

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Horry County
Steven H. John, Circuit Court Judge

DEC 19 2011

S.C. Supreme Court

Opinion No. 2011-UP-481 (S.C. Ct. App. filed 10/28/2011)
08-GS-26-03999

THE STATE,

RESPONDENT,

V.

NORRIS H. SMITH,

PETITIONER.

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Norris Hennesey Smith,

Appellant.

Appeal From Horry County
Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2011-UP-481
Submitted October 1, 2011 – Filed October 28, 2011

AFFIRMED

Appellate Defender Robert M. Pachak, of Columbia,
for Appellant.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
~~Deputy Attorney General Salley W. Elliott, and~~
Assistant Attorney General Christina J. Catoe, all of

2
Columbia; and Solicitor J. Gregory Hembree, of
Conway, for Respondent.

PER CURIAM: Norris Hennesey Smith appeals his conviction for trafficking in cocaine, arguing the circuit court erred in denying his motion to suppress evidence seized after law enforcement improperly expanded the scope of a traffic stop. We affirm¹ pursuant to Rule 220(b)(1), SCACR, and the following authorities: Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.").

AFFIRMED.

FEW, C.J., THOMAS and KONDUROS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

NORRIS H. SMITH,

APPELLANT

Appeal from Horry County

Steven H. John, Circuit Court Judge

Opinion No. 2011-UP-481

PETITION FOR REHEARING

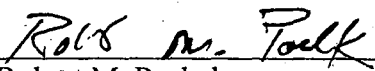
Pursuant to Rule 221(a) appellant petitions for rehearing this Court's opinion number 2011-UP-481 filed on October 28, 2011, as the Court may have overlooked or misapprehended the following points:

1. Appellate counsel has never seen the two issue rule applied on appeal to an issue argued at a suppression hearing.
2. Normally, appellant counsel argues the strongest issue raised at a suppression hearing, not every issue, as we are to winnow "out weaker arguments on appeal and [focus] on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S.

745, 751-752, 103 S. Ct. 3308, 3312 (1983).

3. A suppression hearing is intertwined with many issues, but it is the strongest issue that is relied on in an appeal.
4. Respondent did not argue the two issue rule on appeal. Rather, he argued that seizure was valid after appellant's new and distinct crime. But there was no new and distinct crime as appellant had the right to resist an illegal arrest. State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001).
5. Appellant has no notice this rule would be applied on appeal concerning an issue raised at a suppression hearing. A fundamental requisite of due process is notice. Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011 (1970).
6. Appellant respectfully asks that rehearing be granted.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

This 9th day of November, 2011.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

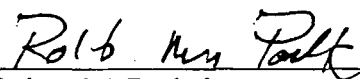
V.

NORRIS H. SMITH,

APPELLANT

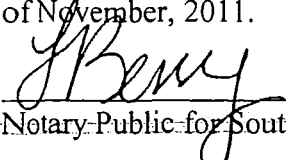
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Christina J. Catoe, Esquire, this 9th day of November, 2011.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 9th day
of November, 2011.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020.

The South Carolina Court of Appeals

The State,

Respondent,

v.

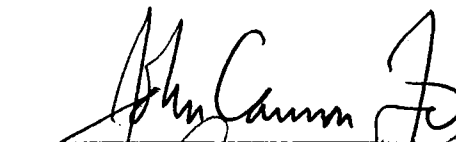
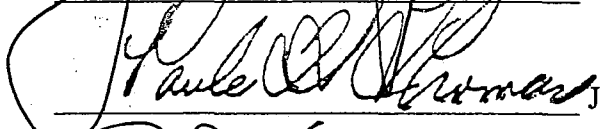
Norris Hennesey Smith,

Appellant.

The Honorable Steven H. John
Horry County
Trial Court Case No. 2008-GS-26-03999

ORDER

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


C.J.

Paul R. Thomas, J.

C. K. E., J.

Columbia, South Carolina

FILED

NOV 18 2011

STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM HORRY COUNTY

DEC 19 2011

Steven H. John, Circuit Court Judge

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

NORRIS H. SMITH,

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RECORD ON APPEAL

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*** STATE’S EXHIBIT #1 DVD OF TRAFFIC STOP HAS BEEN TRANSPORTED TO THE COURT OF APPEALS.**

1 THE COURT: Which one do you want to start off with,
2 Mr. McCollum, which motion?

3 MR. MCCOLLUM: Your Honor, I think initially what I
4 would say is I would move to suppress the controlled
5 substances that were seized as a result of his arrest.

6 THE COURT: All right, sir. All right. Well, why
7 don't we start off with that, then. All right, so the
8 witnesses, they're going to be presented by the State, then,
9 a motion to suppress, or we're going to have to have
10 testimony, correct?

11 MR. MCCOLLUM: Yes, sir, Your Honor. I think that we'd
12 have to have the testimony of the arresting officers. It's
13 my understanding, just to give you some information here, the
14 uniformed police officers with Horry County stopped Mr. Smith
15 and said that he had made an unlawful right turn, that he had
16 made a turn without using a turn signal. That's what the
17 reports indicated.

18 After he was stopped, they asked him to get out of the
19 car and they asked him if they could search the vehicle.
20 They said that they were conducting a drug interdiction stop
21 and that they were asking everybody to stop -- that they
22 stopped, they were asking everybody that they stopped to
23 consent to a search, and there's conversation there back and
24 forth for about twelve minutes about whether or not he was
25 consenting to the search.

1 At some point he gets back on -- he gets on his cell
2 phone. At some point he gets back into the driver's side of
3 the van and his van is either running or he cranks it and
4 then he drives off with the police officers hanging out of
5 the door on the driver's side and on the passenger side and
6 then comes to a stop, and then they detain him, so just
7 basically, Your Honor, is we're saying that the -- the stop
8 -- the seizure for the traffic -- lack of making a traffic
9 signal, whatever seizure that justified beyond writing him a
10 ticket was exceeded, the scope of that justification was
11 exceeded by the officers' conduct and the time that it took
12 prior to him attempting to leave the scene.

13 THE COURT: All right, very good.

14 MR. RICHARDSON: Your Honor, ---

15 THE COURT: Yes, sir.

16 MR. RICHARDSON: --- I would put forward that I believe
17 the -- I don't know if he is trying to say that the stop was
18 unconstitutional, but if that is the case, the defendant has
19 pled on the forfeit of bond, on the unlawful use or failure
20 to use traffic signal and pursuant to State v. Snowden, he
21 would be estopped from arguing constitutionality of the stop
22 now.

23 If we're taking testimony, you'll hear that they
24 couldn't issue him a ticket because he goes to get back in
25 the vehicle. They ask him to stand at the back of the car;

1 he gets back in the vehicle, but you'll hear everything in
2 the testimony.

3 THE COURT: All right, sir, very good.

4 MR. RICHARDSON: You'll see the video.

5 THE COURT: All right. Well, let's -- do you want to
6 proceed with your witnesses first or the video. I don't --
7 it doesn't matter to me.

8 MR. RICHARDSON: I can go out and get Officer Harris, I
9 guess.

10 THE COURT: All right, sir, very good.

11 MR. RICHARDSON: Your Honor, I assume Mr. McCollum is
12 calling Mr. Harris or Officer Harris.

13 THE COURT: Mr. McCollum?

14 MR. MCCOLLUM: I will, if it pleases the Court.

15 THE COURT: That will be great.

16 Come around and be sworn, please, sir.

17 WESLEY HARRIS, BEING FIRST DULY SWORN, IS EXAMINED AND
18 TESTIFIES AS FOLLOWS:

19 THE CLERK: Please be seated. State your full name and
20 spell your last name for the Court.

21 CORPORAL HARRIS: I'm Corporal Wesley Harris. Last
22 name is H-A-R-R-I-S.

23 THE COURT: All right, sir.

24 **DIRECT EXAMINATION**

25 **BY MR. MCCOLLUM:**

1 Q. How are you doing, sir.

2 A. How are you, sir.

3 Q. I notice your name is Gordon Harris. Are you related
4 to the Chief of Police?

5 A. Yes, sir.

6 Q. How long have you been with the Horry County Police
7 Department?

8 A. About four and a half years.

9 Q. Were you working on the date of June the 19th, 2008?

10 A. Yes, sir.

11 Q. And were you in the, I guess, -- what area of the
12 county were you operating at that time?

13 A. That's what we consider the South Precinct.

14 Q. The South Precinct?

15 A. Yes, sir.

16 Q. Does Highway, I guess, 544 and is that 707, Socastee
17 Boulevard, ---

18 A. Yes, sir.

19 Q. --- is that the area that you were working?

20 A. Yes, sir.

21 Q. And were you -- were you assigned with another officer
22 or did you have your own patrol unit, your own patrol car, or
23 did you -- were you assigned with another officer?

24 A. No. I was in my own patrol car.

25 Q. And in that vicinity there, were you -- were you asked

1 to be in that area or did you happen to be in that area and
2 then respond to a call?

3 A. No. I was working that area and I was actually
4 assisting another agency.

5 Q. So you were assigned to that area that you were in,
6 544 and 707?

7 A. Yes, sir.

8 Q. And how long had you been operating there that day?

9 A. I believe it was approximately thirty minutes.

10 Q. And do you have a copy of your incident report?

11 A. Yes, sir, I do.

12 Q. Okay, and there's a three-page incident report,
13 handwritten, that you generated?

14 A. Yes, sir.

15 Q. And it shows that, just to give us an idea of the
16 time, that you show an incident date and time of about 11:30
17 A.M.?

18 A. Yes, sir.

19 Q. If you will, tell the Court what you did around 11:30
20 A.M. and why you did that.

21 A. I was asked to assist another agency and making a
22 vehicle stop on a silver Chrysler Town and Country van with
23 South Carolina tag 6793DR, and while working the 544 area, I
24 -- we located the vehicle traveling eastbound on it, and I
25 followed the subject approximately two to three miles or so,

1 I think was the lapse of time between us getting off of 544
2 onto the 707 Connector, where I observed him -- well, I
3 observed him do a few traffic violations, but we were waiting
4 more to get into a safer location, so at that point he didn't
5 use his turn signal coming off of 544 onto the 707 Connector,
6 so I waited for him to go through that intersection and fully
7 get onto 707. That way, we could get out of traffic, and
8 that's when I initiated the traffic stop.

9 Q. Was anybody else following this Chrysler van other
10 than you?

11 A. Yes, sir.

12 Q. Other marked units were following it as well?

13 A. I had another officer that was working with me that
14 day.

15 Q. And who was that?

16 A. Officer Jack Johnson.

17 Q. All right, and was his patrol vehicle behind yours?

18 A. I don't think he was right behind me. He was probably
19 a car or so back.

20 Q. Were there other -- any vehicles between your marked
21 patrol car and the Chrysler Town and Country?

22 A. Yes, sir, there was one.

23 Q. And that's an unknown vehicle or was that a law
24 enforcement?

25 A. It was a law enforcement vehicle.

1 Q. All right, and you say you followed this law
2 enforcement vehicle and this Chrysler mini-van for maybe two
3 to three miles?

4 A. Yes, sir.

5 Q. And the vehicle that was in front of your vehicle,
6 what was that? What kind of vehicle was that?

7 A. If I'm not mistaken, it was a Expedition.

8 Q. And that had members of the DEU Team in that?

9 A. Yes, sir.

10 Q. And who is it that advised you to pull over this Town
11 and Country?

12 A. Members of the DEU Agency. At the beginning of the
13 day, they had let us know that we would be observing this
14 vehicle and making a traffic stop on it.

15 Q. And at the time, so they told you that you were going
16 to pull over this vehicle when they asked you to?

17 A. No. I was just going to observe a traffic violation
18 and pull the vehicle over.

19 Q. So your understanding of what your position was is
20 that you would get behind this vehicle at some point and you
21 would just follow it until such time as the vehicle made a
22 traffic violation?

23 A. Correct.

24 Q. And your testimony is that at some point, this vehicle
25 made a right turn off of 544 onto 707?

- 1 A. Correct.
- 2 Q. And is there a stop sign there?
- 3 A. No, sir.
- 4 Q. Is that a -- just take me through it. Is there an
5 exit ramp?
- 6 A. Yes, sir.
- 7 Q. And so the exit ramp goes -- is that right after you
8 go over the bridge heading east?
- 9 A. Yes, sir.
- 10 Q. So this vehicle went over the bridge heading east, is
11 that correct?
- 12 A. Yes, sir.
- 13 Q. And then went down an exit ramp?
- 14 A. He got off onto the exit ramp, yes, sir.
- 15 Q. And then at the bottom of the exit ramp, is there --
16 there's no stop sign there?
- 17 A. No, sir.
- 18 Q. Then that lane just merges into 707?
- 19 A. To the 707 Connector.
- 20 Q. To the 707 Connector?
- 21 A. Uh-huh (affirmative response).
- 22 Q. And did he make it onto 707?
- 23 A. Yes, sir. He stopped at the traffic light.
- 24 Q. He did stop at the traffic light?
- 25 A. Uh-huh (affirmative response).

- 1 Q. And when was the right turn unlawful? Was it when he
2 merged onto the exit ramp?
- 3 A. Merging off of 544 onto 707.
- 4 Q. Is there a -- is there an exit lane there?
- 5 A. Yes, sir. There's a separate lane.
- 6 Q. And does the lane then turn into an exit lane? In
7 other words, is that lane exit only?
- 8 A. Yes, sir.
- 9 Q. So basically he was driving or this van was driving in
10 front of you in an exit only lane and he continued in that
11 lane where that lane took him, and at some point you
12 determined that that was a moving violation?
- 13 A. Correct. He did not use his turn signal to exit the
14 highway onto this lane of traffic.
- 15 Q. And then when he got to the bottom of the ramp, he
16 stopped at the stop light?
- 17 A. When he got ---
- 18 Q. Stop sign; I'm sorry.
- 19 A. When he got to the end of the 707 Connector, he
20 stopped at the stop ---
- 21 Q. Stopped at the stop sign, and then did he drive beyond
22 that stop sign?
- 23 A. He proceeded onto 707 southbound.
- 24 Q. And did he do that lawfully?
- 25 A. Yes, sir.

1 Q. And how far did he go along 707 before you activated
2 your blue lights?

3 A. I let him get through the next stop light and I -- I'm
4 going to guesstimate it's a half a mile from that light to
5 where we were stopped.

6 Q. And is there any reason why you didn't activate your
7 blue light when you saw him make the right or stay in the
8 exit lane and come down off the highway?

9 A. I did not want to be in the curve of that off-ramp.

10 Q. And did anybody tell you by radio or somehow at what
11 point they wanted you to activate the blue lights?

12 A. Just prior to that, they wanted us to be further down
13 544, in other words, not when I first observed a violation.
14 I was advised to wait until a little later period to pull him
15 over.

16 Q. At the time that you stopped the vehicle, did you have
17 any knowledge -- you, personally, did you have any knowledge
18 whatsoever of any basis to stop the vehicle?

19 A. I was informed that he was a possible carrier of
20 narcotics.

21 Q. And who informed you of that?

22 A. The DEU agents.

23 Q. Do you know which agent that was?

24 A. I don't recall today, no, sir.

25 Q. Did you know him personally, the agent that told you

- 1 that?
- 2 A. Not the one at the time that told me, no, sir.
- 3 Q. Had you spoken to him before?
- 4 A. No, sir, not that partic- -- well, I don't remember
- 5 who told me. I spoke to three people that day on the -- on
- 6 the cell phone, so I do not remember which one told me.
- 7 Q. So the individual that identified himself as a police
- 8 officer called you on your cell phone and told you to stop
- 9 this vehicle?
- 10 A. I was speaking with another agent and they said, "Get
- 11 with this agent." I called that agent, and that's when I was
- 12 told.
- 13 Q. All right, and then after you stopped him -- now, at
- 14 some point a video tape comes on, right?
- 15 A. Yes, sir.
- 16 Q. And the video tape comes on when you activate your
- 17 blue lights?
- 18 A. Yes, sir.
- 19 Q. Can you turn the tape on prior to activating the blue
- 20 lights?
- 21 A. Yes, sir.
- 22 Q. Was there any conversation or any decision made not to
- 23 turn the video tape on earlier?
- 24 A. No, sir.
- 25 Q. Did anybody advise you to turn it on or not turn it

1 on?

2 A. No, sir.

3 Q. All right, and then at the point that you turned on
4 your blue lights, the video -- is it safe to say that the
5 video comes on at that point?

6 A. Correct. When it comes on, that's when they were
7 initiated.

8 Q. And ultimately did you write a ticket to Mr. Smith for
9 an unlaw- -- is it an unlawful turn?

10 A. It should have been unlawful use of turn signal. Hold
11 on one second. Improper turn signal is what I have written.

12 Q. So at some point you wrote him the ticket for improper
13 turn signal?

14 A. Yes.

15 Q. And that was after he was arrested ---

16 A. Yes.

17 Q. --- on the other charges?

18 A. Yes, sir.

19 Q. Is it your position that you would charge other
20 individuals with an improper turn signal if they made that
21 exit off of 544?

22 A. Would I, ---

23 Q. Yes.

24 A. --- is what you're asking? Yes. I mean, I would
25 write -- I mean, I -- there is no, you know, balance whether

1 I just decide or not decide. I mean, ...

2 Q. So but isn't it true that the reason that you were
3 following the suspect or subject is because the other agency
4 had asked you to do so?

5 A. Correct.

6 Q. And isn't it true that it was your information -- it
7 was your understanding that your role as a uniformed officer
8 was to pull the car over?

9 A. Correct.

10 Q. And isn't it true that you were going to pull the car
11 over for some violation or no violation? At some point your
12 role was to pull the car over, right?

13 MR. RICHARDSON: Your Honor, if counsel could just ask
14 one question at a time.

15 THE COURT: Well, if the witness believes he can answer
16 the question, then I'll allow him to do so.

17 Go ahead.

18 A. My intention was to pull the vehicle over.

19 Q. And your intention was to pull the vehicle over even
20 before you ever saw the vehicle, right?

21 A. Once we made a -- once we came in contact with the
22 vehicle, correct.

23 Q. But your understanding was that once you talked to law
24 enforcement, they wanted you in your role in this to pull the
25 vehicle over, right?

1 A. Correct.

2 Q. And you were going to pull the vehicle over at some
3 point regardless?

4 A. Correct.

5 Q. Because that's what you were asked to do?

6 A. Correct.

7 Q. And you were just -- you were just doing your job,
8 right?

9 A. I would assume I was.

10 Q. But you personally had no knowledge of anything that
11 would -- no personal knowledge of anything that had
12 transpired?

13 A. No, sir. I knew nothing other than that fact that I
14 was asked to do what I did that day.

15 Q. And you were relying on a cell phone conversation that
16 you had with what you assumed to be a police officer?

17 A. Correct.

18 Q. Okay, and at the time that -- after the vehicle was
19 stopped, did you ask Mr. Smith for his license and
20 registration?

21 A. I'm sorry. Say that again.

22 Q. After the vehicle driven by Norris Smith was stopped,
23 did you ask for his driver's license, and his vehicle
24 registration, and his insurance card, and those things?

25 A. Yes.

1 Q. And did you do that within about a minute or less
2 after he had been stopped?

3 A. Yeah, I would say so. I walked straight to the car,
4 explained to him why I was stopping him, and asked for his
5 stuff, his -- his identification and ...

6 Q. So you told him that he was being stopped for an
7 improper signal or improper turn, right?

8 A. Failure to use his turn signal, yes, sir.

9 Q. And then he -- you asked for his driver's license and
10 other information, right?

11 A. I know I asked for his I.D. I don't re- -- I do not
12 recall if I asked for his insurance card and those things.

13 Q. But you definitely asked for his driver's license,
14 right?

15 A. Yes, sir.

16 Q. Is that a -- the court reporter, please -- a yes?

17 A. Yes, sir.

18 Q. And then you had his driver's license, and Mr. Smith
19 was in his -- in the vehicle, a Chrysler Town and Country,
20 correct?

21 A. Yes, sir.

22 Q. And at some point, -- well, you went -- you went back
23 to your patrol car, right?

24 A. Yes, sir.

25 Q. And you had a conversation either by radio, or cell

1 phone, or in person with another individual?

2 A. When another agent arrived, I was just filling him in
3 with my traffic stop.

4 Q. You were telling another police agent about your
5 traffic stop?

6 A. Yes, sir.

7 Q. Do you know who -- sitting here today, do you know who
8 that agent is?

9 A. Yes, sir.

10 Q. And who is it?

11 A. Agent Jeremy Brown.

12 Q. Brown?

13 A. I think his last name is Brown. I just know him by
14 Jeremy. That's what I've always called him.

15 Q. Jeremy, all right, and is he the individual that we
16 see on the video tape standing behind the mini-van?

17 A. Yes, sir.

18 Q. All right. At that point, did you attempt or start to
19 write a ticket to Mr. Norris Smith for making an improper
20 turn?

21 A. At which point?

22 Q. After the mini-van had stopped, after you had
23 approached the van, and then after you had gotten the
24 driver's license or I.D. from Mr. Norris Smith, at that
25 point. Did you go back to your patrol car and start to write

1 a ticket for improper turn?

2 A. No, sir. I went back to his vehicle after I ran his
3 driver's license.

4 Q. You went back to his vehicle?

5 A. Uh-huh (affirmative response).

6 Q. And did what?

7 A. Asked him to step to the back of his vehicle to speak
8 with me.

9 Q. Okay, so did he comply at that point?

10 A. Yeah, somewhat.

11 Q. So did you and Mr. Norris Smith, after a brief
12 conversation, went to the back of his vehicle, correct?

13 A. Yes, sir.

14 Q. And at that point, at some point, did you tell him
15 again that you were going to write him a ticket for an
16 improper turn?

17 A. Did I tell him again?

18 Q. Yes.

19 A. No, sir, I didn't tell him again; at that point, no.

20 Q. Now, you did tell him or ask him if you could have
21 permission to search the van, right?

22 A. Yes, sir.

23 Q. And did he clearly give you permission to search the
24 van?

25 A. He said yes.

1 Q. And then did you search the van right then?

2 A. No, I didn't, because then he followed up with he
3 needed to call his boss.

4 Q. All right, and at some point in that conversation, a
5 police officer, and I don't know if it was you or the other
6 officer there, said to Mr. Smith, "Listen," in so many words,
7 "we're asking to search the van. It's a yes or no response,"
8 right? Then he said -- he gave a response and then added to
9 it, said he needed to call his boss or something to that
10 effect?

11 A. Yes, sir.

12 Q. And prior to him getting back in the van and
13 attempting to drive off, did you ever search the van?

14 A. No, sir.

15 Q. And the reason that you didn't search the van is
16 because you -- you couldn't decide whether or not he had
17 consented to the search, is that a fair statement?

18 A. Correct. When I -- I want a yes or no answer. I
19 don't want -- I don't like somebody to tell me several things
20 after they say, "Well, that's fine," or "That's okay," or --
21 that's why we ask for a yes or no answer, me personally.

22 Q. Because he was -- he was equivocating, or waffling, or
23 not being clear, right?

24 A. Well, he was clearly nervous, and ---

25 Q. He was nervous, all right, and not that you're

1 required to do it, but at no time did you tell him that he
2 had -- he could refuse to consent to search the van, right?

3 A. I do not recall, sir.

4 Q. But to your -- to your knowledge, you didn't say,
5 "Well, you don't have to consent to the search of the van"?
6 No one ever told him that, did they?

7 A. I do not recall ---

8 Q. All right.

9 A. --- under the circumstances, no, sir.

10 Q. But clearly the purpose of pulling him over was to see
11 if he would give consent to search the van, right?

12 A. Well, yes.

13 Q. That was the operation, right?

14 A. Yes, sir.

15 Q. All right, but Mr. Norris Smith, he didn't know that,
16 did he?

17 A. I don't know whether he did or not. I can't answer
18 for him.

19 Q. All right, fair enough. When Mr. Smith attempted to
20 drive away, did you still have his driver's license?

21 A. Yes, sir, I believe so.

22 Q. But it -- was it ever returned to him to your
23 knowledge?

24 A. I don't recall. It was ---

25 Q. It may have been held in evidence, may not?

1 A. I really don't know. Once -- once that happened, I --
2 there was -- it was very vague of things.

3 Q. At the time that you pulled Mr. Smith over in the van,
4 once you pulled him over, is it safe to say that he was not
5 free to leave from that point forward?

6 A. Correct.

7 Q. So once the van was pulled over, your understanding --
8 your instructions was that you and other law enforcement
9 officers would not let him freely leave the area until the
10 van was searched, is that a correct statement?

11 A. No, sir.

12 Q. That's not a correct statement?

13 A. I was never told that, no, sir.

14 Q. All right. How long does it normally take you to
15 write, say, a uniform traffic ticket for something like an
16 improper turn?

17 A. That all depends, sir.

18 Q. But you -- you've done that before, right?

19 A. Written tickets?

20 Q. Yes, sir.

21 A. Yes, sir.

22 Q. And you -- when you write a ticket and you give -- and
23 frequently on something like that, you give somebody what's
24 called a courtesy, right?

25 A. A courtesy summons.

- 1 Q. Which means that you -- you get their information and
2 you write them a ticket, right?
- 3 A. Correct.
- 4 Q. And then you give them the ticket, right?
- 5 A. Yes, sir.
- 6 Q. And you point out the court date, where it is?
- 7 A. Correct.
- 8 Q. And you say, "Have a nice day," and then they drive
9 off, right?
- 10 A. Right.
- 11 Q. Are you issued a uniform traffic summons book or a
12 uniform ticket book?
- 13 A. Yes, sir.
- 14 Q. And in that -- and is that your normal -- are you a
15 patrol officer, or a traffic officer, or have some other
16 designation?
- 17 A. I am not -- I'm a traffic officer, yes -- well, I have
18 multiple functions. I'm sorry.
- 19 Q. I'm sorry. I can't hear.
- 20 A. I have multiple functions that I do. I don't -- but I
21 do not work specifically calls if that's what you're asking.
- 22 Q. You don't exclusively respond to calls?
- 23 A. Correct.
- 24 Q. So you also work traffic?
- 25 A. Yes, sir.

