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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable Alison Renee Lee

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Court of Appeals

Appellate Case No. 2014-002105

The City of Greer,

Respondent,

v.

Michael Edward Schulz,

Appellant.

AMENDED RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

FILED-CLERK OF COURT
GREENVILLE CO. C.C.P.
PAUL B. WICKENSIMER
2014 AUG 26 PM 4 00

City of Greer,

Respondent,

v.

Michael Edward Schulz,

Appellant.

DOCKET NO.: 2013-CP-23-05261

ORDER

This matter came before the Court on May 20, 2014 on appeal from the Greer Municipal Court. The City of Greer ("City") was represented by Daniel Hughes, Esquire, and the Appellant, Michael Schulz, was represented by Daniel Farnsworth Jr., Esquire.

BACKGROUND

Appellant was arrested and charged on April 28, 2013 with Driving Under the Influence and Open Beer in Moving Vehicle. A jury trial was held before Municipal Judge Henry J. Mims on September 27, 2013. At the trial, Daniel Farnsworth Jr., Esquire, represented the Appellant, and Daniel Hughes, Esquire, represented the City. During the trial, Appellant admitted guilt for the charge of Open Beer in Moving Vehicle; therefore, only the charge of Driving Under the Influence was submitted to the jury.

The City called Sergeant Patrick Fortenberry, the arresting officer, as the only witness for the City. Fortenberry testified that he responded to a call about an erratic driver and got behind a blue Ford Explorer inside the city limits of Greer. He observed erratic driving and activated his in-car camera. Soon thereafter, the vehicle passed outside the city limits of Greer traveling towards the town of Duncan. Fortenberry requested that the Duncan Police Department respond to initiate a traffic stop. However, a Duncan officer could not do so soon enough, so Fortenberry continued to follow the Explorer through the town limits of Duncan and back into the County of Greenville. During this time, the video continued to capture erratic driving. Fortenberry testified that he observed the Appellant's vehicle drift over the fog line at least 13 times, drift completely into the opposite lane at least three times, drift halfway over the double yellow line at least 14 times, and weave in and out of its lane of travel at least 47 times. After several miles, the vehicle returned to the city limits of Greer, and Fortenberry initiated a traffic stop.

Fortenberry testified that he approached the Explorer and immediately smelled a strong odor of alcoholic beverage and observed an open beer can located in the center console cup holder. Appellant was the driver and only occupant in the vehicle. Fortenberry testified that Appellant told him that he was coming back from a wedding and admitted he had consumed two beers while at the wedding. Fortenberry had the Appellant step out of the car to administer sobriety tests—the nine step walk and turn test and the one leg stand test. Fortenberry testified that Appellant performed poorly on the tests. Specifically, Fortenberry observed three out of four cues of intoxication on the one leg stand test and five out of eight cues on the nine step walk and turn test.

Based upon the Appellant's erratic driving, the smell of alcoholic beverage coming from inside the vehicle and from Appellant's breath, Appellant's admission of the use of alcohol, and his performance on the sobriety tests, Fortenberry arrested Appellant and transported him to the Duncan Police Department for a Datamaster test. After advising Appellant of his implied consent rights, Appellant refused the test.

During the course of direct examination, the following exhibits were admitted into evidence by the City and published to the jury: a picture of the open beer can found inside the vehicle, the in-car video (with redactions), the Datamaster video, and the SLED Breath Alcohol Analysis Test Report.

During his case in chief, Appellant testified that he was at a wedding and had an argument with his fiancé, who at the time was pregnant with his child. Appellant became very upset and left the wedding with an open can of beer, but did not consume any of the beer while driving. Appellant contended that the erratic driving resulted from texting with his fiancé while driving, rather than from any impairment by alcohol. Furthermore, he did not realize how bad his driving was until he watched the in-car video.

Appellant stated that he had a bad knee due to an injury he sustained during his career as a college football player. Appellant also testified that he suffers from anxiety, and that his condition possibly affected his performance on the sobriety tests. Appellant was under a doctor's care for anxiety. Appellant stated he refused the breath test because he did not trust the machine to produce an accurate result.

Appellant was found guilty on the charge of Driving Under the Influence, First Offense and sentenced to time served plus 30 hours of community service work. The court sentenced

Appellant to the minimum fine for the charge of Open Beer in Moving Vehicle. Appellant timely filed his appeal on September 30, 2013. A transcript of the proceeding below was filed by the municipal court. In his Notice of Appeal and oral argument before the Court, Appellant asserted three grounds for review:

1. The municipal court erred by not admitting into evidence or allowing questioning of the arresting officer on evidence of a report authored by the National Highway Transportation Safety Administration ("NHTSA") pertaining to the dangerous nature of texting while driving.
2. The municipal court erred by allowing the jury to view the City's visual aids that were not admitted into evidence after jury deliberations had begun.
3. The municipal court erred by allowing the City to argue in cross-examination and closing argument that Appellant could have produced evidence that would have proven his case, unfairly shifting the burden of proof to Appellant and causing undue prejudice to Appellant.

STANDARD OF REVIEW

"In criminal appeals from magistrate or municipal court, the circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception." *Rogers v. State*, 358 S.C. 266, 594 S.E.2d 278 (Ct. App. 2004) (citing *City of Landrum v. Sarratt*, 352 S.C. 139, 141, 572 S.E.2d 476, 477 (Ct. App. 2002)). Further, "the circuit court, sitting in its appellate capacity, may not engage in fact finding." *Id.*, 358 S.C. at 270. On appeals from municipal court "[t]he appeal must be heard by the Court of Common Pleas upon grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court... [a]nd the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." S.C. Code Ann. § 18-3-70.

DISCUSSION

I. Admission of NHTSA Report

Appellant's first ground for appeal is that the municipal court erred "by not admitting into evidence or allowing specific questioning of the arresting officer from that evidence, that was in the form of a report, including specific data and findings, allowed by the National Highway Transportation Safety Administration (NHTSA), a federal agency, pertaining to the dangerous nature of texting while driving, a critical component in Appellant's case." Appellant attempted

to introduce an NHTSA report regarding the dangers of texting and driving through Fortenberry during cross examination. *See* Transcript of Record at 105-08. The City objected on the ground of hearsay. *Id.* at 105. The Court excused the jury to address the issue. *Id.* at 108. Fortenberry testified that he had no knowledge of the report that Appellant sought to introduce into evidence. *See id.* at 106, 108. The Court sustained the objection, holding the report was inadmissible hearsay evidence, and Appellant was allowed the opportunity to make a proffer of Fortenberry's testimony. *See id.* at 115-18.

"As a general rule, the admission of evidence is a matter addressed to the sound discretion of the trial court." *Seabrook Island Property Owners' Ass'n v. Berger*, 365 S.C. 234, 241, 616 S.E.2d 431, 436 (Ct. App. 2005). "The trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision." *Id.* at 242, 616 S.E.2d at 436. Appellant argued the report was admissible because it fell within the "public records and reports" exception to hearsay evidence found in Rule 803(8), S.C. R. Evid. *See* Transcript of Record at 105, 109. The exception provides:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; *provided, however,* that investigative notes involving opinions, judgments, or conclusions are not admissible. Accident reports required by S.C. Code Ann. §§ 56-5-1260 to -1280 (1991) are not admissible as evidence of negligence or due care in an action at law for damages.

The municipal court found that Appellant did not offer any evidence of the report being authentic. *See* Transcript of Record at 110. Appellant then contended that the report was a self-authenticating document and did not need evidence of its authenticity pursuant to Rule 902(5) as an "official publication" issued by a "public authority." *See id.* at 110-11; Rule 902(5), S.C. R. Evid. ("Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: ...Books, pamphlets, or other publications purporting to be issued by public authority."). Appellant argued that the publication was authored by the NHTSA, which is a federal agency under the United States Department of Transportation. *See id.* at 113. The Court rejected this argument on the basis that it did not know if the NHTSA was a public agency and stated that Appellant offered no proof that it was a public agency. *See id.* at 111-13.

Appellant argued that the NHTSA is under the United States Department of Transportation and proffered testimony that the report indicated in its content that it was a publication of the NHTSA and Department of Transportation. *See* Transcript of Record at 119. The South Carolina Supreme Court has acknowledged that the NHTSA is a federal authority. *See, e.g.*, *Priester v. Cromer*, 401 S.C. 38, 49, 736 S.E.2d 249, 255 (2012); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 47, 691 S.E.2d 135, 148 (2010). Additionally, the Fourth Circuit Court of Appeals has explicitly held that an NHTSA report "fits snuggly within the [public records] exception."[1] *Jones v. Ford Motor Co.*, 204 F. App'x 280, 284 (4th Cir. 2006). Therefore, the municipal court did abuse its discretion in prohibiting the admission of the report.

Appellant argues that his primary defense was that he was texting while driving, not driving under the influence, and the report relates to the effects of texting while driving, making its exclusion prejudicial to Appellant. However, this Court finds that the error in failing to admit the report was harmless. The proffered testimony of Fortenberry on the report was brief and provided facts from the study that texting is one of the worst driving distractions and that texting takes a driver's eyes off the road for an average of 4.6 seconds, or at 55 miles per hour, the equivalent of driving the length of a football field blind. *See* Transcript of Record at 121. Appellant had already questioned Fortenberry and asked additional questions on the record after the proffer about the possibility that Appellant was texting while driving and the dangers of texting and driving. *See id.* at 52-56, 103-04, 125. Fortenberry even admitted that texting and driving can be dangerous. *Id.* at 103-04. Therefore, omission of the report was not prejudicial because the information proffered did not provide any substantive additional information for the jury to consider. The municipal court's decision not to admit the evidence is affirmed.

II. Jury viewing visual aids

Appellant's second issue on appeal is that the municipal court erred "by allowing the jury to view the prosecutor's visual aids that were not admitted into evidence after jury deliberations had begun." During the City's opening statement, the prosecutor listed the following numbers on an easel: 13, 3, 14, 47, 3/4, and 5/8. *See* Transcript of Record at 14. During Fortenberry's direct examination, he testified that those numbers represented the number of times that he observed Appellant's vehicle travel over the fog line (13), travel into the opposite lane of travel

[1] While the Fourth Circuit was analyzing the Federal Rules of Evidence, the South Carolina Rules of Evidence are similar with regards to the public records exception, with the South Carolina rule containing two additional limitations to public records, neither of which is applicable here.

(3), travel halfway over the double yellow line (14), weave in and out of his lane of travel (47), number of cues on the one leg stand (3 out of 4), number of cues on the nine step walk and turn test (5 out of 8). *See id.* at 23-26.

The City referred to the easel during its closing argument. *See id.* at 180. After deliberations began, the jury requested that it be allowed to review the numbers and information on the easel. *See id.* at 191. While not on the record, the municipal court inquired of counsel for the City and co-counsel for Appellant whether the jury could view the easel, and both parties indicated they had no objection to the request. The jury entered the courtroom and viewed the numbers on the easel before returning to their deliberations. *See id.* The municipal court informed Appellant's lead attorney of this occurrence, and he did not object or provide any comment. *See id.*

It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *B & A Dev., Inc. v. Georgetown Cnty.*, 372 S.C. 261, 271, 641 S.E.2d 888, 894 (2007). To preserve an issue at trial for appellate review, the issue must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007). There is no evidence in the record of either Appellant's attorney or co-counsel objecting to the viewing of the easel. Therefore, this issue was not preserved for review.

III. City's inappropriate comments during cross examination and closing argument

Appellant's final issue on appeal is that the municipal court erred by "allowing the City to argue in cross examination and in closing argument, that Appellant could have produced evidence that would have proven his case, thus unfairly shifting the burden of proof to the Defendant, thereby causing undue prejudice to the Defendant, resulting in his conviction." Appellant testified on direct examination that his erratic driving was caused by texting and driving, rather than impaired driving. *See, e.g.*, Transcript of Record at 141-42. During cross examination, the City challenged Appellant's testimony by asking him why he did not subpoena a records custodian from his wireless provider, Verizon Wireless, to admit his phone records from the day of his arrest into evidence to support his testimony. *See id.* at 157. The City argued

in closing argument that Appellant failed to produce the phone records for the jury to consider. *See id.* at 179.

"It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *B & A Dev., Inc. v. Georgetown Cnty., supra.* To preserve an issue at trial for appellate review, the issue must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C., supra.* Appellant's counsel never objected to the City's line of questioning during cross examination. When the City argued in closing argument that Appellant failed to produce the phone records for the jury to consider, Appellant's counsel again never objected. Therefore, this issue was not preserved for review. Additionally, this Court finds that Appellant opened the door to allowing these statements by asserting that Appellant was texting while driving as a defense. Appellant's appeal is denied on this ground.

ORDER

For foregoing reasons, this Court finds that the conviction of the lower court is **AFFIRMED.**

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

August 20, 2014
Columbia, South Carolina

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 OCT 30 PM 2 00

City of Greer,) C.A. No.: 2013-CP-23-05261

Respondent,)

vs.) RETURN

Michael Edward Schulz,)

Appellant.)

Charge:	Driving Under the Influence, Open Beer in Moving Vehicle
Date of Offense:	April 28, 2012
Location of Trial:	Greer Municipal Court
Date of Trial:	September 27, 2013
Presiding Judge:	The Honorable Henry J. Mims
Disposition:	"Guilty" on both charges/Jury Trial

On April 28, 2012, Sgt. Patrick Fortenberry charged the Appellant with the offenses of Driving Under the Influence (Ticket No. 10422 FI) and Open Beer in Moving Vehicle (Ticket No. 10423 FI). At a regularly scheduled term of jury trials in Greer Municipal Court, Appellant's case was called to trial and a jury selected. The trial was set for September 27, 2013. Dan Farnsworth, Jr. represented the Appellant. Daniel Hughes represented the City of Greer. During the trial, the Appellant admitted guilt for the charge of Open Beer in Moving Vehicle. The jury returned a verdict of "Guilty" for Driving Under the Influence.

Appellant made pretrial motions to 1) exclude reference to a prior DUI arrest that was captured on video; 2) to limit the officer's testimony about his response to multiple calls to 911 reporting a possible drunk driver in a blue Ford Explorer; 3) to exclude any testimony regarding the Horizontal Gaze Nystagmus (HGN) Test; and, 4) to dismiss, for the officer's failure to timely or properly advise the Appellant of his Miranda warnings.

As to each motion, the Court ruled as follows:

1) The Court ordered the City to redact the portion of the video that referenced a prior DUI arrest. 2) The officer was only allowed to testify that he responded to a call about an erratic driver, and not that he responded to multiple calls about a possible drunk driver in a blue, Ford Explorer. 3) The City stipulated to Appellant's motion to exclude any testimony or video evidence of the HGN test. 4) The Court denied Appellant's motion to dismiss regarding the Miranda warnings. The officer advised the Appellant of his Miranda warnings prior to the administration of the sobriety tests. The Appellant argued that S.C. Code §56-5-2953 mandates that Miranda can only be given at the time of arrest. The Court disagreed, finding that the Miranda warnings complied with S.C. Code 56-5-2953.

SUMMARY OF TESTIMONY

The arresting officer, Sgt. Patrick Fortenberry, was the only witness for the City. His testimony is summarized as follows:

Sgt. Fortenberry responded to a call about an erratic driver. He responded to the area and got behind a blue Ford Explorer inside the city limits of Greer. Sgt. Fortenberry immediately observed erratic driving and activated his in-car camera. Soon thereafter, the vehicle passed outside the city limits of Greer traveling towards the town of Duncan. Sgt. Fortenberry requested that the Duncan Police Department respond to initiate a traffic stop. However, a Duncan officer could not respond soon enough, and Sgt. Fortenberry continued to follow the blue Ford Explorer through the town limits of Duncan and back into the County of Greenville. During this time, the video continued to capture very erratic driving. Sgt. Fortenberry testified that he observed the Appellant's vehicle drift over the fog line at least thirteen (13) times; drift completely into the opposite lane at least three (3) times; drift halfway over the double yellow line at least fourteen (14) times; and, weave in and out of

its lane of travel at least forty-seven (47) times. After several miles, the vehicle returned to the city limits of Greer near or at S.C. Hwy 80 and Sgt. Fortenberry initiated a traffic stop.

