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ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable C. Victor Pyle, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

SHANE A. MAHON,

APPELLANT

APPELLATE CASE NO 2015-001599

RECORD ON APPEAL

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Case No. 14-GS-23-10119

Bench Trial of July 15-16, 2015 - Motions

Before The Honorable C. Victor Pyle, Jr.

1 my Motion is, uh, to dismiss pursuant to the
2 statute 56-5-2953 and also the case law. The
3 most recent cases: *Hinkle*, the *City of*
4 *Greenville v. Humble* and several other cases.
5 I've actually written a brief that I would
6 like to hand up as well at this time, Your
7 Honor.

8 SOLICITOR HOLLOWAY: Your Honor,
9 this is -- I've not had an opportunity to
10 review this brief whatsoever. I don't want
11 to speak offhand but -- (pause). I am
12 certainly aware of the *Hinkle* case, Your
13 Honor, and of the DUI statutes. I am sure
14 that I can speak intelligently on the subject
15 as to Mr. Kornfeld's Motions.

16 MR. KORNFELD: Well, Your Honor, do
17 you want him to read the Motion? I've ---

18 THE COURT: No, I want to know
19 what the Motion is.

20 MR. KORNFELD: Okay. Your Honor,
21 the Motion -- one is on *Brady* but it goes
22 back into the statute 56-5-2953. This case
23 concerns the failure to file the affidavit.

24 To understand this, that you have to know
25 the facts of the case. On May 4th, 2014, at

1 approximately 4:24, according to Officer
2 Klemm's report, he arrived on scene and had
3 his video looking at the one-car accident.
4 He then -- at some point later, he went back
5 to his vehicle and repositioned it so that it
6 was looking at the back of an ambulance
7 vehicle, and we have that video. There are
8 three different videos that are relevant of
9 the five that were given to me.

10 At that time, he continued -- his
11 incident report says that he went to the
12 vehicle and smelled a strong odor of alcohol;
13 that he watched Mr. Mahon speak to the
14 ambulance (sic). He then says -- at that
15 point there is no conduct, we don't see any
16 of this on the video, any of his conduct.

17 He then goes to the hospital, he says,
18 after he continues his investigation. I am
19 not sure what that meant, he doesn't tell me,
20 but I assume that he was taking pictures. He
21 goes to Greenville Hospital Systems downtown.
22 At that point he see Mr. Mahon at that time
23 and says in his report that he gives Mr.
24 Mahon a field sobriety test, in this case the
25 HGN. I think he's in the emergency room.

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1 He's in the hospital for sure. He gives him
2 the HGN test.

3 He then says after that he gives him --
4 well, let me stop there. He gives him the
5 HGN test, the field sobriety test.

6 According to the law, all field sobriety
7 tests -- under the case law and 56-5-2953 --
8 that field sobriety test must be on video
9 unless -- but that, in and of itself, is not
10 grounds for dismissal if he can provide, in
11 this case, an affidavit. One of the
12 specifics things the legislators put in there
13 is that if there's an accident, which there
14 was in this case, the new *Hinkle* case, which
15 just came out July 1st says -- it is very
16 clear that the video must start as soon as
17 reasonably practical and continue to the
18 conclusion of the arrest. That did not
19 happen in this case. There is no video
20 showing that. Thereby it's a violation of
21 the statute, it's a violation of the case
22 law.

23 The case of the brief that I've written
24 here, it is ten pages, explains what that
25 remedy is. That remedy is dismissal. It's

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1 very clear, "If emergency medical treatment
2 is needed and it is physically impossible to
3 produce a video recording because a person
4 needed emergency medical treatment, an
5 officer can avoid dismissal of the charge if
6 he submits a sworn affidavit certifying the
7 same."

8 That is exactly what happened here. He
9 did not do that. He gave him a field
10 sobriety test and the remedy -- there is no
11 other way to say it, all the case law
12 supports my argument.

13 And apparently the South Carolina
14 Department of Public Safety also agrees. I
15 attached their affidavit form, which I've
16 seen on several DUI cases before, on which
17 they would check that if a defendant needed
18 emergency medical treatment.

19 Failure to do this doesn't allow me to
20 cross-examine, as the legislature intended.
21 That is why there is such a strong
22 repercussion if you don't follow that. I
23 can't cross-examine those factors if there
24 is no video, Your Honor.

25 THE COURT: Solicitor?

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1 SOLICITOR HOLLOWAY: As Mr.

2 Kornfeld briefly touched on, and with all 'due
3 respect to his argument, upon immediately
4 following the sentence which he is certainly
5 keying on, (reading): -- in the alternative,
6 submits a sworn affidavit certifying that it
7 was physically impossible to produce a video
8 recording because the person needed emergency
9 medical treatment or there were exigent
10 circumstances exists, it then provides a very
11 specific caveat. It says, (reading): "In
12 circumstances, including but not limited to
13 roadblocks, traffic accidents/investigations,
14 and citizen's arrests...", so -- it appears
15 that the statute is mutually exclusive of the
16 two.

17 My understanding of the statute would be
18 that once you have a traffic investigation,
19 which this case was, Your Honor, we would
20 then fall under that part of the statute.
21 That says were *Hinkle* falls, which Mr.
22 Kornfeld brought to the court's attention.
23 That says that when there is a traffic
24 accident and a trooper has been called to the
25 scene to investigate it, then the video is to

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1 be started as soon as reasonably practical.
2 Hinkle confirmed that, saying that "once that
3 it starts the video that it must adhere" --
4 and then it goes back to adhering to -- in
5 this situation, Your Honor, when the trooper
6 arrived on scene the accident had already
7 happened. Mr. Mahon's car was on its side,
8 he had to be extricated from the vehicle. He
9 was placed in an ambulance and immediately
10 taken to the hospital. So I understand that
11 there were no field sobriety tests taken,
12 Your Honor, not conducted at the incident
13 scene. There were no field sobriety tests at
14 the incident scene, Your Honor. There were
15 no wrecks at the incident scene.

16 He was taken to the hospital. Trooper
17 Klemm at that point waited for a wrecker.
18 The truck -- the defendant's car was then
19 taken, he took photographs. Then he went to
20 the hospital where they came in contact with
21 Ms. Becky Howe, who is a nurse at GHS. While
22 there at the hospital, the trooper -- he goes
23 to the trauma bay where the defendant was.
24 He walks up to him, speaks with him and
25 observes the odor of alcohol. The defendant

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1 then admits to consuming alcohol and at that
2 point in time, for his probable cause
3 determination to arrest, the trooper then
4 performs an HGN test; the HGN being the
5 horizontal gaze nystagmus.

6 When he identified the nystagmus, he then
7 placed the defendant under arrest for driving
8 under the influence of alcohol. He requested
9 a blood sample, the defendant consented to
10 that blood sample and a sample was taken.

11 Your Honor, I understand where Mr.
12 Kornfeld is coming from when it comes to a
13 field sobriety test being on camera.
14 However, 29-53(a) specifically delineates the
15 video recording at the incident site must
16 include all field sobriety tests and that
17 sort of thing.

18 At this point in time, Your Honor, the
19 statute was not written to -- the in-car
20 camera was mounted on the trooper's dash.
21 There is no way to remove that camera and
22 take it in with them. Again, Your Honor, he
23 performed the horizontal gaze nystagmus test
24 at the hospital to determine -- to make a
25 proper cause or determination of whether or

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1 not he could -- if he was in fact within
2 rights to arrest the defendant for driving
3 under the influence.

4 The State is willing to not use that as
5 evidence of impairment if the court would
6 describe that is not appropriate, but it's
7 certainly not a situation that falls under
8 the statute as reasons for dismissing the
9 case, because at no point could the
10 legislature of the statute reasonably think
11 that the trooper would be able to dismount
12 his in-car camera and videotape this. The
13 trooper himself did not. It was solely for
14 the purpose of making the arrest, making an
15 appropriate cause determination.

16 MR. KORNFELD: May it please the court,
17 Your Honor. One, we have some disagreements
18 about the law, which isn't that uncommon.
19 But specifically in this case, as I state in
20 my brief here, the court says "we hold..." --
21 in *State v Hinkle*, the new *Hinkle* case, it
22 says that, (reading): "We hold the phrase
23 that "as soon as videotaping is practical...",
24 and these circumstances applies to both
25 videotaping -- "...must begin and video must

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1 conform to the provisions of this section.
2 Accordingly, we hold that when an
3 individual's conduct is videotaped during a
4 situation provided for in subsection (b)..." --
5 and subsection (b), if I go back to the
6 Hinkle case, subsection "b", (reading):
7 "...including the person being advised of his
8 Miranda rights" -- which the incident report
9 makes no mention of -- "...before any field
10 sobriety tests are administered ..." An HGN
11 test is a field sobriety test. (Reading
12 continued): "...if the tests are administered."

13 Then it -- and I'm reading: "Compliance
14 with subsection (a) must begin at the time
15 that the videotaping becomes practical and
16 continues until the arrest is complete."

17 Now, Justin, Mr. Holloway makes the point
18 that they couldn't think of everything that
19 could possibly happen, and he's absolutely
20 right. But they did think about an accident,
21 an emergency situation, which is why the
22 affidavit states that, which is why the
23 statute requires that and which is why the
24 Court of Appeals and Supreme Court has
25 interpreted that. They did think of this.

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1 situation and they said that when those sorts
2 of things occur that you must have an
3 affidavit. The reason is because we've got
4 issues as far as cross-examining and defend-
5 ing the case.

6 SOLICITOR HOLLOWAY: Your Honor, if I
7 may, just to briefly clarify some of the
8 facts of *Hinkle*. Sargent Hiott, who is
9 actually in attendance here today, was the
10 arresting officer in that case. This does
11 come out of the 13th Circuit, Your Honor.

12 *Hinkle* was an accident, it was a -- and
13 that's how we get ourselves under "b", just
14 like we are here today, it was -- it was an
15 automobile accident and that's when the
16 Supreme Court has now ruled that when there
17 is an accident like here, the videotaping
18 should begin as soon as reasonably practical
19 and it should have everything that (a)
20 requires, Your Honor. Which (a) says,
21 (reading): "Any field sobriety test
22 administered" -- and this is (a) again, says
23 -- "at the incident site. Any field sobriety
24 test(s) administered and Miranda rights."

25 In *Hinkle*, Your Honor, first it operated

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1 under the prior statute which made law
2 enforcement officers read a defendant his
3 *Miranda* rights before even conducting a field
4 sobriety test. Now that is not what is
5 required. Law enforcement may conduct a
6 field sobriety test and then place him under
7 arrest for DUI, then read them the *Miranda*
8 rights. It's just required that that be done
9 on camera.

10 However, the significant difference, Your
11 Honor, from *Hinkle* and the case at-hand is
12 that Defendant *Hinkle* was never taken to the
13 hospital. Specifically the Court says in the
14 recitation, "After the HGN test, Officer
15 *Hiott* and other responders were not going to
16 the hospital." So, Your Honor, in *Hinkle*,
17 what happened was that the highway patrolman
18 arrived at the scene before -- and this was
19 an old case, I believe the facts date back to
20 2009, Your Honor. It was in January 2008.
21 So the original officer who reported to the
22 scene did not have an in-car camera. At that
23 point in time, he read him the *Miranda* and
24 conducted an HGN test. Subsequently after he
25 did the HGN test, a highway patrolman with an

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1 in-car camera appeared and then everything
2 was captured on video. That is where the
3 Supreme Court was ruling about "as soon as
4 reasonably practical."

5 Here is it obviously entirely different
6 in that this defendant was taken to the
7 hospital, no field sobriety tests were
8 conducted at the incident site. Therefore
9 (a) never comes into play because there was
10 no conduct in terms of a field sobriety test
11 at the incident site.

12 He was taken to the hospital and, as I
13 previously said, Your Honor, the HGN test was
14 only conducted by the trooper for the
15 purposes of making a probable cause
16 determination. That's it.

17 MR. KORNFELD: Your Honor, the fact
18 that he went to the hospital doesn't make it
19 different in that he doesn't have to comply
20 with the statute, Your Honor. He could
21 easily comply with the statute if he goes
22 with (b). They give the government an out
23 here. Compliance can be remedied by
24 following subsection (b).

25 The fact that he gave him an HGN, that he

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1 gave him the HGN test, he keeps saying at the
2 incident site, the incident site. It's clear
3 the legislature's intent that field sobriety
4 tests were to be on camera. *Miranda* was to
5 be on camera. If neither of those did not
6 occur, you need an affidavit.

7 THE COURT: Well, what was he
8 supposed to do? Was he supposed to take a
9 camera into the ---

10 MR. KORNFELD: He was supposed
11 to have an affidavit, Your Honor, or have
12 a camera; either way, one or the other
13 according to the statute, according to the
14 law. He's got to have one or the other,
15 according to the law. Just as the officer
16 that was in here previously had a camera on
17 him, he's got to remedy it. He's supposed
18 to follow the law that I just stated, 56-5-
19 2953, if he doesn't have that.

20 The other thing that he ---

21 THE COURT: So you're saying that
22 he should have filed an affidavit?

23 MR. KORNFELD: Absolutely.

24 THE COURT: All right. Solicitor,
25 what have you got to say about that?

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1 SOLICITOR HOLLOWAY: Your Honor, I
2 would think that -- as I said, the affidavit
3 essentially goes to, in subsection (b), a
4 situation in which an officer fails to
5 produce a video in a normal scenario. It is
6 certainly a two-part statute.

7 Under 2953(b) it says, "*Failure of*
8 *an officer to produce the video recording*
9 *required by this section is not alone a*
10 *reason for dismissal of a charge.*" He can
11 then produce an affidavit as to why he could
12 not produce this video. The reasons being
13 and then go through what the reasonable
14 efforts were. Mr. Kornfeld said that if
15 emergency medical was needed, then the State
16 is not denying that emergency help was
17 needed. However what the State would
18 argument, Your Honor, is that just after that
19 line it specially delineates in circumstances
20 including, but not limited to, roadblocks,
21 traffic accident investigates and citizens
22 arrest. So that's the part that doesn't
23 mention an affidavit. The affidavit

24 THE COURT: All right, I've heard
25 enough. Motion denied. I rule with the

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1 argument by the Solicitor. Anything else?

2 SOLICITOR HOLLOWAY: Thank you,
3 Your Honor.

4 MR. KORNFELD: Yes, Your Honor.
5 I think I have one more Motion. The other
6 Motion I have concerns the implied consent in
7 this case. I've attached some of the forms
8 that were provided to me in discovery: the
9 SLED form, I've also got some medical records
10 and the distance between the accident and the
11 hospital.

12 Your Honor, in this case Officer Klemm
13 states that he, in his incident report says
14 that he stayed at the scene some time after
15 the defendant left. His video lets me know
16 that he left at least some time after 5:05
17 a.m., I know that for sure.

18 We also know that the quickest route that
19 he could take from the accident to the actual
20 hospital is 16.9 miles. According to the
21 medical records, at the time of 5:21 a.m.,
22 Mr. Mahon was unable to answer. The incident
23 report says that the advisement of the
24 implied consent rights was produced in this
25 case, and there are two things that I have I

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1 attached to this Motion. The first one says
2 "Subject's Copy." The next one says that the
3 defendant was "unable to sign."

4 Those two along with the medical records
5 showing that he was unable to answer and what
6 Mr. Mahon's father would say would let you
7 know that he did not answer, that he did not
8 consent to the blood draw at that time.

9 If he did not consent to that blood draw
10 at that time and they took it, it would be in
11 violation of his Fourth Amendment right, and
12 they could not take that. It doesn't say
13 that he was unconscious at the time.

14 The medical records -- I'm just trying to
15 get the prongs. The SLED notes say "unable
16 to sign", the implied consent form says
17 "Subject's Copy", and the medical records say
18 "unable to answer." Along with what Mr.
19 Mahon's father I think would say, when he
20 arrived there that he was in and out of
21 consciousness. Those things, taken all
22 together, lead me to believe that he did not
23 consent, Your Honor; thereby, that evidence
24 should be suppressed.

25 THE COURT: All right. Solicitor?

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1 SOLICITOR HOLLOWAY: Your Honor,
2 if I may, I have spoke with Trooper Klemm and
3 the nurse, Ms. Becky Howe, about this at
4 length. They would certainly be willing to
5 proffer testimony, if the Court deems it
6 necessary. This SLED form has been, Your
7 Honor, such a kind of thorn in everyone's
8 side, the way it looks. If you have it up
9 there, Your Honor, it says -- in the second
10 field it says, "check the correct one."

11 So essentially there are two situations
12 and the statute makes it abundantly clear --
13 and the statute that is on point, Your Honor,
14 is 2950, which talks about situations where
15 you can print this and blood. Here it's not
16 -- it's not abnormal in my experience, Your
17 Honor, for that mark on the implied mark on
18 the implied consent to say "unable to sign."
19 In this situation, it is uncontested that the
20 defendant, Mr. Mahon, was in the hospital.
21 The trooper and Miss Howe will be able to
22 testify as to what sort of condition he was
23 in while he was in the hospital. Was he
24 laying in the bed? Was he strapped down?
25 Did he have IV's in. It wasn't just that he

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1 didn't just actually not sign the sheet.

2 The trooper has written in his incident
3 report and would plan to testify at trial
4 that he certainly read him his implied
5 consent rights. The trooper has written in
6 his incident report also that at that point,
7 after he read him his implied consent rights,
8 that the defendant consented to a blood draw.
9 So at that point -- it's the trooper's
10 allegations and soon to be in-trial sworn
11 testimony that he did in fact read him his
12 implied consent rights and that the defendant
13 himself consented.

14 And, Your Honor, you also have the
15 incidence -- and this is where it typically
16 comes in -- is the fourth box in that section
17 that says, "A blood sample is requested by
18 the arresting officer because a licensed
19 medical person has informed the officer that
20 the subject is unable to take a breath test
21 at this time due to any reason deemed
22 acceptable by that licensed medical person",
23 -- that is typically the scenario that
24 happens in these situations. There is case
25 law to the effect that a scrivener's error is

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1 certainly not a reason to suppress or to
2 dismiss at the greatest length.

3 Here, as Miss Howe will testify, and I
4 spoke to her twenty minutes ago about this,
5 when an individual comes in after a car
6 accident and they are taken to a trauma bay,
7 it is on average three to four hour until
8 they are either released from the trauma bay
9 or then admitted to the hospital.

10 Regardless, it is not a situation in
11 which they can go take a breath test, Your
12 Honor. As the Court is well aware, 2950
13 would require a breath test to take place
14 within two hours of the time of arrest. In
15 this situation that determination was made by
16 licensed medical personnel, Miss Howe
17 herself, that this defendant would not be
18 able to leave the hospital, would not be able
19 to get out of there, to do this breath test
20 as well. For that reason, blood was drawn.

21 So not only do we have the trooper's
22 testimony or soon-to-be testimony as written
23 in his report that the defendant, himself,
24 consented but also Miss Howe would also
25 testify, if the court need be, that this

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1 defendant was likely not going to be out of
2 the hospital within two hours, to meet the
3 statutory requirement to give a breath
4 sample.

