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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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OCT 31 2014

SC Court of Appeals

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-002406

The State,

Appellant,

vs.

Shelby Jean Lorusso,

Respondent.

RECORD ON APPEAL

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**Video Recording of Incident Site to be Transported Separately to the Court



YORK COUNTY GOVERNMENT
Centralized DUI Court

STATE OF SOUTH CAROLINA

IN THE MAGISTRATE'S COURT

COUNTY OF YORK

RETURN TO NOTICE OF APPEAL

CASE NUMBER: 2013-CP-46-1390

STATE,

VS.

DEFENDANT,

Shelby Lorusso

Ticket: 62685GB

Charge: Driving Under the Influence, 1st offense

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2013 MAY 17 PM 2:02
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

The above action came before the Court on April 23, 2013 at 2:00 P.M. in a PreTrial Motion Hearing before the jury trial started. Assistant Solicitor Johanna Valenzuela was the prosecutor for the State and Deputy Matthew Palmer was a witness for the State. The defendant was represented by Attorney Christopher Wellborn and Sam Ludlam was called as an Expert Witness for the defense.

Testimony was taken from the arresting officer, Deputy Palmer, with the York County Sheriff's Office. The videotape of the Defendant's arrest and her performance of the field sobriety tests was played and reviewed by the court. The issue in this case is whether the arresting officer complied with the requirements of section 56-05-2953(A)(1)(a)(ii) of the South Carolina Code of Laws for 1876, as amended in the video recording of the sobriety test. The Defendant asserts that the arresting officer failed to comply with the statute. The State argues that the arresting officer substantially complied with the statute and that he acted in good faith in his efforts to comply. This court granted the Defendant's



YORK COUNTY GOVERNMENT
Centralized DUI Court

motion to dismiss based on the unpublished ruling by Judge Alford in the State of South Carolina vs. John Douglas Pittman case on July 26, 2012.

In the State vs. Pittman case, a person watching the recording could view the test performed by the driver suspect so that an assessment could be made as to how well the driver suspect performed the test. In the video, the Defendant is instructed to walk heel to toe directly toward the camera and directly back. In the State vs. Lorusso case, a person can only see the toe of each foot when the Defendant is walking towards the camera and the heel of each foot when the Defendant turns to walk back. At no time can a person watching the video observe any heel to toe touching or not touching. Based on these facts, testimony, and video this court felt compelled to grant the Defendant's motion for dismissal.

Please find enclosed documents, the tape, and a copy of Judge Alford's ruling.

If I can be of any further assistance, please do not hesitate to call.

Amber Haydel
DUI Clerk

A handwritten signature in dark ink, appearing to read "Clayburn Barnette, Jr.", written over a horizontal line.

CLAYBURN BARNETTE, JR.
MAGISTRATE
YORK COUNTY CENTRALIZED DUI COURT

May 13, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
State of South Carolina,)
Appellant,)
vs.)
Shelby Lorusso,)
Respondent.)

IN THE COURT OF COMMON PLEAS
CASE NO: 2013-CP-46-1390

ORDER DISMISSING APPEAL

FILED - RECEIVED
2013 SEP 20 AM 11:08
CLERK OF COURT
C.C.P. & GS
YORK COUNTY, SC

Appearance for Appellant: Johanna C. Valenzuela
Appearance for Respondent: Christopher A. Wellborn
Trial Judge: Honorable Clayburn Barnette, Jr., Magistrate

This matter came before this Court pursuant to an appeal taken by the State from a dismissal of the charge against the Respondent, Shelby Lorusso. This dismissal was entered by the trial judge, the Honorable Clayburn Barnette, Jr. on April 24, 2013. The State filed its appeal on May 3, 2013. The appeal was heard by this Court on August 27, 2013. After review of the State's appeal, the Return of Magistrate Barnette, the transcript of record from the proceedings below and argument of counsel I find the following:

FACTS

On December 15, 2012, the Respondent was stopped by Deputy Matthew Palmer of the York County Sheriff's Department. Deputy Palmer ultimately arrested the Respondent and charged her with driving under the influence of alcohol. This case was called for trial on April 23, 2013 before the Magistrate. At the time of the trial, the Respondent moved to have her charge dismissed, asserting that the arresting officer failed to comply with the mandatory video taping requirements of Section 56-5-2953(A)(1)(a)(ii) of the S.C. Code of Laws, as amended. After review of the video

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tape of the field sobriety tests and testimony from Deputy Palmer, the Magistrate sustained the Respondent's motion. This appeal followed.

During the hearing for this motion, Deputy Palmer testified that after stopping the Respondent, he directed her to step out of her car and submit to field sobriety tests, including, inter alia, the walk and turn test. Deputy Palmer testified that he asked the Respondent to take nine heel to toe steps in a straight line and that her heels should touch her toes on each step. He further testified that she was to turn back the opposite direction and take nine heel to toe steps on the same line with her heel again touching her toe with each step. Deputy Palmer testified that the Respondent "missed the majority of her steps" when she attempted to walk the first nine steps. He acknowledged the video tape did not show whether her heels actually touched her toes or not. After completing the turn, Deputy Palmer said she "missed the majority of her steps" when she walked back along the line. He also said that this was not visible on the video camera because of the way he had positioned the Respondent relative to the camera. Deputy Palmer stated that he choose which direction to have the Respondent walk and therefore what her position would be relative to the camera.

The Magistrate also reviewed the video tape of the field sobriety tests and found that, as Deputy Palmer testified, whether or not the Respondent's heels touched her toes was not visible on the video tape.

LEGAL ANALYSIS

1. The provisions of S.C. Code Section 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 video 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 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 test administered; and
- (iii) include the arrest of a person for a violation of Section 56-5-2930 or 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.

HISTORY: 1998 Act. No. 434, Section 9, eff. June 29, 1998; 200 Act. No. 390, Section 23-2003 Act. No. 61, Section 8, eff. August 19, 2003; 2008 Act. No. 201, Section 11, eff. February 10, 2009.

Since the 2009 Amendment to Section 56-5-2953(A), there has been no published, or unpublished, opinion by the South Carolina Supreme Court or Court of Appeals interpreting or applying the requirement that there be a video recording of "any field sobriety test administered." However, the Court of Appeals recently addressed this statute in the context of the mandatory recording requirement for Miranda warnings, see *State v. Henkel*, 746 S.E. 2d, 347 (2013).

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. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342 713 S.E. 2d 278, 282 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App. 2011). A Court should not attempt to divine the intent of the legislature when the statutory language of the state is clear and unambiguous. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. Spp 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, 342, 713 S.E. 2d 278, 282 (2011). *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 520 (Ct. App. 2011). Lastly, where, as here, the provisions of a statute are penal in nature, the statute must be strictly construed against the State and in favor of the Defendant. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E. 2d 278, 282 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App. 2011).

Arguably, one could say that the statutory language is ambiguous, because the statute does not specifically state or define what is required in the recording of field sobriety test. To the extent there is any ambiguity in the statute, this Court looks to any evidence of the legislature's intent in enacting the statute. Prior to the 2009 Amendment, all that was required by Section 56-5-2953(A)(1), (with respect to the recording of any field sobriety testing), was that the "conduct" of the suspect-driver be recorded at the incident site. Thus, in *Murphy v. State*, 392 S.C. 628, 709 S.E. 2d 685 (2011), under the former provisions of Section 56-5-2953 (A)(1), the video recording at the incident site in that case only showed the suspect-driver doing the "walk and turn test" from the knees or waistline upwards. Although the feet of the suspect-driver could not be seen during the test, which is an important part of the test, the Court of Appeals held that under the *former* statute the video recording requirements of Section 56-5-2953(A)(1)(a) had been complied with:

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's conduct. .

However, footnote number 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. Section 56-5-2953(A)(1)(a)(ii) (supp. 2010) ("The video recording at the incident site must...include any field sobriety test

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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 import of the above quote from *Murphy v. State* is that if the complete recording of a person *performance* if 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 General Assembly 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 v. State*, there would have been no need to amend the statute. It must be presumed that the General Assembly did not intent a futile or meaningless act by enacting the 2009 Amendment. *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). To put it plainly, there is no sense in conducting field sobriety tests if the finder of fact can not see the results of such test.

2. That the video recording provisions of S.C. Code Ann. Section 56-5-2953(a) are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 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 proceeding agency fails to comply with the mandatory video recording provisions of S.C. Code Ann. Section 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 (Ct. App 2001). In *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 SE. 2d 278 (2011), the South Carolina Supreme Court return to the *City of Rock*

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Hill v. Suchenski, decision and reiterated that the un-excused noncompliance with the S.C. Code Ann. Section 56-5-2953 mandates the dismissal of a DUI/DUAC charge:

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 the 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 a ground for dismissal of any charge made pursuant to Section 56-5-2930....if (certain exceptions are met).). The term "dismissal" is significant as it explicitly 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*.

Likewise, the decisions of the South Carolina Court of Appeals have been consistent with *City of Rock Hill v. Suchenski*.¹

3. In the present case the State failed to comply with the videotaping requirements in regard to the "walk and turn test". The Respondent was asked to take several steps by lining up the heel of the front foot against the toe of the trailing foot. The Respondent was then required to turn around and walk in the opposite direction in the same manner. Although the video camera was

¹ See *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516 (Ct. App. 2011) (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 that second machine in the same room but failed to activate the videotape for that second machine; 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); *Murphy 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 the evidence).

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recording during the Respondent's performance of this test, it was positioned in such a manner that the Respondent's heels were not visible as they touched or did not touch her toes. Therefore, the Respondent's performance, an important part of the test, was not video taped.

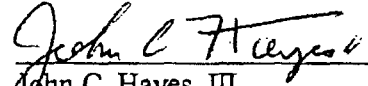
The State has argued that compliance with the statute should be excused in this case because the actions of the arresting officer in failing to record the field sobriety test was not intentional or in bad faith. Whether an officer acts in good faith, or if any omission in recordings is unintentional, does not excuse noncompliance under S.C. Code Ann. Section 56-5-2953. The General Assembly has provided for exceptions for noncompliance under Section 56-5-2953(B), but none have been invoked by the State in this case. See, *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007) (charge of DUAC was dismissed where arresting officer was unaware that his recording tape had run out, and failure to record as neither intentional or done in bad faith).

In the present case the arresting officer did not properly video tape the Respondent being given the walk and turn field sobriety as required by Section 56-5-2953(A)(1)(a)(ii). The recording requirements of Section 56-5-2953 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). The only remedy for noncompliance with the video recording requirements of Section 56-5-2953 is dismissal of a case. *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). Admittedly, the sanction of dismissal is severe, but as the South Carolina Supreme Court observed in *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011), the Legislature has clearly intended strict compliance with the provision of Section 56-5-2953 and, in turn, promulgated a severe sanction of dismissal for noncompliance.

John

IT IS THEREFORE ORDERED, that based upon above stated findings of fact and conclusions of law, the Court hereby dismisses the appeal of the State in South Carolina v. Shelby Lorusso, 2013-GS-46-1390.

AND IT IS SO ORDERED.


 John C. Hayes, III
 Chief Administrative Judge #8
 Sixteenth Judicial Circuit

York, South Carolina
 September 17, 2013

STATE OF SOUTH CAROLINA

COUNTY OF YORK

State of South Carolina,

Appellant,

vs.

Shelby Jean Lorusso,

Respondent.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C.A. No.: 2013-CP-46-1390

ORDER

2013 OCT 11 AM 8:20
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 C.C.P. & GS
 YORK COUNTY, SC

The Court issued an Order in this Appeal from Magistrate's Court on September 17, 2013. The State has timely filed a Rule 59(c) SCRPC Motion to Reconsider.

The gist of the State's motion to reconsider is that the Court did not specifically address all of its grounds for reversal of the ruling of the Magistrate Judge.

The Court has reviewed the September 17, 2013 Order and the grounds the State asserts need to be specifically addressed. The Court finds its analysis of the issue on appeal was thorough and viewed through the lens of the applicable law, § 56-5-2953, South Carolina Code of Laws, 1976, as amended.

The Code did not have to analyze any issue relative to an Order of Judge Lee S. Alford in The State v. John Douglas Pittman.

Here, a video was produced and the Magistrate had it to review. This is not a § 56-5-2953(B) totality of the circumstances issue. Here, the issue was the content, not the absence, of a video tape and its compliance with § 56-5-2953(A)(1).

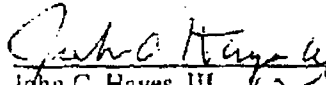
There is no authority cited regarding the State's fifth ground for reconsideration. The issue on appeal is from a ruling of law, not of a finding of fact.

2013/10/11

The State argues that the Magistrate's ruling and thus the Court's upholding of same creates an "absurd" result and that compliance with the statutory scheme is "impossible" and not physically possible." These latter assertions are just wrong.

The State's Motion to Alter/Amend is DENIED.

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge

October 7th, 2013
York, South Carolina

2013-CP-416-1390

STATE OF SOUTH CAROLINA IN THE COMMON PLEAS COURT

COUNTY OF YORK 2013 MAY -3 10:37 TICKET NUMBER 62685GB

STATE OF SOUTH CAROLINA

-V-

Shelby Lorusso,

Respondent.

NOTICE OF APPEAL

The State of South Carolina in the Sixteenth Judicial Circuit, by and through Assistant Solicitor Johanna Valenzuela, appeals the ruling of York County Magistrate Judge Clayburn Barnette dismissing the Driving Under the Influence charge, ticket 62685GB, against Ms. Shelby Lorusso, represented by Chris Wellborn. The ruling was made by Judge Barnette on April 24, 2013.

The appeal is made on the following grounds:

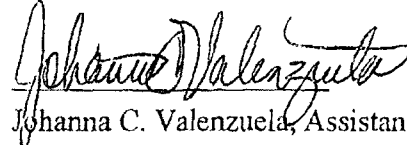
1. The Magistrate Court erred in interpreting S.C. Code Ann. Section 56-5-2953(A)(1)(a)(ii) as requiring the DUI charge to be dismissed on the basis that one of the indicators on the walk and turn test—whether the defendant's toe was touching her heel at different points in the test—was not visible on the roadside video; where there was sworn testimony that regardless of the number of times a defendant fails to touch her toe to her heel, she has only missed one indicator on the field sobriety test; where sworn testimony from the defense's expert witness, the deputy, and a review of the roadside video (State exhibit) shows that every other indicator on that test was on video; and where no part of the defendant's body was ever off-camera.
2. The Magistrate Court erred in treating unpublished circuit court and magistrate court decisions from other cases as binding on its interpretation of the statute.
3. The Magistrate Court erred, even if it treated unpublished circuit court and magistrate court decisions from other cases as persuasive rather than binding, when it misapplied the legal holding of those cases to this case.
4. Further, even if the defendant's toes and heels not being visible on video during the field sobriety test was held to violate § 56-5-2953(A)(1)(a)(ii), under the totality of circumstances analysis pursuant to § 56-5-2953(B), the failure to record the defendant's toes and heels is excused.

5. Finally, any error by the State goes to the weight and not the admissibility of the evidence, and thus dismissal of the case was erroneous.

DATED this 3d day of May, 2013.

York, South Carolina

Respectfully Submitted,



Johanna C. Valenzuela, Assistant Solicitor

16th Judicial Circuit, York

1070 Heckle Boulevard, Ste. 207

Rock Hill, South Carolina

(803) 909-7582

Attorney for Appellant

Other Counsel of Record:

Chris Wellborn, Esq.

Post Office Box 10191

Rock Hill, SC 29731

(803) 366-1065

Attorney for Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
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 STATE OF SOUTH CAROLINA,)
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 -v-)
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 Shelby Lorusso,)
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)
 Respondent.)

IN THE COMMON PLEAS COURT

TICKET NUMBER 62685GB

CERTIFICATE OF SERVICE

I certify that I have served the Notice of Appeal on Shelby Lorusso by depositing a copy of it in the United States Mail, postage prepaid, on May 3, 2013 addressed to his attorney of record, Chris Wellborn, Post Office Box 10191, Rock Hill, South Carolina, 29731.

York, South Carolina
 May 3, 2013


 Johanna C. Valenzuela
 Assistant Solicitor
 1070 Heckle Boulevard, Ste. 207
 Rock Hill, South Carolina
 (803) 909-7582

2013 MAY -3 AM 10:33
 Reg. D. Clerk

FILED
 2013 MAY -3 AM 10:24
 REG. D. CLERK

STATE OF SOUTH CAROLINA, IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

2013 OCT -4 PM 2:31

SIXTEENTH JUDICIAL CIRCUIT

State of South Carolina,

Case No. 2013-CP-46-1390

Appellant,

vs.

**MOTION TO ALTER/AMEND
AND MEMORANDUM OF LAW IN SUPPORT**

Shelby Jean Lorusso,

(Oral Argument Requested)

Respondent.

**TO: CHRISTOPHER A. WELLBORN, ESQUIRE, ATTORNEY FOR THE
RESPONDENT, AND TO THE RESPONDENT ABOVE-NAMED:**

YOU WILL PLEASE TAKE NOTICE that the State of South Carolina intends to move, and does hereby so move, for an order altering and/or amending the Court's Order Dismissing Appeal (signed September 17, 2013 and filed September 20, 2013 (attached hereto as **Exhibit A**)). This Motion is made pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, and is based upon the facts and law as further set forth below in the incorporated Memorandum.

The State requests that the Court enter an order reversing the Magistrate and remanding this case for trial. In the alternative, the State requests an Order addressing each of the State's contentions on this appeal.

PROCEDURAL HISTORY

This case originated as a charge of Driving Under the Influence, brought in the York County Magistrate's Centralized DUI Court and proceeding under Ticket No. 62685GB. Upon the Defendant's Motion to Dismiss, the Magistrate dismissed the charge of DUI, holding that the State failed to comply with the provisions of S.C. CODE ANN. § 56-5-2953, as amended. The State

appealed the Magistrate's dismissal, and this Court heard oral argument on the appeal on August 27, 2013. Via Order dated September 17, 2013, this Court issued an Order dismissing the State's appeal and affirming the Magistrate's ruling. The Court's Order of September 17, 2013 is the subject of this Motion.

CERTIFICATION OF TIMELINESS

A motion made under Rule 59(e) "shall be served not later than 10 days after receipt of written notice of the entry of the order." SCRCP 59(e). In this case, the written notice of the entry of this Order was received by former Assistant Solicitor (and current Assistant Attorney General) Johanna Valenzuela on September 24, 2013. The Sixteenth Circuit Solicitor's Office has not been served with a copy of the Order. However, and out of an abundance of caution, the State makes this Motion within 10 days after receipt of the Order by Ms. Valenzuela.

STANDARD OF REVIEW

"In a criminal appeal from the magistrate's court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by the appropriate exception." State v. Hoyle, 397 S.C. 622, 625, 725 S.E.2d 720, 721-22 (2012) (citing Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011)).

GROUND FOR THE MOTION AND PERTINENT AUTHORITY

1. The Order does not address the second ground for reversal as set forth by the Appellant in its Appeal from the Magistrate Court. Specifically, Appellant asserted: "The Magistrate Court erred in treating unpublished circuit court and magistrate court decisions from other cases as binding on its interpretation of the statute." Specifically, in his Return to the Notice of Appeal, the Magistrate stated that he granted the motion to dismiss "based on the unpublished ruling by Judge Alford in the State of South Carolina v. John Douglas

Pittman case on July 26, 2012.” (Return at pp. 1-2.) Presumably, this is a reference to the Order of Dismissal in State v. Pittman, Case No. 2012-GS-11-382 (heard July 26, 2012 and signed on August 20, 2012) (hereinafter “Pittman”).

The State contends that it was an error of law for the Magistrate to rely on Pittman, an unpublished circuit court order, as binding precedent. See SCACR 220 (stating that even Supreme Court and Court of Appeals opinions, when unpublished, have no precedential value). Therefore, the Magistrate’s order of dismissal should be reversed.

2. The Order does not address the third ground for reversal as set forth by the Appellant in its Appeal from the Magistrate Court. Specifically, Appellant asserted: “The Magistrate Court erred, even if it treated unpublished circuit court and magistrate court decisions from other cases as persuasive rather than binding, when it misapplied the legal holding of those cases to this case.”

As stated in Part 1, supra, the State contends that it was error for the Magistrate to treat Pittman as binding precedent. In the alternative, and to the extent that the Magistrate considered Pittman to be persuasive rather than binding, the State also asserts that the Magistrate incorrectly applied Pittman to the facts of the instant case. The Pittman defendant’s feet were not visible in that video. See Pittman, Order of Dismissal, p. 8. As further explained in Part 6, infra, the Respondent’s only contention in this case is that her heels were not visible on the video, because one foot obscured the other foot as she performed the test. Compare Pittman at p. 8 with Exhibit A at pp. 6-7. The State asserts that this factual distinction renders the Pittman rationale inapplicable to the facts of this case. Therefore, the Magistrate’s order of dismissal should be reversed.

3. Also in the alternative, and to the extent that Pittman is a correct statement of law, the State asserts that the Magistrate erred in disregarding the key holding of Pittman. That holding is as follows:

The requirement [embodied in § 56-5-2953] that any field sobriety test be recorded would necessarily mean that a person watching the recording would be able to *completely or substantially view the test* as it was performed by the driver-suspect, such that any person watching the recording could make *some assessment* as to how well the driver-suspect performed the test.

Pittman, at p. 6 (emphasis added). The Magistrate's disregard of this holding is a clearly erroneous determination of law and fact. There is no evidentiary support in the record that would allow for a finding that this walk-and-turn test was not "completely or substantially" recorded, such that a juror could not make "some assessment" as to how well the Respondent did on the test. Indeed, and as further set forth in Part 6, *infra*, Respondent's entire person is on camera during these field sobriety tests. There is no other reasonable inference to be gathered from the video in the record in this case. Therefore, the Pittman test has been satisfied and the Magistrate's order of dismissal should be reversed.

4. The Order does not address the fourth ground for reversal as set forth by the Appellant in her Appeal from the Magistrate Court. Specifically, Appellant asserted that "even if the defendant's toes and heels not being visible on video . . . is held to violate § 56-5-2953(A)(1)(a)(ii), under the totality of the circumstances analysis pursuant to § 56-5-2953(B), the failure to record the defendant's toes and heels is excused."

S.C. Code Ann. § 56-5-2953(B) states, in part, that "[n]othing in [§ 56-5-2953] prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances . . ." S.C. CODE ANN. § 56-5-2953(B) (Supp. 2011). In this case, should the Court find that § 56-5-2953(A) has been

violated—which the State does not concede—the State asserts that it is entitled to rely on the “totality of the circumstances” exception from Subsection (B). See City of Rock Hill v. Suchenski, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (noting that a Subsection (B) exception can mitigate a violation of Subsection (A)).

From the totality of the circumstances visible on the video in the record in this case, it is clear that the field sobriety testing was done on an active street. Therefore, the area to the left of the patrol car is roadway on which other vehicles may travel. Performing the walk-and-turn test straight towards the camera (which caused the Respondent’s feet to obscure each other) insures that the officer and the driver-suspect are shielded from oncoming traffic. If the walk-and-turn test was performed at a different angle to the camera, a suspect’s heel-to-toe touching might be visible, but the defendant would run the risk of walking into (or stumbling into) the flow of traffic. The State contends that the Legislature included the Subsection (B) exception for the “totality of the circumstances” to avoid this very result.

5. The Order does not address the final ground for reversal as set forth by the Appellant in her Appeal from the Magistrate Court. Specifically, Appellant asserted that “any error by the State goes to the weight and not the admissibility of the evidence, and thus dismissal of the case was erroneous.” In other words, it is the State’s contention that the trial court is not allowed to invade the province of the jury when it comes to charges of driving under the influence.

In this case, the trial court’s inquiry should stop when the record reveals that “any field sobriety tests administered” have been recorded by the in-car camera. After that, it is the jury’s job to determine what the video reveals about the Respondent’s state of

impairment. At trial, Respondent will be free to cross-examine the arresting officer on all aspects of the video that she feels may exculpate her.

6. Lastly, the Court's Order does not address the State's contention that its holding will "produce a result so plainly absurd that it could not have been intended by the General Assembly and would defeat the plain legislative intent of the statute." State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011) (citing Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (S.C. 2011)). Regardless of how a patrol car camera is positioned, all parts of a defendant's body will never be visible at all times. When a defendant moves, as required by most of the standard field sobriety tests, one of their body parts will, at different times, obscure another body part. As part of the walk-and-turn test, a defendant has to move her body and take steps. The fact that as she takes a step one part of her body will block another cannot be attributed to the State as a failure to comply with the provision of § 56-5-2953. The Court's holding in this Order appears on pages 6 and 7:

In the present case the State failed to comply with the videotaping requirements in regard to the "walk and turn test". The Respondent was asked to take several steps by lining up the heel of the front foot against the toe of the trailing foot. The Respondent was then required to turn around and walk in the opposite direction in the same manner. Although the video camera was recording during the Respondent's performance of this test, it was positioned in such a manner that the Respondent's heels were not visible as they touched or did not touch her toes. Therefore, the Respondent's performance, an important part of the test, was not video taped.

Nowhere in this holding (or in any of Respondent's arguments) is the finding that Respondent was off-camera at any point during the field sobriety tests. Rather, the sole basis for the holding is the simple fact that one foot obscured the other foot as the Respondent performed the walk-and-turn test. Such a holding creates a standard that

makes field sobriety testing impossible. That result is so plainly absurd that it could not have been intended by the General Assembly.

The statute simply requires that roadside videos must include “any field sobriety tests administered.” S.C. CODE ANN. 56-5-2953(A)(1)(a)(ii). The Court’s Order concedes that there is no binding appellate court precedent construing these words. (See Ex. A at p. 3.) However, the Court’s holding in this case is tantamount to a holding that the words “any field sobriety tests administered” actually means “all parts of a defendant’s body at all times.” The State respectfully asserts that there is no basis for this holding under South Carolina law, because such a standard is beyond the realm of what is physically possible. The roadside video in the record in this case is of exceptional quality, and it records all of the field sobriety tests that were administered to Respondent. The State asserts that it has complied with both the letter and spirit of § 56-5-2953, and therefore the holdings of City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) and Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 at n.4 (2011) are inapplicable to this case.

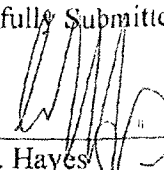
RELIEF REQUESTED

For the foregoing reasons, the State requests that the Court alter/amend its Order of September 17, 2013. The State contends that the Magistrate’s judgment of dismissal should be reversed, and the case remanded for trial. In the alternative, the State requests that the Court alter/amend its Order of September 17, 2013, to address all issues raised by the State in this matter.

The State respectfully requests that the Court hear oral argument on this Motion.

Signature Block on Following Page

Respectfully Submitted,



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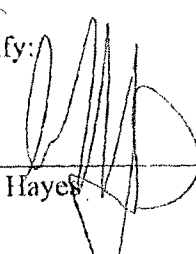
Rock Hill, South Carolina

October 4, 2013

CERTIFICATION OF COUNSEL PURSUANT TO RULE 11

The State of South Carolina, by and through its counsel Aaron J. Hayes, Assistant Solicitor, hereby certifies that consultation with opposing counsel on this Motion would serve no useful purpose.

I so certify:



Aaron J. Hayes

FILED-RECEIVED
2013 OCT -4 PM 2:31
CLERK OF COURT
ROCK HILL, SC

STATE OF SOUTH CAROLINA,)
) IN THE YORK COUNTY DUI COURT
 COUNTY OF YORK)

STATE OF SOUTH CAROLINA,)

-VS-)

) CASE NO. 62685GB

SHELBY LORUSSO,)

)
 DEFENDANT.)

TRANSCRIPT OF PROCEEDINGS
 ROCK HILL, SOUTH CAROLINA
 APRIL 23, 2013

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

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PROCEEDINGS

BEFORE: THE HONORABLE CLAYBURN S. BARNETTE, JR.

2:08 P.M.

THE COURT: Okay. We're on the record. And we are -- It seems like we have got motions here concerning Case No. -- what is it: G2685? No, 62685GEB?

MS. VALENZUELA: Yes, Your Honor.

THE COURT: State versus Shelby Lorusso, represented by Mr. Wellborn. Today being April 23rd. It is 2:08. The Solicitor's Office is represented by Ms. Valenzuela.

MS. VALENZUELA: And Mr. Newkirk is also here, Your Honor.

THE COURT: Okay. What kind of pretrial motions do we have?

MR. WELLBORN: I believe the State has some -- They have four that --

THE COURT: How would we want to address this? Do we want to go --

MR. WELLBORN: Since Your Honor is speaking to me, I'll be glad to address that --

THE COURT: You go ahead.

MR. WELLBORN: -- first, and then, of course, obviously, Ms. Valenzuela will, I'm sure, have her

Page 2

APPEARANCES: For the State -
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point of view, as well. But, since the State is the proponent of any evidence initially that comes into the trial, I think, procedurally, the State should go first; but, if the State wants to go after my motions, that doesn't offend me, either. I'm just giving them the opportunity to go first. I think that --

THE COURT: I didn't even know the State had motions.

MR. WELLBORN: I don't know, if you've been handed a copy of the State's --

THE COURT: Yeah, --

MR. WELLBORN: -- motions or not.

THE COURT: -- that was just handed to me.

MR. WELLBORN: Yes.

MS. VALENZUELA: Then, Your Honor, I'll go ahead and go first.

THE COURT: You want to go first?

MS. VALENZUELA: Yes, I think just to get things moving along, I think we can go ahead and just do that. So I've handed up -- And actually, it says -- I just realized this; it says "State's Witness List" on there, but it's still motions in limine.

THE COURT: Okay.

1 But that said, --
 2 THE COURT: Do you have any problem with that?
 3 MS. VALENZUELA: Would we just reconvene
 4 after he drops his daughter off at home?
 5 MR. WELLBORN: No, no, I'm actually -- I have
 6 to be -- It's not a drop-off-at-home scenario.
 7 It's a stay with a nine-year-old child. There's
 8 nowhere, at home, to drop her off.
 9 THE COURT: Hold on just a minute. We'll work
 10 something out, I'm sure.
 11 MS. VALENZUELA: I -- Your Honor, --
 12 THE COURT: Are we still set up for 9:00
 13 o'clock in the morning?
 14 MS. VALENZUELA: We're set up for 9:00 o'clock
 15 in the morning. Mr. Wellborn had indicated that he
 16 has an 8:00 o'clock admin hearing tomorrow
 17 morning.
 18 THE COURT: Is that true?
 19 MR. WELLBORN: I do. But, I may
 20 still be able to contact a hearing officer and
 21 perhaps get someone else to cover that. So I could
 22 come in early tomorrow morning.
 23 MS. VALENZUELA: Which is something I
 24 pointed out that he could've done last week, so
 25 that that would all be taken care of, instead of

1 creating a delay. There is -- I don't think that
 2 there's a problem with an incentive for both of us
 3 --
 4 THE COURT: It's not.
 5 MS. VALENZUELA: -- to not talk about, and not
 6 give lengthy answers where a quick sentence would
 7 do, and not go into completely irrelevant things.
 8 I think it's good for both to have an incentive to
 9 get things done quickly, because we know that if we
 10 can't, that we'll have to come back and be before
 11 you until we get that done. I don't think that's
 12 that's a problem.
 13 THE COURT: So, now, right now you're asking
 14 that at fifteen to seven we stop.
 15 MR. WELLBORN: That would be my request. And
 16 just to -- That gives us really three hours and a
 17 half to do my Motions. At least, my side of the
 18 Motions should be fairly quick.
 19 MS. VALENZUELA: Your Honor, there's no
 20 reason you even have to rule on it, at this point.
 21 We can go ahead and if it looks like it's getting
 22 close to 6:30, we can then address this issue at
 23 that point.
 24 THE COURT: Why not? Let's just do that.
 25 Let's go to 6:30.

1 MR. WELLBORN: That's fine.
 2 THE COURT: That gives is 15 minutes --
 3 MR. WELLBORN: Yes, that's fine.
 4 THE COURT: -- to shut it down, --
 5 MR. WELLBORN: Yes.
 6 THE COURT: -- if we got a problem and we're
 7 going to have to have some extra time. My question
 8 to both of you is this: If you're going to get the
 9 admin hearing taken care of, we're going to have
 10 the jury here in the morning at 9:00 o'clock, and
 11 they're going to be ready to go. It's going to be
 12 up to us to be sure that all this is taken care of.
 13 MR. WELLBORN: Right.
 14 THE COURT: If we have to shut down at 6:30
 15 tonight -- I wasn't aware of this, and I can work
 16 with anybody -- but, we still have a jury coming
 17 in, in the morning at 9:00 o'clock.
 18 MR. WELLBORN: I think most of the motions
 19 that -- absent this first one, I'm hopeful, should
 20 go fairly quickly.
 21 THE COURT: Okay.
 22 MR. WELLBORN: And honestly, with the
 23 exception of the testimony that will be required
 24 for this first one, this first one really should go
 25 very quickly, because, this is a carbon copy of

1 motions where all the arguments were made exactly
 2 two weeks ago in front of Judge Wood in Fort Mill.
 3 And so, we've been -- both attorneys have been down
 4 this same road before. And again, I'm hopeful, but
 5 I can't guarantee how things might go. So, but I
 6 --
 7 THE COURT: Okay. Let's go ahead and get
 8 started, and you tell me what your motion is.
 9 MR. WELLBORN: First motion is a Motion to
 10 Dismiss the charge against my client for a
 11 violation of the video recording statute,
 12 specifically 56-5-2953A of the South Carolina Code.
 13 I believe this is going to require Your Honor
 14 to look at the videotape. Ms. Valenzuela may wish
 15 to call the deputy to testify for purposes of this
 16 Motion. I certainly will call Mr. Ludlam to
 17 testify for the purposes of this Motion.
 18 But, specifically, what we're talking about is
 19 there were three field sobriety tests that were
 20 given to my client. The Statute requires that the
 21 video -- that the field sobriety test be recorded,
 22 and that means seen and not just heard; it means
 23 both, it means heard and seen.
 24 The first test that was given was the
 25 horizontal gaze nystagmus test, as I think Your

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1 Honor will be able to discern, from looking at the
2 videotape during the -- from the perspective of the
3 camera to my client's face, you can't see her eyes
4 at all. But, to the extent you can see anything,
5 you can see some kind of a marking where presumably
6 there is a left eye, but you can't see the right
7 side of her face whatsoever.