Sgt. Fortenberry approached the blue Ford Explorer and immediately smelled a strong odor of alcoholic beverage and an open Bud Light can located in the center console cup holder. Appellant was the driver and only occupant in the vehicle. Appellant told the Officer that he was coming back from a wedding and admitted he had consumed two beers while at the wedding. Sgt. Fortenberry had the Appellant step out of the car to administer sobriety tests -- the nine (9) step walk and turn test and the one leg stand test. Sgt. Fortenberry testified that the Appellant performed poorly on those two standardized field sobriety tests. Specifically, Sgt. Fortenberry observed three (3) out of four (4) clues on the one leg stand test and five (5) out of eight (8) clues on the nine step walk and turn.

Based upon the Appellant's erratic driving; the smell of an alcoholic beverage coming from inside the vehicle and from the Appellant's breath; Appellant's admission of the use of alcohol; and, his performance on the sobriety tests, Sgt. Fortenberry arrested the Appellant for Driving Under the Influence and transported him to the Duncan Police Department for a Datamaster test. After advising the Appellant of his implied consent rights, the Appellant refused the test.

During the course of direct examination, the following exhibits were admitted into evidence by the City and published to the jury: a picture of the open can of "Bud Light" beer found inside Appellant's vehicle; the in-car video (with redactions); the Datamaster video; and, the SLED Breath Alcohol Analysis Test Report.

After the City rested its case, the Appellant elected to testify. He testified as follows:

Appellant had a bad argument with his fiancé, who at the time was pregnant with his child, at a wedding. Appellant became very upset and left the wedding with an open can of beer, but did not consume any of the beer while driving. Appellant could not recall the location of the wedding.

Appellant contended that the erratic driving resulted from texting with his fiancé while driving, rather than from any impairment by alcohol. Furthermore, he did not realize how bad his driving was until he watched the in-car video.

Appellant had a bad knee due to an injury he sustained during his career as a college football player, and that this previous injury affected his performance on the sobriety tests. Appellant also suffers from an anxiety condition, and that his condition also affected his performance on the sobriety tests. Appellant was under a doctor's care for anxiety, and had last taken medication for the condition a day before his arrest. Appellant refused the breath test because he did not trust the machine to produce an accurate result.

ISSUES RAISED ON APPEAL

Appellant raises multiple issues on appeal. Appellant's first issue is that the Court erred "by not admitting into evidence or allowing specific questioning of the arresting officer from that evidence, that was in the form of a report, including specific data and findings, allowed by the National Highway Transportation Safety Administration (NHTSA), a federal agency, pertaining to the dangerous nature of texting while driving, a critical component in Appellant's case."

Appellant attempted to introduce this report through Sgt. Fortenberry during cross examination. The City objected. The Court excused the jury to address the issue. During a *motion in limine*, Appellant was allowed the opportunity to make a proffer of testimony from the officer. Sgt. Fortenberry testified that he had no knowledge of the report that the Appellant sought to introduce into evidence. Therefore, the Court ruled that the article or report could not come into evidence through Sgt. Fortenberry. Appellant further contended that the article was a self-authenticating document pursuant to Rule 902 (5) as an "official publication" issued by a "public authority." The Appellant did not produce any evidence, other than that the article was written by

NHTSA, to support his argument that the report qualified as an "official publication." Furthermore, the Appellant failed to show that NHTSA qualified as a "public authority" under the Rule.

Appellant's second issue on appeal is that the Court erred "by allowing the jury to view the prosecutor's visual aids that were not admitted into evidence after jury deliberations had begun." During the City's opening statement, the prosecutor listed the following numbers on an easel: 13, 3, 14, 47, 3/4, and 5/8. During Sgt. Fortenberry's direct examination, he testified that those numbers represented the number of times that he observed the Appellant's vehicle travel over the fog line (13); travel into the opposite lane of travel (3); travel halfway over the double yellow line (14); weave in and out of his lane of travel (47); 3/4 (number of clues on the one leg stand); and, 5/8 (number of clues on the nine step walk and turn test). The easel and numbers remained on display throughout the trial.

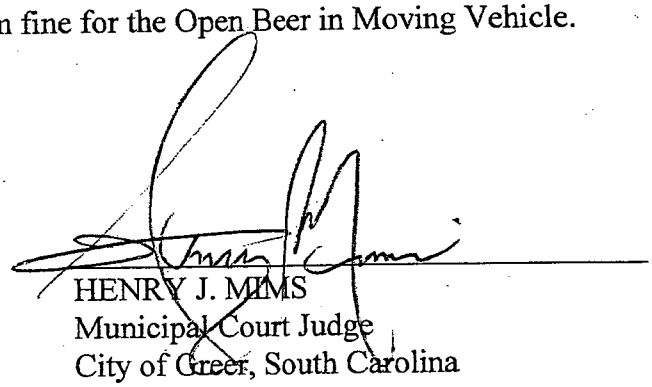
The City referred to the easel during its closing argument. As soon as deliberation began, the jury requested that it be allowed to review the numbers and information on the easel. The Court inquired of counsel for the City and co-counsel for the Appellant, and both parties indicated they had no objection to the request. The jury entered the courtroom and viewed the numbers on the easel before returning to their deliberations. The Court allowed no questions, comments, or discussion during the viewing.

Appellant's final issue on appeal is that the Court erred "by allowing the City to argue in cross examination and in closing argument, that Appellant could have produced evidence that would have proven his case, thus unfairly shifting the burden of proof to the Defendant, thereby causing undue prejudice to the Defendant, resulting in his conviction."

Appellant testified on direct examination that his erratic driving was caused by texting and driving, rather than impaired driving. During cross examination, the City challenged the Defendant's

testimony by asking him why he did not subpoena a records custodian from his wireless provider, Verizon Wireless, to admit his phone records from the day of his arrest into evidence to support his testimony. Defense counsel never objected to this line of questioning during cross examination. The City argued in closing argument that the Appellant failed to produce the phone records for the jury to consider. Again, defense counsel never objected.

The evidence produced at trial resulted in a "Guilty" verdict on both charges. The Appellant was sentenced to the mandatory minimum assessment for Driving Under the Influence, plus thirty (30) hours of community service work after having given him credit for time served. The Court sentenced the Appellant to the minimum fine for the Open Beer in Moving Vehicle.



HENRY J. MIMS
Municipal Court Judge
City of Greer, South Carolina

Dated: Oct 29, 2013
Greenville, South Carolina

1 Q Sergeant, if you would, please tell the jury, on April 28, 2012, what were you
2 duties with the city?
3 A On that date, April 28, 2012, I was a patrol sergeant over the Charlie team,
4 which is one of our nighttime shifts in the evening.
5 Q And how did you come into contact with the vehicle operated by Mr. Schulz?
6 A At approximately 8:24 p.m., our dispatch put out a general broadcast to all
7 officers on duty about an erratic driver who was driving on East Poinsett Street
8 headed towards the direction of Duncan City.
9 Q Was that within the city limits of Greer?
10 A It was.
11 Q From the time you received the call from dispatch until the time you got
12 behind the vehicle operated by Mr. Schulz, how long did that take you?
13 A Approximately five to six minutes from the time the general broadcast went
14 out to the time I located the vehicle.
15 Q Okay. And, Sergeant, where did you initially pull behind, at what point on
16 Poinsett?
17 A It was on East Poinsett Street right at Robinson Road, which is pretty much
18 the edge of the city limits. If you know the town of Duncan, there's a gas bottling
19 company on the right-hand side. It's about three-tenths of a mile towards Greer, is
20 where Robinson Road is.
21 Q And at that time did you activate your in-car camera?
22 A I did.
23 Q Sergeant Fortenberry, please tell this jury about what you observed about Mr.
24 Schulz' driving immediately upon approaching his car.

1 A Upon approaching him I observed his vehicle. He was driving a blue Ford
2 Explorer, and it was, the driver's side wheels were touching the center line. We
3 continued driving and I observed even more of his driving was drifting in his lane,
4 drifting into oncoming lanes, hitting the fog line. At times he would even go off the
5 side of the road on the right-hand side. And there were times he would also
6 completely go into the oncoming traffic.
7 Q Sergeant, at that time what were you doing as far as communicating with other
8 departments?
9 A As soon as I located the vehicle we were actually going outside the city limits.
10 Of course, I started my in-car video. I had our dispatch center try to contact Duncan,
11 the town of Duncan to see if they had an officer because we were headed towards
12 their police department, to see if there was a Duncan officer that was in the area that
13 could get behind the vehicle and then ultimately go ahead and make a traffic stop on
14 him.
15 Q Uh-huh.
16 A Continued doing that and we turned off of East Poinsett Street onto South
17 Spencer Street which is right, probably within a hundred yards of the Duncan police
18 department, but there was no Duncan officer available for whatever reason, whether
19 they were out on calls or just not in the area. So, I continued to follow his vehicle
20 awaiting for another law enforcement agency to have jurisdiction to make a stop.
21 Q Mr. Schulz traveled through the city limits of Greer through the town limits of
22 Duncan?
23 A He did.
24 Q Then he went onto South Spencer?
25 A Yes, he made a right.

1 Q And what road did he come to after that?

2 A After South Spencer Street he made a right-hand turn onto Victor Hill road.

3 Q At that time were you aware that he was headed back into the city limits of

4 Greer?

5 A I was.

6 Q Do you know how many miles you were able to follow Mr. Schulz?

7 A Just off the top of my head, approximately I followed him maybe eight miles,

8 nine miles. That's approximate.

9 Q Okay. And Sergeant Fortenberry, where did you finally make a stop of Mr.

10 Schulz?

11 A When we got to the intersection of Victor Hill Road and Highway 80, or the J.

12 Verne Smith Parkway, we got back into the city limits. He made a left-hand turn for

13 the straight lane. He made a left-hand turn out of that and as soon as we got back in

14 the city limits, I activated my blue lights in order to stop his vehicle.

15 Q Officer, you testified earlier about your past duties as a law enforcement

16 officer.

17 A Yes.

18 Q Have you had an opportunity during your law enforcement career to observe

19 impaired driving?

20 A Yes. It differs among individuals, of course, and the amount they have had to

21 drink, based on my training and experience. There are drivers who are continuously

22 drifting, you know, some may be drifting within their lane and they cross over the

23 center lane. Some of them in the more extreme cases completely go into oncoming

24 traffic or run off the roadway. Or make huge, wide turns when they're making turns.

1 A I got out and I approached his vehicle that he was driving. He had rolled his
2 driver's side window down. Upon approaching the vehicle, I could smell a strong
3 odor of alcoholic beverage coming from inside the vehicle, and as he spoke with me
4 as well. Of course, I asked him for his driver's license, registration card and
5 insurance card. And then I observed a Bud Light can that was open sitting in the
6 center console, and I asked Mr. Schulz to hand the open beer to me.
7 Q Could you smell the alcoholic beverage coming from his breath?
8 A Yes, as well as from the vehicle itself.
9 Q Did you confirm that when he came out of the vehicle?
10 A I did.
11 Q Sergeant Fortenberry, what did, based on your investigative training, what at
12 that point did you do?
13 A At that point I asked him to step out of the vehicle where I could observe him
14 a little and also give him some field sobriety tests.
15 Q Okay. What tests, two tests did you administer to Mr. Schulz?
16 A I gave Mr. Schulz the one-leg stand and the test that we call the walk-and-turn
17 test.
18 Q Did Mr. Schulz prior to that time admit to having consumed alcoholic
19 beverages?
20 A He did.
21 Q How much?
22 A He stated that he had had two beers and what was out of the can that was
23 inside the center console.
24 Q Did you ask him where he was coming from?
25 A I did.

1 Q And what did he say?

2 A He stated that he was coming from a wedding.

3 Q When you got him out of the car-- I want you to tell the jury about these two

4 tests. What are divided attention tests?

5 A They are ones that require you to be able to mentally process what's being

6 asked of you to do as well as to be able to physically perform the task.

7 Q What were the two tests you administered?

8 A One of the tests was the one-leg stand and the second was the walk-and-turn

9 test.

10 Q Let's take the one-leg stand. Tell the jury what you're looking for when you

11 administer this test.

12 A When you're doing the one-leg test, what you're looking for-- There are four

13 cues that you are looking for on that particular test. The first is if the person you're

14 out with puts their foot down. The second one is using their arms to balance. The

15 third one is-- Let's see, arms to balance... Let me see here.

16 You put your foot down, use your arms to balance, you sway is what the third

17 one is. And then the last one is where somebody hops in order to maintain their

18 balance to keep their foot up. Those are the four cues.

19 Q How many cues did you observe Mr. Schulz perform on these tests?

20 A On that test I observed three of the four cues.

21 Q Tell the jury about the nine-step walk-and-turn test.

22 A The nine-step walk-and-turn test has, I believe it's eight cues you're looking

23 for and on that test he had five of those that I could observe when I gave the test. The

24 first clue that you're looking for there is they're unable to maintain balance during the

25 instructional phase while we're giving them instructions. The second would be

1 whether or not the person would start too soon. The third would be where they stop
2 walking while they're taking the test. They're not supposed to stop at any point while
3 they do that.
4 They're supposed to be walking heel-to-toe as well, so they would need to
5 maintain that for each of the nine steps going forward and then for the nine steps on
6 return. If they step off the line with the, another clue that they could exhibit, of
7 course, using their arms to potentially balance their self because they're unsteady.
8 They're instructed when they turn around to return the nine steps a specific way so
9 you can make a proper turn. And then, of course, they're told to take nine steps
10 forward and turn around and take nine steps back. So, if they take incorrect number
11 of steps.
12 Q And how many cues did you observe with Mr. Schulz?
13 A On that, I believe there was five cues I observed on that.
14 Q Okay. Overall, Sergeant, how would describe his performance on those
15 sobriety tests?
16 A He performed poorly on those.
17 Q Did that confirm your suspicions earlier of impaired driving?
18 A It did.
19 Q Officer did you ask Mr. Schulz if he had any health problems before he
20 performed those tests?
21 A I asked him if he considered himself in good physical shape and he stated yes.
22 Q At that time after the completion of the nine-step walk-and-turn, what did you
23 do with Mr. Schulz?
24 A After that he was placed under arrest for driving under the influence.
25 Q And where did you take him after that?

1 Q Sergeant, in your career as a law enforcement officer, have you stopped
2 people who claimed to be texting while driving?
3 A I have.
4 Q What's different about the type of driving that you see when someone claims
5 to be texting and what you saw on this video?
6 A In my experience, when somebody's texting they can go over into, partially
7 into an oncoming lane, but when they realize they're in that lane, they jerk their
8 vehicle back. It's almost like it's a natural reaction. When they're looking down,
9 they're doing whatever with their telephone. Then they realize they're out of their
10 lane of travel they'll jerk back so they can hurry up and get back into their proper
11 lane.
12 Q And the difference we saw in that video was what?
13 A He was constantly drifting. With oncoming cars that were coming, he'd drift
14 over into their lane and then he's just kind of drift back. There was no urgency in his
15 driving, from what I observed, to get back into the proper lane of travel.
16 Q Did he ever tell you that I was texting while I was driving?
17 A No, he did not.
18 Q Officer you transferred him to the Duncan Police Department for a breath
19 test?
20 A That is correct.
21 Q Why Duncan and not Greer?
22 A Our Datamaster machine was not operating at the time.
23 Q And officer, are you certified to administer the breath test?
24 A I am.
25 Q Who certifies you?

1 A The South Carolina Criminal Justice Academy through SLED.

2 Q Your certification was in effect at the time you administered Mr. Schulz the

3 test?

4 A It was.

5 Q And what did Mr. Schulz do with this test when you offered it to him?

6 A He refused to take the test.

7 Q Officer, is the Datamaster room that SLED sets up for police departments and

8 different law enforcement agencies equipped with video equipment?

9 A Yes, they are.

10 Q Are you able to-- Have you been able to watch the recording from the

11 administering the test to Mr. Schulz?

12 A Yes sir, I have.

13 Q When Mr. Schulz was in the Datamaster room were you still able to smell

14 alcoholic beverages?

15 A Yes sir, I was.

16 Mr. Hughes: Your Honor, at this time the City would offer the Datamaster

17 video into evidence and ask that it be published to the jury.

18 Mr. Farnsworth: No objection, Judge.

19 The Court: Without objection. That will be City's Three?

20 Mr. Hughes: Yes sir.

21 (Whereupon City's Exhibit Number Three, Datamaster video, was played for

22 the jury)

23 (end playing of video)

24 Q I'm showing you what's been marked as City Exhibit Number Four. Do you

25 recognize that?

