

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Union County
Brooks P. Goldsmith, Circuit Court Judge

RECEIVED

JUL 11 2016

SC SUPREME COURT

KASHIF POITEIA NASH

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-00290

• APPENDIX

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INDEX

INDEX	i
TRIAL TRANSCRIPT DATED FEBRUARY 4, 2014	1
APPLICATION FOR POST-CONVICTION RELIEF	322
RETURN	331
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED NOVEMBER 3, 2016	336
ORDER OF DISMISSAL	411
INDICTMENTS	421

1 STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS
2 COUNTY OF UNION

3 2013-GS-44-0918
4 2014-GS-44-0033

5 _____
6 State of South Carolina,
7 vs. Transcript of Record
8 Volume 1
9 Kashif P. Nash
10 _____

11 Date: February 4, 2014

12 BEFORE: The Honorable Lee Alford

13
14 APPEARANCES:

15 Blaine Fleming, Esq.,
16 Assistant Solicitor
17 Ricky Harris, Esq.,
18 Attorney for Defendant

19 Court Clerk: Freddie Gault
20 Phyllis M. Campo, RPR
21 Official Court Reporter
22
23
24
25

INDEX.

	<u>Page</u>
Jury Selection	4
Opening Statement	
By Mr. Fleming	100
By Mr. Harris	105
Closing Argument	
By Mr. Harris	261
By Mr. Fleming	280
Jury Charge	294
Verdict of the Jury	312
Sentence of the Court	315
Certificate of Reporter	162

INDEX TO WITNESSES

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Roger Suber	114	141	156	--
Wendy Childers	166	170	180	--
Marie Wearing	183	192	197	--
Lawrence Zivkovich	198	214	222	--
Junior Rogers	229	238	--	--
Roger Suber	247	255	258	--

INDEX TO EXHIBITS

	<u>ID</u>	<u>EVID</u>
<u>STATE'S EXHIBITS</u>		
1 - Letter from DMV	4	189
2 - In-Car Video	4	253
3 - Evidence Report From S.L.E.D	4	214
4 - Aerial Map of Mainsville Rd	4	125
5 Evidence Packet	4	125

COURT'S EXHIBITS

1 - Certificate of Conviction	316	316
2 - Certificate of Conviction	316	316
3 - Certificate of Conviction	316	316

JURY SELECTION

1 (STATE'S EXH. 1, Letter from DMV, was
2 marked for identification.)

3 (STATE'S EXH. 2, In-Car Video, was marked
4 for identification.)

5 (STATE'S EXH. 3, Evidence Report from
6 S.L.E.D, was marked for identification..)

7 (STATE'S EXH. 4, Aerial Map of Mainsville
8 Rd, was marked for identification.)

9 (STATE'S EXH. 5, Aerial Map, was marked
10 for identification.)

11 (STATE'S EXH. 6, Aerial Map, was marked
12 for identification.)

13 THE JUDGE: Counsel, approach just a
14 minute, please.

15 (Whereupon, a bench conference was held
16 off the record in the presence of the
17 prospective jury, but out of hearing of the
18 jury.)

19 THE JUDGE: Mr. Bailiff, is everybody in?

20 THE BAILIFF: Yes, sir.

21 THE JUDGE: Ladies and gentlemen of the
22 jury panel, if you will give me your attention,
23 please. We are about to go into a trial in the
24 matter of the *State of South Carolina vs. Kashif*
25 *P. Nash, N-A-S-H.*

JURY SELECTION

1 The State charges Mr. Nash with three
2 offenses. They charge him with habitual traffic
3 offender statute. They charge him with driving
4 under suspension.

5 Counsel, approach just a minute.

6 (Whereupon, a bench conference was held
7 off the record in the presence of the
8 prospective jury, but out of hearing of the
9 jury.)

10 THE JUDGE: Ladies and gentlemen of the
11 jury panel, again, if you would give me your
12 attention. Let me correct one thing. The State
13 is not going forward with a driving under
14 suspension charge in this case. So there are
15 actually two charges in total at this time, two
16 charges in which the State is proceeding today.
17 They are violation of habitual traffic offender
18 statute and also possession of cocaine. Those
19 are the two charges the State is proceeding on
20 today.

21 To these charges, the defendant has pled
22 not guilty. We are about to go into a trial on
23 those charges.

24 The State is represented in this case by
25 assistant Solicitor T. Blaine Fleming.

JURY SELECTION

1 Mr. Fleming, please stand up so the jury can see
2 who you are. Thank you. You may be seated.

3 Is anyone on the jury panel related by blood
4 or marriage, friends with, or have any other
5 type of social, business, or professional
6 relationship with T. Blaine Fleming, Assistant
7 Solicitor? If so, please stand.

8 Yes, sir. Give us your name and number,
9 sir.

10 PROSPECTIVE JUROR 96: Douglas Keith
11 Gault. My wife works for the solicitor's
12 office.

13 THE JUDGE: Let me ask you to keep
14 standing.

15 Give me your number again, please.

16 PROSPECTIVE JUROR 96: 96.

17 THE JUDGE: You may be seated. Counsel,
18 approach a minute.

19 (Whereupon, a bench conference was held
20 off the record in the presence of the
21 prospective jury, but out of hearing of the
22 jury.)

23 THE JUDGE: Is anyone on the jury panel
24 related by blood or marriage, friends with or
25 any other type of social, business, professional

JURY SELECTION

1 relationship with anyone that works in the
2 Sixteenth Circuit Solicitor's Office? That
3 includes Solicitor Kevin Brackett or anyone else
4 who works in the solicitor's office. If so,
5 please stand.

6 The defendant in this case, Kashif
7 P. Nash, is represented in this case by Attorney
8 Ricky Harris. Mr. Harris, please stand and I
9 ask Mr. Nash to also stand and face the jury so
10 they can see him in person.

11 Thank you. You may be seated. Is anyone
12 on the jury panel related by blood or marriage,
13 friends with or have any other type of social,
14 business or professional relationship with
15 Kashif P. Nash. If so, please stand.

16 Is anyone on jury panel related by blood
17 or marriage, friends with, or have any other
18 type of social, business, or professional
19 relationship with, that is to say, currently or
20 formerly represented by or any other
21 relationship to attorney Ricky Harris? If so,
22 please stand.

23 Ladies and gentlemen of the jury panel, I
24 am going to go through a list of potential
25 witnesses in this case. All of these witnesses

JURY SELECTION

1 may not be called but they may be called.

2 What I am asking you to do is when I call
3 out the potential witness's name, if you are
4 related by blood or marriage, friends with or
5 have any other type social, business or
6 professional relationship with any of these
7 named potential witnesses, when I call their
8 names, I would ask that you please stand.

9 Junior Rogers. This is Mr. Rogers down in
10 front. Thank you, sir. You may be seated.
11 Robert Suber, S-U-B-E-R, with the Union County
12 Sheriff's Office. This is Officer Suber down in
13 front too. Thank you, sir.

14 Yes, ma'am, please give your name and
15 number, ma'am. I'm sorry, we couldn't hear
16 you. Can you give us name and number first.
17 For the record, we need your full name.

18 PROSPECTIVE JUROR 81: Michelle Eison,
19 Number 81.

20 THE JUDGE: How do you know Officer Suber?

21 PROSPECTIVE JUROR: We have been friends
22 for a long time.

23 THE JUDGE: Anything about that
24 relationship that would interfere in any way
25 with your ability to give both the State and

JURY SELECTION

1 defendant a fair and impartial trial in this
2 case?

3 PROSPECTIVE JUROR 81: No, sir.

4 THE JUDGE: Thank you, ma'am. Yes, sir,
5 all the way in the back. Please give your name
6 and number.

7 PROSPECTIVE JUROR 101: Jeffrey Glenn,
8 Number 101.

9 THE JUDGE: Yes, sir.

10 PROSPECTIVE JUROR 101: I know Officer
11 Suber.

12 THE JUDGE: Okay. Sir, is there anything
13 about that relationship that would interfere in
14 any way with your ability to give both the State
15 and the defendant a fair and impartial in this
16 case?

17 PROSPECTIVE JUROR 101: No.

18 THE JUDGE: Yes, ma'am.

19 PROSPECTIVE JUROR 271: I know Roger. He
20 is my niece's brother.

21 THE JUDGE: Give us your name and number
22 first.

23 PROSPECTIVE JUROR 271: Paulette Thompson,
24 271.

25 THE JUDGE: Anything about that

JURY SELECTION

1 relationship that would interfere in any way
2 with your ability to give both the State and the
3 defendant a fair and impartial trial in this
4 case?

5 PROSPECTIVE JUROR 271: No, sir.

6 THE JUDGE: Thank you. Yes, sir. Give us
7 your name and number.

8 PROSPECTIVE JUROR 227: Weldon Rodgers,
9 227.

10 THE JUDGE: Yes, sir.

11 PROSPECTIVE JUROR 227: We went to school
12 together.

13 THE JUDGE: Sir, is there anything about
14 that relationship that would interfere in any
15 way with your ability to give the State and
16 defendant a fair and impartial trial in this
17 case?

18 PROSPECTIVE JUROR 227: No, sir. The
19 defendant's father was also in the group.

20 THE JUDGE: The defendant's father was
21 also in that group?

22 PROSPECTIVE JUROR 227: Yes, sir.

23 THE JUDGE: Again, would that interfere in
24 any way, sir?

25 PROSPECTIVE JUROR 227: No, sir.

JURY SELECTION

1 THE JUDGE: Anyone else?

2 Wendy Childers with the Union County
3 Sheriff's Office.

4 PROSPECTIVE JUROR 147: Yes, sir.

5 THE JUDGE: Give us your name and number.

6 PROSPECTIVE JUROR 147: Torrance Inman,
7 Number 147. Wendy Childers is my second cousin.

8 THE JUDGE: Anything about that
9 relationship that would interfere in any way
10 with your ability to give both the State and
11 defendant a fair and impartial trial in this
12 case?

13 PROSPECTIVE JUROR 147: No, sir.

14 THE JUDGE: Thank you, sir.

15 Anyone else?

16 Roger Hill with the Union County Sheriff's
17 Office. Ross Zivkovich, spelled
18 Z-I-V-K-O-V-I-C-H, who is with the South
19 Carolina Law Enforcement Division. Gina Floyd.

20 Yes, sir. Give us your name and number,
21 sir.

22 PROSPECTIVE JUROR 64: Rodney Davis,
23 Number 64, long-time friend.

24 THE JUDGE: What was your number again?

25 PROSPECTIVE JUROR 64: 64.

JURY SELECTION

1 THE JUDGE: Anything about that
2 relationship that would interfere with your
3 ability to give both the State and the defendant
4 a fair and impartial trial in this case in case
5 she was called as a witness?

6 PROSPECTIVE JUROR 64: No, sir.

7 THE JUDGE: Yes, ma'am.

8 PROSPECTIVE JUROR 182: Jennifer McGee,
9 Number 182. Friends.

10 THE JUDGE: Ma'am, anything about that
11 relationship that would interfere in any way
12 with your ability to give both sides a fair and
13 impartial trial in this case?

14 PROSPECTIVE JUROR 182: No, sir.

15 THE JUDGE: Thank you, ma'am. All the way
16 in the back.

17 PROSPECTIVE JUROR 91: Rita Fuggle,
18 Number 91. Ms. Floyd is my first cousin.

19 THE JUDGE: Anything about that
20 relationship that would interfere with your
21 ability to give both sides a fair and impartial
22 trial in this case?

23 PROSPECTIVE JUROR 91: No, sir.

24 THE JUDGE: Thank you. Anyone else?
25 Terry Humphries, spelled H-U-M-P-H-R-I-E-S, with

JURY SELECTION

1 the Union County Sheriff's Department.

2 Has any member of the jury panel or a
3 member of your immediate family or close friend
4 ever filed a lawsuit against the City or County
5 of Union South Carolina? If so, please stand.

6 Is any member of the jury panel related by
7 blood or marriage to any law enforcement
8 officer, state constable or any other person
9 having authority to impose the laws of this
10 state, county or city? If so, please stand.

11 Yes, sir please give us name and number,
12 sir.

13 PROSPECTIVE JUROR 31: Dustin Brewer,
14 Number 31. My father works for State Police as
15 an officer.

16 THE JUDGE: Anything about that
17 relationship that would interfere in any way
18 with your ability to give both sides a fair and
19 impartial trial in this case?

20 PROSPECTIVE JUROR: No, sir.

21 THE JUDGE: Thank you, sir.

22 Yes, ma'am.

23 PROSPECTIVE JUROR 255: Jamie Stepp. My
24 number is 255. My son is in law enforcement.

25 THE JUDGE: What was your number?

JURY SELECTION

1 PROSPECTIVE JUROR 255: Number 255.

2 THE JUDGE: Your husband is in law
3 enforcement?

4 PROSPECTIVE JUROR 255: My son.

5 THE JUDGE: Your son is in law
6 enforcement. Where does he work?

7 PROSPECTIVE JUROR 255: He is in
8 Spartanburg.

9 THE JUDGE: Spartanburg. Ma'am, is there
10 anything about that relationship that would
11 interfere in any way with your ability to give
12 both the State and the defendant a fair and
13 impartial trial in this case?

14 PROSPECTIVE JUROR 255: No, sir.

15 THE JUDGE: Thank you, ma'am.

16 Yes, sir.

17 PROSPECTIVE JUROR 191: David Morrow, 191.
18 My father is a state constable.

19 THE JUDGE: He is a police officer?

20 PROSPECTIVE JUROR 191: State constable.

21 THE JUDGE: State constable. Is that in
22 Union County?

23 PROSPECTIVE JUROR 191: Yes.

24 THE JUDGE: Anything about that
25 relationship that would interfere in any way

JURY SELECTION

1 with your ability to give both sides a fair and
2 impartial trial in this case?

3 PROSPECTIVE JUROR 191: No, sir.

4 THE JUDGE: Yes, sir.

5 PROSPECTIVE JUROR 139: Charles Horne,
6 Number 139. My son is a state trooper here in
7 Union.

8 THE JUDGE: Is there anything about that
9 relationship that would interfere in any way
10 with your ability to give both sides a fair and
11 impartial trial in this case?

12 PROSPECTIVE JUROR 139: No, sir.

13 THE JUDGE: Thank you, sir. Anyone else?

14 Has any member of the jury panel or member
15 of your immediate family been actively involved
16 in or contributed financial support to public
17 interest groups such as Crime Stoppers or
18 Neighbor Crime Watch or a similar organization
19 whose primary function is to assist law
20 enforcement agencies in the protection from
21 criminal activity? If so, please stand.

22 Has any member of the jury panel or their
23 immediate family acted as an agent for any law
24 enforcement organization, either on a paid or
25 volunteer basis? If so, please stand.

JURY SELECTION

1 Ladies and gentlemen, I am going to go
2 through a series of questions now and if you
3 need to respond to one or more of these
4 questions, the answers may be rather personal,
5 and for that reason, I am not going to require
6 you to stand up in open assembly and respond to
7 these questions.

8 What I will do instead is ask you to listen
9 carefully to these questions. If you think one
10 or more may apply to you or you need to respond
11 to one or more of them, I will ask you to wait
12 until I have gone through all of the questions
13 and then I will give you an opportunity to come
14 forward and respond and you can do that with a
15 little more privacy down next to the court
16 reporter here. Here are the questions. Listen
17 carefully.

18 Has any member of the jury panel or your
19 immediate family been a member of or contributed
20 to any organization whose primary purpose is to
21 affect public or legislative opinion on drug
22 enforcement laws of this state?

23 Has any member of the jury panel or member
24 of your immediate family or close friends ever
25 been prosecuted by Blaine Fleming or the

JURY SELECTION

1 Sixteenth Circuit Solicitor's Office, or are you
2 or any member of your immediate family or close
3 friend currently being prosecuted by the
4 Sixteenth Circuit Office Solicitor's Office?

5 Have you or any member of your immediate
6 family or close friend ever been charged with a
7 crime for violation of the habitual traffic
8 offender statute?

9 Have you or any member of your immediate
10 family or any close friend ever been charged
11 with the crime of possession of cocaine, crack
12 cocaine possession, or any other crime involving
13 illegal possession or distribution of illegal
14 drugs? If so, please come forward at the
15 appropriate time.

16 Does any member of the jury panel feel
17 that for religious or personal reasons they
18 would not be able to judge another person's
19 actions in order to determine whether that
20 person has committed a crime involving the
21 illegal possession of drugs?

22 Are you a member of any organization that
23 does not recognize the authority of the
24 Government of the United States or the State of
25 South Carolina?

JURY SELECTION

1 Does any member of the jury panel support
2 NORML, spelled N-O-R-M-L, or any other
3 organization advocating the decriminalization of
4 marijuana or other drugs?

5 If you need to respond to one or more of
6 these questions, I will ask you to come to the
7 center aisle and come forward one at a time as
8 the clerk may direct.

9 THE BAILIFF: Number 154.

10 PROSPECTIVE JUROR 154: Cynthia Jeter.

11 THE JUDGE: Yes, ma'am.

12 PROSPECTIVE JUROR 154: My ex-husband is
13 serving time for drugs.

14 THE JUDGE: Let me ask you whether there
15 is anything about your experiences in that
16 regard that would interfere with your ability to
17 give both the State and the defendant a fair and
18 impartial trial in this case?

19 PROSPECTIVE JUROR 154: (Nodding head no).

20 THE JUDGE: You have to answer yes or no.

21 PROSPECTIVE JUROR 154: No.

22 THE JUDGE: Thank you. You may have a
23 seat.

24 THE BAILIFF: Number 240.

25 THE JUDGE: Give us your name for the

JURY SELECTION

1 record.

2 PROSPECTIVE JUROR 240: Nicholas Slomin.
3 My brother was arrested for possession of
4 cocaine once.

5 THE JUDGE: Is there anything about your
6 experience in that regard that would interfere
7 in any way with your ability to give the State
8 and defendant a fair and impartial trial in this
9 case?

10 PROSPECTIVE JUROR 240: No, sir.

11 THE JUDGE: Thank you.

12 THE BAILIFF: 196.

13 THE JUDGE: Give us your name and number
14 for the record.

15 PROSPECTIVE JUROR 196: Tammi Newton. I
16 have a family member that was arrested for
17 cocaine.

18 THE JUDGE: I am going to ask you whether
19 there was anything about your experiences in
20 that regard that would interfere in any way with
21 your ability to give both the State and
22 defendant a fair and impartial trial in this
23 case?

24 PROSPECTIVE JUROR 196: I honestly can't
25 say. It is hard for me to say that I could

JURY SELECTION

1 fairly judge someone.

2 THE JUDGE: Fairly judge someone. What I
3 am asking you at this point is, is there
4 anything about the that that would interfere
5 with your ability to give the State or the
6 defendant a fair trial an impartial trail in
7 this case?

8 PROSPECTIVE JUROR 196: I don't know. I
9 honestly don't know if I could pass judgment. I
10 don't know.

11 THE JUDGE: You don't know if you can pass
12 judgment on another person?

13 PROSPECTIVE JUROR 196: Yes.

14 THE JUDGE: Let me ask you one more
15 question: Could you listen to the testimony and
16 evidence that comes in during the course of the
17 trial and listen to the Court's charge and the
18 law and render a decision and judgment that
19 would be fair and impartial to the State and the
20 defendant? Could you do that or not?

21 PROSPECTIVE JUROR 196: I really don't
22 know. I don't know if I could pass judgment
23 because of the past experiences that I have had.

24 THE JUDGE: Okay. I am not going to
25 require you to sit on this case. If you would

JURY SELECTION

1 please return to your seat.

2 THE BAILIFF: Number 118.

3 THE JUDGE: Yes, sir. Give us your name.

4 PROSPECTIVE JUROR 118: Michael Hagen.

5 THE JUDGE: Yes, sir.

6 PROSPECTIVE JUROR 118: I was arrested for
7 simple possession of marijuana back when I was
8 20.

9 THE JUDGE: Anything about your
10 experiences in that regard that would interfere
11 in any way with giving both the State and the
12 defendant a fair and impartial trial in this
13 case?

14 PROSPECTIVE JUROR 118: No.

15 THE BAILIFF: Number 267.

16 THE JUDGE: Give us your name for the
17 record.

18 PROSPECTIVE JUROR 267: Rosalyn Thomas.
19 My daughter was busted for marijuana.

20 THE JUDGE: Is there anything about your
21 experiences in that regard that would interfere
22 in any way with your ability to give both the
23 State and the defendant a fair and impartial
24 trial in this case?

25 PROSPECTIVE JUROR 267: No.

JURY SELECTION

1 THE JUDGE: Ladies and gentlemen of the
2 jury panel, if you would give me your attention
3 again. I have just a few more questions for
4 you.

5 Has any member on the jury panel have any
6 prior knowledge of this case from any source
7 before coming into court today, from any media
8 source or any other type of source before coming
9 here to court today? If so, please stand.

10 Has any member of the jury panel formed or
11 expressed an opinion as to the guilt or
12 innocence of the defendant, Kashif P. Nash? If
13 so, please stand.

14 Is any member of the jury panel conscious
15 of an interest, bias or prejudice for or against
16 the defendant, Kashif P. Nash? If so, please
17 stand.

18 Can each member of the jury panel give
19 both the State and the defendant a fair and
20 impartial trial in this case? If not, please
21 stand.

22 Does any member of the jury panel know of
23 any reason whatsoever why he or she should not
24 serve as juror in this particular case? If so,
25 please stand.

JURY SELECTION

1 Any additional questions requested of the
2 jury panel from the State?

3 MR. PLEMING: No, sir, your Honor.

4 THE JUDGE: From the defense?

5 MR. HARRIS: No, your Honor.

6 THE JUDGE: Thank you. Mr. Clerk, if you
7 would give us a jury.

8 THE CLERK: We will draw one alternate.
9 As I call your name if you would come forward,
10 stand in front of me and face the attorneys. At
11 that time I will ask the attorney some
12 questions. When you come forward, if you have
13 personal belongings, bring them with you as you
14 come forward, please.

15 Juror Number 300, Michael Zimmerman.

16 So says the State?

17 MR. PLEMING: Please present
18 Mr. Zimmerman.

19 THE CLERK: So says the defense?

20 MR. HARRIS: Swear the juror.

21 THE CLERK: Please sit in the jury box,
22 please.

23 Juror Number 262, Deborah Summer.

24 So says the State?

25 MR. PLEMING: Please present Ms. Summer.

JURY SELECTION

1 THE CLERK: So says the defense?

2 MR. HARRIS: Please excuse the juror.

3 THE CLERK: You may return to your seat

4 now:

5 Juror Number 101, Jeffrey Glenn.

6 So says the State.

7 MR. PLEMING: Please present Mr. Glenn.

8 THE CLERK: So says the defense?

9 MR. HARRIS: Please excuse the juror.

10 THE CLERK: You may return to your seat,

11 sir.

12 Juror Number 240, Nicholas Slonim.

13 So says the State?

14 MR. PLEMING: Please present Mr. Slonim.

15 THE CLERK: So says the defense?

16 MR. HARRIS: Please swear the juror.

17 THE CLERK: Have a seat in the jury box,

18 please.

19 Juror Number 146, Jonathan Grady.

20 So says the State?

21 MR. PLEMING: Please present Mr. Grady.

22 THE CLERK: So says the defense?

23 MR. HARRIS: Swear the juror, please.

24 THE CLERK: Have a seat in the jury box,

25 please.

JURY SELECTION

1 Juror Number 135, Teresa Hill.
2 So says the State.
3 MR. PLEMING: Please present Ms. Hill.
4 THE CLERK: So says the defense?
5 MR. HARRIS: Please swear the juror.
6 THE CLERK: Have a seat in the jury box,
7 ma'am.
8 Juror Number 120, Sallie Hamilton. So
9 says the State?
10 MR. PLEMING: Please present Ms. Hamilton.
11 THE CLERK: So says the defense?
12 MR. HARRIS: Excuse the juror, please.
13 THE CLERK: You may return to your seat,
14 ma'am.
15 Juror Number 252, Lisa Spurlock.
16 So says the State?
17 MR. PLEMING: Please present Ms. Spurlock.
18 THE CLERK: So says the defense?
19 MR. HARRIS: Swear the juror.
20 THE CLERK: Have a seat in the jury box,
21 please.
22 Juror Number 267, Rosalyn Thomas.
23 So says the State?
24 MR. PLEMING: Please strike Ms. Thomas.
25 THE CLERK: You may return to your seat

JURY SELECTION

1 now.

2 Juror 205, Cathy Patrick.

3 So says the State?

4 MR. PLEMING: Please present Ms. Patrick.

5 THE CLERK: So says the defense?

6 MR. HARRIS: Swear the juror.

7 THE CLERK: Have a seat in the jury box.

8 Juror 286, Pamela Welch.

9 So says the State?

10 MR. PLEMING: Please present Ms. Welch.

11 THE CLERK: So says the defense?

12 MR. HARRIS: Swear the juror.

13 THE CLERK: Have a seat in the jury box,

14 ma'am.

15 Juror Number 55, Richard Cooksey. So says

16 the State.

17 MR. PLEMING: Please present Mr. Cooksey.

18 THE CLERK: So says the defense?

19 MR. HARRIS: Swear the juror, please.

20 THE CLERK: Have a seat in the jury box,

21 please.

22 Juror Number 105, Hope Gossett.

23 So says the State?

24 MR. PLEMING: Please present Ms. Gossett.

25 THE CLERK: So says the defense?

JURY SELECTION

1 MR. HARRIS: May counsel approach?

2 THE JUDGE: Yes. Approach.

3 (Whereupon, a bench conference was held
4 off the record in the presence of the
5 prospective jurors, but out of hearing of the
6 jury.)

7 THE JUDGE: The question is we are not
8 sure about your husband. You said he works at
9 the detention center. Is he a law enforcement
10 officer?

11 PROSPECTIVE JUROR 105: He is a jailer.
12 He just got certified.

13 THE JUDGE: Certified as a jailer?

14 PROSPECTIVE JUROR 105: Mm-hmm.

15 THE JUDGE: Does he have the power to
16 arrest people and that sort of stuff?

17 PROSPECTIVE JUROR 105: I don't think so.

18 THE JUDGE: You don't think so?

19 PROSPECTIVE JUROR 105: I don't think so.

20 THE JUDGE: Has he been to the Criminal
21 Justice Academy?

22 PROSPECTIVE JUROR 105: He just come back
23 for three weeks.

24 THE JUDGE: Three weeks?

25 PROSPECTIVE JUROR 105: Mm-hmm.

JURY SELECTION

1 THE JUDGE: Not 12 weeks?

2 PROSPECTIVE JUROR 105: No.

3 THE JUDGE: Thank you, ma'am. You can
4 stand back over here.

5 Counsel, proceed.

6 MR. HARRIS: Please excuse the juror.

7 THE CLERK: Return to your seat.

8 Juror Number 147, Torrance Inman.

9 So says the State.

10 MR. PLEMING: Please present Mr. Inman.

11 THE CLERK: So says the defense?

12 MR. HARRIS: Swear the juror.

13 THE CLERK: Have a seat in the jury box,
14 sir.

15 Juror Number 114, Tony Griffin.

16 So says the State?

17 MR. PLEMING: Please present Mr. Griffin.

18 THE CLERK: So says the defense?

19 MR. HARRIS: Please swear the juror.

20 THE CLERK: Have a seat in the jury box.

21 Juror Number 246, Donna Smith.

22 So says the State?

23 MR. PLEMING: Please present Ms. Smith.

24 THE CLERK: So says the defense?

25 MR. HARRIS: Swear the juror.

JURY SELECTION

1 THE CLERK: Please have a seat in the jury
2 box, please.

3 Juror Number 244, Connie Smith.

4 So says the State?

5 MR. PLEMING: Please present Ms. Smith.

6 THE CLERK: So says the defense?

7 MR. HARRIS: Excuse the juror, please.

8 THE CLERK: Return to your seat, ma'am.

9 Juror Number 10, Ernest Bates. So says the
10 State?

11 MR. PLEMING: Please strike Mr. Bates.

12 THE CLERK: You may return to your seat,
13 sir.

14 Juror Number 224, Matthew Robinson.

15 So says the State?

16 MR. PLEMING: Please present Mr. Robinson.

17 THE CLERK: So says the defense?

18 MR. HARRIS: Swear the juror, please.

19 THE CLERK: Have a seat in the jury box,
20 please.

21 THE JUDGE: This is the alternate.

22 THE CLERK: Juror Number 265, Cynthia
23 Taylor.

24 So says the State.

25 MR. PLEMING: Please present Ms. Taylor.

JURY SELECTION

1 THE CLERK: So says the defense?

2 MR. HARRIS: Excuse the juror.

3 THE CLERK: You may return to your seat,
4 ma'am.

5 Juror Number 178, Deborah Lominack.

6 So says the State?

7 MR. PLEMING: Please present Ms. Lominack.

8 THE CLERK: So says the defense?

9 MR. HARRIS: Excuse the juror.

10 THE CLERK: Please return to your seat.

11 Juror Number 117, Phillip Hagan.

12 So says the State?

13 MR. PLEMING: Please present Mr. Hagan.

14 THE CLERK: So says the defense?

15 MR. HARRIS: Please swear the juror.

16 THE CLERK: Have a seat in the jury box,
17 please.

18 THE JUDGE: Any questions concerning the
19 selection process from the State?

20 MR. PLEMING: No, sir, your Honor.

21 THE JUDGE: From the defense?

22 MR. HARRIS: No, your Honor.

23 THE JUDGE: Solicitor, what time do you
24 want to tell the jury about?

25 MR. PLEMING: We'll be ready to begin.

STATE OF SC VS. KASHIF F. NASH

1 THE JUDGE: We are excusing these. Do
2 they need to call back tonight?

3 MR. PLEMING: Yes, sir.

4 THE JUDGE: Ladies and gentlemen of the
5 jury panel, you are not selected for this
6 particular case. We are going to excuse you at
7 this time. I ask you to call in to your
8 voicemail tonight any time after 6 o'clock. You
9 will get instructions if you need to report back
10 or call back again. Thank you for your services
11 today.

12 (Prospective jurors being excused at 12:12
13 p.m.)

14 THE JUDGE: Counsel, approach just one
15 minute.

16 (Whereupon, a bench conference was held
17 off the record in the presence of the jury, but
18 out of hearing of the jury.)

19 THE JUDGE: All right. Ladies and
20 gentlemen of the jury panel, if you would give
21 me your attention, please. I am going to give
22 what I call a preliminary instruction with
23 regard to the format of the trial and what to
24 expect as we go through the trial. I suspect
25 that most of you have not served on a jury in a

STATE OF SC VS. KASHIF P. NASH

1 general sessions criminal case in Circuit Court
2 before, and hopefully, this instruction will
3 make you feel a little more comfortable in these
4 unfamiliar surroundings.

5 The first thing that will happen will -- and
6 let me just give you the whole picture here.
7 Once I complete the instruction, I will send you
8 out to the jury room to elect a foreperson. You
9 might be thinking about that. After that you
10 will go to lunch and come back after lunch and
11 we will start with the trial.

12 The first thing that will happen once we
13 actually get started with the trial is an
14 attorney for the State, who is the assistant
15 solicitor, will make an opening statement to
16 you. Then the attorney for the defendant will
17 have the same opportunity to address you in an
18 opening statement.

19 Now, these opening statements by the
20 attorneys are not evidence, but you should pay
21 close attention because they are, in essence,
22 going to identify to you what they perceive or
23 say the issues in the case are.

24 After they make their opening statements
25 to you, then the State will proceed by

STATE OF SC VS. KASHIF P. NASH

1 presenting the testimony and evidence they want
2 you to consider. The reason the State goes
3 first is that the State has the burden of proof
4 in this case.

5 There is no burden of proof upon the
6 defendant to prove his innocence. The burden of
7 proof is upon the State of South Carolina to
8 prove the charges against this defendant by
9 evidence that satisfies you, the jury, beyond a
10 reasonable doubt before you can return a verdict
11 of guilty. If the State fails to meet that
12 burden of proof, then your verdict must be not
13 guilty.

14 After the assistant solicitor has
15 presented to you the evidence to consider on
16 behalf the State, then the same opportunity will
17 be afforded to the defense. The defendant may,
18 but is not required, to present any testimony or
19 evidence because the State has the burden of
20 proving the defendant guilty beyond a reasonable
21 doubt.

22 The defendant does not have to prove he is
23 innocent. He is presumed innocent and that
24 presumption stays with him throughout the trial
25 and may only be removed if the State meets its

STATE OF SC VS. KASHIF P. NASH

1 burden of proving the defendant guilty beyond a
2 reasonable doubt.

3 What is evidence in the case? Evidence is
4 the sworn testimony you will hear from the
5 witness stand to my left, the exhibits submitted
6 into the record for your consideration by me,
7 the presiding judge, and any stipulation of
8 counsel.

9 Now, exhibits may take many forms such as
10 documents, pictures, videotapes, maps, diagrams
11 and so forth.

12 Stipulations are an agreement of facts by
13 the attorneys. If the attorneys enter into a
14 stipulation, that will be made known to you and
15 you can consider that stipulation of fact along
16 with all of the other testimony and evidence,
17 give it such weight as you deem appropriate once
18 you begin your deliberations.

19 Sworn testimony, the exhibits, and
20 stipulations are the only evidence you may
21 consider in your deliberations of the innocence
22 or guilt of the defendant. You may not consider
23 anything you heard from any other source about
24 this case in making your decision because that's
25 not evidence.

STATE OF SC VS. KASHIF F. NASH

1 After you heard all of the evidence, the
2 attorneys for the State and the defendant once
3 again will appear before you and make what we
4 call closing arguments. We call them arguments
5 because the attorneys are allowed at that time
6 to argue their position in an attempt to
7 persuade you as to their view and position as to
8 the facts.

9 When you have heard the final arguments
10 from counsel, I will charge you and instruct you
11 as to the law that applies to the issues in this
12 case. You will then retire to the jury room to
13 deliberate and reach your verdict. That's how a
14 case is tried in General Sessions Court, whether
15 it be this case or any other case. Some cases
16 take a half day or a day. Some cases take
17 weeks, but the same format applies in every
18 case.

19 As the trial judge, I have three functions
20 to perform during the trial. I am the presiding
21 officer, and therefore, see that the trial is
22 run in an orderly manner. I decide, based on
23 rules of civil and criminal procedure, whether
24 testimony and exhibits are admissible into
25 evidence for your consideration and, at the

STATE OF SC VS. KASHIF F. NASH

1 conclusion of the trial, I instruct you as to
2 the law you must apply to the facts in this case
3 in reaching your verdict.

4 You, ladies and gentlemen, are also judges
5 in this case. You are the judges of the facts.
6 In other words, you determine the truth of the
7 facts in this case.

8 Under our Constitution, I am not permitted
9 as the judge of the law to have an opinion about
10 the facts, so I do not get into whether I
11 believe a witness or not. That is not my
12 function. I am not even permitted to express an
13 opinion if I had one as to the facts in this
14 case. So you, the jurors, determine what is the
15 truth of the facts.

16 Now, I do not want jurors to take notes
17 during the trial because it is my experience
18 that while writing notes, you may miss something
19 very important for you to hear and you may fail
20 to observe a witness testifying. It is
21 important that you pay careful attention to all
22 testimony and introduction evidence since you
23 must judge the credibility or believability of
24 the witnesses and the weight to give all
25 evidence introduced into this case in

STATE OF SC VS. KASHIF P. NASH

1 determining the truth of the facts.

2 During the trial, the attorneys may object
3 to the admissibility of certain testimony or
4 other evidence. I will sustain the objection,
5 which means I agree, and the testimony and
6 evidence may not be made part of the record for
7 your consideration or I will overrule the
8 objection, which means, as the judge of the law,
9 I have determined that it is inadmissible as
10 part of the record for your consideration.

11 The mere fact that I have admitted it does
12 not mean that you must believe it or disbelieve
13 it. I have simply determined it is admissible
14 under our rules. It is up to you then to
15 believe it or disbelieve it and to assign such
16 weight to it as you determine to be appropriate.

17 At the conclusion of the trial, I will
18 send you to the jury room. Every exhibit
19 submitted into evidence will be sent to the jury
20 room for you to examine further and to consider.

21 I remind you one of the most important
22 aspects of your duty as a jury lies essentially
23 in the oath which you have not taken yet but you
24 will take it when you come back. In that oath
25 that you will take, to well and truly decide

STATE OF SC VS. KASHIF F. NASH

1 this case and determine the truth of the facts
2 in this case. That oath, once again, in a very
3 essential way, says that you are the sole judges
4 of the facts in this case.

5 Ladies and gentlemen, whatever your
6 verdict in this case, it must be your unanimous
7 verdict. All 12 of you must agree on the
8 verdict. The foreperson would be authorized to
9 write on behalf of the jury.

10 Ladies and gentlemen, you are not to
11 discuss this case at any time during the trial
12 until I tell you and that will not occur until
13 you have received all of the evidence and I have
14 instructed you upon the law. You should not
15 discuss the case among yourselves and you should
16 not discuss the case with family, friends or
17 anyone else that you might see outside of court.

18 You might say what is wrong with us
19 discussing the case as we go along and somebody
20 finds out you're on the jury and wants to know
21 something about the case, what's wrong with
22 discussing it with them.

23 The problem with discussing the case among
24 yourselves or with anyone else is that once you
25 start discussing the case, you start forming

STATE OF SC VS. KASHIF P. NASH

1 opinions, and you would not be fair to both
2 sides of this case if you didn't wait until you
3 heard all of the testimony and evidence and I
4 have instructed you upon the law that applies
5 before you start forming opinions.

6 Until then, you should keep an open mind.
7 Wait until you have all of the information you
8 need before you decide any issues in this case.

9 Now, if you see the parties or witnesses
10 or attorneys talking about the case outside of
11 the courtroom, you should not listen and move
12 away from them. If anyone should deliberately
13 try to discuss the case with you, you should not
14 discuss it with them and leave and report that
15 attempt to me through the bailiff or clerk of
16 court and give as best a description as you can
17 of that person and they will let me know and I
18 will deal appropriately with that person. No
19 one should try to discuss the case with you. If
20 they do, I certainly wish to be made aware of
21 it.

22 If there should be any media coverage of
23 this trial, please do not read, listen to or
24 watch any media account until after the trial is
25 over and the verdict is in. If there should be

STATE OF SC VS. KASHIF P. NASH

1 any media coverage, I don't know if there would
2 be any and there very well might not be, but if
3 there should be media coverage of the trial, I
4 ask you to save it until after the verdict is
5 in. You are welcome to listen to or read media
6 accounts after the trial. There is no way we
7 can guarantee the accuracy of any such accounts
8 of the trial. You must make your decision
9 solely on the sworn testimony and evidence that
10 comes in during the course of the trial and not
11 from any other source.

12 I am well aware that many people today get
13 their news and information over the Internet and
14 through electronic devices such as a phone or
15 other things like computers and ipads and all
16 that sort of thing. Please do not go on any
17 kind of electronic device, phone, et cetera, to
18 try to find out anything about this case.

19 Again, after the trial is over, that's
20 fine, but in the meantime, do not do that. This
21 will be a very short trial and shouldn't be an
22 imposition on anybody. Please do not get any
23 information on this case through electronic
24 devices or reading or media coverage that might
25 appear on electronic devices.

STATE OF SC VS. KASHIF P. NASH

1 I am concerned about your comfort and
2 ability to see and hear the testimony and
3 evidence to properly do your job. I try to take
4 a break about every hour and a half. If you
5 need a break before the time a break is taken,
6 please raise your right hand and let me know and
7 I will take a break as quickly after that as I
8 can.

9 If you cannot hear or see something you
10 need to hear or see during the course of the
11 trial, I will try to anticipate that. Some of
12 you are much further away from the witness stand
13 or where the attorneys are standing. If you
14 cannot hear or see something you need to hear as
15 we go through the trial, please do not hesitate
16 to raise your right hand and let me know and I
17 will make sure you are able to hear and see so
18 you can properly do your job.

19 If you wish to communicate with the Court
20 other than needing a break or inability to hear,
21 please write the message down on a tablet which
22 will be provided for you back in the jury room
23 and give that to the bailiff and the bailiff
24 will bring it to me. I will correspond in a
25 like manner or I will bring you back out in the

STATE OF SC VS. KASHIF F. NASH

1 courtroom as the case need be. That's how we
2 should communicate in this case.

3 What I will ask you to do is go with the
4 bailiff back into the jury room and elect from
5 the first 12 jurors chosen, not the alternate,
6 but the first 12 jurors chosen, a foreperson.

7 Let me explain the role of a foreperson.
8 The foreperson is asked to serve as spokesperson
9 for the jury back to the Court. So if a matter
10 needs to come to the attention of the Court from
11 the jury, we ask the foreperson to write the
12 message down on a tablet, again, give it to the
13 bailiff, the bailiff will bring it in and I will
14 respond appropriately.

15 We also ask that the foreperson serve as a
16 moderator once we reach the deliberation stage
17 of the trial, maintain order during the
18 deliberations and make sure everyone is allowed
19 to participate in the deliberations. And then
20 finally, once the unanimous verdict is reached
21 by the jury, record that verdict on a verdict
22 form which can be provided to you and explained
23 to you at the appropriate time and conclusion of
24 the trial.

25 The primary role of the foreperson is to

STATE OF SC VS. KASHIF P. NASH

1 listen carefully to the testimony and evidence
2 so you will be in a position to deliberate and
3 reach a verdict the same as every other juror.

4 I will also explain the role of alternate.
5 Mr. Hagan, you are the alternate in this case.
6 The role of the alternate is the same as the
7 first 12 jurors chosen because for any reason if
8 an emergency should develop with regard to one
9 of the first 12 jurors chosen and we would have
10 to excuse that juror, you would automatically be
11 asked to fill in for the missing juror. You
12 could not do that if you had not listened
13 carefully to the testimony and evidence and were
14 in a position to deliberate and reach a verdict
15 in this case.

16 We ask you to keep that same seat
17 throughout the trial and the foreperson sit on
18 the first seat in the front row. All the other
19 seats are interchangeable and it doesn't matter
20 where you sit. We like to keep the alternate
21 and foreperson in the same seats.

22 Once you elect a foreperson, when that
23 person is elected, write the name and juror
24 number down and give it to the bailiff. Once
25 you are done with that, you can go to lunch. I

STATE OF SC VS. KASHIF F. NASH

1 will ask you to be back at 1:45. It is 12:30
2 now, if you could be back at 1:45. We have a
3 couple matters to take up before we get started.
4 Please retire to the jury room.

5 (Whereupon, the jury exited the courtroom
6 at 12:28 p.m.)

7 THE JUDGE: Counsel, I will hear you with
8 pre-trial motions at this time.

9 MR. PLEMING: Thank you, your Honor. Your
10 Honor, first off, the State would seek to
11 introduce at this time and move for admission
12 into evidence self-authenticating certified
13 copies of the defendant's DMV notice of his
14 habitual traffic offender status. I will show
15 that to defense counsel at this time.

16 MR. HARRIS: I object.

17 THE JUDGE: You object?

18 MR. HARRIS: Yes, sir.

19 THE JUDGE: On what basis?

20 MR. HARRIS: Your Honor, I don't know if
21 the documents have been marked for purposes of
22 this hearing or not.

23 MR. PLEMING: They have been marked as
24 State's Exhibit Number 1.

25 MR. HARRIS: Your Honor, the two documents

STATE OF SC VS. KASHIF F. NASH

1 and these documents were supplied to me couple,
2 three weeks ago as part of discovery. What the
3 documents are, and they might bear inspection by
4 the Court, it purports to be a letter addressed
5 to Kashif P. Nash, dated July 29, 2010 on South
6 Carolina Department Motor Vehicle letterhead,
7 which is titled Official Notice but which would
8 be a declaration of habitual offender status.

9 There is also a separate document,
10 although I was informed, presented by the
11 assistant solicitor today, stapled to the July
12 29th, 2010 letter what to me purports to be a
13 certified mail return receipt bearing the
14 signature of an unknown person dated August 11,
15 2010 referencing Article Number -- there is a
16 lengthy number here, but it is in Paragraph 2 of
17 the second page of the document that the
18 apparent -- it is the unique identifying number
19 for the actual certified letter that was sent.

20 I have two grounds for objection for this
21 document. First of all, on hearsay grounds.
22 The document itself, the defendant asserts, is
23 clearly hearsay. It is offered not just for the
24 truth of the matter asserted, which would be the
25 defendant had, prior to the date in the

STATE OF SC VS. KASHIF P. NASH

1 indictment for habitual traffic offender
2 charged, been declared a habitual traffic
3 offender.

4 But so far as my review of the State's
5 witness list, it seems apparent to me that they
6 will offer no live witness from the Highway
7 Department of record, custodian or any other
8 type person.

9 So the document itself is continuing to be
10 the State's sole evidence of the essential
11 element of the offense of habitual traffic
12 offender.

13 I have searched the rules of evidence as
14 best I can and I can find no rule of evidence
15 that permits this document, which is a letter
16 allegedly sent to the defendant declaring him a
17 habitual traffic offender. I can find no rule
18 of evidence that would permit the introduction
19 of this document without at least a record
20 custodian.

21 The only rule of evidence that I can find
22 that would remotely fit the situation -- and
23 here we are not talking, your Honor, at least I
24 want to make clear for the record, the grounds
25 of objection is not authenticity at this point

STATE OF SC VS. KASHIF F. NASH

1 for purposes of this argument. It is not
2 authenticity. It is just that it is hearsay,
3 impermissible hearsay, because it can't be
4 allowed in by an exception to hearsay rule.

5 Rule 803 is the closest rule I can find
6 which, of course, governs hearsay exceptions
7 when the availability of the declarant is
8 immaterial. Of course, I know the Court is well
9 aware of the rule, and there are 23 exceptions.
10 I find none of them applicable to this document.
11 Exception 6, Records of Regularly Conducted
12 Activity, the State might argue could apply but
13 it only applies if you have a record custodian
14 present.

15 Paragraph 8, Public Records and Reports.
16 This is not a public record. It is not on file
17 for public inspection. It is a private record
18 sent to the defendant, pursuant to the Highway
19 Department's obligation to notify a driver if he
20 has reached, in the Highway Department's view,
21 habitual traffic offender status.

22 So, your Honor, it is a very
23 straightforward argument we make here, that this
24 document is clearly hearsay within the
25 definition of a rule for hearsay. It is offered

STATE OF SC VS. KASHIF P. NASH

1 not just for the truth of the matter asserted
2 but to prove an essential element of the State's
3 case, the HTO case, and there is no exception
4 that permits that straight introduction into
5 evidence without foundation or a witness to
6 qualify its admission.

7 THE JUDGE: Counsel.

8 MR. HARRIS: There is another ground,
9 separate argument, but --

10 MR. PLEMING: Thank you, your Honor. Your
11 Honor, first of all, I would draw the Court's
12 attention to Section 56-1-800 of South Carolina
13 Code which makes this document
14 self-authenticating. I know the objection at
15 this point doesn't go to authentication. I will
16 respond to the hearsay argument first. But I
17 think that in order to do so, I need to lay the
18 groundwork that this is a self-authenticating
19 document. It has been stamped certified to be a
20 true and a correct copy of the original document
21 on file with South Carolina Department of Motor
22 Vehicles.

23 It is stamped by the Deputy Director of
24 the Department and that complies with 56-1-800,
25 which states that "In all proceedings held under

STATE OF SC VS. KASHIF F. NASH

1 the provisions of this article, photostatic,
2 optical disks, or other copies of the reports
3 filed with the Department of Motor Vehicles,
4 including official reports received from
5 directors of the motor vehicle divisions, court
6 officials, or other agencies of other states
7 charged with duties of keeping records of
8 offenses against the traffic laws of such states
9 and reports of courts marshal or out-of-state
10 commissioners are deemed to be true copies when
11 such copies are duly certified by the director
12 or designee or as true copies of the original or
13 on file therewith, and such shall be deemed
14 prima facie evidence of the information
15 contained on such reports for the purpose of
16 showing any conviction."

17 That last line states that it should be
18 deemed evidence of the information contained for
19 the purpose of showing any conviction. That's
20 the very reason why this section is in the code.
21 It's why the legislature adopted this section so
22 that in every driving case we don't have to call
23 someone from the Department of Motor Vehicles to
24 come all the way up from Columbia to testify. I
25 mean, that appears to me to be the very reason

STATE OF SC VS. KASHIF F. NASH

1 and intent of the legislature to include the
2 section in the code.

3 As far as the hearsay objection, I would
4 submit to your Honor that this is a public
5 record or report under the definition of the
6 public record exception to the hearsay rule,
7 that it is a record or report or in a data
8 compilation that is in the form, whether that be
9 in a letter addressed to notify someone, it is
10 still on file with the Department of Motor
11 Vehicles. That still makes it that a status
12 compilation which contains the information that
13 we are seeking to comport here, that he is
14 habitual traffic offender. It states the
15 beginning date of his suspension and the ending
16 date and the reasons for his suspension.

17 And it sets forth the activities of the
18 office or the agency, that they did suspend his
19 license, they did declare him a habitual traffic
20 offender, and that satisfies Subsection A of the
21 exception which I submit to your Honor is all
22 that is necessary for the exception to apply in
23 this case.

24 THE JUDGE: What about that, Counsel?

25 MR. HARRIS: Your Honor, I simply

STATE OF SC VS. KASHIF P. NASH

1 disagree. Public records are records that are
2 readily available to the public. Probably the
3 classic example of a public record is something
4 that is required to be filed. It is something
5 that can be searched by the public.

6 This is a private letter, clearly by its
7 terms a letter sent supposedly, personally to
8 Kashif Nash, notifying him, not the public, not
9 the world, notifying him supposedly of his
10 status with the Highway Department, vis-à-vis,
11 his license.

12 Would the solicitor have us believe that
13 every piece of correspondence that we receive
14 from the Highway Department is for all the world
15 to know as a public record? I don't think so.

16 THE JUDGE: Forget about public record.
17 There is not any question that records down
18 there, whether you call them public records or
19 business records down there. You know, that is
20 an exception to the hearsay rule, records kept
21 in the ordinary course of business. They have
22 somebody that says they are regularly kept in
23 and part of their activity. Isn't that an
24 exception to the hearsay rule?

25 MR. HARRIS: Well, we are back to

STATE OF SC VS. KASHIF F. NASH

1 Paragraph 6 now of 803, which states that
2 records that are business records are admissible
3 as an exception to the hearsay rule if the
4 custodian of the records or other qualified
5 witness comes into court to testify about the
6 record.

