
9 must be recorded and then it says including, not just, and
10 that would be the argument from Mr. Wells, Your Honor.

11 COURT REPORTER - Could I get your name?

12 MR. HAYES - Yes, ma'am, for the record, my name
13 is Aaron Hayes on behalf of the State of South Carolina;
14 I'm in for Stephanie Wood today who had a conflict. And,
15 Your Honor, just briefly in response, there's nothing in
16 2953(A) that requires video of a defendant getting out of
17 his car, and that's essentially what Mr. Reeves' argument
18 boils down to, is that there's a problem when an officer
19 repositions his car and sits in his car, runs the license,
20 runs the tag and the defendant is sitting in his car just
21 off camera. The Magistrate Judge directly held that that's
22 not a problem, because that's not something that's required
23 to be recorded under 56-5-2953(A), and as we've all heard
24 many times today, that statute requires that someone's
25 conduct be recorded at the incident site, including field

1 sobriety tests, the arrest and Miranda, and under Gordon,
2 this Court's standard of review prevents the relief that
3 Mr. Reeves is seeking. This Court can review only for
4 errors of law; the facts found by the Magistrate must be
5 upheld if there's any evidence in the record to support
6 them. This Magistrate found that the conduct of this
7 defendant was recorded, and that's in his Return. He found
8 that the field sobriety tests were properly recorded under
9 Gordon. That's in the Magistrate's Return on the second
10 page. The evidence in the record, which Your Honor has
11 available, would be the transcript that was sent up from --
12 the audio recording that was sent up of the proceedings --
13 the evidence in that record supports these findings.
14 There's no provision in the law that says the defendant has
15 to be on camera during license check. There's no hard and
16 fast rule as to how much of a defendant's conduct must be
17 on camera as long as that conduct is captured. Murphy does
18 speak to this issue when it holds that a continuous view of
19 the excused is not necessary to capture conduct. That's
20 from Murphy, construing the word conduct as it appears in
21 the predecessors at 56-5-2953(A), but that word conduct
22 also appears in our current 56-5-2953(A). So the rule from
23 Murphy on that point is still applicable. You don't need a
24 continuous view of the accused at the incident site in
25 order to capture their conduct and comply with the statute.

1 And that's essentially what the Magistrate is saying in his
2 Return. On page 2 -- the first full paragraph on page 2,
3 the Magistrate says -- and I'll direct the Court to that if
4 you have a copy of the Return. I have a spare ---

5 THE COURT - I do. I've got a copy.

6 MR. HAYES - -- if you don't.

7 THE COURT - All right, page 2.

8 MR. HAYES - In that second paragraph, the
9 Magistrate explains essentially the principle that conduct
10 must be recorded, but not everything about the defendant
11 must be recorded. And this is the third sentence in that
12 second paragraph. The time that lapsed on the video in
13 which the defendant was not able to be seen did not include
14 any conduct required to be recorded per section 56-5-2953.
15 That's the Magistrate saying, yes, it's true, there's part
16 of this video where we can't see the defendant; it happens
17 to be the part of the video where the officer is running a
18 license and the tag; the defendant is sitting in the front
19 seat of his car waiting on further -- waiting on a future
20 interaction with the officer, but the Magistrate ---

21 THE COURT - Well, I got lost a little bit then.
22 When Mr. Reeves was saying that you -- that you also could
23 not see the defendant or the driver when he got out of the
24 car for a short period of time. Can you see him getting
25 out of the car?

1 MR. HAYES - You cannot see him getting out of the
2 car. What happens is -- and Mr. Reeves' recitation of the
3 facts is correct. Deputy Osborne pulls the defendant over
4 and you can see ---

5 THE COURT - I got all that, but you just kept
6 talking about -- you were trying to isolate that doesn't
7 have to video his conduct while he's sitting in the car,
8 but ---

9 MR. HAYES - Yes, sir ---

10 THE COURT - -- what was videoed as far as -- how
11 long was he out of the car before the video captured him?

12 MR. HAYES - A matter of seconds, Your Honor.

13 THE COURT - How far did he walk or stumble or
14 whatever he did?

15 MR. HAYES - I believe that's in the record.

16 MR. REEVES - He testified about 30 feet.

17 THE COURT - Okay, so there was 30 feet that was
18 not -- 30 feet of conduct and a few seconds were not
19 recorded.

20 MR. HAYES - That's right, Your Honor, and it's
21 the State's position that under Murphy's definition of the
22 word conduct and Murphy's holding that a continuous view of
23 the accused is not necessary to capture conduct, that
24 that's not a problem under 2953(A), especially because as
25 soon as the defendant is on camera, we watched the progress

