

ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of General Sessions
The Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No: 2012-213136

THE STATE,

APPELLANT,

v.

NEZAR ABRAHAM,

RESPONDENT.

RECORD ON APPEAL

ALAN WILSON
Attorney General

C. AUSTIN MCDANIEL
S.C. Bar No: 76084

J. BENJAMIN APLIN
Assistant Attorney General
S.C. Bar No: 8729

MICHAEL O. HALLMAN
S.C. Bar No: 2610

Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3737

The Cole Law Firm
1303 Ella Street
Anderson, South Carolina 29621
(864) 225-3617

ATTORNEYS FOR APPELLANT

ATTORNEYS FOR RESPONDENT

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APR 11 2013

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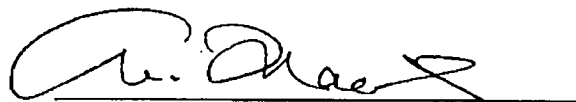
the time of the collision, or the make / model or any other pertinent information regarding the vehicle alleged to have been involved. None of the emergency personnel, that arrived on scene before the arresting officer, were present for trial. At the close of the State's case, the Appellant moved for a Directed Verdict based on the State's failure to prove the *corpus delicti* of the offense of Driving Under the Influence. That motion was denied and the Appellant was subsequently convicted. This appeal followed.

The issue on appeal before this Court is whether the Magistrate erred in failing to grant the Appellant's directed verdict motion for lack of evidence to establish the *corpus delicti* of the offense of driving under the influence. Based on this Court's scope of review on appeal, the arguments presented and considering State v. Townsend, 321 S.C. 55, and the law applicable in South Carolina, I reverse the conviction and dismiss.

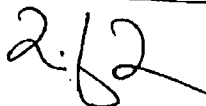
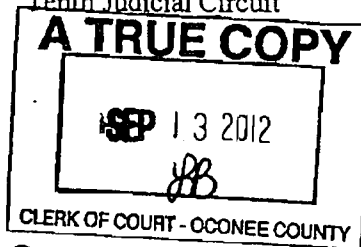
THEREFORE, the motion of the Defendant is granted and the above captioned case is hereby dismissed. And,

IT IS SO ORDERED.

Walhalla, South Carolina
September 13, 2012.



The Honorable Alexander S. Macaulay
Circuit Court Judge
Tenth Judicial Circuit



FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 SEP 13 PM 3 14

IN THE COURT OF COMMON PLEAS

CASE NO. 2012 CP-37-00383

NEZAR ABRAHAM

STATE OF SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: C. AUSTIN MCDANIEL	Attorney for : <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$N/A
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest



STATE OF SOUTH CAROLINA)	
)	IN THE SUMMARY COURT
COUNTY OF OCONEE)	
STATE,)	TICKET NO.:
)	F225314
PLAINTIFF,)	COPY
VS.)	
NEZAR ABRAHAM,)	
)	TRANSCRIPT
DEFENDANT.)	OF
)	RECORD

SUMMARY COURT JURY TRIAL HELD BEFORE THE HONORABLE WILLIAM F. DERRICK, JR., MAGISTRATE, ON THE 17TH DAY OF APRIL, 2012, BEGINNING AT 1:00 P.M. IN THE OCONEE COUNTY COURTHOUSE, WALHALLA, SOUTH CAROLINA.

APPEARANCES:

AUSTIN MCDANIEL, ESQUIRE
 THE COLE LAW FIRM
 1303 ELLA STREET
 ANDERSON, SOUTH CAROLINA 29621

REPRESENTING THE DEFENDANT

BETHANY ANN BLUNDY, ESQUIRE
 SOLICITOR'S OFFICE
 415 SOUTH PINE STREET
 WALHALLA, SOUTH CAROLINA 29691

REPRESENTING THE STATE

TRANSCRIBED BY: MELODY JANINE WILLIAMS

Bowen Court Reporting Service, LLC

P.O. BOX 2422
 ANDERSON, SOUTH CAROLINA 29622

TELEPHONE NO. (864) 226-2644
 bowenreporting@bellsouth.net



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WITNESS: TROOPER KEVIN N. BROWN

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NOTE: ALL EXHIBITS RETAINED

1 AUTOMATICALLY CONVICTS SOMEBODY OF DRIVING UNDER
2 THE INFLUENCE. THAT IT'S JUST A PIECE OF EVIDENCE
3 AND I BELIEVE YOUR JURY CHARGES CLEAR THAT UP.
4 BUT IT IS JUST A PIECE OF THE EVIDENCE THAT CAN BE
5 CONSIDERED IN DETERMINING WHAT'S GUILTY OF DRIVING
6 UNDER THE INFLUENCE. I DO HAVE THE SPECIFIC TIMES
7 IF YOU WANT THEM, BUT I'LL LEAVE THAT UP TO YOU.
8 I'M NOT SURE ---

9 BY THE COURT: HOW WOULD YOU GO ABOUT
10 REDACTING THAT FROM VIDEO? MS. BLUNDY, I WILL BE
11 GLAD TO HEAR ANYTHING YOU HAVE TO SAY.

12 BY SOLICITOR BLUNDY: I WAS JUST LOOKING BACK
13 AT MY NOTES. THERE MAY HAVE BEEN A FEW TIMES
14 WHERE THAT WAS SAID ---

15 BY THE COURT: I THINK IT WOULD BE EASIER IF
16 I JUST EXPLAIN TO THE JURY THAT THERE IS NO LEGAL
17 LIMIT, THAT THERE ---

18 BY SOLICITOR BLUNDY: I THINK A WAY TO CURE
19 THAT WOULD BE TO SAY THE LAW COMES FROM ME OR
20 YOU'RE A -- NOT FROM THE TROOPER -- AND THIS IS
21 WHAT THE LAW ACTUALLY IS, AND IT'S AN INFERENCE --
22 I AGREE, I AGREE WITH THE DEFENSE IT'S AN
23 INFERENCE OF IMPAIRMENT, NOT ---

24 BY THE COURT: OKAY. ALL RIGHT.

25 BY MR. MCDANIEL: AND IF, MAYBE IF WE ENTER A

1 STIPULATION BEFORE WE ACTUALLY GET INTO THE CASE
2 WHERE WE BOTH STIPULATE THAT THERE'S NO LEGAL
3 LIMIT. I DON'T KNOW HOW WE'RE GOING TO WORK IT,
4 BUT I WOULD PREFER IT TO BE ADDRESSED BEFORE THE
5 HEARING. IT IS SAID A GOOD BIT OF TIMES.

6 BY THE COURT: IF IT'S INTRODUCED --
7 OBVIOUSLY, I DON'T KNOW WHAT YOU'RE GOING TO DO.

8 BY MR. MCDANIEL: RIGHT.

9 BY THE COURT: BUT IF IT IS INTRODUCED, I
10 WILL GO OVER THAT AS IT'S BEING SET UP AND MAKE
11 SURE THEY UNDERSTAND THAT ---

12 BY MR. MCDANIEL: OKAY.

13 BY THE COURT: --- AND WE CAN DO IT THAT WAY.
14 YOU ALL JUST MAKE SURE I DON'T FORGET.

15 BY SOLICITOR BLUNDY: OKAY.

16 BY MR. MCDANIEL: JUDGE, AND SIMILARLY,
17 DURING THE TRANSPORT FROM INCIDENT SITE TO JAIL,
18 THERE'S ABOUT A FIFTEEN (15) SECOND CONVERSATION
19 BY TROOPER BROWN WHERE HE OBVIOUSLY ALLEGED THE
20 COLLISION IN THIS CASE. HE KIND OF TELLS THE GUY
21 THAT HE'S -- THANK GOD HE DIDN'T KILL SOMEBODY AND
22 THIS ISN'T A FELONY DUI. I WOULD JUST PREFER -- I
23 THINK IT SHOULD BE REDACTED BECAUSE, ONE (1),
24 NOBODY'S EVEN -- WAS ALLEGED TO HAVE OCCURRED OR
25 EVEN CLOSE TO OCCURRING. IT IS A SINGLE CAR

1 WRECK. AND I JUST -- I DON'T THINK IT -- PURELY
2 WOULD INFLAME THE JURY TO CONSIDER FACTS THAT
3 AREN'T IN THE EVIDENCE AND AREN'T GOING TO ATTEMPT
4 TO BE PUT INTO EVIDENCE. AND I, I -- THE TRUTH OF
5 THE MATTER IS I THINK IT WOULD JUST TAINT A JURY
6 IF THEY HEARD IT, SO I DON'T KNOW THE BENEFIT TO
7 THE STATE AND CERTAINLY NOT TO THE DEFENSE WHEN
8 THEIR HEARING SUCH.

9 BY SOLICITOR BLUNDY: I THINK, YOUR HONOR, I
10 MEAN THE QUESTION WOULD BE AS TO WHETHER YOU FEEL
11 THE PROBATIVE VALUE, YOU KNOW, OUTWEIGHS THE
12 PREJUDICE OF IT. I DO BELIEVE THE DEFENDANT DOES
13 SAY SOMETHING AFTER THE TROOPER SAYS THAT AND
14 SAYS, "YEAH, I AGREE WITH YOU. I'M GLAD I DIDN'T
15 HURT SOMEBODY."

16 BY MR. MCDANIEL: BUT REGARDLESS, HE'S NOT
17 ALLEGED TO HAVE EVEN, TO HAVE HURT ANYBODY. AND
18 IF WE ARE GOING TO DO A 403 ANALYSIS, IT'S
19 PROBATIVE TO NOTHING. HE'S ALREADY BEEN ARRESTED
20 OF A DUI ---

21 BY THE COURT: RIGHT. AND THEN I ASSUME HE
22 WOULD HAVE, IN THE ARRESTING, BEEN MIRANDIZED AT
23 THAT TIME.

24 BY MR. MCDANIEL: THAT IS CORRECT.

25 BY SOLICITOR BLUNDY: HE IS MIRANDIZED, SO HE

1 DOES KNOW THAT ANYTHING HE SAYS CAN BE USED
2 AGAINST HIM.

3 BY THE COURT: AND THEN YOUR POSITION IS THE
4 OFFICER ---

5 BY MR. MCDANIEL: THERE'S NOTHING TO USE
6 AGAINST HIM. I MEAN, PURELY, THIS WHOLE
7 CONVERSATION HAS NOTHING TO DO WITH THE ALLEGED
8 CRIME. IF IT WAS -- I WOULDN'T HAVE AN ARGUMENT
9 IF I WAS TRYING TO SUPPRESS HIM ADMITTING TO THE
10 DRINKING ---

11 BY THE COURT: LET ME ASK YOU THIS WHILE WE
12 ARE OUTSIDE THE PRESENCE OF THE JURY. WAS THERE A
13 COLLISION IN THIS CASE?

14 BY SOLICITOR BLUNDY: THERE -- IT IS A WRECK
15 CASE, A SINGLE CAR.

16 BY MR. MCDANIEL: A SINGLE, SINGLE CAR WRECK.

17 BY THE COURT: I'M JUST NOT SURE HOW TO MAKE
18 SENSE OF IT. I MEAN HE'S REFERRING TO A COLLISION
19 AND THERE WAS ONE, EVEN THOUGH IT WASN'T WITH
20 SOMEBODY ELSE. I DON'T SEE HOW THAT WOULD BE NOT
21 FAIR AND IMPARTIAL. I MEAN, I HAVEN'T HEARD --
22 WHAT'S THE WORD I'M LOOKING FOR? ---

23 BY MR. MCDANIEL: WELL, I MEAN, THE -- IT'S
24 NOT PROBABLE WITH ANYTHING, I GUESS IS WHAT THE
25 QUESTION IS. IS THAT THEY ARE NOT GOING TO --

1 DOESN'T GO TO THE STRENGTH OF THEIR CASE AT ALL
2 AND IT'S PURELY INTRODUCED TO INFLAME THE JURY.
3 THAT WHILE THEY ARE ALLEGING THERE IS A SINGLE CAR
4 COLLISION HERE, THAT -- I MEAN, WE CAN EXPOUND IT
5 ON ---

6 BY THE COURT: INFLAMMATORY WAS THE WORD I
7 WAS LOOKING FOR. I DON'T SEE -- I JUST DON'T SEE
8 HOW THAT WOULD BE INFLAMMATORY IF IT WAS -- I
9 MEAN, IF HE JUST SAID THAT, YOU KNOW, YOU -- HE
10 DIDN'T KILL ANYBODY AND HE SAID, "YEAH," ---

11 BY MR. MCDANIEL: BUT HOW IS IT PROBATIVE, I
12 GUESS IS -- I MEAN IT'S NOT PROBATIVE TO GUILT OR
13 INNOCENCE. HE'S ALREADY BEEN ARRESTED FOR THE
14 ALLEGED CRIME. I MEAN THE DUI ---

15 BY THE COURT: I THINK THE BIGGEST THING FOR
16 ME IS HE WAS MIRANDIZED AND ANYTHING HE SAID COULD
17 BE USED AGAINST HIM. AND HE -- YOU KNOW, IF HE
18 ADDRESSED IT AS WELL, I THINK IT, I THINK IT
19 SHOULD COME IN. I'LL, I'LL NOTE YOUR -- I'LL LET
20 -- WHAT I'LL DO IS I'LL NOTE YOUR MOTION AND I'M
21 GOING TO DENY IT AT THIS TIME.

22 BY MR. MCDANIEL: OKAY.

23 BY THE COURT: IF YOU WISH TO MAKE AN
24 OBJECTION ON THE RECORD, I'LL ALLOW YOU TO DO THAT
25 AS WELL. AND IF SOMETHING ELSE COMES UP,

1 OBVIOUSLY, IN IT, THEN YOU'LL HAVE IT ON RECORD.

2 BY MR. MCDANIEL: ALL RIGHT. THANK YOU.

3 JUDGE, I MOVE TO SUPPRESS THE BREATH TEST RESULT
4 IN THIS CASE. IT'S BASED OFF A SPUN (PHONETIC)
5 WHICH YOUR HONOR HAS. AND IN PARTICULAR, I MOVE
6 TO SUPPRESS BASED ON COHERSION, PASSIVE AS IT
7 MIGHT HAVE BEEN. I'M NOT ALLEGING AN INTENTIONAL
8 ACT ON THE PART OF TROOPER BROWN, BUT
9 INCORPORATING THAT IS WHAT I CONSIDER TO BE
10 MISLEADING STATEMENTS AFFECTING THE LAW THAT WERE
11 RELAYED TO MR. ABRAHAM DURING THE BA PROCESS. AND
12 ACTUALLY IT BEGINS DURING THE TRANSPORT WHERE -- I
13 THINK, JUDGE, JUST KIND OF A BRIEF INTRODUCTORY
14 STATEMENT ABOUT WHO MR. ABRAHAM IS. HE IS FROM
15 CHICAGO. HE WAS DOWN HERE DOING CONTRACT WORK AS
16 A STRUCTURAL ENGINEER FOR DUKE POWER. NEVER BEEN
17 IN TROUBLE BEFORE. NEVER BEEN ARRESTED. AS FAR
18 AS I KNOW, HE NEVER HAD ANY CONTACT WITH LAW
19 ENFORCEMENT AT ALL. HE IS A NATIVE BORN OF SYRIA.
20 MOVED HERE 2001. BECAME A CITIZEN -- TO ATTEND
21 SCHOOL IN ILLINOIS. BECAME A CITIZEN OF THE
22 UNITED STATES IN 2005. DIDN'T SPEAK A LICK OF
23 ENGLISH UNTIL HE TOOK ENGLISH AS A SECOND
24 LANGUAGE. OBVIOUSLY -- AND I KNOW THAT WE GET A
25 NUMBER OF PEOPLE CONNECTED TO DUKE HERE, BUT A

1 MAJOR CONCERN IS BEING CHARGED WITH A DUI. THE
2 RAMIFICATIONS OF WHICH -- REALLY NOBODY CAN TELL
3 YOU WHAT DUKE OR ANYBODY WOULD DO IF YOU ARE
4 CONVICTED. THE PROBLEM IS SINCE HE IS A
5 STRUCTURAL ENGINEER IN THE NUCLEAR POWER INDUSTRY,
6 HE ALSO HAS HOMELAND SECURITY CLEARANCE THAT HAS
7 BEEN YANKED SINCE THEN. SO, YOU HAVE A GUY THAT
8 KNOWS THAT THERE ARE GOING TO BE SOME
9 RAMIFICATIONS AND HE IS SEEKING ADVICE FROM THE
10 TROOPER IN WHAT HE SHOULD DO. AND WHAT BEGINS
11 DURING TRANSPORT AND ENDS THROUGH THE BA, THROUGH
12 THE ACTUAL BLOW IN THIS CASE, JUDGE, IS TROOPER
13 BROWN TELLING HIM THAT IT IS IN HIS BEST
14 INTERESTED TO BLOW INTO THE MACHINE. AND HERE'S
15 JUST SOME QUOTES THAT I WROTE, JUDGE. THIS IS
16 JUST PURELY DURING THE BA, NOT THE TRANSPORT, BUT
17 (PAUSE) ---

18 BY THE COURT: I GOTCHA.

19 BY MR. MCDANIEL: "IT'S MORE BENEFICIAL TO
20 TAKE THE TEST. I THINK IT'S IN YOUR BEST INTEREST
21 TO TAKE THE TEST. I DON'T SEE ANY REASON WHY YOU
22 SHOULDN'T TAKE THE TEST. THE ONLY WAY TO KNOW
23 WHAT YOU ARE IS TO TAKE THE TEST. IF YOU TAKE THE
24 TEST AND YOU ARE NOT UNDER THE INFLUENCE, YOU'RE
25 FREE TO GO. YOU WON'T BE CHARGED WITH A DUI IF

1 YOU'RE UNDER THE -- IF YOU'RE NOT UNDER THE
2 INFLUENCE. IF YOU BLOW UNDER AN .08, YOU'LL WALK
3 OUT OF HERE. YOU DON'T HAVE ANY REASON NOT TO
4 TAKE THE TEST." AND, JUDGE, SEE I DON'T KNOW HOW
5 MANY -- I KNOW THAT YOU'VE BEEN DOING THIS A LONG
6 TIME. I HAVE NOT. AND I HAVE HAD A LOT OF CASES
7 WITH TROOPER BROWN AND I'VE NEVER HEARD HIM SAY
8 THIS TO PEOPLE THAT HAVE BEEN ARRESTED AND ASKED -
9 - IN FACT, I THINK THE STOCK QUESTION THEY ARE
10 TRAINED TO TELL IS, "I CAN'T GIVE YOU LEGAL
11 ADVICE. HERE'S THE IMPLIED CONSENT FORM. AGAIN,
12 THE DECISION IS YOURS. IF YOU BLOW .15 OR
13 GREATER, YOU'RE SUSPENDED FOR ONE (1) MONTH AND IF
14 YOU REFUSE, THAT REFUSAL WILL BE USED AGAINST YOU
15 AND I TAKE YOUR LICENSE FOR SIX (6) MONTHS." NOW,
16 HERE, JUDGE, I THINK THIS OPENS UP A LOT OF
17 THINGS. IN PARTICULAR, "IF YOU TAKE THE TEST AND
18 YOU'RE NOT UNDER THE INFLUENCE, YOU'RE FREE TO
19 GO." IN MY MIND, THAT ALREADY OPENS UP IN MR.
20 ABRAHAM'S MIND THAT PERHAPS HE'S NOT UNDER ARREST
21 FOR DRIVING UNDER THE INFLUENCE. AND THAT IS A
22 DIRECT QUOTE FROM THE BA, IS THAT "IF YOU BLOW AND
23 YOU'RE NOT UNDER -- AND YOU'RE UNDER -- AND YOU'RE
24 NOT UNDER THE INFLUENCE, YOU'RE FREE TO GO."
25 WELL, THAT'S NOT TRUE. IN FACT, A MAGISTRATE IS

1 THE ONLY INDIVIDUAL THAT CAN UNARREST SOMEBODY, IF
2 THAT'S THE CASE. AND I DON'T KNOW HOW MANY TIMES
3 I'VE HEARD TROOPERS SAY, "WELL, LOOK, I CAN'T
4 UNARREST YOU HERE. DOESN'T MATTER WHAT YOU DO.
5 NO MATTER WHAT YOU BLOW, YOU'RE UNDER ARREST AND
6 YOU CAN TAKE CARE OF THIS LATER. THAT'S WHY YOU
7 HAVE ATTORNEYS." THE STATEMENTS, TAKEN INTO
8 CONSIDERATION, WOULD ALSO NOT EXPLAIN TO MR.
9 ABRAHAM THE FACT THAT SOUTH CAROLINA CAN GO
10 FORWARD ON A DUI IF YOU BLOW AN .06 OR AN .07 WAS
11 COMPLETELY OMITTED. THE FACT THAT IF YOU BLOW AN
12 .05 OR LESS, THAT HE CAN ASK FOR URINE. ACTUALLY,
13 IF YOU BLOW UNDER AN .08 OR LESS, THAT HE CAN ASK
14 FOR URINE. IT DOESN'T TAKE -- AND JUST
15 SPECIFICALLY FOCUSING IN ON THIS CASE, JUDGE, AT
16 THE ROADSIDE, AFTER ARREST, WHEN TROOPER BROWN WAS
17 ASKING ABOUT THE AMOUNT OF ALCOHOL CONSUMED, MR.
18 ABRAHAM SAYS, "I HAD THREE (3) GLASSES OF WINE."
19 TROOPER BROWN SAYS, "WELL, THEY MUST HAVE BEEN
20 GALLON SIZED," BASED ON HIS INTERPRETATION OF THE
21 FIELD SOBRIETY TEST. IN HIS MIND, HE'D ALREADY
22 KNOWN THAT THIS IS AN INDIVIDUAL, IN HIS OPINION,
23 THAT IS HIGHLY IMPAIRED. TO TELL HIM THAT IT'S IN
24 HIS BEST INTEREST TO BLOW INTO THE MACHINE, WHERE
25 HE HAS A FULL UNDERSTANDING THAT SOUTH CAROLINA --

1 THE HIGHEST PENALTY IS RESERVED FOR THAT
2 INDIVIDUAL THAT BLOWS A .16 OR GREATER, POSES A
3 NINETY (90) DAY JAIL PERIOD AND THE FACT THAT HIS
4 FINES CAN BE CLOSER TO THREE THOUSAND DOLLARS
5 (\$3,000) IS A COMPLETE -- WELL IT'S A MISTRUTH, IN
6 FACT. AND IF THEY TRY TO RELAY THIS TO THE FACT
7 THAT IT GOES TO A DRIVER'S LICENSE CASE, AS FAR AS
8 THE SUSPENSION GOES, TROOPER BROWN HAD NO
9 INTENTION TO SUSPEND HIS DRIVER'S LICENSE AT ALL
10 TO BEGIN WITH. AND THAT'S CLEAR ON THE VIDEO
11 WHERE HE SAYS, "WELL, YOU DON'T HAVE A SOUTH
12 CAROLINA LICENSE," AFTER HE BLEW THREE (3) TIMES
13 ARGUABLY THE LEGAL LIMIT, IS THE QUOTE. "I'M NOT
14 TAKING YOUR LICENSE." SO THERE -- IT IS NEVER IN
15 ANYBODY'S BEST INTEREST TO BLOW. AND I WOULD
16 ARGUE THAT NOBODY SITTING IN THIS COURT ROOM -- IF
17 AN INDIVIDUAL CALLED ME AFT- -- DURING THE ARREST
18 AND SAID, "DO I BLOW?" I THINK EVERYBODY WOULD
19 SAY, "HECK, NO. DON'T BLOW." SO, WE HAVE A GUY
20 THAT'S NEVER BEEN IN TROUBLE A DAY IN HIS LIFE,
21 WHO IS HONESTLY SEEKING ASSISTANCE FROM THE
22 HIGHWAY PATROL, WHO TELLS HIM THAT IT'S IN HIS
23 BEST INTEREST TO BLOW, THAT HE'S GOT NOTHING TO
24 LOSE, AND THAT REALLY, THE KEY TO HIS FREEDOM IS
25 IN THAT BREATH SAMPLE, THAT HE'S GOING TO WALK OUT

1 THE DOOR. AND THAT'S SIMPLY NOT TRUE, JUDGE.
2 THERE'S NOT A TROOPER, THAT I'M AWARE OF, THAT
3 WOULD EVER LET ANYBODY FROM A WRECK SCENE THAT
4 BLOWS AN .07 WALK OUT THAT DOOR. AND THAT'S WHAT
5 WE'RE DEALING WITH. THEY ARE TALKING ABOUT -- AND
6 THIS KIND OF GOES RIGHT INTO WHAT I'VE ASKED TO
7 SUPPRESS -- THAT HE SAID, "WELL, THANK GOD YOU
8 DIDN'T KILL ANYBODY." WE'RE NOT TALKING ABOUT
9 SOMETHING MINOR, ALTHOUGH WE'RE NEVER GOING TO
10 REALLY SEE WHAT THE WRECK LOOKED LIKE. BUT THAT
11 DOES GIVE AN UPSHOT OF WHAT WAS IN THE TROOPER'S
12 MINDFRAME. THAT HE HAD SOMEBODY HIGHLY
13 INTOXICATED IN HIS POSSESSION THAT WAS SEEKING
14 ADVICE, AND HE TOLD HIM THE BEST THING HE COULD DO
15 WAS BLOW. "AND IF YOU BLOW UNDER AN .08, YOU'RE
16 WALKING OUT OF HERE." NOW, HIS CAR HAD TO BE
17 TOWED AND HE'S FROM CHICAGO, SO I DON'T KNOW HOW
18 HE'S GOING TO GET HOME, IF THE TROOPER IS GOING TO
19 CALL HIM A CAB OR PHYSICALLY TAKE HIM HOME
20 HIMSELF. BUT, I THINK IT'S EASY TO SEE THERE WAS
21 NO WAY HE WAS LEAVING REGARDLESS OF WHAT HE BLEW.
22 AND I SUBMIT THAT IF HE BLEW AN .07 THAT TROOPER
23 BROWN WAS GOING TO ASK FOR A URINE TEST. AND I
24 THINK HE WOULD HAVE BEEN FULL IN HIS, IN HIS
25 RIGHTS TO DO SUCH. BUT ---

1 (TEXT MISSING - SECTION 13)

2 BY SOLICITOR BLUNDY: ...PAGE 415 (INAUDIBLE)

3 ANALYSIS -- WHEN IT GOES DOWN AND ---

4 BY MR. MCDANIEL: PAGE THREE (3), JUDGE.

5 BY THE COURT: THANK YOU.

6 BY SOLICITOR BLUNDY: --- AND GOES THROUGH,
7 IT TALKS ABOUT HOW, YOU KNOW, THE LAW IN OUR STATE
8 IS IF YOU BLOW UNDER AN .07, THERE -- YOU KNOW, OR
9 UNDER AN .05, YOU'RE CONCLUSIVELY PRESUMED TO NOT
10 BE IMPAIRED. SO AT THAT POINT, THERE WAS SOME
11 DIALOGUE ABOUT -- WELL, CAN YOU UNARREST SOMEBODY
12 OR, YOU KNOW, DO YOU LET HIM GO? DO YOU KEEP HIM
13 IN JAIL? WHAT DO YOU DO? BECAUSE NOW YOU HAVE
14 ONE LAW THAT SAYS THEY'RE CONCLUSIVELY PRESUMED
15 NOT TO BE IMPAIRED, BUT YET YOU HAVE HIM ARRESTED,
16 SITTING HERE IN THE JAIL. AND SO, BASICALLY WHAT
17 THE COURT, YOU KNOW, ENDED UP WITH IS THAT THERE'S
18 DIFFERENT PROCEDURES AND POLICIES DONE WITH
19 DIFFERENT TROOPS. SOME TROOPS SAY -- DO ONE
20 THING. SOME TROOPS DO ANOTHER THING. SO I DON'T
21 THINK IT'S CLEAR-CUT AS FAR AS THAT GOES. THE
22 OTHER MAJOR CASE THAT WE NEED TO LOOK AT IS TOWN
23 OF MOUNT PLEASANT VERSUS SHAW. DO YOU HAVE A COPY
24 OF THIS CASE?

25 BY MR. MCDANIEL: YEAH, I'VE GOT IT. IT'S

1 MENTIONED IN THIS.

2 BY SOLICITOR BLUNDY: I BELIEVE THIS IS MORE
3 OF THE CONTROLLING CASE. THE RULE OF LAW THAT THE
4 SUPREME COURT OF SOUTH CAROLINA HAS ACTUALLY HELD,
5 SAYS THAT "IF A DEFENDANT IS REASONABLY INFORMED
6 OF HIS RIGHTS, DUTIES AND OBLIGATIONS UNDER THE
7 IMPLIED CONSENT LAW, HE IS NEITHER TRICKED, NOR
8 MISLED INTO THINKING HE HAS NO RIGHT TO REFUSE,
9 THEN THE TEST WILL GENERALLY BE ADMISSIBLE." SO
10 THE KEY IS NOT JUST THAT HE WAS TRICKED OR MISLED
11 IN ANY WAY, IT'S HE'S GOT TO BE TRICKED OR MISLED
12 INTO THINKING HE DOESN'T HAVE A RIGHT TO REFUSE
13 THE TEST. AND THAT WAS THE HOLDING IN THAT CASE.

14 BY THE COURT: I BELIEVE THAT CASE IS
15 ACTUALLY, IN THE CASE ---

16 BY MR. MCDANIEL: IT IS, JUDGE. IT'S
17 ACTUALLY HIGHLIGHTED FOR YOU ON PAGE FOUR (4),
18 THAT EXACT HOLDING.

19 BY SOLICITOR BLUNDY: AND SO I DON'T BELIEVE
20 WE HAVE THAT HERE. I -- THE FACTS OF THIS CASE
21 ACTUALLY COME OUT -- YOU'LL HEAR THAT THROUGHOUT
22 THE ENTIRE TRANSPORT, THE DEFENDANT IS ASKING HIM
23 NUMEROUS TIMES, "WHAT SHOULD I DO? WHAT SHOULD I
24 DO? WHAT SHOULD I DO?" ALMOST TO THE POINT WHERE
25 IT'S BADGERING THE OFFICER, I THINK, TO AN EXTENT.

1 ALL DURING THE TRANSPORT, THE OFFICER CLEARLY
2 TELLS HIM -- LET ME SEE. LET ME GRAB MY NOTES
3 HERE BECAUSE I CAN READ IT WORD-FOR-WORD, WHAT'S
4 SAID ON THE VIDEO. IT STARTS OFF, THE OFFICER
5 SAYS, "I'M GOING TO OFFER YOU A BREATH TEST. YOU
6 CAN TAKE IT OR NOT." THAT'S FROM THE VERY
7 BEGINNING IN THE TRANSPORT -- DURING THE
8 TRANSPORT. THEN THEY GO OVER SEVERAL TIMES -- HE
9 SAYS, "WHAT ARE THE CONSEQUENCES FOR TAKING THE
10 TEST?" AT ONE POINT HE SAYS -- YEAH, HE ASKS HIM
11 WHAT THE CONSEQUENCES ARE AND HE GOES OVER THE
12 DRIVER'S LICENSE CONSEQUENCES SEVERAL DIFFERENT
13 TIMES. WE ALSO HAVE CASE LAW THAT SAYS THE
14 OFFICER, YOU KNOW, ISN'T -- DOESN'T -- ISN'T HELD
15 TO THE STANDARD OF KNOWING WHAT HAPPENS TO AN OUT-
16 OF-STATE DRIVER'S LICENSE. THEY JUST HAVE TO TELL
17 THEM WHAT WOULD HAPPEN TO A SOUTH CAROLINA
18 LICENSE. I BELIEVE THAT'S PERCY VERSUS SOUTH
19 CAROLINA DEPARTMENT OF HIGHWAY. THE OFFICER
20 DOESN'T NEED TO INFORM THE DEFENDANT OF ANY
21 REPERCUSSIONS TO AN OUT-OF-STATE DRIVER'S LICENSE.
22 I HAVE A COPY OF THAT CASE, AS WELL. SO HE IS
23 STATING TO HIM, HIM THE LAW AS HE'S REQUIRED TO.
24 THE FACT THAT THE DEFENDANT HAS A LICENSE FROM
25 CHICAGO REALLY IS IRRELEVANT IN THIS MATTER.

1 BY MR. MCDANIEL: IT IS, JUDGE. AND I HAVE
2 NEVER ALLEGED THAT IT WAS. WHAT'S RELEVANT IS HE
3 DID -- I MEAN, HE -- THE TROOPER READ WHAT HE WAS
4 SUPPOSED TO. HE READ THE IMPLIED CONSENT. BUT HE
5 WENT FURTHER. AND HE WENT FAR FURTHER THAN ANY OF
6 THESE CASES HANDED UP BY THE STATE OR THE DEFENSE.

7 BY SOLICITOR BLUNDY: BUT HERE'S WHERE WE
8 HAVE TO DIAGRAM IT OUT, YOUR HONOR. HE'S GIVEN
9 THE IMPLIED CONSENT. SO HE'S FOLLOWED THE LAW IN
10 SOUTH CAROLINA. THE FACT THAT THE DEFENDANT TOOK
11 THE TEST WOULDN'T REALLY RESULT IN ANY MATERIAL
12 INACCURACY OF THE TEST. THE ONLY TIME I'VE EVER
13 SEEN THAT USED IS WHEN SOMEONE ACTUALLY REFUSED
14 THE TEST AND WISHED THAT THEY COULD HAVE GIVEN A
15 SAMPLE. AND THEN WE NEED TO MOVE TO THE NEXT
16 POINT WHICH IS YOU HAVE TO BE TRICKED OR MISLED
17 INTO THINKING THAT YOU CANNOT REFUSE THE TEST.
18 AND AT NO TIME DID THE DEFENDANT FEEL THAT WAY.
19 THAT'S WHY HE KEEPS ASKING HIM, "WHAT SHOULD I
20 DO?" "SHOULD I TAKE THE TEST OR NOT?" HE SAYS.
21 "I NEED YOU TO ADVISE ME." THESE ARE DIFFERENT
22 THINGS THAT THE DEFENDANT SAYS AT LEAST FOUR (4)
23 OR FIVE (5) TIMES THROUGHOUT THE BREATHALYZER
24 VIDEO.

25 BY MR. MCDANIEL: AND JUDGE, WHAT SHE'S NOT

1 MENTIONING TO YOU IS WHAT OUT -- WHEN HE SAYS, "I
2 NEED YOU TO TELL ME WHAT TO DO," HE SAYS, "YOU
3 NEED TO BLOW. IT IS MORE BENEFICIAL FOR YOU TO
4 BLOW." I'M NOT ARGUING THE DRIVER'S LICENSE
5 ISSUE, JUDGE. IN FACT, TROOPER BROWN HAD NO
6 INTENTION OF SUSPENDING HIS DRIVER'S LICENSE IF HE
7 DIDN'T DO IT. WHAT I AM ARGUING IS THAT IF HE IS
8 GOING TO TELL SOMEBODY THAT IS MORE BENEFICIAL FOR
9 THEM TO BLOW, THEN HE NEEDS TO SAY -- AND THIS IS
10 WHY THEY ARE ENCOURAGED -- AND, AND THIS CASE LAW
11 THAT SHE'S MENTIONED SAYS THAT, THAT -- STICK TO
12 YOUR IMPLIED CONSENT RIGHT. BECAUSE WHAT HE
13 ENGAGED IN WAS SAYING, "THIS -- IT IS MORE
14 BENEFICIAL FOR YOU TO BLOW." BUT HE DOESN'T TELL
15 HIM THE CONSEQUENCES OF BLOWING .16 OR GREATER,
16 .15 OR LESS, .10 OR LESS, OR REFUSING. AS FAR AS
17 JUDICIAL PENALTIES, WHAT WE ARE SITTING IN FRONT
18 OF YOUR HONOR FOR TODAY: FINES AND JAIL TIME. SO
19 THAT IS TRICKED -- BEING TRICKED AND MISLED.
20 BECAUSE EVEN IF WE'RE JUST FOCUSING ON THE
21 DRIVER'S LICENSE SUSPENSION, THAT -- IT DOESN'T
22 MATTER. HE DIDN'T SUSPEND HIS LICENSE. HE HAD NO
23 INTENTION OF SUSPENDING HIS LICENSE. IT'S ON THE
24 VIDEO THAT HE HAD NO INTENTIONS--AT THE END--OF
25 SUSPENDING HIS DRIVER'S LICENSE. BUT IF YOU'RE

1 GOING TO TELL SOMEBODY IN YOUR CUSTODY THAT ASKS
2 YOU FOR ASSISTANCE THAT IT'S MORE BENEFICIAL TO
3 BLOW, I DON'T SEE HOW THAT WE CAN SAW THAT IT IS
4 NOT BEING TRICKED OR MISLED. BECAUSE IT'S NOT
5 MORE BENEFICIAL TO BLOW.

6 BY THE COURT: ALL RIGHT. I THINK THAT MAIN
7 QUESTION IS TO -- FOR ME, IS, IS REALLY TWO-FOLD.
8 IT'S WHETHER OR NOT, NUMBER ONE (1): THE
9 BREATHALYZER AND IMPLIED CONSENT RIGHTS WERE MET.
10 I DO FIND THAT THEY WERE. AND I THINK THE MAIN
11 ARGUMENT THAT YOU HAVE, MR. MCDANIEL, IS WHETHER
12 OR NOT STATEMENTS THAT WERE MADE LET HIM BE
13 TRICKED OR MISLED INTO REFUSING THE TEST. I'M
14 GOING TO FIND AT THIS POINT THAT IT DID NOT,
15 BECAUSE OF THE FACT THAT MR. ABRAHAM WAS ASKING
16 HIM AND PROMPTING HIM TO ANSWER THE QUESTION,
17 "WHAT DO I NEED TO DO?" HE WAS ASKING FOR THE
18 ADVICE. AND IT WAS NOT OFFERED BY THE OFFICER TO
19 TRICK OR MISLEAD HIM. HE WAS JUST ASKING THE
20 QUESTIONS THAT WERE GIVEN HIM. SO I AM GOING TO
21 DENY THE MOTION AT THIS TIME BASED ON THAT, THAT
22 THE OFFICER -- HE WAS NOT OFFERING THIS
23 INFORMATION TO TRICK OR MISLEAD HIM, THAT HE WAS
24 BEING PROMPTED BY THE DEFENDANT AS TO WHAT HE
25 NEEDED TO DO, AND THAT HE WAS JUST ANSWERING A

1 QUESTION. OKAY?

2 BY MR. MCDANIEL: THAT'S -- WELL, JUDGE, I
3 DISAGREE ---

4 BY THE COURT: YOU CAN DISAGREE ---

5 BY MR. MCDANIEL: WELL, I DO DISAGREE BECAUSE
6 ONE -- I MEAN, I THINK SHE SAID BADGERING. AND I
7 THINK THE VIDEO IS GOING TO SHOW THAT THERE WAS NO
8 BADGERING WHATSOEVER THERE.

9 BY THE COURT: WELL -- AND I'M NOT
10 CONSIDERING THAT PART OF IT AS BADGERING.

11 BY MR. MCDANIEL: BUT THE FACT IS THAT THE,
12 THE ADVICE OFFERED BY THIS OFFICER WAS COMPLETELY
13 AND UTTERLY MISLEADING.

14 BY THE COURT: AND THE REASON FOR MY RULING
15 IS I DON'T THINK THE ADVICE WAS OFFERED. I THINK
16 IT WAS ASKED FOR.

17 BY MR. MCDANIEL: NO, IT WAS OFFERED. WELL,
18 YEAH. BUT IF I ASKED YOU, AN ARRESTING OFFICER,
19 "WHAT DO I DO?", JUDGE, WHAT DO YOU SAY? "I CAN'T
20 TELL YOU. I'M NOT A LAWYER." THAT'S WHAT THEY
21 OUGHT TO SAY. BUT IF YOU SAY, "MAN, IT'S IN YOUR
22 BEST INTEREST TO BLOW IN THAT MACHINE," THEN
23 YOU'VE JUST OFFERED ADVICE THAT IS MISLEADING.
24 NOW, I DON'T KNOW WHAT ANY OTHER TERM IMPARTS IT
25 ANY OTHER WAY. THAT'S EXACTLY WHAT IT IS. IT IS

1 MISLEADING. IT IS NEVER --- IT IS NEVER BENEFICIAL
2 TO ANYBODY TO BLOW INTO A MACHINE. BUT THAT'S NOT
3 JUST MY OPINION. THAT'S EVERYBODY'S OPINION.

4 BY SOLICITOR BLUNDY: THE LAW, AS IT STANDS,
5 IT THAT IT HAS TO BE MISLEADING TO THE POINT WHERE
6 THE DEFENDANT DOESN'T KNOW THAT HE HAS A RIGHT TO
7 REFUSE THE TEST.

8 BY THE COURT: AND I THINK THAT WAS COVERED
9 IN THE IMPLIED CONSENT, WHICH -- I HAVE NOT HEARD
10 ANY ARGUMENT THAT IT WAS NOT DONE CORRECTLY.

11 BY MR. MCDANIEL: AND HE READ THE IMPLIED
12 CONSENT.

13 BY THE COURT: AND I THINK HE DID THAT FIRST,
14 WHICH COVERED HIM. AND THEN THE FACT THAT THE
15 DEFENDANT WAS ASKING HIM THIS QUESTION, IS I, I
16 THINK ---

17 BY MR. MCDANIEL: BUT IT'S NOT A SHIELD,
18 JUDGE, TO THEN ENGAGE IN THE UNLAWFUL PRACTICE OR
19 THE UNLICENSED PRACTICE OF LAW TO GIVE SOMEBODY
20 LEGAL ADVICE.

21 BY THE COURT: WELL, I DON'T THINK IT'S AN
22 UNLAWFUL PRACTICE OR UNLICENSED PRACTICE OF THE
23 LAW. I THINK THE DEFENDANT KEPT ASKING HIM THESE
24 QUESTIONS AND HE HAD TO GIVE HIM SOME SORT OF
25 ANSWER. COULD HE HAVE DONE IT ANOTHER WAY?

1 OBVIOUSLY. BUT I DON'T THINK IT -- I DON'T THINK
2 IT PREJUDICED HIM BECAUSE HE ALREADY KNEW HIS
3 RIGHTS OF WHETHER OR NOT HE SHOULD TAKE THE TEST.

4 BY MR. MCDANIEL: WELL, JUDGE, THE IMPLIED
5 CONSENT -- AND SHE GLOSSED OVER IT A LITTLE BIT --
6 WE ARE CONCERNED ABOUT FAIRNESS AS WELL.

7 BY THE COURT: I UNDERSTAND.

8 BY MR. MCDANIEL: AND THIS WAS -- I MEAN THIS
9 WAS NOT A FAIR TEST; AT ALL. I MEAN, TO NEVER
10 HAVE BEEN IN THAT POSITION AT ALL AND THEN TO HAVE
11 YOUR ARRESTING OFFICER WHO -- LOOK, TROOPER BROWN
12 WAS VERY NICE TO HIM, BUT TO HAVE HIM SAY, "IT IS
13 IN YOUR BEST INTEREST TO BLOW INTO THAT MACHINE,"
14 -- I MEAN HOW CAN WE EVEN SAY THAT THAT IS NOT
15 MISLEADING INFORMATION TO GIVE SOMEBODY?

16 BY SOLICITOR BLUNDY: YOUR HONOR -- I MEAN,
17 AT NO TIME DID TROOPER BROWN HOLD HIMSELF OUT AS A
18 LAWYER. IN FACT, AT THAT POINT, HE HAD ALREADY
19 KNOWN THAT HE HAD -- YOU KNOW, HE HAD A RIGHT TO A
20 LAWYER UNDER MIRANDA. HE WAS IN CUSTODY. HE
21 COULD HAVE EASILY ASKED TO CALL A LAWYER. HE DID
22 NOT DO SO. AND THE DEFENSE SAID, SAID IT HIMSELF.
23 THE ONLY THINGS THAT HE TOLD HIM ABOUT THE TEST
24 WERE THE DRIVER'S LICENSE IMPLICATIONS. HE, AT NO
25 TIME, WENT INTO THE LEGAL PENALTIES ON THE LAW.

1 BY MR. MCDANIEL: AND THAT'S WHY IT'S
2 MISLEADING, JUDGE. THAT'S IT, SIMPLY, RIGHT
3 THERE. HE DIDN'T SAY THAT HE ---

4 BY THE COURT: I, I DISAGREE WITH THAT.

5 BY MR. MCDANIEL: JUDGE, HE WAS FACING NINETY
6 (90) DAYS IN JAIL. IF THIS WAS REFUSAL, IT WOULD
7 BE THIRTY (30) DAYS. THAT'S WHAT'S MISLEADING.
8 HE COULD GET FINED UP TO TWENTY-SEVEN HUNDRED
9 (\$2,700) BUCKS INSTEAD OF NINE HUNDRED AND NINETY-
10 SEVEN (\$997) BUCKS. THAT'S WHY THIS IS
11 MISLEADING. AND TO TELL SOMEBODY, "IF YOU BLOW
12 UNDER AN .08, I'M GOING TO LET YOU WALK OUT OF
13 HERE," IS MISLEADING BECAUSE WE KNOW THAT DOESN'T
14 HAPPEN; IT CAN'T HAPPEN . THAT'S WHAT'S
15 MISLEADING ABOUT ALL THIS.

16 BY SOLICITOR BLUNDY: BUT THAT'S NOT REQUIRED
17 UNDER ---

18 BY MR. MCDANIEL: IF HE'S GOING TO ENGAGE IN
19 TELLING SOMEBODY THAT IT IS ---

20 BY SOLICITOR BLUNDY: --- IMPLIED CONSENT
21 STATUTE.

22 BY MR. MCDANIEL: --- IN YOUR BEST INTEREST
23 TO BLOW, THEN HE NEEDS TO SAY, "BUT IF YOU BLOW
24 .16 OR GREATER, YOU COULD SPEND THREE (3) MONTHS
25 IN JAIL, SIR, BUT IF YOU BLOW THIS, YOU CAN SPEND

1 SIX- -- SIXTY (60) DAYS IN JAIL AND IF YOU REFUSE
2 OR YOU BLOW A .10 OR LESS, YOU'RE ONLY LOOKING AT
3 THIRTY (30) AND A VERY LOW FINE." THAT'S WHAT'S
4 MISLEADING ABOUT ALL OF THIS. AND TO FOCUS ON THE
5 DRIVER'S LICENSE EVEN ADDS A SMOKESCREEN TO THIS
6 BECAUSE HE NEVER HAD ANY INTENTION, WHATSOEVER, TO
7 SUSPEND HIS DRIVER'S LICENSE. AND THAT'S CLEAR ON
8 THE VIDEO.