7 Clearly, by the terms of Paragraph 6 of
8 Rule 803, business records, if indeed a record
9 is deemed to be a business record, is admissible
10 outside the hearsay rule as an exception to
11 hearsay if they have a witness come to court and
12 say, yes, this is a record that we keep in the
13 regular course of business. Yes, we have a
14 procedure to do this, et cetera, all of the
15 things that would be foundational for the
16 documents' admissibility as an exception to the
17 hearsay rule.

18 Here again, we are not talking about
19 authentication of the documents. We are talking
20 about a separate evidentiary issue, and that is
21 the foundational requirement for its admission
22 as a category of evidence outside the hearsay
23 rule.

24 Now, I haven't raised in this argument,
25 but given the assistant solicitor's position,

STATE OF SC VS. KASHIF P. NASH

1 confrontation clause considerations come into
2 play here as well because the assistant
3 solicitor says, well, you can look at the
4 document and you can see that the Highway
5 Department has found that there has been these
6 violations and what all has been done.

7 Well, also, the letter, if we want to read
8 the letter, says that there is a right of an
9 appeal and that a person can appeal, and that
10 the Highway Department's decision can be
11 overturned.

12 Well, the defendant has we know no burden
13 of proof and there can't be any evidence
14 submitted that would shift the burden of proof
15 so we would put a document into -- one example,
16 we would put a document into evidence, if the
17 State had its way, they would say, see there, he
18 has been declared a habitual offender for
19 something that happened three or four years
20 beyond that date but without any way for me to
21 cross examine the document to determine if there
22 has been an appeal, if the decision of the
23 department has been overturned.

24 That's the whole purpose for allowing
25 business records to come in only if there is a

STATE OF SC VS. KASHIF F. NASH

1 witness to say this is our record, this is the
2 only record we have, this is the record that is
3 kept in the Court.

4 I certainly appreciate the logistical
5 challenge, if we want to say it's a challenge,
6 of having a witness come to court in a felony
7 prosecution for habitual traffic offense like we
8 have here, felony prosecution, the logistical
9 concern that they have about bringing in a
10 witness to say this is what to qualify the
11 record, business record under Paragraph 6 of
12 803.

13 It is no different, your Honor, than
14 prosecuting somebody for felony possession of
15 cocaine and having the person who tested the
16 drugs come from Columbia or wherever they have
17 to come and say that. Unfortunately, when in
18 criminal prosecutions, certain proof has to be
19 adduced. That's all it is. I have handled a
20 lot of these cases, as your Honor knows, and I
21 do think that there is sort of this generalized
22 notion that exists out there that not a lot of
23 these cases necessarily get tried.

24 But there's a generalized notion out there
25 among our colleagues on the prosecution side,

STATE OF SC VS. KASHIF P. NASH

1 hey, that's just the record. We have a record,
2 they put a stamp on it, and we just put it into
3 evidence. But the rules of evidence don't
4 permit it, in our view, particularly when it
5 goes to prove an essential element of the
6 charge.

7 THE JUDGE: What controls the statute or
8 rules?

9 MR. HARRIS: The rules of evidence control
10 because the statute that the assistant solicitor
11 references is merely for purposes of
12 authentication. I am not talking about
13 authentication here. That statute goes solely
14 to authentication and how they can authenticate
15 a document. That would be if an evidence
16 custodian came into court trying to qualify the
17 record as a business record and a defendant
18 tried to challenge the document, not on business
19 record grounds but on authenticity grounds, that
20 this record doesn't -- it's not what it purports
21 to be. Even in a military record custodian, you
22 didn't make this record, did you? You didn't
23 generate this record. You didn't research this
24 data that went into making this decision.

25 That's what the statute, your Honor, I

STATE OF SC VS. KASHIF P. NASH

1 would say, intended to address is you don't have
2 to have -- if you have a business record and you
3 can go record in through the business records
4 set in 803, you don't then have to face, if you
5 authenticate it properly, you don't then have to
6 bring a lot of other witnesses to say I was the
7 actual maker of the document. I actually know
8 the things in it are true. I hope I am being
9 clear enough in my position.

10 THE JUDGE: Not really. The statute he
11 sites normally is absolutely correct that they
12 would have to bring somebody in to file, to show
13 what the record is based on and what they have
14 on file and the reason. You have the right to
15 question about that. Normally, that would be
16 the case. They have a foundation.

17 But here you have a statute that states it
18 is prima facie evidence if they have got one
19 that has been certified by either the director
20 of motor vehicles or assistant who is authorized
21 to do that.

22 MR. HARRIS: The statute is intended for
23 self-authentication and to relieve the State of
24 proving that the content of the document is true
25 through a direct witness. But that's a separate

STATE OF SC VS. KASHIF P. NASH

1 issue of whether or not it remains hearsay under
2 803.

3 The streamline approach that is
4 envisioned, I think if you look at the statute
5 and you look at 803(6), is if you get the proper
6 certifications on a document from a state
7 agency, from the Highway Department, if you get
8 the proper stamps on it and all those things to
9 authenticate it, then all we are going to make
10 you do, State, is bring the records custodian in
11 for five minutes of testimony. That's all we
12 are going to make you do, and then you can get
13 your document in.

14 But they have not removed that obstacle.
15 You still have to bring your records custodian.
16 I think the statute only relieves them of the
17 obligation to present the maker of the document
18 itself or somebody else that can vouch for its
19 content.

20 THE JUDGE: Do you have any case law on
21 this?

22 MR. PLEMING: Your honor, I don't have any
23 case law on the argument he is making
24 specifically. However, he continues to argue
25 that we are trying to use the business exception

STATE OF SC VS. KASHIF P. NASH

1 to get around the hearsay rule in this case.
2 With all due respect for Mr. Harris's definition
3 of what is public record, we have a definition
4 of a public record in the hearsay rule and
5 public record is a record, statement, data
6 compilation of any form of public offices or
7 agencies setting forth the activities of that
8 office or agency. What makes it public is not
9 that it's available to anyone in the public to
10 get it. What makes it a public record is that
11 it is a record of a --

12 THE JUDGE: It is maintained by a public
13 agency.

14 MR. PLEMING: Yes, sir. And that can be
15 authenticated by the stamp and the signature of
16 the deputy director that is on these records.
17 And it is authenticated as a record from this
18 public agency and then what gets around the
19 hearsay rule is that it is a public record so we
20 don't have to worry about hearsay and we don't
21 have to worry about that authentication.
22 Authentication is satisfied by statute and it
23 says by that stamp that it is a public record.
24 We have established that.

25 MR. HARRIS: But I say it is not a record,

STATE OF SC VS. KASHIF P. NASH

1 report, statement, or data compilation. It is
2 not like the Highway Department has put together
3 something to say there has been this many DUIs
4 relating traffic fatalities.

5 It is a private letter, a private piece of
6 correspondence directed to one individual in the
7 State of South Carolina intended for him, to
8 notice him, not to notice the world, to notice
9 him. I mean, I guess the solicitor can try to
10 say that, you know, under his argument, I go
11 back to my analogy, he would say that every
12 single piece of correspondence that the Highway
13 Department sends to any driver in the State of
14 South Carolina on any subject is a public
15 record.

16 I don't even think the Highway Department
17 would agree with that. I don't think the
18 Highway Department is going to generally make
19 available to the public a letter that they sent
20 to him.

21 THE JUDGE: I am not buying your argument.
22 I think these are public records. There are a
23 lot of public records down there that you cannot
24 get access to but they are maintained as part of
25 the public records. Your driver license

STATE OF SC VS. KASHIF F. NASH

1 suspensions, et cetera, whatever charges you've
2 got and points on that, it is not generally
3 available to the public. What they are sending
4 out, true, is sent to an individual, no question
5 about that, but it is from their records,
6 verifying their records, saying this is what we
7 have on our records, and therefore, you are
8 suspended under the HTO.

9 So it is a letter to him reflecting what
10 the records show based on their records and they
11 authenticated this is what their records are
12 under the statute by having that person on it.

13 The question I still have, under the rule
14 normally you have to vouch for any of those
15 records if they are, in fact, your records, and
16 the question is whether if it carries an
17 authentication or verification by someone who is
18 authorized to issue that report or that letter
19 reflects in the record, it has a standard
20 signature of the person authorized by statute
21 can do that, if that's sufficient to show that's
22 what this record shows.

23 MR. HARRIS: Well, I don't think that the
24 letter itself and the content of the letter
25 is -- that goes to, your Honor, I told the Court

STATE OF SC VS. KASHIF P. NASH

1 that I have a second portion that goes with this
2 and the Court is sort of going into that
3 territory now.

4 If you look at the letter and the return
5 receipt and what it purports to say, the letter,
6 which is supposedly the official notice of
7 declaration of habitual traffic offender status,
8 is not signed at all. It is simply at the
9 bottom there is a -- the last thing on the
10 letter, it says, "Driver records manager." The
11 language of the HTO statute is the driver
12 records manager, if that's who really is the
13 maker of this document, the person or entity or
14 office that is responsible for searching the
15 records and determining that making the
16 declaration of habitual offender status.

17 In my mind, the manager of the records
18 compiles the records but gives them to somebody
19 to make the decision into --

20 THE JUDGE: Let me cut you short.

21 MR. HARRIS: I am sorry, your Honor.

22 THE JUDGE: I have tried a couple of these
23 cases and each time we had somebody come verify
24 the record and letter. We had somebody come in
25 on both cases from the Highway Department

STATE OF SC VS. KASHIF F. NASH

1 verifying.

2 So if that was done in those cases,
3 somebody acknowledged you had to bring somebody
4 to verify their records and ask questions about
5 what it was based on. That's my question. Is
6 there any authority that shows this statute
7 alleviates their requirement to bring somebody
8 to verify these are, in fact, their records in
9 their office? Who verified it?

10 MR. PLEMING: Who verified the records?

11 THE JUDGE: From what you have there.

12 MR. PLEMING: Well, we sent a letter
13 requesting the records directly to the
14 Department of Motor Vehicles and our office
15 received those records in response to that
16 request with a copy of our request contained in
17 it. And so because of the stamp and because of
18 the statute, I take that as verification that
19 they are the records that we requested.

20 And I believe that's what the statute -- I
21 think that's why the statute exists. I think it
22 is to alleviate the burden of having someone
23 from DMV have to travel to --

24 THE JUDGE: I have only tried a couple of
25 these cases and both cases had somebody travel

STATE OF SC VS. KASHIF F. NASH

1 up and take the stand and verify the records and
2 show the file, what it was based on is what they
3 had in the file. That may not have been
4 required in the case but the solicitors called
5 it so that causes me concern if they thought it
6 was necessary to do it in those cases, so why
7 you don't think it is necessary to do it?

8 MR. PLEMING: They may have been
9 practicing more caution than our office has in
10 this case. We believe that because of the
11 statute, that it is not necessary to go to those
12 measures in every single one of these driving
13 cases that we get.

14 There are a number of driving cases that
15 are on the docket every month and most of them
16 plead out. But, you know, I would be sending
17 subpoenas to Blythwood every single month
18 asking someone to be prepared to clear their
19 schedule to come up here and testify if this
20 statute did not alleviate that burden from us.

21 It is our position that the statute has
22 done that. That's the purpose of it. I can
23 distinguish it from having someone from S.L.E.D
24 come to authenticate drugs because those are
25 expungeable evidence that an expert has to

STATE OF SC VS. KASHIF P. NASH

1 testify to say that they are what they purport
2 to be. There is something different about a
3 stamped record and drugs.

4 Our position would remain that the statute
5 -- I don't know what purpose the statute would
6 serve if it were not to alleviate that burden
7 from the State of having someone travel all over
8 South Carolina all of the time to testify in
9 these cases.

10 MR. HARRIS: Your Honor, I am just back to
11 -- they are talking about authenticity. You
12 know, the stamp on the letter simply says
13 certified to be the true correct copy of the
14 original document. The original letter, you
15 know, so they don't have to have the original
16 letter. It says nothing about whether, in fact,
17 it is verifiably true that there has been three
18 qualified convictions for habitual traffic
19 offender status, that those things are all
20 correct. It just says, yes, this is the letter
21 we sent. It is a copy of the letter we sent in,
22 but it doesn't say anything about --

23 THE JUDGE: Is that what the records show?

24 MR. HARRIS: No, it just says this is
25 certified to be a true and correct copy of the

STATE OF SC VS. KASHIF P. NASH

1 original document on file with the South
2 Carolina Department of Motor Vehicles. This is
3 a true copy of a letter we sent, but that
4 doesn't go to the concern here, which is --

5 THE JUDGE: Does that reflect what the
6 record showed?

7 MR. PLEMING: Yes, sir. The purpose of it
8 is to establish that he was, at the time he was
9 stopped in this case, declared by the DMV to be
10 a habitual traffic offender. It is not to --

11 THE JUDGE: What if the letter is not
12 right? What if they are wrong?

13 MR. PLEMING: This is the evidence that we
14 are presenting, that he was a habitual traffic
15 offender. It is authenticated as true. I think
16 that's reliable.

17 THE JUDGE: Don't they have to verify
18 that, in fact, he met the criteria, that he has
19 the records and number of traffic offenses to
20 comply? Don't they have to do that?

21 MR. PLEMING: I think they would have to
22 do that if he appealed his habitual traffic
23 offender status. But as far as whether or not
24 his license to drive was, in fact, still
25 suspended on the date that he was driving in

STATE OF SC VS. KASHIF P. NASH

1 this case, we don't have to look at his past
2 record and I had no intention of going into that
3 during the course of the trial.

4 The only element of the offense of
5 habitual traffic violation is that the defendant
6 was declared a habitual traffic offender by the
7 DMV, whether they got it right or wrong, that he
8 drove while being a habitual traffic offender.

9 And so the issue of whether or not he did
10 have the requisite record to be declared
11 habitual traffic offender is something he would
12 have to take up with the agency in an
13 administrative hearing. That is not an issue
14 that would be part of whether or not he was
15 driving while declared a habitual traffic
16 offender.

17 MR. HARRIS: In the cases that I've had,
18 your Honor, like somebody from the Highway
19 Department goes and gets on the stand and they
20 say, okay, our records show that just like the
21 letter says, that on such and such a date, this
22 violation occurred. On such and such a date,
23 this violation occurred. On such and such a
24 date, this violation occurred. Based on all of
25 that, we determined and declared him a habitual

STATE OF SC VS. KASHIF F. NASH

1 traffic offender and we sent him a letter to put
2 him on notice of that factor. The letter is
3 itself not the declaration. The declaration is
4 made by somebody in the Highway Department. The
5 letter is simply meant to provide notice to a
6 driver that action has already been taken, that
7 that declaration has already occurred.

8 THE JUDGE: Okay. That's what they are
9 saying.

10 MR. HARRIS: Well, my point is that you
11 have to prove that the defendant had been
12 declared at a point in time prior to this
13 habitual traffic offender, you have to have
14 somebody come in to say that had occurred, not
15 to simply say we sent him a notice about that,
16 but that had occurred. That is my whole point.

17 That is like the assistant solicitor trying
18 to prove a defendant's prior record but by
19 providing a summary of it, not actually proving
20 the convictions. It is sort of an analysis type
21 thing. Just writing down a summary and saying,
22 you know, this is what we believe the record
23 showed is not sufficient proof in a trial. As I
24 have said, they may not try many habitual
25 offenders down here but...

STATE OF SC VS. KASHIF F. NASH

1 THE JUDGE: Counsel, you know, we can go
2 on and on about this all day. I am going to
3 require you have somebody come in and verify the
4 records. It has been done. I have only tried a
5 couple of these, probably had a thousand plead
6 guilty to it. I have only tried a couple of
7 them. In those cases they have crossed somebody
8 and verified it with the person. This is what
9 our records show, this and this and on such and
10 such a date this record showed it. I am
11 familiar with the records. I keep the records.
12 I am one of the persons that keeps the records.
13 But sometimes it is the person who works in the
14 office that keeps the records.

15 It has been done in the two cases that I
16 had. If it is unnecessary, I don't know why
17 they would do that. I would like to see case
18 law, but I don't see a single case telling me
19 one way or the other.

20 But we still have the rule with regard to
21 hearsay to deal with and we are talking about a
22 felony so I am going to require you to bring
23 somebody in to do it. You have time to do it.
24 If you need to take somebody out of order, bring
25 them in tomorrow, do something like that, get

STATE OF SC VS. KASHIF P. NASH

1 them here. I think I am going to require that.

2 I may be wrong, but I have not seen
3 anything one way or the other. I don't know why
4 we had it in the other two cases I tried if it
5 wasn't necessary. I don't know why the
6 solicitors would have brought them in if not
7 necessary.

8 MR. PLEMING: Yes, sir.

9 THE JUDGE: If nobody objects, it is fine.
10 It is kind of ridiculous to object to it. I
11 think it is ridiculous to make somebody come to
12 verify what he already got. But on the other
13 hand, he is entitled to do anything he needs to
14 under the rule.

15 I think that person is going to come in
16 and verify it, and you will tie up a public
17 official to travel up here to do that and
18 testify in court, do the same thing they have
19 there. I think it is ridiculous. On the other
20 hand, I need to get it right so it doesn't come
21 back on appeal because they didn't have anybody
22 in to verify the records on file, what it means
23 and the background is, and the suspension order,
24 and when this and that sort of thing. I don't
25 know. I may be wrong, but it has been done in

STATE OF SC VS. KASHIF F. NASH

1 the other two cases I had. I don't know why it
2 wouldn't be necessary in this case.

3 MR. PLEMING: Your Honor, I would ask at
4 this time if Mr. Harris would stipulate that he
5 was declared a habitual traffic offender on the
6 date of this offense then we would no longer
7 feel a need to submit this exhibit into evidence
8 at that point, that element will be established.
9 Then the only issue of trial is whether or not
10 he was the driver. From what I understand, he
11 denies that he was the driver. That was really
12 the only issue that we are going --

13 THE JUDGE: Do you stipulate he was
14 designated by the Highway Department as a
15 habitual traffic offender by that letter?

16 MR. HARRIS: Your Honor, the point of my
17 whole argument is if I had been in a position to
18 do that, we would not have spent the time.
19 Under the circumstances, I am not in the
20 position to stipulate.

21 MR. PLEMING: We'll seek to have someone
22 here tomorrow morning.

23 THE JUDGE: I will work with you time-wise
24 to get him in here. I don't know if it is
25 necessary to have him here at 9, but because I

STATE OF SC VS. KASHIF F. NASH

1 am in doubt about it, I think the better way is
2 to get him here. If I had something in the case
3 law, I would feel comfortable. Anyway, that's
4 where I am. Because I am in doubt, I would
5 require you to bring them in.

6 MR. PLEMING: Yes, sir.

7 THE JUDGE: What else?

8 MR. PLEMING: Your Honor, there is a video
9 from the incident, the officer's in-car video
10 that the State would seek to introduce. So in
11 light of that, I know a copy was given to
12 Mr. Harris and he has had a chance to review it.
13 And there are certain statements made by the
14 defendant, albeit in certain places on the video
15 it is more or less difficult to hear, that the
16 State would seek to admit as admission in this
17 case. So we would just like to see if we need
18 to have a Jackson vs. Denno hearing, we could do
19 that at this time.

20 MR. HARRIS: Well, your Honor, it is very
21 difficult to hear many of the statements on the
22 video, at least the copy I have listened to or
23 we listened to. There are various statements,
24 and although you can't see -- you never see the
25 defendant on the video. It supposedly is his

STATE OF SC VS. KASHIF F. NASH

1 voice on the video. I don't doubt it is.

2 But you don't see the people talking to
3 one another, at least Mr. Nash and Officer
4 Suber. You do hear some, to the extent you can
5 hear it, there is a lot of discussion on there
6 about the officer having had prior conversations
7 with the defendant to the effect of, if I see
8 you out driving again, I am going to arrest you.

9 To the extent that the video includes that
10 content, I object to it because it is not
11 relevant to any --

12 THE JUDGE: Sure it is.

13 MR. HARRIS: Well, I don't believe it is
14 relevant to show that he was driving on this
15 time.

16 THE JUDGE: Maybe not. It shows that on
17 the issue of whether he has been told don't be
18 driving. It goes to show that the officer,
19 number one, knew who he was and talked to him
20 before, and had told him not to drive and he was
21 aware of it.

22 I mean, yes, it goes to part of the
23 State's case. Why wouldn't they be able to get
24 that in there? If he responded and said, no,
25 you never told me that, that would be one thing.

STATE OF SC VS. KASHIF P. NASH

1 If he didn't deny it when he was told that then
2 why wouldn't it be part of the State's case? I
3 don't understand your problem there.

4 MR. HARRIS: Well, it places before the
5 jury this element of the defendant --

6 THE JUDGE: Well, he will sit up there on
7 the stand and testify you don't do that. I am
8 sure he is going to testify --

9 MR. HARRIS: I object to it. I think it
10 is more prejudicial than probative.

11 THE JUDGE: Why?

12 MR. HARRIS: Because there is no evidence
13 he was driving on this particular date.

14 THE JUDGE: I don't disagree with that,
15 and you can argue that to the jury. If he
16 wasn't driving, it doesn't matter, does it?

17 MR. HARRIS: The grounds for objection,
18 your Honor, just for the record, is that to the
19 extent that any of those statements would have
20 any probative value whatsoever, and we say it
21 does not, the prejudicial effect of the
22 statements outweighs the probative value. And
23 that's the grounds for the objection.

24 I would like to make this clear now before
25 we start the trial that I am going to object

STATE OF SC VS. KASHIF P. NASH

1 each and every time they attempt to do anything
2 like that.

3 THE JUDGE: Well, the officer is going to
4 testify and I am not going to stop him from
5 testifying that he has told him before. So I am
6 not going to stop him from doing that.

7 Now, the tape might be a whole different
8 thing. I am not clear on something like that,
9 being in violation of giving Miranda rights or
10 something like that, and he was told that or
11 didn't answer to it and something was
12 considered, admission of something, that's a
13 different argument.

14 The officer warned him before not to
15 drive, I think he can say that. If he stopped
16 him, and it goes to show why he stopped him.
17 They knew his license was suspended when they
18 stopped him and that goes to show all that.

19 I don't see what your objection is. I am
20 sure it is prejudicial but it is also probative.
21 It is more probative than prejudicial on the
22 issue of whether he should have been driving or
23 not driving. If he wasn't driving, it is not
24 going to matter. His defense is I am not
25 driving the vehicle.

STATE OF SC VS. KASHIF P. NASH

1 It goes to show whether this officer knew
2 it and could recognize and knew he was the one
3 driving the vehicle and stopped him because he
4 knew that when they stopped him. I mean, it is
5 probative, very probative on those issues.

6 Now, it is a whole different argument
7 about whether one of his rights of getting the
8 video showing the officer told him that and he
9 didn't respond, which is kind of an answer, I
10 guess, if you don't respond or if he responded.
11 I don't know if he didn't respond. I have not
12 seen the tape. That's a whole different issue
13 of whether it is probative. I think it is
14 probative.

15 MR. HARRIS: Well, it is claimed to be,
16 your Honor, that at some point in time, it is
17 not clear to me when because I can't find it at
18 any point in time on the video, but it may be
19 because I can't understand it well enough.

20 But it is claimed by the State in the case
21 that Officer Suber pulled in behind a parked
22 vehicle that he believed he saw the defendant
23 driving earlier at Mr. Rogers's house. At that
24 time, the defendant was going inside
25 Mr. Rogers's house very briefly and came back

STATE OF SC VS. KASHIF F. NASH

1 out.

2 I believe, although it is not been stated
3 to me this way, I believe he was called over by
4 Officer Suber. At some point in time it is
5 claimed that the question was asked to the
6 defendant, why were you driving? The defendant
7 allegedly responded, I don't know. Now, I can't
8 find that on the tape anywhere, but they claim
9 that was said.

10 THE JUDGE: That would be an admission.

11 MR. HARRIS: But none of this was with
12 Miranda rights. I don't think Mr. Nash has ever
13 received Miranda rights, but it is very
14 difficult to --

15 THE JUDGE: Did he receive the rights?

16 MR. PLEMING: Your Honor, we would only
17 seek to introduce part of the video that was
18 recorded prior to the point that he was ever
19 placed in custody. Anything said after that
20 point would be in violation of Miranda and we
21 are not seeking to introduce those statements.

22 THE JUDGE: If he asked him before he took
23 him into custody, if he asked him, why are you
24 driving and he said, I don't know, then that's
25 asking him -- basically, it is asking him to

STATE OF SC VS. KASHIF P. NASH

1 incriminate himself.

2 MR. PLEMING: Your Honor, for Miranda to
3 apply, he would have to be interrogated by the
4 police officer while in custody. In this case
5 it was more like a traffic stop, a routine stop
6 where an officer might come up to you and say,
7 Do you know why I stopped you or why were you
8 speeding, those type of questions. He is not in
9 custody.

10 THE JUDGE: Why were you driving, that's
11 to get an answer. That's not the same thing as
12 I am investigating this, you know, and asking
13 questions. Generally, by investigation I am
14 going to make sure there was a charge. He
15 already decided he was going to drive under
16 suspension, then -- he asked him, Why were you
17 driving, then he is soliciting an incriminating
18 response.

19 That can be considered, you know, when he
20 stopped him and charged him with that, you know,
21 that's a different situation. If he asked how
22 fast were you going, where were you going,
23 something like that, is different than why were
24 you driving when he knows he is under
25 suspension. He is asking for -- he is going to

STATE OF SC VS. KASHIF F. NASH

1 charge him with driving under suspension and he
2 is asking him to incriminate himself, is he not?
3 Why were you driving? That's not were you
4 driving? That was why are you driving?

5 MR. PLEMING: Basically, my understanding
6 of Miranda and the requirements for Miranda --

7 THE JUDGE: I don't know. We could argue
8 this all day. I am saying you don't have to
9 have somebody sitting in the police station
10 behind the bench asking him questions in custody
11 for Miranda to apply. It can apply where the
12 police officer was asking him questions designed
13 to solicit an incriminating response and an
14 incriminating response before he takes him into
15 custody.

16 MR. PLEMING: Yes, sir. If I could put
17 one more thing on the record regarding that. I
18 have not been able to state that. Your Honor, I
19 would like the opportunity to get case law
20 together to present to your Honor, but I believe
21 the question is whether or not someone is in
22 custody is based on the circumstances and which
23 they are different in every case.

24 THE JUDGE: I don't disagree with you.
25 Normally, they have to be in custody. If

STATE OF SC VS. KASHIF P. NASH

1 somebody is coming out to investigate it, how
2 much have you had to drink? That's not in
3 custody. That's an investigation stage. Why
4 were you driving? You were driving and I know
5 it is under suspension. Why were you driving?
6 He says, well, I was driving. I don't know why
7 I was driving. You are seeking an incriminating
8 response to something. There are cases that say
9 if the officer asked the question that is
10 designed to solicit an incriminating response in
11 his questioning then he has to give Miranda
12 rights.

13 Read the case law. You said you want to
14 read it and talk to me about it after before we
15 get started. I will let you present whatever
16 you like. I am just saying if the questions are
17 designed to get incriminating responses, whether
18 he has been placed in custody or not, it is
19 still being subject to Miranda warnings.

20 MR. PLEMING: Yes, sir.

21 THE JUDGE: I don't think you need that.
22 I think you have the police officer testifying
23 to what he saw, what he knows. He knows this
24 defendant, he knows the person, and previously
25 he talked to him about not driving. I think he

STATE OF SC VS. KASHIF F. NASH

1 can testify to that.

2 MR. PLEMING: Yes, sir. If I could have
3 time during lunch to research it.

4 THE JUDGE: All right. What else?

5 MR. HARRIS: Your Honor, I don't have
6 anything further as far as pre-trial matters.

7 THE JUDGE: I thought you had one other.

8 MR. HARRIS: Well, I have a case for
9 severance, but I don't know if I am going to
10 present it now since I am doubtful that the
11 State is going to be able to move forward on
12 this HTO.

13 THE JUDGE: All they have to do is bring
14 somebody.

15 MR. HARRIS: I know. I understand. I am
16 not going to present my severance motion.

17 THE JUDGE: Nothing else then?

18 MR. PLEMING: No, sir, your Honor.

19 THE JUDGE: I will hear you on the other.
20 You can bring me law, and I will reconsider on
21 that.

22 MR. PLEMING: Thank you, your Honor.

23 THE JUDGE: You didn't tell me you had
24 pre-trial. I had one little thing from defense
25 that I thought would take two minutes. Why

STATE OF SC VS. KASHIF P. NASH

1 didn't you tell me about it? I could have sent
2 the jury out to 2 or 2:30 if you had told me. I
3 somehow thought 15 minutes. We are going to
4 take time to get lunch. We'll start back at
5 2:15.

6 (Court in recess at 1:18 p.m.)

7 (Open court out of presence of jury.)

8 THE JUDGE: Counsel, the case you handed
9 me didn't help at all. I certainly understand
10 that part of the law which says you have to be
11 in custody in order for Miranda warnings to be
12 given. I understand that. In the usual sense
13 of that word rather than just investigations,
14 roadside, and that sort of thing, routine
15 questions are certainly not subject to Miranda
16 warnings, and the law is clear on that. The
17 part that gives me pause, the problem is it says
18 that the interrogation -- in the case of Rhode
19 Island vs. Innis, interrogation being an
20 expressed questioning for or its functional
21 equivalent be included words or action on the
22 part of police, other than those with intent to
23 arrest custody, and the police should know a
24 reasonably likelihood to initiate an
25 incriminating response. That's the part of the

STATE OF SC VS. KASHIF P. NASH

1 law that is giving me the problem. I don't
2 think that he was in custody. Tell me again
3 what the brief facts are with regard to the
4 police officer.

5 MR. PLEMING: Yes, sir. Essentially, your
6 Honor, Deputy Suber observed the defendant
7 driving on [REDACTED] [REDACTED]. They were driving
8 in two opposite directions. They passed one
9 another on the road. Deputy Suber then turned
10 around with the intent to perform a traffic
11 stop.

12 By the time he was able to get the car
13 turned around, he had lost sight of the
14 defendant's vehicle. He accelerated to find
15 him, and eventually, he was able to see the
16 defendant's car going around a curve down
17 another street. He turned around again and went
18 down that road. By the time he caught up to
19 where the defendant's car was, he saw the car
20 parked at one of the defendant's friend's homes.

21 Deputy Suber then pulled into the driveway
22 behind the defendant's car. At that point, the
23 defendant was walking from his car to the front
24 door of the residence. Deputy Suber called out
25 for him to come back out and he briefly stepped

STATE OF SC VS: KASHIF P. NASH

1 inside the house and then turned around and came
2 back out. His microphone, the in-car recording,
3 did not begin recording until after Deputy Suber
4 had gotten out of his car and began to converse
5 with the defendant.

6 So it is not clear whether or not there
7 was anything spoken before that time. The first
8 thing you hear him saying on the video is, you
9 know, what did I say about you driving. And a
10 conversation then follows where the two of them
11 talk about past conversations they've had with
12 one another about him driving and he tells him,
13 you can't drive; explains to him why he can't
14 drive, and they have a conversation about him
15 driving when he is not supposed to.

16 At some point, Deputy Suber does place the
17 defendant in handcuffs and asks him to sit in
18 his car. At that point, the defendant asked
19 him, are you going to arrest me? He says, I
20 don't know yet. I need to look into some
21 things. But that is a brief summary --

22 THE JUDGE: When was the question asked
23 why was he driving?

24 MR. PLEMING: Right after he gets out of
25 the car and the defendant is coming back out of

STATE OF SC VS. KASHIF F. NASH

1 the house to talk to him. I believe the exact
2 question was, what have I told you about
3 driving? What have I said to you about driving?

4 THE JUDGE: I thought the question is
5 trying to keep out, suppresses the statement
6 that he was asked why were you driving and he
7 said I don't know.

8 MR. PLEMING: He does ask that question at
9 some point during the conversation. Since the
10 whole conversation turns on that issue of, you
11 know, we have gone over this. I have warned you
12 not to be driving. Now you are driving. You
13 know, what kind of explanation can you give me.

14 The State's position on this -- I don't
15 disagree that it is -- and that kind of
16 interrogation, that it is asked with the -- it
17 is a question which a reasonable person would
18 intend to elicit an incriminating response. But
19 my understanding of the case law as discussed in
20 these cases, Coralie and Kerr (phonetic
21 spellings). So there is an additional
22 requirement for Miranda to apply that the
23 officer's interrogation has to be custodial.

24 In the Kerr case, the officer asks the man
25 he suspects of drinking and driving because he

STATE OF SC VS. KASHIF P. NASH

1 smells alcohol on his breath, had you had
2 anything to drink tonight. This is after a car
3 accident --

4 THE JUDGE: It is different. It is
5 different. He is investigating at that point.
6 The problem I'm having with this is he knows
7 that he has violated the law by driving under
8 suspension. He knows he is going to arrest
9 him. He is not going to arrest him, but he
10 uses his discretion not to arrest him. He was
11 asking him, why were you driving and he has
12 already made the decision that he violated the
13 law. That's where I'm having the problem with.

14 He knows he is going to arrest him for
15 driving under suspension and he was asking why
16 were you driving in that design to get an
17 incriminating response. If he admitted why he
18 was driving, that he was driving.

19 MR. PLEMING: May I respond?

20 THE JUDGE: Yes, sure.

21 MR. PLEMING: I don't know that it is
22 clear that he had already determined that he was
23 going to arrest him. I think he thought he
24 probably was going to arrest him, but I think
25 there could be some justifiable reason, some

STATE OF SC VS. KASHIF P. NASH

1 emergency that caused him to drive. However
2 slim that possibility may be, I think that
3 question could be construed as an investigative
4 question as well to determine was there some
5 emergency that he had to drive in this instance.
6 You know, perhaps someone --

7 THE JUDGE: Hold on. Wait for the train
8 to go by. I think I am going to let it in. I
9 changed my mind on the ruling on that unless I
10 hear something different when the testimony goes
11 down. The reason I am going to let it in is
12 this: He was not actually in custody. I would
13 agree with that. He was never told he was under
14 arrest. He hadn't been put under handcuffs,
15 hadn't been told he was charged with anything,
16 and hadn't been told he was arrested. He
17 essentially hadn't been detained. They were was
18 still questioning.

19 I think it was clear to him that he was
20 driving and driving under suspension to the
21 officer. That question could have certainly
22 eliminated a criminal response, an incriminating
23 statement. However, it could have been a
24 different statement too like I was not driving.
25 It wasn't me. Or, if he asked him, why were you

STATE OF SC VS. KASHIF P. NASH

1 driving? Well, I mean, it could have been
2 extenuating circumstances that caused him to
3 drive or a reason why he was driving, knowing
4 his license was suspended. It could have been a
5 reason other than he was just willfully
6 violating the law even though technically he
7 would have been violating it.

8 I guess it would be a call to the officer
9 about whether he was going to charge him or
10 arrest him. So it is a fairly close question, I
11 guess, but really, he was not in custody, no
12 rendition of him being in custody at all at the
13 time the question was asked.

14 So it might be the functional equivalent
15 of saying, I think I smelled alcohol and how
16 much have you had to drink, and they let that go
17 because the officer is still investigating it.
18 That is not considered to be custodial
19 interrogation requiring Miranda warnings. The
20 cases are clear on that. There are a number of
21 them.

22 In any event, the fact that the officer
23 knew the defendant, and the defendant knew the
24 officer outside of being a police officer, lends
25 less to any kind of intimidation or threat or

STATE OF SC VS. KASHIF F. NASH

1 anything from being a police officer. But
2 nevertheless, it is a police officer who has to
3 make a decision whether he is going to charge
4 him or not.

5 I would find that he wasn't really in
6 custody unless I hear something to indicate
7 different at the time. He was not under arrest,
8 not in custody, not in handcuffs. No gun is
9 pointing on him. There was only one officer
10 there. He knew the officer as a person. It was
11 not a police officer that was a stranger and
12 didn't know that he might be intimidated by it.

13 So looking at the totality of the
14 circumstances, I don't think he was in custody
15 or subject to custodial interrogation.
16 Therefore, you know, no Miranda warnings would
17 be required in that situation. So I will let it
18 in unless I hear something different on that
19 issue.

20 MR. PLEMING: Thank you, your Honor.

21 THE JUDGE: What else? Anything?

22 MR. PLEMING: Nothing from the State, your
23 Honor.

24 MR. HARRIS: Your Honor, could I get some
25 clarification that might help us. Do I

STATE OF SC VS. KASHIF F. NASH

1 understand that it is the State's position that
2 the statement -- the question, why were you
3 driving and the answer, I don't know, are not to
4 be found on the video?

5 THE JUDGE: Are they?

6 MR. PLEMING: You cannot hear Mr. Nash
7 audibly say, I don't know. However, I would
8 actually say from watching it, the tone of his
9 responses, in my opinion, support what is in the
10 incident report. I asked him why he was driving
11 and he stated, I don't know. It seemed like his
12 response was he was dancing around a direct
13 answer and he was mumbling.

14 THE JUDGE: Why should I let that in if it
15 is not clear what he was saying?

16 MR. PLEMING: Because the response I don't
17 know I don't think is clear. It is possible he
18 said that before the recording began because
19 Deputy --

20 THE JUDGE: The officer can testify to
21 that.

22 MR. PLEMING: Right. But in addition to
23 that, there are other statements such as he
24 asked him, have you gotten your license issue
25 cleared up? And he said, I have two more years

STATE OF SC VS. KASHIF F. NASH

1 left. The defendant said at one point, when I
2 drive, I only go short distances. I only go to
3 the store. He says, I can drive. And he said,
4 I know you can drive but not legally. And he
5 asked him what he was going to do that day and
6 what have you been doing. He said, drinking
7 beer. He said, drinking and driving? He said,
8 no, I just drank beer, no liquor.

9 That's the response to the questions. He
10 said, that is drinking and driving. And he
11 said, oh, it is just beer.

12 THE JUDGE: None of that is going to come
13 in. That would be more prejudicial. He is not
14 charged with that.

15 MR. PLEMING: That happens later in the
16 video and if there is an objection to that,
17 certain parts of the video can certainly be
18 redacted.

19 THE JUDGE: I think anything to do with
20 driving and drinking should be redacted because
21 he is not charged with it. Was he charged with
22 it?

23 MR. PLEMING: No, sir. But he admits to
24 driving in his response about drinking and
25 driving.

STATE OF SC VS. KASHIF P. NASH

1 THE JUDGE: I understand drinking is more
2 prejudicial than probative. It is like the jury
3 is deciding the case on something else. The
4 police officer can testify. That's what I am
5 ruling about that. Anything that is clear on
6 there, but I don't think you can get in the
7 drinking part of it because he was not charged
8 with it.

9 If he was charged with it, fine. He is
10 not charged with drinking and driving and that
11 would be very prejudicial, more prejudicial than
12 probative and the jury will likely decide
13 whether he was drinking or driving rather than
14 driving on suspension.

15 MR. PLEMING: Yes, sir.

16 THE JUDGE: So you need to look at the
17 video and see if you can agree on what comes in
18 and redact what doesn't come in and let me look
19 at it to make a decision.

20 MR. PLEMING: Yes, sir.

21 THE JUDGE: Is that cleared up?

22 MR. HARRIS: Well, I'm certainly willing
23 to look and see if we can agree on redaction of
24 the video. I already expressed before lunch, I
25 think a lot of it is not admissible. But on the

STATE OF SC VS. KASHIF F. NASH

1 critical point, do I understand that the State's
2 position is that you cannot hear Mr. Nash make
3 this statement on the video? I don't know.

4 MR. PLEMING: I personally couldn't hear
5 him say those three words among all of the other
6 responses he gives.

7 THE JUDGE: If it is not on there, it is
8 not on there. So you can't innovate it. I
9 think the officer testified as to what he asked
10 him about, why were you driving. If he asked
11 him, do you this -- well, as part of that really
12 supports the ruling I just made in that he is
13 trying to find out if you've got your license
14 issue cleared up and he could have been -- if he
15 did, he could have said, yes, I got it cleared
16 up. If he said, no, I have two more years then
17 he should not be driving. He is driving under
18 suspension if he said that.

19 But if he is giving him a chance to say I
20 am no longer under suspension. He asked him,
21 did you get your driver's license issue cleared
22 up? That means you are in suspension or it was
23 taken care of. He gave him a chance to say
24 that. If he had, obviously, there would have
25 been no arrest. He is still investigating at

STATE OF SC VS. KASHIF P. NASH

1 that point.

2 Do you understand, Counselor? He is not in
3 custody. He is asking questions whether he
4 could lawfully drive or not.

5 MR. HARRIS: I understand the Court's
6 reasoning. I don't agree that it was
7 speculation. I think taking the totality of the
8 circumstances, it was a situation that required
9 Miranda.

10 THE JUDGE: I find he was not in custody.
11 He was not being interrogated while he was in
12 custody. It is not the usual situation where
13 somebody is confined or a bunch of officers
14 around or some other way where you could easily
15 determine somebody is in custody and subject to
16 custodial interrogation.

17 I think the officers are still
18 investigating at this point, but he also asked
19 him, you had your driver's license issue cleared
20 up? Why were you driving? And, of course, then
21 asked as part of the investigation, did you get
22 your license issue cleared up? In other words,
23 your suspension was lifted or something, make
24 sure he is, in fact, driving under suspension.

25 It is all part of the investigation. So

STATE OF SC VS. KASHIF P. NASH

1 that supports the ruling that is made and the
2 type of circumstances he is investigating
3 whether he is, in fact, under suspension. He
4 gave him a chance to clear that up before he
5 makes a charge, before he arrests him and
6 charges him.

7 MR. HARRIS: I follow the Court's
8 reasoning. I am more concerned at this point
9 about, and I think the Court has already
10 explained where I was going with this. I want
11 to prevent the State from inviting the jury to
12 believe that if they're going to use this video,
13 that the video is evidence of that statement.

14 THE JUDGE: I am not going to do that
15 unless -- you are not going to be able to
16 intimate that unless it is clear on the video.
17 He can't say, well, you hit this guard rail
18 right here --

19 MR. PLEMING: We were never going to.
20 That was not our intention.

21 MR. HARRIS: Your Honor, I certainly will
22 anticipate and try to agree to redaction of the
23 video. The question then comes to when are we
24 going do this?

25 THE JUDGE: When are you all going to do

STATE OF SC VS. KASHIF F. NASH

1 it?

2 MR. PLEMING: I was going to try to get it
3 in through Officer Suber. He's my first
4 witness.

5 THE JUDGE: How long will it take to
6 review that?

7 MR. PLEMING: Well, the video itself is I
8 think up to the point I have already intended to
9 cut it off, I think about 20 minutes long. I
10 intended to play up until that certain point
11 because the State, I believe we had a good faith
12 basis for all the statements up to that point
13 and, again, request redaction upon objection
14 from the defense.

15 But at this point we can sit down and
16 watch it together. Up until this day I have not
17 received anything from Mr. Harris saying he
18 objected to any part of the video so I have not
19 actually sat down to flag the most objectionable
20 parts.

21 THE JUDGE: Let's do this: I will let you
22 do that. Do it now. I will send word back to
23 the jury, something has come up, matters I have
24 to take up with counsel. You go agree, do that
25 and let's get it resolved before we get started.

STATE OF SC VS. KASHIF P. NASH

1 MR. PLEMING: Yes, sir.

2 THE JUDGE: We are in recess.

3 (Court in recess at 2:48 p.m.)

4 (Open court out of presence of jury.)

5 THE JUDGE: Go ahead and play it.

6 MR. PLEMING: Yes, sir.

7 (Playing tape.)

8 THE JUDGE: I am not letting that in. You
9 cannot hear any of that stuff. It amounts to a
10 good lecture by the officer. I am sure he only
11 did that because he knew the defendant, but it
12 amounts more to a lecture than it does anything
13 else. I can't really hear the defendant. I
14 can't hear him making any clear statements.
15 Some of it is pretty much a warning by the
16 officer who knew the defendant and about what
17 could happen if he was out driving illegally and
18 what could happen, that sort of thing. But that
19 doesn't have anything to do with the case.

20 I think that it is more prejudice than
21 probative. As I stated earlier, he can ask him
22 why he was driving. If he said, I don't know,
23 that has nothing to do with the tape. It is a
24 terrible tape, very poor quality tape, one of
25 the worst I have heard.

STATE OF SC VS. KASHIF P. NASH

1 Of course, the defendant doesn't speak up
2 and he is muttering a little bit and you cannot
3 understand what he is saying on there. That is
4 the problem. I will allow the officer to
5 testify he asked him, why were you driving? And
6 he said, I don't know.

7 You know, an officer can ask, did you get
8 your license cleared up and if he said no, but
9 it has to be his testimony. It can't be coming
10 from the tape. You can't understand it on the
11 tape. If that's what he said.

12 I think you can hear something about the
13 license, getting the license or something what
14 the officer is saying, but I couldn't hear his
15 response. So I think that's where we're going
16 to leave it.

17 MR. PLEMING: Yes, sir. I have one
18 question for clarification. If we are not
19 playing the tape but can he still testify about
20 other responses that he remembers the defendant
21 making during that conversation?

22 THE JUDGE: No. I am going to limit you
23 to asking him when he is investigating, why were
24 you driving? If his testimony is going to be,
25 he said I don't know. That's tantamount to the

STATE OF SC VS. KASHIF P. NASH

1 admission of driving. I will allow that because
2 he is still investigating at that point, and I
3 will allow him to ask him, did your license
4 clear up?

5 If he is going to testify that he already
6 knew that his license was suspended or thought
7 his license was suspended, he asked him if he
8 had gotten his license cleared up and what his
9 response to that was. That's all part of the
10 investigation.

11 But if he got his license cleared up, the
12 suspension lifted, then obviously, he could not
13 charge him. You are not going to do it from the
14 tape because the tape is not clear to me. It is
15 not clear to me sitting on top of that. The
16 jury won't be able to understand it. All right.
17 Anything else?

18 MR. PLEMING: No, sir, your Honor.

19 MR. HARRIS: Not from the defendant, your
20 Honor.

21 THE JUDGE: All right. I think we are
22 clear on that. Do you want to take it off?

23 MR. PLEMING: Yes, sir.

24 THE JUDGE: I would say this to you, I was
25 just thinking about it, if the defense opens the

STATE OF SC VS. KASHIF P. NASH

1 door to something that is on there, I would
2 reconsider whether I will let you try to get it
3 in or not. I am not going to let them open the
4 door to something and when the response is on
5 there and not try to do it. So if they open the
6 door to some of that, then I think you might be
7 able to get into it but only if they open the
8 door. Do you understand?

9 MR. HARRIS: I understand.

10 THE JUDGE: I'll bring the jury in and get
11 started with the clerk swearing the jury and
12 then get into opening statements.

13 (Whereupon, the jury entered the courtroom
14 at 3:37 p.m.)

15 THE JUDGE: Before we get started, I have
16 your note out indicating that you had elected
17 Nicholas Slonim as foreperson of the jury; is
18 that correct?

19 THE FOREMAN: Yes, sir.

20 THE JUDGE: Please swear the jury.

21 (The jury was duly sworn.)

22 THE JUDGE: Please be seated. Again, I
23 apologize for the time you had to sit back there
24 in the jury room. There were some issues that
25 had come up. If I was aware of these issues

OPENING STATEMENT BY MR. PLEMING

1 coming up, I would have took more time to get
2 ready.

3 If I had known that, I would sent you home
4 and brought you back in the morning, but I could
5 not anticipate that. It got longer and longer,
6 and I apologize. We have been working the whole
7 time, believe me, trying to resolve this thing.
8 I think we are ready to go now. So, again, I
9 apologize for the long delay.

10 We are to that part of the trial where
11 counsel will make their opening statements to
12 you and I ask you to listen attentively now
13 while counsel addresses their opening
14 statements.

15 Solicitor.

16 MR. PLEMING: Thank you, your Honor, may
17 it please the Court.

18 Good afternoon, ladies and gentlemen. We
19 are all here today because this defendant,
20 Mr. Kashif Nash, chose to drive when he wasn't
21 allowed to and because he chose to possess an
22 illegal substance which he did not have a right
23 to possess.

24 On June 14, 2013, Mr. Nash was declared a
25 habitual traffic offender. He was declared a

OPENING STATEMENT BY MR. PLEMING

1 habitual traffic offender by the Department of
2 Motor Vehicles during the time of June 14, 2013.

3 Deputy Roger Suber, who knows the
4 defendant, they go to the same church, they have
5 known each other for a very long time, saw him
6 driving. So he stopped him. That was his job.
7 Well, he tried to stop him. We'll get into the
8 facts in a moment a little bit more. He
9 eventually was able to catch up to Mr. Nash when
10 Mr. Nash had stopped his car at a friend's
11 house.

12 When he pulled in behind him, he saw
13 Mr. Nash walking across the yard and he talked
14 to him briefly then and then he decided to place
15 him under arrest. Again, that is his job. He
16 saw him driving when he knew his license had
17 been revoked, and he placed him under arrest for
18 driving while he had been a habitual traffic
19 offender, thus in violation of the habitual
20 traffic offender statute.

21 Well, at the time of that arrest, he
22 conducted a search of Mr. Nash's person incident
23 to that arrest which is standard for law
24 enforcement to do. When he did so, he found
25 digital scales in Mr. Nash's front right- or

OPENING STATEMENT BY MR. PLEMING

1 left-hand, I can't remember, one of his front
2 pockets of his pants. With that, those digital
3 scales, there was a razor blade and there's some
4 white powdery residue on those scales.

5 So Deputy Suber collected the scales and
6 he packaged them up according to police
7 procedure, and he had those scales sent down to
8 S.L.E.D in Columbia to be analyzed. They were
9 analyzed and the substance that was on those
10 scales turned out to be cocaine.

11 Now, just to fill in a few more of the
12 facts that you will hear in more detail from our
13 witnesses, Officer Suber was driving along
14 [REDACTED] when he saw Mr. Nash was driving
15 his car. They were driving in two opposite
16 directions. Mr. Nash passed Deputy Suber.
17 Deputy Suber then made the decision to make the
18 traffic stop so he turned his car around and
19 started going the opposite way in pursuit of
20 Mr. Nash.

21 By the time he was able to turn his car
22 around, he lost sight of Mr. Nash. He continued
23 going in that direction down [REDACTED] in
24 an attempt to catch up with Mr. Nash. As
25 Officer Suber was moving through the [REDACTED]

OPENING STATEMENT BY MR. PLEMING

1 ██████████, he saw Mr. Nash's car
2 rounding a curve on ██████████. Officer
3 Suber then turned down that road and as he was
4 driving down Rogerstown, he looked to the left
5 and he saw Mr. Nash as Mr. Nash was pulling the
6 car into the driveway of his friend's house on
7 ██████████.

8 Officer Suber pulled in behind him and as
9 he did so, he saw Mr. Nash walking from the car
10 to the front door. He called Mr. Nash to stop
11 and after speaking with Mr. Nash for several
12 minutes, he placed him under arrest.