1 of his field sobriety tests; we watched his arrest; we
2 watched how he's acting; we're able to judge how this
3 defendant was doing, how this defendant's conduct appeared
4 on camera. The fact that conduct is required to be on
5 camera doesn't mean that every little bit of that conduct
6 must be on camera. So that's the State's position on the
7 majority of his appeal and then just addressing the HGN
8 issue briefly, Gordon is directly on point that if the
9 Magistrate makes a specific finding that the field sobriety
10 tests are visible, that's the Magistrate's division alone
11 and the Circuit Court cannot disturb it based on the
12 standard of review. And then lastly just addressing his
13 Jackson contention, Jackson doesn't apply at all in this
14 case, because that was a case where the State told the
15 defendant his charges were dismissed and then destroyed the
16 video, and then charged -- and then tried him for DUI a few
17 months later. Obviously, this defendant was tried with the
18 video that we used, so that has no applicability at all.
19 Thank you, Your Honor.

20 THE COURT - Any follow-up?

21 MR. REEVES - One thing, Your Honor. It's
22 interesting to me that the Magistrate Judge after hearing
23 the testimony and also the State's failure to address this
24 issue, the officer who is an agent and servant of the
25 State, said, him getting out of the car and walking is

1 conduct as defined by Murphy and I didn't record it. I
2 don't know how you get around that.

3 THE COURT - All right, I'll take this one under
4 advisement.

5 MR. REEVES - Thank you, Your Honor.

6 MR. HAYES - Thank you.

7 (END OF TRANSCRIPT)

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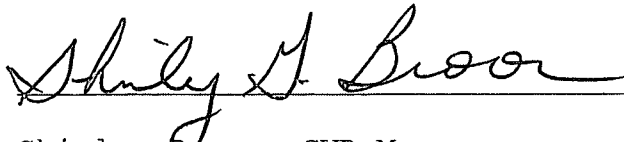
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C E R T I F I C A T E

I, Shirley Broom, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing 15 pages is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the proceedings of State of South Carolina vs. Richard Wells, as taken by me in the Court of Common Pleas for the Sixteenth Judicial Circuit on the 3rd day September, 2014, and provided by me this the 24th day of Oct., 2014.

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

A handwritten signature in cursive script, reading "Shirley D. Broom", written over a horizontal line.

Shirley Broom, CVR-M
Official Court Reporter,
Certified Verbatim Reporter, In and
for the State of South Carolina.

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DAVID HAMILTON
C.O.C. & S.S.
YORK COUNTY, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No.: 2014-CP-46-1548

The State Respondent,
v.
Richard Wells Appellant.

NOTICE OF APPEAL

Richard Wells appeals the order of the Honorable John C. Hayes, III dated April 30, 2014, which affirmed his conviction in magistrates court. Appellant received written notice of the order on September 12, 2014.


s/ Paul L. Reeves

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DAVIDSON
S.C. COUNTY, SC
YORK COUNTY, SC

Certificate of Service

I certify that I have served the Notice of Appeal upon the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on October 9, 2014, to the Counsel of Record, as listed below:

Stephanie Ann Wood, Esquire
Aaron J. Hayes, Esquire
Sixteenth Circuit Solicitor's Office
1675 York Highway, Ste 1A
York, SC 29745-7495


Jennifer E. Roof

CERTIFICATE OF COUNSEL

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JUL 21 2015

SC Court of Appeals

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

The undersigned further certifies that the Record on Appeal complies with the Order of the South Carolina Supreme Court, dated April 15, 2014, RE: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, Appellate Case No. 2013-002681.



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June 30, 2015



July 21, 2015

RECEIVED
JUL 21 2015
SC Court of Appeals

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

RE: State of South Carolina vs. Richard Alan Wells
Appellate Case No.: 2014-002312

Dear Ms. Kitchings:

Enclosed for filing are the original (unbound) and fourteen (14) copies of both the Final Brief of Appellant and Record on Appeal along with the Certificate of Service of the Final Brief in the above referenced case.

By copy of this letter, I am serving Mr. Blich with a copy of the Final Brief.

Sincerely,


Paul L. Reeves
Attorney at Law

PLR:jer
Enclosures

cc: Williams M. Blich, Jr., Assistant Attorney General