- 1 Q. And when you have a traffic ticket book, isn't it a
2 normal practice to fill out some parts of the ticket prior to
3 going on your shift or at the beginning of your shift?
- 4 A. No, sir, I do not, no.
- 5 Q. You do not do that?
- 6 A. No, sir.
- 7 Q. You don't put the day of the week or the date on
8 there?
- 9 A. Absolutely not.
- 10 Q. But some people do, right?
- 11 A. I can't speak for anybody else. I do not.
- 12 Q. And so in terms of filling out a ticket book, is it --
13 would it take you more than ten minutes to fill one out?
- 14 A. It takes me more than most people, yes, sir.
- 15 Q. And why is that?
- 16 A. Because I don't fill anything out. I do it at that
17 point that I make the traffic stop.
- 18 Q. But if you have the person's driver's license and tag
19 number, I mean, most of the information is on the driver's
20 license, right?
- 21 A. Assuming that's the correct address and everything.
- 22 Q. All right, but that's what you rely on? That's where
23 their mail goes, right?
- 24 A. Usually.
- 25 Q. And then so you just put the information of who they

1 are, the driver's license number, the code violation, and the
2 court date, and then you give it to them, right?

3 A. And whether it was in the city, your location. Those
4 kind of things are also on there.

5 Q. But certainly you could do that in ten minutes, right?

6 A. I would hope so.

7 Q. Do -- well, let me rephrase it. Do you think you
8 could do it in ten minutes?

9 A. I would think I could.

10 Q. All right, and if ten minutes went by and you were
11 having a slow day or a difficult time doing it, do you think
12 you would have half of it or two-thirds of it done after ten
13 or twelve minutes?

14 A. I should have it done by ten minutes.

15 Q. Okay, fair enough; thank you, sir, but in this
16 occasion, you had not written any of it, right?

17 A. No, sir.

18 Q. Okay, and that goes back to the original reason for
19 the stop? You didn't really stop him for the traffic
20 violation; you stopped him because another agency had asked
21 you to assist them and stop him, stop the car, right?

22 A. I was asked to assist them by another agency, yes,
23 sir.

24 Q. Okay, and you may have -- did -- did you write the
25 traffic violation summons before or after Mr. Smith was

1 released from jail, do you know?

2 A. I couldn't accurately answer that. I -- I believe it
3 was that same day, but I -- I -- to tell you when I wrote it,
4 I don't know. I'm not -- I'm not sure.

5 Q. That's fair enough.

6 MR. McCOLLUM: All right, thank you, sir.

7 Your Honor, those would be all the questions I have at
8 this time for this witness.

9 THE COURT: All right. Solicitor.

10 MR. RICHARDSON: Thank you, Your Honor.

11 CROSS EXAMINATION

12 BY MR. RICHARDSON:

13 Q. No doubt about it, the defendant failed to use his
14 traffic signal?

15 A. I'm sorry, sir?

16 Q. The defendant failed to use his traffic sig- -- or his
17 turn signal when he ---

18 A. Correct.

19 Q. --- changed lanes? And that's a violation of the law
20 in South Carolina?

21 A. The State of South Carolina.

22 Q. That's a yes?

23 A. Yes, sir.

24 Q. And you were aware that the defendant was a possible
25 drug dealer?

- 1 A. Yes, sir.
- 2 Q. And when you pulled the defendant over, how was he
3 acting?
- 4 A. He was very nervous and visibly shaking. His hands
5 were shaking when he handed me his D.L. or his driver's
6 license; I'm sorry.
- 7 Q. All right. Were you concerned for your safety?
- 8 A. I had no idea what his intentions were.
- 9 Q. And because of that, is that why you asked him to exit
10 the vehicle?
- 11 A. Yes, sir. He was very nervous. Most people that are
12 -- never mind. Yes, sir.
- 13 Q. Did he do anything to frustrate your attempts to write
14 him a ticket?
- 15 A. He was not very compliant with our commands.
- 16 Q. And you wrote him a ticket for disregarding a traffic
17 signal?
- 18 A. Yes, sir, at some point.
- 19 Q. And the defendant pled on that, correct?
- 20 A. Yes, sir.
- 21 Q. When you pulled the defendant over, were you concerned
22 for your safety and the safety of other officers?
- 23 A. At that point, yes, sir.
- 24 Q. And you didn't just pull the defendant over willy-
25 nilly; you waited for a traffic violation?

- 1 A. Correct.
- 2 Q. And the courtesy summons, is it a requirement that you
3 give a courtesy summons?
- 4 A. Is it a requirement? No, sir.
- 5 Q. So you can actually put someone in jail for failure to
6 use a traffic ---
- 7 A. Correct.
- 8 Q. Once you had the defendant outside of the car, he
9 walked back to the car?
- 10 A. At some point he did, yes, sir.
- 11 Q. And what -- did that cause you concern?
- 12 A. Very much, sir.
- 13 Q. And why was that?
- 14 A. At that point, I definitely don't know what his
15 intentions are. He was going straight back to the vehicle,
16 not listening to anything we said at that point.
- 17 Q. So at that point, you were more concerned with getting
18 him back out of the vehicle?
- 19 A. Correct.
- 20 Q. So you weren't as concerned right then with writing
21 the street name and his license number?
- 22 A. No, sir, not at all.
- 23 Q. Concerned for your safety?
- 24 A. Absolutely.
- 25 Q. And the safety of Officer Jones (sic)?

- 1 A. Correct.
- 2 Q. The safety of Agent Jeremy Brown?
- 3 A. Correct.
- 4 Q. Once the defendant got into the car, did you ask him
- 5 to step back out?
- 6 A. Several times.
- 7 Q. Did you or any of the officers ask him to -- did --
- 8 what did he do once he was in the car?
- 9 A. He started fidgeting around. He got on a cell phone.
- 10 Q. At any point did he reach his hand inside of a bag?
- 11 A. He reached down to a black bag in the center console
- 12 area.
- 13 Q. Was that bag big enough to hold a hand gun?
- 14 A. Yes, sir.
- 15 Q. You couldn't see through the bag?
- 16 A. No, sir.
- 17 Q. And did you ask the defendant to exit the vehicle?
- 18 A. Several more times, yes, sir.
- 19 Q. And did he exit the vehicle?
- 20 A. No.
- 21 Q. What did he do?
- 22 A. He began making a phone call, and we also asked him to
- 23 get off the cell phone. He would not do that, and then at
- 24 that point, he began reaching down to the bag area. Officer
- 25 Johnson came in from the side, was telling him to get his

1 hand off the bag. At that point, I think taser was yelled,
2 said, "Tase him; tase him." Well, I backed up at that point.
3 Officer Johnson grabbed his arm. They began tussling.
4 You'll see I actually reach in the car and grab the suspect.
5 He grabs -- somehow grabs his keys. I didn't even see where
6 they had fallen during the whole tussle thing, but he had
7 grabbed his keys and got them to the ignition, cranked it.

8 Officer Johnson came through the vehicle, grabbed his
9 arm, turned the car back off. At that point, he reaches
10 under the passenger seat to what was a compartment that we --
11 I didn't even know was there and was grabbing for that
12 compartment.

13 At that point, Officer Johnson said he was going to tase
14 him again if he did not move his hand back. At that point,
15 you could see the compartment, a concealed compartment, come
16 forward. Officer Johnson grabbed at his arm and grabbed it.

17 There was a bag; I believe it was black in color, was
18 sitting in there. You couldn't tell what was in it because
19 it was dark, so Officer Johnson grabbed that bag at that
20 time, not knowing what it was, pulls his hand back -- the
21 defendant pulls his hand back. That's when he's trying to
22 get the car started again.

23 Myself and Officer -- Agent Jeremy were trying to
24 basically subdue the suspect back, but we couldn't get to him
25 very well the way we were. That's the point when the vehicle

1 was started. Officer Johnson grabbed the bag that was in the
2 floorboard area, pulled his taser, deployed it and shot --
3 struck the subject in the right shoulder, and at that point
4 was when he gunned the vehicle and they went around the back
5 of the vehicle -- or around the back of the house, I'm sorry,
6 or building that was there.

7 Q. Was anyone injured during this?

8 A. Officer Johnson was, yes, sir.

9 Q. How was he injured?

10 A. He had a fractured left wrist. He had a -- his knee
11 and right -- one of his ankles; I don't recall. I can pull
12 it up out of my notes, though.

13 Q. When I say how was he injured, was it a gunshot, a
14 stab wound?

15 A. He was run over.

16 Q. By?

17 A. The defendant's silver van.

18 Q. And was the defendant charged with that crime?

19 A. Yes, sir.

20 Q. All that occurred here in Horry County?

21 A. Yes, sir.

22 Q. Let's cut to the chase on this.

23 DVD OF VEHICLE STOP MARKED FOR IDENTIFICATION

24 AS STATE'S EXHIBIT 1.

25 Q. I'm going to hand to you what's been marked for

1 identification as State's Exhibit 1. Do you recognize that
2 item?

3 A. Yes, sir.

4 Q. And what do you recognize that item to be?

5 A. That's a copy of my in-car video.

6 Q. Is it a true and accurate depiction of the stop of the
7 defendant's vehicle that day?

8 A. Yes, sir.

9 Q. And everything that occurred during that stop?

10 A. Yes, sir.

11 MR. McCOLLUM: That's the one you gave me, right?

12 MR. RICHARDSON: Uh-huh (affirmative response).

13 Your Honor, for the purpose of this hearing, I'd like to
14 show this video to you at this time.

15 THE COURT: Any objection?

16 MR. McCOLLUM: Not to Your Honor seeing it, no.

17 THE COURT: Very good. Go ahead.

18 (State's Exhibit 1 for identification is played.)

19 **MR. RICHARDSON CONTINUES:**

20 Q. Officer Harris, you told him on the tape that you were
21 doing a random stop?

22 A. Yes, sir.

23 Q. And you said he was acting nervous?

24 A. Yes, sir.

25 Q. Okay. You had had -- recalled a tip that he was a

1 drug dealer?

2 A. Correct.

3 Q. And you were concerned for your safety and the other
4 officers' safety?

5 A. Correct.

6 MR. RICHARDSON: Thank you, Your Honor. That's all the
7 questions.

8 MR. MCCOLLUM: May it please the Court.

9 THE COURT: Yes, sir.

10 **REDIRECT EXAMINATION**

11 **BY MR. MCCOLLUM:**

12 Q. If you will, Officer Harris, I'm going to ask you what
13 the timer says at the time that it comes on. Do you know
14 that without looking at it?

15 A. It's an hour off. You're correct.

16 Q. It's an hour off?

17 A. Uh-huh (affirmative response).

18 Q. But I'm talking about just the time and the minutes.
19 (State's Exhibit 1 for identification is briefly turned on.)

20 A. 10:46.

21 THE COURT: I'm sorry?

22 A. That was me. I was telling it was 10:46 on that.

23 Q. Okay, so the time of the stop, can you see the numbers
24 here?

25 (State's Exhibit 1 for identification is briefly turned on.)

1 A. Yes, sir, I see them.

2 Q. What were the numbers you saw at the time of the stop?

3 A. I wasn't looking at my video screen, so I don't know
4 what the time of the -- the numbers ---

5 Q. Okay. Can you see that right there, and I'll back it
6 up.

7 (State's Exhibit 1 for identification is briefly turned on.)

8 A. It was 10:27, if that's what you're asking.

9 Q. And can you see how many seconds it is?

10 A. Thirty-nine.

11 Q. Okay. Thank you, sir.

12 THE COURT: Continue it until it stops.

13 MR. MCCOLLUM: I'm sorry, Your Honor?

14 THE COURT: Just continue it until the car stops and
15 see what it was.

16 (State's Exhibit 1 for identification is turned on and
17 continues to play.)

18 THE COURT: Thank you. Go ahead.

19 Q. So what time is it now?

20 A. It's 10:28 and 12 seconds when you asked.

21 Q. 10:28 and 12 seconds?

22 A. Correct.

23 Q. And that's the time that you are -- we hear you
24 stepping out of your patrol vehicle?

25 A. At 10:28, about 16 or 18.

1 Q. All right, thank you, sir.

2 MR. MCCOLLUM: Your Honor, I just want to move it
3 forward.

4 THE COURT: Why don't you use the remote control.

5 MR. MCCOLLUM: Your Honor, I don't know if you took
6 note of this earlier, but I just wanted to make sure we have
7 it in the record.

8 THE COURT: That's fine. Go ahead.

9 MR. RICHARDSON: Do you want it backed up?

10 MR. MCCOLLUM: Yes, just a very little bit. It should
11 be about a hundred and thirty-eight and change. There you
12 go. That's good.

13 Q. And also, Officer Harris, if you can, I'll ask you
14 this. Will you watch the counter and tell me at what time
15 the van accelerates?

16 A. 10:39:12 it looked like.

17 Q. 10:39 and 12 seconds?

18 A. 11 or 12. I ---

19 Q. 11 or 12, so the tape, just to make sure this is clear
20 for the record, at the time the tape comes on and you show
21 the vehicle pulling over, it's about 10:27 A.M. and 41
22 seconds for purposes of the tape, is that right?

23 A. That's equivalent, yes, sir, pretty close.

24 (State's Exhibit 1 for identification is stopped.)

25 Q. And then at the time that the Judge asked you to look

1 at when the vehicle comes to a stop ---

2 A. Uh-huh (affirmative response).

3 Q. --- and you start to exit your vehicle, do you
4 remember the time that was?

5 A. 10:28, like 16 or 18, I said.

6 Q. So something like 10:28 and 16 seconds, something like
7 that?

8 A. Yeah, I think.

9 Q. More or less, so if the -- if the -- when you
10 initiated the stop of the vehicle, was initially pulled over,
11 it was 10:27 and 41 seconds, and the vehicle accelerated away
12 from you and the other officers at 10:39 and 11 or 12
13 seconds, and that is -- for that period, that's just under 12
14 minutes, right?

15 A. Yes, sir.

16 Q. And so for the time that the vehicle was initially
17 pulled over until the time that the vehicle accelerated and
18 where he attempted to -- to drive away is over 10 minutes,
19 just less than 12 minutes, is that a fair statement?

20 A. It was approximately 12 minutes.

21 Q. Okay. Thank you, sir.

22 MR. MCCOLLUM: Your Honor, that's all I wanted to
23 establish.

24 THE COURT: All right, thank you.

25 MR. RICHARDSON: No further questions, Your Honor.

1 THE COURT: All right, sir, you may step down.

2 Any further witnesses on the motion to suppress?

3 MR. McCOLLUM: None from the Defense, Your Honor.

4 THE COURT: All right. Any from the State?

5 MR. RICHARDSON: No, sir, Your Honor.

6 THE COURT: All right.

7 MR. RICHARDSON: I do have a Court's Exhibit, but ...

8 THE COURT: All right. Y'all need to -- you want to
9 eject that disk, or tape, or whatever it is.

10 All right, do you want to make your arguments then, Mr.
11 McCollum, on your motion to suppress?

12 MR. McCOLLUM: Yes, sir. May it please the Court.

13 Your Honor, I do have a couple of cases I'd like to hand
14 up.

15 Your Honor, the basic issue is simply that the testimony
16 in the record here is that the defendant was pulled over for
17 a traffic violation, that he was pulled over for not properly
18 signaling as he drove on an exit ramp off of Highway 544,
19 which I think Your Honor -- I didn't establish this, but
20 could take judicial notice, that that's a four-lane highway
21 going from Conway to Surfside Beach.

22 Essentially, Your Honor, in looking at just the language
23 from Sikes versus State of South Carolina, 448 S.E.2d 560,
24 the Court states on -- on basically what's marked as Page 3,
25 when an officer stops a vehicle for a traffic violation, he

1 may briefly detain the vehicle and its occupants while he
2 examines the vehicle's registration and driver's license. An
3 individual is seized when an officer restrains his freedom,
4 even if the detention is brief and falls short of an arrest.
5 The scope and duration of the seizure must be strictly tied
6 to and justified by the circumstances which rendered its
7 initiation proper.

8 Now, I don't necessarily want to concede that the stop
9 was proper, Your Honor, because the officer has testified
10 that he was going to stop the vehicle on command basically.
11 He testified that a person which really unknown to him told
12 him by way of cell phone that they needed his assistance in
13 that area and they were wanting him to basically stop this
14 car whenever the time was appropriate, and he testified that
15 he doesn't -- did not know that individual, they weren't
16 talking on a police radio, that he got a cell phone call and
17 he wasn't sure of the individual's name. I would submit that
18 then he said that he followed the vehicle as instructed and
19 that the vehicle, he said, made a couple of violations, but I
20 don't think he specified them, but then he testified that
21 when the vehicle, which was in the turn lane, which was --
22 he described as an exit lane, on command he stopped the
23 vehicle for not using a turn signal.

24 He also additionally said, Your Honor, that he didn't
25 stop the vehicle at the time it occurred because the people

1 that he had spoken to wanted him to let the vehicle move
2 further down the road on 707. I would submit that in that
3 situation that the case law, and I guess I need to just put
4 -- cite these into the record, Your Honor, State versus
5 Pichardo, 367 S.C. 84. It's a Court of Appeals' decision in
6 2005. State versus Adams, 377 S.C. 334. State versus
7 Williams, I believe, 374 S.C. 129.

8 I would submit that the proper scope there would be that
9 if he's going to be stopping the vehicle to write him a
10 traffic ticket, then he would take the normal steps to write
11 the traffic ticket. He indicates that he doesn't fill out
12 the beginning of the traffic ticket book like I say. He said
13 he didn't know if this happens, so in other words, he's going
14 to have to write the whole ticket from scratch. He says he
15 got the person's driver's license, but he could not recall if
16 he got the registration form or the insurance form. He goes
17 back to the patrol car and we hear him on the tape where he
18 says, "Well, I'm just going to act like I'm checking his
19 vehicle registration or his driver's license just to stall
20 him."

21 At that point, over and over they ask Mr. Smith for
22 consent to search. I would submit that based on the case law
23 and the cases that I've read in South Carolina, when they
24 stopped Mr. Smith, if Your Honor deemed the stop was
25 appropriate and brief, and if they immediately asked him,

1 "Oh, we stopped you for turning right, but we want to check
2 your car," there is a case that says that since they had
3 gotten consent -- in fact, it's State versus Adams, 659 S.E.
4 2d 272, at the bottom of Page 3. "In the case before us,
5 both James and Reece testified that permission to search the
6 vehicle was sought within five minutes of the initial
7 detention. They also told him he could refuse to consent to
8 search," and apparently there in that case they said you
9 could search.

10 I would submit in this case that it goes longer than
11 that and that it was never clear to the officers that Norris
12 Smith was agreeing to any kind of search. They said -- they
13 keep asking him if they can search. In fact, and the officer
14 testified that they thought at one point he had agreed to the
15 search, but if you listen to him, he actually asked him two
16 questions. Initially, Officer Harris says, "Do you mind if
17 we search?" and Norris Smith says, "I need to go to work."
18 Then at some point they asked him to step out. They asked
19 him, "What's wrong?" He says, "Nothing."

20 Another officer, I'm not sure if it was Harris or the
21 other officer, says, "Mind if we search?" and then he says,
22 "Are you on your way to work?" so he asked him, "Do you mind
23 if we search?" and "Are you on your way to work?" Norris
24 Smith says, "Yes" after they ask him if he's on his way to
25 work, which he keeps saying he's on his way to work, so since

1 that wasn't clear, because you don't know if he's saying,
2 "Yes, I'm on my way to work" or "Yes, you can search," they
3 ask him again, and then he says, "I have to call my bossman
4 first.

5 THE COURT: So, I mean, your position is that to a
6 clear question, "Can we search your vehicle?" that your
7 client never said yes to that question?

8 MR. McCOLLUM: That's our -- that's our ---

9 THE COURT: We need to play that tape again because I
10 clearly heard that. The question was asked and your client
11 says, "Yes." Then he says, "I need to call my boss," or
12 whatever, but in response to a question, "Can we search?" he
13 clearly says, "Yes."

14 MR. McCOLLUM: When you listen to it, Your Honor, ---

15 THE COURT: Well, let's play it again.

16 MR. McCOLLUM: I'll be glad to.

17 THE COURT: Let's play it again now.

18 MR. RICHARDSON: Yes, sir, Your Honor.

19 MR. McCOLLUM: May I speak, Your Honor?

20 THE COURT: No. We're going to play the tape again
21 right now. We're going to get to that point and then you can
22 make your arguments after that.

23 Keep going. Just fast-forward it to the officer getting
24 out, ---

25 MR. RICHARDSON: Yes, sir.

1 THE COURT: --- getting his driver's license, and going
2 back to his vehicle.

3 (A portion of State's Exhibit 1 for identification is re-
4 played for the Court.)

5 THE COURT: All right, stop the tape.

6 All right, Mr. McCollum, you may continue.

7 MR. MCCOLLUM: Thank you, Your Honor.

8 Your Honor, I think you understand the motion, and I
9 think Your Honor is probably familiar with this, having heard
10 this situation numerous times before. Essentially we are
11 saying that the basis for the stop was limited based on the
12 testimony entered into this record for purposes of writing
13 him a ticket and letting him go.

14 No ticket was ever written according to the officer's
15 testimony, or let me rephrase that; no ticket was written
16 that day. The ticket was written eventually and at some
17 point he was given a summons, but in the ten to twelve
18 minutes that this so-called consensual encounter took place
19 before the van accelerated away, I would submit that he never
20 gave consent.

21 I would just reiterate, Your Honor, that it's very
22 intimidating to him that he -- that they said, "You" -- the
23 second question or the second time about the search, they
24 said, "Do you mind if we search?" and "Are you on your way to
25 work?" He says, "Yes," and I submit that that can certainly

1 be construed as he was on his way to work, and they asked him
2 again, "Do you mind if we search?" and he says, "I mean, what
3 for? No, I don't mind. What's going on? I need to talk to
4 my boss."

5 I would submit, Your Honor, that if he had consented,
6 they would have stopped asking him questions. It was not
7 clear to them until what ultimately happened, happened. Our
8 position, Your Honor, is based on this case law and other
9 case law, the South Carolina Constitution, the United States
10 Constitution, the rights to privacy afforded in the South
11 Carolina Constitution, beyond those in the United States
12 Constitution, that the scope of the seizure and the purpose
13 for the seizure was clearly exceeded, and that the search was
14 an unlawful continuation of that detention. The search was a
15 then unlawful act because it was not consented to and it did
16 not arise out of the basis of the stop, and we would ask Your
17 Honor to suppress anything that was found as a result of the
18 stop.

19 THE COURT: All right, sir. All right, Solicitor.

20 MR. RICHARDSON: Thank you, Your Honor. With regard to
21 cases cited by Mr. McCollum, I believe State v. Sikes, that's
22 a PCR issue where they just basically state they're holding
23 his -- the original trial attorney should have questioned the
24 stop a little bit more. There is some language in there
25 talking about briefly stopping a vehicle. There are more

1 accurate cases.

2 With regard to State v. Willard, in that case the Court
3 actually found that Willard voluntarily consented to the
4 search. They talk about -- let's see; I just looked at it.
5 It's a case in which -- where officers got -- picked him up
6 on a bench warrant, found some methamphetamines, asked him to
7 call his dealer. He calls his dealer. Officers show up
8 where the dealer says he's going to go. The officers
9 approached the vehicle the dealer is in, Willard, and they
10 say, "All right, boys, where is the drugs?" and said, "We
11 ain't got no drugs," and the officer holds up a cell phone
12 and says, "You've been calling my phone," and says -- and
13 then the defendant, Willard, dropped his head and said,
14 "They're in the console." The Court upheld that conviction,
15 upheld the search on that if I'm reading it correctly, when
16 they consented.

17 The Pichardo case, the actual facts in Pichardo, Your
18 Honor, the only evidence the State produced in that whole
19 stop, in Pichardo, was that one defendant might have acted
20 nervous. We've provided more testimony than that.

21 With regard to State v. Adams, once again the search was
22 upheld. It was in Judge Patterson's court, that -- and they
23 state again, "The search and seizures are reasonable within
24 the meaning of the Fourth Amendment when conducted under the
25 authority of voluntary consent." That's here, and they

1 question whether or not the consent was freely given.

2 Your Honor, regardless of whether or not consent was
3 given, which the State would maintain it was, first of all
4 let me address the stop. As the officer testified, the
5 defendant pled guilty to the stop, to the traffic violation.
6 Therefore, he had stopped complaining that it was a bad stop.
7 That is under State v. Snowdon, which is a Court of Appeals'
8 case. I've got a copy for the Court. Cert. was denied as
9 improvidently granted. The cite on that case is 371 S.C.
10 331, 638 S.E.2d 91. Also, Your Honor, I'll be going into IN
11 RE: Jeremy Duffew, which is a Supreme Court case, 361 S.C.
12 620, 606 S.E.2d 766.

13 Basically in Snowdon we had the same -- the same
14 situation where a defendant pled on, I believe, it was breach
15 of peace, breach of peace, and then he tried to challenge the
16 validity of the breach of peace afterwards, after he had
17 already pled, to challenge the marijuana conviction he got,
18 and the Court held that the defendant was collaterally
19 estopped from challenging the validity of the arrest for
20 breach of peace for which he pleaded guilty at trial for
21 possession of marijuana, and specifically on Page 3, at the
22 top of the page it says Page 404. In 5 and 6, Your Honor, it
23 says, "In addition, Snowdon is collaterally estopped from re-
24 litigating the issues of the validity of his arrest.
25 Collateral estoppel prevents a party from re-litigating in a

1 subsequent suit an issue actually and necessarily litigated
2 and determined in a prior action." That's what we have here.