13 I will allow Deputy Suber to tell you how
14 Mr. Nash responded to him when he confronted him
15 about his driving. Deputy Suber will also tell
16 you a little more about Mr. Nash and their
17 relationship, how they know each other, and of
18 conversations they've had which made it clear
19 that Mr. Nash was certainly aware that his
20 license to drive was -- had been revoked on that
21 date. He knew he was not supposed to drive and
22 he chose to drive anyway.

23 You will also hear testimony from
24 Wendy Childers, who is the evidence custodian
25 and she transported the scale and residue to

OPENING STATEMENT BY MR. PLEMING

1 S.L.E.D and S.L.E.D then placed them in evidence
2 and then someone by the name of Lawrence
3 Zivkovich then analyzed the scales. He is the
4 one who positively identified the substance on
5 those scales as cocaine. He will be here
6 tomorrow morning to testify to you as well.

7 As I said before, this is a simple case.
8 We are here because Mr. Nash drove when he knew
9 he was not supposed to and we are here because
10 he possessed an illegal substance that he knew
11 he was not allowed to have.

12 At the conclusion of this trial, I will
13 talk a little bit about the differences between
14 rights and privileges. I submit to you the
15 defendant doesn't understand the difference,
16 that he doesn't have a right to drive. When the
17 DMV says you can't drive anymore, you --

18 MR. HARRIS: I object, your Honor, to this
19 argument, persuasive argument.

20 THE JUDGE: It is opening statement,
21 Counsel.

22 MR. PLEMING: Thank you, your Honor.

23 Essentially, I will ask you to find him
24 guilty of those two offenses, for violating the
25 habitual offender statute and for possession of

OPENING STATEMENT BY MR. PLEMING

1 cocaine. We are here today because he made a
2 decision to break the law. That is something he
3 never had a right or privilege to do. Thank
4 you.

5 THE JUDGE: Counsel.

6 MR. HARRIS: May it please the Court, your
7 Honor. Thank you. Mr. Foreman, ladies and
8 gentlemen of the jury, please allow me to
9 introduce myself once again. I think sometimes
10 at the beginning of the trial, things can seem a
11 little hectic. Unless you have been here as
12 much as I have over the years, you probably
13 might not catch all of it.

14 What I want to do, and it is little late
15 in the afternoon, and that's okay. Let's just
16 slow down a little bit. You have been sitting
17 back there and wondering what is going on. His
18 Honor already explained we were attending to
19 some very important matters in order to present
20 this case fairly to you according to the law and
21 the rules of evidence. Now we are beginning
22 that process.

23 So let's slow down, take our time because
24 justice, which, after all, is what we are after
25 here, is best served when we go at it not in a

OPENING STATEMENT BY MR. PLEMING

1 rush, not in a panic, not in a hurry but when we
2 take it slow and deliberately.

3 You know, at the end of the case, a jury
4 deliberates its decision using their
5 intelligence, thinking about everything,
6 thinking about what the rules of court are,
7 meaning the legal principles that his Honor will
8 explain to you at the close of the case using
9 the constitutional and other legal principles
10 that apply to your work in this case, to your
11 deliberations only, and put that together with
12 the facts. In other words, what you believe as
13 a jury of ultimately 12 people back in the jury
14 room eventually what has been proved or not
15 proved.

16 My name is Ricky Harris. I represent that
17 gentleman seated over there with his hands
18 folded at the table, Kashif Nash. He is what we
19 call the defendant in the case. He does have a
20 name, and his name is Kashif P. Nash. He is a
21 citizen and resident of Union County just like
22 you are. You have been selected, as we know, as
23 a jury of his peers to listen to the evidence in
24 the case, to apply the appropriate legal
25 principles, and, out of your deliberations, come

OPENING STATEMENT BY MR. PLEMING

1 up with a verdict.

2 Mr. Nash, as his Honor has indicated, is
3 charged with two separate and distinct legal
4 offenses. One is what is called habitual
5 traffic offender. There is an indictment in the
6 case that brings this case to court which is a
7 piece of paper which charges Mr. Nash with
8 driving on the date in question in the
9 indictment, on that date, not other times, on
10 that date in June, with the offense of driving a
11 vehicle on the highways while he had been
12 declared or after a period of time that he had
13 been declared a habitual traffic offender by the
14 State Highway Department.

15 What does the State have to prove in order
16 to prove that case? They have to prove, of
17 course, that Mr. Nash was driving a vehicle. So
18 at the end of the case, if you don't believe
19 under the proper legal principles that apply
20 that there is proof beyond a reasonable doubt
21 that Mr. Nash was driving a car on that
22 particular date and time, then the State has not
23 proven its case and your verdict would have to
24 be, under the law and your oath, not guilty.

25 The State also has to prove that at the

OPENING STATEMENT BY MR. PLEMING

1 time Mr. Nash was driving, if they can prove it,
2 that Mr. Nash had previously been declared a
3 habitual traffic offender by the Highway
4 Department. If the State doesn't prove that to
5 your satisfaction, then they have not proven
6 that case and your verdict will have to be not
7 guilty.

8 Mr. Nash is also charged, although one
9 really has nothing to do with the other, I would
10 submit to you, has been charged with possession
11 of cocaine. Now, of course, we all know that
12 cocaine is illegal in this state and this
13 country. If you posses it, that is, if you
14 intentionally and knowingly have it in your
15 possession or under your control, then you could
16 be found guilty of possession of cocaine.

17 So what does the State have to prove in
18 order to prove that case? They have to prove
19 that Mr. Nash possessed cocaine, the substance
20 known as cocaine. By possession, they have to
21 prove that he knowingly and intentionally
22 possessed cocaine. That is, he knew that he had
23 the substance cocaine, the drug cocaine in this
24 case they are saying it is on the device in his
25 pocket. The State would have to prove to you in

OPENING STATEMENT BY MR. PLEMING.

1 this case that Mr. Nash knew that he had
2 cocaine, that he intentionally had it, it was no
3 accident and that he knew it, knew what it was
4 in his pocket.

5 Now, we'll see how the evidence develops
6 on this particular case, the discharge of
7 possession of cocaine. I believe that following
8 up on what the assistant solicitor just told
9 you, I believe you are going to find that there
10 is an allegation in the case that after
11 Deputy Suber decided to arrest Mr. Nash for
12 driving, that he searched him.

13 I don't know, we'll see how the search all
14 happened. But he searched him and found some
15 sort of device, a small scale, and allegedly on
16 that small scale was what was described as
17 powdered residue, a powdered residue.

18 And somewhere or another they took
19 possession, Deputy Suber took possession of this
20 device and sent it off and they claimed they are
21 going to have somebody come in here and swear
22 that it was the drug cocaine, this powdered
23 residue was the drug cocaine.

24 It is my understanding that the State is
25 going to try to prove that -- actually, I am

OPENING STATEMENT BY MR. PLEMING

1 sure they would like to prove more. The proof
2 will be, if they jump through all of the legal
3 hoops to get to that stage, that there was no
4 measurable amount of the drug. Well, I say,
5 what do you mean, no measurable amount?

6 Well, they will have to explain that if
7 there was no -- like it weighed nothing. So
8 they are alleging that Mr. Nash intentionally
9 and knowingly possessed a drug which weighed
10 nothing. I mean, I've got, you know, some
11 credit cards and a license and money in my
12 pocket, and otherwise, it is pretty much air.
13 Well, there might be a little dust in there.
14 But, heck, even that's got to weigh something.

15 MR. PLEMING: Objection, your Honor.

16 THE JUDGE: I sustain the objection,
17 Counsel.

18 MR. PLEMING: Thank you, your Honor.

19 THE JUDGE: I'll instruct the jury on what
20 the law is.

21 MR. PLEMING: Thank you, your Honor.

22 MR. HARRIS: So anyway, that's pretty much
23 the drug case. Will they be able to prove to
24 you beyond a reasonable doubt, that's the legal
25 stand, beyond a reasonable doubt, that Mr. Nash

OPENING STATEMENT BY MR. PLEMING

1 possessed cocaine, that he possessed a drug,
2 that is humanly possible to know that he can.

3 So those are the cases. Now, what are the
4 legal principles involved? These things are
5 very, very important, we'll be stressing
6 throughout the trial. So very briefly, in every
7 criminal case, including this case, every single
8 person who comes into this court accused of a
9 crime or crimes is presumed innocent. That's
10 not just something we say.

11 But it takes you, the jury, to pump life
12 under that constitutional principle. If you all
13 don't accept it under your oath and make it work
14 in this case then it won't work but you are
15 instructed to give Mr. Nash the presumption of
16 innocence.

17 He can only be found guilty, that is, that
18 presumption of innocence can only be taken away
19 from him when you, the jury, unanimously as a
20 result of your deliberations, decide that the
21 State has proven everything required to be
22 proven for each of these cases beyond a
23 reasonable doubt.

24 That means that at the end of the case
25 when you are in your jury room sometime later

OPENING STATEMENT BY MR. PLEMING

1 today or tomorrow and you are going to decide
2 this case, if you have a doubt for which you can
3 give a reason, you have reasonable doubt.

4 I submit to you at the end of this case
5 there will be reasonable doubt. I submit to you
6 there will be reasonable doubt about whether
7 there has been proof that Mr. Nash was actually
8 driving this car. I submit to you that there
9 will be reasonable doubt about what the status
10 of the license was.

11 I submit there is reasonable doubt about
12 whether or not he or anybody could have known
13 that they had something in their pocket that is
14 thinner than air regardless of what any fancy
15 instrument in Columbia says.

16 I want to address in closing here of my
17 opening statement, and we will sit down and the
18 State will proceed to place before you what
19 evidence they have, and I will have a chance to
20 cross-examine and question that evidence.

21 I want to leave you with this because I
22 believe it is very important to get off on the
23 right foot in any event particularly something
24 as important as this case.

25 We are not here because of something that

OPENING STATEMENT BY MR. PLEMING

1 Kashif did. I couldn't disagree more with the
2 assistant solicitor about that. I think that is
3 a very unfortunate statement to make about a
4 criminal case. We are not here because of
5 something Kashif Nash did or didn't do. We are
6 here because of the precious constitution that
7 men and women have fought and died for over 200
8 years in this country. We are here to vindicate
9 the constitutional principle.

10 We are here because Mr. Nash, just like
11 every other citizen of this county and of the
12 state and of the United States has the absolute
13 unabridged right to defend himself against
14 allegations that he doesn't agree with. He has
15 a right to stand up to the police and to the
16 solicitor and say, I didn't do these things.
17 You have to prove your case. I am taking my
18 case to the jury of my peers.

19 We are here because the law allows us to
20 be here. The law, in order to achieve justice
21 in this case, demands a jury trial. The law
22 says Mr. Nash is presumed innocent. The law
23 says he cannot be found guilty unless you the
24 jury find him guilty by finding the State has
25 proven this case beyond a reasonable doubt. We

OPENING STATEMENT BY MR. PLEMING

1 are here to validate the constitutional
2 principle. So make no mistake about that. I
3 thank you for being here. Thank you.

4 MR. PLEMING: Your Honor, may we approach.

5 (Whereupon, a bench conference was held
6 off the record in the presence of the jury, but
7 out of hearing of the jury.)

8 THE JUDGE: Please call the first witness.

9 MR. PLEMING: The State calls Deputy Roger
10 Suber.

11 ROGER SUBER

12 being first duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. PLEMING:

15 Q Good afternoon, Deputy Suber. Deputy Suber, how
16 long have you been a police officer?

17 A Little over 13 years.

18 Q I'm sorry. Would you first go ahead and
19 introduce yourself to the jury tell them what
20 you do and who you work for?

21 A My name is Roger Suber. I work with the
22 Union County Sheriff's Office, and I am a patrol
23 deputy.

24 Q You said you have been doing law enforcement
25 work for 13 years now?

ROGER SUBER. - DIRECT BY MR. PLEMING

1 A Yes, sir.

2 Q How long have you been with the Union County
3 Sheriff's Office?

4 A Little over six all together.

5 Q How long exactly have you lived in Union?

6 A All my life.

7 Q Are you married?

8 A No.

9 Q Do you have any children?

10 A Yes.

11 Q What are their ages?

12 A Nine and 14.

13 Q Does your family still live here in Union?

14 A Yes.

15 Q What part of Union are you from?

16 A Jonesville.

17 Q Do you know the defendant in this case,
18 Mr. Nash?

19 A Yes, I do.

20 Q How long have you known him?

21 A About 12, 15 years.

22 Q How is it that you know him?

23 A We go to church together, family gatherings.
24 Thing of that nature.

25 Q How would you describe your relationship with

ROGER SUBER - DIRECT BY MR. PLEMING

1 Mr. Nash?

2 A It seems to be a good relationship. We
3 carry on conversation when we see each other.

4 Q How often would you say you see him?

5 A Probably two or three times a month.

6 Q In your past, have you ever had any major
7 conflicts, feuds, anything like that between the
8 two of you?

9 A No.

10 Q In June of last year, were you aware of the
11 status of his driving license?

12 A Yes.

13 Q What was the status of his driver's license?

14 A It was suspended.

15 Q How did you become aware that his license to
16 drive had been suspended?

17 A I seen it in the crime report in the
18 newspaper.

19 Q Do you know personally if Mr. Nash was aware
20 that his license had been revoked during that
21 period of time?

22 A Yes, I would say so.

23 Q How is it that you can be sure of that, that he
24 knew his license had been suspended?

25 MR. HARRIS: I object to the leading

ROGER SUBER - DIRECT BY MR. PLEMING

1 nature of the question. The question
2 characterizes Mr. Nash being sure of something.
3 I don't know how this witness could know that.

4 THE JUDGE: Well, you might want to
5 rephrase the question, Counselor.

6 BY MR. PLEMING:

7 Q Okay. Had you talked to Mr. Nash about his
8 driver's license?

9 A Yes.

10 Q What had you told him and what did you say to
11 him about his driver's license?

12 MR. HARRIS: Objection. Your Honor, I
13 object to the question. It is calling for an
14 answer that is outside the scope of any relevant
15 issue in the case.

16 THE JUDGE: Counsel, approach just a
17 minute.

18 (Whereupon, a bench conference was held
19 off the record in the presence of the jury, but
20 out of hearing of the jury.)

21 BY MR. PLEMING:

22 Q Deputy Suber, where would you speak to Mr. Nash
23 when you would see him?

24 A Mostly at church.

25 Q When you had these conversations with him, how

ROGER SUBER - DIRECT BY MR. PLEMING

1 is it that he let you know that he was aware his
2 license had been suspended?

3 A We had talked about it.

4 Q Okay. Prior to this incident, when would you
5 say was the last time you had talked to him
6 about the status of his driver's license?

7 A A couple weeks prior.

8 Q Okay. From your past experience knowing
9 Mr. Nash, what type of car would Mr. Nash drive?

10 A Normally, it is an older model blue Buick --
11 I'm sorry, Chevrolet.

12 Q Do you know who the registered owner of that car
13 is?

14 A Yes.

15 Q Who is it?

16 A Teresa Nash.

17 Q Who is she?

18 A Mr. Nash's mother.

19 Q Did you see Mr. Nash driving his mother's car on
20 Friday, June 14, 2013?

21 A Yes.

22 Q Where were you when you saw him driving?

23 A On the main road near [REDACTED] [REDACTED] [REDACTED].

24 Q Do you see Mr. Nash, the one whom you saw
25 driving on June 14th, in this courtroom today?

ROGER SUBER - DIRECT BY MR. PLEMING

1 A Yes.

2 Q Please point to him and describe what he is
3 wearing.

4 A He is sitting at the table to my right
5 wearing a black leather jacket (indicating).

6 MR. PLEMING: For the record, the witness
7 has identified the defendant.

8 BY MR. PLEMING:

9 Q Now, Deputy Suber, where were you exactly when
10 you saw him driving that day?

11 A Pretty close around the [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED].

13 Q Is that in Union County?

14 A Yes.

15 Q What direction were you traveling?

16 A I was traveling north.

17 Q Which direction was he traveling?

18 A South.

19 Q You say the car that he was driving was the same
20 one you described earlier, the blue Chevrolet?

21 A Yes.

22 Q Did you recognize the car that day?

23 A Yes.

24 Q Did you recognize the car before you recognized
25 the driver on the road?

ROGER SUBER - DIRECT BY MR. PLEMING

1 A Yes.

2 Q When his car passed your car going in the
3 opposite direction, were you able to see clearly
4 inside the car?

5 A Yes.

6 Q How many people were inside the car?

7 A One person.

8 Q Are you sure that Mr. Nash was that person
9 driving the car?

10 A Positive.

11 Q Is there any possibility that you saw someone
12 else driving it?

13 A No.

14 Q Do you know if Mr. Nash saw you?

15 A I am pretty sure he did. We were the only
16 cars on the road.

17 Q Describe the car you were driving that day.

18 A It was a white and brown -- white marked
19 brown vehicle with lights on top and a stripe
20 down the side.

21 Q Describe the marking on that car.

22 A Sheriff's Office is displayed on both sides
23 of it.

24 Q What was the weather like that day?

25 A Sunny.

ROGER SUBER - DIRECT BY MR. PLEMING

1 Q Tell us, after you saw Mr. Nash driving the car,
2 what did you do?

3 A After he passed me, I went to the next
4 driveway on my left to turn around and make a
5 traffic stop on him.

6 Q How long would you say it took you to get your
7 car turned around?

8 A Eight, 10 seconds.

9 Q After you got your car turned around, were you
10 still able to see him?

11 A No.

12 Q What did you do to catch up with him?

13 A I sped up to try to get a view of him.

14 Q Were you able to catch up to him while you were
15 on [REDACTED] [REDACTED]

16 A No.

17 Q When you passed him, can you estimate the speed
18 that his car was going?

19 A Thirty, 35 miles an hour.

20 Q Do you know about how fast you accelerated to
21 try to catch up to him on [REDACTED] [REDACTED] after
22 you turned around?

23 A I would say anywhere from 70 to 80 miles an
24 hour.

25 Q Going 70 to 80 miles an hour you were still not

ROGER SUBER - DIRECT BY MR. PLEMING

1 able to catch up to him?

2 A No.

3 Q What happened next?

4 A When I got to the intersection of [REDACTED]
[REDACTED] which comes into [REDACTED] [REDACTED], I slowed
6 down a little bit and looked up to [REDACTED]
[REDACTED] and saw the back end of the car going
8 around a curve.

9 Q Are you sure it was the same car that you had
10 seen on [REDACTED] [REDACTED]

11 A Yes, same blue colored car.

12 Q To be specific, what street was that car on when
13 you saw it rounding the curve?

14 A [REDACTED] [REDACTED]

15 Q When you saw his car heading down [REDACTED]
[REDACTED], your car was still on Meansville?

17 A Yes.

18 Q What did you do then?

19 A I was going probably 20, 25 miles an hour.
20 When I seen the car going around the curve, I
21 hit the brakes and backed up to get -- to make a
22 turn onto [REDACTED] [REDACTED].

23 Q So you slowed down then before you entered the
24 intersection?

25 A Yes.

ROGER SUBER - DIRECT BY MR. PLEMING

1 Q After turning onto [REDACTED], what did you
2 see next?

3 A When I got onto [REDACTED], there is a
4 straightaway. I didn't see his car on
5 straightaway, so I picked the speed up to try to
6 catch up to the car.

7 Q What did you see after that?

8 A I picked the speed up and got to that
9 straightaway and around the curve and I looked
10 up to the left on [REDACTED] and I seen the
11 car pull into a driveway.

12 Q Where is [REDACTED] in relation to
13 Rogerstown?

14 A It is going in the direction traveling to
15 the left.

16 Q You said you could see the driveway in question
17 that is on Dogwood from where you were on
18 Rogerstown?

19 A Yes.

20 Q What did you do after you observed his car there
21 in that driveway?

22 A I seen his car in the driveway and I went up
23 to the next driveway which was maybe 50 yards
24 and turned around that driveway and went back
25 onto [REDACTED].

ROGER SUBER - DIRECT BY MR. PLEMING

1 Q Describe exactly what you saw when you pulled
2 into Dogwood.

3 A When I pulled into the driveway on [REDACTED]
4 [REDACTED] I seen Mr. Nash walking toward the house.

5 Q Describe more specifically where he was coming
6 from, based on the direction he was walking.

7 A He was walking down the driveway toward the
8 house from the blue car.

9 Q You said that you grew up in this area?

10 A Yes.

11 Q And you have been a police officer here for how
12 many years?

13 A About six and a half.

14 Q Being from this area and having patrolled these
15 streets for your job over the years, would you
16 say you are familiar with the layout of the
17 roads in Jonesville in that area?

18 A Yes.

19 Q At this point I would like to show you a couple
20 of exhibits for the record.

21 MR. PLEMING: I am now showing State's
22 Exhibits 4 and 5 as previously marked for
23 identification to defense counsel.

24 BY MR. PLEMING:

25 Q Deputy Suber, I am approaching you at this time.

ROGER SUBER - DIRECT BY MR. PLEMING

1 MR. PLEMING: If you could turn the lights
2 up for just a moment while he inspects the
3 exhibits.

4 BY MR. PLEMING:

5 Q Do you recognize the images depicted in
6 Exhibits 4 and 5?

7 A Yes.

8 Q Tell us what those exhibits show.

9 A Exhibit 4 is an aerial view of portion of
10 [REDACTED] and portion of Rogerstown.

11 Q And State's Exhibit 5?

12 A It shows a portion of [REDACTED] and
13 all of [REDACTED].

14 Q Are these photographs a fair and accurate
15 depictions of the area in Jonesville that you
16 saw the defendant driving and pursued him on
17 June 14th of last year?

18 A Yes.

19 MR. PLEMING: At this time, the State
20 moves 4 and 5 for admission.

21 MR. HARRIS: No objection.

22 THE JUDGE: Received in evidence.

23 (STATE'S EXH.'S 4 and 5, previously marked
24 for identification, was received into evidence.)

25 MR. PLEMING: The State would like to

ROGER SUBER - DIRECT BY MR. PLEMING

1 publish these exhibits at this time.

2 THE JUDGE: You may publish them.

3 BY MR. PLEMING:

4 Q Deputy Suber, I am going to hand you this laser
5 pointer. If you will, please, indicate on
6 State's Exhibit 5 where you were driving when
7 you first saw Mr. Nash driving his car?

8 A I was pretty much in this area here
9 (indicating).

10 Q If you will, point out [REDACTED] [REDACTED] from top
11 to bottom as it appears on that map.

12 A (Indicating).

13 Q If you can, using the exhibit, indicate how and
14 where you turned around to pursue him.

15 A I met him in this general area here and
16 there is a driveway here and that's the driveway
17 I turned around in.

18 Q You said that after turning around, you didn't
19 see his car again until you were crossing
20 through the intersection with [REDACTED] [REDACTED]?

21 Will you please point out that location,
22 the intersection of Meansville and Rogerstown?

23 A Right here (indicating).

24 Q What would you say is the distance from where
25 you turned around on [REDACTED] [REDACTED] to the

ROGER SUBER - DIRECT BY MR. PLEMING

1 intersection on Rogerstown?

2 A Pretty close to three quarters of a mile.

3 Q Could you tell -- let's see. If Mr. Nash had
4 remained driving at the speed that he was at
5 when you passed him, would you, in your opinion,
6 been able to catch up to him before you reached
7 [REDACTED]?

8 MR. HARRIS: Objection. Calls for
9 speculation. There has been no testimony that
10 the car, the Chevrolet car, sped up, slowed down
11 or anything else.

12 THE JUDGE: I think he can give his
13 opinion. Go ahead.

14 THE WITNESS: I believe I would have
15 caught up to him before I got to [REDACTED]
16 [REDACTED]

17 BY MR. PLEMING:

18 Q Okay. Very good. What can you conclude from
19 that fact?

20 MR. HARRIS: Objection. That calls for
21 speculation to the extent I can't discern what
22 the question is trying to ask.

23 THE JUDGE: Sustained. Rephrase.

24 BY MR. PLEMING:

25 Q Let me can ask you this: How did you know to

ROGER SUBER - DIRECT BY MR. PLEMING

1 slow down as you approached the intersection and
2 looked down [REDACTED] [REDACTED]?

3 A There's several driveways on Meansville.
4 When I came to a driveway and yard, I glanced up
5 to see if I could see the car. There is
6 intersection of [REDACTED] [REDACTED] and [REDACTED]
7 [REDACTED] [REDACTED] I slowed down and looked up that way
8 and saw the car go around the curve.

9 Q Based on your relationship, your knowledge of
10 Mr. Nash, are you familiar with any of the
11 individuals he associates with?

12 A Some of them.

13 Q Was there anything about the intersection of
14 [REDACTED] [REDACTED] that made you look down that
15 road?

16 A Well, I know he has a friend living up that
17 way. I assumed he may be going to his house.

18 Q Okay. What is the name of that friend you are
19 referring to?

20 A Junior Rogers.

21 Q Where does Mr. Rogers live?

22 A He lives on [REDACTED] [REDACTED].

23 Q Were you familiar with where he lived at the
24 time?

25 A Yes.

ROGER SUBER - DIRECT BY MR. PLEMING

1 Q Point out, please, now where [REDACTED] [REDACTED] is
2 located on this map.

3 A [REDACTED] [REDACTED] is there where the red thing
4 is (indicating).

5 MR. PLEMING: At this time, I am going to
6 remove State's Exhibit 4 and put up State's
7 Exhibit 5.

8 BY MR. PLEMING:

9 Q Point out where [REDACTED] [REDACTED] is located on
10 this photograph.

11 A That oval-shaped drive.

12 Q Point out where [REDACTED] [REDACTED] is located.

13 A That was [REDACTED] [REDACTED] (indicating). You
14 want [REDACTED] [REDACTED]?

15 Q Yes.

16 A [REDACTED] [REDACTED] is the straight road.

17 Q Thank you.

18 If you can, show us, if you were coming
19 from [REDACTED] [REDACTED], where you would turn onto
20 [REDACTED] [REDACTED], onto [REDACTED] [REDACTED]?

21 A Right here (indicating).

22 Q Show us where Junior Rogers' house is located
23 off [REDACTED] [REDACTED].

24 A There (indicating).

25 Q More specifically, can you point out where you

ROGER SUBER - DIRECT BY MR. PLEMING

1 observed Mr. Nash's -- well, the car that
2 Mr. Nash was driving that day?

3 A The driveway here (indicating).

4 Q Okay. Point out where Mr. Nash was when you saw
5 him.

6 A When I saw him...

7 Q When you saw him outside of his car.

8 A When I saw him outside the car, he was in
9 the driveway walking toward the house.

10 Q When you saw him and you pulled your car in
11 behind his in the driveway, what did you do
12 next?

13 A I called for him to come back to me, to the
14 car.

15 Q Where was he when you advised him to do this?

16 A He was on the door jamb, had just stepped
17 into the house.

18 Q What happened next?

19 A He was in the house couple seconds and came
20 back out.

21 Q When he came back out, where did he go, what did
22 he do?

23 A He came to where I was at the corner of the
24 patrol car.

25 Q Okay. I am not sure if I heard you clearly.

ROGER SUBER - DIRECT BY MR. PLEMING

1 Where did he exactly go? Did he come all of the
2 way back to where you were, or did you go to
3 him?

4 A I stayed at the corner of the patrol car and
5 he came to me and we were within three feet of
6 each other.

7 Q Okay. Did you speak to him?

8 A Yes.

9 Q What did you say to him?

10 A I asked him why was he driving.

11 Q How did he respond to you?

12 A He nonchalantly said he didn't know.

13 Q Did you continue to talk to him after that?

14 A Yes.

15 Q Did he acknowledge to you that he had been
16 driving?

17 MR. HARRIS: Objection.

18 THE JUDGE: Sustained.

19 BY MR. PLEMING:

20 Q Without getting into -- let me ask you this:
21 Did you ask him about the current status with
22 his driver's license at the time?

23 A Yes.

24 Q What did he tell you about that?

25 A He said he had two more years on his

ROGER SUBER - DIRECT BY MR. PLEMING:

1 suspension.

2 Q Okay. How long would you say you spoke with him
3 there? Without getting into any specific things
4 he said, how long would you say you talked to
5 him?

6 A At least five minutes.

7 Q Without getting into what he said, what were the
8 things that you talked to him about?

9 A About the driving conditions of -- his
10 driver's license conditions, or status of
11 driver's license, why wasn't somebody else
12 driving him around, things of that nature.

13 Q Did you continue to try to find out a reason for
14 why you had seen him driving?

15 A Yes.

16 Q After he acknowledged that his driver's license
17 was still suspended for two years, did he ever
18 provide to you an explanation for why he was
19 driving?

20 MR. HARRIS: Your Honor, I object. The
21 defendant is under no legal obligation to make
22 explanations.

23 MR. PLEMING: I just asked whether or not
24 he did.

25 MR. HARRIS: There is no necessity defense

ROGER SUBER - DIRECT BY MR. PLEMING

1 asserted here.

2 MR. PLEMING: Your Honor, may we approach.

3 THE JUDGE: Approach just a minute.

4 (Whereupon, a bench conference was held
5 off the record in the presence of the jury, but
6 out of hearing of the jury.)

7 BY MR. PLEMING:

8 Q Deputy Suber, did anyone ever come out of the
9 residence while you were there talking to
10 Mr. Nash?

11 A Yes.

12 Q Did you speak to that person?

13 A Yes.

14 Q Without getting into anything they said to you
15 or didn't say to you, who was that person that
16 you spoke with?

17 A The homeowner, Junior Rogers.

18 Q After you had talked with Mr. Nash and
19 Mr. Rogers, what did you do as a result of that
20 day? Did you place Mr. Nash under arrest?

21 A Yes.

22 Q With what did you charge him?

23 A Habitual traffic offender.

24 Q Is it a crime to drive while you are a habitual
25 traffic offender?

ROGER SUBER - DIRECT BY MR. PLEMING

1 MR. HARRIS: Objection, your Honor.

2 That's a legal --

3 THE JUDGE: He can answer that question, I
4 think, if he charged him with it. Go ahead.

5 THE WITNESS: Yes, it is.

6 BY MR. PLEMING:

7 Q Were you aware -- and obviously, you charged him
8 with it. How did you become aware he was a
9 habitual traffic offender?

10 MR. HARRIS: Objection.

11 THE JUDGE: Counsel, approach just a
12 minute.

13 (Whereupon, a bench conference was held
14 off the record in the presence of the jury, but
15 out of hearing of the jury.)

16 BY MR. PLEMING:

17 Q Deputy Suber, prior to charging -- well, what
18 was the basis for charging Mr. Nash with
19 violating the habitual traffic offender statute?

20 A I called his driver's license number. He
21 had an ID number on him. His driving status
22 came back as suspended.

23 Q You stated that you were familiar with the car
24 he was driving that day and that it belonged to
25 his mother, Theresa Nash?

ROGER SUBER - DIRECT BY MR. PLEMING

1 A Yes.

2 Q Did you also officially check on the
3 registration of that vehicle based on the
4 license tag that day?

5 A Yes. It came back to Theresa Nash at the
6 same address.

7 Q Was anyone from Mr. Nash's family, Theresa Nash
8 or anyone else, there at Junior Rogers' house?

9 A No.

10 Q After you placed Mr. Nash under arrest, what did
11 you or what did the Sheriff's Office do with his
12 mother's car that was still parked at the
13 Rogers' house?

14 A Once he was placed under arrest, we looked
15 through the car to see if there was anything
16 illegal and we didn't find anything. So we left
17 the car there in the yard with Mr. Nash's
18 permission and Mr. Rogers' permission for his
19 mother to come and pick it up.

20 Q Did you talk to his mother that day at all?

21 A No.

22 Q Okay. You say that you know his family like you
23 know him?

24 A Yes.

25 Q Have you ever seen his mother driving that car?

ROGER SUBER - DIRECT BY MR. PLEMING

1 A Not that I can remember.

2 Q Okay. Do you know where Mr. Nash was living at
3 this time?

4 A With his parents on [REDACTED] [REDACTED].

5 Q When you place a person under arrest for any
6 reason, is it customary to search that person's
7 body and belongings at the moment of the arrest?

8 A Yes.

9 Q What is the purpose of that search?

10 A To see if they have anything illegal on them
11 before they take anything into the jail.

12 Q Did you search Mr. Nash before you placed him in
13 your patrol car?

14 A Yes.

15 Q Did you find anything as a result of that
16 search?

17 A Yes.

18 Q What did you find?

19 A I want to say his right front pocket there
20 was a black set of scales.

21 Q In the course of your career in law enforcement,
22 did this arise any suspicions with you?

23 A Yes.

24 Q What did you do with the scales after you found
25 them in his pocket?

ROGER SUBER - DIRECT BY MR. PLEMING

1 A We took them out of his pocket and laid them
2 on top of the patrol car. When we got back to
3 the office, we placed it in a Best Pack.

4 Q Let me back up a little bit. What is it about
5 those scales that made you suspicious?

6 A Once you opened it up, there was a razor
7 blade under the lid of the scales.

8 Q Have you have the opportunity to view and seize
9 cocaine during the course of your job as a
10 police officer?

11 A Yes.

12 Q Had you had the opportunity to view and seize
13 see cocaine residue on other items?

14 A Yes.

15 Q Do you have experience with drug paraphernalia
16 and what items are used with taking drugs?

17 A Yes.

18 Q Based on your experience as an officer, what did
19 those razor blades and the scales indicate to
20 you?

21 A Usually when we find scales and razor
22 blades, that kind of indicates to us that you
23 are using that scale to weigh out narcotics with
24 them and use the razor blade to cut up the
25 narcotics.

ROGER SUBER - DIRECT BY MR. PLEMING

1 Q Describe what you found with those scales and
2 the razor blade?

3 A There was a white powdery residue on the
4 scales and on the razor blade.

5 Q Based on your experience as an officer, what did
6 that indicate to you?

7 A That those scales were used to cut up
8 cocaine or crack with.

9 Q Now, tell us what you did with those
10 residue-covered scales and that razor blade
11 after you seized it from Mr. Nash's pocket.

12 A Took it from his pocket, took it back to
13 office and filled out a Best Pack and sent it
14 off to S.L.E.D.

15 Q Describe what a Best Pack is for the jury.

16 A The Best Pack is a plastic bag that you put
17 your items that you seize in along with some
18 paperwork and you seal that package up. You
19 sign that you sealed it up on a particular day.

20 Q Okay. Once you seal an item that you believe to
21 be cocaine, for instance, in a Best Pack, what
22 do you do with it?

23 A You put it in an evidence locker.

24 Q Did you place the scales and the razor blade in
25 separate Best Packs or the same one?

ROGER SUBER - DIRECT BY MR. PLEMING

1 A Same one.

2 Q Okay. Did you mark the Best Pack with any sort
3 of marking to assist in identifying them?

4 A Each Best Pack has a control number on it.

5 Q Okay. That allows you to determine which Best
6 Pack it is?

7 A Yes.

8 Q On what date did you transfer the Best Pack into
9 evidence?

10 A I don't remember the date. It was on that
11 Friday.

12 Q Who with the Union County Sheriff's Office is
13 responsible for maintaining the evidence there
14 in the evidence locker?

15 A Master Sergeant Childers.

16 MR. PLEMING: At this time, your Honor, I
17 am showing you what was previously marked
18 State's Exhibit Number 6 to defense counsel.

19 BY MR. PLEMING:

20 Q Now, Deputy Suber, before I show State's
21 Exhibit 6 to you, where exactly did you say you
22 found the razor blade with those scales?

23 A The razor blade was under the lid of those
24 scales.

25 Q Where exactly on those scales did you find the

ROGER SUBER - DIRECT BY MR. PLEMING

1 powdery residue?

2 A On the razor blade and interior of the
3 scale.

4 Q You said interior of the scale?

5 A Yes.

6 Q Is there something on the scale you can open up
7 then?

8 A There is a top that comes off the scale.

9 Q In relation to the top that comes off the scale,
10 where did you find the residue?

11 A On the top of that scale and on the
12 interior.

13 Q Very good. Deputy Suber, I am now showing you
14 State's Exhibit Number 6 and I want you to take
15 this moment to look inside the clear bag that is
16 marked State's Exhibit 6 and tell us if you
17 recognize what is inside of that bag.

18 A Yes, that's the scale and the razor blade I
19 took from Mr. Nash.

20 Q How do you know that the scale and the razor
21 blade that are contained in the clear bag marked
22 State's Exhibit 6 are the same scale and razor
23 blade that you retrieved from Mr. Nash's front
24 pocket?

25 A Because it has the same numbers on the bag

ROGER SUBER - DIRECT BY MR. PLEMING

1 and on the scale itself.

2 Q Okay. While in your possession, did you do
3 anything with it, scales, that would alter them
4 in any way?

5 A No.

6 Q You said it was a Friday you transferred these
7 items into evidence. Was it that same day you
8 placed Mr. Nash under arrest?

9 A Yes.

10 Q Were those items in the possession of anyone
11 else from the time that you found them on
12 Mr. Nash until the time that you submitted them
13 or placed them into the Best Pack and submitted
14 them into the locker?

15 A No.

16 Q Okay. Do these items appear substantially the
17 same today as they were on the day you placed
18 them into the Best Pack and put them into
19 evidence?

20 A Yes.

21 MR. PLEMING: Thank you. I have no
22 further questions at this time. Please answer
23 any questions that Mr. Harris may have for you.

24 CROSS-EXAMINATION

25 BY MR. HARRIS:

ROGER SUBER - CROSS BY MR. HARRIS

1 Q Deputy, you just responded to the assistant
2 solicitor that the scale and the razor blade
3 that is in State's Exhibit 6 appear in exactly
4 the same condition as you originally took
5 possession of them; is that right?

6 A There was residue on them when I turned them
7 in. When we took possession of them, residue
8 was on the scales -- on the razor blade.

9 Q Let me ask the question again: Didn't you
10 respond to the assistant solicitor just now when
11 asked the question, are these -- is the scale
12 and razor blade in the same condition as when
13 you originally took possession of them and your
14 answer was yes, that is correct?

15 A Yes.

16 THE WITNESS: Am I allowed to go on?

17 THE JUDGE: Yes.

18 THE WITNESS: They are the same as far as
19 having any defects, as far as damages.

20 BY MR. HARRIS:

21 Q Any defects or damages. So you misunderstood
22 the assistant solicitor's question?

23 A I possibly could have.

24 Q You will admit then that the condition of the
25 razor blade and scale in this sealed up bag

ROGER SUBER - CROSS BY MR. HARRIS

1 today does not look like, in your opinion, like
2 it did on June 14, 2013?

3 A On June 14 it had white powder residue on
4 it.

5 Q So somebody cleaned all of that off?

6 A I guess S.L.E.D did when she tested it.

7 Q You don't know then?

8 A I didn't talk to them. I don't know.

9 Q Do you want to see it again?

10 A No, I don't have to see it again.

11 Q So your testimony to the jury today is that the
12 scale and the razor blade don't look like they
13 looked like when you took them --

14 THE JUDGE: He already answered that.

15 Move on.

16 BY MR. HARRIS:

17 Q As a matter of fact, there is no residue on
18 these items today, is there?

19 A I don't know what their testing procedure
20 is.

21 Q That's not what I asked you, sir. Do you want
22 to look at them again?

23 A I don't need to see them.

24 Q You admit today there is no residue on either of
25 these items?

ROGER SUBER - CROSS BY MR. HARRIS

1 A I agree.

2 Q There wasn't any residue on them then either?

3 A Yes, there was.

4 Q You said that you took this scale and the razor
5 blade was inside of it; is that right? But you
6 took the razor blade outside of it?

7 A When I opened the top up on the scales, the
8 razor blade was laying on the platform of the
9 scale. I never took the razor blade out of the
10 scale. When I sealed it up in that Best Pack,
11 the razor blade was standing to the side.

12 Q You say you put that item on the hood of the
13 car?

14 A On top of the car.

15 Q On top of the car?

16 A Until we placed Mr. Nash in the car, then I
17 put it inside the car.

18 Q But without covering it up, without putting it
19 in a plastic bag at that point in time?

20 A The lid was closed.

21 Q I understand, sir. My question was, at the
22 scene, did you place the items in a protective
23 plastic bag?

24 A No. I laid it on the seat of the patrol
25 car.

ROGER SUBER - CROSS BY MR. HARRIS

1 Q Okay. Only later on did you put it in a sealed
2 up bag and put it in some kind of locker?

3 A When I got back to the office, yes.

4 Q Did you take any photographs of the items as
5 they were that day?

6 A No.

7 Q Isn't that a common police practice?

8 A Not always, sir.

9 Q I didn't ask you if it is done always. Is it a
10 common practice to photograph --

11 THE JUDGE: He answered your question. He
12 said not all of the time. Move on.

13 BY MR. HARRIS:

14 Q There are no photographs?

15 A No.

16 Q We can't see what you saw?

17 A There are no photographs.

18 Q Is it correct that you are, as you said, well,
19 familiar with Mr. Junior Rogers here?

20 A He is friends with my brother. I have known
21 Junior for 30 years, probably.

22 Q You know that Kashif Nash and Junior Rogers see
23 each other frequently at each other's house; is
24 that correct?

25 A Yes.

ROGER SUBER - CROSS BY MR. HARRIS

1 Q On the date and time in question here in this
2 case, you knew exactly where Junior Rogers
3 lived, didn't you?

4 A Yes.

5 Q Right there on Dogwood?

6 A Yes.

7 Q And you knew that Kashif often went there to see
8 him; is that correct?

9 A That's correct.

10 Q So it wouldn't be anything unusual for
11 Kashif Nash to be at Junior Rogers house, would
12 it?

13 A No.

14 Q Now, you stated that you saw Kashif Nash and he
15 was traveling toward Union?

16 A No.

17 Q Toward Jonesville?

18 A Yes.

19 Q You were traveling toward Union. You were going
20 in opposite --

21 A I was traveling toward Jonesville, he was
22 traveling toward Union.

23 Q You were traveling in opposite directions. He
24 was going toward Union and you were going
25 towards Jonesville?

ROGER SUBER - CROSS BY MR. HARRIS

1 A That's correct.

2 Q You live in Jonesville, correct?

3 A That's correct.

4 Q You were getting off work, right?

5 A I was going home to get off work.

6 Q Right. Okay. By happenstance, it is your
7 testimony, is it, that you saw this blue Chevy
8 pass by, passed by one another?

9 A Yes.

10 Q And that took half a second?

11 A The time, it passing or --

12 Q You are going toward Jonesville, getting off
13 work, this blue Chevy is going toward Union?

14 A I would say in the time period probably of
15 four to five seconds had passed from the time I
16 saw the car until we were passing each other.

17 Q I see. Let's see. One one thousand, two one
18 thousand, three one thousand, four one thousand
19 and you had seen him, approached him and passed
20 him?

21 A That's correct.

22 Q And that was your look at whoever was driving
23 the car?

24 A Yes.

25 Q You testified in response to the solicitor's

ROGER SUBER - CROSS BY MR. HARRIS.

1 questions that you recognized the car before you
2 recognized the driver; is that correct?

3 A That's correct.

4 Q Is it possible that you just assumed that
5 Kashif Nash was driving that blue Chevrolet?

6 A No.

7 Q Because you are infallible?

8 A I know who I saw driving that car.

9 Q You are not going to back out of it now, are
10 you, no matter what?

11 A Why should I? I know who was driving.

12 Q Okay. You say you immediately formed the
13 intention that you were going to stop the blue
14 Chevrolet; is that right?

15 A That's correct.

16 Q To that end, as soon as you could get stopped,
17 you turned around in a driveway and started
18 heading back toward Union; is that right?

19 A Yes.

20 Q By that time you had lost sight of the blue
21 Chevrolet?

22 A That's correct.

23 Q As a matter of fact, you never caught sight of
24 the blue Chevrolet again, according to your
25 testimony, except to see the back end of the

ROGER SUBER - CROSS BY MR. HARRIS

1 blue Chevrolet in a curve?

2 A On [REDACTED], correct.

3 Q But not the driver?

4 A Not the driver.

5 Q Your only opportunity to see who was driving was
6 that four or five seconds initially; is that
7 correct?

8 A That's correct.

9 Q Never again did you see anybody behind the wheel
10 of the blue Chevrolet, did you?

11 A Because the next time I came upon it, it was
12 stopped.

13 Q Well, my question is never again did you see any
14 person behind the wheel of the blue Chevrolet?

15 A That's correct.

16 Q As a matter of fact when you next saw the Chevy
17 after the glance of the rear end of it incurred,
18 the car was parked in the driveway of
19 Mr. Rogers' home; is that correct?

20 A That's correct.

21 Q Parked in the driveway?

22 A When I saw it, it was pulled up in the
23 driveway.

24 Q Now, let me ask you this: When you filed your
25 official report of this -- you filed an official

ROGER SUBER - CROSS BY MR. HARRIS

1 report then?

2 A Yes.

3 Q You tried to be as accurate as possible?

4 A Tried to be, yes, sir.

5 Q Isn't it correct that you stated that "So I was
6 passing [REDACTED] [REDACTED] I noticed that Kashif
7 pulled into the driveway of Junior Rogers. I
8 turned around and I pulled into [REDACTED] [REDACTED]
9 and I pulled into the driveway behind the
10 Chevy," right?

11 A Yes.

12 Q Isn't it also true that you stated that the
13 first time you saw Kashif Nash after saying you
14 initially saw him drive was when he was walking
15 into Junior Rogers house?

16 A When I was on the [REDACTED] [REDACTED] I saw the
17 car pull in the driveway. I turned around
18 because I pulled up behind the car. He was
19 walking toward the house to the front door.

20 Q Now, isn't it true in your official report that
21 you stated that you pulled in to the driveway
22 behind the Chevy, the South Carolina tag on the
23 Chevy was JAK 627. Kashif was walking into the
24 house. That's what your report says?

25 A No, that is not what --

ROGER SUBER - CROSS BY MR. HARRIS

1 Q He was walking into the house?

2 A When I pulled up in the driveway, he was
3 walking towards the house.

4 Q Now, are you changing your story today?

5 A No. I never changed my story.

6 Q Do you feel it's accurate what you're --

7 A When I got stopped, he was walking into the
8 house. When I pulled up into the driveway, he
9 was walking up toward the house.

10 Q You didn't put that in your report, did you?

11 A I haven't read that report since the same
12 day I wrote it.

13 Q Would you like to read it now?

14 A No.

15 Q Do you dispute what it says?

16 A No. You read it.

17 Q So Mr. Nash actually was walking into the house
18 and actually walked into the house?

19 A He did.

20 Q But you held him back out?

21 A I had him come back, yes, sir.

22 Q And he willingly came out, didn't he?

23 A Yes, sir.

24 Q Did you have to go drag him out of the house?

25 A No, sir.

ROGER SUBER - CROSS BY MR. HARRIS

1 Q Did you have to call for him several times?

2 A No, sir.

3 Q Did you have to beg him to come out?

4 A No, sir.

5 Q Would you agree that's not exactly the actions
6 of a man that might be trying to hide the fact
7 that he has been doing something wrong?

8 A Maybe that is the actions of a man that I
9 know and he knows me. We are not total
10 strangers.

11 Q He had no reason to fear that you would accuse
12 him of a crime?

13 A I don't know what he was thinking.

14 Q Nevertheless, he just came on back out and, as
15 you say, you started talking to him?

16 A Yes.

17 Q You claim that you asked him, why were you
18 driving; is that correct?

19 A I didn't claim it. I did ask him why he was
20 driving.

21 Q You asked him, why were you driving? And he
22 said, I don't know.

23 A That's what he said.

24 Q Would you say that is an odd response to that
25 question?

ROGER SUBER - CROSS BY MR. HARRIS

1 A Very odd.

2 Q Are you sure that was the answer?

3 A Yes, I am sure.

4 Q Because you are infallible?

5 A I don't consider myself infallible.

6 Q Okay. Well, then you weren't infallible.

7 Is it true that Kashif Nash never, ever
8 said to you, okay, you got me. I was driving.

9 A During the conversation that me and him had,
10 he didn't come out and say, yes, I was driving.
11 But the questions that I asked him indicated
12 that he was driving by his response.

13 Q Your interpretation?

14 A No, by what he said.

15 Q That is your interpretation because you already
16 admitted he never said he was driving, correct?

17 A He made a statement that he only drives a
18 short distance from home like to the store and
19 things of that nature.

20 Q But not that day?

21 A I don't know where he was going that day.
22 Who knows where he was coming from.

23 Q Maybe he didn't leave Mr. Rogers' house?

24 A He drove to Mr. Rogers house.

25 Q So you say that you placed Mr Nash under arrest,

ROGER SUBER - CROSS BY MR. HARRIS

1 put handcuffs on him?

2 A Yes, sir.

3 Q Then you went and had an encounter with -- you
4 and some other officers, you went and had an
5 encounter with the homeowner, Mr. Junior Rogers;
6 is that correct?

7 A That's correct.

8 Q Isn't it correct that Junior Rogers retrieved
9 his cell phone from the car, the blue Chevrolet?

10 A He said he had a cell phone. It'd been in
11 the car for a couple of days.

12 Q So Junior Rogers reached into the car and got a
13 phone, a cell phone that he told you was his?

14 A He had a cell phone in his pocket and he
15 also had an open can of beer in his pocket.

16 Q Well, didn't you just admit Mr. Rogers retrieved
17 the phone from the car and he said it was his?

18 A He said he got a phone from the car. All I
19 can tell you is what was in his pockets.

20 Q Do you find it odd that Mr. Rogers' cell phone
21 would have been in the car if he weren't driving
22 it?

23 A I find it odd that it would have been in his
24 car for two days.

25 Q You don't know if it had been there for two

ROGER SUBER - CROSS BY MR. HARRIS

1 days?

2 A According to him, it was.

3 Q We will see what he says.

4 A Okay.

5 Q Now, in terms of what you did or didn't do, did
6 you -- you said you sped up to 70 miles an hour,
7 something like that?

8 A Yes.

9 Q Did you put your blue lights on?

10 A No, sir.

11 Q Did you activate the police sirens?

12 A No, sir.

13 Q So let's be honest here. This wasn't like some
14 kind of rip-roaring chase?

15 A No.

16 Q You never signalled whoever was driving the blue
17 Chevrolet to even stop, did you?

18 A Well, if I would have gotten close enough
19 behind him, I would have. I am not going to
20 turn the blue lights and siren on going down
21 [REDACTED] without seeing anybody.

22 Q Didn't you testify that immediately when you
23 passed the blue Chevrolet that you formed the
24 intention that you were going to stop it?

25 A When I got close enough behind it, I would

ROGER SUBER - CROSS BY MR. HARRIS.

1 have.

