

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT
Garrison D. Hill, Circuit Court Judge

Case No. 2012-GS-23-2124
Court of Appeals Appellate Case No.: 2013-000883

State of South Carolina, ... Respondent,

v.

Johnie Allen Devore, Jr., ... Petitioner.

APPENDIX

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SC SUPREME COURT

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The South Carolina Court of Appeals

The State, Respondent,

v.

Johnie Allen Devore, Jr., Appellant.

Appellate Case No. 2013-000883

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Luff A.C.J.
H. B. W. J.
Paul C. Thomas J.

Columbia, South Carolina

cc:

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FILED

4/21/16

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John Benjamin Aplin, Esquire
The Honorable D. Garrison Hill

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Johnie Allen Devore, Jr., Appellant.

Appellate Case No. 2013-000883

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5392
Heard November 3, 2015 – Filed March 23, 2016

DISMISSED

J. Falkner Wilkes, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General John Benjamin Aplin, both of
Columbia, and Solicitor William Walter Wilkins, III, of
Greenville, for Respondent.

HUFF, A.C.J.: Johnie Allen Devore, Jr. seeks to appeal his conviction for driving under the influence (DUI). We dismiss the appeal for lack of jurisdiction.

On March 14, 2013, Devore—who was represented by counsel—was convicted of DUI in a jury trial. On March 21, 2013, seven days after his conviction, Devore sent a pro se letter to the trial judge, raising various concerns and asking the trial

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judge to reconsider the verdict or to declare a mistrial. On April 1, 2013, eighteen days after his conviction, Devore sent a second pro se letter, this time to the circuit solicitor, "Re: Request for Appeal or Re-examination of [his case]." This letter purportedly attached his March 21 letter to the trial judge, and stated he intended the attached letter "to be a request for appeal, review, or consideration of changing [Devore's] trial results to a mistrial." Devore noted his letter to the trial judge had "been ignored and [had] remained unanswered."

At some point, Devore obtained new counsel—Attorney Wilkes—to represent him. On April 19, 2013, thirty-six days after his conviction, Attorney Wilkes filed an "Amended Notice of Appeal" with this court from Devore's conviction entered March 14, 2013, noting a pro-se filing requesting reconsideration had been mailed to the trial judge on March 21, 2013, that no order appeared to have been issued from that filing, and that a second pro se filing was served on the solicitor on April 1, 2013.

On June 21, 2013, this court remanded the matter for the limited purpose of entertaining Devore's motion. On March 17, 2014, the trial judge held a hearing on Devore's motion for a new trial. Attorney Wilkes began the hearing by giving the background on the matter, informing the trial judge that Devore had, subsequent to his DUI conviction, sent the two documents—one of which was addressed to the trial judge and was "technically a motion for a new trial which was appropriate under the time frame." The trial judge responded, "Now, he was represented by counsel, wasn't he, at that point?" Attorney Wilkes agreed Devore was represented by counsel at the time, but further explicated that "[trial counsel] left on vacation and left the country without filing the motion or notice," that "[t]here may have been some miscommunication," and Devore, "being . . . aware of the timing, filed both."

Attorney Wilkes then proceeded to argue the merits of the motion to the trial judge. In ruling on the matter, the trial judge began by indicating he did receive Devore's post-trial motions, but stated he was confused because, "for all [he knew], [Devore] was still represented by [trial counsel]." The trial judge further stated it was "difficult for [him] to respond when [Devore was] represented by counsel." He noted that Devore's pro se documents were timely filed, but stated it put him in an awkward position of not knowing how to respond since Devore was represented by counsel who had not communicated with the court that there were motions to be resolved by the court. The trial judge then addressed the merits of the argument, but found no error and no basis for a new trial.

On March 27, 2014, Attorney Wilkes filed a notice of appeal from Devore's March 14, 2013, conviction and sentence, as well as the trial judge's oral ruling of March 17, 2014, which denied Devore's post-trial motion. On October 10, 2014, the State filed a motion to dismiss for lack of appellate jurisdiction. On November 13, 2014, this court denied the State's motion to dismiss. The parties thereafter filed the record on appeal and their briefs for consideration by this court.

The State persists in asserting this court lacks appellate jurisdiction over the matter, declaring it did not waive the argument and continuing to maintain the appeal should be dismissed. Specifically, it contends that Devore was admittedly represented by counsel at the time he submitted the March 21, 2013, letter to the trial judge and, pursuant to *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010), such substantive pro se documents are not proper when a party is represented by counsel. Thus, the March 21, 2013 letter could not operate as a notice of appeal or as a motion for reconsideration which would stay the time for filing of the appeal. Accordingly, the State maintains no proper motion for reconsideration or notice of appeal was served within the required ten days of Devore's conviction. Devore argues this court does have appellate jurisdiction. He contends the State's argument overlooks the fact that, although he had an attorney of record from the trial, he did not have an attorney "actively representing" him after the conclusion of the trial. Thus, he maintains his pro se filings did not create or constitute prohibited "hybrid representation." We agree with the State that this court lacks appellate jurisdiction to consider the matter.

Our appellate court rules require a party intending to appeal to serve and file a notice of appeal. Rule 203(a), SCACR. In criminal appeals, after a trial resulting in conviction, a notice of appeal must be "served on all respondents within ten (10) days after the sentence is imposed." Rule 203(b)(2), SCACR. However, "[w]hen a timely post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion." *Id.* Our rules of criminal procedure provide as follows:

Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence. . . . The time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion.

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Rule 29(a), SCRCrimP.

"The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (quoting *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004)); see also *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("The service of a notice of appeal is a jurisdictional requirement, and the time for service may not be extended by [the appellate court]."). "[T]he failure to comply with procedural requirements for an appeal divests a court of appellate jurisdiction" *State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004). Accordingly, in the absence of a timely served notice of appeal, this court has no jurisdiction.

Turning to the procedural facts of this case, absent service of a proper notice of appeal within ten days of Devore's March 14, 2013 sentence, and if no valid post-trial motion was made within ten days to stay the time for appeal, this court has no appellate jurisdiction. It is undisputed Devore served his pro se letter on March 21, 2013, within ten days of his conviction. However, if the pro se letter is a substantive document filed while Devore was represented by counsel, such that his representation is partially pro se and partially by counsel, it would be improper and could not be accepted. Rather, it would be considered a nullity.

In *Foster v. State*, Foster, who was represented by counsel in a post-conviction relief (PCR) matter pending before our supreme court, attempted to file a substantive document with the appellate court, which the court instructed the Clerk of Court to return. 298 S.C. 306, 306, 379 S.E.2d 907, 907 (1989). Foster's counsel asserted the court was required by the state constitution to accept Foster's pro se document. *Id.* at 306-07, 379 S.E.2d at 907. The court disagreed, holding our constitution "does not establish a right to 'hybrid representation,' that is, representation which is partially pro se and partially by counsel." *Id.* at 307, 379 S.E.2d at 907. The court ordered the Clerk to return Foster's document and stated, "Nothing in this order shall be construed to limit any litigant's right to file a *pro se* motion seeking to relieve his counsel, nor . . . limit a pro se litigant's right to file a brief in cases submitted pursuant to the procedures established" for *Anders v. California*¹ and *Johnson v. State*² appeals.

¹ 386 U.S. 738 (1967).

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Thereafter, in *State v. Stuckey*, Stuckey submitted a pro se initial appellate brief and designation of matter and sought to have it incorporated with the initial brief his appellate defender "will file on his behalf." 333 S.C. 56, 57, 508 S.E.2d 564, 564 (1998). Stuckey asserted he had a right to "hybrid representation" under our federal constitution. *Id.* Our supreme court disagreed and stated, "[s]ince there is no right to hybrid representation, substantive documents filed pro se by a person represented by counsel are not accepted unless submitted by counsel." *Id.* at 58, 508 S.E.2d at 564. Because Stuckey attempted to file a substantive document related to the case while she was represented by counsel and the document was not submitted through counsel, it was "not appropriate for consideration" by the appellate court. *Id.* at 58, 508 S.E.2d at 564-65. The court also continued to note exceptions to the rule for pro se motions seeking to relieve counsel and for a party's right to file a pro se brief pursuant to *Anders* and *Johnson*. *Id.* at 58, 508 S.E.2d at 565.

Finally, in *Miller*, following denial of his PCR application, Miller filed a pro se "59(e)/60(B) Motion," which was not heard at that time because of the filing of notices of appeal. 388 S.C. at 347, 697 S.E.2d at 527. This court denied the petition for writ of certiorari and, thereafter, the circuit court entertained Miller's pending pro se motion, ultimately denying and dismissing it. *Id.* Miller then filed a pro se notice of appeal from that order. *Id.* Our supreme court held as follows:

Since there is no right to "hybrid representation" that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel. Because [Miller] was represented by counsel, the *pro se* motion was not proper, should not have been accepted, and should not have been ruled upon. The motion was essentially a nullity.

We therefore vacate the order ruling on the motion and dismiss [Miller's] notice of appeal as moot. *We also take this opportunity to remind judges and clerks of court of our directive in Foster not to accept substantive documents, with the exception of motions to relieve*

² 294 S.C. 310, 364 S.E.2d 201 (1988).

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counsel, filed pro se by a party who is represented by counsel.

Id. (emphasis added) (internal citations omitted).

Following a criminal trial, a defendant's trial counsel "must make certain the defendant is made fully aware of the right to appeal." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in [Anders]." *Id.* (quoting *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). "After the client is convicted and sentenced, trial counsel in all cases has a duty to make certain that the client is fully aware of the right to appeal, and if the client is indigent, assist the client in filing an appeal." *Wilson v. State*, 348 S.C. 215, 218 n.3, 559 S.E.2d 581, 583 n.3 (2002). Even though an attorney is retained for purposes of trial only, "[t]he requirement [that he] take reasonable steps to protect the client requires counsel . . . to serve and file the Notice of Appeal and to continue to represent the client until relieved by [the appellate court] under Rule 235, SCACR." *In re Anonymous Member of the Bar*, 303 S.C. 306, 308, 400 S.E.2d 483, 484 (1991). Rule 264 of our appellate court rules, formerly Rule 235, provides for continued representation by a party's trial counsel at the appellate level until proper withdrawal, stating as follows: "The attorneys . . . of the respective parties in the court below shall be deemed the attorneys . . . of the same parties in the appellate court *until withdrawal is approved and notice is given* as provided in this Rule." Rule 264(a), SCACR (emphasis added). As well, Rule 602(e)(1), SCACR stipulates, except as otherwise provided, "[t]rial counsel, whether retained, appointed, or Public Defender, shall continue representation of an accused until final judgment, including any proceeding on direct appeal." See also Comment 4 to Rule 1.3, RPC, Rule 407, SCACR ("Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. . . . [I]f a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer should consult with the client about the possibility of appeal before relinquishing responsibility for the matter."); Rule 1.16(c), RPC, Rule 407, SCACR ("A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.").

We find Devore was represented by counsel at the time he sent his March 21, 2013 pro se letter and, therefore, that document could not qualify as a proper motion or

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notice of appeal and is, essentially, a nullity.³ First, we note that Devore conceded to the trial judge that he was represented by counsel at the time he sent his pro se letter to the trial court. Beyond that concession, however, we find Devore was represented by counsel at that time. We disagree with Devore's contention that counsel for a litigant must be actively filing documents around the same time as the litigant is filing pro se documents for it to be considered "hybrid representation." Our courts have determined "hybrid representation" is representation that is partially pro se and partially by counsel. Here, Devore was clearly represented by trial counsel at trial and, once Devore was convicted, trial counsel was obligated to ensure Devore was made fully aware of his right to appeal. In the event Devore desired to appeal, trial counsel, even if only retained to represent Devore at trial, was obligated to serve and file a notice of appeal and continue to represent Devore until his withdrawal from representation was approved.⁴ Thus, trial counsel was Devore's counsel of record at the time Devore sent the March 21, 2013 letter to the trial court and any attempt to serve a motion for new trial or notice of appeal by this pro se letter constituted "hybrid representation." Since Devore was represented by counsel, his pro se motion was not proper and could not be accepted. Inasmuch as the letter was not submitted through counsel and it was not a motion to relieve counsel, the trial judge appropriately followed our supreme court's specific directive not to accept

³ The April 1, 2013 letter was beyond ten days from Devore's March 14, 2013 conviction and sentence and, therefore, was clearly untimely.

⁴ In the event Devore was improperly denied his right to appeal, the proper avenue of relief is through a PCR proceeding. See *McCray v. State*, 271 S.C. 185, 187, 246 S.E.2d 230, 231 (1978) ("[W]here an accused establishes in a [PCR] proceeding that he was unconstitutionally deprived of his statutory right to a direct appeal, this [c]ourt, upon obtaining jurisdiction of the case on the [PCR] appeal, will review the trial record and pass upon all issues properly raised and argued just as if a direct appeal had been taken to this [c]ourt."). We disagree with Devore's assertion that, pursuant to *State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (2013), a PCR hearing would be unwarranted in this case because it would not be necessary to resolve a factual dispute and would not aid the court in its application of law. Unlike *Rivera*, we are dealing here with the issue of appellate jurisdiction. If Devore's appeal is dismissed for lack of appellate jurisdiction because trial counsel was ineffective in protecting his right to appeal, then the matter clearly would be proper for consideration in a PCR action. However, this court simply cannot consider the matter if it is divested of appellate jurisdiction.

substantive documents filed pro se by a party who is represented by counsel.⁵ Because Devore's pro se filings were a nullity, there was no proper notice of appeal served or post-trial motion made within ten days of imposition of his sentence, and this court does not have appellate jurisdiction. Accordingly, we dismiss this appeal.

DISMISSED.

WILLIAMS and THOMAS, JJ., concur.

⁵ It is clear from the hearing held on Devore's pro se motion that the trial judge recognized the problem arising from the pro se filing while Devore was represented by counsel and, for that reason, did not initially respond to or rule on the matter. It was only after this court remanded for consideration of Devore's motion that he held a hearing and considered Devore's motion. Further, the fact that the trial judge eventually ruled on Devore's pro se motion does not prevent dismissal of this appeal. As noted, timely service of the notice of appeal is jurisdictional, it may not be extended by this court, and failure to comply with procedural requirements for an appeal divests this court of appellate jurisdiction. Accordingly, Devore's pro se motion was improper and was a nullity. *See Miller*, 388 S.C. at 347, 697 S.E.2d at 527 (vacating an order which ruled on an improper pro se motion, finding the motion to be a nullity, and dismissing the appeal from the order on the motion).

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT
Garrison D. Hill, Circuit Court Judge

Case No. 2012-GS-23-2124
Appellate Case No.: 2013-000883

State of South Carolina, ... Respondent,

v.

Johnie Allen Devore, Jr., ... Appellant.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding that the incident site video was sufficient where it did not contain the entire Miranda warning on the video?
2. Did the court err in refusing to accept the defendant's stipulation and instead allow the State to introduce the implied consent warning as to an administrative suspension for refusing the breath test, as evidence of guilt?
3. Did the court's failure to answer the jury's question about being deadlocked 11-1 allow undue pressure on minority juror?

STATEMENT OF THE CASE

Appellant was indicted by the grand jury in Greenville County for the offense of Driving Under the Influence 2nd offense. A jury trial was held on March 14, 2013, the Honorable D. Garrison Hill presiding. The Appellant was found guilty and sentenced to 90 days in the county detention center and a fine of \$3,000, suspended to five days HIP and a fine of \$2,100, and probation for six months, MADD victim impact panel meeting, and substance abuse counseling. Elizabeth C. Major, Assistant Solicitor, represented the State at trial. Steve Sumner, of Greenville, represented the Appellant at trial. J. Falkner Wilkes represents the Appellant on the appeal of this case.

ARGUMENT

I. The Court Erred in Failing to Dismiss Where Roadside Video Fails to Show the Appellant Being Advised of His Miranda Rights in its Entirety Pursuant to S.C. Code Section 56-5-2953.

The Appellant was pulled over by a South Carolina State Trooper in Greenville County. The Trooper's in-car video was running when the Trooper initiated the stop. The Trooper conducted several field sobriety tests, all of which can be seen on the video. After the field sobriety tests, the Trooper then walked the Appellant out of the camera's view as he began advising the Appellant of his Miranda rights. As a result, the Appellant's Miranda warnings were not captured in their entirety on video. R. 37. The defense moved to dismiss based on the state's failure to comply with the video taping requirements of S.C. Code Section 56-5-2953. 37.

In response to the defense motion, the State offered the testimony of the arresting Trooper. 8. During his testimony the Trooper's gave no explanation for his decision to walk the Appellant out of the camera's view before the Appellant had been fully advised of his rights under Miranda. R. 39-42; (S-1 Video). The video does not show the Appellant being fully advised of his Miranda rights.

Although it offered no evidence in support, the State argued: "These cameras don't have a 360-degree view. We're working within budget constraints here." R. 42. 1, 18-20. The State took the position at trial that the court should "read the statute as a whole" to overlook the Trooper's failure to comply with the clear requirements of 56-5-2953. Contrary to the state's argument, there was no impediment to the Trooper's ability

to comply with the statute. The record shows clearly that the Trooper simply walked the Appellant out of the camera's view before completing the Miranda advisement. The State stipulated at trial that the video did not show the entire advisement. The record fails to show the existence of any statutory exception to the advisement being videoed in its entirety.

The plain language of the Section 56-5-2953 requires not only that there be an incident video, but specifically that the video must *show* the advisement of Miranda. The provisions of 56-5-2953 have repeatedly been construed as mandatory. Since the trial of this case, the Court in State v. Sawyer, 27393 (S.C. 6-4-2014) has ruled that a videotape from the breath test site that lacks the audio portion of the reading of Miranda rights and the informed consent law did not satisfy the requirements of S.C. Code Ann. § 56-5-2953(A)(2) (2006). The video, as contemplated in 56-5-2953, clearly includes both its visual and audio components. In Sawyer the Court held that "A silent video simply cannot meet these statutory requirements." Likewise, a video without the defendant on screen equally fails to meet the statutory requirements, regardless of whether it contains audio. Section 56-5-2953 requires that the incident location video "(iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and *show* the person being advised of his Miranda rights." S.C. Code Section 56-5-2953(iii). Here the incident location video fails to show the Appellant being fully advised of his Miranda rights.

While the state would have the court began to interpret just how much of a part of Miranda is enough to satisfy 56-5-2953, under the reasoning of the Court's prior rulings,

the state must video the entire advisement of Miranda; not just a portion of it. Anything less than the full advisement falls short of strict compliance and dances upon the proverbial slippery slope. Because the visual component is an essential part of the video requirement, and no exception applies, the court erred in failing to suppress evidence from the stop and dismiss the Appellant's charge.

II. The Court Erred in Refusing to Accept the Defendant's Stipulation and Allowing the State to Offer the Existence of a Statutory Six Month Administrative Suspension for a Refusal as Evidence of Guilt.

The defendant objected to the admission of any reference to the implied consent warning relating to the six-month administrative suspension for refusing a breath test. R. 52-63; 120-122; 221-222. In conjunction with the objection, the defense stipulated that the defendant was "properly given and offered the SLED test." R. 56, l. 23-24. While the defense agreed that the refusal itself could be considered against the defendant, it argued that the potential for a six-month administrative suspension for a refusal was irrelevant to the criminal case. R. 53. The state sought to introduce the Appellant's refusal in light of the potential administrative penalty as evidence of guilt. R. 55. The court ruled that the risk of administrative suspension of the Appellant's license for refusing to give a breath sample was relevant to the issue of guilt and not overly prejudicial. R. 122.

In addressing the admissibility of the implied consent warning the Court has held that the reference to the failure to request additional tests was improper. State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001). In Henderson the Court reasoned:

Given the offer to stipulate by Henderson's counsel, there was no plausible reason why this language should have been read to the jury. Unlike the situation in Wilson, the State was not required to lay a foundation for the Datamaster test results. While we recognize that a stipulation usually involves the consent of all parties, the State's consent was not necessary here, where, by statute, "a person's . . . failure to request additional blood or urine tests is not admissible against the person in the criminal trial." § 56-5-2950(a). It was thus error for the municipal court judge to allow it to come before the jury.

State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001).

Although the additional tests language was redacted in this case, the State still admitted the remainder of the advisement, specifically the administrative penalty for refusal, to establish evidence of guilt. Although the Court in Henderson did not reach the admissibility of the potential for administrative penalty for a refusal, the result should be the same.

S.C. Code Section 56-5-2950(B)(1) provides that a person "does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his *refusal* may be used against him in court". Similarly, Section 2946(B) provides: "The resistance, obstruction, or opposition to testing pursuant to this section is evidence admissible at the trial of the offense which precipitated the requirement for testing." Nowhere, however, is there any provision that provides for the admissibility of the potential administrative penalty for a refusal as further evidence of guilt.

In offering evidence of the administrative suspension the State seeks to have the jury infer guilt based on the willingness of a defendant to risk the potential hardship caused by an administrative suspension. This risk would vary from person to person based upon

each person's particular situation. The administrative penalty would be more severe on those heavily dependent on a driver's license than those non-reliant on the ability to drive. Without more evidence, it is impossible for the jury to evaluate the effect of the penalty on any particular defendant. This leaves the jury to speculate as to the effect of the penalty, and thus, how to evaluate the refusal in light of any given length of potential suspension. This also places the defendant in a position of having to offer evidence to allow the jury to quantify the effect of a potential suspension. Otherwise, the jury would not be able to determine what weight to place on the defendant's decision to risk a suspension to exercise a statutory right. Placing a defendant in the position of having to introduce evidence to justify the exercise of a statutory right is simply untenable. The admission of the potential administrative penalty to establish guilt was therefore error.

In the Appellant's case there was less than overwhelming evidence of guilt. Where there is less than overwhelming evidence, the improper admission of evidence is not harmless. *See State v. Henderson, supra; State v. Sweet*, 342 S.C. 342, 349, 536 S.E.2d 91, 94 (Ct.App. 2000).

III. The Court Erred in Failing to Answer the Jury's Question about Being Deadlocked 11-1 And Allowing Undue Pressure on Minority Juror.

After hours of deliberation the jury sent out two or more notes, one of which indicated that the jury was split in their verdict. R. 194; 224-229. The jury wanted to know what would happen if they could not reach a unanimous verdict. Without a lot of discussion, the court brought out the foreman and asked him to find out if they wanted to stay and continue to deliberate, or come back in the morning. The foreman inquired

about seeing the video again and returned to the jury room. The court did not answer the jury's question concerning what would happen if they could not reach a unanimous verdict. The foreman subsequently sent word that they would continue deliberating.

The failure of the court to answer the jury's question had the effect of placing undue influence on the minority juror. Although a *de novo* issue, the law relating to an *Allen* charge is instructive. The jury in this case had deliberated for over two hours and it was after six o'clock in the evening. The court commented that the jury was getting tired. R. 194. There had been numerous questions from the jury. R. 224-229. One of the questions revealed that the jury was deadlocked 11 to 1. The jury specifically asked the question: "What happens when a one juror has a different verdict from the others?" R. 194, l. 9-10; 229. The court simply chose not to answer the jury's question. R. 194. It then let the foreman of the jury to "inquire" as to whether they wanted to continue or come back in the morning. The foreman reported that the jury wanted to continue on that evening. The jury was not instructed, questioned or polled by the Court. Presumably, either the foreman, or the majority was allowed to make the decision to continue deliberations into the night.

Providing no instruction on how long they would be kept that evening, or what could happen if hopelessly deadlocked, undue influence was allowed to enter the jury deliberations. Failing to answer the jury's question as to what happens with a hung jury, or to give the jury any idea of how late into the evening they would have to stay, was coercive in regards to the minority juror. It allowed the majority to effectively hold

the minority juror hostage indefinitely unless he or she changed his or her verdict. The failure of the court to answer the jury's question acted to coerce the jury into a verdict and focused naturally on the minority juror.

Although the unsolicited disclosure of the jury's division by a juror is not by itself grounds for a mistrial, in this case once the court became aware of the numerical split in the jury it was incumbent upon it to prevent undue influence from being injected into the deliberations.

In South Carolina state courts, an *Allen* charge cannot be directed to the minority voters on the jury panel. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Instead, an *Allen* charge should be even-handed, directing both the majority and the minority to consider the other's views. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996). It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict. State v. Singleton, 319 S.C. 312, 460 S.E.2d 573 (1995). Green v. State, 351 S.C. 184 (2002).

South Carolina adopted the standard set by the United States Supreme Court in Lowenfield to determine whether an *Allen* charge is unconstitutionally coercive. Tucker v. Catoe, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield v. Phelps, 484 U.S. at 237, 108 S.Ct. 546) Those factors are:

(1) *Does the charge/ or in this case, the lack thereof, speak specifically to the minority juror(s);*

In this case the situation allowed undue pressure on the minority juror. From the record we know we have a minority juror, and that the jury was deadlocked at 11-1. The record also shows that the jury specifically had a question concerning their inability to reach a unanimous verdict. The court's failure to answer the question about a hung jury, to give an *Allen* charge, or to determine whether continuing would be appropriate, allowed undue pressure on the minority juror. (Part of an *Allen* charge includes the instruction that a juror need not abandon his convictions).

(2) Does the charge/ or in this case, the lack thereof, indicate that the jury had to reach a decision in this case;

By not answering the question about the potential for mistrial, or polling the jury as to continuing, the court allowed the majority to exert undue pressure on the minority juror forcing the jury to reach a verdict. The minority juror was left in a position of being stuck there indefinitely unless he or she changed his or her verdict.

(3) Was there an inquiry into the jury's numerical division, which is generally coercive;

Although the Court did not inquire of the division, the split was clear from the jury note. The court was therefore aware of the numerical division so that any action (or inaction) it took would be seen by the minority as directed at him or her.

(4) The time the jury takes to return a verdict after the Court's action.

A verdict returned shortly after a supplemental charge, suggests a possibility of coercion. Although in John Devore's case counsel did not object to the Court's failure to respond to the jury question, or continuation of deliberations further into the evening,

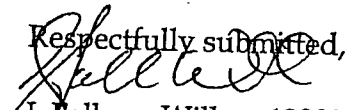
the lack of objection is only a factor to weigh in the analysis. The Short Time after the Question That Went Unanswered Increases the Likelihood That the Minority's Change in Verdict Was Influenced by the Court's Decision Not to Answer the Question.

Applying a Tucker analysis, the record in John Devore's case shows that the Court's failure to respond to the jury's question allowed undue influence into the jury deliberations. This was due in part to the circumstances of the trial. The jury was deadlocked 11-1. The numerical split was known to the Court. The jury had already deliberated for over two hours and was noticeably tired. It was after six o'clock in the evening and the jury had not had a break for dinner. The majority was allowed to make the decision to continue to deliberate without any inquiry, questioning, or polling of the jury by the Court. The majority was therefore allowed to essentially hold the minority juror in deliberations. The minority juror was not given any response to the question, nor any indication of how long into the night court would continue because of that juror's position. As a result, the lack of an *Allen* charge or other instruction, allowed for undue pressure on minority juror to change his or her verdict.

CONCLUSION

Based on the foregoing arguments the Appellant's conviction should be reversed.

Respectfully submitted,


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February 5, 2015.

FINAL BIRTH OF RESPONDENT

FINAL BIRTH OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The appeal should be dismissed because this Court does not have appellate jurisdiction over the case.
- II. The trial judge properly denied Appellant's motion to dismiss the case where the video taken at the incident site conclusively demonstrated that Appellant was fully advised of his Miranda rights; where dismissal of the case would be an absurd result not intended by the legislature; where the video was admissible under the totality of the circumstances exception; and where Appellant failed to allege or show any prejudice from the purported defect in the video.
- III. The trial judge properly allowed the State to present evidence regarding the consequences of refusing to take a breath test where Appellant was fully advised of these consequences prior to refusing the test and the consequences were relevant to an assessment of Appellant's refusal.
- IV. Appellant's issue regarding the judge's failure to answer the jury's question is not preserved for appellate review where defense counsel failed to contemporaneously object to the judge's procedure below and where defense counsel was in fact the one who suggested that the judge refrain from immediately answering the jury's question. In addition to not being preserved, Appellant's argument is wholly speculative and without merit.

STATEMENT OF THE CASE

Appellant was indicted in Greenville County in November 2012 for driving under the influence, second offense. On March 14, 2013, Appellant was tried before the Honorable D. Garrison Hill and a jury. The jury found Appellant guilty, and Judge Hill sentenced Appellant to ninety days and imposed a fine of \$3,000.00, suspended to five days of active time on house arrest, a \$2,100.00 fine, and probation for six months. He also ordered that Appellant attend MADD meetings and complete substance abuse counseling while on probation.

Appellant submitted a *pro se* letter to the trial judge on March 21, 2013, and another *pro se* letter to the solicitor on April 1, 2013. Appellant then retained a new attorney to represent him, who filed an "Amended Notice of Appeal" with the Court of Appeals on April 19, 2013, referencing Appellant's previous *pro se* filings. On June 21, 2013, this Court remanded the case to the circuit court "for the limited purpose of consideration of Appellant's motion for reconsideration." On March 17, 2014, a hearing on Appellant's post-trial motion was held, and the trial judge denied the motion in an oral ruling from the bench. On March 27, 2014, Appellant's counsel filed and served a new Notice of Appeal. On March 31, 2014, the trial judge filed an Order Denying Defendant's Motion for New Trial. (See Order filed 3/31/14).

On October 10, 2014, the State filed and served a motion to dismiss the appeal for lack of jurisdiction. Following the filing of a Return by Appellant and a Reply by the State, this Court denied the State's motion by Order dated November 13, 2014.

ARGUMENT

I. The appeal should be dismissed because this Court does not have appellate jurisdiction over the case.

By submitting this Brief, the State does not waive its argument that the Court lacks appellate jurisdiction over this case. The State made this argument by way of a Motion to Dismiss dated October 10, 2014. (R. p. 4-15). Following the filing of a Return by Appellant and a Reply by the State, this Court denied the State's Motion by Order dated November 13, 2014. (R. p. 16-23). Nevertheless, the State maintains its position that this appeal should be dismissed for lack of jurisdiction. The relevant facts are as follows.

Relevant Facts

A Greenville County jury found Appellant guilty of driving under the influence on March 14, 2013. On that date, the trial judge sentenced Appellant to ninety days and imposed a fine of \$3,000.00. This sentence was suspended upon service of five days of active time under Greenville County's "Home Incarceration Program," payment of a \$2,100.00 fine, and probation for six months. The trial judge also ordered that Appellant attend MADD meetings and complete substance abuse counseling while on probation. On March 21, 2013 - eight days after trial - Appellant submitted a *pro se* letter to the judge asking for reconsideration of his conviction. This letter stated it was being copied to the "GS Court, Prosecutor, personal attorney." (R. p. 9-10). On April 1, 2013, Appellant submitted a second *pro se* letter to the solicitor referencing his prior letter and referring to it as a "request for appeal, review, or consideration for changing my trial results to a mistrial." (R. p. 11). Subsequently, Appellant retained a different attorney to represent him. On April 19, 2013 - thirty-six days after Appellant's conviction -

Appellant's new counsel filed and served an "Amended Notice of Appeal" referencing Appellant's previous *pro se* filings. On June 21, 2013, this Court remanded the case to the circuit court "for the limited purpose of consideration of Appellant's motion for reconsideration." On March 17, 2014, a hearing on Appellant's post-trial motion was held, and the trial judge denied the motion in an oral ruling from the bench. On March 27, 2014, Appellant's counsel filed and served a new Notice of Appeal. On March 31, 2014, the trial judge filed an Order Denying Defendant's Motion for New Trial. (R. p. 13-15).

Discussion

Rule 203 of South Carolina's Appellate Court Rules states, in pertinent part:

After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents **within ten (10) days after the sentence is imposed**. In all other cases, a notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the order or judgment. When a **timely** post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion (emphasis added).

Rule 29(a), SCRCrimP, provides, in pertinent part, that post-trial motions shall be made **within ten days** after the imposition of the sentence and that the time for appeal shall be stayed by a **timely** post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion.

In Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010), the South Carolina Supreme Court stated as follows:

Since there is no right to "hybrid representation" that is partially *pro se* and partially by counsel, substantive documents, with the exception of

motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel. State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). Because petitioner was represented by counsel, the *pro se* motion was not proper, should not have been accepted, and should not have been ruled upon. **The motion was essentially a nullity.** We therefore vacate the order ruling on the motion and dismiss petitioner's notice of appeal as moot. We also take this opportunity to remind judges and clerks of court of our directive in Foster not to accept substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a party who is represented by counsel (emphasis added).

In Appellant's case, there was no proper, timely motion for reconsideration or notice of appeal within the ten days after the conviction. Appellant was admittedly represented by counsel at the time he submitted the March 21, 2013 letter to the trial judge. (See R. p. 12, lines 19-21; see p. 9-10). Under Miller, this document was an improper *pro se* filing that should not have been - and could not properly have been - accepted or ruled upon by the trial judge; it was a "nullity." Miller at 347, 697 S.E.2d at 527; see also Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) ("There is no constitutional right to hybrid representation either at trial or on appeal."); Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989) (ordering the Clerk of Court to return a substantive *pro se* document filed while the petitioner was represented by counsel). Therefore, the March 21, 2013 letter could not operate as a notice of appeal or a motion for reconsideration that would stay the time period for the filing of the appeal.

Since no proper motion for reconsideration or notice of appeal was filed within ten days of Appellant's conviction, this Court has no jurisdiction over Appellant's case and must dismiss his appeal. See Hill v. South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("The service of a notice of appeal is a jurisdictional requirement, and the time for service may not be

extended by this Court.”); Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 24 S.E.2d 416, 418 (Ct. App. 1999) (in a civil case, pointing out that Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of jurisdiction “and results in dismissal of the appeal”); see also Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) (“[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State.”). Although this required dismissal will prevent Appellant from challenging his conviction in a direct appeal, Appellant’s issues can be raised in a post-conviction relief application.¹

In his response to the State’s Motion to Dismiss, Appellant contended that the *pro se* documents² he submitted following trial did not constitute impermissible hybrid representation because Appellant “did not have an attorney **actively** representing him after the conclusion of the trial or during the time for filing post-trial motions or notice of appeal.” (R. p. 16) (emphasis added). This argument misses the mark because it is undisputed that Appellant’s trial counsel had not been relieved as counsel in the ten days following Appellant’s trial. At least as far as the State is aware, there is no test regarding

¹ At the post-trial hearing on March 17, 2014, Appellant’s new counsel explained that Appellant’s trial counsel “left on a vacation and left the country without filing the motion [for reconsideration] or notice [of appeal].” (See R. p. 12, lines 21-22).

² In his Return, Appellant refers to these documents as a “motion for new trial” and “notice of appeal.” However, the March 21, 2013 *pro se* letter - the only document submitted within ten days of the conviction - stated it was regarding a “Request to re-examine Case # GS2302124-01.” (See R. p. 9-10). It stated several reasons that the judge should “reconsider the verdict” and “find this jury disqualified or accept their initial split decision for declaration of a mis-trial.” (See R. p. 9-10). This filing could not in any way be construed as a notice of appeal, despite the fact that Appellant’s subsequent *pro se* letter to the solicitor referred to it as a “request for appeal, review, or consideration for changing my trial results to a mistrial.” (See R. p. 11). Note also that the March 21, 2013 *pro se* letter was not filed with the appellate court. In the State’s view, the *pro se* filings of Appellant in this case illustrate the problems that arise when inexperienced litigants attempt to submit documents to the court. This is, at least in part, the reason for the Supreme Court’s opinion in Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010).

an attorney's "level of activity" used in order to determine whether or not a defendant is entitled to submit *pro se* documents. Certainly, when a trial judge receives a *pro se* document from a criminal defendant, he should not be required to undertake an investigation into how "active" trial counsel has been; instead, he should only have to check the file to see whether or not the defendant is represented by counsel and whether or not counsel has been relieved by the court.³ (See R. p. 217, lines 8-24, wherein the trial judge describes his confusion upon receiving the *pro se* letters from Appellant).

Appellant also argued in his response that his case is distinguishable from Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010), because Miller involved a civil case (a post-conviction relief case) and because "unlike in Miller, Devore was not acting in parallel with an attorney actively engaged in his representation." (R. p. 18). However, the Miller decision was not limited to civil cases, nor was it limited to situations where both the attorney and the defendant file documents at similar times. To the contrary, the language of Miller is clear and unequivocal:

Since there is no right to "hybrid representation" that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel. **Because petitioner was represented by counsel, the *pro se* motion was not proper, should not have been accepted, and should not have been ruled upon. The motion was essentially a nullity.** We therefore vacate the order ruling on the motion and dismiss petitioner's notice of appeal as moot. We also take this opportunity to remind judges and clerks of court of our directive in Foster not to accept substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a party who is represented by counsel.

Miller, 388 S.C. at 347, 697 S.E.2d at 527 (citations omitted) (emphasis added).

³ In this case, Appellant made no request for his counsel to be relieved following trial.

In his response to the State's Motion to Dismiss, Appellant further pointed to a defendant's right to act as his own lawyer and argued that "in the absence of counsel, Devore had an absolute right to represent himself and file a *pro se* motion for a new trial and notice of appeal." (R. p. 18). However, a criminal defendant is only allowed to act as his own lawyer after being properly warned about the dangers of self-representation. See, e.g., State v. Barnes, 407 S.C. 27, 36, 753 S.E.2d 545, 549 (2014) ("Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel.") (citation omitted). In this case, Appellant was never "in the absence of counsel." Instead, he was at all times represented by counsel; consequently, he was never warned of the dangers of self-representation.

Appellant asserts there was no hybrid representation in his case "as counsel had concluded his representation and left the country." (R. p. 18). However, in criminal cases, attorneys are not entitled to unilaterally "conclude" their representation of defendants even if they have plans to leave the country. Here, for the ten days following Appellant's conviction, jurisdiction over the case remained in the circuit court, and counsel had not been relieved by the court. Therefore, **only** counsel could properly file a motion for reconsideration or a notice of appeal.

It seems that in Appellant's view, because trial counsel was not "actively" representing Appellant, trial counsel did nothing wrong by leaving the country on vacation without filing a notice of appeal or motion for reconsideration on Appellant's behalf. And perhaps he did not; it may be that Appellant expressly instructed counsel not to file an appeal for one reason or another. However, to the extent counsel did, in fact, do

something "wrong," he should be held accountable, and the proper forum in which to do so is post-conviction relief. In the post-conviction relief forum, any questions relating to trial counsel's representation of Appellant could be addressed along with any direct appeal issues if it is shown that trial counsel's representation deprived Appellant of his right to a direct appeal. See White v. State, 263 S.C. 110, 113, 208 S.E.2d 35, 36 (1974). However, under the circumstances of Appellant's case at present, this Court does not have jurisdiction over Appellant's direct appeal and cannot properly address Appellant's direct appeal issues. See, e.g., Hill, 389 S.C. at 21, 698 S.E.2d at 623 ("The service of a notice of appeal is a jurisdictional requirement, and the time for service may not be extended by this Court."). Accordingly, the State respectfully requests that this Court dismiss the appeal in its entirety on the basis of lack of appellate jurisdiction.

- II. The trial judge properly denied Appellant's motion to dismiss the case where the video taken at the incident site conclusively demonstrated that Appellant was fully advised of his Miranda rights; where dismissal of the case would be an absurd result not intended by the legislature; where the video was admissible under the totality of the circumstances exception; and where Appellant failed to allege or show any prejudice from the purported defect in the video.**

The Incident Site Video Complied with the Statute

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). All rules of statutory construction are subservient to the rule that legislative intent must prevail if it can reasonably be discovered from the language employed in the statute, which must be construed in light of the statute's intended purpose. State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory

interpretation are not needed and the court has no right to impose another meaning.” State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” Hodges, 341 S.C. at 85, 533 S.E.2d at 581 (citation omitted). Accordingly, the legislature’s intent should be ascertained primarily from the plain language of the statute, and the court must apply clear and unambiguous terms of a statute according to their literal meaning. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004). Furthermore, “[a]lthough it is a well-settled principle of statutory construction that penal statutes should be strictly construed against the state and in favor of the defendant, courts must nevertheless interpret a penal statute that is clear and unambiguous according to its literal meaning.” Jacobs, 393 S.C. at 587, 713 S.E.2d at 623. Nevertheless, courts will reject a statutory interpretation which would lead to a plainly absurd result which the legislature could not have intended or which would defeat the plain legislative intent. State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 650 (Ct. App. 2008).

“Statutory interpretation is a question of law subject to *de novo* review.” In re Manigo, 398 S.C. 149, 157, 728 S.E.2d 32, 35 (2012).

S.C. Code § 56-5-2953 states that a “[a] person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site videotaped.” S.C. Code § 56-5-2953(A). The statute specifies the events at the incident site that must be recorded:

The video recording at the incident site must:

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

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

S.C. Code § 56-5-2953(A)(1)(a)(i)-(iii) (emphasis added).

In the video recording of Appellant at the incident site, the officer properly started his video camera at the time he activated his blue lights. The video also properly included the field sobriety tests and the arrest of Appellant. The only part of the statute at issue in this case is the language requiring that the video recording at the incident site “show” the person being advised of his Miranda rights. Under Miranda, there are four warnings that must be given prior to questioning. Specifically, the suspect must be informed that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. State v. Hoyle, 397 S.C. 622, 627-28, 725 S.E.2d 720, 723 (Ct. App. 2012).

It is clear from the video, and it was stipulated below, that the officer began his recitation of the Miranda rights on camera. (See State’s Exhibit # 1, Video, see R. p. 49, lines 1-24). In full view of the camera, the officer advised Appellant that he had the right to remain silent, that anything he said or did could be used against him in court, and that he had the right to an attorney before and during any questioning. (See Video at 23:06-23:12). Before the officer completes the fourth required prong of Miranda - that is, that if Appellant cannot afford an attorney, one will be appointed for him free of charge - he and Appellant walk off camera and the officer places Appellant in the backseat of the patrol

car. However, the fourth prong of Miranda can be heard clearly despite the fact that the two men are off camera. (See Video at 23:13-23:17).