3 With regard to IN RE: Jeremy Duffew, assuming arguendo
4 that the consent wasn't there, the stop wasn't there, Your
5 Honor, the defendant commits a separate act for which he's
6 charged. He is charged with assault and battery with intent
7 to kill for running Off- -- over Officer Jack Johnson. In
8 that, any -- he'll -- he's going to get charged. He's going
9 to be arrested. He's going to be taken away. Anything taken
10 during that time period would be -- would be granted in a
11 search incident to arrest, Your Honor. In that case, the
12 defense tried to use fruit of the poisonous tree, and the
13 Court specifically held that it is not fruit of the poisonous
14 tree when there is a separate crime that occurs. In this
15 case, it was a juvenile charged with, I believe, once again,
16 breach of peace. That was thrown out, but he also threatened
17 the officer on the -- on the way to the jail, and that was
18 upheld, Your Honor, because it was a separate and distinct
19 offense.

20 Your Honor, very succinctly, it was a good stop. A
21 traffic ticket was issued -- a traffic ticket was issued.
22 The officer stated that he was a little more on guard because
23 he was notified this wasn't a mere tipster. An officer
24 testified that he was following, that this was a drug deal.
25 He saw the defendant grabbing in bags, grabbing in

1 compartments where a gun could be held. He was afraid for
2 his safety, and the stop lasted in a most generous amount
3 twelve minutes. The defendant frustrated any attempts to
4 write a ticket there, and the officer actually testified he
5 did not know when the ticket was written exactly; he couldn't
6 testify to that on the stand. He didn't say it was written
7 the next day, Your Honor, and that would be the State's
8 position.

9 THE COURT: All right, so in this case, the defendant
10 was served arrest warrants for trafficking in cocaine, four
11 hundred grams or more?

12 MR. RICHARDSON: That's correct, Your Honor.

13 THE COURT: Trafficking in cocaine, ten grams or more,
14 but less than twenty-eight grams?

15 MR. RICHARDSON: Yes, sir, Your Honor, and actually the
16 State will put on the record that it is dismissing that
17 indictment, nolle prosequing that indictment. We got a drug
18 report back on that and it detected no controlled substance.

19 THE COURT: All right. He was arrested or given an
20 arrest warrant for assault and battery with intent to kill on
21 the -- regarding the defendant resisted and assaulted Officer
22 Harris, ---

23 MR. RICHARDSON: He -- he ---

24 THE COURT: --- and striking Officer Johnson?

25 MR. RICHARDSON: That's correct, Your Honor.

1 THE COURT: And then he was arrested also for resisting
2 arrest, opposing or resisting, assaulting a law enforcement
3 officer serving process, or arresting -- resisting arrest
4 under the B-Section, is that correct?

5 MR. RICHARDSON: Yes, sir, Your Honor, and he was
6 served with Ticket 24192ED for disobeying a traffic device or
7 signal.

8 THE COURT: All right, sir.

9 All right, and in addition to your motion to suppress,
10 Mr. McCollum, you had a motion to exclude the tape, or in
11 conjunction, I suppose. What -- do you want to argue that
12 also?

13 MR. MCCOLLUM: Yes, sir, if it please the Court.

14 Your Honor, as you just stated, at the time of the
15 incident on June 19th, 2008, Norris Smith was arrested and
16 charged with the offense of trafficking over four hundred
17 grams. He was also charged on separate warrants, Your Honor,
18 for Warrant Number J611855, assault and battery with intent
19 to kill, for assaulting the officer, I think Johnson,
20 striking him with a vehicle, and then also Warrant J611856
21 for resisting arrest or attempting to leave the scene.

22 When I requested the indictments on the case, Your
23 Honor, from the Clerk of Court, we got the two indictments
24 that the Solicitor referred to for trafficking cocaine, so my
25 understanding, we were going forward on the indictment that

1 we've gone forward on. I would submit that since the
2 defendant is not on trial for assaulting an officer or
3 assault and battery with intent to kill, or not on trial for
4 resisting arrest, that there would be no reason to show that
5 part of the video. It has nothing to do with whether or not
6 he had the cocaine and was transporting the cocaine.

7 It has to do with a separate and distinct offense that
8 whatever reasons, I don't know, the State has decided not to
9 pursue, so we would ask Your Honor to limit that tes- --
10 limit that evidence, testimony and the tape, regarding that.
11 It's -- obviously would be extremely probative of the offense
12 of assault and battery and resisting arrest. It's clear
13 evidence of that. It's evidence of a separate crime of which
14 he's not charged. It's extremely prejudicial. It's
15 disturbing to watch and is highly prejudicial, and, in fact,
16 I would submit, has no probative value as to the issue at
17 hand here today.

18 I don't know why they elected to do that, but that was
19 their decision and we would ask Your Honor to exclude that
20 part of the tape which shows that -- that part of that
21 assault, Your Honor.

22 THE COURT: All right, Mr. Richardson, I'll be glad to
23 hear from you, sir.

24 MR. RICHARDSON: Your Honor, on the tape you clearly --
25 or you can see, if you're watching, the defendant throw the

1 bag of dope out of the car. That shows that he had
2 possession of it, in addition to his statement. It's all res
3 gestae. It's part of the stop. It's part of the ongoing
4 thing. Your Honor, it shows him actually denying the drugs,
5 "I didn't have a kilo of cocaine," which subsequently he
6 admitted to later, Your Honor, and it -- it goes with the
7 natural flow. You have to show the entire tape, Your Honor,
8 and like I said, the stop at the beginning, and then you have
9 the dope getting thrown out of the window at the end, and it
10 shows his flight from the scene, which also tends to show his
11 guilt.

12 THE COURT: Any arguments, other arguments, that you
13 want to make, Mr. McCollum?

14 MR. MCCOLLUM: On that issue, Your Honor?

15 THE COURT: Yes, sir.

16 MR. MCCOLLUM: No, Your Honor.

17 THE COURT: All right, very good, or anything else on
18 the motion to suppress or the motion to exclude the tape?
19 Anything else you want to argue on either one of them?

20 MR. MCCOLLUM: No, sir.

21 THE COURT: All right, very good. All right,
22 gentlemen, what we're going to do is I'm going to take the
23 matter right now under advisement. I'm going to, when the
24 jury comes back at 1:30, I'm going to tell -- have the
25 bailiff tell them that they can either stay in the room or

1 they can come back at 2:30. We'll start back at -- I'll tell
2 them 2:30. I want y'all back in the courtroom by two
3 o'clock.

4 MR. RICHARDSON: Yes, sir, Your Honor.

5 THE COURT: All right, thank you very much.

6 MR. MCCOLLUM: Thank you, Judge.

7 MR. RICHARDSON: Thank you, Your Honor.

8 (OFF THE RECORD)

9 ON THE RECORD

10 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
11 JURY.)

12 THE COURT: Mr. McCollum, normally we would have the
13 defendant detained into custody. Is there some reason we
14 shouldn't do that at this point in time?

15 MR. MCCOLLUM: Your Honor, I mean, he's been facing
16 these charges since 2008. He's always -- he's made his
17 appearances. He's appeared here in Court two days in a row.
18 He lives here locally. I was going to meet with him
19 yesterday in my office and asked him to go there. He went
20 there. I got held up in a plea. He's not shown any threat
21 to flee. It's more difficult for me -- obviously this is not
22 a long case. It's a little more difficult if you put him in
23 the lock-up. I'd just ask that he be allowed to remain out
24 until ---

25 THE COURT: So you intend to talk to him and for y'all

1 to communicate in the interim until two o'clock?

2 MR. McCOLLUM: Your Honor, I'm not saying that I plan
3 on doing that. He may need to speak to me right now. I'm
4 just asking that -- he's not shown himself to be a flight
5 risk or a danger subsequent to his arrest, and I would ask
6 that he be allowed to remain out today.

7 THE COURT: All right. The jury -- Mr. Smith, go ahead
8 and stand, please, sir. Mr. Smith, please stand. (Mr. Smith
9 stands.) The jury has not yet been sworn in this particular
10 matter. Mr. Smith, though the case has been called by the
11 Solicitor, though the jury has not been sworn in this matter,
12 your case has commenced as far as the motions that have been
13 made in this particular matter.

14 Now, I am having y'all come back at two o'clock. If you
15 are not present in the courtroom at two o'clock, this matter
16 will proceed in your absence. Whether you are here or not,
17 that will not stop this matter from going forward. Do you
18 understand that?

19 MR. SMITH: Yes, sir.

20 THE COURT: Obviously, it's in your best interest to
21 cooperate with your attorney and communicate with him, but if
22 you choose not to do so, that will not stop the trial. Do
23 you understand that?

24 MR. SMITH: Yes, sir.

25 THE COURT: You further understand if you are not here

1 in the courtroom at two o'clock, a bench warrant will be
2 issued for your arrest. You understand that?

3 MR. SMITH: Yes, sir.

4 THE COURT: If you are not detained before the end of
5 the trial and a jury finds you guilty of any offense, then
6 the sentence will be sealed and will be read to you at the
7 time of your arrest. You understand that?

8 MR. SMITH: Yes, sir.

9 THE COURT: All right, sir. I'm going to allow him to,
10 at this point in time, remain out. Now, once the jury is
11 sworn, he will be in the custody of the Sheriff's Office.

12 MR. RICHARDSON: Yes, sir, Your Honor.

13 MR. MCCOLLUM: Thank you, Your Honor.

14 (OFF THE RECORD - Lunch Recess)

15 ON THE RECORD

16 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
17 JURY.)

18 THE COURT: On the motion to suppress, we'll deal with
19 the motion to suppress first. What we have before us is the
20 officer making the stop indicated that he apparently was part
21 of some prearranged situation and/or plan to stop the
22 defendant in this particular case.

23 There is no question that the defendant did commit a
24 traffic violation. That's uncontradicted by any evidence
25 that has been presented to the Court in this matter, so that

1 is taken as a fact that he did commit a traffic violation.

2 At the time, or prior to the stop, the officer that made
3 the stop was informed by other officers, even if he did not
4 know the actual name of that officer, it was clear that it
5 was another fellow police officer, that he knew that the
6 defendant was believed to be a drug courier or transporting
7 drugs and obviously would have -- he would give that matter
8 attention in any potential stop, heightened awareness, I
9 guess, by that particular officer.

10 He did indicate that when he stopped the defendant, the
11 defendant by his actions in his response to questions, the
12 defendant was nervous; that the officer, based upon the
13 defendant's actions, was concerned for his safety and the
14 safety of others.

15 I do find that the defendant did consent to exit his
16 vehicle. There was certainly questions by the arresting
17 officer that had made the traffic stop and other officers
18 regarding a consent to search the defendant. On two
19 occasions in response to questions to consent to search
20 indicated that he said on two different occasions, "I don't
21 mind," but he did thereafter indicate he wanted to call his
22 boss.

23 When -- after that occurred, the defendant went back to
24 the vehicle, ignoring requests by the police to stop. When
25 he was in the vehicle, they asked him numerous times to stop

1 doing certain things, which apparently he refused to do. The
2 defendant then reached for a compartment and thereafter a
3 black bag, both of those which were unknown contents to the
4 officers. The officer in an obvious move for officer safety
5 tried to stop him. The defendant thereafter in response to
6 that started his vehicle, drove away, and ran over a police
7 officer in his leaving the area where he had previously
8 parked his car.

9 The time frames that are indicated from the best the
10 Court could tell from the tape, that the defendant pulled off
11 the travel portion of the highway that was indicated on the
12 tape at 10:27 and 48 seconds. He stopped his car at 10:28
13 and 12 seconds. He was asked to come out of his vehicle at
14 10:31, approximately three minutes later, which he consented
15 to do so. He comes out of the vehicle at 10:33 and 22
16 seconds. He thereafter re-enters the car, and at 10:39 and
17 11 seconds, he pulls off and immediately after pulling off
18 runs over the police officer, so the entirety of the time
19 from the time the car reaches an initial stop or is stopped
20 by the defendant as a result of the officer putting on the
21 blue lights and indicating for him to stop to the time that
22 he pulls -- starts the car and pulls off and runs over the
23 officer is -- looks to be one second less than eleven minutes
24 in total, the total time of eleven minutes from the time that
25 he actually stopped the vehicle until he started the vehicle

1 again and thereafter ran over the officer.

2 Cases that the Court has found to be enlightening and
3 useful in this matter are The State versus Adams, a 2008
4 decision of the South Carolina Court of Appeals found at 659
5 S.E.2d 272. In that the Court indicated a -- where a
6 probable cause exists to believe a traffic violation has
7 occurred, a decision to stop the automobile is reasonable per
8 se. When the vehicle has been lawfully detained for a
9 traffic violation, a police officer may order the driver to
10 get out of the vehicle without violating the Fourth
11 Amendment's prescription of unreasonable searches and
12 seizures. In carrying out the stop, an officer may request
13 driver's license, vehicle registration. However, any further
14 detention for questioning is beyond the scope of the stop and
15 therefore illegal unless the officer has a reasonable
16 suspicion of a serious crime. The analysis could then go to
17 whether or not the defendant was detained or seized anew,
18 thereby triggering a Fourth Amendment and potentially
19 rendering any subsequent consent to search of the vehicle
20 invalid or if the encounter turned into a consensual one
21 invoking no constitutional scrutiny.

22 The Court indicated that law enforcement may request
23 permission to search a vehicle at any time. However, when an
24 officer asks for consent to search after an unconstitutional
25 detention, the consent procured is per se invalid unless it

1 is both voluntary and not an exploitation of the unlawful
2 detention. Whether consent to a search is voluntary is a
3 question of fact to be determined from the totality of the
4 circumstances.

5 In the case of State versus Pichardo, a 2005 decision of
6 the South Carolina Court of Appeals, the Court indicated
7 again or previously that once a motor vehicle is detained for
8 -- lawfully for a traffic violation, the police may order the
9 driver to exit the vehicle without violating Fourth Amendment
10 proscriptions on unreasonable searches and seizures. The
11 investigative detention must be temporary and last no longer
12 than is necessary to effectuate the purpose of the stop and
13 the scope of the detention must be carefully tailored to its
14 underlying justification. The officer's purpose in an
15 ordinary traffic stop is to enforce the laws of the roadway,
16 and ordinarily to investigate the manner of driving with the
17 intent to issue a citation or warning. Once the purpose of
18 that stop has been fulfilled, the continued detention of the
19 car and the occupants amounts to a second detention, and they
20 go on to talk about that.

21 And in talking about that, lengthening the detention for
22 further questioning beyond the related -- that related to the
23 initial stop is permissible in two circumstances. First, the
24 officer may detain the driver for questioning unrelated to
25 the initial stop if he has an objectively reasonable and

1 articulable suspicion illegal activity has occurred or is
2 occurring. Second, further questioning unrelated to the
3 initial stop is permissible if the initial detention has
4 become a consensual encounter, and those general principles
5 were also indicated in the PCR decision of the South Carolina
6 Supreme Court in general in Sikes versus State of South
7 Carolina, a 1994 decision of the South Carolina Supreme Court
8 at 448 S.E.2d 560.

9 In this particular case, I basically make two rulings.
10 One, I do find that there was a proper stop of the vehicle.
11 The defendant did commit a traffic violation in the presence
12 of a uniformed officer in a marked vehicle. He was properly
13 stopped and detained. There is certainly an indication that
14 the defendant had given consent to search the vehicle, but
15 it's not necessary to find that, that the officer's actions
16 appear to be reasonable in this regard. It's not an unusual
17 amount of time. The officer indicated that he hoped he would
18 be able in the normal circumstance to write a ticket in --
19 within ten minutes. This one was obviously not a normal
20 situation due to the actions of the defendant. Therefore, I
21 would find that, therefore, there being a proper search -- or
22 a proper stop and search that the motion to suppress should
23 be denied.

24 The second ground would be in allowing -- in denying the
25 motion to suppress and allowing the evidence would be that

1 even if it is found that all of the actions of the officer
2 were a mere pretext to stop this person suspected of
3 transporting drugs, even if those actions were a mere pretext
4 and the stop was invalid, under the decision of the South
5 Carolina Supreme Court in State versus Eric P. Nelson, in 519
6 S.E.2d, 786, again a 1999 decision of the South Carolina
7 Supreme Court, that -- and when they went through a somewhat
8 detailed or lengthy discussion of U.S. Supreme Court
9 decisions and Federal Court of Appeal decisions, that as a
10 general rule that the -- as held in Wong Sun versus The
11 United States, as found in 371 U.S. 471, a 1963 decision of
12 the U.S. Supreme Court, that the United States Supreme Court
13 declined to hold that all evidence is fruit of the poisonous
14 tree simply because it would not have come to light but for
15 the illegal actions of the police. The South Carolina
16 Supreme Court indicates that since Wong Sun, courts have
17 recognized that a new and distinct criminal act following an
18 illegal stop do not qualify as fruit of the poisonous tree
19 simply because such acts were causally connected to the
20 police misconduct.

21 And they talked about The United States versus NookSafe,
22 a Fifth Circuit decision, 1971. They also talked about The
23 United States versus Bailey, found at 691 Fed.2d 1009, an
24 Eleventh Circuit decision, 1982, and the Fourth Circuit,
25 United States versus Sprinkle, 106 Fed.3d 613, a Fourth

1 Circuit decision in 1997.

2 In these particular circumstances, even if the police
3 actions, number one, were a mere pretext and, secondly, were
4 any kind of illegal actions of the police, the defendant in
5 starting his vehicle and thereafter assaulting and running
6 over a police officer committed a crime, for which he was
7 subsequently arrested.

8 As a result of his actions in committing a crime, he
9 was, therefore, thereafter lawfully detained, and any
10 subsequent items that were found as a result of that proper
11 arrest for assault and battery with intent to kill, or
12 resisting arrest, or assaulting a police officer, trying to
13 run the police officer over, there was a proper arrest for
14 that, a proper detention, and, therefore, under the decisions
15 of the United States Supreme Court, several U.S. Circuit
16 Courts of Appeal, and the South Carolina Supreme Court in
17 State versus Nelson, I find that the motion to suppress
18 should be denied.

19 As to the video tape and the playing of the video tape,
20 I hate to tell you this, but you're going to have to play the
21 end of it again because I was not paying attention to what
22 was happening with the -- exactly how the black bag came out
23 the window. I did not -- did not see exactly if the
24 defendant threw the black bag out of the vehicle or a
25 result of an action of a police officer, so we'll

1 play that part again to see how the black bag came out of the
2 vehicle, so if we could find that part and play that, just
3 basically once he drives off.

4 MR. RICHARDSON: Your Honor, do you want me to cue it
5 up now?

6 THE COURT: Yeah, I want you to set it all up and get
7 it cued up to the point where basically he's driving off.

8 MR. RICHARDSON: At 10:39 and 11 seconds.

9 THE COURT: Something like that.

10 (A Portion of State's Exhibit 1 for Identification is re-
11 played for the Court.)

12 THE COURT: All right. Re-play that again if you don't
13 mind, please.

14 MR. RICHARDSON: Yes, sir.

15 (A Portion of State's Exhibit 1 for Identification is re-
16 played for the Court.)

17 THE COURT: All right, thank you. Now, I'm assuming
18 the item that's in the center of the screen right there,
19 that's the black bag?

20 MR. RICHARDSON: Yes, sir.

21 THE COURT: All right. I'm -- that's what I was
22 assuming.

23 MR. RICHARDSON: Some of the officers have told me.

24 THE COURT: All right, very good.

25 MR. RICHARDSON: I wasn't at the scene.

1 THE COURT: All right. I understand that. All right,
2 it appears the tape is somewhat unclear as to how the black
3 bag exited the vehicle. As I understand the testimony to be
4 presented, and you correct me if I'm wrong, Solicitor, ---

5 MR. RICHARDSON: Yes, sir.

6 THE COURT: --- is that the officers present will
7 testify that the defendant threw the black bag out of the
8 vehicle?

9 MR. RICHARDSON: Yes, and ---

10 THE COURT: Hold on one second because the court
11 reporter -- wait until you get back over here because the
12 court reporter has got to get your answer.

13 MR. RICHARDSON: Yes, sir, Your Honor.

14 THE COURT: All right.

15 MR. RICHARDSON: I -- I'm sorry.

16 THE COURT: I want you to -- based upon that, I want
17 you to make sure and clarify that with your officers, that
18 the bag didn't come out of it as a result of one of the
19 officers grabbing it and throwing it out of the vehicle, that
20 it came out of the vehicle as a result of the defendant's
21 actions; the bag came out of it as a result of the defendant
22 in some way getting the bag out of the vehicle.

23 MR. RICHARDSON: Yes, sir, Your Honor, and I don't know
24 that Officer Harris could testify. Officer Johnson was the
25 one that was on that side of the vehicle and he ---

1 THE COURT: Well, whomever -- whomever it is, I need
2 for you to clear that up, because if it's the defendant's
3 actions that the black bag exited the vehicle, I would find
4 that would be proper evidence for the jury to consider in the
5 totality of the circumstances as to the charge that he is
6 facing, and that is in the trafficking of the cocaine in the
7 weight of more than four hundred grams, so I want that to be
8 clear.

9 If that's not the testimony, if the testimony is going
10 to be the officers say the officers threw it out, I don't see
11 the necessity for the tape, because he's not charged for
12 assault and battery with intent to kill. He's charged with
13 trafficking. We'd have to be concerned with his actions that
14 the jury would see or I would see that the jury could use to
15 determine what occurred as far as the charge he's facing.

16 MR. RICHARDSON: Yes, sir.

17 THE COURT: So we make sure that's clear. Otherwise --
18 now, I'll allow the officers to testify as to what
19 occurred, ---

20 MR. RICHARDSON: Yes, sir.

21 THE COURT: --- but we would not then be using the
22 video tape if the officers threw the bag out, all right?

23 MR. RICHARDSON: Yes, sir. Your Honor, if we could
24 have a moment, I ---

25 THE COURT: Well, I was going to -- we're going to take

1 a -- we'll take a short break and you can ---

2 MR. McCOLLUM: Your Honor, ---

3 THE COURT: Yes, sir.

4 MR. McCOLLUM: Your Honor, this is what I am requesting
5 the Court to do. These things like this are very important
6 for the case obviously. Rather than have Mr. Richardson go
7 and talk to the police officer, as the Defense requests,
8 they're sequestered. I would ask the Court to call the
9 witness in here without explaining the Court's reasoning and
10 what would happen depending on what the testimony is, simply
11 ask the officer from the witness stand that question or that
12 series of questions ---

13 THE COURT: I'm not going to ask him any questions. If
14 y'all want to ask him some questions, ---

15 MR. McCOLLUM: I'm asking that I be allowed to do
16 that ---

17 THE COURT: Well, y'all -- we're going to take a short
18 break and then we can come back in, and then, Solicitor, you
19 can call the witnesses you deem necessary.

20 MR. RICHARDSON: Yes, sir, Your Honor.

21 THE COURT: Thank you very much.

22 MR. McCOLLUM: Your Honor, may I say something else?

23 THE COURT: Yes, sir.

24 MR. McCOLLUM: Since they're sequestered, I'm also
25 asking that the Solicitor not talk to them while we're on

1 recess.

2 THE COURT: I'm sure he won't.

3 MR. McCOLLUM: Thank you, Judge.

4 (OFF THE RECORD)

5 ON THE RECORD

6 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
7 JURY.)

8 THE COURT: All right, have we determined who we need
9 to call.

10 MR. RICHARDSON: I'll call Officer Harris.

11 THE COURT: All right, sir.

12 MR. RICHARDSON: Your Honor, the State would call
13 Officer Wesley Harris.

14 THE COURT: All right, sir.

15 Please come around to be sworn, sir.

16 WESLEY HARRIS, BEING FIRST DULY SWORN, IS EXAMINED AND
17 TESTIFIES AS FOLLOWS:

18 THE CLERK: Please state your name and -- please state
19 your name and give the Court your last name.

20 CORPORAL HARRIS: Corporal Wesley Harris.

21 DIRECT EXAMINATION

22 BY MR. RICHARDSON:

23 Q. Officer Harris, we saw a video earlier.

24 A. Yes, sir.

25 Q. And there was a discussion about the bag of cocaine

1 that was found on the ground after the vehicle left.

2 A. Yes, sir.

3 Q. Do you know how that cocaine came to be on the ground?

4 A. It was in the -- when the driver was wrestling around
5 under the driver -- or the passenger seat and my other
6 officer was in the passenger door, and he was reaching over
7 under the seat ---

8 Q. When you say "he," ---

9 A. The driver, the defendant. At that point, my partner
10 was -- Officer Johnson was yelling to tase him. At first
11 hearing, I thought he was saying he was going to tase him, so
12 I actually backed up a little bit, so they began wrestling
13 around. He was telling him he was going to tase him if he
14 didn't get his hand out of the -- from under the seat. At
15 that point, the -- the compartment had come open. At some --
16 right -- it was very quick, but in a very short period of
17 time, he managed to -- he was reaching down. Officer Johnson
18 grabbed his arm. I was standing next to him in the doorway.
19 He let go. Officer Johnson still had the dark-colored bag in
20 his hand and pulled his taser, and that's when he deployed
21 the taser, striking the subject in the shoulder, and at that
22 point, that's when the car took off, so the bag was still in
23 one hand, the taser in the other hand, and then I'm assuming
24 while that was happening it fell, because he falls out of the
25 door, goes under the van, and from that point, so ...

1 Q. Okay, so Officer Johnson had control of the bag at
2 that point?

3 A. When he was on the -- when the defendant was holding
4 the -- I guess it's a drawer. I don't even know really what
5 it was. It was some kind of compartment under the seat.

6 Q. Okay. All right.

7 MR. RICHARDSON: Thank you, Officer Harris. No further
8 questions.

9 THE COURT: Mr. McCollum?

10 MR. MCCOLLUM: No questions, Your Honor.

11 THE COURT: All right, you may step down, sir.

12 Now, the other officer is not present?

13 MR. RICHARDSON: Officer Johnson is in -- on training
14 in Arizona, Your Honor.

15 THE COURT: Okay, very good. Okay, so this would be
16 basically the only witness as to that particular part of the
17 events then, is that right?