9 BY THE COURT: WELL, HERE'S WHAT I'M GOING TO
10 BASE MY DENIAL OF YOUR MOTION ON -- AND IT'S
11 BASICALLY -- IT'S PRETTY STRAIGHTFORWARD. IF THE
12 ARRESTED PERSON IS REASONABLY INFORMED OF HIS
13 RIGHTS, DUTIES AND OBLIGATIONS, UNDER OUR IMPLIED
14 CONSENT LAW -- I THINK THAT WAS DONE. THAT WAS --
15 I MEAN, I DON'T THINK THERE'S ANY QUESTION ABOUT
16 THAT. AND HE'S NEITHER TRICKED NOR MISLED, WHICH
17 IS THE BASIS OF YOUR ARGUMENT, IS THAT HE WAS
18 MISLED INTO THINKING HE HAS NO RIGHT TO REFUSE THE
19 TEST AND DETERMINE THE ALCOHOL CONTENT IN HIS
20 BLOOD, URINE OR BREATH, THE TEST WILL GENERALLY BE
21 HELD ADMISSIBLE. AND I DON'T THINK THAT HE HAS --
22 AT ANY POINT WAS HE TOLD HE HAD NO RIGHT TO REFUSE
23 TO THE TEST OR NO RIGHT TO -- YOU KNOW, OR THE
24 RIGHT THAT HE HAD TO TAKE IT. I MEAN, I KNOW HE
25 WAS TOLD THAT THE OFFICER SAID, "I THINK YOU NEED

1 TO BLOW." THAT'S NOT TELLING HIM HE HAD TO BLOW.
2 AND THAT'S WHAT I ---

3 BY MR. MCDANIEL: WELL, IF WE ARE GOING TO
4 (INAUDIBLE), THAT'S FINE; I WOULD JUST LIKE TO
5 KNOW. BUT PERCY WAS CITED IN SPONAR. SPONAR IS A
6 NEWER CASE. IT WOULD BE CONTROLLING. THE HOLDING
7 IN THAT WAS THAT BECAUSE THAT INDIVIDUAL WAS NOT
8 TRICKED OR MISLED INTO ---

9 BY THE COURT: RIGHT.

10 BY MR. MCDANIEL: --- REFUSING THE TEST, THEN
11 THEY WERE GOING TO GENERALLY UPHOLD IT. MY
12 ARGUMENT IS THAT FOR WHATEVER PERCY STANDS FOR,
13 SPONAR CLEARED THAT UP BY SAYING THAT HE KNEW THE
14 WAY THE SUPREME COURT IS GOING TO LOOK AT IT IS
15 THAT IF YOU ARE TRICKED OR MISLED INTO EITHER
16 REFUSING OR BLOWING INTO A MACHINE, THEN YOU HAVE
17 SERIOUS ISSUES. MY ARGUMENT IS BASED ON SPONAR,
18 NOT PERCY. I WOULD THINK THAT'S CONTROLLING AND I
19 UNDERSTAND ---

20 BY THE COURT: WELL, AND -- YOU KNOW, I'M
21 READING FROM THE LAW AND THE ANALYSIS IN SPONAR,
22 IS WHERE I JUST READ THAT FROM, WHICH IS THE CASE
23 THAT YOU HANDED UP. AND I THINK THE OFFICER IS
24 COVERED BY THE PARAGRAPH THAT I JUST READ. AND
25 I'M ---

1 BY MR. MCDANIEL: I'M JUST, I'M JUST TRYING
2 TO KEEP THE RECORD CLEAR FOR, FOR MY PURPOSES.

3 BY THE COURT: I UNDERSTAND. YOUR -- IN YOUR
4 ARGUMENT, I'LL HELP YOU CLARIFY THAT YOUR ARGUMENT
5 IS -- EVEN IF I AM QUOTING THAT STATUTE -- OR NOT
6 THAT STATUTE, BUT THAT PARAGRAPH FROM THE LAW IN
7 THAT CASE, THAT IT IS YOUR ARGUMENT THAT HE WAS
8 MISLED AND YOU THINK IT WAS FATAL TO, TO THE
9 BREATHALYZER.

10 BY MR. MCDANIEL: IT WAS UNFAIR AND IT SHOULD
11 BE SUPPRESSED, YOUR HONOR.

12 BY THE COURT: ALL RIGHT. OKAY. AND I, AND
13 I DISAGREE. I THINK HE'S COVERED BY THE STATUTE.
14 NOT ONLY THE STATUTE, BUT THE LAW THAT YOU
15 PRESENTED. AND I THINK HE WAS REASONABLY INFORMED
16 OF HIS RIGHTS AND I THINK HE WAS ANSWERING THE
17 QUESTIONS. I DO NOT THINK IT WAS -- HE WAS
18 MISLED. AND I, I JUST THINK THE OFFICER IS
19 COVERED IN A WAY THAT ---

20 BY MR. MCDANIEL: YES, YOUR HONOR.

21 BY THE COURT: I DON'T, I DON'T THINK HE TOLD
22 HIM -- I THINK THE KEY IS HE DIDN'T TELL HIM HE
23 HAD TO BLOW. THE, THE DEFENDANT ASKED HIS OPINION
24 AND HE SAID, "I THINK YOU NEED TO BLOW." SO I
25 THINK IT WAS MORE AN OPINION. I DON'T THINK IT

1 WAS A MISLEADING FACT. OKAY?

2 BY MR. MCDANIEL: JUDGE, THERE'S A VIDEO TAPE
3 ISSUE. SOME OF THE REQUIREMENTS FROM TWENTY- --
4 TWENTY-NINE FIFTY-THREE (2953) ARE OFF VIDEO. THE
5 STATE DID SUBMIT THIS MONTH AN AFFIDAVIT, NINE (9)
6 MONTHS AFTER ARREST. BASICALLY, AN OFFICER SHOWS
7 UP. MY CLIENT IS OFF VIDEO. HE MAKES CONDUCT --
8 CONTACT WITH HIM. DOES PERFORM A FIELD SOBRIETY
9 TEST ON HIM THAT IS NOT ON VIDEO. AND THE
10 INCIDENT SITE IS NOT CAPTURED ON VIDEO AS WELL.
11 THERE IS LARGE PORTIONS OF THIS CONDUCT THAT'S NOT
12 CAPTURED ON VIDEO. HE IS BROUGHT, AFTER THE
13 OFFICER DETERMINES THAT ALCOHOL IS PARTIALLY TO
14 BLAME -- A, A PARTIAL RESULT OF THE WRECK. HE
15 BRINGS HIM ON CAMERA. AND THEN, I GUESS FOR SHOW,
16 DOES THE FIELD SOBRIETY TEST. BUT IN A STRICT
17 READING OF THE STATUTE WHICH IS A REQUIREMENT,
18 THAT HE MUST HAVE ALL FIELD SOBRIETY TESTS THAT
19 HE'S CONDUCTED ON VIDEO. AND ARGUABLY, SINCE WE
20 GOT THIS AFFIDAVIT THAT CAME IN SO LATE THAT THEY
21 HAVE REALIZED THAT THAT WAS AN ISSUE AND THEY'VE
22 SENT AN AFFIDAVIT. ONE (1), I'D CHALLENGE THAT
23 THE AFFIDAVIT IS NOT SUFFICIENT TO SAVE THEM IN
24 THIS CASE. IT CLEARLY DOESN'T FALL WITHIN ANY OF
25 THE ENUMERATED EXCEPTIONS IN PART B BECAUSE THE

1 COLLISION PORTION SAYS THAT CIRCUMSTANCES
2 INVOLVING TRAFFIC ACCIDENTS AND CITIZEN'S ARRESTS,
3 WHERE AN ARREST HAS BEEN MADE AND THE VIDEO
4 RECORDING EQUIPMENT HAS NOT BEEN ACTIVATED BY THE
5 BLUE LIGHT'S FAILURE OF THE ARRESTING OFFICER TO
6 PRODUCE. IT'S NOT ALONE GROUNDS FOR DISMISSAL.
7 THAT'S NOT WHAT WE'RE DEALING WITH HERE. WHAT
8 WE'RE DEALING WITH IS THAT MANY COURT PROVISIONS
9 OF VIDEO TAPING STATUTE WERE CONDUCTED OFF VIDEO
10 AND THAT IS NOT AN EXCEPTION THAT IS ALLOWED BY
11 THE LAW. FURTHER, JUDGE, ONCE HE'S ARRESTED AND
12 PLACED IN THE CAR, TROOPER BACKED AROUND, TURNS
13 THE CAR ON HIM AND THEN CUTS HIS PERSONAL MIC OFF.
14 AND THERE'S SEVEN (7) MINUTES OF MISSING AUDIO
15 FROM THE WRECK SCENE THAT IN AND OF ITSELF
16 VIOLATES THE STATUTE. I THINK THOSE, TAKEN
17 TOGETHER, WOULD WARRANT A DISMISSAL BASED ON
18 SUCHENSKI, MURPHY AND TREVA ROBBIT- -- ROBERTS OF
19 MOUNT PLEASANT BECAUSE THE STATUTE AS BEEN
20 VIOLATED. WE HAVE MISSING CONDUCT. WE HAVE NO
21 INCIDENT SITE RECORDED. IT SAYS "INCLUDING ANY
22 FIELD SOBRIETY TESTS ADMINISTERED." WE ARE
23 MISSING THE FIELD SOBRIETY TEST THAT WAS
24 ADMINISTERED OFF CAMERA. AND I GUESS WHAT THEY
25 ARE ALLEGING IS THAT, BECAUSE IT'S A WRECK, THEY

1 CAN DO THAT, AND THAT IT SIMPLY DOESN'T APPLY TO
2 THE FACTS RELATED TO THIS CASE, YOUR HONOR.

3 BY THE COURT: THANK YOU. MS. BLUNDY?

4 BY SOLICITOR BLUNDY: THANK YOU, YOUR HONOR.
5 AGAIN, GOING BACK TO THE STATUTES SPECIFICALLY.
6 BASICALLY, THE STATUTE LAYS OUT WHAT MUST BE ON
7 THE VIDEO RECORDING AND IT DOES GO THROUGH THE
8 REQUIREMENTS. ONE (1) OF THE REQUIREMENTS IS THAT
9 THE VIDEO MUST START AS SOON AS PRACTICABLE. WHEN
10 THERE ARE CASES LIKE A WRECK CASE. AND SO I DID
11 ASK TROOPER BROWN IF HE WOULD SUBMIT AN AFFIDAVIT
12 JUST SO EVERYONE WOULD BE CLEAR THAT IT WAS A
13 WRECK CASE. THE VIDEO STARTED AS SOON AS
14 PRACTICABLE. LET IT STAND FOR THE RECORD, I DO
15 NOT THINK THE LAW REQUIRES THAT IN THAT CASE. ALL
16 IT REQUIRES IS NOT NECESSARILY AN AFFIDAVIT, BUT
17 JUST THAT THE VIDEO START AS SOON AS PRACTICABLE.
18 BUT TO BE ON THE CAUTIOUS SIDE, SINCE THERE ARE
19 SOME DIFFERING OPINIONS WITHIN THE CIRCUIT COURTS
20 ABOUT THAT, TO GO AHEAD AND FILL OUT THE AFFIDAVIT
21 AS AN ABUNDANCE OF CAUTION. SO THE AFFIDAVIT WAS
22 SUBMITTED TO THE DEFENSE PRIOR TO TRIAL, STATING
23 THAT IT WAS -- AN ACCIDENT INVESTIGATION HAD
24 STARTED. TROOPER BROWN PULLED UP. AS SOON AS HE
25 REALIZED ALCOHOL COULD HAVE POSSIBLY BEEN INVOLVED

1 WITH THE ACCIDENT, HE HAD BROUGHT THE DEFENDANT
2 OVER AND IN FRONT OF THE CAMERA. THE FIELD
3 SOBRIETY TEST THAT THE DEFENSE IS REFERRING TO IS
4 WHEN HE GOES UP AND APPROACHES THE DEFENDANT, HE
5 DOES A QUICK CHECK OF HIS EYES. HE'S NOT FORMALLY
6 ADMINISTERING A FIELD SOBRIETY TEST. I THINK IT
7 WAS TO HELP DETERMINE IF THERE WAS SOME ---

8 BY THE COURT: LET ME ASK YOU THIS. HOW DID
9 HE DO A QUICK CHECK OF HIS EYES? DID HE DO AN HGN
10 TEST?

11 BY MR. MCDANIEL: YES.

12 BY SOLICITOR BLUNDY: IT WASN'T A REAL HGN
13 TEST. I MEAN ---

14 BY MR. MCDANIEL: JUDGE, IF THEY NEED TO ---

15 BY SOLICITOR BLUNDY: IF YOU NEED TO WATCH
16 THE VIDEO TO SEE IT -- I MEAN, YOU CAN'T ACTUALLY
17 SEE IT ON THE VIDEO, BUT YOU CAN HEAR IT. THEN HE
18 BRINGS THE DEFENDANT OVER IN FRONT OF THE CAMERA
19 AND ACTUALLY ADMINISTERS THE REAL FIELD SOBRIETY
20 TEST, FULL COMPLETE INSTRUCTIONS, EVERYTHING. SO,
21 I -- IT'S MY CONTENTION THAT THE ACTUAL FIELD
22 SOBRIETY TESTS ARE ON THE VIDEO. I THINK AT THAT
23 POINT HE WAS STILL INVESTIGATING, DETERMINING
24 WHETHER HE SMELLED ALCOHOL ON THE DEFENDANT AND IF
25 THERE WAS ANY ALCOHOL IN THE DEFENDANT'S SYSTEM,

1 ENOUGH SO THAT HE COULD DO THE FIELD SOBRIETY TEST
2 TO GET AN ACCURATE READING OF THAT.

3 BY MR. MCDANIEL: AND THE PROBLEM WITH THAT
4 IS, JUDGE, THAT THE -- WHAT THE AFFIDAVIT THAT
5 SUBMITTED, SUBMITTED TO US SAYS. IT WAS FROM AN
6 ACCIDENT. "UPON ARRIVAL, I WAS INVESTIGATING THE
7 COLLISION AND TRYING TO GATHER EVIDENCE WHEN IT
8 WAS DETERMINED ALCOHOL WAS A PARTIAL FACTOR AND I
9 MOVED THE SUBJECT IN FRONT OF THE CAMERA." SO
10 WHAT THAT BRIEF STATEMENT SAYS IS THAT WHAT'S OFF
11 VIDEO IS HIM ACTUALLY DEVELOPING PROBABLE CAUSE
12 THAT THIS IS A DUI. THAT HE DID THE FIELD
13 SOBRIETY TESTS AND THAT WHATEVER INVESTIGATION ---

14 BY THE COURT: WELL, HE HAD OTHER FACTORS,
15 YOU KNOW, FROM THE WRECK SITE.

16 BY MR. MCDANIEL: WELL, SEE, BUT THAT'S JUST
17 IT. WE DON'T -- THIS IS GOING TO BE AN ALLEGED
18 WRECK CASE THAT WE ARE NOT GOING TO SEE ANY
19 INCIDENT SITE WHATSOEVER. THERE'S NOTHING.
20 YOU'RE NOT GOING TO SEE A CAR. WE'RE NOT GOING TO
21 -- YOU KNOW, NOTHING.

22 BY SOLICITOR BLUNDY: IT -- THE VIDEO IS
23 RECORDING. YOU CAN SEE, YOU CAN SEE THE EMERGENCY
24 VEHICLES THERE. YOU MIGHT NOT BE ABLE TO SEE THE
25 ACTUAL CAR. IT'S TWO (2:00) IN THE MORNING. IT'S

1 DARK. BUT, I MEAN, THERE'S NO REQUIREMENT TO COME
2 OUT THERE WITH FLOODLIGHTS SO THAT YOU CAN SEE
3 EVERY ASPECT OF THE WRECK.

4 BY THE COURT: I THINK AT THIS POINT, I WOULD
5 OBVIOUSLY -- I THINK I'VE HELD FROM SEVERAL
6 OCCASIONS IF A, IF A FIELD SOBRIETY TEST WAS NOT
7 ON THERE, THAT OBVIOUSLY THAT DOES NOT LEAD -- I
8 MEAN THERE'S SEVERAL OF THESE THAT DID NOT LEAD TO
9 DISMISSAL OF THE ENTIRE CASE. BUT I THINK AT THIS
10 POINT, FROM WHAT I'VE BEEN TOLD, THAT I WOULD
11 SUPPRESS ANY TEST THAT WAS DONE OFF-CAMERA ON, ON
12 THIS CASE. IF YOU'RE TALKING ABOUT A -- AND I,
13 AND I THINK IT'S A -- FIRST OF ALL, I WILL AGREE
14 WITH MR. MCDANIEL, ANY KIND OF HGN TEST, WHETHER
15 IT'S A REAL ONE OR A FAKE ONE, IS AN HGN TEST.
16 AND I WOULD SUPPRESS THAT IN ANY STATEMENTS THAT
17 HAVE TO DO WITH THAT. YOU KNOW, IF HE CAME BACK
18 AND DID IT ON VIDEO, I DON'T THINK I WOULD HAVE A
19 PROBLEM WITH THAT. BUT CERTAINLY ANY TEST THAT HE
20 DID OFF VIDEO WOULD DEFINITELY BE SUPPRESSED.

21 BY SOLICITOR BLUNDY: OKAY.

22 BY MR. MCDANIEL: BUT, JUDGE, WHAT ABOUT THE
23 MISSING AUDIO? THERE'S SEVEN (7) MINUTES WHERE
24 THE AUDIO IS SIMPLY TURNED OFF.

25 BY THE COURT: AND YOU -- I BELIEVE YOU SAID

1 THAT WAS ON THE RIDE TO THE JAIL?

2 BY MR. MCDANIEL: WELL, THAT -- HE'S ARRESTED
3 AND PUT IN THE CAR. THE CAMERA IS FACING MR.
4 ABRAHAM AND THEN FOR SEVEN (7) MINUTES -- WELL, I
5 DON'T KNOW WHAT HE'S DOING, I MEAN. THERE'S SEVEN
6 (7) MINUTES WHERE THE TROOPER IS OUT OF THE CAR
7 WHERE HE CUTS HIS AUDIO OFF.

8 BY THE COURT: OKAY.

9 BY SOLICITOR BLUNDY: WELL, YOUR HONOR, AGAIN
10 I GO BACK TO THE STATUTE. THEY'VE MET THE
11 QUALIFICATIONS. WE'VE MET THE QUALIFICATIONS
12 UNDER THE STATUTE. I, I THINK MURPHY VERSUS STATE
13 ACTUALLY TO-, TOUCHES ON THAT. WELL, THE OFFICER
14 CAN VIDEO RECORD THEM ALL THE WAY TO THE JAIL.
15 YOU DON'T NECESSARILY HAVE TO VIDEO RECORD THEM
16 ALL THE WAY TO THE JAIL.

17 BY THE COURT: WELL, LET ME ASK YOU THIS. IS
18 THERE GOING TO BE EVIDENCE IN TESTIMONY FROM ANY
19 STATEMENTS THAT WERE MADE DURING THAT PERIOD?

20 BY SOLICITOR BLUNDY: NO.

21 BY THE COURT: OKAY. BUT IF THERE IS, I
22 WOULD DEFINITELY SUPPRESS THAT SINCE THERE WAS --
23 WHETHER IT'S A MALFUNCTION OR WHETHER HE TURNED IT
24 OFF. WHATEVER THE FACTS ARE, THAT THAT DEFINITELY
25 WOULD NOT BE ALLOWED. OKAY?

1 BY MR. MCDANIEL: SO, I MEAN, THE STATE'S
2 INTENTION IS TO HAVE CUT IT OFF WHEN HE WAS PUT IN
3 THE CAR?

4 BY SOLICITOR BLUNDY: I CAN CUT IT OFF, YOU
5 KNOW, AS SOON AS IT GETS TO THE POINT WHERE THE
6 MIC GOES OUT.

7 BY THE COURT: YEAH, I MEAN, CERTAINLY IF
8 Y'ALL TWO (2) CAN AGREE WITH THAT, I THINK THAT
9 WILL ELIMINATE THAT PROBLEM.

10 BY MR. MCDANIEL: I MEAN THERE'S NOTHING
11 THERE. I JUST ---

12 BY THE COURT: RIGHT.

13 BY MR. MCDANIEL: I MEAN, CLEARLY IF
14 SOMETHING'S WRONG, THAT WOULD BE GIVEN SOME TYPE
15 OF ---

16 BY THE COURT: RIGHT. IF SOMETHING'S WRONG,
17 I MEAN, I WOULD ALWAYS THINK THAT THAT WOULD
18 DEFINITELY NOT COME IN, SO ---

19 BY MR. MCDANIEL: AND, JUDGE, I JUST NEED --
20 BRIEFLY -- AND WE'RE READY. THIS IS IT. I JUST
21 WANTED SOMETHING ADDRESSED. AND IT'S A -- THIS
22 CASE IS NINE (9) MONTHS OLD, ROUGHLY. AND WE HAD
23 A OCTOBER -- THIS WAS A JULY ARREST -- AND
24 OCTOBER, THREE (3) MONTHS AFTER THAT, WE HAD A
25 PRETRIAL MOTION -- I MEAN, NOT A PRETRIAL MOTION,

1 BUT A PRETRIAL HEARING TO ATTEMPT TO GET THIS
2 RESOLVED. JUDGE, THE EVIDENCE THAT WE HAD THAT
3 WAS TURNED OVER TO THE DEFENSE BY THE STATE AT THE
4 POINT WAS NOT COMPLETE. IT'S NOT WHAT THE STATE
5 IS ATTEMPTING TO SHOW TODAY. WE DID NOT GET A
6 COMPLETE VIDEO OF THIS CASE UNTIL MARCH 23RD, 2012
7 OF THIS YEAR. WHAT WE HAD BEEN PROVIDED THROUGH
8 THAT TIME WAS A CASE THAT I EVEN THINK YOUR HONOR
9 WOULD HAVE SUPPRESSED, AT LEAST THE ENTIRE VIDEO,
10 IF NOT, IF NOT KICKED THE CASE DUE TO THE FACT
11 THAT'S IT'S MISSING TEN (10) MINUTES AND IT WAS
12 APPARENT THAT THEY WERE STARTING THIS FIELD
13 SOBRIETY TEST AFTER A FIELD SOBRIETY TEST HAD
14 ALREADY BEEN GIVEN. ALSO, THE AUDIO, WHICH GOES
15 OUT IN THE CASE THAT WE HAD HAD IS NEVER TURNED
16 ON. AND THEN THE TRANSPORT VIDEO CUTS OFF IN THE
17 MIDDLE. UNDERSTANDING YOUR PRIOR RULINGS THAT
18 THAT'S NOT A BIG ISSUE, BUT THE PROBLEM THAT WE
19 HAVE IS THAT UP UNTIL THREE (3) WEEKS ---

20 BY THE COURT: THIS IS NOT A BIG ISSUE, BUT
21 IT'S CERTAINLY SOMETHING THAT NEEDS TO BE EITHER
22 SUPPRESSED OR ---

23 BY MR. MCDANIEL: SO -- AND SEE, JUDGE, THIS
24 IS WHAT HAPPENS, AND IT REGULARLY HAPPENS, IS THAT
25 THEY EXPECT US TO WORK A CASE OUT WHEN WE HAVE

1 VIDEO EVIDENCE THAT WE FEEL VERY CONFIDENT IS
2 GOING TO BE SUPPRESSED AT TRIAL OR AT LEAST WE CAN
3 USE AS LEVERAGE, RIGHT? TO GET THIS CASE RESOLVED
4 LIKE THE WAY WE THINK IT SHOULD RESOLVE. WHEN WE
5 TURN DOWN A NON-OFFER -- AND THAT'S WHAT OUR
6 OPINION IS -- THAT, YOU KNOW, ANYTHING THAT'S NOT
7 BEING RESOLVED IN ---

8 BY THE COURT: HOW, HOW WOULD YOU TURN DOWN A
9 NON-OFFER?

10 BY MR. MCDANIEL: WELL, I MEAN -- WHAT I'M
11 SAYING IS THE OFFER WOULD BE THE MINIMUM ON THE
12 DUI OR SOMETHING LIKE THAT.

13 BY THE COURT: ALL RIGHT.

14 BY MR. MCDANIEL: SO LET'S JUST -- I MEAN
15 THAT'S JUST WHAT MY OPINION IS. THAT WHEN WE
16 START TO GET READY FOR TRIAL AND THE STATE STARTS
17 SENDING COMPLETE VIDEOS. SO NOW WE HAVE THE
18 COMPLETE VIDEO THREE (3) WEEKS AGO THAT IS
19 COMPLETELY DIFFERENT AND ATTEMPTS TO CURE UP ANY
20 ARGUMENT THAT WE WOULD HAVE HAD. AND THEN ON THE
21 12TH OF APRIL, WE GET A COLLISION REPORT THAT WE
22 HADN'T HAD IN OUR POSSESSION SINCE WE FILED THIS,
23 OUR RULE FIVE (5), IN JANUARY 18TH, 2011. THEN ON
24 THE 13TH, WE GET DATAMASTER REPORTS ---

25 BY THE COURT: WAIT, WAIT, WAIT, WAIT, WAIT.

1 YOU OBVIOUSLY DIDN'T FILE YOUR DISCOVERY JANUARY
2 18TH OF 2011. THAT WAS SIX (6) MONTHS BEFORE THE
3 INCIDENT ---

4 BY MR. MCDANIEL: JULY 19TH, 2011.

5 BY THE COURT: ELEVEN ('11)?

6 BY MR. MCDANIEL: YES, SIR.

7 BY THE COURT: HE WAS ARRESTED IN JULY OF
8 2011.

9 BY MR. MCDANIEL: RIGHT.

10 BY THE COURT: SO YOU FILED DISCOVERY BEFORE
11 HE WAS ARRESTED?

12 BY MR. MCDANIEL: NO. HE ---

13 BY THE COURT: THAT'S WHAT YOU JUST SAID.

14 BY MR. MCDANIEL: HE'S ARRESTED JULY AND I
15 FILED IN JULY. JULY --

16 BY THE COURT: BUT YOU SAID JANUARY TWICE.

17 BY MR. MCDANIEL: OKAY. JULY THE ---

18 BY THE COURT: DO YOU HAVE THE DISCOVERY WITH
19 YOU?

20 BY MR. MCDANIEL: OH, THAT'S -- YES, SIR.

21 BY THE COURT: BECAUSE YOU KEEP SAYING YOU
22 FILED DISCOVERY IN JANUARY OF 2011.

23 BY MR. MCDANIEL: OKAY, BUT I MISSPOKE. AND
24 THE COURT ---

25 BY SOLICITOR BLUNDY: IF I COULD TOUCH ON

1 SOME OF THAT, YOUR HONOR.

2 BY MR. MCDANIEL: --- SAVE -- HERE'S THE
3 RECEIVED COPY IN ---

4 BY THE COURT: OKAY. THAT'S ALL I WANT.

5 BY MR. MCDANIEL: --- JANUARY -- I MEAN, JULY
6 2011.

7 BY THE COURT: SEE.

8 BY MR. MCDANIEL: 22ND. AND ---

9 BY THE COURT: LET'S JUST GET THIS STRAIGHT
10 FOR THE RECORD BECAUSE YOU HAVE SAID JANUARY.

11 BY MR. MCDANIEL: OKAY. JULY.

12 BY THE COURT: HE WAS ARRESTED JULY 7TH. YOU
13 FILED THIS JULY 18TH.

14 BY MR. MCDANIEL: RIGHT.

15 BY THE COURT: OKAY. ALL RIGHT. SO, MS.
16 BLUNDY, I'LL BE GLAD TO HEAR FROM YOU ---

17 BY SOLICITOR BLUNDY: OKAY.

18 BY THE COURT: --- AS TO ---

19 BY SOLICITOR BLUNDY: WE DID RECEIVE THE
20 DEFENDANT'S DISCOVERY. WE FILED ON AUGUST THE
21 11TH. OUR INITIAL DISCOVERY THAT WE HAD IN OUR
22 CONTROL, CUSTODY AND POSSESSION AT THAT TIME, WHAT
23 HAD BEEN SUBMITTED TO ME IN MY OFFICE. AS YOU
24 KNOW, YOUR HONOR, THESE CASES DO TAKE SOME TIME TO
25 PREPARE. AND AS I WAS PREPARING FOR A FULL-BLOWN

1 TRIAL, SOMETHING ON THE INITIAL VIDEO SEEMED
2 STRANGE TO ME. I CONTACTED THE TROOPER AND I
3 SAID, "ARE WE MISSING ANY VIDEO HERE BECAUSE LATER
4 ON YOU HAD MENTIONED SOMETHING AND I DIDN'T SEE IT
5 ON THE VIDEO?" HE THEN REALIZED THAT THE COPY HE
6 HAD SUBMITTED TO ME DID NOT HAVE -- AND I DON'T
7 BELIEVE IT WAS TEN (10) MINUTES. MAYBE A MINUTE
8 OR TWO (2) ON THE ACTUAL VIDEO -- AND HE CAME IN
9 AND REDUBBED IT. SEE, WHAT HAPPENS SOMETIMES WHEN
10 YOU ARE GOING FROM THE VHS TO THE DVD, IT TAKES
11 TIME TO CLICK ON, SO WE ACTUALLY MISSED A SMALL
12 PORTION OF IT. AS SOON AS I REALIZED THAT THAT
13 PORTION WAS NOT SUBMITTED, I DID TURN THAT OVER TO
14 THE DEFENSE. OBVIOUSLY, I WANT THEM TO HAVE A
15 COMPLETE VIDEO. BECAUSE I HAD A VIDEO, I DIDN'T
16 INITIALLY PICK UP ON IT UNTIL I WAS IN FULL-BLOWN
17 REVIEWING FOR THE TRIAL. THAT WAS SUBMITTED PRIOR
18 TO THE TRIAL. I DON'T BELIEVE IT WAS TEN (10)
19 MINUTES, MAYBE A MINUTE OR TWO (2).

20 BY MR. MCDANIEL: IT'S SIX (6) ---

21 BY SOLICITOR BLUNDY: SIR ---

22 BY MR. MCDANIEL: SIX (6) MINUTES. I'M
23 SORRY. I, I ---

24 BY SOLICITOR BLUNDY: WELL, NOW WE WENT FROM
25 TEN (10) TO SIX (6).

1 BY MR. MCDANIEL: I MISSPOKE. IT ---

2 BY SOLICITOR BLUNDY: IT WAS SEVERAL MINUTES.

3 I THINK WE CAN AGREE ON THAT.

4 BY MR. MCDANIEL: IT COULD BE SEVEN (7).

5 BY SOLICITOR BLUNDY: IT WAS TURNED OVER.

6 ALSO IN PREPARING, I NOTICED THAT THE WRECK
7 REPORT, WHICH RARELY COMES INTO EVIDENCE. THERE'S
8 USUALLY AN OBJECTION. I'M NOT PLANNING ON USING
9 IT AT TRIAL. I DID TURN THAT OVER JUST TO MAKE
10 SURE THAT THE DEFENSE DID HAVE THAT. AND AS FAR
11 AS THE BREATHALYZER STUFF, ALL OF THAT IS ONLINE
12 AT SLED THAT I SUBMITTED A FEW WEEKS PRIOR TO
13 TRIAL. I NORMALLY DON'T PRINT THAT OFF UNTIL A
14 FEW WEEKS PRIOR TO TRIAL BECAUSE THE DEFENSE HAS
15 ACCESS TO IT. IT WAS ACTUALLY JUST A COURTESY TO
16 HIM SO HE DIDN'T HAVE TO GO ONLINE AND PULL ALL OF
17 THAT OFF.

18 BY MR. MCDANIEL: NO, I KNOW I HAD TO DO IT.
19 BUT, I MEAN, JUDGE, THE OVERARCHING ARGUMENT IS
20 THIS, THAT EVIDENCE IS TRICKLING IN THREE (3)
21 WEEKS BEFORE TRIAL THAT WE HAD NOT HAD IN OUR
22 POSSESSION.

23 BY THE COURT: WHAT DID YOU GET IN MARCH THAT
24 YOU DID NOT HAVE BEFORE? THAT'S WHAT I NEED TO
25 KNOW.

1 BY MR. MCDANIEL: A VIDEO -- A COMPLETE VIDEO
2 TAPE. UP UNTIL ---

3 BY THE COURT: OKAY, YOU ---

4 BY MR. MCDANIEL: --- MARCH 23RD, 2012 ---

5 BY THE COURT: YOU HAD ALL BUT SIX (6)
6 MINUTES.

7 BY MR. MCDANIEL: THE FIRST SIX (6) AND THEN
8 FIFTEEN (15) TO TRANSPORT. THIS WHOLE ENTIRE
9 CONVERSATION ---

10 BY THE COURT: OKAY. WELL, WE HAVE ALREADY
11 SUPPRESSED THE TRANSPORT.

12 BY SOLICITOR BLUNDY: CAN I ALSO BRING BEFORE
13 THE COURT, YOUR HONOR, THE DEFENSE HAD PLENTY OF
14 TIME TO FILE A MOTION TO CONTINUE IF THIS WAS
15 TRULY AN ISSUE, IF THEY NEEDED MORE TIME TO REVIEW
16 THE EVIDENCE THAT WAS SUBMITTED. AND THAT WAS
17 NEVER DONE IN THIS CASE.

18 BY MR. MCDANIEL: WE DON'T NEED ANY EVIDENCE,
19 JUDGE. THE FACT OF WHAT I'M TRYING TO GET
20 ADDRESSED IS THIS: THAT WE HAVE ENGAGED, OR
21 ATTEMPTED TO ENGAGE IN WORKING THIS CASE OUT, AND
22 THAT NOW -- AND THREE (3) WEEKS BEFORE A TRIAL IS
23 THE EVE OF TRIAL, TO THEN GIVE A COMPLETE VIDEO, I
24 THINK VIOLATES DISCOVERY, RULE FIVE (5), BRADY,
25 ALL OF IT. THEY HAVE THIRTY (30) DAYS TO GET THAT

1 TURNED OVER. AND THEN TO DO THAT BY FAX AND BY
2 MAIL AND NOT CALL AND SAY IMMEDIATELY, "HEY, LOOK.
3 THIS IS WHAT WE'VE GOT..." I MEAN, THAT'S WHAT
4 I'M TRYING TO ADDRESS, JUDGE. I THINK IT'S -- I
5 THINK THAT SHOULD WARRANT A DISMISSAL IN THIS CASE
6 BECAUSE WE DIDN'T HAVE EVERYTHING WE NEEDED WITHIN
7 THIRTY (30) DAYS TO EVEN SIT DOWN AND START
8 NEGOTIATING THIS CASE. BUT AT THE VERY LEAST,
9 THIS -- THE, THE PORTION THAT WE WEREN'T GIVEN
10 SHOULD BE SUPPRESSED. THE PORTIONS THAT WE HAD
11 RELIED ON FOR NINE (9) MONTHS FOR TRIAL SHOULD BE
12 SUPPRESSED.

13 BY THE COURT: MS. BLUNDY?

14 BY SOLICITOR BLUNDY: YOUR HONOR, I'M NOT
15 AWARE OF ANYTHING IN RULE FIVE (5). I MEAN, I
16 KNOW THE THIRTY (30) DAY RULE; WHICH I DID SUBMIT
17 THE DISCOVERY THAT WAS IN OUR POSSESSION AT THE
18 TIME OF THE THIRTY (30) DAY MARK. I SENT OVER
19 EVERYTHING THAT I HAVE. IT'S ALWAYS BEEN ROUTINE
20 PRACTICE TO SEND SUPPLEMENTAL DISCOVERY IF
21 SOMETHING DID COME UP OR TURN UP. AND I THINK I
22 WENT OVER AND ABOVE IN THIS CASE TO DO THAT.
23 CERTAINLY WOULDN'T WANT TO MISLEAD THE DEFENSE IN
24 ANY WAY. I DID IT TO DISCLOSE ALL OF THE EVIDENCE
25 THAT I THOUGHT WAS OUT THERE. AND SOME OF IT, I

1 DIDN'T COME IN CONTACT TILL I DID MORE
2 INVESTIGATING ON THE CASE.

3 BY THE COURT: THE SIX (6) MINUTES THAT WERE
4 -- THAT IS IN DISPUTE HERE, WHAT -- IS THAT WHEN
5 HE TURNS IT ON?

6 BY MR. MCDANIEL: THAT'S ALL THE VIDEO STUFF
7 THAT WE'VE ALREADY ARGUED. BUT THAT WAS ---

8 BY THE COURT: WHICH I'VE ALREADY SUPPRESSED.

9 BY MR. MCDANIEL: THAT WAS NOT -- YOU
10 SUPPRESSED HGN. BUT SEE, NONE OF THAT WAS -- WHAT
11 WE HAD GOING FORWARD, JUDGE, BEFORE THIS NEW VIDEO
12 CAME IN, WAS JUST THE UNDERSTANDING THAT THEY HAD
13 PERFORMED FIELD SOBRIETY TESTS SOMEWHERE -- IT'S
14 OFF VIDEO. AND THEN TO GET THE COMPLETE VIDEO
15 THREE (3) BEFORE TRIAL ON ISSUES THAT WE HAD
16 RELIED ON TO ARGUE BEFORE YOUR JUDGE -- BEFORE
17 YOUR HONOR AND BEFORE THE JURY, IN MY MIND
18 VIOLATES WHAT RULE FIVE (5) -- WHY RULE FIVE (5)
19 IS IN PLACE. BUT, AGAIN ---

20 BY THE COURT: THIS IS, THIS IS WHAT I AM
21 GOING TO DO: I AM GOING TO SUPPRESS THE TRANSPORT
22 OF THE VIDEO, WHICH WE HAVE ALREADY DONE, THE --
23 OBVIOUSLY, THE OFF-CAMERA HGN OR NON-HGN TESTS. I
24 AM GOING TO SUPPRESS THE SIX (6) MINUTES IN
25 DISPUTE. WELL, LET ME ASK YOU THIS QUESTION

1 FIRST: WAS IT ON YOUR VIDEO THAT YOU HAD, MS.
2 BLUNDY?

3 BY SOLICITOR BLUNDY: NO, YOUR HONOR. IT WAS
4 NOT UNTIL I GOT THE NEW, NEW COPIED VIDEO.

5 BY THE COURT: AND IT IS ---

6 BY SOLICITOR BLUNDY: AND THAT'S WHY I DIDN'T
7 -- I MEAN, HONESTLY, I DON'T EVEN NOW. IT WAS
8 LIKE ONE SMALL THING WHERE I WAS LIKE, "OH, MAYBE
9 WE'RE MISSING A FEW MINUTES HERE." AND -- 'CAUSE
10 THE VIDEO I HAD DIDN'T HAVE IT ON THERE EITHER. I
11 MEAN; BE -- FRANKLY, I'M LUCKY I CAUGHT IT.
12 OTHERWISE, THERE WOULD HAVE BEEN EVIDENCE FLOATING
13 OUT THERE.

14 BY MR. MCDANIEL: BUT, I MEAN THAT'S --
15 UNDERSTANDING, IN THAT IS PART OF OUR DEFENSE, WAS
16 THAT.

17 BY SOLICITOR BLUNDY: BUT THE DEFENDANTS HAD
18 THE EVIDENCE NOW FOR A MONTH AND COULD HAVE FILED
19 A MOTION TO CONTINUE ---

20 BY MR. MCDANIEL: I DON'T WANT ---

21 BY SOLICITOR BLUNDY: --- IF IT TRULY WAS AN
22 ISSUE.

23 BY MR. MCDANIEL: I DON'T WANT A CONTINUANCE.
24 I'M NOT ASKING FOR A CONTINUANCE.

25 BY SOLICITOR BLUNDY: I JUST DON'T KNOW

1 ANYTHING IN THE RULES -- IT JUST REQUIRES ME TO
2 DISCLOSE EVIDENCE AS IT COMES INTO MY POSSESSION.

3 BY THE COURT: I WILL, I WILL ALLOW THE SIX
4 (6) MINUTES. OBVIOUSLY, I HAVE TO ASSUME THAT
5 EVERYTHING IS BEING TOLD TRUTHFUL; AND I HAVE NO
6 DOUBT THAT IT IS, THAT IS WAS TURNED OVER AS SOON
7 AS YOU DISCOVERED IT. YOU KNOW, WE'LL ALLOW THAT.

8 BY MR. MCDANIEL: JUDGE, WE'RE READY TO ROCK,
9 THEN.

10 BY THE COURT: LET'S, LET'S JUST REVIEW. THE
11 TRANSPORT -- OBVIOUSLY, THE TRANSPORT VIDEO IS
12 SUPPRESSED. THE, THE -- ANY TESTS -- I'M GOING TO
13 STATE ANY TESTS DONE OFF-CAMERA IS SUPPRESSED.
14 YOU, YOU STATED YOU -- I THINK THERE WAS A
15 QUESTION ABOUT AN ACCIDENT REPORT. YOU DON'T HAVE
16 ANY INTENTION OF -- IF THAT DOES COME UP,
17 OBVIOUSLY, I'LL HEAR ANY OBJECTION THAT YOU HAVE
18 AT THAT TIME. AND, OBVIOUSLY, YOUR MOTION TO
19 DISMISS BASED ON SPONAR MISLEADING AND THE BA,
20 WE'VE ALREADY RULED ON. I JUST WANT TO READ-,
21 READDRESS THAT THAT IS DENIED FOR MISLEADING
22 STATEMENTS. BUT I DO FEEL THE OFFICER IS -- DID
23 REASONABLY -- READ THE IMPLIED CONSENT AND DID NOT
24 TRICK OR MISLEAD HIM. YOUR CONTENTION IS THAT HE
25 WAS MISLED. AND I'M HOLDING THAT HE DID -- HE WAS

1 RESPONDING TO THE DEFENDANT'S QUESTIONS ONLY.
2 THAT IT DID NOT TELL ANY -- HE DID NOT HAVE THE
3 RIGHT TO REFUSE OR THE RIGHT TO TAKE. AND THAT
4 WAS THE REASON FOR DENIAL ON THAT MOTION. AND YOU
5 CAN HAVE THAT NOW SUMMARIZED ON THE RECORD FOR --
6 IF THERE'S ANY APPEAL.

7 BY MR. MCDANIEL: THANK YOU, JUDGE.

8 BY THE COURT: ALL RIGHT. WE'LL BEGIN.

9 BY MR. MCDANIEL: AND JUDGE, JUST BEFORE WE
10 GET STARTED, THE SIX (6) MINUTES THAT YOU'RE
11 ALLOWING IN IS FRAUGHT WITH HEARSAY AND I JUST ASK
12 THAT THE STATE JUST BE MINDFUL OF THAT BEFORE THEY
13 PAY THAT -- PLAY THAT VIDEO.

14 BY SOLICITOR BLUNDY: YOUR HONOR, I JUST ASK
15 THAT AT THE TIME WHERE WE GO TO INTRODUCE THE
16 VIDEO, WE EXCUSE THE JURY AND YOU AND I CAN BOTH
17 LOOK AT THE PORTION THAT ---

18 BY MR. MCDANIEL: OKAY.

19 BY THE COURT: OKAY. THANK YOU VERY MUCH.
20 ANYTHING ELSE?

21 BY MR. MCDANIEL: NO, SIR.

22 BY THE COURT: ALL RIGHT, LADIES AND
23 GENTLEMEN, THE FIRST THING I NEED TO DO IS APPOINT
24 A FOREPERSON FOR YOUR JURY. SO, MR. MIZE, WOULD
25 YOU RAISE YOUR HAND FOR ME PLEASE, SIR? THANK

1 YOU! I APPRECIATE YOU VOLUNTEERING. WHAT THAT
2 MEANS IS THAT YOU ARE GOING TO BE MY FOREMAN.
3 THAT MEANS YOU HAVE ABSOLUTELY NO ADDITIONAL
4 RESPONSIBILITY WHATSOEVER. HOWEVER, WHEN WE DO
5 GET TO THE END OF THE TRIAL, I WILL GO OVER THE
6 VERDICT FORM WITH YOU. IF ANY ISSUES COME UP IN
7 THE JURY ROOM INVOLVING CONTACT WITH ANYONE, IF
8 YOU WOULD BRING THAT TO MY ATTENTION. THAT IS THE
9 ONLY RESPONSIBILITY THAT YOU HAVE. NOW, IF I
10 COULD GET YOU TO RAISE YOUR RIGHT HANDS FOR ME,
11 PLEASE.

12 BY THE JURY: (COMPLIES)

13 BY THE COURT: DO EACH OF YOU SWEAR OR AFFIRM
14 TO RENDER A FAIR AND IMPARTIAL DECISION BASED UPON
15 THE EVIDENCE PRESENTED IN THIS CASE, SO HELP YOU
16 GOD? AMEN?