2 Q You immediately tried to turn around in order to
3 stop it?

4 A Yes.

5 Q And isn't it very common police practice when
6 you turn around on a car, you activate the at
7 least the blue lights, perhaps the siren to
8 indicate to the car that you are coming after
9 it?

10 A When you are close to the car -- I guess
11 every officer does it different.

12 Q The fact of the matter is you never indicated by
13 blue light or siren any signal to the driver of
14 the blue Chevrolet to stop, did you?

15 A That's correct.

16 MR. HARRIS: Thank you, your Honor.
17 That's all I have.

18 MR. PLEMING: Briefly, your Honor.

19 REDIRECT EXAMINATION

20 BY MR. PLEMING:

21 Q Deputy Suber, you said you talked to
22 Junior Rogers after you placed Mr. Nash under
23 arrest or during the time that you were out
24 there?

25 A Yes.

ROGER SUBER - REDIRECT BY MR. PLEMING

1 Q Exactly when did you start talking to
2 Mr. Rogers?

3 A After we placed Mr. Nash in the back seat of
4 the truck. I noticed Mr. Rogers leaning into
5 the blue car to get something out of it.

6 Q Did you see exactly what he retrieved from that
7 car?

8 A No. When he backed out of the car, he had
9 nothing in his hands. Whatever he had, he put
10 in his pocket.

11 Q Do you know what all he had in his pocket?

12 A He had a cell phone and an open can of beer.

13 Q In his pocket?

14 A In his pocket.

15 Q You didn't see him pull the beer or the cell
16 phone from the car that Mr. Nash was driving?

17 A That's correct.

18 Q You said you did talk to Mr. Rogers?

19 A Yes.

20 Q Without telling us what his answer was, did you
21 ask him if he knew who was driving that car?

22 A Yes.

23 Q Why didn't you activate your blue lights or
24 siren that day?

25 A Because whenever I activate the blue lights,

ROGER SUBER - REDIRECT BY MR. PLEMING

1 I am closer to the car where the driver can
2 actually see the lights flashing.

3 Q Did you feel it was necessary in this case to
4 activate your blue lights?

5 A No.

6 MR. PLEMING: One moment, your Honor.

7 Couple more questions.

8 BY MR. PLEMING:

9 Q Mr. Harris just asked you about what Mr. Nash
10 said to you that day, that he had said that he
11 only drives short distances?

12 A Yes.

13 Q Without getting into the specific statements,
14 did he give you any other reasons or
15 explanations for driving?

16 A He stated he drove on that day because him
17 and his girlfriend got into an argument, and he
18 had to get out of the house..

19 MR. PLEMING: No further questions.

20 MR. HARRIS: Nothing else, Judge.

21 THE JUDGE: Thank you. You may step down.
22 (Witness excused.)

23 THE JUDGE: All right. I think it is good
24 time to recess for the evening.

25 Mr. Foreman, ladies and gentlemen of the

STATE OF SC VS. KASHIF F. NASH

1 jury panel, we are going to go ahead and recess
2 for the evening. On the overnight recess,
3 please do not discuss the case among yourselves
4 or with anyone else you might see. If anyone
5 tries to discuss the case with you, please do
6 not discuss it with them.

7 Do not listen or watch any media accounts
8 of this trial if it should be in the newspaper
9 or social media, et cetera. We should finish
10 this case tomorrow so it shouldn't be a
11 hardship.

12 Please have a pleasant night tonight. Be
13 back in jury room ready to go tomorrow morning
14 at 9:30. Thank you.

15 (Whereupon, the jury exited the courtroom
16 at 5:01 p.m.)

17 THE JUDGE: Is there any matter we need to
18 take up out of the presence of the jury at this
19 time?

20 MR. PLEMING: No, sir, your Honor.

21 MR. HARRIS: No, your Honor. Other than
22 is Mr. Nash free to go during the overnight?

23 THE JUDGE: Does the State have a position
24 on that?

25 MR. PLEMING: No, sir, your Honor. But I

STATE OF SC VS. KASHIF F. NASH

1 did think of one thing I might want to put on
2 the record.

3 THE JUDGE: Let me tell Mr. Nash this.
4 We'll leave you out overnight. You need to
5 understand if you fail to show up in the morning
6 for the trial, that the trial will go forward in
7 your absence and your attorney will be here to
8 represent you the best he can but the trial will
9 go forward.

10 If the jury would find you not guilty,
11 that would be the end of it. If they found you
12 guilty, a bench warrant would be issued for your
13 arrest and a sentence would be sealed. You
14 would be picked up on a bench warrant and you
15 will be brought in. Your sentence would be
16 unsealed when you are brought in. You will be
17 brought in if you don't show up. Do you
18 understand that?

19 THE DEFENDANT: Yes, your Honor.

20 THE JUDGE: What else?

21 MR. PLEMING: Your Honor, I just want to
22 make sure the defense is aware and the Court
23 that I did speak with someone -- my paralegal
24 spoke with someone from the Department of Motor
25 Vehicles. We should have a Marie Wearing in to

STATE OF SC VS. KASHIF P. NASH

1 testify tomorrow morning. She is from the
2 records department with the DMV.

3 THE JUDGE: Okay. I am not sure who you
4 are planning to call next. Anyway, we'll be
5 ready to go at 9:30. I will be here a little
6 before 9:30 if something comes up. Have a good
7 night.

8 (Whereupon, at 5:04 p.m., the
9 above-entitled matter was adjourned.)
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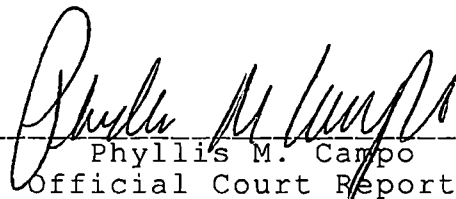
C E R T I F I C A T I O N

STATE OF SOUTH CAROLINA
COUNTY OF YORK

I, Phyllis M. Campo, Official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings at the time and place herein in the above-entitled matter.

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

May 19, 2014



Phyllis M. Campo
Official Court Reporter

1 STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS
2 COUNTY OF UNION

3 2013-GS-44-0918
4 2014-GS-44-0033

5 State of South Carolina,

6 vs.

Transcript of Record
Volume 11

7 Kashif P. Nash
8

9 Date: February 5, 2014
10

11
12 BEFORE: The Honorable Lee Alford

13
14 APPEARANCES:

15 Blaine Fleming, Esq.,
16 Assistant Solicitor

17 Ricky Harris, Esq.,
18 Attorney for Defendant

19 Court Clerk: Freddie Gault
20

21 Phyllis M. Campo, RPR
22 Official Court Reporter
23
24
25

INDEX

	<u>Page</u>
Jury Selection	4
Opening Statement	
By Mr. Fleming	100
By Mr. Harris	105
Closing Argument	
By Mr. Harris	261
By Mr. Fleming	280
Jury Charge	294
Verdict of the Jury	312
Sentence of the Court	315
Certificate of Reporter	321

INDEX TO WITNESSES

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Roger Suber	114	141	156	--
Wendy Childers	166	170	180	--
Marie Wearing	183	192	197	--
Lawrence Zivkovich	198	214	222	--
Junior Rogers	229	238	--	--
Roger Suber	247	255	258	--

INDEX TO EXHIBITS

	<u>ID</u>	<u>EVID</u>
<u>STATE'S EXHIBITS</u>		
1 - Letter from DMV	4	189
2 - In-Car Video	4	253
3 - Evidence Report From S.L.E.D	4	214
4 - Aerial Map of Mainsville Rd	4	125
5 Evidence Packet	4	125

COURT'S EXHIBITS

1 - Certificate of Conviction	316	316
2 - Certificate of Conviction	316	316
3 - Certificate of Conviction	316	316

WENDY CHILDERS - DIRECT BY MR. PLEMING

1 (Open court out of presence of jury.)

2 THE JUDGE: Good morning, Counsel. Are
3 you ready to proceed this morning?

4 MR. PLEMING: Yes, sir.

5 MR. HARRIS: The defense is ready.

6 THE JUDGE: Anything we need to take up
7 before we bring the jury in?

8 MR. PLEMING: Nothing from the State.

9 MR. HARRIS: No, your Honor.

10 THE JUDGE: Please bring the jury in.

11 (Whereupon, the jury entered the courtroom
12 at 9:43 a.m.)

13 THE JUDGE: Good morning, Mr. Foreman,
14 ladies and gentlemen of the jury panel. We are
15 ready to presume the trial at this time.
16 Counsel, you may proceed.

17 MR. PLEMING: Thank you, your Honor. The
18 State calls Wendy Childers.

19 WENDY CHILDERS

20 being first duly sworn, testified as follows:

21 DIRECT EXAMINATION:

22 BY MR. PLEMING:

23 Q Will you please state your name and occupation?

24 A Wendy Childers. I am a police officer with
25 the Union County Sheriff's office.

WENDY CHILDERS - DIRECT BY MR. PLEMING

1 Q How long have you worked as a police officer?

2 A Nine years.

3 Q Please tell us your current position?

4 A I am a master SERGEANT at the Sheriff's
5 office.

6 Q How long have you been a master sergeant for the
7 Sheriff's office?

8 A A little over two years.

9 Q Do you hold any other titles or job?

10 A I am also the evidence technician at the
11 Sheriff's office.

12 Q Sergeant Childers, when an officer with the
13 Sheriff's office obtains a substance that he
14 needs to have analyzed, what is the protocol?
15 What do they do with those substances?

16 A If they have an illegal substance, they seal
17 it in a Best Pack. That Best Pack is turned
18 over to evidence at S.L.E.D for analysis.

19 Q Can you describe what a Best Pack is?

20 A A Best Pack is a tamperproof plastic bag.
21 Once it is sealed, if the sealed is tampered
22 with, it will show on the marking on the outside
23 of the bag.

24 Q Is it possible to open -- how do you open a Best
25 Pack once it has been sealed shut? .

WENDY CHILDERS - DIRECT BY MR. PLEMING

1 A I have never opened one, but I am assuming
2 once it gets down to S.L.E.D they cut it open.

3 Q Okay. I am showing you now an item that has
4 been previously marked for identification as
5 State's Exhibit 6. Actually, before I show it
6 to you, I am showing it to defense counsel. If
7 you will take a moment to examine State's
8 Exhibit 6.

9 Do you recognize it?

10 A Yes.

11 Q How are you able to recognize it?

12 A The Best Pack Control Number 232839 is also
13 the control number that is listed on the Chain
14 of custody that was made out by Roger Suber and
15 on the S.L.E.D analysis report.

16 Q To be specific, are you reading from the outside
17 package of State's Exhibit 6 or the bag that is
18 contained on the interior of that package?

19 A The bag that is contained on the interior.

20 Q So when you refer to the bag, the Best Pack in
21 this case, you are referring to the bag
22 contained on the interior of that package,
23 correct?

24 A Yes.

25 Q Have you ever seen this particular Best Pack

WENDY CHILDERS - DIRECT BY MR. PLEMING

1 before?

2 A Yes.

3 Q When have you seen it before?

4 A I took it to S.L.E.D, I think it was
5 September 12th, 2013; to get it analyzed.

6 Q When you took it to S.L.E.D, had it already
7 been sealed?

8 A Yes.

9 Q From where and from whom did you receive the
10 Best Pack before you took it to S.L.E.D?

11 A The Best Pack was placed in our vault. We
12 retrieve it from the vault and took it to
13 S.L.E.D.

14 Q Do you know who placed in the vault?

15 A Captain Robby Hines. He is the primary
16 evidence custodian. He is a backup when I was
17 out. I was out that week so he turned it over
18 to Captain Robby Hines, and Captain Robby Hines
19 placed into the vault. I retrieved it from the
20 vault and took it to S.L.E.D.

21 Q Thank you. Once you took it to S.L.E.D, to whom
22 did you transfer the item at that point?

23 A The intake S.L.E.D officer was Doris
24 Yarborough.

25 Q What date did you submit it to S.L.E.D?

WENDY CHILDERS - CROSS BY MR. HARRIS

1 A I think it was September 12th, 2013.

2 Q While this particular Best Pack was in your
3 custody and control, did you do anything to it,
4 change it or alter it in anyway?

5 A No.

6 Q After S.L.E.D had completed their analysis, who
7 from the Sheriff's office retrieved the exhibit
8 from S.L.E.D?

9 A Lieutenant Terry Humphries retrieved it from
10 S.L.E.D.

11 Q Where has it been since that date?

12 A It has been in our evidence vault since
13 then.

14 Q Until?

15 A Until yesterday.

16 MR. PLEMING: Thank you very much. I have
17 no further questions at this time.

18 CROSS-EXAMINATION

19 BY MR. HARRIS:

20 Q Deputy, you consider yourself the evidence
21 custodian?

22 A I am the primary evidence custodian.

23 Q For Union County Sheriff's offices?

24 A Yes.

25 Q You were during the pendency of this case?

WENDY CHILDERS - CROSS BY MR. HARRIS

1 A Yes.

2 Q You testified that you are familiar with the
3 Best Evidence Pack?

4 A Yes, sir.

5 Q And State's Exhibit 6 for identification, is
6 that considered a Best Evidence bag?

7 A The interior bag on the inside is, yes, sir.

8 Q Let's clarify a little bit. Just looking at
9 State's Exhibit 6 for identification, would it
10 be correct that the bag, the plastic bag that
11 you are holding that is sealed up, that bag is
12 sealed up?

13 A Yes, sir.

14 Q Is not the Best Evidence bag?

15 A The exterior bag is not ours. It did not
16 come from the Sheriff's office. It came from
17 S.L.E.D.

18 Q That was not the original Best Evidence bag,
19 this control number you are talking about?

20 A The interior bag is the original.

21 Q I am asking about the outer bag?

22 A No, sir. We send it down in an envelope.
23 The sealed interior bag is in a brown envelope.
24 When it comes back, it is in a sealed plastic
25 exterior bag.

WENDY CHILDERS - CROSS BY MR. HARRIS

1 Q I understand. I am asking you about the outer
2 packaging as we see it today?

3 A Yes, sir.

4 Q We weren't all there then, okay. So the outer
5 bag that is sealed up today that you are holding
6 was not a bag that anybody from the Union County
7 Sheriff's office sent anything in?

8 A No.

9 Q That's a bag that these things were returned in?

10 A Yes.

11 Q Now, inside the sealed up plastic bag appears to
12 be, would you agree, another plastic bag?

13 A Yes.

14 Q Is that the original best bag?

15 A Yes.

16 Q How do you know that?

17 A Because it is signed by Deputy Roger Suber
18 and dated, and it has the same control number as
19 the chain of custody that he turned in.

20 Q Is it signed by you as a custody person in the
21 chain of custody?

22 A No.

23 Q Is there any paperwork inside the bag that you
24 are holding?

25 A No.

WENDY CHILDERS - CROSS BY MR. HARRIS

1 Q Okay. Are you familiar with the Best Evidence
2 protocol as established by S.L.E.D policies and
3 regulations?

4 A I don't know.

5 Q You don't know if you are familiar with it or
6 you have never heard of it or what ?

7 A I would never use the term protocol.

8 Q So the Union County Sheriff's office uses a Best
9 Evidence bag, correct?

10 A Yes.

11 Q And did in this case; is that right?

12 A Yes.

13 Q But you are saying as the primary evidence
14 custodian for the Union County Sheriff's office,
15 you have no familiarity with the S.L.E.D Best
16 Evidence protocol?

17 A We have directions that come in the Best
18 packet, if that's what you are referring to.
19 That's what we go by.

20 Q Ma'am, I am merely asking you the question. I
21 am sorry if I am not clear. The question again,
22 if you will bear with me. Are you testifying
23 today that as the primary evidence custodian for
24 the Union County Sheriff's office that you are
25 not familiar with the S.L.E.D Best Evidence

WENDY CHILDERS - CROSS BY MR. HARRIS

1 protocol?

2 A If by protocol you mean the directions
3 sealed that come with the Best Pack then yes.

4 Q All right. Then you would be familiar with the
5 standardized forms that are prescribed for use
6 by all law enforcement agencies by the S.L.E.D
7 evidence protocol?

8 A Those forms that come with the Best Packs,
9 yes.

10 Q Are you familiar with the standardized form
11 called Form B, Initial Chain of Custody?

12 A Yes. They are used on the older Best Packs.
13 I am not sure if this is one of the older Best
14 Packs or newer Best Packs.

15 Q You are saying the Form B, Initial Chain of
16 Custody Form, that's part of the S.L.E.D
17 evidence protocol is obsolete?

18 A From what I understand, they have a new
19 chain of custody inside of them now. They don't
20 have the Form B and Form C. I am not sure which
21 Best Pack we used for this package.

22 Q I am asking you what would apply to June 14th,
23 2013 in this case?

24 A I don't know.

25 Q Well, you are the primary evidence custodian?

WENDY CHILDERS - CROSS BY MR. HARRIS

1 A Yes. We still have some of the older Best
2 Packs. We have some of the older Best Packs in
3 the office but once we go to S.L.E.D and get the
4 newer Best Packs, they have changed. So
5 sometimes somebody will grab older ones and
6 sometimes they will grab new ones.

7 Q Didn't you say that you were one of the first
8 people to receive from the evidence vault the
9 Best Pack that was used in this case?

10 A From the vault, yes.

11 Q Your testimony was, wasn't it, that Robby Hines,
12 according to you, placed this Best Pack in the
13 evidence vault?

14 A Yes.

15 Q Is there any written documentation to show that
16 Mr. Hines' involvement in this case?

17 A Yes, it is on the original chain of custody.

18 Q Do you have that with you today?

19 A Yes.

20 Q You might have to decipher some signatures here.
21 I have never seen this form.

22 A This is where Roger Suber signed it over to
23 Robert Hines on June 14, 2013 and Robby Hines
24 placed it in the vault, and yesterday I took it
25 from the vault.

WENDY CHILDERS - CROSS BY MR. HARRIS

1 Q Now, whose signature is this?

2 A Robby Hines.

3 Q Okay. Then the next thing is where you got it?

4 A Where I turned over to Deputy Suber
5 yesterday.

6 Q So this form here does document your involvement
7 in September of 2013?

8 A No, that should have been with the chain of
9 custody with the Best Pack.

10 Q Okay. So you are saying then, just to clarify,
11 from what you know, Deputy Suber put the Best
12 Pack -- and he testified yesterday in a locker.
13 Are you familiar with this locker?

14 A Yes. We have a lock box down in the patrol
15 office.

16 Q Then who got it out of the locker?

17 A Robby Hines.

18 Q And you know that because he signed that form?

19 A Because he signed that form.

20 Q Then Robby Hines put it in what you are calling
21 a vault?

22 A The evidence vault, yes.

23 Q Is the vault more secure than the locker?

24 A They're both secure, but the evidence vault
25 is the long-term vault. It is for long-term

WENDY CHILDERS - CROSS BY MR. HARRIS

1 storage.

2 Q Okay. So the first time you laid eyes on
3 whatever Best Pack was used was in September of
4 2013 when you got it from this bank vault; is
5 that correct?

6 A I am in and out of the vault all of the time
7 so I have likely seen it before then, but I
8 actually laid hands on it in September.

9 Q That's when you took custody of it anyway?

10 A I have had custody since it has been locked
11 in my vault.

12 Q Okay. Ever since what time, whenever you first
13 saw it, or when you took custody of it, was it a
14 so-called old best bag or new best bag?

15 A I don't know.

16 Q Why not? You are the evidence custodian.

17 A Like I said, they have changed and I do not
18 know what we used at the time.

19 Q But the bag was sealed up then?

20 A Yes, sir.

21 Q It was the bag that was inside the bag that is
22 sealed up now?

23 A Yes.

24 Q It had no paperwork with it?

25 A Yes, sir.

WENDY CHILDERS - CROSS BY MR. HARRIS

1 Q What kind of paperwork did it have with it?

2 A I can't recall. I would have to see the
3 paperwork to verify. I cannot recall on the top
4 of my head. This is not the only Best Pack that
5 we get or have.

6 Q Would it be any paperwork that would describe
7 with some particularity what is supposed to be
8 in the bag?

9 A It should. Suber should have put a
10 description on the paperwork.

11 Q So you are saying somewhere in the world of this
12 case, somewhere there should be an official
13 document authored by Deputy Suber that is
14 supposed to describe with some particularity
15 what items are placed in the original Best bag;
16 is that correct?

17 A Yes. It is with S.L.E.D with the Best bag.

18 Q You don't have that document?

19 A No.

20 Q Nor have you ever seen it?

21 A I have seen it.

22 Q When did you see it?

23 A In September. I have to look through it and
24 make sure all the paperwork is there because
25 S.L.E.D will not accept it if it does not have

WENDY CHILDERS - CROSS BY MR. HARRIS

1 all of the paperwork.

2 Q Do you remember what the document said. I know
3 we are not able to lay our hands on it?

4 A No.

5 Q Are you sure it is not in that bag?

6 A No.

7 Q Do you recall if it said anything like small
8 digital scale with residue?

9 A I can't assume what it said. I can't
10 recall.

11 Q Or if it said small digital scale with razor
12 blade with residue?

13 A I can't recall.

14 Q Did you look at the actual items that were in
15 the Best bag?

16 A I am sure I did. Like I said, I have to
17 look through everything to make sure it is all
18 together because S.L.E.D will not take it.

19 Q You see the items in the bag that you have
20 before you, State's Exhibit 6 for ID?

21 A Yes.

22 Q Do you recall if the razor blade was visible to
23 you inside the original Best bag?

24 A I don't recall.

25 Q Do you remember seeing anything that you, as a

WENDY CHILDERS - REDIRECT BY MR. PLEMING

1 trained police officer, master sergeant, could
2 recognize as residue?

3 A I don't recall. I do not take a mental note
4 of this particular case.

5 MR. HARRIS: Okay. Thank you. No further
6 questions.

7 REDIRECT EXAMINATION

8 BY MR. PLEMING:

9 Q Sergeant Childers, is it your job to analyze the
10 stuff put into the Best Pack to transport to
11 S.L.E.D?

12 A No.

13 Q What is your job to inspect the evidence that is
14 submitted to S.L.E.D?

15 A Just to make sure that all of the proper
16 paperwork is together and it goes to S.L.E.D so
17 S.L.E.D accepts it.

18 Q Was that done in this case?

19 A Yes. S.L.E.D accepted it.

20 Q Do you know why S.L.E.D places it in a new
21 sealed plastic bag?

22 A I can assume, if you would like.

23 Q Well, let me ask you this: We talked about the
24 tamperproof qualities of the Best Pack. Once a
25 Best Pack has been torn or open, is it possible

WENDY CHILDERS - REDIRECT BY MR. PLEMING

1 to reseal it again?

2 A No.

3 Q Can you read the number on the Best Pack through
4 that clear plastic bag?

5 A Yes.

6 Q You said you recognized that number?

7 A Yes.

8 Q What is that number?

9 A That is the control number.

10 Q Where else have you read that number?

11 A It is also on the chain of custody and the
12 analysis report.

13 Q Those items were signed by Roger Suber?

14 A Yes.

15 Q Is that the number you used to identify the Best
16 Pack?

17 A Yes. That and the case number also.

18 Q Okay.

19 MR. PLEMING: No further questions, your
20 Honor.

21 MR. HARRIS: Nothing else, your Honor
22 thank you.

23 THE JUDGE: Thank you, ma'am. You may
24 stand down.

25 (Witness excused.)

STATE OF SC VS. KASHIF NASH

1 MR. PLEMING: Your Honor, may I approach?

2 THE JUDGE: Yes.

3 (Whereupon, a bench conference was held
4 off the record in the presence of the jury, but
5 out of hearing of the jury.)

6 THE JUDGE: Mr. Foreman, ladies and
7 gentlemen of the jury panel, we have a witness
8 who is driving here from Columbia and supposed
9 to be here in any moment. What we are going to
10 do is take a short recess and allow you to take
11 a break.

12 THE BAILIFF: She is outside.

13 THE JUDGE: Okay. Thank you, sir. We are
14 going to take a short recess. You can refresh
15 yourselves during the break. Please do not
16 begin discussing the case. Thank you.

17 (Whereupon, the jury exited the courtroom
18 at 10:05 a.m.)

19 THE JUDGE: We will take a short recess.

20 (Court in recess at 10:05 a.m.)

21 (Open court out of presence of jury.)

22 MR. PLEMING: We are ready, your Honor.

23 THE JUDGE: Please bring the jury in.

24 (Whereupon, the jury entered the courtroom
25 at 10:28 a.m.)

STATE OF SC VS. KASHIF NASH

1 THE JUDGE: Counselor, proceed.

2 MR. PLEMING: Your Honor, the State calls
3 Marie Wearing.

4 MARIE WEARING

5 being first duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. PLEMING:

8 Q Good morning.

9 A Good morning.

10 Q Would you please state your name and occupation
11 for the jury?

12 A Marie Wearing. I work at South Carolina
13 Department of Motor Vehicles.

14 Q Thank you, Ms. Wearing. How long have you been
15 with the DMV?

16 A Twenty-five years.

17 Q What is your current position there?

18 A I am the supervisor of custodial drivers'
19 records.

20 Q What are your duties as the supervisor of
21 drivers' records?

22 A I am the regular keeper of drivers' records.

23 Q Okay.

24 THE JUDGE: Excuse me. You look
25 uncomfortable. If you would pull that mike up

STATE OF SC VS. KASHIF NASH

1 and you can lean back.

2 A Thank you.

3 BY MR. PLEMING:

4 Q Am I correct, you are familiar with how records
5 of the DMV are kept and stored?

6 A Yes.

7 Q Are you familiar with the term habitual traffic
8 offender and what that means to be declared a
9 habitual traffic offender?

10 A Yes.

11 Q Explain how the DMV notifies a person when his
12 or her license has been suspended or they have
13 been declared a habitual traffic offender?

14 A When you have three regular suspensions, the
15 computer will generate letters.

16 Q When the computer generates the letter, how is
17 it then mailed to the individual to notify them?

18 A It is like a overnight cycle that pulls out
19 the address that is on the driver's record.

20 Q So a letter automatically prints?

21 A Generates, yes.

22 Q Who is responsible for them putting that letter
23 in an envelope and sending it out?

24 A , It goes to the U.S. mailing service.

25 Q Okay. Very good. Once the DMV has mailed out

STATE OF SC VS. KASHIF NASH

1 an official notice of suspension or habitual
2 traffic offender declaration does the DMV retain
3 copies of those letters?

4 A Yes.

5 Q Explain how this is done?

6 A It is being kept in a hard drive in the
7 database.

8 Q Is that done immediately after the letter is
9 generated?

10 A Immediately after it is generated.

11 Q Do you have access to that database?

12 A That's correct.

13 Q Are those copies kept in the course of the DMV's
14 regularly conducted business affairs?

15 A Yes.

16 Q You said you are responsible for maintaining
17 those records?

18 A Yes.

19 Q Is that done with every notice that is sent?

20 A That's correct.

21 Q Are you familiar with any of the DMV records on
22 one Kashif P. Nash?

23 A Yes.

24 Q How did you become familiar with those records?

25 A I was told to research them yesterday.

STATE OF SC VS. KASHIF NASH

1 Q Did you have a chance to retrieve his records?

2 A Yes.

3 Q Have you had a chance to review them for court
4 today?

5 A Yes.

6 Q Did you bring a copy of those records with you?

7 A Yes.

8 Q Do you have those with you now?

9 A Yes.

10 Q From having reviewed his records, are you
11 familiar with what was the status of his
12 driver's license on June 14 of last year?

13 A Yes.

14 MR. PLEMING: For the record, I am now
15 showing State's Exhibit Number 1 as previously
16 marked for identification to the defense
17 attorney.

18 BY MR. PLEMING:

19 Q Ms. Wearing I am now showing you what has been
20 marked as State's Exhibit 1. Would you please
21 take a moment to review it. Are you familiar
22 with State's Exhibit 1?

23 A Yes.

24 Q Where have you seen it before?

25 A This is an official notice declaring

STATE OF SC VS. KASHIF NASH

1 habitual offender.

2 Q Is this one of the records that you previously
3 stated as regularly kept by the DMV in the
4 regular course of its business?

5 A Yes.

6 Q How can you be certain that this is an
7 authenticate copy of that notice?

8 A Because it is certified, true certified.

9 Q What does that mean? How is it certified?

10 A It is sealed by the Deputy Director of
11 Service.

12 Q Is that a stamped seal?

13 A Yes.

14 Q What type of letterhead is that notice on?

15 A Excuse me?

16 Q Can you describe the letterhead that is on the
17 top of the letter?

18 A South Carolina Department of Motor Vehicles.

19 Q Okay. Is there a signature on that stamp?

20 A Yes.

21 Q Do you know the name that is signed there?

22 A It N.L. Phelps.

23 Q Who is that?

24 A Driver Service Deputy Director.

25 MR. PLEMING: The State now moves State's

STATE OF SC VS. KASHIF NASH

1 Exhibit 1 for admission into evidence.

2 MR. HARRIS: Your Honor, would it be -- I
3 would suggest it might be proper for me to
4 cross-examine the witness prior to that time and
5 then the State reserve.

6 THE JUDGE: Why?

7 MR. HARRIS: At this time, having the
8 questions I have, I would have to object to the
9 document. I may be in the position --

10 THE JUDGE: If you are going to object to
11 it, you are going to give me a basis for your
12 objection, please.

13 MR. HARRIS: I believe the witness has
14 verified the information on the document. The
15 document has been described as a notice.

16 THE JUDGE: It has been sent out. She is
17 verifying the document itself has been sent out,
18 the letter that they are offering into
19 admission. That is not a question about the
20 contents, et cetera, that's not the issue. The
21 issue is, is this an officially created document
22 she is aware of and kept in the regular course
23 of business mailed out to him and verified copy,
24 all of that is what it is about. They are
25 offering this. What is your objection?

STATE OF SC VS. KASHIF NASH

1 MR. HARRIS: That the witness has not, in
2 my opinion, in her testimony established the
3 basis for the Department's declaration of
4 habitual offender.

5 THE JUDGE: She doesn't have to do that.
6 She verified he was notified. It was a record
7 kept in the normal course of business that it
8 was verified and it was sent to him. That's
9 what she is saying. It doesn't mean the
10 information is correct. You can cross-examine
11 her about that. The question is about the
12 admission of it. You can still cross-examine
13 her about the contents of it, the basis for the
14 declaration of it, but of course, you could
15 appeal that if you think it is incorrect, the
16 defendant could have, if he didn't think that
17 was correct. You can still examine her on that.
18 I overrule your objection. I admit it over
19 objection.

20 MR. PLEMING: Thank you, your Honor.

21 (Whereupon, STATE'S EXH. 1, previously
22 marked for identification, was received into
23 evidence.)

24 BY MR. PLEMING:

25 Q Ms. Wearing, you stated a second ago that you

STATE OF SC VS. KASHIF NASH

1 were familiar with Mr. Nash's driver's license
2 status on June 14 of last year. Is your
3 familiarity with that status based solely on
4 that notice or based on your review of his
5 entire record?

6 A Based on the review of his entire record.

7 Q Thank you. Let me ask you this: Those records
8 that you reviewed, were all of those records
9 that were also kept in the regular course of DMV
10 business?

11 A Yes.

12 Q Based on your review of those records, was
13 Mr. Nash properly qualified as a habitual
14 traffic offender?

15 A Yes.

16 MR. PLEMING: At this time, your Honor,
17 the State would like to publish State's Exhibit
18 Number 1.

19 THE JUDGE: You may publish.

20 BY MR. PLEMING:

21 Q Ms. Wearing, can you read the official notice
22 that I have placed on this screen?

23 A Can I read from mine? I can hardly see
24 this.

25 Q Is the copy that you have the same as the copy I

STATE OF SC VS. KASHIF NASH

1 showed you?

2 A Yes, sir.

3 MR. PLEMING: Your Honor, may she read
4 from that copy?

5 THE JUDGE: Yes, sir.

6 THE WITNESS: Official notice. You have
7 accumulated violation in a three-year period
8 that results in being declared a habitual
9 offender, Section of Law 56-1-1030.

10 Q Thank you. Does this notice indicate on what
11 date this habitual traffic offender status
12 began?

13 A Yes.

14 Q What is that date?

15 A August 28, 2010.

16 Q Does it also indicate on what date his habitual
17 traffic offender status ended or was set to end?

18 A August 28, 2005.

19 Q Thank you. If you will now read the name and
20 address to whom this letter was sent.

21 A Kashif P. Nash, [REDACTED]
22 Jonesville, South Carolina 29353.

23 Q When official notices are sent, does the DMV --
24 is it sent by certified mail, do you know?

25 A It is sent by certified mail.

MARIE WEARING - CROSS BY MR. HARRIS

1 Q Can you tell us if this letter was received at
2 that address?

3 A Yes.

4 Q Was it signed by a recipient at that address?

5 A Yes.

6 MR. PLEMING: Your Honor, I have no
7 further questions at this time. Ms. Wearing,
8 please answer any questions Mr. Harris may have
9 for you.

10 CROSS-EXAMINATION

11 BY MR. HARRIS:

12 Q Ma'am, thank you for coming today. Just a
13 couple of things. State's Exhibit 1, the notice
14 letter that you in front of you. You just read
15 from it; is that correct?

16 A Yes.

17 Q This letter, do I understand your testimony, to
18 your knowledge, is a computer-generated form
19 letter?

20 A Yes.

21 Q I believe your testimony was that whenever the
22 computer decides that a person has, as the
23 letter says, accumulated certain driving
24 offenses to declare a habitual traffic offender
25 status, that generates a letter?

MARIE WEARING - CROSS BY MR. HARRIS

1 A Yes. We entered from the citation into the
2 computer.

3 Q Well, I guess along you do that?

4 A Yes, sir.

5 Q You don't go in -- a human being doesn't go in,
6 check everything, and go this person has to be
7 sent a habitual traffic offender letter.

8 A No.

9 Q That doesn't happen?

10 A No, that doesn't happen.

11 Q Is it correct that as the Highway Department
12 receives over the course of time, in this case a
13 three-year period of time, various information
14 about a driver, that information is as it comes
15 into the highway department put in to the
16 computer?

17 A Yes. We enter it into the computer.

18 Q Without anybody doing anything, any person doing
19 anything at the highway department, the computer
20 will scan its records like an audit and generate
21 one of these letters like we have in this case;
22 is that right?

23 A We key in the information from the citation.
24 Once the computer realizes it has three major
25 violations, it automatically generates the

MARIE WEARING - CROSS BY MR. HARRIS

1 letter.

2 Q So answer to my question is, yes, that's the
3 procedure whenever the computer decides that
4 enough violations have been generated, it
5 generates the letter?

6 A Yes.

7 Q The letter is simply put in an envelope and
8 sent; is that correct?

9 A Yes.

10 Q Is that an ultimatum process?

11 A It is automatically generated for the
12 nightly cycle, and it goes to a U.S. mailing
13 service and they mail it out to the individual.

14 Q I'm sorry. My question probably wasn't clear.
15 Does a person at the Highway Department actually
16 stuff the envelope, if you will?

17 A No, sir.

18 Q That's a machine driven process?

19 A That's correct.

20 Q As a matter of fact is it correct, and it wasn't
21 shown on the screen just now, but isn't it
22 correct that actually the letter in this case,
23 Mr. Nash's letter, that State's Exhibit 1, is
24 not signed by any person, correct?

25 A Correct.

MARIE WEARING - CROSS BY MR. HARRIS

1 Q Actually, it just prints out at the end driver
2 records manager?

3 A That's correct.

4 Q And who is the driver records manager for this
5 particular letter, do you know? I am not trying
6 to put you on the spot.

7 A The Deputy Director of Driver Services.

8 Q Okay. Who was that?

9 A Annie Phelps.

10 Q I am sorry, is that Annie Phelps?

11 A Yes.

12 Q Ms. Phelps didn't review this letter before it
13 went out, did she?

14 A No, sir.

15 Q Is it correct that nobody at the Highway
16 Department verified the accuracy of the
17 information contained in this letter at all?

18 A Like I said, as the citation comes in, we
19 key it into the system. It automatically
20 generates a letter. Do we see all these
21 letters? No. Like I said, it goes through a
22 nightly cycle.

23 Q What if a mistake has been made in inputting the
24 information over three years or however long?
25 What happens then?

MARIE WEARING - CROSS BY MR. HARRIS

1 A We would capture it.

2 Q How would you capture it if no human being lays
3 eyes or hands on it? How would you capture the
4 mistake?

5 A I don't understand what you are saying.

6 Q What if there had been a human error in
7 inputting the data over the course of time and
8 the computer acted on that and generated one of
9 these letters, that would be wrong, wouldn't it,
10 the content of the letter would be wrong?

11 A Once the customer realizes it is wrong he
12 will contact DMV.

13 Q Really?

14 A Yes.

15 Q So you rely on the customer to check the Highway
16 Department. The Highway Department doesn't
17 check itself?

18 A We check ourself too, sir, but if the
19 mistake is on DMV, like if it is the wrong
20 person, they would notify the DMV.

21 Q So the Highway Department doesn't check itself?
22 All of us that drive, we have to check you all?

23 A We check.

24 MR. HARRIS: Thank you, ma'am. Nothing
25 further.

MARIE WEARING - REDIRECT BY MR. PLEMING

REDIRECT EXAMINATION

1

2

BY MR. PLEMING:

3

Q Ms. Bearing, did you testify previously that you reviewed Mr. Nash's entire file before coming to court today?

4

5

6

A Yes.

7

8

9

10

Q Is that each of the reports and records contained in his file that were filed and recorded and kept in the regular course of DMV's business?

11

A Yes.

12

13

14

15

16

Q Are you familiar, based on your 25 years of working with the DMV, which citations and the accumulation of the correct number of citations that are necessary to be declared habitual traffic offender?

17

A Yes.

18

19

20

21

Q Having reviewed Mr. Nash's entire file, has he accumulated a sufficient number of driving offenses to be declared a habitual traffic offender?

22

A Yes.

23

24

25

Q So then, in fact, you personally have been -- in that case, has someone then verified that he is accurately declared a habitual traffic offender?

MARIE WEARING - REDIRECT BY MR. PLEMING

1 A Yes.

2 Q That would be you?

3 A Yes.

4 MR. PLEMING: Thank you very much.

5 MR. HARRIS: Nothing else, your Honor.

6 THE JUDGE: Thank you, ma'am. You may
7 stand down.. Any objection to this witness being
8 excused?

9 MR. PLEMING: No, sir, your Honor.

10 THE JUDGE: Thank you for coming in. You
11 may step down.

12 (Witness excused.)

13 MR. PLEMING: Your Honor, at this time,
14 the State calls Lawrence Zivkovich.

15 LAWRENCE ZIVKOVICH

16 being first duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. PLEMING:

19 Q Good afternoon. Please state your name and
20 occupation?

21 A Lawrence Zivkovich -- Z-I-V-K-O-V-I-C-H.

22 Q Thank you, Mr. Zivkovich. What is your current
23 occupation?

24 A I am a forensic chemist for the South
25 Carolina Law Enforcement Division.

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 Q Please describe your duties as a forensic
2 chemist?

3 A I analyze and submit in evidence for the
4 presence of controlled substances.

5 Q How long have you been employed in that
6 position?

7 A A little bit less than eight years.

8 Q A little bit less than eight years?

9 A Yes, sir.

10 Q Have you worked anywhere in this capacity other
11 than S.L.E.D?

12 A No, sir.

13 Q What is your personal background and training
14 that makes you qualified for this position?

15 A I got a bachelors of science in chemistry at
16 the University of South Carolina. I worked as
17 an environmental chemist for ten years at the
18 Department of Health and Environmental Control
19 and then when hired at S.L.E.D, I received
20 training as a forensic scientist, and also, I
21 have received training from the DEA.

22 Q Thank you. Is there any way for you to estimate
23 how many times you have had occasion to
24 chemically analyze a substance to determine what
25 it is?

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 A About 7 to 10,000.

2 Q What are the some of the substances that you are
3 trained to identify through your analysis?

4 A The presence of any controlled substances
5 such as pharmaceuticals or methamphetamine or
6 cocaine, crack, heroin, things like that.

7 Q Thank you. How many tests of substances would
8 you say you make in a given week?

9 A From 20 to 30.

10 Q Okay. You make these analysis as a regular part
11 of your duties?

12 A Yes.

13 Q Have you had occasion to qualify as an expert in
14 any courts of this state?

15 A I have.

16 Q About how many times?

17 A Twenty-three times.

18 Q How many of these cases can you say that
19 involved analyzing substances that you
20 determined to be cocaine?

21 A I would have to guess probably about half of
22 them.

23 MR. PLEMING: At this time, your, Honor
24 the State moves for Mr. Zivkovich to be declared
25 an expert in the field of chemical analysis and

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 identifying controlled substances.

2 MR. HARRIS: I would not object.

3 THE JUDGE: The Court finds him so
4 qualified. Let me give the jury a brief
5 explanation of that.

6 I charge you that all lay witnesses are
7 limited to testifying about facts and knowledge
8 and are not allowed to give opinions. Certain
9 witnesses with training, education, and
10 experience are considered experts in a
11 particular field and give opinions in that field
12 based upon the facts and their conclusions.

13 These opinions constitute evidence to be
14 considered by you in connection with all of the
15 other evidence and testimony in the case. It is
16 for you, the jury, to give it such weight as you
17 and your experience and discretion may
18 determine. By this, I mean you must weigh such
19 evidence, accept it or reject it in the same
20 manner you treat all other evidence in the case.
21 The value of expert testimony is not dependent
22 upon the skill and knowledge of testimony of
23 experts but on the skill and knowledge they
24 actually possess. You may proceed.

25 MR. PLEMING: Thank you, your Honor.

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 BY MR. PLEMING:

2 Q Mr. Zivkovich, please describe the process that
3 you go through when you receive a substance that
4 you intend to analyze and identify?

5 A Normally, I will go down to evidence control
6 and pick up the case. When I pick it up, first
7 thing I do is make sure it is actually sealed.
8 Once I determine that it is sealed, then I will
9 open the case up, and I will compare the
10 contents of the case to the request form to see
11 that they match. If they do match, I will go
12 ahead and work the case. If they don't match, I
13 will have it confirmed by a fellow analyst to
14 determine the contents, in fact, don't match.
15 Once I determine to work the case, then I will
16 do a physical inspection of what is inside the
17 case, then I will then do a chemical test if
18 there is enough substance or I will proceed to
19 do instrumental analysis.

20 Q What is the difference between chemical test and
21 the instrumental analysis?

22 A A chemical test is a presumptive test which
23 is a preliminary test that might give you an
24 indication of what type of substance might be
25 there. The drawback to the test is you need a

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 specific amount of substance in order to perform
2 the test because you have to add in certain
3 chemicals so if there is not enough substance
4 then we go to the instrumental analysis which is
5 a positive confirmation.

6 Q How do you perform an instrumental analysis?

7 A We take the substance that's unknown and we
8 extract it using solvents and then inject it
9 into a gas chromatograph mass spectrometer and
10 that analyzes the substance where we identified.

11 Q Okay. Very good. When a law enforcement agency
12 brings an item to S.L.E.D for testing, what is
13 the process for how those items are received and
14 stored while in the custody and control of
15 S.L.E.D?

16 A We have technicians downstairs that log in
17 evidence that is brought in from outside
18 agencies, and those technicians will log in,
19 give it a unique S.L.E.D lab number and then
20 that evidence will be placed into evidence
21 control. Once that has been assigned to an
22 analyst, that analyst will be notified. That
23 analyst will then go down to evidence control,
24 pick up the evidence, work the case, and then
25 when the handler is finished with the case, he

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 will return it back to evidence control who
2 keeps the case until the submitting agency can
3 pick it up.

4 Q Thank you. Did you have the opportunity to
5 perform an analysis involving the case,
6 involving the subject named Kashif Nash last
7 year?

8 A Yes.

9 Q In that particular case, from where or from whom
10 did you receive the item or items that you
11 tested?

12 A I received the evidence from Doris
13 Yarborough on 9-13-13.

14 Q When you received the item for testing, describe
15 how it was packaged?

16 A It was a kit that the S.L.E.D issues to
17 agencies called Best Kit which is designed
18 specifically for drugs so that the agencies can
19 submit them in a uniform way and we can actually
20 tell if the evidence has been tampered with.

21 Q Thank you. Did the Best Pack in this case
22 appear to have been torn, opened or the seal of
23 the Best Pack broken prior to you receiving it?

24 A All of the seals were intact.

25 Q Explain how you opened the Best Pack to retrieve

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 the items inside?

2 A Normally, as long as it is not packed in
3 full, we cut across the bottom of the bag
4 leaving the upper seal that the submitting
5 agency sealed intact and retrieved the evidence
6 from the bottom of the bag.

7 Q Did you do that in this case?

8 A I would have to see, but I would assume I
9 did, yes.

10 MR. PLEMING: At this time I am showing
11 defense counsel State's Exhibit Number 6.

12 BY MR. PLEMING:

13 Q I am handing State's Exhibit Number 6 to you at
14 this time. Do you recognize what I just handed
15 up to you?

16 A Yes, sir. This is a S.L.E.D Lab Case
17 L13-11830.

18 Q Are you familiar with that case?

19 A I am. It has my initials and the fact that
20 I inspected the seal on 9-13-13 and deemed it
21 intact.

22 Q Describe now the contents of the package that I
23 just handed to you?

24 A I will refer to my worksheet here. When I
25 worked the case, I noted that it contained a

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 digital scale and I noted that the digital scale
2 had residue and it contained a razor blade stuck
3 to the weight pan on top of the scale.

4 Q Thank you. To be clear, did the lab number on
5 that package match that of the case involving
6 the subject, Kashif Nash, that you referred to
7 earlier?

8 A It did.

9 Q Based on that, can you be certain that the items
10 you tested in that case are contained in that
11 package?

12 A I can't. When we finish working a case, we
13 take all of the evidence and put it in a plastic
14 bag, heat sealed bag. At the bottom of the bag
15 where it is heat sealed, we have the date
16 9-24-13 and my initials.

17 Q Is the original Best Pack that you receive prior
18 to your analysis also contained in that bag?

19 A It is.

20 Q How can you tell?

21 A It is across the front of the bag with lab
22 number displayed and my initials and date on it.

23 Q Okay. Looking at the heat sealed bag, the
24 exterior bag that you sealed, does it now appear
25 to have been opened, torn, or has the seal been

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 broken since you sealed it?

2 A No, sir.

3 Q Would it be possible for someone to have opened
4 the bag and resealed it without you being able
5 to know it from observing it?

6 A Not to my knowledge, no.

7 Q What was the date that you received the items
8 from Doris Yarborough once again?

9 A I received it September 13th.

10 Q Did you perform your analysis at that time?

11 A I performed the actual analysis on September
12 24.

13 Q Okay. Where was the evidence from September 13
14 to September 24?

15 A We have a concrete vault with an
16 electromagnetic lock on it that we have inside
17 of our laboratory and we store evidence in there
18 until we have an opportunity to be able to work
19 the case.

20 Q Thank you. Once you analyzed the item on
21 September 24, what did you do after the analysis
22 was complete? Where did you return the item?

23 A After I finished my analysis, I put the
24 evidence in the heat sealed bag and I put it
25 back in the vault inside our laboratory until my

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 report is generated and then is reviewed by a
2 peer, and once the report is locked then I
3 return the evidence to evidence control to be
4 picked up by the submitting agency.

5 Q Thank you. During the time that you had control
6 and custody over those items, did anybody else
7 take them into possession?

8 A No, sir.

9 Q During the time that the items in your care,
10 custody, and control, did you do anything to
11 substantially change the item as to form or
12 content?

13 A I did not.

14 Q Lastly, does this exhibit having reviewed it in
15 the bag there, do the items appear to be in the
16 same condition now as they were when you placed
17 them in the bag and heat sealed it?

18 A They do. Both items the razor blade and
19 digital scale have my item numbers and initials
20 on them.

21 Q At this time I am going to ask you to open the
22 bag that you placed the items into. Will that
23 due?

24 A Yes, sir.

25 Q Describe the way in which you packaged those

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 items that you referred to previously as the
2 digital scales and the razor blade?

3 A Yes, sir. When I opened the Best Kit, I saw
4 that it had a digital scale on it. When I
5 opened the digital scale, I noted on my
6 worksheet that there was residue on the scale
7 and there was a razor blade that was stuck to
8 the top of the weight pan. So I removed the
9 razor blade from the weight pan and repackaged
10 it and analyzed the residue on top of the
11 digital scale.

12 Q Where specifically, specifically as you can be,
13 was the residue located on the scale?

14 A As you can see, it is located on top of the
15 scale and around the edges where the lid
16 attaches.

17 Q Was there any residue on the outside of the
18 scale?

19 A There may have been. I didn't notice. I
20 didn't know of any on worksheet and I don't see
21 any right now.

22 Q The residue that you analyzed, did it all come
23 from inside of the scale?

24 A On top of the weight pan, yes, sir.

25 Q When I say inside the scale, explain to the jury

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 how this scale is constructed?

2 A Well, it is just a plastic scale that has a
3 removable lid on it. When you pull the lid off
4 and this is the actual weigh pan and the razor
5 blade was stuck on top of the weigh pan.

6 Q Let me ask you one more question: Having
7 reviewed the scale now that you removed it from
8 the bag and opened it up, does it appear today
9 to be in the same condition as it was when you
10 analyzed it?

11 A It does.

12 Q Or when you analyzed the residue that was on it?

13 A It does.

14 MR. PLEMING: At this time, your Honor,
15 the State moves State's Exhibit 6 into evidence.

16 MR. HARRIS: No objection.

17 THE JUDGE: Admitted without objection.

18 (STATE'S EXH. 6, previously marked for
19 identification, was received into evidence.

20 BY MR. PLEMING:

21 Q When you analyze a substance, if you can, do you
22 document the weight in your report?

23 A Yes, sir.

24 Q Were you able to weigh the substance that you
25 analyzed in this case?

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 A I didn't record a weight in this particular
2 case due to the small amount of substance that
3 was on the scale and with the razor blade
4 actually being rusty, some of the substance on
5 there was rust. So there was a mixture of rust
6 and powder on top.

7 Q Did that in any way interfere with your ability
8 to analyze and identify the substance?

9 A No, sir.

10 Q Now, you already have gone over and described
11 the test that you performed on the residue and
12 from these tests were you able to form an
13 opinion as to the nature of the residue that you
14 found on those scales?

15 A Yes, sir.

16 Q Please state that opinion now?

17 A I find that the residue on the scale was
18 cocaine.

19 Q Is that opinion provided today with a reasonable
20 degree of scientific certainty?

21 A Yes, sir.

22 Q You may have already touched on this, but if you
23 can elaborate on this. What is the basis for
24 your opinion that this is, in fact, cocaine?