18 MR. RICHARDSON: Yes, sir.

19 THE COURT: Okay.

20 MR. RICHARDSON: Unless the Court has questions.

21 THE COURT: No, I don't. I'm just saying I -- you
22 know, as to who would actually know what happened regarding
23 that bag, ---

24 MR. RICHARDSON: Yes, sir.

25 THE COURT: --- this would -- this would be -- and

1 apparently Officer Johnson is not available?

2 MR. RICHARDSON: That's correct, Your Honor. The only
3 other argument the State would have is the tape does show
4 evidence of flight from the scene, which further is
5 indicative of the defendant's guilt.

6 THE COURT: Certainly -- now, as I indicated, I am
7 going to allow the officers to testify as to what occurred.
8 That includes the defendant driving off, what happens with
9 the bag, all that. The officers can testify about that
10 because though it is not proper to charge a jury as far as
11 flight or escape, that's not a proper charge to the jury, it
12 is proper evidence that a jury may consider if it wants to in
13 deciding this particular matter, so that is proper evidence
14 that can be received and I will allow it by testimony, but in
15 looking at the Rules of Evidence, 403, 401, the probative
16 value and the prejudicial value of it, I would find that the
17 prejudice to the defendant far outweighs any probative value
18 as far as the tape itself, that there would be more than -- a
19 great tendency of the jury to focus on the fact that the
20 officer -- seeing the officer get run over would be extremely
21 prejudicial to the defendant, since he's not being charged
22 with -- or being tried at this point in time with assault and
23 battery with intent to kill.

24 If he was being tried for ABWIK, then obviously it would
25 come in, but he's not, so I'm not going to allow the tape in,

1 but I'm going to allow the complete testimony about what
2 occurred.

3 MR. RICHARDSON: Yes, sir, Your Honor.

4 THE COURT: All right, very good. Now, Mr. McCollum,
5 in understanding that, you understand in tailoring your
6 questions in cross examination. You know, I've ruled with
7 you on the issue about the tape, but, you know, depending on
8 your questions and the answer you get, then I might have to
9 revisit the issue. I don't know. I'm just telling you, you
10 know. It doesn't completely and totally foreclose it
11 depending on what might occur in trial, all right?

12 MR. MCCOLLUM: I understand if I open the door. Your
13 Honor, is there any way we can revisit that other issue?

14 THE COURT: As to ---

15 MR. MCCOLLUM: I'm just joking -- the suppression.

16 THE COURT: Oh, okay. I'm sorry. I didn't understand
17 that. I'm sorry. Okay.

18 All right, so is the State ready for the jury then?

19 MR. RICHARDSON: The State is ready to proceed, Your
20 Honor.

21 THE COURT: And the Defense, is there anything else
22 before we call the jury in?

23 MR. MCCOLLUM: You know, and this may be a little
24 premature, Your Honor, and I'm not sure how I would handle
25 it, but it's my understanding that when he asked for a

1 I look forward to having you hear the case and presenting the
2 case to you. Thank you.

3 THE COURT: All right, Solicitor, your first witness,
4 please.

5 MR. RICHARDSON: The State calls Wesley Harris.

6 WESLEY HARRIS, BEING FIRST DULY SWORN, IS EXAMINED AND
7 TESTIFIES AS FOLLOWS:

8 THE CLERK: Please state your full name and spell your
9 last name for the Court.

10 CORPORAL HARRIS: Corporal Wesley Harris, H-A-R-R-I-S.

11 **DIRECT EXAMINATION**

12 **BY MR. RICHARDSON:**

13 Q. Good afternoon, Corporal Harris. Would you please
14 tell us all where you are employed, in what capacity, and for
15 how long?

16 A. I'm employed with the Horry County Police Department.
17 I am a corporal, and I've been approximately four and a half
18 years now employed there.

19 Q. And what are your duties with the Horry County Police
20 Department?

21 A. Right now I am on a, what we'd call a, mobilization
22 team, which does traffic and some narcotics work, and other
23 things.

24 Q. Corporal Harris, if you'll just speak up just a little
25 bit so we can all hear you. You said you'd been with the

1 Horry County Police Department about four years?

2 A. Four and a half.

3 Q. Four and a half, so you were still employed back in
4 June of 2008?

5 A. Yes, sir.

6 Q. And back -- let's go back to June 19th, 2008. Were
7 you working that day?

8 A. Yes, sir.

9 Q. And would you tell us what your duties were that day.

10 A. On that day I was asked to assist another agency on
11 observing and making a traffic stop on a -- the defendant and
12 his vehicle, a silver Chrysler Town and Country van, with
13 South Carolina tag 6793DR. We located the vehicle and
14 initiated a traffic stop once I observed a traffic violation.

15 Q. Now, take us back. You said you were asked to
16 initiate a stop?

17 A. Yes, sir.

18 Q. When you were asked to do this, how did this begin?
19 Where were you when it began?

20 A. I was located on 544 approximately around the Highway
21 814 area.

22 Q. Okay, and some of us may not be familiar with that.
23 Could you tell us the towns where you're coming from and
24 where you're going to?

25 A. That would be between Socastee and Conway on 544.

1 Q. Okay, and that's here in Horry County?

2 A. Yes, sir.

3 Q. And you began following -- following the defendant at
4 that point?

5 A. Yes, sir.

6 Q. Take us through that trip.

7 A. We observed the car, like I said, around the 814 area.
8 We were set up, waiting. At that point, I got in behind the
9 vehicle. I was one vehicle back. One of the other agents
10 was in front of me, followed him approximately two and a half
11 to three miles. It was about the area between where I got
12 behind him and the high rise bridge going into 5- -- into
13 Socastee on 544.

14 At that point, we had observed one other violation, but
15 I did not want to pull him over on 544 due to the traffic,
16 the amount of people on the highway, so we waited for him to
17 exit onto 707 when he was coming off the high rise bridge
18 going eastbound. He did not use a turn signal when leaving
19 Highway 544 onto the Highway 707 connector.

20 He then proceeded around the off-ramp, came to a stop at
21 707 at the light. At that point, he went southbound on 707.
22 I got behind his vehicle as we were turning the curve and
23 made a traffic stop in where I thought was the safest place,
24 which was 6602 Highway 707, which would be Paint Ball USA at
25 that time, and that's where our stop ended, where I initiated

1 the stop.

2 Q. You said southbound on 707?

3 A. Uh-huh (affirmative response).

4 Q. 707 runs between what two areas?

5 A. 707 runs from Socastee to the Pawleys Island ar- --
6 well, the Murrells Inlet area.

7 Q. And southbound would be going in what direction?

8 A. That would be going away from Socastee.

9 Q. Now, you said you stopped the defendant's vehicle on
10 Highway 707 at Paint Ball USA?

11 A. Yes, sir.

12 Q. And where is that located, in what county?

13 A. That's in Horry County.

14 Q. I believe you indicated the defendant turned off of
15 544 onto 707?

16 A. Yes, sir.

17 Q. What kind of road is 544, how many lanes?

18 A. It's four lanes.

19 Q. And the exit off to 707, could you describe that exit?

20 A. You have a decel lane. As soon as you go over the
21 bridge, there's a decel lane that you get off onto to make
22 the curve to the connector.

23 Q. That's a deceleration lane?

24 A. Decel, yeah; deceleration, sorry.

25 Q. And so if I understand you correctly, the defendant

1 switched lanes without signaling?

2 A. Yes, sir.

3 Q. And you waited until you got to a safe spot to pull
4 him over?

5 A. Yes, sir.

6 Q. And you did that. Once you got the defendant, did he
7 pull over?

8 A. Yes, sir.

9 Q. And describe the area where he pulled into.

10 A. When he initially stopped, he tried to stop kind of in
11 the driveway of the business, which would have still put us
12 on the roadway, and so I signaled for him to pull on into the
13 parking lot, and which at that point he did pull into the
14 parking lot, and I pulled in behind him.

15 Q. And you said this was at the request of another agent?

16 A. Yes, sir.

17 Q. Why not just pull him on the road?

18 A. I'm sorry.

19 Q. Why not just pull him because the other agency asked
20 you to?

21 A. We were given information that this ---

22 MR. McCOLLUM: Objection, Your Honor.

23 THE COURT: Sustained.

24 Q. Changing lanes or making a turn without a signal,
25 illegal?

- 1 A. Yes, sir. It's a violation in South Carolina.
- 2 Q. No doubt you can write a ticket?
- 3 A. Yes, sir.
- 4 Q. No doubt you can arrest him?
- 5 A. Yes, sir.
- 6 Q. You pull into Paint Ball USA and he pulls into the
7 parking lot?
- 8 A. Yes, sir.
- 9 Q. And where are you located?
- 10 A. I am directly behind him.
- 11 Q. Directly behind him. What do you do, ask him to stop?
- 12 A. Yes, sir.
- 13 Q. And he stops?
- 14 A. Yes, sir.
- 15 Q. What do you do?
- 16 A. At that point I exited my vehicle. I approached his
17 vehicle. I asked him for his driver's license and I informed
18 him of why I stopped him, and he made some comment about he
19 didn't think he didn't use his blinker, or that he thought he
20 used it, and I informed him that he did not use it, and then
21 at that point I was given his driver's license and I returned
22 back to my vehicle.
- 23 Q. And what was the purpose of your returning to your
24 vehicle?
- 25 A. Well, at that point, I ran the driver's license on my

1 computer and I was also waiting for another agent to arrive
2 as well.

3 Q. When you approached the defendant to ask for his
4 license, ---

5 A. Yes, sir.

6 Q. --- what was his demeanor?

7 A. He was very nervous. He was sweating; his forehead
8 was sweating, and it wasn't because he had his windows down.
9 His windows were up. His air was on. He was sweating. His
10 hand was visibly shaking when he handed me his driver's
11 license, his voice kind of a high pitch, which usually when
12 you're nervous, that's what happens.

13 Q. Is that unusual on a traffic stop?

14 A. Most of the time, yes. Most people are nervous
15 initially getting pulled over, but not sweating, not hand
16 shaking, you know. It's not completely normal, no.

17 Q. This other agency that asked you to follow the
18 defendant, what agency was that?

19 A. That's the Drug Enforcement Unit with the Solicitor's
20 department.

21 Q. Did you have any knowledge about this defendant other
22 than that?

23 A. No, sir. I've never met him.

24 Q. Now, you go back to the car. You're calling in his
25 information, correct?

- 1 A. No. I actually ran it on my computer.
- 2 Q. Okay, you ran it on your computer?
- 3 A. Yes, sir.
- 4 Q. Did that take a little while?
- 5 A. Yes, sir.
- 6 Q. And where was the defendant at this point?
- 7 A. Still in his vehicle.
- 8 Q. Did any other officers come on the scene?
- 9 A. Officer or Lance Corporal Jack Johnson, and about the
- 10 time -- on my video about the time that it dings with the
- 11 information back, an agent from DEU had pulled up behind me.
- 12 Q. Okay, so you're running some information. What do you
- 13 do after this initial period of time?
- 14 A. After the initial, information came back; the agent
- 15 arrived on scene. We walked back up to the vehicle, and at
- 16 that point I had asked the defendant if he would step out of
- 17 the vehicle and come to the rear of the vehicle and if we
- 18 could search his vehicle.
- 19 Q. That was Agent Jeremy Brown that was with you?
- 20 A. Yes, sir.
- 21 Q. Did he approach the vehicle with you?
- 22 A. Yes, sir. He was behind me.
- 23 Q. Okay, and y'all -- where are y'all located at the
- 24 defendant's vehicle?
- 25 A. We approached the driver's side.

1 Q. And once again, what kind of vehicle is it?

2 A. It's a silver Town and Country van, Chrysler.

3 Q. Now, you and Agent Brown are on the driver's side of
4 the vehicle?

5 A. Yes, sir.

6 Q. And you said Officer -- Lance Corporal Jack
7 Johnson ---

8 A. Jack Johnson approached the passenger side.

9 Q. He was on the passenger side?

10 A. Yes, sir.

11 Q. And you stated that you asked the defendant to step
12 out of the vehicle?

13 A. Yes, sir.

14 Q. Did he do so?

15 A. Not at the beginning, no, sir, he did not. He was
16 hesitant, wanting to ask why, and rebut our -- that we didn't
17 pull him over for whatever reason, and at that point we
18 advised him again to step out of the vehicle and come to the
19 rear of the vehicle and talk to us, and he did do so at that
20 time.

21 Q. Now, why did you ask the defendant to step out of the
22 vehicle?

23 A. Usually for safety reasons. Removing them from the
24 vehicle, especially as nervous as he was, shaking, sweating,
25 that makes me nervous at that point. When we get them out of

1 the vehicle, you can take them away from any potential
2 weapons.

3 Q. And how did Agent Brown seem to you at that point?

4 A. He seemed a little edgy.

5 Q. Now, you had the defendant at the back of his vehicle?

6 A. Yes, sir, he was at the back of his vehicle.

7 Q. And you and Agent Brown were talking to him?

8 A. Yes, sir.

9 Q. What are you talking to him about?

10 A. At that point we're asking him if we could -- we asked
11 him again if we could search his vehicle, which I had asked
12 him at the beginning when we were talking to him. When we
13 made our second approach, we asked him if we could go to --
14 or if we could search his vehicle, and at that point ---

15 MR. McCOLLUM: Your Honor, may we approach a minute?

16 THE COURT: Absolutely.

17 (A Bench conference was held in the presence, but out of
18 the hearing, of the jury.)

19 Q. You and Agent Brown asked the defendant for consent to
20 search his vehicle?

21 A. Yes, sir.

22 Q. Was that consent given?

23 MR. McCOLLUM: Objection, Your Honor.

24 THE COURT: I'm going to allow the response to that
25 particular question.

1 A. Yes. He said we could search his vehicle, but he
2 needed to talk to his boss.

3 Q. And at that point, did you search the vehicle?

4 A. No, we did not.

5 Q. What happened after that point, after he said he
6 needed to speak to his boss?

7 A. At that point he became more nervous and non-compliant
8 to what we were saying because we told him he wasn't going to
9 be able to call his boss at that time, you know, and he also
10 at that point turned around and started walking back to the
11 vehicle saying that he was going to contact his boss. He
12 said that he worked at Blackmoor Golf Course. We advised
13 him, "You can't make the phone call right now."

14 He started walking back to his car. We told him, "Do
15 not get in the car." At that point, he got the door open,
16 got back in his car. I stepped in the doorway and advised
17 him he needed to step back out of the car and come back to
18 the rear of the vehicle. Not once did he comply with
19 anything I had asked him to do.

20 Q. And once again, why did you want him out of the car?

21 A. For any potential weapons. I mean, anybody that's
22 that nervous when we're on a traffic stop, there's something
23 up.

24 Q. For officer safety?

25 A. For officer safety, clearly.

1 Q. So I assume by your testimony he got back in his van?

2 A. Yes, sir.

3 Q. The driver's seat?

4 A. Yes, sir.

5 Q. What did you do at that point?

6 A. At that point we asked him several times to exit his
7 vehicle, which he did not do. He kept -- and then at that
8 point he grabbed a cell phone and started trying to dial. We
9 advised him to put the cell phone up and step back out of the
10 vehicle. We made that request several times.

11 From then, he started to reach between the seat, and I
12 observed a black bag, about a medium size black bag, and I
13 verbally told him not to be grabbing for any bags -- for the
14 bag, to keep his hand away from the bag. At that point, he
15 started making a phone call again.

16 By now, we've asked him several times to step out of the
17 car, get off the phone and step out of the car. He did not
18 do that, and from there, we got into a little bit of a
19 scuffle inside the vehicle with Officer Johnson on the
20 passenger side. He had now come in the passenger side.
21 Because of him reaching over, he could get to him easier than
22 I could, so he came into the passenger door and told him to
23 get away from the bag.

24 At that point, he tried to start his vehicle. Officer
25 Johnson advised him to take the key out of the ignition, and

1 he grabbed his hand, his right hand, and pulled it away from
2 the ignition. At that point, he said, "All right, all right,
3 I'm going to get out," but he never got out. Then he started
4 going back to trying to make a phone call.

5 Then we advised him to get out of the car again. At
6 that point, he reaches back over under the passenger seat and
7 there's some sort of compartment that was under the passenger
8 seat, like a drawer. Officer Johnson advised him to get away
9 from that. He -- Officer Johnson hollered, "Taser." Well,
10 at that point, I thought he was going to tase him. He was
11 telling me to tase him. I did not understand the verbiage
12 with everything going on. It's kind of hectic.

13 At that point, he was reaching down at the compartment.
14 The compartment came open. Officer Johnson grabbed his right
15 arm, because his right arm was extended over the seat.
16 Officer Johnson grabbed his arm with his left hand, and you
17 could see a dark colored bag down in the compartment area.
18 Officer Johnson told him to get his hand away from there. At
19 that point, the suspect -- or the, excuse me, defendant
20 grabbed the key off the floorboard area and went to start the
21 vehicle again.

22 Officer Johnson advised him not to start the car, and at
23 that point, he pulled his taser out and deployed it, striking
24 the suspect in the right shoulder region here (indicating).
25 Meanwhile, myself and Agent Brown were still in the doorway

1 trying to pull him back while they were wrestling around in
2 the seat, and at that point, that's when the vehicle sped
3 away. Once he was tased, that's when the vehicle sped away,
4 the bag still being in Officer Johnson's hand. After tasing
5 him, the bag comes out of the vehicle when it took off, and
6 the vehicle subsequently running over my officer and the bag
7 falling onto the ground.

8 Q. Now, you said at one point the defendant reaches into
9 a black bag. Where is that black bag located?

10 A. It's -- the little black bag was between the seat. It
11 was about a -- I don't know, like a shaving bag size bag. I
12 really ---

13 Q. Could you see inside that bag?

14 A. I could not see it, no, sir.

15 Q. And did that concern you?

16 A. Yes..

17 Q. Why?

18 A. I -- I figured there was a gun in there, honestly. I
19 don't know why you would be reaching into a black bag in your
20 car while I'm telling you to get out of your car.

21 Q. And you said there was a compartment under the
22 passenger seat?

23 A. Yes, sir.

24 Q. And you saw that open up?

25 A. Yes, sir. He reached for that, I believe, twice.

- 1 Q. Could you tell what was in there?
- 2 A. No, sir.
- 3 Q. Eventually could you tell?
- 4 A. Once it opened up, I could see that there was a dark
- 5 colored bag, but ---
- 6 Q. But initially, did that concern you?
- 7 A. Oh, absolutely.
- 8 Q. And once again, why?
- 9 A. That was plenty big enough for any type of weapon
- 10 other than a long rifle type thing.
- 11 Q. And when that opened up, you said Officer Johnson
- 12 reached down at the same time?
- 13 A. Yes, sir.
- 14 Q. And what did you see in there?
- 15 A. I saw a dark colored bag, but at that point, we were
- 16 trying to struggle him out of the driver's side or hold him
- 17 back while they were wrestling under the seat.
- 18 Q. And how quickly did this take place?
- 19 A. Very fast. It was very quickly.
- 20 Q. And you said the vehicle took off?
- 21 A. Yes, sir.
- 22 Q. Who was in the driver's seat?
- 23 A. The defendant was in the driver's seat.
- 24 Q. And who was in control of that vehicle?
- 25 A. The defendant.

1 Q. Did y'all get him stopped?

2 A. No, sir. He collided into a camper with Agent --
3 Agent Brown hanging out of the driver's seat -- the driver
4 door.

5 Q. And upon him colliding into that camper, what
6 happened?

7 A. At that point, Agent Brown subdued him out of the
8 vehicle, took him to the ground. I pulled my car over behind
9 them so that it would all be on video still, and he and
10 Officer Johnson -- Agent Brown and Officer Jack Johnson got
11 him cuffed while I stood atop.

12 Q. And about how long did this whole stop take until the
13 defendant drove off?

14 A. Approximately twelve minutes, I think, is what we ---

15 Q. And it sounds like there was a lot going on during
16 that twelve minutes?

17 A. Yes, sir, because the beginning of it was mostly us
18 sitting there, me running the D.L. and stuff.

19 Q. Did you get a chance to write the ticket?

20 A. No, sir. That was far from my mind at that point.

21 Q. Did you -- did there ever come a time when you did
22 issue a ticket?

23 A. Yes, sir, I did issue a ticket.

24 Q. And Officer Harris, or Corporal Harris, is that the
25 extent of your involvement in this case?

1 A. Yes, sir. I -- I had no dealings with him after that
2 day.

3 MR. RICHARDSON: Corporal Harris, thank you for your
4 testimony. If you would answer any questions Mr. McCollum
5 may have.

6 MR. MCCOLLUM: Your Honor, before I do so, may we
7 approach the Bench again, sir?

8 THE COURT: Yes, sir.

9 (A Bench conference was held in the presence, but out of
10 the hearing, of the jury.)

11 **CROSS EXAMINATION**

12 BY MR. MCCOLLUM:

13 Q. Officer Harris, how are you doing?

14 A. Good, sir.

15 Q. So you've been with the Police Department four years?

16 A. Approximately four and a half.

17 Q. And your father, whom I know, he was the Police Chief
18 for how many years, twenty?

19 A. Pretty close, yes, sir.

20 Q. Did that help when you went to apply for a job, that
21 your Dad had been the Police Chief for twenty years?

22 A. I wouldn't have any ---

23 Q. Okay. This is serious business we're talking about
24 here, right?

25 A. Yes, sir.

1 Q. And at the time of June the 19th, 2008, you did not
2 know Norris Smith, did you?

3 A. No, sir.

4 Q. Never met him, right?

5 A. No, sir.

6 Q. Never seen him before in your life to your knowledge?

7 A. No, sir.

8 Q. You had never stopped him, or pulled him over, or
9 talked to him?

10 A. No, sir.

11 Q. And for whatever reason on that day, and you had said,
12 I think, that somebody had called you on your cell phone and
13 said, "We want you to fall in behind this car and stop it,"
14 right?

15 A. We were notified to -- of a particular car that would
16 be carrying -- coming in our area, sir, and to assist them.

17 Q. And you had that conversation with somebody on your
18 cell phone, right?

19 A. Yes, sir.

20 Q. And at the time, I think you said you assumed that it
21 was a police officer, right?

22 A. No. I knew the first officer that I talked to.

23 Q. Did you know his name?

24 A. Yes, sir.

25 Q. Because you testified previously in a hearing related

1 to this case where you said you didn't know?

2 A. No. I had said that I had talked to an officer that I
3 knew and he told me to contact another officer, and you asked
4 me if I knew who that was, and I told you no, sir.

5 Q. I'm sorry; I stand corrected. So you called somebody
6 and you talked to him, and he told you to get in position and
7 stop this car, right?

8 A. Yes, sir.

9 Q. And you were going to stop the car based on seeing the
10 car violate some traffic law, right?

11 A. Yes, sir.

12 Q. And you were just going to drive around and behind it
13 until you saw them violate the traffic law and you were going
14 to pull it over?

15 A. Yes, sir.

16 Q. And, in fact, you got behind the car, is your
17 testimony, right? You got behind the vehicle, right?

18 A. I did state earlier that I was behind one vehicle,
19 behind that one.

20 Q. And you were in your marked patrol car, right?

21 A. Yes, sir.

22 Q. With blue lights on top, right?

23 A. Yes, sir.

24 Q. And you were wearing your uniform, right?

25 A. Yes, sir.

- 1 Q. There was nobody in the car with you, right?
- 2 A. No, sir.
- 3 Q. And you were following a mini-van, a Chrysler Town and
- 4 Country, silver in color, right?
- 5 A. Yes, sir.
- 6 Q. That you later learned was driven by Norris Smith,
- 7 right?
- 8 A. Yes, sir.
- 9 Q. And your testimony is under oath that he was in a turn
- 10 lane, right?
- 11 A. He was going into a turn lane.
- 12 Q. That he merged from a right lane into a turn lane,
- 13 right?
- 14 A. Yes, sir.
- 15 Q. And then that lane exited the highway, right?
- 16 A. Yes, sir.
- 17 Q. So in other words, -- well, was the violation getting
- 18 in the turn lane?
- 19 A. No. The violation was not using your turn signal.
- 20 Q. So was the violation to get in the turn lane without
- 21 using a turn signal?
- 22 A. The violation was not using his turn signal.
- 23 Q. All right, and was the violation merging over into the
- 24 turn or pulling into the turn lane when it started there
- 25 without using a signal?

1 A. No, sir. The violation was not using his turn signal
2 to merge off of the highway.

3 Q. All right, so if -- so the violation was not merging
4 into the turn lane? That was -- without a signal, that was
5 not the violation?

6 A. It was not using his turn signal to merge off of the
7 highway.

8 Q. All right. I'm sorry I keep asking this over and
9 over, but I still don't understand. When he merged into the
10 turn lane without turning a signal on, was that the
11 violation?

12 A. Yes, sir. The statute states that you have to turn
13 your signal on one hundred feet upon the last part of your
14 descent into a turn lane.

15 Q. So anybody going down a four-lane highway who is going
16 to exit, you're saying everybody would have to turn on the
17 turn signal a hundred feet before they took a right-hand exit
18 on the highway?

19 A. Not all times, no, sir, but that's what the statute --
20 one of the statute -- parts of the statute states.

21 Q. So is that always illegal?

22 A. Is what always illegal?

23 Q. To go down a divided highway and then ease over into
24 the exit only lane and then exit off the highway without a
25 right-hand signal, is that always illegal?

- 1 A. Is it always illegal?
- 2 Q. Yes, sir. Is that always illegal?
- 3 A. If you're supposed to use your turn signal to turn
- 4 right or left, then I would assume that the statute covers
- 5 that.
- 6 Q. So anybody driving down a four-lane highway who gets
- 7 in the turn lane without a signal, that they have all --
- 8 that's grounds to stop any of us?
- 9 A. Could be.
- 10 Q. And then based on that, then that's grounds to then
- 11 search any of our cars?
- 12 A. No, sir.
- 13 Q. Now, at the time, and you followed this mini-van, by
- 14 your testimony, some two to three minutes, right?
- 15 A. I said two and a half to three miles.
- 16 Q. Two and a half to three miles?
- 17 A. Yes, sir.
- 18 Q. About how fast were you going during this time you
- 19 followed it?
- 20 A. Probably about forty-eight miles an hour I think he
- 21 had gotten up to.
- 22 Q. So it would have been more than two or three minutes,
- 23 right?
- 24 A. I would assume. I wasn't keeping up with the time.
- 25 Q. And then the vehicle -- after the vehicle moved into

1 the right-hand lane to be in the exit only lane, how much
2 longer did you follow the vehicle without -- before you
3 stopped the vehicle to issue a ticket?