8 I'm going to hand you up, Your Honor, some
9 Orders from Circuit Court, one of them is Judge
10 Alford's Order, Judge Couch's Order and Judge Mark
11 Hayes, all Circuit Court Orders on this very issue.
12 And I think Ms. Valenzuela has previously been
13 given these, but I have copies of her, if she
14 doesn't have them with her.

15 MS. VALENZUELA: I'll take some copies.

16 MR. WELLBORN: Okay.

17 MS. VALENZUELA: Thank you.

18 MR. WELLBORN: And a second test was also
19 given to my client, and that was a horizontal --
20 excuse me -- a walk-and-turn test. In the walk-
21 and-turn test, there is a significant portion of
22 the test where you cannot see whether or not my
23 client's feet are or are not touching during the
24 nine steps forward or nine steps back, which, of
25 course, is the whole subject of the test. And so

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1 Circuit Court judges have ordered. But, before we
2 get there, I think it would be most appropriate for
3 you to be conversant of the facts, so that you can
4 see the videotape.

5 MS. VALENZUELA: Your Honor, the State calls
6 Deputy Palmer to the stand.

7 MR. WELLBORN: Your Honor, before we put the
8 deputy on the stand, what I would ask is that we
9 play the -- Since this is my Motion, I would
10 ask that we play the videotape; and then, after you
11 play the videotape, then there would perhaps be a
12 response from the State, in which case --

13 MS. VALENZUELA: I'm sorry. I thought he said
14 he wanted the State to put the video in. I
15 misunderstood him.

16 MR. WELLBORN: Well, I'd like the videotape to
17 be played. If the State wants to do that, that's
18 great; if not, I have my laptop computer and we can
19 try it that way. But it's probably easiest to do
20 it on the big screen, so Your Honor can see what's
21 going on.

22 THE COURT: Let's try to get it on the big
23 screen. Where's the tape?

24 MS. VALENZUELA: Mr. Wellborn?

25 THE COURT: You don't have the tape?

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1 that test has not been recorded, either, for
2 purposes of the statute. And here are the Orders
3 -- here's the Pittman case from July of last year
4 from Judge Alford. That was his Order dismissing a
5 DUI for the same reason, and then we have two cases
6 from June, one from Circuit Judge Mark Hayes, and
7 one from Circuit Judge Roger Couch, all addressing
8 this particular issue.

9 I can argue, to some extent, the law now, but
10 what I might suggest, Your Honor, is it may be very
11 easy just to quickly look at the videotape and that
12 way you -- the videotape kind of speaks for itself.
13 You can see that you can't see the right side of my
14 client's face or her face really at all, other than
15 a blur; and you can see what's happening with the
16 walk-and-turn -- more importantly, what's not
17 happening with it. We can take the testimony and
18 then we can go into these Orders and the currently
19 existing law from our Supreme Court and our Circuit
20 Court judges' interpretation of that, because
21 that's going to be the complex part.

22 I'm clearly going to be asking that you rule
23 in accordance with what the Circuit Court has
24 decided. I highly suspect Ms. Valenzuela will be
25 asking that you rule in opposition to what the

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1 MS. VALENZUELA: If you want me to put it in, I
2 get to pull my deputy in, and I actually get to put
3 it in --

4 MR. WELLBORN: Let's just do it that way.

5 MS. VALENZUELA: Okay. Well, that's what I
6 was confused about.

7 MR. WELLBORN: Let's just do it that way.
8 That's fine.

9 MS. VALENZUELA: Deputy Palmer --

10 THE COURT: Deputy Palmer.

11 MS. VALENZUELA: -- please come to the stand.
12 Whereupon --

13 DEPUTY MATTHEW BRIGGS PALMER

14 was called as a witness and first being first duly
15 sworn, was examined and testified as follows:

16 DIRECT EXAMINATION: (By Ms. Valenzuela)

17 Q Deputy Palmer, will you state your full name for the
18 record?

19 A Matthew Briggs Palmer.

20 Q Thank you, Deputy Palmer. And which agency do
21 you work with?

22 A York County Sheriff's Office.

23 Q And so, I'm going to come back to my portion of the
24 proffer, and we'll get into your testimony a little
25 bit further. For this point, we're just going to

1 go into the video. Okay?

2 A All right.

3 Q I'm handing you what's going to be labeled State's

4 Exhibit 1. Do you recognize it?

5 A Yes, I do.

6 Q And what is it?

7 A That is a copy of my in-car video.

8 Q Okay. And how do you know that that disk contains

9 a copy of your in-car video?

10 A Because I requested it, and I watched it at your

11 office on the 17th.

12 Q Okay. And how do you know the specific date?

13 A The specific date that I watched it?

14 Q Yes.

15 A Okay. Because, it's written on the CD.

16 Q Okay. So you put your initials and the date on

17 that video?

18 A Yes, I did.

19 Q Okay. And does this videotape fairly and

20 accurately represent the events as they happened

21 that night?

22 A Yes, it does.

23 Q Okay. In Mrs. Lorusso's DUI case?

24 A Yes, it does.

25 MS. VALENZUELA: Your Honor, the State now

1 moves to admit State's Exhibit into evidence.

2 MR. WELLBORN: And I have no objection, as

3 long as we're admitting it just for purposes

4 of pretrial, at this stage.

5 THE COURT: That's correct.

6 MS. VALENZUELA: Yes. I have --

7 THE COURT: That's correct.

8 MS. VALENZUELA: -- I'm not --

9 THE COURT: Pretrial only.

10 MR. WELLBORN: Thank you, Your Honor.

11 Whereupon - State's Exhibit No. 1 marked for

12 identification.

13 Whereupon - Video is played.

14 MR. WELLBORN: Can we pause it while we're

15 getting this sorted out, because that way the

16 judge can watch what's going on, and be able

17 to see what's actually happening.

18 (Video continues)

19 MR. WELLBORN: I think, at this point, if you

20 can see, you should be able to see, or not

21 see, any detail in a face, eyes, that sort of

22 thing. But, go ahead and -- I would suggest

23 you go ahead and play it.

24 MS. VALENZUELA: Are those capable of being

25 seen in a full image, just in case that's

1 affecting -- Are you only challenging the HGN

2 and the walk-and-turn?

3 MR. WELLBORN: That is correct.

4 MS. VALENZUELA: I think we can stop. All you

5 wanted me to do is get the video in?

6 MR. WELLBORN: That's correct. So basically,

7 I'm prepared -- At this point, I'll present

8 one witness; and then I'm prepared to argue.

9 I don't know if the State wants to get

10 anything out of Deputy Palmer while he's up

11 there or not. That's up to them.

12 MS. VALENZUELA: I'll do it in the regular

13 fashion; call him back up, since he's --

14 THE COURT: Be fine.

15 MS. VALENZUELA: -- put in the video. So --

16 MR. WELLBORN: Well, okay, that's fine. I

17 mean, obviously, when we say "in the regular

18 fashion," it would be inappropriate to call a

19 witness after I've made my motion and started

20 arguing law. So, I guess what I'll do is I'll

21 call Mr. Ludlam, and then the State can call

22 Deputy Palmer in response.

23 MS. VALENZUELA: That is what I meant.

24 MR. WELLBORN: Okay. All right.

25 THE COURT: Deputy Palmer, would can step

1 down. Remember you're under oath.

2 (WHEREUPON, the witness was excused.)

3 MR. WELLBORN: Call Sam Ludlam.

4 THE COURT: Mr. Ludlam, would you identify

5 yourself?

6 THE WITNESS: Sam Ludlam.

7 Whereupon -

8 SAM LUDLAM

9 was called as a witness and being first duly sworn, was

10 examined and testified as follows:

11 DIRECT EXAMINATION: (By Mr. Wellborn)

12 Q Sam, could you spell your last name, for the

13 record, please?

14 A L-U-D-L-A-M.

15 Q Thank you. Sam, have you been qualified as an

16 expert in field sobriety testing by any courts in

17 York County? And let's start with circuit court.

18 A I have, both before Judge Hayes and Dr. Alford.

19 Q As an expert in standardized field sobriety tests.

20 A Yes, sir.

21 Q And have you been qualified as an expert in

22 standardized field sobriety testing by any

23 magistrate's courts or municipal courts in York

24 County?

25 A I have.

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1 Q Can you tell us who?
 2 A Fort Mill, Judge Woods; Clover and here.
 3 Q All right. And when you say "here," you mean Judge
 4 Davenport?
 5 A Judge Davenport.
 6 MR. WELLBORN: Okay. I would offer Mr.
 7 Ludlam as an expert in the area of
 8 standardized field sobriety testing, unless
 9 the State has any objections; then we'll go
 10 into your qualifications, as well.
 11 MS. VALENZUELA: Your Honor, I haven't heard
 12 any qualifications, other than just that he's
 13 been admitted in the past; and so, I would ask
 14 for a little bit more information.
 15 MR. WELLBORN: That's fine.
 16 BY MR. WELLBORN: (Continuing Direct)
 17 Q Have you taken any specific courses related to
 18 instructing standardized field sobriety testing,
 19 and can you tell us what those courses are?
 20 A I started as a practitioner with standardized field
 21 sobriety training through NHTSA. And then --
 22 Q What is NHTSA?
 23 A National Highway Traffic Safety Association.
 24 Q And so we're clear, the standardized field sobriety
 25 tests that we're talking about, these are tests

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1 that are standardized by the National Highway
 2 Traffic Safety Administration?
 3 A That is correct.
 4 Q And "standardized" means they're supposed to be
 5 instructed and given and scored the same way every
 6 time. Correct?
 7 MS. VALENZUELA: Your Honor, which expert is
 8 testifying before you right now? Is it Mr.
 9 Wellborn or is it the expert who's actually on
 10 the stand?
 11 THE COURT: You're leading him just a little
 12 bit, Mr. Wellborn.
 13 BY MR. WELLBORN: (Continuing Direct)
 14 Q Does "standardization" mean they are supposed to be
 15 instructed the same way every time?
 16 MS. VALENZUELA: Now, Your Honor, it -- Never
 17 mind.
 18 BY THE WITNESS: (Continuing Direct)
 19 A That is correct.
 20 Q Does "standardization" mean that they're supposed
 21 to be scored the way -- the same way --
 22 MS. VALENZUELA: Your Honor, objection. I'm
 23 sorry. And it might just be that I have more
 24 practice doing direct than Mr. Wellborn. But
 25 the usual fashion of an open question is,

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1 "What does this terminology mean?" And then
 2 the expert can explain however he wants to,
 3 instead of, "This is the answer that I am
 4 looking for, Mr. Ludlam. Would you please
 5 give me the answer that I just gave you?"
 6 So, I would object to leading.
 7 BY MR. WELLBORN: (Continuing Direct)
 8 Q What does the term "standardization" mean?
 9 A It's to be done the exact same way consistently.
 10 Q And does the term "standardization" apply to every
 11 part of the test, according to NHTSA's rules?
 12 A According to NHTSA, that if any elements change,
 13 the entire test loses its validity.
 14 MR. WELLBORN: I think the Court can take
 15 judicial notice of what the term "standards"
 16 mean and "standardization." I'm assuming the
 17 Court can take judicial notice of that,
 18 without objection.
 19 MS. VALENZUELA: Your Honor, --
 20 MR. WELLBORN: Perhaps not.
 21 MS. VALENZUELA: -- the Defendant (sic) hasn't
 22 been qualified as an expert yet, and I thought
 23 -- I thought what we were doing there was
 24 going into some more of his training and
 25 laying down the foundation so that Mr.

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1 Wellborn could move to qualify him as an
 2 expert. And so I'm a little confused, because
 3 it seems like what he's asking is he's going
 4 ahead and asking for, you know, the part of
 5 the testimony. I think, if we could just go
 6 back and focus on the part where he's
 7 qualifying for an expert -- as an expert, and
 8 go into that portion of the training, not what
 9 all of that means, for the Court, which I
 10 think is what we'll go into after he's
 11 qualified as an expert.
 12 MR. WELLBORN: I will certainly make every
 13 endeavor to do that.
 14 BY MR. WELLBORN: (Continuing Direct)
 15 Q Mr. Ludlam, how many hours were you trained in the
 16 basic standardized field sobriety testing course
 17 that you alluded to earlier, before the first
 18 objection?
 19 A The 24-hour training course.
 20 Q Okay. After that 24-hour training course that you
 21 got in standardized field sobriety testing -- And,
 22 before we even go to that, in that training course,
 23 what did they teach you?
 24 A How to conduct and do three standardized field
 25 sobriety tests.

1 Q Did they teach you what the standards were?
 2 A They did.
 3 Q Okay. After you took that training, did you take
 4 any advanced training regarding the standards for
 5 the standardized field sobriety tests?
 6 A May of 2011, and I have a certificate. My
 7 certificate's in the book on the pew there, if
 8 you'd like to have it. Graduated from IDS
 9 Training, Atlanta, Georgia -- or Alpharetta,
 10 Georgia -- and was qualified as an instructor for
 11 standardized field sobriety training.
 12 Q Okay. What is "IDS"?
 13 A Internal Defense System.
 14 Q Okay. Well, let's try it this way. Was the course
 15 that you -- the instructor's course that you took
 16 -- By the way, did you pass the course?
 17 A Oh, yes, I did.
 18 Q The instructor's course that you took and passed,
 19 what did that qualify you to do, according to the
 20 National Highway Traffic Safety Administration?
 21 A To be able to teach standardized field sobriety
 22 training to law enforcement officers nationwide.
 23 Q Now, have you ever done that?
 24 A No, not yet.
 25 Q If you were asked to do that, would you do it?

1 A Yes, I would.
 2 Q So you are qualified as an instructor in
 3 standardized field sobriety testing to teach people
 4 what the standards are, but you've also gone
 5 through the training to learn what they are
 6 yourself. Correct?
 7 A That is correct.
 8 MR. WELLBORN: Again, I would offer Mr.
 9 Ludlam as an expert in the area of
 10 standardized field sobriety testing,
 11 especially given in light of --
 12 MS. VALENZUELA: No objection.
 13 MR. WELLBORN: Thank you.
 14 BY MR. WELLBORN: (Continuing Direct)
 15 Q Have you had a chance, today and previously, to
 16 look at this videotape?
 17 A Yes.
 18 Q What I'd like to do is I'd like to walk you through
 19 the two tests that are at issue, the horizontal
 20 gaze nystagmus test and the walk-and-turn test;
 21 and I'd like to do those in order, if you don't
 22 mind.
 23 A Be fine.
 24 Q Okay. When you are doing -- or an officer is
 25 giving a horizontal gaze nystagmus test, tell me

1 what the standards are, what the officer is
 2 supposed to do and he is supposed to look for.
 3 Starting with the beginning, what is the officer
 4 supposed to do?
 5 A Resting nystagmus first.
 6 Q Okay. What is "resting nystagmus"?
 7 A "Resting nystagmus" is when you actually hold your
 8 stimuli at one particular place and watch the
 9 pupils of both eyes without any movement taking
 10 place, whatsoever.
 11 Q Okay. So -- And the term "nystagmus" means what?
 12 A Involuntary jerking of the eye.
 13 Q All right. And so, in the "resting nystagmus" part
 14 first, the officer is not supposed to move his
 15 finger or pen, or whatever is it, at all. Is that
 16 correct?
 17 A That's correct.
 18 Q And he's supposed to look into the eyes and
 19 determine whether, in those eyes, we can see any
 20 resting nystagmus.
 21 A That is correct.
 22 Q And if the officer sees resting nystagmus, what is
 23 he required to do, or she required to do, according
 24 to the standards?
 25 A At that particular time, there's something wrong.

1 Q Wrong with what? With the person or --
 2 A Well, I mean, they're --
 3 MS. VALENZUELA: Mr. Wellborn -- Your
 4 Honor, clearly the --
 5 THE WITNESS: (Continuing Direct)
 6 A There could be a medical issue other than just
 7 alcohol or anything. There could be an issue
 8 there.
 9 MS. VALENZUELA: Your Honor, the witness isn't
 10 actually allowed to keep talking over me, if
 11 I've stood up to make an objection. I think
 12 he testified that he has plenty of experience
 13 in a courtroom, so he knows that.
 14 When the witness is struggling to come up with
 15 an answer and Mr. Wellborn gives him "a
 16 person," something like that, that is
 17 specifically leading him. And the whole point
 18 is to see whether he can testify on his own
 19 knowledge in this situation. And so,
 20 although, at this point, we've surpassed,
 21 because the witness continued talking over me,
 22 I would ask the Court and -- to advise Mr.
 23 Wellborn that he's not actually supposed to
 24 lead the witness by providing him an answer
 25 when he can't come up with it himself.

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1 MR. WELLBORN: Well, I believe my comment was
2 "wrong with what," which kind of left the
3 whole panoply of human experience wide open.
4 And I was hoping he might fill in the gap,
5 which he did. But That said, --

6 BY MR. WELLBORN: (Continuing Direct)

7 Q So, if an officer notices resting nystagmus, that
8 tells an officer that he is supposed to go forward
9 with the testing or not go forward with the
10 testing, those being two options. And I'm not
11 going to suggest either one to you. I just want to
12 know what the answer is.

13 A Not go forward with testing.

14 Q Thank you. Now, for anybody looking at this test,
15 reviewing it to determine whether an officer was
16 able to make that determination, they'd have to be
17 able to see the witness -- or the person being
18 tested to see their eyes. Right?

19 A That is correct.

20 Q When you looked at this videotape -- And that means
21 one eye or both eyes?

22 A Both eyes.

23 Q When you looked at this videotape, as Mrs. Lorusso
24 was given this test, she was facing her left side,
25 towards the video camera; is that correct?

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1 continues -- First of all, he hasn't waited a
2 single time for your ruling. He's just spoken
3 right over and not waited for you to rule any
4 single time that I have objected. And then he
5 has continued, after that, to ask the
6 questions in the exact same way. And so what
7 I'm asking for here is exactly what I asked
8 for, to wait until the Court's ruling and for
9 some assistance here, in that Mr. Wellborn
10 cannot continue to violate -- that he cannot
11 continue to ask leading questions, when he is
12 directing his expert witness.

13 MR. WELLBORN: And I thought that's what I'd
14 just done.

15 MS. VALENZUELA: Except that he sustains my
16 objection.

17 MR. WELLBORN: Right.

18 MS. VALENZUELA: So you were leading and --

19 MR. WELLBORN: No, actually, I -- If you may
20 recall -- and I think the record would reflect
21 -- I asked the Court to take judicial notice.
22 I'm not trying to lead the Court. I'm asking
23 the Court to take judicial notice of the fact
24 that when my client is given the horizontal
25 gaze nystagmus test, it is shown on the video

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1 A That is correct.

2 MS. VALENZUELA: Your Honor, objection. If
3 the witness has watched the video, then he's
4 asked and he provides testimony, Mr. Wellborn
5 is giving the answer on every single question
6 that he asks, and then asking the witness to
7 confirm what he just asked. That's the
8 definition of leading. And this time, I would
9 ask that Mr. Wellborn wait for your ruling on
10 whether you're sustaining or overruling my
11 objection.

12 THE COURT: I am sustaining your objection.

13 MR. WELLBORN: Thank Your Honor.

14 MS. VALENZUELA: Thank Your Honor.

15 THE COURT: Mr. Wellborn?

16 MR. WELLBORN: Your Honor, can we take
17 judicial notice of the fact that when the
18 horizontal gaze nystagmus test was given, my
19 client's left side of her body was facing the
20 camera and her right side is away from the
21 camera?

22 MS. VALENZUELA: He's already asked the
23 question, and we can go on. My whole point is
24 that he's leading every single time that he
25 does it. And, if I have to wait -- If he

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1 that the left side of her body is facing the
2 camera and the right side of her body is not
3 on the camera. So I'm making a request of the
4 Court to take judicial notice of that fact,
5 which I think might speed the process up.
6 But, if the Court is not inclined to do so,
7 we can certainly go there other ways.

8 THE COURT: Just don't lead him, sir.

9 MR. WELLBORN: No. Would the Court take
10 judicial notice of the fact that my client's
11 right side --

12 THE COURT: I will.

13 MR. WELLBORN: Thank you. All right.

14 BY MR. WELLBORN: (Continuing Direct)

15 Q So now that we have an established fact that the
16 right side of Mrs. Lorusso's body, including the
17 right side of her face, is not on camera, --

18 MS. VALENZUELA: But, Your Honor, you did not
19 just take judicial notice that the entire
20 right side is not on camera. You took
21 judicial notice that the left side --

22 THE COURT: Left side.

23 MS. VALENZUELA: -- of her body was being
24 presented to the camera. And so he asked you
25 to take judicial notice, and then he

1 completely rephrased the fact that was
 2 established right there. So I just want to
 3 make sure that the record is clear that those
 4 were two different facts in how he phrased
 5 that.
 6 THE COURT: So noted.
 7 MR. WELLBORN: Would the Court be willing to
 8 take judicial notice of the fact that the
 9 right side of my client's face is not visible
 10 on the camera during -- Wait, let just ask the
 11 question first -- during the horizontal gaze
 12 nystagmus test?
 13 MS. VALENZUELA: Your Honor, does he want the
 14 Court to prove the entire case; or, can he --
 15 The video is right there. He asked to show
 16 it. He can play it again, if the witness
 17 needs reminding of the video that he's already
 18 seen several times? He can say, "Do you want
 19 me to play the video again?" and see if I'm --
 20 MR. WELLBORN: All right. Let's go --
 21 MS. VALENZUELA: -- going to object to that.
 22 MR. WELLBORN: -- I'll move on.
 23 THE COURT: Ask your question.
 24 MR. WELLBORN: I'll move on.
 25 BY MR. WELLBORN: (Continuing Direct)

1 Q Can you see the right side of Mrs. Lorusso's face
 2 when she's given that horizontal gaze nystagmus
 3 test?
 4 A I cannot.
 5 Q Is there any point, during the horizontal gaze
 6 nystagmus test, where the -- from your perspective,
 7 the right side of her face is visible to the
 8 camera?
 9 A It is not.
 10 Q Okay. So, if the right side of her face is not
 11 visible to the camera, can you see her right eye?
 12 A Cannot.
 13 Q Since you can't see her right eye, is there any way
 14 to determine whether or not there's resting
 15 nystagmus in her right eye?
 16 A There is no way.
 17 Q Okay. Which is -- And is that one of the standards
 18 in the test?
 19 A It is.
 20 Q Is that part of the test?
 21 A It is.
 22 Q All right. Now, let's talk about the left side of
 23 her face. When we look at the left side of her
 24 face on the camera, can we even see her left eye;
 25 or, is it a blur?

1 A You can see the left side of her face. You cannot
 2 see the eyeball close-up.
 3 Q Okay. Since you can't see the eye or the eyeball
 4 or the pupil itself, is there any way to determine
 5 whether or not she had resting nystagmus in her
 6 left eye?
 7 A You cannot.
 8 Q All right. Moving on with the next part of the
 9 test. After an officer determines whether or not
 10 there is resting nystagmus, what is the very next
 11 thing they're supposed to do, according to the
 12 standards?
 13 A The very next thing is to check for equal tracking.
 14 Q All right. Tell us what that means?
 15 A Equal tracking is when you check both eyes,
 16 movements to the right and to the left to make sure
 17 both eyes are following at the same motion.
 18 Q Does that mean that one eye is not supposed to move
 19 differently than the other eye?
 20 A Both are supposed to work together.
 21 Q Both are supposed to work together. Is there any
 22 way, from the way this is recorded, whether we can
 23 see whether her right eye is following the left
 24 eye?
 25 A It cannot be seen.

1 Q Is there any way to determine whether the left eye
 2 is following the right eye?
 3 A It cannot be seen.
 4 Q So therefore, is there any way to determine whether
 5 or not Mrs. Lorusso has equal tracking in her eyes?
 6 A Cannot.
 7 Q Is that part of the test?
 8 A Yes, it is.
 9 Q And if, in fact, she did not have equal tracking in
 10 her eyes, what, according to the standards, is the
 11 officer supposed to do? Is he allowed to go
 12 forward or not?
 13 A No equal tracking would've meant she had some type
 14 of medical conditions. It could've been anything.
 15 If there was something wrong that she needed
 16 medical attention, that would be the first thing to
 17 take her to.
 18 Q But my question is would the officer, under the
 19 standards and under the rules, be allowed to go
 20 forward with a horizontal gaze --
 21 A No.
 22 Q -- nystagmus test, if she did not have equal
 23 tracking?
 24 A No.
 25 Q Is there any way, when we look at this videotape,

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1 whether or not we can determine if she had equal
2 tracking or not?
3 A Cannot.
4 Q And that's because we can't see her eyes?
5 A Can't see either eye.
6 Q Okay. Now, if she has -- Does not have resting
7 nystagmus and if she -- her eyes do track equally,
8 what is the very next thing, according to the
9 standards, that the officer is supposed to give
10 regarding the horizontal gaze nystagmus test?
11 A Supposed to check for distinct and sustained
12 nystagmus at maximum deviation.
13 Q Okay. So the first one is max -- not smooth
14 pursuit, but maximum deviation.
15 A No, I'm sorry, smooth pursuit. I apologize.
16 Q All right. So tell us what "smooth pursuit" means.
17 A Smooth pursuit is basically the same as equal
18 tracking, except from a standpoint it's done with
19 the timing of two seconds going out and two seconds
20 coming back in -- it's not done as fluidly -- to
21 see that they're both tracking smoothly.
22 Q Okay. Now, if an officer indicated that -- And if
23 an officer felt that someone lacked smooth pursuit,
24 what would that be saying?
25 A Just a clue.

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1 Q Okay. Can an officer determine smooth pursuit --
2 whether someone has or does not have smooth
3 pursuit, without looking into their eyes?
4 A No.
5 Q Okay. Because this all addresses the eyes.
6 A Right.
7 Q Correct?
8 A Correct.
9 Q Is there any way to determine, given the fact that
10 we cannot see her right eye, whether or not she had
11 smooth pursuit in her right eye?
12 A Cannot tell.
13 Q Is there any way, given the fact that we can't see
14 her left eye, whether she had smooth pursuit in her
15 left eye?
16 A Can't see.
17 Q Okay. What is the very next thing, according to
18 the standards, that's supposed to happen after
19 check for smooth pursuit?
20 A Then it's distinct and sustained nystagmus at
21 maximum deviation.
22 Q Okay. Tell us what that means.
23 A That is basically where you use your stimuli from
24 the center, go up as far as you can, till you see
25 the white of the eye, taking approximately two

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1 seconds to go out, and hold it for four seconds to
2 see if it has the involuntary jerking, and then to
3 come back and go the opposite direction and check
4 the other eye.
5 Q So are you supposed to check both eyes?
6 A Both eyes.
7 Q And when you check both eyes -- Let's just say
8 start with the right eye. When the officer moved
9 to Mrs. Lorusso's right, checking her right eye,
10 was he supposed to stop when he can still see the
11 white of her eyes?
12 A After he got it out to the max. Correct.
13 Q Okay. And then, at that point, he was supposed to
14 see if there was any involuntary jerking.
15 A That is correct.
16 MS. VALENZUELA: Your Honor, --
17 MR. WELLBORN: Oh, excuse me. I --
18 MS. VALENZUELA: -- objection --
19 MR. WELLBORN: All right.
20 MS. VALENZUELA: -- again, --
21 MR. WELLBORN: Apologize.
22 MS. VALENZUELA: -- he is leading the witness.
23 He's been leading the witness, and I have not
24 stood up and objected every time. I would ask
25 that Mr. Wellborn wait for the Court's ruling

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1 on this. And I would ask for some assistance
2 in advising Mr. Wellborn that he should stop
3 leading his witness on direct.
4 THE COURT: Mr. Wellborn, --
5 MR. WELLBORN: Well, I was --
6 THE COURT: -- you know how --
7 MR. WELLBORN: Judge, with all due respect,
8 if --
9 THE COURT: You know how to ask a question.
10 Sustained.
11 MR. WELLBORN: I do. But now I would simply
12 point, for the record, asking somebody "Is
13 this or is this not" is not a leading
14 question. If I said, "She didn't show it;
15 right?" or, "You're supposed to do this;
16 right?" that would be leading. You know,
17 asking somebody, "Are you supposed to do
18 this," is not a leading question.
19 MS. VALENZUELA: Your Honor, when you're
20 saying, "And then when the officer did this
21 and the Defendant did that, is" blah, blah,
22 blah, blah, blah, and you're inserting the
23 fact there, I think that is where it starts to
24 be a leading question. And before I asked
25 that he wait for your ruling, he was about to

1 say, "Oh, oh, okay, sorry, never mind," and
 2 keep going. But then suddenly, when I said
 3 actually, "And wait on a ruling for the
 4 Court," and "Can the Court please advise him,"
 5 then suddenly he wasn't actually leading, and
 6 he wants to make sure that you know what that
 7 means, Your Honor.
 8 MR. WELLBORN: Thank you.
 9 THE COURT: Ma'am, you know I sustained it.
 10 MS. VALENZUELA: Yes.
 11 THE COURT: Okay.
 12 MR. WELLBORN: Thank you.
 13 BY MR. WELLBORN: (Continuing Direct)
 14 Q Going back to the question, from the videotape,
 15 were you, or is anybody, able to determine whether
 16 or not there was distinct nystagmus at maximum
 17 deviation in Mrs. Lorusso's right eye?
 18 A No, sir.
 19 Q Why not?
 20 A Cannot see it.
 21 Q Can't see the --
 22 A Can't see the eye.
 23 Q Can't see the eye. Okay. Are we able to determine
 24 whether there was maximum -- distinct and
 25 sustained nystagmus at maximum deviation of Mrs.

1 Lorusso's left eye?
 2 A No, sir.
 3 Q Why not?
 4 A Cannot see the eye.
 5 Q If you can't see the eye, is it possible to see if
 6 there's nystagmus at all?
 7 A No, sir.
 8 Q Okay. Last thing the officer is supposed to check
 9 for, according to the standards, what is that?
 10 A The nystagmus onset prior to 45 degrees.
 11 Q Okay. Explain what that means.
 12 A Basically, it's to use the same stimuli and go out
 13 slowly, approximately to shoulder width, to see if
 14 onset is occurring -- or nystagmus is occurring
 15 prior to the 45 degree angle.
 16 Q Okay. Now, can we determine, from this videotape
 17 whether there was any nystagmus prior to 45
 18 degrees in Mrs. Lorusso's right eye?
 19 A No, sir.
 20 Q Why not?
 21 A You can't see her eye.
 22 Q So, if you can't see her eye -- Okay. I'm not
 23 going to say that. Can we determine whether or not
 24 there was any nystagmus, prior to 45 degrees, in
 25 her left eye?