1 having the open container and then giving him those two tests, led me to believe his
2 faculties to drive were impaired.
3 Q Do you believe his was a case of DUI?
4 A I do.
5 Q Thank you, Sergeant. I have no further questions. Please answer any
6 questions that Mr. Farnsworth may have.
7 A Yes sir.
8 The Court: Mr. Farnsworth.
9 Mr. Farnsworth: Thank you, Your Honor. May it please the court.
10 The Court: Yes sir.
11 **CROSS EXAMINATION BY MR. FARNSWORTH:**
12 Q Mr. Fortenberry, this impaired driving that we saw and you've described, it
13 could have been caused by anything other than alcohol?
14 A Not in my opinion.
15 Q Okay. So, it's your opinion that alcohol was the only thing that caused the
16 impaired driving that we just saw?
17 A Like we just saw, that is correct.
18 Q What we saw, let me make sure I'm characterizing this correctly. You saw
19 Michael, my client here, the wheels of his vehicle touched the middle line a number
20 of times. Right?
21 A Yes, many times, yes.
22 Q You saw those left tires, both front and rear, go over into the other lane a
23 number of times?
24 A Yes, many times.
25 Q You saw him also go and come back the right side line. What's that called?

1 A The fog line.

2 Q Fog line. Went over there and touched that several times.

3 A Yes, many times.

4 Q And it's your testimony that alcohol is the only thing that causes that?

5 A For the continuous amount of time that this occurred, that is my opinion.

6 Q Have you ever been in a hurry to go to a lunch break, and gone through the

7 drive-thru at McDonald's and eaten your meal while you're driving back to work?

8 A I have.

9 Q Has that caused you to run out of your lane sometimes?

10 A Not me, no sir.

11 Q You're not driving a lot. But you saw you've seen that in your experience

12 where they get pulled over and they've explained, I've got my Big Mac in my lap

13 and I'm trying to---

14 A Yes.

15 Q You've seen that happen?

16 A Yes. Yes, I've seen them move over once and the immediately back into their

17 lane, I have.

18 Q When following a car like that that you recall turned out to be eating or

19 drinking, do you recall following them for this long a period of time ever?

20 A Ever? Not that I can recall.

21 Q But you've seen them cross the line a time or two while they're eating and if

22 you're following them, you may have seen them do it over and over again?

23 A I'm not sure if I would or wouldn't have.

24 Q But that's possible?

25 A I would assume it's possible.

1 Q So, you're assuming it's possible that they can continue, continuously go
2 across lanes and get out of their lane if they're something like eating while they're
3 driving, but earlier you said that alcohol is the only thing that causes that kind of
4 behavior.
5 A For the erratic driving that he displayed, for all of those things, that's correct.
6 The drifting over, touching the fog line, possibly.
7 Q And that's your opinion?
8 A That is correct.
9 Q And you arrested him for DUI based on your opinion?
10 A Based on all of the circumstances that I observed and my training and
11 experience in dealing with impaired drivers.
12 Q So, that would be your opinion. And do you think anyone else who watched
13 this would say, I think you're DUI, I'm arresting you
14 A Not at that time, no, they didn't, no sir.
15 Q So, again, my question is, it was your opinion that he was guilty of DUI
16 before you arrested him?
17 A That he was driving under the influence, that is correct.
18 Q And like the example I just asked you about with food and driving, have
19 you, --- Let me ask you this, and I think you testified you had. How many times
20 have you pulled over a driver who exhibited impaired-like behavior or poor driving,
21 and it turned out they were texting or emailing on their phone?
22 A I can't give you a specific number. It's been a handful of times I have.
23 Q A handful of times. And how is that handful of times different from what
24 Michael was doing when he was driving?

1 A They didn't have an open beer in the car, didn't smell of alcohol and didn't
2 fail the sobriety tests that I gave as well.
3 Q Well, we'll get to that. But my question is, this guide has got all these things
4 in here, one, two, three, four. I guess the first four categories refer to---
5 A Yes sir.
6 Q ---driving.
7 A That is correct, they do.
8 Q So, the big focus was on my client's driving. In your mind, it was your
9 decision in your opinion to arrest him for DUI?
10 A You're going to have to restate the question so I can understand exactly what
11 you're trying to have me answer.
12 Q I'll be glad to.
13 A Thank you.
14 Q Was it or was it not a big focus in your decision to arrest him for DUI when he
15 was driving like this?
16 A It was part of my decision, yes.
17 Q Was it the biggest part of your decision?
18 A I think they're all equal, but his driving certainly made me believe he was
19 driving under the influence.
20 Q Having an open beer in your car does not make you under the influence, does
21 it?
22 A It does not, no.
23 Q And in fact he told you that he had just opened that and he hadn't had
24 anything out of it yet?
25 A Correct.

1 Mr. Farnsworth: Thirty minutes, Judge?

2 The Court: I'm going to need an hour.

3 Mr. Farnsworth: Yes sir.

4 (Whereupon court was in recess for lunch at 11:56 a.m.)

5 **COURT IN SESSION 12:37 P.M.**

6 The Court: Are we ready to bring the jury in?

7 Mr. Hughes: No sir.

8 The Court: Mr. Farnsworth?

9 Mr. Farnsworth: No sir, Your Honor.

10 The Court: Bring the jury in.

11 (Whereupon the jury entered the courtroom)

12 All right. The jury is present, as is counsel for the City and counsel for the Defense.

13 Was lunch okay?

14 (positive response from jury)

15 The Court: Mr. Fortenberry, take the stand. You're still under oath. Mr. Farnsworth,

16 the witness is with you.

17 Mr. Farnsworth: Thank you, Your Honor. May it please the court.

18 The Court: Yes sir.

19 **RESUME CROSS EXAMINATION BY MR. FARNSWORTH:**

20 Q Officer, we were, before we broke for lunch, revealing some inaccuracies in

21 your recollection and some other things that you have testified to that weren't in your

22 report.

23 You, I think, in your testimony, when he asked you about texting when he

24 asked you, you testified to Daniel's questions that a you could think of a handful of

25 times that you pulled over drivers that were showing bad driving or driving problems

1 and you found out they were texting. What-- Is that something they told you or did
2 you have to figure it out?
3 A Something they told me.
4 Q On any of these arrests you made-- Let me ask you, how many DUI cases
5 have you worked?
6 A I can't give you a number. It's probably a hundred plus, but I can't give you a
7 number.
8 Q In those stops do you typically ask them if they have a reason or explanation
9 for any bad driving or impaired driving or driving that looks impaired?
10 A Just depends on the particular circumstances and what I observed.
11 Q And you did in this case ask Michael why he was having trouble on the road
12 with his driving?
13 A Correct.
14 Q You didn't think it was important to ask him why?
15 A No, I didn't.
16 Q You assumed when you saw the beer can in his console there that he was
17 drunk driving?
18 A I assumed that before that.
19 Q When you were following him you assumed he was drunk driving?
20 A Yes, I did.
21 Q And you followed him for-- How long did you follow him, how many
22 minutes, your best guess?
23 A Best guess would be ten, twelve minutes.

1 Q And again, these other incidences of poor driving that you referred to, I asked
2 you about whether people ever are eating, texting while they are driving the vehicle,
3 you never have followed any of those cars that long, have you?
4 A Yes, I have.
5 Q You have. How many others have you followed that long?
6 A I could only make a guess.
7 Q Best guess.
8 A That long, twenty, maybe.
9 Q So, twenty percent of cases, your best guess. In your experience twenty
10 percent of the cases you followed for that long a period of time?
11 A Yes, that is a guess.
12 Q And in those DUI stops you also see a lot of other examples of impaired
13 driving that he wasn't doing. Right?
14 A There are some; I wouldn't say a lot.
15 Q You mentioned that you had been certified by the South Carolina Criminal
16 Justice Academy in operating that breathalyzer machine. Right?
17 A That is correct.
18 Q And you've been trained in DUI detection by the same South Carolina
19 Criminal Justice Academy?
20 A I have.
21 Q And you've studied that in a one-day class. When did you take that class?
22 A To be honest, I can't remember. It's been a while.
23 Q What year did you take that class when you got certified in DUI detection?
24 A Maybe around '99, 2000; that's a guess.

1 Q And that course, where did you take that course? When you were training for
2 DUI detection, where did it consist of?
3 A Where did I take it, is that your question? It was either at the Academy or a
4 satellite site. It could have been at a local police department. I don't recall exactly
5 where.
6 Q And you would have studied a manual that was put out by NTSA, wouldn't
7 you?
8 A It would have been a manual provided and NTSA would be the ones
9 established in the guidelines. That is correct.
10 Q And NTSA is the National Highway Safety Administration?
11 A That is correct.
12 Q And that Administration of the United States government puts out procedures
13 on how to do these tests?
14 A Correct.
15 Q And which tests to use, procedures on tests to use for DUI detection?
16 A Correct.
17 Q And in that course of study, which you would have studied in your student
18 manual, DUI detection and standardized field sobriety testing.
19 A It would have been one similar to this, yes.
20 Q And since taking that course have you had any other follow-ups or
21 courses dealing with DUI detection?
22 A Last year they started implementing a way-- Late last year they started
23 implementing where you get re-certified in that.
24 Q Did you complete that?
25 A Yeah, I think November of last year, if I recall correctly.

1 Q And you would have, again, studied the NTSA manual for that?

2 A No, not for the recertification.

3 Q What would you have studied for that?

4 A It's an online class that the Academy has started.

5 Q And that would be based on tests and procedures promulgated by NTSA?

6 A Yes.

7 Q And would you agree with me that NTSA would be authoritative on DUI

8 detection and their studies they do regarding those tests and their accuracy?

9 A Yes.

10 Q You just testified that there weren't many other driving errors that would

11 indicate impaired driving. Right?

12 A There weren't many driving areas he did to indicate impaired driving?

13 Q I'm asking you if in stopping other DUI drivers if you've seen other examples

14 of bad driving that weren't seen on that seen on that video.

15 A You're asking if someone were driving under the influence if I were observing

16 other things would lead me to believe reasonable suspicion, such as someone getting

17 out of their car and falling down?

18 Q Okay.

19 A I've seen that.

20 Q I think your answer was there weren't many others.

21 A There were some others, I believe is the word I used, yes sir.

22 Q Some would include turning with a wide radius?

23 A It would.

24 Q Some would include someone appearing to have eye fixation?

25 A Correct.

1 A Well, driving ten miles under the speed limit, that would have been. And
2 there's probably-- I'm trying to recall some of the others you mentioned there. I
3 don't recall slouching and things like that. The speed, I would say, is one.
4 Q You didn't mention in your testimony that he was driving significantly slower
5 in the speed limit.
6 A No, I didn't.
7 Q You didn't have on that video measuring the speed?
8 A No.
9 Q Do you recall going to Greer and having a breath test that was
10 malfunctioning---
11 A Correct.
12 Q ---before going to Duncan? Do you recall whether or not-- Do you recall
13 accurately that he was driving significantly slower than the speed limit?
14 A Looking at the video, I would think that. I can't sit here and say one hundred
15 percent no.
16 Q The speed limit there had signs of 45 miles per hour. There were varying
17 speed limits---
18 A That is correct.
19 Q You didn't at any time have to slow down to keep from hitting him, did you?
20 A Not to keep from hitting him because I kept my distance. That is correct.
21 Q You also testified that in your opinion, in your experience, you said, I think
22 you said you saw--- Again, you've had experience over the years about a handful of
23 texting while driving individuals. And you said they're driving differs. Correct?
24 A The ones that I've had experience with. Yes, that is correct.

1 Q What I mean by differs is it differs from the ones that you've had were DUI
2 drivers.
3 A I was talking specifically about Mr. Schulz when that question was asked.
4 Q Let's go back to that question and make sure I am accurate. I think Daniel
5 asked you did you find a difference in the way texting drivers drive and his driving
6 errors versus the ones who are under the influence of alcohol and those driving errors.
7 You said that in your opinion, based on your experience, that you see texting drivers
8 jerk the wheel back once they realize they're in another lane.
9 A Yes.
10 Q And in your training of visual clue descriptions you have listed all these other
11 areas of possible drunk driving. Can you read Number 7 there?
12 A The one you have marked seven? Swerving. A swerve is an abrupt turn away
13 from a generally straight course.
14 Q Continue.
15 A Swerving might occur by way of drifting when a driver discovers the
16 approach of traffic in an oncoming lane or discovers that the vehicle was going off
17 the road.
18 Q So, in your opinion, based on your experience, with a handful of texting
19 drivers they are different because they will jerk the wheel back after going into an
20 oncoming lane is in fact the same thing that's described in your training for drunk
21 driving in the manual. Correct?
22 A Could be, yes.
23 Q Could be or yes?
24 A I'm talking about my experience. You're talking about what the book says,
25 yes sir.

1 Q But you in your testimony in answering those questions tried to show that
2 drivers drunk driving and text driving is different.
3 A I was trying to answer truthfully and honestly based on my training and
4 experience.
5 Q And we talked about opinions earlier, didn't we?
6 A We did.
7 Q Is it your opinion that some of this texting or emailing, either receiving or
8 writing these emails or texts while driving exhibit different bad driving behaviors
9 than someone who is drunk?
10 A Are you talking about in general or are you talking about this particular
11 instance?
12 Q I'm talking about in your experience.
13 A In my experience their behaviors do differ from someone who is driving while
14 impaired.
15 Q And that's what you testified earlier---
16 A Yes sir.
17 Q ---in response to---
18 A Yes sir.
19 Q ---Daniel's question?
20 A Yes sir.
21 Q And you said that texting drivers in your experience seem to, when they go
22 across the lane, they jerk back.
23 A Yes sir.
24 Q That's exactly what you just read which is Number 7, in the list of errors that
25 drunk drivers make.

1 A Yes sir.

2 Q So, it's not what texters necessarily do.

3 A Based on my experience that is what texters do, yes sir.

4 Q Based on you training and I realize it's been a long time since you took this

5 course when you took this course and updated on the online update, the same things

6 they pointed out as drunk driving behavior are explained by you as texting behavior,

7 aren't they?

8 A No.

9 Q Didn't you just testify earlier-- Didn't you testify earlier that in your

10 experience which is what you based your opinion on---

11 A Yes sir.

12 Q --- that texting drivers tend to jerk the wheel back abruptly into their lane

13 when they find they are drifting into another lane?

14 A Yes.

15 Q Is that not the same thing you read just now as a swerving action?

16 A That's what the book lists that as

17 Q Do you think that your opinion is more valid or more trustworthy than this

18 training manual?

19 A No, I just know my personal observations and through the experiences I've

20 had working as a police officer what I have seen to be true to life with what I have

21 had to deal with.

22 Q Your opinion is that texting drivers make abrupt turns where drunk drivers

23 don't?

1 A Based on the individuals that I have dealt with while texting they are the ones
2 that have driven into a lane or drifted into a lane and then they jerk back when they
3 realize that they're out of their lane of travels.
4 Q And in this manual-- And you're basing that on the handful of texting drivers
5 that you have dealt with?
6 A That is correct.
7 Q Would you agree that referring to the findings of this NTSA training manual
8 for all of you officers in the country is more authoritative than your handful of people
9 who are driving while texting?
10 A Can you restate that in another way so that I understand exactly what you're
11 asking?
12 Q Do you feel more comfortable relying on your experience in differentiating
13 between text driving and drunk driving rather than relying on the manual for all the
14 officers in the country?
15 A I use both, just as most officers would.
16 Q So you disagree with what the manual says?
17 A That's not what I said. No, I don't.
18 Q Would you agree that the actions you described as what you think are more
19 texting are actually the same thing the book says are DUI indicators?
20 A That's one indicator that's in the book that shows that swerving could be one
21 possible thing dealing with impairment.
22 Q So, you agree your testimony about texting and driving differences is not
23 absolute?
24 A It's based on my opinion and my observations on the particular ones that I've
25 had to deal with.