At issue, then, is the meaning of the word "show" in the context of the statute. The legislature's purpose in enacting this statute was to create direct evidence of a DUI arrest. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). It is also clear that the legislature's intent was to require the State to document the steps taken at the incident site to ensure a fair procedure was used and that the intoxicated individual's rights were not violated. Considering these underlying purposes of the statute, the State submits that the most appropriate definition of "show" is to demonstrate, reveal, or make evident. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE EDITION 1199 (1980) (under transitive verbs, definition 3: "To point out, demonstrate" and definition 4: "To manifest, reveal;" see also definition 1 under intransitive verbs: "'To be or become visible or evident'"); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, 2nd COLLEGE EDITION 1319 (1976) (definition 5: "to reveal, manifest, or make evident (an emotion, condition, quality, etc.) by behavior or outward sign"). This definition of "show" best comports with the legislative intent while still giving effect to the plain language of the statute.

Any person viewing the video of the incident site in Appellant's case would have no question that Miranda rights were given to Appellant. The video makes it abundantly clear that Miranda rights were given to Appellant. Indeed, there has never been any question that Appellant was advised of his Miranda rights inasmuch as the tape is so clear in illustrating this point. (See R. p. 48-49). Because the video demonstrates - through a combination of video and audio - that all of the Miranda rights were given to Appellant,

the video "shows" Appellant being advised of his Miranda rights in compliance with S.C. Code § 56-5-2953(A)(1)(a)(iii).

Appellant relies on State v. Sawyer, 409 S.C. 475, 763 S.E.2d 183 (2014), in support of his position that the video recording here was deficient. However, Sawyer did not involve a video recording of the incident site but instead involved a video recording of the breath test site, which is governed by a different part of the statute. Id. at 477, 763 S.E.2d at 184. Also, Sawyer dealt with the old version of the statute prior to its amendment effective February of 2009. See id. at 480, 763 S.E.2d at 185. The old version of the "breath test" portion of the statute read as follows:

(2) The videotaping at the breath site:

(a) must be completed within three hours of the person's arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency medical treatment considered necessary by licensed medical personnel;

(b) must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test;

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

(d) must also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to videotape this waiting period. However, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pre-test waiting period must be videotaped.

In Sawyer, the video of the breath test site did not include audio. Id. at 477, 763 S.E.2d at 184. The Supreme Court held that, although a "silent video" would suffice for a recording of the defendant's conduct during the twenty-minute waiting period and the

actions of the breathalyzer operator conducting the test, a silent video could not meet the other statutory requirements; specifically, that the videotape "must include the reading of Miranda rights" and the person "being informed that he is being videotaped" and that "he has a right to refuse the test." *Id.* at 480, 763 S.E.2d at 185-86. In a footnote, the Supreme Court explained that a silent video could not meet the latter statutory requirements because "all that the video shows is the officer's lips moving." *Id.* at 480, 763 S.E.2d at 186 n4. Thus, without audio, the video did not, on its face, "include the reading of Miranda rights" as required by the breath test site portion of the old statute.

In Appellant's case, unlike in Sawyer, the statutory requirement at issue is that the *incident site* video must "show the person being advised of his Miranda rights." S.C. Code § 56-5-2953(A)(1)(a)(iii). Also unlike in Sawyer, there is not a "silent video;" instead there is both video and audio that, when taken together, conclusively establishes - that is, "shows" - that Appellant was advised of his Miranda rights. Accordingly, Sawyer is distinguishable and does not compel reversal in Appellant's case.

Dismissal Here Would be an Absurd Result

As a separate basis for upholding the trial judge's denial of Appellant's motion to dismiss, the State submits that dismissal of the case under the circumstances presented here would constitute an absurd result that could not have been intended by the legislature. See In re Manigo, 398 S.C. 149, 157, 728 S.E.2d 32, 36 (2012) (if applying the plain language of a statute would lead to an absurd result, courts will interpret the words in such a way to escape the absurdity). As mentioned above, one of the purposes of S.C. Code § 56-5-2953 was to require the State to document the steps taken at the incident site to ensure a fair procedure was used and that the intoxicated individual's

rights were not violated. The videotape in this case meets that legislative intent because it conclusively shows beyond doubt that Appellant was advised of all of his Miranda rights. It would be absolutely absurd to dismiss a DUI charge - or an even more serious charge such as a felony DUI - for such a trivial reason as the officer and Appellant walking off screen during the giving of the fourth Miranda right. Indeed, under Appellant's theory of the case, a court would be required to dismiss the case even if the last *word* of the fourth Miranda right was given off-camera. Such an interpretation goes too far. In fact, dismissal despite the fact that the video recording presented by the State clearly demonstrates that the person's constitutional rights were honored could breed disrespect for the judicial system and flouts the long-established philosophy that harsh sanctions, such as exclusion of evidence or dismissal, should be limited to blatant violations or serious misconduct. See, e.g., United States v. Leon, 468 U.S. 897, 907-908 (1984) ("The substantial social costs exacted by the exclusionary rule...have long been a source of concern. 'Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury.' An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. Indiscriminate application of the exclusionary rule, therefore, may well 'generat[e] disrespect for the law and administration of justice.' Accordingly, '[a]s

with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.”); Davis v. United States, ___ U.S. ___, 131 S. Ct. 2419, 2426 (2011) (“Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a ‘last resort.’”) (citations omitted).

In sum, the State submits that the legislature could not have intended the absurd result of dismissal under the circumstances presented in this case. Even assuming there was technical noncompliance with the statute, the video unquestionably demonstrates that Appellant was fully advised of his Miranda rights. Accordingly, this Court should uphold the trial court’s denial of Appellant’s motion to dismiss.

The Totality of the Circumstances Exception Applies

However, even if this Court were to reject the arguments set forth above, Appellant’s conviction should still be affirmed under the “totality of the circumstances” exception. See Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”). Subsection (B) of S.C. Code § 56-5-2953 states, in pertinent part, that “[n]othing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances.” Appellant’s argument that the video is deficient is essentially an argument that the State failed to produce a portion of the video. However, in this case, the officer’s failure to produce that

portion of the video was reasonable under the totality of the circumstances. Appellant was stopped on a January night in Greenville, South Carolina. (R. p. 96, lines 11-18). As both Appellant and the officer testified at trial, it was around twenty-five degrees on the night Appellant was stopped. (R. p. 127, lines 20-22; p. 148, lines 7-12; see also p. 153, lines 18-19). In fact, according to Appellant, "the highest it could have been was twenty-five," and it was "one of the coldest nights of the year 2011 and 2012." (R. p. 148, lines 11-12). Also according to Appellant, he had been "shivering that whole time we were on that videotape." (R. p. 151, lines 11-14). Indeed, the cold affected Appellant so much that he was unable to perform one of the field sobriety tests. (R. p. 151, lines 11-15). Notably, the video reflects that Appellant was not wearing gloves, was wearing a fairly light jacket, and was wearing only a baseball cap on his head. (See Video at 7 minutes, 45 seconds).

After attempting to conduct sobriety tests outside in front of the patrol vehicle's camera for more than twenty-two minutes, the officer ultimately decided he had probable cause to arrest Appellant. (See Video). He then handcuffed Appellant, started advising him of his Miranda rights, and simultaneously began walking Appellant to the patrol car. (See Video). It was entirely reasonable - and the safest and most prudent course of action - for the officer to walk Appellant directly to the patrol car without delay in order to get Appellant out of the twenty-five degree weather.⁴ In other words, it was reasonable for the officer to be more concerned with getting Appellant out of the cold weather than with whether or not the fourth Miranda prong was fully in view of the camera. Furthermore, under the totality of the circumstances, the video as a whole unquestionably demonstrates

⁴ As the solicitor pointed out, the cameras on officers' vehicles "don't have a 360-degree view." (R. p. 42, lines 18-19).

that Appellant was fully advised of his Miranda rights. For these reasons, the totality of the circumstances exception applies and this Court should uphold the trial court's denial of Appellant's motion to dismiss.

Appellant Failed to Allege or Show Any Prejudice

Even assuming the video did not strictly comply with S.C. Code § 56-5-2953, and assuming this Court rejects the other arguments above, the State submits that a defendant should be required to show prejudice from an officer's noncompliance with the statute.⁵ It has long been the rule in this state that where a statute does not explicitly set forth a remedy for noncompliance, it is appropriate to employ a prejudice analysis. See e.g., State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) ("exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedure."); State v. Huntley, 349 S.C. 1, 5-6, 562 S.E.2d 472, 474 (2002) (a prejudice analysis was appropriate where breathalyzer operator failed to comply with a statute regarding the simulator test solution where the statute did not specify a remedy; the defendant was not prejudiced where there was no question the breathalyzer machine was operating properly and its results were reliable); State v. Landon, 370 S.C. 103, 108-109, 634 S.E.2d 660, 663 (2006) (although the law enforcement agency failed to comply with a statute requiring detailed records be kept regarding breath testing devices, a prejudice analysis was appropriate where the statute did not specify a remedy); see also State v. Weaver, 361 S.C. 73, 80, 602 S.E.2d 786, 789

⁵ To the extent necessary, the State will move to argue against the precedent of Sawyer and the other cases holding that a prejudice analysis is not appropriate in cases involving noncompliance with S.C. Code § 56-5-2953.

(Ct. App. 2004) (failure to comply with § 17-13-140 does not void a warrant where a defendant fails to demonstrate prejudice).

The fact that S.C. Code § 56-5-2953 mentions dismissal as a *possible* remedy for noncompliance should not change the fact that a defendant must show prejudice. In the dissent in State v. Sawyer, Chief Justice Toal stated as follows:

Contrary to the majority's assertion, the General Assembly did not specify a remedy in section 56-5-2953 for failure to comply with the statutory requirements. Subsection (B) merely provides that noncompliance with the statute "is not alone a ground for dismissal" *if* the video recording qualifies under an exception in subsection (B). S.C. Code Ann. § 56-5-2953 (B); *see also Suchenski*, 374 S.C. at 16, 646 S.E.2d at 881 (finding that failure to produce a video recording in compliance with 56-5-2953 *may* be a ground for dismissal if no exceptions apply). Regardless, in my opinion, a statute's failure to specify a remedy for noncompliance does not preclude a prejudice analysis, as the majority implies. *C.f. State v. Landon*, 370 S.C. 103, 108-09, 634 S.E.2d 660, 663 (2006) (finding a prejudice analysis appropriate for an alleged violation of a recordkeeping statute which does not specify a remedy for noncompliance).

In my view, Respondent was not prejudiced by the video recording's lack of audio. Aside from its lack of audio, the video recording complies with the statutory requirements of 56-5-2953 by including the reading of Respondent's *Miranda* warnings, the officer informing Respondent of the video recording and his right to refuse the breath test, and the breath test procedure itself. This Court has stated that "the purpose of section 56-5-2953 ... is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). Despite the malfunctioning of the audio, the video recording nevertheless creates evidence of Respondent's breath test. Significantly, Respondent has challenged neither the validity of the *Miranda* warnings he was given nor any other aspect of the breath test procedure. Respondent has not asserted that bad faith or a bad motive existed on the part of any actor involved in the video recording audio failure.

Therefore, I would hold that Respondent was not prejudiced by the omission of audio in the video recording and, consequently, the circuit court erred in suppressing the evidence. Absent a violation of Respondent's constitutional rights—which are not in dispute here—the circuit court should not have excluded the video recording or the evidence surrounding Respondent's breath test without a showing that (1) the video did not comply with section 56-5-2953 and (2) Respondent was

prejudiced as a result of the video's non-compliance. *See Huntley*, 349 S.C. at 6, 562 S.E.2d at 474; *Chandler* 267 S.C. at 143, 226 S.E.2d at 555.

Sawyer, 409 S.C. at 484-85, 763 S.E.2d at 187-88 (Toal, C.J., dissenting, Kittredge, J., concurring in the dissent). The State wholeheartedly agrees with the reasoning in Chief Justice Toal's dissent.

In this case, as discussed above, it is abundantly clear from the video that Appellant was fully advised of his Miranda rights. Indeed, Appellant has never contended otherwise and has never asserted that his constitutional rights were violated or that he suffered prejudice from the fact that the fourth Miranda warning was given while the officer and Appellant were out of the camera's view. Accordingly, dismissal of the case was not warranted.

III. The trial judge properly allowed the State to present evidence regarding the consequences of refusing to take a breath test where Appellant was fully advised of these consequences prior to refusing the test and the consequences were relevant to an assessment of Appellant's refusal.

Relevant Facts

Prior to trial, defense counsel requested that language regarding the six-month driver's license suspension that is a consequence of a person's refusal to take a breath test be redacted on both the written advisement of rights form and the Datamaster videotape. (R. p. 52-53). He argued that the six-month suspension, which was an administrative action by the highway department, was irrelevant to the case. (R. p. 53, lines 3-11). Defense counsel agreed with the solicitor that, under S.C. Code § 56-5-2950(B)(1), Appellant's refusal to take the breath test itself could be used against him at trial, but disagreed that the six-month suspension - a consequence of refusal - was admissible. (R. p. 53-54). The solicitor pointed out that, although she would have to redact the portions

regarding the suspect's right to have independent tests conducted pursuant to State v. Henderson, 347 S.C. 455, 556 S.E.2d 691, (Ct. App. 2001) - because the statute specifically states that a person's failure to request additional tests is not admissible against the person - the rest of the statute is admissible. (R. p. 55, lines 2-22). The solicitor also argued that the evidence was "relevant to the implied consent rights that [the officer] is required to read" and stated she did not see how the six-month suspension language was prejudicial to Appellant. (R. p. 55, line 22 - p. 56, line 13). Defense counsel again reiterated his argument that the evidence was not relevant. (R. p. 56, lines 9-11). Specifically, he stated "[t]hat would be my point on that just for consistency's sake." (R. p. 56, lines 10-11).

Appellant's counsel then told the judge he would agree to stipulate for the record that Appellant was "properly given and offered the SLED test" or that "[t]he test was offered pursuant to SLED regulations." (R. p. 56, line 23 - p. 57, line 2). Counsel also pointed out that Appellant's suspension had actually been rescinded and stated he saw no reason to "get into that" because it "takes us away from what we're here about." (R. p. 57, lines 3-5). He added that the evidence would inject "this administrative stuff into [the case]." He stated that if the solicitor "gets into it, then I have to be allowed to get into it." (R. p. 57, lines 23-25). In response, the solicitor stated she would not tell the jury Appellant's license was actually suspended, but "that's the choice [Appellant] faced under the statute." (R. p. 58, lines 10-12). She stated that she believed she "should be able to under the statute that the statute says that he has the right to refuse, but it can be used against him and his license will be suspended for six months. I guess I can go on and say he can challenge the suspension. But that was the choice that he faced that night.

And I think that the jury needs to understand the choice that he faced.” (R. p. 59, line 21 – p. 60, line 2).

The judge then asked defense counsel to explain why Appellant’s full awareness of the risks and consequences of refusing the test was not probative regarding his decision. (R. p. 60, lines 3-7). Defense counsel responded, “[b]ecause it’s a separate – a totally separate proceeding” that is “not a part of the criminal case.” (R. p. 60, lines 8-10; see also lines 17-25).

The judge subsequently asked about what the State was requesting as far as jury charges and the right to refuse the test. (R. p. 61, lines 24-25; see also p. 58, lines 5-18). The solicitor passed up the statute with only the “right to independent testing” language redacted. (R. p. 62, lines 1-3).

After fully hearing from both sides, the trial judge first noted that he was “keenly interested” in “not wanted to get bogged down in collateral matters.” (R. p. 62, lines 11-13). However, he ruled that “evidence of what [the defendant] risked under the law and possible consequences from the refusal are relevant.” (R. p. 62, lines 14-16). He also ruled that the evidence was admissible under Rule 403, SCRE, because he did not find that the probative value of the evidence was substantially outweighed by the concerns of Rule 403. (R. p. 62, lines 16-22). The judge stated that defense counsel would be permitted to respond by eliciting evidence concerning what ultimately occurred regarding the suspension. (R. p. 63, lines 2-4).

Later in trial, the defense objected to the implied consent form containing the language about the six-month suspension and objected to the Datamaster video which

also contained that language.⁶ (R. p. 119-25). Significantly, however, although defense counsel was given the opportunity to review the jury charge in advance (R. p. 140, lines 2-12; p. 142, lines 6-25), he failed to object to the fact that the judge's instructions to the jury included a reading of the implied consent statute containing the six-month suspension language. (R. p. 142, lines 6-25; p. 185-86; p. 188, lines 20-24). In fact, after the jury charge was completed, and the judge asked whether there were any objections, defense counsel specifically told the court there were no objections from the defense. (R. p. 188, lines 18-24).

Issue Preservation

Initially, the issue raised on appeal is not preserved for review because Appellant expressly waived any complaint he had below. As mentioned above, in the jury charge, the judge provided the jury with information regarding the fact that a six-month driver's license suspension is a consequence of refusal to take the breath test. (R. p. 185-86). Appellant had no objection to this jury instruction and in fact expressly told the judge after the jury charge ended that he had no objection. (R. p. 188, lines 20-24). Accordingly, Appellant waived any objection to the jury being given information about the six-month suspension. See State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."); Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d

⁶ Defense counsel did not object to the officer's testimony about the six-month suspension. (R. p. 120, lines 21-25).

84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced.").

Further, even if defense counsel's failure to object to the language regarding the six-month suspension in the jury charge did not operate as a waiver of his previous objection, the fact that the jury was provided with information regarding the six-month suspension in the jury charge rendered the evidence regarding the six-month suspension at trial merely cumulative. Therefore, any error with respect to admission of the unredacted implied consent form and unredacted Datamaster video was entirely harmless. See, e.g., State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless).

The issue is also not preserved for appellate review because the argument made on appeal is different than the argument raised to the trial judge. Before the trial judge, defense counsel argued **only** that the language regarding the six-month suspension was not relevant. (See R. p. 21-32). On appeal, Appellant relies on State v. Henderson, 347 S.C. 455, 556 S.E.2d 691 (Ct. App. 2001), arguing that the statute itself does not provide that the administrative penalty for refusal of the test is admissible, and further argues that allowing evidence of the six-month suspension "places the defendant in a position of having to offer evidence to allow the jury to quantify the effect of a potential suspension" and that "[p]lacing a defendant in the position of having to introduce evidence to justify the exercise of a statutory right is simply untenable." (Brief of Appellant, p. 5-6). The

new arguments made on appeal - which do not even mention relevance - are not preserved for review and should not be addressed by this Court. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding an issue not properly preserved for appeal where one ground is raised below and another ground is raised on appeal); State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (holding to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court with the objection addressed to the trial court in a sufficiently specific manner that brings attention to the exact error, and if a party fails to properly object, he is procedurally barred from raising the issue on appeal); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments."). Therefore, Appellant's issue regarding admission of evidence of the six-month suspension should be dismissed on error preservation grounds.

Discussion of the Merits

Assuming the issue on appeal is somehow preserved for review, the trial judge did not err in admitting evidence regarding the six-month driver's license suspension which is a consequence of a person's refusal to take a breath test. S.C. Code § 56-5-2950, the implied consent statute, provides, in relevant part, as follows:

(B) No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

(1) the person does not have to take the test or give the samples, but that the person's privilege to drive must be suspended or denied for at least six months with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person refuses to submit to the test, *and that the person's refusal may be used against the person in court*[.]

S.C. Code § 56-5-2950(B)(1) (emphasis added); see also S.C. Code § 56-5-2951.

Significantly, subsection (G) of S.C. Code § 56-5-2950 provides that “[t]he provisions of this section must not be construed as limiting the introduction of any other evidence bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of alcohol or drugs.” S.C. Code § 56-5-2950(G).

Thus, subsection (B) of the implied consent statute expressly permits a person's refusal to take a breath test or provide biological samples to be used against the person in court. Significantly, the person cannot even be offered any tests unless the person is first advised, verbally and in writing, that there are certain consequences for refusing a test. Subsection (G) makes it clear that “any other evidence” relevant to the question of whether or not the person was under the influence is admissible.

A person's refusal to take a breath test or provide samples is not - standing alone - particularly probative of guilt. However, when there are consequences flowing from a refusal - and the person is fully advised of these consequences - the refusal becomes highly probative on the issue of guilt. Obviously, on one hand, a person with nothing to hide would be inclined to take the test and clear themselves of wrongdoing, particularly where he or she knows there are significant consequences for refusing the test. On the

other hand, an impaired person would be inclined to refuse to the test, and the fact that a person refuses the test despite the consequences bolsters the inference of impairment.

Here, the consequences of refusing a breath test are that "the person's privilege to drive must be suspended or denied for at least six months" and that "the person's refusal may be used against the person in court." S.C. Code § 56-5-2950(B)(1). Appellant was fully advised of these consequences before he was offered the test and before he refused the test. (R. p. 119-25). As the solicitor argued below, it is only fair that the jury have a full picture of the choice Appellant faced that night and of what he chose to give up by refusing to submit to the test. The consequences of refusal are obviously relevant and probative on the issue of impairment - and thus guilt - and the jury was entitled to know about them. See State v. Rocha, 335 P.3d 586, 591 (2014) (in case where defendant argued that his "suspension advisory form" - which contained information about the consequences of refusal to take a breath test including suspension of his driver's license - was not relevant, the Idaho Supreme Court of held that the suspension advisory form was in fact relevant because "the form stated the adverse consequences faced by [the defendant] for failing to perform evidentiary testing," and thus "it strengthened the inference that he was unwilling to submit to a test because he believed the test results would show an alcohol concentration above the legal limit").

Appellant's reliance on State v. Henderson is misplaced. Henderson dealt with admission of evidence regarding a person's right to have an independent test to determine his blood-alcohol level. State v. Henderson, 347 S.C. 455, 556 S.E.2d 691 (Ct. App. 2001). Critically, the implied consent statute specifically provides that a person's failure to request additional blood or urine tests is **not** admissible against the person in court. Id.

at 458, 556 S.E.2d at 693; see also S.C. Code § 56-5-2950(D). Although the State was required to lay a foundation for the Datamaster test results, the defense offered to stipulate that the proper procedures were followed and that he was advised of his statutory rights. Id. at 458, 556 S.E.2d at 692. Therefore, this Court held, "there was no plausible reason why [the language about the right to an independent test] should have been read to the jury," particularly where the magistrate judge had ruled that the language would be redacted from the report itself. Id.

In Appellant's case, the issue is not regarding the language about the right to independent testing, since the State properly redacted that language. (R. p. 55, lines 13-17). Instead, the issue is regarding language about consequences stemming from the refusal to take a breath test. As discussed above, the statute expressly provides that a person's refusal may be used against them, and the evidence regarding the consequences of refusal is clearly relevant to a jury's assessment of the significance of a person's refusal. The Henderson case is factually and legally distinguishable and does not support Appellant's position.⁷ For the reasons discussed above, the trial judge did not err in allowing evidence regarding the six-month driver's license suspension.

⁷ Regarding Appellant's unpreserved argument that allowing evidence of the six-month suspension "places the defendant in a position of having to offer evidence to allow the jury to quantify the effect of a potential suspension," this contention is wholly without merit. Appellant's argument confuses admissibility of legitimately probative evidence with a jury issue regarding the weight of such evidence. As with any other evidence of guilt, if a particular defendant believes he is an exception to the rule - in other words, that the State's legitimately probative evidence is less probative when applied to him - he may present such a theory through cross-examination, closing argument, and, if he so chooses, through his own testimony or the testimony of defense witnesses.

- IV. Appellant's issue regarding the judge's failure to answer the jury's question is not preserved for appellate review where defense counsel failed to contemporaneously object to the judge's procedure below and where defense counsel was in fact the one who suggested that the judge refrain from immediately answering the jury's question. In addition to not being preserved, Appellant's argument is wholly speculative and without merit.

Relevant Facts

After deliberating for approximately one-hour and forty-five minutes, the jurors sent out a note asking the following question: "What happens if one juror has a different verdict than the others?" (R. p. 188-94; p. 194, lines 9-10). After advising the attorneys about this note, the judge stated he was considering giving the jurors the option of stopping deliberations for the evening and returning in the morning because he thought they were getting tired in light of other jury questions that had come up. (R. p. 194, lines 9-15). Defense counsel apparently agreed and ultimately stated "[t]hat's fine with me." (R. p. 194-95; p. 195, line 7). The judge then presented this option to the foreman of the jury and asked that he confer with the other jurors and then let the court know their decision. (R. p. 195-96). The jury subsequently decided to stay and continue deliberations. (R. p. 196, lines 14-15). After the foreman indicated that the jurors wished to watch one of the videos again, the jury was provided with a computer on which to watch the video. (R. p. 196-98).

Thereafter, the judge reminded the attorneys that there was an outstanding jury question regarding what happens if one juror has a different verdict than the others. (R. p. 198, lines 19-22). The judge then stated, "I don't know what y'all want to do with that. Do you want to wait and see what they do?" (R. p. 198, line 21-22). Defense counsel responded: "Why don't we give them 15 or 20 minutes. Do you want to do that?"

I mean, this may solve it.” (R. p. 198, lines 24-25). The judge agreed and stated, “[a]ll right.” (R. p. 199, lines 1-2). Approximately 15 or 20 minutes later, the jury reached its guilty verdict. (R. p. 199, lines 5-23). During the subsequent sentencing hearing, defense counsel raised no issue with the judge’s failure to answer the jury’s question. (R. p. 199-206). In fact, the issue was not raised until a post-trial hearing, at which time a different attorney represented Appellant. (R. p. 209-20). The judge denied Appellant’s motion for new trial on this ground by order filed March 31, 2014. (See R. p. 1-3).

Issue Preservation

As Appellant’s counsel appears to have conceded at the post-trial hearing,⁸ the issue being raised on appeal is not preserved for appellate review. (R. p. 211, lines 17-18; p. 216, line 21 – p. 217, line 3; see also p. 214, lines 1-19; p. 219, lines 10-20). Not only did defense counsel fail to contemporaneously object at the appropriate time, he in fact suggested that the trial judge give the jurors “15 or 20 minutes” rather than immediately answer the jury’s question. Defense counsel also had no complaints about the trial judge’s procedure for allowing the jurors to determine whether or not they wished to return in the morning, and he never requested that the jurors be instructed, polled, or given an Allen charge. Appellant cannot now complain on appeal where he failed to timely and properly object below and where his own conduct helped induce the alleged error. See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) (to preserve an issue for appellate review, the objection must be timely made, which usually requires it

⁸ Specifically, Appellant’s counsel agreed that no contemporaneous objection was raised by trial counsel. (R. p. 211, lines 15-19). Appellant’s counsel also stated that “[p]reservation of error becomes critical for the direct appeal, but not for the motion for a new trial.” (R. p. 216, lines 23-25). The judge noted at the post-trial hearing that Appellant’s trial counsel did not want him to give the jury an Allen charge and that defense counsel specifically agreed with the court’s procedure regarding the jury question. (R. p. 219, lines 10-20).

be made at the earliest possible opportunity); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); State v. King, 334 S.C. 504, 509-510, 514 S.E.2d 578, 581 (1999) (where defendant failed to object to issue arising during the jury charge until after the verdict in his post-trial motion for a new trial, he waived appellate review of the issue); Bank of New York v. Sumter County, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010) ("It is axiomatic that an issue cannot be raised for the first time in a post-trial motion."); State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) ("Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal."); State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) ("Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object to the charge, Appellant is procedurally barred from raising these issues for the first time on appeal."); State v. Hale, 284 S.C. 348, 355, 326 S.E.2d 418, 423 (Ct. App. 1985) ("Hale concedes that no exception was taken to the 'Allen' charge in the trial court. Having denied the trial judge an opportunity to cure any alleged error by failing to object to the charge, Hale cannot properly raise the issue for the first time on appeal."); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced."). Therefore, Appellant's issue regarding the jury question must be dismissed on error preservation grounds.

Discussion

Even if the issue had been properly preserved for review, Appellant's argument is wholly speculative and without merit. Appellant asserts that, because the jury asked a

question about what would happen if one of the jurors had a different verdict than the others, there must have been a minority juror and this minority juror was unduly influenced. Appellant's argument thus assumes that the jury was deadlocked eleven to one; however, such an assumption is without basis in actual fact. The jury never informed the court it was deadlocked. As the trial judge pointed out, the jury may have simply been asking a hypothetical question. (R. p. 1, footnote 1). Again, because defense counsel acquiesced in the trial judge's procedure below and actually encouraged the judge **not** to immediately answer the jury's question, this issue was not explored at the trial level and consequently cannot be explored on appeal. There are simply no facts in the record to support the notion that there was in fact a minority juror or that he or she was unduly influenced by the court's procedure.

Furthermore, the trial judge did not abuse his broad discretion by delaying the answering of the jury question until after the jury watched the video - as per defense counsel's request. He also did not abuse his discretion by allowing the foreman to inquire of the other jurors regarding whether or not they wished to stop deliberating for the evening. See e.g., State v. Sheppard, 391 S.C. 415, 420, 706 S.E.2d 16, 19 (2011) ("The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion.") (citation omitted); see also United States v. Barnes, 586 F.2d 1052, 1060 (5th Cir. 1978) (in case where the trial judge failed to answer a jury question before a verdict was reached due to a lengthy objection from defense counsel, the court stated, "[h]aving delayed the answering of the question in order to serve the interests of his client, counsel cannot now complain that he was prejudiced by the delay.").

In any event, even if the judge had abused his discretion somehow, Appellant cannot possibly show prejudice under the circumstances presented here. See State v. Black, 400 S.C. 10, 16-17, 732 S.E.2d 880, 884 (2012) (“To warrant reversal, an error must result in prejudice to the appealing party.”); see also Alexander v. State, 778 So.2d 1017, 1021 (Fla. App. Ct. 2000) (“Not only is this issue not preserved by a contemporaneous objection at trial, we cannot conclude that the failure to answer the jury question constituted harmful error when the jury was appropriately instructed on the law in question, including the standard jury instruction that appellant himself suggests would have answered the jury question.”). As the trial judge pointed out at the post-trial hearing and in his post-trial order, he had already instructed the jurors that Appellant could only be convicted “if all twelve of you agree the State has proven each and every element of the case beyond a reasonable doubt” and that “each of you have a vote,” that “your vote is exactly that, it’s your vote and no one else’s,” and that a juror should not “surrender to an honestly and conscientiously held belief simply to get this case over with or to reach a unanimous verdict.” (R. p. 2-3; p. 183, lines 8-11; p. 187, lines 8-15; p. 218, line 21 – p. 219, line 1). Notably, in closing argument, defense counsel also urged the jurors to stand firm if they developed a belief that Appellant was innocent. (R. p. 173, lines 7-11 & lines 17-18). In sum, besides being totally unpreserved, Appellant’s argument is premised upon a faulty assumption that the jury was deadlocked. Appellant cannot show an abuse of discretion or prejudice under these circumstances because his argument is speculative. Appellant’s conviction should be affirmed.

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 4, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-000883

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JOHNIE ALLEN DEVORE, JR.,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."


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ATTORNEYS FOR RESPONDENT

February 4, 2015

D-41

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-000883

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JOHNIE ALLEN DEVORE, JR.,

APPELLANT.

PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **J. Falkner Wilkes**, 114 Whitsett Street, Greenville, South Carolina, 29601, this 4th day of **February**, 2015.


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D-42

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT
Garrison D. Hill, Circuit Court Judge

Case No. 2012-GS-23-2124
Appellate Case No.: 2013-000883

State of South Carolina, ... Respondent,

v.

Johnie Allen Devore, Jr., ... Appellant.

REPLY OF APPELLANT

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STATEMENT OF ISSUES IN REPLY

1. WAS THE APPELLANT ENTITLED TO FILE A POST TRIAL MOTION OR NOTICE OF APPEAL PRO SE WHERE HE WAS NOT BEING ACTIVELY REPRESENTED BY AN ATTORNEY SUBSEQUENT TO THE TRIAL?
2. WERE THE APPELLANT'S FILINGS SUFFICIENT TO VEST APPELLATE JURISDICTION IN THIS COURT?

ARGUMENT

I. APPELLATE JURISDICTION IS PROPER IN THIS CASE.

The State's argument is based on the claim that the Appellant's *pro se* motion for new trial and notice of appeal constituted "hybrid" representation. The State's argument overlooks the fact that although Devore had an attorney of record from the trial, he did not have an attorney *actively* representing him after the conclusion of the trial, or during the time for filing post trial motions or notice of appeal. As a result, under the circumstances of this case, Devore's *pro se* filings did not create or constitute a prohibited "hybrid" representation.

The State's argument that the appeal should be dismissed and the issue best raised through a PCR is flawed. A post-conviction relief hearing would be unwarranted in this case as it is not necessary to resolve a factual dispute and would not aid the Court in its application of the law. *See State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (2013). The question presented is not whether an issue could be raised in a post conviction relief hearing, but simply whether this Court has jurisdiction for the direct appeal.

Devore was represented at trial by counsel, however, subsequent to

trial counsel left the country without filing a notice of appeal or Rule 29 motion. Clearly Devore sought to have a new trial and/or appeal from the conviction. There was no action taken by trial counsel. Accordingly, Devore timely filed a *pro se* request for a new trial and subsequently a *pro se* request for an appeal. When Devore filed these documents, he was not being actively represented by counsel. There was therefore, no prohibited "hybrid" representation.

Under Rule 29 of the South Carolina Rules of Criminal Procedure, Devore was entitled to make a motion for new trial. Devore was also constitutionally guaranteed the right to an appeal from a criminal case. There appears no case holding that a criminal defendant is prohibited from filing a *pro se* motion for new trial, or an appeal, when he is no longer being actively represented by counsel.

The Sixth Amendment guarantees criminal defendants the right to representation by counsel at every critical stage of the prosecution. Turner v. Calderon, 281 F.3d 851, 879 (9th Cir. 2002). The Sixth Amendment right to counsel extends to all critical stages of a criminal proceeding. *See, e.g., Missouri v. Frye*, 132 S.Ct. 1399, 1405 (2012); Lafler v. Cooper, 132 S.Ct.

1376, 1385 (2012); Smith v. Murray, 477 U.S. 527, 535-36 (1986). A critical stage of trial is "any stage that may significantly affect the outcome of the proceedings" Traylor v. State, 596 So.2d 957, 968 (Fla.1992).

The Sixth Amendment further guarantees every criminal defendant the "right to proceed without counsel when he voluntarily and intelligently elects to do so." State v. Barnes, 27322 (S.C. 1-15-2014) *citing* Faretta, 422 U.S. at 807. Faretta established that a defendant has an independent fundamental right guaranteed by the Sixth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, to represent himself at all stages of criminal proceedings if he elects to do so. A trial court cannot force a defendant to accept counsel or refuse to dismiss a court appointed counsel if the defendant elects to represent himself. *See* Parker v. State, 1976 OK CR 293.

In addition to the Sixth Amendment, the right to represent one's self is also protected by the South Carolina Constitution. The South Carolina Constitution provides that every criminal defendant has the right to represent himself and makes no distinction between capital and non-capital defendants. S.C. Const., art. 1, § 14; State v. Brewer, 328 S.C.

117, 492 S.E.2d 97 (1997). Additionally, the United States Supreme Court has interpreted the United States Constitution as providing a right to self-representation. See Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) ("The Sixth Amendment, when naturally read, thus implies a right of self-representation."). State v. Starnes, 388 S.C. 590 (2010). See also: McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

Unlike the case in Miller, cited by the State, this case involves a filing in a criminal, not civil case. Also unlike in Miller, Devore was not acting in parallel with an attorney actively engaged in his representation. Here there was no "hybrid" representation as counsel had concluded his representation and left the country. When counsel, for whatever reason, does not file a motion under Rule 29 or direct appeal, the duty to do so does not alone establish "hybrid" representation when the defendant files his own. Here counsel never filed any post trial motion or notice of appeal. There was therefore, no representation by counsel. As a result, Devore was entitled to self-representation in order to protect his rights.

"The right of a defendant in a criminal case to act as his own lawyer is unqualified" Williams v. Bartlett, 44 F.3d 95, 99 (2d Cir. 1994) (*quoting* United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965))

Moreover, a court's denial of the right to self-representation is not subject to harmless error analysis, and requires automatic reversal of a criminal conviction. See Johnstone v. Kelly, 808 F.2d 214, at 218 (2nd Cir. 1986); U.S. v. Green (D.Conn. 2-1-2013). In the present case, in the absence of counsel, Devore had an absolute right to represent himself and file a *pro se* motion for a new trial and notice of appeal. Allowing Devore to proceed under the circumstances is consistent with the decision in Miller. The Miller court specifically defined "hybrid" representation as "partially *pro se* and partially by counsel". Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010). Miller involved a case where the represented party and the attorney were each filing post trial motions and notices of appeal independently of each other. In this case, there was no "partial" representation by counsel, and therefore, no "hybrid" representation. Miller is therefore clearly distinguishable. Jurisdiction is proper here where Devore filed a timely motion under Rule 29 which was heard by the circuit court while the

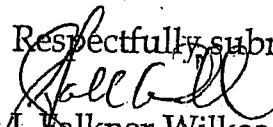
appeal was held in abeyance. Subsequent to the circuit court's ruling on the Rule 29, the undersigned timely filed an amended notice of appeal including the conviction and the denial of Rule 29 relief by the circuit court. This Court therefore has jurisdiction in this matter.

Based on the foregoing, the appellate jurisdiction is proper in this Court.

CONCLUSION

Based on the foregoing arguments the Appellant's conviction should be reversed.

Respectfully submitted,


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February 5, 2015.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

State of South Carolina,

v.

Johnie Allen Devore, Jr.,

Defendant.

IN THE COURT OF GENERAL SESSIONS

THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2012-GS-23-2124

ORDER DENYING DEFENDANT'S
MOTION FOR NEW TRIAL

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The court heard oral argument on Defendant's Motion for New Trial on March 17, 2014. The motion is respectfully **DENIED** for the reasons that follow.

After the jury had been deliberating for some time, they requested to have the video of Defendant's traffic stop replayed. With both parties' consent, the court arranged for the video to be viewed by the jury in the jury room.

The jury asked several questions related to the law, and then sent out a note asking: "What happens if one juror has a different verdict than the others?" Defendant argues that the court's failure to respond to this note and to provide an *Allen* charge unduly influenced the jury and pressured the "one juror" referenced in the note.¹ Defendant argues that the court should have sua sponte issued an *Allen* charge to remind the jury that their verdict must be unanimous and that a mistrial would ensue should they fail to reach unanimity. After discussing the situation on the record with both counsel, the court asked the foreman to check with his fellow jurors and inquire as to whether they wished to continue their deliberations or return in the morning. The foreman reported that the jury desired to stay and continue deliberating. The jury returned a guilty verdict shortly thereafter.

¹ Notes from juries are notoriously unreliable insights into their deliberations, so it would be folly to presume that the jury was deadlocked 11-1, or even deadlocked at all. The jury could have simply been asking a hypothetical question.

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Defendant makes the novel argument that the court erred by not giving an *Allen* charge. This failure, his argument goes, resulted in isolating the holdout, who was ignorant of his right to hang the jury and cause a mistrial. The trial court's silence therefore pressured the minority juror, increasing his isolation and breaking down his resistance to the majority. Defendant creatively contends that the court should have given the *Allen* "dynamite" charge to lessen the pressure on the minority juror.

This argument fails on several levels. First, it was not raised at trial and cannot be raised by post-trial motion. Second, even assuming there was a lone holdout, it is impossible to determine whether the lone juror changed her vote, or whether she persuaded the majority to change their view. Third, the note did not expressly state the jury was deadlocked, as juror notes often do. Judges have an obligation to assist jurors in their duty to attempt to reach a verdict and avoid a hung jury. This task could hardly be furthered by a meddling judge who hangs the jury on his own initiative. Mindful of the delicate and metamorphic nature of jury deliberations, courts should not rush to complicate matters for a jury that asks hypothetically about the consequences if one juror has a different view from the others. To rashly issue an *Allen* charge in such circumstances might mystify the jury and disrupt the deliberative process that was clearly underway. Moreover, it would set in motion the procedures mandated by S.C. Code Ann. § 14-7-1330, which could ultimately confine the court to being able to diplomatically ask only if the jury thought further explanation of the law would assist them, or further deliberation would be fruitful. See *State v. Barnes*, 402 S.C. 135, 739 S.E.2d 629 (2013).

There is no evidence pressure was exerted on any juror or that their deliberations were otherwise unduly influenced. The jury's review of the video evidence may well have resulted in the verdict, as it often does. Prior to deliberations, the court charged the jury that each juror's

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vote was his or her own vote and the verdict must be unanimous. Furthermore, the jury never specified they were "deadlocked." Finally, Defendant's counsel at trial did not request the court to respond to the jury question, did not object to the continuation of deliberations further into the evening, and did not request an *Allen* charge or other instruction. The transcript reveals no error or a basis for a new trial. There was sufficient evidence to support the jury's verdict.

Defendant's Motion for New Trial is therefore respectfully denied.

IT IS SO ORDERED.



D. Garrison Hill
Circuit Judge

March 28, 2014
Greenville, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-000883

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JOHNIE ALLEN DEVORE, JR.,

APPELLANT.

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

The State is hereby moving this Court to dismiss Appellant's direct appeal based upon a lack of jurisdiction, and is further requesting that this Court hold the time period for the filing of the Initial Brief of Respondent and Designation of Matter in abeyance pending the resolution of this motion. The basis for this motion is explained below.