1 A No, sir, you can't see the eye.
 2 Q So is there any part of the horizontal gaze
 3 nystagmus test, according to the standards, where
 4 we can see either of Mrs. Lorusso's eyes?
 5 A No, sir.
 6 Q Okay. Let me move to the walk-and-turn test.
 7 A Okay.
 8 Q What I'd like to do --
 9 MS. VALENZUELA: I'm sorry. Just so that I
 10 don't miss that, did you -- It sounded like
 11 you asked him, "Was there a point in the video
 12 where you couldn't see either eye?" and he
 13 said, "No."
 14 MR. WELLBORN: Well, I mean, I said what I
 15 said. But, I mean, I don't if -- We're moving
 16 to walk-and-turn. Did you want me to repeat
 17 the question?
 18 MS. VALENZUELA: No, I was just confused,
 19 because you also seemed to pause there. So is
 20 -- Are you asserting, now, that you can't see
 21 either eye, in the motion?
 22 MR. WELLBORN: I think we've addressed that
 23 ad nauseam; but, yes.
 24 BY MR. WELLBORN: (Continuing Direct)
 25 Q Just so we're clear, on any part of this videotape

1 with the horizontal nystagmus test, can you see
 2 Mrs. Lorusso's eyeball?
 3 A No, sir.
 4 Q Either one of them?
 5 A Neither eye.
 6 Q At any portion of this videotape, on the horizontal
 7 gaze nystagmus test, can you make any
 8 determination whether there's nystagmus in either
 9 one of Mrs. Lorusso's eye?
 10 A I cannot.
 11 Q Did the officer, according to the standards and his
 12 training, have options to move Mrs. Lorusso closer
 13 to the camera? Could he have done that?
 14 A Yes.
 15 Q Okay. Did he have an option where he could've
 16 turned her to face the camera?
 17 A Yes.
 18 Q Could he have moved her right up against the
 19 camera so the camera could capture her eyes, if
 20 that's what he wanted to do?
 21 A She could be placed anywhere he wanted to place
 22 her.
 23 Q Now, moving to walk-and-turn test. According to
 24 what you saw on the videotape, as Mrs. Lorusso did
 25 her nine steps -- or, before we even get there,

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1 let's -- just so the record's clear, let's
 2 describe the walk-and-turn test. Is part of the
 3 walk-and-turn test whether someone is able to walk
 4 nine steps forward, touching their heel or their
 5 toes -- or heels to their toes, as they walk nine
 6 steps forward? Is that part of the test?
 7 A Yes.
 8 Q Okay. And, in fact, is there a specific distance
 9 where the officer is supposed to look for, to make
 10 a determination whether those heels are being
 11 touched? And can you explain that?
 12 A As an instructor, and when you go through training,
 13 you're taught that if it's a half inch or less gap
 14 between from heel to toe, it's not considered a
 15 clue.
 16 Q Okay. So the officer is supposed to look for two
 17 things: are they touching heel-toe, but also
 18 whether there is -- if they're not, it's not more
 19 than a -- or less than a half-inch gap.
 20 A That's correct.
 21 Q Okay. As you reviewed this videotape, were you
 22 able to make a determination whether Mrs. Lorusso
 23 was touching heel-toe every time?
 24 A Could not see.
 25 Q Why was that?

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1 A The position that the officer had her placed in
 2 going straight toward the car, put it in a position
 3 to where you could not see the distance between her
 4 heel and toe as she was taking steps.
 5 Q So were you able to determine whether there was a
 6 half-inch gap or not?
 7 A I was not.
 8 Q Were you able to determine whether there was less
 9 than half-an-inch gap?
 10 A Could not.
 11 Q Were you able to determine whether or not that she
 12 touched toes every time?
 13 A I have no idea.
 14 Q Okay. Did the officer have an option, according to
 15 the standards, to make her walk across in front of
 16 the camera sideways, so we'd be able to see that?
 17 A It could've been placed in a different position so
 18 it could've been seen.
 19 Q Okay. And as she walked -- And is part of the
 20 walk-and-turn test, according to the standards, to
 21 have someone, after they do a turn, walk back nine
 22 steps heel-toe?
 23 A That is correct.
 24 Q And, as Mrs. Lorusso walks away from the camera
 25 nine steps, can we see whether or not her toes are

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1 touching?
 2 A It's impossible to see the same way that it was
 3 coming, as it was coming towards you. It's the
 4 same vertical line that's going away. You cannot
 5 see the distance between heel-to-toe, if they're
 6 touching or how far they're apart.
 7 Q So would that also include whether or not they are
 8 less than half an inch apart?
 9 A That is correct.
 10 Q And again, had the officer moved her closer to the
 11 camera or had her walk sideways, would we be able
 12 to see whether, as she walked back, her heels
 13 touched her toes?
 14 A Yes, you could.
 15 Q And potentially, whether or not there was more or
 16 less than half an inch apart?
 17 A Close.
 18 Q So, on either one of these standardized field
 19 sobriety tests, reviewing that videotape, can a
 20 determination be made, according to your expertise
 21 and your experience, whether or not she passed or
 22 failed those tests?
 23 A Cannot.
 24 MR. WELLBORN: Okay. That's all the questions
 25 I have for you, Mr. Ludlam.

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1 THE COURT: Thank you, sir.
 2 CROSS-EXAMINATION: (By Ms. Valenzuela)
 3 Q Mr. Ludlam, hello.
 4 A Hello.
 5 Q It seems a little unfair, but I actually get to ask
 6 leading questions on my turn. But I'm sure that
 7 Mr. Wellborn will keep me in line, once I put the
 8 deputy on the stand and I'm directing him.
 9 Mr. Ludlam, you went through your
 10 qualifications a little bit. And, just out of
 11 curiosity, were you a police officer yourself?
 12 A I was not.
 13 Q Have you ever performed field sobriety tests
 14 outside of a training context?
 15 A Yes, I have. Well, --
 16 Q And what --
 17 A -- not -- I'm -- I don't know. Make sure they're
 18 separate questions.
 19 Q Okay. I'll repeat it. Have you ever administered
 20 a field sobriety test to someone outside of a
 21 training scenario? So I assume that you've
 22 administered field sobrieties in your training
 23 classes. Outside of those training classes, have
 24 you ever administered field sobriety to someone?
 25 A I've done CLE's for attorneys in classes we would

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1 give them. Is that still training? Because,
 2 they're not getting -- I'm not instructing them to
 3 get certified. But we put on CLE classes for
 4 attorneys in Georgia and South Carolina.
 5 Q So you have taught classes. And I'm assuming that
 6 when you administered the field sobriety test in
 7 those classes, you're just grabbing someone out of
 8 the audience and having them demonstrate it? Is
 9 that fair to say?
 10 A No. No, we've actually dosed them with alcohol and
 11 have the portable BAC to be able to confirm the
 12 test.
 13 Q So a wet lab? You've --
 14 A Yes.
 15 Q -- done a wet lab.
 16 A Yes.
 17 Q Okay. So you have administered field sobriety.
 18 It's still within a training concept, but outside
 19 of you being trained.
 20 A Yes.
 21 Q And how many times have you done these wet labs?
 22 A Three.
 23 Q And now, you mentioned Georgia. Have you done
 24 that in South Carolina?
 25 A All the wet labs have always been in Georgia.

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1 Q And the training that you went through, I think you
 2 said, --
 3 A IDS.
 4 Q -- IDS, that was when you were trained to be an
 5 instructor, that was in Georgia, as well?
 6 A That's correct.
 7 Q Okay. Now, earlier you testified that you've been
 8 qualified as an expert in other courts to include
 9 Judge Hayes and Judge Alford. Is that right?
 10 A That is correct.
 11 Q And do you remember if you testified as an expert
 12 in the case of the State versus Jared Lewis on
 13 July 11th, 2012; Mr. Wellborn was representing Mr.
 14 Lewis, at that time?
 15 A I wouldn't remember the name. I've done probably
 16 over 350 DUI tapes in the last 18 months. It's
 17 hard for me to remember names of who I've been to
 18 court. I wouldn't -- I'm not trying to be evasive.
 19 I --
 20 Q No, I know.
 21 A -- don't remember.
 22 Q Would it be helpful if I showed you the transcript?
 23 A Yeah.
 24 MR. WELLBORN: What was the date of that,
 25 again?

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1 MS. VALENZUELA: It's July 11th, 2012.
 2 MR. WELLBORN: Okay.
 3 BY MS. VALENZUELA: (Continuing Cross)
 4 Q Oh, I'm sorry.
 5 A That's all right.
 6 Q So that's the first page -- No, I'm --
 7 A I'm sorry.
 8 Q -- I'm fine. Under "Witnesses," do you see your
 9 name?
 10 A Yes.
 11 Q And so do you remember testifying?
 12 A Yeah.
 13 Q Okay.
 14 A That was in 2012?
 15 Q The date on the transcript is July 11th, 2012,
 16 uh-huh (affirmative).
 17 Now, Mr. Ludlam, we heard a lot of testimony
 18 on your inability to see the Defendant's eyeballs
 19 on camera. Is that right?
 20 A That's correct.
 21 Q And how many videos did you say -- DUI videos you
 22 said that you've reviewed in your career?
 23 A I didn't say in my career. I said I've been in
 24 over 350 probably in the last 18 months.
 25 Q 350 in the last 18 months?

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1 A Reviewed videos, yeah.
 2 Q And then is that how long you've been doing DUI
 3 work; 18 months?
 4 A Well, my partner, Robert Barnhill, with cases,
 5 actually been doing it for about 15 years until he
 6 passed away in March. So I was helping review --
 7 even when I was a practitioner, helping review
 8 videos with him, prior to me getting -- becoming an
 9 instructor.
 10 Q So before the 18 months, you also reviewed videos?
 11 A Yeah.
 12 Q So would it be fair to say that you've definitely
 13 watched more than 350 DUI videos?
 14 A Oh, yes, definitely.
 15 Q And were those DUI videos outside of South
 16 Carolina; or, were they all South Carolina DUI
 17 videos?
 18 A No. Not all of them have been South Carolina, no.
 19 Q What percentage were South Carolina videos?
 20 A I'd be guessing. The majority was South Carolina,
 21 yes.
 22 Q The majority?
 23 A Yes.
 24 Q And so, in those DUI videos that you watched the
 25 majority of the plus-350, how many of those were

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1 you able to observe the defendants' eyeballs?
 2 A Very limited, but I have seen some.
 3 Q And how did the officer capture the defendants'
 4 eyeballs on camera in the ones where you've seen?
 5 A They were facing the car.
 6 Q And what distance was the defendant from the car
 7 that you could see with your --
 8 A Close.
 9 Q -- eyeballs?
 10 A They were real close.
 11 Q They were real close.
 12 A To the patrol car hood.
 13 Q Okay. So they were standing by the patrol car
 14 hood. And where was the officer who was
 15 administering HGN standing when they administered
 16 this HGN?
 17 A Somewhat to the side of them, but you could still
 18 see the --
 19 Q I'm a real visual person. Do you mind just showing
 20 me?
 21 A Like here's -- I'm the officer. This is the face
 22 of the person, the camera's here.
 23 Q So the camera's here.
 24 A Camera's here, like they're --
 25 Q Right.

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1 A Yeah.
 2 Q And so the hood --
 3 A Yeah, they should've been.
 4 Q -- is standing beside me?
 5 A No, it's down here at your knees. It's not up at
 6 your eyes.
 7 Q So the hood's at my knees?
 8 A Yeah.
 9 Q And then the officer's sitting on the hood?
 10 A No, the officer's standing up. If you ever look at
 11 the video and you look at the way the car does, the
 12 hood of the car takes up about half the camera at
 13 the very, very front of the car.
 14 Q Uh-huh (affirmative).
 15 A And, at that point, when you're standing there,
 16 you're seeing the hood and half the body of the
 17 person doing the HGN.
 18 Q So I'm just -- I'm trying to -- I told you I'm
 19 visual.
 20 A You're visual, huh?
 21 Q I have to draw pictures for myself. I use maps to
 22 figure out --
 23 A Okay.
 24 Q -- different things. And so that's what I'm just
 25 trying to figure out. Because, you said the hood

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1 would be in front of the defendant. So that -- on
 2 the ones where you said that you could see the
 3 eyeballs.
 4 A See the eyes.
 5 Q And you said that you -- or where the officer was
 6 standing, that that would -- to me, that's still --
 7 you'd be sitting on the hood. That's why I asked
 8 was the officer sitting on the hood. But it would
 9 be more like this? Is this fair to say?
 10 A Well, where am I?
 11 Q That's what I'm asking. You're the one who's
 12 watching the video.
 13 THE WITNESS: Your permission to stand up,
 14 Your Honor.
 15 THE COURT: Stand up, sir.
 16 MS. VALENZUELA: (Continuing Cross)
 17 Q Position me as you would, in terms of the hood.
 18 A If -- May I put it down, if you --
 19 Q Sure.
 20 A -- don't mind?
 21 A Yeah.
 22 A If this is the hood of the car, --
 23 Q Yes.
 24 A Back up just a little bit. There's the hood of the
 25 car. The camera's coming out at them. The

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1 officer's standing right here, and you -- there's a
 2 plain view to your eyes and the officer's standing
 3 here to the side. I can't necessarily see the
 4 entire officer's body. Doesn't matter if I see his
 5 body. All I need to see is the stimuli and the
 6 eyes.
 7 Q Yes. So you're saying, on the ones where you've
 8 been able to see the eyeballs --
 9 A You could see --
 10 Q -- the officer has been standing in between the
 11 hood and the defendant, and you've been able to see
 12 how the eyeball moves?
 13 A You could see -- That is not what you asked me.
 14 You asked me could I see the eyes.
 15 Q Okay. Well, actually, I'm being very specific now.
 16 A Okay, I'm --
 17 Q On how many --
 18 A -- just saying that's not what you --
 19 Q -- of those occasions could you see the eyeballs?
 20 I thought I had asked that before.
 21 A No, you said could I see the eyes.
 22 Q No, I'm very -- I was very clear.
 23 A You could see the eyeball -- I can see the eyeballs
 24 on those. I could -- Yeah, you can see the
 25 eyeballs.

1 Q So, on those, you could see the eyeballs, --
 2 A Uh-huh (affirmative).
 3 Q -- where the officer is standing here, and then
 4 there's a hood, and then the camera's back there.
 5 A Correct.
 6 Q And, on a video, you've been able to see the
 7 defendants' eyeballs.
 8 A Yes.
 9 Q Okay. And where was the stimulus that the officer
 10 uses to do HGN?
 11 A Placing them between.
 12 Q So when the defendant was tracking the stimulus,
 13 was the stimulus --
 14 A I didn't say it didn't get blocked. It's going to
 15 get blocked at some point in time. It's not going
 16 to be completely unobstructed. It's impossible.
 17 Q Oh, so --
 18 A Okay. So, if that's -- I mean, there's no way -- I
 19 mean, you can't not obstruct the viewpoint to the
 20 eyeball, when you've got a hand that's going
 21 between the camera and the eyes. You know,
 22 there's going to be an obstruction at some point.
 23 Q Thank you, Mr. Ludlam. That was exactly my point
 24 So I'm glad that we were able -- I told you I'm
 25 visual. So I think we worked that out by -- by

1 having that done.
 2 And I believe what you just said is there is
 3 never going to be a situation where there is not
 4 some obstruction to the eyeball on HGN, when
 5 observing it on video.
 6 A That is correct.
 7 Q Okay. Thank you, Mr. Ludlam. And, Mr. Ludlam,
 8 did you take any part in drafting the statute at
 9 issue, 56-529-53?
 10 A I did not.
 11 Q And, as an expert, do you have -- are you able to
 12 say whether something is legally -- or legally does
 13 not fall in that statute?
 14 A I cannot.
 15 Q Okay. And so, just to go through it, you said
 16 first you check for resting nystagmus. Is that
 17 right?
 18 A Correct.
 19 Q And, now, how long do you -- does an officer check
 20 for resting nystagmus?
 21 A There's not a flat amount of time you have to check
 22 it.
 23 Q So there's not -- They don't have to hold the
 24 stimulus out for four seconds just to check for the
 25 resting nystagmus?

1 A No.
 2 Q So you could come up, hold the pen up and
 3 basically -- or, I'm sorry, yes, and you could
 4 basically check, okay, is there resting nystagmus
 5 right there.
 6 A It's not a minimum on resting, but it is -- you
 7 know, it's not an exact number.
 8 Q So there's no minimum, there's no exact number.
 9 Okay.
 10 Okay. And then equal tracking, you said that
 11 you do two passes. You check the eyes and -- and
 12 that that could -- If there is an equal tracking
 13 that could indicate a medical problem. Is that
 14 correct?
 15 A Correct.
 16 Q And then you do smooth pursuit.
 17 A Correct.
 18 Q Okay. And then you do distinct and sustained
 19 nystagmus at maximum deviation?
 20 A Correct.
 21 Q And then prior to onset, 45 degrees; right?
 22 A That's correct.
 23 Q And now, you said that there were a few where you
 24 could actually see the eyes on the videos, I think
 25 you said, of the more than 350, somewhere, where

1 you could actually see the eyes. Now, on the
 2 majority of the other ones where they weren't
 3 positioned right in front of the camera, or the
 4 hood, how were the defendants positioned?
 5 A They've been positioned probably every way you can
 6 possibly be.
 7 Q Is their body on camera on most of them?
 8 A Most of them. Some of them's not, but most of
 9 them.
 10 Q Okay. Well, if they're not on camera, can you even
 11 see if the HGN's being done on them?
 12 A You talking about --
 13 Q Just HGN. Just HGN.
 14 A HGN, I don't need to see the whole body. I just
 15 got to see their eyes and their face.
 16 Q Okay. But, on the ones where you have been able to
 17 observe HGN, have you ever been able to observe a
 18 video and determine whether they had resting
 19 nystagmus, equal tracking, smooth pursuit, distinct
 20 and sustained nystagmus at maximum deviation, and
 21 then, prior to onset, 45 degrees, by watching the
 22 video?
 23 A For me to review from the eye movement itself?
 24 There have been some, that's been facing the car,
 25 that you could see.

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1 Q Okay. So what --
 2 A As you said a moment ago, you do lose some of your
 3 obstruction, but you can see the nystagmus as the
 4 obstruction passes.
 5 Q Okay.
 6 A It's not going to be blocking the camera the entire
 7 time.
 8 Q Okay. So, on some of those cases where there has
 9 been HGN done, even though there has been some
 10 obstruction at different points where you can't see
 11 all of it, you've still been able to make a
 12 determination as to how they did on the HGN.
 13 A Yes.
 14 Q Okay. I'm just trying to be really quick. So,
 15 even though you can't see the whole thing at
 16 different points, you can still make a
 17 determination watching the video.
 18 A You have to see it somewhere. On the particular
 19 case you're asking me today, I never saw it one
 20 time. I couldn't even see the eyes. So --
 21 Q So are you --
 22 A -- you're asking me a question and --
 23 Q Are you answering the question that I asked you or
 24 --
 25 A I'm trying to. I mean, you're -- I'm -- Go back.

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1 I'm sorry. I'm not trying to be evasive. I've
 2 just --
 3 Q No, you're not being evasive. You're just pushing
 4 your own agenda into the --
 5 A No, I --
 6 MR. WELLBORN: Your Honor, I would object to
 7 that. You know, her telling him he's pushing
 8 his own agenda is not a question, most of all.
 9 It's a derogatory comment about a witness,
 10 that's just sort of gratuitous. If that's an
 11 issue, she can object --
 12 THE COURT: Sustained.
 13 MR. WELLBORN: Thank you.
 14 MS. VALENZUELA: Thank you, Your Honor.
 15 MS. VALENZUELA: (Continuing Cross)
 16 Q And, Mr. Ludlam, I'm sorry if I hurt your feelings
 17 A Well, yeah, that's okay.
 18 Q Now, let's move on to walk-and-turn.
 19 A Okay.
 20 Q Now, in your testimony earlier, you were saying
 21 that you couldn't see heel touching toe on the
 22 video, as the Defendant was positioned. Is that
 23 right?
 24 A I couldn't see the presence or the non-presence of
 25 heel-to-toe.

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1 Q I'm sorry. I couldn't catch that last part.
 2 A I couldn't see the presence or the non-presence of
 3 heel-to-toe.
 4 Q Okay. So you couldn't see anything to deal with
 5 the heel-to-toe portion of the walk-and turn.
 6 A Because it's not --
 7 Q "Yes" or "no," Mr. Ludlam.
 8 A No.
 9 Q Thank you. Now, Mr. Ludlam, could you see if the
 10 Defendant was able to maintain her start position
 11 on the walk-and-turn?
 12 A Yes, I could.
 13 Q And could you see, Mr. Ludlam, if the Defendant was
 14 able to take the nine steps that she was able to
 15 take in one direction?
 16 A Yes, I could.
 17 Q And could you see if the Defendant turned
 18 correctly, as she was instructed by the officer to
 19 do?
 20 A Yes, I could.
 21 Q And could you see if the Defendant took the last
 22 nine steps walking back to the original start
 23 position that she was instructed to do?
 24 A Yes, I could.
 25 Q So could you see if the Defendant counted her steps

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1 correctly?
 2 A Yes, I could.
 3 Q And could you see if the Defendant stepped off
 4 camera? -- I mean, offline; not off camera.
 5 A Yes, I could.
 6 Q Okay. So, in the position that she was in, you
 7 would've been able to determine if she was able to
 8 maintain her start position, if she was -- I told
 9 you I'm visual. I have to pull out this
 10 handy-dandy list that I use. So you were able to
 11 see if she could maintain her start position. You
 12 were able to see if she could follow directions?
 13 A Yes.
 14 Q You were able to see if she stepped offline. I
 15 think you already told us that. Is that right?
 16 A Uh-huh (affirmative).
 17 Q Were you able to see if she walked a straight line?
 18 A Yes.
 19 Q Okay. Just -- I think, if you're the camera right
 20 there, the Defendant was --
 21 A Coming toward me.
 22 Q -- walking towards you, and then walking back away
 23 from you?
 24 A Correct.
 25 Q Do you think that's a good way of being able to

1 tell if she was walking a straight line or not?
 2 A Yeah.
 3 Q Okay. Now, Mr. Ludlam -- Well, let's finish this.
 4 And you were able to see if she turned improperly
 5 or not.
 6 A Correct.
 7 Q Were you able to see if she could use her arms for
 8 balance?
 9 A Yes.
 10 Q Okay. And then you were able to see if she took
 11 the correct number of steps.
 12 A Yes.
 13 Q Okay. So, of the indicators that someone looks for
 14 on the walk-and-turn, you were not able -- Well,
 15 let me ask you this. When a defendant or a subject
 16 doesn't touch heel-to-toe, and you -- if you heard
 17 an officer testify, "She did touch heel-to-toe
 18 seven times," and those were seven different
 19 indicators, do you see a problem with that
 20 statement?
 21 A There's not seven different indicators. It would
 22 be the same indicator we count one time.
 23 Q So it's only -- It only counts one time. Okay. So
 24 what you're saying is that, because you can't see
 25 her touch heel-to-toe, which is one indicator, --

1 Right? --
 2 A Yes.
 3 Q -- then really, you can't see one indicator of many
 4 on the video.
 5 A Well, according to -- Yeah, that's correct.
 6 Q That's correct. Okay. And so earlier, when you
 7 said, on HGN, even though you couldn't always see
 8 every part of it, you were still able to make a
 9 determination, do you think it's a fair analogy to
 10 say that when you can see all the different
 11 indicators -- three, four, five, six -- seven
 12 different indicators, but not the one, that you
 13 should still be able to make determination as to
 14 how that person did on the -- on that portion --
 15 on the walk-and-turn?
 16 A As far as counting the clues?
 17 Q Well, how do you determine if someone -- how
 18 someone does on the walk-and-turn?
 19 A Count all the things that you ask, if they maintain
 20 position, stepped off the line or if they didn't --
 21 Q So you count --
 22 A -- touch each one.
 23 Q So you count up all the indicators. And you don't
 24 count a specific indicator more than once. You
 25 just count it once. I think --

1 A Correct.
 2 Q -- you told us that earlier.
 3 A Correct.
 4 Q And so that's what I'm asking, is, on a walk-and-
 5 turn, if you could see seven out of the eight
 6 indicators, would you still have an idea of whether
 7 that defendant passed or failed that walk-and-turn?
 8 A According to the way that we're giving the test --
 9 you take the test, it says that, if I change any
 10 element of it, whatsoever, --
 11 Q Okay, but I'm just asking --
 12 A -- it's invalid. So I can't make that
 13 determination to you from my perspective, if I
 14 change any -- You're asking me a question. If I
 15 change the rules, --
 16 Q Right.
 17 A -- do I get a different result; yes. If I took
 18 that one off of it -- I can say I'm going to look
 19 at the other seven things. If there's eight there,
 20 I can look at the other seven and make a
 21 determination. But they told me I have to look at
 22 all eight, not seven. If I try to make that
 23 determination, I've made the test invalid on my
 24 own; and that's not the way I can do it.
 25 Q Well, I think we're talking about two different

1 things here. And you -- And please correct me, if
 2 --
 3 A No. Okay.
 4 Q -- I'm wrong. So what's captured on the video --
 5 If you were the officer, and you were watching that
 6 videotape, and you were watching her walk-and-turn,
 7 and then you are making the determination of
 8 whether she didn't pass that test, and making the
 9 arrest, you're saying, no, an officer cannot watch
 10 her on video and be able to make a full decision on
 11 that, because he's missing that big stuff. Is that
 12 what you're saying?
 13 A Repeat that, please. I'm sorry. I don't want to
 14 get back between y'all two again. I want to make
 15 sure I'm --
 16 Q I know.
 17 A -- understanding the question.
 18 Q Well, I mean, it's like a tough question.
 19 A I'm not trying to judge. -- You're asking me what
 20 would I do, if I was the officer?
 21 Q Well, I'm -- I guess -- Let me start over here.
 22 A Okay.
 23 Q Earlier you said, on HGN, that there were portions
 24 that you wouldn't be able to see of the eyes that
 25 you were still able to make a determination as to

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1 how they did on HGN.

2 A Yeah. A nystagmus, on HGN, doesn't just happen

3 one jerk and then that -- Nothing in any book has

4 ever said it's just one jerk, when an officer or

5 anybody's giving a stand-up field sobriety test. I

6 mean, the jerking is constant. I mean, it's not

7 just one jerk. The passing of a hand in the way of

8 an obstruction for a brief moment is not going to

9 eliminate you from seeing what's going on with the

10 eye.

11 Q Okay. And so -- But you were just saying that you

12 could make a determination, if you don't follow --

13 that you were tied -- If you don't follow all the

14 rules, and you don't have a good portion of it, you

15 can't make a determination. Now, how, when the

16 person was standing in front of you with the

17 stimulus right in front, were you able to check for

18 resting nystagmus?

19 A Because the finger was standing there, and the

20 finger was dead center. The camera still showed

21 both eyes.

22 Q And so you remember that on all the ones where you

23 could see their eyeballs, the officer from the side

24 position, the pen in front of him -- in front of

25 their eyes, in order to see it? Is that right?

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1 A Yes.

2 Q Okay. Let me ask you, if you are standing beside

3 me, --

4 A Uh-huh (affirmative).

5 Q -- administering this test, --

6 A Okay.

7 Q I'm going to stand at an angle, so the judge can

8 see.

9 A Okay.

10 Q And you're putting this here, so that you can check

11 for resting nystagmus, can you see my left eye?

12 A Well, number one, I couldn't put it that close. It

13 would be -- It's going to be 12 to 15 inches and

14 about an inch above the eye. But go ahead.

15 Q That's why you're the expert. So, I'm putting this

16 here, --

17 A Okay.

18 Q -- and you're looking at me, can you see my left

19 eye?

20 A I cannot. I wouldn't put you in a position to do

21 the test that way. That wouldn't do me no good. I

22 have to be looking at you to do it.

23 Q Okay. So, on all the ones where you could see the

24 eyeball, the officer was actually in a position

25 where he shouldn't have been?

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1 A Well, he can stand a little bit to the side. When

2 I showed you this, you can still see both eyes.

3 Q Okay. So -- So you're --

4 A You were looking toward the door just now.

5 Q Oh, okay. So --

6 A I can still see resting nystagmus. Nothing says

7 that I have to be directly, directly in front of

8 you.

9 Q No, no, no. Nobody says you have to be anywhere.

10 A Okay.

11 Q We're just talking about the cases where you said

12 that you could directly see the eyeball and where

13 you had the officer placed in that situation. And

14 so I'm just -- I'm getting a little confused here,

15 because it's -- it seemed like what you were saying

16 is that the times where you actually could see the

17 eyeballs the officer was in a --

18 A He was --

19 Q -- placement and --

20 A -- a little bit -- He'd place a little bit to the

21 side of the camera, if he can get to it; but, not

22 completely to the side, no.

23 Q Okay. So -- So he's in that perfect sweet spot

24 where he can see both eyes and the video camera

25 can see the eyeballs, except for certain portions;

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1 but, you're still able to make that --

2 A Right.

3 Q -- determination. Okay. Mr. Ludlam, did -- you've

4 watched the video. Did the Defendant step off

5 camera during any of the field sobriety test?

6 A I didn't watch the complete --

7 Q Well, I mean, you watched the field sobriety

8 portions; right?

9 A I watched the HGN walk-and-turn.

10 Q Okay. On the HGN, on the walk-and-turn, did the

11 Defendant step off camera?

12 A I didn't see her step off camera.

13 Q "Yes" or "no"?

14 A No.

15 Q Okay. Now, tell me, in the wet labs, where you've

16 given field sobriety tests, where do y'all put the

17 camera to capture the field sobriety?

18 A Put the camera to --

19 Q Yes.

20 A -- capture the field sobriety? I haven't.

21 Q Okay. In the wet labs, when you do this, what kind

22 of environment are you in?

23 A There's a lot of attorneys that were going for CLE

24 classes, continuing education training.

25 Q I could've have been more clear. When I meant --

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1 When I said "environment," I meant like were you
 2 outside, were you inside, were you in a building?
 3 A Some of all.
 4 Q Okay. And so you've been outside and you've been
 5 inside?
 6 A Correct.
 7 Q And have you ever given field sobriety on the
 8 roadside?
 9 A None on the roadside.
 10 Q Okay. And have you ever given field sobriety where
 11 a dashcam video was recording your actions?
 12 A No, I have not.
 13 Q Okay. And when you've given -- When you've done
 14 the wet labs outside, where were you outside?
 15 A Parking lots.
 16 Q Is it fair to call that a controlled environment?
 17 A The place we were, but I guess, you could. It was
 18 a lot of traffic, yes.
 19 Q In the parking lot, there was a --
 20 A Yeah.
 21 Q -- lot of traffic? So, in a wet lab, you selected
 22 a busy parking lot to practice your field sobriety
 23 tests?
 24 A No, that's just where the seminar was being given.
 25 And so the parking lot was a pretty busy parking

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1 lot.
 2 Q The seminar was being given in a parking lot?
 3 A The particular portion of walk-and-turn was being
 4 done outside.
 5 Q Okay.
 6 MS. VALENZUELA: Your Honor, may I have a
 7 moment?
 8 THE COURT: You may. In fact, could we all
 9 take a little five-minute break?
 10 MR. WELLBORN: Works for me, Judge.
 11 (Brief break; resuming as follows:)
 12 THE COURT: You ready to continue, if you
 13 will?
 14 MS. VALENZUELA: And then, just during the
 15 break, Your Honor, Mr. Wellborn asked if I had
 16 any objection to him putting in the Incident
 17 Report as a court document. I indicated that
 18 I did have an objection. So I'm going to put
 19 that on the record, since we weren't on the
 20 record when he and I had that discussion.
 21 BY MS. VALENZUELA: (Continuing Cross)
 22 Q Mr. Ludlam, are you being paid to be here today?
 23 A Probably. I haven't been yet, but probably.
 24 Q In theory, you will receive compensation for your
 25 testimony today?

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1 A That is correct.
 2 Q Okay. And how many times have you testified for
 3 the State?
 4 A None; never been asked. But I would, for the same
 5 fee.
 6 Q So you've never testified for the State. And how
 7 many times have you testified for the Defense?
 8 A Actually on stand? Twenty-five, thirty. I don't
 9 -- or somewhere around in there.
 10 MS. VALENZUELA: Mr. Ludlam, thank you for
 11 your patience.
 12 MR. WELLBORN: I have no further questions.
 13 THE COURT: Sir, you can step down.
 14 THE WITNESS: Thank you.
 15 (WHEREUPON, the witness was excused.)
 16 MS. VALENZUELA: Your Honor, at this point,
 17 the State would call Deputy Palmer to the
 18 stand.
 19 THE COURT: Sir, I will remind you you're
 20 still under oath.
 21 THE WITNESS: All right.
 22 THE COURT: If you will, so the court reporter
 23 can see you, sit on this side right here.
 24
 25 Whereupon -

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1 DEPUTY MATTHEW BRIGGS PALMER
 2 was called as a witness and having been previously
 3 sworn, was examined and testified as follows:
 4 REDIRECT EXAMINATION: (By Ms. Valenzuela)
 5 Q Okay, Deputy Palmer. I think earlier you gave you
 6 full name for the record, and that's Matthew
 7 Palmer. Correct?
 8 A Correct.
 9 Q And then earlier you were sworn in by the Court and
 10 the Court reminded you that you were still under
 11 oath?
 12 A Yes, ma'am.
 13 Q You're still under oath right now. Now, Deputy
 14 Palmer, you work for the sheriff's office?
 15 A Yes, ma'am.
 16 Q Okay. And how long have you worked for the
 17 sheriff's office?
 18 A This will be my fifth year.
 19 Q Okay. And did you go through any training in order
 20 to become a deputy with the York County Sheriff's
 21 Office?
 22 A I did.
 23 Q Okay. And what training was that?
 24 A I attended nine weeks at the Criminal Justice
 25 Academy back in 2009.