25 A What we do is I extract the residue, scrape

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 a little bit of residue off and extract it with
2 a solvent. Then I would use that solvent and
3 inject it into an instrument called gas
4 chromatograph mass spectrometer. There it would
5 break it down into molecular components and give
6 me data which I can interpret and the data
7 happened to match a standard that I ran on the
8 same day that was cocaine.

9 Q That instrument that you use, how can you rely
10 on the accuracy of that instrument? How are you
11 able to rely -- as a scientist, how are you able
12 to rely on accuracy?

13 A It is a universally accepted scientific
14 protocol. It is used all over the world.

15 Q Okay. Have you ever tested a substance that you
16 received from a law enforcement agency for
17 testing that turned out to not be cocaine?

18 A Yes, sir.

19 Q Okay. That would be determined after performing
20 the same exact test did you in this case?

21 A Yes, sir.

22 Q Did you document the results of your analysis in
23 a report?

24 A I did.

25 Q When did you create that report?

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 A The report was finalized on October 4, 2013.

2 Q Where do you keep these reports once you
3 completed them?

4 A They are stored electronically on a S.L.E.D
5 network server.

6 Q How long do you keep those reports?

7 A They are permanent records.

8 Q Are these reports kept in course of regularly
9 conducted professional activity at S.L.E.D?

10 A Yes.

11 Q Are they conducted and are these reports done on
12 every analysis that you performed?

13 A They are.

14 MR. PLEMING: I am now showing State's
15 Exhibit 3 as previously marked to defense
16 counsel.

17 BY MR. PLEMING:

18 Q I am now handing State's Exhibit 3 to you, sir.
19 Will you please take a moment to examine that.
20 Do you recognize that report?

21 A Yes, sir. It is a report issued on the
22 evidence I have in front of me that was
23 generated upon myself.

24 Q Thank you. Has this report been materially
25 altered or changed in any way since you made it

LAWRENCE ZIVKOVICH - DIRECT BY MR. PLEMING

1 on October 4th, 2013?

2 A No, sir.

3 MR. PLEMING: At this time, your Honor,
4 the State offers State's Exhibit Number 3 into
5 evidence.

6 MR. HARRIS: No objection.

7 THE JUDGE: Admitted without objection.

8 MR. PLEMING: Thank you, your Honor.

9 (STATE'S EXH. 3, previously marked for
10 identification, was received into evidence.)

11 MR. PLEMING: Your Honor, at this time the
12 State would like to publish the contents of
13 State's Exhibit 6 for the jury.

14 (Publishing exhibit.)

15 MR. PLEMING: I have no further questions
16 for this witness, your Honor.

17 CROSS-EXAMINATION

18 BY MR. HARRIS:

19 Q Of course you are familiar with the substance
20 known as crack cocaine, commonly referred to as
21 crack cocaine?

22 A Yes, sir.

23 Q You already testified that you are an expert in
24 cocaine?

25 A Yes, sir.

LAWRENCE ZIVKOVICH - CROSS BY MR. HARRIS

1 Q Is it correct that when you refer to the
2 substance cocaine, you are referring to a
3 powder?

4 A My reference would be cocaine hydrochloride
5 as opposed to cocaine based.

6 Q Okay. I know you are a scientist and we don't
7 understand some of these terms. So cocaine
8 hydrochloride is normally found in powder form,
9 correct?

10 A It is sometimes powder, sometimes rock.

11 Q What was it in this case?

12 A Residue. I would not call it powder.

13 Q That's my point, sir. Is it correct that the
14 substance that you claim to have found in this
15 case was neither cocaine hydrochloride nor
16 cocaine based, correct?

17 A It was cocaine hydrochloride.

18 Q Residue. You said it was residue?

19 A Residue that was cocaine hydrochloride. It
20 would be like if you had made cookies on our
21 counter and when you cleaned it up there was
22 residue on your counter top, that residue would
23 still be floury even though it would be residue.

24 Q It wouldn't be cookies?

25 A Right.

LAWRENCE ZIVKOVICH - CROSS BY MR. HARRIS

1 Q You would not eat it?

2 A You might.

3 Q Well, you might eat flour, but any regular
4 person not here testifying for the State is in
5 this case would say, would you agree, no, I
6 wouldn't eat the flour, I would eat the cookies?

7 THE JUDGE: You are speculating, counsel.

8 Move on.

9 BY MR. HARRIS:

10 Q So when you say residue, and if you will admit
11 that cocaine hydrochloride is normally in a
12 powder form, would you?

13 A I wouldn't know for certain.

14 Q Okay. Well, forget the question. That is all
15 right if you don't want to answer.

16 THE JUDGE: He did answer the question.

17 Don't say he didn't answer it.

18 BY MR. HARRIS:

19 Q I will ask it again. Try to explain to this
20 jury one more time in lay terms, if you will,
21 please, what forms of cocaine hydrochloride can
22 be found in the universe?

23 A It depends. It can be found in rock form.
24 It can be found in powder form. People use
25 mirrors to snort it off of. There could be

LAWRENCE ZIVKOVICH - CROSS BY MR. HARRIS

1 residue on mirrors. If they use credit cards or
2 anyway to cut the samples, there would be
3 residue on those. It can be found in numerous
4 forms.

5 Q All right. You tested it, what form was it in
6 this case?

7 A It was residue.

8 Q So you can't say if it was powder or crystalline
9 or anything else, you can't say that, can you?

10 A By definition there is not enough residue to
11 determine which form it's in.

12 Q As an expert witness in this case, you are
13 testifying to the jury that you believe that
14 whatever it was that you scraped off the inside
15 of this scale was cocaine hydrochloride but you
16 can't say what form it originally was in?

17 A It was originally in residue form upon the
18 scale.

19 Q You couldn't find enough of it to weigh it,
20 correct?

21 A That's correct. There is enough to weigh
22 but not on the scales that we have that is
23 sensitive to the residue.

24 Q The state of South Carolina doesn't have
25 sophisticated enough weighing equipment to weigh

LAWRENCE ZIVKOVICH - CROSS BY MR. HARRIS

1 whatever it is that you say is there, correct?

2 A The state might. Our particular lab
3 doesn't.

4 Q I'm talking the State Law Enforcement Division
5 Crime Lab?

6 A I can give you an example such as if you
7 were to go home in your bathroom and take a
8 feather and put it on your scale in your
9 bathroom, you would not get a weight because it
10 was so light because of that scale. It doesn't
11 mean it doesn't have weight. It is just that
12 your scale is not sensitive enough.

13 Q You didn't have sensitive enough weighing
14 equipment to weigh whatever it is you say was
15 inside this scale?

16 A That's correct.

17 Q Now, you say you scraped residue from inside the
18 scale?

19 A Yes, sir.

20 Q You somehow injected that into a sophisticated
21 instrumental instrument in order to test it?

22 A Yes, sir.

23 Q Your report says cocaine. It doesn't say
24 cocaine hydrochloride?

25 A That's correct. That's the way S.L.E.D

LAWRENCE ZIVKOVICH - CROSS BY MR. HARRIS

1 reports cocaine hydrochloride. It is cocaine
2 base, reported as cocaine based.

3 Q But your report doesn't say hydrochloride,
4 correct?

5 A That's correct.

6 Q Now, this scale that you say, it is like a
7 two-part box, essentially?

8 A Yes, sir.

9 Q Like you just pull it apart and its two pieces;
10 is that right?

11 A You pull the lid off and then the scale is
12 an individual piece under the lid, yes, sir.

13 Q Do I understand your testimony to be that you
14 pulled the lid off and you saw a razor blade
15 inside?

16 A I saw a razor blade stuck on top of the
17 scale.

18 Q Was it hard to get off?

19 A I pried it off with a razor.

20 Q You pried the razor blade off with another
21 razor?

22 A Yes, as part of my instrumentation that I
23 use to examine cases.

24 Q You inspected the razor blade and determined it
25 was too rusty to fool with?

LAWRENCE ZIVKOVICH - CROSS BY MR. HARRIS

1 A No, sir. I could analyze the razor blade if
2 I wanted to, but since the scale had residue on
3 it already, I didn't need to analyze the blade.
4 I considered the razor blade contaminated by
5 whatever was sitting on top of the scale.

6 Q You saw the razor blade today, didn't you?

7 A I did.

8 Q Does it look to be in about the same shape as it
9 was when you saw it?

10 A Yes, sir.

11 Q So, for instance, if you are there and you got
12 your lab and your stuff and you got the lid off
13 of the scale and you are looking at it, if you
14 blew on it, would powder fly everywhere?

15 A It just depends. This particular residue
16 was stuck to the top of the scale. If it was
17 powdery residue that didn't have any weight then
18 I would have used a copy saw to pull it off.

19 Q I don't know, you may not know the answer. You
20 may not know enough about it. Did anybody take
21 a straw and sniff that residue up their nose?

22 A Off that particular scale?

23 Q Yes.

24 A I have no idea.

25 Q Well, the answer is no, isn't it?

LAWRENCE ZIVKOVICH - CROSS BY MR. HARRIS

1 A I have no idea. If you scrape a straw, are
2 you going to get cocaine off of it?

3 Q You have no idea. Will you stick with that
4 answer.

5 A If you scrape a straw on there, you will
6 pull residue up that was sniffed up the straw.

7 Q The truth of the matter is there wasn't enough
8 of anything on that scale for a person to use as
9 a drug?

10 A I have no idea how much you would need to
11 use.

12 Q You have no idea. Okay. Do you any idea about
13 whether or not there was any residue on the
14 outer surfaces of the scale?

15 A I didn't note any on my worksheet.

16 Q So a person possessing the scale put together in
17 its two parts would see no residue and know no
18 residue is there?

19 A He may have seen some where the lid attaches
20 to the scale. I have no idea. I can't
21 speculate on that unless I see it.

22 Q If you were knowledgeable enough like you are an
23 expert in it, if you were knowledgeable enough
24 to know what you were looking for, if you did
25 open the scale up, a person would see exactly

LAWRENCE ZIVKOVICH - REDIRECT BY MR. PLEMING

1 what you saw, a razor blade stuck to you say the
2 pan of the scale, right?

3 A The weigh pan.

4 Q And whatever the residue you say you scraped off
5 and put in your instrument?

6 A Yes, sir.

7 MR. HARRIS: Thank you, sir. I appreciate
8 it.

9 REDIRECT EXAMINATION

10 BY MR. PLEMING:

11 Q Is it common for you to receive items such as
12 this scale to analyze residue?

13 A It happens fairly often, yes, sir.

14 Q Based on your use -- well, analyzing it and
15 dealing with these scales, would that scale be
16 sufficient to weigh a substance such as cocaine
17 or crack cocaine?

18 MR. HARRIS: Your Honor, I object unless
19 he examined the scale for its -- whether or not
20 it was properly functioning and operating. I
21 don't understand that to be his expertise.

22 THE JUDGE: What was your question again?

23 MR. PLEMING: I will rephrase it.

24 BY MR. PLEMING:

25 Q Is the size of that scale sufficient to obtain a

LAWRENCE ZIVKOVICH - REDIRECT BY MR. PLEMING

1 weight on cocaine or crack cocaine if placed on
2 that scale?

3 MR. HARRIS: I do object because he is
4 asking this witness to testify about the
5 properties of the scale not the substances that
6 he says he found. I don't think that is within
7 this witness' expertise. I mean, maybe he
8 didn't want to get qualified to that, but unless
9 he determined what the scale was working, but I
10 don't think he did.

11 THE JUDGE: All right. Counsel, I am
12 going to sustain the objection as to the form of
13 the question asked. Do you want to rephrase the
14 question again and ask it.

15 MR. PLEMING: Thank you, your Honor. I
16 will move on.

17 BY MR. PLEMING:

18 Q You talked a little bit about the substance
19 cocaine hydrochloride. You talked about the
20 differences between cocaine based and cocaine in
21 powdered form. Of the substances that make up
22 cocaine base and cocaine powder form, is there
23 any common substance between the two?

24 A Cocaine base is cocaine hydrochloride
25 altered chemically to make it smokable. It

LAWRENCE ZIVKOVICH - RECROSS BY MR. HARRIS

1 lowers the boiling point so it can be smoked in
2 a pipe.

3 Q Thank you. What did you find when you analyzed
4 the residue in this case?

5 A Cocaine.

6 MR. PLEMING: Thank you. No further
7 questions.

8 MR. HARRIS: I just have a couple.

9 RECROSS-EXAMINATION

10 BY MR. HARRIS:

11 Q Do I understand that your testimony previously
12 has been that although your report says you
13 found cocaine, that it was actually cocaine
14 hydrochloride?

15 A When S.L.E.D issues a report, if it states
16 it is cocaine, it is implied it is cocaine
17 hydrochloride. If it is cocaine based, we
18 actually put that it is cocaine based on the
19 report.

20 MR. HARRIS: Thank you, your Honor.

21 THE JUDGE: Thank you. Sir. Any reason
22 why this witness couldn't be excused?

23 MR. PLEMING: No, sir, your Honor.

24 MR. HARRIS: No, your Honor.

25 THE JUDGE: You are excused at this time.

STATE OF SC VS. KASHIF NASH

1 (Witness excused.)

2 MR. PLEMING: The State rests, your
3 Honor.

4 THE JUDGE: Let's take a short recess
5 then. Mr. Foreman, ladies and gentlemen of the
6 jury, we will take a short recess at this time.
7 You may refresh yourselves during the break. It
8 will probably take ten minutes or so. Thank
9 you.

10 (Whereupon, the jury exited the courtroom
11 at 11:24 a.m.)

12 THE JUDGE: I will hear you in regard to
13 any motions.

14 MR. HARRIS: May it please the Court, your
15 Honor. At this time the State having rested, it
16 would be appropriate for the defendant to make a
17 motion for a directed verdict of acquittal.
18 However, I am mindful of the standard by which
19 the Court must judge those motions. I just want
20 to make it clear on the record. I am aware that
21 it would be appropriate to make the motions, but
22 I have to proceed under the Court's standards or
23 views that such motions probably do not lie in
24 this case.

25 THE JUDGE: Counsel, with that information

STATE OF SC VS. KASHIF NASH

1 provided for the record, the Court agrees. The
2 Court will deny the directed verdict. In
3 looking at the evidence most favorable to the
4 State, I think there is substantial evidence
5 from which the jury could infer the State has
6 proved the elements of the offense beyond a
7 reasonable doubt. Since you are not stating
8 those, I will not go into reasons why I think
9 that's the case.

10 Anything else we need to address? Has the
11 defendant made a decision whether he is going to
12 testify or not.

13 MR. HARRIS: We have discussed it. I do
14 not believe he will take the stand, but since we
15 are taking a break, I would like to take that
16 final opportunity in case something happened
17 this morning to change his mind.

18 THE JUDGE: I will give you that
19 opportunity. Are you calling any other
20 witnesses if he does not testify?

21 MR. HARRIS: At this point, we intend to
22 call Mr. Rogers.

23 THE JUDGE: What we will do is take a
24 short break, come back and question Mr. Nash as
25 to whether he is going to testify or not under

STATE OF SC VS. KASHIF NASH

1 oath, and we can proceed with your case.

2 (Court in recess at 11:27 a.m.)

3 (Open court out of jury's presence.)

4 THE JUDGE: You may proceed.

5 MR. HARRIS: Your Honor, Mr. Nash

6 indicates he does not want to testify.

7 KASHIF P. NASH,

8 being first duly sworn, testified as follows:

9 THE JUDGE: Sir, you are Kashif P. Nash?

10 THE DEFENDANT: Yes, your Honor.

11 THE JUDGE: Please take your hands out of
12 your pocket.

13 Mr. Nash, we are at the stage of the trial
14 where you present your defense. You have the
15 right to testify on own behalf. However, no one
16 can make you testify. In any event, if you have
17 a record involving any convictions involving
18 dishonesty or false statements or for a crime
19 punishable by imprisonment for more than one
20 year and this Court determines that the
21 probative value outweighs the prejudicial effect
22 to you, the solicitor will be able to introduce
23 this record for impeachment purposes to attack
24 your credibility. If you elect not to take the
25 stand, I will charge the jury that they are not

STATE OF SC VS. KASHIF NASH

1 to give the fact that you did not testify any
2 consideration whatsoever and there is to be no
3 prejudice to you because you did not testify.

4 It is left entirely up to you whether or
5 not you testify. You may talk to your attorney,
6 family, friends, or anyone else. The ultimate
7 decision is left entirely up to you.

8 Do you understand that it is your decision
9 as to whether you will or will not testify in
10 your case?

11 THE DEFENDANT: Yes, your Honor.

12 THE JUDGE: Have you discussed with the
13 attorney the advantages and disadvantages of
14 testifying in the case?

15 THE DEFENDANT: Yes, your Honor.

16 THE JUDGE: Do you wish to testify, sir?

17 THE DEFENDANT: No, your Honor.

18 THE JUDGE: Is that your decision, sir?

19 THE DEFENDANT: Yes, your Honor.

20 THE JUDGE: You may return to your seat.
21 Please bring the jury in.

22 (Whereupon, the jury entered the courtroom
23 at 11:52 a.m.)

24 THE JUDGE: Counsel, you may proceed.

25 MR. HARRIS: I call James Junior Rogers.

JUNIOR ROGERS - DIRECT BY MR. HARRIS

JAMES ROGERS

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q Please state your full name?

A James Rogers, Jr.

Q Are you commonly and mostly referred as Junior?

A Yes, sir.

Q Now, Mr. Rogers, I am going to ask you if you would speak loudly enough so all of the members of the jury can hear you. If you need to speak more into the microphone, please do that. If you need to lean forward, please do that. Okay?

A Yes, sir.

Q Where do you live?

A Currently I lived at [REDACTED],
Jonesville, but I don't live at that address anymore.

Q Are you saying you formally lived on [REDACTED]
[REDACTED]?

A Yes, sir.

Q You do not live there anymore?

A Yes, sir.

Q Where do you live now?

A I live with my cousin up in Jonesville.

JUNIOR ROGERS - DIRECT BY MR. HARRIS

1 Q How long did you live over there on [REDACTED]

2 [REDACTED]
3 A I lived on [REDACTED] [REDACTED] about 40 -- all my
4 life. I lived in the house there about 15, 20
5 years almost.

6 Q How old are you?

7 A 53.

8 Q So you lived on [REDACTED] [REDACTED] most of that time?

9 A Yes.

10 Q At the time of this incident that we are here in
11 court about today, June 14, 2013, you lived at

12 [REDACTED] [REDACTED]?

13 A Yes, sir.

14 Q Now, do you know Kashif Nash?

15 A Yes.

16 Q How do you know Kashif?

17 A I and Kashif's mother are first cousins.

18 Q So Kashif is a relative of yours?

19 A Right.

20 Q Do you know Kashif's father?

21 A Yes, sir.

22 Q What is Kashif's father's name?

23 A Kashif's father's name is Lorenzo Nash.

24 Q Do you know Deputy Suber?

25 A Yes, sir.

JUNIOR ROGERS - DIRECT BY MR. HARRIS

1 Q How long have you known Deputy Suber?

2 A Ever since he was little boy.

3 Q Ever since he was little boy?

4 A Yes.

5 Q I am still having a little bit of trouble
6 hearing you clearly. I want to make sure
7 everybody can. Okay?

8 A Okay.

9 Q All right. So you know the folks involved in
10 this case?

11 A Yes, sir.

12 Q And you have known them for a long time?

13 A Yes, sir.

14 Q Now, I want to take you to June 14, 2013 and the
15 days leading up to that, okay?

16 A Yes, sir.

17 Q Had you been in contact with Kashif in and
18 around June 14, 2013?

19 A Yes.

20 Q And in what way, what kind of contact did you
21 have with Kashif in and around that date?

22 A Well, I worked on cars part time. I was
23 working on his vehicle, on the car.

24 Q Describe the vehicle?

25 A It was a blue Chevy Impala.

JUNIOR ROGERS - DIRECT BY MR. HARRIS

1 Q All right. Now, you have been here all of this
2 trial I think. Is that the car in question
3 here?

4 A Yes, sir.

5 Q How long had you been working on the blue Chevy?

6 A Two days.

7 Q You are talking about two days prior to June
8 14th?

9 A Yes. I finished working on it on the day of
10 the incident. I was test driving it.

11 Q You had been working on the blue Chevy for a
12 couple of days and had finished working on it on
13 the date in question?

14 A Yes, sir.

15 Q June 14, 2013?

16 A Yes.

17 Q What had you been doing with the car?

18 A Well, the carburetor needed adjustments on
19 it, and it had a few other things that needed to
20 be worked on. The starter needed tightening up,
21 to do a complete thorough check, make sure
22 everything is tight and not leaking or anything.

23 Q On June 14, 2013, late afternoon, early evening
24 time, did you have occasion to drive the blue
25 Chevy?

JUNIOR ROGERS - DIRECT BY MR. HARRIS

1 A Yes, sir.

2 Q Tell the jury about that?

3 A Well, I got behind the car. It was around 6
4 o'clock. I took it for a test drive. I was
5 coming back around on the [REDACTED], and I
6 just punched it to test and see how it was going
7 to pick up and run. Then I saw the county car,
8 and I looked back and saw him hit the brakes and
9 turned on the lights. I kept going until I went
10 home. I pulled up in the yard and gone in the
11 house. I came back out the door and I seen the
12 Sheriff Deputy pull up in the yard, and Mr. Nash
13 was on the porch. He was there all day. That's
14 when Officer Suber called him off the porch to
15 the car.

16 Q Just to be clear, your testimony is that you had
17 taken the car out to test it out after you had
18 been working on it, that you admitted that you
19 gunned it or something like that, that when you
20 did you saw a Deputy Sheriff's car. You saw him
21 turn it around but you --

22 A I didn't see him turn it around. I kept
23 going.

24 Q You just kept on going?

25 A Yes.

JUNIOR ROGERS - DIRECT BY MR. HARRIS

1 Q And you went back to your house on Dogwood?

2 A Yes.

3 Q Now, was Kashif Nash at your house while you
4 were out driving this car?

5 A Yes.

6 Q How long had Mr. Nash been at your house that
7 day?

8 A He had been at my house four or five hours.

9 Q How did he get there?

10 A I picked him up earlier that day.

11 Q Did Mr. Nash often come to your house?

12 A Yes, sir.

13 Q Of course, did Mr. Nash know that you had his
14 mother's car?

15 A Yes.

16 Q The blue Chevy?

17 A The blue Chevy.

18 Q You described that when you got back to your
19 house on Dogwood that Kashif Nash was on the
20 porch?

21 A He was on the porch.

22 Q About all at the same time the Deputy Sheriff
23 pulled up and called him down into the yard, in
24 the driveway?

25 A Yes.

JUNIOR ROGERS - DIRECT BY MR. HARRIS

1 Q What did you do?

2 A I sat there and was looking at him.

3 Q How long did they talk?

4 A They talked about 15 minutes, then the
5 backup came up.

6 Q You say backup came up?

7 A Yes, sir.

8 Q By backup do you mean other sheriff deputies?

9 A Yes, sir.

10 Q Do you know how many?

11 A I think there was two of them in the car.

12 Q Eventually there were three sheriff deputies?

13 A Yes, sir.

14 Q Did you recognize the first deputy that pulled
15 in being Deputy Suber?

16 A Deputy Suber was the first one that pulled
17 in.

18 Q Were you able to really hear anything that was
19 said between them?

20 A I wasn't able to hear a whole lot because I
21 thought he was having friendly conversation with
22 him. I didn't know they were getting serious
23 enough to take him to jail.

24 Q Okay. Did eventually you come down from off the
25 porch of your house to where the blue Chevy was,

JUNIOR ROGERS - DIRECT BY MR. HARRIS

1 roughly?

2 A Yes, sir.

3 Q Why did you do that?

4 A To retrieve my phone, cell phone, out of his
5 car.

6 Q So you came down off the porch after a while to
7 go into the blue Chevy and retrieve your cell
8 phone?

9 A Yes, sir.

10 Q Had you left your cell phone in the car?

11 A Yes, sir.

12 Q Did you have an open beer?

13 A I had went in the house when I pulled back
14 in the yard, went in the house and got me a beer
15 and just popped it. When I seen officer Suber
16 pull up, I put it in my pocket.

17 Q When the police came, you stuck the beer in your
18 pocket?

19 A Yes, sir.

20 Q You then reached into the car and you actually
21 got your phone -- did you actually get it?

22 A Yes, sir.

23 Q What happened when you did that?

24 A When I did that, Officer Suber asked me what
25 was I getting out of the car. I told him I was

JUNIOR ROGERS - DIRECT BY MR. HARRIS

1 getting my cell phone out of the car. He said;
2 are you sure you are getting your cell phone out
3 of the car? I said, yes, I was getting my cell
4 phone out of the car. He said, I am going to
5 have to come and pat you down.

6 Q What was your impression of that? They felt you
7 had done something wrong?

8 A I thought they did --

9 THE JUDGE: I sustain the objection
10 without it being made. You can't speculate what
11 they meant, Counselor. You know that. Proceed.

12 BY MR. HARRIS:

13 Q What did you think about him saying he wanted to
14 pat you down?

15 A I thought he was kind of not out of the norm
16 of patting me down like that because the car was
17 still in the yard.

18 Q Now, at the time you were driving this car, did
19 you have a valid driver's license?

20 A Yes.

21 Q Is it true that he took Mr. Nash off to jail?

22 A Yes, sir.

23 Q Did at any time anybody question you about
24 whether you had been driving the car?

25 A No, sir.

JUNIOR ROGERS - DIRECT BY MR. HARRIS

1 Q Had you been asked the simple question, do you
2 know who has been driving this car, what would
3 you have said?

4 A I would have told them, no, he was not
5 driving. I was driving. That's what I would
6 have told them, but I wasn't asked the question.

7 Q There has been some mention in the case about
8 you saying that you had the phone in the car for
9 two days or some reference to that. Did you say
10 anything like that?

11 A I don't recall saying anything about the
12 phone in the car.

13 Q And you had the car two days?

14 A Yes, sir.

15 MR. HARRIS: Thank you. Please answer any
16 questions of the solicitor.

17 CROSS-EXAMINATION

18 BY MR. PLEMING:

19 Q Mr. Rogers.

20 A Yes, sir.

21 MR. PLEMING: Actually, I beg the Court's
22 indulgence one moment.

23 BY MR. PLEMING:

24 Q Mr. Rogers, have you ever been convicted of a
25 crime?

JUNIOR ROGERS - CROSS BY MR. PLEMING

1 A Yes, sir.

2 Q What were you convicted of?

3 A Assault and battery.

4 Q More specifically, was it assault and battery
5 high and aggravated nature?

6 A Yes, but I don't see the relevance in this
7 case.

8 Q Excuse me?

9 A I don't understand what relevance it may
10 have in this case.

11 Q That's Okay. You don't have to know.

12 Now, you said on the day this incident
13 happened, you came outside and saw Deputy
14 Suber's patrol car in your driveway; is that
15 right?

16 A I said when I came outside I seen Deputy
17 Suber pulling up in the driveway.

18 Q You saw him pulling up into the driveway. You
19 said you saw his lights on?

20 A No. He didn't have no lights on.

21 Q I may have misheard you then.

22 You said when you talked to Deputy Suber,
23 was that before or after he placed Mr. Nash
24 under arrest?

25 A I didn't started talking -- I talked to

JUNIOR ROGERS - CROSS BY MR. PLEMING

1 Deputy -- no, I didn't talk to Deputy Suber
2 before he put Mr. Nash under arrest.

3 Q Do you remember them placing Mr. Nash and
4 placing him in the patrol car?

5 A Yes.

6 Q Do you remember talking to the deputy after that
7 occurred?

8 A When he asked me about the cell phone and
9 checked my pockets to see what I put in my
10 pocket, that's when I talked to him.

11 Q Was this before or after the other two deputies
12 arrived?

13 A This was after the two deputies arrived.

14 Q Why did you chose to go get your cell phone out
15 of the car at that time of all times?

16 A Because it was my phone and I needed my
17 phone.

18 Q Did you to make a call right then?

19 A I went to check to make sure I didn't have
20 any calls.

21 Q At that point, were you aware of whether or not
22 they were going to have the car towed or if they
23 were going to call someone to pick the car up?

24 A No.

25 Q So you just --

JUNIOR ROGERS - CROSS BY MR. PLEMING

1 A I didn't think it was going to be nothing
2 that serious.

3 Q You got your phone because you needed it, you
4 wanted to check it?

5 A Yes.

6 Q Now, how close was the deputy standing to your
7 car -- not your car but the car that you got the
8 phone out of?

9 A Well, he walked up to it. The car was
10 parked and pulled up in the yard, and he walked
11 up to the side of me.

12 Q After you reached in the car and got your cell
13 phone out?

14 A Yes.

15 Q Did it occur to you at any point that maybe I
16 should ask the officer if it is okay if I go in
17 the car and retrieve something?

18 A Like I said before, I didn't know what was
19 going on. I didn't know he was going to be that
20 serious about why he pulled up in the yard.

21 Q He already placed Mr. Nash in the patrol car at
22 that time, right?

23 A No. He didn't put him in the patrol car,
24 no.

25 Q Are you aware of whether or not there is a video

JUNIOR ROGERS - CROSS BY MR. PLEMING

1 in Deputy Suber's patrol car recording what you
2 did?

3 A Yes, I was aware of it.

4 Q Are you aware that your conduct and behavior at
5 that time was recorded on that video?

6 A Yes.

7 Q And but it is still your testimony today that
8 Mr. Nash had not been arrested yet when you went
9 into that car?

10 A I am pretty sure he hadn't been arrested.

11 Q But you didn't think you needed to let the
12 deputies know, hey guys, I know you are all
13 talking right now but I am going to go in the
14 car and get something out?

15 A The deputies hadn't arrived yet when I went
16 to the car to get the phone like that.

17 Q Did you get anything else out of the car?

18 A Nope.

19 Q After you got your phone out of the car, did you
20 then talk to deputy Suber?

21 A Deputy Suber approached me.

22 Q Did you talk to him?

23 A Yes. When he asked me what I was getting
24 out of the car, I told him.

25 Q Did you talk to any of the other deputies that

JUNIOR ROGERS - CROSS BY MR. PLEMING

1 arrived later?

2 A Me and no other deputy had a conversation.

3 Q Really?

4 A No.

5 Q So you don't remember talking to Deputy Roger
6 Hill after he arrived?

7 A The only person that talked to me was
8 Officer Suber. I don't remember talking to any
9 other deputy. They were just standing there
10 assisting him. They didn't have any
11 conversations with me.

12 Q So you don't recall another deputy asking you
13 who the owner of the home was?

14 A He probably asked me. I probably told him
15 who owned the home, but I don't remember him
16 asking me. I assumed Officer Suber told them to
17 who the owner of the home was.

18 Q You don't recall Deputy Hill asking you who was
19 the owner of the home?

20 A No, I don't recall that.

21 Q And you don't remember answering that question
22 with I am?

23 A Excuse me?

24 Q You don't remember telling him you were the
25 owner of that home?

JUNIOR ROGERS - CROSS BY MR. PLEMING

1 A If he had asked me that question I am pretty
2 sure I would have told him I was the owner of
3 the home. I would have no other reason not to
4 tell him that I was the owner of the home.

5 Q Do you recall Deputy Hill following that answer
6 with who was it that pulled this car, referring
7 to the blue Chevy, into your driveway?

8 A I don't remember him asking me any questions
9 like that, no.

10 Q You don't remember answering him, the one you
11 got in the car there, referring to Kashif Nash
12 sitting in the patrol car?

13 A Deputy Hill? I don't remember talking to
14 Deputy Hill. I remember talking to Officer
15 Suber.

16 Q Okay. Are you aware that not only was your
17 conduct recorded on that video but that the
18 things you said to Deputy Hill were also
19 recorded?

20 A I am aware of everything that the county
21 does.

22 MR. PLEMING: I have no further questions.

23 MR. HARRIS: Thank you, your Honor,
24 nothing further.

25 THE JUDGE: You may stand down. Thank

JUNIOR ROGERS - CROSS BY MR. PLEMING

1 you, sir.

2 (Witness excused.)

3 MR. HARRIS: The defendant rests.

4 THE JUDGE: Anything in reply, Solicitor?

5 MR. PLEMING: Yes, sir, your Honor. The
6 State calls Deputy Roger Suber in reply.

7 Your Honor, the State is going to need a
8 couple moments to set up the equipment to play
9 the video.

10 THE JUDGE: You need to do that before his
11 testimony?

12 MR. PLEMING: It would probably be better
13 if we went ahead and did that, yes, sir.

14 THE JUDGE: We will take a brief recess
15 while you set that up.

16 Mr. Foreman, ladies and gentlemen of the
17 jury panel, we will take a short recess while he
18 sets up the video equipment. You may take a
19 short break.

20 (Whereupon, the jury exited the courtroom
21 at 12:12 p.m.)

22 THE JUDGE: We will give you a few minutes
23 to do that.

24 (Court in recess at 8:42 p.m.)

25 (Open court out of Jury's presence.)

STATE OF SC VS. KASHIF P. NASH

1 THE JUDGE: Are we ready to go?

2 MR. HARRIS: Your Honor, I asked the court
3 reporter to retrieve a portion of Deputy Suber's
4 cross-examination testimony, and we located the
5 portion of it and we are trying to print it but
6 her computer went out on her as she was trying
7 to do it. I would like to have that material.

8 THE JUDGE: You don't get that material.
9 We don't breakdown court to get a copy of the
10 transcript. Do you understand that? What is
11 your problem? What is it?

12 MR. HARRIS: Wait a minute, your Honor.

13 THE JUDGE: We don't break down court to
14 print a transcript. Do you understand that?
15 Tell me what your problem is so I can see if I
16 can help you.

17 MR. HARRIS: I wanted to try to determine
18 whether or not the subject matter had been
19 already covered.

20 THE JUDGE: Well, when he asks it, you can
21 make your objection if you think it has --

22 MR. HARRIS: Your Honor --

23 THE JUDGE: Be seated. I am not going to
24 argue this. You are not changing the courtroom
25 procedures and stop the courtroom procedures to

ROGER SUBER - DIRECT BY MR. PLEMING

1 make the court reporter type it up and print it
2 to you. This was just a few minutes ago. It
3 was earlier. You can't remember that? If you
4 have an objection, make it. I am not stopping
5 court so you can have the transcript provided so
6 you can go put that back on the record. I am
7 not doing that. That's ridiculous.

8 Bring the jury in, please.

9 (Whereupon, the jury entered the courtroom
10 at 12:43 p.m.)

11 THE JUDGE: Officer, you were previously
12 sworn. You continue to be sworn and are under
13 oath.

14 ROGER SUBER

15 previously sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. PLEMING:

18 Q Deputy Suber, do you recall while you were at
19 Junior Roger's home and talking to Mr. Nash that
20 several other officers also arrived?

21 A Yes.

22 Q Do you recall those officers speaking to
23 Mr. Rogers?

24 A One of them did. I am sure of --

25 Q Where were you when this conversation was taking

ROGER SUBER - DIRECT BY MR. PLEMING

1 place?

2 A We were in the same little area.

3 Q About how far away were you from them?

4 A Four or five feet.

5 Q Were you close enough to hear what they said?

6 A Yes.

7 Q Were you close enough to hear what Mr. Rogers
8 said?

9 A Yes.

10 Q Tell us what you recall Deputy Hill asking
11 Mr. Rogers?

12 MR. HARRIS: I object to hearsay of
13 Deputy Hill.

14 THE JUDGE: I am going to sustain the
15 objection as to hearsay.

16 MR. PLEMING: Your Honor, may I approach
17 and make the argument?

18 THE JUDGE: You can approach.

19 (Whereupon, a bench conference was held
20 off the record in the presence of the jury, but
21 out of hearing of the jury.)

22 BY MR. PLEMING

23 Q Deputy Suber, during the conversation which you
24 heard between Deputy Hill and Mr. Rogers, do you
25 recall Mr. Rogers telling Deputy Hill that he

ROGER SUBER - DIRECT BY MR. PLEMING

1 was the homeowner of that residence where you
2 all were?

3 A Yes.

4 Q Do you recall Mr. Rogers telling Deputy Hill who
5 had driven the blue Chevrolet and pulled up into
6 the driveway?

7 A Yes.

8 Q And who did he say pulled that blue Chevy into
9 his driveway?

10 A Mr. Rogers stated something to the effect,
11 the one you have in the back seat of the car,
12 the one you have in the car.

13 Q Okay. Did you hear him deny it was him?

14 A He made that statement and followed up with,
15 it wasn't me. I wasn't driving.

16 Q Deputy Suber, is your patrol car equipped with
17 video recording equipment?

18 A Yes..

19 Q And are you also able to record audio with that
20 equipment?

21 A Yes.

22 Q And explain how that is done?

23 A You can activate the audio and video
24 different ways. It automatically comes on when
25 you activate the blue lights or manual record

ROGER SUBER - DIRECT BY MR. PLEMING

1 button you can match on the recorder itself.

2 Q Where is the video camera located?

3 A In the front windshield near the passenger
4 side.

5 Q Where is the microphone that records the audio
6 located?

7 A In the body mike that would clip on your
8 belt.

9 Q Okay. Have you reviewed the video of -- let me
10 ask you this: Did you activate that camera and
11 recording device during the incident in
12 question?

13 A Yes.

14 Q Were you able to record parts of what happened?

15 A Yes.

16 Q Was your conversation with Mr. Nash recorded?

17 A Yes.

18 Q Were Mr. Nash's responses very audible on that
19 recording?

20 A Some parts were, but there was a lot of
21 muttering or mumbling on his responses.

22 Q Were the responses that Mr. Rogers gave to
23 Deputy Hill audible on that recording?

24 A Yes.

25 Q Have you reviewed the video and the audio

ROGER SUBER - DIRECT BY MR. PLEMING

1 recording from that date?

2 A Yes.

3 MR. PLEMING: At this time, I am showing
4 defense attorney what has been marked as State's
5 Exhibit Number 2.

6 BY MR. PLEMING:

7 Q Deputy Suber, I am now handing up State's
8 Exhibit 2. Please take a moment to examine it
9 and please tell the jury what it is?

10 A This is a DVD of the traffic stop that was
11 made on June 14, 2013.

12 Q Does this particular disc marked as State's
13 Exhibit Number 2 contain all of recording from
14 that incident?

15 A Yes.

16 Q And how can you be certain that recording from
17 that incident is recorded on this particular
18 disc?

19 A Because once I reviewed the disc, I
20 initialed it and dated it and reviewed it.

21 Q Okay. I am sorry I walked away, but can you
22 please point out to me where your initials are
23 and the date?

24 A The initials are here (indicating) and we
25 reviewed it December 30th, 2013.

ROGER SUBER - DIRECT BY MR. PLEMING

1 Q Where did you watch this video?

2 A In the Solicitor's office.

3 Q Is the recording contained on this disc a fair
4 and accurate depiction of the conversation you
5 had with Mr. Rogers on that date? Does it
6 contain a fair and accurate depiction of that
7 conversation?

8 A Yes.

9 MR. PLEMING: Your Honor, at this time,
10 the State would move the portion of the video
11 contained in State's Exhibit Number 2 beginning
12 at 17:49 and 25 seconds -- beginning at 17:49
13 and 20 seconds through 17:49 and 40 seconds.

14 MR. HARRIS: Your Honor, I have to object
15 because my understanding is that the portion
16 contains hearsay from Deputy Hill. It is
17 essentially a question and answer section
18 between Deputy Hill and Mr. Rogers.

19 THE JUDGE: Counsel approach just a
20 minute.

21 (Whereupon, a bench conference was held
22 off the record in the presence of the jury, but
23 out of hearing of the jury.)

24 THE JUDGE: Mr. Foreman, ladies and
25 gentlemen of the jury panel, you are going to

ROGER SUBER - DIRECT BY MR. PLEMING

1 see a portion of the video. That is in
2 evidence. You will be able to see that now.
3 This video is offered solely on the purpose of
4 impeachment of Junior Rogers, the witness who
5 already testified. It was not offered for any
6 other purpose and not to be considered as proof
7 or evidence for any other purpose. It is
8 offered solely for the purpose of impeaching or
9 contradicting, if you will, the testimony on
10 Junior Rogers. That's the reason it is being
11 offered. You are not to consider it for any
12 other reason or any other purpose other than
13 impeaching the witness. Proceed.

14 (STATE'S EXH. 2, previously marked for
15 identification, was received into evidence.)

16 MR. PLEMING: Thank you, your Honor.

17 For the record, State's Exhibit 2 is
18 admitted into evidence.

19 THE JUDGE: Yes.

20 MR. PLEMING: We will publish the portion
21 of the video admitted at this time.

22 THE JUDGE: That portion of the video.

23 MR. PLEMING: Yes.

24 (Playing video.)

25 MR. PLEMING: Let me turn the volume up.

ROGER SUBER - DIRECT BY MR. PLEMING

1 BY MR. PLEMING

2 Q Deputy Suber, is that the moment on the video
3 that contains the statement that you alluded to
4 moments ago?

5 A Yes.

6 Q And what did you say the statement from Junior
7 Rogers was?

8 MR. HARRIS: Objection. Asked and
9 answered.

10 THE JUDGE: Please proceed. Overruled.

11 MR. PLEMING: I will continue playing
12 until 17:49:40.

13 BY MR. PLEMING:

14 Q Deputy Suber, before I conclude my questions, I
15 would like for you to just take a moment to
16 point out where each of the individuals who were
17 present that day were standing the best you can
18 depicted in the video?

19 A This is Mr. Rogers standing here
20 (indicating) and the deputy to the left. And
21 that is Mr. Rogers there (indicating).

22 Q Where were you standing?

23 A To the left of him, facing him would be our
24 left. He is right.

25 Q Very good. Can you point out the car in

ROGER SUBER - CROSS BY MR. HARRIS

1 question?

2 A The blue Chevrolet.

3 Q That is the car you observed Mr. Nash driving?

4 A That's correct.

5 MR. PLEMING: Thank you. Nothing further,
6 your Honor.

7 THE JUDGE: Any questions of this witness?

8 MR. HARRIS: Yes, your Honor, please.

9 CROSS-EXAMINATION

10 BY MR. HARRIS:

11 Q Is it correct that when you had Mr. Nash, you
12 arrested Mr. Nash, that you saw Mr. Rogers reach
13 into the blue Chevrolet as if to get something
14 out of the car?

15 A I seen him reach into the Chevrolet, yes,
16 sir.

17 Q Is it correct that either you or Deputy Hill
18 basically told him to stop doing that?

19 A Yes.

20 Q Is it correct that either you or Deputy Hill
21 told him to stop doing that because you didn't
22 know what he was doing?

23 A That's correct.

24 Q In other words, he could have been removing
25 something he should not have been removing; is

ROGER SUBER - CROSS BY MR. HARRIS

1 that correct?

2 A That's correct.

3 Q Or he could be retrieving something that could
4 be dangerous to you; is that correct?

5 A Correct.

6 Q You just didn't know and that's why your
7 suspicion was drawn toward him at what he was
8 doing at the car; is that right?

9 A That's correct.

10 Q You and Deputy Hill fairly immediately
11 approached, as we can see on the video,
12 Mr. Rogers to confront him about what he was
13 doing reaching inside the car; is that right?

14 A That's correct.

15 Q Confrontation would be a correct way to describe
16 that interaction, wouldn't it?

17 A I would say it wasn't confrontation.

18 Q What would you call it?

19 A Just asking him what he were doing in the
20 car.

21 Q You and Deputy Hill up there saying, what are
22 you getting out of the car? Isn't it correct he
23 was getting his cell phone?

24 A That's what he said, that's correct.

25 THE JUDGE: This has to do with what they

ROGER SUBER - CROSS BY MR. HARRIS

1 ask on their reply. I have not heard any
2 questions along those lines. It was about him
3 about driving. So what does that have -- you
4 are going over the same stuff you went over
5 before. Where are you going with that?

6 MR. HARRIS: I am just trying to provide
7 context to show if, indeed, Mr. Rogers made
8 contrary statements, why, out of what context
9 and why he might have made them.

10 THE JUDGE: That would be a good argument
11 for the jury because I don't think you are
12 entitled to go into it on -- it is not
13 responsive to anything they raised in their
14 reply testimony.

15 MR. HARRIS: Thank you, your Honor.

16 THE JUDGE: Yes, sir.

17 MR. PLEMING: Your Honor, may have I have
18 the opportunity to respond to a couple of those
19 questions that he was able to ask.

20 THE JUDGE: If you are going to do that,
21 let him finish his questions. Go ahead if he is
22 going to respond.

23 BY MR. HARRIS:

24 Q So, you and Deputy Hill came up to Mr. Rogers,
25 talked about what, questioned him about what he

ROGER SUBER - CROSS BY MR. HARRIS

1 got out of the car and then questioned him about
2 how the car got there, and questioned him about
3 the beer in his pocket; is that correct?

4 A That's correct.

5 Q In other words, putting Mr. Rogers in a position
6 to having to defend himself --

7 THE JUDGE: Now you are putting words in
8 his mouth. Pure speculation. Move on. What
9 else are you going to ask him?

10 MR. HARRIS: Thank you, your Honor.

11 THE JUDGE: You are not testifying. He
12 is testifying, Counselor.

13 MR. HARRIS: Your Honor.

14 THE JUDGE: Do you have anything else?

15 MR. HARRIS: Your Honor, I was trying --

16 THE JUDGE: Do you have anything else?

17 MR. HARRIS: No, sir, not for this
18 witness.

19 THE JUDGE: Please be seated, sir.

20 Do you have anymore questions, Solicitor?

21 MR. PLEMING: Just one, your Honor.

22 REDIRECT EXAMINATION

23 BY MR. PLEMING:

24 Q Deputy Suber, did you or Deputy Hill question
25 Mr. Rogers about what he was getting in or out

STATE OF SC VS. KASHIF F. NASH

1 of the car before or after Deputy Hill asked him
2 these questions about who pulled into the
3 driveway?

4 A We asked him about what he got out the car
5 after we talked about who drove the car into the
6 yard.

7 MR. PLEMING: Thank you.

8 THE JUDGE: Thank you, sir. You may stand
9 down.

10 (Witness excused.)

11 THE JUDGE: Anything else?

12 MR. PLEMING: Nothing from the State,
13 your Honor.

14 THE JUDGE: I think it is good time to get
15 lunch.

16 Mr. Foreman, ladies and gentlemen of the
17 jury panel, it is almost 1 o'clock. I have a
18 couple of matters I need to take up with counsel
19 out of your presence so we will take a few more
20 minutes for lunch. I am going to ask you to get
21 lunch and be back in the jury room ready to go
22 at let's say 2:20. So please get some lunch and
23 be back in the jury room ready to go at 2:20.
24 Thank you.

25 (Whereupon, the jury exited the courtroom

STATE OF SC VS. KASHIF F. NASH

1 at 12:57 p.m.)

2 THE JUDGE: Do you have any motions you
3 would like to make at this time?

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

5 MR. HARRIS: No motions.

6 THE JUDGE: All right. Counsel, approach
7 a minute and let me run through the charge with
8 you right quick.

9 (Whereupon, a bench conference was held
10 off the record.)

11 (Court in recess at 12:59 p.m.)

12 (Open Court out of the presence of jury.)

13 THE JUDGE: Counsel, are you ready to
14 proceed?

15 MR. PLEMING: Yes, sir, your Honor.

16 MR. HARRIS: Yes, your Honor.

17 THE JUDGE: Please bring the jury in.

18 (Whereupon, the jury entered the courtroom
19 at 2:23 p.m.)

20 THE JUDGE: Good afternoon, Mr. Foreman,
21 ladies and gentlemen of the jury panel. We are
22 to that part of the trial where counsel will
23 make their final arguments to you. I would ask
24 that you listen attentively now as counsel
25 addresses you in their final argument.

CLOSING ARGUMENT

1 Counsel, are you ready to proceed?

2 MR. HARRIS: May it please the Court,
3 your Honor.

4 THE JUDGE: Yes, sir.

5 MR. HARRIS: Mr. Foreman, ladies and
6 gentlemen of the jury, we have come nearly to
7 the end of the case. There is no more evidence
8 to be heard, only arguments from myself and the
9 assistant solicitor, instructions by his honor,
10 and then what we discussed yesterday, the stage
11 in the case where you, the jury, twelve of you,
12 will go into the jury room and deliberate.

13 I simply emphasize to you and suggest to
14 you at this point in time what I did at the
15 start the case, which is make it deliberate.
16 Don't get in a rush, don't assume things, don't
17 gloss over things. Discuss it all, think about
18 it all, take it all in. With great care and
19 trouble, at least the best that we can do, the
20 best I can do on behalf of Mr. Nash, to try to
21 present the case to you. We ask that you give
22 careful deliberation.

23 Now, my remarks to you at this stage in
24 the case are not intended just to be a rehash of
25 what you already heard. You were all very

CLOSING ARGUMENT

1 attentive as I have been able to tell and
2 concerned folks. You have all sworn that you
3 would have an open mind, that's why you were
4 selected on the jury. I need not go back
5 through every sentence anybody said or point
6 that was made.

7 Merely, my purpose here in a few brief
8 minutes is to sum up the case to try to tell you
9 from Mr. Nash's side of things why we believe
10 there is reasonable doubt in this case as to
11 both charges. I am merely saying to you, I
12 would ask you consider this, I would ask to you
13 consider the arguments I make, also consider the
14 arguments the assistant solicitor makes. It is
15 only fair. After all, this is the time to have
16 a fair trial. You can get a fair result if you
17 have a fair trial. I trust that you will reach
18 a fair verdict in this case based on as your
19 oath, as you may remember said, the law and the
20 evidence as we talked about yesterday.

21 The judge will give you the law to apply
22 to the facts of the case. The facts of the case
23 meaning what you can pick out of the evidence
24 that is believable or not believable or
25 somewhere in between. Out of all of that, you

CLOSING ARGUMENT

1 determine whether or not the State legally has
2 proven everything, and we call them the
3 essential elements of the offenses, everything
4 they have to prove, and proving it that apply to
5 the standard. That legal standard is proof
6 beyond a reasonable doubt.

7 Now, his honor will define the term
8 reasonable doubt for you in just a few moments.
9 Reasonable doubt is often said is the kind of
10 doubt that would make a reasonable person
11 hesitate to act. Meaning, when you consider any
12 important thing in your life and you are trying
13 to decide what to do. In this case, what you
14 are trying to decide is whether there has been
15 proof beyond a reasonable doubt.

16 If you have any hesitation, that is
17 reasonable doubt. If you an intellectual sort
18 of, I don't know, kind of question that a little
19 bit. That's all it takes to have reasonable
20 doubt. Not every single doubt we can possibly
21 imagine is enough, but on the other hand, just
22 that hesitation is reasonable doubt.