5 THE COURT: What about that, Mr.
6 Kornfeld?

7 MR. KORNFELD: Yes, Your Honor.
8 One, I think that they have to be in the
9 statement that he -- their statement up to
10 this point has been that he consented to the
11 blood test.

12 My statement of the actual things that
13 they have provided me with evidence would
14 show that he wasn't consenting to it, along
15 with the medical records.

16 If she -- he says that it was done at the
17 direction of the medical professional, Nurse
18 Howe. He still has to show implied consent
19 was given. Of if they are going to argue
20 something else, like that he was unconscious,
21 I would like to know that as well. But to
22 this point, they can't get over the implied
23 consent even if it was at her direction if he
24 did not give consent, Your Honor.

25 SOLICITOR HOLLOWAY: Your Honor,

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1 just briefly, I -- I don't know if Mr.
2 Kornfeld was saying that Trooper Klemm's
3 testimony is incorrect or is false. The
4 State would submit that Trooper Klemm did
5 read his implied consent rights and he wrote
6 down on the implied consent form that he was
7 unable to sign. This is not an unusual
8 occurrence, especially when someone is in the
9 hospital. On more than one occasion, a
10 defendant in a Datamaster room refuses to
11 sign. Trooper Klemm himself, on the stand,
12 under oath, will testify that he read the
13 defendant his implied consent rights. So I
14 don't understand the basis of Mr. Kornfeld's
15 argument, without us at least having some
16 testimony up there in trial.

17 THE COURT: No, I don't need that.
18 Again I deny your Motion, Mr. Kornfeld. I
19 agree with the argument by the State.

20 SOLICITOR HOLLOWAY: Thank you,
21 Judge.

22 MR. KORNFIELD: Yes, sir.

23 THE COURT: All right. Anything
24 else?

25 SOLICITOR HOLLOWAY: (No

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1 response) .

2 MR. KORNFELD: No, sir.

3 THE COURT: Bring our jury up.

4 (OFF RECORD BENCH CONFERENCE)

5 THE COURT: All right. Well,
6 let's do this on the record.

7 SOLICITOR HOLLOWAY: Your Honor,
8 would you like for us just to call our first
9 witness?

10 THE COURT: Well, let's get on the
11 record now that we are going to do a bench
12 trial, and he's got to waive his rights to a
13 jury trial.

14 SOLICITOR HOLLOWAY: Yes, sir.

15 MR. KORNFELD: Yes, Your Honor. We
16 would waive our right to a jury trial and
17 request to go forward on a bench trial. I
18 believe that the solicitor has consented to
19 that.

20 SOLICITOR HOLLOWAY: No objection
21 from the State, Your Honor.

22 THE COURT: All right. I think
23 the jury is on the way up. Bring them on in.
24 When we get them in, let me dismiss them.

25 (JURY IN @ 11:40 A.M.)

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1 THE COURT: Ladies and gentlemen, you
2 are no longer needed. So this concludes your
3 service on this case. I'm happy to inform
4 you that this will conclude your service for
5 the week. You don't have to come back the
6 rest of the day, tomorrow or Friday.

7 What we are going to ask you to do at
8 this time is to report back downstairs to the
9 jury assembly room. Judy will have a voucher
10 to give to you and a statement for your jury
11 service this week.

12 I've enjoyed working with you this week.

13 At this time, please go back to the jury
14 assembly room and see Judy. Thank you so
15 much.

16 (JURY DISMISSED)

17 THE COURT: All right, Solicitor,
18 you may proceed.

19 SOLICITOR HOLLOWAY: Yes, sir,
20 Your Honor. As you are already aware what
21 this case is about, the State will call its
22 first witness, Trooper Erik Klemm.

23 (WITNESS TAKES STAND)

24 SOLICITOR HOLLOWAY: If we could
25 just take a minute and let Ms. Garrison

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1 (court reporter) premark the exhibits.

2 COURT REPORTER: We have pre-
3 marked State's Exhibits 1 through 44 for
4 identification.

5 ERIK KLEMM, having been sworn to tell the
6 truth, and nothing but the truth, testified
7 as follows:

8 DIRECT EXAMINATION

9 BY SOLICITOR HOLLOWAY:

10 Q. Officer, would you please state your
11 name for the record?

12 A. Trooper Klemm.

13 SOLICITOR HOLLOWAY: I'm sorry.
14 Has the trooper been sworn in yet?

15 CLERK: Yes.

16 DIRECT EXAMINATION CONTINUED

17 BY SOLICITOR HOLLOWAY:

18 Q. Trooper, where are you employed?

19 A. With the South Carolina Highway
20 Patrol.

21 Q. Are you primarily stationed here in
22 Greenville?

23 A. Yes, sir.

24 Q. Where did you grow up?

25 A. Here in South Carolina; Greenville,

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1 South Carolina.

2 Q. Have you lived here your whole life?

3 A. I have.

4 Q. How long have you been with the
5 Highway Patrol?

6 A. Two years.

7 Q. What are some of your general duties
8 and responsibilities with the Highway Patrol?

9 A. Mainly traffic direction, monitoring
10 traffic, responding to collisions, as well as
11 any other traffic-related incidents.

12 Q. As part of your duties, do you drive
13 around the city and county of Greenville
14 quite often?

15 A. (Affirmative nod), I do.

16 Q. Okay. Trooper, do you recognize
17 this map or this area?

18 A. Yes.

19 Q. Is that an area here in Greenville
20 County?

21 A. It is.

22 Q. What area is that depicting?

23 A. It's south Greer.

24 Q. The incident for which we are here
25 today, did it take place in that area?

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1 A. It did.

2 Q. Can you delineate on that map where
3 it took place? Just draw a little X for me.

4 A. (Complies).

5 Q. Okay, and where on that map is that?

6 A. It is on (Highway) 14 as it crosses
7 136.

8 Q. And -- sorry, I have to go back.
9 I've gotten a little ahead of myself. On May
10 the 4th, 2014, were you working? Were you on
11 duty?

12 A. Yes.

13 Q. Did you have the opportunity to
14 investigate an incident that took place at
15 the intersection of South Carolina Highway 14
16 and 136?

17 A. Yes.

18 Q. Okay. To the best of your
19 knowledge, given that you have lived in
20 Greenville all of your life and you've been
21 with the Highway Patrol two years, where
22 generally you drive the streets and roads of
23 Greenville quite often, is that a fair and
24 accurate representation of the road layout in
25 Greenville County?

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1 A. Yes, sir.

2 SOLICITOR HOLLOWAY: Your Honor, at
3 this point the State would move to admit
4 State's Exhibit 1.

5 THE COURT: Any ---

6 MR. KORNFELD: No objection.

7 THE COURT: Okay.

8 (SO ENTERED AS STATE'S EXHIBIT 1)

9 SOLICITOR HOLLOWAY: Your Honor,
10 do you just want me to put these on the
11 table?

12 THE COURT: Let me look at it for
13 just a moment.

14 SOLICITOR HOLLOWAY: (Tenders).

15 DIRECT EXAMINATION CONTINUED

16 BY SOLICITOR HOLLOWAY:

17 Q. As part of the Highway Patrol, do
18 you have any certain training and
19 certifications?

20 A. I do.

21 Q. Can you explain your certifications
22 and training for the court?

23 A. The certifications and training we
24 do at the Academy, one of the main ones that
25 we probably are discussing is DUI detection,

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1 accident investigation and such.

2 Q. What all takes place in this
3 training? Is this initially when you become
4 a highway patrolman or do you do this
5 training regularly, annually?

6 A. It's done every two years.

7 Q. Do you have to do this training in
8 order to become a highway patrolman?

9 A. Yes.

10 Q. Again, you say that you were working
11 on the night of May the 4th, 2014.

12 A. I was.

13 Q. Did you have a chance to come into
14 contact with the defendant, Mr. Shane Mahon,
15 that evening?

16 A. Yes.

17 Q. Can you explain to the court how you
18 had a chance to come into contact with Mr.
19 Mahon?

20 A. If it pleases the court, let me get
21 my notes.

22 Q. Sure.

23 A. (Upon review), it was May the 4th,
24 2014. It was actually in the morning and ---

25 Q. What time in the morning was it?

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1 A. It was about 4:30 in the morning.
2 I was dispatched to a collision at the
3 intersection of 14 and Secondary 136, which
4 is near Pleasant Grove Baptist Church. 4:28
5 was the exact time.

6 Upon arriving at the scene, I observed a
7 vehicle that had run off the road, had rolled
8 over into the parking lot at the Pleasant
9 Grove Baptist Church.

10 After I got on scene, I turned on my
11 camera and ---

12 MR. KORNFELD: (Stands) ---

13 WITNESS: (Pause).

14 DIRECT EXAMINATION CONTINUED

15 BY SOLICITOR HOLLOWAY:

16 Q. Just answer the question. If he has
17 an objection, he'll state it.

18 A. I arrived on the scene, turned on my
19 camera, advised dispatch that I was on the
20 scene and then proceeded to investigate the
21 accident.

22 Q. You didn't mention it earlier but do
23 you have any sort of accident investigation
24 training?

25 A. I do.

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1 Q. What does that involve?

2 A. Basic investigation, how to write
3 down the TR-310.

4 Q. What is the TR-310?

5 A. The accident report.

6 Q. Okay. When you arrived at the
7 scene, did you immediately begin to
8 investigate the accident?

9 A. Yes.

10 Q. Did you have a portable camera on
11 you?

12 A. No.

13 Q. Did you take any pictures?

14 A. I did.

15 Q. What did you take the pictures with?

16 A. It was a little digital camera, I
17 believe that it was a Nikon Coolpix.

18 Q. So you would agree that you had a
19 camera on you?

20 A. Yes.

21 Q. Did you take pictures of the
22 incident scene?

23 A. I did.

24 Q. Do you recognize these photos --
25 take your time, thumb through them all. They

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1 have been marked as State's Exhibits 2
2 through 38. Please thumb through those and
3 verify that you do recognize those
4 photographs.

5 A. (Upon review), yes. I do recognize
6 them.

7 Q. Are those photographs of the
8 accident you investigated?

9 A. Yes.

10 Q. Again, for the purposes of the
11 record, where was this accident that you
12 investigated at?

13 A. At the intersection of Highway 14
14 and Secondary 136.

15 Q. And is that in Greenville County?

16 A. Yes.

17 Q. Did you take these photographs?

18 A. I did.

19 Q. Are these photographs a fair, true
20 and accurate representation of the
21 photographs that you took that day?

22 A. Yes.

23 SOLICITOR HOLLOWAY: Your Honor, I am
24 showing defense counsel what has been marked
25 as State's Exhibits 2 through 38.

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1 MR. KORNFIELD: (Upon review), I
2 have seen them, Your Honor, and have no
3 objection.

4 THE COURT: No objection. All
5 right.

6 SOLICITOR HOLLOWAY: Your Honor,
7 the State would move to admit these into
8 evidence.

9 (SO ENTERED AS STATE'S EXHIBITS 2 - 38)

10 DIRECT EXAMINATION CONTINUED

11 BY SOLICITOR HOLLOWAY:

12 Q. Trooper, can you detail for the
13 court any kind of contact that you had with
14 the defendant at that time? First, can you
15 verify Shane Mahon, the defendant sitting
16 here at the counsel table in this courtroom,
17 as the driver of this white Grand Cherokee
18 that was involved in this accident at the
19 scene?

20 A. Yes, sir.

21 Q. Can you tell the court about your
22 investigation and your interaction with Mr.
23 Mahon at the time?

24 A. The first interaction, as you say,
25 is that he was actually being extracted from

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1 the vehicle when I got on scene. The fire
2 department had cut off the roof of the
3 vehicle and they were trying to get him out
4 of the vehicle when I got there.

5 I let them do their job. They got him
6 out of the vehicle and took him and placed
7 him into ambulance.

8 I did speak with him very briefly when he
9 was in the ambulance before they left.

10 Q. Did you observe anything while you
11 were speaking with him in the ambulance?

12 A. I did. There was a very strong odor
13 of alcoholic beverage about his person.

14 Q. And when he was in the ambulance,
15 was he then taken to the hospital?

16 A. He was.

17 Q. Did you stay at the incident
18 location for a certain period of time?

19 A. Yes.

20 Q. What did you do at the incident
21 location?

22 A. As we discussed, I took pictures;
23 I marked the scene with road paint; and I had
24 to wait for the tow truck to arrive and then
25 cleaned up the debris from the vehicle.

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1 Q. Would you please review what has
2 been premarked as State's Exhibit 20.

3 A. (Review).

4 Q. Is there anything you notice in that
5 picture?

6 A. There are several Bud Lite cans on
7 the ground near the vehicle.

8 Q. Okay. When you arrived at the
9 incident location, was there anyone else at
10 the scene or inside the car with the
11 defendant?

12 A. No.

13 Q. Were you able to draw any kind of
14 conclusions about how the accident occurred?

15 A. Yes.

16 Q. Can you describe what conclusions
17 that you drew pursuant to your investigation
18 as to how the accident occurred?

19 A. The vehicle had traveled off the
20 roadway, had struck a pole and then proceeded
21 to roll over several times after striking a
22 curb.

23 MR. KORNFELD: Objection.

24 Hearsay. He did not view that, Your Honor.

25 THE COURT: Overruled. Go ahead.

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1 DIRECT EXAMINATION CONTINUED

2 BY SOLICITOR HOLLOWAY:

3 Q. You may continue.

4 A. The vehicle struck the curb and
5 proceeded to roll into the church's ground
6 and ended up in front of the church building.

7 Q. Did you -- after you took pictures
8 and waited for the car to be towed, did you
9 then proceed to the hospital?

10 A. I did.

11 Q. Was the defendant, Mr. Mahon, at the
12 hospital at the time?

13 A. He was, (affirmative nod).

14 Q. And what hospital was this?

15 A. It was Greenville Memorial.

16 Q. Did you have any sort of interaction
17 with the defendant at the hospital?

18 A. Yes, I spoke with him in the trauma
19 bay.

20 Q. While in the trauma bay, did you
21 observe any other indications that he had
22 consumed alcohol that evening?

23 A. He still smelled of alcoholic
24 beverages and he also admitted to consuming
25 alcoholic beverages.

1 Q. Okay. As part of your investiga-
2 tion, did you conduct a horizontal gaze
3 nystagmus test?

4 A. I did.

5 Q. Okay. What are you looking for in a
6 horizontal gaze nystagmus test that could
7 possibly indicate the consumption of alcohol?

8 A. There are six clues in the
9 horizontal gaze nystagmus test: two clues
10 for -- well, there is one clue for each eye
11 but there are two clues for the test; so it
12 comes to six.

13 We're looking for three different things.
14 First, the lack of smooth pursuit, where the
15 eye actually acts like a camera shutter as it
16 moves across.

17 We also look for nystagmus at forty-five
18 degrees.

19 Q. Are there certain things that you
20 have to confirm before you can conduct a
21 horizontal gaze nystagmus test?

22 A. Yes. We ask the subject if he has
23 any medical issues and, as well, if they wear
24 glasses or contacts.

25 Q. Is there anything else about equal

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1 tracking or anything of that nature?

2 A. Yes. We do look for equal tracking
3 as well as we do smooth pursuit. It is part
4 of the clues for the test but it is also to
5 make sure that if there is any head injury
6 that we would omit that test.

7 Q. Did you make sure to ask the
8 defendant whether he wore glasses or had any
9 sort of eye problems and also confirmed that
10 he had smooth pursuit?

11 A. I did.

12 Q. Or equal tracking?

13 A. Yes.

14 Q. Sorry. How many indications of
15 impairment did you notice while conducting
16 the HGN test?

17 A. Six.

18 Q. Does that tell you through your
19 training and experience that this defendant
20 had most likely consumed alcohol such that it
21 would impair him to drive a vehicle?

22 A. It would suggest that there was some
23 depressants in his system, yes.

24 Q. After that, did you arrest Mr. Mahon
25 for driving under the influence?

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1 A. I did.

2 Q. Pursuant to the law, did you read
3 the defendant his implied consent rights?

4 A. I did.

5 Q. Let me let you look at what has been
6 premarked as State's Exhibit 44. Do you
7 recognize this?

8 A. I do.

9 Q. And what is it?

10 A. That is the implied consent rights
11 that I read to Mr. Mahon.

12 Q. And is that your signature right
13 there?

14 A. It is.

15 Q. What date does that say?

16 A. May 4th, 2014.

17 Q. And what did you put where -- on the
18 subject's signature line?

19 A. "Unable to sign."

20 Q. And why did you put that on the
21 subject's signature line?

22 A. The subject was inside the trauma
23 bay. He just wasn't able to sign it at the
24 time.

25 SOLICITOR HOLLOWAY: Your Honor,

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1 I am showing defense counsel what has been
2 premarked as State's Exhibit 44.

3 MR. KORNFELD: No objection.

4 THE COURT: No objection.

5 SOLICITOR HOLLOWAY: With no
6 objection, Your Honor, the State would move
7 to have State's Exhibit 44 moved into
8 evidence.

9 (SO ENTERED AS STATE'S EXHIBIT 44)

10 DIRECT EXAMINATION CONTINUED

11 BY SOLICITOR HOLLOWAY:

12 Q. Did you read off the implied consent
13 rights to Mr. Mahon as they are listed on
14 that sheet?

15 A. I read them exactly as they are
16 listed.

17 Q. After you read them, did you request
18 the defendant to submit a blood sample?

19 A. I did.

20 Q. What was the purpose of that blood
21 sample?

22 A. To determine the amount of blood
23 alcohol in the system.

24 Q. And did the defendant consent when
25 you asked him to submit a blood sample?

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1 A. He did.

2 Q. Was there a nurse there to perform
3 or to take the blood sample?

4 A. There was.

5 Q. Who was that nurse?

6 A. Miss Becky in the back here.

7 Q. Is she present in the room today?

8 A. She is, (affirmative nod).

9 Q. I am going to show you some more
10 photographs, premarked as State's Exhibit 39,
11 State's Exhibit 40, State's Exhibit 41, and
12 State's Exhibit 42. Do you recognize these?

13 A. I do.

14 Q. Can you describe for the court what
15 is State's Exhibit 39?

16 A. That is the two vials that I
17 received from Miss Becky, who drew the blood.

18 Q. And there is a label on them?

19 A. There is, (affirmative nod).

20 Q. And what does that label say?

21 A. "Shane Mahon."

22 Q. Is there -- is the picture of
23 State's Exhibit 40 the same two vials shown
24 in State's Exhibit 39?

25 A. It is.

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1 Q. Can you describe to the court what
2 is shown in State's Exhibit 41?

3 A. This is the chain of custody
4 evidence bag that we procure at the office.

5 Q. How can you confirm that this is the
6 evidence bag that you used the evening or the
7 early morning of May 4th, 2014, of the blood
8 sample involving Mr. Shane Mahon?