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1 Q Did you do any DUI training as part of your academy
2 training?
3 A That was advanced training.
4 Q And what -- Were you qualified -- or did you get --
5 receive any training on field sobriety tests?
6 A I did.
7 Q Did you receive any training on DataMaster?
8 A I did.
9 Q Operation of the DataMaster, I should say. Are you
10 required to recertify on this?
11 A Every two years.
12 Q Okay. And have you kept up with your
13 certification?
14 A I have.
15 Q Have you kept up with your certification as to the
16 field sobriety test?
17 A Yes.
18 Q And have you kept up with your certification as to
19 the DataMaster?
20 A Yes.
21 Q Okay. Now, have you gone through any other
22 advanced training regarding under the -- being
23 under the influence of alcohol or drugs? And
24 that's actually probably repetitive, drugs, --
25 alcohol being a drug.

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1 MR. WELLBORN: I'm going to object as to
2 relevance. The only issue really at hand
3 right now is just the field sobriety test.
4 Other training and -- Excuse me. I should
5 stand up. Other training and other issues
6 related to, quote, "alcohol and/or drugs,"
7 would, I would suggest not be relevant for
8 purposes of this particular motion, which is
9 the only issue at hand. Okay.
10 MS. VALENZUELA: Your Honor, his training is
11 directly relevant, just like his expert
12 testimony was directly relevant.
13 THE COURT: Motion denied.
14 MS. VALENZUELA: Thank you. Objection.
15 MS. VALENZUELA: (Continuing Redirect)
16 Q So, I'm sorry, before I was interrupted, have you
17 gone through any other training as relates to
18 identification of driving under the influence of
19 alcohol and/or drugs?
20 A Yes, 2011, I believe, I took ARIDE, which is called
21 Advanced Roadside Impairment Driving Enforcement.
22 It's kind of a brief overview of what drugs can do
23 to your body or the combination of alcohol and/or
24 drugs. And then, with that, which was a
25 prerequisite for me to attend the Drug Recognition

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1 Expert School, and that is a selected school. It's
2 not something every officer can get. And that
3 teaches me --
4 Q Hold up. Let me stop you. When you say that Drug
5 Recognition School is a selected school, what does
6 that mean?
7 A That means I have to apply and test for it and
8 actually -- The ARIDE is my actual test for that.
9 I have to apply, just like a regular job interview,
10 and I have to go through an interview and selection
11 process. And if they feel that I'm qualified
12 enough to become a drug recognition expert, then
13 they allow me to attend their school and become
14 certified.
15 Q Okay. And so you have to actually be selected for
16 this specific training that --
17 A Yes.
18 Q -- we're talking about.
19 A Yes.
20 Q Okay. And about how many -- Well, let's keep
21 them -- Were you selected for that?
22 A Yes, I was.
23 Q Okay. And then what did that training entail?
24 A That shows me how the different seven drug
25 categories affects the body, specific --

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1 Q Let me stop you. Is alcohol one of those seven
2 types of -- Is ethanol one of those seven types of
3 --
4 A That falls under the CNS Depressants category.
5 Q Okay. So it is -- it does fall under one of the
6 categories that you --
7 A Yes.
8 Q -- were taught in this? Okay.
9 A Yes.
10 Q Okay. So go ahead and continue.
11 A It teaches me specific drug categories, what they
12 do to your body, or a combination of drugs and
13 drugs and alcohol.
14 Q Okay. And then is that course divided into certain
15 sections?
16 A Can you be more specific?
17 Q I can.
18 A Is the course divided into specific sections on how
19 we learn?
20 Q Yes.
21 A Yes.
22 MR. WELLBORN: Your Honor, once again, I'm
23 going to object to relevance, because, again,
24 the issue -- purpose of this Motion -- We're
25 talking about a horizontal gaze nystagmus test

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1 and a walk-and-turn, not whether or not
2 somebody's gone through drug recognition
3 training or what they've learned in drug
4 recognition training, or whether or not even
5 -- whether or not Deputy Palmer felt my client
6 was under the influence. The only issue, for
7 purposes of the Motion, is whether or not what
8 occurred during the horizontal gaze nystagmus
9 test, what occurred during the walk-and-turn
10 test, and whether they're present or not
11 present on the videotape. So, I mean,
12 certainly, we can spend hours going into
13 Deputy Palmer's training. She can attempt to
14 qualify him as an expert, which I don't think
15 she can do, under the Rules of Evidence, but
16 she could attempt to.

17 I could take him on via voir dire. I
18 could ask him about his experience in serology
19 and his experience in toxicology, and we still
20 would never get to the point, which is the
21 issue at hand. The only issue that is before
22 this Court right now is whether it can be
23 shown or not shown that the videotaping
24 portion of the statute was complied with,
25 because that's the Motion on the table. And

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1 therefore, to use Rule 401, which was used
2 before, relevance, does what he has to say
3 tend to show or not show that the videotaping
4 portion of the statute was complied with.
5 That's what's relevant or not relevant. So I
6 would object, for relevance purposes, for all
7 the other stuff. And it's really cool stuff,
8 but it's not relevant to the Motion at hand.
9 MS. VALENZUELA: Your Honor, it's directly
10 relevant, in that, first of all, when the
11 expert testified, he testified as to how he
12 would give the test, and he kept -- and Mr.
13 Wellborn kept asking, "And can anyone see how
14 they did on this test?" "Can anyone determine
15 how they passed this test?"

16 And so I am laying the foundation to show
17 that the deputy has the qualifications and the
18 training; and that, yes, someone could watch
19 this and determine that that was done.

20 And Mr. Wellborn got a lot of leeway in
21 his questions with his expert, and I would ask
22 for the same leeway --

23 THE COURT: I'll give you the same leeway.

24 MS. VALENZUELA: Thank you, Your Honor.

25 MS. VALENZUELA: (Continuing Redirect)

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1 Q And so, with the DRE, are you expected to pass a
2 portion before you go on to the second portion?

3 A Yes.

4 Q Okay. And explain the first portion of that
5 training.

6 A The first portion of the training is called DRE
7 Preschool. It's a quick synopsis of a little bit
8 of everything of past knowledge. Once you pass
9 that test, that actually dwindles out the -- The
10 people who don't pass have to go home immediately.

11 Q Okay. So let me get this straight. You are -- You
12 go through the first section, and you actually have
13 to test and pass before you're allowed to go on and
14 complete the second portion of the training for
15 DRE?

16 A Correct.

17 Q Okay. And are you taught on different types of
18 tests to give people to determine whether they're
19 under the influence of alcohol and/or drugs?

20 A Correct.

21 Q Okay. And then were you able to successfully pass
22 that first section?

23 A Correct.

24 Q Okay. And did you go on to the second section?

25 A I did.

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1 Q And what is that second section?

2 A The second section just basically breaks down the
3 drug categories and how they affect the body; and
4 then several wet labs, more hands-on experience,
5 things of that nature. And then, at the end,
6 there's a final exam; and, of course, you have to
7 pass that.

8 Q Okay. And where does this all happen?

9 A At the Academy in Columbia.

10 Q Okay. And then are you sent to Arizona at any
11 portion of your DRE experience?

12 A Yes, after you pass the two weeks in Columbia.

13 Q Okay. So, after you pass the two weeks, then you
14 go to Arizona?

15 A Correct.

16 Q And then what do you do there?

17 A You actually do a hands-on experience with people
18 who are impaired by drugs, specifically drugs,
19 because you don't really get to see that too much;
20 but, that's the main focus, is drugs. You do
21 hands-on evaluations on them and you determine the
22 category that they're on, or categories. And, of
23 course, there's also a toxicology that's also been
24 provided.

25 Q Okay.

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1 A And then, once you've completed that, you do
2 another final exam at the end of that week; and,
3 once you pass that, then you become a DRE.
4 Q Okay. Now, on the portions where you're actually
5 using, you know, different people to determine
6 whether they're under the influence of drugs, do
7 you have to correctly identify a certain number of
8 people in order to pass that portion of the DRE
9 School?
10 A Yes.
11 Q Okay. What success rate do you have to have in
12 accurately identifying whether someone was under
13 the influence of drugs, in order to pass that
14 portion?
15 A I think that would be 10 out of 12, 11 out of 12.
16 It's pretty high.
17 Q Okay. And did you pass that portion?
18 A Yes, I did.
19 Q So you correctly identified the majority of the
20 people that you --
21 A Yes.
22 Q -- tested? Now, how did they confirm this, that
23 you were doing a correct --
24 A After the evaluation, we go out and talk to an
25 instructor, and we'll tell them what we believe

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1 Q Okay. And how long are you required to check for
2 resting nystagmus? How long do you have to hold
3 the stimulus?
4 A There's no requirement.
5 Q There's no minimum time for that?
6 A No, ma'am.
7 Q And so you did check for resting nystagmus. And
8 what did you do after you checked for resting
9 nystagmus?
10 A After I checked for resting nystagmus, determined
11 that her eyes were equal -- or equal pupil size,
12 and then I checked for equal -- or resting
13 nystagmus, and then I checked for equal tracking.
14 Q Okay. And how did she do -- What did her eyes
15 show you, in terms of the resting and the equal
16 tracking?
17 A That things were normal.
18 Q Okay. And so what did you do after you confirmed,
19 through resting nystagmus and equal tracking, that
20 her eyes were normal?
21 A Continued through the nystagmus test.
22 Q Okay. And what was the next -- What's the --
23 A The next test was a lack of smooth pursuit.
24 Q Can you explain to the Court what that is?
25 A Lack of smooth pursuit is, just for illustrations,

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1 that this subject is on; and we go back and
2 interview the subject and see if he tells us. And,
3 if he does or doesn't, it's also confirmed by the
4 toxicology that he takes before we evaluate that
5 person.
6 Q Okay. So a toxicologist takes a sample, you give
7 them your series of tests, you identify what
8 they're on, whether they're under the influence of
9 anything; and then your decision as to what they're
10 on is either confirmed or denied by what the
11 toxicologist proved through the blood. Is that
12 right?
13 A Through the urine, yes, ma'am.
14 Q Through the urine.
15 A Yes, ma'am.
16 Q Okay. And so you did that correctly in at least 10
17 out of 12 cases.
18 A Yes, I did.
19 Q Okay. Now, let's move on. We're focusing on just
20 the HGN portion, so that's why I want to skip a
21 little bit ahead and do this a little bit
22 differently. But let's move on to the actual HGN
23 portion that you gave the Defendant. Did you check
24 for resting nystagmus?
25 A I did.

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1 you have a wet windshield, your windshield wipers
2 move smoothly left and right. If the subject has
3 alcohol in their system, it interrupts the lack of
4 smooth pursuit; therefore, it looks like dry
5 windshield wipers on a windshield. It's kind of
6 jerky.
7 I moved my stimulus left and right, two
8 passes, two seconds each; therefore, you know, you
9 could see the jerking of the eyes move back and
10 forth.
11 Q Okay. And were you able to see the Defendant's
12 eyeballs during this test?
13 A I was.
14 Q And so, if you checked for smooth pursuit or lack
15 of smooth pursuit, be it as it may, what did you do
16 after that?
17 A After lack of smooth pursuit, I checked for
18 distinct and sustained nystagmus at maximum
19 deviation.
20 Q And how do you check for that?
21 A You take your stimulus and move it out to as far --
22 The first check would be the left. Move it as far
23 out as you can so you see the white of the eye, and
24 you hold it out there for approximately four
25 seconds. And then, once you see the jerking of

1 the eye, you go back to the right and hold it for
 2 four seconds and you do that for two passes.
 3 Q And were you able to see the Defendant's eyeballs
 4 while you were doing that portion?
 5 A Yes.
 6 Q Okay. And what did you do after determining she
 7 had distinct and sustained nystagmus at maximum
 8 deviation?
 9 A I continued on. I went to nystagmus onset prior to
 10 45 degrees.
 11 Q Okay. And how do you do that?
 12 A I take the stimulus and move it slowly, about a
 13 four or five second pass to the shoulder or the
 14 shoulders, estimated to be roughly 45 degrees.
 15 That's where you're supposed to stop. You check to
 16 see if the subject has nystagmus in their eye
 17 before you get to their shoulder.
 18 Q Could you see the Defendant's eyeballs when you did the
 19 nystagmus onset prior to 45 degrees?
 20 A Yes, I did.
 21 Q Those are always a mouthful for me. Now, let me
 22 ask you is there a certain distance that you're
 23 supposed to hold your pen or your finger from the
 24 suspect?
 25 A Approximately 12 to 15 inches.

1 Q Okay. And why is that? Why is the 12 to 15 inches
 2 important?
 3 A Just to -- Just so you can see and they're able to
 4 follow your stimulus, and it's not really in their
 5 face so their eyes don't get crossed; or, you see
 6 something that's not supposed to be there.
 7 Q Okay. And when you're taught to do HGN, are you
 8 taught to be the person who holds it and does the
 9 actual moving of the stimulus, or -- yes.
 10 A Yes.
 11 Q Okay. Have you ever been taught to stand behind
 12 somebody and have someone else do HGN while you
 13 look over that person's shoulder to see that
 14 person's eyeballs?
 15 A If I'm watching it with them, they're usually the
 16 administrator.
 17 Q Uh-huh (affirmative).
 18 A And I would just observe. So that wouldn't be my
 19 case. That would be their case.
 20 Q Where would you stand, if someone else was
 21 administering the HGN?
 22 A If somebody else was administering? If I didn't
 23 want to get in their video, per se, I'd just stand
 24 off camera. Or, if they would like -- If they
 25 asked for me to actually watch, I would stand kind

1 of back and off to the angle just a little bit so I
 2 can watch.
 3 Q Okay. How close do you think you have to be in
 4 order to be able to see close enough to the eyeball
 5 in order to make a determination?
 6 A To actually see nystagmus? Anywhere from 15 to 30
 7 inches.
 8 Q Deputy Palmer, where is your video camera in your
 9 roadside -- in your car?
 10 A It is in the front right part of the windshield.
 11 Q Okay. And how is it connected to your car?
 12 A How is it connected?
 13 Q Uh-huh (affirmative).
 14 A Tons of wires.
 15 Q Okay.
 16 A I mean, it's a bunch of wires, and there's a DVR
 17 system that's in the back of my trunk.
 18 Q Are you able to get the video camera and release it
 19 from the --
 20 A No.
 21 Q -- the camera? No?
 22 A Huh-uh (negative).
 23 Q I mean, from the vehicle.
 24 A No.
 25 Q So you're not able to actually take the camera out

1 and move it around to the outside?
 2 A No.
 3 Q Okay. Would you have a camera in the car, that if
 4 another deputy responded, you could have that
 5 deputy hold the camera and adjust as necessary --
 6 A No, ma'am.
 7 Q -- on the scene? No. So the only video camera
 8 that you have is the one that attached to your car
 9 in a stationary position?
 10 A That's correct.
 11 Q Okay. Have you reviewed any DUI videos in your
 12 career as a police officer?
 13 A Yes, mine and several other officers.
 14 Q Have you ever seen the eyeballs of a defendant on a
 15 video -- when you're watching the video?
 16 A No.
 17 Q So you've never been able to see the eyeball of a
 18 defendant by watching the video camera from a
 19 stationary camera that's inside of a police vehicle
 20 observing out onto the scene.
 21 A No. You can see their eyes, but not the eyeball.
 22 Q And can you see enough to make a determination, as
 23 a person who wasn't on the scene?
 24 A No, ma'am.
 25 Q Now, you were talking about your certifications in

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1 field sobriety. Are you trained and certified in
 2 HGN?
 3 A Yes, I am.
 4 Q And, from the position where you were standing,
 5 were you able to determine if the Defendant had any
 6 clues, when you gave her HGN?
 7 A Yes, I was.
 8 Q Okay. And is HGN a pass-or-fail test?
 9 A It's a pass-or-fail.
 10 Q Has it been described as one that determines the
 11 presence or lack of presence of alcohol?
 12 A Can you rephrase the question?
 13 Q Sure. Has it been -- Is HGN a test that can
 14 determine whether alcohol is present in a
 15 defendant?
 16 A Yes.
 17 Q Okay. And so, when you say "pass-or-fail," what do
 18 you mean?
 19 A If -- If they have -- Well, if they have the
 20 indicators in the eye, that means that something is
 21 present in their body; so, therefore, you know,
 22 they would obviously fail that test.
 23 Q Okay. But -- So, if you're testing for whether
 24 they have alcohol, that would be a fail; whether
 25 they don't have alcohol, that would be a pass. Is

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1 --
 2 MS. VALENZUELA: I'm not --
 3 MR. WELLBORN: -- it's just an argument.
 4 THE COURT: You're not saying that --
 5 MS. VALENZUELA: That's not what I'm
 6 saying. That's not what I was saying at
 7 all. And so I am just going to move on,
 8 at this point. I think we're on two
 9 different pages.
 10 BY MS. VALENZUELA: (Continuing Redirect)
 11 Q Okay. Deputy Palmer, let's move on to the walk-
 12 and-turn.
 13 A Okay.
 14 Q Did you administer the walk-and-turn on the
 15 Defendant that night?
 16 A I did.
 17 Q Okay. And did you instruct her on how to do the
 18 test correctly?
 19 A I did.
 20 Q Okay. And did she then actually do the
 21 walk-and-turn?
 22 A She did.
 23 Q Okay. Now, where were you standing, in relation to
 24 the Defendant, as she did the walk-and-turn?
 25 A I believe, if you were actually looking at her in

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1 that --
 2 A Sure.
 3 Q -- how you're defining it?
 4 A Sure.
 5 Q Okay. But does doing -- Does doing HGN give you
 6 any indication of how impaired a person is?
 7 A No. Well, to an extent. I mean, it can --
 8 MR. WELLBORN: Your Honor, I'm going to
 9 object to that. There's actually law on that,
 10 what they can testify to.
 11 BY MS. VALENZUELA: (Continuing Direct)
 12 Q So we can stipulate that HGN gives the presence of
 13 alcohol.
 14 A Yes.
 15 Q And is not indicative of --
 16 MR. WELLBORN: I'll be glad to stipulate that
 17 if the HGN is instructed properly and the
 18 clues are present and visible, that that is
 19 admissible in a trial to establish that the
 20 presence of alcohol -- or that they can admit
 21 that, in an attempt to establish that the
 22 presence of alcohol exists. But that's all
 23 I'll stipulate to. I'm not going to stipulate
 24 to the fact that that is a scientific fact,
 25 because, in fact, it's not a scientific fact;

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1 the car, I was off to the back left.
 2 Q Okay. And did she -- What indicators did she have
 3 on the walk-and-turn?
 4 A She couldn't stand in the beginning position during
 5 the instruction stage, did not touch heel-to-toe in
 6 the majority of her steps, and did an incorrect
 7 turn.
 8 Q Now, let me ask you about the -- You said three
 9 indicators. Is that right?
 10 A I believe so.
 11 Q Okay. When you say that she didn't touch heel-to-
 12 toe on several steps, is that one indicator allowed
 13 for --
 14 A Yes, this --
 15 Q -- heel-to-toe, or is that several indicators?
 16 A That's just one indicator.
 17 Q So it's one indicator, no matter how many times she
 18 missed heel-to-toe.
 19 A Yes.
 20 Q Okay. In the position that you were in, that you
 21 just told the Court, could you see whether she
 22 failed to touch heel-to-toe?
 23 A Yes, I could.
 24 Q Okay. And could you see whether she maintains --
 25 whether she failed to maintain her start position?

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1 A Yes, I could.
 2 Q Okay. And were you able to see whether she turned
 3 incorrectly or not?
 4 A Yes, I could.
 5 Q I mean, were you in a position where you could
 6 determine that?
 7 A Yes.
 8 Q Deputy Palmer, when you eventually made your --
 9 Well, did you arrest this Defendant for DUI?
 10 A Yes, I did.
 11 Q And what was the basis of your determination to
 12 arrest her for DUI that night?
 13 A It's based off the driving and field sobriety; so
 14 totality of circumstances. It was based off her
 15 driving, field sobriety and the characteristics or
 16 things that I observed with her. So, it was
 17 totality of the circumstances.
 18 Q So was it totality of the circumstances decision,
 19 incorporating everything that you observed before
 20 you made that arrest.
 21 A Correct.
 22 Q Okay. How many -- Are there -- Is there more than
 23 one indicator on the walk-and-turn that you're
 24 looking for?
 25 A Yes, there's eight.

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1 Q Okay. And what do you think of the statement that
 2 the walk-and-turn all boils down to whether her
 3 heel met her toe?
 4 A Can you rephrase that or --
 5 Q Sure. Do you think it is a true statement that
 6 walk-and-turn basically boils down to whether she
 7 was touching heel-to-toe?
 8 A I mean, that is one of the objectives, yes, is
 9 touch heel-to-toe. I'm still not following your
 10 question.
 11 Q That's okay. Is -- Would your decision only be --
 12 Is that the only thing that you look for, when
 13 you're looking at walk-and-turn, whether she --
 14 A Oh, no, ma'am.
 15 Q -- touched heel --
 16 A No.
 17 Q -- heel-to-toe?
 18 A No.
 19 Q Okay. When you're considering how you place the
 20 defendant in relation to your car, what do you take
 21 into account?
 22 A Amount of space, actual -- my safety and their
 23 safety; and also, if we're on a road, parking lot,
 24 how busy the road is, things of that nature.
 25 Q Were you taught that your lights --

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1 MR. WELLBORN: Your Honor, I'm going to
 2 object as to what she -- her saying, "Were you
 3 taught that." That's about as leading as it
 4 gets. She can ask what he's taught, but not,
 5 "Were you taught," blank, and then have him
 6 respond "yes" or "no."
 7 MS. VALENZUELA: Well, Your Honor, if I said,
 8 "Were you taught?"
 9 MR. WELLBORN: Well, it's -- "Were you
 10 taught?" is fine. When you add, "Were you
 11 taught," and then bring into what he was
 12 taught, that's when it becomes leading. And
 13 that's my objection. That's a leading
 14 question.
 15 MS. VALENZUELA: Your Honor, I have to give
 16 context to "Were you taught?" I can't just
 17 say, --
 18 MR. WELLBORN: Well, by giving context, --
 19 MS. VALENZUELA: -- "Were you" -- "Deputy
 20 Palmer, were you taught?"
 21 MR. WELLBORN: -- you can -- The simple way
 22 to address this is simply say, "What were you
 23 taught about" blank.
 24 THE COURT: Ma'am, put it that way.
 25 BY MS. VALENZUELA: (Continuing Redirect)

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1 Q Okay. Deputy Palmer, what were you taught about
 2 blue lights and HGN?
 3 A To turn off your front blues whenever you conduct
 4 HGN.
 5 Q Why is that?
 6 A They could give you a -- I guess you'd consider it
 7 a false reading or something. You could see
 8 something that you're not supposed to see.
 9 Because, it could -- It could mess up the other
 10 person's eyes.
 11 Q So the blue lights could affect how you --
 12 MR. WELLBORN: Your Honor, again, "what could
 13 the blue lights affect."
 14 MS. VALENZUELA: No, I'm restating what he
 15 just said. That's not leading.
 16 THE COURT: That's right. Go ahead.
 17 BY MS. VALENZUELA: (Continuing Redirect)
 18 Q So -- I keep getting thrown off here. But -- So
 19 the blue lights could affect your determination of
 20 the HGN?
 21 A Correct.
 22 Q Okay. Do you take that into account when you
 23 determine the position that you're putting the
 24 defendant in relation to your car?
 25 A Yes.

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1 MS. VALENZUELA: Your Honor, we're not
 2 getting into -- Mr. Wellborn and I talked
 3 about this off the record. We're not getting
 4 into all the things that he observed up until
 5 field sobriety. The testimony I'm eliciting
 6 is merely -- I'm limiting it to the field
 7 sobriety portion, so that we can keep it
 8 relevant to the Motion at hand. Is it -- And
 9 I think -- Mr. Wellborn, do you agree that
 10 that's what we talked about?
 11 MR. WELLBORN: Well, I assume that we were
 12 going to be talking about the horizontal gaze
 13 nystagmus test and the walk-and-turn, since
 14 that's what the Motion's about. But
 15 obviously, we've expanded it beyond that; but
 16 I'm still kind of hoping that that's where we
 17 are. That's my understanding of where we're
 18 supposed to be. But then, again, I don't
 19 know.
 20 MS. VALENZUELA: I think that was a "yes."
 21 MR. WELLBORN: Well, no, actually, it wasn't a
 22 "yes." For the record, we've gone into DRE
 23 training, which is not a horizontal --
 24 MS. VALENZUELA: I'm -- I know I'm not --
 25 MR. WELLBORN: We've gone into all kinds of

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1 stuff that's not related to this.
 2 MS. VALENZUELA: I'm just trying to determine
 3 whether we're -- you're not making a probable
 4 cause argument, or anything, at this point.
 5 And we know that --
 6 MR. WELLBORN: No.
 7 MS. VALENZUELA: -- I could --
 8 MR. WELLBORN: Yeah.
 9 MS. VALENZUELA: -- recall the deputy, if we
 10 got into other motions.
 11 MR. WELLBORN: Correct. My Motion was very
 12 specific. I've -- you know, and that's what
 13 I'm hoping we're addressing, is the Motion
 14 that's on the table.
 15 MS. VALENZUELA: Thank you.
 16 BY MS. VALENZUELA: (Continuing Redirect)
 17 Q Deputy Palmer, when you were trained to do field
 18 sobriety, where -- In some of your training
 19 classes, where did you do that field sobriety?
 20 A I did it at the training center in York, for the
 21 sheriff's office. We'd -- That was an indoor
 22 location.
 23 Q An indoor location?
 24 A Yes.
 25 Q Okay. And have you found that there's differences

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1 in the way that you're -- the things that you have
 2 to keep in mind, when you give field sobriety
 3 inside a building versus on the roadside?
 4 A Yes.
 5 Q Okay. And, on this night, where were you located,
 6 when you gave this field sobriety?
 7 A It was in Spicewood Pines neighborhood. I believe
 8 it was on Sycamore Road, Drive. I'd have to look
 9 at the report and get the exact location.
 10 Q Were you on a roadway?
 11 A Yes, it was a roadway.
 12 Q And what time of day was it?
 13 A Quarter to 1:00, I believe.
 14 Q Is that P.M. or A.M.?
 15 A That would be A.M.
 16 MS. VALENZUELA: Thank you. You can answer
 17 any questions that Mr. Wellborn has for you.
 18 THE WITNESS: Yes, ma'am.
 19 THE COURT: Mr. Wellborn?
 20 MR. WELLBORN: Sure. Be pretty quick here.
 21 CROSS-EXAMINATION: (By Mr. Wellborn)
 22 Q You gave Mrs. Lorusso the horizontal gaze
 23 nystagmus test. Correct?
 24 A (Indicating yes) Correct.
 25 Q Okay. I'm sorry, this court reporter has to -- She

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1 doesn't pick up nods very well.
 2 And you were able to see that she had no resting
 3 nystagmus. Right?
 4 A Correct.
 5 Q And you were able to see that, because you saw her
 6 eyes.
 7 A Correct.
 8 Q But, on the videotape, we can't see her eyes at
 9 all. You'd agree with that. Correct?
 10 A Sure.
 11 Q Okay. You were able to determine that her eyes
 12 tracked equally. Correct?
 13 A Correct.
 14 Q Because you were able to see her eyes.
 15 A Correct.
 16 Q But, on the videotape, we can't determine that,
 17 because we can't see her eyes at all. Right?
 18 A Okay.
 19 Q Would you agree with that?
 20 A Correct.
 21 Q Okay. On the videotape, you were able to determine
 22 that she had lack of smooth pursuit in her right
 23 eye; correct? Sir? Right eye?
 24 A Right and left.
 25 Q Right and left. In both eyes; right?

1 A Yes, sir.
 2 Q But, on the videotape, we can't determine whether
 3 she had smooth pursuit in her right eye, because we
 4 can't see the right side of her face at all;
 5 correct?
 6 A Correct.
 7 Q And we can't discern whether she had lack of smooth
 8 pursuit in her left eye, because we can't see her
 9 left eye, either; can we?
 10 A Correct.
 11 Q Okay. And, on the video -- When you were giving
 12 the test, you said you were able to determine that
 13 she had distinct nystagmus at maximum deviation in
 14 both her right and left eyes; correct?
 15 A Correct.
 16 Q But, on the videotape, we can't see either her
 17 right or her left eye; correct?
 18 A Correct.
 19 Q So we can't make that determination, or no one --
 20 the jury wouldn't be able to make that
 21 determination, either; would they?
 22 A Correct.
 23 Q Okay. And then, of course, you were able to
 24 determine that she had onset of nystagmus prior to
 25 45 degrees in her right eye; correct?

1 A Correct.
 2 Q And, by the way, how many degrees was it that you
 3 noticed she had onset in her right eye?
 4 A It was probably about 30 to 35.
 5 Q Probably about 30 to 35. But, of course, we can't
 6 see her right eye at all, so we have no way of
 7 knowing; correct?
 8 A Correct.
 9 Q And same thing for her left eye, because we can't
 10 see her left eye, either; right?
 11 A Right.
 12 Q Okay. So, basically, none of the things that you
 13 noticed when you looked at her eyes, absolutely
 14 none of the stuff that you noticed, as far as the
 15 horizontal gaze nystagmus test, are we able to see
 16 on the videotape; are we?
 17 A Correct.
 18 Q Okay. Let's talk about the walk-and-turn. You
 19 were able to see, according to what you testified
 20 to, that when she walked nine steps forward, --
 21 A Uh-huh (affirmative).
 22 Q -- she missed the majority of her steps, did not
 23 touch heel-to-toe. Is that correct?
 24 A Correct.
 25 Q And, on the videotape, we can't see that, because

1 we can't see where -- whether her heels are
 2 touching her toes or not; can we?
 3 A Correct.
 4 Q And on the video -- or, on the scene, based on what
 5 you testified to, she also missed the majority of
 6 her steps going back nine steps heel-toe; correct?
 7 A Correct.
 8 Q All right. But we can't see that, either, because
 9 of the position of the camera relative to her feet;
 10 correct?
 11 A Correct.
 12 Q All right. You chose to tell her where to stand
 13 for the horizontal gaze nystagmus test; didn't you?
 14 A Correct.
 15 Q You shined a flashlight, you told her to stand
 16 there, you told her which direction to face; didn't
 17 you?
 18 A Sure.
 19 Q You also told her which direction to walk towards
 20 the camera during the walk-and-turn test; didn't
 21 you?
 22 A Correct.
 23 Q And which direction to walk back.
 24 A Correct.
 25 Q Those were your choices.

1 A Correct.
 2 MR. WELLBORN: All right. That's all the
 3 questions I have.
 4 MS. VALENZUELA: I don't have any questions.
 5 THE COURT: Sir, you can step down. Thank
 6 you.
 7 (WHEREUPON, the witness was excused.)
 8 MR. WELLBORN: Being my Motion, I'm ready for
 9 argument whenever the Court would like to go.
 10 THE COURT: Ma'am, are you ready?
 11 MS. VALENZUELA: Yes, Your Honor.
 12 THE COURT: Okay.
 13 MR. WELLBORN: Thank you. Judge, I have
 14 handed up -- and Ms. Valenzuela is previously in
 15 possession of -- the Court Orders, which I think
 16 summarize in excruciating detail the requirements
 17 of 58-521-53, Subsection A, of South Carolina Code
 18 of Laws.
 19 And what that section requires is that field
 20 sobriety tests be recorded in such a manner that
 21 would allow a person watching the recording to view
 22 the test performed so that an assessment can be
 23 made how well the defendant performed each test.
 24 I would refer specifically to the Pittman
 25 Order from Judge Alford that was -- that is a

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1 hearing on July 26, 2012. That's Page 2. You'll
2 find, on Page 2, the second to last paragraph,
3 Judge Alford states that gravamen of the
4 Defendant's argument is that the videotape fails to
5 show the field sobriety test in such a manner as
6 would allow a person watching the recording to view
7 the test performed so that an assessment could be
8 made as how well the defendant performed each test.

9 On the next page, Judge Alford then outlines
10 the statute, under Paragraph 2, Page 3 of 10. And,
11 specifically under Section (A-1A), talks about how
12 the video recording at the incident site must --
13 not shall, should, could, if we wanted to, but must
14 include any field sobriety test administered.

15 Now, the question is what does that mean.
16 Well, what it means is it's got to show the whole
17 field sobriety test, not part of it. It's not a
18 good enough for government work argument. It's not
19 a well, we came close, or we would've done better,
20 but the conditions didn't allow us to. They've got
21 to show the whole thing.

22 Page 4 of 10, Judge Alford then goes into an
23 analysis of what this code section means. In the
24 last paragraph, in construing the terms, the South
25 Carolina Section Code, Section 56-529-53 (A12),

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1 which requires that any field sobriety test
2 administered must have been videotaped, --
3 recorded, the plain and ordinary meaning of the
4 statute would appear that a field sobriety test be
5 completely or substantially recorded such that a
6 person watching the recording -- not the person who
7 made the recording; but the person watching the
8 recording, which would include Your Honor,
9 presumably the jury -- next page -- view the test
10 performed by the driver suspect so that an
11 assessment could be made as how well the driver --
12 the suspect driver performed the test.

13 Now, the reason I'm starting with Judge
14 Alford's Order is, quite frankly, it's the latest
15 word we have on this; not to mention that Judge
16 Alford is one of our circuit judges, which has, I
17 would suggest, some import.