1 Q Now that I've pointed out to you the very action you describe as the difference
2 between text driving and drunk driving is actually included in these driving cues, you
3 agree that swerving and abrupt turns are DUI indicators.
4 A Sure, swerving and abrupt turns can be an indicator, one of many.
5 Q And is this something you're seeing more frequently, texting and driving?
6 A More than eighteen years ago, yes.
7 Q And if someone is texting, driving and receiving a text or an email, do you
8 think that all those, all the people who are doing that are going to necessarily jerk
9 back into the lane?
10 A Some might not even leave their lane.
11 Q Do you think it's, that texting is something that can divert your attention
12 pretty significantly while you're driving?
13 A Yes, it can.
14 Q And texting and driving is not illegal in the state of South Carolina, is it?
15 A No, it's not.
16 Q There's some cities and municipalities that have made it illegal. Are you
17 aware of that?
18 A Within the United States?
19 Q Yes.
20 A I'm not aware if any has or has not.
21 Q But you would agree that if you're driving based on texting or emailing that
22 that wouldn't be drunk driving?
23 A Would I agree that if it's based on text driving? Not necessarily. There's a lot
24 of factors and someone who's driving under the influence. Someone could be driving
25 under the influence and be texting.

1 Q Sure. Let me ask you this, let's move on to alcohol.

2 A Yes sir.

3 Q In your training, and I know it's been a long time. This training of yours

4 taught you and the other officers that alcohol affects different people differently.

5 A That's correct.

6 Q And they also taught you that two beers for one person could be not an

7 impairment at all, and two beers for someone else could.

8 A Yes, for various reasons, yes.

9 Q And that's why these tests have to be done to try to get a good guess as to

10 whether they're impaired or not.

11 A It's one factor to add in to the decision to make an arrest, yes.

12 Q So, you would also agree that in this state that it is not illegal to consume

13 alcohol and drive?

14 A That's correct.

15 Q As long as you don't have too much?

16 A As long as you're practicing good driving and are not too appreciably

17 impaired, yes.

18 Q And what gave you, other than driving, I think you testified is what was a

19 major factor or one of the factors. Other than that, what are the, what other evidence

20 that you relied on to form your opinion that he was drunk driving?

21 A In addition to the multiple traffic violations that I observed, the odor of

22 alcohol coming from the vehicle, from his person while talking with him, and open

23 container inside the vehicle, as well as not performing well on sobriety tests, all of

24 those combined to led me to make the decision to make an arrest.

1 A No.

2 Q I'm going hand you this page. Can you identify that as the stopping

3 sequence?

4 A Correct.

5 Q And there's a list-- I've numbered them. There's a list of six cues you need

6 to look for in a stopping sequence to indicate drunk driving?

7 A Correct.

8 Q Can you read them to us?

9 The Court: Are you referring to the NTSA book, sir?

10 Mr. Farnsworth: Sir?

11 The Court: Are you referring to the NTSA book?

12 Mr. Farnsworth: Yes sir.

13 The Court: And what page are you on?

14 Mr. Farnsworth: I'm on page, It's Roman numeral V- 9 of the manual.

15 The Court: Thank you.

16 A What you have marked here are cues reinforcing the suspicion of DUI. One

17 is an attempt to flee, no response, slow response, abrupt swerve, sudden stop, striking

18 a curb or another object.

19 Q So there again we see an abrupt swerve, a cue of possible drunk driving?

20 A Yes.

21 Q And that's again what you claim to be in your experience text driving

22 behavior?

23 A My experience through the people I've dealt with who have been texting have

24 swerved back into their lane once they have seen that they have moved out of their

25 lane of travel or partially out of their lane of travel. That is correct.

1 Q Is it possible that when some texts a text or email and they cross into another
2 lane they would move over gradually?
3 A That's a possibility, yes.
4 Q And in fact, that's what you saw him do. Right? You saw him gradually
5 move back into his lane.
6 A I don't have any reason to believe he was texting.
7 Q Would that be exhibiting behavior of somebody texting or emailing?
8 A What's the question? Say the question one more time so I can be sure I
9 understand you correctly.
10 Q You don't have any reason to believe that he was texting; you didn't ask him
11 what he was doing, did you?
12 Q No, I did not.
13 Q Now, a number of things can cause someone to get out of their lane. Right?
14 A Right.
15 Q If your kid's in the back seat, that can cause that?
16 A Yes.
17 Q Trying to change the radio station can cause to get out of your lane?
18 A Yes.
19 Q Anything you do that would distract you from your vision of the road is
20 probably likely to cause you to move out of your lane?
21 A It could cause that, yes.
22 Q If you take your eyes off the road you're likely to do behaviors like that.
23 Correct?
24 A In my opinion, not like the driving we observed on there, no.

1 Q If you continue to do whether it's eating or texting or emailing, or fiddling
2 with the radio, if you continue to do that for a long period of time, you're probably
3 going to be able to show that same behavior, aren't you?
4 A Not based on what I observed. I would not be able to say yes to that, no. For
5 that continuous amount of time and that extreme driving I would not say that.
6 Q Did he run off the road where the grass was?
7 A I couldn't see if there was grass. He did run off the right side of the road on at
8 least two occasions.
9 Q And on those occasions did he cross the fog line where he just went over to
10 the inside or outside of that fog line?
11 A And that's on thirteen occasions, I believe. On two separate occasions, he
12 went off the roadway.
13 Q And how he maintained that that can't be due to him drinking because he's
14 texting or emailing.
15 A Based on what I've observed and all the factors that were present that night I
16 believe that he was driving under the influence.
17 Q So, these factors that you mention and just read to us, attempting to flee the
18 scene, he didn't do that?
19 A No, he didn't.
20 Q Failed to respond to your questions?
21 A No, he did answer my questions.
22 Q Slow response to your questions?
23 A I don't think so, no.
24 Q Abrupt swerve, did he do that?
25 A No.

1 Q My question is when you learn these tests, are there any comments from the
2 instructor to make sure you do these and practice these to make sure you don't mess
3 up on your own test when you're illustrating?
4 A No, I don't recall an instructor ever saying that.
5 Q When you gave this walk-and-turn test to Michael and he's standing there
6 watching your demonstration—
7 A Yes sir.
8 Q ---you don't do the turn properly, do you?
9 A No, and we're not required under NTSA to do the turn, to demonstrate that as
10 I recall.
11 Q You did the turn, and said turn like this?
12 A I was doing exactly what I--- I went through a whole demonstration as the
13 subject was doing it. Normally, I don't even take the nine complete steps.
14 Q How many do you---
15 A You tell them to. I think they told us to do three, three or four or five.
16 Q When you're describing in your report that he did the turn sequence wrong,
17 what did he do wrong?
18 A Didn't take the small steps turning around.
19 Q Let's be clear about this. He didn't take small steps turning around, meaning
20 when he made the ninth step he didn't take small steps and turn around?
21 A Correct.
22 Q Okay. And it's your recollection that you showed him that turn properly?
23 A No, I don't think I showed him the turn.

1 Q The video, when the jury viewed it, shows you showing the steps and then
2 turning. Would that refresh your memory about the turn when showing how to do the
3 steps?
4 A I turned and I stopped. It may not have been-- I don't recall-- I do recall
5 turning, but I don't think I demonstrated the turning movement to him, is what my
6 recollection is based on everything today.
7 Q My point exactly. I'm glad to see we're on the same page here. You're
8 pointing out something you say he did wrong on the test.
9 A That's in the incident report. That is correct.
10 Q Those things, out of the eight, five out of the eight---
11 A Correct, out of eight cues, yes.
12 Q One of those five out of eight things on the walk-and-turn test you say he did
13 wrong was an improper turn.
14 A Correct.
15 Q And what I'm saying is you, did you not, illustrate the turn properly that he
16 was supposed to make?
17 A I may not have even demonstrated that to him.
18 Q If you remember that, then that's something we can concede.
19 A Yes sir.
20 Q You said, "Take small steps and turn back around."
21 A I may have said that, yes.
22 Q You didn't say anything about keeping his foot on the line?
23 A I don't recall if I did or not. There's a possibility I did not.

1 Q And if you did not tell him and not only not show him how to turn, but did not
2 tell him what he was supposed to do on the turn, then how fair is it so that was one of
3 the things he failed on the test?
4 A Not very fair.
5 Q You said you'd done I think, about a hundred DUIs or so over the years.
6 Before this arrest, again, which a year and a half ago, April, 2012.
7 A Almost, yes.
8 Q And nine or ten years before that, before this DUI arrest, when you were
9 using your experience in DUI detection and training to make conclusions and arrests
10 on DUI training, how many DUI cases did you handle those nine or ten years before
11 his stop?
12 A Out of the approximately a hundred, maybe eighty, and that's just an
13 approximate number.
14 Q So, I guess that would make about twenty since his arrest?
15 A Approximately, once again that's approximate.
16 Q Now, this is SLED, South Carolina Law Enforcement Division, operator-
17 arresting officer log.
18 A Yes sir.
19 Q You're Fortenberry. Right?
20 A That is correct.
21 Q First name, Patrick.
22 A That is correct.
23 Q Middle initial N.
24 A N, correct.
25 Q Patrick N. Fortenberry.

1 Isn't that the kind of thing , in your opinion, that would contribute to doing poorly on
2 your test, on this kind of test?
3 A I wouldn't believe so.
4 Q Are you familiar with anybody in your family or any of your friends that
5 suffer from any kind of anxiety disorder?
6 A No sir, I'm not.
7 Q Do you remember, or your recollection from the video earlier, when he did
8 the walk-and-turn test, during the steps back again, do you remember him doing
9 anything wrong?
10 A Other than missing heel to toe on a few of the steps which I didn't write down.
11 Q You didn't write down whether they were on the first nine or the second nine?
12 A They were on both.
13 Q You don't have that written down anywhere?
14 A No.
15 Q And we've already gone over a number of things that you remember
16 inaccurately from that day, that night?
17 A I wouldn't say a number of things. There were things that were left out of the
18 incident report, correct.
19 Q Several things that you were wrong about in your recollection, looking at the
20 incident report. In fact, you put in the incident report, didn't you, that he said that he
21 had part of that third beer. You put that in the incident report?
22 A Correct.
23 Q And that wasn't correct, is it?
24 A That he said that, that is correct.
25 Q You would agree with me that texting and driving is a dangerous thing to do?

1 A It can be.

2 Q And one difference between texting and driving and driving while impaired

3 and drunk, wouldn't it be that if you're texting, you not only have your physical,

4 your hands busy and distracted, but also your eyes are distracted off the road? Is that

5 true?

6 A With both, yes.

7 Q With drunk driving, you don't necessarily have your eyes off the road, do

8 you?

9 A Not necessarily, but you certainly can, and---

10 Q And you're---

11 A And your vision is not as if you are sober, as well.

12 Q And you're talking about how alcohol relaxes you and slows down your

13 reaction time, aren't you?

14 A That is correct.

15 Q And an example of slow reaction time would be if you were weaving into the

16 next lane and realized it late and jerked it back over?

17 A Jerk it back over? Could be, yes.

18 Q And that's what we pointed out was one of the drunk driving factors you are

19 looking for?

20 A Jerking the car back over, sure.

21 Q And that's what you described as texting driving, not drunk driving?

22 A Through my experience, the individuals I've stopped texting and driving,

23 when I've observed them going into an oncoming lane or partially into another lane,

24 they immediately jerk it back because they're, like, oh, my God, I went into the other

25 lane.

1 Q Are you familiar with the NTSA findings and studies which shows findings
2 of driving while texting---
3 Mr. Hughes: He's reading from what's a hearsay document.
4 The Court: Sustained.
5 Mr. Farnsworth: Judge, one thing it is, it was actually following up. First of
6 all, I'm not offering it into evidence. I'm not offering it into evidence at this point.
7 But even if I was, I think it would fall under a publication by public authority, and
8 this is a United States government agency. At this point I'm just asking questions of
9 the officer concerning---
10 The Court: Step One: It doesn't come in on that ground. Step Two: His
11 objection sustained. Set a foundation and you can ask him whatever you want to
12 about it.
13 Mr. Farnsworth: Thank you.
14 Q The NTSA publication I'm talking about---
15 The Court: No. I'm saying set the foundation, not read what's in it.
16 Mr. Farnsworth: Okay.
17 Q The NTSA that's being referred to during most of this testimony and
18 questioning is the National Highway Traffic Safety Administration, is it not?
19 A National Highway Traffic Safety Administration, yes sir.
20 Q And that same group is the group that put together this training manual to
21 show that you studied to learn how to perform DUI detection activities?
22 A Yes, it is.
23 Q And If that same group, NTSA, done an additional studies of texting and
24 driving, would that be something that you would consider authoritative?

1 A I would have to use that on a case by case basis. I would have to look at that
2 publication and study that to make a determination myself on that particular subject
3 matter.
4 Q Earlier you testified that after being trained on and studying this manual at
5 the Criminal Justice Academy that you consider NTSA to be authoritative as far as
6 highway safety. Would you agree with that?
7 A Yes.
8 Q And if this book that we've been looking at, the training manual, suggests
9 that other driving behaviors are possibly as dangerous as drunk driving, would you
10 also consider authoritative the NTSA conclusions and findings that describe other
11 things that could cause driving problems?
12 A I would have to review and study that particular study to make a
13 determination at that point. I'm not familiar with any publications that NTSA has
14 done in relation to texting and driving.
15 Q Let me ask you this: Earlier we talked about the percentage of the accuracy of
16 these two tests for sobriety?
17 A Yes sir.
18 Q And it was based on studies done by NTSA. Right?
19 A Correct, and the particular publication that you showed me that I studied out
20 of.
21 Q This publication represents original research- I think I showed you those
22 words - indicating that the one-leg stand was twenty-five – I'm sorry – sixty-five
23 percent accurate. And original research indicated the walk and turn was sixty-eight
24 percent accurate. You remember that? Right?
25 A Yes sir.

1 Q Do you accept those numbers as authoritative and valid?

2 A Based on the guidelines for the establish, being able to determine, using that

3 one factor, reinforcing cues, yes.

4 Q And you didn't read that research?

5 A On that particular one, they may have shown parts of it during the class. I

6 can't recall if they did or did not do that.

7 Q And they may not have shown it?

8 A They may have.

9 Q But today, when we talked, you accepted those two numbers as accurate and

10 reliable and authoritative figures from NTSA without having read the research and

11 study itself, but just taking NTSA's conclusions on these pages, didn't you?

12 A In conjunction with, it was taught by Academy instructors and had been

13 reviewed by the legal staff at the Academy in order to be put into curriculum for law

14 enforcement officers to study in this state. Based on that, being taught at our

15 Criminal Justice Academy, which is our only criminal justice academy here in South

16 Carolina all officers go to, and that NTSA did the studies, and the Criminal Justice

17 Academy legal staff and instructors felt comfortable teaching those, I did accept

18 those.

19 Q Are you saying that your teachers and instructors at your police academy

20 taught things other than what's in this manual, things they didn't agree with NTSA

21 on?

22 A No, I'm not saying that at all.

23 Q So, if the Highway Traffic Safety Administration publishes and makes

24 conclusions concerning other, generally concerning other sources of dangerous

25 driving, is that considered authoritative also?

1 A Once again I would to look at that publication, study that publication, or be
2 taught in the Criminal Justice Academy after it's been reviewed by their legal staff to
3 determine the applicability of the laws of the state of South Carolina. I have not
4 reviewed any publication dealing with texting and driving and I'm not familiar with
5 any.
6 Mr. Farnsworth: Judge, permission to allow him to review this publication?
7 The Court: The jury will take a short break. Ladies and gentlemen, make
8 sure you don't discuss the case or deliberate and don't let anybody discuss it in front
9 of you. I will get you back in here as quickly as possible.
10 (Whereupon the jury exited the courtroom)
11 I don't see how you can lay a foundation. Even if he reviews it w hat does
12 that give you?
13 Mr. Farnsworth: Judge, I'm not sure he-- It doesn't have to be-- What I can
14 do is-- I can ask him, several things can cause, similar things can cause poor driving.
15 So, this is another example of---
16 The Court: Sure, it can. He's merely told you he's not familiar with this
17 study on texting. So, you don't get to come and ask him did you know that there's a
18 study that shows that everybody who texts and drives is dangerous. He's already told
19 you he doesn't know that. All right. You get to ask him if somebody told him that
20 texting and driving is dangerous, I'll give you that. But you can't ask him about that
21 specific study when he's telling you he doesn't know the study.
22 Mr. Farnsworth: Judge, I think I can show evidence, Judge, based on the
23 public records exception.
24 The Court: Public records exception? How does he know public records?