9 A. It is.

10 Q. How do you know this?

11 A. I signed it and dated it.

12 Q. Is your signature on this page?

13 A. It is.

14 Q. Is the date on this page?

15 A. It is.

16 Q. Is the date May 4th, 2014?

17 A. It is.

18 Q. All right. This bag that is
19 represented in State's Exhibit 42 is the same
20 bag?

21 A. It is.

22 Q. What did you do with these two vials
23 of blood once you received them?

24 A. After we receive evidence, we take
25 it to the Patrol office to log it into the

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1 Evidence room.

2 Q. And where is the patrol office?

3 A. It is 33 Villa Road, Greenville.

4 Q. At that time they were both sealed?

5 A. Yes.

6 Q. And that office is known as Post C?

7 A. Yes.

8 Q. And what did you do with these two
9 blood vials went you got to Post C on May 4th,
10 2014, that morning?

11 A. That's when I put them into the
12 evidence bag that is in the picture. I would
13 sign and seal the bag and it would be placed
14 into the evidence locker room, inside an
15 evidence refrigerator.

16 Q. So the bag that was shown in State's
17 Exhibit 41 and State's Exhibit 42, is that a
18 bag that you obtained at Post C.

19 A. Yes.

20 Q. Were the vials packaged in another
21 bag prior to your leaving Greenville Memorial
22 Hospital?

23 A. Yes.

24 Q. Who packaged it in that bag?

25 A. Miss Becky.

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1 Q. When you got to the Post, you
2 mentioned that there is an Evidence room and
3 a refrigerator?

4 A. Yes.

5 Q. Do you typically have access to
6 that?

7 A. No.

8 Q. How did you access it that night --
9 that morning?

10 A. A supervisor has to unlock the
11 evidence room and be present with you the
12 entire time you're in the evidence room and
13 he also has to unlock the refrigerator so
14 that you can place it in.

15 Q. Do you remember the supervisors that
16 are allow to do that, do you remember that
17 off the top of your head?

18 A. They are corporals and above, and
19 ---

20 Q. Is Sergeant Hiott one of those?

21 A. Yes.

22 Q. Thank you.

23 SOLICITOR HOLLOWAY: I have
24 nothing further at this time from the State,
25 Your Honor. Trooper, please answer any

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1 question that Mr. Kornfeld may have for you.

2 THE COURT: Cross-examination?

3 CROSS EXAMINATION

4 BY MR. KORNFELD:

5 Q. Officer Klemm -- Trooper Klemm, I'm
6 sorry. Before you were talking about the
7 incident report and your recollection. Is
8 that the incident page -- it's two pages in
9 length, is that correct?

10 A. That's correct

11 Q. You mentioned that you were taught
12 at the academy and you understand the reasons
13 for filing out the incident report?

14 A. (No verbal response).

15 Q. Right?

16 A. (No verbal response).

17 Q. You understand the reason for
18 filling out the incident report?

19 A. (Affirmative nod).

20 Q. What is that reason?

21 A. To make sure that we didn't do
22 anything wrong in the investigation.

23 Q. Isn't it also so that you fully and
24 accurately complete the report so that if it
25 comes to court that both the State, maybe Mr.

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1 Holloway, and the defense attorney may be
2 able to review the report?

3 A. Absolutely.

4 Q. So it needs to be fully and
5 accurately reported?

6 A. Yes.

7 Q. So any reason in this case that it
8 wasn't fully and accurately reported?

9 A. Can you repeat the question?

10 Q. Is there any reason in this case
11 that it wasn't fully and accurately reported?

12 A. There shouldn't be a reason.

13 Q. All right. In your report you state
14 that you arrived at the scene at 4:28 a.m.;
15 correct?

16 A. I was dispatched to the scene at
17 4:28.

18 Q. So your time of arrival was 4:47; is
19 that correct?

20 A. Correct.

21 Q. And at that time you had your in-car
22 camera on when your blue lights were on as
23 you were coming to the scene of the accident;
24 is that correct?

25 A. That's correct. When my blue lights

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1 turn on, the camera turns on.

2 Q. It was positioned looking at the
3 vehicle. Correct?

4 A. I believe so. Yes, sir.

5 Q. Then, according to your incident
6 report, you went and investigated some at
7 that time. Did you take pictures at that
8 time or did you take pictures -- was that
9 part of your investigation after Mr. Mahon
10 left for the hospital?

11 A. I believe that it was actually when
12 the -- he was still in the car. I proceeded
13 to let them do their job, get him out of the
14 car, and get him in the ambulance. Then I
15 spoke with him, then I took more pictures.

16 Q. Okay. At one point in the video you
17 go back to your vehicle and position it so
18 that you can't actually see the accident or
19 Mr. Mahon or any of those. Do you remember
20 that?

21 A. I do remember repositioning the
22 vehicle, yes.

23 Q. And what was your reason for doing
24 that?

25 A. Usually when we first get on the

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1 scene, we want to make sure that the scene is
2 secure. Once the scene is secure, I try to
3 get everything out of the way. Most probably
4 I was in the way of traffic and I wanted to
5 get myself out of the way of traffic.

6 Q. It appears that it's on the side of
7 the road, that there is an ambulance that you
8 pull in front of and then position. Was it
9 on the side of the road? On in the grass?

10 A. I believe it was on the side of the
11 road, Secondary 316 (sic) -- 136.

12 Q. All right. There were also three
13 different relevant videos in this case that
14 were produced. Can you elaborate on why that
15 was?

16 A. I am not sure there were three
17 videos that were produced. Can you explain?

18 Q. One of the videos starts at 4:47 and
19 goes until 5:05. You're saying that you got
20 there at 4:47, which would make sense.

21 There are two other videos that were
22 produced that were before that time that also
23 show the actual incident site. Do you know
24 if those came from your vehicle?

25 A. I don't think so. The only

1 recording that I did come from my vehicle.

2 Q. Okay. So you only produced one
3 video?

4 A. I produced one video.

5 Q. Thank you.

6 A. Now, there were other DVDs that had
7 pictures on them.

8 Q. Okay. All right. So when you moved
9 your video, obviously we were no longer able
10 to see -- meaning myself, the defendant or
11 Mr. Holloway -- the actual incident after
12 that; correct?

13 A. Yes, sir. True.

14 Q. And there was space between the
15 incident that wouldn't have been in the road
16 and your vehicle, in which you could have had
17 the video on the actual -- on actually Mr.
18 Mahon and the vehicle, correct?

19 A. I believe that I moved the vehicle
20 after Mr. Mahon was transported.

21 Q. Okay.

22 A. If I remember correctly, I waited
23 until all that was done and then I moved the
24 vehicle.

25 Q. Would you agree that Mr. Mahon is

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1 never on the video?

2 A. That's correct.

3 Q. How long -- your video stays on
4 until 5:05. How long after that did you stay
5 at the scene taking pictures?

6 A. I believe that I was finished at the
7 scene at that point.

8 Q. And at what time are you saying that
9 Mr. Mahon was transported to the hospital?

10 A. Sometime between 4:47 and 5:05.

11 Q. Okay.

12 A. I am not sure of the exact time.

13 Q. All right. Okay. And then you went
14 to the hospital. I'm assuming you took the
15 quickest route, is that correct?

16 A. Probably, yes.

17 Q. Do you remember which route that you
18 took?

19 A. I couldn't say. Most likely down
20 85, down 85 to 25 and take that to GHS, but
21 I'm not sure. Or 185. I'm not sure.

22 Q. Do you -- how long did it take you
23 to get to the hospital? The fastest route, I
24 believe to be 16.9 miles. It'd take, if you
25 weren't speeding, about twenty-five minutes.

1 How long did it take you?

2 A. Probably somewhere between twenty to
3 thirty minutes.

4 Q. Okay. When did you arrive at the
5 hospital?

6 A. I am not sure exactly of the time
7 that I arrived.

8 Q. Okay. When did you leave the
9 hospital, when did you leave Mr. Mahon's
10 presence?

11 A. Around 6:00 o'clock.

12 Q. And when you left at that time, was
13 this gentleman in the back of the courtroom,
14 named Mr. Mahon, at the hospital?

15 A. Yes, he was.

16 Q. Okay. When you get to the hospital,
17 is he in the emergency room?

18 A. He was in a trauma bay, which is the
19 emergency room, yes.

20 Q. Okay. After you got to the
21 hospital, how long did it take you to get to
22 the ---

23 A. To his room?

24 Q. Right.

25 A. Maybe five minutes.

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1 Q. You mentioned before that you had a
2 camera, that you took a lot of pictures of
3 the incident, but you don't take any pictures
4 or any video of Mr. Mahon in the hospital.
5 Correct?

6 A. Correct.

7 Q. Did your camera have a video option?

8 A. I don't know.

9 Q. Does your cell phone have a video
10 option?

11 A. It does.

12 Q. It does or doesn't?

13 A. It does.

14 Q. Okay. So when you saw him in the
15 hospital, does he have IVs in or -- what is
16 his condition?

17 A. Honestly, I wouldn't want to say
18 because I don't remember. I believe that he
19 did have IVs in; he was in the trauma bay, so
20 he was in pretty bad condition.

21 Q. But you say that you don't want to
22 say, is that because you don't remember or
23 because ---

24 A. I don't remember.

25 Q. Then you say you administered the

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1 HGN test?

2 A. Yes.

3 Q. How many HGN tests had you given
4 prior to this arrest? Do you know?

5 A. I had never given an HGN test
6 before.

7 Q. This was your first one?

8 A. I believe so.

9 Q. All right. And you administered it
10 at the hospital?

11 A. Yes, sir.

12 Q. I am assuming he was in a bed?

13 A. In a bed in the trauma bay,
14 (affirmative nod).

15 Q. And when you administered the HGN to
16 him, was he still in the bed?

17 A. Yes.

18 Q. At that time, what was his reaction?
19 Were you having a conversation with him at
20 that time?

21 A. I was. He was conscious.

22 Q. Was he coherent?

23 A. Yes. He was able to follow
24 instructions.

25 Q. What instructions did you -- did you

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1 ask him if he wore contacts?

2 A. I believe the first part of the
3 test, if done correctly, is that you ask them
4 if they have any medical problems that would
5 interfere with the test. Then you ask if
6 they wear glasses or contacts.

7 Q. Right. You say that's what you do,
8 but did you do that in this case? Do you
9 remember?

10 A. Yes. I always do that.

11 Q. Did you check for his pupil size?

12 A. Yes.

13 Q. If he had a concussion, would it
14 affect the results of the test?

15 A. (Affirmative nod), potentially.

16 Q. Were you aware that he had a
17 concussion?

18 A. No.

19 Q. All right. In your report you
20 didn't explain, you don't state anything
21 about the amount of clues that you testified
22 to today. Do you agree with that statement?

23 A. I do agree with that, sir.

24 Q. Would you agree that your memory was
25 better then than that it is now on this case?

1 A. Yes, sir.

2 Q. And what are the three clues that
3 you look for?

4 A. Smooth tracking, nystagmus forty-
5 five degrees and nystagmus gaze.

6 Q. All right. Let's go to the implied
7 consent form. You say that you read that to
8 him and he was -- and you wrote "subject
9 conscious" on that, but you say that he was
10 unable to sign. Correct?

11 A. (Affirmative nod).

12 Q. Did you ask him to sign?

13 A. I don't recall.

14 Q. Okay. All right. Did you offer him
15 a breathalyzer in this case?

16 A. No.

17 Q. Then after you say that he
18 consented, then what did you do?

19 A. After consent, I requested the
20 charge nurse or the supervising nurse to come
21 and draw the blood for me.

22 Q. Okay. Is that what you did in this
23 case?

24 A. Yes. I don't know if Miss Becky
25 remembers but usually it's one of the charge

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1 nurses or supervising nurses who comes in and
2 I again asked him for consent to a blood draw
3 so that the charge nurse could hear.

4 Q. Okay. When you were taught how to
5 do the HGN test, did they not also tell you
6 that you should do the HGN test when the
7 suspect was upright?

8 A. He was sitting upright in the bed,
9 he was not laying down.

10 Q. But he wasn't -- you wouldn't say
11 that he was perfectly vertical; is that
12 correct?

13 A. No, he was laying back on the bed.

14 Q. Do those variations from the
15 instructions -- with a concussion, which I
16 say that you don't know, would those change
17 the, uh -- could those change the test, the
18 HGN test?

19 A. A concussion could, yes.

20 Q. All right.

21 MR. KORNFELD: No further
22 questions, Your Honor.

23 THE COURT: Redirect?

24 SOLICITOR HOLLOWAY: Just very
25 briefly.

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REDIRECT EXAMINATION

BY SOLICITOR HOLLOWAY:

Q. Trooper Klemm, please remember when you're testifying that you don't remember something off the top of your head, please consult your notes and what we have up there for you. Can you consult your incident report, just to clarify for the court's purposes, of what time you departed the incident site?

A. 6:11.

Q. What time did you arrive?

A. 4:47.

Q. And, again, what did you testify that you did at the incident site after the defendant was taken in the ambulance to the hospital?

A. I took more pictures, marked the scene and waited on the tow truck to get there.

Q. Would that take a substantial amount of time? At least thirty minutes to an hour?

A. It may be longer in some cases.

Q. Again if you'll look, just to refresh your memory, at the SLED report, what

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1 was the time of arrest?

2 A. Seven o'clock.

3 Q. Okay. What time did you request the
4 blood draw?

5 A. It would be right at 7:00 o'clock.

6 Q. What time does it say on that sheet?

7 A. The time of the test was 7:10

8 Q. Would that coincide with the time of
9 you getting to the hospital, you departing
10 the scene after 6:00 and you then arriving at
11 the hospital?

12 A. Yes.

13 SOLICITOR HOLLOWAY: No further
14 questions, Your Honor.

15 THE COURT: Thank you. You may
16 step down.

17 (WITNESS STEPS DOWN)

18 SOLICITOR HOLLOWAY: Your Honor, the
19 State would next call Miss Becky Howe to the
20 witness stand.

21 (WITNESS TAKES STAND)

22 BECKY HOWE, having been sworn to tell the
23 truth, and nothing but the truth, testified
24 as follows:

25 DIRECT EXAMINATION

1 BY SOLICITOR HOLLOWAY:

2 Q. Good morning, Miss Howe. Thanks for
3 being here with us today.

4 A. You're welcome.

5 Q. Miss Howe, how old are you?

6 A. How old?

7 Q. Yes, ma'am.

8 A. I'm thirty.

9 Q. Where did you go to school?

10 A. East Tennessee State University.

11 Q. And what did you study while you
12 were in school?

13 A. Nursing.

14 Q. And are you now a nurse?

15 A. (Affirmative nod).

16 Q. How long have you been a nurse?

17 A. Since 2008.

18 Q. How long have you lived in
19 Greenville?

20 A. Humm, -- five years?

21 Q. How long have you been a nurse with
22 the Greenville Hospital Systems?

23 A. Five years.

24 Q. Were you on duty the morning, early
25 morning hours of May the 4th, 2014?

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1 A. Yes.

2 Q. While you were on duty, did you have
3 an opportunity to come into contact with
4 Officer Erik Klemms or Mr. Shane Mahon?

5 A. Okay.

6 Q. What were the circumstances
7 surrounding your contact with these two?

8 A. I was called to the trauma bay to
9 perform a legal blood draw, by Trooper Klemm.
10 That was my only interaction with them.

11 Q. And you said a legal - and I didn't
12 understand ---

13 A. A legal blood draw.

14 Q. And did you perform a legal blood
15 draw on the defendant, Mr. Mahon?

16 A. I did.

17 Q. All right. Do you recognize these
18 photos, which have been premarked as State's
19 Exhibits 39 through 42? Please thumb through
20 them.

21 A. (Upon review), yes.

22 Q. Here on State's Exhibit 39, what
23 indication is there that lets you know what
24 this is?

25 A. It's a specimen tube with which we

1 collect all of our blood draws.

2 Q. And on that specimen tube, is there
3 a tag or something that indicates that it
4 belongs to a certain patient?

5 A. Yes, the name.

6 Q. Is that name "Shane McMahon"?

7 A. It is.

8 Q. And did you place that name label on
9 that tube?

10 A. I did.

11 Q. All right. On this one, do you
12 recognize this one as well?

13 A. Yes.

14 Q. This one has been premarked as
15 State's Exhibit 40.

16 A. (Affirmative nod).

17 Q. Is there any other indication that
18 identifies you as the person that collected
19 the blood in this vial?

20 A. Yes, it has my tech code on it.

21 Q. What's a tech code?

22 A. A tech code is the identification.
23 Each nurse, each tech that draws blood has a
24 tech code. When it is sent to the lab it has
25 to have that identification on it to tell the

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1 lab who drew the blood from the patient.

2 Q. Okay. Does each nurse have their
3 personal, individual tech code?

4 A. Um-humm, (affirmative nod).

5 Q. And this number 27521-0710, is that
6 your tech code?

7 A. The 27521 is and the rest is the
8 time code.

9 Q. So the 0710 is the time, 7:10 in the
10 morning?

11 A. Yes.

12 Q. And was 27521 your tech code on May
13 4th, 2014?

14 A. Yes.

15 Q. After you got done drawing the
16 blood, what is the procedure at Greenville
17 Hospital Systems?

18 A. After I draw it?

19 Q. Yes, ma'am.

20 A. After I draw it, I label it and
21 immediately hand it over with a chain of
22 custody form to the officer.

23 Q. Did you sign a chain of custody form
24 that day?

25 A. I did, (affirmative nod).

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1 Q. And you guys place the vials of
2 blood into a bag?

3 A. (Affirmative nod).

4 Q. Is this a bag that is a Greenville
5 Hospital Systems bag?

6 A. It is.

7 Q. Okay. While looking at State's
8 Exhibit 41 and State's Exhibit 42, can you
9 identify a separate bag inside the exterior
10 bag?

11 A. (Upon review), yeah, you can tell by
12 the blue marking.

13 Q. Is that the bag that you placed the
14 two vials of blood into?

15 A. Um-humm, (affirmative nod).

16 SOLICITOR HOLLOWAY: I don't have
17 any further questions for Miss Howe. I would
18 ask that she answer any questions that Mr.
19 Kornfeld may have.

20 THE COURT: All right. Cross-
21 examination?

22 CROSS EXAMINATION

23 BY MR. KORNFELD:

24 Q. Nurse Howe, how are you doing?

25 A. I'm good.

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1 Q. Good. Good. Were you the nurse --
2 you were the nurse that first saw him when he
3 first got to the hospital; correct?

4 A. No, I was not the primary nurse.

5 Q. All right. When did you first
6 encounter Shane Mahon; do you know?

7 A. From what I remember, it was right
8 when I drew the blood because I had two
9 nurses on duty that were trauma nurses.

10 Q. If I showed you a report, can you
11 tell me what this report is? Have you seen
12 one of these before?

13 SOLICITOR HOLLOWAY: Your Honor, just
14 to clarify, is this the report that you
15 attached to your Motion?

16 MR. KORNFELD: Yes.

17 SOLICITOR HOLLOWAY: Okay.

18 WITNESS: This is our patient
19 status documentation.

20 CROSS EXAMINATION CONTINUED

21 BY MR. KORNFELD:

22 Q. From that report, can you tell me
23 when Shane got to the hospital?

24 A. It's rather hard to tell but it
25 looks like ---

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1 Q. I've got the rest if you need it.