17 BY THE JURY: (INAUDIBLE)

18 BY THE COURT: OR, "I WILL." ALL RIGHT.
19 LADIES AND GENTLEMAN, BEFORE WE BEGIN, I WILL
20 EXPLAIN SOME THINGS TO THOSE OF YOU WHO ARE NOT
21 FAMILIAR WITH TRIAL PROCEEDINGS. AS JURORS, IT IS
22 YOUR DUTY TO DECIDE THE FACTS OF THIS CASE FROM
23 THE EVIDENCE THAT IS PRESENTED DURING THE TRIAL.
24 I KNOW VERY LITTLE ABOUT THIS CASE, BUT IT DOESN'T
25 MATTER SINCE IT IS YOU, THE JURY, THAT MUST DECIDE

1 THE FACTS BASED UPON THE EVIDENCE PRESENTED FROM
2 THE WITNESS STAND. THERE WILL BE CONFLICTS IN THE
3 TESTIMONY. SO I ASK YOU TO PAY CAREFUL ATTENTION
4 TO THE WITNESSES AS THEY TESTIFY. BECAUSE IT IS
5 YOU WHO WILL HAVE TO DETERMINE WHICH WITNESSES ARE
6 TELLING THE TRUTH FOR YOU TO DECIDE THE FACTS IN
7 THIS CASE. THE TICKET CHARGING THE DEFENDANT WITH
8 THE CRIME OF DRIVING UNDER THE INFLUENCE IS NOT
9 EVIDENCE AGAINST THE DEFENDANT. IT IS ONLY THE
10 CHARGING DOCUMENT AND THE MEANS OF BRINGING THIS
11 MATTER BEFORE YOU FOR TRIAL. THE DEFENDANT HAS
12 ENTERED A PLEA OF NOT GUILTY. ANYONE ACCUSED OF A
13 CRIME CAN PLEAD NOT GUILTY; AND HAVING DONE SO,
14 THE STATE THEN HAS THE BURDEN OF PROVING THEIR
15 GUILT BEYOND A REASONABLE DOUBT. ANYONE ACCUSED
16 OF A CRIME IS PRESUMED TO BE NOT GUILTY; AND THAT
17 PRESUMPTION MUST REMAIN WITH THE ACCUSED UNTIL
18 THAT GUILT HAS BEEN PROVEN TO YOU. EACH SIDE WILL
19 HAVE THE OPPORTUNITY TO ADDRESS YOU, TO EXPLAIN
20 THEIR POSITION AS TO THE CHARGE. AND THE STATE
21 WILL PROCEED FIRST, SINCE THE STATE AS MADE THE
22 CHARGE. THEN THE DEFENDANT, IF HE SO DESIRES, MAY
23 ALSO PRESENT HIS POSITION AS TO THE CHARGE. WHEN
24 ALL THE EVIDENCE IS IN, EACH SIDE WILL HAVE THE
25 OPPORTUNITY TO ARGUE THEIR RESPECTIVE CASE. AND

1 THEN I'LL EXPLAIN TO YOU THE LAW THAT APPLIES. IT
2 WILL THEN BE UP TO YOU TO DETERMINE THE FACTS OF
3 THE CASE. AND APPLYING THE LAW THAT I HAVE
4 EXPLAINED TO YOU, YOU WILL DETERMINE GUILT OR
5 INNOCENCE OF THE DEFENDANT. NOW, STATE LAW DOES
6 NOT ALLOW JURORS TO TAKE NOTES OR ASK QUES-,
7 QUESTIONS DURING THE TRIAL. AND WHAT YOU'LL
8 NOTICE THAT WE'RE DOING IS -- OBVIOUSLY, I'M
9 RECORDING THIS THROUGH THE COMPUTER. BUT YOU'LL
10 SEE THAT I'M TAKING NOTES DURING THE TRIAL. SO
11 IT'S NOT A "DO AS I SAY, NOT AS I DO." I TAKE
12 THAT JUST IN CASE THERE IS A PROBLEM WITH THE
13 RECORDER OR WITH THE COMPUTER, POWER GOES OUT.
14 THAT IF WE NEED THIS FOR ANY FURTHER PURPOSES,
15 THAT WE WILL HAVE IT. SO THAT'S ALL THAT I AM
16 DOING. THERE MAY BE TIMES, WHICH YOU HAVE ALREADY
17 NOTICED TODAY, THAT I NEED TO CONFER WITH BOTH
18 PARTIES OUTSIDE YOUR PRESENCE TO MAKE SURE THAT
19 BOTH PARTIES RECEIVE A FAIR TRIAL UNDER THE LAWS
20 AND RULES OF EVIDENCE. DURING THIS TIME, IT IS
21 INAPPROPRIATE FOR YOU TO TALK TO ANYONE, EVEN
22 AMONGST YOURSELVES, ABOUT THE CASE. IF ANYONE
23 ATTEMPTS TO TALK TO YOU ABOUT THE CASE -- MR.
24 MIZE, IF YOU WOULD REPORT IT TO ME IMMEDIATELY.
25 IT IS ALSO IMPROPER OF YOU TO FORM ANY OPINION

1 ABOUT THE CASE BEFORE ALL THE EVIDENCE HAS BEEN
2 PRESENTED AND THEN I'VE EXPLAINED THE LAW THAT
3 APPLIES IN THIS CASE. REMEMBER, YOU'VE SWORN TO
4 BE FAIR AND IMPARTIAL TO BOTH THE STATE AND THE
5 DEFENDANT; AND I KNOW YOU'LL DO JUST THAT. THANK
6 YOU FOR YOUR ATTENTION. MS. BLUNDY?

7 BY SOLICITOR BLUNDY: THANK YOU, YOUR HONOR.
8 GOOD AFTERNOON, LADIES AND GENTLEMAN OF THE JURY.
9 THE THREE (3) "W"'S IS WHAT I WANT YOU TO REMEMBER
10 DURING THIS CASE. WHEELS, WINE AND A WRECK.
11 THOSE ARE THE FACTS OF OUR CASE TODAY. TROOPER
12 BROWN WAS CALLED OUT TO A WRECK ON SOUTH FLAGSHIP
13 DRIVE IN SALEM. WHEN HE ARRIVED, HE SAW THE
14 DEFENDANT. HE THOUGHT THE DEFENDANT WAS NOTABLY,
15 NOTICEABLY INTOXICATED AS SOON AS HE ARRIVED ON
16 THE WRECK SCENE. THE ASKED THE DEFENDANT WHAT
17 HAPPENED AND THE DEFENDANT SAID HE JUST MISSED THE
18 TURN. HE ASKED THE DEFENDANT HOW MUCH HE HAD
19 DRANK AND THE DEFENDANT SAID TWO (2) TO THREE (3)
20 GLASSES OF WINE. BUT THEN LATER CHANGED HIS STORY
21 AND, AND SAID FOUR (4) GLASSES OF WINE. TROOPER
22 BROWN THEN ADMINISTERED FOUR (4) FIELD SOBRIETY
23 TESTS; THREE (3) WHICH ARE STANDARDIZED AND ONE
24 WHICH IS NOT STANDARDIZED. THE STANDARDIZED TESTS
25 ARE STANDARDIZED BECAUSE THEY ARE PRETTY MUCH USED

1 ACROSS THE ENTIRE COUNTRY FOR BEING SCIENTIFICALLY
2 ACCURATE AND RELIABLE TO DETECT ALCOHOL IN A
3 PERSON'S SYSTEM. LET ME TELL YOU A LITTLE BIT
4 ABOUT THOSE TESTS. THE FIRST ONE IS CALLED
5 HORIZONTAL GAZE NYSTAGMUS. SOUNDS VERY SCIENTIFIC
6 AND VERY COMPLICATED, BUT IT ACTUALLY IS A PRETTY
7 SIMPLE EYE TEST. THAT TEST, TESTS TO SEE IF
8 THERE'S JERKING IN SOMEBODY'S EYES, WHICH CAN BE
9 CAUSED BY ALCOHOL. THERE IS A SMALL PERCENTAGE OF
10 THE POPULATION WHO HAS THIS JERKING IN THEIR EYES
11 NATURALLY. THE DEFENDANT DID HAVE THIS JERKING OF
12 THE EYES, BUT DID TELL THE OFFICER THAT HE WAS
13 BORN WITH THAT. SO THE OFFICER KNEW THAT. HE
14 THEN WENT AHEAD AND DID THE TWO (2) OTHER
15 STANDARDIZED TESTS. THE WALK AND TURN TEST; YOU
16 MAY HAVE HEARD OF IT. NINE (9) HEEL TO TOE STEPS,
17 PIVOT ON A TURN AND COME BACK, NINE (9) HEEL TO
18 TOE STEPS. YOU DEFINITELY WILL SEE CLUES OF
19 IMPAIRMENT IN THAT TEST. HE ALSO ASKED HIM TO DO
20 THE ONE-LEG STAND TEST. YOU'LL BE ABLE TO SEE ON
21 THE VIDEO THAT HE DOES NOT DO IT AS TROOPER BROWN
22 INSTRUCTED HIM TO DO IT. THESE ARE CLUES THAT
23 TROOPER BROWN USED TO DETERMINE IF THE DEFENDANT
24 WAS DRIVING UNDERNEATH THE INFLUENCE OF ALCOHOL.
25 AT ONE POINT HE ASKED HIM TO SAY HIS ABC'S. HE

1 PAUSED. HE DIDN'T REALLY COMPLETE IT. AND
2 TROOPER BROWN THEN DETERMINED TO PUT HIM UNDER
3 ARREST. AT THAT POINT HE ASKED THE DEFENDANT TO
4 TAKE A BREATHALYZER TEST; AND HE DID. AND THE
5 CLUES THAT HE SAW ON THE TESTS WERE RIGHT BECAUSE
6 HE BLEW A .22, TWENTY-TWO (22). WHAT THAT MEANS
7 IN SOUTH CAROLINA CARRIES INFERENCE, A PRESUMPTION
8 THAT YOU HAVE HAD TOO MUCH TO DRINK TO BE DRIVING.
9 IF YOUR ALCOHOL CONCENTRA-, CONCENTRATION
10 REGISTERS AT A .08 OR MORE, YOU'RE CONSIDERED TO
11 BE TOO IMPAIRED TO DRIVE. AND THAT'S WHAT WE HAVE
12 HERE. NOW AS THE STATE, I HAVE THE BURDEN OF
13 PROOF. AND THAT BURDEN IS BEYOND A REASONABLE
14 DOUBT. NOW, IT'S A HIGH BURDEN, BUT IT'S NOT AN
15 IMPOSSIBLE BURDEN. AND THERE ARE FIVE (5) THINGS
16 THAT I HAVE TO DEMONSTRATE TO YOU. THE DEFENDANT
17 WAS DRIVING A CAR IN THE STATE OF SOUTH CAROLINA
18 TO THE EXTENT THAT HIS FACULTIES TO DRIVE WERE
19 MATERIALLY AND APPRECIABLY IMPAIRED BY THE
20 INFLUENCE OF ALCOHOL OR DRUGS OR A COMBINATION OF
21 ANY OF THOSE. I'M CONFIDENT WHEN YOU HEAR THE
22 EVIDENCE IN THIS CASE THAT YOU WILL FIND THE
23 DEFENDANT GUILTY. THANK YOU.

24 BY THE COURT: MR. MCDANIEL?

25 BY MR. MCDANIEL: LADIES AND GENTLEMEN, I

1 REPRESENT NEZAR ABRAHAM. HE WAS BORN AND RAISED
2 IN SYRIA. HE MOVED HERE AND HE FOUND EMPLOYMENT,
3 FOR SCHOOL IN ILLINOIS, IN CHICAGO. HE IS A
4 CITIZEN OF THE UNITED STATES IN AND AROUND 2005.
5 HE HAD WORKED AT THE SAME CIVIL ENGINEERING FIRM
6 FOR THE PAST SEVEN (7) YEARS, DOING -- WHAT HE
7 DOES IS -- HE WAS ACTUALLY HERE WORKING FOR DUKE.
8 HE'S A NUCLEAR -- HE'S DOING WORK FOR THE POWER
9 PLANTS AS A STRUCTURAL ENGINEER. SO HE WAS HERE
10 BRIEFLY TO WORK AT DUKE. HE DOES SUFFER--AND THE
11 STATE MENTIONED THIS BRIEFLY--FROM CONGENITAL
12 NYSTAGMUS. AND I'M NOT SURE IF YOU CAN SEE AT THE
13 PRESENT NOW, BUT HIS EYES DO TWITCH BACK AND
14 FORTH. IT'S SOMETHING HE HAS NO CONTROL OVER
15 WHATSOEVER. HE TELLS THAT OFFICER ON THE SIDE OF
16 THE ROAD -- PART OF THE PROBLEM IS WHAT'S NOT
17 INQUIRED IS THAT -- AS YOU MAY WELL IMAGINE, THAT
18 IN CONGENITAL NYSTAGMUS CAN ALSO CAUSE BALANCE
19 ISSUES BECAUSE OF YOUR EYES TWITCHING BACK AND
20 FORTH. WHAT Y'ALL ARE HERE FOR AND WHAT YOU'VE
21 BEEN SELECTED TO BE A PART OF IS THE MOST
22 IMPORTANT EVENTS THAT TAKE PLACE IN THE UNITED
23 STATES, AND THAT'S A CRIMINAL TRIAL. AND IT'S
24 IMPORTANT THAT THE STATE IS TRYING TO TURN THAT
25 INDIVIDUAL INTO A CRIMINAL, BASED ON ACCUSATIONS

1 AND ALLEGATIONS THAT THEY BRING FORTH. SO WHAT'S
2 IMPORTANT HERE IS THAT MR. ABRAHAM IS NOT ON
3 TRIAL. WHAT'S ON TRIAL IS THE STATE'S CASE. AND
4 THE ELEMENTS THAT SHE SAID THAT SHE HAD TO PROVE
5 TO YOU BEYOND A REASONABLE DOUBT. THAT'S WHAT
6 THIS TRIAL IS. NOT-US; WE DON'T HAVE TO PROVE A
7 THING. THE STATE HAS TO PROVE TO EACH AND
8 EVERYONE OF YOU -- NOT HALF, NOT JUST FOUR (4) --
9 EVERYONE OF YOU, BEYOND A REASONABLE DOUBT, THAT
10 THEY'VE DONE WHAT THEY'RE SUPPOSED TO DO. AND
11 IT'S NOT JUST PROVING ELEMENTS OF THE CRIME. IT
12 IS DOING ABSOLUTELY EVERYTHING THAT THE STATUTES
13 REQUIRE OF YOU THAT THE STATE AND LAW ENFORCEMENT
14 DO CORRECTLY. ALL OF THAT IS FAIR GAME AND THEY
15 HAVE TO PROVE THAT TO YOU BEYOND A REASONABLE
16 DOUBT. WE ASK THAT YOU JUST PAY ATTENTION TO THE
17 VIDEO. TROOPER BROWN IS GOING TO TESTIFY AND
18 WE'LL GET TO CROSS-EXAM HIM. PLEASE LISTEN TO HIS
19 ANSWERS. ALL OF THAT IS WHAT THIS CASE IS ABOUT.
20 NOT JUST THOSE FIVE (5) ELEMENTS THAT THE STATE
21 SAID SHE HAVE TO PROVE. IT'S EVERYTHING. THOSE
22 FIVE (5) ELEMENTS ARE IMPORTANT. PAY ATTENTION.
23 CAN SHE PROVE THOSE ELEMENTS? BUT IT'S EVERYTHING
24 ELSE AS WELL. LADIES AND GENTLEMEN, WE ARE JUST
25 LOOKING FOR A FAIR SHAKE. HE FLEW IN FROM CHICAGO

1 LAST NIGHT. HE'S EXERCISING HIS RIGHT FOR A
2 TRIAL. THANK YOU.

3 BY THE COURT: THANK YOU, MR. MCDANIEL. CALL
4 YOUR FIRST WITNESS PLEASE.

5 BY SOLICITOR BLUNDY: THANK YOU, YOUR HONOR.
6 THE STATE WOULD LIKE TO CALL TROOPER KEVIN BROWN
7 TO THE STAND.

8 BY THE COURT: TROOPER BROWN, IF YOU WOULD,
9 COME UP.

10

11 TROOPER KEVIN N. BROWN TAKES THE STAND

12

13 BY THE COURT: PLACE YOUR LEFT HAND ON THE
14 BIBLE AND RAISE YOUR RIGHT HAND FOR ME, PLEASE,
15 SIR.

16 BY THE WITNESS: (COMPLIES)

17 BY THE COURT: DO YOU SWEAR TO TELL THE
18 TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH,
19 SO HELP YOU GOD?

20 BY THE WITNESS: YES, SIR.

21 BY THE COURT: PLEASE HAVE A SEAT AND ANSWER
22 ANY QUESTIONS MS. BLUNDY MAY HAVE AND ANY
23 QUESTIONS MR. MCDANIEL MAY HAVE.

24 DIRECT EXAMINATION BY MS. BLUNDY:

25 Q. TROOPER BROWN, WHERE ARE YOU EMPLOYED?

1 A. I AM EMPLOYED WITH THE SOUTH CAROLINA HIGHWAY
2 PATROL.

3 Q. AND HOW LONG HAVE YOU BEEN EMPLOYED WITH THE
4 HIGHWAY PATROL?

5 A. I'VE BEEN WITH THE HIGHWAY PATROL APPROXIMATELY
6 SEVEN (7) YEARS.

7 Q. AND DURING THAT TIME PERIOD, HAVE YOU ALWAYS BEEN
8 A HIGHWAY PATROLMAN?

9 A. YES, MA'AM.

10 Q. AND WHAT ARE YOUR DUTIES AS A HIGHWAY PATROLMAN?

11 A. OUR PRIMARY DUTIES ARE TRAFFIC ENFORCEMENT. WE
12 WORK COLLISIONS, AND WHAT OUR PRIMARY, PRIMARY
13 ENFORCEMENT DUTIES IS IMPAIRED DRIVING.

14 Q. AND WERE YOU ON DUTY THE MORNING OF JULY THE 7TH,
15 2011?

16 A. YES, MA'AM, I WAS.

17 Q. AND ON THAT DATE, DID YOU SEE THE DEFENDANT NEZAR
18 ABRAHAM?

19 A. I DID.

20 Q. IS HE PRESENT IN THE COURTROOM TODAY?

21 A. YES, MA'AM.

22 Q. COULD YOU PLEASE POINT HIM OUT FOR THE JURY.

23 A. HE'S THE GENTLEMAN IN THE DARK SUIT WITH THE GREEN
24 SHIRT.

25 BY SOLICITOR BLUNDY: PLEASE LET THE RECORD

1 REFLECT THAT HE'S POINTED TO THE DEFENDANT.

2 Q. DO YOU REMEMBER WHAT TIME YOU CAME INTO CONTACT

3 WITH THE DEFENDANT?

4 A. IT WAS A LITTLE AFTER MIDNIGHT ON JULY THE 7TH.

5 Q. AND HOW DID YOU COME INTO CONTACT WITH THE

6 DEFENDANT?

7 A. I WAS CALLED TO A COLLISION BY MY DISPATCH.

8 Q. ALL RIGHT. AND WHERE WAS THE WRECK AT?

9 A. IT WAS ON SOUTH FLAGSHIP DRIVE IN THE KEOWEE KEY

10 AREA, RIGHT OFF OF HIGHWAY 183.

11 Q. AND WHAT COUNTY AND STATE IS THAT IN?

12 A. IT'S IN OCONEE COUNTY IN SOUTH CAROLINA.

13 Q. WHAT TYPE OF ROAD IS FLAGSTAFF [SIC] DRIVE?

14 A. SOUTH FLAGSHIP DRIVE IS THE ---

15 Q. SORRY. FLAGSHIP.

16 A. --- ONE OF THE MAIN ROADS THAT COMES OFF OF

17 HIGHWAY 183 INTO KEOWEE KEY; RUNS BY THE KEOWEE

18 KEY COUNTRY CLUB. IT'S ONE OF THE MAIN ACCESSES

19 INTO KEOWEE KEY.

20 Q. AND WHAT DID YOU NOTICE WHEN YOU PULLED UP TO THE

21 DEFENDANT?

22 A. WHEN I ARRIVED ON THE SCENE, I NOTICED EMERGENCY

23 VEHICLES, FIRE DEPARTMENT. YEAH, I BELIEVE THE

24 AMBULANCE WAS THERE, MAYBE. AND I OBSERVED A

25 VEHICLE OFF THE SIDE OF THE ROAD INTO A TREE.

1 Q. WERE YOU ABLE TO DETERMINE WHO WAS DRIVING THAT
2 CAR?

3 A. YES, MA'AM.

4 BY MR. MCDANIEL: OBJECTION.

5 BY THE COURT: STATE YOUR OBJECTION.

6 BY MR. MCDANIEL: JUDGE, HE'S GOING TO RELY
7 ON HEARSAY TESTIMONY AT THIS POINT. AND THEY
8 HAVEN'T LAID THE FOUNDATION TO ALLOW THAT TO COME
9 IN YET.

10 BY SOLICITOR BLUNDY: CERTAINLY, HE CAN, HE
11 CAN STATE, NOT WHAT THEY SAID, BUT HOW HE CAME TO
12 KNOW WHO WAS DRIVING THE CAR.

13 BY MR. MCDANIEL: WELL, ---

14 BY THE COURT: I'LL HAVE TO HEAR WHAT HE SAYS
15 FIRST.

16 BY MR. MCDANIEL: CAN WE TAKE THIS UP
17 OUTSIDE, OUTSIDE OF THE PRESENCE OF THE JURY?

18 BY THE COURT: YEAH. LET'S GO AHEAD AND GIVE
19 Y'ALL A SHORT BREAK. AND IF Y'ALL WOULD, JUST
20 COME UP TO THIS DOOR BACK TO THE JURY ROOM AND WE
21 WILL BRING YOU RIGHT BACK AS SOON AS WE CAN.

22 BY THE JURY: (COMPLIES)

23 BY THE COURT: YES, SIR?

24 BY MR. MCDANIEL: I GUESS YOU WANTED TO HEAR
25 WAS HE'S GOING TO TESTIFY TO AND THEN I'LL ---

1 BY THE COURT: OKAY.

2 BY MR. MCDANIEL: --- TELL YOU WHAT MY
3 CONCERNS ARE.

4 BY SOLICITOR BLUNDY: YOUR HONOR, COULD I
5 JUST REPHRASE THE QUESTION AS TO "WERE YOU ABLE TO
6 DETERMINE WHO WAS DRIVING THE CAR, AND WHO WOULD
7 THAT BE?" BECAUSE THERE IS NO HEARSAY IN THAT.

8 BY THE COURT: I MEAN, THAT QUESTION IS FINE.

9 BY MR. MCDANIEL: BUT SEE, JUDGE, HE IS
10 RELYING ON HEARSAY TESTIMONY. SEE, WHAT THE VIDEO
11 SHOWS IS -- AND HE'S ALREADY TESTIFIED TO IT --
12 THERE'S PEOPLE THERE WHO HAD BEEN THERE THE ENTIRE
13 TIME THAT HAD TALKED TO HIM FOR OVER AN HOUR.
14 HE'S NEVER INDEPENDENTLY TRIED TO, TO DETERMINE IF
15 HE WAS THE DRIVER. AND THEY ARE PROHIBITED FROM
16 USING ANY HEARSAY TESTIMONY, REGARDLESS. BUT THEY
17 CAN'T INTRODUCE ANY OF HIS STATEMENTS TILL THEY
18 CAN PROVE CORPUS DELICTI TO SATISFY, YOUR HONOR,
19 AND THEY, AT THIS POINT, THEY CAN'T DO IT. BUT HE
20 IS PROHIBITED FROM RELYING ON ANY HEARSAY
21 TESTIMONY. SHOULD HAVE HAD SOMEBODY FROM THE
22 WRECK SCENE HERE THAT WAS THERE THE HOUR BEFORE
23 TROOPER BROWN SHOWED UP.

24 BY SOLICITOR BLUNDY: YOUR HONOR, I DO
25 BELIEVE AT, AT ONE POINT, HE, HE ADMITS THAT IT'S

1 HIS CAR THAT HE WAS DRIVING HOME. HE WAS COMING
2 FROM A CLUB. CERTAINLY, HE'S ABLE -- HE CAN -- HE
3 COULD HAVE HAD INDEPENDENT KNOWLEDGE OF IT. AND
4 EVEN IF IT WAS FROM HEARSAY TESTIMONY, PRESENT
5 SENSE IMPRESSION ALLOWS TO SHOW HIM HOW HE
6 DEVELOPED THAT INFORMATION AND HOW HE DETERMINED
7 THAT.

8 BY THE COURT: I, I THINK IF YOU GO UNDER
9 PRESENT SENSE IMPRESSION AND ANY DIRECT STATEMENTS
10 HE MADE TO HIM, CERTAINLY. BUT I THINK IF HE'S
11 GOING TO TESTIFY AS TO WHAT SOMEBODY TOLD HIM ---

12 BY MR. MCDANIEL: SEE, JUDGE -- AND I'VE GOT
13 THIS CASE FOR YOU. THIS IS THE CITY OF EASLEY V.
14 PORTMAN THIS IS CORPUS DELICTI CASE. AND THIS --
15 THE STATE IS PROHIBITED FROM USING ANY OF MR.
16 ABRAHAM'S TESTIMONY UNTIL THEY CAN SUFFICIENTLY
17 PROVE CORPUS DELICTI. IN THAT, JUDGE, IS A
18 TEMPORAL ARGUMENT IN THAT THEY ARE GOING TO HAVE
19 TO DETERMINE WHAT TIME THIS WRECK HAPPENED OR THAT
20 IT WAS FRESHLY COMMITTED AND THAT THIS OFFICER
21 WOULD HAVE HAD TO HAVE DONE SOME INDEPENDENT
22 INVESTIGATING WORK BEFORE THEY ARE ALLOWED TO JUST
23 USE HIS WORDS AGAINST HIM. AND THAT'S EXACTLY
24 WHAT'S AN ISSUE HERE, THAT TO ARRIVE TO A WRECK
25 SCENE AN HOUR AND A HALF AFT- -- OR AN HOUR AND

1 FIVE (5) MINUTES AFTER IT ALLEGEDLY OCCURRED -- HE
2 ONLY RELIED ON THE OFF- -- WHOEVER WAS THERE.
3 WELL, WE DON'T GET -- WE HAVEN'T BEEN PROVIDED
4 THEIR NAMES. THIS IS THE FIRST I'VE LEARNED THAT
5 THERE WAS AMBULANCE THERE, WHICH WAS ONE OF MY
6 CONCERNS. THAT HE'S GOING TO HAVE TO PROVE HOW
7 THIS WAS A FRESHLY COMMITTED CRIME WITHOUT THAT
8 OTHER PERSON'S TESTIMONY, WITHOUT SOMEBODY THAT
9 CAN TESTIFY THIS WAS FRESHLY COMMITTED. SIMPLY
10 CAN'T DO IT, JUDGE.

11 BY SOLICITOR BLUNDY: YOUR HONOR, IT'S SIMPLY
12 NOT EXCLUDED UNDER HEARSAY. HEARSAY IS AN OUT-OF-
13 COURT STATEMENT OFFERED FOR THE TRUTH. WE ARE NOT
14 ENTERING ANY STATEMENTS. WE'LL ACTUALLY STATE OF
15 MIND, PRESENT SENSE IMPRESSION ARE NOT HEARSAY.
16 AND HE CAN CERTAINLY TESTIFY TO WHAT HIS STATE OF
17 MIND WAS. LET ME LOOK UP A FEW MORE THINGS.

18 BY MR. MCDANIEL: SEE, SEE THAT'S WHAT THE
19 PROBLEM IS, JUDGE.

20 BY THE COURT: WELL, LET'S GO WITH -- LET'S
21 GO OVER THE FACTS OF THE CASE THAT YOU PRESENTED.

22 BY MR. MCDANIEL: OKAY.

23 BY THE COURT: BASICALLY, THE SAME FACTS.

24 BY MR. MCDANIEL: RIGHT.

25 BY THE COURT: THE OFFICER, IN THAT CASE,

1 CAME UPON THE SCENE ---

2 BY MR. MCDANIEL: THIRTEEN (13) MINUTES ---

3 BY THE COURT: THE OFFICER CONCLUDED THE
4 ACCIDENT HAD -- WELL, I'M NOT GOING TO GET INTO
5 THE THIRTEEN (13) MINUTES, FIFTEEN (15) MINUTES,
6 FORTY-FIVE (45) MINUTES.

7 BY MR. MCDANIEL: HOUR AND FIVE (5) MINUTES
8 (INAUDIBLE).

9 BY THE COURT: WELL ---

10 BY MR. MCDANIEL: BUT SEE, JUDGE, THAT IS
11 WHAT WE HAVE TO GET INTO. IS THIS OFFICER'S
12 TESTIMONY WAS, "I WAS CALLED. I ARRIVED THIRTEEN
13 (13) MINUTES LATER AND THIS IS WHAT I SAW." THIS
14 IS HOW I PROVE CORPUS DELICTI BEFORE CAN I -- HOW
15 CAN I ALLOW THE DEFENDANT'S STATEMENTS? HE CAN'T
16 DO IT. HE SIMPLY DOES NOT AND DID NOT OBTAIN THIS
17 KIND OF INFORMATION ON THE SIDE OF THE ROAD
18 INDEPENDENTLY FROM HEARSAY TESTIMONY. AND THAT IS
19 BORE OUT WITH THE VIDEO THAT WE HAVE. I HAVEN'T
20 SEEN THE WRECK SITE. IT WAS NEVER CAPTURED ON
21 VIDEO. AND I DON'T KNOW WHERE IT WAS BECAUSE IT
22 WAS BLOCKED BY A LOT OF PEOPLE OUT THERE WATCHING
23 THESE FIELD SOBRIETY TESTS. BUT ONE OF THOSE
24 INDIVIDUALS WHO SHOWED UP TO THE SCENE FIRST
25 SHOULD HAVE BEEN HERE TO TESTIFY TO THE CORPUS

1 DELICTI. AND IF YOU LOOK AT WHAT THE HOLDING END
2 OF THIS CASE IS, JUDGE -- AND THE WHOLE THING IS
3 NOT -- THERE IS A VERY LONG CONCURRENCE HERE. BUT
4 WHAT EVERYBODY'S CONCERNED ABOUT IS IT IS
5 IMPERMISSIBLE, IMPERMISSIBLE SPECULATION AS TO
6 FACTS NOT IN EXISTENCE. SO, WHAT THEY ARE TRYING
7 TO DO IS USE HIS STATEMENTS AGAINST HIM WITHOUT
8 BEING ABLE TO PROVE WHAT TIME THIS WRECK ACTUALLY
9 OCCURRED, WHEN IT OCCURRED, HOW IT OCCURRED, OR
10 ANYTHING LIKE THAT. NONE OF THAT IS COMING IN.
11 AND THEY DON'T HAVE THE APPROPRIATE PERSON HERE TO
12 TESTIFY TO THAT. ALL HE CAN TESTIFY TO AS A
13 WITNESS IS WHAT HE OBSERVED. THAT'S IT. NOT WHAT
14 HE HEARD FROM EVERYBODY AND NOT A BACK-DOOR AROUND
15 HEARSAY TO SAY, "WELL, I WAS ABLE TO CONCLUDE THAT
16 HE WAS THE DRIVER." ONE (1), HE NEVER ADMITS TO
17 DRIVING ON -- BEFORE ARREST. AND TWO (2), THE
18 ONLY THING THAT TROOPER BROWN -- IF THIS IS A
19 COMPLETE VIDEO -- THAT TROOPER BROWN CAN RELY ON,
20 IS SOME BIG HUSKY FELLOW THAT SAYS, "THIS GUY WAS
21 DRIVING." AND THAT BIG HUSKY FELLOW IS NOT HERE
22 TO TESTIFY. AND WITHOUT HIM, MY CLIENT'S
23 STATEMENTS CANNOT COME IN. ALL THAT HE CAN DO IS
24 TESTIFY TO WHAT HE SAW AT THE SCENE WHEN HE CAME.

25 BY THE COURT: MS. BLUNDY?

1 BY SOLICITOR BLUNDY: I DON'T THINK THERE IS
2 AN ORDER TO CORPUS DELICTI. I'VE NEVER HEARD THAT
3 BEFORE. I THINK AS LONG AS THE EVIDENCE PROVES
4 CORPUS DELICTI, THAT'S JUST THE REQUIREMENT PUT ON
5 THE STATE. I'VE NEVER HEARD THAT THERE HAS TO BE
6 A SPECIFIC ORDER TO IT. OBVIOUSLY, YOUR HONOR, I
7 DON'T -- I HAVEN'T GONE THROUGH THIS CA- -- WHOLE
8 CASE.

9 BY MR. MCDANIEL: IT'S ONLY THE FIRST FOUR
10 (4) PAGES.

11 BY SOLICITOR BLUNDY: I MEAN -- I THINK
12 THERE'S, YOU KNOW, EXCEPTIONS TO THE HEARSAY RULE.
13 WE HAVE ADMISSION BY A PARTY OPPONENT. THE
14 DEFENDANT CERTAINLY ADMITTED TO DRIVING THE
15 VEHICLE. HE, HE SAID WHERE HE WAS COMING FROM AND
16 WHERE HE WAS HE- -- IN FACT, HE TOLD THE DEFENDANT
17 [SIC] HE WAS HEADED HOME AND THAT HE LIVED IN
18 KEOWEE KEY. THESE ARE ADMISSIONS THAT DO COME IN
19 UNDER MIRANDA AND ALSO UNDER ADMISSION BY PARTY
20 OPPONENT. THOSE CAN CLEARLY GO TO CORPUS DELICTI
21 TO PROVE THE DRIVING ELEMENT.

22 BY MR. MCDANIEL: WELL ---

23 BY SOLICITOR BLUNDY: THEY DON'T HAVE TO
24 NECESSARILY GO IN ANY ORDER.

25 BY THE COURT: WELL, HERE'S MY CONCERN -- AND

1 I'M ACTUALLY ON PAGE SIX (6) OF WHAT YOU PRESENTED
2 UP -- THAT "THE PROSECUTION MUST SHOW THE ACTUAL
3 COMMISSION BY SOMEONE OF THE PARTICULAR OFFENSE
4 CHARGED," ---

5 BY MR. MCDANIEL: WHERE IS THIS, JUDGE?

6 BY THE COURT: --- "BEFORE A DEFENDANT CAN BE
7 REQUIRED TO PRESENT A DEFENSE. OBVIOUSLY, THE
8 STATE MUST ESTABLISH SOME PROOF OF THE CORPUS
9 DELICTI. AND HE CANNOT BE CONVICTED OF A BASIS OF
10 HIS EXTRAJUDICIAL CONFESSION ALONE". OBVIOUSLY --
11 I CAN TELL YOU RIGHT NOW, IF YOU ARE GOING TO GO
12 INTO THE PRESENT SENSE IMPRESSION, I'M GOING TO
13 ALLOW THAT. I THINK -- I DON'T HAVE ANY PROBLEMS
14 WITH THAT. BUT IF, BUT IF ALL YOU'VE GOT IS A
15 WRECKED VEHICLE AND THEN HIS STATEMENT AFTER HE
16 HAD TALKED TO ALL THE WITNESSES, I THINK WE MIGHT
17 HAVE A PROBLEM.

18 BY SOLICITOR BLUNDY: NO, WE HAVE STATEMENTS
19 FROM THE DEFENDANT'S MOUTH. I MEAN, THE
20 DEFENDANT'S ADMISSIONS TO DRIVING THE CAR. HE
21 SAID HE WAS COMING HOME -- HE WAS GOING HOME AND
22 HE WAS COMING FROM THE CLUB, AND HE LIVED IN
23 KEOWEE KEY, WHICH IS WHERE THE WRECK OCCURRED. I
24 THINK THERE IS DEFINITELY ENOUGH EVIDENCE TO SHOW
25 THAT HE, HE WAS PUT BEHIND THE WHEEL OF THE CAR;

1 NOT ONLY THROUGH HIS OWN MOUTH, BUT, YOU KNOW,
2 FROM WHAT THE TROOPER DETERMINED AT THE SCENE.

3 BY MR. MCDANIEL: AND, JUDGE, I WOULD AGREE
4 WITH HER IF THEY HAD THAT WITNESS HERE THAT COULD
5 PUT A TIMEFRAME ON THIS. THERE'S NOBODY IN THIS,
6 -- I MEAN THE TROOPER CAN'T TESTIFY TO WHEN THIS
7 WRECK HAPPENED. AND THE ONLY WAY THAT HE KNEW
8 THAT MR. ABRAHAM WAS DRIVING WAS BASED ON ONE --
9 AND I DON'T KNOW WHO HE IS -- AND WE HAVEN'T BEEN
10 PROVIDED HIS NAME, WHOEVER. IT'S EITHER A
11 FIREMAN, AN EMS OR AMBULANCE DRIVER WHO HAD BEEN
12 ON THE SCENE FOR OVER AN HOUR BEFORE TROOPER BROWN
13 SHOWED UP.

14 BY SOLICITOR BLUNDY: YOUR HONOR?

15 BY MR. MCDANIEL: SO, ---

16 BY SOLICITOR BLUNDY: SORRY.

17 BY MR. MCDANIEL: --- WHAT THE STATE IS
18 ATTEMPTING TO DO IS JUST -- INSTEAD OF TRYING TO
19 PROVE THE DRIVING ELEMENT, THEY ARE JUST TRYING TO
20 PROVE THAT THROUGH HIS STATEMENT THAT HE WAS
21 DRIVING. THAT'S NOT ALLOWED UNLESS THEY CAN
22 INDEPENDENTLY PROVE HOW THEY DETERMINED HE WAS THE
23 DRIVER. NOW, TO SAY IT WAS HIS PRESENT SENSE
24 INCEPTION -- PRESENT SENSE PERCEPTION, WOULD BE
25 ACCURATE, EXCEPT FOR THE FACT THAT HE IS RELYING

1 ON THE HEARSAY TESTIMONY OF INDIVIDUALS NOT
2 SUBPOENAED TO BE IN THIS COURT TO TESTIFY. I
3 MEAN, HE DIDN'T GO DOWN -- HE DIDN'T TAKE HIM DOWN
4 TO THE CAR. HE DIDN'T ASK HOW THE WRECK HAPPENED.
5 NONE OF THAT. AND IF YOU'LL SEE WHAT EASLEY V.
6 PORTMAN SET FORTH THAT THIS OFFICER WAS ABLE TO
7 DETERMINE THAT -- ONE (1), HE, HE SHOWED UP
8 THIRTEEN (13) MINUTES LATER. HE FELT IT WAS WARM
9 TO THE TOUCH. HE COULD SMELL THE TIRES. I MEAN,
10 THIS IS HOW HE PROVED TO THAT COURT THAT THIS WAS
11 FRESHLY COMMITTED. WE DON'T HAVE THAT HERE. THEY
12 CAN'T DO THAT HERE. THAT -- NOT WITH THE
13 WITNESSES HERE. THEY MIGHT HAVE BEEN ABLE TO PULL
14 THAT OFF HAD THEY GOTTEN SOMEBODY THAT RESPONDED
15 IMMEDIATELY. BUT THEY CAN'T JUST RELY ON -- AND
16 THAT GOES, NOT ONLY FOR DUI'S, FOR EVERYTHING. IF
17 YOU ONLY HAVE A STATEMENT, THAT'S NOT GOOD ENOUGH.
18 AND THAT'S EXACTLY WHAT WE HAVE HERE.

19 BY SOLICITOR BLUNDY: YOUR HONOR, THAT -- WE
20 DON'T JUST HAVE A STATEMENT. WE HAVE A WRECKED
21 CAR. WE HAVE, YOU KNOW, EMS THERE WITHIN, YOU
22 KNOW, A CERTAIN TIMEFRAME OF WHEN THE WRECK WAS
23 CALLED IN. WE HAVE THE DEFENDANT BY HIMSELF AT
24 THE SCENE. THESE ARE ALL CIRCUMSTANTIAL EVIDENCE
25 THAT THIS CASE THAT HE SUBMITTED SAYS "IF THERE'S

1 ANY EVIDENCE TENDING TO ESTABLISH THE COR-, CORPUS
2 DELICTI, THEN IT IS THE DUTY OF THE TRIAL COURT TO
3 PASS THAT QUESTION ON TO THE JURY." THAT CASE,
4 ALONE, SAYS IT RIGHT THERE, AND, AND I ---

5 BY MR. MCDANIEL: WHAT CASE, ALONE, WAS THAT?

6 BY SOLICITOR BLUNDY: THE CASE THAT YOU JUST
7 SUBMITTED.

8 BY MR. MCDANIEL: WHERE -- I MEAN, WHERE DID
9 YOU READ THAT FROM?

10 BY SOLICITOR BLUNDY: PAGE SIX (6). UNDER
11 CORPUS DELICTI.

12 BY MR. MCDANIEL: I MEAN, THIS ISN'T ---
13 THAT'S NOT THE OPINION THAT'S A -- THE OPINION --
14 THAT'S THE CONCURRENCE.

15 BY SOLICITOR BLUNDY: WELL. LET, LET ME
16 ARGUE MY POINT HERE, YOUR HONOR.

17 BY THE COURT: OKAY.

18 BY SOLICITOR BLUNDY: STATE VERSUS TOWNSEND,
19 WHICH I DON'T HAVE AN EXTRA COPY OF IT ---

20 BY MR. MCDANIEL: IT'S ACTUALLY MENTIONED IN
21 THE BODY OF WHAT I GAVE YOU.

22 BY THE COURT: IT IS. IT IS.

23 BY SOLICITOR BLUNDY: BUT IT TALKS ABOUT
24 CIRCUMSTANTIAL EVIDENCE. AND IT SAYS THAT
25 "CIRCUMSTANTIAL EVIDENCE AND PRESUMPTIVE EVIDENCE

1 MAY BE SUFFICIENT WHEN IT'S THE BEST THAT CAN BE
2 OBTAINED." IN THAT CASE, YOU KNOW, THERE ARE
3 SIMILAR FACTS. THERE WAS A WRECK. THE DEFENDANT
4 WASN'T SEEN DRIVING. HE SMELLED OF ALCOHOL. AND
5 HE WAS ALONE AT THE WRECK SCENE. SO -- AND WE
6 HAVE MORE THAN CIRCUMSTANTIAL EVIDENCE. WE HAVE
7 THE DEFENDANT'S OWN ADMISSION THAT HE WAS DRIVING
8 THE CAR. SO ALL OF THOSE IN TOTALITY, I THINK ---

9 BY THE COURT: AND ONE OF THE PROBLEMS I HAVE
10 IS THAT YOU ARE ASKING ME TO RULE ON TESTIMONY
11 THAT HASN'T BEEN GIVEN YET. I THINK THAT, THAT'S
12 -- ONE OF THE PROBLEMS THAT I'M HAVING WITH IT.
13 BECAUSE, OBVIOUSLY, I DON'T KNOW WHAT YOU'RE GOING
14 TO PUT UP. OBVIOUSLY, THERE'S NOBODY ELSE CAN IN
15 THE COURT ROOM.

16 BY SOLICITOR BLUNDY: STATE VERSUS SAWYER:
17 "THE BA TEST WAS ADMITTED, EVEN THOUGH THE
18 DEFENDANT HAD NOT BEEN SEEN DRIVING, BUT HE
19 ADMITTED TO THE OFFICER THAT HE HAD BEEN DRIVING."

20 BY THE COURT: BUT WE'RE NOT, WE'RE NOT
21 TALKING ABOUT A BA TEST.

22 BY SOLICITOR BLUNDY: WELL, OBVIOUSLY, THESE
23 ARE CASES WHERE THE CORPUS DELICTI WAS MET. AND
24 IN THAT CASE, HE JUST ADMITTED TO THE OFFICER THAT
25 HE HAD BEEN DRIVING. STATE VERSUS GILLIAM:

1 "DEFENDANT WAS FOUND AT THE WRECK SCENE, ADMITTED
2 TO DRIVING THE CAR. THE CASE WAS SUBMITTED TO THE
3 JURY."

4 BY THE COURT: ALL RIGHT. I THINK AT THIS
5 POINT -- OBVIOUSLY, I, I DON'T KNOW WHAT THE
6 OFFICER IS GOING TO TESTIFY TO. I THINK WE NEED
7 TO SEE -- AND OBVIOUSLY, HEARSAY IS -- ACTUAL
8 HEARSAY -- IF HE'S GOING TO DO A PRESENT SENSE
9 IMPRESSION, IF HE'S GOING -- IF THERE'S SOME
10 INVESTIGATION THAT HE DID THAT CONNECTS THE
11 DEFENDANT TO THE VEHICLE, THEN, THEN I THINK WE'RE
12 FINE. BUT ONCE HE'S FINISHED, IF, IF THERE ISN'T
13 ANYTHING, THEN YOU WOULD MAKE A MOTION FOR A
14 DIRECT VERDICT OF NOT GUILTY, AND I WOULD
15 ENTERTAIN THAT.

16 BY MR. MCDANIEL: NO, AND I UNDERSTAND. BUT,
17 JUDGE, BUT, I MEAN I ---

18 BY THE COURT: IT'S KIND OF HARD FOR ME TO
19 RULE ON A MOTION IF I HAVEN'T HEARD IT YET.

20 BY MR. MCDANIEL: BUT SEE -- MY ---

21 BY THE COURT: I MEAN, WHEN I HAVEN'T HEARD
22 IT.

23 BY MR. MCDANIEL: NO, I UNDERSTAND THAT. BUT
24 MY READING OF THIS CASE IS THAT BEFORE HIS
25 STATEMENTS ARE ALLOWED IN, THAT THEY HAVE TO

1 SUFFICIENTLY BE PROVED TO YOUR HONOR THAT THEY CAN
2 PROVE THE CORPUS DELICTI. AND I'M NOT SURE THAT
3 THEY CAN, BUT I -- I MEAN, THEY ---

4 BY THE COURT: I'M NOT SURE THAT THEY CAN,
5 EITHER, BECAUSE I HAVEN'T HEARD IT. SO, ---

6 BY MR. MCDANIEL: CAN I JUST GET A LITTLE SIP
7 OF WATER?

8 BY THE COURT: YEAH, THAT -- LET'S ALL TAKE A
9 FIVE (5) MINUTE BREAK.

10 (BREAK/BRIEF RECESS)

11 BY THE COURT: LET ME JUST STATE, FOR THE
12 RECORD THAT -- AND, AND I'M READING FROM BROWN AND
13 TOWNSEND, TOO -- THAT "IF THERE IS NO EVIDENCE TO
14 PROVE THE CORPUS DELICTI, THE DEFENDANT IS
15 ENTITLED TO A DIRECTIVE VERDICT OF NOT GUILTY."
16 CERTAINLY, YOU CAN MAKE THAT MOTION, BUT I DON'T
17 THINK I CAN GO OVER THE MOTION YOU'RE MAKING NOW
18 BECAUSE I HAVE NO IDEA WHAT THEY ARE GOING TO PUT
19 UP.

20 BY MR. MCDANIEL: RIGHT.

21 BY THE COURT: I HAVE NO IDEA WHAT HE'S GOING
22 TO SAY. AND I UNDERSTAND YOUR POINT, IS THEY HAVE
23 TO BE ABLE TO SHOW IT ---

24 BY MR. MCDANIEL: RIGHT. NO, I MEAN, ALL
25 THEY ARE GOING TO USE IS HIS STATEMENTS. AND I

1 JUST WANT TO -- BECAUSE MY READING WAS -- AND I
2 DIDN'T MEAN TO JERK THE JURY AROUND, BUT ---

3 BY THE COURT: NO, WE'RE FINE.

4 BY MR. MCDANIEL: --- COULDN'T GET INTO THAT
5 UNTIL THEY COULD PROVE THE -- I UNDERSTAND.

6 BY THE COURT: RIGHT. BUT THAT -- I DID NOT
7 -- I DON'T THINK I CAN RULE UNTIL WE GET -- WE GOT
8 TO GET THERE AND SEE EXACTLY WHERE THEY ARE GOING
9 WITH IT. AND I DON'T THINK WE GOT TO THAT POINT
10 YET. SO I'M GOING TO NOTE YOUR MOTION -- OR YOUR
11 OBJECTION, BUT WE ARE GOING TO CONTINUE AT THIS
12 POINT.

13 BY MR. MCDANIEL: YES, SIR. THANK YOU VERY
14 MUCH.

15 DIRECT EXAMINATION BY MS. BLUNDY RESUMES:

16 Q. TROOPER BROWN, WHAT DID YOU SEE WHEN YOU ARRIVED
17 AT THE WRECK SCENE?

18 A. WHEN I ARRIVED AT THE WRECK SCENE, I SAW A
19 MULTIPLE -- EMERGENCY VEHICLES, EMERGENCY
20 PERSONNEL AND A VEHICLE OFF THE ROAD INTO A TREE,
21 AND THE DEFENDANT, MR. ABRAHAM.

22 Q. DO YOU REMEMBER WHAT TYPE OF CAR WAS AT THE SCENE?

23 A. AS IN THE, THE CAR INVOLVED IN THE COLLISION?

24 Q. THE WRECKED VEHICLE?

25 A. I CAN'T TELL YOU OFF THE BAT -- RIGHT OFF THE BAT

1 -- WHAT, WHAT MAKE IT WAS, BUT IT WAS A NEWER
2 MODEL, DARK-COLORED CAR, LIKE A -- MAYBE LIKE A
3 CHARCOAL GRAY OR SOMETHING LIKE THAT.