Background Facts

Appellant was indicted in Greenville County in November 2012 for driving under the influence, second offense. On March 14, 2013, Appellant was tried before the Honorable D. Garrison Hill and a jury. Appellant was represented by Steve W. Sumner, Esquire. The jury found Appellant guilty, and, on that same date - March 14, 2013 - Judge Hill sentenced Appellant to ninety days and imposed a fine of \$3,000.00. This sentence was suspended upon service of five

days of active time under Greenville County's "Home Incarceration Program," payment of a \$2,100.00 fine, and probation for six months. Judge Hill also ordered that Appellant attend MADD meetings and complete substance abuse counseling while on probation. Eight days after trial, on March 21, 2013, Appellant submitted a *pro se* letter to the judge asking for reconsideration of his conviction. This letter stated it was being copied to the "GS Court, Prosecutor, personal attorney." (See Exhibit #1, 3/21/14 Letter). On April 1, 2013, Appellant submitted a second *pro se* letter to the solicitor referencing his prior letter and referring to it as a "request for appeal, review, or consideration for changing my trial results to a mistrial." (See Exhibit #2, 4/1/14 Letter). Subsequently, Appellant retained J. Falkner Wilkes to represent him. On April 19, 2013 - thirty-six days after Appellant's conviction - counsel filed and served an "Amended Notice of Appeal" referencing Appellant's previous *pro se* filings. On June 21, 2013, this Court remanded the case to the circuit court "for the limited purpose of consideration of Appellant's motion for reconsideration." On March 17, 2014, a hearing on Appellant's post-trial motion was held, and Judge Hill denied the motion in an oral ruling from the bench. On March 27, 2014, Appellant's counsel filed and served a new Notice of Appeal. On March 31, 2014, Judge Hill filed an Order Denying Defendant's Motion for New Trial. (See Exhibit #3, Order).

Discussion

Rule 203 of South Carolina's Appellate Court Rules states, in pertinent part:

After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents **within ten (10) days after the sentence is imposed**. In all other cases, a notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the order or judgment. When a **timely** post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion (emphasis added).

Rule 29(a), SCRCrimP, provides, in pertinent part, that post-trial motions shall be made within ten days after the imposition of the sentence and that the time for appeal shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion.

In Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010), the South Carolina Supreme Court stated as follows:

Since there is no right to “hybrid representation” that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel. State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). Because petitioner was represented by counsel, the *pro se* motion was not proper, should not have been accepted, and should not have been ruled upon. **The motion was essentially a nullity.** We therefore vacate the order ruling on the motion and dismiss petitioner's notice of appeal as moot. We also take this opportunity to remind judges and clerks of court of our directive in Foster not to accept substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a party who is represented by counsel (emphasis added).

In Appellant's case, there was no proper, timely motion for reconsideration or notice of appeal within the ten days after the conviction. Appellant was admittedly represented by counsel at the time he submitted the March 21, 2013 letter to the trial judge. (See Exhibit #3, 3/17/14 Transcript, p. 3, lines 19-21; see Exhibit #1, 3/21/13 Letter). Under Miller, this document was an improper *pro se* filing that should not have been - and could not properly have been - accepted or ruled upon by the trial judge; it was a nullity. Miller at 347, 697 S.E.2d at 527; see also Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (“There is no constitutional right to hybrid representation either at trial or on appeal.”); Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989) (ordering the Clerk of Court to return a substantive *pro se* document filed while the petitioner was represented by counsel). Therefore, the March 21, 2013 letter could not operate as a

notice of appeal or a motion for reconsideration that would stay the time period for the filing of the appeal.

Since no proper motion for reconsideration or notice of appeal was filed within ten days of Appellant's conviction, this Court has no jurisdiction over Appellant's case and must dismiss his appeal. See Hill v. South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("The service of a notice of appeal is a jurisdictional requirement, and the time for service may not be extended by this Court."); Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 24 S.E.2d 416, 418 (Ct. App. 1999) (in a civil case, pointing out that Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of jurisdiction "and results in dismissal of the appeal"); see also Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) ("[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State."). Although this required dismissal will prevent Appellant from challenging his conviction in a direct appeal, Appellant's issues can be raised in a post-conviction relief application.¹

¹ At the post-trial hearing on March 17, 2014, Appellant's new counsel explained that Appellant's trial counsel "left on a vacation and left the country without filing the motion [for reconsideration] or notice [of appeal]." (See Exhibit #4, 3/17/14 Transcript, p. 3, lines 21-22).

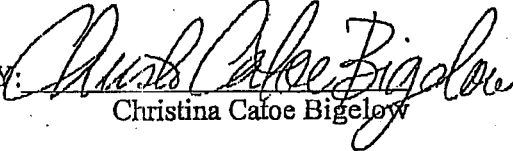
CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court dismiss Appellant's appeal for lack of jurisdiction. The State further requests that this Court hold the time period for the filing of the Initial Brief of Respondent and Designation of Matter in abeyance pending the resolution of this motion.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA CATOE BIGELOW
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

October 10, 2014

EXHIBIT 1 (page 1 of 2)

March 21, 2013

Dear Judge Hill:

Re: Request to re-examine Case# GS2302124-01

On March 14, 2013 I pled innocent but was found guilty of DUI in your courtroom (Case# GS2302124-01).

It is my sincere belief and observation that many occurrences during the trial and primarily during the deliberation continually tipped the scales of justice unfairly against me, an innocent man. The following instances were unfair, caused a miscarriage of justice, and should either dis-qualify the jury or re-establish the trial finding as a miss-trial.

- 1) After over two hours of deliberation and four rounds of questionable questions, the jury asked: "what happens if we have a split decision?" Rather than answering the question with what I assume proper, "then it will be declared a mistrial", the court instead brought the jury foreman in and asked if the jury would deliberate further or come back tomorrow or deliberate further. This basically said to and forced the jury to come to a unanimous decision based not on their convictions but rather on the threat of having to come back tomorrow, after two hours of obviously confused deliberation. The jury foreman had already reported that they were at a split decision after the two hours and numerous bizarre questions. As presumed innocent, I feel that split decision should have been accepted.
- 2) In the 3rd round of questions, the jury asked; "can you define DUI?" This was already explicitly defined during and immediately after the trial period. Now the jury was confused on what they were deciding. Although the implications were tremendous on my life, the court incredibly sent a confusing, two-page definition to the jury room for a self-explanation by an admittedly already confused jury. Due to the serious implications, I think the jury should have been brought back to the courtroom and had DUI redefined verbally and explicitly by the judge.
- 3) The road-side film, though produce digitally, was fully compromised by the analog playback in the courtroom, thus was nearly 90% inaudible. The muffled playback and poor quality projector presented an hour long, inaudible and visually compromised video that subjected the jury to long periods of inattention and even dozing off. This portion of the video was a compromised presentation of our in-car conversation and I

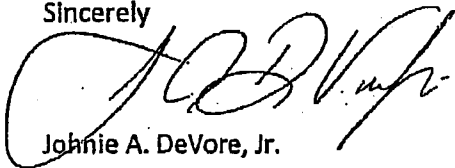
EXHIBIT 1 (page 2 of 2)

think it should have been dis-allowed from the trial unless shown in the digital quality it was created in.

- 4) Lack of a jury of my peers was a major imbalance of justice. No one on the jury looked like me. From the pool of 40 jurors, one African American man was brought in and was not selected. A pool of 11 white jurors and 1 black female is tantamount to me being in a foreign country. The City of Greenville is nearly 40% black and the County is 18% black; I was given a jury that was 8% black, an opposing gender? That's not justice. If you or the prosecutor were on trial and had a 92% black jury and with one Caucasian of opposing gender, would you consider that a jury of your peers? I do not.
- 5) Finally, for a 3rd time, the jury asked to see the road-side film. By a 3rd time, both my and the officers testimony also should have been allowed again as the jury is now prejudiced. However, to further prejudice, the court sent the lap-top computer to the jury room for self-playback. As this was the prosecutor's computer, I don't know what other information was accessed or made available on that computer while in the jury-room accessible to all jurors with absolutely no over-site. After the computer was sent back during the fourth round of questions, the jury finally got a unanimous verdict...guilty? This was improper.

It is 2013; please understand that I understand the establishment of this verdict should be taken serious. I am not a lawyer, but just a citizen still pleading innocent. I am currently carrying out my sentence as prescribed and without contortion. However, I feel and currently live the after-effects of this confused and improperly quantified jury, which are proving tragic to my career, family, and long-term goals. I have worked hard and studied harder for success. My long years of work tough accomplishments should not be derailed unfairly by a faulty jury, poorly replayed film, improper instructions, or basic miscarriage of justice. Please reconsider this verdict and find this jury disqualified or accept their initial split decision for declaration of a miss-trial.

Sincerely



Johnie A. DeVore, Jr.

864-848-6444 home, 864-787-7205 cell

302 Victor Hill Road, Greer SC 29651

Cc: GS Court, Prosecutor, personal attorney

April 1, 2013

EXHIBIT 2

Judge W. Walter Wilkins
13th Judicial Circuit Solicitor
305 E North Street # 325
Greenville, SC 29601

Re: Request for Appeal or Re-examination of Case # GS2302124-01 (J. DeVore, Jr.)

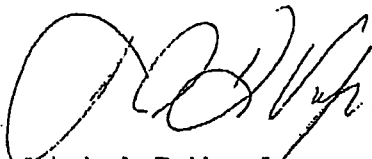
Dear Solicitor Wilkins;

Attached is a request I sent to Judge Hill seven days following my case? I intended for this attachment to be a request for appeal, review, or consideration for changing my trial results to a mistrial. Apparently my letter has been ignored and has remained unanswered.

I too am a government employee, and disappointed that a matter of such importance to my life is being ignored while I as a public servant strive daily to even-handedly answer every call, letter, or email as swiftly as I can. Eminently, the current decision in my case will terminate my employment and career.

I am requesting an appeal to my case primarily not only because I am innocent but also because it was decided by a confused and improperly instructed jury. After halting deliberations a series four times with eleven confusing questions, many of which even confused Judge Hill; the confused, but split jury was hurried to a decision by the threat of returning for a second day. It was never explained that a split decision would be accepted.

I have offered a number of reasons for my requesting an appeal in the attachment sent to Judge Hill. Please read my concerns, respond and schedule the appeal or consider changing my trial results to a mistrial, etc.



Johnie A. DeVore Jr.
302 Victor Hill Road
Greer, SC 29651

EXHIBIT 3

P R O C E E D I N G S

1
2 THE COURT: This is a motion for a new trial, the
3 State v. Johnie Devore.

4 Yes, sir, Mr. Wilkes.

5 MR. WILKES: Thank you, Your Honor.

6 May it please the Court.

7 I represent Mr. Devore. I will pass up, if the Court
8 would like, a transcript from the end of the trial
9 pertinent to the part that I'm going to talk about.

10 THE COURT: Okay.

11 MR. WILKES: And behind that is a rudimentary
12 memorandum that I typed up to try to make sense of what I
13 say since sometimes I don't make sense when I'm saying it.

14 Mr. Devore had, subsequent to his DUI conviction,
15 filed two documents, one was addressed to Your Honor,
16 which was technically a motion for a new trial which was
17 appropriate under the time frame.

18 Mr. --

19 THE COURT: Now, he was represented by counsel,
20 wasn't he, at that point?

21 MR. WILKES: He was. Mr. Sumner left on a vacation
22 and left the country without filing the motion or notice.
23 There may have been some miscommunication. But,
24 fortunately, Mr. Devore, being astute and aware of the
25 timing, filed both.

EXHIBIT 4 (page 1 of 3)

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

State of South Carolina,

v.

Johnie Allen Devore, Jr.,

Defendant.

IN THE COURT OF GENERAL SESSIONS

THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2012-GS-23-2124

ORDER DENYING DEFENDANT'S
MOTION FOR NEW TRIAL

2014 MAR 17 10:02 AM
CLERK

The court heard oral argument on Defendant's Motion for New Trial on March 17, 2014.

The motion is respectfully **DENIED** for the reasons that follow.

After the jury had been deliberating for some time, they requested to have the video of Defendant's traffic stop replayed. With both parties' consent, the court arranged for the video to be viewed by the jury in the jury room.

The jury asked several questions related to the law, and then sent out a note asking: "What happens if one juror has a different verdict than the others?" Defendant argues that the court's failure to respond to this note and to provide an *Allen* charge unduly influenced the jury and pressured the "one juror" referenced in the note.¹ Defendant argues that the court should have sua sponte issued an *Allen* charge to remind the jury that their verdict must be unanimous and that a mistrial would ensue should they fail to reach unanimity. After discussing the situation on the record with both counsel, the court asked the foreman to check with his fellow jurors and inquire as to whether they wished to continue their deliberations or return in the morning. The foreman reported that the jury desired to stay and continue deliberating. The jury returned a guilty verdict shortly thereafter.

¹ Notes from juries are notoriously unreliable insights into their deliberations, so it would be folly to presume that the jury was deadlocked 11-1, or even deadlocked at all. The jury could have simply been asking a hypothetical question.

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EXHIBIT 4 (page 2 of 3)

Defendant makes the novel argument that the court erred by not giving an *Allen* charge. This failure, his argument goes, resulted in isolating the holdout, who was ignorant of his right to hang the jury and cause a mistrial. The trial court's silence therefore pressured the minority juror, increasing his isolation and breaking down his resistance to the majority. Defendant creatively contends that the court should have given the *Allen* "dynamite" charge to lessen the pressure on the minority juror.

This argument fails on several levels. First, it was not raised at trial and cannot be raised by post-trial motion. Second, even assuming there was a lone holdout, it is impossible to determine whether the lone juror changed her vote, or whether she persuaded the majority to change their view. Third, the note did not expressly state the jury was deadlocked, as juror notes often do. Judges have an obligation to assist jurors in their duty to attempt to reach a verdict and avoid a hung jury. This task could hardly be furthered by a meddling judge who hangs the jury on his own initiative. Mindful of the delicate and metamorphic nature of jury deliberations, courts should not rush to complicate matters for a jury that asks hypothetically about the consequences if one juror has a different view from the others. To rashly issue an *Allen* charge in such circumstances might mystify the jury and disrupt the deliberative process that was clearly underway. Moreover, it would set in motion the procedures mandated by S.C. Code Ann. § 14-7-1330, which could ultimately confine the court to being able to diplomatically ask only if the jury thought further explanation of the law would assist them, or further deliberation would be fruitful. See *State v. Barnes*, 402 S.C. 135, 739 S.E.2d 629 (2013).

There is no evidence pressure was exerted on any juror or that their deliberations were otherwise unduly influenced. The jury's review of the video evidence may well have resulted in the verdict, as it often does. Prior to deliberations, the court charged the jury that each juror's

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EXHIBIT 4 (page 3 of 3)

vote was his or her own vote and the verdict must be unanimous. Furthermore, the jury never specified they were "deadlocked." Finally, Defendant's counsel at trial did not request the court to respond to the jury question, did not object to the continuation of deliberations further into the evening, and did not request an *Allen* charge or other instruction. The transcript reveals no error or a basis for a new trial. There was sufficient evidence to support the jury's verdict.

Defendant's Motion for New Trial is therefore respectfully denied.

IT IS SO ORDERED.



D. Garrison Hill
Circuit Judge

March 28, 2014
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Garrison D. Hill, Circuit Court Judge

Case No. 2013-GS-23-2124

State of South Carolina, ... Respondent,
v.
Johnie Allen DeVore, Jr., ... Appellant.

RETURN

The State has moved to dismiss based on an allegation that the Appellant's *pro se* motion for new trial and notice of appeal constituted "hybrid" representation. The State's argument overlooks the fact that Devore did not have an attorney actively representing him after the conclusion of the trial or during the time for filing post trial motions or notice of appeal. As a result, Devore's *pro se* filings did not create or constitute "hybrid" representation.

The State's argument that the appeal should be dismissed and the issue best raised through a PCR is flawed. A post-conviction relief hearing would be unwarranted in this case as it is not necessary to resolve a factual dispute and would not aid the Court in its application of the law. See State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013). The question presented is not whether an issue could be raised in a post conviction relief hearing, but simply whether this Court has jurisdiction for the direct appeal.

Devore was represented at trial by counsel, however, subsequent to trial counsel left the country without filing a notice of appeal or Rule 29 motion. Clearly Devore sought to have a new trial and/or appeal from the conviction. There was no action

taken by trial counsel. Accordingly, Devore timely filed a *pro se* request for a new trial and subsequently a *pro se* request for an appeal. When Devore filed these documents, he was not being actively represented by counsel. There was therefore, no "hybrid" representation.

Under Rule 29 of the South Carolina Rules of Criminal Procedure, Devore was entitled to make a motion for new trial. Devore was also constitutionally guaranteed the right to an appeal from a criminal case. There appears no case holding that a criminal defendant is prohibited from filing a *pro se* motion for new trial, or an appeal, when he is no longer being actively represented by counsel.

The Sixth Amendment guarantees criminal defendants the right to representation by counsel at every critical stage of the prosecution. Turner v. Calderon, 281 F.3d 851, 879 (9th Cir. 2002). The Sixth Amendment right to counsel extends to all critical stages of a criminal proceeding. *See, e.g., Missouri v. Frye*, 132 S.Ct. 1399, 1405 (2012); Lafler v. Cooper, 132 S.Ct. 1376, 1385 (2012); Smith v. Murray, 477 U.S. 527, 535-36 (1986). A critical stage of trial is "any stage that may significantly affect the outcome of the proceedings" Traylor v. State, 596 So.2d 957, 968 (Fla.1992).

The Sixth Amendment further guarantees every criminal defendant the "right to proceed without counsel when he voluntarily and intelligently elects to do so." State v. Barnes, 27322 (S.C. 1-15-2014) *citing* Faretta, 422 U.S. at 807. Faretta established that a defendant has an independent fundamental right guaranteed by the Sixth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, to represent himself at all stages of criminal proceedings if he elects to do so. A trial court cannot force a defendant to accept counsel or refuse to dismiss a court appointed counsel if the defendant elects to represent himself. *See* Parker v. State, 1976 OK CR 293.

In addition to the Sixth Amendment, the right to represent one's self is also protected by the South Carolina Constitution. The South Carolina Constitution provides that every criminal defendant has the right to represent himself and makes no

distinction between capital and non-capital defendants. S.C. Const., art. 1, § 14; State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997). Additionally, the United States Supreme Court has interpreted the United States Constitution as providing a right to self-representation. See Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) ("The Sixth Amendment, when naturally read, thus implies a right of self-representation."). State v. Starnes, 388 S.C. 590 (2010). See also: McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

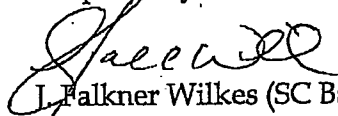
Unlike the case in Miller, cited by the State, this case involves a filing in a criminal, not civil case. Also unlike in Miller, Devore was not acting in parallel with an attorney actively engaged in his representation. Here there was no "hybrid" representation as counsel had concluded his representation and left the country. When counsel, for whatever reason, does not file a motion under Rule 29 or direct appeal, the duty to do so does not alone establish "hybrid" representation when the defendant files his own. Here counsel never filed any post trial motion or notice of appeal. There was therefore, no representation by counsel. As a result, Devore was entitled to self-representation in order to protect his rights.

"The right of a defendant in a criminal case to act as his own lawyer is unqualified" Williams v. Bartlett, 44 F.3d 95, 99 (2d Cir. 1994) (quoting United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965)) Moreover, a court's denial of the right to self-representation is not subject to harmless error analysis, and requires automatic reversal of a criminal conviction. See Johnstone v. Kelly, 808 F.2d 214, at 218 (2d Cir. 1986); U.S. v. Green (D.Conn. 2-1-2013). In the present case, in the absence of counsel, Devore had an absolute right to represent himself and file a *pro se* motion for a new trial and notice of appeal. Allowing Devore to proceed under the circumstances is consistent with the decision in Miller. The Miller court specifically defined "hybrid" representation as "partially *pro se* and partially by counsel". Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010). Miller involved a case where the represented party and the attorney were each filing post trial motions and notices of appeal independently of each

other. In this case, there was no "partial" representation by counsel, and therefore, no "hybrid" representation. Miller is therefore clearly distinguishable. Jurisdiction is proper here where Devore filed a timely motion under Rule 29 which was heard by the circuit court while the appeal was held in abeyance. Subsequent to the circuit court's ruling on the Rule 29, the undersigned timely filed an amended notice of appeal including the conviction and the denial of Rule 29 relief by the circuit court. This Court therefore has jurisdiction in this matter.

Based on the foregoing, the State's motion to dismiss should be denied.

Respectfully submitted,



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(864) 271-6035 (facsimile)

Counsel for Appellant

October 13, 2014.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-000883

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JOHNIE ALLEN DEVORE, JR.,

APPELLANT.

REPLY TO APPELLANT'S RETURN TO THE STATE'S MOTION TO DISMISS
APPEAL FOR LACK OF JURISDICTION

On October 10, 2014, the State moved to dismiss Appellant's appeal for lack of jurisdiction based upon the fact that the only document submitted in the ten days following Appellant's conviction was a *pro se* letter to the trial judge, which was copied to Appellant's "personal attorney." On October 13, 2014, the State received, via electronic mail, a copy of Appellant's Return to the motion. The State submits the following in Reply.

In his Return, Appellant contends that the *pro se* documents¹ he submitted following trial

¹ In his Return, Appellant refers to these documents as a "motion for new trial" and "notice of appeal." However, the March 21, 2013 *pro se* letter - the only document submitted within ten days of the conviction - stated it was regarding a "Request to re-examine Case # GS2302124-01." (See State's Exhibit # 1). It stated several reasons that the judge should "reconsider the verdict" and "find this jury disqualified or accept their initial split decision for declaration of a mis-trial." (See State's Exhibit # 1). This filing could not in any way be construed as a notice of appeal, despite the fact that Appellant's subsequent *pro se* letter to the solicitor referred to it as a "request for appeal, review, or consideration for changing my trial results to a mistrial." (See State's Exhibit # 2). Note also that the March 21, 2013 *pro se* letter was not filed with the appellate court. In the State's view, the *pro se* filings of Appellant in this case illustrate the problems that arise when inexperienced litigants attempt to submit documents to the court. This is,

did not constitute impermissible hybrid representation because Appellant “did not have an attorney actively representing him after the conclusion of the trial or during the time for filing post-trial motions or notice of appeal.” (Return, p. 1) (emphasis added). This argument misses the mark because it is undisputed that Appellant’s trial counsel had not been relieved as counsel in the ten days following Appellant’s trial. At least as far as the State is aware, there is no test regarding an attorney’s “level of activity” used in order to determine whether or not a defendant is entitled to submit *pro se* documents. Certainly, when a trial judge receives a *pro se* document from a criminal defendant, he should not be required to undertake an investigation into how “active” trial counsel has been; instead, he should only have to check the file to see whether or not the defendant is represented by counsel and whether or not counsel has been relieved by the court.²

Appellant argues in his Return that his case is distinguishable from the case of Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010), because Miller involved a civil case (a post-conviction relief case) and because “unlike in Miller, Devore was not acting in parallel with an attorney actively engaged in his representation.” (Return, p. 3-4). However, the Miller decision was not limited to civil cases, nor was it limited to situations where both the attorney and the defendant file documents at similar times. To the contrary, the language of Miller is clear and unequivocal:

Since there is no right to “hybrid representation” that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel. Because petitioner was represented by counsel, the *pro se* motion was not proper, should not have been accepted, and should not have been ruled upon. The motion was essentially a nullity. We therefore vacate the order ruling on the motion and dismiss petitioner's notice

at least in part, the reason for the Supreme Court's opinion in Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010).

² In this case, Appellant made no request for his counsel to be relieved following trial.

of appeal as moot. We also take this opportunity to remind judges and clerks of court of our directive in Foster not to accept substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a party who is represented by counsel.

Miller, 388 S.C. at 347, 697 S.E.2d at 527 (citations omitted) (emphasis added).

In his Return, Appellant also points to a defendant's right to act as his own lawyer and argues that "in the absence of counsel, Devore had an absolute right to represent himself and file a *pro se* motion for a new trial and notice of appeal." (Return, p. 3). However, a criminal defendant is only allowed to act as his own lawyer after being properly warned about the dangers of self-representation. See, e.g., State v. Barnes, 407 S.C. 27, 36, 753 S.E.2d 545, 549 (2014) ("Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel.") (citation omitted). In this case, Appellant was never "in the absence of counsel." Instead, he was at all times represented by counsel; consequently, he was never warned of the dangers of self-representation.

Appellant also contends that there was no hybrid representation in his case "as counsel had concluded his representation and left the country." (Return, p. 3). However, in criminal cases, attorneys are not entitled to unilaterally "conclude" their representation of defendants even if they have plans to leave the country. Here, for the ten days following Appellant's conviction, jurisdiction over the case remained in the circuit court, and counsel had not been relieved by the court. Therefore, only counsel could properly file a motion for reconsideration or a notice of appeal.

It seems that in Appellant's view, because he was not "actively" representing Appellant, trial counsel did nothing wrong by leaving the country on vacation without filing a notice of appeal or motion for reconsideration on Appellant's behalf. And perhaps he did not; it may be

that Appellant expressly instructed counsel not to file an appeal for one reason or another. However, to the extent counsel did, in fact, do something "wrong," he should be held accountable. The proper forum for resolution of this matter is through the processes of post-conviction relief, because this Court does not have jurisdiction over Appellant's direct appeal. See, e.g., Hill v. South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("The service of a notice of appeal is a jurisdictional requirement, and the time for service may not be extended by this Court."). In that forum, any questions related to trial counsel's representation of Appellant can be addressed along with any direct appeal issues if it is shown that trial counsel's representation deprived Appellant of his right to a direct appeal. See White v. State, 263 S.C. 110, 113, 208 S.E.2d 35, 36 (1974).

CONCLUSION

Based upon the foregoing, in addition to the arguments made in the State's previous motion to dismiss, the State respectfully requests that this Court dismiss Appellant's appeal for lack of jurisdiction.

Respectfully submitted,

ALAN WILSON
Attorney General

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Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

October 15, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Garrison D. Hill, Circuit Court Judge

Case No. 2013-GS-23-2124

State of South Carolina, ... Respondent,
v.
Johnie Allen DeVore, Jr., ... Appellant.

RETURN

The State has moved to dismiss based on an allegation that the Appellant's *pro se* motion for new trial and notice of appeal constituted "hybrid" representation. The State's argument overlooks the fact that Devore did not have an attorney actively representing him after the conclusion of the trial or during the time for filing post trial motions or notice of appeal. As a result, Devore's *pro se* filings did not create or constitute "hybrid" representation.

The State's argument that the appeal should be dismissed and the issue best raised through a PCR is flawed. A post-conviction relief hearing would be unwarranted in this case as it is not necessary to resolve a factual dispute and would not aid the Court in its application of the law. *See State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (2013). The question presented is not whether an issue could be raised in a post conviction relief hearing, but simply whether this Court has jurisdiction for the direct appeal.

Devore was represented at trial by counsel, however, subsequent to trial counsel left the country without filing a notice of appeal or Rule 29 motion. Clearly Devore sought to have a new trial and/or appeal from the conviction. There was no action

taken by trial counsel. Accordingly, Devore timely filed a *pro se* request for a new trial and subsequently a *pro se* request for an appeal. When Devore filed these documents, he was not being actively represented by counsel. There was therefore, no "hybrid" representation.

Under Rule 29 of the South Carolina Rules of Criminal Procedure, Devore was entitled to make a motion for new trial. Devore was also constitutionally guaranteed the right to an appeal from a criminal case. There appears no case holding that a criminal defendant is prohibited from filing a *pro se* motion for new trial, or an appeal, when he is no longer being actively represented by counsel.

The Sixth Amendment guarantees criminal defendants the right to representation by counsel at every critical stage of the prosecution. Turner v. Calderon, 281 F.3d 851, 879 (9th Cir. 2002). The Sixth Amendment right to counsel extends to all critical stages of a criminal proceeding. *See, e.g., Missouri v. Frye*, 132 S.Ct. 1399, 1405 (2012); Lafler v. Cooper, 132 S.Ct. 1376, 1385 (2012); Smith v. Murray, 477 U.S. 527, 535-36 (1986). A critical stage of trial is "any stage that may significantly affect the outcome of the proceedings" Traylor v. State, 596 So.2d 957, 968 (Fla.1992).

The Sixth Amendment further guarantees every criminal defendant the "right to proceed without counsel when he voluntarily and intelligently elects to do so." State v. Barnes, 27322 (S.C. 1-15-2014) *citing* Faretta, 422 U.S. at 807. Faretta established that a defendant has an independent fundamental right guaranteed by the Sixth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, to represent himself at all stages of criminal proceedings if he elects to do so. A trial court cannot force a defendant to accept counsel or refuse to dismiss a court appointed counsel if the defendant elects to represent himself. *See* Parker v. State, 1976 OK CR 293.

In addition to the Sixth Amendment, the right to represent one's self is also protected by the South Carolina Constitution. The South Carolina Constitution provides that every criminal defendant has the right to represent himself and makes no

distinction between capital and non-capital defendants. S.C. Const., art. 1, § 14; State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997). Additionally, the United States Supreme Court has interpreted the United States Constitution as providing a right to self-representation. See Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) ("The Sixth Amendment, when naturally read, thus implies a right of self-representation."). State v. Starnes, 388 S.C. 590 (2010). See also: McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

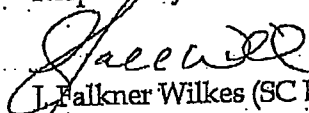
Unlike the case in Miller, cited by the State, this case involves a filing in a criminal, not civil case. Also unlike in Miller, Devore was not acting in parallel with an attorney actively engaged in his representation. Here there was no "hybrid" representation as counsel had concluded his representation and left the country. When counsel, for whatever reason, does not file a motion under Rule 29 or direct appeal, the duty to do so does not alone establish "hybrid" representation when the defendant files his own. Here counsel never filed any post trial motion or notice of appeal. There was therefore, no representation by counsel. As a result, Devore was entitled to self-representation in order to protect his rights.

"The right of a defendant in a criminal case to act as his own lawyer is unqualified" Williams v. Bartlett, 44 F.3d 95, 99 (2d Cir. 1994) (quoting United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965)) Moreover, a court's denial of the right to self-representation is not subject to harmless error analysis, and requires automatic reversal of a criminal conviction. See Johnstone v. Kelly, 808 F.2d 214, at 218 (2d Cir. 1986); U.S. v. Green (D.Conn. 2-1-2013). In the present case, in the absence of counsel, Devore had an absolute right to represent himself and file a *pro se* motion for a new trial and notice of appeal. Allowing Devore to proceed under the circumstances is consistent with the decision in Miller. The Miller court specifically defined "hybrid" representation as "partially *pro se* and partially by counsel". Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010). Miller involved a case where the represented party and the attorney were each filing post trial motions and notices of appeal independently of each

other. In this case, there was no "partial" representation by counsel, and therefore, no "hybrid" representation. Miller is therefore clearly distinguishable. Jurisdiction is proper here where Devore filed a timely motion under Rule 29 which was heard by the circuit court while the appeal was held in abeyance. Subsequent to the circuit court's ruling on the Rule 29, the undersigned timely filed an amended notice of appeal including the conviction and the denial of Rule 29 relief by the circuit court. This Court therefore has jurisdiction in this matter.

Based on the foregoing, the State's motion to dismiss should be denied.

Respectfully submitted,



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Counsel for Appellant

October 13, 2014.

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE THIRTEENTH JUDICIAL CIRCUIT
2012-GS-23-2124

STATE OF SOUTH CAROLINA)

v.)

JOHN DEVORE)

MEMORANDUM OF DEFENDANT

I. THE COURT ERRED IN FAILING TO ANSWER THE JURY'S QUESTION ABOUT BEING DEADLOCKED 11-1 AND ALLOWED UNDUE PRESSURE ON MINORITY JUROR.

The failure of the court to answer the jury's question had the effect of placing undue influence on the minority juror. Although a *de novo* issue, the law relating to an *Allen* charges is instructive.

The jury in this case had deliberated for over two hours and it was after six o'clock in the evening. The court commented that the jury was getting tired. 163. There had been numerous questions from the jury. One of the questions revealed that the jury was deadlocked 11 to 1. The jury specifically asked the question of what happens when a one juror has a different verdict from the others? p. 163, l. 9-10. The court chose not to answer the jury's question. 163. It then let the foreman of the grand jury to "inquire" as to whether they wanted to continue or come back in the morning. The foreman reported that the jury wanted to continue on that evening. The jury was not instructed, questioned or polled by the Court. Presumably, either the foreman, or the majority was allowed to make the decision to continue deliberations into the night.

Providing no instruction on how long they would be kept that evening, or what could happen if hopelessly deadlocked, undue influence was allowed to enter the jury deliberations. Failing to answer the jury's question as to what happens with a hung jury, or to give the jury any

idea of how late into the evening they would have to stay, was coercive in regards to the minority juror. It allowed the majority to effectively hold the minority juror hostage indefinitely unless he or she changed his or her verdict. The failure of the court to answer the jury's question acted to coerce the jury into a verdict and focused naturally on the minority juror.

Although the unsolicited disclosure of the jury's division by a juror is not by itself grounds for a mistrial, in this case once the court became aware of the numerical split in the jury it was incumbent upon it to prevent undue influence from being injected into the deliberations.

In South Carolina state courts, an *Allen* charge cannot be directed to the minority voters on the jury panel. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Instead, an *Allen* charge should be even-handed, directing both the majority and the minority to consider the other's views. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996). It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict. State v. Singleton, 319 S.C. 312, 460 S.E.2d 573 (1995). Green v. State, 351 S.C. 184 (2002).

South Carolina adopted the standard set by the United States Supreme Court in Lowenfield to determine whether an *Allen* charge is unconstitutionally coercive. Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (*citing Lowenfield*, 484 U.S. at 237, 108 S.Ct. 546) Those factors are:

(1) Does the charge/ or in this case, the lack thereof, speak specifically to the minority juror(s);

- In this case the situation allowed undue pressure on the minority juror. From the record we know we have a minority juror, and that the jury was deadlocked at 11-1. The record also shows that the jury specifically had a question concerning their

inability to reach a unanimous verdict. The court's failure to answer the question about a hung jury, to give an *Allen* charge, or to determine whether continuing would be appropriate, allowed undue pressure on the minority juror. (Part of an *Allen* charge includes the instruction that a juror need not abandon his convictions).

(2) Does the charge/ or in this case, the lack thereof, indicate that the jury had to reach a decision in this case;

- By not answering the question about the potential for mistrial, or polling the jury as to continuing, the court allowed the majority to exert undue pressure on the minority juror forcing the jury to reach a verdict. The minority juror was left in a position of being stuck there indefinitely unless he or she changed his or her verdict.

(3) Was there an inquiry into the jury's numerical division, which is generally coercive;

- Although the Court did not inquire of the division, it was clear from the jury note. The court was therefore aware of the numerical division so that any action (or inaction) it took would be seen by the minority as directed at him or her.

(4) The time the jury takes to return a verdict after the Court's action. A verdict returned shortly after a supplemental charge, suggests a possibility of coercion. Although in John Devore's case counsel did not object to the Court's failure to respond to the jury question, or continuation of deliberations further into the evening, the lack of objection is only a factor to weigh in the analysis.

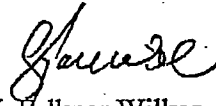
- the Short Time after the Question That Went Unanswered Increases the Likelihood That the Minority's Change in Verdict Was Influenced by the Court's Decision Not to Answer the Question.

Applying a Tucker analysis, the record in John Devore's case shows that the Court's failure to respond to the jury's question allowed undue influence into the jury deliberations. This was due in part to the circumstances of the trial. The jury was deadlocked 11-1. The numerical

split was known to the Court. The jury had already deliberated for over two hours and was noticeably tired. It was after six o'clock in the evening and the jury had not had a break for dinner. The majority was allowed to make the decision to continue to deliberate without any inquiry, questioning or polling by the Court. The majority was therefore allowed to essentially hold the minority juror in deliberations. The minority juror was not given any response to the question, nor any indication of how long into the night court would continue because of that juror's position. As a result, the lack of an *Allen* charge or other instruction, allowed for undue pressure on minority juror to change his or her verdict.

Based on the foregoing the conviction of the Defendant should be set aside and a new trial granted.

Respectfully submitted,



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March 16, 2014.

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF GENERAL SESSIONS
2012-GS-23-02124

STATE OF SOUTH CAROLINA,)

vs.)

JOHNIE ALLEN DEVORE, JR.,)
DEFENDANT.)

TRANSCRIPT OF RECORD

ORIGINAL

March 14, 2013
Greenville, South Carolina

B E F O R E:

THE HONORABLE D. GARRISON HILL, JUDGE; and a jury.

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

ELIZABETH C. MAJOR, ESQ.
Assistant Solicitor

STEVE W. SUMNER, ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(SW) - Denotes State's Witness
 (DW) - Denotes Defense Witness
 (IC) - Denotes In-Camera

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All Exhibits were retained by the Clerk of Court for Greenville County.

P R O C E E D I N G S

THE COURT: This is the State v. Johnie Allen Devore.

Mr. Devore is present?

MR. SUMNER: Yes, sir, Your Honor, he is.

Steve Sumner for the Defendant. He is here.

THE COURT: And, Ms. Major, you're here for the
State?

MS. MAJOR: Yes, Your Honor.

THE COURT: Okay.

MR. SUMNER: Thank you, Your Honor.

Good morning.

May it please the Court.

Again, Steve Sumner for the Defendant, John Devore.

Your Honor, my review of -- first of all, this would
be a motion to dismiss. I have a written motion. And,
also, I have some cases to hand up. I'm going to ask
Ms. Devore -- forgive me, Ms. Major, if she would go ahead
and get the road tape up to the Miranda issue. I think
that she can do that.

Your Honor, here are the cases and the very brief
point on my part. When I reviewed the video -- and I'll
just defer this to the judgment of the Court -- the -- it
does not show the Miranda warning, as required by the
statute.

Judge, I have handed up some opinions of your

1 colleagues, Judge Hayes, who has a very succinct order
2 from the Sixteenth Circuit, and Judge Verdin has issued
3 two written orders on this. Again, I have those attached
4 regarding that dismissal is the appropriate remedy as
5 mandated by the statute.

6 And Judge, I've, also, handed up Suchenski and the
7 Mt. Pleasant -- the Roberts opinion. If you need me to go
8 through all of those, I can. I don't know if that's
9 something that you would like to hear argument on, but
10 the -- our Supreme Court has said, clearly, in Mt.
11 Pleasant and Suchenski that failure to comply with the
12 video requirements is defective in the State's case. And
13 the only remedy is dismissal.

14 You will, also, see in the circuit court opinions
15 that it doesn't matter whether or not it can be heard, it
16 must show it. The word "show" means show. And Judge
17 Sullivan's opinion -- Judge Hayes opinion in Sullivan --
18 and I've handed all of these to my colleague -- it's
19 succinct and right on point.

20 And so, at this point, I'll ask that the Solicitor go
21 ahead and move -- this is a DUI case. We stipulate to
22 this Court's jurisdiction. I'd like for her to move into
23 that portion of the video and then I'll make my complete
24 arguments at that point.

25 THE COURT: Okay, sir.

1 (WHEREUPON, State's Exhibit No. 1 was marked for
2 identification only.)

3 (WHEREUPON, a portion of State's Exhibit No. 1 was
4 shown in open court.)

5 MR. SUMNER: Your Honor, you've seen and heard the
6 video. The Miranda warning -- I think this falls right
7 under Sullivan, the Sullivan opinion from Judge Hayes.
8 It's, certainly, under Mt. Pleasant v. Roberts. There's
9 no question that the field video does not show the Miranda
10 warning in its entirety. It just does not. Trooper May
11 walks him off camera. And there is a significant portion
12 that is off camera. It doesn't show it.

13 THE COURT: Hold on. May I ask you a question?

14 MR. SUMNER: Yes, sir.

15 THE COURT: From the audio portion, I heard the
16 Miranda warnings.

17 MR. SUMNER: Right.

18 THE COURT: The video portion, is the trooper who's
19 escorting the gentleman shown on the video the same one
20 who's giving the Miranda warnings? And is the gentleman
21 being escorted the Defendant?

22 MR. SUMNER: Apparently so, yes, sir. Apparently so.
23 I believe that to be correct.

24 MS. MAJOR: Yes, Your Honor.

25 We can take testimony, if we need to. But that's

1 correct.

2 MR. SUMNER: I believe that would be correct. But as
3 you look -- as the Court looks, again, at the opinions
4 that were handed up, and, certainly, with Suchenski and
5 Mt. Pleasant, it's just clear that strict statutory
6 compliance is there. And I look at Mt. Pleasant as
7 evidenced by this Court's decision in Suchenski. The
8 legislature, clearly, intended a per se dismissal in the
9 event that the mandatory provisions of 29-53 are not
10 followed. It's right there in the last three or four --
11 the last three or four paragraphs of the opinion.

12 And, again, I'm -- I know that the Court is aware of
13 these things. And I understand that. And I would like
14 you to consider, certainly, the circuit opinions that have
15 construed this exact issue that's before you. And I would
16 make a motion to dismiss on that basis as with what's been
17 put forward.

18 Thank you.

19 THE COURT: Thank you, Mr. Sumner.

20 Ms. Major.

21 MS. MAJOR: Your Honor, I would argue that the
22 officer did comply with the statute. The officer who you
23 saw on video, who was arresting the Defendant, began
24 Miranda. You can see them walking towards each other.
25 He's giving Miranda. I believe that the officer complied

1 with the statute. There's no question that the officer
2 was speaking to the Defendant. It shows Miranda.