2 A. We usually document when one arrives
3 in a particular spot, but ---

4 Q. What would "time of greet" mean to a
5 nurse? What does that mean to you?

6 A. Time of greet. Well, for a trauma
7 patient, we drop their names into the
8 computer before they even get there, so that
9 when they get there the doctors -- for the
10 doctor's record, that has to be very precise.

11 Q. Okay.

12 A. But in the documentation further on,
13 in the trauma flow sheet, which that isn't
14 the trauma flow sheet, but that would
15 specifically say exactly when they arrived.

16 Q. In this sheet it states that he was
17 unable to answer on several things. Is that
18 -- would that mean because he was actually
19 unable to answer?

20 A. No, dropping it down, we will put
21 that there if they're in critical condition
22 and then we will go back and change this once
23 we know the condition.

24 Q. Were you aware that Mr. Mahan had a
25 concussion from the accident?

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1 A. No, I don't think I knew that he had
2 a concussion. I can't recall.

3 Q. Is it safe to say that you came in
4 to draw, as you say, to draw -- legal -- to
5 draw the blood. Was that your primary
6 purpose?

7 A. Yes, because I already had two
8 nurses caring for him.

9 Q. When you came in to draw the blood,
10 was -- did you see Officer Klemm giving Mr.
11 Mahon a piece of paper or implied consent at
12 that time?

13 A. I can't recall.

14 Q. Do you know if he was instructing
15 him on -- about the tests when you came in?

16 A. I'm sorry, I can't recall that
17 either.

18 Q. Okay. All right. Did you write on
19 the -- there was another form, it was a SLED
20 form and it appears that it was someone
21 else's writing and it says your name on
22 there. Is that your writing?

23 A. Yeah.

24 Q. Let me give you the sheet. Sorry.

25 A. Yeah.

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1 Q. Have you ever seen this South
2 Carolina Law Enforcement Division urine blood
3 collection report?

4 A. Yes.

5 Q. Where did you fill this out?

6 A. In the trauma bay.

7 Q. How long were you in the trauma bay?
8 I guess, how long did you see Mr. Mahon?

9 A. Maybe -- typically it doesn't take
10 very long to draw blood. It could have been
11 ten minutes, but I don't know the exact time.

12 Q. Okay.

13 A. It depends on how easy they are to
14 get blood from.

15 Q. All right. Did you see anything
16 around Mr. Mahon as far as any kind of
17 paperwork or did the officer tell you 'I'm
18 giving him some paperwork.' I know you said
19 that you didn't see anything like that before
20 but did you see any paperwork anywhere?

21 A. Not that I recall.

22 Q. Did you write at the bottom of that
23 -- and let me show it to you again. I'm
24 sorry. Did you write "unable to sign" on
25 that form that I just showed you or was that

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1 written by someone else?

2 A. I usually don't write anything like
3 that on the papers. I mean, usually not.

4 Q. Do you know if this is your
5 handwriting?

6 A. No, that's not my handwriting.

7 SOLICITOR HOLLOWAY: Your Honor,
8 I believe that Trooper Klemm has already
9 mentioned on the record -- has already said
10 that he was the one who wrote "unable to
11 sign" on there.

12 MR. KORNFELD: I saw on the subject's
13 copy, and I was just making sure. This is a
14 different form.

15 THE COURT: Go ahead.

16 CROSS EXAMINATION CONTINUED

17 BY MR. KORNFELD:

18 Q. Do you remember if Mr. Mahon had
19 anything wrong with his hands, was there
20 anything over his arms or hands?

21 A. I don't remember.

22 Q. All right. Okay. Do you remember
23 what kind of medicine that he was
24 administered at the time?

25 A. No, I wasn't there in the presence

1 of any medicine, medication
2 administration.

3 MR. KORNFELD: No further
4 questions, Your Honor.

5 THE COURT: Any redirect?

6 SOLICITOR HOLLOWAY: Just briefly,
7 Your Honor

8 THE COURT: Go ahead.

9 REDIRECT EXAMINATION

10 BY SOLICITOR HOLLOWAY:

11 Q. Miss Howe, will you read from this
12 medical report's History the present
13 complaint?

14 A. (Reading): *"Patient was restrained*
15 *driver in vehicle rollover at high speed,*
16 *possible loss of consciousness, patient has*
17 *obvious deformity to left lower leg and right*
18 *upper arm. Patient was given Narcan prior to*
19 *arrival by EMS. Patient alert and oriented*
20 *X1. Upon arrival to E.D., patient asking*
21 *repetitive questions. Patient admits to*
22 *drinking prior to arrival. C-spine*
23 *precautions maintained upon arrived to the*
24 *E.D."*

25 Q. Where is it on this sheet that the

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Testimony of Wesley Hiott

1 patient admits to drinking alcohol?

2 A. Yes, (indicating).

3 Q. No further questions.

4 THE COURT: Thank you, you may
5 step down.

6 (WITNESS STEPS DOWN)

7 THE COURT: May we excuse this witness?

8 SOLICITOR HOLLOWAY: Yes, Your Honor.

9 THE COURT: Objection to excusing her?

10 MR. KORNFELD: No, Your Honor.

11 THE COURT: Thank you. You are
12 excused.

13 SOLICITOR HOLLOWAY: Your Honor, the
14 State would next call Wes Hiott to the stand.

15 (WITNESS TAKES STAND)

16 WESLEY HIOTT, having been sworn to tell
17 the truth, and nothing but the truth,
18 testified as follows:

19 DIRECT EXAMINATION

20 BY SOLICITOR HOLLOWAY:

21 Q. Sergeant, where are you employed?

22 A. South Carolina Highway Patrol.

23 Q. How long have you been employed by
24 the Patrol?

25 A. Twenty-four and a half years.

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Testimony of Wesley Hiott

1 Q. Can you tell the court, explain to
2 the court what indicates that?

3 A. Uh, when you see a name on it as far
4 as who recovered, when they recovered, where
5 they recovered on it.

6 Q. Does it have a date on it?

7 A. Yes, it does.

8 Q. Is that date May the 4th, 2014?

9 A. Maybe I am getting old, but I can't
10 see -- (upon review), yes.

11 Q. Refreshing your memory from what you
12 see in front of you, can you explain to the
13 court how this evidence was processed when it
14 arrived at Post C?

15 A. Basically it's a chain of custody.
16 It's got the date on it of when he obtained
17 the blood, what type of evidence that it is,
18 our case number, Officer Klemm's name on it,
19 the subject that he obtained the blood from
20 is on there, the date, uh, time of the
21 violation. It's got a description of what he
22 placed in evidence, which shows:

23 Item one, two vials of blood labeled
24 "Shane A. Mahon."

25 From there it's got a place to show

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Testimony of Wesley Hiott

1 the movement of the blood from Trooper Klemm
2 to the Post C evidence refrigerator, which
3 the refrigerator that night would have been
4 locked up. It's stored in there until we
5 actually transported it down to our central
6 evidence facility in Columbia.

7 It was placed into evidence on 5/4.

8 On 5/5 it was taken out of the Post
9 C evidence refrigerator by myself and given
10 to Trooper T.J. Frick to deliver CEF on May
11 5th.

12 Then it shows where it was received
13 at ---

14 Q Okay. Let's leave it at that. What
15 is CEF?

16 A. It is our Central Evidence Facility.
17 They are responsible for collecting and
18 storing all of our evidence -- not collecting
19 but storing all of our evidence throughout
20 the whole agency, the Highway Patrol in
21 Columbia.

22 Q. And is Trooper Frick, Corporal
23 Frick, does he work at the Central Evidence
24 Facility?

25 A. Yes, he's the supervisor there.

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Testimony of Rodney Frick

1 A. We won't accept it if it is not
2 sealed.

3 Q. So is it safe to say -- is it safe
4 to draw the conclusion that if evidence is
5 not sealed that it would be marked
6 stringently throughout the chain of custody;
7 that it would be improper to store it and
8 reseal it?

9 A. That's correct.

10 Q. Do you recognize these three photos
11 that have been premarked as State's Exhibits
12 41, 42 and 43?

13 A. (Upon review), yes, sir, I do.

14 Q. And what are these three exhibits,
15 what do they display?

16 A. Exhibit 41 and Exhibit 42 are the
17 actual South Carolina Department of Public
18 Safety evidence bags that we received at the
19 central evidence facility.

20 Q. So are those the bags that would
21 have been transported from Post C down to
22 CEF?

23 A. That's correct.

24 Q. And these were sealed bags?

25 A. Yes, they are.

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1 Q. And inside these sealed bags there
2 were two -- were there two vials of blood?

3 A. According to the chain of custody
4 there were two vials of blood inside a blue
5 bag.

6 Q. Is there a way to confirm from this
7 sealed bag that it is a certain -- how is it
8 recorded and documented from the bag to the
9 chain of custody?

10 A. If you look on the bag, it's got --
11 the defendant's name that it was recovered
12 from -- or the suspect's. It also has a
13 South Carolina Department of Public Safety
14 evidence label with the case number, the
15 officer's name and the subject's, which
16 corresponds to what is on the chain of
17 custody.

18 Q. And how does the Highway Patrol keep
19 their chain of custody reports?

20 A. We keep the chain of custody with
21 the evidence.

22 Q. How long did -- you said you've been
23 working with the Highway Patrol now for
24 twenty-two years?

25 A. Yes, sir.

1 Q. And how long have you been working
2 at CEF?

3 A. Since 2008.

4 Q. How long have you been using that
5 form?

6 A. This form in particular?

7 Q. Yes.

8 A. A very long time. I can't recall
9 when this form came out. Prior to this it
10 was a form that was similar, and this has
11 just a few modifications. This one has been
12 around since 2008 and before.

13 Q. Is this a form that is regularly
14 kept throughout the operations of the Highway
15 Patrol?

16 A. Yes, it is.

17 Q. And what is the purpose of this form
18 and why is it regularly kept?

19 A. This form documents the evidence,
20 gives the violator's name, gives a
21 description of the evidence and also notates
22 the movement of the evidence from location to
23 location, along with who moved it from
24 location to location.

25 Q. If you could do a guesstimate, and

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1 that may not work, but how much evidence do
2 you guys deal with on a weekly basis, a
3 monthly basis, an annual basis?

4 A. I can give you an example from last
5 week but ---

6 Q. Last week would be perfect.

7 A. Last week we had a busy week. We
8 transferred a little over twenty pieces of
9 evidence to SLED on Monday, on Tuesday we
10 transferred thirty pieces of evidence to
11 SLED, and then on Thursday a little over
12 twenty again.

13 Q. Okay.

14 A. That is not including the evidence
15 that we take in that is stored at our
16 facility.

17 Q. For every piece of evidence that you
18 transfer to SLED, for every piece of evidence
19 that's stored at the facility, do you
20 document it on a form just like that?

21 A. Yes, we do.

22 Q. Is it an identical form just like
23 that?

24 A. Yes, it is.

25 Q. Is it the identical form except for

1 the specifics or particulars that deal
2 specifically with this case?

3 A. That's correct.

4 SOLICITOR HOLLOWAY: Your Honor,
5 pursuant to the business exception records,
6 the State would move to submit this chain of
7 custody and have this chain of custody
8 admitted into evidence. It has not been
9 premarked.

10 THE COURT: Any objection?

11 MR. KORNFELD: No, Your Honor.

12 COURT REPORTER: State's Exhibit

13 45.

14 (SO ENTERED AS STATE'S EXHIBIT 45)

15 DIRECT EXAMINATION CONTINUED

16 BY SOLICITOR HOLLOWAY:

17 Q. Corporal, is your name on that
18 sheet?

19 A. Yes, sir, it is.

20 Q. Where is your name on that sheet and
21 what does it tell the court? What does it
22 demonstrate to the court?

23 A. In the transfer section of the form,
24 my name is on the last two lines.

25 On May 6th, 2014, it documents that I

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1 removed this item from our safe at our
2 facility and transferred it to SLED for
3 analysis.

4 Q. And what has been premarked as
5 State's Exhibit 43, can you tell us what you
6 see in this photo?

7 A. Yes, sir. That is a SLED photo
8 evidence bag and that -- when we take
9 evidence to SLED, they take our evidence --
10 or box, whatever it is in - place it inside
11 one of their bags, heat-seal it, we then
12 initial and sign along the seal and they
13 enter it into the official log.

14 Q. Is your name on that official log?

15 A. Yes, it is.

16 Q. What is the date on this?

17 A. May 6th, 2014.

18 Q. Does that May 6th, 2014, date
19 correspond with the date that is on the chain
20 of custody?

21 A. Yes, sir, it does.

22 SOLICITOR HOLLOWAY: Your Honor, I
23 am going to show defense what has been
24 premarked as State's Exhibit 43, (tendering).

25 MR. KORNFELD: (No verbal

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1 response upon review).

2 SOLICITOR HOLLOWAY: No further
3 questions for the corporal at this time.

4 THE COURT: Any questions?

5 MR. KORNFIELD: No questions, Your
6 Honor.

7 THE COURT: Thank you, you may
8 step down.

9 (WITNESS STEPS DOWN)

10 SOLICITOR HOLLOWAY: Your Honor,
11 may the corporal be excused and relieved from
12 the subpoena?

13 THE COURT: Sure. Any objection
14 to excusing?

15 MR. KORNFIELD: No, Your Honor.

16 THE COURT: All right, let's take
17 a short recess at this time. Do you have
18 more?

19 SOLICITOR HOLLOWAY: Yes, sir,
20 Your Honor, the State has one more. It's our
21 forensic scientist.

22 THE COURT: How long?

23 SOLICITOR HOLLOWAY: Very short.
24 We need to qualify him as an expert but
25 expect that it will be relatively short, no

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1 more than twenty-five or thirty minutes,
2 tops. Probably twenty. We've been rushing
3 through.

4 THE COURT: Are you from
5 Greenville or Columbia?

6 WITNESS: Columbia.

7 THE COURT: Okay, let's take a
8 short recess.

9 (BRIEF RECESS)

10 THE COURT: Call your next witness
11 so that we can get her back to Columbia.

12 SOLICITOR HOLLOWAY: The State
13 would call next Carmen Tucker to take the
14 witness stand.

15 (WITNESS TAKES STAND)

16 CARMEN TUCKER, having been sworn to
17 tell the truth, and nothing but the truth,
18 testified as follows:

19 DIRECT EXAMINATION

20 BY SOLICITOR HOLLOWAY:

21 Q. Good afternoon, Ms. Tucker. Thanks
22 for being here with us today? Where are you
23 employed?

24 A. With SLED, South Carolina Law
25 Enforcement Division.

1 Q. How long have you been employed with
2 SLED?

3 A. Nine years.

4 Q. For the purposes of this trial we
5 are going to refer to it as SLED, if that is
6 all right with you?

7 A. That's fine.

8 Q. Where did you go to school?

9 A. Originally I had my Bachelors of
10 Science degree at Armstrong State University
11 in Savannah, and I have Bachelor of Science
12 degree from Wake Forest in Winston-Salem,
13 North Carolina.

14 Q. And when you graduated with your
15 master's, what was your next position of
16 employment?

17 A. My next position of employee was at
18 the Research Triangle Institute in the
19 Raleigh-Durham, Chapel Hill area of North
20 Carolina. I did drug research.

21 Q. Going from that position to your
22 time at SLED, what have you done --
23 experience-wise, what have been your duties
24 or professional responsibilities?

25 A. I started out at SLED in the drug

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1 analysis department. I was there for four
2 years in training. After training, I then
3 was transferred to the toxicology department
4 basically to learn more, because there was
5 more to learn in that department -- I
6 thought. I was trained with in-house
7 training and attended the law legal at the
8 Academy, the South Carolina Law Enforcement
9 Academy. Every year we are sent to training
10 abroad, so we have to go to different places
11 to train.

12 Q. In the drug analysis department,
13 what were your primary duties and
14 responsibilities?

15 A. In drug analysis, we received cases
16 in that department. We basically analyzed
17 all the evidence in that case, issued
18 reports; and testified in court, if need be.

19 Q. What sort of evidence were you
20 analyzing?

21 A. The drug analysis department we were
22 analyzing any types of drugs that were
23 brought in on a case.

24 Q. All right. When did you shift to
25 toxicology?

1 A. I took a transfer to toxicology in
2 July of 2010.

3 Q. And have you been with toxicology
4 ever since?

5 A. I have.

6 Q. What are your day-to-day primary --
7 in toxicology, what are your primary duties
8 and responsibilities?

9 A. The primary duties in toxicology are
10 the analyses of biological and nonbiological
11 evidence. We do the analyses, we issue
12 reports and then testify in court if need be.

13 Q. You mentioned training.

14 A. (Affirmative nod).

15 Q. Have you had any ongoing training
16 since you moved to toxicology in 2010?

17 A. Yes. Every year we have to do on-
18 going training, in-house and out. We also
19 have to take proficiency tests in all the
20 areas that we are trained in.

21 Q. What does that training consist of?

22 A. Initially you will be trained in
23 volatile analyses, which covers alcohol
24 testing; drug screen training, where we can
25 screen the samples for drugs; and then also

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1 if it is a fire death, we do CO testing.
2 Then you go on into the actual quantitation
3 training, where you are trained to analyze
4 those samples for what components are there,
5 to confirm them. Then you also quantitate
6 the value.

7 Q. And you said that as part of your
8 training and in your time with toxicology
9 that you have to do proficiency exams?

10 A. We do.

11 Q. What are those proficiency examina-
12 tions on?

13 A. Proficiency examinations are on the
14 alcohol and drugs. We get some that we just
15 test for alcohol on, then we get some for
16 drugs as well.

17 Q. As part of this training are you
18 required to perform analyses of not just
19 testing a certain substance, whether it is
20 urine or blood for the presence of ethanol or
21 drugs, but also if it were present how that
22 would impair the human body?

23 A. Yes. Impairment training is
24 something that we also get. It's kind of
25 incorporated into the rest of our training.

1 So we don't just train on the analysis of the
2 samples but we also trained on the compound's
3 action on the body and what that causes.

4 Q. And are you proficient at explaining
5 what a certain level, of ethanol for example,
6 would have on the typical human body?

7 A. Yes, I am.

8 Q. And that is something that you're
9 well-versed on?

10 A. Yes, I have.

11 Q. Have you ever been qualified as an
12 expert before in a court of law in the field
13 of forensic science and toxicology?

14 A. Yes, I have.

15 Q. Have you ever testified as to levels
16 of ethanol in blood and what that level of
17 ethanol present in blood would do as it
18 relates to impairment?

19 A. Yes, I have.

20 SOLICITOR HOLLOWAY: Your Honor,
21 pursuant to Rule 702; Ms. Tucker's education,
22 Bachelor of Science, her Master's in Science;
23 her several years with SLED, especially the
24 last five; her training and experience and
25 certificates of expertise, the State would

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1 move that she be certified as an expert in
2 the fields of forensic science and of
3 toxicology.