4 Q. WHAT DID THE CAR -- OTHER THAN THE COLOR, WHAT DID
5 IT LOOK LIKE WHEN YOU SAW IT?

6 A. IT HAD FRONT-END DAMAGE WHERE IT HAD RAN OUT OF
7 THE ROAD AND STRUCK A TREE. IT WAS STILL,
8 ACTUALLY, UP AGAINST THE TREE. AND IT JUST HAD,
9 YOU KNOW, FRONT-END DAMAGE CONSISTENT WITH RUNNING
10 INTO A TREE.

11 Q. WAS THERE ANYBODY ELSE PRESENT AT THE SCENE OTHER
12 THAN MEDICAL PERSONNEL AND THE DEFENDANT, MR.
13 ABRAHAM?

14 A. NO, MA'AM.

15 Q. WERE YOU ABLE TO RUN A DRIVER'S LICENSE -- LET ME
16 REPHRASE THE QUESTION. WERE YOU ABLE TO RUN HIS
17 LICENSE PLATE?

18 A. THE LICENSE PLATE, IF I'M NOT MISTAKEN, CAME BACK
19 REGISTERED TO A RENTAL COMPANY.

20 Q. OKAY.

21 A. OUT OF -- MAYBE, MAYBE ATLANTA OR -- I, I'M NOT
22 EXACTLY SURE WHERE IT CAME BACK FROM. FAIRLY
23 CERTAIN IT WAS A RENTAL CAR, OR A LEASED VEHICLE
24 MAYBE. I, I'M JUST TRYING TO PULL THAT OFF THE
25 TOP OF MY HEAD.

1 Q. BUT YOU BELIEVE IT CAME BACK TO A RENTAL COMPANY?

2 A. I BELIEVE SO.

3 Q. WERE YOU ABLE TO DETERMINE WHO WAS DRIVING THE
4 CAR?

5 A. YES, MA'AM.

6 Q. AND WHO WAS THAT?

7 A. MR. ABRAHAM.

8 BY MR. MCDANIEL: JUDGE, I WOULD OBJECT TO
9 THAT -- I JUST RENEW MY PREVIOUS INJECTION.

10 BY THE COURT: OKAY. OBJECTION OVERRULED AT
11 THIS TIME.

12 Q. WHERE DID THE DEFENDANT SAY HE HAD BEEN COMING
13 FROM?

14 A. HE TOLD ME HAD BEEN COMING FROM THE -- I BELIEVE
15 IT'S CALLED THE LAKE KEOWEE COUNTRY CLUB. OFF
16 THE, OFF THE TOP OF MY HEAD, I THINK THAT'S THE
17 NAME OF IT. HE HAD BEEN THERE THAT NIGHT AND WAS
18 ON HIS WAY HOME. HE -- I BELIEVE HE LIVED WITH
19 HIS BROTHER OR LIVED SOMEWHERE INSIDE KEOWEE KEY.

20 Q. SO, WHERE DID HE SAY HE WAS HEADED?

21 A. SAID HE WAS HEADED HOME. HE WAS -- HE HAD LEFT THE
22 CLUB AND WAS ON HIS WAY HOME.

23 Q. DID THE DEFENDANT ADMIT TO YOU THAT HE WAS DRIVING
24 THAT CAR?

25 A. YES, MA'AM.

1 BY MR. MCDANIEL: AGAIN, JUDGE, SUBJECT TO MY
2 OBJECTION.

3 BY THE COURT: IT'S BEEN NOTED.

4 Q. TELL THE JURY WHAT YOU OBSERVED ABOUT THE
5 DEFENDANT WHEN YOU APPROACHED THE WRECK SCENE.

6 A. I -- WHEN I, WHEN I WENT TO SPEAK WITH MR.
7 ABRAHAM, I COULD SMELL A STRONG ODOR OF ALCOHOL.
8 I MEAN, FROM WHAT, WHAT I KNOW TO BE THE SMELL OF,
9 OF ALCOHOL. UNSTEADY ON HIS FEET. HIS SPEECH WAS
10 SLURRED.

11 Q. WHAT DID THE DEFENDANT SAY, IF ANYTHING, ABOUT
12 WHETHER HE HAD BEEN DRINKING?

13 A. HE SAID THAT HE HAD BEEN DRINKING, THAT HE HAD HAD
14 TWO (2) TO THREE (3) GLASSES OF WINE, I BELIEVE,
15 AT THE CLUB.

16 Q. DO YOU REMEMBER WHAT KIND OF WINE HE SAID HE HAD?

17 A. I DON'T REMEMBER EXACTLY WHAT KIND OF WINE IT WAS,
18 BUT FOR SOME REASON, I'M THINKING IT WAS A -- HE
19 WAS THERE -- HE WAS AT THE BAR WATCHING A SPORTING
20 EVENT OR SOMETHING. I -- MAYBE. AND HE SAID HE'D
21 BEEN DRINKING WINE AT THE -- YOU KNOW, I'M NOT
22 SURE WHAT, EXACTLY WHAT, YOU KNOW.

23 Q. DO YOU REMEMBER HIM SAYING TO YOU HOW LARGE THE
24 GLASSES OF WINE WERE?

25 A. I REMEMBER HIM SAYING THAT IT WAS -- THEY WERE,

1 THEY WERE LARGER GLASSES. THEY WEREN'T JUST, YOU
2 KNOW, FROM WHAT I PERCEIVE TO BE AN AVERAGE WINE
3 GLASS. I MEAN, HE HAD HAD LIKE A CUP OF WINE AND
4 -- FROM WHAT I CAN REMEMBER.

5 Q. WHAT TYPE OF FIELD SOBRIETY TEST DID YOU OFFER TO
6 THE DEFENDANT?

7 A. I OFFERED THE DEFENDANT WHAT WE REFER TO AS
8 STANDARDIZED FIELD SOBRIETY TESTS, WHICH IS THE
9 HORIZONTAL GAZE NYSTAGMUS, WALK AND TURN, ONE-LEG
10 STAND. THEN I ALSO ASKED HIM TO SAY HIS ABC'S,
11 WHICH IS NOT A STANDARDIZED TEST, BUT IT'S A, A
12 TEST THAT I OFFERED HIM AFTER THE STANDARDIZED
13 FIELD SOBRIETY TESTS.

14 Q. EXPLAIN, FOR THE JURY, A LITTLE BIT ABOUT WHAT THE
15 HGN TEST IS.

16 A. THE HORIZONTAL GAZE NYSTAGMUS, OTHERWISE KNOWN AS
17 HGN, IS, IS A TEST THAT WE PERFORM WHEN YOU'RE --
18 YOU LOOK AT THE, THE PERSON'S EYES. AND YOU CHECK
19 FOR CLUES WITHIN THOSE EYES. AS FAR AS WHEN THE
20 EYES MOVE, DO THEY, DO THEY MOVE TOGETHER? BOTH
21 EYES? YOU KNOW, YOU DON'T HAVE ONE EYE GOING IN A
22 DIFFERENT DIRECTION. ARE THE PUPIL SIZES THE
23 SAME? AS THE EYES MOVE BACK AND FORTH, YOU LOOK
24 FOR WHAT WE CAN CALL JERKING, WHICH IS CALLED
25 NYSTAGMUS. AND IF YOU LOOK -- THERE'S A -- THE

1 FIRST CLUE YOU LOOK FOR IS LACK OF SMOOTH PURSUIT,
2 WHICH IS LIKE -- THE BEST WAY I CAN, I CAN
3 DESCRIBE IT, AND HAVE BEEN TOLD, IS, IS IF YOU
4 TAKE A MARBLE AND ROLL IT ACROSS GLASS, IT, IT
5 JUST FLOWS SMOOTHLY ACROSS THE GLASS AS IT ROLLS.
6 IF YOU THROW SAND ON IT AND THEN ROLL A MARBLE ON
7 IT, IT'S GOING TO KIND OF JERK AS IT GOES. AND
8 THAT'S WHAT WE LOOK FOR, FOR LACK OF SMOOTH
9 PURSUIT, IS IF THE EYES ARE MOVING TO BOTH CORNERS
10 OF THE -- WHEN YOU'RE GOING EACH WAY WITH THE
11 EYES, THEY'RE JERKING. THEY ARE NOT JUST FLOWING
12 SMOOTHLY. AND THEN THE NEXT THING IS YOU'RE
13 LOOKING FOR NYSTAGMUS OF MAXIMUM DEVIATION, WHICH
14 IS BASICALLY A FORTY-FIVE (45) DEGREE ANGLE FROM
15 THE, FROM THE EYES. IF, IF YOU TAKE THEIR EYES
16 AND LOOK EITHER DIRECTION WHERE THERE'S NO MORE
17 WHITE IN THE CORNER OF YOUR EYES, THAT'S, THAT'S
18 WHAT WE'RE TAUGHT MAXIMUM DEVIATION IS. AND, AND
19 EVERYONE HAS NYSTAGMUS. IT'S -- THE PROSECUTORS
20 HAVE SAID THERE'S A VERY RARE PERCENTAGE OF THE
21 POPULATION HAS MASSIVE NYSTAGMUS. BUT EVERYONE
22 HAS NYSTAGMUS IF YOU -- AS THE -- YOUR EYES, YOUR
23 EYES ARE WEAK AS YOU'RE LOOKING A DIFFERENT WAY.
24 THEY WILL ALL START TO BOUNCE, BUT ALCOHOL
25 PRONOUNCES THAT. IT, IT EXAGGERATES IT. SO

1 THAT'S WHAT WE'RE LOOKING FOR. WHEN THE EYES MOVE
2 TO THE FORTY-FIVE (45) DEGREES OF MAXIMUM
3 DEVIATION, THEY, THEY JERK AS THEY'RE -- THEY JUST
4 KIND OF BOUNCE BACK AND FORTH. AND ---

5 Q. HOW ABOUT THE WALK AND TURN TEST? EXPLAIN, FOR
6 THE JURY, HOW THAT TEST WORKS.

7 A. THE WALK AND TURN TEST IS A DIVIDED, DIVIDED
8 ATTENTION TEST. YOU, YOU'RE ASKING THE PERSON TO
9 FOCUS ON FOLLOWING YOUR COMMANDS AS FAR AS
10 STANDING IN A CERTAIN POSITION AND DOING THE TEST
11 LIKE YOU TELL THEM, BUT YOU'RE ALSO ASKING THEM TO
12 KEEP THEIR BALANCE AT THE SAME TIME. SO, THEY ARE
13 HAVING TO FOCUS ON TWO (2) DIFFERENT TASKS. AND
14 SOMEONE UNDER THE - -- YOU KNOW, -- THROUGH THESE
15 STANDARDIZED TESTS, SOMEONE UNDER THE INFLUENCE
16 HAS A HARD TIME DOING THAT. SO YOU ASK THEM, ASK
17 THEM TO STAND IN A CERTAIN POSITION WITH THEIR
18 RIGHT FOOT TOUCHING HEEL TO TOE TO THEIR LEFT FOOT
19 AND THE RIGHT FOOT IN FRONT OF THEM. THEN YOU
20 TELL THEM TO STAND THERE. AND THEN YOU EXPLAIN
21 THE TEST TO THEM AND THEN YOU ASK THEM TO WALK
22 NINE (9) STEPS HEEL TO TOE, TOUCHING HEEL TO TOE
23 AS THEY GO, COUNT ALOUD AS THEY GO, WATCH THEIR
24 FEET AS THEY GO. AND THEN WHEN THEY GET TO THE
25 NINTH (9TH) STEP, THEY SHOULD LAND ON THEIR LEFT

1 FOOT. AND WHEN THEY LAND ON THEIR LEFT FOOT, THEY
2 DO A PIVOT. THEY JUST KIND OF -- THEY KEEP THE
3 LEFT FOOT PLANTED AND THEY JUST DO A SMALL SERIES
4 OF STEPS AROUND THEIR LEFT FOOT, TURN AROUND AND
5 THEY COME BACK FOR NINE (9) STEPS, TOUCHING HEEL
6 TO TOE. AND THEY'RE, THEY'RE NOT SUPPOSED TO
7 RAISE THEIR ARMS. THEY'RE NOT SUPPOSED TO STEP
8 OFF THE LINE OR ANYTHING LIKE THAT. AND THAT'S
9 WHAT YOU'RE LOOKING FOR. YOU'RE LOOKING FOR, YOU
10 KNOW, RAISING THEIR ARMS, STEPPING OFF THE LINE,
11 NOT TOUCHING HEEL TO TOE IF THERE'S MORE THAN A, A
12 HALF INCH GAP OR INCH GAP OR SOMETHING BETWEEN
13 THE, THE, THE FRONT OF THE FOOT, THE LEFT FOOT IN
14 FRONT OF THE OTHER FOOT. THAT'S WHAT YOU'RE
15 LOOKING FOR BECAUSE YOU, YOU'RE TRYING TO, YOU'RE
16 TRYING TO SEE IF THEY'RE ABLE TO FOCUS ON WHAT
17 THEY'RE DOING AND KEEP THEIR BALANCE AT THE SAME
18 TIME. AND THAT'S THE WALK -- THAT'S THE WALK AND
19 TURN TEST.

20 Q. AND HOW ABOUT, LASTLY, THE ONE-LEG STAND TEST?
21 HOW DOES THAT TEST WORK?

22 A. ONE-LEG STAND IS PRETTY SELF-EXPLANATORY. YOU
23 JUST ASK THEM TO STAND ON ONE LEG, RAISE THE OTHER
24 FOOT SIX (6) INCHES OFF THE GROUND, POINT IT
25 STRAIGHT OUT, PARALLEL TO THE GROUND. WATCH THEIR

1 FEET AND YOU COUNT OUT LOUD UNTIL YOU TELL THEM TO
2 STOP. AND THE POINT OF THAT TEST IS THEY ARE
3 FOCUSING ON COUNTING AND THEY ARE TRYING TO FOCUS
4 ON KEEPING THEIR LEG UP. SO, AS THEY ARE DOING
5 THAT, YOU'RE LOOKING FOR THEM RAISING THEIR ARMS,
6 TRYING TO KEEP THEIR BALANCE. AND THEY'LL -- SOME
7 PEOPLE START HOPPING. THEY'LL PUT THEIR FOOT
8 DOWN. THEY, THEY WON'T COUNT. STUFF LIKE THAT.
9 SO THAT'S WHAT YOU'RE LOOKING FOR WHEN THEY'RE
10 DOING THAT. THEY'LL PUT THEIR FOOT DOWN. THEY'LL
11 BOUNCE AND -- IT'S --- JUST IMAGINE RAISING YOUR
12 FOOT IN THE AIR AND HOLDING IT. YOU JUST DO THAT
13 UNTIL I TELL YOU TO STOP. IT'S BASICALLY ABOUT
14 THIRTY (30) SECONDS. THEN YOU SEE IF THEY CAN DO
15 IT.

16 Q. WERE YOU ABLE TO VIDEO RECORD THESE FIELD SOBRIETY
17 TESTS?

18 A. YES, MA'AM.

19 Q. WHEN DID THAT RECORDING START?

20 A. AS IN? WHEN DID, WHEN DID I START RECORDING?

21 Q. WHEN DID YOU START THE RECORDING?

22 A. WELL, THE -- AS SOON AS I ARRIVED ON THE SCENE,
23 THE -- WHEN I ACTIVATE MY BLUE LIGHTS, THE CAMERA
24 COMES ON. AND IF IT RECORDS -- YOU KNOW, I CAN'T
25 -- I HAVE TO ACTUALLY GET IN AND TURN THE CAMERA

1 OFF. BUT IT, IT'S RECORDED FROM, FROM THE TIME I
2 GOT THERE, PLACED HIM IN FRONT OF MY CAR, AND
3 ACTUALLY PERFORMED THE TESTS.

4 Q. AND DID YOU FILL OUT AN AFFIDAVIT STATING THAT?

5 A. YES, MA'AM.

6 Q. OKAY. I'M SHOWING YOU WHAT'S BEEN MARKED AS
7 STATE'S EXHIBIT NUMBER ONE (1). WHAT IS THIS?
8 (DOCUMENT HANDED TO WITNESS)

9 A. IT IS A -- THE IN-CAR VIDEO TAPE FROM THE -- FROM
10 MY CAMERA ON THE NIGHT IN QUESTION.

11 Q. AND HOW DO YOU RECOGNIZE THAT DISK?

12 A. IT HAS MY INITIALS ON THE, THE LEFT-HAND CORNER.

13 Q. DID YOU HAVE A CHANCE TO WATCH THAT DISK PRIOR TO
14 TRIAL?

15 A. YES, MA'AM.

16 Q. IS IT A FAIR AND ACCURATE REPRESENTATION AS OF THE
17 DAY IT WAS RECORDED?

18 A. YES, MA'AM.

19 Q. HAS IT BEEN ALTERED OR CHANGED IN ANY WAY?

20 A. NO, MA'AM.

21 BY SOLICITOR BLUNDY: STATE WOULD MOVE TO
22 ADMIT EXHIBIT NUMBER ONE (1).

23 BY THE COURT: OBJECTION?

24 BY MR. MCDANIEL: JUDGE, I'M OBJECTING UNLESS
25 THAT'S THE ORIGINAL. I'M NOT SURE THAT THAT'S --

1 I MEAN, THE FOUNDATION HASN'T BEEN LAID. I MEAN,
2 SHE DIDN'T ASK THAT QUESTION.

3 BY SOLICITOR BLUNDY: YOUR HONOR, THE
4 FOUNDATION HAS BEEN LAID. HE TESTIFIED THAT HE'D
5 SEEN IT BEFORE TRIAL. IT'S A FAIR AND ACCURATE
6 REPRESENTATION AS OF THE DAY IT WAS RECORDED.

7 BY THE COURT: IT WAS -- I DON'T KNOW IF IT
8 WAS SAID -- IT'S A COPY OF THE IN-CAR CAMERA
9 THAT'S BEEN TESTIFIED TO. IS THAT CORRECT?

10 BY SOLICITOR BLUNDY: THAT IS CORRECT, YOUR
11 HONOR.

12 BY THE COURT: IT'S NOT BEEN ALTERED?

13 A. NO, MA'AM ---

14 BY SOLICITOR BLUNDY: HE SAID THAT IT HAD NOT
15 BEEN.

16 A. NO, SIR.

17 BY THE COURT: NOTE YOUR OBJECTION, FOR THE
18 RECORD, AND I WILL ALLOW THE VIDEO.

19 (STATE'S EXHIBIT "1" MARKED AND ENTERED)

20 BY SOLICITOR BLUNDY: YOUR HONOR, I JUST ASK
21 THAT AT THIS TIME THE JURY BE EXCUSED WHILE WE SET
22 UP THE VIDEO.

23 BY THE COURT: COURT, LADIES AND GENTLEMEN,
24 YOU'RE EXCUSED WHILE THEY SET UP.

25 (BREAK - SETTING UP VIDEO)

1 BY THE COURT: ALL RIGHT, MS. BLUNDY, YOU MAY
2 PRODUCE THE VIDEO TO THE JURY, PLEASE.

3 BY SOLICITOR BLUNDY: THANK YOU, YOUR HONOR.

4 (VIDEO (INAUDIBLE) PLAYING)

5 (TEXT MISSING - SECTION 64)

6 DIRECT EXAMINATION BY MS. BLUNDY RESUMES:

7 Q. ...BUT THE DEFENDANT DID TELL YOU THAT HE WAS BORN
8 WITH -- HE CALLED IT CONGENITAL ---

9 A. YES, MA'AM.

10 Q. --- MEANING BEING BORN WITH -- NYSTAGMUS, RIGHT?

11 A. YES, MA'AM.

12 Q. OKAY. IS THAT WHEN YOU ADMINISTERED THE OTHER
13 FIELD SOBRIETY TESTS?

14 A. YES.

15 Q. AND WHAT DID YOU OBSERVE -- OR WHAT CLUES OF
16 IMPAIRMENT DID YOU OBSERVE ON THE WALK AND TURN
17 TEST?

18 A. ON THE WALK AND TURN TEST, I SAW THAT HE LOST HIS
19 BALANCE. HE -- ONCE I TOLD HIM TO START THE TEST,
20 HE KIND OF, HE KIND OF STOOD THERE. DIDN'T,
21 DIDN'T, DIDN'T START IT. HE DIDN'T RAISE HIS FOOT
22 LIKE HE WAS SUPPOSED TO, YOU KNOW, STRAIGHT OUT,
23 TO TRY TO MAINTAIN HIS BALANCE, THEN YOU HEARD ME
24 CALL HIM THE KARATE KID. HE BENT HIS FOOT AND
25 STARTED DOING LIKE A KARATE KICK. PUT HIS FOOT

1 DOWN NUMEROUS TIMES. LOST HIS BALANCE WHILE HE
2 WAS DOING -- RAISING HIS ARMS UP -- I FINALLY HAD
3 STOPPED THE TEST. I -- YOU KNOW, I DIDN'T WANT
4 HIM TO FALL DOWN OR ANYTHING LIKE THAT. SO, I
5 JUST, JUST STOPPED THAT PART OF THE TEST.

6 Q. AND HOW ABOUT THE ABC'S?

7 A. THE ABC'S, HE, HE STARTED HIS ABC'S AND THEN HE --
8 YOU COULD TELL HE JUST KIND OF TRAILED OFF. HE --
9 LIKE HE KIND OF JUMBLED THEM TOGETHER THERE
10 TOWARDS THE END AND THEN JUST KIND OF STOPPED
11 SAYING THEM. SO, AT THAT POINT, I DECIDED THAT I
12 HAD SEEN ENOUGH. THAT CLEARLY, HE WAS UNDER THE
13 INFLUENCE AND I JUST PLACED HIM UNDER ARREST.

14 Q. AND DID YOU READ THE DEFENDANT HIS MIRANDA
15 WARNINGS?

16 A. YES, MA'AM, I DID.

17 Q. OKAY. WHO ACTUALLY ADMINISTERED THE BREATH TEST?

18 A. I DID.

19 Q. AND WERE YOU ABLE TO READ TO THE DEFENDANT, PRIOR
20 TO THAT TEST, HIS IMPLIED CONSENT WARNINGS IN
21 SOUTH CAROLINA?

22 A. YES, MA'AM.

23 Q. WERE YOU ABLE TO GIVE HIM A COPY OF THOSE IMPLIED
24 CONSENT RIGHTS?

25 A. I DID. I GAVE HIM A COPY PRIOR, I MEAN, WE, WE

1 PRINT TWO (2) COPIES OFF. I KEEP ONE (1) AND HE
2 GETS ONE (1). GAVE HIM HIS COPY PRIOR TO DOING
3 THE BREATHING TEST.

4 BY MR. MCDANIEL: IS THAT JUST A COPY?

5 BY SOLICITOR BLUNDY: YEAH.

6 (TEXT MISSING - SECTION 70)

7 (STATE'S EXHIBIT "2" MARKED AND ENTERED)

8 Q. ...I'M SHOWING YOU WHAT HAS BEEN MARKED AS STATE'S
9 EXHIBIT NUMBER TWO (2). WHAT IS THIS DOCUMENT?
10 (DOCUMENT HANDED TO WITNESS)

11 A. (UPON REVIEW) THIS IS A COPY OF THE IMPLIED
12 CONSENT RIGHTS THAT WE, WE PRINT OFF OF THE
13 DATAMASTER MACHINE TO READ TO THE PERSON IN THE
14 DATAMASTER ROOM.

15 Q. OKAY.

16 (TEXT MISSING - SECTION 72)

17 BY MR. MCDANIEL: ...I KNOW WE RAN INTO THAT
18 BEFORE. THE STATE GENERALLY HAS TO BRING THE
19 ORIGINAL TO THE COURT TO ALLOW US TO INSPECT THAT.
20 AND THEY HAVEN'T DONE THAT. AND, SO I OBJECT TO
21 THE ADMISSION UNLESS IT'S THE ORIGINAL, UNLESS
22 THEY CAN SHOW ME THE ORIGINAL.

23 BY THE COURT: ALL RIGHT. MS. BLUNDY?

24 BY SOLICITOR BLUNDY: YOUR HONOR, ACTUALLY
25 THE RULES OF EVIDENCE STATE THAT COPIES ARE

1 DETERMINED TO BE THE SAME AS THE ORIGINAL AND ARE
2 ADMISSIBLE JUST LIKE THE ORIGINAL, AS LONG AS THE
3 FOUNDATION IS LAID.

4 (TEXT MISSING - SECTION 74)

5 Q. ...TROOPER BROWN, ARE YOU A CERTIFIED DATAMASTER
6 BREATH TEST OPERATOR?

7 A. YES, MA'AM, I AM.

8 Q. AND BY WHOM ARE YOU CERTIFIED?

9 A. THROUGH SLED, SOUTH CAROLINA LAW ENFORCEMENT
10 DIVISION.

11 Q. AND HOW LONG HAVE YOU BEEN CERTIFIED BY SLED TO
12 OPERATE THE DATAMASTER TEST?

13 A. UMM, I'M ---

14 (TEXT MISSING - SECTION 76)

15 Q. ...WERE YOU ABLE TO INFORM THE DEFENDANT, IN THE
16 BREATHALYZER ROOM, THAT HE WAS BEING VIDEO
17 RECORDED?

18 A. YES, MA'AM, I DID.

19 Q. WERE YOU ABLE TO CHECK THE DEFENDANT'S MOUTH TO
20 SEE IF THERE WERE ANY FOREIGN MATERIALS, LIKE
21 DENTURES OR GUM, THAT MIGHT AFFECT THE
22 BREATHALYZER TEST?

23 A. YES, MA'AM.

24 Q. WERE ---

25 (TEXT MISSING - SECTION 78)

1 Q. ... (PAUSE - REVIEWING DOCUMENTS)

2 (TEXT MISSING - SECTION 80)

3 Q. ... DID THE MACHINE, THAT DAY, RUN A SIMULATOR
4 TEST?

5 A. IT DID.

6 Q. WOULD YOU EXPLAIN FOR THE JURY WHAT A SIMULATOR
7 TEST IS?

8 A. THE MACHINE GOES THROUGH A SERIES OF TESTS. AND
9 IT PERFORMS ALL THESE TESTS PRIOR TO ALLOWING
10 ANYONE TO BLOW INTO THE MACHINE. IT DOES AN
11 INTERNAL CHECK BEFORE IT -- MAKES SURE ALL THE
12 COMPONENTS INSIDE THE MACHINE ARE WORKING AND
13 OPERATING PROPERLY. THEN AFTER THAT, IT DOES AN
14 EXTERMENT (PHONETIC) STANDARD TEST. AND THERE'S A
15 -- INSIDE THE MACHINE, THERE'S A, A CONTAINER OF
16 ALCOHOL THAT THE COMPANY PROVIDES. IT'S IN A
17 SEALED CONTAINER. WE HAVE -- YOU KNOW, WHOEVER
18 CHANGES THE SOLUTION AT THE TIME POURS IT IN
19 THERE. AND IT'S AT AROUND .08% PERCENTAGE. AND
20 IT, IT TESTS THE MACHINE -- PULLS IN FROM THAT,
21 THAT, THAT CONTAINER AND TESTS THE ALCOHOL COMING
22 OUT OF THE CONTAINER TO VERIFY THAT IT'S AT .08.
23 BY DOING THAT, IT'S ABLE TO DETERMINE THAT IT'S
24 TESTING THE ALCOHOL CORRECTLY. BECAUSE THAT'S A
25 KNOWN .08 ALCOHOL CONCENTRATION. SO IF IT, IF

1 THE PASS (INAUDIBLE) -- EXTERNAL TEST.

2 Q. AND DID THE DEFENDANT END UP GIVING A BREATH
3 SAMPLE THAT DAY?

4 A. HE DID.

5 Q. AND WHAT DID HIS BREATH SAMPLE REGISTER AT?

6 A. AT A .22%.

7 BY SOLICITOR BLUNDY: STATE WOULD MOVE TO
8 ADMIT EXHIBIT NUMBER THREE (3).

9 BY THE COURT: ANY OBJECTION?

10 BY MR. MCDANIEL: JUDGE, I THINK THE COURT
11 REQUIRES THE ORIGINAL. I DIDN'T SEE THE RULE SHE
12 CITED, BUT I KNOW A THOUSAND AND TWO (1002), RULE
13 A THOUSAND AND TWO (1002) REQUIRES THE ORIGINAL.
14 AND JUDGE THIS COURT, FRANKLY, HAD ALWAYS REQUIRED
15 THE ORIGINALS BEFORE THEY WERE ADMITTED INTO
16 EVIDENCE. THAT'S MY OPINION.

17 BY SOLICITOR BLUNDY: YOUR HONOR, IF YOU
18 WOULD GIVE ME A FEW MOMENTS, I PROBABLY CAN PULL
19 THE RULE OUT THAT DOES ALLOW THE COPIES.

20 BY THE COURT: OKAY. WELL, LET'S TAKE A
21 SHORT BREAK. LET'S TRY TO GET SOME WATER. IF YOU
22 NEED SOME WATER OR ANYTHING FROM THE CLERK, IF
23 YOU'LL JUST ASK HER, SHE'LL BE GLAD TO GET YOU
24 SOMETHING; OKAY? AND Y'ALL ARE WELCOME TO BRING
25 IT IN HERE WITH YOU.

1 (BREAK/BRIEF RECESS)

2 BY THE COURT: WHERE ARE THE ORIGINALS?

3 BY TROOPER BROWN: IN MY CAR.

4 BY SOLICITOR BLUNDY: IT'S RULE 103.

5 ADMISSIBILITY OF DUPLICATES. "A DUPLICATE IS
6 ADMISSIBLE TO THE SAME EXTENT AS AN ORIGINAL
7 UNLESS THERE IS A GENUINE QUESTION RAISED AS TO
8 THE AUTHENTICITY OR IN CIRCUMSTANCES WHERE IT
9 WOULD BE UNFAIR TO ADMIT THE DUPLICATE IN LIEU OF
10 THE ORIGINAL." I MEAN, IT'S ALWAYS BEEN THE RULE
11 OF THIS COURT THAT THE COPIES WERE FINE. I'VE
12 NEVER HAD IT BEEN AN ISSUE BEFORE. I THINK HE
13 STATED IT WAS GENERATED FROM THE MACHINE. THERE
14 WAS NO, YOU KNOW, ISSUES RAISED, EVEN PRE-TRIAL,
15 ABOUT ITS AUTHENTICITY. AND IT IS RECORDED IN THE
16 ORDINARY COURSE OF BUSINESS WITH SLED.

17 BY THE COURT: ALL RIGHT. MR. MCDANIEL, IS
18 THERE ANY QUESTION AS TO THE AUTHENT- -- OTHER
19 THAN IT BEING A COPY?

20 BY MR. MCDANIEL: SURE. I MEAN, I'VE NEVER
21 SEEN IT. I MEAN, THAT'S THE PROBLEM. THIS IS
22 WHAT RULE ONE THOUSAND AND TWO (1002) REQUIRES,
23 THAT "TO PROVE THE CONTENT OF WRITING OR
24 RECORDING, TO INCLUDE THE ENTIRE VIDEO OR
25 PHOTOGRAPH, THE ORIGINAL WRITING, RECORDING OR

1 PHOTOGRAPH IS REQUIRED, EXCEPT IF OTHERWISE
2 PROVIDED IN THESE RULES OR BY STATUTE."

3 BY THE COURT: (INAUDIBLE)

4 BY MR. MCDANIEL: I DON'T KNOW. I'VE NEVER
5 EVEN (INAUDIBLE). AND, JUDGE, IF YOU'LL REMEMBER
6 STATE V. KARL TUMBLIN, WHICH IS STILL ON MY MIND
7 TO THIS DAY, THE STATE DIDN'T HAVE THE ORIGINALS
8 AND YOUR HONOR WAS NOT ALLOWED -- DID NOT ALLOW
9 THEM TO BE INTRODUCED, THE IMPLIED CONSENT FORM OR
10 THE BREATH TEST. AND THAT'S WHAT I'M RELYING ON,
11 BUT I DON'T KNOW IF, IF I HAVE ANY ISSUES. I
12 MEAN, I -- FRANKLY, I HAVEN'T SEEN ANYTHING THAT
13 WOULD CALL INTO, INTO QUESTION, BUT I WOULD HAVE
14 LOVED TO AT LEAST INSPECT THEM. BUT, BASICALLY,
15 BA VIDEO IS NOT GOING TO SHOW MY CLIENT SIGNING
16 THE BA FORM. THE VIDEO IS CUT OFF BEFORE THAT.
17 AND ON HERE, IT SAYS "UNABLE TO SIGN." WELL, I --
18 I DON'T KNOW WHAT THAT MEANS, WHY -- THAT'S
19 ACTUALLY THE FIRST TIME THAT I'VE NOTICED THAT. I
20 WOULD GUESS THAT IT WAS BECAUSE HE WAS ALREADY
21 CUFFED. BUT I, I MEAN, I THINK WE HAVE A RIGHT TO
22 SEE THE ORIGINAL. BUT I'M NOT ALLEGING ---

23 BY THE COURT: AND OFFICER -- TROOPER BROWN,
24 YOU STATE THE ORIGINAL IS HERE?

25 BY TROOPER BROWN: YES, SIR, YOUR HONOR. IN

1 MY CAR.

2 BY THE COURT: LET'S GET IT!

3 (BACK ON RECORD)

4 BY THE COURT: ALL RIGHT. WE'RE BACK ON THE
5 RECORD. IT'S BEEN BROUGHT TO MY ATTENTION THAT
6 THE ORIGINAL IS NOT AVAILABLE; WAS THAT CORRECT?
7 MS. BLUNDY?

8 BY SOLICITOR BLUNDY: YOUR HONOR, I THINK IF
9 THERE'S ANY QUESTION ABOUT THE GENUINENESS OF THE
10 BREATHALYZER SHEET, I MEAN, WE MAY BE ABLE TO PULL
11 IT UP ON THE ACTUAL SLED WEBSITE. WHICH THEY ARE
12 RECORDED IN THE ORDINARY COURSE OF BUSINESS WITH
13 SLED.

14 BY THE COURT: DO YOU HAVE A COPY OF OUR COPY
15 FOR MR. MCDANIEL? DID YOU GIVE HIM ONE WHEN YOU
16 HANDED THOSE ---

17 BY SOLICITOR BLUNDY: YEP, IT WAS ---

18 BY MR. MCDANIEL: I'VE GOT A COPY, JUDGE.

19 BY SOLICITOR BLUNDY: IT WAS TURNED OVER IN
20 DISCOVERY.

21 BY THE COURT: IS THERE ANY SPECIFIC --
22 ANYTHING SPECIFIC, MR. MCDANIEL, THAT YOU SEE AT
23 THIS POINT? I'M GOING TO NOTE YOUR OBJECTION FOR
24 THE RECORD. I DO FEEL UNDER RULE OH- -- 103 THAT
25 IT IS ACCEPTABLE UNLESS YOU HAVE A SPECIFIC

1 PROBLEM.

2 BY MR. MCDANIEL: WELL, I MEAN, MY SPECIFIC
3 PROBLEM IS THAT I HADN'T ---

4 BY THE COURT: THAT IT'S NOT AN ORIGINAL ---

5 BY MR. MCDANIEL: --- HAD THE OPPORTUNITY TO
6 VIEW THE ORIGINALS AT A CRIMINAL TRIAL. THAT'S MY
7 PROBLEM.

8 BY THE COURT: ALL RIGHT. BUT YOUR
9 OBJECTION, JUST AS WITH THE IMPLIED CONSENT, ARE
10 NOTED.

11 BY MR. MCDANIEL: AND THE IN-CAR VIDEO,
12 JUDGE.

13 BY THE COURT: AND, AND OVERRULED.

14 BY MR. MCDANIEL: THANK YOU. ALL RIGHT. MS.
15 BLUNDY?

16 BY SOLICITOR BLUNDY: THANK YOU.

17 (STATE'S EXHIBIT "3" MARKED AND ENTERED)

18 DIRECT EXAMINATION BY MS. BLUNDY RESUMES:

19 Q. TROOPER BROWN, TURNING BACK TO THE BREATHALYZER
20 SHEET. WERE -- WAS THE BREATH SAMPLE GIVEN WITHIN
21 TWO (2) HOURS OF THE ARREST?

22 A. YES, MA'AM.

23 Q. AND WERE THE TIME OF THE TESTS AND THE TIME OF THE
24 ARREST AND THE RESULTS RECORDED ON THIS SHEET ---

25 A. YES, MA'AM.

- 1 Q. --- THAT YOU HAVE IN FRONT OF YOU, MARKED AS
2 EXHIBIT NUMBER THREE (3)?
- 3 A. (UPON REVIEW) YES, MA'AM.
- 4 Q. IN CONDUCTING THE TESTS, DID YOU FOLLOW ALL THE
5 SLED PROCEDURES THAT NIGHT?
- 6 A. I DID.
- 7 Q. DID YOU ALSO MAKE A VIDEO RECORDING OF YOUR
8 ACTIONS IN THE BREATHALYZER ROOM?
- 9 A. YES, MA'AM.
- 10 Q. ARE THESE RECORDINGS ALSO CONTAINED IN A DATA BASE
11 IN COLUMBIA AT SLED?
- 12 A. YES, MA'AM, THEY ARE. IT TRANSMITS IT ACROSS THE
13 INTERNET AND RECORDS IT IN COLUMBIA.
- 14 Q. I'M SHOWING YOU STATE'S EXHIBIT NUMBER FOUR (4).
15 WHAT IS THAT? (DOCUMENT HANDED TO WITNESS)
- 16 A. (UPON REVIEW) IT'S A COPY OF THE DATAMASTER TAPE
17 FROM MR. ABRAHAM.
- 18 Q. OKAY. AND HOW DO YOU RECOGNIZE IT?
- 19 A. IT'S GOT MY INITIALS ON THE BOTTOM RIGHT-HAND
20 CORNER.
- 21 Q. IS IT A FAIR AND ACCURATE REPRESENTATION AS OF THE
22 DAY IT WAS RECORDED?
- 23 A. YES, MA'AM.
- 24 Q. HAS IT BEEN ALTERED OR CHANGED IN ANY WAY SINCE
25 THE DAY IT'S BEEN RECORDED?

1 A. NO, MA'AM.

2 BY SOLICITOR BLUNDY: STATE MOVES TO ADMIT
3 EXHIBIT NUMBER FOUR (4).

4 BY THE COURT: ANY OBJECTION, FOR THE RECORD?

5 BY MR. MCDANIEL: JUDGE, I'D JUST LIKE TO
6 RENEW MY PRE-TRIAL SPONAR OBJECTION OF -- I GUESS
7 IT'S STATE'S THREE (3) AND STATE TWO (2). THAT
8 WAS THE BREATH TEST RESULT.

9 BY THE COURT: ALL RIGHT. NOTED. AND
10 OVERRULED, FOR THE RECORD.

11 BY MR. MCDANIEL: THANK YOU.

12 BY SOLICITOR BLUNDY: MAY I PUBLISH IT TO THE
13 JURY?

14 BY THE COURT: YOU MAY.

15 (STATE'S EXHIBIT "4" MARKED AND ENTERED)

16 (TEXT MISSING - SECTION 82)

17 Q. ...TROOPER BROWN, WHILE YOU'VE BEEN EMPLOYED WITH
18 THE HIGHWAY PATROL, HAVE YOU HAD AN OCCASION TO
19 SEE INDIVIDUALS WHO ARE UNDER THE INFLUENCE OF
20 ALCOHOL?

21 A. YES, MA'AM.

22 Q. AND CAN YOU ESTIMATE, FOR THE JURY, ABOUT HOW MANY
23 PEOPLE YOU'VE SEEN THAT WERE UNDER THE INFLUENCE?

24 A. HOW MANY DUI ARRESTS I'VE MADE?

25 Q. JUST HOW MANY PEOPLE YOU'VE SEEN UNDERNEATH THE

1 INFLUENCE OF ALCOHOL.

2 A. WELL OVER A HUNDRED (100).

3 (TEXT MISSING - SECTION 84)

4 BY SOLICITOR BLUNDY: ...ONE MOMENT, YOUR
5 HONOR. AT THIS TIME, THE STATE WOULD REST THEIR
6 CASE.

7 BY THE COURT: LET'S SEE IF HE WANTS TO CROSS
8 EXAMINE HIM FIRST.

9 BY SOLICITOR BLUNDY: OH, I'M SORRY.

10 BY THE COURT: MR. MCDANIEL?

11 BY MR. MCDANIEL: ALL RIGHT, JUDGE. CAN WE
12 JUST HAVE ABOUT FIVE (5) MINUTES SO I CAN SET UP.
13 THERE'S JUST A FEW PORTIONS ON THE BA THAT I'D
14 LIKE TO SHOW.

15 BY THE COURT: SURE. OKAY.

16 BY MR. MCDANIEL: THANK YOU, JUDGE.

17 BRIEFLY...

18 (TEXT MISSING - SECTION 86)

19 CROSS EXAMINATION BY MR. MCDANIEL:

20 A. ...TRYING TO RECALL FROM THE TAPE, I THINK IT WAS
21 LIKE, MAYBE 12:07 OR SOMETHING.

22 Q. 12:07? SO YOU'RE SAYING THE TIME ON THE IN-CAR
23 VIDEO IS ACCURATE?

24 A. I'M ASSUMING IT IS. I'M NOT SURE.

25 Q. OKAY, AND YOU WERE CALLED BY DISPATCH TO SHOW UP

1 TO A COLLISION; CORRECT?

2 A. YES.

3 Q. ALL RIGHT. THE VIDEO THAT THE STATE SHOWED--WHEN
4 YOU ARRIVED ON THE SCENE--SHOWED A NUMBER OF
5 EMERGENCY VEHICLES ON THE SIDE OF THE ROAD. AND I
6 THINK YOU TESTIFIED THAT THERE WAS EMS, THE FIRE
7 DEPARTMENT AND AN AMBULANCE; IS THAT CORRECT?

8 A. I SAID I THOUGHT THERE MAY HAVE BEEN EMS THERE. I
9 MEAN, I ---

10 Q. HOW MANY PEOPLE WERE THERE?

11 A. I MEAN, OFF THE TOP OF MY HEAD, I COULDN'T GIVE
12 YOU -- I MEAN, I COULD GUESS.

13 Q. YEAH, PLEASE GUESS.

14 A. MAYBE SEVEN (7) OR EIGHT (8), TEN (10) MAYBE. I
15 DON'T ---

16 Q. TEN (10) PEOPLE?

17 A. I DON'T KNOW, I MEAN, OFF THE TOP OF MY HEAD, HOW
18 MANY WERE ACTUALLY THERE.

19 Q. WELL, HA- -- SEVEN (7) TO TEN (10) IS ACCURATE,
20 THOUGH?

21 A. PROBABLY, WITH THE RESCUE SQUAD AND KEY ---

22 BY SOLICITOR BLUNDY: I'M JUST GOING TO
23 OBJECT BECAUSE HE'S ALREADY TESTIFIED THAT HE'S
24 NOT REALLY SURE.

25 BY THE COURT: OKAY. I'LL, I'LL OVERRULE

- 1 Q. AND THESE ARE STANDARDIZED. I BELIEVE THE STATE
2 HAD KIND OF SPOKE ABOUT THEM. MEANING THAT THEY
3 HAVE TO BE DONE THE SAME WAY EVERY TIME?
- 4 A. YES, SIR.
- 5 Q. OKAY. AND PART OF YOUR TRAINING IS TO MEDICALLY
6 QUALIFY AN INDIVIDUAL BEFORE YOU GIVE THEM A FIELD
7 SOBRIETY TEST?
- 8 A. YES, SIR.
- 9 (TEXT MISSING - SECTION 90)
- 10 A. ...I'VE HEARD OF (INAUDIBLE) NYSTAGMUS. BUT, I
11 MEAN, YOU KNOW, I DON'T KNOW IF THAT'S THE SAME
12 THING, YOU KNOW.
- 13 Q. RIGHT. WELL, I THINK BOTH THE STATE AND YOURSELF
14 HAD MENTIONED THAT ONE PERCENT (1%) OF ---
- 15 A. I MEAN, IT'S VERY RARE, OF COURSE.
- 16 Q. IT IS. IT'S VERY RARE. AND DON'T THEY INFORM YOU
17 THAT THERE'S BALANCE ISSUES ASSOCIATED WITH
18 CONGENITAL NYSTAGMUS?
- 19 A. I'VE NEVER HEARD OF BALANCING ISSUE. I MEAN, I --
20 I MEAN, WE DON'T GO OVER THAT.
- 21 Q. OKAY.
- 22 A. I HAD A SUPERVISOR THAT HAD IT AND HE, HE, HE WAS
23 FINE.
- 24 Q. AND THESE TESTS ARE PROGRESSIVE IN NATURE; RIGHT?
25 I MEAN HORIZONTAL GAZE NYSTAGMUS IS THE MOST

1 RELIABLE OF THE THREE (3) TESTS; CORRECT?

2 A. ARE YOU TALKING ABOUT AS FAR AS PROBABILITY-WI- --

3 I MEAN PERCENTAGE-WISE?

4 Q. YEAH.

5 A. YES, SIR. I MEAN, IT'S, IT'S THE MOST -- WITH THE

6 HIGHEST PERCENTAGE FOR SOMEONE THAT COULD BE UNDER

7 THE INFLUENCE OF ALCOHOL, RIGHT.

8 Q. SO, GENERALLY, WHEN YOU SEE HORIZONTAL GAZE

9 NYSTAGMUS IN AN INDIVIDUAL, THAT SHOWS TO YOU THAT

10 THERE IS ALCOHOL PRESENT IN THE SYSTEM. AND YOU

11 RELY ON THAT TEST HEAVIER THAN THE WALK AND TURN

12 AND ONE-LEG STAND IN MAKING A DETERMINATION OF

13 ARREST?

14 A. I WOULDN'T SAY I RELY ON IT HEAVIER. I, I WOULD

15 SAY THAT'S, THAT'S A GOOD INDICATOR FOR ME TO

16 CONTINUE WITH THE TESTS.

17 Q. RIGHT. OKAY.

18 A. TO, TO CONTINUE ON TO THE OTHER TWO (2) TESTS.

19 Q. AND, AND THAT'S RIGHT. SO IF YOU DON'T SEE HGN

20 WHEN YOU ACTUALLY BEGIN THE FIELD SOBRIETY TEST,

21 YOU WOULD STOP THE SOBRIETY TEST; CORRECT?

22 A. I MEAN, UNDER SOMEONE THAT'S NOT -- THAT I DON'T

23 FEEL IS UN- -- JUST UNDER THE INFLUENCE OF

24 ALCOHOL, I PROBABLY WOULDN'T CONTINUE ON. I MEAN,

25 IF I THINK THERE'S DRUGS INVOLVED, THE NYSTAGMUS

- 1 DOESN'T PLAY A ROLE IN A LOT OF DRUGS.
- 2 Q. SO BASED ON THAT, THE CONGENITAL NYSTAGMUS. BUT
- 3 GOING FORWARD -- I MEAN, YOU ALREADY HAD THE
- 4 ASSUMPTION -- OR YOU HAD ALREADY CONCLUDED IN YOUR
- 5 MIND THAT THERE WAS ALCOHOL USE INVOLVED; CORRECT?
- 6 A. YES, SIR.
- 7 Q. OKAY. NOW, THE VIDEO OF THE IN-CAR VIDEO THAT WAS
- 8 SHOWN SHOWS THAT IT WAS A SLICK ROAD; CORRECT?
- 9 A. I THINK IT HAD BEEN RAINING. YES, SIR. OR IT HAD
- 10 RAINED EARLIER.
- 11 Q. WAS IT A HEAVY RAIN? DO YOU REMEMBER?
- 12 A. I, I DON'T REMEMBER. I DON'T, I DON'T RECALL IT
- 13 BEING -- WHEN I DROPPED MY, MY NOTE PAD, IT WASN'T
- 14 SOAKING WET WHEN I PICKED IT UP. IT WAS JUST A
- 15 LITTLE BIT.
- 16 Q. BUT THE ROAD WAS SLICK.
- 17 A. YES, SIR. I MEAN, THE ROAD WAS ---
- 18 Q. AND Y'ALL ARE CAUTIONED FROM DOING FIELD SOBRIETY
- 19 TESTS ON SLICK SURFACES; CORRECT?
- 20 A. DO WHAT?
- 21 Q. YOU'RE CAUTIONED FROM PERFORMING FIELD SOBRIETY
- 22 TESTS ON SLICK SURFACES?
- 23 A. WELL, WE DO THEM WHERE WE THINK THEY'RE SAFE. I
- 24 MEAN, I, I DIDN'T FEEL THE ROAD WAS WET ENOUGH TO
- 25 CAUSE HIM TO NOT BE ABLE TO PERFORM THE TEST.