23 Having said that, what are the legal
24 principles involved here. What does the State
25 have to prove remembering all the while, as we

CLOSING ARGUMENT

1 said yesterday, Mr. Nash sitting over there is
2 presumed innocent of these two offenses that he
3 is charged with and on trial for. Remembering
4 all the while that that presumption of innocence
5 cannot be taken away from Mr. Nash until you,
6 unless you, the jury, unanimously find the State
7 has proven what the law requires him to prove as
8 to each charge beyond a reasonable doubt.

9 Now, in order to determine whether the
10 State has met its burden of proof, juries often
11 have to weigh the credibility of witnesses. You
12 heard witnesses come to the witness stand. They
13 have each sworn an oath and they have testified.
14 They have been examined and cross-examined and
15 in some cases more than one time. You have to
16 chose from all of that whether witnesses are
17 believable. You can chose to believe all of
18 what a witness says or not of what a witness
19 says. You can chose to believe a part of what
20 the witness says and not believe another part.
21 Through your deliberations, you will come to the
22 conclusion of whether the witness can be
23 believed on what essential points. That's part
24 of your deliberations.

25 Okay. It is no secret that Mr. Nash takes

CLOSING ARGUMENT

1 the position as to the habitual traffic offender
2 charge that he was not driving this blue Chevy.
3 He says he wasn't driving. That's clearly the
4 defense in this case. There has been some quite
5 some back and forth about what his status as the
6 driver was. There is no doubt that the evidence
7 has shown that he was under suspension, that he
8 had no valid driver's license at the time. We
9 never argued otherwise. I will leave it to you
10 to determine whether or not this notice letter
11 that was testified to by the lady from the
12 highway department is sufficient in your
13 deliberation to prove that the highway
14 department had undergone correctly a
15 determination that he had, in fact, those three
16 violations. I will only say this about that.
17 It is real easy to assume, yes, the highway
18 department, they never make a mistake. But you
19 know, you're entitled to decide for yourselves
20 based on the evidence whether or not your
21 willing to trust without reasonable doubt a
22 process where no human being ever lays eyes on
23 or touches his hands to the essential document.

24 Now, think about that. I know we are in
25 modern society and we are supposed to be. No

CLOSING ARGUMENT

1 human being ever checked the computer. And you
2 never saw any record presented to you here today
3 to say here is what we were going on when we
4 said he had driving under suspension three years
5 ago. Here is what we were going on to put it in
6 the computer that he another one two years ago.
7 Here is what we were going on to say he had
8 reckless driving.

9 If we are not going to overlook anything
10 and we are going to try to look at everything,
11 which I think the jury should do, and I suggest
12 you do in the interest of justice, you have to
13 decide whether that is sufficient to overcome
14 reasonable doubt.

15 Back to the driving or the not driving.
16 Who was driving this blue Chevrolet. Okay.
17 Classic contest with a little twist. The police
18 officer gets up on the witness stand and says,
19 he is 100 percent sure that he saw Kashif Nash
20 driving the blue Chevy. He said he saw -- what
21 did he say? He saw the car. I believe the
22 testimony was in answer to the Assistant
23 Solicitor's question of you saw the car. You
24 recognized the car before you recognized the
25 driver? Understanding that that whole process

CLOSING ARGUMENT

1 according to the cross-examination testimony of
2 Detective Suber was four or five seconds. He
3 never again, although he saw the tail end of the
4 car once, he never, again, saw anybody behind
5 the wheel of the car, anybody.

6 I suggest to you, ladies and gentlemen,
7 that Detective Suber is convinced in his mind
8 that it must have been Kashif Nash driving that
9 car. I would suggest to you, however, that
10 there is reasonable doubt about whether
11 Detective Suber really did see Kashif. I am not
12 saying he got up here and tried to tell a fib.
13 I think he is convinced, you know, and that as a
14 police officer, he is convinced it must have
15 been Kashif driving. I am not sure he can
16 overcome reasonable doubt on the question of
17 whether it really was or whether he assumed
18 that. I don't have a doubt that he tried to get
19 back to stop the car while it was being driven
20 as soon as he could. You know, they made a
21 pretty big thing with it saying, you know, they
22 turned around, and he sped up, he tried to get
23 to the car, and couldn't get back there even in
24 time to put the blue lights on.

25 Well, I don't question that that's

CLOSING ARGUMENT

1 probably the way it happened, but he wasn't able
2 to get to the car. He obviously wasn't able to
3 stop it on the roadway.

4 Had he been able to, we would have no
5 reasonable doubt about who the driver is.
6 Remembering the State must prove beyond a
7 reasonable doubt that Mr. Nash was the driver,
8 not maybe, not possibly, but was the driver
9 beyond a reasonable doubt before you can find
10 him guilty of habitual traffic offender.

11 Had it gone differently, had the evidence
12 been different, had the blue Chevrolet been
13 stopped on the highway and the driver of the
14 vehicle taken from behind the wheel, we would
15 know beyond a reasonable doubt the identity of
16 the driver. But that's not the evidence in the
17 case and you can't fill in those blanks.

18 The evidence in the case is that the blue
19 Chevrolet was seen in the driveway at [REDACTED]
20 [REDACTED], whose house? Junior Rogers' house,
21 junior Rogers' house. Nobody was behind the
22 wheel of the blue Chevrolet at the time the
23 deputy got there. There is some conflict in the
24 testimony about whether or not Kashif Nash was
25 walking in the driveway or walking, quote, into

CLOSING ARGUMENT.

1 the house. There is no dispute that he walked
2 into the house, that he actually did walk into
3 the house. I say to you -- now Mr. Rogers said
4 Kashif was on the porch when he got back there.
5 I pointed out in cross-examination that the
6 original report written by Deputy Suber said
7 that Mr. Nash was walking, quote, into house and
8 then walked back in the house and was called
9 back out.

10 In deliberations I just ask you to
11 consider if Mr. Nash was walking from the car in
12 the driveway, not even to the porch of the house
13 yet, why would the deputy have not been able to
14 prevent him from going on the porch and into the
15 house. Because after all, the deputy testified
16 he did everything, moved heaven and earth to
17 stop the car before it ever got there, right?
18 That was his sole intention, to stop that car.
19 So if he saw who he thought was driving the car
20 in the driveway of [REDACTED] [REDACTED], is it logical
21 to think he would have never allowed the driver
22 to be able to get inside the house where he
23 would lose sight of him again. That's not
24 logical. It didn't happen that way I would
25 suggest to you.

CLOSING ARGUMENT

1 Think about Mr. Rogers' testimony.
2 Mr. Rogers got up on the witness stand,
3 testified that that was his home. He certainly
4 is familiar with these people, that he has been
5 working on the car for a couple of days, that he
6 had gone and gotten Mr. Nash several hours
7 prior, that he had taken the car out to test it
8 out. He admitted speeding, which is important
9 to your deliberations, ladies and gentlemen.
10 Mr. Rogers admitted to gunning the car to test
11 it out and at about that time seeing the Deputy
12 Sheriff, which obviously turned out to be Deputy
13 Suber.

14 I know what you are thinking and the
15 Assistant Solicitor may suggest this later,
16 well, you know, that Detective Suber said that
17 the car was going 35 miles an hour. It might
18 have been. Mr. Rogers may have feared that he
19 saw something he was doing wrong.

20 Nevertheless, think about it from
21 Mr. Rogers' perspective. Mr. Rogers said, I
22 didn't stop. I decided to try to get on home.
23 In other words, Mr. Rogers knew he had done
24 something wrong and he is driving. It wasn't
25 wrong for him to drive but it was wrong for him

CLOSING ARGUMENT

1 to gun the car like that and be guilty of
2 speeding. So he is trying to make it home.
3 Mr. Rogers is trying to make it to his house
4 because he fears that the deputy is coming after
5 him, Mr. Rogers.

6 Mr. Rogers does get home and does make it
7 outside the car before the deputy arrives.

8 Now, the deputy in his mind is dead
9 certain that it must have been Mr. Nash. He
10 sees Mr. Nash on the porch and calls him down
11 after he went inside the house briefly. See,
12 the deputy is not wanting to investigate the
13 case to find out the truth, and this is
14 important to your deliberations. Deputy Suber
15 was never trying to investigate the case to find
16 out who the driver was. He all along believes
17 in his mind it must have been Mr. Nash because
18 Mr. Nash didn't have a valid driver's license
19 and he was probably further bolstered in that
20 belief by thinking the car had gotten away from
21 him, not realizing Mr. Rogers was getting away
22 from him because Mr. Rogers thought that he had
23 been caught speeding.

24 It was just an assumption on the part of
25 Deputy Suber that turned out not to be true.

CLOSING ARGUMENT

1 That's how people get falsely accused of stuff.
2 You know, the police do a great and valuable job
3 for us, but they are human too no matter how
4 infallible they plan to be, and when they go
5 into a situation like that totally closed minded
6 and already decided, we get bad and unfair
7 results, and that's why we are thank full for
8 you because you are coming into it objective and
9 open minded. You already made up your minds and
10 now you know the evidence in the case. The
11 evidence that could have been found out perhaps
12 had only the deputy not jumped to conclusions.

13 Now, I have no doubt that the assistant
14 solicitor is going to get up in a few movements
15 and say, wait a minute, wait a minute, wait a
16 minute. Mr. Rogers when confronted by Deputy
17 Hill and Deputy Suber supposedly made the
18 statement that it was the man in the car driving
19 and not him, if that's what that statement is.
20 I think it is a little hard to hear.
21 Nevertheless, if that's what it is, that's what
22 it is. He will say that's why you have to throw
23 out Mr. Rogers' testimony, you can't believe
24 anything he says. He has a criminal record a
25 few years ago for assault and battery plus which

CLOSING ARGUMENT

1 he denied he was driving on the day of.

2 Well, think about this now, two things
3 about that. Why do you think that -- why would
4 you be surprised to think Mr. Rogers on the spot
5 being confronted by two deputy sheriffs had just
6 reached into the car to get his cell phone.
7 They thought he was doing something suspicious.
8 They confronted him. He already knew he had
9 committed a traffic violation by speeding,
10 that's why he was trying to get home. He had an
11 open beer. They were already suspicious of him.
12 I am sure he is not proud of it today, but he
13 threw -- if the statement is correct, he threw
14 Mr. Nash under the bus because he didn't want to
15 be taken to jail.

16 Well, you know, it has been a long time
17 since then, and I think we ought to give people
18 credit for getting on the witness stand and
19 trying to straighten the record out, trying to
20 tell him the truth, instead of downing them for
21 it. We all should give him credit for trying to
22 straighten the record out and not see somebody
23 that didn't do something get convicted of it.

24 Now, I am sure that the assistant
25 solicitor won't see it that way, but I am asking

CLOSING ARGUMENT

1 you to consider seeing that way because I
2 suggest to you there is nothing in it, there is
3 nothing in it at all from Mr. Rogers to get up
4 here and admit to what he did, nothing at all,
5 and stand the embarrassment of having the
6 conviction of assault and battery drug out in an
7 open courtroom. I don't think so. I think we
8 ought to give credit where credit is due.

9 I think if you look at it in the
10 deliberations logically, you will see it is far
11 more likely, although it is beyond a reasonable
12 doubt standard, it is far likely that it is true
13 that, in fact, Mr. Rogers was driving this car
14 and the deputy just assumed some things that may
15 be he should not have assumed.

16 Now, Mr. Nash is also accused of
17 possession of cocaine. The possession that he
18 has claimed to have had is of a substance so
19 small that it cannot be weighed or at least
20 cannot be weighed with the technology that
21 S.L.E.D possesses.

22 Just a little side of that expert witness
23 of S.L.E.D. you know, you would think a man of
24 science would come in here and just tell what he
25 knows and what he did and not take a side or

CLOSING ARGUMENT

1 play word games. I hate to say it because I am
2 sure he is a very fine chemist. I didn't even
3 challenge his qualifications, wouldn't want to.
4 He has worked hard and been real educated and
5 done a lot of hard work. There is no sense to
6 come in here and play word games. You know,
7 think about that in terms of credibility.

8 Now, he knew as well as we all know in
9 this courtroom that whatever, no crud or
10 residue, or whatever it was that was inside this
11 closed up box looking scale thing was nothing
12 that anybody could ever use. Nobody is getting
13 high off that. Nobody wants to. Did you all
14 see that razor blade? You know, the assistant
15 solicitor wants to suggest that, oh, you know,
16 that's what they use and they cut it up and all
17 that stuff. I don't know where that bag -- you
18 can see the bag. That razor blade is about as
19 rusty as a nail standing out there on the
20 sidewalk for about 15 years getting run over
21 about 40 times by a tractor trailer. You look
22 at the razor blade and see if anybody would
23 believe that the razor blade had been used any
24 time to chop up cocaine. It is ridiculous. As
25 a matter of fact, it was so rusty, and I

CLOSING ARGUMENT

1 suggest, so unused for so long that according to
2 the lab guy, the razor blade was stuck to the
3 scale to the point that he had to take one of
4 his instruments and pry it off of there. So
5 don't let them make you want to believe that
6 this was something that this device has been
7 used to posses cocaine. I mean, it is just the
8 opposite. It looked like it was something that
9 had not been opened in a very, very long time.

10 Now, of course, there is absolutely no
11 evidence, zero evidence, that I can recall in
12 the case to show that Kashif Nash knew there was
13 any such residue inside of it. Why is that
14 important? Because the law states that it must
15 be proven beyond a reasonable doubt to prove
16 possession of cocaine, that it was cocaine and
17 that the person claimed to have been possessing
18 it intentionally and knowingly possessed it.

19 Let me say that again. Intentionally and
20 knowingly possessed it. In other words,
21 knowledge of the presence of the drug is
22 essential. When we say essential in law, we
23 mean you cannot do without. That means if you
24 haven't proven actual knowledge, if you haven't
25 proven knowledge, then if you are the State you

CLOSING ARGUMENT

1 lose. Okay.

2 Now, there is no evidence whatsoever
3 either by way of any statement alleged to have
4 been made by Kashif Nash or other things that
5 were found or anything else that Kashif Nash
6 knew or had any way to know that there was
7 residue inside -- inside. You cannot see from
8 the outside, inside this thing that you have to
9 open up. That even the lab guy didn't know what
10 it was until he put it through what you call it,
11 instrumental analysis. He had to scrape off
12 some of it and inject it on the chromatograph in
13 order to find out what it was himself.

14 So you decide, ladies and gentlemen, and I
15 ask you to decide without assuming but by making
16 the State prove the case. That's how our system
17 works. If we don't have juries that hold the
18 State's feet to the fire as to proof, our system
19 is going to crumble. Okay. No weight, so
20 little of an amount.

21 Why do I harp on this residue? It was
22 funny, again, this word game. I said, well,
23 look, talking about the S.L.E.D guy. I said
24 look, all right, is it cocaine? Is it crack
25 cocaine or cocaine based? And he said, it was

CLOSING ARGUMENT

1 residue. He seems to make a distinction but
2 then he wants to backtrack, you know, when he
3 thinks he is going to lose the case. He says,
4 well, you know, that's cocaine hydrochloride,
5 something.

6 Well, you have to decide in the end
7 whether somebody under these facts, whether
8 somebody ought to be found guilty beyond a
9 reasonable doubt of knowingly possessing cocaine
10 under these circumstances. That's basically
11 what you have to decide.

12 Ladies and gentlemen, I am here to ask you
13 with all due respect to find as to the charge of
14 habitual traffic offender that the State has not
15 proven what they have to prove in the case.
16 They have not proven beyond a reasonable doubt
17 that Kashif Nash was driving and they have not
18 proven beyond a reasonable doubt even that he
19 truly has been declared a habitual traffic
20 offender. That is different than not having a
21 valid license. We don't contest he didn't have
22 a valid license, but have they proven that he
23 has been properly declared a habitual offender?
24 We want you and ask you for a verdict of not
25 guilty on the habitual traffic offender charge.

CLOSING ARGUMENT

1 On the charge of knowingly possessing
2 cocaine, we are going to ask you for a not
3 guilty verdict as well because we don't believe
4 the evidence under these circumstances can prove
5 knowing possession of the drug. We don't
6 believe a person under these circumstances ought
7 to be found guilty of possession of cocaine. We
8 will ask you of a verdict of not guilty as to
9 that.

10 I have to sit down now, and I thank you
11 for your attention not just now, not just for
12 what I said, but for everything everybody said
13 in the case. That's only fair. Everybody ought
14 to be given a free chance to speak out and
15 nobody should be unfairly prevented. Okay. I
16 appreciate the opportunity to come before you
17 and come before this Court and present my
18 client's case, but I don't have the last word.
19 The Assistant Solicitor will have an opportunity
20 to address you and make an argument to you. I
21 have done my best to anticipate some of the
22 points he might make. I cannot anticipate
23 everything he might say. I sometimes try to be
24 a mind reader and it always backfires. I am not
25 going to do it. I am going to avoid that today

CLOSING ARGUMENT

1 if I possibly can.

2 All I ask you to do, ladies and gentlemen,
3 in strict fairness, is as you listen to his
4 argument, please don't forget about mine. Okay.
5 Please don't forget about what I said and my
6 side. I won't have another chance to come back
7 and try to refute these. I am not complaining.
8 I am just saying that's how things will proceed.
9 The only thing I will ask of you is to listen
10 carefully to everything he has to say, but don't
11 forget what I had to say about it myself. The
12 judge will then give you the law and the case
13 will be yours to do that very important process
14 of deliberation. Thank you.

15 MR. PLEMING: Mr. Foreman, ladies and
16 gentlemen of the jury, during opening
17 statements, I mentioned that this defendant may
18 not know the difference between or understand
19 the difference between a right and a privilege.
20 Under our constitution, both Federal and State,
21 we have a number of rights that are enumerated
22 therein. However, we don't have a right to
23 drive. The constitution doesn't grant us all a
24 fundamental right to drive a car. Driving a car
25 is privilege. I have been told that before. My

CLOSING ARGUMENT

1 parents were the first to teach me that. That's
2 why you have to take a test before you can do
3 it. You have to prove that you understand the
4 rules of the road and you understand how to
5 drive safely and you can safely operate a motor
6 vehicle.

7 Because driving is a privilege, it can
8 also be taken away from you. In this case, the
9 Department of Motor Vehicles had revoked
10 Mr. Nash's privilege to drive because he had
11 been declared a habitual traffic offender
12 according to the laws of this state. No person
13 had to evaluate his record and determine whether
14 or not those laws applied because every time
15 that he had an offense it was computed. It was
16 entered into a database and at which point he
17 met the qualifications under the law to be a
18 habitual traffic offender. He was declared a
19 habitual traffic offender and notice was sent to
20 him that his license was revoked from August 28,
21 2010 to August 28, 2015. This incident occurred
22 on June 14, 2013. During the period that he was
23 declared a habitual traffic offender, you have
24 seen no evidence to the contrary or to show that
25 his license had been reinstated prior to that

CLOSING ARGUMENT

1 date and that's because it hadn't.

2 Ms. Wearing from the DMV testified to this
3 morning. She told you she reviewed his driving
4 record and that she had verified that he had the
5 offenses on his record necessary and sufficient
6 to declare him a habitual traffic offender.

7 You don't need to see all of those because
8 your job is not to determine how many offenses
9 he had on his record. Your job is to determine
10 the facts of this case. Your job is to
11 determine whether the elements of the violation
12 of the habitual traffic statute has been met.
13 The elements of that charge, of that offense,
14 are that that, first, Mr. Nash has been declared
15 a habitual traffic offender and that status
16 applied to him on the day in question; and
17 second, that he drove while he was still a
18 habitual traffic offender. Those are the two
19 questions you have to answer. You have to
20 decide whether or not those two facts have been
21 proven by the State beyond a reasonable doubt.

22 You don't have to prove that he received
23 X, Y, Z offenses on his record prior to that
24 day. If that is to be contested, that's to be
25 done at another hearing somewhere else but not

CLOSING ARGUMENT

1 in this courtroom today. That's not your job.

2 When Mr. Harris tells you the State hasn't
3 proven that he was fairly declared a habitual
4 traffic offender, he is trying to distract from
5 you from what his honor well tell you what is
6 your job in this courtroom is today and that is
7 whether or not the DMV had declared him a
8 habitual traffic offender and whether or not he
9 was driving during that time.

10 Here is your proof: It wasn't necessary
11 for me to introduce the entire driving record
12 for you to have a stack of papers to go over.
13 This is what you need to know, that the DMV had
14 declared him a habitual traffic offender on the
15 date in question. Proof that he was driving is
16 satisfied by the testimony of Roger Suber and by
17 your common sense when applied to all of the
18 things you know about this case based upon what
19 you heard from Deputy Suber, based on what you
20 heard from Junior Rogers.

21 Deputy Suber saw Kashif Nash driving. It
22 is that simple. Mr. Harris' defense for his
23 client is that, one, Mr. Nash was not driving,
24 that Mr. Rogers was driving. And two, that you
25 should not find him guilty of possessing cocaine

CLOSING ARGUMENT

1 because he only had a very little amount.

2 Let's consider each of these two defenses
3 in turn. First, to believe that Mr. Rogers was
4 driving, that it was not Mr. Nash who was
5 driving the car, you have to do two things.
6 First, you must believe that Junior Rogers lied
7 to the police in his driveway when he said that
8 Mr. Nash was the one that pulled into the
9 driveway. It wasn't me. You have to believe
10 that as Mr. Harris said that he was willing to
11 throw his -- I think it was his second cousin.
12 At any rate, it was a family member, that he was
13 willing to throw his own family member under the
14 bus. That he, someone who did have a valid
15 driver's license, and who at worse was speeding,
16 and there is not enough evidence to prove that
17 he did anything else, that that person had a
18 license to drive and would throw his family
19 member under the bus, his family member who
20 didn't have a driver's license, and was getting
21 arrested and sent to jail. You have to believe
22 he would that.

23 Now, you can hear exactly what Mr. Rogers
24 said to you because we have it on tape, we have
25 it recorded. Albeit, the body microphones that

CLOSING ARGUMENT

1 the police wear, they don't produce the best
2 quality. It is sometimes difficult to hear.
3 But just because it is difficult to hear doesn't
4 mean it is not on there. I don't know whether
5 or not you heard it or not when I played it
6 earlier, but if you need to, it is in evidence.
7 You can listen to it again. You can focus and
8 ask us to turn the volume up or down and you can
9 listen to it until you can determine what is
10 said on that video. I submit to you if you do
11 that, if you pay attention and you listen
12 closely, there is no question, there is no doubt
13 that Mr. Rogers said when they asked him who
14 pulled this blue Chevy into the driveway, and
15 paraphrasing, his response was the one you got
16 in the car. It wasn't me.

17 I submit to you that it wasn't me was the
18 easiest part to hear if you listen to it over
19 again, and that's really all you need to hear
20 him say because you know that he told the
21 officers that day he hadn't been driving that
22 car.

23 If you want to listen to it again, it is
24 there for you. Deputy Hill says, who is the
25 owner of this home? You hear a response, I am.

CLOSING ARGUMENT

1 Deputy Hill said, who pulled the car in here?
2 That one that you got in the car. It wasn't me.
3 Either Mr. Rogers had forgotten what he said
4 that day or he forgot that he lied to the police
5 to protect himself and threw his family member
6 under the bus or he was just trying to make a
7 last-stitch effort now to help Kashif Nash.

8 I don't know if he remembers what he said,
9 but it doesn't matter. It is on there. You can
10 hear, you know what he said. Deputy Suber knows
11 what he said. He was there. He heard it.

12 Now, I thought it was interesting that
13 Mr. Harris said that you can believe Mr. Rogers,
14 that his testimony was credible. You cannot
15 trust anything that man said. He most certainly
16 had a reason to come in here and lie. He most
17 certainly had a reason to do that because his
18 friend, his family member that he spends a lot
19 of time with is on trial. I don't think that
20 takes an expert's testimony for you to
21 understand why he would come in here and testify
22 as he did.

23 So if it just comes down to which person
24 do you believe, I submit to you Deputy Suber
25 certainly has no reason to risk his job and his

CLOSING ARGUMENT

1 freedom to come here and swear under oath that
2 he had seen Mr. Nash drive the car if he didn't
3 see Mr. Nash drive the car. He knows Mr. Nash.
4 He has known him for years. He knows his entire
5 family. He sees them every other week at
6 church. He has had conversations with him about
7 driving and his driver's license status. He
8 would not be mistaken. If he had a doubt and
9 didn't get a good look at him, he would have
10 told you. He has no reason to risk that, but he
11 was confident. I mean, he knows what he is
12 talking about. If you cannot believe it with
13 your own eyes then what can you believe. He
14 didn't have any doubt of who he saw driving that
15 car. Then when he turns around and finally
16 catches up to where that car went, what does he
17 see? Mr. Nash walking from that car to the
18 house.

19 Mr. Harris asked you, said something,
20 there was some dispute about that and asked why
21 would, you know, Mr. Nash go inside the house
22 and then come out. I don't know. Maybe he had
23 some reason for why he wanted to quickly step
24 into that house before he came back outside and
25 answer that. I don't know what that reason was.

CLOSING ARGUMENT

1 That doesn't mean there wasn't one. I can't
2 tell you why he did that. That is what Deputy
3 Suber saw him do. That was the testimony. It
4 is reliable and trustworthy, and you can bet on
5 it.

6 In order for you to believe that Junior
7 Rogers was driving, you would have to believe
8 that Officer Suber lied to you today so that he
9 could arrest Mr. Nash. There was no testimony
10 he had bad blood for him or set him up for that
11 or he didn't recognize Kashif, a man he has
12 known for years and had multiple conversations
13 with and was very familiar with.

14 Now, let's talk about the second charge,
15 possession of cocaine. People chose to do
16 things every day that are bad for them, that are
17 harmful to their body, that have the tendency to
18 disrupt and hurt their lives and people around
19 them. People do things that threaten their
20 health and safety and they do this every day and
21 that's why certain things are illegal and that's
22 why we don't have a right to possess any kind of
23 substance we want and pump it into our body.
24 Because ultimately, the cost to those
25 individuals are spread out to our society. Our

CLOSING ARGUMENT

1 society and our community suffers because of
2 drugs. Possessing drugs by cocaine is illegal
3 for a reason. People don't have the right to
4 take drugs, to subject our society to the
5 dangers and the ills that drugs cause.

6 I submit to you that it is not like he --
7 it is actually pretty crazy to think that he
8 didn't know what was on those scales. They were
9 in his pocket. Those scales were used for
10 weighing drugs. That razor blade was at some
11 point used for cutting cocaine. I don't know
12 whether or not that he had just used that razor
13 blade or when that razor blade was last used.
14 It doesn't matter. That's why they were with
15 that scale. We can use our common sense to
16 understand that. The point I want to make is
17 the fact that it is illegal to posses cocaine.
18 It doesn't matter how much cocaine was found on
19 him. Cocaine is cocaine whether it is a little
20 or a lot, whether or not it is in powder form or
21 a rock form, and that's what our expert tried to
22 explain. Despite how Mr. Harris tried to
23 confuse that issue and make it sound like he was
24 talking about a different drug. Cocaine is
25 cocaine, and cocaine is cocaine whether it is in

CLOSING ARGUMENT

1 rock form powder form or residue. In this case,
2 there was cocaine residue on those scales. We
3 have an expert who tested it and identified it
4 in his testimony and his report, that's his job
5 and it is reliable.

6 Mr. Nash was in possession of cocaine that
7 day and that can't be denied. It is plain and
8 simple.

9 Now, it is a good thing that we had court
10 this week instead of last week because it snowed
11 last week and we may not have been able to come
12 to court one of the days last week. Now, I know
13 in South Carolina here we aren't that familiar
14 with winter weather and snow but one thing that
15 you will always notice when it snows on those
16 rare occasions is that after it snows and the
17 next day the sun comes out and it starts melting
18 away, that is how long that vast amount of snow
19 can melt away and be gone. It seems like every
20 bit of evidence that it snowed is gone until you
21 walk into a spot that has been under the shade
22 for a full day and you see a little patch of
23 snow here that had been left. It is just a
24 little bit of snow. It is not a lot. If you
25 look at that, the little bit of snow that is

CLOSING ARGUMENT

1 still left over there after all of the other
2 snow had evaporated, you know that the whole
3 land was covered, that snow was there. That's
4 what it tells you.

5 Now, Mr. Nash isn't being charged with
6 having cocaine in the past. He is charged with
7 possessing cocaine on June 14, and he did posses
8 cocaine on June 14, a very little bit of
9 cocaine. Mr. Zivkovich told that you was, in
10 fact, cocaine.

11 How certain was he? To a reasonable
12 degree of scientific certainty, he could opine
13 that that was cocaine, you can trust it.

14 Ladies and gentlemen, I am asking you
15 today -- I want you to consider one other thing
16 before I make my last point -- two things. One,
17 Mr. Nash and Mr. Rogers, they are friends. They
18 are family members. It is in evidence in the
19 testimony that they spend a lot of time
20 together. It would not be naive to think that
21 they did not have the opportunity to talk about
22 this and prepare for this day. That is another
23 reason for you to doubt Mr. Rogers' credibility
24 because he is close with the defendant and had
25 time to talk to him about this and had time for

CLOSING ARGUMENT

1 Mr. Rogers to decide he was going to come in
2 here and try to help Kashif out today. It is
3 not unfair for you to think that. It is very
4 reasonable for you to question that.

5 Back to Mr. Zivkovich, Mr. Harris actually
6 said in his closing that Mr. Zivkovich is a fine
7 chemist, a fine chemist. If he is a fine
8 chemist, if he is, in fact, a fine chemist then
9 he wouldn't report false findings, and he would
10 not come in here and lie and tell you he was
11 certain about what that residue was because he
12 said he has tested suspicious substances before
13 and only to receive negative results and to have
14 to say this isn't cocaine, I can't prove this is
15 cocaine. In this case, that wasn't the outcome.
16 In this case, he knew what was inside that scale
17 and it was cocaine.

18 A fine chemist isn't going to lie when he
19 just knows nothing else about the case and has
20 no reason to make it up.

21 Lastly, I just ask that you not be
22 confused by what your job is here. Don't listen
23 to me tell you what your job is. That's his
24 honor's job. He will instruct you on the law
25 and he will tell you what your job is and

CLOSING ARGUMENT

1 whether based on the facts what conclusions you
2 can draw.

3 He will tell that you if you are firmly
4 convinced by the in evidence this case that this
5 defendant was driving while he was a habitual
6 traffic offender and that he possessed some
7 amount, any amount, whether measurable or
8 otherwise of cocaine then he is guilty to both
9 of those offenses. I submit to you that you can
10 be and I submit to you that you are firmly
11 convinced of those facts, that you are firmly
12 convinced by Deputy Suber and by the rest of the
13 evidence that you heard in this case, that this
14 defendant is guilty under the habitual traffic
15 offender statute, that he is guilty of
16 possession of cocaine because Deputy Suber saw
17 him driving and you can trust it, and because
18 the white powder residue that was found in his
19 pocket, on scales in his pocket, was confirmed
20 to be cocaine.

21 I ask you to find him guilty of violating
22 habitual traffic offender statute and possession
23 of cocaine because he has to follow the rules
24 just like everyone else, just like every single
25 one of us here today. These laws apply to him

JURY CHARGE

1 just like everyone else, and he needs to learn
2 the difference between a privilege and a right
3 and respect the fact that he lost his privilege
4 to drive and that he doesn't have a right to
5 possess cocaine in any amount. Thank you.

6 THE JUDGE: Mr. Foreman, ladies and
7 gentlemen of the jury panel, that concludes the
8 final arguments of counsel. It is now time for
9 me to charge you, that is to instruct you with
10 regard to the law that applies to the issues in
11 this case.

12 In this case, the State charges Kashif P.
13 Nash with two offenses. They charge him with a
14 violation of the habitual traffic offender
15 statute and also with possession of cocaine.

16 To these two charges the defendant has
17 pled not guilty which places upon the State then
18 the burden of proving the defendant guilty. A
19 person charged with committing a criminal
20 offense in South Carolina is never required to
21 prove himself innocent. I charge you that it is
22 a viable court rule of law that a defendant in a
23 criminal trial must always to be presumed
24 innocent until his guilt has been proved beyond
25 a reasonable doubt. This presumption of

JURY CHARGE

1 innocence remains with the defendant at all
2 times throughout the trial and is only removed
3 when and if the State has proved guilt beyond a
4 reasonable doubt.

5 It is your solemn duty, ladies and
6 gentlemen, if not clearly convinced of guilt
7 beyond every reasonable doubt to the contrary,
8 to find the defendant not guilty.

9 Mr. Foreman, ladies and gentlemen of the
10 jury panel, I instruct you and emphasize to you
11 the fact that the defendant did not testify in
12 this case is not a factor to be considered by
13 you in any way in your deliberations. You must
14 not consider the fact that this defendant has
15 chosen not to testify when you determine the
16 guilt or innocence of the defendant and must not
17 be considered by you in any matter whatsoever
18 either against or for the defendant.

19 A defendant has a constitutional right to
20 remain silent. If he asserts that
21 constitutional right, it cannot or must not be
22 considered by you in your deliberations. Under
23 your oath, you are to reach no inference or draw
24 any conclusion whatsoever from the fact that the
25 defendant did not testify. The fact that the

JURY CHARGE

1 defendant did not testify should not even be
2 discussed in your jury room.

3 The burden of proof, as I have stated to
4 you, is upon the State. It is not the burden of
5 the accused to prove his innocence. The burden
6 of proof remains upon the State to prove guilt
7 beyond every reasonable doubt.

8 What is a reasonable doubt. Some of you
9 may have served as jurors in civil cases where
10 you were told it is only necessary to prove the
11 facts which is more likely true than not such as
12 by the greater weight or preponderance of the
13 evidence. However, in criminal cases, the
14 State's proof must be more powerful than that.
15 It must be beyond a reasonable doubt.

16 Now, ladies and gentlemen, proof beyond a
17 reasonable doubt is proof that leaves you firmly
18 convinced of the defendant's guilt. There are
19 very few things in this world that we know with
20 absolute certainty. In criminal cases, the law
21 does not require proof that overcomes every
22 possible doubt. A reasonable doubt may also be
23 described as a kind of doubt that would cause a
24 reasonable person to hesitate to act. If you
25 have such a doubt as to the guilt of the

JURY CHARGE

1 defendant then he would be entitled to a verdict
2 of not guilty. Reasonable doubt may arise from
3 evidence which is in the case or from the
4 absence or lack of evidence in the case.

5 Based on your consideration of the
6 evidence, if you are firmly convinced that the
7 defendant is guilty of the crimes charged, you
8 must find him guilty. If, on the other hand,
9 you think there is a real possibility that he is
10 not guilty, you must give him the benefit of the
11 doubt and find him not guilty. You, alone, must
12 make a determination on whether or not
13 reasonable doubt exists as to the guilt of the
14 defendant.

15 Mr. Foreman, ladies and gentlemen, there
16 are two types of evidence which are generally
17 presented during a trial. Direct evidence and
18 circumstantial evidence. Direct evidence
19 directly proves the existence of a fact and does
20 not require deduction. Circumstantial evidence
21 is proof of a chain of facts and circumstances
22 indicating the existence of a fact. Crimes
23 maybe proven by circumstantial evidence. The
24 law makes no distinction between the weight or
25 value to be given either to direct or

JURY CHARGE

1 circumstantial evidence. However, to the extent
2 the State provides circumstantial evidence, all
3 of the circumstances must be consistent with
4 each other, taken together and point
5 conclusively to the guilt of the accused beyond
6 a reasonable doubt. If these circumstances
7 merely portray the defendant's behavior is
8 suspicious, the proof is failed.

9 The State has the burden of proving the
10 defendant guilty beyond a reasonable doubt. This
11 burden rests with the State regardless if the
12 State relies on direct evidence, circumstantial
13 evidence, or some combination of the two.

14 You have heard the testimony of a witness
15 who has special knowledge, skill, experience,
16 training, or education in a particular field who
17 has given opinions as to matters which he is
18 skilled. In determining the weight to be given
19 such opinions, you should consider the
20 qualification and credibility of the expert
21 witnesses and the reasons given for his
22 opinions. You are not bound by such opinions.
23 Give them the weight you feel they are entitled.

24 Mr. Foreman, ladies and gentlemen of the
25 jury of South Carolina, you are the finders of

JURY CHARGE

1 facts in this case. I do not have the right to
2 pass upon the facts or even to express any
3 opinion I might have as to the facts nor may I
4 suggest in any way what I think about the guilt
5 or innocence of the defendant. You should form
6 no opinion in that regard from anything I may
7 have said or any ruling I made during the course
8 of the trial.

9 As the sole judges of the facts in this
10 case, you are also necessarily and sole judges
11 of the credibility or believability of each of
12 the witness that have testified during the
13 course of the trial.

14 Now, there are a number of factors which
15 you may consider in arriving at your assessment
16 as to a particular witness' credibility or
17 believability. Some factors I am going to list
18 for you now, and should you think of other
19 factors that you believe also ought to be
20 considered when you go back into the jury room
21 on the question of credibility, then you should
22 consider those factors as well. You may
23 consider the demeanor of the witness from the
24 witness stand, what was that witness' manner of
25 appearance, was the witness straight forward in

JURY CHARGE

1 answering questions or hesitant in responding to
2 the questions. Simply put, do you believe the
3 witness was telling the truth or not telling the
4 truth? Do you believe the witness knew what
5 that witness testified or did not know what that
6 witness testified.

7 You may consider whether or not the
8 testimony of a witness is consistent or
9 inconsistent with that witness' own testimony or
10 with other testimony or evidence presented
11 during the course of the trial.

12 You may also consider how the witness
13 handled the facts to which he or she testified.
14 You may consider the opportunity that the
15 witness had to observe or hear, that is to
16 perceive the existence of the facts by means of
17 their senses.

18 You may also consider whether a witness is
19 bias or prejudice. That simply means, do you
20 think a particular witness had some reason to
21 come into court and testify one way or another
22 to help or hurt one side or the other.

23 You may also consider whether or not the
24 testimony of a witness was strengthened or
25 weakened by other testimony or other evidence

JURY CHARGE

1 presented during the course of the trial.

2 You as the finders of the facts in this
3 case, you as the judges of the credibility or
4 believability of each of the witnesses that
5 testified, may believe as much or as little of
6 what a witness testifies to as you deem
7 appropriate. You may believe all of what a
8 witness says, you may believe none of what a
9 witness says, or you may believe only part of
10 what a witness says. You may believe one
11 witness against several or several against one.
12 Whatever your good judgment and common sense
13 tells you is the most believable testimony is
14 the testimony you should accept and reject that
15 testimony that you find not to be credible or
16 believable.

17 Mr. Foreman, ladies and gentlemen of the
18 jury, the same constitution that makes you the
19 finders of the facts in this case makes me the
20 sole and only instructor in the law. You must
21 accept as correct the law that I charge and
22 apply to the law the evidence as you find it and
23 reach your verdict. Put aside any conceptions
24 you may have had as to the law before coming
25 here today and accept the law as I instructed it

JURY CHARGE

1 to be. You for purposes of your duty as jurors
2 today should not be concerned about what the law
3 ought to be but what I tell you the law is now
4 in this state.

5 Mr. Foreman, ladies and gentlemen of the
6 jury panel, I charge you with regard to criminal
7 intent. Criminal intent is a necessary element
8 of each crime that must be proved by the State
9 beyond a reasonable doubt. Criminal intent is
10 always a matter that must be determined by the
11 jury from the circumstances surrounding the
12 situation. There is no way to prove intent to a
13 mathematical certainty. There is no way medical
14 science can dissect a person's brain and
15 determine what he had in mind.

16 So the law says that criminal intent may
17 be inferred from the circumstances showing to
18 have existed. This is how the jury makes the
19 determination whether or not the element of
20 requiring intent was present.

21 Criminal intent is a state of mind which
22 operated jointly with an act, with the
23 commission of a crime. Criminal intent is
24 mental state, conscious wrongdoing. It is up to
25 you, the jury, to determine what the defendant

JURY CHARGE

1 intended to do based on the circumstances shown
2 to have existed.

3 I tell you that the State must prove
4 criminal intent beyond a reasonable doubt just
5 as the State must prove every element beyond a
6 reasonable doubt. It is not necessary to
7 establish intent by direct and positive
8 evidence, but intent may be established by
9 inference in the same way of any other fact by
10 taking into consideration the acts of the
11 parties and all of the facts and circumstances
12 of the case.

13 While the State may prove motive, it is
14 unnecessary for the state to do so. However,
15 the State must prove intent.

16 Mr. Foreman, ladies and gentlemen of the
17 jury panel, I charge you now with the law
18 specifically as to the two charges that the
19 State has made against the defendant in this
20 case. You are not going to have these charges
21 written down for you back in the jury room so
22 you are going to have to call on your collective
23 memories as to what I instruct you on what the
24 law is. Once you begin deliberations, and if
25 you are still not sure about some part or all of

JURY CHARGE

1 the law, upon your request I can bring you back
2 out in the courtroom and recharge if you need to
3 be recharged if you do not understand.

4 What I will ask you to do at this time is
5 listen carefully concerning the elements of the
6 two offenses of which the defendant is charged
7 in this case.

8 I am going to charge you first with the
9 offense of possession of cocaine. In this case,
10 the State must prove beyond a reasonable doubt
11 that the defendant, Kashif P. Nash, knowingly or
12 intentionally possessed cocaine. Knowingly
13 means with knowledge, consciousness, not
14 accidentally.

15 Intentionally means willful, intentionally
16 with the result which actually occurs, not
17 incidentally or involuntarily. Intent may be
18 shown by acts of conduct by the defendant and
19 other circumstances from which you may naturally
20 and reasonably infer intent.

21 To prove possession, the State must prove
22 beyond a reasonable doubt that the defendant had
23 both the power and the intent to control the
24 disposition or use of the cocaine.

25 Possession may be either actual or

JURY CHARGE

1 constructive. Actual possession means that the
2 cocaine was in the actual, physical custody of
3 the defendant. Constructive possession means
4 that the defendant had dominion and control or
5 the right to exercise dominion or control over
6 either the cocaine itself or the property upon
7 which the cocaine was found.

8 Mere presence at the scene where the drugs
9 were found is not enough to prove possession.
10 Knowledge of the presence of the drugs is
11 essential. The defendant's knowledge and
12 possession may be inferred when a substance is
13 found on the property of the defendant's
14 control. However, this evidence is subject to
15 evidentiary fact and may be taken into
16 consideration by you along with all of the other
17 evidence in the case and given the weight you
18 decide it should be have.

19 The defendant is also charged in this case
20 with the violation of habitual traffic offender
21 statute. The State in this case must first
22 prove beyond a reasonable doubt that the
23 defendant was operating a motor vehicle in this
24 state.

25 Secondly, the State must also prove beyond

JURY CHARGE

1 a reasonable doubt that at the time the
2 defendant was operating the motor vehicle, the
3 Department of Public Safety had found the
4 defendant to be a habitual traffic offender and
5 had revoked the defendant's license to drive
6 based on that finding. I would charge you also
7 that they would have had to notify him of the
8 suspension based upon the finding of habitual
9 traffic offender. Those are the things that
10 would have to be proved for there to be a
11 violation of the habitual traffic offender
12 statute.

13 Let me go back to the possession of
14 cocaine and say to you the law does not require
15 any specific amount of a drug in order for a
16 person to be found in possession of it. It does
17 not have to be a measurable amount. It does not
18 have to be specific. What it has to be is an
19 amount sufficient to be tested, analyzed, and
20 tested, and a finding made that it is, in fact,
21 that drug. That's what it has to be, not any
22 measurable amount. I don't want you to be
23 confused about that. It is any amount that can
24 be analyzed, tested, and the result found as to
25 whether it is a drug or not. That's all that is

JURY CHARGE

1 required, not any specific amount.

2 Now, nothing I may have said or done
3 during the course of this trial is in any way
4 intended to express a view of the case or an
5 opinion as to the facts, the weight of the
6 evidence on the credibility of witnesses. If
7 any of my actions or words have seemed so to
8 indicate, you will disregard such and form your
9 own opinion as to these matters. You have been
10 selected as fair, impartial jurors, sworn to
11 impartially try and determine the facts of this
12 case. When you comply with your oath to do so,
13 no one will have the right to criticize your
14 verdict and you will have fully discharged your
15 duty as jurors. You are to decide this case
16 according to the testimony you heard from the
17 lips of the sworn witnesses along with other
18 evidence introduced during the course of the
19 trial.

20 I charge you as jurors that you must
21 decide the issues in this proceeding without
22 bias, without prejudice to any party. You
23 cannot allow yourself to be governed by
24 sympathy, by prejudice, by passion, by public
25 opinion, or any other arbitrary factor. Both

JURY CHARGE

1 the State and the defendant have the right to
2 expect that each of you will carefully and
3 impartially consider all of the evidence in the
4 case and you will follow the law as I have
5 explained it to you.

6 Mr. Foreman, ladies and gentlemen of the
7 jury panel, whatever your verdict is in this
8 case, it must be your unanimous verdict. All
9 twelve jurors must agree on the verdict and the
10 foreperson will be authorized to write on behalf
11 of the jury.

12 Mr. Foreman, I charge you once you begin
13 your deliberations you maintain some order in
14 those deliberations. Everyone that wishes to
15 participate to be heard in the deliberations to
16 participate at any time. If for any reason any
17 member of the jury panel needs to take a break
18 from deliberations, all should take a break. By
19 that I mean all twelve jurors should be present
20 and deliberating when deliberations are going
21 on.

22 Now, I have prepared for your use in the
23 jury room two verdict forms, one for each of the
24 two charges in this case. I am going to go over
25 the verdict form with you at this time. The

JURY CHARGE

1 first has to do with the habitual traffic
2 offender violation. The possible verdict which
3 appears on the verdict form reads as follows:
4 "We the jury find the defendant guilty of
5 violating the habitual traffic offender
6 statute."

7 The second possible verdict which appears
8 on the form, "We, the jury, find the defendant
9 not guilty."

10 It is the same as to the possession of
11 cocaine. "We, the jury, find the defendant
12 guilty of possession of cocaine. Or, "We, the
13 jury, find the defendant not guilty of
14 possession of cocaine."

15 Now, in preparing the verdict forms, I
16 have to put the possible verdicts in some order.
17 I do it the same way every time, but the order
18 in which the possible verdict appears on the
19 verdict form mean actually nothing, and you
20 should infer nothing from them.

21 What you should do, Mr. Foreman, is the
22 jury should deliberate separately and make a
23 separate finding as to each of these charges.
24 Make a finding as to each of them and there has
25 to be an unanimous verdict and finding as to

JURY CHARGE

1 each of them.

2 Once the jury has reached an unanimous
3 verdict as to each of these charges, you would
4 then go to the verdict form, find the verdict on
5 the verdict form which corresponds to the
6 verdict reached by the jury. You will simply
7 put a checkmark in the blank by that particular
8 verdict, sign your name on the line above the
9 foreperson's signature and date it. Once you
10 have done that, knock on the door, let the
11 bailiff know you have reached verdict. The
12 bailiff will let me know and I will bring you
13 back into the jury room to receive those
14 verdicts.

15 I will ask you at this time to retire to
16 the jury room, but do not yet begin your
17 deliberations. I have to give counsel an
18 opportunity to request additional instructions
19 on the law and if instruction being requested
20 and I deem is necessary, I will bring you back
21 out and give you further instructions.

22 If there is no additional instructions
23 necessary, I will send you by means of the
24 bailiff the verdict forms and exhibits admitted
25 into evidence and instructions to begin

STATE OF SC VS. KASHIF F. NASH

1 deliberating. Please do not begin deliberating
2 until you get that instruction. Please retire
3 to the jury room all except for the alternate.
4 I ask you not to go into the jury room and wait
5 outside the courtroom door for further
6 instructions. Please retire to the jury room.

7 (Whereupon, the jury exited the courtroom
8 at 3:35 p.m.)

9 THE JUDGE: Exceptions or additional
10 charge from the State?

11 MR. PLEMING: None.

12 THE JUDGE: Defense?

13 MR. HARRIS: No.

14 THE JUDGE: Counsel, look at the exhibits
15 and make sure they are there to go back to the
16 jury.

17 (Whereupon, the alternate juror entered
18 the courtroom.)

19 THE JUDGE: Mr. Hagan, you can stand
20 there, if you will. We made it through the
21 trial without an emergency developing and went
22 with the first twelve jurors chosen. This will
23 complete your service on this case. The good
24 news is this completes your service for the
25 week. We are not going to start another jury

STATE OF SC VS. KASHIF P. NASH

1 trial. We have a lot of work to do but not a
2 jury trial. If you need anything to take to
3 your employer, you can get that from the Clerk's
4 office and a check will be put in the mail for
5 your service. Thank you for your service and
6 sacrifices you made this week to help make our
7 justice system work. You are free to go. Of
8 course, you are welcome to stay if you would
9 like.

10 (Whereupon, the alternate juror was
11 excused at 3:37 p.m.)

12 THE JUDGE: We will be at ease.

13 (Whereupon, the jury began deliberating at
14 3:37 p.m.)

15 (Open Court out of presence of jury.)

16 THE JUDGE: Please bring the jury in.

17 (Whereupon, the jury entered the courtroom
18 at 4:02 p.m.)

19 THE JUDGE: Mr. Foreman, have you and the
20 jury reached an unanimous verdict in these
21 cases?

22 MR. FOREMAN: Yes, sir, we have.

23 THE JUDGE: If you would hand up the
24 verdict form to the bailiff.

25 If the clerk will please publish the

STATE OF SC VS. KASHIF P. NASH

1 verdict.

2 THE CLERK: In the case of State of South
3 Carolina versus Kashif Nash, we, the jury, find
4 the defendant guilty of possession of cocaine.
5 We, the jury, find the defendant guilty of
6 violating the habitual traffic offender statute.

7 THE JUDGE: Ladies and gentlemen of the
8 jury, if this is your verdict, please so
9 indicate by raising your right hand.

10 The record should reflect all have raised
11 their right hand.

12 Any questions of the jury panel from the
13 State?

14 MR. PLEMING: Nothing from the State?

15 THE JUDGE: From the defense?

16 MR. HARRIS: No, your Honor.

17 THE JUDGE: Mr. Foreman, ladies and
18 gentlemen of the jury panel, this will conclude
19 your service on this case. I am also happy to
20 tell you this will also conclude your service
21 for the week. We have plenty of work that we
22 have scheduled for the balance of the week and
23 it is not going to involve another jury so this
24 will complete your service for this week.