3 We can get the officer to testify, but I think it's
4 pretty self-explanatory what's going on. I think you have
5 to read the statute as a whole, and read it with the
6 intent of the legislature. And the officer gave Miranda.
7 And it was on the video, and it was shown.

8 THE COURT: Do you wish to present any testimony?

9 MS. MAJOR: Yes, Your Honor.

10 THE COURT: Okay.

11 MS. MAJOR: The State calls Trooper Chadwick May to
12 the stand.

13 THE CLERK: Sir, place your left hand on the Bible
14 and raise your right hand.

15 WHEREUPON,

16 DIRGEN CHADWICK MAY,
17 after first having been duly sworn, testified as follows:

18 THE CLERK: Please be seated.

19 Please state your name for the record.

20 THE WITNESS: Dirgen Chadwick May.

21 DIRECT EXAMINATION

22 BY MS. MAJOR:

23 Q Trooper May, were you working on January 14th, 2012?

24 A Yes, ma'am, I was.

25 Q And did you stop the Defendant for suspicion of DUI?

1 A Yes, ma'am, I did.

2 Q And, after your investigation, did you make a
3 determination as to whether you should place the Defendant
4 under arrest for DUI?

5 A Yes, ma'am. I placed him under arrest.

6 Q Was that you that we saw in the video?

7 A Yes, ma'am, it was.

8 Q Was that the Defendant we saw in the video?

9 A Yes, ma'am.

10 Q Please describe to us what you did once you put the
11 Defendant under arrest.

12 A Once I placed him under arrest, I was escorting him
13 back to my patrol vehicle. And I was advising him of
14 Miranda rights during that short walk back to my car.

15 Q Once you walk off camera, are you still talking to
16 him?

17 A Yes, ma'am.

18 Q Was anybody else around?

19 A Trooper Shane Williams, I believe, was standing out
20 to the side of my car at that time.

21 Q Okay. Were you giving Trooper Williams his Miranda
22 rights?

23 A No, ma'am, I was not.

24 Q Was there anybody else in your vehicle?

25 A No, ma'am.

1 Q What did you do once you walk off camera?

2 A I'm just placing the Defendant in my vehicle. He
3 sits in the front seat. I had to walk him around the door
4 and sit him in there.

5 Q Did he indicate he understood?

6 A Yes, ma'am.

7 Q Did he understand that you were speaking to him?

8 A Yes, ma'am.

9 Q How does your camera operate as far as who points --
10 does it point forward automatically?

11 A 'It points forward all the time. If I want to change
12 the direction that the camera is pointing, I have to reach
13 up and manually turn it around. It's on like a little
14 ball swivel on the windshield, but it doesn't turn on its
15 own. I have to reach up and do it.

16 When I'm placing somebody in the car, I usually have
17 to reach in and turn it to face the Defendant -- or the
18 person in the car.

19 Q Besides you, and Trooper Williams, and the Defendant,
20 was anybody else near or on this scene?

21 A Not at that time, no, ma'am.

22 MS. MAJOR: Please answer any questions Mr. Sumner
23 may have.

24 MR. SUMNER: Thank you, Your Honor.

25 May it please the Court.

CROSS-EXAMINATION

BY MR. SUMNER:

Q The video that we've seen is accurate; is that correct? And that is from the arrest of Mr. Devore that evening?

A Yes, sir, Mr. Sumner.

MR. SUMNER: Thank you.

I don't have any other questions.

Thank you.

THE COURT: Thank you, Officer.

THE WITNESS: Thank you, sir.

MR. SUMNER: Your Honor, briefly --

MS. MAJOR: Your --

MR. SUMNER: Go ahead. I didn't want to interrupt you if you were going to make a statement. I apologize.

MS. MAJOR: Your Honor, as the trooper testified, nobody else was around. You see Miranda. You see it given to him. Nobody else is around. These cameras don't have a 360-degree view. We're working within budget constraints here.

So I would argue that the officer complied with the statute.

MR. SUMNER: Your Honor, briefly, could I be heard?

THE COURT: Yes, sir.

MR. SUMNER: I'd like to hand this up as well. I

1 think it's a little bit further of a briefing on this
2 issue.

3 Judge, I'd like you to look here, please, if you
4 would. I have researched this issue pretty thoroughly. I
5 have a lot of South Carolina law here. But, Judge, what
6 you've heard here today is exactly what was addressed
7 twice by Judge Verdin, once by Judge, I believe, Cothran.

8 And Judge Hayes, if you look at his opinion, which
9 is, again, extremely short, he says the rights can,
10 clearly, be heard on video, but you can't see them. And
11 then he goes on to in a brief succinct opinion talk about
12 what the word video means, and what the word show means.

13 And, I mean, it's just -- it's there. It's strict
14 statutory compliance. I'd ask you to, please, look at
15 Judge -- I keep saying Sullivan. You know me, I always
16 get my words mixed up when I'm up here. Judge Hayes.
17 Judge Hayes is a short circuit opinion that I've handed up
18 to you. Because he talks about it. And he talks about
19 Suchenski. And he talked about Mt. Pleasant. And it is
20 strict statutory compliance.

21 Mt. Pleasant makes it clear after Suchenski, the
22 Supreme Court reiterated, there is strict compliance. We
23 have a very strict mandatory DUI law. It has to be
24 followed. This is a criminal prosecution. And I'm,
25 certainly, not suggesting because I happen to know both of

1 these fine gentlemen, Shane Williams, who's seated here,
2 and, of course, Chad May -- this is not personal. I have
3 the upmost respect for them. And they could not be any
4 more cordial. And they are fine representatives of the
5 highway patrol, absolutely.

6 However, the law is the law. And the statute was not
7 followed. And the remedy is there. And our Supreme Court
8 has said what the remedy is. It has said this is the
9 remedy. It's not personal. This is the remedy. And when
10 you look at -- there's no dispute between myself and the
11 State as to what's on the video, what it shows, and what
12 it doesn't show. And Judge Hayes, in a recitation of his
13 facts, Judge Hill, is exactly what we see here. I mean,
14 it's just the same thing.

15 And again, as we look not only at Suchenski, but we
16 look at Mt. Pleasant where our Supreme Court went back to
17 say let's make it clear. Let's make it clear. This is
18 strict compliance. And I know you and I have had a
19 discussion before in these cases where they say, look, we
20 don't even require -- our legislature doesn't require that
21 a confession to a murder case be videoed, but we require
22 it in DUI, and we're going to follow it every single step
23 of the way. And it may not be the most popular thing at
24 any particular point, but the ruling is clear -- or the
25 direction from our Supreme Court is clear.

1 I know that the circuit court opinions, Judge, that I
2 handed up aren't binding on you. I know that. But
3 they're clear. They are your colleagues. And I don't
4 think there's anything else I can add. I think this is an
5 exhibit. There's no question what it shows. There's no
6 question what it doesn't show. And there's no question
7 what the statute mandates.

8 THE COURT: What does it not show, in your opinion?

9 MR. SUMNER: It does not show the entire Miranda
10 warning. I mean, it shows him starting, and then he goes
11 off. And it does not -- and our Supreme Court has said
12 what the Miranda warning is, our Court of Appeals has,
13 because I was in front of Judge Few on that case. And he
14 said it is those four warnings.

15 The terminal prong is not there. But there's no
16 question that the entire Miranda warning -- the Miranda
17 warning that is required by our statute that had been
18 announced by our Court of Appeals by Hoyle is the four
19 prongs, and it doesn't show it. And that's exactly the
20 situation in front of Judge Hayes. That's exactly what
21 we've got here. It's just not there. It's just not
22 there.

23 THE COURT: Well, what do you think the purpose of
24 the statute requiring it to be on videotape is?

25 MR. SUMNER: I don't know. I'm going to just say

1 that it is a -- I will say this. Our DUI statute is
2 highly specific. It has been rewritten four times since
3 1998.

4 Our Supreme Court has said that the first role of all
5 of us -- of course, you because you're making the
6 decision. The first role is to look at the plain language
7 that's in the statute. The Miranda warning has got to be
8 shown. It's right there. It's specific. And that's what
9 Judge Hayes did, he said, look, let's just resort to what
10 the words are. If we can effectuate it, let's go from
11 right there. And he did that in his opinion. It's very
12 brief. He said, look, it's got to be shown. There's no
13 question in this case it's not shown in its entirety. The
14 remedy is dismissal.

15 When -- I would say two things, Judge. First, when
16 the words are clear and easy to understand, the case law
17 is countless that that's what we do. We don't go any
18 further than that.

19 Number two, our Supreme Court has consistently
20 rendered in writing that when it's a criminal prosecution
21 that any and all doubts go in favor of the Defendant. And
22 we know that.

23 And so I think it's with that lens that we have to
24 look through it. The words are clear. Any ambiguity --
25 any leniency, rule of lenity, I believe, Madam Court

1 Reporter, is in favor of Mr. Devore. Written opinions
2 from your colleagues are there with the same issue. And
3 the video shows what it shows, and it doesn't show what it
4 doesn't show. There's not been statutory compliance. The
5 remedy is dismissal.

6 Thank you.

7 THE COURT: Well --

8 MS. MAJOR: I --

9 THE COURT: Go ahead.

10 MS. MAJOR: Just briefly.

11 I believe these cases are distinguishable. From what
12 I can tell from Judge Hayes' order, we don't know what the
13 officer -- whether he testified or not and explained the
14 situation. And, also, from what I can tell, it appears
15 that the Defendant was -- no portion of Miranda was on the
16 video, as opposed to this case.

17 Also, the purpose of Miranda, I believe it's so that
18 we know that Miranda was given and that the Defendant knew
19 what his rights were. It's not a tool for dismissal.

20 THE COURT: All right. Thank you.

21 So your position, Mr. Sumner, is that you said the
22 terminal prong -- you're talking about that he could have
23 a lawyer appointed. Is that --

24 MR. SUMNER: No, sir.

25 The terminal prong was that you have the right to

1 terminate this interrogation at any point.

2 THE COURT: Oh, okay.

3 MR. SUMNER: That was not a part of the original
4 Miranda court opinion. It was put in in Duckworth v.
5 Eagan, a Michigan opinion heard by the Supreme Court.

6 There has been some discussion about whether or not
7 after you advise someone of the four basic rights, you
8 have to tell them you can exercise this right and
9 terminate answering any questions at any point. That's
10 not really what this case is about. It's the more central
11 elements that are required.

12 Does that answer that question?

13 THE COURT: Yes, sir. It does.

14 So you concede that the other portions of the Miranda
15 warnings are visible on the videotape?

16 MR. SUMNER: Only -- no, sir.

17 I would only say that the point that's -- what's
18 visible is what -- I think we need to maybe look at it
19 again.

20 THE COURT: Yes. Let's look at it again.

21 MR. SUMNER: The entire Miranda warning as required
22 is not shown.

23 THE COURT: Let's just make sure the record is clear.
24 Sometimes, these videos don't get in the record for
25 whatever reason.

1 (WHEREUPON, State's exhibit No. 1 was played in open
2 court.)

3 THE COURT: All right. So I guess we can come up
4 with some stipulation as to what's not on there.

5 MR. SUMNER: The -- it does not show him being
6 advised that he has a right to have an attorney appointed
7 for him should he not be able to afford one. That's what
8 I saw on it.

9 MS. MAJOR: I agree.

10 Mr. SUMNER: Would you agree with that?

11 THE COURT: So, at that point, the trooper is saying
12 those words -- or words substantially to that effect. But
13 he's putting the Defendant in the car.

14 MR. SUMNER: Yes, sir.

15 THE COURT: And the camera can't track that because
16 it's not -- based on some kind of action movement or
17 whatever. So everybody agrees that the trooper did tell
18 him that he had the right to remain silent. And if he
19 stated something, it could be used against him. And that
20 he could -- he did have the right to a lawyer. And that's
21 about the time he started walking outside the camera's --

22 MR. SUMNER: I would agree with that, Judge.

23 THE COURT: Is that right?

24 MR. SUMNER: As I -- yes.

25 THE COURT: Okay. Anything further?

1 MR. SUMNER: Not from the Defendant on that point,
2 Your Honor.

3 MS. MAJOR: Your Honor, I would just argue that the
4 main purpose -- if I have it here -- of Miranda is to
5 advise him that he has the right to remain silent, and
6 that he has -- the essential portions of Miranda, I
7 believe, are that he has the right to remain silent, what
8 he says can be used against him, and what he says can be
9 used against him in court, and then he has the right to a
10 lawyer. I would argue it comes under that. And then if
11 he cannot afford one -- I don't believe that -- even I
12 would argue that he complied with Miranda, because there's
13 been testimony that he did. But the essential portions of
14 Miranda are shown.

15 THE COURT: Okay. Well, I appreciate the fine
16 arguments. And I've reviewed the case law that Mr. Sumner
17 has been so kind to furnish me, as well as the opinions of
18 Judges Hayes and Verdin, both of whom I highly respect.
19 And they're, certainly, persuasive.

20 However, I find, based on the credible evidence in
21 the record, that the Miranda warnings were given by the
22 trooper. And the video recording of the incident site
23 complied with Section 56-5-2953. The fact that a portion
24 of it is not visible when, clearly, he's advising him
25 while he's walking him to the car is not, in my opinion,

1 sufficient to take it outside of compliance of the
2 statute. And it does not warrant dismissal.

3 I understand the rule of lenity that Mr. Sumner so
4 correctly raised. However, I believe that the statute was
5 complied with. Certainly, the Defendant knew -- there's
6 no dispute that he knew what his rights were. And he was
7 told them accurately by the officer. And I don't believe,
8 unless I'm wrong, there's any issue regarding any
9 statement he made or any misinterpretation by him or
10 misunderstanding of his right to remain silent, or his
11 Fifth Amendment rights, or his right to counsel.

12 And more Miranda case law states as a prophylactic
13 rule, I believe the -- it's not necessarily required by
14 the Fourth Amendment. And there's been a lot of debate
15 about that. And I find that the warning that was given,
16 certainly, complied with the Miranda decision, satisfied
17 all other authorities on Miranda.

18 And simply because a small portion of it was not
19 captured on video doesn't mean the statute wasn't complied
20 with. I think the purpose of the statute is something I
21 would have to look at. And I'm, certainly, not going to
22 sit here and try to define the intent of the legislature.

23 But one of the reasonable purposes of the statute
24 would be to ensure that the Defendant knew what his rights
25 were. And there was an objective basis to determine he

1 had been advised of his rights. And, further, that he
2 wasn't coerced when he was told of his rights in order to
3 try to pry some kind of statement out of him.

4 So those would be among the purposes, I imagine, that
5 the legislature had in mind when they passed this statute.
6 And I think, here, there's no evidence or suggestion that
7 any of those things that the legislature may have been
8 concerned about occurred in this case.

9 Mr. Devore knew what his rights were. He was
10 correctly advised of them by the trooper. And although
11 part of it was not fully captured on video, I believe
12 there was compliance with the statute.

13 So I respectfully deny the motion to dismiss. And I
14 appreciate the argument. It was a substantial motion.
15 And I appreciate your authorities in support of it.

16 MR. SUMNER: Thank you, Your Honor.

17 May it please the Court.

18 The Solicitor and I had agreed to some redactions
19 regarding the road tape and the breath tape. And I'll let
20 her recite those.

21 There's one thing that we have not been able to agree
22 on. And that is that I am going to ask that on both the
23 written advisement to Mr. Devore and on the videotape that
24 would be played with the jury that the six-month
25 suspension, which is a totally administrative action taken

1 by the Department of Motor Vehicles, not be referenced in
2 this case. When I spoke to the Solicitor, she told me
3 that she did plan on getting into that. And it's not
4 relevant to this case. It's -- I don't think.

5 And I'll agree that I shouldn't be able to get into
6 the six-month suspension. That is not initiated by the
7 Court of General Sessions. It has nothing to do with the
8 Court of General Sessions. It is an administrative action
9 by the highway department. And I would ask that any
10 references to that from either side not be allowed into
11 this trial because it's irrelevant in this case.

12 Thank you.

13 THE COURT: Thank you.

14 MS. MAJOR: Your Honor, I believe that it is very
15 relevant to this case. The -- by statute, the officer has
16 to read the Defendant certain rights under the implied
17 consent law. He has the -- the way the implied consent
18 law is structured is that every person has agreed to
19 submit to a breath, or urine, or blood test. If you --
20 but you have the right to refuse. But if you refuse, your
21 refusal can be used against you. And the way the statute
22 is written --

23 MR. SUMNER: Can I just -- I agree that it can be
24 used against him. And I agree that she can say to the
25 jury that they can consider refusal. I'm just merely

1 talking about the six-month suspension.

2 Okay. Thank you.

3 I didn't mean to interrupt you.

4 MS. MAJOR: No. That's okay.

5 And, Your Honor, I can -- if you'll just indulge me
6 for a moment.

7 THE COURT: Sure. Take your time.

8 (Pause.)

9 MR. SUMNER: I have the statute, if you'd like it.

10 MS. MAJOR: I have it right here. I just wanted to
11 make sure I'm on the right part.

12 On 56-5-2950 -- that's the implied consent law. And
13 the way it reads is that no testimony be administered,
14 unless it's recorded. And that he's been given a written
15 copy and verbally informed that, one, he does not have to
16 take the test or give the samples, but his privilege to
17 drive must be suspended for, at least, six months, if he
18 refuses to submit to the test. And that his refusal may
19 be used against him.

20 Your Honor, I believe that that's read in conjunction
21 and that the jury needs to know what he was giving up when
22 he refused to take that test, and what can be used against
23 him. That the -- it hinders my case and makes it unclear
24 that if I just argue it can be used against him.

25 Well, he had a choice. He had a choice to take the

1 test, like he agreed to, or he had a choice to refuse the
2 test. But if he refused the test, under Section 1, his
3 license would be denied for, at least, six months, and it
4 could be used against him in court. I think it's highly
5 relevant. I think I have the -- it's part of my case that
6 I have to prove.

7 I have a copy of the implied consent rights. And
8 from what my understanding was that Mr. Sumner, also,
9 wanted any other administrative -- what's the word I'm
10 looking for? Action taken because of his refusal. He
11 wanted that redacted as well. Well, Your Honor that's
12 what this looks like.

13 I believe under State v. Henderson, I do have to
14 redact that he has the right to an independent test.
15 Because in the statute, it, specifically, says that the
16 State can't use his refusal to get an independent test
17 against him. I've redacted that part. The rest of it, I
18 have to prove that he was read all of these rights.

19 And some of these rights, although it's an
20 administrative point of view, this is a whole statute, as
21 Mr. Sumner said, that must be strictly complied with. So
22 I don't feel like he can have it both ways. And I don't
23 even see what is so prejudicial about it either.

24 THE COURT: Oh, so now you're all for strict
25 compliance; is that right?

1 MS. MAJOR: Well, I have to prove what I have to
2 prove. And I believe we complied with that part of the
3 statute. I don't think that it's prejudicial in any way.

4 I think that Mr. Sumner wanted the part about if you
5 have an alcohol concentration of 15 one-hundredths percent
6 or more that your privilege may be suspended. Well, he
7 didn't provide a sample. So I don't see how that
8 prejudices him in any way.

9 MR. SUMNER: I don't see how it would be relevant.
10 It's -- evidence has to be relevant. That would be my
11 point on that just for consistencies sake.

12 MS. MAJOR: I believe it's relevant to the implied
13 consent rights that he is required to read. Also, I
14 believe it's part of my case to prove that he read him all
15 of those rights.

16 And, Your Honor, the jury gets confused. It's going
17 to cause more confusion to redact all this. What are they
18 trying to hide? Why can't we see all of this? What are
19 we not allowed to see about this? And it's relevant to
20 evidence that I have to turn in, what is on this sheet of
21 paper.

22 THE COURT: Thank you.

23 MR. SUMNER: Your Honor, first of all, I will agree
24 that he was properly given and offered the SLED test. I'm
25 glad to make that stipulation on the record. There's no

1 problem on that. The test was offered pursuant to SLED
2 regulations.

3 This suspension, actually, was rescinded. And I
4 don't want to get into that. I think that takes -- it's
5 way -- it takes us way away from what we're here about.

6 And where this comes from is every time I try a DUI
7 case, the Prosecutor says what you've seen in the old case
8 law. Who would refuse? Somebody that wouldn't want to
9 give a sample. I agree that's a fair comment. Our
10 Supreme Court has said that.

11 But when you get into this administrative thing, I
12 think what she's going to say is he wanted so bad not to
13 do this -- this is the argument I heard in my last case
14 that he was willing to have a six-month suspension. Well,
15 he didn't have a six-month suspension. And I can show
16 that in my file. But I don't want to go there. I think
17 that gets this administrative stuff into it.

18 This is purely administrative. A six-month
19 suspension is not something that's regulated in this
20 Court. It's not something that has anything to do with
21 the Court of General Sessions. It is a highway department
22 matter. And it is not relevant to the case. It's
23 confusing. And I'm just asking -- I don't want to get
24 into it. But I think that if she gets into it, then I
25 have to be allowed to get into it. And I just don't think

1 it has anything to do with the criminal charge.

2 THE COURT: Doesn't the -- well, bear with me one
3 second.

4 (Pause.)

5 THE COURT: What kind of charge would the State be
6 seeking regarding the -- for the jury?

7 MS. MAJOR: Your Honor, I have some proposed charges.
8 And I have copied and pasted the statute, except for he
9 has the right to have a qualified person -- or conduct the
10 additional test. I think the jury can figure out -- I'm
11 not going to say his license was suspended. But that's
12 the choice that he faced under the statute. And, I mean,
13 that he can request an administrative hearing. And if
14 it's upheld, then he must take other certain steps. And
15 that's a part of the statute. And that's included on the
16 advisement of implied consent rights.

17 THE COURT: But there's no authority that requires
18 that to be charged to the jury, is there?

19 MS. MAJOR: Your Honor, State v. Henderson -- if I
20 can have a second to review it.

21 MR. SUMNER: And, Your Honor, I just want to say I
22 have a copy of the order dismissing that six-month
23 suspension. So I'm able to proceed judicially. Again, I
24 don't think it's relevant. I don't want anybody to get
25 into it. I was not planning on getting into it.

1 THE COURT: Well, I just can't recall. Is there some
2 type of charge that's been sanctioned by the appellate
3 courts about any inference you can draw from the refusal?

4 MR. SUMNER: My -- the only charge I've heard on it,
5 Judge, just going from memory is what I said earlier,
6 which is something to the effect of you can take into
7 consideration the fact that they did not take the test in
8 arriving at your decision. And she can comment --

9 THE COURT: Right.

10 MR. SUMNER: I mean, she can comment and say he could
11 have taken that test, and he didn't. And you need to
12 consider that. I'm not saying she can't -- I think she
13 can argue that. But what I think she's going to do is
14 say, you know, he wanted so bad not to do this that he had
15 a six-month suspension, which he never had. That's an
16 administrative issue that's not -- and I don't want to
17 have to get into it. And I wasn't planning on getting
18 into it. I was just going to say he had the right to
19 decline, and he did.

20 MS. MAJOR: I don't know if this is semantics, but I
21 can say -- I think I should be able to say under the
22 statute that the statute says that he has the right to
23 refuse, but it can be used against him and his license
24 will be suspended for six months. I guess I can go on and
25 say he can challenge the suspension. But that was the

1 choice that he faced that night. And I think that the
2 jury needs to understand the choice that he faced.

3 THE COURT: Why wouldn't the jury -- why wouldn't
4 that be relevant that he -- regardless of what,
5 ultimately, occurred, that he was fully aware of the risks
6 and consequences of not taking the test? Why wouldn't
7 that be something that is probative of his decision?

8 MR. SUMNER: Because it's a separate -- a totally
9 separate proceeding. I mean, it's not a part of the
10 criminal case. It is something totally separate. And he
11 is advised it can be used against you, but he is, also,
12 told you can have an administrative hearing to challenge
13 that. I'm saying that is not relevant to a criminal
14 prosecution. Because then I'm going to need to get into
15 another hearing was held and it was, actually, dismissed,
16 wasn't it. And that didn't even happen.

17 I mean, I think that is getting -- I think we're
18 getting into an administrative hearing that is not a part
19 of this case. I mean, it's just not. I don't -- you
20 know, I mean, he is advised it can be used against him.

21 I think anything to do with the administrative aspect
22 of it, either what you blow or what your suspension would
23 be should not come in front of this jury. This is not
24 what this jury is here to decide. This jury is simply
25 here to decide the criminal charge. And I just think it

1 ought to be a bright line that we're not going to get into
2 anything involving an administrative hearing, any issues
3 that are covered by another tribunal, that are covered by
4 another court.

5 MS. MAJOR: Your Honor, briefly.

6 If -- I don't want it to appear that I'm hiding
7 anything. I think that I can say that this is the choice
8 that he faced. I'm not going to say his license was
9 suspended, because, clearly, it wasn't. The jury, I think
10 they can put the pieces together that he was facing that,
11 and then that he had the right to an administrative
12 hearing. I don't see what the harm is in giving the jury
13 all the information, as opposed to this.

14 I just think it's prejudicial to my case. I just
15 don't see the -- let them decide. Let them be able to
16 figure it out. He's going to read that to them. They're
17 going to know what the procedure was. If I ask was his
18 license suspended for six months, no, it wasn't. But
19 that's the choice that he faced. And I guess I'll just
20 have to delicately phrase that. But I think the jury
21 should be able to see everything. And it should be an
22 open document so that it doesn't look like we're trying to
23 hide the ball.

24 THE COURT: So what are you going to ask the jury to
25 be instructed regarding the refusal?

1 MS. MAJOR: Your Honor, I can pass up some -- just
2 the statute. The statute in its totality, minus the right
3 to an independent test.

4 THE COURT: Okay.

5 MS. MAJOR: And, Your Honor, from my experience
6 regarding the implied consent, we know what it means.
7 But, sometimes, I don't know if the jury knows what it
8 means. But we're going to hear all about the implied
9 consent rights. And they don't get to see what the
10 implied consent rights are.

11 THE COURT: Well, I understand the concerns about not
12 wanting to get bogged down in the collateral matters. And
13 that's, certainly, something I'm keenly interested in.

14 But I find the evidence of what he risked under the
15 law and possible consequences from the refusal are
16 relevant. It still could be excluded, as Mr. Sumner has
17 argued. Because its probative value can be substantially
18 outweighed by the danger of unfair prejudice, or confusion
19 of issues, or misleading the jury, or by considering waste
20 of time, or undue delay. And those are the grounds under
21 Rule 403. But I don't believe that the probative value of
22 this is substantially outweighed by the Rule 403 concerns.

23 So I would allow you to ask and allow evidence to
24 come in about the language of the statute of implied
25 consent and that his privilege could be suspended or

1 denied.

2 And, Mr. Sumner, I'll, certainly, allow you the
3 opportunity to elicit evidence concerning what,
4 ultimately, occurred regarding any suspension.

5 MR. SUMNER: Okay.

6 MS. MAJOR: So we're clear, it does not need to be
7 redacted?

8 THE COURT: No. I don't think it needs to be
9 redacted.

10 MS. MAJOR: Okay.

11 THE COURT: All right. Anything further?

12 MR. SUMNER: I think that -- I don't see a need to
13 recite all this, but didn't you and I agree on what has
14 been redacted from the tape and will not be referenced in
15 any way, I guess?

16 MS. MAJOR: Yes.

17 I don't know. Maybe this is something that
18 Mr. Sumner and I need to review. I have redacted --
19 Mr. Sumner requested that I redact one hour and 10 minutes
20 to one hour and 11 minutes. I don't think that all of
21 that needs to be redacted. Basically, in that portion,
22 the trooper says that the decision -- he believes the
23 decision he made was the right one, and that he doesn't
24 take lightly taking away a man's freedom. I didn't see
25 the need to redact that.

1 MR. SUMNER: Okay. If she wants to -- if you want to
2 play that about -- well, about I don't take it lightly to
3 take somebody's freedom away.

4 MS. MAJOR: Right.

5 MR. SUMNER: If she wants to play that and make that
6 a part of her case, I'm fine with that.

7 THE COURT: Anything further?

8 MR. SUMNER: Judge, I'll tell you what, as an officer
9 of the Court, I can say this. I've had good conversations
10 with Ms. Major throughout this week. And I think she and
11 I have agreed upon what is going to come in and not. And
12 we've reviewed it yesterday. And as long as that
13 agreement has been followed, which in my mind it has been,
14 then I think we're fine.

15 THE COURT: Okay. Very good.

16 MR. SUMNER: We're ready.

17 THE COURT: Any voir dire that y'all, specifically,
18 have?

19 MR. SUMNER: No. Just your standard is fine with me.

20 THE COURT: Do you want me to ask anything about
21 anything specific to this case?

22 MR. SUMNER: I would ask that you not ask if anybody
23 has been involved in an accident involving somebody with
24 drinking and driving. The only thing I would ask is if
25 anybody has ever contributed to MADD, or some other

1 organization. That's the only thing I would ask.

2 MS. MAJOR: I agree.

3 THE COURT: Bring the panel on up then.

4 Thank you.

5 How long is the video, by the way?

6 MS. MAJOR: Your Honor, the in-car is an hour, and
7 the BA is 30 minutes.

8 MR. SUMNER: I am fine -- I think there's some
9 redactions. I mean, I'm comfortable -- you know, I told
10 her that I'm comfortable cutting some of it. But I've got
11 to let -- you know, it's her case, so.

12 MS. MAJOR: I would like to play the whole thing.
13 I've just found, in my experience, that the jury wonders
14 when you cut something off. And I believe that there are
15 some incriminating statements throughout the entire video.

16 THE COURT: Okay. Thank you.

17 (Pause.)

18 (WHEREUPON, the jury panel entered the courtroom.)

19 THE COURT: Ladies and gentlemen, good morning.

20 We are going to pick a jury now in the case of the
21 State v. Johnnie Allen Devore, Jr. And this is a criminal
22 case. And I'm going to read to you the indictment. And
23 before I do that, I just want to remind you of several
24 things.

25 First of all, this indictment is not evidence of

1 anything. It is simply the formal way a case begins in
2 General Sessions criminal court. And it is the ticket, so
3 to speak, that lets the prosecutor come into the courtroom
4 and start a case against a citizen, and let's a citizen
5 know what he's charged with. But it, certainly, doesn't
6 suggest or imply any guilt. And it is not evidence of
7 anything.

8 So, with that in mind, Mr. Devore has pled not guilty
9 to this indictment. And that puts the burden of proof
10 entirely on the State. He may only be convicted if, and
11 only if, the jury unanimously finds that the State has
12 proven each and every element of the charge beyond a
13 reasonable doubt.

14 And Mr. Devore is presumed innocent and he will
15 remain presumed innocent throughout the trial and even
16 into your deliberations. And that presumption of
17 innocence can only be removed by proof that the State
18 brings forward that convinces you of guilt beyond a
19 reasonable doubt.

20 Mr. Devore doesn't have any burden of proof. He
21 doesn't have to offer any evidence or explanation
22 whatsoever.

23 The indictment alleges that Johnnie Allen Devore, Jr.,
24 did in Greenville County on or about the 14th day of
25 January, 2012, drive a motor vehicle while under the

1 influence of alcohol, or other drug, or substance, or a
2 combination of alcohol, other drug and/or substance which
3 caused impairment to the extent that the Defendant's
4 faculties to drive were materially and appreciably
5 impaired. Those are the allegations of the indictment.

6 JURY QUALIFICATIONS

7 THE COURT: Now, we want to be able to have a jury
8 that can be fair and impartial. So, to that end, I need
9 to ask a series of questions.

10 The first one being, is there anyone related by blood
11 or marriage to Johnnie Allen Devore, Jr.?

12 And, sir, if you could just stand up so everybody
13 knows who you are, Mr. Devore.

14 Does anyone have any personal, social, or business
15 relationship with Mr. Devore?

16 Thank you, sir.

17 (WHEREUPON, there was no response.)

18 THE COURT: All right. There's no response.

19 The people who may testify in this case for the State
20 include Trooper Dirgen Chadwick May and Trooper Shane
21 Williams. Is anyone related by blood, or marriage, or kin
22 to any of these potential witnesses? If so, please,
23 stand.

24 You can stand up, sir, Trooper.

25 Thank you.

1 (WHEREUPON, there was no response.)

2 THE COURT: Does anyone have any business, personal,
3 or social relationship with either of these potential
4 witnesses?

5 (WHEREUPON, there was no response.)

6 THE COURT: Does anyone know anything about this
7 case, other than what you've heard from me here this
8 morning?

9 (WHEREUPON, there was no response.)

10 THE COURT: Is anyone aware of any bias or prejudice
11 they may have about any matter related to this case, or
12 anyone related to it? If so, please, stand.

13 (WHEREUPON, there was no response.)

14 THE COURT: Is there anyone who contributes to any
15 organization whose primary purpose is to promote victim's
16 rights, or to promote more aggressive law enforcement? If
17 so, please, stand.

18 (WHEREUPON, there was no response.)

19 THE COURT: Is there anyone who does not believe they
20 can be fair and impartial in this trial to either the
21 State or Mr. Devore? If so, please, stand.

22 (WHEREUPON, there was no response.)

23 THE COURT: Any further voir dire requested by --

24 MR. SUMNER: I guess we just need to introduce
25 ourselves.

1 THE COURT: Oh, I'm sorry.

2 MR. SUMNER: But no further voir dire, Your Honor,
3 not from the Defense.

4 MS. MAJOR: Not from the State.

5 THE COURT: Ms. Major, you can introduce yourself.

6 MS. MAJOR: I'm Elizabeth Major. I'm here on behalf
7 of the Greenville County Solicitor's Office.

8 THE COURT: Mr. Sumner.

9 MR. SUMNER: Good morning.

10 I'm Steve Sumner. I represent Mr. Devore. And I
11 practice law here in Greenville.

12 THE COURT: Is anyone related by blood or marriage to
13 either Ms. Major or Mr. Sumner? If so, please, stand.

14 (WHEREUPON, there was no response.)

15 THE COURT: Does anyone have any personal, business,
16 or social relationship with either of these attorneys? If
17 so, please, stand.

18 (WHEREUPON, there was no response.)

19 THE COURT: Has anyone ever been employed by the
20 Solicitor's Office or had a member of their immediate
21 family be employed by the Solicitor's Office? If so,
22 please, stand.

23 (WHEREUPON, there was no response.)

24 THE COURT: Has anyone ever been employed by
25 Mr. Sumner's office, or had a member of their immediate

1 family be employed by him? If so, please, stand.

2 (WHEREUPON, there was no response.)

3 THE COURT: Has anyone ever been represented by
4 Ms. Major, or Mr. Sumner, or been involved in a dispute or
5 transaction where the other side was represented by one of
6 these lawyers? If so, please, stand.

7 (WHEREUPON, there was no response.)

8 THE COURT: All right. We will proceed now with the
9 jury selection.

10 Thank you.

11 JURY SELECTION

12 THE CLERK: When I call your name, if you'll, please,
13 stand in place and wait for further instruction.

14 Juror #97, José Gonzalez.

15 (WHEREUPON, José Gonzalez, a Hispanic male, stood.)

16 THE CLERK: What says the State?

17 MS. MAJOR: Please present this juror.

18 THE CLERK: What says the Defendant?

19 MR. SUMNER: Please swear the juror.

20 THE CLERK: Mr. Gonzalez, please, come have a seat in
21 the jury box.

22 Juror #152, Robert Macmeccan.

23 (WHEREUPON, Robert Macmeccan, a white male, stood.)

24 THE CLERK: What says the State?

25 MS. MAJOR: Please present this juror.

1 THE CLERK: What says the Defendant?

2 MR. SUMNER: Please swear the juror.

3 THE CLERK: Sir, please, come have a seat in the jury
4 box.

5 Juror #219, Brian Shelton.

6 (WHEREUPON, Brian Shelton, a white male, stood.)

7 THE CLERK: What says the State?

8 MS. MAJOR: Please excuse this juror.

9 THE CLERK: Sir, please, be seated. You've been
10 excused from this case.

11 Juror #49, Judith Churchwell.

12 (WHEREUPON, Judith Churchwell, a white female,
13 stood.)

14 THE CLERK: What says the State?

15 MS. MAJOR: Please present this juror.

16 THE CLERK: What says the Defendant?

17 MR. SUMNER: Please excuse this juror.

18 THE CLERK: Please be seated. You have been excused
19 from this case.

20 Juror #128, Stinnes Jordan.

21 (WHEREUPON, Stinnes Jordan, a white male, stood.)

22 THE CLERK: What says the State?

23 MS. MAJOR: Please excuse this juror.

24 THE CLERK: Please be seated. You've been excused
25 from this case.

1 Juror #118, William Hunnicutt.

2 (WHEREUPON, William Hunnicutt, a white male, stood.)

3 THE CLERK: What says the State?

4 MS. MAJOR: Please present this juror.

5 THE CLERK: What says the Defendant?

6 MR. SUMNER: Please swear the juror.

7 THE CLERK: Mr. Hunnicutt, please, have a seat in the
8 jury box.

9 Juror #253, Tony Wallace.

10 (WHEREUPON, Tony Wallace, a white male, stood.)

11 THE CLERK: What says the State?

12 MS. MAJOR: Please present this juror.

13 THE CLERK: What says the Defendant?

14 MR. SUMNER: Please swear the juror.

15 THE CLERK: Mr. Wallace, please, have a seat in the
16 jury box.

17 Juror #31, Janice Broyles.

18 (WHEREUPON, Janice Broyles, a white female, stood.)

19 THE CLERK: What says the State?

20 MS. MAJOR: Please present the juror.

21 THE CLERK: What says the Defendant?

22 MR. SUMNER: Please excuse this juror.

23 THE CLERK: Please be seated, Ms. Broyles. You've
24 been excused from this case.

25 Juror #41, Audrey Carter.

1 (WHEREUPON, Audrey Carter, a white female, stood.)

2 THE CLERK: What says the State?

3 MS. MAJOR: Please present this juror.

4 THE CLERK: What says the Defendant?

5 MR. SUMNER: Please swear the juror.

6 THE CLERK: Ms. Carter, please, have a seat in the
7 jury box.

8 Juror #245, Catherine Thomason.

9 (WHEREUPON, Catherine Thomason, a white female,
10 stood.)

11 THE CLERK: What says the State?

12 MS. MAJOR: Please present this juror.

13 THE CLERK: What says the Defendant?

14 MR. SUMNER: Please swear the juror.

15 THE CLERK: Ms. Thomason, please, have a seat in the
16 jury box.

17 Juror #109, Carolyn Harding.

18 (WHEREUPON, Carolyn Harding, a white female, stood.)

19 THE CLERK: What says the State?

20 MS. MAJOR: Please present this juror.

21 THE CLERK: What says the Defendant?

22 MR. SUMNER: Please swear the juror.

23 THE CLERK: Ms. Harding, please, have a seat in the
24 jury box.

25 Juror #100, John Gordon.

1 (WHEREUPON, John Gordon, a white male, stood.)

2 THE CLERK: What says the State?

3 MS. MAJOR: Please present this juror.

4 THE CLERK: What says the Defendant?

5 MR. SUMNER: Please swear the juror.

6 THE CLERK: Mr. Gordon, please, have a seat in the
7 jury box.

8 Juror #59, Maureen Coyne.

9 (WHEREUPON, Maureen Coyne, a white female, stood.)

10 MS. MAJOR: Please present this juror.

11 THE CLERK: Thank you.

12 What says the Defendant?

13 MR. SUMNER: Please present the juror.

14 THE CLERK: Ms. Coyne, please, come have a seat in
15 the jury box.

16 Juror #63, Gregory Crum.

17 (WHEREUPON, Gregory Crum, a white male, stood.)

18 THE CLERK: What says the State?

19 MS. MAJOR: Please excuse this juror.

20 THE CLERK: Please be seated. You have been excused
21 from this case.

22 Juror #279, John Ross.

23 (WHEREUPON, John Ross, a white male, stood.)

24 THE CLERK: What says the State?

25 MS. MAJOR: Please excuse this juror.

1 THE CLERK: Please be seated. You have been excused
2 from this case.

3 Juror #231, Barbara Steffke.

4 (WHEREUPON, Barbara Steffke, a white female, stood.)

5 THE CLERK: What says the State?

6 MS. MAJOR: Please present this juror.

7 THE CLERK: What says the Defendant?

8 MR. SUMNER: Please excuse the juror.

9 THE CLERK: Ma'am, please, be seated. You have been
10 excused from this case.

11 Juror #45, Sharon Chancellor.

12 (WHEREUPON, Sharon Chancellor, a black female,
13 stood.)

14 THE CLERK: What says the State?

15 MS. MAJOR: Please excuse this juror.

16 THE CLERK: Please be seated.

17 Juror #182, Teresa Pace.

18 (WHEREUPON, Teresa Pace, a white female, stood.)

19 THE CLERK: What says the State?

20 MS. MAJOR: Please present the juror.

21 THE CLERK: What says the Defendant?

22 MR. SUMNER: Please excuse the juror.

23 THE CLERK: Ma'am, please, be seated. You have been
24 excused from this case.

25 Juror #90, Paul Gerbig.

1 (WHEREUPON, Paul Gerbig, a white male, stood.)

2 THE CLERK: What says the State?

3 MS. MAJOR: Please present this juror.

4 THE CLERK: What says the Defendant?

5 MR. SUMNER: Please swear the juror.

6 THE CLERK: Mr. Gerbig, please, have a seat in the
7 jury box.

8 Juror #20, Sheri Benore.

9 (WHEREUPON, Sheri Benore, a white female, stood.)

10 THE CLERK: What says the State?

11 MS. MAJOR: Please present this juror.

12 THE CLERK: What says the Defendant?

13 MR. SUMNER: Please swear the juror.

14 THE CLERK: Ma'am, please, come have a seat in the
15 jury box.

16 Juror #51, Kathleen Cleys.

17 (WHEREUPON, Kathleen Cleys, a white female, stood.)