1 Q. GOTCHA.

2 A. I PERFORM THEM.

3 Q. AND -- RIGHT. AND YOU'VE PERFORMED THEM AT LEAST

4 A HUNDRED (100) TIMES.

5 A. PERFORMED THEM QUITE A BIT; YES, SIR.

6 Q. BUT MORE THAN A HUNDRED (100); PROBABLY A THOUSAND

7 (1,000) TIMES?

8 A. I DON'T KNOW IF I'D GO THAT HIGH.

9 Q. YOU'RE PRETTY DARN GOOD ---

10 A. IT IS, IT IS ---

11 Q. YOU'RE PRETTY DARN GOOD ---

12 A. IT IS A LARGE NUMBER, YES.

13 Q. YOU'RE PRETTY DARN GOOD AT IT, THOUGH?

14 A. YEAH, I PERFORM THEM QUITE A BIT; YES, SIR.

15 Q. SO, BEFORE WE GO FORWARD -- I MEAN, UNDERSTAND,

16 THIS IS NOT YOUR FIRST DUI ARREST?

17 A. NO, SIR.

18 Q. AND YOU HAVE SEEN HUNDREDS OF INDIVIDUALS THAT ARE

19 IMPAIRED?

20 A. YES, SIR.

21 Q. OKAY. SO HE'S ARRESTED ON THE SIDE OF THE ROAD

22 FOR DRIVING UNDER THE INFLUENCE?

23 A. YES, SIR.

24 Q. AND IT DOESN'T MATTER WHAT HE DOES IN THE BA ROOM,

25 RIGHT? I MEAN, HE'S STILL UNDER ARREST?

- 1 A. HE'S BEEN -- YES, SIR, HE'S BEEN PLACED UNDER -- I
2 MEAN, THE LAW REQUIRES ME TO PLACE HIM UNDER
3 ARREST FOR DRIVING UNDER THE INFLUENCE ---
- 4 Q. I UNDERSTAND.
- 5 A. --- PRIOR TO OFFERING THE TEST.
- 6 Q. STATE'S EXHIBIT TWO (2), WHICH IS THE, THE COPY OF
7 THE IMPLIED CONSENT, OUTLINES THAT THEY HAD BEEN
8 ARRESTED FOR DRIVING UNDER THE INFLUENCE.
- 9 A. THEY'RE UNDER ARREST FOR DRIVING UNDER THE
10 INFLUENCE.
- 11 Q. SO, HAD HE REFUSED THAT TEST, HE WAS STILL
12 ARRESTED; CORRECT?
- 13 A. YES, SIR.
- 14 Q. SO, I GUESS MY QUESTION IS: HE'S ARRESTED ON THE
15 SIDE OF THE ROAD AND IT DOESN'T NECESSARILY MATTER
16 WHAT HAPPENS IN THAT BA ROOM; CORRECT?
- 17 A. I MEAN, I -- NOT THAT IT DOESN'T MATTER. I, I
18 MEAN I THINK I KNOW WHAT YOU'RE ASKING. I MEAN I,
19 YOU KNOW, -- IT DOE- -- IT, IT'S GOING TO PLAY A
20 ROLE, TO ME, WHAT'S GOING TO HAPPEN.
- 21 Q. OKAY. TO YOU.
- 22 A. I MEAN, YOU KNOW, BECAUSE YOU'VE GOT OTHER, YOU
23 KNOW, DRUGS, STUFF LIKE THAT. I MEAN, YOU KNOW.
- 24 Q. DID YOU SUSPECT DRUGS AT ALL?
- 25 A. NO, SIR, NOT AT ALL.

- 1 Q. ALL RIGHT. YOU ARRESTED HIM AND YOU TRANSPORTED
2 HIM DOWN, I BELIEVE, TO OCONEE?
- 3 A. YES, SIR.
- 4 Q. IS THAT CORRECT? HE DIDN'T GET INTO ANY PROBLEMS?
- 5 A. NO, HE WAS VERY NICE.
- 6 Q. OKAY. AND AT THE BREATH TEST SITE, HE, HE ASKED
7 YOU A NUMBER OF TIMES WHAT HE SHOULD DO; CORRECT?
- 8 A. YEAH, A NU-, A NUMBER OF TIMES; YES, SIR.
- 9 Q. AND SPECIFICALLY, YOU TELL HIM PRETTY EARLY ON
10 THAT IT IS MORE BENEFICIAL TO TAKE THE TEST;
11 RIGHT?
- 12 A. YES, SIR, I SAID THAT.
- 13 Q. OKAY. DID YOU TELL HIM ABOUT THE AGGREGATED
14 PENALTIES IN SOUTH CAROLINA?
- 15 BY SOLICITOR BLUNDY: OBJECTION, YOUR HONOR.
16 THIS ISSUE HAS BEEN HANDLED PRE-TRIAL. I'M NOT
17 SURE WHERE THE DEFENDANT IS GOING WITH IT; BUT
18 YOUR HONOR HAS ALREADY RULED ON IT.
- 19 BY MR. MCDANIEL: HE RULED THAT IT WASN'T
20 COERCIVE. I STILL THINK IT'S FAIR GAME FOR TRIAL.
- 21 BY THE COURT: I'LL LET YOU, I'LL LET YOU ASK
22 WHAT HAPPENED IN THE VIDEO ROOM.
- 23 Q. OKAY. SO I ASKED YOU IF YOU RESPONDED THAT IT WAS
24 MORE BENEFICIAL FOR HIM TO TAKE THE TEST.
- 25 A. IT WAS MORE BENEFICIAL BASED ON THE LICENSES --

- 1 LICENSE. I MEAN, THAT -- READING IT, LIKE I SAID,
2 BASED ON -- IF YOU TAKE THE TEST OR DON'T TAKE THE
3 TEST, WHAT THE SUSPENSION WILL BE. THAT'S ---
- 4 Q. HE SAID HE ---
- 5 A. THAT'S, THAT'S WHAT I WAS SAYING.
- 6 Q. SO, YOU'RE THINKING THAT HE'S ONLY CONCERNED ABOUT
7 A DRIVER'S LICENSE SUSPENSION AND NOT SO MUCH THE
8 DUI CHARGE.
- 9 A. I -- I MEAN, I, I DON'T KNOW. I CAN'T SPEAK FOR
10 WHAT HE WAS CONCERNED ABOUT. I MEAN ---
- 11 Q. SO YOUR POSITION IS THAT HE WAS ONLY CONCERNED
12 ABOUT THE DRIVER'S LICENSE SUSPENSION?
- 13 A. NO. A LOT OF PEOPLE, THAT'S ALL -- THEY, THEY
14 WANT TO KNOW HOW LONG THEIR LICENSE IS GOING TO BE
15 SUSPENDED FOR.
- 16 Q. RIGHT.
- 17 A. SO, THAT'S, THAT'S, THAT'S ---
- 18 Q. SO, WHEN ---
- 19 A. --- THAT'S THE WHOLE POINT OF IMPLIED CONSENT.
- 20 Q. WHEN YOU TOLD HIM THAT IT WAS MORE BENEFICIAL TO
21 BLOW INTO THE MACHINE, YOU ONLY SPECIFICALLY MEANT
22 FOR DRIVER'S LICENSE SUSPENSION?
- 23 A. THAT WOULD HAVE MADE HIM A ONE (1) MONTH
24 SUSPENSION VERSUS A SIX (6) MONTH SUSPENSION.
- 25 Q. GOT YOU. AND THEN YOU SAID, "I THINK IT'S IN YOUR

1 BEST INTEREST TO TAKE THE TEST." WHAT DID YOU
2 MEAN ABOUT THAT?

3 A. WELL, READING THE IMPLIED CONSENT, YOU'RE SAYING
4 IF YOU DON'T TAKE THE TEST, IT'S GOING TO BE A SIX
5 (6) MONTH SUSPENSION. IF YOU TAKE THE TEST AND
6 BLOW AND .015 OR GREATER, IT'S GOING TO BE A ONE
7 (1) MONTH SUSPENSION. IF YOU BLOW BETWEEN AN 0.08
8 AND .014, IT'S NOT -- YOU'RE NOT GOING TO LOSE
9 YOUR LICENSE AT THAT TIME. BUT THAT'S WHAT I'M
10 SAYING. WHAT -- AND I, I'M THINKING IMPLIED
11 CONSENT PART, YOU KNOW, BECAUSE ---

12 Q. YOU KNEW HE WAS A, A DRIVER FROM CHICAGO; RIGHT?

13 A. YES, SIR.

14 Q. HAD AN OUT-OF-STATE DRIVER'S LICENSE?

15 A. YES, SIR.

16 Q. AND YOU HAD NO INTENTION OF SUSPENDING HIS
17 DRIVER'S LICENSE AT ALL.

18 A. NO, SIR.

19 Q. IN FACT, YOU DIDN'T.

20 A. NO.

21 Q. IN FACT, YOU TOLD HIM THAT YOU WEREN'T GOING TO
22 SUSPEND IT AT THE END; CORRECT? DID YOU TELL HIM
23 THAT? THAT YOU WEREN'T GOING TO SUSPEND IT BEFORE
24 YOU TOLD HIM THAT IT WAS MORE BENEFICIAL TO BLOW
25 INTO THE MACHINE?

1 A. NO, SIR.

2 Q. OKAY. YOU DID THEN TELL HIM THAT "I DON'T SEE ANY
3 REASON WHY YOU SHOULDN'T TAKE THE TEST." I MEAN,
4 THERE'S A NUMBER OF REASONS WHY AN INDIVIDUAL
5 WOULDN'T TAKE THE TEST; CORRECT?

6 A. YES, SIR. BUT HE ASKED MY OPINION. HE SAID,
7 "SHOULD I TAKE IT?"

8 Q. OKAY.

9 A. NO. HE KEPT ASKING ME AND ASKING ME MY OPINION,
10 SO I ---

11 Q. DID YOU INFORM HIM, AS YOU WERE TELLING HIM WHAT
12 YOUR OPINION IS, THAT IS IT IN HIS BEST INTEREST
13 TO BLOW; THAT THE HIGHER THE NUMBER, THE HIGHER
14 THE PENALTY IN SOUTH CAROLINA?

15 A. NO, SIR.

16 Q. THAT THE HIGHEST FINE AND THE HIGHEST AMOUNT OF
17 TIME YOU GET IN JAIL IS ASSOCIATED WITH THE
18 HIGHEST PENALTY?

19 A. NO, SIR. MY, MY THOUGHT ON IT WAS ---

20 BY SOLICITOR BLUNDY: OBJECTION, YOUR HONOR.
21 I JUST ASK THAT WE RENEW THE STIPULATION THAT THE
22 LAW COME FROM, FROM YOU AND THAT THE JURY
23 DETERMINE ONLY WHAT YOU SAY THE LAW IS.

24 BY THE COURT: OKAY. SO, SO NOTED.

25 BY MR. MCDANIEL: THANK YOU.

- 1 Q. NOW, IN THE MIDDLE OF THIS, YOU TELL HIM THAT "IF
2 YOU TAKE THE TEST AND YOU'RE NOT UNDER THE
3 INFLUENCE, YOU'RE FREE TO GO," AND YOU'VE ARGUABLY
4 ARRESTED A HUNDRED, A HUNDRED PLUS. DID YOU THINK
5 HE WAS GOING TO BLOW UNDER 0.08?
- 6 A. NO, SIR.
- 7 Q. YOU DID NOT?
- 8 A. NO, SIR.
- 9 Q. NO DOUBT IN YOUR MIND THAT HE WASN'T?
- 10 A. NO, SIR.
- 11 Q. OKAY. SO, HAVING THAT KNOWLEDGE, HOW COULD IT
12 HAVE EVER BEEN BENEFICIAL FOR HIM TO BLOW INTO THE
13 MACHINE?
- 14 A. WHEN HE KEPT ASKING ME, "SHOULD I TAKE THE TEST?
15 SHOULD I TAKE THE TEST?" I ASKED HIM, "DO YOU, DO
16 YOU FEEL YOU'RE DRUNK?" AND HE STATED NUMEROUS
17 TIMES, "I'M NOT DRUNK." MY THOUGHT PROCESS WAS,
18 "IF YOU DON'T FEEL YOU'RE UNDER THE INFLUENCE, WHY
19 WOULDN'T YOU TAKE THE TEST?"
- 20 Q. OKAY. BUT YOUR TESTIMONY HERE IS THAT YOU KNEW
21 THAT HE WAS GOING TO BLOW OVER AND .08.
- 22 A. THAT WAS MY OPINION THAT HE WAS GOING TO BLOW OVER
23 -- HE WAS GOING TO BLOW OVER .08.
- 24 Q. SO, IF YOU TELL SOMEBODY THAT'S ASKING YOU, WHO'S
25 -- IT'S APPARENT THAT HE'S NEVER BEEN IN TROUBLE,

1 THAT HE'S NOT FROM THE UNITED STATES; CORRECT?
2 AND IT'S APPARENT THAT HE WAS TERRIFIED THAT
3 NIGHT; AM I RIGHT?

4 BY SOLICITOR BLUNDY: OBJECTION. I JUST ASK
5 THAT HE ALLOW THE WITNESS TO ANSWER THE QUESTION.

6 BY THE COURT: SUSTAINED.

7 A. I MEAN, LIKE -- LIKE I STATED, I MEAN HE, HE KEPT
8 SAYING ---

9 Q. JUST AN- -- NO, ANS- -- PLEASE ANSWER MY QUESTION.

10 A. WELL, YOU ACTUALLY ASKED LIKE FOUR (4) AT ONE
11 TIME.

12 Q. CAN YOU ANSWER ALL OF THEM?

13 A. I DON'T, I DON'T ---

14 Q. 'CAUSE THE ANSWER SHOULD BE "YES."

15 A. I REALLY DON'T REMEMBER, TO BE HONEST. I MEAN,
16 YOU KIND OF GOT ME A LITTLE CONFUSED THERE WHEN
17 YOU ---

18 BY SOLICITOR BLUNDY: OBJECTION. BADGERING
19 THE WITNESS.

20 BY THE COURT: HEY, LET'S NOT TELL HIM WHAT
21 HIS ANSWER SHOULD BE.

22 Q. IS -- IT IS YOUR OPINION THAT -- YOU KNOW THAT
23 HE'S NEVER BEEN IN TROUBLE BEFORE; CORRECT?

24 A. I DON'T KNOW THAT. I MEAN, HE DOESN'T ---

25 Q. HE TOLD YOU, HE TOLD YOU ---

1 A. --- STRIKE YOU AS THE TYPE THAT WOULD HAVE BEEN IN
2 A LOT OF TROUBLE.

3 Q. AND ON THIS VIDEO, YOU TELL HIM THAT "I CAN TELL
4 THAT YOU -- THAT YOU'RE NOT SOMEBODY THAT GETS IN
5 TROUBLE ALL THE TIME," CORRECT?

6 A. YES, SIR.

7 Q. AND YOU KNOW THAT HE WAS FROM SYRIA?

8 A. YES, SIR.

9 Q. AND HE WAS DOWN HERE FROM CHICAGO. SO YOU KNOW HE
10 WAS OUT OF STATE. AND YOU KNOW THAT HE IS, WHILE
11 AN U.S. CITIZEN, HE IS FOREIGN; CORRECT?

12 A. I MEAN, I DIDN'T KNOW HE WAS A U.S. CITIZEN. BUT,
13 I MEAN, I KNEW HE WAS ---

14 Q. FOREIGN.

15 A. HE HAD BEEN HERE, YOU KNOW, TEN (10) OR ELEVEN
16 (11) YEARS.

17 Q. RIGHT. AND YOU KNOW, BASED ON THE VIDEO THAT
18 WE'VE SEEN, THAT HE WAS DEFINITELY CONCERNED ABOUT
19 WHAT TO DO; RIGHT?

20 A. YES, SIR.

21 Q. HE WASN'T BADGERING YOU. HE WASN'T TRYING YOU --
22 TO GET YOU TO TELL HIM HOW TO BEAT THE MACHINE.
23 HE JUST LEGITIMATELY WANTED TO KNOW WHAT TO DO;
24 CORRECT?

25 A. YES, SIR.

1 Q. AND NOW YOUR TESTIMONY IS THAT YOU ALREADY KNEW
2 THAT HE WAS GOING TO BLOW OVER THE LIMIT, BASED ON
3 WHAT YOU HAD SEEN ON THE SIDE OF THE ROAD.

4 A. THAT WAS MY OPINION; YES, SIR.

5 Q. OKAY. BUT YOU DIDN'T TELL HIM THAT. ALL YOU DID
6 WAS TELL HIM THAT IT -- YOUR -- THAT IT'S MORE
7 BENEFICIAL FOR HIM TO BLOW INTO THAT MACHINE;
8 CORRECT?

9 A. WELL, HIS -- SEE, HE KEPT SAYING I -- I MEAN,
10 WHEN, WHEN HE STATES HE'S NOT -- HE DOESN'T FEEL
11 HE'S UNDER THE INFLUENCE ---

12 BY SOLICITOR BLUNDY: OBJECTION, FOR THE
13 RECORD, ESPECIALLY. THIS HAS BEEN ANSWERED. I, I
14 THINK IT'S THE THIRD (3RD) TIME.

15 BY THE COURT: SUSTAINED.

16 Q. OKAY. WHEN YOU TELL HIM THAT "IF YOU TAKE THE
17 TEST AND YOU'RE NOT UNDER THE INFLUENCE, YOU'RE
18 FREE TO GO," WHAT WOULD HAVE HAPPENED IF HE HAD
19 BLOWN AN .07?

20 A. AN .07?

21 Q. YEAH.

22 A. HE WOULD HAVE --- YOU KNOW, I, I WAS -- I MISSPOKE
23 WHEN I SAID "IF YOU BLOW UNDER A .08, YOU'LL BE
24 FREE TO GO." IF HE HAD BLOWN A .07, YOU KNOW -- A
25 .06 TO .07, IT CAN'T BE INFERRED YOU'RE UNDER THE

- 1 INFLUENCE OF ALCOHOL.
- 2 Q. YOU NEVER TOLD HIM THAT HE COULD ACTUALLY STILL BE
- 3 PROSECUTED FOR DUI IF YOU BLOW AND .06 OR AN .07;
- 4 CORRECT?
- 5 A. NO, SIR.
- 6 Q. WHAT IF HE HAD BLOWN AN .05?
- 7 A. I WOULDN'T HAVE CHARGED HIM WITH DUI.
- 8 Q. YOU WOULD NOT HAVE?
- 9 A. NO, SIR.
- 10 Q. SO, BASED ON WHAT YOU'VE SEEN ON THE SIDE OF THE
- 11 ROAD, YOU WOULDN'T HAVE ASKED FOR URINE?
- 12 A. NO, SIR.
- 13 Q. IF HE'D HAVE BLOWN AN .05 ---
- 14 A. I DIDN'T HAVE REASONABLE, REASONABLE SUSPICION TO
- 15 BELIEVE HE WAS UNDER THE INFLUENCE OF NARCOTICS.
- 16 Q. SO, IF HE HAD BLOWN AN .05, YOU WERE GOING TO LET
- 17 HIM WALK OUT OF THERE?
- 18 A. I WOULD HAVE CHARGED HIM WITH, YOU KNOW, TOO FAST
- 19 FOR CONDITIONS OR, OR WHATEVER. I, I WA- -- I'M
- 20 NOT GOING TO PUT A MAN IN JAIL THAT I DON'T FEEL
- 21 IS UNDER THE INFLUENCE.
- 22 Q. BUT HE'S ALREADY BEEN ARRESTED FOR BEING UNDER THE
- 23 INFLUENCE.
- 24 A. HE HAS.
- 25 Q. AND YOU'VE ALREADY DETERMINED ON THE SIDE OF THE

1 ROAD THAT YOU KNEW HE WAS GOING TO BLOW OVER THE
2 LEGAL LIMIT.

3 A. THAT'S WHAT I FELT.

4 Q. OKAY.

5 A. BUT HAD HE NOT, I'M MAN ENOUGH TO ADMIT I CAN MAKE
6 MISTAKES JUST LIKE ANYONE ELSE CAN.

7 Q. SO, HE, HE WAS GOING TO WALK HOME THAT NIGHT.

8 A. NO. I'VE DONE IT BEFORE.

9 Q. HAVE YOU?

10 A. YES, SIR.

11 Q. WHEN'S THE LAST TIME YOU'VE DONE THAT?

12 A. IT WAS RIGHT WHEN I FIRST COME ON THE -- POLICE
13 OFFICER. I'M NOT AFRAID TO ADMIT I MADE A
14 MISTAKE.

15 Q. AND HOW DID YOU UNARREST SOMEBODY?

16 A. I DIDN'T UNARREST HIM. I CHARGED HIM WITH A, WITH
17 A LESSER OFFENSE OF TOO FAST FOR CONDITIONS.

18 Q. SO IN THAT PARTICULAR CASE, YOU HADN'T ARRESTED
19 HIM ON THE SIDE OF THE ROAD?

20 A. I HAD.

21 Q. FOR DRIVING UNDER THE INFLUENCE?

22 A. BUT IT -- AND I DON'T FEEL HE WAS BEING
23 UNARRESTED. I MEAN, I -- HE DROVE LEFT OF CENTER
24 OR WHATEVER. I DON'T REMEMBER THE SPECIFICS OF
25 THE CASE, BUT HE WAS CHARGED WITH DRIVING LEFT OF

1 CENTER.

2 Q. OKAY.

3 A. I ISSUED A ---

4 Q. SO, YOU WOULDN'T HAVE HAD NO PROBLEM, BASED ON
5 WHAT YOU'D SEEN ON THE SIDE OF THE ROAD, YOUR
6 INTERPRETATION OF THE FIELD SOBRIETY TEST, AND HIM
7 STATING THAT HE HAD THREE (3) GLASSES OF WINE,
8 THAT IF HE'D BLOWN AN .05, YOU WERE GOING TO LET
9 HIM GO?

10 BY SOLICITOR BLUNDY: OBJECTION. ASKED AND
11 ANSWERED.

12 BY THE COURT: SUSTAINED.

13 Q. OKAY. NOW, YOU'VE WORKED HERE FOR TEN (10) YEARS
14 IN THE UPSTATE?

15 A. YEAH, NOT THE UPSTATE.

16 Q. I MEAN, THE UPSTATE -- THIS ---

17 A. THE WHOLE UPSTATE, EXCEPT FOR A YEAR IN IRAQ.

18 Q. OKAY. AND YOU'VE DONE -- YOU'RE TELLING ME THAT
19 YOU'VE LET SOMEBODY GO HOME?

20 A. YES, SIR.

21 Q. OKAY. DO YOU REMEMBER -- I MEAN, WE'LL BE ABLE TO
22 TRACK THAT DOWN. I'M GOING TO ASK FOR A BREAK TO
23 FIND THAT. IS THAT THE ONLY ONE YOU'VE EVER DONE?

24 A. NO. I'VE HAD TWO (2) PEOPLE IN MY CAREER.

25 Q. SINCE YOU'VE BEEN WITH THE HIGHWAY PATROL, AS

1 WELL?

2 A. NO. ONE WITH THE SHERIFF'S OFFICE; ONE WITH THE
3 HIGHWAY PATROL.

4 Q. OKAY. DO YOU REMEMBER -- BECAUSE I HAVE YOUR
5 HIGHWAY PATROL RECORDS -- DO YOU REMEMBER ABOUT
6 WHAT YEAR THAT IS?

7 A. I REALLY DON'T. I MEAN, I, I WOULD TELL YOU IF I
8 DID.

9 Q. NO IDEA?

10 A. I MEAN, IT WAS OUT OF ANDERSON.

11 Q. SO IF HE'D BLOWN AN .05, WERE YOU GOING TO TAKE
12 HIM HOME OR WERE YOU GOING TO LET THE TAXI COME
13 PICK HIM UP?

14 A. I WOULD -- I'VE TAK- -- I --- WHEN I WAS AT THE
15 SHERIFF'S OFFICE, I HAD A MAN THAT WAS -- THAT HAD
16 BLEW A .04 AND HE HAD -- HE WAS HAVING A DIABETIC
17 ISSUE. AND I TOOK HIM TO THE HOSPITAL AND
18 RELEASED HIM AT THE HOSPITAL.

19 Q. NO, I UNDERSTAND THAT. BUT, I MEAN -- AND THAT
20 MAKES SENSE, BUT I'M JUST SAYING ---

21 BY SOLICITOR BLUNDY: I'M GOING TO OBJECT TO
22 THE RELEVANCY OF THE PRIOR CASE. I MEAN, HE'S,
23 HE'S TESTIFIED ---

24 BY MR. MCDANIEL: NO, I'M NOT TALKING ABOUT
25 THE PRIOR ---

1 BY SOLICITOR BLUNDY: --- AS TO WHAT HE WOULD
2 DO ---

3 BY MR. MCDANIEL: I'M TALKING ABOUT THIS
4 CASE. HOW WAS HE ---

5 BY THE COURT: I THINK YOU'RE TALKING ABOUT
6 AN '04 CASE, WHICH I DON'T FEEL IS RELEVANT. SO,
7 LET'S ASK QUESTIONS SPECIFIC TO THIS CASE.

8 BY MR. MCDANIEL: NO. I'M TALKING ABOUT THIS
9 CASE. I MEAN HOW WAS HE ---

10 Q. HOW WERE YOU PLANNING TO GET HIM HOME IF HE HAD
11 BLOWN ---

12 A. I MEAN, I, I CAN'T ANSWER. I DON'T KNOW. I MEAN,
13 I WASN'T FACED IN THAT SIT- -- I WASN'T FACED WITH
14 THAT SITUATION, SO ---

15 Q. RIGHT. AND YOU KNEW YOU WEREN'T GOING TO FACE
16 THAT SITUATION?

17 A. I DIDN'T FEEL HE WAS GOING TO BLOW A .05; NO, SIR.

18 Q. OKAY. ALL RIGHT. NOW, THIS MACHINE -- DO YOU
19 HAVE ANY IDEA HOW THE MACHINE WORKS?

20 A. I MEAN, I CAN TELL YOU THE, THE BASIC PROCESS. I
21 CAN'T TELL YOU HOW THE INFRARED SPECTROMETRY AND
22 ALL OR, WHATEVER IT'S CALLED, WORKS.

23 Q. RIGHT.

24 A. I'M NOT CERTIFIED ON ---

25 Q. OF HOW -- OF ACTUALLY HOW IT WORKS.

- 1 A. --- HOW THE MACHINE ACTUALLY TESTS.
- 2 Q. BUT THIS MACHINE WILL SHUT ITSELF DOWN?
- 3 A. OH, I MEAN, IT, IT WOULD STOP IF IT -- FROM WHAT
- 4 I'VE BEEN TAUGHT IN THE, THE CLASS.
- 5 Q. AND -- BUT IT'S SHUT ITSELF DOWN ON, ON YOU IN A
- 6 LOT OF TIMES, TOO; RIGHT?
- 7 A. YEAH.
- 8 Q. AND WHEN IT SHUTS DOWN, IT JUST -- SOME KIND OF
- 9 ERROR CODE AND IT WON'T LET YOU PROCEED.
- 10 A. AND IT, IT'LL POP UP AN ERROR AND PRINT OUT A
- 11 SHEET, TELLING ME WHAT THAT ERROR IS ---
- 12 Q. THESE HAVE TO BE CALIBRATED; RIGHT?
- 13 A. YES, SIR.
- 14 Q. DO YOU REMEMBER -- DO YOU KNOW WHEN THIS WAS LAST
- 15 CALIBRATED?
- 16 A. NO, SIR. SLED DOES IT.
- 17 Q. WHAT ABOUT THIS TUBE THAT HE BLEW THROUGH? DO YOU
- 18 REMEMBER WHEN THAT WAS CHANGED LAST?
- 19 A. THE TUBE?
- 20 Q. YEAH.
- 21 A. I HAVE NO IDEA WHEN THE TUBE ---
- 22 Q. I MEAN THAT WHOLE TUBE THAT EVERY PERSON THAT YOU
- 23 SUSPECT OF DRINKING HAS BEEN BLOWING THROUGH THAT
- 24 SAME TUBE?
- 25 A. THE TUBE, THE TUBE IS WARM. THE TUBE, THE TUBE IS

1 HEATED TO ALLOW -- SO IT DOESN'T ALLOW ANY KIND OF
2 RESIDUE TO STAY INSIDE THE TUBE.

3 Q. BACTERIA DOESN'T GLOW -- GROW IN WARM CONDITIONS?

4 A. THAT'S -- PEOPLE A LOT SMARTER THAN ME DESIGNED
5 THAT MACHINE AND SAID THAT'S, THAT'S THE WHY THAT
6 THEY DO IT. SO, I JUST GO WITH WHAT THEY SAY.

7 Q. SO, YOU DON'T KNOW WHEN THAT TUBE HAS BEEN
8 REPLACED?

9 A. I DOUBT -- I MEAN, THAT'S A FAIRLY NEW MACHINE. I
10 DOUBT IT'S EVER BEEN REPLACED.

11 Q. SINCE '09 -- SO YOU'RE SAYING SINCE '09, IT'S
12 NEVER BEEN REPLACED?

13 A. I CAN'T TELL YOU.

14 Q. SO EVERYBODY HAS BLOWN THROUGH THAT TUBE OVER AND
15 OVER AGAIN AND IT HASN'T BEEN REPLACED, AS FAR AS
16 YOU KNOW?

17 A. IT DOES AN INTERNAL STANDARD CHECK WHERE IT PULLS
18 AIR THROUGH THAT TUBE AND IT TESTS ITSELF AT A
19 POINT -- IT HAS TO HAVE A BLANK TEST OF .00 ---

20 Q. RIGHT. NO, I UNDERSTAND THAT. BUT, ---

21 A. SO IT PULLS AIR THROUGH THAT TUBE.

22 Q. --- YOU DON'T KNOW WHEN THAT TUBE HAS BEEN
23 REPLACED?

24 A. NO.

25 Q. OKAY.

1 (TEXT MISSING - SECTION 92)

2 Q. ... (PAUSE - REVIEWING DOCUMENTS)

3 (TEXT MISSING - SECTION 94)

4 Q. ... (PAUSE - REVIEWING DOCUMENTS)

5 (TEXT MISSING - SECTION 96)

6 REDIRECT EXAMINATION BY MS. BLUNDY:

7 Q. ...BEFORE YOU WENT TO ADMINISTER THE WALK AND TURN
8 FIELD SOBRIETY TEST TO THE DEFENDANT, DO YOU
9 REMEMBER ASKING THE DEFENDANT IF HE HAD ANY
10 PROBLEMS WALKING OR WITH HIS LEGS?

11 A. YES, MA'AM; I DID. I ASKED HIM.

12 Q. AND DID HE STATE THAT HE HAD ANY BALANCE ISSUES?

13 A. NO, MA'AM.

14 Q. DID HE EVER SAY, AT ANY TIME, THAT HE HAD BALANCE
15 ISSUES BECAUSE OF HIS CONGENITAL NYSTAGMUS?

16 A. NO, MA'AM. HE JUST STATED HE HAD CONGENITAL
17 NYSTAGMUS.

18 Q. THE DEFENSE BROUGHT UP THE POINT THAT IT HAD BEEN
19 RAINING. DURING ANY OF THE FIELD SOBRIETY TESTS,
20 DID YOU NOTICE THE DEFENDANT SLIPPING AT ALL?

21 A. NO, MA'AM. JUST, JUST LOSS OF BALANCE. I MEAN,
22 NOT, NOT DUE TO WEATHER CONDITIONS.

23 (TEXT MISSING - SECTION 98)

24 Q. ...IN FACT HE ASKED YOUR OPINION ON WHAT HE SHOULD
25 DO WITH THE TEST; RIGHT?

1 A. YES, MA'AM.

2 Q. AND ANYTHING THE DEFENDANT SAID TO YOU ABOUT BEING
3 FROM SYRIA OR WHERE HE WORKED, THAT ALL CAME RIGHT
4 FROM THE DEFENDANT'S MOUTH; RIGHT?

5 A. YES, MA'AM.

6 Q. YOU DIDN'T HAVE ANY INDEPENDENT INVESTIGATION AS
7 TO THE DEFENDANT'S BACKGROUND OR HOW IT MIGHT
8 AFFECT HIS JOB OR WHERE HE WAS FROM OR ANYTHING
9 LIKE THAT?

10 A. NO, MA'AM.

11 Q. IS ---

12 (TEXT MISSING - SECTION 100)

13 Q. ...AND AREN'T YOU INSTRUCTED AND TOLD THAT ALCOHOL
14 WILL DISSIPATE AFTER TWENTY (20) MINUTES, WHICH IS
15 WHY YOU USUALLY WAIT THE TWENTY (20) MINUTE
16 WAITING PERIOD BEFORE A DEFENDANT WILL BLOW INTO
17 THE MACHINE?

18 A. YES, MA'AM.

19 Q. AND SO, IF THERE WAS ANY ALCOHOL IN THAT TUBE, IT
20 PROBABLY WOULD HAVE DISSIPATED DURING THAT TWENTY
21 (20) MINUTE PERIOD?

22 BY MR. MCDANIEL: SPECULATION, YOUR HONOR.

23 BY THE COURT: SUSTAINED.

24 BY SOLICITOR BLUNDY: NO FURTHER QUESTIONS.

25 BY THE COURT: ALL RIGHT. ANYTHING FURTHER?

1 BY MR. MCDANIEL: YES, SIR. JUST BRIEFLY.

2 RE CROSS EXAMINATION BY MR. MCDANIEL:

3 Q. THE STATE BROUGHT UP THE POINT THAT HE DIDN'T
4 EXERCISE HIS RIGHT TO CALL AN ATTORNEY; CORRECT?

5 A. YES, SIR.

6 Q. SO, DID YOU FEEL LIKE IT WAS YOUR POSITION TO STEP
7 IN TO GIVE HIM LEGAL ADVICE?

8 A. NO, SIR.

9 Q. OKAY. YOU AND I HAVE HANDLED A NUMBER OF CASES
10 TOGETHER; CORRECT?

11 A. YES; SIR.

12 Q. HAVE YOU EVER TOLD ANYBODY THAT IT WAS BENEFICIAL
13 TO BLOW INTO THAT TUBE?

14 A. I MEAN, I -- I'VE BEEN ASKED BEFORE, "I DON'T
15 THINK I'M DRUNK. SHOULD I TAKE THE TEST?" AND,
16 YOU KNOW, I'VE SAID, "IF YOU DON'T THINK YOU'RE
17 DRUNK, WHY, WHY WOULDN'T YOU TAKE THE TEST?"

18 Q. HAVE YOU EVER TOLD THEM IT WAS BENEFICIAL TO BLOW
19 INTO THAT TUBE?

20 A. I DON'T RECALL USING THAT EXACT LANGUAGE; NO, SIR.

21 Q. ALL RIGHT. AND, REALLY, THE MAJORITY -- IF AND
22 WHEN SOMEBODY ASKS YOU WHAT TO DO, YOU SAY, "I
23 CAN'T RENDER LEGAL ADVICE." CORRECT?

24 A. WELL, IF SOMEONE ASKS ME, "SHOULD I TAKE THIS
25 TEST?"

1 Q. AND YOU SAY ---

2 A. JUST THAT. I SAY, "WELL, I CAN'T TELL YOU WHETHER
3 TO TAKE THE TEST OR NOT."

4 Q. RIGHT. AND YOU DIDN'T DO THAT IN THIS CASE?

5 A. WELL, HE ASKED ME -- HE SAID, "I DON'T FEEL I'M --
6 HE SAID, "SHOULD I TAKE THE TEST?" BUT HE WAS --
7 I DON'T FEEL LIKE -- HE SAID, "I DON'T THINK I'M
8 DRUNK."

9 Q. OKAY.

10 A. BUT, BUT HE ASKED MY OPINION.

11 Q. YOU DIDN'T DO THAT IN THIS CASE; RIGHT? YOU TOLD
12 HIM IT WAS MORE BENEFICIAL TO BLOW. YOU DIDN'T
13 SAY, "WELL, I CAN'T RENDER LEGAL ADVICE."

14 A. NO, I DIDN'T SAY THOSE WORDS; NO, SIR.

15 Q. RIGHT. IN FACT, YOU SAID, "IT'S BENEFICIAL TO
16 BLOW INTO THAT MACHINE"?

17 A. YES, SIR.

18 Q. OKAY. THANK YOU, SIR.

19 BY THE COURT: ANYTHING ELSE?

20 BY SOLICITOR BLUNDY: JUST A FEW MORE
21 QUESTIONS.

22 FURTHER REDIRECT EXAMINATION BY MS. BLUNDY:

23 Q. NOT TO BELABOR A POINT HERE -- DID YOU FEEL THAT
24 THAT WAS LEGAL ADVICE?

25 A. NO, MA'AM.

1 Q. OKAY. AND DID THE DEFENDANT KEEP ASKING YOU FOR
2 YOUR OPINION?

3 A. OVER AND OVER.

4 Q. AND DID THAT ACTUALLY START DURING THE TRANSPORT?

5 A. YES, MA'AM.

6 Q. AND ALL THE WAY INTO THE BREATHALYZER ROOM?

7 A. YES, MA'AM.

8 BY MR. MCDANIEL: JUDGE, I WOULD OBJECT AS
9 THE TRANSPORT AS BEEN SUPPRESSED IN THIS CASE.

10 BY THE COURT: SUSTAINED.

11 BY MR. MCDANIEL: THANKS.

12 BY SOLICITOR BLUNDY: NO FURTHER QUESTIONS.

13 BY THE COURT: ALL RIGHT. ANYTHING ELSE?

14 BY MR. MCDANIEL: NO, SIR.

15 BY THE COURT: YOU MAY STEP DOWN.

16 BY THE WITNESS: (COMPLIES)

17 (TEXT MISSING - SECTION 102)

18 BY MR. MCDANIEL: ...YOU'RE AT THE BAR. AND
19 THEN WHEN ASKED ON THE SIDE OF THE ROAD IF -- DID
20 THE ALCOHOL HELP CREATE THE WRECK, HE NEVER ADMITS
21 TO ANYTHING. I DON'T SEE ANY OF THAT. AND, THE
22 FACT OF THE MATTER IS, JUDGE, WHAT TROOPER BROWN
23 TESTIFIED TO IS THAT BETWEEN SEVEN (7) TO TEN (10)
24 PEOPLE RESPONDED TO THAT ACCIDENT SITE BEFORE HE
25 DID. HE DOESN'T KNOW WHEN THEY SHOWED UP. HE

1 DOESN'T KNOW WHO HELPED HIM OUT OF THE CAR. HE
2 DOESN'T KNOW IF HE GOT HELPED OUT OF THE CAR. HE
3 DOESN'T KNOW IF HE WENT TO THE EMS. HE DOESN'T
4 KNOW ANY OF THAT. HE SHOWED UP; RELIED ON WHOEVER
5 THAT FELLOW WAS THAT SAID THAT HE WAS DRIVING; AND
6 THEN DID FIELD SOBRIETY TESTS. AND TROOPER BROWN,
7 I MEAN TO HIS CREDIT, WAS QUITE TRUTHFUL THAT
8 ABSOLUTELY, HE HAD NO IDEA WHEN THIS WRECK
9 OCCURRED.

10 BY THE COURT: OKAY. MS. BLUNDY?

11 BY SOLICITOR BLUNDY: THANK YOU, YOUR HONOR.

12 THERE IS DIRECT AND CIRCUMSTANTIAL EVIDENCE IN
13 THIS CASE THAT POINTS TO THE DEFENDANT DRIVING.
14 BOTH CAN BE USED UNDER STATE VERSUS GRAVES, STATE
15 VERSUS GILLIAM, STATE VERSUS TOWNSEND. ALL THAT
16 SAYS CIRCUMSTANTIAL EVIDENCE CAN BE CONSIDERED TO
17 DETERMINE IF THE DEFENDANT WAS LINKED TO THE CAR
18 AND TO THE CRIME. YOU DO NOT HAVE TO HAVE EYE-
19 WITNESSES, SEE THE DEFENDANT DRIVING. THE FACTS
20 ARE THAT A CAR WAS CRASHED INTO A TREE. WE'VE
21 HEARD TESTIMONY ABOUT THAT. WE'VE HEARD TESTIMONY
22 THAT THE DEFENDANT ADMITTED TO DRIVING. WE'VE
23 HEARD TESTIMONY THAT HE WAS COMING FROM THE CLUB
24 AND GOING TOWARDS HIS HOME. WE'VE HEARD TESTIMONY
25 THAT THE DEFENDANT ADMITTED THAT HIS HOME WAS IN

1 KEOWEE KEY, RIGHT AT THE ENTRANCE OF WHERE HE WAS
2 STAYING AT THE TIME. I THINK ALL OF THOSE ARE
3 FACTS THAT CAN LEAD TO -- POINT TO THE DEFENDANT
4 BEING THE DRIVER OF THE CAR, ALONG WITH HIS OWN
5 ADMISSION. THE CAR WAS STILL ATTACHED, OR UP
6 AGAINST THE TREE WHEN THE TROOPER ARRIVED. HE
7 TESTIFIED THAT HE WAS DISPATCHED OUT TO THE WRECK.
8 AS SOON HE WAS DISPATCHED, HE WENT RIGHT TO THE
9 WRECK SCENE. THERE'S NO TESTIMONY THAT HE WENT
10 ANYWHERE ELSE. AND HE ALSO TESTIFIED THAT
11 DISPATCH IS NOTIFIED AS SOON AS THEY RECEIVE
12 NOTICE -- OR THEY SEND OUT A TROOPER AS SOON AS
13 THEY RECEIVE NOTICE OF A WRECK ACTUALLY OCCURRING.

14 BY THE COURT: ALL RIGHT. I'M GOING TO QUOTE
15 -- ACTUALLY, FROM STATE VERSUS COLLETON, IN THE
16 COURT ROOM CASE, AS WELL AS SOME OTHER THINGS. IF
17 YOU WILL JUST BEAR WITH ME, THAT -- "CORPUS
18 DELICTI MUST BE ESTABLISHED BY THE BEST PROOF
19 OBTAINABLE, BUT DIRECT AND POSITIVE EVIDENCE IS
20 NOT ESSENTIAL, AND SUCH MAY BE PROVED BY
21 PRESUMPTIVE OR CIRCUMSTANTIAL EVIDENCE WHEN IT IS
22 BEST OBTAINABLE. IN DETERMINING WHETHER THERE IS
23 SUFFICIENT PROOF OF THE CORPUS DELICTI, THE COURT
24 IS NOT CONCERNED WITH THE WEIGHT OF THE EVIDENCE
25 OR CREDIBILITY OF THE WITNESSES, BUT RATHER, WITH

1 WHETHER THERE WAS SUFFICIENT EVIDENCE TO GO TO THE
2 JURY INTENDING TO PROVE THE CORPUS DELICTI BEYOND
3 A REASONABLE DOUBT. FURTHER, PROOF IS NOT A
4 PREREQUISITE TO THE ADMISSION OF AN EXTRAJUDICIAL
5 CONFESSION OF THE DEFENDANT; HOWEVER, IF IT IS NOT
6 PROVEN AND THE SOLE EVIDENCE WOULD GO TO THE
7 CONFESSION AND A DIRECTIVE VERDICT IN FAVOR OF THE
8 DEFENDANT IS REQUIRED. ON THE OTHER HAND, IF
9 THERE IS ANY EVIDENCE ATTEMPTING TO ESTABLISH THE
10 CORPUS DELICTI, THE TRIAL JUDGE HAS THE DUTY TO
11 SUBMIT THE QUESTION TO THE JURY." AND COMING
12 STRAIGHT FROM PORTMAN -- IN THE OPINION -- IN
13 FACT, IN THE PORTMAN CASE, IT STATES THAT "HAD
14 PORTMAN BEEN THE ONLY PERSON AT THE SCENE OF THE
15 ACCIDENT, IT'S CLEAR FROM SOUTH CAROLINA PRESIDENT
16 -- PRECEDENT THAT THERE WOULD BE SUFFICIENT PROOF
17 OF THE CORPUS DELICTI." I BELIEVE, IN THAT CASE,
18 THERE WAS ACTUALLY THE OWNER OF THE VEHICLE THERE.
19 "BUT WHEREIN THE COURT HAVE A QUESTION WHETHER A
20 DEFENDANT OR ANOTHER PERSON WAS THE DRIVER IS A
21 MATTER FOR THE JURY TO DETERMINE AS THE FACT-
22 FINDER." I BELIEVE IT IS -- WAS FOR THE JURY, IN
23 THAT CASE, TO DETERMINE WHETHER PORTMAN WAS INDEED
24 THE OPERATOR OF THE WRECKED VEHICLE. BASED ON
25 THOSE THREE (3) EXAMPLES, I'M GOING TO DENY YOUR

1 MOTION.. AGAIN, YOU MAY CERTAINLY USE WHAT I HAVE
2 SAID FOR THE RECORD IF ANY APPEAL IS NECESSARY ON
3 ANY CASE.

4 BY MR. MCDANIEL: JUDGE, CAN YOU MAKE THAT
5 PART OF THE CASE -- THAT CASE, PART OF THE COURT
6 EXHIBIT?

7 BY THE COURT: I CAN.

8 BY MR. MCDANIEL: THANK YOU.

9 BY THE COURT: OKAY.

10 BY MR. MCDANIEL: AND, JUDGE, I JUST WOULD
11 LIKE TO POINT OUT THAT -- AND ASK ---

12 BY THE COURT: I WILL ACTUALLY, I WILL
13 ACTUALLY MAKE IT DEFENSE EXHIBIT ONE (1).

14 BY MR. MCDANIEL: I'M NOT MOVING THAT INTO
15 EVIDENCE.

16 BY THE COURT: OKAY.

17 BY MR. MCDANIEL: I'LL JUST MAKE IT ---

18 BY THE COURT: COURT EXHIBIT?

19 BY MR. MCDANIEL: YES, SIR. COURT EXHIBIT
20 ONE (1).

21 BY THE COURT: OKAY.

22 (COURT'S EXHIBIT "1" ENTERED)

23 BY MR. MCDANIEL: JUDGE, WHAT I'D LIKE TO ASK
24 YOU A QUESTION IS, DID HE -- BASED ON THE
25 TESTIMONY YOU HEARD, DID YOU -- DO YOU KNOW WHEN

1 THIS WRECK OCCURRED?

2 BY THE COURT: WELL, I'M NOT ON THE STAND AND
3 IT'S NOT UP TO ME TO JUDGE THE FACTS OF THE CASE.
4 IT IS UP TO THE JURY TO DO THAT. SO I ---

5 BY MR. MCDANIEL: SEE, IT IS IN THIS CASE.
6 BECAUSE ALL THEY HAVE -- AND THE STATE JUST
7 ADMITTED IT -- IS HIS STATEMENT. AND IT'S NOT A
8 STATEMENT THAT "I WAS DRIVING"; IT'S A STATEMENT
9 THAT HE CAME FROM HERE AND HE DID THIS. IT WAS
10 NOT THAT "I DROVE. I GOT IN THIS CAR." THEY
11 CAN'T EVEN IDENTIFY THE CAR, JUDGE.