18 Now, the question then becomes, if we look at
19 Page 6 of 10, which is the very next page,
20 Paragraph 3, that the video recording provisions
21 of South Carolina Code Annotated, Section
22 56-529-53(A) are mandatory. This isn't optional.
23 It's mandatory.

24 And then quoting Town of Mount Pleasant versus
25 Roberts and City of Rock Hill versus Suchinsky --

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1 and I'm going to come back to the Suchinsky case,
2 because that's very important, as well -- When a
3 prosecuting agency fails to comply with the
4 mandatory video recording provision of South
5 Carolina Code Section 56-529-53, the appropriate
6 remedy is dismissal the case against the
7 Defendant. Again, citing the Suchinsky opinion.

8 The Suchinsky Opinion, parenthetically, was a
9 South Carolina Supreme Court Opinion, and what's
10 also of interest in the Suchinsky Opinion is that,
11 on the circuit level, that was decided against the
12 City of Rock Hill in favor of the Defendant by
13 Judge John C. Hayes, our other resident circuit
14 judge. That was taken up to the South Carolina
15 Supreme Court. Judge Hayes was affirmed at the
16 Supreme Court, and the case was dismissed.

17 What we have here, quite frankly, as we go
18 through this, is we have uncontradicted testimony.
19 Deputy Palmer's testimony is 100 percent in line
20 with the videotape. The videotape clearly shows we
21 can't see either eye. We can't even see the right
22 side of the face. But he supposedly observed all
23 this stuff, but we can't see it. He acknowledges
24 that.

25 We also can't see what he says occurred

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1 regarding the walk-and-turn: He has acknowledged
2 that. So there are no facts in dispute here.
3 There are just simply none. It's either on camera
4 or it's not. They deputy acknowledges that it's
5 not on the camera. The law says it's required to
6 be on the camera, and that those provisions are
7 mandatory.

8 Our Supreme Court has handed down two opinions
9 of note: Suchinsky and Town of Mount Pleasant
10 versus Roberts, that says the remedy is dismissal,
11 when it's not on the camera, when they haven't
12 complied with the recording provisions.

13 This isn't a situation where the State says,
14 Oh, well, wait a minute. It's okay. The reason we
15 didn't record this, because the camera wasn't
16 working or, oh, well, we had an emergency situation
17 where we had to take the person to the hospital, so
18 there were no field sobriety tests, so that's why
19 it's not on camera.

20 This is a case where field sobriety tests were
21 done in their entirety, based on the testimony of
22 the officer, based on the testimony of Mr. Ludlam,
23 based on the videotape, and they were not
24 recorded -- I mean, horizontal gaze nystagmus test
25 at all. And merely -- And, I would mention, merely

1 the fact that someone is visible on a tape while a
2 test is being given to them, does not mean the test
3 is being recorded. Because, that was something
4 that Ms. Valenzuela alluded to.

5 Let me give you a hypothetical. We could have
6 a situation where my client had her back to the
7 camera so he couldn't even see her face and we
8 couldn't see the officer's hand. But we know
9 that's her. She's visible on the tape. That
10 doesn't comply with the recording provisions. We
11 could have a situation where she's being given a
12 walk-and-turn and we can't even see her feet, but
13 she's visible on camera. That does not comply with
14 the recording provisions.

15 In Judge Couch's case, there was a finger
16 touch. And I'm sure you had a chance to read Judge
17 Couch's Order. And, in that case, one of the hands
18 wasn't visible on the camera, but the person was
19 surely on the tape; but, Judge Couch ruled that
20 that doesn't comply with the recording provisions.

21 In another one of these cases, the feet were
22 cut off. That didn't comply with the recording --
23 That was Judge Alford's case dealing with another
24 walk-and-turn situation. In this case, we know
25 there are feet; we just don't know what they're

1 The statute doesn't say that, because an officer
2 puts his camera in a certain position and he's not
3 able to pick it up on camera, that that complies.
4 The statute says, "If you're going to give the
5 test, you've got to record it." It doesn't say,
6 "If you don't record it, because your camera angle
7 was wrong, or your camera was in the wrong
8 position, that's okay."

9 Our Legislature, our law, which is mandatory,
10 our rulings from our Supreme Court do not rise and
11 fall based on how Deputy Palmer mounts his camera;
12 or someone else, in mounting Deputy Palmer's camera
13 for him, mounts his camera. "Mandatory" means
14 "mandatory." It doesn't mean "if you choose to
15 follow it" or "good enough for government work."

16 And this is not, in any way, meant to
17 disparage Deputy Palmer. I don't think he has any
18 way to control over where that camera is mounted.
19 It's probably mounted at a factory, or it's mounted
20 when the car's fitted by the York County Sheriff's
21 Department.

22 But the point is that does not change the
23 legal analysis, because the law is very clear.
24 "Mandatory" means "must." It doesn't mean "when
25 you feel like doing it." And it doesn't mean

1 doing, because of the camera angle. How is an
2 independent person supposed to make an assessment,
3 whether my client -- how she performed that test,
4 if we can't see whether the feet are touching the
5 toes or not.

6 Now, we can take the officer's word for it,
7 but that doesn't comply with the statute, and that
8 doesn't comply with the law. The statute doesn't
9 say, well, if the officer testifies, it's all okay.
10 It's supposed to be recorded. And "recorded" means
11 able to be seen, not guessed at or hunches of
12 happened; or, what the heck? We all know somebody
13 went by. It must've happened that way. So that's
14 the problem we have.

15 Very, very briefly -- Bear with me just one
16 second, because I'm almost done, so we can move
17 on with the State's argument. There was an
18 argument -- or a suggestion made that because the
19 officer has a camera mounted in his patrol car,
20 that there are certain things that, just as a
21 practical matter, can't be captured.

22 Now, Mr. Ludlam said he's seen situations
23 where you can see it. Officer Palmer says, "I've
24 never seen that situation." Okay. Maybe one has
25 and maybe one hasn't. But that's not the issue.

1 "whether the sheriff's department decides to do it
2 that way or not."

3 The actual case on that point is State -- Town
4 -- or City of Mount Pleasant versus Roberts -- or
5 Town of Mount Pleasant versus Roberts. Our
6 Supreme Court took great pains in that case, where
7 they were just saying, "Hey, look, we don't have
8 any cameras, so we don't have to record." And the
9 Supreme Court said, "Wrong. There's this statute
10 that requires you've got to do this, you've not
11 done it, and the remedy is dismissal." Bear with
12 me one second.

13 THE COURT: Take your time, sir.

14 MR. WELLBORN: Thank you.

15 THE COURT: You got till 6:30.

16 MR. WELLBORN: Well, I'm actually almost done.
17 I should be done in a couple of seconds.

18 How well someone performs a test is -- means
19 the entire test. It doesn't mean, "Well, we think
20 they didn't so well on these first three things, so
21 that's close enough." The jury has to be able to
22 see the whole test. In this case, the officer
23 specifically said she failed every one of the
24 portions of the horizontal gaze nystagmus test.
25 How is the jury supposed to know whether the

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1 officer is telling the truth or not, other than
2 simply taking his word for it, if you can't even
3 see her eyes. That's what the recording statute
4 hints at.

5 When the officer says she missed the majority
6 of all of her 18 steps, not counting the
7 turnaround, because nine plus nine is 18; so,
8 presumably, if she missed the majority, she missed
9 at least 10 of them, 10 steps. She'd have to miss
10 at least 10 steps for it to have been a majority.

11 If she missed at least the majority, how does
12 the jury know whether that's true or not, if we
13 can't see whether her feet -- whether her heels are
14 touching the toes. We can't see it. All the
15 officer had to do was turn her sideways, and we'd
16 be able to see it.

17 Again, I don't think was intentional. But
18 intentional is not the issue. The recording
19 statute is mandatory. The remedy is dismissal.
20 Our Supreme Court has told us that. The statute
21 tells us that. The South Carolina Supreme Court
22 has told us that. Judge Alford has told us that,
23 Judge Hayes has told us that, Judge Couch has told
24 us that. And that's what I'm asking for is a
25 dismissal of the charge, because clearly, according

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1 to the videotape and the two people that have
2 testified on this issue, Mr. Ludlam and Deputy
3 Palmer, we can't see, in one test, any of it; and,
4 in another test, substantial portion of it. Thank
5 you.

6 THE COURT: Thank you. Okay.

7 MS. VALENZUELA: Thank you, Your Honor.
8 Do you have those three cases that he gave you
9 earlier?

10 THE COURT: I do.

11 MS. VALENZUELA: Okay. Because, I'm going to
12 direct us to different portions on that.

13 Before Mr. Wellborn started his Motion, he
14 said that he anticipated that what I'd be saying is
15 that I want you to disregard what the circuit court
16 judges said; and, actually, that's not true. I
17 think that you can read the cases that Judge Alford
18 decided, that Judge Mark Hayes -- which is a
19 different judge than our circuit judge; he just
20 shares the same last name -- and Judge Couch held;
21 and using -- and looking at the facts of this case,
22 still make a decision that's actually in the same
23 line as they made.

24 And additionally -- and, of course, since Mr.
25 Wellborn was the actual attorney in this case, he's

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1 aware of Judge Alford's ruling; and he is supposed
2 to tell you if he is aware of a different or
3 opposite ruling. He's --

4 MR. WELLBORN: With all due respect, --

5 MS. VALENZUELA: -- supposed to bring that to
6 your attention.

7 MR. WELLBORN: -- that's -- that's improper.
8 What she's handed is a transcript from a trial
9 where there was no order made, there was no motion
10 made -- There was a motion made pretrial --
11 actually, from a bench trial, which the judge
12 denied, on videotape recording. However, there was
13 -- and no order issued. As I'm sure Ms. Valenzuela
14 would acknowledge; or, if she doesn't perhaps needs
15 a refresher. A transcript of a trial is not
16 precedent. It simply isn't. And argued from a
17 transcript of the trial that a judge made a ruling
18 in a bench trial in July of 2012 -- July 11th, to
19 be specific -- when, in fact, we have an order from
20 the same judge later, where he has made a very
21 specific ruling, because Judge Alford's Order, in
22 Pittman, was July 26, 2012. Judge Alford's bench
23 trial that he had with me was July 11th, 2012. So,
24 even if we say Judge Alford made a ruling which is
25 precedent -- and a transcript of record is not

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1 precedent, by law. But, even if we suddenly create
2 a new rule and say that it is, it's clear that, as
3 of July 26, which was approximately 15 days later,
4 Judge Alford had reversed himself and changed his
5 mind. So the latest precedent we have is the July
6 26, 2012.

7 But I would object to a transcript being used
8 as precedent, because that is, quite frankly,
9 simply not proper under the Rules of Evidence or
10 the Rules of Legal Argument. And I would be
11 absolutely fascinated to know where Ms. Valenzuela
12 gets the idea that transcript record becomes
13 precedent.

14 MS. VALENZUELA: As Mr. Wellborn knows, or
15 perhaps needs to be reminded, circuit orders are
16 also not precedent, Your Honor. What he handed to
17 you is not precedent, and I can point to you
18 actually where it says, within the order, that it's
19 not precedent. But it is something that can inform
20 the Court and the Court can use to make its
21 decision, but it's not precedential.

22 So the difference being that, if it were
23 precedent, it would require you to follow what that
24 person has held. But you can use this to inform
25 your decision. So the Orders that he gave you,

1 also under the Rules, are not precedential; and,
2 actually, under the Rules, are not allowed to be
3 cited in any holding, except the actual case that
4 they came out of.

5 The only cases that would be precedential are
6 published Court of Appeals Opinions or published
7 Supreme Court Opinions. Even unpublished
8 decisions, at the Court of Appeals level, are not
9 technically supposed to be cited, under the
10 Appellate Rules. So Mr. Wellborn knows that, as
11 well.

12 And so, in the same hand, a transcript that
13 does reflect that a Motion was made -- and I can
14 direct you to the last page, Page 76, the Court
15 finds that the Statute has been complied with.
16 It's the last two lines, 24 and 25. What the
17 transcript shows is that there was a Motion made
18 before the judge, and that the judge issued an oral
19 ruling on that Motion.

20 And so it is not in writing, but it was -- a
21 transcript was prepared. Mr. Wellborn was actually
22 present at that hearing. And, if you look at the
23 witness list, Mr. Ludlam was actually also present
24 at that hearing; he testified during that hearing.

25 And so I am not here to tell you that this is

1 precedential -- it has precedential value; it does
2 not. It carries the same -- the same weight as
3 these written orders that were given to you by Mr.
4 Wellborn.

5 Now, Mr. Wellborn pointed out that Judge
6 Alford issued the Order in Doug Pittman's -- in
7 John Douglas Pittman's case on July 26, 2012, and
8 that this decision was on July 11th, 2012. The one
9 thing I would point out to Your Honor, is that the
10 statute at issue -- the current statute was amended
11 in 2009. So the judge was looking at the same
12 statute, in John Douglas Pittman, as he was in the
13 Jared Lewis case. Okay. So he was applying the
14 same statute. And the facts are different, in that
15 in Pittman -- Sorry, I have the specific page. On
16 Page 2 of Pittman, you'll see the tests that were
17 given included the HGN test, the walk heel-to-toe
18 test, and the stand-on-one-leg test; so, all three
19 tests were given on that video. And then it tells
20 you, if you flip to Page 8, starting at the top,
21 "in regard to the three fields radius," --

22 THE COURT: Don't go too fast.

23 MS. VALENZUELA: Sorry.

24 THE COURT: That's all right. Go ahead.

25 MS. VALENZUELA: Page 8, so it's the first

1 full sentence starting with the word "The Court
2 finds."

3 THE COURT: Yes.

4 MS. VALENZUELA: "The Court finds that the
5 State has complied with the statute in regard to
6 HGN test and the stand-on-one-leg test." And then
7 it goes on to say that the Court finds that the
8 State failed to comply with the videotape statute
9 in regard to the heel-to-toe.

10 And then, in the Jared Lewis transcript that I
11 handed you, -- In the Jared Lewis transcript that I
12 handed you, Page 11, --

13 THE COURT: Yes, ma'am.

14 MS. VALENZUELA: -- Line 12, Mr. Wellborn
15 indicated that his Motion was based on the HGN
16 test. And you can read through other -- I don't
17 know if Mr. Wellborn was, of course, present. But
18 that was the only test that he was challenging, was
19 the HGN.

20 And Judge Alford held that the HGN, in
21 actually very similar facts, did not violate the
22 statute. And then, also, in Pittman, he held that
23 the HGN test did not violate the statute.

24 And so, when Mr. Wellborn said that Judge
25 Alford reversed himself, I think that that would be

1 inaccurate. I think that, on HGN, he actually
2 remained consistent. He upheld that HGN did not
3 violate the statute in both.

4 And then, you know, staying with the Pittman
5 Order, I give you the transcript on Jared Lewis to
6 show you that perhaps that Mr. Wellborn -- either
7 he thought that Judge Alford had reversed himself,
8 or forgot that he had a duty to advise you of both
9 decisions that were different than the ones that he
10 knows about -- that are different than the ones
11 that he wants to give you.

12 But Judge Alford has held that, even when you
13 can't see the eyeballs on HGN, that that does not
14 violate the statute; and, he was talking about the
15 current statute that we're working under today.
16 And so that applies to the same argument that you
17 have today. He's challenging that, because you
18 can't see the eyeballs on the HGN, or because you
19 can't see half of her face, that that violates the
20 -- the video statutes.

21 And, in the Jared Lewis case, Judge Alford
22 looked at similar facts, had Mr. Ludlam also
23 testifying as an expert witness, and there said
24 that, even though her eyeballs weren't on camera
25 and you couldn't see her full -- her full eyes on

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1 camera, that that did not violate the video
2 statute.

3 Now, looking at the Pittman Order, where Judge
4 Alford held that that specific video did violate
5 the video statute, he specifically says, on Page 8,
6 when he's talking about the facts, that the video
7 camera was positioned in such a manner as that the
8 defendant's feet were not visible.

9 In this case, the Defendant's feet were
10 visible. She's actually seen walking on camera,
11 and you can see her feet going through there. You
12 can see the majority of the test. It is not a
13 situation -- And frankly, I have had cases like
14 this, where the officer positions the defendant
15 too closely his patrol vehicle, or does the camera
16 in such a way that when the defendant is walking,
17 you can't see below, you know, their calves at all;
18 and so, you can't see their feet. You can't see
19 whether they maintain start position, or whether
20 they step offline, or whether they actually touch
21 heel-to-toe. You can't see whether they do an
22 appropriate turn, because you can't see their feet,
23 which is a majority of the walk-and-turn test, in
24 that circumstance.

25 Here Mr. Ludlam testified himself that he had

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1 watched this video, and that you were able to see
2 every single indicator, you just couldn't see her
3 heels and her toes on the camera. But, he said,
4 "Yes, I could see her" -- "see if she could
5 maintain her start position. I could see whether
6 she had her hands up in the air. I could see
7 whether she did a proper turn. I could see whether
8 she stepped offline." And we went through all the
9 different indicators, and all of those were on
10 there.

11 And so earlier, when Mr. Wellborn was telling
12 you what these orders said, he said that -- that
13 they held that all of it, but not part of it has to
14 -- all of the field sobriety, not part of it, has
15 to be on camera. And I think he used a phrase --
16 the phrase, "This isn't just good enough for
17 government work," when he was talking about that,
18 just to remind you where we're talking about.

19 But actually, in reality, if you look at Page
20 4 of the Pittman Order -- He read this out loud,
21 which is why I thought it was kind of amusing -- It
22 says "The plain and ordinary meaning of the statute
23 would appear that a field sobriety test be
24 completely or substantially recorded."

25 So, right there, in Judge Alford's Order, he

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1 does not say that the field sobriety test be
2 completely recorded. And he could've said that.
3 He could've just said "completely," that all of it
4 has to be on camera. He said "completely or
5 substantially recorded," meaning that the majority
6 of it has to be recorded.

7 And then it goes on to the next page and
8 states "it has to be enough so that an assessment
9 could be made as to how well the driver suspect
10 performed the test." Not whether defendant -- the
11 suspect passed or failed, it says how well the
12 defendant did on the test.

13 So, you've watched the video. A jury could
14 see whether she could hold up her hands, whether
15 she could maintain start position, whether she
16 could touch -- whether -- I'm sorry -- whether she
17 could walk in a straight line, whether she could
18 step offline, whether she did the proper turn, they
19 can see that for themselves.

20 Now, Mr. Wellborn says that it's improper for
21 you to consider whether the jury would be
22 supplemented by testimony, whether, you know,
23 testimony can supplement this when they're
24 watching this. I would point for Your Honor that
25 we've had to have an expert and then a DRE person

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1 explain field sobriety tests. Testimony always
2 goes along with the video when presented to the
3 jury. Because, if you put field sobriety up there
4 with no one explaining the process to the jury, a
5 jury is not going to know what they're looking for.
6 They're not going to know if -- that they're
7 supposed to be paying attention to whether she's
8 maintaining her start position. They're -- They're
9 going to say -- They're not going to know whether
10 they're supposed to be looking for heel-to-toe at
11 all. They're not going to know that they're
12 supposed to pay attention to whether she can do the
13 turn improperly -- or properly. I'm sorry. All of
14 those things that you're told to look for -- that a
15 jury is told to look for comes from testimony.
16 Testimony is what helps explain the field sobriety
17 test to the jurors every single time.

18 And so, when he says that that -- you know,
19 that it's crazy that testimony could supplement the
20 test. In this situation, which is very different
21 from the one that Judge Alford ruled on, where you
22 can see her feet, and you can see substantially --
23 you can see a substantial portion of the
24 walk-and-turn test on video camera, and you can see
25 enough that you can determine that the jury could

1 make an assessment as to how well she did, and then
2 that's going to be -- that is going to come down to
3 the weight of the evidence versus the admissibility
4 of the evidence.

5 And Mr. Wellborn is -- I'm sure, is going to
6 get up and put his expert up there to challenge
7 what; you know, the deputy saw and how the deputy
8 analyzed that. And that is his right, and that is
9 actually how he's supposed to do it, is to go
10 through and break down through everything else.
11 And he can say, "Ladies and gentlemen, do you see
12 her miss heel-to-toe on that? No, you don't see
13 it. But, according to the deputy, she missed
14 everything."

15 Now, Mr. Ludlam and the deputy both testified
16 that missing heel-to-toe is one indicator. Even
17 though she misses several steps, it's one indicator
18 to the entire test. And then Mr. Ludlam testified
19 that he could see all the different indicators.
20 And I don't know if you remember me going through
21 and I picked up my chart, and I went through and I
22 said, "Could you see whether she could maintain
23 start position? Could you see whether she stepped
24 offline? Could you see whether she walked a
25 straight line, turned improperly, used her arms to

1 balance or took an incorrect number of steps?" And
2 Mr. Ludlam said yes, that he could see all of
3 those.

4 And so, if you can see seven out of eight of
5 the indicators on camera, then, Your Honor, you can
6 -- the field sobriety test has been substantially
7 recorded and an assessment could be weighed as to
8 how well the driver suspect performed on the test.
9 That is repeated again on Page 6, where it says
10 "The requirement that any field sobriety test be
11 recorded would necessarily mean that a person
12 watching the recording would be able to completely
13 or substantially" -- so, once again, he emphasizes
14 "completely or substantially view the test as it
15 was performed by the drive suspect, such that any
16 person watching the recording could make some
17 assessment as to how well the driver suspect
18 performed on the test." Not a definitive "yes, she
19 passed it" or "no, she didn't pass it." Make some
20 assessment as to how she did on that test.

21 Now, the other two -- And so, that was Judge
22 Alford's decision. The other two is -- Christopher
23 Self was Judge Hayes -- a different Judge Hayes's
24 decision. And there the feet and legs were not
25 visible on walk-and-turn. Once again, when we go

1 through the indicators, you want to be able to see
2 if they maintained the start position. You want to
3 be able to see if they touched heel-to-toe. You
4 want to be able to see if they stepped offline, or
5 if they walked a straight line. You want to be
6 able to see if they turned properly. You want to
7 be able to see if they took the correct number of
8 steps. That is a significant difference.

9 So I don't stand before you saying, "Don't go
10 along with what they said. I just point out that
11 the facts that they were dealing with were
12 different than the ones that are before you today,
13 because this isn't a case where the car -- or the
14 camera cut off their entire feet or their entire
15 legs. The majority of the test is captured on
16 camera.

17 The final one is Turner, and that one was by
18 Judge Couch. And, on that one, Your Honor, it's
19 the finger dexterity. And we didn't have
20 testimony on it, but you can see, on Page 3, it
21 explains the test; and it basically says you count
22 "one, two, three, four, four, three, two, one," and
23 you use the thumb -- touching the tip of the thumb
24 to each four fingers while counting out loud. And
25 on Page 3, it says, "In the video recording of the

1 Defendant, the Defendant's back is facing the
2 camera, such that one cannot see the test being
3 demonstrated or being performed by Defendant."
4 So, in that case, her back is blocking her hand,
5 which is showing how the test is being done, in
6 that situation.

7 Once again, it is very different than the
8 facts before you today, where you can see her feet,
9 her legs, all of her body, to show you the
10 indicators -- the seven out of eight indicators,
11 except for the heel-to-toe, which is, in the
12 reality, a lot of the videos. When he's walking
13 heel-to-toe, you can't see whether the defendant is
14 walking towards you or walking in a different
15 direction, because of the limited capability of the
16 camera.

17 Now, Mr. Wellborn said that you -- you know,
18 the fact that the General Assembly ordered that
19 this be done, and it doesn't matter how the
20 camera's installed. But, when you're determining
21 -- and right now, you don't have a case that is --
22 that tells you what you have to do -- I'm sorry,
23 the word literally escapes me right now -- a
24 precedent -- you don't precedence on this issue.
25 I'm sorry. I'm like making up ways to describe it.

1 There is the Murphy case. And the Murphy
2 case -- I don't know if you're familiar with it. I
3 have a copy of it. But the Murphy case is -- I
4 have it in here. The Murphy case analyzed field
5 sobriety. In that case, her legs basically below
6 -- I say "her," but I don't know if it was a female
7 or a male. The legs and feet were cut off on field
8 sobriety. The judge held there; you know what, we
9 captured enough, and that's fine.

10 Now, the reason that I'm not pointing you to
11 that case, to begin with, is because the Court
12 analyzed that video camera under the old statute.
13 And the new statute has changed to add the
14 language that the video recording must -- and then
15 this is where the quote starts -- "must include any
16 field sobriety offered."

17 So the statute doesn't say "must include every
18 portion of the field sobriety offered," or the --
19 And you can look at the language yourself, Your
20 Honor, 56-29-53. It specifically says "The video
21 recording at the incident site must not begin later
22 than activation of the officer's blue lights." And
23 then the second point is "Include any field
24 sobriety test administered."

25 Now, we don't have guidance from the Court of

1 Appeals or the Supreme Court on what that language
2 means exactly. The only published opinion from the
3 Court of Appeals is Murphy. And Murphy analyzed
4 that, under the prior statute, that did not say
5 "must include any field sobriety offered." I think
6 the only portion where it actually mentioned field
7 -- it said you basically capture the defendant's
8 conduct, and then it went on to say that -- I'm
9 sorry -- have to capture Miranda before any field
10 sobriety is offered. So it did make it clear, like
11 this statute, basically lining it out.

12 And so I do think that's it's different from
13 Murphy. And I think where we are right now is
14 basically in a no-man's land, where there is no
15 guidance. And you can look at the facts, and you
16 can look at the statute, and you determine, based
17 -- looking at the statute, what it means. And when
18 you are looking at a statute to determine -- to
19 interpret what it means, you are -- If it is not
20 clear on its face -- And I would argue that just
21 saying "include any field sobriety offered" is not
22 clear on its face that a hundred percent of the
23 field sobriety has to be offered.

24 So, when you're looking at something that's
25 ambiguous, you are allowed to look at what the

1 General Assembly intended when it wrote this
2 statute.

3 And so, looking at that, when the General
4 Assembly made this law, were they familiar with how
5 dashcams work in a police car video? Did they know
6 that police car videos aren't detached and able to
7 go around with the police officer, like the
8 person's body mic is. Yes, they did know that
9 you're limited, in that situation. Did the General
10 Assembly know what, unlike Mr. Ludlam, when does
11 his wet labs in a controlled environment where he
12 gets to pick where he is, where he gets to make
13 sure that he doesn't have to worry that the persons
14 he's administering field sobriety to isn't going to
15 turn around and stab him or hurt him or punch him
16 or do anything like that; or even doesn't have to
17 worry about "What's the car that's pulling up
18 behind me? I have no idea if he's with her or if
19 he's a good guy or a bad guy." Or, he doesn't have
20 to worry about the traffic that's going in either
21 direction, although he did say that he picked a
22 very busy parking lot to do his wet lab in.
23 But, in all these situations, he didn't have to do
24 it. And he said that he didn't have a video camera
25 filming, because it would be tough in that

1 situation.

2 Here, when the General Assembly wrote this
3 statute, they knew that they were dealing with
4 traffic stops. And a checkpoint, yes, Your Honor.
5 A checkpoint with law enforcement gets to pick
6 where they want to have that checkpoint. They get
7 to say, you know, "based on the number of arrests
8 and the number of stops here, based on our data,
9 we're going to pick this location, because it is
10 indicated that there's no problems, and we're
11 going to pick" -- "we're going to set it up down
12 here, because there's a nice, even place where we
13 can do field sobriety, or we're going to take it
14 over here," whatever the case may be.

15 On a regular stop such as this one, with Mrs.
16 Lorusso, Deputy Palmer doesn't know that he's going
17 to pull Mrs. Lorusso over. He's not -- He can't
18 tell the future. He's sitting there, and he
19 observes something -- her committing a traffic
20 infraction, and turns to go and pull her over. He
21 doesn't -- He also doesn't get to determine when
22 she decides to stop. As soon as his blue lights
23 come on, that's rarely the case. He has to follow
24 her until she stops. And when she stops, that's
25 when he decides where they're going to -- you know,

1 where they're going to do field sobriety.

2 If he gets out, because she stops, he can't
3 honk his horn or say, "Keep going," or whatever the
4 case is. If it's probably a foot or two, something
5 like that, he could say that. But, in that case,
6 where he doesn't know what the person's doing, he
7 turns on his blue lights and where she stops is
8 what determines what environment you're left with.

9 Now, when he gets out of the car and he talks
10 to her and he smells alcohol, and he has other
11 suspicions of DUI, and he's not sure, yet, so he's
12 going to do field sobriety, he's certainly not
13 going to put her in the car and then say, "Ma'am, I
14 need you to drive over here so that we can do it in
15 the safety of your driveway. The reality is that
16 most of these stops are going to be in a condition
17 where you can't control things, and you're trying
18 to make sure that the lighting is right and
19 everything's going well.

20 And the General Assembly knew that, when it
21 wrote this statute. And so, when it did not
22 specify a hundred percent of the field sobriety has
23 to be captured on camera, or it must include all
24 portions of field sobriety test administered, I
25 mean, we're talking -- Your Honor, we're talking

1 about one extra word that they could've thrown in
2 there, if they meant that they wanted every single
3 portion of it administered. They did not put that
4 in there. And it is up to you, because you have no
5 precedent right now telling you what to do, how
6 you're going to read that statute.

7 But, unlike Mr. Wellborn says, I'm not here
8 shooting for the moon, so to speak, or telling you
9 that I want you to look at my interpretation of
10 that statute; because, the facts in the case don't
11 need me to. The facts in this case -- I can point
12 you the decisions that the circuit judges have
13 already made in cases that aren't precedent, so
14 that can help to inform your decision; and I can
15 look at the transcript, in this case, and I can see
16 that, in this case, Judge Alford has held that HGN
17 is not -- that's not the situation, that it doesn't
18 violate the statute, because there's no way to
19 capture the eyes on field sobriety tests. There is
20 no camera that the State of South Carolina has that
21 allows the eyes to be seen on camera.

22 Now, Mr. Ludlam did say that he had watched
23 videos where he could see portions of the eyes.
24 But, even if -- I mean, I don't know if you took it
25 the same way I did, but the way I took it is that

1 he kept shifting the situation of where the officer
2 was and where the car was and where the Defendant
3 was, so that he could -- "Okay, now it's magical.
4 Now I have the magical spot where the officer can
5 see both eyes and the camera can somehow capture
6 these two eyes." But, there's been no example
7 brought to you to show that, yes, in fact, this can
8 be done with a regular roadside video camera.

9 Additionally, -- and I think this is the part
10 where I was asking for the stipulation, where there
11 was some confusion -- HGN is not a pass-or-fail
12 test. Okay. And so there has to be -- So, in that
13 case, when Mr. Ludlam was saying that they have to
14 determine if they pass -- that you have to be able
15 to see enough where they know if they pass or fail
16 the test. We all agree HGN isn't a pass-or-fail
17 test, in the terms of did they miss, you know,
18 these indicators to show that they're materially
19 and appreciably impaired. All it's showing is the
20 presence of alcohol.

21 Even if the jury saw their eyeballs, Your
22 Honor, they don't know what they're looking for.
23 They could be shown eyeballs, and it means nothing
24 to them, because they have not been trained to look
25 for resting nystagmus, sustained nystagmus at

1 maximum deviation, onset of nystagmus prior to 45
2 degrees. Without an officer explaining what that
3 all means, they can't make the determination,
4 anyway. So, when Mr. Wellborn's like, "I can't
5 believe that my jury can't see my eyes, because now
6 what are they going to say," they wouldn't be able
7 to make that determination without testimony,
8 anyway. And so that's the testimony that's the
9 officer is going to provide, "This is what I see."
10 And, in every case that we do, we have HGN, and
11 this is the testimony that is given.

12 Isn't it in -- I wrote this down earlier, so
13 that I wouldn't have to flip through. In Couch's
14 Order, it shows that HGN was given in that case.
15 And, in Couch's Order, the only thing that it held
16 was that the finger test -- that's where the focus
17 was -- that that violated the field sobriety. In
18 Judge Hayes's, unfortunately, he doesn't give the
19 full facts. He just focuses on the walk-and-turn,
20 so I don't know whether HGN was given in that one
21 or not. But, in Judge Alford's, he specifically
22 said that the one-leg stand and HGN were given and
23 the walk-and-turn, and the only problem that he had
24 was with the walk-and-turn. And then I gave you a
25 transcript where he literally put on motion of Mr.

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1 Wellborn and expert testimony from Mr. Ludlam with
2 very similar facts that said, no, this is does not
3 violate the video statute, and I am not going to
4 dismiss this case because I couldn't see the
5 eyeballs on the -- of HGN given on videotape.

6 And so, I -- what I'm standing before you
7 asking is not to disregard what the judges said,
8 but to look at their Orders where they say can you
9 see most are substantial -- I'm sorry. I want to
10 make sure that I use the specific language. "Can
11 the person watching the recording be able to
12 completely or substantially view the test, as it
13 was performed by the driver suspect, such that any
14 person watching the recording could make some
15 assessment as to how well the driver suspect
16 performed on that test."

17 And, I think, with walk-and-turn, you can
18 definitely do that, when you have seven out of
19 either indicators all present for the jury to look
20 and see how she did on that test and to determine,
21 "I wonder how she did on that test," and see that.