4 THE COURT: Cross-examination?

5 MR. KORNFELD: No, Your Honor.

6 THE COURT: She's qualified.

7 Proceed.

8 SOLICITOR HOLLOWAY: All right.

9 DIRECT EXAMINATION CONTINUED

10 BY SOLICITOR HOLLOWAY:

11 Q. Ms. Tucker, in your position as a
12 forensic scientist at SLED, are you guys
13 trained or made aware of the different
14 policies and procedures that are in place
15 from the actual reception of evidence until
16 it is actually analyzed?

17 A. Yes, we are.

18 Q. Reviewing your chain of custody as
19 it pertains to this case --- well, first, Ms.
20 Tucker, do you recognize what has been marked
21 as State's Exhibits 39 through 43. Please
22 take your time and look at all five.

23 A. (Upon review), yes. I do.

24 Q. Were these pictures taken at SLED,
25 at the SLED facility?

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1 A. Yes, they were.

2 Q. Did you review the samplings and
3 tests that were done on these five -- on the
4 two samples that are presented in these five
5 pictures?

6 A. Yes.

7 SOLICITOR HOLLOWAY: Your Honor, now
8 that the State has completed the chain of
9 custody, we would move to admit State's
10 Exhibits 39 through 43 into evidence.

11 THE COURT: Any objection?

12 MR. KORNFELD: May I see them?

13 SOLICITOR HOLLOWAY: Yes,
14 (tenders).15 MR. KORNFELD: (Upon review),
16 no objection.

17 THE COURT: Without objection.

18 (SO ENTERED AS STATE'S EXHIBIT 39)

19 (SO ENTERED AS STATE'S EXHIBIT 40)

20 (SO ENTERED AS STATE'S EXHIBIT 41)

21 (SO ENTERED AS STATE'S EXHIBIT 42)

22 (SO ENTERED AS STATE'S EXHIBIT 43)

23 DIRECT EXAMINATION CONTINUED

24 BY SOLICITOR HOLLOWAY:

25 Q. If you will turn to your laboratory

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1 report -- well, first, what was your role as
2 a forensic scientist as it pertains to the
3 vials/pictures that were just taken into
4 evidence?

5 A. Once the samples were tested for
6 blood alcohol and an initial drug screen was
7 performed, this case was assigned to me as a
8 Level II Analyst. I would then make sure
9 that anything that came up, I would go over
10 and submit it for further testing if need be.

11 Q. Okay.

12 A. Then I'm responsible for issuing the
13 report.

14 Q. Let's take it back a step. When
15 this vial first reaches the Level I Analyst,
16 would does that Level I Analyst test for?

17 A. A Level I Analyst would test for
18 alcohol in the content of the blood. They
19 would also do an initial drug screen, which
20 covers a handful of panels and compounds that
21 we would look for that are typically abused.
22 Then if it is a fire situation, they would
23 also do a CO test. That's what they're
24 responsible for.

25 Q. And what are the procedures in place

1 when they do a test for both alcohol and
2 drugs? How are those conducted?

3 A. When they do the initial alcohol
4 tests, they will run the samples with the
5 appropriate controls. Those controls have
6 to meet our specs or they will have to be
7 redone, will not be allowed.

8 Then they run that sample again, a
9 second time, and compare the two values that
10 they receive. Those values have to agree
11 within an eight percent differential.

12 Q. What are the specs that go into each
13 test? How is each test conducted?

14 A. Okay. Well, initially when they run
15 any sample we have different concentrations
16 of known standards that have to be run with
17 that sample. Those standards are checked to
18 be sure that they fall into the range that
19 they are supposed to fall in.

20 They also run a negative control
21 which doesn't have alcohol in it and then
22 what we call a check mix, which has several
23 different volatile compounds in it, which
24 tells us -- that's how identify the alcohol
25 or ethanol, based on what ethanol, methanol

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1 or isopropanol that we find, and things like
2 that.

3 Q. And if it doesn't complete that
4 first test, is the test redone?

5 A. Yes.

6 Q. In this incidence was the first test
7 completed successfully?

8 A. Yes.

9 Q. What date was that test completed?

10 A. Sorry, I'll have to look at my chain
11 of custody. (Upon review), that test was
12 performed on May 13th, 2014.

13 Q. What happened after the first test
14 was completed?

15 A. After the first test was completed;
16 at that time the evidence is in the analyst's
17 custody. They will scan the evidence
18 electronically into the refrigerator's
19 custody. It will be locked up in the
20 refrigerator until such time as they take it
21 out and repeat the test.

22 Q. So is the second test, the
23 repetitive test, is that done to ensure that
24 the results you're getting are correct?

25 A. Yes.

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1 Q. Is the second test done the same way
2 as the first test?

3 A. Yes, it is.

4 Q. Does it use the same exact controls
5 as well?

6 A. It does.

7 Q. In this test did everything check
8 out?

9 A. Yes, it does.

10 Q. Can you explain to the court -- this
11 is sort of complicated and I am just using
12 shorthand. In order to check it out again,
13 how many controls are there and what must be
14 tested correctly in order for the test to
15 move on to the second test?

16 A. There are a number of different
17 controls. It is basically ethanol standards
18 at a known concentration. In front of the
19 standard a .08 ethanol standard will be ran,
20 and it will also be run after that sample.
21 We also run a .15 and a .4, to cover the
22 range, to make sure that our instrumentation
23 can see the wide ranges of ethanol.

24 We also run the data control that I spoke
25 of, and that's run right behind the highest

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1 control, which is .4, and that shows that
2 there is no carryover.

3 Then we have the check mix, as I stated
4 earlier, that has several different volatile
5 compounds in it of known concentrations that
6 we can look at and say -- can determine if --
7 they all come out at a different time,
8 different retention times, so we know where
9 ethanol comes out, where isopropanol comes
10 out.

11 Q. Okay. In the first test, which you
12 know the control sample, if the test does not
13 come back to be .08, it is then stopped and
14 redone?

15 A. The standard also has a degree
16 within a certain percentage, it has to be
17 within five percent of the known value. So
18 it has to be within five percent of .08.

19 Q. In this situation, since it was
20 tested a second time, does that mean that all
21 the controls checked out and that SLED was
22 very sure about the level of alcohol
23 concentration in this first test?

24 A. That's correct.

25 Q. Is this procedure replicated a

1 second time?

2 A. Yes, it is.

3 Q. Does the second -- do you use the
4 exact same controls the second time?

5 A. We use the same controls,
6 (affirmative nod).

7 Q. And is there an additional
8 verification percentage that must be used to
9 ensure the calculation between the first test
10 and the second test?

11 A. Additional?

12 Q. Well, you mentioned five percent, it
13 had to be within a five percent limit.

14 A. (Affirmative nod).

15 Q. Is there an additional one after the
16 second test?

17 A. Well, the controls, the .08
18 standard, has to agree with its known value
19 within five percent. The value that we get
20 from the instrument for the actual case
21 sample, the first value and the second value,
22 those two have to agree within eight percent
23 of each other in order to be accepted.

24 Q. In your opinion this is an extreme
25 policy and procedure that is made to ensure

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1 the validity and accuracy of the tests?

2 A. Yes, it is.

3 Q. And once the test -- in this
4 situation, who performed the alcohol
5 analysis?

6 A. In this situation the alcohol
7 analysis was formed by Stacy Matthews.

8 Q. Once that analysis was performed,
9 who performed the drug analysis?

10 A. The initial drug screen was
11 performed by Kelly A. Buffin (phonetic).

12 Q. So once those two screens are
13 performed, is that when you come into play?

14 A. That's correct. If there is a need
15 to send it an analyst, they will assign it to
16 a Level II Analyst, which in this case was
17 me. Then I will take the case from there.

18 Q. What is the difference between a
19 Level II and a Level I Analyst? Are both
20 Kelly Buffin and Stacy Matthews Level I
21 analysts.

22 A. They are Level I Analysts. They are
23 training to be Level II at this time.

24 Q. What is the distinction between
25 Level II and Level I?

1 A. Level II are primarily responsible
2 for cases that -- we take care of all the
3 cases that need further analyses, where we
4 need to confirm the different quantification
5 of those drugs in residence, when we need to
6 get an amount of those drugs, a quantitative
7 value on those drugs -- or qualitative. Some
8 times it is urine that we are testing and we
9 only report 'positive' or 'negative.' But
10 any time that there is a need to go further
11 -- for example, with a DUI case, if you have
12 a value that is coming in at less than .08,
13 that automatically gets kicked up to Level II
14 to run more general screens, to cover our
15 bases, to make sure that there is nothing
16 else present that could cause impairment.

17 Q. So in this particular case, what was
18 -- when you received the sample as an
19 analyst, what did you intend to -- what were
20 your duties as it pertained to this case?

21 A. As it pertained to this case, I was
22 responsible for anything that showed positive
23 on the drug screen, to make sure that goes on
24 to test for quantitative value and
25 confirmation.

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1 I was also responsible for reading and
2 looking over all of the quality data for all
3 of the runs; for the alcohol run, for the
4 drug screen run, to make sure that they met
5 within our standards.

6 And then I was responsible for issuing
7 the report.

8 Q. This report, does this report show
9 what was found to be in the defendant's
10 system?

11 A. Yes, it does.

12 Q. Before we get to the results that
13 are there in that report, can we walk through
14 quickly how SLED would ensure that when we
15 already have Corporal Frick drop off what was
16 the defendant's blood, how does SLED ensure
17 that that blood is actually what was tested
18 and what you've written your report on?

19 A. Sure. When Corporal Fricks brings
20 the blood to SLED, he will go into the
21 evidence control department. In the evidence
22 control department, he will sit with the
23 technician that works there -- in this case I
24 believe that it was Doris Yarbrough.

25 That same technician will take the

1 evidence that he has brought in and will
2 check it to make sure that it is sealed. If
3 they can confirm the seal, they will initial
4 that seal and date it.

5 They will then sit with him while it is
6 packaged into one of our SLED heat-sealable
7 bags.

8 Q. Is that a SLED heat-sealable bag as
9 shown in State's Exhibit 43?

10 A. I don't have it in front of me but
11 if you have a picture of it.

12 Q. I apologize, (tendering). There
13 are differences in these bags?

14 A. Yes.

15 Q. And State's Exhibits 42 and 43, is
16 State's Exhibit 43 a SLED heat-sealable bag?

17 A. That's a SLED heat-sealable bag.

18 Q. And that bag is representative of
19 the bag that the vial will be placed in when
20 it is brought into SLED?

21 A. Whatever package that they bring it
22 in and whatever package that's confirmed the
23 seal on the package, that's what she will
24 place the sealed package in.

25 Q. Okay.

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1 A. She will place it, in front of the
2 officer, in a SLED sealed bag. It will be
3 sealed in front of that officer and that
4 officer will sign and date the seal.

5 Q. Is that Corporal Fricks' signature,
6 or his writing, or his name on the bag?

7 A. Yes, it is..

8 Q. After it gets taken into SLED, what
9 happens next?

10 A. Well, they also issue a lab number.
11 Typically in these cases now that we have our
12 I-LAB system up and running, the officer has
13 already entered all of the information:
14 suspect's name and otherwise into the system.
15 So they issue a lab number. This evidence,
16 like I said, is sealed from the officer; he
17 initials and will date the bag. Then that
18 evidence is then taken at that time into the
19 custodian's custody at SLED.

20 She takes it and scans it into their
21 lockable room, which in our case it would be
22 a refrigerator in their lockable room because
23 it needs to be refrigerated.

24 That is where it stays until such time as
25 they call us and tell us that it's time to

1 come and pick the evidence up.

2 Q. On the chain of custody, when do
3 they call and tell you it is time to pick the
4 evidence up?

5 A. It looks like on May 7th, 2014 at
6 9:21 a.m. Ms. Patricia H. Crooks let our
7 department know that it was okay to come and
8 get the evidence.

9 Q. So someone in your department, in
10 toxicology, got the evidence?

11 A. Yes. Kevin Selenka (phonetic) at
12 9:23, two minutes later, would have come down
13 and picked the evidence up.

14 Q. And what were his responsibilities
15 in the case?

16 A. Kevin picked the evidence up. It
17 was scanned into his custody electronically.
18 He brings it upstairs and he will then do an
19 inventory of the evidence. He takes it to
20 the inventory area, he will cut open the bag,
21 -- none of the tubes are opened, but he takes
22 pictures of everything, from start to finish.
23 State's Exhibit 43 is a picture of the bag as
24 he received it. Then he takes pictures of
25 all of the packaging from outside in, all the

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1 way down to the tubes which are rotated
2 and taken pictures of so that he can get all
3 of the information. We do this so that we
4 have a record of what was received, the
5 manner in which it was received. We also do
6 that so that we can make sure that what we
7 see matches what was entered into our system.

8 Q. Once you are sure it is what was
9 entered into your system, does he then reseal
10 the bag?

11 A. He does. He reseals the tubes back
12 into the original SLED bag. He puts his
13 initials and date on the seal.

14 Q. And after he takes pictures of
15 everything and puts his initials on the seal,
16 what does he do with the blood next in this
17 case?

18 A. He would return it to our walk-in
19 refrigerator and it's locked in there until
20 such time as analysis is started.

21 Q. Can only forensic scientists or
22 toxicologists, are they the only ones that
23 can enter the refrigerator, or perform the
24 analyses; or how does that work?

25 A. Toxicologists are the only people

1 allowed. You have to be in our department to
2 get into that refrigerator.

3 Q. And once all the alcohol analyses
4 were performed and the drug analyses were
5 performed, you said then that's when you were
6 handed the case to review and to eventually
7 you do a report?

8 A. That's correct.

9 Q. Did you do a report in this case?

10 A. I did.

11 Q. What were your findings in regards
12 to ethanol present in the defendant's system?

13 A. 0.159.

14 Q. In your expert opinion as a forensic
15 scientist, what would a blood alcohol level
16 of 0.159 do to someone's impairment or
17 ability to drive?

18 A. There are quite a few things that
19 are characteristic of that blood level for
20 alcohol. You could have impairment of motor
21 sensory. When you drive, you do a lot of
22 things. You have divided attention,
23 basically. You're operating the gas, the
24 brake, the steering wheel, the turn signals,
25 you're looking at your mirrors, you're

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1 gauging cars, you're reading road signs. We
2 sometimes take that for granted, we don't
3 think about all the things that we are doing.
4 So when you're operating under an alcohol
5 level such as this, those become impaired.
6 You're not able to focus on everything. So
7 you have impairment of concentration, you
8 have impairment of visual acuity, impairment
9 of peripheral vision and glare recovery,
10 impairment of memory, balance, drowsiness.
11 There are a number of things that can present
12 themselves at a level like this.

13 Q. Would all those affect one's ability
14 -- would all of those, in the words of the
15 law, materially and appreciably impair one's
16 ability to drive?

17 A. Yes, they would.

18 Q. In your expert opinion, would the
19 average individual with a 0.159 blood alcohol
20 level, would his faculties be materially and
21 appreciably impaired?

22 A. Yes, they would.

23 SOLICITOR HOLLOWAY: Your Honor,
24 no further questions for the expert.

25 THE COURT: Cross-examine?

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1 MR. KORNFELD: Yes.

2 CROSS EXAMINATION

3 BY MR. KORNFELD:

4 Q. When you do a test -- when the bring
5 you a test in there, you're not told any of
6 the facts or the case or anything about the
7 blood tests; correct? You just take the
8 tests, is that right?

9 A. It depends on what they put in the
10 history, in the paperwork that we receive.

11 Q. Okay. In this case were you given
12 any facts about this case?

13 A. Pertaining to?

14 Q. The blood that you received?

15 A. I will have to look back at the
16 scanned document. Just one second.

17 Q. Okay.

18 A. (Upon review), in this case, which
19 is typical for DUI cases, we received the
20 I-Lab submission where they checked all the
21 different boxes. We also received the urine
22 blood collection report.

23 Q. Okay.

24 A. That's all the information that we
25 got.

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1 Q. Okay. Would the fact that he lost
2 several pints of blood possibly change a
3 reading of a blood test?

4 A. The level of blood (sic) in his
5 blood would be uniform. I mean, he wouldn't
6 have -- I mean, loss of blood wouldn't cause
7 a change in that.

8 Q. Well, the actual test is for
9 ethanol, correct?

10 A. That's correct.

11 Q. Which is not actual -- I guess --
12 it's different than alcohol? Ethanol?

13 A. Ethanol is ---

14 Q. Yes. And they also showed in the
15 report that he tested positive for a very
16 small amount of morphine. Did you notice
17 that?

18 A. Yes, that was confirmed.

19 Q. Are you aware or not if that
20 occurred at the hospital or otherwise?

21 A. I have no documentation of where
22 that occurred.

23 Q. And you said that there is a reading
24 -- a margin of error, as there would be in
25 any test. Correct?

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1 A. Correct.

2 Q. And in this case you stated that it
3 was -- can you say it again? Five percent?
4 Eight percent?

5 A. With this particular test sample, it
6 has to agree with the secondary run within
7 eight percent. Myself, I say within two
8 percent of the eight percent.

9 Q. All right. So you would agree that
10 there is a two percent variation?

11 A. Yes, I would.

12 MR. KORNFIELD: Thank you. No
13 further questions.

14 THE COURT: Redirect?

15 SOLICITOR HOLLOWAY: No questions.

16 THE COURT: Thank you, you may
17 step down.

18 (WITNESS STEPS DOWN)

19 SOLICITOR HOLLOWAY: Your Honor,
20 the State resets. May Miss Tucker be excused
21 from her subpoena?

22 THE COURT: May she be excused?

23 MR. KORNFIELD: Yes, Your Honor.

24 THE COURT: You are excused.

25 Thank you, ma'am. All right, do you have any

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1 testimony or would you like to make some
2 Motions now?

3 MR. KORNFELD: Yes, Your Honor, I
4 would like to make some *Motions.

5 THE COURT: Sure.

6 MR. KORNFELD: My first Motion
7 and likely my most important Motion is that
8 the State did not, there was no evidence or
9 testimony otherwise that Mr. Mahon was ever
10 given his Miranda rights. It was not in his
11 incident report, which I know is not
12 evidence.. He did not testify to it on the
13 stand here. And he didn't give him an HGN
14 test.

15 The law is clear on the newest case,
16 *State v Hinkle* and also 56-5-2953 that
17 *Miranda* is required if a -- if a test is
18 given. Here we are not even -- I am not even
19 bringing in the fact that there wasn't video.
20 It simply was not done, they did not prove it
21 and the correct remedy for that is dismissal,
22 Your Honor.