18 THE CLERK: What says the State?

19 MS. MAJOR: Please present the juror.

20 THE CLERK: What says the Defendant?

21 MR. SUMNER: Please excuse the juror.

22 THE CLERK: Ma'am, please, be seated. You have been
23 excused from this case.

24 Juror #164, Patsy McKelvey.

25 (WHEREUPON, Patsy McKelvey, a black female, stood.)

1 THE CLERK: What says the State?

2 MS. MAJOR: Please present this juror.

3 THE CLERK: What says the Defendant?

4 MR. SUMNER: Please swear the juror.

5 THE CLERK: Ms. McKelvey, please, have a seat in the
6 jury box.

7 THE COURT: We'll have one alternate.

8 MS. MAJOR: Yes, sir.

9 MR. SUMNER: That's fine..

10 THE CLERK: Juror #158, Debra Mason.

11 (WHEREUPON, Debra Mason, a white female, stood.)

12 THE CLERK: What says the State?

13 MS. MAJOR: Please present this juror.

14 THE CLERK: What says the Defendant?

15 MR. SUMNER: Please swear the juror.

16 THE CLERK: Ms. Mason, please, have a seat in the
17 jury box.

18 THE COURT: Any matters related to the selection
19 process or composition of the jury from the State?

20 MS. MAJOR: None from the State.

21 THE COURT: From the Defense?

22 MR. SUMNER: Likewise.

23 THE COURT: All right. I find it complied with all
24 statutory and Constitutional mandates.

25 Ladies and gentlemen, you've been selected to be the

1 jury in the case of the State vs. Johnie A. Devore, Jr.
2 We're going to begin the case in just a few moments. I'll
3 just ask you to go back to the jury room at this time and
4 not talk about the case. And we will have the opening
5 statements here in just a few minutes.

6 Thank you.

7 (WHEREUPON, the jury was excused from open court at
8 approximately 10:55 a.m.)

9 THE COURT: For those of you who were not chosen to
10 be on the jury, you may return downstairs to the jury
11 assembly room.

12 (WHEREUPON, the remaining jury panel members exited
13 the courtroom.)

14 THE COURT: We'll just take about a five-minute break.
15 (WHEREUPON, a break was taken.)

16 (WHEREUPON, State's Exhibit Nos. 2, 3, 4, and 5 were
17 marked for identification only.)

18 THE COURT: Anything else before we bring the jury
19 in?

20 MS. MAJOR: No, Your Honor.

21 MR. SUMNER: One last thing. We stipulate to the
22 jurisdiction of the Court.

23 THE COURT: All right. Bring the jury in.

24 (WHEREUPON, the jury came into open court at
25 approximately 11:08 a.m.)

INTRODUCTORY REMARKS

THE COURT: Ladies and gentlemen, good morning.

I want to thank you again for your service this week. And I know the parties appreciate you being here.

And I know you're here, as I mentioned to you on Monday morning, in part, because you respect the fact that the right to a jury trial is a fundamental and important part of your justice system. You probably know that you got the summons to come down here to report for jury duty because you're either registered to vote, or you have a driver's license, or you have an identification card issued by the highway department.

But you may be curious as to why you were selected to sit on this particular case as a juror. And the reason is because both sides, both the State and Mr. Devore, believe you can be fair and impartial, and you could decide this case without any kind of bias, or prejudice, or preconceived ideas.

Now, my name is Gary Hill. I introduced myself to you Monday morning when we were doing jury qualifications. I'm one of the circuit judges here in Greenville County and Pickens County, which is the Thirteenth Circuit. I'm glad to be in my home circuit this week, as we do travel around the state periodically. And you've met the lawyers because they just introduced themselves to you. But

1 there's some other people in the courtroom who you've not
2 met who I do want to introduce, and I'll tell you what
3 their jobs are. And then I'm going to tell you what your
4 job is.

5 The first person I want to introduce is Ms. Hollie
6 Jenkins. She's the court reporter. And, as you can see,
7 she is furiously typing, because she's taking down every
8 word that's being said, because Circuit Court is a court
9 of record. And then to her right is Mary Troop, who is
10 one of the assistant clerks of court for Mr. Wickensimer.
11 And she assists with jury selection and assisted with the
12 qualification process on Monday, as well as trying to run
13 things efficiently in terms of keeping up with the
14 paperwork. Up on the bench with me is Parker Baxley,
15 who's my law clerk. She's a lawyer. She's a graduate of
16 the USC School of Law. And she assists me with research
17 and other issues that arise during trials. The two
18 bailiffs we have in this case are Mr. Blackmon, and
19 Mr. Christ here in the back. And they're here for your
20 assistance while you're serving on the jury.

21 Everyone I introduced to you and, certainly, the
22 lawyers have done this and I have done this as well, we
23 have all taken an oath to do our job. And you're going to
24 take an oath to do your job.

25 So, at this time, I'm going to ask Ms. Troop to.

1 administer the oath. And listen to it very carefully,
2 because it tells you in a nutshell what your
3 responsibility is. And I'll elaborate on that after she
4 finishes.

5 THE CLERK: Please stand and raise your right hand.
6 The proper response is "I will."

7 (WHEREUPON, the jury was sworn at approximately
8 11:12 a.m.)

9 THE CLERK: Thank you.

10 Please be seated.

11 THE COURT: Thank you.

12 Now, as I mentioned on Monday, any time a trial
13 occurs in circuit court with the jury, there are always
14 two judges. There's the judge of the law, and that's the
15 judge -- that's the role that I fulfill. And there's the
16 judge of the facts, and that's the role that you, the
17 jury, discharge. Our responsibilities are very distinct.
18 And yours are much harder and more difficult than mine
19 are. But I'm going to tell you what my job is as the
20 judge of the law first. And then I'll tell you what your
21 job is as the judge of the facts.

22 As the judge of the law, I have two main
23 responsibilities. The first is to rule on the
24 admissibility of evidence. I don't know much about this
25 case, but I anticipate we may have objections to evidence.

1 And if there is an objection, I have to rule on whether it
2 is admissible under the law. And I usually can do that
3 right on the spot. Sometimes, we have to take a break if
4 things get a little complicated. But, nevertheless, if I
5 sustain the objection, that simply means that the evidence
6 is not something you can consider in this case. If I
7 overrule the objection, that means the evidence is
8 something you can consider. So that's my first job as the
9 judge of the law is to rule on the admissibility of
10 evidence.

11 The second job I have, as the judge of the law, is
12 that I will instruct you on what the law is that applies
13 to the facts of this case. And I will do that at the end
14 of the case after you've heard all the evidence and the
15 arguments of the lawyers.

16 Now, your job as the judge of the facts, as I said,
17 is much more difficult. And our Constitution gives you,
18 the jury, the sole and exclusive right to determine what
19 the facts are in a trial such as this. I can't and I
20 won't make any comment on the facts of this case.

21 Please don't interpret anything I do during the trial
22 as any indication as to what I think the facts are, or
23 what your verdict should be. Because our Constitution
24 gives you the sole and exclusive right to determine what
25 the facts are. And I'm not going to interfere with that

1 any more than you would interfere with my right to tell
2 you what the law is that applies to the facts.

3 So how do you determine what the facts are? You do
4 that by weighing and evaluating the evidence you're going
5 to hear during the course of this trial. Evidence
6 consists of two sources. The first is the one you're
7 probably most familiar with, and that is sworn witness
8 testimony.

9 The second source of evidence is by way of an
10 exhibit. An exhibit is simply a physical tangible object.
11 It might be a map, or a photograph, or something of that
12 nature. But you'll know it's an exhibit and you'll know
13 it's something you can use as evidence to determine what
14 the facts are because it will be back in the jury room
15 with you at the end of the case. And it will have a
16 sticker on it that says exhibit number so and so. It's
17 very important, ladies and gentlemen, that you understand
18 that those are the only two things you can use to
19 determine what the facts are, sworn witness testimony and
20 exhibits. Nothing else is evidence.

21 We have fine lawyers in this case. And they are
22 going to make arguments on behalf of their clients. But
23 bear in mind that they are not witnesses. So what they
24 say is not evidence. They're trying to help you
25 understand what the evidence is, so you should pay keen

1 attention to what they say.

2 Now, as the judge of the facts, you will have to by
3 necessity determine the credibility of all the evidence.
4 So that means for every witness who testifies and every
5 exhibit that is admitted, you will have to determine the
6 believability or credibility of that evidence.

7 And how do you do that? I can tell you in the case
8 of a witness, you can use some guidelines, or you can
9 disregard these guidelines. But, nevertheless, something
10 you could use if you wish to would be considering the
11 witness's opportunity to observe the things that they are
12 coming into court to tell you they saw or observed.

13 Second, you may consider how the witness's testimony
14 stacks up to the other evidence in the case, whether it's
15 consistent or inconsistent. You can, also, take into
16 account whether the interest has -- the witness has some
17 interest in the outcome of this case, or if they have some
18 bias or prejudice towards someone or some issue involved
19 in the case. And you may consider their demeanor on the
20 stand. You, certainly, can, also, use your common sense,
21 because it did not evaporate when you walked into the
22 courtroom. So those are some of the things you can use in
23 determining the credibility of the witnesses, which will
24 be one of your jobs as the judge of the facts.

25 Now, this is a criminal case. And there are certain

1 principles that apply to all criminal cases that I've
2 already alluded to. But I'm going to tell you about them
3 now and at the end of the case because they are so
4 fundamentally important.

5 The first is the indictment I read to you doesn't
6 constitute evidence. This indictment is not a witness.
7 It's not an exhibit. It's simply the formal way the case
8 begins. And, as I mentioned, it's the way a citizen is
9 notified of what they're charged with.

10 Secondly, Mr. Devore pled not guilty to the
11 indictment. And that puts the burden of proof squarely
12 and solely on the State. Mr. Devore is presumed innocent.
13 And that presumption of innocence accompanies him
14 throughout this trial and even into your deliberations.
15 He has no burden of proof and doesn't have to offer any
16 evidence or explanation whatsoever.

17 Now, how many of you have sat on a criminal trial
18 before? If you could, just raise your hand for me.

19 (WHEREUPON, one juror raised their hand.)

20 THE COURT: Some of you may know from your own
21 experience, if you haven't been a juror before in a
22 criminal case, a little bit about the structure of a
23 criminal trial. But just to further demystify the
24 surroundings for you, I'm going to tell you briefly what
25 the structure is.

1 The State, as I've said, bears the burden of proof.
2 So in just a few minutes, they're going to give you the
3 opening statement, which is simply an outline, a road map
4 of what they think the evidence will show, and what the
5 issues are going to be in the case. And after the State
6 finishes their opening statement, the Defense, through
7 Mr. Sumner, will have the opportunity, but not the
8 obligation, to give an opening statement as well.

9 Then after you've heard the opening statement or
10 statements, we'll have the evidence portion of the trial
11 where, again, the State, bearing the burden of proof, will
12 go first and the Defense will have the opportunity to
13 confront that evidence and cross-examine the witnesses.
14 And then after you've heard the State's evidence, the
15 Defense will have the opportunity, but, again, not the
16 obligation, to present evidence they wish to which the
17 State may confront.

18 After you've heard all the evidence, we'll have the
19 closing arguments where they will tell you what they think
20 the evidence showed and what your verdict should be. Then
21 I will instruct you on the law that applies to the facts
22 of the case. And then you will go back and deliberate and
23 determine what the facts are and apply the law to those
24 facts and, ultimately, reach a verdict.

25 Now, I don't know how long this case is going to

1 last. It may be relatively short. But, regardless of how
2 long or short it is, it's a very important case to both
3 the State and Mr. Devore. And I know you will give them
4 your devout attention throughout this trial as the
5 evidence is being presented.

6 The important thing for you to understand as well is
7 that we spent time here this morning, and so did you,
8 trying to find a jury that could be open minded and fair
9 and impartial. So we want to keep you that way. So don't
10 start talking about this case during the breaks. Don't
11 discuss it with anyone. Don't do any kind of outside
12 investigation, or research, or engage in any kind of
13 social media. Because you must confine your decision, as
14 I've said, to the evidence that you hear during this trial.

15 These trials are sometimes like jigsaw puzzles. And
16 they have to be presented one piece at a time. And you,
17 certainly, don't want to start trying to solve the puzzle
18 when you don't have all the pieces in the box.

19 So don't talk about the case or discuss it until
20 you've heard all the evidence, heard the arguments of the
21 lawyers, and heard the law that applies to the facts.
22 And, at that point, you may begin deliberating. And I
23 will tell you when you can start discussing the case.

24 Now, ladies and gentlemen, you have seen the lawyers
25 in this case. And, as I said, we have very fine lawyers

1 involved in this trial, fortunately. And they are
2 advocates for their clients. They're going to do their
3 best to zealously represent their client's interest. You
4 and I are not advocates. We don't have any interest in
5 the outcome of this case. Our job is to be fair and
6 impartial. And your job is to determine what the facts
7 are and determine whether the State has met its burden of
8 proof.

9 So with that, we'll have the opening statement.

10 Ms. Major.

11 OPENING STATEMENTS

12 MS. MAJOR: Thank you.

13 Good morning, ladies and gentlemen.

14 My name is Elizabeth Major. And I'm here on behalf
15 of Greenville County and the Solicitor's Office.

16 At the table is Trooper May. He's the arresting
17 officer in this case, and my investigator is Renee Kelly.
18 We're here today in the matter of the State v. Johnie
19 Devore. And Mr. Devore has been charged -- he is charged
20 with the crime of driving under the influence.

21 As the Judge told you, I bear the burden of proving
22 to you beyond a reasonable doubt that he is guilty of this
23 crime. Now, all crimes have certain elements. So what
24 are the elements of DUI? I have to prove to you that the
25 Defendant was driving a motor vehicle in the State of

1 South Carolina while under the influence of alcohol or
2 drugs to the extent that his ability to operate that
3 vehicle was materially and appreciably impaired.

4 So how am I going to do that? You're going to hear
5 from Trooper May. He is going to tell you that he was on
6 patrol on January 14th, 2012, on 385 in Greenville County.
7 He's going to tell you what he saw, that he observed the
8 Defendant's vehicle driving down the road. He observed it
9 swaying back and forth. He'll tell you that he pulled his
10 vehicle out onto the road to follow it onto 385. And he's
11 going to tell you what he saw.

12 He's going to tell you how he saw the Defendant's
13 vehicle continue to sway to the left and back to the
14 right, and back to the left and back to the right. And
15 after a while of investigating, he, finally, determined
16 that he needed to pull this car over and see what was
17 going on.

18 He's going to tell you what he saw, what he smelled,
19 and what he observed from the Defendant. And he's going
20 to tell you that he made a decision that he thought that
21 the Defendant was too impaired to operate that vehicle.

22 He'll tell you that he took the Defendant down to the
23 law enforcement center into the breathalyzer data master
24 room where he gave him the opportunity to provide a breath
25 sample. And he told him that if he didn't, his refusal to

1 provide that sample could be used against him.

2 Now, you're, also -- you're going to hear from
3 Trooper May. But you're, also, going to see two videos.
4 You're going to see the in-car video. And you're going to
5 see what Trooper May saw that night. You're going to see
6 the video, also, from the breathalyzer room. And you're
7 going to see Mr. Devore refuse that opportunity to provide
8 a sample.

9 I don't think this is an extremely complicated or
10 convoluted case. But, as the Judge said, it's important.
11 It's important to Mr. Devore, and it's important to the
12 State.

13 You brought your best tool in here with you, and
14 that's your common sense. I ask that you listen carefully
15 to all the evidence. And I ask that you keep an open
16 mind. And, at the end of this case, I will ask that you
17 return a verdict of guilty.

18 Thank you.

19 THE COURT: Thank you, Ms. Major.

20 Mr. Sumner.

21 MR. SUMNER: Yes, sir.

22 Thank you, Your Honor.

23 May it please the Court.

24 THE COURT: Yes, sir.

25 MR. SUMNER: Ms. Major.

1 Good morning.

2 My name is Steve Sumner. I had a chance to introduce
3 myself to you briefly. I practice law here in Greenville.

4 It is my pleasure to be representing John Devore.
5 John is seated to my left. I know he stood up just a few
6 moments ago. This is one of the most important days of
7 his life.

8 Now, this trial will be short. I will tell you that.
9 Nobody will miss supper tonight because of this trial.
10 But, please, don't think because it's short that it is not
11 one of the most important days of his life. This is a
12 criminal prosecution.

13 Now, Judge Hill touched on that a few moments ago
14 when he asked you if you had been a juror on a criminal
15 case before. This is not a civil case. This is not a
16 lawsuit over money, or over a boundary dispute, or
17 anything like that. It is much more serious than that.
18 And because it is so serious and because there are
19 permanent ramifications, lifelong ramifications that could
20 affect John, because of that, there's several important
21 ground rules. Judge Hill has touched on them. I want to
22 follow-up on them just for a second.

23 First of all, John is presumed to be not guilty. The
24 presumption is now and throughout this trial that he is
25 not guilty.

1 Number two, the State bears the burden of proof
2 solely in this case. He does not have to prove anything
3 to you. The State bears the burden of proof. Before you
4 could consider rendering a verdict of guilty, your verdict
5 would have to be unanimous. It is not enough for the
6 State to prove to six, or eight, or 10, or even 11 of you.

7 And what is the standard of proof? We know how
8 important it is. We understand that this is a criminal
9 case. It is the highest standard of proof of any court in
10 South Carolina, or of any court in this country, and that
11 is beyond a reasonable doubt.

12 Judge Hill will tell you that a reasonable doubt is
13 the kind of doubt that would cause you to hesitate to act.
14 And if you have any hesitation about whether or not
15 they've proven this case against John, then your verdict
16 should be and must be not guilty. He will tell you that.
17 And those are the ground rules that are in place.

18 He will tell you that it is not against the law in
19 South Carolina to merely consume alcoholic beverages and
20 drive a vehicle. That is not proof of drunk driving. It
21 is not proof of DUI. He will tell you that.

22 Now, you are going to get an opportunity -- and I am
23 not going to touch on John's testimony. But you are going
24 to hear from him. He will fully explain to you what
25 happened that evening. The order of the trial is going to

1 be that the Solicitor and Officer May, they go first.

2 Okay. And you will see John. You will hear him.

3 The videos may take an hour to an hour and a half.
4 You're going to see a lot. And you're going to hear from
5 him. Then we'll take a little break. And then you're
6 going to get to hear from John.

7 And I want to ask you this, this trial is no
8 different than a coin. Every coin has two sides. And
9 every case has two sides. And I know Judge Hill touched
10 on this, he said don't talk among yourselves, and don't
11 think about anything until you've heard from everyone.
12 Okay.

13 John will take the witness stand. He does not have
14 to. And he will look at you and he will tell you what
15 happened that evening. He will fully explain everything
16 to you. And I know you will give him your full attention.
17 I know that you will.

18 I'm going to do everything I can to keep this trial
19 moving crisply. I've already told you that we're not
20 going to be here past supper tonight. I'm not going to
21 ask any questions that I don't think need to be asked.
22 This isn't going to be a trial that goes on and on that
23 you might have seen on television or heard about. It's
24 not going to happen. Okay. I'm going to keep everything
25 moving just as quickly as I can. I respect your time. I

1 respect the fact that you're here.

2 And, at the conclusion of this case after you've
3 heard everything from everybody involved, then I'll have a
4 chance to come and talk with you again. And I am just
5 going to ask you to only follow your oath, and not think
6 about making your mind up now. Don't even think about
7 making your mind up until you've heard everything and
8 heard from Judge Hill. And that's all I can ask you to
9 do.

10 Thank you very much.

11 THE COURT: Thank you, Mr. Sumner.

12 MR. SUMNER: Yes, sir.

13 THE COURT: You may call your first witness,
14 Ms. Major.

15 MS. MAJOR: Thank you.

16 The State calls Officer Chad May.

17 THE CLERK: Sir, place your left hand on the Bible
18 and raise your right hand.

19 WHEREUPON,

20 DIRGEN CHADWICK MAY,
21 after first having been duly sworn, testified as follows:

22 THE CLERK: Please be seated.

23 Please state your name for the record.

24 THE WITNESS: Trooper D.C. May, or Dirgen Chadwick
25 May, excuse me.

1 THE CLERK: Thank you.

2 DIRECT EXAMINATION

3 BY MS. MAJOR:

4 Q Good morning, Trooper May.

5 Where are you employed?

6 A The South Carolina Highway Patrol under the South
7 Carolina Department of Public Safety.

8 Q How long have you worked for the highway patrol?

9 A I've been at the highway patrol just shy of eight
10 years.

11 Q How long have you been in law enforcement?

12 A Road work or law enforcement work for 10. I was with
13 the Greenville Sheriff's Office for just short of three
14 years before I was a trooper.

15 Q Okay. What was your role at the Sheriff's Office?

16 A I was a road deputy. I was a beat deputy. I
17 patrolled a beat here in Greenville County.

18 Q What type of training have you received to work at
19 the highway patrol?

20 A I've been through the highway patrol basic academy.
21 I, also, went through the basic academy as a deputy prior
22 to that. The highway patrol certified me in advanced DUI
23 detection and administration of standardized field
24 sobriety tests, to include some other certifications.

25 Q Are you certified to administer sobriety tests?

1 A Yes, ma'am, I am.

2 Q Okay. Just, if you could, briefly elaborate on your
3 DUI detection training.

4 A Like I said, advanced DUI detection, administration
5 of standardized field sobriety tests. And I've, also,
6 attended a course called ARIDE, which it's a little more
7 on drug impaired drivers, instead of alcohol impaired
8 drivers.

9 Q How often do you have to get recertified?

10 A Yearly.

11 Q Okay. Were you working on January 14th, 2012?

12 A Yes, ma'am, I was.

13 Q And did you come into contact with the Defendant?

14 A Yes, ma'am, I did.

15 Q And just tell us about that.

16 A That night, I was on patrol on Interstate 385 here in
17 Greenville in the city limits. I got behind an SUV
18 traveling southbound on 385.

19 Once I got behind that vehicle, it was noticeably
20 weaving in and out of its own lane and within the lane.
21 It was in the center lane. It would swerve into the far
22 left-hand lane all the way back into the right. And this
23 happened over a period of a mile or so, or more. And it
24 was just repeated. It was non-stop.

25 At which time, I made a determination that I needed

1 to stop that vehicle in order to figure out what was going
2 on, and if we had an impaired driver situation or not.

3 Q Was this in Greenville County?

4 A Yes, ma'am, it was.

5 Q Okay. Were you stationary?

6 A I was, actually, coming southbound out of the city
7 limits downtown on 385, right there on North Street coming
8 past the Bi-Lo Center. And I believe I got behind
9 Mr. Devore right around the Stone Avenue-291 area.

10 Q How long would you estimate that you followed
11 Mr. Devore?

12 A Probably from SC 291 all the way to Roper Mountain
13 Road, so a couple of miles, a couple to three miles.

14 Q What goes into your determination as to whether to
15 stop somebody after you've observed this type of driving?

16 A Well, a lot of times you see a driver or a vehicle
17 just bobble once. And that could be the result of
18 somebody just messing with the radio, cell phone, dropped
19 something, et cetera.

20 But if it becomes a pattern of this swerving in and
21 out of a lane, braking that's unnecessary, especially on
22 the interstate, there comes a point where that pattern
23 leads me to believe, okay, there's something other than --
24 this isn't just an isolated thing where somebody dropped a
25 cell phone on the floor, or turned a channel on the radio,

1 something else is going on. If you're turning the channel
2 on the radio, generally, that's not something that lasts
3 for three miles.

4 Q What goes into your decision as to the location of
5 where you stop somebody?

6 A The safety of the surrounding motorists that are
7 going to be passing by, my safety, and the safety of the
8 violator are very important when trying to determine a
9 location. And we're not always able to get somebody to
10 stop exactly where we want them.

11 But on the interstate, especially if we suspect we
12 may have an impaired driver or something like that, it
13 sometimes can be difficult and dangerous not only for me,
14 but for a violator and passing motorists out there on the
15 interstate if I'm standing on a white line on the side of
16 the interstate trying to conduct field sobriety tests, so.

17 Q Did you stop the Defendant for speeding?

18 A No, ma'am.

19 Q What time was this?

20 A I believe it was about a little after midnight, I
21 think, 12:15.

22 Q Okay. Did you turn on your blue lights on the
23 interstate?

24 A I turned them on -- I think I activated them on the
25 off ramp to Roper Mountain Road so we could get off the

1 interstate.

2 Q Where did the Defendant stop?

3 A We pulled into the parking lot of the Crown Plaza
4 Hotel there at Roper Mountain and Congaree Road.

5 Q So this was off the interstate?

6 A Yes, ma'am, it was.

7 Q Was this a safe location?

8 A A lot safer than the side of the interstate, yes,
9 ma'am.

10 Q Were any other cars around?

11 A Just cars that were parked sporadically through the
12 parking lot. But there was no high speed passing traffic,
13 or anything like that.

14 Q What happened when you stopped the Defendants's
15 vehicle?

16 A Once he pulled into a parking place, I exited my
17 vehicle. And as I started to approach his vehicle, the
18 driver's door immediately came open. And it opened about
19 that far, which is normally not normal at nighttime or
20 daytime, it doesn't matter. At which time, I drew my
21 weapon.

22 We've had some troopers and officers around the state
23 and the country that have been seriously hurt or injured
24 when that door comes open. Not that Mr. Devore was trying
25 to do that, but I didn't know who was in the car.

1 Once I made contact with Mr. Devore, I determined
2 that, obviously, we didn't have that type of situation.
3 And I re-holstered my firearm.

4 Q From what you could tell, did he know that you had
5 drawn your weapon?

6 A I don't think he ever realized I had done it, no.

7 Q How soon thereafter did you realize this wasn't a
8 dangerous situation?

9 A Probably within 15 to 30 seconds.

10 Q Okay. What happened after that?

11 A I spoke to Mr. Devore. I asked him where he was
12 going, where he was coming from, some general destination
13 questions. I asked him for the appropriate documents
14 regarding his vehicle, his driver's license. When I asked
15 him for those items, he kind of fumbled around in the
16 vehicle trying to find his driver's license, registration,
17 and insurance card.

18 Q Where did he say he was coming from?

19 A The TD Convention Center between 291 and Keith
20 Drive -- or Airport Road.

21 Q And where did he say he was going?

22 A I believe he said he was going home.

23 Q Okay. What did you notice about him when you
24 approached?

25 A As I talked to him there at the car, I detected a

1 strong odor of an alcoholic beverage coming from his
2 breath, his person. His eyes were bloodshot and glassy.

3 In the conversation I had with him, I determined it
4 was probably wise for me to go ahead and get him out and
5 do a little further investigation to determine whether he
6 was impaired or not. When I asked him to step out of the
7 car, he opened the door up, stepped out of the car. And
8 he, actually, stumbled back into the side of the car once
9 I got him out.

10 Q Did he catch his fall, or did you have to break his
11 fall, or --

12 A No. He just kind of stuck a hand out and kind of
13 caught himself up against the side of the car as he
14 stepped out. He was unsteady on his feet. His balance
15 was back.

16 Q Did you continue to smell the odor of alcohol?

17 A Yes, ma'am.

18 Q Did it look like he had spilled anything on himself?

19 A No, ma'am. He was dry.

20 Q Okay. Did you ask the Defendant if he had been
21 drinking?

22 A Yes, ma'am.

23 Q What did he say?

24 A He said that he probably consumed a glass of wine, in
25 those words, probably drank a glass of wine.

1 Q Did he say just one glass?

2 A At that point, yes, ma'am.

3 Q Was it -- did any other troopers arrive on the scene?

4 A Yes, ma'am. Trooper Cannon was -- we worked on the
5 same unit together. And most of time, we all kind of
6 travel a little close together. It was four of us total
7 on that unit at the time. And he just happened to be
8 close. And he knew that I was pulled over in that parking
9 lot. And he stopped by just to do a routine check. I
10 didn't really call for any backup. He just stopped to
11 check on me.

12 Q And how long was he there?

13 A I'd say Trooper Cannon was there no more than
14 probably three or four minutes, maybe a little longer,
15 give or take a minute or so.

16 Q Is that typical for other troopers to arrive on the
17 scene?

18 A Yes, ma'am. If I see another trooper on the side of
19 the road with a car stopped, or a wreck, or whatever
20 they're doing, we'll always kind of pull up -- at the very
21 least, we pull up, kind of give a thumbs up to make sure
22 they're okay.

23 Depending on what's going on, we may get out of the
24 car and stand around with them for a little while, and
25 make sure they're okay before we leave.

1 Q Did another trooper arrive on the scene?

2 A Yes, ma'am. Trooper Williams showed up just after
3 Cannon -- Cannon had left, and Williams and him kind of
4 switched roles there.

5 Q And did -- Trooper Williams, was he there for the
6 same purpose that Trooper Cannon was?

7 A Yes, ma'am.

8 Q What did you do next once the Defendant was out of
9 the vehicle?

10 A Once he was out of the car, I asked the Defendant to
11 submit to some field sobriety testing.

12 Q Did he?

13 A We did get one test completed, which was the
14 horizontal gaze nystagmus, or HGN test.

15 Q And what --

16 A It's an eye test.

17 Q Explain to us what that is.

18 A HGN, or horizontal gaze nystagmus, is the involuntary
19 jerking of your eyes that's caused by some substance,
20 usually, a central nervous system depressant or alcohol.
21 It's not something that your body controls. Your mind
22 can't control it.

23 So if you have consumed alcohol, your eyes will
24 normally jerk due to that consumption.

25 Q When you say "jerk," what do you mean?

1 A I compare it to if I took a marble and had a piece of
2 sandpaper laying up here on this bench and rolled that
3 marble across that sand paper. It kind of bounces across
4 that sandpaper. Your eye kind of does that same bouncing
5 motion. And that's what we're looking for on the HGN
6 test.

7 Q What are the different steps that you perform on this
8 HGN test?

9 A The first thing I do is make sure that they can focus
10 on the end of the stimulus. Usually, I use my finger.
11 Sometimes, I use the tip of my ink pen. It just depends
12 on which one I can get to. If I've got a heavy jacket on
13 or something like that, a lot of times I'll just use my
14 finger, because I can't get my pen. But the first thing I
15 do is make sure they can focus on the tip of that.

16 The next thing I do is make sure that they can,
17 actually, track it when I move back and forth. If they
18 have one eye that tracks and one that doesn't, then I'm
19 not going to carry on that test. Because they, obviously,
20 can't complete the test as somebody could that had both
21 eyes tracking that object, or my finger.

22 Q Okay.

23 A And once I've established that he can track it,
24 there's some other clues that I'm looking for that
25 indicate the presence of alcohol in a driver's system. As

1 I'm moving back and forth, the eyes will kind of do that
2 motion like I was describing with a marble bouncing across
3 sandpaper. It's kind of a jerking motion. And we call
4 that lack of smooth pursuit. Mr. Devore displayed lack of
5 smooth pursuit as I was doing that test.

6 The next thing we moved to after we've established
7 that is we'll go to maximum deviation. And that's,
8 basically, where I just hold my finger out here. You keep
9 your head still, and you just focus on the tip of my
10 finger with your eyes. Once you focus on the tip of that
11 finger out here, if there's alcohol present in your
12 system, like I say, some drugs can cause it, the eye will
13 tick. It will kind of bounce.

14 And then I do the same thing on the other side. I do
15 the same thing again on this side, and the same thing
16 again on this side. So a total of two times per eye.

17 And then from there, I move on to looking for this
18 same jerking motion at prior to 40 -- I look at the onset
19 of it prior to 45 degrees. So I'm not going to come all
20 the way out here. As I'm moving my finger to about
21 halfway to this point, if that nystagmus onset is prior to
22 that 45 degrees, that's a good indicator that there's a
23 level of alcohol in someone's system that would be
24 indicative of impairment and it wouldn't be safe to
25 operate a vehicle.

1 Q So how many different clues will you look for in that
2 test?

3 A Six..

4 Q Okay. Three per eye?

5 A Yes, ma'am.

6 And then once we've concluded the horizontal portion
7 of the test, we'll usually move on to a vertical portion
8 of the test, which we don't normally count that clue in
9 that six. But that vertical nystagmus is usually
10 indicative of somebody who's using drugs or has consumed a
11 large amount of alcohol.

12 Q Okay. Did Mr. Devore display the six horizontal
13 clues?

14 A Yes, ma'am.

15 Q Did he display vertical nystagmus?

16 A Yes, ma'am, he did.

17 Q Did you ask Mr. Devore if he had consumed any drugs?

18 A I believe I asked him about some medication.

19 Q What did he say?

20 A I think he said he takes blood pressure medication.

21 Q Would blood pressure medication cause nystagmus?

22 A Not to my knowledge, no.

23 Q What type of drugs would cause nystagmus?

24 A Usually, central nervous system depressants,
25 antidepressant, Xanax, some of those different medications

1 can.

2 Q The higher the level of impairment or the more
3 alcohol you consume, how does that affect the jerking?

4 A It gets worse. It gets more predominant most of the
5 time. We're all different. We all have different body
6 chemistry. Your eyes are different than mine. And so, I
7 mean, we look at it on a sort of case-by-case basis.

8 But there's a common thing of that jerking. There's
9 a large majority of us out there that we don't have a
10 natural nystagmus just sitting here. If I did it to you
11 right now, I would say just about all of you wouldn't
12 display a nystagmus. That's just my opinion.

13 Q Did -- was Mr. Devore able to equally track the
14 stimulus?

15 A Yes, ma'am.

16 Q Okay. Once you completed that test, what did you do?

17 A I offered to let Mr. Devore attempt some other tests.
18 There's three standardized field sobriety tests. The
19 horizontal gaze nystagmus, the one-legged stand test, and
20 the walk and turn test. And I, generally, do them in that
21 order, HGN, one-legged stand, and walk and turn.

22 Q Can you briefly describe, first, the one-legged
23 stand?

24 A The one-legged stand is, basically, keeping both of
25 your legs straight. You lift one of your feet about six

1 inches off the ground, pointing your toe out, looking at
2 your toe with your hands by your side, counting 1,001,
3 1,002, 1,003, and so on until asked to stop. We're
4 looking for you to do it for 30 seconds.

5 Q What are you looking for in the one-legged stand?

6 A That the suspect holds his foot in the air during
7 those 30 seconds. He doesn't drop it, doesn't sway,
8 doesn't hop, doesn't use his arms for balance.

9 Q And what's the third sobriety test?

10 A The walk and turn.

11 Q If you could, just briefly describe that.

12 A It's, basically, the defendant -- or the person we
13 suspect is driving under the influence will start with
14 left foot to their right and take nine heel-to-toe steps,
15 touching their heels to toes. I'm just using my hands as
16 an example. They'll take nine heel-to-toe stand steps.

17 And once they get to nine, do a series of small steps
18 in a circle and just return back to the opposite direction
19 they came from. Basically, a 180 and do nine more steps.
20 They count their steps out loud and touch their heels to
21 their toes. Don't step off line. Don't use your arms for
22 balance. Don't stop during the middle of the test.

23 Q And what are these tests designed to show?

24 A They're divided attention tests. Driving is
25 definitely a multi-tasking job. You've got a gas pedal, a

1 brake pedal, a steering wheel, a mirror, other cars around
2 you. You've got all these things you must think about and
3 do. And these divided attention tests help us determine
4 whether or not you've reached the point of no return as
5 far as alcohol consumption or drug consumption, whatever
6 the case may be.

7 Q So are you looking for more than just the physical
8 ability to walk heel to toe?

9 A Yes, ma'am. We're looking for more than just walking
10 across this room in a normal fashion. We're looking that
11 you can do more than one thing at a time.

12 Q Did you offer these tests to Mr. Devore?

13 A Yes, ma'am, I did.

14 Q Which one did you offer?

15 A Both.

16 Q Did he take those?

17 A Mr. Devore didn't opt to complete any more field
18 sobriety tests after the HGN test.

19 Q Is someone allowed to say, I don't want to complete
20 these tests?

21 A Certainly.

22 Q Okay. Did you tell the Defendant that he had the
23 right not to take these tests?

24 A I believe in so many words, yes, ma'am, I did.

25 Q Okay. What happened with you and the Defendant? If

1 you could, just describe the interaction.

2 A In our conversation and interaction with one another
3 after he completed the HGN test and, more or less, refused
4 to do the other tests, I did ask him to say his ABC's.
5 One of the reasons he said that he couldn't take the other
6 tests was because of an old ankle injury, or a leg injury.

7 So I asked him to say his ABC's. He did say his
8 ABC's. But based on the interaction that I had with him,
9 based on the evidence that I had in front of me, the
10 driving, the odor of alcohol, the stumbling around when he
11 got out of the car, the HGN test -- overall, based on the
12 facts I had in front of me, I made a decision to arrest
13 Mr. Devore that night for driving under the influence.

14 Q Would you say you got irritated with the Defendant?

15 A A little, yeah. We kept dancing around the field
16 sobriety testing. You know, I've interacted with
17 thousands of people as a trooper out here on the highway
18 day-to-day. And these tests are not like playing
19 basketball, or football, or doing some hard strenuous
20 labor or work. They're, actually, fairly simple for sober
21 folks.

22 And so we -- every time we'd talk about the test, we
23 would dance -- Mr. Devore would dance around the issue at
24 hand. And that was do you or do you not want to complete
25 the test. And it was never yes or no. It was, well, I

1 can't do this, or I can't do that. And, yes, ma'am, I did
2 get a little frustrated with him.

3 Q Have you stopped somebody before for suspicion of
4 DUI?

5 A Absolutely.

6 Q And do you arrest everybody that you stop?

7 A No, ma'am. As a matter of fact, I probably arrest
8 less than -- I've conducted more field sobriety tests and
9 let people go than people that I've done field sobriety
10 tests on and arrested.

11 Does that make sense?

12 MR. SUMNER: Your Honor, I would have to object, and
13 ask that it be stricken.

14 THE COURT: Sustained.

15 MR. SUMNER: And --

16 THE COURT: I sustain the objection.

17 MR. SUMNER: And I'm going to have to have a matter
18 outside the presence of the jury for just a second, Your
19 Honor.

20 THE COURT: Ladies and gentlemen, just go back to the
21 jury room. And don't talk about the case. I've arranged
22 to have some menus brought in.

23 I guess they're here?

24 THE BAILIFF: Yes, sir.

25 THE COURT: So you can order lunch while we're

1 discussing this matter. And continue to keep an open
2 mind.

3 Thank you.

4 (WHEREUPON, the jury was excused from open court at
5 approximately 11:48 a.m.)

6 THE COURT: Yes, sir, Mr. Sumner.

7 MR. SUMNER: Your Honor, I'm going to have to move
8 for a mistrial at this point. There's no way to unring
9 that bell, the question of bringing in other people that
10 he was giving field sobriety tests to, and I've let other
11 people go and I've not arrested them. There is no -- it's
12 an improper bolstering of credibility. It's away from
13 this case. And I think that -- there's just no way to
14 unring the bell on that. I mean, there just isn't a way
15 to do it. It's just not proper.

16 This isn't directed towards Ms. Major, of course, or
17 Trooper May. But that is getting beyond the scope. He
18 talked about thousands of other people that he's
19 encountered. And there's no way to cure that. I'm sorry.
20 I have to move for a mistrial at this point.

21 MS. MAJOR: Your Honor, I think that it's in his
22 training and experience, that he's worked on the roads for
23 10 years. And through his training and experience, I
24 think that he can testify as to his determination as to
25 what in his mind constitutes somebody being too impaired

1 to drive. I think that that goes to his experience.

2 THE COURT: All right. Well, the objection is
3 sustained. It is improper bolstering at this stage of his
4 credibility on direct examination.

5 I decline to grant a mistrial. I don't think it's
6 something that would undermine the fundamental fairness of
7 the trial, or such a piece of inadmissible evidence that
8 it can't be cured with a curative instruction, which I'll
9 be glad to give, if you want me to, Mr. Sumner. It's up
10 to you, sir.

11 MR. SUMNER: Yes, I guess.

12 I say that thousands of other people. It's only
13 about this case. Yeah, I would like it. I don't know --
14 again, I respect the Court's ruling. I don't know how you
15 can undo it at this point. But, yeah, go ahead and give
16 it a shot, you know. All right.

17 THE COURT: How long -- you said the video is about
18 an hour and a half?

19 MS. MAJOR: Your Honor, that in-car video is an hour,
20 and the BA room is half an hour.

21 THE COURT: I'm just trying to figure out about their
22 lunch that we're bringing in.

23 How close are we to getting to the in-car?

24 MS. MAJOR: Fairly close. Another five minutes.

25 THE COURT: Okay.

1 MS. MAJOR: I'm happy to play the video after the --
2 after they break for lunch. Whatever is in your --

3 MR. SUMNER: Why don't we let -- I'm just going to
4 suggest, why don't we let him finish. I'm sure I won't
5 have any other objections. And then we can just take a
6 lunch break and start with the video after lunch.

7 Would that be acceptable?

8 THE COURT: Well, I'm going to have the lunch brought
9 in. And if we order it now, I think --

10 MS. MAJOR: We can play the video.

11 THE COURT: We can play the first video, and then
12 we'll break.

13 All right. Let's take about five minutes while we
14 have the opportunity before we have the movie.

15 (WHEREUPON, a break was taken.)

16 THE COURT: Anything else before we bring the jury
17 back in?

18 MS. MAJOR: Nothing from the State.

19 MR. SUMNER: No, Your Honor.

20 THE COURT: Bring the jury in.

21 (WHEREUPON, the jury came into open court at
22 approximately 12:04 p.m.)