22 When the General Assembly passed the
23 56-529-53 -- And I'd pointed out that, in the prior
24 statute, they had mentioned field sobriety test --
25 they had said you have to capture Miranda before

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1 where it's -- resting nystagmus, I think it is.

2 "I don't think he held the pen long enough, so I
3 don't think he actually did the resting nystagmus."
4 Or, "Actually, you know what? I have a problem,
5 because actually you're supposed to hold the pen
6 out for four seconds over to the side when you're
7 trying to see if they have nystagmus, if it's at
8 maximum deviation. And I counted it, and it was
9 two seconds" -- or "actually, it was 10 seconds,"
10 whatever the case may be.

11 All of that is actually on camera so that Mr.
12 Ludlam can still rip it apart however much he wants
13 to, because he sees how it's administered and
14 everything that the deputy is doing to the
15 Defendant. He sees where she's standing. He sees
16 that, no, she's not facing the blue lights;
17 because, if she were facing the blue lights, Your
18 Honor, we'd be here on a whole other motion, at
19 that point. He'd be arguing no probable cause,
20 because the blue lights were flashing in her eyes;
21 and so you have to discount the entire test.

22 And so, in this portion, you see everything
23 that the officer's doing. You see how the
24 Defendant's standing, you see the distance that he
25 had the pen from her eyes, you see that he's --

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1 any field sobriety test are offered. The General
2 Assembly was aware field sobriety tests are
3 offered, and field sobriety tests have been
4 standardized across our country for quite a while.
5 And I think you heard some of that testimony from
6 Mr. Ludlam -- excuse me -- he was able to go to
7 Georgia and get the same type of training on the
8 field sobriety test as the deputy -- Deputy Palmer
9 gets when he gets it here in South Carolina.

10 And so, when the General Assembly wrote this
11 statute, they were aware that horizontal gaze
12 nystagmus is a standardized field sobriety test,
13 that it is basically given, in almost every single
14 DUI case that is ever going to come before you,
15 Judge. And they knew that we do not have the
16 capability of recording a person's eyeballs on
17 camera. They knew that. They said it must include
18 any field sobriety test administered. It didn't
19 say, you know, in this case, where you have the
20 video where she's on camera and it shows you how
21 the deputy is administering the test, and it does
22 so in a way that Mr. Ludlam can be called to say,
23 "Actually, I have a criticism. I don't think he
24 held the pen long enough to show that she had" --
25 I'm forgetting the phrase. But, in the beginning,

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1 that she's moving -- he's moving it, the pace that
2 he's moving it; you see whether he does -- she
3 passes, to do -- you know, to make sure that she's
4 not doing the windshield wiper effect. You see
5 that she -- he holds it -- he has maximum
6 deviation. You see that he tries to make sure,
7 before 45 degrees, is there onset of nystagmus
8 before you even get to 45 degrees with the eyes.
9 You see all of that on camera. And it can be
10 ripped apart by the Defense, if they want to. And
11 then they can go to the jury how they want to
12 determine how this person did on this, you know,
13 scientific test that it would take -- it takes
14 people to explain to us. It's not going to be one
15 where it's just, "Here are the eyeballs of this
16 woman. Do you think she was under the influence of
17 alcohol?" And, either way, those tests don't tell
18 us if she was materially and appreciably impaired.
19 It gives the --

20 And, you've heard -- You know, Mr. Wellborn
21 was quick to make sure that you understood that.
22 And you heard that -- Well, in this case, officers
23 are going to use that just to determine if, you
24 know, "I'm smelling alcohol. I'm going to give you
25 HGN. I'm going to see if there's something in your

1 system." And then they're going to go on and give
2 you the other two tests. And there have been some
3 officers that have done HGN and determined I don't
4 see anything in your substance, sir. Thank you
5 very much, and you can go on your way." But that's
6 one of the tests that leads to the evidence.

7 On the walk-and-turn, I think, you know, I've
8 exhausted it. We've definitely -- We went through
9 the entire video. You saw the walk-and-turn. You
10 saw how it was done. You've heard Mr. Wellborn's
11 testimony where he basically said that every
12 indicator is --

13 MR. WELLBORN: Just for the record, I never
14 testified at all.

15 MS. VALENZUELA: I'm sorry. Did I say
16 "Wellborn"? I meant "Ludlam."

17 MR. WELLBORN: Yes.

18 MS. VALENZUELA: Okay. So, Mr. Ludlam's
19 testimony where he said that he was able to see all
20 the different indicators, except that one indicator
21 of the heel-to-toe. And then -- And that will be
22 supplemented by testimony, and Mr. Wellborn will
23 be able to say, "We can't see it on video, Jury.
24 What do you think? Do you think she touched
25 heel-to-toe?" And maybe what the jury will say --

1 To be honest with you, this is sometimes how I
2 analyze my cases, that I think the jury will say,
3 "I didn't really get to see that portion, so I'm
4 just going to kind of even it out. It's neutral.
5 It's like that part never happened. I'm going to
6 rely on the portions that I want to see."

7 The State has an incentive to want to get this
8 on video. We want to get this on video. The --
9 One of the indicators is did she walk a straight
10 line. On her video, you see that she's positioned
11 in a way so that you can actually see where she
12 walks a straight line. Well, if she had been
13 positioned in the way that Mr. Wellborn has
14 suggested, where she's actually, you know, with her
15 side to the camera so that you can perhaps see the
16 heel-to-toe, well, I mean, it might have still been
17 dark and the distance of the camera might not have
18 specifically shown the distance from the
19 heel-to-toe.

20 In that situation, you might not have been
21 able to see if she's walking a straight line. She
22 might be walking diagonally, but to the camera, it
23 looks like she's walking straight. And the
24 officer's going to say, "She did not walk a
25 straight line." And that's one of the indicators

1 that they have.

2 And, in that situation, is Mr. Wellborn going
3 to say, "That portion of the test isn't on camera."
4 Even though you can see all of her feet and all of
5 her body and everything, because you can't tell
6 whether she's walking diagonally or not, because of
7 the way that he chose the position her on the
8 camera, you've got to dismiss the entire case." It
9 would not -- It would not make sense. It does not
10 comply with what the General Assembly intended when
11 it passed the statute, which is actually
12 instructing officers and the court how to treat
13 driving under the influence charges, and it doesn't
14 reflect the whole case that not only I passed up to
15 you from Judge Alford, but also the ones that even
16 Defense Counsel gave you. I'm through.

17 MR. WELLBORN: Just briefly.

18 THE COURT: Briefly.

19 MR. WELLBORN: Thank you. This is really
20 simple, actually. First of all, in Judge Alford's
21 transcript, which is not an order, on Page 76, at
22 the bottom, Judge Alford found, in that case --
23 First of all, in that case, the only thing
24 challenged was the horizontal gaze nystagmus test.
25 That is correct. But, as the trial lawyer, what

1 was interesting about that case is the challenge to
2 that was not that you couldn't see my client's
3 face. The challenge was that you could see part of
4 the officer's hand.

5 Judge Alford found, quote, -- starting on Line
6 22, at the bottom of Page 76 -- quote, "but it is
7 clearly visible. It is clearly on the videotape
8 and the Court finds the statute has been complied
9 with." What Judge Alford did is he made an
10 independent analysis as the finder of fact in the
11 Jared Lewis case, that, in fact, the HGN was
12 visible and was substantially -- the recording
13 statute was substantially complied with, because it
14 was visible, unlike here, where you can't see the
15 person's eyes at all and you can't see one-half of
16 her face.

17 Now, also, in Judge Alford's Order in Pittman,
18 where he talks about -- He does not -- anywhere in
19 the Pittman Order, does he make a finding that the
20 HGN was challenged. No one challenged the HGN, in
21 Pittman. No one challenged the one-leg-stand test,
22 in Pittman. What they challenged, in Pittman, was
23 the walk-and-turn, and Judge Alford made a decision
24 based on what was challenged. The HGN wasn't
25 before him. He didn't need to make a finding that

1 the HGN was appropriate or not appropriate. In
2 fact, he does not say, in Pittman, that anybody
3 challenged the HGN, he found it complied -- was
4 complied with. He simply says that it's visible.
5 Okay, great. It probably was visible in Pittman,
6 but it sure as heck isn't visible here.

7 Furthermore, in both the Turner and Self
8 cases, no one challenged the HGN in those cases,
9 either; but, golly gee, they're being challenged
10 today. And they're being challenged today,
11 because, unlike in the Lewis case, where Judge
12 Alford found it was visible on the camera, every
13 single person in this courtroom agrees it is not
14 visible on the camera, because you can't -- It's
15 not just you can't see the details of Mrs.
16 Lorusso's eyes. It's not just that you can't see a
17 little bit of twitching during some portion of the
18 HGN, in her eyes. It's not just that you can't see
19 twitching in her eyes at all. The point is you
20 can't even see her eyes. And more to the point,
21 you can't see one entire half of her face.

22 Now, the argument that, "Oh, well, golly gee,
23 this could be challenged by cross-examination, this
24 could be supplemented by testimony," that is not
25 significant when it comes to a mandatory recording

1 statute says, and it says that field sobriety tests
2 are supposed to be recorded. We also know it's a
3 mandatory recording statute, because that's -- our
4 Supreme Court has told us that.

5 Now, the next thing is, if we have a -- If we
6 are going to talk about whether something has been
7 substantially recorded, Judge, "substantially" has
8 at least got to mean more than 50 percent; right?
9 It's got to mean, as Ms. Valenzuela said, it's got
10 to mean at least a majority; doesn't it? That
11 means "substantial." The word "substantial" means
12 more than half. It means at least the majority,
13 according to what the State has said.

14 In the HGN, we have none, zero, zippo. We
15 can't see her eyes. We can't see her face. We
16 don't know how she performed it, other than the
17 officer's, quote, "supplemental testimony," which
18 is not what the statute requires. The statute
19 doesn't say if the officer says it happened, it
20 happened.

21 On the walk-and-turn, according to Judge
22 Alford, on Page 5 of 10 of the Pittman Opinion, he
23 said, quote, "Although the feet of the suspect
24 driver could not be seen during the test, which is
25 an important part of the test, the Court of Appeals

1 statute. The statute -- The Rules of Statutory
2 Construction -- and there are a bunch of cases that
3 say this, but, if you want a case that says it,
4 look at Town of Mount Pleasant versus -- City of
5 Mount Pleasant versus Roberts. Talks all about
6 what the Rules of Statutory Construction are. All
7 of these orders reference what the rules of
8 Statutory Construction are.

9 Our Supreme Court tells us what the Rules of
10 Statutory Construction are. And what it means is
11 two things: Number one, words are supposed to be
12 taken in their plain and ordinary meaning. We're
13 not supposed to start adding stuff or saying,
14 "Well, this is what we think the legislature
15 meant." or "This is what we think the legislature
16 understood," or, "Golly gee, the legislature
17 must've known all about HGNs when it passed the
18 statute." There is nothing in the record that says
19 that. There's no testimony that says that. There
20 are no cases that say that. That's absolutely
21 nothing for you, as a trier of fact -- or, more
22 importantly, as a finder of law -- there's no
23 evidence in the record what the heck the
24 legislature knew when they passed this statute.

25 But we do know what the language of the

1 held, under the former statute" -- this is talking
2 about Murphy versus State -- They held that that
3 was okay, but the law changed. And, in Murphy, our
4 Court of Appeals said the only reason we're
5 deciding this case in favor of the State is because
6 we're addressing the old statute; under the new
7 statute, the field sobriety test -- not just the
8 conduct, but the field sobriety test must be
9 recorded.

10 So, our Court of Appeals has told us that
11 what's happening with the feet during the walking
12 portion is an important part of the test. Well, if
13 it's important enough to the Court of Appeals, it
14 arguably is important enough to this Court. And,
15 in this case, we don't know how in the world Mrs.
16 Lorusso did on the walking portion of the
17 walk-and-turn. We don't know how she did on step
18 number one, step number two, step number three, all
19 the way to step number nine. We don't know how she
20 did on all nine steps back. Eighteen portions of
21 that test, we have no idea how she did, because of
22 the way she was placed towards the camera.

23 So we know that Judge Alford has dismissed a
24 driving under the influence charge against Mr.
25 Douglas Pittman, John Douglas Pittman, as of

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1 July 26, 2012, because the walk-and-turn was not
2 visible. The walking portion wasn't visible. We
3 don't know whether he even considered the HGN or
4 whether the HGN was challenged, because the Order
5 is silent to that. Ms. Valenzuela says it, but,
6 quite frankly, none of us were there; so, we really
7 don't know.

8 We do know that, in the case that I tried, in
9 Jared Lewis, where no written Order was issued,
10 Judge Alford found that, in fact, it was visible.
11 That's part of his findings on Page 76 in the
12 transcript of record. In this case, we know that
13 Deputy Palmer, Mr. Ludlam and everybody in this
14 courtroom agrees it's not visible, because you
15 can't see her eyes, and you can't see one-half of
16 her head.

17 So, given all that, you have to decide whether
18 or not, in fact, the plain language of 56-529-53,
19 Subsection A applies or doesn't apply. If it does
20 apply, you're required, as a matter of law from the
21 South Carolina Supreme Court, to dismiss this
22 charge. If this statute does not apply, if it, in
23 fact, is not mandatory or if this statute means,
24 when we can't see somebody's eyes at all, that's
25 good enough, and we can't see how someone's

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1 statute that I brought this under. And it was
2 addressing whether or not field sobriety tests were
3 being recorded pursuant to or as a requirement of
4 the mandatory provisions of the recording statute.
5 Suchinsky is a field sobriety test case. That's
6 just the reality of it. So -- And that case was
7 decided -- was ruled that where the -- the charge
8 was not dismissed at the city court level, it was
9 appealed to Judge Hayes, who reversed, finding it
10 should've been dismissed. It was then appealed on
11 up to the South Carolina Supreme Court, who
12 affirmed Judge Hayes, affirming the dismissal. And
13 it is Suchinsky that is the progenitor of all these
14 other cases.

15 It was Suchinsky that was cited by our South
16 Carolina Supreme Court when they decided last year
17 Town of Mount Pleasant versus Roberts. It was
18 Suchinsky that was subsequently been cited in
19 every follow-up, and it is Suchinsky that has been
20 cited by Judge Alford in the Pittman Opinion, by
21 Judge Roger Couch in the Turner Opinion, and by
22 Judge Mark Hayes in the Self Opinion. So, you know,
23 it is precedent related to this matter.

24 That's all I have to say. Thank you for your
25 time on this particular issue.

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1 performing the walking portion of a walk-and-turn;
2 that's substantial enough, then that is not the
3 remedy. But that's the decision you're charged
4 with making.

5 I would suggest that you take this matter
6 under advisement. You may want to take some time
7 and look at City of -- or Town of Mount Pleasant
8 versus Roberts, and you may want to look at
9 Suchinsky and you may want to look at these other
10 cases, because, with all due respect, our two
11 reviewing judges are the judges that have issued
12 orders dismissing for violations of the recording
13 statute.

14 MS. VALENZUELA: That's Judge Mark Hayes.

15 MR. WELLBORN: Well, no, what I was going to
16 say is, City of Rock Hill versus Suchinsky, which
17 starts out the whole entire process, which is the
18 primary case that started this whole concept of
19 dismissal being the only remedy, was Judge John
20 Hayes's case on appeal that came out of the City of
21 Rock Hill.

22 MS. VALENZUELA: It wasn't addressing this
23 specific issue --

24 MR. WELLBORN: It was addressing 56-529-63,
25 Subsection (A) of South Carolina Code, which is the

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1 MS. VALENZUELA: Your Honor, --

2 THE COURT: Ma'am?

3 MS. VALENZUELA: I do -- Yeah, there's --
4 Because, there were a couple of issues. When
5 referring to the transcript, he said that the judge
6 was -- he was sitting on -- it was a bench trial,
7 so he did make factual and legal determinations;
8 and I think Mr. Wellborn just said that to you.

9 But, the actual -- This is a legal
10 determination of whether it complies or violates
11 with the statute. And when you see it, it says
12 "The Court finds that the statute has been complied
13 with," referring to Page 76, that -- that's a legal
14 decision. It's not a factual decision. And he
15 suggested, in the beginning, that actually, since
16 it was a bench trial, it was a factual finding, but
17 actually it was a legal finding.

18 Looking at that same transcript, if you'll
19 turn to Page 13, because it looked like there was
20 some confusion as to, you know, how Judge Alford
21 felt on this, is "I have never seen a nystagmus
22 test where you could see what the eyes were doing
23 to the jerking of the eye, seeing exactly that."
24 You always have to allow what the officer
25 testifies. They are required to videotape it to

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1 show that they were running the test. Then you
2 have to rely on the officer and what he saw when he
3 -- what he said he saw with the eyes. "I have
4 never been able to see anybody's eyes or jerking or
5 anything else during the test. The question is
6 have they got a videotape." And your question was
7 that the videotape could've been better, so that
8 you can see more. The videotape clearly shows the
9 officer administering the test, which is what's
10 required. And, in that same case here, that's
11 exactly what you have, is you have the officer
12 administering the test to show what's required.

13 And that is from the transcript that he told
14 you that Judge Alford wasn't even looking at the
15 eyeballs and whether they were on the test; but,
16 clearly, that was one of the things that was
17 addressed in the transcript.

18 In the Pittman Order, he said that I wasn't
19 there, and that I was telling you that the judge
20 had ruled on all three tests. And so, I just would
21 point you to Page 7, at the bottom.

22 THE COURT: Yes, ma'am.

23 MS. VALENZUELA: It says -- Well, it starts
24 with the number --

25 THE COURT: Okay.

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1 be captured. It doesn't say a hundred percent.
2 And there is no precedent, no binding precedent
3 right now telling you what that means.

4 I pointed out Murphy to you, but I expressly
5 told you that was the old statute. But, if you'll
6 look at Footnote 4 and read it, he described it as
7 Footnote 4, but the Court of Appeals said the only
8 reason we're deciding this way is because it's the
9 old statute. On the contrary, what the Court was
10 saying is we want you to know that we expressly --
11 this is analyzing it under the old statute. That's
12 all it was saying. It wasn't saying we're
13 analyzing this under the new statute. To be honest
14 with you, that would've been improper. That
15 would've been picked up in the Court of Appeals.
16 They weren't looking at the new statute in that
17 case, and so they're not going to make a holding as
18 to how the new statute applies. They're just
19 saying, "Look, all we're saying is we're looking at
20 this case under the old statute." That's it.
21 Because, we're not actually giving you any
22 guidance, on the new statute. We're just saying
23 this is the old statute.

24 And when I presented it to you, that's exactly
25 how I said it. I'm not trying to grab more out of

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1 MS. VALENZUELA: In the present case, the
2 Defendant asserts that the State has failed to
3 comply with the videotaping requirement in regard
4 to three field sobriety tests, mainly the HGN test,
5 the walk heel-to-toe test, and the stand-on-one leg
6 test. The Court finds -- So, right there, it tell
7 you, no, actually all three tests were challenged
8 before Judge Alford, and that Judge Alford found --
9 He made a legal holding that the State had complied
10 with the statute in regard to the HGN and the
11 one-leg stand. And then he went on to say, now,
12 but wait a minute, as to the walk heel-to-toe test,
13 where the entire feet were cut off, now, that one,
14 no. Because, in terms of the HGN, he did, in fact,
15 do that. And that's why I do think that you have
16 to take that into consideration in making your
17 decision, since I'm sure that Mr. Wellborn just
18 missed that point, when he told you that that
19 hadn't been looked at by the Court. And he wanted
20 you to focus -- You know, he says, "Don't focus on
21 what the General Assembly feels about this. Focus
22 on the words of the statute."

23 And, if you look at the statute, it says
24 "includes any field sobriety test administered."
25 That's it. It doesn't tell you everything has to

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1 Murphy, analyze it under the new statute. And you
2 look at cases before you and see that they're
3 saying basically that you can follow Judge Alford's
4 holdings, follow Judge Couch's holdings, and follow
5 Judge Mark Hayes's holdings, and come to the same
6 decision in this case, when you look at the facts,
7 come to the decision to actually know the
8 substantial portion of the field sobriety test is
9 on camera.

10 And so, because the substantial portion is on
11 camera and there's the officer -- that person could
12 determine how they go -- how they did, that is,
13 that you -- I don't have to dismiss the case. And
14 you can look at your own interpretation of the
15 words -- the video recording of the incident citing
16 "must include any field sobriety test." That's it.
17 There's no other guidance.

18 Mr. Wellborn says that there's 18 indicators
19 -- there are 18 portions of the walk-and-turn that
20 are missing. But, Mr. Ludlam -- and we have the
21 benefit of a court reporter and your recording, Mr.
22 Ludlam testified that you don't count every time
23 that she misses heel-to-toe as an indicator; you
24 count all those as one indicator, and my deputy
25 said the same -- testified the same thing. She

1 could miss every single time and it's one indicator
2 that she missed heel-to-toe. So, that's not the
3 majority of the tests. Then you look at all the
4 other indicators and Mr. Ludlam testified that
5 every single other indicator was on camera for you
6 to see.

7 The Suchinsky decision was issued in 2007. I
8 point that out to you because Mr. Wellborn did not
9 do, as I did, when I gave you the Murphy case,
10 and explained to you that Murphy was analyzing the
11 statute under the old case. Suchinsky, being
12 decided in 2007, means that it was decided under
13 the old statute. It also was the case where the
14 videotape cut out, and there was an entire field
15 sobriety test missing; so, it's very different from
16 the facts that are before you today.

17 In addition, the Murphy, which was analyzing
18 the same statute as Suchinsky was analyzing, Murphy
19 was decided in 2011. So the Court of Appeals
20 decided Murphy after they decided Suchinsky. So,
21 Suchinsky, they said, oh, if you're missing an
22 entire test, the whole tape runs out, yes, the case
23 can be -- the case should be dismissed.

24 In Murphy, that's where it looked like that
25 that's a more similar charge, where it said, okay,

1 if you've got field sobriety and some portion are
2 missing, actually, we're okay with that both under
3 the old statute. So, when he's like, "Judge Hayes
4 has held that some of these, when they're off
5 camera, you dismiss the whole case," is not an
6 accurate presentation of how Judge Hayes has ruled
7 on the current statute in this case. Those are
8 completely different. There isn't an entire field
9 sobriety test that's off camera, and that was under
10 the old statute, and that was before the Murphy
11 case was decided, Your Honor.

12 Those were all the points I felt like were
13 necessary to correct, because of the way -- You
14 know, we're all dealing with a lot of cases here,
15 but there were some things that were not brought to
16 your attention in terms of Judge Alford, yes,
17 analyzed all three tests; all three were challenged
18 by the Defendant, not just the walk and turn. It
19 was the HGN, and he upheld it there and in here, he
20 upheld it. And you can look at Page 13 of the
21 transcript to see how clearly he says, "I've never
22 seen eyes on a videotape. You're being ridiculous.
23 As long as you've got the person on there and you
24 can see how it's administered, it's fine, it
25 complies with the statute." And he did that in

1 July 11th of 2012, meaning well after the current
2 statute that we're working under, Your Honor.

3 MR. WELLBORN: Well, what Judge Alford did
4 also do is he said that the HGN is visible. And we
5 don't have that here. And Judge Alford clearly
6 said that on Page 76.

7 Furthermore, in Pittman, there are no --
8 there's nothing in the Pittman Order that talks
9 about what was visible or not visible -- was not
10 visible, relating to the HGN and the one-leg stand
11 test that the judge found complied -- that the
12 statute complied with.

13 In this case, we know it's not there; so,
14 that's first. Suchinsky, all I raised it for was
15 the proposition that this is a mandatory statute;
16 and, when you don't follow it, the remedy is
17 dismissal. That's the only thing I used it for,
18 and that's what the Supreme Court has told us, and
19 that's what I'm still raising it for. It is the
20 first case ever brought up before our Supreme Court
21 which addressed this issue. There were no cases
22 before it, so it was obviously the first case.
23 It's also been cited in by all these Orders, and
24 has been cited ever since, including in the Town of
25 Mount Pleasant versus Roberts case.

1 But what we have here -- Factually, what we
2 have is we have a horizontal gaze nystagmus test
3 where it's not just that we can't see the details
4 of eyes or we can't see part of -- We know the
5 officer is giving some kind of a test. That's
6 clearly visible. That's okay. That's good.
7 That's part one. But we have no idea how my
8 client's doing on the test, other than what the
9 officer says, and that's what violates the
10 mandatory recording statute, because her face is
11 not visible, her eyes are not visible, like in the
12 Jared Lewis case.

13 We don't know whether the face was visible in
14 Pittman, because there's nothing in the Order to
15 reflect it, but we sure as heck know it's not
16 visible here.

17 We do know that we can't see her heels and her
18 toes at any portion -- at any portion on the walk-
19 and-turn in this case. Just so to say, "Well,
20 we've got it on camera that she's doing the test,
21 and the officer can supplement it," that's the
22 whole point of the recording statute is because how
23 do you challenge it when you say, "Officer, she
24 actually touched her toes." "No, she didn't. I
25 was there. I know she didn't touch her toes."

1 It's his word versus the challenging lawyer.
 2 That's not the way it's supposed to work. That's
 3 why we have a mandatory recording statute.
 4 So I don't think there's any dispute about
 5 what the facts are in this case. There's no
 6 dispute there. There's no dispute what's required;
 7 the statute requires certain things. Also, along
 8 with the Rules of Statutory Construction, it's also
 9 worth noting that any ambiguity, any guesses as to
 10 what the legislature meant, by law, that is cuts
 11 against the State always. And, if we need anything
 12 on the record to verify that, in case there's any
 13 doubt, I'll very quickly read this into the record,
 14 and then I will be done, on this issue.

15 But it's been brought up, this whole bit about
 16 what the legislature meant, and the ambiguity, and
 17 the fact that the officer can supplement, and all
 18 this other stuff. Statutory Construction is a
 19 very, very specific thing; and it always cuts
 20 against the State, if there's ambiguity.

21 "Criminal statutes must be strictly construed
 22 against the State," State versus McCord. That was
 23 decided by our South Carolina Supreme Court in
 24 1972. That's found at 187 Southeast Second, 654.
 25 "Construing a statute, words, take their plain and

1 ordinary meaning without resort to or forced
 2 construction," that's State versus Southerland --
 3 or Southerland, S-O-U-T-H-E-R-L-A-N-D. That was
 4 decided by our Supreme Court in 1994, 447
 5 Southeast Second, 862

6 "Penal statutes are construed strictly against
 7 the State and in favor of the Defendant." That was
 8 State versus Cutler, C-U-T-L-E-R, decided by our
 9 Supreme Court in 1980, 264 Southeast Second, 420.
 10 That was followed by a whole lot of other cases,
 11 but ultimately, it was also -- There's United
 12 States Supreme Court law that says the same thing
 13 -- same exact thing going back to 1820.

14 There's nothing here that is unusual about the
 15 concept of Statutory Construction and the fact that
 16 these statutes are strictly construed against the
 17 State and always in favor of the Defendant.

18 So there we are. That's all I -- That is my
 19 entire argument. I think we've been over, sort of
 20 ad nauseam, all this stuff. I think Your Honor is
 21 certainly capable of making a decision on this, and
 22 we'll respect whatever decision you make.

23 I would simply request that, given the fact
 24 that what we're talking about is either dismissing
 25 a case that ought to be dismissed, as the law

1 requires it, or potentially not dismissing a case
 2 that the law requires be dismissed, before you make
 3 your ruling, that you have some time to actually
 4 read these cases, reflect on it. And I would
 5 suggest that it would -- might be worth it taking
 6 this under advisement.

7 There is no mandatory requirement that this
 8 case be tried this week. You may have time
 9 tonight, you may have time tomorrow to make a
 10 decision. But making it just off the cuff at the
 11 bench, I think, might be -- I would suggest, given
 12 everything that's been presented, may not be the
 13 way to go; and I would respectfully request that
 14 you take the time to actually read the cases that
 15 were cited.

16 MS. VALENZUELA: We don't think he's going --
 17 The State's fine with you taking this under
 18 advisement. In fact, we can go ahead and move onto
 19 the next Motion, and you can rule on it -- you
 20 know, rule on this issue at a later time, in terms
 21 of this week. I don't think that -- Mr. Wellborn
 22 has been jockeying for a continuance of this case
 23 all last week, and I don't think that it requires
 24 you to continue this case for months or weeks or
 25 even days. I think that if you can make a decision

1 and review all this tonight, and you feel
 2 comfortable making a decision by tomorrow morning,
 3 we should be fine. And, at this point, we can
 4 move on to Mr. Wellborn's other Motions that he may
 5 or may not have.

6 THE COURT: Let's do that.

7 MR. WELLBORN: That's fine.

8 THE COURT: Let's go ahead and --

9 MR. WELLBORN: Can we have a --

10 THE COURT: -- keep that 9:00 o'clock trial --

11 MR. WELLBORN: Can we have a short break?
 12 It's already 6:26, and my next Motion is probably
 13 going to require testimony. It's probably going to
 14 go at least an hour, given what we've been through
 15 today.

16 THE COURT: What you going to do?

17 MR. WELLBORN: Well, --

18 MS. VALENZUELA: Do you have a -- Like can
 19 you pick some of your motions where you can --

20 MR. WELLBORN: My next Motion is the Jackson
 21 versus Denno Motion, that's going to require --
 22 Your Honor, if -- Assuming the State does not
 23 concede the issue, --

24 MS. VALENZUELA: No, I'm not.

25 MR. WELLBORN: Well, there we are. It's

STATE OF SOUTH CAROLINA)
) IN THE YORK COUNTY DUI COURT
 COUNTY OF YORK)

STATE OF SOUTH CAROLINA,)
 VS)
) CASE NO. 62685GB
 SHELBY LORUSSO,)
)
 DEFENDANT.)

TRANSCRIPT OF PROCEEDINGS

ROCK HILL, SOUTH CAROLINA

APRIL 24, 2013

REPORTER: KELLY REITER

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PROCEEDINGS

BEFORE: THE HONORABLE CLAYBURN S. BARNETTE, JR.

8:18 a.M.

The Court - It's 8:18 on April 24th, motions hearing. Ms. Valenzuela and Mr. Newkirk from the solicitor's office are here. We also have Mr. Wellborn. All right. I think that I can solve a lot of the issues here. I've had ample time to read over everything. At this time, based on what has been --- the orders that have been put in front of me, I'm going to go ahead and dismiss this charge against the defendant. I'm dismissing the charge based on what came down from higher up. This is a Sixteenth Circuit opinion. I'm making no --- Nothing is based on anything to do with HGN. I'm basing it strictly off the walk-and-turn. The order, even though it's an unpublished opinion, does come down from above me. That being said, it needs to be --- At least these issues have been addressed, and I'm dismissing it.