23 THE COURT: Solicitor?

24 SOLICITOR HOLLOWAY: Your Honor,
25 we have gone over the statute, and the Court

1 is well aware, that the statute requires that
2 if *Miranda* be given at the incident site, on
3 video, at the time of arrest, there -- the
4 Court has already ruled that it was not
5 necessary for the trooper to video inside the
6 hospital room again. The State is not trying
7 to admit any sort of testimony from the
8 defendant post-arrest that would require
9 *Miranda* be read to him. There is nothing on
10 the record here and certainly there are no
11 statements from the defendant that he made
12 post-*Miranda* that could have been made while
13 in custodial arrest. So, Your Honor, at this
14 point I would argue that there was no
15 requirement per the statute to read him the
16 *Miranda* rights on the ---

17 MR. KORNFIELD: That is not the
18 case. *State v. Hinkle* states that very
19 clearly. The new case states that if they
20 are given a field sobriety test that they
21 must be read *Miranda* rights. They must be
22 read *Miranda*, that's exactly what it says.
23 It says, "including the arrest of a person
24 for violation or probable cause determination
25 ... must show the person being advised of

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1 *Miranda rights.*"

2 In this case it's clear that the
3 Court has said that, that if sobriety tests
4 are given that *Miranda* must be given.
5 Regardless of whether it's on videotape,
6 because you have already ruled on that. But
7 it has to be given. He did not give it. He
8 gave an HGN test. That is a violation of the
9 statute, which means in this case that the
10 case has to be dismissed if you follow the
11 law. That's what the law says.

12 THE COURT: How about that,
13 Solicitor?

14 SOLICITOR HOLLOWAY: Your Honor,
15 briefly I would just say that what Hinkle is
16 standing on is that *Miranda* must be read to
17 defendants at the time of arrest on video in
18 a situation such as *Hinkle* where a videotape
19 can be made as soon as practical. Subsection
20 (a) in 2953, one of the things that it
21 requires of course is "at the incident scene,
22 the defendant's conduct in a field sobriety
23 test must be caught on video and *Miranda* must
24 be read to him at the time of arrest" on
25 video.

1 Hinkle is directly related to that
2 requirement in 2953(a).

3 What the defense attorney, Mr. Kornfeld,
4 has misapplied here is that this is not a
5 Hinkle scenario, in which the court has
6 already ruled pretrial that this was not a
7 scenario in which it was reasonable for the
8 officer to have video of anything of the
9 defendant at the hospital. Therefore, there
10 are no requirements to have *Miranda*
11 exclusively shown on video. That is why
12 Hinkle is not applicable here, Your Honor.

13 MR. KORNFELD: Your Honor, I am
14 not arguing that it is on the video. I know
15 that you have already ruled on that issue.
16 My argument is that it doesn't say in Hinkle
17 -- that if there is no video that then you
18 don't have to follow the statute, you don't
19 have to read the *Miranda* to them any more,
20 and just 'don't worry about *Miranda*.' It
21 doesn't say that at all. It still says you
22 have to give them the *Miranda* instructions,
23 the *Miranda* rights.

24 That did not occur. The law
25 requires the court to dismiss a case if that

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1 is the scenario, not whether or not it was
2 videoed. That is a totally separate issue.
3 The only reason that the Court wanted it to
4 be on video is so that we can cross-examine.
5 It says that in the *Hinkle* case, goes into
6 depth about that. It doesn't say that if
7 there is no video, don't worry about video.
8 You have to give the defendant *Miranda* rights
9 if you give them a field sobriety test, Your
10 Honor.

11 THE COURT: Solicitor?

12 SOLICITOR HOLLOWAY: Your Honor,
13 it appears that this Motion to Dismiss was
14 already dealt with on the front end. Here we
15 are at a directed verdict -- the period of
16 time in which to make a directed verdict.
17 The elements of the offense happened that the
18 State has asserted all four elements and has
19 produced evidence of all four elements of
20 driving under the influence. Defense counsel
21 is now asserting, and the again State would
22 implore that it does not fit in this
23 scenario. It's the videotaping requirement
24 2953 -- the statute is specifically labeled
25 -- I apologize, Your Honor, 56-529 says

1 "incident site and breath test site video
2 recorded." This is strictly a provision of
3 the law of driving under the influence that
4 deals with video recording. And, Your Honor,
5 unless I am mistaken, I believe that the
6 Court has already held that this is not a
7 situation in which a video recording was
8 necessitated and where standing was required
9 under the statute.

10 THE COURT: I have said that.
11 Mr. Kornfeld?

12 MR. KORNFELD: I think Mr.
13 Holloway was paraphrasing. That is not --
14 I don't agree that is what it says. It says
15 that, "including the arrest of the person"
16 and that's what's got to be on the video.
17 The other parts say "to show the person being
18 advised of his *Miranda* rights."

19 So we can understand what the
20 legislature's intent was to say. They
21 thought that *Miranda* was so important that
22 they thought that it needed to be on video.
23 That is my argument.

24 In this case it wasn't on video.
25 There is no dispute about that. In this case

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1 it doesn't say that because he wasn't there
2 or because you couldn't get a video there
3 because we find that it wasn't practical or
4 whatever ruling there would be on that. It
5 doesn't say that you don't have to give them
6 *Miranda* otherwise. It says absolutely the
7 opposite. The statute is very clear. It
8 says that to give them a field sobriety test
9 that you've got to give them *Miranda*. That
10 did not occur.

11 The fact that he argues all these
12 other things around it are irrelevant to this
13 Motion in particular. The law is clear, the
14 statute is clear, and the most recent case --
15 *Hinkle* -- is clear on this as well, Your
16 Honor.

17 THE COURT: Let me see your
18 statute and *Hinkle*.

19 SOLICITOR HOLLOWAY: Do you mind
20 looking at it out of the statutory book?

21 THE COURT: No, that's fine.

22 SOLICITOR HOLLOWAY: (Tenders to
23 Judge Pyle). I know Mr. Kornfeld would never
24 mislead the court but I certainly didn't
25 paraphrase. That's where it begins, right

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1 there.

2 MR. KORNFELD: Well, you didn't
3 read it directly from the statute.

4 THE COURT: (Upon review), I am
5 going to deny your Motion, Mr. Kornfeld. It
6 appears to be that this case, *State v.*
7 *Hinkle*, is applicable to the facts of this
8 case and for that reason I would deny your
9 Motion.

10 MR. KORNFELD: I would also like
11 to renew both of my Motions that I put in the
12 brief and to also elaborate concerning
13 whether or not it was reasonably practical.

14 Mister or Officer Klemm said that he
15 had at least a camera. He took pictures at
16 the wreck site. He did not take any pictures
17 of Shane Mahon. He also testified that he
18 also had video recording capability and that
19 he could have video-recorded the implied
20 consent.

21 After hearing that evidence,
22 concerning the case and how the case it was
23 reasonably practical, he failed to do so. He
24 failed to file an affidavit; thereby causing
25 the violation of the statute. That would be

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1 grounds for dismissal, Your Honor.

2 THE COURT: I would again deny
3 that Motion.

4 MR. KORNFELD: And the other --
5 I would like to renew my Motion to Dismiss
6 the memoranda of implied consent.

7 THE COURT: And I deny that.

8 MR. KORNFELD: All right. The
9 other Motion that I would make would be is
10 that the nurse did not testify -- I inquired
11 about the statute that specifically states --
12 she did prove that blood was taken at the
13 direction of the nurse. She testified that
14 she had come in and made the legal blood draw
15 at his request. Also there was no testimony
16 about whether it was requested -- whether a
17 breath test was offered, whether he had an
18 injured mouth, whether he was unconscious or
19 dead. So the only exception that would apply
20 would be that it would be under the direction
21 of the licensed medical personnel, not the
22 other way around, Your Honor.

23 THE COURT: Solicitor?

24 SOLICITOR HOLLOWAY: Your Honor,
25 there is testimony on the record that the

1 Defendant himself consented to a blood draw.
2 At that point in time, Trooper Klemm asked
3 Miss Howe to come perform a blood draw
4 pursuant to the defendant's consent to have
5 one drawn.

6 There is also testimony on the
7 record from Miss Howe about the average stay
8 of someone in the trauma bay.

9 As we know, there is also testimony
10 on the record that Mr. Mahon checked into the
11 hospital at 5:21 -- this was brought out on
12 cross-examination by Mr. Kornfeld and on
13 redirect examination of Trooper Klemm, we
14 were able to determine that the blood draw
15 was actually taken at 7:10 a.m. It is very
16 clear that this was a situation in which the
17 defendant, Mr. Mahon, was not going anywhere,
18 that he was at the hospital being treated for
19 a very, very serious accident as the pictures
20 exemplify. It certainly was not a scenario
21 in which the blood was drawn either without
22 his consent or a situation where a breath
23 sample could have been taken instead of a
24 blood draw sample, which is clearly more
25 invasive. We were in a situation where Mr.

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1 Mahon was in the hospital and a blood draw
2 was the only means by which the State could
3 get an accurate blood alcohol reading, and
4 that the defendant, after being read his
5 implied consent rights knew that he had the
6 right to refuse and still consented, Your
7 Honor.

8 MR. KORNFELD: Your Honor, I
9 don't believe that Officer Klemm testified
10 that he said it was at 7:10 a.m. As a matter
11 of fact, I believe that he left from his
12 presence at ---

13 THE COURT: Well, how could they
14 give him a breathalyzer test in the hospital
15 when he was in a bed?

16 MR. KORNFELD: I don't know, Your
17 Honor. I assume that is just what the
18 statute says, that you've got to offer one.

19 THE COURT: All right, I deny your
20 Motion.

21 MR. KORNFELD: But, Your Honor, I
22 want to object to the fact that he says that
23 he that at 7:15, when Officer Klemm said that
24 he left at around 6:00 a.m. from his
25 position. So we know from his own testimony

1 that he took that blood prior to that
2 time.

3 THE COURT: Okay.

4 SOLICITOR HOLLOWAY: Your Honor,
5 I am positive that I went back and cleaned
6 that up on redirect with Trooper Klemm. My
7 exact words were "please review your incident
8 report and refresh your memory of the chain
9 of custody" - and he did review that.

10 THE COURT: All right, the record
11 will show that.

12 MR. KORNFELD: The time that he
13 put the time down and not when he left that
14 room, there is a distinction there that needs
15 to be made.

16 THE COURT: Okay.

17 MR. KORNFELD: The other *Motion
18 that I have concerns the potential juror who
19 did disclose the fact that her husband is an
20 officer, is a police officer. She did that
21 at jury qualification and then when asked up
22 here, she didn't say anything.

23 THE COURT: Well, she denied it.

24 MR. KORNFELD: She denied it,
25 correct. She denied that he was South

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Testimony of Ronald Mahon

1 Carolina Highway Patrol, so technically she
2 answered my question correctly. She did not
3 respond direct, or truthfully, to your
4 question by saying 'yes, I have a close
5 family member that is Highway Patrol.'

6 THE COURT: Okay.

7 MR. KORNFELD: Which would leave
8 the inference to be that she would be so
9 prejudiced in that that she wasn't even going
10 to divulge it to the court so that she could
11 be questioned about it; thereby prejudicing
12 my client and ---

13 THE COURT: Okay. I hear you.
14 Motion denied.

15 MR. KORNFELD: Thank you. Your
16 Honor, I have no further Motions. We would
17 call Ron Mahon to the stand.

18 (WITNESS TAKES STAND)

19 RONALD MAHON, having been sworn to tell
20 the truth, and nothing but the truth,
21 testified as follows:

22 DIRECT EXAMINATION

23 BY MR. KORNFELD:

24 Q. Please state your name.

25 A. Ronald Mahon.

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Testimony of Ronald Mahon

1 Q. Good. And you are the father of
2 Shane Mahon?

3 A. I am.

4 Q. Did you arrive at Greenville
5 Memorial Hospital on the morning of May 4th,
6 2014?

7 A. I did, roughly around 6:00 a.m.

8 Q. When you arrived at that time, were
9 you in the room with your son, Shane?

10 A. Yes.

11 Q. Can you describe his -- was he awake
12 at that time?

13 A. He was awake but he was kinda in and
14 out, doing some mumbling words.

15 Q. Was there anything wrong with his
16 hands?

17 A. No.

18 Q. Did you have occasion to see Officer
19 Klemm there?

20 A. Yes.

21 Q. Do you know what time that he left?

22 A. Roughly 6:10, right around that
23 time.

24 Q. Did he ever come back to the room
25 while you were there?

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Testimony of Ronald Mahon

1 A. No.

2 Q. Did you see any forms or anything
3 like that when you were there? Any of those
4 around? Or did he tell you about -- did you
5 notice any forms at all?

6 A. No.

7 Q. Was anything given to you?

8 A. No.

9 Q. Did the officer say anything to you
10 about arresting your son?

11 A. No.

12 Q. Did you notice that your son was
13 restrained in the bed?

14 A. No.

15 Q. Would you have noticed?

16 A. Yes.

17 Q. All right. Were you able to have --
18 was Mr. Mahon, your son, able to have any
19 coherent conversations?

20 A. Yes, but it wasn't very coherent.

21 No.

22 Q. Why do you say that? Can you
23 elaborate on that?

24 A. He was kind of going in and out,
25 talking about things that happened in the

1 past. He looked at me and he looked at the
2 trooper, and that was about it. The trooper
3 came and said to just tell him that he -- he
4 did mention something about taking a vial of
5 blood. He did say that he would advise him
6 to get a lawyer because it takes four to six
7 weeks for the blood work to get back. And he
8 said that if things were good that he could
9 beat it.

10 Q. All right. How long were you there
11 before -- your son went into surgery after
12 that?

13 A. Yes, that afternoon.

14 Q. He went into surgery for -- he had
15 an issue with his foot that he had to have
16 surgery on?

17 A. Yes.

18 Q. At what point did he become coherent
19 during that day?

20 A. Through the whole day, he -- he
21 started getting coherent in the afternoon.

22 Q. And what -- do you know if he was
23 hooked up to any IVs when you walked in?

24 A. Yes.

25 Q. All right. And he was -- do you

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Rebuttal Testimony of Erik Klemm

1 know if he was on pain killers?

2 A. He was on pain medication. They
3 would come in every four hours to administer
4 pain medication. After two and a half hours,
5 he would be back awake -- tossing and turning
6 because his leg was hurting him so badly.

7 Q. Thank you.

8 MR. KORNFELD: No further
9 questions.

10 THE COURT: Solicitor?

11 SOLICITOR HOLLOWAY: Nothing from
12 the State, Your Honor. However, if it is
13 necessary, the State can recall Trooper Klemm
14 as a rebuttal witness to testify that he did
15 hand Mr. Mahon a copy of the implied consent.

16 THE COURT: Well, any questions?

17 SOLICITOR HOLLOWAY: No, sir, no
18 questions for him.

19 THE COURT: You may step down.

20 (WITNESS STEPS DOWN)

21 THE COURT: Anything else?

22 MR. KORNFELD: That is our case,
23 Your Honor.

24 THE COURT: Anything in reply?

25 SOLICITOR HOLLOWAY: Your Honor,

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Rebutttal Testimony of Erik Klemm

1 the State would just very briefly recall
2 Trooper Klemm to the stand.

3 Your Honor, he's rested his
4 case. This is in the purview of rebuttal

5 ---

6 THE COURT: Any reply?

7 (OFFICER ERIK KLEMM RESUMES STAND)

8 THE COURT: You are still
9 under oath. Be seated.

10 ERIK KLEMM, having been previously
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY SOLICITOR HOLLOWAY:

14 Q. Trooper Klemm, briefly, what is
15 the policy that takes place when you are
16 reading someone their implied consent
17 rights?

18 A. The first thing that occurs as
19 soon as I've told somebody that they're
20 being placed under arrest is -- before I
21 read them their implied consent rights, I
22 actually have a card in my pocket that I
23 will pull out and read to them, which is
24 the *Miranda* warnings.

25 Q. Then you would go forward to

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1 implied consent?

2 A. Then I would go forward to
3 implied consent, (affirmative nod), after
4 reading *Miranda*. I would then -- I have
5 two pieces of paper, one of which is the
6 subject's copy, which Mr. Mahon received,
7 and one which is my copy. I give them
8 their copy and they would, they could if
9 they wanted to, follow along with me. If
10 they don't, then I would read them the
11 entire implied consent.

12 Q. Every time that you make an
13 arrest for driving under the influence,
14 do you have two copies of the implied
15 consent?

16 A. Every time, (affirmative nod).

17 Q. Do you always give a copy to
18 the person who has been charged with
19 driving under the influence?

20 A. Every time.

21 Q. In this incident on the early
22 morning of May 4th, 2014, at the
23 hospital, the Greenville Memorial
24 Hospital, did you give Mr. Mahon a copy
25 of this implied consent form?

1 A. Yes.

2 THE COURT: Any questions.

3 CROSS EXAMINATION

4 BY MR. KORNFELD:

5 Q. Officer Klemm, where did you
6 give him the report? Did you put it in
7 his hands?

8 A. Yes.

9 Q. But earlier you testified that
10 you don't remember whether he had IVs or
11 what condition that he was in. Correct?

12 A. That's correct.

13 Q. And you also said that you
14 believe that Miss Howe, the nurse, would
15 also testify that she saw you gave that.
16 Correct?

17 A. I don't know if I said that or
18 not.

19 Q. Well, did you -- you did say
20 that you give the implied consent to Mr.
21 Mahon in front of R.N. Howe, did you not?

22 A. Sorry?

23 Q. You did say that you gave the
24 implied consent to Mr. Mahon in front of
25 Nurse Howe; correct?

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A. No.

Q. What did you say?

A. (No verbal response).

Q. You -- nobody witnessed that
then?

A. Mr. Ron was in the room with
us.

Q. Mr. Ron was in the room and now
you're saying that he saw the implied
consent?

A. Yes.

Q. Did you testify to that
earlier?

A. No.

SOLICITOR HOLLOWAY: Nothing
further from the State, Your Honor.

MR. KORNFELD: I am not done,
Your Honor.

SOLICITOR HOLLOWAY: I'm sorry.

CROSS EXAMINATION CONTINUED

BY MR. KORNFELD:

Q. Also when I asked you
questions he stated -- you told me before
that you wouldn't remember when you got
there, is that correct?

1 A. That is correct. I didn't
2 write down the exact time. I wrote
3 approximately.

4 Q. And would you say that you left
5 Mr. Mahon's room at 6:05, as you
6 testified earlier, and did not return to
7 his room?

8 A. No, that was a mistake on my
9 part. I left the accident scene at
10 approximately 6:11 and traveled to the
11 hospital.

12 Q. So Mr. Mahon, Sr.'s statement
13 that you left around 6:05, you dispute
14 that?

15 A. Yes.

16 Q. You think that you got to the
17 hospital at 6:11?

18 A. I left the accident scene at
19 6:11.

20 Q. So you also dispute your
21 earlier statement that you left at 5:07
22 a.m. when your video turned off; which is
23 what you stated earlier?

24 A. Sorry. Say that again?

25 Q. Earlier you testified that you

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1 left the accident site at 5:07 a.m. when
2 your video ended.

3 A. No, I don't believe that I said
4 that. It would have taken me a lot
5 longer to have worked the accident than
6 thirty minutes.