1 Mr. Farnsworth: Records of public agencies. This is what it says: Records,
2 reports, statements or data compilation in any form-- I'm sorry. I'm referring to
3 Section VIII of . In any form of public offices or agencies- which this clearly is, the
4 National Highway Traffic Safety Administration.
5 The Court: Did you make sure that the new rule-- Wait a minute.
6 (dialogue concerning juror's child needing to be picked up– court in recess)
7 The Court: All right. Go ahead.
8 Mr. Farnsworth: Judge, again, just for the record, I would say the public
9 records and reports exception for hearsay exceptions, it's my position-- And what it
10 says, if I've described it correctly, and I don't think I have yet.
11 This is a publication by NTSA, the National Highway Traffic Safety
12 Administration entitled distracted driving and it has the NTSA numbers at the bottom
13 of the page This summarizes statistics and other data compiled by NTSA concerning
14 the problem of texting and driving, which is part of our case.
15 Now, I haven't put my case up yet, but that's going to be part of my case. It's
16 also part of my-- Maybe not a stretch, but more of a stretch if I was putting
17 something up from some obscure agency. But this same agency that produced this--
18 And what it does and I'm trying to put it in, whether the officer knows it or not,
19 given the fact that texting and driving is more dangerous than drunk driving and I
20 have statistics to back it up.
21 The Court: Do you agree with that?
22 A Not necessarily. I'd have to review that and---
23 The Court: I'm not asking you that. Do you agree with the report?
24 A No, I don't agree with the report.

1 Mr. Farnsworth: I could ask him a few more questions. I could ask him if he
2 read the report and I could show him what NTSA says---
3 The Court: He says he's not familiar with it. It's not coming in.
4 Mr. Farnsworth: Judge, I think it comes in under---
5 The Court: I appreciate that, but it ain't coming in. Now, give me the one
6 he gave me.
7 Mr. Farnsworth: Let me tell you, too, the data that it says. It says that
8 sending and receiving text messages takes a driver's eyes off the road for an average
9 of 4.6 seconds.
10 The Court: I think that's true. I think that's true. But you can't testify to
11 that. He doesn't know anything about it. Right?
12 Mr. Farnsworth: Right.
13 The Court: And we don't have anybody here who has relied on that to opine
14 one way or the other.
15 Mr. Farnsworth: But the public records exception---
16 The Court: I'm telling you that I don't think the public records exception---
17 Mr. Farnsworth: And another one---
18 The Court: --- applies to that---
19 Mr. Farnsworth: And again, hearsay is about There's another one on line
20 two self-authentication. Section 55 is about the authenticity and other foundations
21 and testifying to it.
22 The Court: (inaudible)
23 Mr. Farnsworth: (inaudible) does not require (clicking noises obscuring
24 statements)
25 The Court: First time in Greer apparently.

1 Mr. Farnsworth: ---is not required with respect to the following---

2 The Court: I am a high school graduate.

3 (laughter)

4 Mr. Farnsworth: official publications, books, pamphlets or other publications

5 purporting to be issued by public authority.

6 The Court: NTSA is not a public authority. Let me hear you.

7 Mr. Farnsworth: How can a public agency not be a public authority?

8 Mr. Hughes: I agree, Judge.

9 The Court: No, don't agree with me; tell me what your argument is.

10 Mr. Hughes: Your Honor, I do not see how a article, which is what he's

11 holding up, - I haven't read - qualifies as self-authenticating under 8-902-5.

12 The Court: Why?

13 Mr. Hughes: It is not a-- There's no basis of showing it's a pamphlet or

14 publication purportedly issued by a public authority. And I don't think I agree with

15 you, Judge. I don't think this NTSA's a public authority.

16 Mr. Farnsworth: Judge, I can have him read it.

17 Mr. Hughes: Well, ...

18 Mr. Farnsworth: What it does, Judge-- And I know what you're saying, I

19 could have chosen to have someone read it but---

20 The Court: (off record discussion regarding juror situation with child)

21 Mr. Farnsworth: I had the option to, if I wanted to, subpoena someone from

22 NTSA to come down from Washington, DC to admit this in as some record as part

23 of, is this an official publication of your governmental agency, yes, but that's not

24 necessary, Judge, under the two rules that I've quoted.

1 The Court: Well, two things. That's not your only option. The other option
2 would have been if you had someone to render an opinion as to texting vis-à-vis DUI
3 driving who had relied on that for an example. So, you don't have to have somebody
4 out of Washington in order to get that in. All I'm saying is you've not shown me
5 anything yet which convinces me that that should come in when, step one, he doesn't
6 know, that witness, anyway, he doesn't know a darn thing about it.
7 Mr. Farnsworth: Well, Judge, he also wasn't familiar with some of his
8 training that I reminded him from the same NTSA book what your conclusions were,
9 and there are percentages and statistics that---
10 The Court: He didn't object.
11 Mr. Farnsworth: Well, Judge, if I can present---
12 The Court: I'll let you make an offer of proof.
13 Mr. Farnsworth: Is that a-- I'm not sure how to set it up. I can show a data
14 compilation of the public agency, Judge.
15 The Court: I'm not sure that I find NTSA to be a public agency. I don't--
16 I'm not even sure it's analogous to a public agency. I think you're saying it's public
17 by the mere fact that it's not private. I don't know that it's private, by the way. My
18 difficulty is I'm not considering NTSA in that light. Let me hear you on that.
19 Mr. Farnsworth: Well, the way I'm looking at---
20 The Court: Let me hear you on that.
21 Mr. Hughes: As far as I know, NTSA developed standards to train officers
22 and---
23 The Court: For whom?
24 Mr. Hughes: Law enforcement.
25 The Court: No, who'd they do that for, just law enforcement?

1 Mr. Hughes: That's my understanding, although I'm no NTSA expert. But
2 that does not make it a public authority.
3 The Court: He didn't say public authority, he said public entity.
4 Mr. Hughes: Well, the rule says public authority.
5 The Court: Aha.
6 Mr. Farnsworth: It does say public authority, and the other rule talks about
7 public offices or public agencies. It's just like when you are doing real estate
8 transactions and things or real estate in general that's (inaudible)
9 The Court: How is NTSA funded, does anybody know?
10 Mr. Farnsworth: NTSA? By the Department of Transportation. NTSA's is
11 under that, the Department of Transportation.
12 The Court: Is it part of the public transportation?
13 Mr. Farnsworth: Yes sir. That's my understanding, which---
14 The Court: That's your understanding?
15 Mr. Hughes: I've got a secondary objection.
16 The Court: Let's hear it.
17 Mr. Hughes: I served Mr. Farnsworth with a request for disclosure. I have
18 not seen this document until today. On that basis I would object to it coming into
19 evidence.
20 The Court: Show it to me.
21 Mr. Farnsworth; He says he didn't get it; I guess he didn't. For cross-
22 examination, I have to present what I have and he has cross-examination. I think I
23 have to present what I have in my case in chief.
24 (pause to review document)

1 The Court: Okay. He's asked to use this in his case in chief. But that's not
2 what you're talking about?
3 Mr. Hughes: I'm sorry?
4 The Court: The information he's asked to present in his case in chief. Am I
5 reading this wrong? It's evidence in chief. What is evidence in chief?
6 Mr. Hughes: My understanding is anything material to the defense, and this
7 could certainly would be that.
8 The Court: It says intended for use by defendant as evidence in chief. I
9 assume that should be as evidence in his case in chief. I haven't heard it phrased,
10 evidence in chief. Have you?
11 Mr. Hughes: I have not.
12 (pause to review)
13 The Court: At this point in the trial, I'm going to overrule your objection on
14 that ground as to disclosure.
15 Mr. Hughes: Section 8 says papers, documents, et cetera, which are material
16 in said defendant's defense or intended for use by defense as evidence in its case in
17 chief.
18 The Court: Oh. So, I'm reading it now. All right. Now here's the question:
19 Rule 5. Rule 5 says grounds....
20 (conversation between counsel)
21 The Court: I hate to interrupt you guys, but I've asked for Rule 5. I've been
22 real patient with you guys. You don't want to see that side of me.
23 (pause to review)

1 The Court: Here's that phrase again, evidence in chief. Your subpoena, or
2 your request has added something that's not in the rule. There's a phrase in there not
3 contained in the rule itself.
4 Mr. Hughes: Which one is that?
5 The Court: That says in material to the defense. This one just says if it's in
6 his possession or control or custody and attempting to use as evidence in chief at the
7 trial. I take that to mean in his case in chief, not to be introduced.
8 Mr. Hughes: All right.
9 The Court: Okay. So, on that basis it's, the objection is overruled. That still
10 doesn't get it because of his earlier objection. So, this is the difficulty I'm having and
11 I'll be glad to hear you guys on it. I've got a witness up there who has said I don't
12 know anything about that report, I don't know if it is a report, and I don't if NTSA
13 did a study on that. You present a copy of some pages from wherever that is. I don't
14 know if it's an article, a pamphlet, or what, and say, yeah, but whether you know
15 about it or not, here's one, by the way, I want to put that into evidence.
16 I don't see it. Go ahead.
17 Mr. Farnsworth: What I have, Judge, is it's by the agency NTSA is a division
18 of the Transportation Department, which is a public agency and NTSA is a branch of
19 that. Judge, it's from the same agency by someone from NTSA, who, as we've
20 talked all day long about how to do these tests, what it involves, the detection of
21 drunk driving behaviors, drunk people, impaired drivers, what are exceptions what
22 are some of the things that cause it, and it's just---
23 The Court: Here's the difference I'm drawing, two of them. First and
24 foremost, he didn't object. If he had objected, I would have overruled his objection
25 because before you asked him, I think before you asked him your first question, he

1 identified it and I think his answer, or the gist of his answer, well, it wasn't that
2 particular book, it was one just like it or something to that effect. He identified that
3 he studied from that, he subscribes to that. It's taught at the Academy. He believes in
4 it. I think he might have said at some point he believes in NTSA.
5 But all of this context was the guideline book, or whatever that book is, the
6 NTSA book to which you were referring. At the same time he said I don't know
7 anything about this one here. I don't know anything about it. I don't even know that
8 they did such a study.
9 Mr. Farnsworth: Yes, Judge. My points are that there were a number of
10 things omitted from his training and I have to show it.
11 The Court: Oh, I totally agree. But he didn't say I've never seen this book
12 before, we don't use that book at the Academy. He said, yeah, that's the book.
13 Mr. Farnsworth: One thing that he said, too, Judge, that would make a
14 difference and that was he updated his DUI detection training online recently. I'm
15 sure that had something about texting and driving.
16 The Court: He says it didn't.
17 Mr. Farnsworth: But he couldn't remember what was in his report, so we can't
18 go by whether he remembers. And my case---
19 The Court: In that case, you can ask him about would that refresh his
20 memory. If that doesn't refresh his memory, that's a done deal.
21 Mr. Farnsworth: We've got something that identifies, Judge, a whole manual.
22 And he took it back and went over it and we're referring to the manual that he said
23 he relied upon. He also said, Judge, he admits that NTSA is authoritative.
24 The Court: Admits what?
25 Mr. Farnsworth: Admits that NTSA is authoritative.

1 The Court: I don't doubt that.

2 Mr. Farnsworth: So, ---

3 The Court: The question isn't whether NTSA is a good thing.

4 Mr. Farnsworth: No, no. Because I don't agree with a lot of what the book

5 says.

6 The Court: Nor do I.

7 Mr. Farnsworth: But they're relying on it, they are trained on it. And NTSA

8 has some more current information right on the website that says here's something

9 that's worse than---

10 The Court: Sure. The problem is, though, is it isn't based on his testimony,

11 his training that he had. My problem is how does this witness be the conduit.

12 Mr. Farnsworth: One thing, Judge, we don't know whether his training

13 included this. So, I can't say that. Let's say that he was trained on it. Then he---

14 The Court: Let's say that he was trained on it. You would have to first

15 impeach him as to that. I don't know how you're going to get that stew together to

16 impeach him as to that issue. But even if you, if you did, what he's saying is, I don't

17 know. I didn't even know that they did a study or tested in that area.

18 Mr. Farnsworth: Right.

19 The Court: This witness doesn't get that document in.

20 Mr. Farnsworth: Right. And the rules that I have here talk about not having

21 to have extrinsic evidence to put in a document such as this. There are two different

22 ways. One is exception to hearsay So, I don't need to have someone here to

23 substantiate it, like medical records that are provided. I don't need the public

24 agency, if it's a public agency. Or again, like---

25 The Court: Here's what I'm saying.

1 Mr. Farnsworth: But I don't need---

2 The Court: Here's what I'm saying. Say all that's true and he tells you, I
3 don't anything what you're talking about. And you say, Ah, but I've got one that
4 says no. Okay, do that. You read this; now he's read it. So you say, therefore, since
5 he's read this, it goes into evidence and I'm saying no, it doesn't.

6 Mr. Farnsworth: Well, I think I could---

7 The Court: He's not saying-- He's not even saying NTSA didn't do that.
8 He's not saying NTSA didn't do a study. He's not saying there is no such study.
9 He's not saying they got their study wrong. He's saying I don't know what the heck
10 you're talking about.

11 Mr. Farnsworth: One other thing, too, Judge. In his testimony he talks about
12 the difference between texting driving and DUI driving. And he gives an opinion
13 saying that it was different, somehow it's different.

14 The Court: And I thought you did an awfully good job of burning him a new
15 one on that.

16 Mr. Farnsworth: But this is a---

17 The Court: That's a legal term.

18 Mr. Farnsworth: But this is a time for the opportunity to address that---

19 The Court: I think you've already addressed it. I think it's good information
20 for you in there. I don't deny that. It ain't coming in through that witness.

21 Mr. Farnsworth: Judge, for the record, can I read this second sentence for the
22 record so---

23 The Court: Didn't I tell you I would let you do an offer of proof?

24 Mr. Farnsworth: I can do it.

25 The Court: What?

1 Mr. Farnsworth: Yes sir.

2 The Court: I'm not kidding you.

3 Mr. Farnsworth: Okay.

4 The Court: Get on up here. You're still under oath Any objection?

5 Mr. Hughes: None.

6 Mr. Farnsworth: Thank you, Judge.

7 **CROSS EXAMINATION BY MR. FARNSWORTH OUT OF PRESENCE OF JURY:**

8 Q Officer, can you identify this publication, this document that I'm handing

9 you?

10 A Yes. It says Blueprint for Ending Distracted Driving.

11 Q And at the bottom what agency does it say? What group is this under? On the

12 bottom in the right hand corner.

13 A It says NTSA.

14 Q And in the bottom left hand corner, what does that say?

15 A U. S. Department of Transportation, National Highway Safety

16 Administration.

17 Q So, does that seem to you to be the same NTSA group that puts together your

18 driving while impaired and DUI detection manual?

19 A It would appear so.

20 Q Let's turn to the inside of this document, page 5. If you can read the first

21 sentence in paragraph 3, page 5.

22 A Study-- Just what's underlined or the paragraph?

23 Q The paragraph.

24 A Studies show that texting simultaneously involves manual, physical and

25 mental distraction as among the worst of all driving distractions. Observational

1 surveys show that more than one hundred thousand drivers are texting at any given
2 daylight moment and more than six hundred thousand drivers are holding phones to
3 their ears while driving.
4 Q Okay.
5 A Then it references another document.
6 Q And the document it references at the bottom of the page, are those NTSA
7 sources also?
8 A It appears to be so, based on the citation.
9 Q Say again.
10 A It appears to be so, based on the citation that they put in.
11 Q And the next page, read the statement there in the white box.
12 A Sending or receiving a text takes a driver's eyes from the road for an average
13 of 4.6 seconds, the equivalent at 55 miles per hour of driving the length of entire
14 football field blind. VTTI.
15 Q Okay. And the next page has two studies with data and graphs. Can you just
16 say the title of both figure one and figure two?
17 A The titles of the graphs, Figure One, crash or near-crash involvement of the
18 driver of the past year by age, sex and percentage. Figure Two, sending text or
19 emails by sex and age percentage ever.
20 Mr. Farnsworth: Your Honor, I believe that's all I have as my proffer of
21 evidence.
22 The Court: Mr. Hughes.
23 Mr. Hughes: Thank you, Your Honor.
24

1 RE-DIRECT EXAMINATION BY MR. MR. HUGHES OUT OF PRESENCE OF
2 JURY:
3 Q Sergeant Fortenberry, have you ever seen what Mr. Farnsworth showed you
4 just now?
5 A No, I have not.
6 Q Have you ever received any training about, based on this document in your
7 training through SLED?
8 A No, I have not.
9 Q This is not a document that is posted up in the squad room and said all officers
10 read this manual put out by NTSA?
11 A No sir, it's not.
12 Q It's not containing any book put out by NTSA such as the one we've been
13 referring during the course of this trial that's call a student manual?
14 A No, it's not.
15 The Court: How do you know that?
16 A Not in that manual that we talked about---
17 The Court: That's not what he asked you. He asked you was it contained in
18 any book.
19 A That's the only book that we got during our DUI training is the student
20 manual.
21 Q Is there anything in your training, Officer, that refers to anything in this
22 document?
23 A Not that I'm aware of, no.
24 Mr. Hughes: I have nothing further.
25 The Court: Anything further?