23 THE COURT: All right. Ladies and gentlemen, I told
24 you at the outset that part of my job was to rule on the
25 admissibility of evidence. And I told you what evidence

1 consisted of. And right before we broke, there was an
2 objection to some evidence. And I sustained that
3 objection. And that meant that the evidence was improper.

4 So to the extent there was any testimony about other
5 arrests by this witness, or the officer's previous number
6 of arrests, or testimony about field tests in regard to
7 other individuals, that was improper evidence. It should
8 not have been brought out, and it cannot be considered by
9 you. I'm striking it from the record in this case.

10 So it's no longer part of the evidence in the case.
11 And it would not be in keeping with your oath for you to
12 consider it, comment upon it, or take it into account
13 whatsoever in determining the facts of this case. So,
14 please, disregard that testimony. And you're instructed
15 to put it out of your mind and not give it any
16 consideration whatsoever.

17 With that, you may resume your examination,
18 Ms. Major.

19 CONTINUED DIRECT EXAMINATION

20 BY MS. MAJOR:

21 Q Trooper May, I think when we left off, you had said
22 that you had placed the Defendant under arrest?

23 A Yes, ma'am.

24 Q Okay. Did you read him his Miranda rights?

25 A Yes, ma'am.

1 Q And what are the Miranda rights, just overall?

2 A He has the right to remain silent. Anything he says
3 or does on the roadside, or any time during our contact
4 will be used against him in court. He has the right to
5 have an attorney. If he can't afford one, one will be
6 appointed to him free of charge.

7 Q After you placed the Defendant under arrest, did he
8 offer to do the tests?

9 A Once he had a pair of handcuffs on him, yes, ma'am.

10 Q And did you allow him to?

11 A I had offered up to that point, just roughly,
12 probably up to somewhere between 15 and 20 times, almost
13 begging him to do the tests. And it was one reason after
14 another why he couldn't do them, can't do them, you know.

15 Q Did the Defendant ever admit to drinking more than
16 the one glass of wine that he said?

17 A Once we were in the vehicle, it went from I probably
18 drank a glass of wine to, I drank a couple of beers to, a
19 glass of Crown Royal at the house before I went to the TD
20 Convention Center. So that definitely changed and wasn't
21 consistent with what he had originally told me.

22 Q Deputy May, I'm showing you what's been marked as
23 State's Exhibit No. 1. Do you recognize that?

24 A Yes, ma'am. That's a copy of my in-car video.

25 Q How do you know that's what it is?

1 A I have reviewed it. And my initials are right here
2 where I signed it, also.

3 Q Does it fairly and accurately depict what happened
4 that night?

5 A Yes, ma'am.

6 MS. MAJOR: Your Honor, at this time, the State moves
7 State's Exhibit No. 1 into evidence, and requests
8 permission to publish it to the jury.

9 MR. SUMNER: Without objection.

10 THE COURT: All right. It's in evidence.

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

13 (Pause.)

14 MS. MAJOR: I apologize, Your Honor.

15 Your Honor, if he can step down. I think he may be
16 in the way of the --

17 THE COURT: Yes, sure.

18 MS. MAJOR: Thank you.

19 (WHEREUPON, State's Exhibit No. 1 was played in open
20 court.)

21 MS. MAJOR: Your Honor, at this time, if we wanted to
22 break.

23 THE COURT: I just wanted to make sure --

24 Is the lunch here?

25 THE BAILIFF: I'll go see. I'll check real quick.

1 (Pause.)

2 THE BAILIFF: No. It's not here.

3 THE COURT: If you've got some more questions, just
4 go ahead. The lunch is not quite here yet.

5 MS. MAJOR: Sure.

6 BY MS. MAJOR:

7 Q Trooper, after you completed the tests, where were
8 you driving the Defendant?

9 A To the Greenville Detention Center.

10 Q What did you do once you got there?

11 A Once we got to the detention center, we go into the
12 breathalyzer or data master room. It's not called the
13 breathalyzer room. It's commonly called that by some. We
14 go in there and offer him the data master test.

15 Q And are you certified to administer the data master
16 test?

17 A Yes, ma'am, I am.

18 Q By whom are you certified?

19 A The State of South Carolina.

20 Q What does the data master machine show?

21 A It measures blood alcohol concentration by means of
22 taking a breath sample.

23 MS. MAJOR: Your Honor, at this time, the State would
24 move that the Defendant [sic] be recognized as an expert
25 in the administering of the data master test.

1 MR. SUMNER: He's certified. No question.

2 THE COURT: All right. He's qualified.

3 Go ahead.

4 BY MS. MAJOR:

5 Q Once you got into the room, what did you do?

6 A Once I get into the room, the first thing I'm
7 required by law to do is advise the Defendant -- or
8 suspect that he's being videotaped and audio recorded
9 while we're in that room, all of his actions,
10 verbalizations, all that's on tape. After that, I move to
11 advise that same defendant of his implied consent rights.

12 Q And, if you could, just briefly, generally, describe
13 what implied consent rights are.

14 A Implied consent is, basically, when you possess a
15 driver's license in the State of South Carolina, you're
16 giving implied consent that if you're lawfully asked to
17 submit to a blood alcohol test by a law enforcement
18 officer in this state that you will. And that if you do
19 not, there's some consequences for not blowing in the
20 machine.

21 Q Okay. Do you recognize what's been marked as State's
22 Exhibit No. 3?

23 A Uh-huh.

24 Q What is that?

25 A This is the Implied Consent Advisement that I'm

1 required to give a suspect in the data master room.

2 Q Is that what you read to the Defendant?

3 A Yes, ma'am. This is it.

4 MS. MAJOR: Your Honor, at this time, we move to have
5 the Implied Consent Advisement form admitted into
6 evidence.

7 MR. SUMNER: Just subject to my previous --

8 THE COURT: Yes, sir.

9 Subject to your earlier objections, it's in evidence.

10 (WHEREUPON, State's Exhibit No. 3 was admitted into
11 evidence.)

12 BY MS. MAJOR:

13 Q Did the Defendant indicate that he understood his
14 implied consent rights?

15 A Yes, ma'am. We reviewed them in the room and he
16 indicated to me that he understood what I told him.

17 Q Okay. What happens if the Defendant does not take
18 the test -- does he have the right to refuse the test?

19 A Yes, ma'am. He has the right to refuse it.

20 Q And what did you advise him if he so refused?

21 A If you refuse a data master test, a blood test, or
22 urine test in this state as a result of an arrest for DUI,
23 your license will be suspended for six months for the
24 refusal. And the refusal can, also, be used against you
25 in court.

1 MR. SUMNER: No objection to the next exhibit.

2 BY MS. MAJOR:

3 Q Do you recognize what's been marked as State's
4 Exhibit No. 5?

5 A Yes, ma'am.

6 Q And what is that?

7 A This is what I call the data master ticket, or slip.
8 That's what we used to call them on the old data master
9 machine.

10 It's got the Defendant's information on it, my
11 information, the ticket number. And it's got a series of
12 internal tests that the machine does to itself right here
13 to make sure that it's within these parameters before
14 allowing a defendant to submit to a test. But it just
15 indicates here that he refused the test.

16 Q Have any additions or alterations been made to that
17 document?

18 A No, ma'am. That's just like it was that night.

19 MS. MAJOR: Your Honor, at this time, we move the
20 South Carolina breath analysis report into evidence.

21 THE COURT: All right. It's in evidence --

22 MR. SUMNER: No objection.

23 THE COURT: It's in evidence.

24 (WHEREUPON, State's Exhibit No. 5 was admitted into
25 evidence.)

1 BY MS. MAJOR:

2 Q After the Defendant refused the test, did you
3 initiate a suspension?

4 A Yes, ma'am.

5 Q Okay. And do you recognize this document?

6 A Yes, ma'am. It's a South Carolina Department of
7 Motor Vehicle's notice of suspension.

8 Q Okay. And have any additions or alterations been
9 made to that document?

10 A No, ma'am.

11 Q So did you suspend the Defendant's license that
12 night?

13 A I submitted this form, yes, ma'am.

14 MS. MAJOR: Your Honor, at this time, we move State's
15 Exhibit No. 4 into evidence.

16 MR. SUMNER: Just subject to the previous objection.

17 THE COURT: Yes, sir. It's in evidence.

18 (WHEREUPON, State's Exhibit No. 4 was admitted into
19 evidence.)

20 MS. MAJOR: Your Honor, at this time, I would move
21 the video into evidence.

22 I don't know if you want to wait.

23 THE COURT: Yes. We'll go ahead and break for lunch.

24 I don't know why it's not here. It should be here
25 momentarily.

1 So just go back to the jury room. Don't talk about
2 the case. Continue to keep an open mind. And enjoy your
3 lunch. And we'll resume probably right around 2:00.

4 Thank you.

5 (WHEREUPON, the jury was excused from open court at
6 approximately 1:12 p.m.)

7 THE COURT: We'll start back at 2:00.

8 Thank you all.

9 (WHEREUPON, a lunch break was taken.)

10 THE COURT: The lunch got delayed, so now everybody
11 is ready to go.

12 Anything for the record before we resume?

13 MS. MAJOR: Nothing from the State.

14 MR. SUMNER: Nothing, Your Honor.

15 THE COURT: All right. Trooper, you can come back up
16 to the witness stand.

17 (WHEREUPON, the jury came into open court at
18 approximately 2:16 p.m.)

19 THE COURT: Yes, ma'am, Ms. Major.

20 MS. MAJOR: Thank you, Your Honor.

21 CONTINUED DIRECT EXAMINATION

22 BY MS. MAJOR:

23 Q Trooper May, just so we're all on the same page. You
24 were testifying that you had taken the Defendant to the
25 law enforcement center?

1 A Yes, ma'am.

2 Q And did you read him his implied consent rights?

3 A Once we were in the breathalyzer room, yes, ma'am.

4 Q And what was his decision whether to take the test or
5 not?

6 A Ultimately, he refused to submit to a data master
7 test.

8 Q And did you initiate a notice of suspension?

9 A Yes, ma'am.

10 Q And was this whole process captured on video?

11 A Yes, ma'am, as required by law.

12 Q I'm showing you what's been marked as State's Exhibit
13 No. 2. What is that?

14 A This is a copy of the data master room video
15 recording.

16 Q Okay. And how do you know that that's what that is?

17 A I reviewed it. And those are my initials right
18 there.

19 Q Have any alterations been made to it?

20 A No, ma'am.

21 MS. MAJOR: Your Honor, at this time, the State
22 requests that State's Exhibit No. 2 be admitted into
23 evidence, and requests permission to publish it to the
24 jury.

25 MR. SUMNER: Subject to the pre-trial matter we took

1 up, Your Honor.

2 THE COURT: It's in evidence subject to that, yes, sir.
3 (WHEREUPON, State's Exhibit No. 2 was admitted into
4 evidence.)

5 THE WITNESS: Your Honor, would you like me to step
6 down?

7 THE COURT: I guess so, yes.

8 (WHEREUPON, State's Exhibit No. 2 was played in open
9 court.)

10 BY MS. MAJOR:

11 Q Trooper May, we heard and we saw you just sitting in
12 there with the Defendant. What were you doing during that
13 time?

14 A There's an observation period that we must observe
15 that's 20 minutes.

16 Q And what was that beeping?

17 A The beeping noise?

18 Q Yes.

19 A Once that 20 minutes is up, the machine will start
20 beeping. And that's when it's giving the Defendant an
21 opportunity to submit a breath sample in that machine.

22 Q Did the Defendant have a right to change his mind
23 until the machine timed out?

24 A Yes, ma'am. Once it times out, it's over. But
25 during the time the machine is beeping, the Defendant can

1 still submit a sample during that time period.

2 Q How cold was it that night?

3 A It was cold. Probably 25, 30 degrees.

4 Q Okay.

5 A It was cold.

6 Q And what day of the week did this incident happen?

7 A The exact time would have been Sunday morning --
8 well, Saturday morning, but Friday night going into
9 Saturday morning.

10 MS. MAJOR: Please answer any questions Mr. Sumner
11 may have.

12 THE WITNESS: Yes, ma'am.

13 THE COURT: Cross-examination.

14 MR. SUMNER: Thank you, Your Honor.

15 Just a few questions.

16 We're going to take one second. The jury can stay
17 right there. We're going to move back the first video, if
18 we need to do that. I'm comfortable if the jury will just
19 give us 30 or 45 seconds.

20 THE COURT: Yes, sir.

21 MR. SUMNER: And I'm not sure that we'll need to go
22 to any of it, but we might. And I'm not real good here.

23 Thank you. Thank you, Ms. Major.

24 That's helping me a little bit. She's a little bit
25 younger than I am.

1 (Pause.)

2 CROSS-EXAMINATION

3 BY MR. SUMNER:

4 Q As I mentioned just a second ago, Officer May, just a
5 few questions in followup. We'll start with the breath
6 procedure. That's the last tape that the jury saw. John
7 was already under arrest for DUI at this point; is that
8 correct?

9 A Yes, sir.

10 Q Okay. And you advised him, as you told the jury,
11 both in writing and verbally several times that it was his
12 absolute right to decline the test; is that right?

13 A Yes, sir. That's correct.

14 Q Now, would you agree with me that the standard to
15 arrest someone is probable cause or suspicion; is that
16 right?

17 A Probable cause, yes, sir.

18 Q Probable cause. Now, I want to follow-up just for a
19 second with the last question that my colleague asked.
20 And that is you've already said it was 25 degrees,
21 roughly, I mean, it was cold?

22 A It was cold, yes, sir.

23 Q No question about that. And you -- Officer Williams
24 was there, but he had no real role in the case; is that
25 right?

1 A That's right.

2 Q He was there kind of bouncing around a little bit?

3 A Yes, sir.

4 Q Now, would you say that John appeared to be sluggish
5 to you? Would that -- is that a fair statement?

6 A Yes, sir.

7 Q Now, I want to talk a little bit about everything
8 that went into your decision to arrest John that evening.
9 You testified to the jury that he had, in your opinion,
10 bloodshot eyes. Was that something that was important in
11 your decision-making process?

12 A It was one of many observations I made, yes, sir.

13 Q Did it play a role in your decision?

14 A There was several observations that I made that
15 played a role in my decision to arrest him. It wasn't
16 just solely the fact that his eyes were bloodshot.

17 Q And if I asked that clumsily, I apologize. Did it
18 have a role in your decision?

19 A Yes, sir.

20 Q I'm going to hand you this photograph. I want to ask
21 you to step down here for just a second, if you would,
22 please.

23 A (Witness complied.)

24 Q Do you recognize this photograph?

25 A Yes, sir.

1 Q Is it a true and accurate representation of John that
2 evening?

3 A I'm not sure what time the picture was taken, but
4 that is the clothing he was wearing, yes, sir. That was
5 after the breathalyzer.

6 Q Right, right. This would have been a jail shot, or
7 booking photo. Would that be correct?

8 A Yes, sir. It could have been any time after I
9 submitted him to the detention facility. I don't have
10 anything to do with taking that picture.

11 Q I know that you don't. Do you feel comfortable
12 saying that's what it is, or would you rather not?

13 A No, that's him. That's him, absolutely.

14 MR. SUMNER: I would move this into evidence, Your
15 Honor, Defendant's Exhibit No. 1.

16 THE COURT: Any objection?

17 MS. MAJOR: No objection, Your Honor.

18 THE COURT: All right. It's in evidence.

19 MR. SUMNER: Thank you.

20 (WHEREUPON, Defendant's Exhibit No. 1 was marked for
21 identification and admitted into evidence.)

22 BY MR. SUMNER:

23 Q Now, in addition to that, you've said there were some
24 other observations that went into your decision to place
25 him under arrest. You said you felt like he was sluggish.

1 You talked about bloodshot eyes. You, also, talked about
2 this test right here; is that right?

3 A The HGN test, yes, sir.

4 Q Right, right. Where you --- and we saw that on the
5 tape. It's where you move your finger back and forth.
6 And that detects a presence of alcohol; is that right?

7 A Yes, sir, or other substances.

8 Q Right, which are not a part of this case at all?

9 A Right.

10 Q There's no question about that, is there?

11 A Huh-uh.

12 Q Okay. Now, this test, we noticed that his back was
13 turned to the camera, and that's fine. But it is a
14 subjective test, meaning that you make a determination of
15 whether or not someone's eyes are jerking? That's your
16 judgment to make?

17 A Yes, sir. It's my observation and my judgment to
18 make, yes, sir.

19 Q And we saw that test being given. Now, the next
20 thing that you asked him to do was to say his ABC's; is
21 that right?

22 A Yes, sir.

23 Q And he did that correctly?

24 A Yes, sir, he did.

25 Q And then there was some discussion. It was kind of

1 muffled in the video. The audio portion is a little bit
2 muffled, but there's a five or six-minute discussion
3 regarding some other tests -- or another test?

4 A Yes, sir.

5 Q And then, ultimately, you placed him under arrest?

6 A Yes, sir.

7 Q Okay. Now, did all of the things that I just went
8 through play a role in your decision?

9 A Yes, sir, to include other things, also.

10 Q Such as?

11 A The odor of an alcoholic beverage upon his breath and
12 his person, his stumbling when he exited his vehicle, and
13 the driving that led up to me stopping him in turn led up
14 to all that.

15 Q Fair enough. I don't want to shortchange you on that
16 answer at all. Let's go through those for a second. We
17 saw the driving on the tape. No question about that. The
18 odor of alcohol.

19 Now, you would agree with me that an odor of alcohol
20 is not proof of a DUI? It's not proof of drunk driving at
21 all, is it?

22 A That alone, absolutely not.

23 Q Absolutely not. And, actually, if any of us -- if I
24 took a big gulp of beer or wine right now and begin to
25 lean over and speak, I could have a very strong odor of

1 alcohol about me. Would you agree?

2 A I would agree.

3 Q And it wouldn't mean that I'm under the influence.
4 It would just mean simply that I've consumed an alcoholic
5 beverage?

6 A Yes, sir.

7 Q You've, also, talked about in your answer -- and,
8 again, I don't want to shortchange you, that -- the way he
9 got out of the car, was that important to you?

10 A It was, yes, sir.

11 Q Okay. I want to ask you this. We saw on the tape --
12 and I'm coming to a close right now. We saw on the tape
13 that there was, actually, another officer there, Josh
14 Cannon. Officer Cannon was there initially; correct?

15 A Yes, sir.

16 Q I know he didn't play a role in this case. I'm not
17 intimating that. But we see on the video that after
18 you've spoken, initially, with John, we see the blond.
19 And Officer Cannon has snow blond -- not snow blond, but
20 very Norwegian blond hair. We see him walk a little bit
21 around the car, and then get back in his car?

22 A Yes, sir.

23 Q And this was before John stepped out of the car; is
24 that right?

25 A Yes, sir. I believe it was.

1 Q It was. And this was before you administered the
2 first test; is that right?

3 A Yes, sir.

4 Q And you gave -- you knocked on the windshield of
5 John's car and you gave a signal?

6 A On the roof of the car.

7 Q On the roof of the car. Forgive me. On the roof,
8 you gave a signal, and you flashed something. What was
9 that you flashed?

10 A That was a five five...

11 Q What does five five mean?

12 A A 10 code for an impaired driver in highway patrol
13 was 1055. And I was alerting Trooper Cannon that
14 Mr. Devore was potentially an impaired driver, so that he
15 would know what he was going to be standing there with at
16 the time I asked him to exit the vehicle.

17 Q So the video shows your signal to Officer Cannon?

18 A Very clearly, yes, sir.

19 Q Very clearly before any of the things -- before he
20 got out of the car, before any of the other things you
21 mentioned, you're flashing to Officer Cannon that this is
22 an impaired driver?

23 A Only twice.

24 Q Forgive me. I don't mean to do that. Twice here.
25 And you knocked to get his attention. And I'm just going

1 to do it twice.

2 Let me see if I have any other questions. Again,
3 give me just one second.

4 A Yes, sir.

5 (Pause.)

6 MR. SUMNER: I don't.

7 Thank you.

8 THE COURT: Redirect.

9 MS. MAJOR: Yes, Your Honor, briefly.

10 REDIRECT EXAMINATION

11 BY MS. MAJOR:

12 Q Trooper May, when you were trained in DUI detection,
13 were you trained to observe clues with solely looking at
14 somebody's driving?

15 A Yes, ma'am.

16 Q And what kind of clues about somebody's driving would
17 lead you to believe that you may have an impaired driver?

18 A As we saw on the video that we watched, that swaying
19 back and forth. A lot of times an impaired driver,
20 whether it be drugs or alcohol, they tend to drift. And
21 then once they realize they drift, they pull back, but
22 they overcorrect causing them to go back in that opposite
23 lane.

24 In this case, he's in the middle lane. He steers
25 left, probably not realizing it's happening. And once he

1 realizes it, he's steering back right. And then he
2 overcorrects going back into that far right lane.

3 Q Okay. When you had done your signal about 55, had
4 you made contact with the Defendant?

5 A Yes, ma'am.

6 Q And had you smelled the odor of alcohol?

7 A (Witness nodded.)

8 Q Are some situations that you deal with more dangerous
9 than others?

10 A Absolutely.

11 Q Typically, in your experience, have -- would this be
12 more characteristic of a routine stop for suspicion of
13 DUI?

14 A Yes, ma'am. It was fairly routine.

15 Q Okay. Would you need backup for that?

16 A That's a -- that's one of those answers that you
17 don't know when something bad is going to happen and when
18 it's not. It's always good to have another officer with
19 you, especially at night late like that.

20 Q Do you like to -- why would you have told Trooper
21 Cannon that I think I have a drunk driver here?

22 A Well -- and not to say that this would have happened
23 with Mr. Devore. But in the past -- and Trooper Cannon
24 and I have worked together for a long time.

25 You have an impaired driver, you get them out of the

1 vehicle. You begin talking to them and an arrest decision
2 gets made. And then all of a sudden things break bad.
3 It's good for him to go ahead and have a heads up that
4 that potential is there. Like I say, not to imply that
5 Mr. Devore would have done that.

6 Q Right.

7 A But, as my partner, he needs to know what we're
8 dealing with before I get a gentleman out of a vehicle at
9 almost 1:00 in the morning.

10 Q And had you made a decision to arrest Mr. Devore upon
11 having a suspicion that he was driving under the
12 influence?

13 A Not at that particular time, no, ma'am.

14 Q But were you suspicious?

15 A Yes, ma'am.

16 MS. MAJOR: I don't have any further questions.

17 MR. SUMNER: Very briefly.

18 THE COURT: Yes, sir, Mr. Sumner.

19 RECROSS-EXAMINATION

20 BY MR. SUMNER:

21 Q I don't want to beat a dead horse. John didn't give
22 you any problems. There's no question about that; is that
23 right?

24 A That's correct.

25 Q And let's just get that out of the way.

1 A That's correct.

2 Q And you would agree with me that there can be more
3 than one cause of someone drifting within a lane, or
4 outside of a lane?

5 A Yeah.

6 Q Okay. Lots of things -- or some things that have
7 nothing to do with drunk driving. There could be a
8 distraction, a lot of different things?

9 A Yes, sir, dropping a cell phone, playing with a
10 radio. But, as I stated earlier, there was a clear
11 pattern on the video.

12 MR. SUMNER: I don't have any other questions.

13 Thank you.

14 MS. MAJOR: Nothing further.

15 THE COURT: Thank you, Trooper May.

16 THE WITNESS: Yes, sir.

17 THE COURT: You may call your next witness.

18 MS. MAJOR: Your Honor, the State rests.

19 THE COURT: All right. Ladies and gentlemen, we're
20 going to take a brief recess while we take up a legal
21 matter out here. And we'll resume in a few minutes.
22 Don't talk about the case. And continue to keep an open
23 mind.

24 (WHEREUPON, the jury was excused from open court at
25 approximately 3:06 p.m.)

MOTIONS

1
2 THE COURT: Any motions at this stage from the
3 Defense?

4 MR. SUMNER: Yes, sir.

5 THE COURT: All right. Yes, sir, Mr. Sumner.

6 MR. SUMNER: Thank you.

7 As we move late in the afternoon on Thursday, I would
8 make a motion for a directed verdict at this time. I'm
9 glad to give the Court argument, if you would find it
10 persuasive or helpful. But I'm sure it's not the first
11 time that you've heard that motion.

12 Secondly, just in case that's denied, just in case, I
13 would renew my motion again for a mistrial. I understand
14 a curative instruction was given. I did put my reasons on
15 the record that I felt like the bell could not be unring.
16 I appreciate the Court instructing the jury, but I did
17 want to renew that primarily for the record at this point.

18 THE COURT: Yes, sir.

19 MR. SUMNER: And those are the two motions I would
20 have.

21 Thank you.

22 THE COURT: All right. Well, I find that I can't,
23 obviously, weigh the evidence at this stage. But, based
24 on Trooper May's testimony and the video, I think there is
25 sufficient evidence to submit it to the jury viewing it in

1 the light most favorable to the State, which, of course,
2 I'm required to do.

3 So I respectfully deny your motion for directed
4 verdict. And I, also, note your objections to the failure
5 to grant a mistrial. And for reasons previously stated, I
6 decline to grant a mistrial.

7 Anything further?

8 MS. MAJOR: Nothing, Your Honor.

9 I think your law clerk had approached us about jury
10 instructions.

11 THE COURT: Yes.

12 MS. MAJOR: And I wanted to add if we could just get
13 a short instruction about the video and redactions, or
14 something to clear up that it wasn't a malfunction, but
15 that certain portions had been omitted because of
16 relevance.

17 MR. SUMNER: I agree. That's not something that we
18 addressed, Judge. I would just ask that you -- I would
19 agree that there needs to be something from the bench,
20 however, in your discretion where they're not to consider
21 it if the sound was low and/or off. I don't want to draw
22 too much attention to it.

23 MS. MAJOR: No. But I want to make sure it's clear
24 that it's not a malfunction.

25 THE COURT: I think that's wise. And I'll be glad to

1 do it.

2 And I've got the charge, if y'all want to look at it.

3 MR. SUMNER: That would be great.

4 Do you have more than one copy, Your Honor?

5 THE COURT: Yes. We can get another one.

6 MR. SUMNER: If you don't mind. I just want to
7 glance at it briefly. I don't want to say anything
8 incorrect when the jury is riveted.

9 We can share it.

10 MS. MAJOR: I've got copies of everything else.

11 THE COURT: Well, I'll tell you what, while y'all are
12 looking at that, let me --

13 Mr. Devore, just raise your right hand.

14 WHEREUPON,

15 JOHNIE ALLEN DEVORE, JR.,
16 after first having been duly sworn, testified as follows:

17 THE COURT: Have a seat, sir.

18 I'm just going to ask you some questions about your
19 right to testify, and make sure you understand what your
20 rights are in that regard, which I'm sure Mr. Sumner has
21 already gone over with you.

22 First of all, you understand that you could testify,
23 take the stand. And if you did that, you'd get to tell
24 your side of the story. But you'd, also, be subject to
25 being cross-examined, just as Mr. Sumner has

1 cross-examined the State's witnesses. And you could be
2 asked anything by the Prosecutor that might be relevant in
3 the case, or might bear on your credibility.

4 And is there any kind of impeachment?

5 MS. MAJOR: There's not, Your Honor.

6 THE COURT: So there wouldn't be any prior record
7 that would come in that the jury would find out about that
8 they otherwise would not find out about if you chose to
9 remain silent. But you, also, have the right, sir, not to
10 testify, and to remain silent.

11 And, as I've told the jury already, you don't have
12 any burden of proof. And if you chose to remain silent, I
13 would tell the jury you have the absolute right guaranteed
14 by the Constitution to remain silent, just as everyone
15 does in a criminal case. And they couldn't use that in
16 any way against you, or even discuss the fact that you
17 didn't take the stand during their deliberations.

18 So those are the consequences of testifying or not
19 testifying. It's a strategic decision you make, sir.
20 It's a personal decision. It's your right and nobody
21 else's. I'm sure you've talked to Mr. Sumner about it.
22 If you need more time to talk to him about it, I'll give
23 you more time to discuss it with him.

24 But have you understood all of my questions?

25 DEFENDANT DEVORE: Yes, sir.

1 THE COURT: Do you have any questions of me about
2 your right to testify?

3 DEFENDANT DEVORE: I don't have any questions, sir.
4 Thank you.

5 THE COURT: Does Mr. Devore plan to testify?

6 MR. SUMNER: He does. Yes, sir, he does.

7 THE COURT: I know you said so in opening. I just
8 wanted to make sure.

9 MR. SUMNER: He does.

10 And that would be our only witness. And I'm
11 comfortable after his testimony and cross-examination
12 moving right on, if the Court -- if my colleague is.

13 MS. MAJOR: I am. If you could take a restroom break
14 right now.

15 THE COURT: Yes. We'll take about five minutes and
16 let everybody get comfortable and come right back.

17 (WHEREUPON, a break was taken.)

18 THE COURT: Anything else before we bring the jury
19 in?

20 MR. SUMNER: Nothing from the Defense, Your Honor.

21 MS. MAJOR: Nothing from the State.

22 THE COURT: All right. Thank you very much.
23 You can bring them in.

24 (WHEREUPON, the jury came into open court at
25 approximately 3:25 p.m.)

1 THE COURT: All right. Ladies and gentlemen, the
2 State has completed their presentation of evidence. And
3 it is now the opportunity, as I've already said, not the
4 obligation, of the Defense to present any evidence they
5 wish to.

6 So, at this time, Mr. Sumner.

7 MR. SUMNER: Thank you, Your Honor.

8 May it please the Court.

9 Ms. Major.

10 We'd call John Devore to the stand.

11 Step right up and be sworn, John.

12 THE CLERK: Sir, if you'll, please, place your left
13 hand on the Bible and raise your right hand.

14 WHEREUPON,

15 JOHNIE ALLEN DEVORE, JR.,
16 after first having been duly sworn, testified as follows:

17 THE CLERK: Thank you.

18 Please be seated.

19 Please state your name for the record.

20 THE WITNESS: My name is Johnie A. Devore, Jr.

21 THE CLERK: Thank you.

22 DIRECT EXAMINATION

23 BY MR. SUMNER:

24 Q You are John Devore?

25 A Yes, I am.

1 Q I'm going to get a little background from you. And
2 then we'll talk about why we're here today. Okay.

3 A Okay. I'm John Devore. I'm 49 years old. For the
4 past 26 years, I've worked as a civil engineer. For the
5 last 14 of 26, I've worked as a sign superintendent in
6 engineering -- well, staff engineer of Greenville County.
7 And that's where I'm employed right now.

8 Q Okay. Now, you -- tell us. You're a supervisor now;
9 is that right?

10 A Yes. I'm a supervisor over the sign shop. And I,
11 also, do -- manage sidewalk construction, guardrail
12 maintenance, road striping. And I have five guys that
13 make and install all signs on Greenville County roads.

14 Q But you worked your way up through construction; is
15 that correct?

16 A Yes. I have a degree in construction. And I've got
17 a Masters in Public Administration. I've been working in
18 construction. I started in Florida where I went to
19 school, but I'm from here. I've been working in
20 Greenville since 1991. I work for a private firm, it's
21 called AECOM right now, but I'm with Greenville County
22 right now. I think I worked with AECOM for about eight
23 years, nine years. I've been with Greenville County for
24 14 years. I've had some stops in between, but I've been
25 with Greenville County for 14 years.

1 Q A little bit of this was covered through the State's
2 presentation, but you are married with one child, with a
3 daughter; is that correct?

4 A Yes. I've been married for 15 years. I live in
5 Spartanburg County -- well, I live in Greer, but the
6 Spartanburg County portion of Greer. I have a daughter
7 that's 12 years old. She goes to school here in
8 Greenville County.

9 Q Not to get too personal, John, but how tall are you?

10 A I'm 5'7".

11 Q And how much do you weigh?

12 A 205.

13 Q How much should you weigh, do you feel like?

14 A About 170, 175.

15 Q Okay. I'm going to get you to do something a little
16 bit -- I want you to step down for a second. And I want
17 the jury to see you walk back and forth for a few
18 minutes -- or a few seconds. Just walk over this way to
19 this fine bailiff right over this way, if you would.

20 A (Witness complied.)

21 Q And then walk back, if you would, please, and have a
22 seat for us.

23 A (Witness complied.)

24 Q I guess there's no good way for me to ask this. I'm
25 just going to ask it. Do you -- would you like to weigh

1 30 pounds lighter?

2 A Of course, I would. I fight every day to, I try to,
3 but it's tough. At 50, it's tough. I'm 49, so my
4 metabolism has slowed down a lot in the last five years.

5 Q Have you always been bow-legged, or is that --

6 A All my life. My knees don't touch.

7 Q John, I'm going to ask you to turn your attention to
8 why we're here today.

9 A Okay.

10 Q And we're going to talk about that evening a little
11 bit and that day. I'm going to ask you, are you guilty of
12 drunk driving, or driving under the influence?

13 A No. I am not guilty of drunk driving, or I wasn't
14 driving under the influence.

15 Q Was it excessive alcohol consumption that caused you
16 to have difficulty driving that was seen on the video?

17 A No. It definitely was not. It was more fatigue. If
18 you want me to describe it, I can tell you.

19 Q We're going to go through it right now.

20 A Okay.

21 Q Tell the jury, if you would, did you go to work that
22 day? Now, Officer May already testified it was a Friday.
23 Did you work that day?

24 A Yes. I worked that Friday. I have to be at work at
25 7:00. I live 40 minutes from the office. I live in

1 Spartanburg County. My office is in Travelers Rest. It's
2 a 40-minute commute. We work 10-hour days.

3 But, essentially, when I get in that truck and cross
4 into Greenville County, I'm at work. We do signs. I pay
5 attention to all the signs. I handle all the -- anything
6 that's on the right of way of the road besides the asphalt
7 is my responsibility. So as long as I'm in my truck and
8 I'm in Greenville County, essentially, I'm working.

9 Q Did you work a full day?

10 A Yes. I worked approximately 11 and a half hours that
11 day.

12 Q After work, did you go home?

13 A I went home. I had a meal with my wife and daughter.
14 And soon after getting home, probably about an hour and
15 half, that's when I left to head out to -- I had some
16 stops to make, one of which, eventually, was at the TD
17 Convention Center. We were having a Martin Luther King
18 celebration, or they were starting that day.

19 Q And you -- I guess it was around -- now, let me back
20 up. Did you eat supper that evening?

21 A Yes. I ate supper when I got home. I had eaten
22 lunch earlier that day and, of course, I had eaten
23 breakfast that morning.

24 Q Was it around midnight when you left the TD
25 Convention Center?

1 A I think it was more like 11:15. I think I got
2 stopped about 11:30.

3 Q And there's no question that's you're -- that's you
4 on the videotape, and that's you that had the interaction
5 that evening with Officer May?

6 A Yes, sir, without a doubt.

7 Q Okay. Now, would you agree with his testimony that
8 it was roughly 25, 30 degrees.

9 A I think it might have been colder than 25. It was
10 one of the coldest nights of the year. But, at a minimum,
11 the highest it could have been was 25. That was one of
12 the coldest nights of the year 2011, and 2012.

13 Q Did you -- when you got out, how long had you been at
14 the TD Convention Center approximately?

15 A I'd been probably there about three hours, give or
16 take, probably more, three and a half hours.

17 Q When you got in your vehicle, was it cold?

18 A It was cold. I got in the vehicle, of course, I
19 turned the heat on.

20 Q And then you proceeded to be driving home; is that
21 right?

22 A Yes. I, actually, drove up past -- I have a rental
23 house. I drove past there, which is why I got on a little
24 bit further back from 291.

25 Q Now, did your car warm up?

1 A Eventually, yes, it did. By the time I --

2 Q I'm talking about the cab. I'm not talking about the
3 engine. I'm talking about the inside cab of the car.

4 A Yes, yes. Before I got on 385, my car was warm.

5 Q Tell the jury what you can remember happening as
6 you're going down 385.

7 A Well, I was going down 385. I was, actually, pretty
8 tired. I was, actually, going down 385. I pretty much
9 thought everything was okay. And I'm driving. And all of
10 a sudden, I saw blue lights.

11 So I started pulling over. And, you know, I was
12 close to an exit. So I went over a little bit just to let
13 him know I was pulling over. I turned my signal on as
14 soon as I saw the lights. And then I said, well, let me
15 go to a place that's lit. And I thought that -- the hotel
16 was there, the Crown Plaza.

17 So I went to the Crown Plaza there. I went there for
18 safety purposes. You know, getting pulled over at night,
19 you're supposed to find a place. And the other thing with
20 the, you know -- I work -- I do traffic work. And I
21 understand about being on the side of the road. So any
22 time I get pulled over or have gotten pulled, I try to
23 pull over in a safe place for both me and the officer. So
24 that's what I did.

25 He came -- when he pulled over, it was a little bit

1 of time before he got to the car, which is why I opened
2 the door. Because I looked around to see, you know, when
3 he was coming to the car. And that's when I saw him, and
4 I closed the door back. Then, of course, he came to the
5 car. We had a little conversation. He asked me to get
6 out. I got out of the car. We went --

7 Q Let me stop you there for just one second.

8 A Okay.

9 Q You've seen yourself on the video getting out of your
10 vehicle. Was that any different than you normally get out
11 of your car?

12 A No. I did not stumble getting out of the car. I do
13 touch the side of the car. I am only 5'7". I was in an
14 SUV. It is a 4 by 4. It's a little higher than normal.
15 So my feet don't touch the ground when I reach out of the
16 car.

17 Q Now, you did speak with Officer May?

18 A Yes, sir.

19 Q Okay. Now, we saw you on the video. He asked you to
20 come over, and you did this; is that correct?

21 A Yes, sir.

22 Q Did you do everything that he asked you to do on that
23 test?

24 A I did everything he asked me to do. I thought I did
25 it satisfactorily. Apparently, I didn't. In the process,

1 my questions were, you know, if I pass these tests, can I
2 go home? I asked that question I don't know how many
3 times. There were multiple times I asked it, but I never
4 really got an answer.

5 He said he offered me the heel to toe test. That was
6 not offered. Had I been offered the heel to toe test, I
7 would have done it. I did not do the test where you stand
8 on one foot because if you asked me to do that now, I
9 probably can't do it. I'm about 30 pounds overweight.
10 I'm bow-legged, almost 50 years old.

11 The main thing, though, was I was shivering. I had
12 been shivering that whole time we were on that videotape.
13 When I was standing there, it looks like I was standing
14 still. I was shivering the whole time. And I cannot
15 stand on one foot while I'm shivering. I don't know if
16 anybody really can. Officer May did do it. You know,
17 but, like I said, I'm bow-legged.

18 The other thing, I had cowboy boots on. I don't wear
19 cowboy boots but about twice a year. The heels are kind
20 of high. And I had cowboy boots on that night. I did
21 express that to him.

22 A lot of that you can't hear on the video because
23 it's muffled. When I played the video, it wasn't muffled.
24 What you guys are hearing is muffled. What I hear on my
25 thing is a little bit more like what you hear in the

1 breathalyzer room.

2 Q All right. Now, he asked you to say your ABC's?

3 A Yes, he did.

4 Q And you did that?

5 A I did that. And I did it completely. I didn't miss
6 anything.

7 Q And you had asked him, at this point, I guess a time,
8 or more than one time, do I -- am I going to get let go if
9 I pass these tests?

10 A Yes, sir.

11 Q And, to your recollection, John, did Officer May
12 answer that question?

13 A I never got that question answered. That's why I
14 kept asking. It just seemed as if -- once I did the two
15 tests and did the ABC's, I was like, well, you know,
16 what's going on? It's kind of like you've already made
17 your mind up to arrest me. Is it going to make any
18 difference if I take another test?

19 But, like I said, I would have taken the heel to toe
20 test, but that was not offered.

21 Q Now, he had asked you in the earliest conversation
22 about alcohol consumption; is that right?

23 A Yes, he did, yes, sir.

24 Q And you told him that you had probably had a glass of
25 wine?

1 A Yes. That's what I told him. I told him I had a
2 glass of wine when I got to the TD Convention Center.

3 Q Later, you changed that?

4 A Yes, unfortunately, I did. I'm embarrassed about
5 that. I'm very sorry. I should have been more
6 forthcoming with the officer. But I guess I was in
7 protection mode.

8 Q Okay. And you, ultimately, corrected -- you never
9 denied you had consumed alcohol?

10 A No, I did not.

11 Q You just lightened it up?

12 A Right. I did not deny that I had consumed alcohol.

13 Q Now, ultimately, he -- we saw on the video that he
14 raised his foot, and you declined that. And you were
15 placed under arrest; is that correct?

16 A Yes, sir. After he put the handcuffs on me, I was
17 like, well, I'll take it, I'll take it, I'll take it. You
18 know, the exchange had gone on pretty long. And I'm
19 assuming he may have gotten cold by then, too, or
20 frustrated.

21 But I was a little surprised when he went ahead and
22 put me in handcuffs. The conversation had gone on pretty
23 long. I kind of thought that after being in the
24 conversation as long as we had that he would realize that,
25 you know, I wasn't impaired. But that didn't happen.

1 Q All right. And then we see you in the breathalyzer
2 room. That was the second tape; is that correct?

3 A Yes.

4 Q He advised you -- Officer May advised you multiple
5 times in writing and verbally that you had a right to
6 decline the test, or take the test; is that right?

7 A Yes, sir, he did.

8 Q And, again, obviously, not to beat a dead horse,
9 you're already under arrest at this point?

10 A Right. That is one of the reasons I didn't. I was
11 already under arrest. I was not given the opportunity to
12 take the other test besides the raising of your foot. I
13 thought I had passed the other two tests, the eye test. I
14 thought I had passed the alphabet test.

15 I was under arrest. And I'm kind of like, well, you
16 know, what's the use? My car has already been towed. I
17 didn't see the point. I don't necessarily understand the
18 machine. Honestly, quite frankly, I don't necessarily
19 trust the machine. There was nothing that went on that
20 was in my favor up to that point. So I didn't see the
21 need to do that.