7 MR. KORNFELD: Your Honor, I
8 would ask for the transcript to be read
9 back.

10 THE COURT: My recollection is
11 that he cut his camera off and then he
12 continued his investigation. That's what
13 I recall him saying. But if you want to
14 play it back, that's fine. Give the
15 court reporter some indication of where
16 the ---

17 MR. KORNFELD: It was Officer
18 Klemm's response in the State's case,
19 cross-examination.

20 THE COURT: All right, we will
21 have to take a recess while she does
22 that. Why don't y'all stay there and we
23 will find the testimony?

24 MR. KORNFELD: Okay.

25 THE COURT: All right, let's take

1 the scene after 6:00 and you then arriving at
2 the hospital?

3 A. Yes.

4 SOLICITOR HOLLOWAY: No further
5 questions, Your Honor.

6 (PLAYBACK CONCLUDED)

7 THE COURT: Okay.

8 EXAMINATION CONTINUED

9 BY SOLICITOR HOLLOWAY:

10 Q. All right, Officer Klemm, your
11 report indicates departed at 6:11,
12 correct?

13 A. Departed from the accident
14 scene; yes, sir.

15 Q. And it says that you had
16 arrived at 4:47; correct?

17 A. Correct.

18 Q. So your statement before is
19 that you left once the video turned off
20 and came over to that, you were mis-, --
21 that you mis-remembering what occurred;
22 correct?

23 A. I misspoke. Yes.

24 Q. Did you not remember or did you
25 misspeak?

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1 A. I misspoke.

2 Q. You did say that Mr. Mahon
3 stayed in the hospital and then you left.
4 Correct? You left Mr. Mahon's room, the
5 defendant's room. Correct?

6 A. At what time? Sorry.

7 Q. He says shortly after 6:00
8 o'clock because he was there at 6:00
9 o'clock.

10 A. No way. I was still on the
11 accident scene.

12 Q. All right. So basically
13 you're saying that Ron Mahon wasn't there
14 at 6:00 o'clock and that you didn't leave
15 there at 6:00 o'clock. Is that what
16 you're saying? That you didn't leave
17 there at 6:00 o'clock?

18 A. I don't know what time Mr. Ron
19 got there but I wasn't there at 6:00
20 o'clock.

21 Q. Do you remember -- obviously we
22 just heard the transcript back. Before
23 you'd said that you'd left at 5:07 and
24 you agreed with that.

25 A. I do agree that I first said

1 that.

2 Q. And then after Mr. Holloway
3 asked you some questions and then said,
4 'well, it says here on this form 7:00
5 o'clock', you said 7:00 o'clock.
6 Correct?

7 A. Yes.

8 Q. You were testifying to what the
9 actual form said, correct?

10 A. Correct.

11 Q. And you would say that if your
12 incident report, if it was different from
13 what it actually said at the top, that
14 you notate it in your actual incident
15 report if it was at a later time;
16 wouldn't you?

17 A. I am not certain of the
18 question. Can you repeat it?

19 Q. Yes. Your incident report says
20 that -- where it says arrival time/depart
21 time, what is the depart time?

22 A. That's the time that I would
23 have left the accident scene.

24 Q. Not the time that your
25 investigation has been completed for the

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1 day; is that correct?

2 A. No, this was just the time that
3 I would have been leaving the scene to go
4 to the hospital at.

5 Q. And nowhere in your incident
6 report is there any indication or does it
7 say anything about a time later than
8 6:11; correct?

9 A. (Upon review), no.

10 SOLICITOR HOLLOWAY: No further
11 questions. Thank you.

12 MR. KORNFELD: No questions.

13 THE COURT: You may step down.

14 (WITNESS STEPS DOWN)

15 THE COURT: Anything further?

16 SOLICITOR HOLLOWAY: Nothing from
17 the State, Your Honor.

18 MR. KORNFELD: Your Honor, if I
19 could renew all my Motions.

20 THE COURT: Certainly.

21 MR. KORNFELD: Okay. The first
22 Motion has to do with the Miranda, the
23 fact that ---

24 THE COURT: You can just
25 summarize.

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1 MR. KORNFELD: I am just trying
2 to make sure that I'm protected, I guess,
3 because they could say that I didn't put
4 it on the record.

5 The case law in *Hinkle*, as I
6 previously stated states that the new
7 *Hinkle* case states that -- I believe that
8 the new rule is that he has to -- the
9 rule is that if he gives -- that if an
10 officer gives a defendant a field
11 sobriety test, then Miranda must be
12 given. If that does not happen on video,
13 then the next thing that has to occur is
14 part (b) of the statute, which states
15 that he must fill out an affidavit
16 explaining one of the four exceptions
17 that are listed in the statute, this one
18 being -- this one being -- I would say
19 that the defendant needed emergency
20 medical treatment, which was the case
21 here.

22 Because *Miranda* was never given,
23 that's one issue in this case, this case
24 should be dismissed.

25 The second issue is the video --

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1 that there needs to be a video in this
2 case showing the incident site and
3 showing *Miranda*. In this case there was
4 no *Miranda* of him taking any field
5 sobriety test. So they are different but
6 they are related. That did not occur in
7 the case and the legislature, the Supreme
8 Court and the Court of Appeals have both
9 made it clear that that is grounds for
10 dismissal when an affidavit is not filed.

11 The other issues that I've got are
12 that *Hinkle* says you must start videoing
13 as soon as it is reasonably practical and
14 continue until the arrest ends -- in a
15 felony DUI case, it would be until there
16 was probable cause. In this case, until
17 the arrest concludes.

18 In this case, Officer Klemm
19 testified that he had a camera and he
20 took pictures of the scene. He did not
21 take any pictures of Mr. Mahon. He
22 didn't take any pictures of him. He also
23 did not take any pictures at the
24 hospital. He also testified that he did
25 have video recording, that his phone

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1 could video record and that he did not
2 video record.

3 For those reasons, I would say that
4 under *Hinkle* and the statute that it was
5 as soon as reasonably practical and he
6 still failed to follow the statute or to
7 file an affidavit explaining why it was
8 not practical.

9 The other Motion was/is they -- they
10 didn't prove that he was physically
11 unable -- as stated, he's supposed to
12 take a breath test in the hospital. The
13 statute states that he was physically
14 able. So I would make the argument that
15 he is supposed to at least be offered a
16 breath test prior to the blood test.

17 The last Motion concerns the
18 possible juror who did not divulge
19 information when you requested
20 information about whether a family member
21 -- in this case, her husband -- works for
22 -- is a police officer in some capacity.
23 She stated at jury qualification on
24 Monday that he was an officer. I
25 objected and she stated that he was not a

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1 Highway Patrol. I believe that would
2 show that she -- the fact that she even
3 failed to divulge it, to give you that
4 information, would leave the inference
5 that she would be prejudiced and -- and
6 in that case should have been struck
7 under those conditions, Your Honor.

8 THE COURT: Okay. All right,
9 anything further now, gentlemen?

10 SOLICITOR HOLLOWAY: Nothing from
11 the State, Your Honor.

12 MR. KORNFELD: I guess you're
13 going to rule?

14 THE COURT: Well, no. On your
15 Motions, I denied your Motions.

16 MR. KORNFELD: Thank you.

17 THE COURT: All right. Now, we
18 are at a point where I assume that you
19 want to make some arguments.

20 SOLICITOR HOLLOWAY: Your Honor,
21 if we may, I believe the State's
22 summation and closing argument would be
23 five to seven minutes. Very brief.

24 MR. KORNFELD: I can do the same.

25 THE COURT: I'm just thinking.

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Motions Renewed by Defense

1 It's almost 2:30. We've run through
2 without lunch. The court reporter ---

3 COURT REPORTER: I'm okay if you
4 are.

5 THE COURT: Well, I think we'll
6 break for the day and start back at 9:00
7 o'clock in the morning. That will give
8 you time to get some thought together,
9 you can make your arguments and then I'll
10 see if I can come to a decision.

11 SOLICITOR HOLLOWAY: Okay.

12 MR. KORNFIELD: Thanks, Your
13 Honor.

14 (COURT IN RECESS)

15 (TRANSCRIPT CONTINUED NEXT PAGE)

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Closing Argument by Defense

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JULY 16, 2015 9:00 a.m.

(DEFENDANT PRESENT)

THE COURT: Gentlemen.

MR. KORNFELD: I believe that I
am supposed to go first.

THE COURT: Doesn't make any
difference to me.

MR. KORNFELD: If it please the
court, Your Honor, you've heard all the
facts in this case. On May 4th, 2014,
Officer Klemm made his first DUI arrest.

As you know more than anybody, they
must show that he was materially and
appreciably impaired at the time of the
accident. There is no testimony, direct
testimony that anyone saw this accident,
who did attempt to testify as to what he
thought occurred. We do not know what
time this accident occurred from the
facts or how long after Officer Klemm
came on the scene at that time.

With this, you do not have the
necessary element of driving. Therefore,
under the law you would not be able to

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Closing Argument by Defense

1 convict him.

2 The officer took several pictures at
3 the scene, none of which included the
4 defendant. This, Your Honor, takes your
5 ability away to evaluate for yourself if
6 Shane Mahon was materially and
7 appreciably impaired, at least at the
8 scene.

9 It is evident that the officer was
10 unclear of the timeline, so we must look
11 to what we were given at the trial. We
12 must look to his testimony, which
13 contradicts from the beginning to when
14 Mr. Holloway asked him questions, along
15 with the testimony of Nurse Howe, along
16 with the testimony of Ron Mahon, father
17 of the defendant.

18 First Officer Klemm's video starts
19 at 4:47 and ends at 5:05 a.m. That was
20 uncontradicted.

21 We also know that the officer moved
22 his vehicle so that we can no longer see
23 what he saw as Shane Mahon's conduct at
24 the scene.

25 He then first testified that when he

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Closing Argument by Defense

1 left the scene and he got back in the
2 vehicle -- he first testified that he
3 left the scene when he got back in the
4 vehicle, at 5:05, to leave for the
5 hospital; which was 16.9 miles away, if
6 you took the fastest route. He states
7 that it took him twenty to twenty-five
8 minutes to get to the hospital. We also
9 know that he first left Shane's side for
10 good at around 6:05 or 6:10 a.m., and
11 that Shane's father was there.

12 This is also what he testified, that
13 his incident report states, that the
14 incident ended at 6:11 a.m. as the depart
15 time.

16 Mr. Ron Mahon testified that he got
17 to the hospital, after his son was in a
18 catastrophic accident, at approximately
19 6:00 a.m. on May 4th, 2014; and that the
20 officer left five to ten minutes later.
21 This is corroborated by the officer's
22 first statement, his testimony about his
23 report and Mr. Ron Mahon's statement that
24 the officer left Shane's side at
25 approximately 6:10 a.m.

1 Before the officer leaves and
2 after Shane suffered a concussion, the
3 officer said that he gave Shane an HGN
4 test, which is a field sobriety test,
5 while he was in a hospital bed. I asked,
6 'did you think about how accurate this
7 test would be after a catastrophic
8 accident and after all the evidence that
9 was given, including the fact that he had
10 a concussion and the fact that there were
11 other drugs in this system -- or another
12 drug in his system. Morphine was in his
13 system as well, which I would believe
14 that was through IVs as his dad testified
15 to, as his dad testified that he was
16 under a lot of pain medication.

17 The officer also doesn't
18 remember if Shane had IVs. He didn't
19 give any description whether or not he
20 had IVs, he didn't elaborate on that.

21 But he testified that he had a
22 camera and had videotaping capabilities.
23 Wouldn't you like to see that? It
24 certainly would have been practical, Your
25 Honor.

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Closing Argument by Defense

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1 Nurse Howe couldn't remember
2 how much she stayed -- she couldn't
3 remember how long that she was there. I
4 believe that she stated, quote, maybe ten
5 minutes to draw the blood.

6 If, on the other hand, you
7 believe the officer's second statement to
8 Solicitor Holloway that the blood draw
9 occurred around 7:15, then we really have
10 a reason for reasonable doubt and a lot
11 of it.

12 For that to occur and for it to
13 be Shane's blood, you must believe the
14 Officer's first statement about when he
15 left Shane's side are incorrect, that the
16 Officer's incident report incorrectly
17 stated the time he left; that he in his
18 car at 5:05 but then got back out to
19 continue to take pictures; and that Ron
20 Mahon is misrepresenting when the Officer
21 left his son's bedside for the last time.

22 Well, maybe the officer did
23 observe the nurse take someone's blood.
24 That someone just wasn't Shane Mahon.

25 That's enough reasonable doubt

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Closing Argument by the State

1 and when there is reasonable doubt,
2 you have to find my client, Shane Mahon,
3 not guilty. Thank you, Your Honor.

4 THE COURT: Thank you.

5 SOLICITOR HOLLOWAY: Your
6 Honor, Mr. Kornfeld stated but what we
7 know is that on May 4th, 2014, about 4:20
8 a.m. in the morning that the defendant,
9 Mr. Mahon, was involved in a traffic
10 accident at South Carolina 14 and 136
11 here in Greenville County.

12 He knows that he tried to make
13 a left-hand turn, that he was incapable
14 of doing so, that he struck a pole and
15 that his car then proceeded, roughly
16 estimated, about a hundred and fifty feet
17 right in front of a church as the
18 pictures so identify.

19 Those pictures also identify
20 that between Exhibits 18 and 21, four
21 different pictures, several Bud Lite cans
22 that are just strewn outside that car.

23 We do know that the defendant,
24 Mr. Mahon, was taken to the hospital. We
25 know that while at the hospital that he

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Closing Argument by the State

1 admitted to the hospital personnel,
2 through the medical records, as Mr.
3 Kornfeld brought to the attention of
4 Miss Becky Howe yesterday, he admitted
5 to consuming alcohol. We know that he
6 admitted consuming alcohol to the
7 trooper.

8 We also know as we went through
9 the testimony of Miss Howe yesterday that
10 the blood draw was taken at 7:10 a.m. We
11 know that Miss Howe labeled both vials
12 with labels marked "Shane A. Mahon",
13 "Shane A. Mahon" on both of them. She
14 also put her tech code number, which she
15 testified here yesterday was her personal
16 tech number, her number that she has had
17 for years now and what was certainly the
18 number that she had on May 4th, 2014.

19 We then went through how
20 Trooper Klemm drove that back to Post C.
21 Sergeant Hiott discussed the policies and
22 procedures and processes at Post C.
23 Corporal Frick then testified to the same
24 thing that happened at Post C happened
25 down at CEF, the central evidence

1 facility, in Columbia. He testified how
2 he brought those two vials that were
3 already sealed in Highway Patrol sealed
4 over to SLED. He confirmed that was his
5 name on the SLED seal.

6 Carmen Tucker, a forensic toxicolo-
7 gist at SLED also confirmed that was the
8 exact seal placed on those vials, Your
9 Honor. Miss Tucker was qualified as an
10 expert in the field of forensic science
11 and forensic toxicology. She testified
12 that those vials in the pictures were in
13 fact the vials that she tested and wrote
14 her analysis on, and that the analysis
15 that she performed yielded a BA result of
16 0.159, Your Honor; which is twice the
17 level of presumption in this state, as
18 the level of presumption, as you know,
19 Your Honor, being .08.

20 So at this point -- and
21 additionally, Your Honor, before I get
22 ahead of myself, Miss Tucker, who is an
23 expert in that field of forensic
24 toxicology not only in determining levels
25 of BA but what that level of blood

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Closing Argument by the State

1 alcohol could do to one's impairment and
2 ability to operate a vehicle. She
3 testified that level would have drastic
4 effects on one's ability to operate a
5 vehicle.

6 Summarily speaking, we know that the
7 defendant was in fact driving the car.
8 He was the only one in the car at the
9 time when law enforcement arrived. He
10 was extricated from the vehicle by the
11 fire department and placed in the
12 ambulance.

13 There is no contesting there. We
14 know that there were floodlights outside
15 the vehicle. We know that he admitted to
16 medical personnel and to the trooper that
17 he had been drinking that night. We know
18 that his BA was twice the level of
19 presumption here in the State of South
20 Carolina, at 0.159.

21 At this point, Your Honor, as it
22 goes to -- so we know that he was driving
23 in South Carolina, we know that he was
24 driving under the influence of alcohol.
25 The only thing left to be determined is

1 whether he was materially and
2 appreciably impaired and I think the
3 evidence is three-fold in that regard:
4 the BA level of 0.159, Miss Tucker's
5 expert testimony that that blood alcohol
6 level would certainly lead to significant
7 impairment of one's ability and one's
8 faculties to operate a vehicle. Also the
9 simple fact, Your Honor, that Mr. Mahon
10 could not operate his vehicle safely that
11 night. He was not able to make a simple
12 left-hand turn and he hit a large post
13 and then flipped his vehicle.

14 We are all glad that he is safely
15 here today, but I think his driving
16 speaks for itself in the fact that he was
17 truly materially and appreciably
18 impaired.

19 Thank you, Your Honor.

20 THE COURT: Gentlemen, I have to
21 find in this case that the Defendant is
22 guilty. I have to find beyond a
23 reasonable doubt that the evidence in
24 this case, circumstantial and direct,
25 prove beyond a reasonable doubt that he

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Verdict and Sentence

1 was impaired at the time of this
2 accident. Some over two hours after the
3 accident, he registered a 0.159 blood
4 alcohol content, which as the Solicitor
5 said is about twice the presumptive of
6 .08.

7 It is obvious to me that he
8 certainly was impaired. The
9 circumstantial evidence shows that. If
10 the blood alcohol test was over two hours
11 after the accident, I understand the body
12 burns about one ounce of alcohol per
13 hour, so it would have been considerably
14 higher at the time of the accident.

15 For those reasons, as I said, I find
16 that the State has proved beyond a
17 reasonable doubt that he was driving,
18 that he was impaired and I have to find
19 him guilty.

20 SOLICITOR HOLLOWAY: Thank you,
21 Your Honor.

22 MR. KORNFELD: Your Honor, I
23 would like to make a *Motion at this
24 time.

25 THE COURT: Sure.

1 MR. KORNFELD: Your Honor, I make
2 a Motion for a new trial and -- the first
3 Motions, I know that you've already ruled
4 on but I still need to do this. As I
5 said, there was no evidence of driving or
6 such allegation that occurred immediately
7 after the officer's arrival. This is
8 essential for the crime of driving-under-
9 the-influence. Under the circumstances,
10 this way the officer would not be able to
11 arrest him in this manner.

12 Also, Your Honor, the defendant was
13 denied a fair and impartial trial when at
14 the beginning of the trial when we did
15 have a juror, possible to Juror Sexton's
16 nondisclosure that her husband is in law
17 enforcement after being asked by Your
18 Honor, which disallowed the court the
19 right to ask if she could be fair and
20 impartial. Further, she was not
21 impartial and this was an improper --
22 this was an improper denial for my
23 challenge with cause.

24 Klemm's -- the officer's
25 testimony about how the accident occurred

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Verdict and Sentence

1 was hearsay, to which no exception
2 applied; thus was improperly admitted and
3 -- I don't believe that I need to do this
4 but I am going to do it anyway. The next
5 one is that Mr. Mahon was given a field
6 sobriety test, specifically one HGN test,
7 and Officer Klemm, nor any other officer,
8 ever gave him *Miranda* rights.