1 Mr. Farnsworth: Yes sir. Just a few things to clear up, Judge.

2 RE-CROSS EXAMINATION BY MR. FARNSWORTH OUT OF PRESENCE OF

3 JURY:

4 Q You said your training and review of that book was in 2001, I think, or late

5 nineties?

6 A I believe I said '99 or 2000, if I recall correctly.

7 Q You wouldn't be aware, then, whether the most current book would have

8 anything in here – when I say book, I mean the NTSA DUI detection manual – would

9 have anything in there about texting or mention that?

10 A About texting? No, I'm not familiar with anything being in there, no.

11 Q Do you have any documentation or did you receive a new book when you did

12 your online training on the date you mentioned?

13 A No, we did not.

14 Mr. Farnsworth: That's all, Judge.

15 The Court: Are we ready for the jury?

16 Mr. Farnsworth: Yes sir.

17 The Court: Are you ready for the jury, Mr. Hughes?

18 Mr. Hughes: As soon as I refill my water glass, yes sir.

19 The Court: All right. Bring in the jury. From his testimony I know that name

20 of that, whatever it is. I don't know what it is, I don't think. Can you tell me what it

21 is?

22 Mr. Farnsworth: What's that, Judge?

23 The Court: Did he tell me what that is, he's been reading from it.

24 Mr. Farnsworth: The name of it?

1 Q And the second video we saw, on the video, where you offered him the breath
2 test, I guess it was the second location you went to?
3 A Correct.
4 Q And you offered him the second machine to try and he refused, his demeanor
5 was just sitting there and he didn't show any display of emotion, did he?
6 A I would not say that.
7 Q What in your opinion would be what was shown?
8 A To me he was profusely sweating while he was there. It appeared like he
9 couldn't sit still at some points, moving forward or backwards. When I took the
10 handcuffs off he had to wipe his perspiration off as well. He still smelled of alcohol.
11 Q And again, you didn't mention a smell of alcohol, a strong smell of alcohol in
12 any of your reports, did you?
13 A I did not.
14 Q You didn't mention it on the video we saw?
15 A No.
16 Q Either video?
17 A No.
18 Q You said you weren't familiar with the anxiety condition. Did you know that
19 anxiety may cause profuse sweating under certain conditions?
20 A I'm not aware if it can or if it can't.
21 Q I want to ask you a couple more questions about texting and driving. Would
22 you agree that texting and driving can be as dangerous or more dangerous than drunk
23 driving?
24 A I couldn't say whether it could or could not be more or less dangerous. The
25 collisions that I've worked, the fatalities that I've worked where people have been

1 killed, none of them have been involving anyone with texting, but there have been
2 many where people were driving under the influence.
3 Q Are you aware of the recent article in the Greenville News last week that
4 discussed this issue?
5 A No, I'm not.
6 Q You've been a law enforcement officer for-- How many years have you been
7 doing this?
8 A It will be eighteen years on November 30.
9 Q Eighteen years in law enforcement and you're now not familiar with the
10 current issues of dangerous information about texting and driving, how dangerous it
11 can be?
12 A I haven't received any training on texting and driving.
13 Q But you have acknowledged a handful of, as you said, a handful of people
14 you've stopped on DUI suspicion turned out to be texting instead?
15 A Correct. There were approximately about five that I can recall.
16 Q Was that during those nine years where you had eight cases?
17 A It was during my career as a law enforcement officer. I couldn't say if it was
18 prior to the nine years before his arrest, if any of them occurred after his arrest or not.
19 And those are approximate numbers again.
20 Q Thank you. Are you aware of the incentives you receive for making arrests
21 for DUI?
22 A I don't receive any incentives for making arrests for DUI.
23 Q Are you aware of your police department urging incentives or rewards or
24 promotions for arrests for DUI?

1 Q ---tell the judge and the jury and the court what was happening that evening
2 and why you were driving.
3 A That was a particularly (inaudible) for me. Sorry if I get emotional. I was in
4 a relationship with a beautiful woman for three years. I was the father to her son for
5 three years. I treated him like my own. And then she got pregnant with my daughter.
6 So, she was eight months' pregnant at the time.
7 Q I'm going to stop you now.
8 A Yeah, please.
9 Q Just to help move it along. But you told the officer when you got pulled over
10 that you were coming from a wedding. Tell us about that.
11 A We were at the wedding. Me and her son got ready for the wedding. She
12 was part of the bride's bridal part. So, she was there early, taking pictures and stuff.
13 And we got there to the wedding and dropped the son off and went to the ceremony
14 and stuff. And me and, she was my fiancé at the time, got in an argument, a big
15 argument, a blow-up argument to the point where-- It was her best friend's wedding
16 and I left out of anger and frustration and arguing and stuff when I left. And it was an
17 argument pretty much until I got pulled over.
18 But it was just a blow-up argument, get my stuff out, moving my stuff out,
19 changing my whole life, changing my whole career, having a baby. It was just
20 overwhelming me. So, I was just, I wasn't mentally there at that point. I was
21 focusing on her and arguing with her and hanging up the phone and texting her and
22 calling her and back and forth. It was rough, it was a rough time, a rough time.
23 Q You saw in the video your driving that day. When was the first time you'd
24 seen how bad it was?

1 A I did not know my driving was that erratic, that bad, had no clue that I was
2 driving that bad. That's why I asked the officer why he pulled me over. I had no
3 idea. I didn't think I was crossing the center lines or anything. I wasn't paying
4 attention. I'm not saying that as an excuse. I just wasn't paying attention. I didn't
5 know my driving was that bad.
6 Q Do you agree texting and driving is unsafe?
7 A It's very unsafe, very unsafe. I coulda killed somebody. Somebody couda
8 got hurt.
9 Q Now that you've seen your bad driving, (inaudible) your behavior?
10 A A hundred percent. I answer a lot of work and emails in my work And
11 everybody knows, my customers, my friends and my family, I don't get on the phone
12 when I'm driving. It's a risk I'm not willing to take, not only for my sake, but for my
13 daughter's sake and everybody's on the road. It's just too dangerous.
14 Q Michael, when you were playing college football, why did you only play two
15 years?
16 A My knees. My ankles were okay, but my knees were still the worst problem.
17 I got hit a couple of times by big linemen, got cut a lot. Took out, I have no
18 meniscus between my bones, so when I'm standing on one knee or standing for a long
19 period of time, it really starts to affect them.
20 Q I'm going to skip around so I can cover this quickly. When the officer asked
21 you to get out of the car, and you said yes sir, did you have any trouble putting the car
22 in park or did you have it in park?
23 A No, it was already in park. I had already parked it and put my hands on the
24 wheel when I pulled over. For the officer's safety, you know, when he turns on the
25 lights, you pull over and put your hands on the steering wheel.

1 A Had no clue, had no clue.

2 Q Let me ask you this, too, Michael: Tell us about any disorders or conditions

3 that you've been struggling with over the last several years.

4 A I---

5 Q Or maybe longer than that.

6 A I got a problem being very zzzz. I wake up in the morning, I have a lot of

7 stuff on my mind, a lot of stuff for me to sort through, to focus on, to keep straight, to

8 keep thoughts straight. If one thought's popping in, there's another thought's

9 popping out. And it's just continual. It's very overwhelming. And at this time in the

10 relationship with my ex-fiancé and have the daughter, I was trying to find resolutions

11 to stop me from just being zzzz all the time.

12 I went to my local doctor, my physician, and I asked him, you know, told him

13 my symptoms and told him how I was feeling overwhelmed at work, and school, and

14 finances, and having a baby and how I was going to deal with that. He suggested that

15 I might have ADHD or some type of ADD and he was going to try to give me some

16 trial medications.

17 Mr. Hughes: Objection to hearsay, Judge.

18 Mr. Farnsworth: I think he can talk about his diagnosis, it's his diagnosis.

19 The Court: I'll overrule that.

20 Q Had you sought-- At the time you were stopped, had you sought treatment for

21 this condition previous to the stop?

22 A Yes.

23 Q Had you tried different medications?

24 A He had me on a couple different medications, yes.

25 Q Had you-- And did you find that they worked?

1 A I had two beers that day, sir.

2 Q Do you drink often or do you not drink often? How often do you drink?

3 A I'm a social drinker. If we go to a game or something or we're at a party or

4 something, I'll have a beer or two here or there. I don't drink by myself, don't sit

5 there and get a beer every day after work. I've had my fair share of drinks.

6 Q Are you aware of how much beer it takes to make you start feeling a buzz and

7 feel like you're feeling affected?

8 A I've been educated in some classes to know that one beer equates to twelve

9 ounces and each twelve ounces an hour. I might have had two beers in thirty to forty-

10 five minutes at the reception. I was there for about an hour. People started coming in

11 and taking pictures and stuff. I started drinking a beer, had an argument during the

12 last beer, took a beer with me, and that was it, took off.

13 Q So, do two beers typically cause an effect in your system?

14 A No. But I was definitely scared that I could be caught with that. I mean, .08

15 is not a lot.

16 Q Why did you not take the Breathalyzer test?

17 A Honestly, I've been told by a lot of people who have gotten pulled and had

18 DUIs it's better not to blow.

19 Mr. Hughes: Objection to hearsay.

20 Q Okay. Don't talk about what you were told, but based on-- You can say

21 what you did based on what you learned.

22 A I refused to take a Breathalyzer test because I thought it was best. I thought it

23 was best not to blow. They're not that accurate. I've actually seen studies where

24 people, you know, you can blow in the tube, take the Breathalyzer test and see if

25 you're drunk, blue, positive. And so that was my first instinct, not to blow. And then

1 Mr. Hughes: Four exhibits.

2 The Court: One is the photo, two is the video, three is the Datamaster video,

3 and four is the breath test report. Is that your understanding?

4 Mr. Hughes: Yes sir.

5 Mr. Farnsworth: Yes sir.

6 The Court: All right. (addressing clerk) Take the exhibits to them and tell

7 them to begin deliberations.

8 (Whereupon jury deliberations began at 5:30 p.m.)

9 Gentlemen, both of you, you really did a good job.

10 Mr. Farnsworth: Thank you.

11 Mr. Hughes: Thank you.

12 (Court in recess)

13 (Court in session 5:37 p.m. – jury in courtroom)

14 The Court: Reading back the transcript, which we'll be glad to do. The

15 problem is that's not actually in evidence. The video you can see it. I don't want

16 y'all to have a discussion because we're all in here. She's gonna roll that back.

17 Y'all need both pages?

18 (Whereupon jury exited courtroom)

19 Clerk: We've got a light on.

20 The Court: Mr. Farnsworth and Mr. Hughes, we had a question, which was to

21 see the easel. It wasn't in evidence, so I didn't send it back, they came out there.

22 Now we have a question, which I suspect is they want to see the video now.

23 Anything before I bring them in? If it's a question, make sure it's reduced to writing.

24 Mr. Farnsworth: No sir.

25 Mr. Hughes: No sir.

1 The Court: Bring them in.

2 (Whereupon the jury entered the courtroom at 5:43 p.m.)

3 All right. Let the record reflect that the jury is in, as well as counsel for the
4 City and counsel for the defendant, as well as the defendant. The jury has asked to
5 see the video starting at the traffic stop. All right. Can we cue it up in less than two
6 hours?

7 (laughter)

8 What we're gonna do, you can see this as many times as you'd like, but there
9 are some parts on this that are not part of this trial, part of this case, and have nothing
10 to do with the defendant's guilt or innocence. As a result, you're not gonna see that
11 or hear anything about that. I have a way of doing that remotely. Otherwise, I would
12 just send it back there with you guys and say have at it. However, rather than have
13 you running back and forth, if there's a point that you need to see again, tell us and
14 we'll re do it. Now, if there is a point where you just need to huddle I'll just kick
15 everybody out and you guys huddle and we'll get you back in. Fair enough?

16 But we'll do it to accommodate you and, again, you can see it as many times
17 as you like, provided they can make it work

18 (Whereupon the video was played for the jury)

19 If you need to see the video again, let me know.

20 (Whereupon jury exited the courtroom and deliberations resumed at 6:05 p.m.)

21 (Jury returns to courtroom 6:16 p.m.)

22 The Court: Let the record reflect that the jury is present, along with the
23 counsel for the City as well as the counsel for the defendant, and defendant, as well.

24 Mr. Foreman, I understand you have reached a verdict?

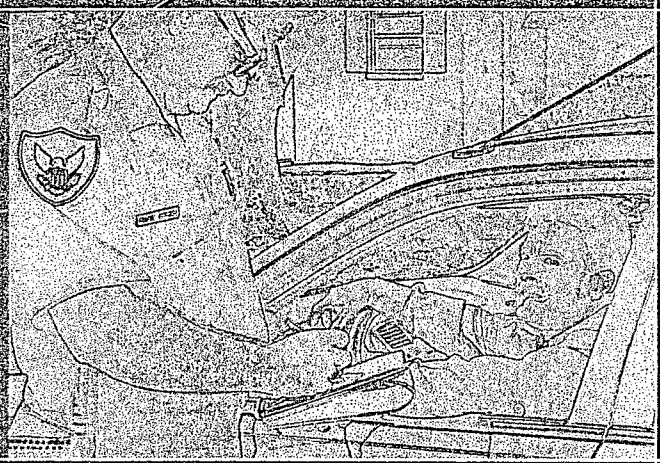
25 Jury Foreman: We have, Your Honor.

1 The Court: Will you hand it to the bailiff, please. Ladies and gentlemen, is
2 this a unanimous verdict?
3 The Court: Mr. Foreman, would you please rise? Will you please stand, sir?
4 (Whereupon jury foreman stands)
5 As to the sole charge of driving under the influence, how does the jury find?
6 Jury Foreman: The jury found guilty.
7 The Court: All right. Thank you. Ladies and gentlemen, thank you very
8 much for your service (buzzing-inaudible) You are excused. Thank you for your
9 service.
10 (Whereupon the jury exited the courtroom)
11 Anything from the City?
12 Mr. Hughes: No sir.
13 The Court: Mr. Farnsworth, anything?
14 Mr. Farnsworth: Your Honor, we would renew our motions we made earlier.
15 The Court: Say again.
16 Mr. Farnsworth: We first renew our motions that we had earlier that you
17 ruled on. As far as sentencing, Judge, Michael, as you heard today, is gainfully
18 employed. He's a new dad of a one-year old daughter, single dad. He shares
19 custody of his daughter. How long'd you stay in jail?
20 Mr. Schulz: I'm not sure.
21 Mr. Farnsworth: When'd you get out?
22 Mr. Schulz; Three or four o'clock the next day.
23 Mr. Farnsworth: Three or four o'clock the next afternoon. So, this was about
24 dark, in April. So, we're not sure exactly how long that was.
25 The Court: 9:30 it was, or thereabouts? Is that right, Officer?