Ms. Valenzuela - Your Honor, I would --- Obviously, I disagree with your ruling, Your Honor, based on the law. As was pointed out yesterday, under the appellate rules, unpublished circuit

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Appearances: For the State -

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court opinions or circuit court opinions are not law. They're not precedential value. They're not allowed to be cited in another case that doesn't apply to the case at hand. It seems like you are taking Mr. Wellborn's assertion that because the circuit court judge, Judge Alford, ruled that you --- your hands are tied. So once again, I'm going to remind the Court that that is not true. There is nothing precedential there, and so you are making --- You are relying on an opinion that actually, under the court rules, is not supposed to be cited. I don't have the appellate rule. I will find time to get that, and I will make that a part of the record to make sure that the Court was aware of that. I would also go ahead and put on the record that, unlike Judge Alford's order --- Which, once again, it has no precedential value in the sense that you're not required to follow it, and it's not a published court of appeals or supreme court opinion. In Judge Alford's order, it noted that the feet were not visible on walk-and-turn. In this case, the feet were visible. While the defendant walked towards the camera, you could see her feet at all times. You could see her toes. You just could not see where her --- when she

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1 would take the next step, where her heel and her
 2 toe would meet at that point. This testimony also
 3 put on the record that that was one of many
 4 indicators. The defense's own witness testified
 5 that he could see every other indicator on that
 6 camera, to include whether she raised her arms,
 7 whether she was able to maintain her start
 8 position, whether she was able to properly turn,
 9 whether she was able to walk in a straight line,
 10 whether she was - - - whether she stepped off line
 11 while she was walking in that straight line. There
 12 was also testimony from the officer that included
 13 his various reasons for why he positioned the
 14 defendant as he did, and the things that he takes
 15 into account. At this point, Your Honor, I would
 16 argue that your decision is based on a non-
 17 mandatory court opinion that you appear to be
 18 treating as mandatory, and also that the facts
 19 there don't match up. That there's nothing in 56-
 20 5-2953 that states that every portion of the field
 21 sobriety test, every indicator of the field
 22 sobriety test, must be on camera. There's actually
 23 nothing even that says that her entire body would
 24 have to be on camera. It just says that it has to
 25 include any field sobriety test, include and - - -

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1 Sorry, Your Honor, give me just a second.
 2 The Court - That's all right.
 3 Mr. Wellborn - Judge, while Ms. Valenzuela is
 4 looking, would you like me to draft the order?
 5 The Court - I would.
 6 Mr. Wellborn - Thank you.
 7 The Court - I was going to ask both of you, if
 8 you would.
 9 Mr. Wellborn - Absolutely. Thank you. That's
 10 all.
 11 The Court - Put something in writing.
 12 Mr. Wellborn - That's all I was going to ask.
 13 Thank you.
 14 The Court - Thank you, and - - -
 15 Ms. Valenzuela - Your Honor, the standard is
 16 to ask the proponent of the person who succeeded in
 17 the - - -
 18 The Court - That will be fine.
 19 Ms. Valenzuela - Order to draft it.
 20 The Court - Thank you.
 21 Ms. Valenzuela - Of course, he is required to
 22 serve that on me before you sign it, so that I can
 23 make any objections to that order known.
 24 Mr. Wellborn - Got that. Thank you.
 25 Ms. Valenzuela - And so, of course, if he would

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1 serve that on me. I'm happy to draft an order for
 2 you.
 3 The Court - Yes.
 4 Ms. Valenzuela - I can't find the other
 5 copies, but I'll be happy to make a copy.
 6 Mr. Wellborn - This is the word include from
 7 Black's Law Dictionary.
 8 Ms. Valenzuela - Right. I'm more than happy
 9 to read it. I'm just - - -
 10 Mr. Wellborn - Yes.
 11 Ms. Valenzuela - Showing it to you out of
 12 courtesy.
 13 Mr. Wellborn - Yes, that's fine.
 14 Ms. Valenzuela - Your Honor, I'm about to hand
 15 you Black's Law Dictionary. It's a dictionary that
 16 is relied upon by attorneys to give the - - - to
 17 search for the meaning of every word. As you might
 18 be familiar with, the legal field focuses on every
 19 term, every word, and every term of phrase,
 20 especially when attempting to construe the meaning
 21 of a statute or a statute might not be clear on
 22 what you read. Sometimes, even when it appears
 23 clear, you look further into the words. Black's
 24 Law Dictionary defines include as to contain as a
 25 part of something. So you can read include any

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1 field sobriety test as a way of saying that the
 2 field sobriety test must be a part of the video,
 3 that it must include field sobriety tests. There's
 4 also - - - As I pointed out yesterday, the - - - if
 5 the legislator had - - - If the general assembly
 6 had meant to say that every indicator of a field
 7 sobriety test would have to be on camera, it would
 8 have said, include all parts of field sobriety test
 9 administered - - - administered, anything that the
 10 officer relies on to determine if the field
 11 sobriety test was passed. Of course, the statute
 12 doesn't say that. You don't have any case law
 13 that's published that interprets that. The only
 14 published case law that you have is Murphy, which
 15 was handed up to you. In that case, it was
 16 analyzing the prior statute. In that case, the - -
 17 - the statute had mentioned field sobriety, but the
 18 focus was on definition of conduct and whether
 19 conduct meant that every portion of field sobriety
 20 was supposed to be relied on. I will point out
 21 that when Murphy was decided, DUIs were still based
 22 a lot on field sobriety. The jury still had to
 23 look at field sobriety on video in order to
 24 determine what, you know, the - - - whether they
 25 believed that the defendant was guilty or not

1 guilty of driving under the influence. In Murphy,
 2 where her entire legs were cut off and she had
 3 other field sobriety, the judge there said that
 4 that's not how he read it, and he didn't read the
 5 statute as requiring every single part of every
 6 single field sobriety test. In this case, we don't
 7 even have the defendant off camera. We don't have
 8 an obstruction to the defendant. We don't have a
 9 single portion where she is blocked from view. We
 10 have that, in the normal course of her walking,
 11 doing the walk-and-turn, and the fact that the
 12 camera is stationed inside the vehicle and can't be
 13 moved, the fact that Deputy Palmer is out on the
 14 road by himself. I believe, at this point, another
 15 deputy had come up further along in the process.
 16 It has been said that there's no way the general
 17 assembly actually intended to have law enforcement
 18 perform as a movie producer, in the sense that we
 19 would need to set up lights and a moving camera in
 20 order to capture every single portion. So that
 21 would be the portion of the walk-and-turn. I would
 22 also point out to the Court that it is not --- It
 23 said it's not basing its decision on HGN, so it
 24 would --- The Court's opinion would basically be
 25 saying that, because you could not see one

1 indicator out of eight on walk-and-turn, meaning
 2 you couldn't see where her heel met her toe, that
 3 that meant that the statute was violated. But yet
 4 on HGN, where you couldn't see any single part of
 5 the test, the eyeballs or half of her face, that
 6 that field sobriety test did conform with the
 7 statute. So it would seem as if your decision did
 8 not match up. Because if you find that the HGN
 9 didn't violate it, because even though the jury
 10 can't see their eyeballs, that that can be
 11 supplemented by testimony, that the same would
 12 apply with walk-and-turn, especially where seven
 13 out of eight indicators were on camera. Where, as
 14 was pointed out yesterday, the defense could tear
 15 down or challenge, you know, the fact that you
 16 couldn't see where the heel or toe met. So the
 17 argument would be that, it's just as Judge Alford -
 18 -- or --- Or Judge Alford's order referring to
 19 the transcript mentioned that it goes, you know, to
 20 the weight of the evidence and not to
 21 admissibility. It's left to the attorneys to argue
 22 that to the jury and to challenge that, and that
 23 it's not actually a statutory violation.
 24 Additionally, I would --- I did not anticipate
 25 this, and so to --- To make sure that I put

1 everything on the record for you to consider, so
 2 that the circuit court can consider these things as
 3 well, under "twenty-nine --- 56-5-2953, Subsection
 4 B, if you look at the bottom it says, nothing in
 5 this section prohibits the Court from considering
 6 any other valid reason for the failure to produce
 7 the video recording based upon the totality of the
 8 circumstances, nor do the provisions of this
 9 section prohibit the person from offering evidence
 10 relating to the arresting officer enforcement's
 11 (sic) failure to produce the video recording. That
 12 subsection starts off by saying, nothing in this
 13 section may be construed as prohibiting the
 14 introduction of other relevant evidence in the
 15 trial, the violation of the DUI statutes, failure
 16 by the arresting officer to produce the video
 17 recording required by this section is not allowed -
 18 -- alone a ground for dismissal of any charge made
 19 pursuant to those same sections, if the arresting
 20 officer submits a sworn affidavit certifying that
 21 the video recording equipment at the time of the
 22 arrest or probable cause determination. It goes on
 23 to also capture, or video equipment at the breath
 24 test facility was in inoperable condition. It goes
 25 on at length. Do you have a copy of that in front

1 of you?
 2 The Court - Which one?
 3 Ms. Valenzuela - 56-5-2953, the statute ---
 4 The Court - Yes, I'm looking at it.
 5 Thank you.
 6 Ms. Valenzuela - At issue, Subsection B.
 7 The Court - Yes.
 8 Ms. Valenzuela - So I would point out that
 9 Suchinsky, which Mr. Wellborn relied on heavily and
 10 pointed out, was issued by Judge Hayes, our own
 11 resident judge, and --- Which, as Mr. Wellborn
 12 defined, was the first of all the cases to start
 13 this process. He pointed out that in Suchinsky,
 14 that's the case that we look at to see that
 15 dismissal is the remedy. When you look at
 16 Suchinsky, Suchinsky relies on Subsection B. Where
 17 with Suchinsky, there was a video. It wasn't that
 18 there wasn't a video, but the video cut out at the
 19 end. Yet, Suchinsky relied on Subsection B to say
 20 that the language, failure of the arresting officer
 21 to produce the video recording required in that
 22 section is not allowed --- a ground for
 23 dismissal, and they --- The Court read that as
 24 meaning that, if you don't comply with certain
 25 requirements in Subsection B, then that means that

1 you do have to dismiss it. What that points out
 2 is, that that - - - that Subsection B does not only
 3 apply when there's no video at all, it also applies
 4 when there is a video, but that video doesn't
 5 comply with Subsection A. So that's based on
 6 Suchinsky itself relying on that same language when
 7 the facts of that case indicated that it had a
 8 video that wasn't complete, not a video that wasn't
 9 turned in at all. So that means that we can rely
 10 on Subsection B in this case. There have been
 11 cases published where there wasn't an affidavit
 12 provided, and yet, the Court still looked at the
 13 totality of the circumstances. If you will give me
 14 a minute, I would like to make those a part of the
 15 record. Suchinsky, Your Honor, is 374 S.C. 12.
 16 It's a supreme court decision, decided in 2007.
 17 I'm giving Mr. Wellborn - - - I'm sorry, I just
 18 found those copies - - - a copy of the Black's Law
 19 Dictionary language of include. I think I found
 20 it. Yes, okay. One of the cases, Your Honor, was
 21 State v Manning. It is a court of appeals opinion.
 22 I just have the Lexis citation, 2012 S.C. Appellate
 23 Lexis 212. That was filed in - - - on August 1st,
 24 2012, Published Opinion Number 5017, and it's a
 25 court of appeals case. In Manning, that situation

1 did involve a car accident where by the time - - -
 2 I think the facts basically laid out, by the time
 3 the officer arrived on scene, the defendant had
 4 already left and been taken to the hospital. There
 5 was no affidavit filed in that case, and the Court
 6 still decided that under Subsection B, that - - -
 7 that the lack of any video was - - - was allowed.
 8 It specifically went on to say - - - And I'm
 9 looking for the actual citation. The Pin Cite 10,
 10 using the Lexis numbers - - -
 11 Mr. Wellborn - Excuse me. Is it possible that
 12 I could get a copy of it when you're referring to
 13 it?
 14 Ms. Valenzuela - Sure.
 15 Mr. Wellborn - Thank you.
 16 Ms. Valenzuela - Mr. Wellborn and I had - - -
 17 Yesterday when you pointed out that I already had
 18 those circuit court opinions, Mr. Wellborn was well
 19 familiar with the Manning case at that point. So
 20 if - - -
 21 Mr. Wellborn - Thank you.
 22 Ms. Valenzuela - So as he pointed out
 23 yesterday, that - - - He does not have that one,
 24 but I've just provided him a copy. I'll hand the
 25 Court this copy as well in a moment. In Cite 10,

1 it states that, despite the failure to provide an
 2 affidavit under Subsection B, the video recording
 3 was not required because Corporal Hallman was
 4 conducting an investigation of a traffic accident,
 5 and Manning was arrested at that - - - at the
 6 hospital. Moreover - - - And this is probably the
 7 most important part that I would ask you to look
 8 at. Moreover, even if the traffic accident
 9 investigation exception was inapplicable - - - So
 10 the Court says, even if we weren't considering - - -
 11 - Because the statute specifically envisions, in
 12 circumstances including, and then it says, but not
 13 limited to. That language would indicate that
 14 you're not limited to the three things listed out
 15 there. You can consider other things, but that
 16 they just want to give you a few examples. So but
 17 not limited to, road blocks, traffic accident
 18 investigations, and citizen's arrest. Then it goes
 19 on to, where an arrest has been made and the video
 20 recording equipment has not been activated, and it
 21 goes on to describe that part. So they say,
 22 moreover, even if the traffic accident
 23 investigation exception was inapplicable, the
 24 circuit court properly concluded the video
 25 recording was not required due to the totality of

1 the circumstances because Manning and Corporal
 2 Hallman were never at the incident scene at the
 3 same time. So in that situation, the Court said,
 4 even when we don't have an affidavit, the Court can
 5 consider the totality of the circumstances to
 6 decide whether the - - - whether - - - the fact
 7 that the State did not comply with Subsection A.
 8 Of course, that is your interpretation of the
 9 statute. So I would urge you to look at Subsection
 10 B, where you can consider the totality of the
 11 circumstances. A second case is - - - I'll hand
 12 you the Manning case. Of course, I was holding the
 13 copy while - - - So it prevented you from reading
 14 it, but I started at Pin Cite 10. I started with
 15 that paragraph, going down over here. The entire
 16 case is attached, so that if you wanted to verify
 17 the synopsis of the facts, you can do so.
 18 The Court - Have you got a copy of this
 19 one?
 20 Mr. Wellborn - I do. Thank you very much.
 21 Ms. Valenzuela - That was - - - That was what
 22 I handed him a moment ago. If I could have a
 23 moment to go make a copy of Johnson, Your Honor - - -
 24 -
 25 The Court - (Indicating yes)

1 Ms. Valenzuela - So that everyone can have a
 2 copy of that.
 3 Whereupon - A brief recess was taken.
 4 Ms. Valenzuela - We're back on the record?
 5 The Court - Yes, ma'am.
 6 Ms. Valenzuela - Your Honor, I've just handed
 7 you and defense counsel State v Johnson, 396 S.C.
 8 182, court of appeals decision issued December
 9 14th, 2011. This case dealt with the fact that the
 10 State had not video-recorded the breath test site.
 11 It didn't have a video of it. It also had a
 12 roadside issue, but the Court declined to address
 13 that issue because they could resolve it on the
 14 fact that there was no breath test video. I'm
 15 looking --- I'm trying to find --- I --- I've
 16 highlighted portions on the third page, underlining
 17 them. Okay. In this case, you can see starting at
 18 Number 15 there, it's Pin Cite 190, it ---
 19 Starting at 15, we must decide if the State should
 20 be excused for its noncompliance with Subsection A.
 21 The defendant claims when an officer does not
 22 provide a sworn affidavit --- In this case, there
 23 was no sworn affidavit --- certifying that the
 24 equipment was inoperable, that reasonable efforts
 25 were made to maintain, et cetera, and that there

1 was no other operable facility, the DUI must be
 2 dismissed. The State argues that the magistrate
 3 and circuit court correctly considered the language
 4 in 2953, permitting the Court to consider any other
 5 valid reason for the failure to produce a video.
 6 It goes on to look at Subsection B and analyze it.
 7 What the Court says here, and the reason why I'm
 8 pointing this out is that, they do not say that the
 9 circuit court was wrong in looking at Subsection B
 10 to make a totality of the circumstances
 11 determination on whether there was an excuse. What
 12 the Court says is that, when the court of appeals
 13 applied the totality of the circumstances, they did
 14 not find that it met the totality of the
 15 circumstances. Not that it was error that the
 16 Court relied on Subsection B to look at the
 17 totality of the circumstances to see if there was a
 18 reason why, considering everything, that the State
 19 hadn't complied with Subsection A. But that under
 20 the totality of the circumstances --- On the very
 21 last line --- So if you'll look at Number 16, and
 22 you go all the way to the bottom. Under the
 23 totality of the circumstances --- So they say,
 24 we're using that analysis --- we find that the
 25 State did not articulate a valid reason for the

1 officer's failure to comply with the mandates of -
 2 2953, and they did hold that dismissal was
 3 appropriate. Now, at first glance, it seems like
 4 that case is not helpful since what the court of
 5 appeals said is that, based on those facts, they
 6 didn't think the totality of the circumstances
 7 apply. It's helpful in this case because I urge
 8 the Court to look at Subsection B to see if,
 9 considering the totality of the circumstances, the
 10 Court does in fact think, well, even if the video
 11 does not comply with Subsection A, which the State
 12 strongly disagrees with --- That even though it
 13 does not comply with it, that considering the
 14 totality of the circumstances, you do think that
 15 the case does not need to be dismissed. You could
 16 perhaps say that --- So considering that fact,
 17 you can look at the facts that --- that the
 18 deputy testified to yesterday. He was out on the
 19 road. He --- There was nobody out there with
 20 him. This camera is stationary. He is not allowed
 21 to remove that camera and take it out and show it
 22 around and move it in different directions. As was
 23 said in my motion, an officer doesn't actually get
 24 to select the location of the stop. Unless we're
 25 talking about a checkpoint location where the State

1 has, based on different statistics, decided at this
 2 point I have been able to select this location. So
 3 I should be able to --- to limit any impediments
 4 or lighting issues at this point. In this case,
 5 this wasn't a checkpoint. He saw a traffic
 6 violation, and he went to pull the defendant over.
 7 When he pulled --- When he turned on his blue
 8 lights, a person doesn't stop immediately. He fell
 9 --- He must follow that person until they stop,
 10 and then she chose the location at which they
 11 stopped. Then in that situation, he positions his
 12 car, and he has to do the best that he can in
 13 whatever environment that he's in. Now, the
 14 State's defense witness testified that he's done
 15 various field sobriety tests in --- in what I
 16 think he agreed could be considered controlled
 17 locations. This is very different. As I pointed
 18 out to the Court yesterday, when the general
 19 assembly wrote the statute, it realized that
 20 officers don't get to pick where they pull over
 21 people, that they have to deal with the various
 22 environments in how they deal with things. In this
 23 situation, considering the fact that there was no
 24 one there to adjust the camera, that he does have
 25 to capture every single portion of the field

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1 sobriety test. So he has to decide how he's going
2 to adjust his camera, and he had it in a way that
3 could film the entire portion. That if he had
4 turned and faced her the other way, as I pointed
5 out to the Court, I guess your opinion then would
6 be that the case should be dismissed because we
7 were unable to see that she could walk a straight
8 line, which is one of the indicators. So the - - -
9 So to speak, you're - - - you're darned if you do
10 it one way and darned if you do it the other way,
11 and - - - And part of statutory interpretation is
12 that you don't interpret a statute to come up with
13 comical results. A stat - - - The general assembly
14 is presumed to write statutes that they know will
15 be effective, will work. Now, you don't stretch
16 the definition of a statute in order to make it
17 what you want it to do. But when you read a
18 statute, if you interpret it in a way that really
19 seems absurd and that really doesn't seem to take
20 into account what the general assembly intended
21 with that statute, then I think at that point the
22 interpretation of the statute might be wrong. That
23 - - - That's not my language. That is language
24 that is based on the law of statutory
25 interpretation. So in this situation, I would, you

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1 know, once again for the record point out that when
2 the language isn't clear on its face - - - Include
3 any field sobriety tests administered does not
4 clearly state that every single portion of a
5 person's body must be mis - - - must be on camera.
6 It doesn't say how much of the field sobriety test.
7 The orders that you have before you, which have no
8 precedential value but can help to inform your
9 decision, all say that most or substantially - - -
10 you - - - You must be able to see - - - I always
11 use this language wrong. The majority or a
12 substantial portion of the field sobriety test. So
13 in this portion - - - In this exact instance, where
14 you're not looking at HGN and you're only looking
15 at the walk-and-turn, even under the analysis of
16 all three circuit court judges, even applying their
17 own analysis, most of the field sobriety test is on
18 camera. You can only not see the gap between the
19 heel and the toe, which even if diagonal, would
20 probably be very hard to see based on the fact that
21 they cannot remove their camera and walk around
22 with it while they're performing field sobriety.
23 So one indicator missing, and yet, all the circuit
24 court judges say, all or most or a substantial
25 portion of the vid - - - of the field sobriety must

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1 be captured. So factually, this fits that. Then
2 in addition, it says, you have to have enough where
3 the jury could have some idea of how they performed
4 on that, not that the jury would have to see that
5 and know that they passed the test. Because as I
6 pointed out to the Court, field sobriety tests have
7 to be explained with testimony. Because a jury
8 cannot watch this and know what indicators, if
9 there isn't someone there to testify about what
10 indicators they have been trained to look for on
11 field sobriety tests. So - - - But even though the
12 judge in the orders that you're relying on said
13 that you have to be able to - - - you have to have
14 enough on there, so that they can make some
15 determination as to how well the defendant
16 performed on the administered field sobriety tests.
17 In watching the video yourself, which is a part of
18 the testimony going up to the circuit court - - -
19 So if the circuit court were to look at that video,
20 they would see - - - And, of course, they've also
21 heard the testimony from the defense's own expert
22 and the defense - - - the testimony from the
23 deputy, that you are able to see the indicator of
24 whether she could maintain her start position,
25 whether she raised her arms, whether - - - when she

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1 was walking, whether she walked the straight line,
2 whether she stepped off line, whether she turned
3 correctly, and - - - And I'm sure that I'm missing
4 - - - whether she counted her steps correctly. All
5 of those indicators were present, were seen for the
6 jury to see that, yes, in fact, she did not raise
7 her arms. Yes, in fact, she did count her steps
8 correctly. But, no, she did not do her turn
9 correctly, and no, she was not able to maintain her
10 start position. And then, no, she did not touch
11 heel-to-toe, which once again is one indicator
12 unlike what Mr. Wellborn tried to convince the
13 Court of yesterday, as it being eighteen different
14 parts of the test that were missing. When his own
15 expert witness testified that, no, if you miss
16 heel-to-toe on every single step, it's one
17 indicator, one part of the entire test. So it - - -
18 - We would hope that the Court would look back at
19 the orders that it's relying on, but remind the
20 Court again that it's - - - Even though it comes
21 from the circuit judge ahead of you, that with all
22 due respect to Judge Alford, it doesn't make it
23 mandatory. It doesn't even make it - - - It makes
24 it persuasive authority, and I - - - I mean, not
25 persuasive authority. It - - - It's a case that

1 our own court rules say, you can't - - - Do not
 2 look at unpublished and circuit court opinions, and
 3 don't cite them in your opinions because you can't.
 4 Now, you can look at them and they can inform your
 5 decision, but you don't rely on them here. And
 6 here, there is no published court of appeals
 7 opinion and no circuit court opinion. Which means
 8 that you, as the judge, look at the plain language
 9 of the statute and look at it and read the - - -
 10 the language and see if the language says to you,
 11 include any field sobriety tests definitely reads
 12 to me as every portion, to include the tips of her
 13 toes, should be included on the video. Or if you
 14 read that to mean, I don't actually see where it
 15 tells me what percentage of the body should be on
 16 camera. I don't actually see where it tells me
 17 that most or all of the field sobriety has to be on
 18 camera. But looking past the language, since it
 19 doesn't clearly tell me, I am going to make a
 20 decision as to what did the general assembly
 21 intend. Well, looking at what the general assembly
 22 intended, I will look at a previous statute and see
 23 that they didn't actually focus on field sobriety,
 24 and they made the decision to change the language
 25 to include the language that the videotape needed

1 to include any field sobriety. That indicates to
 2 me that it did become a priority of the general
 3 assembly that field sobriety tests be videotaped.
 4 I wonder still, though, when looking at that
 5 language if that means to me that what the general
 6 assembly intended, when they knew that officers are
 7 not movie producers and when they knew that
 8 officers cannot control where a traffic stop
 9 occurs, when they knew that officers have a
 10 multitude of reasons to keep track of things, if
 11 they thought, what I mean when I say include all
 12 field sobriety is that every teeny, tiny portion of
 13 the field sobriety test must be captured, to
 14 include the tips of their toes and the heels of
 15 their feet. Or if what I mean is, I want the
 16 majority of that field sobriety captured. So in
 17 this situation, the tips of her toes and the heel
 18 of her foot are not visible when she's walking
 19 towards the camera, so that you cannot see if her
 20 toe meets her heel. When she walks away from the
 21 camera, her heels are visible, but it's not visible
 22 where the tips of her toes meet the heel as she's
 23 taking a step forward. And as has been described
 24 through testimony, that is one indicator, one very
 25 small portion of the several indicators that make

1 up walk-and-turn. Even on the orders that you're
 2 relying on, I don't think that the facts of this
 3 case meet that, but despite that, they're - - -
 4 those orders are not mandatory. Then as I pointed
 5 out, I do ask you to look at Subsection B. I
 6 pointed out Manning and Johnson as case law that
 7 indicates to you that you may look at Subsection B
 8 and the totality of the circumstances and take that
 9 into account. Now, you should read Johnson to
 10 determine if the facts in Johnson remind you of
 11 anything of the facts here, and determine if the
 12 court of appeals would make the same totality of
 13 the circumstances examination. But I do say that
 14 the Subsection B does apply, and that you can take
 15 into account the various things that happened in
 16 this case, the reality of the facts, to see if
 17 Subsection B applies. In all honesty, the very
 18 first portion of Subsection A and the
 19 interpretation of the statute is the main focus of
 20 the case, but for the record, we would make a - - -
 21 We would want it to be clear that Subsection B is
 22 available to the Court to look at. Although, we
 23 would say that the reliance on the Court, if it
 24 were to dismiss the case, would probably be on the
 25 interpretation of the as-yet-undefined-by-

1 published-case-law language in the statute, quote,
 2 include any field sobriety test. So not include
 3 all, not include all portions, but include any
 4 field sobriety tests administered. At that point,
 5 we'd put everything on the record from before.
 6 Today, we do disagree, and obviously - - - I think
 7 at this point it's probably obvious, the State will
 8 appeal the case. If the Court does want a draft
 9 order from the State, the State is more than happy
 10 to do that. If in the more customary fashion what
 11 you would like to do is, have Mr. Wellborn draft
 12 his own order and just make sure that he delivers
 13 that to me ahead of time, so that I can make any
 14 input to the Court. I would - - - I would suggest
 15 the usual fashion, but it is, of course, up to the
 16 Court. Just let me know, Your Honor.

17 Mr. Wellborn - Very briefly - - -

18 The Court - (Indicating yes)

19 Mr. Wellborn - Thank you. Again, I mean
 20 briefly because I really don't intend to argue
 21 everything we argued yesterday. Because that was
 22 all put on the record yesterday, and I think you
 23 have a fairly good discussion of Murphy in the
 24 orders. I think all circuit judges gave a fairly
 25 extensive and exhaustive rendition of what Murphy

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1 means, so I won't even address that. Very, very
 2 briefly, State versus Johnson, the facts are
 3 completely opposite, quite frankly, because we're
 4 talking about sound missing when the trooper gave
 5 somebody a Miranda warning. That's not what we're
 6 talking about here. We're talking about recording
 7 the field sobriety tests. Also in Johnson, they're
 8 talking about how the trooper moved off camera
 9 during the Breathalyzer test. Again, that's not
 10 what we're talking about here. The last thing I'd
 11 bring up - - - Well, two other things I'd bring up
 12 about Johnson. First of all, Johnson is applying
 13 the old statute, not this statute. Because the
 14 facts of Johnson are, that the person was arrested
 15 in 2008. The new statute became law in 2009. And,
 16 of course, the biggie is the fact that, in Johnson,
 17 they actually reversed the conviction of the
 18 defendant. So I would suggest that Johnson is
 19 about as opposite as we can possibly get to this
 20 particular case. Regarding Manning, in Manning,
 21 the facts are that there were never any field
 22 sobriety tests. The Court excused that because the
 23 officer got to the scene, and the person had been
 24 taken to the hospital. So the issue is, why didn't
 25 you have an affidavit? Well, gee, we didn't need

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1 an affidavit because there weren't any field
 2 sobriety tests, and this was the extreme
 3 circumstance. I didn't have somebody to give a
 4 field sobriety test to. Those are the facts of
 5 Manning. But what Manning does do is, it talks
 6 about Subsection B, if Subsection B applied at all
 7 - - - And it doesn't apply in this case at all.
 8 But if it did, what Manning says is, a sworn - - -
 9 It's that the videotape requirement is excused,
 10 one, if the arresting officer submits a sworn
 11 affidavit certifying the video equipment was
 12 inoperable. We don't have that here. The video
 13 equipment clearly was operable. Number two, if the
 14 arresting officer submits a sworn affidavit that it
 15 was impossible to produce the video recording
 16 because either the defendant needed emergency
 17 treatment, we don't have that here; or B, exigent
 18 circumstances existed. There were no exigent
 19 circumstances. Nobody was shooting. Nobody was
 20 running from the police. There was no emergency
 21 situation. He had all the time he needed, and I'm
 22 going to come back to that. Three, in
 23 circumstances including, but not limited to, road
 24 blocks, not true here; traffic accident
 25 investigations, not true here; and citizen's

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1 arrest. None of those apply to this case. Four,
 2 for any other valid reason for the failure to
 3 produce the video recording based upon the totality
 4 of the circumstances. So let's talk about that.
 5 Ms. Valenzuela is right, to some extent, about the
 6 officer choosing the selection of the location to
 7 stop. Well, actually, they do. They choose when
 8 to turn the blue lights on. That's their choice.
 9 But that aside, the officer does get to choose the
 10 selection of which field sobriety tests to give and
 11 where to give them. They're not required to give
 12 field sobriety tests at all. In some cases, when
 13 they give walk-and-turns, they pick a location
 14 where somebody is walking on a white line, and you
 15 can actually see if they step off that white line
 16 because the white line is visible on camera. You
 17 see that a lot in videotapes. Sometimes, they
 18 don't. Sometimes, they have people face the
 19 camera. Sometimes, they have people face away from
 20 the camera. Some cases, they have them off camera.
 21 But the officer, as he testified under oath
 22 yesterday, gets to choose what sobriety tests to
 23 give, when to give them, how to give them, where to
 24 give them. So all of that is within the officer's
 25 control. So I simply bring that up briefly. Now,

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1 my understanding is, the Court has ruled. Given
 2 that understanding, I also understand that in
 3 accordance with your direction, that you wish me to
 4 prepare an order. Obviously, I will copy, as I
 5 always do, the State with a copy of the letter - -
 6 - or excuse me, the proposed order. I've just been
 7 through this process with Judge Wood, where I
 8 copied Ms. Valenzuela on our proposed order in
 9 accordance with Judge Wood's instructions. I'm
 10 sure that when Ms. Valenzuela drafts her proposed
 11 order, she'll copy me. That's just the way it's -
 12 -- the way we do it. With all that said,
 13 obviously, we could go through another hour to an
 14 hour-and-a-half arguing this point. But again, my
 15 understanding is, you've ruled and with that being
 16 the case, I'm prepared to go forward. I would
 17 request ten days to draft the order, if you find
 18 that's appropriate to submit the order to you, but
 19 if you wish me to accelerate that time, I'll be
 20 glad to do that as well.

21 The Court - Ten days is not a problem.

22 Mr. Wellborn - Thank you, Your Honor.

23 Ms. Valenzuela - Did you want one from me?

24 The Court - Ma'am?

25 Ms. Valenzuela - Did you want a draft order

State of South Carolina.,)

In the Court of Common
Pleas of York

County of York.)

Case No. 2013-CP-46-01390

State of South Carolina.,)

Appellant.,)

-v.-)

Transcript of Record

Shelby Jean Lorusso.,)

Respondent.)

August 27, 2013
York, South Carolina

B E F O R E:

The Honorable John C. Hayes, III., Judge.

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

Ms. Johanna Valenzuela
Assistant Solicitor
Sixteenth Judicial Circuit
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ORIGINAL

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For the Respondent

Wanda Nelson, CVR-M.
Official Court Reporter
Sixteenth Judicial Circuit
To the Honorable John C. Hayes, III

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I-N-D-E-X

2

E-X-A-M-I-N-A-T-I-O-N

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WITNESSBY:PAGE NO.

4

No witnesses were called.

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I-N-D-E-X - CON'TE-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
CT.1	Trial Transcripts		
	Vol. 1 & 2.		P.5

Reporter's Note: All Exhibits were filed with the York
County Clerk of Court's Office.

1 (COURT IN SESSION TUESDAY, AUGUST 27, 2013, AT 11:21
2 A.M..)

3 THE COURT: The next is not until 11:30 but I thought
4 I saw Ms. Valenzuela here, and Mr. Wellborn is here.
5 Unless there is an objection we can go forward with - We're
6 getting a little ahead of ourselves which rarely happens,
7 Lorusso.

8 MS. VALENZUELA: Yes, sir.

9 THE COURT: This is an appeal on behalf of Shelby
10 Lorusso for driving under the influence first before Judge
11 Barnett, Magistrate Barnett. And the grounds set forth in
12 the Notice of Appeal - And this is an appeal by the State.

13 MS. VALENZUELA: It is, Your Honor.

14 THE COURT: All right, you may proceed.

15 MS. VALENZUELA: Your Honor, do you want a brief
16 summary of the facts or the procedural history?

17 THE COURT: Please. Go ahead.

18 MS. VALENZUELA: In this case, Your Honor, Ms. Shelby
19 --

20 THE COURT: Just --

21 MR. WELLBORN: Not to jump in, I was just gonna ask if
22 Your Honor wanted a copy of the transcript. I have a copy
23 for Your Honor. I think Ms. Valenzuela also has a copy
24 which might be instructive.

25 THE COURT: All right. I don't know what you all

1 gonna be talking about but if you think it will be
2 instructive I want to have it.

3 MS. VALENZUELA: Well do you have both the two days in
4 there?

5 MR. WELLBORN: I do.

6 THE COURT: Let's go ahead and get it marked as an
7 exhibit and then hand it up to me.

8 MADAME COURT REPORTER: Court's, Judge?

9 THE COURT: Please.

10 (WHEREUPON: COURT'S EXHIBIT NUMBER ONE, IDENTIFIED
11 AND MARKED, RECEIVED INTO EVIDENCE.)

12 THE COURT: All right, you may proceed.

13 MS. VALENZUELA: Okay, Your Honor.

14 In this case Ms. Lorusso, the defendant, was pulled
15 over by Deputy Palmer over in the Fort Mill jurisdiction on
16 December 15th of 2012. She was pulled over then she was
17 offered a series of field sobriety test. The standard
18 proof that you're familiar with, the Horizontal Gaze
19 Nystagmus, Walk and Turn and One Legged Stand. But the
20 field sobriety test that's at issue before you today is
21 only the walk and turn which is what was the basis of Judge
22 Barnett's decision.