4 A. Approximately three-quarters of a mile.

5 Q. So about another minute, minute and a half?

6 A. I don't know about time, approximately three-quarters
7 of a mile.

8 Q. And then only at that point did you stop the vehicle
9 and approach the vehicle and tell this occupant that you were
10 going to write him a ticket for no turn signal, right?

11 A. Once we initiated the stop, yes, sir, I approached the
12 vehicle.

13 Q. But, in fact, you did not write him a ticket at that
14 time, and by that I mean when you went up to the window and
15 got his driver's license, right?

16 A. Yes, sir.

17 Q. And you did not then immediately take his driver's
18 license back to your car and write him a ticket, did you?

19 A. No, sir, I did not.

20 Q. You did not, okay, but you did ask the occupant of the
21 vehicle if he would let you search the vehicle?

22 A. Yes, sir.

23 Q. Who shot the taser into Norris Smith?

24 A. Officer Jack Johnson.

25 Q. And Officer Jack Johnson, did you see him shoot his

1 taser into Norris Smith?

2 A. Yes, sir.

3 Q. And where did the taser strike Mr. Smith?

4 A. In his right shoulder area.

5 Q. And Officer Johnson was inside the van with Mr. Smith
6 when he shot him with a taser?

7 A. No, sir. He was in the passenger doorway.

8 Q. In the passenger doorway?

9 A. Yes, sir.

10 Q. And you said the van, which accelerated or spun off,
11 did that happen before or after Norris Smith was shot with
12 the taser?

13 A. That was afterwards.

14 Q. So Norris Smith is sitting in a motor vehicle or mini-
15 van, with the engine running, with it in drive, and after he
16 got shot with -- how many electric volts are in a taser?

17 A. How many volts?

18 Q. Yes, sir.

19 A. It's fifty thousand volts.

20 Q. So after somebody shot fifty thousand volts of
21 electricity in him, your testimony is that he then sped off
22 -- sped off and went a few yards and then wrecked into a
23 camper?

24 A. Yes, sir, he wrecked into a camper.

25 Q. After receiving fifty thousand volts of electricity in

- 1 his shoulder?
- 2 A. He did not take off as soon as it hit him, no, sir.
- 3 Q. The point of the taser -- and do you have a taser?
- 4 A. Yes, sir.
- 5 Q. Have you used it before?
- 6 A. Yes, sir.
- 7 Q. Have you been trained in its use?
- 8 A. Yes, sir, and I have been hit with it.
- 9 Q. And the reason you have the taser and the reason
- 10 tasers are used is to make somebody become incapacitated,
- 11 right?
- 12 A. Yes, sir.
- 13 Q. So in other words so that that person either falls
- 14 down or becomes unable to use their limbs and their senses,
- 15 right?
- 16 A. It immobilizes their -- them.
- 17 Q. Where the person has a complete loss of control,
- 18 right?
- 19 A. Yes, sir.
- 20 Q. For a temporary period of time?
- 21 A. Correct.
- 22 Q. And usually they're okay afterwards?
- 23 A. Correct.
- 24 Q. And that's what happened to Mr. Norris Smith, right?
- 25 A. He was tased.

1 Q. By?

2 A. Officer Johnson.

3 Q. Johnson. Now, you know Officer Johnson?

4 A. Yes, sir.

5 Q. You work with him?

6 A. He's under me, yes, sir.

7 Q. But he is not here to testify today, is he?

8 A. No, sir.

9 Q. So whatever he has to say about what he did or didn't
10 do on this case in these crucial moments, we'll never know
11 that, right?

12 A. No, sir.

13 Q. Because he is in Arizona going to school?

14 A. Yes, sir. He's in training.

15 MR. MCCOLLUM: Thank you, sir. That's all I have, Your
16 Honor.

17 THE COURT: Yes, sir.

18 MR. RICHARDSON: Very briefly, Your Honor.

19 **REDIRECT EXAMINATION**

20 **BY MR. RICHARDSON:**

21 Q. Mr. McCollum asked you about the taser?

22 A. Yes, sir.

23 Q. Very basically how does it work? How many prongs does
24 it have?

25 A. It has two probes.

1 Q. And is that so you can shoot two different people?

2 A. No. It's so you can make a current connect. The top
3 one comes out at a straight line. The bottom one drops out
4 at eight degrees, and it comes out at .0036 amps.

5 Q. And what can affect the effectiveness of a taser?

6 A. What can affect it? If it doesn't make a good
7 contact, which ---

8 MR. McCOLLUM: Your Honor, ---

9 THE COURT: Yes, sir.

10 MR. McCOLLUM: --- I object. I think that's beyond his
11 scope of knowledge.

12 THE COURT: I -- well, I don't know if it's beyond the
13 scope of his knowledge, but if you want to explore that,
14 Solicitor, I'll be glad for you to do that, but I find it to
15 be proper cross examination.

16 MR. McCOLLUM: Your Honor, may it please the Court, ---

17 THE COURT: I mean direct examination -- redirect, ---

18 MR. McCOLLUM: --- I think he's on redirect.

19 THE COURT: --- redirect, I'm sorry, redirect, because
20 of the questions asked on cross examination. Thank you.

21 Q. Do you know if both prongs made proper contact with
22 this defendant?

23 A. No, sir, I do not.

24 Q. You've seen someone tased before?

25 A. Yes, sir.

1 Q. Did he appear like most people you've seen tased
2 before?

3 A. No, sir.

4 Q. So he didn't seem to be incapacitated?

5 A. Not to me he did not, no.

6 Q. Did he appear to be able to drive?

7 A. Yes. He would have not made that turn without -- with
8 being incapacitated.

9 Q. And that traffic violation you charged the defendant
10 with, ---

11 A. Yes, sir.

12 Q. --- what happened to it?

13 A. He pled guilty.

14 MR. McCOLLUM: Your Honor, ---

15 THE COURT: Yes, sir.

16 MR. McCOLLUM: --- may we approach on that?

17 THE COURT: Yes, sir.

18 (A Bench conference was held in the presence, but out of
19 the hearing, of the jury.)

20 MR. McCOLLUM: Your Honor, I just object to the
21 characterization that he pled guilty.

22 THE COURT: Very good, and I'm going to sustain the
23 objection. The jury will disregard the last statement of the
24 officer regarding that. Thank you.

25 Q. Mr. McCollum asked you about where you pulled the

1 defendant over eventually?

2 A. Yes, sir.

3 Q. You said he violated right as you come off 544 ---

4 A. Yes, sir.

5 Q. --- on that curve? Why not pull him right there?

6 A. It's a unsafe location.

7 Q. So you want to get to a safe location?

8 A. Yes, sir.

9 Q. And Corporal Johnson is actually in training for his
10 job?

11 A. Yes, sir.

12 MR. RICHARDSON: Thank you.

13 THE COURT: Anything on those questions, Mr. McCollum?

14 MR. MCCOLLUM: No, sir, Your Honor.

15 THE COURT: All right, you may step down sir.

16 All right, Solicitor, your next witness.

17 MR. RICHARDSON: The State would call Jeremy Brown.

18 THE COURT: Please come around to be sworn, sir. Thank
19 you.

20 JEREMY BROWN, BEING FIRST DULY SWORN, IS EXAMINED AND
21 TESTIFIES AS FOLLOWS:

22 THE CLERK: Please state your full name and spell your
23 last name for the Court.

24 OFFICER BROWN: My name is Jeremy Brown; last name,
25 B-R-O-W-N.

1 MR. RICHARDSON: The Court's indulgence.

2 DIRECT EXAMINATION

3 BY MR. RICHARDSON:

4 Q. Agent Brown, ---

5 A. Yes, sir.

6 Q. --- could you please tell us where you are employed
7 and in what capacity?

8 A. I am currently employed with the Fifteenth Circuit
9 Drug Enforcement Unit as their canine officer.

10 Q. And by canine, you mean?

11 A. Their drug dog.

12 Q. And how long have you been employed in such capacity?

13 A. I've been employed since March of last year in the
14 capacity of the canine handler.

15 Q. And so you were working with the Drug Enforcement Unit
16 back on June 19th, 2008?

17 A. Yes, sir.

18 Q. And on that date, did you have the opportunity --
19 opportunity to come in contact with the defendant, Norris
20 Smith?

21 A. Yes, sir, I did.

22 MR. RICHARDSON: The Court's indulgence.

23 Q. Tell us a little bit about that contact with the
24 defendant.

25 A. I was called to deploy the drug-sniffing canine on the

1 vehicle. From my approach, Officer Wes Harris had already
2 had the vehicle, and Jack Johnson already had the vehicle
3 stopped, at Patriot Paint Ball on 707. At that time, I --
4 when I got on scene, I approached with Officer Harris. We
5 asked Mr. Smith to step to the rear of the vehicle with us.
6 At that time he obliged.

7 He was a little shaky, wanting to know why we wanted him
8 out. We explained to -- Officer Harris explained it. He
9 wanted him to step out to, you know, issue him the ticket.
10 At that time, he approached back into the vehicle. We
11 advised him many times to not do so. He still approached
12 back into the vehicle.

13 As he approached back into the vehicle, he started the
14 vehicle. We advised him to shut the vehicle off, which he
15 did not. Officer Johnson had to turn the vehicle off himself
16 and remove the keys into the passenger seat. At that time,
17 he was asked multiple times again. Mr. Smith was obviously
18 shaking. His hands was real jittery, voice was trembling.
19 You could see sweat profusely on his forehead.

20 At that time he began to -- we went on trying to get him
21 to exit the vehicle so we could run the canine on the
22 vehicle. We advi- -- he stated for us to go ahead and run
23 the dog on the vehicle with him inside of it, which is not a
24 great idea because of the incidence of maybe the dog possibly
25 biting the person.

1 He then started to reach up under the passenger seat
2 area where there was a pull-out drawer. At that time, he
3 grabbed a hold of a bag of some sort. Officer Johnson
4 advised him not to do so. When he done that, he -- Officer
5 Johnson advised him that if he touched -- if he touched him,
6 he was going to tase him, and I believe at that time Officer
7 Johnson deployed the taser because he grabbed at his hand.

8 Q. Now, you say that you recall -- were you on 544
9 whenever this occurred?

10 A. When I -- when I first received the call, I was
11 actually doing -- conducting monthly canine training at
12 Myrtle Beach Annex.

13 Q. And how far away was that from ---

14 A. Approximately maybe two miles, three miles.

15 Q. So you got there pretty quick?

16 A. Yes, sir.

17 Q. Now, you said you got out of the car and Corporal
18 Harris already had the defendant out at that point or ---

19 A. No, sir. When I arrived on scene, Corporal Harris was
20 still in his vehicle running the driver's -- driver's license
21 and he advised me, you know, what he had.

22 Q. And were you in uniform or ---

23 A. In my uniform at the time. We hadn't purchased them
24 yet, but yeah.

25 Q. Plain clothes?

1 A. Yes. Well, it was a D.U. shirt and badge.

2 Q. And as you -- you approached the vehicle and then the
3 defendant got out, correct?

4 A. Yes, sir.

5 Q. And you stated he went back in the vehicle?

6 A. Yes, sir. We were at the vehicle for just a few
7 moments when he -- before he went back inside the vehicle.

8 Q. And you said the defendant was sweating profusely?

9 A. Yes, sir.

10 Q. All right. How else was he acting?

11 A. His hands were very shaky. He kept wanting to place
12 his hands in his pockets to the best of my knowledge. He
13 kept wanting to use the telephone, which we advised him not
14 to do so.

15 Q. And I believe you went on and you stated that he
16 pulled a drawer out?

17 A. Yes, sir. It was a -- under the passenger seat. It's
18 factory-made. There's actually a pull-out drawer, and that's
19 where he pulled out.

20 Q. And I believe you indicated Lance Corporal Johnson was
21 over on the passenger side?

22 A. Yes, sir.

23 Q. And you indicated that Corporal Johnson deployed the
24 taser?

25 A. Yes, sir.

1 Q. What happened whenever Corporal Johnson employed his
2 taser?

3 A. As Corporal Johnson employed this taser, Mr. Hennessey
4 had placed the vehicle into drive and was able to get his
5 foot on the gas pedal and actually take off at kind of a --
6 at a right angle. I was able to hold onto the side of the
7 vehicle and get inside of it. At that time, Corporal Johnson
8 was also in -- in between the door, and he actually got ran
9 over in tumbling through the door.

10 Q. Now, inside that drawer, did you see anything?

11 A. When I was inside of the vehicle, no, sir. Now,
12 before I got inside of the vehicle, there was a brown -- if
13 I'm not mistaken, there was a brown-in-color bag that
14 contained a white powder substance.

15 Q. And where were you when the vehicle took off?

16 A. I was standing at the driver's door, just at the rear
17 sliding door, and Corporal Harris was standing just to the
18 left of me.

19 Q. So you were closer inside the door?

20 A. Yes, sir. I was closer to the driver's door jamb and
21 Off- ---

22 Q. As the defendant took off, what happened?

23 A. As the defendant took off, I grabbed onto the door
24 jamb and pulled myself inside the vehicle.

25 Q. For what purpose?

1 A. To stop the suspect from fleeing.

2 Q. Were you successful in that?

3 A. Yes, sir. We didn't travel very far. I'm not sure on
4 the -- how far we went, but I was able to get myself inside
5 the vehicle, get my foot on the brake pedal just before a
6 camper was there, and the vehicle just did bump into the
7 camper, at which time I exited the vehicle and also made Mr.
8 Hennessey -- grabbed Mr. Hennessey's arm and exited the
9 vehicle with him also.

10 Q. And you said you're not sure exactly how far you
11 traveled?

12 A. No, sir. I mean, I -- I'm not exactly sure. It
13 wasn't very far.

14 Q. More than a couple of yards?

15 A. Oh, yes, sir.

16 Q. And you were able to extract the defendant from the
17 vehicle?

18 A. That's correct.

19 Q. What did you do once you extracted him from the
20 vehicle?

21 A. Once I extracted Mr. Smith from the vehicle, we placed
22 him on the ground. We still had to fight with him to get his
23 hands behind his back. Corporal Johnson had the left arm,
24 and me and Officer Harris was trying to get the right hand
25 behind him, told him -- asked him multiple times to please

1 place his hands behind his back. He refused to do so. At
2 that time, I think it was Corporal Harris or Corporal Johnson
3 advi- -- because I didn't have a taser; one of them advised
4 him that if he didn't, he was going to be drive-stunned to
5 make him put his hands behind his back.

6 Q. So you were finally able to get him into compliance?

7 A. Finally, approximately probably about forty seconds or
8 more.

9 Q. Now, while on the scene, did you retrieve anything?

10 A. Yes, sir.

11 Q. What was that?

12 A. After the incidents and Corporal Harris and Corporal
13 Johnson had the -- Mr. Smith detained and in the back seat of
14 the patrol car, I went back and retrieved a -- I think it was
15 a brown-in-color bag that contained two zip-lock bags of a
16 white substance, which tested for cocaine.

17 Q. You received a brown-in-color bag, correct?

18 A. That's correct.

19 Q. And what did you do with that brown-in-color bag?

20 A. I held onto the bag. I -- as I was approaching the
21 bag, I called Commander Knowles to the scene. Once he
22 arrived on the scene, I requested him to unlock his vehicle
23 as to secure the evidence. That way, it wasn't inside the
24 vehicle with the canine the entire time.

25 Q. Was that marked any particular way?

1 A. It was marked in a white-in-color bag.

2 Q. So you placed that into Commander Bill Knowles'
3 vehicle?

4 A. That's correct.

5 Q. And is that the extent of your involvement in this
6 case?

7 A. Yes, sir. At that time, I went ahead and left the
8 scene, and we traveled to the residence.

9 MR. RICHARDSON: Your Honor, no further questions of
10 this witness.

11 THE COURT: Cross examination.

12 MR. McCOLLUM: No questions, Your Honor.

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

15 Who is your next witness, Solicitor?

16 MR. RICHARDSON: Commander Bill Knowles.

17 WILLIAM S. KNOWLES, BEING FIRST DULY SWORN, IS EXAMINED
18 AND TESTIFIES AS FOLLOWS:

19 THE CLERK: Please state your full name and spell your
20 last name for the Court.

21 COMMANDER KNOWLES: It's William S. Knowles,
22 K-N-O-W-L-E-S.

23 DIRECT EXAMINATION

24 BY MR. RICHARDSON:

25 Q. Commander Knowles, would you please tell us about your

1 place of employment, and your capacity, and how long?

2 A. I am presently employed with the Fifteenth Circuit
3 Solicitor's Office. I am the Narcotics Commander for the
4 Fifteenth Circuit Drug Enforcement Unit. I've been there for
5 approximately three years, and I am in my thirtieth year of
6 law enforcement.

7 Q. Prior to working as Commander for the Drug Enforcement
8 Unit, where were you employed?

9 A. I worked for seven years with the State Law
10 Enforcement Division as a Special Agent. Prior to that, I
11 ran the Criminal Investigative Division for the Horry County
12 Police Department.

13 Q. And you were employed with the Drug Enforcement Unit
14 back on June 19th of 2008?

15 A. Yes, sir, I was.

16 Q. On that particular date and time, did you become
17 involved with a case against the defendant, Norris Smith?

18 A. Yes, sir, I did.

19 Q. And in what capacity?

20 A. After overhearing some radio traffic, I responded to
21 an area located off of 544 to an officer, Jeremy Brown, who
22 is employed with the Drug Enforcement Unit, and several
23 uniformed officers of the County Police Department, and the
24 defendant.

25 Q. And did Agent Brown make any requests of you?

1 A. He did. There was a package that he had retrieved,
2 and he asked to place it in my vehicle, which I opened the
3 vehicle and allowed him to place it in, and then secured my
4 vehicle.

5 Q. And by securing the vehicle, what do you mean?

6 A. I locked the vehicle up.

7 Q. And who all has keys to your vehicle?

8 A. I hope just me.

9 Q. Okay, and that -- that package, approximately how big
10 was it?

11 A. Approximately twelve inches long by -- and two or
12 three inches in height.

13 Q. And was that the only package in your vehicle?

14 A. That was placed there by Agent Brown, yes, sir.

15 Q. And what did you do with that package?

16 A. I just kept my vehicle secured and I waited for
17 someone else to come and retrieve it.

18 Q. And do you know who retrieved that from your vehicle?

19 A. I do, sir. Officer Robbie Caulder with the Horry
20 County Police Department Evidence Section.

21 Q. And you saw him retrieve that?

22 A. I opened the vehicle and allowed him to retrieve it.

23 MR. RICHARDSON: Commander Knowles, thank you for your
24 testimony.

25 A. Yes, sir.

1 MR. MCCOLLUM: May it please the Court.

2 THE COURT: Yes, sir.

3 CROSS EXAMINATION

4 BY MR. MCCOLLUM:

5 Q. Commander Knowles, how are you doing today?

6 A. Just fine, sir.

7 Q. You've been in law enforcement thirty years?

8 A. Yes, sir.

9 Q. And we've known each other for twenty something?

10 A. A lot of them, yes, sir.

11 Q. Have you ever known anybody else that went by the
12 title "Commander"?

13 A. Well, I thought it was something until I figured out
14 there was an Admiral in our office, too, so ...

15 Q. Were there any other packages of cocaine in your
16 vehicle that day?

17 A. No, sir.

18 Q. Just the package that the agent gave you was the only
19 one?

20 A. That's -- that's correct, yes, sir.

21 Q. And then you gave it to Agent Caulder?

22 A. That's correct.

23 Q. And do you know where you were when you gave it to
24 him?

25 A. Standing beside my truck. I used the remote to unlock

1 the door.

2 Q. But was your truck on the same location there?

3 A. Yes, sir. No, my truck had not been moved from the
4 time ---

5 Q. Okay. That's my question.

6 A. --- the time I arrived.

7 Q. So at the same scene, you gave it -- you held it, had
8 the vehicle locked, and then you gave it to another agent?

9 A. That's -- that's correct, yes, sir.

10 MR. MCCOLLUM: That's all I have, Your Honor.

11 THE COURT: All right, very good.

12 You may step down, sir.

13 MR. RICHARDSON: No objection to him being excused.

14 THE COURT: Do you wish the witness to be excused?

15 MR. RICHARDSON: Yes, sir, Your Honor.

16 THE COURT: All right, sir.

17 You are released from your subpoena and may go back to
18 your regular duties.

19 MR. RICHARDSON: The State would call Crime Scene
20 Specialist John R. Caulder.

21 JOHN R. CAULDER, BEING FIRST DULY SWORN, IS EXAMINED AND
22 TESTIFIES AS FOLLOWS:

23 THE CLERK: Please state your full name and spell your
24 last name for the Court.

25 AGENT CAULDER: John R. Caulder, II, C-A-U-L-D-E-R.

DIRECT EXAMINATION

BY MR. RICHARDSON:

Q. Officer Caulder, would you please tell us where you are employed and in what capacity.

A. I'm employed at the Horry County Police Department as a Crime Scene Investigator.

Q. And could you tell us how long.

A. I've been with the Horry County Police Department for twelve years, and as an investigator for five.

Q. And just tell us about your duties in crime scene investigation.

A. Crime scene investigation, we respond basically to anything from certain types of burglaries to violent crimes, and any time there is some type of assistance needed at any type of scene where a crime has been committed against property or person.

Q. Kind of like the C.S.I. thing?

A. Yes, sir.

Q. So you help collect evidence?

A. That is correct.

Q. And back on June 19th, 2008, did you assist the Drug Enforcement Unit of Horry County with the collection of evidence from the defendant, Norris Smith?

A. That is correct.

Q. Tell us about your involvement in this case.

1 **A.** On that -- that afternoon or early morning, I did
2 receive a call to assist at -- off of Highway 707 in the
3 Socastee area in reference to some -- some type of drug that
4 had been put into the back seat of an officer's car. They
5 wanted to know if I could respond out and see if there was
6 any way I could help with it. On arrival, Agent Knowles, who
7 is over the combin- -- or the drug unit here in Horry County,
8 stated that he -- there were some drugs that were found in
9 the back of a patrol car after someone, unbeknownst to me who
10 it was, was arrested for a drug -- a narcotics violation, and
11 that drugs had been put ---

12 MR. McCOLLUM: Your Honor -- Your Honor, I'm not sure
13 what he's testifying to, but I object.

14 THE COURT: All right. Well, let's -- I appreciate it.
15 Why don't you rephrase your question, Solicitor. Why
16 don't you do that.

17 **Q.** Were you asked to retrieve any narcotics?

18 **A.** That is correct.

19 **Q.** And from whose vehicle?

20 **A.** It was from -- I believe it was Officer Wesley Harris
21 with the Horry County Police Department's.

22 **Q.** Was it Commander Knowles that told you to retrieve it?

23 **A.** That is correct.

24 MR. RICHARDSON: The Court's indulgence.

25 **Q.** Did you prepare a report in regard to this?

1 A. No, sir, I did not. Mine was to assist. They had no
2 -- they wanted to know if I had a way of -- the powder -- the
3 packaging ---

4 MR. McCOLLUM: Your Honor, I object to what they wanted
5 to know. I just -- I think he can testify as to what he did.

6 THE COURT: Sustained.

7 Q. Was there a large package that you retrieved from any
8 vehicle?

9 A. Not from -- no, sir, not from any vehicle.

10 Q. From Commander Knowles?

11 A. That is correct.

12 Q. Okay, so you retrieved a large package of narcotics
13 from Commander Knowles?

14 A. I -- he -- he gave me a package of powdery substance
15 to -- because he wanted me -- the packaging ---

16 MR. McCOLLUM: Objection, Your Honor.

17 Q. Were there any requests made of you?

18 A. That is correct.

19 Q. And after having a request made of you, what did you
20 do?

21 A. I took the white powdery substance and put it in a
22 different container and took the zip-lock container that the
23 powder was originally in when it was given to me to be
24 processed for fingerprints.

25 Q. So you took -- you took the white powdery substance

1 out of its initial container?

2 A. That is correct.

3 Q. So that you could attempt to fingerprint that initial
4 container?

5 A. That's correct.

6 Q. And you took that white powdery substance and you put
7 it in a different bag?

8 A. That is correct.

9 DRUGS CONTAINED IN CLEAR POUCH MARKED FOR
10 IDENTIFICATION AS STATE'S EXHIBIT NUMBER 2.

11 Q. I'm going to show you -- Officer Caulder, I'm going to
12 show you what's been previously marked for identification
13 purposes only as State's Exhibit 2. Do you recognize that
14 item?

15 A. Yes, sir.

16 Q. And how do you recognize that item?

17 A. This is a -- this is the packaging used -- that is
18 used for our -- that's turned into our drug lab at the Horry
19 County Police Department.

20 Q. And you said you transported the white powdery
21 substance from its initial container into another bag?

22 A. Yes, sir.

23 Q. And what did you do with that other bag?

24 A. The other bag was given to Agent Ryan Wood with the
25 DEU.

1 Q. Did you ever weigh the substance?

2 A. I don't remember if I did personally, no, sir.

3 Q. Is this -- I hate to belabor the point, but my
4 understanding, you retrieved a large amount of white powdery
5 substance from Agent Knowles?

6 A. That's correct.

7 Q. You took it, put it another package?

8 A. That's correct.

9 Q. And you attempted to get fingerprints off of the
10 original package?

11 A. That's correct.

12 Q. Did you ever get any fingerprints?

13 A. No, sir, none that could be -- I could compare it to
14 anyone or I.D. it back to anyone.

15 Q. Is that unusual?

16 A. No, sir.

17 Q. And you handed the re-packaged white powdery
18 substance, you handed that to Agent Ryan Wood?

19 A. That is correct.

20 MR. RICHARDSON: Thank you.

21 THE COURT: Cross examination.

22 MR. MCCOLLUM: No questions, Your Honor.

23 THE COURT: All right, sir. All right, we're going to
24 take a short break at this point in time. Ladies and
25 gentlemen of the jury, if you will go to your jury room for a

1 few moments, please.