9 THE COURT: Thank you.
10 Anything further, gentlemen?

11 SOLICITOR HOLLOWAY: Your
12 Honor, I would just like to clarify on
13 the record, in relation to Mr. Kornfeld's
14 Motion and the objections that we filed
15 in our memoranda, it appears to me that
16 it has sort of morphed from the argument
17 that he was not given *Miranda* on camera
18 to that he was never given *Miranda*. Your
19 Honor, for the record's purposes, I would
20 just like to make clear that there is no
21 evidence whatsoever that he was not read
22 his *Miranda* rights. That was not given
23 and no one testified to that.

24 THE COURT: Okay.

25 MR. KORNFELD: And I

1 responded that the burden is on the State
2 and they didn't do that. His incident
3 report -- and in my brief I explained
4 that more in depth, but there is no
5 evidence that he did.

6 THE COURT: Didn't the officer
7 testify that he read his rights to him,
8 including *Miranda*?

9 MR. KORNFELD: No, Your
10 Honor, he testified that he read implied
11 consent.

12 THE COURT: I recall it being
13 including *Miranda*. I may be mistaken but
14 I ---

15 MR. KORNFELD: I respect-
16 fully disagree that he said that.

17 THE COURT: That's fine.
18 Okay, what offense is this?

19 SOLICITOR HOLLOWAY: Your
20 Honor, this is a DUI third offense with a
21 blood alcohol level between .10 and 0.15
22 but less than 1.6, which carries ninety
23 days to four years.

24 His prior convictions, Your Honor,
25 and I have them here if you would like to

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1 see them for driving under the influence
2 from 2008 -- as it pertains to this
3 driving under the influence case he has
4 got a prior conviction in 2008 for DUI
5 and in 2012 for DUI.

6 Your Honor, the defendant also
7 has prior convictions in 2005 for
8 possession with intent to distribute
9 marijuana, four convictions for burglary,
10 second, and two convictions for burglary
11 third, grand larceny and a financial
12 transaction fraud card case. Then in
13 2013, Your Honor, he's got unlawful
14 possession of prescription drugs.

15 THE COURT: All right, would
16 you like to go first or have your client
17 speak?

18 MR. KORNFELD: I would like
19 to go first and then have him speak, Your
20 Honor.

21 THE COURT: Okay.

22 MR. KORNFELD: Your Honor,
23 my client, Shane, is twenty-eight years
24 old. He lives with his father and
25 mother, Ronnie who is here today.

1 Your Honor, obviously you saw that
2 this was a horrendous and catastrophic
3 accident. Mr. Mahon almost lost his foot
4 to this. He's had several surgeries
5 since. He's still is -- I believe on
6 medication due to this wreck.

7 One time when he came in, and I
8 don't think that Mr. Holloway would
9 object to this, one time when he came in
10 he actually had a cast on his foot after
11 a surgery. He has to wear certain shoes.
12 The reason I tell you all this, Your
13 Honor, is that he has suffered other --
14 other, uh, -- he's suffered otherwise
15 other than the sentence that you're about
16 to hand down, Your Honor.

17 He's been -- he's got an
18 excruciating amount of pain. And, Your
19 Honor, here is another argument that I
20 wouldn't always necessarily make but I
21 felt when I talked to him, and I did
22 counsel him, that there were several
23 legal issues in this case. I was -- I
24 advised him that it was a triable case,
25 that we could try this case.

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1 THE COURT: I agree with that.

2 MR. KORNFELD: Unfortunately, my
3 prediction was incorrect but I would just
4 ask, as most defense attorneys would, for
5 mercy of the court. He does live with
6 his parents. His dad is very involved in
7 his life. I think that he just wanted to
8 speak to his prescriptions and
9 medications. He's concerned about those
10 things, Your Honor.

11 THE COURT: All right. Mr. Mahon,
12 do you want to say anything before
13 sentencing?

14 DEFENDANT: I was just reiterating
15 to him that I can't really walk without
16 my shoes on; that I have to wear high-
17 tops and I've got an extra piece in my
18 shoe because my heel can't touch the
19 floor. I've been through multiple
20 surgeries, I've had casts on, I haven't
21 been able to wear -- I've just been
22 through a lot, had a lot of suffering.

23 THE COURT: Your own fault, sir.

24 MR. KORNFELD: And, Your Honor, --
25 it is. The other thing that I want to

1 say is that is is not -- he was in the
2 hospital for ten days, so -- for
3 surgeries and other things, so he was in
4 there for quite some time.

5 THE COURT: All right, anything
6 else?

7 SOLICITOR HOLLOWAY: Nothing from
8 the State, Your Honor.

9 THE COURT: All right. Mr. Mahon,
10 the sentence of the court is that you be
11 committed to the Department of
12 Corrections for a period of three (3)
13 years and pay a thirty-five hundred
14 dollar (\$3,500) fine, provided on the
15 service of one year and the payment and
16 payment of the fine, the sentence is that
17 you will then be on probation for a
18 period of five (5) years. Special
19 conditions of your probation is that you
20 will pay five hundred dollars (\$500) to
21 the Public Defender Fund and that you
22 will successfully complete a drug
23 diversion program, which will be
24 prescribed for you by the Greenville
25 County Probation authority and parole

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1 board. Anything else, Mr. Holloway?

2 SOLICITOR HOLLOWAY: Nothing further,
3 Your Honor. Thank you.

4 MR. KORNFELD: Your Honor, he was
5 privately retained, does he still have to
6 pay the five hundred dollars ---

7 THE COURT: No. I'm sorry. I
8 wasn't notified so I will strike that
9 out. I have taken that out.

10 MR. KORNFELD: Thank you, Your
11 Honor.

12 (TRIAL CONCLUDED)

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Case No. 14-GS-23-10119

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Certificate of Court Reporter

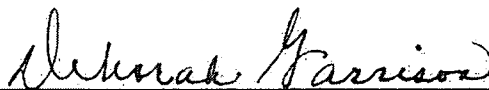
STATE OF SOUTH CAROLINA)

) CERTIFICATE

COUNTY OF GREENVILLE)

I, the undersigned Deborah Garrison,
Circuit Court Reporter for the 13th
Judicial Circuit, hereby certify that the
foregoing is a complete and accurate
transcript of the bench trial held in the
within action on July 15-16, 2015, before
The Honorable Victor Pyle;

I further certify that I am neither
kin nor counsel to any of the parties and
have no interest in the outcome of this
action.



Deborah Garrison

Greenville, South Carolina

February 1, 2016

ADVISEMENT OF IMPLIED CONSENT RIGHTS

Subject's Name (Print)

Shane McNamee

Driver's License Number

100310206



Date of Birth

2-9-87

State Licensed

SC

DRIVING UNDER THE INFLUENCE ADVISEMENT

- (A) Will test be video recorded? If answer is Yes, start here → - Inform subject of video recording.
If answer is No, start here → - Inform subject of type samples requested (i.e. breath, blood, urine).
- (B) Provide subject with a written copy of the following advisement and read the advisement to the subject:
- You are under arrest for Driving Under the Influence (DUI), Section 56-5-2930, South Carolina Code of Laws 1976, as amended.
 - The arresting officer has directed that samples be taken for alcohol and/or drug testing.
 - The samples will be taken and tested according to Section 56-5-2950 and SLED policies.
 - You do not have to take the tests or give the samples, but if you refuse to submit to the tests, your privilege to drive in South Carolina must be suspended or denied for at least six (6) months and your refusal may be used against you in court.
 - If you take the tests or give the samples and have an alcohol concentration of eight one-hundredths of one percent (0.08%) or more, you may instead be charged with Driving with an Unlawful Alcohol Concentration (DUAC), Section 56-5-2933.
 - If you have an alcohol concentration of fifteen one-hundredths of one percent (0.15%) or more, your privilege to drive in South Carolina must be suspended for at least one (1) month.
 - You have the right to have a qualified person of your own choosing conduct additional independent tests at your expense and the officer, upon request, must provide you affirmative assistance.
 - You have the right to request an administrative hearing within thirty (30) days of the issuance of the notice of suspension.
 - If you do not request an administrative hearing or if your suspension is upheld at the administrative hearing, you must enroll in an Alcohol and Drug Safety Action Program.

If applicable, perform the following procedures:

- (C) Check subject's mouth and remove any foreign material. (Not required if a refusal has occurred.)
(D) Enter biographical data into DataMaster DMT. (Required for all tests, including refusals.)
(E) Observe subject for a minimum of twenty (20) minutes before collecting breath sample. (Not required if a refusal has occurred.)

ADVERTENCIA PORMANEJAR BAJOS LOS EFECTOS DE ALCOHOL O DROGAS(DUI)

- (A) ¿Se grabará en video el análisis? Si la respuesta es Si, empieza aquí → - Informe al sujeto que va a ser grabado en video.
Si la respuesta es No, empieza aquí → - Informe al sujeto de lo que se requiere (ejemplo: soplar, sangre, orina.)
- (B) De al sujeto una copia escrita de la siguiente advertencia y lea la advertencia al sujeto:
- Usted queda detenido por Manejar Bajo los Efectos de Alcohol o Drogas (DUI), Sección 56-5-2930, del Código de Leyes de Carolina del Sur de 1976, según su enemenda.
 - El agente que efectuó la detención dispuso que se sacaran muestras de alcohol y/o drogas para ser analizada(s).
 - Se obtendrán y se analizarán las muestras según la Sección 56-5-2950 y las normas de SLED.
 - Usted no está obligado a hacerse los análisis ni a sacarse las muestras, pero si se niega a someterse a estos análisis, se le tendrá que suspender o negar el derecho de manejar en Carolina del Sur por lo menos durante seis (6) meses y el hecho de que usted se niega, podrá usarse en su contra en un tribunal.
 - Si usted se somete a los análisis o se saca las muestras y tiene una concentración de alcohol de ocho centésimos del uno por ciento (0.08%) o más, entonces se lo podría acusar de Manejar con una Concentración Ilegal de Alcohol (DUAC), según la Sección 56-5-2933.
 - Si usted tiene una concentración de alcohol de quince centésimos del uno por ciento (0.15%) o más, se le deberá suspender el derecho de manejar en Carolina del Sur por lo menos durante un (1) mes.
 - Usted tiene el derecho de que una persona que usted elija y que esté capacitada para hacerlo, realice sus propios análisis adicionales, los cuales usted mismo tiene que pagar y en ese caso, el agente debe brindarle ayuda si usted lo solicita.
 - Usted tiene el derecho de solicitar una audiencia administrativa dentro de los treinta (30) días de la fecha en que se emitió la notificación de la suspensión.
 - Si usted no solicita una audiencia administrativa o si se le confirma la suspensión en la audiencia administrativa, usted tiene que matricularse en un Programa de Medidas Contra el Abuso del Consumo del Alcohol y las Drogas.

Si aplica, efectúe los siguientes procedimientos:

- (C) Inspecciona la boca del sujeto y quite material extraño de la boca. (Ignora si se niega el sujeto.)
(D) Añade datos biográficos en el DataMaster DMT. (Esto es requerido para todos los exámenes aunque se niega el sujeto.)
(E) Observe al sujeto un mínimo de (20) minutos antes de tomarle el aliento. (Ignora si se niega.)

Subject's Signature
Firma del Sujeto (Recibió una copia)

Unalide to Sign

Officer's Signature
Firma del Agente

SLED

0713 5-4-14

date/time
fecha/hora

STATE OF SOUTH CAROLINA	)	THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	
	)	CASE NO.: G786883 (DUI)
State of South Carolina,	)	
	)	
Plaintiff,	)	
	)	
versus	)	MOTION TO DISMISS AND MEMORANDUM
	)	(IMPLIED CONSENT)
Shane A. Mahon,	)	
	)	
Defendant.	)	
_____	)	

THE DEFENDANT HEREBY MOVES that the above charge be dismissed on the applicable jurisprudence to include but not limited to the law in accordance with the requirements set out in S.C. Code Ann. §56-5-2950, Town of Fairfax v. Smith, 285 S.C. 458, 330 S.E.2d 290 (1985), State of South Carolina v. Stacy, 315 S.C. 105, 431 S.E.2d 640 (1993), City of Columbia v. Moore, 457 S.E.2d 346 (1995, along with other applicable laws.

FACTS

This matter is before the Court on the above named Defendant's Motion to Dismiss. The defendant is represented by Alex Kornfeld.

The Defendant was arrested for Driving Under the Influence, 2nd Offense on May 4, 2014. According to Officer Erik S. Klemm, (hereinafter 'Officer') he arrived at the intersection of SC 14 and Secondary 136 at 4:28 a.m. on May 4, 2014. He observed a vehicle that appeared to have stuck a pole.

The officer states he took photos of the scene and that the defendant was extracted from the vehicle by emergency personnel, that he spoke to the defendant in the ambulance which was

transporting the defendant to Greenville Memorial Hospital (hereinafter GHS). Then, only after completing his investigation, the Officer states he drove to GHS to meet with the defendant. The fastest route from the scene of the accident to GHS is 16.9 miles and takes approximately 24 minutes. (see google driving directions)

According to the Officer, he placed the defendant under arrest for driving under the influence and read 'the subject his implied consider of rights and requested a blood draw to which he [defendant] consented.' It appears the earliest the Officer could have left the scene of the accident was sometime after 5:05 a.m. See video VTS-01-3. We also know that if he took the fastest route by car he traveled at least 16.9 miles.

According to the GHS primary medical records the defendant's 'time of greet' was at 5:21 a.m. on Sunday, May 4, 2014. At that time, the defendant was 'unable to answer'. See medical records dated 5/4/2014. The medical records also show Defendant was concussed. See GHS medical record dated 05/04/2014. The advisement of implied consent rights form that was produced in this case does not include the subject's signature. Instead in the line in which the subject's signature is required someone wrote 'subject copy'. See Advisement of Implied Consent Rights. On the SLED collection report requiring the subject's signature at the bottom of the page stating, 'I _____ received a copy of this report on 5/4/14, it appears the Officer wrote 'unable to sign'. See SLED-Urine/Blood Collection Report. Further, the incident report makes no mention that Defendant's *miranda* rights were read to him as required by law before the HGN field sobriety test was given as required by S.C. Code Ann. §56-5—2953(A)(1)(a)(iii).

Mr. Ron Mahon arrived at GHS at approximately 6:00 a.m. and stated the Officer left GHS approximately five minutes after Mr. Ron Mahon arrived. During that time, Mr. Ron

Mahon did not witness the Officer give the defendant a copy of the advisement of implied consent rights or advise the defendant of his implied consent rights. Further, Mr. Ron Mahon did not believe defendant Mahon to be under arrest, nor was Mr. Mahon cuffed to the bed or restricted in anyway. Further, Mr. Ron Mahon states defendant Mahon was in and out of consciousness and unable to answer any questions upon his arrival.

LAW

S.C. Code Ann. §56-5-2950

(A) A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. **At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken.** If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that a urine sample be taken for testing. A breath sample taken for testing must be collected within two hours of the arrest. Any additional tests to collect other samples must be collected within three hours of the arrest. The breath test must be administered by a person trained and certified by the South Carolina Criminal Justice Academy, pursuant to SLED policies. Before the breath test is administered, an eight one-hundredths of one percent simulator test must be performed and the result must reflect a reading between 0.076 percent and 0.084 percent. Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility. Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED.

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

informed that:

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

(2) the person's privilege to drive must be suspended for at least one month with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person takes the test or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;

(3) the person has the right to have a qualified person of the person's own choosing conduct additional independent tests at the person's expense;

(4) the person has the right to request a contested case hearing within thirty days of the issuance of the notice of suspension; and

(5) if the person does not request a contested case hearing or if the person's suspension is upheld at the contested case hearing, the person shall enroll in an Alcohol and Drug Safety Action Program.

ARGUMENT

The evidence shows through the medical records, the advisement of implied consent rights, the SLED-Urine/Blood Collection Report, and Mr. Ron Mahon's eyewitness accounts and/or testimony that:

- 1) Defendant was not video recorded as required by law and the videotape that was provided did not continue until the arrest was complete.
- 2) Failure to produce the videotapes required is grounds for dismissal because a sworn affidavit was not produced explaining the person needed emergency medical treatment as required by statute.
- 3) Defendant Mahon did not consent to give a blood sample.
- 4) Since Defendant Mahon was unable to consent to give a blood sample he is unaware if he was given a copy of the advisement of implied consent rights AND read the

same prior to the commencement of the testing procedure.

- 5) The arresting officer did not advise Defendant Mahon of his *Miranda* rights prior to administering a field sobriety test.
- 6) Defendant Mahon was unable to answer the Officer's questions. He did not sign the 'advisement of implied consent rights' or consent otherwise.
- 7) Defendant Mahon was unaware he could have a person of his own choosing conduct additional independent test.
- 8) Defendant Mahon was unaware that he could request a hearing within thirty days of the issuance of the notice of suspension and failed to do so.
- 9) Defendant Mahon is now required to enroll in Alcohol and Drug Safety Action Program.

CONCLUSION

The State has failed to properly follow the procedures required by S.C. Code Ann §56-5-2950 and S.C. Code Ann §56-5-2953. This failure disallowed the defendant to gather independent evidence to submit in reply to the State's evidence. This violation cannot be corrected. Therefore, the only remedy available under existing law is that the charge be dismissed.

Respectfully submitted,

Alex Kornfeld (S.C. Bar # 79046)
Kehl Culbertson Andrighetti & Kornfeld, LLC
114 Manly Street
Greenville, South Carolina 29609
(864) 370-8222
Attorney for Defendant

Greenville, South Carolina

July 15, 2014

010117

WITNESSES

E S Klemm

ELL

South Carolina Highway Patrol

5/4/2014

ARREST WARRANT NUMBER

G786883

ACTION OF GRAND JURY

TRUE BILL

Wayne D. Harrison

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2014-GS-23-

JWH

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

June

TERM 2014 *2015*

THE STATE

vs.

SHANE A MAHON

Indictment for

3361

DRIVING UNDER THE INFLUENCE

VIOLATION § 56-05-2930

FILED

NOV 10 2014

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

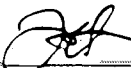
INDICTMENT FOR
DRIVING UNDER THE INFLUENCE

At a Court of General Sessions, convened on **JUN 30 2015** the Grand Jurors of Greenville

County present upon their oath:

That SHANE A MAHON did in Greenville County, on or about the 4th day of May 2014, drive a motor vehicle while under the influence of alcohol, or other drug or substance or combination of alcohol, other drug and/or substance which caused impairment to the extent that the defendant's faculties to drive were materially and appreciably impaired, ~~such not being the first offense within a period of ten (10) years including and immediately preceding the foregoing date.~~ This is in violation of §56-05-2930 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

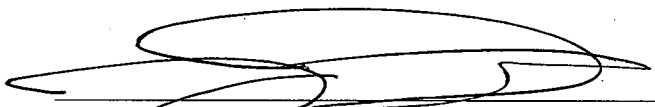

SOLICITOR

BAR # 100639

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



John H. Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 27th day of January, 2017.

RECEIVED
JAN 27 2017
SC Court of Appeals