23 Mr. Wellborn did at pretrial motions make a motion to
24 dismiss the DUI case based on violation of the video
25 statute. He argued that both the HGN was off camera and

1 that the walk and turn was on camera. But Judge Barnett
2 made his ruling clear, he was not ruling on the Horizontal
3 Gaze Nystagmus. He was only ruling on walk and turn.

4 The walk and turn and the actual roadside video was
5 admitted as an exhibit, as a State's Exhibit, in pretrial
6 motions and you should have that as part of the return that
7 Judge Barnett sent you and I think it would be instructive
8 to watch the walk and turn portion. But in addition the
9 transcripts that Mr. Wellborn just handed up to you has
10 testimony from both the defense's expert, Sam Lovlin, who
11 testified during the pretrial motion. And the State's
12 witness which is Deputy Palmer stating that the defendant's
13 body was on camera the entire time. Her body was not
14 blocked by the hood of the car. It was not blocked by
15 shadows, it was not blocked by some other obstruction. She
16 was never actually outside of the camera scope.

17 The issue in this case, and what Mr. Wellborn argued
18 to the court, was that when the defendant was positioned in
19 a way that she was facing the camera straight on so such as
20 I'm facing you right now on the roadside camera, and that
21 she was positioned to take that walk and turn straight
22 towards the car, turn around and take the steps, the nine
23 steps back away from the car. And that by being positioned
24 in that manner, ever time she took a forward step her
25 leading foot would obscure her back foot such that you

1 could not see where her heel and her toe met because the
2 front step obscured her back step. And then of course when
3 she turned around it was just reversed that her back foot
4 would have been obscured - the lead foot - and you wouldn't
5 be able to see where the heel and the toe met.

6 He argued that that meant that field sobriety was not
7 captured on camera and that that violated a part of the
8 video statute that claims that the video tape, the roadside
9 video must include all field sobriety administered.

10 The State argued to Judge Barnett - I should back up.

11 Mr. Wellborn presented Circuit Court decisions and
12 Magistrate Court decisions addressing this issue.

13 THE COURT: Ms. Wood and I saw them yesterday.

14 MS. VALENZUELA: I'm sorry.

15 THE COURT: Ms. Wood and I saw those cases yesterday.

16 MS. VALENZUELA: So a lot of the same cases there.

17 And I think it was established and it was a part of
18 the record that there is no published decision that's
19 addressing this issue since Murphy and that Murphy was
20 decided based on the statute before it was amended.

21 And the argument there mostly relied on one of Judge
22 Alford's decisions where the entire feet of the defendant
23 had been cut off from the camera and so you couldn't see
24 the defendant's feet when he did walk and turn, and Judge
25 Alford ruled that that did violate the video tape statute.

1 In this case I did argue Murphy. I did argue that I
2 believed based on the judge's language which is included in
3 the transcript that he was teaching - that he was treating
4 this circuit court decision by Judge Alford as binding
5 authority on him instead of his persuasive authority. But
6 I said even if he was treating that as just persuasive
7 authority that he still misapplied the holding in Judge
8 Alford's case because even looking under Judge Alford's
9 reading of the statute, Judge Alford says that if you have
10 - if you have most of the field sobriety on the video, or
11 at least enough so that the jury can make some
12 determination as to how the defendant did on field
13 sobriety, then you have satisfied the video tape statute's
14 requirement that the video include any field sobriety
15 administered.

16 I also pointed out to the judge that without any
17 published Court of Appeals or Supreme Court decisions that
18 he has to look at that statute and basically interpret it
19 and he can look at the statute on its face and also look at
20 what the General Assembly intended when it wrote that
21 statute and when it amended it in 2009. And the only thing
22 that's written in the statute is that the video tape must
23 include any field sobriety administered and it doesn't say
24 it has to include all portions of field sobriety
25 administered. It doesn't say it has to be a hundred

1 percent. It doesn't give any sort of percentage, it just
2 says that the video tape has to have field sobriety on
3 there. And certainly --

4 THE COURT: What percentage does it have to have? Ten
5 percent?

6 MS. VALENZUELA: Well, Your Honor, I believe that
7 that's - I think one of the opinions that have - you know a
8 lot of the decisions have been coming out of the circuit
9 courts have looked at can the fact finder look at this
10 video and make some determination as to how that defendant
11 did on the field sobriety test. So if you only have ten
12 percent of field sobriety test, then it's very unlikely
13 that a fact finder wouldn't be able to determine how that
14 person did on that field sobriety test.

15 THE COURT: What percent, where does the percent cut
16 off?

17 MS. VALENZUELA: I don't know, you know, I am not
18 familiar with this statute that - at all, but certainly not
19 even making eye contacts that makes everything to a
20 statistical number except for the data master percentage
21 that you blow into the data master machine, and so I don't
22 think that it's necessary to put a specific number here.
23 It's gonna be like every other statute and the one that
24 we're all familiar with it's gonna shift according to the
25 facts and according to the discrimination as the court

1 looks at the video that's put before you.

2 THE COURT: What is you video - What if your video
3 shows fifty percent, and they fail on the fifty percent,
4 but the fifty percent they don't see they passed?

5 MS. VALENZUELA: Well, Your Honor, I think that that
6 satisfies statute in that case.

7 THE COURT: How can a jury determine - How can a jury
8 determine if they see all of the bad and none of the good?

9 MS. VALENZUELA: Well the video is not a stand alone
10 item. It's not - it can't even be put in and presented to
11 the jury without some foundation being laid. So the
12 concept that we're looking at this video as a stand alone
13 exhibit that's gonna be presented to the jury with no
14 testimony ignores the reality of how the trial works. That
15 video is only get in with testimony from the officer laying
16 the foundation explaining, you know, how his video camera
17 captured that moment.

18 And in addition all field sobriety test isn't gonna be
19 able to be understood by a jury without testimony to go
20 along with and explain it. Horizontal Gaze Nystagmus is
21 gonna completely confound the jury without an officer there
22 to explain exactly how the eye works, what they're looking
23 for. Just like walk and turn and one leg stand, the
24 officer is going to explain these are the indicators that
25 I've been trained to look at, this is how I explained it to

1 the person and this is how they did. And so in that case,
2 in this hypothetical case --

3 THE COURT: But you right then you said and the
4 officer is gonna testify how they did.

5 MS. VALENZUELA: Yes.

6 THE COURT: The video is so the jury can see, confirm
7 whether how they did as what he said how they did and if
8 they only saw fifty percent of what they did how can they
9 determine that they can rely a hundred percent on the
10 officer?

11 MS. VALENZUELA: Well in that case of the hypothetical
12 that you present, Your Honor, the officer would be
13 testifying that the fifty percent that you can't see he
14 passed so the jury is like great he passed that part. And
15 so really the only one that's at issue where you really
16 have a determination that needs to be done by the jury
17 about whether there is, you know, a conflict between the
18 officer and what was actually captured on video is whether
19 he failed the fifty percent that you are able to see on
20 that video. And so if you have that portion of the video
21 able for the jury to look and challenge and actually
22 determine whether they passed or not then the benefit goes
23 to the defendant in that case.

24 But it's important to note that in this case you don't
25 have to do that at all because a walk and turn in this case

1 shows, and the testimony and the transcript that you have -
2 and I can actually point to some specific page numbers for
3 you if that would be helpful to you.

4 If you'll turn to Page 111, Your Honor.

5 THE COURT: Okay.

6 MS. VALENZUELA: Okay. And so in looking at 111 just
7 to give you some context and I'm sure that Mr. Wellborn
8 will jump in and correct me if he thinks I'm
9 misrepresenting that. But what you're looking at is Sam
10 Lovlin the defense's expert testifying at this point on
11 cross. And throughout this page Mr. Lovlin the defense's
12 expert says that yes in fact you can see that she was able
13 to take the nine steps. You are able to see if the
14 defendant turned correctly. You are able to see if she
15 took the nine steps walking back to the original position.
16 You are able to see if the defendant counted her steps
17 correctly. You can if the defendant stepped off camera.
18 And then you can see if she was able to maintain her start
19 position. You can see if she was able to walk a straight
20 line. And it goes on and I think at Page...

21 Okay, and then going on to Page 113, you can see that
22 she used her arms to balance and that she counted the
23 correct number of steps.

24 And so Mr. Lovlin, and then later the deputy also I
25 believe indicated that you could see everything except

1 whether she was able to touch heel to toe. That was the
2 portion that you were not - that wasn't visible just
3 because the defendant's leading step obscured it every
4 time. But then further down on Page 113 Mr. Lovlin states
5 that yes even if the defendant as in this case missed every
6 single one of the nine steps touching heel to toe walking
7 towards the camera and every single one of the steps
8 walking away from the camera that all of that would still
9 be treated as one indicator, one portion of the entire walk
10 and turn test.

11 And so at one point Mr. Wellborn made the argument to
12 Judge Barnett that this was missing, you know, eighteen
13 parts of the test because you couldn't see whether she
14 missed heel to toe or made heel to toe on every single one
15 of the nine steps. But even his own expert testified that
16 that's not the way that field sobriety is analyzed. It's
17 not analyzed as to whether she made every single step. Its
18 just one portion is whether she was actually able to be
19 meet heel to toe.

20 But all the other indicators and the things that the
21 jury is gonna look at, whether they have testimony to
22 assist them or not, whether she's able to maintain balance,
23 whether she is using her arms as she walks, whether she's
24 actually taking the appropriate number of steps, doing the
25 turn correctly, stepping off line throughout any portion of

1 the walk and turn test. All of that was visible on camera.

2 The reality is that - The State's asking in this case
3 that you reverse Judge Barnett and that you remand this
4 case for trial because the reality of this is that if you
5 were to affirm a decision where the heel to toe not being
6 visible on camera it basically violates the video taping
7 statute; in essence a large majority of the DUI cases would
8 then have to automatically be dismissed. And there is no
9 way that the General Assembly wrote this statute with that
10 preposterous outcome in mind.

11 THE COURT: Well I like to think that I have a pretty
12 big ego but my ego is not such that if I issue an opinion
13 the whole state is gonna all of a sudden throw out all the
14 heel and toe, every heel - every case where the heel and
15 toe is made directly toward the camera.

16 MS. VALENZUELA: Well I would say that focusing - my
17 focus tends to be on the county - or the county's that I
18 feel like your decision is gonna impact. And we're looking
19 at the reality of that hearing, Your Honor, where a circuit
20 court judge, Judge Alford, who is a resident judge in our
21 county, issued a decision that has no precedential value,
22 where he was looking at the case in front of him that dealt
23 with feet being cut off, and where a magistrate judge
24 making decisions in our county on DUI cases read that in
25 such a way as to be - my argument would be as to be binding

1 on him. He thought that as his law or as his superior as
2 he put it that he was indicating what needed to be done,
3 that he needed to do this.

4 THE COURT: Well let the record reflect that we are
5 not the bosses of the Summary Court judges.

6 MS. VALENZUELA: But I think it reflects a reality
7 that even if your decision today isn't gonna be a published
8 binding precedent, that your decision today is going to
9 affect how DUI's are looked at by the magistrate judges and
10 by other circuit court judges in our county. They are
11 going to look at your decision and they are going to be
12 influenced by it. And so I do think that this decision
13 does have import that perhaps your record is not gonna be
14 binding precedent for the whole state but it's certainly
15 gonna be persuasive authority for our county or for Union
16 and York Counties and that's gonna impact a large majority
17 of DUI cases because there is no possible way that a video
18 camera that is installed and locked into a patrol vehicle
19 is going to capture a 360 degree view of the defendant.
20 That's just not possible.

21 And the General Assembly when they wrote this statute,
22 Your Honor, was well aware of how the cameras work in a
23 patrol vehicle.. They knew that they are not able to be
24 dismounted. They knew that a large majority of roadside
25 stops do not happen with two or three officers responding.

1 A lot of these times its one officer responding and its
2 that officer responding and stopping in a location that is
3 the defendant's choice. Not the officers choice. He turns
4 on the light when the violation is done but that defendant
5 can continue driving for a few minutes, can choose to go to
6 a well lite gas station with plenty of flat ground to walk
7 and plenty of lighting. Or that defendant can choose to
8 pull over on a rocky gravel side road with not lighting and
9 that's where the officer has --

10 THE COURT: Are you arguing that someone under the
11 influence sees a blue light that they can drive for a mile
12 to get to a station so they can be under a spotlight?

13 MS. VALENZUELA: I'm arguing that the reality of a
14 stop is determined where the stop location is selected by
15 the driver and not by the officer.

16 THE COURT: But the --

17 MS. VALENZUELA: I'm not trying to establish the
18 failure to stop law for drunk driver's in our county. But
19 my notes of appeal, Your Honor, broke it down and I would
20 just go back and point out that in this case, you know,
21 your scope of review is looking at errors in the law. And
22 the state is arguing that in this case the judge did make a
23 legal error when he interpreted 56-5-2953 to require that a
24 hundred percent of the field sobriety test to include
25 whether their tiptoes touch their heels pass beyond camera

1 or it requires that the DUI case be dismissed.

2 In this case that would be the wrong interpretation of
3 the statute just reading the statute on it's face. Knowing
4 that we don't have any precedent to look at except for
5 *Murphy*, of course it disagrees with *Murphy*, but the State
6 understands that *Murphy* was written about, you know,
7 addressing a statute that has been amended since that time.

8 But then even looking at the decisions that he was
9 relying on, Your Honor, from the other circuit courts that
10 were just - that had a precedential value even those all
11 use the language that there has to be a substantial portion
12 of the field sobriety on camera and there has to be enough
13 so that the fact finder can make some determination as to
14 how the defendant did. And in this case there was more
15 than a substantial amount of the field sobriety on camera
16 and there was enough so that a jury could look at it and
17 make some determination as to how the defendant did aside
18 from whether she, you know, actually her heels touched her
19 toes on those eighteen steps.

20 And then finally I would argue, Your Honor, that even
21 if you were to hold that the judge did not make a legal error
22 in terms of how he defines Subsection A of 56-5-2953, he
23 did make a legal error and if that would be the correct
24 interpretation in not considering the totality of the
25 circumstances under Subsection B, and I think that those

1 apply here in a situation where the officer did not select
2 the location of the stop, did position the camera in order
3 to capture the defendant's body at all times, it was a well
4 lite location and the reality of the circumstances that are
5 provided for officers today is that there is no way that
6 one hundred percent of that field sobriety in a three
7 hundred and sixty degree view of that defendant's body is
8 gonna be on camera. And this would certainly be one
9 circumstances where it wouldn't require a dismissal of the
10 case.

11 There can be some other option for the court to
12 address the issue of no, you know, no heel to toe touching.
13 I would argue that that does in fact have to do with the
14 weight of the evidence and not the admissibility of the
15 evidence in that if you were to reverse and remand as the
16 State is asking you Mr. Wellborn, I am sure, would do an
17 excellent job of crossing the officer and pointing out to
18 the jury that you cannot in fact see on the video whether
19 she was touching heel to toe and then challenging the
20 deputy on all other aspects of the field sobriety test.

21 THE COURT: Thank you.

22 MS. VALENZUELA: Yes, Your Honor.

23 THE COURT: Mr. Wellborn.

24 MR. WELLBORN: Thank you, Your Honor.

25 Your Honor, what I would like to do is address the

1 grounds for appeal as alleged when they were filed.

2 The first ground in the Notice of Appeal was that the
3 magistrate erred in interpreting the code section because
4 he made - and then it goes on to say whether or not -
5 whether the defendant's toes touching her heel at different
6 points in the test was not visible on the roadside video.

7 So what's alleged in that first ground is actually the
8 magistrate erred factually. And of course it's standard
9 review on appeal is whether the magistrate erred legally
10 because this court is bound by the magistrate's
11 interpretation of the factual findings below unless they
12 are clearly erroneous. Of course Your Honor is aware of
13 the authority on that but the most recent case that cites
14 that which I think is germane in this opinion or this
15 particular matter is *State versus Greg Gerald Henkel*,
16 H-e-n-k-e-l which was decided by our Court of Appeals on
17 July 10th, 2013, reversing a conviction in a *Suchenski* type
18 scenario. *Henkel* as Your Honor may be aware, I'm sure
19 you're aware, involved an issue where the - they didn't
20 have *Miranda* recorded and the Court of Appeals reversed the
21 conviction in that matter.

22 The *Henkel's* opinion dealt with a pre 2009 case like
23 *Murphy*. But the Court of Appeals among other things in
24 *Henkel's* talked about how the statute had to be strictly
25 construed in citing *Town Of Mount Pleasant versus Roberts*

1 and *City of Rock Hill versus Suchenski* indicated that the
2 appropriate remedy provided under the section was dismissal
3 so I would open with that.

4 The second grounds for appeal as alleged was that the
5 magistrate, in this case Judge Barnett, erred by treating
6 the circuit court orders, to wit, the one in the *Pittman*
7 case from Judge Alford, one from Judge Mark Hayes and one
8 from Judge Roger Couch, as binding authority. In fact the
9 record does not reflect that. In the smaller volume you
10 have with you on Page 3 starting on Line 12, Judge Barnett
11 at that point announces what his ruling is going to be.
12 And he says quote I'm going to go ahead and dismiss this
13 charge against the defendant. I'm dismissing the charge
14 based on what came down from higher up." This is a
15 Sixteenth Circuit opinion. He does not say --

16 THE COURT: What page number again?

17 MR. WELLBORN: This would be Page 3. It should be
18 Page 3 of your transcript.

19 THE COURT: I got it. I got it. Okay.

20 MR. WELLBORN: Starting on Line 12. He does not at
21 that point indicate whether he is finding that this is
22 binding authority or persuasive authority. However in the
23 much thicker transcript which was a transcript of the
24 proceedings from the day before, this was a two-day process
25 on this one discreet issue. There was a tremendous amount

1 of discussion with the judge both from defense counsel and
2 from the state that in fact these opinions issued by Judge
3 Couch and Judge Alford, and these orders, actually not
4 opinions, were in fact not binding that was conceded. So
5 the judge was keenly aware that this was not binding.

6 THE COURT: Well why does he say in his order or
7 return quote based on the unpublished ruling by Judge
8 Alford?"

9 MR. WELLBORN: Well he doesn't say that. He says I'm
10 dismissing this charge based on what he now from higher up
11 --

12 THE COURT: No, no. I'm talking about - I've got his
13 return and he's saying "the court granted the defendant's
14 motion to dismiss based on the unpublished ruling by Judge
15 Alford in the *State of South Carolina versus John Douglas*
16 *Pittman.*"

17 MR. WELLBORN: And that still doesn't indicate whether
18 it's where because he found it persuasive in it's analysis
19 or he found it binding, and that's the issue alleged by the
20 State. But regardless, regardless, if, if the judge used
21 an opinion, and that opinion stated correct propositions of
22 law, and those same correct propositions of law were
23 adopted by the magistrate, that is there is nothing
24 erroneous about them, there is nothing illegally about
25 them, so that would be grounds number two as alleged.

1 Grounds number three as alleged which is in the
2 alternative if in fact that Judge Barnett did not find this
3 binding but found it persuasive he erred in misapplying the
4 opinion that the State complains about. So what they're
5 saying is he erred because he found Judge Alford's opinion
6 as binding. Then they're saying well if he didn't find it
7 as binding but found it persuasive, they erred because he
8 didn't follow the analysis in the opinion and that should
9 some how bound him. Either way the record does not reflect
10 that one way or the other.

11 What the record says is he is dismissing the grounds,
12 he's looking at the Sixteenth Opinion, Sixteenth Circuit
13 Opinion. You have that that he obviously analyzed it, but
14 whether he found that to be binding or not the record is
15 silent. What we do know is he made a decision, he made a
16 finding of fact, there is no question about that. He made
17 a finding of fact. And his finding of fact was that the
18 test, specifically the walk and turn test, was not recorded
19 from his opinion. And there is support for that finding of
20 fact which I think addresses the issue as to whether it is
21 erroneous or not. What I would point Your Honor to is in
22 the thicker part of the transcript starting on Page 154 -
23 When you have that page I'll direct you to the appropriate
24 line.

25 This was the testimony of the deputy who conducted the

1 field sobriety test.

2 THE COURT: Okay.

3 MR. WELLBORN: Page 54, Line 18. "Okay let's talk
4 about the walk and turn."

5 Quote, you were able to see according to what you
6 testified to that when she walked nine steps forward" -
7 response yes or Uh-huh - "she missed the majority of her
8 steps." This was based on the deputy's previous testimony.
9 "Did not touch heel toe; is that correct?"

10 "Correct" says the deputy. So the deputy's analysis
11 was that the time that Ms. Lorusso was walking these heel
12 toe steps that she had missed the majority of them. And on
13 the video tape we can't see that. "We can't see whether
14 her heels are touching her toes or not can we?" And the
15 deputy's response on the next page, Line 3, is "Correct."
16 Then it goes further.

17 "And on the video on the scene based on what you
18 testified to she also missed the majority of her steps
19 going back nine steps heel toe. Correct?" Is the
20 question. The deputy's response is "Correct". And then
21 the next question "All right. But we can't see that either
22 because of the position of the camera relative to her feet.
23 Correct?"

24 Answer. "Correct." Then as you follow down from
25 that page starting on Line 19 we talk about how she was

1 positioned and why she was positioned. This is Page 155,
2 Line 19. "You also told her which direction to walk.
3 Towards the camera during the walk and turn test didn't
4 you?" "Correct." "And which direction to walk back?"
5 "Correct." "Those were your choices?" "Correct" which
6 ends on Page 156, Line 1.

7 So what the deputy in fact had testified to and what
8 was addressed in front of Judge Barnett was the deputy -
9 this wasn't a matter of needing a three hundred and sixty-
10 five degree view. The deputy could have had her walk
11 sideways, or even at an angle, and we would have been able
12 to see whether her feet touched her toes. But the deputy
13 made a decision to place her relative to the camera any way
14 so for all nine steps down and all nine steps back we could
15 not see whether her heels touched her toes or not. But the
16 deputy was going to quote interpret this, or lay a
17 foundation as the State has presented, so that the jury
18 could understand what was going on that in fact she missed
19 the majority of her steps and there would be no way to
20 challenge that.

21 THE COURT: Was the officer ask why he had her walk
22 that way?

23 MR. WELLBORN: He was not.

24 THE COURT: Because I can understand why he might not
25 want somebody to walk perpendicular to the camera because

1 they would be walking out in the middle of the highway.

2 MR. WELLBORN: Well this wasn't in a highway. This
3 was on a residential street --

4 THE COURT: They could be walking out beyond the nine
5 steps would most likely - well would take someone, unless
6 they walked up off the roadway, into the traveling lane of
7 the road.

8 MR. WELLBORN: This is a situation where factually you
9 have a side street in a residential neighborhood. The
10 deputy's camera and car was placed at an angle and sort of
11 off set to my client's car where there was also a sidewalk,
12 immediately adjacent. There were options to have her walk
13 as the deputy affirmed to walk either sideways or at an
14 angle where we would have been able to see the nine steps.
15 There was room, there's no question about that factually.
16 The question is the deputy simply chose to do it the way he
17 did it and that was it. There was no other testimony that
18 conflicts that.

19 Furthermore there is nothing in the record that
20 reflects that my client did anything that would have failed
21 this test other than missing the nine steps forward and
22 nine steps back. The deputy testified that he was able to
23 see on camera how she stood in place and how she did her
24 turn but there is nothing in the record that reflects that
25 any of those were inappropriate or bad. So what we're left

1 with is the deputy being able to testify in front of the
2 jury well, ladies and gentlemen, I can tell you cause I was
3 there and I saw it even though you can't see it. Trust me,
4 I saw it, she missed the majority of those steps on the
5 nine down and on the nine back. But I know you can't see
6 it, I know she can't contest it but just take my word for
7 it, I'm the deputy.

8 That's the problem with it and that of course would
9 not comply with the tenants of the video taking statute
10 which is a mandatory recording statute.

11 Finally the State has alleged in grounds number four
12 that even if the heel toes were not visible, and that this
13 does violate 56-5-2953(A) that this should be excused under
14 Subsection B. But Subsection B, and all the cases that
15 cite Subsection B, talk about exigent circumstances where
16 either the camera wasn't working or someone was taken off
17 to the hospital as a result of an auto accident therefore
18 they could not possibly record. Or for something else -
19 something else was going on where they weren't able to
20 record at all. There is nothing in the record that
21 indicates they had a situation that was exigent where they
22 would not be able to record.

23 Now these cases have been - And again, it's persuasive
24 authority, they have been dismissed in instances where
25 someone has clearly walked the nine steps forward and nine

1 steps back, it is clearly discernable to a finder of fact,
2 in this case the courts, various judges, that someone is in
3 fact is doing a walk and turn test but because the camera
4 cuts off below the feet and you can't see the feet at all
5 and the courts, various courts have found that violative of
6 the recording statute. The reason of course is if you
7 can't see what the feet are doing you can't see if someone
8 is touching your heels or touching your toes. This is the
9 same. It's factually - There is a nuance that's factually
10 different and you can see the feet but you still can't see
11 if the feet are touching the toes and that is a part of the
12 test. And this is a part of the test where the deputy
13 would testify no they did not but the camera doesn't show
14 one way or other. And that was the finding of the fact
15 made by the court. And again, the finding of the fact is
16 something that a reviewing court has to accept unless it's
17 clearly erroneous. And there is no suggestion that it's
18 clearly erroneous in this case, just that the judge
19 committed an error of law.

20 I would just briefly touch on weight versus
21 admissibility. This statute as interpreted by *State versus*
22 *Suchenski*, as interpreted by *Town of Mount Pleasant versus*
23 *Roberts*, and the latest case *State versus Henkel* from our
24 Court of Appeals, there has never been a suggestion on
25 appeal that it's a weight versus admissibility issue. It's

1 not. As we know the law is, if it's not recorded and a
2 finding is made by the court that in fact it has not been
3 recorded, the remedy is dismissal. It's not a weight
4 versus admissibility. In fact it's not an evidentiary
5 issue, It's a straight dismissal issue.

6 So those would be issues that I would present in
7 response briefly. I beg the Court's indulgence.

8 (PAUSE AT 11:56 A.M..)

9 MR. WELLBORN: I would also just point out that the
10 fact that one person testified they could see part of the
11 test, would also not satisfy the requirement because an
12 independent factual analysis has to be made by the
13 magistrate in this case and was. And the magistrate's
14 independent factual analysis is that this test was not
15 recorded. Thank you.

16 THE COURT: Briefly.

17 MS. VALENZUELA: I do have just a few brief comments.

18 He pointed you to Page 3 and he talked to you about
19 how the judge said that I'm dismissing the charge based on
20 what came down from higher up because it's a Sixteenth
21 Circuit opinion. And then further down he goes on to say
22 that even though it's an unpublished opinion it does come
23 down from above me. In all of those statements in addition
24 to the fact that he cited Judge Alford's order in his
25 return when appellate rules which were pointed out to him

1 actually do not allow the citation of unpublished cases in
2 support of an unrelated case do indicate that he felt that
3 he treated the case more like it was a binding precedent
4 and just something that he could take into account and
5 helping him resolve this legal issue before him.

6 Additionally you ask Mr. Wellborn specifically if the
7 deputy was ever ask what he takes into account when he
8 positions someone. And giving Mr. Wellborn the benefit of
9 doubt, it's been a long time since we had this, but Page
10 146 the deputy is specifically ask, and it's in the context
11 of HGN because the motion did cover HGN and walk and turn,
12 but he's ask on Page 146 by me, "Okay when you're
13 considering how you place a defendant in relation to your
14 car what do you take into account?" And the officer says
15 "Amount of space. Actually my safety and their safety and
16 also if we're on a road, parking lot, how busy the road is,
17 things of that nature." And so he did specifically address
18 the issue that you ask about.

19 And I think he goes on on Page 150 and he is ask there
20 by me if he takes different things into account when he's
21 doing field sobriety out on the road than he does when he's
22 in a secure location like inside of a building and he's
23 doing practice field sobriety during class and he says yes
24 that he does take them into account.

25 Finally because Mr. Wellborn suggest that even if the

1 judge was treating this not as binding authority on him, I
2 do want to hand up Judge Alford's case of *Pittman*, and
3 point out that, Your Honor, even - this is where it's a
4 legal error. Its even in applying Judge Alford's and that
5 legal analysis, I mean not factually, just his legal
6 analysis. When you turn to Page 4 at the bottom, he says
7 "in construing the video tape statutes 2953 that requires
8 that any field sobriety test administered must be videoed
9 and recorded that the plain and ordinary meaning of the
10 statute would appear to be that a field sobriety test be
11 completely or substantially recorded such that a person
12 watching the recording could view the test performed by the
13 driver suspect so that the assessment could be made as to
14 how well the driver suspect performed the test."

15 And then again on Page 6 Judge Alford said "that the
16 requirement that any field sobriety test be recorded would
17 necessarily mean that a person watching the recording would
18 be able to completely or substantially view the test as it
19 was performed such that any person watching the recording
20 could make some assessment as to how well the driver
21 suspect performed the test."

22 And so in this case everything except one indicator is
23 missing. And you know Mr. Wellborn pointed out that when
24 the deputy testified he said that she missed several steps.
25 But on cross examination just like I elicited and is

1 actually part of the record, the deputy and the defense's
2 own expert said that regardless of how many steps she
3 misses heel to toe on, it's one indicator. It's only one
4 item that he is allowed to take into account. If she
5 misses it once then that's one of the things that he takes
6 into account in saying that she did not pass walk and turn,
7 the walk and turn field sobriety test.

8 If she misses it eighteen times he counts it once in
9 determining that she did not pass the field sobriety test.
10 And so it's not a majority of the test no matter how you
11 want to kind of obscure the math numbers on this it's a
12 very small portion. And so even with Judge Barnett
13 applying or looking at just to help inform him on his
14 decision as to how to interpret this law, Judge Alford's
15 case in his analysis of what 2953 requires is in complete
16 opposition to what this case holds. There is no factual
17 support for the argument that Judge Barnett was applying
18 Judge Alford's analysis.

19 And Judge Barnett tells you in his return that that is
20 what he was trying to do. He was reading Judge Alford's
21 opinion thinking that this is what he needed to apply and
22 he thought that he applied that in this case. And
23 unfortunately and respectfully we believe that Judge
24 Barnett did not properly apply the law and that's why we're
25 here asking you to reverse him and remand the case for

1 trial.

2 THE COURT: Brief response?

3 MR. WELLBORN: I think the end of Judge Barnett's
4 opinion is sort of - or excuse me, the end of his return,
5 says quote in the *State versus Lorusso* case a person can
6 only see the toe of each foot when the defendant is walking
7 towards the camera and the heel of each foot when the
8 person turns to walk back. At no time can a person
9 watching the video observe any heel to toe touching or not
10 touching. Based upon these facts, testimony and the video,
11 this court felt compelled to grant the defendant's motion
12 for a dismissal."

13 I think that sums up the grounds. It is purely a
14 factual grounds. Now whether he found *Pittman* to be
15 persuasive, and we know it to be binding, we don't know.
16 What we do know is he made the determination based on fact
17 that the test was not recorded by the video camera. And
18 that therefore the appropriate thing to do applying the
19 statute was dismissal which would be perfectly within line
20 of *Suchenski* and *Town of Pleasant versus Roberts*; now
21 *Henkel's* opinion from July of this year from our Supreme -
22 South Carolina Court of Appeals, and perfectly in line with
23 other rulings that have come down interpreting this
24 statute.

25 THE COURT: All right. Well I'm gonna take it under

1 advisement. These are very complicated. Again we just had
2 this in Union yesterday in a little different context but
3 boiling down basically the issue seems to be about the
4 same.

5 We're gonna take a short break and then the next one -
6 we're a little behind - is *State versus Timothy Mason*.
7 That's Ms. Valenzuela and Mr. Sheldon. All right. We'll
8 take a couple of minutes break and refresh ourselves.

9 (END OF TRANSCRIPT OF RECORD.)

10 (COURT IN RECESS AT 12:05 P.M..)

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-002406

The State,

Appellant,

vs.

Shelby Jean Lorusso,

Respondent.

PROOF OF SERVICE

I, William Blitch, certify that I have served the within Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Christopher A. Wellborn, Esquire
142 Oakland Avenue, Suite C
Rock Hill, South Carolina 29730

I further certify that all parties required by Rule to be served have been served.

This 31st day of October, 2014.



WILLIAM M. BLITCH, JR.
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(803) 734-3727

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OCT 31 2014

SC Court of Appeals

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: 

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ATTORNEYS FOR APPELLANT

October 31, 2014



ALAN WILSON
ATTORNEY GENERAL

October 31, 2014

Christopher A. Wellborn, Esquire
142 Oakland Avenue, Suite C
Rock Hill, South Carolina 29730

Re: The State v. Shelby LoRusso
Appellate Case Tracking No. 2013-002406

Dear Mr. Wellborn:

Enclosed please find two (2) copies of the Record on Appeal, along with proof of service, in the above-referenced State's appeal.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General

Enclosures

cc: ☒ The Honorable Jenny A. Kitchings (original & 9 copies enclosed)
Victim Services

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OCT 31 2014

SC Court of Appeals