2 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
3 JURY.)

4 THE COURT: Do you want the witness to be excused,
5 Solicitor?

6 MR. RICHARDSON: Yes, sir, Your Honor.

7 THE COURT: Any objection?

8 MR. McCOLLUM: None whatsoever, Your Honor.

9 THE COURT: All right, sir.

10 You are released from your subpoena and may go back to
11 your regular duties.

12 All right, we'll take a short break for about five or
13 ten minutes. Thank you very much.

14 (OFF THE RECORD)

15 ON THE RECORD

16 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
17 JURY.)

18 THE COURT: Solicitor, who might your next witness be?

19 MR. RICHARDSON: Agent Ryan Wood.

20 THE COURT: All right, sir, and how long do you think
21 that's going to be?

22 MR. RICHARDSON: Agent Wood?

23 THE COURT: Yes.

24 MR. RICHARDSON: Two minutes.

25 THE COURT: Okay, and then you're going to have who?

1 MR. RICHARDSON: Agent Kitelinger.

2 THE COURT: And his testimony?

3 MR. RICHARDSON: It will basically be what we heard
4 this morning, Your Honor, with regard to the statement.

5 THE COURT: Okay. All right, we'll probably do those
6 two. I don't know that I'm going to ---

7 MR. RICHARDSON: Would you like me to send Lisa Floyd
8 on home?

9 THE COURT: Let's see how quickly we get through these,
10 but most likely we're not going to do her, have her testimony
11 this afternoon, so if you want to, that will be fine.

12 MR. RICHARDSON: I'll go ahead.

13 THE COURT: You do that, and we'll just have the
14 testimony of those other two.

15 All right, is the Defense ready for the jury?

16 MR. McCOLLUM: Yes, Your Honor.

17 THE COURT: All right, very good.

18 Ask the jury to come in, please.

19 **(THE FOLLOWING TAKES PLACE IN THE PRESENCE OF THE JURY.)**

20 THE COURT: All right, Solicitor, your next witness,
21 please, sir.

22 MR. RICHARDSON: The State would call Agent Ryan Wood.

23 THE COURT: Please come around and be sworn, sir.

24 RYAN C. WOOD, BEING FIRST DULY SWORN, IS EXAMINED AND
25 TESTIFIES AS FOLLOWS:

1 THE CLERK: Please state your full name and spell your
2 last name.

3 AGENT WOOD: Ryan C. Wood. Last name is spelled
4 W-O-O-D.

5 DIRECT EXAMINATION

6 BY MR. RICHARDSON:

7 Q. Good afternoon, Agent Wood. Would you please tell us
8 about your place of employment, how long, and in what
9 capacity.

10 A. Currently I'm employed through the City of Myrtle
11 Beach Police Department, and I'm a narcotics agent for Myrtle
12 Beach Police, and currently assigned to the Fifteenth Circuit
13 Drug Enforcement Unit.

14 Q. And in the course of your duties, you were so employed
15 back on June 19th, 2008?

16 A. Yes, sir, I was.

17 Q. In the course of your duties on that day, were you
18 involved in a case against the defendant?

19 A. Yes, I was.

20 Q. And I will show you -- what was the extent of your
21 involvement in this case?

22 A. Once the -- from the arrest, there was an amount of
23 drugs seized from that scene. Those drugs were taken by
24 Horry County Crime Scene Officer Caulder to the lab where he
25 was transferring those drugs to a different bag, I believe so

1 he could fingerprint the original bag the drugs came in. I
2 simply responded to the Horry County Police Department lab
3 and took possession of the drugs from Caulder and transported
4 them back to the DEU Office.

5 Q. I want to show you what's been previously marked as
6 State's Exhibit 2 for identification. Do you recognize this
7 item?

8 A. Yes, I do.

9 Q. And how do you recognize this item?

10 A. Those are the -- the cocaine that I picked up from
11 Officer Caulder from the Horry County Crime Scene lab.

12 Q. And how can you identify the item?

13 A. There's case numbers on them, I think on the front.
14 Can I pick it up -- the case number, and also that this is a
15 -- the DEU Best Pack that was filled out, and it was
16 essentially turned in to -- after I had it and gave it to
17 another agent where he filled this -- this portion out and
18 turned it in.

19 Q. And when you received an item from Agent Caulder -- I
20 mean Officer Caulder, it was in one bag?

21 A. I believe it was in two if I'm not mistaken.

22 Q. And after receiving that from Officer Caulder, did you
23 do anything to manipulate or alter that?

24 A. No. He had heat-sealed the cocaine into two separate
25 bags ---

1 MR. McCOLLUM: Objection; objection as to what somebody
2 else had done out of his presence.

3 THE COURT: If you want to explore that, Solicitor.

4 Q. Do you know that the bags were heat-sealed?

5 A. Yes. I noticed the bags had been heat-sealed.

6 Q. Did you see Officer Caulder heat-seal the bags?

7 A. No, I did not.

8 Q. And upon your receipt of this, what did you do?

9 A. I took it to -- back to the DEU Office, and at that
10 time I handed it over to Agent Kitelinger, who was the case
11 agent.

12 Q. Was that the extent of your involvement with this
13 case?

14 A. Yes, it is.

15 MR. RICHARDSON: Thank you. No further questions of
16 this witness, Your Honor.

17 THE COURT: Cross examination.

18 MR. McCOLLUM: No questions, Your Honor.

19 THE COURT: All right.

20 Do you wish this witness to be excused?

21 MR. RICHARDSON: I do, Your Honor.

22 MR. McCOLLUM: No objection, Your Honor.

23 THE COURT: All right, sir.

24 You are released from your subpoena. You may go back to
25 regular duties.

1 MR. RICHARDSON: The State would call Officer -- or
2 Agent Will Kitelinger.

3 THE COURT: All right.

4 WILLIAM J. KITELINGER, BEING FIRST DULY SWORN, IS
5 EXAMINED AND TESTIFIES AS FOLLOWS:

6 THE CLERK: Please state your full name and spell your
7 last name for the Court.

8 AGENT KITELINGER: William J. Kitelinger,
9 K-I-T-E-L-I-N-G-E-R.

10 DIRECT EXAMINATION

11 BY MR. RICHARDSON:

12 Q. Agent Kitelinger, could you please tell us where you
13 are employed, in what capacity, and for how long.

14 A. I am employed by the City of Myrtle Beach Police
15 Department as a narcotics officer. I'm currently assigned to
16 the Fifteenth Circuit Drug Enforcement Unit. I've been a
17 police officer for approximately nine years.

18 Q. And how long with the DEU?

19 A. Two years, a little over two years.

20 Q. And you were employed with the Drug Enforcement Unit
21 or DEU back on June 19th, 2008?

22 A. I was employed by Myrtle Beach, assigned to the Drug
23 Enforcement Unit.

24 Q. Thank you. In your capacity as a narcotics officer,
25 did you have the opportunity to come in contact with

1 Defendant Smith?

2 A. I did.

3 Q. And with particularity back to June 19th, 2008, you
4 were employed then. Is that when you came in contact with
5 the defendant?

6 A. Yes.

7 Q. And were you involved in a case investigating the
8 defendant for trafficking in cocaine?

9 A. Yes.

10 Q. Could you tell us about your involvement in this case.

11 A. I arrived on scene as a follow-up investigative
12 officer and I then served him his warrants and had a brief
13 conversation with him at the J. Reuben Long Detention Center
14 the following day.

15 Q. Now, you say you arrived on scene. Where is on scene?

16 A. The scene of the original traffic stop on Highway 707.

17 Q. And that was at Paint Ball USA?

18 A. Yes, sir.

19 Q. And upon arrival on the scene, did you come into
20 contact with the defendant?

21 A. Yes.

22 Q. And did you advise the defendant of anything that day?

23 A. I advised him of his rights on scene, his Miranda
24 rights.

25 Q. And briefly, if you could, I believe we've probably

1 all heard it on T.V., what are the Miranda rights?

2 A. You have the right to remain silent. Anything you say
3 can and will be used against you in a court of law. You have
4 the right to an attorney. If you cannot afford an attorney,
5 one will be appointed to represent you. You can have an
6 attorney present while you are being questioned, and you can
7 choose to quit answering my questions at any time.

8 Q. And the defendant was taken into custody?

9 A. Correct.

10 Q. And that was on June 19th, 2008?

11 A. Yes, sir.

12 Q. And on that same day, June 19th, 2008, did you take
13 into custody items seized?

14 A. I took into custody an amount of cocaine.

15 Q. And what did you do with that item?

16 A. I weighed it, photographed it, and placed it into the
17 DEU evidence safe overnight for safekeeping.

18 Q. And from whom did you receive that?

19 A. Agent Ryan Wood.

20 Q. And I may have missed this; what was the item?

21 A. It was an amount of cocaine, a white powdery
22 substance.

23 Q. A white powdery substance?

24 A. That had field-tested positive for the presence of
25 cocaine.

1 Q. And it was placed into a drug safe, correct?

2 A. Yes, sir.

3 Q. And describe this drug safe. What precautions are
4 taken with the drug safe?

5 A. It's a very large, very heavy safe that is hidden in a
6 closet in our office and only two members of the DE Unit
7 actually have the combination, Commander Bill Knowles, and
8 Assistant Commander Dean Bishop.

9 Q. And when you took those items from Agent Wood, how
10 were they packaged?

11 A. They were packaged in plastic envelopes that he had
12 received them from, from Horry County Evidence.

13 Q. And were those sealed in any way?

14 A. Yes.

15 Q. And how were they sealed?

16 A. Heat-sealed.

17 Q. Now, you placed them in the safe on June 19th, 2008,
18 correct?

19 A. Correct.

20 Q. And was there sometime when you took them back out of
21 the safe?

22 A. I took them out on the 20th, the following day, to
23 place them in an Horry County Best Packet for delivery to
24 Horry County Property and Evidence.

25 Q. And were they marked in any way so you could tell they

1 were the same whenever you removed them from the safe?

2 A. They were in the same bags in which I had placed them
3 in there.

4 Q. Had those bags been tampered with in any way?

5 A. No.

6 Q. Did you, after receiving those bags, do anything to
7 modify or alter their content?

8 A. No.

9 Q. Agent Kitelinger, I'm going to show you what's been
10 previously marked and identified as State's Exhibit 2. Do
11 you recognize this item?

12 A. Yes. This is the cocaine that I removed from our safe
13 to place into Property and Evidence.

14 Q. And after -- before placing them into Property and
15 Evidence, what did you do again?

16 A. I placed it in an Horry County Best kit. It is a kit
17 consisting of three parts. It's a manilla envelope with a
18 corresponding number on the outside of the manilla envelope.
19 That number corresponds to a plastic envelope very similar to
20 this inside the package. This envelope also has a tab on it
21 with another corresponding number of the same number. Once
22 the drugs are placed into this plastic bag, the corresponding
23 tag is removed. There's a blue piece of plastic that
24 separates the opening. Once that piece of blue plastic is
25 removed, it becomes very, very adhesive and it seals together

1 very, very tightly.

2 I then keep the small tab that was removed for our case
3 file so I know what was turned into Property and Evidence.
4 There is some paperwork that's placed inside the manilla
5 envelope along with this bag with corresponding numbers.
6 That is then dropped with the Horry County Property and
7 Evidence.

8 Q. And the purpose of -- let's see, is there any way to
9 tell if this is the exact bag used?

10 A. If it was the exact bag I had used, it would have had
11 my name and signature on it.

12 Q. How about these numbers on here, do they correspond
13 with anything?

14 A. They correspond with the case number.

15 Q. They correspond with the case number, okay, so this
16 Case Number is L080367?

17 A. Right. That's the case number that the Horry County
18 Evidence assigned to it.

19 Q. And once the items are placed in a Best kit, you said
20 it's adhesive?

21 A. Right.

22 Q. It's got blue, I'll call them, squiggles down the
23 side?

24 A. Correct.

25 Q. What's the purpose of those?

1 A. If any kind of tampering were to occur with that
2 plastic bag, it would deform the -- the markings on the bag
3 where you tell it was tugged open or tried to have been
4 pulled open or resealed. It would deform the plastic case
5 that the drugs are kept in to show that it had been tampered
6 with.

7 Q. And to your knowledge, was the Best kit ever tampered
8 with?

9 A. Not to my knowledge.

10 Q. And this, no doubt, is the drugs you took out of the
11 safe and put into a Best kit?

12 A. Yes.

13 MR. RICHARDSON: Your Honor, at this time the State
14 would seek to introduce State's Exhibit 2 into evidence.

15 THE COURT: Is there an objection?

16 MR. McCOLLUM: Yes, Your Honor, I object. I don't
17 think he's laid a proper foundation.

18 THE COURT: All right. I'll reserve my ruling at this
19 point in time. Thank you.

20 MR. RICHARDSON: Yes, sir.

21 Q. When you took State's for identification -- State's 2,
22 the Best kit, or you put those in the Best kit, and what did
23 you do with it?

24 A. I sealed it. I placed it into its manilla envelope.
25 I then took it to the Horry County M. L. Brown Building, went

1 to Horry County Property and Evidence and deposited it there
2 for safekeeping and testing.

3 Q. And you said you -- did you say you weighed this at
4 some point?

5 A. Yes.

6 Q. And what did it test out to weigh?

7 A. I believe -- there was two separate bags. I believe
8 one was approximately 490 grams, and the other one was
9 slightly over 500.

10 Q. And what was the purpose of you taking this Best kit
11 over to the Horry County M. L. Brown Building?

12 A. It's where the Drug Enforcement Unit stores its
13 evidence. It's our evidence storage. It's also where the
14 drugs would be tested to ensure, in fact, that they are the
15 drug that we suspect they are.

16 Q. So if I understand your testimony, you took it over to
17 M. L. Brown so that it could be eventually tested?

18 A. Yes, sir.

19 Q. And you'd be able to tell if that Best kit had been
20 tampered with?

21 A. Yes. When the -- when the technician were to open
22 that, if it had been tampered with, she would -- she would
23 know that.

24 Q. And that was the extent of your involvement with this
25 package you took?

1 A. Yes.

2 Q. Now, did there ever come a time when you -- I believe
3 you stated you went back out and met with the defendant at J.
4 Reuben Long Detention Center?

5 A. Correct.

6 Q. What was the purpose of that?

7 A. I am the one who was responsible for completing his
8 warrants. We have to generate warrants after X-amount of
9 time to issue to him so he can be issued a bond. I generated
10 those warrants and went to the J. Reuben Long Detention
11 Center to meet with the defendant to issue him his warrants
12 so then he could, in fact, receive a bond.

13 Q. And you were later required to present him with those
14 warrants?

15 A. Yes.

16 Q. So you were doing what was required by law?

17 A. Yes.

18 Q. Now, -- and did you do this?

19 A. Yes.

20 Q. Now, upon serving the defendant his warrants, what, if
21 anything, did he do?

22 A. At that time, the defendant wanted to give me
23 particulars of the case ---

24 MR. McCOLLUM: Your Honor, objection. I'm making a
25 contemporaneous objection based on a previous hearing.

1 THE COURT: Y'all come talk to me for just a second.

2 (A Bench conference was held in the presence, but out of
3 the hearing, of the jury.)

4 THE COURT: All right, the Court is going to reaffirm
5 its prior ruling in this matter. You may continue.

6 Q. Agent Kitelinger, once again, once you served the
7 defendant his warrants, what, if anything, did he do or say?

8 A. He was visibly upset with the warrants, sometimes
9 tearful. I read the warrants to him. He kept wanting to
10 tell me particulars of the case. I again advised him of his
11 rights, the very same rights that I just recited a short time
12 ago. He advised me that he was transporting the drugs to a
13 subject that he knew as Zap in the Murrells Inlet area of
14 Horry County and Georgetown -- Horry and Georgetown counties.

15 Q. And you said whenever the defendant -- the defendant
16 initiated this conversation?

17 A. Yes.

18 Q. Did you take any kind of recording device?

19 A. No. I was unprepared for any kind of interview. I
20 was not expecting to complete one at that time, so I did not
21 have any recording device.

22 Q. So once again, you didn't go out there to initiate
23 this conversation?

24 A. No, sir.

25 Q. Now, and you said you began reading the defendant his

1 rights?

2 A. I read him his rights.

3 Q. And upon reading those rights, did the defendant
4 appear to understand them?

5 A. Yes.

6 Q. Did he appear to speak the English language?

7 A. Yes.

8 Q. Did he appear to be under the influence of any drugs
9 or alcohol?

10 A. No.

11 Q. Now, prior to this statement, did you, or anyone to
12 your knowledge, or in your presence, make any undue promises
13 to him?

14 A. No.

15 Q. Coerce him in any way?

16 A. No.

17 Q. Threaten him in any way?

18 A. No.

19 Q. And he admitted knowledge that he had the drugs?

20 A. Yes.

21 Q. Admitted that he was transporting the drugs?

22 A. Yes.

23 Q. From Horry to Georgetown County?

24 A. To a subject that he knew as Zap in the Murrells Inlet
25 area.

1 MR. RICHARDSON: Agent Kitelinger, thank you. If you
2 will answer any questions Mr. McCollum may have.

3 THE COURT: Cross examination.

4 MR. MCCOLLUM: May it please the Court.

5 THE COURT: Yes, sir.

6 CROSS EXAMINATION

7 BY MR. MCCOLLUM:

8 Q. Just briefly, you didn't make any recording of the
9 statement?

10 A. No, I did not.

11 Q. And you didn't get a written statement?

12 A. No, I did not.

13 Q. Didn't make any record whatsoever except the police
14 report that was generated later?

15 A. Yes.

16 Q. And that police report when you wrote down what he
17 allegedly said, you wrote that report as many as ten days
18 later?

19 A. Yes.

20 Q. And this was on June the 20th?

21 A. Correct.

22 Q. Were you working on June the 21st?

23 A. I don't recall.

24 Q. Did you interview anybody on June the 21st?

25 A. I don't recall.

1 Q. Were you working on June the 18th?

2 A. I don't recall.

3 Q. Did you interview anybody on June the 18th?

4 A. I don't recall.

5 Q. So you don't know if anybody admitted any crimes to
6 you on those days?

7 A. No.

8 Q. You don't even know where you were?

9 A. I don't recall now.

10 MR. MCCOLLUM: That's all I have, Your Honor.

11 THE COURT: Any redirect?

12 **REDIRECT EXAMINATION**

13 **BY MR. RICHARDSON:**

14 Q. Agent Kitelinger, you reviewed your notes with regard
15 to this case?

16 A. Yes.

17 Q. And no doubt about it, you would have done this report
18 within ten days of the conversation?

19 A. Yes, and I would put that information in my notes for
20 just this purpose.

21 Q. And your recollection would probably be fresher within
22 ten days -- ten days ago whether you were working or not,
23 correct?

24 A. Yes.. That was the maximum amount of time allotted to
25 do that report.

1 Q. So you may have done the report within two days?

2 A. Correct.

3 Q. May have done it the same day?

4 A. Unlikely.

5 Q. Unlikely, but within ten days?

6 A. Yes.

7 MR. RICHARDSON: Thank you.

8 THE COURT: Anything on those questions?

9 MR. McCOLLUM: No, sir, Your Honor.

10 THE COURT: All right.

11 Do you wish this witness to be excused?

12 MR. RICHARDSON: I do, Your Honor.

13 THE COURT: Any objection?

14 MR. McCOLLUM: No objection, Your Honor.

15 THE COURT: All right, sir, you are excused, released
16 from your subpoena, and may go back to your regular duties.
17 Thank you.

18 All right, ladies and gentlemen, we are going to stop
19 for the evening. We will resume the trial tomorrow morning.
20 I want you back in your jury rooms, please, at nine-thirty.
21 Be back in your jury rooms at nine-thirty. We will finish
22 and continue on with this particular case at that point in
23 time.

24 When you go home, you know, please remember that I've
25 told y'all not to talk about this case among yourselves and

1 APRIL 15, 2009.

2 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
3 JURY.)

4 THE COURT: All right, Solicitor, are you ready to
5 proceed?

6 MR. RICHARDSON: The State is ready to proceed.

7 THE COURT: All right. Defense?

8 MR. MCCOLLUM: Yes, sir, Your Honor.

9 THE COURT: Very good. Ask the jury to come in,
10 please.

11 (THE FOLLOWING TAKES PLACE IN THE PRESENCE OF THE JURY.)

12 THE COURT: All right, good morning, ladies and
13 gentlemen. I trust you found everything to your satisfaction
14 in the jury room, and we'll continue on with the case.

15 Solicitor, your next witness, please.

16 MR. RICHARDSON: The State would call Lisa Floyd.

17 THE COURT: Please come around to be sworn, ma'am.

18 LISA FLOYD, BEING FIRST DULY SWORN, IS EXAMINED AND
19 TESTIFIES AS FOLLOWS:

20 THE CLERK: Please state your full name and spell your
21 last name for the Court.

22 MS. FLOYD: Lisa Floyd, F-L-O-Y-D.

23 DIRECT EXAMINATION

24 BY MR. RICHARDSON:

25 Q. Good morning, Ms. Floyd.

1 A. Good morning.

2 Q. Could you please tell us your place of employment, how
3 long, and what capacity?

4 A. Yes. I've worked for the Horry County Police
5 Department since September of 2002, and I run the Regional
6 Drug Analysis Laboratory.

7 Q. And what's the purpose of that laboratory?

8 A. To test substances that I found the officers believe
9 are controlled substances or drugs.

10 Q. So you are basically the Horry County Police
11 Department chemist who analyzes suspected narcotics?

12 A. That's correct.

13 Q. And where is your office?

14 A. It's located at the M. L. Brown Building at the Police
15 Department.

16 Q. That's here in Horry County?

17 A. Yes, it is.

18 Q. How long has the lab been up and running?

19 A. We opened officially in August of 2003.

20 Q. And are you the head chemist or ---

21 A. I'm the only chemist.

22 Q. So you're head chemist, the only chemist, for the drug
23 laboratory. It sounds kind of scientific. How does it work?
24 What's your background? What's your background in drug
25 analysis?

1 A. Well, I have the years experience working here. I've
2 been a chemist for eleven years now, and my educational
3 background is I have a Bachelor of Science degree in
4 biochemistry from Clemson University, and approximately
5 twenty-four hours toward a Master's in biochemistry from
6 Clemson as well.

7 Q. Any kind of specialized training that you received
8 with regard to drug analysis?

9 A. Yes. I completed a fourteen week training course with
10 the Spartanburg County Sheriff's Office Forensics Laboratory,
11 which is run by a former SLED drug analyst as well.

12 Q. How about any kind of specialized certification or
13 authorization to perform drug analysis?

14 A. I received certification through that laboratory that
15 I trained with.

16 Q. And are you a member of any professional
17 organizations?

18 A. Not at this time, no.

19 Q. Have you previously testified as an expert in the
20 field of forensic drug analysis?

21 A. Yes, I have.

22 Q. About how many times?

23 A. Twenty-five now.

24 Q. Twenty-five times.

25 MR. RICHARDSON: Your Honor, at this time the State

1 moves to have this witness admitted as an expert in the field
2 of forensic drug analysis.

3 THE COURT: Do you wish to voir dire the witness or do
4 you have any objections?

5 MR. McCOLLUM: No objection, Your Honor.

6 THE COURT: All right, very good. I will qualify the
7 witness to give her opinion.

8 You may proceed, sir.

9 Q. Ms. Floyd, you were employed at the Horry County
10 Regional Drug Analysis laboratory during the period of time
11 between June 19th, 2008, and July 11th, 2008?

12 A. That's correct.

13 Q. Now, with regard to this case against Norris Hennessey
14 Smith, did you receive any request for analysis?

15 A. Yes. I received a case to test for him.

16 Q. I'm going to show you what's been previously marked
17 for identification as State's Exhibit Number 2. If you'll
18 just take a moment and take a look at that package. Can you
19 identify that item?

20 A. Yes, I can.

21 Q. And how can you identify that item?

22 A. The control number matches the control number that is
23 on my report.

24 Q. And from whom did you receive that item?

25 A. I received the kit from Sharon Lilly, who works in

1 Evidence at the Horry County Police Department, on July 3rd
2 of 2008.

3 Q. And Sharon Lilly, what's -- she works in Evidence?

4 A. Yes. She's an evidence custodian.

5 Q. And do you have personal knowledge of what her job
6 entails?

7 A. Not in depth.

8 Q. Is it typical for you to receive items to analyze from
9 Ms. Lilly?

10 A. Yes. I receive many items.

11 Q. And how can you tell you received that item from Ms.
12 Lilly?

13 A. From my written chain of custody form.

14 Q. And how was that item packaged when you received it?

15 A. When I received it, it was in a box that was sealed
16 with evidence tape, and inside that box was this bag that
17 you've seen here with the blue edges and the green adhesive
18 at the top, and there's packaging behind what this white
19 powder is here, and all of that was inside the box as well.

20 Q. Can you tell -- and I believe you stated that you
21 could tell the Best items in this case due to the numbers on
22 there?

23 A. Yes. The lab number matches; the agency's case number
24 matches, and the control number all match.

25 Q. And what's the purpose of using those numbers?

1 **A.** To track the evidence to make sure that what I'm
2 reporting on is the correct case.

3 **Q.** Okay. Now, when you received that package of
4 narcotics, no doubt about it, this is the narcotics you
5 received?

6 **A.** Yes, that's correct.

7 **Q.** And you analyzed these?

8 **A.** Yes, I did.

9 **Q.** And they were sealed when you got them?

10 **A.** Yes, they were sealed.