25 If anybody needs anything to take to their

STATE OF SC VS. KASHIF F. NASH

1 employer to show them you were required to be
2 here this week, you can go down to the Clerk's
3 office on the next level and they will give you
4 something to take to your employer showing you
5 were required to be here. A check will be put
6 in the mail for services this week or in the
7 very near future. I want to thank you for your
8 service and sacrifices you have made. We do not
9 take that sacrifice for granted. We deeply
10 appreciate it. Again, we could not function
11 without individuals such as yourself who make
12 those sacrifices. You are free to go at this
13 time with our thanks.

14 THE JUDGE: Mr. Foreman, if you would come
15 sign the indictment for us.

16 (Whereupon, the jury exited the courtroom
17 at 4:08 p.m.)

18 THE JUDGE: Solicitor, you need to
19 complete these forms and everyone needs to sign
20 them.

21 While you are doing that, I will be glad
22 to hear from you if you have matters to take up
23 at this time.

24 MR. HARRIS: Your Honor, you mean in terms
25 of mitigation?

STATE OF SC VS. KASHIF P. NASH

1 THE JUDGE: We will do that in a minute.
2 As far as the trial.

3 MR. HARRIS: No, your Honor, I have no
4 motions. Thank you.

5 THE JUDGE: Please bring the defendant up.
6 Solicitor, what do you want to tell me?

7 MR. PLEMING: Yes, sir, your Honor. At
8 this time I would like to read into the record
9 the defendant's prior criminal history. In 2008
10 he was convicted of possession of marijuana, 28
11 grams or less, unlawful carrying of a weapon and
12 reckless driving. 2009, public disorderly
13 conduct, public drunkenness. In 2010,
14 possession of cocaine. In 2010, driving under
15 suspension, open container violation. In 2011,
16 violation for possession of cocaine. In 2013,
17 driving under suspension, second offense,
18 habitual traffic offender, in possession of 28
19 grams or less of marijuana.

20 He is a habitual traffic offender,
21 obviously, and he does have two prior cocaine
22 convictions as we entered on the record. This
23 constitutes a third drug offense, cocaine
24 conviction, and he is currently on probation and
25 has just recently been served.

STATE OF SC VS. KASHIF F. NASH

1 THE JUDGE: Do you have your verification
2 on the previous convictions?

3 MR. PLEMING: Yes, sir.

4 THE JUDGE: Please make those part of the
5 record.

6 (COURT'S EXH. 1, Certificate of
7 Conviction, was marked for identification and
8 received into evidence.)

9 (COURT'S EXH. 2, Certificate of
10 Conviction, was marked for identification and
11 received into evidence.)

12 (COURT'S EXH. 3, Certificate of
13 Conviction, was marked for identification and
14 received into evidence.)

15 THE JUDGE: Are these enhanceable under
16 the current status of the law?

17 MR. PLEMING: Yes, sir, your Honor.

18 THE JUDGE: Is there anything else you
19 want to tell me?

20 MR. PLEMING: No, sir, your Honor.

21 THE JUDGE: Do you wish to proceed today
22 with probation violation today?

23 MR. HARRIS: Your Honor, I believe that
24 he does. He has just been served. We have been
25 aware, obviously anticipating this trial, that

STATE OF SC VS. KASHIF P. NASH

1 would result in violation.

2 THE JUDGE: Mr. Nash, were you served in
3 court today with probation citation for a
4 violation of probation cases Number
5 2013-GS-44-542, 2012-GS-44-055, 57 and 58. Were
6 you served with that in court today? This
7 probation citation I just referred to.

8 THE DEFENDANT: I know I am on probation.

9 THE JUDGE: Were you just served with
10 probation citation in court?

11 THE DEFENDANT: All right.

12 THE JUDGE: Show it to him so he
13 understands.

14 THE DEFENDANT: I understand, your Honor.

15 THE JUDGE: All right. Tell me about
16 probation.

17 PROBATION OFFICER: Thank you, your
18 Honor. On April 9, 2013 Mr. Nash was sentenced
19 by Judge McMahon here in Union County for
20 possession of crack cocaine. At that time, he
21 received a sentence of three years suspended
22 with time served and the balance suspended with
23 three years probation. He got credit for one
24 day of jail time on that.

25 Also, possession marijuana of 30 days

STATE OF SC VS. KASHIE F. NASH

1 suspended on time served, balance suspended to
2 three years probation.

3 DUS second, 60 days suspended time served,
4 balance suspended three years probation.

5 And being habitual traffic offender, three
6 years suspended time served, balance suspended
7 three years probation.

8 THE JUDGE: Are those all concurrent?

9 PROBATION OFFICER: Yes, sir.

10 THE JUDGE: He has almost three years
11 left.

12 PROBATION OFFICER: Yes, sir.

13 THE JUDGE: Counselor?

14 MR. HARRIS: May it please the Court,
15 your Honor. Mr. Nash is 25 years of age. He
16 has two small children that he says he supports.
17 He has lived here all of his life in Union
18 County other than the time he spent at a
19 technical college in North Carolina. He says he
20 does have a degree in welding.

21 He tells me that the last decent job he
22 had was about a year ago but he got put out of
23 that job because of his background. He has just
24 been unable to find employment because of his
25 background. So, of course, this is not going to

STATE OF SC VS. KASHIF P. NASH

1 make it any better. Your Honor, there is not a
2 lot more to say. Unfortunately, I don't have
3 time to rehash the trial.

4 THE JUDGE: Go ahead.

5 MR. HARRIS: Your Honor, that's all we
6 have.

7 THE JUDGE: I don't think there will be
8 time to rehash the trial. He was guilty. He
9 has a right to go to court. He has a right to
10 go to trial, absolute constitutional right to go
11 to trial. I would not deny him that right and
12 he had that right. I would say he had no
13 defense to these charges. Be that as it may, he
14 had a right to go to trial, I am not criticizing
15 him for it, but I am saying there is no real
16 defense raised with these charges when they had
17 a solid case against him. He did get two people
18 off their jobs from Columbia to come up here and
19 testify.

20 Is there anything you want to say,
21 Mr. Nash?

22 THE DEFENDANT: No, your Honor.

23 THE JUDGE: Case Number 2014-GS-44-33
24 Kashif P. Nash found guilty by a jury of
25 possession of cocaine being a third drug

1 offense, the sentence of the Court is to be
2 committed to the State Department of Corrections
3 for a determinate term of six years. The
4 sentence is concurrent and give him credit for
5 time served.

6 Case Number 2013-GS-44-918, Kashif P. Nash
7 having been found guilty by a jury trial of
8 habitual traffic offender violation, the
9 sentence of the Court is to be committed to the
10 State Department of Corrections for determinate
11 term of five years. That is to be concurrent.
12 Credit for time served.

13 The probation violation matters, the Court
14 finds substantial, willful violation of
15 probation. The Court will revoke the remaining
16 time he had on all and run concurrent and
17 terminate probation. Thank you.

18 (Whereupon, the above-entitled matter was
19 concluded.)
20
21
22
23
24
25

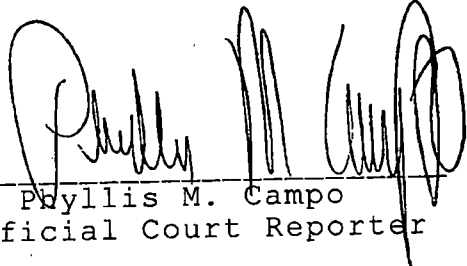
C E R T I F I C A T I O N

STATE OF SOUTH CAROLINA
COUNTY OF YORK

I, Phyllis M. Campo, Official Court
Reporter for the Sixteenth Judicial Circuit of
the State of South Carolina, do hereby certify
that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings
at the time and place herein in the
above-entitled matter.

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

May 19, 2014



Phyllis M. Campo
Official Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

County of Union)Kashif Bateia Uash #35874)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2014 ~~CP-44~~ 401APPLICATION FOR
POST-CONVICTION REVIEWWILLIAM F. GALT
CLERK OF COURT
UNION, SC

2014 OCT 7 PM 3 07

FILED FOR RECORD

INSTRUCTIONS - READ CAREFULLY

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

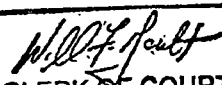
Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

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

1. Place of detention Catawba Pre-Release Center
1030 Milling Road Rock Hill, SC 29730
2. Name and location of Court which imposed sentence Union County
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2014-GS-44-0033
 - (b) 2013-GS-44-0918

A TRUE COPY

OCT 7 2014


CLERK OF COURT

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 2-5-14 / 6 years
- (b) 2-5-14 / 5 years Concurrent
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Commission of indigent Defense
- ii. Division of Appellate Defense
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal was dismiss
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. September 25, 2014
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
- (b) Insufficient chain of custody
- (c) Unreasonable Search
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attachments
- (b) See Attachments
- (c) See Attachments
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. I filed an appeal it was dismissed
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. South Carolina Commission of indigent Defense
- ii. Division of Appellate Defense
- iii. Post Office Box 11589
Columbia, SC 29211-1589
- iv. _____

(c) the disposition thereof:

i. Appeal was dismissed

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. September 25, 2014

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) I have Post-Conviction Relief issues
 (b) not appeal issues
 (c) _____

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

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

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

(a) the name and address of each attorney who represented you:

i. Picky Harris, Attorney 145 N Church Street # 34 SpHbg SC 29306

ii. Benjamin John Tripp P.O. Box 11589 Columbia SC 29211

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Jury Trial

ii. Appeal

iii. _____

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

I want Possession Cocaine 3rd offense Reduced to
a Residue Violation

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

No

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Union)

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

Kashif Nooh

SWORN to and subscribed before me this 26
 day of September, 2014.

James Cardine (L.S.)
 Notary Public

My Commission Expires: 9-21-2020

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

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

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

Keshif Nosh

Applicant

SWORN or affirmed to and subscribed before me this

26 day of September, 2014.

[Signature]
Notary Public

My Commission Expires: 9-21-2020

11A Ineffective Assistance of Counsel is Present in my Case. The Applicant contends the state Failed to Produce Substantial Evidence to warrant A 6yr. sentence Because there was "NO Weight" Recorded By the Forensic Scientist. The state Presented NO Evidence of Fact NOR Circumstantial to Support the conviction that there was Ever Any Weight involved. [see "State v. James 608 S.E.2d 455"]. I'm aware that Possession of any amount of Cocaine can support this conviction But in this Case there is NO Amount. SEE exhibit A. I was originally charged with Possession of drug Paraphernalia I assume there was residue yet in weighs Nothing. SEE exhibit B 1 & 2. state 44-53-370 does not say anything About Residue The weight of any controlled Substance in this Section includes the Substance in Pure form or any compound or mixture of the Substance

11B The Applicant submits Proof that chain of custody is not sufficient Because the storage location for the Best Kit is not Filed. there is no location. SEE Exhibit C. Where Analyzed Substance that Has Passed through Several Hands, the identity of individuals who Acquired the Evidence and what was done with the Evidence Between the taking and the Analysis must not Be left to conjecture. See Key #110 Criminal law. Exhibit C clearly does not say where the items were secured

11C The Applicant states the search was unreasonable and violated my 4th Amendment Protection Against Unreasonable Searches and Seizures. Officer Suber was wrong when he conducted a warrantless search of a vehicle I wasn't even in at the time.
SEE "State v. Pope 2014 WL 4087586".

S/ Thach Nash # 358744

Date:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF UNION	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
	)	
Kashif Poiteia Nash, #358744,	)	2014-CP-44-0401
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

The Respondent, making its Return to the Application for Post-Conviction Relief filed October 7, 2014, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. The Applicant was indicted at the August 2013 term of the Union County Grand Jury for Habitual Traffic Offender (2013-GS-44-0918) and at the January 2014 term of the Union County Grand Jury for Possession of Cocaine (2014-GS-46-0033). He was represented by Ricky Harris, Esq. On February 4-5, 2014, the Applicant was tried by a jury and convicted both charges as indicted. The Honorable Lee S. Alford, sentenced Applicant to confinement for six (6) years for Possession of Cocaine, 3rd offense and five (5) years, concurrent, for Habitual Traffic Offender.

A notice of appeal was filed on Applicant's behalf. Thereafter, Applicant signed an affidavit and submitted to the Court of Appeals, informing the Court of Appeals that he wished to dismiss his appeal. The Court of Appeals issued an Order dismissing

Applicant's appeal on November 7, 2014. The Remittitur was issued on November 24, 2014.

Attached herewith and incorporated herein by reference are the records of the Union County Clerk of Court regarding the subject conviction, the Applicant's records from the Department of Corrections, the trial transcript, and the Court of Appeals order. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. "Ineffective Assistance of Counsel"
2. "Insufficient chain of custody"
3. "Unreasonable search"

III.

The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Butler, Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

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

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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

VI.

The Applicant alleges there was an insufficient chain of custody and an unreasonable search in his case. These allegations raise direct appeal issues that are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974).

A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. His voluntary dismissal of his direct appeals has waived these allegations as grounds for relief. Therefore, the Court should summarily dismiss these allegations.

V.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VI.

WHEREFORE, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired. In the alternative, Respondent requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

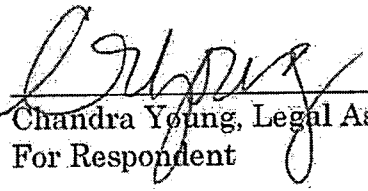
February 10, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF UNION	)	
	)	
	)	2014-CP-44-0401
	)	
KASHIF P. NASH, #358744	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

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

Leah B. Moody
 235 East Main Street; Suite 115
 Rock Hill, SC 29730

DATED this 10th day of February, 2015.


 Chandra Young, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA

2 -----x

3 KASHIF POITEIA NASH,

4 Petitioner,

5 Case No.

6 -against-

2014-CP-44-0401

7 STATE,

8 Respondent.

9 -----x

10 November 3, 2016

11 Union, S.C.

12

13 B E F O R E:

14 HONORABLE BROOKS P. GOLDSMITH

15

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

17 LEAH MOODY, Esquire

18 Attorney for the Petitioner

19

20 JUSTIN HUNTER, Esquire

21 Attorney for the Respondent

22

23 Aileen Butler

24 Official Court Reporter

25

1		<u>I N D E X</u>			
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	Kashif Nash				
4	Ms. Moody	6			
5	Mr. Hunter		42		
6	Ricky Harris				
7	Mr. Hunter	45			
8	Ms. Moody		60		
9					
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1	<u>E X H I B I T S</u>			
2				
3	<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
4				
5		NO EXHIBITS RECEIVED		
6				
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1 MR. HUNTER: May it please the Court, Your Honor.
2 This is Kashif Nash versus State of South Carolina.
3 That's 2014-CP-44-0401.

4 Your Honor, he was indicted in Union County for
5 habitual traffic offender. That's 2013-GS-44-918 and
6 also possession of cocaine, 3rd offense, 2014-GS-44-33.
7 Your Honor he was represented at trial by Mr. Ricky
8 Harris. On February 4, 2014 he underwent a jury trial
9 before the Honorable Lee Alford. He was subsequently
10 found guilty of both charges. Judge Alford sentenced
11 him to a prison term of five years on the habitual
12 traffic offender charge and six years on the possession
13 of cocaine, 3rd offense charge.

14 He filed a Notice of Appeal. On October 6, 2010,
15 (sic) he filed an affidavit explaining that he wished
16 to withdraw his appeal. Court of Appeals issued an
17 Order dismissing that action November 7, 2014. A
18 Remittitur was sent November 24, 2014.

19 He is present in court today represented -- oh, he
20 filed his current PCR action October 7, 2014, several
21 allegations. The State filed it's Return. He's
22 present today and represented by Miss Leah Moody.

23 THE COURT: Miss Moody.

24 MS. MOODY: Thank you, Your Honor. May it please
25 the Court.

1 Before I call Mr. Nash to the stand, Your Honor, I
2 just want to make sure that it is on the record that Mr.
3 Nash filed his PCR application for ineffective
4 assistance of counsel and in doing so he alleges that
5 his attorney failed to communicate with him information
6 that he received from the State, adequately
7 communicating with him, as well as Your Honor, his
8 attorney failed to object to the improper impeachment of
9 a witness, Junior Rogers, for his prior conviction
10 without a balancing test within the hearing as to the
11 prejudice or the probative value of that information
12 being presented to the jury.

13 He also alleges that his counsel was ineffective
14 assistance of counsel where his counsel failed to object
15 to the closing arguments statements by the State, as
16 well as his counsel was ineffective assistance when he
17 failed to argue his position as to whether he was in
18 custody during the questioning of Mr. -- well, him being
19 questioned by the officer who was the arresting officer
20 and there was some statements involved in that situation
21 where it should have been -- he should have been advised
22 of his Miranda warnings. As well as where he -- where
23 he was -- I guess I should say that it's not that he was
24 arrested, but he was detained with the arresting officer
25 on private property and he elicited statements against

1 his interest, Mr. Nash's interest. I believe that is
2 all of the amendments.

3 Your Honor, I also believe that in his
4 application it specifically states insufficiency of the
5 chain of custody that his attorney did not object to the
6 chain, and that's dealing with the scales involved with
7 the possession of cocaine third offense that he was
8 convicted of, as well as the unreasonable search of the
9 property of the car.

10 At this time Your Honor I would ask to call Mr.
11 Nash to the stand.

12 THE COURT: All right.

13 KASHIF POITEIA NASH, called as a witness, having
14 been duly sworn by The Clerk, was examined and
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MS. MOODY

18 Q Mr. Nash, could you please state your full name for the
19 record.

20 A Kashif Nash.

21 Q And where are you currently incarcerated?

22 A Kershaw Correctional Institution.

23 Q And how long are you incarcerated -- will you be
24 incarcerated there?

25 A I have been there five months I've been at Kershaw.

1 Q Well, the department of corrections, what is your
2 sentence?

3 A Six years, nonviolent.

4 Q And so since the date of your trial which was 2000 --
5 excuse me February 15, 2014, you have been in the department of
6 correction?

7 A Yes, ma'am.

8 Q All right. But you have been in different facilities?

9 A Different location.

10 Q Okay. So, who was your attorney with regard to this
11 habitual offender and possession of cocaine 3rd?

12 A Attorney Ricky Harris.

13 Q And is that person you file your application -- your
14 PCR application relief against?

15 A Ineffective counsel.

16 Q Did you file your application for PCR against Mr.
17 Harris?

18 A Yes, ma'am.

19 Q Okay. And what were the grounds that you filed your
20 application on?

21 A On issue number two.

22 Q Let me ask you this way. You filed against your
23 attorney for ineffective assistance of counsel.

24 A Full issue.

25 Q Right, but the overall issue is ineffective assistance

1 of counsel, correct?

2 A Yes, ma'am.

3 Q Okay, and in that you have four issues that you would
4 like the Court to hear about?

5 A Yeah, I want to amend that all so I get copies of them,
6 if possible.

7 Q Okay. You understand for purposes of this hearing you
8 need to speak about what those issues are?

9 A Well, for the second issue I have inefficient for not
10 -- inefficient for not objecting on the grounds of the solicitor
11 impeaching my witness.

12 Q And the witness that you are speaking of can you tell
13 the Court?

14 A His name is Junior Rogers.

15 Q Junior Rogers?

16 A Yes, ma'am.

17 Q On the grounds it would be more prejudicial than
18 probative and the solicitor did not produce indictments for the
19 trial judge to determine whether assault and battery of a high
20 and aggravated nature offense involved the crime of dishonesty.

21 Q Okay, lets break that down. So, your saying that the
22 your attorney, Mr. Harris, did not object to the solicitor
23 questioning about Mr. Roger's prior offense?

24 A For impeaching my witness without giving a 403 three
25 balancing test.

1 Q So, when you say he impeached the witness what
2 specifically did he do? Would you agree with me that he asked
3 him about a prior conviction?

4 A He asked him a question about assault and battery and
5 he shouldn't have did that like I said without the 403 balancing
6 test he shouldn't have impeached him.

7 Q And who was suppose to do the 403 balancing test?

8 A Ricky Harris. Oh no, not Ricky, Blaine Plemning

9 Q You mean the Court should have decided whether or not
10 this conviction or this impeachment of this witness was within
11 the 403 balancing test?

12 A He pulls the game of 403 balancing test for impeaching
13 my witness about assault and battery charge. Do you know what
14 I'm saying.

15 Q Well, you have got to explain it so the Court
16 understands what you are saying. Who is suppose to do the
17 balancing, the Court or the State?

18 A The State should have did a balancing test.

19 Q Okay. So, you are saying that Mr. Harris should have
20 objected to that information coming in to the trial?

21 A He should object when Junior Rogers was on the stand
22 getting impeached.

23 Q That's what I am saying?

24 A Yes, ma'am.

25 Q Mr. Harris should have objected when the question was

1 asked of Mr. Rogers, correct?

2 A Yes, ma'am.

3 Q Okay. And when that objection was rendered the Court
4 should have ruled on that objection, correct?

5 A Yes, ma'am.

6 Q Okay. So they would have gone through the balancing
7 test as to whether or not that information was more prejudicial
8 versus probative, correct?

9 A Yes, ma'am.

10 Q Okay. And so your attorney didn't object so the Court
11 never got to make a ruling on that, correct?

12 A That's correct.

13 Q Okay. And specifically what you are talking about is
14 on page 238 of the transcript where Mr. Plemning was questioning
15 Mr. Rogers?

16 A Yes, ma'am.

17 MS. MOODY: Your Honor, may I approach the
18 witness.

19 THE COURT: You may certainly.

20 Q Do you recognize this document?

21 A Yeah, I recognize it.

22 Q What is it?

23 A Transcript.

24 Q Okay, of your trial?

25 A Yes, ma'am.

1 Q Okay, and on page 238, starting at line 24.

2 A "Mr. Rogers have you ever been convicted of a crime?"

3 Answer, "Yes, sir." Question, "What were you convicted of?"

4 Answer, "Assault and battery." Question, "Was it assault and

5 battery of a high and aggravated nature?" Answer, "Yes, but it

6 don't -- it don't see the relevance in this case." Question,

7 "excuse me."

8 Q Okay, so is that what you can talking where your

9 attorney should have --

10 A He should have objected at that point.

11 Q He should have objected at that question being asked of

12 your witness?

13 A Yes, ma'am.

14 Q Okay. And you're saying that he had to provide the

15 copies of the indictment where the witness was convicted?

16 A For the trial judge, yes, ma'am.

17 Q But because your attorney didn't object it didn't -- it

18 was not taken up by the trial judge?

19 A Yeah, that's ineffective counsel. Objecting to his

20 impeachment.

21 Q All right. Okay. And your next issue in this PCR is

22 what?

23 A Issue number three, is ineffective assistance of trial

24 counsel, Harris didn't object to a filing a motion for a

25 mistrial where the defense did not strongly attack --

1 THE COURT: You have to speak slower and more
2 distinctly.

3 A Issue three is ineffective assistance of trial counsel
4 Harris, where Harris failed to object to a file a motion for
5 mistrial where the defense did not strongly attack Officer
6 Suber's (phonetics) credibility when Solicitor Plemning calls
7 prejudice by improperly vouching for the credibility of law
8 enforcement Officer Suber in the closing arguments stating I
9 submit to you Deputy Suber certainly has no reason to risk his
10 job and freedom to come in here and swear under oath that he
11 did. That he had seen Mr. Nash driving the car if he didn't see
12 Mr. Nash driving the car. He would not be mistaken if he had --
13 if he didn't get a good look at him he would have told you. He
14 has no reason to risk that, but he was confident. I mean, he
15 knows what he is talking about. He didn't have any doubt of who
16 he saw driving the car. That's what Deputy Suber saw him do.
17 That was the testimony is reliable and trustworthy and you can
18 bet on it. In violation of Nash's right and ineffective
19 counseling and a fair trial under U.S. Constitution, fifth,
20 sixth and fourteenth amendment.

21 Q Okay, so you are saying that your attorney should have
22 objected when the solicitor made those comments to the jury. Is
23 that what you are saying?

24 A Yes, ma'am.

25 Q Okay, and what you read came from the transcript?

1 A Yes, ma'am.

2 Q Okay, and you would agree with me that comes from page
3 286 of the transcript?

4 MS. MOODY: Your Honor, just for the record that
5 on page 286 and 287 of the transcript.

6 A Yes, ma'am, line 24 through line 25 and page 287, one
7 through 15.

8 Q And so your attorney did not object, correct?

9 A Yes, ma'am.

10 Q And your next issue is as to whether or not you were in
11 custody and whether the law enforcement officer should have
12 given you your Miranda warnings?

13 A Yeah, issue number four.

14 Q Issue number four.

15 A Yeah, ineffective assistance of trial counsel Harris
16 where Harris failed to argue that a reasonable person in Nash's
17 position would not have felt that he was free to leave or Nash
18 had prior knowledge and assume a warrant to him about driving.
19 Two, failed to argue Suber to pursue Nash as suspect for DUS.
20 Three, failed to argue that Suber had drove upon prior property
21 and behind the Chevy vehicle blocking it in. Four, failed to
22 argue that Suber gave Nash a directive to come to him while
23 dispatching other officers, and five, failed to argue that
24 Officer Suber asked the question he knew or should have known
25 would have elected an incriminating -- incriminating response of

1 why were you driving. Ineffective would mean in US vs Henderson
2 in violation ever Nash's rights to effective assistance of
3 counsel and a fair trial in under the US constitution fifth,
4 sixth and fourteenth amendment.

5 Q So you are stating that your attorney did not argue
6 those positions?

7 A He didn't argue five facts of how did I feel. Did I
8 feel could I leave. Did I feel could I walk away.

9 Q Well know when you say he didn't argue five facts are
10 you discussing in front of the jury he didn't argue that?

11 A Yes, ma'am.

12 Q Okay. Did you testify in the trial?

13 A No, ma'am, I didn't testify.

14 Q And you wanted your attorney to argue that to the jury
15 in your closing?

16 A I mean, I got the reason why I ain't testify.

17 Q Well, I understand that, but this issue you are saying
18 that your attorney did not argue this to the jury. The only way

19 --

20 A No, ma'am, he didn't argue.

21 Q Well, when you saying that I need to know at what point
22 because you didn't testify, correct?

23 A That's correct.

24 Q And so you wanted him to argue this in the closing
25 argument because if you're not testifying he can't make that

1 argument if you are not on the stand?

2 A That's another issue.

3 Q We will come to that, but I need you to address at what
4 point did you want your attorney to make that argument, during
5 the closing or was there an objection he was suppose to make?

6 A I figured he should have objected in the beginning.
7 Well, um ---

8 Q You recall the Court talking about your statement being
9 submitted, the statements that were made on the video in this
10 case, do you recall that?

11 A Yes, ma'am.

12 Q Okay, and you recall that your attorney made an
13 argument regarding conversation that was on the video, but you
14 couldn't see who was doing the talking, correct?

15 A Yes, ma'am.

16 Q Okay, and is that at that point that you wanted your
17 attorney to argue?

18 A Yeah, he should have argued when he incriminated me.

19 Q When the Officer Suber incriminated you?

20 A Yes, ma'am.

21 Q Okay, and they had a Jackson v. Denno Hearing where
22 they took testimony from Officer Suber, correct?

23 A They took, yeah they took many testimony from.

24 Q And so are you saying that you didn't get to give your
25 testimony or your side of where you were?

1 A No, ma'am, I didn't.

2 Q And that's where you feel your attorney should have put
3 you on the stand so you could relay that to the Court?

4 A Yes, ma'am.

5 Q All right. So, that's took place in --- was there any
6 other point of time that your attorney should have made those
7 arguments? Are you saying at the closing argument?

8 A Should have made that argument in the beginning.

9 Q Okay, and he should have argued that to the Court in
10 the Jackson v. Denno Hearing?

11 A Yeah, he should have argued that at the beginning of
12 Court.

13 Q Right, the Jackson v. Denno Hearing which was done with
14 Officer Suber, correct?

15 A Yes, ma'am.

16 Q All right. So your attorney didn't make those
17 arguments and you are saying that violated your rights and
18 rendered him ineffective?

19 A Yes, ma'am.

20 Q What is your next issue?

21 A The first one. My first issue of ineffective
22 assistance of counsel present in my case the applicant contend
23 that the State failed to produce substantial evidence to warrant
24 a six-year sentence because there was no weight recorded by the
25 forensic scientist. The State presented no evidence of fact nor

1 circumstantial to support this conviction that there was ever
2 any weight involved. See State versus James.

3 I'm aware that possession of any amount of cocaine can
4 support this conviction but in this case there is no amount.
5 See exhibit A.

6 Q And were you talking about exhibit A that goes along
7 with your application?

8 A Yes, ma'am.

9 Q Okay, and so you are talking about on the charge for
10 possession of cocaine third offense, there was no weight of any
11 kind of drugs. There was no drugs found at the time that you
12 were arrested?

13 A Yes, ma'am. I mean, it wasn't no drugs found. It was a
14 scale.

15 Q Right. No drugs found --

16 A Yeah.

17 Q -- and the evidence that they seized was no weight?

18 A No amount.

19 Q No amount found, but they did take in to custody a
20 scale and razor?

21 A Yes, ma'am.

22 Q And on that scale was there any drugs on that scale?

23 A No, ma'am. They say a forensic scientist residue zero
24 point zero. No weight obtained.

25 Q So there was residue on the scales. If you were

1 weighing some drugs you would put on the scale and it would
2 render a weight, correct?

3 A Yes, ma'am.

4 Q But the only thing they said they found was something
5 of residue. Like something but it was not actual --

6 A It wasn't there on the scale.

7 Q Okay, and then they found a razor and that's what they
8 took in evidence as well too?

9 A Yes, ma'am.

10 Q And so you are saying that the State could not come up
11 with -- they could not prove that this was possession of
12 cocaine, just possession of a scale and razor?

13 A Yes, ma'am.

14 Q And so you are challenging why your attorney did not
15 object to it?

16 A Yes, ma'am. I mean, he hadn't object to it.

17 Q But what did you want him to do? What should he have
18 done?

19 A Do you want me to finish reading? No amount seized. I
20 was originally charged with possession of drugs paraphernalia.
21 I assumed there was residue yet it weighed nothing. See exhibit
22 B one and two. I was charged with paraphernalia.

23 Q The ticket that you were charged with when you got
24 arrested is a uniform ordinance summons that you got, is that
25 what you are referring to?

1 A Yes, ma'am.

2 Q And you attached that to your PCR application and on
3 that that was clocked on June 19, 2013?

4 A It say 7-12-13.

5 Q I understand that, but if you look to the side it says
6 filed for record. The Court has the file for record with your
7 application as 2013, June 19th?

8 A Yes, ma'am.

9 Q Okay. So that's the document you are talking about,
10 and you were originally given a summons and trial date to come
11 regarding the possession of drug paraphernalia from Officer
12 Suber?

13 A Yes, ma'am.

14 Q Okay, and so you're saying that when you got to this
15 trial you weren't dealing with this charge you were dealing with
16 possession of cocaine third offense?

17 A I should have been dealing with paraphernalia instead
18 of third offense cocaine possession.

19 Q And so what did you want your attorney to do with this,
20 object to this, you being charged with possession of cocaine?

21 A They should have handled that really in pretrial.

22 Q All right.

23 A Like motions.

24 Q Right, so what did you want -- that is what I am trying
25 to get from you?

1 A It's a 44-53-370. It doesn't say anything about
2 residue, the weight of being a controlled substance in this
3 alleged and two, the substance in pure form or any compound
4 mixture of this substance. So they can't charge me with
5 possession third, for nothing, which is the original charge of
6 residue. That's what I am arguing.

7 Q So you want your lawyer to file a motion to challenge
8 the indictment, the direct presented indictment for possession
9 of cocaine third offense?

10 A Yes, ma'am.

11 Q And he did not do that?

12 A No, ma'am.

13 Q Did you all discuss him doing that?

14 A No, we didn't really discuss it.

15 Q I'm sorry.

16 A No, ma'am.

17 Q Okay, and prior to you going to trial did you and your
18 attorney have an opportunity to discuss the evidence that they
19 had against you?

20 A We talked about it.

21 Q Okay. Do you recall how often or how many times you
22 talked about it?

23 A Maybe once, or twice at the most. Yeah, twice.

24 Q And so when you all talk about it did you say to him
25 that why were you being charged -- why were you charged

1 originally with paraphernalia and then indicted for the
2 possession of third?

3 A Yes, ma'am.

4 Q And what if anything did he tell you with regard to the
5 new charge?

6 A He said he felt they couldn't do it. They couldn't
7 charge me with possession of third.

8 Q And so when you all got to trial -- I mean, like what
9 happened? Did he change his opinion? Did you all talk about it
10 any further?

11 A I mean, he discussed it at the trial. I felt he wasn't
12 argued like it should have been argued.

13 Q And how should it have been argued?

14 A Like see 11-B on the paperwork right here, it say he
15 didn't have a chain of custody.

16 Q Okay. Now you are talking about the evidence, when
17 they seized the evidence from you, but when you are talking
18 about the charge that's a different thing?

19 A The scale was passed down through several hands.

20 Q I understand that, but you are saying that your
21 attorney should have challenged whether you were charged with
22 possession of a third offense versus drug paraphernalia and you
23 just said that he didn't argue it the way it should have been
24 argued.

25 What did you want him to say? Did you want him to say that

1 they should not be allowed to charge you with the third and that
2 your original charge was paraphernalia and that's what they
3 should stick with?

4 A Yes, ma'am.

5 Q Did he present any kind of case law or did he discuss
6 any kind of case law with you about whether or not they could
7 charge you for residue on the scale?

8 A No, ma'am.

9 Q So when you say you all discussed it, you all discussed
10 it but it did not come out at trial?

11 A No, it didn't come out at trial. They just argued
12 about the scale, you know.

13 Q Which takes you -- go ahead. I'm sorry.

14 A About the scale. It didn't have nothing on the scale.
15 They checked the scale at trial.

16 Q Who said it didn't have anything on the scale?

17 A Roger Suber actually said it didn't have nothing on it.
18 It didn't have nothing on the scale. Like when I had it it
19 didn't have anything on the scale.

20 Q Okay. So, when you talk about chain of custody you are
21 saying that the chain of custody as to the scale and the razor
22 was not proven by the State?

23 A It had no location.

24 Q I'm sorry?

25 A You have to have a location. I'm going to read. I'm

1 going to read it out. It says the applicant submits proof of
2 chain of custody is not significant because the storage location
3 for the BEST kit is not filed. There's no location, see exhibit
4 C where analyzed substance has passed through several hands.
5 The identified of the individual who acquired the evidence and
6 what was done with the evidence between the taking and the
7 analysis must not be left and see 110 criminal law. Exhibit C
8 clearly does not say what item was secured.

9 Q Now, these items that you talked about that weren't
10 secured, you're referring to things that you attached to your
11 application, correct?

12 A Yeah, everything in application. Yes, ma'am.

13 Q Okay. And so, you are saying that there -- they didn't
14 secure it, but didn't Officer Suber testify about putting it in
15 a Best evidence bag?

16 A Yeah, that's what he said. But he also said he laid
17 the scale on top of the car, then he put the scale inside his
18 car without wrapping it in no kind of Best kit and left. And I
19 got in another car with another officer and went down to the
20 county.

21 Q So what you're saying is you didn't see him put it in
22 --

23 A He didn't. No camera. He didn't put -- he put it in
24 his car. He stated that in the transcript.

25 Q Can you point to where you are talking about?

1 THE COURT: The trial transcript:

2 MS. MOODY: Yes, sir.

3 Q From line 18.

4 A Question, "What did you find?" Answer, "I want to say
5 his right front pocket there was a black set of scales."
6 Question, "In the course of your career in law enforcement did
7 this raise any suspicion with you?" Answer, "Yes." Question,
8 "What did you do with the scales after you found them in his
9 pocket?" Answer, "We took them out of his pocket and laid them
10 on top of the patrol car. When we got back to the office we
11 placed them in a Best kit."

12 Question, "Let me back up a little bit. What is it about
13 those scales that made you suspicious?" Answer, "Once you open
14 it up there was a razor blade under the lid of the scales."
15 Question, "Have you had the opportunity to view and seize
16 cocaine during the course of your job as a police officer?"
17 Answer, "Yes." Question, "Have you had the opportunity to view
18 and seize cocaine residue on other items?" Answer, "Yes."

19 Q Do you recall -- so when you said that he took the
20 scales and put it on top of the car you're saying that he put it
21 on top of the car and then he took it back to the office with
22 him?

23 A Yes, ma'am.

24 Q And you are saying that you don't have any information
25 that shows that he put it in a Best evidence kit and that it

1 went as as far as being tested by SLED that it went through the
2 proper channels?

3 A That's correct?

4 Q And what did you want your attorney to do with regard
5 to that information?

6 A File a motion for that.

7 Q Well, during the trial did you want him to object to
8 it?

9 A You really can't object to any argument about the
10 situation in pretrial. Pretrial.

11 Q So if he would put in a motion during pretrial that
12 would have resolved the issue you feel?

13 A Possibly. Possibility it would have.

14 Q But he didn't object to the chain at all?

15 A The chain of custody he didn't object to it.

16 Q Or he didn't challenge it I should say?

17 A He didn't challenge it like he should have. He should
18 have challenged. No, ma'am.

19 Q Is there any other issues you have?

20 A What about 11-C, the applicant states that the search
21 unreasonable and violated my fourth amendment, prohibited
22 against unreasonable search and seizure. The officer was
23 wrongly in conducting a warrant of search of a vehicle I wasn't
24 even in.

25 THE COURT: I can't understand the witness.

1 A He say the applicant states the search is unreasonable
2 and violated my fourth amendment prohibition (sic) against
3 unreasonable searches and seizure. Officer Suber was wrong when
4 he conducted a warrant and search of a vehicle I wasn't even in
5 at the time.

6 Q Okay. So you are saying that he did an unlawful
7 search, the search of the car?

8 A Yes, ma'am.

9 Q Okay, and he did that after he searched you and found
10 the scale in your pant's pocket.

11 A Yes, ma'am. Another officer did with him.

12 Q I didn't understand what you said.

13 A The officer that took me down to the county search the
14 car.

15 Q The officer who took you to the county searched your
16 car?

17 A He did too without my concept. I didn't tell them they
18 could search the car. It was on private property. He didn't
19 have no reason to search the car even though it wasn't anybody
20 in the car.

21 Q I'm sorry, even though who wasn't in your car?

22 A There was nobody in the car at the time.

23 Q So, you are aware when Officer Suber said that he saw
24 the car it was on the road, street, highway, that he has
25 jurisdiction over, correct?

1 A Yes, ma'am.

2 Q Okay. And then when he did a search of you he found
3 the scales, correct?

4 A Yes, ma'am.

5 Q And when he found the scales he is saying that he was
6 under suspicion that there was drugs or something in the car?

7 A I guess he did feel that way. He put me in cuffs and
8 he searched the car.

9 Q But you're saying when that came out you're saying that
10 your attorney should have objected to that or --

11 A All this should have went in a motion.

12 Q I understand that, but when that testimony came out did
13 your attorney object to any of that? When that testimony came
14 out in front of the jury your attorney did not object?

15 A No, ma'am.

16 Q Okay. And as far as you know in terms of the pretrial
17 motions that took place before Judge Alford, that was not one of
18 the issues that was discussed?

19 A No, ma'am.

20 Q Okay. And so that's why you're saying your lawyer was
21 ineffective because he didn't challenge it in pretrial and he
22 didn't challenge it during the case in Chief that the State
23 presented?

24 A Yes, ma'am.

25 Q Okay. Is there any other issue that your attorney or

1 any other thing your attorney did not do that you felt he should
2 have done?

3 A Back to the -- ah, my perception of the incriminating
4 response.

5 Q Incriminating what?

6 A Incriminating response situation.

7 Q Response?

8 A Yeah. Arguing about my perception.

9 Q Okay.

10 A Suber as he was approaching me on private property left
11 me under the perception that I was not free to go. Enumerating
12 issue number four.

13 Q You have additional information --

14 A I have plenty of information.

15 Q I understand that, but you need to say it's in addition
16 to what you already testified to.

17 A Back on issue number four.

18 Q Right, but you already testified as to issue number
19 four. Is there something new that you are adding to issue
20 number four?

21 A Yes, ma'am. You can say it about why I didn't get on
22 the stand and testify.

23 Q Okay. So you are going to your attorney -- your
24 attorney did not have you testify at your trial?

25 A Yeah.

1 Q Okay.

2 A Yeah. I'm about to explain the reason I didn't.

3 Q Hold on. Let me ask the question first. When your
4 attorney didn't allow you to testify there are two points at
5 which you wanted to testify, correct?

6 A Yes, ma'am.

7 Q You wanted to testify during the Jackson V Denno
8 Hearing when the Court was taking up whether or not the Officer
9 Suber should have given you your Miranda warnings?

10 A Should have read my Miranda.

11 Q And then you didn't get to testify within your trial
12 for the jury to hear about what happened?

13 A Yes, ma'am.

14 Q And so you wanted to testify at those two times?

15 A Yes, ma'am.

16 Q Okay. Now, going back to where he didn't ask you any
17 questions about whether or not you felt like you were in
18 custody?

19 A Yes, ma'am.

20 Q That's your issue number four?

21 A Yes, ma'am.

22 Q Okay. What did your attorney, if anything, tell you
23 about your ability to testify at that time?

24 A Told me my prior charge could be used against me.

25 Q Okay, and the prior charges, your prior criminal

1 record?

2 A Yes, ma'am.

3 Q And so you discussed that with him and you made your
4 decision not to testify based on the fact that the prior charges
5 could be used against you?

6 A Yes, ma'am.

7 Q But you feel differently that you should have
8 testified?

9 A Yes, ma'am. I might read it out to you. "However
10 prior to during the trial my retained counsel never asked me
11 whether I was under the perception as to whether I could have
12 walked away from Officer Suber after Suber previously warned me
13 about driving. Suber pursued me on private property as a
14 suspect, block in the rear of my mother's car, the Chevy in the
15 driveway. Gave me a directive to come here and ask me
16 incriminating statement, why are you driving, while calling for
17 other officers for backup.

18 Q When you got to -- when you came in contact with
19 Officer Suber, he told you to come and he was motioning for you
20 to come to him and he blocked your car in at the location that
21 he followed the car to?

22 A Yes, ma'am.

23 Q Okay, and your attorney didn't ask you whether or not
24 you felt like you were in custody?

25 A Yes, ma'am. As the trial transcript Mr. Harris did not

1 argue any of the factors to trial Court in the motion to
2 suppress my alleged response, "I don't know", to Officer Suber's
3 question, "Why are you driving?"

4 Prior to doing trial Mr. Harris inappropriately informed me
5 that I could be impeached with my prior possession -- my prior
6 possession of cocaine conviction that in support of this fact it
7 direct the Court's attention to the facts cited below in issue
8 number two. Where my sole witness, Junior Rogers, was
9 improperly impeached by Solicitor Plemning with his prior
10 conviction for assault and battery of high and aggravated nature
11 was objection from Mr. Harris on the grounds that it would be
12 more prejudicial then probative and that the solicitor did not
13 produce indictments for the trial judge to determine for the
14 offense of crime of dishonesty.

15 Q So in your own words you're saying that just like your
16 attorney did not object to Junior Rogers's testimony and being
17 questioned about his prior felony, that your attorney gave you
18 wrong information that you could be impeached and how you can be
19 impeached, and therefore you didn't testify relying on that
20 information?

21 A Yes, ma'am.

22 Q Okay, and so in your own words, you're saying that a
23 solicitor can't impeach you without producing the indictments or
24 the certified copies of your conviction or prior charges unless
25 -- you're saying they can't impeach you unless they have a copy

1 of the certified conviction?

2 A Yeah, I mean.

3 Q Yes?

4 A Yes, ma'am.

5 Q And then if they do present that to the Court with the
6 property documentation then the Court has to determine whether
7 that information can be used against you because it's either
8 going to be prejudicial or probative?

9 A Yes, ma'am.

10 Q And you're saying that's under the rule 403 that is
11 what they are suppose to determine before they ask you those
12 questions?

13 A Yeah, my witness.

14 Q For your witness. But you agree with me that it
15 applies to the defendant if the defendant takes the stand too,
16 correct?

17 A Yes, ma'am.

18 Q Okay and so when you talked with your attorney he
19 didn't show you any of your prior certified convictions?

20 A Yeah, I know what I have been convicted of.

21 Q I understand that, but you are saying that your
22 attorney should have had that documentation and this test should
23 have been done by someone to determine whether it is probative
24 or prejudicial?

25 A Yes, ma'am.

1 Q Okay, and when you are saying prejudicial whether it
2 influenced the jury unfairly against you having a fair trial?

3 A Yes, ma'am.

4 Q Or the opposite could be true that it would be
5 probative as to whether or not you should be convicted?

6 A That's correct.

7 Q Okay. So your attorney didn't go through that but he
8 told you your prior convictions as you say you know you were
9 convicted of them. He said they can be used against you if you
10 got on the stand?

11 A That's correct.

12 Q And you felt like he gave you wrong information that
13 you should have been able to get on the stand and that the State
14 couldn't use that against you?

15 A Yes, ma'am. I mean, they can't use against me.

16 Q Okay.

17 A I got something else to read. From Mr. Harris failure
18 to object to use a defense witness, Rogers, assault and battery
19 of high and aggravated conviction the reason to believe that Mr.
20 Harris did not correctly inform me as to whether my prior
21 cocaine conviction could be used. That Mr. Harris informed me
22 that my cocaine possession conviction could be used if I take
23 the stand. That as result of that I decided not to testify.
24 However, had I known that such conviction could not be used I
25 would not have waived -- I would not have waived my rights and

1 would have testified that my trial counsel, Harris, never asked
2 me whether I felt I was free to go or walk away from Officer
3 Suber or argue.

4 Mr. Harass informed me that my prior cocaine conviction,
5 possession conviction, were going to be used against me if I
6 testified caused me to waive my right to testify. In fact he
7 did know or didn't object to an assault and battery of high and
8 aggravated nature conviction. A conviction that did not
9 consider of a crime of moral turpitude within the meaning of
10 State v Bradybury.

11 Q So in essence you are saying that he didn't follow the
12 rule that is outlined in 609, rule 609?

13 A No, ma'am, 609 is when you can use conviction that
14 shows dishonesty. That Junior's assault is not a crime of
15 dishonesty. Mr. Harris was ineffective for not objecting to the
16 solicitor's use of this crime for impeachment purposes.

17 Q What I am saying is that's the rule, 609, and then 609
18 refers you to rule 403 and that's what your attorney did not go
19 through in objecting and require that they go through 403 to
20 analyze whether it's prejudicial or probative in terms of this
21 particular case?

22 A That's correct.

23 Q Now, you are seeking relief from the Court. What kind
24 of relief are you seeking?

25 A Relief.

1 Q You want the Court to overturn this and grant you a new
2 trial?

3 A If possible.

4 Q Well, on your application you requested --

5 A A reduction of my cocaine conviction.

6 Q But you realize that this Court can not give you a
7 reduction and give you a different sentence for your cocaine
8 conviction?

9 A Yes, ma'am.

10 Q Now, do you recall us discussing that you would be
11 asking for relief so you could start over, have a trial or
12 whether it was a plea? Do you recall that?

13 A Yes, ma'am.

14 Q So the Court would have to make a ruling as to whether
15 your attorney was ineffective?

16 A Yes, ma'am.

17 Q And then you you would start over, do you understand
18 that?

19 A Yes, ma'am.

20 Q But your you are wanting is to be able to get a lesser
21 sentence?

22 A Yes, ma'am.

23 Q Okay. Is there anything else you feel you need to tell
24 the court as to how your attorney might not have been effective
25 counsel for you this trial or in your representation?

1 A About the vouching situation.

2 Q Well, you talked about that in terms of whether or not
3 your attorney should have objected to the closing statement.
4 That was one of your issues. You read that.

5 A You didn't go thoroughly through the voucher situation.

6 Q Well, what thoroughly in your own words do you want to
7 say about the vouching? You read the exact sheet what you put
8 on your application.

9 A I might read it right now.

10 Q Don't read the same issue over again that you read from
11 the paper. What else did you want to tell the court about it?

12 A About vouching -- okay. Say number one, the degree of
13 which the comments could have mislead the jury to whether the
14 comments were isolated or extensive. Three, the strength and
15 proof of guilt in asking of inappropriate comments. And four,
16 was the comment were deliberately made to divert the jury's
17 attention.

18 Q Now you are reading the test for whether or not that's
19 the Court analysis that they have to look at to determine
20 whether or not the solicitor inappropriately vouched for the
21 credibility of this witness, correct?

22 A Yes, ma'am.

23 Q Okay. But, I need you to focus on what exactly your
24 attorney didn't do? The Court is fully aware of what the
25 standard is.

1 A It say therefore the Court should find the jury's
2 attention could have been easily diverted from making a
3 credibility determination as the solicitor stated Officer Suber
4 would not risk losing his job as law enforcement officer and his
5 freedom. That the comments were extensive and not isolated.
6 That there was only Officer Suber's version against Nash's as
7 proof and the solicitor deliberately places officer as well as
8 sheriff's office behind Suber's credibility and grant Nash a new
9 trial.

10 Q So you are saying that when the Court didn't go through
11 that in -- well, not the Court, but when your attorney did not
12 object to that then it prejudiced you because that's how you got
13 convicted?

14 A Part of reading of the voucher for the officer in the
15 opening statement --

16 Q Right. But my question is, you are saying that your
17 attorney did not object to that in the closing and that caused
18 you to get a conviction?

19 A Yes, ma'am.

20 Q Okay, and so that's part of the prejudice in this case
21 is that your attorney did not object in certain instances such
22 as allowing you to testify, allowing you to give your
23 information as to whether or not you were in custody and your
24 attorney didn't object in the closing.

25 Your attorney didn't object to the chain of custody involved

1 in this case and your attorney didn't object to the illegal
2 search of your car?

3 A Yes, ma'am. I have one more thing to read also.

4 Q What is that issue dealing with?

5 A The Jackson versus Denno.

6 Q The statement that you gave, and you discussed that
7 issue. You talked about the Miranda warning?

8 A I ain't discuss -- I ain't discuss all of that. The
9 second part I did.

10 Q What's the second part?

11 A Counsel Harris agreed that the probative value of
12 statement on the video were more prejudicial grounds for
13 prejudice. See transcript page 374. Trial counsel Harris was
14 aware that no Miranda warning was given on the video and that it
15 was clear by the State that Officer Suber drove up behind the
16 parked vehicle. Believed he saw Nash driving. That Nash was
17 called over by Officer Suber and asked why were you driving and
18 then Nash's alleged response, was I don't know. The trial judge
19 agreed that Officer Suber question was designed to elicit an
20 incriminating response and subject a Miranda warning. See
21 transcript page 70, line 16 through 19.