1 outside with, actually, the clerk, the court clerk. I had
2 an associate there with me who was a new associate, who
3 was sitting at the conference table. He never addressed
4 the witnesses, never participated in the trial, and was
5 sitting with me. I found out later when I went back in,
6 they said the jury had a question.
7 Well, I went back in. And the question was -- I
8 think they reviewed the tape. I think they reviewed part
9 of the video that we had introduced into evidence -- or
10 Daniel had.
11 So they're queuing up the -- I will just give sort of
12 a brief factual background. They're queuing up the tape.
13 And I notice the easel is there with this exhibit, which
14 is, of course, prejudicial to me because it's, basically,
15 his closing argument. So I kind of walked over there kind
16 of in front of it. And I was trying to get the Judge's
17 attention. And he didn't seem to know what I was talking
18 about.
19 So after that was over, I said, Judge, why is this in
20 here? And he said, Well, they wanted to see it earlier.
21 They've seen it. And that's when I found out that they --
22 the first question they had is, hey, can we see -- or can
23 you bring back the exhibit? Can we see that exhibit
24 again? And the Judge said, Well, I can't bring it back
25 into the evidence room. I can bring you in here in the

1 courtroom to see it.
2 Well, obviously, I think that's a huge problem that
3 you allow the jury to study and consider an exhibit that's
4 not in evidence. And they're only allowed to consider
5 evidence and their recollection of the testimony. What
6 the Judge explained was he -- I think Daniel probably
7 addressed this. Evidently, he looked at my associate, who
8 was very limited in his experience, and said, You don't
9 have a problem with that, do you? And I think my
10 associate said, I don't think so, Judge. I guess not.
11 Well, my position is it's inappropriate to ask --
12 he's really not even really co-counsel. He's my associate
13 that has not participated in the trial, other than looking
14 up some rules and things that we're arguing for me.
15 And I'm not -- I mean, I'm not just lead counsel, but
16 really the only counsel in the trial for the Defense. And
17 I wasn't even made aware that a request was made, you
18 know. And that really just goes to whether or not there
19 was an objection, you know, at the time. I really don't
20 think the fact that my, you know, associate who's not
21 really participating in the trial says, I guess that's
22 okay, you know, and allows that to happen when I wasn't
23 even notified. I was outside with the clerk in the
24 parking lot waiting on the jury. So that, I think, on
25 it's own would be a flaw and would allow us to have a new

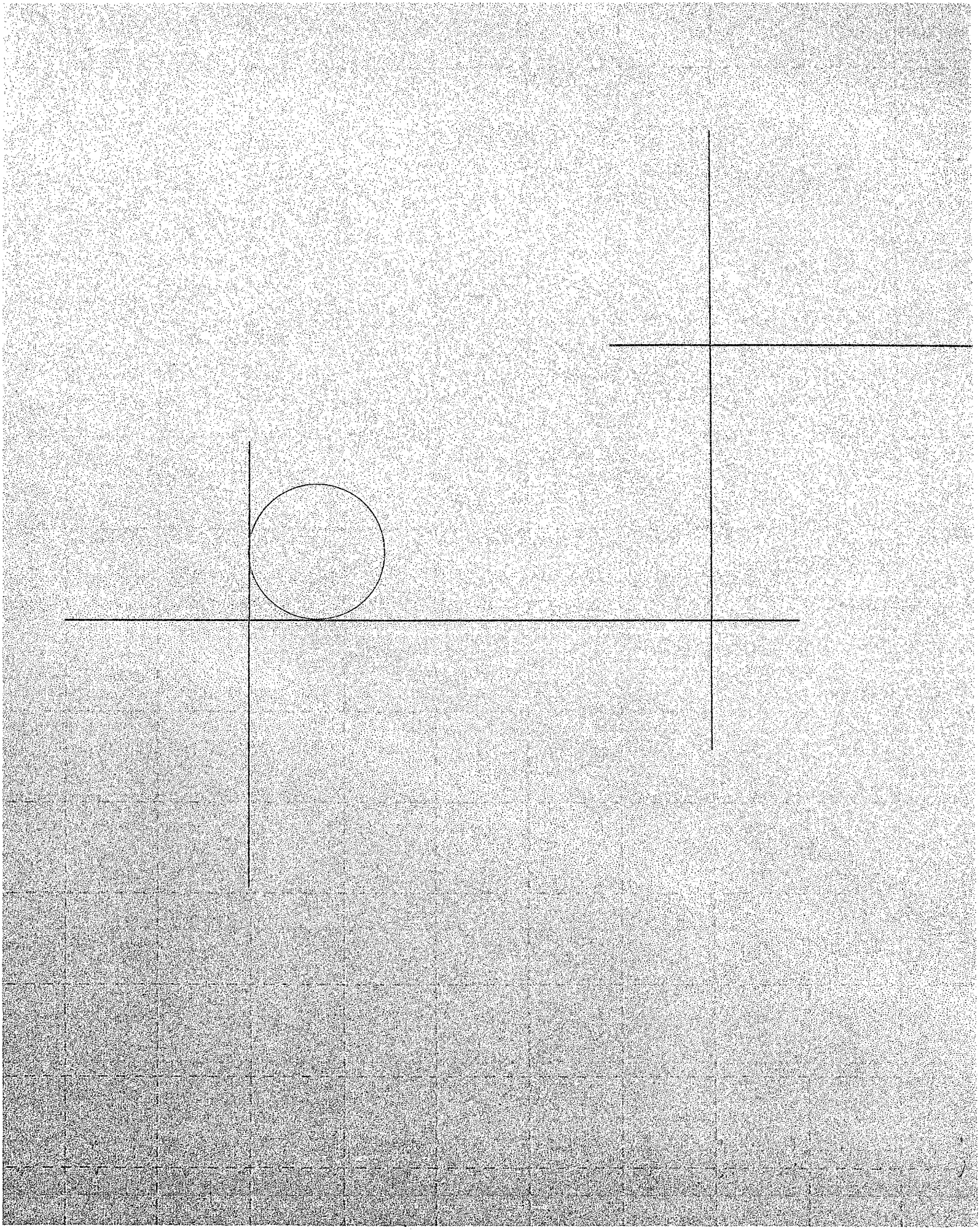
BLUEPRINT FOR ENDING DISTRACTED DRIVING



DISTRACTION.GOV

U.S. Department of Transportation
National Highway Traffic Safety Administration

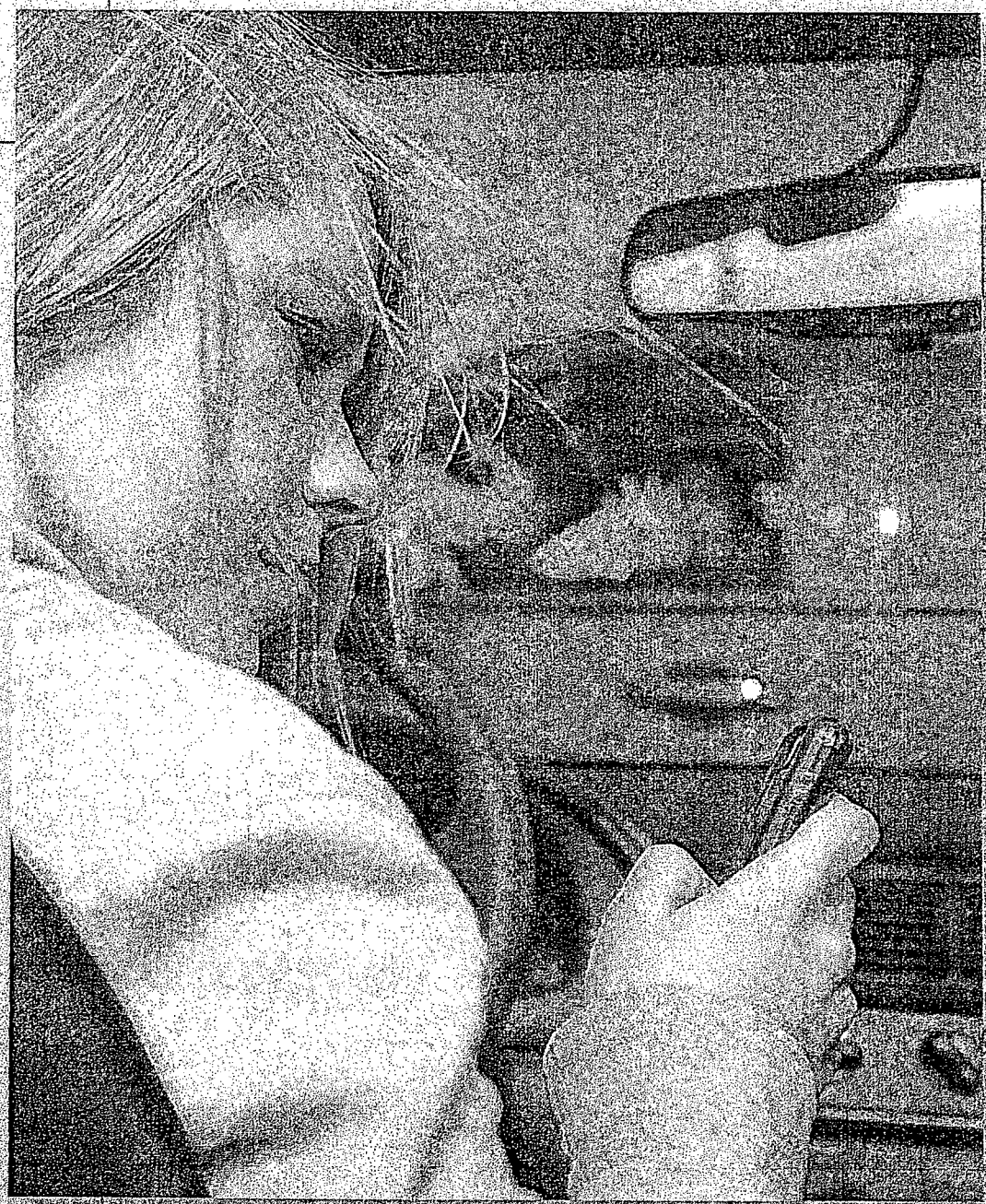
NHTSA
www.nhtsa.gov



BLUEPRINT FOR ENDING DISTRACTED DRIVING

UNDER THE LEADERSHIP OF SECRETARY RAY LAHOOD, THE U.S. DEPARTMENT OF TRANSPORTATION LAUNCHED A NATIONAL CAMPAIGN IN 2009 TO END THE DANGEROUS PRACTICE OF DISTRACTED DRIVING. WHILE THESE EFFORTS HAVE BOOSTED PUBLIC ATTENTION TO THE PROBLEM AND BUILT MOMENTUM FOR ACTION IN COMMUNITIES AROUND THE COUNTRY, SERIOUS BEHAVIORAL AND TECHNOLOGICAL CHALLENGES REMAIN. ADDRESSING THESE ISSUES WILL REQUIRE THE FULL COMMITMENT AND PERSISTENCE OF MANY STAKEHOLDERS.

THE BLUEPRINT FOR ENDING DISTRACTED DRIVING lays out a plan for building on the progress we've made to date—and arms safety partners, advocates, and the Nation's future leaders with clear, forward-thinking strategies.

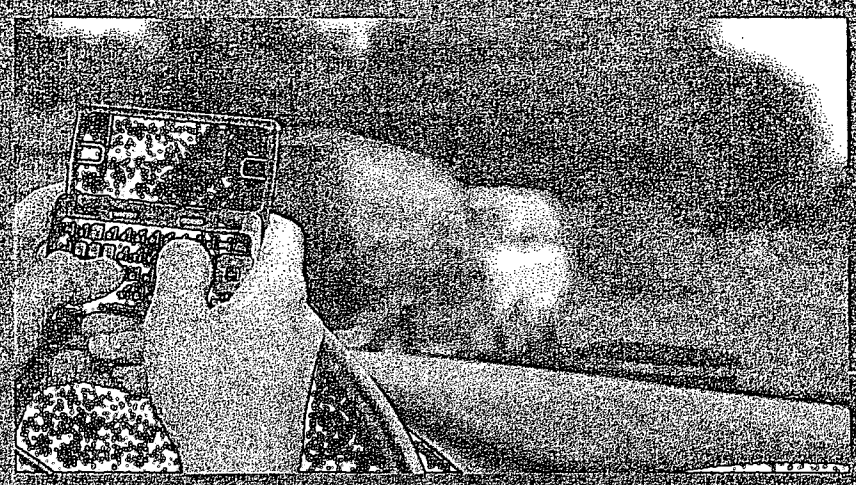


OVERVIEW OF THE PROBLEM: DISTRACTED DRIVING KILLS

With more than 300 million wireless subscriptions in America today—and a growing number of devices and services designed to keep people constantly connected—technology is playing an increasing role in enhancing our quality of life. Yet using these technologies while you're behind the wheel can have devastating consequences.

The U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) estimates that there are at least 3,000 deaths annually from distraction-affected crashes—crashes in which drivers lost focus on the safe control of their vehicles due to manual, visual, or cognitive distraction.[1]

Studies show that texting simultaneously involves manual, visual, and mental distraction and is among the worst of all driver distractions. Observational surveys show that more than 100,000 drivers are texting at any given daylight moment, and more than 600,000 drivers are holding phones to their ears while driving.[2]



[1] www.nhtsa.gov/About+NHTSA/Press+Releases/2012/U.S.+Transportation+Secretary+LaHood+Announces+Lowest+Level+Of+Annual+Traffic+Fatalities+In+More+Than+Six+Decades

[2] www-nrd.nhtsa.dot.gov/Pub/811517.pdf

Young Drivers Are at Greatest Risk

While distracted driving can take on many forms and affects all road users, young drivers are at particular risk.

- A nationally representative survey of distracted driving attitudes and behavior published in 2011 shows that a young driver is most likely to have been involved in a crash or near-crash.
- Drivers under 25 are two to three times more likely than older drivers to send text messages or e-mails while driving.
- While almost all drivers believe that sending text messages while driving is very unsafe, young passengers are much less likely than older passengers to speak up if the driver is texting behind the wheel.

SENDING OR RECEIVING A TEXT TAKES A DRIVER'S EYES FROM THE ROAD FOR AN AVERAGE OF 4.6 SECONDS, THE EQUIVALENT – AT 55 MPH – OF DRIVING THE LENGTH OF AN ENTIRE FOOTBALL FIELD, BLIND. (VTTI)

Figure 1. Crash or Near-Crash Involvement as a Driver in the Past Year, by Sex and Age (Percentage)

Have you been involved in a crash or near-crash as a driver in the past year?

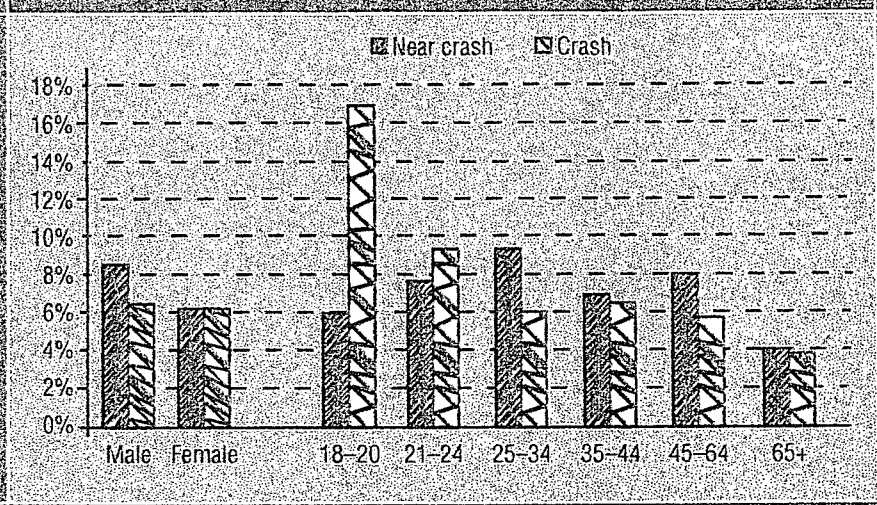
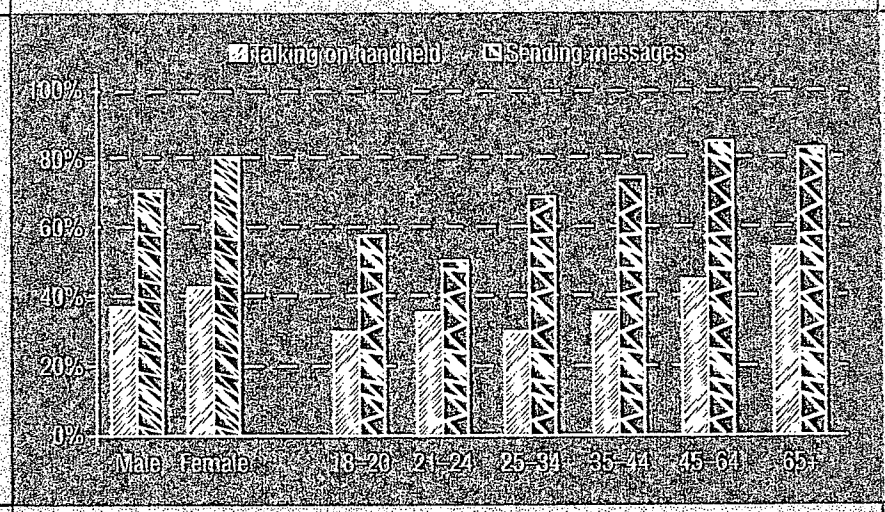


Figure 2. Sending Text Messages or E-mails While Driving, by Sex and Age (Percentage Ever)

Do you ever send text messages or e-mails when you are driving?