11 MR. RICHARDSON: Your Honor, at this time, the State
12 would seek to introduce State's Exhibit 2 into evidence.

13 THE COURT: Is there any objection?

14 MR. McCOLLUM: Yes, Your Honor, improper foundation at
15 this time.

16 THE COURT: All right, sir. I'll allow them into
17 evidence. I find that a proper chain of cus- ---

18 MR. McCOLLUM: Your Honor, excuse me. May we approach?

19 THE COURT: Absolutely.

20 (A Bench conference was held in the presence, but out of
21 the hearing, of the jury.)

22 THE COURT: Ladies and gentlemen of the jury, go to
23 your jury room, please.

24 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE**
25 **JURY.)**

1 MR. RICHARDSON: And, Your Honor, for the record, the
2 State was just going for it under State v. -- I believe it's
3 State v. Williams, and its progeny stating it's practicably
4 possible.

5 THE COURT: I understand that. I understand that.
6 We're going to -- and ask this witness what happened after
7 she got done with the drugs, please.

8 MR. RICHARDSON: I will, Your Honor. That was my
9 intention.

10 THE COURT: Thank you.

11 (THE FOLLOWING TAKES PLACE IN THE PRESENCE OF THE JURY.)

12 THE COURT: You may continue, Solicitor.

13 MR. RICHARDSON: Thank you, Your Honor.

14 **DIRECT EXAMINATION BY MR. RICHARDSON CONTINUES:**

15 Q. Ms. Floyd, drawing your attention back to State's 2,
16 you said you received it from Sharon Lilly on July 3rd, 2008,
17 correct?

18 A. That is correct, yes.

19 Q. And I believe you stated that you had analyzed it?

20 A. That's correct, yes.

21 Q. When was the analysis performed?

22 A. The analysis was performed on July 8th of 2008.

23 Q. And from July 3rd until July 8th, how was State's
24 Number 2 -- how was it -- was it secured in any manner, way,
25 shape, or form?

1 A. Yes. The drugs are stored in the laboratory, which is
2 a secure facility, that only I have access to. It's on the
3 back side of the Police Department and it is similarly
4 constructed to our evidence vault.

5 Q. And you stated that on July 3rd, you could tell that
6 the package had not been tampered with?

7 A. That's correct, yes.

8 Q. And how about on July 8th whenever you went to analyze
9 it, had it been tampered with?

10 A. Yes, actually referring to the question earlier, my
11 notes would have been made on July the 8th that it was -- the
12 seals were intact. When I receive evidence from the Evidence
13 Department, I initially inspect everything at that time as
14 well just to generally make sure everything looks as though
15 it's in order, and if it doesn't, it's automatically returned
16 to Evidence so it never would have made it into the lab had
17 it been tampered with in any way.

18 Q. Now, in analyzing the suspected narcotics, do you use
19 any kind of specialized equipment?

20 A. Yes. We use a gas chromatograph with a mass-selective
21 detector.

22 Q. Difficult to say.

23 A. Commonly referred to as a GCMS.

24 Q. And take us through the steps you took in analyzing
25 State's 2.

1 A. Typically when I get a case like this that has more
2 than one item, only one item at a time is opened ---

3 MR. McCOLLUM: Your Honor, I'm sorry to interrupt, but
4 I know I have to object, so if -- based on the previous
5 argument, I'm renewing that objection.

6 THE COURT: I'm going to allow her to continue to
7 testify. Thank you very much.

8 MR. McCOLLUM: I understand, Your Honor. I just think
9 I need to put that on the record.

10 THE COURT: All right. Thank you.

11 Continue on, sir.

12 Q. If you'll continue, Ms. Floyd.

13 A. Okay. In this case, they were -- all the items in
14 this bag when I got them were individually sealed with
15 impulse-sealed plastic, which is very similar to this outer
16 bag that you see here, so one at a time they would have been
17 opened, and each item is given a presumptive test, which in
18 this case is a color test, and the color test indicated that
19 cocaine was present for each of the three that were analyzed,
20 and then based on the presumptive test, it's -- it's taken to
21 the GCMS for analysis at that point, which is called a
22 confirmatory analysis, and that instrument -- the computer
23 that's hooked to it has libraries in it of all different
24 kinds of drugs, all different kinds of chemicals, and it
25 gives me what it thinks is the best match for that and then I

1 make the determination whether the computer is correct and
2 that's based on a fingerprint, as you wish, of all those
3 different drugs.

4 Each drug has a different chromatograph and they're all
5 very unique, the same as our fingerprints are, so based on my
6 experience and training, then I make the determination that,
7 yes, the computer says it's a ninety-nine match to cocaine
8 and I agree with that, and at that point I would say that
9 yes, cocaine is found.

10 Q. And is that what happened in this case?

11 MR. McCOLLUM: Again, Your Honor, we would renew the
12 objection.

13 THE COURT: I'm going to allow it.

14 Continue.

15 A. Yes, cocaine was found for Items 1 through 3.

16 Q. And Items 1 through 3, so you're saying in your expert
17 opinion the items in that bag are powder cocaine?

18 A. Yes, the Items 1 through 3 that were analyzed were
19 found to be powder cocaine, yes.

20 Q. So you determined that they were powder cocaine. Did
21 you do anything else?

22 A. The weight was observed as well.

23 Q. And how do you determine weight?

24 A. The weight is taken without any packaging, so when I
25 re-packaged the evidence in these zip-lock bags that you can

1 see that have the red lines at the top, the bag is placed on
2 the scales and the scale is zeroed with the bag on there so
3 that when I put the evidence in, only the weight of the
4 evidence is what's shown.

5 Q. And did you reach a expert opinion with regard to the
6 weight of the cocaine?

7 A. Yes. Item 1 was found to be 504.51 grams, which is
8 7,784.58 grains. Item 2 was found to be 496.25 grams, which
9 is 7,657.13 grains; and Item 3 was found to be 9.27 grams,
10 which is 143.03 grains.

11 Q. And could you tell us, do some quick math,
12 approximately how much is that, how many grams?

13 A. How many grains?

14 Q. Grams.

15 A. Grams.

16 Q. Grams, with an "M". I'm sorry.

17 A. Just under one thousand, ten grams.

18 Q. So more than four hundred grams?

19 A. Yes.

20 Q. Now, after you had performed your analysis and you
21 determined that this coca- -- this was cocaine?

22 A. Correct.

23 Q. It was in excess of four hundred grams?

24 A. That is correct.

25 Q. Way more, and what did you do next?

1 **A.** Whenever I finish analyzing the evidence, it's re-
2 packaged usually in one of these clear outer bags that you
3 see, and it's packaged with the bag that has the control
4 number on it so that it's visible and that the evidence is
5 visible from the back, and then at the top where it is
6 sealed, I put the lab number, my initials, and the date that
7 it's sealed and actually heat-seal that information into it
8 so there's no way that could ever be tampered with.

9 **Q.** Ms. Floyd, I'm going to ask you, whose handwriting is
10 this at the top?

11 **A.** That would be Lori Rabon's initials. She's the
12 Evidence supervisor.

13 **Q.** And do your initials appear anywhere on this bag?

14 **A.** They're sealed into the top.

15 **Q.** They sealed into the top. Is this customary?

16 **A.** Yes, this is very typical.

17 **Q.** And could you tell if that bag had been tampered with?

18 **A.** If it had been opened, it would have had to have been
19 heat-sealed back or taped, and there does not appear to be
20 either of those things have happened to it.

21 **Q.** Can you determine if this is the same bag that you
22 sealed up?

23 **A.** Yes, it appears to be the exact same bag. It's dated
24 for the date that I performed the analysis.

25 **Q.** And is it in the same condition as whenever you sealed

1. it back up?

2. A. Yes, it is.

3. Q. And no doubt about it, these are the drugs you
4. analyzed in this case?

5. A. That's correct, yes.

6. Q. And you returned it to Evidence, to Horry County
7. Evidence?

8. A. Yes. Typically I'll wait until I have a few that have
9. been analyzed and return them in what's called a batch
10. return, so this would have been returned to Evidence with a
11. bunch of other cases that I had analyzed.

12. Q. And the last question, no doubt about it that it's
13. more than four hundred grams of powder cocaine?

14. A. Yes. Items 1 and 2 alone were each over four hundred
15. grams.

16. MR. RICHARDSON: Your Honor, I have no further
17. questions. Thank you, Ms. Floyd. If you'll answer any
18. questions Mr. McCollum may have.

19. THE COURT: Cross examination.

20. MR. MCCOLLUM: Thank you, Your Honor. May it please
21. the Court.

22. THE COURT: Yes, sir.

23. CROSS EXAMINATION

24. BY MR. MCCOLLUM:

25. Q. Ms. Floyd, you said you tested three items. Was that

1 three different bags that were submitted to you?

2 A. It was three different packages inside of the box,
3 yes.

4 Q. And how do you select which part of an item to test?

5 A. Which part of a case?

6 Q. Well, which part of -- you have this substance in
7 front of you, and so you test it to see what -- you're
8 testing to see what the entire substance is, right?

9 A. That's correct, yes.

10 Q. And which -- how -- how do you decide which part to
11 test? In other words, do you test the part on top, or do you
12 test the part in the middle, or do you take random samples
13 from it? How do you decide how to do that?

14 A. If it's a large sample, such as this case, where
15 there's a lot of powder, then I would take random samples
16 throughout.

17 Q. So you said there were three items submitted. Would
18 that mean that there were three separate packages of cocaine
19 that were submitted to you?

20 A. That's correct, yes.

21 Q. So in, say, the first one, the Item 1, for example,
22 how many samples of Item 1 did you take and test?

23 A. I don't have note of a number, but it would have just
24 been -- normally I take a couple from the top, a couple from
25 the bottom, and then try to get in the middle of the mixture.

1 Q. So then you blend those altogether and test them
2 altogether?

3 A. No. Normally the presumptive testing are all done
4 individually.

5 Q. So presumptive tests, that's where you hit it with a
6 chemical and see if it changes color?

7 A. That's correct, yes.

8 Q. Is that test conclusive as to what the item is?

9 A. No, it's not. It's simply a presumptive test.

10 Q. And so when you do the analysis in the -- what you
11 call it, the GCMS?

12 A. That's correct.

13 Q. How many of those items do you put in that for a
14 particular item that you're testing? In other words, how
15 many samples do you take from the item to put in the machine?

16 A. Usually I would take the same amount of random samples
17 throughout to actually extract, so if I used five in the
18 presumptive testing and they all showed the same presumptive
19 results, then I would get samples or the same number of
20 samples to actually use in the confirmatory analysis.

21 Q. Okay, and you have Page 1 of your report?

22 A. Yes, I do.

23 Q. And for example, on Item 1, how many samples of Item 1
24 did you test?

25 A. Again, I didn't write down a specific number. I take

1 what I feel is sufficient to make sure that I'm getting an
2 accurate representation of the item.

3 Q. And then what about Item 2, how many samples of that
4 did you take?

5 A. Again, I don't write how many samples.

6 Q. And then the same for Item 3?

7 A. The same.

8 Q. So you can't say how many samples you took from each
9 item?

10 A. No, not a number, no.

11 Q. Because there's no record of that?

12 A. Correct.

13 Q. And how many drug tests do you perform, say, in a
14 week?

15 A. Anywhere from twenty to twenty-five cases on average.

16 Q. So -- so you've done in -- when was this, in July, so
17 what was that, about ten months ago, is that right, nine
18 months ago, so that's a hundred and seventy-five tests?
19 Well, it would be more than that, wouldn't it, because it
20 would be about a hundred, so help me out.

21 A. I typically do about seven hundred in a year.

22 Q. Okay, so maybe you've done five hundred since then
23 roughly?

24 A. I'll agree.

25 Q. I'm sorry?

1 A. I said I'll agree.

2 Q. Okay, so -- and you don't ever keep a record of how
3 many samples you take from it?

4 A. Not the individual sampling from the item, no.

5 Q. And on all of the substance, if you have a pile of the
6 substance, I mean, some of it might be a controlled substance
7 and some of it could not be, right?

8 A. That's possible if it's not mixed well, yes.

9 Q. And if it isn't a controlled substance, then it isn't
10 a controlled substance, right?

11 A. That's correct, yes.

12 Q. And so if you don't test all of it, then you don't
13 know for sure or scientifically whether it was all a
14 controlled substance or not, right?

15 A. No, I don't do any type of purity analysis on it.

16 Q. So it's possible that some of the items which weren't
17 tested, it's possible that that was not cocaine, right?

18 A. Not the items themselves, no. It's possible they
19 contain other what's called diluents, or things that are
20 mixed with the drugs in them, yes.

21 Q. And can you give a percentage -- in other words, if I
22 had one and you say it weighed 504 grams, can you give a
23 percentage of how much of Item 1 you took and tested? In
24 other words, would it be one percent, or five percent, or
25 three-one-hundredths of a percent? Do you have any idea how

1 much of that you took to test?

2 A. No, I really don't know a percentage. I feel what I
3 take is a representative sample of each item, again so if
4 it's a very large sample, then I would take quite a few
5 points from that sample and make sure that it's covered.

6 Q. But you're testifying as to what you would do? You're
7 not testifying from knowledge of what you did in this case,
8 right?

9 A. I would do the same thing every time.

10 Q. You're saying what you would do, ---

11 A. Yes.

12 Q. --- is that right?

13 A. That's correct, yes.

14 Q. So what's one percent of 504 grams? Is that 5 grams?

15 A. I didn't hear the percent again.

16 Q. What is one percent of 504 grams? Just round it up.
17 Is that about 5 grams?

18 A. It would be about 5 grams, yeah.

19 Q. Okay. Would you have used 5 grams in the testing
20 procedure?

21 A. No.

22 Q. So would you have used one gram in the testing
23 procedure?

24 A. Probably not. It would be very small amounts from
25 random places in the sample.

1 Q. So would it be less than one gram?

2 A. Definitely, yes.

3 Q. So, then, I'm sorry; I'm just -- I'm not a scientist,
4 so would it be less than, say, a half a gram?

5 A. In something that large, it might have been close to a
6 half a gram, yes.

7 Q. So what percentage would half a gram be of 500 grams,
8 do you know?

9 A. Not off the top of my head.

10 Q. You studied math to earn your degree, right?

11 A. Yes.

12 Q. Could you give me some ballpark figure?

13 A. (No response.)

14 Q. Would half a gram be ten percent of five grams?

15 A. Hold on. It would be .1 percent.

16 Q. So you may have tested -- may have tested as much one-
17 tenth of one percent of the item that you're saying is all
18 cocaine?

19 A. That's correct.

20 Q. All right. Thank you very much.

21 MR. McCOLLUM: That's all I have, Your Honor.

22 THE COURT: Redirect?

23 **REDIRECT EXAMINATION**

24 **BY MR. RICHARDSON:**

25 Q. You stated you tested random samples throughout?

1 A. That's correct, yes.

2 Q. And why do you test random samples throughout?

3 A. To make sure that we get a fair and accurate
4 representation of what the item is, especially if it appears
5 there might be things mixed with it, if it's not appearing to
6 be a homogenous mixture.

7 Q. All right.

8 A. And I use as little as I can to preserve the weight of
9 the evidence as it was submitted.

10 Q. And once again, it's your expert opinion that it is
11 all cocaine, correct?

12 A. That is correct, yes.

13 Q. Due to your random sampling?

14 A. Yes.

15 MR. RICHARDSON: No further questions, Your Honor.

16 THE COURT: Anything on those questions, Mr. McCollum?

17 MR. MCCOLLUM: No, Your Honor.

18 THE COURT: All right, very good.

19 Do you wish the witness to be excused?

20 MR. RICHARDSON: I would ask that the witness be
21 excused, Your Honor, and if we may approach?

22 THE COURT: All right, just one second, Solicitor. The
23 court reporter needs to speak with you for a second.

24 (Mr. Richardson speaks with the court reporter.)

25 MR. RICHARDSON: Your Honor, I do have one more

1 question. I'm sorry.

2 THE COURT: All right, very good.

3 **REDIRECT EXAMINATION BY MR. RICHARDSON CONTINUES:**

4 Q. Ms. Floyd, and just to make sure that we're talking
5 about the same item, this is in -- on Lab Number L080367?

6 A. Yes, that is the lab number.

7 Q. And that's the number on this package?

8 A. And it's the number written on all of the items on the
9 back and on the security envelope on the front.

10 MR. RICHARDSON: Your Honor, once again the State would
11 seek to introduce State's 2 into evidence.

12 THE COURT: Is your next witness here yet?

13 MR. RICHARDSON: That's what I wanted to approach on,
14 Your Honor.

15 MR. McCOLLUM: The same objection, Your Honor.

16 THE COURT: All right, very good.

17 Y'all come up and talk to me for a second, please.

18 (A Bench conference was held in the presence, but out of
19 the hearing, of the jury.)

20 THE COURT: All right, ladies and gentlemen, there is
21 some delay in getting the next witness, so you're going to
22 have to go to your jury room and we'll be with you just as
23 soon as we can get to you. Thank you.

24 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
25 JURY.)

1 on the original witness list, you may wish to inquire of the
2 Court if -- of the jury if anyone ---

3 THE COURT: What is her full name, please?

4 MR. RICHARDSON: Sharon Lynn Lilly.

5 THE COURT: And she is officially employed by the Horry
6 County Police Department?

7 MR. RICHARDSON: That's correct, Your Honor.

8 THE COURT: Very good.

9 What about the juror?

10 THE BAILIFF: Judge, I just called her again. She told
11 me that she was coming in the door down below so she would be
12 here within the next three minutes or so.

13 THE COURT: All right.

14 **(THE FOLLOWING TAKES PLACE IN THE PRESENCE OF THE JURY.)**

15 THE COURT: All right, Solicitor, you can call your
16 next witness, please.

17 MR. RICHARDSON: The State calls Sharon Lilly.

18 SHARON LILLY, BEING FIRST DULY SWORN, IS EXAMINED AND
19 TESTIFIES AS FOLLOWS:

20 THE COURT: State your full name, please, ma'am.

21 MS. LILLY: Sharon Lynn Lilly, L-I-L-L-Y.

22 THE COURT: All right, before you get started,
23 Solicitor, ladies and gentlemen of the jury, Ms. Lilly may or
24 may not have been named as a potential witness earlier in the
25 case, so I'm going to ask you now is there any member of the

1 jury panel that's related by blood or marriage, close
2 personal friends, acquaintances of, knows this particular
3 witness? If so, please indicate by raising your right hand.

4 All right, sir, your name and jury number, please, sir.

5 MR. NALLY: Jason Nally, 259.

6 THE COURT: And how might you know Ms. Lilly?

7 MR. NALLY: She's my neighbor.

8 THE COURT: All right, very good. Can you give to the
9 State of South Carolina and to the defendant a fair and
10 impartial trial? Can you be a fair and impartial juror and
11 continue in this case?

12 MR. NALLY: Yes, sir.

13 THE COURT: Thank you very much.

14 I'm going to allow it. Very good. Continue on.

15 MR. RICHARDSON: Thank you, Your Honor.

16 **DIRECT EXAMINATION**

17 **BY MR. RICHARDSON:**

18 **Q.** Ms. Lilly, where are you employed?

19 **A.** Horry County Police Department.

20 **Q.** And for how long and in what capacity?

21 **A.** In the Evidence Department for two years.

22 **Q.** And you were so employed back in June -- in July of
23 2008?

24 **A.** Yes, sir.

25 **Q.** And as -- you said you are an evidence custodian?

1 A. Yes, sir.

2 Q. What do you do as an evidence custodian?

3 A. I take in property that's been turned in by the
4 officers. I type it into the computer and store it until
5 court dates come up.

6 Q. In the course of your duties as an evidence custodian
7 at the Horry County Police Department, you say you take in
8 property and evidence. Does that include narcotics?

9 A. Yes, sir.

10 Q. Back on June 20th, 2008, did you receive any items
11 from Agent William Kitelinger of the Drug Enforcement Unit?

12 A. Yes, sir, I did. I received some white powder
13 substance that he turned in.

14 Q. Okay. Let me draw your attention to State's Exhibit
15 for identification Number 2, and what he turned in to you,
16 was it marked any particular way to make it readily
17 identifiable?

18 A. Yes, sir, it was.

19 Q. How was it marked?

20 A. It was inside of a Horry County drug kit with this
21 drug kit number on it in a sealed evidence bag.

22 Q. And on State's Number 2, is that the item that was
23 turned in by Agent Kitelinger?

24 A. Yes, sir.

25 Q. What date was that?

- 1 A. June the 20th, 2008.
- 2 Q. And what was the condition of it? Was it sealed?
- 3 A. It was in a sealed package such as this.
- 4 Q. Heat-sealed?
- 5 A. Heat-sealed.
- 6 Q. And upon your receipt of that, you said that was June
- 7 20th received from Agent Kitelinger, what did you do with
- 8 that?
- 9 A. I entered it into our computer and then stored it into
- 10 our drug vault.
- 11 Q. And talking about the drug vault, tell us about that
- 12 vault. How is it secured?
- 13 A. It's a locked room that only myself and another
- 14 person, my supervisor, Lori Rabon, has access to.
- 15 Q. And when you do access it and take evidence out, what
- 16 is your procedure?
- 17 A. To give it to Lisa Floyd for testing.
- 18 Q. And did you document that?
- 19 A. Yes, sir.
- 20 Q. And in this case did you take State's Number 2 out of
- 21 Evidence?
- 22 A. Yes, sir. I took it out on July 3rd to give to Lisa
- 23 Floyd.
- 24 Q. And you did indeed give it to Lisa Floyd?
- 25 A. Yes, sir, I did.

1 Q. At that point, could you tell if the item had been
2 tampered with in any way?

3 A. No, sir; everything was sealed.

4 Q. And did you ever receive that package back from Ms.
5 Floyd?

6 A. Yes, sir. After she tested it, she returned it back
7 inside this outer sealed package, and I put it back into the
8 drug vault after logging it into the computer.

9 Q. And how was it stored from that point on?

10 A. It's kept into the drug vault until it was called for
11 court yesterday. At that time, I gave it to Officer Caulder
12 to bring to court.

13 Q. And it would be your testimony that the item was
14 sealed when you got it?

15 A. Yes, sir.

16 Q. It remained sealed until you gave it to Ms. Floyd on
17 July 3rd, 2008?

18 A. Yes, sir.

19 MR. RICHARDSON: Your Honor, no further questions of
20 this witness.

21 THE COURT: Cross examination?

22 MR. McCOLLUM: May it please the Court, no questions,
23 Your Honor.

24 THE COURT: All right. Is there any witness -- any
25 reason this witness cannot be excused?

1 MR. RICHARDSON: Your Honor, I would request that this
2 witness be excused.

3 THE COURT: Any objection?

4 MR. MCCOLLUM: No objection, Your Honor.

5 THE COURT: All right, ma'am, you are excused, released
6 from your subpoena to go back to your regular duties. Thank
7 you very much.

8 MR. RICHARDSON: The State calls Caulder.

9 THE COURT: All right, if you would please come
10 forward, sir, and please remain -- please remember that you
11 remain under oath. Thank you very much. Just come up and
12 have a seat and state your full name.

13 OFFICER CAULDER: John Robert Caulder, II.

14 **DIRECT EXAMINATION**

15 **BY MR. RICHARDSON:**

16 Q. Good afternoon, Officer Caulder.

17 A. Afternoon.

18 Q. Officer Caulder, we recall your testimony from
19 yesterday. I'm just going to draw your attention back to
20 what I introduced to you yesterday, State's Exhibit Number 2.
21 Once again, do you recognize State's Exhibit 2?

22 A. Yes, sir.

23 Q. And do you recall when you took it into custody?

24 A. I collected this item yesterday from the evidence
25 custodian, Sharon Lilly, at the Horry County Police

1 Department.

2 Q. So you collected it yesterday, and what did you do
3 with it?

4 A. I brought it here to the courtroom.

5 Q. Did you in any way tamper with it?

6 A. No, sir.

7 Q. And what was its condition whenever you received it?

8 A. The same condition it is in now.

9 Q. No doubt this is the item you brought here yesterday?

10 A. Yes, sir, that is correct.

11 Q. And that's the date on that being April 14th, 2009?

12 A. Yes, sir.

13 MR. RICHARDSON: Your Honor, at this time, the State
14 would seek to introduce State's Exhibit 2 into evidence.

15 THE COURT: Any objection?

16 MR. McCOLLUM: Just the previous ones, Your Honor.

17 THE COURT: All right. I'm going to allow it into
18 evidence. Thank you very much.

19 DRUGS CONTAINED IN CLEAR POUCH MARKED IN EVIDENCE
20 AS STATE'S EXHIBIT 2.

21 MR. RICHARDSON: Your Honor, the State would have no
22 further questions of Officer Caulder and ask that he be
23 released to return to his duties.

24 THE COURT: Do you have any cross examination?

25 MR. McCOLLUM: No questions, Your Honor.

1 THE COURT: All right, very good. Any objection to him
2 being released?

3 MR. McCOLLUM: No objection.

4 THE COURT: Very good.

5 Sir, you are released from your subpoena and may go back
6 to your regular duties. Thank you very much.

7 OFFICER CAULDER: Thank you, Your Honor.

8 THE COURT: Are there any further witnesses on behalf
9 of the State?

10 MR. RICHARDSON: No, sir, Your Honor. At this time the
11 State would rest.

12 THE COURT: All right. Is there a matter of law that
13 you need to bring up at this point in time, Counsel?

14 MR. McCOLLUM: Your Honor, yes; I think I'm required
15 to.

16 THE COURT: All right, very good.

17 All right, ladies and gentlemen, if you will go to your
18 jury room for a short period of time. We will call you back
19 out and we will finish this case up this afternoon. Thank
20 you.

21 **(THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE**
22 **JURY.)**

23 THE COURT: All right, Mr. McCollum, I'll be glad to
24 hear from you, sir.

25 MR. McCOLLUM: Thank you, Your Honor.

1 Your Honor, at this time since the State has rested, the
2 Defense would move before the Court and ask the Court to
3 direct a verdict of not guilty based on insufficient or lack
4 of evidence. Also at this time, Your Honor, the Defense
5 would renew all previous objections for which we have
6 received an adverse ruling.