12 BY THE COURT: CAN I INTERRUPT YOU?

13 BY MR. MCDANIEL: THEY CAN'T IDENTIFY THAT IT
14 WAS ATTACHED TO HIM.

15 BY THE COURT: ALL RIGHT. I NOTE YOUR MOTION
16 AND FOR THE REASONS GIVEN, I WILL DENY YOUR MOTION
17 AT THIS TIME.

18 BY MR. MCDANIEL: SO, JUDGE -- I MEAN, JUST
19 BASED ON THE HOLDING WHEN IT SAYS THAT --
20 IMPERMISSIBLY SPECULATES, WHEN THE FACT'S NON-
21 EXISTENT.

22 BY THE COURT: I'M NOT, I'M NOT ARGUING THE
23 FACTS WITH YOU ANY FURTHER. MOTION DENIED.

24 BY MR. MCDANIEL: JUDGE, WE MOVE FOR A
25 DIRECTIVE VERDICT BASED ON -- WOULD LIKE TO RENEW

1 THAT, IN FACT, THERE IS NO EVIDENCE OF DRIVING.
2 SPECIFICALLY, I WOULD LIKE TO RENEW MY MOTION TO
3 SUPPRESS THE TWENTY-TWO (22) IN THIS CASE. IT WAS
4 CLEAR THROUGH THE TESTIMONY, AND THANKFULLY SO,
5 THAT HE WAS HONEST. THAT HE KNEW HE WAS GOING TO
6 BLOW OVER AN .08; THAT HE MISSPOKE ON A NUMER- --
7 NUMBER OF OCCASIONS THAT AN UNDER AN .08 WASN'T
8 GOING TO ALLOW HIM TO BE UNARRESTED; THAT HE KNEW,
9 BASED ON HIS HUNDRED (100) DUI ARRESTS, THAT HE
10 WAS GOING TO BLOW OVER AN .08. HE STILL TOLD HIM
11 IT WAS BENEFICIAL FOR HIM TO BLOW INTO THE
12 MACHINE, JUDGE. THAT IS COERCIVE; THAT IS A
13 MISSTATEMENT OF LAW. IN FACT, HE ADMITTED TO
14 THAT. AND THAT'S EXACTLY WHAT SPONAR TALKED
15 ABOUT. JUDGE, THEY SHOULD HAVE -- THE JURY --
16 IT'S TOO LATE NOW. BUT THEY SHOULD GET
17 INSTRUCTIONS THAT THEY ARE NOT TO CONSIDER
18 ANYTHING THAT HAPPENED AND THEY SHOULD BE ABLE TO
19 GET A COURT INSTRUCTION THAT THE REASON THEY
20 SHOULDN'T IS BECAUSE THE NUMBER WAS COERCED OUT OF
21 THE DEFENDANT. AND THAT'S CLEAR WHAT HAPPENED.
22 AND HE TESTIFIED TO THAT.

23 BY THE COURT: MS. BLUNDY?

24 BY SOLICITOR BLUNDY: YOUR HONOR, I JUST

25 RENEW MY PRIOR ARGUMENT AS TO THAT. I THINK THE

1. CASE THAT ACTUALLY CONTROLS IS SHAW -- MOUNT
2. PLEASANT VERSUS SHAW, WHICH STATES THAT "IT HAS TO
3. BE TRICKERY OR MISLEADING TO LEAD TO THE FACT THAT
4. THE DEFENDANT WASN'T INFORMED THAT HE HAD A RIGHT
5. TO REFUSE." AND I THINK SEVERAL TIMES, THE
6. DEFENDANT KNEW THAT AND ASKED HIM, "SHOULD I TAKE
7. IT?" WHICH IMPLICATES THAT HE KNEW HE DIDN'T HAVE
8. TO TAKE THE TEST.

9. BY THE COURT: FROM THE TESTIMONY FROM THE
10. OFFICER STATES THAT THE STATEMENT THAT IT "WOULD
11. BE BENEFICIAL FOR YOU TO TAKE IT," WAS UNDER OATH
12. THAT HE IS STATING AS TO THE DRIVER'S LICENSE
13. SUSPENSION, NOT AS TO THE PENALTY OF WHETHER OR
14. NOT -- OR HOW IT WOULD AFFECT -- IT WOULD -- THE
15. TAKING OF THE TEST -- IT WOULD BE BENEFICIAL FOR
16. HIM AS COMPARED TO A REFUSAL. SO I WILL DENY THAT
17. MOTION, AS WELL, BASED ON THAT TESTIMONY FROM THE
18. OFFICER.

19. BY MR. MCDANIEL: WELL, THAT -- AND THE
20. TESTIMONY WAS THAT HE NEVER INTENDED TO SUSPEND
21. HIS DRIVER'S LICENSE, SO I THINK -- I MEAN -- I
22. KNOW YOU'VE LISTENED TO THE ENTIRE PROCESS. AND
23. IT WASN'T LIKE MY CLIENT WAS BADGERING. HE WAS
24. REALLY SEEKING FOR SOME ADVICE. AND THIS OFFICER,
25. WHO SAID THAT HE ALREADY KNEW HE WAS GOING TO BLOW

1 OVER AN .08, TOLD HIM THAT IT'S BENEFICIAL TO BLOW
2 IN THE MACHINE. HOW IS THAT NOT TRICKERY?

3 BY THE COURT: ALL RIGHT. WELL, FIRST OF
4 ALL, IT WAS DENIED EARLIER. IT'S STILL DENIED. I
5 DON'T FEEL THAT -- I FEEL THE OFFICER WAS TELLING
6 HIM THE BENE- -- THAT IT WAS BENEFICIAL IN REGARDS
7 TO THE DRIVER'S LICENSE SUSPENSION; NOT AS TO THE
8 CHARGE OF DUI OR ANY POSSIBLE PENALTY. I DON'T
9 THINK HE WAS MISLEADING HIM INTENTIONALLY OR
10 TRICK- -- CERTAINLY DON'T FEEL HE WAS TRICK-,
11 TRICKING HIM. AND I DO FEEL THAT THE ARRESTED
12 PERSON, MR. ABRAHAM, WAS REASONABLY INFORMED OF
13 HIS RIGHTS, DUTIES AND OBLIGATIONS. AND IT'S
14 DENIED BASED ON THAT.

15 BY MR. MCDANIEL: JUDGE, I MOVE TO DISMISS
16 FOR VIOLATION OF DISCOVERY. THE STATE SHOULD HAVE
17 -- TO GET THIS CASE GET TOGETHER, TO GET PAST THE
18 CORPUS DELICTI ISSUE -- SHOULD HAVE HAD AT LEAST
19 SOMEBODY FROM THE SIDE OF THE ROAD TO COME HERE
20 AND TESTIFY TO WHAT MY CLIENT LOOKED LIKE GETTING
21 OUT OF THAT CAR. THEY DON'T HAVE IT HERE.
22 THERE'S TEN (10) PEOPLE THAT WE COULD HAVE CROSS-
23 EXAMINED ON A NUMBER THINGS. BUT IT'S LEFT TO
24 MERE SPECULATION OF WHAT HAPPENED BETWEEN THAT
25 HOUR AND FIVE (5) MINUTES BEFORE THE TROOPER

1 SHOWN UP. HE DOESN'T KNOW IF EMS DID A PHYSICAL
2 EXAM, CHECKED HIM OUT -- WE DON'T KNOW ANYTHING.
3 AND THE STATE'S DUTY TO PROVE THIS CASE BEYOND A
4 REASONABLE DOUBT IS, AT LEAST, TO HAVE SOMEONE
5 HERE. THEY DIDN'T TURN OVER NAMES. HE DIDN'T
6 TAKE STATEMENTS; NOTHING. THAT IS A SYSTEMIC
7 (PHONETIC) VIOLATION OF OUR RIGHT TO CONFRONT THE
8 WITNESSES AGAINST US. NOW, HE'S BEEN ALLOWED TO
9 TESTIFY TO WHAT HE SAW, BUT IT'S PURELY BASED ON
10 HEARSAY; AND I KNOW IT. AND EVERYBODY IN THIS
11 COURT ROOM KNOWS IT. AND THAT IS -- THAT IS A
12 VIOLATION THAT SHOULD BE INCORPORATED WITH ALL THE
13 OTHER DISCOVERY VIOLATIONS IN THIS CASE. BUT THAT
14 ONE IS THE MOST EGREGIOUS. BECAUSE WHAT IS AT
15 ISSUE HERE, JUDGE, IS WHEN THIS WRECK OCCURRED.
16 AND WHAT WAS HIS ALCOHOL CONCENTRATION WHEN THE
17 WRECK OCCURRED? AND THERE'S BEEN NO TESTIMONY.
18 SO, ALL YOU'VE GOT TO DO IS ---

19 BY THE COURT: ESSENTIALLY, WHAT YOU'RE
20 ASKING ME TO DO ON THAT MOTION, MR. MCDANIEL, IS
21 THROW OUT THE CASE BASED ON EVIDENCE THAT WASN'T
22 PRESENTED.

23 BY MR. MCDANIEL: EVIDENCE ---

24 BY THE COURT: I DON'T THINK I CAN DO THAT.

25 BY MR. MCDANIEL: YOU CAN.

1 BY THE COURT: WELL, I'M NOT GOING TO. SO I
2 WILL DENY YOUR MOTION, BUT IT IS -- ALL THESE
3 MOTIONS ARE NOTED FOR THE RECORD.

4 BY MR. MCDANIEL: YES, SIR.

5 BY THE COURT: ANYTHING ELSE?

6 BY MR. MCDANIEL: JUDGE, I JUST RENEW ALL MY
7 PRE-TRIAL MOTIONS.

8 BY THE COURT: WHICH WE'VE JUST GONE OVER AND
9 (PAUSE) ---

10 BY MR. MCDANIEL: WELL, AND THERE'S VIDEO
11 TAPE ISSUES. THERE'S THIS IMPERMISSIBLE ---

12 BY THE COURT: AND ALL THOSE ARE NOTED FOR
13 THE RECORD.

14 BY MR. MCDANIEL: OKAY.

15 BY THE COURT: MR. ABRAHAM, IF YOU WOULD, I
16 WOULD LIKE TO GO OVER YOUR RIGHT TO TESTIFY. IF
17 YOU WOULD, RAISE YOUR RIGHT HAND FOR ME, PLEASE,
18 SIR.

19 BY MR. ABRAHAM: YES. (COMPLIES)

20 BY THE COURT: MR. ABRAHAM, DO YOU SWEAR TO
21 TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT
22 THE TRUTH, SO HELP YOU GOD? YOU CAN PUT YOUR HAND
23 DOWN AND SIT DOWN. I, I'M SURE YOUR ATTORNEY HAS
24 GONE OVER WITH YOU THAT YOU HAVE THE RIGHT TO
25 TESTIFY IN THIS CASE. AND I WANT TO INFORM YOU

1 THAT YOU ALSO HAVE THE RIGHT NOT TO TESTIFY. IF
2 YOU CHOSE NOT TO TESTIFY IN THIS CASE, IT IS MY
3 DUTY TO CHARGE THE JURY THAT THEY, IN NO WAY, CAN
4 HOLD THAT AGAINST YOU. DO YOU UNDERSTAND THAT?

5 BY MR. ABRAHAM: CAN YOU SAY IT AGAIN?

6 BY THE COURT: YES. IF YOU CHOOSE NOT TO
7 TESTIFY OR PRESENT EVIDENCE IN THIS CASE, THEN I
8 HAVE TO INSTRUCT THE JURY THAT THE BURDEN OF PROOF
9 IS ON THE STATE AND THEY CANNOT HOLD THAT AGAINST
10 YOU. AND I'LL BE GLAD TO GIVE YOU A MINUTE TO
11 TALK TO YOUR ATTORNEY ABOUT IT.

12 BY MR. ABRAHAM: JUST TWO (2) SECONDS.

13 BY THE COURT: SURE.

14 (PAUSE - CONSULTING WITH COUNSEL)

15 BY THE COURT: ALL RIGHT, SIR. YOU -- I'M
16 SORRY?

17 BY MR. ABRAHAM: I DON'T WANT TO TESTIFY.

18 BY THE COURT: YOU DO?

19 BY MR. ABRAHAM: I DO NOT.

20 BY THE COURT: DO NOT. OKAY. THANK YOU VERY
21 MUCH. I WASN'T ASKING FOR A DECISION, BUT I
22 APPRECIATE YOUR HONESTY.

23 BY THE COURT: LADIES AND GENTLEMEN, THE
24 STATE HAS RESTED IN THIS CASE. WE WILL NOW
25 PROCEED WITH THE DEFENSE. MR. MCDANIEL?

1 BY MR. MCDANIEL: JUDGE, THE DEFENSE RESTS.

2 BY THE COURT: THANK YOU VERY MUCH. LADIES
3 AND GENTLEMEN, WE WILL NOW -- THE DEFENSE HAS
4 RESTED IN THIS CASE AND I WILL, OF COURSE, CHARGE
5 YOU IN JURY INSTRUCTIONS SOON. WE WILL NOW
6 PROCEED WITH THE CLOSING ARGUMENTS. MS. BLUNDY?

7 BY SOLICITOR BLUNDY: THANK YOU, YOUR HONOR.
8 LADIES AND GENTLEMEN, WE ARE NOW AT THE CLOSE OF
9 THE TRIAL. AND I KNOW THIS CAN BE A LENGTHY AND
10 LONG PROCESS, ESPECIALLY WITH THE VIDEOS AND THE
11 TESTIMONY. THERE'S A LOT OF PROCEDURE AND THINGS
12 THAT YOU HAVE TO TAKE INTO ACCOUNT. BUT I WANT TO
13 COME BACK TO THE THREE "W"S THAT I STARTED WITH.
14 WHEELS, WINE AND A WRECK. THOSE ARE THE BASIC
15 FACTS OF THIS CASE. WE KNOW THAT THE DEFENDANT
16 WAS DRIVING. HE ADMITTED IT TO TROOPER BROWN.
17 THAT HE WAS DRIVING FROM A CLUB AT KEOWEE KEY ON
18 FLAG- -- I THINK IT'S FLAGSHIP -- FLAGSHIP DRIVE,
19 NEAR SALEM -- AND HE WAS HEADED HOME TO WHERE HE
20 WAS STAYING IN KEOWEE KEY. HE LOST CONTROL OF THE
21 CAR. HE SMASHED THE CAR INTO A TREE. WE KNOW
22 THIS BECAUSE TROOPER BROWN WAS DISPATCHED OUT TO
23 THE WRECK SCENE WHERE HE TESTIFIED BEFORE YOU THAT
24 HE SAW THE CAR ATTACHED TO THE TREE. HE WAS ABLE
25 TO RUN THE LICENSE PLATE, WHICH CAME BACK TO A

1 RENTAL CAR. WHICH MAKES SENSE BECAUSE WE ALSO
2 KNOW THAT THE DEFENDANT WORKS FOR DUKE, AND THAT
3 HE HAS BEEN -- HE'S ORIGINALLY FROM CHICAGO, AND
4 HE'S CONTRACTED. SO IT WOULD MAKE SENSE THAT HE
5 WOULD HAVE A RENTAL CAR AND NOT A SOUTH CAROLINA
6 DRIVER'S LICENSE. HE ---

7 (TEXT MISSING - SECTION 104)

8 BY SOLICITOR BLUNDY: ...WE KNOW WHAT KIND OF
9 WINE. HE TOLD HIM IT WAS PINOT NOIR. WE KNOW
10 APPROXIMATELY HOW MUCH WINE. HE DIDN'T SAY A
11 CORDIAL GLASS; HE SAID A FULL GLASS OF WINE.
12 COULD --

13 (TEXT MISSING - SECTION 106)

14 BY SOLICITOR BLUNDY: ...SOUTH CAROLINA AND
15 YOU WILL HEAR THE LAW FROM THE JUDGE LATER; AND
16 THAT'S THE LAW YOU SHOULD TAKE. THE LAW IN SOUTH
17 CAROLINA STATES THAT ANYTHING ABOVE .08, THERE IS
18 A PRESUMPTION THAT THE PERSON IS UNDERNEATH THE
19 INFLUENCE OF ALCOHOL TO THE EXTENT THAT IT WILL
20 IMPAIR HIS FACULTIES TO DRIVE. THERE'S A
21 PRESUMPTION. SO, WHAT BACKS UP THAT PRESUMPTION?
22 WE HAVE THE FIELD SOBRIETY TEST, HGN. THERE'S
23 SOME TESTIMONY -- AND YOU'VE SEEN FROM THE
24 DEFENDANT'S EYES -- THAT HE SAID HE HAS CONGENITAL
25 NYSTAGMUS. THIS IS EXTREMELY RARE. PROBABLY ONLY

1 HAPPENS IN OUT OF ONE PERCENT (1%) OF THE
2 POPULATION. IT'S THE FIRST TIME I'VE EVER SEEN IT
3 IN TRYING A CASE, EVER IN MY LIFE. IT'S POSSIBLE
4 HE HAS THAT. I'M -- CERTAINLY -- HE, HE STOOD
5 BEFORE YOU HERE TODAY, AND YOU COULD SEE HIS EYES
6 SHAKE. I'M NOT DENYING THAT.

7 (TEXT MISSING - SECTION 108)

8 BY SOLICITOR BLUNDY: ...YOU CAN SEE HIM.
9 HE'S KIND OF WOBBLING LIKE HE DOESN'T KNOW EXACTLY
10 IF HIS FOOTING IS SOLID. HIS ARMS ARE OUT TO
11 HERE. HE'S NOT DOING THAT TEST AT ALL HOW THE,
12 HOW THE OFFICER ASKED HIM TO DO IT. IN FACT, HE
13 TAKES WAY MORE THAN THE NINE (9) STEPS. HE
14 PROBABLY WOULD HAVE KEPT GOING IF THE OFFICER
15 HADN'T SAID, "HEY, WAIT A MINUTE. I ONLY ASKED
16 YOU TO DO NINE (9)." AND THEN HE TURNED AROUND
17 AND CAME BACK.

18 (TEXT MISSING - SECTION 110)

19 BY SOLICITOR BLUNDY: ...HIS LEGS LIKE THIS.
20 WATCH THE VIDEO. THESE ARE CLUES THAT THE OFFICER
21 IS GOING TO LOOK AT WHEN HE'S EXPLAINING THE TEST.
22 THE ---

23 (TEXT MISSING - SECTION 112)

24 BY SOLICITOR BLUNDY: ...CLUES OF IMPAIRMENT.
25 PLUS, WE HAVE THE BREATHALYZER WHICH SHOWS THAT HE

1 WAS AT A .22; NEARLY, THREE (3) TIMES THE
2 PRESUMPTIVE INFERENCE TO BE UNDER THE INFLUENCE.

3 (TEXT MISSING - SECTION 114)

4 BY SOLICITOR BLUNDY: ...I ASK THAT YOU
5 PLEASE FIND THE DEFENDANT GUILTY. THANK YOU.

6 BY THE COURT: MR. MCDANIEL?

7 BY MR. MCDANIEL: THANK YOU, SIR.

8 (TEXT MISSING - SECTION 116)

9 BY MR. MCDANIEL: ...THIS IS A HARD CASE AND
10 I'VE HAD TO ASK SOME HARD QUESTIONS. AND IF YOU
11 SHOULD TAKE THAT OUT ON ANYBODY, IT SHOULD BE
12 TAKEN OUT ON ME. IT'S PART OF THE JOB (INAUDIBLE)
13 TO FIND WHAT ACTUALLY HAPPENED. THE STATE'S
14 MAKING A NUMBER OF ASSUMPTIONS THAT ---

15 (TEXT MISSING - SECTION 118)

16 BY MR. MCDANIEL: ...BUT WHAT THEY HAVE TO
17 PROVE TO YOU IS WHAT TIME THE WRECK HAPPENED.
18 IT'S NOT ENOUGH FOR THEM JUST TO ALLOW AN
19 ASSUMPTION THAT HE WAS DRIVING WHEN THERE'S TEN
20 (10) PEOPLE MILLING ABOUT THAT SHOWED UP AT THAT
21 WRECK SCENE BEFORE ANYBODY ELSE, THAT COULD HAVE
22 COME HERE AND TESTIFIED, "THIS IS WHAT WE SAW AND
23 THIS IS HOW WE KNOW THAT HE WAS DRIVING, AND THIS
24 IS WHAT TIME THE WRECK HAPPENED." THAT ---

25 (TEXT MISSING - SECTION 120)

1 BY MR. MCDANIEL: ...WHAT THE STATE IS TRYING
2 TO DO -- WHAT THE GOVERNMENT IS TRYING TO DO IS
3 TRYING TO TURN SOMEBODY INTO A CRIMINAL. THEY ARE
4 ALLEGING THESE ACTS. THEY WANT YOU TO CONVICT HIM
5 OF THAT AND THEY WANT YOU TO TAKE HIS FREEDOM
6 AWAY. BUT FOR THEM TO DO THAT, EVERYONE OF YOU
7 HAVE TO BELIEVE BEYOND A REASONABLE DOUBT THAT
8 THEY'VE PROVED TO YOU THAT HE WAS DRIVING THE CAR,
9 AND AT WHAT TIME THIS HAPPENED. FOR EXAMPLE, WHAT
10 IF IT HAPPENED FIVE (5) HOURS ---

11 (TEXT MISSING SECTION 122)

12 BY MR. MCDANIEL: ...NOTHING. IT'S LEFT FOR
13 YOU TO ASSUME. THEY ARE MAKING YOU -- THIS IS ALL
14 WE'VE GOT, LADIES AND GENTLEMEN. WE ---

15 (TEXT MISSING - SECTION 124)

16 BY MR. MCDANIEL: ...BUT WHAT THE ISSUE OF
17 THIS CASE IS -- WHEN DID THE WRECK HAPPEN? DID
18 THIS OFFICER DO EVERYTHING THAT YOU NEED TO
19 CONVICT HIM?

20 (TEXT MISSING - SECTION 126)

21 BY MR. MCDANIEL: ...THEY INTRODUCED INTO
22 EVIDENCE. THEY DIDN'T TRY. THERE'S CALL REPORTS,
23 ALL RADIO TRAFFIC, EVERY AMBULANCE, EMS, AND
24 FIREMEN HAVE A RADIO. YOU CAN GET THOSE CALLS
25 LIFETIME. BACK AND FORTH. THE STATE DIDN'T DO

1 IT; NOTHING. SO ---

2 (TEXT MISSING - SECTION 128)

3 BY MR. MCDANIEL: ...BEYOND A REASONABLE
4 DOUBT THAT HE WAS DRIVING UNDER THE INFLUENCE THAT
5 NIGHT. THEY CAN'T EVEN PROVE TO YOU THAT HE WAS
6 DRIVING THE CAR WHEN IT WAS WRECKED. THEY HAVEN'T
7 EVEN MADE ANY LINK. THEY CAN'T. THEY JUST SAID,
8 "LOOK, YOU HAVE TO RELY ON THIS FIELD SOBRIETY
9 TEST," AND HIM SAYING THAT THEY CAME FROM A CLUB
10 AND HE HAD SOME WINE. THAT'S WHAT YOU HAVE TO
11 RELY ON. I ---

12 (TEXT MISSING - SECTION 130)

13 BY MR. MCDANIEL: ...KNOWING THAT THAT'S NOT
14 TRUE. HE KNEW THAT HE WAS GOING TO BLOW OVER.
15 ALL OF THAT NEEDS TO BE CONSIDERED. BUT, MORE
16 IMPORTANT -- AND WHAT "BEYOND A REASONABLE DOUBT"
17 MEANS IS: YOU ALL HAVE TO BE FIRMLY CONVINCED.
18 FIRM ---

19 (TEXT MISSING - SECTION 132)

20 BY MR. MCDANIEL: ...AND FOR THE STATE TO BE
21 ABLE TO DO THAT, THEY NEED TO HAVE PROVED TO YOU
22 WHEN THIS WRECK OCCURRED. WHEN? JUST COME CLOSE.
23 NOT THAT "I HAVE NO IDEA WHEN IT HAPPENED, THAT I
24 HAVE NO IDEA WHO THOSE PEOPLE ARE. I DIDN'T TAKE
25 PICTURES OF THE CAR; I DIDN'T GET IT ON VIDEO; I

1 DON'T KNOW IF THESE PEOPLE HAVE CAMERAS; I DIDN'T
2 INTERVIEW THEM; I DIDN'T GET STATEMENTS FROM THEM;
3 I DON'T KNOW ANYTHING; I DIDN'T GET A..." THAT'S
4 IT. LADIES AND GENTLEMAN, THAT IS NOT "BEYOND A
5 REASONABLE DOUBT." THAT IS JUST A SUSPICION.
6 THAT'S IT. THAT'S ALL THEY'VE GOT. AND THEY'RE
7 THROWING IT AT YOU. AND THEY'RE SAYING, "THIS IS
8 WHAT WE'VE GOT AND WE WANT YOU TO TURN HIM INTO A
9 CRIMINAL." LADIES AND GENTLEMEN, I SUBMIT YOU
10 CAN'T.

11 (TEXT MISSING - SECTION 134)

12 BY MR. MCDANIEL: ...THERE HASN'T BEEN A
13 SINGLE WITNESS HERE; AND THEY COULD HAVE HAD ONE.
14 THAT'S JUST THE PROBLEM. THEY COULD HAVE HAD THEM
15 HERE. THEY DIDN'T HAVE ANY -- THEY DON'T. AND
16 THEY DIDN'T. AND THEY STILL DIDN'T APPEAR.
17 LADIES AND GENTLEMEN, THAT IS NOT ENOUGH. THAT IS
18 NOT ENOUGH. YOU HAVE TO FIND HIM NOT GUILTY.
19 NOW, THE JUDGE IS GOING TO TELL YOU THE LAW. WHAT
20 YOU NEED TO UNDERSTAND IS THERE IS NOT A LEGAL
21 LIMIT IN THE STATE OF SOUTH CAROLINA. THERE IS A
22 PERMISSIBLE INFERENCE LEVEL. I MEAN ---

23 (TEXT MISSING - SECTION 136)

24 BY MR. MCDANIEL: ...BEYOND A REASONABLE
25 DOUBT. AND I'VE TOLD YOU AT THE BEGINNING THAT

1 THE CASE WASN'T JUST DRIVING UNDER THE INFLUENCE.
2 THEY HAD TO PROVE THAT THEY DID EVERYTHING,
3 EVERYTHING THAT'S REQUIRED. YOU HEARD HER SIT
4 THERE AND GO THROUGH ALL THE STUFF THAT THEY ARE
5 SUPPOSED TO DO; EVERYTHING THEY ARE SUPPOSED TO
6 READ. DID THEY DO THAT? DID THEY SATISFY?
7 TONIGHT, WHEN YOU LAY YOUR HEAD TO SLEEP ON YOUR
8 PILLOW, WILL YOU SECOND-GUESS THE FACT THAT THEY
9 DID NOT MAKE AN EFFORT TO TRY TO PROVE WHEN THIS
10 WRECK OCCURRED. I THINK YOU WILL. BECAUSE I
11 HAVE. I HAVE THIS ENTIRE TIME. THANK YOU.

12 BY THE COURT: THANK YOU VERY MUCH. LADIES
13 AND GENTLEMEN OF THE JURY, YOU HAVE LISTENED TO
14 THE PROCEEDINGS AND THE EVIDENCE IN THIS CASE. IT
15 IS NOW MY DUTY TO INSTRUCT YOU AS TO THE LAW WHICH
16 APPLIES TO THE FACTS IN THIS CASE. THE LAWS OF
17 THE STATE OF SOUTH CAROLINA DO NOT PERMIT ME TO
18 COMMENT ON THE FACTS. YOU, AS JURORS, ARE SOLE
19 JUDGES OF THE FACTS IN THIS CASE; HOWEVER, IT IS
20 MY DUTY TO GIVE YOU THE LAW AND YOU MUST ACCEPT
21 AND APPLY THE LAW AS I GIVE IT TO YOU, AND BE
22 GUIDED THEREBY IN YOUR CONSIDERATION AND IN YOUR
23 DELIBERATION UPON THE EVIDENCE THAT'S BEEN
24 PRESENTED TO YOU IN THIS CASE. NOT ONLY ARE YOU
25 THE SOLE JUDGES OF THE FACTS IN THIS CASE, BUT

1 YOU, AS A JURY, ARE THE SOLE AND EXCLUSIVE JUDGES
2 OF THE EFFECTIVE VALUE OF THE EVIDENCE IN THE
3 CASE, AS WELL AS THE CREDIBILITY OF ALL THE
4 WITNESSES WHO HAVE TESTIFIED. IT IS FOR YOU TO
5 DETERMINE WHICH WITNESS, OR WITNESSES, ARE
6 RECALLING AND TRUTHFULLY RELATING WHAT TRANSPIRED
7 AT THE TIME OF THE ALLEGED COMMISSION OF THE CRIME
8 AS DESCRIBED IN THE CHARGING TICKET. TO WEIGH THE
9 EVIDENCE, YOU MUST CONSIDER THE CREDIBILITY OF THE
10 WITNESSES. YOU WILL APPLY THE TEST OF
11 TRUTHFULNESS, WHICH YOU ARE ACCUSTOMED TO APPLYING
12 IN YOUR DAILY LIFE. YOU MAY CONSIDER THE MATTER
13 OF TESTIFYING, THE APPEARANCE OF THE WITNESS UPON
14 THE WITNESS STAND, THE REASONABLENESS OF THE
15 TESTIMONY, THE OPPORTUNITY THE WITNESS HAD TO SEE
16 OR HEAR, ACCURACY OF MEMORY, INTELLIGENCE,
17 INTEREST, AND ANY BIAS, TOGETHER WITH ALL THE
18 FACTS AND CIRCUMSTANCES SURROUNDING THE TESTIMONY.
19 YOU ARE THE SOLE JUDGES OF THE FACTS, THE
20 CREDIBILITY OF THE WITNESSES, AND THE WEIGHT OF
21 THE EVIDENCE. YOU MAY BELIEVE OR DISBELIEVE ALL
22 OR ANY PART OF THE TESTIMONY OF ANY WITNESS. IT
23 IS YOUR PROVIDENCE TO DETERMINE WHAT TESTIMONY IS
24 WORTHY OF BELIEF AND WHAT TESTIMONY IS NOT WORTHY
25 OF BELIEF, ACCORDING TO THE WEIGHT YOU ASSIGN TO

1 THE TESTIMONY OF EACH WITNESS. THE LAW DOES NOT
2 REQUIRE ANY DEFENDANT TO PROVE HIS OR HER
3 INNOCENCE OF A CRIME. THE FACT THAT THE DEFENDANT
4 DID NOT TESTIFY OR PRESENT EVIDENCE, I MUST CHARGE
5 YOU, YOU CANNOT HOLD THAT AGAINST HIM IN ANY WAY.
6 ON THE CONTRARY, THE LAW REQUIRES THE STATE TO
7 ESTABLISH A DEFENDANT'S GUILT BY LEGAL EVIDENCE
8 AND BEYOND A REASONABLE DOUBT. THE LAW PRESUMES
9 THE DEFENDANT TO BE INNOCENT OF THE CHARGE MADE
10 AGAINST HIM UNTIL HIS GUILT HAS BEEN PROVEN BEYOND
11 THAT REASONABLE DOUBT. THE BURDEN OF OVERCOMING
12 HIS PRESUMPTION OF INNOCENCE IS PLACED UPON THE
13 STATE OF SOUTH CAROLINA AND RESTS UPON THE STATE
14 THROUGHOUT THE TRIAL UNTIL THE STATE HAS SATISFIED
15 YOU, THE JURY, BY EVIDENCE OF THE DEFENDANT'S
16 GUILT BEYOND THAT REASONABLE DOUBT. WHAT IS
17 REASONABLE DOUBT? REASONABLE DOUBT IS THE KIND OF
18 DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO
19 HESITATE TO ACT. AS STATED PREVIOUSLY, THE STATE
20 CHARGES THE DEFENDANT WITH DRIVING A MOTOR VEHICLE
21 WITHIN THE STATE WHILE UNDER THE INFLUENCE.
22 SECTION 56-5-2930 OF THE SOUTH CAROLINA CODE OF
23 LAW. THAT LAW MAKES IT UNLAWFUL FOR A PERSON TO
24 DRIVE A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF
25 ALCOHOL, DRUGS, OR A COMBINATION OF ALCOHOL OR

1 DRUGS, TO THE EXTENT THAT THE PERSON'S MENTAL AND
2 PHYSICAL FACULTIES TO DRIVE THE VEHICLE ARE
3 MATERIALLY AND APPRECIABLY IMPAIRED. WE HAVE
4 TESTIMONY FROM THE OPERATOR OF THE DATAMASTER.
5 THE BREATH TESTING MACHINE, OR DATAMASTER, IS A
6 DEVICE DESIGNED TO REGISTER ALCOHOL CONCENTRATION
7 BY ANALYSIS OF A PERSON'S BREATH. THE DATAMASTER
8 DETERMINES ALCOHOL CONCENTRATION, NOT BY TESTING
9 THE BLOOD OF THE INDIVIDUAL, BUT BY TESTING HIS
10 BREATH. I CHARGE YOU, LADIES AND GENTLEMEN OF THE
11 JURY, THAT THE FAILURE OF THE DEFENDANT TO TAKE A
12 DATAMASTER TEST IS NOT A FACTOR TO BE CONSIDERED.
13 IN FACT, IN THIS CASE, THE DEFENDANT DID TAKE A
14 DATAMASTER TEST. AND YOU MAY CONSIDER THAT IN
15 YOUR DELIBERATION. IT NEED NOT CONCERN YOU
16 WHETHER OR NOT THE RESULTS OF THE BREATH TEST MAY
17 BE USED IN COURT. OUR LAW SAYS THAT SUCH RESULTS
18 MAY BE USED IF THE REQUIRED SHOWING IS MADE. THIS
19 DOES NOT MEAN THAT YOU MUST BELIEVE THE RESULTS OF
20 THE TEST; BUT IT MEANS THAT YOU HAVE THE RIGHT TO
21 CONSIDER THE TEST RESULTS, ALONG WITH ALL THE
22 OTHER EVIDENCE PRESENTED IN THE CASE IN
23 DETERMINING THE GUILT OR INNOCENCE OF THE ACCUSED.
24 THE DATAMASTER MEASURES ALCOHOL CONCENTRATION IN
25 ONE-HUNDREDTHS OF A PERCENT (.01%). THE LAW SAYS

1 THAT IF A DEFENDANT REGISTERS FIVE ONE-HUNDREDTHS
2 OF A PERCENT (.05%) OR LESS, THERE'S A CONCLUSIVE
3 PRESUMPTION THAT THE PERSON IS NOT UNDER THE
4 INFLUENCE OF ALCOHOL. THIS WOULD BE PROOF THAT IF
5 THE PERSON HAD SOMETHING TO DRINK, IT WAS NOT SO
6 MUCH THAT HIS MENTAL AND PHYSICAL FACULTIES TO
7 DRIVE A MOTOR VEHICLE WERE MATERIALLY AND
8 APPRECIABLY IMPAIRED. THE LAW SAYS THAT IF THE
9 TEST RESULT IS MORE THAN FIVE ONE-HUNDREDTHS OF A
10 PERCENT (.05%) BUT LESS THAN EIGHT ONE-HUNDREDTHS
11 OF A PERCENT (.08%), THERE IS NOT INFERENCE ONE
12 WAY OR THE OTHER. IN OTHER WORDS, SUPPOSE IF ONE
13 OF HIS TESTS HE HAD REGISTERED SIX ONE-HUNDREDTHS
14 (.06%) OR SEVEN ONE-HUNDREDTHS OF A PERCENT
15 (.07%). BASED ON THAT TEST RESULT, THERE IS NO
16 INFERENCE THAT HE OR SHE IS UNDER THE INFLUENCE OF
17 ALCOHOL. IF THE ALCOHOL CONCENTRATION WAS, AT
18 THAT TIME, EIGHT ONE-HUNDREDTHS OF ONE PERCENT
19 (.08%) OR MORE, IT MAY BE INFERRED THAT THE PERSON
20 WAS UNDER THAT INFLUENCE OF ALCOHOL. IT MUST NOT
21 BE CONSTRUED AS LIMITING THE INTRODUCTION OF ANY
22 OTHER EVIDENCE BEARING UPON THE QUESTION OF
23 WHETHER OR NOT THE PERSON WAS UNDER THE INFLUENCE
24 OF ALCOHOL, DRUGS, OR A COMBINATION OF EITHER. I
25 CHARGE YOU, THAT A PERSON IS NOT GUILTY OF DRUNK

1 DRIVING SIMPLY BECAUSE HE HAS PARTAKEN OF SOME
2 QUANTITY OF ALCOHOL OR DRUGS. ON THE OTHER HAND,
3 IT IS NOT NECESSARY, IN ORDER TO ESTABLISH GUILT,
4 FOR THE STATE TO PROVE THE DEFENDANT WAS GROSSLY
5 INTOXICATED OR ABOUT TO PASS OUT. THE TRUE TEST
6 OF GUILT OR INNOCENCE IS WHETHER OR NOT THE
7 DEFENDANT, WHILE DRIVING A MOTOR VEHICLE, WAS
8 UNDER THE INFLUENCE OF AN ALCOHOLIC BEVERAGE OR
9 DRUGS, OR A COMBINATION OF SUCH THINGS. I CHARGE
10 YOU, LADIES AND GENTLEMEN OF THE JURY, THAT IF THE
11 DEFENDANT COMES INTO THIS COURT ROOM, TO PRESUME
12 TO BE INNOCENT. NO DEFENDANT IN ANY CRIMINAL CASE
13 HAS THE BURDEN OF PROVING HIS OR HER INNOCENCE,
14 WHICH MIGHT BE IMPOSSIBLE TO DO IN ANY NUMBER OF
15 CASES. THE PRESUMPTION OF INNOCENCE SURROUNDS THE
16 DEFENDANT LIKE A CLOAK AND IS ONLY REMOVED FROM
17 THE DEFENDANT AFTER YOU HAVE BEEN CONVINCED BEYOND
18 A REASONABLE DOUBT ON EVERY ELEMENT OF THE
19 OFFENSE, THAT THE DEFENDANT IS, IN FACT, GUILTY.
20 MR. FOREMAN, WE HAVE NOW ARRIVED AT THE POINT OF
21 THE TRIAL FOR EACH OF YOU TO CONSIDER AND WEIGH
22 ALL OF THE EVIDENCE TO DETERMINE, IF YOU CAN, THE
23 QUESTION OF GUILT OR INNOCENCE OF THE DEFENDANT.
24 I CHARGE YOU, YOU MUST TRY THIS CASE ACCORDING TO
25 THE EVIDENCE THAT YOU HAVE HEARD COME FROM THE

1 LIPS OF THE WITNESSES UNDER OATH, AND APPLY THE
2 LAW THAT I HAVE JUST GIVEN TO YOU. WHEN YOU HAVE
3 REACHED YOUR VERDICT, UNDER YOUR OATH TO BE A TRUE
4 VERDICT, NO ONE CAN CRITICIZE YOU AS TO WHAT THAT
5 VERDICT MAY BE. MR. FOREMAN, THIS MUST BE A
6 UNANIMOUS VERDICT; AND ALL SIX (6) OF YOU MUST
7 AGREE. MR. FOREMAN, I HAVE PREPARED A JURY
8 VERDICT FOR YOU. IT HAS FOUR (4) CHOICES ON IT.
9 PLEASE DO NOT ATTACH ANY SIGNIFICANCE TO THE
10 ORDER. OBVIOUSLY, YOU HAVE TO LIST ONE FIRST, ONE
11 LAST, AND TWO (2) IN THE MIDDLE. THE FOUR (4)
12 CHOICES ARE: GUILTY OF DUI, AT LEAST EIGHT (.08%)
13 TO TEN ONE HUNDREDTHS OF A PERCENT (.10%); GUILTY
14 OF DUI, AT LEAST TEN ONE-HUNDREDTHS (0.10%), BUT
15 LESS THAN SIXTEEN ONE-HUNDREDTHS OF ONE PERCENT
16 (.16%-); GUILTY OF DUI SIXTEEN ONE-HUNDREDTHS OF
17 ONE PERCENT (.16%+) OR MORE; OR NOT GUILTY. MR.
18 FOREPERSON, ONCE YOU HAVE REACHED A VERDICT, YOU
19 WILL SIGN NEXT TO "FOREPERSON" UNDER THE DATE AND
20 YOU WILL HAVE YOUR JURORS SIGN UNDER YOUR NAME.
21 AT THAT POINT, YOU WILL KNOCK ON THE DOOR AND WE
22 WILL RECONVENE TO HEAR YOUR VERDICT. OKAY? MR.
23 WYGLE (PHONETIC), MY ALTERNATE, ---

24 BY MR. WYGLE: YES, SIR.

25 BY THE COURT: THANK YOU FOR YOUR ATTENTION.

1 OF COURSE, AS I STATED TO YOU EARLIER, YOU ARE NOT
2 ALLOWED TO DELIBERATE. ALL THE JURORS ARE STILL
3 PRESENT. YOU ARE FREE TO GO AT THIS TIME WITH MY
4 HEART-FELT THANKS. YOU MAY ALSO STICK AROUND AND
5 SEE WHAT THE OUTCOME MAY BE.

6 BY MR. WYGLE: OKAY.

7 BY THE COURT: ALL RIGHT. THANK YOU VERY
8 MUCH. IF THE REST OF YOU WOULD COME FORWARD. MR.
9 FOREMAN, IF YOU WOULD COME FORWARD FOR ME, PLEASE.
10 AND I WILL LET YOU GO WITH MS. LEE. SHE WILL TAKE
11 THIS EVIDENCE WITH YOU TO -- AND THE VERDICT FORM.
12 AND YOU MAY BEGIN DELIBERATIONS. IF YOU NEED A
13 BREAK, THAT'S FINE. BUT PLEASE DON'T START
14 DELIBERATING TILL YOU'RE ALL TOGETHER. WE WILL
15 STAND IN RECESS TILL THE JURY'S READY (SOUND OF
16 GAVEL). YES, SIR?

17 BY MR. MCDANIEL: THANK YOU, JUDGE. I'D LIKE
18 TO RENEW ALL OF MY PREVIOUS DIRECTIVE VERDICT
19 MOTIONS. MAYBE YOUR HONOR HAD A CHANCE TO
20 RECONSIDER, ESPECIALLY IN CORPUS DELICTI AND MIGHT
21 HAVE A DIRECTIVE VERDICT ON MY CLIENT'S BEHALF.

22 BY THE COURT: OKAY. AND I WILL NOTE THAT --
23 ONCE AGAIN -- AND WE'LL NOTE, AGAIN, FOR THE
24 RECORD, AND MY PREVIOUS RULING STILL STANDS.

25 BY MR. MCDANIEL: AND, JUDGE, MY

1 UNDERSTANDING OF HOW A DUI, WITH A NUMBER, WORKS
2 IS ACTUALLY A BIFURCATED CASE. MEANING THEY FIND
3 GUILT OR INNOCENCE ON THE DUI AND THEN THEY WOULD
4 COME BACK AND THEN DECIDE ON THE ALCOHOL
5 CONCENTRATION?

6 BY THE COURT: YEAH, ---

7 BY MR. MCDANIEL: THAT SEEMS TO INDICATE THAT
8 THEY'RE GOING TO DO IT RIGHT THERE AND I DON'T --
9 I WOULD OBJECT TO, TO THE WAY THAT VERDICT FORM
10 IS. I GUESS, AS YOU READ IT -- I DIDN'T GET -- I
11 DIDN'T SEE IT.

12 BY THE COURT: WHAT I CAN DO IS JUST SEND IT
13 -- IF THERE'S NO OBJECTION, GET A -- I'VE GOT THE
14 OTHER VERDICT FORM. WE CAN DO THAT ONE. AND THEN
15 USE, USE THE OTHER ONE. ANY OBJECTION?

16 BY SOLICITOR BLUNDY: NO, THAT ---


17 ...END OF TEXT - SECTION 137

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF NOTARY
 COUNTY OF ANDERSON)

THIS IS TO CERTIFY THAT THE FOREGOING
 ONE HUNDRED FIFTY ONE (151) PAGES REPRESENT A TRUE AND
 ACCURATE TRANSCRIPTION OF THE CD OF THE SUMMARY COURT
 JURY TRIAL HELD ON THE 17TH DAY OF APRIL, 2012,
 REGARDING THE CASE OF STATE VERSUS NEZAR ABRAHAM, WHICH
 WAS DELIVERED TO THE OFFICE OF BOWEN COURT REPORTING
 SERVICE, LLC, FOR THE PURPOSE OF TRANSCRIPTION FROM THE
 SOLICITOR'S OFFICE, 10TH JUDICIAL CIRCUIT.