22 Q John, as we -- and you were then arrested and you
23 were placed in jail; is that correct?

24 A Right. And I -- my main thing is I was arrested. My
25 fatigue was mistaken for intoxication. I had been up at

1 that point -- by the time I was arrested, I had been up 20
2 hours. I get up at 5:00. By the time I was arrested,
3 it's 1:00 in the morning. I had not been asleep at all.
4 And this is after working four 11 and a half hour days in
5 a row. This was the fourth day.

6 Q As I come to a close -- oh, there's one more thing.
7 Step down here just a second. This is a picture that's
8 already been -- step around, John, if you would.

9 A (Witness complied.)

10 Q This is a picture that has already been admitted into
11 evidence. I'm going to get you to step right over here so
12 everybody can take a look. This is a picture of you from
13 that evening; is that correct?

14 A Yes.

15 Q Okay. And is there anything that you would like to
16 tell the jury? I know we've heard some testimony about
17 your eyes. And the jury will get a chance to see this:
18 But do you --

19 A Well, they were saying my eyes were bloodshot.
20 That's the normal color of my eyes. That's the color of
21 my eyes right now.

22 Q And that's an accurate picture?

23 A That's an accurate picture. I don't know. I just --
24 my eyes weren't red. You heard my speech. My speech was
25 not slurred. You couldn't hear it on the road tape. But

1 if you were able to hear it more clearly, you would see
2 that my speech was not slurred during that period of time.
3 When I was standing on the side of the road, I didn't
4 move.

5 MS. MAJOR: Your Honor, I would just ask that he
6 return --

7 MR. SUMNER: Oh, yeah. That's fine

8 BY MR. SUMNER:

9 Q John, go ahead and have a seat.

10 A (Witness complied.)

11 Q And, please, continue with your answer. You had said
12 the first video is kind of muffled, no question about
13 that?

14 A Right. The first video is kind of muffled. And
15 that's just because of transfer from digital to analog.
16 But when I played it on my TV and my computer, it wasn't
17 quite as muffled.

18 But, basically, what I was saying is my speech was
19 not slurred. My eyes were not red. We didn't have any
20 problems communicating. I was very alert during that
21 period of time. And this is even after having -- like I
22 said, I was up for 20 hours. And this is after four 11
23 and a half hour work days. This is the fourth day I had
24 been up for 20 hours.

25 Q John, did excessive alcohol consumption cause you to

1 have fatigue, or what we've seen on video?

2 A No, it did not. I am not guilty of DUI, nor drunk
3 driving.

4 MR. SUMNER: I don't have any other questions.
5 Please answer any questions Ms. Major might have.

6 THE COURT: Cross-examination.

7 CROSS-EXAMINATION

8 BY MS. MAJOR:

9 Q Mr. Devore, we saw the video.

10 A Yes, ma'am.

11 Q And was that you driving on the video?

12 A Yes, ma'am.

13 Q And is that your vehicle?

14 A Yes, ma'am, it is.

15 Q And are you familiar with how it operates?

16 A Yes, ma'am.

17 Q Okay. And we watched the video. And would you agree
18 that you were weaving?

19 A Yes, ma'am. It looks like I was weaving somewhat. I
20 never did cross the line.

21 Q But you were weaving inside your lane and could not
22 maintain your lane; correct?

23 A I stayed in my lane. I did not cross the line. I
24 can say, yes, I did weave from side to side some. But we
25 must consider there are seven curves. In the period of

1 time that he started following me until the period of time
2 I got pulled over, we went around seven curves. There's
3 seven curves on 385. That doesn't show in the video.

4 Q Okay. I think that he followed you on the video, and
5 we can see going in and out. But you said that you had
6 been at the TD Convention Center; right?

7 A Yes, ma'am.

8 Q And were they serving alcohol at this function?

9 A Yes, ma'am.

10 Q And you admitted to drinking that alcohol; right?

11 A Yes, ma'am, over a period of three and a half hours.

12 Q And you first said that you just had one glass of
13 wine; correct?

14 A Yes. And I apologize for saying that. I was
15 incorrect.

16 Q And how much did you, eventually, admit to drinking?

17 A I told him I had two beers and a Crown and Coke.

18 Q And you first said just one glass of wine?

19 A Yes, I did.

20 Q And then it increased?

21 A It changed to two beers and a Crown and Coke, which
22 is what I had. I apologized for saying that. I'm
23 embarrassed for starting out that way. But I did tell the
24 truth.

25 Q But, yet, you did change your story?

1 A Yes, ma'am.

2 Q You say that your 5'7". And I'm 5'6". And you had
3 trouble getting out of your car?

4 A No. I'm sorry. Ma'am, I did not have trouble
5 getting out of the car.

6 Q You admitted to -- and when I say stumble, I don't
7 mean that you were going down, but you needed to use your
8 car as balance; correct?

9 A If we look at the video, it does not show me using my
10 car as balance. It shows me touching the car. But what I
11 did say --

12 Q Were you -- did you -- when you did that, when you
13 touched the car, weren't your feet on the ground --

14 A I touched the car because he was between me and the
15 car --

16 Q Right. And when you turned --

17 THE COURT: Wait. Wait. Let him finish answering
18 the question.

19 BY MS. MAJOR:

20 Q Go ahead. I'm sorry.

21 A When I got out of the car, Sergeant May was standing
22 to my right. My car was to my left. There was about 30
23 inches of space there. I just put my hand on my car, but
24 it was not for balance.

25 Q Okay. You say that you had been tired. And is that

1 what caused the weaving?

2 A Yes. That was fatigue.

3 Q Okay. You were taken to the data master room after
4 you were arrested?

5 A Yes, ma'am.

6 Q And you were given the opportunity to provide a
7 breath sample?

8 A Yes, I was.

9 Q And you were told that if you didn't provide that
10 breath sample that that could be used against you?

11 A Yes, I was told that.

12 Q And you refused; correct?

13 A Yes, I did.

14 Q You, also, asked the officer if he can just take you
15 home, didn't you?

16 A Well, at that point, I was just about under arrest.
17 And, like I said, my fatigue was being mistook for
18 intoxication. I mean, what am I going to do? I mean, I
19 asked. He could only say no.

20 Q How long had you been at that function? What time
21 did you say that you went there?

22 A I went there around 7:00.

23 Q Okay. And what time were you pulled over?

24 A It was around -- right at 11:15 or 11:30.

25 Q Are you sure it wasn't 12:15?

1 A Yes. I'm pretty sure. Because when he and I talked
2 about what time it was, I told him it was about 12:30. He
3 said it was a quarter till 1:00. So I was 15 minutes off.
4 At that time, we had been on the side of the road for an
5 hour.

6 Q Okay. You said that you had on cowboy shoes?

7 A Cowboy boots, yes, ma'am.

8 Q Cowboy boots. Was that going to impair your ability
9 to stand on one leg?

10 A That, among other things. The cowboy boots, the heel
11 is higher than I, typically, wear. You only have about
12 one and a half square inches touching the ground on the
13 back heel. The front end is curved up. So you only have
14 a small part of it under the ball of your foot that
15 touches the ground. I wear flats everyday and/or tennis
16 shoes.

17 Q Were these new shoes?

18 A They aren't new. I've owned them for probably eight
19 or 10 years. But I only wear them once or twice a year.

20 Q And you heard Officer May's testimony; correct?

21 A Yes, I did.

22 Q And you know that the eye test, that's something that
23 you can't control; correct?

24 MR. SUMNER: Your Honor, I don't know if it's good to
25 pit the testimony of one witness against another. I just

1 want to say that from a cautionary point of view.

2 THE COURT: Okay.

3 THE WITNESS: Yeah. I heard him say that. I asked
4 him about that when we were on the side of road. But I
5 don't know that he even -- the point was even considered
6 that we're standing out there in 20 degrees, and I'm
7 shivering for 20 minutes.

8 BY MS. MAJOR:

9 Q But he was out there, too, as well; right?

10 A Do you want me to answer that? You really want -- I
11 mean --

12 Q Y'all were both out there outside in the cold
13 weather; correct?

14 A Let me say it like this, I don't go skiing, most of
15 us don't. I get cold.

16 Q But y'all were --

17 A Do I need to go any further with that?

18 Q No, you don't.

19 But y'all were both out there; correct?

20 A Yes.

21 MS. MAJOR: I have no further questions.

22 MR. SUMNER: I don't --

23 John, you can step down.

24 I don't have anything further on redirect.

25 THE COURT: You can step down, Mr. Devore.

1 MR. SUMNER: And, Your Honor, that would conclude the
2 Defense's case.

3 THE COURT: Does the State have any reply?

4 MS. MAJOR: Nothing, Your Honor.

5 THE COURT: Ladies and gentlemen, we've reached the
6 point where we're going to go into the closing arguments.

7 And, yes, ma'am, Ms. Major.

8 MS. MAJOR: I waive opening.

9 THE COURT: Okay. Mr. Sumner.

10 MR. SUMNER: You waive opening on the law; is that
11 correct?

12 MS. MAJOR: Yes.

13 CLOSING ARGUMENTS

14 MR. SUMNER: Thank you, Your Honor.

15 May it please the Court.

16 Ms. Major.

17 Ladies and gentlemen, I'm going to keep my comments
18 brief just for a few minutes. I know that we're getting
19 late in the day. It is about time for you all to
20 deliberate and make a decision. Just a couple of points.

21 First of all -- and I know I've touched on these just
22 a little bit. If I've said anything that you found
23 offensive when I was asking questions of Officer May, you
24 can hold it against me. But, please, don't hold it
25 against John. Please don't do that.

1 This is -- even though this case has been pretty
2 short, it is -- it's a critical case. A criminal
3 conviction has lifelong ramifications --

4 MS. MAJOR: Objection, Your Honor. I believe that's
5 an improper argument.

6 MR. SUMNER: I'll move forward, Your Honor.

7 THE COURT: All right. Go ahead.

8 MR. SUMNER: But, as Judge Hill stated earlier, that
9 is what we have here is a criminal prosecution. The
10 ground rules are, therefore, reached and it's because
11 what's at stake.

12 His Honor will tell you that if you have any
13 hesitation about whether or not excessive alcohol was the
14 sole factor in what you saw on the videotape, then your
15 verdict should be and must be not guilty. He is not --
16 John is not charged with driving fatigued or tired. And
17 we all know in our common experience what happens. And
18 I'm going to talk about that in just a second. When --
19 we've all seen folks that are driving when they're tired.
20 And that's not what -- he is not charged with that. He is
21 charged with drunk driving. That's the criminal charge
22 that's being brought today.

23 And I want to take just a second to talk about it. I
24 want to just make a few points. I asked about the
25 weather. And what's the weather got to do with anything?

1 Well, we all know when it's 25 degrees -- and I think
2 everybody is in agreement on that, that it was very cold.
3 That your car is super cold.

4 John had worked all day, 11, 12 hours, 10 and a half,
5 whatever exactly it was. He goes home, eats super with
6 his wife and daughter, comes back and is at the TD Center.
7 And there's no question, four, three and a half hours at
8 an event. No question that he consumed alcohol. No
9 question that, under the testimony you've heard, he ate
10 super and was on a full stomach. But when you get outside
11 and it's that cold, you crank up the heat. There's no
12 question that you do that. We've all done it.

13 But what happens when you're tired? You start to
14 fight it. And I think we've all done that. When you've
15 been driving late at night, somebody puts the window down.
16 I mean, you start to really get fatigued. And that
17 matches up -- that is a very reasonable explanation for
18 what we saw.

19 John is moving in his lane. He's moving here and
20 there. It's not erratic. It's not all over the place.
21 Just like John said, you know, 385 is a lot more curvy
22 when we look at it than we think initially. And it makes
23 total sense that -- it is a reasonable explanation for
24 what happened is that he's in there. And he said he went
25 by, I think, a rental home and then went -- or a rental

1 property. And then he went back out on the road. It is
2 very natural to believe and to feel that it is possible
3 that John was just heavily fatigued. That's not proof of
4 drunk driving, or proof of DUI. It is a very reasonable
5 explanation.

6 Judge Hill will tell you that if there is a
7 reasonable explanation, if you've got an explanation that
8 you feel is reasonable that is not a criminal conviction
9 that your verdict should be and must be not guilty.
10 Because all benefits of the doubt go to John. This isn't
11 personal at all against anybody at this table. That's not
12 what I'm talking about. But Judge Hill will tell you
13 that.

14 Now, I made the point a little bit ago about this.
15 And I didn't mean to flash my hand too many times. But
16 it's undisputed, we saw it on the video, that Officer
17 May -- and it's all professional and nothing else. And we
18 don't have anything this high. But we saw it, he taps on
19 there to the blond officer and he says this right here.
20 Okay.

21 Now, what does that mean? It, certainly, means that
22 before John has gotten out of the vehicle that Officer May
23 knows where he may be headed. And that is not anything
24 against Officer May. It's just something we've all done
25 in our common experience, when we expect to see something,

1 when we're looking to see something, often times, we do
2 see it.

3 And, just as John said, I think -- and it was -- he
4 just said I think my fatigue and, you know, the state I
5 was in was mistaken for intoxication. It was mistaken for
6 being drunk and driving. And that's not what happened.
7 Is it very -- would it be a possible mistake? Absolutely.
8 Does that mean that there's anything negative that I'm
9 saying about Officer May? No, not at all. It's just
10 there is no question that that is what is on the video.
11 Without any question whatsoever, he taps on the top of the
12 car, 55. What is that? That's code for drunk driver.

13 Now, why is that important? That's before John has
14 gotten out of the car. That's before John has done any of
15 the tests. I'll talk about that in a second. That's
16 before any of that happens. 55, right here. That would
17 concern me. As a juror, that would concern me.

18 John gets out -- and you all will have to judge it
19 for yourself. It didn't appear to me that he was leaning
20 hard against the car. John explained that fully. He gets
21 out of the vehicle. Of course, I asked him -- I happen to
22 be John's age. I happen to be 49. And after a long day,
23 we're stiff. We're not like we were at 19 or 29. We're a
24 little bit stiffer. And it's not that unusual for any of
25 us to move just a little -- for me to move just a little

1 bit slower. John gets out.

2 Now, what did I notice about this test? And I wrote
3 these things down as we saw it up there. John understood
4 the test. He kept his head still. He stood straight.
5 Remember that? I mean, he was ramrod straight, hands
6 right by his side. He didn't sway, none of that for, at
7 least, 90 seconds.

8 Now, what do we know about the test? Officer May --
9 it just determines whether or not somebody has got alcohol
10 in their system. Well, John -- we know that. That's
11 not -- there's -- that's not a mystery. I mean, there's
12 no question about that. We know that -- through Officer
13 May's testimony that the odor of alcohol is not proof at
14 all. Judge Hill will tell you that.

15 So, at this point, we've got John standing like this,
16 doing what -- now, we saw that on the video. We've got
17 Officer May. We have another officer there. They've got
18 jackets on. They're kind of doing this kind of thing like
19 that that you see people do when they're cold. John does
20 it. The next thing John is asked to do is to say his
21 ABC's. He nails that. He passed that test.

22 John testified, yeah, we know the video was muffled.
23 I mean, there's no question that we couldn't hear
24 everything that was said by everybody. But John said -- I
25 asked him -- and there was a lot of conversation between

1 he and Officer May.

2 And he asked him, am I going to go home if I pass
3 this test? And there's no question. I think we can all
4 agree that a lot of conversation occurs between them out
5 there for seven or eight minutes before John is arrested,
6 seven or eight, at least. I mean, they're talking back
7 and forth. There's no question there's a lot of
8 conversation going on.

9 John is then arrested. And he's taken down. And
10 Officer May told him -- there's no question, first of all,
11 John told you, at this point, my car is towed. I'm in
12 cuffs. I'm -- you know, I'm under arrest for DUI.
13 There's really nothing that -- there's nothing else for me
14 to do at this point. Taking this test isn't going to
15 change anything. We know that's not going to change
16 anything. He's already under arrest. And so, at that
17 point, John said, I felt a little bit of frustration as
18 well.

19 Officer May told him verbally, and told him in
20 writing. Judge Hill will tell you, it's absolutely his
21 right to take the test or decline the test. A six-month
22 suspension was initiated that evening because of the
23 choice that John made. You don't have to hold it against
24 him at all. You do have the right to know he was offered
25 the test just like he was offered the other tests on the

1 side of road. He did two, and he declined the others
2 lawfully. And he declined the breath test lawfully.

3 There's no -- again, as I come to a close, I got John
4 down here for a couple of reasons. First of all, you
5 know, I know he's sitting right over there. And he's my
6 client. And it's my pleasure to represent him. And I
7 appreciate him giving me the opportunity.

8 John could lose a little bit of weigh. There's no
9 question about that. What does that mean? What does that
10 matter? You know, you get a little more stiff. I mean,
11 I'm not going to ask anybody to raise their hand if the
12 doctor said you ought to lose some weight, it would help
13 your joints. We all know that. Certainly, in my case, it
14 would. John is 30 pounds, plus or minus, heavier than he
15 should be.

16 He walked -- the reason I wanted you to see him
17 walking is because he walked just like he walked today.
18 John is very bow-legged. There's no question about that.
19 So it can be a little bit mistaken that he's kind of maybe
20 kind of that weeble wobble. I guess that shows how old I
21 am. There used to be a commercial about weeble toys that
22 do this. John rocks a little bit when he walks. But he
23 does that naturally because he's bow-legged.

24 I got him to put himself beside this picture. And I
25 want you to consider this when you go back. Because I

1 happen to totally agree with John, his eyes look just like
2 they look today. They're a little -- you know, they
3 just -- they do. And you'll have a chance to look at this
4 in the jury room.

5 But I think, at this point, I just want to say that I
6 asked Officer May again, what is the standard to place
7 somebody under arrest? He's got to make that decision
8 that evening. What is the standard? Probable cause,
9 suspension. The standard to prove him guilty in a court
10 of law is much higher than that. This is not an attack at
11 all on Officer May whatsoever. And I hope that it's not
12 perceived as that by anybody in the jury box whatsoever.
13 It's not.

14 But when you step back from it and you say, wait a
15 minute. John took the stand and he didn't have to. He
16 wanted to tell you what happened. He told you he made a
17 mistake. And he said, listen, I should have been candid
18 about how much alcohol I consumed in a three- or four-hour
19 period. He told you that. And he said he was embarrassed
20 about that. And I know that he is.

21 But there's, also, no question from Officer May's
22 testimony, from John, that there was never a threat toward
23 Officer May, or anything like that. I understand why he
24 did what he did, but nothing came from that. John
25 respected his authority.

1 His Honor will tell you that mere proof of
2 consumption of alcohol is nowhere near proof of drunk
3 driving. It's not. Was excessive -- has the State proven
4 excessive alcohol consumption solely and completely,
5 that's what caused it, or have you been offered a
6 reasonable alternative?

7 Everything that's come out has been for a reason.
8 And I told you at the beginning, I said, I'm not going to
9 ask any questions or do anything that doesn't have any
10 purpose on it. That's why I asked about the weather. And
11 we saw that Officer May and the other officer had the big
12 heavy coats on. We saw that. There's no question they
13 were kind of jumping around. When you've been up too
14 long, and you're driving, and you're tired, these are the
15 kind of things that happen. And I think that there has,
16 certainly, been an alternative explanation that justifies
17 completely a verdict of not guilty.

18 His Honor will tell you that the -- what the burden
19 is on the State. And he will tell you that if you have a
20 sincere and honest hesitation, if you have any hesitation
21 at all, he will tell you that if you have a hesitation,
22 then your verdict should be and must be not guilty.
23 That's because of everything that's at stake in a criminal
24 prosecution.

25 And I hope, as I finish up, I'm going to be -- you're

1 going to see me over there. I don't get to get up again.
2 That's just the rules of the Court. I don't get to get up
3 again. I'm going to want to. I'm going to say what about
4 this, and what about that? I can't do anything. But what
5 I can do is this. If you have a hesitation, if you have a
6 concern about whether or not a criminal conviction should
7 be there, then you tell the other jurors why your vote is
8 not guilty. You tell them, I will stay here until the
9 cows come home. I am not going to do this. It's not
10 personal. It's the fact that I heard another reasonable
11 explanation.

12 John took the stand. He told us what happened. It's
13 reasonable what happened. And they've not proven that
14 he's guilty of drunk driving. He's not on trial for being
15 sleepy and for maybe not driving when he was too sleepy.
16 That's not what he's on trial for.

17 So, please, make sure and tell your fellow jurors why
18 your vote is not guilty as to this criminal charge.

19 Thank you.

20 THE COURT: Thank you, Mr. Sumner.

21 MR. SUMNER: Yes, sir.

22 THE COURT: Yes, ma'am, Ms. Major.

23 MS. MAJOR: Ladies and gentlemen, thank you for your
24 time and for listening. I didn't think this was going to
25 be an extremely long, or complicated, or convoluted case.

1 And I hope that we have given you everything that you need
2 to make a fair decision.

3 This case is about following the rules of the road.
4 And we all have to follow the rules of the road, or else
5 our roads would just be chaos. And driving is about
6 multitasking. There's lots of things to pay attention to,
7 lots of things that you have to be able to do to safely
8 operate a motor vehicle. And if you've had too much to
9 drink, you can't do those things.

10 On January 14, 2012, the Defendant did not heed the
11 warnings. He chose to drink and drive to the extent that
12 his ability to operate that motor vehicle was materially
13 and appreciably impaired. As I told you at the beginning,
14 the elements of DUI are that the Defendant was driving a
15 motor vehicle in South Carolina under the influence of
16 alcohol to the extent that his ability to drive was
17 materially and appreciably impaired.

18 What does that mean? Materially means that it made a
19 difference. And appreciably means that you can notice it.
20 And impaired means something less than 100 percent. So
21 it's a difference that you can notice.

22 So I'd like to go over all the evidence that we have
23 here. The most important evidence that you saw came at
24 the very beginning of that videotape. You can see the
25 Defendant not being able to maintain his lane. He goes

1 over to the right and then to the left, and then to the
2 right and then to the left. And, yeah, there were some
3 curves, but this happened on the straight-away as well.
4 You can see him slamming on brakes. And Trooper May gets
5 behind him and records this.

6 And you heard Trooper May tell you what goes into his
7 decision about when to, finally, decide to pull somebody
8 over. And he wants it to be a safe environment for the
9 person he's pulling over, as well as himself. And I think
10 that he did that in this case. And they did pull into a
11 parking lot. This driving is a pattern.

12 And Trooper May got behind him and investigated this.
13 He didn't make a rash decision. He didn't see one little
14 swerve and think, oh, there, I'm going to go get him. It
15 was a continuous pattern. It was not a fluke. It
16 continued.

17 You saw in the video the Defendant get out of his
18 car. And I encourage you to watch -- these videos are in
19 evidence. So you are free to watch them as long and as
20 often as you want. The Defendant gets out of his car.
21 And he doesn't completely fall down, but he has trouble
22 maintaining his balance. He uses his hands. And his feet
23 are on the ground when that happens. Trooper May notices
24 this.

25 Let me back up first. Trooper May has had experience

1 on the road. You cannot ask an officer -- and this goes
2 to our common sense. If we know something is true, we are
3 not going to just disregard what we know. The officer had
4 his suspicions when he saw the vehicle and approached
5 Mr. Devore and smelled him. And he tells his trooper I
6 think I have a 55. I've got a guy who, I think, may be
7 under the influence of alcohol. We want the other
8 troopers to know what's going on so that they're not
9 totally blind.

10 Officer May doesn't arrest him right then. He
11 continues the investigation. He tells you that he smells
12 that odor of alcohol, that the Defendant reeked of that
13 odor of alcohol.

14 He then administers the horizontal gaze nystagmus
15 test. And he told you it's something that you can't
16 control. It doesn't matter whether you're an Olympic
17 athlete or 80 years old. You can't -- it's something that
18 you can't control. And it's caused by alcohol. And not
19 only did he have the horizontal nystagmus, he, also, had
20 the vertical nystagmus. You heard what the Defendant
21 said. And I know that it's a little muffled, and I'm
22 sorry for that. We don't have the highest technology, I
23 guess, in these videos.

24 The Defendant admits to drinking. The Defendant
25 admitted that he had been at this function at the TD

1 Convention Center from 8:00 that morning [sic] is what he
2 said on the video, but then he testified he had been there
3 at 7:00. So he had been there several hours, a place
4 where they were serving alcohol. He first said that he
5 had one glass of wine. He asked the officers for my
6 safety and your safety, can I get somebody to pick me up?
7 He asked the trooper to take him home. He apologizes and
8 asked for compassion. And he seems confused at the end of
9 the video.

10 And, in the video, you can -- I invite you to go
11 watch it again. And you can see there's a shadow over the
12 Defendant's head. I mean, you can see the Defendant's
13 face. He appears lethargic and confused.

14 And I'd like to touch on this fatigue issue. He had
15 just left the convention center or, according to him, his
16 rental property that night. According to him that night,
17 the convention center. He had not been driving all night.
18 It had not been warm in his car all night. He had just
19 left there. And he never tells the officer I know I was
20 weaving. I was dozing off. No, he doesn't know why he's
21 being pulled over. He doesn't remember weaving.

22 Ladies and gentlemen, he is then given the
23 opportunity to go and provide a breath sample. And
24 fatigue does not cause your BA -- your blood alcohol level
25 to rise. Alcohol causes that. The Defendant is given the

1 opportunity to take that test. He's told that it will be
2 used against him, and that he faces a license suspension.
3 And he doesn't take it. That's the choice that he made.
4 And the choice that he made was not to take it. He says
5 to the officer, you know, I'm not taking that test.

6 I know that the videos seem long. And I know that
7 some of the testimony and some of the videos that you may
8 have seen may not have seemed important to you. But
9 there's 12 of you. And there may be one piece of evidence
10 that resonates with one of you while another person finds
11 it's less significant. But I wanted to give you the full
12 picture, and everything that we have, and everything that
13 happened on that video, and everything that happened that
14 night.

15 You heard Officer May testify about the field
16 sobriety tests, and about how they're divided attention
17 tests. But, ladies and gentlemen, the ultimate --
18 obviously, a field sobriety test is being able to safely
19 operate your vehicle. And you can tell from that video
20 that he cannot do that.

21 As Mr. Sumner said, it's not against the law to drink
22 and drive, and it's absolutely not. The smell of alcohol
23 alone is not a basis for arrest. The officer took all of
24 the things that he had observed, smelled, seen, and made a
25 decision that the Defendant was too impaired to operate.

1 that vehicle. It, also, doesn't mean that you have to be
2 stumbling down drunk. You can still be too impaired even
3 if you are able to stand up.

4 The Judge is going to charge you on the law, and
5 charge you on what proof beyond a reasonable doubt is.
6 And I submit to you that we have proven this case beyond a
7 reasonable doubt. And I ask you to return a verdict of
8 guilty.

9 THE COURT: All right. Let me just see the lawyers
10 up here real quick for one second.

11 (WHEREUPON, a bench conference was held.)

12 CHARGE ON THE LAW

13 THE COURT: Ladies and gentlemen, thank you for your
14 patience. You've heard all the evidence you're going to
15 hear in the case. And you've heard the lawyers closing
16 arguments. And it is now my duty to instruct you on the
17 law that applies to the facts of this case. It is your
18 duty to determine the facts from all the evidence in the
19 case.

20 And to those facts, you must apply the law as I give
21 it to you. And you should not be concerned with what the
22 law should be, but with what it is. You must not be
23 influenced by any personal likes or dislikes, or undue
24 sympathy, or biases, or prejudices. And that means you
25 must decide the case solely on the evidence before you and

1 according to the law. And you will recall you took an
2 oath to do just that this morning when we began this case.

3 In following my instructions, you must follow all of
4 them and not single out some and ignore others, because
5 they're all equally important. And, please, do not read
6 into these instructions or into anything I may have said
7 or done during the course of this trial as any indication
8 to what I think the facts are, or what your verdict should
9 be. Because, as I told you at the beginning, through our
10 system of justice and Constitution, you are the sole and
11 exclusive judge of the facts.

12 You decide what the facts are by evaluating and
13 weighing the evidence you heard. There's no way for you
14 to weigh evidence in the literal sense. I'm, certainly,
15 not going to give you a set of scales to take back into
16 the jury room with you to conduct experiments. That
17 wouldn't be practical. You simply weigh and evaluate the
18 evidence by using your good common sense, your life
19 experiences, and your capacity for reason and sound
20 judgment.

21 Now, I told you, also, that evidence consists of two
22 things, sworn witness testimony and exhibits. And nothing
23 else is evidence. I told you the arguments and statements
24 by the lawyers are not evidence, because they are not
25 witnesses. And any testimony that's been excluded or

1 stricken is not evidence, and is not anything you can
2 consider in any way in determining the facts of this case.

3 Now, ladies and gentlemen, we did have an exhibit in
4 this case that consisted of a video -- actually, two
5 videos. And the parties agree that there are certain
6 portions of those exhibits that are either inaudible or
7 muffled. And to the extent that they are inaudible or
8 muffled, they don't constitute evidence in this case, and
9 they shouldn't be considered by you in any way. So don't
10 draw any conclusions from the fact that there may be
11 silent portions of the videos or hard to hear portions of
12 the videos. That part of the video is simply not evidence
13 and cannot be considered by you as evidence.

14 Now, ladies and gentlemen, there are, also, two
15 sources of evidence. And what I'm talking about now is
16 direct evidence and circumstantial evidence. Direct
17 evidence is the testimony of someone who claims to have
18 direct and actual knowledge of a fact, such as an eye
19 witness.

20 Circumstantial evidence is indirect evidence. Put
21 another way, circumstantial evidence is proof of a chain
22 of facts from which you can find another fact exists, even
23 though it has not been proven to you directly. The law
24 makes no distinction between the weight or value to be
25 given to either direct or circumstantial evidence. You're

1 entitled to consider both kinds. And there's not a
2 greater degree of certainty required of one over the
3 other.

4 Now, ladies and gentlemen, I told you, also, at the
5 beginning that as the judges of the facts, you would have
6 to by necessity determine or gauge the credibility of all
7 the evidence. And I gave you some guidelines for doing
8 that. I'm not going to go back over that, because I know
9 you heard me the first time.

10 But I will tell you that in determining
11 believability, you may consider everything a witness says,
12 or you may disbelieve everything a witness says. You may
13 believe parts of a witness's testimony and disbelieve
14 other parts. You may believe one witness over several or
15 several over one. But it is your job to determine the
16 facts of this case. And it is your job to do that in a
17 sound and reasoned manner and not arbitrarily.

18 You, also, have heard testimony from people who have
19 been described as experts in certain fields. Expert
20 witnesses have their testimony judged as any other witness
21 as far as credibility. It is up to you to determine the
22 credibility of all the witnesses, even those who have been
23 qualified as experts.

24 Now, you will recall that I told you in criminal
25 cases, there's certain principles that apply. The first

1 principle I told you about, and I'm going to tell you
2 about it again now, is the fact that Mr. Devore was
3 indicted doesn't constitute evidence of any kind. It
4 doesn't even create a suspicion of guilt. So the
5 indictment is not something you can consider in
6 determining the facts of the case.

7 Mr. Devore pled not guilty. That put the burden of
8 proof solely and squarely on the State. And he can only
9 be convicted if all 12 of you agree the State has proven
10 each and every element of the case beyond a reasonable
11 doubt.

12 And Mr. Devore is presumed innocent. And this
13 presumption of innocence, ladies and gentlemen, is not
14 some legal technicality. It is a fundamental right that
15 every person enjoys in this country. And it can only be
16 removed if the State convinces you with proof beyond a
17 reasonable doubt as to every element of a crime.

18 Now, what is a reasonable doubt? A reasonable doubt
19 is the kind of doubt that would cause a reasonable,
20 sincere, honest, and conscientious person to hesitate to
21 act in an important matter in their own affairs. Proof
22 beyond a reasonable doubt is proof that leaves you firmly
23 convinced of the Defendant's guilt. The law does not
24 require proof that overcomes every possible doubt.

25 If, based on your view of the evidence, you are

1 firmly convinced that the Defendant is guilty of the crime
2 charged, you must find him guilty. On the other hand, if
3 you think there's a real possibility that he is not
4 guilty, you must give him the benefit of the doubt and
5 find him not guilty. A reasonable doubt may arise from
6 the evidence or from a lack of evidence.

7 And I further tell you that a defendant is entitled
8 to every reasonable doubt that may arise in the case. And
9 what that means is simply this, if as to any issue of fact
10 that is essential to a finding of guilt you have some
11 reasonable doubt as to how that issue should be resolved,
12 it's your duty to resolve that doubt in favor of
13 Mr. Devore.

14 Now, the elements of this crime of driving under the
15 influence are as follows. In order for the State to
16 convict him of this charge, the State must prove beyond a
17 reasonable doubt that Mr. Devore was driving a motor
18 vehicle in this state while under the influence of alcohol
19 and/or drugs, or other substances to the extent that his
20 faculties to drive were materially and appreciably
21 impaired.

22 Driving a motor vehicle means the vehicle was in
23 motion. And the State must prove beyond a reasonable
24 doubt that the Defendant was sufficiently under the
25 influence to impair his ability to drive with reasonable

1 care with due regard for others and himself, or as a
2 reasonably prudent person would drive. It is not
3 necessary to show the Defendant was in a helpless
4 condition, passed out, or even intoxicated.

5 On the other hand, the fact that the Defendant at
6 sometime prior to this incident drank an alcoholic
7 beverage does not prove the Defendant was driving under
8 the influence.

9 A defendant has the right to refuse to take a blood
10 alcohol concentration test. Now, under our statutes, a
11 person who drives a motor vehicle is considered to have
12 given consent to chemical tests of his breath, blood, or
13 urine for the purpose of determining the presence of
14 alcohol, or drugs, or a combination of alcohol or drugs if
15 arrested for an offense arising out of acts alleged to
16 have been committed while the person was driving a motor
17 vehicle while under the influence of alcohol, or drugs, or
18 a combination.

19 A breath test must be administered at the direction
20 of a law enforcement officer who has arrested a person for
21 driving a motor vehicle in this state while under the
22 influence of alcohol, drugs, or a combination of alcohol
23 and drugs. No test may be administered or samples
24 obtained unless upon activation of the video recording
25 equipment and prior to the commencement of the testing

1 procedure, the person has been given a written copy of and
2 verbally informed that, one, he does not have to take the
3 test or give the sample, but his privilege to drive must
4 be suspended or denied for, at least, six months if he
5 refuses to submit to the test and his refusal may be used
6 against him in court.

7 Two, his privilege to drive must be suspended for, at
8 least, one month if he takes the test or gives the samples
9 and has an alcohol concentration of 15 one-hundredths of
10 one percent or more. Three, he has the right to request
11 an administrative hearing within 30 days of the issuance
12 of the notice of suspension. And, four, if he does not
13 request an administrative hearing or if the suspension is
14 upheld at the administrative hearing, he must enroll in an
15 alcohol and drug safety action program.

16 Now, those are the principles of substantive law that
17 apply to this case. I'm going to give you just a few
18 closing instructions on the deliberations. And I want to
19 tell you, first of all, you don't serve as jurors in this
20 case or any case to be partisans or advocates for one side
21 or the other. You were chosen in this case because both
22 sides believe you can be fair and impartial, and you can
23 decide this case without any kind of preconceived ideas or
24 any kind of bias or prejudice.

25 So your job is to weigh and evaluate the evidence

1 you've heard and, ultimately, during your deliberations
2 determine what the facts of the case are, and then take
3 the law that I just gave you and apply it to those facts,
4 and you will reach a verdict.

5 If you looked up the word jury in the dictionary, you
6 would see it has been defined as a company of people sworn
7 to render an answer. And that's what you've been sworn to
8 do. And each of you has a vote. And your vote is exactly
9 that, it's your vote and no one else's. If your
10 discussion in the jury room persuades you that you should
11 change your mind or your position if you are of different
12 minds about this evidence, then don't be afraid to do so.
13 But don't surrender an honestly and conscientiously held
14 belief simply to get this case over with or to reach a
15 unanimous verdict. Because this case is extremely
16 important to both the State and Mr. Devore.

17 Now, the verdict form is very straightforward. It
18 simply asks as to the charge, Do you find Mr. Devore not
19 guilty or guilty? That is the verdict form. And the
20 verdict must be unanimous.

21 I have not selected a foreperson at this time. But
22 what I'm going to do in just a minute is ask y'all to go
23 back and confer and tell me who your foreperson is. And
24 once that foreperson has been selected, I'll send back the
25 verdict form and the exhibits, and you can begin

1 deliberating about the case. And the foreperson is only
2 authorized to sign this form when the verdict is
3 unanimous.

4 Now, the record is closed. You're not going to hear
5 anymore witnesses. There's not going to be anymore
6 exhibits. So you'll have to rely on your memory of the
7 testimony and the exhibits you have with you back in the
8 jury room.

9 And I'm going to have to take a few minutes to talk
10 to the lawyers about some more things. And when you get
11 the decision made on who the foreperson is, just write it
12 down and give it to the bailiff. And they'll send it in
13 to me. And then we'll send back the exhibits and the
14 verdict form, and y'all can start talking about the case.

15 Thank you very much for your patience and
16 understanding.

17 Thank you.

18 (WHEREUPON, the jury was excused from open court at
19 approximately 4:26 p.m.)

20 THE COURT: Any objection or exception to the charge
21 from the State?

22 MS. MAJOR: None from the State.

23 THE COURT: From the Defense?

24 MR. SUMNER: Likewise.

25 THE COURT: Okay. Do you all want to just make sure

1 we've got everything there?

2 And once we get word on who the Foreperson is...

3 (Pause.)

4 MR. SUMNER: Yes, sir. Everything is in order.

5 THE COURT: Will you ask the alternate to come out
6 here, please?

7 THE BAILIFF: Yes.

8 (WHEREUPON, Juror #158, Debra Mason, entered the
9 courtroom.)

10 THE COURT: Yes, ma'am. The law doesn't allow you to
11 go in the jury room during the deliberations.

12 JUROR #158, DEBRA MASON: Oh, that's fine.

13 THE COURT: So you're free to go. You're dismissed.

14 JUROR #158, DEBRA MASON: Okay.

15 THE COURT: She doesn't need to call back or
16 anything?

17 THE CLERK: No, you're done.

18 THE COURT: I know -- you don't have to talk to the
19 lawyers, but they might be interested in talking with you.
20 But that's up to you, ma'am.

21 JUROR #158, DEBRA MASON: Thank you.

22 THE COURT: Okay. Thank you for your service.

23 JUROR #158, DEBRA MASON: Thank you.

24 (WHEREUPON, Juror #158, Debra Mason, exited the
25 courtroom.)

1 THE BAILIFF: This is the Foreperson. They just gave
2 us the tag.

3 THE COURT: Mr. Macmeccan is the Foreperson.

4 All right. We'll be at ease until we hear something.

5 Thank you very much.

6 (WHEREUPON, the proceedings were recessed at
7 approximately 4:30 p.m.)

8 THE COURT: We have a question.

9 Bring the jury on in.

10 (WHEREUPON, the jury came into open court at
11 approximately 5:13 p.m.)

12 THE COURT: Ladies and gentlemen, I got your note. I
13 understand you just want to see a portion of this video.

14 JUROR #152, ROBERT MACMECCAN: Yes.

15 THE COURT: So, Mr. Foreman, when you reach the point
16 that you've seen enough, just raise your hand and let us
17 know. And we'll stop it and let you go back.

18 JUROR #152, ROBERT MACMECCAN: Okay.

19 (WHEREUPON, State's Exhibit No. 1 was played in open
20 court.)

21 JUROR #152, ROBERT MACMECCAN: That's it.

22 THE COURT: Okay. Thank you.

23 (WHEREUPON, the jury was excused from open court at
24 approximately 5:27 p.m.)

25 THE COURT: We'll be at ease.

1 (WHEREUPON, the proceedings were recessed at
2 approximately 5:27 p.m.)

3 QUESTIONS FROM THE JURY

4 THE COURT: The jury has a question.

5 This is their question, "If he had passed the
6 breathalyzer at some level in the detention center, would
7 he have been released to go home? Would his arrest have
8 been lifted, cleared? What would have happened?"

9 Do you all want to see it?

10 MS. MAJOR: Well, no. I think I get the gist of what
11 they're asking.

12 MR. SUMNER: Can I speak first?

13 MS. MAJOR: Yeah. Go ahead.

14 MR. SUMNER: I think they've just got to decide the
15 question on the -- they just have to render a verdict
16 based on the evidence that's come in. I think you've
17 already charged them that he has the right to refuse.
18 You've already charged them he can be suspended. He was
19 suspended. I don't know how to answer that question,
20 actually. I mean, maybe I'm wrong, I guess.

21 MS. MAJOR: I understand their question, but don't
22 think that it is -- that you would be able to answer it.
23 I don't know if maybe recharging the law on the implied
24 consent rights and that he has the right to refuse, but it
25 can be used against him and his license is suspended.

1 THE COURT: Well, I don't know what -- I mean,
2 nothing I charge them will answer these questions; right?

3 MS. MAJOR: No.

4 MR. SUMNER: I would just reiterate, Your Honor, that
5 a charge that -- basically, that they just have to decide
6 the case based on the evidence that was presented and the
7 charge that's been given. That's what I would request.

8 THE COURT: Okay. So I'm just saying, "The rules do
9 not allow me to answer these questions. You must base
10 your verdict on the evidence presented and the law you've
11 been given."

12 (WHEREUPON, Court's Exhibit No. 1 was marked for
13 identification and admitted into evidence.)

14 (WHEREUPON, the proceedings were recessed at
15 approximately 5:36 p.m.)