7 THE COURT: All right, very good. First as to the
8 directed verdict that you have made in this particular
9 matter, the basic law being the defendant would be entitled
10 to a directed verdict when the State fails to produce
11 evidence of the offense charged. The Court's duty is to look
12 at the existence of evidence, not with its weight. The
13 weight of the evidence, the credibility, believability, that
14 is the job of the jury. It's the Court's decision to see
15 whether or not the evidence exists.

16 I find that there is more than sufficient evidence which
17 if so believed by the jury would be sufficient to convict the
18 defendant beyond a reasonable doubt, and, therefore, there
19 being direct evidence and substantial circumstantial evidence
20 that reasonably tends to prove the guilt of the accused, the
21 -- I'm going to respectfully decline to grant your motion for
22 a directed verdict.

23 The Court would reaffirm all its previous rulings in
24 this matter, including those regarding the motion to
25 suppress, indicated in the motion to suppress that I felt

1 that there was a proper stop and that the defendant had
2 committed a traffic violation within the presence of and the
3 observation of the officer, that -- and I went through the
4 history of that, and also indicated that even if the -- there
5 was any police misconduct or the arrest of the defendant was
6 a mere pretext to stop the defendant, that pursuant to State
7 versus Nelson, that there had been a new and distinct
8 criminal act by the defendant, that being the assault and
9 battery with intent to kill and the assault on the police
10 officer, those being a new and distinct criminal act, even if
11 it may have been causally connected in some way to the -- if
12 there was any kind of police misconduct or the mere pretext
13 as I indicated, that the new and distinct criminal act of the
14 defendant would be a substantial basis for his arrest and he
15 was subsequently arrested for those two crimes, assault and
16 battery with intent to kill and the assaulting the police
17 officer, therefore, the evidence which came as a result of
18 his arrest, that being the black bag which exited his vehicle
19 which he used to commit the assault and battery or for which
20 he was arrested for the assault and battery with intent to
21 kill and the resisting arrest.

22 Therefore, it is proper evidence in this particular
23 matter, and the motion again to suppress being again denied,
24 and I again reaffirm the previous ruling.

25 Further motions on behalf of the Defense?

1 MR. McCOLLUM: Those are all the motions, Your Honor,
2 at this time.

3 THE COURT: All right. At this point in time, we'll go
4 forward with the Court's questioning of the defendant
5 regarding his constitutional rights to testify, so if you
6 would stand at this time, please, sir, and Madam Clerk, place
7 him under oath.

8 NORRIS H. SMITH, BEING FIRST DULY SWORN, IS EXAMINED AND
9 TESTIFIES AS FOLLOWS:

10 THE COURT: All right, at this point in time, Mr.
11 Smith, I'm going to explain to you certain of your
12 constitutional rights. If you do not understand me at any
13 point in time or understand anything I'm saying, I want you
14 to raise your hand, tell your attorney, in some way indicate
15 to me that you do not understand. Are we clear about that?

16 MR. SMITH: Yes, sir.

17 THE COURT: All right, sir. We've reached the stage of
18 the trial where you can present your defense. You have a
19 right to claim the protection given to you by the Fifth
20 Amendment to the Constitution of the United States of America
21 which states in part that no person shall be compelled in any
22 criminal action to be a witness against themselves. That
23 means nobody can force you or make you testify in this case,
24 but you have the right to do so. You certainly can testify
25 in this case if you voluntarily choose to do so.

1 MR. McCOLLUM: I would also add, Your Honor, just for
2 your information, I think that at the time of arrest the
3 police seized Eight Thousand Dollars from him, and they also
4 seized the mini-van. It's my understanding that he signed
5 those over as property to the State as well.

6 THE COURT: Thank you very much.

7 All right, regarding 2008-GS-26-3999, the State of South
8 Carolina, County of Horry, versus Norris Hennessey Smith,
9 regarding trafficking cocaine, weight four hundred grams or
10 more, the sentence of the Court is the defendant is committed
11 to the State Department of Corrections for a determinate term
12 of twenty-five years. The defendant is given credit for any
13 time that he has already served. Thank you very much.

14 MR. McCOLLUM: Thank you, Your Honor.

15 MR. RICHARDSON: Thank you, Your Honor.

16 (Conclusion of Transcript of Record.)

17

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P. 2/4

To: 803 734 1397

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166

WITNESSES

Will Kitefinger DEU - 15th Drug Enforcement Unit

REST WARRANT NUMBER

J320281

CDR: 0281 44-53-0370(e)(2)(e)

DOA: 6/20/2008

ACTION OF GRAND JURY

Foreperson of Grand Jury

SEP 25 2008

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2008-GS-26-

03999

The State of South Carolina

County of Horry

Brad Richardson

DBH02729

COURT OF GENERAL SESSIONS

September, 2008 TERM

THE STATE

VS.

Norris Hennessey Smith

B/M

Son:

ATTORNEY: McCollum, M. Gregory

Indictment for

**TRAFFICKING COCAINE OVER 400
GRAMS**

J. Gregory Hembree, Solicitor

ORIGINAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)

INDICTMENT
 TRAFFICKING COCAINE OVER 400 GRAMS

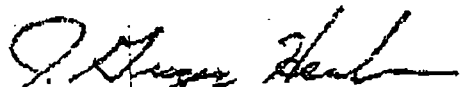
At a Court of General Sessions, convened on September 25, 2008, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING COCAINE OVER 400 GRAMS

CDR: 0281 44-53-0370(e)(2)(e)

That Norris Hennesey Smith did in Horry County on or about June 19, 2008, knowingly sell, deliver, purchase or bring into this State, or aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession, or attempted to become in actual or constructive possession of a quantity of Cocaine in an amount of more than four hundred grams, the same being a controlled substance all within the meaning of Section 44-53-370, et. seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized, and being in violation of Section 44-53-370(e)(2)(e), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

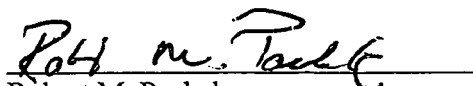
Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 J. GREGORY HEMBREE
 FIFTEENTH CIRCUIT SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 18th, 2010


Robert M. Pachak
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NORRIS H. SMITH,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the trial court erred in refusing to suppress evidence that was seized when the police did not have reasonable suspicion to further detain appellant after a traffic stop for making a turn without using a turn signal?

STATEMENT OF THE CASE

Appellant was convicted of trafficking in cocaine after a jury trial held before the Honorable Steven H. John in Horry County on April 17, 2009. A twenty-five (25) year sentence was imposed.

This appeal follows.

ARGUMENT

The trial court erred in refusing to suppress evidence that was seized when the police did not have reasonable suspicion to further detain appellant after a traffic stop for making a turn without using a turn signal.

At the suppression hearing Cpl. Harris, with the Horry County Police Department, testified that on June 19, 2008, around 11:30 AM he was patrolling the area around Highways 544 and 707. He was asked to assist another agency, the Drug Enforcement Unit (DEU), and make a vehicle stop on a silver Chrysler Town & Country with tag #6793DR. Harris located the vehicle and followed it approximately two or three miles. He observed appellant fail to use his turn signal coming off of 544 onto 707. He initiated a traffic stop. (ROA p. 4, line 6 – p. 6, line 8) He said the DEU agents had informed him that appellant was a “possible carrier of narcotics.” He could not recall which agent told him that as he did not know him. (ROA p. 10, line 16 – p. 11, line 12). Cpl. Harris said it was his intention to pull the vehicle over once he came into contact with it. (ROA p. 13, line 6 – p. 14, line 17)

After appellant stopped, Cpl. Harris walked to the vehicle and told appellant he was being stopped for not using his turn signal and asked for his driver’s license. (ROA p. 14, line 18 – p. 15, line 15) Harris went back to his patrol car and ran the driver’s license. Instead of then writing a ticket, he went back to appellant’s vehicle and asked him to step to the back of his van to speak with him. Harris again did not write him a ticket for an improper turn. Instead, he asked appellant if he could search his van. Harris said appellant gave permission but he did not search the van because appellant followed up with he needed to call his boss, so he could not determine whether or not appellant was giving permission. (ROA p. 15, line 22 – p. 18, line 18) He could not recall if he ever told appellant he could

(ROA p. 15, line 22 – p. 18, line 18) He could not recall if he ever told appellant he could refuse consent to search. (ROA p. 19, lines 1-14) When appellant attempted to drive away, Cpl. Harris still had his driver's license. (ROA p. 19, lines 19-21) He admitted that when he pulled over appellant, he was not free to leave. He also admitted he could not remember when he wrote appellant a traffic ticket. (ROA p. 23, line 24 – p. 24, line 4)

On cross-examination, Cpl. Harris said once he had appellant outside of his van he started to walk back to it. Once appellant got back in, Harris asked him to step back out several times. Appellant got on a cell phone and reached down to a black bag in the center console area. Officer Johnson, also on the scene, told appellant to get his hand off the bag. Somebody yelled, "tase him, tase him." Officer Johnson grabbed appellant's arm and they tussled. Appellant was able to start his van. Officer Johnson grabbed a bag that was on the floorboard and used the taser on appellant again. Officer Johnson fractured his wrist as the van pulled off hitting him. (ROA p. 26, line 8 – p. 29, line 17) The entire stop lasted for a period of approximately 12 minutes. (ROA p. 34, lines 16-20) As a result of his activity appellant was charged with trafficking in cocaine in over four hundred grams from what the police seized from the van appellant was driving.

Defense counsel's motion to suppress was based on the fact that the "scope and duration of [the] seizure must be strictly tied to and justified by the circumstances which rendered its initiation proper." Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) citing, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). In State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009) this court found that the (1) officer in that case lacked sufficient indicators of criminal activity to create a reasonable suspicion that would justify continued detention; (2) evidence was sufficient to support the finding that the officer did

not have reasonable suspicion of illegal drug activity to warrant continued detention, and (3) evidence was sufficient to support finding that driver's consent to search vehicle was an invalid product of unlawful detention. In State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005) this court held that there "was no reasonable suspicion of 'some other crime' to further detain or question Pichardo and Reyes after Pichardo was given the warning ticket. Such a search at this point was an exploitation of the original stop rather than a separate and valid search based upon a reasonable suspicion." This court went on to say "when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention." (citations omitted). 367 S.C. at 104-105, 623 S.E.2d at 851.

In State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001) this court found the continued detention and second search of the defendant was nothing more than a "fishing expedition." 344 S.C. at 552-553, 544 S.E.2d at 298. See, also State v. Rodriquez, 323 S.C. 484, 476 S.E.2d 166 (1996) on continued detention.

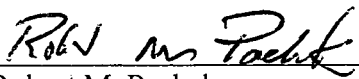
It is obvious in this case that the clear intent of the State was to find and use a traffic violation as a pretext to search appellant's van to find if he was a "possible carrier of narcotics." This information came from an unknown agent Cpl. Harris did not know and who he had not spoken to before. Cpl. Harris' testimony did not reveal a "reasonable suspicion" that requires "a particularized and objective basis" that would lead one to suspect appellant of drug activity. United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 695 (1981) If the DEU had a reasonable suspicion, they did not need Cpl. Harris' help. They could have done it on their own.

It is also clear the police would do anything to detain appellant until he gave an unqualified consent to search the van. Cpl. Harris did not write a ticket for the traffic violation and did not give appellant's driver's license back to him. A review of the DVD of the stop shows that appellant was repeatedly asked and hounded about searching his vehicle. After he got back in the vehicle, he was asked again to get back out, asked again if they could search and was threatened to get "tased" and did get "tased." The police did not have authority to detain appellant as long as they did and he should have been free to leave. The police conduct was not reasonable and they exploited the stop of appellant. The "scope and duration of [the] seizure must be strictly tied to and justified by the circumstances which rendered its initiation proper." Sikes v. State, Terry v. Ohio, supra. "Inarticulate hunches" did not support further detention of appellant. Terry v. Ohio, supra.

CONCLUSION

Appellant's motion to suppress the cocaine seizure from the traffic stop should be granted.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

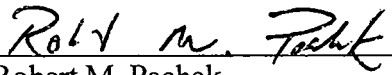
ATTORNEY FOR APPELLANT.

This 6th day of July, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 6th, 2010


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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NORRIS H. SMITH,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of July, 2010.

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 6th day of July, 2010.

Felicia K. Berry (L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge

THE STATE OF SOUTH CAROLINA

RESPONDENT

V.

NORRIS H. SMITH

APPELLANT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly denied Appellant's motion to suppress because admission of the cocaine at trial did not violate the Fourth Amendment.

STATEMENT OF THE CASE

Appellant was indicted in September of 2008 in Horry County for trafficking in cocaine, 400 grams or more. (R. p. 166-67). Appellant was tried on April 14-15, 2009, before the Honorable Steven H. John. (See R. p. 1-165). The jury found Appellant guilty, and Judge John sentenced Appellant to twenty-five (25) years. (R. p. 165, lines 7-12). A Notice of Appeal was timely served and filed.

ARGUMENT

The trial court properly denied Appellant's motion to suppress because admission of the cocaine at trial did not violate the Fourth Amendment.

The Traffic Stop

Corporal Harris testified that he was asked to assist the Drug Enforcement Unit ("DEU") with a traffic stop of Appellant's vehicle on June 19, 2008. (R. p. 5; p. 69). The DEU suspected Appellant of carrying narcotics. (R. p. 10). Corporal Harris's job was to look for a traffic violation and then pull the vehicle over. (R. p. 7). Corporal Harris observed several traffic violations, but he ultimately stopped Appellant for failing to use his turn signal. (R. p. 5-6; p. 9; p. 70-71). After Appellant pulled over, Corporal Harris obtained his driver's license and returned to his patrol car to run a check on it. (R. p. 15-17; p. 73-74). Harris noticed that Appellant's hands visibly shook when he handed over his driver's license. (R. p. 25, lines 4-6; p. 74, lines 7-16). Corporal Harris testified that writing a ticket for a traffic violation would ordinarily take around ten minutes. (R. p. 23). However, he noted that he could have simply arrested Appellant for the violation and taken him to jail. (R. p. 26, lines 2-7; p. 73, lines 4-5).

After briefing another officer who had just arrived, Corporal Harris returned to Appellant's vehicle, where, for safety reasons, he requested that Appellant exit the vehicle and step to the rear of the car to speak to him. (R. p. 16-17; p. 25, lines 7-11; p. 75-77). Harris had a brief conversation with Appellant there and requested permission to search the vehicle. (R. p. 17, lines 11-22; p. 77, lines 19-21). Appellant indicated that he would allow a search of the vehicle. (R. p. 17, lines 20-25; p. 77-78). He also stated that he needed to call his boss. (R. p. 18, line 1-10; p. 78, lines 1-2). Corporal Harris indicated that he wanted a "yes or no" answer; therefore, he did not search the vehicle at

that time. (R. p. 18, lines 1-24). Harris testified that Appellant was acting very nervous throughout this process. (R. p. 18, line 24; p. 25, lines 2-12; p. 78, line 7).

Suddenly, Appellant turned away from the officers and proceeded directly to his car. (R. p. 26, lines 8-10; p. 78, lines 10-16). Although the officers asked him several times to step back out of the vehicle for safety reasons, Appellant refused. (R. p. 26-27; p. 78, lines 18-19). Inside the vehicle, Appellant fidgeted around, attempted to use his cell phone, and reached down for a black bag in the console area. (R. p. 27, lines 9-12; p. 79). Appellant continued to ignore the officers' requests for him to exit the vehicle. (R. p. 27, lines 17-20). Officer Johnson approached Appellant on the passenger side of the vehicle and asked him to take his hand off the black bag. (R. p. 27, line 23 – p. 28, line 1). When he refused to do so, he and the officers began "tussling" as they attempted to prevent Appellant from reaching into the bag. (R. p. 28, lines 1-6). Appellant then grabbed for his car keys and cranked up the vehicle. (R. p. 28, lines 5-7).

After Officer Johnson managed to get the car turned off, Appellant began reaching under the passenger seat for a concealed compartment. (R. p. 28, lines 9-16; p. 80). The compartment slid forward, and there was another black bag inside. (R. p. 28, lines 15-18). Not knowing if a weapon might be inside the bag, Officer Johnson grabbed it away from Appellant, who then pulled his hand back and started the car again. (R. p. 28, lines 18-22; p. 80). Officer Johnson deployed his taser on Appellant to stop him, but Appellant "gunned" the engine and sped off. (R. p. 29, lines 1-6; p. 80-81). Appellant ran over Officer Johnson as Johnson tumbled out of the van. (R. p. 29, lines 7-17; p. 81, lines 5-7). Over one-thousand (1,000) grams of cocaine was found inside the black bag, which fell onto the ground as a result of Appellant's attempt to flee. (See R. p. 63-64; p. 143, lines 17-22). In addition to the cocaine trafficking charge, Appellant was arrested

for assault and battery with intent to kill and resisting arrest while assaulting an officer. (R. p. 45, line 19 – p. 46, line 7). Appellant also received a ticket for the initial violation of failing to use his turn signal, and he ultimately pled guilty to that offense. (See R. p. 24, lines 2-3; p. 25, lines 16-20).

Applicable Law

“Where probable cause for a traffic violation exists, an automobile stop is reasonable *per se*.” State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005) (citation omitted). The officer may ask for a driver’s license and registration, run a computer check, and issue a ticket. Id. at 98, 623 S.E.2d at 847 (citation omitted). Once a vehicle is lawfully detained for a traffic violation, the police do not violate the Fourth Amendment by ordering the driver to exit the vehicle. Id. (citations omitted); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977). In addition, if an officer’s suspicions are further aroused during the course of a traffic stop, the stop may be prolonged and the scope enlarged. State v. Corley, 383 S.C. 232, 240, 679 S.E.2d 187, 191 (Ct. App. 2009). Moreover, “a law enforcement officer may request permission to search at any time.” State v. Pichardo, *supra*, at 98, 623 S.E.2d at 847. An officer’s subjective intentions are irrelevant to a Fourth Amendment analysis, and a traffic violation arrest is not rendered invalid simply because it was a “mere pretext” for a narcotics search. State v. Corley, *supra*, at 240, 679 S.E.2d at 191-92 (*citing* Arkansas v. Sullivan, 532 U.S. 769, 772 (2001); Whren v. United States, 517 U.S. 806, 812-13 (1996); United States v. Stachowiak, 521 F.3d 852, 855 (8th Cir. 2008); State v. Banda, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006)).

In Fourth Amendment search and seizure cases, the duty of the appellate court is to determine whether “any evidence” supports the trial court’s findings. State v.

Pichardo, supra, at 95, 623 S.E.2d at 846 (citations omitted). The appellate court will reverse only when, upon review of the evidence as a whole, it is left with the definite and firm conviction that the trial court committed clear error. Id. at 95-96, 623 S.E.2d at 846 (citations omitted). The appellate court will not reverse simply because it would have decided the case differently. Id. Instead, the trial court's ruling should be affirmed if there is any evidence in the record to support it. See State v. Khingratsaiphon, 352 S.C. 62, 71, 572 S.E.2d 456, 460 (2002).

Appellant's Detention was Reasonable

In this case, there is ample evidence supporting the trial court's denial of Appellant's motion to suppress. First, Appellant was still being lawfully detained at the time the drugs were found. The entire stop, up until the point when Appellant ran over Officer Johnson, was under twelve minutes. (R. p. 83, lines 12-14). At the time consent to search was requested, only a few minutes had elapsed – just enough time for the officer to obtain Appellant's driver's license, run a check on it, and have him step to the rear of the vehicle. (See DVD of stop). The officer's request for Appellant to exit his vehicle was clearly permissible under the Fourth Amendment, and was particularly reasonable where Appellant was unusually nervous and fidgety, was visibly shaking, and where Appellant was suspected by DEU agents of being a trafficker of narcotics. (R. p. 44, lines 19-22; p. 52-61). See State v. Pichardo, supra; Pennsylvania v. Mimms, supra.

When Appellant decided to ignore police and re-enter his vehicle, the officers were justified in attempting to preserve their safety by requesting that Appellant get out of the car and stop reaching for bags that may have contained guns. (See R. p. 81, line 18 – p. 82, line 10). See State v. Banda, supra, at 253, 639 S.E.2d at 40 (discussing the “indisputable nexus” between drugs and guns); see, e.g., State v. Khingratsaiphon, supra,

at 70, 572 S.E.2d at 459 (an officer need not be absolutely certain that the individual is armed; instead, the issue is whether a reasonably prudent man in the circumstances would be justified in believing that his safety or that of others was in danger) (*quoting from Terry v. Ohio*, 391 U.S. 1 (1968)). From that point forward, the officers were, understandably, more concerned with safety than with immediately completing Appellant's traffic ticket. (R. p. 26, line 8 – p. 27, line 3). After Appellant made his initial attempt to flee – without his driver's license and having not yet received his traffic ticket – it was clearly reasonable for officers to attempt to stop him. (R. p. 19, lines 19-21). See *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (flight from police may be considered in determining whether officers have reasonable suspicion).

As the trial judge noted, the entire stop was less than twelve minutes in duration. (See R. p. 53-56). Any prolongation of the stop was the result of Appellant's own conduct and interference. (See R. p. 56, lines 19-20). Appellant became uncooperative, refusing to comply with reasonable requests by the officers, and he ultimately attempted to flee, running over an officer in the process. The police officers' responses were justified under the rapidly escalating circumstances. Thus, the trial court did not err in concluding that, under the totality of the circumstances, Appellant's detention was not unreasonable or unlawful. Accordingly, where the cocaine was found in the course of events that followed a lawful detention, the trial court properly denied Appellant's suppression motion.¹ (See R. p. 51, line 23 – p. 56, lines 23).

¹ Respondent also submits that the drugs would have inevitably been discovered because a drug-sniffing canine was on the scene and was about to be deployed at the time Appellant attempted to flee. (See R. p. 97-98). See *Illinois v. Caballes*, 543 U.S. 405 (2005) (use of a drug dog does not implicate the Fourth Amendment); *State v. Woods*, 382 S.C. 153, 161, 676 S.E.2d 128, 133 (2009) (*citing Nix v. Williams*, 467 U.S. 431 (1984) (evidence that would have inevitably been discovered need not be suppressed under the exclusionary rule)).

The Seizure was Valid After Appellant's New and Distinct Crime

Even if the initial detention had been unlawful, the trial court properly concluded that the cocaine was admissible because it was found pursuant to Appellant's arrest for a new and distinct criminal act committed in the presence of the officers. (See R. p. 56-58). In State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999), the South Carolina Supreme Court held that, even assuming that law enforcement conduct initially violates the Fourth Amendment, if the defendant responds by committing a new and distinct criminal act, the defendant may be arrested for the new and distinct crime, and evidence obtained pursuant to this arrest is not inadmissible "fruit" of the initial violation. See State v. Nelson, 336 S.C. 186, 193-95, 519 S.E.2d 786, 789-90 (1999). Five years after State v. Nelson was decided, the South Carolina Supreme Court re-affirmed its rationale when it again concluded that a defendant's new and distinct crime provided an independent basis for his arrest, notwithstanding that his initial arrest was illegal. See In re Jeremiah W., 361 S.C. 620, 623-25, 606 S.E.2d 766, 768-69 (2004).

This same reasoning applies in Appellant's case. Appellant recklessly and wantonly sped off with a police officer hanging out the door of his van, then ran over him. Appellant's independent decision to commit a new and distinct crime was an intervening act of free will which, although it was in some way causally connected to the alleged police misconduct, was not an "exploitation" of any such misconduct. See State v. Nelson, *supra*, at 194, 519 S.E.2d at 790; Wong Sun v. U.S., 371 U.S. 471, 486-88 (1963). Appellant was arrested pursuant to this new and distinct offense, and the cocaine was lawfully seized in the course of that arrest. (See R. p. 63-64). Therefore, the cocaine was admissible, and the trial judge properly denied Appellant's motion to suppress. See

State v. Nelson, supra, at 194-95, 519 S.E.2d at 790; In re Jeremiah W., supra, at 623-25, 606 S.E.2d at 768-69.

Appellant Gave Consent to Search

The trial judge properly denied Appellant's motion to suppress based upon both grounds set forth above. (See R. p. 56, line 9 – p. 57, line 20). However, even had the trial judge erred with respect to both grounds, this Court should still affirm because, regardless of the officers' subjective beliefs, Appellant gave valid consent allowing a search of his vehicle. (See R. p. 17-18; p. 39, lines 9-13; p. 56, lines 13-16; p. 77, line 19 – p. 78, line 4). See State v. Mattison, 352 S.C. 577, 584-87, 575 S.E.2d 852, 855-57 (Ct. App. 2003). Appellant's comments about needing to call his boss illustrated his consent because it is apparent that he wanted to let his boss know he would be late to work due to the consent search of his vehicle. (See R. p. 17-18; p. 77-78; see DVD of stop). Therefore, the admission of the cocaine at trial should be affirmed on this additional and/or alternative basis. See Rule 220(c), SCACR; State v. Khingratsaiphon, supra, at 71, 572 S.E.2d at 460 (appellate court may affirm based upon any grounds appearing in the record, regardless of the basis for the trial court's ruling).

CONCLUSION

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

Respectfully submitted,

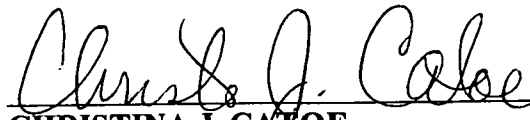
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July 7, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

NORRIS H. SMITH,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.


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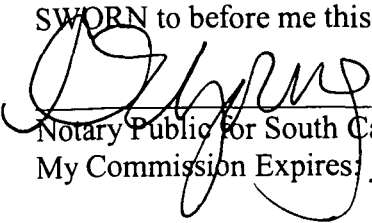
AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **ROBERT M. PACHAK**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **7th day of July, 2010**.


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SWORN to before me this 7th day of July, 2010.


Notary Public for South Carolina.

My Commission Expires: 10/28/2014