THAT I, MELODY JANINE WILLIAMS, COURT
 REPORTER AND NOTARY PUBLIC IN AND FOR THE STATE OF
 SOUTH CAROLINA, WITHOUT BENEFIT OF ANY NOTES
 WHATSOEVER, TRANSCRIBED THE CD TO THE BEST OF MY
 KNOWLEDGE AND ABILITY, ALTHOUGH THE CD WAS NOT AUDIBLE
 IN SOME INSTANCES AND WAS MISSING SEGMENTS OF TEXT.

THIS WILL FURTHER CERTIFY THAT I AM NOT
 INTERESTED IN, NOR AM I COUNSEL OR ATTORNEY TO EITHER
 OF THE PARTIES INTERESTED IN THE EVENT OF THE CAUSE.

 _____ (L.S.)
 MELODY JANINE WILLIAMS, NOTARY
 PUBLIC IN AND FOR THE STATE OF
 SOUTH CAROLINA.

MY COMMISSION EXPIRES: 10/16/2022

DECEMBER 20, 2012

State of South Carolina) In the Court of Common Pleas
County of Oconee) Case No: 2012-CP-37-00383

Nezar Abraham,)
Appellant,) Transcript of Record
-vs-) Appeal from
State of South) Magistrate's Court
Carolina,)
Respondent.)

September 4, 2012
Walhalla, South Carolina

B E F O R E:

The Honorable Alexander S. Macaulay, Judge.

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

C. Austin McDaniel, Esq.
Attorney for the Appellant

Blair Stoudemire, Esq.
Assistant 10th Circuit Solicitor
Attorney For the Respondent

Robin Sue Hild, FCRR, RPR
Circuit Court Reporter

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Index

Witnesses

Page

No witnesses were called.

Certificate of Court Reporter.....17

Exhibits

No.

Description

ID/EV

No exhibits were introduced.

1 ** Start of Requested Certified Transcript of Record **

2 (Whereupon, the Magistrate's Court Appeal
3 commenced, with both counsel being present, on
4 September 4, 2012, at approximately 10:48 a.m.)

5 THE COURT: All right. The next case is Nezar
6 Abraham versus the State, 2012-CP-37-383. Mr. McDaniel
7 here on behalf of the Appellant, Mr. Stoudemire on
8 behalf of the State.

9 All right. Any statement from the Appellant before
10 we proceed?

11 MR. McDANIEL: No, Judge.

12 THE COURT: Anything from the Defendant?

13 MR. STOUDEMIRE: No, sir.

14 THE COURT: All right. As I understand it, this is
15 an appeal from the Magistrate's Court?

16 MR. McDANIEL: Yes, sir.

17 MR. STOUDEMIRE: Yes, sir.

18 THE COURT: All right. What are your grounds for
19 appeal, Mr. McDaniel?

20 MR. McDANIEL: Thank you, Judge. The first ground
21 is that the Magistrate failed to direct a verdict of not
22 guilty in light of the State's failure to prove corpus
23 delicti of the offense of driving under the influence.
24 Your Honor, I have two cases that I relied on at trial.
25 I believe Portman was made --

1 THE COURT: All right. I think I do have the
2 Portman, *City of Easley v. Portman*?

3 MR. McDANIEL: Yes, sir.

4 THE COURT: All right.

5 MR. McDANIEL: And in the body of Portman the State
6 *V. Osborne* is also mentioned and it was argued, and I do
7 have that case if Your Honor would like that.

8 THE COURT: All right. So what you are talking
9 about is confession *aliunde* I think is the term?

10 MR. McDANIEL: Yes, sir.

11 THE COURT: Confession without --

12 MR. McDANIEL: -- uncorroborated evidence.

13 THE COURT: Uncorroborated?

14 MR. McDANIEL: That's correct, Judge.

15 THE COURT: Did I get the term right?

16 MR. McDANIEL: I believe you did, Judge.

17 THE COURT: All right. Okay. So tell me a little
18 bit about what...

19 MR. McDANIEL: Yes, sir. And some background I
20 think is important. This was an alleged single-car
21 wreck that occurred, at least he was charged July 7th
22 based on testimony developed at trial. The wreck
23 occurred at some point on July 6th in the evening.

24 Trooper Brown was the only witness present and
25 called by the State, as he was the responding officer to

1 the collision.

2 THE COURT: But he wasn't present at the wreck?

3 MR. McDANIEL: Not, Judge. But his testimony
4 was -- and this was evidence that was not provided to
5 the State -- was that there was ultimately seven to ten
6 was his estimate of first responders: EMS, ambulance,
7 fire department; there was a rescue team there as well.
8 None of which were interviewed, none of which -- we had
9 to assume that at least somebody made contact with
10 Mr. Abraham first and that somebody had to actually call
11 in this collision. All that was really unclear even
12 through at trial in that Trooper Brown was unable to
13 answer those questions.

14 What we were able to get to and what I think is at
15 the heart of the matter is that Trooper Brown arrives at
16 the scene, according to his video and the testimony, at
17 12:11:16, so 11 minutes after midnight. He was best
18 able to determine that the wreck happened some hour and
19 a half before he showed up was his best estimate based
20 on the collision report. Although Defense objected to
21 that testimony coming in as it was hearsay, it was
22 allowed.

23 So basically what was established is that he was
24 roughly an hour to an hour and a half after the
25 collision did he arrive at the scene.

1 What he relied on in determining that Mr. Abraham
2 was the driver had to have been -- and again, Judge, a
3 lot of the testimony we had to assume a number of things
4 that, of course, the Defense objected to -- that he
5 basically talked to these witnesses that were
6 unidentified, that had not provided statements to
7 determine that Mr. Abraham was the driver, because he at
8 trial could not testify to what type of car was driven,
9 make and model number, or who it was registered to, was
10 unable to determine how the collision occurred.

11 And the only independent evidence that he had on
12 his own that Mr. Abraham was the driver was kind of this
13 nebulous statement that "they had come from a bar." And
14 the wreck occurred in Keowee Key in kind of a gated
15 community. Then he did submit Mr. Abraham to a field
16 sobriety test and was arrested for driving under the
17 influence.

18 What I believe Portman and Osborne show, Judge, is
19 that the threshold corpus delicti is not very high; in
20 fact, I think it's just circumstantial evidence that the
21 driving offense was committed is all that's required
22 before that statement can be used against Mr. Abraham.

23 And what I pointed out at trial, and I think while
24 Portman didn't go to our favor by the Court of Appeals,
25 is that what is required by the officer is at least to

1 determine that the wreck, and generally these are wreck
2 cases, was freshly committed, what kind of car was
3 involved, essentially what could have happened, what
4 caused the wreck.

5 A lot of these cases come down to the officer being
6 able to testify that "I smelled fresh earth in the air,"
7 or "I touched the hood and it was warm." None of that
8 was available at our trial basically because it wasn't
9 done. The initial investigation of determining how the
10 wreck occurred, who was driving, who was the first at
11 the scene to see Mr. Abraham in the car, around the car,
12 none of that was done and none of that was evidence that
13 was submitted by the State at trial.

14 All they had, Judge, that was allowed at court was
15 that Mr. Abraham basically saying that "we were coming
16 from the bar."

17 I think it's ultimately Portman, although not in
18 our favor for this motion, Judge, would have relied on
19 what the Court relied on. The facts were that the
20 officer was able to determine that it was a Bronco that
21 left the road. They did some underlying investigation
22 on how the wreck occurred, and at that point they were
23 able to determine that, at least in Portman, Portman was
24 there and his head was resting against the car.

25 I mean, all this happened in a short amount of

1 time, but he was able to determine that I responded to
2 the wreck scene within 13 minutes of the collision is
3 how he determined that. Here we are dealing with an
4 hour to an hour and a half with no evidence whatsoever
5 of the car involved, no evidence whatsoever that
6 Mr. Abraham was actually driving the vehicle other than
7 that statement, Judge.

8 And I think that's where these cases fall, are,
9 while we're not gonna make it be direct evidence, it's
10 circumstantial, but you at least have to meet this
11 threshold and that threshold was not met at trial.

12 THE COURT: All right.

13 Mr. Stoudemire?

14 MR. STOUDEMIRE: Thank you, Your Honor. I'm gonna
15 go ahead and hand up *State v. Townsend*, which is 321
16 S.C., 55. It also deals with corpus delicti. And I
17 think that that case is a little bit more indicative of
18 what we're dealing with here.

19 The circumstances in this case were that -- and I'm
20 sure Mr. McDaniel will correct me if I'm wrong, but I
21 don't believe there was anybody else at the scene who
22 could have been driving the vehicle. There was only
23 Mr. Abraham there.

24 It was near Keowee Key or in Keowee Key, of course,
25 the gated community on Lake Keowee, but I believe

1 Mr. Abraham was actually renting a place out in that
2 area at the time so it was near where he was staying.
3 He did some field sobriety which I think the officer
4 testified he, of course, did not pass. He also
5 submitted to a BA and blew above the legal limit.

6 If you look at the second page of Townsend in the
7 bottom left-hand column, which starts with number 5,
8 they talked about certain circumstantial evidence that
9 led them to believe that corpus delicti was met in that
10 case.

11 THE COURT: Which headnote is that, Mr. Stoudemire?

12 MR. STOUDEMIRE: I'm sorry, Judge?

13 THE COURT: Which headnote is that?

14 MR. STOUDEMIRE: Number 5. And beginning at the
15 second sentence, it says (reading):

16 Townsend was at the scene where his car was
17 involved in a wreck, he smelled like alcohol, failed
18 field sobriety tests, and appeared to be intoxicated,
19 and a Breathalyzer showed his blood alcohol level to be
20 point 21.

21 And then it goes on to say (reading):

22 This is enough evidence, albeit circumstantial
23 evidence, to submit the case to the jury.

24 I would argue that everything that's present in
25 Townsend is present in this case, with the possible

1 exception that in Townsend you had definitive knowledge
2 presented at trial that Mr. Townsend's car was the one
3 that was involved in the wreck.

4 However, in this case there was evidence presented
5 that Mr. Abraham was there, that it was a car that he
6 was presumed to be driving. Evidently there was some
7 sort of nebulous statement that he may have admitted to
8 driving the car or had come from a bar.

9 I think when all those things are taken together, I
10 do think it meets the threshold requirement of corpus
11 delicti, and we would ask the appeal be denied on that
12 basis.

13 (There was a pause in the proceedings.)

14 THE COURT: I see that there is a disc here, but
15 what was the testimony at trial from the State? Were
16 you there, Mr. Stoudemire?

17 MR. STOUDEMIRE: No, sir.

18 THE COURT: Were you there, Mr. McDaniel?

19 MR. McDANIEL: Yes, sir, I was.

20 THE COURT: All right. And listen carefully rather
21 than me --

22 MR. McDANIEL: Well, I mean, as far as -- we're
23 just talking about the collision, Judge?

24 THE COURT: No. I'm talking about the witnesses,
25 too. Who appeared?

1 MR. McDANIEL: Just Trooper Brown was the only
2 witness there that testified.

3 THE COURT: All right.

4 MR. McDANIEL: And his testimony was -- excuse me,
5 Judge -- that he arrived a little bit after midnight.

6 THE COURT: When was the wreck?

7 MR. McDANIEL: Based on his collision report that
8 he prepared later, he determined that it occurred
9 somewhere around 11:20 I believe is what he said.

10 THE COURT: And he got there an hour later?

11 MR. McDANIEL: A little bit after -- yes. He
12 estimated at trial because he said all of that is an
13 estimate, that he's not a hundred percent sure, but an
14 hour to an hour and a half.

15 THE COURT: The essence of his testimony was he got
16 there an hour after the --

17 MR. McDANIEL: That's correct, Judge.

18 THE COURT: What was his testimony then?

19 MR. McDANIEL: That EMS, fire, and ambulance and
20 search and rescue personnel were there. And what you
21 can hear, and a lot of that wasn't allowed because the
22 Judge did agree that that was hearsay, was that they had
23 already had Mr. Abraham wherever -- and we are still
24 unclear where the wreck actually occurred -- up on the
25 road. And Trooper Brown makes contact with him, runs a

1 field sobriety test and arrests him. That's when he
2 asks, "Where were you coming from?" And he said, "We
3 were coming from the bar."

4 THE COURT: "We"?

5 MR. McDANIEL: "We."

6 THE COURT: Was there another individual there?

7 MR. McDANIEL: I mean, not that we're aware of,
8 Judge.

9 THE COURT: I mean, that was the testimony?

10 MR. McDANIEL: From what was provided to us by the
11 State, that Mr. Abraham was found there on the road some
12 distance away from the collision, although we never
13 actually saw the collision or the car or the condition
14 of the car. And, quite frankly, neither did Trooper
15 Brown, because he was unable to testify to the type of
16 car, the make or the model or anything like that. But
17 that was, the gist of his testimony was he arrived an
18 hour later, located Mr. Abraham, gave him a field
19 sobriety test and placed him under arrest for driving
20 under the influence.

21 THE COURT: Because he was in the vicinity?

22 MR. McDANIEL: Yes, sir. He was there --

23 THE COURT: And then you say he did make a
24 confession then?

25 MR. McDANIEL: Well, the confession was never, "I

1 was driving the vehicle." It was, "We were at the bar,"
2 or "We were going home" or something like that. And
3 apparently, I mean factually he had been at a bar with a
4 co-worker or something like that.

5 THE COURT: But the point is, did he ever say that
6 he was driving the vehicle?

7 MR. McDANIEL: Yes, sir.

8 THE COURT: Well, he did. That's all I need.

9 MR. McDANIEL: Yes, sir.

10 THE COURT: Okay. But that was after he was put
11 under arrest?

12 MR. McDANIEL: That's correct.

13 THE COURT: He was put under arrest with the field
14 sobriety?

15 MR. McDANIEL: That's correct.

16 THE COURT: And do you have any reason to doubt
17 that that would be the essence of the testimony?

18 MR. STOUDEMIRE: No reason whatsoever, Judge.

19 THE COURT: Okay. Now, I note that in Townsend,
20 apparently -- although I don't see, I was looking for
21 the time that the trooper arrived on the scene. But
22 apparently it was fairly prompt. This is again
23 Townsend.

24 MR. McDANIEL: Yes, sir.

25 MR. STOUDEMIRE: Yes, sir.

1 THE COURT: And when he got there, the Defendant
2 was at the scene, had been where his car was involved in
3 the wreck, he smelled alcohol, failed the sobriety test,
4 appeared to be intoxicated, and was given a
5 Breathalyzer. The Court did not address the temporal
6 relationships between the accident and the arrival of
7 the officer, but it did note that a fireman who was
8 there at the time, officer did arrive and apparently
9 was, he questioned some firemen about who was driving
10 and they finally pointed to Townsend.

11 But you tell me that that testimony never came in?

12 MR. McDANIEL: That's correct, Judge.

13 THE COURT: EMS or whoever else was there?

14 MR. McDANIEL: That's right.

15 THE COURT: So it was based entirely on the
16 officer's observation and...

17 MR. McDANIEL: Yes, sir.

18 THE COURT: It's a close case. But I would find
19 that the factual situation, although they talk about
20 Townsend in Osborne, apparently in Osborne they say that
21 the evidence of corpus delicti in this particular case
22 was that Osborne's car was in an accident, the car that
23 was warm at 11:17, the Breathalyzer was administered
24 more than three hours after the accident, and Osborne
25 attempted to file a false report of a stolen vehicle.

1 There, they found that that evidence was insufficient to
2 prove corpus delicti.

3 Now, again I have to look at it as a jury heard the
4 testimony. Apparently in Townsend the jury was
5 permitted, or had testimony that the fireman pointed to
6 Townsend as the driver.

7 Here, we only know what the officer, not to make
8 too fine a point of it, suspected, really. I quote the
9 Court in Osborne (reading):

10 To find guilt on this evidence the fact-finder must
11 impermissibly speculate as to the facts not in
12 existence.

13 So, other than the driver's own statement,
14 apparently there was there was no testimony of
15 identification other than there was factual matters that
16 the car was in an accident, that it was warm, that a
17 Breathalyzer was administered that showed that he
18 registered 14 percent three hours after the incident.
19 Plus he filed a false report and the Court found that
20 insufficient.

21 I feel that Osborne is more closely, and Osborne
22 addresses Townsend, is more, well, it's more controlling
23 than Townsend, so I would grant your motion.

24 Now, all right. If you would, Mr. McDaniel,
25 prepare a proposed Order.

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MR. McDANIEL: Yes, sir, Judge.

MR. STOUDEMIRE: Thank you, Your Honor.

(Whereupon, the Magistrate's Court Appeal was
concluded at approximately 11:10 a.m.)

** End of Requested Certified Transcript of Record **

Nizai Abraham

ADVISEMENT OF IMPLIED CONSENT RIGHTS

Subject's Name (Print)

Date of Birth

Driver's License Number

State Licensed



DRIVING UNDER THE INFLUENCE ADVISEMENT

- (A) Will test be video recorded? If answer is Yes, start here - Inform subject of video recording. If answer is No, start here - Inform subject of type samples requested (i.e. Breath, Blood, urine).
- (B) Provide subject with a written copy of the following advisement and read the advisement to the subject:
 - You are under arrest for Driving Under the Influence (DUI), Section 56-5-2930, South Carolina Code of Laws 1976, as amended.
 - The arresting officer has directed that samples be taken for alcohol and/or drug testing.
 - The samples will be taken and tested according to Section 56-5-2950 and SLED policies.
 - You do not have to take the tests or give the samples, but if you refuse to submit to the tests, your privilege to drive in South Carolina must be suspended or denied for at least six (6) months and your refusal may be used against you in court.
 - If you take the tests or give the samples and have an alcohol concentration of eight one-hundredths of one percent (0.08%) or more, you may instead be charged with Driving with an Unlawful Alcohol Concentration (DUAC), Section 56-5-2933.
 - If you have an alcohol concentration of fifteen one-hundredths of one percent (0.15%) or more, your privilege to drive in South Carolina must be suspended for at least one (1) month.
 - 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, urina.)
- (B) De al sujeto una copia escrita de la siguiente advertencia y lea la advertencia al sujeto:
 - Usted queda detenido por Manejar Bajo los Efectos de Alcohol o Drogas (DUI), Sección 56-5-2930, del Código de Leyes de Carolina del Sur de 1976, según su enmienda.
 - El agente que efectuó la detención dispuso que se sacaran muestras de alcohol y/o drogas para ser analizadas(s).
 - Se obtendrán y se analizarán las muestras según la Sección 56-5-2950 y las normas de SLED.
 - Usted no está obligado a hacerse los análisis ni a sacarse las muestras, pero si se niega a someterse a estos análisis, se le tendrá que suspender o negar el derecho de manejar en Carolina del Sur por lo menos durante seis (6) meses y el hecho de que usted se niega, podrá usarse en su contra en un tribunal.
 - Si usted se somete a los análisis o se saca las muestras y tiene una concentración de alcohol de ocho centésimos del uno por ciento (0.08%) o más, entonces se lo podría acusar de Manejar con una Concentración Ilegal de Alcohol (DUAC), según la Sección 56-5-2933.
 - Si usted tiene una concentración de alcohol de quince centésimos del uno por ciento (0.15%) o más, se le deberá suspender el derecho de manejar en Carolina del Sur por lo menos durante un (1) mes.
 - 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, efectue los siguientes procedimientos:
 - (C) Inspeccione la boca del sujeto y quite material extraño de la boca. (Ignora si se niega el sujeto.)
 - (D) Añade datos biograficos en el DataMaster DMT. (Esto es requerido para todos los exámenes aun que se niega el sujeto.)
 - (E) Observe al sujeto un minimo de (20) minutos antes de obtener un ejemplar de su respiro. (Ignora si se niega.)

Nizai Abraham
Subject's Signature
Firma del Sujeto (Recibió una copia)

[Signature] 7/7/11 0944
Officer's Signature
Firma del Agente
date/time
fecha/hora



SOUTH CAROLINA LAW ENFORCEMENT DIVISION
BREATH ALCOHOL ANALYSIS TEST REPORT
DRIVING UNDER THE INFLUENCE



SUBJECT BIOGRAPHICAL INFORMATION

SUBJECT NAME: NEZARI, ABRAHAM
RACE: WHITE
SEX: M
DOB: [REDACTED]

DL NUMBER: [REDACTED]
DRIVER'S LICENSE: IL [REDACTED]
SUBJECT ADDRESS: CHICAGO, IL [REDACTED]

ARREST INFORMATION

OFFICER NAME: KN/BROWN
TICKET NUMBER: F225315
ARREST DATE: 07/07/2011

AGENCY ORI: SCSHP0300
COUNTY OF ARREST: 37 - OCONEE
ARREST TIME: 00:20

OPERATOR INFORMATION

TEST OPERATOR: KN/BROWN
CERTIFICATION #: DMT000762
SOLUTION LOT #: 11801
BREATH TEST VIDEO RECORDED? YES
SUBJECT'S MOUTH CHECKED AND
ANY FOREIGN MATERIAL REMOVED? YES
SUBJECT ADVISED OF APPLICABLE RIGHTS? YES

AGENCY ORI: SCSHP0300
EXPIRATION DATE: 01/03/2013
BOTTLE: 0596
SUBJECT INFORMED OF VIDEO RECORDING? YES
SUBJECT INFORMED OF TYPE SAMPLE REQUESTED? YES
SUBJECT OBSERVED FOR A MINIMUM OF (20)
TWENTY MINUTES? YES

SUBJECT'S BREATH ALCOHOL TEST RESULTS

DATAMASTER DMT SERIAL #111007

TEST DATE:		07/07/2011
OBSERVATION START TIME:		00:48:46
BLANK TEST	0.00	01:09:46
INTERNAL STANDARD	VERIFIED	01:09:52
0.08% SIMULATOR TEMPERATURE	33.99°C	01:10:13
0.08% SIMULATOR VERIFICATION	0.078	01:10:13
BLANK TEST	0.00	01:11:04
SUBJECT SAMPLE	0.02	01:11:46
BLANK TEST	0.00	01:12:45
INTERNAL STANDARD	VERIFIED	01:12:52

[Handwritten Signature]

Subject's Signature

[Handwritten Signature] 01/09

(Received Copy) Date/Time

[Handwritten Signature]

Arresting Officer's Signature

[Handwritten Signature]

Test Operator's Signature

VISIT WWW.SLED.SCGOV AND CLICK ON IMPLIED CONSENT. THEN CLICK ON BREATH SITE VIDEO RECORDINGS. ENTER THE REQUESTED INFORMATION FROM THE BOX BELOW TO ACCESS THE VIDEO RECORDING OF THIS BREATH TEST.

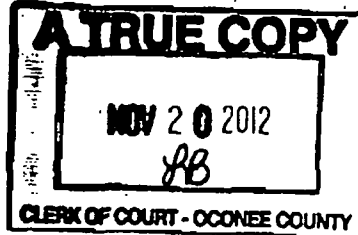
SUBJECT ID: 001802F306
SUBJECT PASSWORD: 4A4BC

IMPORTANT NOTICE

INFORMATION FROM THIS REPORT WILL BE USED TO ACCESS THE BREATH TEST VIDEO. ANYONE WITH THIS INFORMATION WILL HAVE ACCESS TO THE VIDEO. PROTECT THIS REPORT AS YOU WOULD ANY IMPORTANT DOCUMENT. SLED ASSUMES NO RESPONSIBILITY FOR UNAUTHORIZED ACCESS.

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE CIRCUIT COURT



STATE OF SOUTH CAROLINA,)

vs.)

RETURN OF THE CRIMINAL APPEAL

NIZAR Abraham)
_____)
_____) Defendant/Address)

CASE NUMBER

2012-CP-37-0383

2012 MAY 16 P 3:46

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

This matter is on appeal from the Magistrate's Court of Oconee County, South Carolina. the Honorable Will F. Derrick, Presiding Judge.

The defendant, Nizar Abraham, was charged with violating S.C. Code Ann. § 56-5-2930 which is commonly referred to as DUI, on July 7, 20 11.
(Code Section) (Common Name of Offense)

This matter was heard in a Bench/Jury trial on Jury TRIAL → 17, 20 12 and the Notice of Appeal was filed on APRIL 17, 20 12. The proceedings were (check appropriate box)

- recorded electronically
- recorded by a court reporter
- recorded in writing by the judge.

The jury list was prepared pursuant to S.C. Code Ann. (check appropriate box)

§ 22-2-80 Selection of jury list for a single trial.

§ 22-2-90 Selection of jury list for scheduled terms of jury trials.

and the Defendant and the State were given an opportunity to exercise peremptory challenges on April 16, 2012.

The State called the following witnesses:

1. Kevin Brown, SCJP
2. _____
3. _____
4. _____
5. _____
6. _____

A summary of their testimony is attached.

The Defendant called the following witnesses:

1. None
2. _____
3. _____
4. _____
5. _____
6. _____

A summary of their testimony is attached.

The State made the following Motions:

1. None
2. _____
3. _____
4. _____

A summary of the State's and Defendant's position on each motion and the Court's ruling is attached.

The Defendant made the following Motions:

1. Motion suppress transport video
2. Motion " BA video
3. Motion directed verdict
4. Motion dismiss violation of discovery.

A summary of the Defendant's and State's position on each motion and the Court's ruling is attached.

The State offered the following items into evidence:

1. Video - Roadside
2. Implied consent rights
3. BA report
4. BA video
5. _____
6. _____

The Defendant raised the following objections to the items that the State sought to introduce into evidence:

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____

A summary of the Defendant's and State's position and the Court's ruling on the objection is attached.

The Defendant offered the following items into evidence:

- 1. NA
- 2. _____
- 3. _____
- 4. _____
- 5. _____
- 6. _____

The State raised the following objections to the items that the Defendant sought to introduce into evidence:

- 1. NA
- 2. _____
- 3. _____
- 4. _____
- 5. _____
- 6. _____

A summary of the State's and Defendant's position and the Court's ruling on the objection is attached.

The Defendant was found guilty of violating S.C. Code Ann. § 29-5-2430,
 commonly known as DUI .16 or more.
 and the Court imposed the following sentence: 90 days, 89 suspended to
fine of \$ 2267⁰⁰, credit one day.

Attached are copies of the items which are checked.

- Uniform Traffic Ticket No(s). _____
- Arrest Warrant No(s). _____
- The jury list.
- List of witnesses and a summary of their testimony. Relevant
- List of motions, summary of the parties' positions and court's ruling.

- List of items offered into evidence, a summary of objections and the Court's ruling.
- Documents and exhibits entered into the record.
- The Notice of Appeal

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

2012 APR 7 P 9:45)

IN THE MAGISTRATE'S COURT

State,)

Plaintiff,)

RECEIVED)

NOTICE OF APPEAL

vs.)

Nezar Abraham,)

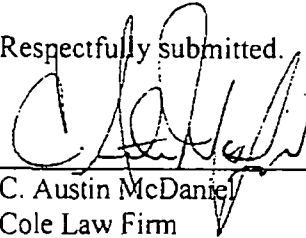
Defendant,)

Ticket Nos. F225314

Now comes the Defendant, by and through his undersigned attorney, respectfully placing this Honorable Court, and the State, on notice that in accordance with Rule 18, Appeals from Magistrate Court, the Defendant intends to appeal the above entitled case on the following grounds, including but not limited to:

1. Failure of the Court to grant a directed verdict of not guilty due to the State's failure to prove the Corpus Delicti of the charge of driving under the influence,
2. Failure of the Court to dismiss the charge for § 56-5-2953 violations,
3. Failure of the Court to Suppress the breath test results due to the fact that the results were obtained due to coercion and misstatements of law and fact by the arresting officer,
4. Failure of the Court Dismiss the case and/or Suppress various evidence due to the State's violations of Rule 5. Discovery and Brady materials.

Respectfully submitted.



#76084

C. Austin McDaniel
Cole Law Firm
1303 Ella Street
Anderson, South Carolina 29621
(864) 225-3617

ATTORNEY FOR DEFENDANT

Oconee, South Carolina

April 17, 2012

State of South Carolina) In the Court of Chief Judge M. Todd Simmons
County of Oconee) Offense: F225314 DUI

The State)
Vs.) JURY VERDICT
Nezar Abraham)
Defendant)

We the Jury find the Defendant:

_____ Guilty of DUI at least eight one-hundredths (.08) of one percent
but less than ten one-hundredths (.10) of one percent.

_____ Guilty of DUI at least ten one-hundredths (.10) of one percent
but less than sixteen one-hundredths (.16) of one percent.

Guilty of DUI sixteen one hundredths (.16) of one percent or more.

DATE: April 17, 2012

FORE PERSON:

Roger E. Mazy
Ram Santhanan
Y. D. L. L.
Jan Bell
Brian J. Cook
Scott D. D.

State of South Carolina)

In the Court of Chief Judge M. Todd Simmons

County of Oconee)

Offense: F225314 DUI

The State)

Vs.)

JURY VERDICT

Nezar Abraham)

Defendant)

We the Jury find the Defendant:

Guilty

Not Guilty

DATE: April 17, 2012

FORE PERSON:







Roger E. Miz
Ramon Santhaman
Paul Collins
Sam Dill
Brian L. Cook
Scott Deuss

Oconee County Summary Court

Jurors by Barcode Report

F225314

Sorted By Seq Nbr


JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
	Crocker, Brian L.	W	M	[REDACTED]	[REDACTED] WESTMINSTER, SC 29693	
	<i>Brian L Crocker</i>			<i>16</i>		
	Demos, Soula A	W	F	[REDACTED]	[REDACTED] SENECA, SC 29678	
	<i>Soula Demos</i>			<i>4</i>		
	Layne, David A	W	M	[REDACTED]	[REDACTED] SALEM, SC 29676	
	<i>David Layne</i>			<i>25</i>		
	Mize, Roger E	W	M	[REDACTED]	[REDACTED] WEST UNION, SC 29696	
	<i>Roger E Mize</i>			<i>10</i>		
	Pollard, Larry J	W	M	[REDACTED]	[REDACTED] SALEM, SC 29676	
	<i>Larry J Pollard</i>			<i>12</i>		
	Santhanam, Rampriyan E	A	M	[REDACTED]	[REDACTED] SENECA, SC 29672	
	<i>Rampriyan E Santhanam</i>			<i>4</i>		

Oconee County Summary Court

Jurors by Barcode Report

F225314

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
	Weigel, Christopher L	W	M	[REDACTED]	[REDACTED] MOUNTAIN REST, SC 29664	
	<i>ALTERNATE</i>				<i>19 Miles</i>	

Total Number of Jurors: 7

COUNTY OF OCONEE

Attorney Ronnie Cole
Cole Law Firm
1303 Ella Street
Anderson, SC 29621

SUMMARY COURT NOTICE OF JURY TRIAL
AND LIVE JURY SELECTION

Please be advised that a jury trial is scheduled on Tuesday, April 17, 2012 at 1:00 p.m. in the case of State of South Carolina vs. Nezar Abraham, Case Number F225314, Violation date July 7, 2011, DUI / Driving under the Influence, .16 or higher, 1st Offense. The jury trial is scheduled in the Oconee County Summary Court of Judge M. Todd Simmons located at 207-A E.N. First Street, Seneca, SC 29678.

The "live" jury selection in this case is scheduled on Monday, April 16, 2012 at 9:30 a.m. in the Oconee County Summary Court of Judge M. Todd Simmons located at 207-A E.N. First Street, Seneca, SC 29678.

Subpoenas for any witnesses that you wish to present at trial must be requested no later than two weeks prior to the date set for trial.

This is a DATE CERTAIN. All requests for continuance must be submitted in WRITING for consideration by the Court. Failure to appear by the defendant, without leave of the Court, will result in a trial in absentia.




LISA D. LEE, COURT CLERK

Oconee County
Seneca Magistrate
207-A East North 1st Street
Seneca, SC 29678
Phone: (864) 888-1460 Fax: (864) 888-1462

February 2, 2012

CERTIFICATE OF MAILING

I, Rhonda Brill, assistant to Ronnie M. Cole, attorney for the Defendant, do hereby certify that I have this 18th day of July, 2011, mailed a copy of this specific **Rule 5/6 and Brady Motion** to, **L/Cpl K.N. Brown, SCHP-Oconee, Post B Headquarters, 211 Century Drive, Suite 210-C, Greenville, SC 29607**, through the United States mail, postage prepaid, in compliance with the South Carolina Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83 [1963].


Rhonda Brill, Legal Assistant
Cole Law Firm
1303 Ella Street
Anderson, South Carolina 29621
Telephone: (864) 225-3617
Facsimile: (864) 231-9117

July 18, 2011
Anderson, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
STATE OF SOUTH CAROLINA,

-vs-

Nezar Abraham,
Defendant(s).

IN SUMMARY COURT

REQUEST PURSUANT TO S.C. RULES
OF CRIMINAL PROCEDURE - RULES 5&6
AND BRADY V. MARYLAND

RECEIVED

TICKET NUMBER(S)
F 225314

TO: L/Cpl K.N. Brown, SCHP-Oconee, Post B Headquarters, 211 Century Drive, Suite 210-C,
Greenville, 29607

PLEASE TAKE NOTICE that the Defendant, by and through the undersigned counsel, respectfully requests that the Solicitor produce or otherwise make available to the Defense all documents, tangible objects, reports of examinations and tests, witness statements, physical evidence and any other information subject to disclosure pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure.

The Defendant further requests the Solicitor to produce all evidence favorable to the Defendant, subject to disclosure pursuant to Brady v. Maryland 373 U.S. 83 (1963) and its progeny.

This request is a continuing request for all such discoverable information as it becomes known to the Solicitor or any Prosecution Agents.

The Defendant hereby asserts his Fifth Amendment right to remain silent and does not wish to be questioned in the absence of counsel, pursuant to McNeil v. Wisconsin 111 S. Ct. 220 (1991) and Edwards v. Arizona 451 U.S. 477 (1981).

Furthermore, pursuant to Rule 6 of the South Carolina Rules of Criminal Procedure, Defendant objects to the introduction of a chemist's or analyst's report without such person being personally present at trial. Defendant also requests the appearance in Court of persons within the chain of custody of all physical evidence.

Respectfully submitted,



Ronnie M. Cole, Attorney for Defendant

Anderson, South Carolina
Dated: July 18, 2011

ACKNOWLEDGEMENT BY DEFENDANT

I understand that if I violate any condition of this Order, a warrant for my arrest will be issued.

I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence.

It has been explained to me that if I fail to appear before the court as required, a warrant for my arrest will be issued.

DEFENDANT INFORMATION: ADDRESS (Chicago, IL 60618), CITY/STATE/ZIP, TELEPHONE, DATE, SIGNATURE OF DEFENDANT, SOCIAL SECURITY NUMBER, DRIVER'S LICENSE OR ID NUMBER, ATTORNEY REPRESENTING ACCUSED (IF KNOWN).

SPECIAL CONDITIONS OF RELEASE

a. [] Placement in custody. The defendant is placed in the custody of: NAME OF PERSON OR ORGANIZATION

ADDRESS, CITY/STATE, ZIP, TELEPHONE

who agrees (1) to supervise the defendant as set forth by the court, (2) to use every effort to assure the appearance of the defendant at all scheduled hearings before the court, and (3) to notify the court immediately in the event the defendant violates any conditions of his release or disappears.

SIGNATURE OF CUSTODIAN (IF APPROVED), DATE

b. [x] Restrictions on Travel, Association or Residence. The defendant will comply with each of the following conditions:

Prohibited to leave state.

c. [] Part-time Release. The defendant will be released from custody from TIME o'clock, AM/PM to TIME o'clock, AM/PM

on DATE(S) on condition that he return to the custody of NAME OF PERSON OR ORGANIZATION

at LOCATION as designated.

d. [] Other conditions. The defendant will comply with the following other conditions of release:

APPEARANCE RECOGNIZANCE WITH SURETY

On the 7th day of July, 2011, personally appeared before the undersigned judge the surety named below who acknowledged himself indebted to the State of South Carolina, in the sum of \$ 2,267.00, such sum to be levied on his real and personal property for the use of the State, should named defendant fail in performing the conditions of this Order.

The surety, being duly sworn, says that he is a resident and free holder within the State and is worth the sum acknowledged and underwritten herein, over all his debts and liabilities, and exclusive of property exempt from execution.

1St 2 Call Bond And Insurance (864) 224-3370
NAME OF SURETY BONDSMAN (Palmetto Surety Corporation)

1716 H. Pearman Dairy Rd
ADDRESS OF SURETY BONDSMAN

Anderson, SC 29625
CITY/STATE/ZIP

Palmetto Surety Corporation
NAME OF INSURANCE COMPANY

126 Seven Farms Rd
ADDRESS OF INSURANCE COMPANY

Charleston, SC 29412
CITY/STATE/ZIP

SIGNATURE OF SURETY BONDSMAN

SIGNATURE OF JUDGE

DATE 7-7-11

Eneca

Name of Defendant

Warrant/Ticket No

County of

Charges:	Trial Court:
----------	--------------

CHECKLIST FOR MAGISTRATES AND MUNICIPAL JUDGES

Directions: Magistrates and municipal court judges must use this checklist for ALL GENERAL SESSIONS and for ALL MAGISTRATE AND MUNICIPAL COURT CASES IN WHICH BOND HAS BEEN SET BY A JUDGE. The judge should attach this checklist to the charging document (arrest warrant or uniform traffic ticket) when the defendant first appears before a judge for a bond hearing or first appearance, and complete the appropriate sections. Defendant must be provided a completed copy of this form.

BAIL PROCEEDING

1. Form used at bail proceeding
 - a. Bond Form I (personal recognizance)
 - b. Bond Form II (surety, cash, percentage)
 - c. None (Non-Bailable Offense)
2. For cases in which bond was set, defendant was informed:
 - a. Warrant for arrest will be issued for violation of any condition of bail bond order.
 - b. His right and obligation to be present at trial and that trial will proceed in his absence if he fails to attend.
 - c. Failure to appear in court as required will result in the issuance of a warrant for defendant's arrest, as well as loss of any posted bond.
3. For cases to be tried in Court of General Sessions, defendant was informed of right to preliminary hearing if requested within ten (10) days:
 - a. Orally
 - b. In writing
(NOTE: Defendant must be informed of right both orally and in writing.)
4. Defendant was informed of the right to trial by jury.
5. In all general sessions cases, in all criminal domestic violence cases, and in all magistrate or municipal cases in which a prison sentence is likely to be imposed, defendant was informed of the following
 - a. Charges against defendant and nature of the charges
 - b. Right to counsel and right to court-appointed counsel if financially unable to employ counsel.
 - c. Defendant was informed orally and provided a copy of this form advising him of his right to obtain court appointed counsel if indigent (must meet federal poverty guidelines) and instructions on how to obtain court appointed counsel. In order to apply for court appointed counsel, defendant is required to appear before _____ located at _____ for indigency screening. Defendant is responsible for a statutory fee of \$_____ for indigency screening.

Appearance or Hearing Date: _____

Judge's Signature

UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS

FIRST NAME: *Michael* MIDDLE NAME: LAST NAME: *Albright*

STREET AND NO.: [REDACTED] CITY: *Chicago* STATE: *IL* ZIP CODE: *60601*

STATE LICENSED: DRIVER'S LICENSE NO.: [REDACTED] CDL: YES NO DRI. LIC. CLASS: *DL*

VEH. LIC. NO.: *A74 2243* STATE: *IL* MAKE OF VEH: *Miss* YEAR: *88* COMM. VEH.: AUTO: MOTOR VEH.: COMB.: HAZ. MT.: MOPED: MOTORCYCL.: OTHER:

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT: *Trattic Ct* STREET AND NO.: *207 E N 1st St*

DATE OF TRIAL: *08 03 2011* TIME OF TRIAL: *10 AM* CITY: *Chicago* STATE: *SC* ZIP CODE: *29678*

VIOLATION - COURT APPEARANCE REQUIRED: YES NO VIOLATION SECTION NO.: *56-51530*

OWNER OF VEHICLE: *A. Abraham* DATE OF ARREST: *0710 011*

ADDRESS OF OWNER: *Chicago IL* DATE OF VIOLATION: *0710 2011*

BAIL DEPOSITED: *500* NAME OF ARRESTING OFFICER: *K.W. BROWN* RANK: *402*

RACE: *WM* DESCRIPTION OF ACCUSED: [REDACTED] HT.: *5'8"* WT.: *135* EYES: *B* COUNTY: *CLANCE* NUMBER: *52*

DATE BAIL REC'D.: *20* BY: [REDACTED] BADGE: *57* TROOP: *3*

CASE BEFORE: MAGISTRATE MUN COURT CIRCUIT COURT FAMILY COURT FEDERAL COURT

NAME OF TRIAL COURT: *0820* WEATHER: *Partly*

DEFENDANT: DID NOT APPEAR APPEARED

NOLLE PROSSED DISPOSITION: *Guilty* MILES: *5* CITY: *Wc* CODE: *2*

FORFEITED BOND PLED: NOLO CONTENDERE

TRIAL BY: TRIAL JUDGE JURY

VERDICT OF TRIAL: GUILTY DATE OF TRIAL IF ANY: *11 17 2012*

TRIAL IF ANY: NOT GUILTY

JAIL: *89* SUSPEND: *2267* FINE: *10* AMT COLLECTED: *10* AMT SUSPENDED: [REDACTED]

COMMITTED TO: [REDACTED] Vehicle Search: *16* Arrest Return: *15* Collusion: [REDACTED]

CERTIFIED CORRECT: *Michael* DATE: *4 17 12* OFFENSE CODE: *99* B.A. LEVEL: *0*

F: 225314

TRIAL COURT COPY
Correct one day

Negai Abraham

ADVISEMENT OF IMPLIED CONSENT RIGHTS

Subject's Name (Print)

Date of Birth

Driver's License Number

State Licensed



DRIVING UNDER THE INFLUENCE ADVISEMENT

(A) Will test be video recorded? If answer is Yes, start here— - Inform subject of video recording.
If answer is No, start here — - Inform subject of type samples requested (i.e. Breath, Blood, Urine)

- (B) Provide subject with a written copy of the following advisement and read the advisement to the subject:
- You are under arrest for Driving Under the Influence (DUI), Section 56-5-2930, South Carolina Code of Laws 1976, as amended.
 - The arresting officer has directed that samples be taken for alcohol and/or drug testing.
 - The samples will be taken and tested according to Section 56-5-2950 and SLED policies.
 - You do not have to take the tests or give the samples, but if you refuse to submit to the tests, your privilege to drive in South Carolina must be suspended or denied for at least six (6) months and your refusal may be used against you in court.
 - If you take the tests or give the samples and have an alcohol concentration of eight one-hundredths of one percent (0.08%) or more, you may instead be charged with Driving with an Unlawful Alcohol Concentration (DUAC), Section 56-5-2933.
 - If you have an alcohol concentration of fifteen one-hundredths of one percent (0.15%) or more, your privilege to drive in South Carolina must be suspended for at least one (1) month.
 - 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 grabara en video el análisis? Si la respuesta es Si, empieza aquí— - informe al sujeto que va a ser grabado en video.
Si la respuesta es No, empieza aquí— - Informe al sujeto de lo que se requiere (ejemplo: soplar, sangre, urina.)

- (B) De al sujeto una copia escrita de la siguiente advertencia y lee 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 ordenada.
 - El agente que efectuó la detención dispuso que se sacaran muestras de alcohol y/o drogas para ser analizadas(s).
 - Se obtendrán y se analizarán las muestras según la Sección 56-5-2950 y las normas de SLED.
 - Usted no está obligado a hacerse los análisis ni a sacarse las muestras, pero si se niega a someterse a estos análisis, se le tendrá que suspender o negar el derecho de manejar en Carolina del Sur por lo menos durante seis (6) meses y el hecho de que usted se niega, podrá usarse en su contra en un tribunal.
 - Si usted se somete a los análisis o se saca las muestras y tiene una concentración de alcohol de ocho centésimos del uno por ciento (0.08%) o más, entonces se lo podría acusar de Manejar con una Concentración Illegal 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, efectue los siguientes procedimientos:
- (C) Inspeccione 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 obtener un ejemplar de su respiro. (Ignora si se niega.)

Subject's Signature
Firma del Sujeto (Recibir una copia)

Officer's Signature
Firma del Agente

date/time
fecha/hora



**SOUTH CAROLINA LAW ENFORCEMENT DIVISION
BREATH ALCOHOL ANALYSIS TEST REPORT
DRIVING UNDER THE INFLUENCE**



SUBJECT BIOGRAPHICAL INFORMATION

SUBJECT NAME: NEZAR ABRAHAM
RACE: WHITE
SEX: M
DOB: [REDACTED]

DL NUMBER: [REDACTED]
DRIVER'S LICENSE: IL
SUBJECT ADDRESS: CHICAGO, IL

ARREST INFORMATION

OFFICER NAME: KIMBROWN
TICKET NUMBER: F225213
ARREST DATE: 07/07/2011

AGENCY ORI: SCSP0100
COUNTY OF ARREST: ST. COCONEE
ARREST TIME: 00:30

OPERATOR INFORMATION

TEST OPERATOR: KIMBROWN
CERTIFICATION #: DMT000162
SOLUTION LOT #: 11501
BREATH TEST VIDEO RECORDED? YES
SUBJECT'S MOUTH CHECKED AND
ANY FOREIGN MATERIAL REMOVED? YES
SUBJECT ADVISED OF APPLICABLE RIGHTS? YES

AGENCY ORI: SCSP0100
EXPIRATION DATE: 01/05/2013
BOTTLE: 0656
SUBJECT INFORMED OF VIDEO RECORDING? YES
SUBJECT INFORMED OF TYPE SAMPLE REQUESTED? YES
SUBJECT OBSERVED FOR A MINIMUM OF (20)
TWENTY MINUTES? YES

SUBJECT'S BREATH ALCOHOL TEST RESULTS

DATAMASTER DMT SERIAL #111007

TEST DATE:		07/07/2011
OBSERVATION START TIME:		00:48:46
BLANK TEST	0.00	01:09:46
INTERNAL STANDARD	VERIFIED	01:09:52
0.08% SIMULATOR TEMPERATURE	33.99°C	01:10:13
0.08% SIMULATOR VERIFICATION	0.075	01:10:13
BLANK TEST	0.00	01:11:04
SUBJECT SAMPLE	0.21	01:11:46
BLANK TEST	0.00	01:12:45
INTERNAL STANDARD	VERIFIED	01:12:52

[Handwritten Signature]

Subject's Signature

[Handwritten Signature] 7/11/11 01:09

(Received from) Date/Time

[Handwritten Signature]

Arresting Officer's Signature

[Handwritten Signature]

Test Operator's Signature

VISIT WWW.SLED.SC.GOV AND CLICK ON INFORMED CONSENT. THEN CLICK ON BREATH SITE VIDEO RECORDINGS. ENTER THE REQUESTED INFORMATION FROM THE BOX BELOW TO ACCESS THE VIDEO RECORDING OF THIS BREATH TEST.

SUBJECT ID: 001602F306
SUBJECT PASSWORD: 4A43C

*****IMPORTANT NOTICE*****

INFORMATION FROM THIS REPORT WILL BE USED TO ACCESS THE BREATH TEST VIDEO. ANYONE WITH THIS INFORMATION WILL HAVE ACCESS TO THE VIDEO. PROTECT THIS REPORT AS YOU WOULD ANY IMPORTANT DOCUMENT. SLED ASSUMES NO RESPONSIBILITY FOR UNAUTHORIZED ACCESS.