Figure 3. As a Passenger, How Likely Are You to Say Something if Your Driver Is Talking on a Handheld or Sending Messages, by Sex and Age (Percentage Very Likely)



BUILDING MOMENTUM TO END DISTRACTION: PROGRESS ON THE ISSUE

For the past three years, the U.S. Department of Transportation has been working to highlight the issue of distracted driving and provide safety partners in the States with the necessary tools to address the problem.

In 2010, NHTSA published a "Driver Distraction Program Plan" that serves as DOT's guiding framework in its efforts to eliminate crashes related to distraction.[1] The plan lays out strategies for:

- Better understanding the problem;
- Reducing distraction from in-vehicle devices;
- Avoiding crashes that might be caused by distraction; and
- Improving driver behavior.

Raising Public Awareness

- Secretary LaHood has hosted two Distracted Driving Summits (September 2009 and 2010) and engaged in numerous public activities to both bring focus to the issue of distraction and to identify strategies to combat the problem.
- In December 2009, DOT launched *Distraction.gov*—the first-ever Federal Web site dedicated to raising awareness and supporting safety advocacy on the issue. *Distraction.gov* serves as a vital information center for people to get the facts on distracted driving and take action in their communities. In November 2011, DOT re-launched the site with suggested actions for a variety of stakeholders, including parents, employers and teachers, and unveiled a new portal designed especially for teens to further raise awareness among young drivers.

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[1] www.nhtsa.gov/staticfiles/nti/distracted_driving/pdf/811299.pdf

ABOUT 40 PERCENT OF ALL AMERICAN TEENS SAY THEY HAVE BEEN IN A CAR WHEN THE DRIVER USED A CELL PHONE IN A WAY THAT PUT PEOPLE IN DANGER. (PEW)

- In November 2010, Secretary LaHood launched *Faces of Distraction*, an online video series that explores the tragic consequences of texting and cell phone use while driving.
- DOT has partnered with organizations including the Ad Council, Walt Disney Corporation, Consumer Reports, ESPN, the Better Business Bureau, State Farm, Regal Cinemas, and others on national and local advertising to highlight the dangers of distracted driving.

Leading by Example: Public Policies on Distraction

- President Obama issued an Executive Order in October 2009 prohibiting Federal employees from texting while driving government vehicles or while using government-supplied cell phones while driving any vehicles.
- NHTSA led a consensus effort to develop a sample law to prohibit texting while driving. The sample law helps State legislators enact effective distracted driving laws and create uniform legal policies and procedures across the country. States can use the sample law as a starting point to craft laws prohibiting texting while driving.
- As of June 2012, 39 States and the District of Columbia have enacted laws banning texting for all drivers. Thirty-five of these States require primary enforcement of their laws.

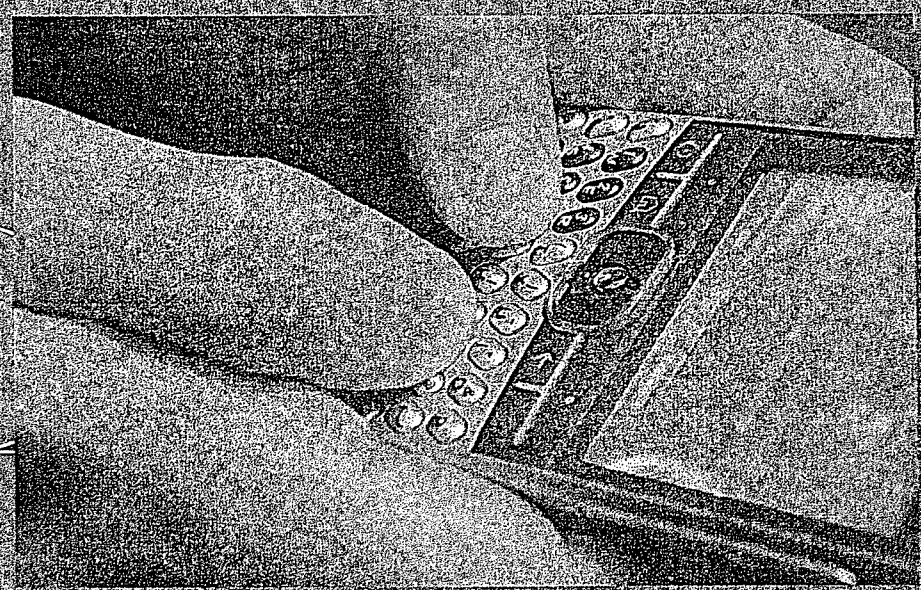
- DOT and NHTSA are working with employers to put an end to driving distraction—both on the job and off. As part of the 2010 Distracted Driving Summit, DOT and the Network of Employers for Traffic Safety (NETS) identified more than 550 U.S. companies employing 1.9 million people nationwide that committed to enacting anti-distracted-driving employee policies.

- Across its agencies, DOT has enacted regulations or advisories against distracted driving—including highways, rail, and air.

  - In September 2010, the Federal Motor Carrier Safety Administration banned commercial truck and bus drivers from texting while driving. In November 2011, the agency strengthened its initial policy by banning all hand-held cell phone use by commercial drivers.

  - In February 2011, the Pipeline and Hazardous Materials Safety Administration banned texting on electronic devices by drivers operating motor vehicles containing hazardous materials.

  - The Federal Railroad Administration has banned railroad operating employees from using cell phones or other

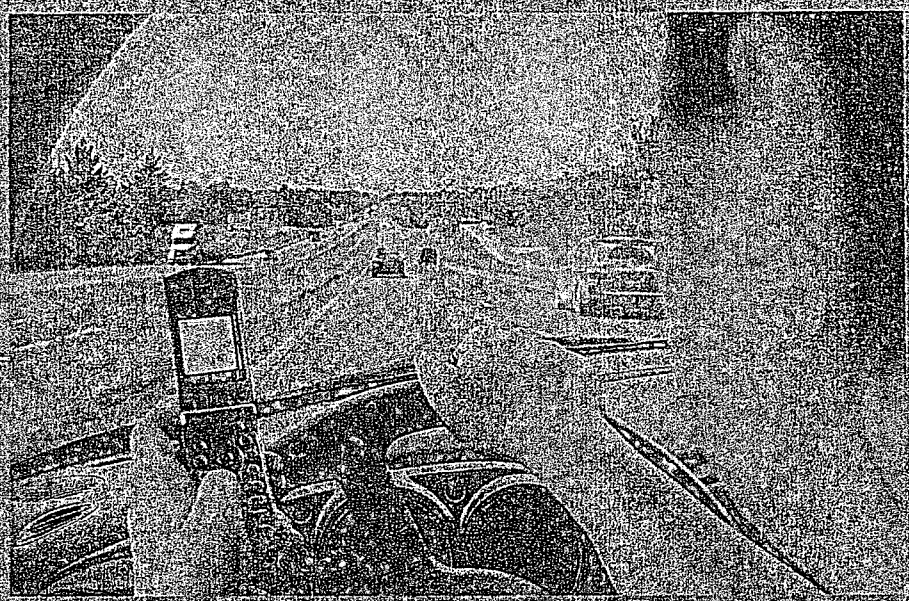


9 OUT OF 10 DRIVERS SUPPORT LAWS THAT BAN TEXTING.
(NHTSA, NATIONAL DISTRACTED DRIVING TELEPHONE SURVEY, 2011)

electronic devices on the job when the devices could interfere with safety-related duties.

- The Federal Aviation Administration has advised air carriers to create and enforce policies that limit distractions in the cockpit and keep pilots focused on transporting passengers safely.

- In February 2012, NHTSA proposed voluntary guidelines for vehicle manufacturers to discourage the introduction of excessively distracting devices that are integrated into vehicles. NHTSA expects to finalize these Phase 1 Distraction Guidelines during 2012.



Research & Development

- In 2011, NHTSA piloted high-visibility enforcement programs in Hartford, Connecticut, and Syracuse, New York. The pilot projects, which promoted the message "Phone in One Hand, Ticket in the Other,"[2] showed that increased law enforcement efforts combined with targeted media can get distracted drivers to put down their cell phones and focus on the road.
- In 2010, NHTSA conducted a representative phone survey on distracted driving attitudes and behavior. More than half of the respondents indicated that they believe using a cell phone and/or sending a text message or e-mail makes no difference in their own driving performance—yet as passengers, 90 percent said they would feel very unsafe if their drivers were talking on a hand-held cell phone, texting, or e-mailing. These findings are consistent with other research showing that despite well-publicized dangers of distracted driving, many Americans choose to use cell phones while driving.
- NHTSA is currently analyzing data from a naturalistic driving study designed to examine differences between hand-held, hands-free, and integrated hands-free cell phone use. The findings are expected to be completed by the end of 2012.

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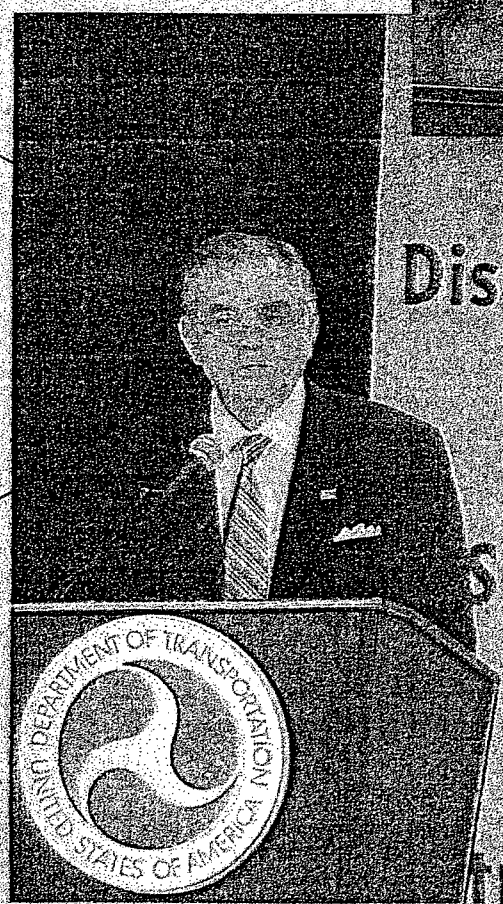
[2] www.nhtsa.gov/About+NHTSA/Press+Releases/2011/New+Research+Shows+Enforcement+Cuts+Distracted+Driving

"Strong laws combined with highly visible police enforcement can significantly reduce dangerous texting and cell phone use behind the wheel."

—U.S. Transportation Secretary Ray LaHood



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NEXT STEPS: BLUEPRINT FOR ENDING DISTRACTED DRIVING

Under Secretary LaHood's leadership, distracted driving has received unprecedented national, State, and local attention. Moving forward, this greater awareness must lead to increased advocacy. In particular, it will be critical to use the current momentum to make progress in the following key areas:

Enact and Enforce Tough State Laws

- As of June 2012, 39 States have enacted anti-texting laws, and 10 States have passed laws banning all hand-held phone use by drivers. One way to help address the problem is to encourage the remaining 11 States to pass anti-texting laws.
- NHTSA's high-visibility enforcement pilot programs in Hartford and Syracuse showed that drivers *do* change their cell phone use when faced with good laws, tough enforcement, and public education campaigns. NHTSA will expand its pilot enforcement programs by initiating two enforcement campaigns in California and Delaware this summer. These and future projects will continue to yield strategies and tools for law enforcement to effectively enforce distraction laws.
- The highway reauthorization bill enacted by the Senate, *The Motor Vehicle and Highway Safety Act of 2012 (S.1813)* includes $39 million for grants to States that enact laws prohibiting texting while driving. If enacted in the next reauthorization, these grants will contribute to State efforts to enact and enforce distracted driving laws and help reduce crashes, injuries, and fatalities.

Address Technology

- Following up on the proposed Phase 1 Distraction Guidelines for devices integrated into vehicles, NHTSA is considering Phase 2 guidelines to address portable devices *not* built into the vehicle, including aftermarket GPS navigation systems, smart phones, electronic tablets and pads, and other mobile communications devices.
- Phase 3 guidelines may address voice-activated controls to further minimize distraction in factory-installed aftermarket and portable devices.
- NHTSA is also looking at advanced crash warning and driver monitoring technologies to help avoid crashes caused by distraction.

Science

- A solid scientific understanding of distracted driving is necessary to guide further policy and technology development.
- Better methods are needed to confirm the role of distraction in crashes. Accurate and consistent crash reports are essential and require widespread adoption of model reporting.

protocols. New techniques are needed to assist crash investigators in identifying when distractions were present at the time of the crash.

- More studies are needed to determine which types of distractions—and under which circumstances—create the greatest crash risk. Experimental research, naturalistic driving studies, and crash data analyses are needed to answer key questions and provide support for laws, regulations, and investment in technology.

A TEEN DRIVER IS MORE LIKELY THAN THOSE IN OTHER AGE GROUPS TO BE INVOLVED IN A FATAL CRASH WHERE DISTRACTION IS REPORTED. IN 2009, 16 PERCENT OF TEEN DRIVERS INVOLVED IN FATAL CRASHES WERE REPORTED TO HAVE BEEN DISTRACTED. (NHTSA)

Better Educate Young Drivers

- NHTSA is working with the American Driver and Traffic Safety Education Association to update its driver education model curriculum to include the latest information on driver distraction. The curriculum, designed to educate young novice drivers with the latest teaching techniques and technology, is widely used in many States.
- In April 2012, DOT announced the Distracted Driving Design Challenge to encourage high school students to spread the word about distracted driving by designing a creative icon that can be shared on Facebook, Twitter, Tumblr, and other social networks.

Getting Involved

While progress has been made in the fight to end distracted driving, there is much more to do to end this dangerous practice. It's clear the problem is complex—and the solutions require parents, teens, educators, employers, industry, and government to get involved. Still, the first line of defense against this risky behavior must be personal responsibility by all drivers to put their wireless devices away and keep their focus on the road.

Responsibility

- All drivers need to understand the risks of distracted driving, recognize their own inability to safely multi-task while behind the wheel, and make the right decisions.
- Friends and family members need to use their influence to steer others toward responsible driving behaviors. Speaking up could save a life.
- Every driver should visit *Distracted.gov* and take the pledge to drive distraction-free.

Advocacy

- Policies are effective at guiding driver behavior—but they don't happen without advocacy. State laws, local ordinances, workplace policies, and organizational resolutions that address the dangers of distracted driving communicate concern about the risks and intolerance for dangerous behavior.
- Employers, teachers, parents, teens and community groups looking to raise awareness can visit *Distracted.gov* for specific suggestions and tools they need to help end distracted driving in communities nationwide.
- Parents, teachers, and youth leaders can educate teens and help establish rules for responsible driving. Teens are especially at risk for distracted driving. They are more frequently involved in crashes involving cell phone use, they overestimate their ability to multi-task, and they underestimate the consequences.

DISTRACTION-AFFECTED CRASHES ARE PREVENTABLE. DISTRACTED DRIVING DOES NOT JUST HAPPEN – IT IS A CHOICE. WORKING TOGETHER, WE CAN ALL HELP REDUCE DRIVER DISTRACTION, SAVE LIVES, AND PREVENT INJURIES.

DOT HS 811 629
June 2012

FOR MORE INFORMATION ON THE DEPARTMENT OF TRANSPORTATION'S WORK TO END DISTRACTED DRIVING, VISIT DISTRACTION.GOV.

U.S. Department of Transportation
National Highway Traffic Safety Administration

NHTSA
www.nhtsa.gov

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable Alison Renee Lee

Appellate Case No. 2014-002105

The City of Greer,

Respondent,

v.

Michael Edward Schulz,

Appellant.

PROOF OF SERVICE

I certify that I served the Amended Record on Appeal on the South Carolina Appellate Court by hand delivery to 1220 Senate Street, Columbia South Carolina 29201 and Daniel R. Hughes by depositing a copy of it in the United States Mail, postage prepaid, on December 30, 2015, addressed to:

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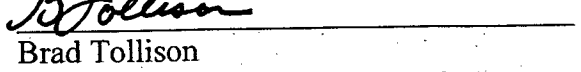

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