16 THE COURT: We have another question. "What is the
17 definition of DUI?"

18 MS. MAJOR: I would ask that you just read your
19 charge again to them, the entire DUI charge.

20 MR. SUMNER: Yeah. I think that it would be covered
21 by they don't have to prove falling down, but they've got
22 to prove more than consumption.

23 THE COURT: What if we just give it to them back
24 there?

25 MR. SUMNER: I'm fine with that.

1 MS. MAJOR: I'm fine with that, if they promise not
2 to ask another question.

3 THE COURT: Do y'all want to come look at it?

4 MS. MAJOR: Yes.

5 MR. SUMNER: It's the same one we reviewed in your
6 chambers, isn't it?

7 MS. MAJOR: Let's just make sure we've got it.

8 I guess if -- the right to refuse, I would want that
9 to come in as well.

10 MR. SUMNER: Well, why don't we just run a copy and
11 just eliminate the right to refuse. Yes, that would be
12 fine.

13 THE COURT: Because they're not asking about refusal.

14 MR. SUMNER: Well, they will in a minute.

15 THE COURT: Okay.

16 (WHEREUPON, the proceedings were recessed at
17 approximately 5:45 p.m.)

18 (WHEREUPON, Court's Exhibit Nos. 2 and 3 were marked
19 for identification and admitted into evidence.)

20 THE COURT: We've got two notes from the jury. The
21 first note says -- it has what appears to be three
22 questions. The first is, "Would like to see video to
23 include, Defendant leaving car and approach police car."

24 The second question, "Can we turn up the volume?"

25 And the third question, it says, "Can we see?"

1 MR. SUMNER: Can we what?

2 THE COURT: See.

3 MS. MAJOR: See?

4 THE COURT: S-E-E. Which one response might be
5 apparently not.

6 MR. SUMNER: Isn't that what they saw 30 minutes ago
7 was the driving, and the interaction, and the getting out
8 of the car?

9 THE COURT: And the second note is, "What happens if
10 one juror has a different verdict than the others?"

11 I think what I'm going to do since it's 6:15, they've
12 been deliberating, what, two hours? Unless there's a
13 strenuous objection persuasive to me, I'm going to give
14 them the opportunity to just come back in the morning. I
15 think they're getting tired.

16 MR. SUMNER: Whatever you -- do you want to give them
17 the option?

18 THE COURT: I'll give them the option. They may want
19 to stay. I don't know.

20 MR. SUMNER: Do you want to give them the option?

21 THE COURT: But I don't -- these notes are just kind
22 of strange. And this first note I read, the three
23 questions, those were kind of along with the first note
24 they sent in. Remember?

25 MS. MAJORS: I was wondering if it's -- is it a

1 different note?

2 THE COURT: Yeah. It's a different note. We've got
3 all of them in the record.

4 So I'll just -- I can bring the Foreman out here and
5 ask him. And he can go back and check with them.

6 How about that?

7 MR. SUMNER: That's fine with me.

8 THE COURT: All right.

9 (Pause.)

10 (WHEREUPON, Juror #152, Robert Macmeccan, entered the
11 courtroom.)

12 THE COURT: Mr. Macmeccan.

13 JUROR #152, ROBERT MACMECCAN: Yes, sir.

14 THE COURT: How are you?

15 JUROR #152, ROBERT MACMECCAN: Wonderful.

16 THE COURT: What I wanted to ask you, sir, if you
17 would just check with the jury. Y'all have been
18 deliberating a couple hours now. And it's 6:15. And I'll
19 give y'all the option if you want to come back in the
20 morning and complete your deliberations. Sometimes, being
21 fresh helps, or you can stay and continue. It's up to
22 y'all. But if you want to just go back and check with
23 them and just let me know.

24 JUROR #152, ROBERT MACMECCAN: Okay. Will we be able
25 to see the video one more time if we stay and continue?

1 THE COURT: Yes, sure.

2 JUROR #152, ROBERT MACMECCAN: Thank you.

3 (WHEREUPON, Juror #152, Robert Macmeccan, exited the
4 courtroom.)

5 MS. MAJOR: Your Honor, it may have been that they
6 just wanted to see the video again.

7 THE COURT: Well, I don't know.

8 MR. SUMNER: It will probably be answered when he
9 comes back. And if he says they want to keep on and watch
10 it again, then -

11 THE COURT: I might even say if they -- we can play
12 it again and then let them go home.

13 (Pause.)

14 THE BAILIFF: Your Honor, they said they want to stay
15 and continue.

16 THE COURT: Okay. Do they want to come out and watch
17 the video?

18 THE BAILIFF: I can go ask them.

19 MS. MAJOR: And if they do, we would need the video.

20 MR. SUMNER: Maybe they just want to keep going
21 without it. I mean, you can only watch Gladiator so many
22 times.

23 THE COURT: The other alternative is to give them the
24 computer. We could do that.

25 MS. MAJOR: If you'd like me to get one from the

1 Solicitor's Office, I will. We can check and make sure
2 there's nothing on it.

3 THE COURT: It's up to y'all.

4 MR. SUMNER: I don't have any problem with that. I'm
5 going to let you make that decision, Judge.

6 MS. MAJOR: Yeah. I would like to test it out and
7 see what the audio is without the speakers.

8 THE COURT: Okay. Is that what y'all want to do,
9 give them the computer?

10 Well, I'll tell you what, just ask the Foreman to
11 come back in. He may not want to do that.

12 MR. SUMNER: We're comfortable with that, Judge.

13 (WHEREUPON, Juror #152, Robert Macmeccan, entered the
14 courtroom.)

15 THE COURT: Mr. Macmeccan, I think we could offer
16 y'all the alternative to take a computer back in there and
17 play it.

18 JUROR #152, ROBERT MACMECCAN: That would be
19 preferable.

20 THE COURT: Do you think that would be helpful?

21 JUROR #152, ROBERT MACMECCAN: That would be most
22 helpful.

23 Does somebody need to show us to play it?

24 MS. MAJOR: Maybe if we could get a second to test it
25 out without using this and then send it back. It should

1 be pretty self-explanatory.

2 THE COURT: Do you know anything about technology?

3 JUROR #152, ROBERT MACMECCAN: A little bit.

4 THE COURT: I kind of thought you did.

5 MS. MAJOR: It's pretty simple.

6 MR. SUMNER: I'm comfortable with the Foreman
7 watching her do it and then take it back.

8 MS. MAJOR: I'd like to test out the volume without
9 the speakers just to make sure that they can hear it.

10 THE COURT: Okay.

11 JUROR #152, ROBERT MACMECCAN: Judge, would you like
12 me to come around?

13 THE COURT: Yeah. You're free to do that.

14 MR. SUMNER: Sure. I'm fine.

15 (Pause.)

16 THE FOREPERSON: Thank you.

17 (WHEREUPON, Juror #152, Robert Macmeccan, exited the
18 courtroom.)

19 THE COURT: Now, you know, they asked the other
20 question about what happens if one juror has a different
21 verdict than the others. I don't know what y'all want me
22 to do with that.

23 Do you want to wait and see what they do?

24 MR. SUMNER: Why don't we give them 15 or 20 minutes.
25 Do you want to do that? I mean, this may solve it.

1 THE COURT: All right. We'll make these Court's
2 Exhibits.

3 (WHEREUPON, Court's Exhibit Nos. 4 and 5 were marked
4 for identification and admitted into evidence.)

5 THE COURT: I understand we have a verdict.
6 You can bring the jury in.

7 (WHEREUPON, the jury came into open court at
8 approximately 6:43 p.m.)

9 THE COURT: All right. Mr. Foreman, has the jury
10 reached a unanimous verdict?

11 JUROR #152, ROBERT MACMECCAN: I'm sorry, sir.

12 THE COURT: Has the jury reached a unanimous verdict?

13 JUROR #152, ROBERT MACMECCAN: Yes, sir.

14 THE COURT: If you'd hand it to the Foreman [sic],
15 we'll receive it and publish it.

16 All right. Yes, ma'am.

17 VERDICT

18 THE CLERK: Your, Honor, in the case of
19 2012-GS-23-2124, the State of South Carolina v. Johnie
20 Allen Devore, as to the charge of driving under the
21 influence, we, the jury, unanimously find the Defendant,
22 Johnie Allen Devore, guilty. This is signed by
23 Mr. Macmeccan, our Foreperson.

24 Ladies and gentlemen, if you agree this is the
25 verdict you reached in your deliberation room, would you,

1 please, raise your right hand?

2 (WHEREUPON, all jury members raised their right
3 hands.)

4 THE CLERK: Thank you.

5 THE COURT: Any matters before the jury is discharged
6 from the State?

7 MS. MAJOR: None from the State.

8 MR. SUMNER: None from the Defense.

9 THE COURT: All right. Ladies and gentlemen, thank
10 you very much for your service this week.

11 This will conclude your jury service. You do now
12 have a three-year exemption from jury duty in circuit
13 court.

14 And we thank you for your time and patience this
15 week.

16 I hope you have a good evening and the rest of the
17 week.

18 Thank you.

19 (WHEREUPON, the jury exited the courtroom at
20 approximately 6:45 p.m.)

21 THE COURT: Yes, sir, Mr. Sumner.

22 MR. SUMNER: Your Honor, I don't really know what I
23 can add over this incident other than John has had a
24 wonderful career. His only prior record is what's got him
25 in court today in terms of driving. And I think he's an

1 excellent candidate for a very short term of probation. I
2 don't think he's a danger to society.

3 We really tried to work this case out. There was a
4 plea offer made that I shared back in chambers that other
5 than the administrative action, I think that we would have
6 resolved it.

7 So, you know, he's got a tough situation now at work.
8 You know, I don't know if there's anything else I can add.
9 If there's anything else you'd like to know about
10 Mr. Devore, I'm happy to answer the questions as best I
11 can.

12 THE COURT: No, sir.

13 I think you did an excellent job. And the Solicitor
14 did an excellent job as well. It was a well-tried case.
15 And both sides raised pertinent issues.

16 So is there anything Mr. Devore would like to say,
17 sir?

18 DEFENDANT DEVORE: The only thing I can say is I'm
19 not guilty. I was not drunk. I don't know how they came
20 to that. But I don't know what I'm going to do with my
21 career right now. It's just -- without a license, I can't
22 work at my current job. I did all I could. I was honest.
23 I just -- this is a decision that's made on my career that
24 I just don't think it's a just decision. I think it's
25 something that went way too far as far as the implication

1 of what I did versus where I'm at now.

2 THE COURT: Well, Mr. Devore, I understand what
3 you're saying. I hear you. As you know, the Court
4 doesn't have anything to do with that.

5 In terms of the penalty, if there's some consequences
6 to your employment, that's just not something that I can
7 do anything about, or Mr. Sumner can do anything about as
8 your lawyer on this charge, or that Ms. Major can do
9 anything about. So that's not to say that I don't
10 empathize with you, sir. And I did listen carefully to
11 your testimony. And I appreciate the things you said.

12 Did he spend anything other than that one night in
13 jail?

14 MR. SUMNER: No, sir, not to my knowledge. No, just
15 that night.

16 THE COURT: Okay. Does the State have anything they
17 wish to present?

18 MS. MAJOR: No, Your Honor.

19 His prior DUI conviction is from 2002. There was a
20 reckless driving charge from 2005, which had been reduced
21 from a DUI. He, I think, from the '90s had a driving
22 under suspension. And there's another arrest on his
23 record that there's no disposition from, I believe, that
24 was 1986 -- I'm sorry, 1982.

25 THE COURT: Is there anything the trooper would like

1 to say? Trooper May?

2 MS. MAJOR: Trooper May, anything you would like to
3 say?

4 TROOPER MAY: No, sir.

5 The Defendant, Your Honor, didn't give me any
6 trouble. He was kind and polite to me, other than the
7 interaction that was pertinent to me arresting him. I
8 don't have anything to say that's negative about his
9 character.

10 MR. SUMNER: Thank you.

11 TROOPER MAY: Yes, sir.

12 THE COURT: Mr. Sumner.

13 MR. SUMNER: No, sir.

14 I was just talking to myself. No, sir. There's
15 nothing I could really add. I appreciate you taking time
16 to hear what everybody has had to say, Judge, regarding
17 sentencing. And I know that John, his emotions are really
18 high right now, as I think you have already recognized.
19 And I would just ask for compassion at this point. He's
20 got a lot of things he's going to have to deal with. And,
21 you know, again, we would -- but for the administrative
22 ramifications, we would have resolved this matter.

23 THE COURT: And, again, I don't know anything about
24 the consequences to his employment.

25 MR. SUMNER: I know that's beyond your control.

1 THE COURT: I would just note that I've -- and I
2 don't know what the county's policies are. Obviously,
3 Mr. Devore does. But I don't know if there's anything
4 under like EAP or something that could possibly come into
5 play.

6 But, nevertheless, I appreciate everybody's
7 presentations today. And I appreciate the testimony that
8 I heard from both the Trooper and the Defendant,
9 Mr. Devore. And I know probation is in here, or they were
10 in here.

11 Mr. Collier?

12 THE COURTROOM OFFICER: He's been notified.

13 THE COURT: He was here. Well, I had a question for
14 him so I'll get that answered.

15 I know the last time I ran into this, there was some
16 question about suspending the five days. And I think I
17 put house arrest and it came back several times.

18 MR. SUMNER: Yeah. I don't know why. There was some
19 confusion that it was different with -- I don't know
20 why --

21 Judge, I told them at the jail on that last one a few
22 months ago, I said, I've never had an issue with this, but
23 we -- maybe we could consider it if you're inclined to do
24 house arrest, let's see if an issue develops. But I've
25 never had that issue until that case we had.

1 THE COURT: Well, the last time we had to change it
2 to HIP, or something.

3 MR. SUMNER: I never knew what the -- I never knew
4 what the issue was on it. I thought your order was very
5 plain. And we had done it a thousand times. I don't
6 really know what was different on that case.

7 SENTENCING

8 THE COURT: All right. The sentence is on case
9 #2012-GS-23-2124, that you be committed to the county
10 detention center for 90 days, pay a fine of \$3,000,
11 suspended to five days and a fine of \$2,100, and probation
12 for six months. That you attend the MADD victim impact
13 panel meeting while you're on probation, and the substance
14 abuse counseling.

15 And I understand this wasn't an aggravated situation
16 and, fortunately, no one got hurt, including yourself.
17 But, you know, there is a prior record here, sir. And you
18 may want to avail yourself of the resources that are out
19 there.

20 But I do wish you luck with your career.

21 MR. SUMNER: Is it -- is he able to serve it on the
22 home incarceration program, Your Honor?

23 THE COURT: Yes. I put house arrest/HIP.

24 Well, Mr. Collier is here now.

25 Is that going to be suitable for the -- the last time

1 I did this, I ran into a problem. I put house arrest and
2 they said I had to put HIP.

3 PROBATION AGENT COLLIER: Yes, sir.

4 THE COURT: I do have to put HIP?

5 PROBATION AGENT COLLIER: Yes, sir.

6 THE COURT: Y'all can't do house arrest?

7 PROBATION AGENT COLLIER: Are you giving him active
8 jail time?

9 THE COURT: No. He's just getting five days.

10 PROBATION AGENT COLLIER: Well, that's in the active
11 part of the sentence, though.

12 THE COURT: Oh, okay.

13 PROBATION AGENT COLLIER: That would have to be HIP.

14 THE COURT: He's already got one day credit.

15 MR. SUMNER: Thank you, Your Honor.

16 THE COURT: Good luck, Mr. Devore.

17 *****END OF TRANSCRIPT OF RECORD*****
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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

COURT OF GENERAL SESSIONS
2012-GS-23-02124

STATE OF SOUTH CAROLINA,

vs.

TRANSCRIPT OF RECORD

JOHNIE ALLEN DEVORE, JR.,
DEFENDANT.

ORIGINAL

March 17, 2014
Greenville, South Carolina

B E F O R E:

THE HONORABLE D. GARRISON HILL, JUDGE.

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

ELIZABETH C. MAJOR, ESQ.
Assistant Solicitor

J. FALKNER WILKES, ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

ROA 207

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

1
2 THE COURT: This is a motion for a new trial, the
3 State v. Johnnie Devore.

4 Yes, sir, Mr. Wilkes.

5 MR. WILKES: Thank you, Your Honor.

6 May it please the Court.

7 I represent Mr. Devore. I will pass up, if the Court
8 would like, a transcript from the end of the trial
9 pertinent to the part that I'm going to talk about.

10 THE COURT: Okay.

11 MR. WILKES: And behind that is a rudimentary
12 memorandum that I typed up to try to make sense of what I
13 say since sometimes I don't make sense when I'm saying it.

14 Mr. Devore had, subsequent to his DUI conviction,
15 filed two documents, one was addressed to Your Honor,
16 which was technically a motion for a new trial which was
17 appropriate under the time frame.

18 Mr. --

19 THE COURT: Now, he was represented by counsel,
20 wasn't he, at that point?

21 MR. WILKES: He was. Mr. Sumner left on a vacation
22 and left the country without filing the motion or notice.
23 There may have been some miscommunication. But,
24 fortunately, Mr. Devore, being astute and aware of the
25 timing, filed both.

1 The first document, however, that he did file was
2 construed as a Rule 59 motion. And that has been before
3 the Court of Appeals. Judge Few ordered that the appeal
4 be stayed and that the Rule 59 motion be heard.

5 So we're here today to present the single argument, I
6 think, on the Rule 59 motion. And I can try to make it as
7 succinct as possible.

8 THE COURT: Okay, sir.

9 MR. WILKES: I provided the Court with a transcript.

10 At the end of the trial, one of the things that
11 Mr. Devore believed was that the way that the case was
12 handled as far as the jury at the very end of the trial
13 may have caused undue influence or pressure on one of the
14 minority jurors, the voters -- the minority voter. There
15 was several questions during the trial and notes from the
16 jury. One of which disclosed that they were, essentially,
17 deadlocked at 11 to one numerically.

18 At that point, the jury, specifically, asked a
19 question. They asked, What happens if one juror has a
20 verdict and it's different from the 11 other jurors? And
21 it's our contention, at that point, the way the note reads
22 about it being a verdict would have -- can only really be
23 construed as them being deadlocked using the term verdict.
24 At that point, though, there was no further instructions
25 from the Court.

1 The important thing is that the jury had asked the
2 question, not only disclosed the numerical split, but
3 asked the question, What happens now if we can't come to a
4 decision? And what our contention is is that the Court
5 did not give an Allen charge, nor did it give any further
6 instruction. Under the circumstances, we analogize that
7 to a defective Allen charge or a coercive Allen charge.
8 Because, at that point, the jury had deliberated for two
9 hours.

10 After that -- sometime after that -- this is late in
11 the evening. I think it was 6:00, 6:15, if I remember the
12 record correctly, when the notes started coming out. And,
13 at that late hour, the question was being asked what
14 happens now at 11 to one?

15 Now, no response was given at all. And that was a
16 conscious choice. There was -- the Court discussed it and
17 just said, Let's see what happens. And I think that that
18 was -- that no objection was raised by trial counsel. I
19 don't think that's critical to the analysis.

20 The impact upon the jury, we contend, is that it
21 placed that minority voter in a position of having no idea
22 of what would happen next, having no idea of when they
23 would ever get to go home, whether they'd be eating
24 dinner, or just what would happen after that.

25 THE COURT: How do we know he's a minority?

1 MR. WILKES: We -- well, we know that they were split
2 11 to one.

3 THE COURT: Well, how do we know he didn't -- he or
4 she, the one, didn't sway the other 11 towards their view
5 in the end?

6 MR. WILKES: Possible, but unlikely.

7 But either way, did the pressure -- it wouldn't
8 matter either way if it's an undue amount of pressure if
9 the minority group or one portion of that jury has some
10 undue influence of not knowing what's going to happen, not
11 knowing the answer to the question that they've asked, and
12 just feeling like they're trapped in there.

13 It then allows the folks with the most will --
14 instead of the most persuasive reasoning as to their view
15 of the case, it then allows the people on whichever side
16 with the most will power to sway the other side out and
17 say, we ain't going home tonight. We're not eating.
18 We're not doing anything ever until you change your vote,
19 because we're not changing. And that's the dilemma that
20 we face is that it allows it to go from the most reasoned
21 views prevailing to more potentially those with the better
22 will that don't have to get home that have kids to take
23 care of, or something like that. And that's the problem
24 that we have with it.

25 And we analogized it to an Allen charge. The absence

1 of an Allen charge or instruction could create some sort
2 of undue influence just as much as a bad Allen charge
3 could. And, in this case, we believe that had -- it
4 should -- some instruction should have been given to the
5 jury. And, importantly, because we really don't know
6 which way the split was going, but what we do know is that
7 it was the foreman that went back and came back out and
8 said that they want to continue.

9 But the Court didn't inquire of the jury, didn't poll
10 the jury, and didn't ask the jury if anyone had a problem
11 staying later and continuing at that point, or answering
12 those questions. And that's where the potential for the
13 pressure comes in.

14 And, of course, we can't say what happens in a jury
15 room. But we can see that there's the potential for that
16 influence going in for somebody to be sitting there not
17 knowing when they'll go home and not knowing, you know, is
18 there dinner? Is -- are we going home? Will we stay
19 until midnight? I can't do that. And then you -- we have
20 a situation where those with the greatest will win,
21 instead of those with the greatest reason. And that's our
22 position.

23 THE COURT: Thank you, sir.

24 Yes, ma'am, Ms. Major.

25 MS. MAJOR: Thank you, Your Honor.

1 Mr. Wilkes and I were discussing this. And my first
2 argument is that this issue is not preserved. I think he
3 has a different position on preservation as far as Allen
4 charges go. But I'm looking at the transcript here and
5 there were several notes that came back to the Court.

6 And, finally, I think two notes -- I think these
7 notes came at the same time. And one said, What happens
8 if one juror has a different verdict than the other? And
9 then you say in discussions with me and Mr. Sumner, you
10 say, you know, Let's think about asking them whether they
11 want to go home or not. And Steve says -- Mr. Sumner
12 says, That's fine with me, all right. And then we bring
13 the Foreperson in.

14 And, in my opinion, it's pretty -- up to him. You
15 can either continue deliberating or you can go home. And
16 he goes back to the jury room and then comes back in. And
17 I don't think that we can -- well, first, my argument is
18 that Steve didn't -- Mr. Sumner -- I'm sorry -- did not
19 object to that. So this issue isn't preserved.

20 Second, you gave the Foreperson the option whether to
21 keep on deliberating or come back. And, pretty quickly,
22 the Foreperson returns and says that we want to keep
23 going. And I believe, at that point, he took the computer
24 back.

25 And I don't think that we can presume that any

1 improper message was delivered, that the Foreperson
2 delivered any improper message to the jurors saying we
3 have to keep deliberating. The Judge said -- has said we
4 can't go home until we deliberate. I think we have to
5 presume that everything was proper back there, and that
6 the juror told him what you told the Foreperson, and they
7 had the option.

8 Again, Mr. Sumner didn't have a problem with it. I
9 didn't have a problem with it. And I think it's up to --
10 that interaction was within your discretion. And it was
11 not an abuse of discretion at all. And we can't presume
12 anything improper went back -- that the Foreperson
13 delivered any improper message or misconstrued what you
14 said. And that's my argument.

15 THE COURT: Thank you.

16 MR. WILKES: Judge, may --

17 THE COURT: Yes, sir, Mr. Wilkes.

18 MR. WILKES: Your Honor, I will say this on the
19 timing of it. If you will recall, and probably won't
20 because it's been a long time now. But there's real poor
21 quality on the video. And my client had a problem with
22 the quality of the video because it was transferred up
23 there to the pull-down screen. And it was real hard to
24 see. It was unclear. And there was a lot of difficulty
25 with audio. And that came out at trial. That was

1 discussed a fair amount about the poor quality.

2 The video, actually, went back at the very end of
3 deliberations. But the timing of it is pretty clear that
4 they weren't able to review the entire video. And my
5 client has had a problem with that ever since. And he's
6 contended that, you know, the evidence, had it been,
7 clearly, presented with the video evidence, that it would
8 not have resulted the way it did.

9 As you can see, the jury was out for two hours. They
10 had numerous questions. They wanted to know a bunch of
11 strange things. They were having a hard time with the
12 case. We -- this isn't something that we have -- and
13 timing wise -- timing is, actually, important. Because if
14 the time is short after an action from the Court, the
15 Allen charge case law, at least, indicates that that is an
16 indicator that it -- the Court action may have
17 influenced -- is more likely to have influenced the jury
18 to act, as opposed to it being a very long time of
19 deliberation afterwards. So that would mitigate in our
20 favor, I think.

21 But the question on preservation, I think, is
22 important. As to a motion for a new trial, his objection
23 I don't think is critical. Preservation of error becomes
24 critical for the direct appeal, but not for the motion for
25 a new trial. This Court can grant a new trial on our

1 motion or on its own motion for any reason, regardless of
2 objections or preservation issues at any time. So I don't
3 think, at this stage, preservation is an issue.

4 THE COURT: All right, sir. I thank you for your
5 arguments. And I think you make novel and unique
6 arguments about the failure to give an Allen charge on the
7 basis of the circumstances here.

8 First of all, as far as Mr. Devore's post-trial
9 motions, I can just go by my memory, which was I did
10 receive them. I was confused because he, for all I know,
11 was still represented by Mr. Sumner. And I believe I
12 forwarded them to the Solicitor's Office when I got them.

13 But, as you can imagine, it's difficult for me to
14 respond when he's represented by counsel. And I believe I
15 forwarded them to his counsel, too, but I'm not confident
16 of that. I don't think that ought to prejudice Mr. Devore
17 in any way because he did file these timely. But that's
18 not necessarily for me to decide. But that's my view of
19 it.

20 He made his position known. And it just put me in
21 the awkward position of not knowing how to respond since
22 he was represented by counsel who had not communicated
23 with the Court that these were, in fact, motions to be
24 resolved or ruled upon.

25 As to the merits of the argument, just looking at the

1 transcript -- and I do remember the case as being one that
2 was close. And I know that there was a communication with
3 the Foreperson, as the transcript reflects. And I
4 understand the point about, perhaps, the Foreperson, if
5 he's part of the majority view and assuming the majority
6 view, ultimately, prevailed, could be in a position to
7 pressure the minority if the Court is just communicating
8 with the Foreperson. However, the Court really doesn't
9 have any other way to communicate other than sending a
10 note back to the Foreperson, which I suppose he could
11 sabotage as well.

12 So while I may not agree with the somewhat cynical
13 view that the Foreperson is going to interfere with the
14 juries deliberations, I understand why you might argue
15 that theoretically. However, I don't know of any reason
16 why, based on the record as it stands, that should be
17 something that should be looked at in this case. I mean,
18 often times, if a juror, after a verdict, feels like he
19 was pressured or intimidated, you know, they'll contact
20 the Court. And that did not happen in this case.

21 And, also, I make a point during my instructions to
22 tell them that their vote is their vote and nobody else's.
23 And I don't know what arguments were made. I don't have
24 any memory of whether Mr. Sumner or Ms. Major argued about
25 the right to each juror having a vote. But I, certainly,

1 tell them their verdict must be unanimous. And I do
2 believe that it is important that they know that if they
3 don't agree, a mistrial would ensue.

4 However, based on the record here, they never said
5 they were deadlocked. They just said what happens if one
6 juror has a different verdict than the others. And I
7 understand I might be parsing the words. But, usually,
8 they'll say they're deadlocked, or we can't reach a
9 verdict. But, here, they didn't say that.

10 And as to not giving them the option of each juror
11 getting a vote, so to speak, on whether they want to come
12 back in the morning or stay, Mr. Sumner didn't ask for
13 that. Nobody asked for that. And Mr. Sumner, in fact, on
14 Page 167 of the transcript I've been supplied says, Why
15 don't we give them 15 or 20 minutes? Do you want to do
16 that? I mean, this may solve it. He's referring to the
17 fact that once the jury saw the video again, they may have
18 a unanimous verdict, which is, in fact, what happened and
19 which is not unusual. So Mr. Sumner, certainly, didn't
20 want me to give an Allen charge.

21 And the other thing in the back of my mind was that
22 once you give an Allen charge, as you know, the case is
23 entirely in the jury's hands. And by that I mean that if
24 they come back after an Allen charge, the statute says
25 they cannot be forced to continue to deliberate and can

1 only be asked diplomatically if further instruction on the
2 law would be helpful.

3 So once you give the Allen charge, you are somewhat
4 limiting the options you have with the jury as far as
5 trying to get them to fulfill their obligation to reach a
6 verdict. So I would be hesitant to do it at that stage
7 given the ambiguous nature of their question and the lack
8 of request by either side for me to do it.

9 I think you're right, Mr. Wilkes, that sometimes and
10 particularly the language that's used, Allen charges can
11 be coercive to the minority. And not giving one -- I've
12 never seen a decision that says not giving one can be
13 coercive to the minority. But I think you make an
14 interesting point about that.

15 And I just don't think, on the record here, I can
16 find that there was any type of error or basis for a new
17 trial. Again, I said the case was close. There was
18 sufficient evidence for the verdict. And I don't find a
19 new trial should be granted on that basis.

20 But you make excellent arguments. And I wish you
21 luck with them.

22 And thank you for your presentation.

23 *****END OF TRANSCRIPT OF RECORD*****
24
25

State 3

ADVISEMENT OF IMPLIED CONSENT RIGHTS

Johnnie Allen Devore Jr.
Subject's Name (Print)

02-05-1964
Date of Birth

008157606
Driver's License Number



SC
State Licensed

DRIVING UNDER THE INFLUENCE ADVISEMENT

- (A) Will test be video recorded? If answer is Yes, start here → - Inform subject of video recording.
If answer is No, start here → - Inform subject of type samples requested (i.e. breath, blood, urine).
- (B) Provide subject with a written copy of the following advisement and read the advisement to the subject:
- You are under arrest for Driving Under the Influence (DUI), Section 56-5-2930, South Carolina Code of Laws 1976, as amended.
 - The arresting officer has directed that samples be taken for alcohol and/or drug testing.
 - The samples will be taken and tested according to Section 56-5-2950 and SLED policies.
 - You do not have to take the tests or give the samples, but if you refuse to submit to the tests, your privilege to drive in South Carolina must be suspended or denied for at least six (6) months and your refusal may be used against you in court.
 - If you take the tests or give the samples and have an alcohol concentration of eight one-hundredths of one percent (0.08%) or more, you may instead be charged with Driving with an Unlawful Alcohol Concentration (DUAC), Section 56-5-2933.
 - If you have an alcohol concentration of fifteen one-hundredths of one percent (0.15%) or more, your privilege to drive in South Carolina must be suspended for at least one (1) month.
- [REDACTED]
- You have the right to request an administrative hearing within thirty (30) days of the issuance of the notice of suspension.
 - If you do not request an administrative hearing or if your suspension is upheld at the administrative hearing, you must enroll in an Alcohol and Drug Safety Action Program.
- If applicable, perform the following procedures:
- (C) Check subject's mouth and remove any foreign material. (Not required if a refusal has occurred.)
(D) Enter biographical data into DataMaster DMT. (Required for all tests, including refusals.)
(E) Observe subject for a minimum of twenty (20) minutes before collecting breath sample. (Not required if a refusal has occurred.)

ADVERTENCIA PORMANEJAR BAJOS LOS EFECTOS DE ALCOHOL O DROGAS(DUI)

- (A) ¿Se grabará en video el análisis? Si la respuesta es Si, empieza aquí → - Informe al sujeto que va a ser grabado en video.
Si la respuesta es No, empieza aquí → - Informe al sujeto de lo que se requiere (ejemplo: soplar, sangre, urina.)
- (B) De al sujeto una copia escrita de la siguiente advertencia y lea la advertencia al sujeto:
- Usted queda detenido por Manejar Bajo los Efectos de Alcohol o Drogas (DUI), Sección 56-5-2930, del Código de Leyes de Carolina del Sur de 1976, según su enmienda.
 - El agente que efectuó la detención dispuso que se sacaran muestras de alcohol y/o drogas para ser analizadas(s).
 - Se obtendrán y se analizarán las muestras según la Sección 56-5-2950 y las normas de SLED.
 - Usted no está obligado a hacerse los análisis ni a sacarse las muestras, pero si se niega a someterse a estos análisis, se le tendrá que suspender o negar el derecho de manejar en Carolina del Sur por lo menos durante seis (6) meses y el hecho de que usted se niega, podrá usarse en su contra en un tribunal.
 - Si usted se somete a los análisis o se saca las muestras y tiene una concentración de alcohol de ocho centésimos del uno por ciento (0,08%) o más, entonces se lo podría acusar de Manejar con una Concentración Ilegal de Alcohol (DUAC), según la Sección 56-5-2933.
 - Si usted tiene una concentración de alcohol de quince centésimos del uno por ciento (0,15%) o más, se le deberá suspender el derecho de manejar en Carolina del Sur por lo menos durante un (1) mes.
- [REDACTED]
- Usted tiene el derecho de solicitar una audiencia administrativa dentro de los treinta (30) días de la fecha en que se emitió la notificación de la suspensión.
 - Si usted no solicita una audiencia administrativa o si se le confirma la suspensión en la audiencia administrativa, usted tiene que matricularse en un Programa de Medidas Contra el Abuso del Consumo del Alcohol y las Drogas.
- Si aplica, efectúe los siguientes procedimientos:
- (C) Inspecciona la boca del sujeto y quite material extraño de la boca. (Ignora si se niega el sujeto.)
(D) Anade datos biograficos en el DataMaster DMT. (Esto es requerido para todos los exámenes aunque se niege el sujeto.)
(E) Observe al sujeto un minimo de (20) minutos antes de obtener un ejemplar de su respiro. (Ignora si se niega.)

[Signature]
Subject's Signature
Firma del Sujeto (Recibió una copia)

1/14/12
[Signature]
Officer's Signature
Firma del Agente
date/time
fecha/hora



South Carolina Department of Motor Vehicles

Notice of Suspension

MV-65
Rev. 3/06

State 4

Defendant's Name: Talric Allen Devore Jr. Address: 20 Cunningham Point Ct. Creek

BP/DL Number: 008157606 State: SC Zip Code: 29651 Date of Birth: 2-5-64

Vehicle's License Plate Number: 4136EA Vehicle Type: Commercial ☐ Yes ☒ No Hazardous Material ☐ Yes ☒ No

**YOUR PRIVILEGE TO DRIVE IN SOUTH CAROLINA IS SUSPENDED IMMEDIATELY FOR THE FOLLOWING:
(CHECK ONLY ONE BOX)**

**UNDER THE AGE OF TWENTY-ONE (21)
AND NOT UNDER ARREST FOR DUI**

☐ Registering an alcohol concentration of .02 or greater

☐ Refusing to submit to a breath, blood or urine test

ANY AGE UNDER ARREST FOR DUI

☐ Registering an alcohol concentration of .15 or greater

☒ Refusing to submit to a breath, blood or urine test

*A person who is taken for testing under 56-1-286 cannot be prosecuted under 20-7-8920, 20-7-8925, 56-5-2930 or 56-5-2933. Everyone who receives this Notice of Suspension can have a hearing to challenge the suspension. A hearing will be scheduled if, within thirty days of the date on this notice of suspension the South Carolina Administrative Law Court RECEIVES your written request for a hearing. There is a \$150.00 filing fee for a hearing. (Personal checks not accepted.) See the back of this form for more information on how to ask for a hearing.

If a hearing is scheduled, you may be able to get a temporary alcohol restricted license. The temporary alcohol restricted license costs \$100.00 and allows you to drive without restrictions until the hearing results are mailed to you. See the back of this form for instructions on how to get a temporary alcohol restricted license.

If you do not get a temporary alcohol restricted license, your suspension continues. You cannot drive until you either get a route-restricted license or your suspension period ends and you: 1) enroll in ADSAP (if you do not complete ADSAP, your driver's license will again be suspended); 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you do get a temporary alcohol restricted license and the hearing officer rules against you after your hearing, your suspension will go back into effect. If you were suspended after having been arrested for DUI, you may be eligible for a route-restricted license to allow you to drive for the remainder of the suspension. There are instructions on the back of this form to explain how to get a route-restricted license. If you do not get a route-restricted license or if you are under the age of twenty-one and were not arrested for DUI, you cannot drive until your suspension period ends and you: 1) enroll in ADSAP (if you do not complete ADSAP, your driver's license will again be suspended); 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you do get a temporary alcohol restricted license and the hearing officer rules in your favor, the suspension will be cancelled. Your driving privileges will be reinstated. However, you must go to a DMV office and have a regular license issued to you.

If you were suspended after having been arrested for DUI, you may be entitled to have a route-restricted license during your suspension period. You do not have to request a hearing to be eligible for a route-restricted license. The route-restricted license costs \$100.00 and allows you to drive only to and from work, college, ADSAP classes, and a court-ordered drug program, plus during the course of your employment or college. However, you must enroll in ADSAP before a route-restricted license will be issued. See the back of this form for instructions on how to get a route-restricted license.

I understand that I cannot drive until a license has been issued to me.

[Signature]
Signature of Defendant

Defendant's license or permit surrendered (yes or no) yes (If yes, license must be attached to yellow copy of this form)

Date: 1/14/12 Signature of Arresting Officer: [Signature] Printed Name of Arresting Officer: DC Mays

Agency Name: SCMP Greenville Agency Code: HP0300 Agency Telephone Number: 251-1000

Date: 1/14/12 Signature of DataMaster Operator: [Signature] Printed Name of DataMaster Operator: DC Mays

Agency Name: SCMP Greenville Agency Code: HP0300 Agency Telephone Number: 251-1000

DEFENDANT'S
EXHIBIT 17
3/14/73

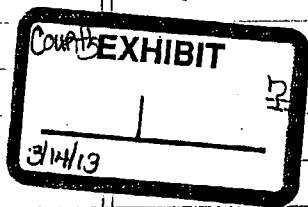


ROA 223

If he had passed the
breathalyzer at some level
in the detention center

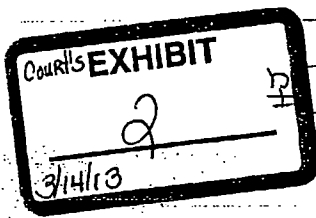
- would he have been released to go home.
- would his arrest been lifted/cleared.
- what would have happened?

The rules do not allow me to answer these questions. You must base your verdict on the evidence presented and the law you have been given.



G. Hill
3/14/13

What is the definition
of DUI?



DRIVING UNDER THE INFLUENCE

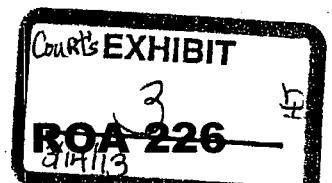
DRIVING UNDER THE INFLUENCE - § 56-5-2930

THE DEFENDANT IS CHARGED WITH DRIVING UNDER THE INFLUENCE. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS DRIVING A MOTOR VEHICLE IN THIS STATE WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS OR OTHER SUBSTANCES TO THE EXTENT THAT THE DEFENDANT'S FACULTIES TO DRIVE WERE MATERIALLY AND APPRECIABLY IMPAIRED.

DRIVING A MOTOR VEHICLE MEANS THAT THE VEHICLE WAS IN MOTION. THIS MAY BE PROVED BY DIRECT OR CIRCUMSTANTIAL EVIDENCE.

A MOVEMENT OF THE VEHICLE MIGHT OCCUR WITHOUT ANY AFFIRMATIVE ACT BY A DRIVER OR, IN FACT, BY ANY PERSON. IF A VEHICLE IS MOVED BY SOME POWER BEYOND THE CONTROL OF THE DEFENDANT, OR BY ACCIDENT, THIS WOULD NOT BE DRIVING.¹

¹ State v. Graves, 269 S.C. 356, 237 S.E.2d 584 (1977).

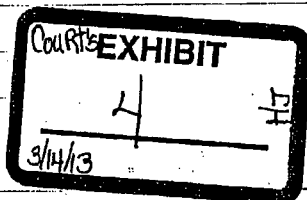


THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SUFFICIENTLY UNDER THE INFLUENCE TO IMPAIR HIS ABILITY TO DRIVE WITH REASONABLE CARE, WITH DUE REGARD FOR OTHERS AND HIMSELF, OR AS A REASONABLY PRUDENT PERSON WOULD DRIVE. IT IS NOT NECESSARY TO SHOW THAT THE DEFENDANT WAS IN A HELPLESS CONDITION, PASSED OUT, OR EVEN INTOXICATED. ON THE OTHER HAND, THE FACT THAT THE DEFENDANT, AT SOME TIME PRIOR TO THIS INCIDENT, DRANK AN ALCOHOLIC BEVERAGE OR TOOK A DRUG DOES NOT PROVE THAT THE DEFENDANT WAS DRIVING UNDER THE INFLUENCE.

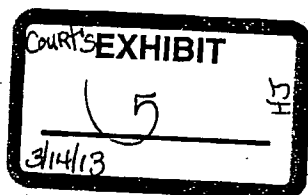
Would like to see video
to including swearing, defendant
leaving car, and approach
police car.

Can we turn up volume.

Can we see



What happens if
1 juror is different
verdict than the
others?



THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF GENERAL SESSIONS
Garrison D. Hill, Circuit Court Judge

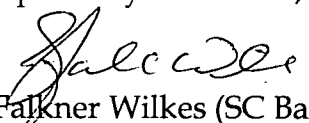
Case No. 2012-GS-23-2124
Court of Appeals Appellate Case No.: 2013-000883

State of South Carolina, ... Respondent,
v.
Johnie Allen Devore, Jr., ... Appellant.

CERTIFICATE

I certify that the Appendix has been redacted in compliance with the Supreme Court's Order 2014-04-15-02.

Respectfully submitted,


J. Falkner Wilkes (SC Bar #12893)
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 (facsimile)
Counsel for Appellant

May 18, 2016..