H

Court of Appeals of South Carolina.
CITY OF EASLEY, Respondent,
v.
Steven Dale PORTMAN, Appellant.

No. 2698.
Heard June 4, 1997.
Decided July 21, 1997.
Rehearing Denied Sept. 3, 1997.

Defendant was convicted in the Circuit Court, Greenville County, John W. Kittredge, J., of driving under influence of intoxicating liquors (DUI). Defendant appealed. The Court of Appeals, Goolsby, J., held that evidence sufficiently established corpus delicti of DUI offense to allow admission of defendant's confession to investigating officer.

Affirmed.

Anderson, J., concurred in result only in a separate opinion.

Howell, C.J., dissented in a separate opinion.

West Headnotes

[1] Criminal Law 110 ↪ 413.92

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)22 Weight and Sufficiency to Convict

110k413.91 Corroboration
110k413.92 k. In general. Most Cited

Cases
(Formerly 110k534(1))

Conviction cannot be based solely on defendant's uncorroborated extra-judicial confession. (Per Goolsby, J., with one judge concurring in result.)

[2] Criminal Law 110 ↪ 413.75

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)20 Corroboration
110k413.71 Necessity
110k413.75 k. Confessions. Most

Cited Cases
(Formerly 110k535(2), 110k535(1))

Criminal Law 110 ↪ 413.80

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)20 Corroboration
110k413.76 Sufficiency
110k413.80 k. Confessions. Most

Cited Cases
(Formerly 110k535(2), 110k535(1))

State must offer some proof of corpus delicti of particular offense for which defendant is charged to authorize admission of confession of defendant, but direct evidence of corpus delicti is not required and circumstantial evidence will do. (Per Goolsby, J., with one judge concurring in result.)

[3] Criminal Law 110 ↪ 741(1)

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k741 Weight and Sufficiency of Evidence in General
110k741(1) k. In general. Most Cited

Cases
(Formerly 110k741(3))

If there is any evidence tending to establish corpus delicti of offense charged against accused, then it is duty of trial court to submit question of whether

offense occurred to jury. (Per Goolsby, J., with one judge concurring in result.)

[4] Criminal Law 110 ↪ 413.93

110 Criminal Law

110XVII Evidence

110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused

110XVII(M)22 Weight and Sufficiency to Convict

110k413.91 Corroboration

110k413.93 k. Corpus delicti. Most

Cited Cases

(Formerly 110k535(2))

Independent proof of defendant's identity as guilty party is not required to prove corpus delicti. (Per Goolsby, J., with one judge concurring in result.)

[5] Automobiles 48A ↪ 332

48A Automobiles

48AVII Offenses

48AVII(A) In General

48Ak332 k. Driving while intoxicated. Most

Cited Cases

Corpus delicti of driving under influence of intoxicating liquors (DUI) consists of evidence that someone operated motor vehicle in state while under influence of intoxicating liquors, drugs, or like substances. (Per Goolsby, J., with one judge concurring in result.)

[6] Criminal Law 110 ↪ 413.81(18)

110 Criminal Law

110XVII Evidence

110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused

110XVII(M)20 Corroboration

110k413.76 Sufficiency

110k413.81 Particular Cases

110k413.81(18) k. Motor vehicle offenses. Most Cited Cases

(Formerly 110k517.3(4))

Evidence sufficiently established corpus delicti of offense of driving under influence of intoxicating

liquors (DUI) to allow admission of defendant's confession to investigating officer; vehicle had left road and rested up against tree in manner indicating that driver's operation of vehicle had been somehow impaired, defendant rested his head against vehicle, smelled of alcohol, and slurred his speech, and investigating officer believed defendant was under influence of alcohol. (Per Goolsby, J., with one judge concurring in result.)

**614 *594 O.W. Bannister, Jr., of Hill, Wyatt, Bannister & Brown, Greenville, for Appellant.

G. Edward Welmaker, of Acker, Welmaker, & Smith, Pickens, for respondent.

GOOLSBY, Judge.

In this driving under the influence of intoxicating liquors (DUI) case, which was prosecuted in the municipal court of the City of Easley, the appellant Steven Dale Portman questions *595 whether the State established the *corpus delicti* of the offense so as to permit the admission into evidence of his statement to the investigating officer that he drove a motor vehicle and was drunk. The jury found Portman guilty. The circuit court affirmed his conviction. We do so as well.

As a result of a call received approximately thirteen minutes earlier, Officer Ron Winegard arrived at the scene of an accident involving a Ford Bronco. Because the vehicle, which rested against a tree, felt warm to his touch and he could still smell the tires, Winegard concluded the accident had occurred within a few minutes of his arrival at the accident scene. Several people were gathered at the accident scene, including Cynthia Gilstrap, the vehicle's registered owner, and Portman. Portman, who smelled of alcohol, stood at the back of the vehicle, his head resting against the outside-mounted spare tire and his hands held behind his back.

When Winegard asked Portman what was going on, Portman responded, "I was driving the vehicle. I'm drunk, take me to jail." Winegard then asked Portman how much he had had to drink, and Portman answered, "I've had four or five—just take me to jail." Winegard arrested Portman, charging him with DUI.

At trial Winegard testified that Portman's speech at that time was slurred and that he could determine by the manner in which the Bronco had left the road that

its operator had been impaired and that it could not have been driven properly. He believed Portman was under the influence of alcohol at the time of arrest. Once at the jail, Portman refused to submit to a breathalyzer examination.

[1][2][3][4] In a criminal case, a conviction cannot be based solely on the defendant's uncorroborated extra-judicial confession. State v. Williams, 321 S.C. 381, 468 S.E.2d 656 (1996). The State must offer some proof of the *corpus delicti* of the particular offense for which the defendant is charged to authorize admission of the confession of the defendant. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); cf. *615State v. Edwards, 173 S.C. 161, 175 S.E. 277 (1934) (the rule barring evidence of the defendant's confession absent proof of the *corpus delicti* has no application to admissions against interest). Direct evidence of the *corpus delicti*, however, is not *596 required. State v. Speights, 263 S.C. 127, 208 S.E.2d 43 (1974). Circumstantial evidence will do. *Id.* If there is any evidence tending to establish the *corpus delicti* of the offense charged against the accused, then it is the duty of the trial court to submit the question of whether the offense occurred to the jury. Edwards, 173 S.C. at 167, 175 S.E. at 278. Independent proof of the defendant's identity as the guilty party is not required to prove the *corpus delicti*. JOHN W. STRONG, McCORMICK ON EVIDENCE § 145, at 557 (4th ed. 1997).

[5] In a DUI case, as this court recently pointed out in both State v. Osborne, 321 S.C. 196, 467 S.E. 2d 454 (Ct.App. 1996), cert. granted, (April 2, 1997), and in State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (Ct.App.1996), the *corpus delicti* of the offense of DUI consists of the following three elements: (1) driving a vehicle; (2) within this State; and (3) while under the influence of intoxicating liquors, drugs, or any other substance of like character. As can be readily seen, therefore, evidence showing the accused in a DUI case to be the driver of the vehicle is unnecessary to the determination of whether the State sufficiently proved the *corpus delicti*. All that the first element requires is that the State sufficiently prove that someone drove the automobile. State v. Stimmel, 800 S.W.2d 156 (Mo.Ct.App.1990); see State v. Knoefler, 563 P.2d 175, 176 (Utah 1977) (DUI case wherein the court noted "the connection of the accused with the crime need not be proven to establish the *corpus delicti*"). In sum, then, the *corpus delicti* of

DUI consists of evidence that someone operated a motor vehicle in South Carolina while under the influence of intoxicating liquors, drugs, or like substances. See State v. Sheppard, 248 S.C. 464, 466, 150 S.E.2d 916, 917 (1966) ("the act of operating a motor vehicle with impaired faculties is the gravamen" of a DUI offense).

[6] Here, we think the following circumstances constituted sufficient evidence to establish the *corpus delicti* of the offense of DUI: the Bronco had left the road; it rested up against a tree; the manner in which the Bronco had left the road indicated the driver's operation of the vehicle had been somehow impaired; Portman rested his head against the vehicle; he smelled of alcohol; he slurred his speech, a characteristic *597 associated with one who is intoxicated; and the investigating officer believed Portman was under the influence of alcohol. The admission, therefore, of Portman's statement admitting he had been driving the Bronco and was drunk did not constitute error.

Our opinion finds support in the following cases: See Townsend, 321 S.C. at 57-58, 467 S.E.2d at 140-41 (in which the court of appeals held that the *corpus delicti* of the offense of DUI was established by evidence showing the defendant was found at the scene of a one-car accident, smelled of alcohol, failed a field sobriety test, and was found to have a .21 per cent blood alcohol level when administered a breathalyzer test); State v. White, 311 S.C. 289, 428 S.E.2d 740 (Ct.App.1993) (a felony DUI case where the court of appeals held proof of the *corpus delicti* was established by evidence showing the defendant, who tested positive for valium and alcohol was found staggering along an interstate highway with a "road rash" on his hand, bleeding, and smelling of alcohol, within a few hundred yards of a single-car accident in which the car had left the road, crossed the median, slid down the road, and gone down an embankment into the woods where it hit a tree, and where the court of appeals upheld the admission into evidence of his statements that he had been the driver of the car, notwithstanding officers found a body lying three or four feet from the driver's side of the car); cf. State v. Gilliam, 270 S.C. 345, 242 S.E.2d 410 (1978) (in which the supreme court upheld a conviction in a DUI case where the defendant was found alone on the passenger side of a wrecked automobile that had gone down a highway embankment, the defendant smelled of alcohol and appeared to be under the influence, an open bottle of

an alcoholic beverage was found in the car, and the defendant admitted he had **616 been the driver of the car at the time of the accident).¹²¹

FN1. Two cases from other jurisdictions with very similar fact patterns support our holding: See State v. Douglas, 102 N.H. 525, 162 A.2d 159 (1960) (DUI case in which the evidence showed a police officer went to the scene of a one-vehicle accident, found a vehicle off the highway against a telephone pole, saw a number of people standing around the scene, including the defendant and a man named Lachenal, asked who was driving and the defendant told the officer it was he while Lachenal said nothing, and determined the defendant was under the influence of intoxicating liquor and in which the court held the evidence established the *corpus delicti*, notwithstanding Lachenal testified at trial he was the operator of the vehicle at the time of the accident); State v. Stimmel, 800 S.W.2d 156 (Mo.Ct.App.1990) (DUI case in which the evidence showed a trooper arrived on the scene of a one-vehicle accident, saw a vehicle at the edge of the westbound lane facing eastward with its rear end in the median and tire tracks leading from the eastbound lane, determined the vehicle's driver was heading eastbound when the vehicle left that lane, traveled into the median, and came to a stop, observed the defendant standing next to the car while two other men, who shortly left in separate vehicles, stood off to one side, noticed the defendant smelled of alcohol and his face was flushed and speech slurred, and was told by the defendant he was the driver of the car and in which the court held the circumstantial evidence established the *corpus delicti*).

*598 The case principally relied on by Portman is State v. Osborne, 321 S.C. 196, 467 S.E. 2d 454 (Ct.App. 1996), cert. granted, (April 2, 1997). Osborne involved a single-car accident and a challenge to the admission into evidence of the defendant's confession. He argued the State did not prove the *corpus delicti* of the offense of DUI. The court of appeals agreed with the defendant, holding the only evidentiary facts offered to establish the *corpus delicti* were (1) the defendant's car had been in an accident;

(2) the hood of the car was still warm when the officer arrived on the accident scene; (3) the defendant registered .14 per cent on the breathalyzer three hours after the accident; and (4) the defendant tried to file a false stolen-vehicle report.

Osborne, however, does not help Portman for the following reasons. In contrast to the present case, the investigating officer in Osborne did not find anyone drunk at or near the wrecked vehicle. Moreover, although the vehicle had been in an accident, the officer did not testify he had any reason to believe the accident had resulted from faulty driving. The officer left the scene to search for the defendant and did not locate him until two and one-half hours later, when the defendant was discovered visibly intoxicated at a place called the Hot Spot. This court concluded a guilty verdict on the evidence presented would require the fact finder to "impermissibly speculate as to facts not in existence." Osborne, 321 S.C. at 196, 467 S.E. 2d at 457. In the present case, Officer Winegard's testimony about his observations of the wrecked vehicle, the accident scene, and Portman's behavior sufficiently *599 established the existence of facts extrinsic to any inculpatory statements by Portman to support a guilty verdict.

AFFIRMED.

ANDERSON, J., concurs in result only in a separate opinion.

HOWELL, C.J., dissents in a separate opinion.

ANDERSON, Judge (concurring in result only):

I concur in the result reached, but write separately to express my views thereon. In my opinion, the trial judge correctly determined there was sufficient circumstantial evidence of the *corpus delicti* to submit the charge of driving under the influence (DUI) to the jury.

I. SOUTH CAROLINA DUI LAW

Portman was charged with violating S.C.Code Ann. § 56-5-2930 (1991), which provides in pertinent part "[i]t is unlawful for any person ... who is under the influence of intoxicating liquors, narcotic drugs, barbiturates, paraldehydes or drugs, herbs or any other substance of like character, whether synthetic or natural, to drive any vehicle within this State." The act of operating a motor vehicle with impaired faculties is the gravamen of the offense. State v. Sheppard, 248 S.C. 464, 150 S.E.2d 916 (1966).

****617** The *corpus delicti* of DUI therefore consists of (1) driving a vehicle; (2) within South Carolina; (3) while under the influence of intoxicating liquors, drugs, or any other substance of like character. State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (Ct.App.1996), cert. denied (Sept. 5, 1996).

In Townsend, this Court concluded the State had presented sufficient evidence of the *corpus delicti* without regard to the defendant's confession, where the State established the defendant, who smelled like alcohol and failed a field sobriety test, was at the scene where the defendant's car had been wrecked. The car struck a power pole before crashing into a bank building. Defendant appeared intoxicated at the scene, and a breathalyzer test showed his blood alcohol content to be .21%. Although Townsend admitted driving the vehicle, he asserted ***600** he became intoxicated *after* the accident. We concluded the above testimony was sufficient circumstantial evidence to submit the case to the jury. In addition, defendant was identified by firefighters during the trial as the driver.

In State v. Gilliam, 270 S.C. 345, 242 S.E.2d 410 (1978), our Supreme Court found there was sufficient evidence to present the charge of DUI to the jury where the defendant was found alone on the passenger side of a wrecked vehicle which had gone down an embankment off the right-hand side of the highway. An open bottle of alcohol was found in the vehicle. A tow truck operator who arrived 15 minutes after the accident testified the defendant smelled of alcohol and appeared to be intoxicated. The defendant was incoherent when he was taken to the hospital, and he admitted he was driving when the accident occurred. The court found this evidence "amply" supported the submission of the case to the jury.

In contrast, in State v. Osborne, 321 S.C. 196, 467 S.E. 2d 454 (Ct.App. 1996), cert. granted (Apr. 2, 1997), we found there was insufficient evidence presented of the *corpus delicti* of the offense of DUI. A trooper discovered an abandoned vehicle at 11:17 p.m. that had been involved in a one-car accident. The hood was still warm. Approximately one and a half hours later, the trooper met Osborne at a nightclub. Osborne had called to report his vehicle was stolen. Osborne appeared intoxicated. Osborne admitted to the trooper that he had wrecked the car. Upon returning to the scene of the accident, Osborne told a second

trooper the car had been stolen. He gave the car keys to one of the troopers. Osborne stated he did not drink after the accident.

In State v. White, 311 S.C. 289, 428 S.E.2d 740 (Ct.App.1993), a case involving felony DUI, we found the *corpus delicti* of the offense had been established, and we noted the question whether the defendant was the driver of the vehicle was a matter for the jury to determine. A trooper found White staggering along the interstate. White was wearing a torn, bloodstained shirt, was bleeding from the shoulder, and had a strong odor of alcohol about him. He initially told the trooper he had been in a fight. However, he told an emergency room nurse he had been hit by a truck he had tried to flag down after something happened to the car he was driving.

***601** Three hours later, White told the same nurse he had been driving and had been in an accident. He said he was afraid his passenger was dead. White told a trooper summoned to the hospital that he had been driving a car when a truck either struck him or ran him off the road. He expressed concern his passenger was out there with the vehicle. White's car was found by a passerby during the night. It had traveled down an embankment into the woods. The passenger was dead, and his body lay three or four feet from the driver's side of the car. In the morning, White told the troopers he had been the driver of the vehicle, he had been drinking and was going around 75 to 80 m.p.h. when he lost control when a truck came into his lane. When White was informed his passenger was dead, White screamed, "Oh, my Lord, ... I've killed him. I've killed him." Regarding White's assertion the state had failed to establish the *corpus delicti* of the offense, this Court stated:

This assertion has no merit. Separate and apart from White's inculpatory statements, the evidence outlined above, when viewed ****618** in the light most favorable to the State ... established proof aliunde of the *corpus delicti*, albeit circumstantially for the most part....

The precise questions of whether White drove the motor vehicle in question while under the influence of alcohol or drugs, whether he either did an act forbidden by law or neglected a duty imposed by law, and whether either his act or neglect caused [the victim's] death, were matters properly left to the

jury. See State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984) (in a prosecution for driving a motor vehicle while under the influence of alcohol or drugs, the questions of whether a defendant was under the influence and whether he was the driver of the vehicle in question presented issues for the jury).

White, 311 S.C. at 295-96, 428 S.E.2d at 744.

II. CORPUS DELICTI

The *corpus delicti* of a crime is the body, foundation, or substance of the crime, which ordinarily includes two elements: the act and the criminal agency of the act. Black's Law Dictionary 344 (6th ed. 1990). In a derivative sense, *corpus delicti* is the objective proof or substantial fact that a *602 crime has been committed. *Id.* It is a combination of two Latin words: "*corpus*," meaning a body or physical substance, and "*delictum*," meaning a wrong, tort, injury or offense. *Id.* When applied to any particular offense, the term *corpus delicti* means the specific crime has actually been committed. State v. Teal, 225 S.C. 472, 82 S.E.2d 787 (1954).

The efficacy of the doctrine of *corpus delicti* is explicated in State v. Williams, 321 S.C. 381, 468 S.E.2d 656 (1996). The Williams Court stated:

A conviction cannot be had on the extrajudicial confessions of the defendant unless corroborated by proof aliunde of the corpus delicti. State v. Blocker, 205 S.C. 303, 31 S.E.2d 908 (1944)... Moreover, if there is any evidence tending to establish the corpus delicti, then it is the duty of the trial court to pass that question on to the jury. State v. Blocker, *supra*.

Williams, 321 S.C. at 384-85, 468 S.E.2d at 657-58.

The State must produce proof *aliunde* of the *corpus delicti* aside from the extrajudicial confession of the defendant. Brown v. State, 307 S.C. 465, 415 S.E.2d 811 (1992). See also State v. Teal, 225 S.C. 472, 82 S.E.2d 787 (1954) (conviction based on confession cannot stand unless corroborated by proof *aliunde* of *corpus delicti*). Before a defendant can be required to present a defense, the State must establish some proof of the *corpus delicti*. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (Ct.App.1996). The prosecution must show the actual commission by someone of

the particular offense charged. See State v. Brown, *supra*. If there is no evidence to prove the *corpus delicti*, the defendant is entitled to a directed verdict of not guilty. *Id.* See also State v. Epes, 209 S.C. 246, 39 S.E.2d 769 (1946) (if there is no proof of *corpus delicti*, defendant is entitled as matter of law to directed verdict).

It is well established in the courts of the American judicial system that a criminal defendant cannot be convicted on the basis of his extrajudicial confession alone. Carolyn P. MacWilliam, Annotation, Sufficiency of Corroboration of Confession for Purpose of Establishing Corpus Delicti as Question of Law or Fact, 33 A.L.R.5th 571 (1995). The requirement that the *corpus delicti* be sufficiently corroborated by *603 independent evidence is rooted in the premise that the examination of this additional evidence will avert the danger that a crime was confessed when in fact no such crime was committed. *Id.* Thus, the rule exists to prevent the conviction of an innocent person. *Id.*

III. IDENTITY NOT ELEMENT OF CORPUS DELICTI

As a general rule, the connection of the accused with the crime, or the identity of its perpetrator, is not an element of the *corpus delicti*. 23 C.J.S. Criminal Law § 1110 (1989). "[T]he *corpus delicti* embraces the fact that a crime has been committed by someone—i.e., that somebody did the required act or omission with the required mental fault, under the required (if any) attendant circumstances, and producing the required**619 (if any) harmful consequence, without embracing the further fact (needed for conviction) that the defendant was the one who did or omitted that act or was otherwise responsible therefor." Wayne R. LaFare & Austin W. Scott, Jr., Substantive Criminal Law, § 1.4(b), at 18-19 (2d ed. 1986). See also Jenkins v. State, 401 A.2d 83 (Del.Super.Ct.1979) (term *corpus delicti* usually does not include perpetrator's identity; otherwise, *corpus delicti* would be synonymous with whole of charge); Davis v. State, 582 So.2d 695 (Fla.Dist.Ct.App.1991) (causal connection between defendant and crime is not required to be shown to establish *corpus delicti* for purpose of determining admissibility of confession).

The identity of the actor charged with a criminal offense is not a necessary part of the *corpus delicti*. See, e.g., State v. Mace, 3 Conn.Cir.Ct. 228, 210 A.2d 675 (1965). See also United States v. Charpentier, 438

F.2d 721 (10th Cir.1971) (identification of accused as person who committed crime is not part of *corpus delicti*); State v. Hawkins, 165 S.W.2d 644 (Mo.1942) (*corpus delicti* consists of act and of criminal agency of act, other than confession of accused, and proof of accused's identity or agency as criminal is not required); State v. Sinovich, 329 Mo. 909, 46 S.W.2d 877 (1931) (proof of *corpus delicti* means merely proof that crime has been committed; proof of defendant's connection therewith ordinarily being no part of *corpus delicti*); Reyes v. State, 151 Neb. 636, 38 N.W.2d 539 (1949) (*corpus delicti* is body or substance of crime and in its primary sense it is fact that crime has been *604 committed without regard to identity of person committing it); Commonwealth v. Thomas, 189 Pa.Super. 25, 149 A.2d 165 (1959) (*corpus delicti* consists of occurrence of specific kind of injury charged, and someone's criminality as source of such injury, and proof of accused's agency as doer of crime does not form part of *corpus delicti*, but is essential requisite in order to convict). See generally VII John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 2072 (3d ed. 1940).

"To establish a *corpus delicti*, the government need only prove that a crime has been committed. Identifying the defendant as the perpetrator of the crime is not required...." 29A Am.Jur.2d Evidence § 753 (1994). See, e.g., State v. Williams, 321 S.C. 381, 468 S.E.2d 656 (1996) (the *corpus delicti* of arson consists of showing the property was burned due to the willful act of some person); State v. Blocker, 205 S.C. 303, 31 S.E.2d 908 (1944) (without a crime being established, there could be no guilt either in the accused or in anyone else). Accord California v. Komatsu, 212 Cal.App.3d Supp. 1, 261 Cal.Rptr. 681 (Super.Ct.1989) (*corpus delicti* does not include identity or mental state of perpetrator); Missouri v. Hill, 812 S.W.2d 204 (Mo.Ct.App.1991) (the *corpus delicti* of driving while intoxicated consists of evidence someone operated a motor vehicle while intoxicated); Pennsylvania v. Zelosko, 454 Pa.Super. 635, 686 A.2d 825 (1996) (in order to establish *corpus delicti* of driving under influence, state need only show someone operated motor vehicle while under influence of alcohol).

IV. PROOF OF CORPUS DELICTI

Articulating the burden of proof efficacious in a *corpus delicti* analysis, the Supreme Court in State v.

Collington, 259 S.C. 446, 192 S.E.2d 856 (1972), observed:

The *corpus delicti* in a homicide case must be established by the best proof obtainable, but direct and positive evidence is not essential and such may be proved by presumptive or circumstantial evidence when that is the best obtainable. In determining whether there was sufficient proof of the *corpus delicti*, we, of course, are not concerned with the weight of the evidence or the credibility of the witnesses, *605 but rather with whether there was sufficient evidence to go to the jury tending to prove the *corpus delicti* beyond a reasonable doubt.

Collington, 259 S.C. at 449, 192 S.E.2d at 857 (citations omitted).

While evidence of the *corpus delicti* must be established by the best proof attainable, direct and positive evidence is not essential. State v. Speights, 263 S.C. 127, 208 S.E.2d 43 (1974); State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (Ct.App.1996). *Corpus delicti* may be proven by circumstantial evidence. **620 State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987); State v. Roof, 196 S.C. 204, 12 S.E.2d 705 (1941). See also State v. Martin, 47 S.C. 67, 25 S.E. 113 (1896) (elements of crime constituting particular *corpus delicti* can be proven by circumstantial evidence). A case should be submitted to the jury if there is any substantial evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. State v. Wakefield, 323 S.C. 189, 473 S.E.2d 831 (Ct.App.1996).

"Proof of *corpus delicti* is not a prerequisite to the admission of an extra-judicial confession of a defendant. If, however, *corpus delicti* is not proven and the sole evidence of guilt is a confession, a directed verdict in favor of the defendant is required." State v. Williams, 321 S.C. 381, 385 n. 2, 468 S.E.2d 656, 658 n. 2 (1996). On the other hand, if there is any evidence tending to establish the *corpus delicti*, the trial judge has a duty to submit the question to the jury. Id. The question as to whether there is any proof of the *corpus delicti* is one for the court; whereas, the sufficiency of the evidence is a question for the jury. See State v. Brown, 103 S.C. 457, 88 S.E. 21 (1916).

We note the standard for establishing the *corpus*

delicti, whether there is any evidence the crime was committed, is therefore not as rigorous as the standard the State must meet to actually obtain a conviction, i.e., the State must establish the offense was committed by the defendant "beyond a reasonable doubt." Cf. Arizona v. Villa, 179 Ariz. 486, 880 P.2d 706 (Ct.App.1994) (*corpus delicti* need not be proven beyond reasonable doubt; only reasonable inference of *corpus delicti* *606 must exist before confession may be considered); Illinois v. Chavez, 285 Ill.App.3d 45, 220 Ill.Dec. 885, 674 N.E.2d 156 (1996) (state need not establish *corpus delicti* beyond a reasonable doubt in order to allow consideration of admission or confession; rather, standard is some independent evidence).

V. CONFESSION AS JUXTAPOSED TO ADMISSION

Some courts make an exception to the *corpus delicti* rule for "admissions." Davis v. State, 582 So.2d 695 (Fla. Dist. Ct. App. 1991), enunciates with clarity the distinction between "confession" and "admission." The Davis court engages in an enlightening discussion of this facet of evidentiary proof of *corpus delicti*:

It is perhaps appropriate to note at this point that not all extrajudicial statements against interest amount to "confessions," notwithstanding that some Florida courts as well as courts in other jurisdictions have, on occasion, used the words "confession" and "admission" interchangeably to describe such statements. In Nelson v. State, 372 So.2d 949 (Fla. 2d DCA 1979), the court, citing Parrish v. State, 90 Fla. 25, 105 So. 130 (1925), distinguished "confessions," which are complete acknowledgments of a criminal act, from "admissions," which are statements from which guilt may be inferred. While confessions are inadmissible until the State presents prima facie evidence of the *corpus delicti*, admissions are admissible as prima facie evidence of the *corpus delicti*.

Davis, 582 So.2d at 700.

A "confession," in the legal sense, is restricted to acknowledgement of guilt and does not apply to a mere statement of fact from which guilt may be inferred. State v. Cunningham, 275 S.C. 189, 268 S.E.2d 289 (1980); State v. Miller, 211 S.C. 306, 45 S.E.2d 23 (1947); State v. Epes, 209 S.C. 246, 39 S.E.2d 769 (1946). See also State v. Morgan, 282 S.C. 409, 319

S.E.2d 335 (1984) (statements made by defendant to effect he had been driving vehicle and had been using alcohol and marijuana, but not stating he was under the influence, did not amount to confession to offense of DUI).

In State v. Owens, 291 S.C. 116, 352 S.E.2d 474 (1987), our Supreme Court concluded:

*607 While the State offered no evidence directly connecting Owens with the events at the Vereen home, there is evidence which connects him with the preparation of the ransom note. The note, in turn, states that Mr. Vereen was in the author's custody. This extra-judicial admission against interest, corroborated by other **621 proof of the *corpus delicti*, is sufficient to support the conviction.

Owens, 291 S.C. at 118-19, 352 S.E.2d at 476 (emphasis added).

It is apodictic the Owens Court treated the statement emanating from the defendant as an "admission against interest." Owens does not answer the direct query as to whether an "admission against interest" is synonymous with a "confession." Cf. People v. Crivder, 90 Cal.App.2d 194, 202 P.2d 765 (1949) ("admission" is not synonym of "confession").

Black's Law Dictionary defines "confession" as a "voluntary statement made by a person charged with the commission of a crime ... wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act or the share and participation which he had in it." Black's Law Dictionary 296 (1990).

According to Black's Law Dictionary, "admissions" are "statements by a party ... of the existence of a fact which is relevant to the cause of his adversary." *Id.* at 47. An "admission" is the avowal or acknowledgement of a fact or circumstance from which guilt may be inferred, tending only to prove the offense charged, but not amounting to a confession of guilt. Pressley v. State, 201 Ga. 267, 39 S.E.2d 478 (1946). An "admission against interest" is any statement made by or attributable to a party to an action which constitutes an admission against his interest and tends to establish or disprove any material fact in the case. See Kellner v. Whaley, 148 Neb. 259, 27 N.W.2d 183

(1947).

Black's distinguishes a "confession" from an "admission." "A confession is a statement admitting or acknowledging all facts necessary for conviction of the crime. An admission, on the other hand, is an acknowledgement of a fact or facts tending to prove guilt which falls short of an acknowledgement of all essential elements of the crime." Black's Law Dictionary 297 (1990). The term "admission" is usually applied to *608 those matters of fact in criminal cases which do not involve criminal intent, while the term "confession" is generally restricted to acknowledgements of guilt. *Id.* at 48.

"Admissions" are distinguished from "confessions" in that the latter constitute full acknowledgements of guilt while the former are incriminating statements from which fewer than all elements of the crime can be inferred. See State v. Trexler, 316 N.C. 528, 342 S.E.2d 878 (1986). See also Claxton v. City of Lynchburg, 15 Va.App. 152, 421 S.E.2d 891 (1992) ("confession" is statement admitting or acknowledging all facts necessary for conviction of crime charged, while "admission" admits of facts tending to prove guilt but falling short of admission to all essential elements of crime); Stowers v. State, 205 Ga.App. 518, 422 S.E.2d 870 (1992) (defendant's statement in which he did not admit every essential element of charged offense constituted "admission," not "confession," and no corroboration thus was required). In an incriminating statement or "admission," only one or more facts entering into the criminal act are admitted, while in a "confession" the entire criminal act is confessed. Burns v. State, 188 Ga. 22, 2 S.E.2d 627 (1939).

In determining the necessity of corroboration, a distinction should be made between confessions of guilt and admissions of incriminating facts. "A confession is the admission of guilt by the defendant of all the necessary elements of the crime of which he is charged, including the necessary acts and intent. An admission merely admits some fact which connects or tends to connect the defendant with the offense but not with all the elements of the crime." State v. Masato Karumai, 101 Utah 592, 126 P.2d 1047, 1052 (1942). In Louette v. State, 152 Fla. 495, 12 So.2d 168 (1943), the court concluded:

The term "confessions" has been held by some

courts to embrace not only an express declaration of the accused that he is guilty of the crime charged, but also those admissions of fact on his part from which guilt may be inferred. However, the better rule, and the majority rule is that the term "confession" does not apply to a mere admission or declaration of an independent fact which tends to prove guilt or from which guilt may be inferred, and our decisions show that this distinction between confessions and inculpatory *609 admissions has **622 been generally accepted and followed by this court.

Louette, 12 So.2d at 172 (citations omitted).

In Burks v. State, 589 So.2d 355 (Fla. Dist. Ct. App. 1991), the court addressed a factual scenario similar to the one in the case *sub judice*. Burks was charged with DUI manslaughter after telling a police officer he was the driver of a truck involved in an accident with a motorcycle. Burks further stated he had been drinking heavily all evening. His blood alcohol registered .14%. After his conviction, Burks appealed contending the *corpus delicti* was not established prior to the court's admission into evidence of his statement he was the driver of the truck; i.e., there was no evidence, other than his statement, that placed him behind the wheel of the truck. The appellate court explained that the statement, to be a confession, must "acknowledge guilt of the crime charged." *Id.* at 357. The Burks court further held:

A confession leaves nothing to be determined, in that it is a declaration of his [defendant's] intentional participation in a criminal act.... An admission as applied to criminal law is something less than a confession, and is but an acknowledgement of some fact or circumstances which in itself is insufficient to authorize a conviction, and which tends only toward the proof of the ultimate fact of guilt.

In the case at bar, Burks' admission that he was the driver of the truck—before any arrest and before any charges were filed—was an admission against interest tending merely to establish one material fact and did not acknowledge guilt. The reason for the ... *corpus delicti* rule ... does not apply to admissions against interest where the law presumes that the one making the statement would not have done so unless the statement was true.

Burks, 589 So.2d at 357.

In State v. Manzella, 306 Or. 303, 759 P.2d 1078 (1988), the Oregon Supreme Court discussed the distinction between "confession" and "admission:"

The "*corpus delicti*" rule also emerged during this third period. English courts first began to recognize the rule during the early 1800's. The rule apparently arose in reaction to a few documented instances of false confessions. *610 However, it was applied sporadically and inconsistently in England, affording little guidance to courts and legislatures in the United States. Although the policy behind the rule has been the subject of extensive criticism, virtually every state in this country has adopted some version of it.

In its discussions of the rule, this court consistently has distinguished between "confessions" and "admissions." Most of those discussions were dicta. In at least one case, however, the distinction drawn between "admissions" and "confessions" supported the holding of the court.

Manzella, 759 P.2d at 1082-83 (citations omitted) (footnotes omitted).

My review of the authorities extant on the doctrine of *corpus delicti* convinces me South Carolina should analyze evidence emanating from a defendant via statements as to whether the testimony is an "admission against interest" or "confession." If the evidence is an "admission against interest," it would be admissible under the *corpus delicti* doctrine. On the other hand, if the testimony is in the nature of an "extrajudicial confession," the *corpus delicti* rule would prohibit the admission of the "extrajudicial confession."

VI. OTHER JURISDICTIONS

In Utah v. Knoefler, 563 P.2d 175 (Utah 1977), the court held evidence that all three occupants of a wrecked automobile were injured and that all three smelled of alcohol was sufficient evidence to establish the crime of driving under the influence of intoxicants and inflicting bodily injury on another had occurred, independent of the defendant's admission of having driven the automobile at the time of the accident. The court observed that one of the three occupants had to be the driver, and with evidence that all three had been

drinking, the injuries suffered were a result of someone's criminal conduct of driving under the influence of intoxicants. The court noted the effect of the driver's admission was to connect him to the crime, and the admission was not needed to establish a crime had been committed.

**623 In Oregon v. Smith, 31 Or.App. 321, 570 P.2d 409 (1977), the court found circumstantial evidence sufficiently established the *corpus delicti* of DUI. An officer saw a vehicle on a lawn just *611 off a public street. Tire tracks in the snow led from the street to the vehicle. The defendant and two other persons were near the front of the vehicle, and the defendant was trying to use a jack to change a flat tire on the car. The hood of the car was warm, and the officer had been by a half hour earlier and the car was not there. The officer asked what the problem was, and the defendant replied he had driven the car on the lawn to change the tire. The officer concluded from talking to defendant and observing his actions that he was under the influence of alcohol.

The Court of Appeals of Oregon concluded:

In this case the evidence, aside from defendant's admission that he was driving, was circumstantial. The essence of defendant's argument is the "other proof" must establish someone drove the vehicle under the influence of intoxicating liquor before the jury can consider his incriminating statements that he was the driver. Since, he contends, there were three people around the car when the officer approached, the circumstantial evidence that defendant was the driver is not clear, cogent, unequivocal or convincing. Concededly the evidence does not exclude every reasonable hypothesis consistent with defendant not driving the car, however, as we view the ... rule regarding circumstantial evidence ..., it is sufficient to establish the *corpus delicti*. The vehicle had been recently driven on a public street as indicated by the tire tracks in the snow and the fact the vehicle was not in that location one-half hour earlier. The hood of the vehicle was still warm. Defendant was the registered owner of the car and indicated control of the vehicle and the situation in asking the officer for a tow and working with the jack to change the flat tire. The other two individuals were simply standing by the car; they said nothing and left the scene when defendant was arrested. In addition, there was substantial evidence

defendant was under the influence of intoxicating liquor.

Smith, 570 P.2d at 411.

In Missouri v. Stimmel, 800 S.W.2d 156 (Mo.Ct.App.1990), the court found the *corpus delicti* of driving while intoxicated had been established where the officer testified that, when he arrived at the scene, he observed the defendant standing next *612 to a wrecked car while two other men were standing off to the side. The officer testified there were tire tracks leading to the car in the median, indicating someone had driven the car. The defendant had slurred speech, a flushed face, and the odor of alcohol. Further, the two other men drove off shortly after the officer arrived, from which the court stated it was inferable the defendant was driving the vehicle.

In another case from the Missouri Court of Appeals, Missouri v. Tillman, 823 S.W.2d 43 (Mo.Ct.App.1991), the court, relying on Stimmel, found there was adequate proof of the *corpus delicti*. There, a police chief saw a red Jeep crossing over into his lane. The Jeep's driver veered back into his own lane but overcorrected and drove off the right-hand side of the road. The Jeep rolled several times before catching on fire. Both of the occupants of the Jeep were ejected. The person furthest from the vehicle admitted to being the driver, and the chief noticed the odor of alcohol on both of the parties and in the vehicle. Several beer cans were lying within 15 to 20 feet of the Jeep. The occupant who identified himself as the driver also admitted he had been drinking and was found to have a blood alcohol content of .15%. The court held the defendant's statements he was the driver of the Jeep and he had been drinking "were corroborated by independent evidence of corresponding circumstances." Id. at 45.

In Arizona ex rel. McDougall v. Superior Court, 188 Ariz. 147, 933 P.2d 1215 (Ct.App.1996), the Arizona Court of Appeals held, in a case of first impression, evidence of drunk driving, improper control of a vehicle, and that either the husband or wife was driving was sufficient evidence of the *corpus delicti*, independent of the wife's admission of having **624 been the driver, so as to support a charge of DUI. The court observed:

This case is one of first impression in Arizona

because it addresses the *corpus delicti* doctrine in the context of DUI cases. Other jurisdictions have commented on this subject. In State v. Knoefler, 563 P.2d 175, 176 (Utah 1977), the Utah Supreme Court held that the state had provided sufficient independent evidence of the crime of DUI when the driver and another passenger at an accident scene appeared intoxicated, there was an "abundance of beer" in the vicinity of the wreck and the driver admitted to consuming alcohol. *613 The California Court of Appeals reached the same result in People v. Ellena, 67 Cal.App. 683, 228 P. 389, 391 (1924), where all three passengers in the front seat of a wrecked vehicle showed signs of intoxication.

Arizona requires proof of the *corpus delicti* independent of the defendant's confession. Weis, 92 Ariz. at 260, 375 P.2d at 739. However, this case presents no *corpus delicti* problems. The *corpus* or "body" of the DUI crime does in fact exist. Apart from the suspect's statements there is evidence of drunk driving, improper control of a vehicle, and evidence that either Mr. or Ms. Plummer was driving. The only persons in the cab of the pickup were Mr. and Ms. Plummer. Tranter and another officer testified that both showed signs of intoxication. Mr. Plummer told the officers that his wife had been drinking and was driving at the time of the collision. These facts alone constitute the *corpus* and also create at least a reasonable inference that some intoxicated person, possibly Ms. Plummer, was driving the truck when it struck the median.

Arizona ex rel. McDougall, 933 P.2d at 1217.

CONCLUSION

The dissent would apply the rule of *corpus delicti* with dogmatic vengeance leaving no room for proof of *corpus delicti* by circumstantial evidence. The origin of *corpus delicti* reveals no application as contended by the dissent to the factual scenario articulated in this case. In light of the plethora of procedural protections granted defendants in modern criminal practice, the *corpus delicti* rule is supported by few practical or social policy considerations. Therefore, the rule of *corpus delicti* should be applied with circumspection. The linchpin of *corpus delicti* is an inquiry as to whether a crime has been committed by someone. The gravamen of *corpus delicti* does not focus on the individual defendant as the perpetrator of the crime or the sufficiency of the evidence to identify the defen-

dant.

In my opinion, the *corpus delicti* of the offense of DUI was established in the case *sub judice*. Had Portman been the only person at the scene of the accident, it is clear from South Carolina precedent, e.g., *614 State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (Ct.App.1996), that there would be sufficient proof of the *corpus delicti*. I do not believe this proof is extinguished merely because another person was at the scene who could have been the driver. Rather, based on State v. White, 311 S.C. 289, 428 S.E.2d 740 (Ct.App.1993), wherein this Court held the question whether the defendant or another person was the driver is a matter for the jury to determine as the factfinder, I believe it was for the jury to determine whether Portman was indeed the operator of the wrecked vehicle. Further, I find the reasoning in the decisions from other jurisdictions persuasive regarding the circumstantial evidence sufficient to establish the *corpus delicti* of a DUI offense. There was circumstantial evidence, independent of Portman's statements, that *someone* had operated a motor vehicle while under the influence. There was evidence of a recent wreck (the car was warm and the officer could smell the tires), there was a loss of control of the vehicle (it ran off the road and hit a tree), and Portman appeared intoxicated and was in close proximity to the vehicle at the scene of the accident. Thus, recognizing the difference between the evidence sufficient to sustain a conviction and the evidence sufficient to sustain a finding that the *corpus delicti* has been established, I believe there was sufficient evidence of the *corpus delicti*. Accordingly, I agree Portman's conviction should be affirmed.

**625 Moreover, the statements emanating from Portman were quintessential "admissions" rather than "an extrajudicial confession." Concomitantly, the statements were admissible as "admissions" without violating the *corpus delicti* rule.

HOWELL, Chief Judge, dissenting:

I respectfully dissent. If the requirement that the State must establish the *corpus delicti* in a DUI case has any meaning at all, then this case should be reversed.

Before a defendant in a criminal case can be required to present a defense, the State must present

some proof of the *corpus delicti* of the crime. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916). That is, the prosecution must show the actual commission by someone of the particular offense charged. *Id.*; see also State v. Teal, 225 S.C. 472, 82 S.E.2d 787 (1954). A conviction based on an extra-judicial confession by defendant cannot stand unless corroborated by proof *aliunde* *615 of the *corpus delicti*. State v. Williams, 321 S.C. 381, 468 S.E.2d 656 (1996). While the *corpus delicti* can be established through circumstantial evidence, I disagree with the majority's conclusion that there is sufficient circumstantial evidence of the *corpus delicti* in this case.

Portman was charged with violating S.C.Code Ann. § 56-5-2930 (1991), which provides, in part, that it is "unlawful for any person ... who is under the influence of intoxicating liquors ... to drive any vehicle within this State." The gravamen of the offense is the operation a motor vehicle with impaired faculties. State v. Sheppard, 248 S.C. 464, 150 S.E.2d 916 (1966). Thus, the *corpus delicti* of the offense of DUI is: (1) driving a vehicle; (2) within this State; (3) while under the influence of intoxicating liquors or drugs. State v. Townsend, 321 S.C. 55, 467 S.E.2d 138, 140 (Ct.App.1996), cert. denied, (September 5, 1996); State v. Osborne, 321 S.C. 196, 467 S.E. 2d 454 (Ct.App. 1996) (cert. granted April 2, 1997). Thus, in order to sustain a DUI conviction, there must be evidence other than the defendant's extra-judicial statements that *someone* (but not necessarily the defendant) was driving while impaired.

In this case, disregarding Portman's statements, the only evidence of the *corpus delicti*—that someone drove the vehicle while impaired—is that Portman was one of several people, including the registered owner, who were present at the scene of a recent car accident. Portman was standing near the car with his hands behind his back and he was intoxicated. There is, however, no evidence that any other person at the scene of the accident was intoxicated. This evidence is simply insufficient to establish that the crime of DUI had occurred.

In State v. Osborne, there was circumstantial evidence that Osborne was driving—he was the registered owner of the car and the keys to the car were in his pocket—but there was no evidence, direct or circumstantial, that he was intoxicated at the time of the accident. In this case, while there was evidence that

Portman was intoxicated, there is no evidence, either direct or circumstantial, that he was the driver of the car or that the driver of the car was impaired when the accident occurred. In fact, the circumstantial evidence makes it just as likely, if not more likely, that the registered owner of *616 the car, who was present at the scene, was driving the car at the time of the accident.

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Single-car accidents can occur for many different reasons, including equipment failure and attempts by the driver to avoid another car, a pedestrian, or an animal. The mere fact that a wreck has occurred simply is not evidence that any crime has occurred, much less the crime of DUI. The record in this case establishes only that a vehicle left the road and came to rest against a tree. There is no evidence of excessive speed or any other factor that might give rise to an inference of impaired driving.^{FNI} Thus, the majority's conclusion that the "manner in which the **626 Bronco had left the road indicated the driver's operation of the vehicle had been somehow impaired" appears to rest on an impermissible assumption wrecks are caused by drunk drivers. See *State v. Brown*, 267 S.C. 311, 227 S.E.2d 674 (1976) (a motion for directed verdict should be granted for a defendant where the evidence merely raises a suspicion of guilt or permits the jury to speculate as to the accused's guilt).

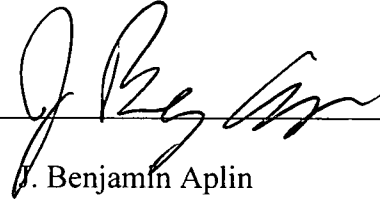
FNI. In fact, the only evidence of the circumstances of the wreck consisted of the testimony of the arresting officer, who stated that the vehicle "ran off the road and hit a tree," and that he "could tell by the way that the vehicle ran off the road the subject's driving was impaired where he couldn't drive the vehicle properly." The officer did not testify about the presence of skid marks or any other factor that might support his bare conclusion that the accident was caused by impaired driving.

Had Portman been the only person at the scene, or had he been the owner of the car, the case might properly have been submitted to the jury. Based on the evidence in this record, however, I conclude that the City of Easley wholly failed to present sufficient direct or circumstantial evidence that Portman was the driver of the car. Accordingly, I would reverse the orders of the municipal court and circuit court and remand the case for entry of judgment of acquittal.

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.

By

A handwritten signature in black ink, appearing to read "J. Benjamin Aplin", written over a horizontal line.

J. Benjamin Aplin
Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

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