22 However, after reviewing the case law stated he did not
23 believe Nash was in custody. The trial Court wanted to hear the
24 facts regarding to the police officer. Trial transcript page
25 82, lines one through four. Without any argument from the trial

1 counsel, Harris, of Nash's decision as to whether he was free to
2 walk away from Officer Suber --

3 Q Okay, let me stop you right there. Isn't it your
4 attorney that brought up the statement on the video? He did the
5 Jackson v. Denno hearing, and only thing that did not occur was
6 you didn't get on the stand and testify as to whether you felt
7 you were in in custody, correct?

8 They had Jackson v. Denno Hearing. That's what you are
9 referring to in this transcript, right?

10 A Yes, ma'am.

11 Q And your attorney brought that to the Court's
12 attention, correct?

13 A Yes, ma'am.

14 Q All right. Okay, so then you can't say that he didn't
15 object to the statements coming in because he brought --

16 A He didn't argue perception.

17 Q He didn't argue what?

18 A He didn't argue perception. What the Court wanted to
19 hear he didn't argue.

20 Q What do you mean perception?

21 A He didn't argue the five facts that Kashif Nash had
22 prior knowledge that Officer Seber warned him about driving and
23 two, pursued him at as suspect. Three, pursue him on private
24 property --

25 Q You already testified to that when you said that your

1 attorney did not allow you to testify as to that. He didn't
2 allow you to testify as to your perception, but your attorney
3 did argue that those statements violated your Miranda warnings
4 and that's how you all got into a Jackson v. Denno Hearing and
5 that's how the officer got on the stand and testified, correct?

6 A Yes, ma'am.

7 Q Okay. So that's not a new issue?

8 A It's all an issue.

9 Q Okay. So, you feel that based on all the information
10 you provided to the Court here today that your attorney
11 prejudiced you by not making those objections and not allowing
12 you to testify, or challenging the evidence that you were not
13 given a fair and proper trial with assistance of counsel that
14 could properly advice you?

15 A Yes, ma'am.

16 Q Okay, and because of that you are asking the Court to
17 grant you a new trial?

18 A Yes, ma'am.

19 MS. MOODY: No further questions for this witness,
20 Your Honor. Please answer any questions the State may
21 have.

22 THE COURT: Cross examination.

23 Mr. Johnson: May it please the Court, Your Honor.

24 CROSS EXAMINATION

25 BY MR. HUNTER:

1 Q Mr. Nash, did counsel go over with you the fact that
2 you can still be convicted with no minimal amount of cocaine?
3 That you you could still be convicted of possession even if it
4 doesn't have a measurable amount?

5 A No, sir.

6 Q Do you remember the Court going over that when the
7 chemist testified?

8 A I remember the judge mentioned something about it.

9 Q Don't you say that in your application, I'm in any
10 amount can support this?

11 A Let me go back to it.

12 Q I believe -- it's okay, I believe it was in your
13 application.

14 Do you remember them talking about residue?

15 A They say there is --I'm going to start back from the
16 beginning. Ineffective assistance of counsel in presenting my
17 case that the State failed to produce substantial evidence to
18 warrant a six-year sentence because there was no weight recorded
19 by forensic scientist.

20 The State presented no evidence of fact nor substantial -- to
21 support the conviction that there was any weight involved. See
22 State versus James.

23 I'm aware that possession of any amount of cocaine can
24 support this conviction, but in this case there is no amount.

25 Q Okay. I see what you are talking about.

1 A I was originally charged with possession of drug
2 paraphernalia. I assumed there was residue yet it weighs
3 nothing. See state 44-53-370 does not say anything about
4 residue. The weight of any controlled substance in this section
5 includes the substance in pure form or any compound admission of
6 this substance.

7 Q Okay, I will just move on. Now, you were searched that
8 was that was after you were arrested, correct?

9 A I was searched first.

10 Q Are you sure?

11 A He called me over to the car. Asked me why I was
12 driving, an incriminating response and if I had anything on me
13 and he searched me and he took the scale and put it on top of
14 the car. And then backup came and he put handcuffs on me and
15 stuck me in the car and see what they are going to do about it.

16 Q So they searched you after you were arrested, correct?
17 They search the car that was all after you were arrested, isn't
18 that correct?

19 A They searched the car once I was in cuffs inside the
20 Roger Suber's patrol car.

21 Q Okay, I understand. Regarding his advice about your
22 prior convictions, what would that have changed? You wanted to
23 testify?

24 A Yeah, I would have testified.

25 Q You wanted to testify?

1 A About the perception how did I feel, but Rick told me I
2 couldn't. I could have, but he said with the charge of my
3 possession charge -- my possession charge, it wouldn't be good
4 for me to testify?

5 Q Okay. So you wanted to testify. He wouldn't let you?

6 A Yeah.

7 Q Do you remember the judge going over with you asking
8 you whether you wanted to testify?

9 A The judge asked me, but I went with my lawyer. He told
10 me I shouldn't. So, you know, I ain't going to do it.

11 Q Do you remember the judge saying if you have a record
12 involving convictions involving dishonesty or false statements
13 or for a crime involving imprisonment for more than one year and
14 this Court determines that the probative value outweighs the
15 prejudicial effect the solicitor will be able to introduce them?
16 The judge said that to you during your colloquy before you told
17 him you didn't want to testify and now you are saying that your
18 counsel told you something different?

19 A I mean, he told me not to testify. That's what he told
20 me. So he told me to sit. He went to trial.

21 MR. HUNTER: Beg the Court's indulgence one second
22 Your Honor.

23 THE COURT: All right.

24 MR. HUNTER: That's all I have for this witness,
25 Your Honor.

1 THE COURT: Anything else.

2 MS. MOODY: No, sir Your Honor.

3 THE COURT: Thank you, you may step down.

4 THE COURT: Call your next witness.

5 MS. MOODY: No other witnesses, Your Honor.

6 MR. HUNTER: The state would call Ricky Harris.

7 RICKY HARRIS, called as a witness, having been
8 duly sworn by the clerk, was examined and testified as
9 follows:

10 DIRECT EXAMINATION

11 BY MR. HUNTER:

12 Q Good afternoon Mr. Harris.

13 A Good afternoon.

14 Q I appreciate you being here?

15 A Yes, sir.

16 Q Tell the Court how long you have been practicing law
17 and how long that has been criminal?

18 A Coming in to my 32nd year of practicing law. Probably
19 for at least the past 25 years with a very emphasis on criminal
20 defense.

21 Q Specifically how much of that has been drug crimes?

22 A For that past 24 years I would say a very large
23 percentage of my criminal case load involved drug crimes of all
24 severity. Most of my practice I would say over the course of
25 time has been in the area of DUI, felony DUI, and drug defense.

1 I have defended several murder cases, sex crimes. I've probably
2 tried just about every kind of case you can imagine. A lot of
3 drug cases.

4 I think probably Mr. Nash came to me from word of mouth
5 recommendation from other drug clients that I had.

6 Q Okay. That's my next question. How did you come by
7 your representation with Mr. Nash?

8 A My recollection is that I called me. I handled another
9 case for Mr. Nash and a prior client had recommended me.

10 Q So he was out on bond when he contacted you?

11 A Yes.

12 Q Okay. How often did you all meet prior to this trial?

13 A We either talked on the -- well, personally met in the
14 office I'm going to say several times. Of course we had much
15 more substantive discussions about the case, the evidence, the
16 posture of the case, plea negotiations, you know, as we approach
17 trial. But I remember meeting with him in my office several
18 times in addition to several telephone calls.

19 Q Okay, and during these conversations was he
20 cooperative? Did he assist in his defense?

21 A I would say, yes. I mean, Mr. Nash is sort of a quiet,
22 almost reticent person one on one, but yes, certainly I think he
23 was capable of assisting in his defense and did.

24 Q Did he provide you with any witnesses or alibis?
25 Anything that would help?

1 A Well, a gentleman's name is his relative, Mr. Rogers. I
2 think, Junior Rogers, was the main witness that he wanted to be
3 at the trial. He insisted he was not driving. That was his
4 main focus with me about this case, was that Deputy Suber was
5 just trying to pin it on him that he was driving, but he was not
6 driving.

7 Q Now what discovery did you receive from the State in
8 this case?

9 A Incident reports, drug report, SLED analysis.

10 Q Did you go over those with with Mr. Nash?

11 A Oh yes. Driving record, chain of custody documentation,
12 rap sheet and video. A video of the interaction between the
13 deputy and Mr. Nash.

14 Q First I want to ask about the chain. When you received
15 it from -- you said you receive it from the State, the
16 discovery?

17 A Solicitor's office.

18 Q Okay. Did anything jump out at you that it was
19 insufficient?

20 A I am sorry, I don't quite understand.

21 Q Did anything about the chain seem insufficient to you?
22 Was there a problem?

23 A Are you talking about chain of custody?

24 Q Yes. Yes. I'm sorry.

25 A No, and I can't remember whether or not the initial

1 response covered it. I just really don't remember, but I know
2 eventually before trial I received of course the SLED report
3 which in and of itself is part of the chain of custody
4 documentation, in addition to what I've come to recognize as
5 sort of the standard printout of the listing of all the names
6 and times that the evidence passed through various hands.

7 Q Okay.

8 A So I didn't in the end -- I didn't see anything
9 insufficient about the chain of custody. Nothing that I
10 believed was going to provide us a basis for suppression of the
11 drug evidence.

12 Q Okay. Thank you. That's my next question. You felt
13 there was no reason to move to suppress the chain?

14 A I didn't see any grounds.

15 Q Okay. Now, as far as the video is concerned you watch
16 it with Mr. Nash?

17 A I don't remember if we watched it together. I
18 certainly view it and we discussed it at length, but I really
19 can't remember if we watch it together or not.

20 Q It seemed to me like that was a pretty big part of your
21 case pretrial was arguing to suppress the video and you did
22 actually argue Miranda, correct?

23 A Yes.

24 Q And the judge wouldn't let it in because -- or he said
25 he wouldn't let in the video because you can't hear very well on

1 it, is that correct?

2 A Well, my recollection was that I moved to suppress
3 certain statements that the State alleged that Mr. Nash made
4 concerning his driving.

5 There was an allegation by the State that Mr. Nash when
6 first confronted by the deputy, at his uncle's house was asked
7 the question by the deputy something to the effect that didn't I
8 tell you I was going have to arrest you the next time I saw you
9 driving, or didn't I tell you better not be driving any more.
10 Referring to two things. Referring to the fact that Mr. Nash
11 had -- was under suspension and referring to the fact that the
12 deputy had -- they knew each other. Had warned him that if he
13 saw him out driving again he was going to have to arrest him.
14 Mr. Nash allegedly responded I don't know, which of course can
15 be taken as an admission of a type. And so the thrust of my
16 argument was to the Court that number one, the videotape wasn't
17 sufficient evidence of that statement because the audio quality
18 of the video was poor. And secondly, even if that was the
19 statement that it should be suppressed because no Miranda was
20 given and what I determined or what I was urging the Court to
21 consider a custodial setting.

22 There was a lot of back and forth between counsel and the
23 Court about that. At one point in time the Court seemed
24 inclined to suppress the statement. In other words not to allow
25 the deputy to testify about it orally or to show it on tape, but

1 then for whatever reason and I don't truly understand the reason
2 necessarily, the Court reversed itself and I think actually
3 probably said -- I remember the judge saying that he had changed
4 his mind and that he didn't think it was a custodial
5 interrogation. That it was investigatory as a traffic stop and
6 that he would allow the deputy to testify about it, but wouldn't
7 allow the tape to be played because of the poor audio quality.
8 That is what -- the transcript of course is the best evidence of
9 all of this, but that is my recollection.

10 Q Right, and you argued pretty heavily that it should be
11 kept out, that statement.

12 A Was, we spent a long time as I remember on that issue.
13 I really felt that that was sort of gateway to defending the
14 case is if I could somehow stop the investigation part of it as
15 a volitive of Miranda that maybe I could use that as a further
16 argument to say that there was somehow that the detention of Mr.
17 Nash exceeded the permissible scope and that therefore the
18 ultimate arrest and search of his person, you know, could be
19 challenged. That was what I was hopeful trying to do, but that
20 all rested on trying to suppress that statement in my view.

21 Q And so how did you characterize just in total the
22 State's evidence against Mr. Nash?

23 A Well, it was a single witness, eye-witness case, if you
24 want to put it in that category. Law enforcement officer saying
25 that he intimately familiar with this individual defendant.

1 That he knows the individual defendant. That he has seen the
2 individual defendant drive the vehicle several times in the
3 past. That he has warned him that he shouldn't be driving and
4 that there would be consequences if he would. Saying --
5 swearing under oath that he saw the defendant drive and he knew
6 very well that it was the defendant and he followed the
7 defendant to the defendant's relative's house where he claimed
8 that he saw the defendant exiting the vehicle and attempting to
9 go in the house. Now of course this is contrary to what Mr.
10 Nash was asserting to me privately, but that is what the deputy
11 was going to testify to. And so, you know, it was going to be
12 the deputy's word against any other evidence in the case on the
13 driving. On the HTO charge. And then of course the drugs came
14 as a result of the actual formal arrest of Mr. Nash for habitual
15 traffic offender.

16 Q Right.

17 A DUS and habitual traffic offender originally.

18 Q And so about the drugs and the search did you have any
19 reason or any basis to move to suppress that search or the
20 evidence found thereof?

21 A In the end I couldn't find any. Here again, I felt
22 like there might have been some interplay depending on the view
23 of the chronology of events, but in the end I could not see any
24 meritorious grounds to argue for suppression.

25 It was very clear to me that Deputy Suber was going to

1 testify and he did testify that he determined that Mr. Nash was
2 driving. That he knew Mr. Nash was under suspension. That he
3 was charging Mr. Nash with driving under suspension. That he
4 handcuffed him. That he searched his person. That he found the
5 drug paraphernalia which was contained within it allegedly
6 residue of cocaine. Based on that sequence of events and having
7 no other evidentiary material that I could deal with I just -- I
8 think it was clearly a probably a permissible warrantless search
9 of his person, either incident to arrest or under the Terry
10 doctrine or both.

11 Q Okay. Well, switching gears. As far as his indictment
12 is concerned, can you explain this paraphernalia charge?

13 A No, I can not explain that. It was to me all along he
14 was charged with -- Mr. Nash was charged with habitual traffic
15 offender, DUS second or subsequent offense, drug paraphernalia
16 and possession of cocaine.

17 Q So the -- this possession of cocaine charge wasn't just
18 this paraphernalia charge morphed into another one? That was a
19 separate charge?

20 A I never -- I never thought about the case in any other
21 way. From the time I entered it as other than it was HTO,
22 cocaine possession case period. That's what I thought of it as.

23 Q And as far as the possession of cocaine goes, did you
24 see any problem with what the chemist testified to as far as the
25 residue and measurable amount?

1 A Well --

2 Q Legally?

3 A No, not legally. I researched the issue of, you know,
4 whether residue cases, whether there had to be a measurable
5 amount or what. If there was any test by which to determine,
6 how much of a controlled substance had to be found in order to
7 prove that the existence of a controlled substance and what I
8 came up with through my research was there doesn't have to be
9 any measurable amount. There doesn't have to be even any amount
10 that would be visible to the naked eye.

11 If a chemist is able to prove that the controlled substance
12 is present and if the other elements of possession are present
13 the charge would lie.

14 Q And this was something if I remember currently you
15 argued pretty extensively in opening and closing, is that
16 correct?

17 A Well, I didn't see a basis to suppress the drug test
18 result on this no amount found theory, but, you know, as much as
19 could be done I tried to give the jury every opportunity to find
20 reasonable doubt in the fact that there wasn't any you could
21 see, feel, touch, smell or anything else.

22 Q Okay.

23 A And you know, I think part of that was, you know, to
24 prove possession you have to prove knowing possession and that
25 if a person can not see a thing, or touch a thing or smell a

1 thing how can you say they know. But it didn't work.

2 Q As far as his potential testimony is concerned, did he
3 express to you that he wanted to testify? You told him no.
4 What were those conversations like?

5 A Well, I really don't remember much of any conversation
6 when it came to Mr. Nash wanting to testify in a Jackson v Denno
7 Hearing or not wanting to testify. I just -- I don't remember
8 him saying anything about that, nor do I remember me thinking it
9 would be helpful for him to testify. Actually it looked all day
10 long like we were going to win that issue and then in the end,
11 after all the evidence had been received in essence on the
12 motion, the Court reversed itself. So that's the way that
13 happened.

14 As far as part of the defense case I don't truly
15 specifically remember the exact words that I used with Mr. Nash,
16 but I'm fairly confident that I would have said to him, listen
17 you do have a record. You do have to remember that this is a
18 habitual traffic offender case and it's a drug case. You do
19 have some criminal convictions which I don't have any doubt the
20 solicitor would try to use as impeachment evidence against you.
21 I'm certain I would have said I don't know if that the Court
22 would allow that to happen or not. We'll argue against it, but
23 they'll certainly try to do that. And on top of that I'm
24 virtually certain that I told him, look this HTO situation where
25 the jury knows that you have this horrible driving record is bad

1 enough. Do we really gain anything by having you get on the
2 witness stand and have that whole litany of your driving record
3 gone through again. I am fairly certain I told him that in some
4 straight forward way.

5 I think I probably also told him something along the lines
6 of, you know, look by this time in the trial the jury doesn't
7 understand that you deny that you were driving, then I don't
8 what we've been doing here, you know.

9 So, in terms of what he could have said in his own behalf in
10 the defense case that could have benefitted us more than
11 maintaining his silence, I mean, he would gotten up and said I
12 wasn't driving. Suber is wrong. I wasn't driving and my uncle
13 is going to be the proof of that. Well, in essence, we had
14 tried the entire case in that fashion anyway. It was I think
15 very plain to the jury that the contest about driving was that
16 he either was or he wasn't driving and he said he wasn't and he
17 had offered Mr. Rogers as being his proof on that. And so I'm
18 sure I would have said something like, look, if you are going to
19 put -- if you are going to count on Mr. Rogers then count on
20 him. No sense you getting on the witness stand subjecting
21 yourself to cross examination and something going wrong and then
22 it doesn't matter how Mr. Rogers comes across. And I'm sorry
23 for the long explanation, but it's just -- I never got the sense
24 from Mr. Nash that he wanted to take the stand at all anyway.
25 But to be thorough about it, in addition to informing him about

1 his constitutional right to do so or not do so and the
2 implications of it that was all the discussion we had about it
3 and he choose not to take the stand and I agreed with his
4 decision.

5 Q And is it your impression that his decision was based
6 on whether his priors would be used again him?

7 A I don't see how. If it was he didn't say so to me,
8 because there were many other factors as I just explained that
9 I'm virtually certain I discussed with him about the advantages
10 and disadvantages of testifying, and certainly I never told him
11 that his prior drug record. I did tell him categorically that
12 his prior driving record could be used against him and it
13 already had been, in essence.

14 I think I told him about his prior drug report that the
15 State will surely try to use it against you. I don't know if
16 the Court will allow them to do it or not, but they will try.
17 But that was in addition to all the other things.

18 Q Okay, and did he ever ask you what that meant? Any
19 questions any hesitations from what you remember?

20 A I think no. I never had any indication he didn't
21 understand or had a question or had any disagreement about it.

22 Q Now, regarding Mr. Rogers, the State using -- or the
23 State asking if he had been convicted and the fact that he had
24 been convicted I think of ABHAN, did you see any reason to
25 object there?

1 A Well, I didn't object, so obviously I did not see a
2 reason to object and I don't know the particulars of his -- of
3 that conviction other than it was for ABHAN. But I certainly
4 didn't see a reason to object, no.

5 Now, I guess if there was more information about whether if
6 it was a stale conviction or -- you know, I couldn't say that
7 today and I haven't heard any evidence of that.

8 Q Do you think it hurt your case the fact that was
9 brought out?

10 A Well, no. Honestly have I to say no. Nobody wants a
11 witness impeached in any way of course, but I think if you read
12 Mr. Rogers's testimony you will see the inconsistencies in it
13 and I think that's probably what the jury -- as a matter of fact
14 I believe I had a conversation with Mr. Nash while we were
15 waiting on the verdict along the lines of, you know, Mr. Rogers
16 did you in. He wasn't the witness that he was purporting to be.

17 Q And a few more things.

18 A And of course part of the problem with that was in the
19 end what Mr. Rogers said on the stand was in conflict with what
20 could be made of the video, and that's why the video was
21 introduced at the end of the trial solely for the purposes of
22 impeachment of Mr. Rogers. So I don't know that Mr. Roger's
23 ABHAN conviction impeached him -- effected his credibility with
24 the jury as much as the videotape effected his credibility.

25 Q Right, the part that concerned him, is that correct?

1 A Yes, Mr. Rogers was on the videotape at some point and
2 there was some interaction that was clear enough to be heard
3 where he wasn't exactly telling the police then what he claimed
4 on the stand he told the police.

5 Q Okay. Now during closing, have you looked at the, I
6 guess the sentence or two, where -- that Nash alleges was
7 damaging by the State?

8 A You all pointed that out to me at break and so I have
9 seen it.

10 Q Do you think that you had any reason to object there
11 during his closing?

12 A Well, I don't think it is vouching necessarily. Now
13 whether it strays over the line of improper argument on some
14 other basis, all I can say it didn't impress me as such at the
15 time. Obviously it is there for anybody to review and determine
16 if that was a mistake on my part and if it was I own it.

17 Q Well, had you objected do you think the case would have
18 turned out differently?

19 A No.

20 Q Now I know you characterized the evidence earlier, but
21 as far as once this -- once you lose the Denno Hearing do you
22 think it's definitely a strong case for the State or pretty weak
23 case for the State?

24 A Well, I thought it was a strong case for the State
25 anyway. I mean, for a lot of reasons that I could go in to if

1 you need me to. But, you know, certainly that first
2 incriminating response I thought just set a bad tone with the
3 jury. That's why I fought so hard to keep it out.

4 Q Okay.

5 A But, you know, we're all -- and I can be too -- guilty
6 of over thinking something or over analyzing it or I think in
7 the end it might have been just as simple as -- on the driving
8 part -- just as simple as the jury just wasn't going to accept
9 the proposition that Mr. Nash just appeared at his uncle's house
10 for a couple of days and how did he get there, you know. I
11 don't think -- I think the jury might have been just that
12 practical thinking about it. You know, if he is not suppose to
13 be driving how did he get there.

14 Q Okay. Lastly -- not lastly, but, regarding his search
15 and how he was found there he alleges that search was
16 unreasonable because he was detained on private property. Did
17 you see any reason to object to that?

18 A No. He was searched after he was formerly placed under
19 arrest and immediately afterward.

20 Q So the search was incident to arrest?

21 A Well, I think it was probably more in the nature of a
22 combination of a Terry search. More than a frisk though. A
23 Terry search and a search incident to arrest. I just couldn't
24 come up with any basis to claim that they needed a warrant to do
25 that search.

1 I considered whether or not the playing field doctrine would
2 apply but decided that under the circumstances with him having
3 just been formerly arrested and searched, obviously I just I
4 didn't think that Minnesota versus Dickenson could apply. I
5 just didn't see a basis.

6 Q Okay.

7 MR. HUNTER: That's all I have. Please answer
8 anything Mr. Moody has.

9 THE COURT: Cross examination.

10 MS. MOODY: Thank you, Your Honor.

11 CROSS EXAMINATION

12 BY MS. MOODY:

13 Q Mr. Harris, you testified earlier that you felt that
14 this was a strong case for the State if terms of the statements,
15 correct?

16 A Well, I think actually my testimony was that I thought
17 that going in to it overall that the State had a pretty strong
18 case. Statements or not, I thought they had a pretty strong
19 case.

20 Q Did you have opportunity to discuss that with Mr. Nash?

21 A Yes.

22 Q And what, if anything, did you discuss with him
23 regarding the strength of the case?

24 A I said look, you know, juries tend to believe police
25 officers and we got this police officer that says he knows you.

1 He knows what you look like. He knows the cars you drive. That
2 he says that he saw you went to a familiar place, your
3 relatives. He will swear up and down that you drove there and
4 it's just going to be hard to overcome that testimony. You
5 know, we'll try do it. And, you know, then I further said once
6 you're arrested and they find drugs on you I told him I don't
7 know that we're going to have a basis to suppress that search
8 and you know, you can't have drugs. And so if the jury buys the
9 legal proposition that you can possess a drug that you can't
10 weigh that's it. You know, so ---

11 Q So did this come right before the trial or did this
12 come when you first met with Mr. Nash?

13 A I probably -- well, when I first met with Mr. Nash I
14 didn't know the evidence in the case.

15 Q Okay.

16 A After I got discovery, after it became obvious that
17 attempts of plea negotiations were not going to be successful,
18 in the last two, three, meetings or phone calls that I had with
19 Mr. Nash centered upon the evidence in the case. The strength
20 of the evidence in the case. Our ability to challenge the
21 evidence in Court.

22 Q So, when plea negotiations didn't work out what, if any
23 plea offers were made from the State?

24 A At this point I might be able to dig through the file,
25 but my recollection is that at one point the solicitor -- the

1 assistant solicitor was offering a cap of three years,
2 concurrent with probation. Whatever probation disposition there
3 was Mr. Nash was on probation, and this would have been a
4 violation of his probation. And then at some other point in
5 time I do recall a discussion about a cap of a year and a half
6 concurrent with probation but since Mr. Nash consistently
7 asserted his innocence he was not inclined to accept any plea
8 offer. He wasn't inclined to accept a conviction.

9 Q So overall you felt the case was strong against Mr.
10 Nash and you would have advised him to take take the plea offer,
11 at least one of them?

12 A My recollection is I strongly encouraged him to
13 consider the year and a half, yes.

14 Q And at the end of that he decided he still wanted to go
15 forward on a trial?

16 A Unequivocally, yes.

17 Q Okay. Did you have opportunity to explain to him what
18 he would be facing on the charges of habitual traffic offender
19 and then a drug conviction and then the probation violation?

20 A Yes. I don't think -- I wasn't formerly retained on
21 the probation case. But I --

22 Q But you knew it was going to be violation?

23 A But we knew it was going to be a violation. I made it
24 very clear he was looking at five years on the HTO and I don't
25 remember now, but ten or fifteen or whatever it was on the

1 cocaine third. I can't remember now. But yes, we discussed
2 that.

3 Q Okay, and so after you all discussed it obviously he
4 decided he still wanted to go to trial?

5 A Well, he consistently asserted his innocence on the
6 driving charge.

7 Q All right. Now during any point of the trial -- I
8 think you gone through it and I just want to make sure -- on the
9 chain of custody issue, I believe you testified earlier you
10 didn't see an issue wrong with the chain as the evidence was
11 coming in; the scale and the razor?

12 A Saw no problem with the chain. Nothing to challenge.

13 Q And that was based on the fact that he was arrested
14 formerly and that was search incident -- or Terry pat down,
15 Terry frisk?

16 A Well, in terms of the chain of custody that is what
17 your question was.

18 Q Right.

19 A I didn't see any flaw in the chain of custody that we
20 could challenge in Court. In terms of the search I didn't see
21 any grounds to assert a fourth amendment violation.

22 Q And then the testifying -- his testifying and going
23 through all of his prior charges and everything you typically
24 give that information, I believe is what you testified? You
25 would go through that with your client in a trial situation?

1 A Now, you are referring to -- I'm sorry. You are
2 referring to the evidence or his prior charges?

3 Q As to whether he testified and his prior convictions
4 you would have gone through that as a normal course with any
5 client advising them of what could be the consequences of their
6 testifying?

7 A Yes, I'm virtually certain that I -- just as I
8 testified -- that I told Mr. Nash the State almost certainly
9 will attempt to use your prior drug record against you. It will
10 be up to the Court to determine if they are allowed to do that,
11 but they certainly are going to try to. They certainly will be
12 able to reiterate to the jury your poor driving history and then
13 in addition to all these other things. I mean, that was his
14 prior record, but in addition to impeachment with a prior
15 criminal history there were a lot of other factors to consider
16 in whether he could benefit by testifying in his own behalf.

17 Q Okay, I understand. So now when you heard some of the
18 testimony from Mr. Nash and then you talked about being able to
19 use the prior conviction of Mr. Rogers to impeach him, did you
20 all have a discussion about like the assault and battery of a
21 high and aggravated nature? Understanding you didn't object to
22 it coming in when Mr. Rogers was questioned about it. Did you
23 all discuss that or did you have any knowledge that he had a
24 prior conviction?

25 A I have no recollection of discussing Mr. Rogers's

1 criminal history with Mr. Nash.

2 Q Okay.

3 A I may have. I just have no recollection of that. I
4 actually have no recollection of the particulars of Mr. Rogers's
5 conviction for ABHAN. There was nothing about it obviously that
6 struck me as objectionable. I didn't object. But, you know, if
7 we look at it closely enough and discovered that it was somehow
8 not a qualifying impeachable offense then to that extent I
9 should have objected. I'm not aware of any information that
10 would leave me to believe it could have been objected to, but
11 ---

12 Q I guess what I'm saying prior to Mr. Rogers getting on
13 the stand did Mr. Rogers inform you that he had been convicted
14 of a felony?

15 A I don't remember.

16 Q Okay.

17 A I just do not remember.

18 Q All right. And I believe you testified that you didn't
19 think that was the linchpin that -- that didn't harm Mr. Nash
20 that he had a prior conviction but the purpose of your having
21 him as witness was to confirm Mr. Nash's position was that he
22 wasn't driving, or am I incorrect in that?

23 A Mr. Rogers hoped for testimony was that Mr. Nash had
24 been at his house for some period of time. It was in fact Mr.
25 Rogers whom Deputy Suber had seen driving that day and that Mr.

1 -- I believe it was that Mr. Rogers had been working on the
2 vehicle. Had been trying to repair the vehicle in some way, so
3 it was him that was driving not Mr. Nash.

4 What I think really undercut Mr. Rogers's credibility with
5 the jury was his actual testimony in court was in material ways
6 conflicting with what could be heard on the video, what he told
7 the police that day. In other words he didn't tell the police
8 he had been driving.

9 Q Well, in fact he told the police that it wasn't him
10 driving?

11 A That's right. Exactly. Yes, on the video he denied
12 having driven the car and in court he was trying to assert it
13 was me all along driving.

14 Q So on the video was his -- I know you discussed in the
15 Miranda -- well, in the Jackson v Denno hearing you challenged
16 the statements that came from the video because you could not
17 see or identify the individual talking to Officer Suber. Could
18 you see Mr. Rogers talking to Officer Suber on the video, is
19 that what you're saying.

20 A Yes, my challenge to the video was to suppress any
21 statements attributed to Mr. Nash.

22 Q Okay.

23 A On the basis of lack of Miranda and on the basis of
24 just poor audio quality. It's not reliable enough evidence in
25 essence. The Court went along with that part, although allowing

1 Deputy Suer to testify to Mr. Nash's statements. After Mr.
2 Rogers testified the State sought to introduce portions of the
3 video relating to Mr. Rogers's communications with the officers
4 solely for the purpose of impeaching Mr. Roger's in court
5 testimony?

6 Q As to the credibility?

7 A For impeachment, yes.

8 Q And so when that occurred you had no position that you
9 could take on behalf of Mr. Rogers because you weren't
10 representing Mr. Rogers?

11 A Well, Mr. Rogers wasn't charged with anything. He had
12 -- no, I mean at that point in time and for the limited purpose
13 of introducing it for impeachment it was not to be. I believe
14 the Court instructed the jury they could not take it as any
15 evidence of Mr. Nash's guilty. I didn't see any way to prevent
16 that from being used in that way.

17 I think that was probably the rule about other statements
18 that might otherwise be hearsay or admissible for impeachment
19 purposes.

20 Q So now, after the verdict was rendered and Mr. Nash was
21 sentenced, what, if anything, did you file on Mr. Nash's behalf?

22 A I filed a Notice of Appeal.

23 Q Did you consider filing a motion to reconsider?

24 A No.

25 Q So the only thing you filed was the Notice of Appeal

1 and did you represent him as to the appeal?

2 A No. My recollection of it was I informed Mr. Nash of
3 his right to appeal. That he had to do it within ten days.
4 Word got back to me that he indeed wanted me to file an appeal
5 and I did that and I believe appellant defense took over at some
6 point in there, but I didn't perfect the appeal, no.

7 MS. MOODY: No further questions for this witness.

8 THE COURT: Any redirect?

9 MR. HUNTER: Nothing else from the State, Your
10 Honor.

11 THE COURT: Thank you, you may step down. You may
12 call your next witness.

13 MR. HUNTER: That's the State's case, Your Honor.

14 THE COURT: The State rests. Anything in reply?

15 MS. MOODY: No, sir, Your Honor.

16 THE COURT: All right, are you ready to make
17 argument.

18 MS. MOODY: Your Honor, I guess I would rely on
19 the trial transcript in terms of all the allegations
20 that Mr. Nash indicated. He indicated ineffective
21 assistance of counsel for failing to object to a number
22 of things and arguing a number of things. Specifically
23 the closing statement of the State in terms of -- he
24 calls it vouching in terms of the credibility of his
25 witness, Mr. Suber and placing his office, or the states

1 -- allowing the State to place the credibility of their
2 office and the sheriff's department behind Officer
3 Suber.

4 He objected to the chain of custody as to how the
5 evidence of the drugs scale and the razor were
6 transported and submit to SLED for testing. That they
7 were not placed in the Best evidence bag at the time or
8 the location of the arrest, as well as who handled the
9 evidence. He objects. He says his attorney was
10 ineffective assistance of counsel for failing to object
11 on behalf of Mr. Rogers terms of how the State choose to
12 proceed to impeach him in confirming he had a conviction
13 of an assault and battery of a high and aggravated
14 nature. As well as he felt that his attorney did not
15 provide him with proper advice in light of how he did
16 not object to Mr. Rogers's impeachment. That he did not
17 provide him with proper advice as to his prior
18 convictions, which could be used and what the Court
19 would use in determining whether or not it was probative
20 or prejudicial in the particular case, at hand. And
21 then Your Honor he objected to -- he failed to object to
22 the Miranda warnings it terms of -- well, he objected to
23 it and they had a Jackson v Denno hearing.

24 Mr. Nash takes issue with the fact that his counsel
25 did not argue whether or not Mr. Nash was receiving

1 himself to be in custody in which he ends up giving a
2 statement that he feels and I believe the Court
3 throughout the transcript -- in the transcript of the
4 Jackson v Denno hearing talks about the functional
5 equivalent of Rhode Island v Innis. He feels that his
6 attorney should have argued more as to what Mr. Nash
7 felt in terms of when the officer motioned him to come
8 and speak with him in the driveway after pulling behind
9 -- I believe it was his mother's car that was parked in
10 the driveway.

11 Your Honor, he further indicated that he was
12 illegally searched and I guess that would hinge
13 basically off of when exactly Mr. Nash was in custody.
14 Whether he was formally arrest and whether it was truly
15 a search incident to arrest and a search incident to
16 arrest of his car where the scales were obtained. So he
17 feels that his counsel throughout the time that he
18 represented him with the his trial he feels that his
19 counsel did not provide him with the type of
20 representation that is of counsel -- lawyer in this area
21 practices criminal law, as well as he was prejudiced
22 because he was sentenced to five years on the habitual
23 offender, as well as six years on the possession of
24 crack cocaine third and in particular with possession of
25 crack cocaine third he would say that his counsel was

1 ineffective in that regard in that he was charged
2 initially with drug paraphernalia and that was the true
3 charge that he should have been charged with as opposed
4 to possession of crack cocaine third offense. He
5 indicated that there was no drugs found, coupled with
6 the fact that the drug -- or coupled with the fact that
7 the scale was placed on top of the car and they were not
8 immediately put in a Best evidence kit to be able to
9 keep the scale from being contaminated from any other
10 foreign substance. I guess that goes into he maintains
11 that he did not have any drugs on him.

12 I believe that is all of the allegations that Mr.
13 Nash has presented to the Court and that overall goes
14 into the effective assistance of counsel issue in an
15 umbrella since and the custody -- the chain of custody
16 and the unreasonable search are in violation of his
17 constitutional right. And so for that basis, Your
18 Honor, we ask the Court to grant him a new trial in this
19 matter -- or on the effective assistance of counsel.

20 THE COURT: Thank you, Miss Moody. Mr. Hunter.

21 MR. HUNTER: Just briefly, Your Honor. Your
22 Honor, the State contends that nothing alleged rises to
23 level of ineffective assistance.

24 Your Honor, the State contends that Mr. Harris
25 pretty vigorously argued the Miranda issue and it was

1 just one of those cases where the judge changed his mind
2 at the last minute and let in a small part of the
3 statement.

4 Your Honor, as far as the vouching question is
5 concerned the State would agree with what Mr. Harris
6 said on the stand, that although it may be improper,
7 that the statement did not rise to the level of
8 vouching. And Your Honor the State argues that there
9 wasn't any -- there wasn't the government trustee or the
10 credibility placed behind -- credibility of Officer
11 Suber there. He is basing it off of what was presented
12 at trial was that they knew each other, Suber and Nash
13 and they had seen each other before and were pretty both
14 familiar with each other.

15 Your Honor, as far as the weight is concerned,
16 countless cases show that no measurable weight is
17 required. And so, Your Honor, he did not err there in
18 not objecting. Also, as far as challenging the search,
19 Your Honor, we agree with Mr. Harris that it was search
20 incident to arrest. It was not unreasonable. Nothing
21 to object to.

22 Let me make sure I hit it all. As far as chain of
23 custody goes, Your Honor, the State contends that -- and
24 agrees with Mr. Harris, that there is nothing legally
25 wrong with the chain of custody. That in any event, it

1 would just go to the credibility not the admissibility
2 of that evidence.

3 Your Honor, for the those reasons we stated
4 throughout this hearing the State feels that nothing
5 alleged would constitute ineffective assistance, and at
6 the same time if anything they alleged might constitute
7 effective assistance there was no prejudiced resulting
8 from this. The trial would not have been different.
9 That is all we have, Your Honor.

10 Thank you.

11 THE COURT: Refresh my memory on one thing, Mr.
12 Hunter. On Mr. Nash's allegation that Mr. Harris should
13 have objected to his witness being impeached Mr. Harris
14 said -- said what about it? I can't remember his words.
15 He said that the video did him in. Did I get that
16 right?

17 MR. HUNTER: Mr. Rogers, yes, because there were
18 some statements on the video that overheard -- there
19 were portions of the video that overheard Mr. Rogers
20 talking to one of the officers and I believe he said
21 contradicted some of the testimony that Rogers gave that
22 day. So when he said the statements on the video that
23 is what he was referring to and that essentially
24 destroyed his credibility.

25 THE COURT: All right. The Court agrees with the

1 argument and the position set forth by the Attorney
2 General on behalf of the State today. In addition
3 thereto find that even if applicant's attorney was
4 deficient in failing to object to that witness -- the
5 impeachment of the witness it would have not made any
6 difference. It would not have changed the outcome of
7 the trial.

8 For all those reasons I am going to deny
9 applicant's motion for post conviction relief.

10 Mr. Hunter would you please prepare an Order.

11 MR. HUNTER: Yes, Your Honor. Thank you.

12
13 END OF TRANSCRIPT
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C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter for the 16TH Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for Union County, South Carolina, on the 3rd day of Novemer, 2015.

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

May 6, 2016

Aileen Butler

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)
Kashif Poiteia Nash, #358744,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
OF THE SIXTEENTH JUDICIAL CIRCUIT

2014-CP-44-0401

ORDER OF DISMISSAL

FILED FOR RECORD
2016 JAN 15 PM 12 43
CLERK OF COURT
UNION, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed October 7, 2014. Respondent made its Return on or about February 13, 2015. An evidentiary hearing into the matter was convened on November 3, 2015, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Leah Moody, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Ricky Harris, Esquire, also testified. This Court had before it a copy of Applicant's records from the Union County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's PCR Application, and Respondent's Return.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. Applicant was indicted at the August 2013 term of the Union County Grand Jury for Habitual Traffic Offender (2013-GS-44-0918) and at the January 2014 term of the Union County Grand Jury for Possession of Cocaine (2014-GS-44-0033). He was represented by Ricky Harris, Esquire. On February 4-5, 2014,



Applicant was tried by a jury and convicted both charges as indicted. The Honorable Lee S. Alford sentenced Applicant to confinement for six (6) years for Possession of Cocaine, 3rd offense and five (5) years, concurrent, for Habitual Traffic Offender.

A notice of appeal was filed on Applicant's behalf. Thereafter, Applicant signed an affidavit and submitted to the Court of Appeals, informing the Court of Appeals that he wished to dismiss his appeal. The Court of Appeals issued an Order dismissing Applicant's appeal on November 7, 2014. The Remittitur was issued on November 24, 2014.

In this PCR action, Applicant alleged he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to communicate with Applicant
 - b. Counsel failed to object to improper impeachment of Junior Rogers
 - c. Counsel failed to object to improper closing argument by the State
 - d. Counsel failed to argue Applicant's position about whether Applicant was in custody when questioned by the officer and whether Applicant was detained on private property
2. Insufficient chain of custody
3. Unreasonable search

II. SUMMARY OF THE TESTIMONY

Applicant's Testimony

Applicant testified that he believed Counsel should have objected to improper impeachment questioning of Junior Rogers during the State's cross examination. Applicant testified that the Assistant Solicitor asked Rogers about a prior ABHAN conviction and that Counsel should have objected because no balancing test took place. Applicant further testified that Counsel should have attacked the credibility of the responding officer (Officer Roger Suber) during cross examination.



Applicant testified that Counsel was ineffective for failing to effectively argue Miranda¹ in his closing to show that he was in custody when he made a statement to the police. Applicant further testified that Counsel should have put Applicant on the stand to let him explain that he was in custody. He explained that he wanted to testify but Counsel told him that his prior convictions could be used against him. He testified that he believed Counsel gave him the wrong advice about his prior convictions and how they could be used to impeach him.

Applicant also testified that the evidence should have been suppressed because only cocaine residue was found from the items seized and no weight was recorded.

Applicant testified that he wanted Counsel to challenge the indictment because he was originally given a Uniform Ordinance Summons for possession of drug paraphernalia and believed he could not be charged with possession of cocaine. He testified that he discussed this with Counsel but it did not come out at trial.

Applicant testified that Counsel should have made a pre-trial objection to the chain of custody because the chain of custody does not list the location. The document in question provided by Applicant is titled Union County Sheriff's Office Receipt for Property Chain of Custody. Applicant also testified that the responding officer, Officer Suber, took the scales from Applicant's pocket, placed it on the car, and then in the evidence BEST kit.

Applicant testified that Counsel should have made a pre-trial objection to suppress the evidence because he believed Officer Suber conducted an unreasonable search of his person and the car.

Counsel's Testimony

Counsel testified that he has been practicing law for thirty-two years with twenty-five years of criminal experience. He testified that his practice mostly consists of defending DUI and

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

#3 

drug offenses. He testified that he became involved in Applicant's case when Applicant called him after being arrested. He testified that he met with Applicant several times in his office and discussed plea negotiations, possible defenses, and the charges he was facing. He testified that the State had a strong case against Applicant and the plea negotiations were unsuccessful. Counsel testified that he received a plea offer of eighteen months incarceration that he advised Applicant to accept it. He testified that he also received a plea offer of a three-year cap on incarceration followed by probation. Counsel further testified that Applicant did not want to plea and maintained his innocence by insisting that he was not driving the vehicle and that Officer Suber was trying to pin the crime on him.

Counsel testified that he received full discovery including the incident report, drug report, Applicant's driving record, the chain of custody documents, and the video recording of the stop. He testified that he did not believe there to be any problem with the SLED report and the chain of custody, and found no flaws in the chain. He testified that he had no grounds to make a motion to suppress the evidence based on the chain of custody.

Counsel testified that he reviewed all of the discovery items with Applicant and discussed the video at length. Counsel testified that he did make a suppression motion pre-trial and successfully argued to keep out a portion of the video that included improper questioning by Officer Suber during the stop. He testified that the drugs were found as a result of a search incident to arrest and there was no reason to challenge it. He also testified that there was no legal reason to challenge the cocaine residue. He testified that he highlighted to the jury that there was no measurable amount of cocaine recorded by SLED and argued in defense that Applicant did not knowingly possess cocaine.

#4 

Counsel testified that he did not remember Applicant wanting to take the stand to testify and never got the impression that Applicant wanted to testify. He testified that he did not think Applicant would have provided helpful testimony and also testified that he believed Applicant had a strong chance to win at that point. Counsel testified that he explained impeachment to Applicant but never told Applicant not to take the stand because of his prior record. Counsel further testified that he did inform Applicant that his prior drug record could be used to impeach him and Applicant had no questions concerning that issue.

Counsel testified that he did not see a reason to object to the State impeaching Junior Rogers by bringing up his ABHAN conviction. He testified that it did not hurt Applicant's case and would not have made a difference in the case. Counsel testified that Rogers' testimony did not help the State because the testimony was already filled with inconsistencies and impeachment by the video recording.

Counsel testified that he did not object to the State's closing argument because he did not think that the State improperly vouched for Officer Suber. He testified that he did not think any statements were improper at the time.

III. APPLICABLE LAW

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

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive

#6 

on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Counsel

This Court finds that Applicant failed to meet his burden of proving that his trial counsel was ineffective. First, this Court finds that Applicant has failed to prove that Counsel was deficient for failing to communicate with Applicant. This Court finds Counsel's testimony persuasive that he met with Applicant several times and discussed all plea offers, discovery, possible defenses, and the charges he was facing.

Next, this Court also finds that Applicant has failed to meet his burden of proving that Counsel was ineffective for failing to object to improper impeachment of Junior Rogers. On cross-examination of Junior Rogers, the State asked if he had been convicted of assault and battery of a high and aggravated nature. (See Trial Tr. p. 239, ll. 2-6). This Court finds that Counsel was not ineffective for failing to object to this impeachment because it was proper under SCRE Rule 609(a)(1) as ABHAN is punishable by more than one year imprisonment. Even so, this Court finds that Applicant has failed to show that the outcome of the trial would have been different if Counsel had objected. Therefore, this allegation must be dismissed.

Next, Applicant alleges that Counsel was ineffective for failing to object to improper vouching during the State's closing argument. Applicant's concern includes the statements:

So if it just comes down to which person do you believe, I submit to you Deputy Suber certainly has no reason to risk his job and his freedom to come here and swear under oath that he had seen Mr. Nash drive the car if he didn't see Mr. Nash drive the car. He knows Mr. Nash. He has known him for years. He knows his entire family. He sees them every other week at church. He has had conversations with him about driving and his driver's license status. He would not be mistaken.

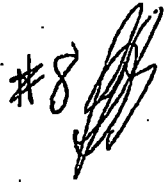
(Trial Tr. p. 286, ll. 23-25 to p. 287, ll. 1-7).

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This Court finds Counsel was not ineffective for failing to object because the remarks do not rise to the level of improper vouching. A solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. Matthews v. State, 350 S.C. 272, 275, 565 S.E.2d 766, 768 (2002). However, "[a] solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record." Smith at 523, 654 S.E.2d at 531-32 (quoting Matthews at 276, 565 S.E.2d at 768 (2002)). "The appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

Counsel testified that he did not object to the comment and did not think the remark merited an objection in the middle of the State's closing. Additionally, this Court finds that Applicant has failed to establish any resulting prejudice because, when looking at the entire record, the remark was harmless and in no way affected the outcome of the trial. Applicant has failed to meet his requisite burden of proof in regards to this allegation. Therefore, this allegation must be denied and dismissed with prejudice.

Applicant next alleges that Counsel failed to argue Applicant's position about whether Applicant was in custody when questioned by the officer and whether Applicant was detained on private property. This Court finds that Counsel's actions were not deficient as he did make such arguments to the trial court and, in doing so, was successful in keeping out a portion of the video because it involved improper questioning. (See Trial Tr. pp. 73, 75, 76, 88, 91, 93). Additionally, this Court finds that Counsel was not ineffective for failing to argue that the search was unreasonable because, as Counsel testified, the search was lawfully conducted incident to Applicant's arrest. Applicant has failed to meet his requisite burden of proof in regards to this allegation. Therefore, this allegation must be dismissed with prejudice.

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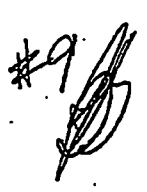
All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

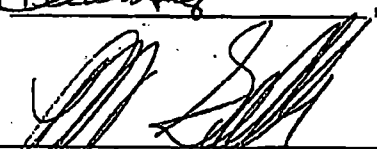
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

#9 

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 28 day of December, 2015.


BROOKS GOLDSMITH
Presiding Judge
Sixteenth Judicial Circuit

WITNESSES

Suber/UCSO

ARREST WARRANT NUMBER

63340FS

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

AUG - 8 '14

VERDICT

Guilty

Foreperson of Petit Jury

Date:

2/5/14

DOCKET NO. 2013-GS-44-0918

The State of South Carolina

County of Union

COURT OF GENERAL SESSIONS

AUGUST 12, TERM 2013

THE STATE

vs.

KASHIF POITEIA NASH

Indictment for

HABITUAL TRAFFIC OFFENDER

SC Code: 56-01-1100

CDR Code: 0057

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)

INDICTMENT

At a Court of General Sessions, convened on August 08, 2013, the Grand Jurors of Union County present upon their oath:

HABITUAL TRAFFIC OFFENDER

That in Union County, South Carolina on or about June 14, 2013, Kashif Poiteia Nash did willfully and unlawfully operate a motor vehicle in the state of South Carolina after having been determined to be an habitual traffic offender by the South Carolina Department of Transportation, in violation of Section 56-01-1100, Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Blaine Fleming
ASSISTANT SOLICITOR

WITNESSES

Suber/UCSO

ARREST WARRANT NUMBER

Direct Indictment – RE: 2013A4410200119

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: JAN - 2 2014

VERDICT

Guilty

Foreperson of Petit Jury
Date: 2/5/14

DOCKET NO. 2014-GS-44-0033

The State of South Carolina

County of Union

COURT OF GENERAL SESSIONS

JANUARY 06, TERM 2014

THE STATE

vs.

KASHIF POITEIA NASH

Indictment for

POSSESSION OF COCAINE

SC Code: 44-53-370
CDR Code: 3013

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)

INDICTMENT

At a Court of General Sessions, convened on January 06, 2014, the Grand Jurors of Union County present upon their oath:

POSSESSION OF COCAINE

That in Union County, South Carolina, on or about June 14, 2013, Kashif Poiteia Nash did possess or attempt to possess a quantity of Cocaine, a controlled substance under provisions of Section 44-53-110, et.seq., Code of Laws of South Carolina (1976, as amended), such possession not having been authorized by law, in violation of Section 44-53-370, Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR